RPLY
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In Proper Person

DISTRICT COURT

CLARK COUNTY, NEVADA

LAWRENCE SCHWIGER
Petitioner,
vs.
WARDEN VARE', ET.AL.,
Respondent.

CASE NO. C 173970/C 174784

DEPT NO. XVIII

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION RELIEF)

COMES NOW, the Petitioner, Lawrence Schwiger, in his Proper Person and hereby submits the attached Points and Authorities in REPLY TO STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (Post-Conviction).

This Reply is made and based upon all papers and pleadings on file herein, the attached Points and Authorities in support hereof, and oral argument at the time of hearing deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

I. THE PETITIONER IS PERMITTED TO RAISE ISSUES OTHER THAN ONLY THAT OF INEFFECTIVE ASSISTANCE OF COUNSEL AND THE VOLUNTARINESS OF THE PLEA.

The Petitioner disagrees whole-heartedly with the state's argument on this issue, and, apparently the United States Supreme Court also disagrees. The Petitioner also asserts the state's statutory authority, NRS 34.810(1)(a), to be Unconstitutional.

The state argues that, "Since Deft. entered a guilty plea (ALFORD - maintaining complete and actual innocence) in the instant matter, the matters he may raise in a petition are limited to claims of Ineffective Assistance of Counsel and claims of Invalid plea." Here, the state argues that a different standard applies to Habeas petitioners depending upon whether they "accepted" an ALFORD plea or whether they proceeded to trial. The U.S. Supreme Court apparently disagrees:

In U.S. v. WHITE, 366 F.3d. 291 (4th Cir. 2004) at 296, the Appellate Court stated:

> The United States Supreme Court in BLACKLEDGE v. ALLISON, 431 US 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977), expressly held that, " a prisoner in custody after pleading guilty, no less than one tried and convicted by a jury, is entitled to avail himself of the writ [of habeas corpus] in challenging the constitutionality of his custody." Id. at 72, 97 S.Ct. 1621.

WHITE was decided in 2004 citing BLACKLEDGE, thus, presumably, this case precedent is still good law. The talismanic phrase in the high court's opinion, in the Petitioner's view, and the intended purpose of the writ [of habeas corpus] itself is, "in challenging the constitutionality of his custody."

Clearly, it would be absurd for the state to argue that an innocent man being imprisoned for life would have been acceptable to the framers of the Constitution; that issues of Ineffective Assistance of Counsel and the Voluntariness of the plea could be the ONLY issues which are Constitutional in nature.

The Petitioner regularly reviews appellate court opinions regarding issues raised in habeas corpus petitions wherein issues are raised and addressed on the merits which are other than the two issues mentioned by the state here. As stated above, BLACKLEDGE was cited by the Fourth Circuit Court of Appeals in WHITE, a case which is identical in context to the Petitioner's. Petitioner asserts that BLACKLEDGE, decided by the U.S. Supreme Court, does in fact permit, contrary to NRS 34.810(1)(a), a habeas petitioner to raise ANY and ALL issues of a Constitutional nature to be raised in a habeas petition in "challenging the constitutionality of his custody." As stated in BLACKLEDGE and WHITE, the U.S. Supreme Court makes NO DISTINCTION in a habeas petition between " a prisoner in custody after pleading guilty and one which has been tried and convicted by a jury in challenging the constitutionality of his custody." Thus, issues raised in this Petition for Writ of Habeas Corpus which do not attack the Ineffective Assistance of Counsel or Voluntariness of the plea are clearly appropriately raised in this petition. Most especially that of a Petitioner's "ACTUAL INNOCENCE." What could possibly be MORE unconstitutional and violate the Bill of Rights than to allow a completely and actually innocent American citizen to remain in prison for life when "the truth" of his innocence can so easily be "flushed-out." A "manifest injustice" is always an overriding factor when considering bars of any kind.

The state also "alleges" that the Petitioner has raised " a bare assertion of actual innocence." Further, if the state's above argument were true, why then would they need to allege this incorrect point. However, this claim by the state of " a bare assertion" is addressed in Petitioner's Supplemental Petition (SEE GROUNDS FIVE, SEVEN, EIGHT AND NINE). However, it cannot be overstated in this case that, the entire focus and intention on the part of the state in this case has been to disguise the truth, withhold and destroy exculpatory evidence, and completely eliminate any effort whatsoever by the Petitioner to defend

against these false and fabricated allegations. As impalpable as it may sound to this court, the Petitioner now knows for a fact that the state has somehow "induced" defense counsels, David C. Amesbury and John P. Parris, to assist the state with convicting their client (getting him to accept an Alford Plea as an innocent man under false and fraudulent promises of prevailing on direct appeal on pre-plea issues, which counsel avered in open court to be preserved for said appeal). The issues raised in this Petition and the actions and inaction of defense counsel in this case should make Petitioner's claims abundantly clear to this Honorable Court, even if the state is unwilling to admit it. Even a very purfunctory review of counsels' performance and non-performance will clearly reveal this to be true.

Petitioner's claim of "ACTUAL INNOCENCE" can ONLY be considered to be "bare" due to counsel's intentional failure to properly investigate Petitioner's clear, consistent, and emphatic protestations regarding his innocence, and, that he was being set up on these outrageous and fictitious allegations. The state's ONLY mission from the genesis of this case has been to suppress evidence (the truth), which is still being done, and to preclude the Petitioner from being heard and defending himself in this case. The state has also done everything within their immense power to cover-up what the state surely knows to be corrupt police conduct in this case. In any adversarial debate, if one party can be kept silenced by the other, there can be no doubt as to the outcome of the debate. If you were to tie the hands behind the back of a professional boxer, there is no question who would win the fight. The Petitioner's sworn assertion of "ACTUAL INNOCENCE" is ONLY 'naked" for the reasons stated above and because he is incarcerated, and thus, been precluded from developing the facts and evidence necessary to fully support his claim, also at the hands of the state in this case. The Petitioner swears, under penalty of perjury, that he can meet the necessary burden of probable cause of his allegations, and with properly skilled

and experienced counsel and criminal investigator to further develope these facts and evidence, and provided a "fair" opportunity to examine the alleged corruptly involved participants, the Petitioner will absolutely be able to satisfy his burden and unequivocably prove his very serious allegations, and, his actual and complete innocence. Clearly if true, the Petitioner has suffered an egregious injustice, of this there can be no doubt. It is the Petitioner's hope and belief that, this Honorable Court would want to ensure that justice ultimately prevails in this or any other criminal case - that "the truth" ultimately comes to light. To these ends, an Evidentiary hearing should be conducted to further examine the Petitioner's claims of Actual Innocence and corrupt police misconduct in this case. Petitioner has only just become aware of facts and clear circumstances which will prove his claim of police corruption and that his false charges were the result of being criminally manufactured against him by the same, and by the parties directly, and some indirectly, involved in Petitioner's case. Disclosing his newly found knowledge within the written pleadings will clearly put the alleged participants of this ruse, and the state (their protectors), on notice of Petitioner's clear evidence, which would in turn permit them to develope cover stories, and continue to destroy and/or withhold exculpatory evidence, a trade-mark of the state in this case.

Petitioner asserts that, if this Honorable Court were to be gracious enough to grant an Evidentiary hearing for the above purposes, the evidence adduced at said hearing of these serious and emphatic allegations would become abundantly clear to this court, if of course, this court will provide the Petitioner with the proper resources to do so. The Court must not only be fair, it must also "appear to be fair" as well.

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II. PETITIONER CLEARLY DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW; Strong and convincing proof of underlying facts not necessary - Preponderance of evidence is legal standard.

1. The state cites HOMICK v. STATE, citing DAVIS v. STATE, quoting LENZ v. STATE, in stating; "Trial counsel is presumed to be effective and this presumption 'can only be overcome by strong and convincing proof to the contrary.'" Although the Petitioner firmly believes he far exceeds even the strong and convincing standard alleged by the state to be the burden for proving the disputed facts and allegations underlying Petitioner's Ineffective Assistance claims and his entitlement to relief, the Petitioner need only meet this burden by a "preponderance of the evidence."

In MEANS v. STATE, 120 Nev. Adv. Op. 101, 103 P.3d. 25 (2004), the Supreme Court of Nevada held the following:

> Some Nevada authority signals that the petitioner must prove the factual allegations underlying an ineffective-assistance-of-counsel claim by clear and convincing evidence. In DAVIS v. STATE, we indicated, consistent with previous decisions, that "'strong and convincing proof'" was necessary to overcome the presumption that defense counsel fully discharged his duties. However, many federal courts have applied the preponderance standard to the underlying facts alleged in the petition. In ALCALA v. WOODFORD, 334 F.3d 862, 869 (9th Cir. 2003), the Ninth Circuit Court of Appeals echoed other federal cases in stating that a habeas petitioner must prove the factual allegations underlying claims of ineffective assistance by a preponderance of the evidence. Similarly, the Fifth Circuit Court of Appeals noted in JAMES v. CAIN, 56 F.3d 662, 667 (5th Cir. 1995), that "[a] petitioner who seeks to overturn his conviction on grounds of ineffective assistance of counsel must prove his entitlement to relief by a preponderance of the evidence.
>
> Choosing consistency with federal authority, we now hold that a habeas petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence. To the extent that our decision today conflicts with the "strong and convincing" language of DAVIS and its predecessors, we expressly overrule those cases. Therefore, when a petitioner alleges ineffective assistance of counsel, he must establish the factual allegations which form the basis for his claim of ineffective assistance by a preponderance of the evidence.

In this case, it is abundantly clear that Petitioner has far exceeded the "preponderance of the evidence standard.

2. There can be absolutely NO doubt whatsoever that counsel's performance was deficient and fell well below any objective standard of reasonableness.

Anytime counsel advises his client to accept a guilty (Alford) plea agreement specifically for the purpose of appealling pre-plea errors, which counsel clearly should have known would in itself waive the very pre-plea issues he wished to correct in that appeal, there can be no question in any reasonable an objective person's mind that counsel's performance was egregiously deficient, and falls glaringly below any objective standard of reasonableness. This becom especially true because counsel advised the Petitioner to waive his right to trial, and other precious constitutional rights, when counsel knew very well th their client is an innocent man. [1]

Counsel further caused, by their deficient advice/performances, Petitioner to lose his entire direct appeal process. Had counsel not advised their client so very wrongly, he would otherwise have had an opportunity to correct these alleged errors had counsel permitted the Petitioner to proceed to trial, and, had the Petitioner actually been convicted. The direct appeal process is of a critical importance, in that, the direct appeal review standard is that of "pl error," thus relieving the appellant of the additional showing of prejudice resulting from the alleged error below.

[1] Counsels Amesbury and Parris told the Petitioner that they knew he had not committed the alleged sexual offenses (SEE ATTACHED AFFIDAVIT OF PETITIONE This fact is further manifested within Appellant's Opening Brief on direct appeal, where counsel confirms they advised this Petitioner he had a 80 to 90% chance of being found not guilty by a jury on the sexual charges if th had been tried separately.

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3. But for counsel's Ineffective Assistance, the outcome of the proceeding would absolutely have been much different.

To establish prejudice to his defense as a result of counsel's deficient performance, Petitioner must establish by a "probability sufficient to undermin confidence that the outcome of the proceeding (acceptance of the plea) would have been different."

Had counsels not advised the Petitioner that, "NO ONE CAN WAIVE THEIR RIGHT TO APPEAL" by accepting an Alford (guilty) plea; had counsels not advised their client that he would not be waiving the pre-plea errors which had precluded him from having any chance at receiving a "fair" trial, advice the court clarified and questioned on July 19, 2001 during Petitioner's "surprise" plea negotiation there is absolutely NO POSSIBLE WAY this Petitioner would ever have agreed to accept a plea of any sort - no matter what the state's offer might have been. Therefore, had counsel not very wrongly advised their client, the outcome of t proceedings (plea process) could not have been the same because, the Petitione would not have accepted the plea as an actually innocent man and would instead have insisted upon going to trial and taking his chances with an "unfair" tria That would absolutely have been a "much different outcome to the proceeding." An entirely and actually innocent man would never have "knowingly or intelli- gently," or willingly allowed himself to be sent to prison without a fight; without at least giving a jury the chance to see through the corrupt and crim ruse - the setup - which has been perpetrated against him by his wife, the "alleged" victim's "FEMALE" family members (two women lying for "a sister" to WIN against a man for perceived but untrue motives), the investigating detect ives in the sexual case, and the egregious misconduct by the state and its ve unscrupulous agents. The "outcome of the proceeding" could not have been any thing but different.

It is not necessary for the Petitioner to show that he would have prevail

at a trial, only that he would not have pleaded guilty absent counsel's unprofessional and constitutionally ineffective advice. And, because this particular Petitioner is ACTUALLY INNOCENT, there is NO CHANCE he would have agreed to a plea unless counsel, the court, and the prosecutor, in Petitioner's mind, had assured him he could appeal the pre-plea errors and that they would have been addressed on their merits by the Supreme Court of Nevada in that appeal.

B. PETITIONER'S TRIAL COUNSEL WAS ABSOLUTELY INEFFECTIVE FOR ADVISING PETITIONER TO ACCEPT A PLEA AGREEMENT INSTEAD OF GOING TO TRIAL.

The Petitioner is not a licensed attorney and therefore is unsure whether o not the following is appropriate. However, this is the Petitioner's opportunit to REPLY to the state's ridiculous RESPONSE and that is precisely what Petition intends to do. Petitioner wishes to make the following part of the record in this case.

Throughout this case, from the very begining, the state has, in all of thei pleadings, misrepresented the facts of this entire case; the facts surrounding it and within it; and told out and out lies in an effort to garner a convictio at all costs when they knew very well the Petitioner had not sexually molested anyone at all. The state's RESPONSE here consists of much more of the same. The state will stop at nothing to maintain their dishonest and illegal convict in order to save face, and has NO CONCERN for the truth or what really transpi in this case. Will this Honorable Court allow the state's conduct to continue and allow an innocent man and his daughter continue to suffer when he avers, that with the proper assistance, he can prove the corruption in this case and his complete innocence.

After reviewing the state's RESPONSE, it is abundantly clear that the stat (Ms. Luzaich) is claiming to know what was in the minds of defense counsel an the Petitioner's pre-plea strategy. Ms. Luzaich is clearly claiming to know

what was in the minds of counsels and Petitioner's pre-plea strategy. Ms. Luzaich is clearly claiming to know why the Petitioner very grudgingly accepted an Alford plea. Ms. Luzaich could not be more wrong in her presumptuous conjecture

This should raise serious questions in this court's mind, as it does in the Petitioner's. First, the Petitioner finds it curious as to where Ms. Luzaich obtained any such information to begin with. Petitioner also is very curious as to what the state's motive is for alleging such conclusions to begin with. It appears clear that the purpose is to deceive this court and thereby prejudice the Petitioner with absolutely UNTRUE conjecture, which the state is representing to be fact. The Petitioner was under the distinct impression that a party to an action was not permitted to make statements in a pleading which are represented as fact when they are known to be false. Since Ms. Luzaich seems to b testifying for David Amesbury, this would seem to be akin to subornation of per jury, or at least perjury alone. The record of this case clearly shows these presumptuous conclusions to be absolutely false.

What is clear, is that the state has either made up these false presumption or has colluded with defense counsel to contrive a story in an attempt to defea Petitioner's claims with lies. Because Petitioner is now aware, and can prove, that the state has colluded with Petitioner's trial counsel to manufacture the fraudulent March 30, 2001 MARCUM Notice (this will be more fully discussed below), he believes the latter to be true. The Petitioner is respectfully asking this court to put a STOP to the state's underhanded and deceitful tactics.

The state argues that joinder was proper (pg. 5, ln. 25 - pg. 6, ln. 7). The joinder of these two wholly disparate cases was absolutely NOT proper and there has yet to be a review by a higher court on the merits of this issue. T issue of MISJOINDER was one of the most critical issues raised on direct appea and was the ONLY reason Petitioner currently stands WRONGFULLY imprisoned! Th was the issue defense counsel advised the Petitioner would deprive him of a fa

trial and would absolutely need to be appealled (corrected) before any trial.

The state would have this court believe, that because NO REVIEW of Joinder has yet to be conducted, this must therefore mean that Joinder - in this case - was proper, and the state does so with "alleged" conclusions in support of their fictitious argument which are absolutely untrue and/or misrepresented. The state is merely making guesses at the defense's strategy, which are inaccurate, and this court should give the state's inaccurate conjecture no weight at all. The Petitioner wonders if the state, specifically Ms. Luzaich, will ever be held accountable for the deciet, lies, and intentional misrepresentations before this court. No wonder an innocent man has been sent to prison, and remains so.

The state makes the ridiculous and absurd assertion that, " His counsel were worried that the evidence against Deft. was formidable and a conviction was likely." (pg. 6, ln. 7-8) There was NO EVIDENCE against the Petitioner to begin with in the sexual case, which is the point, and the state's assertion is belied by the Opening Brief on direct appeal wherein counsels admit they told the Petitioner he had a 80 - 90% chance of being found not guilty by a jury of the sexual allegations if tried separately. This is the reason MISJOINDER was SO PREJUDICIAL and, per counsels, absolutely had to be corrected prior to any trial. It was the improper joining of the two disparate sets of charges ONLY, which caused counsel to advise an ALFORD plea, not any "formidable evidence." There was NO EVIDENCE whatsoever in the sexual case other than the perjured and contrived (by the state and its agents) testimony of the "alleged" victim (coerced by her drug induced mother and the grandmother whom badly wanted the children in her custody because of her daughter's drug abuse and lifestyle) and the **FALSE** prejudicial implication derived by the also fictitious solicitation case - hence, the reason the state needed to ensure the Petitioner would never testify at the Grand Jury, by depriving him of his statutorily mandated MARCUM Notice. This is why the state now has fraudulently manufactured their

"alleged" March 30, 2001 MARCUM Notice. It should also be noted that, the two investigating detectives who orchestrated this entire criminal ruse against the Petitioner, Det. Jay Roberts and Vince Ramirez, interviewed the "alleged" victim on January 25, 2001 at her school (one week after "the Petitioner" called police to report a false allegation being made against him). During this very first contact by any authorities, and clealy prior to anyone being able to coerce the "alleged" victim because of Petitioner's quick reactions to the false allegation, the "alleged" victim, Alexis Ashford, told these two corrupt detectives that the Petitioner had done nothing sexual to her at all. An "alleged" victim or witnesses first statements have a much higher indicia of credibility by law. Clearly "something" was done to change Alexis' story in favor of prosecution!

The state also alleges, " The reasoning behind this decision [to plead Alford] was that counsel felt that if Deft. proceeded to trial and was convicted the Nevada Supreme Court would affirm the conviction based on harmless error analysis." (pg. 6, ln. 11-13). Just because this possibility existed (counsel had advised), DOES NOT mean the Supreme Court would have found so. The state, here again, misses the point and is attempting to decieve this court. It does not matter what the Supreme Court might have decided or, what the state alleges defense counsels' strategy to have been. What matters is what the Petitioner <u>believed in his mind</u> at that time which "induced" him to accept his counsel's advice to accept the plea; what the outcome of their advice actually was; and whether counsel's advice caused the Petitioner to enter the plea without an "intelligent" and "knowing" understanding of the consequences of that plea. Because Petitioner understood that, " NO ONE CAN WAIVE THEIR RIGHTS TO APPEAL," and that the waiver language in the written plea agreement was "ALL JUST WINDOW DRESSING," the Petitioner clearly entered the plea without understanding the consequences of the plea (that he would be waiving his right to appeal pre-plea errors), and thus entered the plea "UNKNOWINGLY" and "UNINTELLIGENTLY." This necessarily renders the Petitioner's plea "INVOLUNTARY" in law.

The "possibility" that Joinder could have been deemed "harmless error" was the precise reason the two disparate cases had to be severed prior to any trial being held. The Joinder issue needed to be properly adjudicated before a trial which would otherwise have been far more prejudicial than probative.

Since it is very likely this court is unaware, the state's Motion to Consolidate was filed on May 9, 2001, and served on counsel for the Petitioner on May 10, 2001 (a friday), and without the defense even being given an opportunity to file a written Opposition to the state's motion, the court (Bonaventure) granted the Consolidation of these two wholly disparate sets of charges on May 13, 2001. There was NO HEARING OR ORAL ARGUMENTS because the state's motion had already been decided prior to the scheduled hearing date and without a peep from the defense. It is quite easy for one side to prevail when the other side is not permitted to say even one word - to tell it's side of the story and argue against it. Certainly, this is not what our founding fathers had in mind when considering Due Process of Law - "FUNDAMENTAL FAIRNESS." A thorough reading of Appellant's Opening Brief on direct appeal regarding the issue of Joinder will clearly manifest that Joinder was impermissable in this case, just for this court's awareness at this juncture.

At such a prejudicial and "fundamentally unfair" trial, the Petitioner stood a high liklihood that a jury would convict, not because any evidence that the alleged sexual crimes were actually committed, but because of the prejudicial and absolutely false implication of the also fictitious solicitation allegation; resulting in the Petitioner being convicted of crimes he absolutely DID NOT COMMIT! The Supreme Court of Nevada would likely have then <u>wrongly</u> presumed that the jury had found at least "sufficient" evidence to convict, when they had not, and found the error to be harmless. However, Petitioner finds it very curious that the state asserts that Joinder would have been found to have been harmless - in order for there to be harmless error there must be error in the

first place. It appears the state is now stipulating that the Consolidation of these cases was in fact error. The Petitioner asserts that error was committed by the Joining of these cases and that it is irrelevant to this issue whether it might have been found harmless or not.

The state further claims, " Defendant's counsel advised Deft. to proceed according to this strategy to reduce defendant's number of convictions to a total of three counts from a potential of eleven counts." (pg. 6, lns. 14-16) Counsel advised the Petitioner of NO SUCH THING! The number of counts and the length of any potential sentence played ABSOLUTELY NO PART whatsoever in the Petitioner's decision to accept what was represented to him by counsel as being ONLY a "temporary" plea. The Petitioner is innocent of the charged crimes, and as such, he did not and does not think of this as a game, as does Ms. Luzaich, where there are degrees of winning and losing. There is ONLY one thing that mattered, and still matters, to this Petitioner: COMPLETE EXONERATION of alleged crimes which he did not commit. Of course Ms. Luzaich and the state could care less whether they put an innocent man in prison or not; they ONLY want to WIN in furtherance of their careers and reputations within the district attorney's office, etc. There has never been anything even resembling " a search for the truth." In fact, in this particular case, the state and Ms. Luzaich has gone out of their way to ensure "the truth" stays quietly hidden. Is that what it means when they say they want justice in a case. Again, where does the state get off telling this court what defense counsel advised their client to do. Where does the state get their incorrect information from to begin with. Apparently, the state is permitted to make things up pull it out of thin air - in a continuing effort to deceive and manipulate this court. The Petitioner would like there to be NO MISTAKE about the following: The **ONLY** consideration concerning any decision he made in this case, most especially the decision to maintain his complete innocence by way of ALFORD, was to walk away

from these false allegations free and clear. Petitioner ONLY accepted the ALFORD plea for the sole and express purpose of correcting the egregious errors committed by Judge Bonaventure and, as John Parris stated on July 19, 2001, to return to trial status for "proper adjudication" at a later date. Petitioner does not know how to make this any more clear.

The state claims, "Such rational and sound trial strategy decisions are not to be disturbed." (pg. 6, ln. 28 to pg. 7, ln. 1) The state goes on to say, "Defense counsel's primary mandate is to be an advocate for their clients and to make strategic decisions with the client's best interest in mind." Petitioner finds this argument laughable, self-serving, and obtuse! For one, counsel can make NO DECISION without their client's permission. Counsel does not make these "strategic" decisions for their client, but only advises their clients of what they believe is the best course of action. Even if the state were correct about the reasons behind counsel advising their client to accept the ALFORD plea, which she is not, counsel's strategies are irrelevant to the issue; only the Petitioner's state of mind is at issue. The issue is what the Petitioner believed were his rights of appeal at the time he accepted the plea. Clearly, our criminal justice system is in grave trouble, seemingly irreversable trouble, when licensed counsel, with a straight face, alleges it to be rational and sound trial strategy to advise an innocent client to accept a plea with a life sentence when they are well aware he is innocent and will be waiving his right to appeal the issues they themselves claimed were such egregious errors. This is unless of course defense counsel made it clear to their client and the court that, "NO ONE CAN WAIVE THEIR RIGHTS TO APPEAL PRE-PLEA ERRORS BY SIGNING A GUILTY PLEA." Does Ms. Luzaich seriously believe this would be in a client's best interests. If so, one should feel very sorry for any client she represents in the future. The Petitioner doubts seriously that she would have much success without the deck being heavily stacked in her favor - clearly the case in this particular case.

The state also alleges, " Petitioner's subargument that he was unaware he would be waiving several rights by entering a guilty plea in this case, is belied by the record." Ms. Luzaich apparently has not read the transcript of the July 19, 2001 plea discussions, where the waiver of appeal rights were made clear to the Petitioner by his counsels and clarified by the court. Mr. Amesbury clearly stated that the appeal waiver language in the written plea agreement was nothing more than "WINDOW DRESSING." Of this there can be no doubt whatsoever. If Mr. Amesbury was wrong about this, as he clearly was per the Supreme Court on direct appeal, Petitioner, being inexperienced in the law and having no other choice but to trust that counsel were telling him the truth, relied upon his advocate's assurances to himself and the court that the plea language regarding his appeal rights were at minimum not what they appeared to be saying. Mr. Parris claimed, "there's a case," which led the Petitioner to believe that some new case law had made that language just "WINDOW DRESSING." This being the case, counsel caused their client to waive his most precious right, a jury trial, and his right to appeal altogether. If this does not make counsel ineffective, what possibly could. Further, the specific right Petitioner was unaware he would be waiving was his right to appeal the Constitutional pre-plea issues he wished to raise on direct appeal and any jurisdictional issues or grounds which otherwise challenge the legality of the [pre-plea] proceedings. In fact, this is precisely what the plea agreement stated, so it should be clear how this vague and ambiguous language would mislead anyone. These were the very issues counsel included in their Criminal Appeal Docketing Statement and promised the Petitioner he would be able to appeal directly to the Supreme Court of Nevada. This is true because counsel would not have asserted these issues in their Docketing Statement if it weren't. In fact, as stated in this Petition for Habeas Corpus, the language in the plea agreement is anything but "clear and unequivocable." As Petitioner reads the agreement, it clearly preserves, on direct appeal, all pre-plea issues which

are "based upon reasonable jurisdictional, constitutional or other grounds that challenge the legality of the proceedings." Counsel, John Parris, stated on the record on July 19, 2001 that the issues were constitutional according to his research. Petitioner emphatically asserts that, when motions are decided adverse to the defendant without permitting the defense to formally oppose and/or argue orally against them, the legality of those proceedings is clearly brought into questions and do qualify under the very language of the written plea agreement. Why the Nevada Supreme Court did not address the merits of the claims is unclear. However, as stated in this Petition, it appears this was the case because counsel neglected to file a REPLY Brief to the state's RESPONSE arguing this point.

The state chooses to manipulate what the plea agreement states and put words in the mouth and make conclusions FOR THE PETITIONER by stating, " Deft. was clearly aware he would be waiving his right to appeal most issues by pleading guilty." (pg. 7, lns. 18-20) Obviously, the Petitioner was not aware he would be waiving the issues counsel advised were preserved, the issues in the Docketing Statement and the issues actually raised, regardless of what the plea agreement stated. Further, how can the state be so presumptuous as to speak to what the Petitioner understood would be waived and/or preserved. Ms. Luzaich IS NOT in the Petitioner's mind at the time and could not possibly know what he understood at that time. The Petitioner was extremely inexperienced in law and did not even understand what the definition of a constitutional or jurisdictional issue meant. Thus, he was forced to rely upon what he believed at the time were honest and ethical "court-appointed" attorneys for his understanding of these issues, which he did. If Ms. Luzaich is now stating that counsel were wrong in what they advised the Petitioner, then clearly she is herself stipulating that counsel was ineffective in their advice. The Petitioner believed the issues included in counsel's Docketing Statement and those which were raised, and others, would be preserved and therefore entered the plea without a full under-