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 REPLY BRIEF

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

DOMINIC P. GENTILE
Nevada Bar No. 1923
VINCENT SAVARESE III
Nevada Bar No. 2467
410 South Rampart Blvd., Suite 420
Las Vegas, Nevada 89145
(702) 880-0000
Attorneys for Appellant
MAZEN ALOTAIBI

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I.

INTRODUCTION[1]

Statutory Sexual Seduction (NRS 200.364(6)(a)) is a strict liability offense. It has no *mens rea* component. At the time of the events resulting in this prosecution, if a person over the age of 18 had anal intercourse and/or fellatio with a person under the age of 16 - as were the allegations in the Information and the facts established at trial in the case at bar - they committed the offense even if the person under 16 was fully desirous of doing so. It is a category C felony punishable with imprisonment for between 1 and 5 years and/or a fine of up to $10,000. Probation is also an available sentencing alternative. NRS 200.368, 193.130.

When the State can plead and prove the additional allegations that the person under 16 engaged in that conduct against his/her will or as a result of his/her incapability to resist or understand the nature of his/her conduct – and that the accused knows of the absence of consent from or the incapability of the person under 16 to resist or understand - then the crime is elevated to a violation of NRS 200.366(1) and is punishable by imprisonment for life with eligibility for parole beginning when a minimum of 35 years has been served if the victim was under 14

[1] Pursuant to NRAP 28(c) , Mr. Alotaibi limits the arguments herein to new matters set forth in the Respondent's Answering Brief. He otherwise relies on his Opening Brief for all arguments raised in this appeal.

years old and substantial bodily harm did not result. Probation is not available to one so convicted. NRS 200.366.

"Sexual penetration" is a means of committing both of these "sexual offenses" and is defined identically as to both. NRS 200.364 subsections (4), (5) and (6). It is undisputed that sexual penetration was the proven means by which the State established its case here. The statutory scheme demonstrates that it was the intent of the legislature to address unlawful sexual penetration on a continuum – in ascending punitive gradations measured by the victim's age and ability to know the nature of the act and consent to it - with harsher penalties to effectuate a policy of deterring non-consensual penetration.

It is from this backdrop that analysis of Mr. Alotaibi's constitutional and statutory rights to an included offense instruction and effective assistance of counsel proceeds.

II.

ARGUMENT

Sexual Penetration and the Age of the Victim Were Necessary Elements of the Sexual Assault with a Minor Under 14 Years of Age Charges in the Information

A. This Court's Jurisprudence Recognizes the Necessarily Included Offense Status of Statutory Sexual Seduction in Sexual Assault with a Minor Under 14 Years of Age.

When a charged offense cannot be committed without committing a lesser offense, it is necessarily included in the greater offense. *Estes v. State,* 122 Nev.

1123, 1143 (2007). The State contends that Statutory Sexual Seduction is not a "necessarily included" offense within Sexual Assault with a Minor Under 14 Years of Age because the text of the former includes "an additional element", i.e. that the consenting person must be under the age of 16. RAB at 14. Ignoring this Court's holding in *Robinson v. State,* 110 Nev. 1137, 881 P.2d 667 (1994), ("[t]he trial court erred when it refused to give the instruction on the lesser included-offense of statutory sexual seduction"), it takes the position that NRS 200.364(6)(a) is not an included offense within NRS 200.366(1) "regardless of the facts in this matter". RAB at 11. Nonetheless, the Information, as pleaded, and the evidence adduced at trial in this matter would have permitted the jury, had it possessed a reasonable doubt as to the victim's lack of consent, to rationally find Mr. Alotaibi guilty of Statutory Sexual Seduction and acquit him of Sexual Assault With a Minor Under 14 Years of Age.

The State concedes that in *Robinson* this Court held that Statutory Sexual Seduction was a lesser-included offense of "Statutory" Sexual Assault where the victim was 14 years old[2]. It attempts to escape the *stare decisis* value of *Robinson* by observing that this Court never decided the issue as to the crime of Sexual

[2] By way of a separate Request for Judicial Notice or, in the Alternative, Motion to Supplement the Record, which will be filed simultaneously with this Reply, Mr. Alotaibi is submitting a certified copy of the Complaint, Information, and all Amended Information upon which the *Robinson* prosecution proceeded. It is clear that the use of the term "statutory sexual assault" in the *Robinson* opinion included the word "statutory" as surplusage.

Assault with a Minor Under 14 Years of Age. RAB at 22. Given the actual charge in *Robinson* as revealed by comparing the original pleadings with those in the case at bar, there is no distinction to be made on that basis. The State further claims that in *Robinson* this Court "summarily comment[ed] that Statutory Sexual Seduction is a lesser-included of Statutory Sexual Assault without any analysis." RAB at p. 22. To the contrary, this Court could not have been more emphatic about the applicability of the lesser-included Statutory Sexual Seduction instruction, categorically holding that "[t]here is no question but that Robinson would be entitled to the requested instruction except for the fact that he was seventeen at the time that the crime was committed". *Robinson v. State,* 110 Nev. at 1138.

Relying on *Slobodian v. State,* 98 Nev. 52, 639 P.2d 561 (1982) the State argues that Sexual Assault can be committed without necessarily committing Statutory Sexual Seduction because the former is not dependent upon the age of the victim. RAB at p. 19. That argument does not prevail on the law or the facts of this case. First, this Court squarely held in *Robinson,* at 1138, that Statutory Sexual Seduction is an included offense in Sexual Assault with a Minor Under 14 Years of Age. Although the Court used the phrase "statutory sexual assault" in the opinion, *Robinson* was charged with violating NRS 200.366, the same statute with which Mr. Alotaibi is charged. Secondly, because it proceeded by Information, it was the State's own decision to charge Mr. Alotaibi with the offense of Sexual

Assault With a Minor Under Fourteen Years Of Age. In doing so it triggered the application of *Apprendi v. New Jersey,* 530 U.S. 466 (2000) and necessarily inserted the age of the alleged victim as an element common to both the greater and lesser offenses, such that the singular distinguishing characteristic between the two crimes - as applied in this case - is the presence or absence of consent. *Id.* at 494.

B. *Constitutional Guarantees of Trial by Jury and Due Process of Law Mandate that the Age of the Victim be Treated as an Element in this Case.*

In Hurst v. Florida, No. 14-7505, __ U.S.__, 136 S. Ct. 616, 621, 193 L. Ed. 2d 504 (January 12, 2016), the United States Supreme Court reiterated that the Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury and that this right, in conjunction with the Due Process Clause of the Fifth and Fourteenth Amendments, requires that each and every element of an alleged crime be proven beyond a reasonable doubt. In *Apprendi* the Court held that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is such an "element" that must be submitted to and determined by a jury. In the years since *Apprendi,* the Court has applied this rule to plea bargains, *Blakely v. Washington,* 542 U.S. 296 (2004), sentencing guidelines, *United States v. Booker,* 543 U.S. 220 (2005), criminal fines, *Southern Union Co. v. United States,* No. 11-94, 567 U.S. ——, 132 S.Ct. 2344 (2012),

mandatory minimum sentences, *Alleyne v. United States,* 570 U.S. —, 133 S.Ct. 2151, 2166 (2013) and, in *Ring v. Arizona,* 536 U.S. 584, 608, n. 6 (2002), capital punishment. The Court held in *Alleyne,* 570 U.S. ——, ——, 133 S.Ct. 2151, 2162 (2013), "[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury."

In the case *sub judice,* for the trial court to impose a sentence calling for a 35 year mandatory minimum before parole may even be considered, as it did, it was necessary for the jury to find that the age of the victim was under fourteen years. Thus, the State was required to plead the age of the victim in the Information and prove it at trial. It is disingenuous and ignores *Apprendi* and its progeny to suggest that the age of the victim was "merely a sentencing enhancement for sexual assault" as the State does in this case. RAB at 20. "Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact-no matter how the State labels it-constitutes an element, and must be found by a jury beyond a reasonable doubt." Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 123 S. Ct. 732, 739 (2003). The State chose the charges here and in doing so it made the age of the victim an element within the meaning of *Apprendi.*

C. Double Jeopardy Would Bar a Prosecution for Statutory Sexual Seduction upon Conviction of Sexual Assault with a Minor Under 14 Years of Age as Charged in this Case.

The analysis that this Court must make here benefits from an examination of *Whalen v. United States,* 445 U.S. 684, 693-94, 100 S. Ct. 1432, 1439 (1980), where the Court held that the defendant could not be punished for both felony murder and the predicate felony rape because the rape was subsumed within felony-murder even though the murder statute does not always require proof of rape but also listed other felonies which could satisfy the felony element. The Court further held that the double jeopardy presumption barring prosecution of lesser-included offenses resolves the issue, unless there is clear legislative intent to overcome it. This Court has applied *Whalen* to determine whether a predicate offense provided by another statute is subsumed within the greater offense. In *Talancon v. State,* 102 Nev. 294, 297, 300-01, 721 P.2d 764, 765-66, 768-69 (1986) the Court presumed that the jury's murder verdict was premised on felony murder with a predicate offense of robbery, but nevertheless held that the legislative intent of Nevada's felony murder statute permitted cumulative sentences for felony murder and the predicate felony of robbery. *Compare Rose v. State,* 127 Nev. ____, 255 P.3d 291 (2011) (holding that assaultive felonies will merge with second-degree felony murder). In the case at bar, Mr. Alotaibi would clearly benefit from double jeopardy protection were the State to attempt to now charge him with Statutory Sexual Seduction. This Court has also rejected arguments relying on hyper-meticulous distinctions in the statutory language defining the elements of lesser and greater offenses. *Rosas v. State,*

122 Nev. 1258, 1263-64, 147 P.3d 1101, 1105 (2006) (concluding that resisting a public officer is a lesser-included offense to battery upon an officer).

D. *The Trial Court Should Have Given the Instruction Sua Sponte.*

There is likewise no question that Mr. Alotaibi was entitled to the instruction notwithstanding that his trial counsel did not request it. This Court has held that 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 lessor offense or degree. The instruction is mandatory, without request." *Lisby v. State,* 82 Nev. 183, 187 (1966). All of the statutory elements of Statutory Sexual Seduction were necessary for the State to prove beyond a reasonable doubt in order to establish Sexual Assault with a Minor Under 14 Years of Age as applied in the instant charging document. There were no allegations of beasts being involved; no allegations of self-penetration by the victim or penetration by others of the victim or by the victim of another; the only issue that needed to or could have been proven to achieve the greater punishment applicable to Sexual Assault with a Minor Under 14 Years of Age was that of the victim's lack of consent or the accused's perception of the victim's inability to do so.

Here the trial judge recognized, without prompting, that there was evidence of consent by the victim placed before the jury. NRS 175.501 mandates that the jury be given the included offense instruction. Merely because sexual assault can

involve beasts and voyeurs doesn't foreclose the giving of an included offense instruction when it isn't alleged to have occurred in that manner. Any other conclusion would render NRS 175.501 meaningless to any crime, which can be – but in any given instance is not– achieved by multiple means or modes. Such an interpretation would violate fundamental rules of statutory construction as the Washington Supreme Court held last year in *State v. Condon,* 182 Wash. 2d 307, 316-318, 343 P. 3d 357, 361-362 (Wash. 2015)(*en banc*).

In Keeble v. United States, 412 U.S. 205 (1973), the United States Supreme Court, in recognizing the right to an included offense instruction, held that:

> "[I]f the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction."

Id. at 212-13.

The lesser-included offense doctrine developed at common law to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged. It is beyond dispute that a defendant is entitled to an instruction on a lesser-included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. A defendant's right to such an instruction in federal criminal trials has been

recognized in numerous United States Supreme Court decisions. *Sansone v. United States*, 380 U.S. 343, 349 (1965); *Berra v. United States*, 351 U.S. 131, 134 (1956); *Stevenson v. United States*, 162 U.S. 313 (1896).

In *Beck v. Alabama,* 447 U.S. 625 (1980), the Court held that the death penalty could not constitutionally be imposed unless an included offense instruction, proper under the facts of the case, was given to the jury. *Id.* at 627. While "death is different", life in prison for *at least* 35 years and maybe forever closely approximates it and, to some, may be worse. As this Court explained in *Peck v. State,* 116 Nev. 840, 844, 7 P.3d 470, 473 (2000): "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, an instruction on the lesser-included offense is mandatory even if not requested." This mandate flows from what has been termed the "trial integrity approach" which recognizes lesser-included offense instructions are fundamental to the trial process and the exclusive province of the trial court. Catherine L. Carpenter, The All-or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?, 26 Am. J. Crim. Law 257, 278 (Spring 1999). Nevada has codified this approach in NRS 175.501. *Id.*at 265, fn. 17, and other states adhere to it as well. *People v. Gray,* 37 Cal. 4th 168, 219, 118 P. 3d 496, 532 (Cal.2005); *State v. Haanio,* 94 Haw. 405, 414, 16 P. 3d 246, 255 (Haw. 2001); *In the Interests of Z.S.*,

776 N.W. 2d 290, 295 (Ia. 2009); *State v. Kobow,* 466 N.W. 2d 747, 752 (Minn. Ct. App. 1991); *State v. Rose,* 237 N.J. Super. 511, 514, 568 A. 2d 545, 546 (App. Div. 1990) and *State v. Brantley,* 501 S.E. 2d 676, 679, 129 N.C.App. 725, 729 (N.C. Ct. App. 1998).

III.

CONCLUSION

To allow a trial judge to ignore the evidence that will thwart an "all or nothing" strategic approach does not promote societal justice, as it can allow an accused who is clearly guilty of an offense to escape punishment for it based upon gamesmanship and rob society of its right to hold persons accountable for their transgressions. The inverse is also true where a jury recognizes that an accused has "done something illegal" and finds against him on the greater, but unproven, charge in the absence of knowledge of the existence of a charge that fits the evidence because it simply doesn't want to allow him to go free.

Neither of these are merely theoretical postulates in a day where the prosecution will "overcharge" a case from time-to-time. When one factors into this equation the reality that prospective jurors do not always reveal to themselves – and therefor to the court and the parties– their biases, which can be based upon such factors as the defendants race, religion, country of origin and the like, this latter scenario is even more likely to occur and go undetected. Mr. Alotaibi, who

the evidence demonstrated is a Saudi Arabian and a member of its military, was entitled to the included offense instruction that, had it been embraced by the jury, might have resulted in him being sentenced to at least three decades less imprisonment. He was also entitled to effective assistance of counsel, which he clearly did not receive.

Finally, notwithstanding that an interpreter was present at all other times during the trial so as to insure that Mr. Alotaibi, an Arabic speaker, would be aware of what was transpiring, there was no interpreter in the court room when the colloquy as to the included offense instruction was taking place. AA 648-663. As a result, it is devoid of anything that would or could support the conclusion that the "knowing and intelligent waiver" doctrine of *Johnson v. Zerbst*, 304 U.S. 458, 58 (1938) can be found to have been satisfied here.

This Court should reverse and remand for a new trial.

Respectfully submitted this 18th day of April, 2016.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

DOMINIC P. GENTILE
Nevada Bar No. 1923
VINCENT SAVARESE III
Nevada Bar No. 2467
410 South Rampart Blvd., Suite 420
Las Vegas, Nevada 89145
(702) 880-0000
Attorneys for Appellant
MAZEN ALOTAIBI

CERTIFICATE OF COMPLIANCE

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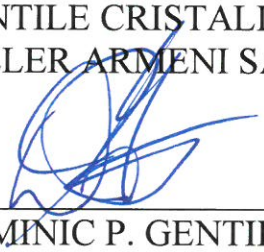
Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that 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 18th day of April, 2016.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE



DOMINIC P. GENTILE
Nevada Bar No. 1923
VINCENT SAVARESE III
Nevada Bar No. 2467
410 South Rampart Blvd., Suite 420
Las Vegas, Nevada 89145
(702) 880-0000
Attorneys for Appellant
MAZEN ALOTAIBI

CERTIFICATE OF SERVICE

The undersigned, an employee of Gentile Cristalli Miller Armeni Savarese, hereby certifies that on the 18 day of April, 2016, I caused a copy of the foregoing **APPELLANT'S REPLY BRIEF**, to be served electronically to all parties of interest through the eFlex system as follows:

Steven B. Wolfson
Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

Adam Paul Laxalt
Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717
(775) 684-1108
Counsel for Respondent

An employee of
GENTILE CRISTALLI
MILLER ARMENI SAVARESE