

# IN THE SUPREME COURT OF THE STATE OF NEVADA

|                                     |   |                                    |
|-------------------------------------|---|------------------------------------|
| Michael Alan Lee,                   | ) | Supreme Court Case No.: 76330      |
| Petitioner/Appellant                | ) |                                    |
|                                     | ) | Electronically Filed               |
| vs.                                 | ) | Nov 27 2018 09:37 a.m.             |
|                                     | ) | <b>APPPELLANT'S APPENDIX INDEX</b> |
|                                     | ) | <b>Vol. VI</b>                     |
| Brian E. Williams, Sr., Warden High | ) | <b>Pages 1000-1054</b>             |
| Desert State Prison,                | ) |                                    |
| Respondent,                         | ) |                                    |
|                                     | ) |                                    |
| and                                 | ) |                                    |
|                                     | ) |                                    |
| The State of Nevada,                | ) |                                    |
| Real Party in Interest              | ) |                                    |
|                                     | ) |                                    |
|                                     | ) |                                    |

## Appendix Index (Alphabetical)

| <u>Document Name</u>   | <u>Date</u> | <u>Bates No.</u> |
|--|-------------|------------------|
| Appellant's Supreme Court Opening Brief (Docket No. 66963)                 | 09/08/2015  | 914-935          |
| Errata to Petition for Writ of Habeas Corpus (Post-Conviction)             | 09/16/2017  | 961-974          |
| Information  | 11/18/2011  | 001-003          |
| Judgment of Conviction   | 11/10/2014  | 912-913          |
| Jury Instructions  | 08/15/2014  | 843-867          |
| Order Denying Petition for Writ of Habeas Corpus (Post-Conviction)         | 08/07/2017  | 1009-1021        |
| Order Granting Second Petition for Writ of Habeas Corpus (Post-Conviction) | 07/09/2018  | 1048-1054        |
| Order of Affirmance  | 09/13/2016  | 936-949          |
| Order of Dismissal   | 12/19/2017  | 1022-1026        |
| Petition for Writ of Habeas Corpus (Post-Conviction)                       | 05/12/2017  | 950-960          |
| Second Petition for Writ of Habeas Corpus                                  | 02/06/2018  | 1027-1039        |

|   |            |           |
|---|------------|-----------|
| (Post-Conviction)   |            |           |
| State's Response to Petition for Writ of Habeas Corpus (Post-Conviction)        | 06/20/2017 | 975-990   |
| State's Response to Second Petition for Writ of Habeas Corpus (Post-Conviction) | 04/03/2018 | 1040-1047 |
| Transcripts, Jury Trial Day 1   | 08/04/2014 | 004-182   |
| Transcripts, Jury Trial Day 2   | 08/05/2014 | 183-285   |
| Transcripts, Jury Trial Day 3   | 08/06/2014 | 286-442   |
| Transcripts, Jury Trial Day 4   | 08/07/2014 | 443-628   |
| Transcripts, Jury Trial Day 5   | 08/08/2014 | 629-728   |
| Transcripts, Jury Trial Day 6   | 08/11/2014 | 729-772   |
| Transcripts, Jury Trial Day 7   | 08/14/2014 | 773-842   |
| Transcripts, Jury Trial Day 8   | 08/15/2014 | 868-905   |
| Transcripts, Jury Trial Day 9   | 08/16/2014 | 906-911   |
| Transcripts, Petition for Writ of Habeas Corpus (Post-Conviction)               | 07/12/2017 | 991-1008  |

Appendix Index (Chronological)

| <b><u>Document Name</u></b>  | <b><u>Date</u></b> | <b><u>Bates No.</u></b> |
|--|--------------------|-------------------------|
| Information  | 11/18/2011         | 001-003                 |
| Transcripts, Jury Trial Day 1  | 08/04/2014         | 004-182                 |
| Transcripts, Jury Trial Day 2  | 08/05/2014         | 183-285                 |
| Transcripts, Jury Trial Day 3  | 08/06/2014         | 286-442                 |
| Transcripts, Jury Trial Day 4  | 08/07/2014         | 443-628                 |
| Transcripts, Jury Trial Day 5  | 08/08/2014         | 629-728                 |
| Transcripts, Jury Trial Day 6  | 08/11/2014         | 729-772                 |
| Transcripts, Jury Trial Day 7  | 08/14/2014         | 773-842                 |
| Jury Instructions  | 08/15/2014         | 843-867                 |
| Transcripts, Jury Trial Day 8  | 08/15/2014         | 868-905                 |
| Transcripts, Jury Trial Day 9  | 08/16/2014         | 906-911                 |
| Judgment of Conviction   | 11/10/2014         | 912-913                 |
| Appellant's Supreme Court Opening Brief<br>(Docket No. 66963)                      | 09/08/2015         | 914-935                 |
| Order of Affirmance  | 09/13/2016         | 936-949                 |
| Petition for Writ of Habeas Corpus (Post-<br>Conviction)                           | 05/12/2017         | 950-960                 |
| Errata to Petition for Writ of Habeas<br>Corpus (Post-Conviction)                  | 09/16/2017         | 961-974                 |
| State's Response to Petition for Writ of<br>Habeas Corpus (Post-Conviction)        | 06/20/2017         | 975-990                 |
| Transcripts, Petition for Writ of Habeas<br>Corpus (Post-Conviction)               | 07/12/2017         | 991-1008                |
| Order Denying Petition for Writ of Habeas<br>Corpus (Post-Conviction)              | 08/07/2017         | 1009-1021               |
| Order of Dismissal   | 12/19/2017         | 1022-1026               |
| Second Petition for Writ of Habeas Corpus<br>(Post-Conviction)                     | 02/06/2018         | 1027-1039               |
| State's Response to Second Petition for<br>Writ of Habeas Corpus (Post-Conviction) | 04/03/2018         | 1040-1047               |
| Order Granting Second Petition for Writ of<br>Habeas Corpus (Post-Conviction)      | 07/09/2018         | 1048-1054               |

1 that was damaging to the defense expert, but it didn't have anything to do with the  
2 defense in this case of intentional or non-intentional or accidental versus non-  
3 accidental. And it says, next sentence, Ms. von Magdenko was not qualified to first  
4 chair a non-capital murder case. Well what's the relevance of that? She was  
5 retained. Both the Defendant and his parents were canvassed by this Court in detail  
6 over a period of years that this Court sat pretrial in this department, and at no point  
7 did anybody raise any concern. In fact, it was their express desire to continue with  
8 the representation when directly asked by this Court.

9       Next line, line 15, refused to adhere to Mr. Altig's advice not to insert -- assert  
10 an inconsistent defense. There was no inconsistent defense presented in this trial  
11 whatsoever, either by Mr. Altig, by Ms. von Magdenko, or any combination thereof,  
12 and the record clearly reflects it.

13       The next thing is Mr. Altig also told Ms. von Magdenko to object several times,  
14 but she failed to timely object. What's the objection? It's in the next line, 21 through  
15 23. Specifically, Mr. Altig was objecting to having the medical examiner's testimony  
16 given early in the trial and cross-examination delayed until the State's case in chief  
17 was ending. I don't remember that at all, and the trial record won't reflect that. It's  
18 simply untrue.

19       Then here's the kicker, the last prayer to the Court, page 9, line 2 -- 28. Steve  
20 Altig submits that Michael Lee case was a defensible case and believes that a  
21 different outcome was probable with experienced trial counsel. Both medical  
22 experts argued that the injury was not accidental. Simply not true. He didn't argue  
23 it. He never stated that. It's a complete distortion and outright misrepresentation of  
24 the record.

25       The Appellate Court of Nevada has already been critical of trial's counsel's

1 opening the door, parenthetically, unnecessarily, for repeated use of the autopsy  
2 photos. No one can look at the Nevada Supreme Court's clear, plain, written record  
3 and draw that conclusion. Number one, it doesn't state it, and number two, there's  
4 no inference that can be drawn. They make no comment that the door was opened  
5 by counsel's theory or argument, and that it was unnecessary. It was imbedded  
6 inherently in the defense of the case no matter how the defense occurs. There was  
7 no pretrial ruling limiting the use of the autopsy photographs, and as the Nevada  
8 Supreme Court said in direct appeal with painstakingly clarifying language that the  
9 use of the autopsy photos to the lay witnesses was the use of the external  
10 photographs that showed this child beaten from head to toe that were clearly visible.  
11 All the witnesses that were shown, five of them were shown the photographs  
12 because they were the last people around this child until the child was unequivocally  
13 and uncontrovertibly in the sole possession of the Defendant and his then wife. And  
14 thus that evidence and those witnesses would have been called no matter what the  
15 Defendant said and no matter what the defense theory or theories were. As soon as  
16 he pled not guilty, those photographs and those witnesses are relevant no matter  
17 what.

18 THE COURT: Okay, with a response, sir?

19 MR. POTTER: Yes, Your Honor. The important aspect here is that Ms.  
20 Magdenko in her opening talked about this being as a result of an accident. The  
21 expert that's in question was the individual that she was trying to get the Court to  
22 allow to make determinations. He's a biomechanical engineer. The individual that  
23 she was then relying upon could not opine, according to the Court's ruling, as to  
24 whether this was a result, and the injuries were as a result of an accidental. Her  
25 other expert, her medical expert --

1 THE COURT: Well, but shouldn't that have been an issue if -- shouldn't that  
2 have been an issue for appeal if the appellate court believed that it was error of this  
3 Court not to disallow the defense's expert? And I don't remember which one. It was  
4 a biomechanical expert.

5 MR. POTTER: Yes, ma'am.

6 THE COURT: Yeah, it was biomechanical experts; not only do they testify  
7 regarding how a body moves and everything else, --

8 MR. POTTER: Right.

9 THE COURT: -- but they wanted to go to the next step, whether that  
10 movement could cause injury, which is --

11 MR. POTTER: Right. Now he was -- he was clearly making a determination  
12 of medical -- in a medical nature.

13 THE COURT: Okay, so wouldn't that be something that should have been --

14 MR. POTTER: But her own medical expert doesn't --

15 THE COURT: -- presented on appeal? That would not be a post-conviction  
16 relief.

17 MR. POTTER: It's -- it's not something because we're not saying that the  
18 Court was wrong. We're saying she was wrong because she went against her own  
19 expert in trying to argue that this was accidental. What Mr. Altig has expressed is  
20 that she was advised by him that that is an inconsistent defense trying to use one  
21 expert that the Court had already excluded his testimony, which she's then trying to  
22 argue that in the opening, and clearly that's the determination that the supreme  
23 court made in making a determination about her theory of defense. Her theory of  
24 defense is it was accidental in nature, and that's what she argued, and -- in the  
25 opening, contrary to what Mr. Altig had advised her.

1 All we're asking is the opportunity to have these individuals either testify in a  
2 hearing or by deposition, which is what I would prefer to do, and I mean, it's -- it's  
3 not a situation where it's -- his parents make the determination. I mean, he's an  
4 individual. He's the one that has requested the petition be filed on his behalf,  
5 whether it was prudent -- I mean, the Court did what you -- what you thought was  
6 proper in asking the parents, but the parents don't control the decision of an  
7 individual.

8 THE COURT: The Defendant was likewise asked.

9 MR. POTTER: I'm sorry?

10 THE COURT: The Defendant was also asked.

11 MR. POTTER: I understand that, Your Honor.

12 THE COURT: And he is an adult, and he does get to make that decision  
13 regarding his representation.

14 MR. POTTER: Correct. And he wasn't given the option of having appointed  
15 counsel take over. Instead, what he was told that -- is this individual had an interest  
16 in protecting him, but that's not what happened, and that's what the record shows,  
17 and it's what's been bolstered by is Mr. Altig's representations, not only to myself,  
18 but to the family, and to the client as to what actually took place; that this individual,  
19 the reason she volunteered -- she wasn't retained. The reason she did this is  
20 because she wanted to get experience as trial counsel so she could move up the  
21 ladder on this appointed panel that they have dealing with these types of cases, and  
22 it's not merely just argument on our part at this point, because Mr. Altig is the one at  
23 this stage who's advised and he felt compelled to advise as to what was taking  
24 place. And Mr. Knapp confirms that he was going to come in, and he had issues,  
25 and he couldn't do it, and so she was left with the situation that Mr. Altig was -- I

1 mean he can testify before the Court that he wasn't co-counsel. I mean he's made  
2 that very clear to me on multiply occasions. He was not co-counsel in this case.

3 THE COURT: All right. Is there anything else by any person?

4 MR. STANTON: Well, Judge, first of all, the *Labastida* argument of child  
5 abuse and neglect, that doesn't even apply in this case. The theory in the charging  
6 document was abuse and first degree murder in a premeditated fashion, so  
7 *Labastida* in the unpublished opinion is of no import in this case whatsoever at any  
8 time. The jury instructions that counsel -- you -- Court just asked earlier directly  
9 about the instructions, that belies the entire argument. There was no theory that  
10 was expanded. There was no instructions on neglect. This is not a neglect case.  
11 It's a straight abuse, premeditated murder. That's the way it's charged. That's the  
12 way the jury was instructed, and that's what the verdict form reads. And there is no  
13 analysis to the prejudicial prong. There's no need for an evidentiary hearing. You  
14 should deny the petition outright.

15 THE COURT: Okay. Is there anything else.

16 MR. POTTER: Yes, Your Honor. The prejudice is directly expressed. The  
17 *Labastida* is appropriate. There's no distinctions made by the court as to that  
18 particular case. It's the way it was instructed, and it's contrary to the existing  
19 supreme court law.

20 THE COURT: But you have never indicated that it's contrary to what the  
21 evidence was during the course of the trial. The jury -- okay, is there anything else?

22 MR. STANTON: Not from the State.

23 THE COURT: And the defense?

24 MR. POTTER: Yeah, Your Honor, I would just point out that the instructions  
25 are -- the jury is allowed to have a plain reading of the -- of the jury instructions and



1 whether they brought forward and argued it differently is not germane to the fact that  
2 those instructions were given, and they're contrary to the existing supreme court  
3 law.

4 THE COURT: Okay. All right. So, at this point, I am going to deny the  
5 Defendant's petition in its entirety for the following reason: With respect to the  
6 claims that there was ineffective assistance by trial counsel, the Court does note  
7 that this was a situation where the trial attorney was retained and chosen by the  
8 Defendant; and again there was a canvas whereby the Court asked him specifically  
9 whether he wanted Ms. Magdenko to represent him, and he answered yes. As far  
10 as claims that he was not aware that the public defenders or some type of appointed  
11 counsel would be available to him, I think that's likewise belied by the record insofar  
12 as if you look at his criminal history contained in his PSI, this gentleman has an  
13 extensive history with the criminal system. It seems very disingenuous that he did  
14 not understand that there's public defenders who could represent him since he had  
15 been through the criminal system so many times. In fact, probably sitting in court all  
16 the multitude times for his various criminal cases, he had probably seen the public  
17 defender's office represent a multitude of individuals and perhaps even himself  
18 through his myriad of cases.

19 As far as the issue about the jury instructions, the Court finds that it's just not  
20 backed up by the record. Throughout the case the State's theory of death was that  
21 the child died by child abuse, and there is nothing in the record indicating neglect,  
22 and that the jury instructions did mirror the evidence, the State's theory throughout  
23 the case, and the evidence that came out during the course of the case.

24 As far as the effectiveness of the appellate counsel, the Court likewise finds  
25 there's no merit to their argument. There's been no showing that anything would

1 have been different if different issues had been raised on appeal. The Court does  
2 note that the supreme court has repeatedly said that it's appellate counsel's  
3 obligation to go through and determine which are the strongest arguments and  
4 present those arguments to the Nevada Supreme Court, and there is no indication in  
5 the record that -- that any -- that the appellate counsel did anything other than that.

6 As far as the photographs, there's been a lot of discussion about the  
7 photographs. This has been an issue that's already been decided by the higher  
8 courts. The higher courts in a pretty detailed analysis did already make the  
9 determination that the photographs, although they may have been prejudicial and  
10 they used the word simply because you have a young victim, which is upsetting to  
11 many individuals, the photographs were more -- nonetheless more probative than  
12 prejudicial. They went directly to what the state had to prove which is the manner  
13 and cause of death, and they showed that there was injuries on this child and those  
14 photographs being shown to the lay witnesses in this case. They were shown for  
15 the purpose, and I think the courts have recognized this, to narrow down when those  
16 injuries could have occurred, because the individuals those photographs were  
17 shown to were -- were with the child in the few days leading to the child's death, so  
18 the Court doesn't believe that any relief is granted on that grounds either.

19 Lastly, because the Court's not finding the Defendant entitled to relief on the  
20 habeas, the Court is likewise not granting any discovery. Thank you. I need an  
21 order, please.

22 MR. STANTON: Judge, could you instruct your court reporter to -- recorder to  
23 prepare a transcript of the Court's findings so that I can make a detailed findings of  
24 fact and conclusions of law?

25 THE COURT: Yeah. Maria, -- I need an order. Okay, yeah, can you submit

1 an --

2 MR. POTTER: And could we also have in addition to the findings of fact,  
3 conclusion of law, written notice of the entry.

4 THE COURT: I can't hear you. I'm sorry, Mr. Potter.

5 MR. POTTER: I'm sorry. We're just confirming that we would also get the  
6 written notice of the entry you told us.

7 THE COURT: Yeah. If it's transcribed. Maria is just going to need an order.

8 MR. STANTON: Okay. I'll prepare an order.

9 THE COURT: And then once I sign it, she'll get that started, --

10 MR. STANTON: Thank you, Judge.

11 THE COURT: -- probably not until next week, though.

12 MR. STANTON: Right.

13 MS. SPELLS: Your Honor, --

14 THE COURT: Yes, ma'am.

15 MS. SPELLS: I would just like the record to reflect that we are withdrawing on  
16 this case at this time.

17 THE COURT: Oh, yeah.

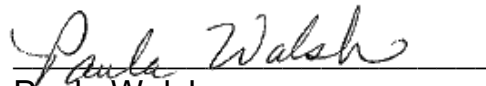
18 MS. SPELLS: It's still showing that.

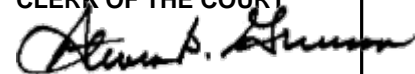
19 THE COURT: And it should show Mr. Potter's office is the counsel of record.  
20 I did notice that. Thank you.

21 MS. SPELLS: Thank you.

22 [Proceedings concluded at 10:08 a.m.]

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

24   
25 Paula Walsh  
Court Recorder/Transcriber



**FCL**  
STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
RYAN J. MACDONALD  
Deputy District Attorney  
Nevada Bar #12615  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,

-vs-

MICHAEL ALAN LEE  
#1699107  
Defendant.

CASE NO: C-11-277650-1

DEPT NO: XXIII

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER

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

THIS CAUSE having come on for hearing before the Honorable STEPHANY MILEY, District Judge, on the 28th day of June, 2017, the Petitioner being represented by CAL J. POTTER III, and JASMIN D. SPELLS, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through DAVID STANTON, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT, CONCLUSIONS OF LAW**

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).

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

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

6 On August 18, 2014, Lee filed a Motion for Judgment of Acquittal. On August 20,  
7 2014, Lee filed a Motion for a New Trial. The State filed its Oppositions to the Motions on  
8 August 21 and 22, 2014. The court denied the Motions on September 3, 2014.

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

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

15 On May 12, 2017, Petitioner filed the instant Petition for Writ of Habeas Corpus. On  
16 June 19, 2017, Petitioner filed an errata to the Petition for Writ of Habeas Corpus. The State  
17 responded on June 20, 2017. On June 28, 2017, this Court heard the Petition for Writ of  
18 Habeas Corpus and denied the Petition for the following reasons:

19 **I. COUNSEL WAS NOT INEFFECTIVE**

20 **A. Ineffective Assistance Of Counsel, Generally:**

21 The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal  
22 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his  
23 defense." The United States Supreme Court has long recognized that "the right to counsel is  
24 the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686,  
25 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323  
26 (1993).

27 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove  
28 he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of

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

10 The court begins with the presumption of effectiveness and then must determine  
11 whether the defendant has demonstrated by a preponderance of the evidence that counsel was  
12 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel  
13 does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of  
14 competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432,  
15 537 P.2d 473, 474 (1975).

16 Counsel cannot be ineffective for failing to make futile objections or arguments. See  
17 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the  
18 "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if  
19 any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167  
20 (2002).

21 Based on the above law, the role of a court in considering allegations of ineffective  
22 assistance of counsel is "not to pass upon the merits of the action not taken but to determine  
23 whether, under the particular facts and circumstances of the case, trial counsel failed to render  
24 reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711  
25 (1978). This analysis does not mean that the court should "second guess reasoned choices  
26 between trial tactics nor does it mean that defense counsel, to protect himself against  
27 allegations of inadequacy, must make every conceivable motion no matter how remote the  
28 possibilities are of success." Id. To be effective, the constitution "does not require that counsel

1 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel  
2 cannot create one and may disserve the interests of his client by attempting a useless charade.”  
3 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

4 “There are countless ways to provide effective assistance in any given case. Even the  
5 best criminal defense attorneys would not defend a particular client in the same way.”  
6 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after  
7 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,  
8 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784  
9 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel's  
10 challenged conduct on the facts of the particular case, viewed as of the time of counsel's  
11 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

12 Even if a defendant can demonstrate that his counsel's representation fell below an  
13 objective standard of reasonableness, he must still demonstrate prejudice and show a  
14 reasonable probability that, but for counsel's errors, the result of the trial would have been  
15 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing  
16 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability  
17 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-  
18 89, 694, 104 S. Ct. at 2064-65, 2068).

19 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the  
20 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of  
21 the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,  
22 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must  
23 be supported with specific factual allegations, which if true, would entitle the petitioner to  
24 relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked”  
25 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS  
26 34.735(6) states in relevant part, “[Petitioner] *must* allege specific facts supporting the claims  
27 in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your  
28 petition to be dismissed.” (emphasis added).

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

4 **B. Defendant Has Not Demonstrated Ineffectiveness At Trial**

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

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

14 In Labastida, the Court held that "we are not willing to read NRS 200.030(1)(a) so as  
15 to define first degree murder to include a murder which is perpetrated by means of child  
16 neglect." Labastida, 115 Nev. at 303, 986 P.2d at 446. Additionally, the Court found that  
17 because the jury did not convict Labastida of child abuse causing substantial bodily harm, "the  
18 evidence presented below simply [did not] justify an assumption that the jury could have found  
19 Labastida guilty of committing an act or acts with the intent to cause the child pain or suffering  
20 and at the same time acquitted her of willfully causing the child to suffer physical pain or  
21 mental suffering, either directly or by aiding and abetting Strawser." Id. at 304. In essence, the  
22 error committed allowed for the possibility that the jury could have convicted Labastida of  
23 felony murder by child abuse when they only found that she committed child neglect, as  
24 evidenced by their acquittal on the child abuse causing substantial bodily harm charge. The  
25 Thompson Court assigned the same error in that case, specifically addressing that "[b]ecause  
26 of the State's argument, it is unclear whether the jury convicted Thompson of first-degree  
27 felony murder for conduct prohibited by the felony murder statute or for conduct merely  
28 prohibited by NRS 200.508." Thompson, 2016 Nev. Unpub. LEXIS at \*5.



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

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

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

8 During opening statements, the State provided the following roadmap:

9 "Most importantly, [Dr. Gavin will] tell you that this was a homicide. This was  
10 child abuse. Someone inflicted these wounds. This isn't accidental."

11 ...

12 "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."

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

14  
15 During closing arguments, the State further argued that Defendant beat Brodie and  
16 caused his death – a direct act of child abuse and not child neglect:

17 "The elements are listed here, somewhat similar as to the child abuse charge.  
18 The defendant willfully caused blunt force trauma in some unknown manner --  
19 same idea as with the other count -- to Brodie's abdomen. This one resulted in  
20 his death. As I stated previously, *it doesn't matter what the defendant intended*  
21 *when he beat Brodie. It only matters he intended to beat him. If he killed Brodie*  
22 *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. "

23 ...

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

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

28 ///

1 Most importantly in my opinion is the Bambam injuries are ruled out.  
2 Bambam injuries are inherently accidental. If this is a kid running around  
3 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."

4 ...  
5 "And most importantly, you can't ignore those symptoms when we're talking  
6 about timing of the injuries. You can't ignore those. That's common sense. This  
7 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  
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."

9 ...  
10 "Again I'll highlight for count two, the substantial bodily harm, who was alone  
11 with him during the operative time period? The defendant. *Who was alone with*  
12 *him during the operative time period that the fatal injury occurred? The*  
13 *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.

14 The duodenum. Remember the hair salon, they did -- they ran these  
15 errands throughout the day on Tuesday. They went to Shark Reef, they went to  
16 a number of different places. They got to the hair salon. Brodie's fast asleep  
17 already showing symptoms from the head injury. He's exhausted, didn't want to  
18 walk. He's fast asleep in the back in the center, facing forward in his car seat.  
19 She gets out, she closes the door gently so she doesn't wake her sleeping baby.  
20 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.

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

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

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

27 *Those injuries. No accidental. Not inflicted by Arica. Those injuries.*  
28 *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.

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

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

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

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

17 ...

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

25 ...

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

Id. p. 27, 32-33.

21 The State's theory of the case, argument, and evidence presented demonstrated only  
22 that Defendant killed Brodie through the intentional act of beating him hard enough to break  
23 a rib and dissect Brodie's duodenum. For the purposes of felony murder: "'Child abuse' means  
24 physical injury of a nonaccidental nature to a child under the age of 18 years." NRS  
25 200.030(6)(b). The State consistently argued that Defendant willfully inflicted a physical  
26 injury of a non-accidental nature to Brodie, a child under the age of 18 years. Therefore, the  
27 State argued precisely the elements of felony murder child abuse.

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

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

17 This Court FINDS the following facts: Throughout the case the State’s theory of death  
18 was that the child died by child abuse, and there is nothing in the record indicating neglect,  
19 and that the jury instructions did mirror the evidence, the State’s theory throughout the case,  
20 and the evidence that came out during the course of the case.

21 Because Defendant did not demonstrate ineffectiveness, and because even if Defendant  
22 had demonstrated ineffectiveness Defendant cannot demonstrate prejudice, this Court now  
23 FINDS that Defendant has not demonstrated that counsel was ineffective, and additionally  
24 FINDS that Defendant has not demonstrated that he was prejudiced even if counsel were  
25 deficient.

26 ///

27 ///

28 ///

1 Defendant's claim is, therefore, DENIED.

2 **2. Defendant's Remaining Claims Of Ineffectiveness Are Unsubstantiated**

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

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

9 Defendant's claims regarding defense counsels' interactions with each other are  
10 unsupported by evidence, and do not appear likely to require relief. They certainly do not  
11 demonstrate ineffectiveness by a preponderance of the evidence. Means, 120 Nev. at 1012,  
12 103 P.3d at 33. Even if Nadia Von Magdenko were deficient, at worst she was supported by  
13 attorney Steve Altig, who was present through trial and who, according to Defendant, provided  
14 effective counsel. Defendant, therefore, cannot demonstrate prejudice because he was  
15 represented by at least one attorney who he admits was not ineffective.

16 This Court also FINDS the following facts: Defendant has an extensive criminal  
17 history, and was certainly aware that a Public Defender could be appointed. Defendant chose  
18 to retain counsel, and cannot now argue that more qualified counsel could have been  
19 appointed. Additionally, Defendant affirmatively requested the counsel that was actually  
20 retained.

21 Therefore, this Court FINDS that Defendant's claim that counsel was unqualified is  
22 unsupported by the record and the claim is DENIED.

23 Additionally, Defendant claims that the Nevada Supreme Court, in its' Order of  
24 Affirmance, was critical of counsel's performance because counsel "opened the door" to  
25 repeated use of autopsy photos. Petition 10. This claim is also belied by the record. Hargrove,  
26 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "[T]he contested images, both below and on  
27 appeal, depict Brodie's external injuries." Order of Affirmance at 2, fn. 2. The Court first  
28 rejected Defendant's argument because the photos "had a high probative value." Id. at 3.

1 Second, because the photos were highly probative, "they would need to be exceedingly  
2 gruesome for the district court to have abused its discretion in admitting them." Id. at 4. Nor  
3 was the Court in any way critical of trial counsel's performance. Defendant's claim is,  
4 therefore, wholly unsupported and belied by the record.

5 This Court hereby FINDS the following facts: That the Nevada Supreme Court has  
6 determined that the autopsy photos were more probative than prejudicial. The photographs  
7 shown were highly relevant to the State's case, and were relevant to determining when certain  
8 injuries were inflicted.

9 Therefore, this Court FINDS that counsel was not deficient as regards the autopsy  
10 photos.

11 Because Defendant's claims are vague, unsupported, and belied by the record,  
12 Defendant's claims are hereby DENIED.

### 13 **C. Defendant Has Not Demonstrated Ineffectiveness On Appeal**

14 There is a strong presumption that appellate counsel's performance was reasonable and  
15 fell within "the wide range of reasonable professional assistance." See United States v.  
16 Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at  
17 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set  
18 forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order  
19 to satisfy Strickland's second prong, the defendant must show that the omitted issue would  
20 have had a reasonable probability of success on appeal. Id.

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

1 Defendant's sole claim of ineffectiveness of appellate counsel appears to be that  
2 appellate counsel did not raise the jury instruction issue. As explained in Section I B, supra,  
3 there was no reason to raise the issue because it was unlikely to succeed on appeal. Counsel  
4 cannot be ineffective for failing to make futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at  
5 1103.

6 Therefore, the Court FINDS that Appellate counsel was not deficient in not raising this  
7 issue because it was unlikely to succeed on appeal, and Defendant has failed to demonstrate  
8 that the outcome of his appeal would have been affected by that argument.

9 Defendant's claim that appellate counsel was ineffective is, therefore, DENIED.

## 10 **II. DEFENDANT IS NOT ENTITLED TO DISCOVERY**

11 This Court also FINDS that, because Defendant's Petition for Writ of Habeas Corpus  
12 is meritless, no discovery is warranted pursuant to NRS 34.780(2). Post-conviction discovery  
13 is not available until "after the writ has been granted" and good cause is shown. Id. Neither of  
14 these statutory requirements has been fulfilled in this case. Therefore, Defendant's request for  
15 discovery is premature and must be DENIED.

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

**ORDER**

THEREFORE, IT IS HEREBY ORDERED that all issues included in Defendant's Petitions for Writ of Habeas Corpus (Post-Conviction) and supplements thereto shall be, and they are, hereby DENIED.

IT IS ADDITIONALLY ORDERED that Defendant's request for Post-Conviction discovery shall be, and it is, hereby DENIED.

DATED this 25 day of July, 2017.

  
DISTRICT JUDGE

JUDGE STEFANY A. MILEY

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

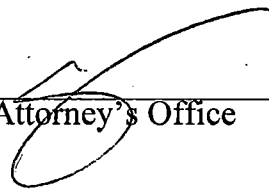
BY  (for)

RYAN J. MACDONALD  
Deputy District Attorney  
Nevada Bar #12615

**CERTIFICATE OF ELECTRONIC FILING**

I hereby certify that service of the Findings of Fact and Conclusions of Law and Order, was made this 19th day of July, 2017, by Electronic Filing to:

CAL POTTER, ESQ.  
[cpotter@potterlawoffices.com](mailto:cpotter@potterlawoffices.com)

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


11FH1653X/JN/saj/MVU



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

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

**Supreme Court No. 74089**  
District Court Case No. C277650

**FILED**

**DEC 19 2017**

**CLERK'S CERTIFICATE**

STATE OF NEVADA, ss.

  
CLERK OF COURT

I, Elizabeth A. Brown, 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 this appeal DISMISSED."

Judgment, as quoted above, entered this 17th day of November, 2017.

IN WITNESS WHEREOF, I have subscribed  
my name and affixed the seal of the Supreme  
Court at my Office in Carson City, Nevada this  
December 14, 2017.

Elizabeth A. Brown, Supreme Court Clerk

By: Amanda Ingersoll  
Chief Deputy Clerk

G-11-277650-1  
CCJD  
NV Supreme Court Clerks Certificate/Judgm  
4708018



IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 74089

**FILED**  
NOV 17 2017  
ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

*ORDER DISMISSING APPEAL*

This is an appeal from a district court order denying postconviction petitions for writs of habeas corpus. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Our initial review of this appeal revealed that the notice of appeal was untimely filed. The district court served notice of entry of its order by mail on August 2, 2017. But the notice of appeal was not filed in the district court until September 19, 2017, after the expiration of the 30-day appeal period set forth in NRS 34.575(1). We thus ordered appellant to show cause why this appeal should not be dismissed for lack of jurisdiction. *See Lozada v. State*, 110 Nev. 349, 352, 871 P.2d 944, 946 (1994) (“[A]n untimely notice of appeal fails to vest jurisdiction in this court.”).

Appellant represents that the district court granted appellant’s former counsel an extension of time to file the notice of appeal. Attached to the response are copies of the district court minutes indicating that the district court granted appellant two extensions of time to file the notice of appeal. However, “the district court lacked authority to extend the thirty-day period within which [appellant] could file his notice of appeal.” *Walker*

*v. Scully*, 99 Nev. 45, 46, 657 P.2d 94, 94 (1983). Accordingly, the notice of appeal was untimely filed, we lack jurisdiction over this appeal, and we

ORDER this appeal DISMISSED.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Pickering

cc: Hon. Stefany Miley, District Judge  
Mayfield, Gruber & Sheets  
Michael Alan Lee  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

**CERTIFIED COPY**

This document is a full, true and correct copy of  
the original on file and of record in my office.

DATE: Dec 14, 2017

Supreme Court Clerk, State of Nevada

By Angela Deputy

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

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

**Supreme Court No. 74089**  
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: December 14, 2017

Elizabeth A. Brown, Clerk of Court

By: Amanda Ingersoll  
Chief Deputy Clerk

cc (without enclosures):

Hon. Stefany Miley, District Judge  
Mayfield, Gruber & Sheets  
Clark County District Attorney  
Attorney General/Carson City

**RECEIPT FOR REMITTITUR**

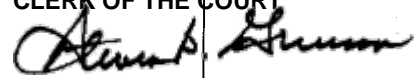
Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the  
REMITTITUR issued in the above-entitled cause, on DEC 19 2017.

RECEIVED  
Deputy ALL District Court Clerk

RECEIVED  
APPEALS

DEC 19 2017

CLERK OF THE COURT



**PET**  
DAMIAN R. SHEETS, ESQ.  
Nevada Bar No. 10755  
MAYFIELD, GRUBER & SHEETS  
726 S. Casino Center Blvd. Suite 211  
Las Vegas, Nevada 89101  
(702) 598-1299  
dsheets@defendingnevada.com  
Attorney for Petitioner

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA, ) CASE NO. C-11-277650-1  
Plaintiff/Respondent, ) DEPT NO. XXIII  
vs. ) **04-09-18 @ 11:00 am**  
MICHAEL LEE, )  
#1699107 )  
Defendant/Appellant. )

**DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS**

COMES NOW, MICHAEL ALAN LEE, by and through his attorney, DAMIAN SHEETS, ESQ. of Mayfield, Gruber & Sheets, 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**

1 with a **MINIMUM** parole eligibility of **Ninety-Six (96)** Months, Consecutive to Count 1 with  
2 **Zero (0) days credit for time served.**

3 6. Are you presently serving a sentence for a conviction other than the conviction under  
4 attack in this motion? Yes \_\_\_ No X

5  
6 7. Nature of offense involved in conviction being challenged: **Count 1. First Degree**  
7 **Murder by Child Abuse, Count 2. Child Abuse and Neglect with Substantial Bodily Harm.**

8 8. What was your plea? (check one)

9 (a) Not Guilty X

10 (b) Guilty \_\_\_

11 (c) Guilty but mentally ill \_\_\_

12 (d) Nolo contendere \_\_\_

13  
14 9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or  
15 information, and a plea of not guilty to another count of an indictment or information, or if a plea  
16 of guilty or guilty but mentally ill was negotiated, give details: **Petitioner pled not guilty**

17  
18 10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the  
19 finding made by: (check one)

20 (a) Jury X

21 (b) Judge without a jury X

22  
23 11. Did you testify at the trial? Yes \_\_\_ No X

24 12. Did you appeal from the judgment of conviction? Yes X No \_\_\_ Public Defender

25 13. If you did appeal, answer the following:

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

27 (b) Case Number or citation: **66963**  
28

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

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

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

4  
5 15. Other than a direct appeal from the judgment of conviction and sentence, have you  
6 previously filed any petitions, applications or motions with respect to this judgment in any court,  
7 state or federal? Yes X No    

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

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

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

11 (3) Grounds Raised: **That there was no direct or circumstantial**  
12 **evidence that Petitioner committed a criminal act of abuse against the decedent**

13  
14 (4) Did you receive an evidentiary hearing on your petition, application or  
15 motion? Yes     No X

16 (5) Result: **Denied**

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

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

20  
21 (b) As to any second petition, application or motion, give the same information

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

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

24 (3) Grounds Raised: **Ineffective assistance of counsel**

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



(5) Result: **Denied**

(6) Date of result: **June 28, 2017**

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: **July 31, 2017**

(c) As to any third or subsequent additional applications or motions, give the same information listed 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? **Yes**

(1) First petition, application, or motion? **No**

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

(2) Second petition, application or motion? **Yes**

Citation or date of decision: **December 19, 2017**

(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: **Ineffective assistance of counsel**

(b) The proceedings in which these grounds were raised: **Second Petition for Habeas Corpus filed May 12, 2017**

(c) Briefly explain why you are again raising these grounds. **As stated in the Points and Authorities, due to ineffective assistance of counsel Petitioner was denied his right to appeal the decision of his Second Petition for Habeas Corpus.**

1 18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or any listed on any additional  
2 pages you have attached, were not previously presented in any other court, state or federal, list  
3 briefly what grounds were not so presented, and give your answers for not presenting them. N/A  
4

5 19. Are you filing this petition more than 1 year following the filing of the judgment of  
6 conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the  
7 delay. **No, the Petition is timely**

8 20. Do you have any petition or appeal now pending in any court, either state or federal, as to  
9 the judgment under attack? Yes \_\_\_ No X  
10

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

14 22. Do you have any future sentences to serve after you complete the sentence imposed by  
15 the judgment under attack? Yes \_\_\_ No X  
16

17 **POINTS AND AUTHORITIES**

18 **I.**

19 **STATEMENT OF FACTS**

20 A Criminal Complaint, filed on October 26, 2011, charged Michael Lee (hereinafter "Mr.  
21 Lee") with the crimes of Murder and Child Abuse and Neglect with Substantial Bodily Harm. A  
22 Preliminary Hearing was held on November 8, 2011, in Henderson Justice Court before the  
23 Honorable David S. Gibson. At the conclusion of the hearing, Mr. Lee was held to answer on  
24 the two charges and was bound over to District Court. An Information, counting the two  
25 criminal charges, was filed in District Court on November 18, 2011.  
26  
27  
28

1 On December 12, 2011, Mr. Lee filed a Petition for Writ of Habeas Corpus on the  
2 grounds that there was no direct or circumstantial evidence that Petitioner committed a criminal  
3 act or abused the decedent. The Writ was denied on January 30, 2012.  
4

5 A jury trial was held in Department 23, before the Honorable Stefany Miley. The trial  
6 began on August 4, 2014 and concluded on August 18, 2014. At the conclusion of deliberations,  
7 the jury returned verdicts of guilty for both counts. Mr. Lee was sentenced on Count 1 (Murder)  
8 to Life without the possibility of parole, consecutive to case C199242; and Count 2 (Child Abuse  
9 and Neglect with Substantial Bodily Harm) to a maximum of 240 months with a minimum  
10 parole eligibility of 96 months, consecutive to Count 1. Because he was on parole at the time of  
11 these charges, Mr. Lee received zero days credit for time served.  
12

13 In November 2014, Mr. Lee's appellate counsel filed an Appeal with the Nevada  
14 Supreme Court claiming two issues: 1) that the trial court erred when it denied the defense  
15 motion for a mistrial, and 2) that there was insufficient evidence produced to sustain the  
16 allegations that Michael Lee murdered Brodie Aschenbrenner. The Supreme Court issued an  
17 Order of Affirmance on August 10, 2016.  
18

19 On May 12, 2017, Mr. Lee filed a second Petition for Writ of Habeas Corpus on the  
20 grounds of ineffective assistance of counsel. The Writ was denied on June 28, 2017 with Finds  
21 of Fact, Conclusions of Law and Order entered on July 31, 2017.  
22

23 On August 18, 2017, Mr. Lee's counsel, Potter Law Offices, filed a Motion to Withdraw  
24 as Counsel due to Mr. Cal Potter, III's medical issues instead of filing the one page Notice of  
25 Appeal to preserve Mr. Lee's right to appeal the decision on the Writ of Habeas Corpus.  
26

27 At the hearing held on August 30, 2017, the district court ordered an extension of 30 days  
28 to file an appeal and continued to the matter to September 13, 2017. At the hearing on

1 September 13, 2017, the district court was advised that Mr. Lee had retained Mayfield, Gruber  
2 and Sheets. Counsel requested an extension to file the appeal and was granted that extension to  
3 October 25, 2017.  
4

5 Counsel for Mr. Lee filed the Notice of Appeal on September 19, 2017. On December  
6 19, 2017, the Nevada Supreme Court issues a dismissal of the appeal due to lack of jurisdiction  
7 under NRAP 4. The Supreme Court held that there was no authority granted to supersede the  
8 jurisdictional boundaries outlined in NRAP 4 and therefore the appeal was untimely, thus forcing  
9 the Supreme Court to deny the appeal.  
10

## 11 II.

### 12 GROUND FOR RELIEF

#### 13 A. Standard for *Lozada* Appeal

14 In *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994), Jose Manuel Lozada filed an  
15 untimely notice of appeal from his 1987 conviction. The basis for Lozada's appeal was a claim  
16 that his trial counsel had been ineffective and had deprived him of a timely direct appeal from  
17 the conviction without his consent. *Lozada*, 110 Nev. at 350-52, 871 P.2d at 945-46. The  
18 Nevada Supreme Court held that Lozada should raise this claim in a post-conviction petition for  
19 a writ of habeas corpus filed in the district court. However, because Lozada had previously filed  
20 a petition for post-conviction relief, he had to demonstrate good cause and prejudice to excuse  
21 the filing of a successive petition pursuant to NRS 34.810. *Id.* at 352-53, 871 P.2d at 946. The  
22 Court held that Lozada could demonstrate good cause for filing a successive petition.  
23  
24

25 Specifically, the Court concluded that the initial, erroneous denial of Lozada's  
26 meritorious appeal deprivation claim in his prior, timely petition for post-conviction relief  
27 constituted an impediment external to the defense, and was thus good cause for raising the claim  
28

1 again in a successive habeas corpus petition. *Id.* at 352-58, 871 P.2d at 946-49. The Court  
2 further concluded that Lozada could demonstrate actual prejudice if his trial counsel's conduct in  
3 fact deprived Lozada of a direct appeal without his consent. *Id.* at 358-59, 871 P.2d at 949-50.  
4

5 Here, Mr. Lee was deprived of a timely appeal on the Writ of Habeas Corpus by the  
6 Potter Law Offices' ineffective assistance of counsel. The Notice of Appeal, which would have  
7 preserved Mr. Lee's right to appeal, is a one page document that takes less than ten (10) minutes  
8 to draft. However, instead of drafting and filing a Notice to preserve Mr. Lee's right to appeal,  
9 the Potter Law Offices filed a much more substantial Motion to Withdraw and Motion for Stay.  
10 Mr. Lee was denied effective assistance of counsel and thus deprived of his right to timely  
11 appeal the decision on his Writ of Habeas Corpus.  
12

### 13 **B. Ineffective Assistance of Counsel**

14 The Sixth Amendment of the United States Constitution guarantees a defendant the right  
15 to effective assistance of counsel. "The question of whether the defendant has received  
16 ineffective assistance of counsel...in violation of the Sixth Amendment is a mixed question of  
17 law and fact and is thus subject to independent review." *Strickland v. Washington*, 466 U.S. 668,  
18 686 (1984).  
19

20 The Nevada Supreme Court looks to the test set out in *Strickland* when determining  
21 whether there has been ineffective assistance of counsel. *Warden v. Lyons*, 100 Nev. 430 (1984).  
22 Under this two-prong test, a defendant who shows that 1) counsel's performance was deficient,  
23 and 2) the defendant was prejudiced by such deficiency, will be deemed to have suffered from  
24 ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. When trial counsel's representation  
25 of the defendant falls below an objective standard of reasonableness, the assistance will be  
26 deemed deficient. *Id.* at 688. If the defendant establishes that counsel's performance was  
27  
28

1 deficient, the defendant must then demonstrate the result of the proceeding probably would have  
2 been different. *State v. Love*, 109 Nev. 1136, 1139 (1993).

3 If the defendant establishes that counsel's performance was deficient, he must then  
4 demonstrate that the result of the proceeding probably would have been different. *State v. Love*,  
5 109 Nev. 1136, 1139 (1993). In the context of a plea agreement, the defendant can satisfy this  
6 element by showing that, had counsel not been deficient, he probably would not have plead  
7 guilty. *Molina v. State*, 120 Nev. 185, 190 (2004).

8 Here, as stated *supra*, Mr. Lee retained counsel to file the Writ of Habeas Corpus and  
9 when that Writ was denied, Mr. Lee instructed his counsel to file an appeal. However, Mr. Cal  
10 Potter, III became ill and instead of filing the Notice of Appeal in a timely manner, the Potter  
11 Law Offices filed a Motion to Withdraw and Motion to Stay. Mr. Lee was deprived of his right  
12 to a timely appeal due to the Potter Law Offices failing to file a one page document. Filing the  
13 Motion to Withdraw took substantially more time than timely filing the Notice of Appeal would  
14 have taken, which would have preserved Mr. Lee's appeal and still allowed the Potter Law  
15 Offices to withdraw from the case due to counsel's medical issues.

16 As such, Mr. Lee asserts that he was deprived of his right to a timely appeal of the Writ  
17 of Habeas Corpus due to the ineffective assistance of his trial counsel.

### 18 **C. Denial of Appeal**

19 Prior counsel's performance was deficient and prejudice is presumed because he did not  
20 perfect the appeal as requested by Mr. Lee.

21 The Nevada Supreme Court has held that an attorney has a duty to perfect an appeal  
22 when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a  
23 conviction. *Mann v. State*, 118 Nev. 351, 46 P.2d 1228 (2002). ***Prejudice is presumed*** for  
24 purposes of establishing ineffective assistance of counsel ***when counsel's conduct completely***

1 *denies a convicted defendant an appeal. Id.* (Emphasis Added). Thus, under *Lozada*, if a  
2 defendant “demonstrates that his counsel in fact ignored his request for an appeal, then [the  
3 defendant] has established ineffective assistance of counsel and is not required to demonstrate  
4 anything further.” *Id.* At that point, “the district court would be obligated at that point to appoint  
5 counsel to represent and assist [the defendant] in the preparation of a post-conviction petition for  
6 a writ of habeas corpus asserting any issues that could have been raised on direct appeal.” *Id.*

8 In the instant case, the Potter Law Offices were retained to file the Writ of Habeas  
9 Corpus and the subsequent appeal when the Writ was denied. However, instead of perfecting the  
10 appeal by filing a timely Notice while Mr. Lee searched for and obtained new counsel, the Potter  
11 Law Offices filed a Motion to Withdraw and a Motion for Stay but nothing else. Mr. Lee was  
12 denied his right to appeal because the Potter Law Offices did not comply with NRAP 4 and file a  
13 one page Notice of Appeal.

15 Therefore, under *Mann*, prejudice is presumed because counsel’s failure completely  
16 deprived Mr. Lee of an appeal.

18 Even if this Court concludes that prior counsel did not ignore Mr. Lee’s requests for an  
19 appeal, he had a duty to properly advise Mr. Lee when he reasonably demonstrated his  
20 individual interest in appealing and, but for that failure, a Notice of Appeal would have been  
21 filed by Mr. Lee or new counsel.

22 While Nevada case law holds counsel does not have absolute duty to advise a defendant  
23 who pleads guilty of the right to appeal, obligations do exist under certain circumstances, such as  
24 when defendant inquires about an appeal, or when defendant may benefit from receiving the  
25 advice, such as when there exists a direct appeal claim that has a reasonable likelihood of  
26 success. *Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999). Additionally, the United States  
27 Supreme Court has held that “counsel has a *constitutionally imposed duty to consult with the*  
28 *defendant about an appeal* when there is reason to think either (1) that a rational defendant

1 would want to appeal (for example, because there are nonfrivolous grounds for appeal), *or* (2)  
2 *that this particular defendant reasonably demonstrated to counsel that he was interested in*  
3 *appealing. Roe v. Ortega*, 528 U.S. 470, 479; 120 S. Ct. 1029 (2000). (Emphasis Added). When  
4 determining whether the client suffered any prejudice by counsel's failure to consult with the  
5 defendant, "*defendant's inability to 'specify the points he would raise were his right to appeal*  
6 *reinstated,'...will not foreclose the possibility that he can satisfy the prejudice requirement*  
7 *where there are other substantial reasons to believe he would have appealed.*" *Id.* at 486.  
8 (Emphasis Added).  
9

10  
11 Here, for the same reasons as noted above, Mr. Lee was denied his right to appeal.  
12 Specifically, Mr. retained counsel to file his appeal and followed that counsel's advice regarding  
13 hiring new counsel when it became apparent that health issues would preclude Mr. Potter from  
14 completing the retainer. However, the Potter Law Offices did not file the one page Notice of  
15 Appeal, did not advise Mr. Lee or his family to file the one page Notice of Appeal and instead  
16 delayed the proceedings substantially by filing the Motion to Withdraw and Motion for Stay,  
17 ignoring years of Nevada Supreme Court rulings on extending the time to file the Notice of  
18 Appeal under NRAP 4. Therefore, because Mr. Lee took every step he could to advise his  
19 attorney of his desire for an appeal, and because counsel failed act on Mr. Lee's request or  
20 properly advise Mr. Lee of the consequences of delay, Mr. Lee has been prejudiced in that he has  
21 been deprived of his appellate rights.  
22

23  
24 Therefore, this Court should allow Mr. Lee to raise the limited appealable issues denied  
25 in the Writ of Habeas Corpus by way of a *Lozada* appeal. *Lozada v. State*, 110 Nev. 349, 871  
26 P.2d 944 (1994). Accordingly, and pursuant to the facts outlined above, Mr. Lee specifically  
27 asked for an appeal and certainly would have benefited from receiving advice regarding his  
28



1 appeal. In any circumstance, pursuant to Mr. Lee's testimony, a Notice of Appeal would have  
2 been filed had Mr. Lee at least been notified by his counsel that he could file such on his own  
3 behalf or that a delay would be grounds for immediate dismissal of his appeal. Mr. Lee seeks to  
4 raise to appeal the denial of his Writ of Habeas Corpus.  
5

6 **III.**

7 **APPEAL ISSUES**

8 Accordingly, Mr. Lee would seek to raise the issue that he was denied effective  
9 assistance of counsel in violation of the Sixth Amendment of the United States Constitution..  
10


11 Under *Roe*, no other specifics regarding the appellate issues need be stated.

12 WHEREFORE, Petitioner prays that the court will grant him such relief to which he is  
13 entitled.  
14

15 **CONCLUSION**

16 For the aforementioned reasons, the State must grant Mr. Lee a new trial.

17 DATED this 2 day of <sup>February</sup> ~~January~~, 2018.

18  
19   
20 DAMIAN R. SHEETS, ESQ.  
21 Nevada Bar No. 10755  
22 726 S. Casino Center Blvd., Ste 211  
23 Las Vegas, Nevada 89101  
24 (702) 598-1299  
25 Attorney for Petitioner  
26  
27  
28

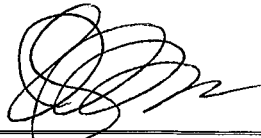
**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 6 day of <sup>February</sup>~~January~~, 2018, I mailed a true and correct copy of the above and foregoing **DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS**, by depositing the same in the United States mail, first class, postage prepaid, addressed as follows:

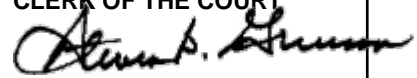
CLARK COUNTY DISTRICT ATTORNEY  
Regional Justice Center  
200 Lewis Avenue  
P.O. Box 552212  
Las Vegas, Nevada 89155-2212  
*Counsel for Plaintiff/Respondent*

ADAM LAXALT  
Nevada Attorney General  
100 North Carson Street  
Carson City, Nevada 89701-4717  
*Counsel for Respondent*

MICHAEL LEE  
NDOC No. 81950  
c/o High Desert State Prison  
P.O. Box 650  
Indian Springs, Nevada 89070-0650  
*Defendant/Appellant*



AN EMPLOYEE OF THE LAW OFFICES  
OF MAYFIELD GRUBER & SHEETS



**RSPN**  
**STEVEN B. WOLFSON**  
Clark County District Attorney  
Nevada Bar #001565  
**CHARLES W. THOMAN**  
Deputy District Attorney  
Nevada Bar #12649  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

**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: April 9, 2018  
TIME OF HEARING: 11:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through CHARLES W. THOMAN, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Third Supplemental Petition for Writ of Habeas Corpus (Post-Conviction).

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.

//

//

//

//

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

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

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

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

11 On August 18, 2014, Lee filed a Motion for Judgment of Acquittal. On August 20,  
12 2014, Lee filed a Motion for a New Trial. The State filed its Oppositions to the Motions on  
13 August 21 and 22, 2014. The Court denied the Motions on September 3, 2014.

14 On October 21, 2014, Lee was adjudicated guilty and sentenced as follows: Count 1 –  
15 life without the possibility of parole; and Count 2 — 96 to 240 months, consecutive to Count  
16 1. Lee received no credit for time served. The Judgment of Conviction was filed on November  
17 10, 2014. A Notice of Appeal was filed on November 24, 2014. On August 10, 2016, the  
18 Nevada Supreme Court Affirmed the Judgment of Conviction. Remittitur issued September 6,  
19 2016.

20 On May 12, 2017, Petitioner filed a Petition for Writ of Habeas Corpus. The State filed  
21 its Response on June 20, 2017. This Court denied the Petition on June 28, 2017. The Findings  
22 of Fact, Conclusions of Law and Order issued on July 31, 2017. Defendant filed a Notice of  
23 Appeal on September 19, 2017. On December 19, 2017, the Nevada Supreme Court dismissed  
24 the appeal and Remittitur issued.

25 Defendant then filed a Second Petition for Writ of Habeas Corpus on February 6, 2018.  
26 The State responds herein.

27 //

28 //

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

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.

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

1 locations on Brodie's body and were more much severe than usual. At some point, Arica  
2 researched nanny cams because she was concerned about the bruises on Brodie.

3 On May 25, 2011, Arica and Brodie were involved in a fender bender. Brodie was in  
4 his car seat at the time of the accident. After the impact, Arica turned around in her seat to look  
5 at Brodie and he appeared fine. Arica went to the hospital to be checked out, while her mother  
6 took Brodie home. When Arica returned home, she examined Brodie and felt no concern as he  
7 was acting like his normal playful self. The next day, Arica brought Brodie to ABC Pediatrics  
8 just to be safe. Brodie was examined by Dr. Sirsy, who found Brodie to be injury free. In June  
9 2011, Arica decided to take Brodie's racecar bed apart and put padding around it so Brodie  
10 would not bump his head on the wall. Around the same time, Arica began to look for a new  
11 place to live because Brodie did not like Lee or want to be around him anymore.

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

23 On June 11, 2011, Arica dropped Brodie off at her parents' house while she went to  
24 work. After work, Arica and Lee went out to dinner. At dinner they had a discussion regarding  
25 the jealousy between Lee and Brodie. Arica told Lee that Brodie was her number one priority.  
26 On June 12, 2011, Lee told Arica that he would do whatever it took for everything to work out  
27 and for them to be together. That evening, Arica picked Brodie up from her parent's house.  
28 When Arica and Brodie came home, Brodie got mad because Lee was there. That same

1 evening, Brodie was playing around with the curtains in his room when they fell down and  
2 scratched his lower back. The scratches were small and barely bled.

3 On June 13, 2011, Arica, Brodie and Lee went to the swimming pool with Lee's sister  
4 Jennifer and her two boys. Brodie swam in the pool and acted like his normal self. They left  
5 the swimming pool around 1:20 p.m. and Arica left for work around 4 p.m. Prior to leaving  
6 for work, Arica put Brodie down for a nap and then left him alone with Lee. Arica returned  
7 home around 8:15 p.m. and checked on Brodie. When she bent down to give Brodie a kiss,  
8 Arica noticed a quarter sized bruise on his forehead. When she asked Lee about the bruise, he  
9 told her that Brodie fell in some rocks while leaving his friend Danny Fico's house.

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

24 After the Shark Reef, they went to a McDonalds in Circus Circus to eat. While in  
25 McDonalds, Brodie had an accident and wet himself through his pull-ups. Lee became  
26 annoyed and commented that Brodie should have been potty trained. Before returning home  
27 that day, Arica stopped by a hair salon. She left Brodie, who was sleeping in his car seat, with  
28 Lee. Arica was gone approximately 5- 10 minutes. When she returned, Brodie was crying and

1 screaming hysterically inside the car. Lee told her that Brodie woke up when she got out of  
2 the car. Afterwards, they went to Best Buy where Brodie kept saying “night night,” which was  
3 a way of him telling Arica he was tired and wanted to go to bed. Inside Best Buy, Brodie  
4 wanted to get a movie. Arica told Brodie that if he wanted the movie he had to be nice to Lee.  
5 However, when Lee attempted to walk up to Brodie, Brodie got angry and kept saying “no,  
6 no, no,” so Arica had to put the movie back. When they got home, Arica put Brodie in his  
7 room and went to make dinner. During dinner, Arica had to spoon feed Brodie, which was not  
8 normal.

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

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

27 ///

28 ///



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

6 **ARGUMENT**

7 **I. DEFENDANT WAS NOT ENTITLED POST-CONVICTION COUNSEL**  
8 **AND THEREFORE DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF**  
9 **THAT COUNSEL**

10 Defendant claims that he was entitled to post-conviction counsel and counsel was  
11 ineffective for failing to file a Notice of Appeal based on the denial of his Petition for Writ of  
12 Habeas Corpus. Pet. at 9 – 12. However, the Nevada Supreme Court has consistently held that  
13 there is no right to effective assistance of post-conviction counsel for noncapital prisoners.  
14 Brown v. McDaniel, 130 Nev. Adv. Rep. 60, 331 P.3d 867, 870 (2014). The Nevada Supreme  
15 Court stated, “[t]his is because there is no constitutional or statutory right to the assistance of  
16 counsel in noncapital post-conviction proceedings, and where there is no right to counsel there  
17 can be no deprivation of effective assistance of counsel.” Id. (citing McKague v. Warden, 112  
18 Nev. 159, 163-65, 912 P.2d 255, 257-58 (1996) (internal quotations omitted)). Here, as  
19 Defendant is a noncapital prisoner, he was not entitled to post-conviction counsel. Therefore,  
20 he was also not entitled to effective assistance of post-conviction counsel. Accordingly,  
21 Defendant's Petition for Writ of Habeas Corpus should be denied.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **CONCLUSION**

2 Based upon the foregoing, the State respectfully requests that this Court order  
3 Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) be DENIED.

4 DATED this 2nd day of April, 2018.

5 Respectfully submitted,

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

9 BY /s/ Charles W. Thoman  
10 CHARLES W. THOMAN  
11 Deputy District Attorney  
12 Nevada Bar #12649  
13  
14  
15

16 **CERTIFICATE OF ELECTRONIC FILING**

17 I hereby certify that service of State's Response to Defendant's Third Supplemental  
18 Petition for Writ of Habeas Corpus (Post-Conviction), was made this 3rd day of April, 2018,  
19 by Electronic Filing to:

20 Damian R. Sheets, Esq.  
21 [dsheets@defendingnevada.com](mailto:dsheets@defendingnevada.com)  
22

23 BY: /s/ Stephanie Johnson  
24 Employee of the District Attorney's Office  
25  
26  
27

28 11FH1653X/CT/saj/MVU



NEO

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

MICHAEL A. LEE,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: C-11-277650-1

Dept No: XXIII

**NOTICE OF ENTRY OF FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

**PLEASE TAKE NOTICE** that on July 5, 2018, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on July 9, 2018.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk

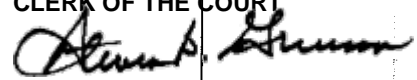
**CERTIFICATE OF E-SERVICE / MAILING**

I hereby certify that on this 9 day of July 2018, I served a copy of this Notice of Entry on the following:

- ☒ By e-mail and certified copies by the United States mail addressed as follows:  
Clark County District Attorney's Office, 200 Lewis Ave., Las Vegas, NV 89101  
Attorney General's Office, Appellate Division,  
555 E. Washington Ave., Ste. 3900, Las Vegas, NV 89101
- ☒ Certified copies by the United States mail addressed as follows:  
Michael Lee # 81950                      Damian R. Sheets, Esq.  
1200 Prison Rd.                              726 S. Casino Center Blvd., Suite 211  
Lovelock, NV 89419                      Las Vegas, NV 89101

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk



ORD  
MAYFIELD GRUBER & SHEETS  
Damian R. Sheets, Esq.  
Nevada Bar No. 10755  
Kelsey Bernstein  
Nevada Bar No. 13825  
726 S. Casino Center Blvd., Suite 211  
Las Vegas, NV 89101  
P: (702) 598-1299  
dsheets@defendingnevada.com  
Attorney for Petitioner  
Michael Lee

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

|                       |   |   |
|-----------------------|---|---|
| The State of Nevada   | ) | Case No. C-11-277650-1                  |
| Plaintiff/Respondent  | ) | Dept. No. XXIII                         |
| vs.                   | ) |   |
| Michael Lee,          | ) | <b>FINDINGS OF FACT, CONCLUSIONS OF</b> |
| Defendant/Petitioner. | ) | <b>LAW AND ORDER GRANTING PETITION</b>  |
|                       | ) | <b>FOR WRIT OF HABEAS CORPUS (POST-</b> |
|                       | ) | <b>CONVICTION)</b>                      |

This matter having come on for hearing before the Court on the 9th day of April, 2018, the Petitioner present in the custody of the Nevada Department of Corrections and represented by his attorney of record, Damian Sheets, Esq. of Mayfield Gruber & Sheets, and Respondent represented by Steve B. Wolfson, by and through Jennifer Clemons, Esq., and the Court having considered the matter, including briefs, arguments and documents on file herein, and now therefore makes the following findings of fact and conclusions of law:

///

///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**FINDINGS OF FACT**

1. On November 18, 2011, an Information was filed that charged Michael Lee ("Petitioner") with: Count 1, Murder; Count 2, Child Abuse and Neglect with Substantial Bodily Harm. Petitioner at the time was represented by Patrick McDonald, Esq.
2. Petitioner proceeded to trial on August 4, 2014. Petitioner at the time was represented by Nadia von Magdenko, Esq. and Steven Altig, Esq. Petitioner was convicted on all charges.
3. On August 21, 2014, Petitioner was sentenced as follows: Life without the possibility of parole.
4. Petitioner timely directly appealed his conviction to the Nevada Supreme Court. On September 13, 2016, the Nevada Supreme Court affirmed the conviction.
5. Petitioner filed his first Petition for Writ of Habeas Corpus (Post-Conviction) on May 12, 2017. Petitioner at the time was represented by Cal Potter, Esq.
6. Petitioner's Petition for Writ of Habeas Corpus was denied on June 28, 2017 with Findings of Fact and Conclusions of Law entered July 31, 2017.
7. Petitioner's Counsel never filed a timely Notice of Appeal to appeal the Findings of Fact and Conclusions of Law entered on July 31, 2017. Instead, Petitioner's Counsel filed a Motion to Withdraw as Counsel on August 18, 2017.
8. Petitioner filed his second Petition for Writ of Habeas Corpus (Post-Conviction) on February 6, 2018 containing a claim that Petitioner was improperly deprived of his appeal on the denial of his first Petition for Writ of Habeas Corpus.

1 9. This Court heard argument on the second Petition on April 9, 2018. At the hearing,  
2 the Court found that Petitioner's Counsel acted ineffectively for failing to timely file  
3 a Notice of Appeal and that ineffectiveness deprived Petitioner of his right to appeal.  
4

5 **CONCLUSIONS OF LAW**

6 1. "In all criminal prosecutions, the accused shall enjoy the right to... have to  
7 Assistance of Counsel for his defense." U.S. CONST. AMEND. VI. "[T]he right to counsel  
8 is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S.  
9 668, 686 (1984). In Nevada, the appropriate vehicle for review of whether counsel  
10 was effective is a post-conviction relief proceeding. *McKague v. Warden*, 112 Nev.  
11 159, 912 P.2d 255, 258 at n.4 (1996). In order to assert a claim for ineffective  
12 assistance of counsel, the Petitioner must prove that he was denied "reasonably  
13 effective assistance" of counsel by satisfying the two-pronged test set forth in  
14 *Strickland*. See, *State v. Love*, 109 Nev. 1136, 865 P.2d 322, 323 (1993). Under  
15 *Strickland*, the defendant must show that his counsel's representation fell below an  
16 objective standard of reasonableness, and that absent those errors, there is a  
17 reasonable probability that the result of the proceedings would have been different.  
18 *Strickland*, 466 U.S. at 697.  
19

20 2. NRAP 32(c) provides that "[t]rial counsel shall file the notice of appeal, rough draft  
21 transcript request form, and fast track statement and consult with appellate counsel  
22 for the case regarding the appellate issues that are raised." Counsel has a duty to file  
23 an appeal when the client's desire to challenge the Court's appealable ruling can  
24 reasonably be inferred from the totality of the circumstances, focusing on what  
25  
26  
27  
28

1 counsel knew or should have known at the time. *Toston v. State*, 127 Nev. Adv. Op. 87,  
2 267 P.3d 795 (2011); see also, *Davis v. State*, 115 Nev. 17, 974 P.2d 658, 660 (1999)  
3 (“[I]f the client does express a desire to appeal, counsel is obligated to file the notice  
4 of appeal on the client’s behalf”). Prejudice is presumed for purposes of establishing  
5 ineffective assistance of counsel when counsel’s conduct completely denies a  
6 convicted defendant of a direct appeal. *Toston*, 267 P.3d at 800 (citing *Lozada v.*  
7 *State*, 110 Nev. 349, 871 P.2d 944, 949 (1994)).  
8

9  
10 3. Here, Petitioner’s Counsel never filed a timely Notice of Appeal to appeal the  
11 Findings of Fact and Conclusions of Law entered on July 31, 2017, and the Court  
12 therefore finds that Petitioner received ineffective assistance of counsel. As a result,  
13 Petitioner suffered presumed prejudice due to the complete loss of an opportunity  
14 to present an appeal.  
15

16 4. The instant Petition is timely as it was filed within one year of the Findings of Fact  
17 and Conclusions of Law entered on July 31, 2017. Petitioner is therefore entitled to  
18 relief and the Court grants the instant Petition.

19 5. NRAP 4(c) provides that an untimely notice of appeal may be filed when a post-  
20 conviction petition for writ of habeas corpus has been timely and properly filed in  
21 accordance with the provisions of NRS 34.720 to NRS 34.830, asserting a viable  
22 claim that the Petitioner was unlawfully deprived of the right to a timely appeal, and  
23 the District Court in which the Petition is considered enters a written order  
24 containing specific findings of fact and conclusions of law finding that Petitioner has  
25  
26  
27  
28

1 established a valid appeal-deprivation claim and is entitled to a direct appeal with  
2 the assistance of appointed or retained counsel.  
3

4 **ORDER**

5 **IT IS HEREBY ORDERED** that Petitioner Michael Lee's Petition for Writ of Habeas  
6 Corpus (Post-Conviction) is **GRANTED**, AND THE Court finds Petitioner was unlawfully  
7 deprived of the right to a timely appeal, and;  
8

9 ///

10  
11  
12 ///

13  
14  
15  
16 ///

17  
18  
19  
20 ///

21  
22  
23 ///

24  
25  
26  
27 ///



**IT IS FURTHER ORDERED** that the District Court Clerk shall prepare and file within five (5) days of the entry of this order a Notice of Appeal from the Findings of Fact and Conclusions of Law entered on July 31, 2017 on Petitioner's behalf. Pursuant to NRAP 4(c)(2), the District Court Clerk shall serve certified copies of the District Court's written order and the notice of appeal required by rule 4(c) on the Petitioner and Petitioner's counsel in the post-conviction proceeding, the respondent, the Attorney General, the district attorney of the county in which the petitioner was convicted (Clark County, Nevada), and the clerk of the Supreme Court.

Dated this 21 day of June, 2018.

DISTRICT COURT JUDGE  
JUDGE STEFANY A. MILEY

Submitted by:  
MAYFIELD-GRUBER & SHEETS

~~Damian R. Sheets, Esq.~~  
Nevada Bar No. 10755  
726 S. Casino Center Blvd., Suite 211  
Las Vegas, NV 89101  
P: (702) 598-1299  
dsheets@defendingnevada.com