

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

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Elizabeth A. Brown
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RODERICK SKINNER,

Petitioner,

vs.

**WARDEN FRANKLIN, NNCC,
STATE OF NEVADA ET AL,**

Respondents.

Sup. Ct. Case No. 86846, 86893

Case No. CR14-0644

Dept. 8

RECORD ON APPEAL

VOLUME 6 OF 16

DOCUMENTS

APPELLANT

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7

IN AND FOR THE COUNTY OF WASHOE

8

HONORABLE BARRY L. BRESLOW

9

RODERICK SKINNER,

10

Petitioner,

11

vs.

Case No. CR14-0644

12

THE STATE OF NEVADA,

Department No. 8

13

Respondent.

14

-----/

15

TRANSCRIPT OF PROCEEDINGS

16

Hearing on post-conviction petition

September 26, 2019

17

APPEARANCES:

18

For the State:

Jenny Noble & Kevin Naughton

19

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For the Petitioner:

Edward T. Reed

Attorney at law

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24

Reported by:

Isolde Zihn, CCR #87

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1 RENO, NEVADA, THURSDAY, SEPTEMBER 26, 2019, 10:35 A.M.

2 THE COURT: Good morning, everyone.

3 Please be seated.

4 Okay. Welcome to Department 8.

5 I'm Judge Breslow.

6 We're on the record in the case of Roderick Skinner
7 versus State of Nevada, CR14-0644.

8 Starting with counsel for petitioner, please state
9 your appearance for the record, and please introduce your
10 client.

11 MR. REED: Thank you, Your Honor.

12 Edward T. Reed, on behalf of Roderick Skinner, who is
13 here today with me. He's in custody, but he is here.

14 THE COURT: Thank you very much.

15 Good morning, sir.

16 THE PETITIONER: Good morning.

17 THE COURT: All right. And then on behalf of the
18 State of Nevada.

19 MS. NOBLE: Good morning, Your Honor.

20 Jennifer Noble and Kevin Naughton, on behalf of the
21 State of Nevada.

22 THE COURT: Thank you. Welcome to both of you.

23 All right. A couple things, preliminarily.

24 First, I apologize for the late start this morning.

1 The Court was in trial this week. Of course, trials are part
2 art, part science, as probably would be true of this hearing.
3 So we estimated as closely as we could when the trial would
4 be over. And that's why I asked this matter be moved to a
5 10:30 start. Turns out the trial got over yesterday, late
6 afternoon. We could have started at 9:00. So my apologies
7 for making everybody wait until now. That's number one.

8 Number two, I've blocked out the Court's calendar for
9 the rest of the day today, and as long as we need tomorrow,
10 if we go into tomorrow. So nobody needs to rush. There's
11 no -- it's like baseball, not football. There's no time
12 limit here.

13 I want to make sure the Court understands and
14 appreciates the legal arguments, the evidence and testimony
15 that the Court will be asked to consider, and that people
16 have enough time to argue their position.

17 Whether the Court decides then right here and now on
18 the bench at the close of the proceeding is possible, but not
19 likely. More likely, it would be the Court taking it under
20 submission, and have a decision out before Halloween.
21 The Court has other matters that require its attention, as
22 you all are aware.

23 But this has been out there for a while, and I
24 realize that Mr. Skinner wants some finality and some

1 understanding of the Court's decision as soon as possible.
2 And, of course, the State is equally interested in having its
3 position put forward, in their mind, hopefully vindicated.

4 So that's the way this matter will go.

5 I did review the entire file. This was not my file
6 originally, as everyone knows. I believe it was originally
7 Judge Hardy's case. It came to the Court for purposes solely
8 of this writ of habeas corpus.

9 I've reviewed everything that was available in the
10 record.

11 I've also reviewed each side's respective pre-hearing
12 brief that was filed in the last day or two, which I
13 appreciate.

14 I found informative the summary of what the State's
15 position is going to be.

16 And then, Mr. Reed, I saw and reviewed the one you
17 filed, I believe, just yesterday, emphasizing to the Court
18 the petitioner's view of the importance, for purposes of the
19 Court's decision-making, on the lack of the available
20 evidence.

21 With that, we can begin to proceed.

22 I'm happy to entertain a very short overview from
23 each side, starting with petitioner, on what you believe this
24 hearing will demonstrate to the Court, and why you believe it

1 will result in what you're asking the Court to do.

2 And then I'll hear from the State briefly, you know,
3 a few minutes, on what you believe the evidence and testimony
4 and law will reflect here, what the State would be asking the
5 Court to do.

6 So, Mr. Reed, why don't you start, if you would,
7 please.

8 And you can address the Court there. We can bring
9 the lectern, if you're more comfortable standing and having
10 your notes on something to read from or review from. Or you
11 can even address the Court seated. It's a little bit
12 informal here, so.

13 MR. REED: Well, I would like to get the lectern.

14 THE COURT: Sure. The deputy will bring that out for
15 you, and we'll go from there.

16 Deputy, if you would just put it right in between the
17 tables, or close to it, that would be helpful.

18 Thank you.

19 MR. REED: And, Your Honor, the first order of
20 business is, I would like to submit a stipulation to you.
21 It's been signed by both me and Ms. Noble, for the State,
22 which --

23 THE COURT: The one you alluded to in the brief you
24 just filed?

1 MR. REED: That's correct; yes.

2 THE COURT: Tell me again, please, what the
3 stipulation provides.

4 MR. REED: Okay. Well, the stipulation provides that
5 the evidence release, which is attached to the stipulation,
6 should be admitted into evidence. It's the evidence release
7 signed by somebody in the District Attorney's Office, a
8 Deputy District Attorney --

9 THE COURT: For Mr. Bolenbaker?

10 MR. REED: Right.

11 THE COURT: He said he didn't sign it; right?

12 MR. REED: Exactly. Yeah. Somebody signed it. We
13 couldn't ever determine who.

14 But it was used to -- sent to Sergeant Carry at the
15 Washoe County Sheriff's Office, and he used it to then
16 sometime thereafter destroy the evidence.

17 THE COURT: Okay. Well, let's just start with the
18 stipulation.

19 The stipulation says that there's no dispute that
20 there was an evidence release prepared and signed by a Deputy
21 District Attorney, and forwarded to then Mr. Carry of the
22 Sheriff's Office --

23 MR. REED: Yes.

24 THE COURT: -- who then sometime, I understand,

1 thereafter believes that the evidence was disposed of.

2 MR. REED: Yes. Well, I'll get to that in a moment.

3 But may I approach --

4 THE COURT: You may.

5 MR. REED: -- Your Honor?

6 THE COURT: Any objection to the stipulation being
7 entered into the record, and the Court deeming it as a proven
8 fact?

9 MS. NOBLE: No, Your Honor.

10 THE COURT: All right. It will be admitted. Please
11 have it marked.

12 Let's file it in. If it's a stipulation, it will be
13 filed in, not marked as a separate exhibit.

14 Okay. So that having been established, tell me what
15 you believe the Court is going to find happened, and what the
16 legal effect of that is that the petitioner is asking the
17 Court to make of all that.

18 MR. REED: Well, Your Honor, if I may, if I can get
19 to one other order of business first.

20 THE COURT: Go right ahead. Sure.

21 MR. REED: Which is that we served a subpoena on
22 Dennis Carry. And this was back when he was still with the
23 Washoe County Sheriff's Office. It was served on him,
24 actually, in July, end of July, 2018, when the hearing at

1 that time was set for January 3rd of this year, 2019.

2 THE COURT: Yes.

3 MR. REED: And then, at the time that this hearing
4 was continued until this day, I notified Mr. Carry -- and
5 there's an e-mail attached to the subpoena, which the
6 subpoena has been filed in the record. And I don't see him
7 here today.

8 THE COURT: Well, you e-mailed him to indicate that
9 the hearing had been continued, and the new date was
10 September 26th?

11 MR. REED: That's correct; yes.

12 THE COURT: Did he respond that he acknowledges that?

13 MR. REED: He did respond. He said those dates were
14 okay, at the time. So he had notice of that. And I don't
15 see him here today.

16 We've done everything we could to get ahold of him.

17 And we've been in contact with the Sheriff's Office
18 during this period of time. Actually, about two months ago,
19 I sent him an e-mail to his original e-mail address, and said
20 that, you know, "I'd like to talk to you about the hearing,
21 when to be here," and all that.

22 And then we received back an e-mail from somebody --
23 this might have been an automatic e-mail -- from somebody at
24 the Sheriff's Office, said -- they gave me a phone number to

1 call, which I did.

2 And I have all the e-mails, if you'd like to see
3 them.

4 THE COURT: So what happened when you called the
5 number?

6 MR. REED: Pardon me?

7 THE COURT: What happened when you called the number?

8 MR. REED: Well, I called the number, and I spoke
9 to -- I ended up speaking to a gentleman, Captain Russ
10 Peterson, who, I guess, had been his supervisor when he was
11 at the Sheriff's Office. And he said that Sergeant Carry was
12 no longer with the Sheriff's Office. And so he wanted me to
13 send him the subpoena, and he would send it to Mr. Carry's
14 last known e-mail address.

15 And I asked him to have Mr. Carry get in touch with
16 me, to call me or e-mail me. So the subpoena was attached.

17 But then the next order of business was that I didn't
18 hear anything for a while. And then, so, in August -- or,
19 actually, I guess this was in September -- I e-mailed him the
20 subpoena in August, August 13th -- September, I e-mailed
21 Captain Peterson again --

22 THE COURT: So we are talking September this year, or
23 September a year ago?

24 MR. REED: This year.

1 THE COURT: So just a couple weeks ago, then.

2 MR. REED: Few weeks ago, yes.

3 So I e-mailed, as I stated, Captain Peterson. You
4 know, I e-mailed the subpoena for Dennis Carry. And he then
5 forwarded it to Dennis Carry.

6 "I have not heard anything back from Mr. Carry, and
7 I'm wondering if you could possibly give me his contact
8 information, such as address, phone number, and/or e-mail. I
9 would like to speak to him prior to the hearing, if possible.

10 "Also, can you tell me whether or not he's still
11 under investigation or has been charged with anything" --

12 MS. NOBLE: Objection. We are getting far afield
13 from service.

14 THE COURT: Well, I'm trying to follow along here.

15 The objection is that what is being read to the Court
16 now does not relate to the issue of Mr. Carry not being here
17 pursuant to valid service of subpoena.

18 MS. NOBLE: That's correct. If Mr. Reed wants to let
19 this Court know about his attempt to contact Mr. Carry
20 through his former employer, the Sheriff's Office, that's
21 fine; but getting into hearsay allegations regarding
22 Mr. Carry, I don't think that's necessary for purposes of
23 determining service.

24 Your Honor, I would also like to respond regarding

1 service, because I do not believe proper service has been
2 effected in this case. But I'll wait for Mr. Reed to finish.

3 THE COURT: Thank you.

4 Well, let's stay on the track here. Please educate
5 the Court on the efforts you've made to secure Mr. Carry's
6 appearance here. I mean, you're on that track, so let's just
7 stay on it.

8 MR. REED: And now Mr. Russell Peterson e-mailed me
9 back that, "I've not heard back from Mr. Carry. As far as
10 sharing this information with you, I'm checking with my
11 executive staff and District Attorney's Office for an answer.
12 For your records, I sent the e-mail containing a copy of the
13 subpoena to his last known e-mail address on August 13th,
14 2019."

15 Okay. And then the next -- I sent another e-mail,
16 when he came back with, "I am unable" --

17 THE COURT: So the e-mail you're now referring to was
18 about what date?

19 MR. REED: Okay. This one was -- the one where he
20 said, "I have not heard back from Mr. Carry" was September
21 10th.

22 THE COURT: Okay.

23 MR. REED: And then there was one September 12th.
24 "After discussing your request with Legal, I'm unable to

1 release Mr. Carry's personal contact information to you.

2 Sorry for the inconvenience."

3 And then my e-mail was, "Would you please tell me who
4 you spoke with in Legal about getting Mr. Carry's contact
5 information?"

6 And then he came back with that he had spoke with DA
7 Keith Munro in the Washoe County District Attorney's Office;
8 that they apparently -- you know, they went along with the
9 refusal to give me any contact information of Dennis Carry.

10 So that's the last e-mail.

11 Now, my investigator, Dustin Greg, was out also
12 trying to find him. We found a couple of addresses for him
13 in the area.

14 I sent out a certified letter, which was actually
15 signed for, and there was a return-receipt-requested letter,
16 which is right here.

17 THE COURT: Okay. What does the letter say?

18 MR. REED: The letter says, "Dear Mr. Carry" -- this
19 is September 17th. "As you know, you were served a subpoena
20 in the above-referenced case on July 30th, 2018. Then the
21 Court continued this case, and I let you know the available
22 dates for the continuance, and you were fine with those
23 dates, which are September 26th to 27th, 2019. I've attached
24 the subpoena and your e-mail in which you agreed to those

1 dates. Please be at Department 8 no later than 9:00 a.m. on
2 Thursday, September 26th, for your testimony on behalf of Mr.
3 Skinner. Please contact me if you have any questions."

4 Now, a separate letter was sent to his physical
5 address --

6 THE COURT: Same letter, basically?

7 MR. REED: Yeah, the same letter.

8 THE COURT: Now, you got the green part back, so he
9 or somebody signed for that letter?

10 MR. REED: Correct.

11 THE COURT: Did he contact you?

12 MR. REED: He never contacted me.

13 And we also -- I was told by Ms. Noble that his
14 attorney was Thomas Vilorio. And I sent him a letter, faxed
15 a letter to him, as well, to pass along to Mr. Carry, about
16 the hearing, and what time to be here, and all that.

17 So that's basically the extent of it.

18 THE COURT: Let's suppose he doesn't arrive. I mean,
19 he's not here now. He hasn't indicated he is planning to
20 show up. What would you ask the Court to do?

21 Of course, you know, there are many options. If I
22 find that service was properly effected -- albeit, quite a
23 while ago -- and that there's no excuse for his
24 non-appearance, what would you ask the Court to do?

1 I mean, do you want to continue this and have a
2 hearing until Sergeant Carry can attend? Do you want to go
3 forward in his absence and have the Court review and consider
4 the deposition transcript that you submitted just the other
5 day? Do you want to take another approach? What's the ask?

6 MR. REED: My suggestion right now would be to admit
7 the deposition transcript. And if we get that admitted into
8 court as part of the record, then I don't believe I would
9 need him here.

10 THE COURT: Okay. Let me hear -- thank you. Have a
11 seat, please.

12 Let me hear from Ms. Noble.

13 What's the State's position, please?

14 MS. NOBLE: Thank you, Your Honor.

15 Well, with that last sentence, Mr. Reed simplified
16 things for me greatly.

17 In terms of effective service, no, I don't think I've
18 heard that. But I'm not Mr. Carry's attorney.

19 Mr. Reed is correct. In August, I did inform him,
20 just because I had seen in media reports that he was
21 represented by Mr. Vilorio. I think the proper thing to do
22 would have been to serve a subpoena on Mr. Vilorio, who is
23 counsel of record for Mr. Carry, as I advised Mr. Reed back
24 in August.

1 However, if his suggestion is simply to admit the
2 deposition transcript, I have no objection to that. And when
3 Mr. Plater agreed, as a courtesy, to do a deposition rather
4 than live testimony here in court, that's what we
5 anticipated.

6 With that, Your Honor, I ask that, when you review
7 it, you keep in mind any objections that Mr. Plater made, and
8 consider whether or not you would consider that evidence or
9 sustain that objection.

10 That's it.

11 THE COURT: Okay. Let me ask you this, Mr. Reed.
12 The types of questions you would ask Mr. Carry, if he were
13 here, are essentially those that were asked of him in his
14 deposition. Is that fair?

15 MR. REED: That's correct; yes.

16 THE COURT: So, I mean, when Ms. Noble said, "Judge,
17 if that's going to be the request, we probably don't have a
18 dispute here. We just ask that, when you review the
19 deposition, you bear in mind the objections," what she should
20 have said is, "When you read the deposition again," because I
21 already read it one time in anticipation of this hearing, to
22 get a flavor of what it would -- the Court would expect the
23 line of questioning to be with Sergeant Carry.

24 So, well, it seems like we're full circle here. The

1 Court is inclined to grant the request, based upon a showing
2 of unavailability, or not being here. I'm not going to
3 assign to Sergeant Carry any good cause for not being here.
4 But for purposes of going forward, and to make sure that your
5 client gets a fair hearing, the Court will allow the
6 deposition to be published, to be made part of the record.
7 The Court will consider it. I'll read it a second time, if
8 I'm not prepared to rule from the bench after this hearing.
9 And I will note the objections. And if I believe I need
10 argument on those further, I'll let each side know. But
11 absent that, I'll assume that Sergeant Carry's testimony,
12 were he here, would have been consistent with that of his
13 sworn deposition testimony under oath.

14 Is that acceptable to the petitioner?

15 MR. REED: Yes; that's correct. Thank you, Your
16 Honor.

17 THE COURT: Acceptable to the defense?

18 MS. NOBLE: Yes, Your Honor.

19 THE COURT: To the State, rather?

20 Thank you.

21 Please approach the court clerk, and we'll have that
22 marked, published, and made part of the record.

23 THE CLERK: Marked as an exhibit, or filed?

24 THE COURT: Filed, please.

1 Now, let me ask this question, as well: Did Sergeant
2 Carry have an opportunity to review and sign? Does anyone
3 know? And, if so, did he make any edits or corrections?

4 MR. REED: As far as I know, he did. I mean, I
5 believe that came up with the court reporter at the end. But
6 there are no corrections that have been made.

7 THE COURT: Okay. So you got the original back from
8 the court reporter?

9 MR. REED: That's correct; yes.

10 THE COURT: All right.

11 THE CLERK: I'll need a cover page. There's not a
12 place to do the stamp.

13 Do you need this now?

14 THE COURT: No, I don't need it at the moment.

15 Please put a cover sheet on it before you make it
16 part of the record.

17 It's been opened and published. The Court will
18 consider it for purposes of this hearing.

19 So let's proceed. So what will the evidence show
20 from the petitioner's perspective; and what is the ask of the
21 petitioner by the close of this hearing, please?

22 And, again, I don't want you to do your summation
23 here, but give the Court a primer on what you believe will be
24 presented.

1 MR. REED: Well, I think the primary thing here is
2 the destruction of the evidence, with the consent of the
3 District Attorney's Office. And this was before Mr. Skinner
4 really -- before his rights to file a petition for writ of
5 habeas corpus had expired, so he's been put in a very bad
6 situation, where he's claiming his innocence. He claims he
7 was coerced through various means, not -- maybe not
8 intentionally, but through the system -- well, to some
9 extent, I think he feels it was intentionally coerced.

10 THE COURT: Well, isn't that conflating two different
11 ideas? If one of the arguments here is, "Hey, my client was
12 coerced into pleading guilty. Here's how he was coerced.
13 Here's what he would have done but for the coercion, and it
14 would have changed the result," that's one thought process.

15 The other is that, I guess, the argument is actual
16 innocence, and you're hamstrung from being able to
17 demonstrate that to the Court by a lack of evidence that
18 would be relevant to that inquiry. Is that fair?

19 MR. REED: Yes. Yeah, that's fair. But I do think
20 that the failure to have the evidence, which we maintain
21 would show actual innocence, if we had it, that does bear on
22 his grounds in his habeas corpus petition, such as the lack
23 of a corpus delicti, and the failure on the part of his
24 attorney to fully investigate this matter, and determine that

1 the evidence was lacking as far as his guilt was concerned.

2 THE COURT: Okay. Thank you.

3 I have questions, but I'm going to save them for the
4 right time during the process of the hearing.

5 If you would please have a seat.

6 Ms. Noble, what does the State believe the Court will
7 have determined by the end of this hearing; and what's the
8 ask, please?

9 MS. NOBLE: Thank you, Your Honor.

10 So I'm not going to go through each of the -- I think
11 it's approximately, actually, 16 grounds in the original
12 petition, in the interests of time right now. But they all
13 essentially allege ineffective assistance of counsel,
14 primarily of Mr. Frey, during the pre-trial proceedings,
15 failure to identify issues, et cetera, some regards to plea,
16 and sentencing.

17 The State is confident that, after you hear the
18 testimony of Chris Frey, who has been subpoenaed to appear at
19 this hearing, that the Court will find that there was no
20 ineffectiveness that's been demonstrated under the two prongs
21 of Strickland.

22 With respect to the supplemental petition's claims,
23 the first is the failure to preserve evidence type of claim,
24 or the corpus delicti claim.

1 First, on the failure to preserve issue, Mr. Reed has
2 identified no basis in law that stands for the proposition
3 that the State is obligated to preserve contraband evidence
4 for any --

5 THE COURT: Well, other than the Constitution. I
6 mean, there's no statute or rule that he pointed to, but he
7 said fundamental fairness, due process, things like that.
8 Doesn't that trump everything else?

9 MS. NOBLE: No, Your Honor, it doesn't. Not when it
10 contravenes strong public policy considerations.

11 We can say that due process would require someone to
12 have a petition for writ of habeas corpus 25 years after
13 they've been convicted, with no excuse -- no reason to excuse
14 that procedural default. At some point, the Court has to do
15 a balance. We have a statutory scheme in Nevada. We have
16 Chapter 34. Chapter 34 recognizes the types of claims that
17 can be made on this type of petition.

18 And, by the way, those don't include a free-standing
19 claim of actual innocence. A free-standing claim of actual
20 innocence can't be used to excuse a procedural bar for an
21 untimely petition.

22 Furthermore, I would submit to the Court that you'll
23 hear testimony from Mr. Frey that he independently consulted
24 an expert in forensic computer analysis, who examined the

1 hard drive, examined the computer, came up to Reno to do
2 that, and verified what Mr. Carry had represented in his
3 analysis for the State.

4 And so, in terms of no proof being on there that
5 there was child porn in the possession of this person and
6 accessed by this person, we believe that will fail, there
7 will be a failure of proof.

8 Second, with respect to Mr. Frey allegedly, in ground
9 2, not explaining or acting to ensure that his client's plea
10 was knowing, intelligent, and voluntary, the State also
11 believes that Mr. Frey's testimony will strongly contradict
12 that assertion, and this Court can make a credibility
13 determination while he testifies.

14 As a matter of housekeeping, Your Honor, the State
15 has two witnesses under subpoena today. One is Mr. John
16 Petty, who is the appellate attorney, who is seated in the
17 courtroom.

18 I also believe, by the way, with the claims with
19 respect to Mr. John Petty, those will be shown to be without
20 traction, and that Strickland analysis merits the conclusion
21 that there was no ineffective assistance of counsel.

22 I would like to ask, Your Honor, however, because I'm
23 not sure how many witnesses Mr. Reed is calling: Mr. Frey is
24 about 10 to 15 minutes away. He's expecting a message from

1 me, and can come at any time. He's a Federal Public
2 Defender, and he's trying to get his cases done. So I would
3 just try to give him a time to show up here. He is happy to
4 be here immediately, if the Court so desires, but I didn't
5 want to have him sitting around for no reason. The same with
6 Mr. Petty, who is in the courtroom today. If there's a time
7 that Mr. Reed and I could maybe agree upon, that's okay with
8 the Court, to have the State's witnesses come back, that
9 would be great.

10 THE COURT: Well, as I understand it, without Mr. --
11 without Sergeant Carry here, then the petitioner's witnesses
12 are the petitioner himself, and also their expert. So
13 however long that takes, it takes. I'm imagining that
14 Mr. Petty and Mr. Frey will be sometime mid-afternoon today.
15 That would be the Court's best estimate. We will take a
16 lunch recess from approximately 12:00 to 1:00 or 1:15, get
17 right back at it. So if that helps at all.

18 MS. NOBLE: That helps the State, Your Honor. I'm
19 happy to ask those witnesses to be here by 1:00 o'clock
20 today.

21 THE COURT: If you want to get a message to them
22 somehow that they don't need to be here until at least 1:15,
23 that's certainly fine. They don't have to be waiting right
24 now to possibly run right over. Or excuse me. For Mr. Petty

1 to wait here, and for Mr. Frey to run right over.

2 MS. NOBLE: Thank you. I think Mr. Petty probably
3 heard that. And I'm just going to e-mail quickly Mr. Frey,
4 and advise him.

5 THE COURT: All right.

6 MS. NOBLE: Thank you, Your Honor.

7 THE COURT: Thank you.

8 So, with that, Mr. Reed, please call the petitioner's
9 first witness.

10 MR. REED: Your Honor, we would call Tami Loehrs as
11 our first witness.

12 THE COURT: Okay. Thank you.

13 (Witness sworn.)

14 THE COURT: Good morning, ma'am.

15 THE WITNESS: Hi.

16 THE COURT: Please make yourself comfortable, slide
17 in, adjust the microphone any way you'd like. Please speak
18 closely to it. And please state your name, and then slowly
19 spell your last name.

20 THE WITNESS: Tami Loehrs: L-o-e-h-r-s.

21 THE COURT: Thank you very much.

22 Please proceed.

23

24

1 TAMI LOEHRS,
2 called as a witness on behalf of the Petitioner,
3 first having been duly sworn,
4 was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. REED:

7 Q. Ms. Loehrs, what is your business, profession, or
8 occupation?

9 A. I am a digital forensics expert. And I own a digital
10 forensics company in Phoenix, Arizona.

11 Q. And how long have you had this business?

12 A. Since '99.

13 Q. What training have you had, and what certifications
14 do you hold to do this kind of work?

15 A. I have a Bachelor of Science in Information Systems.
16 I have thousands of hours of computer forensic training in
17 the industry.

18 I have four certifications in the industry. Two are
19 software-based: the ACE certification and the EnCase
20 certification. And two are general certifications, which is
21 a CHFI, which is a certified hacking forensic investigator;
22 and a CCFE, which is a certified computer forensic examiner.

23 Q. Now, on how many cases would you estimate that you
24 have served as an expert for the defense in child

1 exploitation cases?

2 A. Specifically, I think it's somewhere around half my
3 caseload, so about 500 to date, right around there.

4 THE COURT: The other half being for the
5 prosecution --

6 THE WITNESS: No --

7 THE COURT: -- or half of your workload?

8 THE WITNESS: Yeah. I have worked on over a thousand
9 cases all over the world, and it involves everything. You
10 know, drug cases, fraud cases, civil cases, criminal cases.

11 THE COURT: I see. Thank you.

12 THE WITNESS: Actual child pornography investigation,
13 I think probably about 500.

14 BY MR. REED:

15 Q. Now, on how many cases would you estimate that you
16 have served as an expert for the defense -- strike that.

17 How many times have you testified as an expert
18 witness on such cases, would you estimate?

19 A. I have testified, in total, I think, now 127 times.
20 I don't know that all of those -- they're not all child
21 pornography.

22 Q. Do most of those deal with examination of forensic
23 evidence involving child pornography?

24 A. Well, not all of my cases. But, again, approximately

1 half of them do.

2 Q. Now, as a result of your testimony, how many
3 dismissals and not-guilty verdicts would you estimate that
4 you have contributed to?

5 A. I wouldn't contribute it to my testimony; but to my
6 work, it's approximately 10 percent we've had dismissals and
7 not-guiltys.

8 Q. Now, in this particular case, what did you review as
9 far as discovery materials?

10 A. I reviewed Sergeant Carry's report. I reviewed -- I
11 think there's some general police reports. I reviewed
12 Sergeant Carry's deposition transcript. There might have
13 been a couple other things.

14 Q. Now, in Mr. Carry's deposition, he mentions that he
15 previewed the devices seized from Mr. Skinner. In your
16 experience, what does it mean to preview evidence?

17 A. A preview is just like a quick look. We go in to
18 preview evidence to see if there's anything that's of
19 evidentiary value, what we're looking for. So in a case like
20 this, a preview would be to look at the computer and see if
21 there's child pornography. If there is, now you're ready to
22 go to the next step.

23 Q. And I would note that Mr. Carry indicated that a full
24 analysis was never completed. What is a full analysis?

1 A. A full analysis is when you go in and answer all the
2 questions about that evidence. So, again, using a case like
3 this, we know there's child pornography on the computer. Now
4 we have to analyze it, and determine how those files got
5 there, when they got there. Were they shared? Uploaded?
6 Downloaded? Were they obtained purposely or inadvertently?
7 Were they opened and viewed? Were they deleted? What
8 occurred with these files?

9 And, then, who was at the keyboard at any particular
10 time involving activity surrounding those files.

11 Q. Now, Mr. Carry, in his deposition, on page 19, states
12 that, "Any data that resides on the computer in that user's
13 account is viewable to that user." Do you agree with this?

14 A. Absolutely not.

15 Q. Why not?

16 A. There's tons of data on all of our computers that we
17 can't see. Just because you have a user account doesn't mean
18 that you can see all of the data. Obviously, you can see
19 files that you've put in your documents folder or your
20 pictures folder. But computers have data that's created
21 automatically, data that's cached in hidden locations that we
22 don't see. There's data that's created by viruses and
23 Trojans. There's data that's created by other people who use
24 the computer.

1 And if I put files on your computer, and you don't
2 happen to go to that folder because I have it hidden from
3 you, you'll never see it.

4 There's data on our computers that were there maybe
5 before we got it. You go buy a computer from Best Buy and
6 find out it was used. There's a bunch of data in there from
7 the previous user that you have no idea about. There's lots
8 of data on our computers that we don't see and aren't aware
9 of.

10 Q. How would you determine that someone had knowledge of
11 a particular file on their computer?

12 A. The way we do that is, first, you have to find the
13 file that is of issue. So, again, say, a child pornography
14 file. Find the date and time that that file was created on
15 the computer. Then we do a timeline analysis of that date
16 and time, and just go look at the activity and see what
17 happened.

18 Best-case scenario is, somebody gets on a webcam,
19 they have logged in, there's a picture of them. You know
20 that person is at the keyboard, and it's happening at the
21 same time as child pornography. There's your person.

22 That's not always that clear. So we look for things
23 like, you know, did somebody specifically search for that
24 file? Download that file? Click on it, open it, and view

1 it? Share it with somebody? You know, talk about the file
2 with somebody? Do something with it? Put it in the hidden
3 location? So we're just looking for activity as to who is at
4 the computer, and what they are doing with the file, to show
5 that they have knowledge of it.

6 Q. Is it possible that a user could be unaware of
7 file-sharing software and files downloaded with such
8 software?

9 A. Absolutely.

10 Q. Would you explain that.

11 A. Again, same reason. Let's say you have multiple
12 people using the same computer. One person downloads
13 file-sharing software, and they download files with that, and
14 that's put into a folder.

15 If you are a user on the computer, and you're unaware
16 that that software has been installed, unless you know enough
17 to go into your computer and review every application that's
18 ever been installed in it, you won't even know that
19 application is there.

20 We have software on our computers, again, that we
21 don't know about. Software that comes -- you download
22 anti-virus, and it installs two other pieces of software that
23 you don't know about.

24 We have software that comes with our operating

1 systems; software, again, that's installed by other people.
2 So unless you're specifically going and looking for it and
3 actively using it, you may not know it's there.

4 Q. Now, how do you determine if a user had knowledge of
5 a particular piece of software on their computer?

6 A. Same thing: that timeline analysis. You find out
7 when that software was installed. You do a timeline analysis
8 on that date and time. Did the person sit down, check their
9 e-mail, go online, search for that software, download that
10 software, put it in their downloads folder, execute it, then
11 use the software, download a file, send another e-mail?
12 That's all information showing who is at the keyboard, what
13 they're doing, that they've installed the software, and
14 they're using it.

15 Q. Now, if somebody had, say, a new hard drive installed
16 after maybe they purchased a computer, and then sometime
17 later they, for some reason, had a new hard drive
18 installed --

19 A. Bless you.

20 Q. -- if that hard drive had something on there, child
21 porn, or whatever, could that be on there unbeknownst to the
22 person that had the hard drive put in?

23 A. Sure. It happens all the time.

24 Q. Now, did you review the laptop or any computer hard

1 drive taken from Mr. Skinner that allegedly provided the
2 evidence of possession of child pornography or file-sharing
3 that was the basis of the charges in this case?

4 A. No, I have not.

5 Q. And why were you not able to review those items?

6 A. We requested them. And then we were informed -- I
7 believe it was in October -- that the evidence -- my
8 understanding was, a server crashed, and that created -- I
9 guess the forensic images were on the server, and then the
10 original evidence had been destroyed. That's my
11 understanding.

12 Q. Now, is there any reason -- and I'd represent to you
13 that there were several items, several pieces of equipment in
14 this case that were seized as part of a search warrant on Mr.
15 Skinner's apartment. And there was a laptop, and several --
16 and some external hard drives, and that kind of thing. Why
17 would you want to see, say, not just the laptop they
18 allegedly found child pornography on, but all this other
19 equipment, as well?

20 A. Well, we like to examine everything that was seized
21 because sometimes that will give us information about what's
22 on the main computer.

23 So let's say there's a bunch of child pornography on
24 the laptop, and we can't determine who the user is, who was

1 on the laptop doing it. Sometimes you will find one of those
2 external hard drives belongs to a particular person -- maybe
3 it's a roommate or somebody else in the house -- and then you
4 find similar information in the same files that are on the
5 laptop. And that sometimes connects that person with the use
6 of the laptop, even though it's not their computer.

7 And we have actually proven this in cases where we've
8 found out it was a relative. Based on what they're doing on
9 their computer, they were doing the same thing on the family
10 computer. And so we -- that's how we tie those people
11 together. So we like to see the other evidence that's been
12 seized, as well.

13 Q. Now, did you review the digital evidence and
14 narrative report produced by Sergeant Carry of the Washoe
15 County Sheriff's Office?

16 A. Yes, I did.

17 Q. And what were your conclusions about that report?

18 A. Well, that report is all opinion. It was a statement
19 by Sergeant Carry. It didn't include any forensic evidence
20 for me to look at, so I can't draw any conclusions. I can't
21 corroborate or refute anything that's in that report because
22 there's no forensic evidence to corroborate it.

23 Q. Now, at the bottom of page 1 of Mr. Carry's report,
24 he says, "The report details the initial" -- he used that

1 word -- "initial examination." Does that indicate to you
2 that an examination has not been conducted?

3 A. Yeah. In fact, I think he actually stated in there
4 that a full analysis had not been conducted, and that he
5 actually suggested that more analysis needed to be done,
6 because it was just an initial, like, preview.

7 Q. And I would also note that Mr. Carry provides at
8 least one of the registered owners as Mike -- or the
9 registered owner as Mike, with four user accounts: for Mike,
10 Rod, Sophie, and Sophie 2. What does that indicate to you?

11 A. That would indicate to me that, well, A, the computer
12 was registered to a person named Mike, who, based on the
13 name, is not Mr. Skinner. And that, based on the multiple
14 user accounts, likely, multiple people had access to the
15 computer, which complicates things. It's not a one-owner
16 machine. We have multiple people now that we have to try to
17 decide who conducted the activity that we're interested in.

18 Q. Is this important?

19 A. It's extremely important. It's hard enough to
20 identify activity by a user if they're the only person who
21 uses the computer, because there's still outside things that
22 can cause data to be on there. People get hacked, and
23 there's viruses and Trojans, and they'll have friends use
24 their computer, family members. But it's just registered to

1 | them, and they are the only user account. So that's
2 | difficult, in and of itself.

3 | But when you have other people who are actually named
4 | on the computer, and it's registered to another person, now
5 | you have to start looking for who all had access to this
6 | computer, and who had access during the times of activity
7 | that's in question.

8 | Q. Then Mr. Carry indicated that he located file-sharing
9 | software. When was that software installed?

10 | A. I have no idea. He lists multiple file-sharing
11 | applications. But, again, there's no forensic evidence
12 | included in the reports. So there's no install date, there's
13 | no install logs. I don't know if that software was installed
14 | prior to him owning the computer, or after he owned the
15 | computer. I have no idea when any of those applications were
16 | installed.

17 | THE COURT: Let me ask you a question, please.

18 | Ms. Loehrs, please educate the Court. I mean, this
19 | is your field, and so this might sound like a silly question.
20 | But what exactly is file-sharing software?

21 | THE WITNESS: There's no silly questions.

22 | File-sharing software is, typically, we get it for
23 | free, people get it on the internet, and it allows people to
24 | share files back and forth.

1 Do you remember Napster?

2 THE COURT: I've heard of it.

3 THE WITNESS: Where people would get music files,
4 they would use Napster. That came from the server. So if
5 you wanted to get free music, without buying the CD, you
6 would get it from Napster. That got shut down.

7 So file-sharing software allows the files to be
8 shared directly from computer to computer over the internet
9 anonymously.

10 So if I want to get music files now, I download free
11 file-sharing software, search for that song, and it will come
12 up with a list of computers all over the world that have that
13 song available, and then I can just download them.

14 THE COURT: Thank you.

15 BY MR. REED:

16 Q. As far as when the file-sharing software might have
17 been installed, if you examined the computer, would you be
18 able to determine that?

19 A. Absolutely.

20 Q. Now, there's also -- in his report, there's a huge
21 list of search terms. Where did Mr. Carry obtain these from?

22 A. I have no idea. There's no information about the
23 tool he used, or where those terms came from. I don't even
24 know that those are actually search terms.

1 I find this -- very often, we have forensic tools
2 that will pull out -- quote -- search terms, but they're not
3 really search terms. They're just terms associated with the
4 files in the file-sharing software. You have to actually go
5 in and analyze it and find out if those are actual searches
6 that somebody typed in.

7 But I don't know, because it doesn't say what tool he
8 used, where those terms came from. There's no dates and
9 times. Nothing associated with those. It's just a list of
10 names, of terms.

11 Q. Now, do you have any idea what dates these searches
12 were conducted?

13 A. No. There's no dates in the report. I have no idea.

14 Q. Under "Media file information," the section in the
15 report, I believe Mr. Carry mentions finding adult and child
16 pornography within user-created folders. What information is
17 missing from this section of Carry's report?

18 A. Well, first, he claims there's adult and child
19 pornography. That's actually very important in an analysis.
20 Is it a thousand adult pornography images or files, and only
21 a few child pornography that maybe came in with it? Because
22 in file-sharing that's very common.

23 He says that they're in personal user folders, but
24 doesn't mention which user folders. So I don't know if those

1 are in Mike's user folders, or in Sophie's user folders.
2 There's no details about where those files are, how many of
3 them there are, dates and times of those files, nothing.
4 It's just there's adult and child pornography in user
5 folders. That tells me nothing.

6 Q. Are you able to make any determinations whatsoever
7 about these files based on Mr. Carry's report?

8 A. No.

9 Q. And the next section is "Internet history." Again,
10 what information, if any, is missing here for you to offer
11 any opinions about the evidence?

12 A. Well, internet history is huge. The internet history
13 has tons of important information in it. There's typically
14 millions of files in the internet history that will be cached
15 images, website URLs -- those are the addresses of websites
16 visited -- files that have been opened, things people are
17 searching for. The website -- the internet history is
18 something that we can spend many, many hours analyzing.

19 All I know is, there were some websites visited.
20 There's no internet history provided. Typically, you can
21 extract that from the computer and produce huge reports of
22 internet history. So we can go in and look and see dates and
23 times of what's going on, what websites people are visiting,
24 what websites were visited on purpose, and what websites were

1 pop-ups or Spam or -- all kinds of different information.

2 None of that is in there.

3 Q. Now, Mr. Carry talks about encryption being found,
4 and then it was a hidden volume of child pornography in it.
5 What is missing here?

6 A. Again, I know nothing about -- he just says there's
7 an encrypted volume. I don't know if it's an encrypted
8 volume. He doesn't provide any details about the encryption,
9 when it was encrypted, why he thinks it's an encrypted
10 volume.

11 Encryption can be -- encryption can be tricky because
12 it's hidden. Depending on what you encrypt it with, it may
13 look like something that it is not.

14 So I have no idea. There's no details whatsoever.
15 He just says it's an encrypted volume.

16 Q. Without the computer equipment and hard drives taken
17 from Mr. Skinner, what can you conclude about the accuracy
18 and reliability of the findings of Sergeant Carry in this
19 case?

20 A. Nothing.

21 Q. You just have to accept his word on it?

22 A. That's what you would have to do. But that's not my
23 job, as a digital forensic expert.

24 Q. Now, what do you notice significant in Sergeant

1 Carry's report as to whether his report does or does not
2 conclusively incriminate Mr. Skinner?

3 A. I believe he actually mentions in his report that
4 more analysis is needed for that exact purpose: to either
5 incriminate Mr. Skinner, or show that he was innocent.

6 Q. So he actually uses that phrase: "that if more
7 analysis is done, Mr. Skinner could either be cleared or
8 incriminated"?

9 A. Correct.

10 Q. If you had the evidence, what issues noted by
11 Sergeant Carry would you want to look into?

12 A. Well, again, my job, on the defense side of being a
13 digital forensics expert, is to take what the State or the
14 government has said: "These are the allegations. This is
15 what we found in the evidence." I go in, and I corroborate
16 or review that with my forensic findings.

17 So I prepare very detailed reports, with the forensic
18 evidence, and say, "Yes, you know, this is when this is
19 installed, and I found this person at the keyboard, and these
20 files were downloaded on these dates and times, and they were
21 opened, and they were viewed."

22 Sometimes I go in, and I find, like, well, those
23 aren't actually search terms. That's the software pulling
24 out terms from file-sharing. The actual search terms are

1 these.

2 So there's always a mixture of some things are
3 corroborated, and some things are refuted.

4 Q. Now, Carry indicates that files were carved from
5 unallocated space. What does that mean to you?

6 A. Files carved in unallocated space we can't tell
7 anything about, other than they existed at one time. Once a
8 file is in unallocated space, you have a picture. Once it's
9 deleted, it goes into unallocated space. All the information
10 about that file disappears: the date and time it was
11 created, modified, accessed, the file name, the location
12 where it was at.

13 Our forensic tools go through unallocated space and
14 look for file headers. So it will find a file header for a
15 picture, carve out that data until it gets to the footer, and
16 brings the picture back, so we can see it. But that's all we
17 know. It was a picture that existed at one time. I can't
18 say if it came from the internet. I can't say if it was
19 created a week ago, or five years ago. It's just a picture
20 on the drive.

21 So files of unallocated space are very difficult in
22 criminal cases because you can't prove anything with them,
23 other than they existed at one time.

24 Q. Now, I believe I already asked you this, or you've

1 already answered this, but is it possible that data may
2 reside on a computer without the user's knowledge or consent?

3 A. Yes.

4 Q. And to determine whether this is true, what should
5 the defense do in its examination of the circumstances
6 surrounding this evidence?

7 A. Again, I think I've kind of explained all of that. I
8 would do a very detailed timeline analysis of all the dates
9 and times at issue.

10 Q. Do you see any evidence of Sergeant Carry
11 investigating Mike or anyone else who may have previously had
12 access to this computer?

13 A. I didn't see any mention about looking into that at
14 all, no.

15 Q. What factors are involved in determining whether a
16 defendant had knowing receipt, possession, or distribution of
17 child pornography?

18 A. And, again, I think I've kind of described that, as
19 well. In order to determine knowledge, we want to show that
20 that person was, A, sitting at the keyboard, maybe searched
21 for the file; that they downloaded the file purposely; that
22 they opened and viewed it, shared it with somebody, discussed
23 it, tried to hide it, saved it. Just the person sitting at
24 the keyboard did something with that file, and knew what the

1 content was.

2 Q. In your training, and as part of the certifications
3 you have received, what are the professional standards for
4 evidence preservation?

5 A. In my training, I mean, we still have evidence in our
6 lab that's over 10 years old. We're taught to follow,
7 obviously, local rules, statutes, whatever those are. I
8 don't work for a law enforcement facility, but, on the
9 defense side, we keep stuff for years and years and years,
10 until we know absolutely for sure that it's done, or unless
11 there's a court order telling us to destroy it, or
12 somebody -- you know, we have to send it back.

13 Q. Typically, when somebody is examining a computer,
14 would they make a copy of the hard drive? Would then that
15 copy be examined, or would the original hard drive be
16 examined? Or if you could explain that a little further.

17 A. Yeah. The standard is, you don't do any work on the
18 original evidence. And when you get the original evidence,
19 the first thing you do is, you make a forensic image of it,
20 so you've preserved that, and then you can put the original
21 evidence in an evidence locker and forget about it.

22 The forensic image is also susceptible to damage, so,
23 typically, we'd want to make a backup of that image. So now
24 you have two separate hard drives with an exact copy and

1 exact duplicate of the original evidence.

2 One of those copies, again, goes into your evidence
3 safe, and you don't touch it. It's just a backup. Those are
4 the things, like, in our lab, could exist for years and years
5 and years.

6 The second copy is the one that we do all of our work
7 on. So all of the forensic analysis, all the processes we're
8 running, is on one of the copies. The other copy and the
9 original are sitting in an evidence safe somewhere. We just
10 forget about them.

11 Q. So without being able to review the evidence reviewed
12 by Sergeant Carry, can Mr. Skinner receive an adequate
13 defense to these charges, or be able to prove his innocence
14 of these charges?

15 A. I certainly can't corroborate or refute what the
16 State has alleged, because I have nothing to look at.

17 MR. REED: Thank you, Your Honor.

18 That's all the questions I have at this time.

19 THE COURT: Thank you.

20 Examination by the State.

21 MR. NAUGHTON: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. NAUGHTON:

24 Q. Good morning, Miss Loehrs.

1 A. Good morning.

2 Q. I want to start with your qualifications on your
3 report on page 1.

4 You indicate that you've worked on over 400 child
5 exploitation cases.

6 A. Correct.

7 Q. And, in fact, you think that's actually closer to 500
8 now?

9 A. Well, that was back in January of 2018, so, yeah.

10 Q. So you continue to work in this area?

11 A. Oh, yeah.

12 Q. Do you always work for the defense?

13 A. In criminal cases, I've worked for the defense, yes,
14 because I'm not law enforcement; except for one case in
15 Georgia, where I worked for both sides, because evidence was
16 hidden from me, and so the other side actually hired me to
17 come in.

18 Q. And you pointed out that, of those 400 cases at that
19 point in time, approximately 80 resulted in dismissals, and
20 several resulted in not-guiltys, and there were a number of
21 favorable pleas; is that correct?

22 A. Correct.

23 Q. And how many of those cases resulted in guilty
24 convictions?

1 A. As far as went to trial?

2 Q. Yes.

3 A. I think most of the trial cases ended in convictions.

4 Q. So it's more an exception to the rule that your
5 expertise is able to provide an alternative explanation for
6 the presence of child pornography on these computers?

7 A. Only -- once a case goes to trial, I mean, that's up
8 to a jury. Most of our dismissals have been based on our
9 work pre-trial.

10 Q. Okay. Of those 400 cases at that point in time,
11 about 500 now, at that point in time, there's about 80 that
12 resulted in dismissals prior to going to trial; is that
13 correct?

14 A. Correct.

15 Q. And so the majority --

16 THE COURT: Excuse me. Hold on.

17 You're both speaking very quickly.

18 THE WITNESS: Sorry.

19 THE COURT: It's even hard for the Court to
20 completely dial in.

21 Madam Reporter, are you tracking all this?

22 THE COURT REPORTER: Yes. But I would ask you to
23 slow down.

24 THE COURT: Just a little bit, if you could each do

1 so. Thank you.

2 Please proceed.

3 MR. NAUGHTON: Thank you, Your Honor.

4 BY MR. NAUGHTON:

5 Q. Miss Loehrs, of those 400 or 500 cases, do the vast
6 majority of them wind up going to trial or resulting in some
7 additional litigation?

8 A. No, the vast majority do not go to trial. There's
9 very few that go to trial. Most of them resolve in some way,
10 whether it's a plea or a dismissal, or something.

11 Q. And most of those resolutions are other than
12 dismissal. Is that fair?

13 A. Correct.

14 Q. Okay. Of your 500, approximately, examinations in
15 this area, have you ever conducted an investigation that
16 confirmed law enforcement's findings?

17 A. Sure.

18 Q. How often does that happen?

19 A. I mean, again, all the time, because, like I said, a
20 lot of them are kind of a mixture of: Yes, I have
21 corroborated this, but I refute that.

22 Q. And do you ever find additional incriminating
23 evidence on hard drives, in your view, that law enforcement
24 possibly missed?

1 A. All the time.

2 Q. What do you do when you find that?

3 A. Tell the attorney.

4 Q. Do you generate a report?

5 A. Usually, when I tell the attorney, they ask me not to
6 do a report.

7 Q. You also indicated that you had reviewed some of the
8 certifications that Sergeant Carry had; is that correct?

9 A. Correct.

10 Q. And, in fact, you shared some of those same
11 certifications.

12 A. Correct.

13 Q. Such as CCFE?

14 A. Correct.

15 Q. CHFI?

16 A. Yes.

17 Q. ACE?

18 A. Yes.

19 Q. And EnCase?

20 A. I don't think he has EnCase.

21 Q. Are those types of certifications you would expect a
22 professional in this field to have to conduct these sorts of
23 examinations?

24 A. Yes.

1 Q. Do you have any POST training: Peace Officer
2 Standards Training?

3 A. No. I'm not a peace officer, no.

4 Q. You're a private investigator; is that correct?

5 A. I am a private investigator, yes. I have a state --
6 an agency license in the State of Arizona.

7 Q. Mr. Reed asked you some questions about the items you
8 reviewed in this case in preparing your report or your
9 declaration. How did you select which items to review in
10 this particular case?

11 A. They're provided to me by the attorney.

12 Q. Okay. Did you ask for any additional information to
13 review?

14 A. Not that I know of. I just asked for discovery.

15 Q. Were you aware that there was any other information
16 out there that might be available to you to review?

17 A. I honestly don't know what is in the case file.

18 Q. You reviewed one -- excuse me just one moment. I
19 want to make sure I use the correct language.

20 You reviewed one digital evidence report, that was
21 prepared by Sergeant Carry; is that correct?

22 A. Correct.

23 Q. And that was prepared in November of 2013?

24 A. That sounds about right.

1 Q. Were you aware of any additional digital evidence
2 report narratives that were prepared by Sergeant Carry?

3 A. I am not.

4 Q. Would that have been useful to you in preparing your
5 report in this case?

6 A. Yes.

7 Q. Do you know why you weren't provided with any
8 additional narratives?

9 A. I have no idea.

10 Q. Did you review a police report that was authored by
11 Sergeant Carry?

12 A. I honestly don't know. I know there was a couple of
13 police reports. I don't know if he was the author.

14 Q. Would a police report possibly contain additional
15 information that might be useful to you in forming your
16 opinion?

17 A. Not unless it contained forensic data.

18 Q. Were you aware of any spreadsheets that were created
19 by Sergeant Carry in this case?

20 A. I saw one spreadsheet, with some files in it.

21 Q. Can you describe what that spreadsheet contained or
22 described?

23 A. It was just a spreadsheet, with some file names. I'm
24 not sure of everything that was in it. I think there were

1 some dates and times on there. But I don't remember
2 everything that was in it.

3 Q. When you say "file names," is that a description of
4 various files?

5 A. It's just a file name. It's not necessarily a
6 description. File names aren't always accurate. Just the
7 name of the file.

8 Q. Do you recall how many items were listed in that
9 spreadsheet?

10 A. I don't.

11 Q. Do you recall what that spreadsheet was purported to
12 relate to?

13 A. I don't.

14 Q. Do you know if it was related to showing search terms
15 in Ares?

16 A. I don't believe it was.

17 Q. Are you familiar with what Ares is?

18 A. Very.

19 Q. And for the record, that's A-r-e-s; is that correct?

20 A. Correct.

21 Q. Can you describe what Ares is?

22 A. Ares is a file-sharing software.

23 Q. Okay. This is one of those peer-to-peer file-sharing
24 programs that you described earlier?

1 A. Correct.

2 Q. Are you familiar with Shareaza?

3 A. Yes, very.

4 Q. And that's spelled S-h-a-r-e-a-z-a.

5 A. Yes.

6 Q. Can you describe what that is?

7 A. Its another PTP file-sharing software.

8 Q. PTP is peer-to-peer?

9 A. Peer-to-peer.

10 Q. Did you review any spreadsheets related to any search

11 terms or files that may be related to Shareaza?

12 A. Again, not that I'm aware of. But, again, that

13 spreadsheet that I saw, I don't think there was any -- it was

14 just a spreadsheet, so I don't -- I don't think I even knew

15 where that came from.

16 Q. If Sergeant Carry had created these spreadsheets,

17 would they have been useful to you to review in forming your

18 opinion?

19 A. Sure.

20 Q. And those weren't provided to you in this case;

21 correct?

22 A. I saw that one.

23 Q. Were you aware -- excuse me. Were you aware of a

24 spreadsheet purportedly showing downloads in Ares?

1 A. That may be the one I saw.

2 Q. And that would have contained the file names?

3 A. Correct.

4 Q. Would it contain the download dates and times?

5 A. Yes, I believe so.

6 Q. Would it contain cache information?

7 A. It may.

8 Q. Can you describe what cache information is?

9 A. The cache value is like a fingerprint of a file.

10 Some of the file-sharing had their own cache values, so
11 that's how they identified files, that's how law enforcement
12 identifies known files.

13 Q. Would it contain file source information?

14 A. I don't know.

15 Q. Were you aware of a digital evidence report narrative
16 created by Sergeant Carry on March 18th of 2014?

17 A. I --

18 THE COURT: Let's be clear. She said she saw the
19 one. So is this a different date than the one she saw?

20 MR. NAUGHTON: That is correct, Your Honor.

21 THE COURT: Do you know that to be true?

22 THE WITNESS: I don't know. I'd have to look at it
23 and see. I really don't know.

24 MR. NAUGHTON: May I approach?

1 THE COURT: Yes.

2 BY MR. NAUGHTON:

3 Q. Miss Loehrs, can you describe the document that I
4 just handed to you?

5 A. It says, "Digital evidence report narrative." And
6 it's dated March 18th, 2014. "By Examiner Sergeant Dennis
7 Carry."

8 Q. Okay.

9 THE COURT: So let's circle back just for a minute.

10 I think the question was something like: Do you
11 believe you reviewed that report, as part of your work in
12 this matter?

13 MR. NAUGHTON: That's correct, Your Honor.

14 THE WITNESS: And I do not believe I've seen this
15 report.

16 MR. NAUGHTON: May I approach?

17 THE COURT: You may.

18 THE WITNESS: Although I will say some of this -- I
19 would have to compare this, because some of this looks like
20 the same language that was in the November report. And,
21 again, I'm just going on memory. But some of this -- this
22 page doesn't look familiar, but this language over here does.
23 So I'm not -- I'm not sure if it's from the same -- from the
24 first report.

1 BY MR. NAUGHTON:

2 Q. There appears to be additional information in the
3 March report, however. Is that fair to say?

4 A. There's a spreadsheet behind it, yes.

5 Q. And you did not have an opportunity to review that in
6 preparing for your testimony today?

7 A. Again, not that I know of. But I'd have to match it
8 to what I have.

9 Q. Would that have been important for you to review?

10 A. Looking at it, that wouldn't have changed my
11 opinions. There's nothing there that would have given me
12 what I need, if that's what you're asking.

13 Q. And, again, that's based on a just cursory review
14 there on the witness stand in less than 30 seconds,
15 approximately?

16 A. Well, there's no forensic evidence in there, so, yes.

17 Q. It's your opinion that the initial preview
18 examination conducted by Sergeant Carry was incomplete. Is
19 that fair to say?

20 A. It's not my opinion. He actually said it was
21 incomplete.

22 Q. And he said further examination was necessary; is
23 that right?

24 A. That's correct.

1 Q. And after his initial preview examination, he
2 prepared a report; is that correct?

3 A. Yes. The one in November, yes.

4 Q. That's the report that you reviewed?

5 A. Correct.

6 Q. And then you're now aware that an additional report
7 was prepared in March. Would that suggest additional
8 examination was completed in this case?

9 A. I have no idea. Just because another report was
10 created doesn't mean he did more analysis. I don't know why
11 that report was created, or what he did.

12 Q. Do you know what tool Sergeant Carry used to conduct
13 his examination in this case?

14 A. I do not.

15 Q. Do you have any way of knowing if the tools that you
16 would have used in this case would have arrived at different
17 or additional information?

18 A. It's possible. I mean, our tools should bring the
19 same information out. Some tools bring more than others.
20 But it's really in the analysis of the data that you're
21 pulling, not just the tool.

22 Q. You talked about timelines being important.

23 A. Yes.

24 Q. And that's in order to establish as best you can the

1 identity of the person responsible for various activities on
2 the computer. Is that fair?

3 A. Yes; that's correct.

4 Q. And you indicated in your report that you wanted to
5 know what information or how Sergeant Carry had arrived at
6 his conclusion that Mr. Skinner was the user at the time the
7 child pornography was created on this hard drive. Is that
8 accurate?

9 A. Yes.

10 Q. Are you aware that Sergeant Carry examined a timeline
11 in this case?

12 A. I am not aware. I didn't see that in any report.

13 Q. Are you aware that he identified Skype chat logs in
14 this case?

15 A. He does mention Skype.

16 Q. And do you recall the user name associated with that?

17 A. I believe it was Rod Skinner.

18 Q. And are you aware that Sergeant Carry concluded that
19 those Skype chat logs were created at the same time that the
20 child pornography was being accessed or otherwise created on
21 his hard drive?

22 A. Again, he made a statement, but he provided no
23 evidence to look at. He made a statement in his report to
24 that effect, yes.

1 Q. Is that the sort of timeline creation that you would
2 be looking at?

3 A. No. I would be looking for actual files from the
4 computer, with dates and times showing me exactly what's
5 occurring. Not just a statement that I found a Skype chat,
6 and it was happening at the same time.

7 Q. If you conclude -- if your conclusion is, as a result
8 of that timeline, that Skype was being used at the same time
9 as child pornography was being created on this computer, is
10 that the sort of timeline that you would be creating?

11 A. Well, no. Again, some of where my analysis where I
12 differ in law enforcement's opinions is, I was born and
13 raised in computers, and I understand the data. A lot of
14 these guys are pushing buttons, and the tool brings out data,
15 and they assume it means one thing.

16 Sometimes dates and times aren't accurate for various
17 reasons, and data isn't what it appears to be unless you get
18 in and really analyze it.

19 So my issue is that, yes, he says, "I found the Skype
20 chat that was happening at the same time the child
21 pornography was being downloaded." I don't know that that
22 conclusion is accurate until I go in and see exactly what
23 data he's looking at, to say, "Okay. Yes, he's correct.
24 That is exactly the date and time when that child pornography

1 was occurring, that was happening with Mr. Skinner, and that
2 was happening at the same time as child pornography." I
3 can't do that unless I see raw data. And I have no raw data.
4 So it's just a statement.

5 Q. Okay. So it's a conclusion that you can neither
6 confirm or deny.

7 A. Correct.

8 Q. And if you were creating a timeline, would your
9 conclusion possibly be related in the same way that Sergeant
10 Carry related his conclusion in this case?

11 A. It may very well be. But it would be included with
12 all of the files that I used to come to that conclusion.

13 Q. On page 5 of your declaration, you provided an
14 analysis of the word "knowing" --

15 A. Yes.

16 Q. -- as it relates to possession or distribution of
17 child pornography.

18 A. It's not analysis. It's what we're looking for in
19 the computer, what data shows us knowing, knowledge.

20 Q. Is that a legal definition?

21 A. It's not a legal conclusion. It's just what am I
22 going to look for on the computer to show somebody knew this
23 file was here?

24 If you go to a website, everything is automatically

1 cached to your computer. If you run "CNN," a hundred images
2 that are cached to your computer might be from a story you
3 never looked at. I want to show that you didn't know that
4 was there. That's not knowledge. Knowledge would be if you
5 went to that story and you clicked on it, then you downloaded
6 that picture and saved it to your computer. That's what I'm
7 looking for in data to show that somebody knew it was there.
8 So it's not a legal conclusion. It's just what data shows
9 somebody knew something was there.

10 Q. Is child pornography often downloaded from visiting
11 websites like CNN?

12 A. Oh, of course not. That was just an example.

13 Q. Is child pornography often downloaded through the use
14 of file-sharing software?

15 A. Yes, it is.

16 Q. And that would be the same type of file-sharing
17 software --

18 THE COURT REPORTER: I'm sorry. Can you slow down?

19 MR. NAUGHTON: Absolutely.

20 BY MR. NAUGHTON:

21 Q. And that would be the same type of file-sharing
22 software that was found on the computer in this case. Is
23 that accurate?

24 A. That's correct.

1 Q. If you see search terms or terminology used to
2 describe files in that file-sharing software, would that be
3 consistent with possession of child pornography on that hard
4 drive?

5 A. Yes. If those were search terms that somebody typed
6 in, absolutely.

7 Q. In your report, you also talk about you would want to
8 conduct an examination to locate, review, test, and
9 understand viruses, Trojans, and malware that might be
10 present?

11 A. Correct.

12 Q. Do you have any indication that there were viruses on
13 this particular hard drive?

14 A. I would have no way of knowing. Sergeant Carry
15 didn't mention anything about running a virus scan, so I have
16 no idea.

17 Q. Do you have any indication to believe that Trojans
18 might have been present on this hard drive?

19 A. Again, just the fact that he had file-sharing
20 software on the computer, I am sure there are viruses and
21 Trojans, because you almost can't have file-sharing without
22 having some sort of malware. It's a very, very dangerous
23 software. So I would assume there are. But, again, I
24 haven't seen any mention that anybody even looked for it.

1 Q. And that's not based on any of the actual reports or
2 evidence in this case. Just, in general, file-sharing
3 software typically comes with malware, in your opinion?

4 A. That's based on thousands of exams and me testing.
5 I've been testing and validating and researching file-sharing
6 software for years and years and years. And, yes, it comes
7 with malware.

8 Q. Do you find it every single time that you find
9 file-sharing software?

10 A. Almost every time there's viruses associated with
11 file-sharing, yes.

12 Q. But, again, you can't say whether or not there
13 actually was any malware, Trojans, or viruses on this
14 particular hard drive?

15 A. Correct. I have no idea.

16 Q. Do you have any reason to believe that viruses,
17 Trojans, or malware were responsible for the presence of
18 child pornography on this computer?

19 A. I would have no idea without analyzing it.

20 Q. In your report, you go on to talk about the
21 maintenance or the preservation of evidence. And you
22 indicate that, "All original evidence should be placed in an
23 evidence locker and maintained pursuant to local rules and
24 statutes."

1 A. Correct.

2 Q. Are you familiar with what the local rules and
3 statutes are in Washoe County governing preservation of hard
4 drives?

5 A. I have no idea.

6 Q. You also indicate that "Typical" -- excuse me --
7 "Typically, original evidence and/or forensic images are
8 maintained years after a matter has concluded, due to appeal
9 and other litigated issues."

10 A. Correct.

11 Q. And is that based upon statutes and local rules, as
12 well?

13 A. It's based upon my experience. Again, I work on
14 cases all over the world, so we have evidence from
15 everywhere. And everybody has different statutes and rules.
16 And we've maintained evidence for years on many cases all
17 over the world.

18 Q. Are you aware of any statute or rule in Washoe County
19 that would require the maintenance or preservation of this
20 evidence?

21 THE COURT: She already says she doesn't know.

22 THE WITNESS: I have no idea.

23 BY MR. NAUGHTON:

24 Q. Would you agree with me that child pornography is

1 qualitatively different from many other types of evidence?

2 A. Qualitatively different? I'm not sure I understand
3 what you're asking.

4 Q. Let me rephrase my question.

5 Is child pornography contraband?

6 A. Yes.

7 Q. It's illegal just by virtue of its existence. Is
8 that fair?

9 A. Correct. We have to have a protective order just to
10 maintain it in our lab. That's correct.

11 Q. So, in other words, in a shooting case, for instance,
12 a gun might be evidence.

13 A. Yes.

14 Q. A gun is not necessarily contraband?

15 A. I don't know if they consider that a contraband, but
16 I've heard the term. I don't work with guns. But it's not
17 illegal contraband, if that's what you're talking about.

18 Q. In other words, it's illegal to possess child
19 pornography, under most circumstances.

20 A. Correct.

21 Q. Outside of specific litigation-related issues in
22 these sorts of cases.

23 A. To knowingly possess it, correct.

24 Q. Are there reasons why you might not want to maintain

1 child pornography on a server or a hard drive?

2 A. I mean, if you already have it as evidence, you're
3 already in -- either you have a protective order or you're
4 law enforcement. And law enforcement doesn't need a
5 protective order. So it's just sitting in an evidence
6 locker. It's not plugged in or being shared. It's just
7 evidence sitting on a shelf.

8 Q. Aside from the standard experience that you have with
9 maintaining this, is there any reason that you would need or
10 want to maintain child pornography evidence after a
11 conviction has been secured?

12 A. Sure. We have lots of cases that we maintain it,
13 because people appeal, and there's all kinds of different
14 motions that they file afterwards. So, yeah, we have lots of
15 evidence that -- and we work on lots of cases after
16 convictions.

17 Q. Is there any rule that you're aware of in Nevada or
18 in the Ninth Circuit that would require preservation of child
19 pornography evidence by the State?

20 A. Again, I'm not aware of any Nevada rules or statutes
21 or any of that.

22 Q. In your report, you wrote, "However, according to the
23 State" -- and this is on page 6, at paragraph 16 -- "However,
24 according to the State, all of the original evidence seized

1 and all of the forensic images acquired by Sergeant Carry no
2 longer exist, and, therefore, an independent examination by
3 the defense is not possible."

4 A. Correct.

5 Q. Is it fair to say an independent examination is not
6 possible at this time?

7 A. That's what -- right. Correct. I can't conduct an
8 independent exam, me, personally, because there is no
9 evidence.

10 Q. Is it possible a defense examination could have been
11 produced earlier?

12 A. Of course.

13 Q. Are you aware whether a defense examination was done
14 in this case?

15 A. Not until I heard you in court this morning, or heard
16 Miss Noble in court this morning.

17 Q. Are you aware of an individual named Leon Mare?

18 A. I am not.

19 Q. Last name: M-a-r-e.

20 A. I am not.

21 Q. You don't know him to be a defense expert in this
22 area?

23 A. I don't.

24 Q. If another defense expert had previously examined

1 this child pornography evidence, would you have any reason to
2 conduct another defense examination at a later date?

3 A. Well, if he had --

4 THE COURT: Excuse me one second.

5 Are you okay?

6 THE COURT REPORTER: I just need a cough drop.

7 THE COURT: All right. Please proceed.

8 THE WITNESS: I mean, sure, I would still want to do
9 an exam, unless I saw a detailed report, again, with the
10 forensic evidence. So if he had -- if he had his own
11 conclusions, and he provided a report, with the forensic
12 evidence showing "These are my conclusions, and this is the
13 forensic evidence I used," then I may not need to do an
14 independent exam. But I would need to see that forensic
15 evidence.

16 Q. If he had concluded that Sergeant Carry's analysis
17 was accurate, would that be important in informing your
18 opinion at this point?

19 A. No. I've seen experts agree. I don't know anything
20 about him or his background, or how good he is, or what his
21 work is like, so that wouldn't end it for me, no.

22 Q. Is it possible that it might, depending on his
23 qualifications and the things he looked at?

24 A. Again, if I saw the forensic evidence that -- where

1 his conclusions came from, then I might be satisfied. But
2 without the forensic evidence, I would not be satisfied.

3 Q. Ultimately, your conclusion that you cannot perform
4 an independent examination at this point in time, is that
5 another way of saying you don't know what you would find on
6 this computer if you were to analyze it today?

7 A. Correct. I have no idea. Obviously, I have a pretty
8 good idea of what Sergeant Carry says is on there.

9 Q. But you can't say whether you would have confirmed or
10 been able to rebut the findings of Sergeant Carry. Is that
11 accurate?

12 A. That's correct.

13 Q. Okay. It's possible that Sergeant Carry's findings
14 are accurate?

15 A. It's possible, sure.

16 Q. On page 7 of your report, you indicate that, "The
17 defense cannot be provided with an adequate defense at this
18 point in time." Is that accurate?

19 A. Yes.

20 Q. And are you aware of any adequate defense that exists
21 in this case, based upon the analysis that you were able to
22 perform?

23 A. Well, I haven't performed an analysis, so I have no
24 idea what the defense is. Again, if I get into the computer,

1 and see that all this stuff is attributed to Mike, that would
2 be an adequate defense. But I have no idea.

3 Q. So it's possible that an adequate defense does not
4 exist at this point in time?

5 A. That is very possible.

6 Q. Do you find an adequate defense in every case that
7 you are retained upon?

8 A. No.

9 Q. Mr. Reed asked you about Sergeant Carry's findings of
10 encryption software on the computer. Do you recall that?

11 A. Yes.

12 Q. Can you describe, generally, what encryption software
13 is?

14 A. Encryption essentially hides data so you can --
15 there's a bunch of different types of encryption, different
16 tools you can use. You can encrypt at the root level of a
17 hard drive. You can encrypt a folder. You can encrypt a
18 partition. It's just essentially creating a container that's
19 locked down and hidden, that stores some sort of data.

20 Q. Do you come across these locked containers in your
21 line of work?

22 A. Yes.

23 Q. And what, generally, are put into these locked
24 containers?

1 A. It could be everything. It could be an entire
2 computer. And certainly some people put child pornography in
3 encryption. Some people use encryption because they're
4 paranoid. Some people use encryption for all kinds of
5 reasons, all kinds of stuff in there.

6 I will tell you all of our hard drives that we carry
7 around with us are encrypted. There's nothing nefarious in
8 there. Every removable storage drive that we carry is
9 encrypted.

10 Q. Is that to protect it?

11 A. Absolutely. Because if I lose it on a plane, I don't
12 want somebody opening up my hard drive and seeing everything
13 that's in it. So encryption is used for a lot of different
14 reasons.

15 Q. Do most people, in your experience, who possess child
16 pornography want it to be easily findable or accessible on
17 their hard drives?

18 A. Lots of people have incredibly accessible child
19 pornography on their hard drives.

20 To be honest, in most of my cases, I guess that's why
21 they catch them, is because they're not encrypted, and
22 they're not hidden, and they're just right out in the open.

23 Q. Does encryption typically indicate some desire to try
24 and hide or protect something on a hard drive?

1 A. Yes.

2 Q. And do you know what was trying to be hidden or
3 protected in this particular case?

4 A. I don't even know that there was encryption. I
5 haven't seen anything to show me that a volume was encrypted.
6 Encryption, again, can be misaccurately represented. So I
7 don't know that what he is seeing was encrypted because I
8 didn't see any forensic evidence showing me, oh, that's a
9 true crypt pattern.

10 Q. Along those same lines, you don't know what Sergeant
11 Carry found on this computer, so you're taking his word for
12 it. Is that accurate?

13 A. Correct.

14 Q. So these user names on that computer, you don't
15 necessarily know that those were all various users' names on
16 that computer?

17 A. Again, that's what he put in his report.

18 Q. And, in fact, when you use user names, is there any
19 requirement that you even put your actual name on these
20 computers?

21 A. No.

22 Q. And is it possible that you could input a totally
23 different name and still have access to that user profile?

24 A. Absolutely.

1 Q. In your opinion, if Mr. Skinner had told his attorney
2 that he had intentionally accessed child pornography, would
3 that change the degree to which you question Sergeant Carry's
4 findings?

5 A. No. I've had so many cases where the client has said
6 one thing, and their digital data told me another; including
7 I have had people admit that they were guilty, and I found
8 out that they were covering for somebody in their family. So
9 I don't take statements. I analyze digital data. That tells
10 me what happened.

11 Q. Are you aware of any other users of the computer or
12 hard drive at issue in this case?

13 A. I'm not.

14 Q. In this case, you indicated that you saw file names
15 at a certain point in your review of Sergeant Carry's
16 analysis. Is that accurate?

17 A. Yes.

18 Q. And are those descriptions of the images generally
19 consistent with child pornography?

20 A. Those file names appear to be child pornography, yes.

21 Q. And are those consistent with the descriptions that
22 were present in the charging documents in this case?

23 A. I honestly don't know.

24 Q. Are you familiar with the search term "PTHC"?

1 A. Yes.

2 Q. And can you describe what that means?

3 A. It's pre-teen hard-core.

4 Q. Is that consistent with the descriptions of the file
5 names that you saw Sergeant Carry related in his report?

6 A. I believe that those terms were in there.

7 Q. And is that consistent with the descriptions that
8 were provided in the charging document in this case, as well?

9 A. Again, I'm not familiar with the descriptions in the
10 charging document.

11 Q. If the search terms that Sergeant Carry provided
12 generally matched up with the file names that were also at
13 one point located somewhere on this computer, would that
14 indicate to you that it was more likely the child pornography
15 actually existed on this computer?

16 A. I don't doubt the child pornography exists on the
17 computer. I don't know that those are search terms. Again,
18 just looking at the list, I don't think they are, because
19 there's a lot of terms in there that people just wouldn't
20 search. I think they're terms that the tool pulled out of
21 those file names. But I have no doubt that there's child
22 pornography on the computer. That's not the issue.

23 Q. If the search terms appear to match the file names
24 that were eventually located on that computer, would that

1 generally indicate an intent to locate and procure child
2 pornography images?

3 A. Yes. If there was a search term put into the
4 file-sharing, and somebody downloaded a file with that term
5 in it, then, yes, that would be knowledge of them knowingly
6 having child pornography, yes.

7 MR. NAUGHTON: Court's indulgence, Your Honor.

8 THE COURT: Sure.

9 MR. NAUGHTON: No further questions.

10 Thank you.

11 THE COURT: Mr. Reed.

12 Excuse me one second before you continue with the
13 examination.

14 Please proceed.

15 MR. REED: I just have one follow-up question,
16 actually, on redirect.

17 Your Honor, if I may approach the witness.

18 THE COURT: You may.

19 REDIRECT EXAMINATION

20 BY MR. REED:

21 Q. I want to show you. This is the March 18th, 2014,
22 you know, report. And does that refresh your memory as to
23 whether you saw that report?

24 A. No. If this is the same one he showed me. And,

1 again, this information looks like another report I saw, but
2 I don't know that I saw this page. But, again, I'm going on
3 memory. I don't have my file in front of me.

4 This doesn't look familiar to me. But this page
5 does. It's possible maybe I'm missing a page. Because I
6 did -- I've seen this, this list of search terms. But I
7 thought these were all in the November report. I think
8 that's where I'm getting confused.

9 Q. Let me point out to you. I've highlighted just a
10 couple of headings here on the last page of the report.

11 Does that refresh your memory at all as to whether
12 you saw that report?

13 A. Well, again, I have seen this page.

14 Q. You saw that --

15 A. I have seen this page.

16 Q. Okay.

17 A. That's what I'm saying. I've seen this page. I've
18 seen this page. And this page. I've seen this page. But I
19 thought all of these were from the November report. Maybe
20 it's the November report I don't have. I'd have to see them
21 together. Because I don't recall this page. But that -- I
22 don't know if this was missing, or if this was from another
23 report. That's where I'm having trouble.

24 THE COURT: The record should reflect the witness was

1 going through different pages of the document that Mr. Reed
2 handed to her. "This page and this page," it won't
3 transcribe well. But the Court understands the point the
4 witness was trying to make here.

5 MR. REED: That's all the questions I have, Your
6 Honor.

7 THE COURT: Thank you.
8 Anything else on re-cross?

9 MR. NAUGHTON: Just briefly, Your Honor.

10 THE COURT: Go right ahead.

11 RECROSS-EXAMINATION

12 BY MR. NAUGHTON:

13 Q. Miss Loehrs, if you had reviewed the March 18th, 2014
14 report before, is that something you would have included in
15 your report or declaration?

16 A. Yes. I believe I did. I don't know if I included
17 the date. I think the date is what's throwing me off. I
18 don't know the difference between the November report and the
19 March report. If I could see both reports next to each
20 other, then I would know what I saw. I think that's part of
21 my problem.

22 Q. Would reviewing your report refresh your recollection
23 as to whether you, in fact, reviewed the March 18th report?

24 A. You mean, my declaration?

1 Q. Yes.

2 A. Do I put a date in there?

3 MR. NAUGHTON: May I approach, Your Honor?

4 THE COURT: You may.

5 BY MR. NAUGHTON:

6 Q. Miss Loehrs, do you recognize that document that I've
7 just handed you?

8 A. Yes. This is my declaration.

9 Q. If I could draw your attention specifically to
10 paragraph 5.

11 A. So, yes. I say, "A report narrative prepared by
12 Sergeant Dennis Carry on November 1st, 2013." But that March
13 report appears to be in the same report.

14 Q. If you had reviewed the March report, would that have
15 appeared in your declaration?

16 A. If that date had been on there, yes, it would have
17 been. So I think something happened with the pages that I
18 got. Because those -- again, to be clear, pages like from
19 page 3 to the end of the March report I recognize as what I
20 have as the November report.

21 Q. There was additional information in that March
22 report, based on your short review there, that did not appear
23 to be in that November report, however?

24 A. The first page, the cover page, and the second page,

1 I don't recognize.

2 Q. Thank you.

3 A. The rest of it appears to be the November report I
4 received.

5 Q. Thank you.

6 MR. NAUGHTON: I have no further questions, Your
7 Honor.

8 THE COURT: All right. Anything else, Mr. Reed?

9 MR. REED: Nothing, Your Honor.

10 THE COURT: Miss Loehrs, the Court thanks and excuses
11 you. You may step down.

12 And can we -- she's not here under subpoena. She's
13 here to be called by the petitioner. Is there any reason the
14 Court should ask her to remain?

15 The defense doesn't have a forensic digital expert in
16 this case, so, for this hearing's purpose, I think we can
17 excuse Ms. Loehrs to go about her business.

18 MR. REED: Let me just confer with her just for a
19 second.

20 THE COURT: Okay.

21 MR. REED: That's fine, Your Honor. She may watch
22 some of the testimony in the afternoon, but --

23 THE COURT: Well, are we invoking the rule of
24 exclusion here?

1 MR. NAUGHTON: Yes, Your Honor.

2 THE COURT: So if you plan to -- here are your
3 options. If you may call her again in rebuttal, then she's
4 going to have to wait outside. If you want to use her as a
5 resource to confer with during recesses or from time to time,
6 then she will not be testifying again, and she can remain in
7 the courtroom.

8 You don't have to make that decision now. You can
9 let us know when we resume here at approximately 10 minutes
10 after 1:00.

11 So the Court will be in recess.

12 I'm anticipating that Mr. Skinner will be testifying
13 after lunch; is that correct?

14 MR. REED: Yes.

15 THE COURT: All right. Now, Mr. Skinner, because of
16 your medical condition, you needn't attempt to come up here
17 at the witness stand to testify. The Court will allow you,
18 if you would, if it's acceptable to all counsel, to move your
19 wheelchair out a little bit closer in front of the -- where
20 the jury box is, and I'll allow your counsel to question you
21 from his area, and you can testify seated there. And then
22 I'll allow cross-examination the same way. If you
23 collaborate while I'm off the bench on a better approach, I'm
24 certainly willing to do whatever it is that works out best

1 for everybody.

2 So, with that, we'll be in recess until 1:10.

3 The rule of exclusion is in place. The petitioner
4 counsel will let the Court know whether their expert will be
5 in the courtroom to consult, or remain outside as somebody
6 possibly subject to be re-called on rebuttal, or otherwise
7 free to go.

8 The Court will be in recess for about an hour.

9 (Recess.)

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1 RENO, NEVADA, TUESDAY, SEPTEMBER 26, 2019, 1:15 P.M.
2 THE COURT: Thank you.
3 Please be seated.
4 Okay. We're back on the record.
5 Mr. Reed, please call Mr. Skinner.
6 MR. REED: Yes. Thank you, Your Honor.
7 (Witness sworn.)
8 THE COURT: All right. Thank you.
9 Please proceed.
10 RODERICK STEPHEN SKINNER,
11 called as a witness on behalf of the Petitioner,
12 first having been duly sworn,
13 was examined and testified as follows:
14 DIRECT EXAMINATION
15 BY MR. REED:
16 Q. Now, would you please state your full name, and spell
17 your last name for the benefit of the court reporter.
18 A. Roderick Stephen Skinner: S-k-i-double n-e-r.
19 Q. And, Mr. Skinner, where are you originally from?
20 A. Australia.
21 Q. And when did you first arrive in the United States?
22 A. That was January the 8th, 2013.
23 Q. What was the purpose for your trip here?
24 A. I was traveling through to quarantine my dog on the

1 way back to Australia from southeast Asia.

2 Q. Now, what was your occupation in Australia?

3 A. The last one was, I was a state police officer for
4 the Queensland police. And prior to that, I was a police
5 officer for the Australian federal police for two and a half
6 years, before I transferred to the state. And prior to that,
7 after leaving high school, I was a bank teller for one year.

8 Q. Were you injured in the line of duty?

9 A. Yes.

10 Q. And can you describe your injuries?

11 A. My injuries?

12 THE COURT: Well, you lost your legs; is that right?

13 THE WITNESS: Amongst other things, yes, sir.

14 This left leg -- it was a T-intersection, and I was
15 traveling through a green light, and a car came through the
16 red light the other way and picked me up and put me into a
17 telegraph pole and ripped this leg off.

18 This one was still okay for a while, but it was in a
19 hundred pieces, and they couldn't fix it.

20 I also had a ruptured liver, collapsed lungs, broken
21 ribs. Oh, yeah. And all my teeth are false here because
22 they got smashed out.

23 BY MR. REED:

24 Q. Were you riding a motorcycle at the time?

1 A. I was a motorcycle police officer, on duty.

2 Q. Now, I notice both of your legs have been amputated.

3 Do you suffer pain from this double amputation?

4 A. Horrendous. Well, though, it's controlled now
5 with -- mostly controlled, about 90 percent of the time, with
6 medication.

7 Q. Can you describe the pain?

8 A. It's -- the ones I get, mostly electric shocks. It's
9 like as if somebody is administering some sort of brief
10 electric shock. And then there might be a respite of several
11 seconds, maybe even up to 30, 40, 50, and then it -- it
12 varies -- and then the shock will come again. Sometimes I've
13 had it for two days in a row.

14 Q. Like, say, a scale of 1 to 10, 10 being the worst
15 pain, how would you describe it?

16 A. I've had them -- I've had them up to about 8, 8 out
17 of 10. Normally, when they come on, they're 1, 2, or 3 out
18 of 10. And if I'm lucky, they'll go away, or they'll fade
19 off. But if I'm unlucky, they kind of increase, and you just
20 hope that they go away after a couple of hours. But
21 sometimes they have remained on for a long time.

22 But, on average, I would say that I'll get hit with
23 2s, 3s, and 4s, and it might last more than about two hours.
24 And then there's exceptions.

1 Q. If it gets beyond 8, are you still conscious at that
2 point?

3 A. No. If it gets past about 6, it's unbearable. I
4 generally put a towel or something on that, so I don't bite
5 my tongue.

6 Q. And what other medical issues do you have?

7 A. I have Crohn's, the Crohn's disease, which is -- for
8 the information of everyone, it's an intestinal inflammation
9 type of a disease, that I was born with. It's a hereditary
10 disease.

11 And what that does, it gets set off by various
12 things: stress, certain sorts of food. And what that does
13 is, it gives you -- gives me pain in the intestine, usually
14 on this side, down low, as if somebody is squeezing in there
15 really hard. And it's very painful. And sometimes it will
16 block up, in which case it's a medical emergency.

17 Q. And you have had this how long now?

18 A. I've had it -- supposedly, the doctors and everybody
19 have said that it's something I was born with. But I didn't
20 really get any symptoms or any problems until I was about 22,
21 23. And then, from that point forward, it became an
22 increasingly ever-worsening problem.

23 Q. And how old were you when you had your accident?

24 A. 27.

1 Q. And that would have been what year?

2 A. 1988. September 23rd.

3 Q. And you went into jail July 21st, 2013?

4 A. Yes.

5 Q. And then your conviction was about 13 months later;
6 is that right?

7 A. Yes. I thought it was '14. But, yeah.

8 Q. '13 or '14. So that would have been around September
9 of 2014 that you were convicted and went into prison?

10 A. Yes.

11 Q. Now, did you have any other health issues while you
12 were in jail in that period?

13 A. Pretty well constantly. When I first went in there,
14 they didn't give me my medication for the nerve pain -- yeah,
15 nerve pain, that I have in the amputated limbs. It's called
16 amputee phantom limb nerve pain. But there's another name
17 for it: neuropathic nerve pain. And that's the, like,
18 electrical shocks that happen. And you can feel it in the
19 missing parts. For instance, most of the time I get it in my
20 feet or my big toes. And that's an electric shock sensation.
21 It can really be severe sometimes.

22 Q. Do you feel like -- even though you've lost your
23 legs, you feel like you can still feel something in your
24 feet?

1 A. I can still wiggle my toes right now. I can feel
2 everything.

3 Q. Did you ever have any cancer while you were in jail?

4 A. I had a problem with my neck, which is right here, on
5 this side. There was a cyst that developed. And it was
6 because, when I went into jail, my belly wasn't completely
7 healed from -- it had ruptured open. It was like a fistula
8 or something that happened because of the Crohn's disease.
9 And I got MRSA infection in there. And it transferred to a
10 shaving cut or something in my neck, and I got this cyst,
11 which got bigger and bigger, and filled with blood. It was
12 kind of a big lump there, almost nearly the size of a golf
13 ball. And they kept on sucking blood out of it on a regular
14 basis.

15 And this went on for about eight months, until they
16 finally decided they couldn't cure it or do something with it
17 that way, and I went into Saint Mary's Hospital, and they cut
18 it out.

19 Q. Any other health issues while in jail?

20 A. I've got clinical depression for some reason, which
21 I've had since I was about a teenager. And it's never really
22 got any better. But it's controlled by medication most of
23 the time.

24 Q. Anything related to your appendix?

1 A. The first time -- my appendix ruptured in 1985. And
2 it was associated with some Crohn's disease-type situation.
3 And my appendix was removed in Queen Elizabeth, II Hospital
4 in my city. And they treated me for Crohn's problem at that
5 time. My whole belly was cut open, so they could fix all
6 that.

7 And then the second Crohn's -- major Crohn's event
8 occurred in 1988. '88, I think it was. Same sort of thing,
9 the big intestinal rupture thing. And they had to address
10 that medically, because it was giving me -- spilling out, and
11 peritonitis poisoning in the abdominal cavity, things like
12 that. Pretty -- not a medical description, but it was kind
13 of serious.

14 Q. Did anything happen while you were in jail with
15 regard to your appendix?

16 A. Yeah. It was -- it was the 26th of August. Yeah,
17 26th of August. And from the 20th of August, I was --
18 sorry -- I was starting to get Crohn's pain. And they had
19 been treating it. They treated it on the 4th of August,
20 initially. And the 8th of August there was problems because
21 there was some sort of a fissure here, where it was open.
22 And they treated that in early August of 2013 by packing it.
23 And they tended it every day.

24 And then, around about the 15th or 16th of August, it

1 didn't need treating anymore because it was closing up, and
2 they felt they just needed something to keep it clean, to let
3 it fully heal up a bit.

4 But then, four days later, on the 20th of August, I
5 started getting the Crohn's pain on this side again, which is
6 where it comes, in this area here.

7 And I asked them, "I've got to see the doctor. Can I
8 see the doctor about this, because I'm getting the Crohn's
9 pain?"

10 And they already knew the situation that I had with
11 the medical problem. And they said -- there were two regular
12 nurses, Nurse Taylor and Nurse Fister, who used to do the
13 pill call rounds, and I would see them twice a day.

14 And when I saw them twice a day, I would ask them,
15 "Can I see the doctor about this?"

16 And they said, "Put in a kite," which is a medical
17 request form.

18 So I put in the medical request form to be seen by
19 the doctor.

20 And the next day, the pain was still there, but a
21 little bit worse. And I still hadn't seen the doctor. This
22 went on through the 26th of August, so there was about five
23 days there where I had been asking each day, several times a
24 day, to see the doctor because of the Crohn's pain.

1 And I always really worried about it because it
2 wasn't getting better, it was getting worse. And that's a
3 bad sign in the Crohn's. When it gets worse, it's almost
4 like you can predict that it's going to reach a point where
5 there's going to be some emergency intervention needed. And
6 that's actually what happened on the 26th of August, at about
7 5:30 p.m.

8 I was in a cell. The jail was locked down because
9 there was some incident going on somewhere else in the jail.
10 And the two officers who were normally inside the unit,
11 supervising, weren't there. But they did have an officer
12 walking around at one point, doing what they call a cell
13 inspection. And I heard him come in. I heard the door open,
14 and somebody coming in. I looked through the little gap in
15 the door, the glass in the door, and I see a guard starting
16 to come around. So I waited for him to come all the way
17 around.

18 When he got close, I tapped on the window with my
19 fingernail, and said, "I need to see the doctor. I've got
20 this real bad problem."

21 And this was out here like a balloon at that stage,
22 like way out here, and excruciating pain. And he was kind of
23 rude to me, and left.

24 He said something pretty horrible. I don't know if I

1 | should say it.

2 | THE COURT: Well, what did he say?

3 | THE WITNESS: It was an expletive. He said -- he
4 | looked in, and saw me, and he said, "Shut the fuck up." Just
5 | like that.

6 | THE COURT: Okay.

7 | BY MR. REED:

8 | Q. What eventually happened with regard to that issue?

9 | A. So what happened after that, what happened was, I got
10 | left in there. That was about 5:30. I can't really remember
11 | the great details of what went on after that.

12 | But the shift changed over at 7:00 p.m. to a
13 | different set of guards, because that's when they start their
14 | next shift. At some point -- and I really don't know what
15 | point that was -- during the evening, I got taken to the
16 | infirmary. I believe it was maybe even 10:00 or 11:00 p.m.
17 | before I got seen, taken into the infirmary.

18 | And then they made a -- I stayed there for a while,
19 | actually. And then they made some decision to transfer me to
20 | Saint Mary's Hospital. And I eventually had emergency
21 | surgery at 4:00 o'clock in the morning, after they had done
22 | an MRI scan and a few other things.

23 | And they cut out -- I am going with what the report
24 | said, the medical reports -- they cut out a section of the

1 small intestine, which was inflamed, and joined it up again.

2 MR. REED: Your Honor, may I sit down? Because my
3 knee is starting to hurt me.

4 THE COURT: Sure.

5 MR. REED: Thank you.

6 BY MR. REED:

7 Q. I want to ask you, with regard to your phantom nerve
8 pain, did the jail adequately treat that?

9 A. No. It was a constant problem. They had me on my
10 regular medication, which at the time was 300 milligrams of
11 Neurontin, twice a day, which is a specific medication for
12 that problem, which used to control it 90 percent of the
13 time.

14 But oftentimes I would turn up for the pill call,
15 morning or afternoon, and they would say things like, "We ran
16 out, and it might be in tomorrow." And sometimes it wasn't
17 in for a couple of days. And then it would be in, and then
18 it wouldn't be in. And it was constantly interrupted
19 medication regime because a lot of the time they just said,
20 "We don't have it."

21 Q. Did you ever have any episodes of severe pain during
22 the period of time that you were out of the medication?

23 A. Yeah. All the time. Multiple times. Many times.

24 Q. Do you have any idea how many -- in the 14 months you

1 were in jail, how many times that occurred?

2 A. In 14 months, in a whole year, a hundred times. At
3 least twice a week, I guess. Maybe three times a week, even.
4 It varies. And the intensity of it varies, as well.

5 Q. What about -- other than the incident you described
6 with your Crohn's disease and your stomach blowing up, did
7 they treat your Crohn's disease adequately in the jail?

8 A. They -- I was on such a lot of different drugs, I
9 can't remember all the different names. There was things
10 like Remeron, Vistaril. There was a ton of different pills
11 that they kept on switching me on and off, and try this, try
12 that. But they didn't actually give me anything which was
13 specifically for the Crohn's. I don't remember if they gave
14 me anything which was specifically for Crohn's. It was -- I
15 don't even know what some of those pills did that they gave
16 me.

17 So that's about as much as I can say about that,
18 without looking at the medical records.

19 Q. Now, can you describe the circumstances of your
20 arrest when you were first arrested in July of 2013?

21 A. Okay. It was about 4:00 o'clock in the afternoon.
22 There was a knock on the door. And there was two
23 detectives -- Detective Brown, and another female I don't
24 know -- at the door, and they wanted to talk to me. They

1 said, "Can we come in?"

2 And I said -- and the dog was going crazy. I've got
3 a little Jack Russell dog. He was the reason I came to
4 America: to quarantine him, and then get back to Australia.
5 And he was going crazy.

6 And the next-door neighbors work night shifts, so I
7 said to them, "I'll come outside, and then the dog will stop
8 barking, and I'll talk to you."

9 And they made an allegation. And they said, did I
10 want to come down to the police station?

11 I said, "No, I don't want to. I don't want to come
12 down to the police station. If you've got something to say,
13 tell me here."

14 And then we ended up -- they said, "Well, we have to
15 wait for more information to come in."

16 And we ended up waiting around there, outside the
17 door, just like right outside the door, for another two and a
18 half hours, till about 6:30. And then they received some
19 sort of information on the radio, whatever it was, and then I
20 got to be under arrest, and they took me to the Washoe County
21 Jail.

22 Q. Was there any period of time when you told them that
23 you needed medication, or anything like that?

24 A. It was early on in that, like probably half --

1 probably within a half an hour. I started getting the pangs
2 of the nerve pain. I asked them if I could have my
3 medication from inside.

4 And Detective Brown said, "You're not going back in
5 there."

6 I said, "But I need my medication from inside. I can
7 tell you where it is. It's in the top kitchen drawer. You
8 could get it for me, maybe," you know.

9 And he said, "No," and that was it.

10 So for the rest of the time I didn't get that.

11 And then, when we got to the jail, I didn't get it
12 for another five, six days.

13 Q. Now, after you were arrested and in jail, and Chris
14 Frey was appointed your counsel, did you ever tell him about
15 the problems receiving adequate medical treatment in the
16 jail?

17 A. Constantly. He was -- he was sympathetic, and he was
18 compassionate. And I'm sure he wanted the best situation for
19 me in a medical regard, and otherwise. But nothing really
20 happened with that.

21 I ended up having to ring the consulate, Australian
22 Consulate, about 24 times, begging them for assistance. And
23 each time they would ring the jail, and the medication would
24 resume.

1 But this was over a period of time, at least 24 times
2 I had to ring them, and it was the same story each time,
3 pretty well.

4 Q. Now, when you got to the United States, what, if any,
5 computer equipment did you have with you at the time?

6 A. I had a laptop, which used to travel with me. Mainly
7 for the purpose of having Skype phone, which is an internet
8 phone, so that my daughter in Australia, and other friends in
9 Australia, could contact me, if they wanted to.

10 We're good friends with some lawyers in Australia for
11 15 years or so, and they were really good friends. So there
12 was a lot of various people who would, you know, possibly go,
13 "How's it going?" blah, blah, blah. So I just had the
14 internet phone for that. It's handy to have, you know, some
15 sort of communication while traveling.

16 Q. And did you have any other computer equipment?

17 A. There was a couple of external hard drives that, when
18 I came to America, they had about 450 movies on there, like
19 Hollywood movies.

20 Q. When did you first acquire your laptop?

21 A. That was -- I got it off of eBay in Australia. Wow.
22 The laptop, when I got arrested, was about five or six years
23 old, so whatever that works out to. But I bought it off
24 eBay, for \$1,100, actually, it was. So that was like some

1 sort of trading thing, you can buy goods and stuff like that.

2 Q. Did you ever -- after you got your laptop, did you
3 ever install another hard drive in it?

4 A. Yeah. The first one, when I was in -- when I was in
5 Thailand, the first one was kind of -- it was a 40-gig, so it
6 was pretty small. And it was pretty old, and it wasn't
7 working really very properly. So I went to a shop there,
8 over there, near the hospital, and they upgraded it to a
9 120-gigabyte hard drive. And it kind of worked better after
10 that. And they put extra RAM into it, by the way.

11 Q. And what did you use this computer for, primarily?

12 A. Mostly the internet phone and downloading music. I
13 was -- when I was married, in Vietnam, before we had gone to
14 Thailand, she used to use it for downloading lots of
15 Vietnamese type of songs. Which all sound the same to me,
16 but, you know, that's what she liked. She would download a
17 lot of those. I like Elvis Presley and all the old songs you
18 can't really get hold of anymore, like the '60s- and
19 '50s-type songs. So, you know, you can download that sort of
20 thing, which is not readily available elsewhere.

21 Q. And did you have a file-sharing program on your
22 laptop?

23 A. Yeah. We used the program called Kazaa. It's
24 K-a-zed-a-a.

1 Q. K-a-z-a-a?

2 A. Sorry. Z. We say "zed."

3 Q. What was it used for, primarily?

4 A. The music, download more music. We had thousands of
5 songs. She had, like, a crazy number of songs.

6 Q. Now, was this when you were living in Vietnam, or
7 Australia, or --

8 A. When I was in Vietnam, my Vietnamese wife, she
9 downloaded all the songs.

10 And then I moved to Thailand -- what happened, it was
11 a pretty sad situation. My Vietnamese wife and her mother
12 took the baby away, John.

13 Q. Your baby?

14 Did you have any idea that child pornography may have
15 been on your computer?

16 A. No. No, not at all.

17 Q. What about a file-sharing program for child
18 pornography?

19 A. There was a file-sharing program on there, which was
20 the Kazaa that was for the music.

21 But what I was going to say was, my first -- my
22 Vietnamese wife and her mother took the baby away because it
23 was kind of a cultural thing that the firstborn boy is
24 important. And they didn't -- and they -- and they didn't

1 want him to leave the country.

2 Q. So he's not allowed to leave with you when you left?

3 A. No. But that's what I wanted. I wanted him to be
4 multi-cultural, like two cultures. But they didn't want
5 that.

6 Q. Now, when you sat down with Mr. Frey to talk about
7 the charges in this case, did he go over the elements with
8 you?

9 A. No. No. He said, "You're liable to get 10 life
10 sentences, and you should take a deal; otherwise, you're
11 going to get 10 life sentences." And he just kept on saying
12 that it's better if I took a deal.

13 Q. And he told --

14 A. I didn't want to take a deal.

15 Q. He told you the possible sentences?

16 A. Yeah, he told me the sentences. He said, "This is a
17 life sentence thing. They've charged 10 charges, and you
18 could possibly get 10 life sentences."

19 He said, "You're better off to take a deal and take
20 one, and I'll make sure you get probation."

21 And he said, "This is a probationable charge. And if
22 you plead guilty to one charge, then you'll get probation,
23 and you'll be deported to Australia."

24 Q. It sounds like he almost guaranteed that.

1 A. It was pretty much a done deal. In fact, he
2 organized -- at the time that he said he was doing this,
3 there was two times that ICE came out, which is the
4 immigration people and customs enforcement from here,
5 America. They came out, and they did a comprehensive
6 interview with me on the computer, on their computer. And
7 they were asking me questions, and typing the answers.

8 And the impression I get from this, and from those
9 people who were doing it, the officers, was that this was
10 some sort of a mandatory, routine-type situation in order to
11 facilitate the deportation to Australia.

12 And then, about seven or 10 days later, they came out
13 again, and did the same thing. And then very shortly
14 thereafter it was going to court to accept a guilty plea to
15 one charge. So it was -- that's what happened.

16 Q. Now, when you were arraigned on this charge, what, if
17 anything, did Mr. Frey tell you to say in response to the
18 judge's questions?

19 A. He said, "You have to own this." And that was --
20 that was when we were in the jury room. Actually, that jury
21 room right there. We were in there five minutes before we
22 came in to see Judge Hardy.

23 And he said to me, in that room, "You're going to
24 have to own this. You have to own this." And then, "Agree

1 with everything the judge says, and just don't disagree with
2 anything. Just go along with what is being said in the
3 courtroom, and you'll end up getting probation and going
4 home, and you can get the medical care that you need."

5 That's pretty much word for word.

6 Q. And, so, if you would tell the judge, kind of in a
7 nutshell, why you ended up pleading guilty.

8 A. There was a couple things.

9 One, I even said to the consulate, I said, "I'm not
10 sure I'm going to survive being here. I think I might end up
11 dying here." I was really worried that I was going to die in
12 that jail. I had to get out of there. It was terrible.
13 There was no medical treatment. There was all that pain they
14 were ignoring.

15 And also there was a problem with Sophie, who was two
16 years old at the time. She had been taken by Children's
17 Services. It's my other daughter, from the Vietnamese
18 marriage.

19 And we were already a long time -- many months into
20 Sophie having been taken away by Children's Services. And at
21 the 12-month mark they told me that she automatically gets
22 adopted out. Which was, really, life-threatening to me. I
23 couldn't stand that.

24 So that was one aspect of the reason why we had to

1 stop that from happening somehow. Because it would have been
2 an automatic thing, and they said that she just gets scooped
3 away, and you never see her again.

4 Q. So you at least wanted to get out of that jail to get
5 better medical treatment?

6 A. Medical treatment was a big part of it, too, with
7 that pain. I was constantly under-medicated in there,
8 obviously.

9 And with the Crohn's, the Crohn's thing, sure, they
10 did take me to hospital in the end. If they wouldn't have
11 taken me when they did, I'm sure, like, I only had a couple
12 hours left to live. The doctor spent a really long time
13 getting all the peritonitis out of my belly.

14 Q. Now, you were living in an apartment in Sparks?

15 A. Yes.

16 Q. And who did you rent the apartment from?

17 A. I met -- when I was in Thailand, I met this person
18 called Joe -- Joseph Chiappetto, C-h-i-a-p-p-e-t-t-o -- at
19 the dentist in Thailand, when I was getting my crowns fixed
20 up in the front here. And I got to know him because he was
21 an English-speaker. He used to -- he ran the paddle boat
22 business at the Sparks Marina.

23 He used to go to Thailand for three months of the
24 year, when it was winter over here, when it was really cold,

1 and the business was not working. And he would take that as
2 a holiday, or something like that. And I met him over there
3 in the dentist's. And he got to know my situation.

4 And I've got a little dog, Milo. He's a Jack
5 Russell. He's called Milo. Great little guy. I have had
6 him since a pup. And he has traveled around with me all the
7 time. And I couldn't travel directly back to Australia from
8 Vietnam because it's a rabies country, and Australia has
9 really strict quarantine rules. So I had to spend six months
10 quarantined somewhere, or put him in doggie jail, at \$25 a
11 day, in Australia. Didn't really want him to go in there.

12 So Joe suggested, "Why don't you come to Sparks? You
13 can have a six-month holiday. Quarantine the dog here,
14 because the rules are allowed here. And then you can go
15 straight back to Australia."

16 So that's what I did. He rented an apartment for me,
17 over here in Sparks, and picked me up from the airport, and
18 drove me to the apartment. And we lived in there while we
19 were doing the quarantine thing.

20 Q. Did he have a set of keys to the apartment?

21 A. Yeah. It was his apartment. He rented it in his
22 name. He had a set of keys. Yeah. It was all set up when I
23 got there.

24 Q. Did he ever come into the apartment when you were not

1 there?

2 A. I don't know. He used to come over a lot, pretty
3 well every day. He ran a bookstore here in Sparks, called
4 the Book Gallery. It had hundreds of books in it --
5 thousands of books, and comics. He had this thing about
6 classic comics, Superman, Justice League, all those really
7 good classic ones. The ones that I like, actually. And he
8 had 30,000 of these comics.

9 And he gave me a job to sort them all into subject
10 matter, and put them in boxes, so that he could take them to
11 the bookstore and sell them. Some of these comics sold for
12 \$30 each. So I spent a long time sorting those out for him.

13 And he had -- all these things were stored in the
14 back room, which is like a one-bedroom apartment, so it was
15 all in the bedroom part. And they were all lined up around
16 the wall, this high, with all these boxes of books and comics
17 and stuff.

18 Q. What did Mr. Frey tell you, if anything, about the
19 chances that you would be convicted?

20 A. He didn't really talk about conviction of anything.
21 He was only talking about making a deal. He was just,
22 like, "Deal, deal, deal." And, "You've got to take this
23 deal, and then it will be okay. You'll get probation. It's
24 a first offense. You have no criminal history. And, you

1 know, you're a foreigner. You're not even legally in this
2 country. They'll probation you out, and you'll be deported."

3 He never really went down the track of, "Yeah, we can
4 defend this," or anything like that. But in actual fact, he
5 did talk to someone about a defense forensic report. And he
6 told me that there was a defense forensic report that existed
7 that confirmed what the police said.

8 And I went, "What?"

9 And he goes, "Yeah, yeah."

10 So I asked him for this report. And he never gave it
11 to me, never showed me any report.

12 And my lawyers in Australia, they asked for it, as
13 well.

14 And he said to them in the e-mails, "I can't give you
15 a copy of the report because Mr. Skinner has to authorize
16 it."

17 So I did authorize it. I wrote him a letter.
18 "Please provide my lawyers in Australia with a copy of this
19 defense forensic report, because they want to see what's in
20 it."

21 And he never did.

22 Q. And you thought --

23 A. He never --

24 Q. You thought he had a written report, then?

1 A. Yeah.

2 And he said, "This report confirms what the police
3 are saying, and you're going to have to take a deal for one
4 charge, and then they'll probation you."

5 I never saw the report. I asked him lots of times;
6 on the phone, and in letters, as well.

7 Q. So if I understand your testimony, the main reason
8 you took this deal was, well, number one, to get out of poor
9 medical treatment, get better medical treatment than in the
10 jail; and that you thought certainly that you would get
11 probation?

12 A. Not just to get better medical treatment. I thought
13 I was going to die in there. And I told the consulate
14 exactly that.

15 And yes, sir. The answer to the question is: Yes.

16 Q. You pretty much were -- you felt pretty sure you
17 would get probation?

18 A. Oh, it was -- it was almost an absolute. From the
19 information that I had from what Mr. Frey was saying, he
20 painted it as just that. And I thought: Well, I don't
21 really want to.

22 And even in the colloquy, when the judge asked me
23 directly, "Are you guilty of this offense?" I sort of, like,
24 hung up there, and I didn't -- I couldn't say anything,

1 because I wanted to say "No." But then Frey told me, "Just
2 agree, agree, agree." So there was a lot of pregnant pause
3 of about five or six seconds.

4 And then Mr. Frey jumped up quickly and said, "We
5 plead guilty to the facts and circumstances," or something
6 like that. The factual basis of the charge, Your Honor.

7 And so he kind of spoke over me. I was still in
8 hesitant mode. I didn't really want to do it. And that came
9 out. But that's what happened.

10 MR. REED: That's all the questions I have, Your
11 Honor.

12 THE COURT: Thank you.

13 Are you doing okay for examination from the State, or
14 do you need a break?

15 THE PETITIONER: Yes, sir. No, I'm okay.

16 THE COURT: We're good.

17 Please proceed.

18 MS. NOBLE: Your Honor, because Mr. Skinner is
19 seated, I don't feel comfortable talking over him at the
20 podium. Is it okay if I move my chair and just ask my
21 questions from there?

22 THE COURT: It is. You may.

23 MS. NOBLE: Thank you.

24

1 CROSS-EXAMINATION

2 BY MS. NOBLE:

3 Q. Good afternoon, sir.

4 My name is Jenny Noble. I represent the State.

5 A. Miss Noble.

6 Q. And part of the purpose of my questions today are to
7 understand your claims --

8 A. Okay.

9 Q. -- or the factual allegations underlying them. I'm
10 going to try really hard to arrange my examination sort of
11 temporally, so, starting with the arrest --

12 A. Oh, okay.

13 Q. -- and then negotiation phase, pleading, and --

14 A. What was that?

15 Q. The plea phase.

16 A. Oh, pleading.

17 Q. Arraignment, plea, and sentencing.

18 A. Yes.

19 Q. So trying to kind of keep it in the order in which
20 things happen, because I find that it makes things go a
21 little bit smoother.

22 A. Okay.

23 Q. Okay. Great.

24 So what is your level of education?

1 A. Grade 12. And I did two years of college, with the
2 police.

3 Q. And how long were you a police officer?

4 A. The federal police is two and a half years. And the
5 state police was five and a half years. So that's like eight
6 years, if you combine those two.

7 And I also returned to the Queensland state police,
8 the same state police, as an academy driving instructor, for
9 a two-year contract, after the accident.

10 Q. Okay. So it sounds like about seven years you were
11 in law enforcement.

12 A. Yeah.

13 Q. Prior to your accident?

14 A. Yes. And then the accident happened. And I tried to
15 go back for about 12 months, and it just became too hard,
16 because that was the 12 months where I had -- there was seven
17 operations, in all. So it was a little bit hard to struggle
18 back all the time, even though they really helped me out a
19 lot. They'd come and get me, stuff like that.

20 But then I had about two years of convalescence,
21 recovering from various different operations that they had to
22 do, not just on the legs.

23 And I was pretty well-known, you know. Like very
24 well-known. I was on the national news, and everything like

1 that. So pretty well everybody knew. But the police
2 department, Queensland police really knew about it. And they
3 wanted me to be an instructor for driver training because I
4 had already done the advanced driver training in -- along
5 with my being a Highway Patrol officer.

6 And they said, "You'd be the ideal candidate to
7 inspire the recruits as an instructor." So I did the
8 instructor's course, which only had four students. And two
9 out of the four students didn't pass, but I was one that did
10 pass.

11 And believe it or not, I drove a normal vehicle, with
12 an artificial leg, which is kind of scary, thinking about it
13 in the beginning. But I got very good at it. Mainly because
14 you're doing the same thing over and over again. And it
15 was -- like I said, it was an inspiration to the recruits,
16 because these are all young guys coming in in the first 12
17 months of their training in the actual academy. And our
18 course was three weeks long. And, you know, they said, "We
19 can hardly do this. This guy with no legs can do it." So it
20 kind of inspired them.

21 Q. So you were able to do all of that after your
22 accident in the 1980s?

23 A. It took a while. I had a couple years of break there
24 between the 12 months after the accident, when all these

1 seven operations happened. And there's things like I got
2 skin grafts here that they took to put over the skin that was
3 missing here. And this leg, when it got ripped off, didn't
4 get completely ripped off. It was about this much bone left
5 on the top. And it was giving me so much irritation and
6 infection and stuff, they had to take the whole thing out in
7 another operation. Just things like that. And there was
8 about seven different styles of operation going on in that
9 regard.

10 And then that's when I had the two years' break to,
11 you know, get human again. And then the contract came up,
12 and they proposed this idea that I be an instructor.

13 Q. Okay. So I want to ask you. During the time before
14 your accident that you said you did mostly Highway Patrol
15 type -- what we'd understand as like Nevada Highway Patrol
16 does here; is that right?

17 A. Similar.

18 Q. So traffic enforcement, traffic safety?

19 A. Yeah. Mostly, we used to concentrate on drunk
20 drivers, which we called UALs. But over here it's like DUIs,
21 I think they call it. Drunk drivers, there was a quota, you
22 had to get so many drunk drivers a month. Which wasn't a bad
23 idea, because there was a lot of them out there. That was
24 one of their primary activities. But we'd pick up a lot of

1 | druggies and people like that in the course of doing those
2 | things. It was crazy. Just all sorts of things went on.

3 | Q. So in the context of that, did you ever testify in
4 | court?

5 | A. A couple of times, yeah. I didn't go to court a lot
6 | because, you know, I'd like to think that I was fair in what
7 | I did. And I never -- I didn't get a lot of contested
8 | arrests, you know. In fact, I don't think I've ever had a
9 | contested drunk driver arrest in court. There were --

10 | THE COURT: Excuse me, Mr. Skinner.

11 | Some of the questions that the attorney for the State
12 | of Nevada is going to ask you are really yes-or-no questions.

13 | THE WITNESS: I'm sorry.

14 | THE COURT: If you need to explain your answer to
15 | make sure it's more accurate or fully understood by the
16 | Court, we'll give you the opportunity. And if Mr. Reed
17 | believes that you've been cut off or --

18 | THE WITNESS: Okay.

19 | THE COURT: -- that I should understand better --

20 | THE WITNESS: Sorry.

21 | THE COURT: But if you take these yes-or-no-type
22 | questions and run with them this long, this hearing is going
23 | to last a week.

24 | THE WITNESS: I'm sorry.

1 THE COURT: And probably it would be more than the
2 Court needs to make an informed decision here.

3 THE WITNESS: I understand.

4 THE COURT: Thank you.

5 Please proceed.

6 BY MS. NOBLE:

7 Q. And based on what the judge just said, I'm going to
8 try to keep us on track without interrupting you. If I try
9 to move on to the next question, I'm not trying to be rude,
10 but just to keep us on track. Okay?

11 A. Okay.

12 Q. So in the context of your employment as a police
13 officer, did you receive any training on how to testify in
14 court?

15 A. No. They didn't really train us for that.

16 Q. So after your accident, you were able to travel to
17 Vietnam; correct?

18 A. Yeah. Yes, I mean. That was years later, though.

19 Q. Okay. How many years later?

20 A. Twenty years later.

21 Q. Okay. And you were also able to travel to Thailand;
22 isn't that right?

23 A. After we left Vietnam, I went to Thailand, because I
24 couldn't take the dog back to Australia. I was going to go

1 back through that way.

2 Q. And I wanted to ask you, just while we are talking
3 about Vietnam and Thailand, in reading the pleadings and the
4 papers that you had filed, I had an understanding that Sophie
5 had a mother from Thailand. Is that wrong?

6 A. No. Her mother is Vietnamese. But when I left
7 Vietnam, I knew her mother socially, and she didn't want me
8 to leave Vietnam. I said, "I'm leaving." And she was, like,
9 really emotional about that, and wouldn't let me leave, you
10 know. I was going to go, but I felt so bad about it. So I
11 said, "Look. Maybe we can go -- I can't stay in Vietnam" --
12 sorry, Your Honor.

13 There was reasons I didn't want to stay in Vietnam.

14 Q. Okay.

15 A. And she didn't want me to leave, and she wouldn't
16 take no for an answer, so I said, "Look, let's go to Thailand
17 and think about it, and then I'll go back to Australia."

18 Q. So you and Sophie's mom went from Vietnam to
19 Thailand?

20 A. Yeah. Yeah.

21 Q. And prior to that, the little boy that you testified
22 was taken by your Vietnamese mother, that was a different
23 mother; correct?

24 A. It was a different mother.

1 Q. How did you meet that mother?

2 A. Her? Her name was Lynn. Lynn, you said it like
3 that. When you wander around the streets in Saigon, you meet
4 pretty well everyone that's there.

5 Q. Fair enough.

6 A. Everybody is outside all the time.

7 Q. Okay. So now I want to get to the time of your
8 arrest in 2013.

9 A. Yeah.

10 Q. So you're arrested. And you described being
11 confronted or talked to by police officers outside the
12 apartment you were staying in; correct?

13 A. Correct.

14 Q. And what led the police to come to your door?

15 A. Some mother in the apartment complex had made a
16 complaint that something had happened between me and her
17 daughter, who used to come over and babysit Sophie.

18 Q. And to be more accurate -- and I'm not trying to
19 embarrass you, but the allegations that the child made --

20 A. Yeah.

21 Q. -- and testified to later at the preliminary hearing,
22 was that you had Sophie on your lap, who was two, with your
23 penis exposed, masturbating.

24 A. No.

1 Q. That wasn't the accusation?

2 A. No, that was the accusation. But that didn't happen.

3 Q. But that was what led them to your door; correct?

4 A. Yes.

5 Q. And after that, police got a warrant for -- to search
6 your computer; correct?

7 A. Right.

8 Q. And I know you have issues with the warrant. You
9 don't believe it's sufficient.

10 A. Yeah. That's something that came up, I guess, yeah.

11 Q. And did you discuss any of those sort of Fourth
12 Amendment or search and seizure issues with Mr. Frey?

13 A. Yeah. I think it's one of the grounds, actually.

14 Q. But so you discussed them with your trial attorney,
15 Mr. Frey?

16 A. Yeah.

17 Q. And what did he tell you about whether or not he was
18 going to make any Fourth Amendment challenges?

19 A. He said there was something wrong with the search
20 warrant, and he was going to look into it. And then, about a
21 week later, he totally dropped that idea and kept on going.

22 Q. Did you know why he dropped it?

23 A. It was the probable cause -- the probable cause was
24 the issue that we brought up. And I don't know why he

1 dropped it.

2 Q. Okay. Now I want to talk to you about the original
3 charges. So in that case with the girl and the allegation
4 that you just talked about, that was the open and gross
5 lewdness charge; correct?

6 A. Right.

7 Q. And that went to preliminary hearing?

8 A. It did.

9 Q. And the victims testified; correct?

10 A. Yes.

11 Q. And that was bound over to the District Court?

12 A. Yes. In questionable circumstances, I might say.

13 Q. Okay. And now, in this case, do you remember what
14 the original charges were in the Criminal Complaint in this
15 case that we're here about today?

16 A. I think there were 10 possession and 10 -- what do
17 they call it? -- promotion charges.

18 Q. Okay. So does this sound right? Ten counts of
19 promoting sexual performance of a minor under 14, and then 10
20 possession of visual pornography of a minor?

21 A. Right.

22 Q. And then one count of misuse of encryption software?

23 A. Yes, that would be right.

24 Q. Do you recall, for the 10 counts of promotion of the

1 sexual performance for a minor under 14, do you remember what
2 the possible penalties were?

3 A. I think they were what they call a one-to-six, which
4 means one year to six years.

5 Q. Okay. I think you've got a good memory. So that's
6 the possession of visual pornography. So one to six.

7 A. Yeah, yeah.

8 Q. And then for those promoting sexual performance, the
9 related --

10 A. They were -- I think they were 10 to life.

11 Q. Ten to life. So, all in all, I think, by my count --
12 and I was an English major, so I apologize; my math is bad --
13 but that's 21 charges in that original Complaint.

14 A. Right.

15 Q. Also by my math, that's over a hundred possible years
16 in prison.

17 A. It's a lot.

18 Q. Right. That's a lot.

19 A. Yeah.

20 Q. Now, in your petition, you allege that Mr. Frey
21 failed to investigate your case. What did you ask Mr. Frey
22 to do in terms of investigation that he failed to do?

23 A. What did I ask him to do? I said, "You've got to
24 look into this, because you need to fix this up."

1 Q. Look into what?

2 A. Look into these charges.

3 Q. Okay. Anything else specific about the charges?

4 A. I don't think so.

5 Q. Did you tell Mr. Frey that you didn't commit the
6 crime that you were charged with?

7 A. Right.

8 Q. And what do you say -- or what are you alleging that
9 more investigation would have showed, if he had done more
10 investigation?

11 A. What am I alleging? Oh. I'm just saying that I
12 wasn't right for this; and that, if he could investigate it
13 and fix it up, that's what should be done. But then he moved
14 into this plea bargain mode.

15 Q. And so when you say -- did you say, "I wasn't right
16 for this," or "ripe for this"?

17 A. "Right."

18 Q. "Right."

19 A. That's an Australian saying.

20 Q. Right. I had heard it before. My sister-in-law is
21 from Australia.

22 A. Right: r-i-g-h-t.

23 Q. Now I want to talk to you about those negotiations.
24 Did Mr. Frey ever tell you he was unwilling to go to trial?

1 A. No.

2 Q. In fact, do you remember a trial date was set in this
3 case?

4 A. I don't really remember that, but, probably, yeah.

5 Q. And then you discussed a little bit the conversations
6 you had with Mr. Frey about the expert and his -- that he
7 consulted; right?

8 A. Yes. Yes, yes.

9 Q. And he said that that expert, defense expert,
10 verified the allegations in the police reports about --

11 A. Yeah, he said that.

12 Q. And I'll just finish really quick. About what
13 Sergeant Carry put.

14 A. Right.

15 Q. And did he explain to you how that affected your
16 chances of acquittal?

17 A. No.

18 Q. I'm sorry if I'm asking this question again. Did he
19 tell you he was unwilling to go to trial?

20 A. No. No, he didn't say that.

21 Q. Now, eventually, there was a negotiation struck in
22 this case; right?

23 A. Yes.

24 Q. And that was that you would plead to a single count

1 of promotion of a sexual performance by a minor over the age
2 of 14.

3 A. Yes, that was it.

4 Q. And do you remember what -- I think you probably
5 do -- what the sentencing ranges for that single count are?

6 A. Right. That was what they call a five-to-life. That
7 was the differentiation between what they charged and what
8 they said was a fictitious charge, he called it.

9 Q. So legal fiction charge?

10 A. Right.

11 Q. And that was to allow the charge to put you at
12 exposure for less time, five to life versus 10 to life.

13 A. Yes.

14 Q. As part of those negotiations, the other case, the
15 gross-misdemeanor case, was dropped?

16 A. Yes.

17 Q. And all the other charges.

18 A. I was vehemently defending the gross-misdemeanor one.
19 But it got lumped into this deal thing that went on.

20 Q. So we call that lumping into a deal like a global
21 resolution.

22 A. Okay.

23 Q. Part of the global resolution was to get rid of the
24 gross misdemeanor.

1 A. Right.

2 Q. And then to get rid of 20 of the 21 counts in the
3 Complaint in this case.

4 A. Yes.

5 Q. Now, in your petition, you allege that you couldn't
6 understand the negotiations. Was that because Mr. Frey
7 didn't explain them to you?

8 A. I don't understand what you mean by that question,
9 that I couldn't understand the negotiations.

10 Q. Okay. Let me ask you in another way.

11 A. Okay.

12 Q. Did you understand the negotiations in this case?

13 A. Yeah. My understanding was that there was going to
14 be a plea of guilty to one charge, and then it was a
15 probationable charge, and I would be deported to Australia.

16 Q. And you allege that, I believe, in your petition,
17 that you didn't understand the nature of the elements of the
18 charge.

19 A. That's right. It was some -- I thought it was -- I
20 was thinking along the lines of, it's a possession type of
21 illegal material charge.

22 Q. So, no. So did Mr. Frey ever explain to you the
23 nature of that charge?

24 A. I don't think so, no.

1 Q. Did you ask him --

2 A. I'm going to say no. But if he did, I don't really
3 remember that he ever did. And he didn't make a big point of
4 what I now know to be the elements of the charge. Because
5 ever since I've been in the prison here, I've studied a lot
6 of law, virtually for five years. And back then I didn't
7 know anything about what was going on.

8 Q. Now, when you pleaded guilty, you were provided with
9 a guilty-plea memorandum; right?

10 A. Right.

11 Q. Do you remember that that guilty-plea memorandum said
12 that you understood the negotiations?

13 A. There was a lot -- there was like four or five pages,
14 or something like that. I don't think I really read through
15 it all. It was just a matter of skimming and signing.

16 Q. You didn't read through it all? Would it help you to
17 take a look at the guilty-plea memorandum?

18 A. Sure.

19 Q. Okay. One second here. I have to move all my stuff.
20 I've got it right here. Perfect.

21 MS. NOBLE: Approach the witness, Your Honor?

22 Your Honor, may I approach the witness?

23 THE COURT: Yes. I'm sorry.

24 Go right ahead.

1 MS. NOBLE: That's okay.

2 BY MS. NOBLE:

3 Q. Here you go, sir. Can you turn the pages?

4 A. Yes.

5 Q. Okay. Great.

6 So looking at this guilty-plea memorandum, it's --
7 what? -- several pages. And I want to direct your attention
8 to page 2, paragraph 4.

9 A. Okay.

10 Q. And that says, "I understand the charge against me,
11 and the elements of the offense."

12 A. That's what it says.

13 Q. Okay. And did you read that part before you signed
14 it?

15 A. I think I did read that part, yeah.

16 Q. And it also described the charges; correct?

17 A. Hang on. Is that underneath the part -- underneath
18 the "4"?

19 Q. That's probably line 16 to 24.

20 A. Okay. Hang on. Let me check that.

21 Right. Okay. I did read that.

22 Q. And I'm going to take you to the next page, page 3,
23 paragraph 5. "I understand that I admit the facts which
24 support all of the elements of the offense by pleading

1 guilty." Do you see that part?

2 A. Yeah, I see it.

3 Q. Do you recall reading that?

4 A. I've read that.

5 Q. You've read that. Okay. What about paragraph 6,
6 understanding the consequences of the plea of guilt?

7 A. Yeah. Mr. Frey explained that.

8 Q. He did explain that?

9 A. Yeah. He said it was -- that he was doing a
10 five-to-life, some sort of negotiation, instead of the 10 to
11 life original thing.

12 Q. And it's your understanding that five to life was
13 probationable; right?

14 A. He said it was probationable. He said both of them
15 were, actually, the 10 and the 5.

16 Q. Oh. Okay. Now, did he ever guarantee you were going
17 to get probation?

18 A. He didn't use that word, "guarantee." But he was
19 pretty convincing. And I've got to give him credit. He did
20 put a big effort into that situation of there were hundreds
21 and hundreds and hundreds of pages of his brief trying to
22 organize the probation.

23 Q. I'm going to take you now to page 4. And it's page
24 4, paragraph 12.

1 A. Okay.

2 Q. And that advised you that the Court wasn't bound by
3 the agreement of the parties.

4 A. No, it says that.

5 Q. Sentencing is up to the judge; right?

6 A. Yes.

7 Q. Did you read that part?

8 A. I did read it.

9 Q. Okay. I want to take you to --

10 A. Mr. Frey explained it, too.

11 Q. He did? Okay. Thank you.

12 Page 5, line 8 to 9. "I am satisfied with my
13 counsel's advice and representations leading to the
14 resolution of this case."

15 A. I kind of wasn't really satisfied, but I signed it,
16 anyway.

17 Q. "And I'm aware that, if I am not satisfied with my
18 counsel, I should advise the Court at this time."

19 Did you read that?

20 A. Yeah. And I wasn't satisfied, and I didn't advise
21 the Court.

22 Well, that's not quite true, because I was going to
23 advise the Court, but then -- in that pregnant pause, but
24 then Mr. Frey sort of jumped in and kept it all going. I was

1 really hesitant right at that point.

2 A. Okay.

3 Q. Now, paragraph 15, on that same page, "My plea of
4 guilty is voluntary, not the result of threats, coercion, or
5 leniency."

6 A. That's kind of true. You know, there is a measure of
7 truth in there, a good measure of truth in that. But there
8 were influences which made it kind of not voluntary.

9 Q. I don't have more questions about that, so, if it's
10 okay, I'm going to take that document back from you.

11 A. Thanks. Thank you.

12 Q. Now, I want to talk to you about when you came to
13 court at the arraignment, where you say that Mr. Frey entered
14 the plea for you, and you didn't really plead.

15 A. Right.

16 Q. Okay. So you recall that hearing, it sounds like.

17 A. Absolutely.

18 Q. Okay. And do you recall that, at the time, the judge
19 put you under oath before he asked you the questions?

20 A. Yes.

21 Q. So you swore that your answers would be truthful.

22 A. Yes.

23 Q. Okay. And is it your testimony today that they
24 weren't truthful?

1 A. I guess you could say, like, in a perfect sense, no,
2 they weren't all that truthful, because there was that
3 element of: I didn't really want to. But Mr. Frey had said,
4 "Just go along with the judge."

5 Q. Okay. So you would agree with me that you told the
6 Court or answered the Court that your attorney had accurately
7 stated the negotiations.

8 A. He made a deal. He made this deal. And he said, "We
9 need to go along with this deal. You need to own this."

10 Q. Let me rephrase my question.

11 THE COURT: Hold on, Mr. Skinner.

12 The question is: Do you agree that the judge asked
13 you --

14 HE WITNESS: Oh, the judge.

15 THE COURT: -- if your lawyer had identified what the
16 terms of the negotiations were?

17 THE WITNESS: Oh, yes. I believe that the judge did
18 say that.

19 THE COURT: How did you respond to that question by
20 the judge?

21 THE WITNESS: I said, "Yes, Your Honor."

22 THE COURT: All right. Thank you.

23 BY MS. NOBLE:

24 Q. Okay. Same question with regard to the Court's

1 questioning about no one had forced you to plead guilty
2 today, and it was your decision.

3 A. Yeah. I said, "No, Your Honor," that nobody had
4 forced me.

5 Q. And you recall the prosecutor reading the elements of
6 the offense?

7 A. It kind of went on for a long time. Prosecutor read
8 out a lot of stuff. So I guess it was in that.

9 Q. Okay. And the Court asked you if you had adequate
10 time to consult with your attorney. Do you remember that?

11 A. I had plenty of time to consult with the attorney.

12 Q. Thank you. And do you recall Judge Hardy telling you
13 that the sentencing decision was his, and you had no promise
14 of sentence?

15 A. He did say that.

16 Q. Now, the attorney represented that you accepted the
17 factual basis of the plea; correct?

18 A. That's what Mr. Frey said.

19 Q. Was that without your permission?

20 A. He jumped in over the top and said -- there was no
21 permission or non-permission. It just happened.

22 Q. Did you tell him afterward, "You didn't have my
23 permission to do that"?

24 A. I didn't say that.

1 Q. Did you tell him prior to that hearing, "I'm not
2 pleading guilty today"?

3 A. No. No, I didn't.

4 Q. Thank you. I want to talk to you a little bit about
5 the experience you described in the Washoe County Jail, and
6 the medical duress sort of aspect of the petition you filed.

7 Did you ever file a grievance related to your claims
8 of mistreatment in the Washoe County Jail?

9 A. Well, all that bad mistreatment and everything which
10 led up to the intestinal rupture happened after about 30
11 days. And then, after I had gone to the hospital and come
12 back, I put in a couple of grievances about six months later,
13 about other unrelated things.

14 Q. So you put in grievances, but not about that?

15 A. No.

16 Q. And is it your testimony today that you were not able
17 to enter a knowing, voluntary, and intelligent plea because
18 you were in so much pain with the phantom limb pain and the
19 Crohn's issues you described?

20 A. Yes.

21 Q. Did you tell Mr. Frey that?

22 A. He knew.

23 Q. He knew you were not capable of entering a knowing,
24 voluntary, intelligent plea because you were in so much pain?

1 A. He knew.

2 Q. And he let you plead, anyway. That's your testimony
3 today.

4 A. Yes.

5 Q. Thank you. Now, you sued the Washoe County Jail in
6 Federal Court, didn't you?

7 A. It's still going.

8 Q. Well, the District Court granted summary judgment in
9 your Section 1983 claim -- didn't they? -- in 2018.

10 A. They did. And I appealed to the Ninth Circuit, and
11 the Ninth Circuit panel reversed and vacated that judgment.

12 Q. For further proceedings?

13 A. For further proceedings.

14 Q. And didn't they say in that judgment it didn't appear
15 you had filed any grievances related to your medical
16 problems?

17 A. Yeah. They described it accurately.

18 Q. Now, I want to talk to you about sentencing. And I'm
19 winding down my examination, so if you're getting tired, let
20 me know.

21 A. I'm okay.

22 Q. You had three sentencing hearings; right?

23 A. Yes.

24 THE COURT: Say that again.

1 MS. NOBLE: Three sentencing hearings.

2 THE COURT: Sorry. Thank you.

3 BY MS. NOBLE:

4 Q. It was broken into three parts?

5 A. Yes. The judge kept running out of time.

6 Q. So during one of those sentencing hearings, did you
7 ever tell Chris Frey, "Hey, when you said we stipulated to
8 the factual basis, that was against my will," or, "I don't
9 agree with that, and I want to withdraw my plea"?

10 THE COURT: Or words to that effect.

11 THE WITNESS: Words to that effect? No, I don't
12 think I said anything.

13 BY MS. NOBLE:

14 Q. Did you tell him during the sentencing that you were
15 in too much pain to understand what was going on?

16 A. At what point?

17 Q. During the -- any of the sentencing hearings.

18 A. No.

19 Q. Why not?

20 A. Because sometimes I wasn't in pain.

21 Q. So sometimes you understood things perfectly?

22 A. Yes.

23 Q. Okay. Which parts did you not understand because you
24 were in too much pain?

1 A. It was the colloquy, the very first part, when we
2 went there the first time, before the sentencing.

3 Q. So the plea colloquy.

4 A. Right. That's when the bad times were happening.

5 Q. Okay. Do you remember that Mr. Frey filed a detailed
6 sentencing memorandum on your behalf?

7 A. Yeah. That was on the last day. And I'm not even
8 sure that made it into the record, because it was 600 pages,
9 and Rebecca Druckman, the prosecutor, was objecting to its
10 admission. And I'm not even sure it made it in.

11 Q. Let me try to refresh your memory. And if this
12 sounds wrong, you let me know.

13 There were three sentencing hearings. One of them
14 was continued to give Rebecca a chance to look at that. Does
15 that sound right to you?

16 A. Yeah, it sounds right.

17 Q. So in one of those sentencing hearings Mr. Frey
18 called your friend, Ms. Wellner.

19 A. She's my lawyer in Australia, and family friend.

20 Q. Your lawyer in Australia. And she testified to your
21 good character; isn't that right?

22 A. She did.

23 Q. And the next sentencing hearing, which I believe was
24 the middle one, the beginning in reverse, your daughter,

1 Courtney, who is an adult, testified on your behalf, as well.

2 A. I don't know which one, but, yes, she did. Which
3 hearing it was.

4 Q. Oh, yes. Okay.

5 A. But my daughter did testify, yes, via phone. Yeah,
6 by phone. Mrs. Wellner came over in person. She flew here
7 to testify.

8 Q. I'm sorry. Okay. I misread it. So it was in
9 person?

10 A. Yeah. Mrs. Wellner flew over here to testify. And
11 my daughter, Courtney, was testifying by phone.

12 Q. And Courtney had care of Sophie; isn't that right?

13 A. Yes.

14 Q. Do you recall that, between the second and third
15 sentencing hearings, there was some information that was
16 alleged that perhaps made Mr. Frey's request for probation a
17 bit difficult?

18 A. Yeah. It was something to do with Sophie being
19 examined over there by a doctor.

20 Q. And the examination, in fact, revealed that she had a
21 sexually-transmitted disease at the age of three years old.

22 A. That's what they told me, yeah. Which I couldn't
23 believe. Still don't believe them.

24 Q. You don't believe she has a sexually-transmitted

1 disease?

2 A. No. For the primary reason that Child Services had
3 her over here, and they did examinations on her during the
4 time that they had her, the six or eight months, or whatever
5 it was, and they said, "Everything is fine."

6 Q. Okay.

7 A. They had their own doctor do it over here. And then,
8 when she ended up in Australia, for some reason this --
9 because it's arbitrary reporting over there for such things,
10 then the doctor came up with this thing, and out of the blue,
11 and we --

12 Q. The doctor your daughter took her to; right?

13 A. Right.

14 Q. And were you also aware that there were allegations
15 by the Australian police and by the federal authorities that
16 you had been under investigation since 2008 for sex tourism
17 in Asia?

18 A. I heard about that in the course of all this stuff
19 going on, but I had no idea about that.

20 Q. No idea about that?

21 A. No. No one ever spoke to me about anything like that
22 until I heard it come up in the sentencing thing.

23 Q. Okay. We're almost done. I promise.

24 A. Okay.

1 Q. I want to talk to you a little bit about your
2 allegations against John Petty, your appellate attorney.

3 A. Okay.

4 Q. What issues did you want John Petty to raise that he
5 didn't raise?

6 A. I wrote him letters; several letters, actually. I
7 said that he needed to -- I can't remember what was in the
8 letters. But I said that he needed to present certain
9 grounds that he wasn't presenting.

10 This abuse of discretion ground that he went with,
11 that the judge had abused his discretion in sentencing, was
12 not even an issue, really, that should have been raised on
13 appeal, and other things should have been raised on appeal.
14 And I wrote Mr. Petty a letter saying as much.

15 Q. Do you remember completing a statement for the
16 Division of Parole and Probation prior to being sentenced?

17 A. Yeah.

18 Q. Do you remember writing in that statement that you
19 had betrayed the values of our community?

20 A. Yeah. Mr. Frey told me to write nice things in
21 there.

22 THE COURT: Hold on. Go ahead and finish your
23 answer. What was your response?

24 THE WITNESS: Mr. Frey told me to write things in

1 there that would facilitate the probation.

2 BY MS. NOBLE:

3 Q. Okay. So what did you mean by that?

4 A. Well, it's because these are sort of, like, horrible
5 charges, then that's the kind of thing that I needed to say
6 to demonstrate remorse or repentance, or something like that,
7 so that the judge would understand that I wasn't some
8 callous, horrendous person.

9 Q. So you wrote it, but you didn't mean it because you
10 hadn't done anything wrong, in your mind?

11 A. Yeah, it's true.

12 Q. You wrote, "It is in the spirit of deep regret and
13 shameful dishonor" --

14 A. It is shameful.

15 Q. What is shameful?

16 A. These charges.

17 Q. But not what you did?

18 A. I didn't do anything.

19 Q. Okay. "I am under no delusion that my failing here
20 is a serious breach of the law."

21 You also wrote that, didn't you?

22 A. Right.

23 Q. What did you mean by that?

24 A. That's just how you describe -- if you're a police

1 officer or someone, that's how you think.

2 Q. I'm sorry. I don't understand.

3 A. Okay. The law is the law, and it's supposed to be
4 obeyed. And these charges are alleged that I didn't obey the
5 law, and it's a serious breach, if that's the case, and --

6 Q. So what's the --

7 A. -- that I understand that.

8 Q. Okay. Sorry for interrupting.

9 What's the "failing" you're referencing?

10 A. Not being, like, a model citizen.

11 Q. How are you not a model citizen?

12 A. I got charged with these things.

13 Q. But you're innocent, and so you just wrote that down
14 to try to appease the Court?

15 A. No, not to appease the Court. Because Mr. Frey said,
16 "Write things along the lines which would assist you in
17 getting probation."

18 And I wanted to convey to the Court that I wasn't
19 just some thug in the street, and that I had an understanding
20 of the wrongs and rights of society. And that's kind of how
21 I write things.

22 Q. And so when you wrote about "the betrayal of those I
23 had an absolute obligation to be a better person toward,"
24 what did you mean?

1 A. My family in Vietnam.

2 Q. Okay. And so how had you betrayed them?

3 A. Because I left there. Because I left them, I wanted
4 to leave.

5 Q. But you weren't charged with leaving your family in
6 Vietnam.

7 A. No. But it was a bad thing to do, in hindsight.

8 Q. Why would you write that in your mitigation or your
9 report for the Division? How does that have anything to do
10 with sentencing?

11 A. Well, it does, because I shouldn't have left my child
12 in Vietnam.

13 Q. So you weren't referencing masturbating in front of
14 Sophie?

15 A. No, no. Not at all. No.

16 Q. Do you remember talking to the judge before being
17 sentenced?

18 A. Not really. I don't really remember it.

19 Q. Okay.

20 A. I remember the colloquy part. And then there was all
21 these other things went on. But I'm not sure about talking
22 to the judge after that.

23 Q. So you don't remember, during sentencing hearing,
24 addressing the Court?

1 A. Not really, no.

2 Q. And you don't recall telling Judge Hardy -- quote --
3 "I'm ripe for it"?

4 A. No, no. I didn't say "ripe." They misspelled that.
5 I remember that in the transcript. But that -- once again,
6 that was r-i-g-h-t, not r-i-p-e. As I've come to learn, this
7 means something else in America.

8 Q. What do you mean by, "I'm right for it"?

9 A. I was -- once again, Mr. Frey said, "Go along with
10 everything the judge says." So I just responded as an Aussie
11 will respond and say, "Yeah, I'm right for that."

12 Q. I was wondering. You were talking about -- and I
13 know I'm going back a little bit; I said I wouldn't do
14 that -- but you're talking about the different medications at
15 the jail, you didn't even know what some of them were.

16 A. A whole heap of them, lots of different ones. And
17 they changed it all the time.

18 Q. You've traveled internationally; right?

19 A. Yes.

20 Q. And would you agree that the names of medications in
21 the U.S. are often different than those in Australia?

22 For example, let me give you an example. My
23 sister-in-law, if I have a headache, she will say, "Take a
24 Panadol." She means Tylenol here.

1 A. We say "Panadol."

2 Q. Right. So is it possible that you might have been
3 getting some of the medications that were necessary for your
4 ailments, but you didn't recognize the names of them?

5 A. When you say it like that, it's possible. I can't
6 say what they were, and I don't know what they did. But I do
7 know there was a lot of different ones all the time, and they
8 constantly got switched around a lot. But, sure.

9 Q. Okay.

10 A. For instance, psych meds --

11 Q. There's no pending question right now, sir.

12 A. Okay. Sorry.

13 Q. So how much did you pay for your laptop?

14 A. It was 1,100.

15 Q. And you got --

16 A. Australian.

17 Q. And you used external hard drives to expand storage;
18 right?

19 A. No, not initially. We bought a couple of those in
20 Vietnam, in Saigon, for the music.

21 Q. Wouldn't that be cheaper to do than replacing a hard
22 drive?

23 A. But they go on the outside. They're just like
24 storing things. They're like a storage shed.

1 Q. And I have one more question for you, I think.

2 You talked about Joseph, your friend, who owned -- I
3 think, owned the apartment.

4 A. He's not a friend anymore.

5 Q. Okay. The man that you knew, acquaintance --

6 A. Yeah.

7 Q. -- that owned the apartment in which you were
8 staying --

9 A. Right.

10 Q. -- in America. And did you ever tell Mr. Frey about
11 Joseph?

12 A. Yes.

13 Q. Did you tell Mr. Frey that Joseph accessed your
14 apartment all the time?

15 A. Yes.

16 Q. Unsupervised?

17 A. Yes.

18 MS. NOBLE: Court's indulgence.

19 THE COURT: Sure.

20 MS. NOBLE: I have no further questions for
21 Mr. Skinner.

22 Thank you, sir, for your patience.

23 THE COURT: Thank you.

24 Mr. Reed.

REDIRECT EXAMINATION

BY MR. REED:

Q. Well, Mr. Skinner, why would you sign the guilty-plea memorandum if you were not guilty?

A. Mr. Frey was very adamant that I'd get probation, and he said, "You'll be able to get the medical treatment you need in Australia, once they release you." And I did need medical treatment pretty bad.

Q. So did you feel you had any other choice but to sign the memorandum?

A. It looked like the option was going to possibly save my life. I was worried about not making it while I was in the jail, and I said so to the consulate. And it looked like the best option to do to get a result where I wasn't going to be dying in the jail or suffering any more horrendous pain.

Q. And you did file a lawsuit based on your treatment in the jail?

A. Yes. Over exactly these issues, and more. It was over the intestinal rupture.

MR. REED: That's all the questions I have.

THE COURT: Any re-cross?

MS. NOBLE: No, Your Honor. Thank you.

THE COURT: Thank you, Mr. Skinner. You can go back to the table.

1 The Court is going to be in recess for 15 minutes.

2 If there are additional witnesses that the petitioner
3 would like the Court to hear from, please have them ready.

4 || If not, the Court will hear from the State's witnesses.

5 We will be in recess for about 15 minutes.

6 (Recess.)

7 THE COURT: Thank you.

8 Please be seated.

9 Mr. Reed, will the petitioner have any other
10 witnesses it would like the Court to hear from?

11 I realize you reserve your right to examine any
12 witness called by the State.

13 MR. REED: No, Your Honor, we have no other
14 witnesses.

15 The petitioner rests.

16 THE COURT: You're anticipating taking testimony from
17 Mr. Petty, and also from Mr. Frey, depending on what they
18 say?

19 MR. REED: Am I suspending taking testimony?

20 THE COURT: No. Are you expecting to take testimony
21 from them, as well?

22 MR. REED: No. I didn't call them. They're not our
23 witnesses.

24 THE COURT: Okay. Thank you very much.

1 Have a seat.

2 All right. Then at this time I invite the State to
3 present testimony through its witnesses.

4 MS. NOBLE: Thank you, Your Honor.

5 The State would call John Petty first.

6 THE COURT: Thank you.

7 Let me ask this while we're waiting for Mr. Petty.

8 Can somebody educate the Court? Mr. Reed -- and I
9 don't want to jump to the end here yet -- but what are you
10 asking the Court to do by this hearing?

11 In other words, if you're successful, what does the
12 order look like from Judge Breslow? That your client is
13 allowed to withdraw his guilty plea?

14 MR. REED: Well, we're asking that the charges be
15 dismissed; that the writ issue, the habeas corpus writ issue;
16 and that the charges be dismissed against --

17 THE COURT: In full?

18 MR. REED: -- Mr. Skinner.

19 THE COURT: Because what I thought was being asked
20 for -- and somebody -- I will hear from the State in a
21 moment -- is, the defense says, "Hey, the representation of
22 counsel fell below what is required under Strickland, and it
23 prejudiced the defendant's rights." What I'm getting is,
24 with respect to the guilty plea, he wasn't well enough, he

1 didn't understand his rights, his lawyer didn't make a good
2 enough investigation; so, ergo, he should be allowed to
3 withdraw his guilty plea. In which case, if the Court were
4 to agree with that, the finding would be set aside, and the
5 matter would be set back for trial.

6 Now, understanding that the evidence that the State
7 would intend to use to prove some or all of the charges is
8 not available anymore, the State might have to decide which
9 charges, if any, to continue to pursue.

10 But in the event that I allow the defendant to
11 withdraw his guilty plea, instead of having the charges
12 dismissed, then isn't he just being -- looking down some
13 charges that might have more serious consequences than what
14 he pled to?

15 So think on that for a minute.

16 Ms. Noble, what do you think?

17 MS. NOBLE: Your Honor, respectfully, a
18 post-sentencing withdrawal of guilty plea is not a procedural
19 vehicle or something that can happen in Nevada.

20 If this Court were to grant relief on any of the --
21 on any of the grounds in the petition, the effect of that
22 relief would be that the conviction would be vacated. At
23 that time, I would ask the Court to stay those proceedings,
24 and the State would try to pursue some sort of appellate

1 remedy, assuming we lost. Then that would be the end of it.

2 THE COURT: What does the loss look like? The
3 judgment is thrown out, and there are no further proceedings?

4 MS. NOBLE: No. We start over at square one, with
5 the ability to prosecute Mr. Skinner on all the original
6 charges.

7 THE COURT: All 21 charges, that could lead to, if
8 convicted, and run consecutive to, more than a hundred years
9 in prison?

10 MS. NOBLE: That's correct, Your Honor.

11 THE COURT: That's if the matter is stayed, and then
12 the Nevada Supreme Court were to affirm any decision by this
13 Court to set aside the conviction.

14 MS. NOBLE: Yes, Your Honor; correct.

15 THE COURT: So a win here for the petitioner, success
16 for the petitioner, doesn't necessarily mean this criminal
17 justice matter is over. This is just it gets stayed, if the
18 Court agrees, and then the State has the right to file
19 whatever charges it believes it could prove.

20 MS. NOBLE: That's correct, Your Honor.

21 THE COURT: I just wanted to make sure I understand
22 that. As well, the sentence that was imposed here by Judge
23 Hardy was five to life. And that judgment was entered when?

24 MS. NOBLE: 2014.

1 THE COURT: So five years ago; right?

2 MR. REED: Yes. And we've discussed that issue, I
3 have, with Mr. Skinner.

4 THE COURT: You don't have to disclose the nature of
5 your strategy or your discussions, but I just want to make
6 sure I understand the lay of the land here.

7 The State is -- you both educated the Court that it's
8 not a question of the Court granting the petition, and at
9 some level allowing Mr. Skinner to merely withdraw his guilty
10 plea. Rather, the victory for the petitioner, success for
11 the petitioner, would result in the judgment being set aside,
12 and proceedings stayed or not while appellate review is
13 sought, and then, depending on how the appellate tribunal
14 viewed what I had done, what this department had done, then
15 the State may or may not pursue the original charges.

16 MS. NOBLE: Yes, Your Honor.

17 THE COURT: Do I have that right?

18 MS. NOBLE: That's correct, Your Honor.

19 It's my hunch that the perception is that there would
20 be a spoliation argument to be made at a subsequent trial.
21 And I think probably Mr. Reed and I have different
22 evaluations about how that would go.

23 THE COURT: Would the spoliation be mission-critical
24 on all 21 claims charged?

1 MS. NOBLE: Yes, I believe so.

2 THE COURT: Okay. Just trying to understand what the
3 Court is being asked here in the procedural posture, which is
4 merely informative to the Court, not dispositive, not
5 persuasive in any way. Just wanted to educate the Court on
6 how these types of hearings go, and what the ask is here.

7 So the ask is, petition be granted, judgment be set
8 aside, in which case the State will decide what to do with
9 respect to staying the proceedings pending appellate review.
10 And then, at a later time, depending on how that goes, the
11 State decides to pursue some or all of the charges, or not at
12 all; right?

13 MS. NOBLE: Correct, Your Honor.

14 THE COURT: Is that correct, Mr. Reed, as far as you
15 understand that?

16 MR. REED: Yes, I think so. But I just don't see,
17 with the evidence having been destroyed, how the State could
18 really maintain --

19 THE COURT: Well, that's what Ms. Noble was
20 suggesting here.

21 MR. REED: Right, right.

22 THE COURT: And whether the State could maintain some
23 of the charges, all of the charges, or none of the charges,
24 that's a decision for the State to make at a later time, if

1 and when it got to that point.

2 Okay. All right. Let's re-set ourselves. At this
3 point, then, the Court will invite Mr. Petty to come up, be
4 sworn, and take the witness stand.

5 (Witness sworn.)

6 THE COURT: Mr. Petty, good afternoon.

7 THE WITNESS: Good afternoon, Your Honor.

8 THE COURT: Please make yourself comfortable. Slide
9 in, adjust the microphone, please, so it's near your mouth.
10 And please state your name.

11 THE WITNESS: My name is John Petty.

12 I'm a Chief Deputy with the Washoe County Public
13 Defender's Office. And I've held that position since 1994.

14 THE COURT: Thank you very much.

15 Please proceed.

16 MR. NAUGHTON: Thank you, Your Honor.

17 JOHN PETTY,
18 called as a witness on behalf of the State,
19 first having been duly sworn,
20 was examined and testified as follows:

21 DIRECT EXAMINATION

22 BY MR. NAUGHTON:

23 Q. Mr. Petty, how long have you been licensed as an
24 attorney in the State of Nevada?

1 A. In Nevada, I was licensed in 1980, so almost 40
2 years.

3 And I was licensed in California in 1979.

4 Q. You indicated that you have held the position of
5 Chief Deputy Public Defender since 1994, I believe.

6 A. Yes.

7 Q. Were you previously employed by the Public Defender
8 prior to holding that position?

9 A. I was. Prior to becoming the Appellate Deputy in the
10 Public Defender's Office in 1994, I was a trial deputy in the
11 Public Defender's Office between 1985 and towards the end of
12 1987. And then I -- between 1987 and '94, I was the
13 Discovery Master for this court.

14 Q. All told -- and I don't mean to put you on the spot
15 here -- can you estimate how many years you have in defense
16 practice, overall?

17 A. Well, in defense practice, the majority of my
18 practice has been defense practice. When I started, I spent
19 about two years as a prosecutor at the City, you know, here
20 in Reno. And then I was in private practice, with a mixed
21 practice, including criminal defense. Then I was with the
22 Public Defender's Office as a trial deputy doing trials. And
23 then I was the Discovery Master. And then from '94 to
24 today's date I have been writing appeals for the Public

1 Defender's Office.

2 Q. Over the course of that time since 1994, can you
3 estimate how many appellate briefs you've authored?

4 A. Hundreds. I mean, it's -- I'll say hundreds. It's
5 probably thousands.

6 Q. Has this been your only area of practice since 1994?

7 A. In the Public Defender's Office, in addition to
8 overseeing the Appellate Division, from time to time, between
9 '94 to today's date, I've also, in addition to the work I did
10 as Appellate Deputy, supervised the Juvenile Division;
11 supervised the Family Law Division of our office; helped
12 assist and supervise parole revocation proceedings in the
13 prison system. A little bit of everything. And including
14 over the course of those years doing some co-counseling in
15 trial, trial practices, including capital cases.

16 Q. As the Chief Deputy Public Defender in the Appellate
17 Division, how are cases brought to your attention?

18 A. So, currently, the way a case is brought to my
19 attention is, the trial deputy will inform me, after
20 sentencing, that the client wishes to file an appeal. And
21 they will bring me a -- sort of a memo, with some idea of the
22 issues they think might be fruitful to explore, and a copy of
23 the judgment.

24 And then I take that judgment -- and I need that

1 judgment because of calculating the time to file the notice,
2 because it's a jurisdictional issue. And then I take it from
3 there.

4 Q. Do you recall Mr. Skinner's case?

5 A. I do.

6 Q. Do you recall how that case was brought to your
7 attention?

8 A. Mr. Frey, the trial deputy in that case, indicated to
9 me that Mr. Skinner wished to file an appeal.

10 Q. Did you file that appeal?

11 A. I did.

12 Q. Did you file the necessary documents at the District
13 Court to perfect that appeal?

14 A. I did. And those necessary documents are, the notice
15 of appeal, case appeal statement, request for necessary
16 transcripts. In this case, it was a guilty plea, sentencing
17 appeal, so I filed a request. I know I filed a request for
18 the preparation of the sentencing transcript. Oftentimes,
19 the entry of plea, change of plea transcript is already in
20 the District Court file. And if it's already there, then I
21 have access to it through the District Court.

22 If that transcript is not available, then I'll order
23 the change of plea transcript and the sentencing transcript.

24 So either one of those two ways. But I have both of

1 the transcripts in this case.

2 Q. Do you recall reviewing all of the transcripts in
3 this case?

4 A. I do.

5 Q. Were there any that were unavailable to you?

6 A. There may have been some, initially, and I may have
7 ordered -- I didn't look at my request for transcripts,
8 because I usually file -- or I will file a request for
9 transcripts designating, like, the sentencing transcript. If
10 it were a trial case, I might ask for motion hearing
11 transcripts, status hearing transcripts, depending on what
12 the minutes of the Court's file tell me what took place at
13 those hearings.

14 In this particular case, I don't have an independent
15 recollection of what other motions or what other transcripts
16 might have been out there. But I know that it was a
17 sentencing appeal.

18 Q. Did you review the transcripts that were available to
19 you prior to filing your appellate brief in this case?

20 A. Prior to filing the appellate brief, yes. Because --
21 and I'll tell you why -- because, in addition, in Nevada,
22 when you file your appellate brief, if you're the appellant,
23 you also have to file the -- what, essentially, is the record
24 on appeal, what we call the joint appendix. And that joint

1 appendix will contain copies of the charging document, the
2 guilty-plea memorandum, the change of plea transcript, the
3 sentencing transcript, the judgment, and the notice of
4 appeal.

5 And you need to have those essential documents
6 because there are certain things that you need to put in the
7 very beginning stages of the opening brief to allow the Court
8 to appreciate that it has jurisdiction of the case.

9 Q. Did reviewing those documents inform your strategy on
10 appeal?

11 A. They did, yes.

12 Q. And can you identify what you -- excuse me. Can you
13 describe for us what you identified as the potential issues
14 to pursue on appeal?

15 A. Sure. Pardon me.

16 So this was a sentencing appeal. Because it was a
17 guilty plea, the guilty plea itself, essentially, cuts off
18 any appellate challenges to any pre-trial motion practice
19 that took place and any rulings that may have flown from that
20 practice.

21 When the defendant enters a guilty plea, those
22 pre-trial motions, unless they are reserved for appellate
23 purposes -- and there's a statute that allows you to do that;
24 it's 174.035, Subsection (3) -- unless they're reserved under

1 that statute, then those pre-trial motions are essentially
2 abandoned for appellate purposes.

3 There was no reservation of issues in this case, so
4 the appeal was essentially a sentencing appeal. And on
5 appeal, those types of appeals are reviewed under an abuse of
6 discretion standard of review. So the issue on appeal
7 was: Did the District Court judge -- in this case Judge
8 Hardy -- did Judge Hardy abuse his discretion by imposing a
9 period of incarceration, as opposed to a grant of probation,
10 because Mr. Skinner was eligible for a probationary grant?

11 Q. And is that the only issue that you approached on
12 appeal?

13 A. That was the only issue, was the abuse of discretion
14 issue.

15 Q. Were there any other issues that were brought to your
16 attention that you could --

17 A. No.

18 Q. -- pursue on appeal?

19 A. No. And the transcript didn't admit any.

20 Q. Did you receive any letters from Mr. Skinner during
21 the appellate process in this case?

22 A. I received numerous correspondence from Mr. Skinner.

23 Q. Do you recall, generally, what the requests were in
24 those letters?

1 A. I don't have a specific recollection of specific
2 requests. I know that he was unhappy. He thought that there
3 should be more -- different kinds of issues that should be
4 raised. I think there may have even been an assertion that I
5 should have been raising ineffective assistance of counsel
6 claims. I can't recall, specifically. But the claim of
7 ineffective assistance of counsel cannot be raised on direct
8 appeal.

9 Q. Do you recall him requesting any relief related to
10 the entry of his plea?

11 A. I don't. But you cannot challenge the validity of a
12 guilty plea on direct appeal. That's something that has to
13 be reserved for -- or litigated in post-conviction.

14 Q. Did any of the things that he brought to your
15 attention in those letters highlight any issues that you
16 believed might get traction with the appellate court in
17 Nevada?

18 A. None.

19 Q. Do you recall what the outcome of the appeal was?

20 A. The Supreme Court -- it was either the Supreme
21 Court -- it may have been the Court of Appeals -- affirmed
22 the judgment of Judge Hardy.

23 Q. Do you recall receiving a letter from -- excuse me --
24 an e-mail from an acquaintance of the defendant in Australia?

1 A. I had correspondence with a -- I want to say an
2 attorney from -- a female attorney from Australia, who was
3 both a friend -- I think, represented she was both a friend
4 and an attorney for Mr. Skinner. And we corresponded several
5 times.

6 Q. Did she raise any additional issues with you that you
7 thought you might pursue on appeal?

8 A. She may have. I believe I sent her a copy of the
9 brief. I believe I may have explained to her the limitations
10 of appellate review for sentencing appeals.

11 If there had been something that was brought to my
12 attention that might have traction on appeal, I would have
13 used it. The fact that I didn't suggests there was nothing
14 there.

15 MR. NAUGHTON: Thank you.

16 I have no further questions, Your Honor.

17 THE COURT: Thank you.

18 Mr. Reed.

19 CROSS-EXAMINATION

20 BY MR. REED:

21 Q. Mr. Petty, Mr. Skinner, in his habeas corpus
22 petition, has made a claim that you failed to federalize the
23 claims on direct appeal. Are you familiar with that ground
24 of --

1 A. I read that, yes.

2 Q. What is your response to that?

3 THE COURT: What does that mean to you, first; and,
4 then, what's your response?

5 THE WITNESS: You know, it has a variety of meanings
6 to a variety of practitioners in a broad sense. It means
7 that State practitioners should strive to inject a thorough
8 constitutional claim at any particular stage that they can.
9 At the State trial level, you may have cause to raise Sixth
10 Amendment claims and such, Fifth Amendment claims, Fourth
11 Amendment claims.

12 In this sentencing appeal, I would -- I would be
13 hard-pressed to think what federal claim -- what
14 federalization claim I could make under an abuse of
15 discretion sentencing.

16 There was not a claim that the sentence was
17 unconscionable or was excessive. It was a sentence that was
18 provided for by the statute. The statute wasn't
19 unconstitutional. So there were no constitutional claims to
20 this -- as to the actual sentencing statute.

21 The sentence that was imposed, five to -- a minimum
22 term of five years to a life sentence, is not so excessive as
23 to shock the conscience. So those kind of claims weren't
24 raised.

1 I suspect that in a sentencing appeal where -- in
2 fact, I can think of an appeal that I finished sometime back
3 where there was a consecutive -- there was the imposition of
4 consecutive sentences that gave the defendant, the appellant,
5 a sentence of something like 260 years to life, that we
6 raised an excessiveness claim.

7 THE COURT: That wasn't in play here.

8 THE WITNESS: But that wasn't in play here.

9 So I am saying that that might be something you might
10 think about. But in this case, there would not really be any
11 federalization claim.

12 MR. REED: Thank you.

13 I have no further questions.

14 THE COURT: Anything else?

15 MS. NOBLE: No further questions, Your Honor.

16 THE COURT: Okay. Don't step down just yet. I want
17 to look at this.

18 It was the Court of Appeals, by the way.

19 THE WITNESS: The Court of appeals.

20 THE COURT: Yeah.

21 The Court has no questions of Mr. Petty.

22 Thank you very much. You may step down.

23 THE WITNESS: If I may just make a comment.

24 THE COURT: Sure. I mean, if the parties --

1 THE WITNESS: It's actually a procedural comment.
2 It's talking about why it went to the Court of appeals.

3 Under Rule 17 of the Nevada Rules of Appellate
4 Procedure, sentencing appeals, guilty-plea appeals are
5 presumptively assigned to the Court of Appeals. That's why
6 it went there.

7 THE COURT: Unless the Supreme Court would -- pulls
8 it back up.

9 THE WITNESS: Unless the Supreme Court wants to hold
10 on to it. Otherwise, they push it over.

11 THE COURT: Understood. Thank you for clarifying
12 that.

13 Please step down.

14 THE WITNESS: Thank you.

15 May I be excused?

16 THE COURT: Yes.

17 (Witness excused.)

18 MS. NOBLE: Your Honor, the State has one more
19 witness: Chris Frey. He's outside the courtroom.

20 THE COURT: Please ask Mr. Frey to come in.

21 MS. NOBLE: Yes, Your Honor.

22 (Witness sworn.)

23 THE COURT: Mr. Frey, good afternoon.

24 Make yourself comfortable.

1 THE WITNESS: Thank you.

2 THE COURT: Please slide in, adjust the microphone
3 any way you'd like so it's near your face.

4 Please state your name, and spell your last name.

5 THE WITNESS: Chris Frey: F-r-e-y.

6 THE COURT: Thank you.

7 Please proceed.

8 MS. NOBLE: Thank you, Your Honor.

9 CHRIS FREY,

10 called as a witness on behalf of the State,

11 first having been duly sworn,

12 was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MS. NOBLE:

15 Q. Mr. Frey, what's your occupation?

16 A. I'm a Federal Public Defender at the moment.

17 Q. How long have you been a Federal Public Defender?

18 A. Three years.

19 Q. Before that, where did you work?

20 A. I was with the Washoe County Public Defender's
21 Office.

22 Q. And can I assume you're licensed to practice in the
23 State of Nevada?

24 A. That's correct.

1 Q. And how long were you with the Washoe County Public
2 Defender's Office?

3 A. Just shy of seven years.

4 Q. During the course of your employment with the Washoe
5 County Public Defender's Office, do you have any idea how
6 many folks you defended?

7 A. I'd say hundreds. Maybe more.

8 Q. Did you go to jury trial?

9 A. I did.

10 Q. During that time around 2013 -- we have a car alarm
11 issue; I apologize -- did you happen to represent a Roderick
12 Skinner?

13 A. I did.

14 Q. Do you see Mr. Skinner in the courtroom?

15 A. I do.

16 Q. Could you just briefly describe where he's at, what
17 he's wearing?

18 A. Mr. Skinner is with post-conviction counsel, wearing
19 a blue shirt. He's in a wheelchair.

20 Q. What stage of the representation or the case did you
21 come on?

22 A. Well, the case was really bifurcated between two
23 matters that originated as an open and gross lewdness case
24 that evolved into a child pornography case. I handled both

1 matters. They were in separate case numbers, separate
2 matters, but, obviously, there was an evidentiary overlap in
3 each case.

4 Q. And could you expand on that evidentiary overlap a
5 little bit?

6 A. Yes. So I think there was motion practice to the
7 effect of the State's effort to join the evidence in the open
8 and gross lewdness case. I mean, it didn't involve a contact
9 offense, but it involved an allegation of Mr. Skinner
10 masturbating in front of two young girls that were within the
11 apartment complex, while he had his two-year-old daughter
12 perched on the side of his wheelchair.

13 There was an effort, I think, under NRS 48.045, to
14 bring that evidence into the child pornography trial, should
15 we have proceeded to that trial, for purposes of
16 demonstrating motive, knowledge, intent.

17 Q. Okay. And it was that open and gross lewdness set of
18 facts that led the police to Mr. Skinner's door; correct?

19 A. Yes.

20 Q. And led to seek a search warrant for his computer,
21 ultimately?

22 A. Correct.

23 Q. And did you review the search warrant supporting
24 affidavits?

1 A. Yes.

2 Q. And review the police reports in this case?

3 A. Yes.

4 Q. And in reviewing that information, did you identify
5 any Fourth Amendment issues that you believed would gain
6 traction with the Court?

7 A. I reviewed the affidavits. I reviewed the face of
8 the search warrants. From that review, I didn't glean any
9 information that would lend itself to a meritorious Fourth
10 Amendment challenge, so we declined to pursue any sort of
11 Fourth Amendment litigation.

12 Q. Now, have you filed motions to suppress before?

13 A. Very routinely. Yes.

14 Q. But in this case, you didn't see one?

15 A. No, I did not.

16 Q. Now, the other -- we talked about the open and gross
17 lewdness case. And then the case that we're here about today
18 was the felony case; correct?

19 A. Correct.

20 Q. And that case involved about 21 charges, 20 of them
21 having to do with child pornography. Do you recall that?

22 A. I do.

23 Q. And do you recall about how much time your client was
24 potentially exposed to, if he were convicted on all the

1 charges?

2 A. Worst-case scenario?

3 Q. Yes.

4 A. The possession counts, as I recall, carried between
5 one to six years in prison. The promotion counts carried
6 life sentences, with parole eligibility after 10 years is
7 served.

8 I think at that point in time, you know, he is
9 certainly looking at life exposure, with 10 years fixed,
10 before he could even appear before the Parole Board.

11 Q. And so you don't know what Judge Hardy might have
12 done in terms of running those counts consecutive or
13 concurrent, if it went to trial, and there was a guilty
14 verdict?

15 A. No, not at all. Obviously, I think Judge Hardy at
16 that moment in time was cautious to remind everyone about his
17 sentencing discretion, and so I was, in kind, cautious about
18 reminding my client that sentencing is really up to the
19 discretion of the judge, especially in this courtroom, and
20 so, indeed, if he was convicted at trial, consecutive
21 sentencing could have been a possibility.

22 Q. Now, you've had probably over a hundred clients,
23 hundreds of clients --

24 A. Yes.

1 Q. -- correct? And do you remember this representation
2 for any reason in particular?

3 A. I remember distinctly, for a number of reasons.

4 Q. Why?

5 A. Well, Mr. Skinner is a bilateral amputee. He is a
6 foreign national. I was sympathetic to the fact that he was
7 facing charges abroad. The representation occurred over the
8 course of a number of months, I believe, over the course of a
9 year. I sympathized with his predicament. And it was a case
10 that, quite frankly, I remember very well.

11 Q. What was your relationship like with him? Was it
12 acrimonious? Congenial?

13 A. We had a very good working relationship. Mr. Skinner
14 is one of the most intelligent clients I've ever represented.
15 He was communicative with me. He assisted in my formulation
16 of defense strategy. It was a reciprocal kind of dialogue
17 that I would have with Mr. Skinner. We would communicate
18 frequently about his case.

19 I got to know members of his family, his friends. In
20 particular, the Wellners, both of them were attorneys in
21 Australia; and his daughter, Courtney.

22 I compiled a sentencing memorandum that attached a
23 number of mitigation documents. In the process of gathering
24 those documents for him, I became very familiar with Mr.

1 Skinner and who he was and the trajectory of his life.

2 Q. Did you ever have any concern during your
3 representation, throughout the course of your representation,
4 that Mr. Skinner's medical problems or any kind of pain he
5 was in rendered him unable to understand what you were
6 telling him?

7 A. No.

8 Q. Same question with respect to what the Court might
9 have been telling him at arraignment.

10 A. No.

11 Q. Did you go over the guilty-plea memorandum with him?

12 A. Yes.

13 Q. And did he indicate he understood it?

14 A. Yes.

15 Q. Did you tell him to lie to the judge when he was
16 canvassed during the colloquy?

17 A. Absolutely not.

18 Q. Okay. Now, sorry. I want to backtrack a little bit.
19 A negotiation was ultimately reached in this case; but prior
20 to that, what, if any, investigation did you or your office
21 undertake?

22 A. We had been in touch with Courtney Skinner,
23 obviously. We had interviewed a man by the name of Joseph
24 Chiappetto. We had subpoenaed school records related to the

1 two young girls who had made the initial report that Mr.
2 Skinner was playing adult pornography and masturbating in
3 front of them. We had served subpoenas on the Washoe County
4 Sheriff's Office, I believe, with respect to protocols,
5 practices, as those related to forensic examinations of hard
6 drives.

7 Q. Now, with respect to Mr. Chiappetto, I believe it is,
8 you interviewed him. What, if anything, did you learn from
9 that interview; and how did that affect your strategy in the
10 case?

11 A. I sat down with Mr. Chiappetto in my office building,
12 with my investigator, Ivo Novak. We discussed a number of
13 things that we thought were pertinent to the case.

14 Mr. Chiappetto apparently was a bookstore owner at
15 some point in time, and a resident of Sparks. He, I believe,
16 owned the apartment that Mr. Skinner was living in. And,
17 obviously, he's mentioned throughout the discovery. But that
18 interview didn't impact the way that we defended the case.

19 Q. Did your client ever tell you that Mr. Chiappetto had
20 unrestricted access to his computer, and would go into his
21 apartment all the time, and suggest that perhaps you base a
22 defense around the idea that Mr. Chiappetto was, in fact, the
23 person who had put the pornography on the computer?

24 A. You know, I don't specifically recall that as a

1 defense strategy that we entertained. If we entertained it,
2 it was for a brief moment.

3 You know, Mr. Chiappetto appeared to have been the
4 owner of the apartment. But the forensics from the computer
5 clearly indicated to me, and my assessment would have been
6 that it would have indicated to a jury, that the user of the
7 computer was Roderick Skinner.

8 Q. Let's talk about that forensic information. So you
9 don't have any specific specialty in computer forensics;
10 right, Mr. Frey?

11 A. No, I don't.

12 Q. Did you seek out an expert to look at the reports and
13 data provided by Dennis Carry of the Washoe County Sheriff's
14 Office?

15 A. I did. I contacted Leon Mare, from, I believe,
16 Expert Digital Forensics, in Las Vegas.

17 Q. How did you get Mr. Mare's name?

18 A. You know, I had known about Mr. Mare for quite some
19 time. To the best of my recollection, I believe that he had
20 been an expert on a number of Federal Public Defender child
21 pornography cases. And so my assessment, I think, at that
22 time was, well, he was experienced, and he would be suitable
23 for this particular case.

24 Q. And did you provide Mr. Mare with all the reports you

1 received from the Sheriff's Office?

2 A. Yes.

3 Q. All the spreadsheets?

4 A. There was a series of reports produced by Dennis
5 Carry. All of those were produced, in turn, to Leon Mare.
6 And Leon Mare was cautioned not to formulate a final opinion
7 until he had full discovery with respect to the forensics;
8 and, indeed, had come up to Washoe County over the course of
9 two days and examined the hard drive himself.

10 Q. And that information included in the Sheriff's Office
11 reports included dates and times of alleged access of child
12 pornography; correct?

13 A. Yes. But the reports were cumulative in the sense
14 that they built off of the previous report. And then I think
15 the full picture emerged once the final report was in.

16 Q. And the reports included search terms the law
17 enforcement alleged that your client used?

18 A. Yes. There was evidence of file-sharing software on
19 the computer. There were a number of programs, five or more,
20 I believe. One file-sharing program, I think, was used
21 predominantly, and the search terms gathered from that
22 program were voluminous. All were associated with child
23 pornography.

24 Q. Did you ask him -- this may be duplicative -- did you

1 ask Mr. Mare to do a full analysis of all the information on
2 the computer?

3 A. Yes. So there was a forensic image done at the
4 Washoe County Sheriff's Office. Leon Mare was asked to come
5 to Washoe County, come to the Sheriff's Office, go down to
6 the Sheriff's Office, and perform his own independent
7 examination, in effect, repeating the steps that Dennis Carry
8 went through, and try to replicate the examination, and see
9 if, in fact, he could verify the conclusions and findings in
10 Dennis Carry's report.

11 Q. Was he able to verify that?

12 A. Yes.

13 Q. So did anything that your expert told you suggest
14 that Mr. Carry's report was inaccurate?

15 A. No, not at all. He said that, based upon his review,
16 that he verified that the findings and conclusions of Dennis
17 Carry were corroborated.

18 And when asked to assess the merits of the plea
19 negotiations on the table, he, quite frankly, said that Mr.
20 Skinner should -- quote/unquote -- jump on it.

21 Q. You met with Mr. Reed prior to today; right?

22 A. I did. Well, maybe a year ago Mr. Reed came to my
23 office, and we spoke.

24 Q. Did you share with him that you had consulted an

1 expert with respect to the forensics?

2 A. You know, I can't recall. I believe that I did.

3 It's not a detail that I would withhold for any reason.

4 Q. Okay. And when your expert told you that what the
5 Sheriff's Office alleged in the report was accurate, based on
6 his independent examination, did that surprise you?

7 A. No, it didn't surprise me. No. Part of the due
8 diligence in a case like this, number one, you view the
9 images; which I did, personally, with Mr. Carry.

10 Number two, you have a forensic examiner, such as
11 Mr. Mare, on board to the representations, so that he can
12 make the technical assessments that he did.

13 So with assurances from Mr. Mare, and having
14 personally inspected the pornography myself, I think
15 certainly we did our due diligence with respect to consulting
16 with Mr. Skinner about the merits of a plea deal here.

17 Q. So fair to say none of the information that Mr. Mare
18 provided you would have been exculpatory or help your client?

19 A. No.

20 Q. Was there anything your client told you that was
21 inconsistent with the findings of your expert?

22 A. At moments, I think that Mr. Skinner had trouble
23 accepting some of the findings of Dennis Carry. And, in
24 turn, I would imagine that he would have trouble accepting

1 the findings of our independent expert, as well. So, as a
2 general matter, I think he had trouble coming to terms with
3 those findings and conclusions. But nothing specific.

4 Q. Did he deny accessing child pornography, your client?

5 A. You know, I think he, to my recollection, wavered
6 between denial and acceptance.

7 Q. Could you expand on that a bit, please?

8 A. Yeah. I think, initially, when we were devising a
9 defense strategy, intellectually we were both approaching the
10 case with an eye towards: Well, how can we demonstrate that
11 perhaps there's a deficit of proof on the element of
12 knowledge, to the extent that we're going to run a defense of
13 unknowing possession?

14 I think that our conversation certainly implied that,
15 well, if we're going to prove that up, then Mr. Skinner is
16 going to endorse the idea that he never knew. But once the
17 evidence began to compile, and Dennis Carry began to produce
18 these cumulative reports, and the forensics were corroborated
19 through our own expert, it appeared as if Mr. Skinner was
20 able to process the fact that perhaps there was evidence here
21 sufficient to convict him, and his degree of acceptance of
22 responsibility changed.

23 I'd cite the remarks of Mr. Skinner during
24 sentencing. Those are representative, I think, of his state

1 of mind, once the evidence began to certainly compound.

2 Q. I guess what I'm trying to ask you, Mr. Frey,
3 is: Did he maintain his innocence throughout your
4 representation?

5 A. No. I didn't drag him kicking and screaming to that
6 table right there, and coerce him into a plea, to the extent
7 that's the suggestion from petitioner's counsel.

8 Q. Did he make comments to you suggesting that, to some
9 degree, he knew he was guilty?

10 A. Yes.

11 Q. What did he say?

12 A. Well --

13 THE COURT: Or how did he act?

14 MS. NOBLE: Yes, Your Honor.

15 THE COURT: Because Mr. Frey is trying to answer this
16 question two or three times, and I'm getting the sense it
17 might have been verbal, non-verbal, a combination, or
18 something else.

19 MS. NOBLE: Your Honor, I think also, if I may,
20 especially from the federal public defenders, it's quite
21 uncomfortable for them, with the waiver of attorney-client
22 privilege, and so I think I just -- I know that on the
23 record --

24 THE COURT: For purposes of this hearing, to pursue

1 the relief that's being sought, the waiver has been
2 established, so you can freely speak about the
3 representation, including discussions you had directly with
4 your client.

5 THE WITNESS: Mr. Skinner was completely lucid. He
6 understood the terms and conditions of the plea agreement; he
7 understood the charge; he understood the elements; he
8 understood the facts. I had no qualms about proceeding to an
9 entry of plea with Mr. Skinner endorsing that as the next
10 step in the representation whatsoever. He did not protest.
11 He did not indicate a lack of understanding. He endorsed the
12 plea. He took acceptance of responsibility, so to speak, for
13 the conduct that was memorialized within the guilty-plea
14 memorandum.

15 And there were no tears; there was no hesitation;
16 there was no reluctance; there were no non-verbal cues that
17 indicated that he had second thoughts. It was a joint
18 decision over the course of a number of weeks, I think,
19 consulting about the contents of the guilty-plea memo. I
20 believe I produced it to him weeks in advance. So he had an
21 opportunity to review it.

22 I don't know if he consulted his Australian attorneys
23 in that interval of time. Perhaps he did; perhaps he did
24 not. I have no idea. But he had the document for quite some

1 time, and was familiar with it. So I had zero qualms about
2 proceeding to an entry of plea in the case.

3 BY MS. NOBLE:

4 Q. I want to talk about the arraignment.

5 Let me back up. So it's fair to say that you shared
6 discovery with your client, talked to him about what was in
7 the discovery?

8 A. Yes.

9 Q. Now, did you ever have the expert prepare a report?

10 A. I did not.

11 Q. Why not?

12 A. Because the findings were adverse. And if the
13 findings were adverse, should we have proceeded to trial, and
14 used that expert, it could have been exposed in the discovery
15 process, subjected the expert to damaging impeachment, and
16 would have only, I think, corroborated the State's case,
17 when, obviously, the job of defending a case is to do quite
18 the opposite.

19 Q. So the expert's conclusions, fair to say, informed
20 your strategy?

21 A. Yes. We held off on the entry of plea until the
22 expert had full discovery, had completed his own independent
23 exam, and we got his findings and conclusions.

24 Q. If your client had told you that he was innocent, and

1 he wanted to go to trial, would you have gone to trial?

2 A. Absolutely.

3 Q. If your client told you that the only reason he was
4 pleading guilty was that, although he was innocent, he was
5 worried that he was going to die in the Washoe County Jail?

6 A. Can you repeat that question? I'm sorry.

7 Q. Did your client --

8 THE COURT: Well, you need to finish by
9 saying: Would you have gone to trial, or would you have
10 changed your strategy? It was an incomplete question, so try
11 again, please.

12 BY MS. NOBLE:

13 Q. Mr. Frey, did your client communicate to you in the
14 context of the decision to plead guilty that he was only
15 making that decision because he was afraid he was going to
16 die in the Washoe County Jail, but that he was innocent?

17 A. No.

18 Q. Okay. Thank you. Can you describe your sentencing
19 strategy.

20 A. Develop as much mitigation as possible in support of
21 a request for probation, in addition to the documentary
22 evidence supporting mitigating factors in Mr. Skinner's life.

23 We coordinated for an out-of-country witness to
24 appear in person, Robin Wellner, a character witness, who

1 also acted as something of a fact witness with respect to
2 certain legal matters.

3 We coordinated a phone call for Courtney Skinner to
4 testify from the Wellners' office in, I believe, Brisbane.

5 We compiled a sentencing memorandum, which I think in
6 State practice is not the norm.

7 And I think that the sentencing transcript reveals
8 that we fought our heart out for Mr. Skinner.

9 Q. And, in fact, that sentencing was done over the
10 course of three hearings; correct?

11 A. It was. It was a very lengthy sentencing.

12 Q. Now, between the sentencing hearings, between the
13 settings and, I believe, between the second and the third,
14 did you come across any new information or allegations from
15 Australian law enforcement or the DA's Office that
16 complicated your request for probation, or made it more of a
17 long shot?

18 A. Yes. So I'd been in touch with a number of different
19 agencies: the Australian Consulate in San Francisco, the
20 federal police from Australia, as well as the Queensland
21 police department. We had done a number of things with
22 respect to those agencies in terms of verifying he had no
23 criminal history in Australia.

24 But those same agencies were also put in touch, by

1 me, at the request of the judge, with the Division of Parole
2 and Probation. And upon further investigation, it was
3 discovered that the young daughter of Mr. Skinner, Sophie,
4 was, in effect, repatriated back to the country through Child
5 Protective Services. Upon arrival, she was evaluated by a
6 medical professional and found to have a sexually-transmitted
7 disease, I believe, in her anal region.

8 Q. Do you remember about how old Sophie was at that
9 time?

10 A. I think she was -- she was either two, or just about
11 to turn three. And I think the diagnosis was genital warts.

12 Q. Did you ever promise your client probation?

13 A. Absolutely not.

14 Q. Did you ever suggest that it was almost a hundred
15 percent likely or extraordinarily likely that he would
16 receive it?

17 A. Absolutely not. What I promise my clients is my best
18 efforts. I cannot guarantee a result. The negotiation was
19 crystal-clear from the bindover and the prelim waiver from
20 Justice Court all the way up to the guilty-plea memorandum
21 through the canvass of the Court.

22 Q. So he understood that sentencing was solely up to the
23 judge's discretion?

24 A. Absolutely.

1 MS. NOBLE: Court's indulgence.

2 THE COURT: Okay.

3 MS. NOBLE: I have nothing further.

4 Thank you, Mr. Frey.

5 THE WITNESS: Thank you.

6 THE COURT: Thank you, Ms. Noble.

7 Mr. Reed.

8 CROSS-EXAMINATION

9 BY MR. REED:

10 Q. Mr. Frey, you were aware of Mr. Skinner's serious
11 medical condition, were you not?

12 A. I knew he had two surgeries, I believe, in custody.
13 And he also has symptoms that I think flow from his
14 amputation.

15 Q. And what were those symptoms?

16 A. I think phantom nerve pain, neuralgia. The
17 sentencing memo went into more detail with respect to those
18 symptoms.

19 Q. Were you ever made aware by Mr. Skinner or otherwise
20 of how serious this phantom nerve pain was?

21 A. I think he was medicated as a result. I know that
22 custody was certainly more intense for Mr. Skinner. I was on
23 notice of that because that was one of the arguments in the
24 sentencing memorandum in mitigation. So I think that his

1 physical condition was certainly front and center in the
2 presentation that we advanced for probation.

3 Q. Now, did you actually review Mr. Carry's report,
4 forensic report?

5 A. Yes.

6 Q. And did your expert, Leon Mare, did he -- how
7 thorough a report did he do? Did he just do the same type of
8 review that Mr. Mare had done, which is --

9 THE COURT: Mr. Carry.

10 MR. REED: Pardon me?

11 THE COURT: Did Mr. Mare do the same type of report
12 that Mr. Carry had done? Is that what you're asking?

13 MR. REED: Right.

14 BY MR. REED:

15 Q. Did Mr. Mare do the same kind of report that
16 Mr. Carry had done, which he labeled as either a preview or
17 preliminary examination? Is that your understanding?

18 A. Mr. Mare did not do a report. He did a forensic
19 examination of --

20 Q. I'm sorry. I mean the type of examination that was
21 done by Mr. Mare, was it the same examination that -- the
22 same type of examination that Mr. Carry had done, which
23 Mr. Carry had labeled as either preview or preliminary
24 examination?

1 A. You know, I don't know exactly whether it replicated
2 Dennis Carry's examination, went beyond it, stayed within the
3 scope of it, or supplemented it. But the intent of the
4 examination was to corroborate or disconfirm the findings and
5 conclusions of Detective Carry.

6 Q. Were you aware that Detective Carry in his report
7 stated that additional -- or, "Further analysis of the
8 computer is necessary to locate additional evidence to either
9 clear or incriminate Skinner"? Do you ever recall seeing
10 that?

11 A. That would have been in the preliminary report, which
12 was prior to the final report. I don't know or recall
13 whether or not Detective Carry is referencing the fact that
14 much of the CP content appeared to have been encrypted. But
15 that sounds like a fair entry in that report, yes.

16 Q. I can represent to you that only an initial preview
17 was done, but not a final report. That was the findings of
18 Mr. Carry.

19 MS. NOBLE: Objection. Those facts are not in
20 evidence.

21 THE COURT: Well, the Court has been informed that
22 Sergeant Carry's at least initial view was a preview or
23 preliminary -- I'm not sure what those words were --
24 interchangeable.

1 So the question that Mr. Reed is asking Mr. Frey
2 is: Does Mr. Frey know or recall if the forensic expert,
3 Leon Mare, went beyond the level of review and analysis that
4 Sergeant Carry did?

5 So either he knows he did, he knows he did not, or
6 he's not sure. That's what I'm assuming the response would
7 be.

8 MS. NOBLE: Your Honor, if I may. I think it's not
9 completely clear. I understand that we had the other
10 expert's testimony today. But during her testimony it was
11 also apparent that she perhaps hadn't received all documents.

12 THE COURT: Well, I did review -- I read Sergeant
13 Carry's deposition transcript. Today, in fact. So the Court
14 was informed that Sergeant Carry used a word like
15 "preliminary," "quick view," "initial review," something
16 along those lines. So I appreciate that.

17 So let me ask the witness here if he can
18 differentiate between the level of analysis, the thoroughness
19 of analysis, the completeness of analysis, as between
20 Sergeant Carry, whatever level it was, and what the retained
21 forensic expert did, Mr. Mare. If you know.

22 THE WITNESS: I know that two reports were produced.
23 So, presumably, the first report was a preliminary report,
24 and then there was the final report. We had delayed Mr.

1 Skinner's case on occasion to allow the State to complete its
2 forensic examination.

3 I was not there with Mr. Mare. I did not see him
4 perform the examination. I did not know if it was a mirror
5 image of the examination conducted by Sergeant Carry.

6 THE COURT: Got it. For all -- for our benefit,
7 counsel and Mr. Skinner, the two reports that I'm
8 understanding Mr. Frey to be referring to might have been the
9 November, and then the March. So that's what I take -- what
10 the Court's informed by the witness' testimony.

11 All right. Please continue.

12 BY MR. REED:

13 Q. But do you know whether or not Mr. Mare's forensic
14 analysis was in greater detail than what Mr. Carry did?

15 A. Again, I can't say if it was within the scope, beyond
16 the scope, whether it was the same, different, or otherwise.

17 Q. Did you ever talk with Mr. Skinner about the
18 possibility that, if a more thorough examination were done of
19 the forensic images, that possibly he could even be cleared
20 of the charges?

21 A. I think that was part of the reason why we got the
22 examination in the first place. If Mr. Mare couldn't
23 corroborate the findings of the detective, then certainly we
24 would have had evidence that would have suggested that

1 perhaps the findings were not to be trusted, or lacked
2 credibility.

3 Q. Did you ever give an indication to Mr. Skinner that
4 he was assured to get probation?

5 A. I think I answered that question. It's an absolute
6 no.

7 Q. Are you aware that the evidence in this case has now
8 been destroyed?

9 A. I am aware of that.

10 MR. REED: Court's indulgence.

11 THE COURT: Yes.

12 MR. REED: I think that's all the questions I have,
13 Your Honor.

14 THE COURT: Thank you.

15 Anything further from the State?

16 MS. NOBLE: Yes, Your Honor.

17 THE COURT: Please proceed.

18 REDIRECT EXAMINATION

19 BY MS. NOBLE:

20 Q. Mr. Frey, you testified previously that the Federal
21 Public Defender's Office referred you to Leon Mare as an
22 expert to use in your case; correct?

23 A. I was aware that he had worked on cases for the
24 Federal Public Defender's office, so I can't say that the

1 Federal Public Defender's Office actually referred him
2 directly. But my understanding was, at the time, that he was
3 very well-known in the Las Vegas area, and had been
4 contracted by that office.

5 Q. Did you gather any information or were you aware of
6 his general reputation as a defense expert in this area?

7 A. I had no reason to distrust his qualifications
8 whatsoever.

9 Q. Now, when he gave you an explanation of his findings
10 as to the access of Mr. Skinner of the child pornography, as
11 well as the other portions of Mr. Carry's report regarding
12 images and encryption software, were you satisfied with that
13 explanation?

14 A. Yes. After his independent examination over the
15 course of two days, his access to the material, and his
16 ability to replicate the exam of Dennis Carry, if he did
17 that -- and I assume that he did -- I was completely
18 comfortable that I had a qualified, professional forensic
19 examiner telling me that the findings and conclusions of
20 Dennis Carry were corroborated and supported.

21 MS. NOBLE: Thank you.

22 I have no further questions, Mr. Frey.

23 THE COURT: Thank you.

24 Mr. Reed, anything further?

1 MR. REED: Nothing further.

2 THE COURT: All right. Mr. Frey, thank you very
3 much. You may step down.

4 THE WITNESS: Thank you.

5 (Witness excused.)

6 THE COURT: Does the State have additional witnesses?

7 MS. NOBLE: We do not, Your Honor.

8 THE COURT: Any rebuttal witnesses from the
9 petitioner?

10 MR. REED: No, Your Honor.

11 THE COURT: What we're going to do is take a
12 10-minute recess. I'll let each side gather their thoughts.
13 When I come back, I'll hear argument on what each side
14 believes has occurred here this morning and this afternoon,
15 and what the ask is of the Court.

16 We will be in recess for approximately 10 minutes.

17 (Recess.)

18 THE COURT: Okay. We're back on the record at this
19 time.

20 Mr. Reed, please proceed with argument.

21 MR. REED: Thank you.

22 Your Honor, this case presents an interesting picture
23 in that Mr. Skinner has been precluded from being able to
24 fully present his habeas corpus case because of the

1 destruction of the evidence by the Washoe County Sheriff's
2 Office pending with Sergeant Dennis Carry. This destruction
3 was carried out with a full approval of the District
4 Attorney's Office, as demonstrated by the evidence release
5 submitted into evidence.

6 The testimony of Tami Loehrs has demonstrated that
7 Mr. Skinner's claims of innocence, and that he pled guilty
8 because he was coerced into it because of unbearable pain and
9 the promise of release from jail where he was being
10 under-medicated, are plausible.

11 Mr. Carry only did a preliminary examination of the
12 evidence that he later destroyed. Miss Loehrs has stated a
13 number of matters that could have indicated that Mr. Skinner
14 did not knowingly commit the crime for which he was
15 convicted.

16 Miss Loehrs wanted to review the evidence as part of
17 her testimony today, but was precluded from doing so. His
18 destruction of the evidence before Mr. Skinner's remedies
19 were complete has clearly prejudiced Mr. Skinner, in that he
20 maintains that a full examination of the forensic evidence
21 would have proven that he was not guilty of this crime, which
22 would support his allegations in his petition that he was
23 coerced, and was innocent of the charges. But, alas, since
24 the evidence was destroyed, with the full approval of the

1 State, he's precluded from doing so.

2 The destruction of this evidence is so unusual and
3 damaging that, regardless of the strength or weakness of the
4 petitioner's case, it warrants some kind of relief.

5 Mr. Skinner filed his habeas corpus in a timely
6 manner, within a year of the remittitur of his conviction,
7 and the State should have known not to destroy it, and under
8 the principles of due process, under the Fifth and Fourteenth
9 Amendments, should have some responsibility for this. For
10 the cases I've cited, the bad faith and prejudice as shown,
11 the case has to be dismissed. And in this case, there's
12 nothing that says that these cases would not apply to
13 post-conviction.

14 THE COURT: So, dismissed, with prejudice?
15 Dismissed, never to be filed again? Dismissed, until and
16 unless the State wants to seek to re-file?

17 MR. REED: I think, with a trial case, it would be --
18 the case would have to be dismissed. I think that's the law.
19 With the habeas corpus, since this may be a case of first
20 impression, I would submit that the habeas corpus should be
21 granted. And then I guess you would possibly go back to
22 square one in the case before the entry of the plea.

23 So I submit, clearly, that prejudice has been shown.
24 A foreign hard drive was apparently put into this computer at

1 some point. And Mr. Skinner was under enormous stress from
2 his medical condition. Miss Loehrs testified that, without
3 seeing the evidence, there was no way to make a
4 determination.

5 But there were plenty of instances where --
6 especially where there multiple users over time --
7 potentially, that a particular individual did not know about
8 the child porn. Mr. Skinner has maintained his innocence
9 from day one; that he did not know -- we cited an individual,
10 the owner of the apartment, did have access to his apartment.

11 There's no way to prove it now, clearly. And since
12 there's really no remedy -- further remedy for Mr. Skinner to
13 prove his innocence, I submit that the writ should be issued,
14 and Mr. Skinner's conviction should be overturned, and that
15 would allow him to return to his homeland of Australia,
16 eventually.

17 Thank you.

18 THE COURT: Thank you, Mr. Reed.

19 Mr. Naughton.

20 MR. NAUGHTON: Thank you, Your Honor.

21 THE COURT: You're welcome.

22 MR. NAUGHTON: Your Honor, the State would reiterate
23 many of the arguments that we made in our pre-hearing
24 memorandum that we filed earlier this week.

1 As we expected, the State would submit there has been
2 a failure of proof today, and the legal standards have not
3 been met.

4 Under Strickland, it's a two-prong finding that this
5 Court has to make on the ineffective assistance of counsel
6 claims. And I would submit that neither prong has been met
7 on any of the ineffective assistance of counsel claims.

8 The burden, pursuant to Means, is on the defendant --
9 excuse me -- on the petitioner in this case to prove those
10 claims by a preponderance of the evidence. That has not been
11 done here today.

12 The --

13 THE COURT: Is it the State's position there's been
14 some evidence, but it doesn't rise to the level of a
15 preponderance; or there's been an abject absence of evidence
16 whatsoever?

17 MR. NAUGHTON: I'll get into that, Your Honor.

18 I think on some of the claims there's been a total
19 lack of evidence to support them. And on the other claims,
20 where there was competing testimony between primarily Mr.
21 Skinner and Mr. Frey, that the weight of the evidence, the
22 credibility of the witnesses ought to weigh in favor of
23 denial of the claims.

24 Specifically, when we're talking about the

1 ineffective assistance of counsel claims as they relate to
2 Mr. Frey, we have to weigh the credibility of these
3 witnesses. And I would submit to you that Mr. Frey's
4 testimony is the more credible testimony in this case, and
5 should be given far more weight than the testimony of Mr.
6 Skinner.

7 Mr. Skinner specifically testified today that, when
8 he was sworn in under oath at his arraignment, he understood
9 the questions that were being asked of him, and that he was
10 less than honest about some of those issues.

11 In his written statement attached to the presentence
12 investigation report, he indicated that he was writing things
13 that he believed the Court wanted to hear, and not things
14 that he necessarily agreed with.

15 Ms. Noble asked him a series of questions that
16 purported to be related to his possession of child
17 pornography on his computer in this case. And he said that
18 he was writing those because they were things that he felt
19 that the judge would want to hear, so that they would
20 understand that he wasn't a thug in the streets; that he
21 wasn't a monster; and that he could be trusted on probation.

22 This is somebody who has sworn under oath now and
23 admitted that he has been less than truthful with courts in
24 the past. And when you compare that with Mr. Frey's

1 testimony -- which I would submit is very credible; it was
2 very detailed -- he had very good reasons to recall this
3 case; both because of the unique circumstances presented by
4 Mr. Skinner, both physically and as a result of his
5 nationality; as a result of the length that this
6 representation went on for; and the circumstances of the case
7 itself. He recalled in great detail many of the things that
8 Mr. Skinner suggests resulted in ineffective assistance here.

9 Mr. Skinner, when asked directly, was unable to
10 provide specifics about Mr. Frey's alleged failures to
11 investigate. He couldn't identify anything that he asked Mr.
12 Frey to do that Mr. Frey failed to do.

13 He admits that Mr. Frey put in a big effort on his
14 behalf. He, at several times, added, in response to
15 questions about the guilty-plea memorandum and the plea
16 colloquy, that not only did he read it, not only did he
17 understand it, but that Mr. Frey also went out of his way to
18 explain it to him. And that was supported by Mr. Frey's
19 testimony that he went over this guilty-plea memorandum with
20 Mr. Skinner over the course of weeks leading up to his
21 arraignment.

22 Mr. Skinner acknowledged that he read the portion of
23 the guilty-plea memorandum that specifically instructed him
24 to advise the Court that he was unsatisfied with Mr. Frey's

1 representations, or that he had some concerns, and he says
2 now that he wasn't being completely honest at that point in
3 time.

4 I would submit to Your Honor that the weight of the
5 evidence as it was presented at that point in time, both in
6 the form of Mr. Carry's initial report and final forensic
7 report, as confirmed by the defense expert in this case, Mr.
8 Mare, informed Mr. Skinner's decision to plead guilty.

9 He understood the benefit of the negotiations that he
10 received in this case. He was able to plead away 20 charges
11 in the single case, the possession of child pornography case.
12 He pled away a gross-misdemeanor case with witnesses who
13 would have testified against him at preliminary examination.
14 And he avoided the potential of multiple consecutive life
15 sentences, with 10-year minimums on the bottom end. In
16 exchange for all of that, he got five years.

17 As Mr. Frey related Mr. Mare's comment on that, "He
18 should jump on it." I think that's exactly what Mr. Skinner
19 did in this case, given the weight of that evidence.

20 Notably, Mr. Frey was adamant that he never promised
21 Mr. Skinner that he would get probation. He said that that's
22 not something that he would have done.

23 And Mr. Skinner, when asked specifically, "Did Mr.
24 Frey guarantee you that you would get probation?" he says,

1 "He didn't use that word." When pressed, he said that it
2 wasn't a guarantee, but that it was something that he felt he
3 had a good chance at.

4 And so there was no promises made to Mr. Skinner,
5 there was no overt coercion in this case, there was no undue
6 pressure on Mr. Skinner in this case -- based upon the record
7 that's been related today, the record of the sentencing
8 hearings, the record of the arraignment transcript -- that
9 would suggest that the defendant's plea was -- the
10 petitioner's plea -- excuse me -- was anything other than
11 knowing, voluntary, and intelligent in this case.

12 As it relates to the due-process claim that makes up
13 ground 1 of the supplemental petition, Your Honor brought up
14 the point of the Constitution this morning. And the United
15 States Supreme Court has considered this, the Ninth Circuit
16 has considered this, as it relates to pre-trial preservation
17 of evidence by the State. And specifically relying on the
18 precedent cited by Mr. Reed, which is Arizona versus
19 Youngblood and California v. Trombetta, the Ninth Circuit has
20 held -- this is in United States versus Hernandez, at 109
21 Federal 3d, 1450, a 1997 case -- "The mere failure to
22 preserve evidence which could have been subjected to tests
23 which might have exonerated the defendant does not constitute
24 a due-process violation."

1 And that's pre-trial. We're talking about
2 post-conviction at this point.

3 Mr. Reed, in his memorandum that was filed with the
4 Court, acknowledges that this is an issue of first impression
5 because there's no authority that supports the contention
6 that Trombetta, that Youngblood, that their progeny applies
7 to this type of proceeding.

8 THE COURT: Should it?

9 MR. NAUGHTON: No, Your Honor.

10 THE COURT: Because the Supreme Court Justices -- at
11 least one that I'm remembering -- has reminded this Court
12 that it's a misnomer that the Nevada Supreme Court makes the
13 law. Rather, it's the District Court that makes the law.
14 The Supreme Court just settles the law. So maybe this is the
15 time to make the law, if there's a gap here.

16 MR. NAUGHTON: Your Honor, I would submit to you the
17 argument that the defendant is entitled to due process in the
18 form of preservation of evidence, it's already occurred in
19 this case.

20 The defendant had his opportunity at due process.
21 The defendant was represented by counsel. Counsel had the
22 opportunity to examine the reports that were conducted by
23 Sergeant Carry in this case. The defendant was able to
24 procure an expert, through counsel, to examine those reports;

1 and, in fact, to examine the hard drive itself, which is what
2 Ms. Loehrs' testimony this morning was primarily focused
3 upon. That expert arrived at an adverse conclusion for Mr.
4 Skinner.

5 That was his due process. That's the due process
6 that's discussed in Youngblood; that's the due process that's
7 discussed in Trombetta. There's no violation of the
8 defendant's -- petitioner's due process in this particular
9 case. He's had that opportunity.

10 Due process does not require the State or any other
11 entity to maintain evidence for years, for decades, until
12 time immemorial, for the purposes of the defendant, a
13 petitioner, anybody in post-conviction, to continue to hire
14 experts to try to come up with other alternative explanations
15 that might better suit his theory.

16 Due process was met in this case. He was able to
17 examine the evidence in this case, he was able to challenge
18 the evidence in this case, and it wasn't favorable in this
19 scenario.

20 And, in fact, the description of what occurred in
21 this case where Mr. Frey employed Mr. Mare to conduct an
22 examination, the results of that examination were relayed to
23 him orally, and he elected not to have him compile a report,
24 is exactly what Miss Loehrs said she would do if the findings

1 were adverse in her analysis.

2 Miss Loehrs' testimony essentially stands for the
3 premise that she doesn't know what she would be able to find;
4 that had it been available, she would have conducted an
5 analysis similar to what Sergeant Carry had done, to what
6 Mr. Mare had done, and then made the determination to issue a
7 report, or not, depending on the review at that point in
8 time.

9 Due process does not require that the evidence be
10 maintained so that a multitude of experts can continue to
11 examine it until one of them comes up with a scenario that
12 fits the defense theory.

13 As to ground 2 of the supplemental petition, that was
14 the claim that Mr. Frey had promised the defendant -- the
15 petitioner that he would get probation.

16 THE COURT: We talked about that.

17 MR. NAUGHTON: I think there was a total failing of
18 evidence on that point, as well.

19 All of the evidence in this case, Your Honor, that
20 was put forth today, all of the credible evidence, I think
21 shows that the defendant received -- the petitioner -- excuse
22 me -- it's going to take me a long time to break that habit,
23 I think -- that the petitioner received effective assistance
24 throughout the entire proceedings from Mr. Frey; that Mr.

1 Frey did exactly what Miss Loehrs' opinion suggested should
2 have been done. That a defense expert should have examined
3 this and determined whether or not there was a viable defense
4 here, that was done. It didn't pan out. That was the end of
5 it.

6 The destruction of the evidence here is not unusual.
7 And it was not done with the -- I forget the phrase that Mr.
8 Reed used, but it was not done with the blessing of the
9 District Attorney's Office, for lack of a better term.

10 The District Attorney's Office, the DA's Office,
11 signed an evidence release form that granted the Sheriff's
12 Office permission to destroy the evidence or otherwise
13 dispose of it, pursuant to their departmental regulations.
14 So this wasn't done at the request of the District Attorney's
15 Office. This was done in the ordinary course of business, as
16 described by Mr. Carry in his deposition. There are no
17 regulations, there are no rules, there are no statutes that
18 require the maintenance of this evidence after a conviction.

19 And I believe, as Mr. Carry pointed out, particularly
20 in cases that weren't litigated all the way through a trial,
21 it's not uncommon that these are destroyed on a regular basis
22 after a conviction has been achieved through a plea
23 negotiation. And that's what we have here.

24 The defendant admitted his guilt in the form of that

1 plea negotiation. It was over; it was litigated. He had the
2 opportunity to test the strength of the State's evidence. It
3 did not work out in his favor, and now he has buyer's
4 remorse. That's really what it is. And that's not enough to
5 grant the relief that he seeks today.

6 So the State's position is that the petition and the
7 supplemental petition should both be denied in their
8 entirety.

9 THE COURT: Thank you.

10 Mr. Reed, response.

11 MR. REED: Yes.

12 To say that -- first of all, we're not saying that
13 you have to preserve the evidence for decades, or whatever.
14 We're talking about through the statutory period that Mr.
15 Skinner has to, after his appeal is done, to file a petition
16 for writ of habeas corpus. That's all we're saying. The
17 evidence should at least be maintained through that period.

18 And to say that because way back at the trial the
19 evidence was available to be examined, and all that, so he's
20 had his due process, well, I can't buy that. I mean, he's in
21 his habeas corpus. He has a right to file a habeas corpus.
22 He has a right to review the evidence against him in a habeas
23 corpus. It's a statutorily-approved proceeding in the United
24 States Constitution. And so I think there's been a clear

1 violation of his Fifth and Fourteenth Amendment rights to due
2 process of law.

3 Thank you.

4 THE COURT: Thank you.

5 This matter will stand submitted.

6 I want to compliment both sides for the thorough
7 presentation today, the informative briefing in advance, and
8 the professionalism and respect that all have shown to the
9 Court, including the petitioner himself, Mr. Skinner.

10 So I don't know how this is going to shake out for
11 you. I have to give this more thought, review the law a
12 little more thoroughly, review my notes. But however it
13 shakes out, the Court does recognize the respect for the
14 process that you've shown today. It's much appreciated.

15 We'll be in recess.

16 Thank you very much.

17 (Recess.)

18

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24

1 STATE OF NEVADA)

2 COUNTY OF WASHOE)

3

4 I, ISOLDE ZIHN, a Certified Shorthand Reporter of the
5 Second Judicial District Court of the State of Nevada, in and
6 for the County of Washoe, do hereby certify:

7 That I was present in Department 8 of the
8 above-entitled court on Thursday, September 26, 2019, at the
9 hour of 10:35 a.m. of said day, and took verbatim stenotype
10 notes of the proceedings had upon the matter of RODERICK
11 SKINNER, Petitioner, versus THE STATE OF NEVADA, Respondent,
12 Case No. CR14-0644, and thereafter reduced to writing by
13 means of computer-assisted transcription as herein appears;

14 That the foregoing transcript, consisting of pages 1
15 through 202, all inclusive, contains a full, true and
16 complete transcript of my said stenotype notes, and is a
17 full, true and correct record of the proceedings had at said
18 time and place.

19 Dated at Reno, Nevada, this 8th day of December,
20 2019.

21

22

23

24

/s/ Isolde Zihn
Isolde Zihn, CCR #87

Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2019-12-08 11:03:18.684.

JOHN PETTY, ESQ. - Notification received on 2019-12-08 11:03:18.622.

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CHRISTOPHER FREY, ESQ. - Notification received on 2019-12-08 11:03:18.575.

EDWARD REED, ESQ. - Notification received on 2019-12-08 11:03:18.653.

CHRISTINE BRADY, ESQ. - Notification received on 2019-12-08 11:03:18.637.

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A filing has been submitted to the court RE: CR14-0644

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:

12-08-2019:11:02:17

Clerk Accepted:

12-08-2019:11:02:47

Court:

Second Judicial District Court - State of Nevada

Criminal

Case Title:

STATE VS. RODERICK STEPHEN SKINNER
(D8)

Document(s) Submitted:

Transcript

Filed By:

Isolde Zihn

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CHRISTOPHER FREY, ESQ. - Notification received on 2020-03-18 10:28:32.552.

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A filing has been submitted to the court RE: CR14-0644

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:

03-18-2020:10:25:27

Clerk Accepted:

03-18-2020:10:27:42

Court:

Second Judicial District Court - State of Nevada

Criminal

Case Title:

STATE VS. RODERICK STEPHEN SKINNER
(D8)

Document(s) Submitted:

Ex-Parte Mtn

Filed By:

Edward Torrance Reed

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

RODERICK SKINNER,

Petitioner,

Case No. CR14-0644

vs.

Dept. No. 8

THE STATE OF NEVADA,

Respondent.
_____ /**ORDER DENYING EX-PARTE MOTION FOR PAYMENT OF
TRANSCRIPTS AT PUBLIC EXPENSE**

The Court is in receipt of an *Ex-Parte Motion for Payment of Transcripts at Public Expense* ("Motion"), filed March 18, 2020, by Petitioner RODERICK SKINNER. This being an ex-parte motion, no response appears on the record.

Skinner requests payment for the transcripts of the post-conviction evidentiary hearing held on September 26, 2019. However, the Court has been informed that the court reporter, Isolde Zihn, has already been paid for the transcripts in question.

Therefore, the *Motion* is **DENIED WITHOUT PREJUDICE.**

IT IS SO ORDERED.

DATED this 24 day of March, 2020.



BARRY L. BRESLOW
District Judge

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 24 day of March, 2020, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:


Jennifer Noble, Esq.

John Petty, Esq.

Christopher Frey, Esq.

Edward T. Reed, Esq.

The Division of Parole and Probation



Judicial Assistant

Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2020-03-24 15:16:05.346.
JOHN PETTY, ESQ. - Notification received on 2020-03-24 15:16:04.582.
DIV. OF PAROLE & PROBATION - Notification received on 2020-03-24 15:16:04.551.
CHRISTOPHER FREY, ESQ. - Notification received on 2020-03-24 15:16:04.161.
EDWARD REED, ESQ. - Notification received on 2020-03-24 15:16:05.315.
CHRISTINE BRADY, ESQ. - Notification received on 2020-03-24 15:16:05.284.

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A filing has been submitted to the court RE: CR14-0644

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:

03-24-2020:15:14:45

Clerk Accepted:

03-24-2020:15:15:20

Court:

Second Judicial District Court - State of Nevada

Criminal

Case Title:

STATE VS. RODERICK STEPHEN SKINNER
(D8)

Document(s) Submitted:

Ord Denying

Filed By:

Judicial Asst. CKuhl

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JOHN REESE PETTY, ESQ. for RODERICK
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CHRISTOPHER FREY, ESQ. for RODERICK
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JENNIFER NOBLE, ESQ. - Notification received on 2020-05-07 15:16:03.397.

JOHN PETTY, ESQ. - Notification received on 2020-05-07 15:16:03.287.

DIV. OF PAROLE & PROBATION - Notification received on 2020-05-07 15:16:03.262.

CHRISTOPHER FREY, ESQ. - Notification received on 2020-05-07 15:16:03.235.

EDWARD REED, ESQ. - Notification received on 2020-05-07 15:16:03.372.

CHRISTINE BRADY, ESQ. - Notification received on 2020-05-07 15:16:03.346.

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A filing has been submitted to the court RE: CR14-0644

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:

05-07-2020:15:07:54

Clerk Accepted:

05-07-2020:15:15:30

Court:

Second Judicial District Court - State of Nevada
Criminal

Case Title:

STATE VS. RODERICK STEPHEN SKINNER
(D8)

Document(s) Submitted:

Ex-Parte Mtn

- **Continuation

Filed By:

Edward Torrance Reed

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STEPHEN SKINNER

CHRISTOPHER FREY, ESQ. for RODERICK
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JENNIFER NOBLE, ESQ. - Notification received on 2020-05-18 14:04:27.392.
JOHN PETTY, ESQ. - Notification received on 2020-05-18 14:04:27.315.
DIV. OF PAROLE & PROBATION - Notification received on 2020-05-18 14:04:27.291.
CHRISTOPHER FREY, ESQ. - Notification received on 2020-05-18 14:04:27.267.
EDWARD REED, ESQ. - Notification received on 2020-05-18 14:04:27.364.
CHRISTINE BRADY, ESQ. - Notification received on 2020-05-18 14:04:27.339.

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A filing has been submitted to the court RE: CR14-0644

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:

05-18-2020:13:58:23

Clerk Accepted:

05-18-2020:14:03:45

Court:

Second Judicial District Court - State of Nevada

Criminal

Case Title:

STATE VS. RODERICK STEPHEN SKINNER
(D8)

Document(s) Submitted:

Notice

Filed By:

Krista Meier, Esq.

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NEVADA

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1
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4 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

5
6 IN AND FOR THE COUNTY OF WASHOE

7
8 RODERICK SKINNER,

9 Petitioner,

10 vs.

Case No. CR14-0644

11 THE STATE OF NEVADA,

Dept. No. 8

12 Respondent.
13 -----/

14 **ORDER APPROVING ATTORNEY'S FEES**
15 **(Post Conviction)**

16 Pursuant to the Nevada Supreme Court Order in ADKT 411 and the Second Judicial
17 District Court's Model Plan to address ADKT 411, good cause appearing and in the interests of
18 justice, IT IS HEREBY ORDERED that the recommendations of the Administrator are hereby
19 confirmed, approved and adopted as to the amount of \$5,206.47. This amount may not be the
20 same as the Administrator's recommendation. Counsel is notified that he may request a prove-
21 up hearing for any non-approved amounts before the Chief Judge of the District.

22 Counsel, Edward T. Reed, Esq., shall be reimbursed by the State of Nevada Public
23 Defender's Office attorney fees in the amount of \$5,206.47.

24 DATED this 20th day of May, 2020.

25 
26 **CHIEF DISTRICT JUDGE**

Return Of NEF**Recipients**

JENNIFER NOBLE, ESQ. - Notification received on 2020-05-20 11:30:01.284.

JOHN PETTY, ESQ. - Notification received on 2020-05-20 11:30:01.208.

DIV. OF PAROLE & PROBATION - Notification received on 2020-05-20 11:30:01.184.

CHRISTOPHER FREY, ESQ. - Notification received on 2020-05-20 11:30:01.161.

EDWARD REED, ESQ. - Notification received on 2020-05-20 11:30:01.257.

CHRISTINE BRADY, ESQ. - Notification received on 2020-05-20 11:30:01.232.

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A filing has been submitted to the court RE: CR14-0644

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:

05-20-2020:11:28:56

Clerk Accepted:

05-20-2020:11:29:29

Court:

Second Judicial District Court - State of Nevada

Criminal

Case Title:

STATE VS. RODERICK STEPHEN SKINNER
(D8)

Document(s) Submitted:

Ord Approving

Filed By:

Judicial Asst. BWard

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CHRISTOPHER FREY, ESQ. for RODERICK
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