IN THE SUPREME COURT OF THE STATE OF NEVADA

Michael Alan Lee, Petitioner/Appellant vs. Brian E. Williams, Sr., Warden High Desert State Prison, Respondent, and The State of Nevada, Real Party in Interest	Supreme Court Case No.: 76330 **APPELLANT'S OPENING BRIEF**

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed.

DATED this 26 day of Novembe, 2018.

MAYFIELD GRUBER & SHEETS
Respectfully Submitted By:

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JURISDICTIONAL STATEMENT

The Nevada Supreme Court retains jurisdiction over this matter as an appeal from a decision denying a petition for writ of habeas corpus pursuant to NRS 34.575. A timely notice of appeal was filed on July 9, 2018, the same day that the Notice of Entry of the Order Denying Appellant's Petition was filed, also on July 9, 2018.

NRAP 17 ROUTING STATEMENT

This matter is presumptively retained by the Nevada Supreme Court pursuant to NRAP 17(b)(3) as a post-conviction appeal that involves a challenge to a judgment of conviction or sentence for an offense that *is* a category A felony for which Appellant is facing life imprisonment without the possibility of parole.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Statement of the Issues

1. Whether trial counsel was ineffective for failing to object to jury instructions which allowed a conviction for felony murder child abuse by means of either abuse *or neglect* in direct violation of this Court's holding in *Labastida v. State*, 115 Nev. 298, 302, 986 P.2d 443, 446 (1991).

2. Whether Appellant was denied effective assistance of trial counsel when his trial counsel was not qualified to try a non-capital murder case, was unprepared to conduct cross examination, failed to follow the advice of stand-by counsel, was unable to make closing arguments, and asserted inconsistent defenses in her opening statements.

II. Statement of the Case

On or about November 18, 2011, Appellant Michael Alan Lee was charged by way of Information with one count First Degree Murder by Child Abuse and one count Child Abuse and Neglect with Substantial Bodily Harm (Bates 001). The matter went to a jury trial, which spanned nine days, from August 4, 2014 to August 15, 2014 (Bates 004-842; 868-911). He was convicted of both counts. The Judgment of Conviction was filed on November 10, 2014 (Bates 912).

Appellant was sentenced on Count 1 to life without the possibility of parole (*id*.). On count 2, Appellant was sentenced to 96-240 months, to run consecutive with count 1 (*id.*). A timely direct appeal was taken to the Nevada Supreme Court on November 24, 2014 (docket number 66963). After full briefing, the Court issued an Order of Affirmance on August 10, 2016 (Bates 914). Remittitur was issued September 13, 2016 (Bates 936).

On May 12, 2017, Appellant filed a timely Petition for Writ of Habeas Corpus in the District Court (Bates 950; 961). The State filed a Response on June 20, 2017 (Bates 975). The District Court denied the Petition, directing the State to prepare an Order (Bates 991). Said Order was formally entered on August 2, 2017 (Bates 1009).

Shortly thereafter, Appellant's Counsel filed a Motion to Withdraw as Counsel and Stay Proceedings, at which time the District Court permitted Appellant's Counsel to file an untimely notice of appeal. The document was in fact filed on September 19, 2017. The Nevada Supreme Court quickly dismissed the appeal for lack of jurisdiction based on the untimely filed Notice of Appeal. Remittitur was issued December 19, 2017 (Bates 1022).

On February 6, 2018, Appellant filed a second Petition for Writ of Habeas Corpus, alleging that his prior counsel (subsequently permitted to withdraw) was ineffective for failing to file the notice of appeal within the statutory time frame (Bates 1027). The State filed a Response on April 3, 2018 (Bates 1040). The District Court granted this Petition pursuant to *Lozada v. State*, 110 Nev. 349, 871 P.2d 944, 949 (1994) on July 5, 2018, and ordered the District Court Clerk to prepare and file a Notice of Appeal from the Findings of Fact and Conclusions of Law on Petitioner's behalf (Bates 1048). The instant appeal follows, challenging the denial of Appellant's initial Petition for Writ of Habeas Corpus filed in the District Court alleging ineffective assistance of counsel.

III. Statement of Facts

Brodie Aschenbrenner was born in December, 2008 to Arica Foster and Dustin Aschenbrenner.[1] When their relationship dissolved, Ms. Foster became Brodie's primary caregiver. In October of 2010, she began dating Michael Lee after they were introduced to each other by their respective sisters. In February 2011, Ms. Foster, Michael and Brodie moved together into an apartment. Ms. Foster relied primarily on family and friends to help care for Brodie.

Brodie was found dead at approximately 8:50am on June 15, 2011, while Ms. Foster was alone with him. She testified that she was alone with him the entire previous evening, except for roughly an hour while she ran errands. Around 1am that morning, Michael came into their bed from the bathroom and told Ms. Foster that he thought Brodie had thrown up. Ms. Foster got up and cleaned Brodie, and ended up laying with him on a towel spread out on the sofa before leaving Brodie and returning to bed. A few hours later, Michael

[1] The instant recitation of facts is taken primarily from Appellant's Petition for Writ of Habeas Corpus filed in District Court and the State's Response thereto (Bates 950; 975).

carried Brodie in a fuzzy blanket and laid him in bed with Ms. Foster before leaving for work.

Ms. Foster awoke and began rubbing Brodie's back and noticed that he was cold. She called 911, but the child was unresponsive. Ms. Foster gave an interview on June 17, 2011 that was lost or destroyed by the Henderson Police Department; this interview is believed to have been exculpatory, because Michael was not arrested for several months after Brodie's death.

The crux of this case is determining who inflicted the physical blow to Brodie's abdomen that ultimately killed him. Brodie was in the care of several people during the time frame the blow was inflicted, the vast majority of which was actually with Arica Foster.

With regards to his criminal case, Michael's family paid Steve Wolfson, Esq. over $30,000 to defend his case. The matter was assigned by Mr. Wolfson to Patrick McDonald for a preliminary hearing. After the case was bound over to District Court, Michael's family paid another $20,000 to Mr. Wolfson for representation through trial. Prior to trial, however, Mr. Wolfson left private practice and Mr. McDonald was suspended from the practice of law. Nadia Von Magdenko resumed representation on the case.

However, Nadia Von Magdenko was grossly underqualified to conduct such a trial, and in fact would not have qualified for appointment to any non-capital murder case. She also failed to advise Michael that he had the right to be appointed a public defender who would be specifically experienced with handling murder cases.

At the outset, Ms. Von Magdenko alleged inconsistent defenses in her opening statements, claiming both that Brodie's injuries were intentional in nature and that they were accidental, but not as a result of Michael's actions. Concerned with her lack of qualifications and experience, Steve Altig, Esq. then volunteered to act as stand-by counsel during the trial with Ms. Von Magdenko on a *pro bono* basis.

Ms. Von Magdenko was not prepared to conduct the cross examination of the lead detective and case agent in this case, and asked Mr. Altig to step out of his role as stand-by to perform second-chair duties. Mr. Altig also told her to object several times, which she did not. She similarly was unprepared to conduct closing arguments, which Mr. Altig likewise took over. Throughout the trial, Mr. Altig had serious concerns with Ms. Von Magdenko's lack of qualifications to conduct a trial of this nature, and submitted to the District

Court that Michael's case was defensible, and a different outcome was probable with experienced trial counsel.

IV. Summary of the Argument

The Nevada Supreme Court has explicitly and unambiguously held that felony murder by child abuse *cannot* be committed by an act of child neglect, and therefore to present instructions to the jury which permits them to otherwise infer or convict him on this basis is invalid as a matter of law. The State argues that the error is harmless or not present because the State never specifically argued in their closing arguments that Michael neglected Brodie; however, what the State argued to the jury does not obviate jury confusion that exists when told the law allows them to find a conviction on this unlawful basis. The State only assumes that the jury convicted based on child abuse, and not child neglect. Counsel was ineffective for failing to object to jury instructions clearly prohibited by controlling case law. Similarly, appellate counsel was ineffective for failing to raise this argument on direct appeal.

Counsel was also ineffective for being underqualified and unprepared to conduct Michael's trial. On several occasions, stand-by counsel was forced to step into an active role in the case when his first-chair counsel was unable or

unprepared to proceed with the trial. While the State argues that Appellant received effective assistance of counsel because "at least one" qualified attorney assisted in his defense, the qualified attorney had only a limited role at few portions of the proceedings, and first-chair counsel often ignored or disregarded his advice on evidentiary and strategic matters. Therefore, the mere physical presence of qualified stand-by counsel does not cure the error of having unqualified first-chair counsel throughout the proceedings.

ARGUMENT

A. Trial Counsel was Ineffective for Failing to Challenge Jury Instructions Permitting the Jury to Find Appellant Guilty of Felony Murder Child Abuse by Neglect

A claim of ineffective assistance of counsel presents a mixed question of law and fact and is therefore subject to independent review. *State v. Love*, 109 Nev. 1136, 1139, 865 P.2d 322, 323 (1993). The Court evaluates a claim of ineffective assistance of trial counsel under the "reasonably effective assistance" test articulated in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) and followed in Nevada through *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984). The *Strickland* analysis applies to both the guilt and penalty phases of a trial. 466 U.S. at 686-87; see also *Paine v. State*, 110 Nev. 609, 877 P.2d 1025, 1031 (1994).

Under the *Strickland* test, two elements must be established by a defendant claiming ineffective assistance of counsel: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687; see also *Dawson v. State*, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992). "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." *Kirksey v. State*, 112 Nev. 980, 987-988, 923 P.2d 1102, 1107; *Strickland*, 466 U.S. at 697.

"Deficient" assistance of counsel is representation that falls below an objective standard of reasonableness. *Dawson*, 108 Nev. at 115, 825 P.2d at 595. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *Dawson*, 108 Nev. at 115, 825 P.2d at 595.

In meeting the "prejudice" requirement, the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the

outcome." *Strickland*, 466 U.S. at 694; *Hill v. Lockhart*, 474 U.S. 52, 59, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985). "Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688.

In this case, Appellant's trial counsel was ineffective for failing to challenge jury instructions that permitted a conviction of felony murder by child abuse as a result of child neglect (Bates 849-852). These instructions directly violate the Nevada Supreme Court's ruling in *Labastida v. State*, 115 Nev. 298, 302-303, 986 P.2d 443, 446 (1999):

> As the prior majority opinion recognizes, the terms "abuse" and "neglect" have distinctive meanings and cannot be applied interchangeably. The use of the term "child abuse" and not "child neglect" in NRS 200.030(1)(a) evinces the legislature's intent that different meanings apply to the two terms and that a murder perpetrated by means of "child abuse," and not "child neglect," constitutes first degree murder. Thus, the definition of first degree murder set forth in the prior majority opinion improperly expands the statutory elements of first degree murder to include a murder perpetrated by means of child neglect. Accordingly, we are not willing to read NRS 200.030(1)(a) so as to define first degree murder to include a murder which is perpetrated by means of child neglect. There is no statutory basis for doing so.

By failing to challenge jury instructions that are in violation of established and controlling Nevada law, Appellant's trial counsel's

performance was deficient. There is no strategic basis not to challenge the instructions, as it simply permits another avenue for a conviction that also expands the scope of the case.

The remaining question, then, is whether Appellant suffered prejudice as a result. In response, the State argued in District court that "no such error was possibly because the State never argued that Defendant could have allowed Brodie to die through neglect" (Bates 984: 13). However, the jury is advised and admonished repeatedly that the jury instructions contain the governing law, not the State's closing arguments.

Further, the State only *assumes* that the jury convicted Appellant based on the argument they presented. There is no way to tell the basis on which the jury found Appellant guilty, and there is no basis for the State to presume that the jury did so on lawful grounds when they were presented with both a lawful and unlawful basis. If anything, receipt of jury instructions which differed from the State's arguments would only lead to jury confusion over what was legally permissible. Unnecessary or expansive jury instructions have long been overturned as the source of jury confusion regarding the correct or controlling law. *Jones v. United States*, 527 U.S. 373, 390, 119 S. Ct. 2090, 2102-03 (1999); *Victor v. Nebraska*, 511 U.S. 1, 127 L. Ed. 2d 583, 114 S. Ct. 1239

(1994); *Estelle v. McGuire*, 502 U.S. 62, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991); *Boyde v. California*, 494 U.S. 370, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990).

In fact, these precise instructions were overturned by the Nevada Supreme Court in yet another case for that very reason. In *Thompson v. State*, No. 65538, 2016 Nev. Unpub. LEXIS 79 (Jan. 22, 2016), the defendant challenged a jury instruction which "instead of using the definition of child abuse from the felony murder statute, see NRS 200.030(6)(b), [used] the definition of 'abuse or neglect' from NRS 200.508(4)(a)." *Id.* The Court ultimately agreed with the defendant, ruling that

> [J]ury instructions 10 and 11 improperly expand upon what is prohibited by the felony murder statute. For instance, jury instruction 10 instructs the jury to find Thompson guilty if he placed Bork's child in a situation in which the child could suffer physical pain or mental suffering. Jury instruction 11 instructs the jury that child abuse includes both physical and mental injury of a nonaccidental nature and negligent treatment of a child. … Accordingly, we conclude that the district court abused its discretion in its instructions to the jury regarding felony murder by child abuse.
>
> We further conclude that this error prejudiced Thompson *because the State emphasized in its closing argument the jury's ability to find Thompson guilty of felony murder by child abuse under the erroneous language contained in instructions 10 and 11* (emphasis added).

Thompson makes clear that it was not the State's fact-specific closing argument that triggered the reversal, but simply the reference the jury instructions itself that contained the erroneous language. The State made the same argument Appellant's District Court petition that the error cannot exist in this case because the State only argued child abuse, not child neglect; however, as stated in *Thompson*, it is the jury instructions themselves that permitted the improper inference of guilt by neglect.

Appellant was deprived of effective assistance of counsel when his trial counsel failed to object to the unlawful instructions; he was prejudiced by the finding of guilt, stemming from these invalid jury instructions, which this Court has ruled time and again is grounds for reversal.

Under the same analysis, Appellant was also deprived of effective assistance of appellate counsel for failure to raise this issue on direct appeal. "[T]he proper standard for evaluating [a] claim that appellate counsel was ineffective in neglecting to file a merits brief is that enunciated in *Strickland v. Washington*." *Smith v. Robbins*, 528 U.S. 259, 285–86, 120 S. Ct. 746, 764 (2000); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *see also Smith v. Murray, 477* U.S. 527, 535–536, 106 S.Ct. 2661 (1986) (applying Strickland to claim of attorney error on appeal). For these reasons

and those stated above, Appellant's respectfully requests his case be remanded for a new trial.

B. Appellant was Deprived of Effective Assistance of Counsel when Trial Counsel was Underqualified, Unprepared to Proceed and Unresponsive to Stand-By Counsel

The right to counsel is the right to *effective* assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970)). In the instant matter, Appellant's first-chair trial counsel was underqualified, and in fact would not have been qualified for public appointment. Appellant's case was initially handled by two attorneys, one of which left private practice and the other who was suspended from the practice of law, before the case fell to Nadia Von Magdenko. Appellant was never informed that he had the option of being appointed a qualified public defender specifically experienced in handling murder cases.

Concerned with her lack of qualifications and the high stakes of this case, Steve Altig volunteered *pro bono* to act as stand-by counsel during the trial. He advised trial counsel not to present inconsistent defenses during opening statements, which she ignored. He also told her to object on

numerous occasions during the trial, and she did not. In fact, trial counsel rarely heeded the advice of her qualified stand-by counsel, whose role in the case was slowly but surely enlarged when trial counsel found herself unable or unprepared to proceed.

While Counsel can appreciate that every criminal defense attorney needs to get their feet wet in a trial setting, a murder by child abuse case is not the proper forum to do so. In their Response to Appellant's writ filed in District Court, the State seems to concede that trial counsel was in fact "deficient." The State does not challenge trial counsel's lack of qualifications in handling cases of this nature, arguing only instead that Appellant cannot demonstrate prejudice because of Mr. Altig's limited involvement: "Even if Nadia Von Magdenko were deficient, at worst she was supported by attorney Steve Altig, who was present through trial and who, according to Defendant, provided effective counsel. Defendant, therefore, cannot demonstrate prejudice because he was represented by at least one attorney who he admits was not ineffective" (Bates 998: 15).

The State's argument is such that Appellant received effective assistance of counsel – sometimes – and therefore he cannot demonstrate prejudice. However, Counsel is aware of no law, nor did the State cite to any, that would

permit effective assistance of counsel at some points of the trial, and ineffective assistance of counsel at others. To the contrary, a criminal defendant is entitled to effective assistance of counsel at *all* critical stages of his proceedings, including the entirety of his trial. *United States v. Wade*, 388 U.S. 218, 224, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); *Patterson v. State*, 129 Nev. 168, 174, 298 P.3d 433, 437 (2013).

While Mr. Altig was physically present during Appellant's trial, his active participation was very limited. He only stepped in when trial counsel found herself unable to handle a task, which included significant cross examinations and closing arguments. However, aside from this limited involvement, stand-by counsel stayed in a passive role which trial counsel continuously refused to obey or acknowledge. As a result, the mere presence of "at least one attorney" who was qualified does not alleviate the deficient performance of Appellant's first-chair trial counsel during what amounts to four-fifths of the trial proceedings.

For these reasons, Appellant should have, at a minimum, been granted an evidentiary hearing and discovery to fully articulate the instances in which first-chair counsel was ineffective. Given trial counsel's deficient performance from her opening statements all the way up to the closing arguments she was

unprepared to make, Appellant suffered prejudice and is entitled to a new trial with experienced and effective counsel. When facing life imprisonment without the possibility of parole, justice demands no less.

CONCLUSION

For these reasons, Appellant Michael Alan Lee respectfully requests this Court remand the matter for an evidentiary hearing or, in the alternative, remand this case for a new trial.

VERIFICATION OF DAMIAN SHEETS, ESQ.

1. I am an attorney at law, admitted to practice in the State of Nevada.
2. I am the attorney handling this matter on behalf of Appellant.
3. The factual contentions contained within the Opening Brief are true and correct to the best of my knowledge.

Dated this 26 day of November, 2018.

MAYFIELD GRUBER & SHEETS
Respectfully Submitted By:

DAMIAN SHEETS, ESQ.
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 with 14 point, double spaced Cambria font.

2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7)(A)(ii) because it is proportionally spaced, has a monospaced typeface of 14 points or more and contains 4,417 words.

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

I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 26 day of November, 2018.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 26 day of November, 2018, I served a true and correct copy of the Opening Brief to the last known address set forth below:

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