IN THE SUPREME COURT OF THE STATE OF NEVADA

DUSTIN BARRAL

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NUMBER: 74288
(District Court Case No. C269698)

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APPELLANT'S OPENING BRIEF

(APPEAL FROM JUDGMENT OF CONVICTION)

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Docket 74288 Document 2018-10972

IN THE SUPREME COURT OF THE STATE OF NEVADA

DUSTIN BARRAL Appellant, vs. THE STATE OF NEVADA, Respondent.	CASE NUMBER: 74288 **NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Attorney(s) of record for Appellant: Michael L. Becker, Esq. and Michael V. Castillo, Esq.

Corporation: Las Vegas Defense Group, LLC.

No publically held company associated with this corporation.

Law Firm(s) appearing in District Court: Las Vegas Defense Group, LLC.

Dated this 20 day of March, 2018.

MICHAEL V. CASTILLO, ESQ.
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JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this case pursuant to NRAP 4 and NRS 174.035(3). The Appellant Dustin Barral's (hereinafter "Appellant") Notice of Appeal was timely filed on October 13, 2017 after the Appellant's Judgment of Conviction was entered against him on September 29, 2017 based on a guilty plea agreement entered on May 22, 2017. (*See* Appendix Vol. I, hereinafter "App" at p. 32-41).

ROUTING STATEMENT

Pursuant to NRAP 17(b)(1), this case is appropriately assigned to the Court of Appeals as a post-conviction appeal based on a judgment of conviction following a guilty plea.

STATEMENT OF THE ISSUES

I. Whether the court below abused its discretion by relying on suspect evidence in the imposition of sentence.

II. Whether the sentence imposed by the court below violated the Eighth Amendment of the United States Constitution.

STATEMENT OF THE CASE

On or about December 1, 2010, the Appellant was arraigned and charged by Information with Count I-SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony, NRS 200.364, 200.366) by digital vaginal penetration and Count II-SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony, NRS 200.364, 200.366) based on events alleged to have occurred on or about July 10, 2010. (*See* App at p. 1-3, Volume I).

Following a three-and-a-half-day jury trial which commenced on May 28, 2013, the Appellant was found guilty of both of the above counts on May 31, 2013 (*See* App at p. 4, Volume I).

On September 23, 2013, the Appellant was sentenced to Life with a minimum parole eligibility of four hundred twenty (420) months as to Count 1 and Life with a minimum parole eligibility of four hundred twenty (420) months as to Count 2 with Count 2 to run concurrent with Count 1. (*See* App at p. 6-7, Volume I).

The Appellant filed a timely Notice of Appeal on September 27, 2013. (*See* App at p. 8-14, Volume I).

On July 23, 2016, the Nevada Supreme Court reversed the Appellant's convictions in their entirety holding that the court below committed structural error

when it failed to administer an oath to the jury panel pursuant to NRS 16.030(5) prior to commencing voir dire. (*See* App at p. 15-31, Volume I). *See also* Barral v. State, 131 Nev. Adv. Op. 52, 353 P.3d 1197, 1200 (2015).

On May 22, 2017, the Appellant entered in a guilty plea agreement whereby he pled pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970) to Count 1- ATTEMPT SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category B Felony- NRS 200.364, 200.366, 193.330) and Count 2-CHILD ABUSE, NEGLECT OR ENDANGERMENT (Category B Felony- NRS 200.508) in which the State retained the right to argue at rendition of sentence, including for consecutive counts. (*See* App at p. 32-41, Volume I).

On September 18, 2017, following oral argument and the submission of sentencing memorandums and exhibits by both the Appellant and the Respondent, the Appellant was sentenced to two hundred and forty (240) months with a minimum parole eligibility of ninety-six (96) months as to Count 1 and seventy-two (72) months with a minimum parole eligibility of twenty-eight (28) months as to Count 2 with Count 2 to run consecutive to Count 1. The total aggregate total sentence imposed was Three Hundred and Twelve (312) months maximum with a minimum parole eligibility of one hundred and twenty four (124) months. (*See* App at p. 77-78, Volume I). The Appellant was given one thousand and five

hundred seventy-four (1,574) days credit for time served. (*See* App at p. 77-78, Volume I).

On October 13, 2017, the Appellant filed a timely Notice of Appeal. (*See* App at p. 73-79, Volume I). This Opening Brief due on March 20, 2018 follows.

STATEMENT OF THE FACTS

Per the Presentence Investigation Report (hereinafter "PSI"), which more fully documents the allegations in question, the State alleged that the Appellant sexually assaulted his then four (4) year old niece J.C. as she slept on a futon couch while spending the night at his residence. Specifically, the State alleged that the Appellant came into the bedroom where J.C. was sleeping with her cousin and dug into her vaginal and anal openings with his fingers. [1]

Following a jury trial and full reversal by the Nevada Supreme Court,[2] the Appellant elected to plead pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to the amended charges of Count 1- ATTEMPT SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category B Felony- NRS 200.364, 200.366, 193.330) and Count 2-CHILD ABUSE, NEGLECT OR ENDANGERMENT (Category B Felony- NRS 200.508).

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[1] Pursuant to NRS 176.156, NRAP 10 and NRAP 30, the Appellant has filed a motion to transmit the PSI under seal with this Court based on references that will be made to the same in this fast track statement.

[2] *See* Barral v. State, 131 Nev. Adv. Op. 52, 353 P.3d 1197, 1200 (2015).

Sentencing took place on September 18, 2017. Prior to sentencing, Counsel for the Appellant filed a sentencing memorandum on September 15, 2017. (*See* A. App., pp. 025-039). In the memorandum, Counsel asked for Judge Douglas Smith (hereinafter "Judge Smith") to sentence the Appellant to a minimum term of thirty-six (36) months and a maximum term of one hundred and twenty (120) months in the Nevada Department of Corrections as to Count 1 and twelve (12) to forty-eight (48) months as to Count 2 as recommended by the PSI Report. (*See* App at p. 49-50, Volume I).

In said memorandum, Counsel pointed out that numerous factors in mitigation for Judge Smith's consideration including that the Appellant had no criminal history, a steady employment history, extensive family support and two favorable evaluations (psychosexual and danger) certifying that he did not represent a high risk to reoffend as he came back moderate and low risk respectively. (*See* App at p.49, 52-54, Volume I).

At sentencing, Counsel asked for the Court to follow the above recommendations. (*See* App at p. 085, Volume I). Counsel highlighted the Appellant's lack of a prior record, steady employment history and the numerous character letters submitted showing that he had family and community support. (*See* App at p. 85-86, Volume I). Counsel also pointed out that per the psychosexual evaluation, the Appellant came back as a moderate risk overall but

low risk in the majority of the scoring categories. (*See* App at p.086-086, Volume I).

Counsel further noted that per John Pacult's danger evaluation, the evaluator had no major concerns related to the Appellant having contact with his sons once he was back in the community provided that there was input from the professionals working with him along with input from the children's mother. (*See* App at p. 86, Volume I).

Counsel concluded by noting that the recommendations of Parole and Probation were appropriate given all of the factors for the court to weigh in pronouncing sentence. (*See* App at p. 86-87, Volume I).

The State argued for the maximum sentence of ninety-six (96) to two hundred and forty (240) months as to Count 1 and twenty-eight (28) to seventy-two (72) with Count 2 to run consecutive to Count 1. (*See* App at p. 084, Volume I). In its argument, the State contended that the Appellant should be given a maximum sentence based on the State's recitation of the facts. (*See* App at p. 082-084, Volume I).

Two speakers spoke prior to the Appellant being sentenced. The second speaker, J.C.'s grandfather David Hamens attempted to read into the record what he represented to a be a blog from the Department of Justice regarding sexual offender recidivism rates including assertions that "some sex offenders are

pedophiles, some act out in response to their own abuse and some commit these crimes as part of an overall criminal lifestyle." (*See* App at p. 90, Volume I). At that point, Counsel objected pursuant to NRS 176.015 that Mr. Hamen's statements went beyond the scope of a victim impact statement. (*See* App at p. 90, Volume I). Judge Smith overruled the objection and allowed Mr. Hamens to make further statements into the record including the assertion that "the overall sexual recidivism rate is from 5 to 24 percent" and that "most sexual offenses are not reported to law enforcement." (*See* App at p. 90, Volume I).

Following the conclusion of arguments by Counsel, Judge Smith sentenced the Appellant to imprisonment in the Nevada Department of Corrections as set forth above. (*See* p. 2, *supra*).

SUMMARY OF THE ARGUMENT

Judge Smith erred by relying on suspect evidence in the imposition of sentence, namely by admitting victim impact evidence that was inadmissible. Further, the sentence imposed violated the Eighth Amendment's prohibition against cruel and unusual punishment by completely disregarding the mitigating factors presented and imposing the maximum possible sentence. Accordingly, a new sentencing hearing is warranted.

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ARGUMENT

I. THE COURT BELOW ABUSED ITS DISCRETION BY RELYING ON SUSPECT EVIDENCE IN THE IMPOSITION OF SENTENCE

This Court has held that a district court is afforded wide discretion in its sentencing decision, *see, e.g.* Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). However, this discretion is not limitless and when imposing a sentence, a district court may not abuse its discretion. Parrish v. State, 116 Nev. 982, 989; 12 P. 3d 953, 957 (2000). Further, this Court will reverse a sentence if it is supported solely by impalpable and highly suspect evidence. Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); Renard v. State, 94 Nev. 368, 369, 580 P.2d 470, 471 (1978).

In this context, the Nevada Supreme Court has reversed the sentence of defendants when a sentencing court relies on unsupported representations that are outside the scope of the case. *See* e.g. Goodson v. State, 98 Nev. 493, 654 P. 2d 1006 (1982) (Defendant's sentence for possession of cocaine was improperly prejudiced by district court's consideration of the unsupported representation in presentence report that defendant was trafficking in narcotics), *see also* Stockmeier v. State, Bd. of Parole Commissioners, 127 Nev---,---, 255 P. 3d 209, 213 (2011) (A PSI must not include information based on impalpable or highly suspect evidence).

Further, under NRS 176.015(3)(b), victims may "[r]easonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution." There is no statutory authorization for a victim speaker to address the court with statistics that purportedly support his viewpoint on sexual recidivism rates and to be allowed to state those statistics unchallenged. Allowing Mr. Hamens to opine on sexual recidivism statistics went well beyond the impact of the crime on the victim under NRS 176.015.

Additionally, given that the Appellant's recidivism rate as noted by the professionals who evaluated him as required by statute was moderate on the psychosexual with low risk in the majority of the categories and low risk on the danger evaluation, allowing Mr. Hamens to state that the overall recidivism rate is from 5 to 24 percent constituted improper evidence in violation of NRS 176.015. Given that Judge Smith did not disregard the same and instead promptly sentenced the Appellant to the maximum sentence shortly thereafter, it is clear that Judge Smith relied on this suspect evidence in imposing sentence. Accordingly, reversal should be ordered.

II. THE SENTENCE IMPOSED BY THE COURT BELOW VIOLATED THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Constitutionally, the issue of fairness in sentencing is addressed by the

Eighth Amendment prohibition against cruel and unusual punishment. Under this prohibition, a sentence that is within statutory limits may be unconstitutional if "it is so unreasonable or disproportionate to the crime as to shock the conscience." Allred v. State, 120 Nev. 410, 420; 92 P.3d 1246,1253 (2004), *overruled on other grounds by* Knipes v. State, 192 P.3d 1178; 124 Nev. Adv. Rep. 79 (2008). The Eighth Amendment requires that defendants be sentenced individually, taking into account the individual, as well as the charged crime. Martinez v. State, 114 Nev. 735, 737, 961 P.2d 143, 145 (1998).

Furthermore, the United States Supreme Court has recognized that a sentence is excessive when the sentence imposed serves no penal purpose more effectively than a less severe punishment. Fullman v. Georgia, U.S. 238, 279; 92 S.Ct.2726, 2747 (1972). Finally, in addition to fairness, the United States Supreme Court has recognized "reasonableness as a component of sentencing determination. As Justice Breyer stated in United States v. Booker, "we think it fair to assume judicial familiarity with a reasonableness standard." United States v. Booker, 543 U.S. 220, 262; 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

The Nevada Supreme Court has recognized the prohibition against cruel and unusual punishment in Naovarath v. State, 105 Nev. 525, 779 P. 2d 944 (1989) where the Court cited former United States Supreme Court Justice Frank Murphy in an unpublished draft opinion as follows:

> More than any other provision in the constitution, the prohibition of cruel and unusual punishment depends largely, if not entirely, upon the humanitarian instincts of the judiciary. We have nothing to guide us in learning what is cruel and unusual punishment apart from our conscience. A punishment which is considered fair today may be considered cruel tomorrow. And so, we are not dealing here with a set of absolutes. Our decision must necessarily spring from the mosaic of our beliefs, our backgrounds and the degree of our faith and the dignity of the human personality. Id. at p. 4.

It is clear from the above case law that the Nevada Constitution prohibits the infliction of cruel and unusual punishment. Accordingly, this Court has the right and duty to review the decisions of district court judges to determine if they have abused their discretion in imposition of sentences. It is also clear that based upon the facts and circumstances of specific cases, this Court can determine that as it applies to a specific case, a district court judge has abused his discretion and has imposed a sentence that is cruel and unusual. *See* Naovarath v. State, *supra.*

Although a sentencing judge is given wide discretion to sentence a defendant as he or she sees fit, that discretion is not unlimited and is tempered by a number of statutory and constitutional factors. One way a sentencing judge's discretion is reined in is with regards to whether the recommendations of parole and probation are followed. *See e.g.* NRS 176A.100(3) (the court shall consider the standards adopted by the Chief of Parole and Probation Officer in determining whether or not to grant probation). By requiring that the judge who sentences an individual

consider the standards used by Parole and Probation, the Legislature has shown a strong preference towards deference to the judgment of Parole and Probation.

In cases where the alleged error in the lower court is constitutional in nature, the key determination is whether the error was objected to in a timely manner. *See* Martinorellan v. State, 131 Nev. ___, ___, 343 P.3d 590, 593 (2015). If the Petitioner objected to the error at the time of sentencing, then the standard of review is whether the constitutional error is harmless beyond a reasonable doubt. *See* Id. (citing Chapman v. California, 386 U.S. 18, 24 (1967)).

In this case, notwithstanding that the United States Supreme Court has found a sentence to be excessive if the penal interest is served no better than with a lesser sentence, the court below rejected the recommendations of Counsel and Parole and Probation and sentenced the Appellant to the maximum sentence which means that he will serve in excess of ten (10) years before he is eligible for parole. This is well beyond the forty-eight (48) months prior to parole eligibility recommended by Parole and Probation.

In pronouncing its sentence, the court disregarded the recommendations of Parole and Probation, the recommendations of two professionals certifying that the Appellant did not represent a high risk to reoffend, his lack of a prior criminal record and his steady work history. (*See* App at p. 48-56, Volume I). The court

further disregarded the numerous character letters submitted by the Appellant along with the sentencing memorandum. (*See* App at p. 57-72, Volume I).

All of the foregoing should have been considered by the court below. However, instead of considering the factors in mitigation, the sentence handed out by the court below was disproportionate as to shock the conscious because the court imposed the maximum prison sentence it possibly could have.

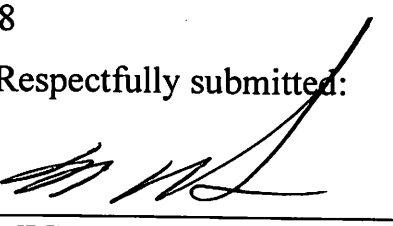
In sum, the court below sentenced the Appellant to a sentence that did not accurately reflect the mitigating factors present in the case at bar. Therefore, the sentence imposed was in violation of the Eighth Amendment right to be free from cruel and unusual punishment. Accordingly, this matter should be remanded for a new sentencing hearing.

CONCLUSION

Based on the Points and Authorities herein contained, it is respectfully requested that the conviction and sentence of the Appellant DUSTIN BARRAL be set aside and for a new sentencing date to be set.

Dated this 20 day of March, 2018

Respectfully submitted:



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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Appellant's Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and has been prepared in a proportionately spaced typeface using Times New Roman in font type 14.
2. I further certify that this appellate 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 does not exceed twelve (12) 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 applicable rules of the Nevada Rules of Appellate Procedure, particularly NRAP 28(e)(1), which requires every assertion in the brief regarding matters of record to be supported by a reference in the page of the transcript or appendix where the matter relied on is to be found.

4. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure.

Dated this 20 day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing **APPELLANT'S OPENING BRIEF** was made this 20th day of March, 2018 upon the appropriate parties hereto by electronic filing using the ECF system which will send a notice of electronic filing to the following and/or by facsimile transmission to:

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DECLARATION OF MAILING

Jessica Sellers, an employee with the Las Vegas Defense Group, hereby declares that she is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 20th day of March, 2018, declarant deposited in the United States mail, a copy of the **Appellant's Opening Brief** in the case of State of Nevada vs. Dustin Barral, Case No. 74288, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to DUSTIN BARRAL, #1108615, High Desert State Prison, P.O. Box 650, Indian Springs, NV 89070, that there is a regular communication by mail between the place of mailing and the place so addressed.

Pursuant to NRS 53.045, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 20th day of March, 2018.

An employee of Las Vegas Defense Group, LLC.