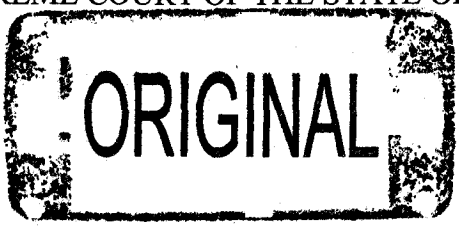
IN THE SUPREME COURT OF THE STATE OF NEVADA



MICHAEL TODD BOTELHO,

Appellant,

vs.

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

Respondents.

_____/

Supreme Court #49586

District Court #CR03P-2156

APPELLANT'S OPENING BRIEF

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07-20477

TABLE OF AUTHORITIES

STATUTE

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APPELLANT'S OPENING BRIEF

I. STATEMENT OF ISSUE

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

II. STATEMENT OF THE CASE

Michael Todd Botelho, hereinafter called Appellant, was Indicted on charges of Kidnapping in the First Degree, Battery with Intent to Commit Sexual Assault on a Child, and three counts of Sexual Assault on a Child. Appellant's Appendix, hereinafter called AA pp. 1-5. Appellant entered a guilty plea to all counts except the Battery charge. Id. pp. 6-26. The parties signed a Guilty Plea Memorandum. Id. pp. 27-34. The State filed a Notice of Intent to Introduce Prior Bad Act Evidence. Id. pp. 35-43. Appellant filed an Opposition to the State's Introduction. Id. pp. 44-51. The State filed a Reply to the Appellant's Opposition. Id. pp. 103-111. The district court had a hearing on the motion. Id. pp. 52-102. The district court granted the Appellant's

request not to hear the live testimony of appellant's ex-wife but permitted the hearsay testimony of Officer Herrera who audiotaped the conversation with Appellant's ex-wife, finding that hearsay was admissible during sentencing. Appellant's sentencing counsel had a copy of the transcript of the audiotaped conversation, Officer Herrera testified about a conversation, which was not taped. A presentence investigation report was completed and recommended the maximum sentencing, to wit, life after fifteen years, and three life terms after twenty years, to run consecutively. Id. pp. 112-133, specifically, p. 116. During the sentencing hearing, along with witnesses, Appellant admitted sealed letters from family members. Id. pp. 134-139. Appellant also presented a psychological/substance abuse evaluation. Id. pp. 140-144. However, no psychosexual evaluation was presented. A Sentencing Hearing took place with witnesses presented on both sides. Id. pp. 145-230. Judgment entered giving Appellant a sentence of forty-five years before parole eligibility, making him eighty-eight years old. Id. pp. 231-232. Notice of Appeal was timely filed attacking the three sexual assaults as really one crime and this Court filed an Order of Affirmance. Id. pp. 233-234 and 235-237. Remittitur entered. Id. p. 238. An original petition for writ of habeas corpus (post conviction) was timely filed. Id. pp. 239-247. Appellant also filed a memorandum in support of his petition Id. pp. 248-250 and AA V. II, pp. 251-328. Appellant was appointed counsel and a Supplemental Petition was filed. AA V. II, pp. 329-342. The State filed a Motion for Partial Dismissal of the Petition and Supplemental Petition for Writ of Habeas Corpus (Post Conviction). Id. pp. 343-356. An Opposition to Motion for Partial Dismissal was filed. Id. pp. 357-365. Notice of Investigation and Amended Supplemental Petition for Writ of Habeas Corpus (Post Conviction) was filed. Id. pp. 366-394. Notice of Dr. Martha Mahaffey's Psychosexual Report in Support of the Supplemental Petition for Writ of Habeas Corpus (Post Conviction) was filed. Id. pp. 395-

416. The district court permitted an evidentiary hearing on May 11, 2007, where Dr. Martha Mahaffey testified. Id. pp. 417-454. Notice of Entry of Order and accompanying Findings of Fact, Conclusions of Law, and Judgment was filed. Id. pp. 455-459. Notice of Appeal was filed after the denial of the petition and supplemental petition. Id. pp. 460-462. This appeal follows.

III. STATEMENT OF THE FACTS

Within the police documents and Dr. Martha Mahaffey's psychosexual report, it showed that on August 7, 2003, a fourteen year old female presented at Carson-Tahoe Hospital with her mother pursuant to a sexual assault committed by Appellant. AA V. II, pp. 396-397. According to the victim, one month earlier, she and her mother placed an ad in the local Carson City "Buck" paper, advertising her services as a babysitter. One week later, she received a call from a male subject who identified himself as "Kevin" and claimed to live in Gardnerville. She stated that he inquired about her babysitting for him in a couple of weeks, stating that his children would be visiting during that period. Two weeks later, he called her and told her he would probably need her services on Thursday, would call her by noon to confirm if he needed her on Thursday, and would definitely need her to babysit on Friday. Early Thursday morning, he called and told her that he did need her to babysit for him and would pick her up by noon and for her to wait for him at the end of her driveway. He later called, said he was at Olsen Tire getting something fixed on his car, and asked her to walk down toward Olsen Tire and he would come pick her up because he didn't know the exact address. A male drove up to her in a dark red colored utility type vehicle and the two confirmed their identities. She got into the back seat, which had towels covering the seat. The victim described that the male drove towards Carson City, then headed northbound, then drove eastbound toward Washoe Lake, and then drove on dirt roads to a remote location past a farm. He stopped the car and got out to supposedly check a flat tire. He came

around to her side of the car, opened the back car door where she was seated, reached into the car, and leaned across her to reach in the back of the vehicle claiming he was looking for gloves. He then suddenly sat down on her lap, proceeded to put duct tape over her eyes, and then he started to suck on her breasts at which point she started to scream. He punched her in her lower stomach area and told her to shut up as he started to put duct tape over her mouth. She complained that she couldn't breathe, so he took the tape off her mouth. He tried to put duct tape around her wrists and tape them together but she fought back. He then made her kiss him and touched her breasts. He told her he was going to put something in her mouth and told her to suck it. She asked him why, but he told her to shut up and just put it in her mouth. He put his penis into her mouth. He then told her to remove her pants, which she did. He then removed her shirt and bra. She took her pants off and he removed her underpants. He then did "the thing," which she later described as he putting his penis inside her vagina. She was crying and told him that it hurt. He told her it always hurts the first time. She believed that the male ejaculated inside her. When the male assailant was finished sexually assaulting her, he told her to get dressed. He then told her he wasn't sure if he should take her home or keep her with him at his home for the night. She begged him to take her home, telling him that he should trust her because she has lied in her life or never broke a promise and she had a sick cat at home. The male agreed to drive her home, but threatened that if she told anyone what happened, he would find her and do a lot worse to her after he got out of jail. He told her that nobody would believe her. He also told her that if she told anybody, he would take a day off from work and sit in front of her house and see where she goes. He told her that he didn't have any children and that the car they were in was not his. The male drove her to the corner of Carmine and Dori and dropped her off. She went home, called her mother, and disclosed the sexual assault to her mother. SART examination at Carson Tahoe

Hospital noted that the victim had redness around her eyes consistent with having duct tape placed over them; pain on her shoulders, upper abdomen area, and lower abdomen area; and red marks on her wrists consistent with tape. Initial exam noted abrasions at five and six o'clock on the child's vaginal area, blood around the cervix, and non-motile sperm deposits. A second exam noted two lacerations and redness to the posterior forchette of the child's external genitalia, redness on the inner aspect of the child's labia minora bilaterally from four o'clock to seven o'clock, blood on the right side of the vaginal vault, and bruising to the vaginal orifice tissue. Sperm DNA analysis suggested that Michael Botelho was the assailant. On September 10, 2003, Michael Botelho, who lived in Yerington and Dayton, and not Gardnerville, was located and identified as the assailant in that he had used his wife's cell phone. On September 16, 2003, Mr. Botelho was located in Susanville. He was with his wife and children and had changed his appearance. During the interview Mr. Botelho described that he had left the area after being initially contacted by authorities, to think and because he had been advised by two attorneys to leave the area and work so that he could earn enough money to hire an attorney. He alleged to have spoken with somebody from the Carson Plains Market about a babysitter and that he had talked to a babysitter about babysitting for them because he needed a babysitter to take his wife out to dinner that evening. He claimed that he did not know where he was going to take the girl to go babysit because he could not remember. He stated, "I feel like something happened by I don't know, I don't feel good about any of it." He stated that he did not remember where he had driven the babysitter, could not remember if he had sexual intercourse with the babysitter, and did not remember using duct tape on the babysitter. Id. pp. 396-397. Appellant pled guilty to Count I, Kidnapping in the First Degree; Count III Sexual Assault on a Child; Count IV Sexual Assault on a Child; and Count V Sexual Assault on a Child before the district court. He received

a sentence of some consecutive time or forty-five years to the Parole Board. Appellant would be eligible for parole at eighty-eight years old, since he was forty-three years old at the time of the presentence investigation report. AA V. I, p. 112. Trial counsel failed to provide a psychosexual examination for sentencing in order to mitigate his time, since concurrent time was an option. Id. pp. 145-230. An evidentiary hearing was held, where Dr. Martha Mahaffey testified that Appellant Botelho was a medium/high risk for reoffending. Despite this professional opinion, the district court opined that trial counsel was effective because the psychosexual evaluation would not have made a difference in the sentencing.

IV. ARGUMENT

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

The district court noted that there was no evidence demonstrating that trial counsel did or did not arrange for a psychosexual evaluation. It was further determined that the district court was left with the presumption that trial counsel fully discharged his duties and made reasonable tactical decisions concerning what evidence to present at sentencing. For that reason alone, the trial court believed that the petition must be denied. The district court relied upon *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004) for the proposition that one who claims ineffective assistance of counsel bears the burden of showing, by a preponderance of the evidence, that the specific decisions of counsel fell below an objective standard of reasonableness and that but for the failings of counsel a different outcome was reasonably likely. Therefore, trial counsel was presumed to have fully discharged his duties and to have made reasonable tactical decisions. 120 Nev. at 1012, 103 P.3d at 32. Petitioner bears the burden of overcoming that presumption and must prove both elements of the claim and if either is lacking, then no relief is available. *Id.* However, in review of the sentencing transcript, it is clear that trial counsel failed to receive and

present a psychosexual evaluation, relying upon a psychological/substance abuse evaluation and supporting personal letters. Id. p. 148, 134-139, and 140-144. Arguably, this presentation was not sufficient, since it failed to present whether Appellant was a danger to the community if he received concurrent time and would be eligible for parole in his sixties; instead of eight-eight years old or a life sentence.

Upon further reflection, the district court also believed that Appellant Botelho was not prejudiced by the lack of testimony provided by Dr. Martha Mahaffey. Her evaluation showing that Appellant was a moderate/high risk to reoffend and any sense of optimism about the safety of the community was so qualified and guarded, that the court could state with confidence that the result would not have changed. In particular, the district court noted the testimony that Appellant must always be prevented from having access to young girls. That goal could be accomplished by leaving Appellant Botelho in prison. The sentence was based on the nature of the crime and the character of Appellant and the testimony of Dr. Mahaffey did nothing to alter the court's view of either. AA V. II, pp. 455-459.

It can be presumed that a psychosexual evaluation was not prepared in mitigation for Appellant because no qualified psychologist testified during sentencing. AA V. I, pp. 145-230. However, during the evidentiary hearing, Dr. Martha Mahaffey presented her psychosexual and risk assessment, which had been reduced to writing. AA V. II, pp. 395-416. Dr. Mahaffey's testimony was provided in an evidentiary hearing on May 11, 2007. Id. pp. 417-454. In preparation for the hearing, Dr. Mahaffey reviewed material presented by post conviction counsel, the District Attorney file, and interviewing Appellant, which included tests. Id. pp. 420-421. Dr. Mahaffey formulated an opinion regarding Appellant's level of risk to the community when reviewing the Static 99 and Sexual Violence Risk 20 testing scales and determined that

Appellant had a moderate/high risk of sexually reoffending. Id. p. 421. Specifically, Dr. Mahaffey determined that the Static 99 test looked upon unchangeable fixed factors related to the sex offense and the factors about Appellant and then rendered an objective number that falls either at low, moderate, or high risk. Similarly, the Sexual Violence Risk dash 20 or SVR dash 20 test looks at both static and dynamic or changeable factors and rendered an opinion as to whether a person poses a low, moderate or high risk, or low/moderate or moderate/high risk. Appellant fell again within the moderate/high degree in that exam. Id. p. 422. Although Appellant would not have been eligible for probation because of the crimes, he could have received a lesser sentence from eighty-eight years old for parole eligibility. Id. p. 423. Dr. Mahaffey opined that she would have been able to testify for Appellant in the same way during the original sentencing hearing. Id. p. 425. In fact, Appellant explored receiving sex offender treatment while being incarcerated. Furthermore, Dr. Mahaffey believed that upon review of the Multiphasic Sex Inventory, Appellant could potentially be amendable to treatment, since he acknowledged the sex offense, expressed remorse about the violent sex behavior he engaged in, showed an interest in treatment, and presented potentially motivated, despite being extremely guarded. Id. p. 426. Dr. Mahaffey noted that denial and sex offending behavior are typical in a person who has not yet undergone treatment. Id. p. 427. When further explaining denial behavior, Dr. Mahaffey testified that the sex offender is not just embarrassed about the behavior. The offender has an ingrained faulty reasoning or cognitive distortion that facilitates their sex offending behavior. They fool themselves into thinking that the child may be interested or wanted this behavior, instead of acknowledging that they are raping the child. Id. pp. 428-429. Treatment attacks the faulty reasoning so that the sex offender takes full responsibility for their actions. Id. p. 429. Since Appellant was convicted of forcible sexual assault, Dr. Mahaffey

evaluated him with regard to the potential diagnoses of sexual sadism. Id. p. 429. Appellant fell within the category of power reassurance or gentleman rapist, in which the precipitating factors of the rape are more often low self-esteem, social deficiency, and sexual inadequacy. Id. p. 430. Dr. Mahaffey acknowledged the crime of kidnapping and sexual assault as violent behaviors. However, there were other identifying factors associated with recidivism in sex offenders. Appellant did not possess some of the more severe factors but fell at moderate/high level. Id. p. 431. For example, Appellant did not possess a sex offense that was sadistic-like in nature, there were no weapons or threats of death or more physical harm, which would have raised the risk scale. Additionally, there was no prior sex offenses noted, which would have kicked him into a higher range. Appellant did not have a history of raping children and adults, looking at pornography, engaging in exhibitionist acts, since the more different and deviant sexual behaviors, the more severe the disorder. Id. p. 432. Appellant did not meet the category for antisocial personality disorder or psychopathy, defined as a person who has a history of callously, remorselessly, repeatedly using others to meet their needs and who have a history of an unstable, antisocial, life-style at the level of psychopathy. Additionally, Appellant showed somewhat realistic plans for the future if he were to be released into the community, he would have certain parameters to maintain safety. Appellant presented as amenable to treatment because he was cooperative, despite being guarded. Appellant showed employment and residential stability, with living with a partner for at least two years, despite having three marriages and four children. Id. pp. 432-433. Dr. Mahaffey noted that a true pedophile in nature cannot form normal relationships with women. Id. p. 434. In conclusion, Dr. Mahaffey opined that before Appellant be released from prison, he complete two years of sex offender treatment, establish a plan for return into the community, have a life-time supervision with the Department

of Parole and Probation, have no unsupervised contact with children or grandchildren, no alcohol, ensure a stable residence, employment, and continue ongoing sex offender treatment for life. Id. pp. 435-436. Upon cross-examination, Dr. Mahaffey advised that the reason an expert witness completes a risk assessment is to determine if the sex offender falls within a level where he can be safely managed in the community. Id. p. 444.

Trial counsel's ineffective assistance of counsel in failing to present an expert opinion through a psychosexual evaluation to determine the risk to the community, since concurrent time was available to sex offender, despite not eligible for probation

Trial counsel should have prepared and presented a psychosexual evaluation in mitigation of sentencing because Appellant fell into the medium/high risk to the community, showing he was amenable to treatment and supervision, was not a psychopath, and deserved a lesser sentence than being eighty-eight years old when he met his first parole board. Within the hard copy document prepared by Dr. Mahaffey, it showed that six separate evaluation instruments were used to determine an expert opinion for the safety of the community. AA V. II, p. 396. Since Appellant had a chance for concurrent sentences, trial counsel was ineffective in failing to provide a psychosexual evaluation for Appellant and presenting it in mitigation, since he met the moderate/high level to reoffend. Id. p. 414 and 421-422. As such, at the time of the sentencing hearing, when the district court is more likely to be receptive to mitigation evidence, trial counsel failed to put forward a psychosexual evaluation to assist the court in determining whether Appellant is safe in the community or must spend the rest of his life in prison. Although the aspects of the crime itself are disturbing, Dr. Martha Mahaffey was able to test whether Appellant would be a risk to the community if provided a lesser sentence. Additionally, this expert witness determined Appellant acknowledged the crime and was remorseful. Id. p. 426.

The district court abused its discretion when sentencing Appellant to forty-five years to the parole board making him eighty-eight years old instead of a concurrent sentence, since the expert witness testified that he could be managed in the community

The district court has great latitude when reviewing matters for sentencing. *Denson v. State*, 112 Nev. 489, 915 P.2d 284 (1996). Furthermore, the district court should have possession of the fullest information possible concerning a defendant's life and characteristics essential to the sentencing judge's task of determining the type and extent of punishment. *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079 (1949). In fact, "few limitations are imposed on a judge's right to consider evidence in imposing a sentence, and courts are generally free to consider information extraneous to the presentence report." However, Appellant's sentence cannot be based upon highly suspect or impalpable evidence. *Sessions v. State*, 106 Nev. 186, 789 P.2d 1242 (1990). A sentencing proceeding is not a second trial, and the court is privileged to consider facts and circumstances that would not be admissible at trial. *Silks v. State*, 92 Nev. 91, 545 P.2d 1159 (1976). In addition, remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence, including psychiatric reports, before rendering a decision. "So long as a judge remains open-minded enough to refrain from finally deciding a case until all of the evidence has been presented, remarks made by the judge during the course of the proceedings will not be considered as indicative of disqualifying bias or prejudice." *Cameron v. State*, 114 Nev. 1281, 968 P.2d 1169 (1998). The sentence must be within the parameters provided by the relevant statutes. *Allred v. State*, 120 Nev. 410, 92 P.3d 1246 (2004). However, the sentence should not be so severe that it shocks the conscience. *Lloyd v. State*, 94 Nev. 167, 576 P.2d 740 (1978); *Lee v. State*, 115 Nev. 207, 985 P.2d 164 (1999). In

its most recent case, this Court has held, "We have consistently afforded the district court wide discretion in its sentencing decisions and have refrained from interfering with the sentence imposed when 'the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.'" Furthermore, NRS 175.552(3) permits "evidence...concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible." However, under the statute, admission of such evidence is bound by constitutional constraints. *Herman v. State*, 128 P.3d 469, 122 Nev. Adv. Op. #17 (2006).

In this regard, the sentence imposed upon Appellant was basically a life sentence because he will be eighty-eight years old when he is eligible for parole. However, Appellant could have received concurrent time and been eligible for parole in his sixties. Trial counsel failed to put forward any mitigating information during sentencing, which would have informed the district court that Appellant could be supervised in the community safely. Despite not being eligible for probation, Appellant was a reasonable candidate for concurrent time, since he did not have any prior sexual misconduct or serious criminal history. AA V. I, p. 113. The presentence investigation shows a 1992 conviction for false insurance claim for benefit and misdemeanor domestic battery. Additionally, the psychosexual report of an expert is the only way that the district court can have a focus upon the sex offender's sexual aberration and whether they are amenable to treatment. AA V. II, pp. 395-416. In this case, trial counsel failed to have a psychosexual evaluation or present it as mitigation for Appellant's sentencing. Trial counsel's neglect amounted to ineffective assistance of counsel, since concurrent time was an option. Within the psychosexual report, Dr. Mahaffey spent time reviewing court documents, testing and

interviewing Appellant, and formulating an opinion, which allowed for community supervision. The district court erred in opining that the psychosexual report did not matter for sentencing because Dr. Mahaffey's opinion for early release was so guarded. However, it appears logical that had the district court received this report for the sentencing hearing, the sentence could have been more favorable for Appellant. Quoting from the district court's prior Order Granting Petition in CR01P-0550 and Denying Petition in CR01P-0183, in *Beznosenko v. State*, where it was held that psychiatric testimony was important for mitigation:

> The defense attorney should recognize that the sentencing stage is the time at which for many defendants the most important service of the entire proceeding can be performed." Sentencing Alternatives and Procedures, Duties of Defense Counsel, Standard 18-6.3.
>
> This is especially true since most cases are disposed of by plea agreements and the only real "representation" aside from bargaining is presenting the defendant in a favorable light at the sentencing.
>
> Rarely does the judge know the defendant and the only information he will receive is that which is presented by the Probation Department in the PSI and the oral presentations by the attorneys in court.
>
> Additionally, the Commentaries to the Sentencing Alternatives and Procedures in discussing the role of the defense attorney state that the first step toward assuring proper protection for the rights to which defendants are entitled at sentencing is recognition by defense counsel that this may well be the most important part of the entire proceeding. *United States. v. Pinkney*, 179 U.S. App. D.C. 282, 551 F.2d 1241, 1249 (1976).
>
> The concept of effective assistance of counsel to have meaning for the majority of defendants, sentencing must stand on a par with the trial stage...No single phrase or example can adequately describe the diversity of the needs for which the defendant must rely on counsel.
>
> It is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by the statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254 (1967); *Specht v. Patterson*, 386 U.S. 605, 357 F.2d 325 (1966).

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The defendant has a legitimate interest in the character of the procedure that leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. *Witherspoon v. Illinois*, 391 U.S. 510, 521-523, 88 S.Ct. 1770 (1968).

The fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights. "Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands...Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593 (1972); *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197 (1977).

If only the prosecutor argues case specific facts and the defense attorney provides nothing more than platitudes, how can it be successfully argued that the system is functioning as it was intended for all concerned? Justice requires that society, the victim and the criminal be fully and effectively spoken for. Beznosenko v. State, district court Order, filed May 15, 2003, pp. 4-7. Affirmed by this Court on different grounds (unnecessary to have a separate sentencing hearing after granting a petition for writ of habeas corpus (post conviction), where sentencing is the issue and the district court hears the sentencing information during the evidentiary hearing on the petition). State v. Beznosenko, Docket No. 41495, October 13, 2003.

As such, trial counsel was ineffective under *Strickland* standards for not receiving the psychosexual report, since Dr. Mahaffey's expert opinion showed Appellant fell into the medium/high risk to the community, showing he was amenable to treatment and supervision, and was not a psychopath. The district court abused its discretion in opining that it did not matter because Dr. Mahaffey was guarded in her opinion because denial and sex offending behavior are typical in a person who has not yet undergone treatment. Therefore, trial counsel was unreasonable in failing to seek and present a psychosexual evaluation and the district court abused its discretion in giving Appellant forty-five years to the Parole Board, making it a life sentence. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

V. CONCLUSION Because of the foregoing, the district court's ruling that trial counsel's tactical reasons for not providing a psychosexual evaluation in mitigation of sentencing should be reversed, since it was unreasonable in light of the fact that Appellant was eligible for

concurrent time. Additionally, the district court abused its discretion in opining that trial counsel used a reasonable tactical decision in not presenting the psychosexual evaluation in mitigation because Dr. Mahaffey's opinion was so guarded, since she testified that Appellant could be supervised in the community. Furthermore, Appellant's criminal history is void of any sexual misconduct, had stable employment, and showed remorse for his behavior. The sentence imposed shocks the conscious because it amounts to Appellant spending the rest of his life in prison when he could have been released in his sixties had he received concurrent time. As such, it is requested that this Court reverse the district court findings and Appellant be given the opportunity for a new sentencing hearing before a different judge.

RESPECTFULLY SUBMITTED this 14 day of September, 2007.

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CERTIFICATE OF COMPLIANCE

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

DATED this 14 day of September, 2007.

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CERTIFICATE OF MAILING

I, Mary Lou Wilson, do hereby certify that on the 14 day of September, 2007, pursuant to NRAP Rule 25, I deposited for mailing a copy of the foregoing to:

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