No. 79752

IN THE SUPREME COURT OF THE STATE OF NEVADA



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

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

# APPELLANT'S AMENDED REPLY BRIEF

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

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

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

1. Mazen Alotaibi
   *Petitioner/Appellant*;

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

3. Don P. Chairez, Esq. (Nevada Bar No. 3495)
   *Attorney for Appellant before the Eighth Judicial District Court, Clark*

*County, Nevada, the Honorable Stefany Miley, for purposes of all pre-trial, trial, and sentencing proceedings in this matter*;

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   *Attorneys for Appellant Mazen Alotaibi: (1) before the Supreme Court of the State of Nevada for purposes of direct appeal from Appellant's conviction before the Eighth Judicial District Court, Clark County, Nevada, the Honorable Stefany Miley in this matter; (2) before the Supreme Court of the United States for purposes of seeking the issuance of a Writ of Certiorari to the Supreme Court of the State of Nevada with respect to Appellant's conviction before the Eighth Judicial District Court, Clark County, Nevada, the Honorable Stefany Miley and its affirmance on direct appeal by the Nevada Supreme Court; (3) before the Eighth Judicial District Court, Clark County, Nevada, the Honorable Stefany Miley, for purposes of Appellant's Post-Conviction Petition for Writ of Habeas Corpus in this matter and all proceedings related thereto; and (4) before the Supreme Court of the State of Nevada for purposes of appeal from the Decision and Order of the Eighth Judicial District Court, Clark County, Nevada, the Honorable Stefany Miley, denying Appellant's Post-Conviction Petition for Writ of Habeas Corpus in this case.*

DATED this 20th day of May, 2020.

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## INTRODUCTION

On September 6, 2019, the District Court entered an Order denying Appellant's Post-Conviction Petition for Writ of Habeas Corpus, seeking relief from his conviction, following jury trial, on Counts 3 and 5 of the Second Amended Information filed in this matter,[1] in each of which counts he was charged with Sexual Assault of a Minor under 14 Years of Age, with both such offenses alleged therein to have occurred on or about December 31, 2012, pursuant to the then-applicable provisions of Nevada Revised Statutes ("NRS") § 200.366,[2] and seeking a new trial with respect thereto; which Petition assigned as grounds in

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[1] (AA00001-AA00004).

[2] In 2012, NRS § 200.366 provided, in pertinent part:

> "1. A person who subjects another person to ***sexual penetration*** . . . ***against the will of the victim*** . . . is guilty of sexual assault.
>
> . . .
>
> 3. . . . [A] person who commits a sexual assault against a child under the age of 16 years is guilty of a category A felony and ***shall*** be punished:
>
> . . .
>
> (c) ***If the crime is committed against a child under the age of 14 years and does not result in substantial bodily harm to the child, by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 35 years has been served.***"

(Emphasis added.)

support thereof that, to his prejudice, Appellant did not receive the effective assistance of counsel at trial guaranteed to him by the Sixth and Fourteenth Amendments to the Constitution of the United States and Article 1, § 8 of the Constitution of the State of Nevada. (AA01085-AA01097).

Appellant has duly appealed to this Court, seeking reversal of that Decision and Order of the District Court, and timely filed his Opening Brief pursuant thereto on March 17, 2020.

On April 16, 2020, the State of Nevada timely filed its Answering Brief.

And Appellant hereby respectfully and timely files his Reply Brief with respect thereto.

## 3.

## STANDARD OF REVIEW

As the State expressly acknowledges, citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984) and *State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993), both the United States Supreme Court and this Court have long recognized that "the [constitutional] right to counsel [guaranteed to the accused in a criminal case] is the right to the ***effective*** assistance of counsel." State's Answering Brief p. 13 ¶ 1 (emphasis added).

And as the State further expressly concurs with Appellant, whether such effective assistance was rendered at trial is determined on appeal according to the

two-pronged test of *Strickland* – under which an appellate court must assess whether counsel's representation fell below an objective standard of reasonableness, and whether, but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. State's Answering Brief p. 13 ¶ 2. 466 U.S. at 686-87. *See also Love*, 109 Nev. at 1138, 865 P.2d at 323; *Warden, Nevada State Prison v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the *Strickland* two-part test).

As this Court explained in *Lara v. State*, 120 Nev. 177, 179, 87 P.3d 528, 529-530 (2004): "The question of whether a 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***" (emphasis added). And accordingly, as this Court has further explained, with respect to appeals from denials of post-conviction habeas corpus petitions brought on grounds of ineffective assistance of trial counsel: "We give deference to the district court's ***factual*** findings . . . but we will review the [district] court's ***application of the law*** to those facts de novo. *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012) (emphasis added). *See also, Lott v. Mueller,* 304 F.3d 918, 922 (9th Cir.2002) (stating that district court's findings of facts are reviewed for clear error, but questions of law are reviewed de novo); *Lader v. Warden,* 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005) (application of standard of review to claims

of ineffective assistance of counsel). And on this, there is no dispute between the parties in this case. *See* State's Answering Brief p. 11 ¶ 2.

## 4.

## ARGUMENT

## I.

## THE STATE'S ANSWERING BRIEF CONTAINS A NUMBER OF MATERIALLY MISLEADING REPRESENTATIONS OF FACT.

Appellant duly acknowledges that the State correctly points out that the trial evidence showed that "[i]n the elevator heading back upstairs [to Appellant's hotel room [with Appellant, and after going downstairs with Appellant for the specific purpose of smoking marijuana with him, and after having done so in fact,] Appellant told A.J. that he want[ed] to have sex [with him], and would have sex [with him in exchange] for money and [an additional quantity of] weed." State's Answering Brief p. 7 ¶ 2. And although the State expressly concedes that "A.J. did [in fact] say ***yes***" to Appellant in response to that proposition, the State nevertheless purports to qualify that *express categorical agreement* on the part of A.J. by citing his assertion "that he never had any [actual] intentions of doing anything sexual with Appellant; [and that] he was only [dishonestly] saying that [by design in order] to try to ***trick*** Appellant into giving him some weed," (*id.*) and further fails to forthrightly acknowledge that A.J. never *communicated* any such purported lack of actual intention to Appellant, but rather – *even under his own*

*version of events* – admitted that he had purposefully promoted Appellant to (purportedly) *misapprehend* that his actual subjective intention was to engage in consensual sexual activity with Appellant in exchange for money and marijuana (emphasis added).

The State further relies upon A.J.'s assertion that, after voluntarily entering the bathroom with Appellant following his unqualified express agreement to engage in sexual activity with him in exchange for money and more marijuana, A.J. purportedly decided that "he wanted to leave [the bathroom] . . . and [repeatedly] attempted to . . . [but that] . . . . Appellant placed himself between A.J. and the . . . [bathroom] door to prevent A.J. from leaving . . . and . . . overpowered [him]." State's Answering Brief p. 7 ¶ 3. And despite the State's further reliance upon evidence showing that Appellant's companion, Mr. Alshehri, knocked on the outside of the bathroom door during this time and told Appellant to "let the kid go," (State's Answering Brief p. 8 ¶ 3), the State is not forthcoming in acknowledging that the evidence showed that A.J. did not once cry out for help to the three other men who he well knew were in the adjacent room just outside the bathroom door. *See* State's Answering Brief p. 6 ¶ 3 ("Once inside Appellant's hotel room, A.J. saw three (3) other males sitting inside").

The State further asserts that "[a]fter the incident, A.J. took the elevator downstairs to the casino level where he ***immediately*** went to hotel security and

reported the entire incident." State's Answering Brief p. 8 ¶ 4 (emphasis added). However, this contention is belied by the evidence of record, which shows that A.J. only *belatedly* conveyed his allegations to hotel security.

Moreover – and as the State expressly concedes – "[a]t trial, A.J. admitted that when he subsequently spoke to Las Vegas Metropolitan Police (LVMPD") detectives summoned by security, he told them a ***different*** story than what he told security at the hotel," State's Answering Brief p. 9 ¶ 2. Indeed, as it must, the State expressly admits that A.J. blatantly lied in very significant respects to investigating detectives; falsely telling them that "Appellant [forcibly] ***pulled him*** inside his hotel room," (State's Answering Brief p. 9 ¶ 2), and that "he . . . never actually smoked any weed." *Id.* (emphasis added).

While the State further points out that "[t]he results of his [medical] examination revealed that A.J. had suffered blunt force trauma . . . . [involving] rectal trauma and tears, which were consistent with a penis being ***forced*** inside his anus," (State's Answering Brief p. 10 ¶ 3), the State fails to point out, in fairness, that, by the same token, the evidence did *not* show that, conversely, such trauma could *not* also have been caused by *consensual* penetration under circumstances where, as here, an adult male sexually penetrates the anus of a 13 year old boy (emphasis added).

Similarly, although the State further points out that A.J. "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," (*id.*), the State further fails to point out, in fairness, that the evidence did *not* show that, conversely, such trauma could *not* also have been caused by *consensual* sexual activity under the above-described circumstances, applicable here.

And the State expressly acknowledges that, during a post-arrest custodial interview, "Appellant . . . ***admitted*** that he did in fact put his penis into both A.J.'s anus and mouth" – insisting however that, consistent with A.J.'s admittedly express previous agreement, he did so with A.J.'s consent. State's Answering Brief p. 10 ¶ 1 (emphasis added). *See also, id.* at p. 23 ¶ 2 ("Appellant himself ***admitted*** to putting his penis into both A.J.'s mouth and anus") (emphasis added).

## II.

## THE STATE DOES NOT CHALLENGE APPELLANT'S ARGUMENT THAT THE DISTRICT COURT HAD CORRECTLY DETERMINED THAT DEFENSE COUNSEL DID IN FACT FAIL TO RENDER EFFECTIVE ASSISTANCE TO APPELLANT AT TRIAL, WHICH SILENCE ON THE PART OF THE STATE SHOULD BE DEEMED A CONCESSION BY APPROPRIATE CONFESSION OF ERROR UNDER THE CIRCUMSTANCES OF THIS CASE.

As the State expressly and *repeatedly* acknowledges no less than 11 times: "Following the evidentiary hearing, the district court found . . . [i]n its Order . . . [that] trial counsel [was in fact] ***ineffective*** for failing to [request and] consult with his client regarding the [the advisability of providing the jury with an instruction regarding the] lesser-related offense of Statutory Sexual Seduction." [3] State's Answering Brief p. 16 ¶ 3 (emphasis added). [4]

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[3] *See also, id.* at p. 11 ¶ 2 ("The district court found that trial counsel was ineffective for failing to request a Statutory Sexual Seduction jury instruction"); *id.* at p. 12 ¶ 1 ("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"); *id.* at p. 16 ¶ 3 ("Following the evidentiary hearing, the district court found that trial counsel, Don Chairez, Esq., was ineffective . . . . for failing to consult with his client regarding the lesser-related offense of Statutory Sexual Seduction"); *id.* at p. 18 ¶ 2 ("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"); State's Answering Brief p. 19 ¶ 3 ("the district court found that counsel was ineffective for failing to request the jury instruction of Statutory Sexual Seduction"); *id.* at p. 21 ¶ 3 ("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"); *id.* ("the district court determined that . . . there was a deficient performance by trial counsel"); *id.* at p. 23 ¶ 3 ("the district court found that counsel was ineffective"); *id.* at p. 25 ¶ 1 ("the district court found that trial counsel was ineffective"); *id.* at p.

However. the State offers no challenge, or indeed, any response whatsoever to Appellant's argument that this determination by the trial court was correct – a critical argument in this appeal to which Appellant devoted detailed discussion in 8 pages of his 22-page Opening Brief. *See* Appellant's Opening Brief pp. 7-12, 15-16.

Rule 31(d)(2) of the Nevada Rules of Appellate Procedure ("NRAP") provides, in pertinent part: "If a respondent fails to file an answering brief, respondent will not be heard at oral argument except by permission of the court. The failure of respondent to file a brief may be treated by the court as a confession of error and appropriate disposition of the appeal thereafter made." And while the foregoing Rule is couched in language addressed to the failure of a respondent on

——————————— (continued)

25 ¶ 1 ("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").

[4] In 2012, NRS § 200.364(5) defined the lesser offense of Statutory Sexual Seduction as:

> "(a) ***Ordinary*** 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).

appeal to file any answering brief at all, in an appropriate case, the interpretive jurisprudence of this Court also applies the "confession of error" concept on an issue-by-issue basis. And Appellant respectfully submits that, with respect to this issue, this is just such an appropriate case.

Thus, as this Court explained in *Polk v. State,* 126 Nev. 180, 184-86, 233 P.3d 357, 359-60 (2010), reconsideration en banc denied Sept. 3, 2010:

> NRAP 31(d)(2) is a discretionary rule providing that if a respondent fails to file an adequate response to an appeal, this court may preclude that respondent from participating at oral argument ***and consider the failure to respond as a confession of error***. . . .
>
> We have routinely invoked our discretion and enforced NRAP 31(d) when no answering brief has been filed. *See County Comm'rs v. Las Vegas Discount Golf,* 110 Nev. 567, 569–70, 875 P.2d 1045, 1046 (1994); *State of Rhode Island v. Prins,* 96 Nev. 565, 566, 613 P.2d 408, 409 (1980). ***We have also determined that a party confessed error when that party's answering brief effectively failed to address a significant issue raised in the appeal.*** *See Bates v. Chronister,* 100 Nev. 675, 681–82, 691 P.2d 865, 870 (1984) (treating the respondent's ***failure to respond to the appellant's argument*** as a confession of error); *A Minor v. Mineral Co. Juv. Dep't,* 95 Nev. 248, 249, 592 P.2d 172, 173 (1979) (determining that the answering brief was ***silent on the issue in question***, resulting in a confession of error . . . .
>
> However, we have elected not to apply NRAP 31(d) on occasions when the respondent has filed a response but ***inadvertently*** failed to respond to an ***inconsequential issue*** or had a ***recognizable excuse.*** *See Hewitt v. State,* 113 Nev. 387, 392, 936 P.2d 330, 333 (1997) (concluding that even though the State failed to address all of the appellant's issues, the issues were ***meritless*** and were ***being raised for the first time on appeal***), *overruled on other grounds by Martinez v. State,* 115 Nev. 9, 11–12, 974 P.2d 133, 134–35 (1999) . . . .

> We recognize that the State filed a lengthy answering brief addressing Polk's other issues on appeal; however, the State failed to address Polk's argument that his constitutional right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004) and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) was violated. This is a ***significant constitutional issue*** that compels a response. The issue was ***clearly raised in Polk's opening brief . . . the argument regarding it collectively consisting of approximately four pages*** . . . .
>
> Accordingly, we grant Polk's oral motion to exclude the State's oral argument on the Crawford and Melendez–Diaz issues and disregard the State's argument. Because the constitutional right to confrontation under Crawford and Melendez–Diaz ***was repeatedly raised throughout the appeal, but the State failed to address or even assert that any potential violation was harmless error***, we invoke our authority under NRAP 31(d) ***and consider the State's silence to be a confession of error on this issue.***

(Emphasis added.) *See also, United States v. Rodriguez,* 880 F.3d 1151, 1163 (9th Cir. 2018) ("when the government fails to argue harmlessness, we deem the issue waived and do not consider the harmlessness of any errors we find"); *Brooks v. Nevada Legislature,* 129 Nev. 1101 *1 (2013) (Unpublished Disposition) ("The failure to respond to a point properly raised by an appellate opponent can, in a proper case, amount to a confession of error"); *Toston v. State,* 128 Nev. 940 *2, 381 P.3d 670 *2 (2012) (Unpublished Disposition) ("Because the State failed to address or even assert that the error was harmless, we are constrained to reverse Toston's conviction"); *Kernan v. State,* 460 P.3d 998 *8 (Nev. App. 2020) (Unpublished Disposition) ("the State does not argue that any errors committed by the district court were harmless. Accordingly, we are constrained to find they were

not harmless individually and collectively"); *Natco v. State,* 134 Nev. 841, 846 n.6, 435 P.3d 680, 683 n.6 (Nev. App. 2018) ("because the State failed to argue harmless error after Natco alleged reversible error by the district court, the State waived its argument that harmless error applies. *Polk,* 126 Nev. at 183 n.2, 233 P.3d at 359 n.2 ('[A respondent] who fails to include and properly argue a contention in the [respondent's] brief takes the risk that the court will view the contention as forfeited')").

## III.

## APPELLANT WAS PREJUDICED BY TRIAL COUNSEL'S FAILURE TO RENDER EFFECTIVE ASSISTANCE.

As the State correctly points out, *Strickland* requires that, in order to prevail on a claim of ineffective assistance of counsel, an accused must suffer "prejudice" attributable to "a reasonable probability that, but for counsel's errors, the result of the trial would have been different" – meaning "a probability ***sufficient to undermine confidence in the outcome.***" 466 U.S. at 687-89, 694. State's Answering Brief p. 15 ¶ 3 – p. 16 ¶ 1 (emphasis added). *See Kirksey v. State,* 112 Nev. 980, 923 P.2d 1102 (1996). However, Appellant respectfully submits that both the State and the District Court have erroneously come to the conclusion that such prejudice is absent in this case.

A.

**Absence Of Prejudice Is Not Shown By The Jury's Verdict As To Lewdness With A Minor.**

The State asserts that "even if there was a deficient performance by trial counsel [who failed to request, after appropriate discussion with his client, a lesser-related jury instruction with respect to the offense of Statutory Sexual Seduction], Appellant was not prejudiced [thereby] ***because the jury chose to convict him 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***." State's Answering Brief p. 15 ¶ 3 (emphasis added).[5]

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[5] Pursuant to NRS § 200.230:

> "1. A person is guilty of lewdness with a child if he or she:
> (a) Is 18 years of age or older and ***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 16 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child;
> . . . .
> 3. Except as otherwise provided in subsections 4 and 5, a person who commits lewdness with a child under the age of 14 years is guilty of a category A felony and ***shall*** be punished 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***, and may be further punished by a fine of not more than $10,000."

(Emphasis added).

Thus, under the above-quoted provisions of NRS 200.230(1)(a), Lewdness with a Child Under the Age of 14 Years may *not* be based on "***acts constituting***

This is a *non sequitur*. Indeed, the lesser offense of Lewdness with a Child Under the Age of 14 is a patently inapt comparative measure of the efficacy of an instruction regarding the lesser related offense of Statutory Sexual Seduction under the law in effect at the time of the offenses alleged in this case; which, as difficult an intellectually gymnastic task as it may well be, must nonetheless be reconciled here in order to satisfy the constitutional imperatives of due process and the *ex post facto* prohibition. For under the incongruous statutory scheme in force in 2012, (which was since repealed and replaced by the Nevada Legislature in 2015), the consensual sexual penetration of a child under the age of 14 years was, at that time, *both* a crime (under the Statutory Sexual Seduction statute) and *not* a crime (under the Sexual Assault statute).

Thus, in order to convict an accused of Sexual Assault, the jury must find that *force* was employed against the will of the victim, whereas, in contradistinction, under the text of NRS 200.230(1)(a), Lewdness with a Child Under the Age of 14 may *not* be based on "***acts constituting the crime of sexual***

---

(continued)

***the crime of sexual assault***" (emphasis added). And therefore – if based upon an act of sexual penetration, that penetration *must* be *consensual*.

Furthermore, in former textual contradistinction to *both* Sexual Assault and Statutory Sexual Seduction – *if based upon an act of consensual sexual penetration* – that the act of penetration in question be undertaken *both* "***willfully and lewdly***" were essential textual elements of the offense of Lewdness with a Child Under the Age of 14 Years (emphasis added).

***assault***" (emphasis added). Therefore – *if based upon an act of sexual penetration* – that penetration, like the sexual penetration textually contemplated by the former Statutory Sexual Seduction statute at issue here *must* be *consensual.* And accordingly, the State's foregoing argument has no logical comparative bearing whatsoever upon the efficacy that a Statutory Sexual Seduction instruction may have had in this case.

Furthermore, Lewdness with a Child Under the Age of 14 is *not* a lesser-included offense subsumed within the greater offense of Sexual Assault with a Minor Under Fourteen Years of Age under the "elements test" of *Blockburger v. United States,* 284 U.S. 299 (1932) applied in this jurisdiction. *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). And this is simply because here, the greater offense of Sexual Assault does not include all of the elements of the lesser offense of Lewdness with a Child Under the Age of 14. *Id.* 117 Nev. at 690, 30 P.3d at 1106.

**B.**

**Absence Of Prejudice Is Not Shown By An Alternative Inability To Avoid Foreclosure Of Complete Exoneration On The Facts Of This Case.**

Appellant wholeheartedly agrees with the State's observation that "[i]n 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***" State's Answering Brief p. 15 ¶ 2 (citing *Strickland*, 466 U.S. at 690) (emphasis added). *See also,* State's Answering Brief p. 14 ¶ 3 ("the role of a court in considering allegations of ineffective assistance of counsel is . . .'to determine whether, ***under the particular facts and circumstances of the case***, trial counsel failed to render reasonably effective assistance'") (quoting *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978)) (emphasis added).

Here, the State contends that Appellant's complete exoneration at trial was very highly unlikely. Appellant also wholeheartedly agrees with this proposition.

Thus, the State argues that the evidence against Appellant was so insurmountable as to preclude his complete exoneration by the jury:

> "[T]here 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. 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. 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. 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. 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."

State's Answering Brief p. 24 ¶ 2 (emphasis added).

However, this is one case in which a prosecutorial argument that there was overwhelming evidence against an accused actually cuts *against* the State. And this is because it bolsters the point that the foreclosure of the highly unlikely complete exoneration of Appellant at jury trial – which a Statutory Sexual Seduction instruction may well have necessitated – does not excuse the failure to seek a Statutory Sexual Seduction instruction under the particular facts and circumstances of this case, as both the State and the District Court presuppose.

Thus, in view of the weight of the evidence and the factual circumstances of the case at bar, combined with the fact that, *at the time of the events in question*, consensual penetration of a minor was – *simultaneously* – *both* a crime and *not* a crime under *co-existing* statutes, Appellant respectfully submits that the only option providing him with a realistic opportunity to obtain the best result would have been to give the jury the option to elect between two guilty verdicts – one of Sexual Assault, if they found the use of force was brought to bear, and one of Statutory Sexual Seduction, if they found consent; and thereby forego the very unlikely option, in any case, of a complete exoneration. For at least the jury would have been aware of their option to find Appellant guilty of the lesser related offense. *Contrast, Guitron v. State of Nevada,* 409 P.3d 890 *1 (2018) ("Trial counsel presented evidence that the victim was knowledgeable about sex and understood the consequences of her actions, argued this issue in closing argument,

and advocated the theory that the victim's consent rendered Guitron's conduct statutory sexual seduction, rather than the sexual assault of a minor under 14 years of age. *Guitron v. State,* 131 Nev. Adv. Op. 27, 350 P.3d 93, 102 (Ct. App. 2015) . The record thus belies Guitron's claim that trial counsel did not challenge the State's theory"). Appellant respectfully submits that this course of action would have taken a complete exoneration off the table, and therefore would have been more likely to encourage the jury to find consent on these facts – which was Appellant's only hope and was hardly belied or repelled by the record – and would have resulted in a far greater chance for Appellant to avoid the very draconian, mandatory minimum 35 year sentence of imprisonment he is now serving.

This would of course be contingent upon the Appellant's unqualified consent after receiving effective consultation by counsel, and a proper canvass and admonition by the Court. While this is certainly a novel solution to be sure, it would have been a prudent course, and Appellant should have been given this option after thinking the matter through with court and counsel. For indeed, under these circumstances, his best result would be the functional equivalent of a guilty plea to Statutory Sexual Seduction. But in his present predicament, the undersigned counsel suspect that he would, and should, have welcomed an opportunity to consider it.

## 5.

## CONCLUSION

**WHEREFORE**, for all the foregoing reasons, Petitioner/Appellant MAZEN ALOTAIBI respectfully prays that this Honorable Court reverse the Decision and Order of the Eighth Judicial District Court, Clark County, Nevada, the Honorable Stefany Miley, denying Appellant's Petition for Post-Conviction Writ of Habeas Corpus; grant him a new trial in this matter with respect to Counts 3 and 5 of the Second Amended Information on file; and grant him such further and other relief as the Court deems fair and just in the premises.

Respectfully submitted this 20th day of May, 2020.

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## CERTIFICATE OF COMPLIANCE

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

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

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

Proportionally spaced, has a typeface of 14 points or more, and contains 5,380 words, and does not exceed the 30 page limit.

Finally, I hereby certify that I have read this Reply 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 20th day of May, 2020.

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## CERTIFICATE OF MAILING

The undersigned, an employee of Clark Hill PLLC, hereby certifies that on the 20th day of May, 2020, I served a copy of **APPELLANT'S AMENDED REPLY BRIEF**, by electronic means:

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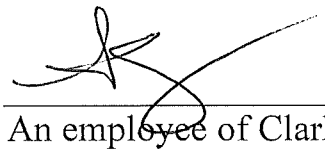

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