

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL TODD BOTELHO,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

No. 49586

FILED

OCT 17 2007

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CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

RESPONDENT'S ANSWERING BRIEF

MARY LOU WILSON
333 Marsh Avenue
Reno, Nevada 89509

RICHARD A. GAMMICK
District Attorney

TERRENCE P. McCARTHY
Appellate Deputy
P.O. Box 30083
Reno, Nevada 89520-3083

ATTORNEY FOR APPELLANT

ATTORNEYS FOR RESPONDENT

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8 Respondent.

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10 RESPONDENT'S ANSWERING BRIEF

11 MARY LOU WILSON
12 333 Marsh Avenue
13 Reno, Nevada 89509

RICHARD A. GAMMICK
District Attorney

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23
24
25
26
TERRENCE P. McCARTHY
Appellate Deputy
P.O. Box 30083
Reno, Nevada 89520-3083

ATTORNEY FOR APPELLANT

ATTORNEYS FOR RESPONDENT

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10 RESPONDENT'S ANSWERING BRIEF

11 I. STATEMENT OF THE CASE

12 This is an appeal from a judgment denying a petition for writ of habeas corpus (post-
13 conviction) following an evidentiary hearing.

14 Appellant Botelho was represented by counsel when he pleaded guilty to kidnaping and two
15 counts of sexual assault. He was sentenced and appealed but the judgment was affirmed. *Botelho*
16 *v. State*, Docket No. 43247, Order of Affirmance (April 4, 2005), at Appellant's Appendix, Volume
17 I, p. 235. He then filed a petition for writ of habeas corpus. The court appointed counsel and
18 allowed a supplement. Altogether he presented some sixteen claims for relief. See Appellant's
19 Appendix, Volume 2 (AA2) at 456. The district court dismissed a dozen claims and allowed a
20 hearing on four.¹ *Id.* At the hearing, petitioner abandoned three of the four surviving claims and
21 sought relief only on the claim that trial counsel rendered ineffective assistance in failing to
22 arrange and present a psycho-sexual evaluation in mitigation of sentencing. AA2 at 457. At the
23 hearing, petitioner presented evidence from a psychologist but neither trial counsel nor petitioner
24 testified even though both were available in the courtroom. *Id.* After the hearing, the district court

25 _____
26 ¹The order dismissing is not included in the appendix, but the propriety of that order is
not an issue in this appeal.

1 entered findings of fact, conclusions of law and a judgment denying the petition. AA2 at 456. This
2 appeal followed.

3 II. STATEMENT OF FACTS

4 The underlying facts are presented in the Opening Brief. Basically, Botelho pretended that
5 he wanted to hire a babysitter. He used that ruse to kidnap and sexually assault a fourteen-year-
6 old child.

7 III. STATEMENT OF ISSUES

8 The district court did not err in failing to be persuaded that the lack of evidence tended to
9 prove ineffective assistance of counsel.

10 IV. ARGUMENT

11 Appellant seems to contend that this Court should find that the evidence presented in the
12 habeas corpus hearing was of such persuasive force that the district court was required as a matter
13 of law to be persuaded that trial counsel rendered ineffective assistance of counsel in failing to
14 garner and present mitigating evidence. However, as noted above, there was no evidence
15 presented concerning the scope of counsel's investigation even though both counsel and Botelho
16 were available to testify.

17 One who would claim ineffective assistance of counsel bears the burden of overcoming the
18 presumption that counsel fully discharged his duties. *Means v. State*, 120 Nev. 1001, 103 P.3d 25
19 (2004). Here, petitioner presented no evidence tending to show that counsel did or did not
20 investigate. In the absence of any evidence, the district court is not required to find that the
21 petitioner had met that burden. Accordingly, the judgment should be affirmed.

22 Botelho also claims that the district court abused its discretion in fixing the sentence. The
23 State would point out that this is an appeal from the judgment denying post-conviction relief. This
24 is not an appeal from a judgment of conviction. Therefore, the propriety of the sentence is not
25 properly before the Court.

26 If Botelho had claimed in his post-conviction petition that the district court had abused its

1 discretion in fixing the sentence, that claim would have been subject to dismissal, via NRS 34.810,
2 because the claim was considered and rejected on direct appeal. *See Botelho v. State*, Docket No.
3 43247, Order of Affirmance (April 4, 2005), at AA1, p. 235.

4 If the argument is that the district court should have found that Botelho was prejudiced by
5 counsel's failure to present a psycho-sexual evaluation such as was presented in the habeas corpus
6 hearing, there are two reasons to reject that argument. First, the petitioner is required to prove
7 both elements of the claim: unreasonable performance by counsel and prejudice. The court may
8 consider those elements in any order and failure of proof of either one negates the claim. *Foster*
9 *v. State*, 121 Nev. 165, ___, 111 P.3d 1083, 1087 (2005). Because petitioner failed to prove that
10 counsel's performance was deficient, the claim that the additional evidence was of great mitigating
11 force is irrelevant.


12 The second reason to reject the assertion of prejudice is because the evidence presented in
13 the habeas corpus hearing was not mitigating evidence. It was damning. The district court went
14 to so far as to question counsel about why she had elected to present such damning evidence. AA2
15 at 451. Dr. Mahaffey's report was so ambiguous and so guarded as to have no value at all. AA2 at
16 457. The State would note Judge Polaha, who evaluated the question of prejudice, was also the
17 judge who imposed the original sentence. Who, one might ask, would be better qualified to make
18 that evaluation?

19 V. CONCLUSION

20 Because Botelho made no effort to prove his claim, the judgment of the district court should
21 be affirmed.

22 DATED: October 15, 2007.

23 RICHARD A. GAMMICK
24 District Attorney

25 By 
26 TERRENCE P. MCCARTHY
Appellate Deputy

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DATED this 15 day of October, 2007.

Terrence P. McCarthy
TERRENCE P. MCCARTHY
Appellate Deputy
Nevada Bar No. 2745
Washoe County District Attorney
P.O. Box 30083
Reno, Nevada 89520-3083
(775) 328-3200

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Mary Lou Wilson, Esq.
333 Marsh Avenue
Reno, NV 89509

Stacy Muel