IN THE SUPREME COURT OF THE STATE OF NEVADA

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MAZEN ALOTAIBI,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 79752

# RESPONDENT'S ANSWERING BRIEF

**Appeal From Denial of Petition for Writ of Habeas Corpus (Post-Conviction)**
**Eighth Judicial District Court, Clark County**

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## ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court because it relates to a conviction for Category A felonies. NRAP 17(b)(3).

## STATEMENT OF THE ISSUES

1. Whether the district court correctly held that Appellant's ineffective assistance of counsel claim fails because he cannot demonstrate prejudice.

## STATEMENT OF THE CASE

On October 18, 2013, the State filed a Second Amended Information charging Mazen Alotaibi (hereinafter "Appellant") with the following: Count 1 – Burglary

(Category B Felony – NRS 205.060); Count 2 – First Degree Kidnapping (Category A Felony – NRS 200.310, 200.320); Count 3 – Sexual Assault with a Minor Under Fourteen Years of Age (Category A Felony – NRS 200.364, 200.366); Count 4 – Lewdness with a Child Under the Age of 14 (Category A Felony – NRS 201.230); Count 5 – Sexual Assault with a Minor Under Fourteen Years of Age (Category A Felony – NRS 200.364, 200.366); Count 6 – Lewdness with a Child Under the Age of 14 (Category A Felony – NRS 201.230); Count 7 – Lewdness with a Child Under the Age of 14 (Category A Felony – NRS 201.230); Count 8 – Lewdness with a Child Under the Age of 14 (Category A Felony – NRS 201.230); and Count 9 – Coercion (Sexually Motivated) (Category B Felony – NRS 207.190, 207.193, 175.547). I AA 001-004.

On October 23, 2013, following a nine-day jury trial, the jury returned a verdict finding Appellant guilty of the following: Count 1 – Burglary; Count 2 – First Degree Kidnapping; Count 3 – Sexual Assault with a Minor Under Fourteen Years of Age; Count 5 – Sexual Assault with a Minor Under Fourteen Years of Age; Count 7 – Lewdness with a Child Under the Age of 14; Count 8 – Lewdness with a Child Under the Age of 14; and Count 9 – Coercion (Misdemeanor). VI AA 1056-1059. The jury found Appellant not guilty of Counts 4 and 6 – Lewdness with a Child Under the Age of 14. VI AA 1057-1058.

On January 28, 2015, the district court adjudicated Appellant guilty and sentenced him to the Nevada Department of Corrections (NDC) as follows: Count 1 – a minimum term of twelve (12) months and a maximum term of forty eight (48) months; Count 2 – a definite term of fifteen (15) years with eligibility for parole beginning when a minimum of five (5) 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 thirty five (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 thirty five (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 ten (10) years have been served, Count 7 to run concurrent with Count 5; Count 8 – Life imprisonment with eligibility of parole beginning when a minimum of ten (10) years have been served, Count 8 to run concurrent with Count 7; and Count 9: credit for time served. VI AA 1087. Appellant received 758 days credit for time served. VI AA 1087. Appellant was also subject to a special sentence of lifetime supervision, which would commence upon his release from any term of probation, parole, or imprisonment. VI AA 1087. Additionally, pursuant to NRS 179D.460, Appellant would have to register as a sex offender within forty-eight (48) hours of sentencing or release from custody. VI AA 1087. The Judgment of Conviction was filed on February 5, 2015. VI AA 1087.

On October 26, 2015, Appellant filed a Notice of Appeal and his Opening Brief with this Court. VI AA 1088. This Court affirmed Appellant's conviction on February 28, 2017. VI AA 1088. The Opinion was filed on November 9. 2017. VI AA 1088.

Appellant filed a Petition for Certiorari on February 7, 2018. VI AA 1088. The United States Supreme Court denied certiorari on April 16, 2018. VI AA 1088.

On November 28, 2018, Appellant filed a Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Petition"). V AA 918-951. The State filed its Response on December 31, 2018. VI AA 1088. Appellant filed a Reply on January 14, 2019. VI AA 1088.

On June 6, 2019, the district court held an evidentiary hearing, where Appellant's trial counsel, Don Chairez, Esq., testified. VI AA 1085-1086. Following the evidentiary hearing, the district court found trial counsel's testimony credible, and denied Appellant's Petition for Writ of Habeas Corpus (Post-Conviction). VI AA 1085-1097. The district court filed its Decision & Order on September 6, 2019. VI AA 1085-1097.

Appellant filed a Notice of Appeal on September 30, 2019. VI AA 1099. Appellant filed the instant Opening Brief on March 17, 2019.

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## STATEMENT OF THE FACTS

A.J.D. ("A.J.") arrived in Las Vegas on December 30, 2012 with his grandmother to celebrate the New Year. I AA 075. They were staying at the Circus Circus Hotel and Casino. I AA 075.

While at Circus Circus, A.J. ran into a friend from school who was also staying at the hotel with her family. I AA 075. On the morning of December 31, 2012, A.J. woke up around 6:30-7:00AM, and decided to meet his friend for breakfast. I AA 078. A.J. asked his grandmother for permission to go and for some money. II AA 266-267. A.J. then went to his friend's room on the 6th floor, but she was still asleep. I AA 078-079. A.J. went downstairs and walked around the hotel to waste some time. I 078-079. About twenty (20) minutes later, A.J. took the elevator back up to the 6th floor and sat on the couch in front of the elevators waiting for his friend to wake up. I AA 079. While sitting on that couch, A.J. came into contact with Appellant. I AA 088.

Appellant and his two (2) friends, Rashed Alshehri ("Alshehri") and Mohammed Jafaari ("Jafaari"), arrived in Las Vegas during the early morning hours on December 31, 2012. III AA 519. Upon arrival, they met up with some friends at the Palms Hotel and Casino where they consumed alcoholic beverages for the next couple of hours. III AA 521. After the Palms, the group went over to a strip club where they also were consuming alcohol. III AA 521-523.

Appellant and his friends left the strip club and drove to the Circus Circus Hotel where they were staying. III AA 526. Even though Alshehri testified that Appellant was drunk, he said that Appellant drove them all to Circus Circus competently with no problems except for maybe some speeding. III AA 530.

They arrived at Circus Circus, and as the four (4) men were exiting the elevator and proceeding toward their room on the 6th floor, they encountered A.J., who was still sitting on the couch waiting for his friend to wake up. III AA 531-532.

Appellant exited the elevator and started talking to A.J. I AA 080-081. A.J. then asked Appellant if he had any marijuana, and Appellant confirmed that he did have some. I AA 081. A.J. then followed Appellant into his hotel room thinking he was going to get some marijuana to smoke. I AA 082. Once inside Appellant's hotel room, A.J. saw three (3) other males sitting inside smoking marijuana, and A.J. could not understand the language the men were speaking. I AA 083. Appellant and A.J. then went downstairs to smoke. I AA 083.

As they were heading toward the elevator to go downstairs, Appellant started making sexual advances toward A.J. I AA 083-084. Once inside the elevator, Appellant started to move onto A.J., and kiss him around his neck underneath his ear. I AA 084. A.J. testified he did not know what to do. I AA 085. After they smoked together outside, Appellant again started to make more sexual advances on A.J., and started touching A.J. around his body and kissing him on his face. I AA 085-086.

A.J. was trying to back off by stepping away and saying no. I AA 086. When A.J. would step away from him, Appellant would bring A.J. closer to him. I AA 086.

In the elevator heading back upstairs, Appellant told A.J. that he wants to have sex, and would have sex for money and weed. I AA 086. Initially, A.J. did say yes, but he testified that he never had any intentions of doing anything sexual with Appellant; he was only saying that to try to trick Appellant into giving him some weed. I AA 086-087.

Once they were back inside Appellant's room, A.J. was trying to buy some weed. I AA 087. Appellant told A.J. to go into the bathroom, and he followed him in. I AA 087-088. Appellant put the weed on the counter, and told A.J. he will give him money and take care of him, and Appellant kept trying to touch and kiss A.J. I AA 088-089. A.J. testified that he felt very awkward and uncomfortable. I AA 089. A.J. told Appellant that he wanted to leave and attempted to get to the door. I AA 089. However, Appellant placed himself between A.J. and the front door to prevent A.J. from leaving. I AA 091. A.J. struggled and repeatedly attempted to leave, but was overpowered by Appellant, who began removing A.J.'s clothing. I AA 089.

Appellant started touching A.J. around his body, and A.J. was trying to back away when Appellant started kissing him on his face and chest. I AA 089-090. All A.J. wanted to do was leave, and he kept telling Appellant to stop. I AA 090. Appellant then removed his own clothing and forced A.J. to bend over, forced A.J.'s

head toward his private area, and put his penis inside A.J.'s mouth. I AA 091-092. A.J. testified it really hurt his throat and he was really creeped out. I AA 092. There was never a point where A.J. felt like he could leave as Appellant was standing between him and the door to the bathroom. I AA 091.

Appellant forced A.J. face down onto the bathroom floor. I AA 092. A.J. testified that Appellant took a green bottle from the hotel bathroom and put it onto his penis and A.J.'s buttocks. I AA 092-093. Appellant then forced his penis into A.J.'s anus. I AA 093. A.J. testified it was very painful and he screeched from the pain. I AA 093. A.J. was then finally able to pull away, and he grabbed his clothes and ran out of Appellant's hotel room. I AA 093-094.

Alshehri testified that he saw Appellant and A.J. go into the restroom of their hotel room. III AA 533-534. Alshehri knocked and said to open the door, and told Appellant to "let the kid go." III AA 536. However, Appellant did not open the door. III AA 536.

After the incident, A.J. took the elevator downstairs to the casino level where he immediately went to hotel security and reported the entire incident. I AA 094-095. A.J. told security he was raped. I AA 094-095. A.J. was embarrassed and ashamed of what had happened. I AA 094. When A.J. spoke to hotel security, he told them that he only went with Appellant because he told him he had weed. I AA 094-096. After security spoke with A.J., they contacted the Las Vegas Metropolitan

Police Department ("LVMPD") and Emergency Medical Services. I AA 164. A.J. described Appellant to security as a dark-skinned Arabic male, wearing a jacket with a red shirt that had a crown on it. I AA 164. Hotel security made contact with A.J.'s grandmother and took her to A.J. I AA 158.

At trial, A.J. admitted that when he spoke to detectives, he told them a different story than what he told security at the hotel. I AA 094-096. He only did so because he did not want his grandmother to know that he had smoked weed, and was embarrassed of what had happened. I AA 095-096. A.J. told detectives that he had approached Appellant because he wanted weed, but said that Appellant pulled him inside his hotel room, and that he never actually smoked any weed. I AA 095-096. A.J. testified he told this lie because he was scared and afraid, and did not want to get in trouble for smoking weed with his parents or grandmother. I AA 096-097. A.J. said that he approached Appellant voluntarily because he wanted to smoke weed, and that was all. I AA 095-097.

A.J. told security officers the room number where he was raped, and officers responded to the room, and waited right outside until someone exited the room. II AA 286. Once the first male left, officers went in, secured the rest of the room, and detained everyone inside. II AA 286-287. The individuals inside the room did not have any problems complying with officer demands, speaking with officers, or understanding the officers. II AA 287-289. They did not have any issue walking, and

they did not seem to be inebriated. II AA 287-289. Mr. Jose Haros, who had detained Appellant inside the bedroom, testified that Appellant did not smell like alcohol, he "wasn't smashed beyond," and was walking fine and not slurring his words. II AA 321.

Detective Robert Williams of the LVMPD served a valid search warrant on Appellant's hotel room. II AA 348. Crime scene analysts ("CSA's") were focusing specifically on the bathroom area where A.J. told them he was raped. II AA 349. Inside the bathroom, CSA's found towels with bodily fluids on them, and an open shampoo bottle on the counter, which was later confirmed as the lubricant that Appellant had used on his penis before sodomizing A.J. II AA 351-353, 365-367.

A.J. was then transported to University Medical Center where he gave his statement and underwent a Sexual Abuse and Neglect Examination (SANE). IV AA 679. The results of his examination revealed that A.J. had suffered blunt force trauma. IV AA 688-689. He had rectal trauma and tears, which were consistent with a penis being forced inside his anus. IV AA 690-694. He had contusions and swelling, he had a glistening wet appearance on the outside of his buttocks, which was consistent with a type of lubricant. IV AA 688-689. He also had a contusion inside his mouth on the soft pallet of his throat, which was consistent with blunt force trauma being applied to A.J.'s throat. IV AA 689-690. A.J. was in a lot of pain from his injuries. IV AA 694-696.

Detectives Pool and Christensen with the LVMPD interviewed Appellant at LVMPD headquarters after he was arrested. III AA 438-439. During the interview, Appellant admitted to knowing A.J., and said that A.J. asked him for weed, and that was it. III AA 462. Appellant then said that he did not remember things that happened that night because he was too drunk, and he said that he never saw A.J. after he asked for weed. III AA 454, 462. Appellant said he did not have sex with A.J. and that he only wanted weed. III AA 454, 462. Detectives continued to question Appellant, and when asked if he forced A.J. to have sex with him, Appellant answered that he did not know because he was too drunk. III AA 466. Detective Christensen then left the interview, and it was just Detective Pool questioning Appellant. III AA 471. After some more questioning, Appellant finally admitted that he brought A.J. into the bathroom of his hotel room. III AA 472. Appellant then admitted that he did in fact put his penis into both A.J.'s anus and mouth for a short period of time. III AA 472.

## SUMMARY OF THE ARGUMENT

This Court should affirm the district court's denial of Appellant's Petition for Writ of Habeas Corpus (Post-Conviction). The district court found that trial counsel was ineffective for failing to request a Statutory Sexual Seduction jury instruction, but that Appellant was not prejudiced because the jury already rejected a lesser-related offense and found him guilty of Sexual Assault with a Minor Under Fourteen

Years of Age. In its Order of Affirmance, this Court found that Statutory Sexual Seduction, in fact, is not a lesser-included offense of Sexual Assault with a Minor Under Fourteen Years of Age. However, even though the district court found that Statutory Sexual Seduction was a lesser-related offense and trial counsel was ineffective for failing to request the jury instruction, the outcome is still the same that Appellant was not prejudiced by the lack of the Statutory Sexual Seduction jury instruction. As such, Appellant cannot demonstrate prejudice. Accordingly, the district court properly denied Appellant's Petition for Writ of Habeas Corpus (Post-Conviction).

## ARGUMENT

### THE DISTRICT COURT CORRECTLY HELD THAT APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FAILS BECAUSE HE CANNOT DEMONSTRATE PREJUDICE

The appellate standard of review is that the Court gives deference to a district court's factual findings in habeas matters but reviews the court's application of the law to those facts de novo. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013). "The question of whether a [criminal] defendant has received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a mixed question of law and fact and is thus subject to independent [appellate] review." Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 529-530 (2004).

### A. Standard of Review for Ineffective Assistance of Counsel.

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, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (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, 104 S. Ct. at 2063-64. 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. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (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, 104 S. Ct. at 2069.

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, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (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, 38 P.3d 163, 167 (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, 584 P.2d 708, 711 (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, 104 S. Ct. 2039, 2046 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, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (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, 104 S. Ct. at 2066.

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, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable

probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068).

This 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, 120 Nev. at 1012, 103 P.3d at 33. 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, 686 P.2d 222, 225 (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).

**B. The district court found trial counsel, Don Chairez, ineffective.**

Following the evidentiary hearing, the district court found that trial counsel, Don Chairez, Esq., was ineffective. VI AA 1086, 1093. In its Order, the district court found trial counsel ineffective for failing to consult with his client regarding the lesser-related offense of Statutory Sexual Seduction:

> 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 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 directed 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*.

VI AA 1093-1094. The district court also noted the sentencing guidelines in 2012, for the charged counts:

> 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(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 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).

VI AA 1093.

However, while the district court found that trial counsel was ineffective at trial for failing to request the Statutory Seduction jury instruction and failing to discuss it with his client, trial counsel's ineffectiveness did not result in reasonable probability that the result would have been different pursuant to Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

**C. Appellant cannot demonstrate prejudice.**

Appellant alleges that he was prejudiced by counsel's ineffectiveness because counsel failed to ask for a jury instruction of the lesser-related offense of Statutory Sexual Seduction. AOB, at 18. Appellant claims that this decision prejudiced him because it presented the jury only two (2) choices: Sexual Assault of a Minor Under the Age of Fourteen or "completely exonerating him" which "resulted in at least 700% more time in prison." AOB, at 18 (emphasis removed). However, Appellant misconstrues the meaning of prejudice by focusing on the punishments for the different charges. The jury did not know the punishments for the charges and was instructed not to consider punishment. Appellant incorrectly equates prejudice with the amount of time in prison instead of focusing on whether the outcome of trial

would have been different pursuant to Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64.

This Court applies the "elements test" from Blockburger v. United States, 284 U.S. 299 (1932), to determine whether an uncharged offense is a lesser-included offense of a charged offense as to warrant an instruction pursuant to NRS 175.501. Barton v. State, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d, 1101 (2006). Applying the elements test, an offense is "necessarily included" in the charged offense if "all of the elements of the lesser offense are included in the elements of the greater offense." Id. 117 Nev. at 690, 30 P.3d at 1106.

While the district court found that counsel was ineffective for failing to request the jury instruction of Statutory Sexual Seduction, in its Order of Affirmance, this Court found that Statutory Sexual Seduction is not a lesser-included offense of Sexual Assault with a Minor Under Fourteen Years of Age:

> In this appeal, we are asked to determine whether, under the statutory definitions existing in 2012, the offense of statutory sexual seduction is a lesser-included offense of sexual assault when that offense is committed against a minor under 14 years of age. Under the elements test, for an uncharged offense to be a lesser-included offense of the charged offense so that the defendant is entitled to a jury instruction on the lesser offense, all of the elements of the lesser offense must be included in the greater, charged offense. In applying the elements test in this case, we must resolve two issues related to the elements that make up the charged and uncharged offenses. First, we consider

whether a statutory element that serves only to determine the appropriate sentence for the offense but has no bearing as to guilt for the offense is an element of the offense for purposes of the lesser-included-offense analysis. We hold that it is not. Second, we consider how to apply the elements test when a lesser offense may be committed by alternative means. We hold that the elements of only one of the alternative means need be included in the greater, charged offense to warrant an instruction on the lesser offense.

**Applying these principles to the statutes at issue, we conclude that statutory sexual seduction, as defined in NRS 200.364(5)(a) (2009), is not a lesser-included offense of sexual assault even where the victim is a minor, NRS 200.366(1) (2007), because statutory sexual seduction contains an element not included in the greater offense.** Thus, the district court did not err in refusing to give a lesser-included-offense instruction on statutory sexual assault.

…

Here, the elements necessary to convict a defendant of sexual assault are contained solely in subsection 1 of NRS 200.366, whereas the age of the victim set forth in subsection 3 is a factor for determining the appropriate sentence for the offense. As clearly indicated by the statute's structure and language, the age of the victim is not essential to a conviction for sexual assault; it serves only to increase the minimum sentence that may be imposed. Thus, it is a sentencing factor and not an element of the offense for purposes of the elements test.

…

Here, neither of the alternatives in NRS 200.364(5) is necessarily included in the offense of sexual assault. Both alternatives include the age of the victim (under 16 years

> of age) as an element of the offense that is required for conviction. 2009 Nev. Stat., ch. 300, § 1.1, at 1296. As explained above, the age of the victim is not an element required for a conviction for the greater offense (sexual assault). The alternative set forth in NRS 200.364(5)(b) also includes an intent element that is not included in the greater offense – that the sexual act was committed "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of [the defendant or the victim]." *Id*. **Therefore, under the elements test, statutory sexual seduction is not a lesser-included offense of sexual assault, and Alotaibi was not entitled to an instruction on sexual statutory seduction**. As such the district court properly refused to instruct the jury on statutory sexual seduction. We therefore affirm the judgment of conviction.

V AA 933-935, 942-945 (emphasis added). Thus, this Court already determined that Statutory Sexual Seduction is not a lesser-included offense of Sexual Assault with a Minor under Fourteen Years of Age and that Appellant was not entitled to an instruction on Statutory Sexual Seduction.

As discussed supra, Section I.B., the district court found that trial counsel was ineffective for failing to request the jury instruction of Statutory Sexual Seduction and failing to discuss it with Appellant. VI AA 1095. However, the district court determined that, even if there was a deficient performance by trial counsel, the outcome of the trial was not prejudiced because the jury chose to convict Appellant on the greater charge, Sexual Assault with a Minor Under Fourteen Years of Age instead of the lesser-included charge of Lewdness with a Child Under the Age of 14.

The district court explained that the jury had three (3) options regarding the anal and oral penetration of A.J.: "the jury had the option to (a) convict the [Appellant] of Sexual Assault, (b) convict the [Appellant] of Lewdness with a Child Under 14 Years of Age, or (c) exonerate the [Appellant]." VI AA 1095. The district court also reasoned:

> This court does not 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.
>
> 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 for 14 years is Lewdness with a child. (Instruction 14) and told that consent is not a defense to Lewdness (Instruction 16).
>
> 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 then Lewdness, would not have had any effect on the outcome of this case.

VI AA 1095-1097. Thus, while the district court found that counsel was ineffective for failing to request the Statutory Seduction jury instruction, it reasoned that it did not prejudice Appellant because the jury rejected Lewdness with a Child Under the Age of 14 and found Appellant guilty of Sexual Assault with a Minor Under Fourteen Years of Age.

The district court determined that Count 4's Lewdness with a Child Under the Age of 14 charge coincided with Count 3's Sexual Assault with a Minor Under Fourteen Years of Age charge for the anal touching and penetration, just as Count 6's Lewdness with a Child Under the Age of 14 charge coincided with Count 5's

Sexual Assault with a Minor Under Fourteen Years of Age charge for the oral touching and penetration. VI AA 1094. Based on the verdict, the jury considered and rejected that the sexual penetration that occurred in Counts 3 and 5 was consensual. VI AA 1094-1096. Thus, the district court found that the outcome of the trial was not prejudiced because there was not a reasonable probability that the outcome would have been different. VI AA 1095-1097.

Moreover, there was overwhelming evidence of Appellant's guilt. A.J. testified that Appellant prevented him from leaving the bathroom, began removing his clothes, and started to touch and kiss him. I AA 088-091. A.J. told Appellant he wanted to leave and kept telling Appellant to stop, but Appellant forced A.J. to bend over and forced his penis in A.J.'s mouth. I AA 090-092. A.J. also testified that Appellant forced him face down onto the bathroom floor, took a green bottle from the hotel bathroom and put a substance onto his penis and A.J.'s buttocks, then forced his penis into A.J.'s anus. I AA 092-093. Additionally, Appellant's friends testified that they were knocking on the door telling Appellant to "let the kid go," and Appellant himself admitted to putting his penis into both A.J.'s mouth and anus. III AA 536, 472. A.J. also had severe injuries to the back of his throat and rectal trauma and tears. Thus, there was overwhelming evidence of Appellant's guilt.

In sum, while this Court found that Statutory Sexual Seduction is not a lesser-included offense of Sexual Assault and Appellant was not entitled to an instruction

on Statutory Sexual Seduction, the district court found that trial counsel was ineffective, but that the jury already rejected the lesser-related offense of Lewdness with a Child Under the Age of 14. Even though the district court found that Statutory Sexual Seduction was a lesser-related offense and trial counsel was ineffective for failing to request the jury instruction, the outcome is still the same that Appellant was not prejudiced by the lack of the Statutory Sexual Seduction jury instruction. Thus, this Court should affirm the denial of Appellant's Petition.

## CONCLUSION

Wherefore, the State respectfully requests that the district court's denial of Appellant's Petition for Writ of Habeas Corpus (Post-Conviction) be AFFIRMED.

Dated this 16th day of April, 2020.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 6,155 words and 25 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 16th day of April, 2020.

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## CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 16th day of April, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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