ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 52104

DELARIAN K. WILSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

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Appeal form a Judgment of Conviction
Eighth Judicial District Court, Clark County
The Honorable James M. Bixler, District Judge
District Court Case No. C232494

# APPELLANT'S REPLY BRIEF

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09-12454

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2. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION AND VIOLATED WILSON'S CONSTITUTIONAL RIGHTS TO DUE PROCESS BY SENTENCING WILSON IN A MANNER THAT WAS ARBITRARY AND DISPROPORTIONATE TO THAT OF HIS CO-DEFENDANT, WESLEY, BASED UPON FACTS NOT PROVEN AT WESLEY'S TRIAL.

## III.
## STATEMENT OF THE CASE

This is Delarian K. Wilson's appeal from a judgment of conviction, pursuant to guilty plea.

Pursuant to District Court Case No. C232494, the Appellant, Delarian K. Wilson, was charged, along with Co-Defendant Narcus S. Wesley, by way of Amended Criminal Complaint, with the following crimes: Count 1, Conspiracy to Commit Burglary; Count 2, Conspiracy to Commit Robbery; Counts 3 and 11, Burglary while in Possession of a Deadly Weapon; Counts 4, 5, 6, 7 and 9, Robbery with use of a Deadly Weapon; Count 8, Assault with use of a Deadly Weapon; Count 10, First Degree Kidnapping with use of a Deadly Weapon; Count 12, 13, 14, 15, and 17, Sexual Assault with a Deadly Weapon; Count 16, Coercion with use of a Deadly Weapon; and Count 18, Open or Gross Lewdness with use of a Deadly Weapon.

On March 28, 2008, Wilson plead guilty to two counts of Robbery with use of a Deadly Weapon and one count of Sexual Assault. Wilson's Co-Defendant, Narcus S. Wesley, proceeded to trial and was convicted on all counts.

Wilson and Wesley were sentenced on July 3, 2008. Wilson was sentenced as follows: Count 1: 72 Months to 180 Months with an equal and consecutive term of 72 Months to 180 Months; Count 2: 72 Months to 180 Months with an equal and consecutive term of 72 Months to 180 Months, consecutive to Count 1; Count 3: Life with Possibility of Parole after 10 years, consecutive to Count 1. Wesley was sentenced as follows: Counts 1 and 18: 12 months; Count 2: 28 to 72 months; Counts 3 and 11: 72 to 180 months; Counts 4, 6, 7, and 9: 60 to 180 months, plus an additional 60 to 180 months for the enhancement; Counts 5 and 8: 24 to 72 months; Count 10, 72 to 180 months, plus an additional 72 to 180 months; Counts 12, 13, 14, 15, and 17: Life with Possibility of Parole after 10 years; all counts to run concurrent to each other.

The Judgment of Conviction for Wilson was filed on July 16, 2008. The Notice of Appeal was filed August 5, 2008. Wilson appeals his sentence on the grounds that the sentence was arbitrary and excessive and therefore constituted an abuse of discretion and violated the Eighth Amendment, and Wilson further asserts that the District Court abused its discretion and violated Wilson's Constitutional rights to Due Process by sentencing Wilson in a manner that was arbitrary and disproportionate to that of his Co-Defendant, Narcus Wesley, based upon facts not proven at Wesley's trial.

## IV.

## STATEMENT OF THE FACTS

Pursuant to District Court Case No. C232494, the Appellant, Delarian K. Wilson, was charged, along with Co-Defendant Narcus S. Wesley, by way of Amended Criminal Complaint, with the following crimes: Count 1, Conspiracy to Commit Burglary; Count 2, Conspiracy to Commit Robbery; Counts 3 and 11, Burglary while in Possession of a Deadly Weapon; Counts 4, 5, 6, 7 and 9, Robbery with use of a Deadly Weapon; Count 8, Assault with use of a Deadly Weapon; Count 10, First Degree Kidnapping with use of a Deadly Weapon; Count 12, 13, 14, 15, and 17, Sexual Assault with a Deadly Weapon; Count 16, Coercion with use of a Deadly Weapon; and Count 18, Open or Gross Lewdness with use of a Deadly Weapon.

These charges stemmed from Wilson's conduct, along with Co-Defendant Narcus Wesley, on February 18, 2007. Change of Plea, pg. 7, ln. 18-21. According to the State, Wilson and Wesley arrived at the victims' residence prepared to rob a drug dealer who had formerly lived at that address. However, that drug dealer had moved, and the individuals who currently resided at that address were a group of six young adults who would become the victims of a robbery and sexual assault. Change of Plea, pg. 9, ln. 2-22. According to a statement by the Court, which Wilson affirmed, Co-Defendant Wesley committed the sexual assault, but Wilson assisted and encouraged in the overall commission of the crime. Change of Plea, pg. 8, ln. 23-25 through pg. 9, ln. 1.

On March 28, 2008, Wilson plead guilty to two counts of Robbery with use of a Deadly Weapon and one count of Sexual Assault. Narcus Wesley proceeded to trial. At trial, Wesley placed all of the blame on Wilson, stating that he had only participated in the crimes with which

he was charged due to duress. The jury did not believe Wesley, and convicted him on every count. Sentencing Transcript, pg. 17, ln. 3-7.

Wilson was sentenced alongside Wesley on July 3, 2008, by the same judge who heard Wesley's trial. At sentencing, the State reiterated the facts proven at Wesley's trial. Specifically, the state argued as follows with respect to Wesley:

> Wesley had a gun and when Wilson left with Ryan Tognotti, Wesley remained with the gun and kept those kids there. He wasn't merely present. He was an active participant.
>
> And if he really didn't want to be part of this, if he really didn't want to be there, he could have let them go, he could have let them call the police. He could have called the police. He could have left. But he chose to stay there with the gun pointed at these five kids' heads.
>
> Even worse than that, when Ryan comes back, and I recognize that it was Wilson that instigated what happened next, but all that gratuitous sexual assault, they could have just taken the money and left, and left it at that, but no, they had to take it one step further.
>
> At least Wilson, not that I'm condoning what he did, was telling kids what to do. This one [Wesley] pipes up with, if they can't do anything, I'll fuck her. He wants to have sex with her.
>
> He [Wesley] tells her she's got a nice ass, can I touch it.
>
> He [Wesley] is the one who digitally penetrated her.
>
> Sentencing Transcript, pg. 19, ln. 11 through pg. 20, ln. 9.

At sentencing, Wilson expressed deep remorse for his crimes. Sentencing Transcript, pg. 8, ln. 19 through pg. 12, ln. 10. Wilson also explained his education, his once bright future, and lack of criminal history, and expressed his desire to one day again become a productive member of society. *Id.* Specifically, Wilson stated the following:

> First off, I want to apologize to the Courts, to the State of Nevada, to my family, but most importantly to the victims and, every victim that was there I truly am sorry, I apologize for everything that what happened that night. I know I'm not the person you want to see, but in the long run if you can truly understand from

> the bottom of my heart that I am very sorry, I apologize for the pain, the fear, the humiliation, and scaring everything, the foolishness and stupidity that I did that night, and there is not a day that I wake up and that I don't feel bad for what I did, and I can only imagine the pain that you feel, and I'm just truly sorry for everything that happened. Id. at pg. 8, ln. 19 through pg. 9, ln. 8.

By contrast, Wesley expressed no remorse and blamed the entire incident upon Wilson. After quoting a Bible passage and suggesting that those who judge will be themselves one day judged by God, Wesley stated, "I didn't do what [the victims] said I did." Sentencing Transcript, pg. 26, ln. 16-17. Further, Wesley stated, "I am ashamed for being acquainted in any way with my Co-Defendant. He is the Guilty one and has ruined all our lives with this malarkey." *Id.* at pg 26, ln. 20-22. Additionally, Wesley's counsel advanced the notion that Wesley was "a minor player in these circumstances." *Id.* at pg. 28, ln. 23-24.

Wilson was sentenced as follows: Count 1: 72 Months to 180 Months with an equal and consecutive term of 72 Months to 180 Months; Count 2: 72 Months to 180 Months with an equal and consecutive term of 72 Months to 180 Months, consecutive to Count 1; Count 3: Life with Possibility of Parole, consecutive to Count 1.

Wesley received a lighter sentence than Wilson. Specifically, Wesley was sentenced as follows: Counts 1 and 18: 12 months; Count 2: 28 to 72 months; Counts 3 and 11: 72 to 180 months; Counts 4, 6, 7, and 9: 60 to 180 months, plus an additional 60 to 180 months for the enhancement; Counts 5 and 8: 24 to 72 months; Count 10, 72 to 180 months, plus an additional 72 to 180 months; Counts 12, 13, 14, 15, and 17: Life with Possibility of Parole after 10 years; all counts to run concurrent to each other. The sentencing judge expressly stated that he was sentencing Wilson to a harsher sentence, according to what was proven at Wesley's trial. In particular, the sentencing judge stated,

> Wesley is certainly not going to be penalized for having a trial, even though by going to trial and getting convicted he exposed himself to tremendously larger amounts of time that the Court could impose.
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> Keeping in mind that Mr. Wilson really played the lead role in this, even though he's only got three counts, he's going to end up doing more time than Narcus [Wesley], but they are both doing substantial, substantial amounts of time. Sentencing Transcript, pg. 31, ln. 20 through pg. 32, ln. 3.

The sentencing judge could only have arrived at the conclusion by believing Wesley's theory of defense, which the jury rejected by convicting Wesley on all counts. It was the sentencing judge's express intention that "Mr. Wesley is going to do about seven years less than Mr. Wilson." Sentencing Transcript, pg. 35, ln. 14-16. The Court stated, "Mr. Wesley's case, he's got about 20 years on those sexual assaults." *Id.* at pg. 35, ln. 11-12. Further, the Court stated that "Wilson got 34 [years]." Id. at pg. 35, ln. 21. The State pointed out that this was a difference of 17 years, not 7. *Id.* at pg. 35, ln. 17.

## V.

## ARGUMENT

### A.

### THE SUPREME COURT'S EIGHTH AMENDMENT JURISPRUDENCE ESTABLISHES THAT NO PENALTY IS PER SE CONSTITUTIONAL, SO WILSON'S SENTENCE DOES NOT FALL AUTOMATICALLY WITHIN ACCEPTABLE EIGHTH AMENDMENT LIMITS SIMPLY BECAUSE THE SENTENCE IS WITHIN NEVADA STATUTORY LIMITS.

The State argues that Wilson's sentence does not violate the Eighth Amendment's prohibition against cruel and unusual punishment because Wilson's sentence fell within statutory limits. However, analysis of the pertinent case law, cited by Appellant in his Opening Brief, demonstrates that the constitutional limits placed upon excessive sentences are not so clearly delineated, particularly under gross disproportionality review. Accordingly, Appellant reiterates his arguments as follows.

The Eighth Amendment mandates that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." "The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Solem v. Helm*, 463 U.S. 277, 284, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

The "'precise contours' of [the gross disproportionality principle] 'are unclear,'" and "applicable only in the 'exceedingly rare' and 'extreme' case." *Lockyer v. Andrade*, 538 U.S. 63, 72-73, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 998, 1001, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring in part and concurring in judgment)).

Five Supreme Court decisions supply guidance on how gross disproportionality review operates in practice.

First, in *Rummel v. Estelle*, the Court considered the imposition of a life sentence with the possibility of parole within 12 years under a Texas recidivist sentencing statute. 445 U.S. 263, 265-66, 268, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). Rummel was convicted of a felony for obtaining $120.75 by false pretenses; he had prior felony convictions for fraudulently using a credit card to obtain $80 worth of goods or services and for passing a forged check in the amount of $28.36. *Id.* at 265-66, 100 S.Ct. 1133. The Court upheld the sentence but cautioned that its decision did not mean "that a proportionality principle would not come into play in the extreme example [of] a legislature [making] overtime parking a felony punishable by life imprisonment." *Id.* at 274 n. 11, 100 S.Ct. 1133.

By contrast, in *Solem v. Helm*, the Court held that imposition of a life sentence without the possibility of parole under South Dakota's recidivist sentencing statute was grossly disproportionate to the triggering offense of uttering a "no account" check for $100. 463 U.S. 277, 281-82, 284, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Ordinarily, the maximum punishment for this offense would have been five years imprisonment and a $5,000 fine; however, Helm had three prior third degree burglary convictions, as well as single convictions for obtaining money under false pretenses, grand larceny, and third-offense driving while intoxicated. *Id.* at 279-81, 103 S.Ct. 3001.

The Court announced three objective factors to guide review of a sentence for a term of years under the Eighth Amendment. *Id.* First, a reviewing court must look to the gravity of the offense and the harshness of the penalty. *Id.* at 290-91, 103 S.Ct. 3001. Second, the Court stated that "it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction." *Id.* at 291, 103 S.Ct. 3001. Finally, the majority explained that reviewing "courts may find it useful to compare the sentences imposed for commission of the same crime in other

jurisdictions." *Id.* at 291, 103 S.Ct. 3001. The Court concluded that Helm's sentence violated the Eighth Amendment. *Id.* at 303, 103 S.Ct. 3001.

In a third case, *Harmelin v. Michigan*, the Court upheld a life sentence without the possibility of parole for possession of more than 650 grams of cocaine. 501 U.S. 957, 961, 996, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). With respect to the general principles of gross disproportionality review, no opinion commanded a majority of the Court. Seven members of the Court agreed, however, that the Eighth Amendment contains a gross disproportionality principle, although they disagreed as to the factors that comprise it. *Id.* at 996-97, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in the judgment); *Id.* at 1009, 111 S.Ct. 2680 (White, J., dissenting); *Id.* at 1027, 111 S.Ct. 2680 (Marshall, J., dissenting).

Justice Kennedy's opinion, joined by Justices O'Connor and Souter, represented the narrowest view of a majority of the Court on the question of gross disproportionality review. See *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). Under Justice Kennedy's view, the Eighth Amendment "does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 1001, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Helm*, 463 U.S. at 288, 303, 103 S.Ct. 3001). Though he acknowledged the three factors set forth in *Helm*, Justice Kennedy thought that the case "did not announce a rigid three-part test." *Id.* at 1004, 111 S.Ct. 2680. Rather, he thought the Court should initially examine the "crime committed and the sentence imposed" and only proceed with intrajurisdictional and interjurisdictional analyses "in the rare case[s]" where the initial examination "leads to an inference of gross disproportionality." *Id.* at 1005-06, 111 S.Ct. 2680.

Applying this methodology, Justice Kennedy concluded that Harmelin's sentence, when compared with his crime, did not give rise to an inference of gross disproportionality, and thus that no further inquiry was required. *Id.* at 1008-09, 111 S.Ct. 2680. Contrasting Harmelin's offense with the crime considered by the Court in Helm, he observed that, while utterance of a no account check was "one of the most passive felonies a person could commit," possession of a large quantity of cocaine "threatened to cause grave harm to society" because of the association between drugs and violent crime. *Id.* at 1002, 111 S.Ct. 2680 (internal quotation marks omitted); accord *Taylor v. Lewis*, 460 F.3d 1093, 1099 (9th Cir. 2006) (upholding, on habeas review, a sentence of 25 years to life imprisonment under California's Three Strikes law for possession of 0.036 grams of cocaine).

In a fourth case, *Ewing v. California*, the Court upheld a Three Strikes sentence of 25 years to life imprisonment for felony grand theft of personal property in excess of $400. 538 U.S. 11, 30-31, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003). The defendant's prior convictions included three counts theft, one count grand theft auto, one count battery, four counts burglary, one count possession of drug paraphernalia, one count unlawful possession of a firearm, at least one count trespassing, and one count robbery. *Id.* at 18-19, 123 S.Ct. 1179. There was no majority opinion but Justice O'Connor's opinion, joined by Chief Justice Rehnquist and Justice Kennedy, represents the narrowest basis for the Court's decision. Justice O'Connor weighed the gravity of the triggering offense against the harshness of the penalty, factoring in Ewing's "long history of felony recidivism" in its calculation. *Id.* at 29, 123 S.Ct. 1179 (opinion of O'Connor, J.). The plurality first rejected the defendant's attempt to downplay the seriousness of his offense, and concluded that Ewing's sentence of 25 years to life imprisonment "reflect[ed] a rational legislative judgment, entitled to deference, that offenders who have committed serious

or violent felonies and who continue to commit felonies must be incapacitated." Id. at 30, 123 S.Ct. 1179. Justices Scalia and Thomas, concurring only in the judgment, concluded that the Eighth Amendment contains no proportionality principle at all. *Id.* at 31-32, 123 S.Ct. 1179 (Scalia, J., concurring in the judgment); *Id.* (Thomas, J., concurring in the judgment). This view, however, was clearly rejected by the plurality and by the four dissenters. *Id.* at 23-24, 123 S.Ct. 1179 (opinion of O'Connor, J.); *Id.* at 32-33, 123 S.Ct. 1179 (Stevens, J., dissenting).

Finally, in *Lockyer v. Andrade*, the Court upheld on federal habeas review a Three Strikes sentence of 25 years to life imprisonment for two petty theft convictions arising from the theft of $153.54 worth of videotapes. 538 U.S. 63, 77, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). The defendant's prior convictions included two counts of misdemeanor theft, at least three counts of residential burglary, and two counts of transportation of marijuana. *Id.* at 66-67, 123 S.Ct. 1166. Applying AEDPA's deferential standard of review, the Court declared that "[t]he facts here fall in between the facts in *Rummel* and the facts in *Solem*[,] ... [a]nd while this case resembles to some degree both *Rummel* and *Solem*, it is not materially indistinguishable from either." Id. at 74, 123 S.Ct. 1166. The Court thus held that the California court decision was not contrary to clearly established Supreme Court precedent. *Id.* Applying the "unreasonable application" clause, the Court first noted the substantial uncertainty among its membership "regarding the application of the proportionality principle to the California three strikes law." *Id.* at 76, 123 S.Ct. 1166. The majority then reiterated that a sentence for a term of years violated the Eighth Amendment only in an extraordinary case. *Id.* at 77, 123 S.Ct. 1166. The Court held that Andrade's sentence did not constitute such an extraordinary case and thus that the California Court of Appeal's affirmance of his sentence did not constitute an unreasonable application of clearly established law. *Id.*

The Supreme Court's Eighth Amendment jurisprudence establishes that "no penalty is per se constitutional," and that " successful challenges to the proportionality of particular sentences [are] exceedingly rare," *Helm*, 463 U.S. at 289-90, 103 S.Ct. 3001 (quotation marks omitted), and "reserve[d] ... for only the extraordinary case." *Lockyer v. Andrade*, 538 U.S. 63, 77, 123 S.Ct. 1166 (2003). Nevertheless, the Court has stated, as plainly as can be expressed in words, that "one governing principle emerges as 'clearly established' under [the applicable sentencing guidelines]: A gross proportionality principle is applicable to sentences for terms of years." *Andrade*, 538 U.S. at 72, 123 S.Ct. 1166.

Although the principle may be "clearly established," the details are not. In *Andrade*, the Court decried its own "lack of clarity regarding what factors may indicate gross proportionality," *Id.*, but declined to clarify the "gross disproportionality" standard, leaving us with a principle, but no explanation. As the Court itself framed, "the only relevant clearly established law amenable to the 'contrary to' or 'unreasonable application of' framework is the gross disproportionality principle, the precise contours of which are unclear." *Id.* at 73, 123 S.Ct. 1166. Although the *Andrade* Court noted that it had in the past largely failed to supply specific content to the gross disproportionality principle, the Court nonetheless did not hesitate to apply it. *Id.* at 76-77, 123 S.Ct. 1166; see also *Ewing v. California*, 538 U.S. 11, 28-31, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (plurality opinion) (applying the gross disproportionality principle).

Following Andrade, the Ninth Circuit has applied the gross disproportionality principle in a number of cases. In *Ramirez v. Castro*, for example, Ramirez shoplifted a $199 VCR and was convicted of one count of petty theft with a prior theft-related conviction, an offense punishable as a felony under California law. 365 F.3d 755, 756 (9th Cir. 2004). Having been

previously convicted of two nonviolent shoplifting offenses, Ramirez was sentenced to 25 years to life imprisonment under California's Three Strikes law. The Ninth Circuit found that Ramirez's sentence was "harsh ... beyond any dispute" and not "justified by the gravity of his most recent offense and criminal history." *Id.* at 767-68. Finding that "this is the extremely rare case that gives rise to an inference of gross disproportionality," the Ninth Circuit then conducted an intrajurisdictional and interjurisdictional "comparative analysis" of Ramirez's sentence. *Id.* at 770-73. The Ninth Circuit concluded that the state court had correctly identified the gross disproportionality principle and that the court's decision was thus not "contrary to" Supreme Court precedent. *Id.* at 774. However, the Ninth Circuit held that Ramirez was entitled to habeas relief because the state court had unreasonably applied the gross disproportionality principle to the facts in Ramirez's case. *Id.* at 774-75.

As *Nunes v. Ramirez-Palmer*, 485 F.3d 432 (9th Cir. 2007), illustrates, however, the Ninth Circuit has followed the Supreme Court's admonition that successful disproportionality challenges should be rare. In *Nunes*, the petitioner was sentenced to 25 years to life imprisonment after being convicted of shoplifting $114.40 worth of tools. *Id.* at 435. Unlike the petitioner in *Ramirez*, however, Nunes had an "extensive felony record" dating back almost sixty years. *Id.* at 440. The Ninth Circuit had little difficulty concluding that Nunes was not entitled to habeas relief. *Id.* at 443. In other cases, the Ninth Circuit has similarly denied habeas relief to petitioners where the triggering offense involved a serious crime against life or property and followed a long criminal history. See, e.g., *Taylor v. Lewis*, 460 F.3d 1093, 1101 (9th Cir. 2006) (denying habeas relief to petitioner who received 25 years to life imprisonment for possessing 0.036 grams of cocaine following a "history of recidivism, marked by violence and the intentional taking of human life and spanning some 30 years"); *Rios v. Garcia*, 390 F.3d

1082, 1083 (9th Cir. 2004) (denying habeas relief to petitioner who received sentence of 25 years to life imprisonment for stealing $80 worth of watches from a department store following prior robbery convictions).

The Supreme Court's Eighth amendment jurisprudence establishes that no penalty is per se constitutional, so Wilson's sentence does not fall automatically within acceptable Eighth amendment limits simply because the sentence is within Nevada statutory limits. This is the legal context in which wilson's sentence must be addressed. Delarian Wilson appeals his sentence on the grounds that the sentence was arbitrary and excessive and therefore constituted an abuse of discretion and violated the Eighth Amendment, and Wilson further asserts that the District Court abused its discretion and violated Wilson's Constitutional rights to Due Process by sentencing Wilson in a manner that was arbitrary and disproportionate to that of his Co-Defendant, Narcus Wesley, based upon facts not proven at Wesley's trial.

**B.**

**WILSON'S SENTENCE WAS ARBITRARY AND DISPROPRORTIONATE GIVEN THAT THERE WAS NO EVIDENCE BESIDES WESLEY'S REJECTED URESS DEFENSE AND ARGUMENT BY WESLEY'S COUNSEL THAT WILSON WAS THE RINGLEADER.**

Here, Wilson's sentence was excessive given that Wilson's similarly situated Co-Defendant, Wesley, was given substantially less time for the same crime. Wilson was sentenced alongside Wesley on July 3, 2008. At sentencing, Wilson expressed deep remorse for his crimes. Wilson also explained his education, his once bright future, and lack of criminal history, and expressed his desire to one day again become a productive member of society. By contrast, Wesley expressed no remorse and blamed the entire incident upon Wilson.

Wesley received a lighter sentence than Wilson. The sentencing judge expressly stated that he was sentencing Wilson to a harsher sentence, according to what was proven at Wesley's trial. In particular, the sentencing judge stated,

> Wesley is certainly not going to be penalized for having a trial, even though by going to trial and getting convicted he exposed himself to tremendously larger amounts of time that the Court could impose.
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> Keeping in mind that Mr. Wilson really played the lead role in this, even though he's only got three counts, he's going to end up doing more time than Narcus [Wesley], but they are both doing substantial, substantial amounts of time. Sentencing Transcript, pg. 31, ln. 20 through pg. 32, ln. 3.

The sentencing judge could only have arrived at the conclusion by believing Wesley's theory of defense, which the jury rejected by convicting Wesley on all counts. It was the sentencing judge's express intention that "Mr. Wesley is going to do about seven years less than Mr. Wilson." Sentencing Transcript, pg. 35, ln. 14-16. The Court stated, "Mr. Wesley's case, he's got about 20 years on those sexual assaults." *Id.* at pg. 35, ln. 11-12. Further, the Court stated that "Wilson got 34 [years]." *Id.* at pg. 35, ln. 21. The State pointed out that this was a difference of 17 years, not 7. *Id.* at pg. 35, ln. 17.

The State argues that it was possible for the jury to reject Wesley's duress defense and still believe Wilson was the ringleader. However, no evidence of such was presented and found by any jury. When a defendant's sentence is enhanced pursuant to some fact, there is a requirement that a jury must find or a defendant must admit to the fact. See *Apprendi v. New Jersey*, 530 U.S. 466, 486-87, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The most that can be said is that Wesley's trial jury made no finding as to who the ringleader was. Accordingly, there was no evidence that Wilson was the ringleader. Wilson did not admit to any such fact, and, significantly, statements by Wesley's attorney that Wilson was the ringleader do not constitute evidence of any kind, contrary to the State's assertions.

Moreover, as noted by the State, it is important to understand that Wilson and Wesley were charged with the same crimes pursuant to theories of aiding and abetting and conspiracy. However, with respect to the sexual crimes in particular, Wesley actually performed these acts.

Because Wesley actually committed the aforementioned acts, and Wilson merely aid or abetted, then Wilson should have been sentenced less harshly, unless the sentencing judge believed Wesley's duress defense, which Wesley's trial jury specifically rejected in convicting him. Accordingly, Wilson's sentence was grossly disproportionate compared to Wesley's sentence for the same crime, especially where Wesley was the primary sexual aggressor and showed no remorse at sentencing.

### C.

### THE NEVADA AUTHORITY CITED BY APPELLANT IS RELEVANT TO THE QUESTION OF DISPROPORTIONALITY REGARDLESS OF THE LEGAL AND FACTUAL DISTINCTIONS CITED BY THE STATE.

The District Court abused its discretion and violated Due Process in sentencing Wilson, because Wilson's sentence was disproportionate to his Co-Defendant's sentence and based upon factual findings specifically rejected by the jury at Wesley's trial. The State seeks to distinguish the Nevada and other authorities cited by Appellant on factual and legal grounds. However, despite any dostinctions, the case law cited by Appellant is still relevant to the question of disproportionality in sentencing to determine whether the sentence imposed on Wilson violates Due Process and constitutes an abuse of discretion.

Although the Nevada Supreme Court will normally not interfere with the broad discretion granted to the trial court in sentencing, the Court will reverse the District Court's sentence in certain circumstances. See *Bushnell v. State*, 97 Nev. 591, 593, 637 P.2d 529, 531 (1981). In *Bushnell*, the Court reversed the sentence of the defendant and remanded the case to the district court with instructions that the sentence of five years be vacated and a sentence of three years be imposed, where the lower court announced that the sole reason for the disparity

in sentences was the fact that the defendant maintained his innocence and did not waive his right to remain silent.

Disparity between the defendant's sentence and his co-defendant's sentence may be a reason to reverse a sentence. In *United States v. Daas*, the Ninth Circuit addressed whether, in light of *Koon*, supra, a district court has the authority to depart downward on the basis of disparity in sentencing among co-defendants. 198 F.3d 1167, 1180-81 (9th Cir. 1999). The Ninth Circuit held that a "[d]ownward departure to equalize sentencing disparity is a proper ground for departure under the appropriate circumstances." *Id.* The Ninth Circuit remanded the case without expressly identifying what circumstances would make a departure appropriate and what circumstances would not. *Id.*

Furthermore, the Nevada Supreme Court addressed a similar issue in *Biondi v. State*, 101 Nev. 252, 699 P.2d 1062 (1985). In *Biondi*, the defendant was convicted of first degree murder and sentenced to death after stabbing the victim once in the chest. *Id.* The Court vacated a death sentence due to the disparity in sentencing between Biondi and his co-defendant, Phillips. *Biondi*, 101 Nev. at 259, 699 P.2d at 1066-67. The Court stated,

> Even more strikingly significant, however, is the comparison between Biondi, who was sentenced to death, and codefendant Phillips, who was sentenced to life in prison with the possibility of parole, for the very same crime.... This is a case where similar defendants were sentenced differently for the identical crime. For this reason, and for the reasons discussed above, we hold the death penalty imposed on Biondi is disproportionate. *Id.* at 259-60, 699 P.2d at 1067.

Here, there is a disparity in sentences between Wilson's sentence and his Co-Defendant's sentence. Based on the respective sentences of Wilson and Wesley, and the statements of the sentencing judge, it is clear that Wilson was singled out for harsher treatment without sufficient grounds. Wilson and Wesley were engaged in a joint criminal enterprise, except that Wesley was the aggressor with respect to the sexual assault. Additionally, Wilson,

unlike Wesley, was not convicted of eighteen felony counts. Wilson instead plead guilty and expressed remorse for his actions, whereas Wesley continually failed to take responsibility or show remorse for his actions all the way through sentencing.

Furthermore, when a defendant is sentenced pursuant to a sentencing enhancement, e.g., the use of a deadly weapon, there is a requirement that a jury must find or a defendant must admit to the fact that a deadly weapon was used in the commission of a crime. See *Apprendi v. New Jersey*, 530 U.S. 466, 486-87, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Here, the sentencing judge expressly stated that he was sentencing Wilson according to what was proven at Wesley's trial. In particular, the sentencing judge stated,

> Wesley is certainly not going to be penalized for having a trial, even though by going to trial and getting convicted he exposed himself to tremendously larger amounts of time that the Court could impose.
>
> Keeping in mind that Mr. Wilson really played the lead role in this, even though he's only got three counts, he's going to end up doing more time than Narcus [Wesley], but they are both doing substantial, substantial amounts of time. Sentencing Transcript, pg. 31, ln. 20 through pg. 32, ln. 3.

The sentencing judge could only have arrived at the conclusion that Wilson played the lead role by believing at least part of the defense theory Wesley presented at trial. This was an error for several reasons. First, it is fundamentally unfair for Wilson's sentence to be enhanced by facts proven at the trial of his Co-Defendant, to the extent that such a practice deprives Wilson, who chose to own up to his crimes and show remorse, of his Constitutional right to Due Process. Furthermore, the jury clearly rejected Wesley's defense theory by finding Wesley guilty on all counts. As such, because the jury rejected the notion that Wesley was not, at least, equally culpable for the crimes for which both Defendants were convicted, it is an abuse of discretion for the District Court to adopt a sentencing scheme that contemplates relative

sentences of co-defendants based upon Wesley's biased and untrue version of the facts, especially given that Wesley's defense theory was rejected by the jury.

As stated above, no facts were proven against or admitted to by Wilson to justify the disproportionate sentence rendered in this case. The only plausible justification for Wilson's harsher sentence is that the sentencing judge relied upon the duress defense of Wesley, which the jury specifically rejected in convicting Wesley on all counts. This is obvious in light of Wesley's lack of remorse compared to Wilson's remorse, Wesley's defiance as compared to Wilson's acceptance of responsibility, and Wesley's actual commission of the most heinous of the criminal acts charged as compared to Wilson's aiding and abetting.

## VI.

## CONCLUSION

The trial court abused its discretion and violated Due Process and the Eighth Amendment's mandate against cruel and unusual punishment by sentencing Wilson excessively and disproportionately compared to Co-Defendant Wesley. Accordingly, Wilson's conviction must be reversed and remanded with appropriate instructions to the District Court. Specifically, Wilson requests that his case be remanded to the District Court for sentencing not disproportionate to the crime and consistent with his Co-Defendant.

Respectfully submitted this 18th day of May, 2009.

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## VII.

## CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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 in not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19th day of May, 2009.

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## VIII.

## CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Appellant's Reply Brief to the attorney of record listed below on this 18th day of May, 2009.

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