IN THE SUPREME COURT OF THE STATE OF NEVADA

DEVON RAY HOCKEMIER,

Appellant,

CASE NO.83147

vs.

RENEE BAKER, WARDEN
LOVELOCK CORRECTIONAL
CENTER (LLC),

Respondent.

Appeal From The Fourth Judicial District Court
Of The State of Nevada
In And For The County Of Elko

RESPONDENT'S ANSWERING BRIEF

THE HONORABLE AARON D. FORD
ATTORNEY GENERAL OF NEVADA
100 N. CARSON STREET
CARSON CITY, NV 89701

TYLER J. INGRAM
Elko County District
Attorney's Office
JEFFREY C. SLADE
State Bar Number 13249
540 Court Street, 2nd Floor
Elko, NV 89801
(775) 738-3101
ATTORNEYS FOR RESPONDENT

Benjamin Gaumond
State Bar Number:8081
495 Idaho St, Suite 209
Elko, NV 89801
(775) 388-4875
ATTORNEY FOR APPELLANT

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STATEMENT OF THE FACTS

On November 20, 2013, Detective Hessing received a report of a child-on-child sexual assault. *Joint Appendix* 718-731(Vol. 4) (Unsworn Declaration in Support of Complaint and original discovery 28-20). The child perpetrator was a 10-year-old male referred to as O.M. in Detective Hessing's report. *Ibid.* Detective Hessing was concerned that O.M. may have been or was being sexually molested. *Id.* On November 21, 2013, he learned that O.M. was attending Northside Elementary School and arraigned to interview the child. *Id.*

During the interview on November 21, 2013, O.M. disclosed that four or five years earlier he had been sexually molested by a male subject who was approximately 18 years of age. *Id.* O.M. described the male sodomizing O.M. and covering O.M.'s mouth so O.M. could not yell. *Id.* O.M. also disclosed that this occurred on two different occasions. *Id.* O.M. also explained that the male subject threatened to kill O.M. if he ever disclosed the abuse. *Id.*

O.M. could not provide a name but did recall that the male's mother's name was Pam. *Id.* He likewise provided general descriptions of the male and where the residence was located where this occurred. *Id.*

At the conclusion of the interview Detective Hessing obtained O.M.'s mother's phone number and attempted to contact her. *Id.* She did not return his call. *Id.* On November 25, 2013, O.M.'s mother, Hydie came to the police station and asked to speak with Detective Hessing. *Id.* It was during this interview of Hydie that Detective Hessing first learned that the male who had molested O.M. four or five years earlier was named Devon Hockemier. *Joint Appendix* 718-731(Vol. 3). Hydie also provided the time frame when she and O.M. had lived with Hockemier and his mother as being September 2009 to February 2010. *Id.*

After speaking with Hydie, Detective Hessing also spoke with O.M.'s older brother S.B. *Id.* S.B. also disclosed that he was molested by Hockemier including being sodomized. *Id.* He described these acts occurring during the same time frame and that he, S.B., was approximately 10 years old. *Id.*

During a Child Abuse Response Examination Services (CARES) exam conducted on November 25, 2013, O.M. stated that Hockemier had inserted his penis into O.M.'s anus a total of four times. *Id.*

Eventually Hockemier was located in Lyon County, Nevada. *Id.* He was interviewed and admitted to sodomizing and preforming oral sex on O.M. *Id.* Hockemier admitted to also sodomizing S.B. and that S.B. had

given Hockemier oral sex on a few different occasions. *Id.* Hockemier recalled his age at the time as being between the ages of 17 and 18 years old. *Id.*

On April 30, 2014, a Complaint was filed charging Hockemier with 21 counts. *JA* 732-744(Vol. 4). Fourteen of which were charged in the alternative, leaving 7 independent counts. *Id.* On July 8, 2014, an Amended Complaint was filed. *JA* 745-756(Vol. 4). It included one additional charge and an alternative to that charge for a total of 23 counts. *Id.* The Elko Justice Court Full Case History shows that appointed counsel, Mr. MacFarlan, filed an ex-parte application to employ a Private Investigator. *JA* 757-769(Vol. 4) (Elko Justice Court Full Case History) (see also 213-216 for the motion and order).

On July 15, 2014, the ex-parte application was granted and presumably a private investigator was employed. *JA* 757-769(Vol. 4) (*see JA* 581-591 for a better copy) (*see also JA* 213-216 for the motion and order). On July 28, 2014, MacFarlan filed the Contingent Motion to Transfer Case to Juvenile Court. *Id* (*see also JA* 221-224 for the motion itself). On August 4, 2014, an ex-parte application for payment of private investigatory fees was filed and granted the following day. *Id* (*see also JA* 784-788). Opposition to the Contingent Motion to Transfer Case to Juvenile

Court was filed and a hearing on the motion was held on August 14, 2014. *Id* (*see also JA* 796-803 for a copy of the opposition).

Court minutes reflect that at the August 14, 2014, hearing, the parties were present including attorney Sherburne MacFarlan. *Id.* Detective Zachary Hessing was sworn in and examined as a witness. *Id.* After testimony, the parties argued the motion and the justice court found, pursuant to NRS 62B.330 that it had jurisdiction of the matter and would move forward with the preliminary hearing set for August 18, 2014. *Id.*

The preliminary hearing was held on August 18, 2014. *JA* 805-836(Vol. 4). At the preliminary hearing Mr. MacFarlan lodged several objections, cross-examined witnesses and argued that six counts not be bound over. *See JA* 804-836(Vol. 4) (Preliminary Hearing Transcript). He successfully convinced the justice court to not bind over three of said counts. *JA* 824(Vol. 4) (PHT p. 77, lns. 24-25). An information was filed on August 28, 2014, charging Hockemier with 20 counts, 13 of which were alternative charges leaving seven counts not charged in the alternative. *JA* 266-274(Vol. 2).

The seven main counts were for sexual assault on a child under the age of 14 years, a category A felony as defined by NRS 200.366(3)(c), each count punishable by a sentence of 35 years to life; and kidnapping in the

first degree, a category A felony as defined by NRS 200.310(1), punishable by a sentence of 5 years to life. If convicted of these seven counts, Hockemier faced the possibility of 215 years to life if run consecutive.

A plea agreement was reached and filed on February 18, 2015, in which Hockemier agreed to plead guilty to two counts of lewdness with a child under 14 years of age, a category A felony as defined by NRS 201.230. *JA* 869-876(Vol. 4). Limiting his possible sentence to 10 years to life for each count.

Arraignment was held on the agreement on March 16, 2015. *JA* 770-773(Vol. 4). The record of Court Proceedings reflects that Hockemier was sworn and canvased by the Court. *Id.* Hockemier stated on the record that he was satisfied with the legal services rendered and that he understood that sentencing was wholly within the discretion of the Court. *Id.* The Court accepted his factual basis for the crimes and accepted his plea based on the filed memorandum of plea agreement, certificate of counsel and statements made by Hockemier in open court. *Id.*

On May 21, 2015, a sentencing hearing was held. *JA* 837-867(Vol. 4) (Rough Draft Transcript of Proceedings Sentencing Hearing, herein after referenced as RDT). A presentence investigation report had been received and review by the Court and the parties. *JA* 840-841(Vol. 4) (RDT p. 3-4).

Clearly, Mr. MacFarlan had reviewed the PSI as well as the attached psychosexual evaluation. *JA* 840-843(Vol. 4) (RDT p.3-6) (Mr. MacFarlan requests several corrections). After noting Mr. MacFarlan's requested corrections, the Court asked Hockemier if he had any other errors or omissions missed by Mr. MacFarlan. *JA* 843(Vol. 4) (RDT p.6, lns. 22-25). Hockemier stated that there were no other issues other than those addressed by Mr. MacFarlan. *JA* 844(Vol. 4) (RDT p.7, lns. 1-2).

At sentencing, the State presented testimony from the victims' mother and step-father and an audio recording of the Defendant's interview with Detective Hessing. *JA* 844-854(Vol. 4) (RDT p.7-17). Mr. MacFarlan then made an extensive argument to run the sentences concurrently. *JA* 854-859(Vol. 4) (RDT p.17-22). As part of that argument Mr. MacFarlan emphasized that Hockemier was a minor himself and at least twice accurately reported Hockemier's age as 17 when the acts were committed. *Id.* Hockemier also addressed the Court, making no correction to Mr. MacFarlan's representations of Hockemier's age. *JA* 859-860(Vol. 4) (RDT p.22-23).

The district court then carefully laid out the rational for its sentence decision including the psychosexual evaluator's concern that Hockemier would reoffend and the fact that there were two separate victims. *JA* 860-

862(Vol. 4) (RDT p.23-25). Hockemier was then sentenced to serve two consecutive 10 to life sentences on his pleas of guilty to two counts of lewdness with a child under 14 years of age, both category A felonies pursuant to NRS 201.230. *Id.*

On December 10, 2015, Mr. MacFarlan filed Hockemier's opening brief appealing the sentence in this matter. *JA* 409-417(Vol. 2). The State filed its answer January 11, 2016, and the Supreme Court issued its Remittitur affirming the judgment of conviction on May 26, 2016. *JA* 774-777(Vol. 4). Hockemier filed his original habeas petition on April 12, 2017. *JA* 1-30(Vol. 1). Hockemier raised the following grounds: 1. Prosecutorial misconduct; 2. Judicial bias; 3. Cruel and unusual punishment; 4. Ineffective assistance of trial counsel; and 5. Ineffective assistance of appellate counsel. *Id.*

Hockemier was appointed counsel for the habeas petition on July 17, 2017. On September 11, 2017, habeas counsel filed Petitioner's Supplement to Petition for Habeas Corpus Relief. *JA* 439-448(Vol. 3). In it Hockemier alleged three additional grounds: 1. Oppressive plea-bargaining tactics by the State; 2. Ineffective assistance of trial counsel; and 3. Exculpatory *Brady* material suppressed by the State. *Id.* On May 30, 2018, the district court ordered Respondent file a response. *JA* 517-518(Vol. 3).

July 17, 2018, Respondent filed the Answer to Petition and Petitioner's Supplement to Petition for Writ of Habeas Corpus. *JA* 525-597 (Vol. 3). February 4, 2020, the district court issued its Order Allowing Withdrawal of Attorney; Order Appointing Attorney; and Order Setting Hearing. *JA* 598 – 600(Vol. 3).

May 22, 2020, the district court denied grounds 1, 2, and 3 of the original petition. *Respondent's Appendix* 1-4. On July 2, 2020, an evidentiary hearing was held on the remaining grounds in Hockemier's petition (grounds 4 & 5) and supplemental petition (grounds 1-3). *JA* 603-717(Vol. 3).

At the July 2, 2020, hearing Hockemier's first witness was his trial and appellate counsel Sherburne Macfarlan. *JA* 607(Vol. 3). Mr. Macfarlan testified that he had been a practicing attorney for almost 30 years. *JA* 608(Vol. 3). His practice primarily focuses on criminal defense. *Id.*

Mr. Macfarlan recalled his contingent motion to transfer Hockemier's case to juvenile court and having a hearing on that motion in Justice Court. *JA* 609(Vol. 3). He further recalled representing Hockemier at the preliminary hearing and on through until sentencing. *Id.* He testified that between himself, and his law partner their office had handled 50 or more cases involving allegations of sexual abuse. *JA* 611(Vol. 3).

When asked about his opinion about the plea offer that Hockemier ultimately took, Mr. Macfarlan explained that the real concern was the allegations of sexual assault on a child under the age of 14 simply because, as he put it, "of the penalties on that particular offense are so draconian." *JA* 616(Vol. 3). Hockemier was facing six of these counts. *JA* 746-754(Vol 4). Each caring a sentence of 35 years to life. NRS 200.366(3)(c).

When asked about his strategy at sentencing, Mr. Macfarlan explained that he felt the biggest mitigating factor was that Hockemier was a juvenile when he committed the offenses, so he tried to emphasize this fact. *JA* 621(Vol. 3). On cross-examination Respondent admitted without objection exhibits A-M. *JA* 627(Vol. 3) (all 13 had coversheets that used numbers 1 – 13 instead of letters). These exhibits are as follows:

A. Unsworn Declaration In Support of Complaint and Detective Hessing's report. *JA* 718-731(Vol. 4).

B. Criminal Complaint. *JA* 732-744(Vol. 4).

C. Amended Criminal Complain. *JA* 745-756(Vol. 4).

D. Elko Justice Court Full Case History. *JA* 757-769(Vol. 4).

E. District Court Record of Court Proceedings. *JA* 770-773(Vol. 4).

F. Remittitur from Direct Appeal. *JA* 774-777(Vol. 4).

G. Ex-parte Application to Employ Private Investigator. *JA* 778-782(Vol. 4).

H. Ex-parte Application for Payment of Private Investigator Fees. *JA* 783-788(Vol. 4).

I. Contingent Motion to Transfer Case to Juvenile Court. *JA* 789-794(Vol. 4).

J. Opposition to Contingent Motion to Transfer Case to Juvenile Court. *JA* 795 – 803(Vol. 4).

K. Transcript of Preliminary Hearing (4 to a page). *JA* 804-836(Vol. 4).

L. Rough Draft Transcript of Sentencing Hearing. *JA* 837-867(Vol. 4).

M. Amended Memorandum of Plea Agreement. *JA* 868-876(Vol. 4).

On cross Mr. Macfarlan explained that when reviewing this case one aspect that he found especially significant was Detective Hessing's interview of Hockemier. *JA* 628(Vol. 3). Hockemier not only admitted to sexual contact with these two boys but also provide even greater detail to the detective than the victims had during their interviews. *JA* 628(Vol. 3).

Mr. Macfarlan also agreed he had reviewed Detective Hessing's report which provided that Hockemier told Hessing that he was 17 turning 18. *JA* 628(Vol. 3) (referencing exhibit A at *JA* 727). He testified to employing a private investigator as shown in exhibits G and H. *JA* 630(Vol. 3).

Mr. Macfarlan identified exhibit I, his motion to transfer the case to juvenile court. *JA* 631(Vol. 3). He agreed that the purpose of the motion was to challenge the jurisdictional issue related to Hockemier's age. *Id.* Respondent crossed Mr. Macfarlan on the State's opposition to his motion to transfer. *Id.* Specifically pointing to the State's contention that Hockemier was 21 years of age when identified by law enforcement. *Id.* Mr. Macfarlan agreed with Respondent characterizing the issue as being hotly contested. *Id.*

Mr. Macfarlan recalled that the justice court denied his motion but that he ultimately mentally (inwardly) agreed with the justice court's legal analysis of the issue. *JA* 632(Vol. 3). Following up with questions asked on direct about Mr. Macfarlan not preserving the juvenile/jurisdiction issue for appeal, Respondent asked Mr. Macfarlan to explain how he goes about making such a decision. *Id.*

Mr. Macfarlan explained that the first step is weighing whether he believes there exists a legitimate legal basis for appeal that has some chance of success. *JA* 632(Vol. 3). He then clarified this by saying, "[i]n other words, I'm not going to ask to preserve an issue for appeal, which I do not believe is a credible issue to actually appeal." *JA* 632:22-24(Vol. 3). He concluded the preservation topic by covering the second step which was determining if the State's plea offer required waiver of the right to appeal that particular issue. *JA* 633(Vol. 3).

As to Hockemier's case and the juvenile/jurisdiction issue, Mr. Macfarlan recalled that he ultimately, although not happy about it, concluded that it would not have been a legitimate issue to try and preserve for an appeal. *JA* 634(Vol. 3).

Mr. Macfarlan testified about challenging at the preliminary hearing as many of the State's counts as he felt had not been sufficiently proven. *JA* 637(Vol. 3). Specifically, six counts of which he succeeded in stopping three from being bound over. *Id.*

Turning to Hockemier's challenge about Mr. Macfarlan telling Hockemier that he believed the judge would likely run the two counts concurrent, the Respondent began with the plea agreement. *JA* 639-640(Vol. 3). Mr. Macfarlan testified to his practice of having clients read a plea

agreement in his presence and following up with them to see if they have any questions. *JA* 640(Vol. 3).

Respondent reviewed exhibit M (amended plea agreement) with Mr. Macfarlan, establishing that in the agreement it specifically stated, "I understand that if I plead guilty to two or more charges, the sentence may be served concurrently or consecutive at the discretion of the Judge who sentences me." *JA* 640(Vol. 3). Mr. Macfarlan did not have an independent recollection of watching Mr. Hockemier review the plea agreement but testified that it was his normal practice to do so. *JA* 641(Vol. 3).

He did recall discussing with Hockemier what he felt the likely outcome would be on the issue of consecutive verses concurrent. *JA* 642(Vol. 3). Specifically, that it was his opinion that the judge would probably run the two counts concurrently. *Id.*

Respondent next established that at arraignment Hockemier was satisfied with Mr. Macfarlan's representation and understood that sentencing was wholly within the discretion of the Court and was ready to proceed. *JA* 644(Vol. 3) (reading from exhibit E, District Court Record of Proceedings).

Mr. Macfarlan also testified that the presentence investigation report had also included a recommendation of concurrent treatment. *JA* 645(Vol.

3). He further explained that his opinion was based on his nearly 30 years of experience, his experience with the specific sentencing judge and the circumstances of the case, primarily Hockemier's age at the time of the offenses. *JA* 645(Vol. 3).

The Respondent then established through exhibits and Mr. Macfarlan's testimony that Hockemier's age was accurately reflected in the PSI, that Hockemier had told Detective Hessing he was 17 or 18 when he committed the offenses and that Mr. Macfarlan pointed out in his sentencing argument that Hockemier was a child when he committed the offenses. *JA* 647(Vol. 3).

While cross-examining Mr. Macfarlan about his sentencing strategy, the Respondent was able to establish that regionally Mr. Macfarlan was familiar with the general practices of criminal defense attorneys. *JA* 651-652(Vol. 3). Further, Mr. Macfarlan testified that he handles cases like this in a manner consistent with these general practices. *JA* 652(Vol. 3). Finally, Mr. Macfarlan made clear that he handled Hockemier's case the same way he handles any serious case. *JA* 652(Vol. 3).

On re-direct Hockemier spend a significant amount of time questing Mr. Macfarlan about never establishing, during the preliminary hearing, when Detective Hessing first identified Hockemier as the perpetrator. *JA*

663(Vol. 3). Then on re-cross Mr. Macfarlan testified that an evidentiary hearing at which Detective Hessing testified, was held a few days *before* the preliminary hearing. *JA* 670(Vol. 3).

Hockemier then testified. *JA* 672(Vol. 3). He stated that he remembered Mr. Macfarlan stating that the judge would more than likely run the two counts concurrent due to Hockemier's age at the time. *JA* 675(Vol. 3). He conceded that Mr. Macfarlan also mentioned that the judge could also run them consecutively. *Id.* Hockemier also conceded that while he was being represented by Mr. Macfarlan, it was Hockemier's understanding that Mr. Macfarlan was the best attorney in Elko. *JA* 685(Vol. 4). On May 24, 2021, the district court filed its order denying Hockemier's writ. *JA* 877-885(Vol. 4).

SUMMARY OF ARGUMENT

Hockemier bears the burden of overcoming the strong presumption that his trial and appellate attorney provided reasonable professional assistance. *See Strickland v. Washington*, 466 U.S. 668(1984). He further must show that he suffered prejudice as a result. *Id.* This Court will not reverse a district court's holding if supported by substantial evidence. *Ford v. State*, 105 Nev. 850(1989).

The vast majority of Hockemier's claims of ineffective assistance of counsel stem from an incomplete understanding of the relevant statutory and Nevada case law surrounding whether his offenses fall under the jurisdiction of the juvenile court. Hockemier assumes that if he had been identified by law enforcement as having committed the offense before he turned 21 years of age the juvenile court would have had jurisdiction over his case. In doing so Hockemier overlooks NRS 62B.330(3)(e)(1) which lowers the age at which the juvenile court would have gained jurisdiction to 20 years, 3 months of age.

Hockemier's bare allegation that his trial counsel failed to address the jurisdictional issue is belied by the record. It was established at the habeas hearing that Mr. Macfarlan filed a motion to transfer the case to juvenile

court which was opposed. The justice court held a hearing on the motion four days before the preliminary hearing. Detective Hessing was questioned by the parties and the motion was ultimately denied by the justice court.

Applying years of experience, Mr. Macfarlan considered whether to challenge the justice court's ruling on the jurisdictional issue and determined it lacked sufficient merit. Hockemier over asserts Detective Hessing's testimony at the preliminary hearing to support this claim that Mr. Macfarlan should have reasserted the then moot issue of jurisdiction. Hockemier failed to substantiate his claim that counsel's performance at sentencing was ineffective.

ARGUMENT

I. Legal Standard for Ineffective Assistance of Counsel

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a defendant must demonstrate a reasonable probability that, but for counsel's errors, he would not have pled guilty an[d] would have insisted on going to trial." *State v. Gomes*, 112 Nev. 1473, 1479 (1996) (internal citations omitted).

In deciding ineffective assistance of counsel or IAC claims, "Judicial scrutiny of counsel's performance must be highly deferential," and "counsel

is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 689-690 (1984). The U.S. Supreme Court explained:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, **a court must indulge a strong presumption that Counsel's conduct falls within the wide range of reasonable professional assistance**; that is, **the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.** There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland v. Washington, 466 U.S. 668, 689 (1984) (citations and quotes omitted) (emphasis added). It is well-settled that this Court will not reverse a district court's holding if substantial evidence supports the court. *Ford v. State*, 105 Nev. 850, 854, 784 P.2d 951, 953 (1989) (internal citation omitted).

Effective assistance of appellate counsel does not mean that appellate counsel must raise every non-frivolous issue. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14(1996) (internal citation omitted). An attorney's

decision not to raise meritless issues on appeal is not ineffective assistance of counsel. *Id.* To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal. *Id.* In making this determination, a court must review the merits of the omitted claim. *Id.*

Hockemier comes before this Court claiming that his trial and appellate counsel, Sherburne Macfarlan, made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment so much so that Hockemier suffered prejudice as a result of said alleged errors. A competent district court judge has already found that Hockemier failed to carry his burden. Rather than accept the reality of the evidence, he asks this Court to reverse the ruling of the district court.

II. <u>Challenge to Jurisdiction.</u>

a. Hockemier can neither establish a reasonable probability that he would not have plead guilty nor that he would have succeeded on appeal.

The majority of Hockemier's appeal focuses on the allegation that Mr. Macfarlan was ineffective in his handling of whether Hockemier's offenses fell under the jurisdiction of the juvenile court. *See Appellant's Opening Brief*, 28-34. Before addressing why Hockemier fails to establish

the first prong of the *Strickland* test, overcoming the presumption that counsel's assistance was competent, it seems more expedient to first address the lack of prejudice.

Specifically, the insistence on the significance of this point is fueled by an incomplete understanding of the relevant statutory provision and Nevada case law related thereto. NRS 62B.330(3)(e) reads:

> 3. For the purposes of this section, each of the following acts shall be deemed not to be a delinquent act, and the juvenile court does not have jurisdiction over a person who is charged with committing such an act:
>
> . . .
>
> (e) A category A or B felony and any other related offense arising out of the same facts as the category A or B felony, regardless of the nature of the related offense, if the person was at least 16 years of age but less than 18 years of age when the offense was committed, and:
>
> (1) The person is not identified by law enforcement as having committed the offense and charged before the person is at least 20 years, 3 months of age, but less than 21 years of age; or
>
> (2) The person is not identified by law enforcement as having committed the offense until the person reaches 21 years of age.

NRS 62B.330(3)(e). All Hockemier's arguments on this issue only focus on subsection (2), "not identified by law enforcement ... until the person reaches 21 years of age." This is because Detective Hessing identified Hockemier on November 25, 2013, one day after Hockemier turned 21 years

old. Thus, Hockemier's assumption is that if Hessing had identified Hockemier just two days prior, he would have been under 21 and subsection (2) would not exclude the juvenile court's jurisdiction. This still would not preclude a juvenile court from exercising its authority under NRS 62B.335(4) to send the case right back to justice court, but this is not the most striking problem with Hockemier's argument.

The most obvious problem with relying on subsection (2) of NRS 62B.330(e) is the subsection just above it, subsection (1). Under subsection (1), the juvenile court does not have jurisdiction over a person who meets all the uncontested elements of the statute and, the person is not identified by law enforcement as having committed the offense and charged before the person is at least 20 years, 3 months of age, but less than 21 years of age.

Pursuant to this provision, even if Hockemier had been identified by Detective Hessing on November 21, 2013, 3 days before Hockemier's 21st birthday, the juvenile court still would not have jurisdiction. This is because, under subsection (1), Hockemier would still not have been identified by law enforcement as having committed the offense before he was at least 20 years, 3 months of age. Further, charges would also have not been filed before he was at least 20 years, 3 months of age.

It is difficult to contemplate a situation in which a person is charged with committing an offence before law enforcement have identified them, but presumably this additional requirement contemplates a John/Jane Doe filing sometimes used in cases where DNA of the perpetrator is recovered but their name is not yet known.

Digression aside, the Respondent's interpretation of this subsection is consistent with *George J. v. State (In re George J.)*, 128 Nev. 345, 279 P.3d 187 (2012). In that matter George J. committed category A and B felony offenses when he was 17 years old. *Id.* He was not identified as the perpetrator until he was 20 years, 8 months old. *Id.* Charges were filed when he was 20 years, 10 months old. *Id.* Shortly after turning 21 George J. was arrested on the charges. *Id.*

One of the issues raised in the appeal was whether NRS 62B.335(1) vested the juvenal court with jurisdiction. It reads in relevant part:

> 1. If:
> (a) A person is charged with the commission of a delinquent act that occurred when the person was at least 16 years of age but less than 18 years of age;
> (b) The delinquent act would have been a category A or B felony if committed by an adult;
> (c) The person is identified by law enforcement as having committed the delinquent act before the person reaches 21 years of age; and

(d) The person is apprehended by law enforcement after the person reaches 21 years of age,

»»the juvenile court has jurisdiction over the person to conduct a hearing and make the determinations required by this section in accordance with the provisions of this section.

NRS 62B.335(1)(a)-(d). The Nevada Supreme Court found that NRS 62B.330(3)(e)(1) made it so that a person who committed a category A or B felony and related offenses when the person was between 16 and 18 years of age but who is not identified and charged before 20 years, 3 months of age would be excluded from the juvenile court's jurisdiction because those acts would not be deemed to be *delinquent* acts. *Id* at 349-50(emphasis added).

Thus, even if Hockemier were able to prove that Mr. Macfarlan's assistance on this issue fell below that which Hockemier was constitutionally entitled, he, nevertheless, cannot meet the second prong of the *Strickland* test by showing that he somehow suffered prejudice as a result. More specifically, he can neither show that he would not have plead guilty nor that the issue would have had a reasonable probability of success on appeal.

b. Substantial evidence supports the district court's holding that Hockemier failed to overcome the strong presumption that Mr. Macfarlan's professional assistance was reasonable.

Hockemier makes a bare allegation belied by the record. Specifically, he accuses Mr. Macfarlan of failing to address the "obvious" jurisdictional defect at the justice court level. *Appellant's Opening Brief*, 29:12-14. Through the testimony of Mr. Macfarlan and the exhibits admitted at the habeas hearing, it was established that Mr. Macfarlan not only recognized the potential jurisdictional issue but in fact filed a Contingent Motion to Transfer Case to Juvenile Court. *See JA* 603-691. The State filed an opposition and, four days before the preliminary hearing, the justice court conducting an evidentiary hearing. *Id.* Detective Hessing was examined by the parties at that hearing. *JA* 670.

Mr. Macfarlan testified that the motion was denied and, although disappointed, he objectively agreed with the justice court's legal analysis of the issue. *JA* 632, 634. He explained how he goes about deciding whether he should challenge an adverse ruling like the one handed down by the justice court days before the preliminary hearing. *JA* 632-634. Specifically, that he contemplates whether there exists a legitimate legal basis for appeal or in other words that he does not seek to preserve an issue for appeal if he does not believe it, is a credible appellate issue. *JA* 632.

Mr. Macfarlan ultimately, although not happy about it, concluded that

Hockemier's jurisdictional issue lacked sufficient merit to be further challenged. *JA* 634. Having recognized, litigated, and exercised his professional judgement regarding whether to further pursue the jurisdictional issue, he then moved forward with the preliminary hearing and his attack on other aspects of the State's case.

Ignoring the strong presumption of adequate assistance which was reinforced by substantial evidence presented at the habeas evidentiary hearing, Hockemier attempts to point to the preliminary hearing transcript as evidence that Mr. Macfarlan was ineffective. *See Appellant's Opening Brief*, 29-32. Such an argument fails to, "evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. 668, 689(1984).

Hockemier tries to assert that Detective Hessing's preliminary hearing testimony should have prompted Mr. Macfarlan to object to the jurisdiction issue. *Appellant's Opening Brief*, 29:19-23. Clinging to a vague reference that occurred during the direct examination of Detective Hessing at the preliminary hearing, Hockemier asserts that Hessing knew of Mr. Hockemier's identify on November 21, 2013. *Appellant's Opening Brief*, 31-32.

During the preliminary hearing, Detective Hessing is actually never asked when he identified Hockemier. *See JA* 819-824. On direct, he testified to beginning his investigation on November 21st, 2013. *JA* 819. Then, taking things out of sequential order, the prosecutor has Detective Hessing identify the defendant as Hockemier. *JA* 819.

The Detective and prosecutor then have the following exchange:

Q. During your investigation, did you talk to all the parties involved?
A. I talked to – except for Devon, himself, yes.
Q. On that day?
A. Correct.
Q. and did you talk to a Hydie Overholder?

JA 819. During the remainder of the direct examination an exact date is never attached to the above vague reference to "that day." *JA* 819-822.

It is quite evident that Detective Hessing was not suggesting that he had identified Hockemier on November 21, 2013. First, his declaration and report specified otherwise. Second, Hessing confirmed that his identification of Hockemier happened "at some point later on" meaning after his interview of the first victim O.M. *JA* 820. Third, he later confirmed that his interview of the second victim, C.M. did not occur until November 25, 2013. *JA* 823.

Hockemier fails to acknowledge that even if Mr. Macfarlan had lodged an objected based on the vague testimony, it would have been quickly resolved by a few clarifying questions and at most Detective Hessing refreshing his recollection with his report. Absent sufficient evidence to that contrary, Mr. Macfarlan is presumed to have foreseen this and have chosen to instead focus on other aspects of the State's case that had not already proven unfruitful.

Mr. Macfarlan in fact did explain exactly why, he never cross-examined Detective Hessing to establish when the Detective first identified Hockemier: From his perspective the issue was moot. Not only because he had litigated the issue before the preliminary hearing but also because, in his professional experience of almost thirty years as a criminal defense attorney, an attack on the justice court's adverse ruling would all but lack merit.

Hockemier also tries to shift his burden onto the Respondent: "...there is no transcription in the record to buttress the State's position that the motion hearing renders this issue of jurisdiction moot. As such, the only sworn testimony as to this issue supports Mr. Hockemier's position that jurisdiction was lacking." *Appellant's Opening Brief*, 31:4-9.

The question is not whether the Respondent's position can be "buttressed." Hockemier bears the burden of overcoming the strong presumption that, under the circumstances, Mr. Macfarlan provided reasonable professional assistance. The evidence adduced at the habeas hearing seriously called into question Hockemier's reliance on the preliminary hearing transcript. Hockemier also forgets that there *is* sworn testimony as to this issue, specifically, Mr. Macfarlan's corroborated testimony provided at the habeas hearing.

Reconstructing the circumstances of this challenged conduct to evaluate it from counsel's perspective at the time shows that there is substantial evidence to support the district court's conclusion that Hockemier did not meet his burden.

III. Sentencing

c. Hockemier fails to show that Mr. Macfarlan's performance at sentencing fell below an objective standard of reasonableness and cannot establish that the outcome would have been different.

Hockemier cites *Brown v. State*, 110 Nev. 846(1994) to support his argument that Mr. Macfarlan was ineffective at sentencing. *Appellant's*

Opening Brief, 27. *Brown* is, however, distinguishable from this case. Brown's attorney was found to have shown blatant ineptitude beginning with his performance at trial and continuing on through sentencing.

Brown was sentenced to two consecutive life terms on two counts of sexual assault and given a ten-year term on an additional count of attempted sexual assault. *Id.* The case against Brown rested solely on the testimony of the victim, there being no other witnesses or corroborating physical evidence. *Id.*

Brown's counsel failed to cross-examine the victim even though he later testified that his strategy was to attack the victim's credibility. *Id* at 848. He also incorrectly assumed that the district court would allow him to call witnesses who would testify to the victim's credibility and alleged falsehoods. *Id* at 849.

Regarding his work at sentencing, Brown's counsel testified that he was unaware that the sentence could run concurrently. *Id* at 850. The record also indicated that he was not even aware of what the minimum sentences were for the offenses. *Id.* He also failed to set forth any evidence of mitigating circumstances in a meaningful way. *Id.*

In contrast, Hockemier was facing 23 counts, including 7 counts of sexual assault on a child under the age of 14. *JA* 747-754. The evidence against him was not that of a single victim with no physical or other corroborating evidence. Instead, he faced two victims, both children. Their statements not only let credibility to the other but the sexual behavior of at least one of these children likewise supported their disclosures. Also, Hockemier, in his own admission, detailed his extensive sexual abuse of both victims. Despite facing much more substantial evidence and the possibility of 215 years to life, Mr. Macfarlan was able to negotiate the case down to two 10 to life counts.

At sentencing Mr. Macfarlan knew the law permitted the sentences to run concurrently and specifically argued for it. He brought to bear his nearly 30 years of practice in criminal defense, having handled at least 50 cases of a similar nature. He handled Hockemier's case the same way he has handled other serious cases like this. He was familiar with how other experienced criminal defense attorneys handle cases of this nature and handled this one in a similar fashion.

When asked to describe his approach to sentencing, he expressed his familiarity with the sentencing judge's approach, which was based on years

of practice before the sentencing judge. *See JA* 653. At the beginning of the proceeding, he pointed to multiple factual inaccuracies in the psychosexual evaluation. *JA* 841-843. When it came time for argument, he carefully pointed out that Hockemier was a child himself when the offenses were committed. *JA* 855. He expounded on this point significantly in the context of culpability. *Id.*

Mr. Macfarlan then highlighted how Hockemier took responsibility for his actions by admitting to them when interviewed by Detective Hessing. *Id.* Even though the presentence investigation report also recommend concurrent treatment and he had provided two compelling reasons to run the sentences concurrently, he added one more in case the 10-year minimum was concerning to the court.

Drawing on what was then his 24 years of experience defending these types of cases, he told the sentencing judge that it was very rare for a person in Hockemier's position to be paroled on the first go-around. *JA* 857. Hockemier argues that counsel should have presented more mitigating evidence in the form of character witnesses such as his mother, siblings, friends, and/or employers. Such a claim lacks any evidence which overcomes the strong presumption that counsel's representation was

adequate. Petitioner makes this claim without citing to a single fact that would have been presented but was not. Hockemier had confessed to committing several counts of sex assault on two different children under the age of 14. The psychosexual evaluator voiced concern that Hockemier would reoffend. The Court heard the testimony of the parents of the victims which included the long-lasting effects Hockemier's actions had had on the victims. Consequently, even if considered a serious error, there is no evidence that such mitigating evidence would have resulted in a different outcome.

CONCLUSION

Based on the foregoing, Respondent asks that the district court's order be upheld.

RESPECTFULLY SUBMITTED this 18th day of January, 2022.

TYLER J. INGRAM
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 2021, in size 14-point Times New Roman font.

I further certify that this brief complies with the page or type-volume 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 6318 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.

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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 18th day of January, 2022.

TYLER J. INGRAM
Elko County District Attorney
540 Court Street, 2nd Floor
Elko, NV 89801

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

CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 18th day of January, 2022. Electronic Service of the Respondent's Answering Brief shall be made in accordance with the Master Service List as follows:

Honorable Aaron D. Ford
Nevada Attorney General

and

Benjamin Gaumond
Attorney for Appellant

Tessa Deml-Sharp
TESSA DEML-SHARP
CASEWORKER

DA#: AP-21-01613