IN THE SUPREME COURT OF THE STATE OF NEVADA

Michael Alan Lee,
Petitioner/Appellant

vs.

Brian E. Williams, Sr., Warden High Desert State Prison,
Respondent,

and

The State of Nevada,
Real Party in Interest

Supreme Court Case No.: 76330

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1 examiner.

2 Q So as part of that you provide testimony for the government in the State

3 of West Virginia?

4 A Yes, well as recently as a few days ago, I appeared as a witness in a

5 criminal case called by the prosecution based on work I did for the State of West

6 Virginia. In my private consulting work, I do work in both civil cases and criminal

7 cases. In the criminal cases, most of my -- most -- most of the times I'm retained by

8 the defense because the prosecution normally has the local medical examiner or

9 coroner as an expert or a witness, but I do occasionally get consulted and retained

10 by prosecutors as an outside consultant and on a few occasions I've been asked to

11 testify in their cases as well.

12 Q And do you have a special area of expertise or interest when -- in the

13 area of forensic pathology -- that's a broad topic, is it not?

14 A It is, and I do have an area of special interest in my -- in my career in

15 forensic pathology and the area in particular is pediatric forensic pathology. It's

16 something I've pursued going back to medical school and residency and my training

17 days and then throughout my career in terms of pursuing additional specific

18 casework in -- in child and infant deaths in terms of working on child fatality review

19 teams.

20 In I think I was -- I forgotten the year. I think it's 1991 I -- I -- sorry, I

21 totally forgotten the -- I -- I chaired one of our national meetings. It was a half-day

22 meeting in New York City for the National Association of Medical Examiners and the

23 topic that I lectured on and that I created the seminar about was related to child

24 abuse deaths. I've taught about sudden infant death, child abuse and neglect, other

25 pediatric forensic topics, and I've -- I worked as a consultant on many such cases.

1 Q And in this case were you retained as a consultant?
2 A Yes, ma'am.
3 Q And did you review anything as part of that?
4 A I did. I was provided materials primarily relating to the autopsy on this
5 child, Brodie, so I had the autopsy report. That came with several consulting reports
6 or -- or additional reports such as the neuropathology report which is the
7 examination of the brain. The separate exam of the eyes was also done by that
8 same neuropathologist. There was a consulting report from a radiologist who read
9 the x-rays or the -- the imaging studies that were part of the autopsy.
10 I was also provided and reviewed the photographs from the autopsy. I
11 was provided and reviewed those x-rays or imaging studies from the autopsy. I was
12 provided the microscopic slides from the autopsy which I personally examined. I
13 also received the -- there were statements made by various people. I had those
14 statements. I had the affidavit for the warrant which had the summary of the law
15 enforcement investigation concerning the death. I think I saw -- I think there were
16 several other photographs that I saw of the child during his life as well.
17 Q And can you approximate how much time you have spent on this case?
18 A I have spent about 30 hours of consulting time prior to today working on
19 this case.
20 Q And that's in formulating your opinions?
21 A Reviewing the materials, formulating my opinions, discussing them with
22 you. Yes.
23 Q And you testified that you actually had slides of Brodie? Can you
24 explain that to the jury?
25 A Sure. Part of the autopsy procedure may be microscopic examination

1 of various organs or tissues if there is a sense that there may be findings to be
2 observed that are not visible to the naked eye, they require the -- the magnification
3 of the microscope. So microscopic examination is not a requirement in every
4 forensic autopsy, but it is commonly used especially for certain types of autopsies.
5 Childhood autopsies being one of those -- child death autopsies being one of those
6 areas in which microscopic examination is commonly used.
7 So in order to do a microscopic examination, the pathologist takes
8 samples of the tissues or organs, the -- the -- the part you want to look at under the
9 microscope, and those are sent to a laboratory where they are processed and the --
10 the tissue is embedded in a little block of wax actually which is what holds it and
11 then there's a cutting machine that makes slices that are less than paper thin.
12 Those slices are then mounted on to little glass slides. They're --
13 they're pieces of glass that are usually about (indicating) I guess roughly two and a
14 half by three-quarters of an inch, and once the tissue has then been mounted on
15 those, again it goes through chemical processing in the lab to stain the tissues
16 because otherwise it would just be clear and you end up with a -- that little slide of
17 glass that has the tissue on it and that's the -- the -- the thing that allows you then to
18 put it on to the microscope, shine a light through it, put the different lenses on it, and
19 examine the features.
20 Q And who provided you with the actual tissue samples of Brodie?
21 A The Clark County Coroner.
22 Q And what were you asked to do in this case?
23 A I was asked to review the circumstances of the death and -- and
24 particularly the autopsy and all of those other related documents and things such as
25 photographs and -- and x-rays and so on and slides, and to provide an independent

1 assessment of the autopsy and the autopsy findings and to provide an independent
2 interpretation of those findings. As it has turned out, the -- the single biggest issue
3 that I've been asked to deal with and provide opinions on has to do with the
4 evidence of the ages of some of those injuries.
5 Q And were you able to come to any findings?
6 A Yes, I was.
7 Q And what were those findings?
8 A Well in -- in very brief summary, the two areas of injury that I particularly
9 looked at -- I -- I mean I've looked at all of the injuries and the whole autopsy, but the
10 -- the two areas of injury that I particularly focused on were the injuries in the scalp,
11 which were areas of bruising which is evidence of impact to the scalp, and the -- the
12 -- the process that was going on inside the abdominal cavity as a result of the
13 transection or the -- the separation in the duodenum which is part of the small
14 intestine. So the process that resulted from the tearing open of the bowel was
15 peritonitis which is a descriptive word that simply means inflammation of the
16 peritoneum or the peritoneal cavity and that's the proper anatomical name for the
17 abdominal cavity where the intestines are residing and so on. So I was looking most
18 importantly at the evidence of response and therefore age -- age or ages of the
19 scalp hemorrhages and the peritonitis.
20 Q And if we can go to the scalp hemorrhage, what are you looking at to
21 determine the age of the injury?
22 A Well in the scalp hemorrhage and in the peritonitis and in general, there
23 are several kinds of features that one may see -- some of them with the naked eye,
24 but particularly with the microscope -- that allow you to gauge the response of the
25 body to the injury. And so the first thing that happens if you have an injury if you

1 disrupt tissue, you break blood vessels in most injuries and you have bleeding. And
2 we use the term hemorrhage for that, but hemorrhage is nothing more than a fancy
3 word that means bleeding. So one thing to look at is the bleeding; is there bleeding
4 or not, is there a lot of bleeding or not, is there any evidence that those red blood
5 cells look like they have started to break down, which they will do eventually, or do
6 they look brand new and crisp and fresh when you look at them under the
7 microscope? So that's -- that's one phase and I'll -- I'll come back to the -- the other
8 evidence that relates to bleeding in a second.
9 The first response once there is an injury and there's bleeding is what's
10 called inflammation, and the body sends out cells. Most of those cells start out their
11 lives as white blood cells. And there's different kinds of inflammatory cells. So they
12 -- they rush to the area that's been damaged and they start to try to mop up the
13 damage and -- and control the damage and basically the response to trying to put
14 an end to the process and to -- to clean up, if you will, the damage that's been done.
15 So we can recognize under the microscope, for instance, there's a
16 certain kind of cell that is called a -- a neutrophil and the neutrophils -- and they
17 have several different names for them, but neutrophils are like the first responders.
18 They come rushing in first when you have an injury or infection and they're -- they
19 are the hallmark of the beginning of the inflammatory response, what we call the
20 acute inflammation. That's the early phase.
21 There's another wave of cells that will the come and follow them and it
22 may start fairly early but becomes predominant in a couple of days time and those
23 second wave of cells, the proper name for those cells they're called macrophages.
24 But the important thing about them is that they -- they're like gobblers. They come in
25 to mop up the -- the damage and the disease tissue. They literally engulf, eat it up,

1 and carry it away.

2 So when you start to see an inflammatory response under the

3 microscope that now has a substantial proportion of macrophages to go along with

4 those neutrophils, we're now getting into the second wave of response so this gets

5 called subacute. It's not quite acute anymore, but it hasn't gone all the way down to

6 an older phase which would be called chronic.

7 So you can separate acute, subacute and chronic inflammation by

8 looking at the kinds of cells under the microscope and which ones are predominant

9 and it gives you the sense of what phase you're in. And the different phases have

10 rough timeframes that go with them. This is not a precise, you know, I can put a

11 stopwatch on it kind of thing, but I can differentiate number one, this phase is usually

12 what happens from a few hours to a few days, the acute phase. The subacute

13 usually is starting in two or three days and may go on up -- up to possibly a week.

14 The chronic phase usually starts at about a week or so and can go on for long times

15 thereafter.

16 The other -- the only other two things I want to mention to give you the

17 full picture of what I look at under the microscope to try to put a timeframe or

18 sometimes a minimum timeframe on the response to this injury or that injury -- two

19 other things. One is I mentioned the hemorrhage, and one of the things that

20 happens when you have bleeding -- you now have red blood cells that have

21 escaped from the blood vessels. They're in the tissue. And the body wants to get

22 rid of them. They don't belong there.

23 So the body will send out inflammatory cells that start to gobble up and

24 break down the red blood cells. And one of the things that happens in the

25 breakdown process is that there's a protein inside your red blood cells called

1 hemoglobin and hemoglobin is a protein that contains iron and that is what carries
2 the oxygen in your red blood cells.
3 So when the inflammatory response starts breaking down these
4 escaped red blood cells, it chemically breaks down the hemoglobin. And there's
5 another protein that has iron in it that is the breakdown product of the hemoglobin
6 and sorry to throw a million big words at you here, but this breakdown product is
7 called hemosiderin. The important thing is that we can identify under the
8 microscope hemosiderin, the breakdown product, and you can sometimes just see it
9 in the regular ordinary slides, but you can also do a special stain on those slides that
10 highlights the iron containing compound. And it -- it -- it makes it bright blue so you
11 can see it easier.
12 So the important thing about this breakdown of hemoglobin and the --
13 and this other product and this positive iron staining is that it takes a certain amount
14 of time before that happens. And in fact, most of the literature will tell you it takes
15 about three days or so before you can see that under the microscope. You may be
16 able to see it in 48 to 72 hours, but -- and -- and there's also some literature that
17 says it's -- it may happen in -- in 72 hours, but in fact, it doesn't get easy to see until
18 maybe four or five days.
19 There's some older literature that says you start to see it readily under
20 the microscope at 90 hours. That's about three and a half days, almost four days.
21 But it's important because positive iron staining, the presence of that breakdown
22 product, is an indicator that something has been going on for at least two and
23 probably at least three days. So it's a good -- it's a good finding and it give -- gives
24 you a minimum age of something even if it doesn't give you an exact age.
25 And then the last thing is that all of this process I've just described for

1 you of inflammation and -- and mopping up the damage and carrying away the
2 debris and everything, if it goes on long enough, it melds smoothly into the actual
3 healing process where the body starts to send in connective tissue cells that literally
4 make like a structure. In some places they make a scar. But the next phase after
5 inflammation is healing where you -- you stabilize everything and if you can't rebuild
6 it the way it was, then you make a scar.
7 Q And with respect to this minimum two to three days, did you look that in
8 the head and in the abdominal area?
9 A Yes, ma'am.
10 Q Okay. And you had said that Brodie had suffered from peritonitis; is
11 that correct?
12 A Yes, he did.
13 Q Is that inflammation?
14 A Yes, peritonitis is a form of inflammation. It's a type of inflammation in a
15 particular part of the body.
16 Q And when you're talking about time periods, you're talking about the
17 time periods of inflammation?
18 A Yes, the time period that you can -- you can characterize looking under
19 the microscope at the inflammation, at whether or not there's positive iron staining,
20 whether or not there is evidence that it's -- it's getting into the -- the next phase of
21 healing, those are all the things that I can look at under the microscope and in fact,
22 those are what I was addressing in the slides from the head and from the -- from the
23 abdomen for Brodie.
24 Q And as part of this you looked at the coroner's autopsy report, correct?
25 A I did.

1 Q And what you're looking for to determine age, is that iron?
2 A The -- the iron or the positive iron staining is one of those factors.
3 That's the one that gives you that two or three day minimum timeframe.
4 Q And in your review did the coroner determine if there was any iron
5 staining?
6 A She reported some iron stains, not on all of the slides of injury, but on
7 some of them and she reported some of them as having a little bit of positive
8 staining, some of them as not having positive staining.
9 Q And you received slides from the coroner's office?
10 A I received a set of the regular stained slides from the coroner's office. I
11 -- that -- including the brain and eye slides. And I received what are called blank
12 slides, unstained slides from the coroner's office which I had to go take to a lab to
13 make my own iron stains.
14 Q And did you prepare any presentation to assist the jury in seeing what
15 you're saying?
16 A I did.
17 Q And would it be beneficial to show that to the jury?
18 A Yes, ma'am.
19 MS. VON MAGDENKO: Your Honor, permission to put that up for the jury to
20 see?
21 THE COURT: Is it the PowerPoint we discussed --
22 MS. VON MAGDENKO: Yes.
23 THE COURT: -- earlier? And that's the one -- it's been previously shown to
24 the State?
25 MR. STANTON: Yes, Your Honor.

1 THE COURT: And you --
2 MR. STANTON: And the State has no objection.
3 THE COURT: Okay, then that's fine, yes.
4 MS. VON MAGDENKO: Thank you, Your Honor.
5 Maria, if we can just --
6 [Colloquy between counsel]
7 BY MS. VON MAGDENKO:
8 Q And is this page 1 of your presentation?
9 A Yes, ma'am.
10 Q And what is on page 1?
11 A This is just the title to show you the -- the name of the case, and I'm
12 going to be demonstrating microscopic features related to the aging of the injuries to
13 Brodie Aschenbrenner and then it's got my name and actually, that's the date that I
14 made the PowerPoint, or the -- the month and year.
15 Q And what is the second slide?
16 A Yes, this slide now is -- is a brief text slide that summarizes actually
17 what I've said, the types of features that I look for, for evidence of inflammation,
18 evidence of -- of aging and response to injuries and bleeding. And so you see the
19 bullet point inflammation. The first -- first point under that are the cells that respond
20 to the site of the damage to limit it and remove the debris.
21 Next point I made is what I've already told you about the different kinds
22 of cells that come at different times. So you have neutrophils which are the acute --
23 I always call them the first responders. You may start seeing them as rapidly as
24 several hours and they may hang around or -- or be pretty obvious for as long as a
25 few days.

1 Next bullet point down you see the word macrophages. Those are
2 those second wave or the mop up cells as I call them. They literally go in and -- and
3 gobble up things. And you may start to see some macrophages late in the first day,
4 but when they become numerous and they predominate in the response, then you're
5 talking two to three days. And it may -- that's the subacute phase I said may go on a
6 little longer.
7 Then the next point you see the word hemosiderin that I threw at you a
8 few minutes ago, and hemosiderin is the iron compound that we get from the
9 breakdown of the red blood cells. It's the breakdown of hemoglobin. And one of the
10 things you may see is hemosiderin that's already engulfed in a macrophage. It's
11 inside a cell that has gobbled it up. And if you have that kind of cell that has
12 gobbled up the hemosiderin, that's the word in parenthesis there. Those cells are
13 called siderophages and it takes even a little bit longer to get to the point of
14 siderophages as opposed to having hemosiderin just free in the tissues.
15 And the -- and the bold at the very bottom, positive iron staining, you
16 see I put the word blue in blue because when you look at the slide under the
17 microscope, the positive iron staining lights up blue and the rest of the background
18 ranges from pink to clear. So the blue becomes quite obvious to show you there's
19 positive staining there.
20 And you don't have to go back, but I -- it also said there what I've
21 already told you that 48 to 72 hours is -- is a very bare minimum -- that's your base
22 minimum before you start seeing hemosiderin or positive iron staining under the
23 microscope and there is literature that says even though you can see it that early
24 that in order to see it reliably or -- or see a lot of it, some people say it takes even
25 several more days.

1 Okay, now we've moved into I -- these are -- these are all photographs
2 that I took of the microscope slides from the autopsy of Brodie through my
3 microscope. So these are all his slides and in fact, what you're looking at now -- it
4 says scalp hemorrhage, subacute inflammation --
5 Q So we're actually looking at Brodie's cells?
6 A Yes. This is Brodie's tissue, this is Brodie's cells. What you're looking
7 at with the -- the mixture of basically pink and blue, this is the standard routine
8 staining for microscope slides that are -- is used by virtually all pathologists
9 everywhere.
10 You'll notice please at the lower left corner it says slide one. These are
11 the numbers assigned to the slides by the Clark County Coroner. Slide one and
12 slide two were two different areas sampled from the scalp hemorrhage. So just to
13 give you a background here, this is a fairly sort of a medium to high magnification.
14 The -- the kind of fat pink squiggles are part of the response or they're -- some of
15 those are collagen, the protein that makes the -- the connective tissue. But you see
16 -- even though they're not magnified very much, you see a lot of basically purple
17 dots scattered throughout there --
18 Q And just not to interrupt you, but you can actually hit the side --
19 A Ah.
20 Q -- screen and then make a circle.
21 A Okay.
22 MS. VON MAGDENKO: Your Honor, if I can approach the witness?
23 THE WITNESS: Actually if --
24 THE COURT: You may.
25 THE WITNESS: -- if we hit --

1 THE COURT: If you touch the screen, you can mark on it.
2 THE WITNESS: Oh, thank you.
3 BY MS. VON MAGDENKO:
4 Q I think if you go like that and then that.
5 A Okay.
6 Q And then that clears it.
7 A Excellent. So --
8 Q (Indiscernible) --
9 A So the little -- I'm going to put a few -- well, my arrows are -- here we
10 go. I'm trying to put a few arrows if -- you see I'm pointing at -- well, the first arrow is
11 not pointing at anything, but the top arrow, the bottom arrow you'll see that you --
12 you have little purple blobs, some of which have pink right around them. Each of
13 those purple blobs is the nucleus of a cell, an inflammatory cell, and in fact, if we hit
14 the next -- if you click next, there we go. I -- you see the -- the -- the label has come
15 in the box says neutrophils. Now the arrows are pointing to selected neutrophils.
16 Those are not all the neutrophils in the -- in the -- in the field that you're looking at
17 here, but those are just examples. And it may be hard for you to see from this
18 distance and I do have some other pictures we'll get to shortly that --
19 MS. VON MAGDENKO: Your Honor, can I bring the screen closer to the
20 jury? Right here?
21 THE COURT: Yeah, make sure you don't unplug anything. Is there enough --
22 THE WITNESS: Yeah, I don't think it's going to go very far.
23 MS. VON MAGDENKO: Okay. Is that -- can you all see that? In the back?
24 THE COURT: We have another screen up there. You want to turn that one
25 on?

1 MS. VON MAGDENKO: Yeah, can we turn that one on? Just so the jury
2 members over here can have a better view what the doctor's talking about.
3 THE WITNESS: I -- I do have some other pictures that are going to magnify
4 this more, but you'll see when we magnify it more each of the neutrophils that I've
5 put the arrow on now, it's nucleus looks like it's -- it's got multiple little labials. It
6 looks like a little cluster of grapes. That's the cardinal feature of a neutrophil or it's --
7 it's the easiest one to see. So --
8 BY MS. VON MAGDENKO:
9 Q And when you're talking about neutrophil, what's the age of a neutrophil
10 just for the jury? Because there's a lot --
11 A Neutrophils are those first responders.
12 Q Okay.
13 A These are things that start to be visible in the microscope within hours
14 and they're very prominent for a day or three, that kind of range.
15 Q And these are the grape looking ones?
16 A Little one -- look like little clusters of grapes.
17 Q Okay.
18 A If we hit the button one more time, please. Now you see I have also
19 pointed here with a label that says macrophages. Those are -- remember those are
20 the -- the second wave of responders, the gobbler cells. And if you look at the arrow
21 that's kind of to your lower left, you can see the -- the nucleus of the macrophage is
22 bigger and it's like a solid blob. And if you look at -- actually if you look at the arrow
23 for macrophage going straight up, the nucleus looks almost like a little kidney bean.
24 Doesn't look like a cluster of grapes, it looks like a little kidney bean. And these cells
25 are bigger than the neutrophils. They have a bigger pink area. That's the cell body

1 around it.

2 So this is just a demonstration. This is one small piece of that slide

3 magnified to a fair amount. A demonstration that we have a substantial number of

4 neutrophils and macrophages, hence my judgment that this is subacute

5 inflammation.

6 Q So the kidney bean shaped one, those are the two to three day old

7 ones?

8 A Yes.

9 Q So grapes are one to two days and the kidney bean shaped is two to

10 three days?

11 A Roughly, yes.

12 Q And these are minimum time periods?

13 A These are -- these are fair approximations. And again especially

14 because -- as I said, you can get a few macrophages early on, but because we're

15 looking at lots of them mixed in with the neutrophils, lots of macrophages -- and this

16 is representative of what I saw when I looked through all the slide. That's what

17 pushes us into calling this -- pushes me into calling this subacute and that's why I'm

18 now telling you that this is the -- this -- this alone is consistent with something that's

19 on the order of two to three days olds.

20 Q And so you have to have a lot of the kidney bean shaped ones?

21 A Yes.

22 Q And do you find a lot of the kidney bean shaped ones?

23 A I did. When I looked at the whole slide, I did. And in fact, I think we

24 have more examples coming up.

25 So this is another higher magnification from slide one and I think if you

1 push the button I think this one has labels also. Yes. See now I've put circles in
2 here circling clusters of macrophages. Those are not the only macrophages in the
3 picture, but the point of this picture is to tell you that as I look around, there are
4 many of them. Some places they're in clusters like this. This is why I've made the
5 judgment that this is subacute inflammation, the thing that gives you the two to three
6 day or a little older timeframe as opposed to acute.
7 Q So macrophage is the kidney bean which equal two to three days?
8 A Correct. When you see many of them, yes.
9 Q When you see many of them.
10 A Okay, let's go to the next one, please. See lower left we're still doing
11 slide one. Now, now you're going to see iron staining and you'll see most of the
12 background of the picture that you're looking at here is either clear or it's light pink
13 and you can -- you can see, even from a distance, there's blue showing up. There's
14 right down the center -- in the center and a little above it you can see some -- some
15 fairly obvious blue areas and if you notice, there's actually a little -- oops. My -- my
16 line's a little off on drawing on the screen, but to the left of this line in the upper
17 left-hand corner there's a little bit of a blue blush. There's blue here. There's some
18 blue blush over here. There's many other spots of blue that are faint and some that
19 are more obvious.
20 I -- if we hit the button, I forgot if I -- okay, I didn't -- I didn't put circles on
21 those. I did it on the screen for you. But again, picture on the screen now, slide
22 one, scalp hemorrhage, positive iron staining. I've now blown it up with a more
23 powerful lens. You're looking at it more closely. And again, you can see in lots of
24 places I'm making bad circles on the screen with my finger and I'm covering over
25 some of these, but I'll -- I'll take them out of the way in a second, but you see every

1 one of these places I'm circling blue, blue, blue, blue, blue, more blue -- I haven't
2 circled all of the blue. Anyway --
3 Q So blue means two to three days old?
4 A Right. Positive iron staining tells us that we're identifying hemosiderin.
5 You don't get hemosiderin until at least 48 to 72 hours. Some books say 72 hours
6 minimum. You don't see it readily in the tissues under the microscope till at least
7 that timeframe. Some authorities say it's much easier to see it four to five days, but I
8 just want to be able to put a bare minimum on this as opposed to a precise
9 timeframe. So two to three days is the minimum to get iron staining like this.
10 Q And what's the maximum?
11 A Well, positive iron staining in some circumstances goes away in days or
12 weeks. In -- in some circumstances, the cells with the positive iron staining in them
13 hang around for years. There are some kinds of lesions, some parts of the body
14 where you can see positive iron staining in a long, old, healed lesion that's been
15 there for years, sometimes as long as 10 or 20 years, but this positive iron staining
16 is all in the context of a lesion that still has some hemorrhage, that still has
17 inflammation, so the positive iron staining in conjunction with the hemorrhage and
18 with the subacute inflammation is what puts us into that two to three day minimum
19 and it's consistent with certainly four, five, six days, that range.
20 Q And we've all been -- we've been looking at the head --
21 A Yes.
22 Q -- during this whole time period.
23 A And actually I -- I just have I think a few more of the head before we
24 move on to the peritoneum.
25 You'll see in the lower left now it says slide two. Slide two is the other

1 slide of the scalp hemorrhage. In this picture, you see the diagonal line going from
2 upper left to lower right. You can see how the -- the -- the picture is divided. The
3 left and lower left has those pink bands. That's collagen. That's connective tissue.
4 The right and upper right is -- is denser, darker red. That's blood. That's -- that's
5 hemorrhage. And one thing I can tell you is that the red blood cells in the upper
6 right are getting kind of smudgy. They're not crisp and clean and clear. That's
7 another indication of blood that's been there for a couple of days.
8 You have three of these roughly circular structures in the middle.
9 Those are blood vessels and in fact, in -- in two of them you can even see the red
10 blood cells inside the blood vessels that are looking a little crisper than the ones up
11 here in the upper right.
12 And clustered around the blood vessels, you'll see a bunch of
13 inflammatory cells. And you'll see that a bunch of them have that kidney bean
14 shape nuclei and that kind of thing and so this is just another example of subacute
15 inflammation now in the other slide of the scalp.
16 In fact, if we go to the next -- again, same theme. I won't belabor this.
17 This is now still slide two, but you can see the blue -- oh, I've changed colors. So
18 there's blue staining. There's blue staining down here as well near the bottom.
19 There's other areas of blue staining throughout here in the middle, but there's
20 positive iron staining, that's slide number two, and I think the next one is the same
21 thing so again, I won't drag this out, but again you can see blue in various parts --
22 I'm sorry, my arrows are not very good. You can see blue in various parts of this
23 picture as well. Positive iron staining, slide two.
24 Remember in the -- in the autopsy report the coroner said very, very
25 little positive iron staining in slide one and none in slide two. I'm finding plenty of it in

1 both.

2 Q And that's what you've shown to the jury?

3 A Yes, ma'am.

4 Okay. This transitions to the peritonitis, the remaining photographs.

5 Q Oh, actually I just wanted to ask you a question. These are two to days

6 -- two to three days prior to death the head injury took place?

7 A Minimum. Yes, ma'am.

8 Q And when is your understanding death occurred? So we can put this in

9 a timeframe for the jury so we know what --

10 A Right.

11 Q -- what days we're actually looking at on the slides then.

12 A Well, the -- the two to three days has to be before death. You know,

13 the -- the clock stops in the body at death. It's no longer responding with

14 inflammation. So as I understand it, that morning when he died, my understanding

15 from the investigation is that he was seen alive at 5:00 in the morning. He was

16 found dead at about 8:30 in the morning. So there's our window of time.

17 Q And that's Wednesday morning?

18 A I believe so. That was the -- I think that was the 15th if I -- if I --

19 Q Yes, a Wednesday, June 15th?

20 A Yes. The -- the date of death.

21 Q Okay.

22 A And so --

23 Q So we go back in time two to three days what -- what time are we

24 looking at then?

25 A We're looking at something that happened -- well, first of all, I've just

1 given you kind of the window of -- of death between roughly 5 a.m. and 8:30 a.m.
2 because we know -- we know he's alive at five. We know he's dead at 8:30. He's
3 described as having some stiffness when his mother discovers him, so rigor mortis
4 is starting to set in. That's consistent with passage of at least several hours from
5 death. So there's your -- there's your window of time. So if you go back -- the -- the
6 positive iron staining for instance means minimum 48 to 72 hours prior to that time
7 of death in the early morning hours, 6:00 roughly -- I'm not trying to tell you exactly
8 six, I'm just giving you a -- a number to hang your hat on. So 48 to 72 hours before
9 that is the minimum timeframe for the findings I've just shown to the jury.
10 Q So sometime prior to Monday morning then?
11 MR. STANTON: Your Honor, I object; ask and answered at least five times.
12 The rest is argumentative for counsel to make to the jury.
13 THE COURT: Overruled.
14 THE WITNESS: Yes, ma'am.
15 BY MS. VON MAGDENKO:
16 Q Okay. And if you can explain to the jury this next slide?
17 A Yes, the -- the -- the remaining photographs are all very similar to what I
18 showed you for the scalp except now we're dealing with the peritoneum or the
19 peritonitis. And so --
20 Q And where is the peritonitis located in the body?
21 A That's the -- the -- the -- the -- the linings of the surfaces of inside the
22 abdominal cavity. The peritoneum is -- is a thin glistening membrane that lines the
23 inside of the abdominal cavity and it also covers the surfaces of the organs that are
24 inside -- most of the organs that are inside the abdomen. So you have peritoneum,
25 this membrane that's thin and clear and glistening under normal circumstances

1 cover all -- essentially all the surfaces inside the belly cavity. So peritonitis is the
2 inflammatory process that affects some of those membranes. Doesn't have to be
3 the whole cavity, but some or all.
4 So this is from slide 13 which is one of the slides the coroner labeled as
5 being from the peritoneum or the peritonitis and again without belaboring this, this is
6 back to the regular stain. You can see in here that there are indeed -- I'm going to --
7 well, the cell that I -- actually, this little cluster of cells here that I've sort of outlined,
8 those are actually neutrophils. And there -- there are several others of them floating
9 around in here.
10 Q The neutrophils are those grapes, the one to two days?
11 A Yes.
12 Q Okay.
13 A Now there's also -- the one closest to the tip of the arrow that I've just
14 given you there -- well, this one near -- right in the dead center of the -- of the field,
15 this one down the lower right that I've circled, those are macrophages. And there's
16 many of them around here. So the -- the point of this photograph is -- is not to pick
17 cell by cell by cell, it's for me to illustrate to you that I looked at the whole slide. I
18 saw some neutrophils, the first responder guys. I saw many macrophages, the
19 second wave of response. This is why the findings here are actually very similar
20 what I showed you and described in the scalp and this is why I've labeled it as
21 subacute inflammation because in my opinion that's what it is, and that's the phase
22 that again is consistent with two or three days or -- or older.
23 If we go --
24 Q Acute, subacute and chronic and this is the middle one?
25 A Correct.

1 Oh, and here I -- I -- I forgot when -- when counsel pushed the button.
2 Indeed, I have a label and arrows that point to many different macrophages here just
3 to illustrate the point.
4 Here again, another picture taken from slide 13 and there's a mixture
5 here of the first responders and the second wave of responders and so it's just
6 another illustration -- I think you undoubtedly have gotten the point by now so it's just
7 another illustration to demonstrate why I am calling this subacute inflammation.
8 And the next one.
9 Q And that -- and we're still looking at the abdomen right now?
10 A Yes. All the rest of these are titled peritonitis at the top and then they're
11 all the abdomen.
12 And so here we move over into iron staining. This -- again look at the
13 bottom left, it's slide number 13. You can see the blue roughly the middle of the -- of
14 the photograph. I don't have to circle it for you at this point. Positive iron staining,
15 minimum two to three days old. Go to the next one.
16 This is another one from slide 13. It's also peritonitis and it's a little
17 harder to see although just above the center there's three small dots that are or
18 three small areas that are blue. Here on the about the middle of the left border, I
19 just draw a circle that unfortunately covered it. I will erase that in a second. Blue.
20 Here just about the middle of the right border circled blue. There's actually a few
21 other spots that are tiny. Here's one about where I just made this green -- let me try
22 to make a circle. There's a tiny blue dot in there, lower right, that I just circled.
23 So there's positive iron staining in slide 13. It's the same phenomenon.
24 It's the same meaning as I gave you for the -- for the scalp. Minimum two to three
25 days old and consistent with older.

1 If we go to the next one, please. This is a higher magnification -- and
2 again I think it's fairly obvious so I'm not even going to circle, but you can see tiny
3 blue dots and actually one thing I do want to circle. The one that's just about in the
4 middle that I'm circling now and here's one to our right that I'm circling now. The
5 one in the middle is the most obvious. That blue staining, the positive iron staining
6 is inside a macrophage. That's what I told you they're called siderophages. Takes a
7 little longer for the hemosiderin that you see is positive iron staining to get gobbled
8 up by the cells. So again, bare minimum, two to three days old in order to have
9 those findings. Oops.
10 Q But with that with the cell within the cell, how long does that take, that
11 special thing we saw?
12 A Well it's -- it's the product within the cell rather than a cell within a cell,
13 but it's the --
14 Q Okay.
15 A Again, at least three days. Some people would say longer, but I'm
16 trying to work with a -- with a minimum here and be conservative.
17 If we go to the next. Okay, now we've gone over to slide 16. I just
18 wanted to show you this is another slide of the peritonitis which -- if I can just refer to
19 the autopsy report very briefly, I want to make sure I don't misrepresent Dr. Gavin's
20 work.
21 In slide 13 of the peritonitis that we just showed several pictures from,
22 she said very rare single cells having the positive iron staining. I think I've just
23 shown you that they aren't rare, there were many I found.
24 Number 16 -- slide 16 where we have gone now, she only described
25 neutrophils, the acute inflammatory response. She did not describe other

1 inflammation and she did not comment -- I don't think she did an iron stain on that
2 one. So here is a photograph and I think I have maybe this one and one other, but
3 again, the -- the blue should be fairly obvious right in the middle of the photograph.
4 So positive iron staining, minimum two to three days old. This is slide 16.
5 If we go to the next one, please. Here again, this is an area from slide
6 16, iron staining now the -- the blue is -- well, the -- the most obvious blue is still
7 fairly small and I'm putting a circle around it. It's just about dead center in the
8 photograph. There is actually a little bit of blue here to our left in that cell and I think
9 -- I think that's all that I can show you on the screen, but the point is there is positive
10 iron staining in slide 16 and it also tells me that in conjunction with all the other
11 findings, that this is a subacute inflammatory response. This is something that has
12 to be at least several days old in order to have this finding.
13 I think that may be the last if -- yes.
14 Q And with respect then to summarize the -- the head and the abdomen
15 had a minimum age of injury and what was that age for both of them?
16 MR. STANTON: Objection; ask and answered.
17 THE COURT: Overruled.
18 THE WITNESS: Two to three days and they're consistent with even being
19 longer, four to five days, six days, that range. But minimum two to three.
20 MS. VON MAGDENKO: Court's indulgence.
21 THE COURT: Uh-huh.
22 [Colloquy between counsel]
23 BY MS. VON MAGDENKO:
24 Q Is there anything that we haven't gone over that's in your report that you
25 like to explain to the jury?

1 MR. STANTON: Objection, Your Honor. That's an improper question.
2 THE COURT: Sustained.
3 BY MS. VON MAGDENKO:
4 Q Is there -- did you come to any other conclusions?
5 A Well if I can refer to my report briefly. I think the biggest issue that I
6 dealt with was the aging of those injuries that I just demonstrated.
7 Oh. Yes, the -- the other area that I addressed in my report and -- and
8 conclusions or opinions that I offered really has to do with -- well two things. One is
9 that there was mention of traumatic brain injury which in my opinion did not
10 contribute to his death. I believe the abdominal process was actually the injury that
11 caused his death. And the -- the mild traumatic brain injury is keeping company with
12 the impact sites to the head that I've just shown you have evidence of being several
13 days old or older and it's not the type of injury that would be expected to cause
14 death. And so in my opinion, I don't disagree with the diagnosis. I -- my
15 interpretation is that the head injury did not actually contribute to causing his death.
16 And the other thing that I addressed in my report was the -- the clinical
17 presentation of this sort of injury, the -- meaning particularly the transected intestine
18 and the peritonitis. And although it seems logical -- it seems self-evident that a child
19 with that kind of injury would be rapidly symptomatic, in fact if you look at the
20 literature on blunt abdominal trauma in children, intestinal injuries can be very
21 difficult to diagnose.
22 And so whether the child is symptomatic or not, even when brought to
23 medical attention, intestinal injuries such as perforations or even on occasions a
24 transection like this may not be extremely obvious clinically and in fact, the literature
25 has reference to difficulty in making such a diagnosis and the literature even has

1 some examples of delayed diagnosis.

2 I found one case reported that a child with a very similar injury to

3 Brodie, a transection of the intestine, who -- in whom it didn't get figured out, they

4 didn't really discover the injury for five days. That is a child who was symptomatic in

5 the interim. He didn't have five days of looking perfectly normal and all of a sudden

6 boom. I'm -- I'm not trying to tell you that, but I think the -- the important point that I

7 made in my report and that I -- that I wanted to offer is that an injury such as this will

8 not necessarily disable this child immediately or even within a few hours. This child

9 can go a day, this child under some circumstances can even go several days before

10 it gets diagnosed correctly.

11 Q Thank you.

12 MS. VON MAGDENKO: I have no further questions.

13 THE COURT: Mr. Stanton, do you mind if we just take a five -- just a short

14 break?

15 MR. STANTON: Certainly, Your Honor.

16 THE COURT: To use the restroom, please?

17 Ladies and gentlemen of the jury, again, please come back at 2:30.

18 You're admonished not to converse amongst yourself or with anyone on any subject

19 connected with the trial, do not read, watch or listen any report of or commentary on

20 the trial by any medium of information, and do not form or express an opinion on this

21 case. See you in a bit.

22 [Jury out at 2:21 p.m.]

23 THE COURT: All right. Thank you.

24 Do you need water or need to use the restroom?

25 THE WITNESS: I would love a glass of water, Your Honor.

1 THE COURT: Okay.

2 [Off the record at 2:22 p.m.]

3 [Proceedings resumed at 2:32 p.m.]

4 THE MARSHAL: District Court XXIII jury is present.

5 [Jury in at 2:33 p.m.]

6 THE COURT: All right, whenever you're ready to begin your cross.

7 MR. STANTON: Thank you, Your Honor.

8 THE COURT: And again, Doctor, you are still under oath, sir.

9 THE WITNESS: Yes, Your Honor.

10 CROSS-EXAMINATION

11 BY MR. STANTON:

12 Q Counsel ask you about the length of time you've devoted to this and

13 that you said 30 hours. What is your hourly rate that you charge for your testimony?

14 A In this --

15 MR. ALTIG: I'm going to object at this point, Your Honor, to the -- may we

16 approach?

17 THE COURT: Uh-huh.

18 MR. ALTIG: Thank you.

19 [Bench conference begins at 2:34 p.m.]

20 MR. ALTIG: Characterization of the question he's being paid for his

21 testimony. He's not being paid for his testimony. He's being paid for consultation

22 and his work.

23 THE COURT: They're allowed to inquire on that. It goes to bias.

24 MR. STANTON: Yeah. Thank you.

25 MS. VON MAGDENKO: (Indiscernible) --

1 MR. STANTON: Are you objecting? Is this your witness or his witness?

2 MS. VON MAGDENKO: Can I -- I can't (indiscernible). He's being paid by

3 the county. So is that going to come out --

4 MR. ALTIG: You can ask him on redirect.

5 MR. STANTON: Well he's not paid by the county --

6 THE COURT: It's not going to come out who he is paid by, but how much he

7 gets paid goes to his bias.

8 MS. VON MAGDENKO: Okay.

9 [Bench conference ends at 2:34 p.m.]

10 BY MR. STANTON:

11 Q Go ahead, sir, you can answer my question.

12 A Well, my hourly rate for my -- the time and -- and my consulting -- I

13 mean I don't know if the question implied being paid for an opinion, but for the time I

14 spend, this is at a reduced rate of $350 an hour.

15 Q That's your reduced rate? And then you have an hour or daily rate for

16 your testimony in court, correct?

17 A I typically do a flat daily fee at $3,500 a day for court, which is less than

18 what it would be if we were doing all the hours.

19 Q Now, you mentioned at the very end of your testimony some comments

20 about literature and in the case where you talked about a two-and-a-half-year-old

21 child having an injured duodenum and that the child was symptomatic during the

22 time period but it went undiagnosed. Do you recall that testimony?

23 A Yes, sir.

24 Q And you refer to that in your report that you prepared in this case that --

25 a particular article, correct?

1 A Yes, sir.
2 Q And one of those -- for our discussion here and for the record, one of
3 the authors was a gentleman by the name of Osuka, O-s-u-k-a; is that correct?
4 A Yes, sir.
5 Q Now, this isn't a study in the sense of this was looking at a number of
6 examples of injured children to abdomen, correct?
7 A Correct.
8 Q This was a paper written as it relates to one child?
9 A Yes, it's -- it's a type of paper that's called a case report.
10 Q And the etiology in that report of that child's abdominal injury was what?
11 A I have it with me. You know what, I don't actually recall if they did
12 identify specifically -- I recall that it discussed blunt abdominal trauma.
13 Q They removed the child to another hospital, sir --
14 A Yes, sir.
15 Q -- along with the -- so that the mother's live-in boyfriend who had
16 shoved the child onto the corner of a coffee table. Does that refresh your
17 recollection?
18 A Yes, sir.
19 Q Now, the -- you're not a pediatrician; in other words, you don't treat
20 living children, correct?
21 A Correct.
22 Q But you are familiar as a forensic pathology (sic) about the
23 symptomatology of a child of this age who had a completely transected duodenum.
24 Would that be accurate?
25 A Yes, sir.

1 Q Those symptoms would be loss of appetite?
2 A Likely, yes.
3 Q Abdominal pain?
4 A Well, there's different kinds of pain. There will be some kinds of pain at
5 different times during the process. By the way, the answers are yes or no or true,
6 but these -- not all of these will happen in every child and some of them may happen
7 at different times in the same child.
8 Q So abdominal pain?
9 A Sometimes abdominal pain commonly will result at some point. Yes.
10 Q Lethargic? Child becomes sleepy?
11 A That's very -- very possible also, yes.
12 Q And a loss of appetite. Vomiting.
13 A Yes, sir.
14 MR. STANTON: No further questions.
15 THE COURT: Redirect?
16 MS. VON MAGDENKO: No questions, Your Honor.
17 THE COURT: All right. Is the Doctor free to go?
18 MS. VON MAGDENKO: Yes, Your Honor.
19 THE COURT: Thank you, Doctor, for your time. You're free to go, sir.
20 THE WITNESS: Thank you, Your Honor.
21 THE COURT: Any more witnesses today?
22 MR. ALTIG: No, Your Honor.
23 THE COURT: Are you resting at this time?
24 MR. ALTIG: Yes, we're resting, Your Honor.
25 THE COURT: All right. And you moved all your evidence into -- exhibits into

1 evidence?

2 MS. VON MAGDENKO: Yes, Your Honor.

3 THE COURT: Okay.

4 Counsel, are you ready for the Court to proceed with the jury

5 instructions?

6 MR. STANTON: Yes, the would ask the Court to charge the jury.

7 THE COURT: All right.

8 MR. ALTIG: Court's indulgence one moment, please.

9 [Colloquy between counsel]

10 MR. ALTIG: Thank you, Your Honor.

11 THE COURT: Hi. Are you ready?

12 MR. ALTIG: Yes, Your Honor.

13 THE COURT: Counsel?

14 All right, ladies and gentlemen, at this point both the State and the

15 defense have rested. So at this point we're going to do what we talked about the

16 very beginning of the trial. Over the next probably 30 minutes I'm going to read you

17 the law in this case. These are called the jury instructions. Now there's a lot of

18 information that I'm going to read to you. If there is something you don't catch, don't

19 worry about it because you'll have a copy of these instructions to take with you to

20 the jury room.

21 Ladies and gentlemen of the jury, it is now my duty as Judge to instruct

22 you in the law that applies to this -- hold on a second.

23 Come here, counsel.

24 [Bench conference begins at 2:40 p.m.]

25 THE COURT: Should we have penalty in here?

MR. STANTON: No. No. Could you just strike that and just --

THE COURT: Yeah.

MR. STANTON: Yeah, thanks.

MR. ALTIG: Thank you.

[Bench conference ends at 2:40 p.m.]

THE COURT: All right. Ladies and gentlemen of the jury, let me start again. It is now my duty as Judge to instruct you in the law that applies to this hearing. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence. You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

Number 2. If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others. The order in which instructions are given has no significance as to their relative importance.

Number 3. An Information is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.

In this case, it is charged in an Information that on or between June 13, 2011 and June 15, 2011 the defendant committed the offenses of murder, a category A felony pursuant to NRS 200.010, 200.030, and 200.508, and child abuse

and neglect with substantial bodily harm, a category B felony pursuant to NRS 200.508 and NRS 200.060, in the following manner, to wit:

Number -- Count 1, murder. Did, on or between June 14, 2011 and June 15, 2011, then and there, without authority of law and with malice aforethought, willfully and feloniously killed Brodie Aschenbrenner, a child being approximately two years of age, by subjecting the said Brodie Aschenbrenner to acts of child abuse, to-wit: by striking the said Brodie Aschenbrenner in the abdominal area and/or did cause blunt force trauma to Brodie Aschenbrenner's abdominal area in an unknown manner, all of which resulted in the death of said Brodie Aschenbrenner.

Count 2, child abuse and neglect with substantial bodily harm. Did, on or between June 13, 2011 and June 14, 2011, wilfully, unlawfully, feloniously, and knowingly neglect, cause, or permit a child under the age of 18 years, to-wit: Brodie Aschenbrenner, being approximately two years of age, to suffer unjustifiable physical pain and substantial bodily harm, by striking the said Brodie Aschenbrenner in the head and/or did cause blunt force trauma to Brodie Aschenbrenner's head in an unknown manner.

It is the duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine whether or not the defendant is guilty of the offenses charged.

Number 4. Murder is the unlawful killing of another -- of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

Number 5. Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate

1 provocation. The condition of mind described as malice aforethought may arise
2 from anger, hatred, revenge or from particular ill will, spite or grudge toward the
3 person killed. It may also arise from any unjustifiable or unlawful motive or purpose
4 to injure another, proceeding from a heart fatally bent on mischief or with reckless
5 disregard of consequences and social duty. Malice aforethought does not imply
6 deliberation or the lapse of any considerable time between the malicious intention to
7 injure another and the actual execution of the intent but denotes an unlawful
8 purpose and design as opposed to accident and mischance.
9 Number 6. Express malice is that intention to unlawfully take away the
10 life of a human being, which is manifested by external circumstances capable of
11 proof. Malice may be implied when no considerable provocation appears, or when
12 all the circumstances of the killing show an abandoned and malignant heart.
13 Number 7. There are certain kinds of murder which carry with them
14 conclusive evidence of malice aforethought. One of these classes of murder is
15 murder committed in the perpetration or attempted perpetration of child abuse.
16 Therefore, a killing which is committed in the perpetration of child abuse is deemed
17 to be murder in the first degree, whether the killing was intentional or unintentional
18 or accidental. This is called the Felony-Murder Rule. The intent to perpetrate or
19 attempt to perpetrate child abuse must be proven beyond a reasonable doubt.
20 You're instructed that child abuse is a felony.
21 Number 8. A person who willfully causes a child who is less than 18
22 years of age to (a) suffer unjustifiable physical pain or mental suffering as a result of
23 abuse or, (b) to be placed in a situation where the child may suffer physical pain or
24 mental suffering as the result of abuse is guilty of the offense of child abuse.
25 Number 9. A person who's responsible for the safety or welfare of a

1 child and who (a) permits or allows that child to suffer unjustifiable physical pain or
2 mental suffering as a result of abuse, or (b) to be placed in a situation where the
3 child may suffer physical pain or mental suffering as the result of child abuse is
4 guilty of child abuse.
5 Number 10. Abuse means physical or mental injury of a non-accidental
6 nature or negligent treatment or maltreatment of a child under the age of 18 years,
7 under circumstances which indicate that the child's health or welfare is harmed or
8 threatened with harm. Allow means to do nothing to prevent or stop the abuse of a
9 child in circumstances where the person knows or has reason to know that the child
10 is abused. Permit means permission that a reasonable person would not grant and
11 which amounts to a neglect of responsibility attending the care, custody and control
12 of a minor child.
13 Number 11. Substantial bodily harm is defined as (a) bodily harm
14 which creates a substantial risk of death or which causes serious, permanent
15 disfigurement or protracted loss or impairment of the function of any bodily member
16 or organ; or (b) prolonged physical pain.
17 Number 12. Physical injury means permanent or temporary
18 disfigurement or impairment of any bodily function or organ of the body. Mental
19 injury means an injury to the intellectual or psychological capacity of the emotional
20 condition of a child as evidenced by an observable and substantial impairment of the
21 ability of the child to function within a normal range of performance or behavior.
22 Number 13. The law declares that one who inflicts an injury on another
23 and thereby accelerates his death shall be held criminally liable -- I'm sorry,
24 criminally responsible therefor. If any life at all is left in a human body, even the
25 least spark, the extinguishment of it is as much homicide as the killing of the most

1 vital being.

2 Number 14. In arriving at a verdict in this case as to whether the
3 defendant is guilty or not guilty, the subject of penalty or punishment is not to be
4 discussed or considered by you and should in no way influence your verdict. If your
5 verdict is murder in the first degree, you will at a later hearing consider the subject of
6 penalty or punishment.

7 Number 15. To constitute the crime charged, there must exist a union
8 or joint operation of an act forbidden by law and an intent to do the act. The intent
9 with which an act is done is shown by the facts and circumstances surrounding the
10 case. Do not confuse motive -- I'm sorry, do not confuse intent with motive. Motive
11 is what prompts a person to act. Intent refers only to the state of mind with which
12 the act is done. Motive is not an element of the crime charged and the State is not
13 required to prove a motive on the part of the defendant in order to convict.
14 However, you may consider evidence of motive or lack of motive as a circumstance
15 in the case.

16 Number 16. The defendant is presumed innocent unless the contrary is
17 proved. This presumption places upon the State the burden of proving beyond a
18 reasonable doubt every material element of the crime charged and that the
19 defendant is the person who committed the offense. A reasonable doubt is one
20 based on reason. It is not mere possible doubt but is such a doubt as would govern
21 or control a person in the more weighty affairs of life. If the minds of the jurors, after
22 the entire comparison and consideration of all the evidence, are in such a condition
23 that they can say they feel an abiding conviction of the truth of the charge, there is
24 not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility
25 or speculation. If you have a reasonable doubt as to the guilt of the defendant, he is

1 entitled to a verdict of not guilty.

2 Number 17. Although you're to consider only the evidence in the case
3 in reaching a verdict, you must bring to the consideration of the evidence your
4 everyday common sense and judgment as reasonable men and women. Thus, you
5 are not limited solely to what you see and hear as the witnesses testify. You may
6 draw reasonable inferences from the evidence which you feel are justified in light of
7 common experience, keeping in mind that such inferences should not be based on
8 speculation or guess.

9 A verdict may never be influenced by sympathy, prejudice or public
10 opinion. Your decision should be the product of sincere judgment and sound
11 discretion in accordance with these rules of law.

12 Number 18. The evidence which you are to consider in this case
13 consists of the testimony of the witnesses, the exhibits, and any facts admitted or
14 agreed to by counsel.

15 There's two types of evidence; direct and circumstantial. Direct
16 evidence is the testimony of a person who claims to have personal knowledge of the
17 commission of the crime which has been charged, such as an eyewitness.
18 Circumstantial evidence is the proof of a chain of facts and circumstances which
19 tend to show whether the defendant is guilty or not guilty.

20 The law makes no distinction between the weight to be given either
21 direct or circumstantial evidence. Therefore, all the evidence in the case, including
22 the circumstantial evidence, should be considered by you in arriving at your verdict.

23 Statements, arguments and opinions of counsel are not evidence in the
24 case. However, if the attorneys stipulate to the existence of a fact, you must accept
25 the stipulation as evidence and regard that fact as proved.

1 You must not speculate to be true any insinuations suggested by a
2 question asked to a witness. A question is not evidence and may be considered
3 only as it supplies meaning to the answer.
4 You must disregard any evidence to which an objection was sustained
5 by the Court and any evidence ordered stricken by the Court. Anything you may
6 have seen or heard outside the courtroom is not evidence and must also be
7 disregarded.
8 Number 19. The credibility or believability of a witness should be
9 determined by his manner upon the stand, his relationship to the parties, his fears,
10 motives, interests or feelings, his opportunity to have observed the matter -- the
11 manner to which he testified, the reasonableness of his statements and the strength
12 or weakness of his recollections. If you believe that a witness has lied about any
13 material fact in the case, you may disregard the entire testimony of that witness or
14 any portion of his testimony which is not proved by other evidence.
15 Number 20. It is a constitutional right of a defendant in a criminal trial
16 that he may not be compelled to testify. Thus, the decision as to whether he should
17 testify is left to the defendant on the advice and counsel of his attorney. You must
18 not draw any inference of guilt from the fact that he does not testify, nor should this
19 fact be discussed by you or enter into your deliberations in any way.
20 Number 21. A witness who has special knowledge, skill, experience,
21 training or education in a particular science, profession or occupation is an expert
22 witness. An expert witness may give his opinion as to any matter in which he is
23 skilled. You should consider such opinion -- such expert opinion and weigh the
24 reasons, if any, given for it. You are not bound, however, by such an opinion. Give
25 it the weight to which you deem it entitled, whether that be great or slight, and you

1 may reject it, if in your judgment the reasons given for it are unsound.

2 Number 22. Although you're to consider only the evidence in the case

3 in reaching a verdict, you must bring to the consideration the evidence your

4 everyday common sense and judgment as reasonable men and women. Thus, you

5 are not limited solely to what you see and hear as the witnesses testify. You may

6 draw reasonable inferences from the evidence which you feel are justified in the light

7 of common experience, keeping in mind that such inferences should not be based

8 on speculation or guess.

9 A verdict may never be influenced by sympathy, prejudice or public

10 opinion. Your decision should be the product of sincere judgment and sound

11 discretion in accordance with these rules of law.

12 Number 23. When you retire to consider your verdict, you must select

13 one of your number to act as a foreperson who will preside over your deliberation

14 and will be your spokesperson here in court.

15 During your deliberation, you will have all the exhibits which were

16 admitted into evidence, these written instructions and form of verdicts which have

17 been prepared for your convenience.

18 Your verdict must be unanimous. As soon as you've agreed upon a

19 verdict, have it signed and dated by your foreperson and then return with it to this

20 room.

21 Number 24. If during your deliberation you should desire to be further

22 informed on any point of law or hear again portions of the testimony, you must

23 reduce your request to writing signed by the foreperson. The officer will then return

24 you to court where the information sought will be given to you in the presence of,

25 and after notice to, the District Attorney and the defendant and his counsel.

1 Playbacks of testimony are time consuming and are not encouraged
2 unless you deem it a necessity. Should you require a read back, you must carefully
3 describe the testimony to be played back so the court recorder can arrange her
4 notes. Remember the Court is not at liberty to supplement the evidence.
5 Now you're going to listen to the arguments of counsel who are going to
6 endeavor to aid you to reach a proper verdict by refreshing in your minds the
7 evidence and by showing the application there to the -- to the law. But whatever
8 counsel may say, you'll bear in mind that it is your duty to be governed in your
9 deliberation by the evidence as you understand it and remember it to be and by the
10 laws as given to you in these instructions with the sole, fixed and steadfast purpose
11 of doing equal and exact justice between the defendant and the State of Nevada.
12 Now, counsel, I think you're anticipating starting closings tomorrow,
13 correct?
14 MR. STANTON: Yes, Your Honor.
15 MR. ALTIG: Yes, Your Honor.
16 THE COURT: All right. So ladies and gentlemen, I've now given you the law
17 that applies in this case. We're going to come back tomorrow at 9:30 in the --
18 tomorrow at 9:30 in the morning and this is what's going to happen. The State's
19 going to present it closing argument. Thereafter the defense will present its closing
20 and the State will have the opportunity to also present a rebuttal. Once that's
21 completed, you'll be taken back to the jury room to deliberate.
22 So ladies and gentlemen, until I see you tomorrow at 9:30, you're
23 admonished not to converse amongst yourself or with anyone on any subject
24 connected with the trial, do not read, watch or listen any report of or commentary on
25 the trial by any medium of information, including without limitation television,

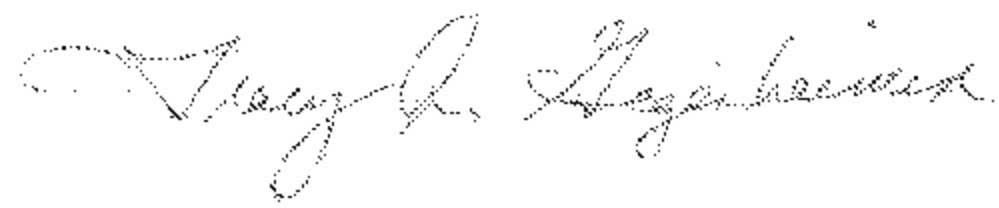
1 newspaper, radio, internet, and do not form or express an opinion on this case. See
2 you tomorrow. Thank you.
3 [Jury out at 2:57 p.m.]
4 THE COURT: All right. Is the jury -- and I just want to make sure that you
5 guys agree to the verdict form that you provided me?
6 MR. ALTIG: Yes, Your Honor.
7 THE COURT: Okay.
8 MR. ALTIG: And Your Honor --
9 THE COURT: Thank you.
10 MR. ALTIG: --I think on the record I believe you might want to admonish the
11 defendant and inquire of him as to his right to testify. Do you need to do that on the
12 record?
13 THE COURT: We already did that.
14 MR. ALTIG: Did you?
15 MR. STANTON: We did, Your Honor. I think the -- what the concern is, is
16 kind of the record speaks for itself that obviously he didn't and so I think the -- I just
17 ask counsel that they've have plenty of time to discuss that with their client. I think
18 he's already been canvased in that regard as well.
19 THE COURT: I know that I canvased him and obviously he --
20 MR. ALTIG: Okay.
21 THE COURT: -- chose not to take the stand and testify.
22 MR. ALTIG: Right. Okay. Okay. I just wanted to make sure.
23 ...
24
25

THE COURT: All right. Thank you.

MS. VON MAGDENKO: Thank you, Your Honor.

[Proceedings concluded at 2:57 p.m.]

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



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

INST

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

AUG 15 2014 at 1:40pm

BY MELISSA MURPHY, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MICHAEL ALAN LEE,

Defendant.

CASE NO: C-11-277650-1

DEPT NO: XXIII

INSTRUCTIONS TO THE JURY

(INSTRUCTION NO. 1)

MEMBERS OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this ~~penalty~~ hearing. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

INSTRUCTION NO. 3

An Information is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.

In this case, it is charged in an Information that on or between June 13, 2011 and June 15, 2011 the Defendant committed the offenses of **MURDER (Category A Felony - NRS 200.010, 200.030, 200.508) and CHILD ABUSE & NEGLECT WITH SUBSTANTIAL BODILY HARM (Category B Felony - NRS 200.508, 0.060)**, in the following manner, to-wit:

COUNT 1 - MURDER

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

COUNT 2 - CHILD ABUSE & NEGLECT WITH SUBSTANTIAL BODILY HARM

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

It is the duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine whether or not the Defendant is guilty of the offenses charged.

INSTRUCTION NO. 4

Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

INSTRUCTION NO. 5

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise from anger, hatred, revenge or from particular ill will, spite, or grudge toward the person killed. It may also arise from any unjustifiable or unlawful motive or purpose to injure another, proceeding from a heart fatally bent on mischief or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent but denotes an unlawful purpose and design as opposed to accident and mischance.

INSTRUCTION NO. 6

Express malice is that intention to unlawfully take away the life of a human being, which is manifested by external circumstances capable of proof.

Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

INSTRUCTION NO. 7

There are certain kinds of murder which carry with them conclusive evidence of malice aforethought. One of these classes of murder is murder committed in the perpetration or attempted perpetration of child abuse. Therefore, a killing which is committed in the perpetration of child abuse is deemed to be murder of the first degree, whether the killing was intentional or unintentional or accidental. This is called the Felony-Murder Rule.

The intent to perpetrate or attempt to perpetrate child abuse must be proven beyond a reasonable doubt.

You are instructed that Child Abuse is a felony.

INSTRUCTION NO. 8

A person who willfully causes a child who is less than 18 years of age:

(a) to suffer unjustifiable physical pain or mental suffering as a result of abuse or,

(b) to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse is guilty of the offense of Child Abuse.

INSTRUCTION NO. 9

A person who is responsible for the safety or welfare of a child and who

a. permits or allows that child to suffer unjustifiable physical pain or mental suffering as a result of abuse, or

b. to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse is guilty of Child Abuse.

INSTRUCTION NO. 10

"Abuse" means physical or mental injury of a nonaccidental nature or negligent treatment or maltreatment of a child under the age of 18 years, under circumstances which indicate that the child's health or welfare is harmed or threatened with harm.

"Allow" means to do nothing to prevent or stop the abuse of a child in circumstances where the person knows or has reason to know that the child is abused.

"Permit" means permission that a reasonable person would not grant and which amounts to a neglect of responsibility attending the care, custody and control of a minor child.

INSTRUCTION NO. 11

"Substantial bodily harm" is defined as:

(a) Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or

(b) Prolonged physical pain

INSTRUCTION NO. 12

"Physical injury" means permanent or temporary disfigurement or impairment of any bodily function or organ of the body.

"Mental injury" means an injury to the intellectual or psychological capacity of the emotional condition of a child as evidence by an observable and substantial impairment of the ability of the child to function within a normal range of performance or behavior.

INSTRUCTION NO. 13

The law declares that one who inflicts an injury on another and thereby accelerates his death shall be held criminally responsible therefor. If any life at all is left in a human body, even the least spark, the extinguishment of it is as much homicide as the killing of the most vital being.

INSTRUCTION NO. 14

In arriving at a verdict in this case as to whether the defendant is guilty or not guilty, the subject of penalty or punishment is not to be discussed or considered by you and should in no way influence your verdict.

If your verdict is murder in the first degree, you will, at a later hearing, consider the subject of penalty or punishment.

INSTRUCTION NO. 15

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

INSTRUCTION NO. 16

The Defendant is presumed innocent unless the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

INSTRUCTION NO. 17

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO. 18

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence; direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the Defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict. Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked to a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

INSTRUCTION NO. 19

The credibility or unbelievability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the manner to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

INSTRUCTION NO. 20

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, the decision as to whether he should testify is left to the defendant on the advice and counsel of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.

INSTRUCTION NO. 21

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his opinion as to any matter in which he is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

INSTRUCTION NO. 22

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO. 23

When you retire to consider your verdict, you must select one of your number to act as foreperson who will preside over your deliberation and will be your spokesperson here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.

INSTRUCTION NO. 24

If, during your deliberation, you should desire to be further informed on any point of law or hear again portions of the testimony, you must reduce your request to writing signed by the foreperson. The officer will then return you to court where the information sought will be given to you in the presence of, and after notice to, the district attorney and the Defendant and his counsel.

Playbacks of testimony are time-consuming and are not encouraged unless you deem it a necessity. Should you require a readback, you must carefully describe the testimony to be played back so that the court reporter can arrange her notes. Remember, the court is not at liberty to supplement the evidence.

INSTRUCTION NO. 25

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

GIVEN: _____
DISTRICT JUDGE

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CLERK OF THE COURT

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. MICHAEL LEE, Defendant.	CASE NO. C277650-1 DEPT. XXIII

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

FRIDAY, AUGUST 15, 2014

TRANSCRIPT OF PROCEEDINGS

JURY TRIAL - DAY 8

APPEARANCES:

For the State: DAVID STANTON, ESQ.
Chief District Attorney
JOHN L. GIORDANI, III, ESQ.
District Attorney

For the Defendant: NADIA VON MAGDENKO, ESQ.
STEVEN M. ALTIG, ESQ.

RECORDED BY: MARIA GARIBAY, COURT RECORDER

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

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

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 no 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 --

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.

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.

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.

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 nota 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 unmistakeably
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.

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

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

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

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

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

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

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

MR. ALTIG: Yes, Your Honor.

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

MR. STANTON: Thank you, Your Honor.

MR. ALTIG: Thank you.

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

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

THE MARSHAL: Be seated, come to order.

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

Are we on the record?

THE COURT RECORDER: Yes, Your Honor.

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

C277650.

[Pause]

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

THE MARSHAL: Yes, Judge.

[Pause]

THE MARSHAL: District Court XXIII jury is present.

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

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

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

THE FOREPERSON: Yes.

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

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

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

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

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

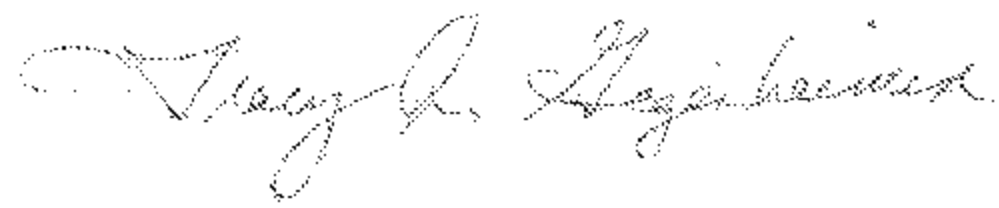
1 please it's -- do not talk about this case. Please remember over the course the
2 weekend it's important that you don't talk about this case with anyone, you don't do
3 any independent research on your own, and that you keep a fair and open mind
4 and don't form or express an opinion -- I mean don't 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.
7 Should you go beyond the bounds of giving a statement setting forth
8 remorse, apology, chagrin, plans or hopes for the future, the Court may allow
9 comment by the prosecutor or allow a reopening of the case for additional cross-
10 examination or may itself make comments to the jury regarding your unsworn
11 statement in mitigation of your sentence.
12 Again you are allowed to make remarks of remorse which are not
13 belied by the evidence, apologies or excuses for your acts, pleas for leniency and
14 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.
18 THE COURT: All right. And I'm sure your counsel will discuss it with you
19 further over the weekend.
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]

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

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

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



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

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CLERK OF THE COURT

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. MICHAEL LEE, Defendant.	CASE NO. C277650-1 DEPT. XXIII

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

MONDAY, AUGUST 18, 2014

TRANSCRIPT OF PROCEEDINGS

JURY TRIAL - DAY 9

APPEARANCES:

For the State: DAVID STANTON, ESQ.
Chief District Attorney
JOHN L. GIORDANI, III, ESQ.
District Attorney

For the Defendant: NADIA VON MAGDENKO, ESQ.
STEVEN M. ALTIG, ESQ.

RECORDED BY: MARIA GARIBAY, COURT RECORDER

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

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

2

3 [Outside the presence of the jury]

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

5 order.

6 THE COURT: Hi. Good afternoon.

7 MR. ALTIG: Good afternoon, Your Honor.

8 THE MARSHAL: Judge, this is --

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

10 THE MARSHAL: It is.

11 THE COURT: Good afternoon. It's the time set for the penalty hearing, but I

12 just received a stipulation pursuant to NRS 175.552(2) waiving the penalty hearing

13 and agreeing to have the sentencing imposed by the trial judge.

14 MR. ALTIG: Yes, Your Honor. I did speak with Mr. Lee yesterday regarding

15 that particular issue and Ms. Von Magdenko and I spoke with the State after that.

16 All the parties agreed that they would stipulate to the waiver of that. I believe that

17 Mr. Lee believes it's in his best interest to do that and so I prepared the stipulation

18 and order and signed by all parties which is a requirement of the statute.

19 THE COURT: Yes.

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

21 THE COURT: All right. And Mr. Lee, did your attorneys discuss this with

22 you? By law you have a right to a penalty hearing where the jury would make a

23 determination as to your sentence on the murder charge --

24 THE DEFENDANT: Yes, ma'am.

25 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.

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

sentencing date.

THE COURT: A couple months, probably.

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

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

THE COURT: Yeah.

MR. ALTIG: Thank you.

THE COURT: Okay.

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

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

MR. ALTIG: Thank you.

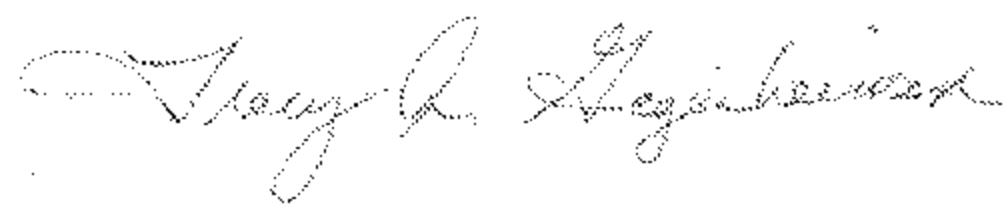
THE COURT: Thank you and let me go see if the jury wants to chat with either one.

MR. ALTIG: Thank you.

THE COURT: Thank you.

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

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



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

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CLERK OF THE COURT

JOC

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MICHAEL ALAN LEE
#1699107

Defendant.

CASE NO. C277650-1

DEPT. NO. XXIII

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 - MURDER (Category A Felony) in violation of NRS 200.020, 200.030, 200.508, and COUNT 2 – CHILD ABUSE & NEGLECT WITH SUBSTANTIAL BODILY HARM (Category B Felony) in violation of NRS 200.508, 0.060; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 – FIRST DEGREE MURDER BY CHILD ABUSE (Category A Felony) in violation of NRS 200.010, 200.030, 200.508; and COUNT 2 – CHILD ABUSE & NEGLECT WITH

SUBSTANTIAL BODILY HARM (Category B Felony) in violation of NRS 200.508, 0.060; thereafter, on the 21st day of October, 2014, the Defendant was present in court for sentencing as to COUNT 1; Defendant returned to court for sentencing as to COUNT 2 on the 27th day of October, 2014, with his counsel STEVEN ALTIG, ESQ., and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee, the Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows: COUNT 1 – LIFE WITHOUT THE POSSIBILITY OF PAROLE, CONSECUTIVE to C199242; and COUNT 2 - a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS with a MINIMUM parole eligibility of NINETY-SIX (96) MONTHS, CONSECUTIVE to COUNT 1, with ZERO (0) DAYS credit for time served. As the $150.00 DNA Analysis Fee and Genetic Testing have been previously imposed, the Fee and Testing in the current case are WAIVED.

DATED this _____ day of October, 2014 11-7-14

STEFANY MILEY
DISTRICT COURT JUDGE

TE
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IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Sep 08 2015 04:18 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

MICHAEL ALAN LEE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

NO. 66963

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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Counsel for Respondent

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ALAN LEE, Appellant, vs. THE STATE OF NEVADA, Respondent.	)))))))))	NO. 66963

APPELLANT'S OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ALAN LEE,	)	NO. 66963
Appellant,	)	
vs.	)	
THE STATE OF NEVADA,	)	
Respondent.	)	

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

A. Statute which grants jurisdiction to review the judgment: NRS 177.015.

B. Judgment of Conviction filed 11/10/14; Notice of Appeal filed 11/24/14.

C. This appeal is from a final judgment entered 11/10/14.

D. Pursuant to NRAP 17, is this matter presumptively assigned to the Court of Appeals? Identify issues or circumstances that override any presumptive assignment to the Court of Appeals or require retention by the Supreme Court. Issues should be identified and explained with specific reference to arguments in the Opening Brief. Pursuant to NRAP 17, is this matter presumptively assigned to the Court of Appeals? Identify issues or circumstances that override any presumptive assignment to the Court of Appeals or require retention by the Supreme Court. Issues should be identified and explained with

specific reference to arguments in the Fast Track Statement. This case is not presumptively assigned to the Court of Appeals because Mr. Lee went to trial and was convicted of a Category A felony. Rule 17(b)(1) of the Nevada Rules of Appellate Procedure excludes defendants who went to trial and were convicted of a Category A felony from "presumptive assignment" to the Court of Appeals.

ISSUES PRESENTED FOR REVIEW

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENSE MOTION FOR A MISTRIAL.

II. THROUGHOUT THE PROCEEDING AGAINST HIM, THERE WAS INSUFFICIENT EVIDENCE PRODUCED TO SUSTAIN THE ALLEGATIONS THAT MICHAEL LEE MURDERED BRODIE ASCHENBRENNER.

STATEMENT OF THE CASE

A Criminal Complaint, filed on October 26, 2011, charged Michael Lee with the crimes of Murder and Child Abuse and Neglect with Substantial Bodily Harm. (App. Vol. I, pgs. 1-2)

A Preliminary Hearing was held on November 8, 2011, in Henderson Justice Court before the Honorable David S. Gibson. (App. Vol. I, pgs. 6-41) At the conclusion of the Preliminary Hearing, Mr. Lee was held to answer on

the two charges, and was bound over to District Court. (App. Vol. I, pg. 41) An Information, counting the two criminal charges, was filed in District Court on November 18, 2011. (App. Vol. I, pgs. 60-62)

A jury trial was held in Department 23, before the Honorable Stefany Miley. The trial began on August 4, 2014, and concluded on August 18, 2014. (App. Vol. III, pg. 492-Vol. VII, pg. 1367) At the conclusion of deliberation, the jury returned verdicts of guilty for both counts. (App. Vol. II, pgs. 347-48) Mr. Lee was sentenced on Count 1 (Murder) to Life without the possibility of parole, consecutive to case C199242; and Count 2 (Child Abuse and Neglect with Substantial Bodily Harm) to a maximum of 240 months with a minimum parole eligibility of 96 months, consecutive to Count 1. Because he was on parole at the time of these charges, Mr. Lee received zero days credit for time served. (App. Vol. II, pgs. 408-408A)

STATEMENT OF THE FACTS

In December of 2008, Arica Foster gave birth to a boy who she named Brodie. Brodie's father was Dustin Aschenbrenner. (App. Vol. IV, pg. 849) When the relationship between Arica Foster and Dustin Aschenbrenner dissolved, Ms. Foster had custody of Brodie and was his primary caregiver. (App. Vol. IV, pg. 849; 851)

In October of 2010, Ms. Foster met and began dating Michael Lee, after they were introduced to each other through their respective sisters. (App. Vol, IV, pgs. 854-55) For a period of time, Mr. Lee's sister Jennifer baby sat Brodie. (App. Vol. IV, pg. 856) In February of 2011, Ms. Foster and Mr. Lee moved into an apartment together. (Prior to that, Ms. Foster had been living in Green Valley with her parents.) (App. Vol. IV, pg. 857) Brodie lived with Ms. Foster and Mr. Lee. Ms. Foster relied on family and friends to help care for Brodie. (App. Vol. IV, pgs. 856-57; 862-63)

Brodie Aschenbrenner was found dead at approximately 8:50 in the morning of June 15, 2011. (App. Vol. IV, pg. 917) Ms. Foster testified that the previous evening, Mr. Lee was alone with Brodie for roughly an hour while she ran some errands. (App. Vol. IV, pgs. 909-10) Around 1:00 the next morning, Ms. Foster woke up as Mr. Lee was coming to their bed from the bathroom. He told Ms. Foster that it stunk and he thought Brodie had thrown up. (App. Vol. IV, pgs. 913-14) Ms. Foster got up and cleaned Brodie up. (App. Vol. IV, pg. 914) She ended up laying him on a towel that she spread out on the sofa, before she returned to her bed. (App. Vol. IV, pg. 915) Sometime in the early morning (it was still dark outside), Mr. Lee carried Brodie in a fuzzy blanket and laid him into bed with Ms. Foster. (App. Vol. IV, pg. 917) When Ms. Foster awoke at 8:50, she began rubbing

Brodie's back and noticed that he was cold. (App. Vol. IV, pg. 918) She jumped out of bed and called 911. (App. Vol. IV, pg. 918)

SUMMARY OF THE ARGUMENT

The Defense, prior to the beginning of trial, filed a Motion in Limine to Exclude Autopsy Photographs of Brodie Aschenbrenner. The Court should have prevented the continuous publishing of Brodie Aschenbrenner's autopsy photos. Failure to do so, denied Mr. Lee of his constitutionally guaranteed right to due process and a fair trial.

Throughout the course of these proceedings against Mr. Lee, questions persisted as to whether or not there was sufficient evidence to proceed against, and to ultimately convict him of the murder of Brodie Aschenbrenner. These questions were never satisfactorily answered beyond a reasonable doubt. Therefore, Mr. Lee's conviction for Murder and Child Abuse and Neglect with Substantial Bodily Harm denied Mr. Lee of his constitutionally guaranteed right to due process and a fair trial.

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ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENSE MOTION FOR A MISTRIAL.

The Defense, prior to the beginning of trial, filed a Motion in Limine to Exclude Autopsy Photographs of Brodie Aschenbrenner. (App. Vol. II, pgs. 263-92) The Court denied the motion. (App. Vol. II, pgs. 311-12) However, in the order denying the Motion, the Court specified that "...the State will be limited in the number of photographs, to those that are absolutely necessary, ..." (App. Vol. II, pg. 312)

The autopsy photos were shown during the testimony of Dr. Gavin, the coroner. (App. Vol. IV, pgs. 731-73) (After Dr. Gavin initially testified, there was not time to conduct cross-examination, so Dr. Gavin's testimony was continued until later in the trial because of scheduling issues. See, App. Vol. IV. pg. 777)

During the testimony of Merridee Moshier, Brodie's maternal grandmother, the photos were shown again. The Defense objected. "... - all of these photos were shown to the jury before and the reshowing of them we believe just inflames the jury and is focusing of the photos instead of the evidence." (App. Vol. IV, pg. 823) And later the Defense argued:

The State's absolutely right. There was a motion filed by the defense, a motion in limine, asking that we prevent certain photographs – these

photographs from coming before the Court. The State argued that they were needed and required because the coroner needed them to describe their testimony. We argued to the Court that we believed that the photographs were much more prejudicial than they were probative, if anything, but you allowed them to be introduced for purposes of the coroner's testimony.

And here we are a day later and they're being introduced again and shown to the jury again through a different witness. They aren't needed to explain that witness's testimony. They aren't needed for anything that's probative. They're using them for the prejudicial effect on the jury and to bring out the ire of the jury to have an emotional effect on the jury. That's what they're being shown [for] again. They're not being shown for any probative value. You can simply ask the witness did any of these injuries exist at the time you saw Brodie and the witness can say no, they did not. You don't need to – showing the – publishing the photographs over and over and over again.

So we would renew the objection that they're not probative of any fact. We believe and I actually would believe that the showing of them to this particular witness violates the Court's order with regard to the motion in limine that they could be used and provided to the coroner for explanation of the coroner's testimony.

And actually I think at this point, Your Honor, since that order's been violated, a motion for mistrial may even be needed at this point because the Court's order on the motion in limine to use them solely for the purpose of the coroner's and to the explain the coroner's testimony has been violated. They've been published to the jury again and we can move for a mistrial and would move for a mistrial. (App. Vol. IV, pgs. 825-26)

Later in the proceedings, the State indicated that they would be "showing several witnesses the photographs of Brodie's external injuries at autopsy." (App. Vol. V, pg. 934) The Defense renewed its motion for a mistrial, again arguing, "[t]hey're, in my opinion, being used to bring an emotional response out of the jury, a highly prejudicial response out of the jury. They're not probative with these other witnesses of any particular fact. ... The same evidence can be elicited without the display of the photographs to the jury." (App. Vol. V, pg. 935) The Court denied the renewed motion. (App. Vol. V, pg. 935)

Nevada law mandates that "evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." **NRS 48.035(1)**. Since all effective evidence is prejudicial in the sense of being damaging to the party against whom it is offered, prejudice which calls for exclusion is given a more

specialized meaning: *an undue tendency to suggest decision on an improper basis, commonly but not necessarily an emotional one, such as hatred, contempt or horror*. Fair trials demand that evidence not be admitted in cases where, by virtue of it prejudicial nature, that evidence is more likely to distract from the essential issue than to bear upon it. **Nester v. State**, 75 Nev. 41, 54, 334 P.2d 524,531 (1959)

In the present case, the State of Nevada repeatedly introduced into evidence photographs of Brodie Aschenbrenner's dead, cut open body as it lay on the autopsy table. To see those photos repeatedly on the screen had to be nothing less than horrific to the jury, and undoubtedly had an impact on their analysis of the evidence against Mr. Lee. There had to be a balance between probative value and prejudicial effect of these photographs, as the Court recognized when it indicated that only " absolutely necessary" photographs were to be shown to the jury. (App. Vol. II, pg. 312) Repeated showing of the photographs violated that balance.

The United States Supreme Court has long recognized that the admission of some evidence can so infect a case that the proceeding cannot be considered fundamentally fair, and the admission of such evidence violates the Due Process Clause of the United States Constitution. **Estelle v. McGuire**, 502 U.S. 62 (1991).

If evidence unfairly prejudices a party by appealing to the emotional and sympathetic tendencies of a jury, rather the jury's intellectual ability to evaluate evidence, the evidence should be excluded. **Krause Inc. v. Little**, 117 Nev. 929, 34 P.3d 566 (2001). The Court should have prevented the continuous publishing of Brodie Aschenbrenner's autopsy photos. Failure to do so, denied Mr. Lee of his constitutionally guaranteed right to due process and a fair trial.

II. THROUGHOUT THE PROCEEDING AGAINST HIM, THERE WAS INSUFFICIENT EVIDENCE PRODUCED TO SUSTAIN THE ALLEGATIONS THAT MICHAEL LEE MURDERED BRODIE ASCHENBRENNER.

This Court has jurisdiction to review the evidence presented at trial and determine whether there was sufficient evidence presented to sustain the conviction. **State v. Van Winkle**, 6 Nev. 340, 350 (1871) (the Nevada Supreme Court has jurisdiction "to decide, as a question of law, whether the evidence is sufficient to sustain such a verdict or decision in a criminal case."). "The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. **Carl v. State**, 100 Nev. 164, 165, 678 P.2d 669, 669 (1984)." **Oriegel-Candido v. State**, 114 Nev. 378, 382 (1998); U.S. CONST. AMEND. V; U.S. CONST.

AMEND. XIV. The standard this Court applies when reviewing the evidence supporting a jury's verdict is whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt by the evidence it had a right to consider. **Wilkins v. State**, 96 Nev. 367, 374 (1980) (citing **Edwards v. State**, 90 Nev. 255, 258-59 (1974)); see also, **Jackson v. Virginia**, 443 U.S. 307 (1979).

Beginning with the Preliminary Hearing held in this matter, there was insufficient evidence established to establish beyond a reasonable doubt that Mr. Lee was guilty of murdering Brodie Aschenbrenner – something his trial attorneys fought to rectify every step of the case.

A. Writ of Habeas Corpus

At the conclusion of the Preliminary Hearing, Mr. Lee's attorney filed a writ of habeas corpus to refute the finding that there had been a finding of probable cause against Mr. Lee. (App. Vol. I, pgs. 63-95) Most troubling was the apparent recognition of the State and the Court that it was impossible to establish that Mr. Lee was the person responsible for the acts that led to Brodie Aschenbrenner's death. The State argued to the Court that, "[t]his child died at the hands of another human being and critically that it's a non-accidental trauma. So one of three things took place. The defendant murdered this child, the mother murdered this child, or they both did. Now,

what we have in this case is the mother of this child and the care and concern that you saw of what and how she cared for this child under oath. With that testimony, Judge, I would submit that there's only one of three options that exist based upon this evidentiary presentation and that the defendant committed the charge that's set forth in the criminal complaint and ask that you bind him over." (App. Vol. I, pg. 41) In essence the State was arguing to the Court that "we aren't really sure who did this – there's a couple of ways this could have happened, but since the Mom was such a good witness today, we think that rules her out as a possible suspect, so we ask that you bind over Mr. Lee." The Court indicated that, "I have some problems with this case, with the amount of knowledge that I've been given here this afternoon. ... The question of who did it is a big question." (App. Vol. I, pg. 41) Owing to this problem of being able to establish who in fact inflicted these injuries on Brodie, the charges against Mr. Lee should not have been allowed to stand.

B. Motion for Judgment of Acquittal

At the conclusion of the trial, Mr. Lee's attorneys filed a Motion for Judgment of Acquittal . (App. Vol. II, pgs. 349-54) The essence of the argument of that motion was that there was no evidence presented at trial that put Mr. Lee alone with Brodie during the timeframe established by medical

testimony, for the possible infliction of the injury that would have resulted in the death of Brodie Aschenbrenner. The State did present evidence that Mr. Lee, the evening before Brodie died, was alone with Brodie for roughly an hour, beginning around 8:00 in the when Ms. Foster ran some errands. (App. Vol. IV, pgs. 909-10) Ms. Foster also testified that Mr. Lee was alone with Brodie, in the car, for about five to ten minutes while she ran into a hair salon to pick up a refund. (App. Vol. IV, pgs. 903-04) Apart from that testimony, the record is devoid of any facts alleging that Mr. Lee had any other time alone with Brodie, on June 14 or June 15, that was not supervised by Brodie's mother, Ms. Foster.

During the trial there was testimony from two doctors that established possible timeframes for the infliction of injury on Brodie. The doctors who testified were, Dr. Lisa Gavin, the medical examiner, for the State (App. Vol. IV, pgs. 731-71; Vol. VI, pgs. 1214-40); and Dr. Jonathan Arden for the defense (App. Vol. VI, pgs. 1280-1311) Both witnesses gave testimony that Brodie's time of death was several hours prior to his mother finding him cold and stiff. Dr. Arden estimated that the injury to Brodie's abdomen (the injury that caused Brodie's death) occurred somewhere between 48 and 72 hours prior to Brodie's death. (App. Vol. VI, pgs. 1288-92) It would seem that Dr. Arden's opinion put the critical injury sometime on June the 12th or 13th.

This would be outside of the dates – the 14th or 15th - alleged by the State as the dates that the fatal injury happened to Brodie.

Dr. Gavin, the State medical examiner, established a different timeframe. Dr. Gavin felt that the injury to Brodie occurred roughly 24 hours prior to his death. (App. Vol. VI, pgs. 1215-17) There was no evidence that Mr. Lee struck or injured Brodie on the 14th prior to 8:30 in the morning. It would therefore seem that Dr. Gavin's testimony puts the critical injury to Brodie outside of any time that there was evidence that established the fact that Mr. Lee was alone with Brodie; that is, any time Mr. Lee would have had the opportunity to injure Brodie in the way that led to Brodie's death.

Throughout the course of these proceedings against Mr. Lee, questions persisted as to whether or not there was sufficient evidence to proceed against, and to ultimately convict him of the murder of Brodie Aschenbrenner. These questions were never satisfactorily answered beyond a reasonable doubt. Therefore, Mr. Lee's conviction for Murder and Child Abuse and Neglect with Substantial Bodily Harm denied Mr. Lee of his constitutionally guaranteed right to due process and a fair trial.

CONCLUSION

Based on the foregoing, Mr. Lee's right to a fair trial under the Due Process clauses of the Fifth and Fourteenth Amendments to the United States

Constitution, as well as Art. 1, Sec. 8(5) of the Nevada Constitution, was violated by the errors in the proceedings against him. Based on these errors, the judgment of conviction in this case must be reversed.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: *<u>/s/ Kedric A. Bassett</u>*

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Deputy Public Defender
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Las Vegas, Nevada 89155-2610
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of September, 2015.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By *__/s/ Kedric A. Bassett_____*
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Deputy Public Defender
309 South Third Street, Suite #226
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 8th day of September, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
STEVEN S. OWENS
KEDRIC A. BASSETT
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

MICHAEL ALAN LEE
NDOC No. 81950
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

BY *____/s/ Carrie M. Connolly_____*
Employee, Clark County Public
Defender's Office

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ALAN LEE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 66963
District Court Case No. C277650

FILED
SEP 13 2016
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of conviction AFFIRMED."

Judgment, as quoted above, entered this 10th day of August, 2016.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this September 07, 2016.

Tracie Lindeman, Supreme Court Clerk

By: Amanda Ingersoll
Chief Deputy Clerk

C-11-277650-1
CCJA
NV Supreme Court Clerks Certificate/Judgr
4582148

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ALAN LEE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66963

FILED

AUG 10 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder by child abuse and child abuse and neglect with substantial bodily harm. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Brodie Aschenbrenner was born in December 2008 to Arica Foster, who was his primary caregiver. In October 2010, Arica began dating the appellant, Michael Lee. In February 2011, Arica, Brodie, and Lee all moved into an apartment together. On the morning of Wednesday, June 15, 2011, Arica woke up and found Brodie dead. After his arrest and subsequent trial, a jury found Lee guilty of first-degree murder by child abuse and child abuse and neglect with substantial bodily harm. He was sentenced to serve consecutive prison terms of life without the possibility of parole and 96-240 months.[1] Lee now appeals, arguing (1) the district court abused its discretion in denying his motion for a mistrial because it

[1]The parties are familiar with the material facts here, thus, we will not recount them further, except as necessary to reach our disposition.

16-24817

improperly allowed the State to publish autopsy photos for the jury, (2) the State failed to proffer sufficient evidence at trial to support his murder conviction; and (3) the State failed to present sufficient evidence to bind him over for trial at his preliminary hearing. Upon review of the record and the arguments presented, we affirm Lee's judgment of conviction.

The district court did not abuse its discretion in denying Lee's motion for a mistrial

Lee argues the district court erred in allowing the jury to see Brodie's autopsy photos during lay witness testimony[2] because their probative value was substantially outweighed by the risk of unfair prejudice. Lee further argues that the photos were so prejudicial that showing them to the jury impaired his due process and fair trial rights, and, as a result, he was entitled to a mistrial. The district court found that the photos' probative value was not substantially outweighed by the risk of unfair prejudice because (1) the timing of Brodie's injuries was crucial to the case, and the photos helped establish that timeline; and (2) the photos were helpful in determining whether Brodie's injuries were accidental or the result of abuse.

A district court may order a mistrial when sufficiently prejudicial conduct occurs, preventing the defendant from receiving a fair

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[2]Of note, the State only introduced and published to the jury photos of Brodie's internal injuries during expert testimony from the State's medical examiner, Dr. Lisa Gavin. Lee did not object to the use of autopsy photos presented during that testimony and did not argue, here or below, that the district court erred in allowing Dr. Gavin to use Brodie's autopsy photos during her testimony. All other autopsy photos published to the jury only depicted Brodie's external injuries. Thus, the contested images, both below and on appeal, depict Brodie's external injuries.

trial. *Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004). "The decision to deny a motion for a mistrial rests within the district court's discretion and will not be reversed on appeal absent a clear showing of abuse." *Ledbetter v. State*, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006) (internal quotation marks omitted).

"Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." NRS 48.035. "This determination rests in the sound discretion of the trial court and will not be disturbed unless manifestly wrong." *Reese v. State*, 95 Nev. 419, 422, 596 P.2d 212, 215 (1979) (internal quotation marks omitted). "By requiring the prejudicial effect of evidence to substantially outweigh its probative value, NRS 48.035 [strongly favors] admissibility." *Krause Inc. v. Little*, 117 Nev. 929, 935, 34 P.3d 566, 570 (2001) (alteration in original) (internal quotation marks omitted). Even "gruesome photos [may] be admitted if they aid in ascertaining the truth." *Browne v. State*, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997). But, if the district court abuses its discretion in admitting unfairly prejudicial evidence, a mistrial may be appropriate. *See Reese*, 95 Nev. at 422, 596 P.2d at 214-15.

We reject Lee's challenge to the admission of the autopsy photos for two interrelated reasons. First, the disputed photos had high probative value. In opening, Lee proffered two theories that made Brodie's autopsy photos particularly probative, namely that (1) Brodie's death was not the result of abuse, but an accidental fall from his Power Wheels toy on Thursday, June 9, 2011; and (2) the fatal blow could have occurred sometime before Tuesday, June 14, 2011. The State used Brodie's autopsy photos, along with testimony from several lay witnesses, to show Brodie's Power Wheels accident did not result in his fatal injuries, and instead, his

death was the result of nonaccidental abuse. Lee's sister, who regularly babysat Brodie, reviewed several autopsy photos and testified that the external injuries depicted were not representative of Brodie's normal bruising. Brodie's grandmother, who also regularly babysat Brodie, provided similar testimony. Brodie's pediatrician testified that facial bruising depicted in an autopsy photo was not present when he saw Brodie, and such bruising would have caused him to contact the Department of Family Services immediately.

The State asked lay witnesses to examine autopsy photos to establish that Brodie sustained his fatal injuries on Tuesday, June 14, 2011, or later. Brodie's pediatrician testified that an autopsy photo showed facial bruising that was not apparent during an examination on Friday, June 10, 2011. Additionally, Brodie's grandmother saw him completely naked on Sunday, June 12, 2011, and testified that several autopsy photos showed many external injuries that Brodie did not have on Sunday. Finally, Lee's friend testified Brodie only had two noticeable bruises on his face on the morning of Tuesday, June 14, 2011, and the autopsy photo he reviewed depicted many additional facial bruises. Therefore, the State used autopsy photos of Brodie's external injuries in a manner that was highly probative, especially in light of the defense theories Lee presented during opening argument.

Second, given the photos' direct probative value, they would need to be exceedingly gruesome for the district court to have abused its discretion in admitting them. Brodie was a young victim of violence, which makes the photographs of his external injuries disturbing. Nevertheless, the injuries shown are not exceedingly gruesome, as they depict extensive bruising, several abrasions, a scleral hemorrhage, and a

torn frenulum. Ultimately, the external injuries shown do not carry a danger of unfair prejudice that substantially outweighs their significant probative value.

Thus, we conclude the district court did not abuse its discretion in admitting these photos during testimony from lay witnesses. For that reason, we further conclude that the district court did not abuse its discretion in denying Lee's motion for a mistrial.

The State presented sufficient evidence to support the jury's guilty verdict for first-degree murder by child abuse

Lee claims an essential element of the murder charge against him was not supported by sufficient evidence because no rational juror could have found beyond a reasonable doubt that he inflicted the fatal blow to Brodie's abdomen. Dr. Gavin opined that Brodie's fatal injury was inflicted sometime around 24 hours before his death, while Lee's expert opined that the fatal injury was inflicted at least 48 hours before death. According to Lee, there is insufficient evidence of his guilt because the State alleged the fatal blows occurred when Lee was alone with Brodie, significantly *less than* 24 hours before Brodie's death. We conclude Lee's argument lacks merit.

In reviewing the sufficiency of evidence supporting a jury verdict, this court "view[s] the evidence in the light most favorable to the prosecution" and asks whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Nolan v. State*, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006) (alteration in original) (internal quotation marks omitted). "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." *Id.* (internal quotation marks omitted).

Consistent with these rules, we credit Dr. Gavin's testimony, which is more favorable to the State. Dr. Gavin made clear that timing Brodie's injury was far from an exact science, that the 24-hour period she testified to was only meant to provide a general idea of when Brodie suffered the fatal blow, and that the true time period could be off by hours. As such, this court looks for evidence in the record that Lee could have inflicted the fatal injury within 24 hours, more or less, of Brodie's death.

Arica testified that Brodie was cold and stiff when she found him at about 8:50 a.m. Wednesday morning. Dr. Gavin testified that Arica's description was consistent with Brodie dying several hours before Arica discovered him. Therefore, the jury heard testimony that Brodie died sometime around 7:00 a.m. on Wednesday, and a very general guide for when Brodie's fatal injury occurred would be sometime proximate to 7:00 a.m. on Tuesday, June 14, 2011.

Viewing the testimony in the light most favorable to the prosecution, the State has established Brodie was with Arica, Lee, or both during the crucial 24-hour time period when his fatal injury was inflicted. No witness ever saw Brodie with bruising consistent with his autopsy photos, and he was seen naked on Sunday and shirtless on Monday morning. On Tuesday morning, both Arica and Lee's friend had noticed worsening facial bruising. Still, that facial bruising was not as severe as the bruising in Brodie's autopsy photos. Therefore, Brodie must have suffered some kind of abuse on Tuesday when he was only around Arica, Lee, or both.

Arica testified that Lee was alone with Brodie in the car for five to ten minutes on Tuesday in the early afternoon. Based on the "early afternoon" description, Lee was alone with Brodie roughly 17 to 18.5 hours

before he died. Brodie was in the center backseat where both the front driver and passenger could easily reach him. Further, Brodie was sleeping when Arica got out of the car, and when she returned he was screaming and crying. Again viewing the facts in the light most favorable to the prosecution, there is sufficient evidence for a rational juror to conclude beyond a reasonable doubt that the fatal abdominal injury occurred in the car while Lee was alone with Brodie.

Additionally, Arica's description of Brodie's symptoms is consistent with the fatal blow occurring in the car. After returning home on Tuesday in the late afternoon or early evening, Brodie lay in bed until dinner. However, at dinner, he had a depressed appetite and Arica had to spoon-feed him, which was abnormal. Brodie then went to bed. At about 1:00 a.m. on Wednesday, Arica found that Brodie had vomited profusely, covering himself and his bedding in vomit. He vomited again in his bathroom. These symptoms were consistent with the transected duodenum that caused Brodie's death. Brodie also complained of a headache, which was consistent with the significant head trauma he had suffered. Only Lee's sister and Arica testified to noticing symptoms of Brodie's fatal injuries. Lee's sister testified that Brodie had a depressed appetite and headache on Monday, June 13, 2011; Arica disagreed, testifying his symptoms manifested Tuesday evening. Based on the standard of review here, we credit Arica's testimony.

Finally, the State proffered a substantial amount of circumstantial evidence tending to show that Lee abused Brodie. First, Brodie began suffering worse bruising in terms of location, frequency, and severity about two months after Lee began living with Arica and Brodie. The suspicious bruising subsided when Arica got a new babysitter, but

returned weeks later. Arica was suspicious enough to look into getting a nanny cam. Second, several witnesses noted that in the weeks preceding his death, Brodie seemed afraid of Lee and did not want to be around him. Third, Arica and Lee had significant arguments about Lee's somewhat contentious relationship with Brodie, and Arica had begun looking at new apartments in case things did not improve. Fourth, Lee would go into Brodie's room at night and take him to use the bathroom against Arica's wishes. Similarly, he would close Brodie's door at night against her wishes. Several times a week, Arica would find Brodie's baby monitor turned off in the morning. Fifth, Arica's stepfather believed Lee tried to get information from him about the direction of the police investigation after Brodie's death. Sixth, Lee's friend and sister never cooperated with police. Finally, multiple witnesses testified that Arica was devastated after Brodie's death.

Based on the foregoing evidence and viewed in the light most favorable to the prosecution, a rational jury could have convicted Lee of Brodie's murder beyond a reasonable doubt. Therefore, sufficient evidence supports Lee's murder conviction.

Any error that occurred during Lee's probable cause determination is harmless

Lee argues there was insufficient evidence for the justice and district courts to find probable cause that he murdered Brodie.[3] Having

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[3]Lee has only conclusorily argued that (1) there was not probable cause to support the child abuse charge against him, and (2) his child abuse conviction was not supported by sufficient evidence. Because he has failed to meaningfully argue these issues, we decline to address them. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

concluded that the jury's verdict is supported by sufficient evidence, we now also conclude that any error that may have occurred during Lee's probable cause determination is harmless in light of the jury's guilty verdict. *See Dettloff v. State*, 120 Nev. 588, 596, 97 P.3d 586, 591 (2004) ("Finally, that the jury convicted [the defendant] under a higher burden of proof cured any irregularities that may have occurred during the grand jury proceedings."); *see also Echavarria v. State*, 108 Nev. 734, 745, 839 P.2d 589, 596 (1992) ("Any irregularities which may have occurred in the second grand jury proceeding were cured when [the defendant] was tried and his guilt determined under the higher criminal burden of proof."); *accord United States v. Mechanik*, 475 U.S. 66, 70 (1986).

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Pickering

cc: Hon. Stefany Miley
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

SAITTA, J., concurring in part and dissenting in part:

I concur with my colleagues' determination that the State presented sufficient evidence to support the jury's guilty verdict for first-degree murder by child abuse. I also concur with my colleagues' determination that any error that occurred during Lee's preliminary hearing with regard to the probable cause determination was harmless. I dissent, however, with regard to my colleagues' analysis on the issue of whether the district court abused its discretion in denying Lee's motion for a mistrial on the basis of the admission of Brodie's autopsy photographs.[1]

"Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." NRS 48.035(1). As previously stated, Lee proffered that (1) Brodie's death was not the result of abuse but an accidental fall from his Power Wheels toy on Thursday, June 9, 2011; and (2) the fatal blow could have occurred sometime before Tuesday, June 14, 2011. The lay witness testimony provided at trial, including the testimony of Brodie's pediatrician, Lee's sister, and Brodie's grandmother, was sufficient to establish that Brodie sustained his fatal injuries on Tuesday, June 14, 2011, or later.

Because the issue was the *timing* of the injuries, not the fact that the injuries existed, the autopsy photographs did not aid in ascertaining the truth and they should not have been admitted. *See Browne v. State*, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997) (stating that "gruesome photos [may] be admitted *if they aid in ascertaining the truth*"

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[1]I disagree only in the analysis of this issue. It is likely, given the testimony of lay and expert witnesses at trial, that any error committed by the district court in admitting Brodie's autopsy photographs would have been harmless error.

(emphasis added)). Furthermore, the fact that Brodie was a child only made the photographs more prejudicial. Accordingly, I believe that the prejudicial nature of the photographs substantially outweighed their probative value; thus, they did not need to be exceedingly gruesome to be excluded, as my colleagues suggest.

_____, J.
Saitta

Bates 947

CERTIFIED COPY
This document is a full, true and correct copy of the original on file and of record in my office.
DATE: Sept. 7, 2016
Supreme Court Clerk, State of Nevada
By A Indeau Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ALAN LEE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 66963
District Court Case No. C277650

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: September 07, 2016

Tracie Lindeman, Clerk of Court

By: Amanda Ingersoll
Chief Deputy Clerk

cc (without enclosures):
Hon. Stefany Miley, District Judge
Clark County Public Defender
Clark County District Attorney
Attorney General/Carson City

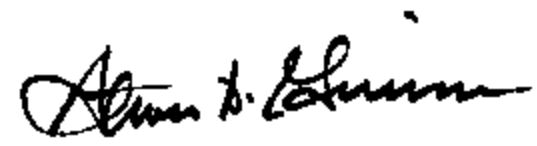
RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on SEP 13 2016.

HEATHER UNGERMANN
Deputy District Court Clerk

RECEIVED
SEP 09 2016
CLERK OF THE COURT

Electronically Filed
05/12/2017 04:30:23 PM



CLERK OF THE COURT

PET
CAL J. POTTER, III, ESQ.
Nevada Bar Number 1988
C. J. POTTER, IV, ESQ.
Nevada Bar No. 13225
POTTER LAW OFFICES
1125 Shadow Lane
Las Vegas, Nevada 89102
Ph: (702) 385-1954
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Attorneys for Petitioner

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL ALAN LEE,

Petitioner,

vs.

BRIAN E. WILLIAMS, SR., Warden
High Desert State Prison,

Respondent.

/

STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL ALAN LEE,

Defendant.

/

Case No.: C-11-277650-1

Dept No.: XXIII

DATE OF HEARING: 6/28/17

TIME OF HEARING: 9:30AM

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, MICHAEL ALAN LEE, by and through his attorneys, Cal J. Potter, III, Esq. and C. J. POTTER, IV, ESQ. Of POTTER LAW OFFICES, and hereby Petitions this Court for post-conviction relief pursuant to NRS 34.735

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: **High Desert State Prison, Clark County, Nevada**

2. Name and location of court which entered the judgment of conviction under attack:

Eighth Judicial District Court

3. Date of judgment of conviction: **November 10, 2014**

4. Case number: **C-11-277650-1**

5. (a) Length of sentence: **Count 1, Life without the Possibility of Parole, consecutive to C199242; and Count 2, a Maximum of Two Hundred Forty (240) Months with a MINIMUM parole eligibility of Ninety-Six (96) Months, Consecutive to Count 1 with Zero (0) days credit for time served.**

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes__ No X_

7. Nature of offense involved in conviction being challenged: **Count 1. First Degree Murder by Child Abuse, Count 2. Child Abuse and Neglect with Substantial Bodily Harm.**

8. What was your plea? (check one)

(a) Not guilty X

(b) Guilty __

(c) Guilty but mentally ill _ __

(d) Nolo contendere ____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: **Petitioner pled not guilty**

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury X

(b) Judge without a jury_____

11. Did you testify at the trial? Yes_ __ No_X_

12. Did you appeal from the judgment of conviction? Yes _X_ No__ Public Defender

13. If you did appeal, answer the following:

(a) Name of court: **Nevada Supreme Court**

(b) Case number or citation: **66963**

(c) Result: **Order of Affirmance**

(d) Date of result: **August 10, 2016**

14. If you did not appeal, explain briefly why you did not: **N/A**

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes **X** No

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: **Eighth Judicial District Court**

(2) Nature of proceeding: **Petition for Writ of Habeas Corpus**

(3) Grounds raised: **That there was no direct or circumstantial evidence that Petitioner committed a criminal act of abused the decedent.**

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes____ No_X_

(5) Result: **Denied**

(6) Date of result: **January 30, 2012**

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: **N/A**

(b) As to any second petition, application or motion, give the same information

(1) Name of court: **N/A**

(2) Nature of proceeding: **N/A**

(3) Grounds raised: **N/A**

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes..... No **X**

(5) Result: **N/A**

(6) Date of result: **N/A**

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: **N/A**

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach. **N/A**

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion? **N/A**

(1) First petition, application or motion? Yes No **N/A**

Citation or date of decision:

(2) Second petition, application or motion? Yes ..... No..... **N/A**

Citation or date of decision: **N/A**

(3) Third or subsequent petitions, applications or motions? Yes ..... No **N/A**

Citation or date of decision: **N/A**

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. **N/A**

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post conviction proceeding? If so, identify:

(a) Which of the grounds is the same: **N/A**

(b) The proceedings in which these grounds were raised:

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. **N/A**

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not

exceed five handwritten or typewritten pages in length.) **No, the Petition is timely**

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes____ No_X_

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: **Patrick Mc Donald, Gregg Knapp, Nadia Von Magdenko, Kendrick Bassett, (Direct Appeal) and Steve Altig (Trial)**

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes____ No_X_

POINTS AND AUTHORITIES IN SUPPORT OF PETITION

I.

STATEMENT OF FACTS

In December of 2008, Arica Foster gave birth to a boy who she named Brodie. Brodie's father was Dustin Aschenbrenner. When the relationship between Arica Foster and Dustin Aschenbrenner dissolved, Ms. Foster had custody of Brodie and was his primary caregiver. In October of 2010, Ms. Foster met and begun dating Michael Lee, after they were introduced to each other by their respective sisters. For a period of time Mr. Lee's sister, Jennifer, babysat Brodie. In February of 2011, Ms. Foster and Mr. Lee moved into an apartment together. (Prior to that, Ms. Foster has been living in Green Valley with her parents). Brodie lived with Ms. Foster and Mr. Lee. Ms Foster relied on family and friends to help care for Brodie.

Brodie Aschenbrenner was found dead at approximately 8:50 in the morning of June 15, 2011, while Ms. Foster was alone with the child. Ms. Foster testified that the previous evening, she was alone with Brodie while Mr. Lee ran errands. Mr. Lee was alone with Brodie for roughly an hour while she ran some errands. Around 1:00 a.m. the next morning, Ms. Foster woke up as Mr. Lee was coming to their bed from the bathroom. He told Ms. Foster that it stunk and he though Brodie had thrown up. Ms. Foster got up and cleaned Brodie. She ended up laying him on a towel that she spread out on the sofa, before she returned to her bed. Sometime in the early morning (it was still dark outside), Mr. Lee carried Brodie in a fuzzy blanket and laid him into bed with Ms. Foster. When Ms. Foster awoke at 8:50 a.m., she began rubbing Brodie's back and

noticed that he was cold. She jumped out of bed and called 911. The Affidavit of warrant says Ms. Foster awoke after the Petitioner left for work, and she found the minor unresponsive. Ms. Foster gave a June 17, 2011 interview that was lost or destroyed by the Henderson Police Department. The *Res Gestae* statements are believed to be exculpatory because Mr. Lee was not arrested for several months after the death of the child.

ON DIRECT APPEAL

The Appellate Court has previously found that the Opening Statement made by Nadia Von Magdenko at trial opened the door for the State to repeatedly use the excluded and limited autopsy photo of the minor child. Ms. Von Magdenko insisted on asserting a "possible defense" that was not supported by the testimony of the Defense medical expert. *i.e.* an accident caused the injury to the duodeum. In contrast both medical experts had opined prior to trial that the injury in question was intentional. In addition, Ms. Von Magdenko was not qualified to "first chair" a non-capital murder case. Indeed she would not have qualified for appointment. Ms. Von Magdenko requested Mr. Altig to assist her with issues of an evidentiary nature. However, Ms. Von Magdenko refused to adhere to Mr. Altig's advice not to assert an inconsistent defense.

Ms. Von Magdenko also asked Mr. Altig to step out of his advisory stand-by role and become co-counsel. In fact, Mr. Altig was requested to conduct the cross-examination of the lead homicide detective because Ms. Von Magdenko was not prepared or capable to conduct the cross-examination. Similarly, Mr. Altig delivered the closing argument because it became clear that Ms. Von Magdenko was not qualified to conduct the closing argument. Mr. Altig also told Ms. Von Magdenko to object several times but she failed to timely object. Specifically, Mr. Altig was objecting to having the medical examiner's testimony be given early in the trial and the cross examination delayed until the State's case in Chief was ending.

Neither Mr. Lee, nor his parents, were ever advised that Mr. Lee would qualify for experienced attorneys from the public defenders office who regularly handle murder cases on a daily basis. Indeed, Mr. Lee's parents had initially contacted Steven Wolfson, Esq. to defend their son and had paid over thirty thousand dollars ($30,000.00) for Mr. Lee's defense. Initially Mr. Wolfson had assigned the case to his associate Patrick McDonald for a preliminary hearing.

After being bound over to District Court Mr. Lee's parents paid ($20,000.00) Twenty Thousand Dollars to Mr. Wolfson's office for representation through trial in the State District Court. Prior to trial Mr. Wolfson left private practice and Mr. McDonald was suspended from the practice of law. Greg Knapp was then asked to assist Ms. Von Magdenko but he also was unable to perform first chair duties. Mr. Altig then stepped in to serve as stand-by counsel to Ms. Von Magdenko

II.

ARGUMENT

A. STANDARD OF REVIEW

The effectiveness of counsel's representation is analyzed using a two prong test. Strickland v. Washington, 466 U.S. 668 (1984). The first prong in the Strickland test is the determination of whether counsel's representation was deficient. Strickland, 466 U.S. at 687. The second prong in the Strickland test focuses on the effect of counsel's deficient representation. The defendant must have suffered prejudice. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland at 687. The Court will consider whether counsel's errors created a reasonable probability that, absent such errors, the result would be different. Strickland at 694.

When evaluating whether a defendant was unfairly prejudiced by counsel's deficient performance, the failure to inspect the evidence and its surrounding disappearance should be analyzed "in light if the strength of the government's case." Eggleston v. U.S., 798 F.2d 374, 376 (9th Cir. 1986).

B. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND DEFENDANT SUFFERED PREJUDICE, AS A RESULT OF COUNSEL'S DEFICIENT PERFORMANCE (SEE, ORDER OF AFFIRMANCE)

Washington, 104 S.Ct. 2052 and Kirksey v. State, 923 P.2d 1102 (Nev. 1996). The Sixth Amendment right to counsel is a right to the effective assistance of counsel. McMana v. Richardson, 397 U.S. 759, 771, n.14 (1970). The Supreme Court held:

> . . .That a person who happens to be a lawyer is present at trial alongside the accused is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be asserted by an attorney, whether retained or appointed, who plays the role necessary to insure that the trial is fair. Strickland v. Washington, 466 U.S. 668, 685 (1984).

"To establish ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that he was prejudiced by the deficiency." Wood v. Ryan, 693 F.3d 1104, 1118 (9th Cir. 2012). "The benchmark for judging any claim of ineffective assistance is whether in light of all circumstances counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). "...any amount of jail time has Sixth Amendment significance." United States v. Glover, 121 S.Ct. 696, 698 (2001).

The Sixth Amendment right to effective assistance of counsel applies to all critical stages of proceedings in both capital and non-capital cases. Lafler v. Cooper, 132 S.Ct. 1376, 1385 (2012).

Mr. Lee was denied the effective assistance of Counsel at the trial and appellate level when the defense Counsel failed to object to the District Court Jury Instructions. Moreover, trial counsel and appellate counsel failed to preserve at trial and prosecute on appeal the fact that the District Court abused its discretion in allowing jury instructions that departed from the information filed to expand the case. The Nevada Supreme Court, in a case that is identical to Mr. Lee's case, reversed a murder conviction because the District Court abused its discretion in allowing jury instructions which departed from the information filed to expand the State's theory of the case to include an act of neglect. Thompson v. State, 2016 Nev. Unpub. LEXIS 79, *2,

2016 WL 315216 (Nev. Jan. 22, 2016). Stated succinctly the Court followed its prior holding in Labastida v. State, 115 Nev. 298, 302 03, 986 P.2d 443, 446 (1991) that"[t]he use of the term 'child abuse' and not 'child neglect' in NRS 200.030(1)(a) evinces the legislature's intent that different meanings apply to the two terms and that a murder perpetrated by means of 'child abuse,' and not 'child neglect,' constitutes first degree murder." Labastita court concluded that felony murder by child abuse must follow the definition of child abuse in the felony murder statute. As a result, the Court was not willing to read NRS 200.030 (1) (a) as to define first degree murder to include a murder which is perpetrated by means of child neglect.

Petitioner seeks to conduct discovery by way of subpoena and depositions as follows. Steven Altig, Esq, and Nadia Von Magdenko, Esq. on the failure of Nadia Von Magdenko's to provide the effective assistance of counsel at trial by asserting that she was not qualified to be appointed as lead counsel in a non-capital murder case and also failed to advise petitioner of his right to appointed counsel when he his retained attorney. Nadia Von Magdenko was not prepared to conduct the examination of the detective and that she failed to follow the direction of attorney Steven Altig who was stand-by counsel thus requiring Steven Altig to perform duties as second chair counsel. Instead, as stand-by counsel Steven Altig's role in defense was not to serve as co-counsel, or led counsel, but was to assist Nadia Von Magdenko with evidenciary and tactical trial decisions. Steven Altig, did not receive any compensation for his services, nor was he appointed by the Court, instead he served on a pro bono basis. Steven Altig became concerned with Nadia Von Magdenko's qualifications to try the murder case of Michael Alan Lee when she insisted on giving an opening statement that was not supported by her expert witnesses testimony or the facts of the case. Nadia Von Magdenko asserted inconsistent defenses arguing that the injuries were intentional in nature, while also arguing that the injuries resulting in death were accidental injuries, but not as a result of Mr. Lee's actions. Nadia Von Magdenko further tried to have Steve Altig take over the case agent's cross examination because she was not prepared to conduct the examination. Steve Altig took over the closing when it became clear that Nadia Von Magdenko did not have adequate experience to conduct the closing argument. Steve Altig submits that the Michael Lee case was a defensible case, and

believes that a different outcome was probable with experienced trial counsel. Both medical experts argued that the injury was not accidental. Patrick McDonald was suspended by the State Bar prior to trial

The Appellate Court of Nevada has already been critical of trial counsel's opening the door (unnecessarily) for repeated use of the autopsy photos. Consequently, *a prima facie* case has been made, and the Court should order discovery, that can only be obtained by subpoena, jail records, ie., also Drew Christensen's records for Nadia Von Magdenko, as well as the standard requirements for counsel in serving as first chair in an non-capital murder case.

WHEREFORE, petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding. This petitioner is verified on behalf of Michael Alan Lee, pursuant to NRS 34.730, by Cal J. Potter, III, Esq. who verifies that Michael Alan Lee personally authorized Cal J. Potter, III, Esq. to commence this action.

EXECUTED on the 12th day of May, 2017.

POTTER LAW OFFICES

By: _____
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Nevada Bar No. 1988
C. J. POTTER, IV, ESQ.
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1125 Shadow Lane
Las Vegas, Nevada 89102
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9 on the 12th day of May, 2017, I did serve at Las Vegas, Nevada a true and correct copy of **PETITION FOR WRIT OF HABEAS CORPUS** on all parties to this action by:

☐ Facsimile

X U.S. Mail

☐ Hand Delivery

X Electronic Filing/Service

Addressed as follows:

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ERRATA
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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

MICHAEL ALAN LEE, Petitioner, vs. BRIAN E. WILLIAMS, SR., Warden High Desert State Prison, Respondent. _____/	Case No.: Dept No.: Date of Hearing: Time of Hearing:	C-11-277650-1 XXIII 06/28/2017 9:30 a.m.

STATE OF NEVADA,
Plaintiff,

vs.

MICHAEL ALAN LEE,

Defendant.
_____/

ERRATA TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Petitioner, MICHAEL ALAN LEE, by and through his attorneys, CAL J. POTTER, III, ESQ, and C.J. POTTER, IV, ESQ, of POTTER LAW OFFICES and hereby submits his Errata to the Petition for Writ of Habeas Corpus to attach the Order of Affirmance, marked as Exhibit 1.

DATED this 19th day of June, 2017.

POTTER LAW OFFICES
By: _____
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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9 on the 19th day of June, 2017, I did serve at Las Vegas, Nevada a true and correct copy of **ERRATA TO THE PETITION FOR WRIT OF HABEAS CORPUS** on all parties to this action by:

☐ Facsimile

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EXHIBIT 1.

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ALAN LEE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66963

FILED

AUG 10 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder by child abuse and child abuse and neglect with substantial bodily harm. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Brodie Aschenbrenner was born in December 2008 to Arica Foster, who was his primary caregiver. In October 2010, Arica began dating the appellant, Michael Lee. In February 2011, Arica, Brodie, and Lee all moved into an apartment together. On the morning of Wednesday, June 15, 2011, Arica woke up and found Brodie dead. After his arrest and subsequent trial, a jury found Lee guilty of first-degree murder by child abuse and child abuse and neglect with substantial bodily harm. He was sentenced to serve consecutive prison terms of life without the possibility of parole and 96-240 months.[1] Lee now appeals, arguing (1) the district court abused its discretion in denying his motion for a mistrial because it

[1]The parties are familiar with the material facts here, thus, we will not recount them further, except as necessary to reach our disposition.

16-24817

improperly allowed the State to publish autopsy photos for the jury, (2) the State failed to proffer sufficient evidence at trial to support his murder conviction; and (3) the State failed to present sufficient evidence to bind him over for trial at his preliminary hearing. Upon review of the record and the arguments presented, we affirm Lee's judgment of conviction.

The district court did not abuse its discretion in denying Lee's motion for a mistrial

Lee argues the district court erred in allowing the jury to see Brodie's autopsy photos during lay witness testimony[2] because their probative value was substantially outweighed by the risk of unfair prejudice. Lee further argues that the photos were so prejudicial that showing them to the jury impaired his due process and fair trial rights, and, as a result, he was entitled to a mistrial. The district court found that the photos' probative value was not substantially outweighed by the risk of unfair prejudice because (1) the timing of Brodie's injuries was crucial to the case, and the photos helped establish that timeline; and (2) the photos were helpful in determining whether Brodie's injuries were accidental or the result of abuse.

A district court may order a mistrial when sufficiently prejudicial conduct occurs, preventing the defendant from receiving a fair

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[2]Of note, the State only introduced and published to the jury photos of Brodie's internal injuries during expert testimony from the State's medical examiner, Dr. Lisa Gavin. Lee did not object to the use of autopsy photos presented during that testimony and did not argue, here or below, that the district court erred in allowing Dr. Gavin to use Brodie's autopsy photos during her testimony. All other autopsy photos published to the jury only depicted Brodie's external injuries. Thus, the contested images, both below and on appeal, depict Brodie's external injuries.

trial. *Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004). "The decision to deny a motion for a mistrial rests within the district court's discretion and will not be reversed on appeal absent a clear showing of abuse." *Ledbetter v. State*, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006) (internal quotation marks omitted).

"Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." NRS 48.035. "This determination rests in the sound discretion of the trial court and will not be disturbed unless manifestly wrong." *Reese v. State*, 95 Nev. 419, 422, 596 P.2d 212, 215 (1979) (internal quotation marks omitted). "By requiring the prejudicial effect of evidence to substantially outweigh its probative value, NRS 48.035 [strongly favors] admissibility." *Krause Inc. v. Little*, 117 Nev. 929, 935, 34 P.3d 566, 570 (2001) (alteration in original) (internal quotation marks omitted). Even "gruesome photos [may] be admitted if they aid in ascertaining the truth." *Browne v. State*, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997). But, if the district court abuses its discretion in admitting unfairly prejudicial evidence, a mistrial may be appropriate. *See Reese*, 95 Nev. at 422, 596 P.2d at 214-15.

We reject Lee's challenge to the admission of the autopsy photos for two interrelated reasons. First, the disputed photos had high probative value. In opening, Lee proffered two theories that made Brodie's autopsy photos particularly probative, namely that (1) Brodie's death was not the result of abuse, but an accidental fall from his Power Wheels toy on Thursday, June 9, 2011; and (2) the fatal blow could have occurred sometime before Tuesday, June 14, 2011. The State used Brodie's autopsy photos, along with testimony from several lay witnesses, to show Brodie's Power Wheels accident did not result in his fatal injuries, and instead, his

death was the result of nonaccidental abuse. Lee's sister, who regularly babysat Brodie, reviewed several autopsy photos and testified that the external injuries depicted were not representative of Brodie's normal bruising. Brodie's grandmother, who also regularly babysat Brodie, provided similar testimony. Brodie's pediatrician testified that facial bruising depicted in an autopsy photo was not present when he saw Brodie, and such bruising would have caused him to contact the Department of Family Services immediately.

The State asked lay witnesses to examine autopsy photos to establish that Brodie sustained his fatal injuries on Tuesday, June 14, 2011, or later. Brodie's pediatrician testified that an autopsy photo showed facial bruising that was not apparent during an examination on Friday, June 10, 2011. Additionally, Brodie's grandmother saw him completely naked on Sunday, June 12, 2011, and testified that several autopsy photos showed many external injuries that Brodie did not have on Sunday. Finally, Lee's friend testified Brodie only had two noticeable bruises on his face on the morning of Tuesday, June 14, 2011, and the autopsy photo he reviewed depicted many additional facial bruises. Therefore, the State used autopsy photos of Brodie's external injuries in a manner that was highly probative, especially in light of the defense theories Lee presented during opening argument.

Second, given the photos' direct probative value, they would need to be exceedingly gruesome for the district court to have abused its discretion in admitting them. Brodie was a young victim of violence, which makes the photographs of his external injuries disturbing. Nevertheless, the injuries shown are not exceedingly gruesome, as they depict extensive bruising, several abrasions, a scleral hemorrhage, and a

torn frenulum. Ultimately, the external injuries shown do not carry a danger of unfair prejudice that substantially outweighs their significant probative value.

Thus, we conclude the district court did not abuse its discretion in admitting these photos during testimony from lay witnesses. For that reason, we further conclude that the district court did not abuse its discretion in denying Lee's motion for a mistrial.

The State presented sufficient evidence to support the jury's guilty verdict for first-degree murder by child abuse

Lee claims an essential element of the murder charge against him was not supported by sufficient evidence because no rational juror could have found beyond a reasonable doubt that he inflicted the fatal blow to Brodie's abdomen. Dr. Gavin opined that Brodie's fatal injury was inflicted sometime around 24 hours before his death, while Lee's expert opined that the fatal injury was inflicted at least 48 hours before death. According to Lee, there is insufficient evidence of his guilt because the State alleged the fatal blows occurred when Lee was alone with Brodie, significantly *less than* 24 hours before Brodie's death. We conclude Lee's argument lacks merit.

In reviewing the sufficiency of evidence supporting a jury verdict, this court "view[s] the evidence in the light most favorable to the prosecution" and asks whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Nolan v. State*, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006) (alteration in original) (internal quotation marks omitted). "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." *Id.* (internal quotation marks omitted).

Consistent with these rules, we credit Dr. Gavin's testimony, which is more favorable to the State. Dr. Gavin made clear that timing Brodie's injury was far from an exact science, that the 24-hour period she testified to was only meant to provide a general idea of when Brodie suffered the fatal blow, and that the true time period could be off by hours. As such, this court looks for evidence in the record that Lee could have inflicted the fatal injury within 24 hours, more or less, of Brodie's death.

Arica testified that Brodie was cold and stiff when she found him at about 8:50 a.m. Wednesday morning. Dr. Gavin testified that Arica's description was consistent with Brodie dying several hours before Arica discovered him. Therefore, the jury heard testimony that Brodie died sometime around 7:00 a.m. on Wednesday, and a very general guide for when Brodie's fatal injury occurred would be sometime proximate to 7:00 a.m. on Tuesday, June 14, 2011.

Viewing the testimony in the light most favorable to the prosecution, the State has established Brodie was with Arica, Lee, or both during the crucial 24-hour time period when his fatal injury was inflicted. No witness ever saw Brodie with bruising consistent with his autopsy photos, and he was seen naked on Sunday and shirtless on Monday morning. On Tuesday morning, both Arica and Lee's friend had noticed worsening facial bruising. Still, that facial bruising was not as severe as the bruising in Brodie's autopsy photos. Therefore, Brodie must have suffered some kind of abuse on Tuesday when he was only around Arica, Lee, or both.

Arica testified that Lee was alone with Brodie in the car for five to ten minutes on Tuesday in the early afternoon. Based on the "early afternoon" description, Lee was alone with Brodie roughly 17 to 18.5 hours

before he died. Brodie was in the center backseat where both the front driver and passenger could easily reach him. Further, Brodie was sleeping when Arica got out of the car, and when she returned he was screaming and crying. Again viewing the facts in the light most favorable to the prosecution, there is sufficient evidence for a rational juror to conclude beyond a reasonable doubt that the fatal abdominal injury occurred in the car while Lee was alone with Brodie.

Additionally, Arica's description of Brodie's symptoms is consistent with the fatal blow occurring in the car. After returning home on Tuesday in the late afternoon or early evening, Brodie lay in bed until dinner. However, at dinner, he had a depressed appetite and Arica had to spoon-feed him, which was abnormal. Brodie then went to bed. At about 1:00 a.m. on Wednesday, Arica found that Brodie had vomited profusely, covering himself and his bedding in vomit. He vomited again in his bathroom. These symptoms were consistent with the transected duodenum that caused Brodie's death. Brodie also complained of a headache, which was consistent with the significant head trauma he had suffered. Only Lee's sister and Arica testified to noticing symptoms of Brodie's fatal injuries. Lee's sister testified that Brodie had a depressed appetite and headache on Monday, June 13, 2011; Arica disagreed, testifying his symptoms manifested Tuesday evening. Based on the standard of review here, we credit Arica's testimony.

Finally, the State proffered a substantial amount of circumstantial evidence tending to show that Lee abused Brodie. First, Brodie began suffering worse bruising in terms of location, frequency, and severity about two months after Lee began living with Arica and Brodie. The suspicious bruising subsided when Arica got a new babysitter, but

returned weeks later. Arica was suspicious enough to look into getting a nanny cam. Second, several witnesses noted that in the weeks preceding his death, Brodie seemed afraid of Lee and did not want to be around him. Third, Arica and Lee had significant arguments about Lee's somewhat contentious relationship with Brodie, and Arica had begun looking at new apartments in case things did not improve. Fourth, Lee would go into Brodie's room at night and take him to use the bathroom against Arica's wishes. Similarly, he would close Brodie's door at night against her wishes. Several times a week, Arica would find Brodie's baby monitor turned off in the morning. Fifth, Arica's stepfather believed Lee tried to get information from him about the direction of the police investigation after Brodie's death. Sixth, Lee's friend and sister never cooperated with police. Finally, multiple witnesses testified that Arica was devastated after Brodie's death.

Based on the foregoing evidence and viewed in the light most favorable to the prosecution, a rational jury could have convicted Lee of Brodie's murder beyond a reasonable doubt. Therefore, sufficient evidence supports Lee's murder conviction.

Any error that occurred during Lee's probable cause determination is harmless

Lee argues there was insufficient evidence for the justice and district courts to find probable cause that he murdered Brodie.[3] Having

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[3]Lee has only conclusorily argued that (1) there was not probable cause to support the child abuse charge against him, and (2) his child abuse conviction was not supported by sufficient evidence. Because he has failed to meaningfully argue these issues, we decline to address them. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

concluded that the jury's verdict is supported by sufficient evidence, we now also conclude that any error that may have occurred during Lee's probable cause determination is harmless in light of the jury's guilty verdict. *See Dettloff v. State*, 120 Nev. 588, 596, 97 P.3d 586, 591 (2004) ("Finally, that the jury convicted [the defendant] under a higher burden of proof cured any irregularities that may have occurred during the grand jury proceedings."); *see also Echavarria v. State*, 108 Nev. 734, 745, 839 P.2d 589, 596 (1992) ("Any irregularities which may have occurred in the second grand jury proceeding were cured when [the defendant] was tried and his guilt determined under the higher criminal burden of proof."); *accord United States v. Mechanik*, 475 U.S. 66, 70 (1986).

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Pickering

cc: Hon. Stefany Miley
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

SAITTA, J., concurring in part and dissenting in part:

I concur with my colleagues' determination that the State presented sufficient evidence to support the jury's guilty verdict for first-degree murder by child abuse. I also concur with my colleagues' determination that any error that occurred during Lee's preliminary hearing with regard to the probable cause determination was harmless. I dissent, however, with regard to my colleagues' analysis on the issue of whether the district court abused its discretion in denying Lee's motion for a mistrial on the basis of the admission of Brodie's autopsy photographs.[1]

"Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." NRS 48.035(1). As previously stated, Lee proffered that (1) Brodie's death was not the result of abuse but an accidental fall from his Power Wheels toy on Thursday, June 9, 2011; and (2) the fatal blow could have occurred sometime before Tuesday, June 14, 2011. The lay witness testimony provided at trial, including the testimony of Brodie's pediatrician, Lee's sister, and Brodie's grandmother, was sufficient to establish that Brodie sustained his fatal injuries on Tuesday, June 14, 2011, or later.

Because the issue was the *timing* of the injuries, not the fact that the injuries existed, the autopsy photographs did not aid in ascertaining the truth and they should not have been admitted. *See Browne v. State*, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997) (stating that "gruesome photos [may] be admitted *if they aid in ascertaining the truth*"

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[1]I disagree only in the analysis of this issue. It is likely, given the testimony of lay and expert witnesses at trial, that any error committed by the district court in admitting Brodie's autopsy photographs would have been harmless error.

(emphasis added)). Furthermore, the fact that Brodie was a child only made the photographs more prejudicial. Accordingly, I believe that the prejudicial nature of the photographs substantially outweighed their probative value; thus, they did not need to be exceedingly gruesome to be excluded, as my colleagues suggest.

_____, J.
Saitta

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DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL ALAN LEE, #1699107, Petitioner, -vs- THE STATE OF NEVADA, Respondent.	CASE NO: C-11-277650-1 DEPT NO: XXIII

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: JUNE 28, 2017
TIME OF HEARING: 9:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through RYAN J. MACDONALD, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Petition for Writ of Habeas Corpus.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On November 18, 2011, Michael Alan Lee ("Defendant") was charged by way of Information with: Count 1 – Murder (NRS 200.010, 200.030, 200.508) and Count 2: Child Abuse and Neglect With Substantial Bodily Harm (Felony – NRS 200.508).

Before trial on June 10, 2014, Lee filed a Motion in Limine to Exclude Autopsy Photographs. The State filed its Opposition on June 20, 2014. The court denied the Motion on June 25, 2014.

Lee's jury trial commenced on August 4, 2014. On August 15, 2014, the jury returned a verdict of guilty on both counts.

On August 18, 2014, Lee filed a Motion for Judgment of Acquittal. On August 20, 2014, Lee filed a Motion for a New Trial. The State filed its Oppositions to the Motions on August 21 and 22, 2014. The court denied the Motions on September 3, 2014.

On October 21, 2014, Lee was adjudicated guilty and sentenced as follows: as to Count 1: life without the possibility of parole; and as to Count 2: a minimum of 96 months and a maximum of 240 months, consecutive to Count 1. Lee received no credit for time served. A Judgment of Conviction was filed on November 10, 2014.

A Notice of Appeal was filed on November 24, 2014. On August 10, 2016, the Nevada Supreme Court Affirmed the Judgment of Conviction. Remittitur issued September 6, 2016.

On May 12, 2017, Petitioner filed the instant Petition for Writ of Habeas Corpus. The State responds below.

STATEMENT OF THE FACTS[1]

In December of 2008, Arica Foster gave birth to Brodie Aschenbrenner. Brodie's father was Dustin Aschenbrenner. When Arica's relationship with Brodie's father dissolved, she kept custody of Brodie. Brodie was a fearless, loving and rambunctious child. In October of 2010, Arica met and began dating Lee after they were introduced to each other by their respective sisters. In the beginning of the relationship, Lee and Brodie liked each other and got

[1] The following facts are derived from the State's Answering Brief filed with the Nevada Supreme Court filed October 13, 2015. Citations to the Appellant's Appendix have been removed.

along. In February of 2011, Arica, Brodie and Lee moved into an apartment together. At some point, Arica became concerned about Brodie's physical condition. Arica became concerned because she started to find more bruises on Brodie than usual. Arica noticed that the bruises were appearing on Brodie's face and were much darker than the normal everyday bumps Brodie used to get.

In early May of 2011, Arica and Lee began to have arguments over Brodie's potty training. Lee felt that Arica was babying Brodie too much and that Brodie should have been potty trained by that point. Arica and Lee also argued about Lee waking Brodie up in the early mornings to use the bathroom and changing him from his diaper into his pull up underwear. Arica kept waking up and finding Brodie in his pull up underwear instead of the diaper she put on him at night so he did not wet the bed. Arica and Lee also argued about keeping Brodie's bedroom door open at night. While Arica wanted the door open so she can hear Brodie at night, Lee insisted on the door being closed. When Arica would wake up in the morning she would find Brodie's bedroom door closed.

Around the same time, Brodie's demeanor towards Lee began to change. Brodie began not to want to be around Lee; he would cower, cry and run over to Arica. Brodie's reaction towards Lee began to put a strain on his and Arica's relationship. After noticing the bruising on Brodie, Arica decided to have her sister Amanda babysit Brodie instead of Lee's sister Jennifer. Once Amanda started babysitting Brodie, the bruising stopped for about two to three weeks but started back up again. The bruises began to show up more frequently, in different locations on Brodie's body and were more much severe than usual. At some point, Arica researched nanny cams because she was concerned about the bruises on Brodie.

On May 25, 2011, Arica and Brodie were involved in a fender bender. Brodie was in his car seat at the time of the accident. After the impact, Arica turned around in her seat to look at Brodie and he appeared fine. Arica went to the hospital to be checked out, while her mother took Brodie home. When Arica returned home, she examined Brodie and felt no concern as he was acting like his normal playful self. The next day, Arica brought Brodie to ABC Pediatrics just to be safe. Brodie was examined by Dr. Sirsy, who found Brodie to be injury free. In June

2011, Arica decided to take Brodie's racecar bed apart and put padding around it so Brodie would not bump his head on the wall. Around the same time, Arica began to look for a new place to live because Brodie did not like Lee or want to be around him anymore.

In the evening of June 6, 2011, Arica noticed that Brodie had a fat lip underneath his nose. Arica was not home at the time the injury happened so she asked Lee about the injury since he was with Brodie. Lee told her that the board from the toddler bed fell on Brodie. On June 9, 2011, Brodie was riding his power wheel while walking the dogs around the apartment complex with Arica. While riding his power wheel, Brodie hit a curb and fell off. After falling down, Brodie jumped back up and continued to act like his normal self. Brodie ended up with a tiny little bruise on his cheek from the fall. That night Brodie never complained about being in any type of pain and appeared normal. On June 10, 2011, Arica noticed that Brodie's eyes were goopy so she took him to ABC Pediatrics, where he was diagnosed with pink eye and prescribed eye drops. Arica never mentioned the power wheel incident to the physician because Brodie never complained of any pain.

On June 11, 2011, Arica dropped Brodie off at her parents' house while she went to work. After work, Arica and Lee went out to dinner. At dinner they had a discussion regarding the jealousy between Lee and Brodie. Arica told Lee that Brodie was her number one priority. On June 12, 2011, Lee told Arica that he would do whatever it took for everything to work out and for them to be together. That evening, Arica picked Brodie up from her parent's house. When Arica and Brodie came home, Brodie got mad because Lee was there. That same evening, Brodie was playing around with the curtains in his room when they fell down and scratched his lower back. The scratches were small and barely bled.

On June 13, 2011, Arica, Brodie and Lee went to the swimming pool with Lee's sister Jennifer and her two boys. Brodie swam in the pool and acted like his normal self. They left the swimming pool around 1:20 p.m. and Arica left for work around 4 p.m. Prior to leaving for work, Arica put Brodie down for a nap and then left him alone with Lee. Arica returned home around 8:15 p.m. and checked on Brodie. When she bent down to give Brodie a kiss,

Arica noticed a quarter sized bruise on his forehead. When she asked Lee about the bruise, he told her that Brodie fell in some rocks while leaving his friend Danny Fico's house.

The next morning June 14th, when Brodie woke up, Arica noticed that he had a lot more bruises on him than the night before. He had a couple of bruises on his forehead and the bruise on his cheek was a lot bigger and darker. Brodie also seemed very upset; he ran into Arica's room screaming and wanting to be cuddled. That type of behavior was not normal for Brodie. That day Arica, Brodie and Lee had plans to go the Mandalay Bay Shark Reef. After Brodie ate breakfast, Arica dressed him for the day. When Arica was dressing him, Brodie complained that his head hurt. Before leaving the house, Lee mentioned to Arica that he did not want to bring Brodie anywhere because it looked like they beat him. Before going to the Shark Reef, they made a stop at the gas station where Lee worked. Lee told Arica that he did not want her to bring Brodie inside the store because of his bruises. Arica and Brodie went inside the store, while Lee went to the car wash part of the gas station. Inside the store, Arica ran into Danny Fico, who commented on the bruises on Brodie's face. When they got to the Shark Reef and began walking inside, Brodie refused to hold Lee's hand. Arica had to tell Brodie that if he did not hold Lee's hand they would not go to the Shark Reef.

After the Shark Reef, they went to a McDonalds in Circus Circus to eat. While in McDonalds, Brodie had an accident and wet himself through his pull-ups. Lee became annoyed and commented that Brodie should have been potty trained. Before returning home that day, Arica stopped by a hair salon. She left Brodie, who was sleeping in his car seat, with Lee. Arica was gone approximately 5- 10 minutes. When she returned, Brodie was crying and screaming hysterically inside the car. Lee told her that Brodie woke up when she got out of the car. Afterwards, they went to Best Buy where Brodie kept saying "night night," which was a way of him telling Arica he was tired and wanted to go to bed. Inside Best Buy, Brodie wanted to get a movie. Arica told Brodie that if he wanted the movie he had to be nice to Lee. However, when Lee attempted to walk up to Brodie, Brodie got angry and kept saying "no, no, no," so Arica had to put the movie back. When they got home, Arica put Brodie in his

room and went to make dinner. During dinner, Arica had to spoon feed Brodie, which was not normal.

After dinner, Arica put Brodie to bed. Arica then told Lee she had to go grocery shopping and run some errands. Lee got upset and asked Arica why she just didn't do it earlier. Arica told Lee that if he didn't want her to leave Brodie with him, she would wake him up and take him with her. Lee told her to just leave Brodie at home. Arica was gone for approximately an hour. When Arica got home, she put the groceries away, took a bath and went to bed. At approximately 1:00 a.m. the next morning, June 15th, Arica woke up and noticed Lee walking into their bedroom. Lee told her that he went to use Brodie's bathroom and it stunk and he thought Brodie had thrown up.

Arica immediately got up to check on Brodie. When she went into Brodie's room Arica could smell vomit and saw that Brodie was covered in vomit. She took him to the bathroom, where he threw up again. Brodie told Arica that his head hurt. Arica cleaned Brodie up, laid him down on the couch in the living room, and laid next to him for a short time until Brodie drifted off to sleep. After Brodie fell asleep, Arica went back to bed. Sometime in the early morning when it was still dark outside, Lee carried Brodie into the bedroom and laid him next to Arica. When Arica woke up around 8:50 a.m. she began rubbing Brodie's back. As she was rubbing his back, Arica noticed that he was cold to the touch. Arica jumped up out of bed and ran around the bed to face Brodie, whose eyes were open but not moving. At that point, Arica called 911. Brodie was pronounced dead at 11:00 a.m.

Clark County Coroner's Office Medical Examiner Dr. Lisa Gavin performed an autopsy on Brodie on June 16, 2011. The autopsy revealed Brodie had suffered fatal internal injuries along with several external injuries. Ultimately, Dr. Gavin determined Brodie died from blunt force trauma to his head and abdomen resulting in a transected duodenum and acute peritonitis. Dr. Gavin ruled Brodie's death a homicide.

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ARGUMENT

I. COUNSEL WAS NOT INEFFECTIVE

A. Ineffective Assistance Of Counsel, Generally:

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the

"immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability

sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

B. Defendant Has Not Demonstrated Ineffectiveness At Trial

1. Counsel Was Not Ineffective For Failing To Challenge Jury Instructions

Trial counsel was not ineffective for failing to challenge jury instructions because the State's theory of the case, and all argument and evidence presented, demonstrated that Defendant willfully, intentionally, and directly killed Brodie via blunt-force trauma. Defendant attempts to analogize the instant case to the unpublished Nevada Supreme Court case Thompson v. State, 2016 Nev. Unpub. LEXIS 79, *2 2016 WL 315216 (Nev. 2016), and a published case, Labastida v. State, 115 Nev. 298, 986 P.2d 443 (1991). Petition 8-9. These cases, while facially similar, are inapplicable because the issues raised in those cases do not apply in Defendant's case.

In Labastida, the Court held that "we are not willing to read NRS 200.030(1)(a) so as to define first degree murder to include a murder which is perpetrated by means of child neglect." Labastida, 115 Nev. at 303, 986 P.2d at 446. Additionally, the Court found that

because the jury did not convict Labastida of child abuse causing substantial bodily harm, "the evidence presented below simply [did not] justify an assumption that the jury could have found Labastida guilty of committing an act or acts with the intent to cause the child pain or suffering and at the same time acquitted her of willfully causing the child to suffer physical pain or mental suffering, either directly or by aiding and abetting Strawser." Id. at 304. In essence, the error committed allowed for the possibility that the jury could have convicted Labastida of felony murder by child abuse when they only found that she committed child neglect, as evidenced by their acquittal on the child abuse causing substantial bodily harm charge. The Thompson Court assigned the same error in that case, specifically addressing that "[b]ecause of the State's argument, it is unclear whether the jury convicted Thompson of first-degree felony murder for conduct prohibited by the felony murder statute or for conduct merely prohibited by NRS 200.508." Thompson, 2016 Nev. Unpub. LEXIS at *5.

In the instant case, no such error was possible because the State never argued that Defendant could have allowed Brodie to die through neglect. Instead, the State argued only, and repeatedly, that Defendant directly killed Brodie through blunt force trauma. For example, the State, during introductions, summarized what the case was going to show as follows:

> "This case involves the death of Brodie Aschenbrenner who was murdered on June 15th of 2011. The State alleges that the defendant beat Brodie Aschenbrenner to death."

Trial Transcript (T.T.), August 4, 2014, p. 15.

During Opening Arguments, the State argued that:

> "Most importantly, [Dr. Gavin will] tell you that this was a homicide. This was child abuse. Someone inflicted these wounds. This isn't accidental."
>
> …
>
> "At the end of this trial, we're going to ask you to find the defendant guilty of first degree murder for beating Brodie and causing his death."

T.T., August 5, 2014 at p. 25, 27-28.

During closing arguments, the State further argued that Defendant beat Brodie and caused his death – a direct act of child abuse and not child neglect:

"The elements are listed here, somewhat similar as to the child abuse charge. The defendant willfully caused blunt force trauma in some unknown manner -- same idea as with the other count -- to Brodie's abdomen. This one resulted in his death. As I stated previously, *it doesn't matter what the defendant intended when he beat Brodie. It only matters he intended to beat him. If he killed Brodie when he beat him, causing his death, and it was unintentional, he didn't want him to die, it doesn't matter for purposes of murder by child abuse.* You beat a kid, you run the risk. Malice is implied. A malignant and abandoned heart is implied. You beat a kid, you run the risk of killing him, first degree murder. "

…

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

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

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

…

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

…

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

The duodenum. Remember the hair salon, they did -- they ran these errands throughout the day on Tuesday. They went to Shark Reef, they went to a number of different places. They got to the hair salon. Brodie's fast asleep already showing symptoms from the head injury. He's exhausted, didn't want to walk. He's fast asleep in the back in the center, facing forward in his car seat. She gets out, she closes the door gently so she doesn't wake her sleeping baby.

///

She comes back within five minutes and that kid's screaming at the top of his lungs. *Once again the defendant is alone with him and the defendant blames it on something else; says when you closed the door, he started freaking out. That's when that fatal injury was inflicted.* That's within the operative time period.

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

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

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

Those injuries. No accidental. Not inflicted by Arica. Those injuries. Definitely not accidental. Definitely not inflicted by Arica.

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

T.T. August 15, 2014 p. 4-5, 7, 13-14.

Finally, during rebuttal argument, the State again emphasized that Defendant killed Brodie through child abuse:

"Now, [Brodie's] body tells you that he was the victim of significant physical abuse over a period of time. Now we focused somewhat unfairly so on two injuries, the injuries to the head and the injuries to the abdomen. But he has a lot more injuries. And the most compelling evidence in this case and I would submit to you simply uncontroverted is the distinction between Bambam injuries and *non-accidental physical abuse*.

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

Even the defendant's sister, as you saw when I showed her the photographs at autopsy, had a physical reaction to what she was seeing. No one had seen those before. No one. *That is because they are indicative of physical abuse, child abuse, intentionally inflicted upon this child.* And as I just heard counsel's argument to you is that's the murder. That's the killer right in front of you."

…

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

…

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

Id. p. 27, 32-33.

The State's theory of the case, argument, and evidence presented demonstrated only that Defendant killed Brodie through the intentional act of beating him hard enough to break a rib and dissect Brodie's duodenum. For the purposes of felony murder: "'Child abuse' means physical injury of a nonaccidental nature to a child under the age of 18 years." NRS 200.030(6)(b). The State consistently argued that Defendant willfully inflicted a physical injury of a non-accidental nature to Brodie, a child under the age of 18 years. Therefore, the State argued precisely the elements of felony murder child abuse.

Counsel was not ineffective for failing to challenge the jury instructions at trial because there was no evidence that supported a finding that Defendant had committed child neglect – only child abuse. As Defendant states, [b]oth medical experts argued that the injury was non-accidental." Petition at 10.

Further, even if counsel were deficient, Defendant cannot demonstrate prejudice. Again, even if the jury instructions were incorrect, the State argued the correct elements of felony murder child abuse. Unlike Labastida and Thompson, there was no possibility that Defendant could have been erroneously found guilty based on child neglect because there was no evidence or argument presented that neglect occurred. Additionally, unlike Labastida, where the Court reversed an earlier decision, in part, because the jury did not find the defendant guilty of child abuse with substantial bodily harm, leading to the inference that the defendant did not inflict a non-accidental physical injury, here the jury found Defendant guilty of that charge. Had counsel challenged the jury instructions, and had those instructions replaced the instructions given, the Defendant would still have been found guilty because the State argued the correct elements of felony murder child abuse, and no alternative "neglect" finding was possible.

Because Defendant cannot demonstrate ineffectiveness, and because even if Defendant could demonstrate ineffectiveness Defendant cannot demonstrate prejudice, Defendant's claim should be denied.

2. Defendant's Remaining Claims Of Ineffectiveness Are Unsubstantiated

Defendant's vague assertions that trial counsel was ineffective because she was "not qualified" are "bare" and "naked" assertions fit only for summary dismissal. Hargrove, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Additionally, these claims are belied by the record. Id. A brief review of the Odyssey filings demonstrate that counsel argued, before, during, and after trial, effectively on behalf of her client.

Defendant's claims regarding defense counsels' interactions with each other are unsupported by evidence, and do not appear likely to require relief. They certainly do not demonstrate ineffectiveness by a preponderance of the evidence. Means, 120 Nev. at 1012, 103 P.3d at 33. Even if Nadia Von Magdenko were deficient, at worst she was supported by attorney Steve Altig, who was present through trial and who, according to Defendant, provided effective counsel. Defendant, therefore, cannot demonstrate prejudice because he was represented by at least one attorney who he admits was not ineffective.

Additionally, Defendant claims that the Nevada Supreme Court, in its' Order of Affirmance, was critical of counsel's performance because counsel "opened the door" to repeated use of autopsy photos. Petition 10. This claim is also belied by the record. Hargrove, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "[T]he contested images, both below and on appeal, depict Brodie's external injuries." Order of Affirmance at 2, fn. 2. The Court first rejected Defendant's argument because the photos "had a high probative value." Id. at 3. Second, because the photos were highly probative, "they would need to be exceedingly gruesome for the district court to have abused its discretion in admitting them." Id. at 4. Nor was the Court in any way critical of trial counsel's performance. Defendant's claim is, therefore, wholly unsupported and belied by the record.

Because Defendant's claims are vague, unsupported, and belied by the record, Defendant's claims should be denied.

C. Defendant Has Not Demonstrated Ineffectiveness On Appeal

There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314.

Defendant's sole claim of ineffectiveness of appellate counsel appears to be that appellate counsel did not raise the jury instruction issue. As argued in Section I B, supra, there was no reason to raise the issue because it was unlikely to succeed on appeal. Counsel cannot be ineffective for failing to make futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Defendant's claim that appellate counsel was ineffective should, therefore, be denied.

II. DEFENDANT IS NOT ENTITLED TO DISCOVERY

The State interprets Defendant's statements regarding discovery as an improperly presented Motion for Post-Conviction Discovery. Petition at 9-10. Rules regarding post-conviction discovery are found in NRS 34.780(2). NRS 34.780(2) reads:

> *After the writ has been granted and a date set for the hearing*, a party may invoke any method of discovery available under the Nevada Rules of Civil

> Procedure if, and to the extent that, the judge or justice for good cause shown grants leave to do so.

(emphasis added). Post-conviction discovery is not available until "after the writ has been granted" and good cause is shown. Id. Neither of these statutory requirements has been fulfilled in this case. Therefore, Defendant's Motion for Post-Conviction Discovery is premature and must be denied.

CONCLUSION

Based on the foregoing, the State respectfully requests that Defendant's Petition for Writ of Habeas Corpus (Post-conviction) be DENIED.

To the extent that Defendant is requesting Post-Conviction Discovery, the State respectfully requests that the motion be DENIED.

DATED this 20th day of June, 2017.

Respectfully submitted,

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

BY /s/ John Giordani for
RYAN MACDONALD
Deputy District Attorney
Nevada Bar #12615

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of State's Response to Defendant's Petition for Writ of Habeas Corpus, was made this 20th day of June, 2017, by Electronic Filing to:

CAL POTTER, ESQ.
cpotter@potterlawoffices.com

BY: /s/ Stephanie Johnson
Employee of the District Attorney's Office

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. MICHAEL ALAN LEE, Defendant.	)	CASE NO.: C-11-277650-1 DEPT NO.: XXIII

BEFORE THE HONORABLE STEPHANY MILEY, DISTRICT COURT JUDGE

WEDNESDAY, JUNE 28, 2017

RECORDER'S TRANSCRIPT OF PROCEEDINGS
DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the State: DAVID STANTON
Chief Deputy District Attorney

For the Defendant: CAL J. POTTER, III, Esq.
JASMIN D. SPELLS
Deputy Public Defender

RECORDED BY: MARIA GARIBAY, COURT RECORDER

WEDNESDAY, JUNE 28, 2017, AT 9:38 A.M.

THE COURT: This is Mr. Potter's.

[Colloquy between The Court and staff member]

MR. STANTON: David Stanton on behalf of the State.

THE COURT: Hi, Mr. Potter. Good morning.

MR. POTTER: Morning.

THE COURT: Hi, Mr. Stanton. Good morning. All right. So this is Defendant's Petition for Writ of Habeas Corpus, and I do have a response by the State, as well as an errata that was filed by Mr. Potter. Mr. Potter.

MR. POTTER: Your Honor, in this case, of course Your Honor heard the trial, Mr. Altig was supposed to be like standby counsel. After the trial he met with the family and then referred them over to my office with strong concerns about the quality of the representation that has been rendered.

We've outlined some of the concerns --

THE COURT: Well, he was more than standby. I mean he took an active role in the trial.

MR. POTTER: He did.

THE COURT: Now I don't know what the agreement was between him and Ms. Magdenko, but --

MR. POTTER: And that's not what he --

THE COURT: -- active role.

MR. POTTER: -- has expressed that he was required to take a more active role than what he had agreed upon that based upon the quality of what was occurring, and the State itself expresses in the transcript at the time of the trial about

the quality of representation and some of the things that were being done.

THE COURT: I thought at one point, though, -- so there was a -- there was discussion, and I didn't have a chance to go back through all the pretrial hearings, but I do recall, and maybe Mr. Stanton recalls where they were, is I know there was a series of attorneys that were supposed to help --

MR. POTTER: Correct.

THE COURT: -- Mr. -- Ms. Magdenko, and I think the last of which is -- I don't believe --

MR. POTTER: Mr. Altig.

THE COURT: -- he's practicing any more, Pat McDonald.

MR. POTTER: He was the first individual.

THE COURT: Okay, so --

MR. POTTER: Then he was suspended during the time.

THE COURT: Yeah. So, anyways, we end up with Ms. Magdenko. Your client was here, and he was asked specifically: Do you want to proceed with this counsel? And his answer was yes. And then you've also raised the issue of he did not know there were experienced public defenders who only handle murder cases that were there for him, but if memory serves, your client is a multi-convicted felon. He's been through the system multi -- a multitude of times, and I just have a hard time believing that he wasn't aware that he could get the PD's office or the special PD's office to represent him.

MR. POTTER: Well, the difficulty is --

THE COURT: So I -- I don't understand.

MR. POTTER: -- there's not a sliding scale of due process, Your Honor, and that --

THE COURT: But he made a choice, and the Supreme Court has repeatedly said that people are entitled to the counsel of your choice.

MR. POTTER: And that's -- that's what I'm saying. He didn't make an informed choice based upon the fact that Mr. Christensen, who's the gatekeeper on this has now explained that she wasn't even qualified to be on an appointed basis, so her taking this case at first blush for altruistic reasons now pale because it becomes for the purposes of her getting the experience on his back.

THE COURT: But don't you -- but in the end -- and I'm not trying to beat this horse, but, you know, it's kind of like -- maybe the distinction would be made between like on a 250 case. You know, if the taxpayers are paying for it, and we are deciding who the defendant's going to have as a lawyer, it's mandated that the lawyer has to have certain qualifications and be 250 qualified, but in contrast if an individual who's up for the death penalty decides to retain their own lawyer, it's not required that -- we don't -- the court doesn't have to go through and determine whether or not that privately-retained lawyer is 250 qualified in order for them to represent the defendant. The defendant gets the lawyer of his choice.

MR. POTTER: The rule 250 is standard, though, to talk about an individual who is qualified in this particular instance. He didn't retain this individual.

THE COURT: But he wasn't -- that individual was not appointed by the taxpayers either.

MR. POTTER: Correct. Because she wasn't qualified to be appointed; and if she's not qualified to be appointed, as Mr. Altig has informed the family and myself, there was real questions about her ability to handle the case. That's why he took over additional witnesses on the day of the detective who's the case agent in the case. She was -- asked him to take over and do that. He wasn't prepared, and he

didn't do it for that reason; but the other arguments about the inconsistencies, when the public defender took over the case's appeal, they filed the issues concerning with the fact that the prejudicial use of these -- of the photographs repeatedly by the State. The Supreme Court says: Well, she opened the door because she brought in the fact that there was some type of accident. That was an inconsistent -- according to Mr. Altig, inconsistent in reviewing the transcript.

THE COURT: Well, hold on.

MR. POTTER: It is inconsistent.

THE COURT: But the appeals court has already made a determination that the photographs were probative, and that the probative value exceeded the prejudicial value, and they went through an analysis as to why within their decision.

MR. POTTER: That's right, but she opened the door.

THE COURT: So -- but I don't understand what you're wanting me to do. You're wanting me to order that the Supreme Court's decision was incorrect?

MR. POTTER: No, no, no, no, no, Judge.

THE COURT: I think that would be better in front of the Nevada Supreme Court.

MR. POTTER: No, Judge. I'm not arguing that.

THE COURT: I guess I'm just trying to understand your position on the photographs, because you did discuss that.

MR. POTTER: Because she asserted a defense that was inconsistent with the facts of the case. The defense --

THE COURT: Are you back on the unqualified --

MR. POTTER: -- defense is also inconsistent with her own experts. The one thing that was clear is this was not an accident. Her own expert told her in his

reports that it was not an accident. The trauma was not accidental. It was intentional. She asserts in the opening statement, which is the finding by the Nevada Supreme Court, that she made the assertion of that defense. That's what allowed these pictures in, but she's asserting an inconsistent defense that is in conflict with her own experts, so she put a defense out there that she could not prove. I mean this is fundamental 101 trial work, and she did not do an adequate job from anyone's perspective, including the State. That's why they brought it up during the trial that they were concerned about some of the decisions that were being made. I'm asking that we've got a *prima facie* case here. The attorneys are still practicing. As you well now in this district, nobody likes to be perceived as writing out an affidavit, but I'm confident that Mr. Altig would testify under oath as to what he has told me, and --

THE COURT: Uh-huh.

MR. POTTER: -- the concerns that he had, the actions he had to take. Mr. Knapp was in the same position. He was going to be assisting counsel. He has expressed the same concerns about what actually took place. We went and then talked with -- and not only the gatekeeper, Mr. Christensen, but other attorneys that make the decisions of who is going to be on the panel and at what level they're going to be. I just think we have -- should have a right to develop that after making a *prima facie* case about the representation that took place on a non-capital murder case, and --

THE COURT: Okay. So you also had issue as far as the effectiveness of appellate counsel, because you disagreed with which issues they apparently decided to take forward on appeal.

MR. POTTER: That's correct, Your Honor, but that -- those are all pivotal

upon the ineffective assistance by the trial counsel.

THE COURT: Okay, and then the other issue you seemed to brought up was you argue that there was an issue -- well, basically, the State's position is: We never argued neglect as one of our theories at the time of trial. Rather we went forward with the whole time as it was murder by child abuse, not by neglect. That was another issue you brought up.

THE COURT: Well, it's an issue because I guess it was your case, Your Honor, that came down on this, and the instructions that were given are contrary. I mean it's not on all fours. It's at least on three of the fours in terms of the facts of our case as well as the facts of the case that the Supreme Court ruled upon; and whether they argued or not, those are the instructions that were given. Juries are entitled to follow the instructions. The instructions were incorrect.

THE COURT: Why were they incorrect?

MR. POTTER: Because they -- they use the statute, whether they're just saying they didn't argue abuse or not, that's the way they're instructed. They're instructed on abuse, and based upon that, it doesn't matter what the argument it is, because the instructions are the same as the case that we lay forward that was your prior case, and a --

THE COURT: I guess I don't understand, because there really wasn't a dispute that the instructions mirrored the State's theory, which it was murder by way of child abuse. I'm sorry. I don't understand, so I'm asking for further clarification.

MR. POTTER: We're -- we were going on what is the -- I mean they didn't do like a theory of the case instruction. They're given the opportunity to make the decision on their own, and because the instruction did not say that, they gave them the choice. It's not clear on what theory they went on, and it's just black letter law at

this point.

THE COURT: Okay. Is there anything else, sir?

MR. POTTER: Well, what we're asking for is the opportunity to conduct discovery on this at this point, Your Honor.

THE COURT: Okay. Is there anything else? Any other issues that I've missed that you raised in your brief, sir?

MR. POTTER: No, Your Honor.

THE COURT: Okay. Thank you, sir. By the State.

MR. STANTON: Well, Judge, frankly, I don't even know where to begin.

THE COURT: The beginning.

MR. STANTON: Based upon the oral representation in the written petition, it's a complete distortion of the trial record and the underlying facts in the case. I guess to start chronologically and devoid in any of the pleadings is the discussion that this Court had when Ms. von Magdenko informed the Court of the inability of Patrick McDonald to attend the trial. If you recall procedurally we were here at calendar call. The state announced ready, and Ms. von Magdenko, contrary to her previous representations, then approached the Court and said: Guess what? Mr. McDonald's in this predicament, and I asked the Court to canvas the Defendant and his parents. If you remember, I asked you: Look, I believe, based upon what I saw at the preliminary hearing, that the person that's paying for this representation and confirmed in the petition was the Defendant's parents, and so I had the Court continue the matter and instruct the Defendant and his parents to be back, which you then on the record canvassed both the Defendant and his parents about who they wanted to continue to represent them as the case went forward, because Mr. McDonald was clear that he's not going to be able to represent them. Both sets of

people, the Defendant and his parents, his mother and -- or I think it's his step-father and his mother were present and indicated that they were comfortable with the representation of Ms. von Magdenko and that they wanted to continue in that representation.

Your court -- the Court makes a very good inquiry this morning that the Defendant's criminal record was significant and massive. To then say that he and that the record would reflect would be unknowing and unaware of the opportunity to have appointed or indigent counsel appointed to him is belied by the record and common sense.

As far as the record, -- I mean, I guess I'll start in the pleadings. For counsel to say, number one, he incorrectly cites that the appellate court is the Nevada Court of Appeals. It is the Nevada Supreme Court that's the reviewing court in this case.

THE COURT: Okay, well then I was wrong. I think I said appellate court.

MR. STANTON: Page 6, line 7, this is quoting from the petition: The appellate court has previously found that the opening statement made by Ms. von Magdenko at trial opened the door for the State to repeatedly use the excluded and limited autopsy photos -- grammatically, it's an error -- of the minor child. Well, there's several errors in that statement. Number one, counsel didn't open any door in her opening statement. What the appellate court said was the theory of the defense was clear and consistent from the opening argument of which they quote to the ending of their case, and their opening argument, as this Court heard, rendered those photographs clearly relevant, at least from the Defendant's perspective of the defense. The photographs are relevant from the State's theory no matter what the defense theory is in this case; and what was ultimately litigated, is completely missed in the petition. It's not about accidental versus non-accidental trauma. The

1 litigation, if you recall, was about the timing of the incident, and at least that's how it
2 came out at trial that was the significant litigation of that aspect.
3 So, there is -- there was no pretrial ruling that these photographs were
4 excluded and that the door was open. That's completely false, and then the
5 comment that the autopsy photos were limited. This Court entered no such order
6 and no such order was either asked, contemplated or could even exist in this case,
7 because the autopsy photos, external and internal, were directly relevant as soon as
8 the Defendant pled not guilty.
9 And then the next comment -- I mean literally you could go through every
10 sentence in there, and it is completely belied by the trial record. In contrast, both
11 medical experts had opined prior to trial that the inquiry in question was intentional.
12 Well, State's not aware of an opinion rendered by the incredibly qualified defense
13 medical expert. You remember him. He was the number two guy in the New York
14 City Medical Examiner's Office; then, a prominent, if not lead, position in the Medical
15 Examiner's Office in Washington D.C. He's a certified forensic pathologist, and
16 double graduate of the University of Michigan and University of Michigan Medical
17 School. You can't get a more qualified individual than that to speak to the issues in
18 this case. I'm aware of -- and the record does not reflect, any pretrial opinion by that
19 individual that the injuries were intentional in nature. The only thing that came in
20 from that expert that the injuries were intentional was my cross-examination of him
21 when he relied upon for his opinion of the timing of this child's injuries -- fatal
22 injuries, he relied on a study that was published in a pediatric journal, and I asked
23 him about the details of that study. He said he didn't recall them, so I showed him
24 the studies, and then the study that he's relying upon, the injury was conceded by
25 the parents presenting the child that the injuries were intentional. Yeah, I thought