

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

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Elizabeth A. Brown
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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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RONALD J. SHAW, JR.

BY

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7 Attorney for Plaintiff

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

* * *

11 THE STATE OF NEVADA,

12 Plaintiff,

Case No. CR03-2156

13 v.

Dept. No. 3

14 MICHAEL TODD BOTELHO,

15 Defendant.

16 REPLY IN OPPOSITION TO DEFENDANT'S OPPOSITION TO STATE'S INTRODUCTION
17 OF OTHER BAD ACT EVIDENCE; DEFENDANT'S MOTION TO SEAL; AND ANSWER TO
18 DEFENDANT'S MOTION TO RECUSE AND TRANSFER CASE

19 COMES NOW, the State of Nevada, by and through RICHARD A.
20 GAMMICK, District Attorney of Washoe County, and BRUCE C. HAHN,
21 Deputy District Attorney, and hereby offers its formal Reply and
22 Answer to the defendant's Opposition Motion filed February 13, 2004.
23 This Reply and Answer is based upon the attached Points and

24 ///

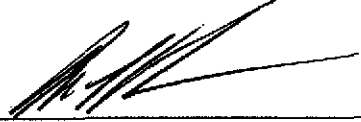
25 ///

26 ///

1 Authorities, all pleadings and papers on file herein and any argument
2 heard on the matter.

3 Dated this 20 day of February, 2004.

4 RICHARD A. GAMMICK
5 District Attorney
6 Washoe County, Nevada

7
8 By 
9 BRUCE C. HAHN
10 5011
11 Deputy District Attorney
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POINTS AND AUTHORITIES

I. STATEMENT OF POSITION

The State opposes the defendant's three claims for relief, namely, the claim of marital privilege to bar relevant sentencing information, his request for Department Three recusal, and request for sealing of all documents concerning the proposed testimony of Melissa Botelho. The State contends that the marital privilege is inapplicable based upon a statutory exception, his request for recusal is not supported by legal authority and unwarranted in fact, and finally, the request for sealing of documents is likewise unsupported by legal authority and unwarranted.

II. AUTHORITY AND ARGUMENT

A. MARITAL PRIVILEGE CLAIM

The State acknowledges the general rule of marital communication privilege under NRS 49.295. The State also acknowledges that the proffered testimony of Melissa Botelho concerns the defendant's communications to her during the course of their marriage. However, this general statutory bar does not apply to our case here because of a statutory exception to the general rule. Therefore, there is no statutory bar to the proffered testimony.

NRS 49.295(2) codifies 5 general exceptions to the marital privilege statute, which contain other subcategories. Ms. Botelho's proffered testimony is admissible because of the fifth general exception - NRS 49.295(2)(e)(1) which states:

(e) Criminal proceeding in which one spouse is charged with:

///

1 (1) A crime against the person or the property
2 of the other spouse or of a child of
3 either, or of a child in the custody or
4 control of either, whether the crime was
5 committed before or during marriage.
6 [Emphasis added].

7 Here, the defendant is charged in a criminal proceeding,
8 our case here. NRS 49.295(2)(e). Further, this criminal proceeding
9 involves a crime against a *child in his control*, fourteen year old
10 Jane Doe as charged in the instant Information. The express language
11 of NRS 49.295(2)(e)(1), one of five codified exceptions to the
12 general rule of privilege encompasses our case facts here. It is
13 undisputed that the defendant lured the child by a false
14 representation of needing a babysitter whereupon the child-victim
15 entered his vehicle equipped with the innocent apparel of child car-
16 seats but also containing duct-tape used as a binding device. When
17 Jane Doe entered his vehicle and was thereafter driven as a backseat
18 passenger into the hills of Washoe Valley, she was totally under his
19 control for a substantial period of time on August 7, 2003.

20 Of particular interest is the statutory language that our
21 Legislature used in the applicable marital privilege exception.
22 First, NRS 49.295(2)(e)(1) excepts communications involving crimes of
23 one spouse against another or against a child with whom they have a
24 biological relationship ("a child of either"). Second, that
25 subsection then uses broader language that involves a child merely in
26 their custody, or control. This secondary language eliminates the
need for a biological or legal relationship. The only legal nexus
that the Legislature expressed is control of a child.

1 The public policy to be served here is really for the
2 benefit of children generally as a protected class. This marital
3 privilege exception essentially protects children by preventing an
4 artificial evidentiary shield being erected between potentially
5 conspiring married partners in crimes against children.¹ Contrary to
6 the often-touted rule of lenity, statutory privileges are to be
7 narrowly construed in favor of the truth-finding process.

8 "Testimonial exclusionary rules and privileges contravene the
9 fundamental principles that 'the public...has a right to every man's
10 evidence.' (citations omitted). As such, they must be strictly
11 construed and accepted 'only to the very limited extent that
12 permitted a refusal to testify or excluding relevant evidence has a
13 public good transcending the normally predominant principle of
14 utilizing all rational means for ascertaining truth." Trammel v.
15 United States, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186,
16 ____ (1980). Likewise, "We have often recognized that statutes
17 establishing evidentiary privileges must be construed narrowly
18 because privileges impede the search for the truth." Pierce County
19 v. Guillen, 537 U.S. 129, 144, 123 S.Ct. 720, 730, 154 L.Ed.2d 610,
20 ____, (2003).

21 ///

22 _____
23 1 The fact that the balance of the NRS 49.295((2)(e)(1) exception states it
24 is irrelevant whether or not "the crime was committed before or during
25 marriage" highlights the State's point. There is no marriage preservation
26 public policy to be served here by protecting the defendant's statements to
Melissa Botelho - the marriage was terminated years ago. In fact, the
marriage was terminated in large part due to the disputed sexual bondage
fantasies involving an underage female.

1 Therefore, under statutory construction rules, NRS 49.295
2 does not apply to our case facts here and, therefore, is no bar to
3 Melissa Botelho's testimony.

4 B. REQUEST TO SEAL DOCUMENTS

5 His request to have "all papers, pleadings, motions and
6 transcripts pertaining to this issue" sealed is offered without any
7 legal authority or meaningful reasoning. Legal arguments made
8 without reference to any supporting legal authority as well as
9 undocumented conclusions are to be summarily rejected. Williams v.
10 State, 88 Nev. 164, 165, 494 P.2d 960 (1972); Cunningham v. State, 94
11 Nev. 128, 130, 575 P.2d 936, 938 (1978); Steese v. State, 114 Nev.
12 479, 496, 960 P.2d 321, 332 (1998); Evans v. State, 117 Nev. 609,
13 627, 28 P.3d 498, 511 (2001). According, the defendant's request for
14 sealing of documents must fail.

15 C. REQUEST FOR DEPARTMENT RECUSAL

16 The defendant's request for this Department to recuse
17 itself should be summarily denied for three primary reasons. First,
18 as with his request to seal, his request for recusal is likewise
19 offered without any legal authority. Accordingly, it should be
20 summarily rejected. See Williams, et.al., supra.

21 Second, his sole factual basis is that this court is
22 somehow irrevocably tainted by routine duties of a trial court in
23 reviewing the admissibility of proposed evidence. If the defendant's
24 argument were sufficient grounds, chaos would result. Theoretically,
25 every trial court would need to recuse itself after denying a
26 defendant's motion to suppress and a conviction resulted. According

1 to the defendant's rationale, no trial judge would ever be able to
2 preside over a jury trial after the first overruled defense
3 objection. The defendant offers no principled basis or scale to
4 determine how "damning and prejudicial" evidence must be before a
5 trial judge must recuse themselves after considering its
6 admissibility. It is for this reason among others that a judge is
7 presumed to understand their responsibilities, and follow the law.
8 Colwell v. State, 118 Nev.Adv.Op. ___, 59 P.3d 463, 468 (2002); Jones
9 v. State, 107 Nev. 632, 636, 817 P. 2d 1179, 1181 (1991). The
10 defendant cites no evidence to suggest that this Department would be
11 unable to disregard any improper evidence and render a just sentence.
12 Without a legal basis and without any evidence in support, the
13 defendant's request should be denied.

14 Finally, there is no improper taint assuming *arguendo* a
15 marital privilege shield because substantial portions of this same
16 disputed evidence are clearly admissible by the defendant's own
17 admissions to be offered by the State at sentencing. The proposed
18 testimony of Washoe County Sheriff's Detective Greg Herrera will
19 include that the defendant admitted engaging in fantasies about tying
20 up a young female adult or child and raping them.' Therefore, because
21 the defendant cites no legal authority to support his request,
22 because his legal basis is unworkable in practice, and because there
23

24
25 2 See, State's Notice of Intent to Introduce Prior or Other Bad Act
26 Evidence at Sentencing Hearing, filed February 3, 2004, pp.2, 11.14-18.

1 is no improper taint, his request for Department Three recusal should
2 be denied.

3 The State is confident that this court would render a just
4 sentence. However, in the abundance of caution, the State will not
5 oppose any possible reservations this Department could conceivably
6 have based on the defendant's bald request, in the sole event that
7 this court finds that a marital privilege applies to bar the
8 proffered testimony of Melissa Botelho.

9 **III. CONCLUSION**

10 For the rationale outlined above, and for the legal basis
11 and reasons outlined in the State's formal Notice of Intent, the
12 State requests that the defendant's Opposition³ filed February 13,
13 2004 be denied in its entirety following argument at the scheduled
14 hearing date of March 11, 2004 at 10:00 am. Furthermore, the State
15 requests that this court enter an Order authorizing the State to
16 present the proposed testimony of Melissa Botelho at the scheduled
17 sentencing of April 7, 2004 at 8:30 am.

18 Dated this 20 day of February, 2004.

19 RICHARD A. GAMMICK
20 District Attorney
21 Washoe County, Nevada

22 By [Signature]
23 BRUCE C. HAHN
24 5011
25 Deputy District Attorney
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3 See defendant's "Opposition to State's Introduction of Prior or Other Bad Act Evidence at Sentencing Hearing; Defendant's Motion to Have the Matter Sealed, to Recuse the Present Sentencing Court, and to have the Matter transferred to Another Court for Sentencing Purposes" filed February 13, 2004.

CERTIFICATE OF FORWARDING

I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I forwarded a true copy of the foregoing document, through the Washoe County interagency mail, addressed to:

SEAN SULLIVAN
WASHOE COUNTY PUBLIC DEFENDER'S OFFICE
350 S CENTER ST
6TH FLOOR
RENO NV

DATED this 20th day of February, 2004.

Dice: Tai

✓ V9. 256

KENNETH C. GUINN
Governor

DISTRICT OFFICES

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DAVE KIECKBUSCH
Acting Director

AMY WRIGHT
Chief

FILED

FEB 11 2004

RONALD A. JOHNSON, JR., CLERK
DEPUTY

Presentence Report

January 13, 2004

The Honorable Jerome Polaha
Department III
2nd Judicial District

Prosecutor: Kelli Vilorio

Defense Attorney: Sean Sullivan

PSI #: 146868

I. Case Information:

Defendant: Michael Todd Botelho, aka Kevin

Date of Birth: 6/10/61 - 43

SS #: [REDACTED], also uses [REDACTED] A NOT USED

Aliases: None

Address: 71 S. Rainbow, Dayton, NV 89403

Phone: 246-4460

Driver's License: N/A

State: N/A

Status: N/A

POB: Honoka, Hawaii

Case #: CR03-2156

DA #: 318167

PCN: 09231924

P&P Bin #: 1000339647

FBI #: 916956RA3

SID: NV01078952

CA24930150

US Citizen: Yes

Alien Registration #: N/A

Sex Offender Tier Level: Pending

II. Charge Information:

Offense: Count I: Kidnapping in the First Degree (F)

NRS: 200.310-1

Category: A

NOC Code: 00107

Penalty: Life with parole eligibility after 5 years or 15 years NDOC with parole eligibility after 5 years

Offense: Counts III, IV, V: Sexual Assault on a Child (F)

NRS: 200.366

Category: A

NOC Code: 05353

Penalty: Life with parole eligibility after 20 years or 20 years NDOC with parole eligibility after 5 years

Plea: 12/22/03, Guilty

Sentencing Set: 2/11/03

III. Defendant Information:**Physical Identifiers:**

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

Social/Mental History:

Childhood: Unremarkable

Marital: Married

Children/Dependants: 4, ages 12, 10, 3 and 1

Custody Status of Children: Two older children reside with ex-wife. The defendant pays \$600 per month in child support. The two youngest children reside with the defendant and his wife.

Employment Status: Unemployed

Total # of months employed/school full time during the 12 months prior to commission of Instant Offense: 2 ½

Income: 0

Debts: \$15,000 in credit card debts

Education: High school graduate

Military: U.S. Marines

Discharge Type: Honorable

Health: The defendant reported that he suffers with chronic Leukopenia. He takes no medications.

Mental Health: Non-problematic

Substance Abuse: The defendant said he drinks alcohol on an occasional, non-problematic basis. He denied any use of controlled substances.

IV. Criminal Record:**Arrest Date:****Offense:****Disposition:**

11/23/92

Lyon County, NV
S.O.

False Insurance Claim for Benefit (F);
Conspiracy to Commit Crime of False Insurance
Claim for Benefit (GM).

6/7/93: Convicted of False
Insurance Claim for Benefit (F), 2
years NDOC, suspended,
probation NTE 3 years, 100 hours
community service
7/8/96: Honorable Discharge

10/4/99

Lyon County, NV
S.O.

Battery Domestic Violence (M)

Per Defendant, Date Unknown:
Convicted, 3 weekends jail, \$600
fine, 100 hours community service

9/24/03

Washoe County,
NV
S.O.

Kidnap First Degree (F);
Battery with Intent to Commit Sexual Assault (F);
Sexual Assault Victim Under 16 (F);

Instant Offense

10/10/03

Ad booked

Kidnap First Degree (F);
Battery with Intent to Commit Sexual Assault (F);
3 Counts: Sexual Assault Victim Under 16 (F).

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

V. Offense Synopsis:

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

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

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

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

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

VI. Co-Defendant's Information:

Co-Defendant: None

VII. Defendant's Statement:

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

VIII. Victim Information:

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

Victim Information (Continued)

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

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

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

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

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

Total Loss: \$338

IX. Plea Negotiations:

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

X. Custody Status/Credit For Time Served:

Custody Status: Washoe County Jail

CTS: 9/24/03 to 2/11/04 = 141 days

197 days

XI. Aggravating / Mitigating Factors:A. Aggravating Factors:

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

B. Mitigating Factors:

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

XII. Recommendations:

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

538
299
637 Rest

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

RESPECTFULLY SUBMITTED,

APPROVED:

AMY WRIGHT, CHIEF


JOE WALD #338
SPECIALIST IV
TROY DILLARD #456
UNIT MANAGER

DEFENDANT'S STATEMENT

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

I DON'T NORMALLY DRINK VERY MUCH AT ALL BUT I DON'T RECALL WHY I HAD BEEN DRINKING FOR ALMOST A WEEK, NOT AT WORK! BUT FOR SOME VERY PATHETIC REASON I HAD A FANTASY, ONE OF WHICH BY THE WAY WASN'T REALLY A SERIOUS ONE, WELL I GOT THE NAME OF THE BABY SITTER FROM SOMEONE IN TOWN AND I WAS HALF SERIOUSLY THINKING OF HAVING HER BABYSIT FOR US (MY WIFE & I) BUT SOMEWHERE ALONG THE WAY I LOST WHAT I WAS DOING AND PLAYING A STUPID GAME I NEVER DREAMED I WOULD ACTUALLY FOLLOW THROUGH ON AND I DID JUST THAT. I REMEMBER TALKING TO HER AND JUST BEING CAUGHT UP IN IT ALL AND I REMEMBER DRIVING AROUND AFTER I PICKED HER UP AND JUST TALKING FOR A BIT THEN I AT SOME POINT JUST ACTED OUT MY PATHETIC FANTASY AND I GOT ON TOP OF HER AND TOLD HER TO TAKE HER CLOTHES OFF AND I SCARED HER BY PUTTING TAPE ON HER EYES, IT ACTUALLY JUST HAPPENED TO BE ON THE FLOOR OF MY WIFE'S CAR. I THEN ASKED HER TO OPEN HER MOUTH AND I PUT MYSELF IN HER FOR MAYBE 30 SECONDS THEN I KISSED HER ON HER VAGINA BUT REMEMBER I JUST KISSED BUT NOT TONGUE INSIDE HER THEN I ASKED HER TO LAY DOWN IN BACKSEAT AND I HAD SEX WITH HER FOR MAYBE A MINUTE OR TWO AND WAS VERY EXCITED AND CAME INSIDE HER QUICKLY AND ONLY THEN DID I REALIZE WHAT I ACTUALLY HAD DONE AND I STARTED TO CRY AS I GOT OFF HER AND TELLING HER I'M SORRY, I'M SORRY AND SHE TRIED TO CALM ME DOWN AND TOLD ME IT WAS ALRIGHT. I NOW REALIZED I DID NOT EVEN HAVE A CONDOM ON, EVEN MORE STUPID AND I GAVE HER A HUG, HELPED HER GET DRESSED AND STARTED TO TAKE HER HOME AFTER TAKING THE TAPE OFF HER EYES AND THROWING IT OUT THE WINDOW. I JUST KEPT SAYING I'M SORRY AND CAME SHE FORGAVE ME. AND I V9. 261, 117

ASKED HER AGAIN IF SHE WAS ALRIGHT AND SHE
V9.262
ASKED ME IF I SAW HER BLUE? BRACELET AND I DONT
EVER REMEMBER SEEING IT. I AGAIN ASKED HER IF SHE
WAS ALRIGHT AND ASKED TO PLEASE NOT SAY ANYTHING AS
I HAD A FAMILY AND I WOULD HURT US ALL. I REMEMBER
TELLING HER IF IT WENT TO COURT WE WOULD ALL BE
MORE EMBARRASSED AND ASHAMED AND IT WOULD RUIN MY
FAMILY AND HER OWN. SHE SAID SHE WAS OK AND THAT SHE
WASNT GOING TO SAY ANYTHING, THAT SHE HAD A SICK
CAT AT HOME AND JUST WANTED TO TAKE CARE OF IT.
AGAIN I TOLD HER I WAS SOBERLY SORRY FOR WHAT I
HAD DONE AND ASKED HER AGAIN IF SHE WAS ALRIGHT
BEFORE I DROPPED HER OFF AT HER HOUSE AND LET
LET DOOR (GAR) OPEN AND I CLOSED IT FOR HER AND
SAID SORRY AND LEFT. I WAS SO FREAKED OUT WHEN
I LEFT HER HOUSE THAT I BEARLY REMEMBERED WHAT
I DID WHEN I GOT HOME. IT TOOK ME A WHILE TO
TO REMEMBER LATER WHAT I HAD ACTUALLY DONE. I GOT
HOME AND HARDLY REMEMBERED THE TRIP. I DRESSED FOR
WORK AND DROVE TO RENO TO MY JOB. I MUST HAVE
REALLY BEEN SCARED BECAUSE A WEEK LATER THE
COPS CAME TO MY HOUSE WHILE I WAS AT WORK
AND SPOKE TO MY WIFE, MY WIFE THEN CALLED MY
WORK AND I CALLED HER BACK TO SEE WHAT WAS UP
AND SHE SAID I BETTER COME HOME AND THAT THE
COPS WANT ME TO CALL THEM WHEN I GOT HOME.
I DIDNT GET HOME TIL ABOUT 11-11:15 PM AND ASKED
WHAT WAS GOING ON. MY WIFE TOLD ME THEY WERE
ASKING ABOUT HER CAR, THE CELL PHONE AND SOME
CLOTHES IF I REMEMBERED AND SINCE IT WAS LATE I
CALLED IN THE MORNING AND THATS WHEN I GOT
THE VOICE MAIL OF DETECTIVE HERRERA AND IT SAID
SOMETHING ABOUT CHILDREN OF CRIMES UNIT AND V9.262
CAME UNGLUED. I STARTED CRYING AND I 110

THEN REALIZED I HAD A BAD FEELING BUT DIDNT KNOW WHAT IT WAS, I CALLED AGAIN ON FRIDAY MORNING AND GOT/MAYBE HE CALLED ME, I DONT REMEMBER. ANYWAY DETECTIVE HERRERA WANTED TO ASK ME SOME QUESTIONS TO CLEAR UP A AN INCIDENT THAT HAPPENED THE WEEK BEFORE. HE SAID THEY HAD 8-9 GUYS HE WAS TALKING TO TO CLEAR UP WHAT HAPPENED AND I STARTED TO GET SCARED BUT DIDNT KNOW WHY. HERRERA ASKED IF I WOULD DRIVE OVER TO RENO FROM DAYTON TO ASK ME SOME QUESTIONS TO ELIMINATE ME FROM WHAT HAPPENED. I REMEMBER ASKING WHY I COULDN'T JUST ANSWER THE QUESTIONS ON THE PHONE AND HE SAID ITS JUST EASIER TO DO IT IN PERSON AND THAT DIDNT MAKE SENSE TO ME SO I ASKED HIM WHAT ITS REALLY ABOUT AND HE TOLD ME THERE WAS A RAPE OF A YOUNG GIRL IN CARSON CITY AND THEY JUST WANTED TO SEE IF I MIGHT BE INVOLVED OR NOT AND TO JUST PROBABLY CLEAR MY NAME OF THE POSSIBLE SUSPECTS. I TOLD HERRERA RIGHT THEN THAT I GOT TO THINK ABOUT THIS AND I HAVE A BAD FEELING SO I SAID I WOULD CALL BACK LATER ON FRIDAY AFTERNOON AND THAT I HAD TO THINK ABOUT WHAT WAS GOING ON. I TALKED TO MY WIFE AT HOME AND STARTED GETTING REALLY SCARED BUT I DIDNT KNOW WHY SO I CALLED WORK AND SAID I WOULDN'T BE IN TODAY. IT WAS THE FIRST TIME I WOULD MISS A DAY OF WORK IN A VERY LONG TIME. I CALLED DETECTIVE HERRERA BACK AGAIN AND SAID I AM FREAKED OUT THAT YOU WANT TO TALK TO ME, I WAS SCARED BUT I DIDNT REMEMBER DOING ANYTHING WRONG V9.263F₁₁₉

(4)

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

INSTEAD OF JUST ANSWERING THEIR QUESTIONS
JUST RIGHT NOW, HE SAID THEY JUST LIKE
TO CLEAR ~~THESE~~ THESE THINGS UP IN PERSON.
BUT THE ATTY'S BOTH TOLD ME THEY WERE
JUST "PLAYING ME" A RUSE TO GET ME DOWN
THERE SO I TOLD DETECTIVE HERRERA I
WAS GOING TO HAVE TO THINK ABOUT THIS
FOR AWHILE AND I WOULD GET A HOLD OF
HIM ANOTHER TIME AND I SAID I WOULD
CALL HIM BACK WHEN I FIGURED OUT WHAT'S
GOING ON, I TOLD HIM I NEEDED TO THINK
AND I WAS HONEST WITH HIM. AT THAT POINT
I CALLED MY JOB AND QUIT CAUSE I WAS
SCARED THEY WOULD COME TO TALK TO ME AT WORK
AND I COULDN'T HANDLE A SCENE LIKE THAT
AND BE TOTALLY OVERWHELMED. I CALLED MY
WIFE AND TOLD HER I QUIT MY JOB AND
I AM SCARED & DONT KNOW WHY AND THAT
I WASNT GOING TO HAVE A SCENE AT WORK
AND THAT I SHOULD LEAVE THE IMMEDIATE
AREA TIL I CAN GET A JOB OUT OF STATE
& EARN ENOUGH FOR AN ATTY. THE COPS
WERE MAKING ME FEEL GUILTY AND I
HAD A BAD FEELING BUT WASNT SURE
WHAT I MIGHT HAVE DONE. I GOT SOME
OVERNIGHT CLOTHES AND KISSED MY VERY
DISTRAUGHT WIFE & BABIES GOODBYE AND

her I would call when I figure it out. I DROVE TO WINEMAUCCA AND STAYED A FEW DAYS - A WEEK MAYBE AND DECIDED TO GO TO OREGON TO TRY GET A JOB AND SAVE UP & SORT IT OUT IN MY HEAD, WELL I COULDN'T GET A JOB AND GAVE UP AND I CAME HOME TO DAYTON AREA FOR A WEEK AT A FRIENDS house while I TRIED TO THINK WHAT THE HECK I DID! I STARTED TO REMEMBER JUST A VERY FEW THINGS AND IT REALLY, REALLY SCARED ME. I TOLD THE LAW THE LAST TIME I SPoke TO THEM THAT I WAS GOING TO COME IN SOON AND TALK TO THEM BUT I DECIDED TO GO GET MY WIFE & KIDS AND TALK TO THEM (my wife) ABOUT WHAT I REMEMBER AND SINCE I THINK BETTER WHEN I AM DRIVING NORMALLY AND SINCE I HAD MY FAMILY WITH ME, MY ONE YR OLD BOY AND MY 2 1/2 YR OLD BOY AND MY WIFE, I DECIDED TO GO TO SALEM OREGON FOR A DRIVE SINCE WE LIKE THE AREA ANYWAY. I TOLD MY WIFE AS WE DROVE ABOUT THE POSSIBLE SENTENCES THAT A RAPE INVOLVES AND WHAT LITTLE I REMEMBERED. I TOLD HER IT WOULD TAKE MONTHS & MONTHS BEFORE I "MIGHT" HAVE ENOUGH FOR A LAWYER AND I

KNOW WE WOULD LOSE EVERYTHING ELSE
BY THEN AND STARTED THINKING OF JUST
TURNING MYSELF IN SINCE IT WAS LOOKING
LIKE THAT WAS THE ONLY WAY I WOULD
GET AN ATTY AND THAT SCARED ME
MORE CAUSE I HAD BEEN SCREWED MANY
YRS AGO BY A PUBLIC DEFENDER AND
PLED TO SOMETHING I SWEAR I, WE NEVER
DID. OH, BY THE WAY WHILE WE DROVE THRU
RENO TOWARD OREGON WE DROVE BY THE
WL. SHERIFFS DEPT ON PARR BLVD SO MY WIFE
WOULD KNOW WHERE ITS AT AND WOULDN'T FREAK
OUT WHEN WE CAME BACK. I (WE) WAS
BEGINNING TO REALIZE THE EXTENT OF
WHAT I WAS LOOKING AT AND WHAT I
COULDN'T REMEMBER AND KNOWING THEY MUST
THINK I DID IT OR THEY WOULDN'T HAVE BEEN
SO ADEMENT ABOUT ME GOING TO RENO TO
SPEAK TO THEM. I WAS TRULY FRIGHTENED
TO DEATH TO KNOW I MIGHT REALLY HAVE
DONE THIS CRIME AND THAT I JUST MIGHT
HAVE DESTROYED OUR FAMILY & FUTURE ALONG
WITH THE VICTIMS. WE STOPPED AT MY SISTERS
HOUSE FOR A FEW DAYS AND TOLD HER WHAT I
MIGHT HAVE DONE AND WHILE THERE MY SISTER SAID
I SHOULD WASH THE GRAY OUT OF MY HAIR AND
GET SOME BLEACH CAUSE IT WORKS BETTER THAN

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

9
taking me to the Susanville jail. I WAS BOOKED
AND 2 DETECTIVES, HERRERA? ANYWAY
THEY QUESTIONED ME AND I HONESTLY DID TELL
THEM WHAT I COULD REMEMBER AT THAT
TIME, THEY LIKED MY BLEACHED HAIR AND I
TOLD THEM IT WASNT FOR EFFECT, I WAS
DOING IT TO GET RID OF ALL THE GRAY BEFORE
I DYED MY NATURAL COLOR BACK IN AND
THAT I WAS GETTING READY TO DO JUST
THAT WHEN THEY KNOCKED AND CAME IN. THEY
SAW ME PUT DOWN THE BOX OF BROWN
HAIR DYE AND PUT MY HANDS UP. THERE
IS EVEN VIDEO AT SUSANVILLE WALMART
OF ME BUYING THE HAIR COLOR THAT EVENING.
ANYWAY THE OFFICERS FROM RENO ASKED ME
TO PUT 2 SWABS IN MY MOUTH FOR
DNA SAMPLES AND I DID IT WITHOUT
HESITATION AND TOLD THEM I WAS TRULY
COMING HOME ELSE WHY WOULD I ONLY
BE 1 1/2 HRS FROM RENO WITH MY FAMILY &
NOT MUCH MONEY! DETECTIVE HERRERA
SAID HE TRULY BELIEVED I WAS
TURNING MY SELF IN AND I THEN TOLD
HIM I SAID I WOULD WORK THIS OUT
RIGHT FROM THE FIRST TIME I EVER
SPOKE TO HIM AND LIKE I TOLD
HIM THEN, I JUST NEEDED TIME TO
REALLY THINK IT OUT AND I HAD! V9. 269 25

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

LETTER TO ACT?

(a)

I KNOW IT SOUNDS BAD, BUT I HAD BEEN DRINKING (SOMETHING I NORMALLY DO VERY LITTLE OF). I HAD THIS STUPID FANTASY ABOUT BEING WITH A BABYSITTER AND I LET IT GET AWAY FROM ME AND OBVIOUSLY DID WHAT I DID AND WILL NEVER FORGIVE MYSELF FOR WHAT I HAVE CAUSED UPON US ALL. I'M NOT MAKING EXCUSES, IT SHOULD HAVE NEVER, EVER HAPPENED AND HAVE ALWAYS TRIED TO HELP OTHERS - NOT HURT THEM. THIS YOUNG LADY DIDNT ASK FOR NOR DESERVED ANY OF THIS AND I WILL HAVE TO LIVE WITH THAT KNOWLEDGE AND THE SHAME I CAUSED MYSELF ALL OF MY LIFE. I HAVE SHATTERED MY OWN FAMILY AS WELL AND I LOVE MY BOYS (I HAVE FOUR ALTOGETHER) SO VERY MUCH. 1 1/2, 2 1/2, 10 AND 12 YRS OLD AND THEY WILL BE HURT FOREVER ALSO AND I CANT TAKE IT BACK, I'D GIVE MY RIGHT ARM & LEG IF I COULD! I HAD THIS STUPID FANTASY FOR YRS BUT I WISH I COULD GIVE YOU AND MYSELF TOO, A BETTER ANSWER FOR WHY IT DID HAPPEN. GOD FORGIVE ME!

B

My present feelings about where I am right now are as follows: AS OF THE DATE I'M WRITING THIS 12-17-03 I HAVE BEEN IN CUSTODY BOTH CALIF AND HERE ALMOST 4 MONTHS AND I HAVE BEEN ABLE TO EXPERIENCE THE WHOLE SPECTRUM OF WHAT I FEEL. I HAVE HURT AN INNOCENT 15 YR OLD GIRL AND HER FAMILY. I HAVE SCARED THEM, SHAMED THEM, EMBARRASSED THEM, CAUSED MENTAL, EMOTIONAL AND PHYSICAL SUFFERING OF WHICH WAS NOT OF THEIR OWN MAKING, I'M SURE I HAVE DAMAGED HER TRUST & FAITH IN MEN AND HAVE LEFT THEM TO WONDER, WHY? WHY HER?, WHY ANYONE?, WHY, WHEN I HAD A PRETTY, LOVING WIFE OF MY OWN?

I HAVE HURT THE MOST KIND, LOVING AND FAITHFUL WOMAN I HAVE EVER KNOWN. SHE BELIEVED IN ME AND STILL DOES THOUGH I KNOW I AM NOT DESERVING OF IT. MY WIFE DEPENDED ON ME TO PROTECT, LOVE, BE HARDWORKING TO PROVIDE FOR MY WIFE & 2 LITTLE BABIES, TO MAKE HER PROUD OF ME AND TRY TO BE HER KNIGHT IN SHINING ARMOR, TO MAKE ALL HER DREAMS COME TRUE AND SO MUCH MORE. I HAVE SHAMED

C

her, embarrassed her, I HAVE CAUSED MENTAL, EMOTIONAL AND PHYSICAL SUFFERING WHICH SHE DID ASK FOR OR DESERVE EITHER. I HAVE DAMAGED HER TRUST AND FAITH IN ME, IN MEN IN GENERAL BY MY ACTIONS I HAVE CAUSED MY WIFE TO LOSE MY TRUCK, her car, ALL OUR CREDIT CARDS, HEALTH INSURANCE, OUR INCOME OF WHICH I HAVE ALWAYS BEEN THE SOLE PROVIDER, her mom is 75 yrs old and lives very far away and has "never" seen either of our 2 BEAUTIFUL TODDLERS $1\frac{1}{2}$ & $2\frac{1}{2}$ AND she SURE WONT BE ABLE TO MAKE THAT TRIP NOW AND I GOT TO LIVE WITH THAT TOO! My wife ISNT EVEN SURE she will BE ABLE TO EARN ENOUGH TO PAY BILLS AND THAT DOESNT EVEN CONSIDER WHAT DAYCARE MIGHT RUN FOR 2 KIDS SO VERY YOUNG. We EVEN HAD TO SELL OUR HOUSE JUST SO WE WOULDN'T LOSE IT IN YORINGTON, ON. My wife NOW HAS THE UNPLEASANT KNOWLEDGE OF HAVING TO PLAY MOM AND DAD BOTH, TO TRY TO RAISE THEM RIGHT WITHOUT DADDY, TO KNOW THE LAST THINGS OUR BOYS WILL NOW MISS OUT ON LIKE FATHER

(P)

SON THINGS, BEING DADDIES LITTLE BOY,
 PLAYING CATCH, HOOP, ALL THE THINGS
 KIDS HAVE THE OPPORTUNITY TO EXPERIENCE
 GROWING UP WHEN DAD IS THERE TO LOVE
 GUIDE & PROVIDE FOR THEM, WILL THEY
 GET TO GO TO COLLEGE? WILL THEY
 EVER UNDERSTAND WHAT AND WHY
 DAD DID WHAT HE DID TO CAUSE THIS,
 WILL THEY HATE ME FOR BEING UNFAITHFUL
 TO THEIR MOM? SO VERY MANY THINGS
 I CAN YET TO THINK OF! MY MOM &
 DAD, MY 4 BROTHERS & SISTERS AND
 16 GRANDCHILDREN, HOW WILL THIS HURT
 THEM ALL, THE QUESTIONS, SHAME, ETC...
 MY 85 YR OLD GRANDMOTHER - I'M CLOSER
 TO HER THEN MY MOM - SHE IS CRUSHED!
 ALL MY CO-WORKERS AND FRIENDS WHO
 KNOW I'M A HARD WORKER AND GOOD (WAS)
 FATHER, I WAS A VOLUNTEER FIRE
 MAN AND EMT CAUSE ~~BE~~ I WANTED
 TO HELP PEOPLE!

YES, I HAVE FELT AND THOUGHT
 ABOUT ALL THESE THINGS, ALL THESE
 FEELINGS, AM ASKING GOD WHY? WHY
 DID I DO THIS? I HAVE BY COMMITTING
 THIS CRUEL ACT DIDNT JUST HURT
 THAT YOUNG LADY BUT ITS BEEN

SO VERY MANY, MANY people who
I have SADDENED, CAUSED DISBELIEF
TO, SHAMED, LET DOWN AND JUST
OUTRIGHT SHOCK AS TO WHY?
I'M NOT LIKE THAT YET I DID
IT. SO MANY FAMILY MEMBERS WILL BE
GONE BEFORE I PRAY I CAN GET
OUT. EVEN IF I ONLY DID 100RS
CONCURRENTLY I WOULD STILL LOSE
4-5 LOVED ONES I WOULDN'T EVEN BE
ABLE TO SAY GOODBYE TO. I KNOW
I AM GUILTY AND I HAVE NEVER
DENIED THAT I MIGHT BE ~~OR~~
WAS IN FACT WHEN IT ALL CAME TO ME!
MY WIFE IS STILL STANDING BY ME
EVEN THOUGH I HAVE CAUSED SO
VERY MUCH DAMAGE TO SO MANY
PEOPLE, SHE PRAYS EVERYDAY AS
DO I THAT WITH GODS MERCY AND
WITH THE COURTS ALSO THAT WE
PRAY TO GOD WE CAN BE A FAMILY
AGAIN BEFORE THE KIDS ARE
COMPLETELY GROWN AND SHATTERED
a/s. I HAVE DONE SUCH A THING
THAT SHOULD NEVER EVER HAVE HAPPENED
AND I CANT TAKE IT BACK, I
HAVE BAD DREAMS ABOUT WHAT I

(F)

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

(G)

SENTENCE OF A DEFINITE TERM
OF 15 YRS WITH POSSIBLE PAROLE IN
A MINIMUM OF 5 (BUT REALISTICALLY ~~A~~ MORE)
YRS IN KIDNAPPING (FIRST DEGREE
SUBSECTION 2(B)) AND FOR THE COUNTS
OF SEXUAL ASSAULT (3) COUNTS NRS 200.366
SUBSECTION B (2) FOR A DEFINITE TERM OF
20 YRS WITH POSSIBILITY PAROLE IN 5 MIN.
(BUT REALISTICALLY MORE) AND PRAY FOR
THE CONCURRENT SENTENCING WHICH
IN EFFECT WOULD MAKE IT: (4) COUNTS
WITH DEFINITE 20 YRS WITH POSSIBLE PAROLE
AFTER 5 YRS SERVED CONCURRENTLY AND
I KNOW THAT IF I COULD BE GRANTED THIS
CONCURRENT SCENARIO WITH DEFINITE TERMS
THAT I KNOW IN MY OWN HEART I SHOULD
AND PROBABLY GET A CHANCE AFTER A
MINIMUM OF 10 YRS IS SERVED IN PRISON
WITH ME DOING GOOD IN PRISON. I KNOW
THAT MIGHT NOT SEEM LIKE MUCH BUT MY
FAMILY AND THE VICTIM AND HER FAMILY WILL
STILL NEVER BE THE SAME BUT I SWEAR I
WOULD DO MY BEST TO MAKE PEP HAPPY SO
I COULD PICK UP MY SHATTERED FAMILY AND
TRY GLUE IT PARTIALLY BACK TOGETHER.
I'M SORRY THIS HAS ALL BEEN SO LONG
BUT I HAVE JUST TRIED TO BE HONEST
AND FORTHCOMING. PLEASE FORGIVE ME YOUR HONOR. 1/33

ORIGINAL FILED

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

2004 FEB 17 PM 2:19
RONALD L. STIN. JR.
67 DEPUTY

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

10 IN AND FOR THE COUNTY OF WASHOE

11 THE STATE OF NEVADA,
12 Plaintiff,

13 vs.

Case No. CR03-2156

14 MICHAEL TODD BOTELHO,
15 Defendant.

Dept. No. 8

16 CONFIDENTIAL LETTERS FROM
17 FAMILY TO BE FILED UNDER SEAL

18 See attached.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

SEALED

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

Honorable Judge Polaha,

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

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

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

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

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

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

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

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

Respectfully submitted,
Leeanne Fish

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

Dear Sir,

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

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

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

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

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

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

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

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

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

February 3, 2004

Mr. Sullivan,

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

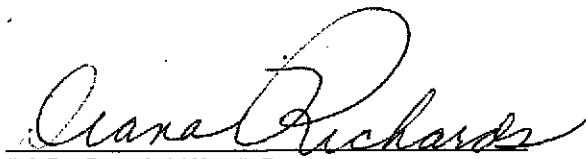
Sincerely,
Leeanne (Botelho) Fish

CERTIFICATE OF SERVICE

I, DIANA RICHARDS, hereby certify that I am an employee of the Washoe County Public Defender's Office, Reno, Washoe County, Nevada, and that on this date I forwarded a true copy of the foregoing document, via inter-office mail, addressed to:

Kelli Vilorio, Deputy District Attorney

DATED this 17th day of February, 2004.


DIANA RICHARDS

ORIGINAL FILED

1 CODE 2528

2 MICHAEL R. SPECCHIO

3 WASHOE COUNTY PUBLIC DEFENDER

4 BAR #1017

5 P. O. BOX 30083

6 RENO, NV 89520

(775) 337-4800

7 ATTORNEY FOR DEFENDANT

2004 JAN 26 PH 2: 34

RONALD A. LONGTIN, JR.

BY

DEPUTY

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

9 IN AND FOR THE COUNTY OF WASHOE

10 THE STATE OF NEVADA,
11 Plaintiff,

12 vs.

Case No. CR03-2156

13 MICHAEL TODD BOTELHO,
14 Defendant.

Dept. No. 3

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

17 See attached.

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

SEALED

V9. 285

Note: This information has been disclosed to you from records who confidentiality is protected by federal law. Federal regulations (42CFR Part 2) prohibit you from making any further disclosure of it without the specific written consent of the person to whom it pertains, or as otherwise permitted by such regulations. A general authorization for the release of medical or other information is not sufficient for this purpose.

Released to

ATTY SEAN SULLIVAN**PSYCHOLOGICAL/SUBSTANCE ABUSE EVALUATION**

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

Identification

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

Limits of confidentiality

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

Referral question

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

Method of assessment

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

Background

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

V9. 28541

V9. 286

Note: This information has been disclosed to you from records who confidentiality is protected by federal law. Federal regulations (42CFR Part 2) prohibit you from making any further disclosure of it without the specific written consent of the person to whom it pertains, or as otherwise permitted by such regulations. A general authorization for the release of medical or other information is not sufficient for this purpose.

Released to

Atty Sullivan**Psychological/Substance Abuse Evaluation**

Michael Todd Botelho

Page 2 of 3

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

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

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

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

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

Mental status

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

V9. 286142

V9. 287

Note: This information has been disclosed to you from records who confidentiality is protected by federal law. Federal regulations (42CFR Part 2) prohibit you from making any further disclosure of it without the specific written consent of the person to whom it pertains, or as otherwise permitted by such regulations. A general authorization for the release of medical or other information is not sufficient for this purpose.

Released to

MTY. Sullivan**Psychological/Substance Abuse Evaluation**

Michael Todd Botelho

Page 3 of 3

Conclusion

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


Bill Davis, Ph.D.

Nevada Psychologist License PY211

t: 01/23/04

V9. 28743

CERTIFICATE OF SERVICE

I, DIANA RICHARDS, hereby certify that I am an employee of the Washoe County Public Defender's Office, Reno, Washoe County, Nevada, and that on this date I forwarded a true copy of the foregoing document, via inter-office mail, addressed to:

Kelli Vilorio, Deputy District Attorney

DATED this 26th day of January, 2004.


DIANA RICHARDS

ORIGINAL

FILED

4185

JOAN MARIE DOTSON

CCR #102

75 COURT STREET

RENO, NEVADA

APR 19 2004

RONALD A. LONGTIN, JR., CLERK

By:
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BEFORE THE HONORABLE JEROME M. POLAHA, DISTRICT JUDGE

--o0o--

THE STATE OF NEVADA,
Plaintiff,

Case No. CR03-2156

vs.

Department No. 3

MICHAEL TODD BOTELHO,
Defendant.

TRANSCRIPT OF PROCEEDINGS

SENTENCING

Wednesday, April 7th, 2004

8:30 A.M.

Reno, Nevada

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

A P P E A R A N C E S

For the Plaintiff: OFFICE OF THE DISTRICT ATTORNEY
BY: BRUCE HAHN
Deputy District Attorney
P.O. Box 11130
Reno, Nevada 89520

For the Defendant: OFFICE OF THE PUBLIC DEFENDER
BY: SEAN SULLIVAN
Deputy Public Defender
P.O. Box 11130
Reno, Nevada 89520

THE NEVADA DEPARTMENT
OF PAROLE AND PROBATION: JO EWALD

1 WEDNESDAY, APRIL 7TH, 2004; RENO, NEVADA

2 --o0o--

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

7 Mr. Sullivan, have you received the
8 presentence report?

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

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

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

24 THE COURT: All right.

1 MR. SULLIVAN: Thank you, Judge.

2 (At this time a brief
3 recess was taken.)
4

5 THE COURT: Be seated please.

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

9 And I was provided a victim impact
10 statement.

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

15 THE COURT: I don't have those.

16 MR. SULLIVAN: You do not have the letters?

17 THE COURT: No.

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

20 MR. SULLIVAN: Yes.

21 THE COURT: Okay. Yes.

22 MR. SULLIVAN: If it pleases the Court, your Honor, we
23 are in receipt of the presentence report dated January 13th,
24 2004.

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

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

12 And my client would ask this court to not
13 consider any of the information alleged by the State per NRS
14 49.305 and NRS 49.405 and the applicable case law set forth
15 in the defendant's opposition to State's motion filed on
16 February 13th, 2004.

17 THE COURT: All right.

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

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

24 MR. SULLIVAN: Can I approach, your Honor?

1 THE COURT: Sure. All right.

2 MR. SULLIVAN: Thank you, Judge.

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

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

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

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

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

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

24 My client himself, your Honor, has never

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

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

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

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

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

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

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

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

8 Your Honor, my client, as you can see from
9 Doctor Davis's report, which was filed under seal on January
10 26th, 2004, has no real mental health issues to speak of. He
11 has never sought any mental health treatment in the past.
12 Doctor Davis diagnosed my client with adjustment disorder,
13 with a depressed mood brought about by his legal issues.

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

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

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

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

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

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

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

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

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

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

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

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

7 He does have a conviction, your Honor, in
8 1999 for a misdemeanor domestic battery.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 But my client has indicated to me from day

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

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

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

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

17 He committed this horrible act and he
18 couldn't remember in great detail. His mind -- this is what
19 he is telling me, your Honor. His mind wouldn't let him
20 remember what happened.

21 And I think it's akin to like post traumatic
22 stress disorder or something like that. But, your Honor, he
23 does actually admit in great detail to your Honor and to the
24 State and to the Division and everyone else in his written

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

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

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

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

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

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

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

1 don't end up that way.

2 He did let her go.

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

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

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

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

24 And what my client feels is fair, your

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

10 THE COURT: All right.

11 State your name for the record.

12 DEFENDANT'S WIFE: Mary Lou Botelho.

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

15 THE COURT: Did you want her sworn?

16 DEFENDANT'S WIFE: Excuse me?

17 MR. SULLIVAN: He is talking to the prosecutor.

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

20 THE COURT: All right.

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

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

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

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

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

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

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

6 THE DEFENDANT: Thank you, honey.

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

11 THE COURT: Right.

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

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

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

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

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

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

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

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

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

1 were very pleased.

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

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

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

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

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

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

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

1 little children.

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

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

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

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

17 THE DEFENDANT: Thank you, mom.

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

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

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

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

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

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

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

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

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

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

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

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

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

5 But it did.

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

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

18 THE COURT: Thank you.

19 THE DEFENDANT: Thank you, Barbara.

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

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

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

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

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

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

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

3 THE COURT: All right. Thank you.

4 THE DEFENDANT: Thank you.

5 THE COURT: Mr. Hahn.

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

12 THE COURT: All right.

13 MR. HAHN: The State would call Greg Herrera.

14 -oOo-

15 GREG HERRERA

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

19
20 DIRECT EXAMINATION

21 BY MR. HAHN:

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

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

1 Q How are you employed, sir?

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

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

6 A Approximately ten years.

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

8 A Yes, I do.

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

14 A Yes, sir, I am.

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

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

20 A Yes, sir, she was.

21 Q Could you recount those injuries for the
22 Court please?

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

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

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

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

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

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

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

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

24 A Absolutely.

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

3 A No, sir, it did not.

4 Q Whose number was it?

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

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

9 A He was apprehended in Susanville,
10 California.

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

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

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

22 A Yes, it was.

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

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

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

4 A Almost never, according to him.

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

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

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

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

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

21 A Yes, sir, I did.

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

24 A He stated the fact that his appearance

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

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

6 A Yes.

7 Q What does that refer to?

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

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

12 A Yes, sir, they did.

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

15 A Yes, sir, it was.

16 Q What unusual fact did they discover about
17 the vehicle?

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

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

23 A Yes, sir.

24 Q Did you have conversations with her in

1 connection with your investigation?

2 A Several.

3 Q Was she truthful in her representations?

4 A No, sir, she was not.

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

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

9 THE COURT: The present wife?

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

11 THE WITNESS: Mary Lou.

12 BY MR. HAHN:

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

15 A No, sir, she was not.

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

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

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

23 A That's correct.

24 Q Along with her children?

1 A Yes, sir.

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

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

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

12 A No, he did not.

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

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

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

19 A Having sex.

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

24 A Yes, sir, I did.

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

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

10 BY MR. HAHN:

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

13 A Melissa Botelho.

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

16 A Michael Botelho's ex-wife.

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

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

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

1 involved?

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

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

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

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

1 from testifying without the other spouse's consent.

2 THE COURT: That's what you raised --

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

5 THE COURT: And that was granted.

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

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

17 MR. SULLIVAN: I don't think --

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

20 MR. SULLIVAN: If I understand --

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

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

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

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

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

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

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

24 THE COURT: All right.

1 You may continue.

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

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

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

15 MR. SULLIVAN: You did, Judge.

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

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

20 THE COURT: Okay.

21 MR. HAHN: Very well, your Honor.

22 THE COURT: So --

23 MR. HAHN: I have nothing.

24 THE COURT: I made my ruling. Continue.

1 BY MR. HAHN:

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

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

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

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

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

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

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

24 A Yes, it did.

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

3 A Yes, I did.

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

6

7 * CROSS EXAMINATION *

8 BY MR. SULLIVAN:

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

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

15 A No, sir, I was not.

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

18 A Correct.

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

21 A And speaking with the persons who performed
22 the examination.

23 Q So secondhand knowledge basically is what
24 you have?

1 A Yes.

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

6 A No, sir. That's not correct.

7 Q You were there, correct?

8 A When he was apprehended, no, sir.

9 Q Who exactly was there when he was
10 apprehended?

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

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

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

18 Q Okay. A couple hours after he was
19 apprehended?

20 A Yes, sir.

21 Q Where?

22 A At the Lassen County detention facility.

23 Q In California?

24 A Yes, sir.

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

3 A Yes, sir.

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

6 A Yes, sir.

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

10 A They stated he was cooperative.

11 Q He never put up a fight?

12 A No, sir.

13 Q He never tried to run?

14 A No, sir.

15 Q He never pulled a weapon?

16 A No, sir, he did not.

17 Q He went along willingly with the
18 authorities?

19 A Yes, sir.

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

23 A I don't recall that part, sir.

24 Q Okay. And when did you actually first speak

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

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

5 Q Were you with Detective Carry at this time?

6 A Yes, sir, I was.

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

9 A No, there was not.

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

12 A We were in my unmarked detective vehicle.

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

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

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

19 A He was inside the jail.

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

21 A No, sir, I did not.

22 Q Who did transport him back?

23 A I believe the Susanville Police Department
24 did.

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

3 A Yes, sir, I did.

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

6 A That's correct.

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

9 A According to him, yes.

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

12 A According to him, that's correct.

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

15 A For five years, yes.

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

19 A Yes, sir.

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

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

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

5 A That's correct.

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

8 A Yes, sir.

9 Q To aid you in the investigation?

10 A Yes, sir.

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

14 A Yes, sir, he did.

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

18 A Just pictures that I have seen.

19 Q Was this a Department of Motor Vehicles
20 picture?

21 A Yes, and a previous booking photo.

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

1 A Yes. As far as his weight, yes.

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

4 A That's correct.

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

7 A Yes, that's correct.

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

11 A Yes, sir.

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

15 A That's correct.

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

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

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

1 A That's correct.

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

4 A Yes, sir.

5 Q And by looking at photographs?

6 A Yes, sir.

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

10 A That's correct.

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

14 A That was their opinion, correct.

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

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

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

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

24 Q Do you recall whether or not my client said

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

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

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

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

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

16 A Yes.

17 Q Who exactly interviewed Melissa Botelho?

18 A I did, sir.

19 Q And was Detective Carry there as well?

20 A I don't believe he was.

21 Q Was this a taped interview?

22 A Yes, sir, it was.

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

1 Melissa Botelho. Is that when the interview was given?

2 A Can you repeat the date?

3 Q January 8, 2004.

4 A Yes, sir.

5 Q You got the date wrong earlier?

6 A I think I said early January.

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

9 A Yes, sir, it was.

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

15 A I testified to dismembering.

16 Q Dismembering. What did you take that to
17 mean?

18 A Cutting off limbs or disfiguring.

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

21 A Yes, sir.

22 Q Prior to today's proceedings?

23 A Yes, I did.

24 Q Does it say anywhere in that transcript what

1 you just testified to?

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

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

8 A That was back in September, I believe.

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

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

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

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

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

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

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

3 A No.

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

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

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

16 A Yes, sir.

17 Q But you chose not to do so?

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

19 Q Okay. So the only testimony transcript that
20 you have -- that we have from Melissa Botelho is on January
21 8, 2004, correct?

22 A Yes.

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

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

3 A Correct.

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

6 A That's correct.

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

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

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

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

19 A Correct.

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

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

1 what the fantasies actually were.

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

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

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

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

11 Q Thank you, Judge. I have nothing further.

12 THE COURT: All right.

13 MR. HAHN: I waive. Thank you.

14 THE COURT: All right. You may step down.

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

17 THE COURT: All right.

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

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

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

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

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

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

24 Because all of the common excuses that you

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

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

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

10 Why exactly, we don't know.

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

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

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

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

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

24 He is selfish.

1 This is not a good man.

2 Love doesn't demand its own way.

3 Those are my thoughts on Mr. Botelho.

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

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

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

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

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

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

10 Judge, this is a man who is minimizing.

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

14 Give credit where credit is due.

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

18 This was her first baby-sitting job.

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

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

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

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

9 Those are my comments concerning her.

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

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

24 There is absolutely no explanation for this

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

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

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

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

13 MR. HAHN: That's correct.

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

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

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

1 stuck.

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

9 Any response?

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

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

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

1 that she is alive.

2 THE COURT: I agree. All right.

3 Go ahead.

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

6 -oOo-

7 JANE DOE

8 being first duly sworn,
9 was examined and testified as follows:

10
11 DIRECT EXAMINATION

12
13 MR. HAHN: May I have just a moment with her?

14 THE COURT: Sure.

15 BY MR. HAHN:

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

18 A Yes.

19 Q Could you tell me how old you are?

20 A I am fifteen now.

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

22 A Yes.

23 Q What grade are you in?

24 A 9th.

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

3 A Yes.

4 Q Did you prepare a statement?

5 A Yeah.

6 Q Would you like to read it?

7 A Yeah.

8 Q If you would please.

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

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

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

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

24 Being raped has turned my whole world

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

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

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

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

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

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

24 I am always watching the road to make sure

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

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

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

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

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

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

4 This has made me wonder.

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

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

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

22 Q Was that your statement?

23 A Yes.

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

1 if I might. Are you receiving therapy right now?

2 A Yes.

3 Q How often?

4 A Once a week.

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

7 A I don't know.

8 Q I would invite any questions from
9 Mr. Sullivan.

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

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

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

16 I am sorry.

17 Would you please raise your right hand and
18 be sworn.

19 -oOo-

20 JANE DOE'S MOTHER

21 being first duly sworn,

22 was examined and testified as follows:

23

24 DIRECT EXAMINATION

1 BY MR. HAHN:

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

4 A Yes, I am.

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

7 A Yes, I did.

8 Q Please.

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

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

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

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

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

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

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

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

24 She works hard in school and is a pole

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

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

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

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

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

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

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

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

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

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

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

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

9 Her therapy has come along steadily but very
10 slowly.

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

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

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

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

24 It takes me hours to calm her down enough to

1 go back to sleep.

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

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

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

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

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

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

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

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

24 Instead of enjoying the last of her summer

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

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

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

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

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

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

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

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

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

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

24 She tries to recapture her independence but

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

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

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

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

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

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

13 I want my daughter back.

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

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

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

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

24 He is very close to my children and the love

1 they share is immeasurable.

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

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

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

9 This just broke his heart.

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

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

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

18 I thank God she was spared the pain of this.

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

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

24 He has become withdrawn and clings to both

1 her and I more than ever.

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

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

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

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

12 Jane's the baby, my baby girl.

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

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

21 My heart has crumbled.

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

1 right, protecting me.

2 That's what kind of a person she is.

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

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

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

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

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

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

1 endless.

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

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

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

14 They are so intense and so deep.

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

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

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

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

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

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

13 THE COURT: All right.

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

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

18
19 * CROSS EXAMINATION *

20 BY MR. SULLIVAN:

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

1 who placed the ad?

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

4 Q That's a local paper in Carson City?

5 A Out of Gardnerville, Carson Valley.

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

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

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

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

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

* REDIRECT EXAMINATION *

BY MR. HAHN:

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

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

Q But that was people that she knew?

A Yes.

Q This was the first time --

A Yes.

Q Nothing else. Thank you.

MR. SULLIVAN: Nothing else. Thank you.

THE COURT: Thank you.

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

THE COURT: All right.

Mr. Botelho, please stand. Any just or

1 legal cause why judgment should not now be entered?

2 MR. SULLIVAN: No, your Honor.

3 THE COURT: There being none, the Court does hereby
4 adjudge Michael Todd Botelho guilty of the offense set out in
5 Count I, kidnapping in the first degree, a violation of NRS
6 200.310(1).

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

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

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

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

23 THE DEFENDANT: Yes, sir.

24 THE COURT: In listening to your family and in looking

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

7 But you did a very bad thing.

8 THE DEFENDANT: Yes, sir.

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

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

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

1 on earth.

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

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

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

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

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

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

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

24 So, in accordance with the laws of the State

1 of Nevada, I do hereby sentence you, Michael Todd Botelho,
2 for the conviction of Count I, kidnapping, to a term of life
3 imprisonment with parole eligibility after a term of fifteen
4 years.

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

7 THE COURT: Five years?

8 PAROLE & PROBATION: Yes.

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

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

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

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

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

24 Now, what that means is you will be sent to

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

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

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

8 THE COURT: 197?

9 PAROLE & PROBATION: Yes.

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

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

17 THE COURT: 632?

18 PAROLE & PROBATION: Yes.

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

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

1 condition of lifetime supervision.
2

3 (At this time the foregoing proceedings were concluded.)
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1 STATE OF NEVADA)

2) ss.

3 COUNTY OF WASHOE)

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

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

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

16
17
18 DATED: This 9th day of April, 2004.

19
20 
21 _____
22 JOAN MARIE DOTSON, CSR #102
23
24

ORIGINAL

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1 CODE 1850

APR - 7 2004

RONALD A. LONGTIN, JR., CLERK
By *C. Patterson*
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5
6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 STATE OF NEVADA,

10 Plaintiff,

11 vs.

Case No. CR03-2156

12 MICHAEL TODD BOTELHO,

Dept. No. 3

13 Defendant.
14

15 JUDGMENT

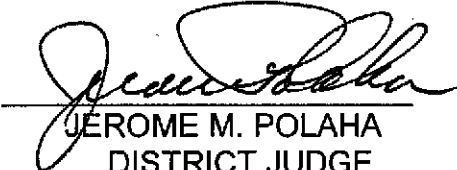
16 The Defendant, having entered a plea of Guilty, and no sufficient cause being
17 shown by Defendant as to why judgment should not be pronounced against him, the Court
18 rendered judgment as follows:19 That Michael Todd Botelho is guilty of the crime of Kidnapping in the First Degree, a
20 violation of NRS 200.310-1 and NRS 200.320, a felony, as charged in Count I of the
21 Indictment, and that he be punished by imprisonment in the Nevada Department of
22 Corrections for a term of Life with the possibility of parole after a minimum of five (5) years
23 as been served, with credit for one hundred ninety-seven (197) days time served.24 It is further ordered that Michael Todd Botelho is guilty of the crime of Sexual
25 Assault on a Child, a violation of NRS 200.366, a felony, as charged in Count III of the
26 Indictment, and that he be punished by imprisonment in the Nevada Department of
27 Corrections for a term of Life with the possibility of parole after a minimum of twenty (20)
28 years as been served, to be served consecutively to the sentence imposed in Count I.

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

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

12 It is further ordered that a special sentence of Lifetime supervision commence after
13 any period of probation, or any term of imprisonment or after any period of release on
14 parole. It is further ordered that the Defendant pay the statutory Twenty-five Dollar
15 (\$25.00) administrative assessment, submit to a DNA analysis test for the purpose of
16 determining genetic markers and pay a testing fee of One Hundred Fifty Dollars (\$150.00),
17 reimburse the Washoe County Public Defender's Office in the amount of Five Hundred
18 Dollars (\$500.00) for legal services rendered and pay restitution in the amount of Six
19 Hundred Thirty-two Dollars (\$632.00).

20 Dated this 7th day of April, 2004.

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28

JEROME M. POLAHA
DISTRICT JUDGE

ORIGINAL

FILED

1 CODE 2515
2 WASHOE COUNTY PUBLIC DEFENDER
3 JOHN REESE PETTY, State Bar No. 10
4 350 SOUTH CENTER STREET, SUITE 600
5 RENO, NEVADA 89501
6 (775) 337-4827
7 Attorney for Defendant.

2004 APR 30 PM 2:20

RONALD LONGTIN, JR.

BY  DEPUTY

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

vs.

Case No. CR03-2156

MICHAEL TODD BOTELHO,

Dept. No. 3

Defendant.
_____ /NOTICE OF APPEAL

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

19 DATED this 30th day of April, 2004.

20 MICHAEL R. SPECCHIO
21 Washoe County Public
22 Defender

By: JOHN REESE PETTY
Chief Deputy

CERTIFICATE OF SERVICE

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

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

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

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

And served a copy by inter-office mail to:

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

DATED this 3rd day of MAY, 2004


Charlene Gaskins

ORIGINAL

CR03 2/56

IN THE SUPREME COURT OF THE STATE OF NEVADA

2005 APR -6 PM : 53

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

No. 43247

RONALD L. LINDEN, JR.

BY *[Signature]*
DEPUTY

FILED

APR 04 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

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

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

Botelho cites to the dissent in Tanksley v. State¹ and asks this court to review his sentence to see if justice was done. He claims that the sexual assaults that he perpetrated on the victim were a continuous act and were completed in a matter of minutes.² He contends that the district

¹113 Nev. 844, 850, 944 P.2d 240, 244 (1997) (Rose, J., dissenting).

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

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

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

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

... continued

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

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


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

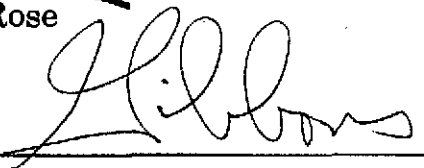
⁵See NRS 200.310(1); NRS 200.320(2)(a); NRS 200.366(3)(b)(1).


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

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

ORDER the judgment of the district court AFFIRMED.


Rose J.


Gibbons J.


Hardesty J.

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

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

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

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

Supreme Court No. 43247

2005 MAY -3 AM 9:46

District Court Case No. CR032156

RONALD A. LONGTIN, JR.

BY C. Keller
DEPUTYREMITTITUR

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

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

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

DATE: April 29, 2005

Janette M. Bloom, Clerk of Court

By: J. Richards
Chief Deputy Clerk

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

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the

REMITTITUR issued in the above-entitled cause, on

5-3-05Ronald Longtin Jr. by C. Keller
District Court Clerk

ORIGINAL

Case No. CR03P2156Dept. No. 3

FILED

2006 MAR -6 PM 3:41

RONALD A. LONGTIN, JR.

BY [Signature]
DEPUTY

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

-oOo-

MICHAEL TODD BOTELHO,

Petitioner,

vs.

PETITION FOR WRIT
OF HABEAS CORPUS
(POST CONVICTION)

JACK PALMER,

Respondent.

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of prisons, name the warden or head of the institution. If you are not in a specific institution of the department but within its custody, name the director of the department of prisons.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

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

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

PETITION

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

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

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

4. Case number: CR03-2156

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

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

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

Yes No XX

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

this time: N/A

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

8. What was your plea? (check one)

(a) Not Guilty

(b) Guilty XX on the advice of counsel

(c) Guilty but mentally ill

(d) Nolo Contendere

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

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

(a) Jury (b) Judge without a jury

11. Did you testify at the trial? Yes No

12. Did you appeal from the judgment of conviction?

Yes XX No

13. If you did appeal, answer the following:

(a) Name of court: Nevada Supreme Court

(b) Case number or citation: 43247

(c) Result: Order of Affirmance

(d) Date of result: April 29, 2005

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

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

N/A

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

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

(a) (1) Name of court: _____

(2) Nature of proceedings: _____

(3) Grounds raised: _____

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

(5) Result: _____

(6) Date of result: _____

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

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

(1) Name of court: _____

(2) Nature of proceedings: _____

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

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

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

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

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

five handwritten or typewritten pages in length.) _____

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

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

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

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

N/A

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

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

This Petition is timely filed.

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

Yes No **XXX**

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

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

Mr. Sean Sullivan, Esq. - Trial and Sentencing

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

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

Yes No **XXX**

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

N/A

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

(a) Ground one: SEE ACCOMPANYING MEMORANDUM OF

POINTS AND AUTHORITIES FOR ALL CLAIMS FOR RELIEF AND FACTS

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

(b) Ground two: _____

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

(c) Ground three: _____

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

(d) Ground four: _____

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

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

Executed at Lovelock Correctional Center on this 28th day of

February, 2006.

N/A
Signature of Attorney (if any)

Attorney & Address of Attorney

Michael T. Botelho

Michael T. Botelho #80837
Lovelock Correctional Center
P.O. Box 359
Lovelock, Nevada 89419

Petitioner

VERIFICATION

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

Michael T. Ball
Petitioner

In Proper Person
Attorney for petitioner

CERTIFICATE OF SERVICE BY MAIL

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

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

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

Dick Gammick
washoe County District Attorney
Post Office Box 30083
Reno, Nevada 89520-3083
, Nevada 89


Signature of Petitioner In Pro Se

/ / /

/ / /

/ / /

ORIGINAL

FILED

Michael Todd Botelho, #89417
Lovelock Correctional Center
Post Office Box 359
Lovelock, Nevada 89419

2006 MAR -6 PM 3:41

RONALD A. LONGIN, JR.

BY 
DEPUTY

Petitioner, In Proper Person

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

--ooOoo--

MICHAEL TODD BOTELHO,

Petitioner,

Case No. CR03P2156

vs.

Dept. No. 3

THE STATE OF NEVADA,

Respondent.
_____ /

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

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

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

DATED THIS 28th DAY OF FEBRUARY, 2006.

Respectfully Submitted,



Michael Todd Botelho
Petitioner, In Proper Person

BRIEF CASE HISTORY AND STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICABLE LAW-STANDARD FOR EFFECTIVE ASSISTANCE OF COUNSEL

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

It is possible for Petitioner to go straight to the Nevada

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

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

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

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

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

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

GROUND ONE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appellate counsel's failure to raise all viable claims

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

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

GROUND TWO

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

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

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

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

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

Detective Herrera testified at the sentencing hearing as follows:

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

....

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

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

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

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

Id. at page 51, lines 4-5

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

Id. at page 51, line 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GROUND THREE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GROUND FOUR

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

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

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

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

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

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

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

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

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

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

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

The United States Supreme Court has held:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Five years?

PAROLE & PROBATION: Yes.

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

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

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

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

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

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

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

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

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

GROUND FIVE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A guilty plea is voluntary only if the defendant enters

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

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

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

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

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

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

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

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

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

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

GROUND SIX

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

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

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

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

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

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

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

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

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

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

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

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

GROUND SEVEN

TRIAL COUNSEL, THIS COURT, AND THE PROSECUTION FAILED TO SEEK A COMPETENCY HEARING, WHEN THE RECORD IS CLEAR THERE EXISTS A DOUBT TO PETITIONER'S MENTAL COMPETENCY, IN VIOLATION OF NRS 178.405, THUS RESULTING IN A DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, EQUAL PROTECTION, A FAIR TRIAL AND A CONSTITUTIONAL PLEA AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

NRS 178.400 states in pertinent part as follows:

1. A person may not be tried or adjudged to punishment for a public offense while he is incompetent.
2. For the purposes of this section, "incompetent" means that the person is not of sufficient mentality to be able to understand the nature of the criminal charges against him and because of that insufficiency, is not able to aid and assist his counsel in the defense interposed upon the trial or against the pronouncement of the judgment thereafter.

Furthermore, Nevada provides the court with the means to suspend the trial when competency arises, as NRS 178.405 provides in pertinent part as follows:

Suspension of trial or pronouncement of judgment when doubt arises as to competence of defendant. When a complaint, indictment or information is called for trial, or upon conviction the defendant is brought up for judgment, if doubt arises as to the competence of the defendant, the court shall suspend the trial or pronouncement of the judgment, as the case may be, until the question of competence is determined.

Trial Counsel knew of, or should have known, of Petitioner's mental deficiencies, as Counsel informed this Court of Petitioner's inability to understand the instant proceedings.

[Trial Counsel] . . . basically his mind blocked them out.

His mind wouldn't let him remember what happened.

And I think it's akin to like post-traumatic stress disorder or something like that.

But right now my mind is drawing a blank.

He is a danger to himself.

(See Sentencing Transcripts, April 7th, 2004, page 13, line 16, 19-20, 21-22. Page 14, lines 11-12. Page 23, lines 7-8).

Counsel had a duty to investigate further into the mental status of Petitioner. As noted by counsel, Petitioner is suffering from what counsel deemed "post-traumatic stress disorder" which has precluded Petitioner from entering into a knowing, intelligent and voluntary plea as warranted by the holding in Boykin v. Alabama, Supra.

It is well established that a conviction obtained against

an incompetent defendant "is a clear violation of the constitutional guarantees of due process." U.S. v. Loyola-Dominguez, 125 F.3d 1315 (9th Cir. 1997), quoting Hernandez v. Yist, 930 F.2d 714, 716 (9th Cir. 1991), citing Pate v. Robinson, 383 U.S. 375, 378, 86 S.Ct. 836, 838, 15 L.Ed.2d 815 (1966). Competency requires that the defendant have the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense. Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

In the instant case, Petitioner could not possibly assisted his counsel, or consulted with counsel in an effective manner if he "blocked out" important aspects of the case or his own actions.

The Ninth Circuit Court of appeals recently held in Douglas v. Woodford, 316 F.3d 1079 (9th Cir. 2003) that counsel "has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired." Id. at 1085, quoting Bean v. Calderon, 163 F.3d 1073, 1077 (9th Cir. 1998).

In the instant case, it will be established at an evidentiary hearing that counsel was aware of petitioner's deficient mental status, and therefore had a duty to perform objectively in ensuring the court held a competency hearing, where medical experts would testify, as to Petitioner's incompetency. The court had a duty to suspend the proceedings to ascertain Petitioner's competency.

Counsel failed to file a Motion for Psychological evaluation. Counsel failed to inform the court that petitioner's

competency was at issue. Counsel failed to request any form of continuance or to further investigate the issue of Petitioner's competency. Counsel's deficient performance greatly prejudiced Petitioner, wherein Petitioner's current plea and convictions are unconstitutional under the guarantees of due process.

GROUND EIGHT

TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE UNDER THE GUARANTEES OF THE SIXTH AMENDMENT FOR ALLOWING PETITIONER TO BE SUBJECTED TO MULTIPLICITOUS, DUPLICITOUS AND/OR LESSER INCLUDED OFFENSES, RESULTING IN A DENIAL OF DUE PROCESS, DOUBLE JEOPARDY, EQUAL PROTECTION AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

Petitioner stands convicted of three (3) counts of sexual assault stemming from one continuous act in violation of the Double Jeopardy protections of the United States Constitution and Nevada Constitution.

Trial counsel, Sean Sullivan, allowed Petitioner to enter guilty pleas to the multiple offenses without protecting him from his Constitutional rights. Appellate counsel failed to present the instant claim to the Nevada Supreme Court for review on direct appeal.

The ban against duplicitous indictments derives from four concerns: (1) prejudicial evidentiary rulings at trial, (2) the lack of adequate notice of the nature of the charges against defendant, (3) prejudice in obtaining appellate review and prevention of double jeopardy, and (4) risk of a jury's non-unanimous verdict. U.S. v. Cooper, 966 F.2d 936, 939, n.3 (5th Cir. 1992). Duplicitous indictments may prevent jurors from acquitting on a particular charge by allowing them to convict on another charge that is improperly lumped together

with another offense on a single count. A duplicitous indictment precludes assurance of jury unanimity, and may prejudice a subsequent double jeopardy defense. U.S. v. Morse, 785 F.2d 771, 774 (9th Cir. 1986)(citing U.S. v. UCO Oil Co., 546 F.2d 833, 835 (9th Cir. 1976)).

It shall be noted that the duplicitous charges in this case arise due to the fact that all of the charges relate only to the acts of August 7, 2003. There was lack of specificity which precluded Petitioner's ability to defend the other charges.

To identify lesser included offenses, federal courts follow the "elements" test. Under that test, an offense is not lesser-included unless: (1) the elements of the lesser offense are a subset of the elements of the charged offense; and (2) it is impossible to commit the greater offense without first having committed the lesser. Schmuck v. United States, 489 U.S. 705, 716, 109 S.Ct. ____ (1989). To be convicted of charges which are lesser included offenses violates Double Jeopardy.

Blockberger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1932).

The elements test set forth in Schmuck requires a textual comparison of criminal statutes, an approach that we explained lends itself to certain and predictable outcome. Carter v. United States, 530 U.S. 255, 120 S.Ct. 2159 (2000).

It is at this juncture that Petitioner has been subjected to numerous convictions of sexual assault stemming from one continuous act as outlined in NRS 200.366. Especially when taken into consideration that the alleged acts stem from acts committed within a few moments of each other.

The Nevada Supreme Court recognized in Brown v. State, 934 P.2d 185 (Nev. 1997), that multiple convictions stemming from one continuous act violated double jeopardy clause of United States Constitution and Nevada Constitution.

The Nevada Supreme Court has also held that multiple convictions under separate theories are impermissibly redundant. Gordon v. District Court, 913 P.2d 240, 243 (Nev. 1996); and Dossey v. State, 964 P.2d 785 (Nev. 1985).

Petitioner's trial and appellate counsel were ineffective under the guarantees of the Sixth Amendment for failing to correct the injustice of multiple life sentences being imposed against Petitioner, to be served consecutively, stemming from convictions in violation of Double Jeopardy, Due Process, Equal Protection as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution as held in the aforementioned precedents.

Petitioner's plea is invalid due to unknowingly being deprived of his rights, as described herein above, in that Petitioner did not waive these rights.

GROUND NINE

TRIAL COUNSEL WAS INEFFECTIVE UNDER THE GUARANTEES OF THE SIXTH AMENDMENT IN FAILING TO ENSURE PETITIONER RECEIVED A PSYCHOSEXUAL EVALUATION PURSUANT TO NRS 176.139 AND NRS 176.135 TO BE UTILIZED AT SENTENCING, FUTURE PSYCHOLOGICAL AND PAROLE BOARD HEARINGS, RESULTING IN A DENIAL OF DUE PROCESS, EQUAL PROTECTION AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

Petitioner was convicted of a sexual offense which mandates Petitioner must appear before a psychological review board prior

to being eligible for any future parole consideration. The psychological review board determines a candidates' possibility of re-offending and/or rehabilitation based upon previous findings of sexual aberrations as determined from a psychological report (sexual) stemming from pre-confinement evaluations. Petitioner has not received the benefit of a proper psychosexual evaluation and subsequent report pursuant to the provisions of NRS 176.135 and NRS 176.139, as Petitioner requested of counsel.

NRS 176.135 and NRS 176.139, when taken in combination, provides that a presentence report must contain a psychosexual evaluatio report conducted by a person professionally qualified to conduct psychosexual evaluations for persons convicted of sexual offenses, such as Petitioner. Petitioner's presentence report ("PSI") does not contain the requisite psychosexual evaluation report. Therefore, the sentencing court did not have the full information before it to determine the proper sentence to impose against petitioer. Additionally, Petitioner is being denied due process, in that future hearings conducted by the NDOC and/or the Nevada Parole Board is without the necessary documentation to properly determine Petitioner's propensity for re-offending, possible threat to the community, etc. Therefore, it will be impossible for Petitioner to recieve a proper parole board determination.

Petitioner will be denied Due process at future Parole Board hearings AND Petitioner was denied due process at the sentencing hearing held in this Honorable Court.

Petitioner has a constitutional right to effective assistance of counsel at sentencing. Strickland v. Washington, Supra. Counsel was ineffective in failing to ensure Petitioner received a psychological evaluation and have the results provided to the court in determining a proper sentence in this action.

GROUND TEN

TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE UNDER THE GUARANTEES OF THE SIXTH AMENDMENT FOR FAILING TO PROTECT PETITIONER FROM THE UNCONSTITUTIONAL KIDNAPPING STATUTE, NRS 200.310 AND NRS 200.320, AS BEING VAGUE AND AMBIGUOUS ON THEIR FACE AND AS APPLIED TO PETITIONER, THUS DENYING PETITIONER HIS RIGHTS TO DUE PROCESS, EQUAL PROTECTION AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioner has entered a guilty plea to "Kidnapping in the First Degree" as defined by NRS' 200.310 and 200.320. However, the statutes define kidnapping as a premeditated "enticing," carrying away, or concealing of another person against their will. The statutes do not clearly define "enticing" in this context. Additionally, under the facts of this case, as alleged by the prosecution, Petitioner did not entice, carry away, or conceal the alleged victim in this case. The victim freely, on her own will, entered into Petitioner's vehicle and never refused or objected to the place or locale wherein Petitioner and the victim ultimately arrived. Therefore, Nevada's Kidnapping statutes cannot be imposed against Petitioner stemming from his alleged actions on the date in question, August 7, 2003.

All criminal statutes which contain language for the imposition of felony prison time must require facts to be

elements of the offense. Apprendi v. New Jersey, 120 S.Ct. 2348 (2000).

When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all material elements thereof, unless a contrary purpose plainly appears. Model Penal Code § 2.02(4); accord U.S. v. King, 122 F.3d 808, 811 (9th Cir. 1997) (citing U.S. v. X-Citement Video, 513 U.S. 64 (1994) and 2.02(4) in stating that when a statute prescribes a level of culpability, that mens rea requirement applies to all other material elements, unless a contrary purpose plainly appears. 1 W. LaFave & Scott, Substantive Criminal Law, 3.11.

The courts are the final authority on questions of statutory construction. Sederquist v. Tahoe Regional Planning Agency, 652 F.Supp. 341 (D. Nev. 1987). It is well established in Nevada that in constructing a statute the legislative intent is the controlling factor. Cleghorn v. Hess, 109 Adv. Op. 85, 853 P.2d 1260 (1993), Kern v. Nevada Insurance Guarantee Ass'n. on behalf of Azstar Casualty Co., 109 Nev. 115, 856 P.2d 1390 (1993), Polson v. State, 843 P.2d 825 (Nev. 1992), State DMV v. McQuire, 827 P.2d 821 (1992).

In United States v. Simpson, 927 F.2d 1088, 1090 (9th Cir. 1991), the Ninth Circuit Court of Appeals held that:

Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature.

The United States Supreme Court held in Reeves v. Ernst & Young, 113 S.Ct. 1163 (1993) at 1169, as:

If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.

Additionally, the United States Supreme Court went on to hold in Caminetti v. United States, 37 S.Ct. 192 (1917), as:

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its' terms.

Petitioner asserts, as argued herein, that the legislative intent is not defined in the kidnapping statute, and/or its effect is not enforceable against Petitioner's actions as they pertain to the instant action.

Petitioner's trial and appellate counsel failed to protect Petitioner from the imposition of the Unconstitutional statute, and therefore Petitioner is being prejudiced as he is serving a LIFE sentence as a result of counsel's failures.

Petitioner's conviction on Kidnapping should be reversed, at a minimum, and his plea held unconstitutionally infirm as a result thereof.

GROUND ELEVEN

TRIAL COUNSEL WAS INEFFECTIVE UNDER THE GUARANTEES OF THE SIXTH AMENDMENT IN FAILING TO ENSURE PETITIONER RECEIVED PROPER PRE-TRIAL HEARINGS, PERTAINING TO EXTRADITION, ARRAIGNMENT, GRAND JURY HEARING AND A PRELIMINARY HEARING, RESULTING IN A DENIAL OF DUE PROCESS, EQUAL PROTECTION AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioner was arrested in Susanville, California on or

about September 16, 2003. Petitioner was not represented by counsel at an extradition hearing held in California. Petitioner was subsequently transported to the WCSDC on or about September 24, 2003. Petitioner did not receive an arraignment hearing pursuant to NRS 174.015. Petitioner did not receive a preliminary hearing wherein it is typical to "bound" over a defendant to the District Court for further proceedings. Thus, the instant court is without jurisdiction for the failure of counsel and the Justice Court.

NRS 174.015 states in pertinent part:

1. Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead.

2. In Justices' Court, before the trial commences, the Complaint must be distinctly read to the defendant before he is called upon to plead.

As outlined above, the statute contains mandatory language which gives Petitioner statutory and constitutional rights to due process. (Petitioner also adopts the arguments and facts set forth in Ground Six, herein above, in support of the instant claim for relief).

Petitioner informed counsel of his desire to attend or receive the benefit of the aforementioned hearings. However, counsel failed to request or otherwise object to the denial of the statutorily mandated hearings. Petitioner did not consent to the waiver of any of the aforementioned hearings.

Petitioner did not effectively waive any of the constitutionally protected hearings in his entry of his guilty pleas. Counsel's failures led to an unknowing and unintelligent plea.

The United States Supreme Court has recognized arraignment as a "critical" stage in the criminal proceedings requiring the guiding hand of counsel to prevent a waiver of available defenses. Hamilton v. Alabama, 368 U.S. 52, 53, 82 S.Ct. 152.

The pre-trial period constitutes a critical period in criminal proceedings because it encompasses counsel's constitutionally imposed duty to investigate the case. Mitchell v. Mason, 325 F.3d 732 (6th Cir. 2003).

Where defense counsel is absent during critical stage of criminal proceedings, prejudice to defendant is presumed. U.S. v. Hamilton, 391 F.3d 1066 99th Cir. 2004).

As reiterated earlier herein, counsel sought to enter into plea negotiations from the first day of representation of Petitioner. Counsel could not possible make an informed decision to advise Petitioner to enter into guilty pleas when counsel did not attend, and did not possess the critical information necessary, i.e. evidence, as it results from the aforementioned pre-trial hearings. Therefore, counsel's advice to petitioner to enter guilty pleas based upon a lack of evidence, was erroneous on the part of counsel, rendering Petitioner's pleas constitutionally infirm.

Petitioner was denied his constitutional rights at every stage of the judicial proceedings leading to his receipt of multiple LIFE sentences, and as such, should be allowed to withdraw his plea.

GROUND TWELVE

TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE UNDER THE GUARANTEES OF THE SIXTH AMENDMENT FOR ALLOWING PETITIONER TO BE SUBJECTED TO THE PROVISIONS OF NRS 176.0931, LIFETIME SUPERVISION, THUS DENYING PETITIONER OF HIS RIGHTS TO DUE PROCESS, EQUAL PROTECTION AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

At the sentencing hearing held in this court on April 7th, 2004, the court imposed LIFETIME SUPERVISION pursuant to NRS 176.0931. (Trial Transcripts, Page 84, lines 23 - 24, Page 85, line 1).

The Judgement of Conviction does not refer to the applicable statute. However, Petitioner asserts the provisions of LIFETIME SUPERVISION are unconstitutional, as they are over-restrictive and place undue burdens on Petitioner upon his eventual release on parole.

The provisions of NRS 176.0931 invariably invoke the provisios of numerous other statutes eventually to be imposed against Petitioner upon his eventual release on parole. For instance, Petitioner will eventually be subjected to the provisions of NRS' 213.1243, 213.1245, 213.1255 and 213.1258. Petitioner was never informed of the provisions and restrictions of these various statutes.

The above quoted statutes will invariable place numerous restrictions on Petitioner's civil liberties, such as, but not limited to, places of employment, residency, availability of professional licenses, and forced mental health counseling.

Petitioner asserts the limitations imposed by LIFETIME SUPERVISION are unnecessarily restrictive and unconstitutional.

The statutes, as they relate to LIFETIME SUPERVISION, do not contain provisions to protect Petitioner's liberty interests rights and due process rights. Additionally, the requirement that Petitioner must register with local police authorities for the remaining years of his life while on parole is unconstitutional and results in a denial of due process, as it does not protect Petitioner's civil and liberty rights.

Liberty is a broad concept that extends to the full range of conduct which the individual is free to pursue and cannot be restricted except for a proper governmental objective.

Bolling v. Sharpe, 347 U.S. 497, 499-500, 74 S.Ct. 693, 98 L.Ed. 884 (1954); Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 572, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

The Ninth Circuit Court of Appeals that the court must analyze the constitutionality of registration under the right to privacy and finding liberty interest in privacy at stake. Russell v. Gregoire, 124 F.3d 1079, 1094 (9th Cir. 1997).

Registration requirements for sex offenders presents an importantly distinct kind of constitutional danger. It is a continuing intrusive and humiliating regulation of the person himself. Doe v. Attorney General, 430 Mass. 155, 715 N.E.2d 37 (1999). Registration places a tangible burden upon Petitioner for the rest of his life. Doe v. Pataki, 3 F.Supp.2d 456 (S.D.N.Y. 1988). The registration requirements permanently alter the legal status of all convicted sex offenders subject to the aforementioned statutes. Paul v. Davis, 424 U.S. 693, 710, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

As such, Petitioner's convictions are constitutionally infirm based upon counsel's failure to protect petitioner from the application of the various statutes as they relate to LIFETIME SUPERVISION in Nevada. The court also failed to inform Petitioner of the numerous restrictions and statutes as they relate to LIFETIME SUPERVISION, thus invalidating Petitioner's plea(s).

GROUND THIRTEEN

TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE UNDER THE GUARANTEES OF THE SIXTH AMENDMENT FOR FAILING TO PROTECT PETITIONER FROM NUMEROUS CONSECUTIVE LIFE SENTENCES, THUS DEPRIVING PETITIONER OF HIS RIGHTS TO DUE PROCESS, EQUAL PROTECTION, A FAIR TRIAL AND CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioner was sentenced to consecutive terms of LIFE imprisonment, which has resulted in a sentence structure wherein Petitioner is not available for release from incarceration at a minimum of forty-five years. Taken in consideration with Petitioner's age, this amounts to life imprisonment without the possibility of parole, as Petitioner will be well over the age of eighty-five when eligible for release.

Petitioner asserts that this amounts to cruel and unusual punishment. Additionally, Petitioner asserts that the various district courts in Nevada act in an insidious manner in imposing sentences of such harsh nature against persons, such as Petitioner, and not more culpable offenders and persons with more heinous crimes. This result can only be the result of an erroneous application of the law that is ludicrous and clearly violates the constitutional guarantee of equal protection. The test of a statute is by the constitution regard-

less of Supreme Court decision. R.C. Tway Coal Co. v. Glenn, 12 F.Supp. 570 (1935).

The equal protection clause is essentially a direction that all persons similarly situated should be treated the same. City of Cleburne Texas v. Cleburne Living Center, 105 S.Ct. 3249 (1985); Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394 (1982); and United States v. Harding, 971 F.2d 410 (9th Cir. 1992).

Sentencing rationale considers the aggravating and mitigating circumstances relevant in each instance. Ostensibly, the greater the aggravating circumstances warrant and compel the imposition of the harsher sentence. However, it is precisely at this juncture that equal protection is fouled in this case.

Persons convicted of more heinous and serious crimes, such as MURDER, recieve a much lower sentence in Nevada. (Nevada's Murder statutes carry sentences of ten years, and over.) Petitioner was not available to recieve a lesser sentence of anything below the statutory mandate of twenty (20) years to life, in gross disproportion to Nevada's Murder statutes. Additionally, the district courts in Nevada have consistently allowed for lower sentences for persons similarly situated as Petitioner, by plea bargain or other means, such as SUSPENDED life sentences. Petitioner recieved a substantially more severe sentences than other offenders in this State, for commission of similar and dissimilar crimes.

The United States Supreme Court has set criteria that must be recognized in determining if there has been an equal

protection violation upon imposition of sentence. The criteria includes (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction, that is, whether more serious crimes are subject to the same penalty or to less serious penalties, and (3) the sentences imposed for commission of the same crime in other jurisdictions. Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

The Eighth Amendment declares "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed. Solem v. Helm, *Supra*.

This is a non-capital case, in that Petitioner did not substantially harm any person, i.e. no physical harm, dismemberment occurred, and no MURDER occurred. Petitioner does not intend to downplay the seriousness of the instant alleged offenses, however, it can be agreed that in today's society it is most important to protect the public from a Murderer than a sex-offender, who can be rehabilitated through extensive mental health experts. It does not take forty-five years to rehabilitate offenders of sex crimes.

The United States Supreme Court has held similarly, in that "rape" is a disproportionate punishment than "murder." Coker v. Georgia, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977). Also see hutto v. Davis, 454 U.S. 370, 374, n.3, 102 S.Ct. 703, 705, n.3, 70 L.Ed.2d (556), where

the United States Supreme Court held that some prison sentences may be constitutionally disproportionate.

The sentencing structure imposed by this Court amounts to a death sentence, one day at a time, and thus is Cruel and unusual Punishment.

Appellate counsel's failure to bring forth the instant claim on direct appeal is ineffective and prejudices Petitioner, thus forcing Petitioner to present the claim for relief in the instant Petition.

GROUND FOURTEEN

TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO INVESTIGATE, COMMUNICATE WITH PETITIONER, INFORM PETITIONER OF THE FACTS AS THEY RELATE TO THE INSTANT CASE, AND EFFECTIVELY REPRESENT PETITIONER THROUGHOUT THE JUDICIAL PROCEEDINGS IN THIS CASE, AS MORE THOROUGHLY DESCRIBED BELOW, WHICH RESULTED IN AN UNKNOWNING, UNINTELLIGENT, AND INVOLUNTARY PLEA, A VIOLATION OF PETITIONER'S RIGHTS OF DUE PROCESS, EQUAL PROTECTION AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioner's court appointed attorneys, both trial and appellate, were ineffective in numerous areas, as outlined below, which prejudiced Petitioner. Petitioner did not have the full benefit of effective assistance of counsel, and counsel failed to preserve issues for appellate review prior to the entry of Petitioner's guilty pleas, therefore Petitioner did not knowingly waive any claims for relief.

1. Counsel failed to seek all available discovery, including the Grand Jury transcripts and Statements of Petitioner's ex-spouse. Counsel has a duty to investigate, failure to investigate is ineffective and leads to prejudice. Visciotti v. Woodford, 288 F.3d 1097, 1110-1115 (9th Cir. 2002).

Counsel's failure to investigate the alleged statements of Petitioner's ex-spouse, Melissa Botelho, admitted at the sentencing hearing through hearsay testimony of Detective Herrera was highly prejudicial to Petitioner. Counsel's failure led to an admittance of testimony with no cross-examination. If counsel had properly investigated, interviewed Melissa Botelho, he would have the facts necessary to present to the court, i.e., Petitioner never made the statements and court Divorce documents reveal Ms. Botelho's inaccuracies.

2. Trial counsel failed to provide a meaningful relationship with petitioner. Counsel visited Petitioner for only fifteen (15) minutes prior to the entry of Petitioner's guilty pleas. Hardly what is expected of competent counsel in this jurisdiction.

If counsel would have attempted to create an attorney-client relationship with Petitioner, he would have received information from Petitioner to be utilized at trial for a proper defense, i.e. Petitioner is not guilty of First Degree Kidnapping. (See Ground Ten, herein above, which Petitioner adopts in support of this claim.) Additionally, as noted in the PSI Report, it is alleged Petitioner "placed duct tape on her hands, eyes and mouth. Therefore, it is impossible for Petitioner to have forced the victim to perform oral sex upon Petitioner. Counsel has a duty to provide his client with loyalty and undivided attention to client's case in chief. Cuyler v. Sullivan, 446 U.S. at 348 (1980).

3. Counsel did not fairly present Petitioner and had no intention on assisting Petitioner at trial in an attempt to put forth an adversarial test of the prosecution's allegations. Counsel sought to enter into plea negotiations immediately following appointment as Petitioner's counsel. On October 17, 2003, less than thirty (30) days from being appointed as Petitioner's counsel, counsel sent a letter to prosecutor Kellie Anne Vilorio seeking a plea agreement. (See Exhibit #3, attached hereto) (Petitioner has requested a copy of the actual letter on numerous occasions, counsel has failed to provide the requested documentation)

In Thomas v. Foltz, 818 F.2d 476, 482 (6th Cir. 1987), the court held a conflict of interest existed between attorney and defendant due to counsel's actions of insisting client enter into guilty plea with no pre-trial investigation by counsel.

4. Counsel failed to seek information regarding petitioner's competency, when counsel knew of Petitioner's apparent mental deficiencies.

Petitioner adopts the facts and arguments set forth in Ground Seven, herein above.

5. Petitioner was never informed of his ability to withdraw his plea prior to sentencing.

Counsel should have informed Petitioner of his right to withdraw his plea, especially at the conclusion of this court's hearing wherein it was determined that the State was given the opportunity to present the privileged ex-spouse communications through the hearsay testimony of Detective

Herrera at the Sentencing Hearing. Counsel's failure to inform Petitioner, or act on Petitioner's behalf at this crucial stage of the proceedings was prejudicial to Petitioner, as Petitioner desired to withdraw his plea once he was informed the State would be able to present evidence at sentencing that counsel advised Petitioner the sentencing court would not be privy to.

Counsel's failure to advise Petitioner of the requirements of NRS 176.165 resulted in a denial of due process and an entry of an unconstitutional and unknowing plea. Petitioner entered into the pleas based upon counsel's erroneous advice concerning the spousal communications.

Petitioner desired, and continues to assert, his desire to withdraw his plea based upon the totality of the circumstances in the instant petition. Petitioner would have insisted on proceeding to trial rather than face a court, ultimately biased, in an attempt to receive a much lesser sentence. It should be noted, Petitioner did not receive ANY BENEFIT from entering into the instant plea agreement.

6. Appellate counsel did not have the full record before him to prepare a proper appellate brief seeking appellate review of preserved issues.

Petitioner adopts the facts and arguments set forth in Ground One and Two, herein above, in support of this claim.

7. Trial counsel failed to file the proper motions for recusal and/or change of venue in accordance with NRS 1.230 and NRS 1.235.

The sentencing court was biased by being subjected to false testimony of Detective Herrera concerning privileged spousal communications. Additionally, the court was subjected to a plethora of media publicity, containing false information.

The sentencing court should never had been subjected to the erroneous and misleading evidence. Therefore, the court was biased prior to imposing sentence against Petitioner and should have been recused in order for Petitioner to be sentenced before an impartial court. The court failed to allow defense counsel to orally seek a change of venue and/or recusal. The court relied on procedures in NRS' 1.230 and 1.235.

The Nevada Supreme Court held in Walker v. State, 944 P.2d 647 (Nev. 1997), that opinions formed by judge on the basis of facts introduced or events occurring in the course of current proceedings, or of a prior proceeding, where the opinion displays a deep seated favoritism or an antagonism that would make a fair judgment impossible amounts to Judicial Bias.

The abuse of a discretion by a judge shows bias and prejudice and lack of impartiality by failing to correct what he knew or should have known to support a conviction. Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992).

8, Counsel informed Petitioner that a jury would convict on all counts if they were to convict on one count, thus Petitioner needed to enter into a plea agreement wherein he ultimately received a LIFE sentence without possibility for release for forty-five (45) years. Counsel also informed Petitioner the court would not be subjected to all the facts

surrounding the instant case and therefore Petitioner would receive a much lesser sentence than ultimately imposed. This amounted to coercion, wherein Petitioner entered his guilty pleas based on misinformation presented by counsel. Petitioner would have insisted on proceeding to trial to prove his innocence to the alleged offenses if were not for the erroneous advice of counsel.

The Nevada Supreme Court held in State v. Gomes, 930 P.2d 701 (Nev. 1996), to state a claim of ineffective assistance of counsel sufficient to invalidate a Judgment of Conviction based on a guilty plea, a defendant must demonstrate a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. State v. Langarica, 187 Nev. 932, 933, 822 P.2d 1110, 1111 (1991).

The standard for determining whether a guilty plea is constitutionally valid is whether the guilty plea represents a voluntary and knowing and intelligent choice among the alternative courses of action open to the defendant. North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160 (1970). The court should look to the totality of the circumstances surrounding the guilty plea. Henderson v. Morgan, 426 U.S. 637, 648, 96 S.Ct. 2253.

Petitioner has demonstrated that the totality of the circumstances surrounding his plea, based on ineffective assistance of counsel, left Petitioner with no alternative but to enter a guilty plea instead of proceeding to trial wherein counsel was ill-prepared and would not assist Petitioner in a reasonably effective manner based on counsel's failure to investigate.

The following areas are but just a few of the ineffective claims of counsel, which rendered Petitioner's plea constitutionally infirm.

A. Counsel failed to investigate, or hire an investigator to secure the facts surrounding the instant case.

B. Counsel failed to ensure Petitioner's California proceedings were legally sound.

C. Counsel failed to ensure Petitioner was represented by competent and effective counsel in the California extradition proceedings.

D. Counsel failed to investigate into the fact that all of the documentary and physical evidence surrounding the instant case is tainted, lacks a chain of custody, and is therefore inadmissible at a jury trial.

E. Counsel failed to ensure Petitioner's presence at all preliminary judicial proceedings, where Counsel failed to appear and represent Petitioner at any and all of the pre-trial judicial proceedings. In addition, counsel failed to secure the transcripts from the various pre-trial proceedings wherein counsel would have deduced there existed insufficient evidence to convict Petitioner of all of the offenses alleged by the prosecution.

F. Counsel failed to investigate victim and other possible prosecution witnesses in an attempt to ascertain truthfulness of matters asserted.

G. Counsel failed to interview, or otherwise converse with Petitioner concerning the facts of the instant proceedings and alleged offenses.

H. Counsel failed to review police reports which contain false and misleading statements.

I. Counsel failed to review forensic reports which do not conclusively prove Petitioner's guilt.

J. Counsel failed to secure all photographic evidence to be utilized against Petitioner at trial. All of which was highly prejudicial and inadmissible at any jury trial.

K. Counsel failed to research and investigate the circumstances surrounding a search warrant used by police detectives that was improperly served upon Petitioner's spouse for the purposes of securing evidence.

L. Counsel failed to investigate statements and/or court records pertaining to the privileged spousal communications used against Petitioner at sentencing. Counsel would have secured information indicating Ms. Melissa Botelho had a propensity to falsify testimony.

M. Counsel failed to represent Petitioner or attempt to ensure Petitioner received a judicially sound "bail" hearing. The prosecution communicated "ex-parte" with the court in seeking, and ultimately gaining, excessive bail against Petitioner.

N. Counsel failed to file ANY pre-trial motions seeking full discovery, attempting to suppress inadmissible evidence, and seeking to dismiss based on all of the alleged errors that occurred during the pre-trial proceedings, i.e. grand jury hearing, arraignment, etc.

O. Counsel failed to file motions seeking to suppress Petitioner's statements made to investigators without being apprized of his MIRANDA rights.

The above noted areas are but a few of the instances wherein trial counsel failed to reasonably and effectively represent Petitioner.

Counsel was adamant on coercing Petitioner into entering guilty pleas from the onset of representation, as is clear from the record, counsel informed this court on numerous occasions of his pending "murder trial" and was therefore unable to appear on behalf of Petitioner at several of the pre-trial hearings, as outlined herein above.

This court must find that Petitioner was prejudiced as a result of counsel's deficiencies and had not alternative but to enter a guilty plea versus proceeding to trial with an attorney who refused to conduct even a precursory amount of investigation into the facts surrounding the instant alleged offenses.

Counsel's actions, or lack thereof, is presumptively prejudicial and Petitioner's instant WRIT must be granted.

U.S. v. Cronin, 466 U.S. 648, 649-50 (1984).

GROUND FIFTEEN

TRIAL COUNSEL WAS INEFFECTIVE UNDER THE GUARANTEES OF THE SIXTH AMENDMENT WHEN HE ALLOWED PETITIONER TO BE SENTENCED BY A BIASED AND PREJUDICIAL COURT WITHOUT ATTEMPTING TO INVESTIGATE AND PRESENT A PLETHORA OF MITIGATING EVIDENCE IN AN ATTEMPT TO SECURE A LESSER AVAILABLE SENTENCE, THUS DENYING PETITIONER HIS RIGHTS TO DUE PROCESS, EQUAL PROTECTION AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

Petitioner's court appointed counsel, Sean Sullivan, failed to investigate and present mitigating evidence to

the sentencing court in an attempt to secure a lesser available sentence for Petitioner.

Counsel failed to request concurrent sentences based on the offenses being from "one continuous act." As the PSI report indicates the alleged victim's mouth was covered by tape, it is impossible for Petitioner to have forced the victim to perform oral sex upon Petitioner, thereby negating the sentence of 20 years to life for sexual assault as alleged in Count III.

Counsel failed to properly request for a change of venue and/or recusal based upon the adverse testimony of Petitioner's wife entered through hearsay and the prosecution's NOTICE OF INTENT to enter prior bad acts and the abundance of pre-trial media publicity.

Counsel failed to interview potential witnesses who were able and willing to testify before the sentencing court as to the work ethics, lifestyle, social background and moral characteristics of Petitioner. This information would have helped the sentencing court impose a less severe sentence based on the circumstances surrounding Petitioner's background and the facts surrounding the instant offenses.

Counsel failed to investigate and admit evidence that existed to refute the testimony of Detective Herrera concerning privileged spousal communications. Counsel's investigations would have produced results that indicated Ms. Botelho had a propensity for falsifying evidence, as she had filed for divorce against

Petitioner wherein court documents reveal their marriage was not dissolved based upon any adverse actions by Petitioner. Additionally, counsel's actions or investigations would have revealed Petitioner never stated he intended to dismember any person or have sexual relationships with a minor.

The following persons were available to testify to the sentencing court, in an attempt to humanize Petitioner before the court, in an attempt to secure a lesser available sentence.

<u>NAME</u>	<u>RELATIONSHIP</u>
William Botelho	Father
LeeAnne Fish	Sister
Mary Jo Cherry	Sister
William Botelho	Brother
Alice Botelho	Grand Mother
Ronald Fish	Brother-In_Law
Dan Diehl	Friend

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978), the United States Supreme Court held:

Possession of the fullest information possible concerning the defendant's life and characteristics . . . is highly relevant, if not essential, to the selection of an appropriate sentence.

The Nevada Supreme Court has held similarly in Brown v. State, 110 Nev. 846 (1994), where "defense counsel neither presented any witnesses to testify on brown's behalf, nor did he present any evidence of mitigating circumstances in an effective manner." Id. at 851. The court went on to indicate

"When a judge has sentencing discretion, as in the instant case, possession of the fullest information possible regarding the defendant's life and characteristics is essential to the selection of a proper sentence." Id. at 851. Additionally, in Brown, Supra, the Court further held that the District Court erred in denying Brown's Petition for Post-Conviction relief based on his counsel's failure to call any witnesses on his client's behalf or to properly request that Brown's sentences run concurrently.

The United States Supreme Court, in Commonwealth of Pennsylvania v. Ashe, 302 U.S. 51, 58 S.Ct. 59 (1937), held:

In the determination of sentences, justice requires consideration of more than particular acts by which the crime was committed, and that there be taken into account the circumstances of the offense, together with the character and propensities of the offender, and his past may be taken to suggest the period of restraint and the kind of discipline that ought to be imposed.

Furthermore, the United States District Court of Nevada agrees with the principles laid out by the State of Nevada, by stating that, "Counsel's complete failure to present any argument or evidence that might have persuaded the Judge to temper the severity of his sentence is sufficient to undermine our confidence in the outcome." Butler v. Sumner, 783 F.Supp. 519, 522 (D. Nev. 1991).

The primary purpose of the penalty phase is to ensure that the sentence is individualized, by focusing on the particularized characteristics of the Defendant. Brownlee v. Hale, 306 F.3d 1043, 1074, (11th Cir. 2002); cf., Siripongs v. Calderon, 35 F.3d 1308, 1316 (9th Cir. 1994), where the court found counsel ineffective during the penalty phase when he failed to conduct

more than a cursory investigation of the defendant's background and made no attempt to humanize him before the court.

Compounding counsel's failure to investigate and develop a positive mitigating case, counsel allowed the prosecution to admit unfounded statements and speculation without objection or attempts to prevent the admission of the prejudicial spousal hearsay statements.

Clearly, the aforementioned scenarios paint the Petitioner in a different light, and but for counsel's errors, the outcome of the sentencing hearing would have been different. The law in this context does not require certainty and prejudice is shown where there is a reasonable probability of a different result. Mayfield v. Woodford, 270 F.3d 915, 936 (9th Cir. 2001).

Petitioner has proved that evidence would have been presented but for counsel's errors, that would probably have rendered a substantially different result at the sentencing hearing.

GROUND SIXTEEN

PETITIONER WAS DENIED HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, EQUAL PROTECTION, A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE CUMULATIVE EFFECT OF ERRORS COMMITTED BY COUNSELS, THE PROSECUTION AND THE COURT, RESULTING IN AN UNKNOWING, UNINTELLIGENT, AND INVOLUNTARY GUILTY PLEAS AND IMPOSITION OF NUMEROUS LIFE SENTENCES

Petitioner's convictions and sentences are invalid under the Federal and State Constitutional guarantees of Due Process, Equal Protection, Effective Assistance of Counsel and a Fair Tribunal due to the cumulative effect of errors, as presented herein, such as in the admission of evidence, misconduct of the prosecution, systematic deprivation of Petitioner's right to effective assistance of counsel throughout the judicial proceedings.

Petitioner entered into guilty pleas based upon promises by counsel, as a result of counsel's erroneous advice. Petitioner would have insisted on proceeding to a jury trial were it not based upon deficient representation by an attorney whom insisted on coercing Petitioner into entering into a guilty plea from the onset of representation, without conducting a scintilla of preparatory investigation.

The Court, counsel, and the prosecution committed numerous errors throughout representation, or non-representation at all judicial hearings relative to the instant action, which include, but are not limited to, the following areas:

1. Counsel was ineffective on direct appeal as outlined in Grounds One and Two, herein.

2. The court erred in denying Petitioner's Motion for recusal and/or change of venue and allowed the entry of hearsay evidence concerning privileged spousal communications.

3. Sentencing hearing was conducted before a biased and prejudicial court.

4. Counsel was ineffective in failing to request a lesser available sentence at the sentencing hearing.

5. The sentencing court relied on untrue and/or impalpable prejudicial evidence.

6. The court entered an ambiguous sentence left uncorrected by counsel.

7. Petitioner's guilty plea is not knowingly, intelligently and voluntarily entered.

8. The plea canvass was deficient in failing to properly advise petitioner of the consequences of his plea.

9. Petitioner's decision to enter guilty pleas was predicated on ineffective assistance of counsel.

10. The court failed to advise Petitioner of the requirements of NRS 176.0927 and LIFETIME SUPERVISION.

11. Petitioner's plea is invalid due to prosecutorial misconduct.

12. Trial counsel was ineffective for failing to appear and/or ensuring the appearance of Petitioner at pre-trial hearings, including the grand jury hearing, in violation of NRS' 172.239, 172.241.

13. Petitioner was incompetent to enter into his pleas. This court, counsel, and the prosecution failed to seek a competency hearing in accordance with NRS 178.405.

14. Petitioner's convictions are a result of multiplicitous, duplicitous and lesser included offenses in violation of the double jeopardy clause.

15. Trial Counsel was ineffective in failing to ensure Petitioner received a PSYCHOSEXUAL EVALUATION and report prior to sentencing.

16. Petitioner's convictions are unconstitutional due to being sentenced to an ambiguous and vague, and thus unconstitutional KIDNAPPING statute, NRS 200.310 and NRS 200.320.

17. Trial Counsel was ineffective in failing to ensure Petitioner received the full benefit of pre-trial hearings, such as extradition, arraignment, grand jury and preliminary hearings.

18. Trial Counsel, the court, and the prosecution subjected Petitioner to the unconstitutional implication of LIFETIME SUPERVISION.

19. Trial counsel was ineffective in allowing Petitioner to be subjected to a cruel and unusual sentencing structure.

20. Trial and appellate counsel were ineffective in failing to investigate and properly represent Petitioner in all judicial proceedings, and pre-trial investigations, surrounding the instant action.

21. This court was biased and prejudicial in its determination of sentences against Petitioner when it was subjected to undue influences from spousal communication testimony and prejudicial media coverage.

All of the aforementioned led to Petitioner entering into an invalid plea resulting in an extremely harsh sentencing scheme.

In United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996), the Ninth Circuit Court of Appeals held that:

In some cases, although no single trial error examined in isolation is sufficiently prejudiced to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. Where, as here, there are a number of errors at trial, a balkanized, issue-by-issue harmless error review is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. In those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors.

Although individual errors looked at separately may not rise to the level of reversible error, the cumulative effect may nevertheless be so prejudicial as to require reversal.

United States v. Necoechea, 986 F.2d 1273, (9th Cir. 1993).

Petitioner's substantive rights were violated as demonstrated by the issues presented herein, let alone, the deprivation of Petitioner's Constitutional rights as outlined in the various grounds for relief presented herein above.

Unless an aggregate harmlessness determination can be made, corrective error will mandate reversal, just as surely as will individual error that cannot be considered harmless. United States v. Rivera, 900 F.2d 1467, at 1470 (10th Cir. 1990).

Due to the cumulative effect of errors, Petitioner's convictions require reversal

CONCLUSION

Petitioner files this accompanying Petition for Writ of Habeas Corpus (Post-Conviction), pursuant to NRS 34.360, et. seq., in which he presents severable viable colorable claims of ineffective assistance of counsel. The claims rise out of instances from Constitutional violations during pre-trial, preliminary, arraignment, sentencing and appellate procedures.

Nevada Revised Statute 34.770 provides for judicial determination in warranting an evidentiary hearing: (1) upon return and/or answer, and review of all supporting documents on file, a determination shall be made as to whether an evidentiary hearing is required.

Petitioner asserts that an evidentiary hearing is mandated in the instant case, wherein Petitioner has provided facts and argument, which if proven true, would warrant relief sought herein. Bolden v. State, 99 Nev. 181 (1983) and Gibbons v. State, 97 Nev. 520 (1981).

In the instant Petition, a hearing is necessary, because based on a review of the record as a whole, including charging documents, arraignment, preliminary hearings, grand jury hearings, plea hearings, sentencing, and appellate review, the absence of competent assistance of counsel, such hearing is necessary to decide these matters.

Thus, Petitioner has not simply raised bare or naked allegations. Even without the benefit of a complete record in the preparation of the instant post-conviction pleadings, there are great significances that have been established in misconduct and inadequate representation. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, State v. Runningeagle, 859 P.2d 169 (1993), cited by the Nevada Supreme Court in Brown v. State, 113 Nev. 305, 933 P.2d 187, 190-91 (1997).

Petitioner has met his burden under the two-prong test set forth in Strickland v. Washington, Supra, and is entitled to the granting of the instant Petition for Writ of Habeas Corpus.

Petitioner respectfully requests an evidentiary hearing on the issues presented herein and GRANTING of the instant WRIT.

DATED THIS 28th DAY OF FEBRUARY, 2006.

Respectfully Submitted,



Michael Todd Botelho
Petitioner, In Proper Person

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VERIFICATION

Under penalty of perjury, the undersigned declares that he is the Petitioner named in the foregoing Petition and knows the contents thereof, that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Executed this day in Pershing County, Nevada.

Dated this 28th day of February, 2006.

Signed under the penalty of perjury in accordance with NRS 208.165.

By: Michael Todd Botelho
Michael Todd Botelho
Petitioner, In Proper Person

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CERTIFICATE OF SERVICE BY MAIL

I, Michael Todd Botelho, do hereby certify that on this date I did serve Respondents with a true and correct copy of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (Post-Conviction) by placing same in the United States Postal Service, postage being fully prepaid, and addressed as follows:

GEORGE J. CHANOS
NEVADA ATTORNEY GENERAL
100 NORTH CARSON STREET
CARSON CITY, NEVADA 89701-4717


&

JACK PALMER, WARDEN
LOVELOCK CORRECTIONAL CENTER
(Via Inter-Departmental Mail)

&

RICHARD GAMMICK
WASHOE COUNTY DISTRICT ATTORNEY
POST OFFICE BOX 30083
RENO, NEVADA 89520-3083

DATED THIS 28th DAY OF FEBRUARY, 2006.


Michael Todd Botelho
Petitioner, In Proper Person

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/ / /

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EXHIBIT #1



Washoe County District Attorney

RICHARD A. GAMMICK
DISTRICT ATTORNEY

Sullivan

September 29, 2003

NOTICE OF GRAND JURY INVESTIGATION
AND RIGHT TO TESTIFY

Michael Todd Botelho
c/o Washoe County Jail
911 Parr Blvd.
Reno, NV 89512

Dear Mr. Botelho:

You are hereby notified that you are the subject of an investigation by the Washoe County Grand Jury, which is looking into allegations of Kidnaping in the First Degree, Sexual Assault on a Child (3 Counts), and Battery with the Intent to Commit Sexual Assault.

While the Grand Jury is not required to hear evidence for the defendant (N.R.S. 172.145), they are required to consider and hear any evidence which may "explain away" the charge. Therefore, Nevada law affords you, as the subject of a Grand Jury investigation, the right to appear and testify before the Grand Jury if you request to do so. (N.R.S. 172.241). But the same law also requires that you give up your constitutional privilege against self-incrimination by signing a written waiver before you testify to the Grand Jury. That means that anything you say can and will be used against you in any legal proceedings.

Nevada law (N.R.S. 172.239) also allows you, as the subject of a Grand Jury investigation, to have your attorney present with you during any Grand Jury appearance. Your attorney's participation, however, is limited to advising you only; he or she may not address the Grand Jury members, ask questions, make objections, make statements or otherwise participate in the proceedings.

Michael Todd Botelho
September 29, 2003
Page 2

The Grand Jury investigating you will meet on the 8th day of October, 2003, at 1:30 p.m., in room 212 of the Washoe County Courthouse at 75 Court Street, Reno, Nevada. Please notify me or my secretary, either through your attorney if you have one or personally, if you wish to testify before the Grand Jury so your appearance can be scheduled. You will be provided with the "waiver of rights" form by the Grand Jury Foreman when you appear.

RICHARD A. GAMMICK
DISTRICT ATTORNEY

By: Kelli Anne Viloria
KELLI ANNE VILORIA
Deputy District Attorney

KAV:lj

cc: Washoe County Public Defender

EXHIBIT #2

EXHIBIT #2

INMATE REQUEST

Will
Courts Transportation

OCT 11 2003

CR03-2156

D3

DA
PD

1. Only one issue/topic per request form.
2. Write only in the space provided.
3. Only one form per each issue/topic.
4. No profanity.
5. Do not address your request to a named individual.

Inmate's Name: MICHAEL BOTELOBooking #: 03-12386Housing Unit: 4Cell #: 3Date: 10-10-03

Describe Request:

I WENT TO COURT YESTERDAY DOWN TOWN
TO FIND OUT THE SHERIFFS DEPT SUPPOSEDLY
MADE A MISTAKE AND THAT COURT WAS
HELD WEDNESDAY 10-8-03 AND THAT I
MISSED IT - I WAS SUPPOSED TO BE
THERE, I WANTED TO BE THERE AND
I HAD A RIGHT TO BE THERE!
NOT TO MENTION I STILL HAVEN'T
SEEN A LAWYER CONCERNING MY CASE
THAT I NOW CONVICTIONALLY HAVE BEEN
DENIED!

Inmate's Signature: Michael BoteleReceiving Staff Member/I.D.#: 02242

(PRINT NAME)

Date: _____

(INMATE IS NOT TO WRITE BELOW THIS SPACE)

ACTION

CR03-2156

Routed to: COURT TRANSPORT Date: 10/10/03 Re-Routed to: 2JDC Date: 10/11/03Answer: Approved ☐Denied ☐

Reason:

referred to counsel per Judge Polaha

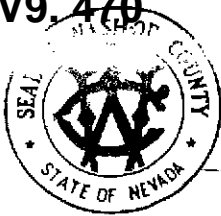
FILED
2003 OCT 30 AM 11:10
RONALD A. LORANT, JR.
CLERK
BY [Signature]

Responding Staff Member/I.D.#: _____

(PRINT NAME)

Date: _____

EXHIBIT #3



Washoe County Public Defender

Jeremy T. Bosler / Public Defender

Standard of Excellence Since 1969

September 15, 2005

Michael Todd Botelho #80837
Lovelock Correctional Center
P. O. Box 7011
Carson City, Nevada 89702

Dear Mr. Botelho:

Pursuant to your request, enclosed is a copy of the discovery in your criminal case. Following is an itemization of those documents:

CHANGE OF PLEA (12-11-2003)

1. ✓ Indictment
2. ✓ Guilty Plea Memorandum
3. ✓ Transcript of interview of Jane Doe
4. ✓ Transcript of statement of Jennifer Rudolph
5. ✓ Application for Setting (March 11, 2004, motion hearing)
6. ✓ Application for Setting (October 23, 2003, post-indictment arraignment)
7. ✓ Application for Setting (December 11, 2003, change of plea)
8. ✓ Subpoena of Verizon Wireless cell account information (12 pages)
9. ✓ Washoe County Pretrial Services Assessment Report
10. ✓ Letter to Sean Sullivan from Kelli Anne Viloria dated October 3, 2003
11. ✓ Letter to Kelli Anne Viloria from Sean Sullivan dated October 17, 2003, w/encl *NEVER SEEN IT!*
12. ✓ Letter to Sean Sullivan from Kelli Anne Viloria dated November 5, 2003
13. ✓ Inmate Request dated 10-10-03
14. ✓ Fax transmittal cover sheet and Ex-Parte Motion to Increase Bail (*16 pgs*) 10-1-2003
15. ✓ Washoe County Sheriff's Office Evidence (4 pages)
16. ✓ Carson City Sheriff's Office Evidence Recovery Report (2 pages)
17. ✓ Handwritten letter unsigned (4 double sided pages)
18. ✓ Statements made to Carson City Sheriff's Department by Jane Doe and Michelle Settle
19. ✓ Newspaper articles (7 pages)
20. ✓ Request for Preliminary Hearing Discovery
21. ✓ Application for Appointment of Public Defender
22. ✓ Request, Agreement and Order for Pre-Trial Reciprocal Discovery Defendant's Request for Discovery
23. ✓ Letter to Sean Sullivan from Leeanne (Botelho) Fish dated February 3, 2004, with enclosure letter to Judge Polaha
24. ✓ Letter to Judge Polaha, unknown author, undated
25. ✓ Letter to Michael Todd Botelho from Records Department dated October 2, 2003 *PRELIM HEARING*
26. ✓ Investigative Request
27. ✓ Stipulation and Order for Continuance filed Jan 30, 2004

28. ✓ Presentence Report dated January 13, 2004
29. ✓ Defendant's Statement (17 pages)
30. ✓ Letter To Whom It May Concern from Jane Doe's friend and big sister (8 pages)
31. ✓ Incident Reports, Carson City Sheriff's Dept. (8 pages)
32. ✓ Susanville Police Department Arrest Report (4 pages)
33. ✓ Confidential Psychological/Substance Abuse Evaluation to be Filed Under Seal (Dr. Davis)
34. ✓ Criminal Complaint filed Sep 12, 2003
35. ✓ Affidavit in Support of Complaint and Warrant of Arrest filed Sep 12, 2003
36. ✓ Order Staying Proceedings filed 10-8-03
37. ✓ Notice of Intent to Introduce Prior or Other Bad Act Evidence at Sentencing Hearing
38. ✓ Opposition to State's Introduction of Prior or Other Bad Act Evidence at Sentencing Hearing; Defendant's Motion to Have the Matter Sealed, to Recuse the Present Sentencing Court, and to Have the Matter Transferred to Another Court for Sentencing
39. ✓ Reply in Opposition to Defendant's Opposition to State's Introduction of Other Bad Act Evidence; Defendant's Motion to Seal; and Answer to Defendant's Motion to Recuse and Transfer Case
40. ✓ Statements of Michael Botelho, Statement by Melissa Botelho and Supplemental Reports
41. ✓ Handwritten letters
42. ✓ Transcript of proceedings held October 8, 2003 (*Grand Jury*)
43. ✓ Notice of Grand Jury Investigation and Right to Testify to Michael Todd Botelho from Kelli Anne Vilorio, Deputy District Attorney, dated September 29, 2003
44. ✓ Motion to Dismiss and Order (dismissing Indictment) filed April 22 and 28, 2004
45. ✓ Search Warrant and Affidavit (Lyon County), dated August 20, 2003
46. ✓ Duplicate Original Seizure Order (telephonic) and Affidavit (Lyon County) dated August 15, 2003, not filed
47. Judgment of Conviction (False Claims for Benefits) (Lyon County) filed Jun 16, 1993
48. Certificate dated Jan 11, 1993 (Lyon County)
49. Commitment and Bail dated Jan 11, 1993 (Lyon County)
50. Print Key Output Lyon County Sheriff Office, January 12, 1993
51. Fifteen Day Waiver dated December 9, 1992 (Lyon County)
52. Affidavit, Application and Affirmation for Appointment of Counsel dated Nov 23, 1992 (Lyon County)
53. Warrant of Arrest, dated Nov 19, 1992 (Lyon County)
54. Criminal Complaint filed 11-20-92 (Lyon County)
55. Information filed Jan 19, 1993 (Lyon County)
56. Memorandum of Plea Negotiation filed Apr 28, 1993 (Lyon County)
57. Criminal History Record and Mugshots
58. ✓ Suspect Blood Draw
59. ✓ Arrest Report and Declaration of Probable Cause (9-24-03)
60. ✓ Maps of Incident Location and Forensic documents (64 pages)

JUDGMENT OF CONVICTION 4-7-2004


Our office does not receive transcripts of all of the proceedings. You must contact the Washoe County Clerk's Office, 75 Court Street, Reno, Nevada, for any further transcripts that you might require.

Our office is in possession of certain audio/video tapes involving this case; however, in light of the fact that you do not have the capability to play these tapes, we will keep them with the file for the benefit of your future counsel of record.

If you have any questions, please call me collect during office hours at 775-337-4803. Or, you may write me a letter.

Sincerely,

JEREMY T. BOSLER
Washoe County Public Defender

By 
Sean B. Sullivan
Deputy Public Defender

SBS: clh

Encl.

FILED

MARY LOU WILSON
 Attorney At Law, Nevada Bar No. 3329
 333 Marsh Avenue
 Reno, Nevada 89509
 775-337-0200
 Attorney for Petitioner Botelho

2006 AUG 14 PM 12:20

ORIGINAL

RONALD A. LONGTIN, JR.

BY

DEPUTY

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MICHAEL TODD BOTELHO,

Petitioner,

vs.

Case No. CR03P-2156

Warden, Lovelock Correctional Center, and
 THE STATE OF NEVADA,

Dept. No. 3

Respondents.

EXPARTE MOTION REQUESTING APPOINTMENT OF DR. MAHAFFEY
 FOR PSYCHOSEXUAL EVALUATION IN SUPPORT OF SUPPLEMENTAL
 PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AND
 NOTICE OF INVESTIGATION OF MELISSA BOTELLO

GROUND 1:

Sentencing counsel was ineffective in failing to put forward and cross-examine Petitioner's ex-wife in violation of the Confrontation Clauses of the Sixth Amendment to the United States and Nevada Constitutions. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

Additionally, appellate counsel was ineffective for not presenting the preserved issue of district court error in violating Petitioner's Confrontation Clause rights when failing to argue the issue on

CR03P2156
 POST: MICHAEL TODD BOTELHO (8 Pages
 District Court 08/14/2006 05:52 PM
 Washoe County 1870

1 direct appeal. *Petitioner claims that trial counsel failed to investigate Melissa Botelho and*
2 *question her regarding the fantasy that was told to her during their marriage. Therefore, Ms.*
3 *Wheeler intends to contact Melissa Botello directly and receive an interview. Additionally, Ms.*
4 *Wheeler has contacted trial counsel requesting information related to the police transcript of*
5 *Officer Herrera and Melissa Botello on two occasions without a response. Therefore, this*
6 *document will be sent to trial counsel in the hopes that post conviction counsel will receive the*
7 *transcript of the taped telephone conversation and any other relevant information about prior*
8 *investigation that was done regarding this subject. Ex. 1.*

9
10 GROUND 2:


11 Sentencing counsel was ineffective in failing to have a psychosexual examination done by
12 Drs. Mahaffey, Ing, or Skewis for the purpose of showing future dangerousness, recidivism, and
13 likelihood of rehabilitation.

14 Trial counsel failed to request, receive, and present a psychosexual evaluation to mitigate his
15 sentencing. As stated above, Petitioner's only fantasy was that he would have a "threesome"
16 with himself, his wife, and another woman. However, the fantasy that was presented during
17 sentencing was that he had always wanted to kidnap, rape and dismember a child. Petitioner
18 presents with a minimal criminal history (insurance fraud and domestic battery), no aberrant
19 sexual crimes, and good character. Therefore, his potential for future dangerousness as a sexual
20 predator was paramount to his sentencing. As such, there is only one way to predict the
21 recidivism of Petitioner's twisted and dangerous behavior.

22
23 *Dr. Martha Mahaffey was requested to prepare and present a cost proposal for a*
24 *psychosexual evaluation regarding Petitioner Botelho. Although Petitioner Botelho was not*
25 *qualified for probation as an option for sentencing, he should have been evaluated for future*

1 *dangerousness given the possibility that he could have received as little as twenty (20) years to*
2 *the parole board instead of forty-five (45) years, which he got. As such, the cost proposal is*
3 *presented for this Court's consideration. Ex. 2.*

4 DATED this 14 day of August, 2006.

5 
6 MARY LOU WILSON
7 Attorney At Law Bar #3329
8 333 Marsh Ave.
9 Reno, Nevada 89509
775-337-0200
Attorney for Petitioner Botelho

V9. 476

LINDSAY WHEELER

333 Marsh Ave
Reno, NV 89509
775.250.4513~c
916.419.1743~f

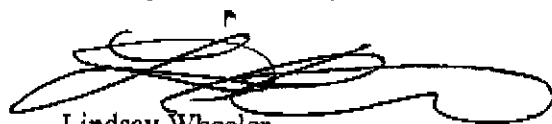
August 14, 2006

Mary Lou Wilson, Esq.
333 Marsh Ave.
Reno, NV 89509
775.337.0200

Dear Mary Lou,

I have attempted to contact Sean Sullivan on August 8 and 10. I have left messages both times for him regarding information relating to the police interview between Mr. Botelho's wife and a Reno police department officer. I have not heard back from him yet.

Thank you in advance,



Lindsay Wheeler
Legal Assistant

Ex. 1

V9. 476

Martha B. Mahaffey, Ph.D.

Clinical Psychologist, Nevada License #190

(775) 323-6766
FAX (775) 323-2716834 Willow St.
Reno, NV 89509

August 11, 2006

Mary Lou Wilson, Esq.
333 Marsh Ave.
Reno, NV 89509**RE: COST PROPOSAL in the case of MICHAEL TODD BOTELLO**

Pursuant to your request in the above mentioned case, following are my **forensic psychological evaluation rates**:

- | | |
|--|---------------|
| • Forensic Psychological Evaluation (including document review, testing, scoring, interpretation, collateral phone consultations, attorney consultation, report writing) | \$200 an hour |
| • Preparation for Courtroom Testimony (including preparation, attorney consultation, wait time) | \$200 an hour |
| • Courtroom Testimony (one hour minimum) | \$300 an hour |
| • Travel Time | \$200 an hour |
| • Travel Costs (lodging, air and ground transportation) | Actual costs |

To conduct a post-conviction psychosexual evaluation of Michael Todd Botello at the Lovelock Correction Center, my cost is estimated as follows:

- | | |
|---|--------|
| • Psychosexual Interview and Psychological Testing, 7.5 hrs. | \$1500 |
| • Travel to and from Lovelock Correctional Center, 3 hrs. | \$ 600 |
| • Review of an estimated 350 pages of legal documents, 3 hrs. | \$ 600 |

Estimated Total	\$2700
-----------------	--------

If you have any questions, please feel free to contact me. Thank you for the potential referral.

Martha B. Mahaffey, Ph.D.
(Electronically signed)

Martha B. Mahaffey, Ph.D.
Clinical Psychologist

EX. 2

1 CERTIFICATE OF MAILING

2 I, *Mary Jane Wilson* do hereby certify that pursuant to NRCP 5(b), on the 14 day of
3 *August*, 2006, a copy of the foregoing was sent to:

4 The Honorable Judge Jerome Polaha
5 Second Judicial District Court
6 Department 3
Post Office Box 30083
Reno, Nevada 89520

7 Gary Hatlestad
8 Chief Appellate Deputy District Attorney
9 Washoe County District Attorney
Post Office Box 30083
Reno, Nevada 89520

10 George Chanos
11 Attorney General
12 100 North Carson Street
Carson City, Nevada 89701-4717

13 Michael Todd Botelho
14 Inmate Number 80837
15 Lovelock Correctional Center
Post Office Box 359
Lovelock, Nevada 89419

16 Sean Sullivan
17 Deputy Public Defender
18 Post Office Box 30083
Reno, Nevada 89520

19 Dr. Martha Mahaffey
20 834 Willow Street
Reno, Nevada 89509

ORIGINAL FILED

Code 2840

SEP - 6 2006

RONALD A. LONGTIN, JR., CLERK

By: *[Signature]*
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

MICHAEL TODD BOTELHO,
Petitioner,

vs.

Case No. CR03P2156

Dept. No. 3

THE STATE OF NEVADA,
Respondent.

ORDER

The Court has reviewed and considered the points and authorities in support of Petitioner's Ex Parte Motion Requesting Appointment of Dr. Mahaffey for Psychosexual Evaluation in Support of Supplemental Petition for Writ of Habeas Corpus (Post Conviction) and Notice of Investigation of Melissa Botello filed August 14, 2006.

Good cause appearing, IT IS HEREBY ORDERED THAT:

(1) Petitioner's motion is GRANTED.

DATED this 28 day of August, 2006.

[Signature]
JEROME M. POLAHA
DISTRICT JUDGE

CR03P2156
DC-09900071927-002
POST: MICHAEL TODD BOTELHO (2 Pages
District Court 09/06/2006 04:28 PM
Washoe County 3060
CMTT

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Second Judicial District
Court of the State of Nevada, in and for the County of Washoe; that on the 19th
day of ~~August~~ September, 2006, I deposited for mailing a copy of the foregoing to:

Mary Lou Wilson
333 Marsh Ave.
Reno NV 89509

Jerrine Ulisei

1 CODE #1130
 2 RICHARD A. GAMMICK
 #001510
 P. O. Box 30083
 Reno, Nevada 89520-3083
 (775) 328-3200
 Attorney for Respondent

2006 OCT -9 AM 11:31

ROSE L. GILBERT, JR.

BY: *R. Gilbert*
 VERITY

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.

ANSWER TO PETITION AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)

COMES NOW, Respondent, by and through counsel, and answers the petition filed on or about
 March 6, 2006, as follows:

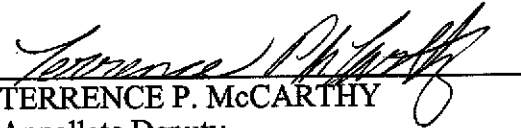
1. That Respondent admits all allegations in paragraphs 1-7, 10-16 and 19-22 of the petition.
2. That Respondent denies all allegations in paragraphs 8-9, 17-18 and 23 of the petition.
3. As to the supplemental petition filed on or about August 8, 2006, because of the unstructured narrative nature of the supplement, the Respondent denies each and every material allegation of fact included therein.
4. That your affiant is informed and does believe that all relevant pleadings and transcripts necessary to resolve the petition are currently available.
5. That Respondent is informed and does believe that aside from an unsuccessful appeal from

CR03P2156
 DC-990000130-063
 POST: MICHAEL TODD BOTELHO (3 Pages
 District Court 10/09/2006 05:22 PM
 Washoe County

1 his judgment of conviction, Petitioner has not applied for any other relief from this conviction.

2 DATED: October 6, 2006.

3 RICHARD A. GAMMICK
4 District Attorney

5 By 
6 TERRENCE P. MCCARTHY
7 Appellate Deputy

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Mary Lou Wilson, Esq.
333 Marsh Avenue
Reno, NV 89509

DATED: October 9, 2006

