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

THE STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL TODD BOTELHO,

Defendant.
_____/

Sup. Ct. Case No. 83996
Case No. CR03-2156
Dept. 1

RECORD ON APPEAL

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POST DOCUMENTS

APPELLANT
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Carson City, NV 89702

RESPONDENT
Washoe County District
Attorney's Office
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Case No. CR03P2156
Dept. No. 3

ORIGINAL

FILED
2010 JAN 27 AM 10:16
HOWARD W. CONYERS
BY DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE

STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

MICHAEL TODD BOTELHO,

Petitioner,

v.

JAMES BENEDETTI, et al.,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

(Post-conviction)

(NRS 34.720 et seq.)

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:

N.N.C.C. IN CARSON COUNTY, NEVADA.

2. Name and location of court which entered the judgment of conviction under attack:

SECOND JUDICIAL DISTRICT COURT, WASHOE COUNTY

3. Date of judgment or conviction: APRIL 7, 2004.

4. Case Number: CR03-2156.

5. (a) Length of sentence:

5 TO LIFE, 20 TO LIFE, 20 TO LIFE (ALL CONSECUTIVE)

AT SENTENCING: 5 TO 15, 20 TO L, 20 TO LIFE BUT J.O.C. WAS CHANGED.

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion: NO.

7. Nature of offense involved in conviction being challenged:

KIDNAP

S. ASSAULT

8. What was your plea? (check one):

(a) Not guilty ____
(b) Guilty X
(c) Nolo contendere ____

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

I DID NOT / NOR WAS I ALLOWED TO DO SO BY COUNSEL

N/A 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? N/A.

12. Did you appeal from the judgment of conviction? YES.

13. If you did appeal, answer the following:
(a) Name of court: NEVADA SUPREME COURT.
(b) Case number or citation: 43247.
(c) Result:

D. APPEAL WAS DENIED J.O.C. WAS AFFIRMED

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.

16. If your answer to No. 15 was "yes," give the following information:
(a) (1) Name of court: SECOND JUDICIAL DISTRICT COURT.
(2) Nature of proceeding: PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
(3) Grounds raised:

RAISED 16 GROUNDS CONSISTING OF INEFFECTIVE ASSISTANCE OF COUNSEL AS WELL AS DUE PROCESS CLAIMS.

(4) Did you receive an evidentiary hearing on your petition, application or motion? YES.

(5) Result: DENIED PETITION IN ITS ENTIRETY.

(6) Date of result: MAY 11, 2007.

(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:

(1) Name of court: _____.

(2) Nature of proceeding: _____.

(3) Grounds raised:

THIS IS MY SECOND PETITION BEING PRESENTED NOW.

I HOPE IM ANSWERING THIS PROPERLY AS WE DONT HAVE A TRAINED LAW LIBRARY WORKER WHO CAN GIVE THIS ANSWER.

(4) Did you receive an evidentiary hearing on your petition, application or motion? _____.

(5) Result: _____.

(6) Date of Result: _____.

(7) If known, citations or 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:

(1) Name of court: _____.

(2) Nature of proceeding: _____.

(3) Grounds raised:

_____.

(4) Did you receive an evidentiary hearing on your petition, application or motion? _____.

(5) Result: _____.

(6) Date of Result: _____.

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

_____.

(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.
Citation or date of decision: MAY 16, 2008.

(2) Second petition, application or motion? N/A.
Citation or date of decision: .

(3) Third or subsequent petitions, applications or motions: N/A.
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:

N/A

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:

(a) Which of the grounds is the same:

YES

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

SECOND JUDICIAL DISTRICT COURT. WITH AN EVIDENTIARY HEARING AND THEN DENIED BY COUNSEL AND THE NEVADA SUPREME COURT TO EXHAUST STATE REMEDY

(c) Briefly explain why you are again raising these grounds:

BECAUSE MY DUE PROCESS WAS DENIED AND THE OPPORTUNITY TO BE ABLE TO EXHAUST STATE REMEDY WAS DENIED BY NEVADA SUPREME COURT SO PETITIONER WENT TO FEDERAL COURT AND WAS ~~tt~~ TOLD TO Fully EXHAUST BACK IN STATE COURT, THUS, BEING FORCED TO RE-PRESENT MY Petition TO ATTEMPT TO EXHAUST STATE REMEDY AGAIN

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 presenting them.

A SINGLE GROUND CONCERNING A CRUTIAL DUE PROCESS VIOLATION WHICH HAD DIRE AND DIRECT ~~CAUSE~~ HARMFUL CONSEQUENCES IN REGARD TO MY ORIGINAL PETITION FOR HABEAS CORPUS AS WELL AS BEING DENIED THE OPPORTUNITY TO FULLY EXHAUST MY STATE REMEDY.

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.

I AM STILL WITHIN THE ORIGINAL ONE YEAR RESTRICTIONS BECAUSE OF HOW THIS WAS DONE TO ME BY THE STATE, AS WILL COME OUT IN COURT. I HOPE THIS ANSWER MAKES SENCE.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? NO.
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:

PUBLIC DEFENDER - SEAN SULLIVAN (POST CONVICTION)
PUBLIC DEFENDER ON DIRECT APPEAL - JOHN REESE PETTY
COURT APPOINTED ATTORNEY ON HABEAS PETITION - MARILOU WILSON

(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 [redacted] 20th day of [redacted], JANUARY, [redacted] 2010.

N/A
Signature of Attorney (if any)

Attorney & Address of Attorney

Michael T. Botelho #80837
[redacted] NNCC
P.O. Box [redacted] 7000
[redacted]
CARSON CITY, NV. 89702
Petitioner, IN PRO SE

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 AND CORRECT OF HIS OWN KNOWLEGE, EXCEPT AS TO THOSE MATTERS STATED ON INFORMATION AND BELIEF, AND AS TO SUCH MATTERS HE BELIEVES THEM TO BE TRUE.

Michael T. Botelho
PETITIONER, IN PRO SE

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 20th DAY OF JANUARY, 2010, 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:

NEVADA ATTORNEY GENERAL
100 N. CARSON ST
CARSON CITY, NV. 89701-4717

WASHOE COUNTY DISTRICT ATTORNEY
BOX 30083
RENO, NV. 89520-3083

Michael T Botelho #80837
MICHAEL T. BOTELHO
PETITIONER, IN PRO SE

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GROUND ONE

THE STATE COURT APPEALS PROCESS WAS INADEQUATE TO PROTECT PETITIONERS RIGHTS OF EXHAUSTION OF THE STATE REMEDY AND DENIED HIS DUE PROCESS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. ON JUNE 30, 2006, COUNSEL, MARILOU WILSON, WAS APPOINTED TO REPRESENT PETITIONER AND HIS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION). SEE EXHIBIT "A." ON AUGUST 8, 2006, COUNSEL FILED A SUPPLIMENTAL PETITION WITH THE SECOND JUDICIAL DISTRICT COURT BY RAISING TWO ISSUES, SEE EXHIBIT "B." AN EVIDENTIARY HEARING WAS HELD MAY 11, 2007. SEE EXHIBIT "C." COUNSEL THEN INFORMED PETITIONER THAT SHE WOULD APPEAL ALL ISSUES RAISED IN THE ORIGINAL PETITION INCLUDING THE TWO SHE RAISED IN HER SUPPLIMENTAL PETITION

IN SEPTEMBER 2007, PETITIONER RECIEVED APPEAL BRIEF FROM COUNSEL, IN WHICH SHE RAISED ONLY ONE SINGLE ISSUE TO THE NEVADA SUPREME COURT ON PETITIONERS BEHALF. SEE EXHIBIT "D." ON JULY 9, 2007, PETITIONER WROTE A FOUR (4) PAGE LETTER TO COUNSEL REGUARDING HER FAILURE TO INCLUDE ALL THE ISSUES RAISED IN THE ORIGINAL PETITION ON APPEAL TO THE NEVADA SUPREME COURT FOR EXHAUSTION OF STATE REMEDY. SEE EXHIBIT "E". THERE WAS NO ANSWER OR RESPONSE BY COUNSEL, MARILOU WILSON. AFTER THE NEVADA SUPREME COURT DENIED HIS PETITION, PETITIONER WROTE THREE (3) PAGE LETTER TO COUNSEL REQUESTING HER TO FILE A MOTION FOR REHEARING ON ALL ISSUES IN THE ORIGINAL PETITION FOR EXHAUSTION OF STATE REMEDY. SEE EXHIBIT "F."

THERE WAS NO RESPONSE OR ANSWER AND AS A RESULT, SHE NEVER ATTEMPTED TO ASSIST PETITIONER IN A MEANINGFUL WAY TO EXHAUST THE ISSUES NOW RAISED IN THIS PETITION. COUNSEL'S ACTIONS FELL BELOW

THE STANDARD SET FOURTH IN STRICKLAND V. WASHINGTON. THUS, PRECLUDING THE RESPONDENTS ASSERTION OF ANY CLAIM REGUARDING UNTIMELY FILING AND/OR UNREASONABLE DELAY IN PRESENTING THE ISSUES OF THIS PETITION, BECAUSE IT WAS CLEARLY COUNSEL'S FAULT AND THE PETITIONER CANNOT BE HELD RESPONSIBLE DUE TO HIS INABILITY TO EXHAUST THE STATE REMEDY DURING THE LAST APPEAL IN STATE COURT PROCEEDINGS.

B. ON OCTOBER 3, 2007, PETITIONER SUBMITTED A MOTION FOR WITHDRAWL OF ATTORNEY OF RECORD AND A REQUEST TO FILE SUPPLIMENTAL APPEAL IN PRO SE TO THE NEVADA SUPREME COURT. SEE EXHIBIT "G." THE NEVADA SUPREME COURT ORDERED, DENYING PETITIONER'S MOTION FOR WITHDRAWL OF APPELLATE COUNSEL AND HIS REQUEST TO FILE SUPPLIMENTAL APPEAL BY ORDERING THAT "WE CONCLUDE THAT APPELLANT'S CONTENTIONS DO NOT RISE TO THE LEVEL OF ADEQUATE CAUSE FOR REMOVAL OF COUNSEL AND WE DECLINE TO GRANT APPELLANTS REQUEST TO REMOVE HIS [redacted] CURRENT COUNSEL. . . . . WE DECLINE TO GRANT HIM PERMISSION TO FILE FURTHER DOCUMENTS IN PROPER PERSON. . . . . ACCORDINGLY, WE DIRECT THE CLERK OF THIS COURT TO RETURN, UNFILED, THE PROPER PERSON DOCUMENTS RECIEVED ON SEPTEMBER 28, 2007. SEE EXHIBIT "H."

FOR THIS REASON, PETITIONER WAS PREVENTED FROM EXHAUSTION OF THE ISSUES AS PRESENTED IN THIS PETITION, AND HE WAS FORCED TO TAKE ACTION IN THE FEDERAL DISTRICT COURT COURT BY FILING A FEDERAL WRIT OF HABEAS CORPUS PETITION. ON OCTOBER 28, 2009, THE FEDERAL DISTRICT COURT ISSUED AN ORDER DIRECTING THAT THE CLAIMS IN HIS FEDERAL PETITION HAVE NOT BEEN EXHAUSTED THROUGH THE STATE COURT ROMEDY, SEE EXHIBIT "I". PETITIONER ASSERTS THAT HIS HABEAS CORPUS APPELLATE

COUNSEL WAS AN OFFICER OF THE COURT, WHEN PETITIONER TAKES ACTION TO THE NEVADA SUPREME COURT REGUARDING COUNSELS FAILURE TO ASSIST HIM, THAT THE COURT DISREGUARDED PETITIONERS ALLOGATIONS AND IGNORED HIS MOTIONS FILED WITH THE COURT BY RETURNING ALL DOCUMENTS TO THE PETITIONER WITHOUT FILING. SEE EXHIBIT "H". IN ADDITION, THE NEVADA SUPREME COURT FURTHER DECLINED TO ALLOW PETITIONER TO EXHAUST THE STATE REMEDY BY DENYING HIS REQUEST TO FILE SUPPLIMENTAL APPEAL. SEE EXHIBIT "H". THUS, THE NEVADA SUPREME COURT FORCED PETITIONER INTO A CATCH 22 POSITION; (1) WHEN HIS COUNSEL WAS NOT WITHDRAWN AS COUNSEL OF RECORD AND THE PETITIONERS DOCUMENTS WERE NOT TO BE FILED DUE TO THE FACT THAT HE STILL HAD APPOINTED COUNSEL; (2) PETITIONER WAS DENIED THE OPPORTUNITY TO FILE SUPPLIMENTAL APPEAL AND NOW MUST RAISE THE ISSUES PRESENT IN THIS PETITION IN WHICH HE WAS FORCED OUT OF THE JUDICIAL PROCESS OF EXHAUSTION OF STATE REMEDY. PETITIONER WAS PRECLUDED FROM EXHAUSTION OF THE STATE REMEDY DURING HIS FIRST PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) APPEAL.

THEREFORE, THE RESPONDENTS CANNOT CLAIM THAT PETITIONER'S PETITION IS UNTIMELY FILED, AND HE CANNOT BE HELD FOR ANY UNTIMELY FILED OR FILING OF THIS PETITION NOR HELD PROCEDURALLY BARRED UNDER STATE AND FEDERAL HABEAS CORPUS RULES AND PROCEDURES.

GROUND TWO

PETITIONER WAS DENIED DUE PROCESS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE SENTENCING COURT ABUSED ITS DISCRETION AND RELIED UPON PREJUDICIAL, FALSE, MISLEADING AND IMPALPABLE INFORMATION AT SENTENCING HEARING WHICH RESULTED IN THE IMPOSITION OF NUMEROUSLY IMPOSED CONSECUTIVE LIFE SENTENCES

SUPPORTING FACTS: PETITIONER INCORPORATES ORIGINIAL ISSUE, GROUND THREE INTO THE BODY OF THIS INSTANT CLAIM.

THE SENTENCING COURT WAS PREJUDICED WHEN IT WAS SUBJECTED TO HIGHLY INFLAMATORY, PREJUDICIAL, PERJURED TESTIMONY OF DET. GREG HERERRA CONCERNING ALLEGED DISCLOSURES MADE BY PETITIONERS FORMER SPOUSE, MELISSA BOTELHO.

AFTER THE ENTRY OF PETITIONER'S PLEAS, AND PRIOR TO SENTENCING, THE STATE FILED NOTICE OF INTENT TO INTRODUCE PRIOR OR OTHER BAD ACTS EVIDENCE AT SENTENCING HEARING. PETITIONERS COUNSEL OPPOSED THE NOTICE. THE COURT HELD A HEARING TO DETERMINE THE PREJUDICIAL AND PROBATIVE EFFECTS OF THE PROFFERED EVIDENCE THE PROSECUTION ATTEMPTED TO PRODUCE AGAINST PETITIONER AT SENTENCING. THE COURT ULTIMATELY AGREED WITH PETITIONER IN THAT HIS EX-WIFE, MELISSA BOTELHO, WOULD NOT BE ALLOWED TO TESTIFY AT SENTENCING 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. THUS, UNABLE TO TEST THE ACCURACY OF THE ENTIRETY AND THE TRUTHFULLNESS OF THE ALLEGED STATEMENTS, THE COURT SHOULD NEVER HAVE BEEN

SUBJECTED TO THE ENTIRETY OF DET. HERERRA'S TESTIMONY AS IT RELATES TO THE MARITAL COMMUNICATIONS BETWEEN PETITIONER AND HIS THEN SPOUSE, MELISSA BOTELHO.

THE TESTIMONY OF DETECTIVE HERERRA WAS HIGHLY PREJUDICIAL AND UNPROVEN FOR TRUTHFULNESS. THE COURT WAS SUBJECTED TO THE TESTIMONY, BOTH AT SENTENCING AND IN THE CONTENTS OF THE PROSECUTIONS NOTICE OF INTENT TO ADMIT THE TESTIMONY.

DETECTIVE HERERRA TESTIFIED AT THE SENTENCE HEARING AS FOLLOWS:

A. [DET. HERERRA]: SHE STATED THAT MICHAEL BOTELHO HAD BEEN HAVING THESE --- HAD BEEN HAVING THESE FANTASIES EVER SINCE THEY WERE MARRIED, DURING THE EARLY 1990's.

. . .

A. SHE TALKED ABOUT FANTASIES - HIS FANTASIES OF KIDNAPPING A YOUNG GIRL AND HAVING SEX WITH THE YOUNG GIRL FOR --- ANYTHING HE WANTED TO DO.

(SEE TRANSCRIPTS OF SENTENCING, APRIL 7, 2004, PAGE 38, LINES 5-14).

OFFICER HERERRA HAD TO RECANT LATER CONCERNING HIS TESTIMONY CONCERING "DISMEMBERMENT", AS FOLLOWS:

Q. [BY DEFENSE COUNSEL] AND SHE NEVER MENTIONS "DISMEMBER" IN THE SECOND TELEPHONE INTERVIEW?

Id. AT PAGE 51, LINES 4-5

A.[DET. HERERRA] THATS CORRECT.

Id. AT PAGE 51, LINE 6.

THE SENTENCING COURT WAS SUBJECTED TO A PLETHORA OF INACCURATE AND FACTUALLY UNTRUE INFORMATION DEEMED HIGHLY PREJUDICIAL TO PETITIONER WHEREIN THE COURT ULTIMATELY IMPOSED A HARSH SENTENCE BASED UPON THE ERRONEOUS, PERJURED TESTIMONY OF LAW ENFORCEMENT.

ADDITIONALLY, THE SENTENCING COURT WAS SUBJECTED TO ERRONEOUS INFORMATION CONTAINED IN THE STATES "NOTICE OF INTENT" TO ADMIT THE ALLEGED PRIOR BAD ACTS EVIDENCE, AS THE PROSECUTION DELINEATED IN THEIR NOTICE AS FOLLOWS:

PRIOR TO INTERVIEWING DEFENDANT, DET. HERERRA HAD RECIEVED INFORMATION FROM DEFENDANTS 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 ACTS EVIDENCE AT SENTENCING HEARING, FILED FEB. 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, REGUARDING "RAPING AND DISMEMBERING A YOUG GIRL," HOWEVER, THIS COURT REFUSED REPEATED REQUESTS FROM COUNSEL TO RECUSE ITSELF AND DECIDED TO PROCEED WITH THE KNOWLEDGE OF THE PREJUDICIAL, INFLAMMATORY FALSIFIED ALLEGATIONS. HOWEVER, THE COURT WAS ALREADY PREJUDICED AND TAINTED, THE "BELL COULDNT BE UNRUNG".

GROUND THREE

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL THROUGH-OUT THE JUDICIAL PROCEEDINGS IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

SUPPORTING FACTS: PETITIONER IS INCORPORATING ORIGINAL GROUNDS INTO THE BODY OF THIS ISSUE.

1. TRIAL COUNSEL, SEAN SULLIVAN, FAILED TO ENSURE PETITIONER'S CALIFORNIA EXTRADITION PROCEEDINGS WERE JUDICIALLY SOUND.

2. COUNSEL FAILED TO ENSURE PETITIONER WAS PRESENT FOR GRAND JURY HEARING AS REQUESTED.

A. PETITIONER WAS NOTIFIED OF HIS STATUTORY RIGHT TO TESTIFY IN ACCORDANCE WITH NRS 172.239 AND NRS 172.241 TO BE PRESENT FOR GRAND JURY INVESTIGATION SEE (EXIBIT A)

B. THE GRAND JURY INVESTIGATION TOOK PLACE ON OCT. 8, 2003 Id. AT PAGE 2. HOWEVER, PETITIONER WAS NOT ALLOWED TO ATTEND AND APPEAR BEFORE THE GRAND JURY. SEE (EXIBIT B)

PETITIONER DESIRED TO APPEAR BEFORE THE GRAND JURY IN AN ATTEMPT TO PROVIDE EVIDENCE OF HIS INNOCENCE OF AT LEAST SOME OF THE CHARGES. PETITIONER ALSO DESIRED TO BE PRESENT AT THE GRAND JURY PROCEEDINGS SO THAT HE HAD KNOWLEDGE OF ALL TESTIMONIAL EVIDENCE IN THIS CASE, THUS, ENABLING THE PETITIONER TO MAKE A RATIONAL INTELLIGENT DECISION AS TO HOW TO PROCEED.

3. TRIAL COUNSEL FAILED TO REPRESENT PETITIONER OR ATTEMPT TO ENSURE PETITIONER RECIEVED A JUDICIALLY SOUND BAIL HEARING AS THE PROSECUTION COMMUNICATED "EX-PARTE" WITH THE COURT IN SEEKING AND ULTIMATELY GAINING "EXCESSIVE" BAIL INCREASE AGAINST PETITIONER, THE RECORD IS CLEAR.

4. COUNSEL FAILED TO FILE AND PRE-TRIAL MOTIONS SEEKING FULL DISCOVERY, TO SUPPRESS POTENTIAL INADMISSIBLE EVIDENCE, AND SEEKING TO DISMISS BASED ON ALL THE ALLEGED ERRORS CONCERNING PRE-TRIAL HEARINGS, i.e. GRAND JURY, PRELIMINARY HEARING, BAIL, ARRAIGNMENT, ETC.,,

5. COUNSEL FAILED TO PROPERLY REPRESENT PETITIONER AND ENSURE PETITIONER RECIEVED THE FULL BENEFIT OF PRE-TRIAL HEARINGS.

6. COUNSEL FAILED TO ENSURE PETITIONER WAS PRESENT AT ALL JUDICIAL HEARINGS.

7. COUNSEL FAILED TO REPRESENT PETITIONER WHATSOEVER IN MOST JUDICIAL PROCEEDINGS, i.e., GRAND JURY, PROPER JUSTICE COURT ARRAIGNMENT UNDER NRS 174.015, "EX-PARTE" BAIL HEARING, ETC.

8. COUNSEL FAILED TO INVESTIGATE, OR HIRE INVESTIGATOR TO SECURE FACTS SURROUNDING THE INSTANT CASE.

A. HAD COUNSEL INVESTIGATED, HE WOULD HAVE FOUND THAT MUCH OF THE DOCUMENTARY AND PHYSICAL EVIDENCE SURROUNDING THE INSTANT CASE IS TAINTED, i.e. ALTERED DEFENDANT STATEMENTS, LACK OF PROPOR CHAIN OF EVIDENCE (CUSTODY) AND THEREFORE INADMISSIBLE, AS WELL AS OTHER TRANSCRIPTS FROM VARIOUS PRE-TRIAL PROCEEDINGS WHEREIN COUNSEL WOULD HAVE DEDUCED THAT THERE EXISTED INSUFFICIENT EVIDENCE TO CONVICT PETITIONER OF ALL OF THE OFFENSES ALLEGED BY THE PROSECUTION.

9. COUNSEL FAILED TO INVESTIGATE THE VICTIM AND OTHER POSSIBLE PROSECUTION WITNESSES IN AN ATTEMAT TO ACERTAIN TRUTHFULNESS OF MATTERS ASSERTED.

10. COUNSEL FAILED TO REVIEW POLICE REPORTS WHICH CONTAIN FALSE AND MIS-LEADING STATEMENTS, AS WELL AS A LACK OF CHAIN OF CUSTODY OF EVIDENCE MENTIONED ABOVE.

11. COUNSEL FAILED TO REVIEW FORENSIC REPORTS WHICH DO NOT CONCLUSIVELY PROVE PETITIONERS GUILT.

12. COUNSEL FAILED TO INTERVIEW OR OTHERWISE CONVERSE WITH PETITIONER CONCERNING THE ALLEGED FACTS OF THE ALLEGED OFFENSE(S).

13. COUNSEL FAILED TO SECURE PHOTOGRAPHIC EVIDENCE TO BE UTILIZED AGAINST PETITIONER AT TRIAL, MUCH OF WHICH WOULD HAVE BEEN INADMISSIBLE AT TRIAL.

14. COUNSEL FAILED TO RESEARCH AND INVESTIGATE THE CIRCUMSTANCES SURROUNDING THE SEARCH WARRENT AND HOW USED BY POLICE DETECTIVES THAT WAS SERVED UPON PETITIONERS WIFE FOR PURPOSES OF SECURING EVIDENCE.

15. PETITIONERS DECISION TO PLEAD GUILTY WAS PREDICATED ON INEFFECTIVE ASSISTANCE OF COUNSEL, THUS MAKING PETITIONERS GUILTY PLEAS UNKNOWINGLY, UNINTELLIGENTLY AND VOLUNTARILY MADE.

A. PETITIONER DID NOT EFFECTIVELY WAIVE ANY OF THE CONSTITUTIONALLY PROTECTED HEARINGS IN ENTRY OF HIS GUILTY PLEA(S). COUNSELS FAILURE LED TO AN UNKNOWING AND UNINTELLIGENT PLEA.

B. TRIAL COUNSEL FAILED TO PROVIDE A MEANINGFUL RELATIONSHIP WITH THE PETITIONER. COUNSEL VISITED PETITIONER FOR ONLY A VERY SHORT TIME PRIOR TO ENTRY OF PETITIONERS GUILTY PLEAS. HAD COUNSEL ATTEMPTED TO CREATE ANY KIND OF ATTORNEY-CLIENT RELATIONSHIP WITH PETITIONER, HE WOULD HAVE RECIEVED INFORMATION FROM PETITIONER TO BE USED AT TRIAL FOR A PROPER DEFENSE

C. COUNSEL HAD NO INTENTION ON ASSISTING PETITIONER AT TRIAL AS COUNSEL SOUGHT TO ENTER INTO PLEA NEGOCIATIONS IMMEDIATELY FOLLOWING APPOINTMENT OF COUNSEL. ON OCTOBER 17, 2003, LESS THAN (3) WEEKS AFTER BEING APPOINTED AS COUNSEL, AS COUNSEL SENT A LETTER TO PROSECUTOR KELLIE ANN VILLORIA

SEEKING A PLEA AGREEMENT (PETITIONER HAD REQUESTED A COPY OF THE ACTUAL LETTER ON NUMEROUS OCCASSIONS, BOTH COUNSEL AND THE STATE FAILED TO PROVIDE THE REQUESTED DOCUMENT). PETITIONER HAS YET TO EVER LAY EYES ON THIS LETTER. COUNSEL COULD NOT POSSIBLY MAKE AN INFORMED DECISION TO ADVISE PETITIONER TO ENTER INTO GUILTY PLEA(S) WHEN COUNSEL DID NOT ATTEND, DID NOT POSESS THE CRITICAL NECESSARY EVIDENCE, AS IT RESULTS FROM THE AFOREMENTIONED PRE-TRIAL HEARINGS. THEREFORE, COUNSELS ADVICE TO PETITIONER TO ENTER GUILTY PLEAS WERE BASED UPON A LACK OF EVIDENCE, WAS ERRONEOUS ON PART OF COUNSEL, RENDERING PETITIONER'S GUILTY PLEAS UNCONSTITUTIONALLY INFIRM.

16. COUNSEL FAILED TO INFORM PETITIONER OF HIS ABILITY TO WITHDRAW HIS GUILTY PLEAS PRIOR TO SENTENCING! NEVER.

A. COUNSEL SHOULD HAVE INFORMED PETITIONER OF HIS RIGHT TO WITHDRAW HIS PLEA, ESPECIALLY AT THE CONCLUSION OF THE COURTS HEARING WHEREIN IT WAS DETERMINED THAT THE STATE WAS GIVEN THE OPPORTUNITY TO PRESENT THE PRIVILEGED SPOUSAL COMMUNICATIONS THROUGH THE HEARSAY TESTIMONY OF DET. HERERRA AT SENTENCING. COUNSEL'S FAILURE TO INFORM PETITIONER OR ACT ON PETITIONERS BEHALF AT THIS CRITICAL STAGE IN/OF THE PROCEEDINGS WAS PREJUDICIAL TO PETITIONER AS PETITIONER DESIRED TO WITHDRAW HIS GUILTY PLEAS ONCE HE WAS INFORMED THE STATE WOULD BE ABLE TO PRESENT THIS EVIDENCE AT SENTENCING THAT COUNSEL ADVISED PETITIONER THE SENTENCING COURT WOULD NOT BE PRIVY TO.

PETITIONER DESIRED, AND CONTINUES TO DESIRE TO WITHDRAW HIS GUILTY PLEAS BASED UPON THE TOTALITY OF THE CIRCUMSTANCES IN THIS PETITION. PETITIONER WOULD HAVE INSISTED ON PROCEEDING TO TRIAL IN AN ATTEMPT TO RECIEVE A

MUCH LESSER SENTENCE INSTEAD OF FACING A COURT, ULTIMATELY BIASED, IN AN ATTEMPT AGAIN, TO RECIEVE A MUCH LESSER SENTENCE AND THUS, RECIEVED NO BENEFIT FROM ENTERING INTO A PLEA AGREEMENT.

B. COUNSEL REPEATEDLY INSISTED THAT PETITIONER SHOULD TAKE A PLEA BARGAIN FROM THE ONSET OF REPRESENTATION AND 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.

C. PETITIONER WAS LEFT WITH NO OPTION BUT TO TAKE THE PLEA VERSUS GOING TO TRIAL WITH AN ATTORNEY WHO WAS ILL-PREPARED AND WOULD NOT ASSIST PETITIONER IN A REASONABLE EFFECTIVE MANNER BASED ON COUNSEL'S FAILURE TO INVESTIGATE.

D. COUNSEL INFORMED PETITIONER THAT A JURY WOULD CONVICT ON ALL COUNTS IF THEY WERE TO CONVICT ON ONE (1) COUNT, THUS, PETITIONER NEEDED TO ENTER A GUILTY PLEA, WHEREIN HE ULTIMATELY RECIEVED FORTY-FIVE (45) YEARS TO LIFE. COUNSEL ALSO INFORMED PETITIONER THAT THIS COURT WOULD NOT BE SUBJECTED TO ALL THE ALLEGED FACTS SOURONDING THE INSTANT CASE AND THEREFORE PETITIONER WOULD RECIEVE A MUCH LESSER SENTENCE THAN ULTIMATELY IMPOSED. THIS AMOUNTS TO COERCION, WHEREIN PETITIONER ENTERED A GUILTY PLEA BASED ON MIS-INFORMATION PRESENTED BY COUNSEL.

17. COUNSEL FAILED TO PRESERVE ISSUES FOR APPELLATE REVIEW PRIOR TO ENTRY OF PLEA, THEREFORE, PETITIONER DID NOT KNOWINGLY WAIVE ANY CLAIMS FOR RELIEF.

18. COUNSEL CLEARLY SHOWED HIS INTENTIONS TO HAVE PETITIONER TAKE A GUILTY PLEA, BACK ON OCT. 17, 2003 (PRIOR TO ARRAIGNMENT) MENTIONED HEREIN ABOVE, WHERE COUNSEL WROTE A LETTER TO THE DISTRICT ATTORNEY REQUESTING THAT HIS CLIENT WANTED TO PLEAD GUILTY AND YET COUNSEL MOVED FORWARD ON OCTOBER, 23, 2003, FOR ARRAIGNMENT IN DISTRICT COURT AND ULTIMATELY CONTINUED IT UNTIL NOV. 6, 2003, WHEREIN THE RECORD SHOWS PETITIONER ENTERED "NOT GUILTY PLEAS" ON ALL COUNTS, THE FACT THAT COUNSEL ASKED FOR A PLEA ALLEGEDLY ON PETITIONER'S BEHALF ON OCT. 17, 2003, PRIOR TO EVEN BEING ARRAIGNED, PROVES IT.

19. AGAIN, COUNSEL INFORMED PETITIONER IF HE PLED GUILTY, HE WOULD RECIEVE LESS THAN THE MANDATORY SENTENCE AVAILABLE UNDER PREVAILING STATUTES IF HE ENTERED A GUILTY PLEA DUE TO THE FACT THAT PETITIONER (1) HAD NOT INVOKED HIS RIGHT TO A JURY TRIAL (2) HAD NOT SUBJECTED THE ALLEGED VICTIM INTO TESTIFYING AT A POSSIBLE JURY TRIAL, AND (3) PETITIONER WOULD BE PLACED IN BEST POSSIBLE LIGHT POSSIBLE BEFORE THE SENTENCING COURT AND DUE TO THE FACT OF COUNSEL'S PROMISE OF THE SENTENCING COURT BEING ABSOLVED OF THE FACTS SURROUNDING THE INSTANT OFFENSES. 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.

20. COUNSEL, THIS COURT AND THE PROSECUTION FAILED TO SEEK A COMPETENCY HEARING IN ACCORDANCE WITH NRS 178.405 AS PETITIONER WAS INCOMPETENT TO ENTER INTO HIS GUILTY PLEAS.

A. COUNSEL FAILED TO SEEK INFORMATION REGUARDING PETITIONERS COMPETENCY, WHEN COUNSEL HIMSELF "KNEW" OF PETITIONERS APPARENT MENTAL DEFICIENCIES.

B. 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 PURPOSE 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 PRONOUNCEMENT OF THE JUDGMENT, THEREAFTER.

FURTHERMORE, NEVADA PROVIDES THE COURT WITH THE MEANS TO SUSPEND THE TRIAL WHEN QUESTIONS OF 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 A 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 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 CLEARLY INFORMED THE COURT OF PETITIONER'S INABILITY TO UNDERSTAND THE INSTANT PROCEEDINGS.

> [TRIAL COUNSEL]..... BASICALLY HIS MIND BLOCKED THEM OUT. HIS MIND WOULDNT LET HIM REMEMBER WHAT HAPPENED. AND I THINK ITS [redacted] AKIN TO LIKE POST-TRAMATIC STRESS DISORDER OR SOMETHING LIKE THAT.
>
> BUT RIGHT NOW MY MIND IS DRAWING A BLANK.
>
> HE IS A "DANGER" TO HIMSELF.

SEE (SENTENCE TRANSCRIPTS, APRIL 7, 2004, PAGE 13, LINES 16, 19-20, 21-22. PAGE 14, LINES 11-12, PAGE 23, LINES 7-8).

C. COUNSEL HAD A DUTY TO INVESTIGATE FARTHER INTO THE MENTAL STATUS OF PETITIONER. AS NOTED BY COUNSEL, PETITIONER IS SUFFERING FROM WHAT COUNSEL DEEMED "POST-TRAMATIC STRESS DISORDER" WHICH HAS PRECLUDED PETITIONER FROM ENTERING INTO A KNOWING, INTELLIGENT AND VOLUNTARY PLEA. IN THE INSTANT CASE, PETITIONER COULD NOT POSSIBLY ASSIST HIS COUNSEL, OR CONSULT WITH COUNSEL IN AN EFFECTIVE MANNER IF HE "BLOCKED OUT" IMPORTANT ASPECTS OF THE CASE OR HIS OWN ACTIONS.

D. COUNSEL FAILED TO FILE A MOTION FOR PSYCHOLOGICAL EVALUATION. COUNSEL FAILED TO FILE A REQUEST ANY FORM OF CONTINUENCE OR TO INVESTIGATE FURTHER, THE ISSUE OF PETITIONER'S COMPETENCY. COUNSEL'S DEFICIENT PERFORMANCE GREATLY PREJUDICED PETITIONER, WHEREIN PETITIONERS CURRENT PLEA(S) AND CONVICTIONS ARE UNCONSTITUTIONAL.

21. COUNSEL FAILED TO ENSURE THE COURT PROPERLY CANVASSED THE PETITIONER CONCERNING THE FULL CONSEQUENCES OF HIS PLEA.

22. (22). COUNSEL FAILED TO ENSURE THE COURT PROPERLY ADVISED PETITIONER OF THE REQUIREMENTS OF NRS 176.0927 LIFETIME SUPERVISION

AT SENTENCING, APRIL 7, 2004, THE COURT IMPOSED LIFETIME SUPERVISION PURSUANT TO NRS 176.0931 (SENTENCE TRANSCRIPTS, PAGE 84, LINES 23-24, PAGE 85, LINE 1)

THE JUDGMENT OF CONVICTION DOES NOT REFER TO THE APPLICABLE STATUTE. THE PROVISIONS OF NRS 176.0931 INVARIBLY INVOKE THE PROVISIONS OF NUMEROUS OTHER STATUTES TO EVENTUALLY BE USED AGAINST PETITIONER UPON HIS EVENTUAL RELEASE ON PAROLE. PETITIONER WILL EVENTUALLY BE SUBJECTED TO THE PROVISIONS OF NRS 213.1243, NRS 213.1245, NRS 213.1255 AND NRS 213.1258. PETITIONER WAS NEVER INFORMED OF THE PROVISIONS AND RESTRICTIONS OF THESE VARIOUS STATUTES. THE STATUTES WILL PLACE NUMEROUS

RESTRICTIONS ON PETITIONERS PLACES OF EMPLOYMENT, RESIDENCY, AVAILABILITY OF PROFESSIONAL LICENSES AND FORCED MENTAL HEALTH COUNSELING.

23. COUNSEL FAILED TO ENSURE PETITIONER RECIEVED A PSYCHO-SEXUAL EVALUATION AND REPORT PRIOR TO SENTENCING.

PETITIONER WAS CONVICTED OF A SEXUAL OFFENSE WHICH MANDATES PETITIONER MUST APPEAR BEFORE A PSYCHOLOGICAL REVIEW BOARD PRIOR TO BEING ELEGIBLE FOR FUTURE PAROLE CONSIDERATIONS. THE PSYCH BOARD DETERMINES A CANDIDATE POSSIBILITY OF RE-OFFENDING, AND/OR REHABILITATION BASED ON PREVIOUS FINDINGS OF SEXUAL ABERATIONS AS DETERMINED FROM A PSYCHOLOGICAL REPORT (SEXUAL) STEMMING FROM PRE-CONFINEMENT EVALUATIONS. PETITIONER DID NOT RECIEVE SUCH ~~AN~~ PSYCHO-SEXUAL EVALUATION AND SUBSEQUENT REPORT PURSUANT TO THE PROVISIONS OF NRS 176.135 AND NRS 176.139 AS PETITIONER DID REQUEST OF COUNSEL.

NRS 176.135 AND NRS 176.139, WHEN TAKEN INTO COMBINATION, PROVIDE THAT A PRE-SENTENCE REPORT (PSI) MUST CONTAIN A PSYCHOLOGICAL EVALUATION REPORT CONDUCTED BY A PERSON PROFESSIONALLY QUALIFIED TO CONDUCT THE PSYCHO-SEXUAL EVALUATIONS FOR PERSONS CONVICTED OF SEXUAL OFFENSES, SUCH AS PETITIONER. PETITIONER'S PSI REPORT DOES NOT CONTAIN THE PREREQUESET PSYCHOLOGICAL REPORT.

THEREFORE, THE SENTENCING COURT DID NOT HAVE THE FULL INFORMATION BEFORE IT TO DETERMINE THE PROPER SENTENCE TO IMPOSE AGAINST PETITIONER. PETITIONER IS THUS BEING DENIED DUE PROCESS NOW AND IN ALL FUTURE PAROLE BOARD HEARINGS.

24. COUNSEL FAILED TO INVESTIGATE STATEMENTS AND/OR RECORDS PERTAING TO THE ALLEGED SPOUSAL COMMUNICATIONS USED AGAINST THE PETITIONER AT SENTENCING WHEREIN COUNSEL WOULD HAVE SECURED INFORMATION INDICATING MS. BOTELHO HAD A PROPENSITY FOR FALSIFYING INFORMATION (TESTIMONY)

COUNSELS FAILURE TO INVESTIGATE THE ALLEGED STATEMENTS OF PETITIONERS EX-WIFE, MS. BOTELHO ADMITTED AS "PRIOR BAD ACTS" EVIDENCE ON APRIL 7, 2004 AT SENTENCING THROUGH DET. HERRERRA WAS HIGHLY PREJUDICIAL TO PETITIONER. COUNSELS FAILURE LED TO AN ADMITTANCE OF TESTIMONY WITH NO-CROSS EXAMINATION POSSIBLE. IF COUNSEL HAD INVESTIGATED, HE WOULD HAVE HAD THE FACTS NECESSARY TO PRESENT TO COURT AFTER INTERVIEWING, MS. BOTELHO THUS PROVING MS. BOTELHO'S INACCURACIES.

ON FEB 3, 2004, THE PROSECUTION FILED A NOTICE OF INTENT TO INTRODUCE PRIOR OR OTHER BAD ACTS EVIDENCE AT SENTENCING.

COUNSEL FAILED TO PROPERLY FILE MOTION TO RECUSE THE JUDGE IN THE CASE, AS THE COURT HEARD HIGHLY PREJUDICIAL ADVERSE TESTIMONY AS OUTLINED HEREIN AND CONTAINED IN THE RECORD AND SHOULD HAVE RECUSED ITSELF. THE RECORD CLEARLY SHOWS THAT THIS COURT REPEATEDLY REFUSED TO RECUSE ITSELF AND SAID IT WAS DUE TO COUNSELS FAILURE TO ADHERE TO PROCEDURES SET FORTH IN NRS 1.230 AND NRS 1.235.

THE COURT STATES AS FOLLOWS:

> **THE COURT:** THE STATUTE, THE GROUNDS FOR DISQUALIFYING A JUDGE, NRS 1.230 AND NRS 1.235, PROCEDURES FOR DISQUALIFYING A JUDGE, DO YOU HAVE A PROBLEM WITH THAT?

TRANSCRIPTS OF PROCEEDINGS, MARCH 11, 2004, PAGE 24, LINES 23-24, PAGE 25, LINES 1-2.

25. COUNSEL FAILED TO FILE PROPER MOTIONS FOR RECUSAL IN ACCORDANCE WITH NRS 1.230 AND NRS 1.235, THUS ALLOWING THE JUDGE TO CONTINUE IN SENTENCING PETITIONER.

26. COUNSEL ALLOWED THE SENTENCING COURT TO RELY ON FACTUALLY UNTRUE, PALPABLE PREJUDICIAL EVIDENCE.

27. COUNSEL FAILED TO REQUEST A LESSER SENTENCE AVAILABLE AT SENTENCING HEARING ON APRIL 7, 2004.

28. COUNSEL FAILED TO REQUEST CONCURRENT SENTENCES BASED PARTLY IN THAT THE OFFENSES WERE FROM "ONE CONTINUOUS ACT", ALSO THE PSI REPORT INDICATES, THE ALLEGED VICTIMS MOUTH WAS TAPED, THUS, IT WAS IMPOSSIBLE FOR PETITIONER TO HAVE FORCED THE VICTIM TO PERFORM ORAL SEX UPON HIM, THEREBY NEGATING ONE SENTENCE OF 20 TO LIFE FOR SEXUAL ASSAULT AS ALLEGED IN COUNT III.

COUNSEL MADE ADVERSE STATEMENTS TO THE COURT, INCLUDING THAT PETITIONER'S CRIME WAS "HORRIBLE" (SENTENCE 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 THEN CLOSES HIS SENTENCE ARGUMENT IN "CONCURRING" WITH PAROLE AND PROBATION'S RECCOMENDATIONS OF LIFE SENTENCES. Id. AT PAGE 16, LINES 1-9.

PETITIONER WAS AFFORDED THE OPPORTUNITY TO RECIEVE A MUCH LESSER SENTENCE OF FIVE (5) TO TWENTY (20) YEARS, HOWEVER, THE COURT NEVER CONSIDERED SUCH A SENTENCE STRUCTURE, PART IN DUE TO COUNSEL'S FAILURE TO REQUEST SUCH A SENTENCE OF PETITIONERS BEHALF.

29. COUNSEL FAILED TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE TO THE SENTENCE COURT IN AN ATTEMPT TO SECURE A LESSER AVAILABLE SENTENCE FOR PETITIONER.

30. COUNSEL FAILED TO INTERVIEW POTENTIAL WITNESSES WHO WERE WILLING AND AVAILABLE TO TESTIFY BEFORE SENTENCING COURT AS TO PETITIONERS WORK ETHICS, LIFESTYLE, SOCIAL BACKGROUND AND MORAL CHARACTERISTICS OF PETITIONER. THIS INFORMATION WOULD HAVE HELPED THE SENTENCING COURT IMPOSE A LESS SEVERE SENTENCE. COUNSEL FAILED TO INVESTIGATE AND ADMIT EVIDENCE THAT EXISTED TO REFUTE THE PREJUDICIAL TESTIMONY OF DET. HERERRA CONCERNING PRIVILEGED MARITAL COMMUNICATIONS. COUNSEL'S INVESTIGATIONS WOULD HAVE PROVEN MS. BOTELHO HAD A PROPENSITY FOR FALSIFYING EVIDENCE, AS SHE HAD FILED FOR DIVORCE AGAINST PETITIONER WHEREIN COURT DOCUMENTS CLEARLY 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" OR HAVE SEXUAL RELATIONSHIPS WITH ANY MINOR.

THE FOLLOWING PEOPLE WANTED TO TESTIFY AT SENTENCING, IN AN ATTEMPT TO HUMANIZE PETITIONER BEFORE THIS COURT, IN AN ATTEMPT TO SECURE A LESSER AVAILABLE SENTENCE:

WILLIAM BOTELHO	FATHER
WILLIAM BOTELHO	BROTHER
ALICE BOTELHO	GRAND MOTHER
LEEANNE FISH	SISTER
RON FISH	BROTHER-IN-LAW
MARY JO CHERRY	SISTER
DAN DIEHL	FRIEND

31. TRIAL COUNSEL WAS INEFFECTIVE IN ALLOWING PETITIONER TO BE SUBJECTED TO A CRUEL AND UNUSUAL SENTENCE STRUCTURE.

32. COUNSEL FAILED TO CORRECT AN AMBIGUOUS AND VAGUE SENTENCE ADMINISTERED BY THE COURT.

THE COURT APPEARED TO ENTER AN AMBIGUOUS SENTENCE AGAINST THE PETITIONER, AS THE FOLLING EXCERPS FROM THE RECORD INDICATES CONFUSION BY 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 ELEGILIBILITY 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 ~~MEANS~~ WILL BE LIFE WITH PAROLE ELEGILIBILITY AFTER FIVE YEARS HAS BEEN SERVED.

SENTENCE TRANSCRIRTS, APRIL 7, 2004, PAGE 83, LINES 1-11

THE COURT APPEARS UNAWARE OF THE AVAILABLE SENTENCE AS TO KIDNAPPING AS THE COURT THEN REITERATES ABOVE, "FIFTEEN DEFINITE WITH A FIVE YEAR TERM!" Id. ~~EF~~ HOWEVER, THE JUDGMENT OF CONVICTION ENTERED BY THIS 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 AMOUNTS TO "PLAIN ERROR" AND ENTITLES PETITIONER TO A NEW SENTENCING HEARING, AS THE COURT FAILED TO CHOOSE ITS WORDS CAREFULLY, AND PETITIONER WAS UNAWARE OF THE SENTENCE IMPOSED BY THE COURT.

33. COUNSEL FAILED TO KEEP THE COURT FROM RELYING ON UNTRUE AND OR IMPALPABLE PREJUDICIAL EVIDENCE.

THE COURT WAS ALLOWED TO RELY ON STATEMENTS OFFERRED BY DETECTIVE HERERRA AS TRUE, AS IT PORTAINS TO THE ALLEGATIONS OF DET. HERERRA CONCERNING PETITIONERS ALLEGED FANTASIES OF "DISMEMBER" 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 7, 2004, PAGE 82, LINES 2-6). THE COURT WENT ON TO NOTE, "AND I THINK THAT, HAVING HEARD EVERYTHING, THATS STILL A VALID CONCERN." Id. AT PAGE 82, LINES 19-20. THE COURT WENT ON TO SENTENCE PETITIONER TO AN EXTREMELY HARSH SENTENCE, BASED ON THE ERRONEOUS, PERJURED TESTIMONY BY DETECTIVE GREG HERERRA.

V11. 721

GROUND FOUR

PETITIONERS GUILTY PLEA WAS NOT ENTERED KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY IN VIOLATION OF HIS RIGHTS TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

SUPPORTING FACTS: PETITIONER IS INCORPORATING PARTS OF ORIGINAL GROUNDS INTO THE BODY OF THIS ISSUE.

PETITIONER ENTERED GUILTY PLEAS IN OPEN COURT ON DEC. 11, 2003, ON ADVICE OF COUNSEL. PETITIONER ASSERTS HIS PLEAS ARE UNCONSTITUTIONAL FOR THE REASONS SET FORTH BELOW:

1. THIS COURT FAILED TO ADVISE PETITIONER, PRIOR TO ACCEPTING HIS GUILTY PLEA(S), OF THE FACTS THAT THIS COURT HAD ULTIMATE AUTHORITY TO IMPOSE CONSECUTIVE PRISON TERMS. THE COURT ADVISES PETITIONER, AS FOLLOWS:

> THE COURT: OKAY, CONCURRENT MEANS THAT THEY CAN ALL BE DONE TOGETHER. CONSECUTIVE MEANS YOU DO ONE, THEN THE OTHER, THEN THE OTHER, THEN THE OTHER AND SO ON.
>
> DO YOU UNDERSTAND?

SEE TRANSCRIPT OF PROCEEDINGS, CHANGE OF PLEA, DECEMBER 11, 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 SENTENCE RANGE TO BE ULTIMATELY IMPOSED. THIS IS CONTRIDICTORY TO COUNSEL'S ADVICE TO PETITIONER, WHEREIN COUNSEL INFORMED PETITIONER THE SENTENCES WOULD BE IMPOSED CONCURRENTLY DUE TO

PETITIONERS ENTRY OF PLEA AND THE FACTS SURROUNDING THE INSTANT OFFENSES.

2. PETITIONERS COUNSEL, SEAN SULLIVAN, INFORMED PETITIONER HE WOULD RECIEVE LESS THAN THE MANDATORY SENTENCE AVAILABLE UNDER PREVAILING STATUTES IF HE ENTERED A GUILTY PLEA 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 BEST POSSIBLE LIGHT POSSIBLE BEFORE THE SENTENCING COURT DUE TO COUNSEL'S PROMISE OF THE SENTENCING COURT NOT BEING SUBJECTED TO AND/OR ABSOLVED OF THE FACTS SURROUNDING THE INSTANT OFFENSE(S).

COUNSEL INFORMED PETITIONER OF THE ABOVE INFORMATION, TAKEN AS FACTUAL STATEMENTS BY THE PETITIONER, AS THOUGH COUNSEL HAD FIRST-HAND KNOWLEDGE OF A LESSER SENTENCE [redacted] TO BE IMPOSED, AS THOUGH IT HAD BEEN PRE-ARRANGED BY COUNSEL ON BEHALF OF PETITIONER.

THE PLEA CANVASS OF PETITIONER BY THIS COURT ON DEC. 11, 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.

COUNSEL AFFIRMATIVELY MISLED PETITIONER ABOUT THE APPLICABLE LAW AS IT PERTAINS TO THE SENTENCE PETITIONER WOULD ULTIMATELY RECIEVE AND THE LAW AS IT APPLIES TO INFORMATION THE COURT WOULD RELY ON IN DETERMINING AN APPROIATE SENTENCE. COUNSEL'S MISREPRESENTATIONS WERE EXACERBATED BY THE MIS-LOADING 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 HE (PETITIONER) WAS IGNORANT OF THE LAW, AS NOTED ABOVE, HIS PLEA IS NOT VOLUNTARILY AND INTELLIGENTLY MADE.

PETITIONER WOULD HAVE PROCEEDED TO TRIAL IN AN ATTEMPT TO RECIEVE A LESSER AVAILABLE SENTENCE IF HE HAD BEEN PROPERLY ADVISED OF THE LAW AS IT PERTAINS TO THE PLEA(S) HE ENTERED. BASED UPON THE CURRENT SENTENCE IMPOSED UPON PETITIONER BY THIS COURT, PETITIONER MUST SERVE A MINIMUM OF FORTY-FIVE (45) YEARS INCARCERATED. 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.

3. THE COURT FAILED TO ADVISE PETITIONER OF THE REQUIREMENTS OF NRS 176.09.27 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 (48) HOURS. NRS [redacted] 179.D.460(1)-(4). FAILURE TO COMPLY WITH THE REGISTRATION REQUIREMENTS IS A CATAGORY D FELONY. NRS 179.D.550. BEFORE A SEX OFFENDER IS SENTENCED, THE DISTRICT COURT IS REQUIRED TO INFORM THE OFFENDER OF THE REGISTRATION REQUIREMENT. NRS 176.09.27(1)(c). PETITIONER ASSERTS THAT HIS GUILTY PLEAS ARE INVALID BASED UPON THE COURTS FAILURE TO ADHERE TO THE ABOVE NOTED APPLICABLE NRS, AND TO ADVISE PETITIONER PRIOR TO ENTRY OF HIS PLEA(S) AS OF THE REQUIREMENTS AS OUTLINED

IN NRS 176.0927, NRS 179D.460, AND NRS 179D.550.

PETITIONERS PLEA IS INVALID DUE TO THE COURTS FAILURE TO INFORM PETITIONER OF THE DIRECT CONSEQUENCES OF HIS PLEA.

THE 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 THE EVENTUAL RELEASE FROM INCARCERATION. THE COURT ALSO FAILED TO ADVISE PETITIONER OF THE FULL PANOPOLY OF RAMIFICATIONS AND IMPLICATIONS REGUARDING LIFETIME SUPERVISION.

4. THIS COURT FAILED TO ADVISE PETITIONER OF THE REQUIREMENTS AND RESTRICTIONS TO BE IMPOSED UPON HIM PURSUANT TO NRS 213.1243, NRS 213.1245, NRS 213.1255 AND ALL THE 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.

IN ADDITION, PETITIONER DID NOT EXECUTE ANY DOCUMENTS PRIOR TO ENTRY OF HIS PLEA OR PRIOR TO SENTENCING IN ACCORDANCE WITH NRS 176.0927. THEREFORE, PETITIONERS PLEA IS CONSTITUTIONALLY INFIRM.

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

PETITIONER ENTERED HIS GUILTY PLEA(S) ON DECEMBER 11, 2003. APPROXIMATELY SIXTY (60) DAYS LATER, ON FEB. 3RD, 2004, THE PROSECUTION FILED A NOTICE OF INTENT TO INTRODUCE PRIOR OR OTHER BAD ACTS EVIDENCE AT SENTENCING HEARING. THIS AMOUNTED TO A BREACH OF CONTRACT, THE PLEA. PETITIONER WOULD NOT HAVE ENTERED INTO THE PLEA KNOWING THE PROSECUTION HAD OR WOULD SEEK, AND ULTIMATELY GAIN APPROVAL, FOR THE ENTRY OF

PRIVILEGED MARITAL COMMUNICATIONS ALLEGEDLY MADE BETWEEN PETITIONER AND HIS EX-WIFE, MELISSA BOTELHO.

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, DET. HORERRA HAD RECIEVED INFORMATION FROM DEFENDANTS 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 CRUCIAL INFORMATION TO THE DEFENSE

ADDITIONALLY, DET. HORRERA TESTIFIED AT SENTENCING CONCERNING "DISMEMBERMENT", A STATEMENT LATER REDACTED BY DET. HORRERA (PERJURY). 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.

BY THE PROSECUTION KNOWINGLY ALLOWING PETITIONER TO ENTER INTO A GUILTY PLEA WITHOUT THE KNOWLEDGE OF THE PROSECUTION'S INTENTION TO ENTER THE UNKNOWN PREJUDICIAL TESTIMONY OF DETECTIVE HORERA, THE PROSECUTION WILLFULLY VIOLATED THE PLEA AGREEMENT. THE PROSECUTIONS UNDERHANDED AND INSIDUOUS ACTIONS OF SEEKING THE ENTRY OF EVIDENCE AFTER PETITIONER ENTERED GUILTY PLEAS RENDERS PETITIONERS GUILTY PLEAS CONSTITUTIONALLY INFIRM.

6. THE COURT ERRED IN DENYING PETITIONER'S REPEATED MOTIONS FOR RECUSAL AND ALLOWED ENTRY OF HEARSAY EVIDENCE CONCERNING PRIVILEGED SPOUSAL COMMUNICATIONS.

THE SENTENCING COURT WAS BIASED BY BEING SUBJECTED TO FALSE TESTIMONY OF DET. HERERRA CONCERNING PRIVILED SPOUSAL COMMUNICATIONS. ADDITIONALLY, THE COURT WAS SUBJECTED TO THE MIS-LEADING EVIDENCE, THEREFORE, THE COURT WAS BIASED PRIOR TO IMPOSING SENTENCE AGAINST PETITIONER AND SHOULD HAVE RECUSED ITSELF IN ORDER FOR PETITIONER TO BE SENTENCED BEFORE AN IMPARTIAL COURT, AS THE COURT REFUSED TO ALLOW COUNSEL TO ORRALLY SEEK RECUSAL AND/OR A CHANGE OF VENUE. THE COURT RELIED ON PROCEDURES IN NRS 1.230 AND NRS 1.235.

7. THE COURT RELIED ON STATEMENTS OFFERED BY DETECTIVE HERERRA AS TRUE, AS IT PERTAINS TO THE ALLEGATIONS OF DET. HERERRA CONCERNING PETITIONERS ALLEGED FANTASIES OF "DISMEMBERING" A YOUNG 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 RE-TURNED TO HER FAMILY."

(SENTENCE TRANSCRIPTS APRIL 7, 2004, PAGE 82, LINES 2-6).

THE COURT WENT ON TO NOTE "AND I THINK THAT AFTER HAVING HEARD EVERYTHING, THATS STILL A VALID CONCERN."

Id. AT PAGE 82, LINES 19-20.

THIS COURT THEN WENT ON TO SENTENCE PETITIONER TO AN EXTREMELY HARSH SENTENCE OF FORTY-FIVE (45) YEARS TO LIFE IN AN ATTEMPT TO PROTECT SOCIETY FROM WHAT IT DEEMED FUTURE POSSIBLE ACTIONS OF PETITIONER, BASED ON ERRONEOUS, PREJUDICIAL AND PURJURED TESTIMONY BY DET. HERERRA.

THE RECORD CLEARLY SHOWS THAT THIS COURT REPEATLY REFUSED TO RECUSE ITSELF AND SAID IT WAS DUE TO COUNSEL'S FAILURE TO ADHERE TO PROCEDURES SET FORTH IN NRS 1.230 AND NRS 1.235.

THE COURT STATED AS FOLLOWS:

THE COURT: THE STATUTE, THE GROUNDS FOR DISQUALIFYING A JUDGE, NRS 1.230 AND NRS 1.235, PROCEDURES FOR DISQUALIFYING A JUDGE, DO YOU HAVE A PROBLEM WITH THAT?

(TRANSCRIPTS OF PROCEEDINGS, MARCH 11, 2004, PAGE 24, LINES 23-24, PAGE 25, LINES 1-2).

THE COURT WAS TAINTED BY THE PREJUDICIAL, ADVERSE TESTIMONY AS OUTLINED HEREIN AND CONTAINED IN THE RECORD AND SHOULD HAVE RECUSED ITSELF AND GRANTED PETITIONERS MOTION FOR RECUSAL. ADDITIONALLY, THE COURT ERRED IN ALLOWING THE PREJUDICIAL HEARSAY EVIDENCE TO BE PROFFERED AT SENTENCING THROUGH DET. HERERRA, CONCERNING MARITAL PRIVILEGE

THE COURT SHOULD REVERSE PETITIONER'S SENTENCES, AS THEY HAVE BEEN IMPOSED CONSECUTIVELY DUE TO THE STATES INFORMATION THAT WAS DEFINITELY "INFLATED" BEYOND THE TRUTH OF THE MATTER, AS THE TESTIFYING OFFICER LATER ADMITTED, AS WELL AS PETITIONERS' ACTIONS HAVING BEEN "UNINTERRUPTED" AND THUS "CONTINUOUS" IN NATURE.

THE TESTIMONIAL EVIDENCE OF DET. HERERRA WAS FALSE IN ITS ENTIRETY AND INFLUENCED THIS COURT WITHOUT GIVING THE PETITIONER THE OPPORTUNITY TO REBUT THE PROFFERED PREJUDICIAL TESTIMONY.

8. THIS COURT ENTERED AN AMBIGUOUS SENTENCE AS FOLLOWS:

A. AS THE RECORD INDICATES, THE COURT SEEMED CONFUSED.

B. **THE COURT:** I HEREBY SENTENCE YOU, MICHAEL TODD BOTELHO, FOR THE CONVICTION OF COUNT I, KIDNAPPING TO A TERM OF LIFE IMPRISON WITH PAROLE ELEGILIBILITY AFTER A TERM OF 15 YEARS.

PAROLE & PROBATION: YOUR HONOR, THAT WAS A MISTAKE, IT SHOULD BE FOR FIVE (5) YEARS.

THE COURT: FIVE YEARS?

PAROLE & PROBATION: YES

THE COURT: OH, YOU ARE RIGHT, FIFTEEN YEARS DEFINITE WITH A FIVE YEAR TERM. THAT WILL BE LIFE WITH PAROLE ELEGILIBILITY AFTER FIVE YEARS HAS BEEN SERVED.

SENTENCE TRANSCRIPTS APRIL 7, 2004, PAGE 83, LINES 1-11

HOWEVER, THE JUDGMENT OF CONVICTION ENTERED BY THIS COURT IMPOSED A LIFE SENTENCE ON COUNT I, IN OPPOSITION TO THE CONFUSING STATEMENTS BY THIS COURT AS NOTED ABOVE.

THE AMBIGUOUS SENTENCE ANNOUNCED ORALLY BY THIS COURT IS CONSIDERED "PLAIN ERROR" AND ENTITLES PETITIONER TO A NEW SENTENCE HEARING...

9. THE COURT WAS BIASED AND PREJUDICIAL IN ITS DETERMINATION OF SENTENCES AGAINST PETITIONER WHEN IT WAS SUBJECTED TO UNDUE INFLUENCE FROM SPOUSAL COMMUNICATIONS TESTIMONY AND PREJUDICIAL MEDIA COVERAGE.

10. THE COURT ALLOWED TESTIMONY EXCLUDED BY THE MARITAL SPOUSE EXCEPTION AS THE COURT SUGGESTED THAT THIS INFORMATION BE BROUGHT IN THROUGH A THIRD PARTY (SEE GROUND TWO, HEREIN ABOVE). COUNSEL REPEATEDLY ASKED THE COURT TO RECUSE ITSELF AFTER DET. HERRERA STATED THAT PETITIONER HAD BEEN HAVING FANTASIES OF "RAPING AND DISMEMBERING A YOUNG GIRL" (HEARSAY). THE COURT ALLOWED IT TO BE BROUGHT IN THIRD PARTY AND WAS SUBJECTED TO THE DAMMING STATEMENT.

11. THE RECORD IS CLEAR THAT THE COURT REPEATEDLY REFUSED TO RECUSE ITSELF AND SAID IT WAS DO TO COUNSELS FAILURE TO ADHERE TO PROCEDURES SET FORTH IN NRS 1.230 AND NRS 1.235.

12. PETITIONER WAS CONVICTED OF A SEXUAL OFFENSE WHICH MANDATES PETITIONER MUST APPEAR BEFORE A PSYCHO-SEXUAL (PSYCHOLOGICAL) REVIEW BOARD PRIOR TO BEING ELEGIBLE FOR ANY FUTURE PAROLE CONSIDERATIONS. THE PSCHOLOGICAL REVIEW BOARD DETERMINES A CANDIDATES POSSIBILITY OF RE-OFFENDING AND/OR REHABILITATION BASED ON A PREVIOUS FINDING OF SEXUAL ABERATIONS AS DETERMINED FROM A PSYCHOLOGICAL REPORT (SEXUAL) STEMMING FROM PRE-CONFINEMENT EVALUATIONS.

PETITIONER DID NOT RECIEVE 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 DID REQUEST OF COUNSEL.

NRS 176.135 AND NRS 176.139, WHEN TAKEN TOGETHER IN COMBINATION, PROVIDES THAT A PRE-SENTENCE REPORT "MUST" CONTAIN A PSYCHOLOGICAL EVALUATION REPORT CONDUCTED BY A PERSON PROFESSIONALLY QUALIFIED

TO CONDUCT THE PSYCHO-SEXUAL EVALUATIONS FOR PERSONS CONVICTED OF SEXUAL OFFENSES, SUCH AS PETITIONER. PETITIONERS PRE-SENTENCE REPORT (PSI) DOES NOT CONTAIN THE PREREQUISITE PSYCHOLOGICAL REPORT.

THEREFORE, THE SENTENCING COURT DID NOT HAVE THE FULL INFORMATION BEFORE IT TO DETERMINE THE PROPER SENTENCE TO IMPOSE AGAINST THE PETITIONER. ADDITIONALLY; PETITIONER WAS DENIED DUE PROCESS, AS THE FUTURE HEARINGS CONDUCTED BY THE NDOC AND/OR NEVADA PAROLE BOARD IS WITHOUT THE NECESSARY DOCUMENTATION TO PROPERLY DETERMINE THE PETITIONER'S PROPENSITY FOR RE-OFFENDING, POSSIBLE THREAT TO PUBLIC, ETC.. THEREFORE, IT WILL BE IMPOSSIBLE FOR PETITIONER TO RECIEVE A FAIR AND PROPER HEARING (BOARD DETERMINATION).

PETITIONER WILL BE DENIED DUE PROCESS AT ALL FUTURE PAROLE BOARD HEARINGS AND PETITIONER WAS DENIED DUE PROCESS AT SENTENCING HELD IN THIS COURT.

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 PLEADINGS ARE TRUE AND CORRECT OF HIS OWN KNOWLEDGE, EXCEPT AS TO THOSE MATTERS STATED ON INFORMATION AND BELIEF, AS TO SUCH MATTERS HE BELIEVES THEM TO BE TRUE.

SIGNED UNDER PENALTY OF PERJURY IN ACCORDANCE WITH NRS 208.165

Michael T Botelho
PETITIONER, IN PRO SE

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 THE 20th DAY OF JANUARY, 2010, 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:

NEV. ATTORNEY GENERAL
100 N. CARSON ST.
CARSON CITY, NV. 89701-4717

WASHOE COUNTY DISTRICT ATTORNEY
BOX 30083
RENO, NV, 89520-3083

Michael T Botelho

///

MICHAEL T. BOTELHO #80837
PETITIONER, IN PRO SE.

EXHIBIT "A"

1 PAGE

ORIGINAL

CODE 2715

FILED

JUN 30 2006

RONALD A. LONGTIN, JR., CLERK

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.

THE STATE OF NEVADA,

Respondent.

CASE NO. CR03P2156

DEPT. NO. 3

AMENDED ORDER FOR RESPONSE AND APPOINTMENT OF COUNSEL

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

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

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

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

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

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

EXHIBIT "A"

EXHIBIT 1 734 64

EXHIBIT "B"

14 PAGES

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 -8 AM 10: 35
RONALD A. LONGTIN, JR.
BY
DEPUTY

ORIGINAL

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MICHAEL TODD BOTELHO,

Petitioner,

vs. Case No. CR03P-2156

Warden, Lovelock Correctional Center, and
THE STATE OF NEVADA, Dept. No. 3

Respondents.

_____/

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS
(POST CONVICTION)

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

EXHIBIT "B"

EXHIBIT 70

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

EXHIBITS CONCERNING THE SUPPLEMENTAL PETITION

STATEMENT OF THE CASE

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

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

STATEMENT OF FACTS:

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

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

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

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.

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

through Officer Herrera because hearsay was admissible during sentencing. Ex. pp. 52-102. During the sentencing hearing, trial counsel did not call Melissa Botelho as a witness and objected to her statements to Officer Herrera as a violation of Petitioner's Confrontation Clause. However, because of the district court's ruling that Melissa Botelho would not be called as a witness in compliance with trial counsel's wishes, her hearsay statement could be admissible through the testimony of Officer Herrera. Petitioner's trial counsel objected to Officer Herrera's testimony of Melissa Botelho based upon a violation of the Confrontation Clause. However, because of the prior ruling, Officer Herrera was able to testify that Melissa Botelho advised him on one occasion over the telephone that Petitioner's fantasy included kidnapping a young girl, raping and dismembering her. Ex. pp. 145-230.

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

6. During their marriage, Petitioner advised his wife, Melissa, about the *Singleton* case where the older man kidnapped a young girl, raped her, and cut off her arms, leaving her in the desert to die;
7. Petitioner advised his wife, Melissa, that he thought Mr. *Singleton* was a very sick man;
8. Petitioner never advised his wife, Melissa, that he also had similar fantasies;
9. Had trial counsel spoken with Melissa Botelho, he would have learned that he never told her that he had these fantasies;
10. Petitioner explained that their marriage broke up because she was seeing another man and their first son was from another man, which was told to him after they were in divorce proceedings;
11. As such, Melissa Botelho never said that Petitioner had such fantasies. Additionally, according to Petitioner, if she did tell Officer Herrera anything like that she was mixing up the story with the *Singleton* case. Additionally, Petitioner opined that if she had said anything derogatory, she had motive to lie because he confronted her about the illegitimacy of his first son and she would not be receiving any child support payments now.

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

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

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

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

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

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

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. Drs. Mahaffey, Ing, and Skewis are experts who can competently provide the sentencing court opinions through testing, interview(s), and prediction of Petitioner's future dangerousness. These experts have proven themselves throughout the years to be able to look objectively at aberrant sexual conduct and determine the potential for recidivism and rehabilitation of a sexual offender through a psychosexual evaluation. Therefore, Petitioner received ineffective assistance of trial counsel in not

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

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

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

CONCLUSION:

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

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

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

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

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

DATED this 8 day of August, 2006.

Mary Lou Wilson

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

VERIFICATIONS

AND SIGNATURES

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.

Michael T Baldwin
Petitioner

Mary Lou Wilson
Attorney for petitioner
Lovelock Correctional Center 8-5-06

CERTIFICATE OF MAILING

I, Mary Lou Stilson do hereby certify that pursuant to NRCP 5(b), on the 8 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
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George Chanos
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Michael Todd Botelho
Inmate Number 80837
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Post Office Box 359
Lovelock, Nevada 89419

EXHIBIT "C"

4 PAGES

ORIGINAL

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

IN AND FOR THE COUNTY OF WASHOE

* * *

MICHAEL TODD BOTELHO,

Petitioner,

v. Case No. CR03P2156

JACK PALMER, Dept. No. 3

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause is before the court upon a petition for writ of habeas corpus (post-conviction). Petitioner Botelho stood trial on multiple sexual offenses stemming from a scheme in which he pretended to need a babysitter and used that as a ruse to get the 14 year old victim in his car. He drove her to a secluded spot and committed the crimes in the car. Upon his conviction he appealed but the judgment was affirmed, except to remand to correct the judgment.

He then filed a petition for writ of habeas corpus in which he raised some sixteen claims for relief. The court appointed counsel who filed a supplement to the petition. The State moved to dismiss most of the claims and that motion was partially granted. The majority of the claims were dismissed by an order filed on December 29, 2006. That interim order is now incorporated into this final judgment by reference. Four claims survived and the court scheduled a hearing for those claims.

EXHIBIT 1 "C"

EXHIBIT 89

On May 11, 2007 the parties appeared for a hearing on the surviving claims. Petitioner, however, abandoned all but the claim that trial counsel rendered ineffective assistance by failing to arrange for a psycho-sexual evaluation for use in mitigation at sentencing. On that claim, petitioner presented only the testimony of Dr. Martha Mahaffey who conducted such an evaluation. There was no testimony from petitioner or from trial counsel even though both were present during the hearing.

One who would claim ineffective assistance of counsel bears the burden of showing, by a preponderance of the evidence, that the specific decisions of counsel fell below an objective standard of reasonableness and that but for the failings of counsel a different outcome was reasonably likely. *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004). Counsel is presumed to have fully discharged his duties and to have made reasonable tactical decisions. 120 Nev. at 1012, 103 P.3d at 32. The petitioner bears the burden of overcoming that presumption. Petitioner must prove both elements of the claim and if either is lacking then no relief is available. *Id.*

The court first notes the absence of any evidence demonstrating that trial counsel did or did not arrange a psycho-sexual evaluation. The court is thus left with the presumption that counsel fully discharged his duties and made reasonable tactical decisions concerning what evidence to present at sentencing. For that reason alone, the petition must be denied. The court further finds, however, that petitioner was not prejudiced by the lack of testimony such as was provided by Dr. Mahaffey. Her evaluation showed that Botelho was a "moderate/high" risk to re-offend and any sense of optimism about the safety of the community was so qualified, and so guarded, that the court can state with confidence that the result would not have changed. In particular, the court notes the testimony that Botelho must always be prevented from having access to young girls. That goal can be accomplished by leaving Botelho in prison. The sentence was based on the nature of the crime and the character of the defendant and the testimony of Dr. Mahaffey did nothing to alter the court's view of either.

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///

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Because Botelho failed to persuade this court that counsel failed to fully investigate, and because the additional evidence would not have altered the sentence, the petition is denied.

DATED this 25th day of May, 2007.

DISTRICT JUDGE

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

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

DATED: May 31, 2007.

EXHIBIT "D"

20 PAGES

Botelho

IN THE SUPREME COURT OF THE STATE OF NEVADA

COPY

MICHAEL TODD BOTELHO,

Appellant, Supreme Court #49586

vs. District Court #CR03P-2156

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

Respondents.

_____/

APPELLANT'S OPENING BRIEF

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EXHIBIT D

V11. 757

TABLE OF AUTHORITIES

STATUTE

LEGAL JOURNAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL TODD BOTELHO,

Appellant, Supreme Court # 49586

vs. District Court #CR03P-2156

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

Respondents.

_____/

APPELLANT'S OPENING BRIEF

I. STATEMENT OF ISSUE

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

II. STATEMENT OF THE CASE

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

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

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

III. STATEMENT OF THE FACTS

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

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

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

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

IV. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RESPECTFULLY SUBMITTED this 14 day of September, 2007.

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CERTIFICATE OF COMPLIANCE

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

DATED this 14 day of September, 2007.

Mary Lou Wilson

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CERTIFICATE OF MAILING

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

Janette Bloom
Clerk of the Supreme Court
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Carson City, Nevada 89701

The Honorable Judge Jerome Polaha
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EXHIBIT "E"

4 PAGES

Ms. Wilson, July,9, 2007

I am writing in reguards to what has happened in this case. As I have written before, I have yet to get several court documents concerning my case, like the opposition to my original Habeas, they gave it to you, not me and I was not informed as to many things. I dont even haVE A CLUE AS TO WHY THE STATE SAID MY ORIGINAL Petition was illegall. It was formatted correctly and properly argued and federalized. So whats the Problem?

I asked you to file my appeal and I now have several issues I need clarified immediately. Fisst-why did you waive the few grounds that the court was actually considering? You never said a word about that to me, nor did you have my blessing to do so. There was a reason for me filing that Petition and it wasnt to just have counsel arbotrarily waive those grounds without cause and without my knowledge and permission. I didnt know what the hell happened at the hearing. You dont tell me anything and then without a word, just waive the grounds. How am I supposed to argue them in the future when you did that?

You told me to my face that you didnt and wouldnt waive any of the original grounds in my Petition and yet you are filing only information and arguing only one (1) ground in the appeal to the Nevada Supreme Court! How am I supposed to file a proper 2254 Federal Habeas with an unexhausted petition. Was this the Idea? I have my Federal Habeas now finished and just realized that It would be a mess as I have now no opportunity to fully exhaust all the claims in my Petition, not to mention the ones you waived without my knowledge or permission. You know that it will be a mixed petition and I am nearly out of time thanks to Congress and now I cant even call you as my calls are not accepted.

I also want you to know that if Sean Sullivan was going to allegedly testify about another a;lleged assault by allegedly myself, howcome it was never brought to my attention before taking the plea he lied to get me to take. If he knew (allegedly) after me taking the plea, why didnt he tell me at that point. In addition, if he had this infor, he got it from the police and it w

EXHIBIT "F" V11. 778

was then knowingly withheld from me (THE CLIENT) and also causes more grounds and brady violations? If he knew about this alleged incident, why didnt the cops bring that out at sentencing? You know that they could have and most definitely would have so as to ensure my never getting out. Also why didnt the doctor mention that at our little roundtable in Lovelock, she said everything else but failed to mention thT PART, HOW COME? Dont you think it was kinda important for her to know so as to question me correctly?

In addition, I just nbticed that you said in the supplimental Petition that there were three (3) additional grounds and yet you only listed and formATTED one properly. The first ground was at least Federalized but you brought two different arguments with two different counsels in the one ground. That doesnt make it two (2) grounds and as far as the last ground goes, you didnt format it correctly **and didnt bother to Federalize that ground, thus, its no good anyways!**

My life is in your hands at this point and its apparently a mess, Am I wrong? I dont know what to do and then you also went and fast tracked this appeal, WHY? That just gives me less time to try fix what I still can.

How could I raise grounds my own counsel waived, you are acting in my behald and you know the federal courts will say its my too bad since my own counsel did it. How could you waive my grounds that you said in the supplimental Petition to the court, that Petitioner doesnt waive any of the grounds in his Petition then you turned around and did just that! Its impossible to argue those now waived grounds in the Nevada Supreme Court when it was you wh waived them. How can that be addressed?

You had an Oath and a legal and moral obligation to inform me of what was going on and you further put my life in jeopardy by waiving what little action I seemed to have coming. If Sean withheld that crucial information from me, which I know he did, I assure youI will follow up with disbarment proceedings and what ever else I have to do to ruin everyone who has forsook me in ther legal capacity, willfully, wantonly and intentionally.!

I filed thisPetition and you have profoted well with the appointment and its quite apparent when the doctor supposedly will get $2700.00 for an evaluation which the county normally pays only 700.00 for to begin with, not to mention, the doctor makes her quote based on 7.5 hours of roundhouse with me in Lovelock, she was only here with me for 4.5 hours so she did quite well there also. You didnt make the trip to Alaska yourself? On a free ride from the state to cover it? You told me it would work great for you as you were going up their anyways. You did get the state to pay for the trip? My wife and mother are checking into this sceniario. It wqs only later that court papers, well, at least letters to the court from your assistant that she was infact trying to contact Melissa, Did your assistant have all the information I have you, to ask her. Did she go up to Alaska, No she didnt but did you at state expense, at tax payers expense? I am not accusing, but rather just asking at this point.

I need this appeal amended or modified to get all my grounds exhausted nproperly so I am not barred from properly arguing my Federal Petition which has been denied me by my own counsel. I need this properly rectified, arent you supposed to help me and keep me informed of whats going on and what you intend to do before yourdo it?? Thats how its supposed to work within the framework of the law. As far as the state was concerned, I had only 4 viable ussies and you waived them away without any regaurd or imput from whatsoever. If thats all I had, and you gave it all away, then what would I have to stand on but those weaker grounds in Federal court, where would that get me??????

I am checking into what I can do or send to the Nevada Supreme Court to try fix this before its too late unless you can tell me or come see me and make sence of what you have done here and what you intend to do to fix it all. Please dont let me down. I screwed up and deserve to be here but not like that! You also know that if the cops , the prosecution had evidence of another alleged assault, they would have filed additional charges, and you know it. Its just Sean Sullivan working in cblusion with the prosecution to head off any podsible remedy I may have to get me less time, if he (tyey)

(they) could come up with a way together to keep me from making the state and my counsel from looking bad or getting possible sanctions on a later date when some of this was fixed, then they have come up with a sure-fire way to quash that!!!!!!!!!!!!

Remember, if he was going to testify for the state at my Evidentiary hearing, then he either had and hid the information, or the state had and hid the information and either way, was kept from me, and in addition, if he did know this, why wasnt there ansingle document with any mention of this alleged assault in my casefile, if he allegedly had this information, he had to get it from the prosecution, so what is the reason that there is no paper-work (documents) whatsoever mentioning this in the casefile. Again, if it is not a concoction, then its a cover up and It will be exposed as such and when its shown to be just that, then those who protected their fellow attorneys will be disbarred and sued into the stone age.

Again, if he had this information, he had a duty to bring it to my attention, which he did not, if he indeed did have this infr-mation, then why not include it in my casefile. Why was it hidden from me tn til the <u>end</u> of the evidentiary, not before. You know this alleged information prior to this hearing and didnt mention it nor what you planned to do about it. If in fact it were true, it was a Brady violation and much more, and also would have given rise to new grounds which would have made the state and the public defenders office culpible it its underhandedness or at leats sanctionable when it all comes out. I will get to the bottom of t this and will make it known to all the apporpriate agencies within the state and the federal government as well as soem other agencies that would be very interested to know what was done to me by 3 of my counsel and the state and the District Attorneys office.

Its cut and dried, if Sean had this alleged infor, where is it and why didnt he say something to me. If its infact true where is the alleged information and if its infact true, why didnt you tell me about it earlier. You have an ethical, moral and legal obligation to do so, so why didnt you????

I need this fixed ASAP,

Sincerely,

Michael T. Botelho #30619
NSP, Carson City, NV

EXHIBIT "F"

3 PAGES

MICHAEL T. BOTELHO 80837
BOX 7000
NNCC
CARSON CITY, NV. 89702

MARYLOU WILSON, ESQ.

AFTER HAVING NOW RECEIVED THE ORDER OF AFFIRMANCE FROM THE NEVADA SUPREME COURT ON MAY 22, 2008. AND IN ADDITION, SINCE THE COURT FILED SAID AFFIRMANCE MAY 16, 2008 AND WAS SENT TO (ME) 7 DAYS LATER, I NOW ASK AND DEMAND THAT YOU SEND AND ARE MADE AWARE OF APPELLANTS PETITION FOR REHEARING ON THE GROUNDS THAT YOU WOULD NOT DO YOUR JOB BY INTENTIONALLY MISLEADING, WITHHOLDING COURT DOCUMENTS (EVIDENTIARY HEARING TRANSCRIPTS) LYING TO CLIENT ABOUT FILING HIS APPEAL TO NV. SUPREME COURT IN WHICH YOU LEFT OUT EVERY GRPUND I INITIALLY FILED IN THE STATE HABEAS, IN ADDITION TO YOUR OWN SUPPLIMENTED GROUNDS. YOU LEFT THEM ALL OUT OF THE APPEAL "INTENTIONALLY" KNOWING FULL WELL I HAD MANY CONSTITUTIONAL GROUNDS AND BY DOING SO, TRIED TO EFFECTIVELY DISALOW APPELLANT TO MAKE IT TO FEDERAL COURT WITH ALL HIS CONSTITUTIONALLY ARGUED GROUNDS THUS RESULTING IN HIS (MY) CLAIMS BEING <u>UNEXHAUSTED</u> AT

EXHIBIT "F"

THE NEV. SUPREME COURT, NEVADAS HIGHEST COURT.

I ASKED, PLEADED WITH YOU TO TELL ME THE TRUTH AS TO WHY YOU LIED ABOUT FILING MY APPEAL IN ITS ENTIRETY, I ASKED AND PLEADED FOR COUNSEL TO EXHAUST ALL SAID CONSTITUTIONAL CLAIMS IN NV. SUPREME COURT. YOU REFUSED! ~~E~~

I TRIED TO FIRE YOU FOR INEFFECTIVE ASSISTANCE OF COUNSEL BUT WAS TOLD THAT I'M NOT ENTITLED TO CONSTITUTIONALLY GUARANTEED EFFECTIVE ASSISTANCE OF COUNSEL WHEN GOING TO THE NV. SUPREME COURT. YOU THUS KNEW THIS, SO DID THE SUPREME COURT, YET WHEN APPELLANT MADE A MOTION TO COURT TO FIRE YOU AND CONTINUE ON SO AS TO EXHAUST MY CLAIMS, NOT EVEN THE NEVADA SUPREME COURT WAS INTERESTED IN LETTING ME ADDRESS MY UNEXHAUSTED CONSTITUTIONAL CLAIMS WITH A SUPPLEMENTAL PETITION (APPEAL) TO NV. SUPREME COURT.

YOU DIDNT EVEN BOTHER TO CONSTITUTIONALIZE THE LONE (1) CLAIM YOU RAISED!

YOU HAVE THUS DENIED MY RIGHT TO DUE PROCESS, AND COMPETENT AND EFFECTIVE ASSISTANCE OF COUNSEL.

YOUR OATH HAS BEEN VIOLATED, YOU HAVE BEEN DISLOYAL TO YOUR CLIENT, LIED AND BEEN IN OBVIOUS CONFLICT WITH MY BEST INTERESTS IN MIND. YOU HAVE VIOLATED YOUR PROFESSIONAL CODE of CONDUCT, YOUR DUTY TO THE CLIENT, YOUR NEVADA BAR, AMERICAN BAR, ETC...

YOU ARE NOW ON NOTICE THAT THE APPELLANTS PETITION FOR REHEARING to the NV. SUPREME COURT IS TO BE FORWARDED BY APPELLANT TO COUNSEL, MARYLOU WILSON ESQ. AND TO THE NV. SUPREME COURT CLERK

ITS IMPARITIVE THAT YOU MAKE EFFORT TO HAVE PETITION BROUGHT to NV. Supreme COURTS ATTENTION, AS COPIES ARE BEING FORWARDED TO the SUPREME COURT AS WELL AS COUNSEL.

Michael T. Botelho #80837

MICHAEL T. BOTELHO
BOX 7000
NNCC
CARSON CITY, NV

EXHIBIT "G"

30 PAGES

OCT. 3, 2007

MICHAEL T. BOTELHO # 80837
P.O. BOX 607
NEVADA STATE PRISON
CARSON CITY, NV. 89702

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL T. BOTELHO,
APPELLANT,
VS.
THE STATE OF NEVADA,
RESPONDENT

CASE NO. 49586

NOTICE OF MOTION AND MOTION FOR WITHDRAWL OF ATTORNEY OF RECORD AND MOTION AND LEAVE TO FILE SUPPLIMENTAL APPEAL IN FORMA PAUPERIS/ PRO-SE' TO NEVADA SUPREME COURT

COMES NOW, MICHAEL T. BOTELHO, IN PRO SE', AND SUBMITS HIS NOTICE OF MOTION AND MOTION FOR WITHDRAWL OF ATTORNEY OF RECORD AND MOTION AND REQUEST OF PERMISSION AND LEAVE TO FILE SUPPLIMENTAL APPEAL IN FORMA PAUPERIS/ PRO SE' TO NEVADA SUPREME COURT, MOVING THIS COURT TO ORDER THAT MARY LOU WILSON, COUNSEL OF RECORD IN THE ABOVE-ENTITLED ACTION, BE WITHDRAWN AS COUNSEL

EXHIBIT "G"

OF RECORD HEREIN, AND THAT SAID COUNSEL DELIVER TO APPELLANT ALL DOCUMENTS, PLEADINGS, PAPERS AND TANGIBLE PERSONAL PROPERTY IN COUNSELS POSSESSION AND CONTROL TO APPELLANT, ACTING IN PRO SE' AT COUNSEL'S EXPENSE, TO THE ABOVE ADDRESS.

THIS MOTION IS BASED UPON NRS 7.055, NEVADA SUPREME COURT RULES 46 & 166, AS WELL AS THE ATTACHED POINTS AND AUTHORITIES AND AFFIDAVIT SUPPORTING SAME.

POINTS AND AUTHORITIES

ALTHOUGH AN ATTORNEY MAY NOT WITHDRAW AS COUNSEL OF RECORD IF DOING SO WOULD ADVERSELY AFFECT THE CLIENT'S INTEREST, MADRID V GOMEZ, 150 F.3d 1030, 1038-39 (9TH 1998), THE CLIENT MAY TERMINATE HIS COUNSEL'S REPRESENTATION AT ANY TIME, KASHEFI-ZADEH VS. INS, 791 F.2d 708, 711 (9TH 1986) SEE ALSO NRS 7.055.1) (EMPHASIS ADDED). SEE ALSO NEVADA SUPREME COURT RULE (SCR) 46 & 166; SECOND JUDICIAL DISTRICT COURT RULE 23(1); AND EIGHTH JUDKIAL DISTRICT COURT RULE 7.40(b)(2)(ii),

AS THE OPENING BRIEF OF APPEAL TO THE NEVADA SUPREME COURT HAS BEEN PARTIALLY PERFECTED AND INCOMPLETE, COUNSEL'S SERVICES

ARE NO LONGER NEEDED, NOR APPRECIATED IN THIS CRIMINAL MATTER.

COUNSEL HEREIN HAS NO LEGAL BASIS FOR WITHHOLDING APPELLANTS PAPERS IN THIS MATTER, AS APPELLANT OWES COUNSEL NO FEES WHICH WOULD PERMIT COUNSEL TO MAINTAIN SAID PAPERS UNDER A GENERAL RETAINING LIEN. FIGLIUZZI VS. DISTRICT COURT, 111 NEV. 338, 340-41, 890 P.2d 798, 800-02 (1995).

THEREFORE, THIS HONORABLE COURT IS MOVED TO EXERCISE ITS JURISDICTION IN THIS MATTER AND ORDER COUNSEL TO BE WITHDRAWN AS COUNSEL OF RECORD AND TO DELIVER THE ENTIRETY OF DOCUMENTATION GENERATED IN THIS INSTANT CASE, AS DEFENDANT (APPELLANT) HAS NO OTHER REMEDY AT LAW TO COMPEL COUNSEL TO DO SO.

DATED THIS 3rd DAY OF OCTOBER, 2007

Michael T. Botelho

MICHAEL T. BOTELHO # 80837
BOX 607
N.S.P.
CARSON CITY, NV. 89702

DEF.(APPELLANT) IN PRO-SE

MICHAEL T. BOTELHO # 80837
P.O. BOX 607
NEVADA STATE PRISON
CARSON CITY, NV. 89702

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL T. BOTELHO,
APPELLANT,
VS.
THE STATE OF NEVADA,
RESPONDENT.

CASE NO. 49586

AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS AND MOTION TO PROCEED IN FORMA PAUPERIS/IN PRO SE' TO FILE SUPPLIMENTAL, APPEAL TO NEVADA SUPREME COURT IN PRO-SE

COMES NOW, MICHAEL T. BOTELHO, APPELLANT ACTING IN PRO SE', WHO BEING FIRST DULY SWORN AND UNDER THE PENALTY OF PERJURY, DO HEREBY DEPOSE AND STATE THE FOLLOWING:

(1) I AM THE APPELLANT IN THE ABOVE ENTITLED ACTION.

(2) I HAVE RECEIVED NO RESPONSE FROM COUNSEL IN REGUARDS TO MY CASE AND HER SUBSEQUENT DISREGUARD FOR APPELLANTS GROUNDS

WHICH COUNSEL INEXPLICITELY WAIVED, AS WELL AS GROUNDS PURPOSELY LEFT OUT OF THE PENDING SUPREME COURT APPEAL IN THE STATE OF NEVADA

(3) COUNSEL TRIED TO CAUSE APPELLANT TO LOSE HIS GROUNDS BY NOT ADDRESSING THEM AND THUS CAUSING THE INEXHAUSTION OF HIS ORIGINAL POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS.

(4)-COUNSEL HAS WITHELD CRUTIAL INFORMATION FROM APPELLANT (CLIENT)

(5) COUNSEL HAS FACTUALLY LIED TO APPELLANT (CLIENT) AND IS PROVABLE

(6) COUNSEL HAS MISDIRECTED CLIENT IN REGUARDS TO THIS INSTANT APPEAL AS WELL AS FAILING TO DISCUSS CRUTIAL POINTS BEFORE PETITIONER'S STATE EVIDENTIARY HEARING, THEN ACTING WITHOUT CLIENTS KNOWLEGGE AND PERMISSION TO ACTS SHOCKING TO PETITIONER,

(7) PETITIONER (APPELLANT/CLIENT) HAD SEVERAL GROUNDS WAIVED BY SAID COUNSEL AT EVIDENTIARY HEARING WITH TOTAL DISREGUARD FOR CLIENT'S GROUND'S AND APPEAL. IN ADDITION, THIS AGAIN WAS DONE WITHOUT PERMISSION AND PRIOR KNOWLEDGE OF HER CLIENT (PETITIONER/APPELLANT), AND WITHOUT PETITIONER'S ENTITLEMENT TO DUE PROCESS.

(8) COUNSEL WAITED TIL ALMOST THE VERY LAST DAY TO FORWARD APPEAL & OPENING BRIEF, A BRIEF WHEREIN SHE FAILS TO FEDERAL PROPERLY THE (1) GROUND SHE ACTUALLY DEFENDED.

(9) TO MAKE MATTERS WORSE, COUNSEL WAS ARGUING IN HER SUPPLIMENTAL TO PETITIONERS PRO SE WRIT OF HABEAS CORPUS. THE WRIT SPECIFICALLY ADDRESSED HER SOLE ISSUE IN GROUND NINE(9) OF ORIGINAL PETITION; IF COUNSEL HAD READ GROUNDS, SHE WOULD HAVE KNOWN THIS. COUNSEL FILED A SUPPLIMENTAL TO THE ORIGINAL PETITION ARGUING THE SAME VERY THING. STRANGELY ENOUGH, THE COURT DENIED THIS GROUND IN PETITIONER'S WRIT BUT HEARD IT WHEN ADDRESSED IN HER SUPPLIMENTAL. AGAIN BY THE SAME PREJUDICIAL, BIASED JUDGE WHO DISREGUARDED THE PETITIONERS MOTION TO THE COURT FOR JUDGES RECUSAL WHEREIN JUDGE POLAHA VIOLATED DISTRICT COURT AND STATE AND FEDERAL RULES BY HEARING AND DENYING PETITIONERS MOTION PROPERLY BEFORE THE COURT. COUNSEL DIDNT CARE TO ARGUE THIS IN THE APPEAL TO THE NEVADA SUPREME COURT AS WELL.

I AM THEREFORE SUBMITTING THE INSTANT MOTION AND AFFIDAVIT IN GOOD FAITH, AS I HAVE NO OTHER REMEDY THAN THIS COURT'S POWER TO ENFORCE MY STATUTORY RIGHTS AND

CAUSE COUNSEL TO BE WITHDRAWN AND PROCEED IN PRO SE IN THIS INSTANT ACTION.

DATED THIS 3rd DAY OF OCTOBER 2007

Michael T Botelho #80837
MICHAEL T. BOTELHO
BOX 607 NSP
CARSON CITY, NV 89702
APPELLANT IN PRO SE'

VERIFICATION UNDER PENALTY OF PERJURY:

I DO VERIFY UNDER PENALTY OF PERJURY THAT THE ABOVE AFFIDAVIT IS TRUE AND CORRECT AND IS STATED TO THE BEST OF MY OWN PERSONAL KNOWLEDGE, AND IS MADE WITHOUT BENEFIT OF A NOTARY PURSUANT TO NRS 208.165, AS I'M AN INCARCERATED PERSON:

Michael T Botelho #80837
APPELLANT IN PRO-SE'

CERTIFICATE OF SERVICE BY MAILING:

I DO CERTIFY THAT I MAILED A TRUE AND CORRECT COPY OF THE FOREGOING "MOTION FOR WITHDRAWL OF COUNSEL; FORWARD OF RECORDS AND MOTION TO FILE APPEAL IN PRO SE' TO FILE SUPPLIMENTAL APPEAL TO DENIAL OF EVIDENTIARY HEARING ~~AGAIN~~ GROUNDS AND WRIT TO NEVADA SUPREME COURT, TO THE ADDRESSES BELOW ON THIS 3rd DAY OF OCTOBER 2007, BY PLACING SAME INTO

V11. 793

THE U.S. MAIL (VIA) PRISON LAW LIBRARY STAFF, IN COMPLIANCE WITH N.R.C.P. 5 (b):

JANETTE BLOOM
CLERK-NV. SUPREME COURT
201 SOUTH CARSON ST.
CARSON CITY, NV 89701

ATTORNEY GENERAL
100 NORTH CARSON ST.
CARSON CITY, NV. 89701-4717

JUDGE POLAHA
SECOND JUDICIAL DIST. COURT
DEPT. #3
BOX 30083
RENO, NV. 89520

TERRANCE McCARTHY
APPELLATE DEPUTY D.A.
WASHOE COUNTY DISTRICT ATTY OFFICE
BOX 30083
RENO, NV. 89520

MARY LOU WILSON, ESQ.
333 MARSH AVE.
RENO, NV. 89509

RESPECTFULLY SUBMITTED
Michael T. Botelho #80837
MICHAEL T. BOTELHO
BOX 607
N.S.P.
CARSON CITY, NV 89702

APPELLANT IN PRO-SE'

CC: FILE

MICHAEL T. BOTELHO #80837
P.O. BOX 607
NEVADA STATE PRISON
CARSON CITY, NV. 89702

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL T. BOTELHO,
APPELLANT,
V.S
THE STATE OF NEVADA,
RESPONDENT.

CASE NO. 49586

REQUEST TO FILE SUPPLIMENTAL TO APPEAL FROM DENIAL OF HABEAS CORPUS POST CONVICTION RELIEF PETITION NRCP 15(d)

COMES NOW, MICHAEL T. BOTELHO, PETITIONER, HEREAFTER ALSO KNOWN AS BOTELHO, PETITIONER OR PRISONER, TO REQUEST TO FILE THE SUPPLIMENTAL PLEADINGS PURSUANT TO NRCP 15(d), to the EARLIER FILED APPEAL BY COUNSEL, MARY LOU WILSON.

THIS PETITION IS BASED ON THE FACTS, STATEMENTS, INFORMATION, LAWS AND STATUTES CONTAINED HEREIN AS FOLLOWS:

EXHIBIT "G"

Ex "G"

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 (14) FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

PLEASE REFER TO THE MORANDUM CONTAINED IN THE REVIEW OF APPEAL. (RECORD)

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 ~~JUDGE~~ (COURT) ABUSED ITS' DISCRETION AND RELIED UPON PREJUDICIAL, FALSE, MISLEADING AND INPALPABLE INFORMATION AT THE SENTENCING HEARING WHICH RESULTED IN THE IMPOSITION OF NUMEROUSLY IMPOSED CONSECUTIVE LIFE SENTENCES

PLEASE REFER TO THE MEMORANDUM CONTAINED IN THE REVIEW OF APPEAL (RECORD)

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 HOARSAY EVIDENCE UNAUTHORIZED UNDER MARITAL COMMUNICATIONS PRIVILEGE

PLEASE REFER TO THE MEMORANDUM CONTAINED IN THE REVIEW OF APPEAL (RECORD)

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

PLEASE REFER TO THE MEMORANDUM CONTAINED IN THE REVIEW OF APPEAL (RECORD)

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

PLEASE REFER TO THE MEMORANDUM CONTAINED IN THE REVIEW OF APPEAL (RECORD)

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

PLEASE REFER TO THE MEMORANDUM CONTAINED IN THE REVIEW OF APPEAL (RECORD)

GROUND SEVEN

TRIAL COUNSEL, THE COURT, AND THE PROSECUTION FAILED TO SEEK A COMPETENCY HEARING, WHEN THE RECORD IS CLEAR THERE EXISTS A DOUBT TO PETITIONER'S MENTAL ~~HEALTH~~ (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

PLEASE REFER TO THE MEMORANDUM CONTAINED IN THE REVIEW OF APPEAL (RECORD)

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.

PLEASE REFER TO THE MEMORANDUM CONTAINED IN THE REVIEW OF APPEAL (RECORD)

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 UNITED STATES CONSTITUTION

PLEASE REFER TO THE MEMORANDUM CONTAINED IN THE REVIEW OF APPEAL (RECORD)

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 AMBIGIOUS 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

PLEASE REFER TO THE MEMORANDUM CONTAINED IN THE REVIEW OF APPEAL (RECORD)

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, ~~BAIL~~ GRAND JURY, HEARINGS 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 U.S. CONSTITUTION

PLEASE REFER TO THE MEMORANDUM CONTAINED IN THE REVIEW OF APPEAL (RECORD)

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 AMENTS TO THE U.S. CONSTITUTION

PLEASE REFER TO THE MEMORANDUM CONTAINED IN THE REVIEW OF APPEAL (RECORD)

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.

PLEASE REFER TO THE MEMORANDUM CONTAINED IN THE REVIEW OF APPEAL (RECORD)

GROUND FOURTEEN

TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO INVESTIGATE, COMMUNICATE WITH PETITIONER, INFORM PETITIONER OF THE TRUE FACTS AS THEY RELATE TO THE INSTANT CASE, AND EFFECTIVELY REPRESENT PETITIONER THROUGHOUT THE JUDICIAL PROCEEDINGS IN THIS CASE, AS MORE THOUROUGHLY 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

PLEASE REFER TO THE MEMORANDUM CONTAINED IN THE REVIEW OF APPEAL (RECORD)

GROUND FIFTEEN

TRIAL COUNSEL WAS INEFFECTIVE UNDER THE GUARANTEE'S 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 UNITED STATES CONSTITUTION

PLEASE REFER TO THE MEMORANDUM CONTAINED IN THE REVIEW OF APPEAL (RECORD)

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 INVOLUNTARILY GIVEN GUILTY PLEAS AND IMPOSITION OF NUMEROUS LIFE SENTENCES

PLEASE REFER TO THE MEMORANDUM CONTAINED IN THE REVIEW OF APPEAL (RECORD)

THE FOLLOWING TWO (2) GROUNDS ARE GROUNDS THAT WERE FILED BY COURT APPOINTED COUNSEL, MARY LOU WILSON, ESQ., AFTER PETITIONER HAD FILED ORIGINAL PETITION CONTAINING ( ) GROUNDS AND AFTER ASKING FOR AND BEING APPOINTED COUNSEL. COUNSEL MET WITH PETITIONER AND HAD INFACT ALREADY WRITTEN SUPPLIMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) PRIOR TO THIS MEETING. COUNSEL MET WITH PETITIONER AROUND 11 Am SUNDAY AND FIRST THING MONDAY MORNING, COUNSEL HAD ALREADY FILED SUPPLIMENTAL PETITION. PETITIONER WAS NOT AWARE OF THIS FACT OR THAT COUNSEL FAILED TO ADD OTHER GROUNDS THAT NEEDED TO BE ADDRESSED UNTIL MUCH LATER.

GROUND SEVENTEEN (SUPPL. # ONE)

SENTENCING COUNSEL WAS INEFFECTIVE IN FAILING TO PUT FORWARD AND CROSS-EXAMINE PETITIONER'S EX-WIFE IN VIOLATION OF THE CONFRONTATION CLAUSES OF THE 6TH AMENDMENT AND THUS VIOLATING THE 14TH AMENDMENT TO THE UNITED STATES AND THE NEVADA CONSTITUTIONS.

PLEASE SEE THE MEMORANDUM CONTAINED IN THE REVIEW OF APPEAL (RECORD)

GROUND EIGHTEEN (SUPPL. GROUND # TWO)

SENTENCING COUNSEL WAS INEFFECTIVE IN FAILING TO HAVE A PSYCHOSEXUAL EXAMINATION DONE BY DR. MAHAFFEY, ING, OR SKEWIS FOR THE PURPOSE OF SHOWING FUTURE DANGEROUSNESS, RECIDIVISM, AND LIKELIHOOD OF REHABILITATION

PLEASE SEE THE MEMORANDUM CONTAINED IN THE REVIEW OF APPEAL (RECORD)

AS THIS HONORABLE COURT WILL NOTE, COUNSEL DIDNT EVEN BOTHER TO CONSTITUTIONALIZE THIS LAST GROUND IN HER SUPPLIMENTAL, THUS RISING TO INEFFECTIVE ASSISTANCE OF COUNSEL.

CONCLUSION

TRIAL, APPELLATE AND PETITIONERS APPOINTED COUNSEL TO ASSIST WITH WRIT OF HABEAS CORPUS (STATE POST-CONVICTION PETITION) WERE ALL RESPONSIBLE FOR INEFFECTIVE ASSISTANCE OF COUNSEL AS THE

RECORD SHOWS.

PETITIONER HAD ALSO ASKED TRIAL COUNSEL TO WITHDRAW HIS GUILTY PLEA WHEN THE STATE TRIED TO USE UNCONSTITUTIONAL EVIDENCE AGAINST HIM, COUNSEL REFUSED. WHEN PETITIONER TOLD COUNSEL (POST-CONVICTION) to ADD THIS AS ANOTHER GROUND, SHE REFUSED. COUNSEL ALSO SAID THAT SHE WOULDNT RAISE A GROUND THAT THE D.A. HAD AN EX-PARTE COMMUNICATION WITH THE JUDGE AND THUS VIOLATED the DEFENDANTS RIGHT TO A BAIL HEARING, HIS BAIL WAS RAISED OVER THE PHONE IN ONE SHORT CALL TO JUDGE POLAHA. PETITIONER WASNT ALLOWED TO RESPOND TO OR HAVE A BAIL HEARING AND HIS 8th AMENDMENTS RIGHTS WERE INTENTIONALLY VIOLATED AND TRAIL COUNSEL DIDNT EVEN RESPOND WHEN DEFENDANT ASKED ABOUT IT. TRIAL COUNSEL NEVER SAID A WORD OR GOT INVOLVED WHATSOEVER IN REGUARDS TO HIS CLIENTS RIGHTS TO BAIL HEARING, ESPECIALLY WHEN PROTOCALS AND COURT RULES WERE VIOLATED BY THE DISTRICT ATTORNEY AND the JUDGE.

PETITIONER'S POST-CONVICTION COUNSEL ALSO FAILED TO ARGUE AND STATE AS A GROUND THAT PETITIONER'S RIGHTS WERE VIOLATED AGAIN WHEN JUDGE POLAHA IMPROPERLY AND ILLEGALLY DENIED PETITIONER'S PROPERLY SUBMITTED

MOTION TO THE SECOND DISTRICT COURT, DEPT. 3, HONORABLE POLAHA. JUDGE POLAHA WOULDNT STEP DOWN AT SENTENCING WHEN ASKED TO RECUSE HIMSELF AFTER ADMONISHING TRIAL COUNSEL. NOW, PETITIONER FOLLOWED DISTRICT COURT, STATE AND FED. RULES OF MOTION FOR RECUSAL AND THIS SAME JUDGE IMPROPERLY DISMISSED THIS MOTION AND INFORMED PETITIONER THAT JUDGE POLAHA HAD BEEN IMPROPERLY SERVED. JUDGE POLAHA WAS GIVEN A PROPER MOTION BEFORE THE COURT AND JUDGE POLAHA TOOK IT UPON HIMSELF TO DISREGARD PROPER COURT RULES AND MOTIONS. POST-CONVICTION COUNSEL WOULD NOT REFILE SAID RECUSAL MOTION AGAINST THIS PREJUDICIAL AND OBVIOUSLY BIASED JUDGE. AGAIN COUNSEL FAILED TO ACT IN THE BEST INTERESTS OF THE LAW AS WELL AS HER CLIENT BY NOT BRINGING THIS FORWARD TO THE NEVADA SUPREME COURTS ATTENTION AS WELL.

ITS ALSO IMPORTANT TO BRING TO THIS HONORABLE COURTS ATTENTION THAT PETITIONER DID BRING GROUND # 9 FORWARD TO THE COURTS ATTENTION AND WAS DISMISSED YET (POST-CONVICTION) COUNSEL BASICALLY USED PETITIONERS ORIGINAL GROUND AND THE SAME JUDGE GRANTED AN EVIDENTIARY HEARING ON THIS (HER) GROUND AND SEVERAL OTHERS.

AFTER INTENTIONALLY MISDIRECTING APPELANT/PETITIONER, COUNSEL FAILED TO SUBMIT (4) MORE GROUNDS ON PETITIONERS BEHALF AND HAVE THE JUDGE RECUSED AS WELL, ALTHOUGH THAT HAD ALREADY BEEN PROPERLY DONE, BUT NOT FOLLOWED.

PETITIONER WAS BROUGHT BEFORE THE COURT FOR EVIDENTIARY HEARING IN REGUARDS TO STATE (POST-CONVICTION) WRIT OF HABEAS CORPUS, BUT PRIOR TO THIS HEARING, PETITIONER BEGGED AND PLEADED WITH COUNSEL TO GET TOGETHER SO WE (PETITIONER) WOULD KNOW WHAT COUNSEL PLANNED AND SO IT COULD BE DISCUSSED. COUNSEL REFUSED TO EVEN RETURN PETITIONERS LETTERS AND 2 phone CALLS THAT SHE REFUSED.

PETITIONER WAS NOT PROPERLY PREPARED FOR HIS EVIDENTIARY HEARING AND I WAST GIVEN EVEN ONE (1) MINUTE WITH COUNSEL PRIOR TO START OF HEARING. COUNSEL WAS TACKING TO PETITIONERS FORMER TRIAL COUNSEL. HEARING STARTED AND DR. MAHAFFEY TOOK THE STAND IN REGUARDS TO COUNSELS SUPPLIMENTAL GROUND # 2 (NOT CONSTITUTIONALIZED) AND WHICH HAD ALREADY BEEN DENIED BY THIS SAME JUDGE IN PETITIONERS ORIGINAL PETITION (SEE GROUND NINE)

BOTH THE STATE AND PETITIONERS COUNSEL CROSSED THE DOCTOR. WHEN THE DOCTOR WAS EXCUSED, PETITIONERS COUNSEL EXEXPLICITLY WAIVED THE REMAINING GROUNDS TO BE ARGUED. PETITIONER WAS STUNNED AND VISIBLY UPSET. PETITIONER WORKED HARD TO GET THIS EVIDENTIARY HEARING ONLY to HAVE COUNSEL INTENTIONALLY WAIVE REMAINING GROUNDS. JUDGE POLAHA THEN STATES HE DIDNT REALLY CARE WHAT THE DOCTOR SAID AND THAT HIS ORIGINAL DECISION ON SENTENCING STANDS. JUDGE POLAHA THEN ADJOURNED COURT AND PETITIONER STOOD UP AND SPOKE, SAYING HE WANTED TO SAY SOMETHING, JUDGE POLAHA SAID TO PETITIONER, I HAD NO RIGHT TO SPEAK, COUNSEL DIONT PUT PETITIONER ON STAND SO I HAD NO Right to SPEAK. PETITIONER WAS REALLY UPSET AT THAT POINT AND WAS ESCORTED OUT AS HE WAS TELLING HIS COUNSELOR, MARYLOU WILSON THAT HE WANTED TO APPEAL HIS WHOLE PETITION. PETITIONER ASKED WHY COUNSEL WAIVED HIS PRECIOUS GROUNDS AS HE WAS ESCORTED OUT. THE EVIDENTIARY HEARING WAS SLATED FOR 2 HOURS AND PETITIONER WAS GIVEN 25 MINUTES AND NOT ALLOWED TO SPEAK OR BE TREATED FAIRLY.

PETITIONER WROTE IMMEDIATELY TO COUNSEL ASKING FOR SENTENCING TRANSCRIPTS AND FOR A REASON AS TO WHY COUNSEL WAIVED SEVERAL

GROUNDS AT PETITIONERS EVIDENTIARY HEARING AND TO THIS DAY PETITIONER HAS BEEN DENIED EVIDENTIARY HEARING TRANSCRIPTS. THE HEARING MINUTES COUNSEL FINALLY SENT ME DO NOT COVER WHAT ACTUALLY HARPENED. PETITIONER/APPELLANT NEEDS THE ACTUAL TRANSCRIPTS NOT SOMEONES OPINION AS TO WHAT IS LEFT IN OR OUT BY ABBRIEVIATING TRANSCRIPTS AND CALING THEM MINUTES. BESIDES, THE MINUTES MENTION NOTHING OF WAIVING MY GROUNDS OR MY VOICING TO THE JUDGE THAT I HAD SOMETHING TO SAY. IN ADDITION, COUNSEL HAS NOT BOTHERED TO ADMIT SHE WAIVED GROUNDS, SHE SAYS SHE DID NOT. COUNSEL THEN TELLS ME SHE DIDNT STOP MY ORIGINAL PETITION FROM BEING APPEALED. THIS IS A LIE, IN COURT DOCUMENTS COUNSEL STATES TO THE COURT (SUPPLIMENTAL PETITION) THAT PETITIONERS COUNSEL DOES NOT WAIVE ANY OF THE GROUNDS WITHIN PETITIONERS ORIGINAL PETITION, YET SHE DID JUST THAT AS SHE ONLY PRESENTED 2 GROUNDS IN HER SUPPLIMENTAL PETITION AND SHE WAIVED SEVERAL (MORE THAN ONE) GROUNDS AT THE EVID. HEARING. PETITIONER HEARD IT WITH HIS OWN EARS.

TO FURTHER PROVE THE POINT, WHEN ASKED AND TOLD TO FOLLOW WITH AN APPEAL TO THE NEVADA SUPREME COURT, AFTER ACTUALLY DOING THE APPEAL, COUNSEL INTENTIONALLY LEFT OUT PETITIONERS ENTIRE ORIGINAL GROUNDS, THUS, CAUSING THEM TO NOT BEING ABLE TO BE PROPERLY EXHAUSTED IN STATE PROCEEDINGS AND EFFECTIVELY ELIMINATING ANY HOPE OF A FAIR AND FULL FEDERAL 2254 FEDERAL HABEAS CORPUS. THIS ONLY PROVES THE LONG LINE OF INTENTIONAL MISDIRECTION, COVER-UPS, LIES AND VIOLATIONS CAUSING PETITIONER TO TAKE THE GUILTY PLEA HE WAS GOADED INTO TO BEGIN WITH!

REMEMBER, AS MENTIONED EARLIER, THERE WERE (ARE) MORE CONSTITUTIONAL GROUNDS THAT HAD TO BE ADDED BUT COUNSEL FAILED TO DO SO, GROUNDS CONCERNING BAIL AND IMPROPER ARRAIGNMENT TO MENTION JUST A FEW. COUNSEL APPEALED (1) ONLY ONE GROUND TO THE NV. SUPREME COURT.

IN COUNSELS OPENING BRIEF TO THE NEVADA SUPREME COURT, IN COUNSELS ONE (1) ARGUMENT, COUNSEL NOTES ON PG 11, LINE 2 COUNSEL ARGUES FOR CONCURRENT 20 YRS SENTENCES, IN FACT 5 TO 20 YR SENTENCES WERE ALSO AVAILABLE BUT NO MENTION IS

MADE OF THAT FACT, ACTUALLY NRS 200.366 STATES AT THE TIME OF THE INCIDENT, THAT PETITIONER WAS ELIGIBLE TO RECIEVE 5 TO 20 YRS, 15 TO 40 YRS OR 20 TO LIFE, NOT JUST THE 20 TO LIFE SHE ARGUES THROUGHOUT, ALSO THAT TRIAL COUNSEL NEVER ARGUED FOR AT SENTENCING EITHER. COUNSEL DOES IT AGAIN ON pg 12, LINE 13. COUNSEL FAILS TO ARGUE THAT PETITIONER EVEN VOLUNTEERED TO BE CHEMICALLY CASTRATED, THIS WAS BEFORE HE EVEN TOOK THE Guilty PLEA HE WAS TRICKED, MISLED AND LIED TO, TO GET HIM TO TAKE IT. You ARGUE ABOUT COERCION TO TAKE THE PLEA. THE COURTS KNOW THAT ITS NOT COERCION WHEN THE DEFENDANT MAKES A DECISION BASED ON MATTERS HE ASSUMES HIS COUNSEL IS TRUTHFUL ABOUT. Why would ANYONE PLEAD TO 45 YRS OR MORE WHEN HE SAID ALL ALONG THAT HE WASNT GUILTY OF EVERYTHING HE PLEADED GUILTY TO. PETITIONER EVEN SPECIFICALLY ASKED COUNSEL TO SEE THE GRAND JURY TRANSCRIPTS AND POLICE REPORTS BEFORE HE DECIDED WHAT TO DO. AFTER COUNSEL SAID THE TRANSCRIPTS AND POLICE REPORTS WERE INCOMPLETE BUT LOOKED BAD, HE AGAIN PUSHED TO TAKE THE PLEA. DEFENDANT NEVER KNEW WHAT THE POLICE ACTUALLY HAD AND WAS MISLED INTENTION-

ALLY SO AS TO GET DEFENDANT TO PLEAD GUILTY, IT WAS NO HIDING TRIAL COUNSEL'S DISDAIN OR DISLIKE FOR DEFENDANT AND DID VERY LITLE BUT TO HELP PUT HIM AWAY FOREVER, COUNSEL WITHHELD INFORMATION, LIED AND WAFFLED WHEN IT CAME TO HIS CLIENT, HE WATCHED HIS CLIENTS Rights VIOLATED AT GRAND JURY HEARING, ARRAIGNMENT, BAIL, SENTENCING, NOT TO FORGET THE GRAND JURY HEARING/PRELIMINARY HEARING SCHEDULED 1 DAY APART JUST FOR BACKUP. COUNSEL KNEW OF ALTERED STATEMENTS AND LACK OF DNA CHAIN OF EVIDENCE, IT CAN EASILY BE PROVED BUT BECAUSE HE GOT DEFENDANT TO PLEAD GUILTY, IT COVERED UP ALL WRONGDOING, BY THE POLICE, THE DISTRICT ATTY, THE COURT AND BY TRIAL COUNSEL HIMSELF.

Pg 15, LINE 7 COUNSEL STILL ARGUES FOR CONCURRENT TIME AS IT SHOULD BE, BUT ALSO FAILS TO MENTION THAT THIS TOOK PLACE IN JUST A VERY FEW MINUTES, ONE PLACE-ONE TIME, UNINTERRUPTED AND CONTINUAL, THAT IN ITSELF SHOULD HAVE JUSTIFIED A CONCURRENT SENTENCE OF 5 TO 20 OR 20 TO LIFE FOR ASSAULT.

THE END RESULT OF WHATS HAPPENED IN THAT PETITIONER MADE EVERY ATTEMPT TO GET COUNSEL TO EXHAUST HIS CONSTITUTIONAL GROUNDS BROUGHT FORTH IN HIS STATE HABEAS TO THE NEVADA SUPREME COURT AND AS COUNSEL REFUSES TO DO SO, I, MICHAEL T. BOTELHO, PETIONER ACTING IN PRO-SE BRING FORTH ALL GROUNDS IN MY ORIGINAL STATE HABEAS AND ALREADY BEFORE THE DISTRICT COURT AT HIS EVIDENTIARY HEARING.

PETITIONER RESPECTFully REQUESTS THIS COURT HEAR ALL GROUNDS NOW BROUGHT FORTH AND GRANT HIS REQUEST TO FINALly WITHDRAW HIS GUILTY PLEA BASED ON THE FACTS OF THE CASE.

CERTIFICATE OF SERVICE

I DO CERTIFY THAT I MAILED A TRUE AND CORRECT COPY OF THE FOREGOING MOTION TO FILE SUPPLIMENTAL APPEAL TO THE NEVADA SUPREME COURT TO THE ADDRESSES BELOW ON THIS 25TH DAY OF SEPTEMBER, 2007, BY PLACING SAME INTO THE U.S. MAIL, [VIA] - PRISON LAW LIBRARY STAFF, IN COMPLIANCE WITH N.R.C.P. 5 (b):

RESPECTFULLY SUBMITTED
BY: Michael T Botelho

MARYLOU WILSON, ESQ.
333 MARSH AVE
RENO, NEVADA 89502

MICHAEL T. BOTELHO #80837
NEVADA STATE PRISON
BOX 607
CARSON CITY, NV 89702

JANETTE BLOOM
CLERK OF NV. SUPREME COURT
201 S. CARSON ST.
CARSON CITY, NV 89701

EXHIBIT "H"

2 PAGES

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 49586

FILED

OCT 31 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER

This is an appeal from the denial of appellant's post conviction petition for writ of habeas corpus. On October 9, 2007, appellant submitted a proper person "Motion for Withdrawl [sic] of Attorney of Record and Motion and Leave to File Supplimental [sic] Appeal in Forma Pauperis/Pro-se to Nevada Supreme Court."[1] In the document, appellant expresses dissatisfaction with his appellate counsel, Mary Lou Wilson, and requests that this court remove her as appellant's counsel of record and allow appellant to proceed in proper person.

A criminal defendant may not reject court appointed counsel absent a showing of good cause. See Thomas v. State, 94 Nev. 605, 584 P.2d 674 (1978); cf., Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985), cert. denied, 475 U.S. 1031 (1986) (good cause for the substitution of appointed counsel cannot be determined solely according to the subjective standard of what the defendant perceived; defendant's general loss of confidence or trust in his counsel, standing alone, is not sufficient). We

[1] We note that appellant has neither sought nor been granted leave to file documents in proper person. See NRAP 46(b). Nevertheless, because we elect to address this motion on its merits, we direct the clerk of this court to file the motion received on October 9, 2007.

EXHIBIT "H"

EXHIBIT 104

conclude that appellant's contentions do not rise to the level of adequate cause for the removal of appointed counsel and we decline to grant appellant's request to remove his current counsel. Appellant shall proceed hereafter through his appointed counsel in the prosecution of this appeal.

As appellant is represented by counsel in this appeal, we decline to grant him permission to file further documents in proper person. See NRAP 46(b). Accordingly, we direct the clerk of this court to return, unfiled, the proper person document received on September 28, 2007.

It is so ORDERED.

_____, C.J.

cc: Mary Lou Wilson
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Michael Todd Botelho

EXHIBIT "I"

1 PAGE

AO 450 (Rev. 5/85) Judgment in a Civil Case ⊕

UNITED STATES DISTRICT COURT

***** DISTRICT OF NEVADA

MICHAEL T. BOTELHO,

Petitioner,

V.

JAMES BENEDITTI, et al.,

Respondents.

JUDGMENT IN A CIVIL CASE

CASE NUMBER:**3:08-CV-00399-LRH-RAM**

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

_X_ **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that respondents' motion to dismiss (#20) is GRANTED. IT IS FURTHER ORDERED that this case is DISMISSED without prejudice to allow petitioner to return to state court to exhaust his claims.

October 28, 2009

LANCE S. WILSON
Clerk

/s/ Marti Campbell
Deputy Clerk

EXHIBIT I

FILED
Electronically
02-17-2010:11:54:25 AM
Howard W. Conyers
Clerk of the Court
Transaction # 1326344

3035

IN THE SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MICHAEL T. BOTELHO,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

_____/

Case No. CR03P2156

Department No.: 3

ORDER GRANTING IN *FORMA PAUPERIS*

Having read Petitioner's Request and Affidavit in Support of Request to Proceed in *Forma Pauperis*, the Court finds that Petitioner is currently serving a sentence in a correctional institution.

Pursuant to Nevada Supreme Court's Order ADKT No. 411, a person will be deemed 'indigent' who is unable, without substantial hardship to himself or his dependents, to obtain competent qualified legal counsel on his own. Under this standard, a presumption of substantial hardship attaches to those persons currently serving a sentence in a correctional institution or housed in a mental health facility.

The Court further finds that pursuant to NRS 171.188, Petitioner has insufficient assets and/or income to proceed absent a grant of *forma pauperis* status.

IT IS HEREBY ORDERED, pursuant to NRS 171.188, Petitioner is granted leave to proceed in *forma pauperis*.

IT IS HEREBY FURTHER ORDERED that the Court allow said MICHAEL T. BOTELHO to bring such action without costs and file or issue any necessary writ, process, pleading or paper without charge, with the exception of jury fees.

IT IS HEREBY FURTHER ORDERED that the Sheriff or any other appropriate officer within the state make personal service of any necessary writ, process, pleading or paper without charge for MICHAEL T. BOTELHO.

IT IS HEREBY FURTHER ORDERED that the above entitled matter is referred to the Honorable Jerome Polaha, the assigned Judge presiding over the underlying matter, for the Court's determination as to whether or not the Petitioner should be appointed counsel to represent him in this matter.

DATED this 16th day of February, 2010.

Connie J. Steinheimer
CHIEF DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of JUDGE CONNIE STEINHEIMER, and that on the 18th day of February, 2010, I deposited in the county mailing system, a true copy of the attached document, addressed to:

Michael T. Botelho
Inmate no. 80837
P.O. Box 7000
Carson City, Nevad 89702
Via U.S. Postal Service

I hereby certify that on the 17th day of February, 2010, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Gary Hatlestad, Esq.
Chief Deputy District Attorney

Marci L. Stone

****** IMPORTANT NOTICE - READ THIS INFORMATION *****
PROOF OF SERVICE OF ELECTRONIC FILING

A filing has been submitted to the court RE:	CR03P2156
Judge:	JEROME POLAHA
Official File Stamp:	02-17-2010:11:54:25
Clerk Accepted:	02-17-2010:11:59:24
Court:	Second Judicial District Court - State of Nevada
Case Title:	POST: MICHAEL TODD BOTELHO (D3)
Document(s) Submitted:	Ord Proceed Forma Pauperis
Filed By:	Marci Trabert
	You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

MARY LOU WILSON, ESQ. for MICHAEL BOTELHO

TERRENCE MCCARTHY, ESQ. for STATE OF NEVADA

The following people have not been served electronically and must be served by traditional means (see Nevada electronic filing rules):

2180

FILED

10 FEB 18 AM 8:04

HOWARD W. CONYERS

BY _____ DEPUTY

MICHAEL T. BOTELHO # 80837
NNCC
BOX 7000
CARSON CITY, NV 89702

PETITIONER, IN PRO SE

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MICHAEL T. BOTELHO,

PETITIONER,

V.S:

CASE NO. CR03P2156

DEPT. NO. 3

J. BENEDETTI, et al.,

RESPONDENTS,/

MOTION FOR RECUSAL

COMES NOW, PETITIONER, MICHAEL T. BOTELHO, IN HIS PROPER PERSON, AND FILES THIS MOTION FOR RECUSAL IN THE ABOVE ENTITLED ACTION.

THIS MOTION IS BASED UPON NRS 1.230 AND NRS 1.235, AS WELL AS THE ATTACHED SWORN AFFIDAVIT IN SUPPORT THEREOF.

DATED THIS 8th DAY OF FEBRUARY, 2010.

RESPECTFULLY SUBMITTED

Michael Botelho

MICHAEL T. BOTELHO # 80837

PETITIONER, IN PRO SE

///

FILED

10 FEB 18 AM 8:04

HOWARD W. CONYERS

BY _____ DEPUTY

MICHAEL T. BOTELHO #80837
NNCC
BOX 7000
CARSON CITY, NV 89702

PETITIONER, IN PRO SE

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MICHAEL T. BOTELHO,

PETITIONER,

VS.

JAMES BENEDETTI, et. al,

RESPONDENT,/

CASE NO. CR03P2156

DEPT NO. 3

AFFIDAVIT OF PETITIONER IN SUPPORT OF MOTION FOR RECUSAL

I, MICHAEL T. BOTELHO, DO HEREBY SWEAR UNDER PENALTY OF PERJURY THAT THE ASSERTIONS OF THIS AFFIDAULT ARE TRUE.

1. THAT THE AFFIANT IS THE PETITIONER IN THE ABOVE ENTITLED ACTION;

2. THAT AFFIANT/PETITIONER IS A PROPER PERSON LITIGANT;

3. THAT AFFIANT/PETITIONER IS HEREIN CHARGED WITH SERIOUS FELONIES, i.e., THREE (3) COUNTS OF SEXUAL ASSAULT ON A MINOR (NRS 200.366), AND ONE (1) COUNT OF KIDNAPPING, (NRS 200.310)(1), WHEREIN PETITIONER HAS BEEN SENTENCED TO NUMEROUS LIFE SENTENCES RESULTING IN A MINIMUM TERM OF IMPRISONMENT OF FORTY-FIVE (45) YEARS;

4. THAT AFFIANT/PETITIONER FILES THIS MOTION TO RECUSE THE HONORABLE JEROME POLAHA FROM PRESIDING OVER OR MAKING DECISIONS AND/OR RULINGS PERTAINING TO AFFIANTS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) ON FILE HEREIN IN THE ABOVE ENTITLED ACTION;

5. THAT AFFIANT HAS PREVIOUSLY SOUGHT THE RECUSAL OF JUDGE POLAHA PRIOR TO SENTENCING, REPEATEDLY THROUGH ORAL MOTIONS, WHEREIN THE COURT REFUSED TO RECUSE ITSELF DUE TO COUNSELS FAILURE TO ADHERE TO APPLICABLE STATUTES FOR RECUSAL PROCEEDING AND DISREGUARDING PETITIONERS DUE PROCESS RIGHTS AND DOING WHAT WAS RIGHT;

6. THAT AFFIANTS PENDING PETITION INCLUDES GROUNDS FOR RELIEF BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL REGUARDING COUNSEL'S FAILURE TO FOLLOW PROPER PROCEDURAL GUIDELINES FOR RECUSAL;

7. THAT THIS COURT HAS BEEN SUBJECTED TO NUMEROUS INCIDENTS OF ERRONEOUS, PREJUDICIAL MIS-INFORMATION REGUARDING PRIVILEGED MARITAL COMMUNICATIONS AND THIS COURTS FAILURE TO ACT UPON THE WILFUL, INTENTIONAL LIE PERPETRATED UPON THE PETITIONER BY THE DISTRICT ATTORNEY AS WELL AS THE DETECTIVE WHO WITH TOTAL DISREGUARD FOR THE LAW, COMMITTED FRAUD AND PERJURY IN COURT WHICH HAD DIRE AND DIRECT CONSEQUENCES UPON PETITIONER WITHOUT THE COURT ADMONISHING AND PLACING SAID DETECTIVE IN CUSTODY FOR FELONY PERJURY, A CLASS D FELONY WITH A LAWFUL MINIMUM SENTENCE OF 1 TO 10 YEARS IN NEVADA STATE PRISON AS WELL AS THE FALSE COURT DOCUMENTS INVOLVED AS WELL AS LEAKING THIS PERPETRATED LIE UPON THE NEWS MEDIA AND COMMUNITY AT LARGE, THE BASIS FOR THE INSTANT PLEADING IN SUPPORT FOR RELIEF IN PENDING PETITION;

8. THAT ON SEVERAL OCCASSIONS, JUDGE POLAHA HAS MADE RULINGS IN PETITIONERS CASE THAT WERE DETRIMENTAL TO HIM;

9. THAT AFFIANT/PETITIONER BELIEVES THIS COURT POSSESSED CERTAIN INFORMATION THAT WAS INADMISSIBLE AT TRIAL AND/OR SENTENCING AND WAS AND STILL IS BIASED AGAINST THE ACCUSED; ITS A MATERIAL FACT

V11. 829

10. THAT THE COURT WAS ASKED TO RECUSE ITSELF AND ADMONISHED COUNSEL FOR DOING IT INCORRECTLY AND THEN USED THE VERY INFORMATION AND VIOLATED PETITIONERS DUE PROCESS RIGHTS AND THEN WENT ON TO COMMENT IMPROPERLY ABOUT IT THEN WENT AND SENTENCED PETITIONER EXTREMELY HARSHLY COMPARED TO OTHERS IN THIS COURT AS WELL AS ACROSS THIS STATE.

11. THE COURT FURTHER VIOLATED COURT RULES AS WELL AS ETHICS BY SENTENCING PETITIONER, IN COURT, TO HIS FACE, ON COUNT I TO 5 TO 15 yrs. THEN WENT ON TO CHANGE IT TO 5 TO LIFE (5-L) ON THE JUDGEMENT OF CONVICTION;

12. THAT AFFIANT ASSERTS THAT ACTUAL BIAS EXISTS AS JUDGE POLAHA VIOLATED COURT RULES BY HEARING THE SAME MOTION FILED FOR RECUSAL PREVIOUSLY IN THIS COURT AND AGAIN DENYING SAME MOTION AGAINST HIMSELF WITHOUT FINDINGS, FACTS AND CONCLUSIONS OF LAW IN DOING SO;

13. THAT AFTER HEARING HIS OWN RECUSAL MOTION AND VIOLATING NRS 1.230, NRS 1.235 THEREIN, JUDGE POLAHA THEN PRESIDED OVER PETITIONER'S HABEAS (POST-CONVICTION) EVIDENTIARY HEARING WHEREIN HE ABRUPTLY ENDED THE HEARING AND SAID HE WAS SATISFIED WITH THE ORIGINAL J.O.C.;

14. THAT THE WITHIN MOTION FOR RECUSAL IS MADE OF NECESSITY TO PROTECT THE DUE PROCESS RIGHTS OF AFFIANT/PETITIONER, AND NOT FOR PURPOSES OF DELAY.

15. THAT AFFIANT READILY ASSERTS THAT THE KNOWLEDGE POSSESSED BY THIS COURT RELATIVE TO FORMER PROCEEDINGS IN THIS COURT RISE

TO THE LEVEL OF IMPROPRIETY AND HIGHLY UNETHICAL BEHAVIOR, SHOULD THE COURT NOT BE RECUSED FROM PRESIDING OVER AND MATTOR CONCERNING THIS CASE WITHIN j

DATED THIS 8th DAY OF FEBRUARY, 2010

MICHAEL T. BOTELHO #80837

PETITIONER, IN PRO SE

CERTIFICATE OF SERVICE BY MAIL

BY PERSON IN STATE CUSTODY

(FED. R. CIVIL P. 5, 28 U.S.C. § 1746)

I, MICHAEL T. BOTELHO, DECLARE: I AM OVER 18 YEARS OLD AND A PARTY TO THIS ACTION. I RESIDE AT NNCC IN CARSON CITY NEVADA. MY PRISON ADDRESS IS N.N.C.C. BOX 7000, CARSON CITY, NEVADA 89702.

ON FEBRUARY ____, 2010, I SERVED THE ATTACHED: ON THE PARTIES HEREIN BY PLACING TRUE AND CORRECT COPIES THEREOF, ENCLOSED IN A SEALED ENVELOPE, WITH POSTAGE THEREON, FULLY PAID, IN THE UNITED STATES CORRECTIONAL FACILITY IN WHICH I AM PRESENTLY CONFINED. THE ENVELOPE(S) WERE MAILED AS FOLLOWS:

NEVADA ATTORNEY GENERAL
100 N. CARSON ST.
CARSON CITY, NV. 89701-4717

WASHOE COUNTY DISTRICT ATTORNEY
BOX 30083
RENO, NEVADA 89520-3083

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA, THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON FEBRUARY 8th, 2010.

Michael T Botelho

///

MICHAEL T. BOTELHO 80837
PETITIONER, IN PRO SE

FILED

2011 DEC 28 PM 1:38

CRAIG FRANDEN ACTING CLERK

BY [signature] DEPUTY

MICHAEL T. BOTELHO # 80837
P.O. BOX 7000
NNCC, CARSON CITY, NV. 89702

ACCUSSED, IN PROPER PERSON

STATE OF NEVADA

IN THE SECOND JUDICIAL DISTRICT, WASHOE COUNTY, NEVADA.

CASE NO: CR03P-2156

MICHAEL T. BOTELHO, ACCUSED -V- STATE OF NEVADA, RESPONDENT	DEPT. NO: 3 PETITIONERS MOTION FOR WRIT OF QUO WARRANTO, AND SUPPORTING MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION.

COMES NOW, MICHAEL T. BOTELHO DENYING AND CHALLENGING THE JURISDICTION OF THE ABOVE NAMED COURT OVER THE (LACK OF) SUBJECT MATTER JURISDICTION IN THE ABOVE ENTITLED CASE, FOR REASONS CITED/EXPLAINED IN THE FOLLOWING POINTS, AUTHORITIES AND MEMORANDUM. IN PETITIONERS COLLATERAL ATTACK OF, ON THE LACK OF THIS HONORABLE COURTS SUBJECT MATTER JURISDICTION, FILED IN ACCORDANCE WITH; BOAG V. MACDOUGAL, 454 U.S. 364, 70 LED 2d 551, 102 S.CT 700 (1982)....

(A) SEE: JOHNSON V. MANHATTAN RY. CO. N.Y. 289 U.S. 479, 77 LED 1331, 53 S.CT 721 (1933) AS INTENDED TO PREVENT EXERCISE OF POWERS THAT ARE NOT CONFERRED BY LAW....

~~22. Suit against state.~~

~~Provision may be made by general law for bringing suit against the State as to all liabilities originating after the adoption of this Constitution.~~

NOTES TO DECISIONS

The words "general law" as used in this section mean a general law passed by the Legislature. Hardgrave v. State ex rel. State Hwy. Dep't, 80 Nev. 74, 389 P.2d 249, 1964 Nev. LEXIS 124 (1964).

The state under the doctrine of sovereign immunity is immune from liability for its negligent construction of roads. Hardgrave v. State ex rel. State Hwy. Dep't, 80 Nev. 74, 389 P.2d 249, 1964 Nev. LEXIS 124 (1964).

Cited in: Hill v. Thomas, 70 Nev. 389, 270 P.2d 179, 1954 Nev. LEXIS 64 (1954); State ex rel. Brennan v. Bowman, 89 Nev. 330, 512 P.2d 1321, 1973 Nev. LEXIS 515 (1973).

23. Enacting clause; law to be enacted by bill.

The enacting clause of every law shall be as follows: "The people of the State of Nevada represented in Senate and Assembly, do enact as follows," and no law shall be enacted except by bill.

NOTES TO DECISIONS

This constitutional provision is mandatory and an act not in the proper form is void and unenforceable. State ex rel. Chase v. Rogers, 10 Nev. 250, 1875 Nev. LEXIS 24 (1875).

This section is an imperative mandate of the people in their sovereign capacity to the Legislature, requiring that all laws to be binding upon them shall, upon their face, express the authority by which they were enacted, and an act which does not show such authority upon its face is not a law. State ex rel. Chase v. Rogers, 10 Nev. 250, 1875 Nev. LEXIS 24 (1875).

Each of the words are necessary in the enacting clause. The words "represented in senate and assembly," expressive of the authority which passed the law, are as necessary as the words "the people" or any other words of the enacting clause. State ex rel. Chase v. Rogers, 10 Nev. 250, 1875 Nev. LEXIS 24 (1875).

OPINIONS OF ATTORNEY GENERAL

MANDATORY, A.G.O. 85 7/25/1451,

→ **The enacting clause is mandatory.** A joint resolution adopted by both houses cannot become a valid law if it does not contain the enacting clause required by this section. AGO 85 (7-25-1951).

~~**24. Lotteries.**~~

1. Except as otherwise provided in subsection 2, no lottery may be authorized by this State, nor may lottery tickets be sold.

2. The State and the political subdivisions thereof shall not operate a lottery. The legislature may authorize persons engaged in charitable activities or activities not for profit to operate a lottery in the form of a raffle or drawing on their own behalf. All proceeds of the lottery, less expenses directly related to the operation of the lottery, must be used only to benefit charitable or nonprofit activities in this state. A charitable or nonprofit organization shall not employ or otherwise engage any person to organize or operate its lottery for compensation. The legislature may provide by law for the regulation of such lotteries.

Amendments. The 1990 amendment to this section was proposed and passed in Statutes of Nevada 1987, p. 2468; agreed to and passed in Statutes of Nevada 1989, p. 2249; and ratified at the 1990 general election.

NOTES TO DECISIONS

A lottery is a game of hazard in which small sums are ventured for the chance of obtaining greater. State ex rel. Murphy v. Overton, 16 Nev. 136, 1881 Nev. LEXIS 23 (1881).

A ticket which purports to entitle the holder to whatever prize may be drawn by its corresponding number in a prize scheme is a lottery ticket. State ex rel. Murphy v. Overton, 16 Nev. 136, 1881 Nev. LEXIS 23 (1881).

When the element of chance enters into the distribution of prizes it is a lottery regardless of the name by which it is called; courts will not inquire into the name but will determine the character of the scheme by the nature of the transaction or business in which the parties are engaged. State ex rel. Murphy v. Overton, 16 Nev. 136, 1881 Nev. LEXIS 23 (1881).

Neither the charitable character nor the name given to the scheme can legitimize a lottery. The act authorizing the Nevada Benevolent Association to give public entertainments or gift concerts and to sell tickets of admission entitling the holder to participate in a distribution of awards by raffle or other scheme of like character, for the purpose of providing means to erect an insane asylum, provided for a lottery and therefore was unconstitutional; the character of the scheme was in no way changed by the charitable purpose of the act, nor by calling the drawings "entertainments or gift concerts." Ex parte Blanchard, 9 Nev. 101, 1874 Nev. LEXIS 1 (1874).

Statement of Facts

Governments, like Individuals tend to do things because they are convenient and easy, such as with codes. But when Governments do things for convenience sake, they usually transcend Constitutional limitations and trespass on Individual Rights.

The mass of laws written by Revisers and Coolidges (NV.) (Legislative Counsel Bureau) is not the law of the Legislatu. They were not Enacted in the mode spelled out in the terms (Article IV §§ 17, 23) of the Nevada Constitution (1864). Also, since we (the People) have no legal relationship to the Commission or Committee that draeted the "Code," and/or Revised Statute," as this is made clear by the fact that these "Comprehensive Codes," and Revisions" have no Sign of Authority, which all law is required to have.(A)

According to the (NV) Constitution, Enacting and changing laws in our State falls upon the Legislative Branch of the Government, and that Branch cannot delegate that power to any other.

It is thus noted that "Revisers" (Read - Legislative Counsel Bureau) has no legislative Authority, and are therefore powerless to lessen, or expand the letter or Meaning of the Law. See; State-v-Mayer, 164 S.W 551, 552, 252 Mo. 152 (1914)

(A) Nevada Constitution, Article IV, § 23. See also; State Ex-Rel. Chase-v-Rogers, 10 Nev 250 (1875), Caine-v-Robbins, 61 Nev 416 (1942 Nev) 1/22) State-v-Ah Sam 15 Nev

Memorandum Of Law

1. The Nature of Subject Matter Jurisdiction.

The Jurisdiction of a court over the subject matter has been said to be essential, necessary, indespensible, and a elementary prerequisite to the exercise of judicial power. 21 (Js, (1) courts 3 318 P.25. A court cannot proceed with a trial or make a judgement without such jurisdiction existing. See: Matter of Green, 313 S.E. 2d 193 (N.C. App. 1984) "It is elementary that the jurisdiction of the court over the subject matter of the action is the most critical aspect of the courts authority to act. Without it, the court lacks any power to proceed; therefore, a defense based upon this lack can not be waived, and may be asserted at anytime."

Subject matter jurisdiction can not be conferred by waiver, or consent, and may be raised at any time; See: Rodriguez-v-State, 441 So. 2d 1129 (Fla App. 1983)

The subject mater jurisdiction of a criminal case is related to the cause of action in general, and more specifically to the alleged crime, or offense, which creates the action. See: Stillwell-v-Markham, 10 P. 2d 15, 16, 135 Kan 206 (1932) "The subject matter of a criminal offense is the crime itself. Subject matter in it's broadest sense, means the cause; the object; the thing in dispute."

(1) Corpus Juris Secum Dum

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V11. 837

I THE NATURE OF SUBJECT-MATTER JURISDICTION

CONT-2 AN INDICTMENT OR COMPLAINT IN A CRIMINAL CASE IS THE MAIN MEANS BY WHICH A COURT OBTAINS SUBJECT-MATTER JURISDICTION, AND IS "THE JURISDICTIONAL INSTRUMENT UPON WHICH THE ACCUSED STANDS TRIAL" SEE: STATE-V-CHAMPION, 671 P.2D 531, 538 (KAN. 1983) THE COMPLAINT IS THE FOUNDATION OF THE JURISDICTION OF THE MAGISTRATE, OR COURT. THUS IF THESE CHARGING INSTRUMENTS ARE INVALID, THERE IS A LACK OF SUBJECT-MATTER JURISDICTION. SEE: HONOMICHL-V-STATE, 333 N.W. 2D 797, 798 (S.D. 1983) "WITHOUT A FORMAL AND SUFFICIENT INDICTMENT OR INFORMATION A COURT DOES NOT ACQUIRE SUBJECT-MATTER JURISDICTION AND THUS AN ACCUSED MAY NOT BE PUNISHED FOR A CRIME" EX-PARTE CARLSON, 186 N.W. 722, 725, 176 WIS 538 (1922) "A FORMAL ACCUSATION IS ESSENTIAL FOR EVERY TRIAL OF A CRIME. WITHOUT IT THE COURT ACQUIRES NO JURISDICTION TO PROCEED, EVEN WITH THE CONSENT OF THE PARTIES; AND WHERE THE INDICTMENT OR INFORMATION IS INVALID THE COURT IS WITHOUT-JURISDICTION," RALPH-V-POLICE COURT OF EL CERRITO, 190 P2D 632, 634, 84 CAL. APP. 2D 257 (1948) "WITHOUT A VALID COMPLAINT ANY JUDGEMENT OR SENTENCE IS RENDERED "VOID AB INITIO" "JURISDICTION TO TRY AND PUNISH FOR A CRIME CAN NOT BE ACQUIRED BY THE MERE ASSERTION OF IT, OR INVOKED OTHERWISE THAN IN THE MODE PRESCRIBED BY LAW; AND, IF IT IS NOT SO ACQUIRED OR INVOKED ANY JUDGEMENT IS A NULLITY 22 (CJS (1) "CRIMINAL LAW" S 167, P202

(1) CORPUS JURIS SECUNDUM

I THE NATURE OF SUBJECT-MATTER JURISDICTION

CONTD-3 THE CHARGING INSTRUMENT MUST NOT ONLY BE IN THE PARTICULAR MODE OR FORM PRESCRIBED BY THE (NV) CONSTITUTION, AND STATUTE TO BE VALID; BUT IT MUST ALSO CONTAIN REFERENCE TO VALID LAWS. "WITHOUT VALID LAW, THE CHARGING INSTRUMENT IS INSUFICIENT AND NO SUBJECT-MATTER JURISDICTION EXISTS FOR THE MATTER TO BE TRIED." SEE: PEOPLE-V-HARDIMAN, 347 N.W. 2D 460, 462, 132 MI. APP 382 (1984) WHETHER OR NOT THE COMPLAINT CHARGES AN OFFENSE IS A JURISDICTIONAL MATTER "EX-PARTE CARLSON, 186 N.W. 722, 725, 176 WIS 538 (1922).

AN INVALID LAW CHARGED AGAINST ONE IN A CRIMINAL MATTER ALSO NEGATES SUBJECT-MATTER JURISDICTION BY THE SHEER FACT THAT IT FAILS TO CREATE A CAUSE OF ACTION. SEE: HOLMES-V-MASON, 115 NW 770, 80 NE. 454, CITING BLACKS LAW DICTIONARY. WITHOUT A VALID LAW THERE IS NO ISSUE, OR CONTROVERSY FOR A COURT TO DECIDE UPON. THUS, WHERE A LAW DOES NOT EXIST, OR DOES NOT CONSTITUTIONALLY EXIST, OR WHERE THE LAW IS INVALID, VOID OR UN-CONSTITUTIONALY THERE IS NO SUBJECT-MATTER JURISDICTION TO TRY ONE FOR AN OFFENSE ALLEGED UNDER SUCH A LAW. SEE: 22 (J.S.(1) "CRIMINAL LAW" § 151, P. 189, CITING "PEOPLE-V-KATRINAK, 185 CAL RPTR. 869, 136 CAL-APP. 3D 146 (1982)" IF A CRIMINAL STATUTE IS UN-CONSTITUTIONAL, THE COURT LACKS SUBJECT-MATTER JURISDICTION AND CANNOT PROCEED TO TRY THE CASE" ALSO, STATE-V-CHRISTENSEN, 329 N.W. 2D 382, 383, 110 WIS 2D 538 (1983) WHERE AN OFFENSE CHARGED DOES NOT EXIST, THE TRIAL COURT LACKS JURISDICTION"

(1) CORPUS JURIS SECUM DUM

4/32 (CONTD-5)

I CONT'D 4 THE NATURE OF SUBJECT-MATTER JURISDICTION

NOT ALL STATUTES CREATE A CRIMINAL OFFENSE. THUS WHEN A MAN WAS CHARGED WITH "A STATUTE WHICH DOES NOT CREATE A CRIMINAL OFFENSE"; SUCH PERSON WAS NEVER LEGALLY CHARGED WITH ANY CRIME, NOR LAWFULLY CONVICTED BECAUSE THE TRIAL COURT DID NOT HAVE "JURISDICTION OF THE SUBJECT-MATTER". SEE: STATE EX-REL HANSEN-V-RIGG, 258 MINN. 388, 104 N.W. 2D 553 (1960) THERE MUST BE A VALID LAW IN ORDER FOR SUBJECT-MATTER TO EXIST. IN A CASE WHERE A MAN WAS CONVICTED OF VIOLATING CERTAIN SECTIONS OF SOME LAWS, HE LATER CLAIMED THAT THE LAWS WERE UNCONSTITUTIONAL WHICH DEPRIVED THE COUNTY (DISTRICT) COURT OF JURISDICTION TO TRY HIM FOR THOSE OFFENSE(S). THE SUPREME COURT OF OREGON HELD: "IF THESE SECTIONS ARE UN-CONSTITUTIONAL, THE LAW IS VOID, AND AN OFFENSE CREATED BY THEM IS NOT A CRIME AND A CONVICTION UNDER THEM CAN NOT BE A LEGAL CAUSE FOR IMPRISONMENT, FOR NO COURT CAN ACQUIRE JURISDICTION TO TRY A PERSON FOR ACTS WHICH ARE MADE CRIMINAL ONLY BY AN UN-CONSTITUTIONAL LAW." SEE: KELLY-V-MEYERS, 263 PAC 903, 905 (ORE. 1928) WITHOUT A VALID LAW THERE CAN BE NO CRIME CHARGED UNDER THAT LAW, AND WHERE THERE IS NO CRIME, OR OFFENSE THERE IS NO CONTROVERSY OR CAUSE OF ACTION; AND, WITHOUT A CAUSE OF ACTION - THERE CAN BE NO SUBJECT-MATTER JURISDICTION. FURTHER, INVALID OR UNLAWFUL LAWS MAKE THE COMPLAINT FATALLY DEFECTIVE AND INSUFFICIENT, AND WITHOUT A VALID COMPLAINT THERE IS A LACK OF SUBJECT-MATTER JURISDICTION.

5/32 (CONT'D-6)

200.310. Degrees.

1. A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person for ransom, or reward, or for the purpose of committing sexual assault, extortion or robbery upon or from the person, or for the purpose of killing the person or inflicting substantial bodily harm upon the person, or to exact from relatives, friends, or any other person any money or valuable thing for the return or disposition of the kidnapped person, and a person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine the minor from his or her parents, guardians, or any other person having lawful custody of the minor, or with the intent to hold the minor to unlawful service, or perpetrate upon the person of the minor any unlawful act is guilty of kidnapping in the first degree which is a category A felony.

2. A person who willfully and without authority of law seizes, inveigles, takes, carries away or kidnaps another person with the intent to keep the person secretly imprisoned within the State, or for the purpose of conveying the person out of the State without authority of law, or in any manner held to service or detained against the person's will, is guilty of kidnapping in the second degree which is a category B felony.

1947, p. 551; CL 1929 (1949 Supp.), § 10612.05; 1959, p. 20; 1979, p. 39; 1987, ch. 215, § 1, p. 495; 1995, ch. 443, § 53, p. 1184.

NOTES TO DECISIONS

Statute was not unconstitutional simply because defendant also could have been charged under NRS § 200.359(1)(a) that provided that taking his daughter from the mother who had custody was only a category D felony. Hernandez v. State, 118 Nev. 513, 50 P.3d 1100, 2002 Nev. LEXIS 69 (2002), cert. denied, 537 U.S. 1197, 123 S. Ct. 1263, 154 L. Ed. 2d 1034, 2003 U.S. LEXIS 1239 (2003).

A minimum distance of asportation is not necessary to support a charge of kidnapping; it is the fact, not the distance, of forcible removal of a victim that constitutes the offense. Jensen v. Sheriff, White Pine County, 89 Nev. 123, 508 P.2d 4, 1973 Nev. LEXIS 443 (1973); Eckert v. Sheriff, Clark County, 92 Nev. 719, 557 P.2d 1150, 1976 Nev. LEXIS 732 (1976).

Asportation was not a necessary element of kidnaping where the victim was physically restrained, the restraint increased the risk of harm and therefore was not incidental to extortion, and the restraint had an independent purpose as it was essential to the accomplishment of mayhem. Clem v. State, 104 Nev. 351, 760 P.2d 103, 1988 Nev. LEXIS 54 (1988), overruled, Zgombic v. State, 106 Nev. 571, 798 P.2d 548, 1990 Nev. LEXIS 110 (1990), overruled in part, Zgombic v. State, 106 Nev. 571, 798 P.2d 548, 1990 Nev.

200.366. Sexual assault: Definition; penalties.

1. A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or herself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct, is guilty of sexual assault.

2. Except as otherwise provided in subsections 3 and 4, a person who commits a sexual assault is guilty of a category A felony and shall be punished:

(a) If substantial bodily harm to the victim results from the actions of the defendant committed in connection with or as a part of the sexual assault, by imprisonment in the state prison:

(1) For life without the possibility of parole; or

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 15 years has been served.

(b) If no substantial bodily harm to the victim results, by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served.

3. Except as otherwise provided in subsection 4, a person who commits a sexual assault against a child under the age of 16 years is guilty of a category A felony and shall be punished:

(a) If the crime results in substantial bodily harm to the child, by imprisonment in the state prison for life without the possibility of parole.

(b) Except as otherwise provided in paragraph (c), if the crime does not result in substantial bodily harm to the child, by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 25 years has been served.

(c) If the crime is committed against a child under the age of 14 years and does not result in substantial bodily harm to the child, by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 35 years has been served.

4. A person who commits a sexual assault against a child under the age of 16 years and who has been previously convicted of:

I THE NATURE OF SUBJECT-MATTER JURISDICTION

CONT'D 5 THE ACCUSED ASSERTS THAT THE LAWS CHARGED AGAINST HIM ARE NOT VALID, OR DO NOT CONSTITUTIONALLY EXIST AS THEY DO NOT CONFORM TO CERTAIN CONSTITUTIONAL PRE-REQUISITES, AND THUS ARE NO LAWS AT ALL, WHICH PREVENTS SUBJECT-MATTER JURISDICTION TO THE ABOVE NAMED COURT. THE COMPLAINT IN QUESTION ALLEGES THAT THE ACCUSED HAS COMMITTED SEVERAL CRIMES BY THE VIOLATION OF CERTAIN LAWS WHICH ARE LISTED IN SAID COMPLAINT, TO WIT: SEE ENCLOSED/INCLUDED PHOTO-COPIES OF STATUTES AT ISSUE; NRS 200.310, NRS 200.366, NRS

I HAVE BEEN INFORMED THAT THESE LAWS OR STATUTES USED IN THE COMPLAINTS AGAINST MYSELF ARE LOCATED IN, AND DERIVED FROM A COLLECTION OF BOOKS ENTITLED "NEVADA REVISED STATUTES." UPON LOOKING UP THESE LAWS IN THIS PUBLICATION, I REALIZED THAT THEY DO NOT ADHERE TO SEVERAL CONSTITUTIONAL PROVISIONS OF THE NEVADA CONSTITUTION.

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6/32 CONT'D-7

I THE NATURE OF SUBJECT-MATTER JURISDICTION

(CONT'D 6) PER/BY ARTICLE IV OF THE CONSTITUTION OF THE STATE OF NEVADA (1864), ALL LAW MAKING AUTHORITY FOR THE STATE IS VESTED IN THE LEGISLATURE OF NEVADA. THIS ARTICLE ALSO PRESCRIBES CERTAIN FORMS, MODES, AND PROCEDURES THAT MUST BE FOLLOWED IN ORDER FOR A VALID LAW TO EXIST UNDER THE CONSTITUTION. IT IS FUNDAMENTAL THAT NOTHING CAN BE A LAW THAT IS NOT ENACTED BY THE LEGISLATURE PRESCRIBED IN THE (NV) CONSTITUTION, AND WHICH FAILS TO CONFORM TO CONSTITUTIONAL FORMS, PREREQUISITES OR PROHIBITIONS. THESE ARE THE GROUNDS FOR CHALLENGING THE SUBJECT-MATTER-JURISDICTION OF THIS COURT, SINCE THE VALIDITY OF A LAW ON A COMPLAINT OR INDICTMENT GOES TO THE JURISDICTION OF A COURT. THE FOLLOWING EXPLAINS IN AUTHORATIVE DETAIL WHY THE LAWS CITED IN THE COMPLAINTS AGAINST THE ACCUSED ARE NOT CONSTITUTIONALLY VALID LAWS.

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BY CONSTITUTIONAL MANDATE, ALL LAWS MUST HAVE AN ENACTING CLAUSE.

ONE OF THE FORMS THAT ALL LAWS ARE REQUIRED TO FOLLOW BY THE CONSTITUTION OF NEVADA (1864) IS THAT THEY CONTAIN AN ENACTING STYLE OR CLAUSE. THIS PROVISION IS STATED AS FOLLOWS: "ARTICLE IV, SEC. 23. THE STYLE OF ALL LAWS OF THIS STATE (NV) SHALL BE" THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS" AND NO LAWS SHALL BE ENACTED EXCEPT BY BILL. NONE OF THE LAWS CITED IN THE COMPLAINT AGAINST THE ACCUSED AS FOUND IN THE COLLECTION KNOWN AS THE "NEVADA REVISED STATUTES, "2007", CONTAIN ANY ENACTING CLAUSES.

THE CONSTITUTIONAL PROVISION WHICH PRESCRIBES AN ENACTING CLAUSE FOR ALL LAWS IS NOT DISCRETIONARY, BUT IS MANDATORY. THIS PROVISION IS TO BE STRICTLY ADHERED TO AS ASSERTED BY THE SUPREME COURT OF NEVADA. SEE: NEVADA -V- ROGERS, 10 NEV 250, 255, 256 (1875) THE SAID SECTION (ENACTING CLAUSE) OF THE CONSTITUTION IS IMPERATIVE, AND MANDATORY, AND A LAW CONTRAVENING ITS PROVISIONS IS NULL AND VOID. IF ONE OR MORE OF THE POSITIVE PROVISIONS OF THE CONSTITUTION MAY BE DISREGARDED AS BEING DISCRETIONARY, WHY NOT ALL? AND IF ALL, IT CERTAINLY REQUIRES NO ARGUMENT TO SHOW WHAT THAT RESULT WOULD BE. THE CONSTITUTION WHICH IS THE PARAMOUNT LAW, WOULD SOON BE LOOKED UPON AND TREATED (CONT'D. P. 9)

1) NRS 200.010. MURDER . . .

II (CONT'D 8) BY CONSTITUTIONAL MANDATE ALL LAWS MUST HAVE AN ENACTING CLAUSE. BY THE LEGISLATURE AS DEVOID OF ALL MORAL OBLIGATIONS; WITHOUT ANY BINDING FORCE OR EFFECT; A MERE "ROPE OF SAND," TO BE HELD TOGETHER, OR PULLED TO PIECES AT ITS WILL AND PLEASURE. WE THINK THE PROVISION UNDER CONSIDERATION (ENACTING CLAUSE) MUST BE TREATED AS MANDATORY." EVERY PERSON AT ALL FAMILIAR WITH THE PRACTICE OF LEGISLATIVE BODIES IS AWARE THAT ONE OF THE MOST COMMON METHODS ADOPTED TO KILL A BILL, AND PREVENT ITS BECOMING A LAW, IS FOR A MEMBER TO MOVE TO STRIKE OUT THE ENACTING CLAUSE. IF SUCH A MOTION IS CARRIED, THE BILL IS LOST. CAN IT BE SERIOUSLY CONTENDED THAT SUCH A BILL, "WITH ITS HEAD CUT OFF," COULD THEREAFTER BY ANY LEGISLATIVE ACTION BECOME A LAW? CERTAINLY NOT" CAINE-V-ROBBINS, 131 P2D 516, 518 61 NEV 416 (1942) "A DECLARATION OF THE ENACTING AUTHORITY IN LAWS IS A USAGE AND CUSTOM OF GREAT ANTIQUITY, AND A COMPULSORY OBSERVANCE OF IT IS FOUNDED IN SOUND REASON" (THE ENACTING CLAUSE GIVES A STATUTE ITS "CONSTITUTIONAL AUTHENTICITY," WHICH MAKES USE ESSENTIAL - SINCE THE CONSTITUTION IS THE SOURCE OF THE LEGISLATURE'S AUTHORITY FOR ENACTING LAWS. A LAW CANNOT BE REGARDED AS COMING FROM A CONSTITUTIONALLY AUTHORIZED SOURCE IF IT DOES NOT HAVE AN ENACTING CLAUSE"; SEE: JOINER-V-STATE 155 S.E.D 20/8, 10, 223 GA. 367 (1967) GA. S(T).

II (CONT'D 9) BY CONSTITUTIONAL MANDATE, ALL LAWS MUST HAVE AN ENACTING CLAUSE. SEE: SJOBERG-V-SECURITY SAVINGS AND LOAN ASSN, 73 MINN. 203, 212, (1898) "UPON BOTH PRINCIPLE AND AUTHORITY, WE HOLD THAT ARTICLE 4 S 13 OF OUR CONSTITUTION, WHICH PROVIDES THAT "THE STYLE OF ALL LAWS OF THIS STATE SHALL BE, BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA," IS MANDATORY AND THAT A STATUTE WITHOUT ANY ENACTING CLAUSE IS VOID"

III) WHAT IS THE PURPOSE OF THE CONSTITUTIONAL PROVISION FOR AN ACTING CLAUS

TO DETERMINE THE VALIDITY OF LIVING LAWS WITHOUT AN ENACTING CLAUSE AGAINST CITIZENS, WE NEED TO DETERMINE THE PURPOSE AND FUNCTION OF AN ENACTING CLAUSE; AND ALSO TO SEE WHAT PROBLEMS OR EVILS WERE INTENDED TO BE AVOIDED BY INCLUDING SUCH A PROVISION IN OUR (NV.) STATES CONSTITUTION. ONE OBJECT OF THE CONSTITUTIONAL MANDATE FOR AN ENACTING CLAUSE, IS TO SHOW THAT THE LAW IS ONE ENACTED BY THE LEGISLATIVE BODY WHICH HAS BEEN GIVEN THE LAW MAKING AUTHORITY UNDER THE CONSTITUTION. SEE: STATE-V-PATTERSON, 45SE 350, 352, 98 N.C. 660 (1887), 82 C.J.S. STATUTES "S 65 P. 104, JOINER-V-STATE, 155 SE 2D 810, 223 GA. 367 (1967) "THE PURPOSE OF THUS PRESCRIBING AN ENACTING CLAUSE - "THE STYLE OF THE ACTS" IS TO ESTABLISH IT: TO GIVE IT PERMANENCE, UNIFORMITY, AND CERTAINTY; TO IDENTIFY THE ACT OF LEGISLATION AS OF THE GENERAL ASSEMBLY; TO AFFORD EVIDENCE OF ITS LEGISLATIVE STATUTORY NATURE; AND TO SECURE UNIFORMITY OF IDENTIFICATION,

III (CONT'D 10) WHAT IS THE PURPOSE OF THE CONSTITUTIONAL PROVISION FOR AN ENACTING CLAUSE "AND THUS PREVENT INADVERTENCE, POSSIBLY MISTAKE AND FRAUD."

TO FULFILL THE PURPOSE OF IDENTIFYING THE LAWMAKING AUTHORITY OF A LAW, IT HAS BEEN REPEATEDLY DECLARED BY THE COURTS OF THIS LAND THAT AN ENACTING CLAUSE IS TO APPEAR ON THE FACE OF EVERY LAW WHICH THE PEOPLE ARE EXPECTED TO FOLLOW AND OBEY. THE ALMOST UNBROKEN CUSTOM OF CENTURIES HAS BEEN TO PREFACE THE LAWS WITH A STATEMENT IN SOME FORM DECLARING THE ENACTING AUTHORITY. SEE: 73 AM. JUR. 2D STATUTES "S 93, P319, 320; PRECKEL-V-BYRNE, 243 N.W. 823, 826, 62 N.D. 356 (1932)" THE PURPOSE OF AN ENACTING CLAUSE OF A STATUTE IS TO IDENTIFY IT AS AN ACT OF LEGISLATION BY EXPRESSING ON ITS FACE THE AUTHORITY BEHIND THE ACT". FOR AN ENACTING CLAUSE TO APPEAR ON THE FACE OF A LAW, IT MUST BE RECORDED, AND PUBLISHED WITH THE LAW SO THAT THE PUBLIC CAN READILY IDENTIFY THE AUTHORITY FOR THAT PARTICULAR LAW OF WHICH THEY ARE EXPECTED TO FOLLOW. THE "STATUTES" USED IN THE COMPLAINT(S) AGAINST THE ACCUSED HAVE NO ENACTING CLAUSES. THEY THUS CANNOT BE IDENTIFIED AS ACTS OF LEGISLATION OF THE STATE OF NEVADA PURSUANT TO ITS LAW MAKING AUTHORITY UNDER ARTICLE IV OF THE CONSTITUTION OF THE STATE OF NEVADA (1864), SINCE A LAW IS VIALLY IDENTIFIED AS A TRUE AND CONSTITUTIONAL LAW" BY WAY OF ITS ENACTING CLAUSE.

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III (CONT'D 11) WHAT IS THE PURPOSE OF THE CONSTITUTIONAL PROVISION FOR AN ENACTING CLAU

THE SUPREME COURT OF GEORGIA ASSERTED THAT A STATUTE MUST HAVE AN ENACTING CLAUSE, EVEN THOUGH THEIR STATE CONSTITUTION HAS NO PROVISION FOR THE MEASURE. THE (GA.) COURT STATED THAT AN ENACTING CLAUSE ESTABLISHES A LAW OR STATUTE AS BEING A TRUE, AND AUTHENTIC LAW OF THE STATE. SEE: JOINER-V-STATE, 155SE 208, 10 (GA 1967) "THE ENACTING CLAUSE IS THAT PORTION OF A STATUTE WHICH GIVES IT JURISDICTIONAL IDENTITY, AND CONSTITUTIONAL AUTHENTICITY".

THE FAILURE OF A LAW TO DISPLAY ON ITS ESSENTIAL LEGALITY, AND RENDERS A STATUTE WHICH OMITS SUCH A CLAUSE AS "A NULLITY, AND OF NO FORCE OF LAW." JOINER-V-STATE, SUPRA. THE STATUTES CITED IN THE COMPLAINT (S) HAVE NO JURISDICTIONAL IDENTITY, AND ARE NOT AUTHENTIC LAWS UNDER THE CONSTITUTION OF NEVADA.

IN: COMMONWEALTH-V-ILLINOIS CENT. R. CO., 170 SW. 171, 172, 175, 160 KY. 745 (1914) THE COURT OF APPEALS OF KY. HELD THAT THE CONSTITUTIONAL PROVISION REQUIRING AN ENACTING CLAUSE IS "A BASIC CONCEPT" WHICH HAS A DIRECT AFFECT UPON THE VALIDITY OF A LAW. THE COURT, IN DEALING WITH A LAW THAT HAD NO ENACTING CLAUSE, STATED; "THE ALLEGED ACT OR LAW IN QUESTION IS UNNAMED; IT SHOWS NO SIGN OF AUTHORITY; IT CARRIES WITH IT NO EVIDENCE THAT THE GENERAL ASSEMBLY, OR ANY OTHER LAW MAKING POWER IS RESPONSIBLE, OR ANSWERABLE FOR IT.

12/32 (CONT'D 13)

III (CONTD 12) WHAT IS THE PURPOSE OF THE CONSTITUTIONAL PROVISION FOR AN ENACTING CLAUSE

"BY AN ENACTING CLAUSE, THE MAKERS OF THE CONSTITUTION INTENDED THAT THE GENERAL ASSEMBLY SHOULD MAKE ITS IMPRESS OR SEAL, AS IT WERE, UPON EACH ENACTMENT FOR THE SAKE OF IDENTITY, AND, TO ASSUME AND SHOW RESPONSIBILITY. WHILE THE CONSTITUTION MAKES THIS A NECESSITY, IT DID NOT ORIGINATE IT. THE CUSTOM IS IN USE EVERYWHERE, AND IS OLD AS PARLIMENTARY GOVERNMEN. BUT, WETHER THESE EDICTS AND COMMANDS BE PROMULGATED BY THE SUPREME RULER OR BY PETTY KINGS, OR BY THE SOVEREIGN PEOPLE THEMSELVES, THEY HAVE ALWAYS BEGUN WITH SOME SUCH FORM AS AN EVIDENCE OF POWER AND AUTHORITY."

THE "LAWS" USED AGAINST THE ACCUSED ARE UNNAMED. THEY SHOW NO SIGN OF AUTHORITY ON THEIR FACE AS RECORDED IN THE "NEVADA REVISED STATUTES". THEY CARRY WITH THEM NO EVIDENCE THAT THE LEGISLATURE OF THE STATE OF NEVADA, PURSUANT TO ARTICLE III OF THE CONSTITUTION OF NEVADA (1864) IS RESPONSIBLE FOR THESE LAWS." WITHOUT AN ENACTING CLAUSE THE "LAWS" REFERENCED TO IN THE COMPLAINT(S) HAVE NO OFFICIAL EVIDENCE THAT THEY ARE FROM AN AUTHORITY OF WHICH I AM SUBJECT TO, OR REQUIRED TO OBEY.

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III (CONT'D-13) WHAT IS THE PURPOSE OF THE CONSTITUTIONAL PROVISION FOR AN ENACTING CLAU THE PURPORTED LAWS" IN THE COMPLAINT(S), WHICH THE ACCUSED IS SAID TO HAVE VIOLATED, ARE REFERENCED TO VARIOUS "LAWS" FOUND PRINTED IN THE "NEVADA REVISED STATUTES" BOOK. I HAVE LOOKED UP THE "LAWS" CHARGED AGAINST ME IN THIS BOOK, AND FOUND NO ENACTING CLAUSE FOR ANY OF THESE "LAWS". A CITIZEN IS NOT EXPECTED OR REQUIRED TO SEARCH THROUGH OTHER RECORDS OR BOOKS FOR THE ENACTING AUTHORITY. IF SUCH ENACTING AUTHORITY IS NOT "ON THE FACE" OF THE "LAWS" WHICH ARE REFERENCED IN A COMPLAINT, THEN THEY ARE NOT LAWS OF THE STATE"; AND THUS ARE NOT LAWS TO WHICH I AM SUBJECT. SINCE THEY ARE NOT LAWS OF THIS STATE, THE ABOVE NAMED COURT HAS NO SUBJECT-MATTER JURISDICTION, AS THERE CAN BE NO CRIME WHICH CAN EXIST FROM FAILING TO FOLLOW LAWS THAT DO NOT CONSTITUTIONALY EXIST. IN SPEAKING ON THE NECESSITY AND PURPOSE THAT EACH LAW BE PREFACED WITH AN ENACTING CLAUSE, THE SUPREME COURT OF TENNESSEE QUOTED THE FIRST PORTION OF THE SJOBERG CASE CITED ABOVE, AND THEN STATED: THE PURPOSE OF PROVISIONS OF THIS CHARACTER IS THAT ALL STATUTES MAY BEAR UPON UPON THEIR FACES A DECLARATION OF SOVEREIGN AUTHORITY BY WHICH THEY ARE ENACTED, AND DECLARED TO BE THE LAW, AND TO PROMOTE AND PRESERVE UNIFORMITY IN LEGISLATION SUCH CLAUSES ALSO IMPORT A COMMAND OF OBEDIENCE, AND CLOTHE THE STATUTE WITH CERTAIN DIGNITY, BELIEVED IN ALL TIMES TO COMMAND RESPECT AND AID IN THE ENFORCEMEN OF LAWS". SEE: STATE-V-BURROW, 104 S.W. 526, 529, 119 TENN. 376 (1907)

III (CONTD 14) WHAT IS THE PURPOSE OF THE CONSTITUTIONAL PROVISION FOR AN ENACTING CLAU

THE USE OF AN ENACTING CLAUSE DOES NOT MERELY SERVE AS A "FUNC UNDER WHICH BILLS RUN THE COURSE OF THEIR LEGISLATIVE MACHINERY," SEE: VAUGHN & RAGSDALE CO. -V- STATE BD OF EQ., 96 P2D 420, 424 (MONT. 1939), "THE ENACTING CLAUSE OF A LAW GOES TO ITS SUBSTANCE, AND IS NOT MERELY PROCEDURAL" SEE: MORGAN -V- MURRAY, 328 P2D 644, 654, (MONT. 1958). ANY PURPORTED STATUTE WHICH HAS NO ENACTING CLAUSE ON ITS FACE, IS NOT LEGALLY BINDING AND OBLIGATORY UPON THE PEOPLE, AS IT IS NOT CONSTITUTIONALLY A LAW AT ALL. THE SUPREME COURT OF MICHIGAN, IN CITING NUMEROU AUTHORITIES, SAID THAT "AN ENACTING CLAUSE WAS A REQUISITE TO A VALID LAW SINCE THE ENACTING PROVISION WAS MANDATORY." SEE: PEOPLE -V- DETTENHALER, 77 N.W. 450, 451, 118 MICH. 595 (1898); CITING - SWANN -V- BULK, 40 MISS 270. "IT IS NECESSARY THAT EVERY LAW SHOULD SHOW ON ITS FACE THE AUTHORITY BY WHICH IT IS ADOPTED AND PROMULGATED, AND THAT IT SHOULD CLEARLY APPEAR THAT IS INTENDED BY THE LEGISLATIVE POWER THAT ENACTS IT, THAT IT SHOULD TAKE EFFECT AS A LAW".

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III (CONTD 15) WHAT IS THE PURPOSE OF THE CONSTITUTIONAL PROVISION FOR AN ENACTING CLAU THE LAWS IN THE "NEVADA REVISED STATUTES" DO NOT SHOW ON THEIR FACE THE AUTHORITY BY WHICH THEY ARE ADOPTED AND PROMULGATE THERE IS NOTHING ON THEIR FACE WHICH DECLARES THEY SHOULD BE LAW, OR THAT THEY ARE OF THE PROPER LEGISLATIVE AUTHORITY OF THIS STATE.

FACE; "THE SURFACE OF ANYTHING, SPECIALLY THE FRONT, UPPER, OR OUTER PART OR SURFACE. THAT WHICH PARTICULARLY OFFERS ITSELF TO THE VIEW OF A SPECTATOR. THAT WHICH IS SHOWN BY THE LANGUAGE EMPLOYED, WITHOUT ANY EXPLANATION MODIFICATION OR ADDITION FROM EXTRINSIC FACTS OR EVIDENCE" SEE: BLACKS LAW DICTIONARY, 5TH. ED., P 530. THE ENACTING CLAUSE MUST BE INTRINSIC TO THE LAW, AND NOT EXTRINSIC TO IT, THAT IS, IT CANNOT BE HIDDEN AWAY IN OTHER RECORDS OR BOOKS. THE ENACTING CLAUSE IS REGARDED AS PART OF THE LAW, AND HAS TO APPEAR DIRECTLY WITH THE LAW, ON ITS FACE, SO THAT ONE KNOWS THE AUTHORITY BY WHICH IT EXISTS.

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IV LAWS MUST BE PUBLISHED, AND REGARDED WITH ENACTING CLAUSES

SINCE IT HAS BEEN REPEATEDLY HELD THAT AN ENACTING CLAUSE MUST APPEAR "ON THE FACE" OF A LAW, SUCH A REQUIREMENT AFFECTS THE PRINTING AND PUBLISHING OF LAWS. THE FACT THAT OUR (NV) CONSTITUTION REQUIRES ALL LAWS TO HAVE AN ENACTING CLAUSE MAKES IT A REQUIREMENT ON NOT JUST BILLS IN THE LEGISLATURE, BUT ON PUBLISHED LAWS AS WELL. IF THE CONSTITUTION SAID "ALL BILLS" SHALL HAVE AN ENACTING CLAUSE, IT PROBABLY BE SAID THEIR USE IN PUBLICATION WOULD NOT BE REQUIRED. BUT THE HISTORICAL USAGE AND APPLICATION OF AN ENACTING CLAUSE HAS BEEN FOR THEM TO BE PRINTED AND PUBLISHED ALONG WITH THE BODY OF THE LAW, THUS APPEARING ON "THE FACE OF THE LAW". SEE: NEVADA-V-ROGERS, 10 NEV 250 261 (1875), UPHELD IN; CAINE-V-ROBBINS, 131 P2D 516, 518, 61 NEV. 416 (1942), SEE: ALSO; KEPAUVER-V-SPURLING, 290 S.W. 1475 (TENN 1926) "OUR CONSTITUTION EXPRESSLY PROVIDED THAT THE ENACTING CLAUSE OF EVERY LAW SHALL BE, 'THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS.' "THIS LANGUAGE IS SUSCEPTIBLE TO BUT ONE INTERPRETATION. THERE IS NO DOUBTFUL MEANING AS TO THE INTENTION." "IT IS, IN OUR JUDGEMENT, AN IMPERATIVE MANDATE OF THE PEOPLE, IN THEIR SOVEREIGN CAPACITY TO THE LEGISLATURE, REQUIRING THAT ALL LAWS, TO BE BINDING UPON THEM, SHALL, EXPRESS THE AUTHORITY BY WHICH THEY WERE ENACTED;

17/82 (CONT'D 18)

IV (CONTD IV) LAWS MUST BE PUBLISHED, AND RECORDED WITH ENACTING CLAUSES

"AND, SINCE THIS ACT COMES TO US WITHOUT SUCH AUTHORITY APPEARING UPON ITS FACE, IT IS NOT A LAW" (THE MANNER IN WHICH THE LAW CAME TO THE (NEVADA SUPREME) COURT WAS BY THE WAY IT WAS FOUND IN THE (NV) STATUTE BOOK, CITED BY THE COURT AS "STAT. 1875, 66," AND THAT IF THEY (NVSCT) JUDGED THE VALIDITY OF THE LAW. SINCE THEY (NVSCT) SAW THAT THE ACT AS IT WAS PRINTED IN THE STATUTE BOOK, HAD AN INSUFFICIENT/LACKING AN ENACTING CLAUSE ON ITS FACE, IT WAS DEEMED TO BE "NOT A LAW") IT IS ONLY BY INSPECTING THE PUBLICLY PRINTED STATUTE (NEVADA REVISED STATUTES) BOOK, THAT WE THE PEOPLE CAN DETERMINE THE SOURCE, AUTHORITY, AND CONSTITUTIONAL AUTHENTICITY OF THE LAW WE ARE EXPECTED TO FOLLOW, AND BE BOUND BY. THE PRECEDING EXAMPLES AND DECLARATIONS ON THE USE AND PURPOSE OF ENACTING CLAUSES SHOWS BEYOND DOUBT THAT NOTHING CAN BE CALLED OR REGARDED AS A LAW OF THIS STATE WHICH IS PUBLISHED WITHOUT AN ENACTING CLAUSE ON ITS FACE. NOTHING CAN EXIST AS A STATE LAW, EXCEPT IN THE MANNER PRESCRIBED BY THE NEVADA STATE CONSTITUTION. ONE OF THESE PROVISIONS IS THAT ALL LAWS MUST BEAR ON THEIR FACE A SPECIFIC ENACTING STYLE- "THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS." ALL LAWS MUST BE PUBLISHED WITH THIS CLAUSE IN ORDER TO BE VALID LAWS, AND SINCE THESE "STATUTES IN THE COLLECTION KNOWN AS THE "NEVADA REVISED STATUTES" ARE NOT SO PUBLISHED, THEY ARE NOT VALID LAWS OF THIS STATE OF NEVADA."

V THE NEVADA STATUTES ARE OF AN UNKNOWN, AND UNCERTAIN AUTHORITY.

THE SO CALLED "STATUTES" IN THE NEVADA REVISED STATUTES "ARE NOT ONLY ABSENT ENACTING CLAUSES, BUT ARE SURROUNDED BY OTHER ISSUES AND FACTS WHICH MAKE THEIR AUTHORITY UNKNOWN, UNCERTAIN, OR QUESTIONABLE. THE TITLE PAGE OF THE "NEVADA REVISED STATUTE "STATES THAT THE STATUTES THEREIN, TO WIT CURRENT THROUGH THE 2007 74TH REGULAR SESSIONS AND THE 23RD SPECIAL SESSION OF THE NEVADA LEGISLATURE AND TECHNICAL CORRECTIONS RECIEVED FROM THE LEGISLATIVE COUNSEL BUREAU (2007)"; "ADDED BY LAWS 1989, P. 486, AMENDED BY LAWS 1995, P. 2663 ETC. ETC. ETC. ADNAUSEAUM. THE CONSTITUTION OF THE STATE OF NEVADA CLEARLY STATES (IN ARTICLE IV, SEC. 17) "EACH LAW ENACTED BY THE LEGISLATURE SHALL EMBRACE BUT ONE SUBJECT, AND MATTER PROPERLY CONNECTED THEREWITH, WHICH SUBJECT SHALL BE BRIEFLY EXPRESSED IN THE TITLE; AND NO LAW SHALL BE REVISED OR AMENDED BY REFERENCE TO ITS TITLE ONLY; BUT IN SUCH CASE, THE ACT AS REVISED, OR SECTION AS AMENDED, SHALL BE RE ENACTED AND PUBLISHED AT LENGTH." SIMPLY AND PLAINLY STATED NEVADA REVISED STATUTES MAY NOT BE CITED, ENUMERATED, OR OTHERWISE TREATED AS A SESSION LAW.

THE SESSION LAWS ARE PUBLISHED BY THE (NV) SECRETARY OF STATE, WHO IS HISTORICALLY, AND CONSTITUTIONALY IS IN POSSESION OF THE ENROLLED BILLS OF THE LEGISLATURE WHICH BECOME STATE LAW. THE CONSTITUTION OF THE STATE OF NEVADA, ART V, SEC. 20 (1864) REQUIRES THAT; (CONTD 20)

(V) NRS 200.010, MURDER

V (CONT'D 19) NEVADA STATUTES ARE OF AN UNKNOWN, AND UNCERTAIN AUTHORITY

"THE SECRETARY OF STATE SHALL KEEP A TRUE RECORD OF THE OFFICIAL ACTS OF THE LEGISLATURE AND EXECUTIVE DEPARTMEN. OF THE GOVERNMENT, AND SHALL, WHEN REQUIRED, LAY THE SAME, AND ALL MATTERS RELATIVE THERETO, BEFORE EITHER BRANC. OF THE LEGISLATURE". THUS IN THIS STATE (NV), AS IN NEARL ALL OTHER STATES, ALL OFFICIAL LAWS, RECORDS, AND DOCUMEN ARE UNIVERSALLY RECOGNIZED BY THEIR BEING ISSUED, OR PUBLISHED BY THE SECRETARY OF STATE.

THE "NEVADA REVISED STATUTES" ARE PUBLISHED BY THE REVISOR OF STATUTES; THE NEVADA LEGISLATIVE COUNSEL BUREAU, AND ARE ALSO COPYRIGHTED BY HIM/HER OR HIS/HER OFFICE THE "SESSION LAWS" WERE NEVER COPYRIGHTED AS THEY ARE TRUE PUBLIC DOCUMENTS. IN FACT, NO TRUE PUBLIC DOCUMENT OF THIS STATE, OR ANY OTHER STATE, OR OF THE UNITED STATES HAS BEEN NOR CAN BE UNDER A COPYRIGHT. PUBLIC DOCUMENTS ARE IN THE PUBLIC DOMAIN. A COPYRIGHT INFERS A PRIVATE RIGHT OVER THE CONTENTS OF A BOOK, SUGGESTING THAT THE LAWS IN THE (COLLECTION OF BOOKS) "NEVADA REVISED STATUTES" ARE DERIVED FROM A PRIVATE SOURCE, AND THUS ARE NOT TRUE PUBLIC LAWS.

THE PURPORTED STATUTES IN THE "NEVADA REVISED STATUTES" DO NOT MAKE IT CLEAR BY WHAT AUTHORITY THEY EXIST. IN FACT, THERE IS NOT A HINT THAT THE LEGISLATUR OF NEVADA HAD ANYTHING AT ALL TO DO WITH THESE SO-CALLED STATUTE BOOKS . . .

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VI ESTABLISHED RULES OF CONSTITUTIONAL CONSTRUCTION.

THE ISSUE OF SUBJECT-MATTER JURISDICTION FOR THIS CASE THUS SQUARELY RESTS UPON CERTAIN PROVISIONS OF THE CONSTITUTION OF THE STATE OF NEVADA (1864) TO WIT: ARTICLE IV, SEC. 17 "EACH LAW ENACTED BY THE LEGISLATURE SHALL EMBRACE BUT ONE SUBJECT, AND MATTER PROPERLY CONNECTED THEREWITH, WHICH SUBJECT SHALL BE BRIEFLY EXPRESSED IN THE TITLE; AND NO LAW SHALL BE REVISED OR AMENDED BY REFERENCE TO ITS TITLE ONLY; BUT, IN SUCH CASE, THE ACT AS REVISED, OR SECTION AMENDED, SHALL BE REENACTED AND PUBLISHED AT LENGTH". ARTICLE IV, SEC. 23. "THE ENACTING CLAUSE OF EVERY LAW SHALL BE AS FOLLOWS: THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS', AND NO LAW SHALL BE ENACTED EXCEPT BY BILL ....

THESE PROVISIONS ARE NOT IN THE LEAST AMBIGUOUS, OR SUSCEPTIBLE TO ANY OTHER INTERPRETATION THAN THEIR PLAIN AND APPARENT MEANING. THE SUPREME COURT OF NEVADA IN CONSTRUING SUCH PROVISIONS, SAID THAT "THIS LANGUAGE IS SUSCEPTIBLE OF BUT ONE INTERPRETATION." "IT IS, IN OUR JUDGEMENT, AN IMPERATIVE MANDATE OF THE PEOPLE, IN THEIR SOVEREIGN CAPACITY, TO THE LEGISLATURE, REQUIRING THAT ALL LAWS, TO BE BINDING UPON THEM, SHALL UPON THEIR FACE, EXPRESS THE AUTHORITY BY WHICH THEY WERE ENACTED". AND, IN A SIMILAR HOLDING, THAT THESE PROVISIONS ARE NOT IN THE LEAST AMBIGUOUS OR SUSCEPTIBLE (CONT'D 22)

V11. 858

VI ESTABLISHED RULES OF CONSTITUTIONAL CONSTRUCTION

(CONTD 21) TO ANY OTHER INTERPRETATION THAT THEIR PLAIN, AND APPARENT MEANING. THE SUPREME COURT OF MONTANA, IN CONSTRUING SUCH PROVISIONS, SAID THAT THEY WERE "SO PLAINLY AND CLEARLY EXPRESSED AND ARE SO ENTIRELY FREE FROM AMBIGUITY" THAT "THERE IS NOTHING FOR THE COURT TO CONSTRUE". SEE: VAUGHN + RAGSDALE -V- STATE BD. OF EQ., 96 P. 2d 420, 423, 424. FURTHERMORE, THE SUPREME COURT OF MINNESOTA STATED HOW THESE PROVISIONS ARE TO BE CONSTRUED, WHEN IT WAS CONSIDERING THE MEANING OF ANOTHER PROVISION UNDER THE LEGISLATIVE DEPARTMENT (ART. 4, § 9.): "IN TREATING OF CONSTITUTIONAL PROVISIONS, WE BELIEVE IT IS THE GENERAL RULE AMONG COURTS TO REGARD THEM AS MANDATORY, AND NOT TO LEAVE IT TO THE WILL OR PLEASURE OF A LEGISLATURE TO OBEY OR DISREGARD THEM." "WHERE THE LANGUAGE OF THE CONSTITUTION IS PLAIN, WE ARE NOT PERMITTED TO INDULGE IN SPECULATION CONCERNING ITS MEANING, NOR WETHER IT IS THE EMBODIMENT OF GREAT WISDOM." THE RULE WITH REFERENCE TO CONSTITUTIONAL CONSTRUCTION IS ALSO WELL STATED BY JOHNSON, J., IN THE CASE OF NEWELL -V- PEOPLE, 7 N.Y. 9, 97, AS FOLLOWS: 'IF THE WORDS EMBODY A DEFINITE MEANING, WHICH INVOLVES NO ABSURDITY, AND NO CONTRADICTION BETWEEN DIFFERENT PARTS OF THE SAME WRITING, THAN THAT MEANING APPEARONT UPON THE FACE OF THE INSTRUMENT IS THE ONE WHICH ALONE WE ARE AT LIBERTY TO SAY WAS INTENDED TO BE CONVEYED. IN SUCH A CASE THERE IS NO ROOM FOR CONSTRUCTION.

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VI ESTABLISHED RULES OF CONSTITUTIONAL CONSTRUCTION

"THAT WHICH THE WORDS DECLARE IS THE MEANING OF THE INSTRUMENT; AND NEITHER THE COURTS NOR LEGISLATURES HAVE THE RIGHT TO ADD TO, OR TAKE AWAY FROM THAT MEANING." "IT MUST BE VERY PLAIN, - NAY, ABSOLUTELY CERTAIN - THAT THE PEOPLE DID NOT INTEND WHAT THE LANGUAGE THEY HAVE EMPLOYED IN ITS NATURAL SIGNIFICATION IMPORTS, BEFORE A COURT WILL FEEL ITSELF AT LIBERTY TO DEPART FROM THE PLAIN READING OF A CONSTITUTIONAL PROVISION." SEE: STATE EX-REL-V-SUTTON, 63 MINN 147, 149, 150, 65 N.W. 262 (1895); AFFIRMED, STATE-V-HOLM, 62 N.W. 2D 52, 55, 56 (MINN. 1954), AND BUTLER TACONITE-V-ROEMER, 282 N.W. 2D 867, 870, 871 (MINN 1979). IT IS CERTAIN THAT THE PLAIN AND APPEARANT LANGUAGE OF THESE CONSTITUTIONAL PROVISIONS ARE NOT FOLLOWED IN THE COLLECTIVE PUBLICATION (S) KNOWN AS THE "NEVADA REVISED STATUTES" WHICH CONTAIN NO ENACTING CLAUSES, AND THUS IT IS NOT AND CANNOT BE USED AS THE LAW OF THIS (N.V) STATE UNDER OUR CONSTITUTION. NO LANGUAGE COULD BE PLAINER OR CLEARER THAN THAT USED IN ART. IV, SEC. 17, SEC. 23 OF OUR CONSTITUTION. THERE IS NO ROOM FOR CONSTRUCTION. THE CONTENTS OF THESE PROVISIONS WERE WRITTEN IN ORDINARY LANGUAGE, MAKING THEIR MEANING SELF-EVIDENT.

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(CONT-23) NO MATTER HOW MUCH THE COURTS OF THIS STATE HAVE RELIED UPON, AND USED THE PUBLICATION KNOWN AS / ENTITLED "NEVADA REVISED STATUTES" AS BEING LAW, THAT USE CAN NEVER BE REGARDED AS AN EXCEPTION TO THE (NV) CONSTITUTION. TO SUPPORT THIS (NEVADA REVISED STATUTES) PUBLICATION AS LAW, IT MUST BE SAID THAT IT IS "ABSOLUTELY CERTAIN" THAT THE FRAMERS OF THE CONSTITUTION DID NOT INTEND FOR TITLES AND ENACTING CLAUSES TO BE PRINTED AND PUBLISHED WITH ALL LAWS, BUT THAT THEY DID INTEND FOR THEM TO BE ALL STRIPPED AWAY AND CONCEALED FROM PUBLIC VIEW WHEN A COMPILATION OF STATUTES IS MADE. NOR CAN IT BE SPECULATED THAT A REVISED STATUTE PUBLICATION WHICH DISPENSES WITH ALL TITLES, AND ENACTING CLAUSES MUST BE ALLOWED UNDER THE CONSTITUTION, AS IT IS MORE PRACTICAL AND CONVENIENT THAN THE "SESSION LAW" PUBLICATION. THE USE OF SUCH SPECULATION OR DESIRED EXCEPTIONS CAN NEVER BE USED IN CONSTRUING SUCH PLAIN, AND UNAMBIGUOUS PROVISIONS. SEE: BASKIN-V-STATE, 232 PAC. 388, 389, 107 OKLA 272 (1925) "THE GENERAL RULE OF LAW IS, WHEN A STATUTE OR CONSTITUTION IS PLAIN AND UNAMBIGUOUS, THE COURT IS NOT PERMITTED TO INDULGE IN SPECULATION CONCERNING ITS MEANING, NOR WHETHER IT IS THE EMBODIMENT OF GREAT WISDOM. A CONSTITUTION IS INTENTED TO BE FRAMED IN BRIEF AND PRECISE LANGUAGE. IT IS NOT WITHIN THE PROVINCE OF THE COURT TO READ AN EXCEPTION IN THE CONSTITUTION WHICH THE FRAMERS THEREOF DID NOT SEE FIT TO ENACT THERE IN".

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(CONT'D 25) THERE IS OF COURSE NO NEED FOR CONSTRUCTION OR INTERPRETATION OF THESE PROVISIONS AS THEY HAVE BEEN ADJUDICATED (TIME AND TIME AGAIN) UPON, ESPECIALLY THOSE DEALING WITH AN ENACTING CLAUSE.

THE SUPREME COURT OF NEVADA HAS MADE IT CLEAR THAT ART. IV, SEC. 23 OF OUR NEVADA CONSTITUTION "IS MANDATORY, AND THAT A STATUTE WITHOUT ANY ENACTING CLAUSE IS VOID". (SEE: STATE OF NEVADA -V- ROGERS, 10 NEV 250, 261 (1875), CAINE -V- ROBBINS, 131 P.2D 516, 518, 61 NEV. 416 (1942). BEING THAT THE STATUTES USED AGAINST ME - ARE WITHOUT ENACTING CLAUSES, AND TITLES THEY ARE VOID, WHICH MEANS THERE IS NO OFFENSE, NO VALID COMPLAINT (S), AND, THUS NO SUBJECT-MATTER JURISDICTION. THE PROVISIONS REQUIRING AN ENACTING CLAUSE AND ONE-SUBJECT TITLES WERE ADHERED TO WITH THE PUBLICATIONS COLLECTIVELY KNOWN AS THE "SESSION LAW" AND "GENERAL LAWS" FOR THE STATE OF NEVADA. BUT, BECAUSE CERTAIN PEOPLE IN GOVERNMENT THOUGHT THAT THEY COULD "DEVISE" A MORE CONVENIENT WAY OF DOING THINGS WITHOUT REGARD FOR PROVISIONS OF THE (NV) STATE CONSTITUTION, THEY DEVISED THE CONTRIVANCE KNOWN AS THE "NEVADA REVISED STATUTES," AND THEN HELD IT OUT TO THE PUBLIC AS BEING "LAW". THIS, OF COURSE, WAS FRAUD, SUBVERSION, AND A GREAT DECEPTION UPON THE PEOPLE OF THIS GREAT STATE OF NEVADA, WHICH IS NOW REVEALED AND EXPOSED.

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CONTD 25) THERE IS NO JUSTIFICATION FOR DEVIATING FROM, OR VIOLATING A WRITTEN CONSTITUTION. THE "NEVADA REVISED STATUTES" CAN NOT BE USED AS LAW, LIKE THE "SESSION" LAWS WERE ONCE USED, SOLELY BECAUSE THE CIRCUMSTANCES HAVE CHANGED, AND WE NOW HAVE MORE LAWS TO DEAL WITH. IT CANNOT BE SAID THAT THE USE, AND NEED OF REVISED STATUTES WITHOUT TITLES, AND ENACTING CLAUSES MUST BE JUSTIFIED DUE TO EXPEDIENTLY.

NEW CIRCUMSTANCES OR NEEDS DO NOT CHANGE THE MEANING OF CONSTITUTION(S), AS JUDGE COOLEY EXPRESSED, "A CONSTITUTION IS NOT MADE TO MEAN ONE THING AT ONE TIME, AND ANOTHER AT SOME SUBSEQUENT TIME WHEN THE CIRCUMSTANCES MAY HAVE CHANGED, AS PERHAPS TO MAKE A DIFFERENT RULE IN THE CASE SEEM DESIREABLE." "[A] PRINCIPLE SHARE OF THE BENEFIT EXPECTED FROM WRITTEN CONSTITUTIONS WOULD BE LOST IF THE RULES THEY ESTABLISHED WERE SO FLEXIBLE AS TO BEND TO CIRCUMSTANCES OR BE MODIFIED BY PUBLIC OPINION." A COURT OR LEGISLATURE WHICH SHOULD ALLOW A CHANGE IN PUBLIC SENTIMENT TO INFLUENCE IT IN GIVING TO A WRITTEN CONSTITUTION A CONSTRUCTION NOT WARRANTED BY THE INTENTION OF ITS FOUNDERS, WOULD BE JUSTLY CHARGEABLE WITH RECKLESS DISREGARD OF OFFICIAL OATH AND PUBLIC DUTY; AND IF ITS COURSE COULD BECOME A PRECEDENT, THESE INSTRUMENTS WOULD BE OF LITTLE AVAIL." "WHAT A COURT IS TO DO, THEREFORE, IS TO DECLARE THE LAW AS WRITTEN. T. M. COOLEY, A TREATIS ON THE CONSTITUTIONAL LIMITATIONS. 5TH ED. PP. 54, 55

VII

CONTD-26) THERE IS GREAT DANGER IN LOOKING BEYOND THE CONSTITUTION ITSELF TO ASCERTAIN ITS MEANING, AND THE RULE FOR GOVERNMEN LOOKING AT THE CONSTITUTION ALONE, IT IS NOT ALL POSSIBLE TO FIND SUPPORT FOR THE "IDEA" THAT THE COLLECTIVE PUBLICATION (S CALLED THE "NEVADA REVISED STATUTES" IS VALID LAIN OF THIS STATE (OF NEVADA). THE ORIGINAL INTENT OF ARTICLE IV SEC 1; SEC 23 OF OUR NEVADA CONSTITUTION CAN NOT BE "STRETCHED" TO COVER THEIR USE AS SUCH. THESE PROVISIONS CANNOT NOW BE REGARDED AS ANTIQUATED, UNNECESSARY, OR OF LITTLE, IMPORTANCE, SINCE "NO SECTION OF A CONSTITUTION SHOULD BE CONSIDERED SUPERFLUOUS" (SEE: BUTLER TACONITE-V-ROEMER 282 N.W. 2D 867, 870 (MINN 1979). THE (NV) CONSTITUTION WAS WRITTEN FOR ALL TIMES AND CIRCUMSTANCES, BECAUSE IT EMBODIES FUNDEMENTAL PRINCIPLES WHICH DO NOT CHANGE WITH TIME.

JUDGES ARE NOT TO CONSIDER THE POLITICAL OR ECONOMIC IMPACT THAT MIGHT ENSUE FROM UPHOLDING THE CONSTITUTION AS WRITTEN. THEY ARE TO UPHOLD IT NO MATTER WHAT MAY RESULT, AS THAT ANCIENT MAXIM OF LAW STATES "THOUGH THE HEAVENS MAY FALL, LET JUSTICE BE DONE".

Summary of Facts

1) The "Nevada Revised Statutes" are fatally, and irreparably constitutionally flawed. They are, in fact, mere revisions of Session Law(s). Nevadas State Constitutional requirement: Article IV, Sec. 17. That "the act as revised, or section amended, shall be reenacted and published at length" has, in fact, been totally, and wholly disregarded and that (Art. IV Sec. 17) constitutional requirement left to the whim, and will of the "Legislative Counsel Bureau"...

2) The failure to uphold these clear, and plain provisions of the State of Nevadas Constitution can not be regarded as mere error in Judgement, but deliberate usurpation: The deliberate unauthorized, arbitrary assumption, and exercise of (Judicial) power.

3) To take Jurisdiction in here it clearly does not exist is usurpation, and no one is bound to follow acts of usurpation since they are void, and unenforceable. See: Hooker-v-Boles, 346 Fed. 2d 285, 286, (1965) "No Authority need be cited for the proposition that, when a court lacks Jurisdiction any Judgement rendered by it is void, and unenforceable".

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Summary of Facts

CONT'D 4) THE FACT THAT "NEVADA REVISED STATUTES" HAVE BEEN IN USE LONGER THAT THE ACCUSED HAS BEEN ALIVE, CANNOT BE HELD AS A JUSTIFICATION TO CONTINUE TO USURP POWER, AND SET ASIDE THE (NV) CONSTITUTIONAL PROVISIONS (ART IX SECS 17, 23) WHICH ARE CONTRARY TO SUCH USURPATION, AS JUDGE COOLEY STATED; "ACQUIESCENCE FOR NO LENGTH OF TIME CAN LEGALIZE A CLEAR USURPATION OF POWER, WHERE THE PEOPLE HAVE PLAINLY EXPRESSED THEIR WILL IN THE CONSTITUTION." COOLEY, CONSTITUTIONAL LIMITATIONS, P71.

5) TO ASSUME JURISDICTION IN THIS CASE WOULD RESULT IN TREASON, "WE JUDGES) HAVE NO MORE RIGHT TO DECLINE THE EXERCISE OF JURISDICTION WHICH IS GIVEN, THAN TO USURP THAT WHICH IS NOT GIVEN. THE ONE OR THE OTHER WOULD BE TREASON TO THE CONSTITUTION"; CHIEF JUSTICE JOHN MARSHALL IN COHENS-V-VIRGINIA, 6WHEAT. (19 US) 264, 404 (1821)

6) THE CONSTITUTION OF THE STATE OF NEVADA (1864) DOES NOT ALLOW LAWS TO EXIST WITHOUT ENACTING CLAUSES OR TITLES. TO GO BEYOND THAT AND ALLOW THE "NEVADA REVISED STATUTES" TO EXIST AS "LAW" IS NOTHING BUT TYRANNY.

TYRANNY AND DESPOTISM EXIST WHERE THE WILL AND PLEASURE OF THOSE IN GOVERNMENT IS FOLLOWED RATHER THAN ESTABLISHED (CONSTITUTIONAL) LAW. IF THESE CLEAR, AND UNAMBIGUOUS PROVISIONS OF THE (NV) STATE CONSTITUTION CAN BE DISREGARDED, THEN WE NO LONGER HAVE A CONSTITUTION IN THIS STATE,

Summary of Facts

(Cont 29) (6) And we no longer live under a Government of Laws - but a Government of Men, i.e. A System that is Governed by the Arbitrary Will of those in Office.

The Creation of the "Nevada Revised Statutes" is a typical example of the arbitrary acts of Government which have become all too prevelant in this (1912-2012) Century. Its use as Law is a Nullity under our Nevada Constitution.

7) Nothing can be Regarded as a Law in this State which fails to conform to the Constitutional Prerequisites which calls for an Enacting Clause, and Title. There is Nothing in the Complaint(s) which can be Constitutionally Regarded as Law(s), and thus, there is Nothing in them which I am answerable for or which can be charged against me. Since there is no Valid, or Constitutional Law charged against me; there are no Crimes that Exist. Consequently, there is no Subject-Matter Jurisdiction by which I can be tried in this above Named Court...

8) The Accused Asserts Estoppel, in that the Supreme Court of Nevada has clearly stated its position in this issue, See; Nevada -v- Rogers, 10 Nev. 250, 255, 256, (1875) and; Caine -v- Robbins, 131 P2d 516, 518, 61 Nev. 416 (1942)

9) The Accused also asserts the Doctrine of Laches, See: Attorney General (NV) Opinion 85, (7-25-1951)

MOTION, AND RELIEF REQUESTED

1) BASED UPON THE ABOVE MEMORANDUM, THE ACCUSED MOVES THAT THIS ACTION, AND CAUSE BE DISMISSED FOR LACK OF SUBJECT-MATTER JURISDICTION. (SEE: UNITED STATES V. SILVIGLIA, 686 FED 2D 832, 835 (1981), "A COURT LACKING JURISDICTION CANNOT RENDER JUDGEMENT BUT MUST DISMISS THE CAUSE AT ANY STAGE OF THE PROCEEDING IN WHICH IT BECOMES APPARRANT THAT JURISDICTION IS LACKING.

2) THAT THIS HONORABLE COURT ORDER THE EXPUNGEMENT, AND/OR REDACTION OF ANY, AND ALL REFERENCE(S) THE ABOVE NAMED CAUSE; IN ANY STATE, OR FEDERAL JUDICIAL OR LAW ENFORCEMENT DATA-BASE, REPOSITORY, STORAGE AND RETRIEVAL SYSTEM/MEANS, D.N.A. COLLECTION, ET C... INCLUSIVE.

3) THAT THIS HONORABLE COURT GRANT DAMAGES IN A CIVIL TORT-AWARD FOR INJURIES UPON THE ACCUSED, IN THE AMOUNT OF $1,000,000.00 USD (ONE MILLION USD) PER YEAR OF SUFFERING, TO START AT/ON THE DATE OF THE ACCUSED ARREST, RUNNING THROUGH THE/THIS COURTS DISMISSAL.

I, MICHAEL T. BOTELHO, ACCUSED, IN PROPER PERSON DO SWEAR UNDER THE PENALTY OF PERJURY, UNDER THE LAWS OF THE UNITED STATES OF AMERICA, THAT THE FOREGOING IS TRUE AND CORRECT, PER 18 USC § 1621; 28 USC § 1746...

DATED THIS 20TH DAY OF DECEMBER, 2011

THAT I PLACED A TRUE AND COMPLEE, ORIGINAL, AND/OR PHOTO-COPY OF PETITIONERS MEMORANDUM AND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, IN FIRST CLASS PRE-PAID, U.S.P.S. MAIL SERVICES ON THIS 20TH DAY OF DECEMBER, 2011; ADDRESSED TO THE FOLLOWING:

1) CLERK OF THE COURT
SECOND JUDICIAL DISTRICT COURT
WASHOE COUNTY RENO, NV 89520-3083

2) WASHOE COUNTY DISTRICT ATTORNEY
BOX 30083
RENO, NV. 89520-3083

Michael T. Botelho

MICHAEL T. BOTELHO
IN PROPER PERSON
N.N.C.C. CARSON CITY, NV.
89702

STATE OF NEVADA
SECOND JUDICIAL DISTRICT COURT

FILED
2012 MAR -6 AM 10:27
JOEY HASTINGS
BY _____ DEPUTY

MICHAEL T. BOTELHO ACCUSED PETITIONER -V- JACK PALMER, WARDEN STATE OF NEVADA, ET-AL RESPONDENT(S)	CASE NO. CR03P2156 DEPT. NO. 3 "PETITIONERS MOTION TO CORRECT CLERKS ERROR, AND, AS A MATTER OF LAW, ISSUE A DIRECTED VERDICT FOR PETITIONER." (DECLATORY RELIEF)

COMES NOW, MICHAEL T. BOTELHO, PETITIONER IN PROPER-PERSON, IN ACCORDANCE WITH; BALESTERI -V- PACIFICA POLICE DEPT, 901 F.2d 696 (9TH CIR 1990), AND BATEMAN -V- U.S. POSTAL SERVICE, 21 F.3d 1220-1224 (9th CIR. 2000).

FACTUAL ISSUE(S)

1) PETITIONER, MICHAEL T. BOTELHO, FILED A PROPER-PERSON WRIT OF HABEAS-CORPUS, AND QUO-WARRANTO CHALLENGE BEFORE THIS HONORABLE COURT ON DECEMBER 20, 2011.

2) PETITIONER ASSERTED "HOUSTON -V- LACK(S), 487 U.S. 266 (1988)," PRISONERS PRO-SE MOTION (FOR JUDGMENT N.W.V.) WAS DEEMED FILED ON DATE MOTION WAS PLACED IN PRISON LEGAL MAIL BOX, AS OPPOSED TO THE DATE OF ITS RECEIT BY COURT CLERK" (PETITIONER CERTIFICATE OF SERVICE). SEE ALSO CALDWELL -V- AMEND, 30 F.3d 1199 (9th CIR. 1994).

FACTUAL ISSUE(S)

3) PETITIONERS PROOF OF SERVICE IS EVIDENCED BY, AND INCLUDES (A) N.D.O.C. "BRASS SLIPS FOR LEGAL COPIES AND LEGAL MAIL POSTAGE TO SECOND JUDICIAL DISTRICT COURT AND THE WASHOE COUNTY DISTRICT ATTORNEY IN THE MATTER OF BOTELHO -V- STATE; FINAL PAGE "AFFIRMATION AND CERTIFICATE OF SERVICE; ALL DATED 12-20-2011 AND MAILED FROM PRISONS LAW LIBRARY LEGAL MAIL.

4) CLERK OF THE COURT HAS YET TO SEND PETITIONER ANY EVIDENCE OF PETITIONERS WRIT OF HABEAS-CORPUS EVER BEING FILED. ON THIS 21ST DAY OF FEBRUARY 2012, THE TIME FRAME IN WHICH PETITIONER IS TO RECEIVE A "FILE-STAMPED" COPY HAS BEEN EXCEEDED.

MOTION FOR DIRECTED VERDICT

1) PETITIONER ASSERTED "HOUSTON-V-LACK, 487 U.S. 266 (1988)" ON HIS "CERTIFICATE OF SERVICE" TO BOTH COURT CLERK AND THE OFFICE OF THE DISTRICT ATTORNEY.

2) PER F.R.C.P. RULE 8 (C) AFFIRMATIVE DEFENSE, AND (THE LACK OF ONE); (D) "EFFECT OF FAILURE TO DENY" AVERMENTS IN A PLEADING TO WHICH A RESPONSIVE PLEADING IS REQUIRED, ARE ADMITTED WHEN NOT DENIED IN THE RESPONSIVE PLEADING. (SEE F.R.C.P. RULE 7 (C) "DEMURRES ABOLISHED." (1951).

MOTION FOR DIRECTED VERDICT (CONT'D)

3) RESPONDENTS HAVE FAILED (CHOSEN NOT TO) FILE A RESPONSIVE PLEADING AS REQUIRED, AND HAVE ALSO FAILED TO DENY PETITIONERS CLAIM(S) IN THE MATTER OF "STATE OF NEVADA -V- MICHAEL T. BOTELHO.

4) PER F.R.C.P. RULE 50(a) "MOTIONS FOR JUDGMENT AS A MATTER OF LAW" MAY BE MADE AT ANY TIME BEFORE SUBMISSION OF THE CASE TO THE JURY.

5) AS A MATTER OF LAW, NON-RESPONSIVE, AND NON-ANSWER EQUAL CONSENT OF DEFECT.

6) MORE THAN 20 DAYS HAVE PASSED SINCE PETITIONERS PRESENTATION FOR MAILING BY PRISON AUTHORITIES OF HIS PROPER-PERSON WRIT OF HABEAS-CORPUS, AND QUO-WARRANTO CHALLENGE OF THE LACK OF SUBJECT-MATTER JURISDICTION.

7) EVEN THOUGH ESTOPPEL AND LACHEES APPLY (PETITIONER RE-ASSERTS THIS FACT) RESPONDENTS COUNSEL HAS CHOSEN TO REMAIN MUTE.

RESPECTFULLY SUBMITTED
THIS 21ST DAY OF FEBRUARY, 2012

Michael T Botelho #80837

V11. 872

MOTION FOR RELIEF

1) THAT THIS HONORABLE COURT FIND GOOD CAUSE SHOWING (IN THAT NON-RESPONSE, NON-ANSWER, EQUAL CONSENT OF DEFECT) AND GRANT PETITIONER, MICHAEL T. BOTELHO (A) RELIEF AS REQUESTED IN HIS WRIT OF HABEAS-CORPUS/QUO-WARRANTO FILING; AND (B) STRIKE ANY AND ALL RESPONSE(S), REPLY(S), PLEADING(S) FROM RESPONDENT, RESPONDENTS COUNSEL, THIRD PARTIES, ETC., ANY KIND, TYPE, FORM, MANNER OF FUTURE OPPOSITION IN THIS MATTER AS UNTIMELY, AND/OR ESTOPPED, AND/OR BARRED BY LACHES AND/OR ESTOPPED BY LACHES, ETC., ETC., ETC.....

AFFIRMATION, CERTIFICATE OF SERVICE

I, MICHAEL T. BOTELHO, SWEAR UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT, PER 18 USC § 1621 AND 28 USC § 1746. Michael T Botelho FEBRUARY 21, 2012.

THAT A TRUE AND COMPLETE ORIGINAL, AND/OR COPY OF PETITIONERS MOTION WAS PLACED IN THE LEGAL MAIL AT THE PRISONS LAW LIBRARY AND ADDRESSED TO THE FOLLOWING ON THIS 21ST DAY OF FEBRUARY, 2012.

1) CLERK OF THE COURT
SECOND JUDICIAL DISTRICT COURT, DEPT. 3
BOX 30083 75 COURT ST.
RENO, NEV. 89520-3083

2) OFFICE OF THE DISTRICT ATTORNEY
ROOM 214 BOX 30083
RENO, NV. 89520-3083

AFFIRMATION, CERTIFICATE OF SERVICE (cont'd)

Michael T. Botelho

MICHAEL T. BOTELHO # 80837
P.O. Box 7000
N.N.C.C
CARSON CITY, N.V. 89702