No. 79752

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAZEN ALOTAIBI, Petitioner/Appellant vs. RENEE BAKER, WARDEN LOVELOCK CORRECTIONAL CENTER; AND JAMES DZURENDA, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS, Respondents/Appellees	Supreme Court No. 79752 District Court Case No. A-18-775143-W Department 23

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

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PETITION FOR REVIEW BY THE SUPREME COURT PURSUANT TO NRAP 40B

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

NRAP 26.1 DISCLOSURE

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

1. Mazen Alotaibi
   Petitioner/Appellant;

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

3. Don P. Chairez (Nevada Bar No. 3495)

Attorney for Appellant Mazen Alotaibi before the Eighth Judicial District Court, the Honorable Stefany Miley, for purposes of all pre-trial, trial, and sentencing proceedings in this matter;

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Attorneys for Appellant Mazen Alotaibi before the Supreme Court of the United States for purposes of seeking the issuance of a Writ of Certiorari to the Supreme Court of the State of Nevada with respect to Appellant's conviction before the Eighth Judicial District Court, the Honorable Stefany Miley, and its Affirmance on direct appeal by the Nevada Supreme Court;

7. Dominic P. Gentile (Nevada Bar No. 1923)
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Attorneys for Appellant Mazen Alotaibi in the instant Petition for Review

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I. INTRODUCTION

This is an appeal from a district court Order Denying Post-Conviction relief brought under *Strickland v. Washington*, 466 U.S. 668 (1984), for ineffective assistance of counsel at trial.[1] The Nevada Court of Appeals affirmed the district court's decision and denied rehearing. Appellant petitions the full Supreme Court for review under NRAP 40(B).

This is no ordinary ineffective assistance case. ***This appeal arises from the denial of an ineffective assistance claim despite the district court's unequivocal finding that trial counsel was ineffective for failure to discuss a vital strategic decision with the appellant – whether to accept an offer by the district court to instruct the trial jury on a "lesser related offense" that carried a substantially lesser sentence than the primary offenses charged in the matter. This finding was ultimately not contested by trial counsel.***

Appellant was tried below on a myriad of sexual offenses charges involving a minor under the age 14 years. The primary substantive offense, non-consensual Sexual Assault, was punishable by life imprisonment with parole eligibility after 35 years. The district court offered a lesser related instruction concerning Statutory Sexual Seduction – punishable by one to five years imprisonment. This was unilaterally rejected by trial counsel ***without consulting the client***. As discussed below, appellant was convicted of Sexual Assault and given life terms in the Nevada Department of Prisons. In the post-conviction writ proceedings, the district court found that this unilateral waiver constituted substandard and ineffective representation. The district court, however, further determined that there was no prejudice, positing that there was no reasonable probability that the outcome – conviction of the primary substantive offense and imposition of a significantly

[1] Under *Strickland*, there are two prongs of proof that must be satisfied by a preponderance of the evidence: ineffective assistance and prejudice. *See Id*. 687-88, and *Means v. State*, 120 Nev. 1001, 1012 (2004).

longer sentence -- would have been changed by accepting the lesser related instruction suggested by the trial court. In this, the district court concluded that another charged offense instruction, based upon four separate charges of Lewdness with a Minor, cured any ineffective representation claimed in the petition below. Importantly, those offenses were punishable by either life imprisonment with parole eligibility in 10 years, or a fixed period of 20 years with parole eligibility after two years in custody. Appellant contends that this offered him little in the way of a safe haven for a more lenient conviction, and that the waiver undermined any chance at a significantly lesser sentence based upon evidence in the record that the actual crime committed did not involve forced sexual conduct. Accordingly, both prongs of *Strickland* were satisfied. See n. 1, *supra*.

The Nevada Court of Appeals did not reach the substantive *Strickland* analysis undertaken by the district court. Instead, the Court *sua sponte* found that there was no prejudice for a different reason – concluding that because appellant never stated at the post-conviction phase that he would have accepted the offer to give the instruction had he been asked to consider it, he did not prove the prejudice prong of *Strickland* by a preponderance of the evidence. Appellant respectfully contends that this ruling is clearly erroneous; it is certainly unsubstantiated in the Order of Affirmance by any statutory or case authority. As indicated, neither party raised this as an issue in this case. Accordingly, appellant contends that this Court should review the matter under NRAP 40(B).

II. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged with nine sexual offenses, including among others, sexual assault, kidnapping and lewdness with a minor. A Clark County trial jury convicted appellant on two counts of sexual assault of a minor under the age of 14. The district court imposed two concurrent sentences of life imprisonment with parole eligibility after 35 years. The district court gave a separate instruction on the

four separate charges of lewdness with a minor, upon which the jury rendered two verdicts of acquittal and two verdicts of guilt. Beyond the sentences for sexual assault, the other charges in total -- including lewdness and kidnapping -- resulted in guilty verdicts with concurrent sentences ranging from "time served" to life imprisonment with parole eligibility after 10 years.

The evidence and trial proceedings underscore the prejudice from trial counsel's unilateral waiver of the statutory sexual seduction instruction. Initially the complainant provided inconsistent accounts of the events in question and demonstrated behavior inconsistent with forceable sexual assault. Accordingly, at the close of evidence, during a 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 the Age of 14 Years. (Evidentiary hearing at 26:3-15, 29:22—29:1; App. Item 2, Bates 010, 012-013, 020). The district court expressly observed that there was indeed evidence of record that the subject minor had in fact consented to engage in the sexual activity at issue, and further stated that the court would be inclined to provide the instruction if requested to do so by defense counsel. *Id.* Trial counsel resisted this entreaty, expressing his preference to "[throw] caution to the wind and pursue an "all or nothing" instruction strategy. *Id*. at 26:3-15, 38:16-17. The district court then directed trial counsel to spend the ensuing lunch hour with appellant to advise him with respect to every instruction to be given; to ensure that the appellant understood the sentencing ramifications of waiving or requesting a lesser-related offense instruction with respect to Statutory Sexual Seduction; and to obtain appellant's informed consent to forgo such a jury instruction. Id. At 31:11-14 (App. Item 2, Bates 014).

During the lunch hour, trial counsel spent most of the time discussing whether appellant should testify. Although trial counsel 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), he did not explain to appellant the sentencing differences between Sexual Assault and Statutory Sexual Seduction. This was aggravated by the fact that appellant is a Saudi Arabian citizen unfamiliar with American legal concepts (Id. at 39:2-3, 34:14-19, and 35:5-6).[2] Unhappily, trial counsel unilaterally declined the invitation to give the lesser-related Statutory Sexual Seduction instruction. At the post-conviction writ proceedings below, counsel admitted that this was a mistake.

As stated, the district court denied relief and this appeal followed.

III. STANDARD FOR SUPREME COURT REVIEW

A decision of the Court of Appeals is only reviewable under NRAP 40(B) via Petition for Review by the Nevada Supreme Court. NRAP 40(B)(a) provide in pertinent part:

> A party aggrieved by a decision of the Court of Appeals may file a petition for review with the clerk of the Supreme Court. The petition must state the question(s) presented for review and the reason(s) review is warranted. Supreme Court review is not a matter of right but of judicial discretion. The following, while neither controlling nor fully measuring the Supreme Court's discretion, are factors that will be considered in the exercise of that discretion:
>
> (1) Whether the question presented is one of first impression of general statewide significance;
>
> (2) Whether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court; or
>
> (3) Whether the case involves fundamental issues of statewide public importance.

[2] There is some dispute over whether an interpreter was present during the break. The district court found that an interpreter was available over the lunch hour while counsel suggests otherwise. Despite this issue, it is certainly reasonable that it would have been difficult to obtain a knowing consent to accept or waive the instruction.

This situation satisfies subsections (1), (2) and (3) of Rule 40(B)(a). It involves a conflation of principles under *Strickland* not yet reached by this court and raises fundamental issues of criminal trial practice throughout this State.

IV. ARGUMENT

A. The Substantive Claim of Ineffective Assistance in the Trial Court

To successfully prosecute an ineffective assistance of counsel claim under *Strickland v. Washington*, the petitioner must satisfy two prongs of proof: first, that counsel's performance is deficient in that it fell below an objective standard of reasonableness and, second, that prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. 466 U.S. 668, 687-88 (1984) and *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P. 2d 504, 505 (1984). Both prongs must be established by a preponderance of the evidence. *See Means, supra*. Stated differently, the ineffective assistance must undermine confidence in the outcome. 466 U.S. 682-89. There are two competing corollaries – first, that strategic decisions based upon plausible alternative decisions of counsel are largely unchallengeable and, second, that critical decisions on strategy must be discussed with the client. *See Dawson v. State*, 108 Nev. 112, 117 (1992), as well as ABA Criminal Justice Standards Section 4-5.2 (d). Although these analyses are fact intensive, and the district court's findings of fact are given deference, the questions of law regarding ineffective assistance are reviewed de novo *Lader v. Warden*, 121 Nev. 682, 686 (2005).

The trial court summarized the salient testimony on post-conviction from appellant's trial counsel:

> At the time of the evidentiary hearing, [counsel] 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, [counsel] [sic] testified that he spent most of that time attempting to persuade Petitioner to testify. [Counsel] testified that the Petitioner had decided against testifying after watching the examination of other witnesses.

> [Counsel] testified that there was no interpreter present during the hour and fifteen-minute discuss [sic].[3] [Counsel] 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.
>
> [Counsel] 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. [Counsel] said he never received consent from his client to reject the instruction for Statutory Sexual Seduction.
>
> [Counsel] 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, [counsel's] testimony credible.

Trial counsel freely admitted that he did not discuss the trial court's suggestion with appellant. Under *Strickland*, the district court found in pertinent part as follows:

> Pursuant to the two-prog 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 [sic] by the Court. . . .

This satisfied the first prong of *Strickland*. The district court went on to resolve the second prong:

> 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-noting 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. (Record citation omitted.) The jury was not left with a strictly binary decision between complete acquittal and conviction for [sexual assault.] Had the jury believed the Petitioner's defense of consent, then the jury had the option to find the anal and oral penetration of [the alleged victim] to be Lewdness with a Child Under 14 Years of Age.

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[3] See n. 2.

This analysis, of course, is severely undermined by the severity of sentences for Lewdness – Life with parole or a fixed term of 20 years -- and the relative lenience of a 1 to 5-year sentence for Statutory Sexual Seduction. It makes little sense that the other instruction on lewdness cured the ineffective assistance in waiving a much more lenient criminal liability construct. Appellant was convicted on two sexual assault charges and was convicted on two of four Lewdness charges. This means that the jury cannot have concluded that the Lewdness charges were a vehicle for a compromise or alternative lesser-related verdict. Importantly, the trial court also rightfully felt that the lesser-related offense of Statutory Sexual Seduction fit the evidence of record.

The *Strickland* elements of proof seriously understate what happened here. The underlying charge of sexual assault carried a lengthy sentence; trial counsel was given an opportunity to discuss with the appellant a lesser related offense instruction suggested by the trial court that would carry a much lighter sentence. Counsel admitted under oath that no such discussion occurred and made a record that refusal was based in part upon language barrier problems, and that he felt as a matter of strategy that an all or nothing approach would be in the best interest of the client. While strategic decisions made by counsel after investigating the plausible options are almost unchallengeable, that principle must be tempered in application where the decision is so critical to the defense. *See* discussion of *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), *infra.* Here, based upon counsel's testimony, the trial court seemed to be telegraphing the importance of giving the alternate lesser related instruction. The result – the trial court conflated of these two competing corollary principles under *Strickland* that implicates this Court's NRAP 40(B) review. In short, this strategic decision does not trump the failure to properly advise and assist the client because the choices were never cleared with him.

We now face the specter of non-communication with a second language

defendant where so much hinged on the strategy preferred by counsel and his rejection of the trial court's suggestion with no input from the client. In this, there can be no question that the deficiency undermines confidence in the ultimate outcome – the result may have been substantially mitigated based upon the lesser-related offense instruction unilaterally rejected by counsel. While the district court concluded that another instruction on the charges of lewdness with a minor alleviated the prejudice, the refusal of the proposed Statutory Sexual Seduction instruction by counsel severely heightened the sentencing exposure faced by this client. Given the mandatory minimum imprisonment of 35 years under the primary sexual assault claim and given that the remaining lesser offense of Lewdness with a Minor would have only been of marginal benefit to appellant, a knowing waiver of the of an instruction that could reduce the exposure by a factor of some 15 to 25 years was essential. To be sure, the fateful decision by trial counsel had a disastrous effect.

The jury convicted appellant on some but not all the charges, at least five of which carried protracted sentences. Those were the only choices available to the jury panel. Had trial counsel accepted the district court's offer of a lesser-related statutory sexual seduction instruction and argued that guilt on the latter charge was the only sensible alternative under the facts, the jury would have had another credible choice that involved convicting appellant, but would have resulted in vastly lesser sentences. As noted below, counsel could not have employed this tactic without informed consent of the appellant which, again, was never discussed despite admonition from the district court.

The United States Supreme Court in *McCoy v. Louisiana*, 138 U.S. S. Ct. 1500 (2018), reached the issue of counsel's duties of assistance in a death penalty murder case where, over the defendant's objection, trial counsel employed a strategy of admitting the defendant's guilt, but argued lack of specific intent to commit first-degree murder. The Court held that the "Sixth Amendment guarantees a defendant

the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid a more serious punishment." *Id.* at 1507 – 1512.

The Supreme Court went on to observe with regard to *Strickland*:

> The Court's ineffective-assistance-of-counsel jurisprudence see *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, does not apply here, where the client's autonomy, not counsel's competence, is in issue. To gain redress for attorney error, a defendant ordinarily must show prejudice. See *Id*, at 692, 104 S.Ct. 2052. But here, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative. Violation of a defendant's Sixth Amendment-secured autonomy has been ranked "structural" error; when present, such an error is not subject to harmless-error review. Id.

The instant appeal raises an extension of the *McCoy* doctrine. To explain, the lesser-related offense instruction on sexual seduction would have required counsel to argue non-guilt on the sexual assault, based upon the consent of the complainant – and then argue guilt on the lesser related offense based upon that same consent evidence. He could not make that argument without appellant's consent under *McCoy*.[4]

The Court in *McCoy* also discusses the situation when the defendant is essentially non-responsive to counsel's trial strategy. Importantly, appellant was active in forming various trial strategies such as whether to testify. While counsel claims that appellant left instructions to counsel, this jury instruction issue was of paramount importance to the defense. Counsel's failure to even discuss this with appellant – in direct violation of the district court's mandate - prevented appellant from ever having the chance to mitigate his sentencing exposure. In summary, the

[4] While consent is not a defense to Lewdness, this does not change the dynamic over the tension between sexual assault and statutory sexual seduction. The jury could convict on the remaining lewdness counts still leaving a lesser sentencing exposure with respect to the sexual assault sentences imposed, including earlier parole. And, the statutory seduction instruction may have led the jury to convict only on that offense. To be sure, either result would be better than that achieved by trial counsel.

issue of trial counsel's autonomy here is seriously in play and, reading *McCoy* and *Strickland* together, both *Strickland* prongs are thus satisfied.[5]

Thus, again, this scenario clearly undermines any confidence in the actual outcome. The finding that the *Strickland* prejudice prong was not met is unsustainable. The two prongs in this case are inextricably related.

B. The Ruling of the Court of Appeals

The Nevada Court of Appeals did not reach any of the above issues. Rather, it simply found that because the defendant never stated at the post-conviction phase that he would have accepted the offer to give the instruction had he been asked to consider it, he could not prove the prejudice prong by a preponderance of the evidence. Appellant respectfully contends that this ruling is completely erroneous.

To explain, the appellate court decision leaves behind a doctrinal construct that a talismanic phrase with no substantive meaning can foreclose relief if not uttered – a phrase that is so self-serving that any district court can use it as an excuse to find that the burden of proof under the second prong of *Strickland* was not met on an episodic and subjective basis. Importantly, the Appellate Court's ruling is unsupported by any case authority. This is because no case has stated that prejudice in such a situation must be proved by an affirmation that the petitioner would have exercised any particular option had proper advice been given by trial counsel. As a matter of justice and public policy, this ruling improperly gives a trial court unbridled discretion in ruling upon the second prong of *Strickland* and *Lyons*.

V. CONCLUSION

This case presents a situation where the *Strickland* prejudice prong is

[5] One might wonder why the issue over appellant's testimony dominated the noon recess when the trial court sought other consultations regarding highly complex legal alternatives between counsel and his client. It can be inferred that this was inconvenient to counsel because the issue the appellant's testimony was evidently not discussed under less constrained circumstances, such as in the jailhouse the previous evening. This also may explain why this vital opportunity to mitigate appellant's sentence was lost.

inextricably related to the deficiency prong. This is demonstrated in the recapitulation of trial counsel's testimony by the district court in its decision below. The failure to fully advise this second-language defendant prevented any input into a vitally important strategic decision which, in turn, seriously undermined any confidence is the outcome of the trial.

The full Supreme Court should review the Appeals Court decision, resolve the full ineffective assistance claim de novo, and retract the Appeal Court's novel statement concerning the second prong of *Strickland*. Accordingly, this Court should, upon review, remand this case for a new trial or, at a minimum, an additional evidentiary hearing to litigate whether appellant would have waived or requested the lesser-related offense instruction on Statutory Sexual Seduction. This would only be appropriate given the novel proposition relied upon by the Court of Appeals in its Order of Affirmance. See NRAP 40(B)(g).[6]

Respectfully submitted this 5th day of January 2021.

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[6] (g) Action by Supreme Court When Petition Granted. The Supreme Court may limit the question(s) on review. The Supreme Court's review on the grant of a petition for review shall be conducted on the record and briefs previously filed in the Court of Appeals, but the Supreme Court may require supplemental briefs on the merits of all or some of the issues for review.

NRAP 28.2 ATTORNEY'S CERTIFICATE

I, Dominic P. Gentile, Esq., certify as follows:

1. I as the signing attorney have read the brief;

2. To the best of my knowledge, information and belief, the brief is not frivolous or interpose for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

3. The Petition for Review complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in this Petition for Review regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found; and

4. The Petition for Review complies with the formatting requirements of Rule 32(a)(4)-(6), and either the page- or type-volume limitations stated in Rule 32(a)(7). This Petition for Review has been typed using Microsoft Word, Times New Roman style, and a 14-point font and contains no more than 3694 words.

Dated this 5th day of January 2021.

CLARK HILL PLLC

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CERTIFICATE OF COMPLIANCE

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

This Petition for Review has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman style, and a 14-point font size.

I further certify that this Petition for Review complies with the page or type volume limitations of NRAP 40, 40A and 40B because it is either:

Proportionally spaced, has a typeface of 14 points or more, and contains no more than 3694 words.

DATED this 5th day of January, 2021.

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CERTIFICATE OF MAILING

The undersigned, an employee of Clark Hill PLLC, hereby certifies that on the 5th day of January, 2021, I served a copy of **PETITION FOR REVIEW BY THE SUPREME COURT PURSUANT TO NRAP 40B**, by electronic means:

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