

**Case No. 67380**

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

MAZEN ALOTAIBI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. 67380

Electronically Filed  
Mar 17 2017 04:03 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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

**APPELLANT'S PETITION FOR REHEARING OF PANEL ORDER OF  
AFFIRMANCE**

Dominic P. Gentile, Esq.  
Nevada Bar No.: 1923  
Vincent Savarese III, Esq.  
Nevada Bar No.: 2467  
410 South Rampart Blvd., Suite 420  
Las Vegas, Nevada 89145  
Phone: (702) 880-0000  
Counsel for Appellant

Steven B. Wolfson  
Clark County District Attorney  
Ryan J. MacDonald  
Deputy District Attorney  
Office of the Clark County District  
Attorney  
200 Lewis Avenue  
Las Vegas, Nevada 89101

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

Counsel for Respondent

Pursuant to Rule 40 of the Nevada Rules of Appellate Procedure (“NRAP”), Defendant/Appellant MAZEN ALOTAIBI hereby respectfully petitions for rehearing of the Order of Affirmance filed by the panel in the above-entitled matter on February 28, 2017.

**I.**

**THIS PETITION IS TIMELY FILED.**

Under the combined provisions of NRAP 40(a)(1) and NRAP 26(a)(3), this Petition for Rehearing of the Order of Affirmance entered by the panel of this Court on February 28, 2017 is due 18 days thereafter, excluding the day of filing. And whereas March 18, 2017 is a Saturday, this Petition must be filed on or before the next judicial business day, which is March 20, 2017.

**II.**

**IN ITS ORDER OF AFFIRMANCE, THE PANEL HAS  
OVERLOOKED, MISAPPLIED OR FAILED TO CONSIDER  
AUTHORITY CONTROLLING A DISPOSITIVE ISSUE IN  
THIS CASE.**

NRAP 40(c)(2)(B) provides that “[t]he court may consider rehearings . . . [w]hen the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.”

Here, the panel has overlooked or failed to consider that the jurisprudence of

*Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Robinson v. State*, 110 Nev. 1137, 881 P.2d 667 (1994) compel the conclusion that, at the time of the conduct alleged in this case, the essential elements of the lesser offense of “Statutory Sexual Seduction,” prohibited by Nevada Revised Statutes (“NRS”) 200.364(6)(a), were necessarily included within the essential elements of the greater offense of “Sexual Assault of a Minor Under 14 Years of Age,” prohibited by “NRS” 200.366(1) – when the charging instrument alleges and seeks a jury finding (and a resulting increase in punishment) – that the crime was committed upon a child under the age of 14, as set forth in NRS 200.366(3)(c).

Stated somewhat differently, at the time of the conduct upon which the charges in this case are based, if a person 18 years of age or older engaged in ordinary sexual intercourse with, or performed a sexual penetration of any kind upon, a person 14 years of age or younger who was able to understand the nature of the act and consented to it, the lesser offense of Statutory Sexual Seduction, in violation of NRS 200.364(6)(a) would obtain. And pursuant to NRS 200.368(1), the offender would be punishable for a category C felony and subject to imprisonment in the state prison for a minimum term of not less than 1 and a maximum term of not more than 5 years. Whereas in contradistinction, if the same act by the same person 18 years of age or older was performed upon the same person 14 years of age or younger who does *not* consent or who is mentally or physically unable to understand the act or resist – and

the older person knows or reasonably should know that – the greater offense of Sexual Assault of a Minor Under the Age of 14 is committed. In the latter instance the offender is punishable for a category A felony pursuant to NRS 200.366(3)(c) 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.

Thus, the age of the victim is an element of both offenses. And the single distinguishing element between the lesser and the greater of them is the presence or absence of consent and the physical or mental ability of the victim to understand and/or resist.

In accordance with NRAP 40(a)(2), this Court’s attention is called to Appellant’s Opening Brief, at page 18, where *Robinson* is cited and its application to the case at bar is discussed. The Respondent has endeavored to side-step *Robinson* by making what Appellant submits to be the disingenuous argument that that case concerns what Respondent characterizes as the so-called offense of “Statutory” Sexual Assault, as purportedly contradistinguished from that of Sexual Assault of a Minor Under 14 Years of Age as charged in the instant case. Respondent’s Answering Brief at page 22. Appellant has requested this Court to take judicial notice that the actual charge in *Robinson* was identical to the charge in the case at bar. Appellant’s Reply Brief, at page 3, footnote 1. However, Respondent has opposed that request, and this Court has thus far refused to recognize that the charge

alleged in *Robinson* were identical to the charge at issue in case at bar.<sup>1</sup> The Order of Affirmance is bereft of any mention of *Robinson*.

Moreover, the Order of Affirmance is likewise devoid of any discussion, or even mention of, the impact of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. \_\_\_, 133 S. Ct. 2151(2013). Appellant presented this issue to the Court in his Reply Brief at pages 5 through 7, in response to Respondent's contention in its Answering Brief, at page 19, that the age of the victim is not a necessary element of Sexual Assault. Respondent's contention that the age of the victim did not become a necessary element by making the charging decision to include it in the Information charging Sexual Assault of a Minor Under 14 Years of Age ignores the holding in *Apprendi*. Under *Apprendi*, where the age of the victim is determinative of a greater punishment than would be available without that factor, the age of the victim upon which a sentence is determined is an element of the offense and within the exclusive province of the jury. *Apprendi* holds that the Sixth Amendment to the Constitution of the United States of America imposes that imperative. The difference between a 5 year statutory maximum and life imprisonment with a 35 year minimum term to be served before parole eligibility rides in the balance. Without a determination as to the age of the victim no

---

<sup>1</sup> See Documents #16-12084, #16-12368, #16-12753, #16-17060, #16-18445, #16-18456 and #16-29281.

conviction for Sexual Assault of a Minor Under the Age of 14 could stand. Thus, the age of the victim is clearly a necessary element of both Sexual Assault of a Minor Under the Age of 14 and Statutory Sexual Seduction. The only difference between the two is the presence or absence of consent. That is precisely why Statutory Sexual Seduction is a necessarily lesser included offense of Sexual Assault of a Minor Under the Age of 14.

///

///

///

///

///

///

///

///

///

///

///

///

///

///

### III.

#### CONCLUSION

For all the foregoing reasons, this Court should grant this Petition for Rehearing; take judicial notice of the underlying charges in *Robinson v. State*, 110 Nev. 1137, 881 P.2d 667 (1994); recognize that *Robinson* and *Apprendi* are controlling authorities; reverse the judgment of conviction and remand for a new trial.

Dated this 17<sup>th</sup> day of March, 2017.

GENTILE CRISTALLI  
MILLER ARMENI SAVARESE

/s/Dominic P. Gentile  
DOMINIC P. GENTILE  
Nevada Bar 1923  
VINCENT SAVARESE III  
Nevada Bar 2467  
410 South Rampart Boulevard, Suite 420  
Las Vegas, Nevada 89145  
(702) 880-0000  
Attorneys for Appellant, Mazen Alotaibi

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this Petition for Rehearing of Panel Order of Affirmance 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 Petition 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 Petition 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 1191 words.

///

///

///

///

///

///

///

///

///



Finally, I hereby certify that I have read this Petition, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17<sup>th</sup> day of March, 2017.

GENTILE CRISTALLI  
MILLER ARMENI SAVARESE

/s/Dominic P. Gentile  
DOMINIC P. GENTILE  
Nevada Bar 1923  
VINCENT SAVARESE III  
Nevada Bar 2467  
410 South Rampart Boulevard, Suite 420  
Las Vegas, Nevada 89145  
(702) 880-0000  
Attorneys for Appellant, Mazen Alotaibi

## **CERTIFICATE OF SERVICE**

I hereby certify and affirm that the above and foregoing **APPELLANT’S**  
**PETITION FOR REHEARING OF PANEL ORDER OF AFFIRMANCE**, was  
filed electronically with the Nevada Supreme Court on the 17th day of March, 2017.  
Electronic Service of the foregoing document shall be made in accordance with the  
Master Service List as follows:

Clark County District Attorney's Office –  
Criminal Division  
Ryan J. MacDonald  
Email: [ryan.macdonald@clarkcountyda.com](mailto:ryan.macdonald@clarkcountyda.com)  
Steven S. Owens  
Email: [steven.owens@clarkcountyda.com](mailto:steven.owens@clarkcountyda.com)  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, NV 89155  
Counsel for the State of Nevada

/s/Myra Hyde  
An employee of  
GENTILE CRISTALLI  
MILLER ARMENI SAVARESE