

No. 25-

IN THE
Supreme Court of the United States

MAZEN ALOTAIBI,

Petitioner,

v.

NETHANJAH BREITENBACH, CHARLES DANIELS,
LOVELOCK CORRECTIONAL CENTER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CLIFF GARDNER
Counsel of Record
LAZULI WHITT
1448 San Pablo Avenue
Berkeley, CA 94702
(510) 524-1093
casetris@aol.com

Counsel for Petitioner
Mazen Alotaibi

QUESTIONS PRESENTED

Petitioner was charged with an offense mandating a 35-year minimum term. After hearing the evidence, the judge advised counsel he would, if requested, instruct on a lesser offense with a five-year maximum term. Because petitioner was absent, he ordered counsel to discuss the matter with petitioner. Counsel agreed, but later admitted he neither discussed the matter with petitioner, nor requested the lesser-offense instruction, because he misunderstood the punishment for the lesser offense. Jurors convicted and the court imposed a 35-year minimum term. Petitioner subsequently alleged counsel's performance (1) fell below an objective standard of reasonableness and (2) prejudiced him given the "totality of the evidence" test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

State courts agreed counsel's performance was unreasonable. But they refused to consider the objective evidence of prejudice petitioner offered showing that had he been consulted, he would have agreed to lesser-offense instructions. Instead, the state courts held there was no showing of prejudice absent a self-serving declaration or testimony from petitioner declaring that he would have agreed to lesser-offense instructions. The Ninth Circuit held this was not an unreasonable determination of federal law. On this record, the question presented is this:

Was the state court's refusal to consider any of petitioner's objective evidence in the absence of either a declaration or testimony from petitioner contrary to or an unreasonable application of *Strickland's* explicit holding that prejudice is assessed by considering the totality of the evidence?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioner Mazen Alotaibi is the petitioner in this case and was represented in the court below by Cliff Gardner and Lazuli Whitt. Nethanjah Breitenbach is the current Warden of Lovelock Correctional Center where petitioner is incarcerated. Charles Daniels is the current Director of the Nevada Department of Corrections which oversees the Lovelock Correctional Center. The Warden, Director, and Lovelock Correctional Center were represented below by the Nevada Attorney General's office. Respondents are Nethanjah Breitenbach, Charles Daniels and Lovelock Correctional Center. Pursuant to Rule 29.6, petitioner states that no parties are corporations.

RELATED PROCEEDINGS

Alotaibi v. Breitenbach, 24-2523, United States Court of Appeals for the Ninth Circuit, Judgment entered March 26, 2026 (denying petition for panel rehearing and rehearing en banc), January 12, 2026 (affirming District Court's denial of habeas petition) and October 30, 2024 (granting request for certificate of appealability).

Alotaibi v. Williams, et al., 2:21-cv-01281-GMN-BNW, United States District Court for the District of Nevada, Judgment entered April 8, 2024 (denying petition for writ of habeas corpus).

Alotaibi v. Baker, et al., 79752, Nevada Supreme Court, Judgment entered February 19, 2021 (denying review of petition for writ of habeas corpus).

Alotaibi v. Baker, et al., 78752-COA, Nevada Court of Appeal, Judgment entered December 18, 2020 (denying

rehearing of petition for writ of habeas corpus) and October 16, 2020 (affirming state District Court's denial of habeas petition).

Alotaibi v. Baker, et al., A-18-785145-W, Nevada District Court, Clark County, Judgment entered September 5, 2019 (denying petition for writ of habeas corpus).

Alotaibi v. Nevada, 67380, Nevada Supreme Court, Judgment entered April 22, 2020 (affirming judgment of conviction en banc), November 3, 2017 (order granting en banc reconsideration), April 26, 2017 (order denying rehearing) and February 28, 2017 (affirming conviction on direct appeal).

Nevada v. Alotaibi, C287173, Nevada District Court, Clark County, Judgment entered November 18, 2014 (denying motion for new trial after conviction and/or evidentiary hearing).

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT.....	ii
RELATED PROCEEDINGS.....	ii
TABLE OF CONTENTS.....	iv
TABLE OF APPENDICES	vi
TABLE OF CITED AUTHORITIES	viii
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. The Trial Evidence And The Evidence Of Consent.....	3
B. The Instructional Conference And Counsel’s Promise To Discuss The Lesser-Offense Instruction With Defendant.....	5

Table of Contents

	<i>Page</i>
C. State Post-Conviction Proceedings	6
D. The Panel Decision	9
REASONS FOR GRANTING THE WRIT	10
I. NEVADA’S REQUIREMENT THAT A HABEAS PETITIONER SUBMIT DIRECT EVIDENCE – IN THE FORM OF A DECLARATION OR TESTIMONY – TO ESTABLISH PREJUDICE IN ASSERTING A CLAIM OF INEFFECTIVE ASSISTANCE IS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW.....	11
CONCLUSION	18

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A – MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 12, 2026	1a
APPENDIX B – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 30, 2024	5a
APPENDIX C – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, FILED APRIL 8, 2024.....	7a
APPENDIX D – ORDER DENYING PETITION FOR REVIEW OF THE SUPREME COURT OF THE STATE OF NEVADA, FILED FEBRUARY 19, 2021.....	35a
APPENDIX E – ORDER DENYING REHEARING OF THE COURT OF APPEALS OF THE STATE OF NEVADA, FILED DECEMBER 18, 2020.....	37a
APPENDIX F – ORDER OF AFFIRMANCE OF THE COURT OF APPEALS OF THE STATE OF NEVADA, FILED OCTOBER 16, 2020.....	38a
APPENDIX G – DECISION AND ORDER OF THE DISTRICT COURT, CLARK COUNTY, NEVADA, DATED SEPTEMBER 5, 2019	41a

Table of Appendices

	<i>Page</i>
APPENDIX H – OPINION OF THE SUPREME COURT OF THE STATE OF NEVADA FILED NOVEMBER 9, 2017	57a
APPENDIX I – ORDER GRANTING EN BANC RECONSIDERATION OF THE SUPREME COURT OF THE STATE OF NEVADA, FILED NOVEMBER 3, 2017.....	72a
APPENDIX J – ORDER DENYING REHEARING OF THE SUPREME COURT OF THE STATE OF NEVADA, FILED APRIL 26, 2017.....	74a
APPENDIX K – ORDER OF AFFIRMANCE OF THE SUPREME COURT OF THE STATE OF NEVADA, FILED FEBRUARY 28, 2017	77a
APPENDIX L – FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER AND DECISION OF THE DISTRICT COURT OF CLARK COUNTY, NEVADA, FILED NOVEMBER 18, 2014	81a
APPENDIX M – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 26, 2026	107a

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Federal Cases	
<i>Alotaibi v. Breitenbach</i> , 2026 WL 84567 (9th Cir. 2026).....	10
<i>Chacon v. Wood</i> , 36 F.3d 1459 (9th Cir. 1994).....	16
<i>Cullen v. United States</i> , 194 F.3d 401 (2d Cir. 1999)	15
<i>Desert Palace, Inc. v. Costa</i> , 539 U.S. 90 (2003).....	17
<i>Dunn v. Reeves</i> , 594 U.S. 731 (2021).....	12, 13, 14
<i>Holland v. United States</i> , 348 U.S. 121 (1954).....	17
<i>Johnson v. Duckworth</i> , 793 F.2d 898 (7th Cir. 1991).....	15
<i>Jones v. Wood</i> , 114 F.3d 1002 (9th Cir. 1997).....	16
<i>Lee v. United States</i> , 582 U.S. 357 (2017).....	14, 15
<i>McFadden v. United States</i> , 576 U.S. 186 (2015).....	17

Cited Authorities

	<i>Page</i>
<i>Merzbacher v. Shearin</i> , 706 F.3d 356 (4th Cir. 2013).....	15
<i>Paters v. United States</i> , 159 F.3d 1043 (7th Cir. 1998).....	15
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	6, 9, 12, 13, 14, 16, 17, 18
<i>Toro v. Fairman</i> , 940 F.2d 1065 (7th Cir. 1991).....	15
<i>Turner v. Calderon</i> , 281 F.3d 851 (9th Cir. 2002)	15
<i>United States v. Bryant</i> , 655 F.3d 232 (3d Cir. 2011)	17
<i>United States v. Davis</i> , 428 F.3d 802 (9th Cir. 2005)	16
<i>United States v. Gordon</i> , 156 F.3d 376 (2d Cir. 1998)	15, 16
<i>United States v. Kearns</i> , 90 F.4th 1301 (10th Cir. 2024).....	18
<i>United States v. Morin</i> , 627 F.3d 985 (5th Cir. 2010).....	17

Cited Authorities

	<i>Page</i>
<i>United States v. Nivica</i> , 887 F.2d 1110 (1st Cir. 1989)	17
<i>United States v. Santos</i> , 553 U.S. 507 (2008)	17
<i>United States v. Scruggs</i> , 549 F.2d 1097 (6th Cir. 1977)	17
<i>United States v. Valdez</i> , 973 F.3d 396 (5th Cir. 2020)	15
<i>Walters v. Martin</i> , 18 F.4th 376 (4th Cir. 2021)	15
State Cases	
<i>Quillen v. State</i> , 112 Nev. 1369 (Nev. 1996)	3
Constitutional Provisions	
U.S. Const. amend. VI	2
Federal Statutes	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2254(d)	2
28 U.S.C. § 2254(d)(1)	11

Cited Authorities

	<i>Page</i>
State Statutes	
NRS § 193.130(2)(c)	3
NRS § 200.366(1)	3
NRS § 200.366(3)(c)	3
NRS § 200.368(1)	3

Petitioner Mazen Alotaibi respectfully prays that a Writ of Certiorari issue to review the decision of the Ninth Circuit Court of Appeals entered on January 12, 2026.

OPINIONS BELOW

The Ninth Circuit Court of Appeals issued its decision in this case on January 12, 2026. A copy of the opinion is attached as Appendix A. That court denied rehearing en banc on March 26, 2026. The order denying rehearing is attached as Appendix M. The District Court denied Mr. Alotaibi's habeas petition on April 8, 2024. The order denying relief is attached as Appendix C.

The Nevada Supreme Court affirmed Mr. Alotaibi's conviction on direct appeal on February 28, 2017. A copy of that opinion is attached as Appendix K. In a superseding opinion, the Nevada Supreme Court again affirmed the conviction in an opinion dated November 9, 2017. A copy of that opinion is attached as Appendix H.

Mr. Alotaibi sought post-conviction relief in Nevada state court. The state trial court issued an order denying relief on September 5, 2019. A copy of that order is attached as Appendix G. The Nevada Supreme Court affirmed that ruling in an opinion dated October 16, 2020. A copy of that opinion is attached as Appendix F.

JURISDICTION

The Ninth Circuit Court of Appeals issued its opinion on January 12, 2026. That court denied rehearing en banc on March 26, 2026. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

This case involves the right-to-counsel provision of the Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

It also involves 28 U.S.C. § 2254(d) which provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. The Trial Evidence And The Evidence Of Consent.

Under Nevada law, the crime of statutory sexual seduction is defined as “consensual sex with an under-aged person.” *Quillen v. State*, 112 Nev. 1369, 1383 (Nev. 1996). The punishment is one to five years in prison. Nevada Revised Statutes (“NRS”) § 200.368(1) and § 193.130(2)(c). The far more serious crime of sexual assault of a minor is defined as sexual conduct with a minor that is “against the will of the victim.” NRS § 200.366(1). The punishment is a mandatory life sentence with parole eligibility in 35 years. NRS § 200.366(3)(c). The difference between the two offenses is consent – if the sexual conduct is consensual, the offense is sexual seduction.

As relevant here, petitioner was charged with two counts of the more serious offense – sexual assault – occurring on December 31, 2012. 3 ER 246.¹ At the time of the charged crimes, petitioner was a Saudi national and a pilot in the Saudi Air Force, stationed in San Antonio, Texas and receiving training on an F-15 aircraft. 4 ER 638-643. He and two friends drove to Las Vegas, Nevada, arriving in the early morning of December 31 around 2 a.m. 5 ER 757-760. They had drinks at several hotels until dawn before heading to the Circus Circus Hotel where they were staying on the sixth floor. 5 ER 762-770.

As they got off the elevator, they saw 13-year-old A.J. Dang sitting on a couch in the hall near the elevator. 3 ER

1. References to “ER” refer to the Excerpt of Record filed in the Ninth Circuit Court of Appeals.

321; 5 ER 775. A.J. later told police that petitioner forcibly dragged him down the hall by his clothing and into his hotel room. 3 ER 336-337, 349. But as A.J. himself would admit at trial – and as video footage from the hotel would show – he was lying. 3 ER 341.

At trial, A.J. no longer advanced the forcible “dragging down the hall” story. Instead, he admitted that he asked petitioner if he had any marijuana. 3 ER 322. Petitioner said he did and A.J. followed him to his hotel room. 3 ER 322. The forcible dragging incident A.J. described to police simply did not happen.

But this was not the only portion of A.J.’s statement to police which was misleading. Thus, A.J. did not tell police that before the sexual acts occurred, he had already been in petitioner’s room once, left with petitioner to go outside and smoke marijuana and voluntarily returned a second time. 3 ER 349, 351-352. But that is exactly what the video evidence showed. 3 ER 322-323, 382. And in the elevator on the way down to smoke marijuana, cameras recorded petitioner kissing A.J.’s neck. 3 ER 323-325, 384. Outside, the two smoked the marijuana together. 3 ER 325.

Of course, the hotel was full of people from whom A.J. could have sought help. Instead, after smoking, A.J. simply walked through the hotel with petitioner and went back to his room on the sixth floor. According to A.J., while in the elevator petitioner said he would give A.J. money and weed to have sex with him. 3 ER 326. A.J. agreed. 3 ER 326. Once back in the room, petitioner and A.J. went immediately to the bathroom and closed the door. 3 ER 328-329. A.J. testified that petitioner put marijuana on the counter and told A.J. he would take care of him, offering him \$300. 3 ER 329-331.

At trial, there was no dispute that inside the bathroom A.J. performed oral sex on petitioner and petitioner had anal sex with A.J. 4 ER 701-718. According to A.J., however, petitioner ignored A.J.'s requests to stop and forced him to engage in these acts. 3 ER 330-332, 334. A.J. ran out of the room, took the elevator to the lobby and told security guard Eric Laskin that he had been raped. 3 ER 333-336, 398. Laskin saw no signs of injury and recalled that A.J. was not crying and instead was "calm and collected." 3 ER 399-400. Hotel security detained petitioner and he was arrested later that day. 4 ER 481.²

At the police station, petitioner waived his *Miranda* rights and voluntarily spoke with police. 4 ER 699-700. He admitted engaging in the sex acts described by A.J. but said that A.J. had agreed to the acts in exchange for marijuana and cash. 4 ER 701-718. In other words, at all points petitioner admitted the lesser offense of sexual seduction.

B. The Instructional Conference And Counsel's Promise To Discuss The Lesser-Offense Instruction With Defendant.

At the end-of-trial instructional conference, the trial court was very much aware of the substantial evidence of consent. After all, video evidence showed A.J. lied about being forcibly dragged down the hall, A.J. made no attempt to seek help in the lobby before returning to petitioner's hotel room, he returned voluntarily to petitioner's room

2. Witnesses in the hotel room heard no talking, screaming or anyone asking for help. 5 ER 799. A.J. was not crying when he left the bathroom. 5 ER 810.

and he admitted agreeing to have sex for money. As such, the court asked defense counsel whether he wanted jurors instructed on the lesser offense of statutory sexual seduction. 6 ER 884, 887. In light of this evidence, under state law the trial court “was inclined to allow it . . . if proffered by the defense [because] . . . there is testimony in this case of consent by the victim.” 6 ER 884.

Petitioner was not at the instructional conference when the lesser offense option was discussed. Accordingly, when he finally arrived in court near the end of the instructional conference, the trial judge explained that he had ordered defense counsel to advise him over the lunch break of what had occurred:

The only reason we started without you is [defense counsel] has agreed that he’s going to go over every single thing as well as all the instructions . . . with you with the presence of the interpreter.

6 ER 888. After the lunch break, defense counsel did not request instructions on statutory sexual seduction and none were given. 6 ER 903-904.

Jurors convicted on both counts of sexual assault. The trial court imposed concurrent life terms with eligibility for parole in 35 years.

C. State Post-Conviction Proceedings.

Petitioner sought post-conviction relief in state court alleging ineffective assistance of counsel. Under *Strickland*, 466 U.S. 668, this claim required petitioner

to establish two elements: (1) counsel's performance in failing to consult with him fell below the standard of care and (2) there was a reasonable probability petitioner would have requested (and the trial court would have given) the lesser-offense instruction.

As to the performance element, petitioner contended that despite counsel's explicit promise to the trial court, he had failed to consult petitioner about instructions on the lesser offense of statutory sexual seduction. 2 ER 81-86. At the subsequent evidentiary hearing, trial counsel explained that petitioner was only the second criminal defendant he had ever represented. 7 ER 1214-1218, 1220-1221. Counsel recalled the instructional conference, but explained that he did not discuss the lesser offense instruction with petitioner as he had promised, and was certain that he did not explain the stark sentencing differences between a conviction for sexual seduction and the charged offenses of sexual assault. 7 ER 1239-1241. When directly asked whether he explained the sexual seduction instruction to petitioner as the judge ordered, counsel testified "no." *Ibid.*

Defense counsel explained his failure, admitting that at the time of trial he thought the punishment for sexual seduction had a 10-year maximum. 7 ER 1239. Because petitioner had previously rejected a plea offer carrying a possible 10-year sentence, counsel believed petitioner would also reject instructions on sexual seduction since (in counsel's mistaken view) sexual seduction also had a 10-year maximum. 7 ER 1241.

To his credit, counsel admitted that he was now aware that the penalty for sexual seduction was only one to five

years. 7 ER 1239. Which meant that there was a “30-year differential” between the minimum time served for sexual assault (35 years) and the maximum time which could be served for sexual seduction (five years). 7 ER 1242. And even though years had passed since trial, counsel recalled the substantial anti-Arab bias in the jury venire from which the petit jury would be selected. 7 ER 1244-1245.

As to prejudice, the record contained substantial evidence of what courts have long described as objective evidence showing petitioner would have requested the lesser instructions. This objective evidence included:

- The vast disparity in punishment between the great offense (life in prison with parole eligibility in 35 years) and the lesser offense (one to five years).
- This was not a case where petitioner maintained he was innocent of wrongdoing. As noted, from the very beginning of this case petitioner at all times admitted committing sexual acts with a minor. An instruction on sexual seduction would simply allow jurors to convict petitioner of what he admitted to doing. And absent such an instruction, jurors would be asked to set him scot-free even though he admitted having oral and anal sex with an underage, 13-year-old boy.
- Hotel video footage showed that the victim had lied to police about being forced into petitioner’s hotel room. This video evidence

was part of the reason the judge was inclined to give the lesser offense instruction.

- Petitioner is a citizen of Saudi Arabia and of Arab descent. The trial voir dire raised the distinct possibility of anti-Arab bias in the jury venire, suggesting it would be dangerous to rely on jurors to acquit if put in an all-or-nothing position.

The state trial court agreed that counsel's performance was not based on strategy but, instead, fell below the appropriate standard of care. 1 ER 25-37. The state court nevertheless denied the petition because it believed counsel's error was harmless. *Ibid.* On appeal, the state court held that evidence from petitioner himself was required to establish prejudice under *Strickland*:

At the evidentiary hearing conducted in this matter, Alotaibi did not present evidence regarding whether he would have agreed to request [the statutory sexual seduction] instruction. 1 ER 24.³

D. The Panel Decision.

Petitioner then sought habeas relief in federal court, again contending that counsel provided ineffective assistance in failing to advise petitioner of and request an instruction on statutory sexual seduction. As noted above,

3. Mr. Alotaibi's subsequent Petition for Review to exhaust state remedies in the Nevada Supreme Court was summarily denied on February 19, 2021. 1 ER 21.

the panel held that the state court was not unreasonable in requiring petitioner to submit a declaration or testimony in order to prove prejudice:

The state court did not unreasonably determine the facts when it denied the petition because Alotaibi failed to submit a declaration or testimony stating he would have requested the jury instruction if given the option. Without such proof, Alotaibi did not establish prejudice because, absent a showing that he would have asked counsel to request the sexual-seduction lesser-related jury instruction, he did not show a reasonable probability of a different outcome at trial. *Alotaibi v. Breitenbach*, 2026 WL 84567 at * 1 (9th Cir. 2026)

This Petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT

The state courts did not consider any of the objective evidence establishing prejudice, ruling instead that petitioner could not establish prejudice absent a declaration or testimony from the petitioner himself. Certiorari is appropriate. As discussed more fully below, this Court has already rejected the suggestion that when a defendant raises a claim of ineffective assistance, there is any single type of evidence that is a mandatory prerequisite for relief. Instead, in assessing such claims, reviewing courts are required to consider the totality of the evidence. The state courts' refusal to do so here was contrary to and an unreasonable application of federal law.

Indeed, under the facts of this case, the state court's approach was especially troubling. Where (as here) a defendant claims that counsel provided substandard advice, federal courts throughout the country – including this Court – have recognized that a declaration from a defendant as to what he or she would have done with different advice is a “self-serving,” “post hoc assertion” which is insufficient to show prejudice and not a basis to vacate a criminal conviction. The state courts unreasonably applied federal law in holding that evidence routinely rejected as self-serving and insufficient is actually a prerequisite to relief. And the state court's holding is equally indefensible in light of this Court's long recognition that like any other fact, a defendant's intent or state of mind may be proven by either direct or circumstantial evidence. The state courts' contrary rule – insisting that direct evidence from petitioner as to this state of mind was required to establish prejudice – was a patently unreasonable application of federal law.

I. NEVADA'S REQUIREMENT THAT A HABEAS PETITIONER SUBMIT DIRECT EVIDENCE – IN THE FORM OF A DECLARATION OR TESTIMONY – TO ESTABLISH PREJUDICE IN ASSERTING A CLAIM OF INEFFECTIVE ASSISTANCE IS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW.

28 U.S.C. § 2254(d)(1) precludes federal habeas relief on any claim adjudicated on the merits in state court unless the state decision “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law.” The panel here held that the state court was not unreasonable in requiring

that in order to prove prejudice from counsel's failure to consult with him, petitioner was required to "submit a declaration or testimony stating he would have requested the jury instruction if given the option." Certiorari is proper because that rule is contrary to or an unreasonable determination of federal law which has never imposed a per se requirement that a defendant testify to establish prejudice in an ineffective assistance of counsel case.

The starting point for this analysis is this Court's decision in *Strickland* itself. There, the Court emphasized that in assessing whether defendant had carried the burden of proving prejudice, a reviewing court must consider "the totality of the evidence." 466 U.S. at 695. Based on the totality of the evidence, "a court making the prejudice inquiry must ask if the defendant has met the burden" of showing prejudice. 466 U.S. at 696. "Most important, in adjudging a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules." *Ibid.* In accord with the admonition that *Strickland* did not establish "mechanical rules" for litigating claims of ineffective assistance, the Court has never required that a defendant present any specific type of evidence to establish either the performance or prejudice prongs of the *Strickland* analysis.

In *Dunn v. Reeves*, 594 U.S. 731 (2021) the Court agreed that *Strickland* did not require any single type of evidence as a prerequisite to relief. There, defendant was convicted of murder and sentenced to death. In post-conviction proceedings he contended trial counsel rendered ineffective assistance in failing to develop and present certain mitigating evidence at the penalty phase

of trial. 594 U.S. at 733. Defendant did not call his trial lawyers to testify. The Alabama state courts denied relief. The Eleventh Circuit reversed, interpreting the state court as having applied an improper blanket rule that a *Strickland* petitioner could not prove ineffective assistance unless he presented testimony from his lawyers. *Id.* at 733.

This Court granted certiorari and reversed. But the Court did not hold that *Strickland* permitted state courts to require a specific type of testimony as a prerequisite to relief. Instead, it held the appellate court “mischaracter[ized] . . . the state-court opinion” as having set forth a “blanket rule” requiring *Strickland* defendants to present testimony from their trial lawyers. *Id.* at 742. And while dissenting Justice Sotomayor (joined by Justice Kagan) flatly disagreed that the appellate court had mischaracterized the state-court opinion, she noted the majority at least “implicitly acknowledges [that] a per se rule that a habeas petitioner’s claim fails if his attorney did not testify at an evidentiary hearing is flatly incompatible with *Strickland*.” *Id.* at 745 (Sotomayor, J., dissenting.)

There are numerous situations where, in assessing prejudice from a defense lawyer’s substandard conduct, a reviewing court must decide what defendant would have done had the lawyer performed competently. For example, when a defendant pleads guilty after receiving incorrect advice, a reviewing court must decide whether the defendant would have gone to trial with competent advice. Similarly, when a defendant rejects a plea and goes to trial after receiving incorrect advice, a court must consider whether defendant would have accepted the plea with competent advice. And, as here, when a lawyer improperly fails to discuss a trial court’s offer of

lesser-offense instructions, the court must decide whether defendant would have requested the instruction. But as *Strickland* itself made clear, there are no “mechanical rules” or mandatory evidentiary prerequisites in the *Strickland* calculus. Instead, reviewing courts must simply consider “the totality of the evidence.”

The state court here embraced the precise approach to *Strickland* rejected by *Strickland* itself and by both the majority and dissent in *Dunn*. The state court did not look at the “totality of the evidence” as *Strickland* requires, refusing to consider *any* of the objective evidence in the record which supported a finding of prejudice. Instead, the state court concluded that absent personal testimony from petitioner himself, *Strickland* prejudice could not be shown. Certiorari is proper because the state court’s approach is contrary to, or an unreasonable application, of both *Strickland* and *Dunn*.

Indeed, in light of the particular evidence required by the state-court rule in this case – direct evidence from petitioner in the form of testimony or a declaration as to what he or she would have done with different advice from counsel – the state court’s departure from *Strickland* is particularly unreasonable for two similar reasons. First, this type of evidence has long been recognized as self-serving, unpersuasive and insufficient to establish prejudice.

For example, in *Lee v. United States*, 582 U.S. 357 (2017) this Court made clear that given the “strong societal interest in finality,” criminal convictions (in that case, a guilty plea) should not be reversed “solely because of post hoc assertions from a defendant about how he

would have [acted] but for his attorney’s deficiencies.” *Id.* at 369. In accord with *Lee*, circuit courts around the country have similarly recognized that a defendant’s declaration as to what he would have done with different advice from counsel is self-serving and not credible. *See United States v. Valdez*, 973 F.3d 396, 403 (5th Cir. 2020) (such declarations are “self-serving, post hoc assertions”); *Merzbacher v. Shearin*, 706 F.3d 356, 367 (4th Cir. 2013) (“self-serving” and “subject to heavy skepticism”); *Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991) (“self-serving”). *See also Turner v. Calderon*, 281 F.3d 851, 879 (9th Cir. 2002) (capital defendant alleges he received ineffective assistance in rejecting a plea offer for second degree murder, defendant provides a declaration that he was never told he could be sentenced to death if he rejected plea and went to trial; held, “[s]elf-serving statements by a defendant that his conviction was constitutionally infirm are insufficient to overcome the presumption of regularity accorded state convictions.”) Instead of relying on such “self-serving” statements from the defendant, courts look instead to “objective evidence” in determining what course a defendant would have taken with proper advice from counsel. *See Toro*, 940 F.2d at 1068; *Paters v. United States*, 159 F.3d 1043, 1047 (7th Cir. 1998); *United States v. Gordon*, 156 F.3d 376, 381 (2d Cir. 1998). *See also Merzbacher*, 706 F.3d at 367; *Johnson v. Duckworth*, 793 F.2d 898, 902 n.3 (7th Cir. 1991); *Cullen v. United States*, 194 F.3d 401, 407 (2d Cir. 1999); *Walters v. Martin*, 18 F.4th 376, 382 (4th Cir. 2021).

Among the types of objective evidence considered central to the prejudice calculus is whether there is a significant disparity between the potential sentences. *Gordon*, 156 F.3d at 381. When that disparity is large

enough, it “provides sufficient objective evidence to establish a reasonable probability that the outcome of the proceedings would differ.” *Gordon*, 156 F.3d at 381 (difference of 12 to 17 years in potential sentences sufficient to show reasonable probability of a different result). *Cf. Chacon v. Wood*, 36 F.3d 1459, 1464-1465 (9th Cir. 1994) (difference of 10 years in potential sentences sufficient to show “gross mischaracterization” for *Strickland* performance-prong analysis); *United States v. Davis*, 428 F.3d 802, 804-806, 808 (9th Cir. 2005) (difference of likely probation versus statutory maximum of eight years sufficient to show “gross mischaracterization” for *Strickland* performance-prong analysis). Other objective factors relevant to assessing whether a defendant would have agreed to a lesser charge include (1) whether defendant has made a “steadfast and unmoving claim[] of innocence,” and (2) the strength of the evidence. *Jones v. Wood*, 114 F.3d 1002, 1012 (9th Cir. 1997).

Here, the objective evidence which state courts refused to consider was more than sufficient to support a finding of prejudice. The disparity in sentences was 30 years. Moreover, defendant never claimed innocence but at all times affirmatively conceded guilt of the lesser offense. And as the trial judge noted, the evidence was plainly sufficient for jurors to find consent and convict on the lesser offense. Juror comments made after trial bear this out; after trial jurors told trial counsel they “found [A.J.] to be a liar and specifically asked why there were no instructions on ‘statutory rape.’” 7 ER 1245-1247.

In short, the state court (1) required petitioner to produce evidence which this Court, and virtually every circuit court, have variously described as “self-serving”

“post hoc assertions” which are “insufficient” to establish prejudice in the first instance and (2) refused to consider the precise type of objective evidence courts around the country have long relied on to determine prejudice. This was an unreasonable application of *Strickland*’s requirement that courts consider “the totality of the evidence.”

The second reason the state court’s departure from *Strickland* is particularly troubling here also relates to the nature of the evidence which the state court required as part of the *Strickland* prejudice calculus. The requirement that petitioner present direct evidence in order to prove prejudice ignores this Court’s long recognition that circumstantial evidence is “intrinsically no different from testimonial evidence” (*Holland v. United States*, 348 U.S. 121, 140 (1954)) and is “not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.” *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003). As the Court has frequently concluded in applying this principle, a defendant’s state of mind need not be proven with direct evidence, but can instead be proven with circumstantial evidence. *McFadden v. United States*, 576 U.S. 186, 195, n.3 (2015); *United States v. Santos*, 553 U.S. 507, 520 (2008). Circuit courts follow this same principle. *See, e.g., United States v. Nivica*, 887 F.2d 1110, 1113 (1st Cir. 1989); *United States v. Bryant*, 655 F.3d 232, 243 (3d Cir. 2011); *United States v. Morin*, 627 F.3d 985, 999, n.4 (5th Cir. 2010); *United States v. Scruggs*, 549 F.2d 1097, 1104 (6th Cir. 1977).

Here, petitioner relied on objective circumstantial evidence to prove what he would have done had counsel discussed the lesser offense with him. This evidence

– including the gross disparity between a 35-year-to-life sentence and a determinate term with a five-year maximum, the fact that petitioner had never claimed innocence but, instead, had at all times admitted the lesser offense and the fact that jurors were unlikely to set free a man who admitted having sex with a minor – all supported a conclusion that “no reasonable person would have rejected” the lesser offense. *United States v. Kearn*, 90 F.4th 1301, 1304 (10th Cir. 2024). In requiring direct evidence to prove *Strickland* prejudice, and effectively holding that circumstantial evidence alone is insufficient, the state court ignored longstanding federal law that facts may be proven by either direct or circumstantial evidence and unreasonably applied *Strickland*’s requirement for courts assessing prejudice to consider “the totality of the evidence.”

CONCLUSION

For all these reasons certiorari is appropriate.

Respectfully submitted,

CLIFF GARDNER
Counsel of Record
LAZULI WHITT
1448 San Pablo Avenue
Berkeley, CA 94702
(510) 524-1093
casetris@aol.com

Counsel for Petitioner
Mazen Alotaibi

DATED: June 16, 2026

APPENDIX

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A – MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 12, 2026	1a
APPENDIX B – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 30, 2024	5a
APPENDIX C – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, FILED APRIL 8, 2024.....	7a
APPENDIX D – ORDER DENYING PETITION FOR REVIEW OF THE SUPREME COURT OF THE STATE OF NEVADA, FILED FEBRUARY 19, 2021.....	35a
APPENDIX E – ORDER DENYING REHEARING OF THE COURT OF APPEALS OF THE STATE OF NEVADA, FILED DECEMBER 18, 2020.....	37a
APPENDIX F – ORDER OF AFFIRMANCE OF THE COURT OF APPEALS OF THE STATE OF NEVADA, FILED OCTOBER 16, 2020.....	38a
APPENDIX G – DECISION AND ORDER OF THE DISTRICT COURT, CLARK COUNTY, NEVADA, DATED SEPTEMBER 5, 2019	41a

Table of Appendices

	<i>Page</i>
APPENDIX H – OPINION OF THE SUPREME COURT OF THE STATE OF NEVADA FILED NOVEMBER 9, 2017	57a
APPENDIX I – ORDER GRANTING EN BANC RECONSIDERATION OF THE SUPREME COURT OF THE STATE OF NEVADA, FILED NOVEMBER 3, 2017.....	72a
APPENDIX J – ORDER DENYING REHEARING OF THE SUPREME COURT OF THE STATE OF NEVADA, FILED APRIL 26, 2017.....	74a
APPENDIX K – ORDER OF AFFIRMANCE OF THE SUPREME COURT OF THE STATE OF NEVADA, FILED FEBRUARY 28, 2017	77a
APPENDIX L – FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER AND DECISION OF THE DISTRICT COURT OF CLARK COUNTY, NEVADA, FILED NOVEMBER 18, 2014	81a
APPENDIX M – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 26, 2026 . . .	107a

1a

**APPENDIX A — MEMORANDUM OF THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT, FILED JANUARY 12, 2026**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-2523

D.C. No. 2:21-cv-01281-GMN-BNW

MAZEN ALOTAIBI,

Petitioner-Appellant,

v.

NETHANJAH BREITENBACH;
CHARLES DANIELS; LOVELOCK
CORRECTIONAL CENTER,

Respondents-Appellees.

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, District Judge, Presiding

Argued and Submitted November 20, 2025
San Jose, California

Filed January 12, 2026

*Appendix A***MEMORANDUM***

Before: SCHROEDER and FRIEDLAND, Circuit Judges, and SCHREIER, District Judge.**

A jury convicted Petitioner, Mazen Alotaibi, on multiple counts of sexual assault and lewdness. He appeals the denial of his habeas corpus petition, brought under 28 U.S.C. § 2254, alleging ineffective assistance of trial counsel. Under § 2254(d), our review is “doubly deferential” because we apply deference under both the Antiterrorism and Effective Death Penalty Act and *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Clark v. Sweeney*, 607 U.S. 7, 10, 146 S.Ct. 410, 223 L.Ed.2d 157 (2025) (per curiam) (quoting *Dunn v. Reeves*, 594 U.S. 731, 739, 141 S.Ct. 2405, 210 L.Ed.2d 812 (2021) (per curiam)). The state court’s decision to affirm Alotaibi’s conviction was not “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2). We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

We “look through” to the last reasoned state court decision. In Alotaibi’s case, that was the Nevada Court of Appeals’ decision, which addressed only the prejudice prong of the *Strickland* analysis. See *Wilson v. Sellers*,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota, sitting by designation.

Appendix A

584 U.S. 122, 125, 138 S.Ct. 1188, 200 L.Ed.2d 530 (2018) (“[T]he federal [habeas] court should ‘look through’ the unexplained decision to the last related state-court decision that does provide a relevant rationale.”). The state court held that because Alotaibi did not present evidence regarding whether he would have agreed to request an instruction on statutory sexual seduction, Alotaibi “did not demonstrate a reasonable probability of a different outcome at trial but for counsel’s failure to discuss this issue with him.”

Alotaibi argues that his trial counsel was ineffective for failing to advise him about and request a jury instruction on the lesser-related offense of statutory sexual seduction. Even assuming counsel’s performance was deficient, the claim fails on the prejudice prong.

To establish prejudice, “a [petitioner] must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Bejarano v. Reubart*, 136 F.4th 873, 890 (9th Cir. 2025) (alteration in original) (quoting *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)). The state court did not unreasonably determine the facts when it denied the petition because Alotaibi failed to submit a declaration or testimony stating he would have requested the jury instruction if given the option. Without such proof, Alotaibi did not establish prejudice because, absent a showing that he would have asked counsel to request the sexual-seduction lesser-related jury instruction, he did not show a reasonable probability of a different outcome at trial. *See id.*

Appendix A

And contrary to Alotaibi's contentions, the state court was not required to expressly address every piece of evidence. *See Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004) ("[S]tate courts are not required to address every jot and tittle of proof suggested to them, nor need they make detailed findings addressing all the evidence before them." (cleaned up)), *overruled on other grounds by Cullen v. Pinholster*, 563 U.S. 170, 185, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). On this record, we cannot say that "*every* 'fairminded jurist' would agree that *every* reasonable lawyer would have made a different decision." *Clark*, 607 U.S. at 10, 146 S.Ct. 410 (quoting *Dunn*, 594 U.S. at 740, 141 S.Ct. 2405). Because Alotaibi failed to establish that the Nevada Court of Appeals reached an unreasonable finding on the prejudice prong, denial of his habeas petition was appropriate.

AFFIRMED.

5a

**APPENDIX B — ORDER OF THE UNITED
STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT, FILED OCTOBER 30, 2024**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-2523
D.C. No. 2:21-cv-01281-GMN-BNW
District of Nevada, Las Vegas

MAZEN ALOTAIBI,

Petitioner-Appellant,

v.

NETHANJAH BREITENBACH; *et al.*,

Respondents-Appellees.

Filed October 30, 2024

ORDER

Before: RAWLINSON and BENNETT, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is granted with respect to the following issue: whether trial counsel was ineffective for failing to advise appellant about and request a jury instruction on the lesser-related offense of statutory sexual seduction. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

Appendix B

The opening brief is due February 25, 2025; the answering brief is due March 27, 2025; the optional reply brief is due within 21 days after service of the answering brief.

The Clerk will serve on appellant a copy of the “After Opening a Case—Counseled Cases” document.

If Nethanjah Breitenbach or Charles Daniels is no longer an appropriate appellee in this case, counsel for appellees must notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).

7a

**APPENDIX C — ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT
OF NEVADA, FILED APRIL 8, 2024**

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. 2:21-cv-01281-GMN-BNW

MAZEN ALOTAIBI,

Petitioner,

v.

BRIAN WILLIAMS, *et al.*,¹

Respondents.

Filed April 8, 2024

ORDER

Counseled Petitioner Mazen Alotaibi was sentenced to life in prison with the possibility of parole after 35 years after he was found guilty in Nevada state court of Burglary, First-degree Kidnapping, Sexual Assault with a

1. The Nevada Department of Corrections inmate database states that Alotaibi is incarcerated at Lovelock Correctional Center. Presently, Nethanjah Breitenbach is the Warden for that facility. At the end of this order, the Court directs the Clerk of the Court to substitute Nethanjah Breitenbach as a respondent for Respondent State of Nevada. *See* Fed. R. Civ. P. 25(d).

Appendix C

Minor Under the Age of 14, Lewdness with a Child Under the Age of 14, and Coercion. ECF No. 20-20. Alotaibi seeks a writ of habeas corpus under 28 U.S.C. § 2254 based on the claim that his trial counsel was ineffective by failing to advise him about and request a jury instruction on the lesser-related offense of Statutory Sexual Seduction. ECF No. 1. The Court finds that habeas relief is not warranted, so it denies Alotaibi's Petition, denies him a Certificate of Appealability, and closes this case.

I. BACKGROUND²**A. Relevant facts underlying Alotaibi's conviction³**

Alotaibi's conviction is the result of events that occurred in Las Vegas, Nevada, on December 31, 2012. Alotaibi is a Saudi Arabian national who was a pilot in the Saudi Air Force stationed in San Antonio, Texas, and learning English so he could receive technical training on aircraft that Saudi Arabia bought from the United States. In late December 2012, Alotaibi traveled from Texas to California and then to Las Vegas, Nevada, with friends and acquaintances to celebrate the New Year. Alotaibi

2. The Court makes no credibility determinations or other factual findings about the truth or falsity of this summary of the evidence from the state court. This summary is merely a backdrop to the issues presented in this case. Any failure to mention a specific piece of evidence does not signify that the Court overlooked it in considering Alotaibi's claim.

3. These facts are taken from the trial transcripts. ECF Nos. 1-1 at 164–224, 1-2, 1-3, 1-4-, 1-5, 1-6 at 2–84. The Court generally cites to these exhibits for this entire subsection.

Appendix C

and his group arrived in Las Vegas around 2:00 a.m. on December 31, 2012. Alotaibi and his group drank at the Palms casino and Olympic Garden strip club and, after dawn, arrived at the Circus Circus hotel where they were staying.

A.J.,⁴ a 13-year-old boy, was staying at the Circus Circus hotel with his grandmother to celebrate the New Year. A.J. discovered that his friend was also staying at the hotel, and they made plans to have breakfast together on December 31. When A.J. arrived at his friend's hotel room on the sixth floor that morning, he was told she was still sleeping. While A.J. waited for her to wake, he wandered the hotel and eventually returned to the sixth floor and sat on the couch near the elevator.

Alotaibi exited the elevator while A.J. was waiting and the two spoke. Alotaibi's eyes were pink, and he smelled like marijuana. A.J. followed Alotaibi into the hall and asked if he had any marijuana. Alotaibi said yes, and they went to Alotaibi's room to get it. Other people were also in the room. Someone asked A.J. his age and A.J. responded that he was 13.

Alotaibi and A.J. left the room to go outside to smoke marijuana. In the elevator on the way down, Alotaibi kissed A.J.'s neck. While Alotaibi and A.J. were smoking marijuana in an alley, Alotaibi kissed A.J.'s face. When A.J. stepped away, Alotaibi pulled him closer.

4. The Court refers to the minor only by his initials. *See* Nev. Loc. R. IC 6-1(a)(2).

Appendix C

On the way back to the elevator, Alotaibi told A.J. he'd give him money and marijuana in exchange for sex. A.J. agreed, but only to trick Alotaibi; he just wanted to buy marijuana. When they returned to Alotaibi's room, Alotaibi told A.J. to go into the bathroom. After speaking to the other people in the room, Alotaibi entered the bathroom and put marijuana on the counter.

Alotaibi repeated that he wanted to exchange marijuana and money for sex. A.J. verbally refused and tried to leave the bathroom. Alotaibi responded by increasing the money offered and started kissing A.J., who backed away. Alotaibi then removed A.J.'s t-shirt, pushed down A.J.'s pants, made A.J. bend over, and forced his penis in A.J.'s mouth.

A.J. yanked away, removing Alotaibi's penis from his mouth. A.J. wanted to leave, but Alotaibi was between him and the door; he didn't know what to do. Alotaibi pushed A.J. to the ground on his stomach and placed shampoo on his penis and A.J.'s anus. Then, Alotaibi penetrated A.J.'s anus with his penis twice before A.J. pushed Alotaibi away, got his clothes on, and ran to the elevator.

A.J. immediately told a security officer in the hotel that he had been raped and told the hotel's security manager and security supervisor that he had gone willingly into Alotaibi's room to get high when it happened. A.J. later told detectives that Alotaibi had dragged him through the hall by his clothes and into the room, and omitted that he had smoked marijuana with Alotaibi. Surveillance video revealed that Alotaibi didn't drag A.J. down the hall or

Appendix C

pull him into the room. A.J. testified that he lied to the detectives because his grandmother was present when he was speaking to them, and he didn't want her to know that he smoked marijuana or to get in trouble for smoking it.

The State's forensic expert testified that Alotaibi's DNA was found on A.J.'s testicles and inside A.J.'s boxer shorts. The registered nurse who examined A.J. testified that he had multiple tears on his anus that were consistent with the forced digital and penile penetration of the anus that he described to her. The nurse observed that a laceration on A.J.'s anus was freely bleeding, and another laceration had clotted blood. She also observed that A.J. had bruising on his buttocks consistent with the closed-fist punch that he described to her. She also observed that A.J. had a glistening wet appearance to his rectal area consistent with the lubricant that he described to her. The nurse observed that A.J. had a contusion on the soft pallet of his throat consistent with the forced penile penetration of the mouth that he described to her. And she observed that A.J. reported being in significant pain.

After he was arrested, Alotaibi told police several times during his interview that he did not use any force on A.J. Alotaibi stated that he had been awake the entire night, had been drinking, and didn't fully remember what happened because he was drunk. Alotaibi said that A.J. wanted marijuana from him. Alotaibi admitted that he put his penis into A.J.'s anus for a second or two. Alotaibi also admitted that he put his penis in A.J.'s mouth.

*Appendix C***B. Procedural history**

Alotaibi was charged with Burglary, First-degree Kidnapping, two counts of Sexual Assault with a Minor Under the Age of 14, four counts of Lewdness with a Child Under the Age of 14, and Coercion. ECF No. 1-1 at 5–8. Following a jury trial, Alotaibi was found guilty on all charges except two of the Lewdness counts⁵ and sentenced to life in prison with the possibility of parole after 35 years. ECF Nos. 18-19, 20-20. He appealed, and the Nevada Supreme Court affirmed the judgment of conviction in an *en banc* decision. ECF No. 22-16.

Alotaibi then filed a state habeas corpus petition. ECF No. 1-1 at 17–25. The state district court denied the petition after conducting an evidentiary hearing, and the Court of Appeals of the State of Nevada affirmed that denial. ECF No. 1-1 at 27–47. The Nevada Supreme Court denied Alotaibi’s petition for review in a summary decision. ECF No. 1-1 at 87.

Alotaibi timely filed his federal Habeas Corpus Petition on July 6, 2021. *See* ECF No. 1. Respondents answered the Petition. ECF No. 16. And Alotaibi filed a reply. ECF No. 27. Alotaibi asserts a single ground for relief: denial of effective assistance of counsel because trial counsel failed to advise him about and request a jury instruction on the lesser-related offense of Statutory Sexual Seduction.

5. Alotaibi was found not guilty of Lewdness with a Child Under the Age of 14 under Counts 4 and 6 and guilty of Lewdness with a Child Under the Age of 14 under Counts 7 and 8. ECF No. 18-19 at 3–4.

*Appendix C***II. LEGAL STANDARDS****A. Antiterrorism and Effective Death Penalty Act (AEDPA)**

If a state court has adjudicated a habeas corpus claim on its merits, a federal district court may grant habeas relief on that claim only in limited circumstances. Habeas relief may be granted if the state court’s adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]” 28 U.S.C. § 2254(d)(1). Or habeas relief may be granted if the state court’s adjudication “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” *Id.* at § 2254(d)(2).

A state court decision is “contrary to” clearly established federal law if it applies a rule that contradicts the governing law established in Supreme Court cases or if the decision addresses facts materially indistinguishable from a Supreme Court case but reaches a different conclusion. *Brown v. Payton*, 544 U.S. 133, 141 (2005). A state court decision is an unreasonable application of clearly established Supreme Court precedent “if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)). “[C]learly established Federal law’ for purposes of § 2254(d)(1) includes only

Appendix C

‘the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions.’” *White v. Woodall*, 572 U.S. 415, 419 (2014) (quoting *Howes v. Fields*, 565 U.S. 499, 505 (2012)). And an “‘unreasonable application of’ those holdings must be ‘objectively unreasonable,’ not merely wrong; even ‘clear error’ will not suffice.” *White*, 572 U.S. at 419 (quoting *Lockyer*, 538 U.S. at 75–76). Where no Supreme Court decision squarely addresses “the specific question presented” by a habeas petitioner, the state court’s decision cannot be contrary to, or an unreasonable application of, Supreme Court precedent. *Woods v. Donald*, 575 U.S. 312, 317 (2015) (quoting *Lopez v. Smith*, 574 U.S. 1, 4 (2014) (per curiam)); see also *Wright v. Van Patten*, 552 U.S. 120, 125–26 (2008); but see *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013) (“[T]he lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since ‘a general standard’ from this Court’s cases can supply such law.”) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

To obtain federal habeas relief, “a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *White*, 572 U.S. at 419–20 (cleaned up) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)); see also *Yarborough*, 541 U.S. at 664. The Supreme Court has explained “that even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Harrington*, 562 U.S. at 102 (citing *Lockyer*, 538 U.S. at 75); see also *Cullen v. Pinholster*, 563

Appendix C

U.S. 170, 181 (2011) (describing the standard as “difficult to meet” and “highly deferential,” which “demands that state-court decisions be given the benefit of the doubt” (internal quotation marks and citations omitted)).

B. Federal habeas review of an ineffective-assistance claim

The Sixth Amendment guarantees the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984), *superseded on other grounds by AEDPA*. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* To establish ineffective assistance of counsel, a petitioner must demonstrate that (1) counsel’s performance was deficient and (2) the deficient performance prejudiced the defense. *Id.* at 687.

To prove deficient performance, a petitioner must demonstrate that counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms. *Id.* at 688; *see also Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curium); *Bobby v. Van Hook*, 558 U.S. 4, 13–14 (2009) (per curium) (Alito, J., concurring) (noting that guidelines such as those promulgated by the American Bar Association, purporting to establish what reasonable attorneys would do, may be helpful but are not the test for determining whether counsel’s choices are objectively reasonable). The relevant inquiry is not what defense counsel could have done, but rather whether

Appendix C

the choices made by defense counsel were reasonable. *See Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998). “Judicial scrutiny of counsel’s performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689; *see also Wildman v. Johnson*, 261 F.3d 832, 838 (9th Cir. 2001); *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). The court “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689 (internal quotation omitted).

To establish that counsel’s deficient performance prejudiced the defense, a petitioner must show “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Lafler v. Cooper*, 566 U.S. 156, 162 (2012); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. The defendant must show that counsel’s errors were so serious as to deprive him of a fair trial, a trial whose result is reliable. *Id.* at 688.

Appendix C

Both prongs of the *Strickland* test must be satisfied to establish a constitutional violation; thus, a failure to satisfy either requires that the petitioner's ineffective assistance of counsel claim be denied. *Strickland*, 466 U.S. at 697. A federal habeas court need not address the prejudice prong of the *Strickland* test "if the petitioner cannot even establish incompetence under the first prong." *Siripongs v. Calderon*, 133 F.3d 732, 737 (9th Cir. 1998). Conversely, the court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697. And where a state court previously adjudicated the claim of ineffective assistance of counsel under *Strickland*, establishing that the decision was unreasonable is especially difficult. *See Richter*, 562 U.S. at 104–05.

In *Richter*, the U.S. Supreme Court clarified that *Strickland* and § 2254(d) are each highly deferential, and when the two apply in tandem, review is doubly so. *Id.* at 105; *see also Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010). The Supreme Court further explained that "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Richter*, 562 U.S. at 105.

III. DISCUSSION

Alotaibi alleges that he was denied effective assistance because his trial counsel failed to advise him about or

Appendix C

request a jury instruction for the uncharged offense of Statutory Sexual Seduction, a Class C felony. ECF No. 1 at 13.⁶ In its order affirming Alotaibi's conviction, a panel of the Nevada Supreme Court concluded that "statutory sexual seduction was not a lesser-included offense of sexual assault with a minor, and Alotaibi was not entitled to an instruction on it." ECF No. 22-12 at 3. Alotaibi successfully petitioned for *en banc* reconsideration. ECF Nos. 22-15. The full Nevada Supreme Court summarized what transpired at trial regarding the instruction:

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

6. At the time of the conduct in 2012, Statutory Sexual Seduction was defined to mean: "(a) [o]rdinary sexual intercourse, anal intercourse, cunnilingus or fellatio committed by a person 18 years of age or older with a person under the age of 16 years; or (b) [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." Nev. Rev. Stat. § 200.364(5) (2009).

Appendix C

as a lesser-related offense of sexual assault, but Alotaibi declined such an instruction.

ECF No. 22-16 at 5–6. After analysis, the Nevada Supreme Court concluded that “statutory sexual seduction is not a lesser-included offense of sexual assault, and Alotaibi was not entitled to an instruction on statutory sexual seduction. As such, the district court properly refused to instruct the jury on statutory sexual seduction.” ECF No. 22-16 at 14.⁷

Next, Alotaibi argued in his counseled state postconviction petition for writ of habeas corpus that he was denied effective assistance of counsel when his trial counsel failed to request a jury instruction on the lesser-related offense of Statutory Sexual Seduction. ECF No. 23-1. The state court denied the ineffective-assistance claim, concluding that trial counsel’s failure to review all jury instructions with Alotaibi fell below the standard of care, but failing to request a jury instruction on the lesser-related offense of Statutory Sexual Seduction did not, as it was a reasonable tactical decision. ECF No. 1-1 at 36–37. The court also found that *Strickland*’s prejudice prong was not satisfied for any ground that Alotaibi raised. ECF No. 1-1 at 36–39.

The court explained there wasn’t a reasonable probability of a different trial outcome because the

7. The Court notes that there is no federal constitutional right to jury instructions on lesser-related offenses in noncapital cases. See *Hopkins v. Reeves* 524 U.S. 88, 96–98 (1998); *United States v. Rivera-Alonzo*, 584 F.3d 829, 834 n.3 (9th Cir. 2009).

Appendix C

jury was not presented with the binary option of either convicting Alotaibi of a severe offense for the penetrative acts or acquitting him. ECF No. 1-1 at 36–39. Rather, the jury had the option of finding Alotaibi guilty on Counts 4 and 6 for Lewdness with a Child Under the Age of 14 for those acts if it credited his consent defense. ECF No. 1-1 at 36–37. But the jury rejected the consent defense for the penetrative acts when it convicted Alotaibi of Sexual Assault with a Minor Under the Age of 14 and found him not guilty of Lewdness with a Child Under the Age of 14. ECF No. 1-1 at 36–37.

The Nevada Court of Appeals affirmed the denial of habeas relief, explaining that Alotaibi had failed to satisfy *Strickland*'s prejudice prong because he provided no evidence at the evidentiary hearing that he would have agreed to instruct the jury on the uncharged Statutory Sexual Seduction offense:

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*,

Appendix C

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 the 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.

ECF No. 1-1 at 41–42. The Nevada Court of Appeals denied Alotaibi's petition for rehearing. ECF No. 1-1 at 64. And the Nevada Supreme Court denied Alotaibi's petition for review. ECF No. 1-1 at 87.

Prejudice is the only prong of *Strickland* that the Nevada Court of Appeals addressed. However, this Court begins its analysis of Alotaibi's claim with the deficient-performance prong.

*Appendix C***A. Deficient Performance**

Because the Nevada Court of Appeals did not reach the issue of whether trial counsel’s performance was deficient, AEDPA does not apply and this Court reviews it *de novo*. See *Rompilla v. Beard*, 545 U.S. 374, 390 (2005). “[D]eficient performance is performance that falls ‘below an objective standard of reasonableness’ and is outside of ‘the range of competence demanded of attorneys in criminal cases.’” *Smith v. Baker*, 983 F.3d 383, 396 (9th Cir. 2020) (quoting *Strickland*, 466 U.S. at 687–88). “The objective measure of counsel’s performance is determined by looking at the ‘reasonableness under prevailing professional norms.’” *Id.* (quoting *Strickland*, 466 U.S. at 688). “Professional norms are measured at the time of counsel’s actions rather than by reference to modern norms.” *Id.* (citing *Cullen*, 563 U.S. at 196). “This assessment is made ‘from counsel’s perspective at the time,’ so as ‘to eliminate the distorting effects of hindsight.’” *Id.* (quoting *Strickland*, 466 U.S. at 689).

The Supreme Court has recognized that “[d]efense counsel undoubtedly has a duty to discuss potential strategies with the defendant.” *Florida v. Nixon*, 543 U.S. 175, 178 (2004). This duty entails “consult[ing] with the client regarding ‘important decisions,’ including questions of overarching defense strategy.” *Id.* at 187. But it “does not require counsel to obtain the defendant’s consent to every tactical decision.” *Id.* (cleaned up). Rather, a defendant “has the ultimate authority to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.” *Id.* (cleaned up).

Appendix C

Habeas courts “defer to a lawyer’s strategic trial choices, but those choices must have been made after counsel conducted reasonable investigations or made a reasonable decision that made particular investigations unnecessary.” *Smith*, 983 F.3d at 396–97 (cleaned up) (quoting *Summerlin v. Schriro*, 427 F.3d 623, 630 (9th Cir. 2005)). Counsel’s “tactical decision may constitute constitutionally adequate representation even if, in hindsight, a different defense might have fared better.” *Bemore v. Chappell*, 788 F.3d 1151, 1163 (9th Cir. 2015).

Habeas courts “must indulge a strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance and presume that under the circumstances, the challenged action might be considered sound trial strategy.” *Carter v. Davis*, 946 F.3d 489, 516 (9th Cir. 2019) (cleaned up) (quoting *Strickland*, 466 U.S. at 689). “*Strickland* does not guarantee perfect representation, only a ‘reasonably competent attorney.’” *Harrington*, 562 U.S. at 110 (quoting *Strickland*, 466 U.S. at 687). “There is a ‘strong presumption’ that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than ‘sheer neglect.’” *Id.* at 109 (quoting *Yarborough*, 540 U.S. at 8). “A trial attorney’s failure to request a jury instruction receives no deference, however, when it is based on “a misunderstanding of the law” rather than “a strategic decision to forgo one defense in favor of another.” *Crace v. Herzog*, 798 F.3d 840, 852 (9th Cir. 2015) (cleaned up) (quoting *United States v. Span*, 75 F.3d 1383, 1390 (9th Cir. 1996)).

Alotaibi argues that trial counsel’s failure to advise him about and request a jury instruction on the lesser-

Appendix C

related offense of Statutory Sexual Seduction is based on a misunderstanding of the law. Trial counsel testified at the postconviction evidentiary hearing that he mistakenly believed the penalty for that offense was one to ten years not the actual one to five years. ECF No. 1-6 at 173. However, trial counsel assumed that the court would sentence Alotaibi to only four years on each count of that offense, for a total of 8 years. ECF No. 1-6 at 175. Alotaibi had already rejected a plea offer of ten years, and trial counsel didn't see much difference between 8 and 10 years, so he didn't consult with Alotaibi about seeking an instruction. ECF No. 1-6 at 175.

However, having reviewed the full record, the Court finds that trial counsel's failure to request an instruction on Statutory Sexual Seduction was a strategic decision to forgo one defense in favor of others, not based on a misunderstanding about the law, and therefore demands deference. Trial counsel testified during the postconviction evidentiary hearing about the strategic reasons why he didn't ask for the instruction. He really believed in Alotaibi's innocence, and there was more than enough evidence of A.J.'s consent for Alotaibi to prevail on the Sexual Assault charges. ECF No. 1-6 at 175. He also understood that neither consent nor intoxication were defenses to Statutory Sexual Seduction. ECF No. 1-6 at 165–66.

Importantly, trial counsel understood that “the issue with consent is different than” other issues and an “inconsistent argument[,]” so the defense needed “to stick with one theme and one strategy even though . . . the

Appendix C

outcome could have been . . . much harsher. ECF No. 1-6 at 175–76. And he recognized arguing that the penetrative acts were consensual and obtaining a Statutory Sexual Seduction instruction was tantamount to conceding that Alotaibi was guilty of Statutory Sexual Seduction. ECF No. 1-6 at 211. Thus, during the trial but before settling jury instructions, trial counsel and Alotaibi “went around and around . . . about the statutory sexual seduction jury instruction as to what [the trial court] would do and, you know, how [the defense] would go about arguing it in closing argument.” ECF No. 1-5 at 21.

Trial counsel tried to get the State to offer a plea for Statutory Sexual Seduction early in the case, but it refused to do so. ECF No. 1-6 at 172. So, trial counsel believed that Alotaibi had “nothing to lose” going to trial seeking a complete acquittal on defenses that Alotaibi was intoxicated and A.J. had consented to the penetrative acts. ECF No. 1-6 at 172–73, 195. After A.J. testified for the first time at trial that he had audibly withdrawn his consent, trial counsel encouraged Alotaibi to testify and thus provide the jury evidence that A.J. had not withdrawn his consent. ECF No. 1-6 at 197–98. But Alotaibi wasn’t willing to testify. ECF No. 1-6 at 176. Trial counsel believed that Alotaibi wasn’t “willing to listen and reason with [him] on various things as to what [they] wanted. [Alotaibi’s] goal was to go home as soon as possible. And [Alotaibi] believed that he was going to go home.” ECF No. 1-6 at 176.

After the defense rested its case, trial counsel concluded that an instruction on Statutory Sexual

Appendix C

Seduction was not necessary if he could argue in closing that consent is a defense to the sexual assault charges and “intoxication [is a defense] for lewdness and all the other charges . . .” ECF No. 1-5 at 194–95. Counsel for the parties confirmed that they had provided stipulated jury instructions on consent and intoxication for the trial court to review. ECF No. 1-5 at 195–96. Before closing arguments, trial counsel moved to dismiss Counts 4 and 6 for Lewdness with a Child Under the Age of 14, arguing that they had been negated by A.J.’s testimony that the penetrative acts did not have associated touching or fondling. ECF No. 1-6 at 4–5.

But the trial court denied the motion, finding that the State was permitted to plead Lewdness with a Child Under the Age of 14 in the alternative to Sexual Assault with a Minor Under the Age of 14 for the penetrative acts. ECF No. 1-6 at 5–6. Trial counsel then sought clarification that the State would not object to defense arguing in closing that “consent is a defense to sexual assault” and “intoxication is a defense to lewdness with a minor . . .” ECF No. 1-6 at 6. The State agreed there was no objection, and the State and trial court confirmed that if the jury believed that A.J. consented to the acts and Alotaibi was intoxicated, then Alotaibi “could potentially end up with a not guilty.” ECF No. 1-6 at 6–7.

Alotaibi’s characterization that this was an all-or-nothing strategy for the penetrative acts is unpersuasive. *See* ECF No. 1 at 23. The record shows that for the penetrative acts, the jury had the option of (1) convicting Alotaibi of Sexual Assault with a Minor Under the Age

Appendix C

of 14, (2) convicting Alotaibi of Lewdness with a Child Under the Age of 14, or (3) exonerating Alotaibi. *See* ECF No. 1-1 at 37. The record demonstrates that the defense never intended to present the offense of Statutory Sexual Seduction to the jury. Rather, the defense sought a complete acquittal using consent and intoxication as defenses to all the charged offenses.

The Court finds this was a sound trial strategy given the circumstances. *Cf. Crace*, 798 F.3d at 852 (recognizing that even an “all-or-nothing” strategy, forcing the jury to choose between convicting on a severe offense and acquitting the defendant altogether” can be “reasonable” “[i]n certain circumstances”). The jury was not placed in an all-or-nothing position on the penetrative acts. It could have convicted Alotaibi of the Lewdness charges for those acts if it credited his consent defense. Alotaibi could have been exonerated if the jury credited his consent and intoxication defenses. But instructing the jury about Statutory Sexual Seduction very well would have foreclosed the possibility of exoneration because neither consent nor intoxication were defenses to that offense. And the jury had evidence supporting both of Alotaibi’s defenses.

A witness testified that Alotaibi had been drinking and smoking marijuana before the offenses. ECF No. 1-4 at 34–38, 61–63, 65–68. The jury heard testimony that Alotaibi could have believed that A.J. consented to the conduct. ECF No. 1-2 at 48–54. A.J. testified that he verbally withdrew his consent. ECF No. 1-2 at 26–27. But A.J. also testified that he fabricated details when

Appendix C

reporting the event to detectives, thus raising issues about his credibility. ECF No. 1-2 at 46–47.

Alotaibi has failed to demonstrate that trial counsel’s performance was objectively unreasonable. Although this finding is fatal to Alotaibi’s claim for federal habeas relief, the Court will also consider his arguments about the prejudice-prong of the *Strickland* analysis.

B. Prejudice

The Nevada Court of Appeals determined that Alotaibi did not demonstrate a reasonable probability of a different outcome at trial because he did not present evidence that he would have agreed to instruct the jury on the lesser-related offense of Statutory Sexual Seduction. Alotaibi argues that AEDPA does not bar habeas relief because the Nevada Court of Appeals’ decision was based on an unreasonable determination of the facts in the state record. ECF No. 1 at 21–23. “[W]hether petitioner’s conviction ‘was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’ . . . is a daunting standard—one that will be satisfied in relatively few cases.” *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004), *overruled on other grounds by Pinholster*, 563 U.S. at 184–86 & nn. 7, 10. But the standard is not impossible to meet. *Id.* (citing *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)). “Intrinsic challenges to state-court findings [under] the ‘unreasonable determination’ standard come in several flavors, each presenting its own peculiar set of considerations.” *Id.*

Appendix C

Alotaibi argues that the Nevada court ignored or overlooked that: (1) the jury heard evidence that Alotaibi confessed to police that he penetrated A.J.'s mouth and anus with his penis; (2) the jury was presented with an all-or-nothing option for the penetrative acts even if it credited his consent defense; (3) the jury heard evidence that could have allowed it to discredit A.J.'s testimony about force; (4) the jury heard evidence that could have allowed it to credit Alotaibi's consent defense; and (5) the disparity between the sentence for Sexual Assault with a Minor Under the Age of 14 (life with the possibility for parole after 35 years) and Statutory Sexual Seduction (one to five years) is enormous. ECF No. 1 at 23–24. When considering this kind of claim, courts must be “mindful that the state courts are not required to address every jot and tittle of proof suggested to them, nor need they ‘make detailed findings addressing all the evidence before’” them. *Taylor*, 366 F.3d at 1001 (quoting *Miller-El*, 537 U.S. at 347). “To fatally undermine the state fact-finding process, and render the resulting finding unreasonable, the overlooked or ignored evidence must be highly probative and central to petitioner’s claim.” *Id.* “In other words, the evidence in question must be sufficient to support petitioner’s claim when considered in the context of the full record bearing on the issue presented in the habeas petition.” *Id.*

Alotaibi’s second item of objective evidence is factually wrong. As discussed above, the jury was not presented with an all or nothing option for the penetrative acts. Rather, if the jury credited Alotaibi’s consent defense it could have convicted him of Counts 4 and 6 for Lewdness with a Child Under the Age of 14.

Appendix C

As for Alotaibi's remaining evidence, trial counsel declared that "during [his and Alotaibi's] discussions regarding jury instructions, [Alotaibi] expressed an inability to understand the nature, significance in context, and potential implications of a waiver of the lesser-related Statutory Sexual Seduction instruction offered by the trial court." ECF No. 23-1 at 65. "[W]ith respect to the jury instructions," trial counsel testified that Alotaibi said, "you are the lawyer, you make the decisions for me and that's what [counsel] did." ECF No. 1-6 at 177. Trial counsel also testified that Alotaibi's "goal was to go home as soon as possible. And he believed that he was going to go home." ECF No. 1-6 at 176.

Trial counsel testified that a complete acquittal was possible without the instruction on Statutory Sexual Seduction. ECF No. 1-6 at 202. Neither consent nor intoxication are defenses to that offense, so Alotaibi agreeing to instruct the jury on Statutory Sexual Seduction was therefore tantamount to him agreeing to be convicted of that offense. ECF No. 1-6 at 201–02. Trial counsel testified that the evidence for Alotaibi was "strong" enough to raise a reasonable doubt on the charges. ECF No. 1-6 at 203. And counsel believed "that there was more than enough evidence in the record for [Alotaibi] to have won the consent issue with respect to sexual assault." ECF No. 1-6 at 175.

Considering the whole record, including the absence of any affirmative act or statement from Alotaibi or trial counsel that Alotaibi would have agreed to the Statutory Sexual Seduction jury instruction, the Court concludes

Appendix C

that the objective evidence Alotaibi raises is not highly probative of his claim that he would have agreed to a jury instruction on that offense—and thus agreed to be convicted of it—instead of seeking a complete acquittal based on his consent and intoxication defenses. The Nevada Court of Appeals determined that Alotaibi could not show a reasonable probability that the outcome of trial would have been different because he did not provide subjective evidence that he would have agreed to instruct the jury on a lesser-related offense. This decision was not based on an unreasonable determination of the facts considering the entire state court record. Thus, AEDPA’s requirements have not been met as to the prejudice-prong of the *Strickland* analysis. And Alotaibi is denied habeas relief on his claim.

The ultimate outcome would be the same even if the Court considered prejudice under a *de novo* standard of review. The parties do not cite authority that addresses *Strickland* prejudice in the context of trial counsel’s failure to advise about and request a lesser-related instruction. Instead, Alotaibi cites cases from other circuits analyzing *Strickland* prejudice in the guilty-plea context. ECF No. 1 at 18. Supreme Court precedent on the subject requires a petitioner to “show [that] the outcome of the plea process would have been different with competent advice.” *Lafler*, 566 U.S. at 164.

Alotaibi’s claim is more akin to when counsel’s ineffective advice leads a defendant to deny a plea offer, rather than improvidently accept one. So, to satisfy *Strickland*’s prejudice prong under a *de novo* review,

Appendix C

Alotaibi must show a reasonable probability that he would have agreed to request a jury instruction on the Statutory Sexual Seduction offense, the trial court would have allowed the instruction, and the conviction or sentence would have been less severe than what was imposed. *See id.* Alotaibi cannot demonstrate that his sentence would have been less severe than what was imposed had the jury been instructed about the Statutory Sexual Seduction offense. The State correctly summarized the flaw with Alotaibi's argument about this issue in the postconviction evidentiary hearing:

The jury rejected the defense of consent. They rejected the defense. [Alotaibi] needed consent to get to statutory sexual seduction. [Alotaibi] needed consent to walk on sexual assault. The jury rejected consent. Merely giving an instruction on a lesser related [offense] that still requires consent doesn't change the fact finding. The jury rejected consent, therefore [Alotaibi suffered] no prejudice and [trial counsel's] strategy was objectively reasonable.

ECF No. 1-6 at 228.

Alotaibi's incorrect insistence that the jury was given an all-or-nothing option on the penetrative acts is not enough to undermine confidence in the outcome of the trial. In sum, the jury was given the option to convict Alotaibi on the lesser-related Lewdness charges for the penetrative acts if it credited his consent defense. But the jury rejected Alotaibi's consent defense and convicted

Appendix C

him on the Sexual Assault charges. The jury also rejected Alotaibi's intoxication defense and found him guilty on Counts 7 and 8 for Lewdness with a Child Under the Age of 14 for other acts. ECF No. 18-19 at 4. Alotaibi was sentenced to Life with a Parole Eligibility after 10 years for those offenses, which run concurrently. ECF No. 20-20 at 3. Given these circumstances, it is not plausible that the jury would have convicted Alotaibi of Statutory Sexual Seduction for the penetrative acts if it had been given that option.

IV. CERTIFICATE OF APPEALABILITY

The standard for the issuance of a certificate of appealability requires a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077–79 (9th Cir. 2000). Applying this standard, the Court finds that a certificate of appealability is not warranted in this case. The Court therefore denies Alotaibi a certificate of appealability.

Appendix C

V. CONCLUSION

IT IS THEREFORE ORDERED that Alotaibi's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) is **DENIED** on the merits.⁸

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that the Clerk of the Court will **SUBSTITUTE** Nethaniah Breitenbach for Respondent State of Nevada, enter final judgment accordingly, and close this case.

DATED: April 8, 2024

/s/ Gloria M. Navarro
Gloria M. Navarro
United States District Judge

8. At the conclusion of his petition, Alotaibi generally asks the Court to “[c]onduct an evidentiary hearing at which proof may be offered concerning the allegations in this petition and any defenses that may be raised by respondents.” ECF No. 1 at 24–25. The Court denies Alotaibi's request because he has not demonstrated that he is entitled to an evidentiary hearing. *See Williams v. Taylor*, 529 U.S. 420 (2000) (explaining standard for federal habeas court to consider new evidence); *Shinn v. Ramirez*, 596 U.S. 366 (2022) (same).

35a

**APPENDIX D — ORDER DENYING PETITION
FOR REVIEW OF THE SUPREME COURT OF THE
STATE OF NEVADA, FILED FEBRUARY 19, 2021**

IN THE SUPREME COURT OF THE
STATE OF NEVADA

No. 79752

MAZEN ALOTAIBI,

Appellant,

vs.

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

Respondents.

ORDER DENYING PETITION FOR REVIEW

Review denied. NRAP 40B.

It is so ORDERED.

/s/ Hardesty_____, C.J.
Hardesty

Appendix D

<u>/s/ Parraguirre</u> _____, J.	<u>/s/ Stiglich</u> _____, J.
Parraguirre	Stiglich

<u>/s/ Cadish</u> _____, J.	<u>/s/ Silver</u> _____, J.
Cadish	Silver

<u>/s/ Pickering</u> _____, J.	<u>/s/ Herndon</u> _____, J.
Pickering	Herndon

37a

**APPENDIX E — ORDER DENYING REHEARING
OF THE COURT OF APPEALS OF THE STATE OF
NEVADA, FILED DECEMBER 18, 2020**

IN THE COURT OF APPEALS
OF THE STATE OF NEVADA

No. 79752-COA

MAZEN ALOTAIBI,

Appellant,

vs.

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

Respondents.

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Gibbons, C.J.
Gibbons

/s/ Tao, J.
Tao

/s/ Bulla, J.
Bulla

38a

**APPENDIX F — ORDER OF AFFIRMANCE OF
THE COURT OF APPEALS OF THE STATE OF
NEVADA, FILED OCTOBER 16, 2020**

IN THE COURT OF APPEALS
OF THE STATE OF NEVADA

No. 79752-COA

MAZEN ALOTAIBI,

Appellant,

vs.

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

Respondents.

Filed October 16, 2020

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

Appendix F

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

40a

Appendix F

ORDER the judgment of the district court
AFFIRMED.

/s/ Gibbons_____, C.J.
Gibbons

/s/ Tao_____, J.
Tao

/s/ Bulla_____, J.
Bulla

41a

**APPENDIX G — DECISION AND ORDER OF THE
DISTRICT COURT, CLARK COUNTY, NEVADA,
DATED SEPTEMBER 5, 2019**

**DISTRICT COURT
CLARK COUNTY, NEVADA**

CASE NO.: A-18-785145-W

DEPARTMENT XXIII

MAZEN ALOTAIBI,

Petitioner,

v.

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

Respondent.

Dated September 5, 2019

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

Appendix G

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 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.

Appendix G

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. 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.

Appendix G

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.

Appendix G

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).

Appendix G

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,

Appendix G

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 of 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 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,

Appendix G

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

Appendix G

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.” *Rhyme 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

Appendix G

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. Cronin*, 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. *McNelson 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

Appendix G

assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502 (1984).

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

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

- Sexual Assault—a category A felony for which a court shall sentence a convicted person to life with parole eligibility after 35 years if the offense was committed against a child under the age of 14 years and did not result in substantial bodily harm. NRS 200.366(3)(c).
- Lewdness—a category A felony for which a court shall sentence a convicted person to
 - (a) Life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served, and

Appendix G

may be further punished by a fine of not more than \$ 10,000; or

- (b) A definite term of 20 years, with eligibility for parole after a minimum of 2 years has been served, and may further be punished by a fine of not more than \$ 10,000. NRS 201.230 (2)
- Statutory Sexual Seduction—a category C felony for which a court shall sentence a convicted person to imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 5 years. In addition to any other penalty, the court may impose a fine of not more than \$ 10,000, unless a greater fine is authorized or required by statute. NRS 193.130(c).

Strategic and tactical decisions should be made by defense counsel, ***after consultation with the client*** where feasible and appropriate. ABA Criminal Justice Standards Section 4-5.2 (d) (emphasis added). An attorney has a duty to consult with the client regarding important decisions. Here, trial counsel was instructed to sit with his client and the interpreter to inform the Petitioner about the jury instruction discussions, including the possible request for the Statutory Sexual Seduction instruction. Transcript Day 7 at 3, 20-21, 31, 34. Trial counsel acknowledged that he did not meaningfully discuss the lesser-related Statutory Sexual Seduction instruction issue with Petitioner.

Pursuant to the two-prong test set forth in *Strickland v. Washington*, COURT FINDS, Petitioner's trial

Appendix G

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

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

COURT FINDS, Petitioner's trial counsel was not ineffective for failing to request the Statutory Sexual Seduction instruction because it was a legitimate, tactical decision that could have led to acquittal. Therefore, COURT FINDS, this decision was not the unreasonable

Appendix G

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

Appendix G

offense of Lewdness when they convicted the Petitioner of Sexual Assault.

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

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

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

Therefore, COURT FINDS, if the jury had determined that A.J. had consented to the penetration, and therefore

Appendix G

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.

/s/ Stefany A Miley
HONORABLE STEFANY A MILEY
DISTRICT COURT JUDGE
DEPARTMENT XXIII

57a

**APPENDIX H — OPINION OF THE SUPREME
COURT OF THE STATE OF NEVADA
FILED NOVEMBER 9, 2017**

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 67380

MAZEN ALOTAIBI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Appeal from a judgment of conviction, pursuant to a jury verdict, of burglary, first-degree kidnapping, two counts of sexual assault with a minor under 14 years of age, two counts of lewdness with a child under 14 years of age, and coercion. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Affirmed.

Filed November 9, 2017

Appendix H

BEFORE THE COURT EN BANC.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we are asked to determine whether, under the statutory definitions existing in 2012, the offense of statutory sexual seduction is a lesser-included offense of sexual assault when that offense is committed against a minor under 14 years of age.¹ Under the elements test, for an uncharged offense to be a lesser-included offense of the charged offense so that the defendant is entitled to a jury instruction on the lesser offense, all of the elements of the lesser offense must be included in the greater, charged offense. In applying the elements test in this case, we must resolve two issues related to the elements that make up the charged and uncharged offenses. First, we consider whether a statutory element that serves only to determine the appropriate sentence for the offense but has no bearing as to guilt for the offense is an element of the offense for purposes of the lesser-included-offense analysis. We hold that it is not. Second, we consider how to apply the elements test when a lesser offense may be committed by

1. 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)).

Appendix H

alternative means. We hold that the elements of only one of the alternative means need be included in the greater, charged offense to warrant an instruction on the lesser offense.

Applying these principles to the statutes at issue, we conclude that statutory sexual seduction, as defined in NRS 200.364(5)(a) (2009), is not a lesser-included offense of sexual assault even where the victim is a minor, NRS 200.366(1) (2007), because statutory sexual seduction contains an element not included in the greater offense. Thus, the district court did not err in refusing to give a lesser-included-offense instruction on statutory sexual seduction.²

FACTS

On the morning of December 31, 2012, appellant Mazen Alotaibi arrived at the Circus Circus hotel where

2. The two other arguments raised on appeal do not merit relief. First, as to the argument that trial counsel was ineffective, claims of ineffective assistance of counsel generally should be raised in postconviction proceedings in the district court, and we therefore decline to consider the argument in the first instance. *See Pellegrini v. State*, 117 Nev. 860, 883-84, 34 P.3d 519, 534-35 (2001). Second, as to the claim regarding the district court's denial of a motion for a new trial based on newly discovered evidence, we have considered the arguments on appeal and conclude that the district court did not abuse its discretion in denying the motion. *See State v. Carroll*, 109 Nev. 975, 977, 860 P.2d 179, 180 (1993) (reviewing a district court's decision to grant a motion for a new trial for an abuse of discretion); *Callier v. Warden, Nev. Women's Corr. Ctr.*, 111 Nev. 976, 990, 901 P.2d 619, 627-28 (1995) (explaining the four required components for granting a motion for a new trial based upon a recantation).

Appendix H

his friends had a room. In the hallway outside the hotel room, Alotaibi encountered A.D., a 13-year-old boy who was staying at the hotel with his grandmother. A.D. asked Alotaibi for marijuana, and they went outside the hotel to smoke it. Alotaibi made sexual advances toward A.D. in the elevator and outside the hotel, despite A.D.'s resistance. Alotaibi then offered A.D. money and marijuana in exchange for sex. A.D. testified that he agreed but intended to trick Alotaibi into giving him marijuana without engaging in any sexual acts.

They went back to the hotel room where Alotaibi's friends were staying, and Alotaibi took A.D. into the bathroom and closed the door. Alotaibi told A.D. that he wanted to have sex and began kissing and touching him. A.D. testified that he told Alotaibi "no" and wanted to leave the bathroom but Alotaibi was standing between him and the door. A.D. testified that Alotaibi forced him to engage in oral and anal intercourse. After leaving the hotel room, A.D. reported to hotel security that he had been raped.

During his interview with the police, Alotaibi admitted meeting A.D. in the hallway of the hotel and stated that A.D. had asked him for money and weed. Alotaibi initially denied touching A.D. or bringing him into the bathroom, but then admitted engaging in the sexual acts in the bathroom of the hotel room. According to Alotaibi, it was A.D.'s idea to have sex in exchange for money and weed, A.D. went willingly with him into the bathroom and initiated the sexual acts, and Alotaibi did not force him.

Based upon this incident, Alotaibi was charged with numerous offenses, including two counts of sexual

Appendix H

assault. In settling jury instructions, Alotaibi requested an instruction on statutory sexual seduction as a lesser-included offense of sexual assault, arguing that evidence indicated the victim consented to the sexual activity. The district court determined that statutory sexual seduction was not a lesser-included offense because it contained an additional element (the consenting person being under the age of 16) not required by sexual assault. Noting that there was evidence of consent to support the lesser offense, the district court instead offered to instruct the jury on statutory sexual seduction as a lesser-related offense of sexual assault, but Alotaibi declined such an instruction.³

The jury found Alotaibi guilty of two counts of sexual assault with a minor under 14 and other offenses. Alotaibi now appeals from the judgment of conviction.

DISCUSSION

Alotaibi contends that the district court erred in refusing to instruct the jury on statutory sexual seduction as a lesser-included offense of the charged offense of sexual assault with a minor because he presented evidence that the sexual conduct was consensual. We review the district court's settling of jury instructions for an abuse of discretion or judicial error. *Crawford v. State*, 121 Nev. 746, 748, 121 P.3d 582, 585 (2005).

3. The district court was not required to give an instruction on a lesser-related offense, as the defendant is not entitled to such an instruction. *See Peck v. State*, 116 Nev. 840, 844-45, 7 P.3d 470, 472-73 (2000), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006).

Appendix H

NRS 175.501 provides that a “defendant may be found guilty . . . of an offense necessarily included in the offense charged.” We have held that this rule entitles a defendant to an instruction on a “necessarily included” offense, i.e., a lesser-included offense, as long as there is some evidence to support a conviction on that offense. *Rosas v. State*, 122 Nev. 1258, 1267-69, 147 P.3d 1101, 1108-09 (2006).

In determining whether an uncharged offense is a lesser-included offense of a charged offense so as to warrant an instruction pursuant to NRS 175.501, we apply the “elements test” from *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). *Barton v. State*, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001), *overruled on other grounds by Rosas*, 122 Nev. 1258, 147 P.3d 1101. Under the elements test, an offense is “necessarily included” in the charged offense if “all of the elements of the lesser offense are included in the elements of the greater offense,” *id.* at 690, 30 P.3d at 1106, such that “the offense charged cannot be committed without committing the lesser offense,” *id.* (quoting *Lisby v. State*, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966)). Thus, if the uncharged offense contains a necessary element not included in the charged offense, then it is not a lesser-included offense and no jury instruction is warranted.

Alotaibi suggests that this court has already resolved the issue of whether statutory sexual seduction is a lesser-included offense of sexual assault with a minor in *Robinson v. State*, 110 Nev. 1137, 1138, 881 P.2d 667, 668 (1994). We disagree. Though *Robinson* contains statements to the effect that statutory sexual seduction is a lesser-included

Appendix H

offense of sexual assault, the focus in that case was on whether a juvenile who had been certified to be tried as an adult also was an adult for purposes of statutory sexual seduction, which includes the defendant's age (18 years of age or older) as an element. *Robinson*, which was decided before this court clarified the test for determining whether an offense is a lesser-included offense in *Barton*, provides no analysis as to whether statutory sexual seduction is a lesser-included offense of sexual assault, and thus any statement on this issue is dictum.⁴ Accordingly, *Robinson* is not controlling on the issue of whether statutory sexual seduction is a lesser-included offense of sexual assault so as to entitle a defendant to an instruction on the lesser, uncharged offense. The issue thus has not been clearly resolved by this court.⁵

The statutes at issue raise several questions about how to apply the elements test. Specifically, the parties disagree about which elements are included in the lesser and greater offenses. Thus, before comparing the

4. Before *Barton*, there was a lack of clarity and consistency in Nevada caselaw as to how courts determine what constitutes a lesser-included offense. As explained in *Barton*, this court initially adopted the elements test in 1966 but then occasionally applied other tests that considered the particular facts of the case as well as the elements of the crimes. 117 Nev. at 689-92, 30 P.3d at 1105-07. *Barton* specifically disavowed the use of this "same conduct" approach and explicitly reaffirmed the *Blockburger* elements test. *Id.* at 694-95, 30 P.3d at 1108-09.

5. We disavow any language in *Robinson* and our previous decisions suggesting that statutory sexual seduction is a lesser-included offense of sexual assault.

Appendix H

statutory elements of the two offenses, we must ascertain what elements actually comprise those offenses.

Elements of the greater offense

In 2012, NRS 200.366(1) proscribed sexual assault as follows:

A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

2007 Nev. Stat., ch. 528, § 7, at 3255. A separate subsection of that statute, NRS 200.366(3)(c), provided for a sentence of 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. *Id.* at 3255-56.

The State contends that the age of the victim is not an element of sexual assault for purposes of the lesser-included-offense analysis because the victim’s age only goes to the sentence for the offense. Thus, the State argues, because statutory sexual seduction requires proof of the victim’s age as an element while the offense of sexual assault does not, statutory sexual seduction is not

Appendix H

a lesser-included offense.⁶ Alotaibi argues that the State’s decision to charge him with the offense of “Sexual Assault with a Minor Under 14 Years of Age” necessarily inserted the age of the alleged victim as an element of that offense and triggered the application of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

We agree with the State that the age of the victim in the sexual assault statute is not an element of the offense for purposes of the lesser-included-offense analysis. We acknowledge that our prior decisions have been somewhat inconsistent in distinguishing elements required for a conviction from those that only affect sentencing in

6. The State contends that this court has already concluded as much in *Slobodian v. State*, 98 Nev. 52, 639 P.2d 561 (1982), *rejected by Barton*, 117 Nev. at 689 & n.9, 30 P.3d at 1105 & n.9. We disagree. In *Slobodian*, which concerned an earlier version of the sexual assault statute, this court held that statutory sexual seduction was not a lesser-included offense of sexual assault because “the crime of statutory sexual seduction requires a victim under the age of sixteen, while the age of the victim is irrelevant to the crime of sexual assault.” 98 Nev. at 53, 639 P.2d at 562 (internal footnote omitted). The earlier version of the sexual assault statute in *Slobodian* defined sexual assault in the same way as the statute in Alotaibi’s case, but differed in that it provided for a specific sentence only where the victim was under the age of 14 but contained no specific sentencing provision for a victim under the age of 16. *See id.*; 1977 Nev. Stat., ch. 598, § 3, at 1626-27. Under this earlier statute, if the victim was between the ages of 14 and 16, the victim’s age was not relevant to either guilt or punishment. The *Slobodian* decision did not indicate whether the victim was under the age of 14. Thus, the *Slobodian* decision did not indicate whether the age of the victim is an element of sexual assault when the offense is *committed against a minor*.

Appendix H

applying the elements test. For example, in *Rosas*, we included as elements of the lesser offense several factors that served only to elevate the offense from a misdemeanor to a gross misdemeanor. 122 Nev. at 1263, 147 P.3d at 1105. We take this opportunity to clarify that when an element goes only to punishment and is not essential to a finding of guilt, it is not an element of the offense for purposes of determining whether a lesser-included-offense instruction is warranted. *Cf. LaChance v. State*, 130 Nev. 263, 273-74, 321 P.3d 919, 927 (2014) (holding that an element that does not affect guilt but rather only determines the sentence is not an element of the offense for the purposes of *Blockburger*). To the extent that *Rosas* included elements only relevant to sentencing in its analysis under the elements test, we disavow any such application of the elements test.

Alotaibi's arguments regarding *Apprendi* do not alter our conclusion. In *Apprendi*, the United States Supreme Court considered whether the Sixth Amendment's guarantee of a jury trial requires that a jury, rather than a judge, determine any factor other than a prior conviction that increases the statutorily authorized sentence for an offense. 530 U.S. at 476. The Supreme Court held that, regardless of how a fact is designated by a legislature, any fact (other than a prior conviction) that authorizes the imposition of a more severe sentence than permitted by statute for the offense alone must be found by a jury beyond a reasonable doubt. *Id.* *Apprendi* did not address whether a sentencing factor is an element of an offense when determining whether the offense is included within a greater offense, and Alotaibi cites no controlling authority

Appendix H

applying *Apprendi* to double jeopardy or lesser-included-offense analysis.⁷

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

- (1) “subject[ing] another person to sexual penetration, or . . . forc[ing] another person to make a sexual penetration on himself or another, or on a beast,”

7. Notably, other courts have rejected the application of *Apprendi* to double jeopardy or lesser-included-offense analysis. See, e.g., *Smith v. Hedgpeth*, 706 F.3d 1099, 1106 (9th Cir. 2013) (holding that *Apprendi* did not clearly establish that a state court must “consider sentencing enhancements as an element of an offense for purposes of the Double Jeopardy Clause”); *People v. Alarcon*, 210 Cal. App. 4th 432, 148 Cal. Rptr. 3d 345, 348 (Ct. App. 2012) (rejecting contention that *Apprendi* requires enhancements to be considered in determining whether an uncharged offense is necessarily included in a charged offense).

Appendix H

- (2) “against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct.”

2007 Nev. Stat., ch. 528, § 7, at 3255 (NRS 200.366(1)).

Elements of the lesser offense

Having identified the elements of the greater offense, we turn to the elements of the lesser offense. In 2012, statutory sexual seduction was defined in NRS 200.364(5) as:

(a) Ordinary sexual intercourse, anal intercourse, cunnilingus or fellatio committed by a person 18 years of age or older with a person under the age of 16 years; or

(b) Any other sexual penetration committed by a person 18 years of age or older with a person under the age of 16 years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of either of the persons.

2009 Nev. Stat., ch. 300, § 1.1, at 1296. The statute therefore sets forth two alternative means of committing statutory sexual seduction: (a) engaging in sexual intercourse, anal intercourse, cunnilingus, or fellatio; or (b) engaging in *other sexual penetration* with the intent of

Appendix H

arousing, appealing to, or gratifying the lust or passions or sexual desires of either person. The parties disagree on how to apply the elements test where, as here, the statute provides different ways for a person to commit the offense. The State asserts that all of the elements of both alternative means of committing the lesser offense must be included in the greater offense, while Alotaibi focuses only on the elements of one of the alternatives, NRS 200.364(5)(a), that is most consistent with the sexual acts alleged in this case.

We conclude that where a statute provides alternative ways of committing an uncharged offense, the elements of only one of those alternatives need to be included in the charged offense for the uncharged offense to be lesser included. *See* 6 Wayne R. LaFave, et al., *Criminal Procedure* § 24.8(e) (3d ed. 2007) (“When the lesser offense is one defined by statute as committed in several different ways, it is a lesser-included offense if the higher offense invariably includes at least one of these alternatives.”). This approach comports with that taken by other jurisdictions that have considered this issue. *See, e.g., United States v. McCullough*, 348 F.3d 620, 626 (7th Cir. 2003) (holding that “alternative means of satisfying an element in a lesser offense does not preclude it from being a lesser-included offense”); *United States v. Alfisi*, 308 F.3d 144, 152 n.6 (2d Cir. 2002) (finding an offense to be a lesser-included offense “notwithstanding the existence of possible or alternative, and non-mandatory, elements in the lesser offense not contained in the greater offense”); *State v. Waller*, 450 N.W.2d 864, 865

Appendix H

(Iowa 1990) (“When the statute defines [a lesser] offense alternatively, . . . the relevant definition is the one for the offense involved in the particular prosecution.”). In particular, we agree with the Second Circuit’s reasoning in *Alfisi*, whereby the court rejected an “unnecessary and formalistic requirement on how [the legislature] drafts criminal statutes,” opting instead to view no differently a statute drafted as a “singular but disjunctive whole” from a statute dividing the alternative elements “into several discreet and independent sections.” 308 F.3d at 152 n.6. Likewise, here, the fact that the Legislature included the alternative means of committing statutory sexual seduction in disjunctive subsections of the statute does not preclude each alternative means from being a lesser-included offense.

Here, neither of the alternatives in NRS 200.364(5) is necessarily included in the offense of sexual assault. Both alternatives include the age of the victim (under 16 years of age) as an element of the offense that is required for conviction. 2009 Nev. Stat., ch. 300, § 1.1, at 1296. As explained above, the age of the victim is not an element required for a conviction of the greater offense (sexual assault). The alternative set forth in NRS 200.364(5)(b) also includes an intent element that is not included in the greater offense—that the sexual act was committed “with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the defendant or the victim],” *Id.* Therefore, under the elements test, statutory sexual seduction is not a lesser-included offense of sexual

Appendix H

assault, and Alotaibi was not entitled to an instruction on statutory sexual seduction. As such, the district court properly refused to instruct the jury on statutory sexual seduction. We therefore affirm the judgment of conviction.

/s/ Hardesty_____, J.
Hardesty

We concur:

/s/ Cherry_____, C.J.
Cherry

/s/ Douglas_____, J.
Douglas

/s/ Gibbons_____, J.
Gibbons

/s/ Pickering_____, J.
Pickering

/s/ Parraguirre_____, J.
Parraguirre

/s/ Stiglich_____, J.
Stiglich

**APPENDIX I — ORDER GRANTING EN BANC
RECONSIDERATION OF THE SUPREME COURT OF
THE STATE OF NEVADA, FILED NOVEMBER 3, 2017**

IN THE SUPREME COURT OF THE
STATE OF NEVADA

No. 67380

MAZEN ALOTAIBI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Filed November 3, 2017

ORDER GRANTING EN BANC RECONSIDERATION

Having considered the petition for en banc reconsideration in this matter, this court has determined that reconsideration is warranted to maintain uniformity of decisions and address a substantial precedential issue.¹ Accordingly, the petition for en banc reconsideration is granted and this matter shall stand submitted on the briefs and record previously filed. *See* NRAP 40A(f).

1. Although we generally request an answer before granting a petition for en banc reconsideration, NRAP 40A(e), we conclude that an answer is not necessary in this case.

73a

Appendix I

It is so ORDERED.

/s/ Cherry_____, C.J.

**APPENDIX J — ORDER DENYING REHEARING
OF THE SUPREME COURT OF THE STATE OF
NEVADA, FILED APRIL 26, 2017**

IN THE SUPREME COURT OF THE
STATE OF NEVADA

No. 67380

MAZEN ALOTAIBI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Filed April 26, 2017

ORDER DENYING REHEARING

This is a petition for rehearing of our February 28, 2017, order affirming appellant's judgment of conviction. Appellant asserts that rehearing is warranted because this court overlooked or failed to consider *Robinson v. State*, 110 Nev. 1137, 881 P.2d 667 (1994), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

We considered *Robinson* and *Apprendi* in making our decision and concluded that those cases do not warrant relief for appellant. First, though the *Robinson* decision

Appendix J

contains statements to the effect of statutory sexual seduction being a lesser-included offense of sexual assault, the focus in that case was on whether a juvenile who had been certified to be tried as an adult on charges of sexual assault was entitled to an instruction on statutory sexual seduction. *Robinson*, which was decided before *Barton v. State*, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006), provides no analysis on statutory sexual seduction being a lesser-included offense of sexual assault with a minor, and thus any statement on this issue is dictum. Accordingly, *Robinson* is not controlling on the issue of whether statutory sexual seduction is a lesser-included offense of sexual assault with a minor so as to entitle a defendant to an instruction on the lesser-included offense.

Second, *Apprendi*—a case about the Sixth Amendment right to a jury determination on any factor (other than a prior conviction) that increases the statutorily authorized sentence for an offense—does not address the analysis used for determining whether an offense is a lesser-included offense. Appellant cites no controlling authority applying *Apprendi* to double jeopardy or lesser-included offense analysis and thus fails to demonstrate that *Apprendi* requires the age of the victim to be an element of sexual assault with a minor for purposes of the *Blockburger*¹ “elements” test. Because appellant has not demonstrated a basis for rehearing, NRAP 40(c)(2), we deny the petition for rehearing.

1. *Blockburger v. United States*, 284 U.S. 299 (1932).

76a

Appendix J

It is so ORDERED.

/s/ Hardesty_____, J.
Hardesty

<u>/s/ Parraguirre</u> _____, J.	<u>/s/ Stiglich</u> _____, J.
Parraguirre	Stiglich

77a

**APPENDIX K — ORDER OF AFFIRMANCE OF
THE SUPREME COURT OF THE STATE OF
NEVADA, FILED FEBRUARY 28, 2017**

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 67380

MAZEN ALOTAIBI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Filed February 28, 2017

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary, first-degree kidnapping, two counts of sexual assault with a minor under 14 years of age, two counts of lewdness with a minor under 14 years of age, and coercion. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

First, appellant Mazen Alotaibi argues that the district court erred in failing to instruct the jury that

Appendix K

statutory sexual seduction is a lesser-included offense of sexual assault with a minor under 14 years of age. We apply the elements test to determine whether an offense is a lesser-included offense of the charged offense so as to warrant a jury instruction. *See Barton v. State*, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006). An offense is “necessarily included” in the offense charged if “the offense charged cannot be committed without committing the lesser offense.” *Id.* at 690, 30 P.3d at 1106 (quoting *Lisby v. State*, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966)). A comparison of the relevant statutes in effect at the time Alotaibi committed the offenses shows that it was possible to commit sexual assault without necessarily committing statutory sexual seduction.¹ Compare 2009 Nev. Stat., ch. 300, § 1.1, at 1296 (NRS 200.364(5)), with 2007 Nev. Stat., ch. 528, § 7, at 3255 (NRS 200.366(1)).² Thus, statutory sexual seduction was not a lesser-included offense of sexual assault with a minor, and Alotaibi was not entitled to an instruction on it.

Next, Alotaibi argues that the district court abused its discretion in denying his motion for a new trial based on newly discovered evidence. We review a district court’s

1. We reach the same conclusion even if we accept Alotaibi’s position and consider only the elements of the offense as charged in the charging document.

2. NRS 200.366(1) was amended in 2015 to provide that sexual penetration of a child under the age of 14 years is sexual assault regardless of consent.

Appendix K

decision whether to grant a new trial for an abuse of discretion. *State v. Carroll*, 109 Nev. 975, 977, 860 P.2d 179, 180 (1993). Alotaibi's motion was based on an affidavit from a State witness recanting part of his trial testimony about Alotaibi driving a car shortly before he committed the offenses. Alotaibi argues that this recantation warrants a new trial because the false testimony about him driving directly undermined his defense of being too intoxicated to form the requisite mental state for the offenses. We conclude that the district court did not abuse its discretion in denying the motion for a new trial. *See Cattier v. Warden, Nev. Women's Corr. Ctr.*, 111 Nev. 976, 990, 901 P.2d 619, 627-28 (1995) (explaining the four required components for granting a motion for a new trial based upon a recantation). The district court was not satisfied that the trial testimony was false and determined that the witness's conflicting accounts demonstrated at most that his recollection of the event could not be trusted. The record supports this determination, given that the witness admitted that he initially believed that Alotaibi was the driver but later decided that Alotaibi had been too drunk to drive. Moreover, the record supports the district court's determination that it was not probable that the outcome of the trial would have been different without the allegedly false testimony. The witness testified that Alotaibi was extremely intoxicated, other witnesses also testified to Alotaibi's level of intoxication, and the jury had the opportunity to observe Alotaibi in a hotel surveillance video and in a recorded interview conducted within hours of the offenses. Thus, we conclude that Alotaibi has not

Appendix K

demonstrated that the district court abused its discretion in denying his motion for a new trial.

Finally, Alotaibi argues that his trial counsel provided ineffective assistance by failing to insist on a jury instruction and interview a witness. Claims of ineffective assistance of counsel should be raised in postconviction proceedings in the district court in the first instance and are generally not appropriate for review on direct appeal unless there has been an evidentiary hearing or an evidentiary hearing would be unnecessary. *Pellegrini v. State*, 117 Nev. 860, 883-84, 34 P.3d 519, 534-35 (2001); *Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995). Alotaibi has not established that either exception applies, and thus we decline to address his ineffective-assistance arguments. For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED.

/s/ Hardesty_____, J.
Hardesty

/s/ Parraguirre_____, J.
Parraguirre

/s/ Stiglich_____, J.
Stiglich

81a

**APPENDIX L — FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER AND
DECISION OF THE DISTRICT COURT OF CLARK
COUNTY, NEVADA, FILED NOVEMBER 18, 2014**

DISTRICT COURT
CLARK COUNTY, NEVADA

CASE NO.: C287173
DEPARTMENT XXIII

STATE OF NEVADA,

Plaintiff,

v.

MAZEN ALOTAIBI,

Defendant.

Filed November 18, 2014

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER AND DECISION**

I. PROCEDURAL HISTORY

This matter was last before the Court on September 12, 2014 pursuant to Defendant's Motion for New Trial and/or for an Evidentiary Hearing, the State's Opposition thereto and Defendant's Reply. Defendant was present, represented by Dominic P. Gentile, Esq. and Anjali D. Webster, Esq. The State of Nevada was present

Appendix L

represented by Steven Wolfson, District Attorney, by and through Jacqueline Bluth, Esq. and Mary Kay Holthus, Esq. Defendant's Motion argued a new trial was necessary due to the recanted trial testimony of Rashed Alshehri. Additionally, Defendant sought an evidentiary hearing and/or new trial based upon allegations of ineffective assistance by trial counsel. The State denied Defendant's contentions in their entirety and further argued that any claims for relief for ineffective assistance of counsel should instead be raised in post-conviction relief.

Defendant Mazen Alotaibi was charged by way of Information with the crimes of Burglary (Category B Felony—NRS 205.060); First Degree Kidnapping (Category A Felony—NRS 200.310, 200.320); Sexual Assault With a Minor Under Fourteen Years of Age (Category A Felony—NRS 200.364, 200.366); Lewdness with a Child Under the Age of 14 (Category A Felony—NRS 201.230) and Coercion Sexually Motivated (Category B Felony—NRS 207.190, 207.193). The State alleged the above crimes occurred on or about December 31, 2012 at the Circus Circus Hotel and Casino (hereinafter Circus Circus) where the minor victim A[REDACTED] was staying as a guest along with his grandmother.

The two-week jury trial for this case began October 10, 2013. On October 23, 2013, Defendant was found guilty on the following counts: Count 1, Burglary; Count 2, First Degree Kidnapping; Counts 3 and 5, Sexual Assault with Minor Under Fourteen Years of Age; Counts 7 and 8, Lewdness With a Child Under The Age of 14; and Count 9, Coercion (misdemeanor). Defendant was found not

Appendix L

guilty on Counts 4 and 6, Lewdness With a Child Under the Age of 14.

A sentencing date was originally set for December 16, 2013 but was later postponed to January 29, 2014. On January 29, 2014, Defendant's trial counsel Don Chairez, Esq. withdrew from the case. Defendant then retained new counsel, namely Vincent Savarese III, Esq. and Dominic Gentile, Esq. of the law firm Gordon Silver. The Court granted a sixty-day continuance for sentencing due to the change of counsel. On May 7, 2014, a Stipulation and Order to continue the sentencing date to June 4, 2014, was filed with the Court.

Defendant filed a Motion for New Trial on May 27, 2014 based upon the recanted testimony of Mr. Alshehri. Mr. Alshehri first testified during the trial as follows:

Q. You guys let him drive that drunk for 30 minutes from the parking, public parking to the Circus Circus?

A. Yes.

Q. Why?

A. Because we are all of us like drunk, but he just said I can drive, I can drive.

A. Yeah.

Q. Did he have any problems driving?

Appendix L

A. I think like just speeding and something like that.

Q. But otherwise, he was able to drive?

A. He was driving, yes.

Alshehri Trial Tr. 43:113,

The recanted testimony is set forth in Mr. Alshehri's Affidavit, attached as Exhibit 4 to Defendant's Motion For New Trial And/Or Evidentiary Hearing. Mr. Alshehri testified in that Affidavit in pertinent part as follows:

My testimony was false. Mazen Alotaibi did not drive any vehicle after we left the strip club at issue. Nor did Mazen Alotaibi drive any vehicle from a public parking lot to Circus Circus. Once we arrived in Las Vegas and parked the vehicle in the lot, Mazen Alotaibi never drove again.

Alshehri Aff. 2:5-8.

In support of the request for new trial, Defendant also requested this Court set an evidentiary hearing. Upon review of the sworn affidavit of Mr. Alshehri this Court determined an evidentiary hearing was not necessary to a determination of Defendant's Request for a New Trial. Defendant also requested the Court allow a pre-sentencing evidentiary hearing on the issue of ineffective assistance of trial counsel.

Appendix L

On July 16, 2014 the State filed its Opposition to Defendant's Motion. The State's Opposition argued that pursuant to *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991) and *Callier v. Warden, Nevada Women's Corr. Ctr.*, 111 Nev. 976, 901 P.2d 619 (1995) a new trial was not warranted on the basis of "newly discovered" or "recanted" testimony. The State argued further that even assuming Mr. Alshehri's trial testimony was false, a new trial was not warranted given the overwhelming weight of the evidence presented at trial. The State also argued Defendant's claims for ineffective assistance of counsel should be raised in a request for post-conviction relief and not in a Motion for New Trial. Defendant filed a reply on August 1, 2014.

The Court postponed sentencing pending the hearing and decision on Defendant's Motion for New Trial. Having considered the matter, including briefs, transcripts, arguments of counsel, and all documents on file herein, the Court now makes the following findings of fact and conclusions of law.

II. DISCUSSION

NEV. REV. STAT. § 176.515(1) provides "[t]he court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence." In *Callier*, the Court addressed the standard under which witness recantations, either in the context of new trial motion or in a habeas petition, should be assessed:

Numerous courts have determined that
recantations should be viewed with suspicion

Appendix L

and that before granting a new trial, the trial court must be satisfied that the witness's trial testimony was false. In other words, in evaluating recantation cases, whether in the context of a new trial motion or a habeas petition, the trial court should apply the following standard: (1) the court is satisfied that the trial testimony of the material witness was false; (2) the evidence showing that the false testimony was introduced at trial is newly discovered; (3) the evidence could not have been discovered and produced for trial even with the exercise of reasonable diligence; and (4) it is probable that had the false testimony not been admitted, a different result would have occurred at trial. Only if *each* component is met should the trial court order a new trial.

Id. at 627-628 (emphasis added).

The Court finds *Callier* provides the standard for assessments of witness recantations; it is unnecessary to analyze the facts presented in the instant action under the similar *Sanborn* standard. It is within the trial court's discretion to grant or deny a motion for a new trial based on the grounds of newly discovered evidence. *See Sanborn*, 107 Nev. at 406, 812 P.2d at 1284. The decision of the trial court regarding the granting or denying of a motion for new trial will not be overturned absent an abuse of that discretion. *See Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008).

*Appendix L***A. The Court is not satisfied the witness's trial testimony was false.**

A finding that the trial testimony was indeed false is essential in evaluating alleged perjury cases, therefore the Court shall address this prong of *Callier* first. The Defendant bases his Motion for New Trial on the recanted testimony of Mr. Alshehri as set forth in Mr. Alshehri's affidavit. Mr. Alshehri's affidavit alleges that following his pretrial interview with the State, but before trial, he realized he was incorrect in his assertion that the Defendant had driven to Circus Circus because the Defendant was in fact too intoxicated to drive. Mr. Alshehri indicated in his affidavit that contrary to his prior testimony, "[he] testified falsely at trial that Mazen Alotaibi drive a vehicle after we left the strip club at issue because I felt threatened by the prosecution for the State of Nevada to do so." Alshehri Aff. 3:19-20. The Defendant now claims Callier warrants a new trial, alleging Mr. Alshehri's Affidavit proves his trial testimony was false.

As stated in *Callier*, recantations should be viewed with suspicion. *Callier*, 901 P.2d at 627. Here, Mr. Alshehri stated in his affidavit that he feared he would be arrested if he did not come to Las Vegas for the Sept. 14, 2013 interview. Alshehri Aff. 2:20-22. He then stated that a few weeks later he was called back for another interview, during which he indicated that the Defendant drove the vehicle from the Olympic Gardens to the Circus Circus Hotel. Alshehri Aff. 3:3-9. Following his second interview, Mr. Alshehri states "upon reflection and further thought I realized that it was not Mazen who drove, as he was far too

Appendix L

drunk to do so. It was definitely Muhammed who drove.” Alshehri Aff. 3:10-11. Mr. Alshehri states that his reason for testifying that Mazen Alotaibi drove that evening is due to feeling threatened by prosecution by the State of Nevada for failing to do so.

Viewing Mr. Alshehri’s recantation with suspicion, the Court is not satisfied the trial testimony was false. There is no evidence that the State threatened Mr. Alshehri with prosecution unless he testified that the Defendant was the driver, nor that he would be prosecuted for giving conflicting testimony at trial. Mr. Alshehri also stated unequivocally during a pretrial conference that Alotaibi not only drove, but that he “drove good” other than speeding a little. Trial Tr., Ruth Leon 42. Mr. Alshehri also noted at the conference that the Defendant had lost the keys to the car but eventually found them. No other witnesses testified to whether the Defendant drove that evening, so the assertion that the trial testimony is false cannot be supported by any other evidence. Mr. Alshehri testified at trial and his credibility was tested by cross-examination. All the Court may determine from Mr. Alshehri’s conflicting accounts of who drove from the Olympic Garden to Circus Circus that evening is that Mr. Alshehri’s recollection of the event cannot be trusted. The Court cannot determine whether either retelling of the events is certifiably true or false.

COURT FINDS Defendant has failed to demonstrate the trial testimony of Mr. Alshehri was false.

*Appendix L***B. The evidence is not newly discovered.**

The second prong of *Cattier* instructs the trial court to determine whether the evidence allegedly exposing the trial testimony as false was recently discovered. The Defendant argues the evidence is newly discovered because Mr. Alshehri did not seek to recant his testimony until after the conclusion of the trial. This argument fails.

The substance of the evidence offered by the defense is that the Defendant could not drive from the Olympic Garden to Circus Circus because he was too intoxicated. At the time of the trial, both the State and the Defendant presented significant amounts of evidence regarding the intoxication and impairment level of the Defendant. The jury heard testimony by Mr. Alshehri, the Victim, the Defense's witness Jennifer Melendez, and an investigator with the District Attorney's office. The relevant testimony from those witnesses is reproduced below.

Trial Testimony of State's Witness Rashed Alshehri

Q. How long were you at that first casino?

A. About two, two and a half hours.

Q. And were you at a bar?

A. Yes. (p. 33)

...

Appendix L

Q. Was Mazen drinking there?

A. Yeah.

Q. What was he drinking?

A. I guess he drink Hennessy.

Q. Did you see him drinking it?

A. Yeah, I saw him. (p. 33)

...

Q. And you were with Mazen the whole time you were at the strip club?

A. Not all the time.

Q. How much of the time were you with him?

A. Maybe half of the time.

Q. During the time that you were with him, did you see him drink?

A. Yeah, I saw him drink.

Q. How many drinks did you see him drink?

A. I saw him, like he used to drink Hennessy shots and a black drink, but I'm not really—what is it.

Appendix L

Q. A shot and a black drink.

A. Yea.

Q. Like two different cups?

A. Yes.

Q. And how many did you see him—how many shots of Hennessy did you see him drink?

A. I'm not too sure, but it's like more than three,

Q. More than three?

A. Yeah. (p. 36-37)

...

Q. And then what happened when you got back to the Circus Circus? Where did you park?

A. We parked I think near to the hotel. Maybe it's for the hotel parking. (p. 40)

...

Q. So you get to the parking lot and what happened then?

A. And then Mazen start talking, like I drink, like he black out at that time.

Appendix L

Q. You think what?

A. He's like I think black out, you call it.

Q. He blacked out?

A. Yeah. (p. 41)

...

Q. How many drinks do you think you had at the first casino when you guys came from Los Angeles to Las Vegas?

A. I didn't like—we drink a lot. We drink something like, because it's a holiday. We drink a lot.

Q. You mentioned you drank tequila.

A. Tequila, tequila and shots, something like that. (p. 60)

...

Q. [D]id you see Mazen drink or do you know how much he drank by the time you came back to the hotel?

A. I guess he drank a lot.

Q. Okay.

Appendix L

A. Yes. But I don't know how many.

Q. But when Mazen would walk, would he walk like he was falling down or did he walk like it was almost normal?

A. It's not normal. (p. 64-65)

...

Q. ... When you went back to the hotel, did you run into this Chinese boy before you arrived in the hotel room or after you arrived in the hotel room?

A. Can you say that, please, again?

Q. Yes. When you came back from the strip club and you hung around the lobby, correct?

A. Uh-huh.

Q. How long did you guys hang out in the lobby?

A. We didn't go in the lobby. Like most of the time we was in the street near to the Subway food and near to the front of the hotel.

Q. Mentioning Subway, did you buy a sandwich for Mazen to eat?

Appendix L

A. We would like to at the time, but it was closed.

Q. All right. At seven in the morning?

A. Yes.

Q. So why did you and Mohammed want to get food for Mazen?

A. Because we want him to like wake up because he just drunk, he want to fight us.

Q. So you were trying to sober him up?

A. Like we want to control him but we couldn't. (p. 65-66)

Trial Testimony of Victim A[REDACTED]

Q. Why did you ask the Defendant if he had marijuana?

A. Because when he passed by I saw that he had pink eyes and he smelled like it. (p. 17)

...

Q. And what happened when you and the defendant got out to the elevator—excuse me, out to the alley from the elevator?

Appendix L

A. And then we smoked two hits, and then he did two, and then he started advance onto me again. (p. 21)

...

Q. Okay. And when you looked at him, was there any indication in your mind that maybe he might have been drinking alcohol and not smoking marijuana?

A. No, because I know people who drink alcohol and their eyes do not turn pink.

Q. So there was not an odor of alcohol about his breath?

A. He had smelly breath.

Q. He had what?

A. Smelly breath.

Q. Smelly breath. But was it the smell or marijuana or was it the smell of alcohol?

A. Mixed.

Q. Mixed. Okay. And when you spoke to him, could you tell whether or not he might be drunk or he might be high?

Appendix L

A. He was like—he couldn't speak right.
(p. 56-57)

Trial Testimony of Defense's Witness Jennifer Melendez

Q. All right. And did you see Mazen drinking?

A. Yes.

Q. And what was he drinking?

A. He does a lot of doubles with no mixers.
Crown, any brown liquor. (p. 109)

...

Q. Okay. And when you got to the strip club,
how did Mazen act?

A. He went straight to the bar.

Q. And what was Mazen doing?

A. Drinking and talking with Sam.

Q. Okay. Now, Mazen basically sat at the bar
most of the time that you were there at the club?

A. Yeah. Him and Sam sat away from the girls
and they just talked to each other.

Q. All right. And were they drinking?

Appendix L

A. Yes.

Q. All right. Did he—so, in your opinion, was he drunk?

A. Yes. Well, having a hunch of doubles.
(p. 111-13)

Trial Testimony of State's Witness Ruth Leon

Q. . . . [W]ere you present at a pretrial conference with Rashed Alshehri?

A. Yes.

Q. And specifically when he talked about getting back to the Circus Circus after the strip club, did he ever use the term “blackout” when referring to the defendant’s level of intoxication?

A. No.

Q. What did—how did he discuss the defendant to be behaving?

A. He indicated that—that the defendant had been drinking. They were all drinking.
(p. 42-43)

...

Appendix L

Q. Did [Mr. Alshehri] ever indicate that [Alotaibi] had any trouble walking?

A. No.

Q. Talking?

A. No.

Q. Communicating with them?

A. No. The only problem they had was trying to convince them to—for him to go upstairs.
(p. 43)

The jury heard similar testimony regarding the Defendant's intoxication level from numerous other witnesses presented by the State and the Defendant, including the security guards who initially detained the Defendant and police officers who arrived at Circus Circus to conduct the Defendant's interview. In addition to trial testimony, the jury watched both a surveillance video from Circus Circus and a recorded interview with the Defendant. Trial Ex. 116, 180. The surveillance video showed the Defendant having difficulties walking around the hotel prior to the incident at issue. The jury also saw video surveillance footage provided by Circus Circus of the Defendant walking about the casino and using the elevators.

The jury was also able to observe the Defendant's demeanor during the course of his interview with police in

Appendix L

the recorded interview conducted the night of the incident. Defendant himself stated as follows about his intoxication level immediately before the—incident in question:

Voluntary Statement of Defendant Mazen Alotaibi

Q. Were you — what were you drinking? What kind of liquor?

A. Hennessy,

Q. Oh Hennessy? How much?

A. I don't know. (p. 9)

...

Q. Wow. So how many drinks did you have?

A. Four, five, six.

Q. You drink Hennessy straight up?

A. Yeah, straight up.

Q. No — no ice, water, nothin'?

A. No Coke, nothin'.

Q. No? Warm, or cold?

A. Uh, I don't know, maybe warm.

Appendix L

Q. Yeah? Just just shots?

A. Yeah shot. (p. 10)

...

Q. You don't do, uh, marijuana? You don't smoke marijuana?

A. Sometimes, but not usually.

Q. Not usually?

A. I was thinking.

Q. Okay. Last night you were smoking marijuana?

A. No.

Q. No?

A. I drink too much. (p. 11)

...

Q. And, they're gonna find out that you were in there with that boy. They're gonna find that out.

A. I don't know, 'cause I didn't do it, 'cause I'm for—I just drank too much—I just drank too much. I got a ten shot of Hennessy with my

Appendix L

friend, she's Mexican. If I can call her, she will come to here to explain to you what happened last night. (p. 38)

...

Q. You — you know whether or not you had sex with him.

A. I don't know.

Q. You don't know?

A. I don't know, I was too drink. (p. 44)

...

Q. I can tell — I can tell that you've had a lot of alcohol in you.

A. Yeah — yeah, you can tell that. (p. 54)

...

Q. You tell — you be honest with me. I know you said you put your penis in his mouth.

A. Yeah.

Q. And, I know you put it in his butt too.

A. Mm-hm.

Appendix L

Q. I know that.

A. I don't know. Maybe.

Q. Come on.

A. Maybe, I did. If I put . . .

Q. The nurse, I saw the pictures, the nurse you did.

A. The nurse?

Q. The nurse took pictures, okay?

A. Mm-hm.

Q. It shows that your penis was in there. Don't lie to me, you already said that you put it in his mouth, don't lie and say you didn't put it in his butt.

A. I know, I was too—I drink too much. I was drinking. (p. 64).

To find that recantations are newly discovered evidence simply because they occurred after trial would lead to absurd results; all post-trial recantations would thus be newly discovered. Instead the Court must examine the substance of the recanted evidence to determine whether it is indeed new. Here, the evidence that the Defendant was intoxicated is uncontroverted. The jury

Appendix L

considered the Defendant's interview and the volumes of other evidence presented before it determined that Defendant, even though intoxicated, was able to form the specific intent required of the crimes charged. Testimony regarding the Defendant's presumed level of intoxication is anything but new; it is at best another handful of sand on an already expansive beach of evidence.

Defendant also claims the evidence is newly discovered because trial counsel was ineffective for failing to investigate or adequately interview Mr. Alshehri prior to his trial testimony, leading to the necessity of Mr. Alshehri's recantation. The Court will not address this issue as claims of ineffective assistance of counsel are matters for post-conviction proceedings.

COURT FINDS Defendant has failed to demonstrate the evidence showing that Defendant was intoxicated is newly discovered.

C. The trial court finds the evidence could have been discovered and produced for trial with the exercise of reasonable diligence.

Defendant argues here that the evidence could not have been discovered and produced for trial with the exercise of reasonable diligence. The Court is not persuaded. Defendant's counsel had every opportunity to conduct a pre-trial interview of Mr. Alshehri regarding his testimony. Counsel either did not conduct such an interview or failed to conduct such an interview with reasonable diligence. The Court declines to make a finding

Appendix L

on whether the actions of the Defendant's counsel rise to the level of ineffective assistance of counsel. As addressed in the prior section, claims of ineffective assistance of counsel are matters for post-conviction proceedings.

COURT FINDS evidence regarding the recantation of Mr. Alshehri could have been discovered and produced for trial with the exercise of reasonable diligence.

D. The trial court finds it is not probable that had the alleged false testimony not been admitted, a different result would have occurred at trial.

The Defendant argues that had Mr. Alshehri testified the Defendant was so drunk he couldn't drive from the Olympic Garden to Circus Circus, it is a probable consequence that the jury would have found the Defendant lacked the specific intent to commit the crimes charged. Black's Law Dictionary defines "probable consequence" as "[a]n effect or result that is more likely than not to follow its supposed cause." BLACK'S LAW DICTIONARY 1321 (9th ed. 2009). The Court does not find it more likely than not that had Mr. Alshehri's allegedly false testimony not been admitted, a different result would have occurred at trial.

Whether the Defendant drove while intoxicated or did not drive because he was too intoxicated—is insignificant when weighed against the fact that numerous eyewitnesses including the Defendant—testified to the level of Defendant's intoxication. The Court notes Mr. Alshehri's Affidavit only recants the portion of his trial testimony wherein he testified Defendant drove to the

Appendix L

hotel. According to the affidavit, a person known to Mr. Alshehri as Muhammed drove to the hotel instead. Alshehri Aff. 2:9. Even without the recanted testimony, there was still significant testimony from Mr. Alshehri from which the jury could assess the Defendant's level of intoxication.

Both the State and the Defense presented extensive testimony at the trial regarding Defendant's level of intoxication. Mr. Alshehri himself testified repeatedly the Defendant was drinking heavily and was intoxicated. Defense witness Jennifer Melendez also testified the Defendant was drinking heavily. Additionally, the videotape from the casino and the recorded interview of the Defendant at the police station allowed the jury to make their own assessments regarding the Defendant's level of intoxication. Testimony that Defendant was intoxicated or impaired was brought up repeatedly during the course of trial testimony by the State's witnesses, the Defense's witnesses, and the Defendant himself. Additionally, through the surveillance video and the video interview with police the jury could make their own observations regarding the intoxication/impairment of the Defendant. The jury was inundated with evidence from which the jurors could assess Defendant's level of intoxication. Whether the jury chose to believe or disbelieve Defendant was intoxicated was within their province.

COURT FINDS it is not probable that had the alleged false testimony not been admitted, a different result would have occurred at trial.

106a

Appendix L

COURT ORDERS Defendant's Motion for New Trial
and/or Evidentiary Hearing DENIED.

IT IS SO ORDERED.

Dated this 18th day of November, 2014.

/s/ Stefany A. Miley
Honorable Stefany A. Miley
District Court Judge
Department XXIII

107a

**APPENDIX M — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT,
FILED MARCH 26, 2026**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-2523
D.C. No. 2:21-cv-01281-GMN-BNW
District of Nevada, Las Vegas

MAZEN ALOTAIBI,

Petitioner-Appellant,

v.

NETHANJAH BREITENBACH; *et al.*,

Respondents-Appellees.

Filed March 26, 2026

ORDER

Before: SCHROEDER and FRIEDLAND, Circuit Judges,
and SCHREIER, District Judge.*

The panel has unanimously voted to deny Appellant's petition for rehearing. Judge Friedland has voted to deny the petition for rehearing en banc, and Judge Schroeder

* The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota, sitting by designation.

Appendix M

and Judge Schreier so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petitions for panel rehearing and rehearing en banc are DENIED.