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



**MICHAEL TODD BOTELHO**
**Petitioner,**
**vs.**

**JAMES BENEDETTI, WARDEN,**
**STATE OF NEVADA,**
**Respondents.**
**_____/**

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

# RECORD ON APPEAL

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**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**

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V6.256

KENNY C. GUINN
*Governor*

DAVE KIECKBUSCH
*Acting Director*

AMY WRIGHT
*Chief*

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FILED
FEB 11 2004
RONALD A. LONGTIN, JR., CLERK
BY: DEPUTY

**Presentence Report**
January 13, 2004

**The Honorable Jerome Polaha**
**Department III**
**2nd Judicial District**

**Prosecutor:** Kelli Viloria
**Defense Attorney:** Sean Sullivan

**PSI #:** 146868

## I. Case Information:

**Defendant:** Michael Todd Botelho, aka Kevin
**Date of Birth:** 6/10/61
**SS #:** [redacted], also uses [redacted]
**Aliases:** None
**Address:** 71 S. Rainbow, Dayton, NV 89403
**Phone:** 246-4460
**Driver's License:** N/A
**State:** N/A
**Status:** N/A
**POB:** Honoka, Hawaii

**Case #:** CR03-2156
**DA #:** 318167
**PCN:** 09231924
**P&P Bin #:** 1000339647
**FBI #:** 916956RA3
**SID:** NV01078952
CA24930150
**US Citizen:** Yes
**Alien Registration #:** N/A
**Sex Offender Tier Level:** Pending

## II. Charge Information:

**Offense:** Count I: Kidnapping in the First Degree (F)
**NRS:** 200.310-1 **Category:** A
**NOC Code:** 00107
**Penalty:** Life with parole eligibility after 5 years or 15 years NDOC with parole eligibility after 5 years

**Offense:** Counts III, IV, V: Sexual Assault on a Child (F)
**NRS:**200.366 **Category:** A
**NOC Code:** 05353
**Penalty:** Life with parole eligibility after 20 years or 20 years NDOC with parole eligibility after 5 years

**Plea:** 12/22/03, Guilty
**Sentencing Set:** 2/11/03

## III. Defendant Information:

**Physical Identifiers:**

**Sex:** M **Race:** W **Height/Weight:** 5'10"/210 **Hair/Eyes:** Brown/Hazel
**Scars/Tattoos:** Scar: Left side of face (verified)

**Social/Mental History:**

**Childhood:** Unremarkable
**Marital:** Married **Children/Dependants:** 4, ages 12, 10, 3 and 1
**Custody Status of Children:** Two older children reside with ex-wife. The defendant pays $600 per month in child support. The two youngest children reside with the defendant and his wife.
**Employment Status:** Unemployed
**Total # of months employed/school full time during the 12 months prior to commission of Instant Offense:** 2 ½
**Income:** 0 **Debts:** $15,000 in credit card debts
**Education:** High school graduate
**Military:** U.S. Marines **Discharge Type:** Honorable
**Health:** The defendant reported that he suffers with chronic Leukopenia. He takes no medications.
**Mental Health:** Non-problematic
**Substance Abuse:** The defendant said he drinks alcohol on an occasional, non-problematic basis. He denied any use of controlled substances.

## IV. Criminal Record:

| Arrest Date: | Offense: | Disposition: |
|---|---|---|
| 11/23/92<br>Lyon County, NV<br>S.O. | False Insurance Claim for Benefit (F);<br>Conspiracy to Commit Crime of False Insurance Claim for Benefit (GM). | 6/7/93: Convicted of False Insurance Claim for Benefit (F), 2 years NDOC, suspended, probation NTE 3 years, 100 hours community service<br>7/8/96: Honorable Discharge |
| 10/4/99<br>Lyon County, NV<br>S.O. | Battery Domestic Violence (M) | Per Defendant, Date Unknown: Convicted, 3 weekends jail, $600 fine, 100 hours community service |
| 9/24/03<br>Washoe County, NV<br>S.O. | Kidnap First Degree (F);<br>Battery with Intent to Commit Sexual Assault (F);<br>Sexual Assault Victim Under 16 (F); | **Instant Offense** |
| 10/10/03<br>Ad booked | Kidnap First Degree (F);<br>Battery with Intent to Commit Sexual Assault (F);<br>3 Counts: Sexual Assault Victim Under 16 (F). | |

In addition to the above, the defendant informed that he was arrested in California in 1981 for Trespassing (M). He said he doesn't recall the disposition.

## V. Offense Synopsis:

Investigation by the Washoe County Sheriff's Office disclosed that on Aug. 7, 2003, defendant Michael Botelho picked up the 14-year-old female victim in Carson City, ostensibly in response to her newspaper advertisement to provide services as a babysitter. He drove the victim to a remote area near Washoe Valley Lake and stopped. He then grabbed the victim and placed duct tape on her hands, eyes and mouth. The victim told police that she struggled, to which the defendant responded by punching her in the stomach. He then forced her to kiss him, touched her breasts, and put his tongue in her vagina. The victim related that he also placed his penis in her mouth and told her to suck it, after which he removed her clothing and vaginally raped her. The victim told police that she eventually managed to persuade the defendant to drive her to her home and drop her off, which he did after threatening to harm her if she told anyone what had occurred.

Detectives subsequently traced the cellular telephone number which the victim had been given in response to her advertisement to the defendant. They went to the defendant's residence in Dayton and left a message with his wife for the defendant to contact them about this case. Detectives subsequently learned that Mr. Botelho left his wife and two children, quit his job, and his whereabouts were unknown.

Two sexual assault exams were performed on the victim. Findings included observing red marks on her eyes, consistent with having duct tape placed over them, pain on her shoulders and pain on her abdomen, and red marks on her wrists consistent with tape. Abrasions on her vaginal area were also observed, as well as blood around the cervix and sperm deposits. Lacerations and redness to te child's external genitalia were also observed, as well as redness on the inner aspect of the child's labia minora. Blood was also noted to be present on the right side of the vaginal vault and there was bruising to the vaginal orifice tissue.

DNA sperm samples from the victim's underpants and vagina subsequently matched the DNA of the biological father of the defendant's two children, and a warrant was issued for his arrest.

Mr. Botelho was subsequently located in California and arrested and returned to Nevada.

## VI. Co-Defendant's Information:

**Co-Defendant:** None

## VII. Defendant's Statement:

*See attached written statement.* Verbally, the defendant said he had consumed two beers the day of the Instant Offense, but was not intoxicated. He asserted that he arranged to pick the victim up so as to interview her for possible future babysitting jobs. Then, "something came over me," he said. "I don't know what made me do it." Mr. Botelho added that he is "extremely sorry" for the impact this crime must have had on the victim. He pointed out that he does not have an extensive criminal history, declaring, "I'm not like that."

## VIII. Victim Information:

**VC2137066.** The now 15-year-old victim's mother was contacted and she stated that she and her daughter plan to be present at sentencing and address the court. She emphatically declared that the defendant should receive the maximum sentence possible. She said her daughter, who weighs only 70 pounds, has suffered with nightmares since this offense and is taking sleeping pills and anti-anxiety medication because "she's afraid of everything."

**Victim Information (Continued)**

She added that the victim is afraid to be alone at home and will not go anywhere alone. Also, she no longer babysits. She added that her daughter was punched so hard in her stomach during this incident that she has had an ultra sound and x rays; however the results have been inconclusive because she is so small.

The mother went on to explain that the defendant telephoned her daughter a month prior to the Instant Offense. He told her he was divorced and would need a babysitter when his two sons came to visit him. Then, on the day of the Instant Offense, she said he called her and told her he needed her to babysit that day. He told her he was calling from a tire store where he was having his car looked at, so she should walk there, rather than wait for him to pick her up at her house, she recounted. When he picked her up, the mother added, he made her sit in the backseat, which had blinds covering the windows. "It was so well choreographed," she opined. The mother said her daughter is attending counseling, as well as taking medication. She stated that she would submit the costs in writing, but, as of the writing of this report, has not done so.

The victim was also contacted with her mother's permission, and she, also, stated that the defendant should be sentenced to the maximum possible penalty. When asked, she stated that following the assault, the defendant became very upset and apologized, at which point she was able to persuade him to take her home.

**VC2118664**. The Victim Witness Assistance Center reported a loss of $275. That amount should be paid in restitution.

**VC4000000**. The Washoe County Sheriff's Office reported that it cost $63.00 to return the defendant from California. That amount should be paid in restitution.

**Total Loss: $338**

## IX. Plea Negotiations:

The parties will be free to argue for an appropriate sentence. As part of plea negotiations, the State will dismiss Count II: Battery with Intent to Commit Sexual Assault on a Child at the time of sentencing. The State will also refrain from pursuing any transactionally related charges or enhancements arising out of the Instant Offense.

## X. Custody Status/Credit For Time Served:

**Custody Status:** Washoe County Jail **CTS:** 9/24/03 to 2/11/04 = 141 days

## XI. Aggravating / Mitigating Factors:

**A. Aggravating Factors:**

1. Sex offense against a minor
2. Premeditated/planned
3. Fled state to avoid prosecution
4. Prior felony conviction
5. Prior domestic violence conviction

**B. Mitigating Factors:**

1. Lack of extensive criminal history
2. No prior sex offense convictions

## XII. Recommendations:

1. $25.00 AAF
2. $500 Attorney fee
3. $150 DNA fee/Genetic Marker Testing
4. $338 Restitution
5. Count I: Life with parole eligibility after 15 years
6. Count III: Life with parole eligibility after 20 years consecutive to Count I
7. Count IV: Life with parole eligibility after 20 years consecutive to Counts I and III
8. Count V: Life with parole eligibility after 20 years consecutive to Counts I, III and IV

*The Division notes that pursuant to NRS176.0931, the Court must further order that a special sentence of lifetime supervision commence after any period of probation, or any term of imprisonment, or after any period of release on parole.*

RESPECTFULLY SUBMITTED,

AMY WRIGHT, CHIEF

JO EWALD #338
SPECIALIST IV

APPROVED:

TROY DILLARD #456
UNIT MANAGER

DEFENDANT'S STATEMENT

Write in your own words the circumstances of your offense. Why you committed the offense, your present feelings about your situation and why you may be suitable for probation. A copy of this statement will be sent to the judge. Write or print clearly. If using a pencil, please write as dark as possible.

I DONT NORMALLY DRINK VERY MUCH AT ALL BUT I DONT RECALL WHY I HAD BEEN DRINKING FOR ALMOST A WEEK, NOT AT WORK! BUT FOR SOME VERY PATHETIC REASON I HAD A FANTASY, ONE OF WHICH BY THE WAY WASNT REALLY A SERIOUS ONE, WELL I GOT THE NAME OF THE BABY SITTER FROM SOMEONE IN TOWN AND I WAS HALF SERIOUSLY THINKING OF HAVING HER BABYSIT FOR US (MY WIFE & I) BUT SOMEWHERE ALONG I WAY I LOST WHAT I WAS DOING AND PLAYING A STUPID GAME I NEVER DREAMED I WOULD ACTUALLY FOLLOW THROUGH ON AND I DID JUST THAT. I REMEMBER TALKING TO HER AND JUST BEING CAUGHT UP IN IT ALL AND I REMEMBER DRIVING AROUND AFTER I PICKED HER UP AND JUST TALKING FOR A BIT THEN I AT SOME POINT JUST ACTED OUT MY PATHETIC FANTASY AND I GOT ON TOP OF HER AND TOLD HER TO TAKE HER CLOTHES OFF AND I SCARED HER BY PUTTING TAPE ON HER EYES, IT ACTUALLY JUST HAPPENED TO BE ON THE FLOOR OF MY WIFES CAR. I THEN ASKED HER TO OPEN HER MOUTH AND I PUT MYSELF IN HER FOR MAYBE 30 SECONDS THEN I KISSED HER ON HER VAGINA BUT REMEMBER I JUST KISSED BUT NOT TONGUE INSIDE HER THEN I ASKED HER TO LAY DOWN IN BACKSEAT AND I HAD SEX WITH HER FOR MAYBE 4 MINUTE OR TOO AND WAS VERY EXCITED AND CAME INSIDE HER QUICKLY AND ONLY THEN DID I REALIZE WHAT I ACTUALLY HAD DONE AND I STARTED TO CRY AS I GOT OFF HER AND TELLING her I'm SORRY, I'm SORRY AND SHE TRIED TO CALM ME DOWN AND TOLD ME IT WAS ALRIGHT. I NOW REALIZED I DID NOT EVEN HAVE A CONDOM ON, EVEN MORE STUPID AND I GAVE HER A HUG, HELPED her get DRESSED AND STARTED TO TAKE HER home AFTER TAKING THE TAPE OFF HER EYES AND THROWING IT OUT THE WINDOW. I JUST KEPT SAYING I'M SORRY AND CAN she FORGIVE ME. AND I

ASKED HER MOTTER IF SHE WAS ALRIGHT AND SHE ASKED ME IF I SAW HER BLUE? BRACELET AND I DONT EVER REMEMBER GETTING IT. I AGAIN ASKED HER IF SHE WAS ALRIGHT AND ASKED TO TO PLEASE NOT SAY ANYTHING AS I HAD A FAMILY AND I WOULD HURT US ALL. I REMEMBER TELLING HER IF IT WENT TO COURT WE WOULD ALL BE MORE EMBARRASSED AND ASHAMED AND IT WOULD RUIN MY family AND HER OWN. SHE SAID SHE WAS OK AND THAT she WASNT GOING TO SAY ANYTHING, THAT SHE HAD A SICK CAT AT HOME AND JUST WANTED TO TAKE CARE OF IT. AGAIN I TOLD HER I WAS SOOORRY SORRY FOR WHAT I HAD DONE AND ASKED HER AGAIN IF SHE WAS AIRIGHT BEFORE I DROPPED HER OFF AT HER house AND LET LET DOOR (CAR) OPEN AND I CLOSED IT FOR HER AND SAID SORRY AND LEFT. I WAS SO FREAKED OUT WHEN I LEFT HER house THAT I BEARLY REMEMBERED WHAT I DID WHEN I GOT HOME. IT TOOK ME A WHILE TO TO RENDER LATER WHAT I HAD ACTUALLY DONE. I GOT HOME AND HARDLY REMEMBERED THE TRIP. I DRESSED FOR WORK AND DROVE TO RENO TO my JOB. I MUST HAVE REALLY BEEN SCARED BECAUSE A WEEK LATER THE COPS CAME TO my HOUSE while I WAS AT WORK AND SPOKE TO my WIFE, my WIFE THEN CALLED my WORK AND I CALLED HER BACK TO SEE WHAT WAS UP AND she SAID I BETTER COME HOME AND THAT THE COPS WANT ME TO CALL THERE WHEN I GET home. I DIDNT GET HOME TIL ABOUT 11-11:15 PM AND ASKED WHAT WAS GOING ON. my WIFE TOLD ME THEY WERE ASKING ABOUT HER CAR, THE Cell phone AND SOME CLOTHES IF I REMEMBER AND SINCE IT WAS LATE I CALLED IN THE MORNING AND THATS WHEN I GOT THE VOICE MAIL OF DETECTIVE HERRERA AND IT SAID SOMETHING ABOUT CHILDREN VICTIM OF CRIMES UNIT AND IT CAME UNGLUED. I STARTED CRYING AND I

THEN REALIZED I HAD A BAD FEELING BUT DIDNT KNOW WHAT IT WAS, I CALLED AGAIN ON FRIDAY MORNING AND GOT/MAYBE HE CALLED ME, I DONT REMEMBER. ANY WAY DETECTIVE HERERRA WANTED TO ASK ME SOME QUESTIONS TO CLEAR UP A AN INCIDENT THAT HAPPENED THE WEEK BEFORE. HE SAID THEY HAD 8-9 GUYS HE WAS TALKING TO TO CLEAR up what HAPPENED AND I STARTED TO GET SCARED BUT DIDNT KNOW why. HERERRA ASKED IF I WOULD DRIVE OVER TO RENO FROM DAYTON TO ASK ME SOME QUESTIONS TO ELIMINATE ME FROM WHAT HAPPENED. I REMEMBER ASKING WHY I COULDNT JUST ANSWER THE QUESTIONS ON THE PHONE AND HE SAID ITS JUST EASIER TO DO IT IN PERSON AND THAT DIDNT MAKE SENCE TO ME SO I ASKED HIM WHAT ITS REALLY ABOUT AND he told me THERE WAS A RAPE OF A YOUNG GIRL IN CARSON CITY AND THEY JUST WANTED TO SEE IF I MIGHT BE INVOLVED OR NOT AND TO JUST PROBABLY CLEAR MY NAME OF THE POSSIBLE SUSPECTS. I TOLD HERERRA RIGHT THEN THAT I GOT TO THINK ABOUT THIS AND I HAVE A BAD FEELINGSO I SAID I WOULD CALL BACK LATER ON FRIDAY AFTERNOON AND THAT I HAD TO THINK ABOUT WHAT WAS GOING ON. I TALKED TO MY WIFE AT HOME AND STARTED GETTING Really SCARED BUT I DIDNT KNOW WHY SO I CALLED WORK AND SAID I WOULDNT BE IN TODAY. IT WAS THE FIRST TIME I WOULD MISS A DAY OF WORK IN A VERY LONG TIME. I CALLED DETECTIVE HERERRA BACK AGAIN AND SAID I Am FREAKED OUT THAT YOU WANT TO TALK TO ME, I WAS SCARED BUT I DIDNT REMEMBER DOING ANYTHING WRONG 26 BTS OF 119

(4)

YET SO I AM GOING TO DRIVE AROUND AND TRY TO THINK ABOUT THIS SO I CALLED SEVERAL GOOD ATTYS IN RENO WHO WERE FAMILAR TO ME AND ASKED THEM WHAT THEY THOUGHT. I TOLD THEM I HAD A BAD FEELING BUT DIDNT RECALL ANYTHING AND THEY TOLD ME WHAT I SHOULD DO. ATTY JOHN SPRINGATE SAID DONT SAY A WORD, DONT GO IN TO ANY QUESTIONS IN RENO TIL I HAD AN ATTORNEY CHECKING WHATS GOING ON DOWN THERE FIRST THEN GO DOWN WITH AN ATTY WHEN WE KNOW WHATS REALLY GOING ON. I THEN CALLED MARVIN WEINER AND HE told me THAT SAME THING AND I ASKED HOW MUCH AND HE TOLD ME 8-10 THOUSAND JUST TO START WITH JUST TO GET INVOLVED AT ALL! MR. WEINER TOLD ME IF I DIDNT HAVE THE MONEY THAT UNTIL I DO THAT HE SUGGESTED TO LEAVE NEVADA AND WORK OUT OF STATE TIL I COULD GET MONEY TOGETHER TO GET AN ATTY THEN GO DOWN WITH THE ATTY AND SPEAK TO THE LAW. WE I WAS NOW REALLY, REALLY SCARED AND HE TOLD ME THEY WOULDNT HAVE THE LAW OUT IN OTHER STATES BESIDES NEV CAUSE IT WAS JUST QUESTIONING OF A LOCAL CASE SO HE SAID "LEAVE NEVADA NOW AND WORK TIL I CAN AFFORD AN ATTY THEN COME BACK" I THEN CALLED THE DETECTIVE BACK AT THAT POINT AND SAID I'm FREAKED OUT CAUSE THEY WANTED TO TALK TO ME V6.26 RENO, 20

IN STOAD OF JUST ANSWING THEIR QUESTIONS JUST RIGHT NOW, HE SAID THEY JUST LIKE TO CLEAR ~~PLSS~~ THESE THINGS UP IN PERSON. BUT THE ATTY'S BOTH TOLD ME THEY WERE JUST "PLAYING ME" A ROUSE TO GET ME DOWN THERE SO I TOLD DETECTIVE HERRERA I WAS GOING TO HAVE TO THINK ABOUT THIS FOR AWhile AND I WOULD GET AHOLD OF HIM ANOTHER TIME AND I SAID I WOULD CALL HIM BACK WHEN I FIGURED OUT WHATS GOING ON, I TOLD HIM I NEEDED TO THINK AND I WAS HONEST WITH HIM. AT THAT POINT I CALLED my JOB AND QUIT CAUSE I WAS SCARED THEY WOULD COME TO TALK TO ME AT WORK AND I COULDNT HANDLE A SCENE LIKE THAT AND BE TOTALLY OVERWELMED. I CALLED MY WIFE AND TOLD HER I QUIT my JOB AND I AM SCARED & DONT KNOW WHY AND THAT I WASNT GOING TO HAVE A SCENE AT WORK AND THAT I SHOULD LEAVE THE IMMEDIATE AREA TIL I CAN GET A JOB OUT OF STATE & EARN ENOUGH FOR AN ATTY. THE COPS WERE MAKING ME FEEL GUILTY AND I HAD A BAD FEELING BUT WASNT SURE WHAT I MIGHT HAVE DONE. I GOT SOME OVERNIGHT CLOTHES AND KISSED my VERY DISTRAUGHT WIFE & BABIES GOODBYE AND

help I would call when I figure it out. I drove to Winnemucca and stayed a few days - a week maybe and decided to go to Oregon to try get a job and save up & sort it out in my head, well I couldn't get a job and gave up and I came home to Dayton area for a week at a friends house while I tried to think what the heck I did! I started to remember just a very few things and it really, really scared me. I told the law the last time I spoke to them that I was going to come in soon and talk to them but I decided to go get my wife & kids and talk to them (my wife) about what I remember and since I think better when I am driving normally and since I had my family with me, my one yr old boy and my 2½ yr old boy and my wife, I decided to go to Salem Oregon for a drive since we like the area anyway. I told my wife as we drove about the possible sentences that a rape involves and what little I remembered. I told her it would take months & months before I might have enough for a lawyer and I

KNEW WE WOULD LOSE EVERYTHING ELSE BY THEN AND STARTED THINKING OF JUST TURNING MYSELF IN SINCE IT WAS LOOKING LIKE THAT WAS THE ONLY WAY I WOULD GET AN ATTY AND THAT SCARED ME MORE CAUSE I HAD BEEN SCREWED MANY YRS AGO BY A PUBLIC DEFENDER AND CLED TO SOMETHING I SWEAR I, WE NEVER DID. OH, BY THE WAY While WE DROVE THRU RENO TOWARD OREGON WE DROVE BY THE W.C. SHERIFFS DEPT ON PARR BLVD SO my WIFE WOULD KNOW WHERE ITS AT AND WOULDNT FREAK OUT WHEN WE COME BACK. I (WE) WAS BEGINNING TO REALIZE THE EXTENT OF WHAT I WAS LOOKING AT AND WHAT I COULDNT REMEMBER AND KNOWING THEY MUST THINK I DID IT OR THEY WOULDNT HAVE BEEN SO ADEMENT ABOUT ME GOING TO RENO TO SPEAK TO THEM. I WAS TRUELY FRIGHTENED TO DEATH TO KNOW I Might Really HAVE DONE THIS CRIME AND THAT I JUST MIGHT HAVE DESTROYED OUT FAMILY & FUTURE ALONG WITH THE VICTIMS. WE STOPPED AT MY SISTERS HOUSE FOR A FEW DAYS AND TOLD HER WHAT I Might HAVE DONE AND While There MY SISTER SAID I SHOULD WASH THE GRAY OUT OF MY HAIR AND GET SOME BLEACH CAUSE IT WORKS BETTER THAN

JUST BROWN HAIR COLOR AND WILL LAST LONGER SO I BLEACHED MY HAIR ON MONDAY BEFORE GETTING READY TO TURN MY SELF IN AND TUESDAY MORNING WE SAID GOODBYE TO MY SISTER AND WE WERE ON OUR WAY TO RENO. ITS A LONG 9 HR. DRIVE TO RENO SO WE DECIDED TO STAY IN SUSANVille, GO TO WALMART AND BOUGHT MY NATURAL BROWN HAIR COLOR AND WAS GOING TO DYE MY HAIR BACK TO ITS NATURAL COLOR LESS THE GRAY HAIR. WE GOT A HOTEL AND I WENT AND GOT CHICKEN DINNER AT KFC AND I CAME BACK AND SPENT ABOUT 20 MINUTES WITH MY FAMILY EATING THEN WENT IN THE BATHROOM TO COLOR MY HAIR BACK AND SHOWER WHEN THE KNOCK AT THE DOOR WAS ANNOUNCED BY SUSANVille P.D. AND MY WIFE LET THEM IN AND I CAME OUT OF THE BATHROOM JUST READY TO DO MY HAIR, I TOLD THEM WITH MY HANDS UP THAT I WAS NOT GOING TO RESIST AND I DID NOT HAVE A WEAPON OF ANY KIND. I TOLD THE OFFICERS THEY COULD CHECK THE ROOM AND THE S4U IF THEY WANTED, THAT I HAD NOTHING TO HIDE AND WAS ON THE WAY TO RENO EARLY TOMORROW MORNING TO TURN MYSELF IN ANY WAY. THE OFFICERS WERE VERY POLITE AND NOT HAVING GUNS DRAWN, ETC.. THEY EVEN LET ME KISS MY 2 BABY BOYS AND MY WIFE GOODBYE BEFORE

taking me to the Susanville jail. I was booked AND 2 DETECTIVES, HERERRA & ? ANYWAY THEY QUESTIONED ME AND I HONESTLY DID TELL THEM WHAT I COULD REMEMBER AT THAT TIME, THEY LIKED MY BLEACHED HAIR AND I TOLD THEM IT WASNT FOR EFFECT, I WAS DOING IT TO GET RID OF ALL THE GRAY BEFORE I DYED MY NATURAL COLOR BACK IN AND THAT I WAS GETTING READY TO DO JUST THAT WHEN THEY KNOCKED AND CAME IN. THEY SAW ME PUT DOWN THE BOX OF BROWN HAIR DYE AND PUT MY HANDS UP. There is EVEN VIDEO AT Susanville WALMART OF ME BUYING THE HAIR COLOR THAT EVENING. ANYWAY THE OFFICERS FROM RENO ASKED ME TO PUT 2 SWABS IN MY MOUTH FOR DNA SAMPLES AND I DID IT WITHOUT HESITATION AND TOLD THEM I WAS TRUELY COMING HOME ELSE WHY WOULD I ONLY BE 1½ HRS FROM RENO WITH my family & NOT much money! DETECTIVE HERRERA SAID he TRUELY BELIEVED I WAS TURNING my SELF IN AND I THEN TOLD HIM I SAID I WOULD WORK THIS OUT RIGHT FROM THE FIRST TIME I EVER SPOKE TO HIM AND LIKE I TOLD HIM THEN, I JUST NEEDED TIME TO REALLY THINK IT OUT AND I HAD

I WAVED EXTRIDITION IMMEDIATELY AND CAME TO RENO A (WK) LATER AND WAS BOOKED here. I AGAIN TOLD DETECTIVE HERRERA ALL THE REST I REMEMBERED AT THAT POINT, I SAT HERE FOR ALMOST A MONTH ~~BEFORE~~ CRYING, THINKING, SHAKING AND IT ALL CAME BACK TO ME AND I WAS JUST SICK, I NOW KNEW I DID IT AND I WAS SICK AND THATS WHY I NEVER, EVER THOUGHT ABOUT GOING TO TRIAL AND EMBARRASS THE VICTIM OR MYSELF SELF FURTHER, WE WERE BOTH ALREADY IN ENOUGH TORMENT & PAIN. IM A STAND UP GUY, I KNOW NOW WHAT I REALLY DID AND DID WHAT WAS RIGHT BE PLEADING GUILTY AND SAVE US BOTH FROM MORE EXPOSURE TO THE PUBLIC IN COURT AND THE ADDITIONAL SUFFERING WE WOULD BOTH GO THROUGH ON THE STAND. I AM SICK TO MY STOMACH AND KNOW NOW WHAT EXTENT OF WHAT I HAD DONE WAS REALLY GOING TO EFFECT US ALL.

ACT 2 (9)

I KNOW IT SOUNDS BAD, BUT I HAD BEEN DRINKING SOMETHING I NORMALLY DO VERY LITTLE OF. I HAD THIS STUPID FANTASY ABOUT BEING WITH A BABYSITTER AND I LET IT GET AWAY FROM ME AND OBVIOUSLY DID WHAT I DID AND WILL NEVER FORGIVE myself FOR WHAT I HAVE CAUSED UPON US ALL. Im NOT MAKING EXCUSES, IT should HAVE NEVER, EVER HAPPENED AND HAVE ALWAYS TRIED TO help OTHERS — NOT HURT THEM. THIS YOUNG LADY DIDNT ASK FOR NOR DESERVED ANY OF THIS AND I will HAVE TO LIVE WITH THAT knowledge AND THE Shame I CAUSED myself ALL OF my LIFE. I HAVE SHATTERED MY OWN FAMILY AS WELL AND I LOVE MY BOYS (I HAVE FOUR ALTOGETHER) SO VERY MUCH. 1½, 2½, 10 AND 12 YRS OLD AND THEY will be hurt FOREVER ALSO AND I CANT TAKE IT BACK, Id GIVE MY RIGHT ARM & LEG IF I COULD! I HAD THIS STUPID FANTASY FOR YRS But I WISH I COULD GIVE YOU AND myself TOO, A BETTER ANSWER FOR Why IT DID HAPPEN. GOD FORGIVE ME!

(B)

My present feelings about where I am right now are as follows: As of the date I'm writing this 12-17-03 I have been in custody both Calif and here almost 4 months and I have been able to experience the whole spectrum of what I feel. I have hurt an innocent 15 yr old girl and her family. I have scared them, shamed them, embarrassed them, caused mental, emotional and physical suffering of which was not of their own making, Im sure I have damaged her trust & faith in men and have left them to wonder, WHY? Why her?, Why anyone?, Why, when I had a pretty, loving wife of my own?

I have hurt the most kind, loving and faithful woman I have ever known. She believed in me and still does though I know I am not deserving of it. My wife depended on me to protect, love, be hardworking to provide for my wife & 2 little babies, to make her proud of me and try to be her knight in shining armor, to make all her dreams come true and so much more. I have shamed

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her, embarrassed her, I have caused mental, emotional and physical suffering which she did ask for or deserve either. I have damaged her trust and faith in me, in men in general. By my actions I have caused my wife to lose my truck, her car, all our credit cards, health insurance, our income of which I have always been the sole provider, her mom is 75 yrs old and lives very far away and has "never" seen either of our 2 beautiful toddlers 1½ & 2½ and she sure wont be able to make that trip now and I got to live with that too! My wife isnt even sure she will be able to earn enough to pay bills and that doesnt even consider what daycare might run for 2 kids so very young. We even had to sell our House just so we wouldnt lose it in Yorington, NV. My wife now has the unpleasant knowledge of having to play mom and dad both, to try to raise them right without daddy, to know the last things our boys will now miss out on like father

(P)

SON THINGS, BEING DADDIES LITTLE BOY, PLAYING CATCH, HOOP, ALL THE THINGS KIDS HAVE THE OPPERTUNITY TO EXPERIENCE GROWING UP WHEN DAD IS THERE TO LOVE GUIDE & PROVIDE FOR THEM, WILL THEY GET TO GO TO college? will they EVER UNDERSTAND WHAT AND WHY DAD DID WHAT HE DID TO CAUSE THIS, will They HATE ME FOR BEING UNFAITHFUL TO THEIR mom? SO VERY MANY THINGS I CAN YET TO THINK OF!! My MOM & DAD, my 4 BROTHERS & SISTERS AND 16 GRANDCHILDREN, HOW WILL THIS HURT THEM ALL, THE QUESTIONS, SHAME, ETC... My 85 YR old GRANDMOTHER - IM CLOSER TO HER THEN my MOM - SHE IS CRUSHED! ALL my CO-WORKERS AND FRIENDS who KNOW IM A HARD WORKER AND GOOD (WAS) FATHER, I WAS A VOLENTEER FIRE MAN AND EMT CAUSE [redacted] I WANTED TO help people!

yes, I HAVE felt AND THOUGHT ABOUT All These THINGS, ALL THESE FeeLINGS, ME ASKING GOD why? why DID I DO THIS? I HAVE BY COMMITTING THIS CRUEL ACT DIDNT JUST HURT THAT YOUNG LADY BUT ITS BEEN

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SO VERY MANY, MANY people who I have SADDENED, CAUSED DISBELIEF TO, Shamed, LET DOWN AND JUST OUTRIGHT SHOCK AS TO WHY? I'm NOT LIKE THAT yet I DID IT. SO MANY family members will be GONE BEFORE I PRAY I CAN GET OUT. EVEN IF I ONLY DID 10 yrs CONCURRENTLY I WOULD STILL Lose 4-5 LOVED ONES I WOULDNT EVEN BE ABLE TO SAY GOODBYE TO. I KNOW I AM GUILTY AND I HAVE NEVER DENIED THAT I might BE OR WAS IN FACT WHEN IT ALL CAME TO ME! My WIFE IS STILL STANDING BY ME EVEN THOUGH I HAVE CAUSED SO VERY MUCH DAMAGE TO SO MANY People. She PRAYS EVERYDAY for DO I THAT WITH GODS MERCY AND WITH THE COURTS ALSO THAT WE PRAY TO GOD WE CAN BE A FAMILY AGAIN BEFORE THE KIDS ARE COMPLETELY GROWN AND SHATTERED ALSO. I HAVE DONE SUCH A THING THAT SHOULD NEVER, EVER HAVE HAPPENED AND I CANT TAKE IT BACK, I HAVE BAD DREAMS ABOUT WHAT I

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HAVE DONE AND WHAT I CAN ~~NEVER~~ NEVER TAKE BACK OR CHANGE. I PRAY TO GOD TO FORGIVE ME FOR MY SINS AND FOR THE YOUNG LADY AND HER FAMILY TO FORGIVE ME SOME DAY AND PRAY THAT SHE MAY HEAL IN MIND AND SPIRIT AND GROW OLD HAPPY AND FORGIVING. I PRAY TO GOD TO TAKE CARE OF MY FAMILY AND ALL THOSE WHO HAVE AND WILL CONTINUE TO BE HURT AND BROKEN HEARTED BECAUSE OF WHAT I WILL LIVE WITH FOREVER. I KNOW I DESERVE TO SPEND YRS IN PRISON, EVEN IF YOU LET ME OUT TOMORROW, I WOULD AND COULD NEVER FORGIVE MYSELF FOR THE DAMAGE I HAVE ALREADY DONE AND WOULD STILL LIVE WITH THAT IN MY HEAD, MY HEART & SOUL FOREVER! I HAVE SPOKEN TO MY ATTORNEY AND ALL I CAN DO IS ASK, PRAY AND BEG FOR THE VICTIMS MERCY, THE COURTS MERCY AND YOU THE JUDGE FOR MERCY OF LENIENCY I KNOW I DON'T HAVE ANY WEIGHT CONCERNING WHAT I SO MERCIFULLY COULD HOPE FOR IS FOR

(6)

SENTENCE OF A DEFINITE TERM OF 15 YRS WITH POSSIBLE PAROLE IN A MINIMUM OF 5 (BUT REALISTICALLY [redacted] MORE) YRS IN KIDNAPPING FIRST DEGREE SUBSECTION 2 (B) AND FOR THE COUNTS OF SEXUAL ASSAULT (3) COUNTS NRS 200.366 SUBSECTION B (2) FOR A DEFINITE TERM OF 20 YRS WITH POSSIBILITY PAROLE IN 5 MIN. (BUT REALISTICALLY MORE) AND PRAY FOR THE CONCURRENT SENTENCING WHICH IN EFFECT WOULD MAKE IT: (4) COUNTS WITH DEFINITE 20 YRS WITH POSSIBLE PAROLE AFTER 5 YRS SERVED CONCURRENTLY AND I KNOW THAT IF I COULD BE GRANTED THIS CONCURRENT SCENARIO WITH DEFINITE TERMS THAT I KNOW IN MY OWN HEART I SHOULD AND PROBABLY GET A CHANCE AFTER A MINIMUM OF 10 YRS IS SERVED IN PRISON WITH ME DOING GOOD IN PRISON. I KNOW THAT MIGHT NOT SEEM LIKE MUCH BUT MY FAMILY AND THE VICTIM AND HER FAMILY WILL STILL NEVER BE THE SAME BUT I SWEAR I WOULD DO MY BEST TO MAKE HER HAPPY SO I COULD PICK UP MY SHATTERED FAMILY AND TRY GLUE IT PARTIALLY BACK TOGETHER. I'M SORRY THIS HAS ALL BEEN SO LONG BUT I HAVE JUST TRIED TO BE HONEST AND FORTHCOMING. PLEASE FORGIVE ME

3/11

ORIGINAL FILED

2004 FEB 17 PM 2:19

CODE 2528
MICHAEL R. SPECCHIO
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RENO, NV 89520
(775) 337-4800
ATTORNEY FOR DEFENDANT

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,
Plaintiff,

vs.

Case No. CR03-2156

MICHAEL TODD BOTELHO,
Defendant.

Dept. No. 8

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**CONFIDENTIAL LETTERS FROM FAMILY TO BE FILED UNDER SEAL**

See attached.

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SEALED

Judge Jerome M. Polaha
Second Judicial District, Dept. 3
75 Court Street
Reno, NV 89520

Honorable Judge Polaha,

I am Leeanne (Botelho) Fish, younger sister to Michael Botelho, and I humbly submit the following in an effort to provide you a more complete picture of my brother.

Michael is the oldest of five children. Growing up in a tiny farming community amid a constant struggle to subsist, we were poor more often than not, but we had each other and we played, worked, and dreamed together. Although we children had our squabbles, Michael always stood up for us if anyone outside our family squabbled with us. He has always stood up for friends and family and even put himself in harm's way to break up a fight between strangers.

Michael was born with a rare bone marrow disease (the diagnostic label is indecipherable) that renders his immune system, in effect, to act like a virus, attacking his healthy red blood cells. Consequently, he has had numerous life threatening or near death incidents caused from insignificant injuries or exposure to common germs. He has survived two bouts with cancer. Despite these chronic health issues and the cancer treatments, Michael always worked to support himself and his children. He has never been one to seek a handout. On the contrary, Michael is a very generous person - perhaps too generous at times - he has loaned vehicles/tools, given money, and given his time to help a family member or friend in need, even if it left him short of resources for himself. He never expects anything in return, doesn't ask for help for himself, and possesses only things he has worked to pay for. He just works and tries harder. I can't possibly recount the number of times he has helped me out, let alone the rest of the family and the myriad friends over the years.

Michael has hard earned knowledge of the various construction trades and recently built the new home where his wife and two young children presently reside. These skills were primarily self-taught throughout the process of remodeling his prior home from the foundation up, transforming a dilapidated, flat roofed salt box into a structurally sound, aesthetically pleasant family home. The remodeling took many years because, throughout this time, Michael maintained his regular employment, he had to "learn as you go" at each stage, he went through a divorce, and it was during this time period that he battled twice with cancer. No matter how tough the going was, however ill Michael was from chemotherapy and other cancer treatments, he never gave up or gave in. He had children to support, bills to pay, work to do, and projects to be completed.

Michael has been a good father and a good provider. His wife loves him and his children adore him. My children love their uncle Michael. I love my brother. He has been a positively contributing member of society who pays his bills, taxes, and child support. We all love him and we all have been enriched by his love, support, and generosity. In taking responsibility for his actions, by admitting guilt and making no excuses, Michael is doing exactly what I would expect from the man I know him to be. He is a hard working, caring person who made a terrible mistake and is unwilling to suffer the victim, her family, or his own family further by having a prolonged and painful trial.

I agonize and pray for the victim and her family, that they can begin piecing their lives back together and begin healing. I agonize and pray for two little boys who've lost the daddy they adore and their mother, who lost her husband, her dreams, and her children's security. I ache and pray for my brother, who knows he has to atone and has stepped into the Light to seek his salvation. I pray that justice will be tempered with mercy, especially for two young boys who need to know their father's love and the

positive things he can teach them: strong work ethic, self-reliance, generosity, integrity, honesty, and the lesson that if you make a mistake, you have to own it and make amends, then make sure you don't repeat it.

Your Honor, I pray that you, who has the difficult and unenviable responsibility of determining a fair and reasonable sentence, will weigh into your decision the needs of my two young nephews to have hope of reuniting with their father and, for my brother's sake, his own redeeming qualities. I believe in the necessity of punishment and, further, I believe in it's value in teaching a lesson when it relies on the opportunity to demonstrate the lesson was learned. I have faith that Michael will learn well the full measure of the lesson at hand and that he will pose no future threat to anyone. My faith is founded on Michael's own inherently positive qualities, which I've tried to recount to you throughout this letter, the significant time he will have for reflection and regret, and he has the love and commitment of his family behind him. I just wanted you to know who my brother really is as a person, a brother, an uncle, and a friend, how much he is loved, and how very important he is to all of us. Thank you for taking the time to read this.

Respectfully submitted,
Leeanne Fish

Judge Jerome M. Polaha
2nd Judicial District; Dept. 3
Reno, NV 89520

Dear Sir,

There are many things that I would like to express, yet, under these circumstances it is essential to stick to the task ahead of me. I need to start by thanking you for the representation you provide, I imagine the difficulty and appreciate having a voice.

Michael Botelho, my older brother, has become a friend of mine in my adult years. I have enjoyed his sense of humor and appreciated his support and input toward decisions I have made in my life. Michael is a kind and a reliable person. He is the kind of man who will stop at an accident to help, to put snow chains on stuck car or pick someone up if they fall, qualities that are fading in our society. He properly supports his family, he has been a hard working employee and an honest person. He's a strong and caring force in his families lives, a very good father and his children adore him.

Our society is riddled with fatherless children and these children suffer tremendously. Although it is sometimes necessary to induce these conditions, it's purpose, rehabilitation, is attainable. Michaels absence is going to be detrimental to his children, but the knowledge that he can and will return to their lives will give them direction and hope. His family will struggle through and survive this trial knowing that the family construct can be whole once again. Those beautiful children may have a chance to know and experience their father. Our goal as parents are to raise healthy, morally conscious adults that are contributing members of society. Michaels' goals are no different and he is an irreplaceable factor in that equation.

There are too many people in our country that can't or won't work, who repeatedly harm those around them and those who blame others for everything. And there are those who struggle and make mistakes, those who need help and who take responsibility and accept consequences. Michael, my brother, my nephews' father, is the latter. He is a good man with attributes that enhance our society and his family.

My heart breaks for those who have been hurt. I pray every night that they find peace and comfort in their hearts. I pray every night for Michael, I know his heart has found the light and I pray that it will stay in the light. I whole-heartedly believe that it has and will.

I know the purpose of incarceration and support and believe in our judicial system. I believe in a just and fair sentence, I believe in Michaels' ability to grow and rehabilitate and I believe in his right to regain and retain a healthy presence in society. Some people are worth fighting for, their worth means a great deal to those who love them or have been helped by them. Michael is such a man.

I pray that those who are in the position of determining his future do so with just and fair hearts and clear minds, that the value of his life is considered. The punishment is being served, haste should not be a factor.

Thank you for your time and know that you, too, are in my prayers, for I know that your job is difficult and I hope that you too will see the worth of Michaels' life and know a fair release.

Sean Sullivan
Washoe County Public Defender
350 S. Center Street, 6th Floor
Reno, NV 89501

February 3, 2004

Mr. Sullivan,

I am one of Michael Botelho's siblings and I was asked by Mr. Novak to write a letter on Michael's behalf addressed to Judge Polaha. That letter is enclosed herein. I endeavored to keep it brief yet still convey the salient characteristics that define my brother throughout his lifetime. I would appreciate it if you would read this letter before presenting it to the judge. In reading it, I pray that you too can discern the depth and breadth of Michael's good qualities and earnestly seek to ensure he receives a fair and reasonable sentence. Please let me know if there is anything further I can do to be of assistance.

Sincerely,
Leeanne (Botelho) Fish

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 Viloria, Deputy District Attorney

DATED this 17th day of February, 2004.

Diana Richards

DIANA RICHARDS

V6.284

ORIGINAL

FILED

2004 JAN 26 PM 2:34

RONALD A. LONGTIN, JR.

BY _____ DEPUTY

CODE 2528
MICHAEL R. SPECCHIO
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ATTORNEY FOR DEFENDANT

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,
Plaintiff,

vs.

Case No. CR03-2156

MICHAEL TODD BOTELHO,
Defendant.

Dept. No. 3

/

**CONFIDENTIAL PSYCHOLOGICAL/SUBSTANCE ABUSE EVALUATION TO BE FILED UNDER SEAL**

See attached.

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SEALED

V6.285



**PSYCHOLOGICAL/SUBSTANCE ABUSE EVALUATION**

Name: Michael Todd Botelho
Date of birth: 06/10/61
Case number: WC03-008924
Date of evaluation: 01/23/04
Date of report: 01/23/04

**Identification**

Michael Todd Botelho is a 42-year-old Caucasian male who is charged with one felony count of Kidnapping in the First Degree, one felony count of Battery With Intent to Commit Sexual Assault, and three felony counts of Sexual Assault on a Child.

**Limits of confidentiality**

He understood that the information given during this evaluation would be put into a report, which will be provided to his Attorney.

**Referral question**

His Attorney, Sean Sullivan, requested a mental health/substance abuse evaluation of Michael Todd Botelho.

**Method of assessment**

Interview of Michael Todd Botelho at Washoe County Detention Facility on 01/23/04
Review of his criminal complaint and arrest reports

**Background**

He reports he was raised by his parents to the age of 18. He claims he has three younger sisters and one younger brother. He indicates neither of his parents abused alcohol or drugs. He suggests his father on occasion was hypercritical of him. He indicates he was not physically or sexually abused.

V6.286





He claims he has been married three times. He reports he got married in 1981 and they divorced in 1985. He indicates they had no children. He claims he got married in approximately 1990 and they divorced in 1994. He reports they have a 10-year-old son and 12-year-old son. He claims their sons reside with his ex-wife in Anchorage, Alaska. He indicates he got married in 12/97 and they remain married at present. He reports they have a 1.5-year-old son and 3-year-old son.

He indicates he graduated from high school in 1980 and he has completed one year of college. He claims he has performed construction work.

He reports he is deaf in his left ear and he has a low white cell blood count.

He claims he has never received mental health treatment. He suggests he has not had a problem with ongoing depression or anxiety. He acknowledges that he has been depressed since he got arrested, because of his legal problems. He indicates he has never been suicidal.

He believes he first consumed alcohol when he was 17-years-old. He claims he has occasionally used alcohol. He indicates he would normally consume a couple beers in a month and no more than six beers in a month. He reports he experimented with cannabis on one occasion when he was a senior in high school.

**Mental status**

He was oriented to person, place, situation, and date. He was cooperative. He was appropriately groomed and attired. His affect was within normal limits and his mood was mildly dysphoric. No suicidal ideation, hallucinations, or delusions were noted. His short-term and long-term memories were generally intact. He presented as functioning in the normal intellectual range.

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**Conclusion**

He is diagnosed as having Adjustment Disorder With Depressed Mood, due to his concerns about his legal issues. He reports he has no substance abuse problems and he has not experienced ongoing mental health problems, but he has occasionally experienced some depression due to situational stressors. He claims he does desire to gain insight into why he committed his offenses. He acknowledged that he will be going to prison and he was informed that he could receive sex offender treatment if he is transferred to the prison in Lovelock.

Bill Davis, Ph.D.
Nevada Psychologist License PY211

t: 01/23/04

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 Viloria, Deputy District Attorney

DATED this 26th day of January, 2004.

Diana Richards
DIANA RICHARDS

ORIGINAL



4185
JOAN MARIE DOTSON
CCR #102
75 COURT STREET
RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BEFORE THE HONORABLE JEROME M. POLAHA, DISTRICT JUDGE

--o0o--

THE STATE OF NEVADA,
Plaintiff,

vs.

MICHAEL TODD BOTELHO,
Defendant.
_____)

Case No. CR03-2156

Department No. 3

TRANSCRIPT OF PROCEEDINGS

SENTENCING

Wednesday, April 7th, 2004

8:30 A.M.

Reno, Nevada

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

A P P E A R A N C E S

For the Plaintiff: OFFICE OF THE DISTRICT ATTORNEY
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THE NEVADA DEPARTMENT
OF PAROLE AND PROBATION: JO EWALD

WEDNESDAY, APRIL 7TH, 2004; RENO, NEVADA

--o0o--

THE COURT: Good morning. Be seated please. This is CR03-2156, State of Nevada verses Michael Todd Botelho. And this is the time set for the entry of judgment and the imposition of sentence in this matter.

Mr. Sullivan, have you received the presentence report?

MR. SULLIVAN: Your Honor, I have received a presentence report. And, your Honor, I apologize. My client did not make it on the first transport this morning. He made it on the second transport, so he just arrived. He just sat down before your Honor hit the bench.

And, your Honor, for the Court's knowledge, there was some confusion as to the pages in the defendant's attached written statement. Myself, including the Division, were missing four pages from the statement.

Apparently on the original my client wrote on the back pages and those copies were not provided to the Division or myself. We just received them this morning. Mr. Hahn was kind enough to allow me to look at his copy. And I would ask this court for just a ten-minute recess so I can review the extra pages with my client.

THE COURT: All right.

MR. SULLIVAN: Thank you, Judge.

(At this time a brief recess was taken.)

THE COURT: Be seated please.

We are back on the record. And, Mr. Sullivan, I have the presentence report. I have a psychological and substance abuse eval.

And I was provided a victim impact statement.

MR. SULLIVAN: Yes, your Honor. I have filed all those documents under seal with the court. And I have provided this morning Mr. Hahn a copy of the letters that were filed under seal on behalf of my client.

THE COURT: I don't have those.

MR. SULLIVAN: You do not have the letters?

THE COURT: No.

I'm sorry. Yes, I do. All right. They were filed under seal too.

MR. SULLIVAN: Yes.

THE COURT: Okay. Yes.

MR. SULLIVAN: If it pleases the Court, your Honor, we are in receipt of the presentence report dated January 13th, 2004.

We have no factual corrections or additions to make at this time. Judge, the only thing I would add for the record concerning the P.S.I. is if you would not attach my client's rather lengthy statement to the P.S.I. at the conclusion of these proceedings. I do not want this statement following him down to the prison.

Your Honor, also another housekeeping matter that I have, my client would like to lodge another objection on the record concerning the State's notice of intent to introduce prior -- or other bad act evidence at sentencing filed on February 3rd, 2004.

And my client would ask this court to not consider any of the information alleged by the State per NRS 49.305 and NRS 49.405 and the applicable case law set forth in the defendant's opposition to State's motion filed on February 13th, 2004.

THE COURT: All right.

MR. SULLIVAN: Thank you, Judge. Judge, my client --

THE COURT: Mr. Sullivan, in looking at the file, I was correct in my first statement concerning the family letters. Yeah. They are not there. I have a cover sheet saying letters from the family. But there are not letters behind it.

MR. SULLIVAN: Can I approach, your Honor?

THE COURT: Sure. All right.

MR. SULLIVAN: Thank you, Judge.

Judge, actually we do have one factual correction to make to the P.S.I.

My client would like to note the Social Security number on the first page, third line down, there are two Social Security numbers. The first one is his true and correct social security number. And it says also used is a different number which is only one number off from his true and correct number.

My client has indicated he has never used the second number and he believes it just to be a typographical error and he would like the Court to note that.

Your Honor, we are set for sentencing today for Michael Todd Botelho. My client is a forty-two year old male born in Honoka, Hawaii. He has three younger sisters and one younger brother.

Your Honor, he was -- for all intents and purposes he was raised in a loving and caring environment. Neither of his parents drank or abused drugs.

The only criticism he would have to say about his upbringing is that sometimes his father could be hypercritical.

My client himself, your Honor, has never

abused alcohol or drugs. He was never physically or sexually abused. He first consumed alcohol at the age of seventeen like a lot of -- unfortunately like a lot of seventeen year old teenagers.

But he would only consume a few beers a month, approximately six beers per month. And he tried cannabis at least on one occasion. So, for all intents and purposes, your Honor, we don't believe my client has any substance abuse or alcohol problems to speak of.

He did graduate from high school with a degree, your Honor. And he also went on to perform one year of college in 1980.

His main trade or profession is in the construction field, and that's where he has worked ever since. He has had a number of construction jobs and he does quite well. He has a very strong worth ethic, your Honor. My client prides himself on never missing a day of work, up until the instant offense.

He told me that he -- even if he was, you know, very gravely ill, he would still go in to work. In speaking of illnesses, your Honor, he does have a number of medical complications to speak of.

He suffers from chronic leucopenia. In addition, he also suffers from a form of Hodgkin's lymphoma.

Right now he has a very low white blood cell count. He has swollen lymph node glands, muscle aches and joints. And he is deaf in his left ear.

In addition, your Honor, my client did serve a stint in the military. He was in the Marines. And he was given an honorable discharge in light of his medical conditions.

Your Honor, my client, as you can see from Doctor Davis's report, which was filed under seal on January 26th, 2004, has no real mental health issues to speak of. He has never sought any mental health treatment in the past. Doctor Davis diagnosed my client with adjustment disorder, with a depressed mood brought about by his legal issues.

Basically my client is certainly depressed and concerned over his current situation. However, he is not on any medication today. And he is not seeking any mental health treatment at this time.

Your Honor, my client has been married in the past: Three times to three different women. The first time he was married was in 1981. This ended in 1985. There were no kids as a result of this marriage.

The second time my client was married, your Honor, was in 1990. This marriage ended in 1994 and there were two kids from this marriage, ages ten and twelve.

And they live with my client's ex-wife up in Anchorage, Alaska. My client's third wife, who is present here today, he married her in 1997; and he is still married to her today. And they have two kids together: Two sons ages two and four. And my client's current wife is here to speak on my client's behalf at the conclusion of my arguments.

In addition, my client also has his sister -- one of his sisters and his mother to speak on his behalf at the conclusion.

Your Honor, as you can see from my client's presentence investigation report dated January 13, 2004, my client's criminal history is not extensive.

He was convicted of a white color crime back in 1993. This was the insurance fraud.

And he was given three years probation on this crime and he received an honorable discharge from probation in 1996.

My client feels it's very important to let the Court know that he pled to this and he owned up to this crime, but he didn't feel he was guilty of the crime at the time.

He got involved with his ex-wife in something and he believes it was more to save the family

relationship. And that's why he basically entered into negotiations.

But he is in no way, shape or form today trying to place blame on anyone else. He would just like the Court to know the facts and circumstances surrounding his single felony conviction for insurance fraud.

He does have a conviction, your Honor, in 1999 for a misdemeanor domestic battery.

And my client was actually the one that alerted probation and parole to this.

He received three weekends in jail, a fine and community service which he completed.

As you can see, he has no other convictions. According to my client, he also alerted the Division of an arrest for trespassing back in 1981; but there was no disposition.

Your Honor, I believe that my client -- and I would submit to you in argument that my client has been very forthcoming about the instant offense.

And to reference or support that argument, I would reference his attached -- his letter that was originally attached to the presentence investigation report.

I don't think everyday your Honor receives a sixteen page letter from the defendants in court which

basically outline in great detail the acts that my client committed and what he was thinking while he committed them and why he committed them.

I think he struggles throughout the sixteen pages to articulate or give this court a good reason for why he committed this horrible act. And I think, if you read this, upon a plain reading of the letter, he comes to the conclusion that there was no good reason.

There is -- there is never a good explanation for committing the crime that he did.

But he does struggle with it. He does admit to the crime in great detail. He spells it out step by step what he did.

And he realizes what he did was wrong. It was horrible. And he is begging for forgiveness from your Honor, the State and, more importantly, from the victim and her family.

Your Honor, my client would like to impress upon the Court today that it was his intention from day one when he was apprehended by the police to never exercise his constitutional right to go to trial. And that was the first thing out of his mouth when I met with him up at the jail.

On my initial appearance on behalf of the client he told me that he did not want to -- put this young

lady through any more trauma or the horrors of a trial of coming in and recounting the horrible acts which she had suffered.

He realized he did have the constitutional right to do so in front of twelve members. But he chose not to do so because he had said, "Mr. Sullivan, I have already done enough damage to that poor little girl."

Your Honor, my client would also like you to know that despite evidence to the contrary -- and I am anticipating the State's argument -- he did want to turn himself in for the crime during the investigation.

You can see the trip, this voyage that he took with his wife where he went to Winnemucca and then he went to the jail to show his wife where he was going to be staying for a long time once he was apprehended and then up through Susanville where he was finally apprehended by the California police.

He did want to turn himself in. But what he was trying to do was basically talk out his options. He had talked to a few attorneys and this is referenced in the P.S.I. attachment. And he had talked to some friends and he had, more importantly, talked to his family members as to how he should handle the situation.

But my client has indicated to me from day

one when he was apprehended he wanted to turn himself in. There is mention by the State how he tried to color his hair or do things to change his appearance.

And my client basically says that, you know, he is going gray and it was just -- something he wanted to do to basically wash the gray out of his hair.

But he did want to turn himself in. He just was scared, and he didn't know how to do it. And my client will tell you that, if he was going to run, he would have been on the other side of the country or Hawaii, his place of birth. He wouldn't have been in Susanville, which is approximately sixty miles away, hanging out there.

He wants you to know that -- he wants the Court to know that initially he did not talk to the police about the events that had transpired on the offense date because he -- basically his mind blocked them out.

He committed this horrible act and he couldn't remember in great detail. His mind -- this is what he is telling me, your Honor. 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, your Honor, he does actually admit in great detail to your Honor and to the State and to the Division and everyone else in his written

statement in great detail as to what he did to commit this crime and I think that's important.

It just took some time for him to come to terms with what he did.

And he -- as I have counseled him over the numerous months in this case, things would come to him and he would give me more and more information as to what happened.

And he knew what he did from day one was wrong. He did a very bad thing. That's what he kept telling me: "Mr. Sullivan, I did a very bad thing. And, when I remember facts, I will let you know. But right now my mind, I am drawing a blank."

And I am glad in the end he ultimately accepted responsibility and he will accept his fate today.

Your Honor, another thing my client would like to impress upon the Court along the same things of accepting responsibility and doing the right thing and ultimately coming clean, so to speak, is that -- he did let this young lady go, which is the most important thing. He let her go. He dropped her off. And he subjected her to no further horrors.

And, as we turn on the t.v., you know, nightly, all of us in this room can agree that we are fortunate to have her here today because a lot of these cases

don't end up that way.

He did let her go.

And he wants to come in and tell the Court he is accepting responsibility for his actions.

Your Honor, another point that my client would like to impress upon the Court is that the sexual assault, the numerous counts of sexual assault arose out of the same transaction and occurrence, meaning it happened within a matter of minutes. He didn't -- kidnap this young lady and sexually assault her over a period of days or weeks or months. It happened within -- on the same date within a matter of minutes.

Albeit, he feels horrible it happened at all; but he would like the Court to know that it was a continuous act and it was over within a matter of minutes.

And my client believes in light of this and in light of the fact that he did not commit separate acts that lasted hours or days or months and in light of the fact that he ultimately did the right thing and released this young lady after he committed these atrocities and in light of all the other arguments I have made this morning, my client would like to argue against the recommendation which has been proffered by the Division.

And what my client feels is fair, your

Honor, and what I would submit to you in argument what I believe is fair is to impose a sentence -- a life sentence for my client on one of the sexual assault counts with the eligibility -- minimum eligibility after he has served twenty years and to run the remaining counts concurrent with that count. And, your Honor, at this time, as I have mentioned earlier in my arguments, I have three family members that would like to speak on my client's behalf, if it would please the Court.

THE COURT: All right.

State your name for the record.

DEFENDANT'S WIFE: Mary Lou Botelho.

MR. SULLIVAN: And what would you like to tell the Court today on behalf of Mr. Michael Botelho?

THE COURT: Did you want her sworn?

DEFENDANT'S WIFE: Excuse me?

MR. SULLIVAN: He is talking to the prosecutor.

MR. HAHN: No. Your Honor, I'll waive it. That's the short answer.

THE COURT: All right.

DEFENDANT'S WIFE: I have -- if you don't mind, I would like to read my statement.

THE COURT: Sure. No problem. Just so long as you speak up so that -- we can hear.

DEFENDANT'S WIFE: My husband had committed the crime and he is sorry. We have been married for seven years and I stand by him. Like any other husband and wife, we have our ups and downs. He is a good husband, a good father, a very hard worker and provider.

He has never been involved in a serious offense before. And I would like to ask your good court, your Honor, to please be lenient with him. Please give him a chance to be a part of our sons' life as they grow up.

We have a three year old and an eight month old baby boy just starting to enjoy and understand what it's like to have a daddy around. They need their father to guide them as they grow up and face life. Because of what happened, I am losing everything we have, everything we worked hard for the future of the children. And I would like to request your good Lord, your Honor, to please consider my innocent children in making your decision. Please don't let -- please don't let them lose their dad too. Here is a man who humbly admits his mistakes. He is facing the consequences of his actions. Every fiber of his being says, "I am sorry," and he is asking forgiveness, not only to the State but to the family.

Please give us a chance to be a family once again. Like normal families we have our hopes. We have our

dreams to become better members of this society. And, lastly, thank you for giving me the opportunity to speak before you and hear my voice. Thank you so much, your Honor. And may the wisdom and the knowledge of God be with you always. Thank you.

THE DEFENDANT: Thank you, honey.

MR. SULLIVAN: Your Honor, this is my client's mother. She would like to speak on behalf of my client. It is my understanding the State will waive her statement being sworn in today.

THE COURT: Right.

MR. SULLIVAN: Please state your name for the record and spell your last name.

THE MOTHER: I am Jackie Botelho, B-O-T-E-L-H-O. I am the mother of the defendant.

And, your Honor, I have also written because I didn't know how I was going to be able to present it. I didn't trust myself.

My son Michael and I have shared many experiences through the years. We have strived for successes, laughed over silly things, cried and regained hope and determination through severe illnesses, fought blinding snow storms trying to get home over the mountain on glass smooth tires.

We have had running dialogs on the best way to approach and solve problems, from school work to misunderstandings, to building a house. All the years Michael has been a protector or a support for the underdog and unpopular people who have touched his life and was very comfortable doing so.

There was sibling rivalry because all of our five children were competitive spirits in school and sports. But, if anyone from outside tried to create a problem, Michael, as well as the others, stood up for their own.

Michael is a person. He is my son. Michael worked with his dad through most of his school years. It wasn't always easy because a lot of play time was missed. But sports and other school activities kept him busy. Michael also had a paper route for several years. And people could rely on him thoroughly. He will help anyone who truly needs help. And there have been times when he has given his last food and/or his last money because someone else needed it more.

All through high school Michael never caused us grief with alcohol, drugs or smoking. If he told us he would be some where at a certain time, he was there.

He drove a semitruck for us for several years. He was one of the best drivers we had. Customers

were very pleased.

Michael was in love with his first wife. She did not share that love unfortunately. She was very pregnant with someone else's child when they were married.

And she called that to his specific attention at a later date. When the child was born, he did not question that the son was not his. He loved him and played with him. When his second son was born he was ever so happy. And to this day I have never seen a division of love between the two boys. It's been absolutely thorough.

He loved and does love those two boys immensely. Unfortunately, their marriage did not last.

She had found her real father toward the end of their marriage and made a determination between her family and her new father who had left her when she was a baby.

And when she left she was also pregnant with someone else's child. So -- things weren't going well there.

Michael met his present wife while visiting his grandmother in Hawaii. They wrote for a couple of years. Then he went to the Philippines to marry her. He was so happy. He loved her so much and still does.

They have two boys ages eighteen months and three years. He dearly loves them. He is so very good with

little children.

Michael had just finished building his own house for his family. Somehow something just went terribly wrong, something I cannot determine, understand. I just don't know. I wish all of us knew.

I am asking you to please have compassion and mercy on Michael. I know that the young lady and her family are suffering tremendously. We all do. Nobody goes unscathed.

We ask that you please let him have a chance with his children. He knows he has a legal debt to pay. Emotionally he has paid and will all his life.

I am asking you to please consider parole after a reasonable amount of years so he can be with his family because they need him and love him. Thank you very much.

THE DEFENDANT: Thank you, mom.

MR. SULLIVAN: Your Honor, this is the defense's final witness.

THE SISTER: Barbara Vasquez. I am Mike's sister, V-A-S-Q-E-Z.

MR. SULLIVAN: What would you like to tell the Judge?

THE SISTER: I am here kind of winging it. I of course have grown up with Mike. He has been my older brother. And

I guess I am -- probably the only person on earth who knows him inside and out in every direction possible.

I have been a witness to, helped with and been a part of just about every aspect of his life up until this of course.

I myself have six children ranging in age from one year to twenty-one.

And my children are my life. And I can't imagine, if anything ever happened to any of them, especially something as heinous as this.

But I will tell you that my brother is -- one of the hardest working and most loving people on this earth.

But he doesn't always do things right. He tries hard and something just happens. Wires get crossed or something. And he never knows why. And he doesn't know how to fix them. I know that he is greatly sorry for this. And it's almost impossible to put down on paper what happened, especially when you don't really know why yourself.

Regardless of how people feel during their life, whatever outside influences do to affect them and how they act and react and the decisions that they make, nobody is perfect. And he has made mistakes.

In this case -- he -- he had just gotten

his -- his ultimate goal. He had his family. He had his babies. And he had just finished his house. His life was -- great. There is absolutely no excuse and no explanation for why this happened.

But it did.

And -- all I can say about that is he is not a bad guy. He is not a danger to society. He is more of a danger to himself. And I -- I beg the Court to consider the fact that he isn't a bad person and that he does have some redeeming qualities. And he has a family that loves him and some babies that need him.

And he did a horrible thing and he dearly serves to be punished. All I ask is that you consider something fair and reasonable in light of the horribleness that does happen in this world. This is a horrible crime. But he needs to be -- he needs to be punished justly and fairly and in accordance with what he did do. Thank you.

THE COURT: Thank you.

THE DEFENDANT: Thank you, Barbara.

MR. SULLIVAN: Thank you, Judge. We have no further evidence or witnesses to present.

THE COURT: All right. The law affords your client an opportunity to address the Court. You may do that at this time.

THE DEFENDANT: Your Honor, first off I would like to apologize to the victim and her family. I have no excuse for what I did. I'm sorry that I hurt her and her family. I have hurt a whole lot of people by what I have done, myself included. I ruined a lot of lives and I have had a lot of time to think about it already and it makes me -- it makes me sick to my stomach.

I can never take back what I have done. And I am going to have to live with it for the rest of my life. But all I can do is ask for the victim and her parents and her extended family's sympathy -- excuse me, forgiveness as my -- I ask my family to forgive me. And I have to forgive myself.

I realize I have done something wrong. And I had to plead guilty to this. I didn't want to put anyone through any more than what's already taken place. I have to be able to live with myself too.

And I never expected to get out of jail on probation. I never expected to stay in jail for five to ten years. I knew I was going to be in jail for a while. I accept that. I know I deserve that. But all I ask is that you give me an opportunity to be -- with my family one of these days so that I can be there when they are older. And please forgive me for I am sorry from the bottom of my heart

for -- to everybody that I have hurt, for all the trouble that I have caused. And I am sorry.

THE COURT: All right. Thank you.

THE DEFENDANT: Thank you.

THE COURT: Mr. Hahn.

MR. HAHN: Your Honor, the way I would like to proceed this morning is I have one witness who will be presenting some evidence. And I will present an argument to the court. And lastly, as the Court has recognized under statute, the victim and the victim's mother would like to present a statement.

THE COURT: All right.

MR. HAHN: The State would call Greg Herrera.

-oOo-

GREG HERRERA

produced as a witness on behalf of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HAHN:

Q Sir, could you tell us your name and spell your last name please?

A Greg Herrera, H-E-R-R-E-R-A.

Q How are you employed, sir?

A I am a detective with the Washoe County sheriff office.

Q For how many years have you been a sworn peace officer?

A Approximately ten years.

Q You know why you are here; is that true?

A Yes, I do.

Q Detective Herrera, I would like to take you to on or about August 7, 2003 in connection with an investigation with the suspect that was ultimately identified as Michael Botelho. You are familiar with that; is that true?

A Yes, sir, I am.

Q With regard to specifically the victim who was presented to you, I would like to first address several issues involving her.

Was she known in this matter to have some physical injuries?

A Yes, sir, she was.

Q Could you recount those injuries for the Court please?

A Yes, sir. The victim had a few injuries. She was -- she complained of soreness in her shoulders, her

back, her stomach where she stated she had been punched. She was also sore from where she was duct taped around her eyes and wrists. And subsequently an examination for the sexual assault was conducted and there were also some injuries in her vaginal area as well.

Q Could you briefly summarize for our record today what those injuries were to not only to the vaginal vault but the vestibule as well?

A Those injuries included abrasions on the fourchette. There was bleeding. There was blood found in the vaginal vault. There were lacerations and bruising located inside the vaginal vault as well.

Q With regard to ultimately attempting to identify a suspect in this case, how was the suspect identified?

A The victim's mother was able to capture a cell phone number off their caller I.D.

Utilizing that number, we were able to track down a name and with that we were -- able to track down -- eventually track down the suspect.

Q Now, had you not had -- had not the victim's mother had a caller I.D., would that have made detection substantially more difficult?

A Absolutely.

Q Now, with regard to the phone number that it came back to, did it come back to his phone number?

A No, sir, it did not.

Q Whose number was it?

A It came back to the defendant's wife, Mary Lou Botelho.

Q Now, with regard to the apprehension of the suspect, where was he apprehended?

A He was apprehended in Susanville, California.

Q And how was it that he was even located there?

A By chance we got a call from a secret witness tip. We had placed the defendant's identification and picture over local news media. A citizen, an alert citizen, in Susanville saw the news cast and saw Mr. Botelho's vehicle. And then Mr. Botelho had a local tail in the Susanville area.

Q Now just to clear up, when you say Mr. Botelho's vehicle, was this the same vehicle that was used in the abduction of the victim?

A Yes, it was.

Q Now, whose vehicle -- who typically drove that vehicle?

A Mr. Botelho's wife, Mary Lou Botelho.

Q Was that a vehicle that he would commonly have driven?

A Almost never, according to him.

Q Now, with regard to the apprehension of the suspect who was at this point in time identified as Mr. Botelho, did you as an investigator observe any strange behavior that would suggest that he was attempting to avoid detection?

A Yes, Mr. Botelho had noticeably changed his appearance as well as he had avoided us for several weeks after learning that he was under investigation.

Q Now, how did he try to change his appearance? Specifically what was it, detective?

A He had bleached his hair. His hair was noticeably longer. He normally keeps his hair short, as it is today. His hair was longer. It was bleached. And he had an a full beard at the time he was arrested.

Q Had he ever -- when -- did you confront him with this concern that you had?

A Yes, sir, I did.

Q What was his representation to you at this time as to why his appearance may have been changed?

A He stated the fact that his appearance

changed was merely coincidental and he had been planning to do it anyway. It was something that he had always been wanting to do because of the graying in his hair.

Q Now, with regard to -- you are familiar with the term FIS?

A Yes.

Q What does that refer to?

A That's our forensic unit, Washoe County crime lab.

Q Again when Mr. Botelho was apprehended did FIS process Mr. Botelho's wife's vehicle?

A Yes, sir, they did.

Q And was that the vehicle that was used in the abduction of the victim?

A Yes, sir, it was.

Q What unusual fact did they discover about the vehicle?

A They stated the vehicle had obviously been cleaned up. Specifically in the back seat of the vehicle, they noticed that it had been vacuumed and wiped down.

Q Now, you heard Mrs. Botelho testify in this matter, correct?

A Yes, sir.

Q Did you have conversations with her in

connection with your investigation?

A Several.

Q Was she truthful in her representations?

A No, sir, she was not.

MR. SULLIVAN: Your Honor, I am going to actually object. I am not sure which Mrs. Botelho he is talking about.

MR. HAHN: I'm sorry. The wife.

THE COURT: The present wife?

MR. HAHN: The present wife of Mr. Botelho.

THE WITNESS: Mary Lou.

BY MR. HAHN:

Q Yes, sir. Was she truthful in her representations to you?

A No, sir, she was not.

Q What misstatements did she make to you in connection with your investigation?

A She told me that she -- several times that she had not been in any contact with her husband whatsoever. And later we found out that that was not accurate.

Q In fact he was actually with her at the time he was apprehended, true?

A That's correct.

Q Along with her children?

A Yes, sir.

Q When you interviewed Mr. Botelho, did he make some representations to you that concerned you, that this incident that happened here involving the victim, this was not -- a one-time thing; that there had been some type of brewing fixation?

A I had asked him if he had had fantasies and he admitted that he had fantasies but couldn't recall what they were about, those fantasies.

Q So he simply didn't articulate them to you in any specific detail?

A No, he did not.

Q And generally, what was the nature of these fantasies that he had represented to you?

A He stated that he had fantasies about being with somebody other than his wife.

Q Okay. Now when you say being with, what was the context?

A Having sex.

Q Okay. Now, ultimately did you follow up later on those representations that he made to you and receive some information concerning those fantasies from another source?

A Yes, sir, I did.

MR. SULLIVAN: Objection. Your Honor. I think the State is actually -- the next question out of the State's mouth is going to be, "Who did you follow up with -- whom did you follow up with?" And I believe it's going to reference my client's ex-wife Mrs. Melissa Botelho. And I would make my objection noted on the record.

THE COURT: All right. And this is the subject -- or this was the subject of the hearing prior to the sentencing and I made my ruling so we'll proceed.

BY MR. HAHN:

Q What representations -- first of all, who was this individual?

A Melissa Botelho.

Q And who did she represent herself to be in relationship to the defendant Michael Botelho?

A Michael Botelho's ex-wife.

Q And would this be his first wife or his second wife, if you recall?

A I don't recall that specifically. I just remember she was a previous wife and she stated that they were married in the early '90s.

Q What representations, if any, did she make concerning his statements or representations to you that this had been something brewing, that there was a fixation

involved?

A She had contacted me by phone when she learned of the investigation and stated that she was not surprised that this had happened at all.

MR. SULLIVAN: Your Honor, I object. Again, I apologize. I make the same objection. I reference Crawford verses Washington, which I don't have the Supreme Court cite; but I have 200 Westlaw 401, 330 301 decided March 8, 2004.

Your Honor, the Court specifically held out-of-court statements by a witness that are testimonial in nature and included police interviews are barred under the confrontation clause unless a witness is unavailable and the defendant had prior opportunity to cross examine this witness regardless of whether the statements are deemed reliable by the Court.

Second, your Honor, the Court held admissions of the defendant's wife concerning out-of-court statements to police officers regarding the facts of the incident violated the confrontation laws. And I am sure your Honor is familiar with this case. The facts of the case in Crawford is that the defendant was charged with an assault and attempted murder. The defendant claims self-defense at trial. The defendant's wife did not testify due to a Washington marital privilege statute which bars one spouse

from testifying without the other spouse's consent.

THE COURT: That's what you raised --

MR. SULLIVAN: Exactly, your Honor, similar to what I raised in the motion hearing.

THE COURT: And that was granted.

MR. SULLIVAN: Exactly. And I think the State is trying to circumvent Crawford and also circumvent the marital communication statute which has been codified by the NRS by getting into what Melissa Botelho, my client's ex-wife, said to this detective.

THE COURT: Well, wasn't Crawford a situation where they were in the guilt phase? And the confrontation clause became paramount because of that? Whereas here the argument was we are not in the guilt phase. We are in the sentencing phase. And the Court is allowed to have different sources of information.

MR. SULLIVAN: I don't think --

THE COURT: You had knowledge of it. You had the opportunity to -- confront it, to refute it, if you can.

MR. SULLIVAN: If I understand --

THE COURT: There is a different standard, and Crawford did not address the sentencing aspect of the case.

MR. SULLIVAN: That's correct, your Honor. Crawford did not carve out an exception for the guilt phase or the

sentencing phase. But I would submit to the court the argument that Crawford doesn't apply right now. Crawford never said that it doesn't apply to the sentencing phase. It just never delineated that fact.

Your Honor is correct and I would argue that under Nevada law and US Supreme Court law, which I have cited, that it does apply at these proceedings because basically it puts my client in a difficult position, as the Court noted in Crawford in the footnote -- footnote one, I believe.

It puts him in the difficult Hobkins choice decision by forcing him to choose between the marital privilege or confronting his ex-wife at sentencing and having a chance to cross examine her.

He can't do that now, so that is what is being thrusted upon my client. It is either he invoke the privilege, which is what he decided to do through the motion hearings that we had, or we have Melissa Botelho come and take the stand and we get a chance to cross examine her.

And I don't think the Court would voice that upon my client at this time. So I would just lay my objection for the record to any testimony concerning Melissa Botelho through this witness.

THE COURT: All right.

You may continue.

MR. HAHN: Your Honor, briefly, before I continue, before the Court makes a ruling from the bench, I am disappointed. Mr. Sullivan is a fine lawyer and he has made a very adequate record on this issue already.

This Crawford verses Washington, now this is being dumped on me to deal with in a manner that I am not prepared to. So procedurally, your Honor, it has never been raised. On the merits, Judge, I offered to bring her. I offered to the court and to the defense to have their opportunity --

THE COURT: I am not concerned about that, Mr. Hahn. I believe in the argument -- I came across Crawford before we had the argument. I think I mentioned it in the transcript.

MR. SULLIVAN: You did, Judge.

THE COURT: So I was aware of it and it was just a fresh case two days prior or something like that. It was just decided in March.

MR. SULLIVAN: It was March 8th, your Honor.

THE COURT: Okay.

MR. HAHN: Very well, your Honor.

THE COURT: So --

MR. HAHN: I have nothing.

THE COURT: I made my ruling. Continue.

BY MR. HAHN:

Q Detective Herrera, with regard to her representations concerning this fixation, what specifically did she relate to you?

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

Q And specifically what -- in as best detail as you can recall, what did she represent these fantasies were composed of?

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.

Q Now, these representations that she made to you, were they -- was this in a phone conversation? Was it documented? How did you preserve -- in other words, I want to know how sharp your memory is about this.

A She originally contacted me. But later on I believe it was -- early January, I believe, I had a taped interview with her over the phone with her consent.

Q And had that tape been in fact transcribed, that conversation?

A Yes, it did.

Q And you reviewed that prior to coming and testifying today?

A Yes, I did.

Q Judge, I have no other questions of the witness. I would invite Mr. Sullivan to inquire.

* CROSS EXAMINATION *

BY MR. SULLIVAN:

Q Detective, concerning -- I just have a few questions.

Concerning the injuries that you have already discussed pursuant to Mr. Hahn's questioning, were you present when the victim in this case was examined by the SART team or by medical professionals?

A No, sir, I was not.

Q So you have no first-hand knowledge of the injuries in question, correct?

A Correct.

Q You only saw them from documents and photographs; is that accurate?

A And speaking with the persons who performed the examination.

Q So secondhand knowledge basically is what you have?

A Yes.

Q Okay. Now, concerning the fact that my client was apprehended in Susanville, California, you and Detective Carry were actually present when my client was apprehended in California, correct?

A No, sir. That's not correct.

Q You were there, correct?

A When he was apprehended, no, sir.

Q Who exactly was there when he was apprehended?

A It was a police officer from the Susanville Police Department.

Q When did you finally come into contact with my client?

A Detective Carry and I, I believe, came into contact with him approximately a couple hours after he was apprehended.

Q Okay. A couple hours after he was apprehended?

A Yes, sir.

Q Where?

A At the Lassen County detention facility.

Q In California?

A Yes, sir.

Q Okay. And, to your knowledge, you spoke to the officers that actually apprehended my client, correct?

A Yes, sir.

Q And you have reviewed those reports in making your investigation in this case?

A Yes, sir.

Q Okay. And, to your knowledge, my client was completely cooperative when he was apprehended by the California authorities, correct?

A They stated he was cooperative.

Q He never put up a fight?

A No, sir.

Q He never tried to run?

A No, sir.

Q He never pulled a weapon?

A No, sir, he did not.

Q He went along willingly with the authorities?

A Yes, sir.

Q As a matter of fact, he put his hands in the air, dropped his bag and said, "I am ready to go." Isn't that accurate?

A I don't recall that part, sir.

Q Okay. And when did you actually first speak

with my client, about how long after he was apprehended?

A I believe it was approximately a couple hours after he was apprehended. It was driving time from Reno to the detention facility there in Susanville.

Q Were you with Detective Carry at this time?

A Yes, sir, I was.

Q Was there any other detectives with you at this time?

A No, there was not.

Q Were you guys in a marked patrol car or an undercover car?

A We were in my unmarked detective vehicle.

Q Okay. And was my client handcuffed and sitting in the back seat?

A No, sir. He was already -- he had already been booked in the Lassen County detention facility.

Q So he was -- seated in civilian clothes in the back seat of the car, no handcuffs?

A He was inside the jail.

Q I apologize. You didn't transport him back?

A No, sir, I did not.

Q Who did transport him back?

A I believe the Susanville Police Department did.

Q Okay. When you spoke with my client in California, did you first read him his Miranda rights?

A Yes, sir, I did.

Q And he chose to waive his rights and speak with you?

A That's correct.

Q And it's true that he was having trouble remembering the facts of this case initially, correct?

A According to him, yes.

Q And he was trying to remember things, but he was just having a hard time. Isn't that accurate?

A According to him, that's correct.

Q But -- you have been a detective for quite a long time; isn't that true?

A For five years, yes.

Q And you are familiar -- I mean, I am sure you have interviewed a lot of suspects concerning a lot of heinous crimes?

A Yes, sir.

Q It's true that my client wasn't playing games with you, correct, giving you -- knowingly giving you false and misleading information?

A I wouldn't say that's correct. I believe that he was -- choosing not to remember. That was my belief.

Q Okay. But he wasn't saying his wife's car was purple rather than it being red or he wasn't giving you a different make of the vehicle and trying to actively mislead you in the investigation?

A That's correct.

Q Okay. So at least he was attempting to give you some facts?

A Yes, sir.

Q To aid you in the investigation?

A Yes, sir.

Q And he in fact did give you some facts. I am not saying all the facts you wanted. I am just saying some facts to aid you in the investigation?

A Yes, sir, he did.

Q Thank you. Now, concerning his appearance, you had never laid eyes on my client prior to the time that you went and saw him in the Lassen County jail, correct?

A Just pictures that I have seen.

Q Was this a Department of Motor Vehicles picture?

A Yes, and a previous booking photo.

Q Okay. And the previous booking photo and the Department of Motor Vehicle photo, those two pictures looked pretty different, correct?

A Yes. As far as his weight, yes.

Q His weight had fluctuated and his hair might have been either shorter or longer, correct?

A That's correct.

Q And maybe a few more wrinkles around the eyes where some years had passed, correct?

A Yes, that's correct.

Q And you have already testified that you hadn't laid eyes on him physically prior to interviewing him at the Lassen County jail?

A Yes, sir.

Q So you can't really testify as to what he looked like without having known him in person prior to the offense date, correct?

A That's correct.

Q And you can't really accurately testify as to how his appearance had changed, correct?

A That's not correct. I had shown a picture to his wife Mary Lou and she had stated that that's pretty much how he looked. She said his hair was a little bit longer.

Q Okay. Well, what I am asking you is that you have no personal knowledge of how his appearance had changed?

A That's correct.

Q You had to rely on the secondhand information of other persons, correct?

A Yes, sir.

Q And by looking at photographs?

A Yes, sir.

Q Now, you testified pursuant to Mr. Hahn's questioning that FIS processed my client's wife's vehicle, correct?

A That's correct.

Q And pursuant to the processing, FIS informed you throughout the investigation that the vehicle in question had been cleaned recently. Is that an accurate statement?

A That was their opinion, correct.

Q But that is an opinion. What I am driving at is you don't know when that vehicle was cleaned, do you?

A That's not correct. I was later informed by Mr. Botelho himself that he had cleaned the vehicle.

Q Okay. Did he tell you when he cleaned the vehicle?

A He stated that it was after -- either the night that he was informed he was under investigation or the next day. I don't recall which one specifically.

Q Do you recall whether or not my client said

it was just routine maintenance, a routine cleaning on the vehicle or whether it was cleaning the vehicle to cover up a crime?

A It was cleaning the vehicle to cover up a crime.

Q He actually used the words, "I cleaned the vehicle to cover up a crime"?

A He didn't state those words, but he stated he realized he had done something horrible and he didn't know what it was so he cleaned out his vehicle.

Q So concerning -- this is my last segment, detective. Thank you for bearing with me today. This is my last segment that I want to get into. Concerning the alleged fantasies that you testified about that you heard through Melissa Botelho, my client's ex-wife?

A Yes.

Q Who exactly interviewed Melissa Botelho?

A I did, sir.

Q And was Detective Carry there as well?

A I don't believe he was.

Q Was this a taped interview?

A Yes, sir, it was.

Q And I have a transcript of her original interview dated January 8, 2004, stating statement given by

Melissa Botelho. Is that when the interview was given?

A Can you repeat the date?

Q January 8, 2004.

A Yes, sir.

Q You got the date wrong earlier?

A I think I said early January.

Q And it says statement taken by Detective Greg Herrera. And it was telephonic, correct?

A Yes, sir, it was.

Q Okay. Now, in the -- you have testified that -- Melissa Botelho told you my client had these alleged deviant sexual fantasies where he wanted to dismember and maybe dispose of a young female. Is that your testimony today?

A I testified to dismembering.

Q Dismembering. What did you take that to mean?

A Cutting off limbs or disfiguring.

Q Okay. Have you reviewed the transcript from Melissa Botelho from your interview?

A Yes, sir.

Q Prior to today's proceedings?

A Yes, I did.

Q Does it say anywhere in that transcript what

you just testified to?

A Not in that transcript. But I believe I testified there was also a previous phone call that I had with Melissa Botelho when I was first notified of these fantasies.

Q There was a previous phone call. What date was that, sir?

A That was back in September, I believe.

Q Did you make -- was there a statement or transcript provided to the District Attorney's Office concerning this phone call?

A I didn't do a taped interview, sir, no.

Q So this is the only transcript that we are working from, just so I am clear, January 8, 2004?

A Yes. I didn't do a formal interview at that time. I just received the information and -- relayed it to the District Attorney and moved on.

Q Let me ask you this, detective. Don't you think that the earlier telephonic communication with Melissa Botelho when she mentions the word dismember is important enough to put down on a transcript or a taped recording?

A At the time, sir, I was more interested in apprehending Mr. Botelho than I was sitting down and doing that formal interview at that time.

Q But that doesn't answer my question. My question is --

A No.

Q -- do you feel that that testimony or that piece of information that Melissa Botelho gave you is not significant -- significant enough to put down in a transcript or written statement, have her provide a written statement to that effect?

A She was in Anchorage, Alaska. I couldn't have the -- I couldn't have her easily and quickly do a written statement. I just did it when -- the first chance I had.

Q Okay. But you would agree you could have provided her -- mailed her a written statement to fill out and then provide it back to you, correct?

A Yes, sir.

Q But you chose not to do so?

A Right. I didn't do so, correct.

Q Okay. So the only testimony transcript that you have -- that we have from Melissa Botelho is on January 8, 2004, correct?

A Yes.

Q Wherein she says, "It was -- Michael's key fantasy to kidnap a young girl, twelve, thirteen years old,

find someplace to keep her and basically just have his way with her," correct?

A Correct.

Q And she never mentions dismember in the second telephonic interview?

A That's correct.

Q When was this report that you just testified about, this report that you provided to the District Attorney's Office, what was the date on that report concerning Melissa Botelho's first telephonic interview? What was the date on that?

A I don't recall. I would have to see the report and see the date.

MR. SULLIVAN: Court's indulgence, your Honor.

Q Detective, just so I am clear, my client never admitted to you or Detective Carry during the course of the investigation that he had deviant -- these alleged deviant sexual fantasies, correct?

A Correct.

Q As a matter of fact, the fantasies that he said he might have had were just normal -- normal type fantasies of having sex with another female other than his wife?

A We didn't -- he said he couldn't remember

what the fantasies actually were.

Q And then after he said he couldn't remember any fantasies; isn't that true?

A I don't believe so. I think he admitted that he had fantasies; but he couldn't recall the content, if I remember correctly.

Q But didn't he say, "I don't know. I don't know," when you were pressing him during the course of the investigation? "I can't remember"?

A I believe he said, "I can't remember."

Q Thank you, Judge. I have nothing further.

THE COURT: All right.

MR. HAHN: I waive. Thank you.

THE COURT: All right. You may step down.

MR. HAHN: Your Honor, that's the State's evidentiary presentation.

THE COURT: All right.

MR. HAHN: Your Honor, with regard to a couple of comments that I want to make clear to the court that I don't know are adequately addressed in the presentence investigation report, I want to offer a couple of thoughts concerning Mr. Botelho, a couple of thoughts concerning the acts involved here and then a couple of thoughts concerning the victim.

Your Honor, I agree with Mr. Sullivan about one thing; that there were some atrocities committed. But I think the Court has seen through its years of experience that atrocities are committed many times on impulse or they simply occur very, very quickly and they occur by people who have had horrific life experiences, people who were whacked-out on dope or they are intoxicated or they have been horribly abused themselves or there is something which the psychologists and the legal community and the forensic community can say, "Okay, well, at least there is some type of understanding. There is some type of explanation to this behavior," so we can make a judgment as to whether or not a person would ever be a risk to someone else again.

And what I am seeing in the defense's presentation and what I have examined is is that Mr. Botelho has none of those. This is a man who had a good background.

This is a man who was treated properly as a child.

This is a man who has not abused drugs, who has not abused alcohol. This is a man who was in the Corp and should have learned something about honor and sacrifice.

It doesn't exist here, Judge. And that's what troubles me so much as a prosecutor.

Because all of the common excuses that you

and I see every week, he doesn't have any.

And I believe that's what represents this man to be such a significant threat.

What we do know is that, despite all of these good things that his parents did for him, he is a convicted felon before he ever hits this courtroom because of false representations: The insurance fraud. We do know that he has had a series of failed relationships, intimate relationships.

Why exactly, we don't know.

But we do know that there is some stability issues that this man has.

And when I hear his family and friends come and present these letters and present these arguments, I appreciate the pain they are going through, Judge. But this isn't about them.

Because, frankly, they are victims too. This is not a good man. This is a selfish man.

He is selfish to the core and he simply injured other people in getting his own selfish way.

This man has young children and he is engaging in anything remotely considerate with this type of behavior.

He is selfish.

This is not a good man.

Love doesn't demand its own way.

Those are my thoughts on Mr. Botelho.

As to the crimes involved in this case, Judge, again, I agree that an atrocity has occurred. But those things sometimes happen on impulse. The amount of planning that went into this troubles me.

This man did not use his own car. He used his wife's car with the baby blinds and the dark tinted windows. He brought duct tape. He cleansed the car inside and out because he didn't want to get caught. He didn't even use his own cell phone. He changes his appearance.

Judge, this is not just planning. But this was an intelligent, concealed cover-up. And of course that makes sense. This man has a year of college behind him. He is not a dummy.

Those are the thoughts that I have on the crime. And when -- again when I hear about he is a hard worker, well, that's nice. I appreciate that. And he is okay with his kids. I can appreciate that too.

But this is a man who slugged a girl who doesn't even weigh ninety pounds soaking wet in the stomach to gain her compliance. This is a man who threatened her with harm if she ever told anybody.

And yet when I read his statements I am wondering if I am looking at the right case because I am hearing how, "After I get off of her I start to cry and say I'm sorry, I'm sorry and she tries to calm me down and she tries to tell me it's okay. And I am really scared and I am so freaked out. I am very sorry and I didn't remember doing anything wrong and the cops were trying to make me feel guilty and I just -- I can only remember just doing a few things."

Judge, this is a man who is minimizing.

He came in and he admitted responsibility, and for that he should receive some credit. I am okay with that. But this is a man who will not go one step further.

Give credit where credit is due.

Judge, my last group of comments is concerning the victim in this case. Judge, she was fourteen years old.

This was her first baby-sitting job.

Her mom and her had responded to an ad that this man had placed for a baby-sitter.

And of course everything looked right. It was a decent looking car. And, of course, there is baby seats in the back. This girl did everything that she knew in her fourteen years to be smart.

And Detective Herrera would have indicated to you that when the defendant was talking to them, the one thing he remembered when -- in this -- in this haze where he can't remember anything in detail -- one of the things that this man did remember is when he saw the young girl he saw her smile. He saw her smile.

And the reason that that's significant, Judge, is that tells you that she trusted this man.

Those are my comments concerning her.

Judge, with regard to the Division's recommendations, there is some additional restitution that the court needs to be familiar with. It's another two hundred sixty-nine dollars to the victim. And that's been documented and I'll invite the Court to inquire of the Division. The fines and fees look appropriate. I agree that the court should put the defendant on lifetime supervision with the standard fines and fees.

I also agree with the Division that the life terms are in fact appropriate in this case. It's the right thing, Judge. And I also agree with the Division that the maximum, not just the maximum terms, but the fact that the sentences should in fact run consecutive is the right thing to do in this case.

There is absolutely no explanation for this

man's behavior. And that's the most troubling thing that I have to address to you. So having said that, Judge, I will rest and invite any questions from the court. If the court has none, I would like to then have the Court hear from the victim and her mother in a sworn statement.

THE COURT: All right. Here, let me give you my thoughts before we proceed any further.

I see the recommendation. And I can fully appreciate the setting in motion the -- yes, setting into motion the chain of events that caused this.

I guess the bottom line question that I have is the recommendation is for the maximum.

MR. HAHN: That's correct.

THE COURT: The minimum is five to twenty, the maximum is sixty-five to life. Okay. We are at the maximum. Now, here is my concern.

The only saving factor that I see in this case was the fact that she was returned alive. Because, as you indicated, almost every case that we see it turns out otherwise.

My concern in that regard is, if you face the maximum for having done the acts and returning the victim alive, what is to prevent killing the next victim because the punishment is going to be the same? And that is where I am

stuck.

This is not a minimum punishment case. This is a heavy punishment case. But the only concern, as I have expressed is -- what stops the next person, once that is set in motion and the thought occurs kill the victim, kill the witnesses, because I have already crossed the line and, once crossed, there is no turning back. Is that a legitimate concern or -- that's the concern I have.

Any response?

MR. HAHN: Your Honor, with regard to -- -- I appreciate what the court is saying. Because the Court is saying theoretically, if offenders would hear about this, then why not just go ahead and cut up and kill the victim like they have been thinking about for years?

Judge, I don't know. I don't have an intelligent answer in terms of presenting to the potential offender community out there a mathematical formula and a carrot-stick type of approach to saying, at least if you -- if you come forward and you turn yourself in or if you don't kill the victim, you know, we want to offer you something.

I can't speak to that, Judge. I just -- it's really outside my realm. I appreciate the weight on your shoulders. But what I do know about this man -- what I do know is this was not an impulse act. And we are thankful

that she is alive.

THE COURT: I agree. All right.

Go ahead.

MR. HAHN: The State will ask -- will invite the Court to inquire of Jane Doe, the victim.

-oOo-

JANE DOE

being first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

MR. HAHN: May I have just a moment with her?

THE COURT: Sure.

BY MR. HAHN:

Q Ma'am, you were the Jane Doe that's listed in the information on file; is that true?

A Yes.

Q Could you tell me how old you are?

A I am fifteen now.

Q And you know why you are here; is that true?

A Yes.

Q What grade are you in?

A 9th.

Q And is there some information that you would like to relate to Judge Polaha?

A Yes.

Q Did you prepare a statement?

A Yeah.

Q Would you like to read it?

A Yeah.

Q If you would please.

THE COURT: If you could, could you get closer to the microphone so that your voice is heard?

THE VICTIM: Okay. You know, my name is Jane Doe. On August 7th, 2003 I thought I was going to go for a baby sitting job for Kevin. That's what he said his name was.

Instead Mike Botelho took me up in the hills and raped me. That day changed my family's life and my life forever. I sat there not knowing if I was going to live or die.

I kept telling myself over and over again, "This is all a horrible dream. You will soon wake up and be home again." I think that is how I got through this horrifying rape. I would like to tell you what my life has been like for the past eight months and how Mike Botelho's crime has affected me.

Being raped has turned my whole world

upside-down in every horrible possible way. I have been through four internal pelvic exams -- which is pretty unusual and scary for somebody my age, who hasn't even started their period yet -- thirteen separate blood tests, two x-rays and two ultra sounds, which have to be repeated in a couple of years because of my size.

We don't really know if I will ever be able to have kids of my own because of the damage that has been done. And I have just received the paperwork for my fourth HIV test.

I have seven more of those to go over in the next four-and-a-half years. All of those proceedings that I have gone through have been painful, scary and embarrassing.

I have been on antidepressants and medication to sleep because I have not been able to sleep. And, when I do, I have really bad dreams.

I live my life afraid. I can't even stay alone in my own house. I lock every single lock on every single door and I am still scared.

I am afraid of men now, even ones I knew before this happened. To get in a car with men, especially in the back seat, it takes everything I have got. And I am still scared even with my own grandpa.

I am always watching the road to make sure

we are going the way we are supposed to be going. I started school two weeks after the rape. I had to get some of my classes changed so that I would only have female teachers. I am afraid to trust anybody. I have never in my life been so scared. I am still scared. I feel like I have to watch my back every second of everyday. And I hate it.

I hate that I have no freedom. I am afraid to go anywhere alone. My brother walks me to and from my friend's house and my mom drives me wherever else I go.

I hate this. No one should ever -- have to be this afraid ever. My family and closest friends don't know what to say or do. They all want to help me. They just don't know how. I don't even know how. My brother goes into another room and we start talking about the rape. My brother feels like he let me down. He does not know what to say or do. He feels helpless. My grandfather can find no words to say how much this has torn him up.

What he says over and over is how lucky we are to have me here. My mother feels she let me down because she wasn't there to protect me from him. My best friend is afraid to talk about it because she is afraid she might say the wrong thing. She won't though.

I feel so much grief in this. I am so embarrassed by it. And I am so afraid that he will come back

and do this again, maybe even worse. But, like my grandma always used to say, God never gives you anything that he thinks you cannot handle.

This has made me wonder.

I know I will survive this and I hope one day I can help other victims. I know how terrible it can be. I have lived it nonstop for the past eight months and will for the rest of my life.

I would never wish this kind of life on anybody in the whole world. I think Michael Botelho should receive the maximum sentence for what he did and took from me to make sure that he can never do this to any other girl ever.

Nobody should ever have to go through the pain, humiliation, the anguish, the terror that I have. I didn't deserve this. No one does. I didn't ever want -- I don't want to ever have to worry that there will be a day that Michael Botelho will be released from prison and come knocking on my door. He warned me, if I ever told anyone, that he would come back and do worse. I don't want that to happen. I just want to be me again.

Q Was that your statement?

A Yes.

Q Just a few questions. I want to follow-up,

if I might. Are you receiving therapy right now?

A Yes.

Q How often?

A Once a week.

Q And how long do the medical providers think that you are going to be under care?

A I don't know.

Q I would invite any questions from Mr. Sullivan.

MR. SULLIVAN: Judge. The defense has no questions for this witness. Thank you.

THE COURT: All right. Thank you. You may step down.

MR. HAHN: Your Honor, the next witness will be the mother of Jane Doe.

I am sorry.

Would you please raise your right hand and be sworn.

-oOo-

JANE DOE'S MOTHER

being first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HAHN:

Q Ma'am, you are the mother of the child that just spoke here in court?

A Yes, I am.

Q Did you prepare a statement that you would like to offer to Judge Polaha?

A Yes, I did.

Q Please.

A All she wanted to do is earn a little bit of money so she could help buy her school clothes and supplies for her first year in high school that was starting in two weeks. She didn't earn anything that day. Instead she lost a part of herself that she will never be able to get back.

She lost that little-girl innocence that she has always had, that special sparkle that was always in her eyes. She lost her independence, her freedom, her ability to trust and a lot of her confidence and self-esteem. And I lost my little girl.

These past eight months have been excruciating. The endless doctors appointments, blood tests, x-rays, ultra sounds, therapy appointments, more blood tests and on and on, all in the desperate attempt to get back at least some of what this amazing young woman has lost since that date.

I have so hated taking her to this appointment and that appointment, seeing the terror in her eyes, the pain and fear of more unfamiliar tests or the next procedure. The agony of what this whole nightmare is doing to her, pain, that for the first time, as her mommy, I can't just kiss away. I'll never be able to kiss it away.

She is always the champ though. Through all of this she has done what she's had to do, regardless, and has held her head up high and endured more trauma and fear than any person on the face of the earth, let alone a now fifteen year old girl should ever have to.

My daughter is a remarkable young lady. She isn't like a lot of the teenage girls that we see running around the streets these days. She is a good, honest, decent, honorable, responsible, loving young lady with real true morals, values and beliefs.

In my lifetime, I have seen few people as kind or loving or as generous as she. Her heart has no limits.

She is currently on petition for the International Order of Rainbow For Girls, a civic group for teenage girls that is a descendent of the Masonic Lodge and the Shriners.

She works hard in school and is a pole

vaulter on the school track team. She volunteers every Saturday morning, a day I'd guess most teenagers sleep rather late, at a local bowling alley helping and teaching young children how to bowl.

Every Monday after school she is at her old elementary school tutoring second graders in reading.

She used to baby-sit a lot until this animal using the pretense of a baby-sitting job kidnapped her, attacked her, terrorized her, hit her and then he raped her.

She hasn't been able to baby-sit since.

She is a very beautiful young lady and had been doing some modeling, the results of which have always been unbelievable. She is a delight to work with and her beauty is refreshing.

She hasn't done much modeling either since the attack.

I adore my daughter. There is no doubt in the world about that. And I am so extremely blessed to have such a loving and very close relationship with her.

The day I adopted her and her older brother was when I felt my life was finally complete and they have shown me each and every day how truly fortunate I am.

She has been in intense weekly treatment with a clinical psychologist.

Her doctor feels it will take at least five more years of therapy for her to get to a point where she can comfortably live with this nightmare and proceed with a relatively normal life.

This isn't something she will ever be able to get over or forget about.

She will carry the horror and the terror she's experienced with her for the rest of her life.

Her therapy has come along steadily but very slowly.

It has been terribly hard for her emotionally to even accept what happened to her. She is still in a lot of denial about it.

They feel that, given the extreme circumstances, she is only able to process a little at a time or she becomes so overwhelmed that she doesn't know which way to go and retreats back into denial.

She is having a terrible time with sleep, getting to sleep or staying asleep. And when she finally can rest, the nightmares come.

There are nights when I wake up to blood curdling screams and go to her and she is soaked with sweat and trembling violently.

It takes me hours to calm her down enough to

go back to sleep.

Other nights while she is sound asleep she cries, sobs in her sleep.

When I wake her up from this, she just lays in my arms and cries her heart out. She is still so afraid.

She was placed on antidepressant, antianxiety medication immediately after the attack and just recently was put on a prescription medication to help her sleep.

She was hypnotized a few months ago. But when it wasn't helping anymore they prescribed the pills for her.

No fifteen year old should have to go through any of this.

When the detectives realized that he was on the run and especially since he had threatened her that if she told anyone what had happened he would come back and do worse, they warned me to make sure she was never out of my or any other responsible and informed adult's sight literally.

For the next three weeks she was never alone, not even for a second.

Even when she was at home, I found myself just checking in on her to make sure she was okay.

Instead of enjoying the last of her summer

vacation like most of the other kids, she spent it alone, looking over her shoulder and in constant fear.

When Detective Herrera called and told me he was in custody, although relieved, it was impossible even then to feel safe.

My heart still stops when she walks away from me. I wonder if any of us will ever feel safe again.

Before this happened, she was given the freedom of an average teenager. She went to movies with friends or walked to the store or to nearby friends houses.

Now, eight months later, we still make sure she is driven to wherever she needs to go.

She doesn't walk anywhere anymore. Anywhere we go, she is always by my side.

Recently she has started going out a bit with her friends, but I always drop them off and pick them up at the door. And I am never too far away.

She has no freedom or the chance to just get away by herself.

This is not a rule that I've imposed on her. It's just the way it has become for all of us.

I'm afraid to let her out of my sight and she is afraid to be out of my sight.

She tries to recapture her independence but

is so afraid and untrusting now that it's hard.

What had always been such a bright, bubbly, happy, positive outgoing young lady has turned into a scared, sad, withdrawn little girl.

There are times that it seems like her spirit has just been drained right out of her.

The look of sadness and fear that is so deep in her eyes is heart breaking.

I want to see her smile again and hear that cute little laugh of hers.

I miss the twinkle in her eyes and the bounce in her step.

I want my daughter back.

We've learned the hard way that when someone is raped, especially your child, it doesn't just happen to her. It happens to the whole family.

We hurt obviously not to the degree that this has hurt my daughter so terribly but in so many other ways.

This has even changed her friends and friends of my son's as well.

My father is eighty-three years old and underwent a triple bypass surgery three years ago.

He is very close to my children and the love

they share is immeasurable.

It killed me to have to tell him that his girl had been raped. I was terrified that he would have another heart attack or worse.

Thankfully, he didn't. But I am not sure if I have ever seen such pain and hurt in his eyes.

He's been our rock through this, as daddies often are. But his grief is plain to see.

This just broke his heart.

We lost my dear mother last year and for once I was so glad she wasn't here to see this.

She was my children's biological great grandmother before I adopted them. So there was a special bond there.

My daughter spoon fed her some of her meals in the days before she passed away. That was how close they were.

I thank God she was spared the pain of this.

Her brother, who is eleven months older, is at a terrible loss over this.

He feels the rage and pain that we all feel along with the guilt that he wasn't able to protect his little sister from something so horrible.

He has become withdrawn and clings to both

her and I more than ever.

He has confessed to me that he doesn't know how to act with her or how to treat her.

They have always been very close. At times it's as if he they can feel each other's pain.

Like now watching what she has to go through is tearing him up. He can't understand how or why someone could inflict such terrible pain on an innocent girl. None of us can.

My children are my heart beat. Each of them so incredible in their own special way.

Jane's the baby, my baby girl.

The one that the doctors said at three pounds wouldn't even make it through her first night. But she fought to survive, just as she's had to do for the past eight months.

To have something this devastating happen to your own daughter is a hurt no mother should ever have to endure. It's a pain so hard and so deep that I can't begin to describe the intensity.

My heart has crumbled.

Seeing her strength and her courage through all of this is all that has sustained me. During the worst time in her life she's been worried about me that I am all

right, protecting me.

That's what kind of a person she is.

That's what she is and has always been all about.

What this animal, himself a parent, did to my precious daughter is beyond comprehension.

I have watched what the pain and the fear that he imposed on her has done and continues to do to her and it is killing me. His fantasies turned our world horribly, tragically upside-down.

I am a single mother and own and operate a residential cleaning business.

I am my business. I am our income. I have missed so much work for all of the obvious reasons since this has happened that I have been lucky to pay our rent.

I work hard for my money and the sleepless nights I spend comforting and rocking her back to sleep for half of the night after a nightmare, my own endless crying, tossing and turning the rest of the night from fear and sadness and heart break, wondering how I'll pay the bills, how I can protect my kids, how I can help my daughter try to rebuild her shattered life, how can I help my son try to deal with what happened to his sister, my worries for my father and his health in trying to cope with this. This list is

endless.

My health has nose dived. I'm so tired and rundown all the time. I catch every bug around. I have developed stress related ulcers which results in more lost work and more lost money. I was barely able to keep our heads above water before this tragedy.

I am the mom. I am supposed to be the strong one, but it's so terribly hard now. It's hard to be strong when your greatest fear materializes and your world crumbles to pieces.

There aren't words to describe the feelings of contempt and hatred I have for this man and for what he did to my daughter.

They are so intense and so deep.

I have never felt this way before. I never realized I was capable of it.

This man took something away from my daughter and our family that we can never again have. He has damaged each of us in irreparable ways. His actions have forever changed our lives.

Michael boat is not fit to be free among others ever to do this again, to destroy the life and the dreams of a young girl or to tear another family's life apart the way he did ours.

I do thank God each and every day that he did bring her home, broken and battered. But home to her family with enough love to put her back together again.

We will heal in time. But we will never understand his selfish and cruel acts or why he picked our family.

Our greatest hope is that he will receive the maximum sentences for each charge with no chances for parole, ever and that everyday for the rest of his miserable life he is reminded of all the pain he's caused and all of the irreversible damage he's done. We believe he deserves at least that.

THE COURT: All right.

MR. HAHN: I would invite any questions from Mr. Sullivan.

MR. SULLIVAN: I have a few questions, Judge. Thank you.

* CROSS EXAMINATION *

BY MR. SULLIVAN:

Q Mrs. Jane Doe, could you please clarify for the Court and myself, I believe Mr. Hahn throughout his argument articulated that my client actually placed the baby-sitter ad which we know is not true. Would you tell us

who placed the ad?

A My daughter placed the ad in a local -- it's called the Bug, one of the local freebie newspapers.

Q That's a local paper in Carson City?

A Out of Gardnerville, Carson Valley.

Q Thank you. I appreciate that. And, in addition, I believe the State referenced that your daughter had not babysat -- or babysat before in the past; that it was her first time. But you articulated she had babysat?

A She babysat for probably two years, maybe three years before that.

Q Okay. Okay. And just one last question that I have. Your family or your daughter did not know my client prior to the incident that we are talking about?

A He called a few weeks before the actual -- when he actually attacked her, he called to set it up. He setup -- he said he was divorced and was going to have visitation of his children for a month and asked if she would be interested in just a -- a short term job instead of like an ongoing job. And they discussed at that time -- he said he would call her back when he found out when his children would be visiting.

Q Thank you, Mrs. Doe. I have no further questions.

* REDIRECT EXAMINATION *

BY MR. HAHN:

Q When I asked about and represented the information concerning the baby-sitting job, that had been with people that she had known before?

A Yes, yes, it had been like -- real close friends or -- family members, so to speak. About, yeah, she had worked for -- she had one lady in particular she babysat for for about two years like once or twice a week and then just odds and ends people here and there. But, yeah, she would baby-sit.

Q But that was people that she knew?

A Yes.

Q This was the first time --

A Yes.

Q Nothing else. Thank you.

MR. SULLIVAN: Nothing else. Thank you.

THE COURT: Thank you.

MR. HAHN: Your Honor, I have not been alerted to anyone else who is going to provide a victim impact statement.

THE COURT: All right.

Mr. Botelho, please stand. Any just or

legal cause why judgment should not now be entered?

MR. SULLIVAN: No, your Honor.

THE COURT: There being none, the Court does hereby adjudge Michael Todd Botelho guilty of the offense set out in Count I, kidnapping in the first degree, a violation of NRS 200.310(1).

The Court finds him guilty of the charges that are set out in Counts III, IV and V of that Information charging sexual assault on a child, a violation of -- violations of NRS 200.366, all by virtue of his pleas of guilty entered December the 22nd of last year.

The Court has read the documentation that was provided. I have read the facts of the case as contained in the file. And, of course, I heard the statements that were made today. And I have read and considered the recommendation by the Division of Parole and Probation.

Mr. Botelho, you had the opportunity to hear the impact of the acts that you perpetrated against the young girl and her family.

I know by reading your statement that you considered not only the damage done to them but also the damage that you inflicted on your own family.

THE DEFENDANT: Yes, sir.

THE COURT: In listening to your family and in looking

at your past record, somebody presented to me one time that we are not the sum total of the worst things that we ever did. And, in looking at your background and looking at what your attorney presented to the court, you present an enigma in as much as I can say without too much hesitation that basically you are not a bad person.

But you did a very bad thing.

THE DEFENDANT: Yes, sir.

THE COURT: I mean, it is difficult to contemplate exactly what it was that you did to this young girl in as much as she was coming to you to offer her services for your children.

And you took that offer of trust and terrorized. And we say terrorized and use words like that so many times today, awesome words like that, but we forget the true meaning of those words.

You did in fact terrorize that young girl. She -- as she indicated, she did not know whether that was the last day of her life. All right. And I cannot imagine what a -- to a fourteen year old person, either girl or boy, who is looking forward the second year of their teen years, looking forward to finishing high school, enjoying high school, going to college and getting on with life, coming to the realization that perhaps this is going to be my last day

on earth.

As I mentioned earlier, the only, the only saving fact in this particular case is that you did not mutilate or kill her and she was returned to her family. She has to come, you know, with the help of professionals and the love that her family has given her to get past this.

I do recognize that in your statement you appreciate what you did to the extent of what you did because that was an unusual statement. And you went step by step as to the harm that you inflicted on her, her family and your own family. Okay. Those are the positives.

The negatives are what you did. And society has to protect its children. All right. They are our hope and our future.

Some acts are so uncivilized that the people that commit those acts forfeit their place in society.

I do believe that I was concerned about the message that we send out. And I still am.

And I think that, having heard everything, that's still a valid concern.

But I am certain that the message has to go out that, if you harm a child, the punishment must be severe. It must be swift. And it must be certain.

So, in accordance with the laws of the State

of Nevada, I do 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.

For Count III, sexual assault on a child, I am sentencing you to a term of life imprisonment with a parole eligibility after twenty years has been served.

That count and sentence will run consecutive to the sentence that I meted out in Count I.

For Count IV I sentence you to a like term of life imprisonment with a minimum parole eligibility of twenty years. That count will run concurrent with the second -- excuse me, with Count III.

And for Count V, I sentence you to a term of life imprisonment with a parole eligibility after twenty years. And that will run consecutive to Counts III and IV.

Now, what that means is you will be sent to

prison for the rest of your life with a minimum parole eligibility of forty-five years. You will be given credit for one hundred forty-one days served.

MR. SULLIVAN: Your Honor, I believe there is a correction on the credit time served.

PAROLE & PROBATION: That should be one hundred ninety-seven days.

THE COURT: 197?

PAROLE & PROBATION: Yes.

THE COURT: You will be given credit for one hundred ninety-seven days. I am ordering you to effect restitution in the amount of six hundred seven dollars.

PAROLE & PROBATION: It should be six hundred thirty-two. The prosecutor misspoke the amount. The family is requesting two hundred ninety-four dollars restitution. So if you add the amounts together it comes out to 632.

THE COURT: 632?

PAROLE & PROBATION: Yes.

THE COURT: All right. I am ordering that you submit to genetic marker testing. And there is a one hundred fifty dollar fee for that. I am assessing a five hundred dollar fee, a twenty-five dollar administrative assessment fee.

Finally, if, in the event that you did get paroled, you will be subject pursuant to NRS 176.0931 to a

condition of lifetime supervision.

(At this time the foregoing proceedings were concluded.)

STATE OF NEVADA )
)ss.
COUNTY OF WASHOE )

I, JOAN MARIE DOTSON, a Certified Shorthand Reporter for the Second Judicial District Court of the State of Nevada in and for the County of Washoe DO HEREBY CERTIFY;

That I was present in Department No. 3 of the court on Wednesday, April 7th, 2004 and took verbatim stenotype notes of the proceedings and thereafter transcribed them into typewriting as herein appears;

That the foregoing transcript is a full, true and correct transcription of my said stenotype notes and is a full, true and correct record of the proceedings had and the testimony given in the above-entitled action to the best of my knowledge, skill and ability.

DATED: This 9th day of April, 2004.

Joan Dotson

JOAN MARIE DOTSON, CSR #102

ORIGINAL

FILED

APR - 7 2004

RONALD A. LONGTIN, JR., CLERK

By C. Patterson DEPUTY

CODE 1850

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

Case No. CR03-2156

MICHAEL TODD BOTELHO,

Dept. No. 3

Defendant.

/

JUDGMENT

The Defendant, having entered a plea of Guilty, and no sufficient cause being shown by Defendant as to why judgment should not be pronounced against him, the Court rendered judgment as follows:

That Michael Todd Botelho is guilty of the crime of Kidnapping in the First Degree, a violation of NRS 200.310-1 and NRS 200.320, a felony, as charged in Count I of the Indictment, and that he be punished by imprisonment in the Nevada Department of Corrections for a term of Life with the possibility of parole after a minimum of five (5) years as been served, with credit for one hundred ninety-seven (197) days time served.

It is further ordered that Michael Todd Botelho is guilty of the crime of Sexual Assault on a Child, a violation of NRS 200.366, a felony, as charged in Count III of the Indictment, and that he be punished by imprisonment in the Nevada Department of Corrections for a term of Life with the possibility of parole after a minimum of twenty (20) years as been served, to be served consecutively to the sentence imposed in Count I.

It is further ordered that Michael Todd Botelho is guilty of the crime of Sexual Assault on a Child, a violation of NRS 200.366, a felony, as charged in Count IV of the Indictment, and that he be punished by imprisonment in the Nevada Department of Corrections for a term of Life with the possibility of parole after a minimum of twenty (20) years has been served, to be served concurrently to the sentences imposed in Count III.

It is further ordered that Michael Todd Botelho is guilty of the crime of Sexual Assault on a Child, a violation of NRS 200.366, a felony, as charged in Count V of the Indictment, and that he be punished by imprisonment in the Nevada Department of Corrections for a term of Life with the possibility of parole after a minimum of twenty (20) years as been served, to be served consecutively to the sentences imposed in Counts I and IV.

It is further ordered that a special sentence of Lifetime supervision commence after any period of probation, or any term of imprisonment or after any period of release on parole. It is further ordered that the Defendant pay the statutory Twenty-five Dollar ($25.00) administrative assessment, submit to a DNA analysis test for the purpose of determining genetic markers and pay a testing fee of One Hundred Fifty Dollars ($150.00), reimburse the Washoe County Public Defender's Office in the amount of Five Hundred Dollars ($500.00) for legal services rendered and pay restitution in the amount of Six Hundred Thirty-two Dollars ($632.00).

Dated this 7th day of April, 2004.

JEROME M. POLAHA
DISTRICT JUDGE

ORIGINAL

FILED

2004 APR 30 PM 2:20

RONALD A. LONGTIN, JR.

BY _____ DEPUTY

CODE 2515
WASHOE COUNTY PUBLIC DEFENDER
JOHN REESE PETTY, State Bar No. 10
350 SOUTH CENTER STREET, SUITE 600
RENO, NEVADA 89501
(775) 337-4827
Attorney for Defendant.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,

Plaintiff,

vs. Case No. CR03-2156

MICHAEL TODD BOTELHO, Dept. No. 3

Defendant.

/

**NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that MICHAEL TODD BOTELHO the defendant above named, hereby appeals to the Supreme Court of Nevada from the judgment entered in this action on April 7, 2004. This is **not** a fast track appeal. NRAP 3C.

DATED this 30th day of April, 2004.

MICHAEL R. SPECCHIO
Washoe County Public Defender

By: _____
JOHN REESE PETTY
Chief Deputy

**CERTIFICATE OF SERVICE**

I hereby certify that on MAY 3, 2004, I served a copy of the foregoing by mailing it by first class mail with sufficient postage prepaid to the following addresses:

JANETTE M. BLOOM, CLERK
OFFICE OF THE CLERK
SUPREME COURT OF NEVADA
201 SOUTH CARSON STREET SUITE 201
CARSON CITY, NEVADA 89701-4702

MICHAEL TODD BOTELHO #80837
NORTHERN NEVADA CORRECTIONAL CENTER
PO BOX 7000
CARSON CITY, NEVADA 89702

BRIAN SANDOVAL
ATTORNEY GENERAL STATE OF NEVADA
100 N. CARSON STREET
CARSON CITY, NEVADA 89701

And served a copy by inter-office mail to:

RICHARD GAMMICK
WASHOE COUNTY DISTRICT ATTORNEY
Attn: GARY HATLESTAD, CHIEF APPELLATE DEPUTY

DATED this 3rd day of MAY, 2004

Charlene Gaskins

V6.379

ORIGINAL

CR02 2156

IN THE SUPREME COURT OF THE STATE OF NEVADA

2005 APR -6 PM 1:53

RONALD A. LONGTIN, JR.

MICHAEL TODD BOTELHO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43247

BY C. Keller
DEPUTY

FILED

APR 04 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a guilty plea, of one count of kidnapping and three counts of sexual assault on a child. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

The district court sentenced appellant Michael Botelho to a prison term of life with the possibility of parole for kidnapping and prison terms of life with the possibility of parole for each count of sexual assault. The terms for two counts of sexual assault were imposed to run concurrently to one another and consecutively to the term for kidnapping. The term for the remaining count of sexual assault was imposed to run consecutively to the two concurrent terms for sexual assault.

Botelho cites to the dissent in Tanksley v. State[1] and asks this court to review his sentence to see if justice was done. He claims that the sexual assaults that he perpetrated on the victim were a continuous act and were completed in a matter of minutes.[2] He contends that the district

[1]113 Nev. 844, 850, 944 P.2d 240, 244 (1997) (Rose, J., dissenting).

[2]Botelho cites Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 285-86 (2004), in which we concluded that Crowley's convictions for sexual

*continued on next page . . .*

court should have imposed concurrent sentences to reflect the uninterrupted nature of his assault. And he argues that this court should ensure that the punishment fits the crime.

We have consistently afforded the district court wide discretion in its sentencing decisions, and we have refrained from interfering with the sentence imposed when "the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."[3] Regardless of its severity, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional and the sentence is not so unreasonably disproportionate to the crime as to shock the conscience.[4]

Botelho does not allege that the district court relied on impalpable or highly suspect evidence or that the sentencing statutes are unconstitutional. The sentences imposed were within the parameters provided by the relevant statutes.[5] And the sentences were not so unreasonably disproportionate to the crimes as to shock the conscience. Botelho admitted to kidnapping the 14-year-old victim and perpetrating three distinct acts of sexual assault upon her: forcing her to perform

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*. . . continued*

assault and lewdness with a minor were redundant because Crowley's actions were uninterrupted: "Crowley's act of rubbing the male victim's penis on the outside of his pants was a prelude to touching the victim's penis inside his underwear and the fellatio."

[3]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

[4]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996).

[5]See NRS 200.310(1); NRS 200.320(2)(a); NRS 200.366(3)(b)(1).

fellatio on him, subjecting her to cunnilingus, and subjecting her to vaginal intercourse. Contrary to Botelho's assertion, his sexual assaults were not one continuous act, and the district court was not required to treat them as one at sentencing.[6] Accordingly, we conclude that the district court did not abuse its discretion when sentencing Botelho.

Having considered Botelho's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose

_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Jerome Polaha, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[6]See Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981) ("The great weight of authority supports the proposition that separate and distinct acts of sexual assault committed as a part of a single criminal encounter may be charged as separate counts and convictions entered thereon."); see also Peck v. State, 116 Nev. 840, 848, 7 P.3d 470, 475 (2000).

V6.382

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

2005 MAY -3 AM 9:46

RONALD A. LONGTIN, JR.

BY C. Stebler DEPUTY

MICHAEL TODD BOTELHO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 43247

District Court Case No. CR032156

## REMITTITUR

TO: Ronald A. Longtin Jr., Washoe District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: April 29, 2005

Janette M. Bloom, Clerk of Court

By: J. Richards
Chief Deputy Clerk

cc: Hon. Jerome Polaha, District Judge
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe County Public Defender

### RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on 5-3-05.

Ronald Longtin Jr. by C. Stebler
District Court Clerk

V6.382 05-06748 238

ORIGINAL

FILED

2006 MAR -6 PM 3:41

RONALD A. LONGTIN, JR.

BY _____ DEPUTY

Case No. CR03P2156

Dept. No. 3

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

**IN AND FOR WASHOE**

**-oOo-**

MICHAEL TODD BOTELHO,

Petitioner,

vs.

JACK PALMER,

Respondent.

**PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)**

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.

(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 XX

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

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.

Petitioner

In Proper Person
Attorney for petitioner

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS to the below addresses on this 28th day of February, 2006, by placing same into the hands of prison law library staff for posting in the U.S. Mail, pursuant to N.R.C.P. 5:

JACK PALMER, WARDEN
Lovelock Correctional Center
[via Interdepartmental Mail]

GEORGE J. CHANOS
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Dick Gammick
washoe County District Attorney
Post Office Box 30083
Reno, Nevada 89520-3083

_____, Nevada 89_____

Signature of Petitioner In Pro Se

/ / /

/ / /

/ / /

ORIGINAL

FILED

2006 MAR -6 PM 3:41

RONALD A. LONGTIN, JR.

BY _____ DEPUTY

Michael Todd Botelho, #8[illegible]
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,

vs.

THE STATE OF NEVADA,

Respondent.
_____/

Case No. CR03P2156

Dept. No. 3

**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

Michael Todd Botelho
Petitioner, In Proper Person

## 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 Petitioer 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 Melissaa 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 occurrred 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 occassions during the pendancy of the appeal, without response from counsel. Petitioner desired to put forth his issues in the Nevada Supreme 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 alw 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 constitutioal 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 Constitutioal 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 latrer 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 prejudical 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 confromt 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 counld 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. Consel'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 priviliged 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 "dismembering" 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 wnet 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 Petitioer 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 Petitioer, 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 sentnecing 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 surro/unding the instant offense(s) including not being subjected to the highly damaging and prejudicial privileged spousal communications as outlined in great detain 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, Doganiere 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 sentnece 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 panopoly of ramifications and implications regarding LIFETIME SUPERVISION. This court failed to advise petitioner of the reuirements 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 ocnstitutionally 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 priviliged 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 insiduous 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 insiduous 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 magniture 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 understant 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 ahd 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 duplicitous 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). Duplicitous 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 testual 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 contiuous act violated double jeopardy clause of United States Constitution and Nevada Constitution.

The Nevada Supreme Court has also held that multiple convictios under seperate 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 Protectio 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 allother material elements, unless a contrary purpose plainly appears. 1 W. LaFave & 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, ata 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 madatory 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 aforementioed 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 constitutioal 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 provisios 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 insiduous 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, dis-memberment 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 UNKNOWING, 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 jurisdcition.

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 Viloria seeking a plea agreement. (See Exhibit #3, attached hereto) (Petitioner has requested a copy of the actual letter on numerous occassions, 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 priviliged 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 unkowing 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 recieve a much lesser sentence. It should be noted, Petitioner did not recieve 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 sub jected to false testimony of Detective Herrera concerning priviliged 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 diplays 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 trail 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 inadmissable at a jury trial.

E. Cousel 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 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 inadmissable at any jury trial.

K. Counsel failed to research and investiage 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 priviliged spousal communications used against Petitioner at sentencing. Counsel would have secured informatio 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 inadmissable evidence, and seeking to dimiss 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 occassions 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. Cronic, 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 prodcued 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.

| NAME | RELATIONSHIP |
|---|---|
| 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 isindividualized, 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 humanzie 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 priviliged spousal communications.

3. Sentencing hearing was conducted before a biased and prejudical 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 T. Botelho

Michael Todd Botelho
Petitioner, In Proper Person

/ / /

/ / /

/ / /

**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 T Botelho
Michael Todd Botelho
Petitioner, In Proper Person

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/ / /

/ / /

**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

/ / /

/ / /

/ / /

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.

321

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

EXHIBIT #2

V6.468

COUNTY DETENTION FACILITY

# INMATE REQUEST

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 BOTELLO Booking #: 03-12286

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 WAS 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 THE CASE THAT I NOW CONVENIENTLY HAVE BEEN DENIED!

Inmate's Signature: Michael Botello

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

(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. LONGTIN, JR.
CLERK
BY [signature] DEPUTY

Responding Staff Member / I.D.#: _____ Date: _____
(PRINT NAME)

S-725 (01/02) White-Booking; Canary-Inmate; Pink-Inmate Receipt

V6.468 3 24

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 HEARING
26. ✓ Investigative Request
27. ✓ Stipulation and Order for Continuance filed Jan 30, 2004

350 South Center Street, 6th Floor • P.O. Box 30083, Reno, Nevada 89520-3083
Phone (775) 337-4800 • Fax (775) 337-4856

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 Testity to Michael Todd Botelho from Kelli Anne Viloria, 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.

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

FILED

2006 AUG 14 PM 12:20

ORIGINAL

RONALD A. LONGTIN, JR.

BY _____ 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 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 BOTELLO

GROUND 1:

Sentencing counsel was ineffective in failing to put forward and cross-examine Petitioner's ex-wife in violation of the Confrontation Clauses of the Sixth Amendment to the United States and Nevada Constitutions. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Additionally, appellate counsel was ineffective for not presenting the preserved issue of district court err in violating Petitioner's Confrontation Clause rights when failing to argue the issue on

direct appeal. *Petitioner claims that trial counsel failed to investigate Melissa Botelho and question her regarding the fantasy that was told to her during their marriage. Therefore, Ms. Wheeler intends to contact Melissa Botello directly and receive an interview. Additionally, Ms. Wheeler has contacted trial counsel requesting information related to the police transcript of Officer Herrera and Melissa Botello on two occasions without a response. Therefore, this document will be sent to trial counsel in the hopes that post conviction counsel will receive the transcript of the taped telephone conversation and any other relevant information about prior investigation that was done regarding this subject. Ex. 1.*

GROUND 2:

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

Trial counsel failed to request, receive, and present a psychosexual evaluation to mitigate his sentencing. As stated above, Petitioner's only fantasy was that he would have a "threesome" with himself, his wife, and another woman. However, the fantasy that was presented during sentencing was that he had always wanted to kidnap, rape and dismember a child. Petitioner presents with a minimal criminal history (insurance fraud and domestic battery), no aberrant sexual crimes, and good character. Therefore, his potential for future dangerousness as a sexual predator was paramount to his sentencing. As such, there is only one way to predict the recidivism of Petitioner's twisted and dangerous behavior.

*Dr. Martha Mahaffey was requested to prepare and present a cost proposal for a psychosexual evaluation regarding Petitioner Botelho. Although Petitioner Botelho was not qualified for probation as an option for sentencing, he should have been evaluated for future*

*dangerousness given the possibility that he could have received as little as twenty (20) years to the parole board instead of forty-five (45) years, which he got. As such, the cost proposal is presented for this Court's consideration. Ex. 2.*

DATED this 14 day of August, 2006.

MARY LOU WILSON
Attorney At Law Bar #3329
333 Marsh Ave.
Reno, Nevada 89509
775-337-0200
Attorney for Petitioner Botelho

**LINDSAY WHEELER**
333 Marsh Ave
Reno, NV 89509
775.250.4513~c
916.419.1743~f

August 14, 2006

Mary Lou Wilson, Esq.
333 Marsh Ave.
Reno, NV 89509
775.337.0200

Dear Mary Lou,

I have attempted to contact Sean Sullivan on August 8 and 10. I have left messages both times for him regarding information relating to the police interview between Mr. Botelho's wife and a Reno police department officer. I have not heard back from him yet.

Thank you in advance,

Lindsay Wheeler
Legal Assistant

Ex. 1

Martha B. Mahaffey, Ph.D.
Clinical Psychologist, Nevada License #190
(775) 323-6766
FAX (775) 323-2716

834 Willow St.
Reno, NV 89509

August 11, 2006

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

**RE: COST PROPOSAL in the case of MICHAEL TODD BOTELLO**

Pursuant to your request in the above mentioned case, following are my **forensic psychological evaluation rates:**

| | |
|---|---|
| • Forensic Psychological Evaluation (including document review, testing, scoring, interpretation, collateral phone consultations, attorney consultation, report writing) | $200 an hour |
| • Preparation for Courtroom Testimony (including preparation, attorney consultation, wait time) | $200 an hour |
| • Courtroom Testimony (one hour minimum) | $300 an hour |
| • Travel Time | $200 an hour |
| • Travel Costs (lodging, air and ground transportation) | Actual costs |

To conduct a post-conviction psychosexual evaluation of Michael Todd Botello at the Lovelock Correction Center, my cost is estimated as follows:

| | |
|---|---|
| • Psychosexual Interview and Psychological Testing, 7.5 hrs. | $1500 |
| • Travel to and from Lovelock Correctional Center, 3 hrs. | $ 600 |
| • Review of an estimated 350 pages of legal documents, 3 hrs. | $ 600 |
| Estimated Total | $2700 |

If you have any questions, please feel free to contact me. Thank you for the potential referral.

*Martha B. Mahaffey, Ph.D.*
*(Electronically signed)*

Martha B. Mahaffey, Ph.D.
Clinical Psychologist

EX. 2

CERTIFICATE OF MAILING

I, Mary Lou Jackson do hereby certify that pursuant to NRCP 5(b), on the 14 day of August, 2006, a copy of the foregoing was sent to:

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

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

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

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

Sean Sullivan
Deputy Public Defender
Post Office Box 30083
Reno, Nevada 89520

Dr. Martha Mahaffey
834 Willow Street
Reno, Nevada 89509

**Code 2840**

**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. CR03P2156**
**Dept. No. 3**

**THE STATE OF NEVADA,**

**Respondent.**

_____/

**ORDER**

The Court has reviewed and considered the points and authorities in support of Petitioner's Ex Parte 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 Botello filed August 14, 2006.

Good cause appearing, IT IS HEREBY ORDERED THAT:

(1) Petitioner's motion is GRANTED.

DATED this 28 day of August, 2006.

**JEROME M. POLAHA**
**DISTRICT JUDGE**

## CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 15th day of ~~August~~ September, 2006, I deposited for mailing a copy of the foregoing to:

Mary Lou Wilson
333 Marsh Ave.
Reno NV 89509

Jeanne Ulsen

CODE #1130
RICHARD A. GAMMICK
#001510
P. O. Box 30083
Reno, Nevada 89520-3083
(775) 328-3200
Attorney for Respondent





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

IN AND FOR THE COUNTY OF WASHOE

* * *

MICHAEL TODD BOTELHO,

Petitioner,

v.

JACK PALMER,

Respondent.

_____/

Case No. CR03P2156

Dept. No. 3

ANSWER TO PETITION AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, Respondent, by and through counsel, and answers the petition filed on or about March 6, 2006, as follows:

1. That Respondent admits all allegations in paragraphs 1-7, 10-16 and 19-22 of the petition.

2. That Respondent denies all allegations in paragraphs 8-9, 17-18 and 23 of the petition.

3. As to the supplemental petition filed on or about August 8, 2006, because of the unstructured narrative nature of the supplement, the Respondent denies each and every material allegation of fact included therein.

4. That your affiant is informed and does believe that all relevant pleadings and transcripts necessary to resolve the petition are currently available.

5. That Respondent is informed and does believe that aside from an unsuccessful appeal from

his judgment of conviction, Petitioner has not applied for any other relief from this conviction.

DATED: October 6, 2006.

RICHARD A. GAMMICK
District Attorney

By _____
TERRENCE P. McCARTHY
Appellate Deputy

**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

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

DATED: October 9, 2006

ORIGINAL

FILED

2006 OCT -9 AM 11:31

RONALD A. LONGTIN, JR.

BY _____ DEPUTY



CODE #2155
RICHARD A. GAMMICK
#001510
P. O. Box 30083
Reno, Nevada 89520-3083
(775)328-3200
Attorney for Respondent

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

IN AND FOR THE COUNTY OF WASHOE

* * *

MICHAEL TODD BOTELHO,

Petitioner,

v.

JACK PALMER,

Respondent.

Case No. CR03P2156

Dept. No. 3

MOTION FOR PARTIAL DISMISSAL OF PETITION AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, the Respondent, by and through counsel, and respectfully moves this Honorable Court for an order striking certain claims and limiting the scope of the evidentiary hearing on the petition. This Motion is predicated upon the records of this court and the accompanying Points and Authorities.

POINTS AND AUTHORITIES

The petition for writ of habeas corpus appears to be timely and verified. Furthermore, one claim warrants a hearing. The others should be dismissed.

Ground 1 is a somewhat general claim that appellate counsel rendered ineffective assistance in failing to raise arguments on appeal. Those arguments are addressed in grounds 2 and 3 below. All that remains of ground 1 is the assertion that counsel was ineffective on appeal in failing to raise arguments

in such a manner that they will later be considered exhausted if petitioner Botelho eventually seeks federal relief. The problem with that claim, the claim that counsel failed to advance arguments in federal terms, is in the lack of prejudice.

A claim of ineffective assistance of counsel includes prejudice as an element. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). That is, the petitioner is required to demonstrate errors by counsel of such a magnitude that the court may conclude that but for those errors, the results of the litigation would likely have been different. *Id.* Here, in ground 1, we are discussing the appeal. Therefore, in order to obtain relief, the errors of counsel must be such that it is reasonably likely that the Nevada Supreme Court would have reversed the conviction on appeal. There is no such claim in the petition, however. Instead, petitioner claims that if counsel had federalized his arguments, then one day the federal courts might be available to petitioner. That is not the right sort of prejudice. The question is not whether the door to the federal courthouse might one day be open, but instead whether the Nevada Supreme Court would have ordered that the doors to the prison be opened to petitioner now. There being no reason to believe that the Supreme Court would have ordered reversal if the Fast Track Statement had mentioned due process, no hearing is warranted on ground 1.

Ground 2 asserts ineffective appellate counsel in failing to raise a couple different arguments. The first asserts abuse of discretion at sentencing. The second seems to be an assertion that *if* Botehlo had gone to trial and *if* the evidence had shown that the offenses occurred in rapid succession, then he would have been entitled to relief. Those were raised and rejected by the Supreme Court on direct appeal. *Botelho v. State*, Docket No. 43247, Order of Affirmance (April 4, 2005). The doctrine of the law of the case precludes this court from overruling the Supreme Court.

The next putative appellate argument is in an assertion that the court relied on "perjured" testimony or impalpable or highly suspect evidence at sentencing. Indeed, the State acknowledges that a sentence can be reversed if the record demonstrates that the sentence was based solely on impalpable or highly suspect evidence. *See Denson v. State*, 112 Nev. 489, 915 P.2d 284 (1996). There are two problems with the argument, however. First, there is no indication that the sentence was based "solely"

on the disputed evidence. Second, the petitioner confuses the concept of disputed evidence with the notion of reliable evidence. The evidence at issue is the testimony of a detective that he had two interviews with the former spouse of Botehlo. In the first interview, the ex-wife indicated that Botehlo had related fantasies of raping and dismembering a child. In the second interview, there was no mention of dismembering. Petitioner claims in his petition that the testimony was false – that the officer never had the conversation, or that the ex-wife never related a fantasy about dismembering, or that petitioner never told his ex-wife about a fantasy about dismembering. Based on his denial, he claims that the testimony was false. The problem here is that we are discussing ineffective assistance of appellate counsel. Appellate counsel is limited to the record. *Carson Ready Mix v. First National Bank*, 97 Nev. 474, 635 P.2d 276 (1981). There is nothing in the record as it existed at the time of the appeal to indicate that the officer's testimony was untrue and certainly nothing that would support the conclusion that the testimony of the officer was "impalpable" or "highly suspect." Botelho presented nothing, not even his own statement in allocution, to rebut the testimony of the officer. Therefore, this court should conclude that if appellate counsel had advanced the notion that the testimony of the detective amounted to impalpable or highly suspect evidence, that claim would have been rejected on direct appeal and that, accordingly, no hearing is warranted on ground 2.

Ground 3 is an assertion that the sentence must be reversed because this court allowed hearsay testimony in the sentencing hearing. It is raised in the guise of ineffective appellate counsel. No hearing is warranted because hearsay is not prohibited in a sentencing hearing. *See Thomas v. State*, 114 Nev. 1127, 1147, 967 P.2d 1111, 1124 (1998)(state law); *Gregg v. Georgia*, 428 U.S. 153, 203-204, 96 S.Ct. 2909, 2939 (1976)(approving "the wide scope of evidence and argument allowed at presentence hearings" under state law).

Ground 4 is phrased in terms of ineffective trial counsel and has three sub-parts. The first is an assertion that counsel's performance fell below an objective standard of reasonableness when counsel did not request the lowest possible sentence. While the State contends that any lawyer that automatically sought the lowest sentence would be a fool, the basis for this motion for dismissal lies in the lack of

prejudice. The State contends that this court can, and should, conclude that merely asking for a lesser sentence would not have resulted in a lesser sentence. The record shows that this court imposed a sentence greater than that requested by defense counsel. It follows that if counsel had suggested even a lesser sentence, Botelho's counsel's disappointment would have been just that much greater. Reasonable jurists do not decide the sentence based on the requests of counsel but on the facts of the crime and the character of the accused. Because the request of counsel is not pertinent to the facts of the crime or the character of the accused, this court can and should determine that no hearing is warranted because Botelho cannot show prejudice from the failure of his trial counsel to simply request a lesser sentence.

The second part of ground 4 essentially repeats the claim that the detective's testimony regarding fantasies related by petitioner's ex-wife was false. To the extent this is a claim of ineffective trial counsel, the record reveals that counsel did indeed object, repeatedly, and so that claim can be rejected. If the claim is ineffective appellate counsel, that has been addressed above. If it is a free-standing claim of error, it is barred via NRS 34.810. If it is nothing more than an offer to prove that the officer's testimony was false (or that the testimony was true but that the underlying statement by the ex-wife was false), no hearing is warranted because the writ of habeas corpus is limited to claims that the conviction was unlawfully obtained. One who wishes to rebut evidence is free to do so at a trial or at a sentencing hearing, but the failure to do so does not render the conviction or sentence invalid. Thus, no hearing is warranted on the second part of ground 4.

The third part of ground 4 asserts that counsel was ineffective in failing to "correct" a perceived ambiguity in the oral pronouncement of sentence. This can be disposed of as a matter of law because under Nevada law, the oral pronouncement of sentence has no legal significance. *Bradley v. State*, 109 Nev. 1090, 1094, 864 P.2d 1272, 1274-75 (1993).

Ground 5 has several sub-parts. The first is a claim that the guilty plea was invalid because the court did not adequately inform the defendant that the sentences for the various crimes could be consecutive. That claim is repelled by the record. *See* Transcript of Proceedings, December 11, 2003 at

p. 14. Furthermore, the Supreme Court has held that the district court need not inform a defendant of possible consecutive sentences unless the legislature has mandated consecutive sentences. *Rosemond v. State*, 104 Nev. 286, 756 P.2d 1180 (1988).

The second part of ground 5 is an assertion that the plea was invalid because trial counsel assured the defendant that he would receive lesser sentences by pleading guilty. This claim does not warrant a hearing because the record reveals that the court informed the defendant that sentencing was not assured but would be determined later, by the court alone. Whatever the defendant may have believed when he walked into the courtroom, the record reveals that this court disabused him of any notion that he had any guarantees before the court accepted the plea. After the canvass, after defendant acknowledged that he had no promises of any sort, the court inquired and Botelho acknowledged that he still wished to plead guilty. Under those circumstances, Botelho had at most a subjective expectation of a certain sentence. A subjective expectation of leniency, unsupported by any promises from the State or indications by the court, is not grounds for a hearing. *Rouse v. State*, 91 Nev. 677, 541 P.2d 643 (1975).

The third part of ground 5 is an assertion that the court did not inform Botehlo of the mandatory lifetime supervision. That claim is repelled by the record. The court informed Botelho of that requirement and Botelho informed the court that counsel had also let him know about that requirement. Sentencing Transcript at 15. After Botelho was informed of that requirement, the court confirmed that he still wished to plead guilty. Thus, the claim is repelled by the record. Claims repelled by the record do not warrant a hearing. *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984).

The fourth part of ground 5 has multiple arguments. Botelho first asserts that it is a breach of the plea bargain for the prosecutor to introduce evidence at sentencing. The State first points out that the plea memorandum read and signed by petitioner explicitly indicated that the State could present evidence in support of the sentencing argument. Furthermore, the claim of breach is incorrect as a matter of law. *See Sullivan v. State*, 115 Nev. 383, 990 P.2d 1258 (1999). Botelho also asserts that the prosecutor failed to disclose the evidence that was ultimately offered by the detective at sentencing. The record reveals that the evidence was disclosed and fully argued well before sentencing and the court

ruled that the evidence would be admitted. Thus, the second part of the fourth part of ground 5 does not warrant a hearing.

The fourth part of ground 5 also asserts that it was misconduct for the prosecutor to introduce the privileged testimony. That is incorrect as a matter of law as previously decided by this court. Furthermore, the State contends that where the court rules that the evidence may be admitted, it is not misconduct to follow the orders of the court. Finally, the State contends that the evidence was introduced at sentencing and thus has no bearing on the earlier decision to plead guilty.

Ground 6 concerns the grand jury proceedings. Botelho acknowledges that he received the notice of the proceedings and the invitation to appear but contends that he was not transported to the courthouse on the correct day. Notably lacking is any claim that Botelho sent notice to the district attorney, before the proceedings, that he wished to appear. The ability to accept the invitation to appear is not self-executing. The prisoner must notify the prosecutor. NRS 172.241(2)(b). Botelho does not claim that he contacted the prosecutor and so his claim that he wished to appear is irrelevant.

Another problem arises from Botelho's misunderstanding of the proceedings. He indicates that he wanted to watch all of the testimony of the other witnesses. The right to appear and testify does not give the target or his lawyer the ability to sit through the entire presentation.

The State would also point out that Botelho does not give any indication of how he might have testified so as to avoid the indictment. The State notes that his prior statements including the hand-written statement presented at sentencing, include confessions to every count in the indictment. Petitioner claims that he would have proved his innocence on one count, but then refers to ground 8 of the petition which in turn refers only to a single line of a police report. Such a reference amounts to a bare or naked claim, not a claim meeting the requirements of specificity described in *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984). Ground 6 certainly doesn't amount to reason to believe that the results of the litigation would have been different and so no hearing is warranted.

Ground 6 also seems to include the claim that it amounts to misconduct for a prosecutor in Nevada to seek an indictment instead of going through a preliminary hearing. That is incorrect. *Gibson*

*v. State*, 96 Nev. 48, 50, 604 P.2d 814, 815 (1980). So no hearing is warranted on any portion of ground 6.

Ground 7 is phrased in terms of ineffective assistance of counsel. Botelho claims that counsel had sufficient notice that petitioner may be incompetent and that counsel should have sought an evaluation and hearing on the question. The notice, he claims, is in Botelho's claimed lack of recall in the days after the crime. The court may review the handwritten statement submitted at sentencing for more details on how Botelho claimed that he could not recall having committed a crime, but acted inconsistently with that claim of traumatic amnesia. The statement goes on, however, to indicate that Botelho regained his memory of the crime. He states "I sat here [the Washoe County Jail] for almost a month . . . and it all came back to me . . ." Thus, assuming that Botelho's claim of traumatic amnesia is true,[1] he regained his memory of the crime within a month of being transported from Susanville, California to Washoe County. Thus, by Botelho's own statement, the only indicia of his alleged mental problem was gone by the middle of October, 2003.[2] In fact, according to the petition itself, in ground 6, petitioner recalled the events and was available to testify before the grand jury when it considered the case on October 8, 2003. The record further reveals that petitioner did not plead guilty until December 11, 2003 when, according to petitioner, his memory had returned.

The sole indicia of incompetency, according to petitioner, had vanished long before petitioner pleaded guilty. Under those circumstances, this court should conclude that counsel is under no obligation to seek a hearing to inquire into issues of past competency. Furthermore, despite Botelho's assumptions to the contrary, amnesia is not synonymous with incompetence. As one court put it, "The amnesic defendant is no worse off than the defendant who cannot remember where he was on a

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[1]Although the claim of amnesia is laughably untrue, reminding the reader of a small child, the court should assume it to be true for purposes of this motion.

[2]Upon being confronted with his own prior statement, the petitioner may be inclined to disavow his prior statement. When a person takes a position in litigation in an effort to achieve a benefit, such as leniency, he should be judicially estopped from denying the truth of his prior statement in subsequent litigation.

particular day because of the passage of time, or because he was drunk, drugged, unconscious or asleep at the time of the crime. Moreover, amnesia does not inhibit discussion between attorney and client as to tactical decisions concerning the trial. Amnesia as to the alleged offense does not totally incapacitate the defense and a defendant is still free to assist counsel in numerous other ways." *People v. Amador*, 126 P.3d 938, 961 (Cal. 2006). Thus, the lawyer being aware of nothing more than lack of recollection, whether feigned or actual, would not necessarily have reason to believe that the defendant is incompetent. Therefore, counsel would be under no duty to act and the claim of ineffective assistance fails.

Ground 8 is phrased in terms of ineffective assistance of counsel and based on the assertion that Botelho was improperly charged with a series of separate offenses from one continuous act. While he phrases his argument in terms of "duplicity," it is clear that he is actually alleging multiplicity in the indictment. The State contends that no hearing is necessary because the charging instrument is not multiplicitous. The three counts of sexual assault allege fellatio, cunnilingus and vaginal/penile penetration. Even if those three acts occurred in rapid succession, they are properly charged as separate offenses. *See Peck v. State*, 116 Nev. 840, 7 P.3d 470 (2000)(digital penetration, followed by penile penetration are separate crimes and do not merge).

Ground 9 is also phrased in terms of ineffective assistance. According to Botelho, counsel was ineffective in failing to arrange a psycho-sexual evaluation. Botelho claims that in the absence of a pre-judgment evaluation, he can never be released on parole.[3] He is incorrect. NRS 213.1214 prohibits release on parole unless a psychological panel makes its own independent evaluation of the defendant's risk to society. The panel is not dependent upon pre-judgment evaluations. Furthermore, the post-conviction habeas corpus petition is available only to challenge a conviction or sentence. NRS 34.724.

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[3]To the extent that Botelho is claiming that a psycho-sexual evaluation must be presented to the trial court, he is incorrect. Such an evaluation is only required if the defendant is eligible for probation. Botelho was not eligible for probation. The report is a pre-requisite to probation but is not automatically required in every sexual offense. *See* NRS 176.135 and 176.139.

It is not available for the purpose presented in ground 8 because the judgment itself does not create the conditions under which parole might be granted.

Ground 10 is phrased in terms of the constitutionality of the statute. Botelho seems to claim that if he had gone to trial and if the evidence had shown that the victim had voluntarily accompanied him to the scene of the sexual assaults, then he would have been entitled to be acquitted of kidnapping. That argument need not detain the court because a free-standing claim that one might have prevailed at trial is not a valid claim that one is unlawfully imprisoned. On the other hand, an attack on the constitutionality of the statute would be viable, but the attack launched by Botelho is again based on his proposed version of the facts. The only argument that this court ought to consider is the claim that appellate counsel was ineffective in failing to argue that the kidnapping statute is unconstitutionally vague on its face, not as applied, because one cannot know what is prohibited by the word "enticing." That claim can be rejected as a matter of law. In *Sheriff v. Anderson*, 103 Nev. 560, 746 P.2d 643 (1987) the court held that the word "device" was not vague as applied to a computer because, inter alia, reference to any standard dictionary would provide a person with sufficient guidance to know what was prohibited. Similarly, in the instant case, the disputed term is "entice." According to Botelho's statement at sentencing, the victim accompanied him in his car in anticipation of employment as a babysitter. According to Webster's Unabridged Dictionary, that amounts to enticement by persuading by holding out hope or desire.

If Botelho had been contemplating persuading a young girl to accompany him, with the intent to sexually assault her, by offering employment as a babysitter, and if he wondered if that would amount to kidnapping, he need only have referred to any standard dictionary and his question would have been answered in the affirmative. Accordingly, this court should hold that counsel was not ineffective in failing to launch an attack on the kidnapping statute on the theory that the word "entice" was unconstitutionally vague.

Ground 11 seems to be an assertion that Botelho was never arraigned. The record reveals the arraignment, and Botelho's presence at the arraignment, on October 23, 2003 and on November 6, 2003.

Thus the claim is repelled by the record. If the claim is that Botelho was constitutionally entitled to a preliminary hearing, that claim is incorrect as a matter of law. If the claim is something else, then it ought to be dismissed for lack of specificity in the pleadings. The State might be able to guess at the true nature of the claims, but the State is unwilling to undertake the burden of pleading on behalf of the petitioner, especially because Botelho has counsel who has filed a supplement to the petition. That has done nothing to clear up the nature of ground 11 and so ground 11 should be dismissed.

Ground 12 asserts that lifetime supervision and the requirement of registration as a sex offender will one day infringe on his liberty. The State assumes that this is a claim of ineffective appellate counsel. The response is that Botelho is correct. Lifetime supervision is indeed a restriction on his liberty. That is the nature of a criminal sentence. A prison sentence, for instance, severely restricts one's right to interstate travel as the prison has guards that will shoot an inmate who attempts to exercise his right to interstate travel. Therefore, the notion that the sentence restricts Botelho's liberty should be disregarded. Botelho is a criminal and the very nature of sentencing is to interfere with the criminal's liberty interests. The notion that reasonable attorneys would attack a criminal sentence on the grounds that the sentence interferes with the liberty of the criminal is nonsensical. Accordingly, no hearing is warranted on ground 12 of the petition.

Ground 13 is a claim that appellate counsel was ineffective because the sentences amount to cruel and unusual punishment. On direct appeal the Supreme Court declared that the sentences did not amount to cruel and unusual punishment. Re-litigation of that ruling is barred by the doctrine of the law of the case. *Lader v. Warden*, ___ Nev., ___120 P.3d 1164, 1169 (2005).

Ground 14 is a series of brief claims of ineffective assistance of counsel. Several grounds consist of bare or naked claims that do not warrant a hearing. *See Hargrove*. Those are grounds 14(1), 14(6), 14(8)(a) through 14(8)(d), 14(8)(f), (h), (i), (k), (n), (o). No hearing is warranted on those bare or naked allegations.

Ground 14(2) asserts the lack of a "meaningful relationship" between counsel and client. That in itself is insignificant. *See Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610 (1983)(the accused has no right

to a "meaningful relationship" with counsel). The balance of ground 14(2) asserts that with a closer relationship counsel would have learned of information possessed by his client. The problem again lies in prejudice. Botelho claims that he was armed with information when he decided to plead guilty. He gives no explanation about how it would have changed Botelho's decision if Sean Sullivan had also been aware of that information. Thus, there is no claim of prejudice and no hearing is warranted on ground 14(2).

Ground 14(3) is a claim that counsel acted improperly in seeking out a plea bargain and discussing the options with his client. Unless this court is prepared to hold that counsel does not have a duty to explore options, and the defendant has the right to never be presented with options, no hearing is warranted.

Ground 14(4) asserts ineffective assistance in failing to seek a competency hearing. That has been addressed above.

Ground 14(5) asserts that counsel was ineffective in failing to inform Botelho of the option of a motion to withdraw the plea once he learned that the State would be presenting evidence at sentencing. No hearing is warranted because he has not identified any grounds for withdrawing the plea. If the alleged ground is surprise in learning that the State would be presenting evidence at sentencing, that ground is repelled by the plea memorandum. Furthermore, the record extant includes the hand-written statement presented at sentencing in which Botelho informs the court that he never once considered taking the matter to trial. Thus, any claim of prejudice from counsel's alleged failure to discuss the option of a motion to withdraw the guilty plea is repelled by the record and no hearing is warranted.

Ground 14(7) asserts that counsel was ineffective in failing to seek recusal based on the theory that this court was exposed to improper evidence. As noted above, and as previously found by this court, the evidence was not improper. Thus, no hearing is warranted on ground 14(7).

The un-numbered part of ground 14(8) repeats the assertion concerning the expectation of a lesser sentence. As noted above, the plea memo put Botelho on notice that evidence might be presented at sentencing and this court put Botelho on notice that no specific sentence was guaranteed when he

pleaded guilty. Thus, no hearing is warranted.

Ground 14(8)(e) was addressed above and is repelled by the record.

Ground 14(8)(j) concerns the ability to object to evidence at trial. There was no trial. Therefore, the petitioner cannot demonstrate prejudice and thus no hearing is warranted.

Ground 14(8)(m) concerns bail. The question of bail has no impact on the outcome of the litigation and thus there can be no prejudice and thus no hearing is warranted.

Ground 15 actually states a claim that warrants a hearing. Sixty-one pages into the petition, the petitioner finally manages to state a claim that counsel was ineffective at sentencing in failing to present specific additional mitigating evidence. The hearing ought to be limited to that claim.

Ground 16 merely repeats or summarizes claims that have already been addressed.

Turning to the supplement filed by counsel, the supplement addresses the hearsay that was admitted in the sentencing hearing. The supplement claims that appellate counsel should have argued that the admission of the testimony violated the right to confront witnesses. This may be disposed of as a matter of law because the confrontation clause is a trial right that does not extend to sentencing. For the convenience of the court, several cases with that holding are collected at *State v. McGill*, 140 P.3d 930, 942, n.7 (Ariz. 2006).

The supplement also suggests that counsel was ineffective in failing to call the petitioner's ex-wife as a sentencing witness to rebut the testimony of the detective. The problem here is that the privilege that petitioner invoked was a privilege to prevent the ex-wife from testifying about marital communications. That privilege belonged to Botelho to assert or waive. *See Peck v. State*, 116 Nev. 840, 7 P.3d 470 (2000). There are two problems with this claim. The first is that the record shows that Botelho asserted his privilege and despite the volumes submitted in this post-conviction action, there is no claim that he was willing to waive the privilege. The other problem is in the apparent assumption that the marital privilege could be partially waived. That is incorrect. If Botelho had been willing to waive the marital privilege then the prosecutor would also have been free to call Botelho's ex-wife as a sentencing witness to relate any information she had concerning the character of the defendant. Thus

far, Botelho has not explicitly claimed that he was willing to waive the marital privilege, and certainly he has not alleged facts leading to the conclusion that the reasonable lawyer would have made the tactical decision to allow the ex-wife to testify, just to rebut one prior statement by that ex-wife, knowing that such a decision might open the floodgates for other character evidence. The State acknowledges that the claim of ineffective assistance in failing to arrange the attendance of the ex-wife is a close one, but in the absence of any specific allegations leading to the conclusion that counsel would have made the tactical decision to allow the ex-wife to testify, that portion of the first supplemental claim should be dismissed.

The supplement also asserts that trial counsel was ineffective in failing to arrange a psycho-sexual evaluation for use as mitigating evidence at sentencing. The State has already conceded a hearing on the claim that counsel was ineffective in failing to garner additional mitigating evidence. The State agrees that the hearing should include the claim that counsel failed to arrange a psycho-sexual evaluation.

## CONCLUSION

Ground 15 and one part of the supplement warrant a hearing on the claim that counsel was ineffective in failing to garner and present additional mitigating evidence. Each other claim should be dismissed.

DATED: October 6, 2006.

RICHARD A. GAMMICK
District Attorney

By _____
TERRENCE P. McCARTHY
Appellate Deputy

**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

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

DATED: October 9, 2006.

Stella Mulen

3897
RICHARD A. GAMMICK
Nevada Bar No. 1510
Post Office Box 30083
Reno, Nevada 89520-3083
(775) 328-3200
Attorney for Respondents

2006 OCT -9 AM 11:31

T.N. JR.

BY DEPUTY

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

**IN AND FOR THE COUNTY OF WASHOE**

MICHAEL TODD BOTELHO,

Petitioner,

vs.

JACK PALMER,

Respondents.

Case No. CR03P2156

Dept. No. 3

**RETURN**

GLEN WHORTON in his official capacity as the Director of the Nevada Department of Corrections, by way of a return to the order, respectfully shows this Court:

1. Director WHORTON has constructive custody of the Petitioner MICHAEL TODD BOTELHO, (Nevada Department of Corrections #80837), who is presently housed at the Lovelock Correctional Center, Lovelock, Nevada. Warden Jack Palmer, has actual custody.

2. That the authority by which Director WHORTON has and retains custody of the Petitioner BOTELHO is a Judgment filed April 7, 2004, in Case No. CR03-2156 in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, in which BOTELHO was found guilty of the crime of Kidnapping in the First Degree, a violation of NRS 200.310-1 and NRS 200.320, a felony, as charged in Count I of the Indictment and was sentenced to imprisonment in the Nevada Department of Corrections for the term of Life with the possibility of parole after a minimum of five (5) years has been served, with credit for one hundred ninety-seven (197) days time served.

...

It is further ordered that Michael Todd Botelho is guilty of the crime of Sexual Assault on a Child, a violation of NRS200.366, a felony, as charged in Count III of the Indictment, and was sentenced to imprisonment in the Nevada Department of Corrections for a term of Life with the possibility of parole after a minimum of twenty (20) years has been served, to be served consecutively to the sentence imposed in Count I.

It is further ordered that Michael Todd Botelho is guilty of the crime of Sexual Assault on a Child, a violation of NRS200.366, a felony, as charged in Count IV of the Indictment, and was sentenced to imprisonment in the Nevada Department of Corrections for a term of Life with the possibility of parole after a minimum of twenty (20) years has been served, to be served concurrently to the sentence imposed in Count III.

It is further ordered that Michael Todd Botelho is guilty of the crime of Sexual Assault on a Child, a violation of NRS200.366, a felony, as charged in Count V of the Indictment, and was sentenced to imprisonment in the Nevada Department of Corrections for a term of Life with the possibility of parole after a minimum of twenty (20) years has been served, to be served consecutively to the sentence imposed in Counts I and IV.

It is further ordered that a special sentence of Lifetime supervision commence after any term of probation, or any term of imprisonment or after any period of release on parole. It is further ordered that the Defendant pay the statutory Twenty-five Dollar ($25.00) administrative assessment fee, submit to a DNA analysis test for the purpose of determining genetic markers and pay a testing fee of One Hundred Fifty Dollars ($150.00), reimburse the Washoe County Public Defender's Office in the amount of Five Hundred Dollars ($500.00) for legal services rendered and pay restitution in the amount of Six Hundred Thirty-Two Dollars ($632.00).

...

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...

...

...

...

3. That an exemplified or certified duplicate of the judgment of conviction referenced above accompanies this return and by this reference is incorporated into this return.

DATED this 8th day of September, 2006.

GLEN WHORTON, Director
Nevada Department of Corrections

SUBSCRIBED and SWORN to before me
this 8th day of September, 2006,
by GLEN WHORTON.

Dorothy Nash Holmes
NOTARY PUBLIC

DOROTHY NASH HOLMES
NOTARY PUBLIC
STATE OF NEVADA
Appt. Recorded in Washoe County
My Appt. Expires September 25, 2007
No: 95-0603-2

**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

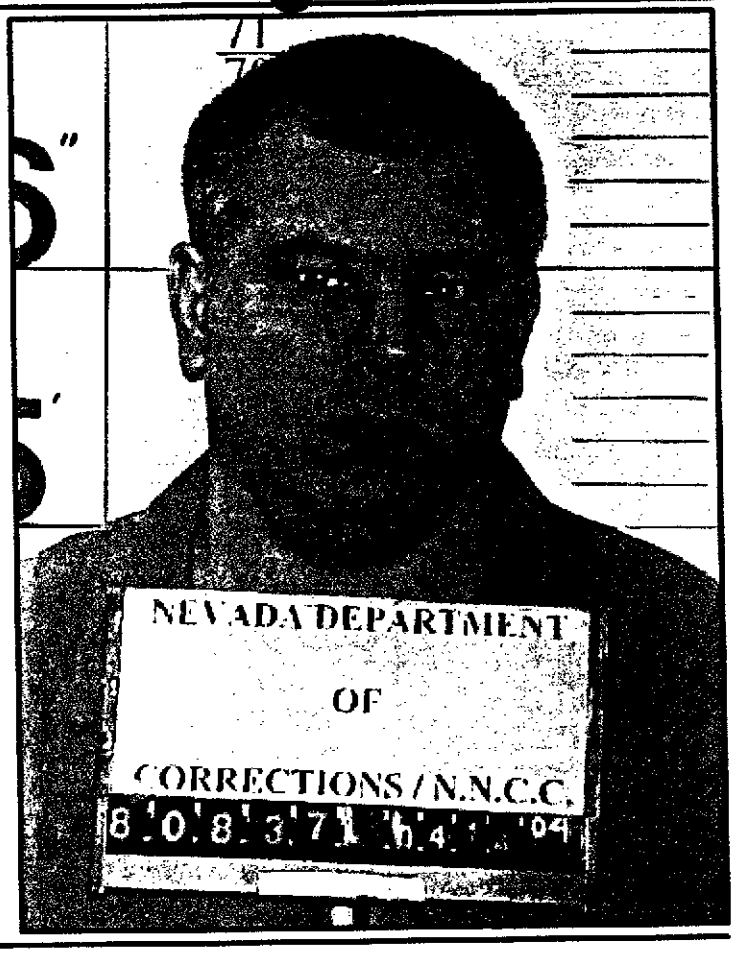
Mary Lou Wilson, Esq.
333 Marsh Avenue
Reno, NV 89509

DATED: October 9, 2006

V6.502

# NEW COMMIT

Date: **4/14/2004**
Case #: **80837**
Soc. Sec. #: [redacted]
Name: **MICHAEL TODD BOTELHO**
Alias: **KEVIN**
Height: **5 Feet 10 Inches**
Weight: **205**
Age: **42**
Sex: **M**
Eyes: **HAZ**
Hair: **BRO**
Complexion: **FAIR**
Race: **1**
BirthDate: **6/10/1961**




OTHER INFORMATION BELOW

FBI: 916956RA3
SID: NV01078952
CRIME: KIDDNAPPING IN THE FIRST DEGREE cs SEXUAL ASSAULT ON A CHILD (3 COUNTS)
SENT: LIFE WITH THE POSSIBILITY OF PAROLE AFTER 5 YEARS cs LIFE WITH THE POSSIBILITY OF PAROLE AFTER 20 YEARS cc LIFE WITH THE POSSIBLITY OF PAROLE AFTER 20 YEARS cs LIFE WITH THE POSSIBLITY OF PAROLE AFTER 20 YEARS
CJC: 197 DAYS
DATE SENT: 04-07-2004
COUNTY: WASHOE
POB: HONOKA, HI
DATE REC'D: 04-14-2004
TATTOOS/SCARS: L/SIDE OF FACE: 2" SCAR; L/KNEE: 6" SURGICAL SCAR; R/THIGH: 3" SCAR

NEVADA DEPT OF CORRECTIONS
775-882-9203



V6.502

LEAVE BLANK | CRIMINAL | (STAPLE HERE) | LEAVE BLANK

STATE USAGE

NFF SECOND SUBMISSION | APPROXIMATE CLASS | AMPUTATION | SCAR

STATE USAGE

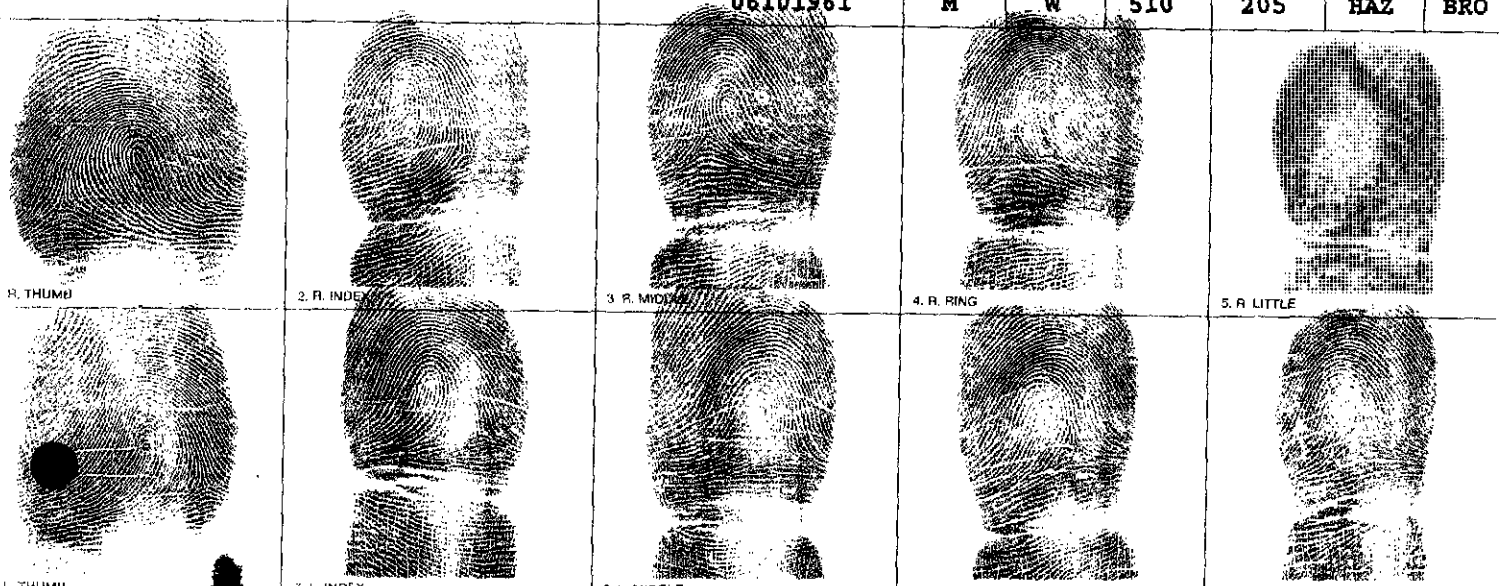
LAST NAME, FIRST NAME, MIDDLE NAME, SUFFIX

BOTELHO,MICHAEL

SIGNATURE OF PERSON FINGERPRINTED | SOCIAL SECURITY NO. | LEAVE BLANK

ALIASES/MAIDEN
LAST NAME, FIRST NAME, MIDDLE NAME, SUFFIX

| FBI | STATE IDENTIFICATION NO. | DATE OF BIRTH MM DD YY | SEX | RACE | HEIGHT | WEIGHT | EYES | HAIR |
|---|---|---|---|---|---|---|---|---|
| | | 06101961 | M | W | 510 | 205 | HAZ | BRO |

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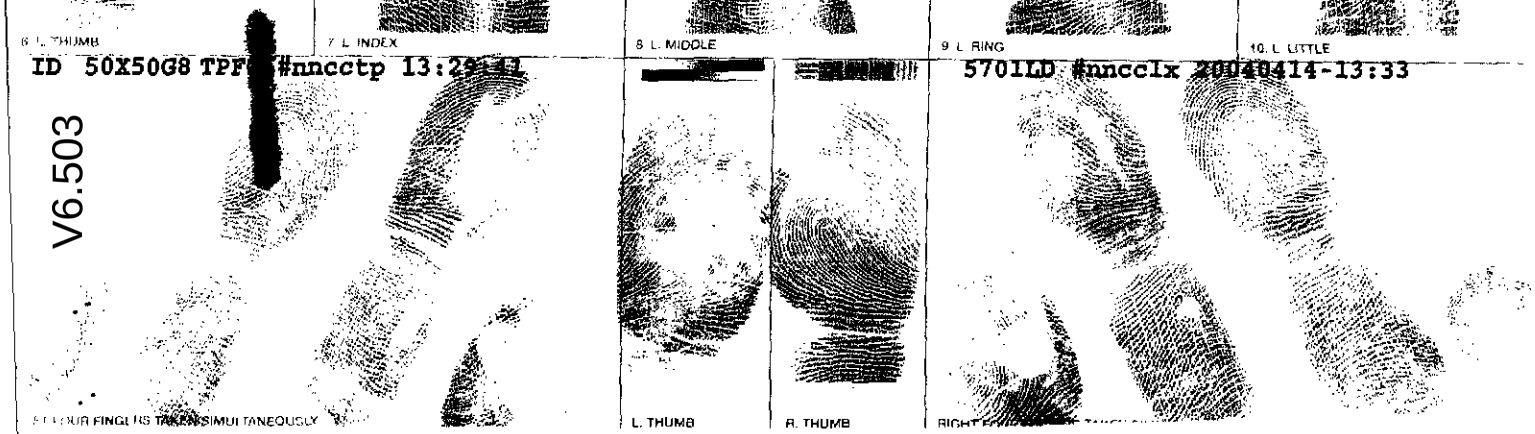
5701LD #nncclx 20040414-13:33

V6.503




V6.503

80837

CODE 1850

FILED

APR - 7 2004

RONALD A. LONGTIN, JR., CLERK

By C. Patterson DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL TODD BOTELHO,

Defendant.

Case No. CR03-2156

Dept. No. 3

/

## JUDGMENT

The Defendant, having entered a plea of Guilty, and no sufficient cause being shown by Defendant as to why judgment should not be pronounced against him, the Court rendered judgment as follows:

That Michael Todd Botelho is guilty of the crime of Kidnapping in the First Degree, a violation of NRS 200.310-1 and NRS 200.320, a felony, as charged in Count I of the Indictment, and that he be punished by imprisonment in the Nevada Department of Corrections for a term of Life with the possibility of parole after a minimum of five (5) years as been served, with credit for one hundred ninety-seven (197) days time served.

It is further ordered that Michael Todd Botelho is guilty of the crime of Sexual Assault on a Child, a violation of NRS 200.366, a felony, as charged in Count III of the Indictment, and that he be punished by imprisonment in the Nevada Department of Corrections for a term of Life with the possibility of parole after a minimum of twenty (20) years as been served, to be served consecutively to the sentence imposed in Count I.

It is further ordered that Michael Todd Botelho is guilty of the crime of Sexual Assault on a Child, a violation of NRS 200.366, a felony, as charged in Count IV of the Indictment, and that he be punished by imprisonment in the Nevada Department of Corrections for a term of Life with the possibility of parole after a minimum of twenty (20) years has been served, to be served concurrently to the sentences imposed in Count III.

It is further ordered that Michael Todd Botelho is guilty of the crime of Sexual Assault on a Child, a violation of NRS 200.366, a felony, as charged in Count V of the Indictment, and that he be punished by imprisonment in the Nevada Department of Corrections for a term of Life with the possibility of parole after a minimum of twenty (20) years as been served, to be served consecutively to the sentences imposed in Counts I and IV.

It is further ordered that a special sentence of Lifetime supervision commence after any period of probation, or any term of imprisonment or after any period of release on parole. It is further ordered that the Defendant pay the statutory Twenty-five Dollar ($25.00) administrative assessment, submit to a DNA analysis test for the purpose of determining genetic markers and pay a testing fee of One Hundred Fifty Dollars ($150.00), reimburse the Washoe County Public Defender's Office in the amount of Five Hundred Dollars ($500.00) for legal services rendered and pay restitution in the amount of Six Hundred Thirty-two Dollars ($632.00).

Dated this 7th day of April, 2004.

CERTIFIED COPY
The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.
DATE: April 7, 2004
RONALD A. LONGTIN, JR., Clerk of the Second Judicial District Court, in and for the County of Washoe, State of Nevada.
By _____ Deputy

JEROME M. POLAHA
DISTRICT JUDGE

I, Missy Gleason (Name of Official Custodian), hereby certify:

V6.506

That I am the Administrative Assistant II (Official Position) of the Nevada Department of Corrections, a penal institution of the State of Nevada, situate in the County and State aforesaid; that in my legal custody as such officer are the original files and records of persons heretofore committed to said penal institution; that the

(1) Photograph, (2) Fingerprint Record and (3) Commitment attached hereto are copies of the original records of Michael Botelho #80837,

a person heretofore committed to said penal institution and who served a term of imprisonment therein; that I have compared the foregoing and attached copies with their respective originals now on file in my office and each thereof contains, and is, a full, true and correct transcript and copy from its said original.

IN WITNESS WHEREOF, I have hereunto set my hand this 15th day of August, A.D. 20 06.

Signature

Administrative Assistant II
Official Title

STATE OF NEVADA }
COUNTY OF CARSON CITY } ss.

I, Dean Heller (Name of Secretary of State), Secretary of State of the State of Nevada, do hereby certify that Missy Gleason (Name of Person Certifying Above), whose name is subscribed to the above Certificate, was at the date thereof, and is now, the Administrative Assistant II (Official Capacity of One Certifying) of the Nevada Department of Corrections, and is the Legal Keeper and the officer having the legal custody of the original records of said Nevada Department of Corrections; that the said Certificate is in due form; and that the signature subscribed thereto is his genuine signature.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of the State of Nevada this 15th day of August, A.D. 20 06.

[SEAL]

Signature

Secretary of State of the State of Nevada

By Deputy