IN THE SUPREME COURT OF THE STATE OF NEVADA

DEVON RAY HOCKEMIER, Appellant, v. RENEE BAKER, WARDEN LOVELOCK CORRECTIONAL CENTER (LLC), Respondent.	CASE NO. 83147

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Elizabeth A. Brown
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Appeal from the Order Denying Petitions for Writ of Habeas Corpus
Fourth Judicial District Court, County of Elko
The Honorable Kriston N. Hill, District Court Judge, Dept. 1

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

Docket 83147 Document 2021-32822

TABLE OF AUTHORITIES

Cases:

Constitutional Amendments:

Docket 83147 Document 2021-32822

Rules:

Statutes:

Docket 83147 Document 2021-32822

STATEMENT OF JURISDICTION

This Court has jurisdiction over an order from the district court denying a postconviction petition for writ of habeas corpus pursuant to NRS 34.575(1). Thirty (30) days from the service of such an order is the deadline to file an appeal. NRS 34.575(1).

The "Order Denying Petitions for Writ of Habeas Corpus" was entered on May 24, 2021. *Joint Appendix 877 (Volume 4).* Said order denying the petitions was mailed to Devon Ray Hockemier on May 24, 2021. *Joint Appendix 885 (Volume 4).* The notice to appeal that order was filed on June 25, 2021. *Joint Appendix 886 (Volume 4).*

NRS 178.482 says, "Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon the party and the notice or other paper is served by mail, 3 days shall be added to the prescribed period."

Pursuant to NRAP 4(a)(1), a notice of appeal must be filed "no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served" – mirroring the timeline articulated in NRS 34.575(1).

Docket 83147 Document 2021-32822

Therefore, Mr. Hockemier had until and including June 28, 2021 to file his appeal. His notice of appeal was filed in a timely matter.

ROUTING STATEMENT

Pursuant to NRAP 17(b)(3) and NRAP 17(b)(4), the two classes of postconviction appeals that are presumptively assigned to the Court of Appeals of the State of Nevada are "appeals that involve a challenge to a judgment of conviction or sentence for offenses that are not category A felonies" and "appeals that involve a challenge to the computation of time served under a judgment of conviction, a motion to correct an illegal sentence, or a motion to modify a sentence."

Mr. Hockemier's appeal is a postconviction appeal that does not fall under either NRAP 17(b)(3) and NRAP 17(b)(4). As such, this appeal is not presumptively assigned to the Court of Appeals of the State of Nevada. Thus, this Court should retain the instant appeal.

STATEMENT OF THE ISSUE

Did the district court commit reversible error in denying Devon Ray Hockemier's postconviction petitions for writ of habeas corpus?

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STATEMENT OF THE CASE

Devon Ray Hockemier filed his postconviction petition for writ of habeas corpus on April 12, 2017. *Joint Appendix 1 (Volume 1).* In a separate filing, Mr. Hockemier filed his "Appendix of Exhibits" – also on April 12, 2017. *Joint Appendix 26 (Volume 1).*

Tony Liker, in his capacity as counsel of record for Mr. Hockemier, filed "Petitioner's Supplement to Petition for Habeas Corpus Relief" on September 11, 2017. *Joint Appendix 439 (Volume 3).*

On May 30, 2018, then District Court Judge Nancy Porter directed the Respondent Renee Baker, Warden of the Lovelock Correctional Center, to file a response to said postconviction petition within forty-five (45) days of that order. *Joint Appendix 517 (Volume 3).*

Dwayne Deal, on behalf of Nevada Department of Corrections Director James E. Dzurenda, filed a "Return to Petition for Writ of Habeas Corpus" on June 27, 2018 verifying that Mr. Hockemier was in the custody of the Nevada Department of Corrections pursuant to a judgment of conviction that was filed on June 9, 2015. *Joint Appendix 519 (Volume 3).*

The Elko County District Attorney's Office, on behalf of the director of the Nevada Department of Corrections, filed its answer to the postconviction petition and supplement on July 17, 2018. *Joint Appendix 525 (Volume 3).*

On February 4, 2020, then District Court Judge Nancy Porter ordered the Nevada Department of Corrections to produce Mr. Hockemier for the evidentiary hearing on the postconviction petition and supplement. *Joint Appendix 601 (Volume 3).* That hearing was held on July 1, 2020 and Shellie Loomis transcribed said hearing. *Joint Appendix 603 (Volume 3).*

District Court Judge Kriston N. Hill filed the "Order Denying Petitions for Writ of Habeas Corpus" on May 24, 2021. *Joint Appendix 877 (Volume 4).* On June 25, 2021, Mr. Hockemier filed his "Notice of Appeal" on June 25, 2021. *Joint Appendix 886 (Volume 4).*

On July 30, 2021, District Court Judge Kriston N. Hill allowed Benjamin C. Gaumond to substitute in as counsel of record for Mr. Hockemier. *Joint Appendix 888 (Volume 4).*

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STATEMENT OF THE FACTS

Having the assistance of legal counsel Tony Liker, Mr. Hockemier filed his "Petitioner's Supplement to Petition for Habeas Corpus Relief." *Joint Appendix 439 (Volume 3).* In that filing, Mr. Liker asserted that Mr. Macfarlan's contingent transfer motion – which was the motion to have Mr. Hockemier's case transferred from justice court to juvenile court – "was not fully and fairly developed by trial counsel." *Joint Appendix 447 (Volume 3).*

In the "Contingent Motion to Transfer Case to Juvenile Court," Mr. Macfarlan noted that the criminal complaint alleged that the acts Mr. Hockemier was accused of committing were allegedly committed between September 1, 2009 and February 28, 2010. *Joint Appendix 474 (Volume 3).* Moreover, Mr. Hockemier's date of birth was indicated as November 24, 1992. *Joint Appendix 474 (Volume 3).* Since that would indicate that Mr. Hockemier was under the age of eighteen (18) at the time of the alleged incidents, Mr. Macfarlan invoked NRS 62B.370(1), which states the following:

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> Except as otherwise provided in this title, a court shall transfer a case and record to the juvenile court if, during the pendency of a proceeding involving a criminal offense, it is ascertained that the person who is charged with the offense was less than 18 years of age when the person allegedly committed the offense.

Joint Appendix 474 (Volume 3).

In response, the State opposed Mr. Macfarlan's contingent motion. *Joint Appendix 477 (Volume 3).* In so doing, the State cited NRS 62B.330 as follows:

> 1. Except as otherwise provided in this title, the juvenile court has exclusive original jurisdiction over a child living or found within the county who is alleged or adjudicated to have committed a delinquent act.
> …
> 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.

Joint Appendix 478-479 (Volume 3).

The State, in that opposition, averred that Mr. Hockemier was not identified as the perpetrator of the alleged offenses until he was 21 years of age. *Joint Appendix 479 (Volume 3).* According to the State, one of the alleged victims said that an individual who used to live with him "did inappropriate things with him" but could not identify the perpetrator. *Joint Appendix 479 (Volume 3).* The State said that, after talking to the alleged victim's mother, the detective learned the identity of Mr. Hockemier on November 25, 2013 – one day after Mr. Hockemier's twenty-first (21st) birthday. *Joint Appendix 479-480 (Volume 3).*

Mr. Liker attached the preliminary hearing transcript to the supplemental petition. *Joint Appendix 492-516 (Volume 3).* Contained in that transcript is the testimony of Zachary Hessing, a detective with the Elko County Police Department for the past one and one-half (1 1/2) years. *Joint Appendix 507-512 (Volume 3).*

Mr. Hessing testified that he started an investigation on Devon Hockemier on November 21, 2013. *Joint Appendix 507 (Volume 3).* On that same date, he met with a woman named Hydie Overholser – who is the mother of the alleged victims O.M. and S.B. *Joint Appendix 508-509 (Volume 3).* O.M. described the person who allegedly sexually abused him as a "male subject" who had lived with the family, approximately 18 years old, works at McDonald's, and had a mother by the name of Pam. *Joint Appendix 508 (Volume 3).* Mr. Hessing clarified that he talked to "all the parties involved" except Mr. Hockemier on November 21, 2013. *Joint Appendix 507 (Volume 3).*

As for S.B., he "discussed Devon's downstairs parts" and he "said Devon attempted to put his downstairs part in his bottom." *Joint Appendix 508-509 (Volume 3).* Later, Mr. Hessing testified that S.B. told him that "Devon asked him to take his pants down" and that S.B. "took his pants down, and Devon had him move to the bed." *Joint Appendix 509 (Volume 3).* Mr. Hessing testified that S.B. said "that Devon had him lay on his side. And Devon attempted to put his penis in to SB's bottom" and that he "stated that he told Devon that it hurt,

that it felt like ripping. And Devon stopped." *Joint Appendix 509 (Volume 3).*

Mr. Hessing would meet up with Devon Ray Hockemier at Mr. Hockemier's house and, early in the encounter, Mr. Hessing read Mr. Hockemier his Miranda rights – which Mr. Hockemier waived. *Joint Appendix 509 (Volume 3).* During this interview, Mr. Hockemier admitted to having oral sex and anal sex with O.M. and that Mr. Hockemier would give oral sex to O.M. *Joint Appendix 509 (Volume 3).* Also, during this interview, Mr. Hockemier confessed "that he had attempted to put his penis in to SB's bottom. And SB told him that it hurt, and so he stopped." *Joint Appendix 510 (Volume 3).* Moreover, Mr. Hockemier told Mr. Hessing that "he had SB give him oral sex on a few different occasions." *Joint Appendix 510 (Volume 3).*

Sherburne Macfarlan was given the opportunity to cross-examine Mr. Hessing. *Joint Appendix 510 (Volume 3).* Mr. Macfarlan, early in the questioning, asked questions about (1) who was present in the interview with O.M., (2) the focal point of the interviewing starting out as being the investigation of O.M. possibly sexually abusing a child in

the Elko area, (3) the number of times O.M. was abused, and (4) whether a boy named "Angel" had attempted to kill O.M. with an axe. *Joint Appendix 510-511 (Volume 3).* O.M. told Mr. Hessing that there were two occasions when Mr. Hockemier had anal intercourse with O.M. *Joint Appendix 510 (Volume 3).*

When getting to the part regarding S.B., Mr. Macfarlan confirmed that the date of the interview with S.B. was November 25, 2013. *Joint Appendix 511 (Volume 3).* S.B. disclosed one time that he claimed Mr. Hockemier attempted to have anal intercourse with him. *Joint Appendix 511 (Volume 3).*

Amid all of Mr. Macfarlan's questioning, there were no questions asked about when Mr. Hessing first became aware of the identity of Devon Ray Hockemier as the perpetrator of sexual abuse on O.M. or S.B. *Joint Appendix 510-511 (Volume 3).* Throughout all the questioning by both parties, Detective Hessing never testified, nor was he asked, when he first learned of the identity of Devon Ray Hockemier as the alleged perpetrator in these incidents. *Joint Appendix 507-512.*

When it came time to give a summation, Mr. Macfarlan did not mention any legal argument about jurisdiction and NRS 62B.370 or NRS 62B.330. *Joint Appendix 512 (Volume 3).* Instead, Mr. Macfarlan was fixated on the corpus delecti rule and that some of the charges should not be bound over on that basis – excluding both of the kidnapping charges. *Joint Appendix 512 (Volume 3).*

In the amended criminal complaint that was filed in the Elko Justice Court on July 8, 2014, Mr. Hockemier was charged with Count 1, Sexual Assault on a Child Under the Age of 14 Years (against O.M.); Count 2, Lewdness with a Child Under 14 years of Age (against O.M.); Count 3, Open or Gross Lewdness (against O.M.); Count 4, Sexual Assault on a Child Under the Age of 14 Years (against O.M.); Count 5, Lewdness with a Child Under 14 Years of Age (against O.M.); Count 6, Open or Gross Lewdness (against O.M.); Count 7, Sexual Assault on a Child Under the Age of 14 Years (against O.M.); Count 8, Lewdness with a Child Under 14 Years of Age (against O.M.); Count 9, Open or Gross Lewdness (against O.M.); Count 10, Sexual Assault on a Child Under the Age of 14 Years (against O.M.); Count 11, Lewdness with a

Child Under 14 Years of Age (against O.M.); Count 12, Open or Gross Lewdness (against O.M.); Count 13, Sexual Assault on a Child Under the Age of 14 Years (against O.M.); Count 14, Lewdness with a Child Under 14 Years of Age (against O.M.); Count 15, Open or Gross Lewdness (against O.M.); Count 16, Sexual Assault on a Child Under the Age of 14 Years (against S.B.); Count 17, Lewdness with a Child Under 14 Years of Age (against S.B.); Count 18, Open or Gross Lewdness (against S.B.); Count 19, Sexual Assault on a Child Under the Age of 14 Years (against S.B.); Count 20, Lewdness with a Child Under 14 Years of Age (against S.B.); Count 21, Open or Gross Lewdness (against S.B.); Count 22, Kidnapping in the First Degree (against O.M.); and Count 23, Kidnapping in the Second Degree (against O.M.). *Joint Appendix 193-201 (Volume 1).*

Justice of the Peace Mason Simons ordered the matter bound up to the Fourth Judicial District Court on all counts excepting Counts 13 through 15, inclusive. *Joint Appendix 512 (Volume 3).*

The Amended Memorandum of Plea Agreement was filed in the action of State v. Hockemier in the Fourth Judicial District Court in

case number CR-FP-14-0635. *Joint Appendix 354 (Volume 2).* That deal entailed Mr. Hockemier pleading guilty to two (2) counts of Lewdness with a Child Under 14 Years of Age, category A felonies as defined by NRS 201.230. *Joint Appendix 354 (Volume 2).* Both parties retained the full freedom to argue at the time of sentencing. *Joint Appendix 354 (Volume 2).*

In Devon Ray Hockemier's postconviction petition for writ of habeas corpus, he identified as his fourth ground for relief that he "was deprived of his Fifth, Sixth and Fourteenth Amendment rights to effective assistance of counsel during all critical stages of court proceeding in violation of the United States Constitution." *Joint Appendix 18 (Volume 1).* Included in that argument was the assertion that trial counsel Sherburne Macfarlan failed to present sufficient evidence in mitigation – including character witnesses – at the sentencing hearing. *Joint Appendix 20-22 (Volume 1).*

As part of his district court appendix, Mr. Hockemier included the transcription of the sentencing hearing that he attended along with his then counsel of record Sherburne Macfarlan. *Joint Appendix 376-404*

(Volume 2). When the district court asked the prosecution if it had any witnesses to present at the sentencing hearing, Deputy Elko County District Attorney Jonathan Schulman proclaimed that he had witnesses to present. *Joint Appendix 382 (Volume 2).* When the district court asked Mr. Macfarlan the same question, he answered, "No, Your Honor." *Joint Appendix 382 (Volume 2).*

During this hearing, the State asked that the two sentences for Lewdness on a Minor Under the Age of Fourteen run consecutively. *Joint Appendix 392 (Volume 2).* Mr. Macfarlan responded that the sentences should run concurrently. *Joint Appendix 396-397 (Volume 2).*

At the sentencing hearing, then District Court Judge Nancy Porter decided to follow the State of Nevada's recommendation for two consecutive prison sentences of ten (10) years to life. *Joint Appendix 405-407 (Volume 2).*

An appeal was filed in the Nevada Supreme Court from Judge Porter's decision in case number 68333. *Joint Appendix 409 (Volume 2).* In the entire opening brief, the only ground for relief that Mr. Macfarlan brought on Mr. Hockemier's behalf was whether Judge

Porter abused Her Honor's discretion by ordering the prison sentences to be served consecutively. *Joint Appendix 415-416 (Volume 2).* No where in this brief did Mr. Macfarlan challenge any jurisdictional defect that arose in the justice court. *Joint Appendix 409-417 (Volume 2).*

In the petitioner's supplemental petition, Attorney Tony Liker noted that Mr. Macfarlan had filed his contingent motion to transfer on July 28, 2014 and that, by the time of the preliminary hearing, "trial counsel knew what he had to establish in order to prevail on the motion. Trial counsel failed to develop this issue, this was a low hanging fruit, that was easy to pluck had trial counsel developed this testimony. Conversely, the State was educated as well, it was crucial that the identity of [Devon Ray Hockemier] was learned after November 24. Trial counsel [Sherburne Macfarlan] totally abandoned this crucial jurisdictional ground." *Joint Appendix 442 (Volume 3).* Citing the record from the preliminary hearing, Mr. Liker reminded the district court that Detective Hessing "specifically stated that" he "first started an investigation into Devon Hockemier on November 21, 2015" and that this "necessarily means that the Petitioner's identify [*sic*] was known

prior to Petitioner's 21st birthday." *Joint Appendix 442 (Volume 3).* On top of that, Mr. Liker asserted that Mr. Macfarlan did not request a hearing on the issue of the contingent motion to transfer and did not reply to the State's opposition. *Joint Appendix 442 (Volume 3).*

Later in the supplemental petition, Mr. Liker said that "Trial counsel only had to raise the issue of when the police learned the Petitioner's identity. Clearly, the coincidental alleged learning of the Petitioner's identity ONE DAY AFTER he turned 21 raises all sorts of flags." *Joint Appendix 447 (Volume 3)* (emphasis in original).

In the State of Nevada's answer to the original petition as well as the supplemental petition, Deputy District Attorney Jeffrey C. Slade cited to Detective Hessing's police report in concluding that it was on November 25, 2013 (the very day after Mr. Hockemier's 21st birthday) that he first learned that the identity of the person who sexually abused O.M. was Devon Ray Hockemier. *Joint Appendix 526-527 (Volume 3).* According to the State, it was also on November 25, 2013 that Mr. Hessing was informed that S.B. was molested at the hands of Mr. Hockemier. *Joint Appendix 527 (Volume 3).*

The State, relying on court minutes rather than a transcription, showed that there was a motion hearing on August 14, 2014 and that the justice court denied the contingent motion to transfer at said hearing. *Joint Appendix 528 (Volume 3).* In a laudatory tone, the State asserted that defense counsel Sherburne Macfarlan "successfully convinced the justice court to not bind over three of said counts" out of twenty-three (23) counts. *Joint Appendix 528 (Volume 3).*

At no point in said answer did the State specifically address the issue of ineffective assistance of counsel with respect to trial counsel's lack of objection to jurisdiction at the preliminary hearing vis-à-vis the plain statement that Detective Hessing started the investigation of Devon Ray Hockemier on November 21, 2013. *Joint Appendix 525-543 (Volume 3).*

On February 4, 2020, Attorney David Loreman was appointed to replace Tony Liker as Mr. Hockemier's attorney due to Mr. Liker's "serious medical issues." *Joint Appendix 598 (Volume 3).*

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On July 1, 2020, the hearing on Mr. Hockemier's original petition for writ of habeas corpus as well as his supplemental petition for writ of habeas corpus was held. *Joint Appendix 603 (Volume 3).*

At this hearing, Mr. Loreman asked former defense counsel for Mr. Hockemier, Sherburne Macfarlan, if the contingent motion for transfer was denied. *Joint Appendix 612 (Volume 3).* Mr. Macfarlan responded that said motion was denied. *Joint Appendix 612 (Volume 3).* Shortly thereafter, Mr. Loreman asked Mr. Macfarlan if, during the cross-examination of the officer, he clarified "when the officer actually knew of Mr. Hockemier?" *Joint Appendix 613 (Volume 3).* Mr. Macfarlan responded that he did not recollect one way or another but would defer to the transcript of the preliminary hearing. *Joint Appendix 613 (Volume 3).* Mr. Loreman asked Mr. Macfarlan if that line of questioning "would be important if you were to go forward with any more action with regard to returning this to a juvenile court; correct?" *Joint Appendix 613 (Volume 3).* Mr. Macfarlan responded, "Potentially, I guess, yes." *Joint Appendix 613 (Volume 3).* When pressed about the importance of the timeline when Detective Hessing

first learned of Devon Ray Hockemier's identity relative to Mr. Hockemier's birthday, Mr. Macfarlan averred that "I'll take your representation. It's been a long time since I've looked at those particular statutes, Mr. Loreman." *Joint Appendix 613-614 (Volume 3).* Mr. Macfarlan testified that he elected to not file a pretrial petition for writ of habeas corpus that could have potentially challenged the jurisdiction of the justice court as well as any other flaws that may have happened at the preliminary hearing. *Joint Appendix 615 (Volume 3).*

When Mr. Loreman asked if Mr. Macfarlan believed that an offer for Mr. Hockemier to plead to two category A felonies for Lewdness on Minors Under the Age of 14 Years was a "good offer," Mr. Macfarlan answered that such an offer was "reasonable." *Joint Appendix 616-617 (Volume 3).* Mr. Macfarlan added that it was his expectation that the sentences for those two felonies would probably be run concurrently. *Joint Appendix 617 (Volume 3).* Mr. Macfarlan did not negotiate in any way that would have allowed Mr. Hockemier to appeal "certain matters that happen during litigation." *Joint Appendix 619 (Volume 3).* Mr.

Macfarlan did not hire any expert who could testify about juvenile conduct. *Joint Appendix 620 (Volume 3).*

Going on, when asked about whether Mr. Macfarlan brought up the fact that the psychosexual evaluator Mr. Hansen showed Mr. Hockemier to be a candidate for probation, Mr. Macfarlan simply deferred to the sentencing transcript. *Joint Appendix 621-622 (Volume 3).*

Mr. Loreman proceeded to ask Mr. Macfarlan if he was aware of the change to NRS 201.230 that made lewdness by a person under 18 years of age on a child under the age of 14 a delinquent act. *Joint Appendix 624-626 (Volume 3).* Mr. Macfarlan responded that did not recall checking to determine if that statute was changed in the legislative period. *Joint Appendix 625-626 (Volume 3).*

Mr. Slade, on cross-examination, asked if NRS 62B.330 and jurisdiction for justice court to proceed constituted a "hotly contested" issue in the case and Mr. Macfarlan replied in the affirmative. *Joint Appendix 631 (Volume 3).* Mr. Macfarlan "agreed with the Justice

Court's legal analysis" regarding retaining jurisdiction but did not stay why he agreed. *Joint Appendix 632 (Volume 3).*

On redirect examination, Mr. Loreman asked Mr. Macfarlan if he remembered failing to ask Detective Hessing if Detective Hessing had known about Devon Ray Hockemier's identity prior to November 24, 2013 and Mr. Macfarlan (yet again) deferred to the record. *Joint Appendix 663 (Volume 3).*

On recross examination, Mr. Macfarlan confirmed that Mr. Hockemier's contingent motion to transfer was "handled" four (4) days before the preliminary hearing yet could not even summarize what Detective Hessing said at that motion hearing. *Joint Appendix 670 (Volume 3).*

Mr. Hockemier took the stand at this evidentiary hearing. *Joint Appendix 672 (Volume 3).* When asked if during any of Mr. Macfarlan's visits with Mr. Hockemier his legal counsel talked to him about having any person send something to the court in support of him, Mr. Hockemier responded, "Absolutely not. He didn't bring anything like that up." *Joint Appendix 676-677 (Volume 3).*

District Court Judge Kriston N. Hill denied Mr. Hockemier's petitions for habeas corpus relief on May 24, 2021. *Joint Appendix 877-885 (Volume 4).* Judge Hill cited NRS 34.810(1)(a) in limiting the consideration of Mr. Hockemier's claims to issues relevant to ineffective assistance of counsel. *Joint Appendix 878 (Volume 4).*

Included in the analysis of Judge Hill's order was a conclusion that Sherburne Macfarlan was not ineffective when he advised Mr. Hockemier that he would probably receive concurrent sentences. *Joint Appendix 880-881 (Volume 4).*

While the district court concluded that Mr. Macfarlan was not ineffective in failing to file a pretrial petition for writ of habeas corpus, the analysis was strictly limited to the issue of not challenging the bind over of two kidnapping charges. *Joint Appendix 881 (Volume 4).* The district court did not address whether it was ineffective for Mr. Macfarlan to not challenge the jurisdictional defect as to Detective Hessing starting the investigation of Mr. Hockemier **prior** to Mr. Hockemier's twenty-first (21st) birthday. *Joint Appendix 881 (Volume 4).*

The district court said that Mr. Hockemier had failed to show which witnesses should have been presented and how that would have given a reasonable probability of a different result at sentencing. *Joint Appendix 881-882 (Volume 4).*

Mr. Macfarlan was not faulted regarding his failure to present mitigating evidence and witnesses at the sentencing hearing. *Joint Appendix 882-883 (Volume 4).* Judge Hill explained that "there was no reason to believe that trial counsel was deficient for not repeating the same facts to the Court *ad nauseum*." *Joint Appendix 883 (Volume 4).*

SUMMARY OF ARGUMENT

The district court erred in denying Devon Ray Hockemier's petition for writ of habeas corpus as well as his supplement to the petition. Trial counsel Sherburne Macfarlan's performance was ineffective pursuant to Strickland v. Washington, 466 U.S. 668 (1984).

Specifically, the performance of Mr. Macfarlan was deficient at the sentencing hearing by failing to present evidence and witnesses in mitigation and failing to even consult with Mr. Hockemier in that regard.

Moreover, Mr. Macfarlan was ineffective at the preliminary hearing in his failure to fully challenge the State's case and was ineffective afterwards when he failed to file a pretrial petition for writ of habeas corpus to challenge the jurisdiction to proceed in district court. That failure continued for the rest of trial counsel's representation.

At the preliminary hearing, Mr. Macfarlan did not object to the jurisdiction of the justice court to proceed when Detective Hessing confirmed that he started the investigation of Mr. Hockemier days before Mr. Hockemier's twenty-first (21st) birthday. Such forbearance was ineffective.

On appeal, Mr. Macfarlan severely limited the scope of his representation on appeal by only arguing the "abuse of discretion" standard in asking for Mr. Hockemier's sentences to be run concurrently. Defense counsel failed to address jurisdiction – and, in the process, provided ineffective assistance of counsel on the appeal, too.

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ARGUMENT

(1) The district court committed reversible error in denying Devon Ray Hockemier's postconviction petitions for writ of habeas corpus.

NRS 34.724, which defines what a petition for writ of habeas corpus is in this jurisdiction, states:

> Any person convicted of a crime and under sentence of death or imprisonment who claims that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State, or who, after exhausting all available administrative remedies, claims that the time the person has served pursuant to the judgment of conviction has been improperly computed, may, without paying a filing fee, file a postconviction petition for a writ of habeas corpus to obtain relief from the conviction or sentence or to challenge the computation of time that the person has served.

The Sixth Amendment to the United States Constitution states the following:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

> compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

In Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005), citing Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996), this Court stated that a "claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review." This Court continued on, stating that "a district court's factual findings will be given deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong." Id., citing Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

To prevail on a claim of ineffective assistance of counsel, a petitioner (1) "must demonstrate that his trial or appellate counsel's performance was deficient, falling below an objective standard of reasonableness," and (2) "must show prejudice." Id. at 686, 1166-67, citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Kirksey at 987-88, 1107.

Pertaining to trial counsel, "prejudice is demonstrated by showing that, but for trial counsel's errors, there is a reasonable probability that the result of the proceedings would have been different." Id., citing Strickland at 694.

Pertaining to appellate counsel, "prejudice is demonstrated by showing that an omitted issue had a reasonable probability of success on appeal." Id., citing Kirksey at 998, 1114.

In Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984), citing Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981), this Court held a "defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record."

In Brown v. State, 110 Nev. 846, 851-52, 877 P.2d 1071, 1074 (1994), a criminal defense attorney was declared ineffective for failing to call any witnesses on his client's behalf at the sentencing hearing. This court emphasized that "when a judge has sentencing discretion, as in the instant case, possession of the fullest information possible regarding the defendant's life and characteristics is essential to the selection of

the proper sentence." Id. at 851, 1074, citing Wilson v. State, 105 Nev. 110, 115, 771 P.2d 583, 586 (1989) (citing Lockett v. Ohio, 438 U.S. 586, 603, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978)).

(a) Sherburne Macfarlan's performance at the trial level was deficient and prejudiced Devon Ray Hockemier's defense.

When considering that Mr. Macfarlan presented no witnesses at the sentencing hearing nor any evidence in mitigation, the performance fell below a reasonable attorney standard and prejudiced Mr. Hockemier's defense. In some cases, one could make an informed decision to not call any witnesses at a sentencing proceeding. This case does not present that situation.

Mr. Hockemier testified under oath that Mr. Macfarlan did not mention to him any opportunity to put on witnesses and evidence in support of the argument that he should receive two (2) concurrent ten (10) year to life prison sentences. There is simply no rational basis for trial counsel to not even start that conversation with his client. Mr. Hockemier was counting on his counsel fighting hard for concurrent

sentences. Instead, he was sentenced to consecutive terms in prison – resulting in an additional ten (10) years of imprisonment before he can possibly be paroled.

The harm to Mr. Hockemier from this inaction is further amplified by the fact that Mr. Macfarlan told him that he would probably receive concurrent sentences. Defense counsel's misprision in his prediction of the result may not in and of itself constitute ineffectiveness. However, defense counsel had some degree of control in seeing to it that such a prediction came true.

But of even more harm to Mr. Hockemier was the failure of Mr. Macfarlan to address the obvious jurisdictional defect at the justice court level. NRS 62B.330(3)(e)(2) makes it very clear that for a juvenile to come under the purview of the adult court, the identity of the suspect would have to be discovered **after** the suspect's twenty-first (21st) birthday. Detective Hessing, in no uncertain terms, stated that his investigation of Devon Ray Hockemier began on November 21, 2013 – three days **before** Mr. Hockemier turned twenty-one (21). That in and of itself should have alerted Mr. Macfarlan to object to the jurisdiction

of the justice court to proceed. Instead, Mr. Macfarlan remained silent on the matter.

The State, in a seemingly hopeless position to try to rehabilitate this obvious miscue, points to court minutes from a hearing that was held four (4) days before the preliminary hearing. All the State can do is say that the issue of the contingent motion to transfer was "handled" during that hearing and that Mr. Macfarlan was convinced that the justice court had jurisdiction. Three (3) problems exist with that position.

Firstly, Mr. Macfarlan could not come close to articulating why he agreed with the ruling that the justice court had jurisdiction to proceed against Mr. Hockemier – who was unquestionably a juvenile when these infractions were allegedly committed. Was there any evidence presented at that hearing indicating that Detective Hessing was oblivious as to Mr. Hockemier's identification until after Mr. Hockemier's birthday? We may never know the answer to that question. Whatever happened at that motion's hearing, the fact is crystal clear – Detective Hessing testified under oath that he started his

investigation of Mr. Hockemier before Mr. Hockemier was 21 years of age. That divests jurisdiction from the adult justice system under Nevada law.

Secondly, 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.

Thirdly, the court minutes are woefully inadequate in explaining the basis for the contingent motion's denial. Between (1) the plain language of Detective Hessing's testimony at the preliminary hearing and (2) court minutes from the motion hearing coupled with Mr. Macfarlan's vague recollection that he agreed with the jurisdictional analysis embodying the denial of his **own** contingent motion, the preliminary hearing transcript provides a far firmer basis in the record to hold that jurisdiction was lacking in the justice court. Even if we assume *arguendo* that Detective Hessing had testified at the motion hearing that he knew of Mr. Hockemier's identity on November 25, 2013, that does not erase the fact that Detective Hessing knew of Mr.

Hockemier's identify on November 21, 2013. After all, common sense would dictate that Detective Hessing would not forget Mr. Hockemier's identity merely four (4) days after his investigation commenced.

Not only did trial counsel not lodge an objection at the justice court level to jurisdiction, but trial counsel failed to file a pretrial petition for writ of habeas corpus as to jurisdiction as well as the sufficiency of the evidence as to the charges. A casual inspection of the preliminary hearing transcript shows that a jurisdictional attack would have been reasonably certain to prevail.

Attorneys Tony Liker and David Loreman were right. Mr. Macfarlan's failure to have objected to jurisdiction constitutes ineffective assistance of counsel. Mr. Macfarlan's testimony that the issue of the timeline pertaining to jurisdiction (specifically, the discovery of Mr. Hockemier's birthday and Detective Hessing's discovery of Mr. Hockemier's identity) would have "potentially" been important can only help Mr. Hockemier's position, not the State's.

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A writ should issue discharging Mr. Hockemier of the restraints of the Nevada Department of Corrections. Mr. Hockemier is being held in violation of the Sixth Amendment to the U.S. Constitution.

(b) Sherburne Macfarlan's performance at the appellate level was deficient and prejudiced Devon Ray Hockemier's defense.

In Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987), this Court held, "The sentencing judge has wide discretion in imposing a sentence, and that determination will not be overruled absent a showing of abuse of discretion." See Deveroux v. State, 96 Nev. 388, 390, 610 P.2d 722, 723 (1980).

In Sims v. State, 107 Nev. 438, 440, 814 P.2d 63, 64 (1991), it was held that it was presumptively invalid for an appellate court to superimpose its view of what an appropriate sentence is when a trial judge sentences a criminal defendant within the statutory parameters.

It was unfortunate enough that the issue of jurisdiction was not fully developed in the justice court level. When Mr. Macfarlan had the

opportunity to address this obvious issue in this Court, counsel forfeited the chance.

Instead of addressing the clear defect in the record, appellate counsel alleged that it was an abuse of discretion for the district court to have sentenced Mr. Hockemier to consecutive terms of imprisonment in the Nevada Department of Corrections.

It is no secret that abuse of discretion claims are routinely rejected by this Court given how much deference is given to district courts. As such, appellate counsel in the instant case forfeited the highly meritorious ground on appeal (jurisdiction) and instead focused on a ground of appeal that was virtually destined to fail (abuse of discretion).

Like his performance at the trial level, Mr. Macfarlan's performance at the appellate level was deficient and severely prejudiced Mr. Hockemier. An appeal as to lack of jurisdiction was reasonably likely to succeed given the clear testimony of Detective Hessing and the lack of record to upend that testimony. Juvenile court, not justice court, should have received this case.

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A writ should issue discharging Mr. Hockemier of the restraints of the Nevada Department of Corrections on this basis as well. Any other result is a violation of the Sixth Amendment to the U.S. Constitution.

CONCLUSION

The performance of Sherburne Macfarlan at the trial level and the appellate level fell below the standard of effective counsel set forth in Strickland v. Washington. Witnesses were not called at sentencing. Mr. Hockemier was not asked about preparing witnesses to testify on his behalf. Jurisdiction was not challenged at the justice court level or the district court level or the Supreme Court level. Trial counsel simply did not file a pretrial petition for writ of habeas corpus that could have challenged jurisdiction. On the direct appeal, trial counsel abandoned the jurisdictional issue that is clear from a casual inspection of the record.

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As such, a writ of habeas corpus should be entered discharging Mr. Hockemier of the restraints of the Nevada Department of Corrections. Mr. Hockemier is illegally in prison.

DATED this 15th day of November, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening 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) because this Opening Brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 Century Schoolbook font.

2. I further certify that this Opening Brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[x] Proportionately spaced, has a typeface of 14 points or more, and contains 6,383 words; or

[ ] Monospaced, has 10/5 or fewer characters per inch, and contains ____ words or ____ lines of text; or

[ ] Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate 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 the applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is found.

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 15th day of November, 2021.

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CERTIFICATE OF SERVICE

(a) I hereby certify that this document was electronically filed with the Nevada Supreme Court on the 15th day of November, 2021.

(b) I further certify that on the 15th day of November, 2021, electronic service of the foregoing document shall be made in accordance with the Master Service List to Aaron Ford, Nevada Attorney General;

and Tyler J. Ingram, Elko County District Attorney; and Jeffrey C. Slade, Deputy Elko County District Attorney.

(c) I further certify that on the 16th day of November, 2021, this brief shall be mailed with postage prepaid to Devon Ray Hockemier, NDOC # 1140743, Lovelock Correctional Center, 1200 Prison Road, Lovelock, NV 89419.

DATED this 15th day of November, 2021.

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