IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ALAN LEE, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 76330

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Post-Conviction Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court under NRAP 17(a) because it is a post-conviction appeal that involves a challenge to the judgment of conviction for an offense that is a category A felony.

STATEMENT OF THE ISSUE(S)

1. Whether Appellant had effective counsel

STATEMENT OF THE CASE

On November 18, 2011, Appellant was charged by way of Information with Murder and Child Abuse and Neglect with Substantial Bodily Harm. 1 AA 1–3.

Appellant's jury trial began on August 4, 2014. 1 AA 4. On August 15, 2014, the jury returned a verdict of guilty on both counts. 5 AA 868, 901.

On October 21, 2014, Appellant was adjudicated guilty and sentenced as follows: as to Count 1: life without the possibility of parole; and as to Count 2: a minimum of 96 months and a maximum of 240 months, consecutive to Count 1. 5 AA 912–13. Appellant received no credit for time served. Id. The Judgment of Conviction was filed on November 10, 2014. Id.

Appellant appealed the Judgment of Conviction and, on August 10, 2016, the Nevada Supreme Court affirmed the Judgment of Conviction. 5 AA 937–47. Remittitur issued September 7, 2016. 5 AA 949.

On May 12, 2017, Appellant filed his first Petition for Writ of Habeas Corpus. 5 AA 950–60. On June 20, 2017, the State responded. 5 AA 975–90. The court denied the petition and filed the Findings of Fact, Conclusions of Law, and Order on July 31, 2017. 6 AA 1009–21.

Appellant appealed the denial and the Nevada Supreme Court dismissed the appeal as untimely on November 17, 2017. 6 AA 1023–24. Remittitur issued on December 14, 2017. 6 AA 1026.

On February 6, 2018, Appellant filed his second Petition for Writ of Habeas Corpus. 6 AA 1027–39. The State responded on April 3, 2018. 6 AA 1040–47. The

district court granted the petition on April 9, 2018, allowing Appellant to file an untimely appeal from the denial of the May 12, 2017, petition. 6 AA 1049–54.

STATEMENT OF THE FACTS

In December 2008, Arica Foster gave birth to Brodie Aschenbrenner. 2 AA 361. Brodie's father was Dustin Aschenbrenner. Id. When Arica's relationship with Brodie's father dissolved, she kept custody of Brodie. Id. Brodie was a fearless, loving, and rambunctious child. 2 AA 363. In October 2010, Arica met and began dating Appellant after they were introduced to each other by their respective sisters. 2 AA 366–67. In the beginning of the relationship, Appellant and Brodie liked each other and got along. 2 AA 367. In February 2011, Arica, Brodie, and Appellant moved into an apartment together. 2 AA 369. At some point, Arica became concerned about Brodie's physical condition. 2 AA 371. Arica became concerned because she started to find more bruises on Brodie than usual. 2 AA 371–72. Arica noticed that the bruises were appearing on Brodie's face and were much darker than the normal everyday bumps Brodie used to get. 2 AA 372.

In early May 2011, Arica and Appellant began to have arguments over Brodie's potty training. Id. Appellant felt that Arica was babying Brodie too much and that Brodie should have been potty trained by that point. 2 AA 372–73. Arica and Appellant also argued about Appellant waking Brodie up in the early mornings to use the bathroom and changing him from his diaper into his pull up underwear. 2

AA 384. 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. Id. Arica and Appellant also argued about keeping Brodie's bedroom door open at night. 2 AA 386. While Arica wanted the door open so she can hear Brodie at night, Appellant insisted on the door being closed. Id. When Arica would wake up in the morning she would find Brodie's bedroom door closed. Id.

Around the same time, Brodie's demeanor towards Appellant began to change. 2 AA 373. Brodie began not to want to be around Appellant; he would cower, cry, and run over to Arica. Id. Brodie's reaction towards Appellant began to put a strain on his and Arica's relationship. 2 AA 374. After noticing the bruising on Brodie, Arica decided to have her sister Amanda babysit Brodie instead of Appellant's sister Jennifer. Id. Once Amanda started babysitting Brodie, the bruising stopped for about two to three weeks but started back up again. 2 AA 377. The bruises began to show up more frequently, in different locations on Brodie's body and were more much severe than usual. 2 AA 377–78. At some point, Arica researched nanny cams because she was concerned about the bruises on Brodie. 2 AA 387.

On May 25, 2011, Arica and Brodie were involved in a fender bender. 2 AA 378. Brodie was in his car seat at the time of the accident. 2 AA 379. After the impact, Arica turned around in her seat to look at Brodie and he appeared fine. Id.

Arica went to the hospital to be checked out, while her mother took Brodie home. 2 AA 380. When Arica returned home, she examined Brodie and felt no concern as he was acting like his normal playful self. Id. The next day, Arica brought Brodie to ABC Pediatrics just to be safe. 2 AA 381. Brodie was examined by Dr. Sirsy, who found Brodie to be injury free. 3 AA 587–88. In June 2011, Arica decided to take Brodie's racecar bed apart and put padding around it so Brodie would not bump his head on the wall. 2 AA 382–83. Around the same time, Arica began to look for a new place to live because Brodie did not like Appellant or want to be around him anymore. 2 AA 387.

In the evening of June 6, 2011, Arica noticed that Brodie had a fat lip underneath his nose. 2 AA 388. Arica was not home at the time the injury happened so she asked Appellant about the injury since he was with Brodie. Id. Appellant told her that the board from the toddler bed fell on Brodie. Id. On June 9, 2011, Brodie was riding his power wheel while walking the dogs around the apartment complex with Arica. 2 AA 389–90. While riding his power wheel, Brodie hit a curb and fell off. 2 AA 390. After falling down, Brodie jumped back up and continued to act like his normal self. Id. Brodie ended up with a tiny little bruise on his cheek from the fall. Id. That night Brodie never complained about being in any type of pain and appeared normal. 2 AA 390–91. On June 10, 2011, Arica noticed that Brodie's eyes were goopy so she took him to ABC Pediatrics, where he was diagnosed with pink

eye and prescribed eye drops. 2 AA 392. Arica never mentioned the power wheel incident to the physician because Brodie never complained of any pain. 2 AA 393.

On June 11, 2011, Arica dropped Brodie off at her parents' house while she went to work. 2 AA 394. After work, Arica and Appellant went out to dinner. 2 AA 395. At dinner they had a discussion regarding the jealousy between Appellant and Brodie. Id. Arica told Appellant that Brodie was her number one priority. Id. On June 12, 2011, Appellant told Arica that he would do whatever it took for everything to work out and for them to be together. 2 AA 396. That evening, Arica picked Brodie up from her parents' house. 2 AA 397–98. When Arica and Brodie came home, Brodie got mad because Appellant was there. 2 AA 398. That same evening, Brodie was playing around with the curtains in his room when they fell down and scratched his lower back. 2 AA 398–99. The scratches were small and barely bled. 3 AA 399.

On June 13, 2011, Arica, Brodie, and Appellant went to the swimming pool with Appellant's sister Jennifer and her two boys. 2 AA 400; 3 AA 401. Brodie swam in the pool and acted like his normal self. 3 AA 401. They returned home around 1:30 p.m. and Arica had work at 4 p.m. 3 AA 402. Prior to leaving for work, Arica put Brodie down for a nap and then left him alone with Appellant. Id. Arica returned home around 8:15 p.m. and checked on Brodie. 3 AA 402–03. When she bent down to give Brodie a kiss, Arica noticed a quarter sized bruise on his forehead.

3 AA 403. When she asked Appellant about the bruise, he told her that Brodie fell in some rocks while leaving his friend Danny Fico's house. Id.

The next morning, June 14th, Arica noticed that Brodie had a lot more bruises on him than the night before. 3 AA 406. He had a couple of bruises on his forehead and the bruise on his cheek was a lot bigger and darker. Id. Brodie also seemed very upset; he ran into Arica's room screaming and wanting to be cuddled. Id. That type of behavior was not normal for Brodie. Id. That day Arica, Brodie, and Appellant had plans to go the Mandalay Bay Shark Reef. 3 AA 407. After Brodie ate breakfast, Arica dressed him for the day. Id. When Arica was dressing him, Brodie complained that his head hurt. Id. Before leaving the house, Appellant mentioned to Arica that he did not want to bring Brodie anywhere because it looked like they beat him. 3 AA 407–08. Before going to the Shark Reef, they made a stop at the gas station where Appellant worked. 3 AA 408. Appellant told Arica that he did not want her to bring Brodie inside the store because of his bruises. Id. Arica and Brodie went inside the store, while Appellant went to the car wash part of the gas station. Id. Inside the store, Arica ran into Danny Fico, who commented on the bruises on Brodie's face. 3 AA 408–09. When they got to the Shark Reef and began walking inside, Brodie refused to hold Appellant's hand. 3 AA 410. Arica had to tell Brodie that if he did not hold Appellant's hand they would not go to the Shark Reef. Id.

After the Shark Reef, they went to a McDonalds in Circus Circus to eat. 3 AA 411. While in McDonalds, Brodie had an accident and wet himself through his pull-ups. Id. Appellant became annoyed and commented that Brodie should have been potty trained. 3 AA 412. Before returning home that day, Arica stopped by a hair salon. 3 AA 415. She left Brodie, who was sleeping in his car seat, with Appellant. Id. Arica was gone approximately 5 to 10 minutes. 3 AA 415–16. When she returned, Brodie was crying and screaming hysterically inside the car. 3 AA 416. Appellant told her that Brodie woke up when she got out of the car. Id. Afterwards, they went to Best Buy where Brodie kept saying "night night," which was a way of him telling Arica he was tired and wanted to go to bed. 3 AA 417. Inside Best Buy, Brodie wanted to get a movie. 3 AA 418. Arica told Brodie that if he wanted the movie he had to be nice to Appellant. Id. However, when Appellant attempted to walk up to Brodie, Brodie got angry and kept saying "no, no, no," so Arica had to put the movie back. Id. When they got home, Arica put Brodie in his room and went to make dinner. 3 AA 418–19. During dinner, Arica had to spoon feed Brodie, which was not normal. 3 AA 419.

After dinner, Arica put Brodie to bed. 3 AA 420. Arica then told Appellant she had to go grocery shopping and run some errands. 3 AA 420–21. Appellant got upset and asked Arica why she just didn't do it earlier. 3 AA 421. Arica told Appellant that if he didn't want her to leave Brodie with him, she would wake him

up and take him with her. Id. Appellant told her to just leave Brodie at home. Id. Arica was gone for approximately an hour. 3 AA 422. When Arica got home, she put the groceries away, took a bath, and went to bed. 3 AA 424–25. At approximately 1:00 a.m. the next morning, June 15th, Arica woke up and noticed Appellant walking into their bedroom. 3 AA 425–26. Appellant told her that he went to use Brodie's bathroom and it stunk and he thought Brodie had thrown up. 3 AA 426. Arica immediately got up to check on Brodie. Id. When she went into Brodie's room Arica could smell vomit and saw that Brodie was covered in vomit. Id. She took him to the bathroom, where he threw up again. Id. Brodie told Arica that his head hurt. 3 AA 428. Arica cleaned Brodie up, laid him down on the couch in the living room, and laid next to him for a short time until Brodie drifted off to sleep. 3 AA 427. After Brodie fell asleep, Arica went back to bed. 3 AA 428. Sometime in the early morning when it was still dark outside, Appellant carried Brodie into the bedroom and laid him next to Arica. 3 AA 429. When Arica woke up around 8:50 a.m. she began rubbing Brodie's back. 3 AA 429–30. As she was rubbing his back, Arica noticed that he was cold to the touch. 3 AA 430. Arica jumped up out of bed and ran around the bed to face Brodie, whose eyes were open but not moving. Id. At that point, Arica called 911. Id. Brodie was pronounced dead at 11:10 a.m. 2 AA 241.

Clark County Coroner's Office Medical Examiner Dr. Lisa Gavin performed an autopsy on Brodie on June 16, 2011. 2 AA 247. The autopsy revealed Brodie had

suffered fatal internal injuries along with several external injuries. 2 AA 251–80. Ultimately, Dr. Gavin determined Brodie died from blunt force trauma to his head and abdomen resulting in a transected duodenum and acute peritonitis. 2 AA 277, 280. Dr. Gavin ruled Brodie's death a homicide. Id.

SUMMARY OF THE ARGUMENT

Appellant argues that his counsel was ineffective and underqualified. However, these claims are bare, unsupported, and belied by the record. First, Appellant claims that counsel was ineffective for not objecting to the jury instructions. This claim fails because the jury instructions were correct, and even if there was error, the State only argued felony murder by child abuse and there was only evidence of abuse. There was no evidence or argument of neglect.

Next, Appellant claims that counsel was underqualified to represent him. However, this is belied by the record. Within this claim, Appellant argues that he was not aware that the Public Defender's Office could be appointed. This is also belied by the record because Appellant has an extensive criminal history, so he is likely aware of this availability. Further, he requested the retained counsel.

Lastly, Appellant contends that appellate counsel was ineffective for failing to raise an argument on appeal about the jury instructions. Again, this claim fails because the jury instructions were correct, and the State only argued felony murder by child abuse—not neglect, so there is no reasonable probability that the claim

would have succeeded on appeal. Thus, this Court should affirm the denial of the petition for writ of habeas corpus.

ARGUMENT

I. APPELLANT HAD EFFECTIVE COUNSEL

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

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

the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

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

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

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that

the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 656 n.19, 104 S. Ct. 2039, 2045 n.19 (1984).

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

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial

would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687–89, 694, 104 S. Ct. at 2064–65, 2068).

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

A. Trial counsel was not ineffective for failing to challenge jury instructions

Trial counsel was not ineffective for failing to challenge jury instructions because the State's theory of the case, and all argument and evidence presented, demonstrated that Appellant willfully, intentionally, and directly killed Brodie via blunt-force trauma. The district court found the following: 1) throughout the case,

the State's theory of death was that the child died by child abuse, and there is nothing in the record indicating neglect; and 2) the jury instructions did mirror the evidence, the State's theory throughout the case, and the evidence that came out during the trial. 6 AA 1006, 1017.

Appellant attempts to analogize the instant case to the unpublished Nevada Supreme Court case Thompson v. State, 2016 Nev. Unpub. LEXIS 79, *2 2016 WL 315216 (Nev. 2016), and a published case, Labastida v. State, 115 Nev. 298, 986 P.2d 443 (1991). AOB 15–18. These cases, while facially similar, are inapplicable because the issues raised in those cases do not apply in Appellant's case.

In Labastida, the Court held that "we are not willing to read NRS 200.030(1)(a) so as to define first degree murder to include a murder which is perpetrated by means of child neglect." Labastida, 115 Nev. at 303, 986 P.2d at 446. Additionally, the Court found that because the jury did not convict Labastida of child abuse causing substantial bodily harm, "the evidence presented below simply [did not] justify an assumption that the jury could have found Labastida guilty of committing an act or acts with the intent to cause the child pain or suffering and at the same time acquitted her of willfully causing the child to suffer physical pain or mental suffering, either directly or by aiding and abetting Strawser." Id. at 304, 986 P.2d at 447. In essence, the error committed allowed for the possibility that the jury could have convicted Labastida of felony murder by child abuse when they only

found that she committed child neglect, as evidenced by their acquittal on the child abuse causing substantial bodily harm charge. The Thompson Court assigned the same error, specifically addressing that "[b]ecause of the State's argument, it is unclear whether the jury convicted Thompson of first-degree felony murder for conduct prohibited by the felony murder statute or for conduct merely prohibited by NRS 200.508." Thompson, 2016 Nev. Unpub. LEXIS at *5.

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

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

1 AA 18.

During Opening Statements, the State argued that:

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

2 AA 207, 209–10.

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

> "The elements are listed here, somewhat similar as to the child abuse charge. The defendant willfully caused blunt force trauma in some unknown manner -- same idea as with the other count -- to Brodie's abdomen. This one resulted in his death.
>
> As I stated previously, *it doesn't matter what the defendant intended when he beat Brodie. It only matters he intended to beat him. If he killed Brodie when he beat him, causing his death, and it was unintentional, he didn't want him to die, it doesn't matter for purposes of murder by child abuse.* You beat a kid, you run the risk. Malice is implied. A malignant and abandoned heart is implied. You beat a kid, you run the risk of killing him, first degree murder. "
>
> …
>
> "So with that said, we know that the car accident or fender bender means nothing here. It wasn't an accident. We know that the nature, severity and extent of those injuries indicate they were caused by someone else.
>
> We know it wasn't the Power Wheels incident. That's an accident, right? Well, it's not an accident what happened here. Those are eliminated for you. You don't have to worry about that.
>
> Most importantly in my opinion is the Bambam injuries are ruled out. Bambam injuries are inherently accidental. If this is a kid running around banging his head on stuff and banging his body on stuff, those are accidents. That's ruled out. This was homicide. You don't have to worry about that."
>
> …
>
> "And most importantly, you can't ignore those symptoms when we're talking about timing of the injuries. You can't ignore those. That's common sense. This kid had a transected internal organ, completely severed internal organ. If you believe that he didn't show symptoms almost immediately after that, we disagree completely. That is a little boy with an internal injury so severe that it's only seen or usually seen in major car accidents, fatal car accidents. He's showing symptoms almost immediately after that injury's inflicted."
>
> …
>
> "Again I'll highlight for count two, the substantial bodily harm, who was alone with him during the operative time period? The defendant.

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

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

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

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

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

Those injuries. Not accidental. Not inflicted by Arica.

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

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

5 AA 871–72, 874, 880–81 (emphasis added).

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

"Now, [Brodie's] body tells you that he was the victim of significant physical abuse over a period of time. Now we focused

somewhat unfairly so on two injuries, the injuries to the head and the injuries to the abdomen. But he has a lot more injuries. And the most compelling evidence in this case and I would submit to you simply uncontroverted is the distinction between Bambam injuries and *non-accidental physical abuse*.

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

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

…

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

…

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

5 AA 894, 899–900 (emphasis added).

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

that Appellant willfully inflicted a physical injury of a non-accidental nature to Brodie, a child under the age of 18 years. Therefore, the State argued precisely the elements of felony murder child abuse.

Counsel was not ineffective for failing to challenge the jury instructions at trial because there was no evidence that supported a finding that Appellant had committed child neglect – only child abuse. As Appellant states, "[b]oth medical experts argued that the injury was not accidental." 5 AA 959.

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

Thus, Appellant cannot demonstrate that counsel's actions fell below an objective standard of reasonableness nor prejudice, so Appellant's claim should be denied.

B. Appellant's remaining claims of ineffectiveness are unsubstantiated

Appellant claims that his counsel was "unqualified." AOB 19. Appellant also claims that he was not informed that the Public Defender's office could be appointed. Id. Appellant's vague assertions that trial counsel was ineffective because she was "not qualified" are "bare" and "naked" assertions fit only for summary dismissal. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Further, Appellant does not cite to the record to show where counsel was allegedly unqualified. Mazzan v. Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000) ("Contentions unsupported by specific argument or authority should be summarily rejected on appeal.")

Additionally, these claims are belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. A review of the court filings demonstrate that counsel argued, before, during, and after trial, effectively on behalf of her client. Also, Appellant exercised his qualified right to choose counsel. Ryan v. Eighth Judicial Dist. Ct., 123 Nev. 419, 426, 168 P.3d 703, 708 (2007).

Appellant's claims regarding defense counsels' interactions with each other are unsupported by evidence, and do not require relief. AOB 19–20. They certainly do not demonstrate ineffectiveness by a preponderance of the evidence. Means, 120

Nev. at 1012, 103 P.3d at 33. Even if Nadia Von Magdenko were deficient in any way—which the State disputes entirely—then at worst she was supported by attorney Steve Altig, who was present through trial and who, according to Appellant, provided effective counsel. AOB 21. Appellant, therefore, cannot demonstrate prejudice because he was represented at trial by at least one attorney who he admits was not ineffective.

The district court found that Appellant chose to retain counsel so he cannot argue now that more qualified counsel could have been appointed. 6 AA 1006, 1018. The court had canvassed Appellant about whether he wanted to retain Nadia Von Magdenko and Appellant confirmed that he did. Id. Appellant had an extensive criminal history, which made him aware that a Public Defender could be appointed. Id.

Further, Appellant claimed below that the Nevada Supreme Court, in its Order of Affirmance, was critical of counsel's performance because counsel "opened the door" to repeated use of autopsy photos. 5 AA 959. This claim is belied by the record. Hargrove, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "[T]he contested images, both below and on appeal, depict Brodie's external injuries." 5 AA 938. The Court first rejected Appellant's argument because the photos "had a high probative value." 5 AA 939. Second, because the photos were highly probative, "they would need to be exceedingly gruesome for the district court to have abused its discretion

in admitting them." 5 AA 940. Nor was the Court in any way critical of trial counsel's performance. Appellant's claim is, therefore, wholly unsupported and belied by the record.

In denying the petition, the district court highlighted that this Court already decided that the autopsy photographs were more probative than prejudicial. 6 AA 1007, 1019. The court found that the photographs were highly relevant to the State's case and in determining when certain injuries happened. Id.

Therefore, because Appellant's claims are vague, unsupported, and belied by the record, Appellant's claims should be denied.

C. Appellant has not demonstrated ineffectiveness of appellate counsel

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

The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if

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

Appellant's sole claim of ineffectiveness of appellate counsel appears to be that appellate counsel did not raise the jury instruction issue. AOB 18. The district court found that there is no showing that the appeal outcome would have been any different if other issues had been raised and found the argument meritless. 6 AA 1006–07. As argued in Section I A, supra, there was no reason to raise the issue because it was unlikely to succeed on appeal. Counsel cannot be ineffective for failing to make futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Thus, Appellant's claim that appellate counsel was ineffective should be denied.

CONCLUSION

Based on the foregoing, the State respectfully requests that the Denial of the Petition for Writ of Habeas Corpus be AFFIRMED.

/ / /

/ / /

Dated this 24th day of December, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 6,256 words and 24 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 24th day of December, 2019.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 24th day of December, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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