

1 Q. Okay. You mentioned one of the significant
2 factors -- specific facts in your analysis of this case was
3 the Defendant's open admission about what had occurred to the
4 law enforcement officer who was Detective -- I'm now
5 forgetting his name, the Detective in this case; is that
6 correct?

7 A. I believe it's Detective Hessing, but yes, that
8 is correct.

9 Q. And based on his -- your report, one of the
10 things that the Defendant stated in that admission was that he
11 was between the age of 17 and 18?

12 A. I don't have any independent recollection of that
13 as I sit here today, Mr. Slade.

14 Q. Okay. But we did just read that from the report?

15 A. Yes.

16 Q. In your argument at sentencing, is it correct
17 that you refer to the Defendant as being a child and also
18 referenced him being 17?

19 A. Again, based on my review of the sentencing
20 transcript, that is correct.

21 Q. Okay. Okay. And that would have been both
22 consistent with the Defendant's admission as well as the PSI
23 and that was presented at the time?

24 A. Yes.

Electronically Filed
Nov 15 2021 06:51 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

1 Q. You were asked on direct by Petitioner's counsel
2 about your decision on -- well, a couple of things. The first
3 thing was whether or not you had knowledge of the examiner
4 method, the psychosexual evaluation being married to partner's
5 ex-wife.

6 Have you ever had any issues come up with the --
7 having to conflict out of or choose a different psychosexual
8 evaluator based on this information? I don't even know if
9 it's actually true or not?

10 A. I can tell you this. To the best of my
11 recollection, it never even crossed my mind back when all this
12 was going on in terms of having any concerns that Mr. Hansen
13 was doing the evaluation, no.

14 Q. Okay. And so you've never -- in your 30 years of
15 experience in handling a great volume of these cases, you've
16 never had to choose a different psychosexual evaluator on the
17 suspicion that the current evaluator somehow might have some
18 sort of bias towards any clients?

19 A. No, I've never run across that.

20 Q. You also asked about decisions at sentencing. I
21 believe there was a question about (indiscernible) experts to
22 address the Court at sentencing. Has -- have you ever seen
23 that done? Or did I misunderstand the question you were
24 asked?

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1 A. No, I know we've actually done that, by "we," I'm
2 referring to my law partner and I, Mr. Lockie and I. I know
3 that Mr. Lockie just did that not too long ago in a
4 sentencing. I'm not sure whether it was in this department or
5 Department Number 2 where our client is -- Department
6 Number 2, our client was being sentenced on an attempted
7 murder charge and related child abuse charge.

8 And we did bring in a psychologist by the name of
9 Dr. Cord to testify at sentencing. But Dr. Cord is also the
10 individual who, as I recall, actually did the psychological
11 evaluation on our client.

12 But we -- so I take that back, that was
13 misspeaking, because Dr. Cord did the evaluation, but then he
14 also testified at the sentencing hearing. So it was the same
15 expert.

16 Going back to your original question, to my
17 recollection, no, we have not.

18 Q. So are there circumstances where you think that's
19 advisable or part of practice, or it sounds like it's just
20 something that is not something that's engaged in. Have you
21 seen that engaged in? Have you seen value of doing that or
22 not?

23 A. I don't know if this is going to answer your
24 question, Mr. Slade. I know that we've had evaluations done

1 that we were not happy with and we've actually had another
2 evaluation done. I mean, that's certainly a possibility
3 sometimes. As I said, I don't know if that answered your
4 question or not.

5 Q. I think I understand your analysis. If you don't
6 like the evaluation, you have it done by another person and
7 made it (indiscernible) at sentencing as well?

8 A. Correct.

9 Q. Okay. There's also some questions about whether
10 or not you had the Defendant's mother or relatives testify at
11 sentencing.

12 What goes into your thought process in deciding
13 what kind of (indiscernible) at sentencing?

14 A. I don't know if I can even really -- I mean,
15 there are a lot of factors that go into your preparation for
16 sentencing.

17 In Mr. Hockemier's case, I have no independent
18 recollection in terms of why I did not call any potential
19 witnesses in mitigation. I just don't -- do not have any
20 recollection.

21 Q. Do you recall being asked to have the mother or
22 the family members of the Petitioner testify at sentencing?

23 A. I do not have any recollection one way or another
24 on that, Mr. Slade.

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1 Q. Based on your experience in handling these types
2 of cases, in the (indiscernible) have the victims testify, you
3 also spoke to this, it was a factor of the Defendant's open
4 admissions of what had occurred -- or I guess Petitioner in
5 this context.

6 Do you see, in your professional opinion, a
7 benefit at this point of having had the mother of the
8 Defendant and his sisters or relatives testify?

9 A. You can always second guess yourself, Mr. Slade.
10 I mean, that's the best answer I can give you. I did not --
11 apparently I did not feel it was necessary back then. In
12 hindsight, should I have? I don't know.

13 Q. I assume, in your experience, you've also seen
14 the approach of criminal defense practitioners in this area,
15 in this local area here?

16 A. Yes.

17 Q. Were your practices in any way different from
18 what is typically done by attorneys in this area as criminal
19 defense attorneys?

20 A. I would say as a general --

21 MR. LOREMAN: I have an objection. Unless he
22 knows every criminal defense attorney's predilections, I don't
23 think he testify to that.

24 THE COURT: I think the witness can qualify it

1 based on what he has seen and experience, so the objection is
2 overruled with that understanding.

3 THE WITNESS: I -- as a general proposition, I
4 think most criminal defense attorneys in this area handle
5 cases in a similar fashion. I mean, certainly some do
6 something different than another, but as a general
7 proposition, I think that most criminal defenses as Mr. Ward,
8 myself, and Mr. Woodbury, et cetera, we handle these cases in
9 a similar fashion. That's about all I can say regarding that.
10 BY MR. SLADE:

11 Q. The way you handled this case was along those
12 similar guidelines or similar practices?

13 A. I handled this case in a fashion that is
14 consistent with how I handle any serious case, let me put it
15 that way.

16 Q. Okay. Thank you.

17 When you argue at sentencing, you argue for a
18 sentence. Obviously the Court already has the presentence
19 investigation report for them in regard to -- the judge was
20 also going to have plea agreements and the Judge is going to
21 hear from the witnesses and they have things to say.

22 Do you -- how do you determine what your thought
23 process in deciding what to review with the judge? Do you
24 dump it all, go through every fact that can be reviewed or do

1 you pick a certain fact that you think is significant? How do
2 you decide what to argue?

3 A. Well, let me preface it this way, I'm not trying
4 to pander to this court. But I know that this court does a
5 very thorough job in reviewing any case prior to sentencing by
6 reviewing or talking not only what the presentence
7 investigation report, any letters, et cetera, in support of
8 this or supplied to the court in support of a particular
9 client.

10 If there's a psychosexual evaluation done, I know
11 that this court reviews that very thoroughly, and so I guess
12 what I'm saying is I come into this court, knowing that the
13 judge is fully informed in terms of the information contained
14 within the court's file.

15 And then I guess, from my point of view, it's
16 really to -- in terms of my sentencing argument, to highlight
17 what I feel is most significant in terms of potentially having
18 most impact on the judge's decision.

19 Q. So you've practiced 30 years in front of various
20 different judges?

21 A. Correct.

22 Q. And you've gained a sense of what each judge's
23 review and in preparing for sentencing, and based on that
24 experience, you chose what you felt was the most persuasive

1 points to them?

2 A. That's fair.

3 Q. Just to tie it back to an earlier point you were
4 asked on direct examination about filing a habeas petition.

5 You mentioned your decision on appeal or not
6 appeal, your decision on whether you do or do not, is that a
7 similar analysis you go through on deciding whether to file a
8 habeas petition or not?

9 A. General proposition, I'm not going to file a
10 pretrial writ unless I believe there's merit to it.

11 Q. And you would -- your general practice is to do
12 that analysis in every case?

13 A. General, yes.

14 Q. And I've just got to ask, get an answer to, do
15 you remember if you did that analysis in this case?

16 A. I have no independent recollection, but I assume
17 I did.

18 Q. The last point that's discussed in the actual
19 petition by the Petitioner is about your performance on direct
20 appeal.

21 Why did you not appeal on the issue of
22 prosecutorial misconduct?

23 A. Quite frankly, because as far as I can recall,
24 there was no prosecutorial misconduct. I mean, there just

1 simply was not in this particular case.

2 Q. So the arguments by Petitioner in regards to the
3 age -- his age, the quantity of charges, and so forth, based
4 on your analysis, there was no merits to that type of -- to
5 that issue to be brought up on appeal?

6 A. If you're asking whether I believe there's any
7 prosecutorial misconduct, I did not believe there was any
8 prosecutorial misconduct in this case.

9 Q. Okay. Why did you not argue about the Court
10 harboring bias or not being impartial?

11 A. I had no reason to believe that the Court was
12 biased or not impartial in this particular case.

13 Again, this Court takes its objectivity very
14 seriously and this Court, if it has any concerns at all in
15 terms of whether it can be fair and impartial in any case,
16 this Court actually brings that up on its own.

17 Q. You've experienced that over the years?

18 A. I have.

19 Q. All right. Just to be clear, the State's had --
20 the Respondent has admitted Exhibits A through M and
21 included -- the Respondent placed a top sheet on it and given
22 the different titles of these, these are also included because
23 they do represent to the facts -- or inform the facts that are
24 in the Respondent's filings in this case.

1 But this is -- the Respondent is not going to
2 (indiscernible) Mr. Macfarlan through all (indiscernible).
3 That's all the Respondent has at this point in time.

4 THE COURT: Okay. Redirect.

5 MR. LOREMAN: Thank you, Your Honor.

6 **REDIRECT EXAMINATION**

7 BY MR. LOREMAN:

8 Q. Mr. Macfarlan, would you take a look at what's
9 been marked as Exhibit B, which is also marked as Respondent's
10 Exhibit 2. And I'm going to turn your attention to the page
11 after the (indiscernible) to Mr. (Indiscernible)?

12 A. I'm sorry. Which page, Mr. Loreman?

13 Q. It's the unsworn declaration that's attached.

14 THE WITNESS: This document is coming apart,
15 Judge. I'm try to keep it in order.

16 Okay. So we're looking at the unsworn
17 declaration to support a complaint, Mr. Loreman?

18 BY MR. LOREMAN:

19 Q. Yes.

20 A. I've got it.

21 Q. And if you look at paragraph 3, that -- what does
22 that paragraph tell you?

23 A. This would pertain, I believe, or goes to the
24 issue as to whether jurisdiction should lodge in juvenile

1 court or Justice Court. I believe that's what this pertains
2 to.

3 Q. Okay. I didn't ask you what it pertains to. I
4 asked you, what did it tell you?

5 A. That according to this document, it -- well, I'll
6 just read it, quote, "that I learned from my investigation
7 that Devon Hockemier, a 21-year old male as of November 24th,
8 1992, was the perpetrator of the sexual abuse."

9 Q. Okay. Now --

10 A. And that's obviously --

11 Q. In reading that, isn't that obviously incorrect?

12 A. It is.

13 Q. And you know November 24th, 1992, is what day?
14 Do you have any recollection of that, what date that is?

15 A. No, do not.

16 Q. Okay. If I represent to you that is
17 Mr. Hockemier's birthday?

18 A. Okay. I'll take your representation on that.

19 Q. Okay. Now, let's go back to page 2 of that
20 exhibit and you're looking at the first paragraph and this
21 paragraph shows a period of time; is that correct?

22 A. Okay. Sorry, I was looking at the wrong page
23 there. Yes, it does.

24 THE COURT: Where are you looking, Mr. Loreman?

1 MR. LOREMAN: It's page 2 of the Exhibit
2 Number -- or the letter E, identified as Bates page,
3 Exhibit 2. It starts out with main, comma, from, on, or about
4 the.

5 THE COURT: Okay. So page 2 of the criminal
6 complaint?

7 MR. LOREMAN: Correct.

8 THE COURT: All right. Thank you.

9 BY MR. LOREMAN:

10 Q. And that's a period of time; correct?

11 A. It is.

12 Q. And what's the period of time from?

13 A. September 1st of 2009 to on or about
14 February 28th of 2010.

15 Q. And in September of 2009, based on the
16 understanding that Mr. Hockemier's birthday is November 24th,
17 1992, how old would Mr. Hockemier be?

18 A. If my math is correct, seven years of age
19 according -- in terms of this time frame?

20 Q. According to this time frame?

21 A. I believe that Mr. Hockemier would have been
22 seven years of age in 2009 if he was born in '92.

23 Q. No.

24 A. That's -- okay. You got me confused now,

1 Mr. Loreman.

2 Q. Okay. If we take the 2009 time period and we
3 understand that in November of 2009, Mr. Hockemier would be
4 17; correct?

5 A. Okay. Yes.

6 Q. So prior to November 24th, 2009, Mr. Hockemier
7 would be?

8 A. 16.

9 Q. Correct. And then this went a couple more months
10 after November 24th of 2009; correct?

11 A. Correct.

12 Q. He would be how old?

13 A. 18.

14 Q. Let's try that again.

15 A. This is why I went to law school. I'm not good
16 with math.

17 Q. Okay. So Mr. Hockemier would have turned 18 in
18 February -- in March or November of 2010?

19 A. Okay.

20 Q. Okay. So he would have been 17 in February of
21 2010; correct?

22 A. I will accept your math, Mr. Loreman.

23 Q. And, in fact, it would have been several months
24 before he would have turned 18?

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1 A. Yes.

2 Q. So at no time whatsoever in this case, as pled by
3 the State, was Mr. Hockemier 18; correct?

4 A. That sounds correct.

5 Q. Okay. Now, I also want you to look at -- let's
6 see. It's Exhibit K also numbered 11?

7 A. Excuse me for a second, Mr. Loreman.

8 MR. SLADE: The staple is coming free on a couple
9 of those pages, Judge.

10 THE COURT: All right. Would you staple that
11 again, please?

12 BY MR. LOREMAN:

13 Q. And I want you to turn to the page at the bottom,
14 it says 66 to 69 of 81?

15 A. Okay.

16 Q. Specifically page 67 in the lower left-hand
17 corner and there was a cross-examination?

18 A. Okay.

19 Q. And that's you that was cross-examining; correct?

20 A. It is.

21 Q. And who are you cross-examining?

22 A. I believe this is Detective Hessing. I'm looking
23 for his name. It just says Detective. Let me flip back a
24 couple pages and make sure I'm -- yes, it is Detective

1 Hessing.

2 Q. Now, you stated that you had reviewed this before
3 you came to court; correct?

4 A. I did read through this last week.

5 Q. Okay. At any point in this cross-examination,
6 did you ask Detective Hessing, what date did he know Devon
7 Hockemier?

8 A. I'd have to read through this again, in all
9 honesty, Mr. Loreman.

10 Q. Do you have any specific recollection of reading
11 that prior?

12 A. I don't recall reading that last week, although I
13 will tell you I did not study this document. I just read
14 through it fairly quickly, but --

15 Q. You had a question on page 69 at the top of the
16 page here. It says ultimately what Owen told you is on two
17 different occasions, that Devon Hockemier, in essence, had
18 anal intercourse with OM, and his answer was yes?

19 A. That is correct.

20 Q. Okay. If I were to represent to you that was the
21 only time when you dealt with that issue, do you agree with
22 that?

23 A. If that's your representation, I'll agree with
24 you.

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1 Q. And you recall that the investigation or the
2 recording that you listened to was the interview with OM;
3 correct?

4 A. I know that I did listen to that.

5 Q. Okay. And you're aware that that took place on
6 or about the 21st of November; correct?

7 A. I don't have any independent recollection of
8 that, Mr. Loreman.

9 Q. Now, prior to this preliminary hearing, you filed
10 your motion to have the case sent down to -- or sent to
11 juvenile; is that correct?

12 A. Yes.

13 Q. Your contingent motion.

14 So at some time prior to this preliminary
15 hearing, you had researched, written, and reviewed the State's
16 opposition, had a hearing on this matter with regard to what
17 would constitute whether this case would go to juvenile versus
18 how it would stay in adult court?

19 A. That's my recollection.

20 Q. So at the time that you were questioning
21 Detective Hessing, you didn't specifically ask him if he knew
22 Devon Hockemier prior to Mr. Hockemier's birth date on
23 November 24th, did you?

24 A. I'm sorry. Can you repeat that, Mr. Loreman?

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1 Q. Okay. In this cross-examination of Detective
2 Hessing, you did not ask if he knew Devon Hockemier prior to
3 November 24th of 2013, did you?

4 A. If that's your representation, I'll accept that.

5 Q. And that was also the basis of the State who is
6 now the Respondent in the argument in that opposition to
7 having this revert to juvenile court, was that specific date
8 issue?

9 A. Again, I have not reviewed the State's
10 opposition, so --

11 Q. Well, I believe Mr. Slade had discussed with you
12 the State's opposition with regard to your motion and reviewed
13 the -- what is stated in 62B.330?

14 A. I do recall looking at that.

15 Q. And he said if the person is not identified by
16 law enforcement as having committed the offense until the
17 person reaches 21 years of age, that that was the gist of the
18 motion; correct?

19 A. Yes.

20 Q. But at that point in the preliminary hearing, you
21 did not ask the question of Mr. -- or Detective Hessing?

22 A. Again, if that's your representation, I accept
23 it.

24 Q. And if you were -- if you did -- if you had done

1 that, and Detective Hessing did answer and he knew prior to
2 the 24th, then you would have a basis for a habeas -- pretrial
3 writ of habeas, wouldn't you?

4 A. Probably, yes.

5 Q. Now, Mr. Slade has asked you about your practice
6 and how you deal with going over plea agreements with your
7 clients. One of the things Mr. Slade had touched on is that
8 in defense work, we actually have a relationship with a person
9 that's dealing with the Court; correct?

10 A. Have a relationship with who, Mr. Loreman?

11 Q. Yeah, we have a one-on-one relationship with the
12 -- it's not something where the State doesn't see who they're
13 really representing. They're just filing their forms. We
14 have those people coming into our office and talking with
15 them; correct?

16 A. As a general proposition, yes.

17 Q. And you understand that they rely on us?

18 A. Sure.

19 Q. Correct?

20 For the most part, if -- like as you -- I believe
21 you testified there are some clients you have that have
22 numerous contact with the Court, that you don't have to go
23 into too much detail on.

24 But you have clients that don't have contact with

1 the Court and/or the legal system and you have to kind of
2 explain this?

3 A. That's fair.

4 Q. Okay. And would it be fair also that the -- that
5 those individuals rely on your expertise and your
6 professionalism and your experiences in making their
7 decisions?

8 A. Sure. I would say that that's fair.

9 Q. And in this situation, in this case, you're aware
10 that Mr. Hockemier had really no contact with the Court
11 system. There was pretty much nothing in his history at the
12 time?

13 A. I don't recall what his prior criminal history
14 was as I sit here today, but I'm sure that -- I'm sure it was
15 listed off of the PSI.

16 Q. Right.

17 A. And as a general proposition, one of the things I
18 always do ask my clients is: Do you have any prior criminal
19 history, either adult or juvenile, so --

20 Q. But at any rate, in this case, did you find
21 yourself -- because Mr. Hockemier was held in the Elko County
22 jail for the period of time from when he was arrested until
23 sentencing?

24 A. That's my recollection, yes.

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1 Q. So you would go down and visit him in jail to
2 talk with him; correct?

3 A. Correct.

4 Q. And when you went down and talked to him, were
5 your efforts to let him know what your perception of what was
6 going to happen or could happen, and then he relied on those
7 perceptions and discussions?

8 A. I presume he did.

9 Q. And we know in this profession, as we've gone
10 through the items that we talked about, sometimes judges don't
11 go along with what P&P recommends and sometimes they don't go
12 along with what the State recommends or, in fact, what we as
13 defense attorneys recommend?

14 A. That is true.

15 Q. But in this situation, your experience was what
16 you had determined. It wasn't some other judge, it was the
17 Judge here today that was sitting on the sentencing and your
18 experiences before her court is what you relayed to
19 Mr. Hockemier?

20 A. Even a little broader than that. It's not only
21 my experiences before this Judge as a judge, but also her as a
22 person, not just being a judge, but also as a person.

23 I mean, let's face it, I think that we all get to
24 know these judges to one degree or another, not only

1 professionally and personally, and part of your assessment in
2 terms of -- well, at least part of my assessment in terms of
3 what I think a judge may or may not do is based not only my
4 professional contact with that judge, but also on my
5 personal -- or my knowledge of that judge as a person, if that
6 makes sense.

7 Q. However, in this situation, you were wrong?

8 A. I was.

9 Q. And is it fair to say that in our -- in your
10 30 -- close to 30 years of experience, that you're in a
11 never-ending learning situation?

12 A. I would --

13 THE COURT: Excuse me, never-ending what?

14 MR. LOREMAN: Learning situation, I'm sorry.

15 THE COURT: I know. It's hard.

16 THE WITNESS: I would hope so, Mr. Loreman.

17 BY MR. LOREMAN:

18 Q. And sometimes that learning comes from making
19 mistakes or errors?

20 A. Sure.

21 MR. SLADE: Your Honor, I realize we try to give
22 a lot of leeway here, but I've got to object as leading.

23 THE COURT: Objection sustained.

24 ///

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1 BY MR. LOREMAN:

2 Q. And at the time of sentencing, were you aware or
3 did you make any discussion with Mr. Hockemier regarding
4 having any persons that could give references to parole and
5 probation or submit them to the court? Have you ever
6 discussed that with him to have him do that?

7 A. As I sit here today, I do not have a recollection
8 one way or another, Mr. Loreman.

9 Q. Now, I know that Mr. Slade brought it up in the
10 context of, have you ever asked. But in your profession, in
11 your experience, how many clients ask you what to do?

12 A. How many clients ask me what to do?

13 Q. Yeah. Yes.

14 A. In terms of whether they should take a deal or --

15 Q. Well, not just take a deal, but do you have many
16 clients come in and say, hey, I've got all this stuff, is it
17 okay if I send it; or do you have a tendency to direct your
18 clients to do stuff, to present to the court?

19 A. Kind of both ways as a matter of fact.

20 Q. In this case, you didn't direct Mr. Hockemier to
21 do that, did you?

22 A. As I sit here today, I don't have any
23 recollection one way or another, Mr. Loreman.

24 Q. The fact that nothing was submitted to the court

1 would indicate that there wasn't any discussion about that;
2 would that be fair?

3 A. All I can say is nothing was submitted to the
4 court, Mr. Loreman.

5 MR. LOREMAN: I've got nothing further.

6 THE COURT: Recross.

7 MR. SLADE: Just one point I want to touch on.

8 **RECROSS-EXAMINATION**

9 BY MR. SLADE:

10 Q. Mr. Macfarlan, State's Exhibit -- Respondent's
11 Exhibit E, which was marked as Exhibit 4, the second to the
12 last page, this has been admitted. It is the record of the
13 Justice Court's proceedings. The second to the last page has
14 two dates at the top of it.

15 Do you see where I'm at?

16 A. The second to the last page, did you say?

17 Q. Yeah, second to last. The very last page, you
18 have one in front of that, the date in the top left corner of
19 8/14/14?

20 A. Correct.

21 Q. Can you define from this, and you probably have a
22 cleaner copy than me, what occurred on that day?

23 A. This appears to be the minutes from the hearing
24 on my contingent motion to transfer the matter to juvenile

1 court.

2 Q. Thank you. And what's the next date on that?

3 A. August 18th of 2014.

4 Q. What occurred on that date?

5 A. It appears that's the date that the preliminary
6 hearing was held.

7 Q. You were just asked on -- I guess on direct
8 examination by the petitioner about whether or not you asked
9 this detective about the age, what he knew of the Defendant,
10 when he first knew who the Defendant was.

11 But, in fact, the motion that you filed with
12 regards to jurisdiction in regards to the age of the Defendant
13 and when law enforcement first knew of him, what his age was
14 on that day, that issue was actually already handled on the
15 14th, not at the preliminary hearing on the 18th; correct?

16 A. All I can tell you, Mr. Slade, is the detective,
17 namely Detective Hessing, testified at the hearing on my
18 contingent motion and the State's opposition. I don't have
19 any specific recollection as to what the testimony actually
20 was.

21 Q. But the motion itself, your motion and the
22 opposition was actually handled before the preliminary
23 hearing; correct?

24 A. Correct.

1 MR. SLADE: Thank you. Nothing further,
2 Your Honor.

3 THE COURT: Do either of you need this witness
4 retained?

5 MR. LOREMAN: No, Your Honor.

6 MR. SLADE: Not from the State.

7 THE COURT: Thank you, Mr. Macfarlan. You're
8 excused from any further attendance at this trial.

9 THE WITNESS: Thank you, Judge.

10 THE COURT: Mr. Loreman, do you have any other
11 witnesses other than your client?

12 MR. LOREMAN: No, Your Honor.

13 THE COURT: Mr. Slade, do you have any witnesses?

14 MR. SLADE: No.

15 THE COURT: All right. Let's take our lunch
16 break and we'll resume and 1:30. We're in recess.

17 (Lunch recess.)
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2
3 ELKO, NEVADA, WEDNESDAY, JULY 1, 2020, P.M. SESSION

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5
6 THE COURT: Mr. Loreman, your witness.

7 MR. LOREMAN: Thank you, Your Honor. I call
8 Devon Hockemier.

9 THE COURT: Come forward, please.

10 DEVON HOCKEMIER,
11 called as a witness on behalf of the
12 PETITIONER, was duly sworn and
13 testified as follows:

14 THE COURT: Please state your name.

15 THE WITNESS: Devon Ray Hockemier. The first
16 name is spelled D-E-V-O-N, middle name R-A-Y. Last name
17 Hockemier, H-O-C-K-E-M-I-E-R.

18 THE COURT: Thank you. Go ahead, Mr. Loreman.

19 MR. LOREMAN: Thank you, Your Honor.

20 **DIRECT EXAMINATION**

21 BY MR. LOREMAN:

22 Q. Mr. Hockemier, you are the Petitioner in this
23 action, are you not?

24 A. Yes, I am.

1 Q. And you have petitioned this Court for a writ
2 with regard to the petition that you filed here in; correct?

3 A. Yes, it is.

4 Q. You were here earlier for the testimony of
5 Mr. Sherburne Macfarlan; correct?

6 A. Yes.

7 Q. And he was your counsel during the majority of
8 this case; correct?

9 A. Yes, he was.

10 Q. Prior to him representing you, who represented
11 you?

12 A. Lorien K. Cole for about two to three weeks.

13 Q. And did you have an opportunity to speak with
14 her?

15 A. I did.

16 Q. For -- how many times did you speak with her?

17 A. I do believe I spoke with her about twice and I
18 spoke with one of her law clerks one time.

19 Q. She subsequently withdrew from this case;
20 correct?

21 A. Yes, she did.

22 Q. And then Mr. Macfarlan was appointed?

23 A. Yes.

24 Q. When was the first time you spoke with

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1 Mr. Macfarlan?

2 A. I don't know an exact date, but it was about the
3 middle of July of 2014.

4 Q. And in 2014, November of 2014, November 24th
5 specifically, you turned 22; correct?

6 A. Yes.

7 Q. So when you spoke with him, you were 21?

8 A. Yes, I was.

9 Q. And when you were sentenced by this court, you
10 were 22?

11 A. Yes.

12 Q. Do you recall having a discussion with
13 Mr. Macfarlan regarding the plea agreement that you entered
14 into in this case?

15 A. Yes, I do.

16 Q. And what was the primary concern that you had
17 when you spoke with him regarding that plea agreement?

18 A. My primary concern is probably the life sentence.
19 It had me a little nervous. But with the charges stacked the
20 way they were, I didn't really feel like I had much wiggle
21 room.

22 And at this point in time, I really had no
23 information on the law. I didn't really know anything about
24 legal work and I was just very disappointed that I had to rely

1 on him to give me the best possible information I needed.

2 Q. And did you discuss the concurrent and
3 consecutive situation?

4 A. Yes, we did. He stated, and I quote, I remember
5 him stating that the judge would more than likely run them
6 concurrent just due to my age at the time. He did mention
7 that she could sentence it consecutively, but he didn't really
8 focus on that.

9 Q. Was that something that you relied on when you
10 went to sign the agreement?

11 A. Yes.

12 Q. And you signed an amended agreement after you
13 signed the first one; correct?

14 A. Absolutely.

15 Q. What was the basis of the amendment if you
16 recall?

17 A. The amended agreement, we had to redo that
18 because I was not eligible for probation as falsely stated in
19 the first plea agreement.

20 Q. During the time prior to your sentencing and
21 after your arraignment on the plea agreement, how many
22 discussions did you have with Mr. Macfarlan regarding
23 preparation for the sentencing?

24 A. I think he only came to visit me once during that

1 period.

2 Q. Okay. And your arraignment, was that in February
3 of 2015?

4 A. That was the first one. The second one was
5 March 16th of 2015.

6 Q. And you were sentenced on what date?

7 A. May 21st, 2015.

8 Q. Would the visit that you had with Mr. Macfarlan
9 come after the first arraignment and before the second one?

10 A. Before the first arraignment, after the second
11 arraignment; right?

12 Q. No. But the second arraignment --

13 A. Yeah.

14 Q. -- which was March 16th, I believe you said?

15 A. Yes.

16 Q. And the first arraignment, which was February of
17 '15?

18 A. Yeah, he came to visit me a couple of times
19 during that period of time.

20 Q. Sure.

21 A. Namely once a week after the first arraignment to
22 get me to sign a new deal.

23 Q. During any of these visits, did he consult with
24 you or talk to you about possibly have anybody do anything to

1 send to the court that -- in your support?

2 A. Absolutely not. He didn't bring anything like
3 that up.

4 Q. And in that time period during the arraignment
5 and toward the sentencing, what was your reliance on
6 Mr. Macfarlan's advice?

7 A. What was my reliance on his advice?

8 Q. Yes.

9 A. I was just hoping that he -- I mean, I was kind
10 of questioning it because just due to the life sentence, and I
11 thought if I had gone further, that if I went to trial, I
12 would probably be facing life in prison without the
13 possibility of parole.

14 Q. But did you have any concerns about him not
15 discussing the sentencing with you?

16 A. It raised a few issues, but at that point, I was
17 kind of in a mindset where I knew he really wasn't helping out
18 much.

19 Q. Prior to the signing of the first agreement, did
20 you meet with him more often?

21 A. Yes, seemed to be about once or twice a month.

22 Q. And during the representation, did Mr. Macfarlan
23 ever discuss with you any possible issues with
24 constitutionality of the statute regarding the juvenile

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1 situation?

2 A. No.

3 Q. When were you made aware of the facts that there
4 was going to be other people here testifying at your
5 sentencing?

6 A. I do believe about a week before sentencing when
7 he informed me that P&P recommended it be concurrent and that
8 the prosecution would probably have a couple witnesses.

9 Q. Did he discuss with you at that point in time if
10 he would be questioning those witnesses at all?

11 A. No.

12 Q. And when you found out that there were going to
13 be witnesses, did you inquire as to whether you were going to
14 have any witnesses?

15 A. I asked him about that and he said he wasn't
16 going to call any witnesses on my behalf.

17 MR. LOREMAN: One moment, Your Honor.

18 BY MR. LOREMAN:

19 Q. Did you have any discussions with regard to the
20 appeal that was filed?

21 A. Yes. After sentencing I asked him to come visit
22 me and I asked if we were able to appeal it, and he said yes,
23 absolutely, you can appeal that. And so I asked him to and he
24 went ahead and did the appeal and didn't really discuss much

1 of the subject matter of the appeal with me.

2 Q. Was the -- was that the only time he discussed
3 any kind of appeal with you regarding decisions that were made
4 in your case for your entire case?

5 A. Yes.

6 MR. LOREMAN: I pass the witness.

7 THE COURT: Cross-examination.

8 **CROSS-EXAMINATION**

9 BY MR. SLADE:

10 Q. So your recollection is that Mr. Macfarlan told
11 you, more than likely, the judge will run these consecutive --
12 or excuse me, concurrent; right?

13 A. Yes.

14 Q. Thank you. In your filings, you filed an
15 appendix on April 10th, 2017, it looks like the 51st item of
16 that appendix was the presentence investigation in this case.
17 That presentence investigation, do you remember being asked in
18 the preparation of it about your childhood?

19 A. Yes, I do.

20 Q. And it says in here that you explained, "I wasn't
21 abused physically or neglected, but at a very young age, I
22 have a small memory of being inappropriately touched, possibly
23 sexually assaulted. I can't remember who it was, but I
24 remember a few features.

1 "I didn't tell anybody until I was 19 when my mom
2 questioned me about it after I came out as gay. I will not
3 use this as an excuse for my actions, but it may have had some
4 influence on how I acted."

5 A. Yes, I remember that.

6 Q. Okay. You said you had no discussions with
7 Mr. Macfarlan about witnesses to be presented?

8 A. Yes. We didn't discuss any witnesses.

9 Q. Okay. Did your mother or your sisters ask to
10 testify? Did they ask you or ask your counsel if they could
11 testify?

12 A. I'm not sure if they did.

13 Q. And you said that you didn't have many
14 discussions about what was going to be appealed. Could you
15 clarify that for me?

16 A. All he really stated when I asked him if we could
17 appeal, is he says, yes, you have every right to appeal. And
18 the only time I really got to know what we were appealing is
19 when I received the appellate paperwork once I was in prison.

20 And basically all he informed me about in the
21 paperwork is that he was challenging that the Court erred by
22 running it consecutive rather than concurrently.

23 Q. Okay. Did you disagree with his points of
24 appeal?

1 A. I just feel like he didn't get any of the
2 allegations I brought forth the ground to forward.

3 Q. Well, and I realize that now. But at the time,
4 is that what you were thinking or did you think about it
5 afterwards and decided there was something that wasn't done
6 right?

7 A. I was -- at the time I had the appeal, I really
8 didn't feel like he was doing his job on that. So I was just
9 waiting for it to basically get denied so I could put forth
10 the Writ of Habeas Corpus.

11 Q. Okay. And what efforts did you make to
12 communicate your disagreement with the points that he decided
13 to appeal?

14 A. I talked to him over the phone a couple of times
15 and he basically informed me that it is what it is right now.
16 He can't bring anything else forward.

17 Q. So after it was filed was when you called him and
18 told him you wanted something else in the appeal?

19 A. Yes, because we didn't necessarily discuss
20 anything before the appeal was filed.

21 Q. Okay. You heard his testimony about his basis
22 for choosing to appeal an issue or not. Did he discuss with
23 you any of the reasons why he did not appeal the issues that
24 you were bringing up?

1 A. I did not hear any of those issues until he
2 brought them up today.

3 Q. Okay. So your recollection is that he didn't
4 have a conversation about why he was not appealing some of
5 these other issues?

6 A. Yes.

7 Q. Okay. You mentioned that you were starting to
8 question your attorney's decisions and such.

9 Do you remember testifying about that?

10 A. Yes.

11 Q. At what point in the process did you start having
12 those questions?

13 A. Really after I did the first arraignment and he
14 came back forward and stated that he effed up and he didn't
15 realize these charges weren't probatable. So it kind of
16 brought into question his competence as a lawyer at that point
17 for me.

18 Q. Okay. Why did you go along with the new
19 agreement if you were not going to get probation?

20 A. Well, I look at it that way, at that point in
21 time, I didn't -- he said that they more than likely wouldn't
22 bring a better deal. This is as good as it can get. And if I
23 had gone to trial, I'd probably be in prison for the rest of
24 my life.

1 Q. Did you believe him?

2 A. I did.

3 Q. It sounds like one of the significant factors

4 here was your admission. Did he talk about the significance

5 of that fact?

6 A. The admission?

7 Q. Yes.

8 A. Of the crimes?

9 Q. Yes.

10 A. Okay. Excuse me, rephrase the question.

11 Q. You mentioned that you believed him, this was the

12 best you could get; right? And you were concerned that you

13 would go to prison for life if you took it to trial; right?

14 A. Yes, due to the admission.

15 Q. Okay. Yeah, and that, I assume, was one of the

16 factors that he pointed out to you was a big --

17 A. Yes.

18 Q. -- factor in the deal?

19 Okay. You were arraigned again a second time

20 when this plea agreement was redrafted and you were asked

21 again about your satisfaction with Mr. Macfarlan.

22 Did you express any doubts or concerns at that

23 time?

24 A. I really didn't on the record. I mean, they were

1 there, I just wasn't sure. I was very uninformed in the law
2 and I was thinking that that's just the way it works.

3 Q. Okay. But now you're under sentence and now you
4 have second thoughts; right?

5 A. Yes.

6 MR. SLADE: Your Honor, that's all I have.

7 THE COURT: Redirect?

8 MR. LOREMAN: Thank you.

9 **REDIRECT EXAMINATION**

10 BY MR. LOREMAN:

11 Q. You filed the -- or the appeal was filed timely;
12 correct?

13 A. Yes.

14 Q. So within a 30-day period after you were
15 sentenced?

16 A. Yes.

17 Q. And you were waiting on that to be resolved
18 before you filed a -- this writ; correct?

19 A. Yes.

20 Q. So, in fact, you had issues or thoughts that had
21 existed prior to you filing the appeal; correct?

22 A. Yes.

23 Q. And at some point during the process, weren't you
24 actually informed of what to say as far as how you answered