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DELARIAN K. WILSON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 52104

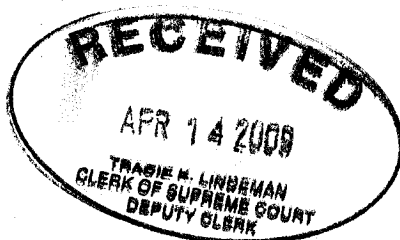
**RESPONDENT'S ANSWERING BRIEF**

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

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09-09440

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## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS .....	2
ARGUMENT .....	4
I.    THE SENTENCE IMPOSED BY THE DISTRICT COURT FELL WITHIN THE PRESCRIBED STATUTORY RANGE AND DID NOT VIOLATE WILSON’S RIGHT TO DUE PROCESS OR THE EIGHTH AMENDMENT’S BAR AGAINST CRUEL AND UNUSUAL PUNISHMENT MERELY BECAUSE WILSON DID NOT RECEIVE THE IDENTICAL SENTENCE AS HIS CO-DEFENDANT .....	4
A    Wilson’s Sentence Fell Within The Prescribed Statutory Range And Was Not Excessive .....	4
B    The District Court Did Not Abuse Its Discretion In Imposing A Harsher Sentence Upon Wilson To Reflect Wilson’s Greater Culpability In The Crime .....	6
CONCLUSION.....	10
CERTIFICATE OF COMPLIANCE .....	11
CERTIFICATE OF MAILING.....	12

## TABLE OF AUTHORITIES

Page Number:

### Cases

<u>Allred v. State,</u> 120 Nev. 410, 92 P.3d 1246 (2004).....	4
<u>Biondi v. State,</u> 101 Nev. 252, 699 P.2d 1062 (1985).....	7, 8
<u>Bushnell v. State,</u> 97 Nev. 591, 637 P.2d 529 (1981).....	9
<u>Martinez v. State,</u> 114 Nev. 735, 961 P.2d 143 (1998).....	4
<u>Nobles v. Warden,</u> 106 Nev. 67, 787 P.2d 390 (1990).....	6, 7
<u>Silks v. State,</u> 92 Nev. 91, 545 P.2d 1159 (1976).....	4
<u>United States v. Daas,</u> 198 F.3d 1167 (9th Cir. 1999).....	9

### Statutes

NRS 176.035(1) .....	5
NRS 177.055 .....	7, 8
NRS 177.055(2)(d).....	7
NRS 177.055(2)(e).....	8
NRS 193.165 .....	5, 6
NRS 200.364(2)(b).....	5
NRS 200.380(2) .....	5

### Other Authorities

18 USC §8553 .....	9
28 USC §991(b)(1).....	9

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5       DELARIAN K. WILSON,

6                                    Appellant,

7       v.

Case No. 52104

8       THE STATE OF NEVADA,

9                                    Respondent.

10  
11                                    **RESPONDENT'S ANSWERING BRIEF**

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

14                                    **STATEMENT OF THE ISSUES**

- 15                    1.     Whether Wilson's sentences for Robbery with Use of a Deadly Weapon  
16                                    and Sexual Assault constitute cruel and unusual punishment.
- 17                    2.     Whether Wilson's rights to due process were violated merely because he  
18                                    did not receive the same sentence as his co-defendant.

19                                    **STATEMENT OF THE CASE**

20                    On April 20, 2007, Delarian Wilson was charged by way of Information with  
21                    Counts 1 & 2 – Conspiracy to Commit Robbery (Gross Misdemeanor – NRS 199.480,  
22                    200.380); Counts 3 & 11 – Burglary While In Possession Of A Deadly Weapon  
23                    (Felony – NRS 205.060); Counts 4, 6 & 9 – Robbery With Use Of A Deadly Weapon  
24                    (Felony – NRS 200.380, 193.165); Counts 5 & 8 – Assault With Use Of A Deadly  
25                    Weapon (Felony – NRS 200.471, 193.165); Count 10 – First Degree Kidnapping With  
26                    Use Of A Deadly Weapon (Felony – NRS 200.310, 200.320, 193.165); Counts 12, 13,  
27                    14, 15 & 17 – Sexual Assault With Use Of A Deadly Weapon (Felony – NRS  
28                    200.364, 200.366, 193.165); Count 16 – Coercion With Use Of A Deadly Weapon  
                                  (Felony – NRS 207.190, 193.165); and Count 18 – Open Or Gross Lewdness With

1 Use Of A Deadly Weapon (Gross Misdemeanor – NRS 201.210, 193.165).  
2 (Appellant's Appendix, Tab 1, pp. 1-8).<sup>1</sup>

3 On March 28, 2008, pursuant to a Guilty Plea Agreement filed in open court,  
4 Wilson pled guilty to Counts 1 & 2 – Robbery with Use of a Deadly Weapon and  
5 Count 3 – Sexual Assault. (Respondent's Appendix 1-6).<sup>2</sup> An Amended Information  
6 was filed on the same day to reflect Wilson's guilty plea. (RA 7-9).

7 On July 3, 2008, Defendant was sentenced as follows: as to Count 1 – to a  
8 maximum of one hundred eighty (180) months with a minimum parole eligibility of  
9 seventy-two (72) months, plus an equal and consecutive term of one hundred eighty  
10 (180) months maximum and seventy-two (72) months minimum for the use of a  
11 deadly weapon; as to Count 2 - to a maximum of one hundred eighty (180) months  
12 with a minimum parole eligibility of seventy-two (72) months, plus an equal and  
13 consecutive term of one hundred eighty (180) months maximum and seventy-two (72)  
14 months minimum for the use of a deadly weapon; as to Count 3 – to life with a  
15 minimum parole eligibility of ten (10) years; Counts 1, 2, & 3 to run consecutive to  
16 each other, with five hundred (500) days credit for time served. (AA Tab 4, pp. 1-2).  
17 Judgment of Conviction was filed on July 16, 2008. Id.

18 Wilson filed a Notice of Appeal to this Court on July 24, 2008 challenging his  
19 Judgment of Conviction. (AA Tab 5, pp. 1-2). The State received Wilson's Opening  
20 Brief on March 11, 2008. The State's Response follows.

### 21 **STATEMENT OF THE FACTS**

22 On February 18, 2007, Wilson and his codefendant, Narcus Wesley, entered a  
23 house occupied by six individuals and robbed the victims at gunpoint. (AA Tab 2,  
24 pp.7-8). Wilson removed one of the individuals from the home so the victim could  
25 withdraw cash from an ATM. (AA Tab 2, p. 8). Later, Wilson assisted and  
26

27 <sup>1</sup> Appellant's Appendix hereinafter referenced as "AA." Furthermore, Wilson did not bates stamp his appendix, so the  
28 State will identify the documents to the best of its ability.

<sup>2</sup> Respondent's Appendix hereinafter referenced as "RA."

1 encouraged Wesley to sexually assault one of the female victims under threats of  
2 death. (AA Tab 1, p. 6; AA Tab 2 pp. 8-9).

3 At Wilson's sentencing hearing, the State made the following argument to the  
4 court:

5 There were multiple sexual assaults that occurred, and they  
6 occurred at the behest of Delari[a]n Wilson, so absolutely a life  
7 sentence is appropriate.

8 ---  
9 He is the one who not only was the ring leader, but who also  
10 physically took Ryan Tognotti away from his friends and to a  
11 location where God knows anything could have happened. I  
12 mean Ryan was smart, and he didn't fight, didn't try to grab the  
13 gun. So things were okay, and he came back safely, but this could  
14 have gone to hell very quickly.

15 (AA Tab 3, pp. 6-7).

16 In imposing a harsher sentence upon Wilson than his codefendant, the district  
17 court justified its decision by stating:

18 I mean, I'm certainly well familiar with this whole thing, since we  
19 did have a trial on Wesley. I'm familiar with everything that went  
20 on.

21 Knowing the Defendant's background, he had the lead role in this  
22 whole scenario.

23 ---  
24 For the record, they both testified at the trial, and the rest of the  
25 people in the house, they all testified. The extent of the trauma  
26 imposed on them has certainly not been lost on the Court, even  
27 though they are not speaking at sentencing due to the fact that I  
28 heard them under oath on the witness stand.

---  
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, but they are both doing substantial,  
substantial amounts of time.

(AA Tab 3 pp. 5, 31-32).

1 **ARGUMENT**

2 **I**

3 **THE SENTENCE IMPOSED BY THE DISTRICT COURT**  
4 **FELL WITHIN THE PRESCRIBED STATUTORY RANGE**  
5 **AND DID NOT VIOLATE WILSON'S RIGHT TO DUE**  
6 **PROCESS OR THE EIGHTH AMENDMENT'S BAR**  
7 **AGAINST CRUEL AND UNUSUAL PUNISHMENT**  
8 **MERELY BECAUSE WILSON DID NOT RECEIVE THE**  
9 **IDENTICAL SENTENCE AS HIS CO-DEFENDANT**

10 **A. Wilson's Sentence Fell Within The Prescribed Statutory Range And Was**  
11 **Not Excessive**

12 A sentencing judge is accorded wide discretion in imposing a sentence and his  
13 determination will not be disturbed on appeal absent an abuse of discretion. Martinez  
14 v. State, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998). "This discretion enables  
15 the judge to consider a wide, largely unlimited variety of information to insure that the  
16 punishment fits not only the crime, but also the individual defendant." Id. at 738, at  
17 145. Indeed, the Eighth Amendment requires that defendants be sentenced  
18 individually, taking into consideration both the individual and the crime itself. Id. at  
19 737, at 145. This Court will not interfere with the sentence imposed "s[o] long as the  
20 record does not demonstrate prejudice resulting from consideration of information or  
21 accusations founded on facts supported by only impalpable or highly suspect  
22 evidence." Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159 (1976); see also Allred v.  
23 State, 120 Nev. 410, 421, 92 P.3d 1246, 1253 (2004).

24 Although the Eighth Amendment prohibits extreme sentences that are grossly  
25 disproportionate to the crime, harsh sentences that fall within the statutory limits do  
26 not constitute cruel and unusual punishment unless the statute delineating the  
27 punishment is unconstitutional or the sentence is so unreasonably disproportionate to  
28 the offense as to shock the conscience. Allred, 120 Nev. at 420, 92 P.3d at 1253.

Wilson contends that his sentence was excessive and constituted cruel and  
unusual punishment because his codefendant received a lighter sentence than he did.  
(Opening Brief 15). The district court sentenced Wilson as follows: as to each count



1 for Robbery with Use of a Deadly Weapon – to one hundred eighty (180) months with  
2 a minimum parole eligibility of seventy-two (72) months, plus an equal and  
3 consecutive term of one hundred eighty (180) months maximum and seventy-two (72)  
4 months minimum for the use of a deadly weapon; as to the Sexual Assault count – to  
5 life with a minimum parole eligibility of ten (10) years; all counts to run consecutive  
6 to one another. (AA Tab 4, pp. 1-2).

7         Wilson's sentences comport with statutory mandates: NRS 200.380(2) provides  
8 that imprisonment for Robbery must not be for less than one (1) year and not more  
9 than fifteen (15) years. NRS 193.165 (1995) provides that use of a deadly weapon  
10 during the commission of a crime compels an additional term of imprisonment for a  
11 minimum term of imprisonment prescribed by statute for the crime. NRS  
12 200.364(2)(b) provides that imprisonment for sexual assault not resulting in  
13 substantial bodily harm must be life with the possibility of parole after a minimum of  
14 ten (10) years. Finally, NRS 176.035(1) provides that where a defendant is convicted  
15 of two or more offenses, the judge has discretion to run the sentences either  
16 concurrently or consecutively.

17         Wilson has not challenged the constitutionality of the statutes under which he  
18 was sentenced and the prison terms imposed are within the statutory limits.  
19 Therefore, Wilson's sentence does not constitute cruel and unusual punishment.  
20 Furthermore, Wilson's subjective belief that he deserves less punishment than his  
21 codefendant because he expressed greater remorse during sentencing is insufficient to  
22 render his sentence unconstitutional. By signing the Guilty Plea Agreement, Wilson  
23 acknowledged that he knew the potential penalties, including the possibility that his  
24 sentences would run consecutively. (RA 1-6). Wilson cannot now complain that his  
25 sentence was unjust merely because his accomplice received a lighter sentence.  
26  
27  
28

1       **B. The District Court Did Not Abuse Its Discretion In Imposing A Harsher**  
2       **Sentence Upon Wilson To Reflect Wilson's Greater Culpability In The**  
3       **Crime**

4       Wilson contends that his punishment violated due process because his sentence  
5       was disproportionate to his co-defendant and was based upon factual findings rejected  
6       at Wesley's jury trial. Wilson's argument is without merit.

7       Disparity in sentencing, by itself, does not violate due process. Nobles v.  
8       Warden, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990). Furthermore, because  
9       sentencing is an individualized process, a court is not required to sentence  
10      codefendants to identical terms. Id.

11      In this case, Wilson received a sentence of one hundred eighty (180) months  
12      with a minimum parole eligibility of seventy-two (72) months, plus an equal and  
13      consecutive term of one hundred eighty (180) months maximum and seventy-two (72)  
14      months minimum for the use of a deadly weapon for each count involving Robbery  
15      with Use of a Deadly Weapon; Wilson received a sentence of life with a minimum  
16      parole eligibility of ten (10) years for the Sexual Assault count; all counts to run  
17      consecutive to one another. (AA Tab 4, pp. 1-2). In contrast, codefendant Wesley  
18      received a sentence of one hundred eighty (180) months with a minimum parole  
19      eligibility of sixty (60) months, plus an equal and consecutive term of one hundred  
20      eighty (180) months maximum and sixty (60) months minimum for the use of a  
21      deadly weapon for each count involving Robbery With Use Of A Deadly Weapon;  
22      Wesley received a sentence of life with a minimum parole eligibility of ten (10) years  
23      for the Sexual Assault counts, plus an equal and consecutive term of life with a  
24      minimum parole eligibility of ten (10) years for the use of a deadly weapon<sup>3</sup>; all

25      \_\_\_\_\_  
26      <sup>3</sup> Wilson states in his Opening Brief that Wesley received life with the possibility of parole after ten years for the counts  
27      involving sexual assault with use of a deadly weapon. Wilson fails to note that Wesley also received an equal and  
28      consecutive term for the use of the deadly weapon. Originally, Wesley was sentenced under the current NRS 193.165  
    (2007) and received a additional consecutive eight (8) to twenty (20) years for the weapons enhancement on the sexual  
    assault counts. (AA Tab 3, pp.35-36). Subsequently, on September 23, 2008, the district court granted the State's  
    Motion To Correct An Illegal Sentence and re-sentenced Wesley under the former NRS 193.165 (1995) since Wesley  
    committed the offense prior to the statute's amendment in 2007.

1 eight counts for which Wesley was convicted were to run concurrent to one  
2 another. (AA Tab 3, pp. 32-35, RA 10). Thus, the difference in the sentence Wilson  
3 and Wesley received was as follows: Wilson received one extra year than did Wesley  
4 for each of the Robbery with Use of a Deadly Weapon counts; Wilson and Wesley  
5 received the same sentence for the Sexual Assault, but Wesley received an additional  
6 equal and consecutive sentence of ten (10) years to life for the weapons enhancement;  
7 Wesley was convicted on eighteen counts whereas Wilson was convicted on three  
8 counts; and Wilson's sentences run consecutively whereas Wesley's sentences run  
9 concurrently.

10 Wilson contends that such disparity in sentencing of codefendants violates due  
11 process and cites to this Court's decision in Biondi v. State, 101 Nev. 252, 699 P.2d  
12 1062 (1985) for support. Notably, the defendant in Nobles proffered the same  
13 argument, which this Court subsequently rejected on the basis that Biondi was a  
14 capital murder case where the Court was required to conduct a proportionality review  
15 of the death sentence pursuant to former NRS 177.055(2)(d)(1977). Nobles, 106 Nev.  
16 at 107, 787 P.3d at 391. In Biondi, a parole officer was stabbed to death by the  
17 defendant and his codefendant, Michael Phillips, following a barroom fight. 101 Nev.  
18 at 255, 699 P.2d at 1064. Phillips pled guilty to First Degree Murder and received life  
19 in prison with the possibility of parole. Id. The defendant, on the other hand, was  
20 convicted following a jury trial and was given death. Id. Former NRS 177.055(2)(d)  
21 required the Court to review a death sentence and determine whether it was  
22 "disproportionate to the penalty imposed in similar cases in this state, considering  
23 both the crime and the defendant." The Court found defendant's sentence was  
24 disproportionate based upon the following facts: (1) The defendant's crime occurred  
25 in the context of a barroom confrontation involving strangers who were substantially  
26 intoxicated and emotional; (2) No evidence was presented showing the murder was  
27 premeditated; (3) The defendant received death while his codefendant received life  
28 with the possibility of parole even though both committed the very same crime; and

1 (4) The defendant's participation in the murder was no more significant than that of  
2 his codefendant. Biondi, 101 Nev. at 259, 699 P.2d at 1066-67.

3 Biondi is distinguishable from the instant case in several respects. First,  
4 proportionality review is no longer required following the Legislature's amendment of  
5 NRS 177.055 in 1985. Today, the Court need only determine "[w]hether the sentence  
6 of death is excessive, considering both the crime and the defendant." NRS  
7 177.055(2)(e). Second, the facts of the instant case compel a harsher sentence for  
8 Wilson in comparison to his codefendant in light of Wilson's more culpable role in  
9 the crimes. Specifically, Biondi is distinguishable from Wilson's case in the  
10 following ways: (1) Wilson's crime did not occur in the context of a heated  
11 confrontation; (2) the robbery and sexual assault of his victims were premeditated; (3)  
12 death was not imposed in this case; and (4) Wilson's participation in the crimes was  
13 vastly more significant than that of his codefendant. Based upon these distinctions,  
14 Wilson's reliance on Biondi is misplaced.

15 Wilson further contends that the judge unfairly determined he was the ring  
16 leader based upon testimony that was elicited during Wesley's trial. (Opening Brief  
17 19). According to Wilson, by convicting Wesley and rejecting the defense's theory  
18 that Wesley acted under duress on the night in question, the jury necessarily had to  
19 have also rejected the theory that Wilson was the ring leader. Wilson's argument is  
20 flawed in several respects. First, whether Wesley acted under duress on the night of  
21 February 18, 2007 and whether Wilson played the lead role during the commission of  
22 the crimes are two separate and distinct questions of fact. Since Wesley was also  
23 charged as an aider and abetter in the crimes, the jury's rejection of duress as a  
24 defense does not preclude the likelihood that Wesley was subsequently convicted for  
25 aiding and abetting Wilson on the night of February 18, 2007. Second, the Court's  
26 perception that Wilson acted as the ring leader did not derive solely from Wesley's  
27 defense team. Both at sentencing and at Wesley's trial, the State argued that Wilson  
28 was the ring leader who instigated the sexual assault and removed Ryan Tognotti from

1 the home to retrieve money from the ATM. (AA Tab 3, pp. 6-7). Third, Wilson's  
2 role as the leader was recognized by all parties, including Wilson's own attorney.

3 During sentencing, Wesley's attorney argued to the Court:

4 Your Honor, there has been -- our rules proportionality, and both  
5 you, who sat through the trial, and Defense counsel, Co-Defense  
6 counsel, and even Miss Luzaich [prosecutor], have indicated that  
7 my client was a minor player in these circumstances, and despite  
8 being convicted of 18 counts, Your Honor, there is a way under  
the sentencing pattern where my client can get less time than the  
Co-Defendant.

9 (AA Tab 3, pp. 28-29). At no point did Wilson's attorney, who was present during  
10 the sentencing, object to co-counsel's characterization that Wilson played a larger role  
11 in the offense. Ultimately, Wilson cannot demonstrate that the Court received  
12 impalpable or highly suspect evidence in sentencing him.

13 Finally, Wilson's reliance on Bushnell v. State, 97 Nev. 591, 637 P.2d 529  
14 (1981) and United States v. Daas, 198 F.3d 1167 (9th Cir. 1999) is also unpersuasive.  
15 Daas interpreted the Federal Sentencing Guidelines and concluded that the district  
16 courts may depart downward from the sentencing guidelines to equalize sentencing  
17 disparity under the appropriate circumstances. 198 F.3d at 1180-81; see also 28 USC  
18 §991(b)(1); 18 USC §8553. Daas is wholly irrelevant since this case involves neither  
19 the Federal Sentencing Guidelines nor the downward departure from those guidelines.

20 In Bushnell, the district court imposed a harsher sentence upon a defendant who  
21 continued to maintain his innocence and refused to waive his right to remain silent.  
22 97 Nev. at 593, 637 P.2d at 531. The Court reversed the defendant's sentence on the  
23 basis that it was an abuse of discretion for the lower court to impose disparate  
24 sentences based upon the defendant's exercise of his constitutional rights. Id. No  
25 such concerns are implicated in the instant case. The court imposed a greater sentence  
26 upon Wilson, not for exercising his constitutional rights, but for his role as a ring  
27 leader in the commission of the robberies and sexual assault against his victims.

1 Although the State does not discount the possibility that disparity in sentences  
2 between codefendants may warrant reversal in some instances, such is not the case  
3 here.

4 **CONCLUSION**

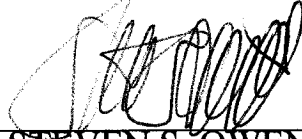
5 Wherefore, the State respectfully requests that this Honorable Court AFFIRM  
6 Wilson's Judgment of Conviction.

7 Dated this 13th day of April, 2009.

8 Respectfully submitted,

9 DAVID ROGER  
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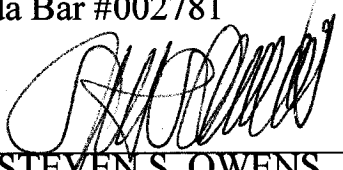
1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that I have read this appellate brief, and to the best of my  
3 knowledge, information, and belief, it is not frivolous or interposed for any improper  
4 purpose. I further certify that this brief complies with all applicable Nevada Rules of  
5 Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the  
6 brief regarding matters in the record to be supported by appropriate references to the  
7 record on appeal. I understand that I may be subject to sanctions in the event that the  
8 accompanying brief is not in conformity with the requirements of the Nevada Rules of  
9 Appellate Procedure.

10 Dated this 13th day of April, 2009.

11  
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15 BY

  
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