

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAZEN ALOTAIBI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. 67380

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Tracie K. Lindeman
Clerk of Supreme Court

District Court Case No.: C-13-287173-1
Dept. XXIII

**MAZEN ALOTAIBI'S REPLY IN SUPPORT OF APPELLANT'S
REQUEST FOR JUDICIAL NOTICE OR, IN THE ALTERNATIVE,
MOTION TO SUPPLEMENT THE RECORD**

COMES NOW Appellant Mazen Alotaibi, by and through his attorneys, Dominic P. Gentile, Esq., and Vincent Savarese III, Esq., of the law firm of Gentile Cristalli Miller Armeni Savarese, and hereby submits his Reply to the State's Opposition to Appellant's Request for Judicial Notice or, in the Alternative, Motion to Supplement the Record (filed on April 20, 2016).

This Reply is made and based upon the papers and pleadings already on file herein and the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Rule 27(a)(1) of the Nevada Rules of Appellate Procedure ("NRAP"): "An application for an order or other relief is made by motion." NRAP 27(a)(2) provides in pertinent part that "[a] motion must state with particularity the

grounds for the motion, the relief sought, and the legal argument necessary to support it,” and that “ [i]f a motion is supported by affidavits or other papers, they shall be served and filed with the motion.” Appellant’s Request for Judicial Notice or, in the Alternative, Motion to Supplement the Record fully complies with these provisions.

Appellant is requesting this Court to take judicial notice of the *actual* offense with which the defendant had been charged and was convicted in *Robinson v. State*, 110 Nev. 1137, 881 P.2d 667 (1994); to wit: Sexual Assault committed against a child under the age of 16 years (prohibited by NRS 200.366). *See* Appellant Mazen Alotaibi’s Request for Judicial Notice or, in the Alternative, Motion to Supplement the Record (“Appellant’s Motion”) p. 3. Appellant specifically and particularly relies upon this Court’s decision in *Robinson* for the proposition that the crime of Statutory Sexual Seduction (prohibited by NRS 200.364) is a lesser included offense of the crime of Sexual Assault committed against a child under the age of 14 years (likewise prohibited by NRS 200.366); and therefore, that Appellant was entitled to a lesser offense instruction in this case *sua sponte*. *See* Appellant’s Opening Brief pp. 16-24; Appellant’s Reply Brief pp. 2-5, 8-12. Appellant has served and filed together therewith certified copies of the charging documents in the *Robinson* case.

Appellant is requesting the Court to take judicial notice of the actual criminal charge at issue in *Robinson* pursuant to NRS 47.130.2(b), because it is a fact

“[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,” i.e. certified copies of the actual charging documents in *Robinson*; and therefore, “is not subject to reasonable dispute.” Pursuant to NRS 47.150.2, “[a] . . . court shall take judicial notice [of such a fact] if requested by a party and supplied with the necessary information.” *See* Appellant’s Motion p. 3.

This is of critical importance in this appeal because, in Respondent’s Answering Brief, at p. 21, the State asserts that *Robinson* is distinguishable here because “in Robinson, the defendant was charged with **statutory** sexual assault of a fourteen-year-old female” – not Sexual Assault committed against a child under the age of 16 years in violation of NRS 200.366 (emphasis added). And therefore, according to the State, “[t]his Court held that Statutory Sexual Seduction was a lesser-included offense of **Statutory** Sexual Assault.” Respondent’s Answering Brief, at p. 22 (emphasis added). According to the State: “There is no published authority discussing the elements of **statutory** sexual assault *vis a* sexual assault as defined in NRS 200.366, and the former crime no longer exists.” Respondent’s Answering Brief, at p. 22, note 4 (emphasis added).

In Appellant’s Reply Brief, at p. 4, Appellant points out that “[a]lthough the [*Robinson*] 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.” And although it also true that the *Robinson* Court did not cite NRS 200.366 (Sexual Assault), the charging documents in that case do so. They also refer to the crime charged in that case as “SEXUAL ASSAULT” (not “statutory sexual assault”); and further allege that – notwithstanding that the victim was “a minor of the age of 14 years” – she was subjected to sexual penetration “*against her will*” (emphasis added). And as the *Robinson* Court acknowledged, NRS 200.364 (Statutory Sexual Seduction) is the Nevada statute that “prohibits a person 18 years of age or older from having [*consensual*] sexual intercourse with a person under the age of 16 years.” 110 Nev. at 1138, 881 P.2d at 668 (quotation marks and italics omitted). Indeed, even the dissenting opinion characterizes NRS 200.364 (prohibiting Statutory Sexual Seduction) as Nevada’s version of “a ‘statutory rape’ law.” 110 Nev. at 1139, 881 P.2d at 669.

The certified pleadings appended as exhibits to Appellant’s Motion therefore squarely support Appellant’s contention that the State is “attempt[ing] to escape the *stare decisis* value of *Robinson*” in this appeal by leaving this Court with a false impression with respect to binding precedent. Appellant’s Reply Brief p. 3. Thus, as Appellant’s Motion points out, at p. 2, what the State characterizes as the purported “former crime” of “Statutory Sexual Assault” “never did exist” in the State of Nevada; and the defendant in *Robinson* was prosecuted under NRS 200.366 “which was the same statute containing the same language as that which formed the basis of

Mr. Alotaibi's prosecution." Appellant's Motion p. 2. *See* Appellant's Reply Brief p. 3, note 2.

Thus, Appellant's Motion is not "trying to raise a new issue" as the State suggests in its Opposition at p. 2. Rather, Appellant is seeking to support a critical issue he has in fact already raised in both Appellant's Opening Brief and Appellant's Reply Brief so as to prevent this Court from entertaining a false impression regarding the direct *stare decisis* effect of a controlling precedent in this appeal. The State's reliance upon NRAP 31(d) is completely inapposite in that that rule has no conceivable application here. And assuming that the State was attempting to refer to NRAP 31(e), that provision is likewise unavailing because it pertains strictly to a "Notice of Supplemental Authorities" and imposes no limitation upon an application for an order providing for appropriate relief pursuant to NRAP 27 like that before the Court in this case.

Dated this 22nd day of April, 2015.

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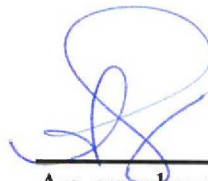
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CERTIFICATE OF SERVICE

The undersigned, an employee of Gentile Cristalli Miller Armeni Savarese, hereby certifies that on the 22nd day of April, 2016, I caused a copy of the foregoing **MAZEN ALOTAIBI'S REPLY IN SUPPORT OF APPELLANT'S REQUEST FOR JUDICIAL NOTICE OR, IN THE ALTERNATVIE, MOTION TO SUPPLEMENT THE RECORD**, to be served electronically to all parties of interest through the eFlex system as follows:

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