

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

Electronically Filed
Dec 16 2015 01:54 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

MICHAEL TODD BOTELHO
Petitioner,

vs.

Sup. Ct. Case No. 69046
Case No. CR03-2156
Dept. 3

JAMES BENEDETTI, WARDEN,
STATE OF NEVADA,
Respondents.

_____ /

RECORD ON APPEAL

VOLUME 5 OF 9

POST DOCUMENTS

APPELLANT

Michael T Botelho #80837
NNCC
P O Box 7000
Carson City, Nevada 89702

RESPONDENT

Washoe County District Attorney's
Office
Terrance McCarthy, Esq.
P O Box 11130
Reno, Nevada 89502-3083

APPEAL INDEX

Case No. CR03-2156
BOTELHO vs STATE
December 16, 2015

PLEADING	DATE	VOL.	PAGE NO.
ADDENDUM TO SHOW CAUSE MOTION	08/27/15	4	488-490
AFFIDAVIT	08/11/15	3	437-438
AFFIDAVIT IN SUPPORT OF MICHAEL TODD BOTELHO	09/22/15	4	561
AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	07/13/05	3	379-380
AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS	01/27/10	7	662-666
AFFIDAVIT OF MICHAEL T BOTEHLO #80837	07/13/05	3	381-385
AFFIDAVIT OF PETITIONER IN SUPPORT OF MOTION FOR RECUSAL	02/18/10	8	803-807
AFFIDAVIT OF PETITIONER, MICHAEL TODD BOTEHO IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	03/06/06	5	2-4
AMENDED ORDER FOR RESPONSE AND APPOINTMENT OF COUNSEL	06/30/06	5	112-114
ANSWER TO PETITION AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	10/09/06	6	481-483
APPLICATION FOR ORDER TO PRODUCE PRISONER	04/12/07	7	562-564
APPLICATION FOR SETTING	10/15/03	2	14
APPLICATION FOR SETTING	12/08/03	2	138
APPLICATION FOR SETTING	02/17/04	2	196
APPLICATION FOR SETTING	01/09/07	7	559-561
BENCH WARRANT	10/08/03	2	6-8
BENCH WARRANT	10/14/03	2	11-13
CASE APPEAL STATEMENT	04/30/04	3	355-358
CASE APPEAL STATEMENT	10/22/15	4	633-634
CASE APPEAL STATEMENT	06/01/07	7	595-599
CERTIFICATE OF CLERK	05/03/04	3	359
CERTIFICATE OF CLERK	06/05/07	7	604
CERTIFICATE OF CLERK AND TRANSMITTAL – NOTICE OF APPEAL	10/22/15	4	635

APPEAL INDEX

Case No. CR03-2156
BOTELHO vs STATE
December 16, 2015

PLEADING	DATE	VOL.	PAGE NO.
CERTIFICATE OF TRANSMITTAL	05/03/04	3	360
CERTIFICATE OF TRANSMITTAL	06/05/07	7	605
CONFIDENTIAL LETTERS FROM FAMILY TO BE FILED UNDER SEAL	02/17/04	9	28-33
CONFIDENTIAL PSYCHOLOGICAL/SUBSTANCE ABUSE EVALUATION TO BE FILED UNDER SEAL	01/26/04	9	1-5
CRIMINAL PROGRESS SHEET	11/03/03	2	130-131
EXPARTE MOTION FOR APPOINTMENT OF COUNSEL	03/06/06	5	95-100
EXPARTE MOTION FOR APPROVAL OF FEES IN THE APPELLANT'S OPENING BRIEF AND APPELLANT'S APPENDIX IN THE DENIAL OF THE PETITION AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	09/17/07	9	76-83
EXPARTE MOTION FOR APPROVAL OF FEES IN THE CONTINUED SUPPORT OF THE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	04/08/07	9	44-51
EXPARTE MOTION FOR APPROVAL OF FEES IN THE PREPARATION AND COMPLETION OF THE EVIDENTIARY HEARING IN THE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	05/22/07	9	61-67
EXPARTE MOTION FOR APPROVAL OF FEES IN THE PREPARATION AND COMPLETION OF THE EVIDENTIARY HEARING IN THE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	05/31/07	9	68-74
EXPARTE MOTION FOR APPROVAL OF FEES IN THE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	08/08/06	9	34-38
EXPARTE MOTION FOR FEES IN THE PREPARATION AND COMPLETION OF THE REPLY BRIEF IN THE DENIAL OF THE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	11/05/07	9	92-95
EXPARTE MOTION REQUESTING APPOINTMENT OF DR MAHAFFEY FOR PSYCHOSEXUAL EVALUATION IN SUPPORT OF SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AND NOTICE OF INVESTIGATION OF MELISSA BOTELHO	08/14/06	6	473-478

APPEAL INDEX

Case No. CR03-2156
 BOTELHO vs STATE
 December 16, 2015

EXPARTE ORDER FOR APPROVAL OF FEES IN THE APPELLANT'S OPENING BRIEF AND APPELLANT'S APPENDIX IN THE DENIAL OF THE PETITION AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	09/20/07	9	84-91
EXPARTE ORDER FOR APPROVAL OF FEES IN THE CONTINUED SUPPORT OF THE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	01/09/07	9	52-54
EXPARTE ORDER FOR APPROVAL OF FEES IN THE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	08/23/06	9	39-43
EXPARTE ORDER FOR DOCUMENTS TO BE COPIED BY THE WASHOE COUNTY CLERK'S OFFICE IN SUPPORT OF THE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	07/28/06	5	128-130
EXPARTE ORDER FOR FEES IN THE PREPARATION AND COMPLETION OF THE REPLY BRIEF IN THE DENIAL OF THE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	12/17/07	9	96-99
EXPARTE REQUEST FOR DOCUMENTS TO BE COPIED BY THE WASHOE COUNTY CLERK'S OFFICE IN SUPPORT OF THE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	07/26/06	5	119-123
EXTRAORDINARY WRIT OF MANDAMUS FOR THE RECUSAL AND THE DISQUALIFICATION OF JUDGE POLAHA, DEPT NO 3	08/19/15	4	456-476
FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT	05/31/07	7	591-594
GUILTY PLEA MEMORANDUM	12/11/03	2	140-147
INDICTMENT	10/08/03	2	1-5
INMATE REQUEST	10/30/03	2	129
JUDGMENT	04/07/04	3	262-263
JUDICIAL NOTICE	10/02/15	4	570-573
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	03/06/06	5	14-94
MINUTES – ARRAIGNMENT 10/23/03	10/23/03	2	128

APPEAL INDEX

Case No. CR03-2156
 BOTELHO vs STATE
 December 16, 2015

MINUTES – ENTRY OF JUDGMENT AND IMPOSITION OF SENTENCE	04/07/04	3	260-261
MINUTES – ENTRY OF PLEA	11/06/03	2	132
MINUTES – EVIDENTIARY HEARING	05/11/07	7	590
MINUTES – MOTION FOR CHANGE OF PLEA	12/11/03	2	139
MINUTES – MOTIONS RE: MEDIA AN SEALING, RECUSAL OF JUDGE AN MARITAL PRIVILEGE	03/11/04	2	207
MOTION FOR APPOINTMENT OF COUNSEL PURSUANT TO NRS 34.750	01/27/10	7	667
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	03/06/06	5	1
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	01/27/10	7	661
MOTION FOR PARTIAL DISMISSAL OF PETITION AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	10/09/06	6	484-497
MOTION FOR RECONSIDERATION	10/01/15	4	569
MOTION FOR RECUSAL	03/06/06	5	101-104
MOTION FOR RECUSAL	02/18/10	8	802
MOTION FOR TRANSCRIPT AT PUBLIC EXPENSE	05/17/04	3	362-364
MOTION TO DISMISS	04/22/04	3	350-351
MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS	07/24/15	3	399-401
MOTION TO SHOW CAUSE	08/31/15	4	477-481
MOTION TO STRIKE AND OPPOSITION TO RESPONDENTS MOTION TO DISMISS PETITION FOR POST CONVICTION WRIT OF HABEAS CORPUS	08/11/15	3	405-436
MOTION TO VACATE JUDGMENT OF CONVICTION AND NRCP 9(6) FRAUD	09/22/15	4	506-560
NOTICE OF APPEAL	04/30/04	3	353-354
NOTICE OF APPEAL AND DESIGNATION OF RECORD ON APPEAL	10/19/15	4	629-632
NOTICE OF APPEARANCE AND REQUEST FOR 45 DAYS TO FILE SUPPLEMENTAL PETITION TO RUN FROM JUNE 27, 2006	06/27/06	5	109-111
NOTICE OF CHANGE OF RESPONSIBLE ATTORNEY	08/13/15	3	444-446

APPEAL INDEX

Case No. CR03-2156
 BOTELHO vs STATE
 December 16, 2015

NOTICE OF DISCIPLINARY HEARING AND POSSIBLE MOTION TO CONTINUE SUBMISSION OF SUPPLEMENTAL PETITION	07/17/06	5	115-118
NOTICE OF DR MARTHA MAHAFFEY'S PSYCHOSEXUAL REPORT IN SUPPORT OF THE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	04/30/07	7	568-589
NOTICE OF ENTRY OF ORDER	06/12/07	7	645-649
NOTICE OF FILE REVIEWED AND POTENTIAL EXHIBITS USED FOR SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	07/26/06	5	124-127
NOTICE OF INTENT TO INTRODUCE PRIOR OR OTHER BAD ACT EVIDENCE AT SENTENCING HEARING	02/03/04	2	179-187
NOTICE OF INVESTIGATION AND AMENDED SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	12/14/06	7	521-549
NOTICE OF MOTION ND MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	07/13/05	3	376-378
OPPOSITION TO "MOTION TO VACATE JUDGMENT OF CONVICTION AND NRCIV P RULE 9(b) FRAUD"	09/25/15	4	563-565
OPPOSITION TO MOTION FOR PARTIAL DISMISSAL OF THE SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	10/17/06	7	507-515
OPPOSITION TO MOTION FOR RECONSIDERTION	10/06/15	4	574-576
OPPOSITION TO STATES INTRODUCTION OF PRIOR OR OTHER BAD ACT EVIDENCE AT SENTENCING HEARING; DEFENDANT'S MOTION TO HAVE THE MATTER SEALED TO RECUSE THE PRESENT SENTENCING COURT AND TO HAVE THE MATTER TRANSFERRED TO ANOTHER COURT FOR SENTENCING PURPOSES	02/13/04	2	188-195
ORDER	04/28/04	3	352
ORDER	06/01/04	3	365-366
ORDER	09/06/06	6	479-480
ORDER	09/06/07	9	55-60
ORDER	06/25/07	9	75
ORDER FOR RESPONSE AND APPOINTMENT OF COUNSEL	06/05/06	5	106-108
ORDER GRANTING IN FORMA PAUPERIS	02/17/10	8	798-800

APPEAL INDEX

Case No. CR03-2156
 BOTELHO vs STATE
 December 16, 2015

ORDER GRANTING MOTION FOR WITHDRAWAL OF COUNSEL	09/13/05	3	388-390
ORDER GRANTING MOTION TO DISMISS PETITION AND DENYING MOTION TO STRIKE	09/16/15	4	491-502
ORDER PARTIALLY DISMISSING PETITION FOR POST CONVICTION RELIEF	12/29/06	7	550-558
ORDER STAYING PROCEEDINGS	10/08/03	2	9-10
ORDER TO PROCEED IN FORMA PAUPERIS	06/05/06	5	105
ORDER TO PRODUCE PRISONER	04/12/07	7	565-567
PETITION FOR WRIT OF HABEAS CORPUS	01/27/10	8	668-797
PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	03/06/06	5	5-13
PETITIONER MOTION TO CORRECT CLERKS ERROR AND AS A MATTER OF LAW ISSUE A DIRECT VERDICT FOR PETITIONER	03/06/12	8	845-849
PETITIONERS MOTION FOR WRIT OF QUO-WARRANTO AND SUPPORTING MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION	12/28/11	8	808-844
PRESENTENCE REPORT	02/11/04	9	6-27
PROOF OF SERVICE OF ELECTRONIC FILING	06/04/12	3	393
PROOF OF SERVICE OF ELECTRONIC FILING	07/31/12	3	396
PROOF OF SERVICE OF ELECTRONIC FILING	08/22/12	3	398
PROOF OF SERVICE OF ELECTRONIC FILING	02/17/10	8	801
RECEIPT FOR GRAND JURY TRANSCRIPT	04/06/04	3	259
RECEIPT OF GRAND JURY TRANSCRIPT	10/20/03	2	127
REPLY AND OBJECTION TO OPPOSITION TO MOTION FOR RECONSIDERATION	10/15/15	4	599-623
REPLY AND OBJECTION TO OPPOSITION TO MOTION TO VACATE JUDGMENT OF CONVICTION FOR NRCIV P 9(b) FRAUD	10/09/15	4	580-593
REPLY IN OPPOSITION TO DEFENDANT'S OPPOSITION TO STATES INTRODUCTION OF OTHER ACT EVIDENCE; DEFENDANTS MOTION TO RECUSE AND TRANSFER CASE	02/20/04	2	197-205
REPLY TO OPOSITION TO MOTION TO STRIKE	08/27/15	4	482-487

APPEAL INDEX

Case No. CR03-2156
BOTELHO vs STATE
December 16, 2015

REPLY TO OPPOSITION TO MOTION FOR PARTIAL DISMISSAL OF PETITION AN SUPPLMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	10/26/06	7	516-518
REPLY TO OPPOSITION TO MOTION TO DISMISS AND OPPOSITION TO MOTION TO STRIKE	08/13/15	3	439-441
REQUEST AGREEMENT AND ORDER FOR PRETRIAL RECIPROCAL DISCOVERY DEFENDANTS REQUEST FOR DISCOVERY	01/26/04	2	175-177
REQUEST FOR SUBMISSION	08/18/05	3	386-387
REQUEST FOR SUBMISSION	08/13/15	3	442-443
REQUEST FOR SUBMISSION	09/22/15	4	562
REQUEST FOR SUBMISSION	10/14/15	4	594-595
REQUEST FOR SUBMISSION	10/19/15	4	624-625
REQUEST FOR SUBMISSION	10/26/06	7	519-520
REQUEST FOR TRANSCRIPT	06/01/07	7	600-603
RETURN	10/09/06	6	498-506
RETURN OF NEF	07/24/15	3	402-404
RETURN OF NEF	08/13/15	3	447-449
RETURN OF NEF	08/13/15	3	450-452
RETURN OF NEF	08/13/15	3	453-455
RETURN OF NEF	09/16/15	4	503-505
RETURN OF NEF	09/25/15	4	566-568
RETURN OF NEF	10/06/15	4	577-579
RETURN OF NEF	10/14/15	4	596-598
RETURN OF NEF	10/19/15	4	626-628
RETURN OF NEF	10/22/15	4	636-638
RETURN OF NEF	10/28/15	4	640-642
RETURN OF NEF	11/23/15	4	645-647
STIPULATION AND ORDER	02/24/04	2	206
STIPULATION AND ORDER FOR CONTINUANCE	01/30/04	2	178

APPEAL INDEX

Case No. CR03-2156
BOTELHO vs STATE
December 16, 2015

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)	08/08/06	5/6	131-472
SUPREME COURT – CLERK’S CERTIFICATE AND JUDGMENT	05/03/05	3	371
SUPREME COURT – CLERK’S CERTIFICATE AND JUDGMENT	06/11/08	7	655
SUPREME COURT – NOTICE IN LIEU OF REMITTITUR	08/22/12	3	397
SUPREME COURT – ORDER DENYING PETITION	06/04/12	3	391-392
SUPREME COURT – ORDER DENYING REHEARING	07/31/12	3	394-395
SUPREME COURT – ORDER DIRECTING TRANSMISSION OF RECORD	11/13/15	4	643-644
SUPREME COURT – ORDER OF AFFIRMANCE	04/06/05	3	367-369
SUPREME COURT – ORDER OF AFFIRMANCE	05/03/05	3	372-375
SUPREME COURT – ORDER OF AFFIRMANCE	05/19/08	7	650-653
SUPREME COURT – ORDER OF AFFIRMANCE	06/11/08	7	656-660
SUPREME COURT – RECEIPT FOR DOCUMENTS	05/05/04	3	361
SUPREME COURT – RECEIPT FOR DOCUMENTS	10/28/15	4	639
SUPREME COURT – RECEIPT FOR DOCUMENTS	06/11/07	7	644
SUPREME COURT – REMITTITUR	05/03/05	3	370
SUPREME COURT – REMITTITUR	06/11/08	7	654
TRANSCRIPT – ARRAIGNMENT/CONTINUED 10/23/03	11/20/03	2	133-137
TRANSCRIPT – CHANGE OF PLEA 12/11/03	12/22/03	2	148-168
TRANSCRIPT – ENTRY OF PLEA 11/06/03	01/12/04	2	169-174
TRANSCRIPT – HEARING ON MOTION 03/11/04	03/31/04	3	208-258
TRANSCRIPT – PROCEEDINGS 10/08/03	10/20/03	2	15-126
TRANSCRIPT – SENTENCING 04/07/04	04/19/04	3	264-349
TRANSCRIPT – WRIT OF HABEAS CORPUS (POST CONVICTION) 05/11/07	06/12/07	7	606-643

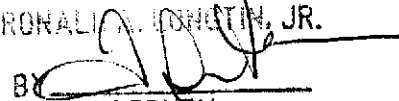
ORIGINAL

FILED

Michael Todd Botelho, #80837
 Lovelock Correctional Center
 Post Office Box 359
 Lovelock, Nevada 89419

2006 MAR -6 PM 3:40

RONALD L. JONSTON, JR.

BY 
DEPUTY

Petitioner, In Proper Person

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
 IN AND FOR THE COUNTY OF WASHOE

--ooOoo--

MICHAEL TODD BOTELHO,

Petitioner,

Case No. CR03P2156

vs.

Dept. No. 3

THE STATE OF NEVADA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW, Petitioner, Michael Todd Botelho, in his proper person, and moves this Honorable Court for an ORDER granting him leave to proceed in the above-entitled action without paying the costs and/or security of proceeding herein.

This Motion is made and based upon the provisions of NRS 12.015, the attached sworn affidavit of Petitioner, and the accompanying Certificate of Inmate Financial status.

DATED THIS 28th DAY OF FEBRUARY, 2006.

Respectfully Submitted,



Michael Todd Botelho
 Petitioner, In Proper Person

ORIGINAL

FILED

Michael Todd Botelho, #80837
 Lovelock Correctional Center
 Post Office Box 359
 Lovelock, Nevada 89419

2006 MAR -6 PM 3:40

RONALD A. LONGWELL, JR.

BY 
DEPUTY

Petitioner, In Proper Person

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

--ooOoo--

MICHAEL TODD BOTELHO,

Petitioner,

Case No. CR03P2156

vs.

Dept. No. 3

THE STATE OF NEVADA,

Respondent.

AFFIDAVIT OF PETITIONER, MICHAEL TODD BOTELHO
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF NEVADA)
 : ss.
 COUNTY OF PERSHING)

COMES NOW, Petitioner, Michael Todd Botelho, being first
 duly sworn according to law, do hereby depose and state the
 following, under the penalty(ies) of perjury in support of
 the foregoing Motion for Leave to Proceed in Forma Pauperis:

1. Because of my poverty I am unable to pay the costs
 of the proceedings in the foregoing judicial action or to
 give security thereof, I am entitled to the relief sought in
 my accompanying Petition for writ of Habeas Corpus (Post-
 Conviction);

2. I do request an attorney be appointed to assist me
 in the instant action (See accompanying Motion for Appointment
 of Counsel);

CR03P2156 DC-09900071927-005
 POST: MICHAEL TODD BOTELHO (3 Pages
 District Court 03/06/2006 11:00 AM
 Washoe County 1030

3. I am not presently employed;

4. The last date of employment was 2003 at the approximate rate of \$500.00 per week;

5. I have NOT recieved any money from any of the following sources within the past twelve (12) months: business, profession, form of self-employment, rent payments, interest or dividends, pensions, annuities, life insurance payments, gifts or inheritances;

6. I do NOT own any real estate, stocks, bonds, notes, automobiles, or other valuable property;

7. I do NOT have any monies in any savings accounts or checking accounts, other than those funds reflected on the accompanying Inmate Financial Certificate;

8. I do NOT have persons dependent on me for financial support;

9. I do NOT have person(s) owing me financial obligations or support;

Further, your Affiant sayeth naught.

Executed under penalty of perjury in accordance with the provisions of NRS 208.165.

DATED THIS 28TH DAY OF FEBRUARY, 2006.

By: Michael Todd Botelho
Michael Todd Botelho
Affiant / Petitioner
In Proper Person
I.D. #80837
Lovelock Correctional Center
Post Office Box 359
Lovelock, Nevada 89419

Case No. CR03-2156Dept. No. 3

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

MICHAEL TODD BOTELHO # 80837Petitioner

vs.

THE STATE OF NEVADARespondentCERTIFICATE OF
INMATE'S INSTITUTIONAL ACCOUNT

I, the undersigned, hereby certify that Michael T. Botelho # 80837
Petitioner above-named, has a balance of \$ 160.91 on account to
his credit in the prisoners' personal property fund for his use at Lovelock
Correctional Center, in the County of Pershing, State of Nevada, where he is
presently confined.

I further certify that said Petitioner owes departmental charges
in the amount of \$ 0 and that the solitary security to his credit is
a savings account established pursuant to NRS 209.247(5) with a balance of
\$ 137.57 which is inaccessible to him.

DATED THIS 24th day of February, 2006.

Radp
Accounting Technician
Inmate Services Division
Nevada Department of Corrections

Submitted by: Michael Todd Botelho # 80837, on 2 / 17 / 06

ORIGINAL

FILED

Case No. CR03P2156Dept. No. 3

2006 MAR -6 PM 3:41

RONALD A. LONGTIN, JR.

DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
 IN AND FOR WASHOE

-o0o-

MICHAEL TODD BOTELHO

Petitioner,

vs.

PETITION FOR WRIT
 OF HABEAS CORPUS
 (POST CONVICTION)

JACK PALMER,

Respondent.

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of prisons, name the warden or head of the institution. If you are not in a specific institution of the department but within its custody, name the director of the department of prisons.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

CR03P2156
 DC-99900071927-003
 POST: MICHAEL TODD BOTELHO (9 Pages
 District Court 03/06/2006 11:01 AM
 Washoe County 3565

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Lovelock Correctional Center, Pershing County, Nevada

2. Name and location of court which entered the judgment of conviction under attack: Second Judicial District Court, Reno, Washoe County, Nevada

3. Date of judgment of conviction: April 7, 2004

4. Case number: CR03-2156

5. (a) Length of sentence: Multiple Consecutive LIFE sentences, with parole eligibility in forty-five (45) years

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes _____ No XX

If "yes" list crime, case number and sentence being served at

this time: N/A

7. Nature of offense involved in conviction being challenged: Sexual Assault and Kidnapping (NRS' 200.366 and 200.310, 200.310(1))

8. What was your plea? (check one)

(a) Not Guilty

(b) Guilty XX on the advice of counsel

(c) Guilty but mentally ill

(d) Nolo Contendere

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: Unknown

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury (b) Judge without a jury

11. Did you testify at the trial? Yes No

12. Did you appeal from the judgment of conviction?

Yes XX No

13. If you did appeal, answer the following:

(a) Name of court: Nevada Supreme Court

(b) Case number or citation: 43247

(c) Result: Order of Affirmance

(d) Date of result: April 29, 2005

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not:

N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ☐ No ☒

16. If your answer to No. 15 was "yes", give the following information:

(a) (1) Name of court: _____

(2) Nature of proceedings: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ☐ No ☐

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(b) As to any second petition, application or motion, give the same information: This is first Petition

(1) Name of court: _____

(2) Nature of proceedings: _____

- (3) Grounds raised: _____
- (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ____ No ____
- (5) Result: _____
- (6) Date of result: _____
- (7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____
-

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

- (1) First petition, application or motion?
Yes ____ No ____
Citation or date of decision: _____
- (2) Second petition, application or motion?
Yes ____ No ____
Citation or date of decision: _____
- (3) Third or subsequent petitions, applications or motions? Yes ____ No ____
Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed

five handwritten or typewritten pages in length.) _____

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify: NO

(a) Which of the grounds is the same: _____

(b) The proceedings in which these grounds were raised: _____

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

N/A

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) Issues presented herein are
properly raised for the first time herein.

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

This Petition is timely filed.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes No XXX

If yes, state what court and the case number: _____

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

Mr. Sean Sullivan, Esq. - Trial and Sentencing

John Reese Petty, Esq - Appeal (Both appointed by this Court)

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack?

Yes No XXX

If yes, specify where and when it is to be served, if you know:

N/A

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground one: SEE ACCOMPANYING MEMORANDUM OF

POINTS AND AUTHORITIES FOR ALL CLAIMS FOR RELIEF AND FACTS

Supporting FACTS (Tell your story briefly without citing cases or law.): IN SUPPORT THEREOF.

(b) Ground two: _____

Supporting FACTS (Tell your story briefly without citing cases or law.): _____

(c) Ground three: _____

Supporting FACTS (Tell your story briefly without citing cases or law.): _____

(d) Ground four: _____

Supporting FACTS (Tell your story briefly without citing cases or law.): _____

WHEREFORE, petitioner prays that the Court grant him relief to which he may be entitled in this proceeding.

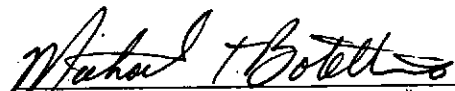
Executed at Lovelock Correctional Center on this 28th day of

February, 2006.

N/A

Signature of Attorney (if any)

Attorney & Address of Attorney



Michael T. Botelho #80837

Lovelock Correctional Center

P.O. Box 359

Lovelock, Nevada 89419

Petitioner

ORIGINAL

FILED

Michael Todd Botelho, #89837
 Lovelock Correctional Center
 Post Office Box 359
 Lovelock, Nevada 89419

2006 MAR -6 PM 3:41

RONALD A. LONGNE, JR.

BY 
DEPUTY

Petitioner, In Proper Person

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

--ooOoo--

MICHAEL TODD BOTELHO,

Petitioner,

Case No. CR03P2156

vs.

Dept. No. 3

THE STATE OF NEVADA,

Respondent.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
 PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**

COMES NOW, Petitioner, Michael Todd Botelho, in his proper person, and submits the instant MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) in the above-entitled action.

This Memorandum is made and based upon the provisions of NRS 34.260, et. seq., all applicable rules of this court, all papers and pleadings on file herein, and the following Argument and Points and Authorities.

DATED THIS 28th DAY OF FEBRUARY, 2006.

Respectfully Submitted,



Michael Todd Botelho
 Petitioner, In Proper Person

CR03P2156
 DC-09900071927-006
 POST: MICHAEL TODD BOTELHO 72 Pages
 District Court 03/06/2006 11:01 AM
 Washoe County
 1955

BRIEF CASE HISTORY AND STATEMENT OF FACTS

Michael Todd Botelho (Hereinafter "Petitioner"), was represented by Mr. Sean Sullivan, Esq. of the Washoe County Public Defender's Office throughout the instant Judicial proceedings. Counsel was appointed by this Honorable Court.

On September 12, 2003, a Criminal Complaint was filed alleging Petitioner committed the following offenses: (1) Kidnapping in the First Degree, a violation of NRS 200.310(1) and NRS 200.320, (2) Battery with Intent to Commit Sexual Assault, a violation of NRS 200.400, and (3) Three (3) counts of Sexual Assault on a Child, a violation of NRS 200.366, all of the above are felony offenses.

On September 16, 2003, Petitioner was arrested by local authorities in Susanville, California pursuant to an Arrest Warrant issued by this Honorable Court. Petitioner waived extradition and was subsequently returned to the jurisdiction of this Court.

On October 8, 2003, a Grand Jury hearing was held, wherein Petitioner and counsel were notified of such, however, Counsel failed to appear at the aforementioned hearing. Petitioner was denied participation at the hearing due to the fact that transportation officials of the Washoe County Sheriff's Office failed to transport Petitioner in a timely manner.

On October 8, 2003, the Grand Jury returned an Indictment containing charges on all counts as outlined above.

On October 9, 2003, a preliminary hearing was scheduled, However, the hearing was never held, for unknown reasons.

On November 6, 2003, Petitioner appeared before this Honorable Court and entered NOT GUILTY pleas to all of the charges, as outlined in the Indictment.

On December 10, 2003, Petitioner executed a Guilty Plea Memorandum on the advice of counsel. The Guilty Plea memorandum contained all of the original offenses, as described in the Indictment, except for Count II, Battery. Petitioner's counsel coerced Petitioner into entering into the guilty plea by advising Petitioner he, and the court, would not be subjected to a jury trial wherein the court would be subjected to adverse facts and testimony. Therefore, counsel informed Petitioner that he would receive a lesser sentence due to the suppression and/or exclusion of possible prior bad acts or evidence deemed highly prejudicial to Petitioner.

On December 11, 2003, Petitioner entered Guilty Pleas to Counts I, III, IV and V of the Indictment.

On or about February 3, 2004, the prosecution filed a NOTICE OF INTENT TO INTRODUCE PRIOR BAD ACTS, wherein the prosecution sought the court's permission to produce testimony of Melissa Botelho, Petitioner's former wife, concerning alleged statements made by Petitioner to Melissa Botelho. Counsel filed rebuttal pleadings. On March 11, 2004, this Honorable Court held a lengthy hearing on the aforementioned NOTICE. This Court subsequently held that the communication between Petitioner and Ms. Botelho was prejudicial in nature, and the marital privilege exception forbade the entry of the evidence at a future sentencing hearing.

However, the court informed the prosecution they could introduce the testimony and/or statements of Melissa Botelho through a third party, Officer Greg Herrera. This is exactly what the prosecution did, they proffered testimony of Greg Herrera, hearsay testimony, at Petitioner's sentencing hearing.

Petitioner was sentenced on April 7, 2004, where the State admitted evidence, highly prejudicial in nature, against Petitioner's objections, concerning communications between Petitioner and his ex-wife, Melissa Botelho, wherein Petitioner was not afforded the opportunity to effectively cross-examine Ms. Botelho due to her exclusion in the courtroom.

A Judgment of Conviction was entered on April 7, 2004 wherein Petitioner was sentenced as follows: a term of Life with parole eligibility after serving five (5) years for the Kidnapping offense, and a term of LIFE with parole eligibility after serving Twenty (20) years on each of the three sexual assault offenses, with one count to be served consecutive to the other count and the Kidnapping count, with the other count to be served concurrently. Effectively, Petitioner has received a minimum sentence of Forty-Five (45) years to LIFE.

Petitioner filed a timely NOTICE OF APPEAL to the Nevada Supreme Court. (Docket No. 43247). Petitioner was represented by court appointed appellate counsel, John Reese Petty of the Washoe County Public Defender's Office on Appeal. Counsel filed an OPENING BRIEF in the Nevada Supreme Court wherein counsel presented a single claim for relief.

The Nevada Supreme Court issued an ORDER OF AFFIRMANCE on April 4, 2005. Remittitur issued on April 29, 2005.

On July 15, 2005, Petitioner filed proper person pleadings in this Honorable Court requesting withdrawal of attorney of record, and seeking his case file, transcripts, etc.

On September 13, 2005, this Court granted the aforementioned request. However, as of this date, Petitioner has not received his entire case file from previous counsel(s).

Petitioner now brings forth the instant accompanying Petition for Writ of Habeas Corpus (Post-Conviction) wherein Petitioner presents numerous colorable claims for relief based upon his Constitutional violations regarding the entry of his plea, ineffective assistance of counsel, and due process errors which occurred throughout the judicial proceedings, sentencing and on appeal.

APPLICABLE LAW-STANDARD FOR EFFECTIVE ASSISTANCE OF COUNSEL

Petitioner has no choice but to raise the questions regarding the effectiveness of his counsel through the forum of a Petition for Writ of Habeas Corpus (Post-Conviction). Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994). The question of ineffective assistance of counsel should not be considered in a direct appeal from a judgment of conviction. Instead, the issues should be raised, in the first instance, in the district court in a Petition for Post-Conviction relief so that an evidentiary record regarding counsel's performance can be created. Wallach v. State, 106 Nev. 470, 796 P.2d 224 (1990).

It is possible for Petitioner to go straight to the Nevada

Supreme Court on the issue of ineffectiveness of counsel, but the fact setting must be one where the Supreme Court can determine that there was not good reason for counsel's actions that could exist. Jones v. State, 110 Nev. 730, 877 P.2d 1052 (1994).

In the case at hand, the appropriate process is for the Petitioner to raise the claims of ineffective assistance of counsel at the district court level in the procedure of a Petition for Post-Conviction relief and the district court to entertain the matter by conducting an evidentiary hearing.

In State v. Love, 109 Nev. 1136, 865 P.2d 322 (1993), the Nevada Supreme Court reviewed the issue of whether or not a defendant had received ineffective assistance of counsel at trial in violation of the Sixth Amendment. The Nevada Supreme Court held that this question is a mixed question of law in fact and is subject to independent review. The Supreme Court reiterated this holding in the ruling of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). The Nevada Supreme Court indicated the test on a claim of ineffective assistance of counsel is that of "reasonably effective assistance" as enunciated by the United States Supreme Court in Strickland, Supra. The Nevada Supreme Court revisited this issue in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984) and Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). The Supreme Court has provided a two-prong test in that the defendant must show first that counsel's performance was deficient and second that the defendant was prejudiced by this deficiency.

The Court will uphold a presumption that counsel was effective. Petitioner, must, therefore, show that his attorney's performance was unreasonable under prevailing professional norms and that he was prejudiced as a result of the deficient performance.

In Smithart v. State, 86 Nev. 925, 478 P.2d 576 (1970), the Nevada Supreme Court held that it will presume that an attorney has fully discharged their duties and that such presumption can only be overcome by strong and convincing proof to the contrary. The Court went on in Warden v. Lischko, 90 Nev. 221, 523 P.2d 6 (1974), to hold that the standard of review of counsel's performance was whether the representation of counsel was of such low caliber as to reduce the trial to a sham, a farce or a pretense.

Thus, Petitioner is properly before this Court on issues of ineffective assistance of counsel and would request this Court grant him an evidentiary hearing on the following issues.

GROUND ONE

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT PRESERVED ISSUES ON APPEAL AND TO PRESENT ISSUES IN A CONSTITUTIONAL MANNER, THEREBY PREJUDICING AND BURDENING PETITIONER AMOUNTING TO A DENIAL OF PETITIONER'S RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioner was represented by John Reese Petty of the Washoe County Public Defender's Office on direct appeal to the Nevada Supreme Court. Counsel was appointed by this Court due to Petitioner's apparent indigency.

Counsel failed to communicate or otherwise converse with Petitioner throughout the Appellate process. Petitioner attempted to contact Counsel, via written letters, on numerous occasions during the pendency of the appeal, without response from counsel. Petitioner desired to put forth his issues in the Nevada Supreme Court in a Constitutional manner, and to present issues preserved in the record, for appellate review.

In an Opening Brief filed on behalf of Petitioner in The Nevada Supreme Court (Docket 43247), counsel presented a single issue for review, i.e.:

1. THE COURT MUST REVIEW THE SENTENCE IMPOSED IN THIS CASE AND REMAND FOR A NEW SENTENCING HEARING WITH INSTRUCTIONS.

The issue, as noted above, was not presented as a Constitutional issue, thereby preventing the Nevada Supreme Court's review of the issue under Constitutional scrutiny.

As is clear, counsel never appointed to constitutional errors or federal law in the above issue in order to preserve the issue for federal review. Additionally, there are other issues Petitioner desired to present to the Nevada Supreme Court on appeal, issues preserved in the record for review on appeal. Petitioner is therefore forced to present the issue above, in a Constitutional manner, in this instant Petition. (See Ground Two below, herein.) Petitioner is also forced to bring forth issues for review, Grounds Three and Four, herein below, for this court's review, as counsel failed to present the issues in the appeal.

Petitioner has a right to effective assistance of counsel on appeal. Evitts v. Lucey, 105 S.Ct. 830 (1985), and Stewart v. Warden, 555 P.2d 218 (Nev. 1976). Petitioner made attempts to confer with appellate counsel, with no response whatsoever from counsel.

In Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2646 (1986), the United States Supreme Court held that "The appellate process affords the attorney time for reflection, research, and full consultation with his client." The record or information brought out at an evidentiary hearing will show that appellate counsel did not confer with petitioner at any time during the appeal process, and in fact, it appears that counsel failed to request the entire trial transcript for review of appellate issues.

In Stewart v. Warden, Supra, the Nevada Supreme Court held "It is uncontroverted that while the appeal was in progress appellant requested his then attorney to raise certain claims of error to the Supreme Court and the attorney neither presented those claims of error nor offered any reason or explanation for his failure to do so."

This has clearly put Petitioner at a disadvantage, as he is now forced to bring forth Claims Two, Three and Four, herein.

Additionally, counsel's failure to federalize issues for possible future review in a United States Court of Appeals and/or U.S. District Court, has prejudiced Petitioner and forced Petitioner to bring forth Ground Two, herein below.

A federal court will not grant a state prisoner's Petition for habeas relief until prisoner has exhausted his available State remedies for all claims raised. Rose v. Lundy, 455 U.S. 509 (1982). State remedies have not been exhausted unless the claim has been "fairly presented" to the State courts and the highest state court has disposed of the claim on the merits. Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979). Furthermore, the state remedies are only exhausted where Petitioner has "characterized the claims he raised in the State proceedings specifically as federal claims." See Lyons v. Crawford, 232 F.3d 666, 670 (9th Cir. 2000). The Constitutional rights to effective assistance of counsel extend to a direct appeal. Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of counsel is reviewed under the "reasonable" effective assistance test set forth in Strickland v. Washington, Supra and Kirksey v. State, Supra.

Even with the issue counsel did raise in the Opening Brief, the claim was not addressed as far as it's federal implications are concerned. It was ineffective for counsel to ignore constitutional issues, as failure to raise them on appeal may preclude further remedy in the federal court system. Generally, any unexhausted claims must be dismissed without prejudice for failure to exhaust all State created remedies. "To satisfy exhaustion requirement, Petitioner must present every claim raised in the federal Petition to each level of State courts." Doctor v. Walters, 96 F.3d 675 (3rd Cir. 1996).

Appellate counsel's failure to raise all viable claims

for relief on appeal, including constitutional issues, fell below an objective standard of reasonableness. Because counsel failed to use his expertise and legal training to present all of Petitioner's appellate issues before the court, Petitioner was prejudiced. Pursuant to the standards set forth in Strickland v. Washington, Supra, counsel denied Petitioner the right to effective assistance of counsel during appeal, a constitutional right secured by the Sixth Amendment to the United State's Constitution.

Due to counsel's egregious errors, Petitioner is now forced to bring forth Grounds Two, Three, and Four, below, for this court's review.

GROUND TWO

PETITIONER WAS DENIED DUE PROCESS, EQUAL PROTECTION AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION WHEN THE SENTENCING COURT ABUSED ITS' DISCRETION AND RELIED UPON PREJUDICIAL, FALSE, MISLEADING AND IMPALPABLE INFORMATION AT THE SENTENCING HEARING WHICH RESULTED IN THE IMPOSITION OF NUMEROUSLY IMPOSED CONSECUTIVE LIFE SENTENCES

Petitioner adopts the facts and argument set forth in Ground One, herein above, in support of the instant claim for relief. Appellate counsel failed to put forth the instant claim for relief in a Constitutional manner, thus precluding the Nevada Supreme Court to address the instant claim under Constitutional scrutiny.

Recently there has been an indication from the Nevada Supreme Court that at least some members of the Court may wish to engage in appellate review of sentences imposed to determine if the sentence(s) imposed constitutes an abuse of discretion given the facts and the nature of the defendant.

Tanksley v. State, 113 Nev. 844, 944 P.2d 240 (1997). Petitioner applauds the suggestion of Justice Rose for precisely the reasons he expressed in his dissent: (1) it is disheartening "that the part of the criminal process that has the greatest ultimate effect on the defendant -- the imposition of his or her sentence -- is the part the court declines to review." Id. at 852, quoting Sims v. State, 107 Nev. 438, 422, 814 P.2d 63 (1991). It is odd that the Court will review every discretionary act performed by a district court but refuse to scrutinize the sentence imposed in felony crimes., and (2) failure to conduct meaningful appellate review of the sentencing process is an abdication of the Court's authority to ensure that justice is achieved. Id.

The sentencing court was prejudiced when it was subjected to highly inflammatory, prejudicial, erroneous, perjured testimony of Detective Greg Herrera regarding apparent disclosures made by Petitioner to his then wife, Melissa Botelho.

Detective Herrera testified at the sentencing hearing as follows:

A. [Detective Herrera]: She stated that Michael Botelho had been having these -- had been having fantasies ever since they were married, during the early '90's.

. . .

A. She talked about fantasies -- his fantasies of kidnapping a young girl and having sex with the young girl, including disfigurement, torture and to hold the young girl for -- anything he wanted to do.

(See Transcript of Proceedings, Sentencing, Wednesday April 7th, 2004, Page 38, lines 5 - 14)

Officer Herrera later recants his testimony concerning "dismembering", as follows:

Q. [By Defense Counsel] And she never mentions dismember in the second telephonic interview?

Id. at page 51, lines 4-5

A. [Det. Herrera] That's correct.

Id. at page 51, line 6.

The Sentencing court was subjected to a plethora of inaccurate information deemed highly prejudicial to Petitioner wherein the court ultimately imposed a harsh sentence based upon the erroneous, perjured testimony.

Additionally, the Sentencing court was subjected to erroneous information contained in the State's Notice of Intent to admit the alleged prior bad act evidence, as the prosecution delineated in their Notice, as follows:

Prior to interviewing defendant, Detective Herrera had received information from defendant's ex-wife, Melissa botelho that defendant had sexual fantasies of raping and dismembering a young girl.

See NOTICE OF INTENT TO INTRODUCE PRIOR OR OTHER BAD ACT EVIDENCE AT SENTENCING HEARING, Filed February 3, 2004, page 2, lines 19 - 22.

The sentencing court was privy to information, which has been proven untrue, in that Petitioner NEVER divulged information, nor retains information, regarding "raping and dismembering a young girl."

Counsel attempted to seek a change of venue to a different unbiased court, however this court refused the request and decided to proceed with the knowledge of the prejudicial and

inflammatory, falsified allegations. Thus, the sentencing court was subjected to inflammatory information never proven as true. It appears from the record the court refused to recuse itself, and/or allow a change of venue was due to trial counsel's failure to adhere to the procedures set forth in NRS 1.230 and 1.235. The Court stated as follows:

THE COURT: The statute, the grounds for disqualifying a Judge, NRS 1.230 and 1.235, procedure for disqualifying a Judge, do you have a problem with that?

(Transcript of Proceedings, March 11, 2004, Page 24, lines 23-24, Page 25, lines 1-2)

The Sentencing Court may not rely on impalpable or highly suspect evidence for the imposition of a proper sentence. Silks v. State, 92 Nev. 91, 545 P.2d 1149 (1976) and Arajakis v. State, 108 Nev. 976, 843 P.2d 800 (1992).

A defendant receives a Due Process violation when a court relies on suspected impalpable and unreliable information at the Sentencing Hearing. U.S. v. Tucker, 404 U.S. 443, 447 (1972) and U.S. v. Pugliese, 805 F.2d 1117, 1124 (2nd Cir. 1986), and U.S. v. Robinson, 63 F.3d 889, 891 (9th Cir. 1995), where the Court held that due process requires that a defendant not be sentenced based on inflated valuation of stolen goods. As is in the instant case, the court received information that was definitely "inflated" beyond the truth of the matter, as the testifying officer admitted.

Additionally, the Nevada Supreme Court has held that the facts of a case may support convictions on separate charges "even though the acts were the result of a single encounter

and all occurred within a relatively short time." Wright v. State, 106 Nev. 647, 650, 799 P.2d 548 (1990), and Crowley v. State, 120 Nev. _____, 83 P.3d 282 (2004), where the Nevada Supreme Court reversed due to Crowley's actions were uninterrupted, considered a continuing act.

This Court should reverse Petitioner's sentences, as they have been imposed consecutively, due to Petitioner's actions being uninterrupted and thus "continuing" in nature.

GROUND THREE

PETITIONER WAS DENIED DUE PROCESS, A FAIR TRIAL, EQUAL PROTECTION AND EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION WHEN THE COURT DENIED PETITIONER'S MOTION FOR RECUSAL AND/OR CHANGE OF VENUE AND ALLOWED THE ENTRY OF HEARSAY EVIDENCE UNAUTHORIZED UNDER MARITAL COMMUNICATIONS PRIVILEGE

Petitioner adopts the argumnets and facts as set forth in Grounds One and Two, herein above, in support of the instant claim for relief.

After the entry of Petitioner's pleas, and prior to sentencing, the State filed a NOTICE OF INTENT TO INTRODUCE PRIOR OR OTHER BAD ACT EVIDENCE AT SENTENCING HEARING. Petitioner's counsel opposed the Notice. The Court held a hearing to determine the prejudicial and probative effect of the proffered evidence the Prosecution attempted to produce against Petitioner at a Sentencing Hearing. The Court ultimately agreed with Petitioner in that his ex-wife, Melissa Botelho, would not be allowed to testify at the Sentencing hearing due to the marital privilege exception. However, the court did allow Ms. Botelho's testimony to be presented through a third party, a police officer, thus relying on hearsay evidence, which precluded Petitioner from

his Constitutional rights to confrontation and cross-examination of a witness.

The instant claim for relief was preserved for review at the Appellate level, as it arose from post-plea acts and Petitioner's counsel also objected to the entry of the hearsay evidence at the sentencing hearing. Therefore, it was incumbent for Appellate counsel to present the instant claim to the Nevada Supreme Court for review on Direct Appeal. It was ineffective for counsel to fail to present the instant viable claim on direct appeal. Petitioner has a right to effective assistance of appellate counsel. Evitts v. Lucey, Supra and Stewart v. Warden, Supra.

The marital communications privilege bars testimony concerning statements privately communicated between spouses. In re Grand Jury Investigation of Hugle, 754 F.2d 863, 864 (9th Cir. 1985), United States v. Lustig, 555 F.2d 737, 747 (9th Cir. 1977), cert denied, 434 U.S. 926, 98 S.Ct. 408, 54 L.Ed.2d 795 (1978), and most recently U.S. v. Marashi, 913 F.2d 724 (9th Cir. 1990). The non-testifying spouse may invoke the privilege even after dissolution of the marriage. Lustig, Supra and Hugle, Supra.

A husband has a privilege to prevent a wife from testifying regarding any statements made to wife in reliance on marital confidence. NRS 49.295(d), Franco v. State, 866 P.2d 247, 109 Nev. 1229 (Nev. 1993).

The Sentencing Court heard untrue and prejudicial testimony from Detective Greg Herrera concerning alleged statements made

by Petitioner's former Spouse. Petitioner was denied his Constitutional right to effectively cross-examine and/or confront Ms. Botelho in an attempt to test the accuracy of the entirety and truthfulness of the statements. The court should never have been subjected to the entirety of Mr. Herrera's testimony as it relates to the marital communications between Petitioner and his then spouse, Melissa Botelho.

The testimony of Detective Herrera was highly prejudicial and unproven for truthfulness. The court was subjected to the testimony, both at Sentencing and in the contents of the prosecution's Notice of Intent to admit the testimony.

The use of hearsay evidence at sentencing violates due process only if the sentencing judge relied upon information which is materially false or unreliable. United States v. Kerr, 876 F.2d 1440, 1445 (9th Cir. 1989), also see Silks v. State, Supra.

In the instant case, the Sentencing Court was subjected to allegations of Petitioner's desire to "raping and dismembering a young girl." Notice of Intent, Page 2, lines 20-22. Additionally, Detective Herrera reiterated the above quoted allegation during the sentencing hearing. However, Detective Herrera later redacted the allegation. However, the Court was prejudicial and tainted, the "bell could not be unrung."

The Sixth Amendment's Confrontation Clause provides a criminal defendant the right to directly encounter hostile witnesses, the right to cross-examine adverse witnesses, and the right to be present at any stage of the trial that would

enable defendant to effectively cross-examine adverse witnesses. Maryland v. Craig, 497 U.S. 836, 846 (1990), Coy v. Iowa, 487 U.S. 1012, 1019 (1988), and U.S. v. Comito, 177 F.3d 1166, 1173 (9th Cir. 1999). The Sixth Amendment provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. Vi. This right extends to state prosecutions through the Due Process Clause of the Fourteenth Amendment. See Pointer v. Texas, 380 U.S. 400, 403 (1965).

The Sentencing Court was tainted by being subjected to the adverse testimony, as outlined herein, and contained in the record, and should have recused itself and granted Petitioner's motion for recusal and/or change of venue. Additionally, the court erred in allowing hearsay evidence to be proffered at the Sentencing Hearing through Detective Herrera, concerning marital privilege. This error of the court resulted in a denial of Petitioner's Constitutional rights as argued herein.

GROUND FOUR

PETITIONER WAS DENIED DUE PROCESS OF LAW, A FAIR TRIAL, EQUAL PROTECTION AND EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AT THE SENTENCING HEARING WHICH RESULTED IN THE IMPOSITION OF NUMEROUS LIFE SENTENCES

This Honorable Court held a Sentencing Hearing in this action on April 7th, 2004, wherein the court imposed an extremely harsh sentence against Petitioner, ultimately subjecting Petitioner to a sentence of forty-five (45) years

to LIFE. Numerous errors of a Constitutional magnitude occurred at the Sentencing hearing deemed highly prejudicial to Petitioner. Each of the errors are addressed herein below in turn, under the guise of an ineffective assistance of counsel claim.

A. COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A LESSER AVAILABLE SENTENCE

Petitioner has a Constitutional right to effective assistance of counsel at sentencing. Strickland v. Washington, Supra and Lockett v. Ohio, 438 U.S. 586, 603 (1978).

Counsel informed the court of adverse statements, including that Petitioner's crime was "horrible." (Sentencing Transcripts, Page 11, lines 14-15). Counsel proceeds to call Petitioner's actions "horrible" a second time. (Id. at page 12, lines 1-3) Also see Page 13, line 17.

Counsel also used the term "atrocities" in describing Petitioner's actions. (Id. at page 15, lines 19-21).

Counsel closes his sentencing argument in concurring with parole and probation's recommendations of LIFE sentences. (Id. at page 16, lines 1-9).

Under prevailing law concerning the offenses under which Petitioner has been sentenced, Petitioner was afforded the opportunity to receive much lesser sentences of five (5) to twenty (20) years. However, the court never considered such a sentencing structure, part in due to counsel's failure to request such a sentence on behalf of Petitioner.

In Gentry v. Roe, 320 F.3d 891, 900 (9th Cir. 2003), the Ninth Circuit Court of Appeals has held that an attorney is ineffective when he mentions a host of details that hurts his

client's position, none of which matter as a matter of law, while at the same time failing to mention those things that do matter, all of which would have helped his client's position.

The United States Supreme Court has held:

In light of these standards, our principle concern in deciding whether counsel exercised "reasonable professional judgment," [Strickland, Supra], at 691, 104 S.Ct. 2052, is not whether counsel should have presented a mitigation case. Rather we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable. Ibid. Cf. Williams v. Taylor, Supra, at 415, 120 S.Ct. 1495.

See Wiggins v. Smith, ____ U.S. ____, 123 S.Ct. 2527, 2536 (2003). Also see Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995), where the court found counsel's failure to present mitigating evidence rendered the sentencing neither fair nor reliable.

Counsel's complete failure to request the lesser available sentence was clearly prejudicial to Petitioner. Counsel's actions fell below the standard expected of attorneys in this arena.

The imposed sentence in this case would have been different if it weren't for counsel's failures. See Mayfield v. Woodford, 270 F.3d 915, 936 (9th Cir. 2001), where the court held that a habeas Petitioner does not require certainty and that prejudice is shown where there is a reasonable probability of a different result.

B. THE SENTENCING COURT RELIED ON UNTRUE AND/OR IMPALPABLE PREJUDICIAL EVIDENCE

Petitioner adopts the facts and arguments set forth in Grounds Two and Three, herein above, in support of the instant claim for relief.

Petitioner's counsel, Sean Sullivan, informed Petitioner if he entered a guilty plea, versus proceeding to a jury trial, the court would not be privy to information regarding facts surrounding the instant offenses. Petitioner understood this to include his privileged spousal communications. However, this Court allowed, and subsequently relied on a plethora of testimony of Detective Herrera concerning Petitioner's communications with his ex-spouse, melissa Botelho, without offering or providing Petitioner with an opportunity to effectively cross-examine and/or confront the source of the alleged information, Ms. Botelho, in an attempt to prove the falsity of the allegations. Petitioner denies the entirety of Detective Herrera's testimony, and asserts it is false and mis-leading, in its entirety.

The Court relied on statements offered by Detective Herrera as true, as it pertains to the allegations of Detective Herrera concerning Petitioner's alleged fantasies of "dis-membering" a person. (Again, Petitioner DID NOT state that he intended or desired to "dismember" any person). As the court stated, "the only saving fact in this particular case is that you did not mutilate or kill her and she was returned to her family." (Sentencing Transcripts, April 7th, 2004, page 82, lines 2 - 6). The court went on to note, "And I think that, having heard everything, that's still a valid concern." Id. at page 82, lines 19 - 20. This court went on to sentence Petitioner to an extremely harsh sentence in an attempt to protect society from what it deemed future possible actions of Petitioner, based on the erroneous information provided by Detective Herrera.

The court should not have relied on impalpable or highly suspect evidence at sentencing, as it did so impermissibly and Petitioner must be resentenced. Silks v. State, 92 Nev. 91, 545 P.2d 1159 (Nev. 1976).

In U.S. v. Tucker, 404 U.S. 443, 447 (1972), the United States Supreme Court held that the Due Process Clause of the United States Constitution is violated when a court relies on improper information at a sentencing hearing. The Due process clause prohibits the sentencing court from considering untrue information without sufficient reliability. U.S. v. Miller, 263 F.3d 1, 4 n. 5 (2nd Cir. 2001).

Due process requires that facts used at sentencing be proven by a preponderance of the evidence. McMillian v. Pennsylvania, 477 U.S. 79, 91-2, n. 8 (1986). In the instant case, the testimonial evidence of Mr. Herrera was false in its' entirety and influenced the court without giving this Petitioner the opportunity to rebut the offered prejudicial testimony.

The record is clear, the court relied on the tainted testimony of Detective Greg Herrera in determining its' imposition of sentence, in combination with the exorbitant amount of publicity in the media prior to, and during, the judicial proceedings held in this action. This Court was biased prior to imposition of sentence due to the abundant of mis-information it was exposed to prior to entering a sentence against Petitioner, and Petitioner is therefore required to be resentenced by an impartial court. See e.g.

Eslaminia v. White, 136 F.3d 1234, 1237 (9th Cir. 1997).

**C. THIS COURT ENTERED AN AMBIGUOUS SENTENCE LEFT
UNCORRECTED BY COUNSEL**

This Court appeared to enter an ambiguous sentence against Petitioner, as the following excerpts from the record indicate confusion of the court:

THE COURT: I hereby sentence you, Michael Todd Botelho, for the conviction of Count I, Kidnapping, to a term of life imprisonment with parole eligibility after a term of fifteen years.

PAROLE & PROBATION: Your Honor, that was a mistake, It should be five years.

THE COURT: Five years?

PAROLE & PROBATION: Yes.

THE COURT: Oh, you are right. Fifteen definite with a five-year term. That will be life with parole eligibility after five years has been served.

(Sentencing Transcripts, April 7th, 2004, Page 83, lines 1 - 11)

Petitioner was eligible for a definite term of imprisonment pursuant to NRS 200.310 as it applies to kidnapping. The court appears unaware of the available sentences, in addition, the Court states, as reiterated above, "Fifteen definite with a five-year term. Id. However, the Judgment of Conviction entered by the court imposes a LIFE sentence, in opposition to the somewhat confusing statements delineated by the court, as noted above.

The ambiguous sentence announced orally by this court is considered "plain error" and entitles Petitioner to a new sentencing hearing. See e.g. U.S. v. Lawton, 193 F.3d 1087, 1093 (9th Cir. 1999). A sentence is illegal if it is so ambiguous that it fails to reveal its meaning with fair

certainty. U.S. v. Garcia, 37 F.3d 1359, cert. denied, 115 S.Ct. 1699, 131 L.Ed.2d 567 (9th Cir. 1994).

NRS 176.035 mandates a Judgment of Conviction must state with fair certainty the amount of incarceration to be ultimately served. Collins v. Warden, 88 Nev. 99, 493 P.2d 1335 (1972); Founts v. Warden, 91 Nev. 353 at 355, 535 P.2d 1291 (1975).

It is incumbent upon sentencing judge to choose his words carefully so that defendant is aware of sentence when he leaves courtroom. U.S. v. Villano, 816 F.2d 1448 (10th Cir. 1987).

This court failed to "choose" its' words carefully, and Petitioner was unaware of the sentence imposed by this Court. Counsel and this court failed to correct the sentence, wherein Petitioner was available to receive a definite term of 5 to 20 years on the kidnapping charge, as delineated by the court in its' confusing statements, as noted herein above.

Petitioner is thus entitled to a new sentencing hearing in accordance with the arguments set forth herein.

GROUND FIVE

PETITIONER'S GUILTY PLEA WAS NOT ENTERED KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY, IN VIOLATION OF HIS RIGHTS TO A FAIR TRIAL, EQUAL PROTECTION, DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

Petitioner entered guilty pleas in open court on December 11th, 2003, on the advice of counsel. Petitioner asserts his pleas are unconstitutional in this instance for the reasons set forth below.

A. THE PLEA CANVASS WAS DEFICIENT IN FAILING TO PROPERLY
ADVISE PETITIONER OF THE CONSEQUENCES OF HIS PLEA

This court failed to advise Petitioner, prior to accepting his guilty plea(s), of the fact that this court had ultimate authority to impose consecutive prison terms. The Court advises Petitioner, as follows:

THE COURT: Okay. Concurrent means that they can all be done together. Consecutive means you do one, then the other, then the other, then the other and so on. Do you understand?

See Transcript of Proceedings, Change of Plea, December 11th, 2003, Page 14, lines 9 - 12.

However, the court fails to inform Petitioner of the fact that the court had discretion to impose sentences consecutively versus concurrently. The only reference to consecutive versus concurrent sentences is the definition of the terminology, not sufficient to advise petitioner of the possible sentencing range to be ultimately imposed. This is contradictory to counsel's advice to Petitioner, wherein counsel informed Petitioner the sentences would be imposed concurrently due to Petitioner's entry of the plea, the facts surrounding the instant offenses, and the fact that counsel believed the sentencing court would not be exposed to, and ultimately rely on, the testimony of Detective Greg Herrera concerning Petitioner's privileged spousal communications.

Petitioner's plea was not properly entered pursuant to the provisions of Boykin v. Alabama, 395 U.S. 238 (1969), and Iaea v. Sunn, 800 F.2d 861 (9th Cir. 1986), where the court

held that a plea is unconstitutional if a defendant does not understand the possible punishment he faces.

Nevada has adopted this standard of reasoning in Higby v. Sheriff, 86 Nev. 774, 476 P.2d 959 (1970) and Bryant v. State, 102 Nev. 268, 271 P.2d 364 @ 367 (1986).

**B. PETITIONER'S DECISION TO ENTER GUILTY PLEAS WAS
PREDICATED ON INEFFECTIVE ASSISTANCE OF COUNSEL**

Petitioner's counsel, Sean Sullivan, informed Petitioner he would receive less than the mandatory sentence available under prevailing statutes if he entered guilty pleas due to the fact that Petitioner (1) had not invoked his rights to a jury trial, (2) had not subjected the alleged victim to testifying at a possible jury trial, and (3) Petitioner would be placed in the best possible light possible before the sentencing court due to counsel's promise of the sentencing court being absolved of the facts surrounding the instant offense(s) including not being subjected to the highly damaging and prejudicial privileged spousal communications as outlined in great detail herein, above. Counsel informed Petitioner of the above information, taken as factual statements by this Petitioner, as though counsel had first-hand knowledge of a lesser sentence to be imposed, as though it had been pre-arranged by counsel on behalf of Petitioner.

Where a defendant enters a guilty plea upon the advice of counsel, the voluntary nature of the plea depends on whether the advice of counsel was within the range of competence

demanded of attorneys in criminal cases. Hill v. Lockhart, 474 U.S. 52, 56-7 (1985). Because an "intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney, counsel has a duty to supply criminal defendants with necessary and accurate information." Iaea v. Sunn, 800 F.2d at 865, quoting Brady v. United States, 397 U.S. 742, 748 (1970).

The plea canvass of Petitioner by this Court on December 11th, 2003, and the Guilty Plea Memorandum fail to correct counsel's mis-advice, and actually exacerbate the fact that Petitioner did not understand the ultimate circumstances and possible punishment he faced as a result of the entry of his guilty pleas.

While it is true that counsel cannot be required to accurately predict what the court might find or do, he is required to give the defendant the tools he needs to make an intelligent plea decision. Turner v. Calderon, 281 F.3d 851, 881 (9th Cir. 2002). And although a mere inaccurate prediction of a probable sentence, standing alone, would not constitute ineffective assistance of counsel, McMann v. Richardson, 397 U.S. 759, 770 (1970), a gross mischaracterization of the likely outcome does. United States v. Michlin, 34 F.3d 896, 899 (9th Cir. 1994).

Counsel's misadvice in this case was not merely an inaccurate prediction of his client's likely sentence, Doganieri v. United States, 914 F.2d 165 (9th Cir. 1990), rather this was a proven, gross mischaracterization of Nevada law which renders Petitioner's

guilty plea unknowing and involuntary. Kennedy v. Maggio, 725 F.2d 269, 272 (5th Cir. 1984), where counsel erroneously advised defendant he could face the death penalty at trial. Also see O'tuel v. Osborne, 706 F.2d 498, 499 (4th Cir. 1983), where defendant's counsel misinformed him as to parole eligibility if he pled guilty. In United States v. Day, 969 F.2d 39, 43 (3rd Cir. 1992), the court found counsel was ineffective because he affirmatively misrepresented that the defendant faced a maximum sentence of eleven (11) years in prison and failed to inform him that he could be classified as a career offender.

Counsel affirmatively misled Petitioner about the applicable law as it pertained to the sentence Petitioner would ultimately receive and the law as it applies to information the court would rely on in determining an appropriate sentence. Counsel's misrepresentations were exacerbated by the misleading and/or ambiguous statements of the court and plea agreement which both failed to correctly inform Petitioner of the mandatory minimum sentences he faced. Because Petitioner was ignorant of the law, as noted above, his plea is not voluntarily and intelligently made. Vittitoe v. State, 556 So.2d 1062, 1065 (Miss. 1990).

Petitioner would have proceeded to trial in an attempt to receive a lesser available sentence if he had been properly advised of the law as it pertains to the plea(s) he entered. Based upon the current sentence imposed upon Petitioner by this court, Petitioner must serve a minimum of forty-five (45)

years incarcerated. In short, he will spend at best most of his remaining life in prison. Under such circumstances it is reasonable to conclude Petitioner, with a stable employment history and strong family support would rather risk convictions via a jury trial than agree to a plea likely to result in his imprisonment for the rest of his entire life. Petitioner was severely prejudiced by his counsel's deficient performance. The instant writ should be granted.

C. THE COURT FAILED TO ADVISE PETITIONER OF THE REQUIREMENTS OF NRS 176.0927 AND LIFETIME SUPERVISION

Under Nevada law, individuals convicted of certain enumerated sex offenses must register with local law enforcement in the city or county in which they reside and in which they are present for more than forty-eight hours. NRS 179D.460 (1) - (4). Failure to comply with the registration requirements is a category D felony. NRS 179D.550. Before a sex offender is sentenced, the district court is required to inform the offender of the registration requirement. NRS 176.0927(1)(b). The district Court is also required to ensure that the defendant reads and signs a form acknowledging that the registration requirements have been explained. NRS 176.0927(1)(c). Petitioner asserts that his guilty plea is invalid based upon the court's failure to adhere to the above noted applicable NRS', and to advise Petitioner prior to entry of his plea of the requirements as outlined in NRS 176.0927, NRS 179D.460 and 179D.550.

Petitioner's plea is invalid due to the court's failure to inform Petitioner of the direct consequences of his plea. Little v. Warden, 34 P.3d 540, 544 (Nev. 2001).

This Court failed to advise petitioner, prior to the entry of his plea, and prior to sentencing, of the requirement to register as a sex offender upon his eventual release from incarceration. The court also failed to advise Petitioner of the full panoply of ramifications and implications regarding LIFETIME SUPERVISION. This court failed to advise petitioner of the requirements and restrictions to be imposed upon him pursuant to NRS 213.1243, 213.1245, 213.1255, and any and all other various statutes of this state concerning LIFETIME Supervision and sex offender registration. The record is void of any language indicating petitioner was made aware of the provisions of Lifetime Supervision or sex offender registration. Petitioner did not execute any documents prior to the entry of his plea or prior to sentencing in accordance with NRS 176.0927. Therefore, Petitioner's plea is constitutionally infirm.

In Brady v. United States, 397 U.S. at 755, the U.S. Supreme Court held that an intelligent and knowing plea includes an on the record assurance that the accused is aware of the direct consequences of his plea.

A number of Nevada Supreme Court decisions have held and/or recognized that a guilty plea, in order to be valid, must have been made with the accused having a full and complete understanding of the consequences of the guilty plea. Taylor v. Warden, 96 Nev. 274, David v. Warden, 671 P.2d 634, 637, and Jezierski v. State, 812 P.2d 355, 356.

A guilty plea is voluntary only if the defendant enters

the plea fully aware of the direct consequences of his plea. Torrey v. Estelle, 842 F.2d 234, 235 (9th Cir. 1988), Bargas v. Burns, 179 F.3d 1207, 1216 (9th Cir. 1999). A trial judge must "canvass the matter with the accused to make sure he has a full understanding of what the plea connotes and of its' consequences." Boykin, Supra, at 244. Before accepting a plea, a court must advise a defendant of the direct consequences of his plea, including the "range of allowable punishment" that he may receive as a result of the plea. Torrey, 842 F.2d at 235, quoting from Carter v. McCarthy, 806 F.2d 1373, (9th Cir. 1986), and United States ex rel. Pebworth v. Conte, 489 F.2d 266, 268 (9th Cir. 1974).

The trial court did not fairly apprize Petitioner of the consequences of his plea and as a result, Petitioner's plea was not knowing or voluntarily entered. State v. Hazel, 271 S.E.2d 602, 603 (S.C. 1980), where the court held that Appellant's plea was not knowing because it was entered without an understanding of the mandatory punishment for the offense to which she was pleading. It was thus a plea entered in ignorance of its direct consequences, and was therefore invalid. Also see Vittitoe v. State, 556 So.2d 1062, 1065 (Miss. 1990), where the court held that because a defendant was "ignorant of the mandatory minimum sentence for the charge to which he was pleading and stated that he would not have pled had he known this information, it cannot be said that his plea was voluntarily and intelligently made."

D. PETITIONER'S PLEA IS INVALID DUE TO PROSECUTORIAL MISCONDUCT

Petitioner entered his guilty plea(s) on December 11th, 2003. Approximately sixty (60) days later, on February 3rd, 2004, the prosecution filed a NOTICE OF INTENT TO INTRODUCE PRIOR OR OTHER BAD ACT EVIDENCE AT SENTENCING HEARING. This amounted to a breach of contract, the plea. Petitioner would not have entered into the plea knowing the prosecution would seek, and ultimately gain approval, for the entry of privileged marital communications allegedly made between Petitioner and his ex-spouse, Ms. Botelho, especially in light of the fact counsel informed Petitioner this court would be shielded, and not reliant on the spousal communications, prior to sentencing.

The prosecution knew, or should have known, of the marital communications. As is noted in the aforementioned NOTICE, the prosecution states, "prior to interviewing defendant, Detective Herrera had received information from defendant's ex-wife, Melissa Botelho that defendant had sexual fantasies of raping and dismembering a young girl." Id. at page 2, lines 19 - 22.

The prosecution failed to divulge and/or provide this information to defense. This was a clear violation under the United States Supreme Court's holding in Brady v. Maryland, 373 U.S. 83, 87 (1963), and Drayden v. White, 232 F.3d 704, 714 (9th Cir. 2000), wherein it is encumbent upon the prosecution to provide defense with discovery material to be used at trial.

Additionally, Detective Herrera testified at sentencing concerning "dismemberment", a statement that was later redacted by Detective Herrera. This testimony was highly prejudicial to Petitioner, as it was also contained in the aforementioned NOTICE filed by the prosecution. The statements were proven untrue. A prosecutor may not knowingly present false testimony and has a duty to correct testimony that he or she knows to be false. Napue v. Illinois, 360 U.S. 264, 269 (1959). A prosecutor may not use staged testimony of a government witness in order to cause inadmissible evidence to be introduced. U.S. v. Maynard, 236 F.3d 601, 604-06 (10th Cir. 2000).

By the prosecution knowingly allowing Petitioner to enter into a guilty plea without the knowledge of the prosecution's intention to enter the prejudicial testimony of Detective Herrera, the prosecution violated the plea agreement. A guilty plea is governed by the law of contracts, Santobello v. New York, 404 U.S. 257, 262 (1971). Therefore, this court must allow Petitioner to withdraw his plea agreement due to the breach caused by the prosecution. U.S. v. Mondragon, 228 F.3d 978, 981 (9th Cir. 2000).

An evidentiary hearing is necessary on the instant claim for relief based upon the doctrine set forth in Blackledge v. Allison, 431 U.S. 63, 76, 80-82 (1977), where the United States Supreme Court held that the allegation of a breach entitles defendant to an evidentiary hearing.

The Prosecution's underhanded and insidious actions of seeking the entry of evidence AFTER Petitioner entered guilty pleas renders Petitioner's plea(s) constitutionally infirm.

GROUND SIX

TRIAL COUNSEL WAS INEFFECTIVE UNDER THE GUARANTEES OF THE SIXTH AMENDMENT FOR FAILING TO APPEAR AND/OR ENSURE THE APPEARANCE OF PETITIONER BEFORE THE GRAND JURY PROCEEDINGS IN VIOLATION OF NRS 172.239 AND NRS 172.241 WHICH RESULTED IN A DENIAL OF DUE PROCESS, EQUAL PROTECTION AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Trial Counsel was ineffective for failing to preserve this issue for review prior to entry of Petitioner's guilty pleas. Petitioner did not knowingly waive the instant claim for relief, as his decision to enter guilty pleas are unknowing, unintelligent and involuntary.

On or about September 29, 2003, while detained in the Washoe County Sheriff's Detention Center ("WCSDC"), Petitioner received notification of Grand Jury Investigation and Right to Testify. (Exhibit #1, attached hereto). The Grand Jury hearing was scheduled for, and took place, on October 8, 2003. Id. at page 2. However, Petitioner was transported by WCSDC officials transported Petitioner to the court room on October 9, 2003, a full day late, Petitioner was ultimately unable to appear before the Grand Jury proceedings. Petitioner informed the court, which in turn informed counsel of the error. (See Exhibit #2).

Petitioner desired to appear before the Grand Jury in an attempt to provide evidence of his innocence of at least one of the sexual assault charges. (Petitioner is not guilty of having the alleged victim perform oral sex upon Petitioner, See Ground Eight, herein below) Petitioner also desired to be present at the Grand Jury proceedings so that he had the

knowledge of all of the testimonial evidence in the case, thus enabling Petitioner to make a rational intelligent plea.

NRS' 172.239 and 172.241 give Petitioner the absolute right to appear before Grand Jury proceedings. Petitioner did not receive this right, and thus was denied Due Process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Counsel was also ineffective in failing to ensure Petitioner's appearance, or appear on Petitioner's behalf, at the Grand Jury proceedings held in this instant action on October 8, 2003.

Petitioner also asserts that the Grand Jury Proceedings held in this case stemmed from prosecutorial misconduct. A Criminal Complaint had been filed on September 12, 2003. A Grand Jury Proceedings is typically utilized to seek a formal Indictment. However, an Indictment was not needed in this action due to Nevada allowing for Criminal Complaints in lieu of an Indictment. Therefore, there exists no reason for the Grand Jury proceedings, absent a need for further fact finding. This is totally insidious and a blatant disregard for the law in this context.

The government cannot use the Grand Jury (Indictment) to assist the government in preparing its' case. U.S. v. Doss, 563 F.2d 265, 276 (6th Cir. 1977, en banc), and U.S. v. Jenkins, 904 F.2d 549 (10th Cir. 1990).

The Ninth Circuit Court of Appeals has held in U.S. v. VanDoren, 182 F.3d 1077 (9th Cir. 1999), that vindictive prosecution occurs when a prosecutor brings additional charges

against a defendant solely for punishing a defendant who desires to exercise a Constitutional right. Petitioner did not enter into a plea, or inform the prosecution he desired to enter into a plea. Factually, Petitioner entered NOT GUILTY pleas to all charges and had exercised his option to proceed to a jury trial.

The prosecution's use of the Grand Jury to seek information to be utilized at a future trial was in violation of Petitioner's rights, especially in light of the fact that the State and/or its' agents FAILED to ensure petitioner's presence at the Grand Jury proceedings.

Trial Counsel was ineffective under the guarantees of the Sixth Amendment in failing to ensure Petitioner's presence, or represent Petitioner, at the Grand Jury proceedings. Counsel was also ineffective in failing to preserve this issue of Constitutional magnitude for appellate review. See Strickland v. Washington, Supra.

GROUND SEVEN

TRIAL COUNSEL, THIS COURT, AND THE PROSECUTION FAILED TO SEEK A COMPETENCY HEARING, WHEN THE RECORD IS CLEAR THERE EXISTS A DOUBT TO PETITIONER'S MENTAL COMPETENCY, IN VIOLATION OF NRS 178.405, THUS RESULTING IN A DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, EQUAL PROTECTION, A FAIR TRIAL AND A CONSTITUTIONAL PLEA AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

NRS 178.400 states in pertinent part as follows:

1. A person may not be tried or adjudged to punishment for a public offense while he is incompetent.
2. For the purposes of this section, "incompetent" means that the person is not of sufficient mentality to be able to understand the nature of the criminal charges against him and because of that insufficiency, is not able to aid and assist his counsel in the defense interposed upon the trial or against the pronouncement of the judgment thereafter.

Furthermore, Nevada provides the court with the means to suspend the trial when competency arises, as NRS 178.405 provides in pertinent part as follows:

Suspension of trial or pronouncement of judgment when doubt arises as to competence of defendant. When a complaint, indictment or information is called for trial, or upon conviction the defendant is brought up for judgment, if doubt arises as to the competence of the defendant, the court shall suspend the trial or pronouncement of the judgment, as the case may be, until the question of competence is determined.

Trial Counsel knew of, or should have known, of Petitioner's mental deficiencies, as Counsel informed this Court of Petitioner's inability to understand the instant proceedings.

[Trial Counsel] . . . basically his mind blocked them out.

His mind wouldn't let him remember what happened.

And I think it's akin to like post-traumatic stress disorder or something like that.

But right now my mind is drawing a blank.

He is a danger to himself.

(See Sentencing Transcripts, April 7th, 2004, page 13, line 16, 19-20, 21-22. Page 14, lines 11-12. Page 23, lines 7-8).

Counsel had a duty to investigate further into the mental status of Petitioner. As noted by counsel, Petitioner is suffering from what counsel deemed "post-traumatic stress disorder" which has precluded Petitioner from entering into a knowing, intelligent and voluntary plea as warranted by the holding in Boykin v. Alabama, Supra.

It is well established that a conviction obtained against

an incompetent defendant "is a clear violation of the constitutional guarantees of due process." U.S. v. Loyola-Dominguez, 125 F.3d 1315 (9th Cir. 1997), quoting Hernandez v. Yist, 930 F.2d 714, 716 (9th Cir. 1991), citing Pate v. Robinson, 383 U.S. 375, 378, 86 S.Ct. 836, 838, 15 L.Ed.2d 815 (1966). Competency requires that the defendant have the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense. Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

In the instant case, Petitioner could not possibly assisted his counsel, or consulted with counsel in an effective manner if he "blocked out" important aspects of the case or his own actions.

The Ninth Circuit Court of appeals recently held in Douglas v. Woodford, 316 F.3d 1079 (9th Cir. 2003) that counsel "has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired." Id. at 1085, quoting Bean v. Calderon, 163 F.3d 1073, 1077 (9th Cir. 1998).

In the instant case, it will be established at an evidentiary hearing that counsel was aware of petitioner's deficient mental status, and therefore had a duty to perform objectively in ensuring the court held a competency hearing, where medical experts would testify, as to Petitioner's incompetency. The court had a duty to suspend the proceedings to ascertain Petitioner's competency.

Counsel failed to file a Motion for Psychological evaluation. Counsel failed to inform the court that petitioner's

competency was at issue. Counsel failed to request any form of continuance or to further investigate the issue of Petitioner's competency. Counsel's deficient performance greatly prejudiced Petitioner, wherein Petitioner's current plea and convictions are unconstitutional under the guarantees of due process.

GROUND EIGHT

TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE UNDER THE GUARANTEES OF THE SIXTH AMENDMENT FOR ALLOWING PETITIONER TO BE SUBJECTED TO MULTIPLICITOUS, DUPLICITOUS AND/OR LESSER INCLUDED OFFENSES, RESULTING IN A DENIAL OF DUE PROCESS, DOUBLE JEOPARDY, EQUAL PROTECTION AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

Petitioner stands convicted of three (3) counts of sexual assault stemming from one continuous act in violation of the Double Jeopardy protections of the United States Constitution and Nevada Constitution.

Trial counsel, Sean Sullivan, allowed Petitioner to enter guilty pleas to the multiple offenses without protecting him from his Constitutional rights. Appellate counsel failed to present the instant claim to the Nevada Supreme Court for review on direct appeal.

The ban against duplicitious indictments dereives from four concerns: (1) prejudicial evidentiary rulings at trial, (2) the lack of adequate notice of the nature of the charges against defendant, (3) prejudice in obtaining appellate review and prevention of double jeopardy, and (4) risk of a jury's non-unanimous verdict. U.S. v. Cooper, 966 F.2d 936, 939, n.3 (5th Cir. 1992). Duplicitious indictments may prevent jurors from acquitting on a particular charge by allowing them to convict on another charge that is improperly lumped together

with another offense on a single count. A duplicitous indictment precludes assurance of jury unanimity, and may prejudice a subsequent double jeopardy defense. U.S. v. Morse, 785 F.2d 771, 774 (9th Cir. 1986)(citing U.S. v. UCO Oil Co., 546 F.2d 833, 835 (9th Cir. 1976)).

It shall be noted that the duplicitous charges in this case arise due to the fact that all of the charges relate only to the acts of August 7, 2003. There was lack of specificity which precluded Petitioner's ability to defend the other charges.

To identify lesser included offenses, federal courts follow the "elements" test. Under that test, an offense is not lesser-included unless: (1) the elements of the lesser offense are a subset of the elements of the charged offense; and (2) it is impossible to commit the greater offense without first having committed the lesser. Schmuck v. United States, 489 U.S. 705, 716, 109 S.Ct. ____ (1989). To be convicted of charges which are lesser included offenses violates Double Jeopardy.

Blockberger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1932).

The elements test set forth in Schmuck requires a textual comparison of criminal statutes, an approach that we explained lends itself to certain and predictable outcome. Carter v. United States, 530 U.S. 255, 120 S.Ct. 2159 (2000).

It is at this juncture that Petitioner has been subjected to numerous convictions of sexual assault stemming from one continuous act as outlined in NRS 200.366. Especially when taken into consideration that the alleged acts stem from acts committed within a few moments of each other.

The Nevada Supreme Court recognized in Brown v. State, 934 P.2d 185 (Nev. 1997), that multiple convictions stemming from one continuous act violated double jeopardy clause of United States Constitution and Nevada Constitution.

The Nevada Supreme Court has also held that multiple convictions under separate theories are impermissibly redundant. Gordon v. District Court, 913 P.2d 240, 243 (Nev. 1996); and Dossey v. State, 964 P.2d 785 (Nev. 1985).

Petitioner's trial and appellate counsel were ineffective under the guarantees of the Sixth Amendment for failing to correct the injustice of multiple life sentences being imposed against Petitioner, to be served consecutively, stemming from convictions in violation of Double Jeopardy, Due Process, Equal Protection as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution as held in the aforementioned precedents.

Petitioner's plea is invalid due to unknowingly being deprived of his rights, as described herein above, in that Petitioner did not waive these rights.

GROUND NINE

TRIAL COUNSEL WAS INEFFECTIVE UNDER THE GUARANTEES OF THE SIXTH AMENDMENT IN FAILING TO ENSURE PETITIONER RECEIVED A PSYCHOSEXUAL EVALUATION PURSUANT TO NRS 176.139 AND NRS 176.135 TO BE UTILIZED AT SENTENCING, FUTURE PSYCHOLOGICAL AND PAROLE BOARD HEARINGS, RESULTING IN A DENIAL OF DUE PROCESS, EQUAL PROTECTION AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

Petitioner was convicted of a sexual offense which mandates Petitioner must appear before a psychological review board prior

to being eligible for any future parole consideration. The psychological review board determines a candidates' possibility of re-offending and/or rehabilitation based upon previous findings of sexual aberrations as determined from a psychological report (sexual) stemming from pre-confinement evaluations. Petitioner has not received the benefit of a proper psycho-sexual evaluation and subsequent report pursuant to the provisions of NRS 176.135 and NRS 176.139, as Petitioner requested of counsel.

NRS 176.135 and NRS 176.139, when taken in combination, provides that a presentence report must contain a psychosexual evaluatio report conducted by a person professionally qualified to conduct psychosexual evaluations for persons convicted of sexual offenses, such as Petitioner. Petitioner's presentence report ("PSI") does not contain the requisite psychosexual evaluation report. Therefore, the sentencing court did not have the full information before it to determine the proper sentence to impose against petitioer. Additionally, Petitioner is being denied due process, in that future hearings conducted by the NDOC and/or the Nevada Parole Board is without the necessary documentation to properly determine Petitioner's propensity for re-offending, possible threat to the community, etc. Therefore, it will be impossible for Petitioner to recieve a proper parole board determination.

Petitioner will be denied Due process at future Parole Board hearings AND Petitioner was denied due process at the sentencing hearing held in this Honorable Court.

Petitioner has a constitutional right to effective assistance of counsel at sentencing. Strickland v. Washington, Supra. Counsel was ineffective in failing to ensure Petitioner received a psychological evaluation and have the results provided to the court in determining a proper sentence in this action.

GROUND TEN

TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE UNDER THE GUARANTEES OF THE SIXTH AMENDMENT FOR FAILING TO PROTECT PETITIONER FROM THE UNCONSTITUTIONAL KIDNAPPING STATUTE, NRS 200.310 AND NRS 200.320, AS BEING VAGUE AND AMBIGUOUS ON THEIR FACE AND AS APPLIED TO PETITIONER, THUS DENYING PETITIONER HIS RIGHTS TO DUE PROCESS, EQUAL PROTECTION AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioner has entered a guilty plea to "Kidnapping in the First Degree" as defined by NRS' 200.310 and 200.320. However, the statutes define kidnapping as a premeditated "enticing," carrying away, or concealing of another person against their will. The statutes do not clearly define "enticing" in this context. Additionally, under the facts of this case, as alleged by the prosecution, Petitioner did not entice, carry away, or conceal the alleged victim in this case. The victim freely, on her own will, entered into Petitioner's vehicle and never refused or objected to the place or locale wherein Petitioner and the victim ultimately arrived. Therefore, Nevada's Kidnapping statutes cannot be imposed against Petitioner stemming from his alleged actions on the date in question, August 7, 2003.

All criminal statutes which contain language for the imposition of felony prison time must require facts to be

elements of the offense. Apprendi v. New Jersey, 120 S.Ct. 2348 (2000).

When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all material elements thereof, unless a contrary purpose plainly appears. Model Penal Code § 2.02(4); accord U.S. v. King, 122 F.3d 808, 811 (9th Cir. 1997) (citing U.S. v. X-Citement Video, 513 U.S. 64 (1994) and 2.02(4) in stating that when a statute prescribes a level of culpability, that mens rea requirement applies to all other material elements, unless a contrary purpose plainly appears. 1 W. LaFare & Scott, Substantive Criminal Law, 3.11.

The courts are the final authority on questions of statutory construction. Sederquist v. Tahoe Regional Planning Agency, 652 F.Supp. 341 (D. Nev. 1987). It is well established in Nevada that in constructing a statute the legislative intent is the controlling factor. Cleghorn v. Hess, 109 Adv. Op. 85, 853 P.2d 1260 (1993), Kern v. Nevada Insurance Guarantee Ass'n. on behalf of Azstar Casualty Co., 109 Nev. 115, 856 P.2d 1390 (1993), Polson v. State, 843 P.2d 825 (Nev. 1992), State DMV v. McQuire, 827 P.2d 821 (1992).

In United States v. Simpson, 927 F.2d 1088, 1090 (9th Cir. 1991), the Ninth Circuit Court of Appeals held that:

Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature.

The United States Supreme Court held in Reeves v. Ernst & Young, 113 S.Ct. 1163 (1993) at 1169, as:

If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.

Additionally, the United States Supreme Court went on to hold in Caminetti v. United States, 37 S.Ct. 192 (1917), as:

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its' terms.

Petitioner asserts, as argued herein, that the legislative intent is not defined in the kidnapping statute, and/or its effect is not enforceable against Petitioner's actions as they pertain to the instant action.

Petitioner's trial and appellate counsel failed to protect Petitioner from the imposition of the Unconstitutional statute, and therefore Petitioner is being prejudiced as he is serving a LIFE sentence as a result of counsel's failures.

Petitioner's conviction on Kidnapping should be reversed, at a minimum, and his plea held unconstitutionally infirm as a result thereof.

GROUND ELEVEN

TRIAL COUNSEL WAS INEFFECTIVE UNDER THE GUARANTEES OF THE SIXTH AMENDMENT IN FAILING TO ENSURE PETITIONER RECEIVED PROPER PRE-TRIAL HEARINGS, PERTAINING TO EXTRADITION, ARRAIGNMENT, GRAND JURY HEARING AND A PRELIMINARY HEARING, RESULTING IN A DENIAL OF DUE PROCESS, EQUAL PROTECTION AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioner was arrested in Susanville, California on or

about September 16, 2003. Petitioner was not represented by counsel at an extradition hearing held in California. Petitioner was subsequently transported to the WCSDC on or about September 24, 2003. Petitioner did not receive an arraignment hearing pursuant to NRS 174.015. Petitioner did not receive a preliminary hearing wherein it is typical to "bound" over a defendant to the District Court for further proceedings. Thus, the instant court is without jurisdiction for the failure of counsel and the Justice Court.

NRS 174.015 states in pertinent part:

1. Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead.

2. In Justices' Court, before the trial commences, the Complaint must be distinctly read to the defendant before he is called upon to plead.

As outlined above, the statute contains mandatory language which gives Petitioner statutory and constitutional rights to due process. (Petitioner also adopts the arguments and facts set forth in Ground Six, herein above, in support of the instant claim for relief).

Petitioner informed counsel of his desire to attend or receive the benefit of the aforementioned hearings. However, counsel failed to request or otherwise object to the denial of the statutorily mandated hearings. Petitioner did not consent to the waiver of any of the aforementioned hearings.

Petitioner did not effectively waive any of the constitutionally protected hearings in his entry of his guilty pleas. Counsel's failures led to an unknowing and unintelligent plea.

The United States Supreme Court has recognized arraignment as a "critical" stage in the criminal proceedings requiring the guiding hand of counsel to prevent a waiver of available defenses. Hamilton v. Alabama, 368 U.S. 52, 53, 82 S.Ct. 152.

The pre-trial period constitutes a critical period in criminal proceedings because it encompasses counsel's constitutionally imposed duty to investigate the case. Mitchell v. Mason, 325 F.3d 732 (6th Cir. 2003).

Where defense counsel is absent during critical stage of criminal proceedings, prejudice to defendant is presumed. U.S. v. Hamilton, 391 F.3d 1066 99th Cir. 2004).

As reiterated earlier herein, counsel sought to enter into plea negotiations from the first day of representation of Petitioner. Counsel could not possible make an informed decision to advise Petitioner to enter into guilty pleas when counsel did not attend, and did not possess the critical information necessary, i.e. evidence, as it results from the aforementioned pre-trial hearings. Therefore, counsel's advice to petitioner to enter guilty pleas based upon a lack of evidence, was erroneous on the part of counsel, rendering Petitioner's pleas constitutionally infirm.

Petitioner was denied his constitutional rights at every stage of the judicial proceedings leading to his receipt of multiple LIFE sentences, and as such, should be allowed to withdraw his plea.

GROUND TWELVE

TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE UNDER THE GUARANTEES OF THE SIXTH AMENDMENT FOR ALLOWING PETITIONER TO BE SUBJECTED TO THE PROVISIONS OF NRS 176.0931, LIFETIME SUPERVISION, THUS DENYING PETITIONER OF HIS RIGHTS TO DUE PROCESS, EQUAL PROTECTION AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

At the sentencing hearing held in this court on April 7th, 2004, the court imposed LIFETIME SUPERVISION pursuant to NRS 176.0931. (Trial Transcripts, Page 84, lines 23 - 24, Page 85, line 1).

The Judgement of Conviction does not refer to the applicable statute. However, Petitioner asserts the provisions of LIFETIME SUPERVISION are unconstitutional, as they are over-restrictive and place undue burdens on Petitioner upon his eventual release on parole.

The provisions of NRS 176.0931 invariably invoke the provisions of numerous other statutes eventually to be imposed against Petitioner upon his eventual release on parole. For instance, Petitioner will eventually be subjected to the provisions of NRS' 213.1243, 213.1245, 213.1255 and 213.1258. Petitioner was never informed of the provisions and restrictions of these various statutes.

The above quoted statutes will invariable place numerous restrictions on Petitioner's civil liberties, such as, but not limited to, places of employment, residency, availability of professional licenses, and forced mental health counseling.

Petitioner asserts the limitations imposed by LIFETIME SUPERVISION are unnecessarily restrictive and unconstitutional.

The statutes, as they relate to LIFETIME SUPERVISION, do not contain provisions to protect Petitioner's liberty interests rights and due process rights. Additionally, the requirement that Petitioner must register with local police authorities for the remaining years of his life while on parole is unconstitutional and results in a denial of due process, as it does not protect Petitioner's civil and liberty rights.

Liberty is a broad concept that extends to the full range of conduct which the individual is free to pursue and cannot be restricted except for a proper governmental objective.

Bolling v. Sharpe, 347 U.S. 497, 499-500, 74 S.Ct. 693, 98 L.Ed. 884 (1954); Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 572, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

The Ninth Circuit Court of Appeals that the court must analyze the constitutionality of registration under the right to privacy and finding liberty interest in privacy at stake. Russell v. Gregoire, 124 F.3d 1079, 1094 (9th Cir. 1997).

Registration requirements for sex offenders presents an importantly distinct kind of constitutional danger. It is a continuing intrusive and humiliating regulation of the person himself. Doe v. Attorney General, 430 Mass. 155, 715 N.E.2d 37 (1999). Registration places a tangible burden upon Petitioner for the rest of his life. Doe v. Pataki, 3 F.Supp.2d 456 (S.D.N.Y. 1988). The registration requirements permanently alter the legal status of all convicted sex offenders subject to the aforementioned statutes. Paul v. Davis, 424 U.S. 693, 710, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

As such, Petitioner's convictions are constitutionally infirm based upon counsel's failure to protect petitioner from the application of the various statutes as they relate to LIFETIME SUPERVISION in Nevada. The court also failed to inform Petitioner of the numerous restrictions and statutes as they relate to LIFETIME SUPERVISION, thus invalidating Petitioner's plea(s).

GROUND THIRTEEN

TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE UNDER THE GUARANTEES OF THE SIXTH AMENDMENT FOR FAILING TO PROTECT PETITIONER FROM NUMEROUS CONSECUTIVE LIFE SENTENCES, THUS DEPRIVING PETITIONER OF HIS RIGHTS TO DUE PROCESS, EQUAL PROTECTION, A FAIR TRIAL AND CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioner was sentenced to consecutive terms of LIFE imprisonment, which has resulted in a sentence structure wherein Petitioner is not available for release from incarceration at a minimum of forty-five years. Taken in consideration with Petitioner's age, this amounts to life imprisonment without the possibility of parole, as Petitioner will be well over the age of eighty-five when eligible for release.

Petitioner asserts that this amounts to cruel and unusual punishment. Additionally, Petitioner asserts that the various district courts in Nevada act in an insidious manner in imposing sentences of such harsh nature against persons, such as Petitioner, and not more culpable offenders and persons with more heinous crimes. This result can only be the result of an erroneous application of the law that is ludicrous and clearly violates the constitutional guarantee of equal protection. The test of a statute is by the constitution regard-

less of Supreme Court decision. R.C. Tway Coal Co. v. Glenn, 12 F.Supp. 570 (1935).

The equal protection clause is essentially a direction that all persons similarly situated should be treated the same. City of Cleburne Texas v. Cleburne Living Center, 105 S.Ct. 3249 (1985); Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394 (1982); and United States v. Harding, 971 F.2d 410 (9th Cir. 1992).

Sentencing rationale considers the aggravating and mitigating circumstances relevant in each instance. Ostensibly, the greater the aggravating circumstances warrant and compel the imposition of the harsher sentence. However, it is precisely at this juncture that equal protection is fouled in this case.

Persons convicted of more heinous and serious crimes, such as MURDER, recieve a much lower sentence in Nevada. (Nevada's Murder statutes carry sentences of ten years, and over.) Petitioner was not available to recieve a lesser sentence of anything below the statutory mandate of twenty (20) years to life, in gross disproportion to Nevada's Murder statutes. Additionally, the district courts in Nevada have consistently allowed for lower sentences for persons similarly situated as Petitioner, by plea bargain or other means, such as SUSPENDED life sentences. Petitioner recieved a substantially more severe sentences than other offenders in this State, for commission of similar and dissimilar crimes.

The United States Supreme Court has set criteria that must be recognized in determining if there has been an equal

protection violation upon imposition of sentence. The criteria includes (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction, that is, whether more serious crimes are subject to the same penalty or to less serious penalties, and (3) the sentences imposed for commission of the same crime in other jurisdictions. Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

The Eighth Amendment declares "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed. Solem v. Helm, Supra.

This is a non-capital case, in that Petitioner did not substantially harm any person, i.e. no physical harm, dismemberment occurred, and no MURDER occurred. Petitioner does not intend to downplay the seriousness of the instant alleged offenses, however, it can be agreed that in today's society it is most important to protect the public from a Murderer than a sex-offender, who can be rehabilitated through extensive mental health experts. It does not take forty-five years to rehabilitate offenders of sex crimes.

The United States Supreme Court has held similarly, in that "rape" is a disproportionate punishment than "murder." Coker v. Georgia, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977). Also see hutto v. Davis, 454 U.S. 370, 374, n.3, 102 S.Ct. 703, 705, n.3, 70 L.Ed.2d (556), where

the United States Supreme Court held that some prison sentences may be constitutionally disproportionate.

The sentencing structure imposed by this Court amounts to a death sentence, one day at a time, and thus is Cruel and unusual Punishment.

Appellate counsel's failure to bring forth the instant claim on direct appeal is ineffective and prejudices Petitioner, thus forcing Petitioner to present the claim for relief in the instant Petition.

GROUND FOURTEEN

TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO INVESTIGATE, COMMUNICATE WITH PETITIONER, INFORM PETITIONER OF THE FACTS AS THEY RELATE TO THE INSTANT CASE, AND EFFECTIVELY REPRESENT PETITIONER THROUGHOUT THE JUDICIAL PROCEEDINGS IN THIS CASE, AS MORE THOROUGHLY DESCRIBED BELOW, WHICH RESULTED IN AN UNKNOWNING, UNINTELLIGENT, AND INVOLUNTARY PLEA, A VIOLATION OF PETITIONER'S RIGHTS OF DUE PROCESS, EQUAL PROTECTION AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioner's court appointed attorneys, both trial and appellate, were ineffective in numerous areas, as outlined below, which prejudiced Petitioner. Petitioner did not have the full benefit of effective assistance of counsel, and counsel failed to preserve issues for appellate review prior to the entry of Petitioner's guilty pleas, therefore Petitioner did not knowingly waive any claims for relief.

1. Counsel failed to seek all available discovery, including the Grand Jury transcripts and Statements of Petitioner's ex-spouse. Counsel has a duty to investigate, failure to investigate is ineffective and leads to prejudice. Visciotti v. Woodford, 288 F.3d 1097, 1110-1115 (9th Cir. 2002).

Counsel's failure to investigate the alleged statements of Petitioner's ex-spouse, Melissa Botelho, admitted at the sentencing hearing through hearsay testimony of Detective Herrera was highly prejudicial to Petitioner. Counsel's failure led to an admittance of testimony with no cross-examination. If counsel had properly investigated, interviewed Melissa Botelho, he would have the facts necessary to present to the court, i.e., Petitioner never made the statements and court Divorce documents reveal Ms. Botelho's inaccuracies.

2. Trial counsel failed to provide a meaningful relationship with petitioner. Counsel visited Petitioner for only fifteen (15) minutes prior to the entry of Petitioner's guilty pleas. Hardly what is expected of competent counsel in this jurisdiction.

If counsel would have attempted to create an attorney-client relationship with Petitioner, he would have received information from Petitioner to be utilized at trial for a proper defense, i.e. Petitioner is not guilty of First Degree Kidnapping. (See Ground Ten, herein above, which Petitioner adopts in support of this claim.) Additionally, as noted in the PSI Report, it is alleged Petitioner "placed duct tape on her hands, eyes and mouth. Therefore, it is impossible for Petitioner to have forced the victim to perform oral sex upon Petitioner. Counsel has a duty to provide his client with loyalty and undivided attention to client's case in chief. Cuyler v. Sullivan, 446 U.S. at 348 (1980).

3. Counsel did not fairly present Petitioner and had no intention on assisting Petitioner at trial in an attempt to put forth an adversarial test of the prosecution's allegations. Counsel sought to enter into plea negotiations immediately following appointment as Petitioner's counsel. On October 17, 2003, less than thirty (30) days from being appointed as Petitioner's counsel, counsel sent a letter to prosecutor Kellie Anne Vilorio seeking a plea agreement. (See Exhibit #3, attached hereto) (Petitioner has requested a copy of the actual letter on numerous occasions, counsel has failed to provide the requested documentation)

In Thomas v. Foltz, 818 F.2d 476, 482 (6th Cir. 1987), the court held a conflict of interest existed between attorney and defendant due to counsel's actions of insisting client enter into guilty plea with no pre-trial investigation by counsel.

4. Counsel failed to seek information regarding petitioner's competency, when counsel knew of Petitioner's apparent mental deficiencies.

Petitioner adopts the facts and arguments set forth in Ground Seven, herein above.

5. Petitioner was never informed of his ability to withdraw his plea prior to sentencing.

Counsel should have informed Petitioner of his right to withdraw his plea, especially at the conclusion of this court's hearing wherein it was determined that the State was given the opportunity to present the privileged ex-spouse communications through the hearsay testimony of Detective

Herrera at the Sentencing Hearing. Counsel's failure to inform Petitioner, or act on Petitioner's behalf at this crucial stage of the proceedings was prejudicial to Petitioner, as Petitioner desired to withdraw his plea once he was informed the State would be able to present evidence at sentencing that counsel advised Petitioner the sentencing court would not be privy to.

Counsel's failure to advise Petitioner of the requirements of NRS 176.165 resulted in a denial of due process and an entry of an unconstitutional and unknowing plea. Petitioner entered into the pleas based upon counsel's erroneous advice concerning the spousal communications.

Petitioner desired, and continues to assert, his desire to withdraw his plea based upon the totality of the circumstances in the instant petition. Petitioner would have insisted on proceeding to trial rather than face a court, ultimately biased, in an attempt to receive a much lesser sentence. It should be noted, Petitioner did not receive ANY BENEFIT from entering into the instant plea agreement.

6. Appellate counsel did not have the full record before him to prepare a proper appellate brief seeking appellate review of preserved issues.

Petitioner adopts the facts and arguments set forth in Ground One and Two, herein above, in support of this claim.

7. Trial counsel failed to file the proper motions for recusal and/or change of venue in accordance with NRS 1.230 and NRS 1.235.

The sentencing court was biased by being subjected to false testimony of Detective Herrera concerning privileged spousal communications. Additionally, the court was subjected to a plethora of media publicity, containing false information.

The sentencing court should never had been subjected to the erroneous and misleading evidence. Therefore, the court was biased prior to imposing sentence against Petitioner and should have been recused in order for Petitioner to be sentenced before an impartial court. The court failed to allow defense counsel to orally seek a change of venue and/or recusal. The court relied on procedures in NRS' 1.230 and 1.235.

The Nevada Supreme Court held in Walker v. State, 944 P.2d 647 (Nev. 1997), that opinions formed by judge on the basis of facts introduced or events occurring in the course of current proceedings, or of a prior proceeding, where the opinion displays a deep seated favoritism or an antagonism that would make a fair judgment impossible amounts to Judicial Bias.

The abuse of a discretion by a judge shows bias and prejudice and lack of impartiality by failing to correct what he knew or should have known to support a conviction. Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992).

8, Counsel informed Petitioner that a jury would convict on all counts if they were to convict on one count, thus Petitioner needed to enter into a plea agreement wherein he ultimately received a LIFE sentence without possibility for release for forty-five (45) years. Counsel also informed Petitioner the court would not be subjected to all the facts

surrounding the instant case and therefore Petitioner would receive a much lesser sentence than ultimately imposed. This amounted to coercion, wherein Petitioner entered his guilty pleas based on misinformation presented by counsel. Petitioner would have insisted on proceeding to trial to prove his innocence to the alleged offenses if were not for the erroneous advice of counsel.

The Nevada Supreme Court held in State v. Gomes, 930 P.2d 701 (Nev. 1996), to state a claim of ineffective assistance of counsel sufficient to invalidate a Judgment of Conviction based on a guilty plea, a defendant must demonstrate a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. State v. Langarica, 187 Nev. 932, 933, 822 P.2d 1110, 1111 (1991).

The standard for determining whether a guilty plea is constitutionally valid is whether the guilty plea represents a voluntary and knowing and intelligent choice among the alternative courses of action open to the defendant. North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160 (1970). The court should look to the totality of the circumstances surrounding the guilty plea. Henderson v. Morgan, 426 U.S. 637, 648, 96 S.Ct. 2253.

Petitioner has demonstrated that the totality of the circumstances surrounding his plea, based on ineffective assistance of counsel, left Petitioner with no alternative but to enter a guilty plea instead of proceeding to trial wherein counsel was ill-prepared and would not assist Petitioner in a reasonably effective manner based on counsel's failure to investigate.

The following areas are but just a few of the ineffective claims of counsel, which rendered Petitioner's plea constitutionally infirm.

A. Counsel failed to investigate, or hire an investigator to secure the facts surrounding the instant case.

B. Counsel failed to ensure Petitioner's California proceedings were legally sound.

C. Counsel failed to ensure Petitioner was represented by competent and effective counsel in the California extradition proceedings.

D. Counsel failed to investigate into the fact that all of the documentary and physical evidence surrounding the instant case is tainted, lacks a chain of custody, and is therefore inadmissible at a jury trial.

E. Counsel failed to ensure Petitioner's presence at all preliminary judicial proceedings, where Counsel failed to appear and represent Petitioner at any and all of the pre-trial judicial proceedings. In addition, counsel failed to secure the transcripts from the various pre-trial proceedings wherein counsel would have deduced there existed insufficient evidence to convict Petitioner of all of the offenses alleged by the prosecution.

F. Counsel failed to investigate victim and other possible prosecution witnesses in an attempt to ascertain truthfulness of matters asserted.

G. Counsel failed to interview, or otherwise converse with Petitioner concerning the facts of the instant proceedings and alleged offenses.

H. Counsel failed to review police reports which contain false and misleading statements.

I. Counsel failed to review forensic reports which do not conclusively prove Petitioner's guilt.

J. Counsel failed to secure all photographic evidence to be utilized against Petitioner at trial. All of which was highly prejudicial and inadmissible at any jury trial.

K. Counsel failed to research and investigate the circumstances surrounding a search warrant used by police detectives that was improperly served upon Petitioner's spouse for the purposes of securing evidence.

L. Counsel failed to investigate statements and/or court records pertaining to the privileged spousal communications used against Petitioner at sentencing. Counsel would have secured information indicating Ms. Melissa Botelho had a propensity to falsify testimony.

M. Counsel failed to represent Petitioner or attempt to ensure Petitioner received a judicially sound "bail" hearing. The prosecution communicated "ex-parte" with the court in seeking, and ultimately gaining, excessive bail against Petitioner.

N. Counsel failed to file ANY pre-trial motions seeking full discovery, attempting to suppress inadmissible evidence, and seeking to dismiss based on all of the alleged errors that occurred during the pre-trial proceedings, i.e. grand jury hearing, arraignment, etc.

O. Counsel failed to file motions seeking to suppress Petitioner's statements made to investigators without being apprized of his MIRANDA rights.

The above noted areas are but a few of the instances wherein trial counsel failed to reasonably and effectively represent Petitioner.

Counsel was adamant on coercing Petitioner into entering guilty pleas from the onset of representation, as is clear from the record, counsel informed this court on numerous occasions of his pending "murder trial" and was therefore unable to appear on behalf of Petitioner at several of the pre-trial hearings, as outlined herein above.

This court must find that Petitioner was prejudiced as a result of counsel's deficiencies and had not alternative but to enter a guilty plea versus proceeding to trial with an attorney who refused to conduct even a precursory amount of investigation into the facts surrounding the instant alleged offenses.

Counsel's actions, or lack thereof, is presumptively prejudicial and Petitioner's instant WRIT must be granted.

U.S. v. Cronin, 466 U.S. 648, 649-50 (1984).

GROUND FIFTEEN

TRIAL COUNSEL WAS INEFFECTIVE UNDER THE GUARANTEES OF THE SIXTH AMENDMENT WHEN HE ALLOWED PETITIONER TO BE SENTENCED BY A BIASED AND PREJUDICIAL COURT WITHOUT ATTEMPTING TO INVESTIGATE AND PRESENT A PLETHORA OF MITIGATING EVIDENCE IN AN ATTEMPT TO SECURE A LESSER AVAILABLE SENTENCE, THUS DENYING PETITIONER HIS RIGHTS TO DUE PROCESS, EQUAL PROTECTION AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

Petitioner's court appointed counsel, Sean Sullivan, failed to investigate and present mitigating evidence to

the sentencing court in an attempt to secure a lesser available sentence for Petitioner.

Counsel failed to request concurrent sentences based on the offenses being from "one continuous act." As the PSI report indicates the alleged victim's mouth was covered by tape, it is impossible for Petitioner to have forced the victim to perform oral sex upon Petitioner, thereby negating the sentence of 20 years to life for sexual assault as alleged in Count III.

Counsel failed to properly request for a change of venue and/or recusal based upon the adverse testimony of Petitioner's wife entered through hearsay and the prosecution's NOTICE OF INTENT to enter prior bad acts and the abundance of pre-trial media publicity.

Counsel failed to interview potential witnesses who were able and willing to testify before the sentencing court as to the work ethics, lifestyle, social background and moral characteristics of Petitioner. This information would have helped the sentencing court impose a less severe sentence based on the circumstances surrounding Petitioner's background and the facts surrounding the instant offenses.

Counsel failed to investigate and admit evidence that existed to refute the testimony of Detective Herrera concerning privileged spousal communications. Counsel's investigations would have produced results that indicated Ms. Botelho had a propensity for falsifying evidence, as she had filed for divorce against

Petitioner wherein court documents reveal their marriage was not dissolved based upon any adverse actions by Petitioner. Additionally, counsel's actions or investigations would have revealed Petitioner never stated he intended to dismember any person or have sexual relationships with a minor.

The following persons were available to testify to the sentencing court, in an attempt to humanize Petitioner before the court, in an attempt to secure a lesser available sentence.

<u>NAME</u>	<u>RELATIONSHIP</u>
William Botelho	Father
LeeAnne Fish	Sister
Mary Jo Cherry	Sister
William Botelho	Brother
Alice Botelho	Grand Mother
Ronald Fish	Brother-In_Law
Dan Diehl	Friend

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978), the United States Supreme Court held:

Possession of the fullest information possible concerning the defendant's life and characteristics . . . is highly relevant, if not essential, to the selection of an appropriate sentence.

The Nevada Supreme Court has held similarly in Brown v. State, 110 Nev. 846 (1994), where "defense counsel neither presented any witnesses to testify on brown's behalf, nor did he present any evidence of mitigating circumstances in an effective manner." Id. at 851. The court went on to indicate

"When a judge has sentencing discretion, as in the instant case, possession of the fullest information possible regarding the defendant's life and characteristics is essential to the selection of a proper sentence." Id. at 851. Additionally, in Brown, Supra, the Court further held that the District Court erred in denying Brown's Petition for Post-Conviction relief based on his counsel's failure to call any witnesses on his client's behalf or to properly request that Brown's sentences run concurrently.

The United States Supreme Court, in Commonwealth of Pennsylvania v. Ashe, 302 U.S. 51, 58 S.Ct. 59 (1937), held:

In the determination of sentences, justice requires consideration of more than particular acts by which the crime was committed, and that there be taken into account the circumstances of the offense, together with the character and propensities of the offender, and his past may be taken to suggest the period of restraint and the kind of discipline that ought to be imposed.

Furthermore, the United States District Court of Nevada agrees with the principles laid out by the State of Nevada, by stating that, "Counsel's complete failure to present any argument or evidence that might have persuaded the Judge to temper the severity of his sentence is sufficient to undermine our confidence in the outcome." Butler v. Sumner, 783 F.Supp. 519, 522 (D. Nev. 1991).

The primary purpose of the penalty phase is to ensure that the sentence is individualized, by focusing on the particularized characteristics of the Defendant. Brownlee v. Hale, 306 F.3d 1043, 1074, (11th Cir. 2002); cf., Siripongs v. Calderon, 35 F.3d 1308, 1316 (9th Cir. 1994), where the court found counsel ineffective during the penalty phase when he failed to conduct

more than a cursory investigation of the defendant's background and made no attempt to humanize him before the court.

Compounding counsel's failure to investigate and develop a positive mitigating case, counsel allowed the prosecution to admit unfounded statements and speculation without objection or attempts to prevent the admission of the prejudicial spousal hearsay statements.

Clearly, the aforementioned scenarios paint the Petitioner in a different light, and but for counsel's errors, the outcome of the sentencing hearing would have been different. The law in this context does not require certainty and prejudice is shown where there is a reasonable probability of a different result. Mayfield v. Woodford, 270 F.3d 915, 936 (9th Cir. 2001).

Petitioner has proved that evidence would have been presented but for counsel's errors, that would probably have rendered a substantially different result at the sentencing hearing.

GROUND SIXTEEN

PETITIONER WAS DENIED HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, EQUAL PROTECTION, A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE CUMULATIVE EFFECT OF ERRORS COMMITTED BY COUNSELS, THE PROSECUTION AND THE COURT, RESULTING IN AN UNKNOWING, UNINTELLIGENT, AND INVOLUNTARY GUILTY
PLEAS AND IMPOSITION OF NUMEROUS LIFE SENTENCES

Petitioner's convictions and sentences are invalid under the Federal and State Constitutional guarantees of Due Process, Equal Protection, Effective Assistance of Counsel and a Fair Tribunal due to the cumulative effect of errors, as presented herein, such as in the admission of evidence, misconduct of the prosecution, systematic deprivation of Petitioner's right to effective assistance of counsel throughout the judicial proceedings.

Petitioner entered into guilty pleas based upon promises by counsel, as a result of counsel's erroneous advice. Petitioner would have insisted on proceeding to a jury trial were it not based upon deficient representation by an attorney whom insisted on coercing Petitioner into entering into a guilty plea from the onset of representation, without conducting a scintilla of preparatory investigation.

The Court, counsel, and the prosecution committed numerous errors throughout representation, or non-representation at all judicial hearings relative to the instant action, which include, but are not limited to, the following areas:

1. Counsel was ineffective on direct appeal as outlined in Grounds One and Two, herein.
2. The court erred in denying Petitioner's Motion for recusal and/or change of venue and allowed the entry of hearsay evidence concerning privileged spousal communications.
3. Sentencing hearing was conducted before a biased and prejudicial court.
4. Counsel was ineffective in failing to request a lesser available sentence at the sentencing hearing.
5. The sentencing court relied on untrue and/or impalpable prejudicial evidence.
6. The court entered an ambiguous sentence left uncorrected by counsel.
7. Petitioner's guilty plea is not knowingly, intelligently and voluntarily entered.

8. The plea canvass was deficient in failing to properly advise petitioner of the consequences of his plea.

9. Petitioner's decision to enter guilty pleas was predicated on ineffective assistance of counsel.

10. The court failed to advise Petitioner of the requirements of NRS 176.0927 and LIFETIME SUPERVISION.

11. Petitioner's plea is invalid due to prosecutorial misconduct.

12. Trial counsel was ineffective for failing to appear and/or ensuring the appearance of Petitioner at pre-trial hearings, including the grand jury hearing, in violation of NRS' 172.239, 172.241.

13. Petitioner was incompetent to enter into his pleas. This court, counsel, and the prosecution failed to seek a competency hearing in accordance with NRS 178.405.

14. Petitioner's convictions are a result of multiplicitous, duplicitous and lesser included offenses in violation of the double jeopardy clause.

15. Trial Counsel was ineffective in failing to ensure Petitioner received a PSYCHOSEXUAL EVALUATION and report prior to sentencing.

16. Petitioner's convictions are unconstitutional due to being sentenced to an ambiguous and vague, and thus unconstitutional KIDNAPPING statute, NRS 200.310 and NRS 200.320.

17. Trial Counsel was ineffective in failing to ensure Petitioner received the full benefit of pre-trial hearings, such as extradition, arraignment, grand jury and preliminary hearings.

18. Trial Counsel, the court, and the prosecution subjected Petitioner to the unconstitutional implication of LIFETIME SUPERVISION.

19. Trial counsel was ineffective in allowing Petitioner to be subjected to a cruel and unusual sentencing structure.

20. Trial and appellate counsel were ineffective in failing to investigate and properly represent Petitioner in all judicial proceedings, and pre-trial investigations, surrounding the instant action.

21. This court was biased and prejudicial in its' determination of sentences against Petitioner when it was subjected to undue influences from spousal communication testimony and prejudicial media coverage.

All of the aforementioned led to Petitioner entering into an invalid plea resulting in an extremely harsh sentencing scheme.

In United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996), the Ninth Circuit Court of Appeals held that:

In some cases, although no single trial error examined in isolation is sufficiently prejudiced to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. Where, as here, there are a number of errors at trial, a balkanized, issue-by-issue harmless error review is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. In those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors.

Although individual errors looked at separately may not rise to the level of reversible error, the cumulative effect may nevertheless be so prejudicial as to require reversal.

United States v. Necoechea, 986 F.2d 1273, (9th Cir. 1993).

Petitioner's substantive rights were violated as demonstrated by the issues presented herein, let alone, the deprivation of Petitioner's Constitutional rights as outlined in the various grounds for relief presented herein above.

Unless an aggregate harmlessness determination can be made, corrective error will mandate reversal, just as surely as will individual error that cannot be considered harmless. United States v. Rivera, 900 F.2d 1467, at 1470 (10th Cir. 1990).

Due to the cumulative effect of errors, Petitioner's convictions require reversal

CONCLUSION

Petitioner files this accompanying Petition for Writ of Habeas Corpus (Post-Conviction), pursuant to NRS 34.360, et. seq., in which he presents severable viable colorable claims of ineffective assistance of counsel. The claims rise out of instances from Constitutional violations during pre-trial, preliminary, arraignment, sentencing and appellate procedures.

Nevada Revised Statute 34.770 provides for judicial determination in warranting an evidentiary hearing: (1) upon return and/or answer, and review of all supporting documents on file, a determination shall be made as to whether an evidentiary hearing is required.

Petitioner asserts that an evidentiary hearing is mandated in the instant case, wherein Petitioner has provided facts and argument, which if proven true, would warrant relief sought herein. Bolden v. State, 99 Nev. 181 (1983) and Gibbons v. State, 97 Nev. 520 (1981).

In the instant Petition, a hearing is necessary, because based on a review of the record as a whole, including charging documents, arraignment, preliminary hearings, grand jury hearings, plea hearings, sentencing, and appellate review, the absence of competent assistance of counsel, such hearing is necessary to decide these matters.

Thus, Petitioner has not simply raised bare or naked allegations. Even without the benefit of a complete record in the preparation of the instant post-conviction pleadings, there are great significances that have been established in misconduct and inadequate representation. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, State v. Runningeagle, 859 P.2d 169 (1993), cited by the Nevada Supreme Court in Brown v. State, 113 Nev. 305, 933 P.2d 187, 190-91 (1997).

Petitioner has met his burden under the two-prong test set forth in Strickland v. Washington, Supra, and is entitled to the granting of the instant Petition for Writ of Habeas Corpus.

Petitioner respectfully requests an evidentiary hearing on the issues presented herein and GRANTING of the instant WRIT.

DATED THIS 28th DAY OF FEBRUARY, 2006.

Respectfully Submitted,



Michael Todd Botelho
Petitioner, In Proper Person

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/ / /

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the Petitioner named in the foregoing Petition and knows the contents thereof, that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Executed this day in Pershing County, Nevada.

Dated this 28th day of February, 2006.

Signed under the penalty of perjury in accordance with
NRS 208.165.

By: Michael Todd Botelho
Michael Todd Botelho
Petitioner, In Proper Person

/ / /

/ / /

/ / /

CERTIFICATE OF SERVICE BY MAIL

I, Michael Todd Botelho, do hereby certify that on this date I did serve Respondents with a true and correct copy of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (Post-Conviction) by placing same in the United States Postal Service, postage being fully prepaid, and addressed as follows:

GEORGE J. CHANOS
NEVADA ATTORNEY GENERAL
100 NORTH CARSON STREET
CARSON CITY, NEVADA 89701-4717

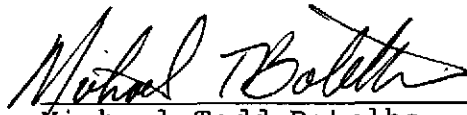
&

JACK PALMER, WARDEN
LOVELOCK CORRECTIONAL CENTER
(Via Inter-Departmental Mail)

&

RICHARD GAMMICK
WASHOE COUNTY DISTRICT ATTORNEY
POST OFFICE BOX 30083
RENO, NEVADA 89520-3083

DATED THIS 28th DAY OF FEBRUARY, 2006.


Michael Todd Botelho
Petitioner, In Proper Person

/ / /

/ / /

/ / /

DC-09900071927-007
CR03P2156
POST: MICHAEL TODD BOTELHO (3 Pages
District Court 03/06/2006 11:01 AM 1955
Washoe County
Nev.

EXHIBIT #1



Washoe County District Attorney

RICHARD A. GAMMICK
DISTRICT ATTORNEY

Sullivan

September 29, 2003

NOTICE OF GRAND JURY INVESTIGATION
AND RIGHT TO TESTIFY

Michael Todd Botelho
 c/o Washoe County Jail
 911 Parr Blvd.
 Reno, NV 89512

Dear Mr. Botelho:

You are hereby notified that you are the subject of an investigation by the Washoe County Grand Jury, which is looking into allegations of Kidnaping in the First Degree, Sexual Assault on a Child (3 Counts), and Battery with the Intent to Commit Sexual Assault.

While the Grand Jury is not required to hear evidence for the defendant (N.R.S. 172.145), they are required to consider and hear any evidence which may "explain away" the charge. Therefore, Nevada law affords you, as the subject of a Grand Jury investigation, the right to appear and testify before the Grand Jury if you request to do so. (N.R.S. 172.241). But the same law also requires that you give up your constitutional privilege against self-incrimination by signing a written waiver before you testify to the Grand Jury. That means that anything you say can and will be used against you in any legal proceedings.

Nevada law (N.R.S. 172.239) also allows you, as the subject of a Grand Jury investigation, to have your attorney present with you during any Grand Jury appearance. Your attorney's participation, however, is limited to advising you only; he or she may not address the Grand Jury members, ask questions, make objections, make statements or otherwise participate in the proceedings.

Michael Todd Botelho
September 29, 2003
Page 2

The Grand Jury investigating you will meet on the 8th day of October, 2003, at 1:30 p.m., in room 212 of the Washoe County Courthouse at 75 Court Street, Reno, Nevada. Please notify me or my secretary, either through your attorney if you have one or personally, if you wish to testify before the Grand Jury so your appearance can be scheduled. You will be provided with the "waiver of rights" form by the Grand Jury Foreman when you appear.

RICHARD A. GAMMICK
DISTRICT ATTORNEY

By: Kelli Anne Viloria
KELLI ANNE VILORIA
Deputy District Attorney

KAV:lj

cc: Washoe County Public Defender

CR03P2156
POST: MICHAEL TODD BOTELHO (2 Pages
District Court 03/06/2006 11:01 AM
Washoe County 1955
CMTTL

EXHIBIT #2

V5.90
WASHINGTON COUNTY DETENTION FACILITY
INMATE REQUEST

Willi
Courts Transportation

OCT 11 2003

CR03-2156

D3 DA
PD

1. Only one issue/topic per request form.
2. Write only in the space provided.
3. Only one form per each issue/topic.
4. No profanity.
5. Do not address your request to a named individual.

Inmate's Name: MICHAEL BOTECH Booking #: 03-1286

Housing Unit: 4 Cell #: 3 Date: 10-10-03

Describe Request:

I WENT TO COURT YESTERDAY DOWNTOWN
TO FIND OUT THE SHERIFFS DEPT SUPPOSEDLY
MADE A MISTAKE AND THAT COURT WERE
HELD WEDNESDAY 10-8-03 AND THAT I
MISSED IT - I WAS SUPPOSED TO BE
THERE, I WANTED TO BE THERE AND
I HAD A RIGHT TO BE THERE,
NOT TO MENTION I STILL HAVE NOT
SEEN A LAWYER CONCERNING MY CASE
THAT I NOW CONVENIENTLY HAVE BEEN
DEPRIVED!

Inmate's Signature: Michael Botech

Receiving Staff Member/I.D.#: 07242
(PRINT NAME)

Date: _____

(INMATE IS NOT TO WRITE BELOW THIS SPACE)

ACTION

CR03-2156

Routed to: COURT TRANSPORT Date: 10/10/03 Re-Routed to: 2JDC Date: 10/11/03

Answer: Approved ☐ Denied ☐

Reason:

Referred to Counsel per Judge Polaha

FILED
2003 OCT 30 AM 11:10
RONALD A. LORRIN, JR.
CLERK
BY AS
RECEIVED

Responding Staff Member / I.D.#: _____

Date: _____

(PRINT NAME)

White-Booking; Canary-Inmate; Pink-Inmate Receipt

CR03P2156 DC-09500071927-009
POST: MICHAEL TODD BOTELHO (4 Pages
District Court 03/06/2006 11:01 AM
Washoe County 1955
nm

EXHIBIT #3



Washoe County Public Defender

Jeremy T. Bosler / Public Defender

Standard of Excellence Since 1969

September 15, 2005

Michael Todd Botelho #80837
Lovelock Correctional Center
P. O. Box 7011
Carson City, Nevada 89702

Dear Mr. Botelho:

Pursuant to your request, enclosed is a copy of the discovery in your criminal case. Following is an itemization of those documents:

CHANGE OF PLEA (12-11-2003)

1. ✓ Indictment
2. ✓ Guilty Plea Memorandum
3. ✓ Transcript of interview of Jane Doe
4. ✓ Transcript of statement of Jennifer Rudolph
5. ✓ Application for Setting (March 11, 2004, motion hearing)
6. ✓ Application for Setting (October 23, 2003, post-indictment arraignment)
7. ✓ Application for Setting (December 11, 2003, change of plea)
8. ✓ Subpoena of Verizon Wireless cell account information (12 pages)
9. ✓ Washoe County Pretrial Services Assessment Report
10. ✓ Letter to Sean Sullivan from Kelli Anne Viloria dated October 3, 2003
11. ✓ Letter to Kelli Anne Viloria from Sean Sullivan dated October 17, 2003, w/encl *NEVER SEEN IT!*
12. ✓ Letter to Sean Sullivan from Kelli Anne Viloria dated November 5, 2003
13. ✓ Inmate Request dated 10-10-03
14. ✓ Fax transmittal cover sheet and Ex-Parte Motion to Increase Bail *(16 pages) 10-1-2003*
15. ✓ Washoe County Sheriff's Office Evidence (4 pages)
16. ✓ Carson City Sheriff's Office Evidence Recovery Report (2 pages)
17. ✓ Handwritten letter unsigned (4 double sided pages)
18. ✓ Statements made to Carson City Sheriff's Department by Jane Doe and Michelle Settle
19. ✓ Newspaper articles (7 pages)
20. ✓ Request for Preliminary Hearing Discovery
21. ✓ Application for Appointment of Public Defender
22. ✓ Request, Agreement and Order for Pre-Trial Reciprocal Discovery Defendant's Request for Discovery
23. ✓ Letter to Sean Sullivan from Leeanne (Botelho) Fish dated February 3, 2004, with enclosure letter to Judge Polaha
24. ✓ Letter to Judge Polaha, unknown author, undated
25. ✓ Letter to Michael Todd Botelho from Records Department dated October 2, 2003 *PRELIM H67464*
26. ✓ Investigative Request
27. ✓ Stipulation and Order for Continuance filed Jan 30, 2004

28. ✓ Presentence Report dated January 13, 2004
29. ✓ Defendant's Statement (17 pages)
30. ✓ Letter To Whom It May Concern from Jane Doe's friend and big sister (8 pages)
31. ✓ Incident Reports, Carson City Sheriff's Dept. (8 pages)
32. ✓ Susanville Police Department Arrest Report (4 pages)
33. ✓ Confidential Psychological/Substance Abuse Evaluation to be Filed Under Seal (Dr. Davis)
34. ✓ Criminal Complaint filed Sep 12, 2003
35. ✓ Affidavit in Support of Complaint and Warrant of Arrest filed Sep 12, 2003
36. ✓ Order Staying Proceedings filed 10-8-03
37. ✓ Notice of Intent to Introduce Prior or Other Bad Act Evidence at Sentencing Hearing
38. ✓ Opposition to State's Introduction of Prior or Other Bad Act Evidence at Sentencing Hearing; Defendant's Motion to Have the Matter Sealed, to Recuse the Present Sentencing Court, and to Have the Matter Transferred to Another Court for Sentencing
39. ✓ Reply in Opposition to Defendant's Opposition to State's Introduction of Other Bad Act Evidence; Defendant's Motion to Seal; and Answer to Defendant's Motion to Recuse and Transfer Case
40. ✓ Statements of Michael Botelho, Statement by Melissa Botelho and Supplemental Reports
41. ✓ Handwritten letters
42. ✓ Transcript of proceedings held October 8, 2003 (*Grand Jury*)
43. ✓ Notice of Grand Jury Investigation and Right to Testify to Michael Todd Botelho from Kelli Anne Vilorio, Deputy District Attorney, dated September 29, 2003
44. ✓ Motion to Dismiss and Order (dismissing Indictment) filed April 22 and 28, 2004
45. ✓ Search Warrant and Affidavit (Lyon County), dated August 20, 2003
46. ✓ Duplicate Original Seizure Order (telephonic) and Affidavit (Lyon County) dated August 15, 2003, not filed
47. Judgment of Conviction (False Claims for Benefits) (Lyon County) filed Jun 16, 1993
48. Certificate dated Jan 11, 1993 (Lyon County)
49. Commitment and Bail dated Jan 11, 1993 (Lyon County)
50. Print Key Output Lyon County Sheriff Office, January 12, 1993
51. Fifteen Day Waiver dated December 9, 1992 (Lyon County)
52. Affidavit, Application and Affirmation for Appointment of Counsel dated Nov 23, 1992 (Lyon County)
53. Warrant of Arrest, dated Nov 19, 1992 (Lyon County)
54. Criminal Complaint filed 11-20-92 (Lyon County)
55. Information filed Jan 19, 1993 (Lyon County)
56. Memorandum of Plea Negotiation filed Apr 28, 1993 (Lyon County)
57. Criminal History Record and Mugshots
58. ✓ Suspect Blood Draw
59. ✓ Arrest Report and Declaration of Probable Cause (9-24-03)
60. ✓ Maps of Incident Location and Forensic documents (64 pages)
JUDGEMENT OF CONVICTION 4-7-2004

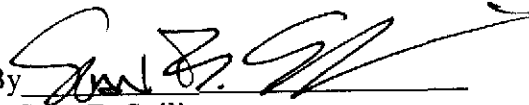
Our office does not receive transcripts of all of the proceedings. You must contact the Washoe County Clerk's Office, 75 Court Street, Reno, Nevada, for any further transcripts that you might require.

Our office is in possession of certain audio/video tapes involving this case; however, in light of the fact that you do not have the capability to play these tapes, we will keep them with the file for the benefit of your future counsel of record.

If you have any questions, please call me collect during office hours at 775-337-4803. Or, you may write me a letter.

Sincerely,

JEREMY T. BOSLER
Washoe County Public Defender

By 
Sean B. Sullivan
Deputy Public Defender

SBS: clh

Encl.

ORIGINAL

FILED

Michael Todd Botelho, #80837
 Lovelock Correctional Center
 Post Office Box 359
 Lovelock, Nevada 89419

2006 MAR -6 PM 3:41

RONALD A. LONGTIN, JR.

BY 
DEPUTY

Petitioner, In Proper Person

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

--ooOoo--

MICHAEL TODD BOTELHO,

Petitioner,

Case No. CR03p2156

vs.

THE STATE OF NEVADA,

Dept. No. 3

Respondent.
 _____/EX-PARTE MOTION FOR APPOINTMENT OF COUNSEL

COMES NOW, Petitioner, Michael Todd Botelho, in his proper person, and submits this EX-PARTE MOTION FOR APPOINTMENT OF COUNSEL in the above entitled action, requesting appointment of counsel on his accompanying Petition for Writ of Habeas Corpus (Post-Conviction).

This Motion is made and based on NRS 34.745 and NRS 34.750, all papers and pleadings on file herein, and the following Points and Authorities.

BRIEF STATEMENT OF THE CASE

Petitioner is incarcerated in the Nevada Department of Corrections pursuant to entering a guilty plea on the advice of counsel in this Honorable Court.

DC-0890007-1886-029
 CR03P2156
 POST: MICHAEL TODD BOTELHO (6 Pages
 District Court 03/06/2006 11:03 AM
 Washoe County 1670

On April 7, 2004, this Honorable Court sentenced Petitioner to numerous LIFE sentences resulting in a minimum term of incarceration of forty-five (45) years. A Judgment of Conviction was entered on same date.

Petitioner's court appointed counsel pursued an Appeal to the Nevada Supreme Court (Docket 43247), wherein counsel presented a single issue for review.

The Nevada Supreme Court issued an ORDER OF AFFIRMANCE on April 4, 2005. Remittitur issued on April 29, 2005.

Petitioner has subsequently filed proper person pleadings in this Court requesting dismissal of counsel of record, and a Court ORDER directing prior counsel to subsequently provide Petitioner with the contents of his case file. As of this date, counsel has failed to comply and/or provide Petitioner with the COMPLETE contents of his case file, including, but not limited to, transcripts and discovery.

Petitioner has now filed a Petition for Writ of Habeas Corpus (Post-Conviction) wherein he has presented several viable claims of a Constitutional magnitude.

Petitioner now moves this Honorable Court for an ORDER appointing counsel to assist him in preparing a possible Supplement to the aforementioned Petition, wherein there may exist further colorable claims for relief upon receipt of the contents of the case file, including Appellate issues.

POINTS AND AUTHORITIES

Although it is well established that, absent a statutory mandate, a defendant does not have a constitutional right to Counsel under the Sixth Amendment in post-conviction proceedings,

Coleman v. Thompson, 501 U.S. 722, 725, 111 S.Ct. 2546, 2552 (1991), the Nevada State Supreme Court addressed the issue in McKague v. Warden, 112 Nev. 159, 912 P.2d 255, 257-58 (1996), and held that with the exception of NRS 34.820(1)(a) (appointment of counsel when defendant is under a death sentence), one does not have "any constitutional or statutory right to counsel at all . . ." in post-conviction proceedings.

Petitioner received virtually no representation throughout the case at bar, or in the appellate court.

In support of the instant pleading, Petitioner cites NRS 34.745, which provides a format that Petitioner for counsel must adhere to. The third instruction of this statute requires an Affidavit in support in order to have an attorney appointed. NRS 34.750 allows the District Court the discretion to appoint counsel if certain criteria are met, which provides in pertinent part:

A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied with the allegation of indigency as being true, and the petition is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider, among other things, the severity of the consequences facing the petitioner, and whether:

- (a) The issues presented are difficult,
- (b) The petitioner is unable to comprehend the proceedings, or
- (c) Counsel is necessary to proceed with discovery.

NRS 34.750(1) states that the Petitioner must first show that his petition will not be summarily dismissed. Petitioner's Petition is right on point, in that he raises several claims of ineffective assistance of counsel, violations of due process,

and other colorable claims for relief. (See accompanying Petition for Writ of Habeas Corpus (Post-Conviction)). These issues compellingly show that Petitioner's counsel provided ineffective assistance, at least, by stipulating to Petitioner's guilt.

Counsel's failure to litigate the issues found in this case subjected Petitioner to ineffective assistance of counsel throughout the instant action. The Constitutional right, briefly, to effective assistance of counsel extends to a direct appeal. Burke v. State, 110 Nev. 1366, 887 P.2d 267 (1994). This claim is reviewed in the "reasonable effective assistance test" set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Also see Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

The issues presented herein are complex, petitioner is unlettered in the science of law, does not comprehend the instant proceedings, has sought the assistance of other inmates in the research and preparation of his post-conviction pleadings, and does not have the full record before him. Counsel would absolutely be necessary to proceed with discovery, as the case file is very limited. However, a complete review of the entire record may very well warrant an "Amended Petition" being prepared. As such, counsel is necessary to proceed with discovery in preparation for an evidentiary hearing.

Ordinarily, claims like the ones presented in the instant Petition would probably require that this court enter an ORDER mandating an evidentiary hearing on the questions of facts

regarding counsel's explanation for why the multiple defenses were omitted. Indeed, this court is fully aware of the Nevada Supreme Court's jurisprudence regarding the need for an evidentiary hearing when Petitioners' allege a colorable claim of ineffective assistance of counsel. *Bolden v. State*, 99 Nev. 181 (1983), and *Gibbons v. State*, 97 Nev. 520 (1981).

In the instant case, a denial of counsel for this Petitioner would rise to the level of a clear unequal protection violation of the law. *Griffin v. Illinois*, 351 U.S. 12, at 17, (1956). The fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its' hand extends as far to each.

Where the complexities of a case, and a Petitioner's inability to comprehend the proceedings are such that a denial of counsel would amount to a denial of due process, this is especially true when a Petitioner has such limited education and is incapable of presenting his claims in such a way that the court can afford him a fair hearing. *Brown v. United States*, 621 F.2d 54 (9th Cir. 1980), also see *Hawkins v. Bennett*, 423 F.2d 948 (1970).

CONCLUSION

Based upon the foregoing arguments and the attached Affidavit of Petitioner, this Honorable Court should find that Petitioner has met his burden in justifying the appointment of counsel to represent him on his Petition for Writ of Habeas Corpus (Post-Conviction), on file herein.

Petitioner respectfully requests this Honorable Court

issue an ORDER granting appointment of counsel in the instant action.

WHEREFORE, Petitioner respectfully prays that this Honorable Court grant the relief sought herein.

DATED THIS 28th DAY OF FEBRUARY, 2006.

Respectfully Submitted,



Michael Todd Botelho
I.D. #80837
Petitioner, In Proper Person
Lovelock Correctional Center
Post Office Box 359
Lovelock, Nevada 89419

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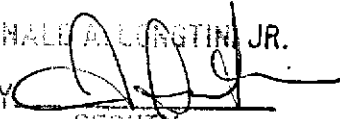
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FILED

Michael Todd Botelho, #80837
 Lovelock Correctional Center
 Post Office Box 359
 Lovelock, Nevada 89419

2006 MAR -6 PM 3:41

RONALD A. LORSTIN, JR.

BY 
DEPUTY

Petitioner, In Proper Person

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

--ooOoo--

MICHAEL TODD BOTELHO,

Petitioner,

Case No. CR03P2156

vs.

THE STATE OF NEVADA,

Dept. No. 3

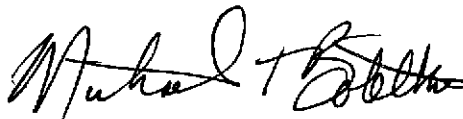
Respondent.
/MOTION FOR RECUSAL

COMES NOW, Petitioner, Michael Todd Botelho, in his proper person, and files this MOTION FOR RECUSAL in the above entitled action.

This Motion is based upon Nevada Revised Statutes (NRS') 1.230 and 1.235, as well as the attached Sworn Affidavit in support thereof.

DATED THIS 28th DAY OF FEBRUARY, 2006.

Respectfully Submitted,



Michael Todd Botelho
 Petitioner, In Proper Person

/ / /

/ / /

CR03P2156
 DC-09500071886-030
 POST: MICHAEL TODD BOTELHO (4 Pages
 District Court 03/06/2006 11:03 AM
 Washoe County 2180
 COUNTY

Michael Todd Botelho, #80837
Lovelock Correctional Center
Post Office Box 359
Lovelock, Nevada 89419

Petitioner, In Proper Person

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

--ooOoo--

MICHAEL TODD BOTELHO,

Petitioner,

Case No. CR03p2156

vs.

THE STATE OF NEVADA,

Dept. No. 3

Respondent.

STATE OF NEVADA)
 : ss.
COUNTY OF PERSHING)

AFFIDAVIT OF PETITIONER IN SUPPORT OF MOTION FOR RECUSAL

I, Michael Todd Botelho, do hereby swear under penalty of perjury that the assertions of this Affidavit are true.

1. That your Affiant is the Petitioner in the above entitled action;
2. That Affiant is of the opinion that this Affidavit must be filed herein pursuant to NRS 1.230 and NRS 1.235;
3. That Affiant / Petitioner is a proper person litigant;
4. That Affiant / Petitioner herein is charged with a serious felony(s), i.e., Three (3) counts of Sexual Assault on a Minor (NRS 200.366), and one (1) Count of Kidnapping,

(NRS 200.310(1)), wherein Affiant has been sentenced to numerous LIFE sentences resulting in a MINIMUM term of imprisonment of forty-five (45) years;

5. That Affiant files this Motion to Recuse the Honorable Jerome Polaha from presiding over or making decisions and/or rulings pertaining to Affiant's Petition for Writ of Habeas Corpus (Post-Conviction) on file herein in the above entitled action;

6. That Affiant has previously sought the recusal of Honorable Jerome Polaha prior to sentencing, through oral motion, wherein the court refused due to Counsel's failure to adhere to applicable statutes for recusal proceedings;

7. That Affiant's pending Petition includes Grounds for relief based on Ineffective Assistance of Counsel regarding counsel's failure to follow proper procedure for recusal;

8. That this Court has been subjected to numerous incidents of erroneous and prejudicial information regarding privileged spousal communications, the basis for the instant pleading and in support of Grounds for relief in the pending Petition;

9. That on several occasions the Honorable Jerome Polaha has made rulings in Petitioner's case that were detrimental to him;

10. That Affiant believes this Court is possessed of certain information that may be inadmissible at trial and/or sentencing and would otherwise be biased against the accused;

11. That Affiant readily believes that the knowledge possessed by the court relative to former proceedings in this Court rise to the level of impropriety should the Court not be recused from presiding over the trial of the within matter;

12. That Affiant claims that an actual bias exists and the Honorable Jerome Polaha should be recused from within proceedings;

13. That the within Motion is made of necessity to protect the DUE PROCESS rights of Affiant / Petitioner, and not for purposes of delay;

FURTHER, your Affiant sayeth naught.

DATED THIS 22 DAY OF FEBRUARY, 2006.

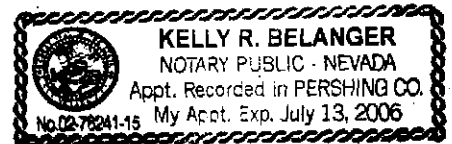
Michael J. Botelho

Michael Botelho
Affiant / Petitioner
Lovelock Correctional Center
PO BOX 359
Lovelock, NV 89419

*State of Nevada
County of Pershing*

SUBSCRIBED AND SWORN TO BEFORE ME ON

THIS 22 DAY OF FEBRUARY, 2006, at
1200 Prison Road, Lovelock, Nevada, 89419
(County of Pershing)



[Signature]
NOTARY PUBLIC

ORIGINAL

FILED

JUN - 5 2006

RONALD A. LONGTIN, JR., CLERK
By *[Signature]* DEPUTY

ORDER

Michael Todd Botelho, #80837
 Lovelock Correctional Center
 Post Office Box 359
 Lovelock, Nevada 89419

Petitioner, In Proper Person

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

--ooOoo--

MICHAEL TODD BOTELHO,

Petitioner,

Case No. CR03P2156

vs.

THE STATE OF NEVADA,

Dept. No. 3

Respondent.

ORDER TO PROCEED IN FORMA PAUPERIS

Upon Consideration of Petitioner's application to proceed in Forma Pauperis, and it appearing that there is not sufficient income, property or resources with which to maintain the action and GOOD CAUSE APPEARING therefore:

IT IS HEREBY ORDERED that Michael Todd Botelho, Petitioner, shall be permitted to proceed in Forma Pauperis with this action as permitted by NRS 12.015, with no fees, costs or securities being necessary towards the filing or issuance of any necessary writ, process, pleading or other paper.

DATED THIS 26 DAY OF May, 2006.

[Signature]
 DISTRICT COURT JUDGE

CR03P2156
 DC-09900071986-028
 POST: MICHAEL TODD BOTELHO (D 1 Page
 District Court 06/05/2006 04:40 PM
 Washoe County
 3370
 CENTU

CODE 2715

ORIGINAL FILED
JUN - 5 2006RONALD A. LONGTIN, JR., CLERK
By *[Signature]*
DEPUTY

CR03P2156 DC-09500071886-027
POST: MICHAEL TODD BOTELHO (3 Pages
District Court 06/05/2006 04:40 PM
Washoe County 2715
ACMYTU

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

* * *

MICHAEL TODD BOTELHO,

Petitioner,

CASE NO. CR03P2156

vs.

DEPT. NO. 3

THE STATE OF NEVADA,

Respondent.

ORDER FOR RESPONSE AND APPOINTMENT OF COUNSEL

Petitioner filed a Petition for Writ of Habeas Corpus (Post Conviction).

Petitioner filed a Request for Appointment of Counsel. The Court has reviewed the petition and has determined that a response would assist the Court in determining whether the writ has merit.

It should also be noted that Petitioner filed a Motion for Recusal, but said motion was not properly served. Therefore, appointed counsel can pursue said recusal if desired.

NOW, THEREFORE, IT IS HEREBY ORDERED that IAN SILVERBERG, ESQ., is appointed to represent Petitioner in this post-conviction action.

IT IS FURTHER ORDERED that Petitioner shall have forty-five (45) days from the date of this order to supplement his petition.

1 IT IS FURTHER ORDERED that respondent shall have sixty (60) days after the
2 date of receiving Petitioner's supplement, to answer or otherwise respond to said
3 supplement.

4 DATED this 2^d day of June, 2006.

5 
6 JEROME M. POLAHA
7 DISTRICT JUDGE
8
9
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26

CERTIFICATE OF MAILING

1 I hereby certify that I am an employee of the Second Judicial District
2 Court of the State of Nevada, in and for the County of Washoe; that on the 5 day
3 of June, 2006, I deposited for mailing a copy of the foregoing document addressed to:
4

5 Ian Silverberg, Esq.
6 96 Winter St
7 Reno, NV 89503

8 Gary Hatlestad, Eq.
9 Chief Appellate Deputy
10 Washoe County District Attorney
11 Appellate Division
12 Via Interoffice Mail

13 Michael Todd Botelho
14 Inmate # 80837
15 Lovelock Correctional Center
16 P. O. Box 359
17 Lovelock, NV 89419

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JERRINE ULLESEIT
Administrative Assistant

CR03P2156
 DC-9900000005-040
 POST: MICHAEL TODD BOTELHO (3 Pages
 District Court 06/27/2006 11:12 AM
 Washoe County 2610

ODE #

MARY LOU WILSON

Nevada Bar No. 3329

13 Marsh Avenue

Reno, Nevada 89509

75-337-0200

Attorney for Petitioner

FILED

2006 JUN 27 PM 3: 56

RONALD A. LONGTIN, JR.

BY

DEPUTY

ORIGINAL

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
 NEVADA, IN AND FOR THE COUNTY OF WASHOE

MICHAEL TODD BOTELHO,

Petitioner,

vs.

Case No. CR03P-2156

WARDEN, Lovelock Correctional Center,
 And THE STATE OF NEVADA,
 Respondent.

Dept. No. 3

NOTICE OF APPEARANCE AND REQUEST FOR 45 DAYS TO FILE
SUPPLEMENTAL PETITION TO RUN FROM JUNE 27, 2006

The undersigned counsel for Petitioner, MARY LOU WILSON, hereby gives
 Notice of Appearance and Request 45 days to file Supplemental Petition for Writ
 of Habeas Corpus (Post Conviction) from June 27, 2006.

Counsel received the file from Mr. Ian Silverberg on June 27, 2006 and notes
 that Petitioner is located in Lovelock Correctional Center. Therefore, the request

1 to visit inmate Botelho and produce a Supplemental Petition will require additional
2 time from the original Order of Appointment dated June 5, 2006.

3
4 Therefore, it is requested that the parties permit until August 1, 2006 for new
5 counsel to file a Supplemental Petition for Writ of Habeas Corpus (Post
6 Conviction).

7 DATED this 27 day of June, 2006.

8 Mary Lou Wilson
9 MARY LOU WILSON

10 Attorney At Law, Bar #3329

11 333 Marsh Ave.

12 Reno, Nevada 89509

13 775-337-0200

14 Attorney for Petitioner Botelho
15
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I Mary Lou Nelson certify that on 27 day of June, 2006, I deposited in the mail the Notice of Appearance to the following:

The Honorable Judge Jerome Polaha
Second Judicial District Court, Department 3
Post Office Box 30083
Reno, Nevada 89520

Chief Appellate Deputy District Attorney Gary Hatlestad
Washoe County District Attorney's Office
Post Office Box 30083
Reno, Nevada 89520

George Chanos
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Mr. Michael Todd Botelho
Inmate Number 80837
Lovelock Correctional Center
Post Office Box 359
Lovelock, Nevada 89419

ORIGINAL

CODE 2715

FILED

JUN 30 2006

RONALD A. LONGTIN, JR., CLERK
By: *[Signature]*
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

MICHAEL TODD BOTELHO,

Petitioner,

CASE NO. CR03P2156

vs.

DEPT. NO. 3

THE STATE OF NEVADA,

Respondent.

AMENDED ORDER FOR RESPONSE AND APPOINTMENT OF COUNSEL

Petitioner filed a Petition for Writ of Habeas Corpus (Post Conviction).

Petitioner filed a Request for Appointment of Counsel. The Court has reviewed the petition and has determined that a response would assist the Court in determining whether the writ has merit.

It should also be noted that Petitioner filed a Motion for Recusal, but said motion was not properly served. Therefore, appointed counsel can pursue said recusal if desired.

It should also be further noted that Petitioner's Request for 45 Days to File Supplemental Petition filed on June 27, 2006, is taken care of by entry of this Order.

NOW, THEREFORE, IT IS HEREBY ORDERED that MARY LOU WILSON, ESQ., is appointed to represent Petitioner in this post-conviction action.


IT IS FURTHER ORDERED that Petitioner shall have forty-five (45) days from the

CR03P2156
POST: MICHAEL TODD BOTELHO (3 Pages
District Court 06/30/2006 02:35 PM
Washoe County 2715
ACMTT

1 date of this order to supplement his petition.

2 IT IS FURTHER ORDERED that respondent shall have sixty (60) days after the
3 date of receiving Petitioner's supplement, to answer or otherwise respond to said
4 supplement.

5 DATED this 30 day of June, 2006.

6 
7 JEROME M. POLAHA
8 DISTRICT JUDGE
9
10
11
12
13
14
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CERTIFICATE OF MAILING

1 I hereby certify that I am an employee of the Second Judicial District
2 Court of the State of Nevada, in and for the County of Washoe; that on the 30 day
3 of June, 2006, I deposited for mailing a copy of the foregoing document addressed to:

4 Mary Lou Wilson, Esq.
5 333 Marsh Ave.
6 Reno, NV 89509

7 Gary Hatlestad, Eq.
8 Chief Appellate Deputy
9 Washoe County District Attorney
Appellate Division
Via Interoffice Mail

10 Michael Todd Botelho
11 Inmate # 80837
12 Lovelock Correctional Center
P. O. Box 359
Lovelock, NV 89419


13 
14 JERRINE ULLESEIT
15 Judicial Assistant
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FILED

CODE #
 MARY LOU WILSON
 Nevada Bar No. 3329
 333 Marsh Avenue
 Reno, Nevada 89509
 775-337-0200
 Attorney for Petitioner

2006 JUL 17 PM 1:14

RONALD A. LONGTIN, JR.

BY  DEPUTY

ORIGINAL

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
 NEVADA, IN AND FOR THE COUNTY OF WASHOE

MICHAEL TODD BOTELHO,
 Petitioner,

vs.

Case No. CR03P-2156

WARDEN, Lovelock Correctional Center,
 And THE STATE OF NEVADA,
 Respondent.

Dept. No. 3

NOTICE OF DISCIPLINARY HEARING AND POSSIBLE MOTION TO
 CONTINUE SUBMISSION OF SUPPLEMENTAL PETITION

The undersigned counsel for Petitioner, MARY LOU WILSON, hereby gives
 Notice of Disciplinary Hearing for Petitioner on July 26, 2006. This hearing will
 determine whether Petitioner may return to general population and thereby have a
 contact visit with counsel. Therefore, the Notice is provided to advise the parties
 of the possible need for a continuance of the filing of a Supplemental Petition for
 Writ of Corpus (Post Conviction).

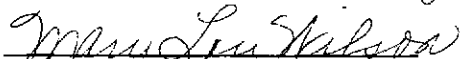
CR03P2156
 DC-990000018-262,7
 POST: MICHAEL TODD BOTELHO (4 Pages
 District Court 07/17/2006 03:43 PM
 Washoe County 2610

1 Counsel attempted to visit Petitioner. However, the visit would have to be over
2 the telephone between glass. Since counsel has done this before with another
3 inmate and found it unsatisfactory, it will not be done again.
4

5 The Department of Corrections was requested and provided a document to
6 verify the upcoming disciplinary hearing that is to take place and may change
7 Petitioner's status. However, the change would not occur until after July 26, 2006.
8 See attached document. The Supplemental Petition is due forty-five (45) days after
9 the last amended order, which was filed June 30, 2006. Therefore, the
10 supplemental petition would be due on August 14, 2006.
11

12 Therefore, this Notice is to let the parties know the status of the case and
13 possible need for continuance. However, every attempt will be made to timely file
14 the supplemental petition. Additionally, the parties will be made aware of the
15 outcome of the disciplinary hearing should Petitioner not be returned to general
16 population.
17

18
19 DATED this 17 day of July, 2006.

20 

21 MARY LOU WILSON

22 Attorney At Law, Bar #3329

23 333 Marsh Ave.

24 Reno, Nevada 89509

25 775-337-0200

Attorney for Petitioner Botelho

BOARD OF COMMISSIONERS
KENNY C. GUINN
GOVERNOR
GEORGE CHANOS
ATTORNEY GENERAL
DEAN HELLER
SECRETARY OF STATE



GLEN WHORTON
Director
JAMES COX
Deputy Director/Operations
JACK PALMER
Warden

STATE OF NEVADA
DEPARTMENT OF CORRECTIONS

Leading Nevada Corrections Into the Future
Lovelock Correctional Center

July 7, 2006

Mary Lou Wilson, Attorney
333 Marsh Avenue
Reno, NV 89509

Subject: Requested Visit with Inmate Botelho, Michael, NDOC #80837

Dear Ms. Wilson,

Per our conversation, the current day and times that inmate Michael Botelho, NDOC #80837 would normally be allowed a visit are Tuesdays, between the hours of 8:30 a.m. and 2:30 p.m., requiring twenty-four (24) hour notice, and only as a non-contact (behind glass) visit. We are also able to schedule an attorney visit on any day of the week, also requiring at least twenty-four (24) hour notice, and non-contact as his current custody level is an Administrative Segregation inmate. This custody level is the result of a pending hearing for a disciplinary action that is not due to be completed until July 26, 2006.

Until such a time as the Disciplinary Hearing Officer completes this hearing, all of Mr. Botelho's visits will be non-contact. Even though there is a partition between you and inmate Botelho, an attorney visit can be made confidential by using a non-contact "attorney booth".

After the disciplinary hearing is complete, and provided Mr. Botelho is not sanctioned to spend more time in Disciplinary Segregation, he will go back to General Population (GP) custody level. GP visiting days are Friday, Saturday, Sunday and Monday, 7:30 a.m. to 11:30 a.m.

I hope this assists you in planning your visits.

Sincerely,

A handwritten signature in black ink, appearing to read "Linda Wightman", with a long horizontal flourish extending to the right.

Linda Wightman, AAI

Cc: AWP LeGrand
80837 I-file

1200 Prison Road
PO Box 359
Lovelock, NV 89419
(775) 273-1300 Fax: (775) 273-4277

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I Mary Lou Wilson certify that on 17 day of July, 2006, I deposited in the mail the Notice of Appearance to the following:

The Honorable Judge Jerome Polaha
Second Judicial District Court, Department 3
Post Office Box 30083
Reno, Nevada 89520

Chief Appellate Deputy District Attorney Gary Hatlestad
Washoe County District Attorney's Office
Post Office Box 30083
Reno, Nevada 89520

George Chanos
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Mr. Michael Todd Botelho
Inmate Number 80837
Lovelock Correctional Center
Post Office Box 359
Lovelock, Nevada 89419

FILED

MARY LOU WILSON
 Attorney At Law, Nevada Bar No. 3329
 333 Marsh Avenue
 Reno, Nevada 89509
 775-337-0200
 Attorney for Petitioner

2006 JUL 26 AM 11:30

ORIGINAL

RONALD A. LONGTIN, JR.

BY *R. Sullivan*
DEPUTY

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MICHAEL TODD BOTELHO,

Petitioner,

vs.

Case No. CR03P-2156

Warden, Lovelock Correctional Center, and
 THE STATE OF NEVADA,

Dept. No. 3

Respondents.

EXPARTE REQUEST FOR DOCUMENTS TO BE COPIED BY THE WASHOE COUNTY
CLERK'S OFFICE IN SUPPORT OF THE SUPPLEMENTAL PETITION FOR WRIT OF
HABEAS CORPUS
 (POST CONVICTION)

COMES NOW, MICHAEL TODD BOTELHO, by and through counsel, and Moves this
 Honorable Court for its Order to copy documents that are currently sealed and/or unavailable to
 counsel from the previous request for the entire file, to wit, the *Grand Jury Transcript*,
Confidential Letters from Family to be filed Under Seal, Confidential Psychological/Substance
Abuse Evaluation to be filed Under Seal, and the presentence investigation report.

DATED this 26 day of July, 2006.

Mary Lou Wilson
 MARY LOU WILSON, Esq.

CR03P2156
 DC-990000027-263
 POST: MICHAEL TODD BOTELHO (5 Pages
 District Court 07/26/2006 12:51 PM
 1670
 Washoe County

ORIGINAL

CODE: 1775

FILED

2004 APR -6 PM 3:56

RONALD A. LONGTON, JR.

BY DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA

Plaintiffs,

CASE NO: CR03-2156

VS.

DEPT. NO.: 3

MICHAEL TODD BOTELHO,

Defendants

RECEIPT OF GRAND JURY TRANSCRIPTTRANSCRIPT OF GRAND JURY PROCEEDINGS RECEIVED FROM RONALD A.
LONGTON, JR., CLERK OF THE COURT.Dated this 6th day of APRIL, 2004.

Signature of Receiving Party

SEAN B. SULLIVAN

RONALD A. LONGTON, JR.

Clerk of the Court

By DEPUTY

Deputy Clerk

ORIGINAL FILED

1 CODE 2528
2 MICHAEL R. SPECCHIO
3 WASHOE COUNTY PUBLIC DEFENDER
4 BAR #1017
5 P. O. BOX 30083
6 RENO, NV 89520
7 (775) 337-4800
8 ATTORNEY FOR DEFENDANT

2004 FEB 17 PM 2:19
RONALD A. MARTIN, JR.
BY: [Signature] DEPUTY

9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

10 IN AND FOR THE COUNTY OF WASHOE

11 THE STATE OF NEVADA,
12 Plaintiff,

13 vs.

Case No. CR03-2156

14 MICHAEL TODD BOTELHO,
15 Defendant.

Dept. No. 8

16 CONFIDENTIAL LETTERS FROM
17 FAMILY TO BE FILED UNDER SEAL

18 See attached.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

SEALED

ORIGINAL

1 CODE 2528

2 MICHAEL R. SPECCHIO

3 WASHOE COUNTY PUBLIC DEFENDER

4 BAR #1017

5 P. O. BOX 30083

6 RENO, NV 89520

7 (775) 337-4800

8 ATTORNEY FOR DEFENDANT

2004 JAN 26 PM 2:34

RONALD A. LONGSTON, JR.

BY *[Signature]*
DEPUTY

9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

10 IN AND FOR THE COUNTY OF WASHOE

11 THE STATE OF NEVADA,
12 Plaintiff,

13 vs.

Case No. CR03-2156

14 MICHAEL TODD BOTELHO,
15 Defendant.

Dept. No. 3

16 CONFIDENTIAL PSYCHOLOGICAL/SUBSTANCE ABUSE
17 EVALUATION TO BE FILED UNDER SEAL

18 See attached.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

SEALED

1 CERTIFICATE OF MAILING

2 I, Mary Lou Wilson hereby certify that pursuant to NRCP 5(b), on the 26 day of
3 July, 2006, a copy of the foregoing was sent to:

4 The Honorable Judge Jerome Polaha
5 Second Judicial District Court
6 Department 3
7 Post Office Box 30083
8 Reno, Nevada 89520

9 Terrence P. McCarthy
10 Appellate Deputy District Attorney
11 Washoe County District Attorney
12 Post Office Box 30083
13 Reno, Nevada 89520

14 George Chanos
15 Attorney General
16 100 North Carson Street
17 Carson City, Nevada 89701-4717

18 Michael Todd Botelho
19 Inmate Number 80837
20 Lovelock Correctional Center
21 Post Office Box 359
22 Lovelock, Nevada 89419
23
24
25

FILED

2006 JUL 26 AM 11:30

MARY LOU WILSON
 Attorney At Law, Nevada Bar No. 3329
 333 Marsh Avenue
 Reno, Nevada 89509
 775-337-0200
 Attorney for Petitioner

ORIGINAL

RONALD A. LONGTIN, JR.
 BY *R. Longtin*
 DEPUTY

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MICHAEL TODD BOTELHO,

Petitioner,

vs.

Case No. CR03P-2156

Warden, Lovelock Correctional Center, and
 THE STATE OF NEVADA,

Dept. No. 3

Respondents.

NOTICE OF FILE REVIEWED AND POTENTIAL EXHIBITS USED FOR
SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS
 (POST CONVICTION)

COMES NOW, MICHAEL TODD BOTELHO, by and through counsel, and hereby gives
 Notice to the parties that the file provided by the Washoe County Clerk's Office has been
 reviewed and the following documents are intended to be included within the Supplemental
 Petition for Writ of Habeas Corpus (Post Conviction). It should be noted that counsel is awaiting
 the results of the disciplinary action taken on July 26, 2006, to determine whether Petitioner will
 be allowed a contact visit at the Lovelock Correctional Center. Therefore, after discussing the
 post conviction matter, additional exhibits may be deemed necessary for the supplemental

CR03P2156
 DC-9900000027-265
 POST: MICHAEL TODD BOTELHO (4 Pages
 District Court 07/26/2006 12:52 PM 2
 2610
 Washoe County

petition. However, at this time, the following documents are deemed relevant and necessary for the supplemental petition:

EXHIBITS

Confidential Letters from Family to be filed Under Seal (need to be copied)

*Confidential Psychological/Substance Abuse Evaluation to be filed Under Seal
(need to be copied)*

Grand Jury Transcript (need to be copied)

Guilty Plea Memorandum, 12-11-03

Indictment, 10-8-03

Inmate Request, 10-10-03

Judgment, 4-7-04

Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus
(Post Conviction)

Motion for Recusal, 3-6-06

Notice of Appeal, 4-30-04

Notice of Intent to Introduce Prior or Other Bad Act Evidence At Sentencing Hearing

Opposition to State's Introduction of Prior or Other Bad Act Evidence at Sentencing Hearing;

Defendant's Motion to Have the Matter Sealed, To Recuse the Present Sentencing Court, and to

Have the Matter Transferred to Another Court for Sentencing Purposes

Order of Affirmance, 4-4-05

Petition for Writ of Habeas Corpus (Post Conviction), 3-6-06

Presentence Investigation Report (need to be copied)

Remittitur, 5-3-05

1 Reply in Opposition to Defendant's Opposition to State's Introduction of Other Bad Act
2 Evidence; Defendant's Motion to Seal; and Answer to Defendant's Motion to Recuse and
3 Transfer Case

4 Transcript of Proceedings, Change of Plea, 12-11-03

5 Transcript of Proceedings, Entry of Plea, 11-6-03

6 Transcript of Proceedings, Hearing on Motion, 3-11-04

7
8 DATED this 26 day of July, 2006.

9 Mary Lou Wilson
10 MARY LOU WILSON, Esq.

11 Attorney At Law, Bar #3329

12 333 Marsh Ave.

13 Reno, Nevada 89509

14 775-337-0200

15 Attorney for Petitioner Botelho
16
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1 CERTIFICATE OF MAILING

2 I, May Lee Wilson hereby certify that pursuant to NRCP 5(b), on the 26 day of
3 July, 2006, a copy of the foregoing was sent to:

4 The Honorable Judge Jerome Polaha
5 Second Judicial District Court
6 Department 3
7 Post Office Box 30083
8 Reno, Nevada 89520

9 Terrence P. McCarthy
10 Appellate Deputy District Attorney
11 Washoe County District Attorney
12 Post Office Box 30083
13 Reno, Nevada 89520

14 George Chanos
15 Attorney General
16 100 North Carson Street
17 Carson City, Nevada 89701-4717

18 Michael Todd Botelho
19 Inmate Number 80837
20 Lovelock Correctional Center
21 Post Office Box 359
22 Lovelock, Nevada 89419

FILED

CODE NO.

2006 JUL 28 AM 11:16

RONALL A. LONGTIN, JR.

BY *R. Williams*
DEPUTY

ORIGINAL

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MICHAEL TODD BOTELHO,

Petitioner,

vs.

Case No. CR03P-2156

Warden, Lovelock Correctional Center, and
THE STATE OF NEVADA,

Dept. No. 3

Respondents.

EXPORTE ORDER FOR DOCUMENTS TO BE COPIED BY THE WASHOE COUNTY
CLERK'S OFFICE IN SUPPORT OF THE SUPPLEMENTAL PETITION FOR WRIT OF
HABEAS CORPUS
(POST CONVICTION)

HAVING REVIEWED the exparte motion for MICHAEL TODD BOTELHO, by and
through counsel, this Honorable Court believes that the documents that are currently sealed
and/or unavailable to counsel from the previous request for the entire file, to wit, the *Grand Jury*
Transcript, Confidential Letters from Family to be filed Under Seal, Confidential
Psychological/Substance Abuse Evaluation to be filed Under Seal, and the presentence
investigation report are reasonable for review.

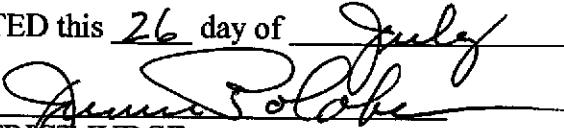
//

//

CR03P2156
POST: MICHAEL TODD BOTELHO (3 Pages
District Court 07/28/2006 07:36 PM
1675
Washoe County

1 IT IS SO ORDERED that the said documents shall be copied and provided to counsel.

2 DATED this 26 day of July, 2006.

3 
4 DISTRICT JUDGE

1 CERTIFICATE OF MAILING

2 I, Mary Lou Wilson do hereby certify that pursuant to NRCP 5(b), on the 28 day of
3 July, 2006, a copy of the foregoing was sent to:

4 Terrence P. McCarthy
5 Appellate Deputy District Attorney
6 Washoe County District Attorney
Post Office Box 30083
Reno, Nevada 89520

7 Mary Lou Wilson
8 Attorney At Law
9 333 Marsh Ave.
Reno, Nevada 89509

FILED

MARY LOU WILSON
 Attorney At Law, Nevada Bar No. 3329
 333 Marsh Avenue
 Reno, Nevada 89509
 775-337-0200
 Attorney for Petitioner Botelho

2006 AUG -8 AM 10: 35

ORIGINAL

RONALD A. LONGTIN, JR.

BY *[Signature]*
DEPUTY

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
 IN AND FOR THE COUNTY OF WASHOE

MICHAEL TODD BOTELHO,

Petitioner,

vs.

Case No. CR03P-2156

Warden, Lovelock Correctional Center, and
 THE STATE OF NEVADA,

Dept. No. 3

Respondents.

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS
 (POST CONVICTION)

Since Petitioner's original petition for writ of habeas corpus (post conviction) has been timely filed, the following information is made for a supplemental petition. It should be noted that post conviction counsel does not waive any of the grounds presented within Petitioner's original petition. Therefore, the following three additional grounds and exhibits are presented within the supplemental petition. The supplemental petition will focus only upon the ineffective assistance of sentencing counsel in the areas of a failure to put forward and cross-examine Petitioner's ex-wife and failure to have a psychosexual examination done by Drs. Mahaffey, Ing, or Skewis for the purpose of showing future dangerousness, recidivism, and likelihood of rehabilitation.

CR03P2156
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 POST: MICHAEL TODD BOTELHO 342 Pages
 District Court 08/08/2006 12:03 PM
 Washoe County 4100

1 Additionally, the supplemental petition will allege ineffective assistance of appellate counsel for
 2 failing to bring forward the district court err in not permitting Petitioner's ex-wife, Melissa
 3 Botelho, to testify instead of Officer Herrera in violation of the Confrontation Clauses of the
 4 United States and Nevada Constitutions.

5 **EXHIBITS CONCERNING THE SUPPLEMENTAL PETITION**

6	Confidential Letters from Family to be Filed Under Seal,	134-139
7	Confidential Psychological/Substance Abuse Evaluation to be Filed Under Seal,	140-144
8	Guilty Plea Memorandum,	27-34
9	Indictment,	1-5
10	Judgment,	231-232
11	Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus	
12	(Post Conviction),	248-328
13	Notice of Appeal,	233-234
14	Notice of Intent to Introduce Prior or Other Bad Act Evidence at the Sentencing Hearing, ..	35-43
15	Opposition to State's Introduction of Prior Bad Act Evidence at Sentencing Hearing,	44-51
16	Order of Affirmance,	235-237
17	Petition for Writ of Habeas Corpus (Post Conviction),	239-247
18	Presentence Investigation Report,	112-133
19	Remittitur,	238
20	Reply to Opposition to Defendant's Opposition to State's Introduction of Other Bad Act	
21	Evidence,	103-111
22	Transcript of Proceedings, Change of Plea,	6-26
23	Transcript of Proceedings, Hearing on Motion,	52-102

1 Transcript of Proceedings, Sentencing,145-230

2 STATEMENT OF THE CASE

3 Petitioner was Indicted on charges of Kidnapping in the First Degree, Battery with Intent to
4 Commit Sexual Assault on a Child, and three counts of Sexual Assault on a Child. Exhibits,
5 hereinafter called Ex. pp. 1-5. Petitioner entered a guilty plea to all counts except the Battery
6 charge. Ex. pp. 6-26. The parties signed a Guilty Plea Memorandum. Ex. pp. 27-34. The State
7 filed a Notice of Intent to Introduce Prior Bad Act Evidence. Ex. pp. 35-43. The Petitioner filed
8 an Opposition to the State's Introduction. Ex. pp. 44-51. The State filed a Reply to the
9 Petitioner's Opposition. Ex. pp. 103-111. The district court had a hearing on the motion. Ex.
10 pp. 52-102. *It should be noted that the district court granted the Petitioner's request not to hear
11 the live testimony of Petitioner's ex-wife but permitted the hearsay testimony of Officer Herrera
12 who audiotaped the conversation with Petitioner's ex-wife, finding that hearsay was admissible
13 during sentencing. *Although Petitioner's sentencing counsel had a copy of the transcript of the
14 audiotaped conversation, Officer Herrera testified about a conversation, which was not taped. A
15 presentence investigation report was completed and recommended the maximum sentence, to
16 wit, life after fifteen years, and three life terms after twenty years, to run consecutively. Ex. pp.
17 112-133, specifically, p. 116. During the sentencing hearing, along with witnesses, Petitioner
18 admitted sealed letters from family members. Ex. pp. 134-139. Additionally, Petitioner
19 presented a psychological/substance abuse evaluation. Ex. pp. 140-144. A Sentencing Hearing
20 took place with witnesses presented on both sides. Ex. pp. 145-230. Judgment entered giving
21 Petitioner a sentence of forty-five years before parole eligibility, making him eighty-eight years
22 old. Ex. pp. 231-232. Notice of Appeal was timely filed attacking the three sexual assaults as
23 really one crime and the Supreme Court filed an Order of Affirmance. Ex. pp. 233-234 and 235-

1 237. Remittitur entered. Ex. p. 238. A petition for writ of habeas corpus (post conviction) was
2 timely filed. Ex. pp. 239-247. Petitioner filed a memorandum in support of the petition. Ex. pp.
3 248-328.

4 STATEMENT OF FACTS:

5 Fourteen-year-old Jane Doe advertised her babysitting services in a local free paper and
6 Petitioner called the number advising her that he needed her child-caring skills for his two young
7 children. Petitioner picked up Jane Doe near her home and took her into the hills around Washoe
8 Lake where he hit, duct-taped, and repeatedly sexually assaulted her. After Petitioner ejaculated
9 into her vagina, he verbalized his remorse and confusion on what to do next. Jane Doe
10 convinced Petitioner that she would never tell anyone about the incident and he took her home.
11 Before taking a shower, Jane Doe called her mother and they went to the hospital. A sexual
12 assault protocol was conducted showing physical trauma to Jane Doe's genitalia and sperm
13 matching Petitioner's DNA. Tracking down Petitioner's cell phone number, he was asked to
14 come down to the police station to discuss the assault. Although Petitioner acknowledged that
15 something bad happened, he could not remember the exact details. Upon arrest in Susanville,
16 California, Petitioner claimed that he was heading toward Reno, Nevada, to turn himself in.
17 Grand Jury Transcript (not included within the exhibits because supplemental petition deals with
18 sentencing). Wanting to cooperate, Petitioner waived his preliminary hearing and entered a
19 guilty plea to first degree kidnapping and three counts of sexual assault. The plea bargain
20 included that the charge of battery with intent to commit sexual assault would be dismissed and
21 the parties were free to argue during sentencing. Ex. pp. 6-26. The State filed a Motion to
22 Admit Prior Bad Act Evidence in the form of Petitioner's ex-wife, Melissa, testifying that he had
23 sexual fantasies that included kidnapping a young girl, raping, and dismembering her. Ex. pp.
24
25

1 35-43. Trial counsel filed an Opposition claiming marital privilege and Recusal of the district
2 court because hearing that information prejudiced him. Ex. pp. 44-51. A hearing was held on
3 the issues and it was decided that 1. Trial counsel failed to file the proper paperwork for recusal;
4 2. District Judge acknowledged neutrality regarding all cases; 3. The State advised that marital
5 privilege did not apply because of the exception dealing with control over children; 4. The State
6 argued that even if Melissa Botelho did not testify, her statement was admissible through Officer
7 Herrera; 5. Trial counsel acknowledged the leniency of sentencing rules and the violation of the
8 Confrontation Clause if Melissa Botelho would not testify; 6. Thereafter, the district court
9 allowed Officer Herrera to testify during sentencing about Melissa Botelho's statement. Ex. pp.
10 52-102. At the sentencing hearing, trial counsel submitted letters from family members touting
11 Petitioner as an excellent provider, loving father, and good person. Ex. pp. 134-139. Live
12 witnesses confirmed this character evidence. A brief psychological report was provided showing
13 that Petitioner was depressed because of the circumstances but was not addicted to drugs or
14 alcohol. Ex. pp. 140-144. *No psychosexual examination was presented. *Melissa Botelho was
15 not called as a witness. The State presented Jane Doe, her mother, and Officer Herrera. The
16 victim impact statements were long, detailed, and emotionally charged with the horrors of the
17 crime itself and the havoc that it created with everyone in the family. Although Melissa Botelho
18 was not called as a witness, the State had Officer Herrera testify about her initial telephone
19 conversation and subsequent audiotaped statement. Although trial counsel objected based upon
20 a violation of the Confrontation Clause, the district court recalled the prior hearing and admitted
21 the evidence. The district court noted that Petitioner brought the child back but believed a
22 sentence of forty-five years to the parole board was warranted, leaving Petitioner eighty-eight-
23 years-old when he met his first parole hearing. Ex. pp. 145-230. Petitioner's direct appeal
24
25

1 questioned the separateness of each sexual assault count arguing that it was really one act and not
2 three separate crimes. The Supreme Court viewed each penetration as separate and distinct
3 sexual assaults affirming the convictions. Ex. pp. 235-237. *Appellate counsel failed to
4 question the district court's decision to allow the hearsay evidence of Melissa Botelho in the face
5 of an objection and violation of the Confrontation Clause of the United States and Nevada
6 Constitutions. Petitioner filed a timely petition for writ of habeas corpus (post conviction) and
7 this supplemental petition follows. Ex. pp. 239-247.
8

9 GROUND 1:

10 Sentencing counsel was ineffective in failing to put forward and cross-examine Petitioner's
11 ex-wife in violation of the Confrontation Clauses of the Sixth Amendment to the United States
12 and Nevada Constitutions. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

13 Additionally, appellate counsel was ineffective for not presenting the preserved issue of district
14 court err in violating Petitioner's Confrontation Clause rights when failing to argue the issue on
15 direct appeal.

16 I. The State's Moving Papers and the district court's ruling showing trial counsel's ineffective
17 assistance of counsel: Petitioner was advised that Melissa Botelho was going to testify during
18 sentencing that he had sexual fantasies that included kidnapping, raping, and dismembering a
19 young girl. Ex. pp. 35-43. Trial counsel Opposed the State's Motion claiming that Petitioner
20 had a marital privilege to the statement made during the marriage. Ex. pp. 44-51. Thereafter, the
21 State advised the parties that if Melissa Botelho did not testify, Officer Herrera would give
22 sentencing testimony that would include Melissa Botelho's hearsay statement because she told
23 him about Petitioner's depraved thoughts. The district court advised trial counsel that preventing
24 Melissa Botelho's testimony violated Petitioner's right to Confrontation if the statements came in
25

1 through Officer Herrera because hearsay was admissible during sentencing. Ex. pp. 52-102.

2 During the sentencing hearing, trial counsel did not call Melissa Botelho as a witness and
3 objected to her statements to Officer Herrera as a violation of Petitioner's Confrontation Clause.

4 However, because of the district court's ruling that Melissa Botelho would not be called as a
5 witness in compliance with trial counsel's wishes, her hearsay statement could be admissible
6 through the testimony of Officer Herrera. Petitioner's trial counsel objected to Officer Herrera's
7 testimony of Melissa Botelho based upon a violation of the Confrontation Clause. However,
8 because of the prior ruling, Officer Herrera was able to testify that Melissa Botelho advised him
9 on one occasion over the telephone that Petitioner's fantasy included kidnapping a young girl,
10 raping and dismembering her. Ex. pp. 145-230.

- 12 1. Petitioner advised post conviction counsel that trial counsel failed to investigate Melissa
13 Botelho's statement;
- 14 2. Petitioner claimed that trial counsel never spoke to him about what fantasy he ever told
15 Melissa Botelho he had during their marriage;
- 16 3. Petitioner asserted that the only fantasy that he ever discussed with his wife at the time
17 was that he wished he could have she and another woman go to bed with him;
- 18 4. Petitioner requested that the State permit him to take a polygraph examination concerning
19 the issue of the fantasy that he, since it would show that he never fantasized about
20 kidnapping a young girl, raping and dismembering her;
- 21 5. When asked how Officer Herrera could have that misconception from anything that
22 Melissa Botelho would have said, Petitioner opined that she may have talked about the
23 *Singleton* case;
- 24

1 6. During their marriage, Petitioner advised his wife, Melissa, about the *Singleton* case
2 where the older man kidnapped a young girl, raped her, and cut off her arms, leaving her
3 in the desert to die;

4 7. Petitioner advised his wife, Melissa, that he thought Mr. *Singleton* was a very sick man;

5 8. Petitioner never advised his wife, Melissa, that he also had similar fantasies;

6 9. Had trial counsel spoken with Melissa Botelho, he would have learned that he never told
7 her that he had these fantasies;

8 10. Petitioner explained that their marriage broke up because she was seeing another man and
9 their first son was from another man, which was told to him after they were in divorce
10 proceedings;

11 11. As such, Melissa Botelho never said that Petitioner had such fantasies. Additionally,
12 according to Petitioner, if she did tell Officer Herrera anything like that she was mixing
13 up the story with the *Singleton* case. Additionally, Petitioner opined that if she had said
14 anything derogatory, she had motive to lie because he confronted her about the
15 illegitimacy of his first son and she would not be receiving any child support payments
16 now.
17

18 Therefore, post conviction counsel intends to investigate Melissa Botelho to determine
19 exactly what she told Officer Herrera, what her memory was of the fantasy that Petitioner
20 explained to her during their marriage, and whether there is any motivation for her to lie.
21 Additionally, understanding that polygraph examinations are inadmissible evidence to show
22 truthfulness or untruthfulness, Petitioner is still willing to submit to one if the State would
23 consider it as mitigation if it shows he was truthful regarding the prior fantasy. Trial counsel was
24 ineffective under *Strickland* standards because Melissa Botelho would have testified that the only
25

1 fantasy Petitioner ever conveyed to her was that he wanted to have a "threesome" with she and
2 another woman. Additionally, Petitioner was prejudiced by trial counsel's failure because if the
3 sentencing court had heard from Melissa Botelho that the only fantasy he advised his wife about
4 was the consensual sexual experience of three consenting adults, he would not have received a
5 sentence of life with forty-five years to the parole board. Strickland v. Washington, 466 U.S.
6 668, 104 S.Ct. 2052 (1984).

7
8 Few rights are more important than confronting and cross-examination of witnesses.
9 Chambers v. Mississippi, 410 U.S. 284 (1973). As such, Petitioner's rights under the
10 Confrontation Clause were compromised when trial counsel failed to investigate and call Melissa
11 Botelho and allowed the hearsay statements made to Officer Herrera to come into evidence
12 during sentencing inferring that he was a dangerous man that had completed his obsessive
13 fantasy.

14 II. The State's Moving Papers and the district court's ruling showing appellate counsel's
15 ineffective assistance of counsel: The same procedural history applies to appellate counsel and
16 presented above. Therefore, upon review of the sentencing hearing transcript, the issue of
17 district court err to allow Officer Herrera to testify about the hearsay statement of Melissa
18 Botelho was preserved through trial counsel's objection. It could be argued that the district court
19 was given a Hobson's choice when trial counsel argued that Melissa Botelho's statement was
20 inadmissible because of the marriage privilege and yet admissible under the hearsay exception to
21 lenient sentencing rules. However, appellate counsel should have known that the Confrontation
22 Clause was so important to Petitioner's rights and fair sentencing procedure, that arguing district
23 court err seems apparent. Additionally, the district court could have changed its ruling at the
24 time of sentencing, granted a continuance to get Melissa Botelho, and not violated the Clause.
25

1 As such, appellate counsel was ineffective under *Strickland* standards and prejudiced
2 Petitioner. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) and Chambers v.
3 Mississippi, 410 U.S. 284 (1973).

4 However, it should be noted that if through investigation, Melissa Botelho made these
5 statements, there was no motivation for her to lie, and it would have been worse to call her as a
6 witness, this ground (regarding trial and appellate counsel) would be withdrawn.

7 GROUND 2:

8
9 Sentencing counsel was ineffective in failing to have a psychosexual examination done by
10 Drs. Mahaffey, Ing, or Skewis for the purpose of showing future dangerousness, recidivism, and
11 likelihood of rehabilitation.

12 Trial counsel failed to request, receive, and present a psychosexual evaluation to mitigate his
13 sentencing. As stated above, Petitioner's only fantasy was that he would have a "threesome"
14 with himself, his wife, and another woman. However, the fantasy that was presented during
15 sentencing was that he had always wanted to kidnap, rape and dismember a child. Petitioner
16 presents with a minimal criminal history (insurance fraud and domestic battery), no aberrant
17 sexual crimes, and good character. Therefore, his potential for future dangerousness as a sexual
18 predator was paramount to his sentencing. As such, there is only one way to predict the
19 recidivism of Petitioner's twisted and dangerous behavior. Drs. Mahaffey, Ing, and Skewis are
20 experts who can competently provide the sentencing court opinions through testing, interview(s),
21 and prediction of Petitioner's future dangerousness. These experts have proven themselves
22 throughout the years to be able to look objectively at aberrant sexual conduct and determine the
23 potential for recidivism and rehabilitation of a sexual offender through a psychosexual
24 evaluation. Therefore, Petitioner received ineffective assistance of trial counsel in not
25

1 requesting, receiving, and presenting a psychosexual profile of Petitioner to determine whether a
2 forty-five-year sentence to the parole board was fair. Petitioner was prejudiced through trial
3 counsel's failure under *Strickland* standards because the sentencing court would have considered
4 a lighter sentence (20 to 25 years to the parole board) if he had presented with minimal threat and
5 an amenable nature of rehabilitation in the future. Strickland v. Washington, 466 U.S. 668, 104
6 S.Ct. 2052 (1984).

7
8 "[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the
9 requirements of the Due Process Clause. Even though the defendant has no substantive right to a
10 particular sentence within the range authorized by the statute, the sentencing is a critical stage of
11 the criminal proceeding at which he is entitled to the effective assistance of counsel." Mempa v.
12 Rhay, 389 U.S. 128; Specht v. Patterson, 386 U.S. 605.

13 Therefore, post conviction counsel will be requesting a psychosexual examination and
14 evaluation done by either Drs. Mahaffey, Ing, or Skewis to determine Petitioner's sexual
15 aberration and whether he is indeed a sexual predator and unable to be rehabilitated.

16 CONCLUSION:

17 Trial and appellate counsels were ineffective under *Strickland* standards for not investigation
18 and presenting Melissa Botelho to confirm Petitioner's only fantasy of having a "threesome"
19 during their marriage. Such information should have been provided during the sentencing
20 hearing through Melissa Botelho. However, because of the district court's ruling finding that the
21 marital privilege prevented her testimony and allowing Officer Herrera to testify to the hearsay
22 statement under lenient sentencing laws, Petitioner's Sixth Amendment rights under the
23 Confrontation Clauses to the United States and Nevada Constitution were violated. Additionally,
24 since trial counsel alleging that Petitioner's Confrontation rights were violated preserved the
25

1 objection to Officer Herrera's testimony, appellate counsel should have presented the issue upon
2 direct appeal.

3 Furthermore, trial counsel was ineffective for not presenting a psychosexual examination of
4 Petitioner to show that he was not a future threat to the young girls of the community and had the
5 ability for rehabilitation given the fact that he had minimal criminal history and never presented
6 with any prior aberrant sexual misconduct.

7 As such, an evidentiary hearing is necessary and requested under Lewis v. State, 100 Nev.
8 456, 686 P.2d 219 (1984), Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983) and Gibbons v.
9 State, 97 Nev. 520, 634 P.2d 1214 (1981).

10 It should also be noted that Petitioner needs additional time and investigation to prove both
11 grounds and respectfully requests that the State provide reasonable time before filing a Motion to
12 Dismiss for failure to state a claim. Petitioner requests sixty (60) days to investigate Melissa
13 Botelho and the amount of fees charged by the experts for a psychosexual examination. All
14 investigation would be subject to reciprocal discovery.
15

16 DATED this 8 day of August, 2006.

17 Mary Lou Wilson

18 MARY LOU WILSON

19 Attorney At Law Bar #3329

20 333 Marsh Ave.

21 Reno, Nevada 89509

22 775-337-0200

23 Attorney for Petitioner Botelho
24
25

1 **VERIFICATIONS**2 **AND SIGNATURES**

3
4 Under penalty of perjury, the undersigned declares that he is the petitioner
5 named in the foregoing petition and knows the contents thereof; that the pleading is
6 true of his own knowledge, except as to those matters stated on information and
7 belief, and as to such matters he believes them to be true.

8 Michael T Botelho

9 Petitioner

10 Mary Lee Wilson

11 Attorney for petitioner

12 Lovelock Correctional
13 Center 8-5-06

1 CERTIFICATE OF MAILING

2 I, Mary Leustila do hereby certify that pursuant to NRCP 5(b), on the 8 day of
3 August, 2006, a copy of the foregoing was sent to:

4 The Honorable Judge Jerome Polaha
5 Second Judicial District Court
6 Department 3
7 Post Office Box 30083
8 Reno, Nevada 89520

9 Gary Hatlestad
10 Chief Appellate Deputy District Attorney
11 Washoe County District Attorney
12 Post Office Box 30083
13 Reno, Nevada 89520

14 George Chanos
15 Attorney General
16 100 North Carson Street
17 Carson City, Nevada 89701-4717

18 Michael Todd Botelho
19 Inmate Number 80837
20 Lovelock Correctional Center
21 Post Office Box 359
22 Lovelock, Nevada 89419

DA # 318167

WCSO WC03-008924

ORIGINAL

FILED

10-8-03
RONALD A. LONGTIN, JR., ClerkBy S. Stagnaro
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7 Attorney for Plaintiff

ORIGINAL

8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
10
11 IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR03 2156

Dept. No. 3

12 MICHAEL TODD BOTELHO,
13 also known as @154004
14 "KEVIN",

Defendant.

INDICTMENT

17 The defendant, MICHAEL TODD BOTELHO, also known as "KEVIN",
18 is accused by the Grand Jury of Washoe County, State of Nevada, of
19 the following:

20 COUNT I. KIDNAPPING IN THE FIRST DEGREE, a violation of
21 NRS 200.310-1 and NRS 200.320, a felony, (F610) committed as follows:

22 That the said defendant on the 7th day of August, 2003, or
23 thereabout, within the County of Washoe, State of Nevada, did
24 willfully and unlawfully seize and/or confine and/or entice and/or
25 kidnap and/or carry away the person of JANE DOE, a minor child of the
26 age of fourteen years having a date of birth of November 8, 1988,

1 with the intent to hold and detain and did hold and detain such
2 person for the purpose of committing sexual assault upon her, and/or
3 with the intent to hold said minor to unlawful service or to
4 perpetrate upon the person of the minor any unlawful act.

5 ^{F110} COUNT II. BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT ON
6 A CHILD, a violation of NRS 200.400, a felony, (F110) committed as
7 follows:

8 That the said defendant on the 7th day of August, 2003, or
9 thereabout, within the County of Washoe, State of Nevada, did
10 willfully and unlawfully use force and violence upon the person of
11 JANE DOE, a minor child of the age of sixteen years having a date of
12 birth of November 8, 1988, at the hills of Washoe Valley, Washoe
13 County, Nevada, with the intent then and there to commit sexual
14 assault upon and/or against JANE DOE, to wit: by applying duct tape
15 over the victim's eyes and/or over the victim's mouth and/or over the
16 victim's hands and/or by punching said victim in the stomach area
17 and/or by pushing said victim down and sitting on her shoulders.

18 ^{F1000} COUNT III. SEXUAL ASSAULT ON A CHILD, a violation of NRS
19 200.366, a felony, (F1000) committed as follows:

20 That the said defendant on the 7th of August, 2003, or
21 thereabout, within the County of Washoe, State of Nevada, did
22 willfully and unlawfully subject JANE DOE, a female child under the
23 age of sixteen years, having a date of birth of November 8, 1988, to
24 sexual penetration, against the victim's will or under conditions in
25 which the defendant knew or should have known that the victim was
26 mentally or physically incapable of resisting or understanding the

1 nature of the defendant's conduct, to wit, said defendant forced the
2 victim to perform fellatio upon him, in the hills of Washoe Valley,
3 Washoe County, Nevada.

4 ^{F1000} COUNT IV. SEXUAL ASSAULT ON A CHILD, a violation of NRS
5 200.366, a felony, (F1000) committed as follows:

6 That the said defendant on the 7th of August, 2003, or
7 thereabout, within the County of Washoe, State of Nevada, did
8 willfully and unlawfully subject JANE DOE, a female child under the
9 age of sixteen years, having a date of birth of November 8, 1988, to
10 sexual penetration, against the victim's will or under conditions in
11 which the defendant knew or should have known that the victim was
12 mentally or physically incapable of resisting or understanding the
13 nature of the defendant's conduct, to wit, said defendant subjected
14 said child to cunnilingus, in the hills of Washoe Valley, Washoe
15 County, Nevada.

16 ^{F1000} COUNT V. SEXUAL ASSAULT ON A CHILD, a violation of NRS
17 200.366, a felony, (F1000) committed as follows:

18 That the said defendant on the 7th of August, 2003, or
19 thereabout, within the County of Washoe, State of Nevada, did
20 willfully and unlawfully subject JANE DOE, a female child under the
21 age of sixteen years, having a date of birth of November 8, 1988, to
22 sexual penetration, against the victim's will or under conditions in
23 which the defendant knew or should have known that the victim was
24 mentally or physically incapable of resisting or understanding the
25 nature of the defendant's conduct, to wit, said defendant subjected
26

1 said child to vaginal intercourse with his penis, in the hills of
2 Washoe Valley, Washoe County, Nevada.

3
4 Dated this 8th day of October, 2003.

5
6 RICHARD A. GAMMICK
7 District Attorney

8
9 By Kelli Anne Viloria
10 KELLI ANNE VILORIA
11 5872
12 Deputy District Attorney
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26 09231924

1 The following are the names of witnesses examined before
2 the Grand Jury:

3 JANE DOE
4 GREG HERRERA
5 ANNIE KNAPIC
6 MARIE NORBERG
7 RENEE ROMERO
8 CUSTODIAN OF RECORDS, VERIZON WIRELESS CFMc
9 JERRY PATTISON
10 CUSTODIAN OF RECORDS, CARSON-TAHOE HOSPITAL CFMc

11 "A TRUE BILL"

12 Charles F. McCarty
13 FOREMAN

14 "NO TRUE BILL"

15
16
17
18 FOREMAN

ORIGINAL

FILED

1 4185

2 JOAN MARIE DOTSON

3 CCR #102

4 75 COURT STREET

5 RENO, NEVADA

DEC 22 2003

RONALD A. LONGTIN, JR., CLERK

By: DEPUTY CLERK

7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

8 IN AND FOR THE COUNTY OF WASHOE

9 BEFORE THE HONORABLE JEROME M. POLAHA, DISTRICT JUDGE

10 --oOo--

11 THE STATE OF NEVADA,
12 Plaintiff,

Case No. CR03-2156

13 vs.

Department No. 3

14 MICHAEL TODD BOTELHO,
15 Defendant.

16 TRANSCRIPT OF PROCEEDINGS

17 CHANGE OF PLEA

18 Thursday, December 11th, 2003

19 8:30 A.M.

20 Reno, Nevada

21
22
23 Reported by: JOAN MARIE DOTSON
24 NV, CA AND UT CERTIFIED, REGISTERED PROFESSIONAL REPORTER
Computer-aided Transcription

A P P E A R A N C E S

1
2
3
4 For the Plaintiff: OFFICE OF THE DISTRICT ATTORNEY
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6 Deputy District Attorney
7 P.O. Box 11130
8 Reno, Nevada 89520
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11 For the Defendant: OFFICE OF THE PUBLIC DEFENDER
12 BY: SEAN SULLIVAN
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1 THURSDAY, DECEMBER 11TH, 2003; RENO, NEVADA

2 --o0o--

3 THE COURT: The next matter CR03-2156, State of Nevada
4 verses Michael Todd Botelho.

5 MR. SULLIVAN: Your Honor, can we trail this one?

6 THE COURT: Yes.

7
8 (At this time a brief
9 recess was taken.)

10 THE COURT: Then let's do CR03-2516, State verses
11 Michael Todd Botelho.

12 MR. SULLIVAN: Sean Sullivan on behalf of the
13 defendant.

14 MS. VILORIA: Kelli Anne Viloria on behalf of the
15 State, your Honor.

16 MR. SULLIVAN: Sean Sullivan on behalf of Mr. Botelho,
17 who is present today in custody.

18 THE COURT: All right. Now, this is set for a change
19 of plea. I see that we have a trial date of July 26th, 2004.

20 MS. VILORIA: That's correct, your Honor.

21 THE COURT: What's going to happen here?

22 MR. SULLIVAN: Your Honor, it is my understanding my
23 client -- we have reached negotiations in this matter.

24 Judge, pursuant to negotiations, my client desires to enter a

1 guilty plea to Count I which is alleged in the Indictment,
2 Count II -- excuse me. Count I, Count III, Count IV and
3 Count V. The State will not be pursuing Count II. In
4 exchange for my client's guilty plea, the parties will be
5 free to argue for the appropriate sentence.

6 As part of the negotiations, the State will
7 dismiss Count II. The State will also refrain from pursuing
8 any transactionally related charges or enhancements arising
9 out of the instant offense. And, Judge, on page six of the
10 original Guilty Plea Memorandum, line two, I struck out the
11 words, "The State will be free to argue," and I just inserted
12 the word, "Parties." And I initialled them. Can I approach?

13 MS. VILORIA: That is correct in addition to the
14 interlineation.

15 THE COURT: Mr. Botelho, you heard what your attorney
16 said?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Is that what you intend to do this
19 morning?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: All right. I received the Guilty Plea
22 Memorandum. And I see that it says you signed it on the
23 10th. Is that correct?

24 THE DEFENDANT: Yes, sir.

1 THE COURT: Now, did you read this before you signed
2 it?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Do you understand what you read?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: How much education do you have?

7 THE DEFENDANT: Almost two years of college.

8 THE COURT: All right. And you read and understand
9 English?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Do you have any questions about anything
12 that is set out or contained in the Guilty Plea Memorandum?

13 THE DEFENDANT: No, sir.

14 THE COURT: Now, you were arraigned back in October.
15 You entered a plea in November. And we have a trial set for
16 July in this case. And at page two it sets out your
17 constitutional rights. And you were on your way to receiving
18 the full benefit of those constitutional rights. If you
19 change your plea, then that means that you don't want to have
20 the advantage of those constitutional rights and that you are
21 giving them up. Is that how you understand it?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: All right. And they are set out at page
24 two. You are giving up your right to a jury trial. And, as

1 you know, that's been set for July. At that trial the State
2 would have to convince twelve people of your guilt on all the
3 elements of all the offenses that you are charged with by the
4 Indictment. If you plead guilty, you are telling the State
5 that they don't have to prove or convince anybody of your
6 guilt; that you will admit your guilt in open court. Is that
7 what you want to do?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: All right. And you are giving up your
10 trial right.

11 THE DEFENDANT: Yes, sir.

12 THE COURT: All right. At that trial you would have
13 had the right of confrontation. That means you would get to
14 confront your accusers. You would be present. You would be
15 represented by counsel and he would get to cross examine the
16 witnesses that the State would bring against you in their
17 effort to convince the twelve people on the jury of your
18 guilt.

19 That's not going to happen, if you plead
20 guilty. Do you understand that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: All right. So you are giving up that
23 constitutional right.

24 THE DEFENDANT: Yes, sir.

1 THE COURT: The right to subpoena witnesses means
2 that -- and this is the compulsory process.

3 That means, if you had any witnesses who
4 could help you establish a defense, the Court could issue
5 subpoenas. And, if they are properly served, those people
6 would have to come to court and offer their testimony in your
7 behalf.

8 That happens at the trial. You gave up the
9 trial. You gave up your right of confrontation. So you are
10 necessarily giving up the subpoena process too. Do you
11 understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: All right. Here it says the privilege
14 against self-incrimination. Obviously, if you enter pleas of
15 guilty, you are convicting yourself. So that's greater than
16 incriminating yourself. So you are necessarily giving up
17 that privilege also. Do you understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: The way that works at trial, that
20 privilege, is that the jury is advised that under the law you
21 are presumed innocent of the charges. The State could not
22 call you as a witness against yourself when they are
23 presenting their case.

24 And, if, for any reason, you chose not to

1 testify in your own behalf when it came your time to put on
2 your defense, the State couldn't argue that to the jury to
3 say, "See, he didn't say anything, so he must be guilty."

4 And the jury will be instructed that they
5 could not consider the fact that you didn't testify, if you
6 didn't, as an indicator of guilt. They could not consider
7 that in your deliberations. Okay. That's how the law
8 protects an accused. You are giving up those rights by your
9 pleas of guilty. Do you understand that?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Do you understand that once you give them
12 up today, they are gone?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: All right. Do you want to give them up?

15 THE DEFENDANT: Yes.

16 THE COURT: Do you want to change the pleas that you
17 have heretofore entered for counts one, three, four and five
18 from not guilty to guilty?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. Let me ask you, the Indictment
21 that was returned October the 8th, 2003 in Count I charges
22 you with kidnapping in the first degree, a felony offense, to
23 that charge, how do you plead?

24 THE DEFENDANT: Guilty.

1 THE COURT: Count III of that Indictment charges you
2 with the felony offense sexual assault on a child, how do you
3 plead?

4 THE DEFENDANT: Guilty.

5 THE COURT: Count IV of that Indictment charges you
6 with a second sexual assault on a child. How do you plead?

7 THE DEFENDANT: Guilty.

8 THE COURT: Count V of that Indictment charges you
9 with a third count of sexual assault on a child. How do you
10 plead?

11 THE DEFENDANT: Guilty.

12 THE COURT: All right. Miss Viloria, would you give
13 us the element please.

14 MS. VILORIA: I will, your Honor.

15 Sir, had we taken this matter to trial, the
16 State would be prepared to prove beyond a reasonable doubt
17 the following elements against you.

18 In Count I, kidnapping in the first degree,
19 a felony, the State would be prepared to prove the elements
20 as follows: That you on the 7th day of August, 2003 in the
21 County of Washoe, State of Nevada did willfully and
22 unlawfully seize and/or confine and/or entice and/or kidnap
23 and/or carry away the person of Jane Doe, a minor child of
24 the age of fourteen years having a date of birth of November

1 8th, 1988 and that you did this with the intent to hold and
2 detain and that you did hold and detain such person for the
3 purpose of committing sexual assault upon her and/or you did
4 hold her with the intent to hold her to unlawful service or
5 to perpetrate upon her any unlawful act.

6 Sir, do you understand the elements the
7 State would have been prepared to prove as to relates to
8 Count I, kidnapping in the first degree?

9 THE DEFENDANT: Yes, ma'am.

10 MS. VILORIA: The State would also have been prepared
11 to prove beyond a reasonable doubt the following elements in
12 Count II -- excuse me, Count III, sexual assault on a child.
13 That's that you on the 7th day of August, 2003 in the County
14 of Washoe, State of Nevada did willfully and unlawfully
15 subject Jane Doe, a female child under the age of 16 years,
16 having a birth date of the November 8th, 1988 to sexual
17 penetration against her will or under conditions in which you
18 knew or should have known that she was mentally or physically
19 incapable of resisting or understanding the nature of her
20 conduct in that you forced the victim to perform fellatio in
21 the hills of Washoe Valley, Washoe County, Nevada.

22 Do you understand the elements the State
23 would have been prepared to prove as it relates to Count III?

24 THE DEFENDANT: Yes, ma'am.

1 MS. VILORIA: Likewise, sir, the State would have been
2 prepared to prove the following as it relates to Count IV,
3 sexual assault on a child in that you on the 7th of August,
4 2003 in the County of Washoe, State of Nevada did willfully
5 and unlawfully subject Jane Doe, a female child under the age
6 of sixteen years, having a date of birth of November 8th,
7 1988 to sexual penetration against her will or under
8 conditions in which you knew or should have known that she
9 was mentally or physically incapable of resisting or
10 understanding your conduct in that you subjected her to
11 cunnilingus in the hills of Washoe Valley, Washoe County,
12 Nevada.

13 Do you understand the elements the State
14 would have been prepared to prove as it relates to Count IV?

15 THE DEFENDANT: Yes, ma'am.

16 MS. VILORIA: Likewise, as it relates to Count V,
17 sexual assault on a child, the State would have been prepared
18 to prove the following elements in that you on the 7th of
19 August, 2003 in the County of Washoe, State of Nevada did
20 willfully and unlawfully subject Jane Doe, a female child
21 under the age of sixteen years, having a date of birth of
22 November 8th, 1988 to sexual penetration against her will or
23 under conditions in which you knew or should have known that
24 she was mentally or physically incapable of resisting or

1 understanding the nature of her conduct in that you subjected
2 such child to vaginal intercourse with your penis in Washoe
3 Valley, Washoe County, Nevada.

4 Do you understand the elements the State
5 would have been prepared to prove as it relates to Count V?

6 THE DEFENDANT: Yes, ma'am.

7 MS. VILORIA: For the record, the victim in this case
8 has elected to proceed under the use of a pseudonym; and this
9 is the reason we are calling her Jane Doe.

10 THE COURT: All right.

11 Mr. Botelho, do you understand that by your
12 pleas of guilty you are admitting the facts that were recited
13 by the District Attorney?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: All right. Now, the potential
16 consequences of your pleas that you entered this morning, to
17 Count I, you may be imprisoned for a period of life with the
18 eligibility of parole after five years or you could be
19 sentenced to a definite term of fifteen years with parole
20 eligibility after you serve five years in the Nevada State
21 Prison. Probation is not available. Do you understand that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: That means the next time you come to court
24 you will be sent to prison.

1 THE DEFENDANT: Yes, sir.

2 THE COURT: The punishment that is set out for counts
3 three, four and five are life imprisonment with eligibility
4 of parole after twenty years or for a definite term of twenty
5 years with parole eligibility after five years.

6 MS. VILORIA: It seems strange, your Honor. It has
7 been corrected in the legislature; but that is the offense
8 when the child is between the ages of fourteen and sixteen.

9 THE COURT: Oh, okay. All right.

10 MR. SULLIVAN: I concur, your Honor.

11 THE COURT: All right.

12 MS. VILORIA: I would just add that, as it relates to
13 counts three, four and five, that the defendant is likewise
14 is not eligible for probation.

15 THE COURT: I was just going to say that.

16 You understand that probation is not
17 available to you?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Okay. So, again, when you come next time
20 you will be sent to prison and it's just a matter of how
21 long.

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Do you understand that?

24 THE DEFENDANT: Uh-huh (affirmative).

1 THE COURT: The punishment, as I have indicated for
2 counts three, four and five, they are identical counts
3 charging three separate acts; but the punishment is the
4 same. And that is life with the eligibility of parole after
5 twenty years or a definite term of twenty years with parole
6 eligibility after five years. Now, do you understand what
7 concurrent means and consecutive?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Okay. Concurrent means that they can all
10 be done together. Consecutive means you do one, then the
11 other, then the other, then the other and so on. Do you
12 understand that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: All right. Do you understand that what
15 happens to you at the sentencing is up to the court?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Okay. Now, in this regard, did anybody
18 make any promises to you in that respect?

19 THE DEFENDANT: No, sir.

20 THE COURT: All right. One of the constitutional
21 rights that you have not given up is your right to be
22 represented by a lawyer. Mr. Sullivan of the Public
23 Defender's staff is standing there beside you. Was he your
24 attorney throughout?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Okay.

3 MS. VILORIA: Your Honor, did you canvass the defendant
4 as it relates to the lifetime supervision part of this?

5 THE COURT: Not yet, thank you. At page four,
6 paragraph five of the plea agreement, it says that you have
7 considered and discussed all possible defenses and defense
8 strategies with your counsel. Is this an accurate statement?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Okay. At page seven, paragraph twelve, it
11 says you have discussed the charges, the facts and the
12 possible defenses with your attorney. All of the foregoing
13 rights, the waiver of rights, the elements, the possible
14 penalties and the consequences have been carefully explained
15 to you by your attorney. Is that an accurate statement?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: All right. And then the District Attorney
18 reminded the Court that pursuant to NRS 176.093(1) lifetime
19 supervision is required. That means if you get out on parole
20 you are required to undergo supervision for life. Do you
21 understand that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Has that been explained to you by
24 Mr. Sullivan?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Do you have any questions about that?

3 THE DEFENDANT: No, sir.

4 THE COURT: Are you satisfied with the amount of time
5 that Mr. Sullivan or members of the Public Defender's staff
6 had to spend with you on this particular case?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Are you satisfied with the representation
9 they provided so far?

10 THE DEFENDANT: Yes.

11 THE COURT: Did anyone promise you anything to get you
12 to plead guilty?

13 THE DEFENDANT: No.

14 THE COURT: Did anyone threaten you with anything to
15 get you to plead guilty?

16 THE DEFENDANT: No.

17 THE COURT: Are you pleading guilty to these charges
18 because in truth and in fact you are guilty of these crimes?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. In your own words, I am going
21 to require you to tell me what you did that makes you plead
22 guilty starting with Count I kidnapping?

23 THE DEFENDANT: I had been -- I had been drinking and
24 I ended up going out and -- picking up a girl whom I called

1 several times and took her out to the Washoe Lake area and --

2 THE COURT: Against her will?

3 MR. SULLIVAN: Can I have the Court's indulgence?

4 THE DEFENDANT: Excuse me. Say it again.

5 THE COURT: For the purposes of having sex with her
6 against her will?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Count III, sexual assault on a child, what
9 did you do?

10 THE DEFENDANT: I did all -- I did all three counts.

11 I am -- I just choked trying to say it.

12 Sorry.

13 MR. SULLIVAN: He is choked up trying to say it, your
14 Honor.

15 THE COURT: All right. But as far as the allegations
16 that were contained in Count III, forcing the victim to
17 perform fellatio on you, is that an accurate statement?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Count IV, you subjected her to
20 cunnilingus. Is that an accurate statement?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Count V, you subjected her to vaginal
23 intercourse?

24 THE DEFENDANT: Yes, sir.

1 THE COURT: All right. Are you under the influence of
2 anything this morning?

3 THE DEFENDANT: No.

4 THE COURT: You are clearheaded and you understand
5 fully what it is that you are doing?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: The rights that you are giving up? You
8 have to answer audibly.

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And the potential consequences of what you
11 are doing this morning?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: And you want to do it?

14 THE DEFENDANT: Yes.

15 THE COURT: All right. The Court finds that Michael
16 Todd Botelho is competent to enter the pleas of guilty that
17 he entered. The Court finds that there is a factual bases to
18 accept all the pleas. The Court finds that Mr. Botelho does
19 understand his constitutional rights and has freely,
20 knowingly, voluntarily and intelligently waived them. The
21 Court finds that he does understand the true nature of each
22 of the charges that have been filed against him in that
23 Indictment. And the Court finds that he does understand the
24 potential consequences of the convictions that result in his

1 pleas of guilty to those particular charges.

2 The Court finds that the pleas of guilty
3 that were entered were entered freely, knowingly, voluntarily
4 and intelligently with the advice of counsel. And the court
5 does hereby accept the pleas of guilty.

6 MR. SULLIVAN: Your Honor, the defense and I believe
7 the State would request a special hearing. I believe two
8 hours would be sufficient. We would like to have a closed
9 hearing, special set, Judge, if that's at all possible. And
10 I am thinking I need a few months to prepare for sentencing
11 for this particular case. The end of March, would that be
12 available?

13 MS. VILORIA: Your Honor, I will not be available from
14 March 1st on so it has to be the end -- I would actually
15 prefer it to be the middle of February, if the court can
16 accommodate or it's going to have to be continued out past my
17 leave.

18 But I concur with everything that
19 Mr. Sullivan says, except for the request for a closed
20 hearing. But as it relates to the time set and a special
21 set, I do request that jointly.

22 MR. SULLIVAN: I just -- I have some concerns. I have
23 a murder trial starting March 1st in Department Four. So can
24 I have the Court's indulgence. Your Honor, does the Court

1 have the first or second week of February available?

2 THE CLERK: Is counsel available at 9:30 on February
3 11th? That's a Wednesday.

4 MR. SULLIVAN: I'm sorry, what's the date?

5 THE CLERK: February 11th.

6 MR. SULLIVAN: That's fine.

7 THE CLERK: At 9:30 a.m. for two hours.

8 MS. VILORIA: Thank you.

9 THE COURT: All right.

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12 (At this time the foregoing proceedings were concluded.)

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1 STATE OF NEVADA)

2) ss.

3 COUNTY OF WASHOE)

4 I, JOAN MARIE DOTSON, a Certified Shorthand
5 Reporter for the Second Judicial District Court of the State
6 of Nevada in and for the County of Washoe DO HEREBY CERTIFY;

7 That I was present in Department No. 3 of
8 the above-entitled court on Thursday, December 11th, 2003 and
9 took verbatim stenotype notes of the proceedings and
10 thereafter transcribed them into typewriting as herein
11 appears;

12 That the foregoing transcript is a full,
13 true and correct transcription of my said stenotype notes and
14 is a full, true and correct record of the proceedings had and
15 the testimony given in the above-entitled action to the best
16 of my knowledge, skill and ability.

17
18
19 DATED: This 19th day of December, 2003.

20
21 
22 JOAN MARIE DOTSON, CSR #102
23
24

FILED

DEC 11 2003

RONALD A. LONGTIN, JR., CLERK

By: C. Patton
DEPUTY

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8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
10
11 IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No. CR03-2156

v.

Dept. No. 3

12 MICHAEL TODD BOTELHO,
13 also known as
14 "KEVIN",

Defendant.

GUILTY PLEA MEMORANDUM

17 1. I, MICHAEL TODD BOTELHO, also known as "KEVIN",
18 understand that I am charged with the offense(s) of: COUNT I.
19 KIDNAPPING IN THE FIRST DEGREE, a violation of NRS 200.310-1 and NRS
20 200.320, a felony; COUNT II. BATTERY WITH INTENT TO COMMIT SEXUAL
21 ASSAULT ON A CHILD, a violation of NRS 200.400, a felony; COUNT III.
22 SEXUAL ASSAULT ON A CHILD, a violation of NRS 200.366, a felony;
23 COUNT IV. SEXUAL ASSAULT ON A CHILD, a violation of NRS 200.366, a
24 felony; COUNT V. SEXUAL ASSAULT ON A CHILD, a violation of NRS
25 200.366, a felony.

///

1 2. I desire to enter a plea of guilty to the offense(s) of
2 COUNT I. KIDNAPPING IN THE FIRST DEGREE, a violation of NRS 200.310-
3 1 and NRS 200.320, a felony; COUNT III. SEXUAL ASSAULT ON A CHILD, a
4 violation of NRS 200.366, a felony; COUNT IV. SEXUAL ASSAULT ON A
5 CHILD, a violation of NRS 200.366, a felony; COUNT V. SEXUAL ASSAULT
6 ON A CHILD, a violation of NRS 200.366, a felony, as more fully
7 alleged in the charge(s) filed against me.

8 3. By entering my plea of guilty I know and understand
9 that I am waiving the following constitutional rights:

10 A. I waive my privilege against self-incrimination.

11 B. I waive my right to trial by jury, at which trial the
12 State would have to prove my guilt of all elements of the offenses
13 beyond a reasonable doubt.

14 C. I waive my right to confront my accusers, that is, the
15 right to confront and cross examine all witnesses who would testify
16 at trial.

17 D. I waive my right to subpoena witnesses for trial on my
18 behalf.

19 4. I understand the charge(s) against me and that the
20 elements of the offense(s) which the State would have to prove beyond
21 a reasonable doubt at trial are that on the 7th day of August, 2003,
22 or thereabout, in the County of Washoe, State of Nevada, I did, as to
23 Count I., willfully and unlawfully seize and/or confine and/or
24 entice and/or kidnap and/or carry away the person of JANE DOE, a
25 minor child of the age of fourteen years having a date of birth of
26 November 8, 1988, with the intent to hold and detain and did hold and

1 detain such person for the purpose of committing sexual assault upon
2 her, and/or with the intent to hold said minor to unlawful service or
3 to perpetrate upon the person of the minor any unlawful act.

4 I further understand the charge(s) against me and that the
5 elements of the offense(s) which the State would have to prove beyond
6 a reasonable doubt at trial are that on the 7th day of August, 2003,
7 or thereabout, in the County of Washoe, State of Nevada, I did, as to
8 Count III., willfully and unlawfully subject JANE DOE, a female
9 child under the age of sixteen years, having a date of birth of
10 November 8, 1988, to sexual penetration, against the victim's will or
11 under conditions in which I knew or should have known that the victim
12 was mentally or physically incapable of resisting or understanding
13 the nature of my conduct, to wit, I forced the victim to perform
14 fellatio upon me, in the hills of Washoe Valley, Washoe County,
15 Nevada.

16 I further understand the charge(s) against me and that the
17 elements of the offense(s) which the State would have to prove beyond
18 a reasonable doubt at trial are that on the 7th day of August, 2003,
19 or thereabout, in the County of Washoe, State of Nevada, I did, as to
20 Count IV., willfully and unlawfully subject JANE DOE, a female child
21 under the age of sixteen years, having a date of birth of November 8,
22 1988, to sexual penetration, against the victim's will or under
23 conditions in which I knew or should have known that the victim was
24 mentally or physically incapable of resisting or understanding the
25 nature of the my conduct, to wit, I subjected said child to
26 cunnilingus, in the hills of Washoe Valley, Washoe County, Nevada.

1 I further understand the charge(s) against me and that the
2 elements of the offense(s) which the State would have to prove beyond
3 a reasonable doubt at trial are that on the 7th day of August, 2003,
4 or thereabout, in the County of Washoe, State of Nevada, I did, as to
5 Count V., willfully and unlawfully subject JANE DOE, a female child
6 under the age of sixteen years, having a date of birth of November 8,
7 1988, to sexual penetration, against the victim's will or under
8 conditions in which I knew or should have known that the victim was
9 mentally or physically incapable of resisting or understanding the
10 nature of my conduct, to wit, I subjected said child to vaginal
11 intercourse with my penis, in the hills of Washoe Valley, Washoe
12 County, Nevada.

13 5. I understand that I admit the facts which support all
14 the elements of the offenses by pleading guilty. I admit that the
15 State possesses sufficient evidence which would result in my
16 conviction. I have considered and discussed all possible defenses
17 and defense strategies with my counsel. I understand that I have the
18 right to appeal from adverse rulings on pretrial motions only if the
19 State and the Court consent to my right to appeal. In the absence of
20 such an agreement, I understand that any substantive or procedural
21 pretrial issue or issues which could have been raised at trial are
22 waived by my plea.

23 6. I understand that the consequences of my plea of guilty to
24 Count I., are that I may be imprisoned for a period of life with
25 eligibility of parole at five years or definite term of fifteen years

26 ///

1 with parole eligibility after five years have been served in the
2 Nevada State Prison and that I am not eligible for probation.

3 I further understand that the consequences of my plea of
4 guilty to Count III., are that I may be imprisoned for a period of
5 life with eligibility of parole at twenty years or definite term of
6 twenty years with parole eligibility after five years have been
7 served in the Nevada State Prison and that I am not eligible for
8 probation. I further understand that I will be required to be on
9 lifetime supervision pursuant to NRS 176.0931.

10 I further understand that the consequences of my plea of
11 guilty to Count IV., are that I may be imprisoned for a period of
12 life with eligibility of parole at twenty years or definite term of
13 twenty years with parole eligibility after five years have been
14 served in the Nevada State Prison and that I am not eligible for
15 probation. I further understand that I will be required to be on
16 lifetime supervision pursuant to NRS 176.0931.

17 I further understand that the consequences of my plea of
18 guilty to Count V., are that I may be imprisoned for a period of life
19 with eligibility of parole at twenty years or definite term of twenty
20 years with parole eligibility after five years have been served in
21 the Nevada State Prison and that I am not eligible for probation. I
22 further understand that I will be required to be on lifetime
23 supervision pursuant to NRS 176.0931. I also understand that the
24 sentence on each count may be concurrent or consecutive to each
25 other.

26 ///

1 7. In exchange for my plea of guilty, the State, my
2 counsel and I have agreed to recommend the following: ~~SB~~ ~~Parties~~ ~~in~~
3 be free to argue for an appropriate sentence. As part of plea
4 negotiations, the State will dismiss COUNT II. BATTERY WITH INTENT
5 TO COMMIT SEXUAL ASSAULT ON A CHILD at the time of sentencing. The
6 State will also refrain from pursuing any transactionally related
7 charges or enhancements arising out of the instant offense.

8 8. I understand that, even though the State and I have
9 reached this plea agreement, the State is reserving the right to
10 present arguments, facts, and/or witnesses at sentencing in support
11 of the plea agreement.

12 9. I also agree that I will make full restitution in this
13 matter, as determined by the Court. Where applicable, I additionally
14 understand and agree that I will be responsible for the repayment of
15 any costs incurred by the State or County in securing my return to
16 this jurisdiction.

17 10. I understand that the State, at their discretion, is
18 entitled to either withdraw from this agreement and proceed with the
19 prosecution of the original charges or be free to argue for an
20 appropriate sentence at the time of sentencing if I fail to appear at
21 any scheduled proceeding in this matter OR if prior to the date of my
22 sentencing I am arrested in any jurisdiction for a violation of law
23 OR if I have misrepresented my prior criminal history. I represent
24 that I have one prior felony conviction. I understand and agree that
25 the occurrence of any of these acts constitutes a material breach of
26 my plea agreement with the State. I further understand and agree

1 that by the execution of this agreement, I am waiving any right I may
2 have to remand this matter to Justice Court should I later withdraw
3 my plea.

4 11. I understand and agree that pursuant to the terms of
5 the plea agreement stated herein, any counts which are to be
6 dismissed and any other cases charged or uncharged which are either
7 to be dismissed or not pursued by the State, may be considered by the
8 court at the time of my sentencing.

9 12. I understand that the Court is not bound by the
10 agreement of the parties and that the matter of sentencing is to be
11 determined solely by the Court. I have discussed the charge(s), the
12 facts and the possible defenses with my attorney. All of the
13 foregoing rights, waiver of rights, elements, possible penalties, and
14 consequences, have been carefully explained to me by my attorney. I
15 am satisfied with my counsel's advice and representation leading to
16 this resolution of my case. I am aware that if I am not satisfied
17 with my counsel I should advise the Court at this time. I believe
18 that entering my plea is in my best interest and that going to trial
19 is not in my best interest.

20 13. I understand that this plea and resulting conviction
21 may have adverse effects upon my residency in this country if I am
22 not a U. S. Citizen.

23 14. I offer my plea freely, voluntarily, knowingly and
24 with full understanding of all matters set forth in the Indictment
25 and in this Plea Memorandum. I understand everything contained
26 within this Memorandum.

2/18

V5:179

ORIGINAL

FILED

2004 FEB -3 PM 1:44

RONALD A. LONGSTIN, JR.

BY  DEPUTY

1 CODE
2 Richard A. Gammick
3 #001510
4 P.O. Box 30083
5 Reno, NV 89520-3083
6 (775) 328-3200
7 Attorney for Plaintiff

8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
10
11 IN AND FOR THE COUNTY OF WASHOE.

12 * * *

13 THE STATE OF NEVADA,

14 Plaintiff,

Case No. CR03-2156

15 v.

Dept. No. 3

16 MICHAEL TODD BOTELHO,

17 Defendant.

18
19 NOTICE OF INTENT TO INTRODUCE PRIOR OR OTHER BAD ACT EVIDENCE AT
20 SENTENCING HEARING

21 COMES NOW, the State of Nevada, by and through RICHARD A.
22 GAMMICK, District Attorney of Washoe County, and KELLI ANNE VILORIA,
23 Deputy District Attorney, and offers its NOTICE OF INTENT TO
24 INTRODUCE PRIOR OR OTHER BAD ACT EVIDENCE AT SENTENCING HEARING.
25 This notice is based upon the attached Points and Authorities and the
26 pleadings and papers on file herein.

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V5:179

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POINTS AND AUTHORITIES

FACTUAL BACKGROUND

Instant Offense

On August 7, 2003, and under the pretense of needing a babysitter for his children, defendant, MICHAEL TODD BOTELHO, picked fourteen-year-old JANE DOE from her home, drove her into the hills of Washoe Valley beat where he duct-taped and sexually assaulted her. Following the attack, defendant became stressed and had to be calmed by the victim. Defendant kept telling the victim he "...didn't know what he was going to do with her now." Due to the calmness of her demeanor and a promise not to tell, by calling herself a reputed liar, the victim was able to talk defendant into taking her home.

Prior or Other Bad Act Evidence

During the investigation of this case, defendant was interviewed by Detective Greg Herrera of the Washoe County Sheriff's Office. In the interview, defendant admitted to Detective Herrera that he had fantasized about wanting to rape a woman or girl and even about tying the victim up.

Prior to interviewing defendant, Detective Herrera had received information from defendant's ex-wife, Melissa Botelho that defendant had sexual fantasies of raping and dismembering a young girl. Melissa Botelho has further described the defendant's sexual fantasies as evolving, getting worse as time went on and, eventually, being a basis that destroyed their marriage. The State wants to present Melissa Botelho as a witness in defendant's sentencing hearing.

1 ARGUMENT

2 The State intends to call the testimony of the defendant and his ex-
3 wife in regards to the defendant's sexual fantasies as it relates
4 specifically to the defendant's propensity for dangerousness and harm
5 to the children in this community.

6 Evidence of a defendant's propensity for dangerousness and
7 harm to children is not inadmissible. Williams v. New York, 337
8 U.S. 242 (1949) is the seminal case dealing with the broad amount of
9 information a trial court is entitled to consider in imposing a
10 sentence. It has been cited with approval in dozens of subsequent
11 United States Supreme court decisions as well as in literally
12 hundreds of other decisions from other federal and state appellate
13 courts. See, e.g., Williams v. Oklahoma, 358 U.S. 576, 584 (1959);
14 Gregg v. Georgia, 428 U.S. 153, 189 (1976); United States v. Grayson,
15 438 U.S. 45, 48-49 (1978); Unites States v. Plisek, 657 F.2d 920, 927
16 (7th Cir. 1986); United States v. Wise, 603, F.2d 1101, 1105 (4th
17 Cir. 1979); Eyman v. Alford, 448 F.2d 306 314, 315 (9th Cir. 1969);
18 Arizona v. Cawley, 648 P.2d 142, 144 (Arizona 1982).

19 In Williams, the United State Supreme Court offered an
20 extended discussion regarding the broad discretion trial judges have
21 in admitting character evidence pertaining to the defendant.

22 Tribunals passing on the guilt of a defendant
23 always have been hedged in by strict evidentiary
24 procedural limitations. But before and since the
25 American colonies became a nation, courts in this
26 country and in England practiced a policy in
which a sentencing judge could exercise a wide
discretion in the sources and types of evidence
used to assist him in determining the kind and
extent of punishment to be imposed within limits

1 fixed by law. Out-of-court affidavits have been
2 used frequently, and of course in the smaller
3 communities sentencing judges naturally have in
4 mind their knowledge of the personalities and
5 Background of convicted offenders. A recent
6 manifestation of the historical altitude allowed
7 sentencing judges appears in Rule 32 of the
8 Federal rules of Criminal Procedure. That rule
9 provides for consideration by Federal Judges of
10 reports made by probation officers containing
11 information about a convicted defendant,
12 including such information 'as may be helpful in
13 imposing a sentence or in granting probation or
14 in the correctional treatment of the
15 defendant...'

9 In addition to the historical basis for different
10 evidentiary rules governing trial and sentencing
11 procedures there are sound practical reasons for
12 the distinction. In a trial before verdict the
13 issue is whether a defendant is guilty of having
14 engaged in certain criminal conduct of which he
15 has been specifically accused. Rules of evidence
16 have been fashioned for criminal trials which
17 narrowly confine the trial contest to evidence
18 that is strictly relevant to the particular
19 events charged. These rules rest in part on a
20 necessity to prevent a time consuming and
21 confusing trial of collateral issues. They were
22 also designed to prevent tribunals concerned
23 solely with the issue of guilt of a particular
24 offense from being influenced to convict for that
25 offense by evidence that the defendant had
26 habitually engaged in other misconduct. A
sentencing judge, however, is not confined to the
narrow issue of guilt. His task within fixed
statutory or constitutional limits is to
determine the type and extent of punishment after
the issue of guilt has been determined. Highly
relevant --- if not essential --- to [the trial
judges] selection of an appropriate sentence is
possession of the fullest information possible
concerning the defendants life and
characteristics. And modern concepts
individualizing punishment have made it all the
more necessary that a sentencing judge not be
denied an opportunity to obtain pertinent
information by requirement of rigid adherence
to restrictive rules of evidence properly applicable to the
trial. Williams, 337 U.S., at pp. 246-247. (Emphasis
added)

///

1 In United States v. Plisek, 657 F.2d 920 (1981), the
2 Seventh Circuit relied heavily on Williams in approving a trial court
3 judges consideration of the facts and circumstances relating to a
4 prior case in which the subject defendant had been acquitted
5 following trial. Id., at page 927. In Plisek the court stated:

6 [T]he scope of a sentencing judge's
7 discretion is wide, and in making the sentencing
8 determination, 'a judge may appropriately conduct
9 an inquiry broad in scope, largely unlimited
10 either as to the kind of information he may
11 consider, or the source from which it may come.'
12 United States v. Tucker, 912 S.Ct. 589, 591, 30
13 L.Ed.2d 592 (1972). While it has been suggested
14 that consideration of mere arrests or pending
15 charges be prohibited in reaching the sentencing
16 determination, United States v. Johnson, 507 F.2d
17 826, 832 (7th Cir. 1974), cert denied, 421 U.S.
18 949, 95 S.Ct. 682, 44 L.Ed.2d 103 (1975)
19 (concurring and dissenting opinion) (Swygert,
20 C.J.), the legislature has chosen to permit a far
21 broader inquiry into 'the background, character
22 and conduct' of a convicted defendant. 18 U.S.C.
23 §3577 (1976). A broad interpretation of this
24 language finds support in the legislative history
25 of §3577, which makes it clear that the section
26 was intended to 'maximize sources of sentencing
information [and] to guard against the
unnecessary formalization of sentencing
procedure.' Rep. No. 91-617, 91st Cong., 1st
Sess 90 (1969), quoted in United States v.
Williamson, 567 F.2d 610, 615 (4th Cir. 1977).
This legislative mandate reflects a sentencing
philosophy articulated by the Supreme Court in
Williams v. New York. Plisek, Id. at p.927.

21 The Plisek court then went on to quote from the
22 Williams decision before concluding that:

23 [The] Williams court intended that full
24 knowledge of the defendant's entire background
25 should be available to the sentencing court... we
26 believe that under this broad grant of sentencing
discretion the trial court did not err in
referring to information int he presentence
report concerning the circumstances surrounding a

1 prior acquittal, particularly in view of the wide
2 latitude of response to the information permitted
to the defendant. Plisek, Id. at p.927.

3 In Arizona v. Cawley, 648 P.2d 142 (Arizona 1982), the
4 defendant was convicted in the court below of three counts of child
5 molesting. On appeal, he challenged the trial judge's consideration
6 of hearsay information regarding past evidence of peculiar sexual
7 behavior. This hearsay information was in the form of a pre-sentence
8 report and a report from his United States navy record. The
9 appellate court upheld the trial court's consideration of this
10 hearsay evidence regarding the defendant's abnormal sexual behavior,
11 even though none of the prior incidents resulted in convictions.
12 Cawley, id. at p.144.

13 In Smith v. State, 517 A.2d 1081 (MD. 1986), the Maryland
14 Court of Appeals held that testimony concerning a rape defendants
15 alleged participation in an uncharged, unrelated attempted rape of
16 another woman was properly admitted at the sentencing hearing, even
17 though no charges had ever been filed in the attempted rape case.
18 The defendant argued that the testimony was unreliable because no
19 formal charges had been filed. The Court rejected this claim and
20 noted that the victim's testimony was not to be deemed incredible
21 simply because she had not pressed charges. The Court noted she was
22 sworn to tell the truth at sentencing hearing and was subject to
23 cross examination. Smith, id. at pp. 1082-1088.

24 NRS 175.552 deals with the evidence that may be considered
25 at the penalty\sentencing hearing in first degree murder cases. That
26 section provides:

1 In the hearing, evidence may be presented
2 concerning aggravated and mitigating
3 circumstances relative to the events, defendant
4 or victim and on any other matter which the court
5 deems relevant to the sentence, whether or not
6 the evidence is ordinarily admissible. NRS
7 175.552(3).

8 This section makes clear that the Nevada legislature
9 intended that the sentencing body in first degree murder cases be
10 allowed to consider the broadest amount of information possible.

11 The Nevada legislature has also made clear that a broad
12 amount of information may be considered by the sentencing court in
13 cases other than first degree murder. NRS 176.145(1)(a)(b) provides
14 that the pre-sentence report compiled to assist the judge at
15 sentencing must contain information regarding the prior criminal
16 record of the defendant and "such information about his
17 characteristics, his financial condition, the circumstances effecting
18 his behavior and the circumstances of the offense, as may be helpful
19 in imposing sentence..."

20 Accordingly, and based on the facts above, the State will seek to
21 admit the defendant and Melissa Botelho's testimony at sentencing.

22 CONCLUSION

23 Based upon the foregoing, the State intends to call the
24 testimony of the defendant and his ex-wife in regards to the
25 defendant's deviant sexual fantasies as it relates specifically to

26 ///

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///

1 the defendant's propensity for dangerousness and harm to the children
2 in this community.

3 Dated this 2nd day of February, 2004.

4 RICHARD A. GAMMICK
5 District Attorney
6 Washoe County, Nevada

7
8 By Kelli Anne Vilorio
9 KELLI ANNE VILORIA
10 Deputy District Attorney

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26 01281561

CERTIFICATE OF FORWARDING

I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I forwarded a true copy of the foregoing document, through the Washoe County interagency mail, addressed to:

SEAN SULLIVAN, ESQ
WASHOE COUNTY PUBLIC DEFENDER'S OFFICE
350 S CENTER ST., 6TH FLOOR
RENO NV

DATED this 2nd day of February, 2004.

Dee' Gavi

ORIGINAL

1 CODE 2645
 2 MICHAEL R. SPECCHIO
 3 BAR# 1017
 4 WASHOE COUNTY PUBLIC DEFENDER
 5 P.O. BOX 30083
 6 RENO NV 89520-3083
 7 (775) 328-3464
 8 ATTORNEY FOR: DEFENDANT

FILED
 2009 FEB 13 PM 3:33
 BY [Signature]
 [Signature]

6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
 7 IN AND FOR THE COUNTY OF WASHOE

9 THE STATE OF NEVADA,
 10 Plaintiff,
 11 vs.

12 MICHAEL TODD BOTELHO,
 13 Defendant.

Case No. CR03-2156

Dept. 3

14 OPPOSITION TO STATE'S INTRODUCTION OF PRIOR OR OTHER BAD ACT
 15 EVIDENCE AT SENTENCING HEARING; DEFENDANT'S MOTION TO HAVE THE
 16 MATTER SEALED, TO RECUSE THE PRESENT SENTENCING COURT, AND TO
 17 HAVE THE MATTER TRANSFERRED TO ANOTHER COURT FOR SENTENCING
 18 PURPOSES.

19 COMES NOW Defendant, Michael Todd Botelho, by and through
 20 his counsel, the Washoe County Public Defender, Sean B.
 21 Sullivan, Deputy Public Defender and hereby opposes the State's
 22 Notice of Intent to Introduce Prior or Other Bad Act Evidence
 23 at Sentencing Hearing. The Defendant hereby respectfully
 24 requests that this Court enter an order prohibiting the State
 25 from presenting any testimony or evidence at the sentencing
 26 hearing regarding any alleged "deviant sexual fantasy" from the

1 Defendant's ex-wife, Melissa Botelho, or from allowing Ms.
2 Botelho to testify at the proceeding in violation of NRS
3 49.295, NRS 49.405, and the applicable Nevada case law set
4 forth below. Furthermore, the Defendant respectfully requests
5 that this Court enter an order sealing all papers, pleadings,
6 motions, and transcripts pertaining to this present issue.
7 Finally, the Defendant respectfully requests that this Court,
8 upon entertaining the merits of the present motion, refrain
9 from sentencing the Defendant in the present matter, and that
10 it recuse itself from hearing the sentencing, and transfer the
11 matter to another court for the purposes of sentencing.

12 The Defendant respectfully requests oral arguments upon
13 the merits of the present matter on or before the time set for
14 sentencing. The sentencing in this matter is currently set for
15 February 18, 2004 at 10:30 a.m., in Department Number Three of
16 the Second Judicial District Court. This opposition and motion
17 is based upon the attached Points and Authorities and the
18 pleadings and papers on file herein.

19 On February 3, 2004, the State filed a document with this
20 Court entitled Notice of Intent to Introduce Prior or Other Bad
21 Act Evidence at Sentencing Hearing. The main thrust of the
22 State's present motion is that it will attempt to introduce
23 testimony from the Defendant's ex-wife, Melissa Botelho, at the
24 time of sentencing, concerning "deviant sexual fantasies" the
25 Defendant allegedly made during course of their marriage. The
26 content of these alleged deviant sexual fantasies are set forth

1 in the State's present motion, which include the specific
 2 details of Ms. Botelho's expected testimony at the upcoming
 3 sentencing hearing. See State's motion, pp. 2, lines 14-26.
 4 However, as will be demonstrated below, the State's present
 5 motion has violated the Defendant's statutory marital
 6 communication privilege set forth in NRS 49.295. This statute
 7 reads in pertinent part:

- 8 1. Except as otherwise provided in subsections 2 and
 9 3 of NRS 49.305¹:
 - 10 (a) A husband cannot be examined as a witness for or
 11 against his wife without his consent, nor a wife
 12 for or against her husband without her consent.
 - 13 (b) **Neither a husband nor a wife can be examined,
 14 during the marriage or afterwards, without the
 15 consent of the other, as to any communications
 16 made by one to the other during the marriage.**
- 17 2. The provisions of subsection 1 do not apply to
 18 a:
 - 19 (a) Civil proceeding brought by or on behalf of one
 20 spouse against the other spouse;
 - 21 (b) Proceeding to commit or otherwise place a
 22 spouse, the property of the spouse or both the
 23 spouse and the property of the spouse under the
 24 control of another because of the alleged mental
 25 or physical condition of the spouse;
 - 26 (c) Proceeding brought by or on behalf of a spouse
 to establish his competence;
 - (d) Proceeding in the juvenile court or family court
 pursuant to chapter 62 of NRS and NRS 443B.410
 to 432B.590, inclusive, and sections 3 to 7,
 inclusive, of this act; or
 - (e) Criminal proceeding in which one spouse is
 charged with:

24 ¹ NRS 49.305 provides an exception to the privilege, stating that when a
 25 husband or wife has been declared insane by a court of competent
 26 jurisdiction, the other spouse shall be able to testify under certain
 circumstances, but that the insane spouse shall be afforded the marital
 privilege set forth in NRS 49.295 once he or she is declared competent by
 the court.

- (1) A crime against the person or the property of the other spouse or of a child of either, or of a child in the custody or control of either, whether the crime was committed before or during the marriage.
- (2) Bigamy or incest.
- (3) A crime related to the abandonment of a child or nonsupport of a wife or child.

3. The provisions of subsection 1 do not apply in any criminal proceeding to events that took place before the husband and wife were married. (Emphasis added).

In short, the marital communication privilege discussed above "... enable a spouse to refuse to be examined against his or her spouse, and enable one spouse to prevent the other from being examined regarding statements made in reliance on marital confidence." See Franco v. State, 109 Nev. 1229, 266 (1993).

Furthermore, NRS 49.405(1) provides that "[t]he claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by the judge or counsel. No inference may be drawn therefrom." In Hylton v. State, 100 Nev. 539 (1984), the Nevada Supreme Court held that it is improper for the State to attempt to call the defendant's wife as a witness in violation of NRS 49.295; and it is misconduct amounting to reversible error for the Prosecutor to even comment, or make any impermissible inferences on the fact that the defendant invoked the spousal privilege. Citing George v. State, 98 Nev. 196 (1982); NRS 49.405.

1 In the present matter, it is clear that the Defendant has
2 a statutory right to invoke the marital communication privilege
3 set forth above in NRS 49.295 at the time of sentencing, which
4 would prevent the State from calling the ex-wife of the
5 Defendant, Melissa Botelho, at the sentencing proceeding to
6 testify about any alleged deviant sexual fantasies the
7 Defendant may have expressed during the course of their
8 marriage. It is axiomatic that any sexual fantasy expressed by
9 one spouse to another, whether it be deviant or otherwise, is
10 done so within the strict confines of the marriage, and not
11 expressed to anyone else but the other spouse. This is the
12 entire purpose and intent of the marital communication
13 privilege, insofar as a spouse should be able to communicate
14 with his or her spouse without fear of repercussion or reprisal
15 from the State.

16 Furthermore, as the State must now concede, these alleged
17 sexual fantasies, according to the Defendant's ex-wife, were
18 made during the course of the couple's marriage, when the
19 couple would engage in sexual relations, and were ultimately
20 the basis that destroyed the marriage. There is no evidence to
21 suggest that these alleged sexual fantasies, if they were made
22 at all, were made in the presence of another person, or made
23 outside the strict confines of the marriage between the
24 Defendant and Ms. Botelho. Accordingly, the marital
25 communication privilege now applies to the present matter and
26

1 it shall prevent Ms. Botelho from testifying against the
2 Defendant at the upcoming sentencing proceeding.

3 Finally, in light of the fact that the State has already
4 disregarded the marital communication privilege discussed above
5 by outlining the specific content of the alleged sexual
6 fantasies within its motion, it is now impossible for the
7 Defendant to invoke his statutory right of the marital
8 communication privilege so that he may receive a fair
9 sentencing. In short, the sentencing court has now been
10 tainted because it has already learned of the testimony to be
11 excluded at the sentencing proceedings. It would be impossible
12 for the sentencing court to simply disregard the alleged sexual
13 fantasies set forth by the State in its motion, because the
14 proverbial "bell" has already been rung, and it cannot now be
15 undone.

16 These alleged sexual fantasies are so damning and
17 prejudicial to the Defendant's position in light of the nature
18 of his current charges, the Defendant hereby requests that this
19 Court enter an order prohibiting the State from presenting any
20 testimony or evidence at the sentencing hearing regarding any
21 alleged "deviant sexual fantasy" from the Defendant's ex-wife,
22 Melissa Botelho, or from allowing Ms. Botelho to testify at the
23 proceeding in violation of NRS 49.295, NRS 49.405, and the
24 applicable Nevada case law set forth above. Furthermore, the
25 Defendant respectfully requests that this Court enter an order
26 sealing all papers, pleadings, motions, and transcripts

1 pertaining to this present issue. Finally, the Defendant
2 respectfully requests that this Court, upon entertaining the
3 merits of the present motion, refrain from sentencing the
4 Defendant in the present matter, and that it recuse itself from
5 hearing the sentencing, and that it transfer the matter to
6 another court for the purposes of sentencing.

7
8
9
10 Dated this 13th day of February, 2004.

11 MICHAEL R. SPECCHIO
12 WASHOE COUNTY PUBLIC DEFENDER

13 By: 

14 SEAN B. SULLIVAN
15 Deputy Public Defender
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CERTIFICATE OF SERVICE

I, DIANA RICHARDS, hereby certify that I am an employee of the Washoe County Public Defender's Office, Reno, Washoe County, Nevada, and that on this date I forwarded a true copy of the foregoing document, via inter-office mail, addressed to:

Kelli Vilorio, Deputy District Attorney

DATED this 13th day of February, 2004.

Diana Richards
DIANA RICHARDS

FILED

ORIGINAL

MAR 31 2004

RONALD A. LONGTIN, JR., CLERK

By: DEPUTY CLERK

1 4185

2 JOAN MARIE DOTSON

3 CCR #102

4 75 COURT STREET

5 RENO, NEVADA

6
7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

8 IN AND FOR THE COUNTY OF WASHOE

9 BEFORE THE HONORABLE JEROME M. POLAHA, DISTRICT JUDGE

10 --oOo--

11 THE STATE OF NEVADA,
12 Plaintiff,

Case No. CR03-2156

13 vs.

Department No. 3

14 MICHAEL TODD BOTELHO,
15 Defendant.
16 _____)

17 TRANSCRIPT OF PROCEEDINGS

18 HEARING ON MOTION

19 Thursday, March 11th, 2004

20 8:30 A.M.

21 Reno, Nevada

22
23 Reported by: JOAN MARIE DOTSON
24 NV, CA AND UT CERTIFIED, REGISTERED PROFESSIONAL REPORTER
Computer-aided Transcription

A P P E A R A N C E S

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For the Defendant: OFFICE OF THE PUBLIC DEFENDER
BY: SEAN SULLIVAN
Deputy Public Defender
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Reno, Nevada 89520

For the Department of
Parole & Probation: PAT CERNIGLIA

1 THURSDAY, MARCH 11TH, 2004; RENO, NEVADA

2 --oOo--

3 THE COURT: Good morning. Be seated. This is
4 CR03-2156, State of Nevada verses Michael Todd Botelho. And
5 this is the time set for the hearing on the defendant's --
6 well, actually it's -- it's the defendant's motion that we
7 will be entertaining at this particular time.

8 Because in their opposition they made
9 requests for affirmative action by the Court. And that would
10 be the second request. Furthermore, the defendant
11 respectfully requests that this court enter an order sealing
12 all papers, pleadings, motions and transcripts pertaining to
13 this present issue.

14 And I took that also to mean this hearing.

15 MR. SULLIVAN: Correct, your Honor.

16 THE COURT: All right. So we will address that
17 portion first because, as you are aware, the press is outside
18 waiting to see what is going to happen. And, if I find in
19 your favor, then we are going to take a recess for about an
20 hour or so and they are going to gather their first amendment
21 forces and present arguments to the court too. So --

22 MR. SULLIVAN: Okay. Thank you, Judge.

23 Your Honor, it is my understanding that
24 myself and the State, Mr. Hahn, we were notified at about

1 4:45, 5:00 p.m. by your administrative assistant last night
2 of the press wanting to come this morning.

3 I just want to make a few brief points about
4 that. First and foremost, your Honor, I believe that having
5 the press here will undercut or thwart all of what I am
6 trying to do today which is, if your Honor rules in my favor,
7 recuses himself and then have this matter sealed and
8 transferred to another court. It's safe to say that other
9 sentencing judges read the paper in this community and they
10 might also be tainted by reading any accounts of this case.
11 And we would like this matter to be sealed and all the papers
12 and pleadings and certainly to exclude the press in this
13 area.

14 Secondly, I think my client has an
15 underlying due process concern that's present today. I
16 believe that the press did not comply with Supreme Court
17 rules which say they must give the Court a certain time line
18 notification when they want to appear.

19 THE COURT: Cameras.

20 MR. SULLIVAN: Cameras. Exactly. And I believe it was
21 SCR-230. I am not entirely sure.

22 Third, your Honor, the third point I am
23 trying to make ties basically in with my second point. It is
24 just basically we did not have proper notification, and thus

1 we did not have adequate time to basically prepare for this
2 type of issue to have it fully briefed.

3 THE COURT: Well, you don't have a say in that.

4 MR. SULLIVAN: Certainly.

5 THE COURT: That's strictly up to the court under our
6 Supreme Court rules.

7 MR. SULLIVAN: Certainly, your Honor, I would like to
8 have -- filed something with the court or gave some type of
9 advisory opinion as to what our position would have been. I
10 understand it is certainly up to the court. And it's
11 certainly your decision.

12 But receiving the notification on the eve of
13 the motion hearing I just don't think the press -- they must
14 follow the rules, your Honor, including whether or not they
15 did not follow the rules in this case. And I think my
16 client's rights are at stake here and I certainly -- I
17 respect the press and I understand that they have a first
18 amendment issue.

19 However, I am -- I am fighting for my client
20 to have a fair and impartial tribunal sit at his sentencing.
21 And that's certainly my overriding concern. And I would
22 certainly -- not want to jeopardize my client's rights when
23 it comes to sealing this matter and having, if the court
24 chooses, another sentencing court to sit in sentencing -- in

1 judgment of this particular individual having them reading
2 the accounts.

3 THE COURT: Let's stick with the sealing portion
4 because, if you prevail, then you will get what you want.

5 MR. SULLIVAN: Well, the -- concerning the sealing,
6 Mr. Hahn made a point in his opposition to my motion that I
7 never relied on any authority. And I don't think that's
8 true. The authority that I am relying on is actually the
9 case law that I cited and the applicable statutes for the
10 privilege itself. That's the authority I am using for
11 sealing this matter.

12 That your Honor can always recuse himself or
13 herself, if he or she believes that he or she cannot be fair
14 and impartial. That's the remedy I am seeking. So the
15 authority for my motion is the marital communication statutes
16 that I have cited and the case law. The remedy is sealing it
17 because the cat -- the proverbial cat has been let out of the
18 bag and the information was put in the State's notice of
19 intent to introduce prior bad acts.

20 The State simply could have just said in its
21 notice of intent to introduce prior bad acts, "We intend to
22 call Melissa Botelho to testify about certain statements made
23 during the course of the marriage," end of story.

24 Nevertheless, they chose to actually

1 delineate what Melissa Botelho was going to testify about.
2 And I think that basically memorializes the State's position
3 and the bell cannot be unrung at this point. So I am -- the
4 remedy is sealing, recusing and transferring to another
5 court. I don't believe -- your Honor can certainly run his
6 court as he sees fit. So the authority that I have cited, I
7 will stand behind the authority that I have already cited.

8 THE COURT: What's the authority for sealing? What's
9 the authority for sealing?

10 MR. SULLIVAN: Your Honor, it's -- analogous to us
11 sealing transcripts when we have substantial assistance
12 clients. We don't want the public or anyone else involved
13 with the case to have access to that type of information.

14 THE COURT: Why?

15 MR. SULLIVAN: Because -- it would thwart our efforts
16 today if your Honor thinks, "Yeah, Mr. Botelho, you did have
17 a statutory right to invoke the marital communication
18 privilege and I have already heard the information prior to
19 even coming to court today and entertaining this motion
20 hearing. I have already read it in the State's notice of
21 intent to introduce the evidence, so it's already in my
22 mind. So, therefore, I want to seal it because I want to
23 make sure, to ensure that no other court is going to open the
24 file and have this motion in front of them and read it and be

1 tainted as well."

2 And that's the purpose for sealing all the
3 documents concerning this issue.

4 THE COURT: I am missing something, Mr. Sullivan. I'm
5 sorry. I am trying to segregate the arguments. And you keep
6 bringing them all back. So your position is that they cannot
7 be separated. They are all -- intertwined.

8 But let me ask you directly. What authority
9 do you have to seal these criminal proceedings?

10 MR. SULLIVAN: And, like I said before, the authority I
11 would have is that your Honor has the innate or inherent
12 authority to seal any document he or she believes will --
13 should not be accessible to the public or any other persons
14 involved in these proceedings.

15 And, like I said before, your Honor will
16 routinely seal transcripts during the criminal calendar when
17 it believes that the public should not learn about a
18 substantial assistance client. So the authority I am relying
19 on is I still stand behind the statutes themselves and the
20 case law.

21 THE COURT: Isn't there a -- a practical reason for
22 that? I mean, if somebody is convicted of a -- or, yeah,
23 accused of trafficking, that has a mandatory punishment
24 requirement.

1 MR. SULLIVAN: Sure.

2 THE COURT: And the only way that they could even give
3 themselves an opportunity for probation or if they start at a
4 level three an opportunity for lesser punishment is by
5 turning in somebody else or giving information that will lead
6 to the conviction or prosecution of somebody else. So since
7 the prison system is the receptacle of all people that are
8 convicted that don't get probation, they run the risk of
9 going to the same place that they are bringing -- or sending
10 or helping to send somebody in advance of their placement
11 there.

12 So that is the reason, as I understand it,
13 why we would tend to go ahead and seal that type of
14 proceeding.

15 But that is a singular type of proceeding.

16 This is an ordinary criminal case. I don't
17 see the -- what's beneath --

18 MR. SULLIVAN: Your Honor, you would agree with me, all
19 the motions and oppositions to the motions were filed within
20 the Court Clerk's jurisdiction and they are sitting in your
21 court's file right now.

22 THE COURT: Right.

23 MR. SULLIVAN: If this matter -- if you believed, your
24 Honor, that you had learned information and you could not

1 separate yourself from that information and be fair and
2 impartial during the sentencing, then you would agree that
3 this matter could be transferred to another department with a
4 random assignment. We don't know who the other Judge would
5 be.

6 That file would then be transferred to that
7 department through the clerk's office. And the only way we
8 can ensure that these motions -- are not read by the
9 sentencing court -- because, if they are read by the next
10 sentencing court, well, then we are back to square one, are
11 we not?

12 The next sentencing court reads this notice
13 of intent and reads all the other oppositions therewith, they
14 are going to be in the exact same position that your Honor is
15 in. And I'll be arguing the exact same arguments in front of
16 that sentencing court. So for the sake of --

17 THE COURT: You are still not answering my question.

18 I think I hear what you are saying. And,
19 again, I imagine we are talking to the appellate record.

20 So let me give you my thoughts on that and
21 they can tell me if I am right or wrong in my interpretation.

22 When a court has information that it uses
23 for a sentencing and the Supreme Court overturns that
24 sentencing -- let's say -- the most common area is the breach

1 of plea negotiations, all right, and it goes up -- he gets
2 sentenced. It goes up and it comes back down. And sometimes
3 the Supreme Court says transfer to another department.
4 Sometimes they don't.

5 Okay. Sometimes the sentencing Judge takes
6 it upon themselves.

7 Now, I am of the impression that the reason
8 that is done is that they feel that because you had that
9 information, you acted on it, and then the higher court said,
10 "Hey, you shouldn't have done that. You were wrong." That,
11 if they sent it back to that Judge, he may have a personal
12 stake in it at that point and say, "Well, okay. I'll
13 disassociate myself from that knowledge and I'll give you the
14 same sentence. What do you think of that?"

15 Now, that is the only explanation I have.
16 Because legally a Judge is presumed to perform his or her
17 duties in an impartial and fair manner.

18 Because if it became apparent that they
19 cannot do that, they would be removed or there would be
20 complaints filed against them.

21 MR. SULLIVAN: Sure.

22 THE COURT: Saying, "Look, he is unfair. She is
23 unfair."

24 In fact the case law says a Judge is

1 presumed to be impartial and the party asserting the
2 challenge carries the burden of establishing sufficient
3 factual grounds warranting disqualification.

4 MR. SULLIVAN: Your Honor, I guess the point I am
5 trying to make is we never even got a chance as a defense to
6 invoke this privilege. The privilege was taken away from us
7 by the State by them filing this notice of intent, so we
8 never even had a chance to exercise our statutory right to
9 invoke this privilege because normally the State would call
10 the victim at sentencing or at trial and we would say, "Hold
11 on, your Honor. Before this victim -- excuse me, before this
12 witness testifies, we are going to invoke this privilege."

13 So we don't want anyone, the Judge, the jury
14 or anyone else to hear what's -- about to come out of this
15 witness's mouth.

16 THE COURT: Okay. So -- now I hear you say that the
17 reason you want this sealed is because it's your position
18 that the State is invoking that -- what to you is a violation
19 of the marital privilege?

20 MR. SULLIVAN: Exactly.

21 THE COURT: Okay. And you don't want those facts to
22 be broadcast.

23 MR. SULLIVAN: These facts should have never been aired
24 to begin with. Exactly. That's my position. And to short

1 stop the facts -- short stop this from going any further down
2 the line and having other judges or other court personnel
3 reading these facts, I am trying to short stop it right now
4 with my motion in today's proceedings. And I think sealing
5 it or even striking it from the record would accomplish that
6 end.

7 THE COURT: Well, that's -- presuming that you are
8 correct in the law that this is a proper subject of the
9 privilege.

10 MR. SULLIVAN: Correct. Correct.

11 THE COURT: Okay. So that's the only reason that you
12 are requesting it be sealed?

13 MR. SULLIVAN: Well, other than the -- other than the
14 fact that we are contesting the allegations themselves. We
15 don't believe them to be true. And we will -- if necessary,
16 if this either comes before your Honor or if this comes
17 before another sentencing Judge, we will certainly address
18 the merits of the allegations themselves.

19 We don't believe these allegations to be
20 true at all, the allegations that the State made concerning
21 the deviant sexual fantasies which I reference in my motion.
22 But I think that's something for whether or not -- yeah, the
23 merits of the issue. We are getting into a different area.

24 THE COURT: All right. Let me hear from the State.

1 Mr. Hahn.

2 MR. HAHN: Your Honor, our official position is that if
3 the press wishes to be here we believe they are entitled to.
4 The point that I tried to make in my opposition is that there
5 is no authority whatsoever that's offered for this. It's
6 just kind of an inherent powers kind of thing. So with
7 regard to that, Judge, I have just a couple of comments.

8 I don't see this as a constitutional
9 magnitude and I see absolutely nothing that has been offered
10 by the defendant to trump any rights or privileges that the
11 public has to this proceeding.

12 They are not articulated, nor is there any
13 bases to articulate nor is there any bases that is
14 articulated for sealing. And the Court obviously picked up
15 on that in my response.

16 Judge, I would simply offer for the Court
17 one additional reason for the analogy that the defense offers
18 about substantial assistance.

19 Well, not only is it to try and offer some
20 type of protection of the inmate when he goes down to the
21 yard, but you are also talking about protection of the
22 officers, C.N.U., when they go back out on the street or a
23 SET team or whatever in fact it may be.

24 If these people's names show up in the

1 record, someone might catch their face and now them and their
2 families are in danger. So it is a much greater issue
3 involved there. So I don't find their analogy compelling.

4 The last point, Judge, that I have is that
5 with regard to the notice, I want to encourage the defense
6 not to be too downcast that we offered formal notice, because
7 it seems like we are in a whip saw. If the State doesn't
8 offer formal notice and specify exactly what we want to offer
9 and put the Court on notice ahead of time, then we are
10 damned.

11 And, if we do offer everything that we are
12 going to do, then we are damned too because somehow that's
13 going to be prejudicial and will improperly taint every Judge
14 that sits. I just don't see that, Judge. I don't see the
15 same issues Mr. Sullivan does. Having said that, I will
16 submit it on my motion.

17 THE COURT: All right.

18 Mr. Sullivan, you get the last word.

19 MR. SULLIVAN: Thank you, Judge. Your Honor,
20 concerning Mr. Hahn's last point, damned if you do, damned if
21 you don't, if I understand his argument correctly, giving
22 notice, they could have simply just said -- we are hereby
23 giving notice that we intend to call this witness to testify
24 about everything she said, anything or everything she said

1 during her interview with the police officers.

2 I have the transcript of her interview with
3 the officers. So they don't need to actually put in there
4 the deviant sexual fantasies that we are going to be talking
5 about. They can just say, "Hey, we are referring to anything
6 in that interview transcript when the officers interviewed
7 her." That's fair game. That's what we will be talking
8 about. That would -- your Honor does not have that interview
9 transcript. And so that would at least give me enough notice
10 to cull over the interview transcript and say, "Ha, ha, here
11 we go. This is stuff where my client has a marital
12 communication privilege and I am going to object to it."

13 And the second they called her up to the
14 stand I could have objected and made my objection for the
15 record. They didn't do that. They chose to go the other
16 route. They chose to actually tell the Court what they are
17 going to be calling the witness for and putting it on the
18 record. And I think that's improper, your Honor. I think
19 that violates the statutory right. Plain and simple. And
20 I'll submit everything else upon my motions.

21 THE COURT: All right.

22 All right. In looking at the pleadings and
23 in getting a firm grasp of what it was, the position that you
24 were taking, I agree with the State that the case isn't of

1 constitutional proportions.

2 So it's denied. So with that, the press can
3 come in.

4 MR. SULLIVAN: And, your Honor, I just want to lodge my
5 objection. I am sure it's already been lodged. But for the
6 purpose of this proceeding I would lodge any objection to the
7 press coming in at today's proceedings.

8 (At this time the press entered the courtroom.)

9 THE COURT: Now, counsel, let's take up with the issue
10 of recusal.

11 There is set out in the statute procedures
12 for disqualifying a Judge.

13 And those procedures were not followed.

14 Because, had they been followed, then I
15 wouldn't be sitting here talking as I am talking now.

16 Okay. Because once the procedures are
17 followed, then I am -- restrained from participating further
18 in the case.

19 I read your motion as, "Judge, once you hear
20 all this, you will have to come to the humanitarian
21 conclusion that it is so packed with things that would
22 necessarily prejudice an individual and you, being that type
23 of individual, you are going to be prejudiced so much that
24 you couldn't fairly sit and hand down a sentence."

1 And is that what you are asking?

2 MR. SULLIVAN: I just think the nature of the
3 allegations that have been alleged by the State are so
4 damning and prejudicial certainly -- when taken in light with
5 the underlying facts of this case -- I mean, the facts speak
6 for themselves. When you couple those facts with these --
7 these allegations that the State has made in their notice of
8 intent to introduce prior bad acts at the sentencing, I think
9 then it become virtually impossible for any person to
10 disassociate those facts from the facts themselves because
11 it's so -- inflammatory.

12 And that's why we have -- that's why we
13 don't show juries certain pieces of evidence because it's so
14 inflammatory that they just basically cannot disassociate
15 themselves from such a passionate argument or passionate or
16 overwhelming piece of evidence.

17 THE COURT: But aren't judges supposed to be above
18 that? I mean, we rule on evidentiary matters everyday. We
19 exclude confessions and sit on a trial and know they already
20 confessed to their guilt.

21 By your logic or your argument, that should
22 prejudice us against the defendant. And, once we exclude, we
23 can no longer sit on those cases. And it doesn't happen that
24 way.

1 MR. SULLIVAN: Well, your Honor -- and that's a good
2 point. You make a very good point. But that's why I raise
3 in my motion NRS 49.405(1) and Hylton verses State. It seems
4 to me that the State legislature and the Nevada Supreme Court
5 did not want the State or the Judge to even comment on my
6 client invoking his marital communication privilege.

7 They don't want the State or the Judge to
8 even make reference to the fact that my client invoked his
9 marital communication privilege. And my client never even
10 got the chance to invoke the privilege. His hand was forced
11 prior to the sentencing proceedings and that's why we had to
12 bifurcate these two issues. So as far as -- as far as the
13 defense is concerned, he was robbed of his statutory right to
14 invoke the privilege.

15 THE COURT: But isn't that statute or that section of
16 the evidence code, doesn't that refer in analogy to the right
17 of the defendant to remain silent? They can't argue to a
18 jury and they can't draw an inference that there is something
19 the matter with not having taken the stand.

20 MR. SULLIVAN: Are you referencing 49.405, your Honor?

21 THE COURT: Yes.

22 MR. SULLIVAN: It says, "The claim of the privilege
23 where in the present proceeding or upon a prior occasion is
24 not a proper subject of comment by the Judge or counsel, no

1 inference may be drawn therefrom."

2 So it seems to me that they don't want
3 this -- whether it be at trial or whether it be at
4 sentencing, the courts and the legislature don't want them
5 to -- they don't want the Court or the State to basically
6 hold it against my client because he decided to invoke this
7 privilege. And that's the way I read it. And they are very
8 careful to -- including Hylton, where it says it's even
9 improper for the State to intend to call the defendant's wife
10 as a witness in violation of 49.295. And it's misconduct,
11 reversible error for the prosecutor to comment or make the
12 impermissible inference.

13 THE COURT: Right.

14 MR. SULLIVAN: They go to great lengths to guard that
15 privilege. Yet when the information concerning the privilege
16 is let out and disseminated to the court and to everyone else
17 prior to my client even getting the chance to stand up at
18 sentencing in court and say, "I am invoking my privilege. I
19 don't want her to even take that witness stand and say one
20 word," well, then nobody would have known what was to be
21 said.

22 And that's the reason why the Court, the
23 legislature have carved out -- carefully carved out these
24 exceptions and these rules. They don't want -- that being

1 the case, I don't want people to say, "I wonder what she was
2 going do say? And I wonder why that particular individual
3 had to invoke that privilege?"

4 Because now we are left with that -- that
5 hanging question mark in our mind, "What was that witness
6 going to say that was so important that he had to invoke that
7 privilege?"

8 That is why I think the case law and the
9 legislature speaks to that.

10 THE COURT: Okay. Let's stay with that thought.
11 Don't judges do that all the time? I mean, that's what we
12 do. When we rule on evidentiary matters, we don't sit and
13 wonder, "Now, if I overrule that objection or if I sustain
14 that objection, I wonder what they were going to say?"

15 I mean --

16 MR. SULLIVAN: Certainly, your Honor.

17 THE COURT: We don't do that.

18 MR. SULLIVAN: Certainly, if we were at trial right now
19 and Mr. Hahn -- I am not saying that he would -- but, if
20 Mr. Hahn asked a question of a witness that I thought was
21 improper and inflammatory, hearsay, whatever, I would
22 immediately jump out of my chair and say, "Objection, your
23 Honor. That's hearsay. The jury can't hear it. You know,
24 and your Honor can't hear it," or whatever.

1 The point is being made that we as a defense
2 need to short stop the issue before the jury or your Honor
3 hears it. How can we short stop the issue when it's already
4 been presented to the court? We can't. So that is why the
5 remedy was -- having the matter transferred.

6 THE COURT: Again, Mr. Sullivan, how can you keep the
7 Judge out of that loop? How do you do that?

8 MR. SULLIVAN: You are right.

9 THE COURT: Motions in limine, motions to bring in
10 prior acts, you all have to advise the Court that this is
11 what you want to bring in so the Judge necessarily -- because
12 of his position, has to rule on whether or not it's going to
13 be admissible. So we are involved in every evidentiary
14 proceeding in every case. How can you say, "Once you are
15 told about it, Judge, therefore you can no longer sit and
16 adjudicate?" I have a tough time with that, counsel.

17 MR. SULLIVAN: Your Honor, that's a good point. Maybe
18 my arguments are a little bit circular. But the point I am
19 going to make is this.

20 Number one, there are certain things that
21 the Judge hears that he has no choice but to hear to rule on
22 the evidence, whether it be in a drug case or whether it be
23 in a domestic battery case. He has to know something about
24 the facts that counsel are arguing about before he can make a

1 legal decision or determination and then pass down judgment
2 on it and then the counsel will act accordingly.

3 That wasn't -- that opportunity wasn't
4 presented here. The point I am trying to make is that the
5 State never even gave you a chance -- a chance to basically
6 decide whether or not you even need to hear the comments.

7 Because don't you think you could still rule
8 on whether or not Miss Melissa Botelho, the ex-wife of my
9 client, could have taken that witness stand at the sentencing
10 without even hearing the -- the deviant sexual fantasies in
11 question because you would certainly look at the statute,
12 look at the exceptions. All you need to know is that there
13 are communications made between my client and the ex-wife.

14 Do you really need to know the specifics of
15 the communications to make a ruling on that? No, you do
16 not. I would submit that you do not.

17 All you would do is apply the law as to the
18 fact pattern and say, "Well, were you married? Was the
19 couple married on or before these communications were made?
20 Do any of these exceptions apply? Were the communications
21 ever waived by presenting it to a third party or was that
22 third party present to where the communication was ever
23 waived?"

24 But do you really need to know the specifics

1 of the communication to make a legal determination as to
2 whether or not this statute applies? I submit you do not.

3 THE COURT: Well, suppose I do. How does that
4 disqualify me from making the decision?

5 MR. SULLIVAN: Well, that would be a point to where we
6 would get up to the -- we would argue on, argue on, argue up
7 to the crux and you say, "Counsel, I will have to hear what
8 the statements are before they come in." Certainly we could
9 have went one avenue or the other avenue and made more
10 arguments.

11 But simply by the fact that the State chose
12 to just interject the statements right off the bat, it leaves
13 the defense at a loss as to how to proceed. It leaves the
14 defense -- scrambling to invoke the privilege after the fact,
15 which I don't think is proper.

16 THE COURT: Well, maybe we are getting ahead of
17 ourselves. Do you agree with me or disagree with me that the
18 procedure to disqualify me from sitting on this case further
19 has not been followed?

20 MR. SULLIVAN: Well, I would have to know exactly what
21 procedure your Honor is referencing. I think that -- this is
22 unusual.

23 THE COURT: The statute, the grounds for disqualifying
24 a Judge, NRS 1.230 and 1.235, procedure for disqualifying a

1 Judge, do you have a problem with that?

2 MR. SULLIVAN: The reason why I wanted to have your
3 Honor decide the merits of the motion and bifurcate the issue
4 is for the very reason that I didn't want to be arguing this
5 in front of another Judge. I want you to make a
6 determination because you have already heard the evidence and
7 then you have yourself recused because of not being able to
8 disassociate yourself from the statement. So I guess I am
9 waffling on the issue.

10 But, no, we didn't follow the procedure.
11 But I don't think that this was the type of case that we knew
12 beforehand you were going to have to recuse yourself. It's
13 because the State made the first blow and we had to respond
14 to it. This isn't a timeliness thing.

15 THE COURT: I am not talking about the timeliness of
16 the request, okay. I will grant you that -- without finding
17 that it's final -- that you have got an argument that it is
18 timely. So I am not talking about that aspect of it.

19 MR. SULLIVAN: Okay.

20 THE COURT: I am talking about the other aspects of
21 it. What I heard you saying, counsel, is there are some
22 cases that judges just can't sit on because they are so
23 inflammatory. And I do not see this as that kind of case.
24 It's a kidnap-rape of a child. That's what it is. And I

1 don't mean to be jaded by saying that. But this is that kind
2 of a case.

3 The Montessori case, when you had
4 eighty-five alleged victims, you know, of five, six, seven
5 years old, there was a lot of passion.

6 And besides, counsel -- and again I didn't
7 want to get ahead of myself. I happened to read this --
8 before I read your motions in anticipation of the sentencing.

9 And what you are saying that they did --
10 they being the State -- he admitted in his statement. So I
11 don't understand the problem that you have here.

12 MR. SULLIVAN: I'm sorry?

13 THE COURT: Did you read his statement?

14 MR. SULLIVAN: Yes, I did. Actually I am missing a
15 page in the statement, but I have been trying to get pages.
16 But I have read the bulk of the statement, save and except
17 the pages I am missing.

18 To my knowledge, my client never admitted to
19 having deviant sexual fantasies against -- raping or
20 dismembering a fourteen-year-old child to the police or to
21 anyone else.

22 THE COURT: I don't know what you are referring to
23 when you say -- deviant sexual --

24 MR. SULLIVAN: I am saying what the State is alleging

1 in their motion.

2 THE COURT: -- sexual fantasies. But if you look at
3 his statement, line nine on page one, he talks about
4 fantasies; that he acted out a fantasy. Now --

5 MR. SULLIVAN: Your Honor, the State is saying that my
6 client expressed deviant sexual fantasies to his ex-wife
7 about raping and dismembering a girl. Unless that is in his
8 statement, I think we are talking about apples and oranges.

9 THE COURT: Dismembering is not in the statement. The
10 other thing is.

11 MR. SULLIVAN: He talked about having sex with underage
12 children? And, like I said, I have already expressed to the
13 State that I am missing pages from his statement.

14 THE COURT: "I had this stupid fantasy about being with
15 a baby-sitter and I let it get away from me and obviously did
16 what I did and will never forgive myself..."

17 MR. SULLIVAN: Wait a minute. Baby-sitter doesn't say
18 a fourteen-year-old girl or minor. The baby-sitter could be
19 eighteen years old.

20 THE COURT: Are you saying that specifically? You are
21 arguing about the specifics?

22 MR. SULLIVAN: Absolutely. It's all in the specifics.

23 THE COURT: "I had a fantasy, one of which, by the way,
24 wasn't really a serious one. Well, I got the name of the

1 baby-sitter ... I never dreamed I would actually follow
2 through," on the fantasy.

3 MR. SULLIVAN: Your Honor, baby-sitter does not say --
4 does not equate to minor child.

5 THE COURT: She was picked up for baby-sitting
6 purposes.

7 MR. SULLIVAN: The State is alleging that he had
8 deviant sexual fantasies. They allege in their motion that
9 he wanted to rape and dismember a child. Nowhere in that
10 statement does he say, "I had deviant sexual fantasies about
11 raping and dismembering a child."

12 THE COURT: Granted.

13 MR. SULLIVAN: That's all I am trying to do. I am
14 trying to basically preserve a fair and impartial sentencing
15 today for my client.

16 THE COURT: All right. But we are still at the
17 disqualification stage.

18 And the reason I am sitting on this is
19 because you did not follow the proper procedure. So then I
20 guess --

21 MR. SULLIVAN: And, your Honor, my response to that is,
22 if your Honor feels that he can be fair and impartial, then
23 that's fine with me. I respect that decision. I will
24 wholeheartedly respect that decision, if you make a ruling --

1 if you say, "Mr. Sullivan, I have read your points and I
2 considered your points. I have read the State's points. But
3 I believe I can be fair and impartial sitting in judgment of
4 this man. And I can disassociate any statements that were
5 not supposed to come in, whether it be through the ex-wife,
6 the detective or anyone else that I should not consider. I
7 will not consider those points at sentencing," then I can
8 live with that.

9 THE COURT: I do that everyday.

10 MR. SULLIVAN: I know you do, Judge. And I want to
11 bring it to your attention and make a record of all this
12 because -- as well you know, attorneys nitpick and dissect
13 every minutia of the law.

14 THE COURT: That's your function. That's your
15 function. But my function is to sit and do the best job that
16 I can with my training and my background and what I bring to
17 the table. And I have done that in every other case. And I
18 see no reason why that can't be the case in this case. If
19 you want an assurance that I believe I can do it, I know I
20 can do it.

21 MR. SULLIVAN: The other point I want to put on the
22 record is a lot of times -- maybe the Court would agree with
23 me. I don't know. A lot of times when you make those legal
24 determinations as to whether certain pieces of evidence would

1 come in, they are sanitized and they concern other types of
2 cases.

3 When you are dealing with a case such as
4 this one, everyone in this room will concede that a sexual
5 assault upon a fourteen-year-old child is a heinous act in
6 and of itself. The facts speak for themselves. It's
7 atrocious. We agree. We are not here to argue that today.

8 What we are here to argue is that when you
9 have those inflammatory facts already and then you couple
10 them with even -- what I would consider even more -- more
11 inflammatory facts that should not have been entered into the
12 equation or the mix for the judges' consideration, I think it
13 heightens the situation to a whole new level.

14 We are not talking about a drug case or even
15 an armed robbery case or something else. That's why I am
16 trying to make the argument that this is such a unique
17 situation. And I just wanted the Court to consider that
18 point.

19 THE COURT: All right. Mr. Hahn?

20 MR. HAHN: Three points. As you have indicated, we are
21 speaking specifically about recusal. The proper protocol
22 hasn't been followed. The Court has already observed that.

23 Your Honor, second, the case law is clear
24 that the defendant bears the burden of proof to demonstrate

1 that a particular court cannot be fair and impartial. And I
2 have heard absolutely nothing to articulate that you cannot
3 be fair and impartial. So they failed their burden of
4 proof.

5 Third, your Honor I will simply rely upon
6 the opposition that I have already submitted dealing with
7 recusal. Thank you.

8 THE COURT: And that part of the motion is denied.

9 Okay. That brings us to the State's motion,
10 the request to admit the testimony of the ex-wife.

11 Now, is this ex-wife the former wife or the
12 one that was -- he was married to when he was arrested.

13 MR. SULLIVAN: This is Melissa Botelho. She is the
14 ex-wife, the former wife who lives in Anchorage, Alaska.

15 THE COURT: This is the mother of the two --

16 MR. SULLIVAN: He has two children with this particular
17 person, yes.

18 THE COURT: All right.

19 MR. SULLIVAN: And, your Honor, basically you have read
20 the State's notice. You have read my opposition.

21 THE COURT: He is the movant on that.

22 MR. SULLIVAN: Okay.

23 THE COURT: Let him go first.

24 MR. HAHN: Your Honor, again I am going to primarily

1 rely upon my reply because I believe there is a statutory
2 exception for this. And having said that, I stand ready to
3 answer any questions.

4 THE COURT: All right. Well, give me the statutory
5 exceptions that you believe qualify as to --

6 MR. HAHN: There is only one. There are five possible
7 exceptions that are identified. And what I have pointed out
8 in my motion specifically --

9 THE COURT: Excuse me. Did you -- there was a case
10 that was just decided by the United States Supreme Court
11 yesterday or the day before.

12 MR. SULLIVAN: Crawford verses Illinois? I'm sorry, I
13 am thinking of something else.

14 THE COURT: It had to do with a confrontation clause.
15 They overruled Ohio v. Roberts.

16 MR. SULLIVAN: That is Crawford verses Illinois. We
17 are on the same page.

18 THE COURT: Crawford verses Illinois?

19 MR. SULLIVAN: Yes.

20 THE COURT: All right. Anyway, they sort of, as I
21 read it, narrowed the -- areas where out-of court statements
22 can come in.

23 And they didn't specifically address the
24 marital testimony or communicative privilege. But,

1 nevertheless, they are talking about hearsay statements and
2 the right to confront. And that plays into this somewhat
3 because, if you bring that in -- but again we are at the
4 sentencing stage. We are not at the guilt stage. So the
5 rules that you point out in your Points and Authorities are
6 relaxed.

7 And I will get back to you.

8 Let me hear from the opposition.

9 MR. SULLIVAN: Thank you, Judge. Judge, it is my
10 understanding that the State's sole contention is that the
11 statutory marital communication privilege set forth in NRS
12 49.295 does not apply because of 49 point -- 49.295(2)(e)(1),
13 which is the exception.

14 And it reads as follows: "Neither a husband
15 nor a wife can be examined during the marriage or afterwards
16 without the consent of the other as to any communication made
17 by one to the other during the marriage. The provisions of
18 subsection one do not apply to -- and here is the exception
19 that the State is hanging their hat on -- criminal
20 proceedings in which one spouse is charged with -- a crime
21 against the person or the property of the other spouse or of
22 a child of either or of a child in the custody or control of
23 either, whether the crime was committed before or during the
24 marriage."

1 And I don't think that this statute -- this
2 exception to this statute applies at all. And I have three
3 main points for that. The State goes to great lengths to
4 talk to your Honor in its motion about strict interpretation
5 of the statute.

6 Well, your Honor, as you can see, this
7 clearly is talking about a family or domestic type
8 situation. Just a plain reading of the statute. It's
9 talking about whether or not one spouse or the other spouse
10 had custody or control or it was a child of them. It's
11 talking about the domestic type relationships because it
12 could have been a stepfather. It could have been a
13 stepmother. It could have been -- there are all sorts of
14 family and domestic relationships.

15 So the legislature clearly is talking about
16 a family or domestic type relationship when they made this
17 exception.

18 Furthermore, if the State relies on strict
19 interpretation of the statute -- however, yet in its footnote
20 it says, "Well, your Honor, disregard the last part of the
21 sentence, whether the crime was committed before or during
22 the marriage. The crime was committed after the marriage."

23 But they don't want you to consider that,
24 Judge. So if they are relying solely on a strict

1 interpretation of the statute, they have to concede a plain
2 reading of it. In a strict interpretation of the statute, it
3 does not apply because it's talking about a family
4 relationship. And the crime was committed after the
5 marriage.

6 My second point, your Honor, is I don't know
7 if your Honor is familiar with Peck verses State. It's 116
8 Nevada 840, decided August 24, 2000.

9 I didn't have a chance to basically reply to
10 the State's reply, so I figured I could bring it up in
11 today's proceedings.

12 But what's interesting about Peck verses
13 State, the defendant in that case accosted a young female
14 victim at a UNR football game. The young lady was urinating
15 behind some bushes out there at Mackay Stadium. And the
16 defendant comes up behind her, grabs her around the throat,
17 tells her he has a knife and drags her away and then sexually
18 assaults her behind these bushes.

19 Clearly in that case the State must concede
20 that the defendant had custody and control over the victim as
21 the State is alleging in their motion today.

22 However, the Supreme Court decided that the
23 reason why the marital communication privilege did not apply
24 was not because the defendant had custody and control over

1 the young female victim and that the exception basically
2 swallowed up the entire statutory privilege of marital
3 communication. They didn't make that determination.

4 What they hung their hat on was Peck's wife
5 failed to -- she waived her privilege when she testified in
6 the case. She never invoked it. And likewise Peck himself,
7 the defendant, waived his privilege to prevent his wife from
8 testifying by not specifically stating his objection prior to
9 her testimony.

10 They never went into this analysis --

11 THE COURT: What did she testify about?

12 MR. SULLIVAN: She testified -- basically Peck was
13 found in the bathroom when the cops came to their residence
14 and she made some statements about his whereabouts. It
15 really doesn't get into more than that.

16 But she made some incriminating statements
17 against him and where he was hiding. And she lied initially
18 to the officers. And then she told a different story and
19 they called her to testify.

20 But the Supreme Court said, "You waived the
21 privilege because you both -- you both never invoked it. You
22 both had a privilege and you never invoked it."

23 They didn't get into this whole analysis,
24 "Wait a minute. There is an exception. And because the

1 defendant had custody and control over the victim, therefore,
2 the privilege has been waived." They never even talked about
3 that because it simply does not present itself. It's not --
4 it's not an argument that has merit.

5 Finally, Judge, the last point I will make,
6 let's assume we follow the State's argument to its logical
7 conclusion. Let's assume that we are standing here before
8 you today and there is twelve people from this community
9 deciding my client's fate.

10 He already entered a plea of guilty to these
11 counts that carry life sentences. But let's just assume, we
12 go back in time and we go to trial and we are at trial and
13 it's me and Mr. Hahn and we are duking it out. We are
14 fighting the good fight.

15 And Mr. Hahn decides to call Melissa
16 Botelho, my client's ex-wife, in his case in chief -- or at
17 any time during the proceedings. Rebuttal witness,
18 whatever. It doesn't matter.

19 So, if you take the State's argument to its
20 logical conclusion and the State stands up and says, "Well,
21 your Honor, Mr. Botelho had custody and control of the victim
22 in this case and therefore he can't exercise his statutory
23 marital communication privilege because of the facts of this
24 case," do you see the faulty logic in that argument?

1 Whether somebody has custody and control,
2 whether the defendant has custody and control during a trial
3 proceeding is not a fact for your Honor to determine.

4 That is a question of fact for the jury.

5 So your Honor would therefore be thrust into
6 a dichotomy. How can I decide whether or not this is -- this
7 exception applies because I cannot make the determination as
8 to whether or not he had custody and control of this victim,
9 because that is one of the elements of the offense that he is
10 charged with and that is something for the jury to do, not
11 myself?

12 So, therefore, the State by their argument,
13 the exception is swallowing up the entire privilege. It
14 falls upon its own weight and it can't happen, Judge. And
15 I'll submit it.

16 THE COURT: All right. Mr. Hahn, let's get your
17 response to that.

18 Your interpretation of a criminal proceeding
19 in which one spouse is charged with a crime of a child -- or
20 against a child in the custody or control of either. You are
21 saying, because he was a kidnapper, therefore, he was in
22 control of a child because of her age; therefore, that's the
23 exception?

24 MR. HAHN: That's true.

1 THE COURT: I have to agree with Mr. Sullivan on
2 that. I don't think that is the -- the intent of that
3 statute. I think it has to be in a -- familial type of
4 setting.

5 But how about the Franco case? Now, we are
6 talking about -- evidently she spoke with the police officer,
7 right?

8 MR. SULLIVAN: Correct, your Honor. Detective Carry
9 and Detective Herrera.

10 THE COURT: All right. And she told them about these
11 fantasies. Is that accurate or no?

12 MR. SULLIVAN: That is accurate, Judge. Well, yes. I
13 have the transcript and she -- that's how the officers knew
14 where to even begin with these -- alleged deviant sexual
15 fantasies.

16 THE COURT: How come they can't come in that way,
17 through the officer's testimony at a sentencing hearing?

18 MR. SULLIVAN: That's a very good question, your
19 Honor. And I have combed all the transcripts from Melissa
20 Botelho and from the officers and have read the officers'
21 reports.

22 And unless the State has some piece of
23 information that I am not privy to, I don't see anywhere in
24 there where my client tells the officers that he ever had

1 these deviant sexual fantasies.

2 THE COURT: I am talking about the wife.

3 MR. SULLIVAN: They certainly cannot circumvent the
4 privilege by saying, "We talked to the wife and the wife said
5 this," because that would certainly violate his confrontation
6 rights. We have a right to basically confront. It's
7 hearsay.

8 THE COURT: At the guilt phase, I agree with you. But
9 we are now at the sentencing phase. The rules are relaxed.

10 MR. SULLIVAN: Absolutely, they are relaxed. But I
11 don't think they are disbanded all together. I don't think
12 the legislature would allow for a scenario where you can
13 circumvent the marital privilege by saying, "Well, we will
14 just call another witness, i.e., the officer who spoke to the
15 wife in question, the ex-wife in question, to get out this
16 testimony." This privilege is all encompassing. You
17 cannot --

18 THE COURT: Didn't they use that in the Franco case?
19 I mean, she talked to the police officer and he testified to
20 what she said.

21 MR. SULLIVAN: Which page are you referencing, your
22 Honor?

23 THE COURT: I didn't bring the book.

24 MR. SULLIVAN: Can I have the Court's indulgence?

1 THE COURT: Sure.

2 MR. SULLIVAN: Well, if I read the case correctly,
3 Judge -- I'm citing Franco verses State, which is 109 Nevada
4 1229 -- the Court decided that the wife could testify and
5 they hung their hat on other reasons. They talked about
6 hearsay exceptions and things of that nature. But I don't
7 ever remember them making a holding that, if there is a
8 marital communication privilege about certain material that
9 another witness --

10 THE COURT: The wife is testifying against her husband
11 in a criminal case. That's what we are talking about. That
12 was at the guilt -- that was at the guilt phase. Okay. So
13 we are taking about the same thing. There is a wife talking
14 to the police officer and he comes in and says what she said
15 to him.

16 MR. SULLIVAN: I don't think that the State could be
17 allowed to circumvent the rule. Then that's what everyone
18 would do. Well, we'll go get a Detective to talk to the
19 exspouse. And then, if the exspouse talks to the Detective,
20 then we can throw the Detective up to the stand and that's
21 how we get around the rule.

22 And I don't think that's appropriate. I
23 think that circumvents it. And the legislature made this
24 privilege for a reason.

1 THE COURT: There is case law that says they can't do
2 that.

3 MR. SULLIVAN: I disagree with the court's
4 interpretation in Franco, respectfully, your Honor.

5 THE COURT: Sure. I understand that. But read the
6 facts. That's --

7 MR. SULLIVAN: I have read the case and I have it here
8 today and I don't think that's what they are saying.

9 THE COURT: She testified against her husband and the
10 co-defendant.

11 MR. SULLIVAN: Whether or not she properly invoked the
12 privilege or whether or not he properly invoked the privilege
13 because there are two privileges.

14 THE COURT: Right. One is testimonial and that lies
15 with the witness.

16 MR. SULLIVAN: Exactly.

17 THE COURT: And then the other communicative. And
18 that goes with the person at the trial.

19 MR. SULLIVAN: And I don't think -- we are talking
20 about the first privilege, not the second privilege in
21 Franco. And I could be mistaken. I would have to give it a
22 thorough reading. But I think we are talking apples and
23 oranges. The first privilege is she wants to waive the
24 privilege. That's fine. She has a right to waive that

1 privilege. If my client invokes that privilege --

2 THE COURT: Didn't she testify in Franco that her
3 husband said, "I think I killed a guy"?

4 MR. SULLIVAN: Yeah. That was -- but whether or not --
5 we are talking about the first privilege or the second
6 privilege.

7 THE COURT: That's hearsay? The exception is against
8 penal interest of the declarant. And it's the spouse of the
9 declarant.

10 MR. SULLIVAN: But she -- she is -- she heard that
11 information firsthand. I am talking about Franco -- the
12 woman in Franco incurred that information firsthand from the
13 declarant.

14 In this fact scenario we have hearsay upon
15 hearsay, do we not? Because we have -- yeah. Exactly. We
16 have hearsay upon hearsay. We have my client allegedly
17 making statements to Melissa Botelho, who makes statements to
18 Detective Herrera and Detective Carry.

19 THE COURT: As far as NRS 49.295, I think your
20 interpretation is accurate. All right. That exception does
21 not apply in a kidnap case. Okay.

22 I agree with you.

23 What we are talking about here is the
24 argument advanced by the State that, because it's a

1 sentencing proceeding, there is an exception to the hearsay
2 rule and it comes in that way.

3 MR. SULLIVAN: Well, then I guess -- if your Honor
4 believes that Detective Herrera and Detective Carry can
5 testify at sentencing, certainly I can't -- can't make -- or
6 ask you to exclude them from testifying.

7 But, once they take that witness stand and
8 start testifying about other admissions my client may have
9 made or other facts about the case, certainly, yeah, that's
10 fine.

11 But once they start going down -- if I see
12 them start going down the path of, "Did you talk to Melissa
13 Botelho? What did she tell you about the client," I am going
14 to stand up and make that objection. I guess we will come to
15 that bridge when we come to it.

16 THE COURT: So let me see if I got this straight
17 again.

18 If a husband and wife have conversations --

19 MR. SULLIVAN: -- during the course of a marriage.

20 THE COURT: -- during the course of a marriage.

21 And then the wife or the husband, either
22 one, tells a party outside the marriage of the contents of
23 that communication, are you saying that that third party is
24 barred from ever testifying about what that spouse said?

1 MR. SULLIVAN: I think so, yes. I think --

2 THE COURT: So the privilege goes to a third party.
3 You can never waive or breach by your conduct?

4 MR. SULLIVAN: Well, all I can tell you is that I am
5 asking you for you to exclude any testimony from Melissa
6 Botelho based upon the marital communication privilege.

7 And as far as the other witnesses in this
8 case that want to testify at sentencing, they have a right to
9 testify. It's whether or not the State can show that this
10 testimony comes in, then they will -- they will have to show
11 as to why it's relevant, if they have a hearsay exception or
12 a -- two hearsay exceptions for the double hearsay.

13 And I would certainly still make the
14 argument that it circumvents the marital privilege because,
15 as your Honor -- as I pointed out, you know, if the State
16 gets into that murky water, that area, what are they doing?

17 They are now commenting on the fact -- or
18 they are coming dangerously close to the fact that my client
19 invoked the privilege to begin with. And, as we know from
20 the statute and the case law that I have cited, you can't do
21 that. It's impermissible. It's improper. And that is
22 Hylton verses State, your Honor. 49.405 is what I am
23 referencing.

24 THE COURT: All right. Mr. Hahn?

1 MR. HAHN: Briefly, your Honor. The statute and the
2 concern that Mr. Sullivan has about -- about the trial Judge
3 or the lawyers commenting about -- commenting about the
4 marital privilege, this is the same chicken and the egg
5 argument we have been arguing about circularly. The Judge is
6 above that.

7 And the Judge can make the call. And so we
8 are not talking about whether or not it comes in front of a
9 jury. The issue is can you, if perhaps you believe it would
10 be inappropriate, put it aside?

11 The legal standard is -- for purposes of
12 sentencing is any information that is highly improbable or
13 specious should not be in front of you. That's the legal
14 standard.

15 There is no issue of a confrontation
16 clause. I agree wholeheartedly with the court because that
17 is not an issue. Hearsay routinely comes in. The issue is,
18 according to the standard, is there something about this
19 evidence that no way, no way can I consider this because this
20 is just too far removed?

21 We are not anywhere close to that because,
22 not only do we have the statements that have been represented
23 by Miss Botelho, but we also have some of those same
24 statements echoed by the defendant himself. So we don't even

1 come close to that standard. So I don't see the problem,
2 Judge.

3 THE COURT: Well, then let me ask you, how do you
4 intend to present it? You are not going to call her, are
5 you?

6 MR. HAHN: If the court finds that she should not be
7 called, I am not even going to go there, Judge.

8 THE COURT: I agree with counsel. She should not be
9 called. If you have another way of putting it on, that's a
10 different --

11 MR. HAHN: I was simply going to offer that so they had
12 the opportunity to confront her, if they want to exercise
13 that. I was going to afford them that privilege.

14 If the court would prefer that I don't, I
15 won't. I will simply put on the officers.

16 THE COURT: All right.

17 MR. SULLIVAN: And, your Honor, I would just -- I know
18 I am beating a dead horse. I apologize. I would simply
19 reference Hylton, which says it's improper for them to make
20 any impermissible inference that my client invoked the
21 spousal privilege. I don't know how the State is going to
22 get around -- they can put on the officer to reference other
23 things. But, once they start going down that path, "What did
24 you talk about with Melissa Botelho," that is an

1 impermissible inference about my client being made at
2 sentencing about the fact that he invoked his privilege. And
3 I think it's improper and I would ask this court to exclude
4 his statement.

5 THE COURT: Wait a minute. I am the one that's
6 deciding the motion. I am the one that's impacted by those
7 facts. How can you say that, because I am doing that --
8 because that's part of my job. Therefore -- I am -- I can't
9 even set that out.

10 MR. SULLIVAN: I understand, your Honor. What I am
11 trying to do is I am trying to caution the State -- and maybe
12 I am not doing a good job at it. I am trying to caution the
13 State and let them know, if they start going down this road,
14 I would consider it an impermissible inference on the fact --
15 and I would make that objection at the appropriate time.

16 THE COURT: So you are not objecting to the fact that
17 they are going to testify and say what they are going to
18 say?

19 MR. SULLIVAN: The detectives?

20 THE COURT: You are saying that because of my ruling
21 that they can't call the wife now because they are calling
22 the police officer to offer those facts, that is an obvious
23 reflection by inference on the fact that he invoked his
24 privilege and that flies in the face of the statute that says

1 the Judge can't comment on it?

2 MR. SULLIVAN: And the case law that says the State as
3 well as the Judge can't comment on it. And so the State is
4 not supposed to comment on it from the witness's -- I can't
5 prevent them from calling Detective Herrera.

6 THE COURT: What do you mean they comment on it?

7 MR. SULLIVAN: It makes the impermissible inference
8 that he invoked the privilege. And I think them asking
9 questions about what she told them, that is an inference.
10 And, you know, we will have to make that determination once
11 we get to it. Because they might not even go there, Judge.
12 They might not even go down that road. I don't know what
13 they are going to ask the Detective. They might ask other
14 things related to the transcript.

15 THE COURT: I suggest you talk with her and find out
16 what they are talking about with her so that you know what
17 they are talking about.

18 MR. SULLIVAN: You are talking about Melissa Botelho?
19 I know what she told the police.

20 THE COURT: Well, then there you go.

21 MR. SULLIVAN: Okay.

22 THE COURT: All right. That will be the order, if we
23 are all clear on it.

24 All right. And of course, counsel, you are

1 free to object like you would in a trial as we go along. But
2 on the issues that were raised here --

3 MR. SULLIVAN: Okay. Just so I am clear, your Honor.
4 The State is precluded from calling Melissa Botelho at
5 sentencing?

6 THE COURT: Yes.

7 MR. SULLIVAN: Okay.

8 Thank you, your Honor.

9 THE COURT: Anything else?

10 MR. SULLIVAN: Nothing, Judge. I think that's --

11 THE COURT: When is this sentencing?

12 MR. SULLIVAN: April sometime, your Honor.

13 THE COURT: April 7th. All right. See you then.

14 MR. SULLIVAN: Thank you, Judge.

15
16 (At this time the foregoing proceedings were concluded.)
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24

1 STATE OF NEVADA)

2)ss.


3 COUNTY OF WASHOE)

4 I, JOAN MARIE DOTSON, a Certified Shorthand
5 Reporter for the Second Judicial District Court of the State
6 of Nevada in and for the County of Washoe DO HEREBY CERTIFY;

7 That I was present in Department No. 3 of
8 the above-entitled court on Thursday, March 11th, 2004 and
9 took verbatim stenotype notes of the proceedings and
10 thereafter transcribed them into typewriting as herein
11 appears;

12 That the foregoing transcript is a full,
13 true and correct transcription of my said stenotype notes and
14 is a full, true and correct record of the proceedings had and
15 the testimony given in the above-entitled action to the best
16 of my knowledge, skill and ability.

17
18
19 DATED: This 12th day of March, 2004.

20
21 
22 JOAN MARIE DOTSON, CSR #102
23
24

ORIGINAL

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RONALD J. SHAW, JR.

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8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
10
11 IN AND FOR THE COUNTY OF WASHOE.

* * *

12 THE STATE OF NEVADA,

13 Plaintiff,

Case No. CR03-2156

14 v.

Dept. No. 3

15 MICHAEL TODD BOTELHO,

16 Defendant.

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REPLY IN OPPOSITION TO DEFENDANT'S OPPOSITION TO STATE'S INTRODUCTION
OF OTHER BAD ACT EVIDENCE; DEFENDANT'S MOTION TO SEAL; AND ANSWER TO
DEFENDANT'S MOTION TO RECUSE AND TRANSFER CASE

COMES NOW, the State of Nevada, by and through RICHARD A.
GAMMICK, District Attorney of Washoe County, and BRUCE C. HAHN,
Deputy District Attorney, and hereby offers its formal Reply and
Answer to the defendant's Opposition Motion filed February 13, 2004.
This Reply and Answer is based upon the attached Points and

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///

1 Authorities, all pleadings and papers on file herein and any argument
2 heard on the matter.

3 Dated this 20 day of February, 2004.

4 RICHARD A. GAMMICK
5 District Attorney
6 Washoe County, Nevada

7
8 By 

9 BRUCE C. HAHN
10 5011
11 Deputy District Attorney
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POINTS AND AUTHORITIES

I. STATEMENT OF POSITION

The State opposes the defendant's three claims for relief, namely, the claim of marital privilege to bar relevant sentencing information, his request for Department Three recusal, and request for sealing of all documents concerning the proposed testimony of Melissa Botelho. The State contends that the marital privilege is inapplicable based upon a statutory exception, his request for recusal is not supported by legal authority and unwarranted in fact, and finally, the request for sealing of documents is likewise unsupported by legal authority and unwarranted.

II. AUTHORITY AND ARGUMENT

A. MARITAL PRIVILEGE CLAIM

The State acknowledges the general rule of marital communication privilege under NRS 49.295. The State also acknowledges that the proffered testimony of Melissa Botelho concerns the defendant's communications to her during the course of their marriage. However, this general statutory bar does not apply to our case here because of a statutory exception to the general rule. Therefore, there is no statutory bar to the proffered testimony.

NRS 49.295(2) codifies 5 general exceptions to the marital privilege statute, which contain other subcategories. Ms. Botelho's proffered testimony is admissible because of the fifth general exception - NRS 49.295(2)(e)(1) which states:

(e) Criminal proceeding in which one spouse is charged with:

///

1 (1) A crime against the person or the property
2 of the other spouse or of a child of
3 either, or of a child in the custody or
4 control of either, whether the crime was
committed before or during marriage.
[Emphasis added].

5 Here, the defendant is charged in a criminal proceeding,
6 our case here. NRS 49.295(2)(e). Further, this criminal proceeding
7 involves a crime against a *child in his control*, fourteen year old
8 Jane Doe as charged in the instant Information. The express language
9 of NRS 49.295(2)(e)(1), one of five codified exceptions to the
10 general rule of privilege encompasses our case facts here. It is
11 undisputed that the defendant lured the child by a false
12 representation of needing a babysitter whereupon the child-victim
13 entered his vehicle equipped with the innocent apparel of child car-
14 seats but also containing duct-tape used as a binding device. When
15 Jane Doe entered his vehicle and was thereafter driven as a backseat
16 passenger into the hills of Washoe Valley, she was totally under his
17 control for a substantial period of time on August 7, 2003.

18 Of particular interest is the statutory language that our
19 Legislature used in the applicable marital privilege exception.
20 First, NRS 49.295(2)(e)(1) excepts communications involving crimes of
21 one spouse against another or against a child with whom they have a
22 biological relationship ("a child of either"). Second, that
23 subsection then uses broader language that involves a child merely in
24 their custody, or control. This secondary language eliminates the
25 need for a biological or legal relationship. The only legal nexus
26 that the Legislature expressed is control of a child.

1 The public policy to be served here is really for the
2 benefit of children generally as a protected class. This marital
3 privilege exception essentially protects children by preventing an
4 artificial evidentiary shield being erected between potentially
5 conspiring married partners in crimes against children.¹ Contrary to
6 the often-touted rule of lenity, statutory privileges are to be
7 narrowly construed in favor of the truth-finding process.

8 "Testimonial exclusionary rules and privileges contravene the
9 fundamental principles that 'the public...has a right to every man's
10 evidence.' (citations omitted). As such, they must be strictly
11 construed and accepted 'only to the very limited extent that
12 permitted a refusal to testify or excluding relevant evidence has a
13 public good transcending the normally predominant principle of
14 utilizing all rational means for ascertaining truth." Trammel v.
15 United States, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186,
16 ____ (1980). Likewise, "We have often recognized that statutes
17 establishing evidentiary privileges must be construed narrowly
18 because privileges impede the search for the truth." Pierce County
19 v. Guillen, 537 U.S. 129, 144, 123 S.Ct. 720, 730, 154 L.Ed.2d 610,
20 ____, (2003).

21 ///

22 _____
23 1 The fact that the balance of the NRS 49.295((2)(e)(1) exception states it
24 is irrelevant whether or not "the crime was committed before or during
25 marriage" highlights the State's point. There is no marriage preservation
26 public policy to be served here by protecting the defendant's statements to
Melissa Botelho - the marriage was terminated years ago. In fact, the
marriage was terminated in large part due to the disputed sexual bondage
fantasies involving an underage female.

1 Therefore, under statutory construction rules, NRS 49.295
2 does not apply to our case facts here and, therefore, is no bar to
3 Melissa Botelho's testimony.

4 B. REQUEST TO SEAL DOCUMENTS

5 His request to have "all papers, pleadings, motions and
6 transcripts pertaining to this issue" sealed is offered without any
7 legal authority or meaningful reasoning. Legal arguments made
8 without reference to any supporting legal authority as well as
9 undocumented conclusions are to be summarily rejected. Williams v.
10 State, 88 Nev. 164, 165, 494 P.2d 960 (1972); Cunningham v. State, 94
11 Nev. 128, 130, 575 P.2d 936, 938 (1978); Steese v. State, 114 Nev.
12 479, 496, 960 P.2d 321, 332 (1998); Evans v. State, 117 Nev. 609,
13 627, 28 P.3d 498, 511 (2001). According, the defendant's request for
14 sealing of documents must fail.

15 C. REQUEST FOR DEPARTMENT RECUSAL

16 The defendant's request for this Department to recuse
17 itself should be summarily denied for three primary reasons. First,
18 as with his request to seal, his request for recusal is likewise
19 offered without any legal authority. Accordingly, it should be
20 summarily rejected. See Williams, et.al., supra.

21 Second, his sole factual basis is that this court is
22 somehow irrevocably tainted by routine duties of a trial court in
23 reviewing the admissibility of proposed evidence. If the defendant's
24 argument were sufficient grounds, chaos would result. Theoretically,
25 every trial court would need to recuse itself after denying a
26 defendant's motion to suppress and a conviction resulted. According

1 to the defendant's rationale, no trial judge would ever be able to
2 preside over a jury trial after the first overruled defense
3 objection. The defendant offers no principled basis or scale to
4 determine how "damning and prejudicial" evidence must be before a
5 trial judge must recuse themselves after considering its
6 admissibility. It is for this reason among others that a judge is
7 presumed to understand their responsibilities, and follow the law.
8 Colwell v. State, 118 Nev.Adv.Op. ___, 59 P.3d 463, 468 (2002); Jones
9 v. State, 107 Nev. 632, 636, 817 P. 2d 1179, 1181 (1991). The
10 defendant cites no evidence to suggest that this Department would be
11 unable to disregard any improper evidence and render a just sentence.
12 Without a legal basis and without any evidence in support, the
13 defendant's request should be denied.

14 Finally, there is no improper taint assuming *arguendo* a
15 marital privilege shield because substantial portions of this same
16 disputed evidence are clearly admissible by the defendant's own
17 admissions to be offered by the State at sentencing. The proposed
18 testimony of Washoe County Sheriff's Detective Greg Herrera will
19 include that the defendant admitted engaging in fantasies about tying
20 up a young female adult or child and raping them.' Therefore, because
21 the defendant cites no legal authority to support his request,
22 because his legal basis is unworkable in practice, and because there
23

24
25 2 See, State's Notice of Intent to Introduce Prior or Other Bad Act
26 Evidence at Sentencing Hearing, filed February 3, 2004, pp.2, 11.14-18.

1 is no improper taint, his request for Department Three recusal should
2 be denied.

3 The State is confident that this court would render a just
4 sentence. However, in the abundance of caution, the State will not
5 oppose any possible reservations this Department could conceivably
6 have based on the defendant's bald request, in the sole event that
7 this court finds that a marital privilege applies to bar the
8 proffered testimony of Melissa Botelho.

9 **III. CONCLUSION**

10 For the rationale outlined above, and for the legal basis
11 and reasons outlined in the State's formal Notice of Intent, the
12 State requests that the defendant's Opposition³ filed February 13,
13 2004 be denied in its entirety following argument at the scheduled
14 hearing date of March 11, 2004 at 10:00 am. Furthermore, the State
15 requests that this court enter an Order authorizing the State to
16 present the proposed testimony of Melissa Botelho at the scheduled
17 sentencing of April 7, 2004 at 8:30 am.

18 Dated this 20 day of February, 2004.

19 RICHARD A. GAMMICK
20 District Attorney
21 Washoe County, Nevada

22 By [Signature]
23 BRUCE C. HAHN
24 5011
25 Deputy District Attorney
26

3 See defendant's "Opposition to State's Introduction of Prior or Other Bad Act Evidence at Sentencing Hearing; Defendant's Motion to Have the Matter Sealed, to Recuse the Present Sentencing Court, and to have the Matter transferred to Another Court for Sentencing Purposes" filed February 13, 2004.

CERTIFICATE OF FORWARDING

I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I forwarded a true copy of the foregoing document, through the Washoe County interagency mail, addressed to:

SEAN SULLIVAN
WASHOE COUNTY PUBLIC DEFENDER'S OFFICE
350 S CENTER ST
6TH FLOOR
RENO NV

DATED this 20th day of February, 2004.

Dee: Tai