IN THE IN THE SUPREME COURT OF THE STATE OF NEVADA

MAZEN ALOTAIBI, Appellant, vs. RENEE BAKER, WARDEN LOVELOCK CORRECTIONAL CENTER; AND JAMES DZURENDA, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS, Respondents.	Supreme Court No. 79752 district court case no. A-18-785145-W department

APPELLANT'S APPENDIX

VOLUME VI OF VII

BATES NOS. AA00952 – AA01158

CLARK HILL PLC

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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 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** **Date of Hearing:** **Time of Hearing:**

MAZEN ALOTAIBI, Petitioner in the above-entitled matter, hereby respectfully submits his Memorandum of Points and Authorities in support of the Petition for Writ of Habeas Corpus (Post-Conviction) submitted together herewith.

1.

STATEMENT OF RELEVANT FACTS

On October 18, 2013, Petitioner Mazen Alotaibi, was charged by Second Amended Information 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. (Appended hereto and

marked "A").[1]

In 2012, NRS § 200.366 (Sexual assault: Definition; penalties) provided:

> "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.
>
> 2. Except as otherwise provided in subsections 3 and 4, a person who commits a sexual assault is guilty of a category A felony and *shall* be punished:
>
> (a) If substantial bodily harm to the victim results from the actions of the defendant committed in connection with or as a part of the sexual assault, by imprisonment in the state prison:
>
> (1) For life without the possibility of parole; or
>
> (2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 15 years has been served.
>
> (b) If no substantial bodily harm to the victim results, by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served.
>
> 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:
>
> (a) If the crime results in substantial bodily harm to the child, by imprisonment in the state prison for life without the possibility of parole.
>
> (b) Except as otherwise provided in paragraph (c), if the crime 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 25 years has been served.
>
> (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.***

[1] Although Petitioner was also charged in that multi-count Information with other alleged offenses, some of which resulted in his acquittal and others of which likewise resulted in his conviction, Petitioner herein challenges only his conviction on Counts 3 and 5, in which he was charged with Sexual Assault Of A Minor Under 14 Years Of Age.

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> 4. A person who commits a sexual assault against a child under the age of 16 years and who has been previously convicted of:
>
> (a) A sexual assault pursuant to this section or any other sexual offense against a child; or
>
> (b) An offense committed in another jurisdiction that, if committed in this State, would constitute a sexual assault pursuant to this section or any other sexual offense against a child,
>
> is guilty of a category A felony and shall be punished by imprisonment in the state prison for life without the possibility of parole.
>
> 5. For the purpose of this section, "other sexual offense against a child" means any act committed by an adult upon a child constituting:
>
> (a) Incest pursuant to NRS 201.180;
>
> (b) Lewdness with a child pursuant to NRS 201.230;
>
> (c) Sado-masochistic abuse pursuant to NRS 201.262; or
>
> (d) Luring a child using a computer, system or network pursuant to NRS 201.560, if punished as a felony."

(Emphasis added).

The matter proceeded to jury trial.

The evidence showed that on December 31, 2012, Petitioner – a Saudi Arabian national and then pilot in the Saudi Air Force stationed in Texas – had come to Las Vegas together with several other Saudi friends to celebrate New Year's Eve, and that after a night of drinking at various local establishments, 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.

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.

A.D. testified that Petitioner thereupon made sexual advances toward him and offered A.D. both money and an additional quantity of marijuana in exchange for sex. A.D. personally testified that, in response, he ***expressly agreed*** to engage in sexual activity with Petitioner pursuant to this proposal, and that he thereupon accompanied Petitioner back to Petitioner's hotel room for that specific purpose. And A.D. testified that, while Petitioner's friends were elsewhere

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in the room watching television, he willingly entered the bathroom with Petitioner, wherein the two thereupon engaged in both oral and anal intercourse.

However, A.D. also claimed that, after voluntarily entering the bathroom for the purpose of engaging in consensual sexual activity with Petitioner by agreement, he purportedly changed his mind, and that he did not in fact engage therein consensually.

During a subsequent video and audio taped police interview which was offered in evidence by the state and played for the jury, Petitioner insisted, 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.***

Thus, the allegations of both oral and anal penetration of the minor accuser were ***uncontested*** at trial. Indeed, the evidence showed that Petitioner had ***expressly confessed*** thereto. Therefore, the only contested issue at trial was whether or not those penetrations were consented to by Petitioner's accuser or undertaken "against his will." 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 in order to provide the jury with the option of offsetting 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.***

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

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> "(a) ***Ordinary***[2] 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) in turn 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, as here, the victim is a minor under the age of 14 years (and, as here, no 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 of imprisonment has be served.*** Whereas, by contrast, while 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 victim***), a finding of guilt as to that offense was punishable by statute by a very considerably lesser ***maximum term of 5 years of imprisonment.***[3]

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

[3] As the Nevada Supreme Court observed in its opinion on direct appeal in this case, this legislative distinction is no longer applicable:

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Thus, as the trial court advised counsel for the parties during their discussion regarding proposed jury instructions:

> "THE COURT: I was looking at cases this weekend on statutory sexual seduction. The only thing I don't think it is, is I don't think it's a lesser included. It looks like a lesser ***related.***
>
> MS HOLTHUS: Which is exactly our argument.
>
> THE COURT: Okay. ***However, I'll tell the State – . . . . I was inclined to allow this instruction if proffered by the defense after looking at the case law. I do think there is testimony in this case of consent by the victim.***
>
> MS HOLTHUS: But . . . . they're only ***entitled*** to lesser ***included.*** The law is clear about that.
>
> THE COURT: ***I understand that. But they can also request – . . . . —lesser related.***"

(Excerpt of Trial Transcript appended hereto and marked "B" Day 7, pp. 16-17 (emphasis added.)

And accordingly, as the trial court pointed out in response to the prosecution's ensuing protestation:

> "MS HOLTHUS: But if it's not a lesser ***included***, then he's not ***entitled*** to it.
>
> THE COURT: Well, ***he's not entitled to it – . . . . [a]s a matter of course*** . . . . [However,] ***[h]e can still request*** [a lesser-***related*** offense instruction]."

(continued)

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). Indeed application here of the 2015 amendments is precluded by the *ex post facto* prohibitions of both Article 1, Sections 9 and 10 of the Constitution of the United States and Article 1, Section 15 of the Constitution of the State of Nevada.

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Exhibit "B" Day 7, p. 22 (emphasis added.)[4]

At the request of defense counsel, the above-quoted portion of this discussion between court and counsel for the parties was commenced while Petitioner was ***not present*** in the courtroom. *Id.* at Day 7, p. 3. However, as the court expressly required, the court's agreement to this procedure was strictly contingent upon defense counsel's 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. *Id.* at pp. 20-21 (emphasis added).

And although Petitioner later was brought into the courtroom while these discussions were still in progress, the court expressly observed that, nevertheless, "the interpreter [wa]s ***not*** present though." *Id.* at p. 20 (emphasis added).[5]

Defense counsel thereupon arguably attempted (albeit ambiguously) to ***unilaterally*** forego the trial court's invitation to request a lesser-included offense instruction with respect to Statutory Sexual Seduction in juxtaposition to those counts (3 and 5) of the charging document in which Petitioner was charged with the greater offense of Sexual Assault With A Minor Under 14 years Of Age. *Id.* at pp. 25-27. In response, the court encouraged defense counsel to give the matter further consideration in consultation with his client:

> "THE COURT: I'm not sure what you want me to do, Mr. Chairez. Do you want to think it over? I mean, as far as whether or not as a strategy you want to argue for the additional charge of statutory sexual seduction? I'm not sure what you're asking for at this point. Would you like to have the chance to think it over? . . . . Yes?"

Id. at p. 28.

In so doing, although reiterating (in agreement with the state) that the court did not

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[4] Thus, the State has never contended that Nevada law ***precluded*** the trial court from providing the lesser-related offense instruction with respect to Statutory Sexual Seduction that the court invited defense counsel to request in this case.

[5] As the Nevada Supreme Court held in *Quanbengboune v. State,* 125 Nev. 763, 220 P.3d 1122 (2009): "In Nevada, criminal defendants who do not understand the English language have 'a due process right to an interpreter at all crucial stages of the criminal process.'" (Quoting *Ton v. State,* 110 Nev. 970, 971, 878 P.2d 986, 987 (1994).

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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 14 Years Of Age;[6] and therefore, that Petitioner did not have the ***right*** to have the jury ***automatically*** 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, (Exhibit "B" Day 7, p. 29) – ***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***. *Id.* at pp. 16-17.

When defense counsel thereupon responded: "I guess I'll think it over," (*id.* at p. 28), the trial court observed: "Okay. So at this point, Mr. Chairez is not requesting [a] statutory sexual seduction [instruction] . . . . [b]ut will indicate to the Court prior to jury instructions . . . . if [upon consultation with your client] you do want the Court to offer this. *Id.* at p. 31. And defense counsel agreed. *Id.*

Thus, observing that "the interpreter is [now] present" the trial court thereupon resolved on the record as follows:

> "THE COURT: You know what, that's okay. What – what's going to happen now is ***Mr. Chairez needs to go over the jury instructions we went over with the defendant***. So you can sit next to him we're not going to – I mean, we don't have to be – we're not going to be on the record while he discusses them with his client."

Id. at p. 31 (emphasis added).

In so doing, the court's express objective was to ensure that "***both of you*** can make sure that . . . . [the jury instructions] . . . include ***everything . . . agreed upon***." *Id.* at p. 34 (emphasis added).

When the court thereafter inquired of defense counsel as to whether this had in fact been accomplished, defense counsel acknowledged as follows:

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[6] Under Nevada law, this determination is made pursuant to the "same elements" test of *Blockburger v. United States*, 284 U.S. 299 (1932). *Alotaibi v. State*, 404 P.3d 761, (Nev. 2017), *cert. denied,* 138 S. Ct. 1555, 200 L. Ed. 2d 743 (2018); *Barton v. State,* 117 Nev. 686, 30 P.3d 1103 (2001).

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> "[W]e [he and Petitioner] ***didn't even get into the issue of – I mentioned to him there is an issue of whether or not statutory sexual seduction is a lesser related or a lesser included. Obviously, that's a concept he does not understand.***
>
> But – so we focused on the jury instructions that talked about consent, reasonable mistake of consent, the intoxication, the various definitions. He wonders why we give the same instruction, it seems to him, over and over. And that kind of thing."

Exhibit "B" Day 7, p. 36 (emphasis added).

Declining additional opportunities to engage in further discussion with Petitioner 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 in order to provide the jury with that option, ultimately, defense counsel nevertheless definitively declined the court's invitation to request a jury instruction regarding statutory sexual seduction as a lesser-related offense. *Id.* at pp. 36-37, 186-187, 193-194. And in so doing, announced: "***I'm the lawyer.***" *Id.* at p.186 (emphasis added).

Indeed, as defense trial counsel expressly acknowledges in the declaration (appended hereto and marked "C" ¶¶ 17-19), he did ***not*** obtain his client's informed 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 Petitioner was charged with the greater offense of Sexual Assault With A Minor Under 14 Years Of Age. Thus, defense trial counsel concedes that he undertook this course of action ***without first securing the understanding and the permission of his client.*** *Id.* 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 comprehensive 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. Instructions to the Jury, appended hereto and marked "D." And no argument with respect thereto was offered to the jury by defense counsel. Instead, defense counsel pursued

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an "all or nothing" defense to the charges of Sexual Assault With A Minor Under 14 Years Of Age 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. (Appended hereto and marked "E"). 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. (Judgment of Conviction appended hereto and "F")[7]

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 convicted of Sexual Assault was punishable by a mandatory term of imprisonment "for life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served"; under the then-effective textual provisions of subsection 3(b), "a person who commits a sexual assault against a child under the age of 16 years . . . ***shall*** be punished . . . . by imprisonment "for life with the possibility of parole, with eligibility for parole beginning when a minimum of 25 years has been served"; and 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).

Attached hereto are the declarations of several duly licensed and experienced Nevada criminal defense attorneys of substantial experience and learning and widespread favorable

[7] Although Petitioner was also convicted (and acquitted) on other charges, only his conviction on the two counts of the Information in which he was charged with Sexual Assault With a Minor Under 14 Years of Age (Counts 3 and 5) are at issue here.

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repute in the community as such, and who are well-regarded as such by both the local legal community and judiciary. And each of them opine therein that, assuming the facts set forth hereinabove, trial counsel's unilateral decision to reject the trial court's invitation that he request a lesser-related offense instruction concerning Statutory Sexual Seduction in juxtaposition to the greater offense of Sexual Assault With a Minor Under 14 Years of Age charged in Counts 3 and 5 of the Second Amended Information in this case without his client's meaningful authorization was, for that reason alone, and otherwise an objectively unreasonable action by which Petitioner was deprived of the effective assistance of trial counsel in this case as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 8 of the Constitution of the State of Nevada in the following respects:

1. Because by failing to secure his client's understanding of the potential comparative consequences and obtain his client's informed authorization before rejecting the trial court's invitation to request a lesser-related offense instruction regarding Statutory Sexual Seduction (then punishable by a maximum sentence of 5 years of imprisonment) in juxtaposition to the greater offense of Sexual Assault With a Minor Under 14 Years of Age charged in Counts 3 and 5 of the Second Amended Information in this case (subjecting him to the considerably harsher punishment of a mandatory, minimum sentence of 35 years to life), trial counsel failed to obtain his client's meaningful personal input into the critical risk analysis inherent in this very momentous decision and the 30 year minimum mandatory sentencing disparity thereby implicated; and
2. Because, in view of the then-applicable statutory scheme and under the facts and circumstances of this case, in which the only contested issue and theory of defense at trial was the consent of the minor accuser, trial counsel's deliberate (unilateral) decision to reject the trial court's invitation to request a lesser-related offense instruction regarding Statutory Sexual Seduction in juxtaposition to the greater offense of Sexual Assault With a Minor Under 14 Years of Age charged in Counts 3 and 5 of the Second Amended Information, was objectively unreasonable in view of the comparatively profound 30 year disparity between the maximum 5 year sentence of imprisonment applicable to a

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conviction of the lesser-related offense of Statutory Sexual Seduction and the mandatory minimum 35 year sentence of imprisonment applicable to the conviction that Petitioner ultimately suffered pursuant to his conviction on the allegations of Counts 3 and 5 as charged.

Declarations of Philip Kohn, Esq., Anthony P. Sgro, Esq., John L. Arrascada, Esq., Kristina Wildeveld, Esq., and Franny Forsman, Esq., appended hereto and marked "G," "H," "I," "J" and "K," respectively).

2.

LEGAL STANDARD

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was deficient because it fell below an objective standard of reasonableness; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *Nika v. State,* 124 Nev. 1272, 1279, 198 P.3d 839, 844 (2008) (en banc); *State v. Powell,* 122 Nev. 751, 759, 138 P.3d 458 (2006). Thus, the defendant must show that "counsel failed to act reasonably considering all the circumstances." *Cullen v. Pinholster,* 563 U.S. 170, 131 S.Ct. 1388, 1403 (2011). And in order to show prejudice, he must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694; *Nika,* 124 Nev. at 1279, 198 P.3d at 844; *Powell,* 122 Nev. at 759, 138 P.3d at 458.

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3.

ARGUMENT

I.

PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BY HIS COUNSEL'S REJECTION OF THE TRIAL COURT'S INVITATION THAT HE REQUEST AN ALTERNATIVE LESSER-RELATED OFFENSE INSTRUCTION WITH RESPECT TO STATUTORY SEXUAL SEDUCTION IN JUXTAPOSITION TO THOSE COUNTS OF THE SECOND AMENDED INFORMATION (COUNTS 3AND 5) IN WHICH PETITIONER WAS CHARGED WITH THE GREATER OFFENSE OF SEXUAL ASSAULT OF A MINOR UNDER 14 YEARS OF AGE.

A.

The Trial Court Properly Invited Defense Counsel To Request That The Jury Be Provided With A Lesser-Related Offense Instruction With Respect To Statutory Sexual Seduction In This Case.

1.

Upon Request, And Where Supported By The Evidence, Nevada Trial Courts May Provide Lesser-Related Offense Instructions In The Exercise Of Their Discretion.

In *Peck v. State,* 116 Nev. 840, 844, 7 P.3d 470, 472-73 (2000) (en banc), *overruled on other grounds by Rosas v. State,* 122 Nev. 1258, 147 P.3d 1101 (2006) (en banc), the Nevada Supreme Court reiterated the long-standing principle of Nevada law that, where supported by the evidence, and unless contrary to the defendant's testimony, a jury instruction on a lesser-***included*** offense must, as a matter of ***necessity***, be provided by the trial court ***even if the defense does not ask for such an instruction to be given***.

> This court has held "to determine whether an offense is necessarily included in the offense charged, the test is whether the offense charged cannot be committed without committing the lesser offense." *Lisby v. State,* 82 Nev. 183, 187, 414 P.2d 592, 594 (1966) (citing *State v. Carter,* 79 Nev. 146, 379 P.2d 945 (1963); *State v. Holm,* 55 Nev. 468, 37 P.2d 821 (1935)). Where "there is evidence which would absolve the defendant from guilt of the greater offense or degree but would support a finding of guilt of the lesser offense or degree," ***an instruction on the lesser-included offense is mandatory even if not requested.***

(Emphasis added).

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However, the *Peck* Court held that – in contradistinction to a lesser-***included*** offense – such ***mandatory entitlement*** would no longer apply with respect to instruction regarding a lesser-***related*** offense. 116 Nev. at 846, 7 P.3d at 473. Indeed, as the Nevada Supreme Court observed in its opinion on direct appeal in this case: "The district court was not ***required*** to give an instruction on a lesser-***related*** offense, as the defendant is not entitled to such an instruction. *See Peck v. State,* 116 Nev. 840, 844–45, 7 P.3d 470, 472–73 (2000), *overruled on other grounds by Rosas v. State,* 122 Nev. 1258, 147 P.3d 1101 (2006)." 404 P.3d at 763, n. 3 (emphasis added). However, as our Supreme Court pointed out in its decision on direct appeal in this case:

> ***Noting that there was evidence of consent to support the lesser offense, the district court instead offered to instruct the jury on statutory sexual seduction as a lesser-related offense of sexual assault, but Alotaibi declined such an instruction.***

404 P.3d at 763 (emphasis added).

Quoting *Moore v. State,* 105 Nev. 378, 383, 776 P.2d 1235, 1238 (1989), *overruled in part by Peck v. State,* 116 Nev. 840, 846, 7 P.3d 470, 473 (2000) (en banc), *overruled in turn on other grounds by Rosas v. State,* 122 Nev. 1258, 147 P.3d 1101 (2006) (en banc), the *Peck* Court explained that a lesser-***related*** offense is implicated "when three conditions are satisfied: (1) the lesser offense is closely related to the offense charged; (2) defendant's theory of defense is consistent with a conviction for the related offense; and (3) evidence of the lesser offense exists."

Nevertheless, as our Supreme Court's en banc post-*Peck* jurisprudence reflects, where supported by the evidence adduced at trial; consistent with the defendant's theory of defense; and ***requested*** by the defense, a Nevada trial court may provide a lesser-***related*** offense instruction in the exercise of its ***discretion*** where, as in this case, the lesser offense is "***closely related,*** or ***incidental***" to the greater, charged offense. *Nika v. State,* 124 Nev. 1272, 1290, 198 P.3d 839, 851-852 (2008) (en banc) (emphasis added). *See also, e.g., Mezgebe v. State*, No. 65178, 2015 WL 4611943 *2 (July 31, 2015) (Unpublished Disposition); *Ouanbengboune v. State,* 125 Nev. 763, 774, 220 P.3d 1122, 1129 (2009).

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Thus, whereas the trial court specifically observed in this case that such a lesser-related offense instruction was supported by the evidence; specifically, evidence of consent on the part of the minor accuser, and was consistent with the defendant's theory of defense, the trial court expressly advised counsel for the parties that, ***if requested by the defense***, it was in fact ***inclined*** to provide the jury by instruction with the option of considering Statutory Sexual Seduction as a lesser-related offense with respect to those counts of the Information (Counts 3 and 5) in which Petitioner was charged with the greater offense of Sexual Assault With a Minor Under 14 Years of Age; and therefore, invited defense counsel to consider making that request. Exhibit "B" Day 7, pp. 16-17, 22. And accordingly, as the Nevada Supreme Court specifically recounted in its opinion on direct appeal in this case:

> Alotaibi requested an instruction on statutory sexual seduction as a lesser-included offense of sexual assault, arguing that evidence indicated the victim consented to the sexual activity. The district court determined that statutory sexual seduction was not a lesser-included offense because it contained an additional element (the consenting person being under the age of 16) not required by sexual assault. ***Noting that there was evidence of consent to support the lesser offense, the district court instead offered to instruct the jury on statutory sexual seduction as a lesser-related offense of sexual assault, but Alotaibi declined such an instruction.***

404 P.3d at 763 (emphasis added).

2.

Statutory Sexual Seduction Was A Lesser-Related Offense With Respect To The Greater Offense Of Sexual Assault With a Minor Under 14 Years of Age At The Time Of The Trial In This Case.

Pursuant to the above-quoted *Moore* test, under the then-effective comprehensive Nevada statutory scheme, Statutory Sexual Seduction was a lesser-***related*** offense with respect to the greater offense of Sexual Assault With a Minor Under 14 Years of Age, as the trial court observed in this case. Exhibit "B" Day 7, pp. 16-17, 22. And the Nevada Supreme Court has likewise said as much in its opinion on direct appeal in this case. 404 P.3d at 763, n. 3. Thus, "(1)

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the lesser offense is closely related to the offense charged; (2) defendant's theory of defense is consistent with a conviction for the related offense; and (3) evidence of the lesser offense exists." 105 Nev. at 383, 776 P.2d at 1238.

As the Nevada Supreme Court explained in *Johnson v. State,* 111 Nev. 1210, 1213-14, 902 P.2d 48, 50 (1995):

> A defendant's theory of defense is not consistent with the conviction for the related offense if "'the defense theory and evidence reflect a complete denial of culpability....'" *Moore v. State,* 109 Nev. 445, 446, 851 P.2d 1062, 1063 (1993) (quoting *Geiger,* 674 P.2d at 1316). "***Instead, this [lesser-related instruction] requires a showing that the defendant admits to conduct which constitutes some lesser crime.***" *Id.* at 447, 851 P.2d at 1063; *see also Moore,* 105 Nev. at 382–84, 776 P.2d at 1238–39 (reversing district court's refusal to instruct on lesser crime where appellant's defense to charge of second-degree murder was involvement only as accessory after the fact).

(Emphasis added.)

And as the Johnson Court further clarified: "***There is no requirement that a defendant mention the lesser offense by its proper name***, but ***only that he or she admits to conduct that constitutes some lesser crime***. 111 Nev. at 1215, 902 P.2d at 51, n. 3 (emphasis added). And that is precisely what the evidence showed in this case: that, following his arrest, Petitioner admitted to police on video and audio tape played for the jury that he had indeed penetrated A.D., but asserted that he had done so with A.D.'s consent. And whereas A.D. was under 16 years of age while Petitioner was over the age of 18, ***that was an admission to conduct that constituted the lesser-related crime of Statutory Sexual Seduction***.

Thus, as applied in this case, the presence or absence of consent was the critical textual distinction between the then-applicable Sexual Assault and Statutory Sexual Seduction statutes at issue. Indeed, ***consensual*** penetration ***even of a minor by an adult*** was ***not*** a violation of the then-effective Sexual Assault statute ***in any case***. However, it was nonetheless a violation of the prevailing Statutory Sexual Seduction statute. Thus, viewing the contemporary statutory scheme ***comprehensively***, the enactment of the then-applicable Statutory Sexual Seduction statute makes irrefutably clear that it was not the intention of the Nevada Legislature to tolerate the adult

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penetration of a child based upon the consent of the child as ***entirely non-criminal conduct***. And therefore, the comprehensive statutory scheme clearly contemplates that the Legislature's intent was that only consent to penetration by another adult was contemporaneously cognizable as effective to ***negate all criminality*** under the law of the State of Nevada. However, penetration ***with the consent*** of ***any*** person penetrated – ***even if a minor*** –was in no event a violation of the then-existing Sexual Assault statute. Indeed, consent to penetration on the part of ***anyone*** – ***even if a minor*** – was ***a complete defense*** to a charge of Sexual Assault. And therefore, only a ***non — consensual*** adult penetration of another – ***even if a minor*** – was then a violation of the existing Sexual Assault statute. And thus, by therein ***contemporaneously proscribing*** the ***consensual*** penetration of a child, the Legislature's enactment of the then-applicable Statutory Sexual Seduction statute was clearly intended to address such a perverse outcome and create an independent, ***related*** offense which it intended to attach upon the penetration of a child by an adult ***with the consent of the child***. And therefore, the two offenses were obviously related but distinguished by the far more onerous penalty assigned to the adult penetration of a minor ***against the will of the child***.

B.

Defense Counsel Should Not Have Rejected The Trial Court's Offer To Provide A Lesser-Related Offense Instruction Regarding Statutory Sexual Seduction In This Case.

As the en banc Nevada Supreme Court has further recognized, notwithstanding its decision in *Peck*, "trial counsel . . . [may be] ***ineffective*** for failing to pursue a lesser-***related*** offense instruction" in a particular case, where "trial counsel ha[s] . . . ***reason*** to pursue a lesser-***related*** offense instruction," (124 Nev. at 1290, 198 P.3d at 851-852), and "but for counsel's decision . . . [not to do so], there was a reasonable probability of a different outcome." *Nika,* 124 Nev. at 1293, 198 P.3d at 853 (emphasis added). Such is the case here.

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1.

Defense Counsel Failed To Obtain Petitioner's Consent To Counsel's Rejection Of The Trial Court's Offer Of A Lesser-Related Offense Instruction Regarding Statutory Sexual Seduction With Respect To Counts 3 And 5.

As the United States Supreme Court explained in *Florida v. Nixon,* 543 U.S. 175, 187-88 (2004):

> An attorney undoubtedly has a duty to consult with the client regarding "important decisions," including questions of overarching defense strategy. *Strickland,* 466 U.S., at 688, 104 S.Ct. 2052. That obligation, however, does not require counsel to obtain the defendant's consent to "every tactical decision." *Taylor v. Illinois,* 484 U.S. 400, 417-418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) (an attorney has authority to manage most aspects of the defense without obtaining his client's approval). ***But certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant, this Court affirmed, has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."*** *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); *Wainwright v. Sykes,* 433 U.S. 72, 93, n. 1, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (Burger, C. J., concurring). ***Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action.***

(Emphasis added).

Because ***it is considered analogous to the decision of what plea to enter***, where a lesser offense instruction is made available, defense counsel must not reject its provision to the jury absent meaningful consultation with and the understanding and personal consent of the defendant. *People v. Brocksmith,* 162 Ill. 2d 224, 228-29, 205 Ill. Dec. 113, 115-16, 642 N.E. 2d 1230, 1232-33 (1994); *In re Trombly*, 160 Vt. 215, 217–18, 627 A.2d 855, 856 (1993); *State v. Boeglin*, 105 N.M. 247, 249, 731 P.2d 943, 945 (1987); *State v. Ambuehl*, 145 Wis.2d 343, 357, 425 N.W.2d 649, 654 (1987); *People v. Frierson*, 39 Cal.3d 803, 817 n. 5, 218 Cal.Rptr. 73, 81 n. 5, 705 P.2d 396, 404 n. 5 (1985); ABA Standards for Criminal Justice, Section 4-5.2 (Commentary).

Here, Defense counsel acknowledged on the record in open court that, although he

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attempted to discuss the trial court's offer to provide a lesser offense instruction regarding Statutory Sexual Seduction to the jury, ***Petitioner did not understand the legal distinctions involved or the implications of the decision to accept or reject the court's offer***, yet counsel declined repeated opportunities to further discuss the matter with his client. Exhibit "B" at pp. 36-37, 186-187, 193-194.

Announcing that "***I'm the lawyer***," (*id.* at p.186), counsel nevertheless rejected the court's offer to provide the lesser offense instruction offered. *Id.* at pp. 31, 36-37, 186-187, 193-194 (emphasis added). And as defense trial counsel expressly acknowledges in the declaration appended hereto as Exhibit "C", in doing so, 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 Petitioner was charged with the greater offense of Sexual Assault With A Minor Under 14 Years Of Age. Thus, defense trial counsel ***concedes*** that he undertook this course of action ***without the permission of his client***. *Id.* 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 comprehensive statutory scheme. And, as explained in the above-cited authorities, for this reason alone, Petitioner's conviction on those counts should be reversed pursuant to this Petition.

2.

Defense Counsel's Rejection Of The Trial Court's Offer Of A Lesser-Related Offense Instruction Regarding Statutory Sexual Seduction With Respect To Counts 3 And 5 Constituted An Objectively Unreasonable Decision Under The Facts And Circumstances Of This Case Prejudicial To Petitioner.

Petitioner having admitted that he did in fact penetrate a minor child under the age of 14 years, and there being evidence of record – by and through the testimony of A.D. himself – that he had in fact engaged in a communication of his consent to engage in sexual activity with Petitioner and had in fact engaged in other anticipatory conduct consistent therewith, it was objectively unreasonable and prejudicial for defense counsel to subject Petitioner to the 35 year

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minimum mandatory sentence of imprisonment required by a conviction for Sexual Assault under NRS § 200.366(3)(c) by rejecting the trial court's offer to provide the jury with a lesser-related offense instruction regarding Statutory Sexual Seduction under NRS § 200.364 – a conviction for which offense would have subjected Petitioner to a 5 year maximum sentence. *A fortiori* in the absence of Petitioner's informed consent. Thus, in that the only issue in contention at trial was whether or not A.D. had consented, and in view of the tremendous sentencing disparity at issue, counsel took an untenable risk that the jury would ***not*** find that such consent had occurred ***having been instructed that such consent would constitute a complete defense to the attachment of any criminal liability whatsoever as a result of such conduct.*** Exhibit "D," Instruction No. 13. Whereas, had the jury received a ***comprehensive*** and accurate understanding of the then-current state of applicable Nevada law providing for ***some degree of punishment for such conduct*** – even if undertaken by Petitioner ***with*** A.D.'s consent – by instruction regarding the option to return a verdict of guilty with respect to the lesser-related offense of Statutory Sexual Seduction, there was a far greater likelihood that the jury may have made a finding of such consent on the facts of this case. And accordingly, that Petitioner would have been able to avoid the comparatively oppressive sentence that he received.

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4.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Petitioner MAZEN ALOTAIBI respectfully prays that this Honorable Court enter an order vacating his conviction and sentence on Counts 3 and 5 of the Second Amended Information filed in the matter entitled *State of Nevada, Plaintiff v. Mazen Alotaibi, Defendant,* Case No. C287173-1, on which counts he was convicted at jury trial of Sexual Assault of a Minor Under 14 Years of Age, together with such other and further relief as the Court deems fair and just in the premises.

Dated this 20 day of November, 2018.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

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Attorneys for Petitioner Mazen Alotaibi

CERTIFICATE OF SERVICE

The undersigned, an employee of Gentile Cristalli Miller Armeni Savarese, hereby certifies that on the 28 day of November, 2018 I served a copy of the **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**, by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

RENEE BAKER, WARDEN LOVELOCK CORRECTIONAL CENTER 1200 Prison Road Lovelock, Nevada 89149	JAMES DZURENDA DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTION 3955 West Russell Road Las Vegas, Nevada 89118
ADAM LAZALT NEVADA ATTORNEY GENERAL 100 North Carson Street Carson City, Nevada 89701	STEVE WOLFSON CLARK COUNTY DA CLARK COUNTY DISTRICT ATTORNEY'S OFFICE 200 Lewis Avenue Las Vegas, Nevada 89101

An employee of GENTILE CRISTALLI MILLER ARMENI SAVARESE

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EXHIBIT A

EXHIBIT A

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STEVEN B. WOLFSON
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Nevada Bar #001565
JAMES R. SWEETIN
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Nevada Bar #005144
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MAZEN ALOTAIBI,
#2884816

Defendant.

Case No: **C-13-287173-1**

Dept No: **XXIII**

SECOND AMENDED INFORMATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That **MAZEN ALOTAIBI**, the Defendant above named, having committed the crimes of **BURGLARY (Category B Felony - NRS 205.060), FIRST DEGREE KIDNAPPING (Category A Felony - NRS 200.310, 200.320), SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony - NRS 200.364, 200.366), LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony - NRS 201.230)** and **COERCION (Sexually Motivated) (Category B Felony - NRS 207.190, 207.193, 175.547)** in the manner following, to-wit: That the said Defendant, on or about the 31st day of December, 2012, at and within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT 1 - BURGLARY

did, then and there, willfully, unlawfully, and feloniously enter, with intent to commit a felony, to-wit: kidnapping and/or sexual assault and/or lewdness with a minor and/or sexually motivated coercion, that certain building occupied by ANKE DANG, located at CIRCUS CIRCUS HOTEL & CASINO, 2880 South Las Vegas Boulevard, Room No. 631, Las Vegas, Clark County, Nevada.

COUNT 2 - FIRST DEGREE KIDNAPPING

did, willfully, unlawfully, feloniously, and without authority of law, lead, take, entice, carry away or kidnap ANKE DANG, a minor, with the intent to keep, imprison, or confine said ANKE DANG, from his parents, guardians, or other person or person having lawful custody of said minor, or with the intent to hold said minor to unlawful service, or perpetrate upon the person of said minor, any unlawful act, to-wit: sexual assault and/or lewdness.

COUNT 3 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE

did, then and there, willfully, unlawfully, and feloniously sexually assault and subject ANKE DANG, a child under fourteen years of age, to sexual penetration, to-wit: anal intercourse, by said Defendant inserting his penis into the anal opening of the said ANKE DANG, against his will, or under conditions in which Defendant knew, or should have known, that the said ANKE DANG was mentally or physically incapable of resisting or understanding the nature of Defendant's conduct.

COUNT 4 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

did, then and there, willfully, lewdly, unlawfully, and feloniously commit a lewd or lascivious act upon or with the body, or any part or member thereof, a child, to-wit: ANKE DANG, said child being under the age of fourteen years, by said Defendant using his penis to touch and/or rub and/or fondle the buttock(s) and/or anal area of the said ANKE DANG, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of said Defendant, or said child.

COUNT 5 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE

did, then and there, willfully, unlawfully, and feloniously sexually assault and subject ANKE DANG, a child under fourteen years of age, to sexual penetration, to-wit: fellatio, by said Defendant placing his penis on and/or into mouth of the said ANKE DANG, against his will, or under conditions in which Defendant knew, or should have known, that the said ANKE DANG was mentally or physically incapable of resisting or understanding the nature of Defendant's conduct.

COUNT 6 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

did, then and there, willfully, lewdly, unlawfully, and feloniously commit a lewd or lascivious act upon or with the body, or any part or member thereof, a child, to-wit: ANKE DANG, said child being under the age of fourteen years, by said Defendant placing his penis on and/or into mouth of the said ANKE DANG, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of said Defendant, or said child.

COUNT 7 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

did, then and there, willfully, lewdly, unlawfully, and feloniously commit a lewd or lascivious act upon or with the body, or any part or member thereof, a child, to-wit: ANKE DANG, said child being under the age of fourteen years, by said Defendant using his mouth and/or tongue to touch and/or kiss and/or lick the face and/or neck and/or body of the said ANKE DANG, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of said Defendant, or said child.

COUNT 8 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

did, then and there, willfully, lewdly, unlawfully, and feloniously commit a lewd or lascivious act upon or with the body, or any part or member thereof, a child, to-wit: ANKE DANG, said child being under the age of fourteen years, by said Defendant using his mouth and/or tongue to touch and/or kiss and/or lick the face and/or neck and/or body of the said ANKE DANG, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of said Defendant, or said child.

COUNT 9 - COERCION (Sexually Motivated)

did, then and there, willfully, unlawfully and feloniously use physical force, or the immediate threat of such force, against ANKE DANG, with intent to compel him to do, or abstain from doing, an act which he had a right to do, or abstain from doing, by said Defendant said preventing the said ANKE DANG from leaving the presence of said Defendant, the purpose for which the Defendant committing the offense being the sexual gratification of said Defendant.

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144

DA#12F20986X/hjc/SVU
LVMPD EV#1212311318
(TK06)

EXHIBIT B

EXHIBIT B

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

STATE OF NEVADA, Plaintiff, vs. MAZEN ALOTAIBI, Defendant.	CASE NO. C287173-1 DEPT NO. XXIII **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 7

MONDAY, OCTOBER 21, 2013

APPEARANCES:

FOR THE STATE:	MARY KAY HOLTHUS, ESQ. Chief Deputy District Attorney JACQUELINE M. BLUTH, ESQ. Deputy District Attorney
FOR THE DEFENDANT:	DON P. CHAIREZ, ESQ.
Also Present:	Mohammad A. Taha, Interpreter Saad Musa, Interpreter Theresa Tordjman, Interpreter

RECORDED BY MARIA GARIBAY, COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

LAS VEGAS, NEVADA, MONDAY, OCTOBER 21, 2013, 11:11 A.M.

* * * * *

(Outside the presence of the jury.)

THE COURT: Okay. We're on. So, we're discussing jury instructions. The defendant is not present yet. Mr. Chairez wants to start. And that's fine with the Court, so long as the instructions, once they're settled, will be reviewed with the defendant prior to the jury coming in. Right?

MR. CHAIREZ: That's -- that's fine, Your Honor. That's correct.

THE COURT: All right. So let's get started. I have a bit of case law that I read over the weekend. Let's just go over the disputed instructions.

MR. CHAIREZ: Right.

MS. HOLTHUS: What -- from -- from the defense end of them --

MR. CHAIREZ: I haven't seen anything from the State, Your Honor.

THE COURT: I don't have any --

MR. CHAIREZ: But I'm assuming they're bringing the stock instructions to which I have no objection --

MS. HOLTHUS: They -- they should have been sent to you.

MS. BLUTH: Howard sent them to you last week.

MR. CHAIREZ: Right. All right.

MS. BLUTH: Your Honor, were you saying that Adams or Adamson was unpublished and it cites Ewish?

MR. CHAIREZ: It cites Ewish and Catanio.

(Pause in proceedings.)

THE COURT: Did you guys come up with a stipulated --

MS. HOLTHUS: I think we did.

THE COURT: -- instruction on intoxication?

MR. CHAIREZ: We have, Your Honor.

MS. HOLTHUS: And I will --

MR. CHAIREZ: Fix it.

MS. HOLTHUS: -- fix it. That's what I will do. I'll fix it.

THE COURT: Okay. So, we will say that you guys stipulated on an instruction for intoxication. Okay.

The last one I have, and this is the one you're saying there's going to be some discussion on --

MS. HOLTHUS: Yes.

THE COURT: -- is statutory sexual seduction. I -- I was looking at cases this weekend on statutory sexual seduction. The only thing I don't think it is, is I don't think it's a lesser included. It looks like a lesser related.

MS. HOLTHUS: Which is exactly our argument.

THE COURT: Okay. However, I'll tell the State --

MR. CHAIREZ: Well, I mean --

THE COURT: -- I was inclined to allow this instruction if proffered by the defense after looking at the case law. I do think there is testimony in this case of consent by the victim.

MS. HOLTHUS: But then that makes it lewdness.

MR. CHAIREZ: No.

MS. HOLTHUS: And they're only entitled to lesser included. The law is clear about that.

THE COURT: I understand that. But they can also request --

MR. CHAIREZ: No.

THE COURT: -- lesser related.

MS. HOLTHUS: Our position, he's not entitled to it and we don't see where -- how do you get around the lewdness, I guess. When -- when would that be? If -- if your issue is consent, because AJ's 13, if it's consensual, it's a lewdness. Or not guilty.

MR. CHAIREZ: Then what is this -- what's statutory sexual seduction, then, Your Honor?

MS. HOLTHUS: Our --

MR. CHAIREZ: See, lewdness, in my opinion, is lack of penetration. So, if the -- you know, if the penis does not go in the mouth or the penis does not go in the rectum, then you would have lewdness. And --

MS. HOLTHUS: Well, lewdness in our facts, we have

two counts that are both ultimately, if you were convicted, going to be treated as alternative counts, and those -- those are the ones that are alternative to the effects of both. The remaining, obviously not. But the statutory -- I mean, he's arguing is that is an alternative for which count?

MR. CHAIREZ: Well, it would be the -- the sexual assault counts. Because they've charged two lewdness counts, and we're going to move to dismiss those, Your Honor. Because we believe AJ said there was no fondling, there was no touching, there was no rubbing.

THE COURT: But there's not a --

MS. HOLTHUS: The cause -- it clearly --

THE COURT: -- there's a case law that says there's no requirement of touching.

MR. CHAIREZ: Well --

THE COURT: It says, "While lewdness does not require physical contact," that's State vs. Catanio.

MR. CHAIREZ: Right. That's correct. I agree with that position.

MS. HOLTHUS: Well, we do --

MR. CHAIREZ: There doesn't need to be touching, Your Honor. But when I asked AJ on cross-examination, you know, your position is he just forced it in. There was no foreplay, there was no rubbing, there was no fondling. And that's what he said. So...

MS. HOLTHUS: We would --

MR. CHAIREZ: But -- okay.

MS. HOLTHUS: We provided the case was Cossack, which clearly supports our right. The two lewdnesses are obviously related to the sex assault, and ultimately if he were convicted of both, we would ask that you sentence him only on the sex assault and set aside for another day, if you will, the lewdness. But Cossack clearly says that we can charge those two lewdnesses in the event the jury found consent or maybe in this fact -- on these facts, reasonable belief regarding consent. Then those would be the appropriate counts. So, we certainly have the right to do that. I'm assuming those are the only two he's objecting to.

MR. CHAIREZ: Well, the concern, Your Honor, is --

MS. HOLTHUS: And let -- let me -- just one more thing, Don.

MR. CHAIREZ: Okay.

MS. HOLTHUS: He's worried about the fondling and hinting around. My position is particularly he's addressing the anal. One of the things we do allege is touching the penis to the anus. And you can't get in the anus without touching it. So the argument would be it would be complete upon contact without requiring the extra penetration and/or against the consent. So that is an alternative on two different theories.

THE COURT: Okay. Anything else?

MR. CHAIREZ: Well, I guess this is the problem when politicians make the law, Your Honor. Because it seems illogical that if you have an -- a sexual act against somebody's will, it's sexual assault. If you have sexual assault, even with a minor under 14 where the state Supreme Court has said consent is a defense, I guess my -- my concern or my issue is, Well, what is the lesser included? Is it basically just consent as a defense to sexual assault? Because why would it be a defense and then you still find them guilty of lewdness? Because I think lewdness is a completely different act than sexual assault.

So, the purpose of -- and so Mr. Alotaibi and I went around and around yesterday about the statutory sexual seduction jury instruction as to what you would do and, you know, how we would go about arguing it in closing argument. But my sense is --

MS. HOLTHUS: Can I interrupt for a minute?

MR. CHAIREZ: Yeah.

MS. HOLTHUS: And the record should reflect that Mr. Alotaibi is present in the courtroom.

MR. CHAIREZ: That's -- that's right.

THE COURT: I did notice it. The interpreter is not present, though.

All right, Mr. Alotaibi, we're going over jury

instructions. You've missed some of the discussion of the jury instructions. However, the only reason we started without you is Mr. Chairez has agreed that he's going to go over every single thing as well as all the instructions that were agreed upon with you with the presence of the interpreter. So you'll know exactly what the case laws -- what case law is going to be given to the jury in your case.

MR. CHAIREZ: It's okay. He has a lawyer that speaks simple English. So...

THE COURT: Well, let me -- on the statutory sexual seduction, the reason I think it's a lesser related versus a lesser included, because it includes the additional factor of the consenting percent must be under the age of 16 years. What I did not see, I'll be frank with you, perhaps the State or the defense has it, is any case which discussed the propriety of having a lewdness count as well as a statutory sexual seduction. And I didn't find it. The only thing I've found so far is Slobodian vs. State, 107 Nev. 145.

MR. CHAIREZ: That was my case, Your Honor.

THE COURT: Yeah.

MR. CHAIREZ: As a DA.

MS. HOLTHUS: And, you know, I don't have it here. I know that -- I mean, to us it doesn't make any sense that -- and -- and Mr. Chairez is asking when. The statutory would be the appropriate alternative if you had consent issue and you

had a child between, say, the ages of 14 and -- and 16. That's when it -- then you could make the pitch more so. But if it's not a lesser included, then he's not entitled to it.

THE COURT: Well, he's not entitled to it --

MS. HOLTHUS: And I suppose the Court --

THE COURT: -- as a matter of course.

MR. CHAIREZ: Well, Your Honor --

MS. HOLTHUS: Correct.

THE COURT: He can still request.

MR. CHAIREZ: I believe Epperson based --

MS. HOLTHUS: I don't --

THE COURT: Hold on. I --

MR. CHAIREZ: Okay. I'm sorry.

THE COURT: Only one at a time. Let Ms. Holthus [indiscernible].

MS. HOLTHUS: My objection is that it -- it's in some ways an absurdity that he would be allowed to argue for a statutory lesser for anally raping or anally penetrating or fellatio, when the kiss on the neck and the lick on the neck and the fondling on the body, he's certainly not going to get a statutory alternative on that. And so it just doesn't even make sense. How can -- how can it be this low-grade felony for -- for tearing up his anus, whereas the little lick on the neck is -- is the full lewdness? That can't be the intent --

MR. CHAIREZ: Well --

MS. HOLTHUS: -- of a legislature. And I think it's real clear from those facts that it was never intended. A child can consent to a sexual assault. A child cannot consent to a lewdness.

MR. CHAIREZ: That's correct.

MS. HOLTHUS: That's just the way the law is.

MR. CHAIREZ: That is correct, Your Honor.

MS. HOLTHUS: And so therefore there is no reason to go to the statutory.

MR. CHAIREZ: Well, here's -- first off Your Honor --

THE COURT: Well, I'm --

MR. CHAIREZ: -- we're not asking for --

THE COURT: Hold on.

MR. CHAIREZ: -- statutory --

THE COURT: I'm guessing the lewdness are, like, the kissing on the neck and everything else.

MR. CHAIREZ: Right.

THE COURT: And then --

MR. CHAIREZ: We're not asking for a statutory sexual seduction as a lesser included or lesser related of lewdness. Okay. That's just the bottom line. In the lewdness, our defense will be intoxication. All right. And we'll fight -- and we'll fight the specific intent. So, for any of the lewdness counts that are going to go to the jury, that is our defense, intoxication.

For the two sexual assault counts, our defense will be reasonable consent or reasonable mistaken belief of consent. So, as the State has it charged right now, if they want to go for all or nothing, and not have a -- I mean, I don't believe that a lesser -- lewdness is a lesser included of sexual assault. And I even think the Cossack case that they cited --

MS. HOLTHUS: That's -- that's correct.

MR. CHAIREZ: Pardon?

MS. HOLTHUS: That's correct.

MR. CHAIREZ: Okay.

MS. HOLTHUS: That's why we've gone ahead and pled it, because we realized we wouldn't be entitled to it ultimately. So we have pled it as an alternate theory. We could have pled the alternate related theory of statutory. We chose not to. I mean, that's a -- that was a charging decision we made at the beginning of the case, because it factually -- it doesn't make any sense. Because if Mr. Chairez is successful and -- and getting the reasonable belief as to consent, or that the child actually consented, then it goes to the lewdness. And then he has the consent of intoxication. If they believe that, then it's not guilty. Period.

Because, quite honestly, statutory under these facts also requires intent of arousing, appealing, or gratifying.

THE COURT: So are you asking for statutory sexual? I'm looking at he case right now.

MS. HOLTHUS: We're -- we're --

MR. CHAIREZ: Well, Your Honor --

MS. HOLTHUS: -- opposing it.

MR. CHAIREZ: -- here is my thing. As long as the Court gives me the consent instruction and the reasonable mistaken belief of consent --

THE COURT: Which the State stipulated to.

MR. CHAIREZ: Well, I guess it's stipulated.

THE COURT: I thought that was the one where you guys came up with --

MR. CHAIREZ: Right.

MS. HOLTHUS: We did. We specifically said if they have a -- a doubt, a reasonable doubt as to his -- whether he believed the consent, then he gets the benefit of the doubt and it's a not guilty on the sex assault. I mean, it's --

THE COURT: Okay. But that's the instruction the State and the defense counsel, you put your heads together and came up with a -- an agreeable stipulated instruction, right?

MR. CHAIREZ: Well, I know we did that with voluntary intoxication and -- and maybe we did it with -- did we, with the -- the consent? I think we did, Your Honor.

MS. HOLTHUS: We did.

MR. CHAIREZ: I mean --

MS. HOLTHUS: We did the Carter -- we did a Carter instruction that we agreed on --

MR. CHAIREZ: Okay.

MS. HOLTHUS: -- and we did a voluntary intoxication --

MR. CHAIREZ: Okay.

MS. HOLTHUS: -- that set forth a statute first.

MR. CHAIREZ: Right.

MS. HOLTHUS: And then it -- I have it right here. It was the statute and then it adds with it, "If you find the defendant was intoxicated, you may consider this evidence in determining whether he could form the specific intent to commit the crime for which he is charged." And then, "You are instructed that burglary, first-degree kidnapping, lewdness with a child under 14, coercion, are specific intent crimes. Sexual assault is a general intent crime."

MR. CHAIREZ: Well, I just want to make sure, Your Honor, for a sexual assault, I can argue consent or reasonable mistaken belief of consent for the two counts of sexual assault, correct?

MS. HOLTHUS: Correct.

MR. CHAIREZ: All right. And we're not going to give any --

THE COURT: And the jury has an instruction that --

MR. CHAIREZ: -- lesser included. It's going to be

guilty or not guilty, correct?

MS. HOLTHUS: Well -- and --

MR. CHAIREZ: Okay. Well, that's --

MS. HOLTHUS: We're giving the -- I mean, we're not giving. The law -- I mean, we have charged the lewdnesses. Our argument will be that he's guilty of both. And that it's a sentencing determination. To me, I believe that that's the way the case law reads. Because here's the problem. If we structure it any other way, if the jury finds him guilty of the sex assault, he's still guilty of the lewdness. Because these facts, it's completely contained in the sex assault.

MR. CHAIREZ: I mean, and I disagree, Your Honor. Based on -- I believe, based on these facts, lewdness is not a lesser included to the two sexual assault counts. I believe the lewdness as they've charged it, with the neck and the other part of the body --

THE COURT: I think it is a lesser included. I think the State indicated.

MR. CHAIREZ: That it is or is not?

THE COURT: Is not.

MR. CHAIREZ: Is not?

MS. HOLTHUS: It's lesser related, which is why we --

MR. CHAIREZ: Okay.

MS. HOLTHUS: -- chose to offer it. We have alternative theories. If for some reason on these facts, I

think it's probably not ever going to happen, if they found that there was not penetration, I suppose. But it's simply that there's no consent requirement as to the lewdness. So they -- he would be guilty of -- potentially of both. He can't be sentenced on both. But we're entitled to present the alternative theory to the extent that there's any issue regarding consent. And -- and/or penetration.

We have pled the anal penetration as simply a touching. So we don't even need the penetration there. Fellatio's trickier, because touching the mouth is effectively fellatio. So, you can't really plead it any other way. So that one has to be just a straight lesser related, he's guilty of both.

THE COURT: I'm not sure what you want me to do, Mr. Chairez. Do you want to think it over? I mean, as far as whether or not as a strategy you want to argue for the additional charge of statutory sexual seduction? I'm not sure what you're asking for at this point. Would you like to have the chance to think it over? Because I think we're mostly settled on the instructions. Yes?

MR. CHAIREZ: I guess I'll think it over.

THE COURT: Okay.

MR. CHAIREZ: But, I mean, I'll just say --

THE COURT: Because it -- I think it's more of a defense strategy --

MR. CHAIREZ: -- based upon -- for me, again, as long as I'm able to argue consent and reasonable mistake of consent, and they're going to have the sexual assault guilty or not guilty, that's one thing. And I guess for the lewdness and any of the other specific intent crimes, if we're allowed to argue voluntary intoxication, I think we're 99 percent there. So I'll just decide whether -- and they're totally opposed to the statutory sexual seduction as a lesser included of sexual assault, correct?

THE COURT: I -- I agree with the State in that it's not a lesser included.

MR. CHAIREZ: Okay. But a lesser related?

THE COURT: I believe that it's a lesser related.

MR. CHAIREZ: Okay.

THE COURT: Which means it's not as a matter of course, but you can request the instruction as lesser related. I will, in the meantime, do a little bit more research --

MR. CHAIREZ: Okay.

THE COURT: -- on the issue. So, okay. We'll --

MS. HOLTHUS: Let me just -- let me just make a little bit more of a record, then, in that regard.

THE COURT: Yes.

MS. HOLTHUS: Our position is that it is not a lesser included of sexual assault. Sexual assault can be committed without necessarily committing statutory sexual seduction;

One: Digital or other object of penetration of a minor can be done without the intent of arousing, appealing to, or gratifying a lust or passions or desires of either persons. This specific intent is not required for sexual assault, but is required for statutory sexual seduction under subsection B for other penetrations not found in subsection A.

Two: Forcing another person to make a sexual penetration on himself or herself or another or on a beast. This is because statutory sexual seduction only involves sexual penetrations occurring between the defendant and the victim.

Third, sexual penetration of a minor by a juvenile who has been certified as an adult. This is because statutory sexual seduction requires the defendant to be age 18 or over, but sex assault does not.

Four, the age of a victim under 16 is required for statutory sexual seduction, but not for sexual assault.

The victim's age is an element of the enhancement for sexual assault of a minor, but it's our position that there should be a distinction between an element of offense and an element of an enhancement when you're looking at a lesser included analysis. It makes no sense the statutory sexual seduction should be a lesser included of sexual assault on a minor, but not on sexual assault.

So, that's -- that's our position, that it doesn't

make sense and that it's not the law.

MR. CHAIREZ: Was she reading the case right now?

MS. HOLTHUS: No.

MR. CHAIREZ: And did I hear -- okay.

THE COURT: I think she's responding to the --

MR. CHAIREZ: Did I hear her say statutory -- did she say statutory sexual seduction requires specific intent?

MS. HOLTHUS: If -- if it's under -- sub B of the statute, where it says, "Statutory sexual seduction is any other sexual penetration committed by a person 18 years of age or older with a person under the age of 16," that is not -- not ordinary sexual intercourse, anal, cunnilingus, or fellatio.

THE COURT: That's NRS -- I don't have the statute in front of me.

MS. HOLTHUS: 200.34 -- 364.

THE COURT: Okay. So at this point, Mr. Chairez is not requesting statutory sexual seduction. You will indicate to the Court prior to jury instructions, obviously --

MR. CHAIREZ: Correct.

THE COURT: -- if you do want the Court to offer this.

MR. CHAIREZ: Right.

THE COURT: Okay. Is there anything else we need to go over as far as the jury instructions?

MR. CHAIREZ: But I --

MS. HOLTHUS: Yes, it's --

MR. CHAIREZ: I'm --

MS. HOLTHUS: It's in there, Judge. "Evidence which tends to show the defendant committed offenses other than that for which he's on trial, if believed, may not be considered that he's a person of bad character." Anyway, you do have it.

THE COURT: I do. Well, that's a standard instruction.

Mr. Chairez, you wanted that instruction, yes?

MR. CHAIREZ: About uncharged bad acts?

THE COURT: Yes.

MR. CHAIREZ: Yes, Your Honor.

THE COURT: Okay. So that is in the State's pile.

MS. HOLTHUS: The interpreter's present.

THE COURT: The interpreter is present. So --

THE INTERPRETER: There might be --

THE COURT: You know what, that's okay. What -- what's going to happen now is Mr. Chairez needs to go over the jury instructions we went over with the defendant. So you can sit next to him. We're not going to -- I mean, we don't have to be -- we're not going to be on the record while he discusses them with his client.

Mr. Chairez, it sounds like we have settled jury instructions. Is there anything else? Did you look at the

State's proposed?

MR. CHAIREZ: Well, I'm looking at them now, Your Honor.

THE COURT: Okay.

MR. CHAIREZ: Well --

MS. HOLTHUS: Are you ready to flip through them, Don, or no? Do you want to break for lunch and give him time to go through these with his --

THE COURT: Yeah, that's fine.

MS. HOLTHUS: You want that, Don?

MR. CHAIREZ: Yeah, that's fine.

THE COURT: Because, what I'll ultimately ask you guys to do is come up with your finalized instructions and ask you to go through and number it together.

MR. CHAIREZ: Okay.

THE COURT: And both of you can make sure that --

MR. CHAIREZ: Okay.

THE COURT: -- it does include everything that was agreed upon.

MR. CHAIREZ: Right.

THE COURT: And then give me that copy.

MR. CHAIREZ: Okay.

THE COURT: To make sure nothing's left out. Okay. Thanks.

MR. CHAIREZ: Now, am I going to be allowed to stay

here with my client and the interpreter?

THE COURT: I don't have any trouble with that.

MR. CHAIREZ: Or do we need to go someplace else?

THE COURT: I don't know where Jason is, but that's fine.

THE MARSHAL: Here, Judge.

THE COURT: He needs to stay in here and talk to Mr. Alotaibi, go over the instructions, okay, during the lunch break. All right. Jason's nodding yes. Okay.

(Court recessed at 12:02 p.m., until 1:16 p.m.)

(Outside the presence of the jury.)

THE COURT: We are on the record. Okay. I just want to make sure of some things, since Mr. Alotaibi is here with the interpreter.

Mr. Alotaibi, when we left off, you kind of came in as we were doing jury instructions. What I want to make sure is that Mr. Chairez went over all the jury instructions, which are the laws we're going to give the jury when they decide your case. Did he do that with you with the --

THE DEFENDANT: Yes.

THE COURT: Yes? I need to hear -- you're nodding your head. Are you -- are you saying yes?

THE DEFENDANT: Yes.

THE COURT: Yes. All right. And I just want to make sure that you don't have -- do you have any questions

regarding the jury instructions or what went on?

THE DEFENDANT: My attorney will address you at this point.

THE COURT: Okay. I just need a yes or a no.

MR. CHAIREZ: Yeah. He's answering yes. I mean, we don't have any questions right now. And I -- we didn't even get into the issue of -- I mentioned to him there is an issue whether or not statutory sexual seduction is a lesser related or lesser included. Obviously, that's a concept he does not understand.

But -- so we focused on the jury instructions that talked about consent, reasonable mistake of consent, the intoxication, the various definitions. He wonders why we give the same instruction, it seems to him, over and over. And -- and that kind of thing.

But at any rate, yeah, it's -- and we discussed it yesterday, as well, Your Honor. So --

THE COURT: Okay.

MR. CHAIREZ: -- we didn't have the State's instructions at that time, but we discussed the special ones that we would be asking for.

THE COURT: Okay.

MR. CHAIREZ: So.

THE COURT: And as we left it, the statutory sexual seduction, it was not requested by you at this time.

However --

MR. CHAIREZ: Right.

THE COURT: -- if you make a strategic decision to request it, then we'll address it prior to the giving --

MR. CHAIREZ: Right.

THE COURT: -- of the jury instructions.

MR. CHAIREZ: Right.

THE COURT: All right.

MR. CHAIREZ: And it also depends on whether or not Mr. Alotaibi testifies. Because we're -- that -- that for me is the bigger issue right now.

THE COURT: Okay.

MR. CHAIREZ: Okay.

THE COURT: Okay. Is there anything else we need to address before bringing the jury back in?

MS. HOLTHUS: Just that I have -- I found my person on standby to redact that video. It's my understanding I gave Mr. Chairez several choices on where we could stop it before the -- the nude whatever -- before Mr. Alotaibi is undressed. He has indicated that he wants as much of the video as he possibly can have.

There is downtime that the jury can fast forward. But there's, like, a half hour where he's sitting in the office with his head down on the desk and the people come in and do everything. I'm going to let it run through the ID

going to crucify AJ for all his inconsistencies, I don't want you to be able to do that to him.

MS. HOLTHUS: I understand. I don't -- I don't care what you do. I just want to make sure you've had enough time to talk to him about it, consider it --

MR. CHAIREZ: [Indiscernible.]

MS. HOLTHUS: -- that's your decision. If that's the case --

MR. CHAIREZ: Right.

MS. HOLTHUS: -- then I would prefer to close it tonight so we know what we're doing tomorrow.

MR. CHAIREZ: Well, either we [indiscernible].

MS. BLUTH: You mean as it stands now?

MR. CHAIREZ: Now.

MS. BLUTH: No.

MR. CHAIREZ: Okay. Then I'll close it tomorrow.

THE COURT: So, will [indiscernible].

MR. CHAIREZ: Yeah. [Indiscernible.]

THE COURT: Okay.

MS. HOLTHUS: Do you want to speak to him?

MS. BLUTH: Yeah, do you want to -- do you want to speak --

MR. CHAIREZ: No. [Indiscernible.]

MS. BLUTH: He's -- I'm sorry, what did you say?

MR. CHAIREZ: I mean, I'll -- I'm the lawyer.

MS. BLUTH: I --

MS. HOLTHUS: I know what you said, but you need to speak to him, and you already know.

MR. CHAIREZ: Yeah.

MS. HOLTHUS: You want him to --

THE COURT: I'm going [indiscernible].

MS. HOLTHUS: -- [indiscernible] a while ago, right?

THE COURT: Thursday.

MR. CHAIREZ: Yeah. I understand.

MS. HOLTHUS: So, you -- you've been considering this with him more?

MR. CHAIREZ: The last three or four days.

MS. HOLTHUS: Okay. And I just want -- I don't care. I just want to know.

MR. CHAIREZ: Yeah. Yeah.

MS. HOLTHUS: That the record was...

THE COURT: You want [indiscernible] tomorrow, it doesn't matter to me.

MR. CHAIREZ: I'm ready -- I'm ready. I'm ready to argue. So, yeah, we'll rest.

THE COURT: Okay.

(End of bench conference.)

THE COURT: All right. Ladies and gentlemen of the jury.

Mr. Chairez, sir, do you have any additional

when I start arguing consent that AJ went up there, he can -- whatever sex may have happened, AJ consented to it. I don't want them to say, Oh, he can't -- because the newspaper keeps on getting it wrong. Consent is not a defense to sexual assault. So, I'm getting these calls from all over the country, Why are you going through the motions if consent is not a defense to sexual assault? And I go, Because the reporter doesn't sit through the courtroom and he doesn't know the law. The judge, the DA, and I do.

THE COURT: I guess I'm still -- I'm sorry, I -- maybe I'm a little bit slow to follow. I just need to know --

MR. CHAIREZ: No, no, Your Honor. It's --

THE COURT: I understand what you guys are saying.

MR. CHAIREZ: Right.

THE COURT: I just need to know whether or not you're going to ask for the statutory sexual seduction instruction so I can do some more research. Or preferably the State provides some really good research on the lewdness this afternoon --

MR. CHAIREZ: Well, to be honest with Your Honor --

THE COURT: -- towards the --

MS. HOLTHUS: Well, I mean --

MR. CHAIREZ: -- the state of the law in Nevada is confusing. Okay. And I think the -- what was the case you gave me?

MS. BLUTH: Cossack?

that they were defined for some reason, there was a consent issue on the SA. We are then saying even if you find that AJ consented or that defendant had a reasonable belief that AJ consented, you still can look at lewdness. Lewdness, even if he consented, would be -- would be the guilty verdict, assuming you can find specific intent. Now, that's where your intoxication argument --

MR. CHAIREZ: Right.

MS. HOLTHUS: -- comes in.

MR. CHAIREZ: Right.

MS. HOLTHUS: You would argue that, and then you say, No, not guilty, lewdness, because he couldn't form a specific intent.

THE COURT: Yeah. So basically, like, Count 5 and 6, it's the same act, which is placing the penis into the mouth.

MS. HOLTHUS: Correct.

MR. CHAIREZ: Right.

THE COURT: It's going to be sexual assault, yes or no, or lewdness, yes or no.

MS. HOLTHUS: Right.

THE COURT: Well, it'd be if no, then lewdness. But again, my question is --

MS. HOLTHUS: I don't know how -- I don't know -- I --

MR. CHAIREZ: Well, see, is Ms. Holthus saying

statutory sexual seduction under no circumstances is a lesser included --

MS. HOLTHUS: Yes.

MR. CHAIREZ: -- of sexual -- of sexual assault?

MS. HOLTHUS: Legally, yes. I mean, that's a total legal argument, is it -- or is it not the same?

MR. CHAIREZ: Well, I think their own case, Cossack says that it is.

MS. HOLTHUS: No. We chose to charge three --

MR. CHAIREZ: No, no. That you're allowed to --

MS. HOLTHUS: -- lesser-related offenses.

MR. CHAIREZ: You're allowed to charge in the alternative --

THE COURT: Correct. They did.

MR. CHAIREZ: -- and I think that that's what Cossack stands for.

MS. HOLTHUS: But if we came in and said we want it, because it's a lesser-included, you'd be going no, and you'd be right.

THE COURT: Okay. I guess I still need to --

MR. CHAIREZ: Why don't you -- I'm going to research it, Your Honor. But right now, as long as I'm allowed to argue consent, and as long as I'm allowed to argue intoxication for lewdness and all the other charges, I think we'll be okay. All right.

MS. BLUTH: So, you don't want it?

MR. CHAIREZ: Well.

MS. HOLTHUS: Do you want to meet at 10:00 and he could say yea or nay?

MR. CHAIREZ: Let's --

THE COURT: I could do 10:30, because I have morning calender. How about 11:00, so you don't have to wait at all? Can you do that?

MS. HOLTHUS: Well, I mean, we're -- we're doing Powerpoints, we're doing jury instructions, I'm fixing things up so that we can get right to the jury tomorrow.

THE COURT: Okay. I have calender at 9:30. I can either pitch in at 9:00, I don't know how much time I'll have to read everything, or after.

THE MARSHAL: The interpreter's asking what time to be back.

THE COURT: Hold on a second. I need to know. I need to know what you want to do, please, the interpreter.

MR. CHAIREZ: Your Honor. Your Honor, as long as I can argue consent and I'm not handcuffed, and as long as I can argue intoxication, we don't need the statutory sexual seduction.

THE COURT: Okay. And they've stipulated to you guys work together on an instruction for consent and intoxication.

MS. HOLTHUS: Yes.

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

STATE OF NEVADA, Plaintiff, vs. MAZEN ALOTAIBI, Defendant.	)	CASE NO. C287173-1 DEPT NO. XXIII **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 8

TUESDAY, OCTOBER 22, 2013

APPEARANCES:

FOR THE STATE: MARY KAY HOLTHUS, ESQ.
Chief Deputy District Attorney
JACQUELINE M. BLUTH, ESQ.
Deputy District Attorney

FOR THE DEFENDANT: DON P. CHAIREZ, ESQ.

Also Present: Mohammad A. Taha, Interpreter

RECORDED BY MARIA GARIBAY, COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

THE COURT: So I think that she doesn't have -- well, I don't want to put words in her mouth, but I don't think --

MS. HOLTHUS: But anyway.

THE COURT: -- she has any objection.

MS. HOLTHUS: That's exactly correct.

THE COURT: Okay. So, is there anything else we need to address before I bring the jury back in?

MR. CHAIREZ: No, Your Honor.

THE COURT: All right. Please bring the jury in.

(Jury reconvened at 1:14 p.m.)

THE COURT: Okay. Welcome back, ladies and gentlemen. Make yourself comfortable.

As we spoke about yesterday, what's going to happen right now, I'm going to give you the law that applies in this case. You'll take that law back with you to the jury room and you'll use it to deliberate upon your verdict. Thereafter, the State is going to present a closing argument. We'll probably take a brief little break so you guys can stretch and be comfortable before Mr. Chairez will have an opportunity to do his closing argument. And then the State has a choice to do a rebuttal.

Now, ladies and gentlemen of the jury, over the next many minutes, I'm going to be reading you these jury instructions. I would love to be able to just recite them to you without having to look down, but I cannot. The reason is,

EXHIBIT C

EXHIBIT C

DECLARATION OF DON CHAIREZ, ESQ.

I, Don Chairez, Esq. declare and state as follows:

1. That I am an attorney licensed to practice law by the Supreme Court of the State of Nevada.
2. That I am over the age of 18 years and fully qualified to make this Declaration.
3. That the matters set forth herein are based upon my personal knowledge except those matters which are stated upon information and belief, and with respect to those matters, I believe them to be true.
4. That I make this Declaration in support of Petitioner Mazen Alotaibi's Petition for Writ of Habeas Corpus (Post-Conviction) to which it is attached.
5. That I was retained defense trial counsel for Petitioner Mazen Alotaibi in the criminal matter entitled *State of Nevada, Plaintiff v. Mazen Alotaibi, Defendant* Case No. C-13-287173-1, to which said post-conviction Petition is addressed.
6. That on October 18, 2013, Petitioner was charged in that criminal matter by Second Amended Information with, *inter alia*, two counts of "Sexual Assault With a Minor Under 14 Years of Age," to wit: "A.D.," pursuant to the then-applicable provisions of NRS § 200.366 (Counts 3 and 5), pertaining to sexual penetration of another "against the will of the victim," and pursuant to which, if convicted, Petitioner was subject, as to each count, under the then-applicable provisions of NRS § 200.366(3)(c) to a sentence of "imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a [mandatory] minimum of 35 years has been served."
7. That the matter proceeded to jury trial.
8. That Petitioner is a (Saudi Arabian) foreign national who, as of that time, had no prior understanding of, or experience with, the American legal system.

9. That A.D.'s allegations that he had been both orally and anally penetration by Petitioner (alleged in Counts 3 and 5) were uncontested at trial.

10. That the only contested issue at trial was therefore whether or not those penetrations were in fact "against the will" of A.D.

11. That A.D. testified that he had indeed initially consented to permit those penetrations in exchange for money and marijuana, but also claimed that he withdrew consent immediately prior to consummation.

12. That a video and audio taped interview was admitted into evidence at the behest of the state and played to the jury during which Petitioner had expressly confessed to police that he had in fact both orally and anally penetrated A.D. as alleged, but insisted that A.D. had engaged in such sexual activity consensually, in accordance with A.D.'s previous agreement to do so, which previous agreement was expressly conceded by A.D.

13. That following the close of evidence, during discussion regarding jury instructions with counsel for the parties outside the presence of the jury, the trial court invited the defense to request a jury instruction with respect to the lesser-related offense of Statutory Sexual Seduction (pertaining to the *consensual* sexual penetration of a minor), pursuant to 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 subject to evaluation by the jury 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 the defense. *See* Trial Transcript, Day 7, pp. 16-17, 22, 29.

14. That, by contrast, under the then-applicable combined provisions of NRS § 200.364(5)(a);

NRS § 200.368(1); and NRS § 193.130(2)(c), if convicted of the lesser-related offense of Statutory Sexual Seduction, Petitioner would be subject, as to each count, to a sentence of "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."

15. That the foregoing discussion between the trial court and counsel for the parties was conducted while Petitioner was not present in the courtroom, (*see* Trial Transcript, Day 7, p. 3), and although Petitioner was later brought into the courtroom while these discussions were still in progress, as the court expressly observed, nevertheless, the interpreter was still not present. *See* Trial Transcript, Day 7, p. 20.

16. That accordingly, the court expressly required that I thereafter go over "every single thing" that court and counsel had discussed regarding jury instructions with Petitioner in the presence of the interpreter, so that Petitioner would understand "exactly" what the proposed jury instructions were going to be and to ensure that "both of you can make sure that . . . . [the proposed jury instructions are] . . . agreed upon." *See* Trial Transcript, Day 7, pp. 20-21, 31, 34.

17. That when the court thereafter asked me whether this had in fact been accomplished, during my subsequent meeting with Petitioner, I acknowledged on the record that Petitioner and I did not meaningfully discuss the lesser-related Statutory Sexual Seduction instruction issue because Petitioner was unable to apprehend the concept; and therefore, that we had focused during our discussions upon other relevant jury instructions. *See* Trial Transcript, Day 7, p.36.

18. That during our discussions regarding jury instructions, Petitioner expressed an inability to understand the nature, significance in context, and potential implications of a waiver of the lesser-related Statutory Sexual Seduction instruction offered by the trial court.

19. That I therefore unilaterally elected to decline the court's invitation to request a jury instruction regarding Statutory Sexual Seduction as a lesser-related offense without the understanding, consent and authorization of Petitioner. *See* Trial Transcript, Day 7, pp. 36-37, 186-87, 193-94.

20. That before unilaterally determining to forego that lesser-related offense instruction, I did not report to the court that I had not obtained Petitioner's informed authorization to do so.

Executed this 28th day of November, 2018.

DON CHAIREZ, ESQ.

EXHIBIT D

EXHIBIT D

INST

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
OCT 23 2013 at 1:32 pm
BY, A. Naumec-Miller
ANTOINETTE NAUMEC-MILLER, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
MAZEN ALOTAIBI,
Defendant.

CASE NO: C-13-287173-1
DEPT NO: XXIII

INSTRUCTIONS TO THE JURY (INSTRUCTION NO. I)

MEMBERS OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

18

INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

INSTRUCTION NO. 3

An information is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.

In this case, it is charged in an information that the said Defendant, on or about the 31st day of December, 2012, at and within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT 1 - BURGLARY

did, then and there, willfully, unlawfully, and feloniously enter, with intent to commit a felony, to-wit: kidnapping and/or sexual assault and/or lewdness with a minor and/or sexually motivated coercion, that certain building occupied by ANKE DANG, located at CIRCUS CIRCUS HOTEL & CASINO, 2880 South Las Vegas Boulevard, Room No. 631, Las Vegas, Clark County, Nevada.

COUNT 2 - FIRST DEGREE KIDNAPPING

did, willfully, unlawfully, feloniously, and without authority of law, lead, take, entice, carry away or kidnap ANKE DANG, a minor, with the intent to keep, imprison, or confine said ANKE DANG, from his parents, guardians, or other person or person having lawful custody of said minor, or with the intent to hold said minor to unlawful service, or perpetrate upon the person of said minor, any unlawful act, to-wit: sexual assault and/or lewdness.

COUNT 3 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE

did, then and there, willfully, unlawfully, and feloniously sexually assault and subject ANKE DANG, a child under fourteen years of age, to sexual penetration, to-wit: anal intercourse, by said Defendant inserting his penis into the anal opening of the said ANKE DANG, against his will, or under conditions in which Defendant knew, or should have known, that the said ANKE DANG was mentally or physically incapable of resisting or understanding the nature of Defendant's conduct.

COUNT 4 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

did, then and there, willfully, lewdly, unlawfully, and feloniously commit a lewd or lascivious act upon or with the body, or any part or member thereof, a child, to-wit: ANKE DANG, said child being under the age of fourteen years, by said Defendant using his penis to touch and/or rub and/or fondle the buttock(s) and/or anal area of the said ANKE DANG, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of said Defendant, or said child.

COUNT 5 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE

did, then and there, willfully, unlawfully, and feloniously sexually assault and subject ANKE DANG, a child under fourteen years of age, to sexual penetration, to-wit: fellatio, by said Defendant placing his penis on and/or into mouth of the said ANKE DANG, against his will, or under conditions in which Defendant knew, or should have known, that the said ANKE DANG was mentally or physically incapable of resisting or understanding the nature of Defendant's conduct.

COUNT 6 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

did, then and there, willfully, lewdly, unlawfully, and feloniously commit a lewd or lascivious act upon or with the body, or any part or member thereof, a child, to-wit: ANKE DANG, said child being under the age of fourteen years, by said Defendant placing his penis on and/or into mouth of the said ANKE DANG, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of said Defendant, or said child.

COUNT 7 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

did, then and there, willfully, lewdly, unlawfully, and feloniously commit a lewd or lascivious act upon or with the body, or any part or member thereof, a child, to-wit: ANKE DANG, said child being under the age of fourteen years, by said Defendant using his mouth and/or tongue to touch and/or kiss and/or lick the face and/or neck and/or body of the said ANKE DANG, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of said Defendant, or said child.

COUNT 8 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

did, then and there, willfully, lewdly, unlawfully, and feloniously commit a lewd or lascivious act upon or with the body, or any part or member thereof, a child, to-wit: ANKE DANG, said child being under the age of fourteen years, by said Defendant using his mouth and/or tongue to touch and/or kiss and/or lick the face and/or neck and/or body of the said ANKE DANG, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of said Defendant, or said child.

COUNT 9 - COERCION (Sexually Motivated)

did, then and there, willfully, unlawfully and feloniously use physical force, or the immediate threat of such force, against ANKE DANG, with intent to compel him to do, or abstain from doing, an act which he had a right to do, or abstain from doing, by said Defendant said preventing the said ANKE DANG from leaving the presence of said Defendant, the purpose for which the Defendant committing the offense being the sexual gratification of said Defendant.

It is the duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine whether or not the Defendant is guilty of one or more of the offenses charged.

Each charge and the evidence pertaining to it should be considered separately. The fact that you may find a defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

INSTRUCTION NO. 4

Every person who, by day or night, enters any house, room, apartment, tenement, shop or other building, with the intent to commit assault, or any felony, on any person, is guilty of burglary.

Here you are instructed that Sexual Assault With a Minor Under Fourteen Years of Age, Lewdness With a Child Under the Age of Fourteen, and First Degree Kidnapping are felonies.

INSTRUCTION NO. 5

Every person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person:

1) For ransom, or reward; or

2) For the purpose of committing sexual assault, extortion or robbery upon or from the person; or

3) For the purpose of killing the person or inflicting substantial bodily harm upon him; or

4) To exact from relatives, friends, or any other person any money or valuable thing for the return or disposition of the kidnapped person; or

5) a person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine him from his parents, guardians, or any other person having lawful custody of the minor, or with the intent to hold the minor to unlawful service, or perpetrate upon the person of the minor any unlawful act, is guilty of Kidnapping in the First Degree.

The law does not require the person being kidnapped to be carried away for any minimal distance.

The term "inveigle" means to lead astray by trickery or deceitful persuasion.

INSTRUCTION NO. 6

In order for you to find the Defendant guilty of both First Degree Kidnapping and an associated offense of sexual assault with a minor under the age of fourteen and/or lewdness with a minor under fourteen years of age, you must also find beyond a reasonable doubt either:

(1) That the movement of the victim was not incidental to the sexual assault with a minor under the age of fourteen and/or lewdness with a minor under fourteen years of age, and that the movement of the victim substantially increased the risk of harm to the victim over and above that necessarily present in the sexual assault with a minor under the age of fourteen, or;

(2) That the victim was "physically restrained"; or

(3) That the victim was restrained and such restraint increased the risk of harm to the victim or had an independent purpose or significance.

"Physically restrained" includes but is not limited to tying, binding, taping, handcuffing, chaining, etc...

INSTRUCTION NO. 7

The consent of the person kidnapped or confined shall not be a defense unless it appears satisfactorily to the jury that such person was above the age of 18 years, and that the person's consent was not extorted by threates, duress or fraud.

INSTRUCTION NO. 8

A person who subjects a minor under fourteen to sexual penetration against the minor's will or under conditions in which the perpetrator knows or should know that the minor is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of Sexual Assault with a Minor Under Fourteen Years of Age.

"Sexual penetration" includes fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning. Evidence of ejaculation is not necessary.

Fellatio is a touching, however slight, of the penis by the mouth or tongue of another person.

Anal intercourse is the intrusion, however slight, of the penis into the anal opening of another person.

INSTRUCTION NO. 9

Physical force is not necessary in the commission of Sexual Assault. The crucial question is not whether a person was physically forced to engage in a Sexual Assault but whether the act was committed without his/her consent or under conditions in which the defendant knew or should have known, the person was incapable of giving his/her consent or understanding the nature of the act.

INSTRUCTION NO. 10

A person is not required to do more than his or her age, strength, surrounding facts and attending circumstances make it reasonable for him/her to do to manifest opposition to a Sexual Assault.

INSTRUCTION NO. 11

Submission is not the equivalent of consent. While consent inevitably involves submission, submission does not inevitably involve consent. Lack of protest by a victim is simply one among the totality of circumstances to be considered by the trier of fact.

INSTRUCTION NO. 12

Voluntary use of drugs or alcohol is not a defense to a charge of Sexual assault.

INSTRUCTION NO. 13

It is a defense to the charge of sexual assault that the defendant entertained a reasonable and good faith belief that the alleged victim consented to engage in sexual intercourse. If you find such reasonable, good faith belief, even if mistaken, you must give the defendant the benefit of the doubt and find him not guilty of sexual assault.

A belief that is based upon ambiguous conduct by the alleged victim that is the product of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another is not a reasonable and good faith belief.

INSTRUCTION NO. 14

Any person who willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of Sexual Assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child is guilty of Lewdness with a Child Under the Age of 14.

To constitute a lewd or lascivious act, it is not necessary that the bare skin be touched. The touching may be through the clothing of the child.

INSTRUCTION NO. 15

Although an essential element of the crime of Lewdness with a Child Under the Age of 14 is an intent to arouse, appeal to or gratify the lust, passions, or sexual desires of either the person committing the acts or the child, the law does not require as an essential element of the crime that the lust, passions or sexual desires of either of the persons be actually aroused, appealed to, or gratified.

INSTRUCTION NO. 16

Consent in fact of a minor child under fourteen years of age to sexual activity is not a defense to a charge of Lewdness with a Child Under the Age of 14.

INSTRUCTION NO. 17

There is no requirement that the testimony of a victim of Sexual Assault or Lewdness with a Child Under the Age of 14 be corroborated, and his/her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty.

INSTRUCTION NO. 18

Where multiple sexual acts occur as part of a single criminal encounter a defendant may be found guilty for each separate or different act of Sexual Assault and/or Lewdness.

Where a defendant commits a specific type of act constituting Sexual Assault and/or Lewdness he may be found guilty of more that one count of that specific type of act of Sexual Assault if:

1. there is an interruption between the acts which are of the same specific type,

2. where the acts of the same specific type are interrupted by a different specific type of sexual assault or lewdness.

Only one Sexual Assault and/or Lewdness occurs when a defendant's actions were of one specific type of Sexual Assault and/or Lewdness and those acts were continuous and did not stop between the acts of that specific type.

INSTRUCTION NO. 19

Any person who uses violence upon another person or threatens violence or injury to another person with the specific intent to compel another to do or abstain from doing an act which such other person has a right to do or abstain from doing is guilty of Coercion.

INSTRUCTION 20

It is unlawful for a person, with the intent to compel another to do or abstain from doing an act which the other person has a right to do or abstain from doing, to:

(A) Use violence or inflict injury upon the person or any of his family, or upon his property, or threaten such violence or injury;

(B) Deprive the person of any tool, implement or clothing, or hinder him in the use thereof; or

(C) Attempt to intimidate the person by threats or force.

Where physical force or the immediate threat of physical force is used, the person has committed the offense of Coercion, a felony.

Where no physical force or immediate threat of physical force is used, the person has committed the offense of Coercion, a misdemeanor.

INSTRUCTION NO. 21

If you find that the Defendant was intoxicated, you may consider this evidence in determining whether he could form the specific intent to commit the crime for which he is charged.

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of the person's intoxication may be taken into consideration in determining the purpose, motive or intent.

You are instructed that Burglary, First Degree Kidnapping, Lewdness With a Child Under Fourteen Years of Age, and Coercion are specific intent crimes.

You are instructed that Sexual Assault With a Minor Under Fourteen Years of Age is a general intent crime.

INSTRUCTION NO. 22

The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt. Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your deliberation.

INSTRUCTION NO. 23

The State has the burden of proving the voluntariness of a confession by a preponderance of the evidence. This burden of proof should lead the trier of fact to find that the existence of the contested fact is more probable than its nonexistence.

Voluntariness is a question of fact to be determined from the totality of the circumstances on the will of the accused. An involuntary statement is one made under circumstances in which the accused clearly had no opportunity to exercise a free and unconstrained will. A voluntary statement must be the product of rational intellect and a free will.

INSTRUCTION NO. 24

Evidence which tends to show that the defendant committed offenses other than that for which he is on trial, if believed, may not be considered by you to prove that he is a person of bad character or to prove that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of proving the defendant's identity, motive, intent, preparation, opportunity, lack of mistake or accident, common scheme or plan. You must weigh this evidence in the same manner as you do all other evidence in the case.

INSTRUCTION NO. 25

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus the decision as to whether he should testify is left to the defendant on the advice and counsel of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.

INSTRUCTION NO. 26

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

INSTRUCTION NO. 27

The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

INSTRUCTION NO. 28

You are here to determine the guilt or innocence of the Defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more persons are also guilty.

INSTRUCTION NO. 29

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence; direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the Defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

INSTRUCTION NO. 30

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

INSTRUCTION NO. 31

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his opinion as to any matter in which he is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

INSTRUCTION NO. 32

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO. 32

In your deliberation you may not discuss or consider the subject of punishment, as that is a matter which lies solely with the court. Your duty is confined to the determination of the guilt or innocence of the Defendant.

INSTRUCTION NO. 34

When you retire to consider your verdict, you must select one of your number to act as foreperson who will preside over your deliberation and will be your spokesperson here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.

INSTRUCTION NO. 35

If, during your deliberation, you should desire to be further informed on any point of law or hear again portions of the testimony, you must reduce your request to writing signed by the foreperson. The officer will then return you to court where the information sought will be given you in the presence of, and after notice to, the district attorney and the Defendant and his/her counsel.

Playbacks of testimony are time-consuming and are not encouraged unless you deem it a necessity. Should you require a playback, you must carefully describe the testimony to be played back so that the court recorder can arrange his/her notes. Remember, the court is not at liberty to supplement the evidence.

INSTRUCTION NO. 36

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

GIVEN: _____
DISTRICT JUDGE

EXHIBIT E

EXHIBIT E

VER ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
OCT 23 2013 at 1:32pm
BY, A. Naumec-Miller
ANNTOINETTE NAUMEC-MILLER, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
MAZEN ALOTAIBI,
Defendant.

CASE NO: C-13-287173-1
DEPT NO: XXIII

VERDICT

We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as follows:

COUNT 1 - BURGLARY

(please check the appropriate box, select only one)

☑ Guilty of BURGLARY

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as follows:

COUNT 2 - FIRST DEGREE KIDNAPPING

(please check the appropriate box, select only one)

☑ Guilty of FIRST DEGREE KIDNAPPING

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as follows:

COUNT 3 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE

(please check the appropriate box, select only one)

☑ Guilty of SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as follows:

COUNT 4 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

(please check the appropriate box, select only one)

☐ Guilty of LEWDNESS WITH A CHILD UNDER THE AGE OF 14

☑ Not Guilty

We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as follows:

COUNT 5 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE

(please check the appropriate box, select only one)

☑ Guilty of SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as follows:

COUNT 6 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

(please check the appropriate box, select only one)

☐ Guilty of LEWDNESS WITH A CHILD UNDER THE AGE OF 14

☑ Not Guilty

We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as follows:

COUNT 7 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

(please check the appropriate box, select only one)

☑ Guilty of LEWDNESS WITH A CHILD UNDER THE AGE OF 14

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as follows:

COUNT 8 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

(please check the appropriate box, select only one)

☑ Guilty of LEWDNESS WITH A CHILD UNDER THE AGE OF 14

☐ Not Guilty

We, the jury in the above entitled case, find the Defendant MAZEN ALOTAIBI, as follows:

COUNT 9 - COERCION (Sexually Motivated)

(please check the appropriate box, select only one)

☐ Guilty of COERCION (Sexually Motivated)

☑ Guilty of COERCION (Misdemeanor)

☐ Not Guilty

DATED this 23 day of October, 2013

FOREPERSON

EXHIBIT F

EXHIBIT F

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MAZEN ALOTAIBI
#2884816

Defendant.

CASE NO. C287173-1

DEPT. NO. XXIII

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 - BURGLARY (Category B Felony) in violation of NRS 205.060, COUNT 2 – FIRST DEGREE KIDNAPPING (Category A Felony) in violation of NRS 200.310, 200.320, COUNTS 3 and 5 – SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony) in violation of NRS 200.364, 200.366, COUNTS 4, 6, 7 and 8 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230 and COUNT 9 – COERCION (Sexually Motivated) (Category B Felony) in violation of NRS 207.190, 207.193, 175.547; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT

1 - BURGLARY (Category B Felony) in violation of NRS 205.060, COUNT 2 – FIRST DEGREE KIDNAPPING (Category A Felony) in violation of NRS 200.310, 200.320, COUNTS 3 and 5 – SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony) in violation of NRS 200.364, 200.366, COUNTS 7 and 8 – LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony) in violation of NRS 201.230 and COUNT 9 – COERCION (Misdemeanor) in violation of NRS 207.190; thereafter, on the 28th day of January, 2015, the Defendant was present in court for sentencing with counsel DOMINIC P. GENTILE, ESQ., and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee, $2,723.94 Restitution and $150.00 DNA Analysis Fee including testing to determine genetic markers, the Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows: **COUNT 1** - a MAXIMUM of FORTY-EIGHT (48) MONTHS with a MINIMUM Parole Eligibility of TWELVE (12) MONTHS; **COUNT 2** - a MAXIMUM of FIFTEEN (15) YEARS with a Parole Eligibility after FIVE (5) YEARS have been served, CONCURRENT with COUNT 1; **COUNT 3** – LIFE with a Parole Eligibility after THIRTY-FIVE (35) YEARS have been served, CONCURRENT with COUNT 2; **COUNT 5** - LIFE with a Parole Eligibility after THIRTY-FIVE (35) YEARS have been served, CONCURRENT with COUNT 3; **COUNT 7** - LIFE with a Parole Eligibility after TEN (10) YEARS have been served, CONCURRENT with COUNT 5; ; **COUNT 8** - LIFE with a Parole Eligibility after TEN (10) YEARS have been served, CONCURRENT with COUNT 7; with SEVEN HUNDRED FIFTY-EIGHT (758) DAYS credit for time served. COUNTS 4 & 6 – NOT GUILTY and COUNT 9 – Credit Time Served.

FURTHER ORDERED, a SPECIAL SENTENCE of LIFETIME SUPERVISION is imposed to commence upon release from any term of imprisonment, probation or parole. In addition, before the Defendant is eligible for parole, a panel consisting of the Administrator of the Mental Health and Development Services of the Department of Human Resources or his designee; the Director of the Department of corrections or his designee; and a psychologist licensed to practice in this state; or a psychiatrist licensed to practice medicine in Nevada must certify that the Defendant does not represent a high risk to re-offend based on current accepted standards of assessment.

ADDITIONALLY, the Defendant is ORDERED to REGISTER as a sex offender in accordance with NRS 179D.460 within FORTY-EIGHT (48) HOURS after any release from custody.

DATED this 4 day of February, 2015

STEFANY MILEY
DISTRICT COURT JUDGE

EXHIBIT G

EXHIBIT G

DECLARATION OF PHILIP KOHN, ESQ., IN SUPPORT OF MAZEN ALOTAIBI'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

I, Philip J. Kohn, Esq. hereby state the following under the penalty of perjury:

1. I am over the age of 18 and am mentally competent to testify. If called upon to testify as to the matters herein, I could and would do so.

2. That I am an attorney licensed to practice law in the State of Nevada. I have been licensed to practice law in the State of Nevada since 1985. For most of the last 40 years, I have practiced criminal defense in both California and Nevada State and federal courts.

3. That in 2004, I was appointed as Clark County Public Defender and have served as the head of that office for over 14 years.

4. That I have reviewed pertinent portions of the Transcript of Proceedings of the trial in the case of *State of Nevada, Plaintiff v. Mazen Alotaibi, Defendant* Case No. C287173-1, and have been asked to provide my opinion as to the failure of defense counsel at trial to consult and effectively communicate with his client when he failed to request a potential lesser-related jury instruction allowing the jury to consider the option of Statutory Sexual Seduction.

5. That the facts, as they are known to me are as follows: 1) the allegation of both oral and anal penetration of the minor accuser were uncontested at trial; 2) the defendant confessed to the sexual conduct; 3) the accuser testified that he had initially consented but later withdrew his consent; 4) the trial court judge repeatedly invited defense counsel to request a jury instruction on the lesser-related offense of statutory sexual seduction and advised the prosecutor that the charge would be given if requested; 5) defense counsel did not request the lesser-related instruction; 6) defense counsel has conceded that he did not meaningfully discuss the sentencing consequences of the failure to request the instruction with his client and advised the court that his client did not understand the implications of defense counsel's failure to make the request.

6. That I understand that the sentencing consequence of defense counsel's failure to request the lesser-related instruction is that the defendant cannot be eligible for parole for 35 years. Had the jury chosen the option of Statutory Sexual Seduction, the maximum sentence for a conviction of that offense would have been 5 years.

7. That in my opinion, the failure of trial counsel to insure that the defendant understood and participated in the decision to waive a defense which would make a sentencing difference of 30 years violated the defendant's right to effective representation of counsel.

8. That a lawyer must "abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4 shall consult with the client as to the means by which they are to be pursued." Nevada Rules of Professional Conduct, Rule 1.2 (a). Rule 1.4 requires that the lawyer shall "[p]romptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these rules"; "reasonably consult with the client about the means by which the client's objectives are to be accomplished"; and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions."

9. That in my opinion, taking an option away from the jury which could have reduced the sentence by 30 years is not a decision of tactics (or means) but rather, it was a decision "concerning the objectives of representation." Thus, the lawyer was ethically required to abide by the client's decision. Because the client was not provided with sufficient information to make an informed decision, he was deprived of the representation to which he was entitled.

10. That the Nevada Supreme Court has addressed the responsibility of the lawyer in criminal cases when even strategic decisions are made: "If, during the trial, it appears to counsel that concessions to facts or offenses are strategically indicated, such concessions may only be made in consultation with the consent of, the client." Nevada Indigent Defense Standards of

Performance, §4-10(h) adopted in ADKT 411, October 16, 2008.

11. That in my opinion, the failure of defense counsel to meaningfully consult with his client and the failure to secure a knowing consent to the concession not to accept a lesser-related offense instruction concerning Statutory Sexual Seduction constituted a violation of the Performance Standards adopted by the Nevada Supreme Court.

12. That a criminal defendant is entitled to opportunities to knowledgably choose between options that will affect the outcome of the case. No meaningful choice can be made if the options and consequences are not communicated to the client. It is apparent from this record, that the client was not given the opportunity to consent to his lawyer's withdrawal from the jury of a choice which would have substantially affected the penalty in this case. Accordingly, in my opinion, this defendant's right to effective representation of counsel was violated.

I declare under penalty of perjury under the laws of the state of Nevada that the above information is true and correct.

Executed this 27th day of November, 2018.

PHILIP J. KOHN, ESQ.

EXHIBIT H

EXHIBIT H

DECLARATION OF ANTHONY P. SGRO, ESQ., IN SUPPORT OF MAZEN ALOTAIBI'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

I, Anthony P. Sgro, Esq. hereby state the following under the penalty of perjury:

1. That I am an attorney licensed to practice law in the State of Nevada. I have been licensed to practice law since 1989. I have practiced criminal defense in both state and federal courts for almost 30 years. I have argued cases before the Ninth Circuit Court of Appeals, and the Nevada Supreme Court.

2. I am over the age of 18 and am mentally competent to testify. If called upon to testify as to the matters herein, I could and would do so.

3. That since 1989, I have tried approximately 125 cases, in State and Federal court. I have also guest taught Trial Advocacy at the Boyd School of Law for various professors.

4. I am not being compensated to provide an opinion in this matter.

5. That I have never provided this type of affidavit in any other proceeding.

6. That I have reviewed pertinent portions of the Transcript of Proceedings of the trial in the case of *State of Nevada, Plaintiff v. Mazen Alotaibi, Defendant* Case No. C287173-1, and have been asked to provide my opinion as to the failure of defense counsel at trial to consult and effectively communicate with his client when he failed to request a potential lesser-related jury instruction allowing the jury to consider the option of Statutory Sexual Seduction.

7. That the facts, as they are known to me are as follows: 1) the allegation of both oral and anal penetration of the minor accuser were uncontested at trial; 2) the defendant confessed to the sexual conduct; 3) the accuser testified that he had initially consented but later withdrew his consent; 4) the trial court judge repeatedly invited defense counsel to request a jury instruction on the lesser-related offense of statutory sexual seduction and advised the prosecutor that the charge would be given if requested; 5) defense counsel did not request the lesser-related instruction; 6) defense counsel has conceded that he did not meaningfully discuss the sentencing

consequences of the failure to request the instruction with his client and advised the court that his client did not understand the implications of defense counsel's failure to make the request.

8. That I understand that the sentencing consequence of defense counsel's failure to request the lesser-related instruction is that the defendant cannot be eligible for parole for 35 years. Had the jury chosen the option of Statutory Sexual Seduction, the maximum sentence for a conviction of that offense would have been 5 years.

9. That in my opinion, the failure of trial counsel to ensure that the defendant understood and participated in the decision to waive a defense which would make a sentencing difference of 30 years violated the defendant's right to effective representation of counsel.

10. The transcript of the hearing wherein defense counsel made the decision to waive a defense reflects confusion about this decision by both the attorney representing the defendant as well as the non-English speaking client.

11. That a lawyer must "abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4 shall consult with the client as to the means by which they are to be pursued." Nevada Rules of Professional Conduct, Rule 1.2 (a). Rule 1.4 requires that the lawyer shall "[p]romptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these rules"; "reasonably consult with the client about the means by which the client's objectives are to be accomplished"; and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions."

12. It appears to me that there was no opportunity for informed consent to have occurred in this case. The proceedings began in the absence of the defendant's presence. The record reveals a lack of understanding on the part of the defendant. Indeed, the Court took it upon itself to inquire of the attorney relative to about discussion with his client regarding the inclusion of an instruction of a lesser related offense. Notwithstanding the above, The transcript

reveals the attorney's decision to forego a lesser related instruction was made without input from the client.

13. That in my opinion, taking an option away from the jury which could have reduced the sentence by 30 years is not a decision of tactics (or means) but rather, it was a decision "concerning the objectives of representation." Thus, the lawyer was ethically required to abide by the client's decision. Because the client was not provided with sufficient information to make an informed decision, he was deprived of the representation to which he was entitled.

14. That the Nevada Supreme Court has addressed the responsibility of the lawyer in criminal cases when even strategic decisions are made: "If, during the trial, it appears to counsel that concessions to facts or offenses are strategically indicated, such concessions may only be made in consultation with the consent of, the client." Nevada Indigent Defense Standards of Performance, §4-10(h) adopted in ADKT 411, October 16, 2008.

15. That in my opinion, the failure of defense counsel to meaningfully consult with his client and the failure to secure a knowing consent to the concession not to accept a lesser-related offense instruction concerning Statutory Sexual Seduction constituted a violation of the Performance Standards adopted by the Nevada Supreme Court.

16. That a criminal defendant is entitled to an opportunity to choose between options that will affect the outcome of the case. No meaningful choice can be made if the options and consequences are not communicated to the client. It is apparent from this record, that the client was not given the opportunity to consent to his lawyer's withdrawal from the jury of a choice which would have substantially affected the penalty in this case. Accordingly, in my opinion, this defendant's right to effective representation of counsel was violated.

...

...

I declare under penalty of perjury under the laws of the state of Nevada that the above information is true and correct.

Executed this 27 day of November, 2018.

ANTHONY P. SGRO, ESQ.

EXHIBIT I

EXHIBIT I

DECLARATION OF JOHN L. ARRASCADA, ESQ., IN SUPPORT OF MAZEN ALOTAIBI'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

I, John L. Arrascada, Esq. hereby state the following under the penalty of perjury:

1. I am over the age of 18 and am mentally competent to testify. If called upon to testify as to the matters herein, I could and would do so.

2. I am an attorney licensed to practice law in the State of Nevada in 1992 and am in good standing with the bar.

3. I began my legal career as law clerk for the Honorable Peter I. Breen of the Second Judicial District of Nevada. I next was a law clerk for the Honorable Procter R. Hug Jr., of the Ninth Circuit Court of Appeals. Following my clerkships I served for four years as a Deputy Public Defender for Washoe County, Nevada. From 1998 to August of 2018 I was in private practice with the law firm of Arrascada & Arrascada (now Arrascada & Aramini) my primary focus of practice was criminal defense. I am currently the appointed Public Defender for Washoe County, Nevada.

4. I have defended numerous clients accused of sexual offenses. I have defended through trial multiple clients accused of sex offenses in Nevada State Court and Federal Court. I have appeared in front of the Nevada Supreme Court and the Ninth Circuit Court of Appeals on cases involving sex offenses. I have represented Clergy men accused of sexual offenses in Northern Nevada and Louisville Kentucky. I have presented two times for the National Association of Criminal Defense Lawyers at their annual Defending Sex Crimes Conference.

5. I currently serve on several local and Statewide commissions and committees focused on issues of effective representation.

6. That I have reviewed pertinent portions of the Transcript of Proceedings of the trial in the case of *State of Nevada, Plaintiff v. Mazen Alotaibi, Defendant* Case No. C287173-1,

and have been asked to provide my opinion as to the failure of defense counsel at trial to consult and effectively communicate with his client when he failed to request a potential lesser-related jury instruction allowing the jury to consider the option of Statutory Sexual Seduction.

7. That the facts, as they are known to me are as follows: 1) the allegation of both oral and anal penetration of the minor accuser were uncontested at trial; 2) the defendant confessed to the sexual conduct; 3) the accuser testified that he had initially consented but later withdrew his consent; 4) the trial court judge repeatedly invited defense counsel to request a jury instruction on the lesser-related offense of statutory sexual seduction and advised the prosecutor that the charge would be given if requested; 5) defense counsel did not request the lesser-related instruction; 6) defense counsel has conceded, notwithstanding a request by the court, that he did not discuss the lesser related offense jury instruction with his client, and did not discuss the consequences of an "all or nothing" jury instruction approach with his client including the attendant sentencing consequences of the lesser related offense versus the instructed offenses; 7) that defense counsel did not explain to his client that the lesser related offense of Statutory Sexual seduction carried a maximum 5 year sentence and that Sexual Assault on a Child under the age of 14 carried a sentence of 35 years to life and 8) trial counsel did not seek his client's authority and consent as to whether the lesser related offense would be requested and presented to the jury.

8. That in my opinion, the failure of trial counsel to insure that the defendant understood and participated in the decision to waive a defense which would make a sentencing difference of 30 years violated the defendant's right to effective representation of counsel.

9. That a lawyer must "abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4 shall consult with the client as to the means by which

they are to be pursued." Nevada Rules of Professional Conduct, Rule 1.2 (a). Rule 1.4 requires that the lawyer shall "[p]romptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these rules"; "reasonably consult with the client about the means by which the client's objectives are to be accomplished"; and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions." That in my opinion trial counsel in this case failed to promptly inform his client, reasonably consult with his client and explain to his client the lesser related offense and the consequences of not submitting a lesser related offense was ineffective representation and prejudiced the client by not allowing the jury to decide upon the lesser related offense.

10. That in my opinion, taking an option away from the jury which could have reduced the sentence by 30 years is not a decision of tactics (or means) but rather, it was a decision "concerning the objectives of representation." Thus, the lawyer was ethically required to abide by the client's decision. Because the client was not provided with sufficient information to make an informed decision, he was deprived of the representation to which he was entitled.

11. That the Nevada Supreme Court has addressed the responsibility of the lawyer in criminal cases when even strategic decisions are made: "If, during the trial, it appears to counsel that concessions to facts or offenses are strategically indicated, such concessions may only be made in consultation with the consent of, the client." Nevada Indigent Defense Standards of Performance, §4-10(h) adopted in ADKT 411, October 16, 2008. In my opinion, the failure of trial counsel to inform and explain to the client the lesser related offense and the potential consequences the lesser related offense instruction could have with a jury, a verdict and sentencing coupled with trial counsel's failure to obtain knowledge based informed consent from his client to not request of the court or instruct the jury of the lesser related offense violated this

performance standard and prejudiced the client because the jury was not allowed to deliberate upon the lesser related offense.

12. That a criminal defendant is entitled to an opportunity to choose between options that will affect the outcome of the case. No meaningful choice can be made if the options and consequences are not communicated to the client. It is apparent from this record, that the client was not given the opportunity to consent to his lawyer's withdrawal from the jury a choice which would have substantially affected the penalty in this case. Accordingly, in my opinion, this defendant's right to effective representation of counsel was violated.

Executed this 28th day of November, 2018.

JOHN L. ARRASCADA, ESQ.

EXHIBIT J

EXHIBIT J

DECLARATION OF KRISTINA WILDEVELD, ESQ., IN SUPPORT OF MAZEN ALOTAIBI'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

I, Kristina Wildeveld, Esq. hereby state the following under the penalty of perjury:

1. I am an attorney licensed to practice law in the State of Nevada and a partner at the law firm of the Law Offices of Kristina Wildeveld & Associates. I have been practicing law in the area of criminal defense for twenty-four (24) years.

2. I am over the age of 18 and am mentally competent to testify. If called upon to testify as to the matters herein, I could and would do so.

3. That I have personally reviewed the Transcript of Proceedings from Monday October 21, 2013 in the case of *State of Nevada v. Mazen Alotaibi*, Case No. C287173-1.

4. That Dominic Gentile, Esq. has also provided me with a general overview of the facts of Mr. Alotaibi's case in Case No. C287173-1.

5. That the facts, as they are known to me are as follows: : 1) the allegation of both oral and anal penetration of the minor accuser were uncontested at trial; 2) the defendant confessed to the sexual conduct; 3) the accuser testified that he had initially consented but later withdrew his consent; 4) the trial court judge repeatedly invited defense counsel to request a jury instruction on the lesser-related offense of statutory sexual seduction and advised the prosecutor that the charge would be given if requested; 5) defense counsel did not request the lesser-related instruction; 6) defense counsel has conceded that he did not meaningfully discuss the sentencing consequences of the failure to request the instruction with his client and advised the court that his client did not understand the implications of defense counsel's failure to make the request.

6. That I have been asked to provide my professional opinion regarding whether or not I would have requested a jury instruction with respect to the lesser-included offense of statutory sexual seduction if I were counsel for Mr. Alotaibi in Case No. C287173-1.

7. That based on my review of the Transcript of Proceedings from Monday October 21, 2013, and based on the information that Mr. Gentile has provided me regarding Mr. Alotaibi's case, I have determine that if I were counsel for Mr. Alotaibi in Case No. C287173-1, I would have requested a jury instruction with respect to the lesser-included offense of statutory sexual seduction, and if my request was denied, I would have immediately filed a writ with the Nevada Supreme Court. Further, I believe that a failure to make such a request would have been a violation of my duty to provide competent representation to a client, pursuant to Rule 1.1 of the Nevada Rules of Professional Conduct, which states that a "lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

8. That I represented Garen Pearson where I appealed Mr. Pearson's convictions for sexual assault and lewdness against several minors in Supreme Court Case No. 38098. In that case, the Nevada Supreme Court found that the District Court committed reversible error by failing to give an instruction regarding the lesser-included offense of statutory sexual seduction, and based on this finding, the Nevada Supreme Court overturned Mr. Pearson's sexual assault convictions and remanded the case for a new trial on those particular charges.

I declare under penalty of perjury under the laws of the state of Nevada that the above information is true and correct.

Executed this 27th day of November, 2018.

KRISTINA WILDEVELD, ESQ.

EXHIBIT K

EXHIBIT K

DECLARATION OF FRANNY FORSMAN, ESQ., IN SUPPORT OF MAZEN ALOTAIBI'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

I, Franny Forsman, Esq. hereby state the following under the penalty of perjury:

1. That I am an attorney licensed to practice law in the State of Nevada. I have been licensed to practice law since 1977 and for 25 years, I have held the highest ranking awarded by Martindale-Hubbel, AV Preeminent. For most of the last 42 years, I have practiced criminal defense in both state and federal courts. I have argued cases before the Ninth Circuit Court of Appeals, the Nevada Supreme Court and the United States Supreme Court.

2. I am over the age of 18 and am mentally competent to testify. If called upon to testify as to the matters herein, I could and would do so.

3. That in 1989, I was appointed as Federal Public Defender for the District of Nevada by the Ninth Circuit Court of Appeals and served as the head of that office for 22 years. Additionally, I taught Trial Advocacy at the Boyd School of Law for 15 years. I have served on many committees and commissions which have studied issues of effective representation. For the last 11 years, I have been a member of the Indigent Defense Commission established by the Nevada Supreme Court.

4. That I have reviewed pertinent portions of the Transcript of Proceedings of the trial in the case of *State of Nevada, Plaintiff v. Mazen Alotaibi, Defendant* Case No. C287173-1, and have been asked to provide my opinion as to the failure of defense counsel at trial to consult and effectively communicate with his client when he failed to request a potential lesser-related jury instruction allowing the jury to consider the option of Statutory Sexual Seduction.

5. That the facts, as they are known to me are as follows: 1) the allegation of both oral and anal penetration of the minor accuser were uncontested at trial; 2) the defendant confessed to the sexual conduct; 3) the accuser testified that he had initially consented but later

withdrew his consent; 4) the trial court judge repeatedly invited defense counsel to request a jury instruction on the lesser-related offense of statutory sexual seduction and advised the prosecutor that the charge would be given if requested; 5) defense counsel did not request the lesser-related instruction; 6) defense counsel has conceded that he did not meaningfully discuss the sentencing consequences of the failure to request the instruction with his client and advised the court that his client did not understand the implications of defense counsel's failure to make the request.

6. That I understand that the sentencing consequence of defense counsel's failure to request the lesser-related instruction is that the defendant cannot be eligible for parole for 35 years. Had the jury chosen the option of Statutory Sexual Seduction, the maximum sentence for a conviction of that offense would have been 5 years.

7. That in my opinion, the failure of trial counsel to insure that the defendant understood and participated in the decision to waive a defense which would make a sentencing difference of 30 years violated the defendant's right to effective representation of counsel.

8. That a lawyer must "abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4 shall consult with the client as to the means by which they are to be pursued." Nevada Rules of Professional Conduct, Rule 1.2 (a). Rule 1.4 requires that the lawyer shall "[p]romptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these rules"; "reasonably consult with the client about the means by which the client's objectives are to be accomplished"; and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions."

9. That in my opinion, taking an option away from the jury which could have reduced the sentence by 30 years is not a decision of tactics (or means) but rather, it was a decision "concerning the objectives of representation." Thus, the lawyer was ethically required to

abide by the client's decision. Because the client was not provided with sufficient information to make an informed decision, he was deprived of the representation to which he was entitled.

10. That the Nevada Supreme Court has addressed the responsibility of the lawyer in criminal cases when even strategic decisions are made: "If, during the trial, it appears to counsel that concessions to facts or offenses are strategically indicated, such concessions may only be made in consultation with the consent of, the client." Nevada Indigent Defense Standards of Performance, §4-10(h) adopted in ADKT 411, October 16, 2008.

11. That in my opinion, the failure of defense counsel to meaningfully consult with his client and the failure to secure a knowing consent to the concession not to accept a lesser-related offense instruction concerning Statutory Sexual Seduction constituted a violation of the Performance Standards adopted by the Nevada Supreme Court.

12. That a criminal defendant is entitled to an opportunity to choose between options that will affect the outcome of the case. No meaningful choice can be made if the options and consequences are not communicated to the client. It is apparent from this record, that the client was not given the opportunity to consent to his lawyer's withdrawal from the jury of a choice which would have substantially affected the penalty in this case. Accordingly, in my opinion, this defendant's right to effective representation of counsel was violated.

I declare under penalty of perjury under the laws of the state of Nevada that the above information is true and correct.

Executed this 27th day of November, 2018.

FRANNY FORSMAN, ESQ.

DISTRICT COURT
CLARK COUNTY, NEVADA

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MAZEN ALOTAIBI, Petitioner, v. RENEE BAKER, WARDEN; LOVELOCK CORRECTIONAL CENTER; AND JAMES DZURENDA, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTON 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

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DISTRICT JUDGE
DEPARTMENT TWENTY THREE
LAS VEGAS NV 89101-2408

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

II. TESTIMONY

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

A. Don Chairez ("Chairez")

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

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

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

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DISTRICT JUDGE
DEPARTMENT TWENTY THREE
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Chairez testified that in hindsight he believes the judge was trying to telegraph that he should ask for the related instruction and that he should not have made the decision to reject the instruction without obtaining informed consent from Petitioner.

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

COURT FINDS, Mr. Chairez's testimony credible.

III. PROCEDURAL BACKGROUND

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

STEFANY A. MILEY
DISTRICT JUDGE
DEPARTMENT TWENTY THREE
LAS VEGAS NV 89101-2408

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

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

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

IV. DISCUSSION

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

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

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

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

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

Next, the State argues an attorney does not need to obtain consent to every tactical decision; however, certain decisions, such as the exercise or waiver or rights, must be discussed and entered into voluntarily. The Sixth Amendment requires that the exercise or waiver of certain rights are of such importance that they cannot be made for the defendant by a surrogate. Here, a jury instruction for a lesser-related offense, unlike one for a lesser-included offense, is not mandatory, nor is it a waiver of a right. Instead, it is a "tactical

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decision" for which defense counsel can argue in his discretion. Thus, consent by the client is not necessary.

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

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

At the time of Petitioner's sentencing in 2012, the sentencing guidelines for the charged counts were as follows:

- Sexual Assault—a category A felony for which a court shall sentence a convicted person to life with parole eligibility after 35 years if the offense was committed against a child under the age of 14 years and did not result in substantial bodily harm. NRS 200.366(3)(c).
- Lewdness—a category A felony for which a court shall sentence a convicted person to
    - (a) Life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served, and may be further punished by a fine of not more than $ 10,000; or
    - (b) A definite term of 20 years, with eligibility for parole after a minimum of 2 years has been served, and may further be punished by a fine of not more than $ 10,000. NRS 201.230 (2)
- Statutory Sexual Seduction—a category C 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. 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).

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

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

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

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

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

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

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.

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

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

To convict the Petitioner of Sexual Assault, the jury had to consider whether or not A.J. consented to the sexual penetration. The jury was instructed on the definition of Sexual Assault (Instruction 8) and told that a good faith belief of consent was a defense to Sexual Assault (Instruction 13). Additionally, the jury was instructed that any lewd or lascivious act, ***other than acts constituting the crime of sexual assault***, upon or with the body, of a child under the age of 14 years is Lewdness with a child. (Instruction 14) and told that consent is not a defense to Lewdness (Instruction 16).

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

V. ORDER

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

Dated this 5th day of September, 2019.

HONORABLE STEFANY A. MILEY
DISTRICT COURT JUDGE
DEPARTMENT XXIII

CERTIFICATE OF SERVICE

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

By: _____
Carmen Alper
Judicial Executive Assistant
Department XXIII

STEFANY A. MILEY
DISTRICT JUDGE
DEPARTMENT TWENTY THREE
LAS VEGAS NV 89101-2408

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Steven D. Grierson
CLERK OF THE COURT

NEOJ

DISTRICT COURT
CLARK COUNTY, NEVADA

MAZEN ALOTAIBI,

Petitioner,

vs.

RENEE BAKER; ET,AL.,

Respondent,

Case No: A-18-785145-W

Dept. No: XXIII

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
P.O. Box 208
Indian Springs, NV 89070

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

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

NOA
CLARK HILL PLLC
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Nevada Bar No. 1923
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VINCENT SAVARESE III
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Email: vsavarese@clarkhill.com
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

NOTICE OF APPEAL

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

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

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 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@clarkcountyda.com

/s/ Tanya Bain
An employee of Clark Hill PLLC

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CLERK OF THE COURT

NEOJ

DISTRICT COURT
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MAZEN ALOTAIBI,

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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
P.O. Box 208
Indian Springs, NV 89070

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

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

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Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

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MAZEN ALOTAIBI, Petitioner, v. RENEE BAKER, WARDEN; LOVELOCK CORRECTIONAL CENTER; AND JAMES DZURENDA, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTON 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

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

II. TESTIMONY

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

A. Don Chairez ("Chairez")

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

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

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

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

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

COURT FINDS, Mr. Chairez's testimony credible.

III. PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

At the time of Petitioner's sentencing in 2012, the sentencing guidelines for the charged counts were as follows:

- Sexual Assault—a category A felony for which a court shall sentence a convicted person to life with parole eligibility after 35 years if the offense was committed against a child under the age of 14 years and did not result in substantial bodily harm. NRS 200.366(3)(c).
- Lewdness—a category A felony for which a court shall sentence a convicted person to
  - (a) Life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served, and may be further punished by a fine of not more than $ 10,000; or
  - (b) A definite term of 20 years, with eligibility for parole after a minimum of 2 years has been served, and may further be punished by a fine of not more than $ 10,000. NRS 201.230 (2)
- Statutory Sexual Seduction—a category C 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. 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).

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

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

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

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

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

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

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.

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

V. ORDER

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

Dated this 5th day of September, 2019.

HONORABLE STEFANY A. MILEY
DISTRICT COURT JUDGE
DEPARTMENT XXIII

CERTIFICATE OF SERVICE

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

By: _____
Carmen Alper
Judicial Executive Assistant
Department XXIII

STEFANY A. MILEY
DISTRICT JUDGE
DEPARTMENT TWENTY THREE
LAS VEGAS NV 89101-2408

ASTA
CLARK HILL PLLC
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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

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.

. . .

. . .

. . .

. . .

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

Nature of the Action:

Petitioner filed a Writ of Habeas Corpus regarding ineffective assistance of counsel. The claims included that Petitioner's trial attorney unilaterally rejected the trial court's invitation to request a jury instruction on a lesser-related, uncharged offense, that 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, however, his trial attorney failed to conduct a complete those discussions. Petitioner's trial attorney also failed to obtain Petitioner's consent to reject the trial court's offer with respect to counts 3 and 5 of his Sexual Assault charges, and the rejection of the lesser-related offense resulted in prejudice against the Petitioner.

Result in District Court:

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

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

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

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

This case does not involve child custody or visitation issues.

. . .

. . .

. . .

. . .

. . .

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@clarkcountyda.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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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

. . .

. . .

. . .

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@clarkcountyda.com

/s/ Tanya Bain
An employee of Clark Hill PLLC

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-18-785145-W

Mazen Alotaibi, Plaintiff(s)	§	Location:	**Department 23**
vs.	§	Judicial Officer:	**Miley, Stefany**
Renee Baker, Defendant(s)	§	Filed on:	**11/28/2018**
	§	Case Number History:	
	§	Cross-Reference Case Number:	**A785145**

CASE INFORMATION

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

Statistical Closures
09/10/2019 Other Manner of Disposition

Case Type: **Writ of Habeas Corpus**

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

		Lead Attorneys
Plaintiff	**Alotaibi, Mazen**	**Gentile, Dominic P.** *Retained* 702-862-8300(W)
Defendant	**Baker, Renee**	**Wolfson, Steven B** *Retained* 702-671-2700(W)
	Dzurenda, James	**Wolfson, Steven B** *Retained* 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
Petition for Writ of Habeas Corpus (Post-Conviction)

11/29/2018 Memorandum of Points and Authorities
Filed By: Plaintiff Alotaibi, Mazen
Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction)

11/29/2018 Transcript of Proceedings
Party: Plaintiff Alotaibi, Mazen
Transcript of Proceedings - Jury Trial Day 2 - In Support of Petition for Writ of Habeas Corpus (Post-Conviction)

11/29/2018 Transcript of Proceedings
Party: Plaintiff Alotaibi, Mazen
Transcript of Proceedings - Jury Trial Day 3 - In Support of Petition for Writ of Habeas

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

Filed By: Plaintiff Alotaibi, Mazen
Motion to Place on Calendar

04/19/2019 Motion
Motion to Place on Calendar

04/19/2019 Clerk's Notice of Hearing
Notice of Hearing

04/25/2019 Stipulation and Order
Filed by: Plaintiff Alotaibi, Mazen
Stipulation and Order to Continue the Evidentiary Hearing

09/06/2019 Decision and Order
Decision and Order

09/09/2019 Notice of Entry of Order
Filed By: Defendant Baker, Renee
Notice of Entry of Order

09/10/2019 Order to Statistically Close Case
Civil Order to Statistically Close Case

09/30/2019 Notice of Change of Firm Name
Filed By: Plaintiff Alotaibi, Mazen
Notice of Change of Firm Affiliation and Address

09/30/2019 Notice of Appeal
Filed By: Plaintiff Alotaibi, Mazen
Notice of Appeal

09/30/2019 Request
Filed by: Plaintiff Alotaibi, Mazen
Request for Transcript of Proceeding

09/30/2019 Case Appeal Statement
Filed By: Plaintiff Alotaibi, Mazen
Case Appeal Statement

HEARINGS

01/14/2019 **Petition for Writ of Habeas Corpus** (11:00 AM) (Judicial Officer: Bell, Linda Marie)
Matter Continued;
Journal Entry Details:
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;

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:

	Pursuant to the Decision and Order filed September 6, 2019, COURT ORDERED, writ DENIED.; Matter Continued; Continued for Chambers Decision; Denied; Matter Continued; Continued for Chambers Decision; Denied; Journal Entry Details: *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;*
06/06/2019	**Evidentiary Hearing** (9:30 AM) (Judicial Officer: Miley, Stefany) Matter Heard;
06/06/2019	**All Pending Motions** (9:30 AM) (Judicial Officer: Miley, Stefany) *Evidentiary Hearing; Deft's Petition for Writ of Habeas Corpus* Continued for Chambers Decision; Evidentiary Hearing; Deft's Petition for Writ of Habeas Corpus Journal Entry Details: *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;*
06/11/2019	*CANCELED* **Motion** (9:30 AM) (Judicial Officer: Miley, Stefany) *Vacated - Moot* *Motion to Place on Calendar*

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**

A-18-785145-W

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):	Defendant(s) (name/address/phone):
Mazen Alotaibi	Renee Baker, Waden Lovelock Correctional Center
	James Dzurenda, Director of the Nevada Department
	Of Corrections
Attorney (name/address/phone):	**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	

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

Civil Case Filing Types

Real Property	Torts	
Landlord/Tenant	**Negligence**	**Other Torts**
☐ Unlawful Detainer	☐ Auto	☐ Product Liability
☐ Other Landlord/Tenant	☐ Premises Liability	☐ Intentional Misconduct
Title to Property	☐ Other Negligence	☐ Employment Tort
☐ Judicial Foreclosure	**Malpractice**	☐ Insurance Tort
☐ Other Title to Property	☐ Medical/Dental	☐ Other Tort
Other Real Property	☐ Legal	
☐ Condemnation/Eminent Domain	☐ Accounting	
☐ Other Real Property	☐ Other Malpractice	

Probate	Construction Defect & Contract	Judicial Review/Appeal
Probate *(select case type and estate value)*	**Construction Defect**	**Judicial Review**
☐ Summary Administration	☐ Chapter 40	☐ Foreclosure Mediation Case
☐ General Administration	☐ Other Construction Defect	☐ Petition to Seal Records
☐ Special Administration	**Contract Case**	☐ Mental Competency
☐ Set Aside	☐ Uniform Commercial Code	**Nevada State Agency Appeal**
☐ Trust/Conservatorship	☐ Building and Construction	☐ Department of Motor Vehicle
☐ Other Probate	☐ Insurance Carrier	☐ Worker's Compensation
Estate Value	☐ Commercial Instrument	☐ Other Nevada State Agency
☐ Over $200,000	☐ Collection of Accounts	**Appeal Other**
☐ Between $100,000 and $200,000	☐ Employment Contract	☐ Appeal from Lower Court
☐ Under $100,000 or Unknown	☐ Other Contract	☐ Other Judicial Review/Appeal
☐ Under $2,500		

Civil Writ		Other Civil Filing
Civil Writ		**Other Civil Filing**
☒ Writ of Habeas Corpus	☐ Writ of Prohibition	☐ Compromise of Minor's Claim
☐ Writ of Mandamus	☐ Other Civil Writ	☐ Foreign Judgment
☐ Writ of Quo Warrant		☐ 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.

Electronically Filed
9/6/2019 1:53 PM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

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MAZEN ALOTAIBI, Petitioner, v. RENEE BAKER, WARDEN; LOVELOCK CORRECTIONAL CENTER; AND JAMES DZURENDA, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTON 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

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

II. TESTIMONY

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

A. Don Chairez ("Chairez")

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

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

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

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

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

COURT FINDS, Mr. Chairez's testimony credible.

III. PROCEDURAL BACKGROUND

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

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IV. DISCUSSION

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

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

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

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

Next, the State argues an attorney does not need to obtain consent to every tactical decision; however, certain decisions, such as the exercise or waiver or rights, must be discussed and entered into voluntarily. The Sixth Amendment requires that the exercise or waiver of certain rights are of such importance that they cannot be made for the defendant by a surrogate. Here, a jury instruction for a lesser-related offense, unlike one for a lesser-included offense, is not mandatory, nor is it a waiver of a right. Instead, it is a "tactical

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decision" for which defense counsel can argue in his discretion. Thus, consent by the client is not necessary.

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

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

At the time of Petitioner's sentencing in 2012, the sentencing guidelines for the charged counts were as follows:

- Sexual Assault—a category A felony for which a court shall sentence a convicted person to life with parole eligibility after 35 years if the offense was committed against a child under the age of 14 years and did not result in substantial bodily harm. NRS 200.366(3)(c).
- Lewdness—a category A felony for which a court shall sentence a convicted person to
    - (a) Life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served, and may be further punished by a fine of not more than $ 10,000; or
    - (b) A definite term of 20 years, with eligibility for parole after a minimum of 2 years has been served, and may further be punished by a fine of not more than $ 10,000. NRS 201.230 (2)
- Statutory Sexual Seduction—a category C 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. 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).

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

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

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

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

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

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

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.

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

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

To convict the Petitioner of Sexual Assault, the jury had to consider whether or not A.J. consented to the sexual penetration. The jury was instructed on the definition of Sexual Assault (Instruction 8) and told that a good faith belief of consent was a defense to Sexual Assault (Instruction 13). Additionally, the jury was instructed that any lewd or lascivious act, ***other than acts constituting the crime of sexual assault***, upon or with the body, of a child under the age of 14 years is Lewdness with a child. (Instruction 14) and told that consent is not a defense to Lewdness (Instruction 16).

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

V. ORDER

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

Dated this 5th day of September, 2019.

HONORABLE STEFANY A. MILEY
DISTRICT COURT JUDGE
DEPARTMENT XXIII

CERTIFICATE OF SERVICE

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

By: _____
Carmen Alper
Judicial Executive Assistant
Department XXIII

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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

MAZEN ALOTAIBI,

Petitioner,

vs.

RENEE BAKER; ET,AL.,

Respondent,

Case No: A-18-785145-W

Dept. No: XXIII

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
P.O. Box 208
Indian Springs, NV 89070

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

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

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Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
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decision" for which defense counsel can argue in his discretion. Thus, consent by the client is not necessary.

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

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

At the time of Petitioner's sentencing in 2012, the sentencing guidelines for the charged counts were as follows:

- Sexual Assault—a category A felony for which a court shall sentence a convicted person to life with parole eligibility after 35 years if the offense was committed against a child under the age of 14 years and did not result in substantial bodily harm. NRS 200.366(3)(c).
- Lewdness—a category A felony for which a court shall sentence a convicted person to
    - (a) Life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served, and may be further punished by a fine of not more than $ 10,000; or
    - (b) A definite term of 20 years, with eligibility for parole after a minimum of 2 years has been served, and may further be punished by a fine of not more than $ 10,000. NRS 201.230 (2)
- Statutory Sexual Seduction—a category C 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. 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).

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

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

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

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

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

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

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.

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

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

To convict the Petitioner of Sexual Assault, the jury had to consider whether or not A.J. consented to the sexual penetration. The jury was instructed on the definition of Sexual Assault (Instruction 8) and told that a good faith belief of consent was a defense to Sexual Assault (Instruction 13). Additionally, the jury was instructed that any lewd or lascivious act, ***other than acts constituting the crime of sexual assault***, upon or with the body, of a child under the age of 14 years is Lewdness with a child. (Instruction 14) and told that consent is not a defense to Lewdness (Instruction 16).

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

V. ORDER

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

Dated this 5th day of September, 2019.

HONORABLE STEFANY A. MILEY
DISTRICT COURT JUDGE
DEPARTMENT XXIII

CERTIFICATE OF SERVICE

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

By: _____
Carmen Alper
Judicial Executive Assistant
Department XXIII

STEFANY A. MILEY
DISTRICT JUDGE
DEPARTMENT TWENTY THREE
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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

Heather Ungermann, Deputy Clerk