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 REPLY BRIEF**

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MEMORANDUM OF POINTS AND AUTHORITIES

1. Failure to Object to Improper Jury Instructions

In Appellant's Opening Brief to this Court, he argued that trial counsel was ineffective for failing to challenge jury instructions that permitted a finding of guilt for felony murder by child neglect in violation of *Labastida v. State*, 115 Nev. 298, 302-03, 986 P.2d 443, 446 (1999). Appellant also pre-emptively addressed the State's argument, originally raised in District Court ,that "no such error was possible because the State never argued that Defendant could have allowed Brodie to die through neglect" (Appellant's Opening Brief, 16). In responding to this argument, Appellant noted that the jury is advised and admonished several times that the jury instructions provided to them – not the closing argument made by the State – is the governing law in this case, and therefore the State's actual argument made does not obviate the error of a jury instruction that permitted a finding of guilt on the improper basis of neglect.

In their Answering Brief, the State addressed Appellant's arguments by raising the exact same argument raised in District Court – "In the instant case, no such error was possible because the State never argued that Appellant could have allowed Brodie to die through neglect" (Respondent's Answering

Brief, 16). However, as noted previously, the actual contents of the State's argument are not relevant when the jury is given an instruction that permits them to find Appellant guilty based on neglect. Although the State assumes that the jury found him guilty based on their theory of the case, this is pure speculation and conjecture.

To support their position, the State factually differentiates *Labastida* from the instant case. In *Labastida*, it is true that the jury acquitted the defendant of child abuse, but then found him guilty of felony murder, thereby implying that he was found guilty of murder under a theory of neglect. However, from this case the Nevada Supreme Court made a *universally applicable* rule of law that the jury instruction given was facially improper because felony murder cannot be accomplished by child neglect.

Additionally, the State's argument (that no error exists because the State did not argue neglect) was directly rejected in *Thompson v. State*, No. 65538, 2016 Nev. Unpub. LEXIS 79 (Jan. 22, 2016). The State's Answering Brief includes one quotation from *Thompson*, that "[b]ecause of the State's argument, it is unclear whether the jury convicted Thompson of first degree felony murder for conducted prohibited by the felony murder statute or for

conduct merely prohibited by NRS 200.508" (State's Answering Brief, 16). However, this quotation is misleading and out of context.

Initially, the quotation makes it appear as though *Thompson* involved arguments of both child abuse and neglect, and therefore it was unclear on which basis the jury convicted him. To the contrary, the argument in *Thompson* which created the error was not the State's discussion of abuse versus neglect, but rather the reference to the improper jury instruction itself. "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**." *Thompson*, No. 65538 (2016) (emphasis added).

In *Thompson*, as in this case, the State only sought to convict on the basis of abuse. It was the State's reference to the improper jury instructions – not the State's theory of abuse or neglect – that resulted in error and reversal. The same error occurred in this case. Like in *Thompson*, the State argued only a theory of abuse but emphasized "the jury's ability to find Thompson guilty of felony murder by child abuse under the erroneous language contained in instructions" 7 and 10. Thus, even assuming a factual difference between the instant case and *Labastida* would preclude application of *Labastida's* rule of

law, there is very little difference between this case and *Thompson*, which also applied the rule of law in *Labastida* and also resulted in reversal.

In response to the prejudice prong on this point, the State argues that "[h]ad counsel challenged the jury instructions, and had those instructions replaced the instructions given, Appellant would have still been found guilty" (State's Answering Brief, 20). This, too, is pure speculation and conjecture. Appellant's prejudice is apparent in his conviction that was derived from a jury instruction which the Nevada Supreme Court has ruled is improper on its face and grounds for a new trial. Appellant remains entitled to, and would have been granted, a new trial on this basis.

In summation, trial counsel was ineffective for failing to object to the improper jury instructions used by the State permitting a finding of guilt for felony murder based on either abuse or neglect. The State does not oppose the impropriety of the instructions themselves, but rather only argues the error is harmless because the State only argued for a conviction based on abuse. However, the mere assumption that the jury agreed with the State's theory remains only an assumption, as the jury was given two avenues to convict Appellant and it will remain unknown if even one juror convicted Appellant on the improper basis of neglect in the event he did not believe Appellant was

abusive. This potential for an erroneous conviction is what led to a reversal in *Thompson* under very similar facts, and it would have been basis for a reversal here. For this reason, appellate counsel is similarly ineffective for failure to raise this matter on direct appeal.

2. Ineffective and Unqualified Trial Counsel

Here, with all due respect to the State, the Answering Brief would seemingly take an opinion and base it as a fact. Specifically, the State argues that Appellant's trial counsel was effective because "a review of the court filings demonstrate that counsel argued, before, during, and after trial, effectively on behalf of her client" (State's Answering Brief, 21). Appellant would disagree with the State's opinion on this point, and contends that Appellant's first-chair trial counsel was in fact not effective.

Again, on this point the State also raises the same arguments that were raised in the District Court. In Appellant's Opening Brief, he argued that the mere physical presence of "at least one attorney" who was qualified does not alleviate the ineffective representation of his first-chair counsel during four-fifths of the proceedings. The law requires effective assistance of counsel during the entirety of the trial process, not only during certain portions where

stand-by counsel assumed first-chair duties. In response, the State again argues that "Appellant, therefore, cannot demonstrate prejudice because he was represented at trial by at least one attorney who he admits was not ineffective" (State's Answering Brief, 22).

Additionally, the State claims that "Appellant had an extensive criminal history, which made him aware that a Public Defender could be appointed." Aside from also being entirely speculative regarding Appellant's subjective knowledge of the legal system, it also misses the point – not that a public defender could be appointed, but that he would be appointed an experienced attorney from a dedicated team that specializes in homicide cases.[1]

Lastly, the State failed to address several facets of Appellant's argument raised in his Opening Brief. The State simply notes that Appellant was canvassed regarding his choice of counsel prior to the commencement of trial; however, the State does not address the numerous instances where Ms. Von Magdenko was ineffective during the trial.

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[1] In the State's Answering Brief, they also raise an argument that appears to be copied from the District Court brief regarding this Court's Order of Affirmance and opening the door to autopsy photos. However, this is a response to a non-existent argument, as Appellant never raised nor mentioned this point in his Opening Brief to this Court, and therefore Appellant will not address this portion of the State's response.

The State fails to address Appellant's contention that Ms. Von Magdenko was ineffective for asserting inconsistent defenses in her opening statements, and defenses inconsistent with even her own expert witness; the State fails to address how Ms. Von Magdenko was ineffective for failing to object when advised to by Mr. Altig; the State fails to address how Ms. Von Magdenko was ineffective for being unprepared and unable to conduct cross examination of the lead detective in this case; and the State fails to address how Ms. Von Magdenko was ineffective for being unprepared and unable to conduct the closing arguments.

Because the State's Answering Brief seems to be only a copy of the arguments made in District Court, numerous portions of Appellant's Opening Brief remain unopposed. As such, Appellant requests this Court treat the unopposed assertions of ineffectiveness as a confession of error. "We have also determined that a party confessed error when that party's answering brief effectively failed to address a significant issue raised in the appeal." *Polk v. State*, 126 Nev. 180, 185, 233 P.3d 357, 360 (2010) (citing *Bates v. Chronister*, 100 Nev. 675, 681–82, 691 P.2d 865, 870 (1984) (treating the respondent's failure to respond to the appellant's argument as a confession of error); *A Minor v. Mineral Co. Juv. Dep't*, 95 Nev. 248, 249, 592 P.2d 172, 173

(1979) (determining that the answering brief was silent on the issue in question, resulting in a confession of error); *Moore v. State*, 93 Nev. 645, 647, 572 P.2d 216, 217 (1977) (concluding that even though the State acknowledged the issue on appeal, it failed to supply any analysis, legal or otherwise, to support its position and "effect[ively] filed no brief at all," which constituted confession of error)).

Respondent argues throughout the pleadings that Appellant is not entitled to relief because he only presented "bare" and "naked" allegations (State's Answering Brief, 10, 14, 21). However, claims of ineffective assistance of counsel can be difficult to substantiate within the limited box of information that is "on the record," which is precisely why an evidentiary hearing is necessary. In this case, many of the claims of ineffective assistance *are* substantiated on the record, such as the instances in which Mr. Altig had to step out of his role as stand-by counsel to assume first-chair duties. On the other hand, the qualifications and preparedness of Ms. Von Magdenko are topics that can only be fully explored through an evidentiary hearing.

Had there been an evidentiary hearing, for example, Mr. Altig would have been able to inform the District Court that he was asked to take over the cross examination of the lead detective *the morning of* his testimony; he would

have stated that Ms. Von Magdenko actually asked him to do cross examination of another significant witness less than *two hours* before his testimony, which he was unable to do and thereby forced Ms. Von Magdenko to conduct a cross examination she was unprepared for; that Mr. Altig actually expressed his concerns to the State twice during the trial regarding Ms. Von Magdenko's effectiveness; that Mr. Altig advised Ms. Von Magdenko at least ten separate times to object, which she ignored; and that Mr. Altig informed Ms. Von Magdenko prior to trial that her expert did not support her defense theory of an accidental injury, yet Ms. Magdenko asserted this defense anyway. Lastly, an evidentiary hearing would fully articulate how Ms. Von Magdenko not only contradicted her own expert witness, but how she failed to recognize that both her expert witness and the State's expert witness each provided a time range for when the fatal blow was inflicted on Brodie, and the only overlap in time between the two experts was a period when Brodie was alone with Arica Foster, not Appellant.

To conclude, Appellant raised numerous instances of ineffective assistance of counsel, with the vast majority of them being unopposed or unaddressed in the State's Answering Brief. At the very minimum, Appellant is entitled to an evidentiary hearing to further articulate the instances in which

trial counsel was ineffective, and how those instances prejudiced him by resulting in an unsound conviction. Appellant is facing life without the possibility of parole; he is entitled not only to a fair trial, but the basic due process protections that would enable him to substantiate his claims that his conviction is otherwise improper.

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 1 day of February, 2019.

MAYFIELD GRUBER & SHEETS
Respectfully Submitted By:

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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 2,468 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 1 day of February, 2019.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 1 day of February, 2019, I served a true and correct copy of the Opening Brief to the last known address set forth below:

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