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8 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

9 **IN AND FOR THE COUNTY OF CLARK**

10 MAZEN ALOTAIBI,

11 Petitioner,

12 vs.

13 RENEE BAKER, WARDEN,
14 LOVELOCK CORRECTIONAL CENTER;
15 AND
16 JAMES DZURENDA, DIRECTOR OF THE
17 NEVADA DEPARTMENT OF CORRECTION,

18 Respondents.

CASE NO. A-18-785145-W
DEPT. NO. XXIII

NOTICE OF APPEAL

19 NOTICE IS HEREBY GIVEN that Petitioner, named above, hereby appeal from the
20 following Order and Notice of Entry of Order, which are attached hereto:

21 September 6, 2019 Order Denying Petitioner's Supplemental Petition for Writ of Habeas
22 Corpus, Notice of Entry of Order filed September 9, 2019.

23 Dated this 30th day of September, 2019.

24 CLARK HILL

25 /s/ Dominic P. Gentile, Esq.

26 DOMINIC P. GENTILE

27 Nevada Bar No. 1923

28 VINCENT SAVARESE III

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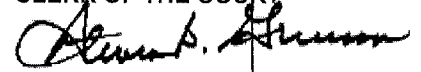
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned, an employee of Gentile Cristalli Miller Armeni Savarese hereby certifies that on the 30th day of September 2019, I served a copy of NOTICE OF APPEAL, by electronic means and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

DISTRICT ATTORNEY
CRIMINAL DIVISION
James R. Sweetin, Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
E-mail: james.sweetin@clarkcountynvda.com

/s/ Tanya Bain
An employee of Clark Hill PLLC



1 NEOJ

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4 MAZEN ALOTAIBI,

5
6 Petitioner,

Case No: A-18-785145-W

Dept. No: XXIII

7 vs.

8 RENEE BAKER; ET,AL.,

9 Respondent,

NOTICE OF ENTRY OF ORDER

10
11 **PLEASE TAKE NOTICE** that on September 6, 2019, the court entered a decision or order in this
12 matter, a true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
15 mailed to you. This notice was mailed on September 9, 2019.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

17
18
19 **CERTIFICATE OF E-SERVICE / MAILING**

20 I hereby certify that on this 9 day of September 2019, I served a copy of this Notice of Entry on the
21 following:

22 ☒ By e-mail:

Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

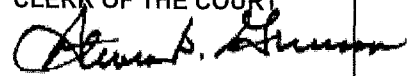
23
24 ☒ The United States mail addressed as follows:

25 Mazen Alotaibi # 1134277
P.O. Box 208
Indian Springs, NV 89070

Dominic P. Gentile, Esq.
410 S. Rampart Blvd., Ste 420
Las Vegas, NV 89145

26
27 /s/ Amanda Hampton

Amanda Hampton, Deputy Clerk



DISTRICT COURT
CLARK COUNTY, NEVADA

MAZEN ALOTAIBI,

Petitioner,

v.

RENEE BAKER, WARDEN;
LOVELOCK CORRECTIONAL
CENTER; AND JAMES
DZURENDA, DIRECTOR OF THE
NEVADA DEPARTMENT OF
CORRECTION

Respondent.

CASE NO.: A-18-785145-W

DEPARTMENT XXIII

DECISION & ORDER

I. INTRODUCTION

This matter was last before the Court on June 6, 2019 for an evidentiary hearing pursuant to Petitioner's Supplemental Post-conviction Petition for Writ of Habeas Corpus and the State's Response thereto. Petitioner was represented by Dominic P. Gentile, Esq. The State was represented by Deputized Law Clerk Joshua L. Prince, Esq. and Chief Deputy District Attorney Charles W. Thoman, Esq.

Petitioner's original petition set forth a claim of ineffective assistance of counsel. These claims include the following allegations: (1) Petitioner's trial attorney unilaterally rejected the trial court's invitation to request a jury instruction on a lesser-related, uncharged offense, (2) Petitioner's trial attorney commenced discussion of jury instructions without the presence of the Petitioner on the condition that he would review all discussions regarding jury instructions with Petitioner Alotaibi, but the trial attorney failed to conduct a complete discussion, (3) Petitioner's trial attorney failed to obtain petitioner's consent to

1
2 reject the trial court's offer with respect to counts 3 and 5 of Sexual Assault, and (4) the
3 rejection of the lesser-related offense resulted in prejudice against the petitioner.

4 II. TESTIMONY

5 At the June 6, 2019 evidentiary hearing, Petitioner's attorney called the original trial
6 attorney, Don Chairez, to the stand. The pertinent testimony was as follows:

7 A. Don Chairez ("Chairez")

8 At the time of the evidentiary hearing, Chairez testified that the Petitioner
9 was not present when Counsel and the Court discussed jury instructions. However,
10 he was directed by the Court to personally go through each of the jury instructions
11 with the Petitioner during the lunch break. During the hour and fifteen minute lunch
12 break, Chairez testified that he spent most of that time attempting to persuade
13 Petitioner to testify. Chairez testified that the Petitioner had decided against
14 testifying after watching the examination of other witnesses.

15 Chairez testified that there was no interpreter present during the hour and
16 fifteen minute discuss. Chairez testified that he briefly went over the elements of
17 sexual assault and lewdness, explaining that these charges would come down to
18 whether Petitioner could show that the victim consented.

19 Chairez testified that during the hour and fifteen minute lunch break, he did
20 not spend any time discussing the lesser-related sexual seduction instruction, nor
21 did he discuss or explain the sentencing differences between Statutory Sexual
22 Seduction and the other charges. He did however explain the sentencing differences
23 between Sexual Assault and Lewdness. Chairez said he never received consent
24 from his client to reject the instruction for Statutory Sexual Seduction.
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1
2 Chairez testified that in hindsight he believes the judge was trying to
3 telegraph that he should ask for the related instruction and that he should not have
4 made the decision to reject the instruction without obtaining informed consent from
5 Petitioner.

6 In fact, after the trial, jurors asked him why there was not an instruction for
7 statutory rape.

8 COURT FINDS, Mr. Chairez's testimony credible.

9
10 **III. PROCEDURAL BACKGROUND**

11 On January 28, 2015, Alotaibi was adjudged guilty and sentenced to the Nevada
12 Department of Corrections as follows: Count 1: a minimum term of 12 months and a
13 maximum term of 48 months; Count 2: a definite term of 15 years with eligibility for
14 parole beginning when a minimum of five years have been served, Count 2 to run
15 concurrent with Count 1; Count 3: Life imprisonment with eligibility for parole beginning
16 when a minimum of 35 years have been served, Count 3 to run concurrent with Count 2;
17 Count 5: Life imprisonment with the eligibility for parole beginning when a minimum of
18 35 years have been served, Count 5 to run concurrent with count 3; Count 7: Life
19 imprisonment with eligibility for parole beginning when a minimum of 10 years have been
20 served, Count 7 to run concurrent with Count 5; Count 8: Life imprisonment with
21 eligibility for parole beginning when a minimum of 10 years have been served, Count 8 to
22 run concurrent with Count 7; and Count 9: credit for time served. Alotaibi received 758
23 days' credit for time served. Alotaibi was also subject to a special sentence of lifetime
24 supervision, which would commence upon his release from any term of probation, parole,
25 or imprisonment. Further, pursuant to NRS 179D.460, Alotaibi would have to register as a
26 sex offender within 48 hours of sentencing or release from custody.
27
28

1 Alotaibi's Judgment of Conviction was filed on February 5, 2015. Alotaibi filed
2 his timely Notice of Appeal on that same date and filed his Opening Brief ("AOB") on
3 October 26, 2015. The State responded. The Nevada Supreme Court affirmed his
4 conviction on February 28, 2017. The Petitioner was successful in having the Supreme
5 Court of Nevada consider his case with an opinion being filed on November 9, 2017. The
6 Supreme Court of Nevada affirmed the Judgment of Conviction.
7

8 Petitioner filed a Petition for Certiorari on February 7, 2018. The United States
9 Supreme Court denied certiorari on April 16, 2018.
10

11 On November 28, 2018, Petitioner filed the instant Petition for Writ of Habeas
12 Corpus. The State filed a Return on December 31, 2018. Petitioner filed a Reply on January
13 14, 2019.
14

15 IV. DISCUSSION

16 A criminal defendant has a Sixth Amendment right to effective representation at
17 trial. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). The United States Supreme
18 Court established the legal principles that govern claims of ineffective assistance of counsel
19 in *Strickland v. Washington*, 466 U.S. 668 (1984). In order for Defendant to be successful
20 in his ineffective assistance of counsel claim, Defendant must prove that his (1) counsel's
21 performance was deficient, and (2) that the deficiency prejudiced the defense. *Strickland v.*
22 *Washington*, 466 U.S. at 687, 694 (1984); *see also State v. Love*, 865 P.2d 322, 323 (1996)
23 (applying the two-prong *Strickland* test in Nevada).
24

25 To meet the deficient performance prong, a petitioner must demonstrate that
26 counsel's representation "fell below an objective standard of reasonableness." *Strickland*,
27 466 U.S. at 688.
28

In his habeas petition, Petitioner argues that his counsel was ineffective for four

1 primary reasons. First, Petitioner claims his trial counsel was ineffective when he
2 *unilaterally rejected the trial court's offer* Statutory Sexual Seduction for Counts 3 and 5.
3 Second, Petitioner claims his trial attorney was ineffective when he *failed to convey*
4 *discussions regarding jury instructions* with the Petitioner. Thus, Petitioner did not
5 understand the legal distinctions involved or the sentencing consequences of the decision to
6 accept or reject the court's offer. Third, Petitioner claims his trial attorney was ineffective
7 when *he did not obtain Petitioner's express consent* to reject the trial court's invitation of
8 the lesser-related offense instruction. Fourth, Petitioner claims that Chairez's representation
9 was ineffective and unreasonable since he only provided the jury two options, a conviction
10 or a complete exoneration, and but for this ineffective assistance of counsel, there was a
11 reasonable probability that the results would have been different.

12 In response, the State argues that the Petitioner's counsel was not ineffective for
13 making unilateral *strategic* decisions. Defense counsel specifically declined to ask for the
14 Statutory Sexual Seduction instruction because he was basing his theory of the defense on
15 the victim's consent for Counts 3 and 5, and the Petitioner's voluntary intoxication for
16 Counts 4, 6, 7, and 8. The possibility of a complete acquittal of the crimes underling
17 Counts 3, 4, 5, and 6 would not have presented itself had counsel requested the Statutory
18 Sexual Seduction Instruction.

19 Next, the State argues an attorney does not need to obtain consent to every tactical
20 decision; however, certain decisions, such as the exercise or waiver of rights, must be
21 discussed and entered into voluntarily. The Sixth Amendment requires that the exercise or
22 waiver of certain rights are of such importance that they cannot be made for the defendant
23 by a surrogate. Here, a jury instruction for a lesser-related offense, unlike one for a lesser-
24 included offense, is not mandatory, nor is it a waiver of a right. Instead, it is a "tactical
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1 decision” for which defense counsel can argue in his discretion. Thus, consent by the client
2 is not necessary.
3

4 Finally, the State claims that even if there was a deficient performance by Defense
5 Counsel, the outcome of the trial was not prejudiced as there was not a reasonable
6 probability that the result of the proceedings would have been different. The jury was not
7 forced to choose between a conviction and a complete exoneration regarding Counts 3 and
8 5, as the State gave the jury an additional option by charging Petitioner with Counts 4 and
9 6, Lewdness with a Child Under the Age of 14, as an alternative to the Sexual Assault
10 charge. Count 4’s Lewdness charge coincided with Count 3’s Sexual Assault charge for the
11 anal touching and penetration, just as Count 6’s Lewdness charge coincided with Count 5’s
12 Sexual Assault charge for the oral touching and penetration. Based on the verdict, the jury
13 considered and rejected that the sexual penetration that occurred in Counts 3 and 5 was
14 consensual. Thus, the outcome of the trial was not prejudiced because there was not a
15 reasonable probability that the outcome would have been different. Finally, the State argues
16 that the evidence presented at trial was in fact sufficient to sustain a conviction and noted
17 the Supreme Court affirmed said conviction.
18
19

20 V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

21 The Sixth Amendment to the United States Constitution provides that, “[i]n all
22 criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of
23 Counsel for his defense.” The United States Supreme Court has long recognized that “the
24 right to counsel is the right to the effective assistance of counsel.” *Strickland v.*
25 *Washington*, 466 U.S. 668, 686 (1984); *see also State v. Love*, 109 Nev. 1136, 1138 (1993).
26

27 To prevail on a claim of ineffective assistance of trial counsel, a defendant must
28 prove he was denied “reasonably effective assistance” of counsel by satisfying the two-

1 prong test of *Strickland*, 466 U.S. at 686-87. *See also Love*, 109 Nev. at 1138, 865 P.2d at
2 323. Under the *Strickland* test, a defendant must show first that his counsel's representation
3 fell below an objective standard of reasonableness, and second, that but for counsel's
4 errors, there is a reasonable probability that the result of the proceedings would have been
5 different. *Strickland*, 466 U.S. at 687-88, 694; *Warden, Nevada State Prison v. Lyons*, 100
6 Nev. 430, 432 (1984) (adopting the *Strickland* two-part test). "[T]here is no reason for a
7 court deciding an ineffective assistance claim to approach the inquiry in the same order or
8 even to address both components of the inquiry if the defendant makes an insufficient
9 showing on one." *Strickland*, 466 U.S. at 697.

12 The court begins with the presumption of effectiveness and then must determine
13 whether the defendant has demonstrated by a preponderance of the evidence that counsel
14 was ineffective. *Means v. State*, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective
15 counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin
16 the range of competence demanded of attorneys in criminal cases.'" *Jackson v. Warden*, 91
17 Nev. 430, 432 (1975). Counsel cannot be ineffective for failing to make futile objections or
18 arguments. *See Ennis v. State*, 122 Nev. 694, 706 (2006). Trial counsel has the "immediate
19 and ultimate responsibility of deciding if and when to object, which witnesses, if any, to
20 call, and what defenses to develop." *Rhyne v. State*, 118 Nev. 1, 8 (2002).

22 Based on the above law, the role of a court in considering allegations of ineffective
23 assistance of counsel is "not to pass upon the merits of the action not taken but to determine
24 whether, under the particular facts and circumstances of the case, trial counsel failed to
25 render reasonably effective assistance." *Donovan v. State*, 94 Nev. 671, 675 (1978). This
26 analysis does not mean that the court should "second guess reasoned choices between trial
27 tactics nor does it mean that defense counsel, to protect himself against allegations of
28

1 inadequacy, must make every conceivable motion no matter how remote the possibilities
2 are of success.” *Id.* To be effective, the constitution “does not require that counsel do what
3 is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot
4 create one and may disserve the interests of his client by attempting a useless charade.”
5 *United States v. Cronin*, 466 U.S. 648, 657 n.19 (1984).
6

7 “There are countless ways to provide effective assistance in any given case. Even
8 the best criminal defense attorneys would not defend a particular client in the same way.”
9 *Strickland*, 466 U.S. at 689, 104 S.Ct. at 689. “Strategic choices made by counsel after
10 thoroughly investigating the plausible options are almost unchallengeable.” *Dawson v.*
11 *State*, 108 Nev. 112, 117 (1992); *see also Ford v. State*, 105 Nev. 850, 853 (1989). In
12 essence, the court must “judge the reasonableness of counsel’s challenged conduct on the
13 facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland*, 466
14 U.S. at 690.
15

16 Even if a defendant can demonstrate that his counsel’s representation fell below an
17 objective standard of reasonableness, he must still demonstrate prejudice and show a
18 reasonable probability that, but for counsel’s errors, the result of the trial would have been
19 different. *McNelson v. State*, 115 Nev. 396, 403 (1999) (citing *Strickland*, 466 U.S. at 687).
20 “A reasonable probability is a probability sufficient to undermine confidence in the
21 outcome.” *Id.* (citing *Strickland*, 466 U.S. at 687- 89, 694 2068).
22

23 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove
24 the disputed factual allegations underlying his ineffective-assistance claim by a
25 preponderance of the evidence.” *Means v. State*, 120 Nev. 1001, 1012 (2004). Furthermore,
26 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief
27 must be supported with specific factual allegations, which if true, would entitle the
28

1 petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502 (1984).

2
3 “Bare” and “naked” allegations are not sufficient, nor are those belied and repelled
4 by the record. *Id.* NRS 34.735(6) states in relevant part “[Petitioner] must allege specific
5 facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than
6 just conclusions may cause your petition to be dismissed.” (emphasis added). A defendant
7 is not entitled to a particular “relationship” with his attorney. *Morris v. Slappy*, 461 U.S. 1,
8 14 (1983). There is no requirement for any specific amount of communication as long as
9 counsel is reasonably effective in his representation. *See id.*

10
11 At the time of Petitioner’s sentencing in 2012, the sentencing guidelines for the
12 charged counts were as follows:

- 13
- 14 • Sexual Assault—a category A felony for which a court shall sentence a
15 convicted person to life with parole eligibility after 35 years if the offense
16 was committed against a child under the age of 14 years and did not result in
17 substantial bodily harm. NRS 200.366(3)(c).
 - 18 • Lewdness—a category A felony for which a court shall sentence a convicted
19 person to
 - 20 ○ (a) Life with the possibility of parole, with eligibility for parole
21 beginning when a minimum of 10 years has been served, and may be
22 further punished by a fine of not more than \$ 10,000; or
 - 23 ○ (b) A definite term of 20 years, with eligibility for parole after a
24 minimum of 2 years has been served, and may further be punished
25 by a fine of not more than \$ 10,000. NRS 201.230 (2)
 - 26 • Statutory Sexual Seduction—a category C felony for which a court shall
27 sentence a convicted person to imprisonment in the state prison for a
28 minimum term of not less than 1 year and a maximum term of not more than
5 years. In addition to any other penalty, the court may impose a fine of not
more than \$ 10,000, unless a greater fine is authorized or required by statute.
NRS 193.130 (c).

25 Strategic and tactical decisions should be made by defense counsel, *after*
26 *consultation with the client* where feasible and appropriate. ABA Criminal Justice
27 Standards Section 4-5.2 (d) (emphasis added). An attorney has a duty to consult with the
28

1 client regarding important decisions. Here, trial counsel was instructed to sit with his client
2 and the interpreter to inform the Petitioner about the jury instruction discussions, including
3 the possible request for the Statutory Sexual Seduction instruction. Transcript Day 7 at 3,
4 20-21, 31, 34. Trial counsel acknowledged that he did not meaningfully discuss the lesser-
5 related Statutory Sexual Seduction instruction issue with Petitioner.
6

7 Pursuant to the two-prong test set forth in *Strickland v. Washington*, COURT
8 FINDS, Petitioner's trial counsel was ineffective when he *failed to review all jury*
9 *instruction discussions* with the Petitioner as explicitly direct by the Court. However,
10 COURT FURTHER FINDS, that failing to review the lesser-related offense with his client
11 did not result in a reasonable probability that the result would have been different pursuant
12 to *Strickland*. COURT FINDS, the jury was not forced to choose between a conviction and
13 exoneration on Counts 3 and 5 - Sexual Assault of a Minor under Fourteen Years of Age,
14 as they had an alternative option of finding Petitioner guilty of Counts 4 and 6 – Lewdness
15 with a Child under the Age of 14. Therefore, COURT FINDS, though Defense Counsel
16 was ineffective, this ineffectiveness did not result in a reasonable probability that the
17 outcome would have been different.
18
19

20 Although Attorney Chairez testified that there was not an interpreter present to
21 discuss jury instructions with the Petitioner, the record indicates otherwise. Trial transcripts
22 indicate an interpreter was present just prior to the lunch break on Day 7 and that Chairez
23 specifically asked permission to stay in the courtroom during the lunch hour with his client
24 *and the interpreter*. Transcript Day 7 at 33-35. After the lunch recess, the court resumed
25 proceedings, affirming the presence of the Petitioner *and the interpreter*. Transcript Day 7
26 at 35. Thus, claims that an interpreter was not present during this time are belied by the
27 record.
28

1 COURT FINDS, Petitioner's trial counsel was not ineffective for failing to request
2 the Statutory Sexual Seduction instruction because it was a legitimate, tactical decision that
3 could have led to acquittal. Therefore, COURT FINDS, this decision was not the
4 unreasonable all-or-nothing strategy as described by the Petitioner since the State had also
5 charged Lewdness with a Child under 14 Years of Age *as an alternative to the Sexual*
6 *Assault charges.* Transcript Day 7, at 24. The jury was not left with a strictly binary
7 decision between complete acquittal and conviction for the anal and oral penetration of A.J.
8 Had the jury believed the Petitioner's defense of consent, then they had the option to find
9 the anal and oral penetration of A.J. to be Lewdness with a Child Under 14 Years of Age.
10

11 Thus, regarding the anal and oral penetration of A.J., the jury had the option to (a)
12 convict the Petitioner of Sexual Assault, (b) convict the Petitioner of Lewdness with a
13 Child Under 14 Years of Age, or (c) exonerate the Petitioner. Exoneration would have only
14 occurred if the jury found that A.J. had consented to the penetration (negating sexual
15 assault) **AND** that the Petitioner was sufficiently intoxicated to nullify the requisite intent
16 for Lewdness. Introduction of the Statutory Sexual Seduction instruction closed the door to
17 any possibility of exoneration, and thus, was not an unreasonable decision made by trial
18 counsel.
19

20 This court does recognize that when a jury is left to decide between complete
21 acquittal or conviction that it might be ineffective assistance for counsel to fail to request a
22 lesser-related offense instruction; however, that is not the case in this matter. Here, the jury
23 already had a lesser-related offense instruction of Lewdness. An additional lesser-related
24 offense instruction of Statutory Sexual Seduction would not have resulted in a different
25 outcome because the jury rejected the lesser-related offense of Lewdness when they
26 convicted the Petitioner of Sexual Assault.
27
28

1 Therefore, COURT FINDS, if the jury had determined that A.J. had consented to
2 the penetration, and therefore not a sexual assault, they could have still convicted
3 Petitioner of Lewdness, which is still a lascivious act upon the body of a child under the
4 age of 14 that *does not constitute the crime of sexual assault*. However, COURT FINDS,
5 the jury chose to convict the Petitioner on the greater charge of Sexual Assault regarding
6 the anal and oral penetration of A.J. Verdict at 2. COURT THEREFORE FINDS, adding
7 another instruction for Statutory Sexual Seduction, which is a lesser charge than
8 Lewdness, would not have had any effect on the outcome of this case.
9

10
11 **V. ORDER**

12 For the foregoing reasons, COURT ORDERS, Petitioner's Supplemental Petition
13 for Writ of Habeas Corpus, DENIED.

14
15 Dated this 5th day of September, 2019.

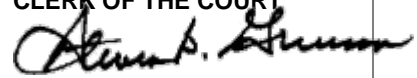
16
17 
18 HONORABLE STEFANY A. MILEY
19 DISTRICT COURT JUDGE
20 DEPARTMENT XXIII

21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on or about the date signed, a copy of this Decision and Order was
23 electronically served and/or placed in the attorney's folders maintained by the Clerk of the
24 Court and/or transmitted via facsimile and/or mailed, postage prepaid, by United States
25 mail to the proper parties as follows: Dominic P. Gentile, Esq., and Charles W. Thoman,
26 Esq.

27
28 By: 

Carmen Alper
Judicial Executive Assistant
Department XXIII



ASTA
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Attorneys for Petitioner Mazen Alotaibi

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

MAZEN ALOTAIBI,

Petitioner,

vs.

RENEE BAKER, WARDEN,
LOVELOCK CORRECTIONAL CENTER;
AND
JAMES DZURENDA, DIRECTOR OF THE
NEVADA DEPARTMENT OF CORRECTION,

Respondents.

CASE NO. A-18-785145-W
DEPT. NO. XXIII

CASE APPEAL STATEMENT

CASE APPEAL STATEMENT

1. Name of appellant filing this case appeal statement:

Mazen Alotaibi

2. Identify the judge issuing the decision, judgment, or order appealed from:

Eighth Judicial District Court Judge Stefany A. Miley

3. Identify each appellant and the name and address of appellate counsel for each appellant:

Appellant: Mazen Alotaibi

Counsel for Appellant:

Dominic P. Gentile
Vincent Savarese III
3800 Howard Hughes Pkwy., #500
Las Vegas, Nevada 89169

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent:

Respondents: Renee Baker, Warden, Lovelock Correctional Center; And James Dzurenda, Director Of The Nevada Department Of Correction

Counsel for Respondents:

James R. Sweetin, Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155-2212

5. Indicate whether any attorney identified above in response to questions 3, or 4 is not licensed to practice in Nevada, and, if so, whether the district court granted that attorney permission to appear under SCR 42:

Appellant's counsel is licensed to practice law in Nevada.

Respondents' counsel are licensed to practice law in Nevada.

6. Indicated whether appellant was represented by appointed or retained counsel in the district court:

Appellant was represented by retained counsel in the district court.

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

Appellant is represented by retained counsel for the appeal.

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

Appellant was not granted leave to proceed in forma pauperis.

9. Indicate the date the proceedings commenced in the district court:

A Petition for Writ of Habeas Corpus was filed on November 28, 2018.

...

...

...

...

1 **10. Provide a brief description of the nature of the action and result in the**
2 **district court, including the type of judgment or order being appealed and the relief**
3 **granted by the district court:**

4 **Nature of the Action:**

5 Petitioner filed a Writ of Habeas Corpus regarding ineffective assistance of counsel. The claims
6 included that Petitioner's trial attorney unilaterally rejected the trial court's invitation to request a
7 jury instruction on a lesser-related, uncharged offense, that Petitioner's trial attorney commenced
8 discussion of jury instructions without the presence of the Petitioner on the condition that he
9 would review all discussions regarding jury instructions with Petitioner, however, his trial
10 attorney failed to conduct a complete those discussions. Petitioner's trial attorney also failed to
11 obtain Petitioner's consent to reject the trial court's offer with respect to counts 3 and 5 of his
12 Sexual Assault charges, and the rejection of the lesser-related offense resulted in prejudice
13 against the Petitioner.

14 **Result in District Court:**

15 On September 6, 2019 the Judge entered an Order denying Petitioner's Petition for Writ
16 of Habeas Corpus.

17 **11. Indicate whether the case has previously been subject of an appeal to or**
18 **original writ proceedings in the Supreme Court and, if so, the caption and Supreme Court**
19 **docket number of the prior proceedings:**

20 This case has not previously been the subject of an appeal or writ proceedings in the
21 Supreme Court.

22 **12. Indicate whether this appeal involves child custody or visitation:**

23 This case does not involve child custody or visitation issues.

24 ...

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13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

No.

Dated this 30th day of September, 2019.

CLARK HILL

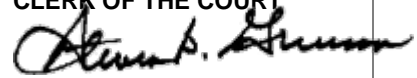
/s/ Dominic P. Gentile, Esq.
DOMINIC P. GENTILE
Nevada Bar No. 1923
VINCENT SAVARESE III
Nevada Bar No. 2467
3800 Howard Hughes Pkwy., #500
Las Vegas, Nevada 89169
Tel: (702) 862-8300
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned, an employee of Gentile Cristalli Miller Armeni Savarese hereby certifies that on the 30th day of September 2019, I served a copy of **CASE APPEAL STATEMENT**, by electronic means and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

DISTRICT ATTORNEY
CRIMINAL DIVISION
James R. Sweetin, Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
E-mail: james.sweetin@clarkcountynvda.com

/s/ Tanya Bain
An employee of Clark Hill PLLC



CLARK HILL PLLC
DOMINIC P. GENTILE
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VINCENT SAVARESE III
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3800 Howard Hughes Pkwy., #500
Las Vegas, Nevada 89169
Tel: (702) 862-8300
Fax: (702) 862-8400
Attorneys for Petitioner Mazen Alotaibi

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

MAZEN ALOTAIBI,

Petitioner,

vs.

RENEE BAKER, WARDEN,
LOVELOCK CORRECTIONAL CENTER;
AND
JAMES DZURENDA, DIRECTOR OF THE
NEVADA DEPARTMENT OF CORRECTION,

Respondents.

CASE NO. A-18-785145-W
DEPT. NO. XXIII

REQUEST FOR TRANSCRIPT OF PROCEEDING

TO: Maria Garibay, Court Reporter

The Petitioner request preparation of a transcript of the proceedings before the District

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Court as follows:

Judge or Officer hearing the proceeding:	Honorable Stefany A. Miley
Date or dates of proceedings:	June 6, 2019
Portions of the transcript requested:	Entire
Number of copies required:	Original and one (1) copy

Dated this 30th day of September, 2019.

CLARK HILL

/s/ Dominic P. Gentile, Esq.
DOMINIC P. GENTILE
Nevada Bar No. 1923
VINCENT SAVARESE III
Nevada Bar No. 2467
3800 Howard Hughes Pkwy., #500
Las Vegas, Nevada 89169
Tel: (702) 862-8300
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned, an employee of Gentile Cristalli Miller Armeni Savarese hereby certifies that on the 30th day of September 2019, I served a copy of **REQUEST FOR TRANSCRIPT OF PROCEEDINGS** by electronic means and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

DISTRICT ATTORNEY
CRIMINAL DIVISION
James R. Sweetin, Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
E-mail: james.sweetin@clarkcountynvda.com

/s/ Tanya Bain
An employee of Clark Hill PLLC

CASE SUMMARY

CASE NO. A-18-785145-W

Mazen Alotaibi, Plaintiff(s)
vs.
Renee Baker, Defendant(s)

§
§
§
§
§

Location: **Department 23**
 Judicial Officer: **Miley, Stefany**
 Filed on: **11/28/2018**
 Case Number History:
 Cross-Reference Case Number: **A785145**

CASE INFORMATION

Related Cases

C-13-287173-1 (Writ Related Case)

Case Type: **Writ of Habeas Corpus**

Statistical Closures

09/10/2019 Other Manner of Disposition

Case Status: **09/10/2019 Closed**

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number A-18-785145-W
 Court Department 23
 Date Assigned 11/29/2018
 Judicial Officer Miley, Stefany

PARTY INFORMATION





Plaintiff	Alotaibi, Mazen	<i>Lead Attorneys</i> Gentile, Dominic P. <i>Retained</i> 702-862-8300(W)
Defendant	Baker, Renee	Wolfson, Steven B <i>Retained</i> 702-671-2700(W)
	Dzurenda, James	Wolfson, Steven B <i>Retained</i> 702-671-2700(W)

DATE

EVENTS & ORDERS OF THE COURT

INDEX

EVENTS













11/28/2018	 Petition for Writ of Habeas Corpus Filed by: Plaintiff Alotaibi, Mazen <i>Petition for Writ of Habeas Corpus (Post-Conviction)</i>
11/29/2018	 Memorandum of Points and Authorities Filed By: Plaintiff Alotaibi, Mazen <i>Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction)</i>
11/29/2018	 Transcript of Proceedings Party: Plaintiff Alotaibi, Mazen <i>Transcript of Proceedings - Jury Trial Day 2 - In Support of Petition for Writ of Habeas Corpus (Post-Conviction)</i>
11/29/2018	 Transcript of Proceedings Party: Plaintiff Alotaibi, Mazen <i>Transcript of Proceedings - Jury Trial Day 3 - In Support of Petition for Writ of Habeas</i>

CASE SUMMARY
CASE NO. A-18-785145-W

Corpus (Post Conviction)

11/29/2018	 Transcript of Proceedings <i>Transcript of Proceedings - Jury Trial Day 4 - In Support of Petition for Writ of Habeas Corpus (Post-Conviction)</i>
11/29/2018	 Transcript of Proceedings Party: Plaintiff Alotaibi, Mazen <i>Transcript of Proceedings - Day 5 - Petition for Writ of Habeas Corpus (Post Conviction)</i>
11/29/2018	 Transcript of Proceedings Party: Plaintiff Alotaibi, Mazen <i>Transcript of Proceedings - Jury Trial Day 6 - in Support of Petition for Writ of Habeas Corpus (Post Conviction)</i>
11/29/2018	 Transcript of Proceedings Party: Plaintiff Alotaibi, Mazen <i>Transcript of Proceedings - Jury Trial Day 7 - in Support of Petition for Writ of Habeas Corpus (Post-Conviction)</i>
11/29/2018	 Transcript of Proceedings <i>Transcript of Proceedings - Jury Trial Day 8 - in Support of Petition for Writ of Habeas Corpus (Post-Conviction)</i>
11/29/2018	 Transcript of Proceedings Party: Plaintiff Alotaibi, Mazen <i>Transcript of Proceedings - Jury Trial Day 9 - in Support of Petition for Writ of Habeas Corpus (Post-Conviction)</i>
11/29/2018	 Transcript of Proceedings Party: Plaintiff Alotaibi, Mazen <i>Transcript of Proceedings - Sentencing - in Support of Petition for Writ of Habeas Corpus (Post-Conviction)</i>
12/31/2018	 Response <i>State's Response to Defendant s Petition for Writ of Habeas Corpus</i>
01/14/2019	 Reply Filed by: Plaintiff Alotaibi, Mazen <i>Petitioner's Reply in Support of Petition for Writ of Habeas Corpus (Post-Conviction)</i>
01/29/2019	 Notice of Rescheduling of Hearing <i>Notice Resetting Date and Time of Hearing</i>
02/04/2019	 Notice of Rescheduling <i>Notice of Rescheduling</i>
02/19/2019	 Notice of Rescheduling <i>Notice of Rescheduling</i>
04/03/2019	 Order for Production of Inmate <i>Order for Production of Inmate</i>
04/17/2019	 Motion


CASE SUMMARY
CASE NO. A-18-785145-W

	Filed By: Plaintiff Alotaibi, Mazen <i>Motion to Place on Calendar</i>
04/19/2019	 Motion <i>Motion to Place on Calendar</i>
04/19/2019	 Clerk's Notice of Hearing <i>Notice of Hearing</i>
04/25/2019	 Stipulation and Order Filed by: Plaintiff Alotaibi, Mazen <i>Stipulation and Order to Continue the Evidentiary Hearing</i>
09/06/2019	 Decision and Order <i>Decision and Order</i>
09/09/2019	 Notice of Entry of Order Filed By: Defendant Baker, Renee <i>Notice of Entry of Order</i>
09/10/2019	 Order to Statistically Close Case <i>Civil Order to Statistically Close Case</i>
09/30/2019	 Notice of Change of Firm Name Filed By: Plaintiff Alotaibi, Mazen <i>Notice of Change of Firm Affiliation and Address</i>
09/30/2019	 Notice of Appeal Filed By: Plaintiff Alotaibi, Mazen <i>Notice of Appeal</i>
09/30/2019	 Request Filed by: Plaintiff Alotaibi, Mazen <i>Request for Transcript of Proceeding</i>
09/30/2019	 Case Appeal Statement Filed By: Plaintiff Alotaibi, Mazen <i>Case Appeal Statement</i>
<u>HEARINGS</u>	
01/14/2019	 Petition for Writ of Habeas Corpus (11:00 AM) (Judicial Officer: Bell, Linda Marie) Matter Continued; Journal Entry Details: <i>Def't. not present. Counsel advised he received the State's Opposition on New Year's Eve and stated somehow it had been overlooked. Court inquired a Reply had been filed. Counsel advised he had not file a Reply, however, noted he would file a Motion for Leave to File. Objection by the State. CONFERENCE AT THE BENCH. COURT ORDERED, matter CONTINUED. NDC 02-04-19 11:00 AM PETITION FOR WRIT OF HABEAS CORPUS;</i>
03/13/2019	 Petition for Writ of Habeas Corpus (11:00 AM) (Judicial Officer: Miley, Stefany) 03/13/2019, 06/06/2019, 07/03/2019 Matter Continued; Continued for Chambers Decision; Denied; Journal Entry Details:

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-18-785145-W

	<p><i>Pursuant to the Decision and Order filed September 6, 2019, COURT ORDERED, writ DENIED.;</i></p> <p>Matter Continued;</p> <p>Continued for Chambers Decision;</p> <p>Denied;</p> <p>Matter Continued;</p> <p>Continued for Chambers Decision;</p> <p>Denied;</p> <p>Journal Entry Details:</p> <p><i>Court stated it is granting an Evidentiary Hearing as the Supreme Court will send the case back in order for the case to be developed. Plaintiff's counsel advised Plaintiff is currently in Ely State Prison. COURT ORDERED, matter SET for hearing. Parties advised the length of hearing will be approximately two hours. 05-16-19 9:30 AM EVIDENTIARY HEARING; PETITION FOR WRIT OF HABEAS CORPUS;</i></p>
06/06/2019	<p>Evidentiary Hearing (9:30 AM) (Judicial Officer: Miley, Stefany)</p> <p>Matter Heard;</p>
06/06/2019	<p> All Pending Motions (9:30 AM) (Judicial Officer: Miley, Stefany)</p> <p><i>Evidentiary Hearing; Deft's Petition for Writ of Habeas Corpus</i></p> <p>Continued for Chambers Decision; Evidentiary Hearing; Deft's Petition for Writ of Habeas Corpus</p> <p>Journal Entry Details:</p> <p><i>Deputized Law Clerk Joshua J. Prince present on behalf of Defendants. Counsel advised Plaintiff is waiving his use of court interpreter as Plaintiff had learned English language very well. Plaintiff advised is waiving attorney/client privilege. Testimony and exhibits presented. (See worksheets) Argument by Mr. Gentile. Argument by Mr. Thoman. COURT ORDERED, matter CONTINUED for Chambers decision. 07-03-19 3:00 AM (CHAMBERS) PETITION FOR WRIT OF HABEAS CORPUS;</i></p>
06/11/2019	<p>CANCELED Motion (9:30 AM) (Judicial Officer: Miley, Stefany)</p> <p><i>Vacated - Moot</i></p> <p><i>Motion to Place on Calendar</i></p>

DATE

FINANCIAL INFORMATION

Plaintiff Alotaibi, Mazen	
Total Charges	24.00
Total Payments and Credits	24.00
Balance Due as of 10/2/2019	0.00

DISTRICT COURT CIVIL COVER SHEET

CLARK

County, Nevada

Case No.

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone): Mazen Alotaibi	Defendant(s) (name/address/phone): Renee Baker, Waden Lovelock Correctional Center James Dzurenda, Director of the Nevada Department Of Corrections
Attorney (name/address/phone): Dominic P. Gentile (SBN: 1923) Vincent Savarese III (SBN: 2467) 410 S. Rampart Blvd. #420, Las Vegas, NV 89145 (702) 880-0000	Attorney (name/address/phone):

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ Civil Writ <input checked="" type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

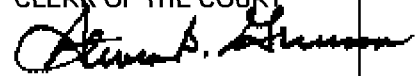
Business Court filings should be filed using the Business Court civil coversheet.

11-28-2018

Date

Signature of initiating party or representative

See other side for family-related case filings.



DISTRICT COURT
CLARK COUNTY, NEVADA

MAZEN ALOTAIBI,

Petitioner,

v.

RENEE BAKER, WARDEN;
LOVELOCK CORRECTIONAL
CENTER; AND JAMES
DZURENDA, DIRECTOR OF THE
NEVADA DEPARTMENT OF
CORRECTION

Respondent.

CASE NO.: A-18-785145-W

DEPARTMENT XXIII

DECISION & ORDER

I. INTRODUCTION

This matter was last before the Court on June 6, 2019 for an evidentiary hearing pursuant to Petitioner's Supplemental Post-conviction Petition for Writ of Habeas Corpus and the State's Response thereto. Petitioner was represented by Dominic P. Gentile, Esq. The State was represented by Deputized Law Clerk Joshua L. Prince, Esq. and Chief Deputy District Attorney Charles W. Thoman, Esq.

Petitioner's original petition set forth a claim of ineffective assistance of counsel. These claims include the following allegations: (1) Petitioner's trial attorney unilaterally rejected the trial court's invitation to request a jury instruction on a lesser-related, uncharged offense, (2) Petitioner's trial attorney commenced discussion of jury instructions without the presence of the Petitioner on the condition that he would review all discussions regarding jury instructions with Petitioner Alotaibi, but the trial attorney failed to conduct a complete discussion, (3) Petitioner's trial attorney failed to obtain petitioner's consent to

STEFANY A. MILEY
DISTRICT JUDGE

DEPARTMENT TWENTY THREE
LAS VEGAS NV 89101-2408

1 reject the trial court's offer with respect to counts 3 and 5 of Sexual Assault, and (4) the
2 rejection of the lesser-related offense resulted in prejudice against the petitioner.
3

4 II. TESTIMONY

5 At the June 6, 2019 evidentiary hearing, Petitioner's attorney called the original trial
6 attorney, Don Chairez, to the stand. The pertinent testimony was as follows:

7 A. Don Chairez ("Chairez")

8 At the time of the evidentiary hearing, Chairez testified that the Petitioner
9 was not present when Counsel and the Court discussed jury instructions. However,
10 he was directed by the Court to personally go through each of the jury instructions
11 with the Petitioner during the lunch break. During the hour and fifteen minute lunch
12 break, Chairez testified that he spent most of that time attempting to persuade
13 Petitioner to testify. Chairez testified that the Petitioner had decided against
14 testifying after watching the examination of other witnesses.
15

16 Chairez testified that there was no interpreter present during the hour and
17 fifteen minute discuss. Chairez testified that he briefly went over the elements of
18 sexual assault and lewdness, explaining that these charges would come down to
19 whether Petitioner could show that the victim consented.
20

21 Chairez testified that during the hour and fifteen minute lunch break, he did
22 not spend any time discussing the lesser-related sexual seduction instruction, nor
23 did he discuss or explain the sentencing differences between Statutory Sexual
24 Seduction and the other charges. He did however explain the sentencing differences
25 between Sexual Assault and Lewdness. Chairez said he never received consent
26 from his client to reject the instruction for Statutory Sexual Seduction.
27
28

1
2 Chairez testified that in hindsight he believes the judge was trying to
3 telegraph that he should ask for the related instruction and that he should not have
4 made the decision to reject the instruction without obtaining informed consent from
5 Petitioner.

6 In fact, after the trial, jurors asked him why there was not an instruction for
7 statutory rape.

8 COURT FINDS, Mr. Chairez's testimony credible.

9
10 **III. PROCEDURAL BACKGROUND**

11 On January 28, 2015, Alotaibi was adjudged guilty and sentenced to the Nevada
12 Department of Corrections as follows: Count 1: a minimum term of 12 months and a
13 maximum term of 48 months; Count 2: a definite term of 15 years with eligibility for
14 parole beginning when a minimum of five years have been served, Count 2 to run
15 concurrent with Count 1; Count 3: Life imprisonment with eligibility for parole beginning
16 when a minimum of 35 years have been served, Count 3 to run concurrent with Count 2;
17 Count 5: Life imprisonment with the eligibility for parole beginning when a minimum of
18 35 years have been served, Count 5 to run concurrent with count 3; Count 7: Life
19 imprisonment with eligibility for parole beginning when a minimum of 10 years have been
20 served, Count 7 to run concurrent with Count 5; Count 8: Life imprisonment with
21 eligibility for parole beginning when a minimum of 10 years have been served, Count 8 to
22 run concurrent with Count 7; and Count 9: credit for time served. Alotaibi received 758
23 days' credit for time served. Alotaibi was also subject to a special sentence of lifetime
24 supervision, which would commence upon his release from any term of probation, parole,
25 or imprisonment. Further, pursuant to NRS 179D.460, Alotaibi would have to register as a
26 sex offender within 48 hours of sentencing or release from custody.
27
28

1 Alotaibi's Judgement of Conviction was filed on February 5, 2015. Alotaibi filed
2 his timely Notice of Appeal on that same date and filed his Opening Brief ("AOB") on
3 October 26, 2015. The State responded. The Nevada Supreme Court affirmed his
4 conviction on February 28, 2017. The Petitioner was successful in having the Supreme
5 Court of Nevada consider his case with an opinion being filed on November 9, 2017. The
6 Supreme Court of Nevada affirmed the Judgment of Conviction.
7

8 Petitioner filed a Petition for Certiorari on February 7, 2018. The United States
9 Supreme Court denied certiorari on April 16, 2018.
10

11 On November 28, 2018, Petitioner filed the instant Petition for Writ of Habeas
12 Corpus. The State filed a Return on December 31, 2018. Petitioner filed a Reply on January
13 14, 2019.

14 IV. DISCUSSION

15 A criminal defendant has a Sixth Amendment right to effective representation at
16 trial. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). The United States Supreme
17 Court established the legal principles that govern claims of ineffective assistance of counsel
18 in *Strickland v. Washington*, 466 U.S. 668 (1984). In order for Defendant to be successful
19 in his ineffective assistance of counsel claim, Defendant must prove that his (1) counsel's
20 performance was deficient, and (2) that the deficiency prejudiced the defense. *Strickland v.*
21 *Washington*, 466 U.S. at 687, 694 (1984); *see also State v. Love*, 865 P.2d 322, 323 (1996)
22 (applying the two-prong *Strickland* test in Nevada).
23

24 To meet the deficient performance prong, a petitioner must demonstrate that
25 counsel's representation "fell below an objective standard of reasonableness." *Strickland*,
26 466 U.S. at 688.
27

28 In his habeas petition, Petitioner argues that his counsel was ineffective for four

1 primary reasons. First, Petitioner claims his trial counsel was ineffective when he
2 *unilaterally rejected the trial court's offer* Statutory Sexual Seduction for Counts 3 and 5.
3 Second, Petitioner claims his trial attorney was ineffective when he *failed to convey*
4 *discussions regarding jury instructions* with the Petitioner. Thus, Petitioner did not
5 understand the legal distinctions involved or the sentencing consequences of the decision to
6 accept or reject the court's offer. Third, Petitioner claims his trial attorney was ineffective
7 when *he did not obtain Petitioner's express consent* to reject the trial court's invitation of
8 the lesser-related offense instruction. Fourth, Petitioner claims that Chairez's representation
9 was ineffective and unreasonable since he only provided the jury two options, a conviction
10 or a complete exoneration, and but for this ineffective assistance of counsel, there was a
11 reasonable probability that the results would have been different.

12 In response, the State argues that the Petitioner's counsel was not ineffective for
13 making unilateral *strategic* decisions. Defense counsel specifically declined to ask for the
14 Statutory Sexual Seduction instruction because he was basing his theory of the defense on
15 the victim's consent for Counts 3 and 5, and the Petitioner's voluntary intoxication for
16 Counts 4, 6, 7, and 8. The possibility of a complete acquittal of the crimes underling
17 Counts 3, 4, 5, and 6 would not have presented itself had counsel requested the Statutory
18 Sexual Seduction Instruction.

19 Next, the State argues an attorney does not need to obtain consent to every tactical
20 decision; however, certain decisions, such as the exercise or waiver of rights, must be
21 discussed and entered into voluntarily. The Sixth Amendment requires that the exercise or
22 waiver of certain rights are of such importance that they cannot be made for the defendant
23 by a surrogate. Here, a jury instruction for a lesser-related offense, unlike one for a lesser-
24 included offense, is not mandatory, nor is it a waiver of a right. Instead, it is a "tactical
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1 decision” for which defense counsel can argue in his discretion. Thus, consent by the client
2 is not necessary.
3

4 Finally, the State claims that even if there was a deficient performance by Defense
5 Counsel, the outcome of the trial was not prejudiced as there was not a reasonable
6 probability that the result of the proceedings would have been different. The jury was not
7 forced to choose between a conviction and a complete exoneration regarding Counts 3 and
8 5, as the State gave the jury an additional option by charging Petitioner with Counts 4 and
9 6, Lewdness with a Child Under the Age of 14, as an alternative to the Sexual Assault
10 charge. Count 4’s Lewdness charge coincided with Count 3’s Sexual Assault charge for the
11 anal touching and penetration, just as Count 6’s Lewdness charge coincided with Count 5’s
12 Sexual Assault charge for the oral touching and penetration. Based on the verdict, the jury
13 considered and rejected that the sexual penetration that occurred in Counts 3 and 5 was
14 consensual. Thus, the outcome of the trial was not prejudiced because there was not a
15 reasonable probability that the outcome would have been different. Finally, the State argues
16 that the evidence presented at trial was in fact sufficient to sustain a conviction and noted
17 the Supreme Court affirmed said conviction.
18
19

20 V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

21 The Sixth Amendment to the United States Constitution provides that, “[i]n all
22 criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of
23 Counsel for his defense.” The United States Supreme Court has long recognized that “the
24 right to counsel is the right to the effective assistance of counsel.” *Strickland v.*
25 *Washington*, 466 U.S. 668, 686 (1984); *see also State v. Love*, 109 Nev. 1136, 1138 (1993).
26

27 To prevail on a claim of ineffective assistance of trial counsel, a defendant must
28 prove he was denied “reasonably effective assistance” of counsel by satisfying the two-

1 prong test of *Strickland*, 466 U.S. at 686-87. *See also Love*, 109 Nev. at 1138, 865 P.2d at
2 323. Under the *Strickland* test, a defendant must show first that his counsel's representation
3 fell below an objective standard of reasonableness, and second, that but for counsel's
4 errors, there is a reasonable probability that the result of the proceedings would have been
5 different. *Strickland*, 466 U.S. at 687-88, 694; *Warden, Nevada State Prison v. Lyons*, 100
6 Nev. 430, 432 (1984) (adopting the *Strickland* two-part test). "[T]here is no reason for a
7 court deciding an ineffective assistance claim to approach the inquiry in the same order or
8 even to address both components of the inquiry if the defendant makes an insufficient
9 showing on one." *Strickland*, 466 U.S. at 697.

12 The court begins with the presumption of effectiveness and then must determine
13 whether the defendant has demonstrated by a preponderance of the evidence that counsel
14 was ineffective. *Means v. State*, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective
15 counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin
16 the range of competence demanded of attorneys in criminal cases.'" *Jackson v. Warden*, 91
17 Nev. 430, 432 (1975). Counsel cannot be ineffective for failing to make futile objections or
18 arguments. *See Ennis v. State*, 122 Nev. 694, 706 (2006). Trial counsel has the "immediate
19 and ultimate responsibility of deciding if and when to object, which witnesses, if any, to
20 call, and what defenses to develop." *Rhyne v. State*, 118 Nev. 1, 8 (2002).

22 Based on the above law, the role of a court in considering allegations of ineffective
23 assistance of counsel is "not to pass upon the merits of the action not taken but to determine
24 whether, under the particular facts and circumstances of the case, trial counsel failed to
25 render reasonably effective assistance." *Donovan v. State*, 94 Nev. 671, 675 (1978). This
26 analysis does not mean that the court should "second guess reasoned choices between trial
27 tactics nor does it mean that defense counsel, to protect himself against allegations of
28

1 inadequacy, must make every conceivable motion no matter how remote the possibilities
2 are of success.” *Id.* To be effective, the constitution “does not require that counsel do what
3 is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot
4 create one and may disserve the interests of his client by attempting a useless charade.”
5 *United States v. Cronin*, 466 U.S. 648, 657 n.19 (1984).
6

7 “There are countless ways to provide effective assistance in any given case. Even
8 the best criminal defense attorneys would not defend a particular client in the same way.”
9 *Strickland*, 466 U.S. at 689, 104 S.Ct. at 689. “Strategic choices made by counsel after
10 thoroughly investigating the plausible options are almost unchallengeable.” *Dawson v.*
11 *State*, 108 Nev. 112, 117 (1992); *see also Ford v. State*, 105 Nev. 850, 853 (1989). In
12 essence, the court must “judge the reasonableness of counsel’s challenged conduct on the
13 facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland*, 466
14 U.S. at 690.
15

16 Even if a defendant can demonstrate that his counsel’s representation fell below an
17 objective standard of reasonableness, he must still demonstrate prejudice and show a
18 reasonable probability that, but for counsel’s errors, the result of the trial would have been
19 different. *McNelson v. State*, 115 Nev. 396, 403 (1999) (citing *Strickland*, 466 U.S. at 687).
20 “A reasonable probability is a probability sufficient to undermine confidence in the
21 outcome.” *Id.* (citing *Strickland*, 466 U.S. at 687- 89, 694 2068).
22

23 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove
24 the disputed factual allegations underlying his ineffective-assistance claim by a
25 preponderance of the evidence.” *Means v. State*, 120 Nev. 1001, 1012 (2004). Furthermore,
26 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief
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1 petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502 (1984).

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3 “Bare” and “naked” allegations are not sufficient, nor are those belied and repelled
4 by the record. *Id.* NRS 34.735(6) states in relevant part “[Petitioner] must allege specific
5 facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than
6 just conclusions may cause your petition to be dismissed.” (emphasis added). A defendant
7 is not entitled to a particular “relationship” with his attorney. *Morris v. Slappy*, 461 U.S. 1,
8 14 (1983). There is no requirement for any specific amount of communication as long as
9 counsel is reasonably effective in his representation. *See id.*

10
11 At the time of Petitioner’s sentencing in 2012, the sentencing guidelines for the
12 charged counts were as follows:

- 13
- 14 • Sexual Assault—a category A felony for which a court shall sentence a
15 convicted person to life with parole eligibility after 35 years if the offense
16 was committed against a child under the age of 14 years and did not result in
17 substantial bodily harm. NRS 200.366(3)(c).
 - 18 • Lewdness—a category A felony for which a court shall sentence a convicted
19 person to
 - 20 ○ (a) Life with the possibility of parole, with eligibility for parole
21 beginning when a minimum of 10 years has been served, and may be
22 further punished by a fine of not more than \$ 10,000; or
 - 23 ○ (b) A definite term of 20 years, with eligibility for parole after a
24 minimum of 2 years has been served, and may further be punished
25 by a fine of not more than \$ 10,000. NRS 201.230 (2)
 - 26 • Statutory Sexual Seduction—a category C felony for which a court shall
27 sentence a convicted person to imprisonment in the state prison for a
28 minimum term of not less than 1 year and a maximum term of not more than
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25 Strategic and tactical decisions should be made by defense counsel, *after*
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27 Standards Section 4-5.2 (d) (emphasis added). An attorney has a duty to consult with the
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1 client regarding important decisions. Here, trial counsel was instructed to sit with his client
2 and the interpreter to inform the Petitioner about the jury instruction discussions, including
3 the possible request for the Statutory Sexual Seduction instruction. Transcript Day 7 at 3,
4 20-21, 31, 34. Trial counsel acknowledged that he did not meaningfully discuss the lesser-
5 related Statutory Sexual Seduction instruction issue with Petitioner.
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7 Pursuant to the two-prong test set forth in *Strickland v. Washington*, COURT
8 FINDS, Petitioner's trial counsel was ineffective when he *failed to review all jury*
9 *instruction discussions* with the Petitioner as explicitly direct by the Court. However,
10 COURT FURTHER FINDS, that failing to review the lesser-related offense with his client
11 did not result in a reasonable probability that the result would have been different pursuant
12 to *Strickland*. COURT FINDS, the jury was not forced to choose between a conviction and
13 exoneration on Counts 3 and 5 - Sexual Assault of a Minor under Fourteen Years of Age,
14 as they had an alternative option of finding Petitioner guilty of Counts 4 and 6 – Lewdness
15 with a Child under the Age of 14. Therefore, COURT FINDS, though Defense Counsel
16 was ineffective, this ineffectiveness did not result in a reasonable probability that the
17 outcome would have been different.
18
19

20 Although Attorney Chairez testified that there was not an interpreter present to
21 discuss jury instructions with the Petitioner, the record indicates otherwise. Trial transcripts
22 indicate an interpreter was present just prior to the lunch break on Day 7 and that Chairez
23 specifically asked permission to stay in the courtroom during the lunch hour with his client
24 *and the interpreter*. Transcript Day 7 at 33-35. After the lunch recess, the court resumed
25 proceedings, affirming the presence of the Petitioner *and the interpreter*. Transcript Day 7
26 at 35. Thus, claims that an interpreter was not present during this time are belied by the
27 record.
28

1 COURT FINDS, Petitioner's trial counsel was not ineffective for failing to request
2 the Statutory Sexual Seduction instruction because it was a legitimate, tactical decision that
3 could have led to acquittal. Therefore, COURT FINDS, this decision was not the
4 unreasonable all-or-nothing strategy as described by the Petitioner since the State had also
5 charged Lewdness with a Child under 14 Years of Age *as an alternative to the Sexual*
6 *Assault charges*. Transcript Day 7, at 24. The jury was not left with a strictly binary
7 decision between complete acquittal and conviction for the anal and oral penetration of A.J.
8 Had the jury believed the Petitioner's defense of consent, then they had the option to find
9 the anal and oral penetration of A.J. to be Lewdness with a Child Under 14 Years of Age.
10

11 Thus, regarding the anal and oral penetration of A.J., the jury had the option to (a)
12 convict the Petitioner of Sexual Assault, (b) convict the Petitioner of Lewdness with a
13 Child Under 14 Years of Age, or (c) exonerate the Petitioner. Exoneration would have only
14 occurred if the jury found that A.J. had consented to the penetration (negating sexual
15 assault) **AND** that the Petitioner was sufficiently intoxicated to nullify the requisite intent
16 for Lewdness. Introduction of the Statutory Sexual Seduction instruction closed the door to
17 any possibility of exoneration, and thus, was not an unreasonable decision made by trial
18 counsel.
19

20 This court does recognize that when a jury is left to decide between complete
21 acquittal or conviction that it might be ineffective assistance for counsel to fail to request a
22 lesser-related offense instruction; however, that is not the case in this matter. Here, the jury
23 already had a lesser-related offense instruction of Lewdness. An additional lesser-related
24 offense instruction of Statutory Sexual Seduction would not have resulted in a different
25 outcome because the jury rejected the lesser-related offense of Lewdness when they
26 convicted the Petitioner of Sexual Assault.
27
28

1
2 Finally, COURT FINDS, the decision not to request the lesser-related charge of
3 Statutory Sexual Seduction did not prejudice the outcome of the jury.

4 Regarding the anal and oral penetration of A.J., the jury had the option to (1)
5 convict Petitioner of a *category A Felony* for Sexual Assault, (2) convict Petitioner of a
6 *category A Felony* for Lewdness, or (c) exonerate the Petitioner. Even if an instruction of a
7 *category C Felony for Statutory Sexual Seduction* was included, this court fails to see how
8 said instruction would have changed the outcome of this trial since the jury chose to
9 convict on the greater charge of Sexual Assault instead of the lesser-related charge of
10 Lewdness.
11

12 To convict the Petitioner of Sexual Assault, the jury had to consider whether or not
13 A.J. consented to the sexual penetration. The jury was instructed on the definition of
14 Sexual Assault (Instruction 8) and told that a good faith belief of consent was a defense to
15 Sexual Assault (Instruction 13). Additionally, the jury was instructed that any lewd or
16 lascivious act, *other than acts constituting the crime of sexual assault*, upon or with the
17 body, of a child under the age of 14 years is Lewdness with a child. (Instruction 14) and
18 told that consent is not a defense to Lewdness (Instruction 16).
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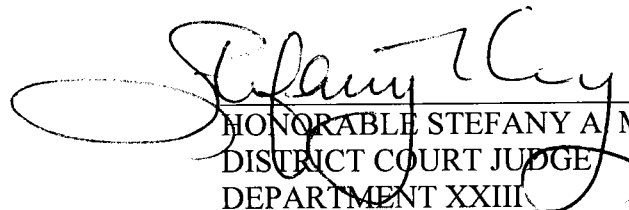
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1
2 Therefore, COURT FINDS, if the jury had determined that A.J. had consented to
3 the penetration, and therefore not a sexual assault, they could have still convicted
4 Petitioner of Lewdness, which is still a lascivious act upon the body of a child under the
5 age of 14 that *does not constitute the crime of sexual assault*. However, COURT FINDS,
6 the jury chose to convict the Petitioner on the greater charge of Sexual Assault regarding
7 the anal and oral penetration of A.J. Verdict at 2. COURT THEREFORE FINDS, adding
8 another instruction for Statutory Sexual Seduction, which is a lesser charge than
9 Lewdness, would not have had any effect on the outcome of this case.
10

11 **V. ORDER**


12 For the foregoing reasons, COURT ORDERS, Petitioner's Supplemental Petition
13 for Writ of Habeas Corpus, DENIED.
14

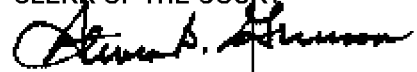
15 Dated this 5th day of September, 2019.

16
17 
18 HONORABLE STEFANY A. MILEY
19 DISTRICT COURT JUDGE
20 DEPARTMENT XXIII

21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on or about the date signed, a copy of this Decision and Order was
23 electronically served and/or placed in the attorney's folders maintained by the Clerk of the
24 Court and/or transmitted via facsimile and/or mailed, postage prepaid, by United States
25 mail to the proper parties as follows: Dominic P. Gentile, Esq., and Charles W. Thoman,
26 Esq.
27

28
By: 
Carmen Alper
Judicial Executive Assistant
Department XXIII



NEOJ

**DISTRICT COURT
CLARK COUNTY, NEVADA**

MAZEN ALOTAIBI,

Petitioner,

Case No: A-18-785145-W

Dept. No: XXIII

vs.

RENEE BAKER; ET,AL.,

Respondent,

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on September 6, 2019, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on September 9, 2019.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 9 day of September 2019, I served a copy of this Notice of Entry on the following:

☒ By e-mail:

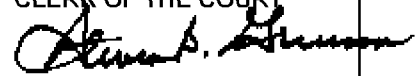
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☒ The United States mail addressed as follows:

Mazen Alotaibi # 1134277	Dominic P. Gentile, Esq.
P.O. Box 208	410 S. Rampart Blvd., Ste 420
Indian Springs, NV 89070	Las Vegas, NV 89145

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk



DISTRICT COURT
CLARK COUNTY, NEVADA

MAZEN ALOTAIBI,

Petitioner,

v.

RENEE BAKER, WARDEN;
LOVELOCK CORRECTIONAL
CENTER; AND JAMES
DZURENDA, DIRECTOR OF THE
NEVADA DEPARTMENT OF
CORRECTION

Respondent.

CASE NO.: A-18-785145-W

DEPARTMENT XXIII

DECISION & ORDER

I. INTRODUCTION

This matter was last before the Court on June 6, 2019 for an evidentiary hearing pursuant to Petitioner's Supplemental Post-conviction Petition for Writ of Habeas Corpus and the State's Response thereto. Petitioner was represented by Dominic P. Gentile, Esq. The State was represented by Deputized Law Clerk Joshua L. Prince, Esq. and Chief Deputy District Attorney Charles W. Thoman, Esq.

Petitioner's original petition set forth a claim of ineffective assistance of counsel. These claims include the following allegations: (1) Petitioner's trial attorney unilaterally rejected the trial court's invitation to request a jury instruction on a lesser-related, uncharged offense, (2) Petitioner's trial attorney commenced discussion of jury instructions without the presence of the Petitioner on the condition that he would review all discussions regarding jury instructions with Petitioner Alotaibi, but the trial attorney failed to conduct a complete discussion, (3) Petitioner's trial attorney failed to obtain petitioner's consent to

STEFANY A. MILEY
DISTRICT JUDGE

DEPARTMENT TWENTY THREE
LAS VEGAS NV 89101-2408

1 reject the trial court's offer with respect to counts 3 and 5 of Sexual Assault, and (4) the
2 rejection of the lesser-related offense resulted in prejudice against the petitioner.
3

4 II. TESTIMONY

5 At the June 6, 2019 evidentiary hearing, Petitioner's attorney called the original trial
6 attorney, Don Chairez, to the stand. The pertinent testimony was as follows:

7 A. Don Chairez ("Chairez")

8 At the time of the evidentiary hearing, Chairez testified that the Petitioner
9 was not present when Counsel and the Court discussed jury instructions. However,
10 he was directed by the Court to personally go through each of the jury instructions
11 with the Petitioner during the lunch break. During the hour and fifteen minute lunch
12 break, Chairez testified that he spent most of that time attempting to persuade
13 Petitioner to testify. Chairez testified that the Petitioner had decided against
14 testifying after watching the examination of other witnesses.
15

16 Chairez testified that there was no interpreter present during the hour and
17 fifteen minute discuss. Chairez testified that he briefly went over the elements of
18 sexual assault and lewdness, explaining that these charges would come down to
19 whether Petitioner could show that the victim consented.
20

21 Chairez testified that during the hour and fifteen minute lunch break, he did
22 not spend any time discussing the lesser-related sexual seduction instruction, nor
23 did he discuss or explain the sentencing differences between Statutory Sexual
24 Seduction and the other charges. He did however explain the sentencing differences
25 between Sexual Assault and Lewdness. Chairez said he never received consent
26 from his client to reject the instruction for Statutory Sexual Seduction.
27
28

1 Chairez testified that in hindsight he believes the judge was trying to
2 telegraph that he should ask for the related instruction and that he should not have
3 made the decision to reject the instruction without obtaining informed consent from
4 Petitioner.
5

6 In fact, after the trial, jurors asked him why there was not an instruction for
7 statutory rape.
8

9 COURT FINDS, Mr. Chairez's testimony credible.

10 III. PROCEDURAL BACKGROUND

11 On January 28, 2015, Alotaibi was adjudged guilty and sentenced to the Nevada
12 Department of Corrections as follows: Count 1: a minimum term of 12 months and a
13 maximum term of 48 months; Count 2: a definite term of 15 years with eligibility for
14 parole beginning when a minimum of five years have been served, Count 2 to run
15 concurrent with Count 1; Count 3: Life imprisonment with eligibility for parole beginning
16 when a minimum of 35 years have been served, Count 3 to run concurrent with Count 2;
17 Count 5: Life imprisonment with the eligibility for parole beginning when a minimum of
18 35 years have been served, Count 5 to run concurrent with count 3; Count 7: Life
19 imprisonment with eligibility for parole beginning when a minimum of 10 years have been
20 served, Count 7 to run concurrent with Count 5; Count 8: Life imprisonment with
21 eligibility for parole beginning when a minimum of 10 years have been served, Count 8 to
22 run concurrent with Count 7; and Count 9: credit for time served. Alotaibi received 758
23 days' credit for time served. Alotaibi was also subject to a special sentence of lifetime
24 supervision, which would commence upon his release from any term of probation, parole,
25 or imprisonment. Further, pursuant to NRS 179D.460, Alotaibi would have to register as a
26 sex offender within 48 hours of sentencing or release from custody.
27
28

1 Alotaibi's Judgement of Conviction was filed on February 5, 2015. Alotaibi filed
2 his timely Notice of Appeal on that same date and filed his Opening Brief ("AOB") on
3 October 26, 2015. The State responded. The Nevada Supreme Court affirmed his
4 conviction on February 28, 2017. The Petitioner was successful in having the Supreme
5 Court of Nevada consider his case with an opinion being filed on November 9, 2017. The
6 Supreme Court of Nevada affirmed the Judgment of Conviction.
7

8 Petitioner filed a Petition for Certiorari on February 7, 2018. The United States
9 Supreme Court denied certiorari on April 16, 2018.
10

11 On November 28, 2018, Petitioner filed the instant Petition for Writ of Habeas
12 Corpus. The State filed a Return on December 31, 2018. Petitioner filed a Reply on January
13 14, 2019.

14 IV. DISCUSSION

15 A criminal defendant has a Sixth Amendment right to effective representation at
16 trial. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). The United States Supreme
17 Court established the legal principles that govern claims of ineffective assistance of counsel
18 in *Strickland v. Washington*, 466 U.S. 668 (1984). In order for Defendant to be successful
19 in his ineffective assistance of counsel claim, Defendant must prove that his (1) counsel's
20 performance was deficient, and (2) that the deficiency prejudiced the defense. *Strickland v.*
21 *Washington*, 466 U.S. at 687, 694 (1984); *see also State v. Love*, 865 P.2d 322, 323 (1996)
22 (applying the two-prong *Strickland* test in Nevada).
23

24 To meet the deficient performance prong, a petitioner must demonstrate that
25 counsel's representation "fell below an objective standard of reasonableness." *Strickland*,
26 466 U.S. at 688.
27

28 In his habeas petition, Petitioner argues that his counsel was ineffective for four

1 primary reasons. First, Petitioner claims his trial counsel was ineffective when he
2 *unilaterally rejected the trial court's offer* Statutory Sexual Seduction for Counts 3 and 5.
3 Second, Petitioner claims his trial attorney was ineffective when he *failed to convey*
4 *discussions regarding jury instructions* with the Petitioner. Thus, Petitioner did not
5 understand the legal distinctions involved or the sentencing consequences of the decision to
6 accept or reject the court's offer. Third, Petitioner claims his trial attorney was ineffective
7 when *he did not obtain Petitioner's express consent* to reject the trial court's invitation of
8 the lesser-related offense instruction. Fourth, Petitioner claims that Chairez's representation
9 was ineffective and unreasonable since he only provided the jury two options, a conviction
10 or a complete exoneration, and but for this ineffective assistance of counsel, there was a
11 reasonable probability that the results would have been different.

12 In response, the State argues that the Petitioner's counsel was not ineffective for
13 making unilateral *strategic* decisions. Defense counsel specifically declined to ask for the
14 Statutory Sexual Seduction instruction because he was basing his theory of the defense on
15 the victim's consent for Counts 3 and 5, and the Petitioner's voluntary intoxication for
16 Counts 4, 6, 7, and 8. The possibility of a complete acquittal of the crimes underling
17 Counts 3, 4, 5, and 6 would not have presented itself had counsel requested the Statutory
18 Sexual Seduction Instruction.

19 Next, the State argues an attorney does not need to obtain consent to every tactical
20 decision; however, certain decisions, such as the exercise or waiver of rights, must be
21 discussed and entered into voluntarily. The Sixth Amendment requires that the exercise or
22 waiver of certain rights are of such importance that they cannot be made for the defendant
23 by a surrogate. Here, a jury instruction for a lesser-related offense, unlike one for a lesser-
24 included offense, is not mandatory, nor is it a waiver of a right. Instead, it is a "tactical
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1 decision” for which defense counsel can argue in his discretion. Thus, consent by the client
2 is not necessary.
3

4 Finally, the State claims that even if there was a deficient performance by Defense
5 Counsel, the outcome of the trial was not prejudiced as there was not a reasonable
6 probability that the result of the proceedings would have been different. The jury was not
7 forced to choose between a conviction and a complete exoneration regarding Counts 3 and
8 5, as the State gave the jury an additional option by charging Petitioner with Counts 4 and
9 6, Lewdness with a Child Under the Age of 14, as an alternative to the Sexual Assault
10 charge. Count 4’s Lewdness charge coincided with Count 3’s Sexual Assault charge for the
11 anal touching and penetration, just as Count 6’s Lewdness charge coincided with Count 5’s
12 Sexual Assault charge for the oral touching and penetration. Based on the verdict, the jury
13 considered and rejected that the sexual penetration that occurred in Counts 3 and 5 was
14 consensual. Thus, the outcome of the trial was not prejudiced because there was not a
15 reasonable probability that the outcome would have been different. Finally, the State argues
16 that the evidence presented at trial was in fact sufficient to sustain a conviction and noted
17 the Supreme Court affirmed said conviction.
18
19

20 V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

21 The Sixth Amendment to the United States Constitution provides that, “[i]n all
22 criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of
23 Counsel for his defense.” The United States Supreme Court has long recognized that “the
24 right to counsel is the right to the effective assistance of counsel.” *Strickland v.*
25 *Washington*, 466 U.S. 668, 686 (1984); *see also State v. Love*, 109 Nev. 1136, 1138 (1993).
26

27 To prevail on a claim of ineffective assistance of trial counsel, a defendant must
28 prove he was denied “reasonably effective assistance” of counsel by satisfying the two-

1 prong test of *Strickland*, 466 U.S. at 686-87. *See also Love*, 109 Nev. at 1138, 865 P.2d at
2 323. Under the *Strickland* test, a defendant must show first that his counsel's representation
3 fell below an objective standard of reasonableness, and second, that but for counsel's
4 errors, there is a reasonable probability that the result of the proceedings would have been
5 different. *Strickland*, 466 U.S. at 687-88, 694; *Warden, Nevada State Prison v. Lyons*, 100
6 Nev. 430, 432 (1984) (adopting the *Strickland* two-part test). "[T]here is no reason for a
7 court deciding an ineffective assistance claim to approach the inquiry in the same order or
8 even to address both components of the inquiry if the defendant makes an insufficient
9 showing on one." *Strickland*, 466 U.S. at 697.

12 The court begins with the presumption of effectiveness and then must determine
13 whether the defendant has demonstrated by a preponderance of the evidence that counsel
14 was ineffective. *Means v. State*, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective
15 counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin
16 the range of competence demanded of attorneys in criminal cases.'" *Jackson v. Warden*, 91
17 Nev. 430, 432 (1975). Counsel cannot be ineffective for failing to make futile objections or
18 arguments. *See Ennis v. State*, 122 Nev. 694, 706 (2006). Trial counsel has the "immediate
19 and ultimate responsibility of deciding if and when to object, which witnesses, if any, to
20 call, and what defenses to develop." *Rhyne v. State*, 118 Nev. 1, 8 (2002).

22 Based on the above law, the role of a court in considering allegations of ineffective
23 assistance of counsel is "not to pass upon the merits of the action not taken but to determine
24 whether, under the particular facts and circumstances of the case, trial counsel failed to
25 render reasonably effective assistance." *Donovan v. State*, 94 Nev. 671, 675 (1978). This
26 analysis does not mean that the court should "second guess reasoned choices between trial
27 tactics nor does it mean that defense counsel, to protect himself against allegations of
28

1 inadequacy, must make every conceivable motion no matter how remote the possibilities
2 are of success.” *Id.* To be effective, the constitution “does not require that counsel do what
3 is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot
4 create one and may disserve the interests of his client by attempting a useless charade.”
5 *United States v. Cronin*, 466 U.S. 648, 657 n.19 (1984).
6

7 “There are countless ways to provide effective assistance in any given case. Even
8 the best criminal defense attorneys would not defend a particular client in the same way.”
9 *Strickland*, 466 U.S. at 689, 104 S.Ct. at 689. “Strategic choices made by counsel after
10 thoroughly investigating the plausible options are almost unchallengeable.” *Dawson v.*
11 *State*, 108 Nev. 112, 117 (1992); *see also Ford v. State*, 105 Nev. 850, 853 (1989). In
12 essence, the court must “judge the reasonableness of counsel’s challenged conduct on the
13 facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland*, 466
14 U.S. at 690.
15

16 Even if a defendant can demonstrate that his counsel’s representation fell below an
17 objective standard of reasonableness, he must still demonstrate prejudice and show a
18 reasonable probability that, but for counsel’s errors, the result of the trial would have been
19 different. *McNelson v. State*, 115 Nev. 396, 403 (1999) (citing *Strickland*, 466 U.S. at 687).
20 “A reasonable probability is a probability sufficient to undermine confidence in the
21 outcome.” *Id.* (citing *Strickland*, 466 U.S. at 687- 89, 694 2068).
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23 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove
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11 At the time of Petitioner’s sentencing in 2012, the sentencing guidelines for the
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3 could have led to acquittal. Therefore, COURT FINDS, this decision was not the
4 unreasonable all-or-nothing strategy as described by the Petitioner since the State had also
5 charged Lewdness with a Child under 14 Years of Age *as an alternative to the Sexual*
6 *Assault charges*. Transcript Day 7, at 24. The jury was not left with a strictly binary
7 decision between complete acquittal and conviction for the anal and oral penetration of A.J.
8 Had the jury believed the Petitioner's defense of consent, then they had the option to find
9 the anal and oral penetration of A.J. to be Lewdness with a Child Under 14 Years of Age.
10

11 Thus, regarding the anal and oral penetration of A.J., the jury had the option to (a)
12 convict the Petitioner of Sexual Assault, (b) convict the Petitioner of Lewdness with a
13 Child Under 14 Years of Age, or (c) exonerate the Petitioner. Exoneration would have only
14 occurred if the jury found that A.J. had consented to the penetration (negating sexual
15 assault) **AND** that the Petitioner was sufficiently intoxicated to nullify the requisite intent
16 for Lewdness. Introduction of the Statutory Sexual Seduction instruction closed the door to
17 any possibility of exoneration, and thus, was not an unreasonable decision made by trial
18 counsel.
19

20 This court does recognize that when a jury is left to decide between complete
21 acquittal or conviction that it might be ineffective assistance for counsel to fail to request a
22 lesser-related offense instruction; however, that is not the case in this matter. Here, the jury
23 already had a lesser-related offense instruction of Lewdness. An additional lesser-related
24 offense instruction of Statutory Sexual Seduction would not have resulted in a different
25 outcome because the jury rejected the lesser-related offense of Lewdness when they
26 convicted the Petitioner of Sexual Assault.
27
28

1 Finally, COURT FINDS, the decision not to request the lesser-related charge of
2 Statutory Sexual Seduction did not prejudice the outcome of the jury.
3

4 Regarding the anal and oral penetration of A.J., the jury had the option to (1)
5 convict Petitioner of a *category A Felony* for Sexual Assault, (2) convict Petitioner of a
6 *category A Felony* for Lewdness, or (c) exonerate the Petitioner. Even if an instruction of a
7 *category C Felony for Statutory Sexual Seduction* was included, this court fails to see how
8 said instruction would have changed the outcome of this trial since the jury chose to
9 convict on the greater charge of Sexual Assault instead of the lesser-related charge of
10 Lewdness.
11

12 To convict the Petitioner of Sexual Assault, the jury had to consider whether or not
13 A.J. consented to the sexual penetration. The jury was instructed on the definition of
14 Sexual Assault (Instruction 8) and told that a good faith belief of consent was a defense to
15 Sexual Assault (Instruction 13). Additionally, the jury was instructed that any lewd or
16 lascivious act, *other than acts constituting the crime of sexual assault*, upon or with the
17 body, of a child under the age of 14 years is Lewdness with a child. (Instruction 14) and
18 told that consent is not a defense to Lewdness (Instruction 16).
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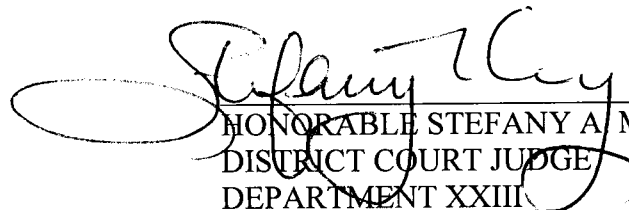
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1
2 Therefore, COURT FINDS, if the jury had determined that A.J. had consented to
3 the penetration, and therefore not a sexual assault, they could have still convicted
4 Petitioner of Lewdness, which is still a lascivious act upon the body of a child under the
5 age of 14 that *does not constitute the crime of sexual assault*. However, COURT FINDS,
6 the jury chose to convict the Petitioner on the greater charge of Sexual Assault regarding
7 the anal and oral penetration of A.J. Verdict at 2. COURT THEREFORE FINDS, adding
8 another instruction for Statutory Sexual Seduction, which is a lesser charge than
9 Lewdness, would not have had any effect on the outcome of this case.
10

11 **V. ORDER**


12 For the foregoing reasons, COURT ORDERS, Petitioner's Supplemental Petition
13 for Writ of Habeas Corpus, DENIED.
14

15 Dated this 5th day of September, 2019.

16
17 
18 HONORABLE STEFANY A. MILEY
19 DISTRICT COURT JUDGE
20 DEPARTMENT XXIII

21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on or about the date signed, a copy of this Decision and Order was
23 electronically served and/or placed in the attorney's folders maintained by the Clerk of the
24 Court and/or transmitted via facsimile and/or mailed, postage prepaid, by United States
25 mail to the proper parties as follows: Dominic P. Gentile, Esq., and Charles W. Thoman,
26 Esq.
27

28
By: 
Carmen Alper
Judicial Executive Assistant
Department XXIII

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

January 14, 2019

A-18-785145-W Mazen Alotaibi, Plaintiff(s)
vs.
Renee Baker, Defendant(s)

**January 14, 2019 11:00 AM Petition for Writ of Habeas
Corpus**

HEARD BY: Bell, Linda Marie

COURTROOM: RJC Courtroom 12C

COURT CLERK: Katherine Streuber

RECORDER: Maria Garibay

REPORTER:

PARTIES

PRESENT: Gentile, Dominic P. Attorney
 Stanton, David L. Attorney

JOURNAL ENTRIES

- Deft. not present. Counsel advised he received the State's Opposition on New Year's Eve and stated somehow it had been overlooked. Court inquired a Reply had been filed. Counsel advised he had not file a Reply, however, noted he would file a Motion for Leave to File. Objection by the State. CONFERENCE AT THE BENCH. COURT ORDERED, matter CONTINUED.

NDC

02-04-19 11:00 AM PETITION FOR WRIT OF HABEAS CORPUS

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

March 13, 2019

A-18-785145-W Mazen Alotaibi, Plaintiff(s)
vs.
Renee Baker, Defendant(s)

**March 13, 2019 11:00 AM Petition for Writ of Habeas
Corpus**

HEARD BY: Miley, Stefany

COURTROOM: RJC Courtroom 12C

COURT CLERK: Katherine Streuber

RECORDER: Maria Garibay

REPORTER:

PARTIES

PRESENT: Bluth, Jacqueline Attorney
Gentile, Dominic P. Attorney

JOURNAL ENTRIES

- Court stated it is granting an Evidentiary Hearing as the Supreme Court will send the case back in order for the case to be developed. Plaintiff's counsel advised Plaintiff is currently in Ely State Prison. COURT ORDERED, matter SET for hearing. Parties advised the length of hearing will be approximately two hours.

05-16-19 9:30 AM EVIDENTIARY HEARING; PETITION FOR WRIT OF HABEAS CORPUS

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

June 06, 2019

A-18-785145-W Mazen Alotaibi, Plaintiff(s)
vs.
Renee Baker, Defendant(s)

**June 06, 2019 9:30 AM All Pending Motions Evidentiary Hearing;
Deft's Petition for
Writ of Habeas
Corpus**

HEARD BY: Miley, Stefany

COURTROOM: RJC Courtroom 12C

COURT CLERK: Katherine Streuber

RECORDER: Maria Garibay

REPORTER:

PARTIES

PRESENT: Alotaibi, Mazen Plaintiff
Gentile, Dominic P. Attorney
Thoman, Charles W. Attorney

JOURNAL ENTRIES

- Deputized Law Clerk Joshua J. Prince present on behalf of Defendants. Counsel advised Plaintiff is waiving his use of court interpreter as Plaintiff had learned English language very well. Plaintiff advised is waiving attorney/client privilege. Testimony and exhibits presented. (See worksheets) Argument by Mr. Gentile. Argument by Mr. Thoman. COURT ORDERED, matter CONTINUED for Chambers decision.

07-03-19 3:00 AM (CHAMBERS) PETITION FOR WRIT OF HABEAS CORPUS

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

July 03, 2019

A-18-785145-W Mazen Alotaibi, Plaintiff(s)
vs.
Renee Baker, Defendant(s)

**July 03, 2019 3:00 AM Petition for Writ of Habeas
Corpus**

HEARD BY: Miley, Stefany

COURTROOM: Chambers

COURT CLERK: Katherine Streuber

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Pursuant to the Decision and Order filed September 6, 2019, COURT ORDERED, writ DENIED.

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; REQUEST FOR TRANSCRIPT OF PROCEEDING; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; DECISION & ORDER; NOTICE OF ENTRY OF ORDER; DISTRICT COURT MINUTES

MAZEN ALOTAIBI,

Plaintiff(s),

vs.

RENE BAKER, WARDEN, LOVELOCK
CORRECTIONAL CENTER; JAMES
DZURENDA, DIRECTOR OF THE NEVADA
DEPARTMENT OF CORRECTION,

Defendant(s),

Case No: A-18-785145-W

Dept No: XXIII

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 2 day of October 2019.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk