IN THE SUPREME COURT OF THE STATE OF NEVADA

MAZEN ALOTAIBI, Appellant, vs. THE STATE OF NEVADA, Respondent.	CASE NO. 67380 Electronically Filed May 10 2017 02:27 p.m. Elizabeth A. Brown Clerk of Supreme Court District Court Case No.: C-13-287173-1 Dept. XXIII

APPELLANT'S PETITION FOR EN BANC RECONSIDERATION

Pursuant to Rule 40A of the Nevada Rules of Appellate Procedure ("NRAP"), MAZEN ALOTAIBI, Defendant-Appellant in the above-entitled matter ("Appellant"), by and through his attorneys, DOMINIC P. GENTILE, ESQ. and VINCENT SAVARESE III, ESQ. of the law firm of GENTILE CRISTALLI MILLER ARMENI SAVARESE, hereby respectfully petitions this Honorable Court for *en banc* reconsideration of the decision of the Panel affirming his conviction in the above-entitled case.

In support of this Petition, Appellant respectfully assigns the following:

1. On February 28, 2017, a Panel of this Court filed its Order of Affirmance;
2. On April 26, 2017, the Panel filed its Order Denying Rehearing;
3. The Order of Affirmance and Order Denying Rehearing conflict with the jurisprudence of this Court and the Supreme Court of the United States.

I.

THIS CASE INVOLVES SUBSTANTIAL PRECEDENTIAL AND CONSTITUTIONAL ISSUES.

As demonstrated with particularity *infra*, this case involves substantial precedential and constitutional issues, implicating the federal and state constitutional imperatives of due process of law, equal protection of the law, fair trial by an impartial jury and the jurisprudential principle of *stare decisis*.

II.

RECONSIDERATION BY THE FULL COURT IS NECESSARY TO MAINTAIN UNIFORMITY OF DECISIONS OF THIS COURT.

At the time of the alleged commission of the offenses charged in this case, to wit; on or about December 31, 2012, Nevada Revised Statutes ("NRS") 200.366(1) defined the crime of "Sexual Assault," in pertinent part, as "subject[ing] another person to sexual penetration . . . ***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*" (emphasis added). Subsection (3)(c) of that statute then provided, in pertinent part, that "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: 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." Appellant was charged with and convicted of the commission of this offense, and sentenced accordingly.

In contradistinction, at the time of the alleged commission of the offenses charged in this case, NRS 200.364(6)(a) – (b) defined the crime of "Statutory Sexual Seduction", in pertinent part, as "*[o]rdinary* 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 . . . *[a]ny other* ***sexual penetration*** committed by a person 18 years of age or older with a person under the age of 16 years...." (emphasis added). NRS 200.368(1) provided at that time, in pertinent part, that "a person who commits statutory sexual seduction shall be punished: If the person is 21 years of age or older, for a category C felony as provided in NRS 193.130." And, in turn, subsection (1) of that statute provided, in pertinent part, that "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."

Accordingly, under the foregoing former statutory scheme in effect at the time of the offenses alleged in this case, "***any***" sexual penetration by an adult of a minor under the age of 16 years – who was neither mentally nor physically incapable of understanding the nature of the conduct or of resisting it (or who the accused

reasonably did not perceive to be so incapable) – not undertaken "***against the will of the victim***" – constituted the less-severely punishable offense of Statutory Sexual Seduction in violation of NRS 200.364(6)(a) – (b), and *not* the greater, and more-severely punishable offense of Sexual Assault of a minor in violation of NRS 200.366(1). Thus, it was not possible at that time, in the case of a minor victim, to commit the greater offense of Sexual Assault of a minor without committing the lesser offense of Statutory Sexual Seduction.

The Panel expressly points out in its Order of Affirmance in this case that "NRS 200.366(1) was ***amended in 2015*** to provide that sexual penetration of a child under the age of 14 years is sexual assault ***regardless of consent.***" Order of Affirmance page 2, footnote 2 (emphasis added).[1] As a result, this Court is presented with a matter (1) in which it must follow its jurisprudence created prior to the 2015 amendments, and (2) that will concern only pre-amendment applications of the statutes involved.

This Court, in *Robinson v. State,* 110 Nev. 1137, 881 P.2d 667 (1994), specifically ***held*** that, under the former statutory scheme still in effect at the time of

[1] It is axiomatic that application of the effect of that "amendment" in the context of the foregoing former statutory scheme in effect at the time of the offenses alleged in this case is precluded by the federal and state constitutional prohibitions against the application of *ex post facto* legislation in state criminal prosecutions. U.S. Const., Art. I, Section 10; Nev. Const., Article 1, Section 15.

the offenses alleged in this case, Statutory Sexual Seduction ***was*** a lesser-included offense of Sexual Assault of a minor under the age of 16 years.[2] The Court found that the age of the victim was a necessary element as to both offenses when the prosecutor chooses that specific subpart of Sexual Assault. It further ***held*** that a defendant "stand[ing] trial . . . on charges of sexual assault [of a minor under the age of 16 years] [i]s entitled to an instruction on the lesser-included offense of statutory sexual seduction"; and it ultimately ***held*** that "[t]he trial court erred when it refused to give the instruction on the lesser included-offense of statutory sexual seduction; [and] accordingly, [that] the judgment of conviction [wa]s reversed, and the case . . . remanded for a new trial."

En banc review is necessary in this case because the Panel has held that "statutory sexual seduction was ***not*** a lesser-included offense of sexual assault of a minor, and Alotaibi was [therefore] ***not*** entitled to an instruction on it." Order of Affirmance page 2 (emphasis added). In reaching that conclusion, the Panel has

---

[2] To avoid the controlling precedent of *Robinson,* Respondent contends that the greater offense held there to include statutory sexual seduction was "statutory" sexual assault, not the one at issue in this case. Appellant has brought to the Court's attention that Respondent is wrong; that there has never been a Nevada statute entitled "statutory sexual assault"; that the statutes at issue in *Robinson* were identical to those in this case; and that Respondent is attempting to mislead this Court. Respondent has opposed Appellant's efforts on procedural grounds. See Documents #16-12084, #16-12368, #16-12753, #16-17060, #16-18445, #16-18456 and #16-29281.

found that "[a] comparison of the relevant statutes in effect at the time that Alotaibi committed the offenses shows that it was possible to commit sexual assault without necessarily committing statutory sexual seduction." Order of Affirmance page 2. The Panel does not articulate how that can occur. Both statutes focused upon identical sexual conduct, with consent being the only distinction.[3] And the age of the victim is clearly an element when the charge selected is the one for which Appellant was prosecuted.[4]

And Appellant further respectfully submits that the Panel's alternative recourse to characterizing the holding in *Robison* as mere "*dictum*" is likewise legally unsound. Order Denying Rehearing, page 1. Indeed, the decision of the then entire Nevada Supreme Court in *Robinson* that, under the former statutory scheme still in effect at the time of the offenses alleged in this case, Statutory Sexual Seduction was indeed a lesser-included offense of Sexual Assault of a minor under the age of 16 years, and that the failure of the trial court to so instruct the jury

---

[3] Sexual gratification is clearly implied by Sexual Assault using the word "sexual" to distinguish the crime from a battery. See *People v. Kolton,* 347 Ill. App. 3d 142, 806 N.E. 2d 1175, 1180 (Ill. App. 1st Dist. 2004).

[4] Respondent contends that because Sexual Assault can be committed upon an adult and Statutory Sexual Seduction cannot, the age of the victim is not an element of the former, but only of the latter. *Robinson* belies that position and the reviewing courts of sister states agree. See *State v. Kemble,* 291 Kan. 109, 238 P. 3d 109, 126 (Kan. 2010); *Insko v. State,* 960 So. 2d 992, 999-1001 (Fla. 2007), *State v. Marsh,* 141 Id. 862, 119 P. 3d 637, 642 (Id. App. 2005).

necessitated a new trial in that case, was the ***essential holding*** in that case, and was therefore hardly *dictum*.[5]

Here, the element of sexual penetration was *uncontested*. Rather, the *solely* contested issue was that of consent. Indeed, the only legally-cognizable issue before the jury was whether Appellant was either guilty of the greater offense of Sexual Assault or the lesser offense of Statutory Sexual Seduction. And therefore, failure to advise the jury of the Statutory Sexual Seduction option led *inexorably* to his conviction of the greater offense. Prejudice was patent.

III.

THE PANEL'S ORDER OF AFFIRMANCE AND ORDER DENYING REHEARING CONFLICT WITH APPLICABLE JURISPRUDENCE OF THE SUPREME COURT OF THE UNITED STATES.

The United States Supreme Court in *Hurst v. Florida*, No. 14-7505, __ U.S.__, 136 S. Ct. 616, 621, 193 L. Ed. 2d 504 (January 12, 2016) and *Apprendi v. New Jersey,* 530 U.S. 466 (2000), held that the Fifth, Sixth and Fourteenth Amendment rights to due process and a fair trial by an impartial jury require that

---

[5] A statement in a case is dictum when it is "unnecessary to a determination of the questions involved." *See St. James Village, Inc. v. Cunningham,* 125 Nev. ——, —— —, 210 P.3d 190, 193 (2009) (quoting *Stanley v. Levy & Zentner Co.,* 60 Nev. 432, 448, 112 P.2d 1047, 1054 (1941)). When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which it is bound. See *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 67 (1996).

each and every element of an alleged crime be proven beyond a reasonable doubt, such that any fact that "expose[s] the defendant to a greater punishment" is an "element" that must be submitted to and determined by a jury to obtain beyond a reasonable doubt. In *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), seven members of the United States Supreme Court found that double jeopardy principles apply to an included offense analysis. In the plurality opinion, Justice Scalia, joined by Justices Rehnquist and Thomas, wrote:

> We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an "offence" for purposes of the Fifth Amendment's Double Jeopardy Clause. Cf. *Monge v. California,* 524 U.S. 721, 738, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998) (SCALIA, J., dissenting) ("The fundamental distinction between facts that are *elements* of a criminal offense and facts that go only to the *sentence*" not only "delimits the boundaries of . . . important constitutional rights, like the Sixth Amendment right to trial by jury," but also "provides the foundation for our entire double jeopardy jurisprudence").

537 U.S. at 111.

In addition, *Apprendi* has been applied 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. In each of those cases, the central

issue was the relationship between punishment and the jury's finding of the existence of the element(s) that supported its imposition beyond a reasonable doubt. Thus, as the Court stated 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."

The issue of the presence or absence of consent, or the ability to do so, were critical determinations of fact under the then-existing statutory scheme at issue here; and therefore, were committed to the exclusive province of the jury. Appellant was entitled to have the jury instructed to that effect. Absent proof beyond a reasonable doubt that one of those circumstances attached, the lesser offense of Statutory Sexual Seduction was the necessary result.

...

...

...

...

...

...

...

IV.

CONCLUSION

Constitutional imperative and this Court's decision in *Robinson* require that the jury should have been given the included offense instruction. The Court should rehear this matter *en banc,* reverse and remand for a new trial.

Respectfully submitted this 10th day of May, 2017.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

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

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 40 and 40A

1. I hereby certify that this Petition for En Banc Reconsideration 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:

[**X**] It has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 font size and Times New Roman; or

[ ] It has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

[ ] Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

[**X**] Does not exceed 10 pages.

Dated this 10th day of May, 2017.

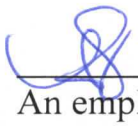
GENTILE CRISTALLI
MILLER ARMENI SAVARESE

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 foregoing **APPELLANT'S PETITION FOR EN BANC REHEARING**, was filed electronically with the Nevada Supreme Court on the 10 day of May, 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
Steven S. Owens
Email: steven.owens@clarkcountyda.com
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155
Counsel for the State of Nevada



An employee of
GENTILE CRISTALLI
MILLER ARMENI SAVARESE