

IN THE SUPREME COURT OF
THE STATE OF NEVADA

S.C. CASE NO. 39007
D.C. CASE NO. C173790

Lawrence E. Schurger

MARKUS WEATHERSPOON
APPELLANT,

FILED

V

DEC 26 2002

THE STATE OF NEVADA
RESPONDENT.

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *S. Young*
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APPEAL FROM THE DISTRICT COURT,
CLARK COUNTY, NEVADA, THE HONORABLE
DONALD M. MOSLEY, DISTRICT JUDGE
JOSEPH BONAVENTURE

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

| | Page |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| TABLE OF AUTHORITIES | iii, iv |
| STATEMENT OF ISSUES PRESENTED FOR REVIEW | 1 |
| STATEMENT OF CASE | 2 |
| STATEMENT OF FACTS | 6 |
| ARGUMENT | 14 |
| I. THE DISTRICT COURT ERRED WHEN IT JOINED TWO DISPARATE CASES | 14 |
| A. The Defendant never had an opportunity to oppose the prosecution's motion for joinder, and the matter was decided by a different judge, prior to the scheduled hearing date, and prior to any opportunity for the Defendant to file an opposition. | 14 |
| B. Joinder of the charges was not based on the same act or transaction, or part of a common scheme or plan | 16 |
| C. Joinder of the charges was unfairly prejudicial | 17 |
| D. Joinder of a poorly-supported count with a well-supported count is not permissible | 18 |
| II. THE DISTRICT COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA PURSUANT TO THE ALFORD DECISION | 20 |
| III. THE DEFENDANT'S 60-DAY RIGHT TO TRIAL AND CONSTITUTIONAL SPEEDY TRIAL RIGHTS WERE VIOLATED | 27 |
| IV. RESPONDENT WAS NOT GIVEN SUFFICIENT NOTICE REGARDING HIS RIGHT TO TESTIFY IN FRONT OF A GRAND JURY AS REQUIRED BY MARCUM. | 28 |
| V. THE DISTRICT COURT ERRED WHEN IT REFUSED TO CONSIDER RESPONDENT'S RIGHT TO REPRESENT HIMSELF | 29 |
| CONCLUSION | 29 |
| CERTIFICATE OF COMPLIANCE | 30 |
| CERTIFICATE OF MAILING | 31 |

TABLE OF AUTHORITIES

| Case | Page |
|--------------------------------------------------------------------------------------------------|----------------|
| Constitution of the United States of America | |
| Fifth Amendment | 21 |
| Fourteenth Amendment | 21 |
| United States Supreme Court Cases | |
| <i>Barker v. Wingo</i> , 407 U.S. 514, 515, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972) | 37 |
| <i>North Carolina v. Alford</i> , 400 U.S. 25 (1970) | 5 |
| Ninth Circuit Court of Appeals Cases | |
| <i>Bean v. Calderon</i> , 163 F.3d 1073 (9 th Cir. 1998) | 26 |
| <i>Park v. California</i> , 202 F.3d 7146 (9 th Cir. 2000) | 26 |
| <i>United States v. Johnson</i> , 820 F.2d 1065 (9 th Cir. 1987) | 24 |
| <i>United States v. Rousseau</i> , 257 F.3d 925 (9 th Cir. 2001) | 22 |
| <i>United States v. Terry</i> , 911 F.2d 272 (9 th Cir. 1989) | 22 |
| Federal Rules of Criminal Procedure | |
| Fed. R. Crim. P. 8(2) | 22 |
| Constitution of the State of Nevada | |
| Article I Section 8 | 21 |
| Nevada Supreme Court Cases | |
| <i>Floyd v. State</i> , 42 P.3d 249, 255, 118 Nev. Adv. Op. No. 17; 118 Nev. Adv. Rep. 17 (2002) | 23, 24, 25, 26 |
| <i>Daniels v. State</i> , 114 Nev. 261, 269, 956 P.2d 111 (1998) | 39 |
| <i>Furbay v. State</i> , 998 P.2d 553, 116 Nev. Adv. Op. No. 55 (2000) | 37 |
| <i>Middleton v. State</i> , 114 Nev. 1089, 1108, 968 P.2d 296 (1998) | 25 |
| <i>Miller v. State</i> , 86 Nev. 503, 471 P.2d 213 (1970) | 21 |
| <i>Sheriff v. Marcum</i> , 105 Nev. 824, 826, 783 P.2d 1389 (1989) | 39 |
| <i>Standley v. Warden</i> , 115 Nev. 333, 990 P.2d 783 (1999) | 36 |
| <i>State v. Freese</i> , 13 P.3d 442, 116 Nev. Adv. Op. No. 115 (2000) | 28, 30, 31 |

| | | |
|----|-----------------------------------------------------------------------------------------------|----|
| 1 | Nevada Statutes | |
| 2 | NRS 173.115 | 21 |
| 3 | NRS 174.165(1) | 22 |
| 4 | NRS 178.556 | 37 |
| 5 | NRS 199.500 | 2 |
| 6 | NRS 200.364 | 2 |
| 7 | NRS 200.366 | 2 |
| 8 | NRS 201.230 | 2 |
| 9 | Nevada Appellate Court Rules | |
| 10 | N.R.A.P. 28(e) | 41 |
| 11 | Nevada District Court Rules | |
| 12 | Nev. D.C.R. 13 | 21 |
| 13 | California Court of Appeals Cases | |
| 14 | <i>People v. Bean</i> , 46 Cal. 3d 919, 760 P.2d 996, 1006, 251 Cal. Rptr. 467 (Cal. 1988) | 25 |
| 15 | Montana Supreme Court Cases | |
| 16 | <i>State v. Campbell</i> , 189 Mont. 107, 615 P.2d 190, 198 (Mont. 1980) | 23 |
| 17 | | |
| 18 | | |
| 19 | | |
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STATEMENT OF CASE

On or about February 27, 2001, the Defendant, LAWRENCE EDWARD SCHWIGER, was charged by way of a Criminal Complaint with three counts of lewdness with a child under the age of 14 in violation of NRS 201.230. Mr. Schwiger's alleged victim was Alexis Ashford. Appendix I, 1 - 2.

On March 13, 2001, said Criminal Complaint was Amended to include two counts of sexual assault in violation of NRS 200.364 and 200.366 and an additional count of lewdness with a child under the age of 14 in violation of NRS 201.230. The alleged victims in these additional counts was Alexis Ashford as well. Appendix I, 3 - 5.

On March 13, 2001, a Preliminary Hearing was conducted before the Honorable Jennifer P. Togliatti, Justice of the Peace and the matter was bound over for trial. Reporter's Transcript dated March 13, 2001.

On April 20, 2001, an indictment was handed down by the Clark County Grand Jury charging Mr. Schwiger with five counts of solicitation to commit murder in violation of NRS 199.500. Allegedly, Mr. Schwiger, while in jail awaiting trial on the lewdness/sexual assault charges, had attempted to solicit the murders of Alexis Ashford, Wendy Ann Shelton, Linda Simone, Michelle Hammack and Lisa N. Schwiger, all potential witness in the lewdness/sexual assault case referenced above. The alleged accomplices to the solicitation was Anthony McFarland, a government "snitch" placed in a cell with Mr. Schwiger at the Clark County Detention Center, and William Scott, a detective with the Las Vegas Metropolitan Police Department. Appendix I, 8 - 11 and 28 - 31.

On or about April 23, 2001, a Pretrial Petition for Writ of *Habeas Corpus* was filed in Judge Joseph Bonaventure's District Court on behalf of Mr. Schwiger alleging that the prosecution had destroyed material, exculpatory evidence, and that such destruction had prejudiced Mr. Schwiger. Mr. Schwiger "invoked his 60-day right to a jury trial" in the petition. Appendix I, 12 - 16.

On or about May 9, 2001, the prosecution filed its return to Mr. Schwiger's Writ of *Habeas Corpus*. Appendix I, 37 - 57.

On or about May 9, 2001, the prosecution filed a motion for joinder of the lewdness/sexual assault case and the solicitation case with a Notice of Motion setting the hearing date for May 14, 2001. The Motion was served on counsel for the defense on May 10, 2001. Appendix I, 58 - 72.

7 On May 13, 2001, the District Court with the Honorable Sally Lochrer presiding, granted the
8 prosecution's motion for joinder. There was no hearing and no opposition had ever been filed by the
9 Defense. Appendix I, 225 - 226, Transcript dated July 19, 2001, page 21, lines 5 - 9.

10 Later, Judge Bonaventure read the briefs regarding joinder and, for the record, stated that he would have
11 ruled the same as Judge Loehrer as to joinder being proper. Transcript dated July 19, 2001, page 13,
12 lines 23 - 25.

13 On May 22, 2001, the District Court denied Mr. Schwiger's Petition for Writ of *Habeas Corpus*.
14 Appendix I, 76 - 77.

15 On June 15, 2001, a motion was filed on behalf of Mr. Schwiger to dismiss the indictment for
16 solicitation of murder, or in the alternative to suppress evidence. The basis for Mr. Schwiger's motion
17 was the allegation that the State of Nevada had improperly induced Mr. Schwiger to engage in the
18 solicitations to commit the murder of the witnesses in his lewdness/sexual assault case. Appendix I, 78 -
19 84.

20 On or about July 9, 2001, the prosecution filed an opposition to Mr. Schwiger's motion to
21 dismiss the indictment or, in the alternative, to suppress evidence. Appendix I, 131 - 133.

22 On or about July 18, 2001, attorneys for Mr. Schwiger sought to have various witnesses
23 transported from Clark County Detention Center to serve as witness in his hearing to consider his motion
24 to dismiss the indictment or, in the alternative, to suppress evidence. Appendix I, 184 - 194.

25 On July 19, 2001, the prosecution filed an amended information combining all of the lewdness,
26 sexual assault, and solicitation to commit murder charges originally alleged. Appendix I, 195 - 198.

27 On July 19, 2001, an evidentiary hearing was held to consider Mr. Schwiger's motion to dismiss
28 the indictment or, in the alternative, to suppress evidence. Mr. Schwiger's motion was denied without
prejudice, largely on the grounds that most of his witnesses were not present. Transcript dated July 19,
2001.

Based upon uncertainty regarding the missing witnesses referenced above and plea negotiations
surrounding an *Alford* plea, Mr. Schwiger asked for a 30-day continuance to try to round up his
incarcerated witnesses, and to understand the plea negotiation process better. Transcript dated July 19,
2001, page 18, line 21 through page 19, line 2.

1 The Court was in no mood to give any additional time to the Defense for any reason, stating "Me,
2 I could care less, I'm going to be in trial [by Friday at 12 noon] or a deal, doesn't matter to me, so its up
3 to the [prosecutor] to make that decision, not me." Apparently, there was work to do on a more
4 important case called *Rudin* and the Court did not want to "chit-chat," and the prosecutor complained
5 about the fact that the Defense might use the additional time to better prepare for trial. The prosecutor
6 also complained that "I've got kids..." Transcript dated July 19, 2001, page 14, lines 8 - 11, page 17,
7 liner 12, page 19, lines 3 - 6.

8 The Defense requests that this Court take judicial notice to the fact that Mr. Schwiger had filed
9 a Petition for Writ of *Habeas Corpus* on April 23, 2001, and therein had invoked his 60-day right to a
10 trial; however this right was never cited by the Court or the prosecution as grounds for the perceived rush
11 to judgment in this case, nor is there any evidence in the record that Mr. Schwiger had a right to waive
12 his Constitutional speedy trial rights. Indeed, by the time of the above-referenced hearing on July 19,
13 2001, said 60-days had long since expired. Appendix I, 12.

14 On July 20, 2001, Mr. Schwiger entered a guilty plea, pursuant to *North Carolina v. Alford*, 400
15 U.S. 25 (1970), to one count of lewdness with a child under the age of 14 and two counts of solicitation
16 to commit murder. Appendix I, 199 - 204 and Transcript dated July 20, 2001.

17 On September 25, 2001, attorneys for Mr. Schwiger filed a motion to withdraw Mr. Schwiger's
18 guilty plea. Appendix I, 205 - 223.

19 On or about October 29, 2001, the prosecution filed an opposition to Mr. Schwiger's motion to
20 withdraw his guilty plea. Appendix I, 224 - 237

21 On November 5, 2001, attorneys for Mr. Schwiger filed a reply to the prosecution's opposition
22 to Mr. Schwiger's motion to withdraw his guilty plea. Appendix I, 238 - 241.

23 On or about November 9, 2001, attorneys for Mr. Schwiger noticed the prosecution regarding
24 the Mr. Schwiger's list of witnesses for the scheduled hearing to withdraw his guilty plea. The notice
25 contained the names of 12 prisoners held at the Clark County Detention Center. Appendix I, 242 - 243.

26 On November 19, 2001, attorneys for Mr. Schwiger caused subpoenas to be issued for several
27 prisoners held in the Clark County Detention Center. Appendix I, 245 - 250 and Appendix II, 251 - 253.

28 On or about November 19, 2001, attorneys for Mr. Schwiger sought to have witnesses

1 transported from Clark County Detention Center to serve as witness in his hearing to consider his motion
2 to withdraw his guilty plea. Appendix II, 254 - 255.

3 At said hearing, held on November 21, 2001, all but one of those subpoenaed did not appear, and
4 the single prisoner witness who did appear (Thomas "Tommyguns" Yates) recanted his earlier
5 statements made to counsel for Mr. Schwiger in favor of Mr. Schwiger. (Mr. Yates testimony will be
6 explained in greater detail below.) Transcript dated November 21, pages 3 - 20.

7 There is no evidence in the record to suggest why the prisoner witnesses were not made to
8 appear.

9 On November 21, 2001, the District Court denied Mr. Schwiger's motion to withdraw his guilty
10 plea, based largely on the lack of witnesses to support Mr. Schwiger's allegations. Transcript dated
11 November 21, 2001, page 26.

12 On November 21, 2001, the Court imposed sentence upon Mr. Schwiger pursuant to the
13 aforementioned *Alford* plea. The Court sentenced Mr. Schwiger to a \$25 administrative assessment fee,
14 a \$250 DNA analysis fee, \$300 in restitution, life imprisonment with a minimum parole eligibility of
15 ten years as to Count I, lifetime supervision upon completion of the prison term on Count I, submission
16 to testing to determine genetic markers, 180 months of incarceration with a minimum parole eligibility
17 of 72 months on Count VIII, to be served consecutive to Count I, and 180 months of incarceration with
18 a minimum parole eligibility of 72 months on Count IX, to be served concurrent to Count VIII. Mr.
19 Schwiger was given credit for 278 served in custody awaiting trial. Transcript dated November 21,
20 2001, page 50.

21 Over the course of the case in District Court, Mr. Schwiger wrote numerous *ex-parte* letters to
22 the Court and others and copied the Court with letters written to others on an *ex-parte* basis. The Court
23 read these letters into the record on various occasions. In all of these letters Mr. Schwiger consistently
24 and emphatically proclaims his innocence as to all charges, complains about his representation, and
25 alleges that his case is not being properly presented to the Court. Appendix I, 85 -130, Transcript dated
26 July 10, 2001, page 14 line 25 through page 35, line 5, Transcript dated July 19, 2001, page 10, lines 3 -
27 6, page 13, lines 4 - 6, Transcript dated September 17, 2001, page 2, lines 6 - 18, and page 4, lines 4 -
28 8, Transcript dated November 21, 2001, page 39, lines 2 - 15 page 42, lines 3 - 16 page 43, lines 13 - 19,

1 and page 44, lines 18 - 19.

2 On December 11, 2001, the Court entered its Judgment of Conviction. Appendix II, 256.

3 On December 24, 2001, Mr. Schwiger filed Notices of Appeal in both the lewdness/sexual
4 assault and the solicitation cases. Appendix II, 258 - 261.

5 This Opening Brief follows:

6 **STATEMENT OF FACTS**

7 During the months of August and September, 2000, Wendy Sheldon, Ms. Sheldon's five-year-old
8 daughter, Alexis Ashford, and Ms. Sheldon's 14 year old daughter, Christina Goodman, were neighbors
9 with Mr. Schwiger and his five-year-old daughter, Chelsey Schwiger. The parties lived in a
10 condominium project. Transcript dated March 13, 2001, pages 10 - 13 and page 44, lines 11 - 16, page
11 124, lines 4 - 5, Transcript dated April 12, 2001, page 10, lines 4 - 6.

12 Ms. Sheldon, Alexis and Christina lived nearby at 6750 Del Ray, Number 106, in Las Vegas,
13 Nevada. Transcript dated March 13, 2001, page 123, lines 22 - 25 and Transcript dated April 12, 2001,
14 page 10, lines 1 - 3.

15 Mr. Schwiger, his wife Lisa, and their daughter Chelsey lived at 6750 Del Ray, Number 109, Las
16 Vegas, Nevada, but Lisa moved out at about the time the incidents described herein occurred, and Mr.
17 and Mrs. Schwiger began divorce proceedings. Transcript dated March 13, 2001, page 18, line 22
18 through page 19, line 5, and page 124, lines 21 - 25, Transcript dated March 14, 2001, page 12, lines 23 -
19 24, and Transcript dated April 12, 2001, page 10, lines 1 - 3, and page 12, lines 20 - 24.

20 The two condominiums were about 20 feet apart, across an alley. Transcript dated March 13,
21 2001, page 13, lines 11 - 15 and Transcript dated November 21, 2001, page 29, lines 17 - 20.

22 Both girls attended Doris Hancock Elementary School, and Mr. Schwiger drove both girls to and
23 from school. Sometimes, the girls would play at Mr. Schwiger's house after school. Transcript dated
24 March 13, 2001, page 13, line 16 through page 14, line 18, Transcript dated April 12, 2001, page 12,
25 lines 6 - 16, and Transcript dated November 21, 2001, page 17 - 20.

26 Alexis' grandmother (and Ms. Sheldon's mother), Linda Simone, came to Mr. Schwiger's every
27 day after school to check on Alexis. About 75% of the time she would pick Alexis up from Mr.
28 Schwiger's home and take Alexis to her home. Transcript dated March 13, 2001, page 125, line 10

1 through page 127 line 6, Transcript dated April 12, 2001, page 19, lines 24 - 25, and Transcript dated
2 November 21, 2001, page 28, lines 4 - 9.

3 There came a time when Alexis did not want to visit the Schwiger residence. However, Alexis
4 did not explain to her mother why she no longer wanted to visit the Schwiger residence. Transcript
5 dated March 13, 2001, page 15, lines 17 - 21 and page 16, lines 18 - 23.

6 Between January 5 and January 10, 2001, Ms. Simone informed Wendy that Alexis had made
7 various allegations regarding acts of lewdness by Mr. Schwiger upon Alexis. Transcript dated March
8 13, 2001, page 32, line 23 through page 33, line 9, page 98, lines 14 - 18, and page 128, lines 11 - 22.

9 According to Ms. Simone, Alexis said that Mr. Schwiger made Alexis "kiss his weiner," or
10 maybe it was his "ding-a-ling," or perhaps his "ding-dong," that Mr. Schwiger would lay on top of
11 Alexis and Chelsey and "play house," and that Mr. Schwiger would kiss Alexis' genitals. Transcript
12 dated March 13, 2001, page 130, line 12 through page 1321, line 23, page 135, lines 7 - 17, page 137,
13 lines 8 - 14, and page 147, lines 20 - 24.

14 Later, Alexis alleged that Mr. Schwiger had touched his genitals to her genitals on one occasion,
15 that Mr. Schwiger had touched her genitals with his hand, that Mr. Schwiger had kissed her genitals, that
16 Alexis had kissed Mr. Schwiger's genitals;. On another occasion Mr. Schwiger allegedly asked Alexis
17 to kiss his genitals, but nothing happened. Transcript dated March 13, 2001, page 50, lines 17 - 25, page
18 53, line 14 though page 54, line 25, page 55, line 6 through page 19 and page 57, lines 8 - 20.

19 It was Alexis testimony that all of the acts described above were committed in Mr. Schwiger's
20 bedroom, that Chelsey witnessed all of the alleged sexual acts, and that Mr. Schwiger performed the
21 same sort of acts upon her, that all three individuals were unclothed at the time the alleged acts were
22 committed, and that all three were laying on Mr. Schwiger's bed at the time the alleged acts were
23 committed. Transcript dated March 13, 2001, page 64, lines 8 - 19, page 70, lines 3 - 14, page 71 line
24 9 through page 74, line 13.

25 Alexis specifically testified that Mr. Schwiger had not touched her buttocks. Transcript dated
26 March 13, 2001, page 57, lines 5 - 7.

27 Alexis and Chelsey were always together while at Mr. Schwiger's house and she was always
28 awake when Mr. Schwiger was allegedly engaged in inappropriate touching. Transcript dated March

1 13, 2001, page 76, lines 22 - 24 and page 80, lines 3 - 6.

2 Despite the shocking nature of Alexis' confession to Ms. Simone, neither Ms. Sheldon nor Ms.
3 Simone contacted police. Transcript dated March 13, 2001, page 34, lines 9 - 11, page 143, lines 13 -
4 18.

5 Ms. Simone habitually rubbed Alexis' back since Alexis liked having her back rubbed.
6 Transcript dated March 13, 2001, page 141, lines 14 - 19.

7 Ms. Simone also bathed Alexis and on one such occasion, Ms. Simone checked Alexis' genitals
8 for signs of sexual abuse. She found none. Transcript dated March 13, 2001, page 151, line 25 through
9 page 152, line 6.

10 Later, Alexis told Ms. Simone that she had made everything (the whole story) up. Ms. Simone
11 then informed Ms. Sheldon that Alexis had recanted her story. Transcript dated March 13, page 154, line
12 18 through page 159, line 21, page 161, lines 1 - 5.

13 Based upon Alexis statement that she had made the entire story up, and upon repeated
14 questioning from her mother, Ms. Sheldon, Alexis stated that she had made the allegations up, and that
15 nothing had happened. Transcript dated March 13, 2001, page 32, lines 2 - 19, page 159, line 22 through
16 page 160, line 20.

17 Later, Alexis changed her story line to reflect that while Mr. Schwiger had not touched Alexis,
18 Alexis had witnessed Mr. Schwiger sexually abuse Chelsey. Transcript dated March 13, 2001, page 161,
19 lines 20 - 25.

20 Ms. Simone then instructed her daughter, Ms. Sheldon, not to allow Alexis to visit Mr.
21 Schwiger's residence in the future. Ms. Sheldon disobeyed her mother's instructions, and as a result,
22 Ms. Simone took Ms. Sheldon's kids away from her. Transcript dated March 13, page 163, lines 15 -
23 24.

24 During this period, Alexis was in a "confused state of mind," regarding Ms. Sheldon's drug use,
25 poverty, recent separation from Alexis' father, and custody issues between Ms. Sheldon and Ms. Simone
26 regarding both Alexis and Christina. Ms. Simone wanted both girls to be in her custody, and she had
27 them in her custody about 75% of the time. After Ms. ~~Sheldon~~^{SiMONE} made her allegations about Alexis'
28 statements alleging sexual abuse, Ms. Sheldon relented and let Ms. Simone have custody 100% of the

1 time. This was very upsetting to Ms. Sheldon because she believes that she lost Alexis because she
2 allowed Alexis to be sexually abused. Transcript dated March 13, 2001, page 24, line 14 through page
3 27, line 23 and page 162, lines 5 - 22, page 166, line 1 through line 19, Transcript dated April 12, 2001,
4 page 19, lines 4 - 7 and page 19, lines 19 through 25 and Transcript dated November 21, 2001, pag 32,
5 lines 4 - 17.

6 Despite the fact that she does not have legal custody of the children, Ms. Simon is adamant that
7 she have custody of the children, and she has set parameters regarding when Ms. Sheldon can have her
8 children back. Transcript dated March 13, 2001, page 167, lines 2 through 19.

9 Eventually, Ms. Sheldon confronted Mr. Schwiger about Alexis' allegations, and on January 18,
10 2001, Mr. Schwiger, thinking he was being "set up," contacted police regarding the allegations.
11 Transcript dated April 12, 2001, page 8, line 23 through page 9, line 7.

12 Detective Jay Roberts, of the Metropolitan Police Department then investigated the allegations.
13 Both Chelsey and Alexis denied the allegations altogether. Transcript dated March 13, 2001, page 89,
14 lines 3 - 14, and Transcript dated April 12, 2001, page 9, lines 7 - 14.

15 Mr. Schwiger maintained extensive computer equipment in his home. No evidence of child
16 pornography or other contraband was found on the computer. Transcript dated March 14, 2001, page
17 17, lines 15 - 22.

18 Chelsey denied any problems with touching (sexual) problems in an interview with a Child
19 Protective Services investigator named Paula Hammack. In fact, Chelsey specifically denied that she
20 was ever present at the times Alexis alleges she was. Charges against Mr. Schwiger regarding Chelsey
21 were ultimately dropped. Transcript dated March 13, 2001, page 115, line 10 - 13, page 116 line 19
22 through page 117, line 24, Transcript dated April 12, 2001, page 15, line 17 through page 16, line 3.

23 While Ms. Hammack did inform the prosecution that Chelsey did not confirm Alexis' story, Ms.
24 Hammack did not provide evidence of her interview with Chelsey to the prosecution or to the defense.
25 Transcript dated March 13, 2001, page 119, line 7 through page 120 line 18.

26 It was ultimately determined that Ms. Hammack no longer had the tape of her interview with
27 Chelsey, and that she had possibly thrown it away. Appendix I, 6 - 7.

28 At her interview, Alexis did make various allegations to Ms. Hammack. Transcript dated March

1 13, 2001, page 88, lines 5-20.

2 However, the statement given to Ms. Hammack by Alexis differed in substantial detail from the
3 testimony that Alexis provided at the Preliminary Hearing. According to Ms. Hammack, Alexis alleged
4 that Mr. Schwiger had touched her breasts on top of her clothes, that he had touched her buttocks under
5 her clothes, that she had touched his genitals with her hand, that he had touched her genitals over her
6 clothes, that Chelsey was standing behind Alexis when Mr. Schwiger touched her, that she had touched
7 him using Kleenex, that she had touched his genitals with her foot, that she and Mr. Schwiger had been
8 standing when he had touched his genitals to her genitals. Transcript dated March 13, 2001, page 93,
9 lines 11 - 13, page 97, lines 1 - 2, lines 10 - 11, and lines 20 - 23, page 105, lines 19 - 24, page 107, lines
10 17 - 21, page 108, line 14 through page 109, line 2, page 109, lines 12 - 24, page 110, lines 12 - 17.

11 In fact, some of what Alexis told Ms. Hammack just did not make sense, i.e. that Mr. Schwiger
12 had touched his genitals to Alexis' genitals while they were both standing up (a grown man and a five-
13 year-old girl). Transcript dated March 13, 2001, page 111, lines 2 - 15.

14 In order to clarify Alexis' allegations, Ms. Hammack asked Alexis to make drawings relative to
15 her allegations. Alexis did so, however the drawings did not support Alexis' allegations at all.
16 Transcript dated March 13, page 95, lines 17 - 24, page 100, lines 10 - 15.

17 After the session Ms. Hammack had with Alexis, Alexis left the drawings with Ms. Hammack.
18 However, Ms. Hammack elected not to give the drawings to the police or the prosecution. She claimed
19 that she had "disregarded it because...it was just scribble." If the picture had supported Alexis'
20 allegations, Ms. Hammack would "possibly" have kept the drawings. Ms. Hammack was not at all
21 surprised that the defense might want to see the drawings. However, for purposes of the Preliminary
22 Hearing, the drawings simply were not available. Transcript dated March 13, page 101, line 12 - through
23 page 102, line 25 and page 122, lines 2 - 9.

24 Later, Ms. Hammack did find the drawings. Indeed, the drawings did not support Alexis'
25 allegations at all. Appendix 1, 6 - 7 and 56 - 57.

26 On February 16, 2001, Mr. Schwiger was arrested on the lewdness with a minor under the age
27 of 14 charges and taken to the Clark County Detention Center. Chelsey was placed in Child Protective
28 Services custody, and eventually custody was granted to Mrs. Schwiger. Transcript dated April 12,

1 Later, Mr. Yates placed two telephone calls to counsel for Mr. Schwiger, and indicated that
2 indeed, Mr. Schwiger had been set up and that Mr. Schwiger was innocent of the solicitation charges.
3 However, Mr. Yates later testified that the reason he made the telephone call was because he was afraid
4 of Mr. Schwiger. Appendix I, 218 and 220. Transcript dated November 21, 2001, page 15, line 9
5 through page 17, line 5.

6 Belying that claim, Michael A. Brandon, another prisoner in the Clark County Detention Center,
7 overheard Mr. Yates side of the conversation, and he knew Mr. Yates to be a "good rat or snitch."
8 According to Mr. Brandon, Mr. Yates did state on the phone that Mr. Schwiger was not guilty of the
9 solicitation charges, and that he was "set up." Appendix I, 218.

10 According to Tony D. Swanson, another prisoner held in the Clark County Detention Center,
11 Daniel Smith and "Mac" set Mr. Schwiger up on the solicitation charges. Apparently, Mr. Swanson also
12 overheard Mr. Yates on the telephone speaking to "David." David Amesbury was counsel to Mr.
13 Schwiger at the time. Appendix I, 219.

14 According to Ricky Tillard, "Tommy [Tommyguns]" said that he had exculpatory testimony
15 regarding Mr. Schwiger's solicitation charges, and that Mr. Schwiger was innocent. Appendix I, 223.

16 Mr. Schwiger was housed in the same cell with an informant, drug user, child sexual abuser, and
17 parole violator by the name of Anthony McFarland. Transcript dated April 12, 2001, page 24, line 10
18 through page 25, line 22, page 68, lines 4 - 11 and Transcript dated April 19, 2001, page 89, lines 15 -
19 24.

20 Mr. Yates represented to Mr. Schwiger that he was an amateur investigator, and that he owned
21 an investigation agency called T.T.F. Investigations, and that he often helped his friends with
22 investigations at no charge to them. According to Mr. Yates this was all code talk for murder. Transcript
23 dated November 21, 2001, page 11, lines 7 - 21.

24 Sure enough, Mr. Yates approached Mr. MacFarland and learned that indeed, "[Mr. Schwiger]
25 had approached [Mr. MacFarland] and asked if [Mr. MacFarland] could have some people killed."
26 Transcript dated November 21, 2001, page 13, lines 1 - 3.

27 Over a period of time, Mr. McFarland alleges that Mr. Schwiger and he discussed killing various
28 witness in Mr. Schwiger's lewdness/sexual assault case, and that Mr. McFarland, "led him on," and drug

1 every thing out making him believe that he was really interested in killing the witnesses against Mr.
2 Schwiger. Transcript dated April 12, 2001, page 36, line 1 through page 38, line 6, page 38 line 19
3 through page 39, line 22 and page 40, lines 4 - 18 and line 25 through page 41, line 1.

4 Mr. MacFarland, being illiterate himself, then dictated a letter to Mr. Schwiger to a fictitious
5 address laying out the "murder plan" over Mr. MacFarland's signature. Mr. MacFarland even threw
6 in a little "Cripp-style" terminology as "a little something for the fellas." Appendix 1, 150 - 153,
7 Transcript dated April 12, 2001, page 41, line 9 through page 44, line 7, page 62, lines 7 - 17 and page
8 63, lines 8 - 12.

9 The authorities then induced Mr. MacFarland to wear a wire while conversing with Mr. Schwiger
10 about the alleged murder solicitation. Transcript dated April 12, 2001, page 47, lines 7 - 13.

11 Mr. Yates was the individual that actually installed the wire on Mr. MacFarland. Transcript
12 dated November 21, 2001, page 13, lines 16 - 24.

13 While Mr. Yates had never installed a wire prior to this, he had "worn a few" himself. Transcript
14 dated November 21, 2001, page 13, line 25 through page 14, line 2.

15 During the ensuing wired conversation between Mr. MacFarland and Mr. Schwiger, Mr.
16 Schwiger, feeling that the conversation was being taped, resorted to whispering. As a result, Mr.
17 MacFarland said, "[...stop whispering?], I'll tell you what's going to happen. They're going to bring the
18 little girl and your ass will sit in the penitentiary for the rest of your life for fooling with that little girl.
19 I made him say okay, okay, okay, okay." Transcript dated April 12, 2001, page 48, line 20 through page
20 49, line 3.

21 Unfortunately for the police and "Tommyguns," the recorder did not work, and they wanted Mr.
22 MacFarland to wear a wire and tape Mr. Schwiger again. Presumably, this wire would have been
23 installed by professionals. However, Mr. MacFarland refused. Transcript dated April 12, 2001, page
24 49, lines 7 - 18.

25 Then Mr. Schwiger was set up to meet "one of the home boys from [Mr. MacFarland's] set."
26 This individual was actually an intelligence officer. Transcript dated April 12, 2001, page 49, lines 22 -
27 24.

28 All the while, of course, Mr. MacFarland was just "shitting [Mr. Schwiger] along." Transcript

1 dated April 12, 2001, page 50, lines 19 - 20.

2 Mr. MacFarland earned \$100 in "stokes" at the jail commissary for his trouble. Transcript dated
3 April 12, 2001, page 56, lines 10 - 19 and page 73, lines 2 - 7.

4 On March 22, 2001, Undercover Agent Will Scott posed as Mr. MacFarland's "home boy" to
5 interview Mr. Schwiger to get audio and video tape confirming Mr. Schwiger's desire to have the
6 witnesses killed. Transcript dated April 12, 2001, page 74, lines 6 - 15 and Transcript dated April 19,
7 2001, page 87 line 5 through page 88, line 17.

8 Undercover Agent Scott did succeed in securing a video and audio tape of his conversation with
9 Mr. Schwiger wherein it appears that Mr. Schwiger does indeed discuss the murder of various witnesses
10 in his case. However, most of the conversation involves Mr. Schwiger's desire to have Mr. Scott
11 "investigate" the case for him. Appendix I, 155 - 183 and Transcript Dated April 19, 2001, page 90,
12 line 13 through page 91, line 20.

13 ARGUMENT

14 I. THE DISTRICT COURT ERRED WHEN IT JOINED TWO DISPARATE CASES.

15 A. The Defendant never had an opportunity to oppose the prosecution's motion for
16 joinder, and the matter was decided by a different judge, prior to the scheduled hearing date,
and prior to any opportunity for the Defendant to file an opposition.

17 On or about May 10, 2001, the prosecution moved the District Court for joinder of the charges
18 on an Order Shortening Time and Judge Bonaventure signed the Order Shortening Time and set the
19 hearing for May 14, 2001. Transcript, May 14, 2001. Appendix I, 58 - 59 and 61.

20 Not only was the Defense not given the time to formally oppose the Motion for Joinder, but
21 Judge Sally Loehrer joined the lewdness/sexual assault charges on May 13, 2001 without even waiting
22 for the May 14, 2001 hearing. Appendix I, 225 - 226, Transcript dated July 19, 2001, page 21, lines 5 -
23 9.

24 Mr. Schwiger wrote numerous lengthy letters to Judge Bonaventure objecting to joinder of the
25 charges as being prejudicial and to the fact that the Defense had not had an opportunity to object to
26 joinder. Appendix I, 85 - 101 and 106 - 109.

27 At subsequent hearing to consider another matter, Mr. Schwiger orally raised an objection to
28 joinder on grounds that he was innocent of the lewdness/sexual assault charges, and that joinder would

1 be prejudicial. Judge Bonaventure then stated, "Judge Lochrer decided that." Transcript dated July 19,
2 2001, page 13, lines 3 - 12.

3 Mr. Schwiger disputed the Judge's statement saying, "Judge Lochrer did not decide this, Judge
4 Lochrer said you decided it. I think this is where the problem is. I don't believe anybody read the briefs.
5 We didn't even have a opportunity to file opposition. No arguments were heard from anybody. How
6 can you make a decision on a brief and how to rule unless you have both sides of the story? From what
7 I can see...nobody actually read anybody's briefs. I think it was a misunderstanding between Judge
8 Lochrer and yourself, unless you read them. Transcript dated July 19, 2001, page 13, lines 13 - 22.

9 Judge Bonaventure then responded, "I agree with Judge Lochrer. I reviewed all the briefs and
10 I would have ruled the joinder was proper so I'll say that, for the record. I read the briefs and I would
11 think...I'm familiar with the doctrines and it would be my opinion the joinder is proper. So whatever
12 you want to say to that. Transcript dated July 19, 2001, page 14, lines 1 - 4.

13 At that point in the proceedings, Counsel for Mr. Schwiger attempted to speak, but the Judge cut
14 him off saying, "I don't want to belabor this...I don't want to be going crazy...I don't want to chit-chat."
15 Transcript dated July 19, 2001, page 14, lines 5 - 6.

16 The fact is that Judge Bonaventure could not have read "all the briefs" because Judge Lochrer
17 decided the matter prior to the filing of any briefs by the defense and without hearing argument of any
18 kind. (Emphasis supplied.)

19 Nev. D.C.R. 13 provides that Defendants be notified of the hearing date, and that Defendants be
20 given the opportunity to file oppositions to motions filed by the prosecution within 10 days of the filing
21 of the motion and prior to the hearing date.

22 In the case at bar, the decision was rendered by a different judge than the judge assigned to the
23 case, on a date prior to the noticed date, and on a date just three days after the original motion was filed.

24 The joinder of charges against Mr. Schwiger by a different judge, without any opportunity for
25 his counsel to oppose joinder violates the Fifth and Fourteenth Amendments to the United States
26 Constitution and Article I Section 8 of the Constitution of the State of Nevada.

27 An exhaustive search of the Lexis data base has revealed any case where a defendant's rights
28 have been so blatantly disregarded.

1 After joinder was a *fait accompli*, Mr. Schwiger did personally attempt to bring the issue before
2 Judge Bonaventure both in writing and orally. While Mr. Schwiger did make numerous issues to raise
3 the issue of improper joinder, he had no right to represent himself, and the Court had no right to
4 disallow Mr. Schwiger's counsel the right to formally object to joinder. See *Miller v. State*, 86 Nev. 503,
5 471 P.2d 213 (1970).

6 At the very least, the due process requirements of the United States Constitution and the Nevada
7 Constitution would require that counsel for Mr. Schwiger be given an opportunity to oppose the
8 prosecution's motion of joinder prior to the hearing date, that the hearing date be held on the date
9 scheduled, and that counsel be given an opportunity to argue the motion. Despite the best efforts of Mr.
10 Schwiger and Mr. Parris, counsel for Mr. Schwiger, none of this happened.

11 **B. Joinder of the charges was not based on the same act or transaction, or part of a
common scheme or plan.**

12 NRS 173.115 provides that:

13 Two or more offenses may be charged in the same indictment or information in a separate
14 count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:

- 15 1. Based on the same act or transaction; or
- 16 2. Based on two or more acts or transactions connected together or
17 constituting parts of a common scheme or plan.

18 Fed. R. Crim. P. 8(a) is similar to NRS 173.115. Two offenses may be joined in the
19 indictment under Rule 8(a) "only if the offenses charged . . . are of the same or similar character or are
20 based on the same act or transaction or on two or more acts or transactions connected together or
21 constituting parts of a common scheme or plan." The term "transaction" is to be interpreted flexibly
22 and "may comprehend a series of related occurrences." Because Rule 8 is concerned with the propriety
23 of joining offenses in the indictment, the validity of the joinder is determined solely by the allegations
24 in the indictment. The evidence necessary to prove the counts must overlap. (Citations omitted.)
25 *United States v. Terry*, 911 F.2d 272 (9th Cir. 1989). See also *United States v. Rousseau*, 257 F.3d 925
26 (9th Cir. 2001) (In determining whether joinder is proper, the district court should examine only those
27 allegations in the indictment.). In the case at bar, there is no effort in the amended information to show
28

1 that the evidence necessary to prove the lewdness/sexual assault counts is also necessary to prove the
2 solicitation to commit murder counts. While it is true that Mr. Schwiger would not have been detained
3 in the Clark County Detention Center and in a position to solicit the murder of his accusers had he not
4 been charged with lewdness/sexual assault; it could very well be that Mr. Schwiger will eventually be
5 found innocent of the lewdness/sexual abuse charges, but later be found guilty of the solicitation of
6 murder charges. That is to say, it is not necessary for the prosecution to prove lewdness/sexual assault
7 in order to prove solicitation of murder.

8 **C. Joinder of the charges was unfairly prejudicial**

9 Even if joinder is permissible under NRS 173.115, a trial court should sever the offenses if the
10 joinder is "unfairly prejudicial." NRS 174.165(1) provides that if a defendant is prejudiced by joinder
11 of offenses, the district court may order separate trials of counts "or provide whatever other relief justice
12 requires." *Floyd v. State*, 42 P.3d 249, 255, 118 Nev. Adv. Op. No. 17; 118 Nev. Adv. Rep. 17 (2002).

13 The first kind of prejudice results when the jury considers a person facing multiple charges to
14 be a bad man and tends to accumulate evidence against him until it finds him guilty of something. The
15 second type of prejudice manifests itself when proof of guilt on the first count in an information is used
16 to convict the defendant of a second count even though the proof would be inadmissible at a separate
17 trial on the second count. The third kind of prejudice occurs when the defendant wishes to testify on his
18 own behalf on one charge but not on another. *Floyd* at 255 citing *State v. Campbell*, 189 Mont. 107, 615
19 P.2d 190, 198 (Mont. 1980).

20 All of the charges herein, if proven, are outrageous. Even if Mr. Schwiger could successfully
21 defend himself against the lewdness/sexual assault charges, or separately the solicitation of murder
22 charges, the effect of having to defend two equally horrible, but unrelated charges could cause a jury to
23 accumulate evidence sufficient to find him guilty of something.

24 Were the charges to be severed, there is no theory under which the evidence in the solicitation
25 for murder counts would be admissible to prove the lewdness/sexual assault counts since the alleged
26 solicitation for murder occurred well after the alleged lewdness/sexual assault allegations.

27 Also, it could very well be that Mr. Schwiger would wish to take the stand and vigorously defend
28 the lewdness/sexual assault counts. This is true because of the nature of the charges themselves, and

1 because of the weak nature of the proof against him. On the other hand, Mr. Schwiger may not wish to
2 take the stand in the solicitation of murder case since the evidence is much stronger, and he may perceive
3 the social stigma of a solicitation case to be less than that of a case involving the sexual assault of a five
4 year old girl.

5 In any case, all three types of prejudice outlined in *Floyd* are present in the instant case.

6 Joinder of offenses may prejudice a defendant in that "(1) he may become embarrassed or
7 confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes
8 charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the
9 other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged
10 and find guilt when, if considered separately, it would not so find. Also, several crimes may also create
11 a latent feeling of hostility toward the defendant. If all of the evidence of the separate count would be
12 admissible upon severance, prejudice is not heightened by joinder. (Citations omitted.) *United States*
13 *v. Johnson*, 820 F.2d 1065 (9th Cir. 1987).

14 There can be no doubt that joinder of these particularly counts would prejudice Mr. Schwiger's
15 case in each of methods described in *Johnson*. Having to defend a solicitation of murder charges against
16 the very witnesses testifying in the lewdness/sexual assault case during the same trial would be
17 extremely embarrassing, confounding, and prejudicial. Clearly, evidence that Mr. Schwiger had solicited
18 the murder of the witness in the lewdness/sexual assault case would cause the jury to infer that Mr.
19 Schwiger had actually been engaged in lewdness and/or sexually assaulted Alexis. And, absent the
20 cumulative nature of the lewdness/sexual assault charges with the solicitation for murder charges, it is
21 reasonable to expect that the jury would be less inclined to find Mr. Schwiger guilty of the
22 lewdness/sexual assault case if they did not learn that he had tried to have all the witnesses in the
23 lewdness/sexual assault case murdered. Finally, it is clear that evidence in the solicitation for murder
24 case would not be admissible in the lewdness/sexual assault case, therefore prejudice would be
25 heightened by joinder.

26 **D. Joinder of a poorly-supported count with a well-supported count is not permissible.**

27 When a trial court considering a defendant's motion for severance of unrelated counts has
28 determined that the evidence of the joined offenses is not "cross-admissible," it must then assess the

1 relative strength of the evidence as to each group of severable counts and weigh the potential impact of
2 the jury's consideration of "other crimes" evidence. (i.e., the court must assess the likelihood that a jury
3 not otherwise convinced beyond a reasonable doubt of the defendant's guilt of one or more of the
4 charged offenses might permit the knowledge of the defendant's other criminal activity to tip the balance
5 and convict him. If the court finds a likelihood that this may occur, severance should be granted. *Floyd*
6 at 254. See also *People v. Bean*, 46 Cal. 3d 919, 760 P.2d 996, 1006, 251 Cal. Rptr. 467 (Cal. 1988).

7 The decision to sever is left to the discretion of the trial court, and an appellant has the "heavy
8 burden" of showing that the court abused its discretion. To establish that joinder was prejudicial
9 "requires more than a mere showing that severance might have made acquittal more likely." (Citations
10 omitted.) *Middletown v. State*, 114 Nev. 1089, 1108, 968 P.2d 296 (1998).

11 In the case at bar, of course, the trial court never considered the matter. However, had the
12 Defense been given an opportunity to argue joinder prior to Judge Lochrer's decision, it would have been
13 made clear from the record that there was no plan to murder the alleged victims or any authorities that
14 might investigate the alleged lewdness/sexual assault charges at the time the lewdness/sexual assault
15 charges were allegedly committed. The solicitation charges, if proven, would necessarily have their
16 genesis after the preliminary hearing and joinder results, which were both negative to Mr. Schwiger, had
17 become known. Since the solicitation allegations did not originate at the time the lewdness/sexual
18 assault allegations originated, there would have been no "cross-admissible" evidence. *Floyd* at 254.

19 Therefore, the Court must look to whether or not the discrepancy between the weight of evidence
20 in one group of counts might cause a jury not otherwise convinced beyond a reasonable doubt of the
21 defendant's guilt of one or more of the charged offenses might permit the knowledge of the defendant's
22 other criminal activity to tip the balance and convict him. *Floyd* at 254.

23 The Ninth Circuit also recognizes potential due process concerns when a poorly-supported count
24 is combined with one that is well supported. *Park v. California*, 202 F.3d 1146 (9th Cir. 2000).

25 In *Bean v. Calderon*, 163 F.3d 1073 (9th Cir. 1998) the Court found that prejudice resulted from
26 the disparity between the evidence supporting the Defendant's guilt one set of crimes and the proof of
27 the Defendant's guilt of the second set of crimes.

28 In the instant matter, the lewdness/sexual assault counts were extremely weak. Incredibly

1 inconsistent testimony was introduced at the preliminary hearing regarding Alexis' allegations. Chelsey,
2 whom Alexis claimed witnessed and participated in every act, denied Alexis' allegations all together.
3 No physical evidence of the lewdness/sexual assault counts was ever introduced, and Alexis herself, on
4 more than one occasion, recanted her allegations.

5 On the other hand, the solicitation counts appear to be well supported. Despite Mr. Schwiger's
6 contention that he was "set-up" and various affidavits that support that view, a letter in Mr. Schwiger's
7 own hand and a video/audio tape appear to support the allegation that Mr. Schwiger solicited the murder
8 of various witnesses in the lewdness/sexual assault case.

9 It is highly likely that in the event a jury believes that Mr. Schwiger attempted to solicit the
10 murder of witnesses against him (including the murder of a five-year-old girl), the jury would be more
11 inclined to believe that Mr. Schwiger was also guilty of the lewdness/sexual assault charges.

12 **II. THE DISTRICT COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO**
13 **WITHEDRAW GUILTY PLEA PURSUANT TO THE ALFORD DECISION.**

14 On July 20, 2001, Mr. Schwiger entered into a written guilty plea pursuant to *Alford* decision.
15 Appendix I, 199.

16 On September 25, 2001, counsel for Mr. Schwiger filed a Motion to Withdraw Guilty Plea on
17 Mr. Schwiger's behalf. Appendix I, 205.

18 On October 29, 2001, the prosecution filed an Opposition to Defendant's Motion to Withdraw
19 Guilty Plea. Appendix II, 224.

20 On November 21, 2001, the District Court held an evidentiary hearing on the motion and denied
21 the motion. Transcript dated November 21, 2001, page 26, lines 13 - 14.

22 After the evidentiary hearing and after denying the motion to withdraw the guilty plea, the
23 District Court sentenced Mr. Schwiger. Transcript dated November 21, 2001, page 46, line 19 through
24 page 51, line 2.

25 The law does not require a ritualistic oral canvass of a defendant to determine if a defendant
26 understands the nature of the offense and the consequences of a plea of guilty before finding a plea is
27 voluntary. So long as the totality of the circumstances, as shown by the record, demonstrates that the
28 plea was knowingly and voluntarily made and that the defendant understood the nature of the offense

1 and the consequences of the plea. *State v. Freese*, 13 P.3d 442, 116 Nev. Adv. Op. No. 115 (2000)

2 The totality of the circumstances include the oral canvass, any written plea memorandum,
3 circumstances surrounding the execution of the memorandum (i.e. did the defendant read it, have
4 questions about it, etc.) That the defendant's plea was freely, voluntarily and knowingly made.
5 specific formula for making this determination is required. Each case must be decided upon the facts
6 and circumstances of that case. *Freese* at 448.

7 On July 20, 2001, the District Court canvassed Mr. Schwiger as follows:

8 COURT: Your true name is Lawrence Edward Schwiger?

9 SCHWIGER: Yes, sir.

10 COURT: How old are you?

11 SCHWIGER: 49.

12 COURT: How far did you go in school?

13 SCHWIGER: One year college.

14 COURT: Do you read and write the English language?

15 SCHWIGER: Sort of, yes.

16 COURT: You understand - What do you mean, "sort of?" You went to college.

17 SCHWIGER: I'm not as particular as I like to be but I understand it generally.

18 COURT: All right. But you do understand the charges in the amended information, Count
19 lewdness with a child under 14 and Count 8, solicitation to commit murder and Count 9, solicitation
to commit murder; is that correct?

20 SCHWIGER: Yes, sir.

21 COURT: It is my understanding, Mr. Schwiger, you're not admitting your guilt but to a
22 harsher punishment you want to plead guilty pursuant to the *Alford* decision.

23 SCHWIGER: Yes, sir.

24 COURT: What is your plea? Is it guilty pursuant to the *Alford* decision?

25 SCHWIGER: Yes.

26 COURT: Before I could accept your plea of guilty pursuant to the *Alford* decision I have
assured it's freely and voluntarily given, is that my understanding.

27 SCHWIGER: Yes, sir.

28 COURT: You heard the negotiations, is that your understanding?

1 SCHWIGER: Yes.

2 COURT: You've read your guilty plea agreement pursuant to the *Alford* decision?

3 SCHWIGER: Not entirely, no.

4 COURT: You have to read it entirely. I'll take a recess. You need a couple of minutes?

5 SCHWIGER: Yes.

6 COURT: We'll take a recess, then, to read it.

7 A brief recess is taken, and the canvass continues:

8 COURT: All right. You have a copy of the guilty plea agreement?

9 SCHWIGER: Yes, sir, thank you for the time.

10 COURT: You read it thoroughly and you understood it?

11 SCHWIGER: Yes, sir.

12 COURT: All right. The Court will accept defendant's plea of guilty pursuant to the *Alford*
13 decision.

14 Transcript dated July 20, 2001, page 6, line 14 through page 8, line 19.

15 In *Freese*, the district court ascertained that Freese's attorney had explained the elements of the
16 offense to him and whether he understood the elements. *Id.* at 449.

17 In the case at bar, the District Court did ask Mr. Schwiger's attorney whether or not he had "went
18 over it with him." While the attorney replied in the affirmative, it was obvious that Mr. Schwiger had
19 not read the agreement, nor did he understand it. The court then recessed the proceedings so that Mr.
20 Schwiger could read the agreement. Transcript dated July 20, 2001, page 8, lines 1 - 8.

21 After the recess, the Court did not ascertain that Mr. Schwiger's attorney had explained the
22 elements of the offense to Mr. Schwiger, nor did the Court specifically inquire as to whether or not Mr.
23 Schwiger understood the elements of the offense. In fact, the elements of the offense were never
24 discussed by the Court in the canvass. Transcript dated July 20, 2001, page 8, lines 12 - 19.

25 In the case at bar it is clear that the canvass was only perfunctory, and that the Court did nothing
26 to ensure that Mr. Schwiger understood that he was giving up valuable Constitutional rights, that he
27 understood the elements of the charges against him, or that he understood the consequences of his plea.

28 The written plea, on its face, does appear relatively complete. Appendix I, 199.

1 However, at the time of sentencing, Mr. Schwiger testified that he had not read the entire
2 agreement and he did not understand the agreement. Further more, Mr. Schwiger testified that he only
3 "sort of" understood the English language. As a result the District Court gave Mr. Schwiger "a couple
4 of minutes" to read the agreement. Transcript dated July 20, 2001, page 6, lines 21 - 23 and page 8, lines
5 1 - 2.

6 After Mr. Schwiger was given a couple of minutes to read the agreement, the District Court
7 simply asked Mr. Schwiger whether or not he had read the agreement and understood it. Mr. Schwiger
8 responded that he had. There was no canvass as to whether or not Mr. Schwiger's counsel had explained
9 the agreement, the loss of important Constitutional rights, the consequences of the plea, or the elements
10 of the charges against him. The District Court simply accepted the plea. Transcript dated July 20, 2001,
11 page 8, lines 12 - 19.

12 As explained by this Court in *Freese*, one must review the totality of the circumstances, and not
13 simply review the canvass and the written plea agreement to determine whether or not the plea was freely
14 given. There is no specific formula for making this determination. *Id* at 448.

15 In the case at bar there is much in the record to indicate that Mr. Schwiger's plea was not freely
16 given. In addition to the fact that the canvass is inadequate, and that it is apparent that Mr. Schwiger did
17 not understand the written agreement, one may look to the following factors, including extreme
18 frustration on the part of Mr. Schwiger that the Court would not honor his speedy trial rights and his
19 right to oppose the motion for joinder, and apparent efforts by the Court to coerce Mr. Schwiger into
20 pleading guilty.

21 Mr. Schwiger was extremely distraught over his arrest and the charges that were lodged against
22 him. Mr. Schwiger himself first contacted the police regarding the allegations against him, and he
23 cooperated fully in the investigation. As was explained above, the evidence gathered by the police was
24 extremely weak, and while potentially sufficient to justify the low probable cause threshold necessary
25 to bind the matter over to District Court for trial, it is doubtful that the evidence was strong enough to
26 garner a conviction.

27 If Mr. Schwiger and his witnesses are to be believed, the prosecution took advantage of Mr.
28 Schwiger's distress over unfounded charges, and used professional sitches in the Clark County

1 Detention Center to set Mr. Schwiger up on solicitation of murder charges under the theory that such
2 allegations would buttress their lewdness/sexual assault charges.

3 Mr. Schwiger fully understood that the key to establishing his innocence of the lewdness/sexual
4 assault charges was getting the charges bifurcated and holding separate trials to resolve the
5 lewdness/sexual assault charges and the solicitation for murder charges. Mr. Schwiger went to great
6 lengths to ensure that his position regarding joinder was considered. Despite his efforts, and as
7 explained above, a judge other than the judge handling Mr. Schwiger's case decided to join the cases.
8 Judge Lochrer made this decision before the scheduled hearing date, and without considering any input
9 from Mr. Schwiger and his attorneys. Appendix I, 85 - 109.

10 Understandably, Mr. Schwiger was very frustrated by the unfair way the Court's handled the
11 prosecution's joinder issue. He began to believe that the Court and the prosecution were in cahoots, and
12 that under no circumstance would he be given a fair hearing on the joinder issue, or a fair trial on either
13 the lewdness/sexual abuse case or the solicitation for murder case.

14 On June 21, Mr. Schwiger wrote,

15 ...without a hearing and actual arguments (on the joinder issue) you don't
16 have even close to the whole picture. What's worse is, the picture you do
17 have is at best, badly distorted...the state has unfairly twisted the facts and
18 used inflammatory tactics to prejudice your view of the case. I would ask
19 your honor to order a re-hearing or entertain a motion to reconsider this
20 issue on the side of fairness and keeping an innocent man from going to
21 prison." Appendix I, page 85.

22 Mr. Schwiger also informed the Court that he had had severe back surgery in 1999, at that during
23 the investigation he had been taking prescribed medications. Presumably, he was not allowed to take
24 these medications while incarcerated in the Clark County Detention Center, thereby further aggravating
25 his mental condition. Appendix I, pages 85 - 86.

26 Mr. Schwiger described his ordeal as a "witch hunt." Appendix I, page 96.

27 Counsel to Mr. Schwiger advised him that he had a 80 - 90% chance of being found not guilty
28 on the lewdness/sexual abuse case before the solicitation for murder charges were lodged, but only a 5 -
10% chance afterwards, thereby contributing to his anxiety. Appendix I, page 98.

Whether true or not, Mr. Schwiger certainly believed that he had been "handled by the snitches"
and threatened by the snitches so that the prosecution would have a better chance to prevail in the

1 lewdness/sexual assault case. Appendix I, page 100.

2 At the end of that day, Mr. Schwiger informed the Court that "It's justice or whatever this system
3 can do to me. I don't care anymore...I won't take it any more." Appendix I, page 100.

4 On June 25, 2001, Mr. Schwiger again informed the Court of his extreme frustration. He
5 continued to profess his innocence. He describes the prosecution as powerful and vicious. He again
6 expresses dismay that the motion for joinder was heard with no opposition from the defense, and no
7 hearing. (In fact, as described above, joinder was ordered by a different judge, on the date BEFORE the
8 scheduled hearing date, and just three days after the prosecution had filed the motion.) Appendix I, page
9 101.

10 Mr. Schwiger came to believe that "innocent just doesn't matter," and that he was "going to
11 prison no matter what." He begged the Court to review the joinder issue and allow him and his attorneys
12 to have an opportunity to oppose the prosecution's motion. Appendix I, 103.

13 Mr. Schwiger particularly complained that "all rulings go in favor of the prosecution." Appendix
14 I, 104.

15 Mr. Schwiger had "had enough." He was "at the end of his rope." He again begged the Court
16 to set a hearing date, "before July 9." Appendix I, 105.

17 On June 28, 2001, Mr. Schwiger informed the Court that he could "not endure this treatment"
18 and that he was innocent. Appendix I, 109.

19 On June 30, 2001, Mr. Schwiger again proclaimed his innocence. Appendix I, 110.

20 By July 2, 2001, Mr. Schwiger had already counted 4 ½ months in jail, and he continued to
21 proclaim his innocence. Appendix I, 115 - 117.

22 On July 6, 2001, Mr. Schwiger informed the Court that his mind and spirit were beginning to be
23 destroyed. Appendix I, 124.

24 On July 7, 2001, Mr. Schwiger again reviewed the prosecution's motion for joinder. He was
25 "furious at the lies and misrepresentations rampant" throughout the document. He again asks the Court
26 for an opportunity to oppose the joinder motion. Appendix I, 125 and 130.

27 Perhaps, had the issue of joinder not been decided by a different judge, on a date prior to the
28 scheduled hearing date, without a hearing, without an opposition filed by the defense, and just three days

1 after the prosecution filed the motion, Mr. Schwiger would not have been so frustrated, regardless of the
2 decision.

3 On July 19, 2001, Mr. Schwiger orally requested that the judge grant the defense an opportunity
4 to argue against joinder. Mr. Schwiger inquired, "how can you make a decision on a brief and how to
5 rule unless you have both sides of the story." The Court dismissed Mr. Schwiger's concerns, claiming
6 that he had "reviewed all the briefs." Of course, he had not "reviewed all the briefs," since the defense
7 had filed no briefs. The Court went on to lump Mr. Schwiger's case in with "hundreds of these types
8 of cases, the same thing..." "I don't want to belabor this." "I don't want to go crazy." "I don't want to
9 chit-chat." Transcript dated July 19, 2001, page 13, line 33 through page 14, line 11.

10 On July 19, 2001, counsel for Mr. Schwiger indicated that Mr. Schwiger was interested in
11 entering into the negotiated plea agreement. Mr. Schwiger stated, "No, absolutely not, not that one."
12 Transcript dated July 19, 2001, page 18, lines 1 -14.

13 Later in the hearing, counsel for Mr. Schwiger informed the judge that Mr. Schwiger "wants to
14 end his life." Mr. Schwiger wanted to know whether the Court could give him the death penalty since
15 it was "evidentially...a cost issue." Transcript dated July 19, 2001, page 22, lines 4 - 10.

16 One last time, Mr. Schwiger attempted to deal with the joinder issue. The Court stated, "this case
17 is joined, so get that in your mind. It's joined...it's joined period. That's a fact of life for you right now,
18 it's joined." Transcript dated July 19, 2001, page 23, lines 3 - 10.

19 Less than 24 hours later, Mr. Schwiger entered his *Alford* plea.

20 Can there be any doubt as to why Mr. Schwiger might have thought the deck was stacked against
21 him at the time he entered his plea? That his attorney had invoked his speedy trial right was ignored.
22 That he had an opposition to the joinder motion was ignored. Clearly, Mr. Schwiger's plea was not
23 freely given.

24 In *Standley v. Warden*, 135 Nev. 333, 990 P.2d 783 (1999) the Supreme Court reversed the denial
25 of a defendant's post-conviction petition for a writ of *habeas corpus*. The defendant had attempted to
26 withdraw a plea of guilty pursuant to the *Alford* decision in a lewdness with a person under the age of
27 14 case. This Court found that while the Constitution does not forbid "all participation by the judge in
28 the plea negotiation process...where the judge's conduct is improperly coercive" the Supreme Court will

1 "consider affording a defendant the opportunity to withdraw his or her plea."

2 In the case at bar, the District Court assured Mr. Schwiger that if he did go to trial and was
3 convicted, his sentences would not run concurrent, and that his sentence would be much longer.
4 Transcript dated July 19, 2001, page 14, lines 15 - 18.

5 The District Court also said, "If you're convicted and I'm sure your lawyers have told you that
6 you'll never get out of prison, that's it. If you want to take a deal to cut your losses, plead guilty
7 pursuant to Alford at least you'll see some daylight outside but that's up to you. It's a tough decision."
8 Transcript dated July 22, 2001, page 22, lines 16 - 21.

9 These sorts of comments, combined with the Courts utter refusal to allow the defense any
10 opportunity whatsoever to register an opposition to the motion for joinder, amounts to coercion under
11 the parameters established in *Standley*.

12 **III. THE DEFENDANT'S 60-DAY RIGHT TO TRIAL AND CONSTITUTIONAL 13 SPEEDY TRIAL RIGHTS WERE VIOLATED.**

14 As measured from the date Mr. Schwiger was bound over to District Court for trial on the
15 lewdness/sexual assault charges, March 14, 2001, Mr. Schwiger had a statutory right to a jury trial by
16 May 13, 2001. Transcript dated March 14, 2001, Transcript dated May 17, 2001, page 4, line 11 - 13.

17 Counsel for Mr. Schwiger invoked Mr. Schwiger's 60-day right for a jury trial on April 23, 2001.
18 Appendix I, page 12, line 25.

19 While Mr. Schwiger's attorneys did not object to the violation of Mr. Schwiger's speedy trial,
20 rights, Mr. Schwiger did so in a letter to the Court dated June 25, 2001. Appendix I, page 102.

21 In Nevada, a defendant has a statutory right to a trial within 60 days after arraignment. See NRS
22 178.556

23 A defendant also has a Constitutional right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 515,
24 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972).

25 When determining whether the right to a speedy trial was violated, four factors should be
26 considered: (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and
27 (4) prejudice to the defendant. *Furbay v. State*, 998 P.2d 553, 116 Nev. Adv. Op. No. 55 (2000).

28 In the case at bar, there has been no trial, and the record is unclear as to the reason for the delay.

1 It is clear that the defendant asserted his right to a speedy trial in a timely fashion.

2 Prejudice to the defendant is, of course, clear and abundant. Mr. Schwiger proclaimed his
3 innocence loudly, emphatically, and often. To say that he was outraged by the charges is obvious.
4 Further, he was frustrated that the Court seemed to be ignoring his desire to invoke his speedy trial
5 rights, and issues surrounding joinder.

6 As will be shown below, the pressure created by the failure of the District Court to ensure that
7 Mr. Schwiger received his speedy trial, coupled with what Mr. Schwiger believes was a "set-up" by
8 government snitches to snare him into a murder for hire scheme, ultimately led to solicitation to commit
9 murder charges. When a different Court joined the cases only three days after the prosecution presented
10 its motion, prior to the scheduled hearing date, and without so much as a peep from defense counsel, Mr.
11 Schwiger ultimately threw in the towel and plead guilty to an *Alford* plea.

12 Had the case moved more swiftly to trial it is unlikely that Mr. Schwiger would have been
13 induced by the jailhouse snitches, and subsequently frustrated by the handling of the joinder motion by
14 the Court.

15 Taking all of these factors into consideration, Mr. Schwiger was prejudiced, and his conviction
16 should be reversed.

17 **IV. RESPONDENT WAS NOT GIVEN SUFFICIENT NOTICE REGARDING HIS
18 RIGHT TO TESTIFY IN FRONT OF A GRAND JURY AS REQUIRED BY MARCUM.**

19 On April 26, 2001, Mr. Schwiger was arraigned on the solicitation of murder charges. At the
20 arraignment, Mr. Schwiger informed the Court that Mr. Schwiger had not been given an opportunity to
21 inform his attorney that he wished to testify in front of the Grand Jury, and consequently had not so
22 testified. The Court stated that he would be required to take the matter up in a Petition for Writ of
23 Habeas Corpus, and the arraignment continued apace. Transcript dated April 26, 2001, page 2, lines 12
24 17.

25 The statutes clearly give a defendant the right to testify in front of a grand jury before he
26 indicted. This right would be meaningless if a defendant is not given notice that a grand jury will meet
27 and consider returning an indictment against him. Without the right to notice, a defendant has only two
28 ways of finding out an indictment against him is being considered. The first is by accident. A defendant