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

APPELLANT'S MOTION TO RECONSIDER SUBMISSION FOR DECISION WITHOUT ORAL ARGUMENT

COMES NOW Mazen Alotaibi, Appellant in the above-entitled matter, by and through his attorney, Dominic P. Gentile, Esq. of the law firm of Gentile Cristalli Miller Armeni Savarese, and pursuant to Rule 27(c)(2) of the Nevada Rules of Appellate Procedure, hereby moves the Court to reconsider the Order of June 2, 2016, entered by a single justice submitting the above-entitled matter for decision without oral argument. (Appended hereto as Exhibit "A").

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This Motion is made and based upon all pleadings and papers on file herein, the exhibits appended hereto, and the following Memorandum of Points and Authorities.

Dated this 13th day of June, 2016.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Rule 34(f)(1) of the Nevada Rules of Appellate Procedure ("NRAP") provides that "[t]he court may order a case submitted for decision on the briefs, without oral argument." The Nevada rule does not prescribe any standards or criteria for consideration by this Court in making this determination. However, its federal counterpart does. Thus, Rule 34(a)(2) of the Federal Rules of Appellate Procedure ("FRAP") provides as follows:

> (2) Standards. Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

> (A) the appeal is frivolous;
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> (B) the dispositive issue or issues have been authoritatively decided; or
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> (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

Although NRAP 34(f)(1) does not prescribe standardized criteria for the submission of an appeal for decision without oral argument, the jurisprudence of this Court does reflect consideration of factors similar to those set forth in the federal rule. See *e.g., In re Discipline of Winter,* 2012 WL 642837 (Nev. February 24, 2012) (ordering appeal submitted on the record without oral argument where parties did not submit briefs challenging findings and recommendation of state bar panel or inform the Court of intent to contest the same); *Simpson v. State,* No. 58435, 2011 WL 5827791 (Nev. Nov. 17, 2011) (ordering appeal submitted on the record without oral argument where "there were no non-frivolous issues . . . on appeal"); *Luckett v. Warden,* 91 Nev. 681, 541 P.2d 910 (1975) (denial of oral argument with respect to successive application for post-conviction relief absent explanation as to why issues were not previously raised).

Appellant respectfully submits that circumstances justifying the submission of an appeal for decision without oral argument do not obtain in the instant case, and that for the reasons hereinafter stated, the Court should therefore reconsider the

Order of June 2, 2016, submitting his appeal on the record and the briefs on file without oral argument – at least with respect to the issues identified hereinafter.

II.

ARGUMENT

A.

THE STATE AND FEDERAL CONSTITUTIONAL IMPERATIVES OF DUE PROCESS MANDATE THAT A JURY BE INSTRUCTED ON A LESSER INCLUDED OFFENSE WHERE THERE EXISTS A PENALTY DIFFERENCE OF LIFE IMPRISONMENT WITH A MANDATORY MINIMUM OF THIRTY-FIVE YEARS OF CONFINEMENT BEFORE PAROLE ELIGIBILITY FOR THE GREATER OFFENSE AND A MAXIMUM OF FIVE YEARS IMPRISONMENT FOR THE LESSER INCLUDED OFFENSE.

In *Beck v. Alabama,* 447 U.S. 625 (1980) the United States Supreme Court held that, in the context of a potential imposition of the death penalty, the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States insures a defendant the right to a lesser included offense instruction "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction". *Id. at* 636-637. The goal of the *Beck* rule is to eliminate the distortion of the fact-finding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence. *Spaziano v. Florida*, 468 U.S. 447, 455 (1984) *overruled on other grounds by Hurst v. Florida*, 136 S. Ct.

616, 193 L. Ed. 2d 504 (2016). Although the United States Supreme Court has not as yet addressed the question of whether *Beck* extends to non-capital cases, "the same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [a State] is constitutionally prohibited from withdrawing that option from the jury...." *Beck., supra,* 447 U.S. *at* 638.

Pursuant to Nevada statutory and case law, a defendant may be convicted of a lesser offense that is necessarily included in the charged offense. And a defendant in Nevada has a right to a jury instruction on such a lesser-included offense as a matter of due process, as long as there is some evidence tending to negate the greater offense and support the lesser offense. *Rosas v. State,* 122 Nev. 1258, 1260, 147 P.3d 1101, 1103 (2006). Moreover, at the time of his trial, *Lisby v. State,* 82 Nev. 183, 187, 414 P.2d 592 (1966) mandated that the trial court give the instruction *without request.*

To state a procedural due process violation in this context, the claimant must allege facts showing that the State has (1) deprived him or her of a liberty interest; and (2) has done so without providing adequate procedural protections. Once a court has determined that a protected liberty interest has been impaired, "the question remains what process is due." *Morrissey v. Brewer,* 408 U.S. 471, 481(1972). The

most basic requirement of due process, however, is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)).

To determine what procedure satisfies due process, the specific case must be analyzed using the three-part test of *Mathews,* which balances the following factors: (1) the private interest impacted by the government action; (2) the chance that the procedures used will result in an improper deprivation of the private interest and the likely value of added procedural protections; and (3) the government's interest in the proceedings and the cost of additional procedural protections. 424 U.S. at 335. In this case, the application of that test demonstrates that Appellant's lesser-included offense instruction analysis is deserving of an oral argument before this Court. Thus, the private liberty interest impacted is the clearly significant difference between a *minimum* of 35 years of incarceration before eligibility for parole and a *maximum* of 5 years of imprisonment before expiration of sentence and restoration of freedom. Secondly, Nevada law already recognizes the danger in providing a jury with an "all or nothing" alternative; and at the time of trial in this case, *Lisby* required the trial judge to instruct on included offenses with or without request. And thirdly, the minimal cost of the lesser included offense instruction was the price of a piece of paper on which to create it, the toner with which to print it, and the half minute of the trial judge's time in which to read it aloud to the jury; and the government's

legitimate interest in the proceedings is that which is always incumbent upon a sovereign whose obligation is to govern impartially, and that is to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629 (1935); *Wallace v. State*, 88 Nev. 549, 552, 501 P.2d 1036, 1037 (1972).

B.

THERE IS A CONFLICT BETWEEN THE PUBLISHED DECISION OF THE FULL COURT IN *ROBINSON V. STATE*, 110 Nev. 1137, 881 P.2d 667 (1994), HOLDING THAT STATUTORY SEXUAL SEDUCTION IS A LESSER INCLUDED OFFENSE OF SEXUAL ASSAULT, AND THE UNPUBLISHED OPINION OF A THREE-JUSTICE PANEL IN *VAN HORN V. STATE*, No. 63069, 2015 WL 4402655 (July 15, 2015), HOLDING THAT IT IS NOT.

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 offender is a minor under the age of 16 years, Statutory Sexual Seduction is a lesser-included offense of the offense of Sexual Assault.[1] Therefore, as this Court explained in that case, 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

[1] Appellant is filing concurrently herewith a Motion Pursuant to NRAP 27(c)(2) to Review the Action of a Single Justice with regard to Request for Judicial Notice or, in the Alternative, Motion to Supplement the Record. The charging document in *Robinson* makes it clear that the term "Statutory Sexual Assault" as used in that opinion was referring to the crime of "Sexual Assault", as no crime denominated "Statutory Sexual Assault" has ever existed. Moreover, "Statutory Rape" hasn't existed since the repeal of NRS 200.360-2 in 1967.

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."

However, 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 disagreed in an unpublished opinion notwithstanding that it met the criteria set out in NRAP 36(C)(1)(b) and (c) when compared with *Robinson.* The *Van Horn* panel opinion does not purport to "overrule" the previous contrary published decision of the *en banc* Court in *Robinson.* Nor does the unpublished *Van Horn* panel opinion distinguish the two cases or even cite *Robinson*[2]. Under the contemporaneous provisions of Nevada Supreme Court Rule ("SCR") 123, as an *unpublished* opinion, *Van Horn* "shall not be regarded as precedent." However, this Court has not decided in a published opinion that a district court is barred from considering an unpublished decision or order. Thus, there is grave danger that, in the wake of the repeal of former SCR 123, the conflict between *Robinson* and *Van Horn* may be misinterpreted by a district court. See *Cooper Roofing and Solar, LLC v. Chief Administrative Officer of Occupational Safety and Health Administration,* No.

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[2] This Court has the discretion to take judicial notice that *Robinson* was cited by both parties in all three briefs filed with the Court in *Van Horn. Mack v. Estate of Mack,* 125 Nev. 80, 91 (2009).

67914, 2016 WL 2957129 (May 19, 2016). Appellant respectfully submits that this Court should not endeavor to silently overrule *Robinson,* as it did in *Van Horn,* without input from interested parties at oral argument. The doctrine of *stare decisis* should not be so casually treated. See *Armenta-Carpio v. State,* 129 Nev. Adv. Op. 54, 306 P. 3d 395, 398 (2013).

III.

CONCLUSION

For the foregoing reasons, Appellant Mazen Alotaibi respectfully requests that this Court reconsider the single justice Order of June 2, 2016, submitting the above-entitled matter for decision without oral argument, and order that oral argument be heard in this case, at least with respect to the lesser-included offense instruction issue.

Dated this 13 day of June, 2016.

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Attorneys for Appellant, Mazen Alotaibi

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 June 13, 2016, I caused to be served a true and correct copy of the foregoing **APPELLANT'S MOTION TO RECONSIDER SUBMISSION FOR DECISION WITHOUT ORAL ARGUMENT**, 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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EXHIBIT A

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MAZEN ALOTAIBI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67380

FILED

JUN 02 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER SUBMITTING APPEAL FOR DECISION WITHOUT ORAL ARGUMENT

Cause appearing, oral argument will not be scheduled and this appeal shall stand submitted for decision as of the date of this order on the briefs filed herein. *See* NRAP 34(f)(1).

It is so ORDERED.

, C.J.

cc: Gentile, Cristalli, Miller, Armeni & Savarese, PLLC
Attorney General/Carson City
Clark County District Attorney

16-17224