Case No. 67380

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAZEN ALOTAIBI, Appellant, vs. THE STATE OF NEVADA, Respondent.	CASE NO. 67380 District Court Case No.: C-13-287173-1 DEPT. XXIII

On Appeal from a Final Judgment of Conviction in a Criminal Case of the Eighth Judicial District Court of the State of Nevada, The Honorable Stefany Miley, District Judge

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons also must be disclosed pursuant to in NRAP 26.1(a). No corporate of other entities are nongovernmental parties in this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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JURISDICTIONAL STATEMENT

A.
Supreme Court

This Court has jurisdiction pursuant to NRS 177.015(3) in that this is an appeal from a final judgment in a criminal case. This Court also has jurisdiction pursuant to NRS 177.015(1)(b) to review the District Court's denial of Defendant's Motion for New Trial.

B.
Timeliness of Appeal

Written judgment of conviction was entered by the District Court in this case on February 5, 2015. Defendant filed notice of appeal that same day, February 5, 2015. Therefore, pursuant to NRAP 4(b)(1)(A), this appeal is timely brought.

C.
Final Order

This is an appeal from a final judgment of conviction in a criminal case.

ROUTING STATEMENT

This case is presumptively retained by the Supreme Court pursuant to NRAP 17(b)(1) in that this is a direct appeal from a judgment of conviction in a criminal case based on a jury verdict involving convictions for category A and B felonies.

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STATEMENT OF ISSUES PRESENTED

The following issues are presented for review:

I.

Whether the District Court should have granted Defendant a new trial on those counts of the Information[1] on which he was convicted of Sexual Assault With A Minor Under Fourteen Years Of Age (Counts 3 and 5) based upon its failure to instruct the jury regarding the lesser-included offense of Statutory Sexual Seduction?

II.

Whether Defendant was deprived of effective assistance of counsel at trial regarding those counts of the Information on which he was convicted of Sexual Assault With A Minor Under Fourteen Years Of Age (Counts 3 and 5), as shown by the trial court record, based upon the opposition of his trial counsel to a jury instruction regarding the lesser-included offense of Statutory Sexual Seduction?

III.

Whether the District Court should have granted Defendant a new trial on

...

[1] An Information was originally filed in this case on February 4, 2013. It is reproduced in Volume I of the Appellant's Appendix at pages 1-5. An Amended Information was filed on October 14, 2013. It is reproduced in Volume I of the Appellant's Appendix at pages 6-9. And a Second Amended Information was filed on October 18, 2013. It is reproduced in Volume I of the Appellant's Appendix at pages 10-13. References herein to "the Information" refer to the Second Amended Information, pursuant to which this case was tried in the District Court.

those counts of the Information on which he was convicted of the specific intent offenses of Burglary (Count 1), First Degree Kidnapping (Count 2), Lewdness With A Child Under The Age Of 14 (Counts 7 and 8), and Coercion (Sexually Motivated) (Count 9) based upon the post-trial recantation of trial testimony by prosecution witness Rashed Alshehri?

IV.

Whether Defendant was deprived of effective assistance of counsel at trial regarding those counts of the Information on which he was convicted of the specific intent offenses of Burglary (Count 1), First Degree Kidnapping (Count 2), Lewdness With A Child Under The Age Of 14 (Counts 7 and 8), and Coercion (Sexually Motivated) (Count 9), as shown by the trial court record, based upon the failure of his trial counsel to interview prosecution witness Rashed Alshehri prior to trial and thereby contemporaneously apprehend the falsity of Alshehri's (subsequently-recanted) trial testimony on behalf of the State?

STATEMENT OF THE CASE

A.
Nature of the Case

This is an appeal from a final judgment of conviction in a criminal case as to several offenses charged by Information.

...

B.
Course of Proceedings and Disposition Below

On October 18, 2013, Defendant/Appellant Mazen Alotaibi was charged by a Second Amended Information with the following offenses, all alleged therein to have been committed on or about December 31, 2012: Count 1—Burglary (Category B Felony—NRS 205.060); Count 2—First Degree Kidnapping (Category A Felony—NRS 200.310, 200.320); Counts 3 and 4 —Sexual Assault With A Minor Under Fourteen Years of Age (Category A Felony—NRS 200.364, 200.366); Count 4 6, and 8—Lewdness With A Child Under The Age Of 14 (Category A Felony—NRS 201.230); and Count 9—Coercion (Sexually Motivated) (Category B Felony—NRS 207.190, 207.193), to which charges Defendant entered pleas of not guilty. (AA Vol. I pp. 10-13).[2]

Trial began in the Eighth Judicial District Court on October 10, 2013 before the Honorable Stefany Miley and a jury. On October 23, 2013, verdicts were returned finding Defendant guilty on Counts 1, 2, 3, 5, 7, 8, and 9 and acquitting him on Counts 4 and 6. (AA Vol. IV pp. 952-955).

On May 27, 2014, Defendant filed a Motion for New Trial and/or for an Evidentiary Hearing based upon (1) the recantation of trial testimony by State's witness Rashed Alshehri; and (2) the failure of the District Court to provide the

[2] Citations to the Appellant's Appendix are herein designated "AA."

jury with a lesser-included offense instruction regarding Statutory Sexual Seduction concerning those counts of the Information in which Defendant was charged with Sexual Assault of A Minor Under Fourteen Years Of Age. On July 16, 2014, the State filed its Opposition to that motion. And on August 1, 2014, Defendant filed his Reply thereto. On November 7, 2014, the District Court heard oral argument on the motion. (AA Vol. IV pp. 956-997). And on November 18, 2014, the District Court filed its Findings of Fact, Conclusions of Law and Order and Decision, denying the motion. (AA Vol. V pp. 998-1012).

On January 28, 2015 Defendant was sentenced with respect to counts 1, 2, 3, 5, 7 and 8 of the Information, and the District Court entered oral Judgment of Conviction. (AA Vol. V pp. 1013-1025). Defendant was sentenced with respect to those counts of conviction as follows: Count 1 (Burglary): a maximum of 48 months of imprisonment with a minimum parole eligibility of 12 months; Count 2 (Kidnapping): a maximum of 15 years of imprisonment with parole eligibility after 5 years have been served, concurrent with Count 1; Count 3 (Sexual Assault of a Minor Under Fourteen Years of Age): life imprisonment with parole eligibility after 35 years of imprisonment have been served, concurrent with Count 2; Count 5 (Sexual Assault of a Minor Under Fourteen Years of Age): life imprisonment with parole eligibility after 35 years of imprisonment have been served, concurrent with Count 3; Count 7 (Lewdness with a Child Under 14 Years): life imprisonment

with parole eligibility after 10 years of imprisonment have been served, concurrent with Count 5; Count 8 (Lewdness with a Child Under 14 Years): life imprisonment with parole eligibility after 10 years of imprisonment have been served, concurrent with Count 7, with 758 days credit for time served. (AA Vol. V pp. 1013-1025).[3]

Defendant was further sentenced to serve a special sentence of lifetime supervision to commence upon release from any term of imprisonment, probation or parole; ordered to register as a sex offender in accordance with NRS 179D.460 within 48 hours after any release from custody; and ordered to pay restitution in the amount of $2,723.94, a $150.00 DNA analysis fee, and a $25.00 administrative assessment fee. (AA Vol. V pp. 1013-1025).

The District Court further ordered that before Defendant is eligible for parole, a panel consisting of the Administrator of Mental Health and Development Services of the Nevada Department of Human Resources or his designee; the Director of the Nevada Department of Corrections or his designee; and either a psychologist or a psychiatrist licensed to practice in the State of Nevada must certify that Defendant does not present a high risk to re-offend based on current accepted standards of assessment. (AA Vol. V pp. 1013-1025).

On February 5, 2015, the District Court filed its written Judgment of

[3] As a result of oversight, sentence was not imposed at the January 28, 2015 sentencing with respect to Count 9 (Coercion Sexually Motivated). So on February 2, 2015, Defendant was separately sentenced to time served with respect to that count.

Conviction. (AA Vol. V pp. 1026-1028). On that same day, February 5, 2015, Defendant filed his Notice of Appeal. (AA Vol. V pp. 1029-1031).

STATEMENT OF FACTS

On the night of December 30, 2012, the Defendant Rashed Alshehri and Mohammed Jafaari, rented a car and drove from Santa Monica, California to Las Vegas, Nevada to celebrate the New Year; arriving on the early morning of December 31, 2012 at around 2:00 A.M. (AA000528). After their arrival, they joined some local friends at a bar in the Palms Hotel & Casino ("the Palms") and began drinking alcoholic beverages. (AA000529; 000741).

The group remained at that bar at for two and a half hours. (AA000529). During that time, Defendant consumed numerous drinks of cognac and numerous double drinks of straight whiskey (with no mixer). (AA000529; 000741).

The group then went from the Palms to the Olympic Garden gentlemen's club ("Olympic Garden"), where they continued to drink alcoholic beverages; Defendant further consuming numerous drinks of cognac and numerous additional double drinks of a straight "dark liquor" (with no mixer). (AA000532-000533; 00741, 000743-000745).

By the time Defendant Mr. Alshehri, and Mr. Jafaari eventually left Olympic Garden, it was well after sun up. (AA000533-000534). And the testimony adduced at trial showed that the Defendant was by then extremely intoxicated.

Indeed, Rashed Alshehri, a witness for the State, testified at trial that when the three men left Olympic Garden, Defendant was "black out" drunk. (AA000533-000537).

However, Mr. Alshehri also testified that after he, Defendant and Mr. Jafaari left Olympic Garden, Defendant drove the group in their rental car to the Circus Circus Hotel & Casino ("Circus Circus"), where the men were staying; and that Defendant drove the vehicle competently and without incident. (AA000535, 000539).

Defendant, Mr. Alshehri, and Mr. Jafaari arrived at Circus Circus at about 7:00 A.M. (AA000087). Mr. Alshehri testified that Defendant was so drunk at this time that he was unable to walk normally. (AA000529, 000560-000562). And, consistent therewith, the District Court personally observed that "a surveillance video from Circus Circus . . . . showed the Defendant having difficulties walking around the hotel." (AA001007).

As the three men exited the elevator and proceeded toward their room on the sixth floor, they encountered 13 year old Anke ("A.J") Dang ("A.J."), who was then sitting alone on a couch in the sixth floor elevator lobby area. (AA00008, 000540). As the three proceeded toward their hotel room, A.J. voluntarily followed them; inquiring if they had any marijuana. (AA000541). A. J. then voluntarily followed Defendant, Mr. Alshehri and Mr. Jafaari into their hotel room

in pursuit of marijuana. (AA000090).

When Defendant told A.J. that they did have marijuana and that he was going to go outside the building to smoke some, A.J. voluntarily accompanied him out of the room and to the elevator in order to smoke marijuana with him. (AA000092).

A.J. testified at trial that as they were walking to the elevator, Defendant made overt sexual advances towards him. (AA000093). A. J. further testified that he thereafter continued to voluntarily accompany Defendant to the elevator, and thereupon voluntarily entered the elevator with him. (AA000093).

A. J. testified that, once inside the elevator, Defendant kissed him on the face and ear. (AA000093). He further testified that he thereupon continued to voluntarily accompany Defendant out of the building to an alley behind the hotel, in order to smoke marijuana with him. (AA000094). And he further testified that, in the alley, the two smoked marijuana together. (AA000094).

A.J. testified that he thereafter voluntarily accompanied Defendant back to the elevator; voluntarily entered the elevator with Defendant; and voluntarily accompanied Defendant back to the sixth floor and into Defendant's hotel room. (AA00097). And A. J. testified that he thereupon walked directly past Mr. Alshehri and Mr. Jafaari, who were then watching television in the immediately-adjacent sitting area, and immediately and voluntarily accompanied Defendant

directly into the interior bathroom. (AA000097).

It is undisputed that, inside the bathroom, A.J. performed oral sex on the Defendant, and that the Defendant then performed anal sex on A.J. (AA000100-000102).

A.J. testified at trial that Defendant physically forced him to engage in those acts against his will. (AA000889). However, he admitted at trial that he deliberately lied to police investigators when he also reported to them that, when the two returned to the sixth floor after smoking marijuana Defendant had likewise physically dragged him down the hallway; and physically forced him into his hotel room, and then into the interior bathroom, against his will. (AA000105-000106). Indeed, A. J. had initially acknowledged to hotel security personnel and testified at trial that he had willingly accompanied Defendant into his hotel room and then into the bathroom as well. (AA000102-000104).

Once inside the bathroom, A. J. did not cry out. (AA000342). And when he ultimately exited the bathroom, he made no complaint to Mr. Alshehri or Mr. Jafaari – who were then still present in the immediately adjacent sitting area watching television – that Appellant had allegedly subjected him to a forcible sexual assault or any other criminal offense. (AA000193).

A.J. ultimately reported to hotel security personnel that he had been assaulted. And Defendant was arrested by officers of the Las Vegas Metropolitan

Police Department ("LVMPD") shortly thereafter.

During a videotaped post-arrest statement to LVMPD detectives, Defendant admitted that he had indeed engaged in sexual conduct with A. J. Dang, and that he had penetrated A. J. both orally and anally. (AA000719). However, Defendant advised the officers that A.J. had agreed to engage in those sex acts with him in exchange for an additional quantity of marijuana and a sum of cash. (AA000095-000096).

Defendant did not testify at trial. However, the videotape of his entire post-arrest statement was offered by the prosecution, admitted into evidence by the District Court, and displayed to the jury.

Following the close of evidence, the District Court conducted a conference with counsel for Defendant and the State; and noting that evidence consistent with consent on the part of A. J. had been adduced, indicated that, if requested to do so by defense counsel, the court was inclined to provide the jury with a lesser-included offense instruction regarding Statutory Sexual Seduction concerning those counts of the Information in which Defendant was charged with Sexual Assault With A Minor Under Fourteen Years Of Age. (AA000649). However, Defendant's trial counsel expressly opted not to make that request; and indeed, affirmatively opposed the instruction. (AA000825-000826). And accordingly, the District Court declined to give it.

In its closing argument, the State expressly relied upon Mr. Alshehri's trial testimony that, after he and his companions had left Olympic Garden, Defendant had competently driven the rental car to Circus Circus as a basis for claiming that Defendant was not so intoxicated that he could not form the *mens rea* required for the specific intent crimes of Burglary, First Degree Kidnapping, Lewdness With A Child Under The Age Of 14, and Coercion (Sexually Motivated). (AA000880).

The jury returned verdicts of guilty on the charges of Burglary (Count 1), First Degree Kidnapping (Count 2), Sexual Assault With A Minor Under Fourteen Years of Age (Counts 3 and 5), two of the counts charging Lewdness With A Child Under The Age Of 14 (Counts 7 and 8), and Coercion (Sexually Motivated) (Count 9). (AA000907-000909). The jury acquitted Defendant on Counts 4 and 6, in which he was also charged with Lewdness With A Child Under The Age Of 14. (AA000908).

Subsequent to trial, State's witness Rashed Alshehri voluntarily came forward and signed a sworn affidavit recanting his trial testimony that Defendant had driven the rental car to Circus Circus; admitting that he had lied at trial when he so testified; and stating that, in truth and in fact, Defendant never drove the car at any time after he, Mr. Alshehri and Mr. Jafaari left Olympic Garden. (AA000060).

Defendant's trial counsel had not interviewed Mr. Alshehri prior to trial in

conjunction with any pre-trial defense investigation either personally or by and through a private investigator. Therefore, at trial, he did not contemporaneously apprehend that Mr. Alshehri was lying during his testimony on direct examination on behalf of the State with respect to his false assertions that the Defendant drove the car to Circus Circus on the morning of December 31, 2012, and was not so intoxicated as to be unable to drive the vehicle safely, competently and without incident. And as a result, defense counsel did not confront and cross-examine Mr. Alshehri at trial accordingly.

SUMMARY OF ARGUMENT

Defendant respectfully submits that, at trial, the District Court erred in failing to provide the jury with a lesser-included offense instruction regarding Statutory Sexual Seduction concerning those counts of the Information in which he was charged with Sexual Assault Of A Minor Under The Age Of Fourteen Years notwithstanding the opposition of Defendant's trial counsel thereto. Thus, he contends that such an instruction was mandatory in this case, and that the trial court was obligated to provide it *sua sponte*.

In support of that contention, Defendant respectfully submits that such a lesser-included offense instruction was sufficiently supported by evidence which would absolve the Defendant from guilt of the greater offense but would support a finding of guilt of the lesser offense; specifically, evidence consistent with both

consent and the capacity to consent on the part of A.J. Dang.

Accordingly, Defendant maintains that the District Court erred in denying his motion for a new trial on this basis concerning those counts of the Information on which he was convicted of Sexual Assault Of A Minor Under The Age Of Fourteen Years.

In the alternative, Defendant contends that by opposing the provision of the lesser-included offense instruction that the District Court was otherwise willing to give, his trial counsel failed to provide him with effective assistance. And he respectfully submits that this claim of ineffective assistance may properly be determined on direct appeal.

Defendant further respectfully submits that the District Court erred in denying his motion for a new trial on the basis of the post-trial recantation of materially false testimony State's witness Alsherhi that significantly undermined his intoxication defense to the remaining counts of the Information on which he was convicted of several specific intent crimes.

In the alternative, Defendant contends that his trial counsel further failed to provide him with effective assistance by having failed to interview or otherwise conduct any pre-trial investigation with respect to Mr. Alshehri. And he likewise contends that this claim of ineffective assistance may also properly be determined on direct appeal.

ARGUMENT

I.
THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL REGARDING THOSE COUNTS OF THE INFORMATION ON WHICH DEFENDANT WAS CONVICTED OF SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (COUNTS 3 AND 5) BASED UPON ITS FAILURE TO INSTRUCT THE JURY WITH RESPECT TO THE LESSER-INCLUDED OFFENSE OF STATUTORY SEXUAL SEDUCTION.

A.
Standard Of Review

"This court generally reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error." *Berry v. State,* 125 Nev. 265, 273, 212 P.3d 1085, 1091 (2009); *Brooks v. State,* 124 Nev. 203, 180 P.3d 657, 658–59 (2008); *Crawford v. State,* 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford* at 748, 585.

Defendant respectfully submits that, in this case, the District Court's decision not to provide the jury with a lesser-included offense instruction regarding Statutory Sexual Seduction as to those counts of the Information in which he was charged with Sexual Assault Of A Minor Under The Age Of Fourteen Years was an abuse of discretion because the provision of such an instruction was legally mandatory in this case; and therefore, that the decision of the District Court not to provide it exceeded the bounds of law.

B.
A Lesser-Included Offense Instruction Regarding Statutory Sexual Seduction Was Mandatory.

1.
Statutory Sexual Seduction Is A Lesser-Included Offense Of Sexual Assault Of A Minor Under Fourteen Years Of Age.

At the time of the alleged commission of the offenses charged in the Information the following pertinent provisions of the Nevada Revised Statutes ("NRS") were in force and effect:

> "**NRS 200.366 Sexual assault: Definition; penalties.**
> 1. A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or herself or another, or on a beast, ***against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct***, is guilty of sexual assault.
> . . . .
> 3. Except as otherwise provided in subsection 4, a person who commits a sexual assault against a child under the age of 16 years is guilty of a category A felony and shall be punished:
> . . . .
> . . . .
> (c) If the crime is committed against a child under the age of 14 years and does not result in substantial bodily harm to the child, by ***imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 35 years has been served.***"

(Emphasis added).

> "**NRS 200.364 Definitions.** As used in NRS 200.364 to 200.3784, inclusive, unless the context otherwise requires:
> . . . .

. . . .

. . . .

. . . .

. . . .

6. "Statutory sexual seduction" means:

(a) ***Ordinary*** sexual intercourse, anal intercourse, cunnilingus or fellatio committed by a person 18 years of age or older with a person under the age of 16 years; or

(b) ***Any other sexual penetration*** committed by a person 18 years of age or older with a person under the age of 16 years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of either of the persons."

(Emphasis added).

"**NRS 200.368 Statutory sexual seduction: Penalties.** Except under circumstances where a greater penalty is provided in NRS 201.540, a person who commits statutory sexual seduction shall be punished:

1. If the person is 21 years of age or older, ***for a category C felony as provided in NRS 193.130.***"

(Emphasis added).

"**NRS 193.130 Categories and punishment of felonies.**

1. Except when a person is convicted of a category A felony, and except as otherwise provided by specific statute, a person convicted of a felony shall be sentenced to a minimum term and a maximum term of imprisonment which must be within the limits prescribed by the applicable statute, unless the statute in force at the time of commission of the felony prescribed a different penalty. The minimum term of imprisonment that may be imposed must not exceed 40 percent of the maximum term imposed.

2. Except as otherwise provided by specific statute, for each felony committed on or after July 1, 1995:

. . . .

. . . .

(c) A category C felony is a felony for which a court shall sentence a convicted person to ***imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 5 years***. In addition to any other penalty, the court may

> impose a fine of not more than $10,000, unless a greater fine is authorized or required by statute."

(Emphasis added).

Accordingly, under the foregoing statutory scheme, a *consensual* sexual penetration by an adult of a minor under the age of 14 years *who is neither mentally nor physically incapable of resisting or understanding the nature of his or her conduct* (or who the accused reasonably does not perceive to be) constitutes the offense of Statutory Sexual Seduction – not the offense of Sexual Assault Of A Child Under the Age Of Fourteen Years. And in view of the considerably harsher mandatory minimum sentence of imprisonment for 35 years applicable to the latter offense – to which Defendant Alotaibi has been sentenced – the importance of this distinction cannot be overstated.

In *Robinson v. State,* 110 Nev. 1137, 881 P.2d 667 (1994), this Court, sitting *en banc*, held that, where the alleged victim of an adult offender is a minor under the age of 16 years, Statutory Sexual Seduction is a lesser-included offense of Sexual Assault. Therefore, the *Robinson* Court explained that the defendant "stand[ing] trial . . . on charges of sexual assault [of a minor under the age of 16 years] [wa]s entitled to an instruction on the lesser-included offense of statutory sexual seduction"; holding that "[t]he trial court erred when it refused to give the instruction on the lesser included-offense of statutory sexual seduction; accordingly, the judgment of conviction is reversed, and the case is remanded for a

new trial." [4]

2.

There Was Sufficient Evidence Consistent With Both Consent And The Capacity To Consent On the Part Of A. J. Dang To Require That A Statutory Sexual Seduction Instruction Be Given *Sua Sponte* Notwithstanding Defense Counsel's Objection.

As this Court made abundantly clear in *Rosas v. State*, 122 Nev. 1258, 1264-1265, 147 P.3d 1101, 1107 (2007): "In Nevada, a defendant is entitled to a jury instruction on a lesser-included offense ***if there is any evidence at all, however slight***, on ***any reasonable theory of the case*** under which the defendant might be convicted" of that offense" (emphasis added). And as this Court instructed in that case, this is true "***no matter how weak or incredible the evidence may appear to be***" (emphasis added). Thus, as this Court explained in *Rosas,* "if ***any*** evidence . . . lay[s] . . . a foundation, then a[ ] [lesser-included offense] instruction should be given – ***regardless of whether the defendant denies complicity***" (emphasis added). 122 Nev. at 1267, 147 P.3d at 1108. Nor is it "require[ed] [that] a defendant . . .

[4] Quite recently, while this appeal was pending, in *Van Horn v. State*, No. 63069, 2015 WL 4402655 (July 15, 2015) (Unpublished Disposition), a three-justice panel of this Court (composed of Justices Parraguirre, Douglas and Cherry) disagreed. However, there is no assertion by the *Van Horn* panel that its unpublished opinion in that case overrules the previous contrary published decision of the full Court in *Robinson.* Nor does the unpublished *Van Horn* panel opinion even cite *Robinson.* And under Nevada Supreme Court Rule ("SCR") 123, as an *unpublished* opinion, *Van Horn* "shall not be regarded as precedent." Nevertheless, the undersigned counsel for Defendant bring the unpublished panel opinion in that case to the attention of the Court pursuant to their duty of candor toward the tribunal under Nevada Rule of Professional Conduct 3.3(a)(2). Thus, *Van Horn* is not herein "cited as legal authority" in violation of the prohibition of SCR 123.

present evidence of . . . a lesser-included offense in order to receive a lesser-included jury instruction." Indeed, as this Court had previously explained in *Allen v. State,* 97 Nev. 394, 398, 632 P.2d 1153, 1155 (1981):

> In every criminal case, a defendant is entitled to have the jury instructed on any theory of defense that the evidence discloses, however improbable the evidence supporting it may be. ***It makes no difference which side presents the evidence,*** as the trier of the fact is required to weigh all of the evidence ***produced by either the state or the defense*** before arriving at a verdict. The test for the necessity of instructing the jury is whether there is any foundation in the record for the defense theory.

(Emphasis in original).

Thus, as the *Rosas* court instructed, the law does not "impos[e] on defendants the burden of presenting evidence or a theory of the case consistent with a lesser-included offense in order to obtain instruction on the offense." 122 Nev. at 1268, 147 P.3d at 1109. "

Moreover, as this Court held in the seminal case in this area of *Lisby v. State,* 82 Nev. 183, 187, 414 P.2d 592 (1966), if "there is evidence which would absolve the defendant from guilt of the greater offense . . . but would support a finding of guilt of the lesser offense . . . . [t]he instruction is ***mandatory, without request***" (emphasis added). *See also Davis v. State,* 110 Nev. 1107, 1115, 881 P.2d 657, 662 (1994) ("We have previously held that a jury instruction on a lesser included offense is 'mandatory' where 'there is evidence which would absolve the defendant from guilt of the greater offense or degree but would support a finding

of guilt of the lesser offense or degree'") (quoting *Lisby)*. Indeed, as the California Supreme Court held in *People v. Breverman,* 19 Cal. 4th 142, 154, 77 Cal. Rptr. 2d 870, 876, 960 P.2d 1094, 1101 (1998) with direct application to the case at bar: "The obligation to instruct on lesser included offenses exists ***even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given***" (emphasis added). (Citing *People v. Mosher* 1 Cal.3d 379, 393, 82 Cal. Rptr. 379, 461 P.2d 659 (1969); *People v. Graham* 71 Cal.2d 303, 319, 78 Cal. Rptr. 217, 455 P.2d 153 (1969)). *Accord, e.g., State v. Wall,* 212 Ariz. 1, 6, 126 P.3d 148, 153 (2006) ("the evidence in the record can be sufficient to ***require*** a lesser-included offense instruction ***even when the defendant employs an all-or-nothing defense*** . . . . Thus the defendant's use of an all-or-nothing defense did not prevent this court from ***requiring*** the lesser-included offense instruction because the evidence was sufficient to support it") (emphasis added).

As the California Supreme Court explained in *Breverman*:

> As we have said, insofar as the duty to instruct applies regardless of the parties' requests or objections, it prevents the "strategy, ignorance, or mistakes" of ***either*** party from presenting the jury with an "unwarranted all-or-nothing choice," encourages "a verdict ... no harsher ***or more lenient*** than the evidence merits" ([*People v.*]*Wickersham, supra,* 32 Cal.3d at p. 324, 185 Cal.Rptr. 436, 650 P.2d 311, italics added), and thus protects the jury's "truth-ascertainment function" ([*People v.*] *Barton, supra,* 12 Cal.4th 186, 196, 47 Cal.Rptr.2d 569, 906 P.2d 531). "These policies reflect concern [not only] for the rights of persons accused of crimes [but

> also] for the overall administration of justice." (*Wickersham, supra,* 32 Cal.3d at p. 324, 185 Cal.Rptr. 436, 650 P.2d 311.)

19 Cal. 4th at 155, 77 Cal. Rptr. 2d at 877, 960 P.2d at 1101(emphasis in original).

Indeed as this Court explained in *Rosas v. State*: a lesser-included offense instruction is required because of the 'substantial risk' that a jury will convict despite a failure to prove the charged offense if the defendant appears guilty of ***some*** offense." 122 Nev. at 1264, 147 P.3d at 1106 (emphasis added). *See Beck v. Alabama,* 447 U.S. 625, 633 (1980). That risk was undeniably present in this case. Particularly in view of the fact that Defendant himself admitted to engaging in fellatio and anal intercourse with A.J. during his videotaped post-arrest statement to police; thereby acknowledging that the threshold element of sexual penetration was conceded, and leaving only the issue of consent in dispute – the essential element distinguishing Statutory Sexual Seduction from the greater offense of Sexual Assault With A Minor Under Fourteen Years of Age.

However, here there was ample evidence consistent with consent on the part of A. J. Dang. The District Court expressly acknowledged as much. (AA000649). And the evidence showed that A.J. – then a teenager – was not the sort of naïve, unsophisticated, disabled or sheltered child who should be deemed legally incapable of consent.

On the morning in question, A.J. was wandering the halls of a Las Vegas hotel-casino unsupervised and admittedly in search of adult mischief. By his own

admission, immediately upon encountering them, he rather boldly initiated inquiry of Defendant and his other adult male companions – all of whom were total strangers to him – as to whether they had any marijuana, and solicited them to provide him with some.

According to his own testimony, A. J. willingly accompanied Defendant out of the building to smoke marijuana; willingly smoked marijuana with Defendant; and thereafter willingly accompanied Defendant back up to his hotel room, and directly into the interior bathroom – all after Defendant had kissed him on the face and neck and overtly indicated his desire to engage in sexual conduct with him. And evidence was introduced by the State in the form of Defendant's post-arrest statement to police (against his penal interest) that A.J. agreed to engage in sexual conduct with Defendant in exchange for more marijuana and a sum of money.

The evidence showed that, by his own admission, A. J. blatantly lied to police regarding his purported lack of consent and supposed subjection to physical force at the hands of the Defendant in other respects; falsely telling them that, upon their return to the sixth floor after smoking marijuana, Defendant physically forced him down the hotel hallway; into his hotel room; and then into the interior bathroom – all against his will. These false assertions of his subjection to physical force by Defendant were demonstrably refuted by hotel hallway video surveillance. And the credibility of A. J.'s further claim that he was likewise therein forced to

engage in sexual conduct against his will is concomitantly undermined by that admittedly deliberate mendacity on his part.

Once inside the bathroom, A. J. did not cry out for help even though he was aware that Mr. Alshehri and Mr. Jafaari were then present in the immediately adjacent sitting area just outside the bathroom door; and even when, after the passage of some time, Mr. Alshehri knocked on the closed bathroom door, asking the occupants what they were doing in there. And when he exited the bathroom, A. J. made no complaint to Defendant's companions that Defendant had just subjected him to unwanted sexual activity against his will.

Thus, here there was ample evidence adduced at trial to support a lesser-included offense instruction regarding Statutory Sexual Seduction. And therefore, based upon the foregoing authorities, the District Court was obligated to provide the jury with such instruction notwithstanding the objection of the Defendant's trial counsel.

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II.

THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL REGARDING THOSE COUNTS OF THE INFORMATION ON WHICH DEFENDANT WAS CONVICTED OF THE SPECIFIC INTENT OFFENSES OF BURGLARY (COUNT 1), FIRST DEGREE KIDNAPPING (COUNT 2), LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (COUNTS 7 AND 8), AND COERCION (SEXUALLY MOTIVATED) (COUNT 9) BASED UPON THE POST-TRIAL RECANTATION OF TRIAL TESTIMONY BY PROSECUTION WITNESS RASHED ALSHEHRI.

A.

Standard Of Review

This Court reviews a district court's decision to grant or deny a new trial in a criminal case based upon recantation of trial testimony by a material witness for abuse of discretion. *Domingues v. State,* 112 Nev. 683, 695, 917 P.2d 1364, 1373 (1996); *Callier v. Warden,* 11 Nev. 976, 990, 901 P.2d 619, 628 (1995).

B.

Defendant Is Entitled To A New Trial Based Upon The Recantation Of Alshehri's Trial Testimony.

As this Court explained in *Riley v. State*, 93 Nev. 461, 462, 567 P.2d 475, 476 (1977): "the truth seeking function of the trial is corrupted by . . . perjury whether encouraged by the prosecutor or occurring without his knowledge . . . . [I]f the character of material evidence is false, due process inevitably is denied the accused." Thus, a new trial may be granted in a criminal case based on newly discovered evidence with respect to witness recantation of trial testimony if the

defendant demonstrates each of the following elements: (1) that the trial testimony of a material witness was false; (2) that the evidence showing that false testimony was introduced at trial is newly discovered; (3) that the evidence showing that false testimony was introduced at trial could not have been discovered and produced for trial even with the exercise of reasonable diligence; and (4) that it is probable that had the false testimony not been admitted, a different result would have occurred at trial. *Callier v. Warden, Nevada Women's Correctional Center*, 111 Nev. 976, 990, 901 P.2d 619, 627-28 (1995). Here, each of the required factors obtains.

1.

Alshehri's Trial Testimony Was Materially False.

This Court should conclude that Alshehri's recantation of his trial testimony is credible. To begin with, Alshehri had no prior relationship with Defendant. In fact, as set forth in his affidavit, at ¶ 20, Alshehri only knew Defendant for two days prior to the event in question. Thus, this is not a case where the recanting witness shares a familial or otherwise close relationship with the defendant, creating a possible ulterior motive to recant damaging trial testimony against him. *See, Callier*, 111 Nev. at 989, 901 P.2d at 628 (where recanting witnesses shared familial relationship with defendants).

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In this case, Alshehri had nothing to gain by recanting his trial testimony.

Furthermore, Alshehri has provided a credible explanation as to why he testified falsely with respect to Defendant having driven the vehicle that morning. As set forth in his affidavit, at ¶¶ 11, 12, and 18, he was afraid when told by police that he might be arrested if he was not completely cooperative to that effect. As a Saudi Arabian citizen living in the United States on an F-1 visa and studying on a scholarship at a Texas college, Alshehri was frightened that such a development would have potentially disastrous consequences for him. (Alshehri affidavit at ¶ 12). Thus, Alshehri was fearful that if he did not testify at trial as to what he had originally told the prosecution in pre-trial preparation, even if untruthful, he would be arrested. (Alshehri affidavit at ¶ 18).

2.

The Evidence Showing That Alshehri's Trial Testimony Was False Was Newly Discovered.

It is clear that the evidence showing that false evidence was introduced at trial is newly discovered because it is undisputed that Mr. Alshehri did not seek to recant his testimony and make that fact known until after the trial had already concluded. And as set forth *infra*, to the extent that evidence of the falsity of Alshehri's trial testimony could have been discovered and produced at trial with the exercise of reasonable diligence, Defendant respectfully submits that failure to do so was attributable to the ineffective assistance of his trial counsel.

3.

It Is Probable That Had Alshehri's False Testimony Not Been Admitted, A Different Result Would Have Occurred At Trial.

Each of the following offenses of which the Defendant was convicted in this case is a specific intent crime: Burglary (NRS 205.060) (Count 1) (*Bolden v. State,* 121 Nev. 908, 124 P.3d 191 (2005); *Crawford v. State,* 121 Nev. 744, 121 P.3d 582 (2005); *Sheriff v. Stevens,* 97 Nev. 316, 630 P.2d 256 (1981)); First Degree Kidnapping (NRS 200.310, 200.320) (Count 2) (*Rosas v. Donat,* No. 3:06-cv-00387-LRH, 2012 WL 1016460 (D. Nev. March 26, 2012); *Bolden v. State,* 121 Nev. 908, 124 P.3d 191 (2005); *United States v. Fei Lin,* 139 F.3d 1303 (9th Cir. 1998)); Lewdness With A Child Under The Age Of 14 (NRS 200.364, 200.266) (Counts 7 and 8) (*State v. Catanio,* 120 Nev. 1030, 102 P.3d 588 (2004)); and Coercion (Sexually Motivated) (207.190, 207.193, 175.547) (Count 9) (*See United States v. Kozminski,* 487 U.S. 931 (1988); *Garner v. State,* 116 Nev. 770, 6 P.3d 1013 (2000)).

Accordingly, the defense of voluntary intoxication is applicable to each and every such allegation. *Ewish v. State,* 110 Nev. 221, 871 P.2d 306, 311 (1994) (generally); *Vincent v. State,* 97 Nev. 169, 625 P.2d 1172 (1981) (Burglary); *Garner v. State,* 116 Nev. 770, 6 P.3d 1013 (2000); *Villafuerte v. Lewis,* 75 F.3d 1330 (9th Cir. 1996) (Kidnapping); *Fountain v. Yates,* 238 Fed. Appx. 213 (9th Cir.

2007) (Lewdness With A Child Under The Age Of 14). Indeed, as the Ninth Circuit explained in *United States v. Martinez-Martinez*, 369 F.3d 1076, 1083 (9th Cir. 2004): "The defense of intoxication, even if that intoxication was voluntary, has been recognized . . . as a valid defense to the mens rea of specific intent." And accordingly, NRS 193.220 provides, in pertinent part, that "whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of the person's intoxication may be taken into consideration in determining the purpose, motive or intent."

Alshehri's recantation relates directly to the issue of the Defendant's *level* of intoxication at the time of his alleged commission of the specific intent offenses charged in the Information. And the State concedes that "***levels*** of intoxication can affect the ability to form the intent required for the crime of Lewdness with a Minor under Fourteen Years of Age . . ." State's Opposition to Motion for New Trial and/or for an Evidentiary Hearing p. 4, ll. 23-24 (emphasis added).

Defendant's defense to the specific intent offenses charged against him was that he was too intoxicated to form the requisite mental state for each of those offenses. State's Witness Alshehri directly undermined Defendant's defense of voluntary intoxication with respect to the specific intent crimes with which he was charged when he falsely testified at trial that after leaving Olympic Garden,

Defendant drove himself, Mr. Alshehri, and Mr. Jafaari from a public parking lot to Circus Circus, and that he did so competently and without incident. And the prosecution expressly employed Mr. Alshehri's false testimony in its closing argument to the jury to claim that if Defendant was sober enough to drive at that time, he was not so intoxicated that he was unable to form the requisite mental state for the specific intent crimes charged against him.

Indeed, a defendant's ability to drive a motor vehicle has been recognized as a factor in determining whether he was so intoxicated as to be unable to form the requisite *mens rea* for specific intent crimes. *See, e.g., State v. Priest*, 100 Wash. App. 451, 997 P.2d 452, 454 (Wash. Ct. App. 2000) ("Mr. Priest ***was able to operate a motor vehicle***, communicate with Trooper Reeves, purposely provide false information, and attempt to reduce his charges by being an informant. Based on this evidence, the trial court acted within its discretion in reasoning that Mr. Priest's alcohol consumption did not affect his ability to possess the required mental state of [the charged offense]"); *Owens v. State*, 659 N.E.2d 466, 472-73 (Ind. 1995) ("In this case, there was certainly substantial evidence that Owens had had a great deal to drink before he participated in the fatal beating of Bennett. But there was also evidence that Owens ***drove a car***, was aware enough of what he was doing and had done to threaten [others], and that he, with Horan, devised a plan to dispose of Bennett's body. From this evidence, the jury could have reasonably

concluded beyond a reasonable doubt that Owens knowingly killed Bennett") (emphasis added).

The false testimony of State's witness Alshehri need not be such that its absence at trial would have *guaranteed* a different result. Rather, it need only be "reasonably probable" that had his false testimony not been admitted, a different result would have occurred. Given the direct relevance of Mr. Alshehri's recanted false testimony to the *level* of the Defendant's intoxication, it is reasonably probable that, in view of the otherwise abundant evidence of Defendant's extreme intoxication, absent that false testimony, the jury would have likely found that Defendant was too intoxicated to be able to form the requisite specific intent to commit the offenses charged in Counts 1, 2, 7, 8 and 9.

III.

DEFENDANT'S TRIAL COUNSEL FAILED TO PROVIDE DEFENDANT WITH EFFECTIVE ASSISTANCE.

A.

Standard Of Review

"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). This 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, 104 S.Ct. 2052, 80 L.Ed.2d

674 (1984) and followed in *Warden, Nevada State Prison v. Lyons,* 100 Nev. 430, 683 P.2d 504 (1984), *cert. denied,* 471 U.S. 1004 (1985)." *Kirksey v. State,* 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997).

Defendant respectfully submits that, as set forth *infra,* the two specific and particular claims of ineffective assistance of trial counsel raised herein are properly brought on direct appeal. Accordingly, Defendant seeks this Court's initial, independent review of those claims on the basis of the trial record.

B.

Trial Counsel's Opposition To A Lesser-Included Offense Instruction Regarding Statutory Sexual Seduction Concerning Those Counts Of The Information On Which Defendant Was Convicted Of Sexual Assault Of A Minor Under Fourteen Years Of Age (Counts 3 And 5) Was Objectively Unreasonable As May Be Properly Determined On Direct Appeal.

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was deficient because it fell below an objective standard of reasonableness; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *State v. Powell,* 122 Nev. 751, 759, 138 P.3d 458 (2006). The defendant must show that "counsel failed to act reasonably considering all the circumstances." *Cullen v. Pinholster,* 563 U.S. 170, 131 S.Ct. 1388, 1403 (2011). And in order to show prejudice, he must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694; *Powell*

at 759, 458.

The District Court expressly invited Defendant's trial counsel to simply ask for the lesser-included offense instruction; advising him that she would provide it upon request. Yet trial counsel affirmatively opposed the instruction. And there was no valid reason to engage in such an ill-advised "all or nothing" gambit under the circumstances. Indeed, it was objectively unreasonable for trial counsel to do so. And the mandatory minimum 35 year sentence imposed upon Defendant was the result.

It was objectively unreasonable for trial counsel to anticipate an acquittal as to the greater offense charged at the cost of foregoing the lesser-included offense instruction in this case. Indeed, Defendant expressly admitted during his videotaped, post-arrest statement that was admitted in evidence and played to the jury that he had sexually penetrated A. J. both anally and orally. However, whereas A. J. testified at trial that the Defendant did so against his will, Defendant said in his videotaped statement that A. J. consented. And there was other, independent evidence consistent with a consent scenario. But due to A. J.'s status as a minor, his marijuana intoxication, and Defendant's admission to sexual penetration, the jury would have been far more likely to find consent if they were aware that consent could have had the effect of *reducing* the offense to that of Statutory Sexual Seduction rather than causing a complete acquittal. And this, in turn, would

have had the effect of relieving the Defendant of the mandatory minimum sentence of 35 years for Sexual Assault.

Thus, it was ineffective assistance *per se* not to request the instruction.

That trial counsel failed to provide the Defendant with effective assistance in this specific and particular respect can be determined in this case on direct appeal. Indeed, as the United States District Court for the District of Nevada explained in *Echavarria v. Baker*, No. 3:98-CV-00202-MMD, 2013 WL 1181951, at *16 (D. Nev. Mar. 20, 2013): "in Nevada, claims of ineffective assistance of counsel may be raised on direct appeal" where "there has already been an evidentiary hearing or where an evidentiary hearing would be ***unnecessary***" (emphasis added). *See Archanian v. State*, 122 Nev. 1019, 1036, 145 P.3d 1008, 1020-21 (2006) ("ineffective-assistance-of-counsel claims [may be raised] on direct appeal . . . [where] the district court has held an evidentiary hearing on the matter or an evidentiary hearing would be ***needless***") (emphasis added). As this Court specifically pointed out in *Pelligrini v. State*, 117 Nev. 860, 883-884, 34 P.3d 519, 535 (2001) those are "the ***exceptions*** to the rule barring review of such claims on direct appeal"; explaining that, under such circumstances, ineffective assistance claims may "be[ ] appropriately raised on direct appeal" (emphasis added). *See Feazell v. State,* 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995), and *Mazzan v. State,* 100 Nev. 74, 80, 675 P.2d 409, 413 (1984).

Indeed, as the *Mazzan* Court explained, where ineffective assistance of counsel is plainly apparent from the record already established in the trial court, this Court may take remedial action on direct appeal without necessity of a further evidentiary hearing pursuant to collateral, post-conviction proceedings. 100 Nev. at 80, 675 P.2d at 413.

Thus, as this Court observed in *Jones v. State,* 110 Nev. 730, 877 P.2d 1052 (1994), "If we accept Jones' argument, ***there is no need for a hearing prior to this court's review.... We therefore elect to address this issue on direct appeal.***"

(Emphasis added).

Defendant submits that the jurisprudence of *Mazzan* and *Jones* should be applied in this case.

The Ninth Circuit has observed that "[r]equiring a defendant to wait for post-conviction relief has several consequences, including that a defendant may serve months in prison waiting for post-conviction arguments to be heard. Lengthy delays necessarily entail concomitant weakening of memories and aging of evidence." *United States v. Steele*, 733 F.3d 894, 897 (9th Cir. 2013). This is particularly true where such delay is unnecessary. Here, Defendant Alotaibi – who is and has been consistently in custody ever since the day of his arrest on December 31, 2012 – respectfully submits that there is no good reason not to consider his claims of ineffective assistance of counsel on direct appeal.

C.

Trial Counsel's Failure To Interview Prosecution Witness Rashed Alshehri Prior To Trial And Thereby Contemporaneously Apprehend The Material Falsity Of Alshehri's (Subsequently-Recanted) Trial Testimony Concerning Those Counts Of The Information On Which The Defendant Was Convicted Of The Specific Intent Offenses Of Burglary (Count 1), First Degree Kidnapping (Count 2), Lewdness With A Child Under The Age Of 14 (Counts 7 And 8), And Coercion (Sexually Motivated) (Count 9) Was Objectively Unreasonable As May Be Properly Determined On Direct Appeal.

"An attorney must make reasonable investigations or a reasonable decision that particular investigations are unnecessary." *State v. Powell,* 122 Nev. 751, 759, 138 P.3d 458 (2006). Indeed, "[i]t is trial counsel's obligation to conduct a reasonable and thorough pretrial investigation, including locating and interviewing potential witnesses. *State v. Walker*, 327 Ga. APP. 304, 758 S.E. 2d 836 (Ga. Ct. App. 2014) (affirming district court's grant of new trial based on ineffective assistance of counsel). Thus, courts have held that "[a] claim of ineffective assistance of counsel may arise where counsel has unjustifiably overlooked or ignored material, exculpatory evidence." *Yoris v. State,* 609 So. 2d 69, 70 (Fla. Dist. Ct. App. 1992).

As the United States Court of Appeals for the Sixth Circuit explained in *Towns v. Smith,* 395 F.3d 251, 258 (6th Cir. 2005):

> It is well-established that "[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691. The duty to

investigate derives from counsel's basic function, which is "'to make the adversarial testing process work in the particular case.' " *Kimmelman v. Morrison,* 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) (quoting *Strickland,* 466 U.S. at 690, 104 S.Ct. 2052). ***This duty includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence***. *See Bryant v. Scott,* 28 F.3d 1411, 1419 (5th Cir.1994) (citing *Henderson v. Sargent,* 926 F.2d 706, 711 (8th Cir.1991)).

(Emphasis added.)

Thus, as the *Towns* court pointed out:

Courts have not hesitated to find ineffective assistance in violation of the Sixth Amendment when counsel fails to conduct a reasonable investigation into one or more aspects of the case and when that failure prejudices his or her client. For example, in the recent case of *Wiggins v. Smith,* the Supreme Court held that the petitioner was entitled to a writ of habeas corpus because his counsel had failed to conduct a reasonable investigation into potentially mitigating evidence with respect to sentencing. 539 U.S. [510] at 524-29, 123 S.Ct. 2527 [(2003)]. According to the Court, "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentence strategy impossible." *Id.* at 527-28, 123 S.Ct. 2527. Consistent with *Wiggins,* we have held, in a variety of situations, that counsel's failure to investigate constituted ineffective assistance in violation of the Sixth Amendment. *See, e.g., [Combs v. Coyle],* 205 F.3d [269] at 287-88 [(6th Cir. 2000)] (holding that defense counsel was constitutionally ineffective for failing to investigate adequately his own expert witness, ***who testified that, despite the defendant's intoxication at the time of the crime, the defendant nevertheless was capable of forming the requisite intent to commit the crimes***); *Sims v. Livesay,* 970 F.2d 1575, 1580-81 (6th Cir.1992) (holding that counsel was constitutionally ineffective for failing to conduct an investigation into certain physical evidence that would have undermined the prosecution's theory that the victim was shot at a distance); *Blackburn v. Foltz,* 828 F.2d 1177, 1183 (6th Cir.1987) (holding that counsel's failure "to investigate a known and potentially important alibi witness" constituted ineffective assistance because "[c]ounsel did not

> make any attempt to investigate this known lead, nor did he even make a reasoned professional judgment that for some reason investigation was not necessary"); *see also [Clinkscale v. Carter],* 375 F.3d [430] at 443 [(6th Cir. 2004)] (collecting cases in which counsel's failure to investigate a potentially important witness constituted ineffective assistance).
>
> As in the foregoing cases, Parrish's trial counsel's failure to conduct a reasonable investigation into Michael Richard, "a known and potentially important witness," *Blackburn,* 828 F.2d at 1183, violated Parrish's Sixth Amendment right to the effective assistance of counsel. Parrish has successfully satisfied both the deficiency and prejudice prongs of *Strickland.*

395 F.3d at 258-259 (emphasis added).

If this Court concludes that evidence showing that false testimony was introduced at trial could have been discovered and produced at trial with the exercise of reasonable diligence, then defense counsel's failure to interview State's Witness Alshehri prior to trial about whether Defendant drove the vehicle and thereby prepare himself to explore the credibility of Mr. Alshehri's testimony relating to that issue during cross-examination – particularly in view of the fact that intoxication was Defendant's central defense to the specific intent crimes alleged – was ineffective assistance of counsel. Indeed, failure to conduct such pretrial investigation was *objectively unreasonable*, as can likewise be determined on direct appeal without necessity of any further evidentiary hearing. *Towns v. Smith,* 395 F.3d at 260 ("We, like the district court, hold that it was ***objectively unreasonable*** for

counsel to make that decision without first investigating Richard, or at least making a reasoned professional judgment that such investigation was unnecessary") (emphasis added).

CONCLUSION

THEREFORE, for all the foregoing reasons, Defendant/Appellant Mazen Alotaibi respectfully prays that this Honorable Court vacate his conviction on all counts of the Second Amended Information on which verdicts of guilty were returned by the jury (Counts 1, 2, 3, 5, 7, 8 and 9) and remand this matter to the District Court for a new trial as to those counts, together with such other and further relief as the Court deems fair and just in the premises.

Respectfully submitted this 23rd day of October, 2015.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this opening 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 opening brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman style, and a 14 font size.

I further certify that this opening brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because it is either:

Proportionally spaced, has a typeface of 14 points or more, and contains 9,100 words.

Finally, I hereby certify that I have read this opening 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

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

Dated this 23rd day of August, 2015.

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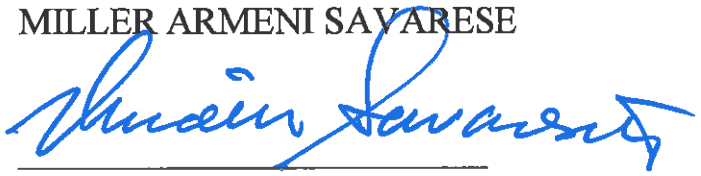

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On October 23, 2015, I caused to be served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF**, by the method indicated:

☒ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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