1 IN THE SUPREME COURT OF THE STATE OF NEVADA 2 3 **DUSTIN BARRAL** CASE NUMBER: ☐ HEASt Sonically File d 4 Appellant, (District Court Case No.05 26969 58:21 a.m. 5 Elizabeth A. Brown VS. 6 Clerk of Supreme Court THE STATE OF NEVADA, 7 8 Respondent. 9 10 **APPELLANT'S REPLY BRIEF** 11 (APPEAL FROM JUDGMENT OF CONVICTION) 12 MICHAEL L. BECKER, ESQ. STEVE WOLFSON, ESQ. 13 Nevada Bar #8765 CLARK COUNTY, NEVADA MICHAEL V. CASTILLO, ESQ. Nevada Bar #1565 14 Nevada Bar#11531 STEVEN S. OWENS, ESQ. 15 2970 W. Sahara Avenue Nevada Bar#4352 Las Vegas, Nevada 89102 Chief Deputy District Attorney 16 (702) 331-2725 200 South Third Street 17 Las Vegas, Nevada 89155 18 Attorneys for Appellant (702) 671-2500 19 20 ADAM P. LAXALT, ESQ. **NEVADA ATTORNEY GENERAL** 21 Nevada Bar #12426 22 100 North Carson Street Carson City, Nevada 89701-4717 23 (702) 486-3420 24 25 Attorneys for Respondent 26 27

1	IN THE SUPREME COURT OF THE STATE OF NEVADA
3	DUSTIN BARRAL)
4) CASE NUMBER: 74288 Appellant,
5	vs. NRAP 26.1 DISCLOSURE
7	THE STATE OF NEVADA,
8 9	Respondent.
10	The undersigned counsel of record certifies that the following are persons
11	and entities as described in NRAP 26.1(a) and must be disclosed. These
13	representations are made in order that the judges of this Court may evaluate
14 15	possible disqualification or recusal.
16	Attorney(s) of record for Appellant: Michael L. Becker, Esq. and Michael V.
17	Castillo, Esq.
18	Corporation: Las Vegas Defense Group, LLC.
20	No publically held company associated with this corporation.
21 22	Law Firm(s) appearing in District Court: Las Vegas Defense Group, LLC.
23	Dated this day of June, 2018.

MICHAEL V. CASTILLO, ESQ. Nevada Bar Number 11531 Attorneys for Appellant

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ARGUMENT

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

The Respondent argues in Answering Brief that the court below did not rely on suspect evidence in the imposition of sentence because "there is nothing in the record to indicate that the District Court improperly considered the impact statement of J.C.'s grandfather" after he read remarks into the record from an unverified blog from the Department of Justice. *See* Respondent's Answering Brief at p. 6 and Appellant's Appendix (hereinafter "AA") at p. 89-90, Volume I.

In support of its position the Respondent cities primarily to Hargrove v. State, 100 Nev. 498, 502, 686 P. 2d 222, 225 (1984) for the proposition that naked assertions are flatly insufficient to warrant relief. It should be noted that in Hargrove, the Nevada Supreme Court was referring to claims in the context of a post conviction motion to withdraw his plea and request for an evidentiary hearing. Hargrove, 100 Nev. at 502, 686 P. 2d at 225. Further, the Appellants contention that the court below specifically relied on the unsupported and unverified blog posting on sexual recidivism rates is supported by the transcript of the sentencing where following the Appellant's objection to the blog being introduced at sentencing, the Court approvingly said to J.C.'s grandfather "Go ahead." See AA at p. 090, Volume I. At no point does the court below clarify that it drew any distinctions between the grandfather's views on the crime, the person responsible

 and the impact of the crime on the named victim which is allowable under NRS 176.015(3)(b) and the unsupported sexual recidivism statistics which is not permitted under NRS 176.015. Instead, the Court thanks J.C.'s grandfather for his testimony and then promptly sentenced him to the maximum sentence shortly thereafter. *See* AA at p. 91, Volume I.

By allowing victim impact testimony other than that of a general nature as contemplated by NRS 176.015 and then sentencing the Appellant to the maximum sentence without clarifying that it was not relying on the suspect evidence admitted in violation of the above referenced statute, the court below relied on impalpable or highly suspect evidence in sentencing. *See* Silks v. State, 92 Nev. 91, 94, 545 P. 2d 1159, 1161 (1976). Therefore, the district court abused its discretion and reversal is required.

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

In its reply, the Respondent takes the position that since the Appellant was sentenced within the statutory range, the sentence imposed did not constitute cruel and unusual punishment. (See generally Appellant's Reply Brief at p. 13-14). However, this response ignores the numerous factors pointed out Appellant in his opening brief, including Parole and Probation's sentencing recommendations, the Appellant's complete lack of a criminal history, extensive family support and two

favorable evaluations certifying that he did not represent a high risk to reoffend. See Appellant's Opening Brief at p. 4 and AA at p. 49, 52-54, Volume I.

Under these circumstances, although the sentence was within the statutory limits, it was so unreasonably disproportionate to the offense as to shock the conscious given the mitigating circumstances present. *See* Allred v. State, 120 Nev. 410, 420, 92 P. 3d 1246, 1253 (2004).

CONCLUSION

Based on the Points and Authorities herein contained and in the Appellant's Opening Brief, 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 <u>M</u>day of June, 2018.

Respectfully submitted:

MICHAEL V. CASTILLO, ESQ. Nevada Bar Number 11531 2970 W. Sahara Avenue

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(702) 331-2725

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CERTIFICATE OF COMPLIANCE

- I hereby certify that this Appellant's Reply 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 Appellant's Reply 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 three (3) pages.
- 3. Finally, I hereby certify that I have read this Appellant's Reply 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.

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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 May of June, 2018.

By:

MICHAEL V. CASTILLO, ESQ. Nevada Bar Number 11531 2970 W. Sahara Avenue

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Attorneys for Appellant

CERTIFICATE OF SERVICE

2	
3	I hereby certify that service of the foregoing APPELLANT'S OPENING
4	BRIEF was made thisday of June, 2018 upon the appropriate parties hereto
5	by electronic filing using the ECF system which will send a notice of electronic
7	filing to the following and/or by facsimile transmission to:
8	STEVEN S. OWENS, ESQ.
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22	An employee of Las Vegas Defense Group, LLC.

DECLARATION OF MAILING

Beverly Carvagal ___, 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 _____ day of June, 2018, declarant deposited in the United States mail, a copy of the Appellant's Reply 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 4th day of June, 2018.

as Vegas Defense Group, LLC.