IN THE SUPREME COURT OF THE STATE OF NEVADA

DUSTIN BARRAL,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 74288

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

MICHAEL L. BECKER, ESQ.
Nevada Bar #008765
MICHAEL V. CASTILLO, ESQ.
Nevada Bar #011531
2970 W. Sahara Avenue
Las Vegas, Nevada 89102
(702) 331-2725

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar #012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

DUSTIN BARRAL, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 74288

RESPONDENT'S ANSWERING BRIEF

Appeal from Judgment of Conviction
Eighth Judicial District Court, Clark County

ROUTING STATEMENT

This appeal is appropriately assigned to the Court of Appeals pursuant to NRAP 17(b)(1) because it is a direct appeal from a judgment of conviction based on a plea of guilty pursuant to North Carolina v. Alford, 400 U.S 25, 91 S. Ct. 160 (1970).

STATEMENT OF THE ISSUES

1. Whether Appellant's sentence was not based on impalpable or suspect evidence.

2. Whether Appellant's sentence does not constitute cruel and unusual punishment.

STATEMENT OF THE CASE

On November 29, 2010, Dustin Barral (hereinafter "Appellant"), was charged by way of Information with the following: Counts 1 and 2 – Sexual Assault With a Minor Under Fourteen Years of Age (Felony - NRS 200.364, 200.366). Appellant's Appendix (hereinafter "AA") 1-2.[1]

Appellant's jury trial began on May 28, 2013, and ended on May 31, 2013, wherein the jury found Appellant guilty of both counts. AA 4-5. Appellant was sentenced as to Count 1 - life with a minimum parole eligibility of four hundred twenty (420) months, and as to Count 2- life with a minimum parole eligibility of four hundred twenty (420) months. AA 6-7. The District Court ordered Count 2 to run concurrent with Count 1. Id. Appellant's Judgment of Conviction was filed September 23, 2013. 1 AA 6.

Appellant filed a Notice of Appeal on September 27, 2013. AA 8. On July 23, 2015, this Court reversed Appellant's convictions finding the District Court committed structural error in failing to administer an oath to the jury panel. AA 19-24.

On May 22, 2017, a Second Amended Information was filed, charging Appellant with Count 1 - Attempt Sexual Assault With a Minor Under Fourteen

[1] An Amended Information was filed on May 30, 2013, correcting the victim's name. Respondent's Appendix (hereinafter "RA") 15-16.

Years of Age (Category B felony – NRS 200.364, 200.366, 193.330- NOC 50123), and Count 2 – Child Abuse, Neglect, or Endangerment (Category B Felony – NRS 200.508(1) – NOC 55226). AA 40-41. Appellant pleaded guilty to the charges as alleged in the second Amended Information pursuant to Alford. AA 32-38. Per the negotiations, the State retained the right to argue at rendition of sentence, including for consecutive counts. AA 32.

On September 18, 2017, Appellant was sentenced as to Count 1 – a maximum of two hundred and forty (240) months with a minimum parole eligibility of ninety-six (96) months, and as to Count 2 – a maximum of seventy-two (72) months with a minimum parole eligibility of twenty-eight (28) months, with Count 2 to run consecutive to Count 1. AA 78. The aggregate total sentence was a maximum of three hundred and twelve (312) months with a minimum parole eligibility of one hundred and twenty-four (124) months. Id. Appellant received one thousand and five hundred seventy-four (1,574) days credit for time served. Id.

The Court also ordered a special sentence of lifetime supervision to be imposed to commence upon release from any term of imprisonment, probation, or parole. Id. Furthermore, the Court ordered that before Appellant is eligible for parole, a panel consisting of the Administrator of the Mental Health and Development Services of the Department of Human Resources or his designee, the Director of the Department of Corrections or his designees, and a psychiatrist

licensed to practice in Nevada must certify that Appellant does not represent a high risk to re-offend based on current accepted standards of assessment. Id. Additionally, Appellant was ordered to register as a sex offender in accordance with NRS 179D.460 within forty-eight (48) hours after release from custody. Id. Appellant's Judgment of Conviction was filed on September 29, 2017. AA 77.

Appellant filed a Notice of Appeal on October 13, 2017. AA 73. Appellant filed his Opening Brief on March 21, 2018.

STATEMENT OF THE FACTS

Between July 10, 2010, and July 12, 2010, J.C. was sexually assaulted by her uncle, Appellant. Presentence Investigation Report (hereinafter "PSI"), p. 4.[2] J.C had spent the night over at Appellant's house when the abuse happened. Id. J.C. explained that she was sleeping in her cousin's room (Appellant's son) on the futon, but could not sleep because Appellant was hurting her. PSI, p. 5. J.C. disclosed to her mother that Appellant had looked at, touched, and "dug" into her vaginal area. Id.

On July 15, 2010, Detective Timothy Hatchett, conducted a forensic interview with J.C. at the Children's Advocacy Center. PSI, p. 4, AA 82. He provided an anatomically correct picture of a female toddler and asked her if there were any areas

[2] Appellant filed a Motion to Transmit Presentence Investigation Report on March 20, 2018. On March 23, 2018, an Order was filed granting Appellant's Motion to Transmit Presentence Investigation Report.

she would consider private, which no one should touch. PSI, p. 4. She identified the vaginal and buttock's area. Id.

He then asked her if she told someone that someone had "dug" into her private area, which she responded Appellant had. Id. She described that the digging hurt and that she awoke to Appellant "digging" on her private. Id. J.C. explained that he was "digging" with his hands and illustrated with her two fingers that he was using his fingers. Id. She also explained that Appellant was sinking inside of her private parts. Id. J.C. said that Appellant did not respond when she told him to stop. PSI, p. 5. She explained that Appellant's fingers went under her pants and he turned his fingers towards her privates. Id. She stated that Appellant told her he wanted to do it again and again. Id. She also told Detective Hatchett that Appellant was digging into her private and then moved to her bottom. Id. She explained Appellant also put his fingers inside her buttocks. Id.

Appellant was sentenced on September 18, 2017. AA 80. Appellant and the State each filed sentencing memorandums. AA 42-46; AA 48-55. Defense counsel requested the Court to sentence Appellant to thirty-six (36) to one hundred and twenty (120) months as to Count 1 and twelve (12) to forty-eight (48) months as to Count 2. AA 49-50. Additionally, defense counsel submitted 11 character letters to the Court. AA 60-72.

During sentencing defense counsel argued that Appellant's psychosexual evaluation performed by Joann Lujan came back at moderate risk, and low risk in the majority of those categories including the risk to reoffend. AA 85-86. Additionally, defense counsel claimed that John Pacult's danger evaluation stated Appellant did not present a high risk to reoffend, and the evaluator had no major concerns related to Appellant having contact with his sons when he is back in the community. AA 86. Lastly, defense counsel asked the Court to give him the sentence that Parole and Probation recommended, which was what defense counsel also asked for. AA 86.

During sentencing, the State argued for Appellant to be given the maximum sentence on both counts. AA 84. Additionally, the State had two victim impact speakers. AA 87-88. J.C.'s mother and J.C.'s grandfather gave statements. AA 87-90.

SUMMARY OF THE ARGUMENT

Appellant claims the district court erred in relying on suspect evidence during the imposition of Appellant's sentence. However, there is nothing in the record to indicate that the District Court improperly considered the impact statement of J.C.'s grandfather. Furthermore, Appellant pleaded guilty pursuant to Alford, admitting there was ample evidence for the State to convict him of greater offenses, or of more offenses if he would have proceeded to trial. Thus, the District Court did not abuse

its discretion in sentencing Appellant to the maximum sentence. Next, Appellant alleges that his sentence amounts to cruel and unusual punishment in violation of the Eighth Amendment of the U.S. Constitution because the District Court did not follow Parole and Probation's recommendation. However, the District Court is not required to follow Parole and Probation's recommendation.

ARGUMENT

I. APPELLANT'S SENTENCE WAS NOT BASED ON IMPALPABLE OR SUSPECT EVIDENCE

District courts are given wide discretion regarding the admittance of evidence at sentencing and alleged error is reviewed for an abuse of discretion. Martinez v. State, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998); Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996) Further, a sentencing judge enjoys significant freedom and discretion in its sentencing decisions. Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). And, unless the trial court relied on impalpable or highly suspect evidence, its decision will not be disturbed on appeal as long as a sentence is within statutory guidelines. Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

Appellant argues the District Court improperly relied on statements made by J.C.'s grandfather, regarding sexual recidivism rates and his viewpoint on sexual recidivism. Appellant's Opening Brief (hereinafter "AOB") at 8. Further, Appellant argues that is it clear the District Court relied on those statements because Appellant

was sentenced to the maximum sentence, however Appellant fails to cite to anywhere in the record to show that the District Court did in fact rely on those statements and representations in imposing Appellant's sentence. Appellant offers nothing more substantial than a naked assumption that the District Court did anything more than politely listen to J.C.'s grandfather. Any claim that the judge relied on J.C.'s grandfather's impact statement regarding sexual offender recidivism rates is a naked assertion that is flatly insufficient to warrant relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

The facts and statements the District Court relied on were those made when Appellant pleaded guilty, when Appellant was sentenced, and the information from the PSI filed on August 25, 2017, before imposition of sentence. The PSI described that in between July 10, 2010, and July 12, 2010, Appellant sexually assaulted his niece, J.C. PSI, p. 4-5. Further, during sentencing, the State gave the Court an account of the events that happened. AA 82-84. The State explained that this sexual assault happened while J.C.'s mother was in the hospital, and J.C.'s maternal aunt stepped in to help. AA 83. During this vulnerable time, Appellant preyed on J.C. Id.

J.C.'s mother made a statement during sentencing explaining how these events affected J.C., how she became depressed, and how Appellant's actions have haunted her family. AA 87. J.C.'s grandfather spoke to the Court about the impact Appellant's actions have had on his entire family, how J.C. endured years of

counseling and extended periods of emotional withdrawal, and how J.C. has felt that her nightmare was never going to end. AA 89.

Moreover, Appellant pleaded guilty pursuant to Alford. Appellant had the following exchange with the Court:

> THE COURT: By pleading guilty pursuant to the *Alford* decision, it is your desire to avoid the possibility of being convicted of more offenses or of a greater offense if you were to proceed to trial on the original charges and also receiving a greater penalty. Is that right?
> THE DEFENDANT: Yes, Your Honor.
> THE COURT: You understand that your decision to plead guilty by way of the *Alford* decision does not require you to admit guilt but is based upon your belief the State would present sufficient evidence at trial that a jury would return a verdict of guilty of a greater offense or of more offenses then that to which you're pleading guilty?
> THE DEFENDANT: Yes, Your Honor.
> [THE COURT]: You understand by—that by pleading guilty pursuant to the *Alford* decision you admit the State could have proven facts at trial which support all of the elements of the offense to which you're now pleading guilty pursuant to the *Alford* decision as set forth in Exhibit 1?
> THE DEFENDANT: Yes, Your Honor.
> THE COURT: And the State will now recite what they would prove at trial.
> MS. JOBE: The State would have proven had we gone to trial that on or between July 10th of 2010 and July 12 of 2010 subject minor J.C. who was approximately 4 or 5 years old at the time, was the niece through marriage of the Defendant. That at the time J.C. was and her sibling were staying the night at the Defendant's—sorry. J.C. was staying the night at the Defendant's residence with the

Defendant, his wife at the time, their children, as well as J.C. because J.C.'s mother was at the hospital. Defendant's wife at the time was J.C.'s maternal aunt. That while on one of the nights where J.C. was staying the night with the Defendant, the Defendant went into the room where J.C. was staying, J.C. was staying in a room that also was where the Defendant's child, who's approximately six to eight months old, was also sleeping in a crib at the time. J.C. was staying on the futon in that room as a bed. The Defendant went into that room where J.C. was trying to sleep, that he took his fingers and placed his fingers inside J.C.'s genital or vaginal opening as well as her anal opening. That J.C. did not report this until she saw her mother the following Tuesday, which was the very first opportunity J.C. had contact with her mother after these events and the only person to whom J.C. felt comfortable initially disclosing. That the criminal investigation was conducted based on this disclosure and J.C.'s mother contacting law enforcement. That during the course of the investigation by law enforcement, I believe it's now Lieutenant Hatchett, he was a detective at the time, conducted a forensic interview with the very young J.C., that during the course of the forensic interview of the very young J.C. she was very descriptive in describing how the Defendant placed his fingers inside her vaginal and anal opening. She used the words dig, digged, and dug repeatedly throughout the course of her interview to describe how the Defendant's fingers were and what they did inside her vaginal opening as well as her anal opening. That based on this, Your Honor, the State believes it would have proved beyond a reasonable doubt that the Defendant committed these acts that were for sexual purpose and included sexual penetration and were acts that J.C. did not wish to happen, that these acts were done willfully,

> unlawfully, feloniously and with the intent to commit these specific said acts.
> THE COURT: Is that what the State would show if they went to trial?
> THE DEFENDANT: Yes, Your Honor.

RA 6-8.

Therefore, the District Court did not rely on suspect evidence in imposing Appellant's sentence. Instead, Appellant was sentenced according to the facts and information that were presented to the Court during Appellant's guilty plea canvass, in both Appellant's and the State's sentencing memorandums, the PSI report, and during the sentencing hearing.[3] Defense counsel made arguments to the Court, submitted a sentencing memorandum with exhibits, and provided the Court with 11 letters on behalf of Appellant. AA 60-72. Therefore, mitigating information was presented to the Court for consideration, and the Court took into account the information and arguments made on behalf of Appellant. Therefore, the district court did not abuse its discretion.

/ / /

[3] Moreover, Appellant was previously convicted of two counts of sexual assault with a minor under fourteen years of age. AA 1-3. He 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, to run concurrent with Count 1. AA 6-7. However, Appellant's conviction was reversed by this Court after finding the district court committed structural error in failing to swear in the jury before voir dire. AA 19-24. Thus, Appellant was aware of the ability of the State to convict him in front of another jury, and pleaded guilty pursuant to Alford based on what he believed was in his best interest.

II. APPELLANT'S SETENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment to the United States Constitution as well as Article 1, Section 6 of the Nevada Constitution prohibits the imposition of cruel and unusual punishment. The Eighth Amendment and Nevada Constitution do not require the sentence to be strictly proportionate to the crime; they only forbid a sentence that is grossly disproportionate to the crime. Chavez v. State, 125 Nev. 328, 347-348 (2009). A sentence within the statutory limits is "not considered cruel and unusual punishment unless (1) the statute fixing punishment is unconstitutional or (2) the sentence is so unreasonably disproportionate to the offense as to shock the conscience." Id.

Additionally, the district court has wide discretion when sentencing. Id. at 348. This Court will not interfere with an imposed sentence unless the record shows prejudice from facts based on "impalpable or highly suspect evidence." Silks, 92 Nev. at 94, 545 P.2d at 1161. The sentence should not be overruled absent an abuse of discretion. Houk, 103 Nev. at 664, 747 P.2d at 1379. A punishment is excessive "if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." Pickard v. State, 94 Nev. 681, 684 (1978). Further, the sentencing judge may consider a variety

of information to ensure "the punishment fits not only the crime, but also the individual defendant." Martinez v. State, 114 Nev. 735, 738 (1998).

Appellant claims that because the Court sentenced Appellant to the maximum sentence and did not follow Parole and Probation's recommendation, Appellant's sentence constitutes cruel and unusual punishment. AOB 10-12.

NRS 193.330 (a)(1) provides "[a]ttempt to commit a category A felony, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 20 years."

Moreover, NRS 200.366 (1)(b) states "a person who commits a sexual assault is guilty of a category A felony[.]" Additionally, NRS 200.366(1)(b) provides:

> A person is guilty of a sexual assault if he or she [c]ommits a sexual penetration upon a child under the age of 14 years or causes a child under the age of 14 years to make a sexual penetration on himself or herself or another, or on a beast.

Appellant was sentenced in accordance with the above statutes. For Count 1- Appellant's conviction of Attempt Sexual Assault With a Minor Under the Age of Fourteen Years of Age, he was sentenced to ninety-six (96) to two hundred and forty (240) months, or eight (8) to twenty (20) years. This is a legal sentence and is within the sentencing parameters set out by the legislature.

Moreover, NRS 200.508 (b)(1) states:

> If the person has not previously been convicted of a violation of this section or of a violation of the law of any other jurisdiction that prohibits the same or similar

> conduct, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years[.]

As to Count 2 – Child Abuse, Neglect or Endangerment, Appellant was sentenced to twenty-eight (28) months to seventy-two (72) months, which again is within the statutory parameters set for forth by the legislature. Appellant's claim that the District Court abused its discretion in sentencing Appellant because it did not impose the sentence Parole and Probation recommended is without merit. The District Court had the authority to sentence Appellant to a lawful sentence within the statutory parameters, which is what the Court did here. Therefore, the Court did not abuse its discretion.

Lastly, to the extent that Appellant takes issue with the fact that the sentences for Count 1 and 2 were imposed consecutively, this Court should find that the circumstances surrounding his abuse of J.C. were particularly egregious and thus warranted the imposition of consecutive sentences. Appellant stuck his fingers in J.C.'s vaginal area and buttocks. PSI, p. 5. Further, he told J.C. he wanted to do it again and again. Id. Additionally, the State explained during sentencing that Appellant took advantage of the four year old J.C. while she was staying with Appellant and her aunt while her mother was in the hospital and unable to care for her. AA 83.

For all these reasons, the District Court rendered a legal sentence within the statutory parameters as explained supra. Therefore, this Court should find that the sentence imposed was not so grossly disproportionate to those crimes as to constitute cruel and unusual punishment because the sex crimes perpetrated by Appellant were particularly egregious in nature.

CONCLUSION

Based upon the foregoing, the State respectfully requests that the Judgment of Conviction be AFFIRMED.

Dated this 19th day of April, 2018.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **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 brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 3,352 words and 15 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 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 to be 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 19th day of April, 2018.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 19th day of April, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

MICHAEL L. BECKER, ESQ.
MICHAEL V. CASTILLO, ESQ.
Counsel for Appellant

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

/s/ J. Garcia
Employee, Clark County
District Attorney's Office

JEV/Madilyn Cole/jg