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3	IN THE SUPREME COURT OF THE STATE OF NEVADA			
4		Electronically Fi Jan 11 2016 11	22 a.m.	
5		Tracie K. Linder Clerk of Suprem		
6	DEVON RAY HOCKEMIER,			
7	Ammallant	CASE NO 60222		
8	Appellant,	CASE NO. 68333		
9	vs.			
10	THE STATE OF NEVADA,			
11 12	Danie and dant			
13	Respondent	•		
14	Appeal From The Fou	rth Judicial District Court		
15	Of The State of Nevada			
16	In And For The County Of Elko			
17	RESPONDENT'S	ANSWERING BRIEF		
18	THE HONORABLE ADAM PAUL LAXALT			
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STATEMENT OF ISSUES

I. Whether the District Court erred by imposing consecutive sentences rather than concurrent sentences.

STATEMENT OF THE CASE

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This is an appeal from a Judgment of Conviction (upon pleas of guilty) of two counts of Lewdness With a Child Under 14 Years of Age, violations of NRS 201.230. Fourth Judicial District Court, the Honorable Nancy Porter, District Judge.

STATEMENT OF THE FACTS

The State does not dispute Hockemier's Statement of Facts, but does need to make the following additions as they are relevant to the State's answer:

The presentence investigation report includes Hockemier's admission to sexually abusing *two* victims. (JA, p.23, 24). It also includes the psychosexual evaluation prepared in this case. (JA, p.27-32).

O.M. was 6 years old when abused by Hockemier and S.B. was 10 years old. (JA, p.23). When interviewed by law enforcement O.M. remembered Hockemier covering O.M.'s mouth so he could not yell. (JA, p.22).

One of the first things covered in the sentencing hearing was Parole and Probation's recommendation of concurrent sentences. The District Court placed this recommendation on the record and confirmed that Hockemier understood this recommendation. (JA, p. 41).

In addition to discussing Parole and Probation's recommendation and hearing defense counsel's argument, the district court also heard from Hockemier, who likewise requested concurrent time. (JA, p.60, 61).

When it came time to make a ruling, the district court began by agreeing with defense counsel's assertion that these types of cases are very difficult. (JA, p.61). It went on to state that it "struggled with" what its decision should be, "for the reasons stated by *both* attorneys." (JA, p.62) (emphasis added).

After ruling that the sentences would run consecutively, the District Court stated, "I am very mindful of the fact that I've just told a 22-year-old he's going to be in prison until he's at least 41 years old. I wish it didn't have to be that way, but it's my judgment that it does." (JA, p.65).

The hearing ended with the District Court expressing hope that Hockemier would follow through with his stated intent to get help while in prison and to, "find some way to make a positive life for [himself] while [he] is there." (JA, p.66).

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<u>ARGUMENT</u>

I. The District Court did not rely on highly suspect or impalpable information when it sentenced Hockemier to two consecutive 10 to life terms of imprisonment. Further, its choosing to not follow the recommendation of Parole and Probation does not evidence an abuse of discretion.

"[T]he trial court has wide discretion in imposing a sentence, and unless there is a showing of abuse of discretion, the sentence will be upheld." Castillo v. State, 110 Nev. 535, 544, 874 P.2d 1252, 1258(1994).(overruled on other grounds by Wood v. State, 110 Nev. 428, 892 P.2d 944(1995)).

A. No Highly Suspect or Impalpable Information Was Relied On.

Hockemier's Brief correctly states that a sentence kept within statutory limits will not be disturbed provided that the district court's decision was not based on "highly suspect or impalpable information."

Smith v. State, 112 Nev. 871, 873 (1996).; Silks v. State, 92 Nev. 91, 94 (1976).

His brief then makes no mention of any highly suspect or impalpable information being relied on.²

Quite to the contrary, the reliable information which served as a basis for the district court's decision included: Hockemier's admission to

¹ Appellant's Opening Brief (AOB),8p. 4.

² AOB, p. 4.

sexually abusing *two* victims;³ the psychosexual evaluation;⁴ the fact that his victims were 6 and 10 years old;⁵ and that during the abuse of the year old, Hockemier placed his hand over the child's mouth to prevent the child from yelling.⁶

B. No Abuse of Discretion

Hockemier's Brief characterizes the district court's decision as "dramatic." Doubling the recommendation by Parole and Probation is, however, much less "dramatic" than quintupling it. In Lloyd v. State, the District Court did just that when it sentenced Lloyd to 30 years rather than the 6 recommended by Parole and Probation. See Lloyd v. State, 94 Nev. 167, 576 P.2d 740(1978). Even this truly "dramatic" decision was found by this court to *not* be an abuse of discretion. Id. This makes sense in light of the fact that a District Court is not bound by the recommendations of Parole and Probation. See Collins v. State, 88 Nev. 168, 494 P.2d 956(1972).

Hockemier's Brief contends that the District Court ignored the

³ JA, p.23, 24.

⁴ JA, p. 27-32.

⁵ JA, p. 23.

⁶ JA, p. 22.

⁷ AOB, p. 4.

recommendations of both defense counsel and Parole and Probation.⁸

This contention lacks merit for the following three reasons:

First, the District Court began the sentencing hearing by not only placing on the record Parole and Probation's recommendation, but went so far as to confirm that Hockemier understood it.⁹

Second, the District Court not only heard, but carefully acknowledged the argument of defense counsel. In reaching its decision, the District Court set a balanced and somber tone by agreeing with defense counsel's framing of the decision as a difficult one.¹⁰ Rather than simply giving a token acknowledgement of the defense counsel's argument, the District Court went so far as to say it wished it did not have to tell a 22 year old that he would be in prison until he was at least 41 years old.¹¹

Third, the District Court ended the hearing by coming back to Hockemier's stated intent to get help while in prison by expressing hope that he would.¹²

⁸ AOB, p. 5.

⁹ JA, p. 41. ¹⁰ JA, p.62.

¹¹ JA, p.65.

¹² JA, p.66.

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CONCLUSION

It is respectfully submitted that the District Court did not err when it sentenced Hockemier to consecutive sentences. Accordingly, the State requests that the District Court's decision be affirmed.

RESPECTFULLY SUBMITTED this _____ day of January, 2016.

MARK TORVINEN Elko County District Attorney

By:

JEFFREY C. SLADE
Deputy District Attorney
State Bar Number: 13249

CERTIFICATE OF COMPLIANCE

I hereby certify that this Respondent's Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This Respondent's Answering Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, in size 14 point Times New Roman font.

I further certify that this brief complies with the page or typevolume limitations of NRAP 32(a)(7) because, excluding the parts of the

Respondent's Answering Brief exempted by NRAP32(a)(7)(C), because it contains 931 words.

I hereby certify that I have read the Respondent's Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this _____ day of January, 2016.

MARK TORVINEN Elko County District Attorney 540 Court Street, 2nd Floor Elko, NV 89801

By:

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CERTIFICATE OF SERVICE I certify that this document was filed electronically with the Nevada Supreme Court on the 11th day of January, 2016. Electronic Service of the Respondent's Answering Brief shall be made in accordance with the Master Service List as follows: Honorable Adam Paul Laxalt Nevada Attorney General and SHERBURNE M. MACFARLAN III Attorney for Appellant CASEWORKER DA#: AP 00043