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IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MAZEN ALOTAIBI,

Appellant,

vs. No. 79752-COA

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

Respondents.

_____/

APPELLANT'S PETITION FOR REHEARING

Pursuant to Rule 40 of the Nevada Rules of Appellate Procedure ("NRAP"), MAZEN ALOTAIBI, Petitioner/Appellant in the above-entitled matter ("Appellant"), by and through his attorneys of record, DOMINIC P. GENTILE, ESQ., and VINCENT SAVARESE III, ESQ., of the law firm of CLARK HILL,

PLLC, hereby respectfully petitions this Honorable Court for rehearing with respect to its *Order of Affirmance*, filed in this matter on October 16, 2020.

1.
TIMELINESS OF PETITION

This Court's *Order of Affirmance* was filed in this matter on October 16, 2020. And accordingly, this Petition for Rehearing is timely filed in accordance with NRAP 40(a)(1).

2.
THE COURT'S ORDER OF AFFIRMANCE

This Court's *Order of Affirmance* should be re-heard because it denies post-conviction relief while leaving *intact* the District Court's conclusion that trial counsel provided ineffective assistance of counsel. More particularly, trial counsel failed to meaningfully advise and consult Appellant regarding the option of requesting the lesser-related offense jury instruction offered by the district court with respect to Statutory Sexual Seduction, and failed to obtain Appellant's informed, express consent to a waiver thereof. Thus, in this case, both this Court and the District Court have agreed that trial counsel failed to render the effective assistance of counsel guaranteed to Appellant by the Sixth Amendment to the Constitution of the United States (and Article 1, Sec. 8(1) of the Constitution of the State of Nevada) under the standard prescribed by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984) and adopted by the Nevada Supreme Court in *Warden v. Lyons*,

100 Nev. 430, 683 dgP.2d 504 (1984). *Order of Affirmance* (App. Item 1, Bates 001-002). [1]

However, in affirming the District Court's denial of Appellant's application for post-conviction writ relief as to those counts (3 and 5) of the Second Amended Information (alleging Sexual Assault of a Minor Under The Age Of 14 Years), this Court, in its *Order of Affirmance*, found that "[a]t the evidentiary hearing conducted in this matter, Alotaibi did not present evidence regarding whether he would have agreed to request such an instruction. Thus, Alotaibi did not demonstrate by a preponderance of the evidence that he would have agreed to request such an instruction. Therefore, he did not demonstrate a reasonable probability of a different outcome at trial [*i.e.* prejudice] but for counsel's failure to discuss this issue with him" as required under the *Strickland* standard. *Order of Affirmance* (App. Item 1, Bates 002) p. 2.

Finding no other deficiency in Appellant's post-conviction challenge, this is the *exclusive* and *singular* predicate basis upon which this Court has affirmed the

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[1] Nor does this Court quarrel with Appellant's "argu[ment] [that] his trial counsel was ineffective for failing to ***discuss*** with him whether they should have requested a jury instruction for a lesser-related offense [with respect to Statutory Sexual Seduction]." *Order of Affirmance* (App. Item 1) p. 2. [References herein to Appellant's Appendix to this Petition for Rehearing are designated thusly: "(App. Item ___, Bates ___)."]

District Court's denial of Appellant's Petition for post-conviction writ relief. *See Order of Affirmance* (App. Item 1, Bates 001-002).

Respectfully, Appellant submits that this conclusion is not well founded in law and that this Court has thereby overlooked, misapplied or failed to consider existing law. Appellant therefore respectfully requests rehearing in order to render substantial justice in the case at bar. *Bahena v. Goodyear Tire & Rubber Co.,* 126 Nev. 606, 608-09, 45 P.3d 1182, 1183-84 (2010).

3.
ARGUMENT

THE COURT'S ORDER OF AFFIRMANCE OVERLOOKS OR MISAPPREHENDS MATERIAL FACT AND LAW, IS NOT SUPPORTED BY JUDICIAL PRECEDENT, AND THEREFORE, APPELLANT SHOULD BE GRANTED REHEARING IN THIS CASE.

A.
The Court's Order Of Affirmance Is Not Supported By Judicial Precedent.

Counsel for Appellant, after performing arduous and thorough legal research via Westlaw and Lexis on the issue after the entry of this Court's *Order of Affirmance,* is aware of no judicial precedent requiring that, in order to demonstrate a reasonable probability of a different outcome at trial [*i.e.* prejudice] as required under the *Strickland* standard, Appellant must "present evidence . . . . [and] demonstrate by a preponderance of the evidence that he ***would have agreed*** to request such an [applicable jury] instruction [that counsel purported to unilaterally waive]." *Order of Affirmance* p. 2 (App. Item 1, Bates 002) (emphasis added).

More to the point, it is *undisputed* that counsel failed to meaningfully consult and advise his client, or indeed even "discuss" the issue with him, or procure his client's personal consent to a waiver of the instruction (as trial counsel was expressly directed to do by the District Court), and ample evidence was presented at the evidentiary hearing that Appellant did not *understand* the substantive and procedural nuances, implications, and ramifications attendant to the decision whether to request or waive the lesser-related offense instruction at issue. And Appellant respectfully submits that this Court's current ruling improperly engrafts upon the *Strickland/Lyons* tests a heretofore non-existent element of proof of ineffective assistance. The result here is that Appellant is now serving a minimum mandatory sentence of thirty-five years in prison before parole eligibility.

This newly created requirement begs the question of whether this Court really believes that the answer from anyone similarly situated to Appellant, after full discussion with post-conviction counsel, to the question: "Had you known what trial counsel did not tell you, would you have availed yourself of the opportunity to be convicted of a crime that did not carry a thirty-five year mandatory minimum and sought the jury instruction?" would be "no I wouldn't have"? First, anytime one is asked the question "what would you have done?" the answer is necessarily speculative. Additionally, how much weight does the answer: "I absolutely would have" carry from a person seeking an opportunity to avoid serving the remainder of

a thirty-five-year mandatory minimum sentence? Although it is not permissible to tell a jury that "*nobody, nobody in this country has more reason to lie than a defendant in a criminal trial*", it is certainly arguably true. *See Degren v. State,* 352 Md. 400, 429, 722 A. 2d 887, 901 (Md. 1999). That credibility question does not disappear after a defendant is convicted, sentenced and in prison. Respectfully, the value of adding the requirement of establishing at the post-conviction evidentiary hearing that Appellant, or anyone similarly situated, would have availed themselves of the option had it been known to them is illusory at best and does not serve substantial justice.

Importantly, this Court cites no supporting judicial precedent in its *Order of Affirmance* (*See* App. Item 1, Bates 001-002). The District Court neither reached any such conclusion nor cited any such precedent in its Decision and Order, denying Appellant's Petition *on other grounds* (*See* App. Item 3, Bates 022-034). The State neither made any such argument nor cited any such precedent in its Answering Brief. And Appellant therefore had no occasion to address this issue in his Reply thereto. Respectfully, it would therefore appear that this Court's post-briefing imposition of such a requirement in this case was *sua sponte,* without legal precedent and a misapplication of law.

Indeed, as the State correctly concedes in its Answering Brief at pp. 15-16, the United States Supreme Court explained in *Strickland* that a demonstration of a

reasonable probability of a different outcome at trial [*i.e.* prejudice], requires no more than "a probability ***sufficient to undermine confidence*** in the outcome." 466 U.S. at 687-89 (emphasis added). And Appellant respectfully submits that he has submitted abundant evidence to satisfy that standard without having to meet the unprecedented requirement imposed by this Court in affirming the denial of the instant Petition by the District Court.

B.

Defense Trial Counsel Unilaterally Waived The Lesser-Related Offense Instruction Without The Court Independently Canvassing Appellant To Protect His Right To A Fair Trial As Guaranteed By The Constitutions Of The United States And The State Of Nevada.

The record shows that during a videotaped post-arrest police interview on the day of his arrest in connection with this case, Appellant had expressly and candidly *conceded* that he had indeed engaged in both anal intercourse and fellatio with A.D. Recorder's Transcript of Evidentiary Hearing on Appellant's Post-Conviction Petition for Writ of Habeas Corpus in the matter entitled *Mazen Alotaibi, Plaintiff v. Renee Baker, et al.*, Case No. A-18-785145-W, before the Honorable Stefany Miley, Judge of the Eighth Judicial District Court in and for the State of Nevada, County of Clark, Dept. No. XXIII, (June 6, 2019) ("Evidentiary Hearing"), at 22:6-8, 11-14, 22:14-25—23:1, 5-13 (App. Item 2, Bates 004-007); Excerpt of Recorder's Transcript of Jury Trial Proceedings in the matter entitled *State of Nevada, Plaintiff v. Mazen Alotaibi, Defendant*, Case No. C287173-1, before the Honorable Stefany Miley,

Judge of the Eighth Judicial District Court in and for the State of Nevada, County of Clark, Dept. No. XXIII ("Excerpt of Trial Transcript"), October 16, 2013, Vol. I, pp. 82, 98-99 (App. Item 4, Bates 0035-038).

This videotape was admitted in evidence and played before the jury. Evidentiary Hearing at 23:21—24:5 (App. Item No. 2, Bates 007-008); Excerpt of Trial Transcript, March 5, 2014, Vol. I, pp. 82, 98-99 (App. Item 5, Bates 039-042). And the admission to the acts of sexual penetration contained therein was not thereafter withdrawn or denied by Appellant, who did not testify at trial. Evidentiary Hearing at 23:2-4 (App. Item 2, Bates 007).

Yet, as Appellant insisted during that same interview, A.D. had *expressly consented* to engage in these acts, as A.D. *himself* had *specifically acknowledged* during his own trial testimony—albeit claiming that he had purportedly withdrawn his consent *at the last minute*. Evidentiary Hearing at 22:14-25—23:1 (App. Item No. 2, Bates 006-007); Excerpt of Trial Transcript, March 5, 2014, Vol. I, pp. 74-80; 85 (App. Item 6, Bates 004-051.

Thus, the accusations set forth in the Sexual Assault charges contained in Counts 3 and 5 that Appellant had engaged in both oral and anal *penetration* of his minor accuser were *undisputed* by the defense at trial. And the *only* contested issue at trial was therefore whether those penetrations were or were not consented to by Appellant's accuser. And the accuser's consent was the *singular* theory of defense

presented to the jury. Evidentiary Hearing at 23:17, 24:22—25:3 (App. Item 2, Bates 007, 008-009).[2]

At the time of the events in question in this case in 2012, the then-applicable provisions of the Sexual Assault statute with which Appellant was charged in Counts 3 and 5 of the Second Amended Information provided in pertinent part: "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*** . . . is guilty of sexual assault." Nevada Revised Statutes ("NRS") § 200.366(1) (emphasis added). And pursuant to its sentencing provisions: "If the

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[2] However, with respect to A.D.'s claim of purported last minute withdrawal of consent, Appellant would respectfully request that the Court consider as probative facts of record that he also admitted during his trial testimony that, on the day of the events in question, he had *willfully lied* to the police about his express agreement to voluntarily engage in sexual activity with Appellant; *falsely represented* to them that he had not previously smoked marijuana with Appellant outside the Circus Circus Hotel; and *falsely represented* to them that Appellant had essentially kidnapped him and dragged him to Appellant's hotel room *for the purpose of deliberately misleading investigators*. Excerpt of Trial Transcript, March 5, 2014, Vol. I, pp. 75 (App. Item 7, Bates 052-053). Indeed, A.D. *personally acknowledged* at trial under oath during his own testimony before the jury that—*consistent with Appellant's version of events*—he had *deliberately lied* to the police when he denied to them that he had in fact smoked marijuana with Appellant outside the Circus Circus Hotel; that he had in fact *expressly agreed* to engage in sexual activity with Appellant in exchange for money and more marijuana; and that he had in fact *voluntarily accompanied Appellant to Appellant's hotel room for that specific purpose*. Excerpt of Trial Transcript, March 5, 2014, Vol. I, pp. 22; 32; 46-49; 88; 99 (App. Item 8, Bates 055-062).

crime is committed against a child under the age of 14 years and does not result in substantial bodily harm to the child, [is punishable] ***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.***" NRS § 200.366 (3)(c) (emphasis added).

In contradistinction, the provisions of the Statutory Sexual Seduction statute in force and effect at that time defined Statutory Sexual Seduction as: "***Ordinary*** [*i.e.*, consensual] 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, [NRS § 200.364(5)(a)]; or [a]ny 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." NRS § 200.364(5)(b) (emphasis added). And at the time of trial, a person convicted of that offense, who, like Appellant, was 21 years of age or older, was punishable by the considerably less onerous "minimum term [of imprisonment] of not less than 1 year and ***a maximum term of not more than 5 years***." NRS § 200.368(1); NRS 193.130(2)(c) (emphasis added).[3]

[3] However, as trial counsel testified at the evidentiary hearing on the instant Petition, he *erroneously* believed that a conviction on Statutory Sexual Seduction was punishable by a term of up to ***TEN (10)*** years imprisonment. Evidentiary Hearing at 34:21-25 (App. Item 2, Bates 016; 017; 019). And accordingly, that is what he *erroneously* told Appellant. *Id.* at 35:10-12, 37:2-5 (App. Item 2, Bates 017, 019).

Thus, under the statutory scheme then in effect, while consent was a *complete defense* to a charge of Sexual Assault, the return of a guilty verdict with respect to that crime where the victim was a minor under the age of 14 years required the court to impose a sentence of life imprisonment with parole eligibility precluded until a minimum mandatory period of 35 years had been served. Whereas, by contrast—neither consent (nor intoxication) constituted a *defense* to a charge of Statutory Sexual Seduction, but the return of a guilty verdict with respect to that offense *was only punishable by a very considerably lesser maximum term of 5 years of imprisonment.* Evidentiary Hearing (App. Item 2, Bates 010, 011) at 26:16-23, 27:7-11.[4]

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[4] As our Supreme Court observed in its opinion on direct appeal in this case:

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

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

The same is true with respect to the analysis contained in this Petition.

And therefore—as trial counsel has acknowledged—he was *aware* that if provided with a Statutory Sexual Seduction instruction, the jury would apprehend that, if they determined that Appellant's admitted sexual penetrations of A.D. were in fact *consented to* by his minor accuser, *he would not simply walk free as required by the Sexual Assault statute*. But rather, they would apprehend that they had the option of finding Appellant guilty of that lesser-related offense. Evidentiary Hearing at 27:12-16 (App. Item 2, Bates 011).

Accordingly, following the close of evidence, during discussion regarding jury instructions with counsel for the parties outside the presence of the jury, the District Court invited defense trial counsel to request a jury instruction with respect to the lesser-related offense of Statutory Sexual Seduction under the then-applicable provisions of NRS § 200.364 to offset the charges of Sexual Assault With a Minor Under 14 Years of Age contained in Counts 3 and 5, *expressly observing that there was indeed evidence of record that A.D. had in fact 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.* Evidentiary Hearing at 26:3-15, 28:22—29:1, 38:16-17 (App. Item 2, Bates 010, 012-013, 020); Excerpt of Trial Transcript, March 5, 2014, Vol. I, pp. 16-17 (App. Item 9, Bates 064-065. In fact, as trial counsel testified at the Evidentiary Hearing on the instant Petition, it was his contemporaneous, in-person impression that the District

Court was essentially "***pleading***" with him to do so. Evidentiary Hearing at 26:3-15, 28:22—29:1, 38:16-17 (App. Item 2, Bates 010-014, 020) (emphasis added).

Nevertheless, trial counsel resisted, and insisted on "throwing caution to the wind" and pursuing an "all or nothing" instruction strategy. *Id.* at 26:3-15, 38:16-17 (App. Item 2, Bates 010, 020). Whereupon the trial court directed trial counsel to spend the ensuing lunch hour with Appellant; advise him with respect to every instruction to be given to the jury; *ensure that he understood the sentencing ramifications of waiving or requesting a lesser-related offense instruction with respect to Statutory Sexual Seduction*; and *obtain Appellant's informed consent to forego such a jury instruction. Id.* at 31:11-14 (App. Item 2, Bates 014).

Trial counsel then met with Appellant for 1.25 hours over the lunch break. Evidentiary Hearing at 31:11-14 (App. Item 2, Bates 014). However, all but 15 minutes of that time was consumed discussing whether Appellant should testify in his own defense. Evidentiary Hearing at 32:7-22 (App. Item 2, Bates 015).

And during that time, trial counsel—who was *aware* that Appellant did not comprehend the lesser-related offense concept or the distinctions between the two offenses, (*id.* at 38:24—39:1(App. Item 2, Bates 020, 021) —did not explain to Appellant—a Saudi Arabian citizen unfamiliar with American legal concepts, (*Id.* at 39:2-3 (App. Item 2, Bates 021))—the sentencing differences between the crime of Sexual Assault and the lesser-related offense of Statutory Sexual Seduction. *Id.* at

34:14-19, 35:5-6 (App. Item 2, Bates 016, 017). He did not "even bother to try" to make Appellant understand the ramifications of the distinctions between the two offenses and the decision as to whether to waive or request a lesser-related offense instruction regarding Statutory Sexual Seduction. *Id.* at 37:18-22 (App. Item 2, Bates 019). And he did *not* obtain Appellant's informed consent to a waiver thereof. *Id.* at 35:21—36:5 (App. Item 2, Bates 017, 018).

When the trial court thereafter inquired of defense counsel as to whether the court's foregoing directives had in fact been carried out, defense counsel acknowledged in open court and on the record that they had *not*. *Id.* at 36-37; 28-40 (App. Item 10, Bates 067-068; 070-079). And counsel specifically advised the court on the record that Appellant did not *understand* the legal distinctions between the crime of Sexual Assault Of A Minor and the lesser-related offense of Statutory Sexual Seduction and the implications and ramifications attendant to the decision whether to waive or request a jury instruction with respect thereto; that he had failed to conduct a meaningful consultation with Appellant with respect thereto, (Evidentiary Hearing at 36-37; 28-40 (App. Item 11, Bates 081-082; 084-093)), and that he had failed to obtain Appellant's consent to a waiver of a lesser-related offense instruction with respect to Statutory Sexual Seduction. *Id.*

Notwithstanding the foregoing, trial counsel thereupon purported to unilaterally decline the trial court's invitation to request a lesser-related offense jury

instruction regarding Statutory Sexual Seduction—***"knowing that [Appellant] didn't understand,"*** (Evidentiary Hearing at 38:24—39:1 (App. Item 2, Bates 020-021) - (emphasis added)—*without first requesting that the court conduct an independent canvass of Appellant with respect thereto in order to protect Appellant's right to a fair trial* 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. *Nor did the trial court do so sua sponte. Id.* at 20-32 (App. Item 12, Bates 095-107).

As the United States Supreme Court emphasized in *Lockhart v. Fretwell,* 506 U.S. 364, 368-69 (1993): "the right to the effective assistance of counsel is recognized . . . ***because of the effect it has on the ability of the accused to receive a fair trial*** . . . [and] ***on the reliability of the trial process.***" And Appellant respectfully submits that where, as here, the *undisputed* evidence clearly shows that the waiver of a critical jury instruction is undertaken vicariously by counsel on purported behalf of an accused who, like Appellant in this case, lacks *understanding*, the right to a *fair trial* has been compromised and a new trial is required. *See e.g., State v. Valdez,* 124 Nev. 1172, 196 P.3d 465 (2008) (new trial required where there is a "reasonable probability" and corresponding "constitutional danger" that the defendant's right to a fair trial may have affected the verdict).

4.

CONCLUSION

Had the district court instructed the jury on both the primary and lesser related offenses, the jury could have convicted Appellant of either offense based upon the conflicting evidence of consent. Thus, in this case, the jury could have simply resolved the conflicting evidence regarding consent by convicting him of Statutory Sexual Seduction—an offense where consent was not relevant. Appellant was prejudiced by his counsel unilaterally denying him that option and confidence in the outcome of the trial is absent without the jury having been provided with that option.

THEREFORE, for all the foregoing reasons, Petitioner/Appellant MAZEN ALOTAIBI respectfully prays that this Honorable Court reconsider its *Order of Affirmance* filed in this matter on October 16, 2020; vacate the Decision and Order of the District Court denying his post-conviction petition for writ of habeas corpus; and grant him a new trial as to Counts 3 and 5 of the Second Amended Information.

However, this Court, by engrafting a heretofore absent element of establishing prejudice from ineffective assistance of counsel, has now raised another alternative; it should remand to the District Court with directions to take further evidence on the question of whether Appellant would have opted for the lesser related offense

instruction had he been provided with the information which trial counsel failed to make known to him on that issue.

Respectfully submitted this 2nd day of November, 2020.

CLARK HILL, PLLC

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 40 and 40A

1. I hereby certify that this Petition for Rehearing 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:

[**X**] It has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 font size and Times New Roman; or

[ ] It has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

[**X**] Proportionately spaced, has a typeface of 14 points or more, and contains **4,454** words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

[ ] Does not exceed 10 pages.

Dated this 2nd day of November, 2020.

CLARK HILL PLLC

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Attorneys for Appellant, Mazen Alotaibi

CERTIFICATE OF SERVICE

I, hereby certify and affirm that the foregoing **APPELLANT'S PETITION FOR REHEARING**, was filed electronically with the Nevada Supreme Court on the 3 day of November, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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An employee of
CLARK HILL PLLC

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MAZEN ALOTAIBI,

Appellant,

vs. No. 79752-COA

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

Respondents.

_____/

APPENDIX TO APPELLANT'S PETITION FOR REHEARING

INDEX

App. Item 1

App. Item 1

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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Respondents.

No. 79752-COA

FILED

OCT 16 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

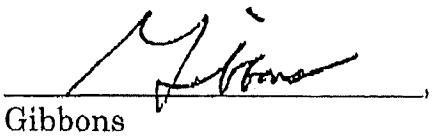
ORDER OF AFFIRMANCE

Mazen Alotaibi appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

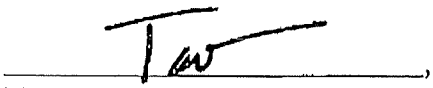
Alotaibi argues the district court erred by denying his claim of ineffective assistance of counsel raised in his November 28, 2018, postconviction petition for a writ of habeas corpus and supplement. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 687, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

Alotaibi argued his trial counsel was ineffective for failing to discuss with him whether they should have requested a jury instruction for a lesser-related offense. At the evidentiary hearing conducted in this matter, Alotaibi did not present evidence regarding whether he would have agreed to request such an instruction. Thus, Alotaibi did not demonstrate by a preponderance of the evidence that he would have agreed to request such an instruction. Therefore, he did not demonstrate a reasonable probability of a different outcome at trial but for counsel's failure to discuss this issue with him. Accordingly, we conclude the district court did not err by denying this claim, and we

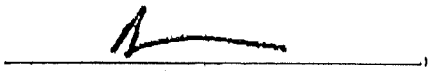
ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Bulla

cc: Hon. Stefany Miley, District Judge
Clark Hill PLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

App. Item 2

App. Item 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

MAZEN ALOTAIBI, Plaintiff, vs. RENEE BAKER, ET AL., Defendants.	CASE#: A-18-785145-W DEPT. XXIII

BEFORE THE HONORABLE STEFANY MILEY,
DISTRICT COURT JUDGE

THURSDAY, JUNE 6, 2019

RECORDER'S TRANSCRIPT OF PROCEEDINGS
PETITION FOR WRIT OF HABEAS CORPUS
EVIDENTIARY HEARING

APPEARANCES:

For the Plaintiff: DOMINIC P. GENTILE, ESQ.

For the Defendants: CHARLES W. THOMAN, ESQ.
Chief Deputy District Attorney
JOSHUA J. PRINCE, ESQ.
Deputy District Attorney

RECORDED BY: MARIA GARIBAY, COURT RECORDER

sir. There's certain things that you -- your attorney may have to go into in representing you that are part of the attorney-client privilege and particularly with respect to Mr. --

THE CLERK: Chairez.

THE COURT: -- Chairez. I'm sorry, I just blanked on his name. And what I'm asking is, and Mr. Chairez will need to know, that you waive your attorney-client privilege just for the purposes of this hearing. And it would only be waived with respect to what comes up during the course of the hearing. Anything that you've talked about other than what comes up in the hearing is not waived.

THE PLAINTIFF: (Indiscernible) --

THE COURT: All right. Thank you.

Do we have Mr. Chairez here?

MR. GENTILE: He's in the hallway. Yes.

THE COURT: Oh, I didn't even see you there.

MR. GENTILE: Oh. There you go.

THE COURT: I'm sorry, I didn't even see you sitting there and then I blanked on your name, I apologize.

All right. Is there anything we need to address before we start?

MR. GENTILE: Other than that I don't think so.

THE COURT: All right. You want to call Mr. Chairez up first?

MR. GENTILE: Mr. Chairez.

It would be easier for me to question him from the --

THE COURT: You can stand wherever you're comfortable.

help find a job for my wife. I said of course. So I sent my resume to the Clark County District Attorney's Office and within a few days Bill Coop [phonetic], who was the chief criminal deputy, called me and asked me how soon would I be able to come and work here.

Q And when did you come down to Clark County --

A August --

Q -- to work for the Clark County District Attorney?

A August 27, 1990.

Q How long did you do that? Oh wait, before we go there, what were your duties at the Clark County District Attorney's Office?

A Well essentially at that time -- and remember in the 1990s Vegas was growing like super super heavy duty growth so we would spend I think two weeks in justice court we would do preliminary hearings. We had to subpoena 10 to 15 preliminary hearings and we'd be down in justice court on two days. Then the following weeks you'd be in district court and again, you're subpoena in 8 to 10 cases and so you would do sentencings, you would do pleas and if you got lucky, you get to do a trial.

Q How long did you do that?

A I did that till April the 1st, 1994.

Q And what happened then?

A Bob Miller appointed me a district court judge.

Q Was Bob Miller the Governor at the time?

A He was.

Q Okay. And how long did you remain on the district court

That's what I remember. I mean I saw the jury verdict I saw coercion. I don't remember that being charged, but it could have been.

Q Prior to going to trial, I take it you received discovery in this case?

A Yes.

Q What do you recall having received as discovery in this case?

A Well, there was a video of Mazen having a confession with a police detective. There were statements by AJ, there were statements by security at Circus Circus. At that point, yeah, that was the initial discovery.

Q And with regard to that video, do you recall when that video was created with regard to how close in time to Mr. Alotaibi having been arrested in this case?

A I believe it was the same day that it was created --

Q And with regard to the content of that video, and the Court's well aware of it, but for purposes of today, what do you recall about the content of that video?

A Well, to me it seemed, especially since I had had conversations with Mazen, that on the video it showed he was clearly intoxicated even three to six hours after he was arrested. So --

Q What about with regard to anything he said about the act or acts that were at the foundation of the charges?

A Well, he -- he did not deny them, but he said the boy consented.

Q So he conceded the acts?

A Yes he did.

Q All right. And did that always remain the same in terms of all way through the trial?

A Yes.

Q He conceded having anal and -- anal intercourse and fellatio with this 13-year-old boy?

A That's correct.

Q From the moment that he was on that videotape the night of his arrest?

A Correct.

Q Okay.

A The day of his arrest.

Q The date of his arrest, I'm --

A He was arrested in the morning.

Q Okay. Sorry. When this case went to trial, what was -- what were the contested issues?

A Whether or not the young boy had consented to having sex with Mazen, that was the issue.

Q Was the question of intoxication ever really at issue in terms of not necessarily the -- the degree of intoxication, but intoxication?

A Well it was and I think and I don't recall perfectly, but we might -- we may have tried to keep the videotape out, but it was one of those things you play the cards that you were dealt and one of the issues we used was whether or not Mazen spoke enough English and whether or not he was intoxicated. So we did play the video for the Judge. She

believed Mazen spoke enough English and she believed that at that time Mazen was not so intoxicated that he wasn't voluntarily conceding -- that he was confessing voluntarily and not involuntarily.

Q So the -- the confession was deemed to be voluntary?

A The -- the confession was deemed to be voluntary --

Q All right.

A -- so that helped shape what strategy we were going to use.

Q Are you --

A The tape was in. Pardon.

Q Are you aware that the -- the voluntariness of the confession was never raised on direct appeal?

A On direct exam?

Q Direct appeal. Never raised it as an issue. Are you aware of that?

A No.

Q Did you ever read the appellate briefs in this case?

A No.

Q Okay. All right, so let's talk about the question of consent. Consent was not a defense to the lewdness charges; am I right?

A That would be correct because I think we argued the intoxication as a defense to the lewdness charges.

Q All right. So but consent was a defense to sexual assault with a minor under the age of 14?

A Yes.

Q Okay. So for you to have -- strike that. Assuming that a jury

were to have found a reasonable doubt as to consent, that would have only affected the sexual assault charge?

A Correct.

Q Assuming that a jury were to have found that Mr. Alotaibi was intoxicated to a degree that eliminated his ability to form the specific intent for the lewdness charge, that would have only applied to the lewdness charge?

A Correct.

Q Okay. Intoxication was not a defense to the sexual assault?

A Unbelievably so and unfortunately so. But yes, that's the rule.

Q All right. And consent was not a defense to the lewdness charges?

A Correct.

Q There came a point in time that you were going to -- that you and the Court and the prosecutors in the case, I think the record reflects Ms. Holthus, but Ms. Bluth may have been -- I don't see her name until the next day, but she may have been there. And I guess now I have to call them both judge, Judge Holthus and --

A Correct.

Q -- Judge Bluth. There came a point in time when the subject of statutory sexual seduction arose during the jury instruction conference. You recall that?

A I do.

Q All right. Now, let's talk about the jury instruction conference. The record appears to indicate that the jury instruction conference

commenced without Mr. Alotaibi being in court. Is that your memory?

A Yes. It is.

Q Okay. Tell us what you remember about the conference prior to his arrival in court.

A Well, I remember Ms. Holthus being adamant she didn't want the intoxication to be given in order -- for the lewdness charge. I remember that fight and I remember Ms. Holthus doing most of the talking. Ms. Bluth was there, but Mary Kay was the one that was the lead prosecutor at that particular time. So I do recall Judge Miley asking me about the statutory sexual seduction and -- and I -- I -- I believe I used the words reluctantly I'm choosing not to -- I'm choosing not to ask for that, and I almost felt like she was -- I don't want to use the word pleading with me, but she seemed to indicate, if I could read her mind and I can't, that she wanted me to ask for it. Mary Kay of course was opposing it and it wasn't a fight that I wanted to worry about.

Q Is it your understanding at that time and -- and you need to know that the law has changed, statutory scheme has changed completely since 2015. This is a dinosaur, this case is a dinosaur. The -- is it your understanding that with regard to sexual -- excuse me, statutory sexual seduction, that consent is not a defense to it?

A Yes.

Q Is it your understanding that intoxication is not a defense to it?

A Correct. Yes.

Q So if the jury had had a reasonable doubt with regard to the sexual assault of a minor under 14 with regard to the -- to the use of

force slash presence of consent and also had a reasonable doubt with regard to the intoxication -- well I should say reasonable doubt as the specific intent because of the presence of intoxication. That would not have helped Mr. Alotaibi with regard to the statutory sexual seduction charges; am I right?

A The question was compound and I got confused so --

Q Okay. Neither consent nor intoxication is a defense to statutory sexual seduction?

A Correct.

Q And it wasn't at that time?

A Correct.

Q So the jury would have had the alternative of not just letting him go, they would have still been able to have found him guilty of something?

A Yes.

Q Him meaning Mr. Alotaibi.

A Yes. And afterwards in the jury room --

MR. THOMAN: Objection; nonresponsive.

THE WITNESS: Okay.

BY MR. GENTILE:

Q I'll ask a question later.

A Okay.

Q I'm going to get to that. We --

A Okay.

Q -- obviously --

A All right.

Q -- we met -- let's talk about it. We met on Saturday?

A Correct.

Q Right, and for a couple of hours?

A Correct.

Q And we have gone through the transcripts and the pleadings and everything --

A Correct.

Q -- to prepare your testimony?

A Correct.

Q All right, you're not just sitting up here cold?

A No.

Q All right.

A It feels like it, but still yes.

Q It seems like it?

A Yeah.

Q Okay. Well that's good. That's good actually.

A No, I spoke to the prosecutor beforehand too --

Q Okay.

A -- and he read me some things that I don't remember. But I don't deny.

Q All right. So it's your memory that during the course of the jury instruction discussions and -- and not quite the settlement conference but the commencement of it you might say, that the Court brought to your attention the statutory sexual seduction?

A That -- yes.

Q Now, there came a point in time when Mr. Alotaibi did get into the courtroom during that segment; am I right?

A Well, I -- I -- he came in at the lunch hour and that's when, yeah, the Judge told me to discuss what we were going to do so that's when I --

Q We're going to get to that in a second.

A Okay.

Q But prior to that do you recall whether a -- an interpreter -- you haven't really spoken -- when was the last time you spoke to Mazen Alotaibi?

A Maybe a couple weeks after the conviction.

Q So it's been six years?

A Six years.

Q Almost six years?

A Six years.

Q Okay. So you don't know how well he speaks English today as compared to then?

A Well, I personally believe and I believe Ms. Bluth brought it out, Mazen struck me as intelligent, Mazen struck me as somebody who wanted to learn. I mean he never asked me to put money on his books for cigarettes. He always wanted me to order him books and he had his -- says however much time I have to do, I want to spend that time productively.

Q Okay.

Q The Judge can read the transcript.

A Okay.

Q Okay. All right, there came a point in time when you were given direction by the Court in terms of during the lunch hour what you were supposed to do --

A Right.

Q -- with regard to the jury instructions and Mazen Alotaibi.

A Right.

Q What is your memory first of what you were directed to do by the Court?

A Well, I was directed to go through the jury instructions with Mazen to see what we were going to object to, what we wanted to request and that kind of thing, and try to explain to him the ramifications of the various jury instructions.

Q Did you meet with Mazen during the recess between the morning session and the afternoon session?

A Yes I did.

Q Okay. Was there an interpreter there with you and Mazen when you had that meeting?

A No there wasn't.

Q You're sure of that?

A I'm positive of that.

Q Okay. Now, what do you recall -- according to the record I will tell you this, according to the record --

A Okay.

Q -- it looks as though there was about an hour and maybe 15 minutes between the adjournment and the reconvening of the court before and after lunch. Okay. I -- I think the record bears that out. If I'm wrong, I'm sure somebody will correct me, but that's my memory of the record. What happened during that hour and 15 minutes as between you and Mazen?

A Well, we discussed whether or not he was going to testify, because for the two months prior while we were preparing for trial, I always insisted he needed to testify and, you know, we were trying to decide was he going to testify in English, was he going to testify with an interpreter. And until that moment he was going to testify and -- but when he saw the way Ms. Bluth cross-examined some of our witnesses, he decided I don't want to -- I'm afraid to go up against Ms. Bluth with cross-examination and I don't want to testify. So I spent my time arguing with him about whether or not he should testify.

Q Assuming that you -- assuming that you actually had an hour and 15 minutes, all right, the whole every minute as between the adjournment and the reconvening of the court, about how much of that time to your memory was spent dealing with the question of whether Mazen would testify or not and your efforts to persuade him?

A Most of it was spent trying to convince him he needed to testify. So I'd say at least 45 minutes to an hour.

Q Okay. With regard to the remainder of the time, what is your memory as to what was discussed?

A Well, I -- I believe we discussed something about the jury

well go to trial. So we -- we could not come to an agreement and -- and that kind of thing so I didn't want to -- I don't want to use the word confuse Mazen, but he basically says Don, do what you think is best.

Q All right, but did he understand --

A Okay.

Q It's -- it's difficult for you to --

A Right.

Q -- know what somebody understands.

A Right.

Q Let's face it. So I'm going to ask you some specific --

A Okay.

Q -- questions with regard --

A All right.

Q -- to that part of the adjournment, the recess, and specifically the discussions with regard to statutory sexual seduction. Did you ever in that time explain to Mazen Alotaibi what the sentencing differences were if he had been convicted of statutory sexual seduction as compared to the other charges that he was facing?

A No.

Q All right. How --

A And even today I'm confused because in my mind, and I had this discussion with the prosecutor that I believed statutory sexual seduction was 1 to 10 and he insist it's 1 to 5 and you insisted it was 1 to 5 and -- but I guess now it's been amended to 1 to 10, but at that time I believed it was 1 to 10.

Q What you believe or not is not what I'm asking you.
A That's fine.
Q I'm asking you specifically --
A Okay.
Q -- did you explain that to Mazen Alotaibi?
A No.
Q Did you explain to Mazen Alotaibi what the sentencing impact of a conviction of sexual assault with a minor would be?
A Yes.
Q Did you explain to him what the impact of lewdness would be with regard to sentencing?
A Yes.
Q But you did not --
A Because --
Q Go ahead. I'm sorry.
A Yeah.
Q I don't want to cut you off.
A Okay. Because that was I -- I believe and I could be wrong that Mary Kay had that on the table up to trial. But I don't remember, I could be wrong, maybe she didn't.
Q Did you ever receive from Mazen Alotaibi any communication at all with regard to him -- after understanding --
A Right.
Q -- it, him consenting -- when I say after understanding it, I mean after him understanding it, or appearing to understand it, with

regard to him consenting for you to not take the Judge up on her suggestion with regard to considering statutory sexual seduction?

A Did I get consent from him?

Q Yes.

A No.

Q Then why did you do this? I mean it's a tough question.

A Yeah. Right. No --

Q Okay, but I know you've been living with it.

A Sure.

Q Why'd you do this?

A Because one, I believed in Mazen's innocence. I still believe in Mazen's innocence. I still believe this kid consented and I believed that there was more than enough evidence in the record for him to have won on the consent issue with respect to sexual assault.

And I knew that Mazen didn't want the 10 years on the lewdness because he had rejected it numerous times and in my mind I believed that statutory sexual seduction carried 1 to 10 which would be the Judge would give him four years for each count, it would be eight years. To me there was no difference between eight years and 10 years, so we -- I don't want to say we rolled the diced, but I believe that it was all or nothing and also the issue with consent is different than the issues -- it was an inconsistent argument that you would have to make and I think you have to stick with one theme and one strategy even though it might have been -- the bad outcome could have been --

Q That's --

A -- much harsher.

Q There was -- even the way you understood it, there was a 30-year differential between sexual assault with a minor under 14 and statutory sexual seduction. Even the way you understood it, a 1 to 10 --

A Right.

Q -- all right, with a four being -- four years being 40 percent.

A Right.

Q All right. Even if they were concurrently run, there was a 30-year differential. Why did you not obtain his knowing consent to that?

A Well, I mean frankly, because he wasn't willing to testify, I don't think he was willing to listen and reason with me on -- on various things as to what we wanted. His goal was to go home as soon as possible. And he believed that he was going to go home.

Q With regard to that timeframe, that hour and 15 minutes, what was your impression of Mazen's emotional state?

A Well, confusion and fear -- confusion and fear.

Q Would it be fair to say that you basically gave up on trying to make him understand what this statutory sexual seduction was about?

A No, I -- I think it be better to say I just didn't even bother to try to make him understand it. Maybe that's the same as gave up, I don't know.

Q There came a time when you came back into the courtroom during the course of settling the instructions and you said something to the Court and again the record will bear that out, but what is your

memory now -- you haven't read that transcript, have you?

A No I haven't.

Q Okay, what is your memory now about what happened after lunch with regard to -- well I'm going to ask you specifically.

A Okay.

Q It appears that you used these words: I am the lawyer. You remember using those words?

A I don't, but it would sound like me.

Q All right, and do you remember what you were trying to communicate?

A Well --

Q If you don't remember the words, do you remember trying to communicate something to the Court at that time --

A Well I would say --

Q -- about the choice not to seek the statutory sexual seduction?

A Well as I mentioned earlier, I believe the Judge was trying to telegraph to me I think you need to ask for this. All right. During the lunch break, I was -- I was trying to specifically convince Mazen he needed to testify, he needed to let the jury see what he was like, that he wasn't this harsh animal, et cetera, et cetera, and ultimately I went along with it. I didn't agree with him, but, you know, with respect to the jury instructions, Mazen told me you are the lawyer, you make the decisions for me and that's what I did. And that's what I think --

Q And you made that decision knowing that he didn't understand?

A Yes.

Q Mazen is a Saudi Arabian?

A Yes he is.

Q During the course of jury selection in that case, did that come up?

A Yes it did.

Q And what is your memory of that jury selection process with regard to that specific issue?

A Well, I recall at least three or four individuals who essentially said they can't give Mazen a fair trial. My son is fighting in Iraq; my son is over there; as far as I'm concerned, if you were to give me a pistol, I'd go ahead and shoot him right now. So the Judge was very open, very fair, would knock them off, and she gave us a lot of leeway to talk about could you be fair, you know, to a Saudi Arabian individual accused of raping an American kid? So I thought we -- I believe we sanitized, quote, the redneck jurors that were there.

Q You're a Pahrump prosecutor and you're talking --

A Right.

Q -- about redneck jurors.

A Well trust that's -- yeah, and I --

Q Let's get back to the -- to this hearing. So if I understand your testimony right now, you were not unaware of the fact that there were some societal and even within the jury biases shall we say with regard to Arabs?

MR. PRINCE: Objection, Your Honor. This is beyond the

App. Item 3

App. Item 3

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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

STEFANY A. MILEY
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.

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

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

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

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

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

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

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

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

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.

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

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.

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

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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STEFANY A. MILEY
DISTRICT JUDGE
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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

App. Item 4

App. Item 4

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CLERK OF THE COURT

TRAN

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 5

WEDNESDAY, OCTOBER 16, 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: Saad Musa, Interpreter
Mohammad A. Taha, Interpreter

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

THE COURT: Oh, I just need for you to translate for him, sir. So there's two things that we need to discuss now that the jury's out of the room.

MS. HOLTHUS: I'd like to -- one of the things I was --

THE COURT: Was the video.

MS. HOLTHUS: Correct. The video, we need to redact the ending of the defendant's request. We're going to take out any naked --

THE COURT: Pictures.

MS. HOLTHUS: -- pictures or parts of it. I don't think it's -- we don't need it and so we have no objection to that being taken out. And additionally, this -- the tape is allowed to run specifically up to and through the defendant requesting a lawyer and that was, again, defense had no request for any redactions out of it. That was part and parcel is my understanding of his argument and ultimately explaining it to the jury or I'm not sure where it comes in. But that was not done by the State independent of the defense, that was at their request.

MR. CHAIREZ: What was her point, Your Honor? That we didn't --

THE COURT: I think she's just waiting for you to --

MS. HOLTHUS: You didn't ask to keep that out. You didn't want it out, you wanted it in.

MR. CHAIREZ: No, we don't -- we don't any of it out.

THE COURT: You wanted to show as much of the videotape -- well, you wanted to show the entirety of the videotape with the exception of the portions where --

MR. CHAIREZ: His body is photographed.

THE COURT: Correct. Which we did keep out.

MR. CHAIREZ: Right.

THE COURT: And you don't have any objection to them -- at the very tail end, if memory serves, he shows his genitalia for photographs and --

MR. CHAIREZ: Right.

THE COURT: -- frankly, I don't see that the jury would need to see that.

MR. CHAIREZ: They don't need to see that.

THE COURT: You agree with that and the State agrees with that.

MR. CHAIREZ: Right.

MS. HOLTHUS: Yeah, that's fine.

THE COURT: All right. And the other issue we need to address, is do you want to do it now or do you want to do it tomorrow as far as the admonishment of his right to testify or not testify?

MR. CHAIREZ: Why don't we do it tomorrow because we'll have more free time then, Your Honor.

(Court recessed for the evening at 4:54 p.m.)

here so --

MS. HOLTHUS: I'm going to object to the -- I don't know, is it testimony or narration or small talk, but there's no question.

MR. CHAIREZ: All right. Well, okay.

THE COURT: Objection sustained. Just ask the question.

MR. CHAIREZ: Is the -- is the statement already in evidence?

THE COURT: That one? The one the jury's seen?

MR. CHAIREZ: Yes.

THE COURT: That was only going to be a court exhibit for demonstrative purposes.

MR. CHAIREZ: Okay. All right.

THE COURT: We discussed it at the break.

MR. CHAIREZ: Well, I don't want to play the tape, but if it's okay, can I read three or four lines of --

THE COURT: I mean, it is in evidence and that is a court exhibit.

MS. HOLTHUS: The tape itself is in evidence and will go back.

MR. CHAIREZ: Right.

THE COURT: The tape is in evidence. The other one is a court exhibit, not a State exhibit, though.

MR. CHAIREZ: Right.

App. Item 5

App. Item 5

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CLERK OF THE COURT

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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**

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App. Item 6

App. Item 6

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CLERK OF THE COURT

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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**

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FOR THE DEFENDANT: DON P. CHAIREZ, ESQ.

Also Present: Saad Musa, Interpreter
Mohammad A. Taha, Interpreter

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

condition, you didn't want to wait a couple hours in order to talk to him, correct?

A That's correct.

Q And -- and you even interviewed his friend, Mohammed, for the hour or hour and a half after you spoke with Mr. Alotaibi, correct?

A No. That -- that interview was very short.

Q Okay. We'll say 30 minutes?

A I don't even think it was 30 minutes.

Q Okay. But you -- you spoke to Mr. Jafaari afterwards, correct?

A Yes, sir.

Q Okay. Now, was Mr. Jafaari intoxicated or not?

A I'm not sure if he was or not, sir.

Q Okay. But in the hour and a half that you spoke to Mr. Alotaibi, you never thought, well, maybe he's -- he's too drunk, I should -- I should wait a little bit?

A Absolutely not.

Q Okay. And so you've never heard Mr. Alotaibi speak when he hasn't had alcohol in him has he -- have you?

A No. The first time I spoke to him was that day.

Q And -- so when you mentioned to Mr. Alotaibi -- or let me just ask you. It was Mr. Alotaibi who first told you if the hotel has surveillance cameras it will show the boy went with me voluntarily, correct?

A Yes, I believe so.

Q Okay. But when -- when you questioned the boy, the boy told you he dragged him down the hall, he grabbed him by the clothes and he forced him into the room, correct?

A Yes, sir.

Q So in terms of that, who was being more honest with you, Mr. Alotaibi or AJ Dang?

A Alotaibi.

Q Okay. And the boy never mentioned to you that he wanted to go to the room because he was trying to get marijuana off of my client or the other gentlemen, correct?

A Correct.

Q And I don't recall it because the interview was long, but did Mr. Alotaibi mention anything about the boy coming to the room wanting weed?

A I believe he mentioned weed, yes.

Q Okay. And so it seemed to me repeatedly that Mr. Alotaibi said the boy wanted money or the boy wanted weed, correct?

A Yes, sir.

Q And so ten months after all of this happened, we know it -- now know Mr. Alotaibi was telling the truth and the victim was not being honest with law enforcement, correct?

A About certain aspects, but not the entire case, no.

Q Well, but we -- can we basically say 80 percent of the boy's story has been thrown out the door because he wasn't honest with you --

MS. HOLTHUS: I'm going to object to this --

MR. CHAIREZ: Let me rephrase it.

BY MR. CHAIREZ:

Q Can we basically say a large portion of the boy's story was not true because he's changed that story from January -- December the 31st to this week?

A I didn't hear the boy's testimony, sir.

Q Okay. Well, would you like me to summarize it for you?

A If you want to ask me a question about it.

MS. HOLTHUS: I'm going to object to that. His opinion in speculation in terms of how much of it was different. He can ask about specifically what was different, but the summary is more of a jury issue.

MR. CHAIREZ: Okay.

THE COURT: I agree.

MR. CHAIREZ: I'll break it down question by question, point by point.

THE COURT: All right. Don't ask him to speculate but you can ask regarding inconsistencies.

BY MR. CHAIREZ:

Q So the boy when he spoke with you and Detective

Christiansen, didn't say he went down to the parking lot and had a couple hits of marijuana, correct?

A No, sir.

Q Okay. And the boy didn't tell you that at 9:04 a.m. he received a cell phone call and it was his mother that was calling and he wouldn't tell his mother that he had just been sexually assaulted.

A No, sir.

Q And the boy told you that he didn't go to security right away because he had to stop because he had a breakfast appointment with a girl named Mary; is that correct?

A Yes, sir.

Q And later on we found out he told you -- or told the -- did he tell you or was it Detective Christiansen that was not true, he didn't have breakfast with Mary?

A I kind of got lost in that one, if you can rephrase it?

Q Okay. It was a compound question so it's my fault, Detective. Okay. And do you recall hearing him mentioning I'm going to go have -- I -- I didn't report the -- I didn't report the crime because I was supposed to go have breakfast with Mary?

A Yes, sir.

Q And did that strike that to -- did that seem to you unusual that he would stop and -- and think it was more

important to have breakfast with Mary than to go report it to security that he had been raped?

A Yes, sir.

Q Okay. And if the boy had been honest with you, maybe you and Detective Christiansen might have taken a different angle or aspect in asking follow- up questions of the boy and asking follow-up questions of Mr. Alotaibi, correct?

A There would have been several different questions asked.

Q I mean, your job as an investigator or as a detective is only as good as the information that's given to you, correct?

A Correct.

Q And do you recall when you asked the question about the lotion, do you remember whether or not Mr. Alotaibi or the boy mentioned what color the lotion bottle was?

A I don't recall the color, sir.

Q Did they -- did the boy say whether or not the lotion was from the hotel?

A I believe he said it was from the bathroom area sink.

Q Okay. And I'll confess, Your Honor -- I mean, excuse me, Detective Pool. I myself don't even remember whether they mentioned it was shampoo or lotion that was used

when the -- when the boy first mentioned it to you and Detective Christiansen. Do you remember?

A No, sir. I believe it was lotion.

Q Okay. And how many times do you think the defendant told you I'm fucked up, I'm drunk --

MS. HOLTHUS: Objection, the transcript speaks for itself.

MR. CHAIREZ: Okay. Well, I'm just asking his estimate.

MS. HOLTHUS: And that's improper. Estimates and speculation are improper questioning.

THE COURT: Sustained.

BY MR. CHAIREZ:

Q Okay. Would you say that he told you he was too drunk more than once?

A Yes, sir.

Q Okay. And would you say it was a common theme in what he was saying during the time that you had him?

A He said it multiple times.

Q Okay. And did he also mention that I don't remember everything that happened because I was too drunk?

A He did say that.

Q And he at no time ever mentioned that to the degree that any sex may have happened, he forced himself on the boy.

A No, sir.

Q Whether we're talking about his mouth or whether we're talking about his rectum, correct?

A Correct.

Q And would you say that repeatedly you might have told him as part of your ruse, it's okay if the boy wanted it, it's okay if he wanted money. And even when all of that was said, he never mentioned that force was used.

A Correct.

Q Now with respect to the incident in Saudi Arabia, and I can't remember exactly what the question or the issue was, but something about maybe he kissed a girl in Saudi Arabia and he was arrested or -- or did we lose all of that in translation?

A I believe you lost all that in translation.

Q Okay. And did he tell you that he was married or did you -- did we transcribe it as if he was married?

A I believe he was -- I believe he stated he was married.

Q Okay. But is it possible that no, he's not married, maybe he just has a fiancé?

A It very well could be.

Q And he may not know what the difference between the word wife and fiancé is?

A I'm not sure what he knows.

A I would say it was a good portion, maybe -- maybe an hour.

Q Okay. And I don't recall, but I -- I think -- did you mention anything about calling his military superiors if he wasn't honest with you?

A I don't believe I said that.

Q Okay. Did you -- so you basically, you said I'm going to give you one more chance and that's kind of like all of this started happening towards the end, correct?

A Yes, sir.

Q And so in the interview when you talked to him, he never admitted that there was force used, correct?

A No, sir.

Q All right. And when he mentioned about his penis, I believe it was his penis being touched by the boy, he said it was just for a second or two, correct?

A The touching, yes.

Q Okay. And -- and would you say it was conclusive that he said -- I mean, was his penis -- did it go inside the boy or did it not go inside the boy or did he say maybe?

A Are you referring to his anus or his mouth, sir?

Q His anus.

A Yes. He said yes, I believe it was for -- I think he said for a second or two.

App. Item 7

App. Item 7

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CLERK OF THE COURT

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 5

WEDNESDAY, OCTOBER 16, 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:	Saad Musa, Interpreter Mohammad A. Taha, Interpreter

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A Yes, I believe so.

Q Okay. But when -- when you questioned the boy, the boy told you he dragged him down the hall, he grabbed him by the clothes and he forced him into the room, correct?

A Yes, sir.

Q So in terms of that, who was being more honest with you, Mr. Alotaibi or AJ Dang?

A Alotaibi.

Q Okay. And the boy never mentioned to you that he wanted to go to the room because he was trying to get marijuana off of my client or the other gentlemen, correct?

A Correct.

Q And I don't recall it because the interview was long, but did Mr. Alotaibi mention anything about the boy coming to the room wanting weed?

A I believe he mentioned weed, yes.

Q Okay. And so it seemed to me repeatedly that Mr. Alotaibi said the boy wanted money or the boy wanted weed, correct?

A Yes, sir.

Q And so ten months after all of this happened, we know it -- now know Mr. Alotaibi was telling the truth and the victim was not being honest with law enforcement, correct?

A About certain aspects, but not the entire case, no.

App. Item 8

App. Item 8

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CLERK OF THE COURT

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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

PARTIAL JURY TRIAL - DAY 2

FRIDAY, OCTOBER 11, 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:	Nabiha Al-Abed, Interpreter Saad Musa, Interpreter

RECORDED BY MARIA GARIBAY, COURT RECORDER
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A He started touching me around my body and started kissing me.

Q When he was kissing you, where was he kissing?

A Around my face.

Q And what were you doing when he was doing those things to you?

A Just like trying to back off, like stepping away, like trying to say no and stop.

Q When you would step away from him, what would he do?

A Like try and bring me back closer.

Q After the alley what happened?

A We walked right back to the elevator, and on the way up the elevator he started saying that he'll have like -- he'll basically like he'll -- he wants to have sex, and like when we got to the like room, he started telling me he'll have sex for money, he wanted sex for money and weed. And I was like -- I said yes, but like not to like actually do it, but just to trick him, but --

Q You've already stated you wanted marijuana, correct?

A Yes.

Q And so when you went from the alley up to the room, why did you do that?

A To buy marijuana.

grandma was there that time, so when I told him, I told him a different story, because I didn't want my grandma to know. So I lied to like -- I didn't want my grandma to worry. And then when we went to the hospital, I told the nurse most same thing I told the security officer. I told them everything. And then now today I have to tell the whole truth, so I am.

Q Okay. Let me ask you a few questions. So when you told security initially, when you go downstairs and you talked to security, you told them that you had approached the man because you wanted marijuana?

A Yes.

Q And did you tell them that you went with the man willingly in his hotel room?

A Yes.

Q And then at some point you're taken to the hospital to have an exam; is that right?

A Yes.

Q And there you speak with detectives from the Las Vegas Metropolitan Police Department?

A Yes.

Q When you speak with them, what do you specifically lie about? What do you tell them?

A I told them that he pulled me in, and like I told him I never smoked marijuana, and I just -- I was really scared, and so I made up this part of a story just to not get

Q Now, when you were in the elevator, my client, he wasn't forcing you into the elevator, was he?

A No.

Q You said you were going with him voluntarily?

A Yes.

Q And you said he was talking to you about sex and money or something like that?

A Yes.

Q And when you say he leaned down and appeared to kiss you or touch you, you felt kind of queasy or anxious about the whole thing, correct?

A Yes.

Q And when you got down to the main elevator, did my client grab you or hold you and force you to stay with him?

A No. He just like -- he told me to follow him.

Q Okay. Could you say that again, please.

A He told me to follow him.

Q He told you to follow him. Okay. Now, when he touched you on your ear or on your neck, he wasn't doing that to turn you on sexually, was he?

MS. BLUTH: Objection. Speculation.

MR. CHAIREZ: Okay.

THE COURT: Sustained.

BY MR. CHAIREZ:

Q You didn't feel -- you didn't feel -- you didn't

feel any sexual vibes yourself from that encounter, correct?

A Yes.

Q It wasn't something that you wanted?

A Yes.

Q And you don't know what he was thinking when he was leaning over and being close to you, correct?

A Actually, I think he was like trying to have sex.

Q He was trying to what?

A Like become sexual like towards --

Q So you think he was touching your neck or ear for some type of sexual reason, correct?

A Yes.

Q Now, if you thought that, AJ, you still followed him voluntarily, correct?

A Yes.

Q You never saw him with a gun, did you?

A No.

Q You never saw him with a knife?

A No.

Q You never saw him with any kind of weapon, did you?

A No.

Q But you chose -- even though you felt he had touched you in a sexual manner, you chose to follow him out to

the alley, correct?

A Yes.

Q Okay. And when you followed him out to the alley, he wasn't dragging you there?

A No.

Q He wasn't forcing you there?

A No.

Q It was something that you did on your own?

A Yes.

Q Because you were hoping to get marijuana?

A Yes.

Q And you today, I think, testified that you took a couple hits off of the marijuana from him, correct?

A Yes.

Q And you knew it was wrong to use marijuana, correct?

A Yes.

Q And you knew it was unwise for you to be with somebody that you saw with the possession of marijuana, correct?

A Yes.

Q So after you were done taking these couple hits of marijuana, he didn't drag -- he didn't force you back into the elevator, did he?

A No.

Q And he didn't drag you into the elevator, did he?

A No.

Q And you went with him on the elevator all the way up to the sixth floor, correct?

A Yes.

Q And you followed him into his room?

A Yes.

Q Now, did you say you went into the bathroom?

A Hmm?

Q Did you go into the bathroom first, or did he go into the bathroom first?

A He told me to go into the bathroom and close the door.

Q He told you to go into the bathroom?

A Yes.

Q And why did you do it, AJ?

A I don't know.

Q You don't know?

A [No audible response.]

Q Okay. Did you do it because you still wanted to try to get marijuana off of him or his friends?

A Yes.

Q Now, do you remember the first time that you told this story, you told the detectives that when you looked

A Yes.

Q Now, isn't it true shortly thereafter, when you were confronted with the video, you came clean and said you went into the room willingly?

A Yes.

Q That wasn't last Wednesday. That was a long time ago?

A [Inaudible.] I thought like -- I'm kind of confused.

Q Okay. Shortly after you spoke to detectives, you came clean with the real story about him not physically grabbing you. You told individuals that you had gone into the room willingly?

A Yeah.

Q And last Wednesday is when you came clean to the whole idea of going to the room to smoke marijuana and that agreement; is that correct?

A Yes.

Q But in fact, you had told security that day, before you ever spoke to police, that you had gone there willingly with him?

A Yes.

Q And this is the first time that you're ever testifying under oath and swearing to tell the truth and nothing but the truth?

Q Who was that?

A AJ Dang.

Q That's a 13-year-old child; is that correct?

A Yes.

Q And did you have conversation with Officer Laskin and AJ?

A We spoke on the telephone prior to Laskin bringing him to the office.

Q When you say you spoke on the telephone, with Laskin or with AJ?

A With Laskin.

Q And once they met you at the security holding area, did you speak with AJ?

A I did.

Q And did AJ tell you what happened to him?

A Yes, he did.

Q And what did he say happened to him?

A He said he was on the sixth floor of our main hotel tower and an Arabic male asked him to come into his room, Room 631 in the main tower, and get high. And then he said once he was in the room the male took him in the bathroom and removed his clothing and sodomized him.

Q So AJ told you that he went into the Room 631 willingly?

A Yes, he did.

App. Item 9

App. Item 9

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CLERK OF THE COURT

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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

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TRANSCRIBED BY: KARR Reporting, Inc.

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

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CLERK OF THE COURT

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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

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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

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

MAZEN ALOTAIBI, Plaintiff, vs. RENEE BAKER, ET AL., Defendants.	CASE#: A-18-785145-W DEPT. XXIII

BEFORE THE HONORABLE STEFANY MILEY,
DISTRICT COURT JUDGE

THURSDAY, JUNE 6, 2019

RECORDER'S TRANSCRIPT OF PROCEEDINGS
PETITION FOR WRIT OF HABEAS CORPUS
EVIDENTIARY HEARING

APPEARANCES:

For the Plaintiff: DOMINIC P. GENTILE, ESQ.

For the Defendants: CHARLES W. THOMAN, ESQ.
Chief Deputy District Attorney
JOSHUA J. PRINCE, ESQ.
Deputy District Attorney

RECORDED BY: MARIA GARIBAY, COURT RECORDER

A All right.

Q -- we met -- let's talk about it. We met on Saturday?

A Correct.

Q Right, and for a couple of hours?

A Correct.

Q And we have gone through the transcripts and the pleadings and everything --

A Correct.

Q -- to prepare your testimony?

A Correct.

Q All right, you're not just sitting up here cold?

A No.

Q All right.

A It feels like it, but still yes.

Q It seems like it?

A Yeah.

Q Okay. Well that's good. That's good actually.

A No, I spoke to the prosecutor beforehand too --

Q Okay.

A -- and he read me some things that I don't remember. But I don't deny.

Q All right. So it's your memory that during the course of the jury instruction discussions and -- and not quite the settlement conference but the commencement of it you might say, that the Court brought to your attention the statutory sexual seduction?

Q The Judge can read the transcript.

A Okay.

Q Okay. All right, there came a point in time when you were given direction by the Court in terms of during the lunch hour what you were supposed to do --

A Right.

Q -- with regard to the jury instructions and Mazen Alotaibi.

A Right.

Q What is your memory first of what you were directed to do by the Court?

A Well, I was directed to go through the jury instructions with Mazen to see what we were going to object to, what we wanted to request and that kind of thing, and try to explain to him the ramifications of the various jury instructions.

Q Did you meet with Mazen during the recess between the morning session and the afternoon session?

A Yes I did.

Q Okay. Was there an interpreter there with you and Mazen when you had that meeting?

A No there wasn't.

Q You're sure of that?

A I'm positive of that.

Q Okay. Now, what do you recall -- according to the record I will tell you this, according to the record --

A Okay.

instructions, like the first part just a few minutes these are standard jury instructions. We discussed the sexual assault, we discussed lewdness, the intoxication and I tried to explain the differences or the nuances of why intoxication would work with one and not with the other and -- and that kind of thing and why I believed this issue really boiled down to consent. If the jury believes that A -- I remember his name was AJ. If AJ consented, then he would walk and he would go home.

Q Okay. How much time did you spend with Mazen and the follow-up question's going to be, depending on your answer --

A Right.

Q -- how much time did you spend with him with regard to the -- what the Judge instructed you to do with regard to the related offense instruction with regard to the statutory sexual seduction?

A To be honest with you, I don't --

Q Please, you're under oath.

A Yeah, I know.

Q Okay?

A Okay. I don't really recall discussing that with him because early on in the trial I tried to get Mary Kay Holthus to make that offer to me and she refused to. You know, over and over Mary Kay would say let's get this case settled and I think we continued the trial on two different occasions because Mary Kay and I were working on a settlement. So I was trying to get the statutory sexual seduction from her, but she would never offer anything lower than a lewdness or maybe two lewdnesses and I go then we've got nothing to lose, we might as

well go to trial. So we -- we could not come to an agreement and -- and that kind of thing so I didn't want to -- I don't want to use the word confuse Mazen, but he basically says Don, do what you think is best.

Q All right, but did he understand --

A Okay.

Q It's -- it's difficult for you to --

A Right.

Q -- know what somebody understands.

A Right.

Q Let's face it. So I'm going to ask you some specific --

A Okay.

Q -- questions with regard --

A All right.

Q -- to that part of the adjournment, the recess, and specifically the discussions with regard to statutory sexual seduction. Did you ever in that time explain to Mazen Alotaibi what the sentencing differences were if he had been convicted of statutory sexual seduction as compared to the other charges that he was facing?

A No.

Q All right. How --

A And even today I'm confused because in my mind, and I had this discussion with the prosecutor that I believed statutory sexual seduction was 1 to 10 and he insist it's 1 to 5 and you insisted it was 1 to 5 and -- but I guess now it's been amended to 1 to 10, but at that time I believed it was 1 to 10.

Q What you believe or not is not what I'm asking you.
A That's fine.
Q I'm asking you specifically --
A Okay.
Q -- did you explain that to Mazen Alotaibi?
A No.
Q Did you explain to Mazen Alotaibi what the sentencing impact of a conviction of sexual assault with a minor would be?
A Yes.
Q Did you explain to him what the impact of lewdness would be with regard to sentencing?
A Yes.
Q But you did not --
A Because --
Q Go ahead. I'm sorry.
A Yeah.
Q I don't want to cut you off.
A Okay. Because that was I -- I believe and I could be wrong that Mary Kay had that on the table up to trial. But I don't remember, I could be wrong, maybe she didn't.
Q Did you ever receive from Mazen Alotaibi any communication at all with regard to him -- after understanding --
A Right.
Q -- it, him consenting -- when I say after understanding it, I mean after him understanding it, or appearing to understand it, with

regard to him consenting for you to not take the Judge up on her suggestion with regard to considering statutory sexual seduction?

A Did I get consent from him?

Q Yes.

A No.

Q Then why did you do this? I mean it's a tough question.

A Yeah. Right. No --

Q Okay, but I know you've been living with it.

A Sure.

Q Why'd you do this?

A Because one, I believed in Mazen's innocence. I still believe in Mazen's innocence. I still believe this kid consented and I believed that there was more than enough evidence in the record for him to have won on the consent issue with respect to sexual assault.

And I knew that Mazen didn't want the 10 years on the lewdness because he had rejected it numerous times and in my mind I believed that statutory sexual seduction carried 1 to 10 which would be the Judge would give him four years for each count, it would be eight years. To me there was no difference between eight years and 10 years, so we -- I don't want to say we rolled the diced, but I believe that it was all or nothing and also the issue with consent is different than the issues -- it was an inconsistent argument that you would have to make and I think you have to stick with one theme and one strategy even though it might have been -- the bad outcome could have been --

Q That's --

A -- much harsher.

Q There was -- even the way you understood it, there was a 30-year differential between sexual assault with a minor under 14 and statutory sexual seduction. Even the way you understood it, a 1 to 10 --

A Right.

Q -- all right, with a four being -- four years being 40 percent.

A Right.

Q All right. Even if they were concurrently run, there was a 30-year differential. Why did you not obtain his knowing consent to that?

A Well, I mean frankly, because he wasn't willing to testify, I don't think he was willing to listen and reason with me on -- on various things as to what we wanted. His goal was to go home as soon as possible. And he believed that he was going to go home.

Q With regard to that timeframe, that hour and 15 minutes, what was your impression of Mazen's emotional state?

A Well, confusion and fear -- confusion and fear.

Q Would it be fair to say that you basically gave up on trying to make him understand what this statutory sexual seduction was about?

A No, I -- I think it be better to say I just didn't even bother to try to make him understand it. Maybe that's the same as gave up, I don't know.

Q There came a time when you came back into the courtroom during the course of settling the instructions and you said something to the Court and again the record will bear that out, but what is your

memory now -- you haven't read that transcript, have you?

A No I haven't.

Q Okay, what is your memory now about what happened after lunch with regard to -- well I'm going to ask you specifically.

A Okay.

Q It appears that you used these words: I am the lawyer. You remember using those words?

A I don't, but it would sound like me.

Q All right, and do you remember what you were trying to communicate?

A Well --

Q If you don't remember the words, do you remember trying to communicate something to the Court at that time --

A Well I would say --

Q -- about the choice not to seek the statutory sexual seduction?

A Well as I mentioned earlier, I believe the Judge was trying to telegraph to me I think you need to ask for this. All right. During the lunch break, I was -- I was trying to specifically convince Mazen he needed to testify, he needed to let the jury see what he was like, that he wasn't this harsh animal, et cetera, et cetera, and ultimately I went along with it. I didn't agree with him, but, you know, with respect to the jury instructions, Mazen told me you are the lawyer, you make the decisions for me and that's what I did. And that's what I think --

Q And you made that decision knowing that he didn't understand?

A Yes.

Q Mazen is a Saudi Arabian?

A Yes he is.

Q During the course of jury selection in that case, did that come up?

A Yes it did.

Q And what is your memory of that jury selection process with regard to that specific issue?

A Well, I recall at least three or four individuals who essentially said they can't give Mazen a fair trial. My son is fighting in Iraq; my son is over there; as far as I'm concerned, if you were to give me a pistol, I'd go ahead and shoot him right now. So the Judge was very open, very fair, would knock them off, and she gave us a lot of leeway to talk about could you be fair, you know, to a Saudi Arabian individual accused of raping an American kid? So I thought we -- I believe we sanitized, quote, the redneck jurors that were there.

Q You're a Pahrump prosecutor and you're talking --

A Right.

Q -- about redneck jurors.

A Well trust that's -- yeah, and I --

Q Let's get back to the -- to this hearing. So if I understand your testimony right now, you were not unaware of the fact that there were some societal and even within the jury biases shall we say with regard to Arabs?

MR. PRINCE: Objection, Your Honor. This is beyond the

scope of the hearing.

THE COURT: What is the relevance?

MR. GENTILE: I'm going to get to that with the next question. Bottom line is it -- it goes right to this whole idea of not taking up the statutory sexual seduction and going for broke.

THE COURT: If you can link it to that, then ask the next question.

MR. GENTILE: I think I can -- I think I can link it to that.

THE COURT: All right. Then overruled.

BY MR. GENTILE:

Q You remember the question?

A Did -- was I aware that there was biases against Arabs?

Q Yes.

A Yes.

Q Okay. And you, knowing that, knowing that, really gave up an opportunity without getting consent from your Arab client to have him be found guilty of something that he admitted to the day he was arrested and instead decided to go for broke even knowing about those biases without his consent?

A Well, yes.

Q Now, after the trial, you spoke to some of the jurors?

A I did.

Q Okay. And you started to talk about this a little earlier and I want to keep this strictly with regard to as it's relevant to the instruction that you did not seek and that was --

App. Item 11

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CLERK OF THE COURT

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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
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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

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

MAZEN ALOTAIBI, Plaintiff, vs. RENEE BAKER, ET AL., Defendants.	CASE#: A-18-785145-W DEPT. XXIII

BEFORE THE HONORABLE STEFANY MILEY,
DISTRICT COURT JUDGE

THURSDAY, JUNE 6, 2019

RECORDER'S TRANSCRIPT OF PROCEEDINGS
PETITION FOR WRIT OF HABEAS CORPUS
EVIDENTIARY HEARING

APPEARANCES:

For the Plaintiff: DOMINIC P. GENTILE, ESQ.

For the Defendants: CHARLES W. THOMAN, ESQ.
Chief Deputy District Attorney
JOSHUA J. PRINCE, ESQ.
Deputy District Attorney

RECORDED BY: MARIA GARIBAY, COURT RECORDER

A All right.

Q -- we met -- let's talk about it. We met on Saturday?

A Correct.

Q Right, and for a couple of hours?

A Correct.

Q And we have gone through the transcripts and the pleadings and everything --

A Correct.

Q -- to prepare your testimony?

A Correct.

Q All right, you're not just sitting up here cold?

A No.

Q All right.

A It feels like it, but still yes.

Q It seems like it?

A Yeah.

Q Okay. Well that's good. That's good actually.

A No, I spoke to the prosecutor beforehand too --

Q Okay.

A -- and he read me some things that I don't remember. But I don't deny.

Q All right. So it's your memory that during the course of the jury instruction discussions and -- and not quite the settlement conference but the commencement of it you might say, that the Court brought to your attention the statutory sexual seduction?

Q The Judge can read the transcript.

A Okay.

Q Okay. All right, there came a point in time when you were given direction by the Court in terms of during the lunch hour what you were supposed to do --

A Right.

Q -- with regard to the jury instructions and Mazen Alotaibi.

A Right.

Q What is your memory first of what you were directed to do by the Court?

A Well, I was directed to go through the jury instructions with Mazen to see what we were going to object to, what we wanted to request and that kind of thing, and try to explain to him the ramifications of the various jury instructions.

Q Did you meet with Mazen during the recess between the morning session and the afternoon session?

A Yes I did.

Q Okay. Was there an interpreter there with you and Mazen when you had that meeting?

A No there wasn't.

Q You're sure of that?

A I'm positive of that.

Q Okay. Now, what do you recall -- according to the record I will tell you this, according to the record --

A Okay.

instructions, like the first part just a few minutes these are standard jury instructions. We discussed the sexual assault, we discussed lewdness, the intoxication and I tried to explain the differences or the nuances of why intoxication would work with one and not with the other and -- and that kind of thing and why I believed this issue really boiled down to consent. If the jury believes that A -- I remember his name was AJ. If AJ consented, then he would walk and he would go home.

Q Okay. How much time did you spend with Mazen and the follow-up question's going to be, depending on your answer --

A Right.

Q -- how much time did you spend with him with regard to the -- what the Judge instructed you to do with regard to the related offense instruction with regard to the statutory sexual seduction?

A To be honest with you, I don't --

Q Please, you're under oath.

A Yeah, I know.

Q Okay?

A Okay. I don't really recall discussing that with him because early on in the trial I tried to get Mary Kay Holthus to make that offer to me and she refused to. You know, over and over Mary Kay would say let's get this case settled and I think we continued the trial on two different occasions because Mary Kay and I were working on a settlement. So I was trying to get the statutory sexual seduction from her, but she would never offer anything lower than a lewdness or maybe two lewdnesses and I go then we've got nothing to lose, we might as

well go to trial. So we -- we could not come to an agreement and -- and that kind of thing so I didn't want to -- I don't want to use the word confuse Mazen, but he basically says Don, do what you think is best.

Q All right, but did he understand --

A Okay.

Q It's -- it's difficult for you to --

A Right.

Q -- know what somebody understands.

A Right.

Q Let's face it. So I'm going to ask you some specific --

A Okay.

Q -- questions with regard --

A All right.

Q -- to that part of the adjournment, the recess, and specifically the discussions with regard to statutory sexual seduction. Did you ever in that time explain to Mazen Alotaibi what the sentencing differences were if he had been convicted of statutory sexual seduction as compared to the other charges that he was facing?

A No.

Q All right. How --

A And even today I'm confused because in my mind, and I had this discussion with the prosecutor that I believed statutory sexual seduction was 1 to 10 and he insist it's 1 to 5 and you insisted it was 1 to 5 and -- but I guess now it's been amended to 1 to 10, but at that time I believed it was 1 to 10.

Q What you believe or not is not what I'm asking you.
A That's fine.
Q I'm asking you specifically --
A Okay.
Q -- did you explain that to Mazen Alotaibi?
A No.
Q Did you explain to Mazen Alotaibi what the sentencing impact of a conviction of sexual assault with a minor would be?
A Yes.
Q Did you explain to him what the impact of lewdness would be with regard to sentencing?
A Yes.
Q But you did not --
A Because --
Q Go ahead. I'm sorry.
A Yeah.
Q I don't want to cut you off.
A Okay. Because that was I -- I believe and I could be wrong that Mary Kay had that on the table up to trial. But I don't remember, I could be wrong, maybe she didn't.
Q Did you ever receive from Mazen Alotaibi any communication at all with regard to him -- after understanding --
A Right.
Q -- it, him consenting -- when I say after understanding it, I mean after him understanding it, or appearing to understand it, with

regard to him consenting for you to not take the Judge up on her suggestion with regard to considering statutory sexual seduction?

A Did I get consent from him?

Q Yes.

A No.

Q Then why did you do this? I mean it's a tough question.

A Yeah. Right. No --

Q Okay, but I know you've been living with it.

A Sure.

Q Why'd you do this?

A Because one, I believed in Mazen's innocence. I still believe in Mazen's innocence. I still believe this kid consented and I believed that there was more than enough evidence in the record for him to have won on the consent issue with respect to sexual assault.

And I knew that Mazen didn't want the 10 years on the lewdness because he had rejected it numerous times and in my mind I believed that statutory sexual seduction carried 1 to 10 which would be the Judge would give him four years for each count, it would be eight years. To me there was no difference between eight years and 10 years, so we -- I don't want to say we rolled the diced, but I believe that it was all or nothing and also the issue with consent is different than the issues -- it was an inconsistent argument that you would have to make and I think you have to stick with one theme and one strategy even though it might have been -- the bad outcome could have been --

Q That's --

A -- much harsher.

Q There was -- even the way you understood it, there was a 30-year differential between sexual assault with a minor under 14 and statutory sexual seduction. Even the way you understood it, a 1 to 10 --

A Right.

Q -- all right, with a four being -- four years being 40 percent.

A Right.

Q All right. Even if they were concurrently run, there was a 30-year differential. Why did you not obtain his knowing consent to that?

A Well, I mean frankly, because he wasn't willing to testify, I don't think he was willing to listen and reason with me on -- on various things as to what we wanted. His goal was to go home as soon as possible. And he believed that he was going to go home.

Q With regard to that timeframe, that hour and 15 minutes, what was your impression of Mazen's emotional state?

A Well, confusion and fear -- confusion and fear.

Q Would it be fair to say that you basically gave up on trying to make him understand what this statutory sexual seduction was about?

A No, I -- I think it be better to say I just didn't even bother to try to make him understand it. Maybe that's the same as gave up, I don't know.

Q There came a time when you came back into the courtroom during the course of settling the instructions and you said something to the Court and again the record will bear that out, but what is your

memory now -- you haven't read that transcript, have you?

A No I haven't.

Q Okay, what is your memory now about what happened after lunch with regard to -- well I'm going to ask you specifically.

A Okay.

Q It appears that you used these words: I am the lawyer. You remember using those words?

A I don't, but it would sound like me.

Q All right, and do you remember what you were trying to communicate?

A Well --

Q If you don't remember the words, do you remember trying to communicate something to the Court at that time --

A Well I would say --

Q -- about the choice not to seek the statutory sexual seduction?

A Well as I mentioned earlier, I believe the Judge was trying to telegraph to me I think you need to ask for this. All right. During the lunch break, I was -- I was trying to specifically convince Mazen he needed to testify, he needed to let the jury see what he was like, that he wasn't this harsh animal, et cetera, et cetera, and ultimately I went along with it. I didn't agree with him, but, you know, with respect to the jury instructions, Mazen told me you are the lawyer, you make the decisions for me and that's what I did. And that's what I think --

Q And you made that decision knowing that he didn't understand?

A Yes.

Q Mazen is a Saudi Arabian?

A Yes he is.

Q During the course of jury selection in that case, did that come up?

A Yes it did.

Q And what is your memory of that jury selection process with regard to that specific issue?

A Well, I recall at least three or four individuals who essentially said they can't give Mazen a fair trial. My son is fighting in Iraq; my son is over there; as far as I'm concerned, if you were to give me a pistol, I'd go ahead and shoot him right now. So the Judge was very open, very fair, would knock them off, and she gave us a lot of leeway to talk about could you be fair, you know, to a Saudi Arabian individual accused of raping an American kid? So I thought we -- I believe we sanitized, quote, the redneck jurors that were there.

Q You're a Pahrump prosecutor and you're talking --

A Right.

Q -- about redneck jurors.

A Well trust that's -- yeah, and I --

Q Let's get back to the -- to this hearing. So if I understand your testimony right now, you were not unaware of the fact that there were some societal and even within the jury biases shall we say with regard to Arabs?

MR. PRINCE: Objection, Your Honor. This is beyond the

scope of the hearing.

THE COURT: What is the relevance?

MR. GENTILE: I'm going to get to that with the next question. Bottom line is it -- it goes right to this whole idea of not taking up the statutory sexual seduction and going for broke.

THE COURT: If you can link it to that, then ask the next question.

MR. GENTILE: I think I can -- I think I can link it to that.

THE COURT: All right. Then overruled.

BY MR. GENTILE:

Q You remember the question?

A Did -- was I aware that there was biases against Arabs?

Q Yes.

A Yes.

Q Okay. And you, knowing that, knowing that, really gave up an opportunity without getting consent from your Arab client to have him be found guilty of something that he admitted to the day he was arrested and instead decided to go for broke even knowing about those biases without his consent?

A Well, yes.

Q Now, after the trial, you spoke to some of the jurors?

A I did.

Q Okay. And you started to talk about this a little earlier and I want to keep this strictly with regard to as it's relevant to the instruction that you did not seek and that was --

App. Item 12

App. Item 12

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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

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TRANSCRIBED BY: KARR Reporting, Inc.

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?

MS. HOLTHUS: Do they -- there were arguable other bad acts brought in by the defendant, the driving and drinking and such, possible marijuana. Do they want a -- first of all, we're going to ask if defense requests that you read the -- what's that instruction...

THE COURT: The not testify instruction?

MS. HOLTHUS: No, the -- you've heard evidence defense could --

THE COURT: The limiting instruction?

MS. HOLTHUS: Yeah. But, what's it called?

THE COURT: The prior bad acts?

MS. HOLTHUS: Just the other bad acts admonishment, I guess. And also offer it if defense wants in our jury instructions.

MR. CHAIREZ: If they're offering it, we'll take it, Your Honor.

MS. HOLTHUS: Okay. Then I'm -- we will ask you then to read the admonishment. I don't know that they're --

THE COURT: Is it contained in these?

MS. HOLTHUS: I don't know that.

THE COURT: Oh, I see you put them in your instructions.

MR. CHAIREZ: Yeah. I haven't had a chance to read them yet.

MS. HOLTHUS: We intended to. Yes.