

RTN COPY

1 PCR  
2 Lawrence Schwiger #71278  
3 Lovelock Correction Center  
4 P.O. Box 359  
5 Lovelock, Nevada 89419

FILED

AUG 22 10 12 AM '05

*Shirley S. Paragiusa*

IN THE EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA

7 LAWRENCE SCHWIGER, )  
8 Plaintiff, )  
9 -vs- )  
10 WARDEN VARE', et. al., )  
11 Defendants, )

CASE NO. C173970/174784  
DEPT NO. VI

Date of Hearing: \_\_\_\_\_  
Time of Hearing: \_\_\_\_\_

PETITION FOR WRIT OF HABEAS CORPUS  
(POST-CONVICTION RELIEF)

- 15 1. Name of institution and county in which you are presently imprisoned  
16 or where and how you are presently restrained of your liberty:  
LOVELOCK CORRECTIONAL CENTER, PERSHING COUNTY, NEVADA.
- 17 2. Name and location of court which entered the judgment of conviction  
18 under attack:  
EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY (LAS VEGAS), NEVADA.
- 19 3. Date of judgment of conviction:  
20 DECEMBER 11, 2001.
- 21 4. Case number:  
C 173970/ C 174784 CONSOLIDATED
- 22 5. Length of sentence:  
23 COUNT I - 10 TO LIFE; COUNTS VIII & IX - 6 TO 15 YEARS CONCURRENT AND  
CONSECUTIVE TO COUNT I.
- 24 6. Are you presently serving a sentence for a conviction other than the  
25 conviction under attack in this motion:  
NO
- 26 7. Nature of offense involved in conviction being challenged:  
27 LEWDNESS WITH A MINOR UNDER AGE 14; SOLICITATION TO COMMIT MURDER.

28 / / / (1)

COUNTY CLERK  
AUG 19 2005  
RECEIVED

- 1 8. What was your plea?  
2 ALFORD V. NORTH CAROLINA (maintaining complete innocence).
- 3 9. NOT APPLICABLE
- 4 10. NOT APPLICABLE
- 5 11. NOT APPLICABLE
- 6 12. Did you appeal from the judgment of conviction?  
7 YES
- 8 13. If you did appeal, answer the following:  
9 (a) Name of court: NEVADA SUPREME COURT  
10 (b) Case number: 39007  
11 (c) Result: AFFIRMED  
12 (d) Date of result: ORDER OF AFFIRMANCE - AUGUST 24, 2004  
13 REMITTITUR ISSUED - SEPTEMBER 23, 2004.
- 14 14. NOT APPLICABLE
- 15 15. Other than a direct appeal from the judgment of conviction and sentence  
16 have you previously filed any petitions, applications or motions with  
17 respect to this judgment in any court, state or federal?  
18 NO
- 19 16. NOT APPLICABLE
- 20 17. Has any ground being raised in this petition been previously presented  
21 to this or any other court by way of petition for habeas corpus, motion  
22 application or any other post-conviction proceeding?  
23 NO GROUNDS HAVE BEEN PREVIOUSLY RAISED IN ANY POST-CONVICTION
- 24 18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed  
25 on any additional pages you have attached, were not previously presented  
26 ed in any other court, state or federal, list briefly what grounds were  
27 not so presented, and give your reasons for not presenting them:  
28 NONE OF THE GROUNDS IN NO. 23 HAVE BEEN PRESENTED BECAUSE THE NEVADA  
SUPREME COURT HELD THAT NO PRE-PLEA ISSUES/GROUNDS CAN BE RAISED ON  
DIRECT APPEAL. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL COULD NOT BE  
RAISED BECAUSE TRIAL COUNSEL WAS THE SAME AS APPELLATE COUNSEL; THE  
INVOLUNTARINESS OF THE PLEA COULD NOT BE RAISED BECAUSE THE GROUNDS  
WHICH SUPPORT IT WERE NOT KNOWN UNTIL THE SUPREME COURT THEMSELVES  
CREATED THE GROUNDS FOR THE CLAIM; AND, INEFFECTIVE ASSISTANCE OF  
APPELLATE COUNSEL CANNOT BE RAISED IN THE APPEAL COUNSEL WAS INEFFECTIVE IN.
- 19 19. I AM NOT FILING THIS PETITION MORE THAN ONE YEAR AFTER THE DECISION  
20 OF MY DIRECT APPEAL.
- 21 20. I DO NOT HAVE ANY PETITION OR APPEAL NOW PENDING IN ANY COURT AS TO  
22 THE JUDGMENT UNDER ATTACK.
- 23 21. Give the name of each attorney who represented you in the proceeding  
24 resulting in your conviction and on direct appeal:

28 / / /

1 Preliminary Hearing: NANCY LEMCKE / JOSEPH ABOOD  
(Pre-Solicitation) CLARK COUNTY PUBLIC DEFENDERS  
2 Trial Counsel: DAVID C. AMESBURY / JOHN P. PARRIS  
3 Direct Appeal: DAVID C. AMESBURY / JOHN P. PARRIS  
4 Opening Brief by: KEITH A. GRIMES & ASSOCIATES  
KEITH A. GRIMES

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

7 23. State concisely every ground on which you are being held unlawfully:  
8

9 GROUND ONE

10 I ALLEGE MY STATE COURT CONVICTION AND/OR SENTENCE ARE UNCONSTIT  
11 TUTIONAL IN VIOLATION OF MY SIXTH AND FOURTEENTH AMENDMENT RIGHTS  
12 TO THE UNITED STATE CONSTITUTION TO EFFECTIVE ASSISTANCE OF  
COUNSEL BASED UPON THE FOLLOWING FACTS AND CIRCUMSTANCES:

13 I. COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE WHEN HE:

14 A. Falsely advised the Petitioner to waive his Constitutional Right to a  
15 fair trial in order to appeal Petitioner's pre-plea/pre-trial issues.

16 1. Sometime just prior to July 19, 2001, counsel for Petitioner, David C  
17 Amesbury and John P.Parris, visited the Petitioner (hereinafter Mr. Schwiger)  
18 at the Clark County Detention Center (CCDC). At this visit, counsel advised  
19 Mr. Schwiger that he absolutely could not receive a "fair trial" with his two  
20 wholly disparate sets of charges (Sexual allegations and Solicitation to commi  
21 murder) [mis]joined into the same trial and, as a result of this "abuse of  
22 discretion" by the district court, as well as other pre-trial errors, would  
23 have little or no chance of being acquitted in such a prejudicial trial.

24 2. Counsel then assured (guaranteed) Mr. Schwiger, that by pleading  
25 ALFORD (guilty) to the charges, he would not be waiving ANY of his Appellate  
26 Rights (regardless of what the plea agreement would "appear" to allege), and  
27 specifically his right to appeal:

28 a. The granting of the state's [illegal] Motion to Consolidate (Join)

1 the two disparate sets of charges, to wit; the various false sexual allegations  
2 and the Solicitation to Commit Murder allegations.

3 (1) In order to Join the two cases, some legal maneuvering had to take  
4 place. The court first had to Shorten the period of time normally allotted by  
5 rule to prepare to oppose the motion and to prepare the Solicitation of murder  
6 case for trial. The court accomplished this task by granting the state's  
7 Motion to Shorten Time, without requiring the state to produce the requisite  
8 Affidavit or Certification of counsel describing the circumstances which would  
9 justify depriving the defense a fair opportunity to defend against the charges.  
10 The court further accomplished this task by refusing the defendant a "fair"  
11 opportunity to oppose the motion in writing or to argue against the Motion in  
12 open court.

13 (2) Counsel advised Mr. Schwiger that it would be absolutely imperative to  
14 sever these disparate cases on direct appeal because the district court refused  
15 to even consider the defense position on Joinder.

16 (3) The evidence of the false sexual allegation was of such a very weak  
17 nature, counsel advised, that the ONLY way possible the state could have  
18 garnered an "honest" conviction on the false sexual allegation was to bolster  
19 the false sexual case with claims that Mr. Schwiger "allegedly" Solicited the  
20 murders of the potential witnesses in the sexual case, implying that Schwiger  
21 was attempting to thwart prosecution on the sexual charges - and therefore "must  
22 be guilty."

23 (4) In essence, the state was attempting to use the "false appearance" of  
24 the Solicitation allegation to attack Mr. Schwiger's credibility in the sexual  
25 case through the use of "unproven other bad acts," and with an Indictment which  
26 State Constitutionally and Statutorily, was illegally obtained.

27 (5) It is abundantly apparent that, the State was counting on the jury to  
28 convict Mr. Schwiger on the false sexual allegation, not because he actually

LAY

1 committed the crime and that they could prove it, but rather, through the use  
2 of the false "perception" (presumption) created by the alleged Solicitation,  
3 that they could simply convince a jury that Mr. Schwiger was an inherently "b  
4 man," (creating a latent hostility with the jury) and that Mr. Schwiger must  
5 therefore deserve to be punished regardless of whether he actually committed  
6 the acts charged in the Information.

7 (6) Counsel advised Mr. Schwiger that severing his two cases would be  
8 his ONLY chance (as an actually innocent man) of being exonerated of these two  
9 fictitious and outrageous sets of charges. Counsel further advised Mr. Schwiger  
10 that, if he were to be found guilty at trial by a jury, the issue of misjoinder  
11 would become moot (harmless error) due to the Appellate Court's disinclination  
12 to invalidate jury verdicts; that although some federal circuits of appeal do  
13 automatically reverse errors of misjoinder, the Ninth Circuit and Supreme Court  
14 of Nevada will instead apply the "harmless error analysis" and would likely  
15 rule that, because the jury had apparently found "sufficient" evidence to  
16 convict, it would find the error to be harmless even though it was not. This  
17 ruling would have been simply due to the false and prejudicial presumption  
18 created by the misjoining of these two disparate sets of charges, as well as  
19 other alleged assignments of error by the district court. Counsels Amesbury  
20 and Parris emphatically asserted, for this specific reason, it would be an  
21 absolute necessity to have these cases severed prior to any trial being held,  
22 at all costs. That, "but for the misjoinder, Mr. Schwiger could absolutely  
23 not receive a fair trial." Counsels then advised Mr. Schwiger that he would  
24 not be waiving his right to appeal the misjoining of these cases by accepting  
25 the ALFORD Plea.

26 b. COUNSEL ADVISED MR. SCHWIGER THAT HE WOULD NOT BE WAIVING HIS RIGHT  
27 TO APPEAL THE DENIAL OF HIS PRE-TRIAL WRIT OF HABEAS CORPUS.

28 (1) Mr. Schwiger received a Notice from the District Attorney's office

45T

1 on or about June 1, 2001, which advised Mr. Schwiger that he had a right to  
2 appeal the denial of his Pre-Trial Writ and that he had 33 days to file his  
3 Notice of Appeal as to his intent to do so. (SEE EXHIBIT "1")

4 At Mr. Amesbury's next visit with Mr. Schwiger following receipt of the  
5 Notice, Mr. Schwiger emphatically instructed counsel to appeal this denial.  
6 As is made clear by the record, counsel ignored Schwiger's instruction to do  
7 so. It should be noted that, the district court denied Mr. Schwiger's Pre-  
8 Trial Writ of Habeas Corpus without including ANY "findings of fact" or ANY  
9 "conclusions of law" whatsoever. Further, the underlying issue of Schwiger's  
10 Pre-Trial Writ presents a "substantial legal issue of first impression" and  
11 was therefore appropriate for an appeal.

12 c. COUNSEL ADVISED MR. SCHWIGER THAT HE WOULD NOT BE WAIVING HIS RIGHT  
13 TO APPEAL THE DENIAL OF HIS MOTION FOR AN INDEPENDANT PSYCHOLOGICAL  
14 EVALUATION OF THE ALLEGED CHILD VICTIM.

15 (1) There is clear and abundant evidence in the record of this case which  
16 clearly calls the veracity of the "alleged" victim into question:

17 (A) There is clear evidence of the "alleged" victim being coerced,  
18 and then coached into making the false allegation.

19 (B) The "alleged" victim's CPS statement and her Preliminary hearing  
20 testimony were wholly inconsistent with each other and, "just didn't make much  
21 sense" on many things, per the CPS Specialist who interviewed her.

22 (C) The "alleged" victim's own mother and grandmother both conceded  
23 that, prior to Mr. Schwiger's wrongful arrest, the "alleged" victim had on  
24 several occasions admitted that she had "lied about the whole thing" and had  
25 "made the entire story up."

26 (D) There was not a single shred of evidence which inculpated Mr.  
27 Schwiger of having committed the alleged sexual misconduct beyond this child's  
28 extremely inconsistent statements, which were also untruthful.

(E) The "alleged" victim herself claimed, that there had been an

1 actual eyewitness/participant to ALL of the alleged misconduct. However, the  
2 record in this case is abundantly clear of the fact that this "alleged" eye-  
3 witness has consistently and emphatically denied that ANY of the alleged mis-  
4 conduct had ever taken place. This "alleged" eyewitness denied the "alleged"  
5 victim's story altogether. CPS Specialist Paula Hammack interviewed this  
6 "alleged" eyewitness on February 02, 2001, and then testified that she had  
7 confirmed "NONE, NONE" of the "alleged" victim's story. The "lead" detective  
8 in the sexual case also interviewed this "alleged" eyewitness on January 25,  
9 2001, wherein she also told these detectives that "there were no touching  
10 (sexual) problems" concerning Mr. Schwiger. These detectives also interviewed  
11 the "alleged" victim on the same day, wherein she also denied any wrongdoing  
12 by Mr. Schwiger. (SEE TRANSCRIPT OF POLICE INTERVIEW WITH ALEXIS ASHFORD).

13 d. COUNSEL ADVISED MR. SCHWIGER THAT HE WOULD NOT BE WAIVING HIS RIGHT  
14 TO APPEAL THE DENIAL OF HIS STATE CONSTITUTIONAL AND STATUTORY RIGHT  
15 TO APPEAR AND TESTIFY BEFORE THE GRAND JURY.

16 (1) Mr. Schwiger was never provided proper notice (MARCUM) of his right  
17 to appear and testify before the grand jury in an attempt to "explain away the  
18 charges." Mr. Schwiger would have been able to prove that Thomas Yates (Tommy  
19 Two Fingers/Daniel Smith), acting as the state's agent, did coerce, pressure,  
20 and threaten Mr. Schwiger with the very lives of his wife and daughter to force  
21 him to attend "the visit" with undercover detective William Scott. Mr. Schwiger  
22 knew "the visit" would be with police (Mr. Yates made no secret of this fact  
23 while he threatened Mr. Schwiger - Mr Yates informed Mr. Schwiger that if he  
24 sought help from police within the jail, he would be seeking help from the very  
25 people [Det. Greg Naglich and Det. Jay Roberts] he was doing it for). Mr. Yates  
26 told Mr. Schwiger that if he did not go to "the visit" and cooperate with the  
27 undercover "hitman," his wife and daughter would be killed (Yates claimed they  
28 were being tailed 24/7 by his partner) and their murders would be pinned on Mr.  
Schwiger. Mr. Yates warned Mr. Schwiger that he would be notified immediately

LT

1 if he did not comply with his instructions at "the visit," and would call his  
2 partner to kill Mr. Schwiger's family. Mr. Schwiger asked Det. Scott if he  
3 knew Tommy Two Fingers at the beginning of "the visit" to ascertain whether or  
4 not Mr. Yates threat had credibility. Det. Scott confirmed that he knew him.  
5 Had Mr. Schwiger been permitted to testify before the grand jury, which was h  
6 right, he would have been able to produce the evidence to "explain away" the  
7 fictitious Solicitation allegations.

8 (2) On April 26, 2001, Mr. Schwiger was arraigned on the Solicitation  
9 charges. At this proceeding, Mr. Schwiger advised the court that he wanted to  
10 testify at the grand jury and had not been permitted to do so. The district  
11 court advised Mr. Amesbury that this objection would need to take the form of  
12 Writ. Despite Mr. Schwiger's instructions to counsel to file this Writ, Mr.  
13 Amesbury failed to follow his and the court's instructions.

14 e. COUNSEL ADVISED MR. SCHWIGER THAT HE WOULD NOT BE WAIVING HIS RIGHT  
15 TO APPEAL THE DENIAL OF MR. SCHWIGER'S ORAL MOTION FOR A CONTINUANCE  
OF TRIAL SO THAT HE COULD BETTER PREPARE FOR TRIAL.

16 (1) The court refused to ask counsel to state for the record why he  
17 needed a continuance. However, counsel at the time still needed to interview  
18 several witnesses concerning the Solicitation charges. (See GROUND TWO (II)(A)(2)  
(a)-inclusive).

19 f. COUNSEL ADVISED MR. SCHWIGER THAT HE WOULD NOT BE WAIVING HIS RIGHT  
20 TO APPEAL THE STATE'S PURPOSEFUL WITHHOLDING OF EXCULPATORY (BRADY)  
EVIDENCE, which consisted of the following:

21 (1) The audio-taped interview of Mr. Schwiger by Det. Roberts and Det.  
22 Ramirez which transpired on February 23, 2001.

23 (2) The CPS audio-taped interview of Chelsea Elizabeth Schwiger (an  
24 alleged eyewitness to the alleged sexual misconduct) which transpired on Feb.  
25 02, 2001.

26 (3) The audio-taped interview of Chelsea Schwiger by Det. Roberts and  
27 Det. Ramirez which transpired on January 25, 2001 at Doris Hancock Elementary  
28 School - without Mr. Schwiger's authorization or notification.

1 (4) The audio-taped interview of Alexis Ashford (alleged victim) by De  
2 Roberts and Det. Ramirez which transpired on January 25, 2001 at Doris Hanco  
3 Elementary School.

4 (5) The audio-taped interview between Linda Simone and CPS Paula M.  
5 Hammack/Det. Ramirez which transpired on February 02, 2001 at CPS.

6 (6) The audio-taped Voluntary statement of Linda Simone by Det. Robert  
7 and Det. Ramirez which transpired on January 25, 2001 at the Sexual Assault  
8 Detail office at 3010 W. Charleston Blvd. Mr. Schwiger was provided a portion  
9 of this transcript, however, he was not provided the entirety of the transcrip  
10 (page 12 is still missing) detailing the alleged victim's admissions of having  
11 lied about it all, and why Ms. Simone did not ever report her granddaughter's  
12 allegation to police or CPS. (Mr. Schwiger was the one who reported the false  
13 allegation to police, in an attempt to get to the bottom of this lie).

14 (7) The CCDC visiting log, demonstrating the exact time and duration of  
15 visits between Thomas Yates (aka Daniel W. Smith/Tommy Two Fingers) and the  
16 individuals associated with Mrs. Schwiger (Petitioner's wife at the time - Mrs  
17 Schwiger's best friend's son-in-law was a Metro Police officer), and others  
18 involved with this case. The visiting log concerning Yates would reveal some  
19 of the individuals who were involved in the manufacturing of the Solicitation  
20 charges against Mr. Schwiger.

21 (8) All CCDC Intel, LVMPD and DA's case files concerning Mr. Schwiger's  
22 Solicitation case investigation.

23 (9) All CCDC Intel, LVMPD and DA's investigation files regarding Thomas  
24 Yates, Daniel Wilson Smith and/or Tommy Two Fingers.

25 (10) The "Confidential Informant File" of Thomas A. Yates and/or Daniel  
26 Smith. This file is known to exist. Det. Joe Pannuillo was Mr. Yates handler/  
27 sponser for Mr. Yates "Informant activities" outside of CCDC.

28 (11) All Internal Communications (kites) concerning Yates at CCDC.

1 (12) All CCDC Intel, LVMPD and DA's investigation files concerning Mr.  
2 Anthony McFarland, to include:

- 3 a) Intel internal investigation files;  
4 b) LVMPD investigation files in this case, and all he was involved;  
5 c) All internal CCDC communications (kites) concerning McFarland;  
6 d) All DA's investigation files concerning Mc Farland on ALL cases.

7 (13) Mr. McFarland's wife was his co-defendant on the crime he was at the  
8 time incarcerated for, and was serving an identical sentence for violating the  
9 probation they had been originally granted. In Mrs. McFarland's criminal case  
10 file, there is an ORDER granting her a sentence Reduction/Modification which  
11 was the impetus for Mr. McFarland's perjured testimony at Mr. Schwiger's grand  
12 jury proceedings. This Motion and Order is evidence of McFarland's motive to  
13 involve himself in the Solicitation ruse and was the state's inducement to get  
14 him to assist them.

15 (14) All CCDC Intel, LVMPD and DA's investigation files and records  
16 concerning Mr. Donald M. Savage.

17 (16) The "ACTUAL" video tape of the interview ("the visit") between Det.  
18 William Scott and Mr. Schwiger. There are one or two unknown voices on this  
19 tape which will shed exculpatory light upon the Solicitation allegation.

20 (17) A copy of the report which was sent to Judge Bonaventure regarding  
21 Mr. Schwiger's attempted polygraph examination on April 11, 2001.

22 (18) All tapes, transcripts, reports and notes generated by Jim Thomas  
23 Investigations concerning his investigation on Mr. Schwiger's cases. These  
24 items have been requested by mail by Mr. Schwiger to Mr. Thomas directly. Mr.  
25 Thomas has not responded to Mr. Schwiger's requests.

26 (19) The 26 audio-tapes, in evidence, which were siezed from Mr. Schwiger  
27 in Det. Roberts Search/Arrest Warrant, and ONE answering machine tape, or exact  
28 copies thereof.

(20) All past and current CPS files regarding Alexis Ashford, Christina

1 Godwin and Wendy Ann Shelton and/or Linda Shelton-Simione. Ms. Simone made  
2 several attempts (calls) to Child Protective Services (CPS) to get Wendy's two  
3 children from her due to her drug abuse. These reports will manifest evidence  
4 of past allegations of sexual abuse and neglect, and are exculpatory in light  
5 of the other evidence and circumstances in this case.

6 g. THERE ARE SEVERAL OTHER ISSUES WHICH MR. SCHWIGER WISHED TO RAISE ON  
7 DIRECT APPEAL, ALL OF WHICH COUNSEL ASSURED MR. SCHWIGER WOULD NOT  
8 BE WAIVED BY ENTERING INTO HIS ALFORD PLEA

9 3. Counsel's false assurances amounted to nothing less than advice to  
10 their client that he would be entering into a Conditional Plea, wherein he  
11 would be allowed to present the afore-mentioned pre-plea/pre-trial issues (that  
12 they were preserved) on appeal, and when he prevailed on appeal he could then  
13 proceed to a "fair trial."

14 4. Counsel's false assurances are well documented in the transcript of  
15 the July 19, 2001 proceeding, less than 24 hours prior to Mr. Schwiger entering  
16 his ALFORD Plea (maintaining his actual and complete innocence).

17 (Counsel for the Petitioner)

18 MR. PARRIS: . . . One of our main concerns is we would request certain appeal  
19 issues be preserved. We feel there's some procedural mistakes  
20 which we'd like to appeal. We do feel they implicate constitutional  
21 rights as well as state rights. However, I was informed by Ms  
22 Luzaich that it was the Clark County D.A.'s office policy not to  
23 agree that various rights -- various non-constitutional rights are  
24 preserved on appeal.

25 Our main concern, assuming a deal would be taken, we would  
26 request any sort of deal be done via the ALFORD decision. As well  
27 we would request that those rights concerning some pretrial motions  
28 be preserved on appeal so we may appeal them, potentially have this  
29 case be remanded for proper adjudication at a later date.

30 THE COURT: Miss Luzaich?

31 MS. LUZAICH: As far as the ALFORD, I do not have a problem with an ALFORD Plea

32 THE COURT: The ALFORD is okay with the court and D.A.

33 LUZAICH: As far as preserving rights, the D.A.'s policy is we'll never even  
34 agree in a guilty plea that rights can be preserved. What the  
35 guilty plea agreement says, you waive your rights to appeal except  
36 for issues of constitutional nature, then necessarily written in

1 the guilty plea agreements, you can still appeal those. If they  
2 are not of constitutional nature you cannot.

3 THE COURT: The D.A. is not going to deviate from the policy, pursuant to the  
4 ALFORD decision and he's going to waive anything except constitu-  
5 tional rights. I'm not going to say nothing and let the Supreme  
6 Court, if he takes this deal, and I don't care if he does or not.  
7 Let the Supreme Court say these are such constitutional issues  
8 that they will be very happy to hear them. That's up to the  
9 Supreme Court. So that's the status of that.

10 MR. PARRIS: Again your honor, I've done some preliminary research concern-  
11 ing certain appeal issues we have and they do appear to be  
12 constitutional in nature, just for the court's awareness at this  
13 juncture.

14 THE COURT: If that's the case and the Supreme Court agrees with your research  
15 he's preserving any appeal rights -- Mr. Schwiger don't like me to  
16 say appeal. I don't want to say it, but that's what we have to do  
17 to make a record. He's preserving those rights according to your  
18 research, that he could make appealable issues on these constitu-  
19 tional rights. So that's about as far as we can go on there.

20 I did get another letter from Mr. Schwiger dated Thursday, July  
21 12, 2001. Again, he just reiterates the other ones, "I wanted  
22 you to be aware of I'm innocent." Its neither here or there to me  
23 if you're innocent. I'm a judge. I'm a gate keeper of the  
24 evidence. I just make sure the trial is presented in a "fair and  
25 proper" manner not prejudicial to the defendant and its up to the  
26 jury to determine if you're guilty or innocent, not me. So my  
27 personal opinion is of no matter and, quite frankly, I never have  
28 a personal opinion as to guilt or innocence. I keep an open mind.

Where that comes in, of course, is the sentencing. Again, its  
highly up to you. If you decide to take some deal then I would  
look, revisit your letters and visit any letters that you want to  
present from your family and everything, just things like that,  
I'll be happy to hear whatever you want to say. Then as mitigation  
of any possible punishment that would certainly be in my domain  
whether or not to sentence you to the least amount or the most  
amount, as far as sentencing. That's when I would get all the  
letters, read anything you want, hear from your lawyers about why  
I shouldn't give you consecutive time, then I'd hear from the state  
saying I should give you consecutive time and make a decision and  
do the best I can, Mr. Schwiger.

But before you're adjudicated guilty or found guilty by a jury  
or you plead guilty pursuant to the ALFORD decision [guilty is a  
seemingly foregone conclusion to the court), you're not admitting  
your guilt [concluding there must be guilt to admit] and maintain  
your innocence but to avoid a harsher punishment of staying in  
Nevada State prison the rest of your natural life you want to cut  
a deal, avoid that and try to get your sentencing down, that's  
your right to do so. I think everything is on the table [every-  
thing but the wrongful joining of these cases that is]. You [Mr.  
Parris] discussed this with Mr. Schwiger?

1 MR. PARRIS: Yes, you honor.

2 THE COURT: Mr. Schwiger, they have discussed at least your options in this  
3 case?

4 DEFENDANT: Yes, what happens if Mr. Parris is wrong about the -- [issues we  
5 want to appeal being preserved]?

6 (Counsel for the Petitioner)

7 MR. AMESBURY: Just for the record, I can't sit by. I've been on your track  
8 a number of years and I've had people appeal grand larceny auto  
9 and whatever and take a copy of that plea agreement and come back  
10 with the Supreme Court and [speaking for the Supreme Court], "Mr.  
11 Amesbury, no one can waive their rights to appeal. You have a  
12 brief on my desk in 30 days or you're sanctioned." I think it's  
13 window dressing!

14 THE COURT: You know more about it than I do. You're a very experienced  
15 attorney (emphasis added) [giving high credibility to counsel's  
16 advice to the Petitioner]. I stop at this level, I don't get  
17 involved in the appeal. You're saying [Mr. Amesbury] that they  
18 [Nevada Supreme Court] always -- at least in your experience, and  
19 again, I have no opinion as to this, so you're opinion, the  
20 Supreme Court would want to resolve some of these issues?

21 AMESBURY: They say you -- some of the most ludicrous cases where the  
22 evidence is clear, they sign a plea agreement on the record I  
23 clearly did this, waive my right to appeal, I'm still on the case  
24 you can't get out of it now. The Supreme Court is the only entity  
25 to let you out and you do an appeal and you do what they call a  
26 SANCHEZ brief. You just don't.

27 THE COURT: Even though he is signing a guilty plea agreement saying he's  
28 waiving [his right to appeal these issues], you're experience --  
[is that he's really not]?

MR. PARRIS: There's a case --

THE COURT: The Supreme Court says, I want to be fair to everybody and hear  
the issues?

AMESBURY: That's right! (emphasis added)

THE COURT: I don't know if that answers your question [Mr. Schwiger] but  
that's what Mr. Amesbury ["a very experienced attorney"] is  
saying. (emphasis added)

a. The above mentioned exchange clearly demonstrates that counsel was  
representing to both Mr. Schwiger and the court that, the issues they wished to  
raise on appeal were not waived; that the issues Mr. Amesbury would be presenting  
on appeal would be of "reasonable constitutional, jurisdictional or ground

1 which otherwise challenge the legality of the proceedings," which in turn would  
2 warrant their inherent preservation on appeal. Mr. Schwiger believed, and still  
3 does, that "the proceedings" meant ALL pre-plea proceedings. Mr. Schwiger was  
4 also clearly convinced, per counsel's advice, that ALL of his perceived pre-plea  
5 errors would be addressed on their merits by the Nevada Supreme Court.

6 (1) In fact, Mr. Schwiger, during the plea negotiations of July 19, 2008,  
7 attempted to ask the court what would happen if counsel [Mr. Parris] was wrong  
8 in his interpretation of the law and his right to appeal these pre-plea issues.  
9 Instead of providing a direct answer to a simple question, the court simply left  
10 it up to counsel to answer. Counsel made it clear, and the record supports, that  
11 he was advising his client [Mr. Schwiger] and the court that the appeal waiver in  
12 the plea agreement meant nothing much at all, at best, and the issues he wished  
13 to raise on appeal would absolutely be addressed on their merits by the Nevada  
14 Supreme Court. A short time later, counsel claimed to have "a case" to support  
15 this position.<sup>1</sup>

16 b. Based upon counsel's representations both in court and at their  
17 visits, Mr. Schwiger was left with NO CHOICE but to believe counsel's advice  
18 concerning the waiver of his appellate rights which, in reality, was NO WAIVER  
19 at all because, the Nevada Supreme Court "wants to be fair to everybody and  
20 hear the issues."

21 5. Mr. Schwiger was repeatedly told by his counsels that, the district  
22 court's handling of this case was so outrageous, the Nevada Supreme Court would  
23 have no alternative but to overturn his conviction and direct the district

24 <sup>1</sup> Even though counsel claimed to have had a case to support his position, NO  
25 case law was presented to the Nevada Supreme Court on direct appeal to support  
26 the position that Mr. Schwiger had not waived his right to present pre-trial  
27 issues on appeal, even though counsel had a fair opportunity to do so in a  
28 REPLY Brief. Mr. Schwiger timely implored Mr. Amesbury and Mr. Parris by mail  
to file a REPLY Brief on direct appeal on his behalf since the Nevada Supreme  
Court would not allow Mr. Schwiger to file anything on his own behalf.

1 court to provide Mr. Schwiger a "fair trial."

2 a. Mr. Amesbury and Mr. Parris both emphatically asserted that, under  
3 NO CIRCUMSTANCES could Mr. Schwiger proceed to trial under such prejudicial  
4 conditions which were created by the district court's rulings on issue of the  
5 misjoinder, the Pre-Trial Writ, and other Pre-Trial/Pre-plea motions.

6 b. Counsel made such statements as:

7 (i) How can we go forward without being provided with all of the  
8 evidence in this case, specifically, the abundance of exculpatory  
9 evidence in the possession of the many separate State agents?

10 (ii) How can we proceed to trial when the district court is going to  
11 allow the prosecution to proceed to trial on the Solicitation charges as  
12 well as the various sexual charges? The prosecutor is going to put you  
13 very character on trial and make you out to be a man who will stop at  
14 nothing to cover up his sex crime, by attempting to kill all the  
15 witnesses in this case.

16 (iii) How can we proceed to trial when the court has denied you a  
17 Independant Psychological Evaluation of the "alleged" Victim, wherein  
18 this deprives us of the right to present expert witnesses? The State  
19 will surely be using experts who have actually interviewed the "alleged"  
20 victim, and we will have nothing. It will be like going to a gun fight  
21 with only a can of Silly String.

22 (iv) How can we go to trial when the prosecution is permitted to  
23 destroy exculpatory evidence which would convince a jury that you are  
24 not guilty of the allegations? The State has, in bad faith, destroyed  
25 the interview tape of the alleged eyewitness/participant, whom we know  
26 has asserted that no such conduct had ever occurred.

27 (v) Counsel to Mr. Schwiger advised him that he had a 80 - 90%  
28 likelihood of being found NOT GUILTY by a jury ON THE sexual charges  
29 BEFORE the Solicitation charges (Mr. Schwiger was illegally indicted on  
30 those charges) were misjoined with the sexual case, but ONLY a 5 - 10%  
31 chance of being acquitted of anything afterward. That the ONLY way Mr.  
32 Schwiger would have any chance, even as a actually innocent man, to walk  
33 away cleanly from his false charges would be to appeal the pre-plea  
34 errors by the court on direct appeal and, "have this case remanded for  
35 proper adjudication at a later date." Counsel assured (guaranteed) Mr.  
36 Schwiger that this ALFORD Plea (maintaining complete innocence) would  
37 only be "temporary," and that counsel would file an immediate "fast  
38 track" appeal and have him back in court within 4 - 6 months for proper  
39 adjudication and the opportunity for a "fair trial." Counsel advised  
40 Mr. Schwiger that these pre-plea errors WOULD NOT BE WAIVED by accepting  
41 this "temporary" ALFORD Plea and that there would be no possible way the  
42 Nevada Supreme Court can overlook these clear "abuses of discretion."

43 6. COUNSEL EXPLAINED TO MR. SCHWIGER THAT IF HE PROCEEDED TO TRIAL WITH  
44 THESE CASES MISJOINED AND WAS SUBSEQUENTLY FOUND GUILTY, HE WOULD  
45 NOT THEN BE ABLE TO SUCCESSFULLY RAISE THESE PRE-PLEA/PRE-TRIAL  
46 ISSUES ON APPEAL.



1 Schwiger had repeatedly and steadfastly proclaimed his complete innocence,  
2 which he still does to this day, and was determined to prove this fact at trial  
3 EXONERATION ONLY, and NOT striking " a good deal", was Mr. Schwiger's  
4 SOLE consideration throughout this entire process and at the time the plea was  
5 entered into. Counsel had repeatedly explained to his client that, the ONLY  
6 way he could receive a "fair trial," and thus be exonerated, was if he could  
7 convince the Supreme Court of Nevada of the trial court's erroneous rulings on  
8 the Joinder and other pre-plea issues. It can be truthfully said, that the  
9 ONLY reason Mr. Schwiger pled guilty (Alford) is so that he could appeal the  
10 pre-plea issues, receive a favorable ruling from the Nevada Supreme Court, and  
11 then return to the district court to finally receive a "fair trial."

12 Counsel repeatedly expressed his dissatisfaction with the court's pre-  
13 plea rulings to his client and had proclaimed that once the Supreme Court  
14 realized the prejudice Schwiger would and did suffer, the conviction would be  
15 for certain overturned, and a "fair trial" would be provided to Mr. Schwiger.

16 Obviously, had Mr. Schwiger known that he was waiving the very pre-plea  
17 issues he was pleading guilty to preserve, he would NEVER have pled guilty and  
18 would have insisted upon proceeding to a jury trial.

19 Thus, not only did counsel's erroneous advice induce Mr. Schwiger to  
20 enter into a guilty plea without full understanding of the consequences of that  
21 plea, he also clearly did not enter into the plea "knowingly" and "intelligent-  
22 ly," rendering the plea clearly "involuntary." Further, it also deprived Mr.  
23 Schwiger of the appellate process altogether, concerning what Mr. Schwiger  
24 viewed as critical pre-plea issues. Issues that clearly would have affected  
25 the outcome of the proceedings, and in fact, prejudicially deprived Mr. Schwiger  
26 of his Constitutional Right to a "fair trial." In other words, if it had not  
27 been for counsel's Constitutionally deficient performance in advising Schwiger  
28 to use the guilty plea as a de facto means to file an Interlocutory Appeal,