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

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| MAZEN ALOTAIBI,<br><br>Appellant,<br><br>vs.<br><br>RENEE BAKER, WARDEN LOVELOCK CORRECTIONAL CENTER; AND JAMES DZURENDA, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS,<br><br>Respondents. | Supreme Court No. 79752<br><br>District Court Case No. A-18-775145-W<br>Department 23 |



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**On Appeal from Decision and Order of the Eighth Judicial District Court, Clark County, Nevada, the Honorable Stefany Miley, Denying Appellant's Petition for Post-Conviction Writ of Habeas Corpus**

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# APPELLANT'S OPENING BRIEF

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| MAZEN ALOTAIBI,<br><br>Appellant,<br><br>vs.<br><br>RENEE BAKER, WARDEN LOVELOCK CORRECTIONAL CENTER; AND JAMES DZURENDA, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS,<br><br>Respondents. | Supreme Court No. 79752<br><br>District Court Case No. A-18-755145-W<br>Department 23<br><br>**NRAP 26.1 DISCLOSURE** |

The undersigned counsel of record hereby certify that no corporate or other entities are non-governmental parties in this case the identities of which need be disclosed herein pursuant to NRAP 26(a). However, the undersigned counsel of record certify that the following qualify as persons whose identities must be disclosed pursuant to the provisions of NRAP 26. These representations are made in order that the judges of this Court may evaluate the possible need for disqualification or recusal.

1. Mazen Alotaibi
   *Petitioner/Appellant*;

2. "A.J. Dang," (a juvenile at the time of the events at issue herein),
   *Complaining Witness*;

3. Don P. Chairez (Nevada Bar No. 3495)
   *Attorney for Appellant before the Eighth Judicial District Court, the Honorable Stefany Miley, for purposes of all pre-trial, trial, and sentencing proceedings in this matter*;

4. Dominic P. Gentile (Nevada Bar No. 1923)
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   *Attorneys for Appellant Mazen Alotaibi before the Supreme Court of the State of Nevada for purposes of direct appeal from Appellant's conviction before the Eighth Judicial District Court, the Honorable Stefany Miley, in this matter;*

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6. Dominic P. Gentile (Nevada Bar No. 1923)
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## 1.

## JURISDICTIONAL STATEMENT

### A.

### Basis Of Appellate Jurisdiction

This Court has jurisdiction to review a final order of the District Court denying a post-Conviction Petition for Writ of Habeas Corpus Pursuant to NRS 34.575(1).

### B.

### Timeliness Of Appeal

The District Court entered its Decision and Order denying Appellant's Petition for Post-Conviction Writ of Habeas Corpus on September 6, 2019. (AA01085-AA01097). Notice of Appeal was timely filed on September 30, 2019. (AA01099-AA01158). Therefore, this appeal was timely filed. And in view of the Court's allowance of an extension of time for preparation of the transcript of proceedings and evidentiary hearing on Appellant's Petition before the District Court on June 6, 2019, (AA01159-AA01248), this Opening brief is likewise timely filed.

### C.

### Final Judgment

The District Court's Decision and Order denying Appellant's Petition for Post-Conviction Writ of Habeas Corpus was a final order disposing of all matters pertaining thereto. Therefore, that Decision and Order constitutes a final judgment of the District Court with respect to Appellant's Petition for Post-Conviction Writ

of Habeas Corpus and is therefore an appealable Order at this time.

**2.**

## ROUTING STATEMENT

Pursuant to NRAP 17(a)(12), this appeal should be retained by the Supreme Court in that this case "raise[s] as a principal issue a question of statewide public importance, or an issue upon which there is an inconsistency in the published decisions of the . . . Supreme Court," and should also be retained by the Supreme Court pursuant to NRAP 17 (a)(11), in that this case "raise[s] as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law."

Specifically, this appeal concerns the question of whether, with respect to the two counts of Sexual Assault of a Minor Under the age of 14 Years with which he was charged in Counts 3 and 5 of the Second Amended Information filed in this case, the prejudice to Appellant attributable to defense counsel's ineffectiveness at trial in unilaterally deciding to reject the Court's invitation for a jury instruction informing the jury of the option of finding Appellant guilty of the then-available lesser-related offense of Statutory Sexual Seduction based upon evidence of record of the alleged victim's consent to engage in acts of sexual penetration by the accused, in lieu of presenting them with the binary choice of either (1) convicting Appellant of the greater offense of Sexual Assault of a Minor Under the age of 14 Years, and thereby invoking the non-discretionary and substantially greater mandatory

minimum sentence associated with each such count, or (2) completely exonerating him with respect to those counts on an "all or nothing basis," was rendered non-prejudicial by the jury's election to convict Petitioner of two separate counts of the distinct lesser offense of Lewdness with a Minor, to which consent was neither a defense nor the basis of any reduction of offense. And to counsel's knowledge this question raises issues of first impression in this jurisdiction which are of statewide public importance in the administration of the criminal law, and further implicate inconsistencies in the published decisions of this Court. And accordingly, Appellant respectfully submits that this Court should retain this appeal.

**3.**

**STATEMENT OF ISSUE PRESENTED**

Whether, with respect to the two counts of Sexual Assault of a Minor Under the age of 14 Years with which he was charged in Counts 3 and 5 of the Second Amended Information filed in this case, the prejudice to Petitioner attributable to defense counsel's ineffectiveness at trial in unilaterally deciding to forego the Court's invitation to give a jury instruction informing the jury of the option of finding Petitioner guilty of the then-available, lesser-related offense of Statutory Sexual Seduction based upon evidence of record of the alleged victim's consent to engage in acts of sexual penetration by the accused, in lieu of presenting the jury with the strictly binary choice of either (1) convicting Petitioner of the greater offense of Sexual Assault of a Minor Under the age of 14 Years, and thereby

invoking the non-discretionary and substantially greater mandatory minimum sentence associated with each such count, or (2) completely exonerating him with respect to those counts on an "all or nothing basis," was rendered non-prejudicial by the jury's election to convict Petitioner of two separate counts of the distinct lesser offense of Lewdness with a Minor under the age of 14 years, with which he was charged in Counts 4 and 6, which distinct lesser offense – in contradistinction to the lesser offense of Statutory Sexual Seduction – had no bearing whatsoever on the inapplicability of the greater offense of Sexual Assault of a Minor Under 14 years based on the consent of the minor, under the-then effective statutory scheme?

**4.**

## STATEMENT OF THE CASE

On October 18, 2013, Appellant Mazen Alotaibi, was charged by Second Amended Information, (AA00001-AA00004), with, *inter alia*, two counts of "Sexual Assault With a Minor Under 14 Years of Age" pursuant to the then-applicable provisions of NRS § 200.366, which then provided in pertinent part:

> "1. A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or herself or another, or on a beast, ***against the will of the victim*** or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct, is guilty of sexual assault.
>
> ...

> 3. Except as otherwise provided in subsection 4, a person who commits a sexual assault against a child under the age of 16 years is guilty of a category A felony and shall be punished:
>
> ...
>
> (c) ***If the crime is committed against a child under the age of 14 years and does not result in substantial bodily harm to the child, by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 35 years has been served.***"

(Emphasis added.)

The evidence at jury trial showed that on December 31, 2012, Appellant – a Saudi Arabian national and then a pilot in the Saudi Air Force stationed in Texas – had come to Las Vegas together with several other friends to celebrate New Year's Eve. (AA00279-AA00283). And that after a night of drinking at various local drinking establishments, (AA00322-AA00323; AA00336), the group were returning together to their room at the Circus Circus hotel casino when they unexpectedly happened upon A.D.—then a 13-year-old boy—loitering unaccompanied in the elevator lobby area of their hotel room floor. (AA00079-AA00081).

The evidence showed that A.D. asked Petitioner—then an adult over the age of 21 years— for marijuana, and that the two went outside the hotel to smoke some. (AA00081-AA00085; AA00144-AA00145).

A.D. testified that Appellant thereupon made sexual advances toward him and

offered A.D. both money and an additional quantity of marijuana in exchange for sex. (AA00084-AA00086).

A.D. personally testified that, in response, he ***expressly agreed*** to engage in sexual activity with Appellant pursuant to this proposal, and that he thereupon accompanied Appellant back to Appellant's hotel room for that specific purpose. (AA00086; AA00096; AA00110-AA00113; AA00152; AA00163). And A.D. testified that, while Appellant's friends were elsewhere in the room watching television, he willingly entered the bathroom with Appellant, wherein the two thereupon engaged in both oral and anal intercourse. (AA00088-AA00093; AA00117).

However, A.D. also claimed that, after voluntarily entering the bathroom for the purpose of engaging in consensual sexual activity with Appellant by agreement, he purportedly changed his mind, and that he did not in fact engage therein consensually. (AA00093-AA00094). During a subsequent police interview, Appellant stated, conversely, that A.D. had indeed consented to have sex with him pursuant to the previous agreement of the parties, the existence of which A.D. had specifically acknowledged in his own testimony, as set forth *supra*. (AA00461-AA00467; AA00472). And a videotape of the police interview of the Appellant was provided to the jury. (AA00485-AA00486; AA00469).

However, the evidence showed that A.D. had lied to the police about

voluntarily agreeing to have sex with Appellant, and falsely represented to the police that the Appellant had essentially kidnapped him and dragged him to his hotel room for the pose of deliberately misleading them. (AA00462).

Thus, the allegations of both oral and anal penetration of the minor accuser were uncontested at trial. Indeed, the evidence showed that Appellant had expressly confessed thereto. The only contested issue at trial was therefore whether or not those penetrations were consented to by Appellant's accuser. And accordingly, consent was the (only) theory of defense.

Following the close of evidence, during discussion regarding jury instructions with counsel for the parties outside the presence of the jury, the court invited defense counsel to request a jury instruction with respect to the lesser-related offense of Statutory Sexual Seduction under the then-applicable provisions of NRS § 200.364 to offset the charges of Sexual Assault With a Minor Under 14 Years of Age contained in Counts 3 and 5, observing that there was indeed evidence of record that A.D. had consented to engage in the sexual activity at issue to support such an instruction, and expressly stating the court's inclination to provide such an instruction if requested to do so by defense counsel. (AA00639-AA00640).

In 2012, NRS § 200.364(5) (Statutory Sexual Seduction: Definition) defined Statutory Sexual Seduction as:

> "(a) ***Ordinary***[1] sexual intercourse, ***anal intercourse***, cunnilingus or ***fellatio*** committed by a person 18 years of age or older with a person under the age of 16 years; or
>
> (b) Any other sexual penetration committed by a person 18 years of age or older with a person under the age of 16 years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of either of the persons."

(Emphasis added).

At that time, NRS § 200.368(1) (Statutory Sexual Seduction: Penalties)—a separate statute—provided, in pertinent part, that "a person who commits statutory sexual seduction shall be punished: "If the person is 21 years of age or older, for a category C felony as provided in NRS 193.130."

And, at that time, NRS § 193.130(2)(c) (Categories and punishment of felonies) provided, in pertinent part, that "[a] category C felony is a felony for which a court shall sentence a convicted person to imprisonment in the state prison for a minimum term of not less than 1 year and ***a maximum term of not more than 5 years***" (emphasis added).

Thus, under the relevant statutes then in effect, while consent was a complete defense to the charge of Sexual Assault (an element of which was that sexual penetration be undertaken "against the will" of the victim), a finding of guilt as to that offense where the victim is a minor under the age of 14 years (and, as here, no

[1] *I.e.*, consensual.

substantial bodily harm is implicated), required by statute that a sentence of life imprisonment be imposed and that parole eligibility be precluded until a minimum mandatory period of 35 years has been served. Whereas, by contrast, a finding of consent on the part of the victim does not constitute a defense to the charge of Statutory Sexual Seduction (prohibiting sexual penetration of a minor by an adult with the consent of the minor), a finding of guilt as to that offense was punishable by statute by a very considerably lesser maximum term of 5 years of imprisonment.[2] (AA00643-AA00645).

At the request of defense counsel, the above-quoted portion of this discussion between court and counsel for the parties was conducted while Petitioner was ***not present*** in the courtroom. However, as the court expressly required, the court's agreement to this procedure was strictly contingent upon defense counsel's

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[2] As this Court observed in its opinion on direct appeal in this case:

> The statutes defining statutory sexual seduction and sexual assault were amended in 2015. Under the 2015 amendments, any sexual penetration of a minor under the age of 14 is sexual assault, and it is no longer possible for statutory sexual seduction to be committed against a minor under the age of 14. Therefore, the analysis of the statutory elements in this opinion pertains only to the version of the statutes in place at the time the offenses were committed in 2012. *See* 2007 Nev. Stat., ch. 528, § 7, at 3255 (sexual assault, NRS 200.366(1)); 2009 Nev. Stat., ch. 300, § 1.1, at 1296 (statutory sexual seduction, NRS 200.364(5)).

*Alotaibi v. State*, 404 P.3d 761, 762 (Nev. 2017), *cert. denied,* 138 S. Ct. 1555, 200 L. Ed. 2d 743 (2018).

commitment to thereafter review ***all*** proposed jury instructions, (*id.*), and go over "***every single thing***" that court and counsel had discussed regarding jury instructions with Petitioner Alotaibi "in the presence of the interpreter," so that Petitioner would understand "***exactly***" what the proposed jury instructions were going to be (emphasis added). (AA00644).

Defense counsel thereupon ***unilaterally*** rejected the trial court's invitation to request a lesser-included offense instruction with respect to Statutory Sexual Seduction concerning those counts (3 and 5) of the Information in which Petitioner was charged with the greater offense of Sexual Assault With A Minor Under The Age Of 14 years. In response, the court encouraged defense counsel to give the matter further consideration in consultation with his client. (AA00643-AA00655)

In so doing, although reiterating (in agreement with the state) that the court did not consider the lesser offense of Statutory Sexual Seduction to be a lesser ***included*** offense ***subsumed*** within the greater offense of Sexual Assault With A Minor Under The Age Of 14 years; and therefore, that Petitioner did not have the ***right*** to have the jury instructed with respect to Statutory Sexual Seduction, the court again reminded defense counsel that he could nevertheless ***request*** a Statutory Sexual Seduction instruction as a lesser ***related*** offense – ***having previously advised all counsel that the court was inclined to provide such instruction in the exercise of its discretion if requested to do so by defense counsel in this case***. And the court

then instructed defense counsel to review and explain all jury instructions to his client, including the issue of whether to request a lesser-related offense instruction for Statutory Sexual Seduction. (AA00656-AA00657).

However, when the court thereafter inquired of defense counsel as to whether this had in fact been accomplished, defense counsel acknowledged that it had not. (AA00659-AA00660). (See AA01186; AA01189; AA01191-AA01198).

Declining additional opportunities to engage in further discussion with Appellant to ensure his understanding of the option to seek or reject a lesser-related offense instruction regarding Statutory Sexual Seduction, and notwithstanding further encouragement of the court to request such an instruction, ultimately, defense counsel nevertheless definitively declined the court's invitation to request a jury instruction regarding statutory sexual seduction as a lesser-related offense. (AA00643-AA00655).

Indeed, as defense trial counsel expressly acknowledges, he did ***not*** obtain his client's authorization to reject the trial court's invitation to seek a lesser-related offense instruction as to Statutory Sexual Seduction, but rather, unilaterally elected to pursue an "all or nothing" defense in closing argument and in instructions with respect to those counts (3 and 5) in which Appellant was charged with the greater offense of Sexual Assault With A Minor Under The Age Of 14 Years. Thus, defense trial counsel concedes that he undertook this course of action ***without the permission***

***of his client.*** And he thereby failed to obtain his client's input into the critical risk analysis inherent in this very momentous decision under the then-applicable statutory scheme.

In the absence of defense counsel's request (notwithstanding the repeated invitation of the trial court), no lesser-related offense instruction regarding Statutory Sexual Seduction was provided to the jury. And no argument with respect thereto was offered to the jury by defense counsel. (AA00841-AA00860). Instead, defense counsel pursued an "all or nothing" defense to the charges of Sexual Assault With A Minor Under The Age Of 14 Years contained in Counts 3 and 5 of the Information both in closing argument and in jury instructions.

A verdict was returned by the jury finding Petitioner guilty on both counts (3 and 5) in which he was charged with "Sexual Assault With a Minor Under 14 Years of Age." And in accordance with the then-applicable mandatory minimum sentencing requirement of NRS § 200.366(3)(c), Petitioner was sentenced with respect thereto to serve (concurrent) terms of life imprisonment without parole eligibility until a minimum of 35 years of incarceration had been served.

Indeed, as set forth *supra*, whereas, at the time, pursuant to NRS § 200.368(1) and NRS § 193.130(2)(c), the lesser-related offense of Statutory Sexual Seduction was punishable by a maximum penalty of 5 years of imprisonment, where, as here, no substantial bodily harm to the victim results, under the textual provisions of

subsection 2(b) of NRS § 200.366 in effect in 2012, one who committed a sexual assault was punishable under the then-effective provisions of subsection 3(c) (applicable here), "[i]f the crime is committed against a child ***under the age of 14 years,***" a person who commits a sexual assault "***shall***" be punished by imprisonment "for life with the possibility of parole, with eligibility for parole beginning ***when a minimum of 35 years has been served***" (emphasis added).

**5.**

## SUMMARY OF THE ARGUMENT

Having correctly found that Appellant's trial counsel failed to provide effective assistance in unilaterally waiving Appellant's opportunity to request a lesser-related offense instruction of Statutory Sexual Seduction (an offense then punishable by a maximum term of imprisonment of 5 years) with respect to Counts 3 and 5 of the Information in which Appellant was charged with Sexual Assault of a Minor under 14 Years of age – an offense punishable by a minimum mandatory term of 35 years imprisonment, the trial court erred in holding that Appellant was not prejudiced by this because the jury had the option to, and did, find Appellant guilty of the distinct lesser-related offense of Lewdness With a Minor Under the age of 14 Years. This is so because that lesser offense had no bearing on whether Appellant would be convicted of Sexual Assault, whereas, in the event of a finding that the minor had consented, Statutory Sexual Seduction and its substantially lesser

sentence would obtain under the law in effect at the time of the alleged offense, because at that time, Sexual Assault and its comparatively Draconian penalties only applied to forcible rape – even of a minor.

## 6.

## ARGUMENT

### I.

### THE DISTRICT COURT ERRED IN DENYING APPELLANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS; AND THEREFORE, HIS CONVICTION ON COUNTS 3 AND 5 OF THE SECOND AMENDED INFORMATION EACH CHARGING HIM WITH THE OFFENSE OF SEXUAL ASSAULT OF A MINOR UNDER THE AGE OF 14 YEARS SHOULD BE REVERSED, AND APPELLANT GRANTED A NEW TRIAL WITH RESPECT THERETO.

### A.

### Standard Of Review

As this Court explained in *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), with respect to appeals from denials of post-conviction habeas corpus petitions: "We give deference to the district court's factual findings . . . but we will review the court's application of the law to those facts de novo. *See Lott v. Mueller,* 304 F.3d 918, 922 (9th Cir.2002) (stating that district court's findings of facts are reviewed for clear error, but questions of law are reviewed de novo); *see also Lader v. Warden,* 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005) (application to review of claims of ineffective assistance of counsel).

## B.

## The Prejudice Attributable To Trial Counsel's Acknowledged Ineffectiveness Was Not Obviated By The Jury's Election To Convict Appellant Of Two Separate Counts Of Lewdness With A Minor Under The Age Of 14 Years

As the District Court pointed out in its Decision and Order denying Appellant's post-conviction petition for writ of habeas corpus in this case: "A criminal defendant has a Sixth Amendment right to effective representation at trial. *McMann v. Richardson,* 397 U.S. 759, 771 n. 14 (1970)," explaining that "the United States Supreme Court established the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668 (1984)," and that under the *Strickland* standard, a defendant must prove, by a preponderance of the evidence, (*Means v. State,* 120 Nev. 1001, 1012 (2004)), "that his (1) counsel's performance was deficient, and (2) that the deficiency prejudiced the defense." (AA01088).

### (1)

### The District Court Correctly Held That Trial Counsel Failed To Render The Effective Assistance To Petitioner Required By The Constitutions Of The United States Of America And The State Of Nevada

In its Decision and Order, the District Court explained that "[s]trategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate. (AA01093) (citing ABA Criminal Justice

Standards Section 4-5.2(d)) (emphasis in original). And that "[a]n attorney has *a* duty to consult with the client regarding important decisions. (AA01094) (emphasis added).

The District Court explained that, after the close of evidence, trial counsel was instructed to sit with his client and the interpreter to inform the Appellant about the jury instruction discussions that had taken place between the court, the prosecutors and defense counsel, *including the possible request for the Statutory Sexual Seduction instruction.* (AA01094) (emphasis added).

However, as the District Court observed: contrary to the court's specific instructions, "***[t]rial counsel acknowledged that he did <u>not</u> meaningfully discuss the lesser-related Statutory Sexual Seduction instruction issue with Petitioner.***" (AA01094) (emphasis added).

And accordingly, the District Court found that, under the *Strickland* standard, "Petitioner's trial counsel ***was ineffective*** when he failed to review all jury instruction discussions with the Petitioner as explicitly direct [sic] by the Court." (AA01094) (emphasis added).

**(2)**

**The District Court Holding That Appellant Was Not Prejudiced By Such Ineffectiveness Was Erroneous**

With respect to the two counts of Sexual Assault of a Minor Under the age of 14 Years with which Appellant was charged in Counts 3 and 5 of the Second

Amended Information, the District Court held that the prejudice to Appellant attributable to defense counsel's acknowledged ineffectiveness at trial was obviated by the jury's election to convict Petitioner of two separate counts (4 and 6) of the distinct lesser offense of Lewdness with a Minor. This conclusion does not logically or legally follow. Appellant submits that this critical aspect of the District Court's analysis is plainly illogical and therefore erroneous. *Indeed, it is a non sequitur because the victim's consent is irrelevant to the Lewdness with a Minor.*

In 2012, under the then-effective provisions of NRS 200.366, only ***forcible*** penetration – ***regardless of the age of the victim*** – constituted Sexual Assault. And in this case, inasmuch as the alleged victim was under the age of 14 years, the applicable penalty (where, as here, the alleged offense is absent substantial bodily harm) for such an offense was life imprisonment ***with a mandatory minimum term of 35 years of imprisonment before parole eligibility***. And that is the sentence that Appellant received.

However, in contradistinction, under the then-effective provisions of NRS 200.364(5) (Statutory Sexual Seduction), ***consensual*** (as opposed to forcible) penetration by an adult – ***even of a minor under the age of 14 years*** –was then punishable by a ***maximum*** term of imprisonment of only ***5 years***.

Thus, at the time of the occurrence addressed by this prosecution, the lesser offense of Statutory Sexual Seduction, where penetration occurred with the consent

of the minor, was directly related to the elements of the greater offense of Sexual Assault of a Minor Under the age of 14 Years. It follows that the non-discretionary and substantially greater mandatory minimum sentence associated therewith in and of itself exposed Appellant to potential prejudice which came to fruition because the jury did not know of the lesser related offense being a possible outcome. Trial counsel, in unilaterally deciding to reject the Court's invitation to give a jury instruction informing the jury of the option of finding Appellant guilty of the then-available, lesser-related offense of Statutory Sexual Seduction based upon evidence of record of the alleged victim's consent to engage in acts of sexual penetration by the accused, and instead presenting them with the strictly binary choice of either convicting Petitioner of the greater offense of Sexual Assault of a Minor Under the age of 14 Years or completely exonerating him with respect to those counts on an "all or nothing basis," resulted in **at least 700% more time in prison**. Based upon actuarial tables, for a healthy man of Appellant's age at the time of trial, that amounts to an additional half a lifetime in prison!

On the other hand, under NRS 201.230, the crime of Lewdness with a Minor provided for a minimum mandatory sentence of 10 years imprisonment, did not distinguish between forcible and consensual acts, and – most importantly – had no bearing whatsoever upon the then-inapplicability of the Sexual Assault statute where there is consent on the part of the minor. And therefore, the District Court's

conclusion that Appellant was not prejudiced by the acknowledged ineffective assistance of trial counsel is logically unfounded, as is the District Court's erroneous conclusion that, with that option, the jury was not limited to a binary choice between Sexual Assault of a Minor and complete exoneration. Because the fact is that the jury were limited to just such a strictly binary choice and the option of Lewdness with a Minor was irrelevant to that limitation and offered the jury no other option than to either send Appellant to prison for a minimum of 35 years or let him go completely. And this is crucial because penetration was uncontested in this case, leaving only the issue of consent, which only had relevancy to Statutory Sexual Seduction and not Lewdness with a Minor. And thus, the following analysis of the District Court is a *non sequitur*:

> "This court does recognize that when a jury is left to decide between complete acquittal or conviction that it might be ineffective assistance for counsel to fail to request a lesser-related offense instruction; however, that is not the case in this matter. Here, the jury already had a lesser-related offense instruction of Lewdness. An additional lesser-related offense instruction of Statutory Sexual Seduction would not have resulted in a different outcome because the jury rejected the lesser-related offense of Lewdness when they convicted the Petitioner of Sexual Assault" (AA01095).

Thus, the foregoing analysis necessarily and erroneously presupposes that all lesser-related offense instructions are created equal. Whereas, ***only*** the Statutory Sexual Seduction offered the jury an option to either imposing the Draconian consequence of a Sexual Assault conviction (which Appellant was handed) or giving

him a complete walk-away. And therefore, Appellant respectfully submits that the District Court's analysis is obtuse in this respect.

As the United States Supreme Court emphasized in *Lockhart v. Fretwell,* 506 U.S. 364, 368-69 (1993): "the right to the effective assistance of counsel is recognized . . . because of the effect it has on the ability of the accused to receive a fair trial . . . . [and] on the reliability of the trial process . . . . " Thus, as the Court has often reiterated, prejudice is shown where counsel's errors deprived the defendant of . . . "a trial whose result is reliable." (internal citations omitted).

Thus, as the Court explained in *Lockhart,* where, as in this case, the lower court's analysis "focuses solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." 506 U.S. at 369.

And, just as the Court pointed out in *Nix v. Whiteside,* 475 U.S. 157, 186 (1986), that "[a] defendant has no entitlement to the luck of a lawless decisionmaker," Appellant respectfully submits that a defendant may not be made to suffer the misfortune of one either. But here, he was. Because the jury was unaware that it could find the consent on the part of A.D. that the record clearly justifies, as noted by the District Court, *without* granting Appellant *complete exoneration* for admittedly penetrating a 13 year old – which remains the binary choice with which they were left – "all or nothing". To be unaware of the law is no less "lawless" than to ignore it.

The District Court found that *with* a Statutory Sexual Seduction instruction

(pursuant to the law in effect at the time of the offenses alleged in this case), a path to *complete exoneration* would have been foreclosed. In doing so, the District Court's analysis failed to consider whether the verdict of the jury convicting Appellant of Sexual Assault is *reliable*. Yet the jury was kept ignorant of the fact that a predicate finding of consent on the part of A.D. did not *require* the complete exoneration of the Appellant, but would have provided the option of convicting him of Statutory Sexual Seduction nonetheless. And had they elected to exercise that option – which was certainly not precluded by the evidence, as the District Court specifically found – Appellant would not have had to face a 35-year mandatory minimum sentence of imprisonment. And as the District Court's own decision and Order recognizes: "Exoneration would have only occurred if the jury found that A.J.[D.] had consented to the penetration (negating sexual assault) ***AND*** that the Petitioner was sufficiently intoxicated to nullify the requisite intent for Lewdness" (emphasis in original). Whereas no such additional finding of intoxication would have been necessary to reduce Appellant's exposure to a 5-year maximum sentence had a Statutory Sexual Seduction instruction been presented and been embraced by the jury.

## 7.
## CONCLUSION

**WHEREFORE,** for all the foregoing reasons, Appellant MAZEN ALOTAIBI respectfully prays that this Honorable Court vacate the Decision and Order of the District Court denying his post-conviction petition for writ of habeas corpus and grant him a new trial as to Counts 3 and 5 of the Second Amended Information, together with such other and further relief as the Court deems fair and just in the premises.

Respectfully submitted this 17 day of March, 2020.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this opening brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This opening brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman style, and a 14 font size.

I further certify that this opening brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because it is either:

Proportionally spaced, has a typeface of 14 points or more, and contains 4,957 words, and does not exceed the 30 page limit.

Finally, I hereby certify that I have read this opening brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix

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where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17th day of March, 2020.

CLARK HILL PLC

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## CERTIFICATE OF MAILING

The undersigned, an employee of Clark Hill PLC, hereby certifies that on the 17th day of March, 2020, I served a copy of **APPELLANT'S OPENING BRIEF and APPELLANT'S APPENDIX VOLUMES I through VII**, by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

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