

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

Electronically Filed
Jan 26 2022 10:36 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

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 A. GUSTIN, JR.

BY: *R. Sullivan*
DEPUTY

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

* * *

9 MICHAEL TODD BOTELHO,

10 Petitioner,

11 v.

Case No. CR03P2156

12 JACK PALMER,

Dept. No. 3

13 Respondent.

14
 15 MOTION FOR PARTIAL DISMISSAL OF PETITION AND
 16 SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)

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

21 POINTS AND AUTHORITIES

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

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

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

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

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

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

1 on the disputed evidence. Second, the petitioner confuses the concept of disputed evidence with the
2 notion of reliable evidence. The evidence at issue is the testimony of a detective that he had two
3 interviews with the former spouse of Botelho. In the first interview, the ex-wife indicated that Botelho
4 had related fantasies of raping and dismembering a child. In the second interview, there was no mention
5 of dismembering. Petitioner claims in his petition that the testimony was false – that the officer never
6 had the conversation, or that the ex-wife never related a fantasy about dismembering, or that petitioner
7 never told his ex-wife about a fantasy about dismembering. Based on his denial, he claims that the
8 testimony was false. The problem here is that we are discussing ineffective assistance of appellate
9 counsel. Appellate counsel is limited to the record. *Carson Ready Mix v. First National Bank*, 97 Nev.
10 474, 635 P.2d 276 (1981). There is nothing in the record as it existed at the time of the appeal to
11 indicate that the officer's testimony was untrue and certainly nothing that would support the conclusion
12 that the testimony of the officer was "impalpable" or "highly suspect." Botelho presented nothing, not
13 even his own statement in allocution, to rebut the testimony of the officer. Therefore, this court should
14 conclude that if appellate counsel had advanced the notion that the testimony of the detective amounted
15 to impalpable or highly suspect evidence, that claim would have been rejected on direct appeal and that,
16 accordingly, no hearing is warranted on ground 2.

17 Ground 3 is an assertion that the sentence must be reversed because this court allowed hearsay
18 testimony in the sentencing hearing. It is raised in the guise of ineffective appellate counsel. No hearing
19 is warranted because hearsay is not prohibited in a sentencing hearing. *See Thomas v. State*, 114 Nev.
20 1127, 1147, 967 P.2d 1111, 1124 (1998)(state law); *Gregg v. Georgia*, 428 U.S. 153, 203-204, 96 S.Ct.
21 2909, 2939 (1976)(approving "the wide scope of evidence and argument allowed at presentence
22 hearings" under state law).

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

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

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

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

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

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

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

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

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

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

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

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

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

17 The State would also point out that Botelho does not give any indication of how he might have
18 testified so as to avoid the indictment. The State notes that his prior statements including the hand-
19 written statement presented at sentencing, include confessions to every count in the indictment.
20 Petitioner claims that he would have proved his innocence on one count, but then refers to ground 8 of
21 the petition which in turn refers only to a single line of a police report. Such a reference amounts to a
22 bare or naked claim, not a claim meeting the requirements of specificity described in *Hargrove v. State*,
23 100 Nev. 498, 686 P.2d 222 (1984). Ground 6 certainly doesn't amount to reason to believe that the
24 results of the litigation would have been different and so no hearing is warranted.

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

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

3 Ground 7 is phrased in terms of ineffective assistance of counsel. Botelho claims that counsel
4 had sufficient notice that petitioner may be incompetent and that counsel should have sought an
5 evaluation and hearing on the question. The notice, he claims, is in Botelho's claimed lack of recall in
6 the days after the crime. The court may review the handwritten statement submitted at sentencing for
7 more details on how Botelho claimed that he could not recall having committed a crime, but acted
8 inconsistently with that claim of traumatic amnesia. The statement goes on, however, to indicate that
9 Botelho regained his memory of the crime. He states "I sat here [the Washoe County Jail] for almost a
10 month . . . and it all came back to me . . ." Thus, assuming that Botelho's claim of traumatic amnesia is
11 true,¹ he regained his memory of the crime within a month of being transported from Susanville,
12 California to Washoe County. Thus, by Botelho's own statement, the only indicia of his alleged mental
13 problem was gone by the middle of October, 2003.² In fact, according to the petition itself, in ground 6,
14 petitioner recalled the events and was available to testify before the grand jury when it considered the
15 case on October 8, 2003. The record further reveals that petitioner did not plead guilty until December
16 11, 2003 when, according to petitioner, his memory had returned.

17 The sole indicia of incompetency, according to petitioner, had vanished long before petitioner
18 pleaded guilty. Under those circumstances, this court should conclude that counsel is under no
19 obligation to seek a hearing to inquire into issues of past competency. Furthermore, despite Botelho's
20 assumptions to the contrary, amnesia is not synonymous with incompetence. As one court put it, "The
21 amnesic defendant is no worse off than the defendant who cannot remember where he was on a
22

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

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

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

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

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

23
24
25 ³To the extent that Botelho is claiming that a psycho-sexual evaluation must be presented to the
26 trial court, he is incorrect. Such an evaluation is only required if the defendant is eligible for probation.
Botelho was not eligible for probation. The report is a pre-requisite to probation but is not automatically
required in every sexual offense. *See* NRS 176.135 and 176.139.

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

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

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

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

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

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

17 Ground 13 is a claim that appellate counsel was ineffective because the sentences amount to
18 cruel and unusual punishment. On direct appeal the Supreme Court declared that the sentences did not
19 amount to cruel and unusual punishment. Re-litigation of that ruling is barred by the doctrine of the law
20 of the case. *Lader v. Warden*, ___ Nev., ___ 120 P.3d 1164, 1169 (2005).

21 Ground 14 is a series of brief claims of ineffective assistance of counsel. Several grounds consist
22 of bare or naked claims that do not warrant a hearing. See *Hargrove*. Those are grounds 14(1), 14(6),
23 14(8)(a) through 14(8)(d), 14(8)(f), (h), (i), (k), (n), (o). No hearing is warranted on those bare or naked
24 allegations.

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

1 to a "meaningful relationship" with counsel). The balance of ground 14(2) asserts that with a closer
2 relationship counsel would have learned of information possessed by his client. The problem again lies
3 in prejudice. Botelho claims that he was armed with information when he decided to plead guilty. He
4 gives no explanation about how it would have changed Botelho's decision if Sean Sullivan had also been
5 aware of that information. Thus, there is no claim of prejudice and no hearing is warranted on ground
6 14(2).

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

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

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

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

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

1 pleaded guilty. Thus, no hearing is warranted.

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

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

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

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

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

11 Turning to the supplement filed by counsel, the supplement addresses the hearsay that was
12 admitted in the sentencing hearing. The supplement claims that appellate counsel should have argued
13 that the admission of the testimony violated the right to confront witnesses. This may be disposed of as
14 a matter of law because the confrontation clause is a trial right that does not extend to sentencing. For
15 the convenience of the court, several cases with that holding are collected at *State v. McGill*, 140 P.3d
16 930, 942, n.7 (Ariz. 2006).

17 The supplement also suggests that counsel was ineffective in failing to call the petitioner's ex-
18 wife as a sentencing witness to rebut the testimony of the detective. The problem here is that the
19 privilege that petitioner invoked was a privilege to prevent the ex-wife from testifying about marital
20 communications. That privilege belonged to Botelho to assert or waive. *See Peck v. State*, 116 Nev.
21 840, 7 P.3d 470 (2000). There are two problems with this claim. The first is that the record shows that
22 Botelho asserted his privilege and despite the volumes submitted in this post-conviction action, there is
23 no claim that he was willing to waive the privilege. The other problem is in the apparent assumption
24 that the marital privilege could be partially waived. That is incorrect. If Botelho had been willing to
25 waive the marital privilege then the prosecutor would also have been free to call Botelho's ex-wife as a
26 sentencing witness to relate any information she had concerning the character of the defendant. Thus

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

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

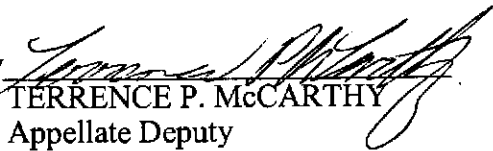
13 CONCLUSION

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

17 DATED: October 6, 2006.

18 RICHARD A. GAMMICK
19 District Attorney

20 By


21 TERRENCE P. MCCARTHY
22 Appellate Deputy
23
24
25
26

CERTIFICATE OF MAILING

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

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

DATED: October 9, 2006.

Stella Mueler

DC-9900000130-087
 CR03P2156
 POST: MICHAEL TODD BOTELHO (9 Pages
 District Court 10/09/2006 05:37 PM
 Washoe County 3897

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

2006 OCT -9 AM 11:31

RONALD L. SULLIVAN, JR.

CLY. *R. Sullivan*
 DEPUTY

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

MICHAEL TODD BOTELHO,

Petitioner,

vs.

JACK PALMER,

Respondents.

Case No. CR03P2156

Dept. No. 3

RETURN

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

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

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

...

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

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

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

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

23 ...

24 ...

25 ...

26 ...

27 ...

28 ...

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

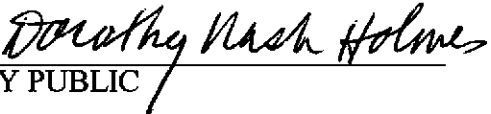
3 DATED this 8th day of September, 2006

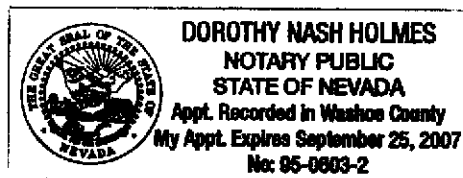
4
5
6 
GLEN WHORTON, Director
Nevada Department of Corrections

7 SUBSCRIBED and SWORN to before me

8 this 8th day of September, 2006,

9 by GLEN WHORTON.

10 
11 NOTARY PUBLIC

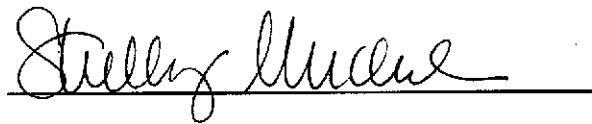


CERTIFICATE OF MAILING

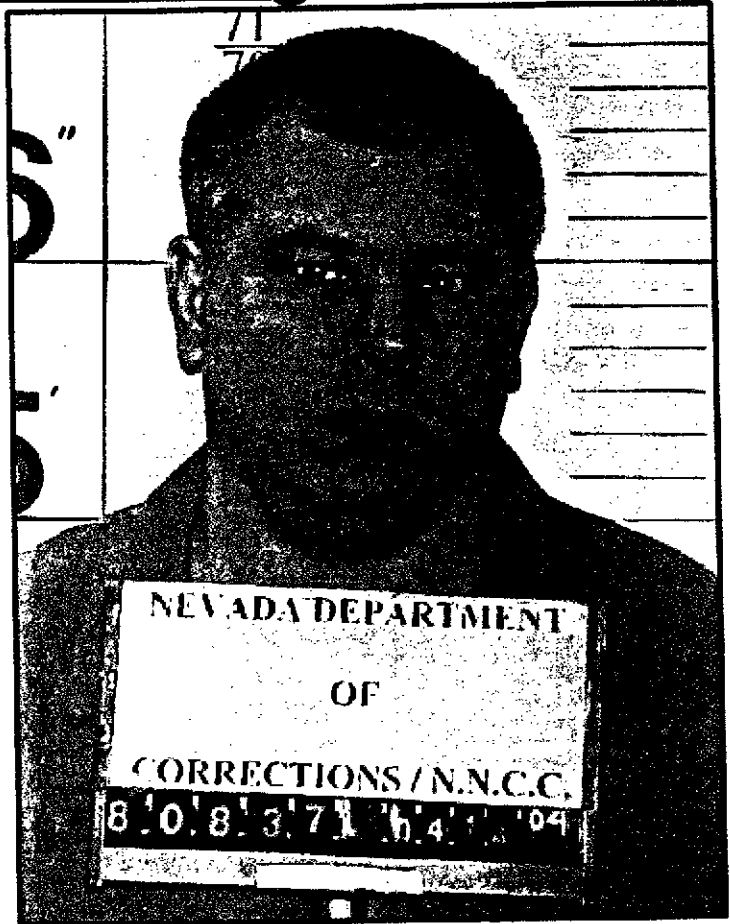
Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

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

DATED: October 9, 2006

A handwritten signature in cursive script, appearing to read "Stubby Muehle", is written over a horizontal line.

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

**OTHER INFORMATION BELOW**

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

NEVADA DEPT OF CORRECTIONS
775-882-9203

LEAVE BLANK CRIMINAL

(STAPLE HERE)

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STATE USAGE

STATE USAGE
MFT SECOND

☐☐☐

SUBMISSION

APPROXIMATE CLASS

AMPUTATION

SCAR

LAST NAME, FIRST NAME, MIDDLE NAME, SUFFIX

SIGNATURE OF PERSON FINGERPRINTED

SOCIAL SECURITY NO.

LEAVE BLANK

BOTELHO, MICHAEL

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

STATE IDENTIFICATION NO.

DATE OF BIRTH MM DD YY

06101961

SEX

M

RACE

W

HEIGHT

510

WEIGHT

205

EYES

HAZ

HAIR

BRO

1 R THUMB

2 R INDEX

3 R MIDDLE

4 R RING

5 R LITTLE

6 L THUMB

7 L INDEX

8 L MIDDLE

9 L RING

10 L LITTLE

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V10. 503

V10. 503

FILED

APR - 7 2004

RONALD A. LONGSTIN, JR., CLERK
By *C. Patterson*
DEPUTY

CODE 1850

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

STATE OF NEVADA,

Plaintiff,

vs.

Case No. CR03-2156

MICHAEL TODD BOTELHO,

Dept. No. 3

Defendant.

JUDGMENT

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

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

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

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.

21
22 CERTIFIED COPY

23 The document to which this certificate is
24 attached is a full, true and correct copy of
the original on file and of record in my office.

25 DATE: April 7, 2004
26 RONALD A. LONGTIN, JR., Clerk of the Second
Judicial District Court, in and for the County
of Washoe, State of Nevada.

27 By C. R. L. [Signature] Deputy
28

[Signature]
JEROME M. POLAHA
DISTRICT JUDGE

I, Missy Gleason, hereby certify:
Name of Official Custodian
V10. 506 That I am the Administrative Assistant II of the Nevada Department of Corrections,
Official Position

a penal institution of the State of Nevada, situate in the County and State aforesaid; that in my legal custody as such officer are the original files and records of persons heretofore committed to said penal institution; that the

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

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

15th

IN WITNESS WHEREOF, I have hereunto set my hand thisday
of August, A.D. 2006

Missy Gleason
Signature
Administrative Assistant II
Official Title

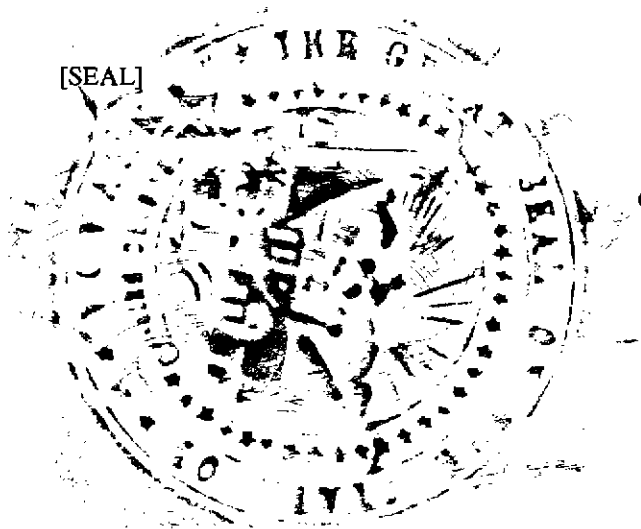
STATE OF NEVADA }
COUNTY OF CARSON CITY } ss.

Dean Heller

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

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of the State of Nevada this 15th day of August, A.D. 2006

[SEAL]



Dean Heller
Signature

Secretary of State of the State of Nevada

By *Scott Henderson*
Deputy

V10. 506

CR03P2156
DC-9900000159-006
POST: MICHAEL TODD BOTELO (9 Pages
District Court 10/18/2006 07:32 AM
Washoe County 2645

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

ORIGINAL

2006 OCT 17 PM 1:53

RONALD E. GALTIN, JR.

BY *R. Sullivan*
DEPUTY

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

MICHAEL TODD BOTELO,

Petitioner,

vs.

Case No. CR03P-2156

Dept. No. 3

JACK PALMER, L.C.C. WARDEN,
And THE STATE OF NEVADA,
Respondents.

OPPOSITION TO MOTION FOR PARTIAL DISMISSAL OF THE
SUPPLEMENTAL PETITION FOR
WRIT OF HABEAS COPUS (POST-CONVICTION)

COMES NOW, Petitioner, by and through counsel, and Moves this Honorable
Court for its Order denying the State's Motion for Partial Dismissal of the
Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) based upon
the attached Points and Authorities, potential investigation by Ms. Wheeler, and
evaluation of Dr. Martha Mahaffey regarding a psychosexual examination.

1 The State Moved this Honorable Court for its Order to partially dismiss the
2 original petition, except for ground 15, and some of the Supplemental Petition
3 because of various reasons.
4

5 Therefore, this Opposition to Motion for Partial Dismissal will address some of
6 these areas.

7 **ORIGINAL PETITION**
8

9 The State asserted that the Petitioner's original petition should be dismissed for
10 violations of the law, except for ground 15. Therefore, post conviction counsel
11 will submit these areas to the district court's discretion.
12

13 **SUPPLEMENTAL PETITION**
14

15 The State's Motion for Partial Dismissal concerns the supplemental petition
16 starting on page 12 of the brief. Initially, the State asserts that the ground for
17 failing to call the petitioner's ex-wife as a witness for sentencing to rebut the
18 testimony of the detective should fail because petitioner invoked the marital
19 privilege. *Peck v. State*, 116 Nev. 840, 7 P.3d 470 (2000). Petitioner
20 acknowledges the case law in the area of privilege but asserts that counsel was
21 ineffective in waiving his privilege because he never said those things to his wife.
22 Had counsel investigated the statement that was purported to be made to the
23 detective, counsel and his investigator would have known that Petitioner never
24 made those statements, the context in which a statement was made, and that the
25

1 wife being placed upon the witness stand would have a different result altogether.
2 Petitioner concedes that the record shows that he asserted his privilege. However,
3 the supplemental petition should assert that trial counsel was ineffective in not
4 waiving his privilege and allowing his ex-wife to be placed under grueling cross-
5 examination showing what exactly he said, the context in which a statement was
6 made, and the motivations for her saying anything derogatory to the detective. It
7 should be noted that additional investigation has been attempted pursuant to the
8 district court's Order through contact with the Washoe County Public Defender's
9 Office and the results of that investigation are presented in a memorandum
10 attached herein. See Order permitting investigation of Melissa Botelo and attempts
11 to receive discovery from the Washoe County Public Defender's Office, exhibit A
12 and B, respectively.
13

14 As shown, Ms. Wheeler's first contact with the office occurred in August 8,
15 2006, wherein she left a message requesting the report; August 10, 2006, wherein
16 she left a message; August 16, 2006, wherein she received a call from Sean
17 Sullivan informing her that he needed a signed release from the client and a
18 detailed memo on the information needed; September 5, 2006, wherein the release
19 was received from the client and sent to Deputy Public Defender Sean Sullivan
20 detailing the information requested; September 21, 2006, wherein she called to Mr.
21 Sullivan regarding the information and was told by the secretary that they were
22
23
24
25

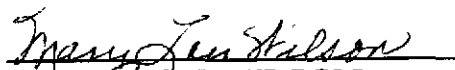
1 working on getting the file from storage and as soon as she received it, she would
2 send the report over to the office; October 13, 2006, called to Mr. Sullivan, the
3 secretary was not there, and was not able to leave a message; October 16, 2006,
4 wherein Ms. Wheeler spoke to Mr. Sullivan's secretary and was informed that she
5 put a request for the file into archives and had not heard back from them but would
6 follow-up and call Ms. Wheeler to advise of the status. Therefore, additional time
7 is requested for documents to be retrieved and turned over to post conviction
8 counsel and Ms. Wheeler and counsel being able to contact Petitioner's ex-wife for
9 further clarification of her alleged statements, only one of which was recorded.
10
11

12 The State asserts that had Petitioner waived his privilege, they could have called
13 her as a sentencing witness to relate any information she had concerning the
14 character of the defendant. Petitioner would have welcomed that procedure so that
15 she would have been subjected to cross-examination. *Chambers v. Mississippi*,
16 410 U.S. 284 (1973) (fewer rights are more important than confronting and cross-
17 examining witnesses). As stated above, trial counsel was ineffective in invoking
18 Petitioner's marital privilege instead of subjecting his ex-wife to cross-examination
19 to elicit the true statement, the context in which it was made, and any motivation
20 for making any derogatory statement against Petitioner during the sentencing
21 hearing.
22
23
24
25

1 The State asserts that reasonable trial counsel would not have waived the
2 marital privilege because of opening the floodgates for other character evidence.
3 As stated, Petitioner welcomes the opportunity to cross-examine his ex-wife in an
4 evidentiary hearing under *Lewis v. State*, 100 Nev. 456, 686 P.2d 219 (1984);
5 *Bolden v. State*, 99 Nev. 181, 659 P.2d 886 (1983); and *Gibbons v. State*, 97 Nev.
6 520, 634 P.2d 1214 (1981).
7

8 As the State concedes the issue of Dr. Martha Mahaffey's psychosexual
9 evaluation, Petitioner agrees. It should be noted that Dr. Mahaffey is reviewing the
10 entire file provided by the Washoe County District Attorney's Office and has been
11 promised any and all investigation regarding Petitioner's ex-wife and the
12 statements made to the detective and Ms. Wheeler.
13
14

15 DATED this 17 day of October, 2006.

16 
17 MARY LOU WILSON
18 Attorney At Law, Bar #3329
19 333 Marsh Ave.
20 Reno, Nevada 89509
21 775-337-0200
22 Attorney for Petitioner Botelo
23
24
25

ORIGINAL FILED

Code 2840

SEP - 6 2006

RONALD A. LONGIN, JR., CLERK

By: *[Signature]*
DEPUTYIN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOEMICHAEL TODD BOTELHO,
Petitioner,

Case No. CR03P2156

vs.

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

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 1st
day of September, 2006, I deposited for mailing a copy of the foregoing to:

Mary Lou Wilson
333 Marsh Ave.
Reno NV 89509

Jerrine Ullscheid

V10. 514

**LINDSAY WHEELER**

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

October 16, 2006

Mary Lou Wilson
333 Marsh Ave.
Reno, NV 89509
775-337-0200

Dear Mary Lou,

I have on several occasions attempted to get the police report in which Melissa Botelho, ex-wife of Michael Botelho made incriminating statements to the police officer regarding Mr. Botelho. I have attempted to get this report on the following dates:

August 8, 2006- call to public defender Sean Sullivan, left message requesting report

August 10, 2006- call to Sean Sullivan, left message

August 16, 2006- received call from Sean Sullivan informing that he needs a signed release from the client and a detailed memo on the information needed.

September 5, 2006- release received from client, sent to Sullivan with letter detailing information requested.

September 21, 2006- call to Sullivan regarding information- told me that his secretary was working on getting the file from storage and as soon as she received it she would send the report over to the office and to contact her.

October 13, 2006- Call to Sean Sullivan, secretary was not in, not able to leave message

October 16, 2006- Call to Sean Sullivan, spoke to secretary, she informed me that she has put a request for that file into archives and has not heard back from them yet. She will follow up with them and call me to let me know what the status of the request.

I am requesting more time in which to get the record from Sean Sullivan. I will then be able to call his ex-wife Melissa and discuss with her the statements made to the officer.

Thank you in advance,

Lindsay Wheeler
Legal Assistant

CERTIFICATE OF MAILING

I, Mary Lou Skilton, hereby certify pursuant to N.R.C.P. 5(b), that
on this 017 day of October, 2006, the documents herein was
mailed a true and correct copy of the foregoing Opposition to Motion for Partial
Dismissal addressed to:

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

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 Attorney for Respondent

2006 OCT 26 AM 11:12

BY *[Signature]* JURY
 DEPT. NO. 3

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

* * *

MICHAEL TODD BÔTELHO,

Petitioner,

v.

Case No. CR03P2156

JACK PALMER,

Dept. No. 3

Respondent.

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

The opposition to the State's motion for partial dismissal is based on the proposition that a lawyer has the authority (and the duty) to override a client's decision to invoke a marital privilege. That proposition is incorrect. NRS 49.295 prohibits one spouse from testifying without the consent of the other spouse. There is no provision for allowing the attorney to give that consent when the accused spouse has refused that consent.

The balance of the opposition consists of speculation about what allegations might eventually be made. The pleadings are closed now and because the pleadings as they exist at this moment do not

///

///

///

CR03P2156
 DC-9900000201-024
 POST: MICHAEL TODD BÔTELHO (3 Pages)
 District Court 10/26/2006 02:21 PM
 Washoe County 3795

1 warrant a hearing, the petition should be dismissed, except the claim that counsel was ineffective in
2 failing to present additional mitigating evidence.

3 DATED: October 26, 2006.

4 RICHARD A. GAMMICK
5 District Attorney

6 By 
7 TERRENCE P. McCARTHY
8 Appellate Deputy
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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 26, 2006.

Stellen Mucce

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2006 OCT 26 AM 11:12

ADJ. CLERK, JR.

BY C. Kepler
DEPUTY

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.

REQUEST FOR SUBMISSION

It is requested that the Motion for Partial Dismissal of Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), filed on October 9, 2006, in the above-entitled matter, be submitted to the court for decision.

The undersigned attorney certifies that a copy of this request has been mailed to all parties of record.

DATED: October 26, 2006.

RICHARD A. GAMMICK
 District Attorney

By Terrence P. McCarthy
 TERRENCE P. MCCARTHY
 Appellate Deputy

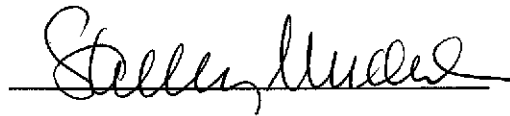
CR03P2156
 DC-9900000201-025
 POST: MICHAEL TODD BOTELHO (2 Pages
 District Court 10/26/2006 02:22 PM
 Washoe County

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 24, 2006.



CR03P2156
DC-S900000389-025
POST: MICHAEL TODD BOTELHO 29 Pages
District Court 12/14/2006 10:18 AM
Washoe County 2510

MARY LOU WILSON
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Attorney for Petitioner Botelho

FILED

2006 DEC 14 PM 1:29

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.

NOTICE OF INVESTIGATION AND AMENDED SUPPLEMENTAL PETITION FOR WRIT
OF HABEAS CORPUS
(POST CONVICTION)

COMES NOW, MICHAEL TODD BOTELHO, by and through appointed counsel, and provides the parties with Notice of Investigation in support of the petition for writ of habeas corpus (post conviction). The attached documents of the transcript from the interview between Detective Greg Herrera and Melissa Botelho through telephonic conversation show that Ms. Botelho never said that Petitioner Botelho ever wanted to dismember or mutilate a victim. Therefore, this telephonic transcript should have been presented in rebuttal to Detective Greg Herrera's testimony during sentencing through trial counsel and should be

1 considered an amended supplemental petition to include that sentencing counsel was
2 ineffective in failing to provide this transcript for impeachment purposes. Additionally, as
3 stated within the supplemental petition, trial counsel was ineffective in failing to put Ms. Botelho
4 on the witness stand during sentencing, despite originally invoking marital privilege. Appellate
5 counsel was ineffective in failing to bring forward the district court error in not permitting
6 Petitioner's ex-wife, Melissa Botelho, to testify instead of Officer Herrera in violation of the
7 Confrontation Clauses of the United States and Nevada Constitutions. It should be noted that Dr.
8 Martha Mahaffey has received this transcript for review in her evaluation of Petitioner Botelho
9 for future dangerousness. Trial counsel was ineffective in not procuring a psychosexual
10 evaluation and expert witness for sentencing in order to provide the district court with an idea of
11 whether Petitioner Botelho should have received concurrent or consecutive sentences depending
12 on his level of dangerousness to the community.

14 STATEMENT OF RELEVANT CASE HISTORY FOR ADMISSION OF TRANSCRIPT

15 The State filed a Notice of Intent to Introduce Prior Bad Act Evidence. Ex. pp. 35-43. The
16 Petitioner filed an Opposition to the State's Introduction. Ex. pp. 44-51. The State filed a Reply
17 to the Petitioner's Opposition. Ex. pp. 103-111. The district court had a hearing on the motion.
18 Ex. pp. 52-102. The district court granted the Petitioner's request not to hear the live testimony
19 of Petitioner's ex-wife but permitted the hearsay testimony of Officer Herrera who audiotaped
20 the conversation with Petitioner's ex-wife, finding that hearsay was admissible during
21 sentencing. Although Petitioner's sentencing counsel had a copy of the transcript of the
22 audiotaped conversation, Officer Herrera testified about a conversation, which was not taped.

24 //

25 //

STATEMENT OF FACTS RELEVANT FOR THE ADMISSION OF TRANSCRIPT

Petitioner picked up Jane Doe near her home and took her into the hills around Washoe Lake where he hit, duct-taped, and repeatedly sexually assaulted her. After Petitioner ejaculated into her vagina, he verbalized his remorse and confusion on what to do next. Jane Doe convinced Petitioner that she would never tell anyone about the incident and he took her home. The State filed a Motion to Admit Prior Bad Act Evidence in the form of Petitioner's ex-wife, Melissa, testifying that he had sexual fantasies that included kidnapping a young girl, raping, and **dismembering her**. Ex. pp. 35-43. Trial counsel filed an Opposition claiming marital privilege and Recusal of the district court because hearing that information prejudiced him. Ex. pp. 44-51. A hearing was held on the issues and it was decided that 1. Trial counsel failed to file the proper paperwork for recusal; 2. District Judge acknowledged neutrality regarding all cases; 3. The State advised that marital privilege did not apply because of the exception dealing with control over children; 4. The State argued that even if Melissa Botelho did not testify, her statement was admissible through Officer Herrera; 5. Trial counsel acknowledged the leniency of sentencing rules and the violation of the Confrontation Clause if Melissa Botelho would not testify; 6. Thereafter, the district court allowed Officer Herrera to testify during sentencing about Melissa Botelho's statement. Ex. pp. 52-102. At the sentencing hearing, trial counsel submitted letters from family members touting Petitioner as an excellent provider, loving father, and good person. Ex. pp. 134-139. Live witnesses confirmed this character evidence. **However, the telephonic transcript was not presented for admission during sentencing, which shows that Melissa Botelho never mentioned dismemberment. This transcript was in the possession of trial counsel.** Melissa Botelho was not called as a witness. Although Melissa Botelho was not called as a witness, the State had Officer Herrera testify about her initial telephone conversation and

1 subsequent audiotaped statement. Although trial counsel objected based upon a violation of the
2 Confrontation Clause, the district court recalled the prior hearing and admitted the evidence. The
3 district court noted that Petitioner brought the child back but believed a sentence of forty-five
4 years to the parole board was warranted, leaving Petitioner eighty-eight-years-old when he met
5 his first parole hearing. Ex. pp. 145-230. The Supreme Court viewed each penetration as
6 separate and distinct sexual assaults affirming the convictions. Ex. pp. 235-237. Appellate
7 counsel failed to question the district court's decision to allow the hearsay evidence of Melissa
8 Botelho in the face of an objection and violation of the Confrontation Clause of the United States
9 and Nevada Constitutions.

10
11 GROUND 1 REGARDING THE ADMISSION OF THE TRANSCRIPT:

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

15 **Additionally, sentencing counsel should have moved for the admission of the transcript of**
16 **the telephonic interview between Detective Greg Herrera and Melissa Botelho, since she**
17 **never said that Petitioner Botelho wanted to dismember a victim.** Additionally, appellate
18 counsel was ineffective for not presenting the preserved issue of district court err in violating
19 Petitioner's Confrontation Clause rights when failing to argue the issue on direct appeal.

20 I. The State's Moving Papers and the district court's ruling showing trial counsel's ineffective
21 assistance of counsel: Petitioner was advised that Melissa Botelho was going to testify during
22 sentencing that he had sexual fantasies that included kidnapping, raping, and dismembering a
23 young girl. Ex. pp. 35-43. Trial counsel Opposed the State's Motion claiming that Petitioner
24 had a marital privilege to the statement made during the marriage. Ex. pp. 44-51. Thereafter, the
25

1 State advised the parties that if Melissa Botelho did not testify, Officer Herrera would give
2 sentencing testimony that would include Melissa Botelho's hearsay statement because she told
3 him about Petitioner's depraved thoughts. The district court advised trial counsel that preventing
4 Melissa Botelho's testimony violated Petitioner's right to Confrontation if the statements came in
5 through Officer Herrera because hearsay was admissible during sentencing. Ex. pp. 52-102.
6 During the sentencing hearing, trial counsel did not call Melissa Botelho as a witness and
7 objected to her statements to Officer Herrera as a violation of Petitioner's Confrontation Clause.
8 **Additionally, trial counsel failed to admit the transcript of the telephonic interview between**
9 **Detective Greg Herrera and Melissa Botelho for impeachment purposes, although the**
10 **detective did advise that his testimony was from an unrecorded telephone conversation.**
11 **Nevertheless, it still sheds doubt upon his testimony, since it was not recorded. Clearly, the**
12 **recorded transcript does not indicate that Petitioner Botelho ever wanted to dismember a**
13 **victim.** However, because of the district court's ruling that Melissa Botelho would not be called
14 as a witness in compliance with trial counsel's wishes, her hearsay statement could be admissible
15 through the testimony of Officer Herrera. Petitioner's trial counsel objected to Officer Herrera's
16 testimony of Melissa Botelho based upon a violation of the Confrontation Clause. However,
17 because of the prior ruling, Officer Herrera was able to testify that Melissa Botelho advised him
18 on one occasion over the telephone that Petitioner's fantasy included kidnapping a young girl,
19 raping and dismembering her. Ex. pp. 145-230.

- 22 1. Petitioner advised post conviction counsel that trial counsel failed to investigate Melissa
23 Botelho's statement;
- 24 2. Petitioner claimed that trial counsel never spoke to him about what fantasy he ever told
25 Melissa Botelho he had during their marriage;

- 1 3. Petitioner asserted that the only fantasy that he ever discussed with his wife at the time
2 was that he wished he could have she and another woman go to bed with him;
- 3 4. Petitioner requested that the State permit him to take a polygraph examination concerning
4 the issue of the fantasy that he, since it would show that he never fantasized about
5 kidnapping a young girl, raping and dismembering her;
- 6 5. When asked how Officer Herrera could have that misconception from anything that
7 Melissa Botelho would have said, Petitioner opined that she may have talked about the
8 *Singleton* case;
- 9 6. During their marriage, Petitioner advised his wife, Melissa, about the *Singleton* case
10 where the older man kidnapped a young girl, raped her, and cut off her arms, leaving her
11 in the desert to die;
- 12 7. Petitioner advised his wife, Melissa, that he thought Mr. *Singleton* was a very sick man;
- 13 8. Petitioner never advised his wife, Melissa, that he also had similar fantasies;
- 14 9. Had trial counsel spoken with Melissa Botelho, he would have learned that he never told
15 her that he had these fantasies;
- 16 10. Petitioner explained that their marriage broke up because she was seeing another man and
17 their first son was from another man, which was told to him after they were in divorce
18 proceedings;
- 19 20
21 11. As such, Melissa Botelho never said that Petitioner had such fantasies. Additionally,
22 according to Petitioner, if she did tell Officer Herrera anything like that she was mixing
23 up the story with the *Singleton* case. Additionally, Petitioner opined that if she had said
24 anything derogatory, she had motive to lie because he confronted her about the
25

1 illegitimacy of his first son and she would not be receiving any child support payments
2 now.

3 Therefore, post conviction counsel intends to investigate Melissa Botelho to determine
4 exactly what she told Officer Herrera, what her memory was of the fantasy that Petitioner
5 explained to her during their marriage, and whether there is any motivation for her to lie.
6 Additionally, understanding that polygraph examinations are inadmissible evidence to show
7 truthfulness or untruthfulness, Petitioner is still willing to submit to one if the State would
8 consider it as mitigation if it shows he was truthful regarding the prior fantasy. Trial counsel was
9 ineffective under *Strickland* standards because Melissa Botelho would have testified that the only
10 fantasy Petitioner ever conveyed to her was that he wanted to have a "threesome" with she and
11 another woman. Additionally, Petitioner was prejudiced by trial counsel's failure because if the
12 sentencing court had heard from Melissa Botelho that the only fantasy he advised his wife about
13 was the consensual sexual experience of three consenting adults, he would not have received a
14 sentence of life with forty-five years to the parole board. Strickland v. Washington, 466 U.S.
15 668, 104 S.Ct. 2052 (1984).
16

17 Few rights are more important than confronting and cross-examination of witnesses.
18 Chambers v. Mississippi, 410 U.S. 284 (1973). As such, Petitioner's rights under the
19 Confrontation Clause were compromised when trial counsel failed to investigate and call Melissa
20 Botelho and allowed the hearsay statements made to Officer Herrera to come into evidence
21 during sentencing inferring that he was a dangerous man that had completed his obsessive
22 fantasy.
23

24 II. The State's Moving Papers and the district court's ruling showing appellate counsel's
25 ineffective assistance of counsel: The same procedural history applies to appellate counsel and

1 presented above. Therefore, upon review of the sentencing hearing transcript, the issue of
2 district court err to allow Officer Herrera to testify about the hearsay statement of Melissa
3 Botelho was preserved through trial counsel's objection. It could be argued that the district court
4 was given a Hobson's choice when trial counsel argued that Melissa Botelho's statement was
5 inadmissible because of the marriage privilege and yet admissible under the hearsay exception to
6 lenient sentencing rules. However, appellate counsel should have known that the Confrontation
7 Clause was so important to Petitioner's rights and fair sentencing procedure, that arguing district
8 court err seems apparent. Additionally, the district court could have changed its ruling at the
9 time of sentencing, granted a continuance to get Melissa Botelho, and not violated the Clause.

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

14 THE RELEVANT PORTIONS OF THE ATTACHED TRANSCRIPT:

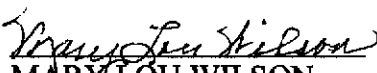
15 *Michael's key fantasy was to kidnap a young girl and be it...you know, twelve, thirteen years*
16 *old and uh...find some place to keep her and, basically, just have his way with her and,*
17 *personally, I don't think she'd ever walk away. And with the fact that the one walked away that*
18 *he got a hold of in August. Just because of the way that he is. His uh...I guess his ___ inaudible*
19 *in life that he wants to be the dominant person. He wants to show his dominance and if he can't*
20 *show his dominance, he'll prove his dominance, so. He'd express [his fantasies] when he*
21 *wanted to have sex. Well, when he...he'd...generally he'd wind up with uh...you know, out with*
22 *his buddies or somthin' and then he'd come home and decided that, you know, that he had to*
23 *have some, so it was, wake me up and then uh...in order for him to even, I guess, get to the point*
24 *of being able to come, he would start discussin these things that he would want to do to*
25

1 ah...young girls. And that would get him off. Well, it was, you know, beatin em up, havin his
2 way with em. You know, uh...kind of, in a sense, maybe torturing em a little bit. Um...you know,
3 them, you know, kinda beggin and pleadin. He just wanted a young girl. Somebody who...who
4 had not been touched yet. Who had not had sexual intercourse with anybody. Still a virgin.
5 Well, he asked me if I would help him and I told him absolutely not. Ex. pp. 8-10.

6
7 As such, an evidentiary hearing is necessary and requested under Lewis v. State, 100 Nev.
8 456, 686 P.2d 219 (1984), Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983) and Gibbons v.
9 State, 97 Nev. 520, 634 P.2d 1214 (1981).

10 It should also be noted that Ms. Wheeler has had a conversation with Melissa Botelho and is
11 in the process of having that recorded conversation properly transcribed to provide to the parties.
12 In corroboration with the taped transcript provided, Ms. Botelho never advised Ms. Wheeler that
13 Petitioner Botelho's fantasies included dismemberment of a victim. The tape and transcript will
14 be provided as soon as possible.

15 DATED this 14 day of December, 2006.

16 
17 MARY LOU WILSON
18 Attorney At Law Bar #3329
19 333 Marsh Ave.
20 Reno, Nevada 89509
21 775-337-0200
22 Attorney for Petitioner Botelho
23
24
25

WASHOE COUNTY SHERIFF'S DEPARTMENT

STATEMENT

TYPE OF ORIGINAL REPORT: SEXUAL ASSAULT / KIDNAPPING

CASE NUMBER: 03-8924

DATE OF STATEMENT: 01-08-04
TIME: 1138 HOURS

STATEMENT GIVEN BY: MELISSA BOTELHO

STATEMENT TAKEN BY: DETECTIVE GREG HERRERA

LOCATION OF INTERVIEW: TELEPHONIC

PERSONS PRESENT: # 1. MELISSA BOTELHO
2. DETECTIVE GREG HERRERA
3.
4.

COPIES OF THIS REPORT DISTRIBUTED TO:

____ RECORDS ____ CASE FILE ☒ D.A. ____ OTHER

03-8924

WASHOE COUNTY SHERIFF'S OFFICESUPPLEMENTAL OR CONTINUATION REPORT

This is NOT a certified transcript. Although every effort has been made to ensure accuracy you need to refer to the original or a copy of the source audio/video tape.

TYPE OF ORIGINAL REPORT
SEXUAL ASSAULT/
KIDNAPPING

DATE OF ORIGINAL REPORT

CASE NUMBER
03-8924

VICTIM OR COMPLAINANT

LOC OF OCCURRENCE

DATE/TIME OF SUPP
01-08-04 @ 1138 hrs.

1 Q: Okay, hello Transcriber, uh.. we're now on tape. Uh.. Melissa,
2 are you there?
3 A: Yep.
4 Q: Okay. And uh.. you're aware that I just uh.. turned the tape on.
5
6 A: Yeah.
7 Q: Okay. And that's okay?
8 A: Yes.
9 Q: Okay. Uh.. Transcriber, uh.. uh.. for the record uh.. this case
10 number WC03 dash 8924. Uh.. type of original.. type of case is
11 Sexual Assault uh.. and uh.. Kidnapping. Uh.. the date is
12 January the eighth, two thousand four. Time is 1138 hours.
13 This is a telephonic interview with uh.. witness uh.. Melissa
14 BOTELHO. Melissa, for the record, can I get your full name and
15 have you spell the last please?

03-8924

WASHOE COUNTY SHERIFF'S OFFICE

SUPPLEMENTAL OR CONTINUATION REPORT

This is NOT a certified transcript. Although every effort has been made to ensure accuracy you need to refer to the original or a copy of the source audio/video tape.

- 1 A: Melissa Marie BOTELHO. B, as in boy, O-T-E-L-H-O.
- 2 Q: Okay. Melissa, can I get your date of birth?
- 3 A: 4-23-70.
- 4 Q: And your social security number, please?
- 5 A:
- 6 Q: Uh.. 530-82-5...
- 7 A: 5255.
- 8 Q: Okay. And uh.. an address?
- 9 A: Uh.. P.O. Box 870167.
- 10 Q: Okay.
- 11 A: Wasilla. W-A-S-I-L-L-A. Alaska. 99687.
- 12 Q: And how your uh.. phone number, Melissa?
- 13 A: 907.
- 14 Q: Okay.
- 15 A: 357-8160.
- 16 Q: Okay. Uh.. Melissa, before we get started I'd like to ask you
- 17 have you any members of the Sheriff's Office uh.. Washoe County
- 18 Sheriff's Office coerced, threatened or made any promises
- 19 whatsoever in a.. in an attempt to have you make this statement?

03-8924

WASHOE COUNTY SHERIFF'S OFFICE

SUPPLEMENTAL OR CONTINUATION REPORT

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- 1 A: Nope.
- 2 Q: And you are doing so on your own free will?
- 3 A: Yep.
- 4 Q: Okay. Uh.. Melissa, what I want to talk to you about uh.. today
- 5 is a uh.. case that uh.. I've been investigating and you and I
- 6 have spoken about it uh.. in the past concerning your ex-husband
- 7 uh.. Michael Bo.. BOTELHO. Is that your understanding?
- 8 A: Yes.
- 9 Q: Okay. And uh.. what I'd like to do is get a little bit of
- 10 background uh.. uh.. firstly, your relationship uh.. he's your
- 11 uh.. your ex-husband, is that correct?
- 12 A: Yes.
- 13 Q: Can you tell me uh.. when you guys uh.. were married and when
- 14 you were divorced?
- 15 A: We were married in Smith Valley in ninety one and I
- 16 divorced him in August of ninety five. My divorce was final.
- 17 Q: Okay. And you guys have two children-in-common, right?
- 18 A: Yes.
- 19 Q: And they're both boys?

SUPPLEMENTAL OR CONTINUATION REPORT

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- 1 A: Yes.
- 2 Q: What are their ages?
- 3 A: My oldest one is uh.. twelve and the other one is ten.
- 4 Q: Okay. Uh.. Melissa how did you learn that I was uh..
- 5 investigating uh.. um.. Michael?
- 6 A: Uh.. friend of mine sent up an article...
- 7 Q: Okay.
- 8 A: ... in..
- 9 Q: Okay. And that...
- 10 A: ... in the newspaper.
- 11 Q: ... and with that article that's when uh.. you.. you contacted me,
- 12 is that correct?
- 13 A: Yes, sir.
- 14 Q: And when you contact me uh.. you had some uh.. concerns, is
- 15 that.. is that correct?
- 16 A: Yes.
- 17 Q: Can.. can you tell me what your uh.. concerns were at that time?
- 18 A: Well, basically, his whereabouts and the threats that he's made
- 19 on my kids.

SUPPLEMENTAL OR CONTINUATION REPORT

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- 1 Q: Can you tell me about those threats?
- 2 A: Well, if uh.. well, if anything was to happen to him he'd come
3 and take my kids and he'd run with 'em.
- 4 Q: And what did he mean if anything was to happen to him?
- 5 A: Well, if he found himself that he
6 wouldn't be able to be around my kids.
- 7 Q: So, I just uh.. so I understand it, uh.. if he was ever put in a
8 situation where he couldn't get at his kids, then he.. he
9 threatened to come and take 'em, is that accurate?
- 10 A: Yeah.
- 11 Q: Okay. When.. that time I spoke to you, you expressed a uh.. fear
12 of uh.. Michael, is that correct?
- 13 A: Well, there's a part of me that will always live in fear of him.
- 14 Q: Part of you will always live in fear?
- 15 A: Yep.
- 16 Q: And.. and why is that?
- 17 A: Cause he's a violent person.
- 18 Q: Can you give me uh.. Melissa, can you give me some specific uh..
19 incidents that you can uh.. recall?

SUPPLEMENTAL OR CONTINUATION REPORT

This is **NOT** a certified transcript. Although every effort has been made to ensure accuracy you need to refer to the original or a copy of the source audio/video tape.

- 1 A: Well, he beat me up on numerous occasions. His mother was even
2 a witness to a couple of times. She was even the one that
3 called the cops on us. And that was right after my first son
4 was born.
- 5 Q: Okay.
- 6 A: A little more specific on a day, I believe it'd be kinda' like
7 uh.. late August, early September in 1991. Lyon County
8 Sheriff's Department.
- 9 Q: Well, what happened?
- 10 A: Well, basically, because he had a scratch on his neck because I
11 defended myself, I mean, he was willin' to have my son removed
12 out of the household while the two of us were arrested for
13 domestic violence. So I chose not to press charges against him
14 because I couldn't put an infant son, who I was breastfeeding at
15 the time, into protective custody, so...
- 16 Q: Okay.
- 17 A: ... no charges were ever pressed.
- 18 Q: Were there any other incidents uh.. where he was uh..
- 19 A: There was other...

SUPPLEMENTAL OR CONTINUATION REPORT

This is **NOT** a certified transcript. Although every effort has been made to ensure accuracy you need to refer to the original or a copy of the source audio/video tape.

- 1 Q: ... Michael was...
- 2 A: ... incidents...
- 3 Q: ... vi...
- 4 A: ... nothing that was ever reported simply for the fact that.. that
- 5 by.. he's also an ex-cop and it's my word over his word and he's
- 6 got buddies on the Lyon County Sheriff's Department, so.
- 7 Q: Is that where you guys lived, Melissa?
- 8 A: Yep.
- 9 Q: Where did you guys live at?
- 10 A: We lived at his house. Fifty.. 537 RTA Hendricks Road, Yerington,
- 11 Nevada.
- 12 Q: Okay. Did you and I discuss another uh.. issue uh.. uh.. on the
- 13 phone prior to this.. to this conversation where you told me
- 14 that uh.. you had uh.. you were aware of what.. what I was
- 15 investigating, is.. is that correct?
- 16 A: Yes.
- 17 Q: And that...
- 18 A: And Michael...
- 19 Q: ... didn't...

03-8924

WASHOE COUNTY SHERIFF'S OFFICESUPPLEMENTAL OR CONTINUATION REPORT

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- 1 A: ... has a big fantasy over it, so.
- 2 Q: Can you.. can you uh.. discuss that with me please? Uh.. as
- 3 detailed as you can tell me about that.
- 4 A: Michael's key fantasy was to kidnap a young girl and be it.. you
- 5 know, twelve, thirteen years old and uh.. find some place to
- 6 keep her and, basically, just have his way with her and,
- 7 personally, I don't think she'd ever walk away. And with the
- 8 fact that the one walked away that he got a hold of in August.
- 9 Q: Okay. And why.. why.. uh.. why is that? Why?
- 10 A: Just because of the way that he is. His uh.. I guess his *maudible*
- 11 *in/bd* that he wants to be the dominant person. He wants
- 12 to show his dominance and if he can't show his dominance, he'll
- 13 prove his dominance, so.
- 14 Q: Okay. Did uh.. how did.. how'd you learn of these fantasies?
- 15 A: He'd express 'em when he wanted to have sex.
- 16 Q: Can you discuss that with me?
- 17 A: Well, when he.. he'd.. generally he'd wind up with uh.. you
- 18 know, out with his buddies or somethin' and then he'd come home
- 19 and decided that, you know, that he had to have some, so it was,

03-8924

WASHOE COUNTY SHERIFF'S OFFICESUPPLEMENTAL OR CONTINUATION REPORT

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1 wake me up and then uh.. in order for him to even, I guess, get
2 to the point of being able to come, he would start discussin'
3 these things that he would want to do to ah.. young girls. And
4 that would get him off.

5 Q: Okay. And do you remember what uh.. some of the stuff that he
6 said specifically?

7 A: Well, it was, you know, beatin' 'em up, havin' his way with 'em,
8 you know, uh.. kind of, in a sense, maybe torturing 'em a little
9 bit. Um.. you know, them, you know, kinda' beggin' and
10 pleadin'.

11 Q: When he'd discuss their uh.. their uh.. did he discuss his
12 fantasies with you all.. while having sex with you?

13 A: Yep.

14 Q: What.. okay. Um.. did he mention uh.. during these.. these uh..
15 during relaying these fantasies he.. he mentioned uh.. *the age*
16 *range* that he was interested in?

17 A: He just wanted a young girl. Somebody who.. who had not been
18 touched yet. Who had not had sexual intercourse with anybody.
19 Still a virgin.

SUPPLEMENTAL OR CONTINUATION REPORT

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1 Q: Did he talk to you about uh.. acting out on these fantasies?

2 A: Well, he asked me if I would help him and I told him absolutely
3 not.

4 Q: Would he...

5 A: And that was right around the day.. right around the time I had
6 left him because it became.. that fantasy of his became more and
7 more uh.. like he wanted to make it a reality because it went
8 from just being in a bed type of thing to get him off to a
9 conversation around the house and it was just somethin' that I
10 just didn't want to take a part in with him. I don't want
11 nothin' to do with that man. He.. weird thoughts, ^{the} ~~there's~~ which
12 him. yards of his outlook and it's just out
13 there.
14

SUPPLEMENTAL OR CONTINUATION REPORT

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- 1 Q: Okay.
- 2 A: And if I had my way, I would have made sure that my kids, in
3 some way or another, wouldn't have to have contact with him, but
4 the courts didn't see it my way.
- 5 Q: Okay. Um.. As these uh.. fantasies that he.. did he seem to
6 talk more and more about them?
- 7 A: Oh, yes.
- 8 Q: Okay. And you say that he tried to get you to help him, what..
9 do you remember what he would uh.. say to you or what he would
10 talk about?
- 11 A: Well, he'd ask, you know, if I would rat him out if he actually
12 did it. Well, of course I would, you know? I wouldn't want
13 anything to happen uh.. you know, at this time I have one little
14 one, yes, he is a male, but just the same, I got a little one at
15 home and one on the way or right after I had him. You know, so
16 I got a baby and a.. and a toddler at home. I wouldn't want
17 anything to happen to my kid. And I couldn't perceive some
18 other parent havin' to go through that same thing.
- 19 Q: Right.

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WASHOE COUNTY SHERIFF'S OFFICESUPPLEMENTAL OR CONTINUATION REPORT

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1 A: I mean, I even feel bad for, you know, what happened in August.

2 I.. I really.. I really feel bad for her because, in a way, if
3 somebody would've listened, it might not have happened.

4 Q: And can you explain to me what you mean by that?

5 A: Well, Lyon County Sheriff's Office was told several times. And
6 I was blown off and I'd certainly believe it's just because he's
7 friend's with 'em.

8 Q: So you.. you notified someone at the Lyon County Sheriff's
9 Office about this.. these fantasies?

10 A: Oh, they were told about 'em.

11 Q: Huh. Do you remember who?

12 A: Um.. I want to say one of 'em was a BOGARD (phonetic). And
13 there was another deputy in there at the same time.

14 Q: Did you file a report or how did you.. how did you...

15 A: I...

16 Q: ... uh...

17 A: ... just...

18 Q: ... I/d ?

SUPPLEMENTAL OR CONTINUATION REPORT

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- 1 A: ... I just told 'em about it. Nobody down there wants to deal
2 with it.
- 3 Q: So, they didn't listen to you, is what you're sayin'?
- 4 A: Yep.
- 5 Q: Okay. What was your purpose in uh.. in telling them?
- 6 A: Well, in a way, it was kinda' to help me.. well, to kinda' let
7 people know what kind of a person he was because, at one point,
8 when I was going through my divorce with him, he took away um..
9 well, I didn't actually have physical custody of my kids, we
10 still had kind of a joint custody?
- 11 Q: Uh huh.
- 12 A: So he took my oldest son and convinced my oldest son that I was
13 beatin' on him when I hadn't seen my son in somethin' like two
14 months when.. when I get a call from Child Services and Child
15 Services turns around and tells me that they want me for Child
16 Abuse for, you know, abusin' my son and so when they found out I
17 hadn't seen my son in two months then it was down to the point
18 of uh.. well, who could've done this, so.. there's only one
19 other person that could've done it. He would never admit to it,

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1 but the nice part that came out about it was my oldest son does
2 have some um.. ah.. challenges in life when it comes to his
3 feelings...

4 Q: Uh huh.

5 A: ... and so, in him doing what he did, it helped my son out in a
6 way because I got my son back. My son got the help that he
7 needed. And when my son started going through counseling, um..
8 it was a counselor that told my ex-husband I.. I.. I was still
9 married to him at the time, that if ah.. things didn't uh.. he
10 didn't stop harassing me over the divorce paper and just sign
11 'em, because he wanted custody of my oldest son..

12 Q: Uh huh.

13 A: ... um.. that he would take him to.. he would officially have the
14 charges brought up against him. And I don't know whatever took
15 place in that room. He.. he kept all the paperwork on it and
16 it's all filed with the state and mental health ah.. department
17 down there in Carson City.

18 Q: Okay.

SUPPLEMENTAL OR CONTINUATION REPORT

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1 A: He signed my divorce papers and that was the end of my divorce,
2 so.
3 Q: Did you.. did you uh.. speak to anybody else about these uh..
4 fantasies of.. of uh.. Michael's or talk to any uh.. uh..
5 counselors or uh.. professionals or anything like that?
6 A: I didn't, no.
7 Q: Okay.
8 A: I decided to get as far away from him as I possibly could at the
9 time. And when my chance arose to go to Alaska, I was on the
10 first plane.
11 Q: Um.. Melissa, one uh.. one.. one of.. I think it was the very
12 first time I talked to you uh.. one of the first things you said
13 to me uh.. that uh.. sticks out in my mind is uh.. that when you
14 found out about this you weren't surprised at.. at all, is that
15 correct?
16 A: No, I wasn't, because his fantasy actually he.. he made his
17 fantasy come true. I look at the fact his.. he ah.. married a
18 lady from the Philippines, is.. is my understanding. Um..
19 her English is not that great, but she speaks

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WASHOE COUNTY SHERIFF'S OFFICE

SUPPLEMENTAL OR CONTINUATION REPORT

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1 English and uh.. I know when I lived with him we got a lot of
2 these ah.. mail order things...

3 Q: Uh huh.

4 A: ... for ah.. you know, ah.. people that wanted to come over to be
5 like nannies and that?

6 Q: Uh huh.

7 A: And he was even lookin' at trying to get a hold of one of those
8 at a young age and that way then she could live in the house and
9 he could have his way with her, too, and raise kids and that was
10 Indubh and so when this one here.. when he turned
11 around and said that he married, you know, this one here and had
12 to go to the Philippines to pick her up, I personally think that
13 it was a mail order bride thing and that way their.. his
14 fantasy, in a sense, could be fulfilled because then he'd have
15 somebody that couldn't run away from him and I know that he's
16 beaten her up on several occasions and his own sister's called
17 the cops on him..

18 Q: Okay.

SUPPLEMENTAL OR CONTINUATION REPORT

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1 A: ... for beatin' his wife up. I don't believe his wife has ever
2 pressed charges because he holds it against her that she could
3 be deported. She's now got two small children that she's got to
4 raise that uh.. she's worried about losin' and so um.. I just..
5 I kind of thought that his fantasy would be kind of nipped in
6 the bud with havin' her. Sounds...

7 Q: Okay.

8 A: ... bad, but, you know it was.. it was that way. But when their..
9 when the article was sent to me over what he had done I wasn't
10 totally shocked over the deal, no, because he had made his
11 fantasy a reality.

12 Q: Okay. Um.. M.. Melissa, I appreciate your time um.. today. Is
13 there anything else that you can think of that uh.. we failed to
14 uh.. uh.. I failed to ask you or we haven't covered?

15 A: Uh.. no, I believe that was it.

16 Q: Okay. And uh.. everything that you said to me today has been
17 the truth?

18 A: Yep.

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WASHOE COUNTY SHERIFF'S OFFICESUPPLEMENTAL OR CONTINUATION REPORT

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1 Q: Okay. Um.. I'm gonna' go ahead and turn the tape off at this
2 time and Melissa I'm gonna' ask you to stay on the phone. Uh..
3 Transcriber, the time right now is 1154 and I'm gonna' be
4 shutting the tape off.

END OF STATEMENT

Melissa Botelho

Date

Detective Greg Herrera

Date

INVESTIGATING OFFICER

SUPERVISOR
APPROVING

TYPED BY

Detective G. Herrera

mat 01-08-04

UNFOUNDED

CLEARED BY ARREST

CLEARED OTHERWISE

INACTIVE

1 CERTIFICATE OF MAILING

2 I, Tracy Lee Wilson do hereby certify that pursuant to NRCP 5(b), on the 14 day of
3 December 2006, a copy of the foregoing was sent to:

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

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

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

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

ORIGINAL

FILED

DEC 29 2006

RONALD A. LONGTIN, JR., CLERK
By *[Signature]*
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DC-990000440-246
CR03P2156
POST: MICHAEL TODD BOTELHO (9 Pages
District Court 12/29/2006 05:01 PM
Washoe County 3370

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

MICHAEL TODD BOTELHO,
Petitioner,

Case No. CR03P2156

vs.

Dept. No. 3

THE STATE OF NEVADA,
Respondent.

ORDER PARTIALLY DISMISSING PETITION FOR POST-CONVICTION RELIEF

This matter concerns a timely filed petition for post-conviction relief pursuant to NRS 34.720 et seq. The petitioner was convicted by his pleas of guilty to kidnapping a 14 year old girl and to forcibly subjecting her to oral and penile penetration. On April 7, 2004 he was convicted of four separate crimes: the kidnapping in the first degree and three counts of sexual assault on a child. He was sentenced to a 5 years to life term for the kidnapping crime, a consecutive 20 years to life term for the fellatio crime, a concurrent 20 years to life for the cunnilingus crime and an additional consecutive 20 years to life term for the penile

1 penetration crime. In addition, he was ordered to serve a life term of supervised release in the
2 event he made parole. He has to serve 45 years before he is eligible for parole consideration.

3 Petitioner filed an appeal which was rejected by the Supreme Court with the remittitur
4 issuing April 29, 2005. He raised the constitutionality of the severity of his sentence and the
5 issue of double jeopardy as to the separate sentences on each of the sexual acts.
6

7 This Petition was filed March 6, 2006 and with it, Petitioner requested appointed
8 counsel to assist him. The Court granted that request and appointed a lawyer for the petitioner
9 on June 6, 2006, however that lawyer asked to be replaced and by Order dated June 30, 2006
10 this Court appointed replacement counsel for the petitioner and provided her with 60 days in
11 which to supplement the original petition.
12

13 The standards this Court must follow are set out in NRS 34. 720 et seq. and certain
14 relevant case decisions of the Nevada Supreme Court. To establish ineffective assistance of
15 counsel or IAC, a claimant must show both that counsels' performance was deficient and the
16 deficient performance prejudiced the defense. *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d
17 1102, 1107 (1996). To show prejudice, the claimant must show a reasonable probability that
18 but for counsel's errors the result of the trial would have been different. *Id* at 988. Judicial
19 review of a lawyer's representation is highly deferential and claimant must overcome the
20 presumption that a challenged action might be considered sound strategy. *Strickland v.*
21 *Washington*, 466 U.S. 668 (1984). A petitioner for post-conviction relief is entitled to an
22 evidentiary hearing only if he supports his claims with specific factual allegations that if true
23 would entitle him to relief. *Hargrove v. State*, 100 Nev. 498,502, 686 P.2d 222,225(1984).
24
25
26

1 The petitioner is not entitled to an evidentiary hearing if the factual allegations are belied or
2 repelled by the record. *Id* at 503. The petitioner has the burden of establishing the factual
3 allegations in support of his petition. *Bejarano v Warden*, 112 Nev. 1466, 1471, 929 P2d
4 922,925(1996).

5
6 The constitutional right to effective assistance of counsel extends to a direct appeal.
7 *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). To establish prejudice, the
8 claimant must show that an omitted issue would have had a reasonable probability of success
9 on appeal. *Id* at 998. Matters that should have been raised on direct appeal are considered
10 waived in subsequent proceedings. *Franklin v. State*, 110 Nev. 750,752, 877 P.2d 1058
11 (1994).

12
13 Also, *State v. Haberstroh*, 119 Nev. 173, 69 P.3d 676 (2003) holds that the application
14 of the procedural default rules to post-conviction petitions for writs of habeas corpus is
15 mandatory. *State v. 8th Judicial District Court*, 121 Nev. 225, 112 P3d. 1070 (2005) holds
16 that a district judge has a duty to consider whether any or all of the claims made are
17 procedurally barred and the failure to do so is an abuse of discretion.
18

19 Here, Petitioner alleges 16 numbered reasons why he feels that he ought to have his
20 sentences vacated and he should receive another sentencing hearing or his pleas ought to be
21 vacated. In the supplemental petition he requests a re-sentencing. The Court will address
22 each claim in seriatim fashion in light of the above-stated standards.
23

24 Ground 1 is directed at appellate counsel charging ineffective assistance. Petitioner
25 alleges that his appellate lawyer failed to consult with him and that he failed to raise pertinent
26

1 issues in the appeal and that he failed to raise federal issues that Petitioner could have raised
2 in a subsequent federal habeas proceeding.

3 Petitioner failed to establish the required showing of prejudice in his first ground. His
4 main argument seems to be that he was not given any federal grounds to pursue relief in the
5 federal system. He failed to show that his attorney failed to raise an appellate issue that
6 probably would have succeeded. Consequently, no hearing is required on ground 1 and it is
7 dismissed.
8

9 Ground 2 claims ineffective assistance of appellate counsel in failing to raise several
10 arguments. Two of the supposed arguments that were available but not raised involved the
11 abuse of discretion by the court at sentencing regarding the severity of the sentence and the
12 consecutive nature of the sentences imposed for the acts involved. Both of those arguments
13 were advanced unsuccessfully in the Supreme Court and this Court may not overrule that
14 court. Their ruling controls per the doctrine of law of the case.
15

16 The other argument had to do with the court relying on perjured testimony or
17 impalpable or suspect evidence at sentencing. Petitioner refers to the testimony of the
18 detective and the statements allegedly provided by Petitioner's former wife. Appellate
19 counsel had to rely on the record and the record did not contain any refutation of those
20 statements. Not even Petitioner's contrary testimony. Hence, this Court is able to conclude
21 that without any supporting evidential basis, even if that argument had been advanced on
22 appeal, Petitioner would have lost on that claim.
23
24

25 The Petitioner is mistaken if he thinks the Court based the sentence on what the
26

1 detective related from the former wife. The Court is not concerned with Petitioner's fantasies
2 regardless if real or not. One is free to think about whatever one wants; there is no crime in
3 that process. The sentence given to Petitioner was based only on what he did to that young
4 girl and what the Court considered to be a condign sentence. Some things one simply does
5 not do to young children. If one can consider the sentence imposed extremely harsh, one can
6 also consider the acts of Petitioner to have been extremely terrifyingly cruel and obscene.
7
8 Ground 2 is dismissed without a hearing.

9 Ground 3 asserts ineffective assistance of counsel because the lawyer did not object to
10 privileged, hearsay testimony at sentencing. The Court determined what was allowed. The
11 sentence was based on the acts of Petitioner. The law permits hearsay at sentencing. *Thomas*
12 *v. State*, 114 Nev. 1127, 1147, 967 P.2d 1111 (1998); *Gregg v. Georgia*, 428 U.S. 203-204
13 (1976). Ground 3 is dismissed without hearing.

14
15 Ground 4 asserts three grounds of ineffective assistance of counsel. Ordinarily,
16 assertions of IAC would provide the basis for an evidentiary hearing but the grounds asserted
17 here do not. The Court imposed a sentence greater than that argued for by defense counsel on
18 Petitioner's behalf, *a fortiori*, had counsel argued for a lesser sentence than he did, it would
19 not have mattered. Petitioner can point to no prejudice, hence his argument fails legally.

20
21 His second argument concerns the detective's testimony to which his counsel did what
22 he was supposed to do: object. If, however, Petitioner wants to proceed on an independent
23 claim of error concerning the use of such testimony, he is barred by NRS 34.810.

24
25 His final argument is that the Court's sentencing was ambiguous and his lawyer failed
26

1 to correct it. Petitioner's complaint herein sets out the sentencing he received, evidently he
2 understood it. Regardless, the matter is covered by the case of *Bradley v. State*, 109 Nev.
3 1090, 1094, 864 P.2d 1272 (1993): the oral pronouncement has no legal significance. Ground
4 4 is dismissed without hearing.

5
6 Ground 5 concerning the potential consequences of his convictions by his pleas of
7 guilty is repelled by the record. *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984). No
8 hearing is necessary.

9 The second part of Ground 5 has to do with Petitioner's expectations based on what
10 his lawyer allegedly told him. The record repels this ground also in that the Court advised
11 Petitioner of the potential consequences. Subjective expectations not based upon a promise
12 from the State or Court do not require a hearing as they are not considered inducements for a
13 plea. *Rouse v. State*, 91 Nev. 677, 541 P.2d 643 (1975).

14
15 The third part of Ground 5 had to do with the imposition of a term of lifetime
16 supervision. It too is repelled by the record. No hearing required.

17
18 The fourth part of Ground 5 concerning the contested testimony from the detective is
19 also repelled by the record and no hearing is required. *Hargrove, Id.*

20 Ground 6 asserts claims concerning the grand jury proceeding and events leading up to
21 them. NRS 172.241(2)(b) requires the target to request a presence, Petitioner failed to do that.
22 *Gibson v. State*, 96 Nev. 48, 50, 604 P.2d 815 (1980) sanctions the use of the grand jury
23 indictment rather than by an information. This argument is without merit and no hearing is
24 required. Ground 6 is dismissed.

25
26

1 Petitioner will be heard on Ground 7.

2 Ground 8 is dismissed without a hearing. Petitioner penetrated his victim in three
3 distinctive manners and at three separate times. That means three acts, three crimes, three life
4 sentences. The acts were properly charged as separate crimes. *Peck v. State*, 116 Nev. 840, 7
5 P.3d 470 (2000).
6

7 Ground 9 is dismissed without a hearing. NRS 176.135 and .139 call for psycho-
8 sexual examinations only when probation is available as an alternative sentence. Probation
9 was not available to Petitioner because of the nature of his crimes.

10 Ground 10 is dismissed without need for hearing. The charge is in line with the words
11 of the statute which also includes the term inveigle. To entice clearly means to allure or to
12 lure by offering some reward. Inveigle means to trick someone into doing something or going
13 somewhere. To kidnap means to seize or carry off or move a person against that person's will
14 by force or fraud. (Definitions found in Webster's New World Dictionary, 3rd College
15 Edition). This Court finds no vague words in the statute or in the charging document. The
16 attorneys did not miss any substantive argument. The Court properly exercised its power in
17 giving effect to the will of the legislature. The facts of the case fit the definition of the words
18 used and actions proscribed in the statute.
19

20
21 Ground 11 is dismissed without a hearing. Petitioner was indicted by a grand jury on
22 October 8, 2003 and arraigned in district court on October 23rd. He changed his pleas to guilty
23 pleas on December 11, 2003. By pleading guilty Petitioner waived all errors, including the
24 deprivation of constitutional rights that occurred prior to the entry of his guilty pleas. *Tollett*
25
26

1 v. *Henderson*, 411 US 258,267 (1973); *Webb v State*, 91 Nev. 469,470, 538 P.2d 164 (1975).

2 Ground 12 is dismissed without a hearing. The argument attempts to tag appellate
3 counsel with IAC because he failed to argue that a lifetime term of supervision is restrictive
4 and unconstitutional. The constitutional right to effective assistance of counsel extends to a
5 direct appeal. *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). However, to
6 establish prejudice, the claimant must show that an omitted issue would have had a reasonable
7 probability of success on appeal. Id at 998. Petitioner failed to do that.

9 Ground 13 is dismissed without a hearing. This issue of the punishment was presented
10 at the appeal and the Supreme Court decided it against the Petitioner. That issue will not be
11 re-litigated regardless of how it is presented.

13 Ground 14 presented manifold assertions based on IAC. Except for that part that
14 refers to the argument presented as Ground 7 Petitioner failed to meet his burden for having a
15 hearing. Ground 14 is dismissed.


16 Petitioner will be heard on Ground 15.

18 Ground 16 is understood by the Court to be a reiteration of the prior grounds and as
19 such, will not get a hearing and is dismissed.

20 The supplemental issues presented will be heard except for the argument concerning
21 the confrontation clause. See *State v. McGill*, 140 P.3d 930, 942 n.7 (AZ, 2006).

22 IT IS ORDERED. Counsel shall set the hearing at a convenient time.

23 DATED this 28th day of December, 2006.

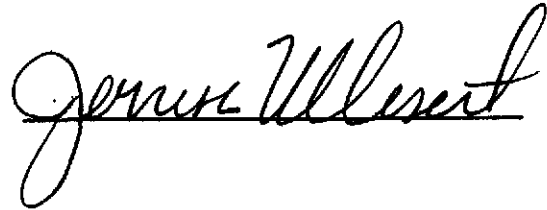
24
25 
26 JEROME M. POLAHA
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Second Judicial District
Court of the State of Nevada, in and for the County of Washoe; that on the 29
day of December, 2006, I deposited for mailing a copy of the foregoing to:

Mary Lou Wilson
333 Marsh Ave.
Reno NV 89509

Terrence McCarthy, Esq.
Appellate Deputy
Via Interoffice Mail

A handwritten signature in cursive script, appearing to read "Terrence McCarthy", is written over a horizontal line.

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DC-9900000491-102
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District Court 01/09/2007 11:59 AM
1250
Washoe County

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By *[Signature]*
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WASHOE

MICHAEL TODD BOTELHO,

Petitioner,

vs.

Case No. CR03P-2156

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

Dept. No. 3

Respondents.

APPLICATION FOR SETTING

TYPE OF ACTION: EVIDENTIARY HEARING

MATTER TO BE HEARD: PETITION FOR WRIT OF HABEAS CORPUS

(POST CONVICTION)

DATE OF APPLICATION: JANUARY 8, 2007

MADE BY: PETITIONER

1 COUNSEL FOR PETITIONER: MARY LOU WILSON

2 COUNSEL FOR RESPONDENT: TERRENCE P. McCARTHY

3
4
5 Mary Lou Wilson Terry McCarthy et al via telephone
6 ATTORNEY FOR PETITIONER ATTORNEY FOR RESPONDENT

7 SET AT may 11, 2007, AT 1:30 A.M./P.M. IN
8 DEPARTMENT 3 2 hours

1 **CERTIFICATE OF SERVICE**

2 I, Mary Lou Nelson, hereby certify pursuant to N.R.C.P. 5(b), that
3 on this 9 day of January, 2007, the documents herein was
4 mailed a true and correct copy of the foregoing APPLICATION FOR SETTING
5 IN THE PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)
6 addressed to:

7 The Honorable Judge Jerome Polaha
8 Washoe County District Court, Department 3
9 Post Office Box 30083
10 Reno, Nevada 89520

11 Terrence P. McCarthy
12 Appellate Deputy District Attorney
13 Post Office Box 30083
14 Reno, Nevada 89520

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

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

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FILED

2007 APR 12 AM 11:20

RONALD A. LONGTIN, JR.

BY: [Signature]

CODE #1260
 RICHARD A. GAMMICK
 #001510
 P. O. Box 30083
 Reno, Nevada 89520-3083
 (775)328-3200
 Attorney for Respondent

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

* * *

MICHAEL TODD BOTELHO,

Petitioner,

v.

Case No. CR03P2156

JACK PALMER,

Dept. No. 3

Respondent.

APPLICATION FOR ORDER TO PRODUCE PRISONER

COMES NOW, the State of Nevada, Respondent herein, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, by TERRENCE P. McCARTHY, Appellate Deputy, and alleges as follows:

1. That the above Petitioner, MICHAEL TODD BOTELHO, is presently incarcerated at the Nevada State Prison, Carson City, Nevada.

2. That the above MICHAEL TODD BOTELHO is scheduled for a post-conviction hearing before the Second Judicial District Court on May 11, 2007 at 1:30 p.m.

WHEREFORE, Applicant prays that an Order be made ordering the appearance of the said MICHAEL TODD BOTELHO before the Second Judicial District Court, and from time to time thereafter at such times and places as may be ordered and directed by the Court for such proceedings as thereafter may be necessary and proper in the premises, and directing the execution of said Order by the

CR03P2156
 DC-9900000892-020
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 Washoe County 1260
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Sheriff of Washoe County, Nevada.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: April 5, 2007.

RICHARD A. GAMMICK
DISTRICT ATTORNEY

By 
TERRENCE P. MCCARTHY
Appellate Deputy

CERTIFICATE OF MAILING

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

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

DATED: April 12, 2007.

Michelle Est

ORIGINAL

FILED

2007 APR 12 AM 11:28

RONALD A. LONGTIN, JR.

BY: *[Signature]*

1 CODE #3340
 RICHARD A. GAMMICK
 #001510
 P. O. Box 30083
 Reno, Nevada 89520-3083
 (775)328-3200
 Attorney for Respondent

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

* * *

9 MICHAEL TODD BOTELHO,

10 Petitioner,

11 v.

Case No. CR03P2156

12 JACK PALMER,

Dept. No. 3

13 Respondent.

14
 15 ORDER TO PRODUCE PRISONER

16 IT APPEARING to the satisfaction of the above-entitled Court that it is necessary that the
 17 Petitioner above named, MICHAEL TODD BOTELHO #80837, presently incarcerated in the Nevada
 18 State Prison, Carson City, Nevada, be brought before the Second Judicial District Court for a post-
 19 conviction hearing in the above-entitled action,

20 NOW, THEREFORE, IT IS HEREBY ORDERED that the Warden of the Nevada State
 21 Prison, Carson City, Nevada, bring the said MICHAEL TODD BOTELHO before the Second Judicial
 22 District Court on May 11, 2007, at 1:30 p.m. for a post-conviction hearing in the above-entitled action,
 23 and from time to time thereafter at such times and places as may be ordered and directed by the Court for

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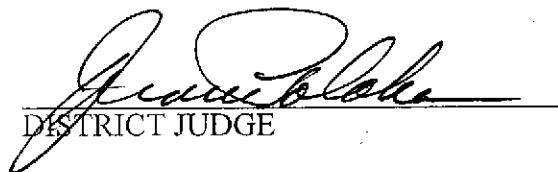
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1 such proceedings as thereafter may be necessary and proper in the premises.

2 DATED: 4-9, 2007.

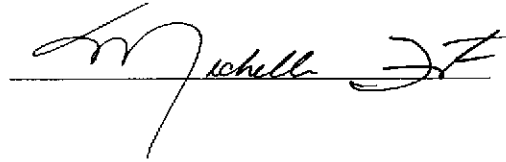
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CERTIFICATE OF MAILING

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 Ave.
Reno, NV 89509

DATED: April 12, 2007.

A handwritten signature in dark ink, appearing to read "Mary Lou Wilson", is written over a horizontal line.

Wilson

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

ORIGINAL

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MICHAEL TODD BOTELHO,

Petitioner,

vs.

Case No. CR03P-2156

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

Dept. No. 3

Respondents.

NOTICE OF DR. MARTHA MAHAFFEY'S PSYCHOSEXUAL REPORT IN
SUPPORT OF THE SUPPLEMENTAL PETITION FOR
WRIT OF HABEAS CORPUS (POST CONVICTION)

COMES NOW, MICHAEL TODD BOTELHO, by and through post conviction
 counsel and gives Notice of Dr. Martha Mahaffey's report.

DATED this 30 day of April, 2007.

Mary Lou Wilson
 MARY LOU WILSON

2007 APR 30 AM 9:31
 FILED
 BY *[Signature]*
 RONALD A. LONGTIN, JR.

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 Washoe County
 VLL0Y
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Martha B. Mahaffey, Ph.D.

Clinical Psychologist, Nevada License #190

834 Willow St.
Reno, NV 89502(775) 323-6766
FAX (775) 323-2716**PSYCHOSEXUAL AND RISK ASSESSMENT****IDENTIFYING DATA****Name:** Michael Botelho**Case No.** CR03P2156**Date of Birth:** 6/10/61 **Age:** 45**Evaluation Date:** March 27, 2007**Current Placement:** Lovelock Correctional Center**Report Date:** April 24, 2007**EVALUATION INSTRUMENTS**

1. Clinical Interview, including psychosexual interview, 4.5 hours
2. Millon Clinical Multiaxial Inventory – III
3. Multiphasic Sex Inventory – II
4. Hare Psychopathy Checklist-Revised
5. Static-99
6. Sexual Violence Risk - 20
7. Review of documents provided by defense counsel
8. Review of file made available by the Washoe County District Attorney's Office

REASON FOR REFERRAL: Michael Botelho was referred for post-conviction psychosexual and risk assessment by defense counsel, Mary Lou Wilson, Esq. On December 22, 2003, Mr. Botelho was convicted of one count of kidnapping in the first degree and three counts of sexual assault on a child for acts on August 7, 2003 involving kidnapping a 14 year old female victim (DOB 11/8/88) and engaging in various acts of sexual assault, including forcing the victim to perform fellatio upon him, subjecting the victim to cunnilingus, and subjecting the victim to vaginal intercourse with his penis. He was sentenced on February 11, 2003 and was serving his sentence at the Lovelock Correctional Center.

REVIEW OF DOCUMENTS: Documents suggested that on August 7, 2003, a 14 year old female victim, presented to the Carson-Tahoe Hospital with her mother pursuant to a sexual assault by defendant, Michael Botelho. The victim described to authorities that one month prior, she and her mother had put an ad in the local Carson City "Buck" paper, advertising her services as a babysitter. One week later, she received a call from a male subject who identified himself as "Kevin" and claimed to live in Gardnerville. She stated that he inquired about her babysitting for him in a couple of weeks, stating that his children would be visiting during that period. Two weeks later, on Wednesday, August 6, 2003, he called her and told her he would probably need her services on Thursday, August 7, 2003, would call her by noon to confirm if he needed her on Thursday, and would definitely need her to babysit on Friday, August 8, 2003. Early Thursday morning, he called and told her that he did need her to babysit for him and would pick her up by noon and for her to wait for him at the end of her driveway. He later called, said he was at Olsen Tire getting something fixed on his car, and asked her to walk down toward Olsen Tire and he would come pick her up because he didn't know the exact address.

A male drove up to her in a dark red colored utility type vehicle and the two confirmed their identities. She got into the back seat, which had towels covering the seat. The victim described that the male drove towards Carson City, then headed northbound, then drove eastbound toward Washoe

Lake, and then drove on dirt roads to a remote location past a farm. He stopped the car and got out to supposedly check a flat tire. He came around to her side of the car, opened the back car door where she was seated, reached into the car, and leaned across her to reach in the back of the vehicle claiming he was looking for gloves. He then suddenly sat down on her lap, proceeded to put duct tape over her eyes, and then he started to suck on her breasts at which point she started to scream. He punched her in her lower stomach area and told her shut up as he started to put duct tape over her mouth. She complained that she couldn't breathe, so he took the tape off her mouth. He tried to put duct tape around her wrists and tape them together but she fought back. He then made her kiss him and touched her breasts. He told her he was going to put something in her mouth and told her to suck it. She asked him why, but he told her shut up and just put it in her mouth. He put his penis into her mouth. He then told her to remove her pants, which she did. He then removed her shirt and bra. She took her pants off and he removed her underpants. He then did "the thing," which she later described as he putting his penis inside her vagina. She was crying and told him that it hurt. He told her it always hurts the first time. She believed that the male ejaculated inside her.

When the male assailant was finished sexually assaulting her, he told her to get dressed. He then told her he wasn't sure if he should take her home or keep her with him at his home for the night. She begged him to take her home, telling him that he should trust her because she has lied in her life or never broke a promise and she had a sick cat at home. The male agreed to drive her home, but threatened that if she told anyone what happened, he would find her and do a lot worse to her after he got out of jail. He told her that nobody would believe her. He also told her that if she told anybody, he would take a day off from work and sit in front of her house and see where she goes. He told her that he didn't have any children and that the car they were in was not his. The male drove her to the corner of Carmine and Dori and dropped her off. She went home, called her mother, and disclosed the sexual assault to her mother.

SART examination at Carson Tahoe Hospital noted that the victim had redness around her eyes consistent with having duct tape placed over them; pain on her shoulders, upper abdomen area, and lower abdomen area; and red marks on her wrists consistent with tape. Initial exam noted abrasions at five and six o'clock on the child's vaginal area, blood around the cervix, and non-motile sperm deposits. A second exam noted two lacerations and redness to the posterior forchette of the child's external genitalia, redness on the inter aspect of the child's labia minora bilaterally from four o'clock to seven o'clock, blood on the right side of the vaginal vault, and bruising to the vaginal orifice tissue. Sperm DNA analysis suggested that Michael Botelho was the assailant.

On September 10, 2003, Michael Botelho, who lived in Yerington or Dayton, and not Gardnerville, was located and identified as the assailant in that he had used his wife's cell phone. On September 16, 2003, Mr. Botelho was located in Susanville. He was with his wife and children and had changed his appearance. During interview Mr. Botelho described that he had left the area after being initially contact by authorities, to think and because he had been advised by two attorneys to leave the area and work so that he could earn enough money to hire an attorney. He alleged to have spoken with somebody from the Carson Plains Market about a babysitter and that he had talked to a babysitter about babysitting for them because he needed a babysitter to take his wife out to dinner. He could not explain why he picked the babysitter up on the date in question as he actually worked that evening. He claimed that he did not know where he was going to take the girl to go babysit because he could not remember. He stated, "I feel like something happened by I don't know, I don't feel good about any of it." He stated that he did not remember where he had driven the babysitter, could not remember if he had sexual intercourse with the babysitter, and did not remember using duct tape on the babysitter.

MENTAL STATUS EXAMINATION: Michael Botelho, a 45 year old male, was generally cooperative and respectful but mildly guarded and potentially not fully disclosing about his sex offense behavior. Physical presentation was generally normal. Affect ranged from normal to anxious. Mood was mildly depressed. He described his mood as, "Tired and stressed out." He denied present suicide or homicide ideations. He endorsed passive suicide ideations one year ago absent intention or plan, involving feeling very sad and thinking that if his present wife left him he would have nothing left to live for. His monthly visits from his wife kept him going. Thought process was focused. Thought content was absent psychosis.

CLINICAL INTERVIEW

DEFENDANT'S ACCOUNT OF ALLEGED SEX OFFENSE: Michael Botelho stated that he initially searched the "Buck" newspaper with the intention of genuinely finding a babysitter to take his wife out during the time that his older children were coming to visit. Such was to be a surprise for his wife since the couple had not utilized a babysitter since their two children were born. When asked why he gave a false name of "Kevin," he denied that he had stated his name was Kevin and that he may have said his name was "Todd" because his middle name is Todd and he is called Todd. He stated that he made plans to pick up the babysitter at noon on Thursday, August 7, 2003 and take her to his home in Dayton to meet his wife and two children, return her to her home, and then pick her up on Friday so that he could take his wife out to dinner at her favorite restaurant, Trader Dick's at John Ascuaga's Nugget. When it was noted that the victim had stated that she had been given the impression that she was going to be babysitting both Thursday and Friday and that she had said nothing about merely meeting his wife and children on Thursday, he insisted that such was his plan. When confronted with the fact that on the Friday he alleged he was going to take his wife out to dinner, I was aware that he worked from 3:00 p.m. to midnight, he stated that on Friday nights the shop usually closed early and he got off work at 10:00 p.m. When confronted about making such later dinner plans involving a long commute from Dayton to Sparks, he claimed that Trader Dick's seated people until 11:30 p.m. and so he anticipated arriving prior to that time and then spending the night at the Nugget with his wife. When it was noted that the victim had stated nothing about babysitting plans involving spending the night, he insisted that such was his plan.

In his statement attached to his January 13, 2004 Presentence Investigation Report (PSI), Mr. Botelho wrote: "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 me (my wife and I) but somewhere along I (*sic*) 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. . . . Then I at some point just acted out my pathetic fantasy. . . . I had this stupid fantasy about being with a babysitter and I let it get away from me and obviously did what I did. . . . I had this stupid fantasy for yrs." When the inconsistency between this statement and his present insistence that his initial plan was for babysitting absent any attempt to carry out a child rape fantasy, he claimed that he had written about having had such a fantasy because of the insistence of law enforcement that he had such fantasies based on what his second wife had told them. He denied having actually had such fantasies.

Mr. Botelho described that he picked the babysitter up at about 10:30 a.m. that Thursday, August 7, 2003. When he saw her, she looked to be around 15 years old and just short of her 16th birthday. He denied that he felt aroused when he initially saw her. As he drove, he started asking her questions about babysitting. He asked her about boyfriends and she said he has boyfriends and goes four-wheeling with them. Mr. Botelho stated, "That when I started to get stupid. That's when I

deviated from the plan and started driving through the hills." When asked what thoughts and feelings he had at that time, he stated, "I don't know." When the victim asked him why they were driving in that area, he told her that it was the way to his home.

He continued with the topic of boyfriends and she disclosed making out and four-wheeling with a lot of boys in the area in which they were driving. Mr. Botelho noted, "That's when I started to get aroused in my head." He assumed that she was sexually experienced: "I thought she must have had sex and liked to have a good time and I wanted to take advantage of that.... I thought she might be inclined." He noted that at that time, he thought the following: "I'll just see if she wants to do something... see what happens, see if we end up doing anything." When asked what he had hoped they would end up doing, he stated, "I don't know. Kissing, touching, making out."

Mr. Botelho described that when he ran over a rock, he used it as an excuse to stop the car, look at the tire, and "see what would happen." He opened the door to the back passenger-side seat in which she was seated and claimed that he wanted to get gloves to feel around the tire. In hindsight, he stated, "That's when I thought, what the hell, let's see what happens." He leaned over her to get the gloves and rubbed up against her: "That's when I got excited."

Mr. Botelho described that he straddled the victim and tried to kiss her. She hit him, he grabbed her arm(s), and she started screaming. He grabbed the duct tape which he claimed was coincidentally on the floor board and put it on her mouth. When asked if he put it on her eyes as she had alleged to authorities, he thought he had put it on her mouth but later recalled that he had duct taped her eyes as well: "All I wanted to do was calm down.... By then, I already had lost control." He acknowledged that as the victim struggled, his arousal increased: "The more she struggled the more I got into that." He asked her to take her shirt off and she did. He took her bra off. He kissed one of her breasts: "That's when I started getting excited... an erection started." I asked her to take her pants off. She took her pants off. One of the two of them took her panties off. He told her to lay down in the car. She fought him so he tried to duct tape her hands but was unable to accomplish this. When asked if he punched her in the stomach as she had described, he did not recall having done this. At some point, he took the tape off her mouth because he wanted to kiss her while having sex.

In hindsight, Mr. Botelho stated, "I looked at her thinking how pretty she was and that I wanted to have her." He described that he kissed her vagina but did not penetrate her vagina with his tongue. He denied that he put his penis into her mouth as she alleged, although in his written statement attached to the PSI report, he wrote, "I then asked her to open her mouth and I put myself in her for maybe 30 seconds..." She said that she hadn't had sex before. He stated, "I remember being excited but not really hard so it was difficult to do it and wasn't very long. I remember being on top of her and remember her crying." At some point she said it hurt and he told her it hurts the first time. When he ejaculated, "It was like a light came on. I realized I just raped her and she's lying there crying." He described that he got teary eyed and told the victim, "Sorry, sorry, sorry." He handed the victim her clothes and helped her get dressed. He removed the duct tape from her eyes.

Mr. Botelho asked the victim not to tell anyone, "Please don't tell anyone." He denied that he said that he didn't know if he would take her home or keep her with him as she alleged to authorities. He could not recall if he threatened to sit outside her home. He drove her near her home, let her out of the car, and asked her if she was okay. The victim responded that she was alright and gave him a weak smile: "It made me feel a little better and hopeful that she wouldn't tell." He said that he would call her the next day to make sure she was alright, although the victim did not report this to

authorities. She asked him about a hair clip that must have fallen into his car. He told her that if he found it he would return it to her.

Mr. Botelho reported that after raping the victim and dropping her off, "I was not feeling real good about myself and hoping she was going to be alright. What did I just do? Why?" He did not initially tell his wife. When police called, he felt scared and nervous. He called two attorneys and both advised him to not present to police absent an attorney. Since he could not afford an attorney, he took the advice of one attorney who allegedly advised him to leave the state, work until he earned enough money to hire an attorney, and then present to police with an attorney. Mr. Botelho told his wife that he was in trouble and had done something wrong. He went to Idaho, worked for three weeks, but was not paid by his employer. He ran out of money, decided to come home, and told his wife, sister, and brother-in-law what he had done. His wife wanted him to leave the country. His sister and brother-in-law advised him to turn himself in. He took the latter advice, drove to Reno, and was arrested in a hotel in Susanville.

In Reflection of the Sex Offense Behavior, Mr. Botelho described, "How small can a man feel? It doesn't matter what kind of excuse you have...it still happened and you can't take it back....I wouldn't want anyone to do it to my kids or my wife, and yet I did it to somebody else. Never in my wildest dreams did I ever think I'd do this." He insisted that his sex offender was atypical of his usual responsible behavior and was the result of surmounting stress in this life the past several years (see *Present Marriage* section): "It was unbearable. For what's it's worth, I think I cracked. Depressed, tired, sick, not enough sleep." When he was educated that such behavior does not merely arise from stress but from sexually deviant interests and power and control issues, he stated, "In my mind when I look at what happened, it looks like that's what happened. But in my life and in my marriage, it's not that way at all."

Mr. Botelho had mixed emotions regarding the victim. On the one hand, he appreciated that he victimized the 14 year old girl he raped: "She didn't ask for it. She didn't see it coming." On the other hand, Michael Botelho harbored negative feelings toward the victim. He reported that someone is sending him newspaper clippings regarding the victim, but he does not know who is sending him such mail since there is a return address but no name. The newspaper clippings have included the fact that the victim was on the Maury Povich show talking about the sex offense and that the show subsequently paid for her to attend modeling school. He stated, "She said a lot of things that are not true. It makes me upset that she has to exploit what actually happened....She is now telling people she can't have children due to the assault. It's not true....Two wrongs don't make a right." He claimed that a family member had investigated her Mary Povich appearance and he had learned that the victim had allegedly made initial contact with the show, which further bothered him. He did not consider that it was positive that the victim could attain positive experiences from the negative experience he had exposed her to.

Present Incarceration and Treatment at the Lovelock Correctional Center: During the past two years at the Lovelock Correction Center, a few times he has attended Sexual Compulsions Anonymous groups run by the inmates. He has gone to only a few groups because he felt overwhelmed by some of the stories told by other inmates, particularly stores of men sexually abusing infants. He reported that he has recently spoken to mental health staff about being placed on the waiting list for the sex offender treatment program. If it would help him to obtain a shorter sentence, when returned to the community, he was willing to undergo chemical castration.

Consultation with mental health staff at the Lovelock Correctional Center revealed that prior to January 2007, sex offenders were not eligible for their two-year long sex offender treatment program until two years prior to parole eligibility or two years prior to completing the term of their sentence in order to facilitate their return to the community. Considering such criteria, Mr. Botelho has not been eligible for sex offender treatment until recently. As of January 2007, all sex offenders are eligible for sex offender treatment regardless of their parole eligibility or completion of the term of their sentence. However, due to supply and demand, there is a lengthy waiting list for such treatment. Mr. Botelho's chart did not indicate that he had expressed interest in being on the waiting list, but at the time of evaluation, he described having spoken to staff about such.

RELEVANT PERSONAL HISTORY

Family of Origin: Michael Botelho was born on June 10, 1971 in Honokaa, Hawaii. His family moved to Nevada in 1970/1971 and he lived in the Smith Valley area thereafter. Mr. Botelho was raised with both parents in the home, the oldest of five siblings. When asked about his childhood, he stated, "Everything I've done I've always been wrong." He referred to having been the victim of emotional/verbal abuse and physical abuse at the hands of his father and having been the sole sibling to have suffered physical abuse. His father, who was a mechanic, would hit him several times a week with a gasoline hose or belt such that he sustained bruises, welts, and bleeding and at times could not wear shorts due to the severe bruises. The physical abuse stopped at about age 15. Emotional/verbal abuse was in the form of repeatedly pointing out and commenting on what he did not do well enough. His mother would at times try to protect her son from the physical abuse by asking her husband to stop, but she was merely ignored. Mr. Botelho described that from age eight throughout adolescence, "My dad was a mechanic and I was his slave." He was expected to work daily after school when he was not involved in sports and every weekend. None of his siblings were expected to work as he was expected to work.

Mr. Botelho described that his father's maltreatment continued into adulthood. When he was 28 years old, his father once hit him with a two-by-four. When he was 35 years old, he and his brother worked for their father and also served as volunteer EMTs. Once, when the brothers were called to a fire, he fired Mr. Botelho for having left work but did not fire his brother who had also left work to help with the fire. Mr. Botelho stated that presently, "I love my dad but I hate my dad. I don't hate my dad. When I was hit, I would ask, 'Why me?' I felt hurt and angry." He denied that he felt angry at his mother for not protecting him, reasoning that she did not the best she could. He stated that he loves his mom and she has always helped him.

Mr. Botelho denied that he was victim of sexual abuse, witness to domestic violence, and parental substance abuse.

Education History: In 1980, Mr. Botelho graduated from Smith Valley High School. From 1981 to 1983, he attended Sacramento City College and Sacramento State College, working toward a degree in criminal justice.

Service, Employment, and Volunteer History: In 1980, Mr. Botelho joined the U.S. Marine Corp but he was medically discharged due to chronic leucopenia. As a child, adolescent, and young adult, Mr. Botelho worked as a mechanic with his mechanic father. From 1995 to 2003, he worked union six to seven months a year doing pitwork, highway work, truck mechanics, and loader operation. When he was not working seasonally, he would receive unemployment. At the time of his sex offense, he had been employed as a mechanic for Granite Construction.

From 1985 to 1992/1993, Mr. Botelho belonged to the Smith Valley Volunteer Fire Department, for which he trained as an emergency medical technician.

Major Medical Problems: From age 6/7 to the present, Mr. Botelho has had chronic leucopenia, which is a decrease in the number of white blood cells in the blood which consequently makes him susceptible to infection and blood poisoning. In 1992, he was diagnosed with non-Hodgkin's lymphoma pursuant to which he underwent surgery and six months of chemotherapy. When initially incarcerated, he was prescribed medication for sleep. Presently, he takes no medications.

Alcohol/Substance Abuse History: Mr. Botelho described that at about age 17, about once a week, he and a group of friends would split a case of beer. After high school until the time of his offense, he would typically consume alcohol in moderation, drinking a couple of beers on a weekend evening. Once a year, during the superbowl game, he would consume alcohol to excess with friends. The day of the offense, after what he described as "a bad night," he consumed a couple of beers in the morning which was atypical for him. He denied that he was intoxicated at the time of the sex offense. In terms of drug use, he tried marijuana once in high school and tried cocaine once in college. He has used no other drugs.

Mental Health History: Mr. Botelho described that with his first two wives, he briefly engaged in marriage counseling. When diagnosed with non-Hodgkin's lymphoma in 1992 and undergoing chemotherapy, he saw a counselor to help him cope with his illness and treatment. At the Lovelock Correctional Center, during initial mental health assessment, April 19, 2004, he endorsed feeling depression or sadness, anxiety or nervousness, sleep difficulties, and a drinking problem, but in general his mental status was perceived to be within normal limits.

Prior Criminal/Institutional and Other Antisocial History: Presentence Report, January 13, 2004, revealed two prior convictions: 1) 1992/1993: Felony conviction for false insurance claim for benefit for which he received three years probation, community service and was honorably discharged; 2) 1999: Misdemeanor battery domestic violence for which he was jailed for three weekends, paid a fine, and completed community service. Mr. Botelho described that he had two domestic battery convictions. The first was in 1992. He and his second wife got into a mutual physical altercation and he took responsibility because his wife was pregnant at the time. The second was in 1999. His third/current wife slapped him, he slapped her in return, and his sister called the police. He turned himself in and pled to the offense.

Weapon History: Mr. Botelho was raised with hunting rifles as a child, until the age of 19/20. As an adult, he has had BB guns to scare away cats and rabbits that go onto his property. A weapon was not utilized in the present sex offense.

Relationship and Sex History: Mr. Botelho first discovered masturbation at around age 14. As a teen, he masturbated almost daily. As an adult, he has masturbated about four or five times a month. Sex fantasies he used while masturbating as an adult having typically involved memories of sexual experiences with his present or past wives or other special happy memories with his partners. Despite having engaged in sexual assault of a 14 year old female child, he denied that he has ever harbored fantasies of forcible rape behavior.

His first wife, Melissa Botelho, alleged to a sheriff detective on January 8, 2004, that her ex-husband harbored fantasies of forcible rape behavior involving young girls: "Michael's key fantasy was to kidnap a young girl and be it...you know, twelve, thirteen years old and uh...find some place

to keep her and, basically, just have his way with her." When asked to be specific about his fantasies she added, "Wells, it was, you know, beatin' 'em up, havin' his way with 'em, you know, uh... kind of, in a sense, maybe torturing 'em a little bit. Um, you know, them, you know, kinda' beggin' and pleadin'...." She added, "He just wanted a young girl. Somebody who... who had not been touched yet. Who had not had sexual intercourse with anybody. Still a virgin." She described that he would express these fantasies when he wanted to have sex and while he was in the midst of engaging in sex to potentially arouse himself during sex. She claimed that his sex fantasies progressed from "being in a bed type of thing to get him off to a conversation around the house." She claimed that he asked her if she would help him act out these fantasies.

When addressing his second wife's statement, he insisted that her allegations were lies and that he had never disclosed such sex fantasies to her. He considered that once he and his wife had talked about the Singleton rape and mutilation and she may have erroneously thought he was disclosing a fantasy. Mr. Botelho noted that if his present wife were to be interviewed, she would confirm that he has never expressed such fantasies to her.

Mr. Botelho described that he and his second wife met when he was 24 and she was 17 years old and they mutually harbored sex fantasies involving a three-some and would talk about including various female friends of hers in such a three-some although they never engaged in a three-some. When the couple's children were 2 ½ and one year old (he would have been 31 and his wife would have been 24), his wife mentioned including her friend, their 15 year old babysitter, in a three-some. He also talked about this possibility but the couple never engaged in this three-some arrangement. When Mr. Botelho was advised that in the State of Nevada, such would have met the criteria for Statutory Sexual Seduction, he stated to have been unaware of such.

He claimed that a few years prior to the present sex offense, his present wife said something to him that rekindled his fantasies about a three-some. When he asked her about such, she stated that she may be open to the possibility. He thought of someone young to consensually join them in sex. When asked how young, he stated that someone younger than his wife but not a child. He denied that this fantasy was related to the sex offense.

When advised that research has shown that sex offenders harbor sex fantasies consistent with their sex offending behavior and so I already knew that he likely harbored sex fantasies involving forcible rape behavior and children, he continued to deny having such fantasies. He claimed that apart from having considered having sex with his former 15 year old babysitter when he was 31 that he has never harbored another sex fantasy involving a child or adolescent.

In terms of other sex fantasies and behavior, Mr. Botelho denied having harbored voyeuristic fantasies but when of high school age, he once peeped in on one his sister's best friend while she was changing into a bathing suit. He denied having harbored fantasies or engaged in sex behaviors involving exhibitionism, boys or men, bestiality, obscene phone calls, cross-dressing, sexual fetish, and netsex. When he had handcuffs in the Marine Corp, he once proposed to his first wife that they use the handcuffs during sex, but she was not interested. He denied that he has harbored other sex fantasies about or engaged in sex behaviors involving sadistic or masochistic sex. Although he tied the victim up with duct tape during the sex offense, he denied that he harbored sex fantasies involving tying someone up during sex. At age 16, he harbored sex fantasies about a 17 year old female cousin. He denied other incestuous fantasies and has never engaged in incestuous behavior.

Mr. Botelho has viewed Playboy type magazines on rare occasion either at work and once in prison. He once viewed an X-rated video. He has viewed Internet pornography that has popped up on his computer about three or four times. He has not viewed other pornography. He denied having ever viewed child pornography.

Mr. Botelho first started dating at age 16, girls his same age. He first touched another person in a sexual way at age 14/15, a girl his same age. He first had sexual intercourse at age 17 with an 18 year old female. As an adolescent, he had two sex partners. As an adult, age 18 to the present, he has had ten sex partners – three wives; two girlfriends; four casual friends; the 14-year old victim; no one-night stands; and no prostitutes. When in a committed relationship he has been unfaithful twice – once when married to his second wife after she was unfaithful; and once with the victim when married to his third wife.

In terms of relationships, Mr. Botelho has been married three times. His first marriage was from 1982 to 1984 when he was age 21 to 23 and his wife was age 20 to 22. The marriage ended because the couple had nothing in common and he perceived that his wife was “a rich girl with an attitude.” Mr. Botelho described that his second marriage was from 1989 to 1992/1993, to Melissa Botelho. During detective interview with Ms. Botelho, she reported that they were married 1991 to 1995. Mr. Botelho described he and his wife married when she became pregnant. During their marriage, they engaged in “two knock down drag out fight” which he claimed they both mutually engaged in. To detectives in 2004, Ms. Botelho described, “Well, he beat me up on numerous occasions. His mother was even a witness to a couple of times. She was even the one that called the cops on us. And that was right after my first son was born.” He described his wife asked for a divorce after he discovered that she had engaged in three affairs with people at work. In 2001/2002, his second wife told him that his first born son was actually her boss’ son. Apparently, his sister and mother knew about this but had not told him.

Present Marriage. Mr. Botelho’s third marriage is to Marilou Botelho, 1997 to the present. He and his wife met in Hawaii when he was 36/37 and she was 32. At the time, his wife lived in the Philippines and was educated and employed as a physician, having gone to eight years of medical school. After their initial meeting, the couple corresponded for eight months. When he was seasonally laid off, he went to the Philippines, proposed, and the couple married in the Philippines in 1997. He returned to the United States, his wife joined him in 1998, and within a year or two she became a U.S. citizen. Mr. Botelho described that although he was generally happy in his third marriage, the marriage was thwart with challenges:

- Considering her distinct cultural heritage and the fact that she was the youngest child who cared for her aging parents, his wife interacted with him in a one-down position. She would cook and clean for him, but never sat down to eat a meal with him. She had been raised to cook for her family, clean up as the family ate, and then eat after the rest of the family had eaten dinner. He told her that it felt like she was his maid or slave rather than his wife, but she reasoned that this was the way she was raised. The couple ate together only when they went out to dinner. When in public, his wife would walk behind him and he did not like this.
- During the couple’s first five to six years of marriage, his wife miscarried twice, her father died, and their two children were born.
- During the marriage and consistent during the ten years preoffense, he would drive from Yerington to Reno, 1 hour and 45 minutes each way, work 10 to 18 hour days, and at times work a total of 110 hours a week.

- To decrease his commute, during the 1 ½ years preoffense, he built a house in Dayton and spent all his nonworking hours building the home. During this period of time, he would come home to Yerington Sunday night only and so did not see his wife and children otherwise. The house was completed May or June 2003.
- During the years preoffense, he had significant financial struggles, including his second wife falsely reporting him to the IRS for back child support payments that he did not owe.

Mr. Botelho described generally satisfactory sexual relations with his wife. When he was not working, the couple would engage in sexual relations about two or three times a week. When he was working and home only on Sundays, the couple engaged in sexual relations once a week. Although their sexual relations were described as generally satisfactory, they were challenged by a couple of things. First, after his non-Hodgkin's lymphoma-related chemotherapy in 1992/1993, Mr. Botelho has experienced decreased sexual desire and occasional orgasmic dysfunction. Post-chemotherapy, he has needed more foreplay to obtain an erection and his erections are less firm. About ten times he has not been able to obtain an erection and/or ejaculate during sex. He has felt self-conscious about his sexual challenges, but his wife has been supportive. Additionally, his wife is self-conscious about the fact that she is 5 feet, 9 inches tall, "too tall" for her Philippine culture, and is flat chested. He chuckled that considering his wife's flat chest, he has felt badly for both of them, although this has not been a significant issue for him. He noted that the victim's breast-size "put his wife to shame." His wife is currently living in Carson City and works at the Carson Tahoe Hospital as a medical technician.

When asked how his wife reacted to his sex offense, he noted that she was mad at him and questioned why he did it, including asking him, "I don't satisfy you? I'm not pretty enough?" When she saw the victim in court, he asked her if he had raped her because she was flat chested and the victim was pretty and well endowed. His wife has remained in the marriage because, "For better or for worse means something." She visits him once a month at the Lovelock Correctional Center. They talk on the phone regularly. If/when allowed to return to the community, he and his wife talk about relocating to the Philippines because both feel ashamed to remain in the same community.

Children. Mr. Botelho has four sons. His first two sons are Brian, age 16, and Cody, age 14. His sons live with their mother, his second wife. With his third wife, Mr. Botelho has two younger sons, Lance, age 6, and Todd, age 4. During the past two years, his younger sons have lived in the Philippines with their mother's family while she has remained in Nevada to work and maintain her relationship with her imprisoned husband. He last saw his younger sons two years ago, before they moved to the Philippines. When asked if his second wife has any concerns about him being around the children, he claimed that she has no concerns because she knows that his sex offense was atypical of his behavior. If he were to obtain parole while his children are underage, he is aware that he may have restrictions in terms of contact with his own children and would be willing to abide by such restrictions.

TEST RESULTS: Review of Nevada State Prison Medical Records revealed that on April 19, 2004, Mr. Botelho underwent a mental health assessment that included intellectual screening with the *Shipley Institute of Living Scale*. Testing suggested an IQ score of 98, in the average range of intellectual functioning.

On the *Millon Clinical Multiaxial Inventory – III*, tests of psychopathology and personality, Mr. Botelho produced a valid profile, absent attempt to look good or look bad. Personality-wise, Mr.

Botelho endorsed mild *Avoidant and Schizoid Personality Traits* suggestive of low self esteem, interpersonal/social withdrawal, and interpersonal/social anxiety. He also endorsed symptoms of depression and anxiety with accompanying physical distress in response to psychological distress, likely in response to his present incarceration and legal situation, although possibly reflective of more chronic depression and anxiety.

The *Multiphasic Personality Inventory – II (MSI-II)*, a test of psychosexual functioning, was administered. It's normative samples includes a census matched sample of nearly 2000 adult male sex offenders from state prisons, state hospitals, mental health centers, probation services, and private clinicians throughout the United States, and a census matched comparison sample of "normal" adult males. Validity measures suggested that he omitted a high percentile of items and was guarded and evasive. In fact, when he mailed the test back to this investigator, he included a 7-page single spaced letter that included comments on the many questions he was hesitant to answer, although any person could have answered such questions. He attempted to look good and to appear asexual. Although his testing may be interpreted, his overall test results tend to be suppressed and minimized such that there is likely more to know about him.

Despite having been referred for rape of a child, Mr. Botelho was low in his level of self-disclosure about his sexual deviance:

- He is only marginally disclosing of having committed sexual assault behavior and lacks understanding of the dynamics involved in his sex offense.
- He denied ever having used fantasies involving a child for sexual arousal, having sought out a child to engage in sexual activity or having acted out molest assault behavior.
- He scored in the low disclosing range on the Rape Scale when compared to the scoring levels of adult male rapists.
- When looking at the stages involved in a sexually deviant act of rape:
 - *Deviant Arousal* – A precursor step in which thoughts of using force and threat to control a victim are empowering and stimulating; in this client's case he either does not recognize or cannot acknowledge ever having been sexually aroused by thoughts or fantasies about rape;
 - *Pre-Assault* – A stalking step in which there is a determined search for a victim to rape; in this client's case, he denied ever having gone out in the community to seek out someone to force to engage in a sex act;
 - *Sexual Assault* – A final step in which a purposeful and willful decision has been made and acted on involving physical assault, force, intimidation, threat to get a victim to capitulate and engage in a sex act; in this client's case, he was only marginally disclosing of having acted out rape assault behavior.
- He minimizes his past obsession with sex.
- He denies or does not recognize the scheming/planning strategies he engaged in to minimize the risk of getting caught.
- He avoided answering questions assessing his recognition of the excitement involved in his sex offense, which admitting sex offenders can answer.

When assessing the depth of his sex deviance attributes as compared to specific groups of sex offenders, the following results were obtained:

- The Molester Comparison Scale suggested that his thinking and behavior is average or similar to that of a reference group of adult male sex offenders who manipulate, rather than force their child victims.
- The Rapist Comparison Scale suggested that his thinking and behavior is moderate or not similar to a reference group of adult male sex offenders who primarily use force during a sexual assault.
- Results suggest that Mr. Botelho is more likely to evidence distorted cognitions (thinking errors) and sexual attitudes more similar to molesters of children than to rapists of children.

When assessing Mr. Botelho's accountability and ability to take responsibility for his sexual behavior, he uses justifications and excuses to keep from accepting full accountability for his sexual assault behaviors. He reported he had no plan, made a mistake, slipped one time, it was an accident, and he does not know how the sex things happened. He believes the allegations made against him have been exaggerated and uses rationalizations commonly found with sex offenders. He attempts to explain it away by indicating it was because he is imperfect, was mixed up, stressed, depressed, and had too much alcohol.

Results suggested that Mr. Botelho has emotional and/or behavioral problems which may have facilitated his forcible rape behavior. He is highly inclined to experience apprehension and anxiety when in the company of adult females. It appears that at the core of his social tension is the fear of being embarrassed and being seen as socially inadequate. There is some indication that he may tend to associate a need for action and/or feelings of loneliness with his sexual impulses and desires. He has very limited information about sexual anatomy and physiology. Results also suggested a history of family violence.

In terms of *sexual functioning*, Mr. Botelho indicated that he is heterosexual in sexual orientation and has been devoid of basic libido urges and drives for a period of years which is highly unusual. He does not report paraphilia interests or behaviors involving bondage/discipline, inflicting sexual humiliation or pain on others, or sexual masochism. He noted that he has always known it is wrong to either force someone to have sex or to engage a minor in sex.

The *MSI-II* assessment for treatment candidacy or amenability suggested a potentially positive response to treatment in some respects. There is the necessary acknowledgement of having committed a sex offense. He shows some contrition for his behavior, i.e., feeling sorry for the victim, feeling guilty about his behavior, and believing it to be his worst mistake. He recognizes he needs treatment and appears to be motivated for treatment. If he is to be involved in treatment, there are some concerns about his amenability. For instance, he was guarded on testing and if this sample of behavior carries over into treatment he may try to minimize and deny his sexual problems and avoid change. He uses many justifications and rationalizations for his offense behaviors and to the extent he holds on to these excuses the less likely he is to change. He omitted a significant number of sex deviance items that could have been answered by anyone, which is another way of avoiding being truthful to others and himself. But overall, he presents as a viable treatment candidate.

The *Hare Psychopathy Checklist-Revised (PCL-R)* suggested that Mr. Botelho is not a psychopath. He does not have a pattern of callously, selfishly, and remorselessly using others to meet his needs nor does not live a chronically unstable and antisocial lifestyle at the level of psychopathy. In convicted sex offenders, psychopathy is a reliable risk marker for sexual reoffense.

Two empirically-devised risk assessment instruments – *Static 99* and *Sexual Violence Risk – 20* (SVR-20) – were used to assist in making a clinical prediction about the defendant's chance of sexual reoffense. These instruments are not definitive measures of sexual recidivism and have no absolute predictability. Instead, they are useful tools to identify aggravating and mitigating factors used to make a decision about the level and type of intervention that an individual might require to ensure community safety. Most offenders who score in the *low* risk range and many who score in the *moderate* risk range can be safely supervised and treated in a community setting. Offenders who score in the *high* risk range generally require incarceration to protect the public.

The *Static-99*, which looks at static or unchangeable factors only, and the SVR-20, which looks at both static and dynamic or changeable factors, both suggested that Michael Botelho poses a moderate-high risk of sexual reoffense. His present level of risk in both measures is generally the same as it would have been at the time of sentencing considering that there has been little change in the dynamic or changeable factors. Mitigating and aggravating variables contributing to lower or higher risk of sexual reoffense are noted in the conclusion section.

DIAGNOSIS

Axis I (Clinical Disorder):	Sexual Abuse of Child (2003 Offense) Provisional Sexual Sadism (Aroused by Rape) Adjustment Disorder with Mixed Anxiety and Depressed Mood Rule Out Dysthymic Disorder (Chronic Depression)
Axis II (Personality Disorder):	Avoidant and Schizoid Traits
Axis III (Medical Disorder):	Self-report suggested history of non-Hodgkin's lymphoma with s/p surgery and chemotherapy, 1992; changes in erectile functioning potentially due to chemotherapy in 1992; chronic leucopenia
Axis IV (Psychosocial Stressors):	Imprisonment; facing a long prison term; amidst legal proceedings; separated from wife and children; no current access to sex offender treatment
Axis V (Global Assessment of Functioning):	59 (Moderate symptoms or moderate difficulty in functioning)

CONCLUSION AND CLINICAL IMPRESSIONS: Michael Botelho was referred for post-conviction psychosexual evaluation by defense counsel, Mary Lou Wilson, Esq. On December 22, 2003, Mr. Botelho was convicted of one count of kidnapping in the first degree and three counts of sexual assault on a child for acts on August 7, 2003 involving kidnapping a 14 year old female victim (DOB 11/8/88) and engaging in various acts of sexual assault, including forcing the victim to perform fellatio upon him, subjecting the victim to cunnilingus, and subjecting the victim to vaginal intercourse with his penis. He was sentenced on February 11, 2003 and was serving his sentence at the Lovelock Correctional Center.

Mr. Botelho's sex offense is his sole sex offense conviction. He admitted culpability to the present sex offense, although he is not aware of or chooses not to admit the deviant sexual arousal and scheming/planning that precipitated his sex offending behavior. He preferred to give the impression that his initial intention was to utilize the victim's babysitting services and that upon picking her up and potentially due to stress, he "cracked up," deviated from the plan, and raped her absent prior intention, plan, or sex fantasies involving rape or children. Mr. Botelho described himself as adult heterosexual in orientation absent deviant sexual preferences or paraphilias.

Testing suggested that Mr. Botelho lacks understanding of the dynamics involved in his offense behavior. He utilizes justifications and excuses to avoid accepting full accountability for his sex deviance behavior and to explain away his sex deviance behavior. Testing suggested that he has attributes and behaviors similar to those of known sex offenders who manipulate or molest their child victims rather than use force. He did not present with attributes and behaviors similar to those of known adult male rapists who use primarily force during a sexual assault.

In attempting to understand Mr. Botelho's potential motivation for rape of a child, two research sources are considered. The *Multiphasic Sex Inventory* (MSI, 2000) suggests that although he is unaware of the dynamics related to his sex offending process, Mr. Botelho's sex offense behavior is consistent with the stages involved in a sexually deviant act of rape:

- He has *deviant sexual arousal* involving rape that cause him to feel empowered and stimulated
- He engaged in *pre-assault behavior* to find a victim to rape that fit into his sexual fantasy; and
- He engaged in *sexual assault* involving kidnapping the victim, using force or physical assault including punching her and tying her with duct tape, and threatening the victim

Groth and Bimbaum (1979) proposed a typology of male rapists, used widely by today's forensic scientists, criminologists, and law enforcement. It is important to recognize the limitations of the following typology as it is based on research with incarcerated sex offenders, and a sex offender may not fit neatly into one typology but instead may exhibit characteristics from multiple typologies or none at all. Based upon this typology, Mr. Botelho potentially exhibits characteristics consistent with the power reassurance rapist.

- The power reassurance rapist (gentleman rapist; most common case): Precipitating factor is low self esteem and loneliness; may be described by others as being gentle, quiet, passive, a loner, and socially deficient; assault is premeditated; uses limited force or threat with victim.
- The power assertive rapist: Precipitating factor is a desire to dominate an impersonal sex partner and maintain a macho image; is self-centered and athletic; may have a history of conflict with women; may hang out at clubs, bars, and locations where he finds his victims; assault is impulsive, spontaneous, and unplanned; level of force is moderate.
- The anger rapist (retaliatory rapist): Precipitating factor is perceived injustice at the hands of women and animosity toward women; sees self as athletic and masculine; personality is explosive and impulsive and may have prior aggressive/violent arrests; often a substance abuser; may have a history of domestic abuse; attack is spontaneous, brutal, out of anger, in "blitz" fashion, and usually precipitated or triggered by life events (e.g. a fight with a girlfriend or wife not long before the assault); level of force is excessive.
- The sadistic rapist (ritualistic rapist; extreme and rare case): Precipitating factor is need to express sadistic fantasies in that sexuality and aggression are merged; may use bondage pornography; tends to be highly socially competent and compulsive; usually a white male, outgoing, well-liked, happily married, in a white collar job, and with above average IQ; attack is calculated, preplanned, and ritualistic; victim suffers physical trauma to sexual areas.

From a diagnostic perspective, Mr. Botelho's sex offense meets the criteria for *Sexual Abuse of Child* and suggests *Sexual Sadism*, of a mild nature rather than severe nature. However, the latter is considered only *Provisionally*, since it is based on a single act rather than a pattern of behavior.

The *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision*, defines *Sexual Sadism* as follows:

- A. Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving acts (real, not simulated) in which the psychological or physical suffering (including humiliation) of the victim is sexually exciting to the person.
- B. The person has acted on these sexual urges with a nonconsenting person, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.

In his statement attached to the January 2004 PSI report, Mr. Botelho stated that for years he harbored sex fantasies involving a babysitter, although in the present evaluation he denied such. His second wife alleged that he disclosed sadistic sex fantasies involving children while married to her, but he denies this. In the present evaluation he disclosed sex fantasies involving a three-some with his second and third wives. When married to his second wife, this fantasy included a friend of his wife that babysat their children and was 15 years when he was 31 year old at the time. He denied that such fantasies were associated with his sex offense.

Emotional, personality, behavioral, situational, and historical factors may facilitate sex offending behavior although they may not fully explain sex offending behavior. Evaluation suggested several factors which may have potentially fueled Mr. Botelho's forcible rape behavior of the 14-year old female victim:

- Mr. Botelho endorsed a childhood history of victimization that involved emotional/verbal abuse and physical abuse at the hands of his father and failure to be protected by his mother. Such abuse understandably led to feelings of hurt, anger, and hatred that are present to date. As to whether he identifies with his aggressor, his father, warrants consideration. As to whether he harbors feelings regarding his mother's inadequacy to protect him warrants consideration. Such a history can fuel aggressive and violent tendencies and behaviors.
- Mr. Botelho endorsed *mild Avoidant and Schizoid Personality Traits* suggestive of low self esteem, interpersonal/social anxiety, and interpersonal/social withdrawal. He is inclined to experience apprehension and anxiety when in the company of adult females. At the core of his social tension is the fear of being embarrassed and being seen as socially inadequate. There is some indication that he may tend to associate a need for affection and/or feelings of loneliness with his sexual impulses and desires.
- Mr. Botelho reported that pursuant to undergoing chemotherapy for non-Hodgkin's lymphoma in 1992, he has experienced intermittent erectile dysfunction that at times has not allowed him to perform sexually. As to whether such impaired sexual functioning fueled his sex deviance thoughts and behaviors warrants consideration.
- Mr. Botelho reported that the morning of the sex offense, he consumed two beers. Substance use/abuse may be a casual factor in that it increases the likelihood of behavioral disinhibition among individual with deviant sexual arousal patterns; or, those with sexual deviances may deliberately use substances to disinhibit themselves when they are considering sexual violence. As to whether Mr. Botelho purposefully drank alcohol to give him the courage to rape his 14-year old victim warrants consideration.
- Mr. Botelho reported that during the years preoffense, he and his wife were having marital problems. Due to her distinct cultural upbringing he at times felt that she acted like his maid or slave rather than his wife, they saw each other infrequently, and both were self-conscious about their sexuality. He also has a history of relationship instability in prior relationships.

Relationship problems can be risk markers in that they are associated with maladaptive personality traits or sexual deviance and alternatively may restrict an individual's opportunities for appropriate sexual relations.

- Mr. Botelho has a history of violence, including two domestic violence convictions. The present sex offense is his third violence conviction.
- Mr. Botelho noted high stress and possible depression during the months and years preoffense (*Rule Out Dysthymic Disorder*). High stress and depression can fuel sex offending behavior for individuals with deviant sexual preferences in that they may engage in sexually deviant behavior to alleviate their stress and depression. Stress does not cause a person to rape as Mr. Botelho believes. Instead, stress facilitates a person to act out on pre-existing sexual deviance.

At the time of evaluation, Mr. Botelho met the criteria for *Adjustment Disorder with Mixed Anxiety and Depressed Mood*, likely in response to his situational stressors. He did not present with a psychotic disorder or cognitive/intellectual disorder. He did not present as an antisocial or psychopathic individual. Mr. Botelho is thrice married and remains married to his third wife who visits him monthly at the prison. He has four sons, ages 16, 14, 6, and 4; the two older boys live with their mother out of state and the two younger boys live with his in-laws in the Philippines.

Risk to the Community: Pursuant to NRS 176A.110, Michael Botelho does not pose a high risk of sexual reoffense, but poses a moderate-high risk of sexual reoffense based upon a currently accepted standard of assessment. His risk level has been generally consistent from the time of his sentencing to the present. Risk assessment measures suggest that most offenders who score in the *low* risk range and many who score in the *moderate* risk range can be safely supervised and treated in a community setting. Offenders who score in the *high* risk range generally require incarceration to protect the public.

Mitigating factors contributing to *lower* risk for reoffense include:

- Sexual Offense(s)
 - Female victim (no male victim)
 - No prior contact or noncontact sex offenses
 - No use of weapons during commission of the sex offense
 - No extreme minimization or denial of sex offense
 - No attitudes that support or condone sex offense
 - No threat of death during commission of the sex offense
 - Sex offense did not include severe physical harm such as beating, cutting, stabbing, strangulation, torture, mutilation, or killing
 - No evidence of high density or frequent acts of sexual violence
 - No evidence of multiple sex offense types
 - No evidence of escalation in frequency or severity of sex offending behavior
- Psychosocial Adjustment
 - On the *MSI-II*, thinking and behavior is not similar to a reference group of adult male rapists of adults and children
 - Does not meet the criteria for *Antisocial Personality Disorder* or psychopathy
 - Not psychotic and absent serious cognitive or intellectual impairment
 - Average intelligence
 - Denied substance abuse problems
 - Denied present or serious history of suicidal or homicidal ideations

- Denies childhood sexual abuse, witnessing of domestic violence, and parental substance abuse
- Is married and has lived with a partner for at least two years
- Generally stable employment history
- Three or less prior sentencing dates
- Age 25 or older
- Future Plans
 - Has realistic plans for the future to avoid sex offending behavior including being involved in sex offender treatment when such becomes available to him in prison, being involved in follow-up sex offender treatment in the community if/when afforded return to the community, exploring chemical castration, and intent to comply with terms of the court regarding contact with children including contact with his own children
 - The *MSI-II* suggested a potentially positive response to treatment in some respects; there is the necessary acknowledgement of having committed a sexual offense, he shows some contrition for his behavior, he recognizes that he needs treatment, and he appears motivated for treatment
 - On the *MCMI-III*, he was willing to acknowledge psychological problems and did not attempt to look good or look bad
 - During evaluation, he was generally cooperative and respectful
 - He has a support system in his wife

Aggravating factors contributing to *higher* risk for reoffense include:

- Sexual Offense(s)
 - Sex offense meets the criteria for *Sexual Abuse of Child*
 - Unrelated victim
 - Stranger victim
 - Sex offense involved physical harm to the victim while committing the act of sexual violence (punching victim in the stomach and tying her with duct tape)
 - Uses justifications and excuses to avoid accepting full accountability for sex offense; lacks understanding of the dynamics involved in his sex offense
- Psychosocial Adjustment
 - Sex offense suggests *Provisional Sexual Sadism (Aroused by Rape)*
 - On the *MSI-II*, thinking and behavior is similar to a reference group of adult male child molesters
 - Childhood victim of paternal emotional/verbal abuse and physical abuse with unresolved feelings of hurt, anger, and hatred toward his father; inadequately protected by mother
 - Alcohol was associated with the sex offense
 - Relationship problems present pre-offense, with history of relationship instability
 - Has experienced occasional problems with sexual functioning pursuant to chemotherapy in 1992
 - The presence of long-standing depression and anxiety warrants further *exploration (Rule Out Dysthymic Disorder)*
 - Has *Avoidant and Schizoid Personality Traits* which contribute to social anxiety in general and social/sexual anxiety around adult females; he may tend to associate a need for affection and/or feelings of loneliness with his sexual impulses and desires
 - Past nonsexual violent offenses (two domestic violence offenses)
 - Past nonviolent offense (false insurance claim for benefit)
 - No known history of violations of conditions while under supervision in the community; honorable discharge from previous probation

- Future Plans
 - Remains married to the mother of his two youngest children and his wife may not realize the potential risk he poses to their children or other children such that there is concern about her ability to protect their children if he is granted release into the community when they are underage
 - The *MSI-II* suggested that treatment amenability could be challenged if his guardedness in testing, lack of truthfulness to others and himself about his sex offending behavior, and his excuses and justifications carry over into treatment and cause him to be resistant to change or participate superficially.
 - During evaluation, he was mildly guarded and potentially not fully disclosing about his sex offending behavior
 - If/when afforded the opportunity for release into the community, his life situation would likely include a high level of stress

There is one risk factor that is new since his sentencing and it is an aggravating one. This factor is that someone is sending the defendant newspaper clippings of the victim which has caused him to develop mixed feelings about the victim. For the safety of the victim and the emotional health and rehabilitation of the defendant, hopefully such potential harassment will cease. He should address such in his anticipated sex offender treatment.

Probable Nature of Future Sex Offending Behavior and Populations Potentially at Risk: The assumption in most cases is that any future sexual misconduct will mirror the current sex offense. That being the case, if Mr. Botelho were to recidivate, it would likely involve premeditated rape or sexual assault of a pubescent female child with whom he was not formerly acquainted. However, there is more to know about his victim preference. As to whether he poses risk to prepubescent female children, prepubescent and/or pubescent male children, and adult females is unknown at this time. It is recommended that he not have unsupervised contact with prepubescent and pubescent male and female children including his own children until his treatment provider deems that such is appropriate.

Treatment/Rehabilitation Needs, Amenability to Treatment, and Potential Return to the Community: Considering that Mr. Botelho's sex offense at the time of sentencing made him ineligible for probation, as to whether he was a viable probation and community-based sex offender treatment candidate at that time was not an issue. If he had been probation eligible, his moderate-high risk level would have suggested that it was questionable whether he could be safely managed and treated in the community at that time. In Mr. Botelho's case, the issues are:

1. What are Mr. Botelho's treatment needs?

Michael Botelho is in need of comprehensive sex offender treatment. Within the Lovelock Correctional Center, there is a two-year long sex offender treatment program. On January 1, 2007, this treatment became available to all sex offenders and not only those near their parole eligibility or sentence termination. Mr. Botelho has spoken to staff about getting onto the waiting list for the sex offender treatment program.

Mr. Botelho expressed willingness to participate in treatment that involved chemical castration if such would increase his chances of earlier release into the community. Such a treatment option is typically recommended for sex offenders who lack self-regulatory control in the community. Options in chemical castration include being prescribed SSRI antidepressant medications whose

side effects for some individuals include impaired sex drive, or being prescribed Depo Provera which blocks the production of male hormone in the testes that generates sex drive. Sexual recidivism rates have been known to drop from 87% to 2% with chemical (Depo Provera) or surgical castration. If he plans to continue in his marriage to his present wife, such a treatment option would likely impact the marital relationship. As to whether Mr. Botelho is a candidate for such treatment warrants exploration in whatever sex offender treatment program he participates in.

2. Is Mr. Botelho amenable to treatment and rehabilitation while in prison?

Evaluation suggested that Mr. Botelho is amenable to treatment and rehabilitation while in prison, with a potentially positive response to treatment in some respects. There is the necessary acknowledgement of having committed a sexual offense, he shows some contrition for his behavior (i.e., feeling sorry for the victim, feeling guilty about his behavior, and believing it to be his worst mistake), he recognizes that he needs treatment, and he appears motivated for treatment. Treatment amenability could be challenged if his guardedness, lack of truthfulness to others and himself about his sex offending behavior, and his excuses and justifications carry over into treatment and cause him to be resistant to change or participate superficially.

3) Can Mr. Botelho's risk of sexual reoffense be lowered or safely managed?

Treatment can potentially lower risk of reoffense or allow it to be safely managed. Risk of reoffense changes over time as dynamic or changeable risk factors change. Risk factors associated with his sex offense specifically will obviously never change. Most psychosocial risk factors will not change, except for his sexual disorder and maladaptive personality traits, which can be addressed in treatment. The factors which are most likely to change or be managed are those related to future plans, i.e., effective participation in treatment in prison and in the community; willingness to be less guarded, more truthful, and accepting of responsibility for his sexually deviant preferences and the sex offense; educating his wife and other relevant family members; identifying "warning signs" to prompt the offender and case management professionals of the presence of exacerbators to risk; close parole supervision with viable conditions; appropriate residence; no unsupervised contact with children; no substance abuse; employment; manageable stress level, and so forth.

4) Can Mr. Botelho be safely managed in the community in the future?

When the time comes for release into the community to be considered, Mr. Botelho would require a re-evaluation of risk since risk of sexual reoffense changes over time as dynamic or changeable risk factors change. Considering his moderate-high risk level absent efforts to manage risk, if Mr. Botelho effectively participates in sex offender treatment in prison and makes viable future plans to manage the risk of sexually reoffending, he could potentially be safely managed in the community in the future.

Martha B. Mahaffey, Ph.D.

Martha B. Mahaffey, Ph.D.
Clinical Psychologist
Diplomate in Forensic Psychology,
American Board of Psychological Specialties

1 AFFIRMATION PURSUANT TO NRS 239B.030

2 The undersigned does hereby affirm that the preceding document called Notice
3 of Dr. Mahaffey's Psychosexual Report does not contain the social security
4 number of any person.

5 Dated this 30 day of April, 2007.

6 Mary Lou Wilson

7 MARY LOU WILSON

8 Attorney for Mr. Michael Todd Botelho
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1 CERTIFICATE OF MAILING

2 I, Mary Luskilow, hereby certify pursuant to N.R.C.P. 5(b), that on
3 this 30 day of April, 2007, the documents herein was
4 mailed a true and correct copy of the foregoing NOTICE OF DR. MARTHA
5 MAHAFFEY'S PSYCHOSEXUAL EVALUATION IN SUPPORT OF
6 SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST
CONVICTION) addressed to:

7 The Honorable Judge Jerome Polaha
8 Second Judicial District Court, Dept. 3
9 Post Office Box 30083
Reno, Nevada 89520

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

14 Attorney General for the State of Nevada
15 100 North Carson Street
16 Carson City, Nevada
89701-4717

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

CASE NO. CR03P2156

POST: MICHAEL TODD BOTELHO

DATE, JUDGE
OFFICERS OF
COURT PRESENT

APPEARANCES-HEARING

CONTINUED TO

05/11/07
HONORABLE
JEROME M.
POLAHA
DEPT. NO. 3
P. Meacham
(Clerk)
J. Dotson
(Reporter)EVIDENTIARY HEARING

Deputy District Attorney Terrence McCarthy represented the State. Defendant (Petitioner) was present with counsel, Mary Lou Wilson, Esq.. Probation Officer was not present.

Court advised that there are 17 claims named in the petition and the Court will hear argument re: claims 7 and 15 and the supplemental petition.

Petitioner's counsel addressed the Court advising that Dr. Martha Mahaffey is present today and will testify re: her report.

Petitioner calls Dr. Martha Mahaffey who was sworn and examined. Cross-Examination was conducted, no Re-Direct and the witness was excused.

Petitioner rests.

Respondent rests.

Petitioner's counsel addressed the Court arguing in support of the petition advising that Dr. Mahaffey's report may have led the Court to give a lesser sentence if it had been presented during sentencing.

COURT ORDERED: Court finds that the report would not have made any difference in the sentence, the petition is **DENIED**. State's counsel will prepare the order and include the lack of evidence re: prior defense counsel Sullivan in the order.

Defendant remanded to the custody of the Dept. of Prisons.

DC-9900000999-259
CR03P2156
POST: MICHAEL TODD BOTELHO (D. 1 Page
District Court 05/11/2007 03:19 PM
Washoe County MTN
PMF:archdr

ORIGINAL FILED

2007 MAY 31 AM 11:37

RONALD A. HIGHTON, JR.

BY *R. Highton*
DEPUTY

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

* * *

MICHAEL TODD BOTELHO,

Petitioner,

v.

Case No. CR03P2156

JACK PALMER,

Dept. No. 3

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT

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

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

CR03P2156
DC-9900001113-091
POST: MICHAEL TODD BOTELHO (4 Pages
District Court 05/31/2007 11:37 AM
Washoe County 2840
NOTARIAL

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

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

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

24 ///

25 ///

26 ///

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

3 DATED this 25th day of May, 2007.

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6 DISTRICT JUDGE
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CERTIFICATE OF MAILING

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

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

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

DATED: May 31, 2007.

Stella M. Mader

CR03P2156
 POST: MICHAEL TODD BOTELHO (5 Pages
 District Court 06/01/2007 02:58 PM
 Washoe County 1310

CODE # 1310

MARY LOU WILSON

Nevada Bar No. 3329

333 Marsh Avenue

Reno, Nevada 89509

775-337-0200

Attorney for Appellant/Petitioner

ORIGINAL

FILED
 2007 JUN -1 PM 2:58
 RONALD A. LONGTH, JR.
 BY *[Signature]*
 DEPUTY

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

MICHAEL TODD BOTELHO,

Appellant/Petitioner,

vs.

Case No. CR03P-2156

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

Respondents.

Dept. No. 3

CASE APPEAL STATEMENT

1. Name of appellant filing this case appeal statement: Michael Todd Botelho.
2. Identify the judge issuing the decision, judgment, or order appealed from:
 The Honorable Judge Jerome Polaha, District Judge, Department 3, Second
 Judicial District Court, Washoe County, Nevada.

1 3. Identify all the parties to the proceedings in the district court:

2 Appellant/Petitioner, Michael Todd Botelho and Respondents, State of
3 Nevada, and Petitioner, Michael Todd Botelho.
4

5 4. Identify all parties involved in this appeal: Appellant/Petitioner Michael
6 Todd Botelho, and Respondent, The State of Nevada.

7
8 5. Set forth the name, law firm, address, and telephone number of all counsel
9 on appeal and identify the party or parties whom they represent: Respondent,
10 the State of Nevada, will continue to be represented by the Washoe County
11 District Attorney's Office; as of this writing, and Mary Lou Wilson, Esq.,
12 will represent Appellant. Address for Mary Lou Wilson, Attorney At Law,
13 333 Marsh Ave., Reno, Nevada 89509. The telephone number is 775-337-
14 0200.
15

16 6. Indicate whether Appellant/Petitioner was represented by appointed or
17 retained counsel in the district court: Appellant/Petitioner Michael Todd
18 Botelho was represented by Mary Lou Wilson on a Petition for Writ of
19 Habeas Corpus (Post Conviction) by appointment of the Honorable Judge
20 Jerome Polaha.
21

22
23 7. Indicate whether Appellant/Petitioner is represented by appointed or retained
24 counsel on appeal: Michael Todd Botelho requested counsel appeal the
25

1 district court's Order denying his Petition for Writ of Habeas Corpus (Post
2 Conviction). Therefore, Mary Lou Wilson retained her appointment.

3
4 8. Indicate whether Appellant/Petitioner was granted leave to proceed in forma
5 pauperis on the date of the Indictment of October 8, 2003.

6 9. Indicate the date of the proceedings commenced in the district court:

7 Proceedings commenced with the filing of the Indictment of October 8,
8
9 2003.

10 DATED this 1st day of June, 2007.

11 Mary Lou Wilson
12 MARY LOU WILSON

13 Attorney At Law

14 333 Marsh Ave.

15 Reno, Nevada 89509

16 775-337-0200

17 Attorney for Appellant/Petitioner
18
19
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25

SECOND JUDICIAL DISTRICT COURT COUNTY OF WASHOE,
STATE OF NEVADA

AFFIRMATION
PURSUANT TO NRS 239B.030

THE UNDERSIGNED DOES HEREBY AFFIRM THAT THE PRECEDING
DOCUMENT: CASE APPEAL STATEMENT

FILED IN CASE NUMBER: CR03P-2156

DOCUMENT DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY
PERSON

DATE: JUNE 1, 2007

SIGNATURE: Mary Lou Wilson

PRINT NAME: MARY LOU WILSON

ATTORNEY FOR: MICHAEL TODD BOTELHO

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I Mary Lou Wilson, certify that on 1 day of June, 2007, I deposited in the mail the Case Appeal Statement to the following:

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

Terrence P. McCarthy
Appellate Deputy District Attorney
Washoe County District Attorney's Office
Post Office Box 30083
Reno, Nevada 89520

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

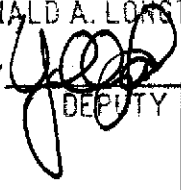
Mr. Michael Todd Botelho
Inmate Number 80837
Lovelock Correctional Center
Post Office Box 359
Lovelock, Nevada 89419

CR03P2156
POST: MICHAEL TODD BOTELHO (4 Pages)
District Court 06/01/2007 02:58 PM
Washoe County
3800
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V10 600

CODE # 3868
MARY LOU WILSON
Attorney At Law, Bar Number 3329
333 Marsh Ave.
Reno, Nevada 89509
775-337-0200
Attorney for Appellant/Petitioner

FILED

2007 JUN -1 PM 2:58
RONALD A. LORSTIN, JR.
BY  DEPUTY

ORIGINAL

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

MICHAEL TODD BOTELHO,
Appellant/Petitioner,

vs.

Case No. CR03P-2156

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

Dept. No. 3

REQUEST FOR TRANSCRIPT

TO: Joan Dotson, c/o The Honorable Judge Jerome Polaha, The Second Judicial
District Court, Department 3, Post Office Box 30083, Reno, Nevada 89509.

Appellant/Petitioner requests preparation of a transcript of proceedings before
the district court, as follows:

V10. 600

1 Judge or officer hearing the proceedings: The Honorable Judge Jerome Polaha.

2 Date of proceedings: May 11, 2007, 1:30 p.m. for Petition for Writ of Habeas

3
4 Corpus (Post Conviction).

5 Number of copies required: one.

6 I, Mary Lou Wilson, hereby certify that on the 1st day of

7 June, 2007, I ordered the transcript of May 11, 2007, and did not
8 pay the deposit because Mr. Michael Todd Botelho was deemed to proceed at the
9 expense of the State of Nevada, through the Nevada State Public Defender's Office
10 because of his indigence and counsel was court appointed.
11

12 DATED this 1st day of June, 2007.
13

14 Mary Lou Wilson
15 MARY LOU WILSON

16 Attorney at Law

17 Bar #3329

18 333 Marsh Ave.

19 Reno, Nevada 89509

20 775-337-0200

21 Attorney for Petitioner/Appellant
22
23
24
25

SECOND JUDICIAL DISTRICT COURT COUNTY OF WASHOE,
STATE OF NEVADA

AFFIRMATION
PURSUANT TO NRS 239B.030

THE UNDERSIGNED DOES HEREBY AFFIRM THAT THE PRECEDING
DOCUMENT: REQUEST FOR TRANSCRIPT

FILED IN CASE NUMBER: CR03P-2156

DOCUMENT DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY
PERSON

DATE: JUNE 1, 2007

SIGNATURE: *Mary Lou Wilson*

PRINT NAME: MARY LOU WILSON

ATTORNEY FOR: MICHAEL TODD BOTELHO

1 CERTIFICATE OF MAILING

2 I Mary Lou Polaha, hereby certify that pursuant to NRCP 5(b), on the
3 1 day of June, 2007, I deposited for mailing a copy of the
4 foregoing to:

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

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

14 Janette Bloom
15 Clerk of the Nevada Supreme Court
16 201 South Carson Street
17 Carson City, Nevada 89701

18 Attorney General
19 100 North Carson Street
20 Carson City, Nevada 89701-4717

21 Joan Dotson
22 C/o The Honorable Judge Jerome Polaha
23 The Second Judicial District Court, Department 3
24 Post Office Box 30083
25 Reno, Nevada 89520

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

CR03P2156 DC-9900001099-134
POST: MICHAEL TODD BOTELHO (D 1 Page
District Court 06/05/2007 03:10 PM
Washoe County 1350
NVEB120

1350

ORIGINAL

FILED

JUN 05 2007

RONALD A. LONGTIN, JR. CLERK

By: *C. Kepler*
DEPUTY CLERK

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

MICHAEL TODD BOTELHO,

Appellant(s)

Case No. CR03P2156

vs.

Dept. No. 3

THE STATE OF NEVADA,

Respondent(s)

CERTIFICATE OF CLERK

I hereby certify that the enclosed documents are certified copies of the original pleadings on file with the Second Judicial District Court, in accordance with the Revised Rules of Appellant Procedure Rule D(1).

Dated: June 5, 2007

Ronald Longtin, Jr. Court Clerk,

By: *C. Kepler*

Cathy Kepler, Appeals Clerk

ORIGINAL

FILED

JUN 05 2007

RONALD A. LONGTIN, JR., CLERK

By: *C. Kepler*
DEPUTY CLERK

1365

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

MICHAEL TODD BOTELHO,

Appellant(s)

Case No. CR03P2156

vs.

Dept. No. 3

THE STATE OF NEVADA,

Respondent(s)

CERTIFICATE OF TRANSMITTAL

I hereby certify that the enclosed the Notice of Appeal and other required documents
(certified copies) were delivered to the Second Judicial District Court mailroom system for
transmittal to the Nevada Supreme Court.

Dated: June 5, 2007

Ronald Longtin, Jr., Clerk of the Court

By: *C. Kepler*

Cathy Kepler, Appeals Clerk

FILED

2007 JUN 12 AM 8:24

RONALD A. LONGTIN, JR.

BY *Amos*
DEPUTY

1 4185

2 JOAN MARIE DOTSON

3 CCR #102

75 COURT STREET

RENO, NEVADA

ORIGINAL

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

--oOo--

11 MICHAEL TODD BOTELHO,
12 Petitioner,

Case No. CR03P2156

13 vs.

Department No. 3

14 THE STATE OF NEVADA, et al.,
15 Respondent.16 WRIT OF HABEAS CORPUS (POST CONVICTION)
17 FRIDAY, MAY 11TH, 2007; 1:30 P.M.
Reno, Nevada

APPEARANCES:

18 For the Respondent:

OFFICE OF THE DISTRICT ATTORNEY
BY: TERRENCE MCCARTHY, ESQ.
Deputy District Attorney
P.O. Box 11130
Reno, Nevada 89520

21 For the Petitioner:

MARY LOU WILSON
Attorney at Law
Reno, Nevada

23 Reported by:

JOAN MARIE DOTSON
Computer-aided Transcription

CR03P2156
DC-990001161-063
POST: MICHAEL TODD BOTELHO 38 Pages
District Court 06/11/2007 08:24 AM
Washoe County
JONES
4185
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* I N D E X *

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
------------	--------	-------	----------	---------

For the Petitioner:

MARTHA MAHAFFEY, Ph.D.	4	20	--	--
------------------------	---	----	----	----

For the Respondent:

--

1 FRIDAY, MAY 11TH, 2007; RENO, NEVADA

2 --oOo--

3 THE COURT: Be seated please. Good afternoon. I
4 apologize for being late. I am showing one of the
5 commissioners around and I didn't wear a watch today and we
6 were talking about budgetary items. And so I am late. I'm
7 sorry.

8 MR. MCCARTHY: Judge, if the County Commissioners are
9 in your office, they are not in my office; so that's okay
10 with me.

11 THE COURT: They want to come in and see how this
12 works. Okay. This is the time set for the evidentiary
13 hearing in this matter. And the petition had seventeen
14 claims. And I believe I have indicated that I would
15 entertain a hearing on seven and fifteen.

16 And then the items that were in the
17 supplemental, save and except the confrontation clause
18 arguments. So, with those guidelines, counsel, Miss Wilson,
19 you may proceed.

20 MS. WILSON: Thank you, your Honor. As to the
21 supplemental petition, we have Dr. Mahaffey, who is present.
22 And I ask that she be able to testify.

23 THE COURT: Now just bring me up-to-date on this. This
24 evaluation was post-conviction based on your preparation for

1 this. And the argument would be that this should have been
2 presented at the time of sentencing?

3 MS. WILSON: That's correct, your Honor.

4 THE COURT: All right. Go ahead.

5 -oOo-

6 MARTHA MAHAFFEY, Ph.D.

7 Produced as a witness on behalf of
8 the Petitioner, being first duly sworn,
9 was examined and testified as follows:

10
11 DIRECT EXAMINATION

12 BY MS. WILSON:

13 Q Dr. Mahaffey, would you please state your
14 full name and spell your last?

15 A Martha Bernal, B-E-R-N-A-L, Mahaffey,
16 M-A-H-A-F-F-E-Y.

17 Q And, Dr. Mahaffey, you have testified before
18 in the Second Judicial District Court as an expert in the
19 area of psychosexual?

20 A Yes.

21 Q And in this case did you have an opportunity
22 to review material on the case of Michael Todd Botelho verses
23 the Warden, L.C.C., and the State of Nevada?

24 A Yes, I reviewed documents that you submitted

1 and also had a chance to review the file at the Washoe County
2 District Attorney's Office.

3 Q And did you have an opportunity to speak
4 with Mr. Botelho?

5 A Yes. I saw him at the Lovelock Correctional
6 Center on March 27th, 2007.

7 Q And at that time did you have an opportunity
8 to have him review and send to you and actually do with you
9 different testing?

10 A Yes.

11 Q Okay. And did you have an opinion regarding
12 whether Mr. Botelho reached a level of minimal, medium or
13 high level of threat to the community?

14 A I did formulate an opinion about risk, yes.

15 Q And what was that opinion?

16 A When looking at two risk assessment
17 measures, the Static 99 and the Sexual Violence Risk 20, I
18 opined that he was at moderate high risk of sexually
19 reoffending.

20 Q And those two tests, are those two tests
21 that are widely accepted in the community of psychological
22 expertise?

23 A Yes.

24 Q And in this instance could you tell us what

1 exactly the Static 99 determined about Mr. Botelho?

2 A Well, the Static 99 looks at static or
3 unchangeable fixed factors related to the sex offense and
4 factors about Mr. Botelho and then renders an objective
5 number that falls either at low risk, moderate low, moderate
6 high or high risk.

7 Q And he fell within that moderate high?

8 A Correct.

9 Q And what about the Sexual Violence Risk dash
10 20 or SVR dash 20?

11 A That is another violence risk assessment
12 measure for sex offenders.

13 And it looks at both static and dynamic, or
14 changeable, factors. And there are -- also you can render an
15 opinion as to whether a person poses a moderate -- a low,
16 moderate or high risk or low moderate or moderate high.

17 Q And did he fall within a moderate high
18 degree in that exam?

19 A Yes.

20 Q Now, let's talk about people that fall into
21 moderate slash high risk.

22 Are those people that can generally be
23 supervised in the community?

24 A Actually, it is questionable whether they

1 can be safely supervised in the community. Because when an
2 individual lands at moderate risk, those typically -- most of
3 them or many of them can be safely supervised and treated in
4 a community setting.

5 Those that fall at high risk generally
6 require incarceration to protect the public. And he fell
7 right in the middle of those two, which would make it
8 questionable at the time of his sentencing for him to have
9 been an adequate probation candidate to be released into the
10 community at that time.

11 Q Okay. Now, you understand that in this
12 situation Mr. Botelho was not available for probation?

13 A Correct.

14 Q Okay. And you know that today Mr. Botelho
15 would be eligible for parole into the community at the age of
16 eighty-eight because of his sentence. And that, in essence,
17 for him to be supervised or for him to be -- have a lesser
18 sentence he would be in his 60's?

19 A Yes.

20 Q Okay. So, given that premise and
21 understanding, would a moderate slash high testing individual
22 be amenable to treatment at -- in their 60's?

23 A Well, certainly considering his
24 circumstances that he fell at moderate high but is in prison

1 and, if he participated in treatment and as part of his
2 treatment program in anticipation of release into the
3 community -- whether that be at age sixty or age eighty -- if
4 future plans were formulated to manage risk, certainly he
5 could be potentially manageable in the community at a later
6 date.

7 THE COURT: Excuse me. Are we talking about makeup of
8 individuals that are unchanging?

9 THE WITNESS: Uhm, no. We look at static factors that
10 are not changeable. But the dynamic factors are potentially
11 changeable.

12 THE COURT: By definition that is. But give me a
13 for-instance. You are saying that what he is going to do --
14 how old is he?

15 THE DEFENDANT: I think I am forty-seven. I don't even
16 remember anymore.

17 THE COURT: Thank you.

18 THE DEFENDANT: Forty-six, forty-seven.

19 THE COURT: Twenty some years. She is asking forty
20 years from now.

21 MS. WILSON: I am actually asking twenty-five.

22 THE COURT: Well --

23 MS. WILSON: He would be sixty something.

24 THE WITNESS: That's why I say he would be potentially

1 manageable. Because certainly risk factors change. And, so
2 before he were to be released, then a risk assessment should
3 be redone to see if the factors that are potentially
4 changeable have changed in the appropriate direction.

5 THE COURT: All right.

6 All right. Because we see cases -- and they
7 are starting to become more prevalent -- where men have no
8 prior problems whatsoever. And, all a sudden, they start
9 molesting their grand kids. And you wonder what's going on?
10 Is there something in the atmosphere? Is it something they
11 are reading? Or what's bringing about the change?

12 THE WITNESS: Right. And each case would have their
13 own specific factors to look at as to why the person is
14 offending.

15 BY MS. WILSON:

16 Q Dr. Mahaffey, if you were to have testified
17 at sentencing, which was years ago, would you be able to tell
18 the Court basically what you are saying today?

19 A Yes.

20 Q Okay. And let's go back to that time.

21 If the court said to you, "Hey, you know, I
22 have -- I have an opportunity to run these consecutive or
23 concurrent and he could get out at sixty or sixty-five or
24 whatever, in his 60's," would you be able to have developed a

1 treatment program that would be amenable to the -- to that
2 kind of situation in his 60's?

3 A Well, I would not myself have formulated a
4 treatment program. But in the prison system where he is at
5 they do have sex offender treatment available. And in fact
6 as of January 2007 he became eligible for such treatment.
7 Whereas, previously he would only have been eligible two
8 years prior to being available for parole or his sentence
9 terminating.

10 So just recently any sex offender can be put
11 on that waiting list. And apparently he has explored that
12 potentially to get on the waiting list. And it is a two-year
13 sex offender treatment program. And so I would
14 have recommended that back then at sentencing and now.

15 Q And, from your interviewing him, is he
16 amenable to treatment?

17 A My clinical opinion and also as suggested by
18 the Multiphasic Sex Inventory, he could potentially be
19 amenable to treatment. He had the necessary acknowledgment
20 of the sex offense. He did express remorse about the violent
21 sex behavior that he engaged in. He showed interest in
22 treatment. He presented as potentially motivated. But of
23 concern was that he was extremely, extremely guarded.

24 He was evasive. I don't feel he is at the

1 level of being honest with himself and others yet about his
2 sex offending behavior. And consistent with his level of
3 denial, he still uses a lot of excuses and justifications to
4 avoid accepting full responsibility.

5 So, if he were to continue having that sense
6 of guardedness and then participate superficially in
7 treatment, I would be concerned. So there is some factors
8 that show that he is potentially amenable but other factors
9 that are of concern.

10 Q And is it unusual for a sex offender to be
11 in denial?

12 A Actually denial and sex offending behavior
13 usually goes hand in hand. So how he presented was quite
14 typical of a person who has not yet undergone treatment.

15 THE COURT: Let me ask you something, Dr. Mahaffey.

16 I am curious about this.

17 And I see it every time I have a criminal
18 calendar. All right. They will stand up there and they will
19 say, "We are going to plead guilty." And I go through the
20 constitutional rights and what you are doing and the
21 potential punishment and they all say yes. And then they say
22 guilty. All right.

23 So then the District Attorney gives them the
24 elements of the offense to which they have pled. And they

1 say, "Yes, I recognize that. And, yes, I understand it. I
2 am admitting that by pleading guilty."

3 Then the last question is, "Now, in your own
4 words, what did you do that makes you plead guilty to this
5 crime?"

6 And after going through all that, they
7 minimize. They evade. They avoid.

8 But I am thinking maybe they are embarrassed
9 because it's in open court. And it is one thing to say
10 guilty, and you can sort of remove yourself from your voice
11 saying, "Guilty."

12 But when you are asked to tell us what it
13 is -- is it more than just the embarrassment of the moment,
14 if you did something that's dreadful or sneaky and you didn't
15 want the whole world -- all the sudden, you feel that
16 everybody is looking at you? Is it as simple as that? Or is
17 there more to it than that?

18 THE WITNESS: Certainly it is not as simple as that.
19 It is not just the embarrassment of the moment. It is really
20 an ingrained faulty reasoning or an ingrained cognitive
21 distortion that sex offenders have that facilitates their sex
22 offending behavior. They fool themselves into thinking,
23 well, perhaps the child may be interested or may have wanted
24 this, so that they can then minimize and not consider the

1 fact that they are raping the child.

2 They engage in thinking that allows them to
3 cross the line, even though they know better. They engage in
4 that faulty reasoning so that they don't have to take full
5 responsibility. It is a very ingrained process, and that's
6 what treatment needs to attack.

7 THE COURT: Thank you.

8 BY MS. WILSON:

9 Q And, Dr. Mahaffey, you touched on something
10 that I am sure the Court and the state will want to explore.
11 And that is the actual -- the actual classification of Mr.
12 Botelho as a rapist.

13 And you note that there is different levels
14 of that.

15 Can you talk a little bit about that.

16 A Well, I had presented a couple of different
17 models that the literature presents.

18 If we look at the Diagnostic and Statistical
19 Model of Mental Disorders, we see then that all rapes would
20 fall under potential diagnoses of sexual sadism. But we do
21 see that among rapists there are different kinds of rapes
22 that do occur. And --

23 Q Where does Mr. Botelho lie?

24 A Okay. Well, if you look at a model that was

1 proposed by Nicholas Graff and Jean Bimbom in 1979, it is a
2 topology of male rapists that is still applied today.

3 They divide rapists into four categories.

4 And he falls into what they call the power
5 reassurance rapist or the gentleman rapist, in which the
6 precipitating factors of the rape are more often low
7 self-esteem, social deficiency. In his case maybe some
8 feelings of sexual inadequacy.

9 And it is those factors that fuel the rape.
10 And those rapists usually, in terms of the amount of force
11 and violence, we see that they are the ones who have more
12 limited force and more limited threats, as compared to some
13 of the other more severely sadistic rapists.

14 Q And given the fact that in this case there
15 was a kidnapping, repeated raping and battery, does he still
16 fall within that gentleman rapist category?

17 A Again, all rapes are sadistic in nature.
18 But, within those four categories, that is the one that he
19 best fits into.

20 Although any individual may overlap across
21 several. But that's probably the best one that he fits into.

22 Q Given the facts of the case, how is it that
23 he could be amenable to treatment and actually go back into
24 the community, given the actual facts and the violence and

1 the kidnapping in this case?

2 A Well, that's a good question. Because, if
3 you look at the offense, if you look at the crime, it is a
4 horrendous, horrendous crime. And any lay person may say,
5 well, if we look at the crime, he has to be a high risk.

6 But that's not how we determine the risk.
7 We look at all the sex offenders and then identify factors
8 that we know that are associated with recidivism in sex
9 offenders.

10 And then they fall into a certain category.

11 And when I look at all the different
12 factors -- and because he had some of the -- he was absent
13 some of the more severe factors, he fell at moderate high,
14 which is still pretty darn high. But it did not kick him
15 over yet into the high range.

16 Q So you certainly considered the facts of
17 this case and still didn't classify him as purely high -- or
18 the testing didn't classify him as purely high?

19 A He was pretty close, but he didn't fall in
20 that range.

21 Q Okay. And what are some of the mitigating
22 factors that testing showed that Mr. Botelho had on -- in his
23 favor?

24 A Well, to answer that, I would look at the

1 factors identified in the Sexual Violence Risk 20. And I had
2 bulleted those on page fifteen and seventeen for the
3 attorneys to look at in their reports.

4 And in terms of some of the nature of the
5 sex offense, certainly, if the sex offense had been more
6 sadist-like in nature, if he had used weapons or threats of
7 death or had more severe physical harm, those are some
8 factors that would have raised the risk. But those were
9 absent.

10 If he had had prior sex offenses, certainly
11 then we would have a pattern of behavior rather than a single
12 act. And that would have kicked him into the higher range.

13 If he had multiple kinds of sex offending
14 behaviors -- for example, if you have someone who engages not
15 only in rape of children but also rape of adults, also
16 looking at pornography, also engaging in exhibition acts, the
17 more -- different sexual deviant behaviors you have, the more
18 severe the disorder. That would have kicked him into high.

19 He did not have that.

20 If you look at factors of psychosocial
21 adjustment, he did not meet the category for antisocial
22 personality disorder or psychopathy. A psychopathy is
23 defined as a person who has a history of callously,
24 remorselessly, repeatedly using others to meet their needs

1 and who also has a history of an unstable, antisocial
2 life-style at the level of psychopathy. He did not have
3 that. If he had, it would have kicked him into the high risk
4 range.

5 He doesn't -- he had -- well, in terms of
6 mitigating, let's stay with that.

7 In terms of future plans, he was somewhat
8 realistic about the fact that, if he were to be released into
9 the community, he would have to have certain parameters to
10 maintain safety.

11 He did present as amenable to treatment.
12 Even though he was guarded, he was generally cooperative with
13 me.

14 So those were some of the mitigating
15 factors.

16 Q And how about his employment and stability
17 with his home life, that kind of thing?

18 A Those would be other factors. He has had
19 some employment stability, some residential stability. He
20 has not had relationship stability. But he has had those
21 other two.

22 Q And he has been married three times?

23 A Married three times. That goes more to an
24 aggravator though. Because he has not shown a pattern of

1 stable relationship history.

2 Q And four children?

3 A Correct.

4 Q And one of the factors I note that, if you
5 are in a relationship with -- that's within two years or --
6 that was a mitigating?

7 A Right. The fact that he has lived with a
8 partner for at least two years is a mitigating factor. When
9 we have sex offenders his age who have never lived with a
10 partner, that shows probably more support for more of a
11 sexually deviant life-style, maybe personality disorder.

12 At times the people who, for example, are
13 truly pedophile in nature, they don't form normal
14 relationships with women. And they may have no history of
15 normal relationships. So that would be certainly a red flag,
16 if he was absent that.

17 THE COURT: What's the standard on that? I know a lot
18 of guys that are single that are older guys that are --

19 MR. MCCARTHY: What do you mean older?

20 THE COURT: I mean --

21 THE WITNESS: Certainly that one factor would not, you
22 know -- I cannot label a person a pedophile based on that one
23 factor.

24 It is among sex offenders, when you look at

1 the totality of the factors, that could potentially be one
2 red flag. But certainly just because you are a single male
3 who has not been in a relationship, it doesn't mean you are a
4 pedophile.

5 BY MS. WILSON:

6 Q Is there anything that -- that perhaps you
7 could add to your report and your testimony today that I
8 haven't asked you in mitigation for Mr. Botelho?

9 A Well, I think if -- if the best that you are
10 hoping for today is a potential release at age sixty, that at
11 that time it would be very important before he were released
12 that he completed his minimum of two years, hopefully more
13 years, of sex offender treatment in prison.

14 And that within the treatment program he has
15 established a safe plan for return to the community. And it
16 should be very lengthy and very well-supervised by, you know,
17 offering life-time supervision by the Department of Parole.

18 Some of the factors that should be there, he
19 should have no unsupervised contact with children. By then
20 his own children will be adults. But there may be
21 grandchildren or other people he could potentially have
22 contact with. Family members need to be educated about the
23 severity of his sex deviance problems.

24 They need to realize the importance of

1 supervising those children. I am concerned that he talks
2 about his wife maybe thinking, as he presents, that this was
3 just, you know, one isolated incident, not reflective of a
4 sex deviant's problem.

5 That's a concern. His family members need
6 to realize that this man has a problem. He is not safe
7 around children. And they cannot afford to relax on
8 supervision.

9 Other factors to promote community safety
10 would be to make sure this man does not have access to
11 alcohol, in that he did drink before the sex offense. And as
12 to whether he may have drank to facilitate that behavior is
13 of concern.

14 Other factors, he needs to then have a
15 stable residence, employment. Where he lives, who he has
16 contact with should be monitored. He should have ongoing sex
17 offender treatment for life. Those are some of the factors
18 that need to be in place for community safety, were he to be
19 released at age sixty or age eighty.

20 MS. WILSON: Thank you.

21

22 * CROSS EXAMINATION *

23 BY MR. MCCARTHY:

24 Q Dr. Mahaffey, how are you?

1 A Good. Thank you.

2 Q If I understand it, you seem to be
3 suggesting that with certain conditions there is no reason
4 not to -- the Court couldn't have allowed a lesser sentence.
5 Is that --

6 A Could you repeat the question?

7 Q I am trying to see if I understand your
8 opinion which is that, if certain conditions are met, then
9 there would be no reason not to have allowed a lesser
10 sentence?

11 A I can't say that there was no reason to not
12 allow a lesser sentence. I am saying that, considering his
13 relatively high risk, moderate high, that there are
14 situations that we can set up to potentially manage that
15 risk.

16 Q Okay. So things that a lesser sentence --
17 there are certain circumstances where it wouldn't be
18 terrible?

19 A It would be feasible.

20 Q Okay. Does his amenability to treatment
21 decrease at all by a lengthy sentence?

22 A I am not sure I know of treatment that says
23 that the longer the sentence the less amenable a person
24 becomes.

1 I do know that as people age that their risk
2 lowers, although certainly there are sex offenders who still
3 offend later in life, in their '80s.

4 But, considering the length of sentence,
5 other factors then start to be concerned, about his level of
6 institutionality and the fact that, when he does return into
7 the community, it's going to be highly stressful.

8 And certainly having an individual being
9 highly stressed may increase the risk of sex offending
10 behavior. So it would have to be monitored in treatment.

11 Q Institutionalization, stressful return,
12 those are typical of all prisoners, without regard to the
13 name of their offense?

14 A Yes.

15 Q Now, you would have recommended, as part of
16 the treatment plan, that he have no contact with children?

17 A Correct.

18 Q Prepubescence, postpubescent, children of
19 all ages?

20 A Correct. The victim was pubescent, so we
21 know that that is one of his victim preferences.

22 Because it is a single act, we don't know if
23 he has a broader victim preference.

24 So I would suggest that he have no contact

1 with prepubescent, pubescent male and female children.

2 Q And that's not something that would go away,
3 in your opinion, is it? That restriction should always apply
4 to Mr. Botelho?

5 A Yes. Until such time that, if he has a
6 treatment provider in the community that thinks that that
7 could be changed, I mean, that's always a possibility that he
8 may say supervision, supervised visitation, under specific
9 circumstances. I don't know what that may be in the future.

10 Q That condition can be met pretty well by
11 remaining in prison, could it not?

12 A Certainly.

13 Q There are hardly any prepubescent children
14 in the general population of the prison, is there?

15 A I think there is none.

16 Q I notice your report on page nineteen, under
17 part two -- and, your Honor, you do have the report appended
18 to a document entitled Notice of Dr. Mahaffey's
19 Psychosexual --

20 THE COURT: Yes, I have that.

21 MR. MCCARTHY: I don't see a need to mark it and admit
22 it then.

23 Q At page nineteen under part two you
24 mentioned a potentially positive response to treatment in

1 some respects.

2 A Correct.

3 Q I am curious about the word potentially.
4 You don't seem certain of that.

5 A Well, there are factors that support
6 amenability and that are factors that challenge amenability.

7 Q All right. I understand. "In some
8 respects," okay.

9 In your opinion about this treatment,
10 amenability -- I'm sorry -- whether he can be managed in the
11 community in the future, in part four it also seems to have a
12 number of qualifiers in it: If he participates in treatment
13 and if he effectively participates in treatment and makes
14 viable future plans. But, even then, you indicate in your
15 report that he could potentially be safely managed at some
16 future time.

17 That doesn't seem very optimistic. The
18 phrasing doesn't -- or am I reading it wrong?

19 A Well, I think you are correctly picking up
20 on the fact that it's not cut and dry. Because it depends on
21 how well he participates in treatment. It depends on his
22 plans. So, if he does follow through effectively, there is a
23 chance that he can be monitored safely. If he does not, I
24 would be concerned.

1 Q Okay. And part of his ability to be safely
2 managed in the community would be affected by things that you
3 and Miss Wilson discussed: Stability in jobs, stability in
4 housing, things like that?

5 A Right. The culmination of all those
6 factors.

7 Q Those things are rather difficult after a
8 lengthy prison term, aren't they?

9 A Regardless of the offense, they could be,
10 certainly.

11 Q Cognitive distortion, you mentioned that,
12 and kind of the odd way that sex offenders tend to think.

13 Is that right?

14 A Yes.

15 Q Okay. Is that a static or dynamic
16 condition?

17 A That is a dynamic condition because it is
18 potentially changeable. Because that is one of the first
19 things that is addressed and confronted in treatment. It is
20 very comparable to the denial of an alcoholic.

21 Q Right.

22 A They don't acknowledge being alcoholic. In
23 treatment they have to break through that denial and accept,
24 "I am an alcoholic."

1 Just like the alcoholic, he is denying that
2 at this time. In treatment he will need to arrive at a place
3 where he says, "I am a rapist. And this is what I did," and
4 take responsibility.

5 Q I thought I read somewhere -- maybe you can
6 correct me on this -- other programs, such as AA, where you
7 first have to change your thought patterns, have something
8 under a ten-percent efficacy rate.

9 But I might be remembering it wrong. Do you
10 have any knowledge of those things?

11 A I do not have statistics about the efficacy
12 rate. And in particular I don't have the statistics about
13 the efficacy rate of sex offender treatment at the Lovelock
14 Correctional Center. So I don't have those numbers.

15 But certainly he may fall under someone who
16 works their treatment program effectively or not.

17 Q Are there any long-term studies about the
18 efficacy of any treatment plans for sex offenders?

19 A Well, I know that Canada has done better
20 than the United States in terms of doing long-term studies as
21 far as recidivism rates in sex offenders.

22 And really, depending on the amount of risk
23 factors that a person has when they participate in treatment,
24 then they will have the lower amount of risk factors and have

1 a better chance of not recidivating, despite their treatment.

2 Q Are there any statistics available about the
3 likelihood of recidivism?

4 A I do not have those available. I don't have
5 that data.

6 Q All right. I notice on page sixteen of your
7 report, Doctor, under mitigating factors, you included, "No
8 extreme minimization or denial of sex offense."

9 Does that still exist?

10 THE COURT: What paragraph are you looking at?

11 MR. McCARTHY: I'm sorry. Mitigating factors.

12 THE COURT: Page fifteen?

13 MR. McCARTHY: Sixteen.

14 THE COURT: Sixteen.

15 THE WITNESS: Extreme would be that he denied doing
16 it. He did not deny doing it. And -- but he has some degree
17 of minimization denial so, therefore, under aggravating I put
18 that piece in; that he engages in excuses and justifications
19 to avoid accepting full responsibility of sex offending
20 behavior.

21 BY MR. McCARTHY:

22 Q Now, if he had at some point outright denied
23 the conduct and then later admitted to you or to the Court,
24 is that still mitigating?

1 A In that he initially denied it to law
2 authority?

3 Q Himself, to his family, to anyone else.

4 A That's very common. And I see that a lot of
5 sex offenders say initially, "I did not do it." And then
6 sometimes by the time they see me they have broken through
7 that initial denial.

8 So at the time that I evaluate him is when I
9 ascertain his risk. And he by then was acknowledging it.

10 Q So a history of denial then wouldn't negate
11 that mitigating factor then?

12 A No.

13 Q Okay. And, just so I am clear, you are
14 concerned only with psychosexual aspects of sentencing.
15 That's the limit of your opinion?

16 A Oh, I am concerned with more than that.

17 Q Okay. You don't propose to be rendering an
18 expert opinion on the other factors that involve sentencing:
19 The protection of society, retribution, anything like that?

20 A Actually the protection of society is why we
21 do risk assessment measures, because we want to determine if
22 his risk falls at a level where he can be safely managed in
23 the community.

24 Q Okay.

1 A That is the goal.

2 Q And -- I think I understand. Thank you. I
3 have nothing further.

4 A You are welcome.

5 MS. WILSON: I have nothing further.

6 THE COURT: All right. Thank you. You are excused.

7 THE WITNESS: Thank you.

8 MS. WILSON: And, your Honor, that would be
9 the petitioner's case.

10 THE COURT: All right.

11 MR. McCARTHY: I guess -- if the petitioner is not
12 going to call Mr. Sullivan and ask about the scope of his
13 investigation, neither am I. That seems to be an element of
14 the claim.

15 THE COURT: Are you abandoning that claim?

16 MS. WILSON: I am prepared to submit it on Dr.
17 Mahaffey's report, her testimony today and ask that your
18 Honor look to the report and determine whether Mr. Sullivan
19 should have prepared that and presented it to you. He
20 didn't. So -- that's what --

21 THE COURT: Well, then I am prepared for argument on
22 it.

23 MR. McCARTHY: I'll rest, too.

24 MS. WILSON: Your Honor, I would ask that you consider

1 Dr. Mahaffey's report and her testimony today and ask
2 yourself if there is anything in the report and her testimony
3 that would have led you to believe that Mr. Botelho would
4 have been amenable to a lesser sentence than what he
5 received.

6 Because what he received was time so great
7 that it's a life sentence. It is an eighty -- it is until he
8 is eighty-eight years old. And, if you had run the sexual
9 assaults concurrent -- there were three of them -- that would
10 still give him twenty-five to the Board.

11 Because the kidnapping you gave five.

12 And then the sexual assaults, if they ran
13 C.C., that would be twenty. You ran that consecutive. It is
14 twenty-five. He would be in his 60's.

15 And there is --

16 THE COURT: Let me ask you this, counselor. And this
17 is something I think about every time I have the criminal
18 calendar. All right.

19 And I recognize it is not my personal views
20 that come into play. All right. I mean, to the extent that
21 they can be cut away from the consideration of the
22 individual, I try to do that.

23 But what are the factors that a Judge should
24 look at when sentencing somebody in this kind of a case?

1 Now, here you have a young girl who was expecting to get a
2 baby-sitting job.

3 Right.

4 She is picked up by a man who appears to be
5 a nice, safe individual.

6 And she is taken to the mountains or to the
7 desert. And then she is sexually assaulted. All right.

8 Now, to be honest with you, the statements
9 about his wife saying -- that didn't concern me whatsoever.
10 I mean, that didn't mean anything at the sentencing.

11 What I was doing to try to recreate my frame
12 of mind was picturing the young girl. All right.

13 And even Dr. Mahaffey mentioned a couple of
14 things there that reminded me of that Stockholm Syndrome
15 where, all the sudden, you are thankful that you didn't get
16 killed. Because you are totally at the mercy of that
17 individual.

18 He was a stranger. And he was totally one
19 hundred percent in charge of her continuing to exist.

20 All right.

21 We have seen the cases where the defendants
22 come up and they have been sexually assaulted as kids. When
23 I had that Montessori case, an attorney there were two
24 trains of thought. I don't know whatever happened to those

1 two trains of thought.

2 One was that something happens that is so
3 extreme that it takes more than a lifetime to get over it.

4 And the other school of thought was, hey, it
5 is like a broken leg. You suffer. Put a cast on it. Time
6 heals and away you go.

7 But I have seen adults in the criminal
8 court, outside in society who, when you find out that they
9 have been molested as children, they are still affected. And
10 when they have kids, then it really comes out because now
11 they are fearful. If it's a woman, don't let the husband
12 have the kids. If it's a man, don't let the wife be with the
13 kids. This happened to this young girl through no fault of
14 her own.

15 And counsel mentioned retribution.

16 What is it? Retribution, rehabilitation,
17 special and general deterrence. Yeah, they are met by life
18 imprisonment.

19 Retribution is life imprisonment.

20 And from what Dr. Mahaffey said, if I
21 understood her right, evidently there is some kind of a
22 programming that goes on here. And rehabilitation is very
23 low on the scale of consideration points.

24 So, that's what we go through when we --

1 when we sentence. And, again, I always said we don't want to
2 destroy anybody's life. But some things are so egregious
3 that, what do you do? Obviously, this is not a probation
4 case. I guess Oregon and Washington for years had probatable
5 offenses for sexual assault and molestation cases, at least
6 back in the '80s.

7 Then I understand subsequently they went
8 away from that. And yet when I was doing that, they had the
9 most fertile grounds for studies and data for the kinds of
10 programs and the result of the programs. And they had at
11 that time low recidivist rates, but then they gave it up for
12 some reason.

13 MS. WILSON: Well, remember doing lewdness was
14 probatable. Do you remember?

15 THE COURT: Right. Then they took that away.

16 MS. WILSON: So, I mean, I guess what -- I share --
17 because I am a human being. Mr. McCarthy is a human being.
18 We share that fear. And we are that fourteen year old when
19 we read this.

20 And I think Dr. Mahaffey was helpful for me
21 personally to get beyond that.

22 And I think that's what a sentencing Judge
23 needs is a psychosexual from an expert to say, "Wait a
24 minute. We hate this crime. We all do. However, let's

1 look -- I am an expert. I have seen a million of these
2 people. Let's look at his amenability to treatment at sixty
3 plus."

4 And that's what I am pitching.

5 THE COURT: You know, I think an even more effective
6 argument would be, "Judge, here is the reality of the
7 situation. You have a Parole Board and you have a Pardons
8 Board. Whatever you do can be affected by either one or the
9 other. But here is the reality of the situation. The Parole
10 Board will or will not act. The Pardons Board will or will
11 not act, depending on what you give and how they intake and
12 categorize them at the prison."

13 MS. WILSON: Absolutely.

14 THE COURT: A day in the life or a year in the life of
15 a prisoner for this type of crime. Because we have no idea
16 what happens once we sentence.

17 And yesterday I had a hearing and I found
18 out totally different from what I anticipated. I thought I
19 gave the guy five years, but it turns out I gave him eleven
20 or twelve years just by the way they calculate.

21 But, if some psychologist or psychiatrist
22 comes in and says, "He deserves a break today because -- "

23 MS. WILSON: Because she is not dead.

24 THE COURT: And I understand that. And that goes

1 through my mind. And I was telling myself, "Don't talk about
2 this or you might wind up like Maddox." I certainly don't
3 want to do that.

4 But, you are absolutely right. What is it?
5 What is it about these crimes that there is a difference
6 there? You could kill somebody, totally take them out of
7 being; and it is not looked on like these kinds of crimes.

8 Now, I don't know what that is. I don't
9 know. I don't have an answer for that.

10 I don't know.

11 But would it have made a difference? I
12 don't think so.

13 MS. WILSON: And that's what -- I looked at this case.
14 And that's the only thing that I could see as not being done
15 that you as the sentencing court should have had before you.
16 And, if you look at this report and you determine that, then
17 that's the end of the hunt.

18 THE COURT: Well, I detect it as I think your
19 colleague, Mr. McCarthy, did. I don't know if -- it's
20 between the lines or sub text or something, but it seemed
21 like a guarded report. I was wondering why are you bringing
22 it, to tell you the truth. And, if that would have been
23 there, I probably would have had the same reception.

24 There are some things that, if done, you

1 know, cannot be undone. And, depending on their nature,
2 there are severe consequences. And this is one of those.

3 Had he killed her, chances are there
4 wouldn't have been that much difference in the punishment. I
5 acknowledge that.

6 You know, that's a bad thing to say.
7 Because hearing that and, if you are that inclined or
8 programmed, from what I heard, maybe there is a programming
9 into all this. You know, somebody thinks you are healthy,
10 normal and that just happens to be a circumstance at birth.

11 The next guy doesn't have those things
12 aligned, and he winds up in criminal court. Does he have the
13 free will to do what he did, or is he just programmed for
14 that? And that's what I seem to have heard. But I don't
15 know.

16 MS. WILSON: Thank you, Judge, for -- thank you.

17 THE COURT: Counsel, I am denying the petition.

18 And, Mr. McCarthy, if you would go ahead and
19 prepare it.

20 MR. MCCARTHY: I will, your Honor. And when I do, did
21 you want to note that lack of evidence about what
22 Mr. Sullivan did or not do? I understand your comments about
23 prejudice, but there are two elements of the claim.

24 THE COURT: Yes. The lack of evidence, yes.

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MR. McCARTHY: I'll do that, too.

(At this time the foregoing proceedings were concluded.)

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 Friday, May 11th, 2007 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 8th day of June, 2007.

19
20 
21 JOAN MARIE DOTSON, CSR #102

ORIGINAL

FILED

SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

JUN 11 2007

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

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

Supreme Court No. 49586

District Court Case No. CR032156

CR03P2156

RECEIPT FOR DOCUMENTS

TO: Mary Lou Wilson
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Ronald A. Longtin Jr., District Court Clerk

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

06/07/07 Filing Fee Waived: Criminal.

06/07/07 Filed Certified Copy of Notice of Appeal.
Appeal docketed in the Supreme Court this day. (Docketing statement mailed to counsel for appellant.)

06/07/07 Filed Request for Transcript of Proceedings.
Transcripts requested: 5/11/07. To Court Reporter: Joan Dotson.

DATE: June 07, 2007

Janette M. Bloom, Clerk of Court

By: *[Signature]*

Deputy Clerk

CODE: 2540

FILED

ORIGINAL

2007 JUN 12 PM 1:16

RONALD A. LONGTIN, JR.

BY  DEPUTY

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

MICHAEL TODD BOTELHO,

Petitioner,

CASE NO: CR03P2156

VS.

DEPT. NO.: 3

THE STATE OF NEVADA,

Respondent,

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on May 31, 2007 the Court entered a decision or Order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of the Court. If you wish to appeal, you must file a notice of appeal with the Clerk of this Court within thirty-Three (33) days, after the date this notice is mailed to you. This notice was mailed on June 13, 2007

RONALD A. LONGTIN, JR.

Clerk of the Court

By 

Deputy Clerk

ORIGINAL FILED

2007 MAY 31 AM 11:37

RONALD A. BRIGHT, JR.

BY *R. B. B. B.*
DEPUTY

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

* * *

MICHAEL TODD BOTELHO,

Petitioner,

v.

Case No. CR03P2156

JACK PALMER,

Dept. No. 3

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT

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

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

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

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

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

24 ///

25 ///

26 ///

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

3 DATED this 25th day of May, 2007.

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6 DISTRICT JUDGE
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CERTIFICATE OF MAILING

Pursuant to NRCP 5 (b), I hereby certify that I am an employee of The Second Judicial District Court 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:

WASHOE COUNTY DISTRICT
ATTORNEY'S OFFICE
APPELLATE DIVISION
(Inter-office mail)

ATTORNEY GENERAL'S OFFICE
100 N. CARSON STREET
CARSON CITY, NV 89701-4717

MARY LOU WILSON
333 MARSH AVENUE
RENO, NV 89509

MICHAEL TODD BOTELHO #80837
LOVELOCK CORRECTIONAL CENTER
P.O. BOX 359
LOVELOCK, NV 89419



LORI MATHEUS
CRIMINAL CLERK

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FILED

2007 JUN 25 PM 2:52

RONALD A. LONGTIN, JR.

BY

DEPUTY

CODE 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

--o0o--

MICHAEL TODD BOTELHO,
Petitioner,

vs.

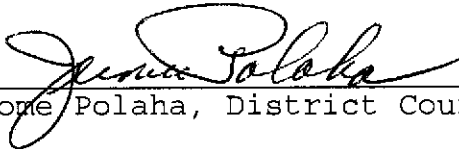
Case No. CR03P2156
Department No. 3STATE OF NEVADA,
Respondent.

ORDER

Upon Invoice of Sharp Reporting Services,
Court Reporter for Department Number 3, and good cause
appearing therefor:

IT IS HEREBY ORDERED that payment of
transcription fees be granted and that the Nevada State
Public Defender pay Sharp Reporting Services the sum of
\$176.70.

Dated the 7th day of June, 2007.


Jerome Polaha, District Court Judge

CR03P2156 DC-990001193-083
POST: MICHAEL TODD BOTELHO (D. 1 Page
District Court 06/25/2007 02:52 PM
Washoe County 3370
DOC YILLOYD

FILED

1 CODE NO. 1670

MARY LOU WILSON

Attorney At Law #3329

333 Marsh Ave.

Reno, Nevada 89509

775-337-0200

Attorney for Petitioner/Appellant

2007 SEP 17 PM 3:54

RONALD A. LONGTIN, JR.

DEPUTY



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

9
10
11 MICHAEL TODD BOTELHO,

12 Petitioner/Appellant,

13 vs.

Case No. CR03P-2156
Supreme Court #4958614
15 Warden, L.C.C. and
16 THE STATE OF NEVADA,

Dept. 3

17 Respondents.
18

19 EXPARTE MOTION FOR APPROVAL OF FEES IN THE APPELLANT'S
20 OPENING BRIEF AND APPELLANT'S APPENDIX
21 IN THE DENIAL OF THE PETITION AND SUPPLEMENTAL PETITION
22 FOR WRIT OF HABEAS CORPUS
(POST CONVICTION)

23 COMES NOW, MICHAEL BOTELHO, by and through counsel, and Moves
24 this Honorable Court for its Order for payment of fees in the Appellant's Opening
25

CR03P2156
DC-9900001643-209
POST: MICHAEL TODD BOTELHO (8 Pages
District Court 09/17/2007 03:54 PM
Washoe County
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1 Brief and Appellant's Appendix, Volumes I and II in the denial of the Petition and
2 Supplemental Petition for Writ of Habeas Corpus (Post Conviction).

3 NRS 7.125(3) allows for waiver of the \$750.00 cap on petitions for writ of
4 habeas corpus upon petitioner showing:

5 (a) the complexity of a case or the number of its factual or legal issues;

6 (b) the severity of the offense;

7 (c) the time necessary to provide an adequate defense; or

8 (d) other special circumstances

9 If Petitioner/Appellant is able to show at least one of the above, the statute
10 allows for the payment of the excess fees upon certification of the court in which
11 the representation was rendered and approval by the presiding judge of the judicial
12 district in which the attorney was appointed. In this regard, (a) the case involved
13 kidnapping, three counts of sexual assault, and battery of a child under the age of
14 fourteen years; (b) the severity of the offenses was that Petitioner has life sentences
15 with forty-five years to the parole board; (c) the time required involved review of
16 expert witness testimony from an evidentiary hearing, written evaluation, review of
17 the findings of fact, conclusions of law, and judgment. Additionally, counsel had
18 to put together Appellant's Appendix, Volumes I and II, ensuring that they were
19 properly numbered; (d) other circumstances involved copying prior law from
20 another district court case involving mitigation in sentencing and gaining the full
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1 citation to present to the Supreme Court, research in the areas of sentencing,
2 shepardizing certain cases, which involved sentencing. Additionally, finalizing the
3 brief included the table of contents and authorities, copying and postage costs. It
4 should be noted that counsel also reduced her fees.
5

6 THEREFORE, the amount of \$2,298.14 is requested.

7 DATED this 17 day of September, 2007.
8

9 Mary Lou Wilson
10 MARY LOU WILSON

11 Attorney At Law, Bar #3329

12 333 Marsh Ave.

13 Reno, Nevada 89509

14 775-337-0200

15 Attorney for Petitioner/Appellant Botelho
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VOUCHER**MICHAEL TODD BOTELHO VS. WARDEN, LCC AND STATE OF NEVADA**

JUNE 1, 2007, NOTICE OF APPEAL, CASE APPEAL STATEMENT, REQUEST FOR
TRANSCRIPT, 1 HOUR

JUNE 7, 2007, RESPOND TO PETITIONER'S LETTER, REGARDING THE ISSUE FOR
APPEAL AND WHY THE ORIGINAL PETITION WAS NOT PURSUED (TRIAL
COUNSEL'S DISCUSSION WITH DETECTIVES), ½ HOUR

JUNE 12, 2007, DOCKETING STATEMENT AND MAILED TO PARTIES, 2 HOURS

SEPTEMBER 8, 2007, START APPEAL REGARDING THE STATEMENT OF THE FACTS
PURSUANT TO DR. MAHAFFEY'S REPORT, 1 HOUR

SEPTEMBER 9, 2007, CONTINUE WITH APPEAL, READ EVIDENTIARY HEARING, PUT
TOGETHER APPELLANT'S APPENDIX, VOLUME I, FOCUS UPON DR. MAHAFFEY'S
OPINION REGARDING PETITIONER AS A MEDIUM/HIGH RISK TO REOFFEND,
3 HOURS

SEPTEMBER 10, 2007, CONTINUE WITH APPEAL, ISSUE BROKEN DOWN INTO TWO
AREAS, SPECIFICALLY TRIAL COUNSEL'S INEFFECTIVENESS AND DISTRICT
COURT ABUSE OF DISCRETION, LOOK TO SENTENCING DISCRETION OF THE
DISTRICT COURT UNLESS USE OF OUTSIDE EVIDENCE OR SHOCK THE
CONSCIOUS, 1 HOUR

1 SEPTEMBER 11, 2007, CONTINUE WITH APPEAL, REVIEW DISTRICT COURT'S
2 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT, LOOK TO DR.
3 MARTHA MAHAFFEY'S TESTIMONY AND REPORT TO PUT INTO ARGUMENT,
4 LOOK TOWARDS OTHER MITIGATION BESIDE MEDIUM/HIGH RISK, SUCH AS NO
5 CRIMINAL HISTORY, NO SEXUAL ASSAULT PRIORS, EMPLOYMENT AND FAMILY,
6 3 HOURS

7
8 SEPTEMBER 12, 2007, APPELLANT APPENDIX, VOLUME II, START STATEMENT OF
9 CASE WITH VOLUMES I AND II, MARK ALL EXHIBITS APPROPRIATELY, RESEARCH
10 AREAS OF SENTENCING AND SHEPARDIZE CASES, COPY BEZNOSENKO FOR
11 MITIGATION EVIDENCE IN SENTENCING, 5 HOURS

12
13 SEPTEMBER 13, 2007, COMPLETE STATEMENT OF CASE, FINALIZE ISSUES OF
14 TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE NOT TO RECEIVE AND PRESENT
15 PSYCHOSEXUAL EVALUATION THROUGH EXPERT WITNESS TESTIMONY AND
16 ABUSE OF DISCRETION IN FAILING TO CONSIDER MITIGATION AND FOCUS UPON
17 THE CRIME. CONTINUE COMPLETION OF THE BRIEF, INCLUDING TABLE OF
18 CONTENTS, TABLE OF AUTHORITIES, STATEMENT OF CASE, FACTS, ISSUES, AND
19 APPELLANT APPENDIX, VOLUMES I AND II, 5 HOURS

20
21 SEPTEMBER 14, 2007, PICK UP DOCUMENTS, PUT TOGETHER FOR FILING, AND
22 MAIL, NO CHARGE

1 ATTORNEY FEES FOR 21 ½ HOURS @ \$100.00 PER HOUR = \$2,150.00

2 (REDUCED TO \$2,000.00)

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5 POSTAGE (WILSON) = \$14.42

6 POSTAGE (POSTAL DEPOT) = \$58.79

7 TOTAL AMOUNT OWING = \$2,448.14

8 (REDUCED TO \$2,298.14)

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10 *Mary Lou Wilson*
11 *9-17-07*
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Botelho

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Branch: 3901

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Price 0.0450

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Item Discount Amt. 0.0350
Price 0.0450

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Tape SuprStrngth Pkg 3.49 T
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Total 191.93

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Mary Lou Wilson

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SECOND JUDICIAL DISTRICT COURT COUNTY OF WASHOE
STATE OF NEVADA

AFFIRMATION
PURSUANT TO NRS 239B.030

THE UNDERSIGNED DOES HEREBY AFFIRM THAT THE PRECEDING
DOCUMENT: EXPARTE MOTION FOR FEES

FILED IN CASE NUMBER: CR03P-2156 SUPREME COURT #49586

DOCUMENT DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY
PERSON

DATE: SEPTEMBER 17, 2007

SIGNATURE: *Mary Lou Wilson*

PRINT NAME: MARY LOU WILSON

ATTORNEY FOR: MICHAEL TODD BOTELHO

1 CODE NO. 1675

FILED



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

9 MICHAEL TODD BOTELHO,

10 Petitioner/Appellant,

11 vs.

12 Case No. CR03P-2156
13 Supreme Court #4958614 Warden, L.C.C. and
15 THE STATE OF NEVADA,

Dept. 3

16 Respondents.

17
18 EXPARTE ORDER FOR APPROVAL OF FEES IN THE APPELLANT'S
19 OPENING BRIEF AND APPELLANT'S APPENDIX
20 IN THE DENIAL OF THE PETITION AND SUPPLEMENTAL PETITION
21 FOR WRIT OF HABEAS CORPUS
22 (POST CONVICTION)

23 HAVING REVIEWED the exparte motion made by MICHAEL BOTELHO, by
24 and through counsel, Moving this Honorable Court for its Order for payment of
25 fees in the Appellant's Opening Brief and Appellant's Appendix, Volumes I and II

1 in the denial of the Petition and Supplemental Petition for Writ of Habeas Corpus
2 (Post Conviction), the following factors are found:

3 NRS 7.125(3) allows for waiver of the \$750.00 cap on petitions for writ of
4 habeas corpus upon petitioner showing:

5 (a) the complexity of a case or the number of its factual or legal issues;

6 (b) the severity of the offense;

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1 citation to present to the Supreme Court, research in the areas of sentencing,
2 shepardizing certain cases, which involved sentencing. Additionally, finalizing the
3 brief included the table of contents and authorities, copying and postage costs. It
4 should be noted that counsel also reduced her fees.
5

6 THEREFORE, the amount of \$2,298.14 requested appears fair and reasonable.

7 IT IS SO ORDERED that the amount of \$2,298.14 be paid to Mary Lou Wilson
8
9 by the State of Nevada through the Nevada State Public Defender's Office.

10 DATED this 17 day of September, 2007.

11 
12 CHIEF JUDGE
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VOUCHER

MICHAEL TODD BOTELHO VS. WARDEN, LCC AND STATE OF NEVADA

JUNE 1, 2007, NOTICE OF APPEAL, CASE APPEAL STATEMENT, REQUEST FOR
TRANSCRIPT, 1 HOUR

JUNE 7, 2007, RESPOND TO PETITIONER'S LETTER, REGARDING THE ISSUE FOR
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CONSCIOUS, 1 HOUR

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6 3 HOURS

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5 POSTAGE (WILSON) = \$14.42

6 POSTAGE (POSTAL DEPOT) = \$58.79

7 TOTAL AMOUNT OWING = \$2,448.14

8 (REDUCED TO \$2,298.14)

9
10 *Mary Lou Wilson*
11 *9-17-07*
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Botelho
FedEx Kinko's

FedEx Kinko's
 24 California Ave
 Reno, NV 89509-1615
 (775) 322-5277

9/14/2007

Trans.: 6837

Register: 004

Team Member: Shawn M.

Customer: Mary Lou Wilson

9:07:28 AM PST

Branch: 3901

Till: 059419

SALE



* 3 9 0 1 0 0 4 6 8 3 7 *

legal copies

6 @ 22.7700 83.49

FS BW SS Standard

0001 1,518.00 @ 0.0800

Item Discount Amt. 0.0350

Price 0.0450

Drilling

0371 1,518.00 @ 0.0100

legal copies 2

6 @ 19.3500 70.95

FS BW SS Standard

0001 1,290.00 @ 0.0800

Item Discount Amt. 0.0350

Price 0.0450

Drilling

0371 1,290.00 @ 0.0100

no holes

7 @ 1.4400 5.67

FS BW SS Standard 5.67 T
 0001 126.00 @ 0.0800
 Item Discount Amt. 0.0350
 Price 0.0450

drilling originals

1 @ 5.0000 5.00

Drilling Setup
0372

1.00 @ 5.0000 5.00 T

Bubble Mailr 12.5x18

5812 6.00 @ 1.6900 10.14 T

Tape SuprStrngth Pkg

4401 1.00 @ 3.4900 3.49 T

Total Discount

102.69

Sub-Total

178.74

Deposit

0.00

Tax

13.19

Total

191.93

Visa (S)

191.93

Account: 4954

Auth: 04020B (A)

Total Tender

0.00

Change Due

Mary Lou Wilson

Thank you for visiting

FedEx Kinko's
 Make It. Print It. Pack It. Ship It.
www.fedexkinkos.com

Customer Copy

Botelho
158.79

09/14/07 1:00 PM
 09014667 0.00

RECEIVED
 5879
 09/14/07 1:00 PM
 09014667 0.00

SECOND JUDICIAL DISTRICT COURT COUNTY OF WASHOE
STATE OF NEVADA

AFFIRMATION
PURSUANT TO NRS 239B.030

THE UNDERSIGNED DOES HEREBY AFFIRM THAT THE PRECEDING
DOCUMENT: EXPARTE MOTION FOR FEES

FILED IN CASE NUMBER: CR03P-2156 SUPREME COURT #49586

DOCUMENT DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY
PERSON

DATE: SEPTEMBER 17, 2007

SIGNATURE: *Mary Lou Wilson*

PRINT NAME: MARY LOU WILSON

ATTORNEY FOR: MICHAEL TODD BOTELHO

1 CODE NO.

Mary Lou Wilson

Attorney At Law, Bar #3329

333 Marsh Ave.

Reno, Nevada 89509

775-337-0200

Attorney for Petitioner/Appellant Botelho

ORIGINAL

2007 NOV -5 PM 3:24

HOWARD W. CONYERS

BY  DEPUTY

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

9
10 MICHAEL TODD BOTELHO,

11 Petitioner/Appellant,

12 vs.

Case No. CR03P-2156

Supreme Court #49586

14 Warden, L.C.C.,

15 and THE STATE OF NEVADA,

Dept. No. 3

16 Respondents.

17
18
19 EX PARTE MOTION FOR FEES IN THE PREPARATION AND COMPLETION
20 OF THE REPLY BRIEF IN THE DENIAL OF THE SUPPLEMENTAL
21 PETITION FOR WRIT OF HABEAS CORPUS
22 (POST CONVICTION)

23 COMES NOW, MICHAEL TODD BOTELHO, by and through appellate/post
24 conviction counsel and requests approval of fees in the preparation and completion
25

1 of the Reply Brief in the denial of the Supplemental Petition for Writ of Habeas
2 Corpus (Post Conviction).

3
4 This exparte motion is based upon the attached voucher of counsel and
5 complies with the statute.

6 Therefore, the amount of \$420.06 is requested to be paid to Mary
7 Lou Wilson by the State of Nevada through the Nevada State Public Defender's
8 Office.
9

10 DATED this 5th day of November, 2007.

11 Mary Lou Wilson
12 MARY LOU WILSON
13 Attorney At Law, Bar #3329
14 333 Marsh Ave.
15 Reno, Nevada 89509
16 775-337-0200
17 Attorney for Appellant/Petitioner
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VOUCHERMICHAEL TODD BOTELHO VS. WARDEN, LCC AND STATE OF NEVADA

NOVEMBER 3, 2007, READ STATE'S ANSWERING BRIEF AND CASE LAW CITED,
REVIEW APPELLANT'S OPENING BRIEF AND START REPLY. COMPLETE
STATEMENT OF ISSUES AND ARGUMENT WITH CITATIONS, 3 HOURS

NOVEMBER 4, 2007, FINALIZE REPLY BRIEF, 1 HOUR

ATTORNEY FEES FOR FOUR HOURS @ \$100.00 PER HOUR = \$400.00

COPYING CHARGES (WILSON) = \$14.40

POSTAGE CHARGES = \$5.66

TOTAL AMOUNT OWING = \$420.06

Mary Lee Stilson

November 5, 2007

SECOND JUDICIAL DISTRICT COURT COUNTY OF WASHOE,
STATE OF NEVADA

AFFIRMATION
PURSUANT TO NRS 239B.030

THE UNDERSIGNED DOES HEREBY AFFIRM THAT THE PRECEDING
DOCUMENT: EXPARTE MOTION FOR FEES

DOCUMENT IN CASE NUMBER: CR03P-2156

DOCUMENT DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY
PERSON

DATE: NOVEMBER 5, 2007

SIGNATURE:

Mary Lou Wilson

PRINT NAME: MARY LOU WILSON

ATTORNEY FOR: MICHAEL TODD BOTELHO

1 CODE NO. 1675

DC-9900002208-050
CR03P2156
POST: MICHAEL TODD BOTELHO (4 Pages
District Court 12/17/2007 02:32 PM
1675
JSHEET15
Washoe County
DOC

FILED

2007 DEC 17 PM 2:32

HOWARD H. CONYERS

BY DEPUTY



SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MICHAEL TODD BOTELHO,

Petitioner/Appellant,

vs.

Case No. CR03P-2156
Supreme Court #49586Warden, L.C.C.,
and THE STATE OF NEVADA,

Dept. No. 3

Respondents.

EXPARTE ORDER FOR FEES IN THE PREPARATION AND COMPLETION
OF THE REPLY BRIEF IN THE DENIAL OF THE SUPPLEMENTAL
PETITION FOR WRIT OF HABEAS CORPUS
(POST CONVICTION)

HAVING REVIEWED the exparte motion for MICHAEL TODD BOTELHO,
by and through appellate/post conviction counsel, requesting approval of fees in

1 the preparation and completion of the Reply Brief in the denial of the
2 Supplemental Petition for Writ of Habeas Corpus (Post Conviction),
3

4 This Honorable Court finds that the exparte motion based upon the attached
5 voucher of counsel complies with the statute and appears fair and reasonable.

6 IT IS SO ORDERED that the amount of \$420.06 be paid to
7 Mary Lou Wilson by the State of Nevada through the Nevada State Public
8 Defender's Office.
9

10 DATED this 13 day of Dec, 2007.

11 
12 CHIEF JUDGE
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VOUCHERMICHAEL TODD BOTELHO VS. WARDEN, LCC AND STATE OF NEVADA

NOVEMBER 3, 2007, READ STATE'S ANSWERING BRIEF AND CASE LAW CITED,
REVIEW APPELLANT'S OPENING BRIEF AND START REPLY. COMPLETE
STATEMENT OF ISSUES AND ARGUMENT WITH CITATIONS, 3 HOURS

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ATTORNEY FEES FOR FOUR HOURS @ \$100.00 PER HOUR = \$400.00

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POSTAGE CHARGES = \$5.66

TOTAL AMOUNT OWING = \$420.06

Mary Lee Stilson

November 5, 2007

SECOND JUDICIAL DISTRICT COURT COUNTY OF WASHOE,
STATE OF NEVADA

AFFIRMATION
PURSUANT TO NRS 239B.030

THE UNDERSIGNED DOES HEREBY AFFIRM THAT THE PRECEDING
DOCUMENT: EXPARTE MOTION FOR FEES

DOCUMENT IN CASE NUMBER: CR03P-2156

DOCUMENT DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY
PERSON

DATE: NOVEMBER 5, 2007

SIGNATURE: Mary Lou Wilson

PRINT NAME: MARY LOU WILSON

ATTORNEY FOR: MICHAEL TODD BOTELHO

FILED

MAY 19 2008

HOWARD W. CONYERS, CLERK
By: *[Signature]*
(DEPUTY CLERK)

IN THE SUPREME COURT OF THE STATE OF NEVADA

CR03/22/56

MICHAEL TODD BOTELHO,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

No. 49586

FILED

MAY 16 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERKORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Michael Todd Botelho's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On April 7, 2004, the district court convicted Botelho, pursuant to a guilty plea, of first-degree kidnapping (Count I) and three counts of sexual assault on a child (Counts III, IV, and V). The district court sentenced Botelho to serve a term of life in prison with the possibility of parole for kidnapping and prison terms of life with the possibility of parole for each count of sexual assault. Count III was ordered to run consecutively to the kidnapping count. Counts III and IV were ordered to run concurrently. Finally, the district court ordered Count V to run consecutively to counts I and IV. This court affirmed

CR03/22/56
DC-9900003169-146
POST: MICHAEL TODD BOTELHO (4 Pages
District Court 05/19/2008 03:19 PM
Washoe County 4134
CKEPLER

Botelho's judgment of conviction on appeal.¹ The remittitur issued on May 3, 2005.

Botelho filed a timely post-conviction petition for a writ of habeas corpus in the district court on March 6, 2006. After conducting an evidentiary hearing, the district court denied Botelho's petition on May 31, 2007. This appeal followed.

Botelho contends the district court erred in deciding that he did not receive ineffective assistance of counsel at sentencing. To establish ineffective assistance of counsel, a petitioner must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.² To prove prejudice, a petitioner must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different.³

Botelho contends that counsel was ineffective because counsel failed to obtain a psychosexual evaluation of him and that if testimony concerning such an evaluation had been presented, he would have received a reduced sentence. At an evidentiary hearing, Botelho called Dr. Martha Mahaffey to testify. Dr. Mahaffey testified that she evaluated

¹Botelho v. State, Docket No. 43247 (Order of Affirmance, April 4, 2005).

²Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

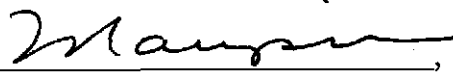
³See Strickland, 466 U.S. at 694.

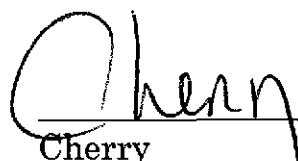
Botelho in preparation for the evidentiary hearing and found him to be a moderate to high risk sex offender. Dr. Mahaffey testified that in her opinion, Botelho should not be allowed near children. Dr. Mahaffey further testified that there was a possibility that Botelho could be rehabilitated sufficiently so that he could be allowed carefully supervised meetings with children in the future, but that his rehabilitation depended on many treatment factors. At the evidentiary hearing, Botelho did not present evidence concerning his trial counsel's investigation or tactical decisions concerning this type of evidence.

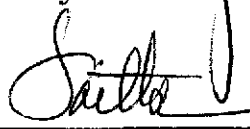
The district court denied Botelho's petition, specifically stating that the sentence imposed was based upon the facts of the crime and that Dr. Mahaffey's testimony would not have affected the sentence. Upon review of the record, we conclude that Botelho did not demonstrate that the testimony of Dr. Mahaffey would have changed the outcome of the sentencing proceeding. The evidence presented at the hearing shows that Dr. Mahaffey formed the opinion that Botelho was at risk to reoffend and that he should never be allowed unsupervised contact with young children. As such, Botelho has not demonstrated a reasonable probability that the outcome of his sentencing hearing would have been different had the testimony of Dr. Mahaffey been presented. Therefore, the district court did not err in rejecting Botelho's claim.

Accordingly, having considered Botelho's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.⁴

 J.
Maupin

 J.
Cherry

 J.
Saitta

cc: Hon. Jerome Polaha, District Judge
Mary Lou Wilson
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk✓

⁴To the extent that Botelho argues that the district court abused its discretion in sentencing him, this claim is procedurally barred as it should have been raised on direct appeal. See Franklin v. State, 110 Nev. 750, 751-52, 877 P.2d, 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

FILED

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUN 11 2008

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

Supreme Court No. 49586

HOWARD W. CONYERS, CLERK
By: *[Signature]*
DEPUTY CLERK

District Court Case No. CR032156

CR03P2156

REMITTITUR

TO: Howard W. Conyers, 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: June 10, 2008

Tracie Lindeman, Clerk of Court

By:

Deputy Clerk

A. Ingerson

cc (without enclosures):

Hon. Jerome Polaha, District Judge
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Mary Lou Wilson

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on JUN 11 2008

Howard W. Conyers by Kepler
District Court Clerk

CR03P2156
DC-9900003342-073
POST: MICHAEL TODD BOTELHO ID 1 Page
District Court 06/11/2008 02:05 PM
Washoe County 4145
000
CKEPLER

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUN 11 2008

HOWARD W. COYNE, CLERK

By: *[Signature]*
DEPUTY CLERKMICHAEL TODD BOTELHO,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

Supreme Court No. 49586

District Court Case No. CR032156

*CR032156*CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of the district court AFFIRMED."

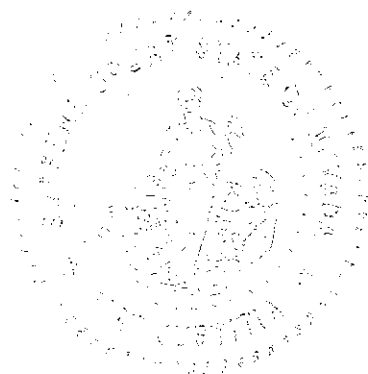
Judgment, as quoted above, entered this 16th day of May, 2008.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 10th day of June, 2008.

Tracie Lindeman, Supreme Court Clerk

By: *A. Ingersoll*

Deputy Clerk



FILED

JUN 11 2008

HOWARD W. COYNE, CLERK
By: *[Signature]*
DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

CR03P2156

No. 49586

MICHAEL TODD BOTELHO,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

FILED

MAY 16 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
By: *[Signature]*
DEPUTY CLERKORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Michael Todd Botelho's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On April 7, 2004, the district court convicted Botelho, pursuant to a guilty plea, of first-degree kidnapping (Count I) and three counts of sexual assault on a child (Counts III, IV, and V). The district court sentenced Botelho to serve a term of life in prison with the possibility of parole for kidnapping and prison terms of life with the possibility of parole for each count of sexual assault. Count III was ordered to run consecutively to the kidnapping count. Counts III and IV were ordered to run concurrently. Finally, the district court ordered Count V to run consecutively to counts I and IV. This court affirmed

08-123407

CR03P2156
DC-990000342-075
POST: MICHAEL TODD BOTELHO (5 Pages
District Court 06/11/2008 02:05 PM
Washoe County 4134
000
CKEPLER

Botelho's judgment of conviction on appeal.¹ The remittitur issued on May 3, 2005.

Botelho filed a timely post-conviction petition for a writ of habeas corpus in the district court on March 6, 2006. After conducting an evidentiary hearing, the district court denied Botelho's petition on May 31, 2007. This appeal followed.

Botelho contends the district court erred in deciding that he did not receive ineffective assistance of counsel at sentencing. To establish ineffective assistance of counsel, a petitioner must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.² To prove prejudice, a petitioner must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different.³

Botelho contends that counsel was ineffective because counsel failed to obtain a psychosexual evaluation of him and that if testimony concerning such an evaluation had been presented, he would have received a reduced sentence. At an evidentiary hearing, Botelho called Dr. Martha Mahaffey to testify. Dr. Mahaffey testified that she evaluated

¹Botelho v. State, Docket No. 43247 (Order of Affirmance, April 4, 2005).

²Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

³See Strickland, 466 U.S. at 694.

Botelho in preparation for the evidentiary hearing and found him to be a moderate to high risk sex offender. Dr. Mahaffey testified that in her opinion, Botelho should not be allowed near children. Dr. Mahaffey further testified that there was a possibility that Botelho could be rehabilitated sufficiently so that he could be allowed carefully supervised meetings with children in the future, but that his rehabilitation depended on many treatment factors. At the evidentiary hearing, Botelho did not present evidence concerning his trial counsel's investigation or tactical decisions concerning this type of evidence.

The district court denied Botelho's petition, specifically stating that the sentence imposed was based upon the facts of the crime and that Dr. Mahaffey's testimony would not have affected the sentence. Upon review of the record, we conclude that Botelho did not demonstrate that the testimony of Dr. Mahaffey would have changed the outcome of the sentencing proceeding. The evidence presented at the hearing shows that Dr. Mahaffey formed the opinion that Botelho was at risk to reoffend and that he should never be allowed unsupervised contact with young children. As such, Botelho has not demonstrated a reasonable probability that the outcome of his sentencing hearing would have been different had the testimony of Dr. Mahaffey been presented. Therefore, the district court did not err in rejecting Botelho's claim.

Accordingly, having considered Botelho's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.⁴

Maupin, J.
Maupin

Cherry, J.
Cherry

Saitta, J.
Saitta

cc: Hon. Jerome Polaha, District Judge
Mary Lou Wilson
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁴To the extent that Botelho argues that the district court abused its discretion in sentencing him, this claim is procedurally barred as it should have been raised on direct appeal. See Franklin v. State, 110 Nev. 750, 751-52, 877 P.2d, 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).



CERTIFIED COPY

This document is a full, true and correct copy of
the original on file and of record in my office.

DATE: June 10, 2008
Supreme Court Clerk, State of Nevada

By A. Ingerson Deputy

Case No. CRO3P2156Dept. No. 3

OFFICIAL FILED

2010 JAN 27 AM 10:17

HOWARD W. CONYERS

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

MICHAEL T. BOTELHO,

Plaintiff/Petitioner,

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

v.

J. BENEDETTI, et. al.,

Defendant/Respondent. /

The PETITIONER, MICHAEL T. BOTELHO

in properia persona, and respectfully moves this Honorable Court,
 purauant to N.R.S. 12.015, for an order granting leave to
 proceed in the above-entitled action in forma pauperis, without
 requiring MICHAEL T. BOTELHO to pay or provide security
 for the payment of costs of prosecuting this action.

This motion is made based upon the attached affidavit of

MICHAEL T. BOTELHO.Dated this 20TH Day of JANUARY 2010
19.

RESPECTFULLY SUBMITTED,

Michael T. BotelhoMICHAEL T. BOTELHO # 80837PETITIONER, IN PRO SE

MICHAEL T. BOTELHO, # 80837

P.O. Box
 Carson City, Nv. 89702
 Petitioner in Proper Person

ORIGINAL

FILED

2010 JAN 27 AM 10:17

HOWARD W. CONYERS

BY: [Signature]
DEPUTY

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

MICHAEL T. BOTELHO
 Petitioner,

Vs.

Case No.: CR03P2156

J. BENEDETTI, et.al.

Dept. No.: 3Respondent 1AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, MICHAEL T. BOTELHO, First being duly sworn, depose and say that I am Petitioner in the above-entitled case; that in support of my Motion to proceed without being required to prepay fees, costs or give security therefore; I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I am entitled to relief.

I do X Do not request an attorney to be appointed for me.

I further swear that the responses, which I have made to question, and instructions below are true.

1. Are you presently employed: Yes No X

A. If the answer is yes, state the amount of your salary or wages per month, and give name and address of your employer.

B. If the answer is no, state the date of last employment and the amount of salary and wages per month, which you received: 6-21-09 \$45⁰⁰ MO.
\$131⁰⁰ TAKE HOME.

2. Have you received within the past twelve months any money from any of the following sources?

- a. Business, profession or form of self-employment? Yes ___ No ☒
- b. Rent payments, interest or dividends? Yes ___ No ☒
- c. Pensions, annuities or life insurance payments? Yes ___ No ☒
- d. Gifts or inheritances? Yes ___ No ☒
- e. Any other sources? Yes ☒ No ___

If the answer to any of the above is "YES" describe each source of money and state the amount received from each during the past twelve months:

I GET A BIT OF MONEY FROM MOM FOR HYGIENE EVERY YEAR

3. Do you own cash or equivalent prison currency, or do you have money in a checking or savings account? Yes ☒ No ___

If the answer is "YES" state the total value of the items owned: 200⁰⁰ GATE MONEY

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuables property (excluding ordinary household furnishing and clothing)? Yes ___ No ☒

If your answer is "YES: describe the property and state its approximate value:

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support:

N/A

UNDER THE PENALTY OF PERJURY, Pursuant to NRS 208.165 the above affidavit is true and correct to the best of my personal knowledge.

DATED this 20th day of JANUARY, 2010.

Michael Botelho

Sign Your Name Here

MICHAEL T. BOTELHO

Print Your Name Here

#80837

DOC#

V10. 688

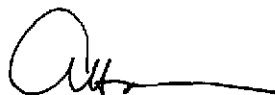
FINANCIAL CERTIFICATE

I hereby certify that the Petitioner/Plaintiff, Michael Botelho # 80837
has the sum of \$ 440.76 on account to his credit at the
Northern Nevada Correctional Center where he is confined.

I further certify that Petitioner likewise has the following securities to his
credit according to the records of said institution: _____

\$ 200.00 in savings

Dated this 6th day of January, 2000



Custodian of Records
Inmate Accounting Services
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, Nevada. 89702

SCVD IN CERTIFICATION

CERTIFICATE OF SERVICE BY MAIL

Pursuant to N.R.C.P. Rule 5 (b), I hereby certify that I am the petitioner/Defendant named herein and that on this 20th day of JANUARY, ²⁰¹⁰~~200~~, I deposited in the United States Mails in Carson City, Nevada a true a correct copy of the foregoing addressed to:

Michael T Botelho

MICHAEL T. BOTELHO #80837

PETITIONER, IN PRO SE

VERIFICATION

UNDER PENALTY OF PERJURY, THE UNDERSIGNED DECLARES
THAT HE IS THE PETITIONER NAMED IN THE FOREGOING PETITION
AND KNOWS THE CONTENTS THEREOF, THAT THE PLEADINGS
ARE TRUE AND CORRECT 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.

TH
EXECUTED THIS 20 DAY OF JANUARY, 2010

SIGNED UNDER PENALTY OF PERJURY IN ACCORDANCE WITH
NRS 208.165

Michael T. Botelho

MICHAEL T. BOTELHO⁴ 80837

PETITIONER, IN PRO SE

///

///

///

CR03P2156
 DC-9900614401-018
 POST MICHAEL TODD BOTELHO (D 1 Page
 District Court 01/27/2010 10:17 AM
 Washoe County 2490
 JEL/OPF

Case No: CR03P2156Dept No: 3

ORIGINAL

FILED

2010 JAN 27 AM 10:17

HOWARD W. CONYERS

BY [Signature]
DEPUTYIN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADAIN AND FOR THE COUNTY OF WASHOEMICHAEL T. BOTELHO,
Petitioner)

vs

J. BENEDETTI, et al.,
Respondent)MOTION FOR APPOINTMENT
OF COUNSEL PURSUANT TO
NRS 34.750Petitioner, MICHAEL T. BOTELHO, pursuant to NRS 34.750

(1) (2) request the Honorable Court to appoint counsel to
 represent him in this HABEAS CORPUS petition for the
 following reasons:

1. Petitioner is not able to afford counsel, see motion to
 proceed in Forma Pauperis and Affidavit in support filed with
 the court.
2. The issues involved in this matter are very complex.
3. The issues involved in this case will require investigation
 which the petitioner cannot do while confined in prison.
4. Petitioner has very limited knowledge of the law and process
 thereof.
5. The ends of justice would best be served in this case if an
 attorney was appointed to represent the petitioner.

Dated this 20th day of JANUARY, 2010 (2010)Case No: CR03-2156

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