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2 IN THE SUPREME COURT OF THE STATE OF NEVADA

3 ORIGINAL

4  
5 MICHAEL TODD BOTELHO,

6 Appellant,

Supreme Court #49586

7  
8 vs.

District Court #CR03P-2156

9 WARDEN, L.C.C. and  
10 THE STATE OF NEVADA,

Respondents.

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APPELLANT'S REPLY BRIEF

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12 APPELLANT'S REPLY BRIEF

13  
14 I. STATEMENT OF ISSUE

15 Whether the district court abused its discretion when finding trial counsel effective, despite failing to provide a  
16 psychosexual evaluation for Appellant's sentence, since it showed he was a moderate/high risk to reoffend?

17  
18 II. ARGUMENT

19 Because trial counsel failed to present an expert opinion for Appellant in the area of sexual  
20 propensity, risk to the community, and rehabilitation, he was sentenced to consecutive time,  
21 making him parole eligible at seventy years old. At the evidentiary hearing on the petition, Dr.

22 Martha Mahaffey testified that Appellant Botelho was a medium/high risk for reoffending.

23 Despite this professional opinion, the district court opined that trial counsel was effective  
24 because the psychosexual evaluation would not have made a difference in the sentencing.

25 However, the district court erred when finding that trial counsel was effective under *Strickland*  
standards because a psychosexual evaluation is the only way to show the Appellant's sexual

1 history, prurient interest, and whether there is a likelihood of future risk to the community.  
2 *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). The sentence for Appellant  
3 could have resulted in the counts running concurrently and permitting his parole eligibility when  
4 Appellant was in his sixties (60) instead of eighty-eight (88) years old, since the sexual assault  
5 carried a minimum time of twenty (20) years to the parole board and Appellant was in his forties  
6 (40). Therefore, it was incumbent upon trial counsel to ensure that Appellant's sexual history,  
7 prurient interest, and risk assessment be presented. An expert like Dr. Martha Mahaffey who  
8 routinely does psychosexual examinations is necessary for mitigation.  
9

10 Trial counsel failed to fully discharge his duties and make reasonable tactical decisions  
11 concerning what evidence to present at sentencing, since he did not present a psychosexual  
12 evaluation. The district court relied upon *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004) for  
13 the proposition that one who claims ineffective assistance of counsel bears the burden of  
14 showing, by a preponderance of the evidence, that the specific decisions of counsel fell below an  
15 objective standard of reasonableness and that but for the failings of counsel a different outcome  
16 was reasonably likely. Therefore, trial counsel is presumed to have fully discharged his duties  
17 and to have made reasonable tactical decisions. 120 Nev. at 1012, 103 P.3d at 32. Petitioner  
18 bears the burden of overcoming that presumption and must prove both elements of the claim and  
19 if either is lacking, then no relief is available. *Id.* Upon further reflection, the district court also  
20 believed that Appellant Botelho was not prejudiced by the lack of testimony provided by Dr.  
21 Martha Mahaffey. Her evaluation showing that Appellant was a moderate/high risk to reoffend  
22 and any sense of optimism about the safety of the community was so qualified and guarded, that  
23 the court could state with confidence that the result would not have changed. In particular, the  
24 district court noted the testimony that Appellant must always be prevented from having access to  
25

1 young girls. That goal could be accomplished by leaving Appellant Botelho in prison. The  
2 sentence was based on the nature of the crime and the character of Appellant and the testimony  
3 of Dr. Mahaffey did nothing to alter the court's view of either. AA V. II pp. 455-459.

4 The district court's findings that trial counsel fully discharged his duties and used reasonable  
5 tactical decisions are in error because the psychosexual evaluation allowed for an expert opinion  
6 that Appellant was at a medium/high risk to reoffend. The report provided intense analysis of  
7 sexual aberration, history, and whether Appellant would be amenable to rehabilitation. This  
8 report would be helpful for the district court to use to determine whether Appellant was parole  
9 eligible in his sixties (60) or too dangerous to be considered for parole until he was eighty-eight  
10 (88). There is no other method to calculate this risk unless it is through a psychosexual  
11 evaluation. In fact, Appellant argues that whenever there is a possibility of a lesser sentence  
12 after conviction of a sex crime, a psychosexual evaluation should be received and presented.  
13 This would be reasonable effective conduct under *Strickland* standards.

14 The State argues that Appellant failed to present evidence concerning the scope of trial  
15 counsel's investigation, since he and Appellant were present to testify.

16 As stated before, there was no psychosexual evaluation done and presented during sentencing.  
17 Therefore, it can be presumed that trial counsel did not do one. The State could have used the  
18 subpoena power of the court to call trial counsel and explain why one was not done.  
19 Appellant/Petitioner was satisfied to support the petition with the expert opinion of Dr. Martha  
20 Mahaffey and present her psychosexual evaluation. Additionally, Appellant/Petitioner is not an  
21 expert in the area of sexual rehabilitation and would only have requested that the district court  
22 find that he was amenable to parole eligibility at a younger age. As such, Appellant/Petitioner  
23 happily bore the burden when presenting Dr. Mahaffey, her report, and testimony.  
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1 The only person in the courtroom with special skills and abilities to determine the risk to the  
2 community for reoffending was Dr. Martha Mahaffey. As such, the State's argument that  
3 Appellant/Petitioner failed to fulfill their burden of proof makes no sense.

4 The State bears the burden of refuting evidence. Appellant/Petitioner presented mitigating  
5 evidence, which was not refuted.

6 The State argues that the district court's sentence is not proper for post conviction  
7 consideration. However, Appellant argued that the district court abused its discretion when  
8 finding that Dr. Mahaffey's opinion was inconsequential. As stated, Appellant understands that  
9 the district court is given discretion at sentencing. However, Dr. Mahaffey's psychosexual  
10 evaluation shows that Appellant was a moderate/high risk to reoffend; not a high risk to reoffend.  
11 Appellant cannot argue that the sentence was outside of the statutory scheme. However,  
12 disregarding an expert witness opinion and focusing upon the crime itself appears to be an abuse  
13 of discretion. Dr. Mahaffey did not opine that Appellant was a high risk to reoffend or must  
14 always be prevented from having access to young girls, which would be accomplished by  
15 leaving Appellant Botelho in prison.

16 Rather, Dr. Mahaffey noted that Appellant fell within the moderate/high degree after testing.  
17 Evidentiary Hearing, hereinafter called EH p. 6. Although Appellant would not have been  
18 eligible for probation because of the crimes, he could have received a lesser sentence from  
19 eighty-eight years old for parole eligibility. Id. p. 7. Dr. Mahaffey opined that she would have  
20 been able to testify for Appellant in the same way during the original sentencing hearing. Id. p.  
21 9. In fact, Appellant explored receiving sex offender treatment while being incarcerated.  
22 Furthermore, Dr. Mahaffey believed that Appellant could potentially be amendable to treatment,  
23 since he acknowledged the sex offense, expressed remorse about the violent sex behavior he  
24  
25

1 engaged in, showed an interest in treatment, and presented potentially motivated, despite being  
2 extremely guarded. Id. p. 10. Additionally, Dr. Mahaffey noted that Appellant did not possess a  
3 sex offense that was sadistic-like in nature, there were no weapons or threats of death or more  
4 physical harm, and no prior sex offenses noted. Also, Appellant did not have a history of raping  
5 children and adults, looking at pornography, and engaging in exhibitionist acts. Id. p. 16.  
6 Appellant did not meet the category for antisocial personality disorder or psychopathy, or have a  
7 history of an unstable, antisocial, life-style. Regarding future plans, Appellant showed somewhat  
8 realistic plans if he were to be released into the community. Appellant presented as amenable to  
9 treatment because he was cooperative, despite being guarded. Furthermore, he showed  
10 employment and residential stability, with living with a partner for at least two years. Id. pp. 16-  
11 17. Dr. Mahaffey noted that Appellant was not a true pedophile in nature because they cannot  
12 form normal relationships with women. Id. p. 18. Finally, Dr. Mahaffey opined that before  
13 Appellant be released from prison, he complete two years of sex offender treatment, establish a  
14 plan for return into the community, have a life-time supervision with the Department of Parole  
15 and Probation, have no unsupervised contact with children or grandchildren, no alcohol, ensure a  
16 stable residence, employment, and continue ongoing sex offender treatment for life. Id. pp. 19-  
17 20.

18  
19 The State argues that this Court has already ruled that the district court abuse of discretion in  
20 sentencing was considered and rejected on direct appeal. *Botelho v. State*, Docket No. 43247,  
21 Order of Affirmance (April 4, 2005). Appellant acknowledges the theory of law of the case.  
22 However, this Court was not given the opportunity to decide whether the district court abused its  
23 discretion after hearing testimony from an expert witness after testing, interview, and analysis  
24 using a psychosexual evaluation. Given that additional and new information, this Court should  
25



1 not be restricted from the prior opinion, which was absent a psychosexual evaluation and  
2 accompanying testimony showing Appellant as amenable to community supervision. In essence,  
3 the district court abused its discretion because it relied upon Appellant's crime itself instead of  
4 sound mental health analysis.

5 The State argues that under *Foster v. State*, 121 Nev. 165, \_\_\_, 111 P.3d 1083, 1087 (2005),  
6 this Court should reject this appeal because Appellant should have proven unreasonable  
7 performance by counsel and prejudice. However, Appellant proved that trial counsel's failure to  
8 procure and present a psychosexual evaluation was deficient because Appellant could have  
9 received a lesser concurrent sentence, making him parole eligible in his sixties (60) instead of  
10 eighty-eight (88) years old. Trial counsel failed to present the one piece of evidence that would  
11 allow the district court the ability to evaluate Appellant's sexual history, aberration, and risk to  
12 the community through a psychosexual evaluation. This additional evidence in the form of the  
13 psychosexual evaluation, which encompassed detailed history, testing, interviews, and analysis  
14 are vital when deciding whether the sex offender could reasonably be released sometime in the  
15 future or need to be forever put away.

17 Appellant also showed that trial counsel's failure to procure a psychosexual evaluation for  
18 sentencing created prejudice because the sentence amounted to a life without the possibility of  
19 parole because Appellant would be eighty-eight (88) years old when he would be parole eligible.

21 The State's opinion that Dr. Mahaffey's report was damning was unfounded given the  
22 testimony that Appellant was amenable to treatment, remorseful, and not a pedophile, in addition  
23 to the numerous other mitigating aspects of the report and testimony already presented. As  
24 stated, it appeared that the district court decided Appellant's sentence based upon the crime itself  
25 instead of the scientific evidence presented by an expert witness who believed Appellant was

1 salvageable, despite the crime. Dr. Mahaffey's report contained mitigating evidence crucial for  
2 sentencing consideration. Therefore, trial counsel was ineffective in failing to produce such a  
3 report and the district court erred in considering it after the evidentiary hearing, only focusing  
4 upon the crime itself and not the risk to the community.

5 CONCLUSION

6 Because of the foregoing, Appellant's petition should have been granted.

7 DATED this 5<sup>th</sup> day of November, 2007.

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1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that I have read this appellate brief, and to the best of my  
3 knowledge, information, and belief, it is not frivolous or interposed for any  
4 improper purpose. I further certify that this brief complies with all applicable  
5 Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires  
6 every assertion in the brief regarding matters in the record to be supported by  
7 appropriate references to the record on appeal. I understand that I may be subject  
8 to sanctions in the event that the accompanying brief is not in conformity with the  
9 requirements of the Nevada Rules of Appellate Procedure.  
10

11 DATED this 5<sup>th</sup> day of November, 2007.

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1 **CERTIFICATE OF MAILING**

2 I Mary Lu Wilson, do hereby certify that on the 5th day of  
3 November, 2007, pursuant to NRAP Rule 25, I deposited for mailing a copy of the  
4 foregoing to:

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