

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACOB DANIEL GOSSELIN

Appellant,

v.

STATE OF NEVADA

Respondent.

CASE NO. 83574

Appeal from a Judgment Pursuant to a Guilty Plea
in Case CR20-4005
Second Judicial District Court of the State of Nevada, Washoe County
Honorable David A. Hardy, District Judge

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1 (a) and must be disclosed pursuant to that rule. These representations are made so that the justice of this Court may evaluate any potential conflicts warranting disqualification or recusal.

1. Attorney of Record for Appellant: Victoria T. Oldenburg, Esq.
2. Publicly held Companies Associated: None
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DATED this 15th day of April, 2022.

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B. Did the District Court impose an unduly and unfairly excessive sentence in violation of Mr. Gosselin's Eighth Amendment rights under the U.S. Constitution and under Article 1, Section 6 of the Nevada Constitution which prohibits the imposition of cruel and unusual punishment given that his guilty plea was based on charges resulting from prosecutorial vindictiveness, and the fact Mr. Gosselin was not charged or in custody for a year after the crime because he provided helpful information to law enforcement which resulted in the arrest of Munoz for the murder of the victim and was considered to have less involvement and to be more in the role as a witness?

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JURISDICTIONAL STATEMENT

This is an appeal from a Judgment of Conviction pursuant to a guilty plea entered on September 23, 2021. 1 Appellant's Appendix (AA) 037. A Notice of Appeal was filed on October 19, 2021 and again on November 1, 2021. 1 AA 112, 115. This Court has appellate jurisdiction pursuant to NRAP 4(b)(1)(A).

ROUTING STATEMENT

This case is presumptively assigned to the Nevada Court of Appeals pursuant to NRAP 17(b)(1).

STATEMENT OF THE ISSUES

A. Should Mr. Gosselin's conviction be overturned because the prosecutor engaged in vindictive prosecution in violation of Mr. Gosselin's due process rights when the Prosecutor made the determination to charge Mr. Gosselin with murder, attempted murder, and conspiracy to commit robbery solely because Mr. Gosselin informed the Prosecutor he would be exercising his Fifth Amendment rights against self-incrimination if called to testify against Munoz? In addition, did the district court erred in not *sua sponte* rejecting the guilty plea of Mr. Gosselin given the clear evidence the charges were predicated on prosecutorial misconduct?

B. Did the District Court impose an unduly and unfairly excessive sentence in violation of Mr. Gosselin's Eighth Amendment rights under the U.S. Constitution and under Article 1, Section 6 of the Nevada Constitution which prohibits the imposition of cruel and unusual punishment given that his guilty plea was based on charges resulting from prosecutorial vindictiveness, and the fact Mr. Gosselin was not charged or in custody for a year after the crime because he provided helpful information to law enforcement which resulted in the arrest of Munoz for the murder of the victim and was considered to have less involvement and to be more in the role as a witness?

STATEMENT OF THE CASE

On May 14, 2021 an Information was filed charging Mr. Gosselin with first degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and conspiracy to commit robbery. 1 AA 001. On May 17, 2021 Mr. Gosselin entered a conditional plea of guilty. 1 AA 037. Judgment entered on September 23, 2021 and Mr. Gosselin receive a sentence of 8 to 40 years. AA 119, and Mr. Gosselin filed a timely notice of appeal. 1 AA 112, 115.

STATEMENT OF FACTS

On May 17, 2021 Mr. Gosselin plead guilty to all three counts in the Information. 1 AA 037. Mr. Gosselin was only charged because he had, before the charges were filed, informed the Prosecutor that he would invoke his Fifth Amendment rights against self -incrimination. 1 AA 107:4-15. In Count 1 of the Information, murder of the first degree with the use of a deadly weapon, Mr. Gosselin plead guilty to acting in concert with Daniel Munoz as a conspirator and abettor in shooting the victim in the face and/or head with a handgun, on or about January 14, 2020, in the perpetration of a robbery. 1 AA 038.¹ As to Count 2, attempted murder, with the use of a deadly weapon, Mr. Gosselin plead guilty to acting in concert with Daniel Munoz as a conspirator and abettor in attempting to

¹ The public records shows that in CR20-0308 Munoz ultimately plead guilty to second degree murder for shooting the victim and was sentenced to 18 years to life.

shoot the victim in the face and/or head with a handgun in the perpetration of a robbery. 1 AA 039.² As to Count 3, conspiracy to commit robbery, Mr. Gosselin plead guilty to conspiring with Daniel Munoz to take money or other personal property from the victim. 1 AA 040.³ In exchange for his guilty plea Mr. Gosselin agreed to, once again, cooperate fully with the prosecutor and law enforcement in the case against Daniel Munoz. 1 AA 042-044. In exchange for his cooperation, the prosecutor agreed that at the time of sentencing Mr. Gosselin's plea to first degree murder would be withdrawn and that he would only be sentenced on Counts 2 and 3 of the Information. 1 AA 044:22-26, 045:1-3.

On May 17, 2021 Mr. Gosselin was arraigned on his guilty plea. 1 AA 009. During the arraignment the district court was informed that the prosecutor supported allowing Mr. Gosselin to be released on his own recognizance with Court Services supervision as well as a GPS monitor on his ankle. 1 AA 025:12-20. However, notwithstanding the agreement by the prosecutor, the district court stated that given the charges to which Mr. Gosselin plead he would need to be persuaded before he

² The possible sentence for attempted murder is 2 to 20 years, with a consecutive sentence of 1 to 20 years for the weapon enhancement with the availability of probation. 1 AA 041:13-20. Mr. Gosselin provided the weapon to Mr. Munoz but never intended for the victim to be shot and has showed remorse. 1 AA 086, 097-099.

³ The possible sentence for conspiracy to commit robbery is 1 to 6 years with the availability for probation. 1 AA 041:21-25.

approved the stipulation. 1 AA 026-027. Subsequently trial counsel filed a Motion for Own Recognizance (OR) Release. 1 AA 048.

At the hearing on the motion for OR release, 1 AA 058, which was denied by the district court, the prosecutor summarized the nature of the charges as they pertained to Mr. Gosselin.⁴ The prosecutor stated that during police interviews Mr. Gosselin ultimately acknowledged his involvement and provided an account of what occurred on January 14, 2020. 1 AA 073:9-25, 074:1-5. Law enforcement's priority was to hold the shooter, Munoz, accountable and to successfully prosecute and prove the case against Munoz, and that they viewed Mr. Gosselin as having lesser involvement and therefore having the role as a witness because they needed information about what happened. 1 AA 074:6-16. Mr. Gosselin was not arrested and was at liberty during the investigation stage of the case (approximately one year) because the State viewed Mr. Gosselin as having lesser involvement and therefore having the role as a witness and they needed information about what happened. *Id.* at 074:16-25, 075:1-3. Because the State needed Mr. Gosselin as a witness, it was their determination to use Mr. Gosselin as a witness and not charge him when they arrested and charged Munoz; the decision was made to pursue the most culpable individual – the person that actually stood in front of the victim and shot him. *Id.* at

⁴ The prosecutor stated "I think Mr. Gosselin will be an acceptable risk in the community under the circumstances of this case." 1 AA 058, 079:19-22.

075:4-22. On the day of Munoz's preliminary hearing Mr. Gosselin was subpoenaed to testify and he was present and willing to do so. 1 AA 075:23-25, 076:1-6. However Munoz waived the preliminary hearing so no testimony was taken. *Id.*

The prosecutor stated that he later contacted Mr. Gosselin to inform him they still intended to call him as a witness at the trial of Munoz, that they were making no promises about what would happen to him and that he was welcome to consult a lawyer. *Id.* at 076:7-12. Subsequently, the prosecutor was contacted by Mr. Gosselin who informed him that he had consulted with an attorney⁵ and received advise that he should invoke his Fifth Amendment right against self-incrimination – this knowledge is what ultimately caused the prosecutor to file charges against Mr. Gosselin since they could not use him as a witness if he invoked his Fifth Amendment rights and did not feel he could have elicited his testimony without either granting him immunity or charging him. *Id.* at 076:12-25, 077:1-9.⁶ The prosecutor stated that had Mr. Gosselin determined not to invoke his Fifth Amendment rights he would have tolerated him being out of custody as a witness and had him testify at the trial. 1 AA 077:10-25.⁷

⁵ It is presumed Mr. Gosselin consulted with a private attorney as he had not yet been arrested and charged.

⁶ Mr. Gosselin was free for almost a year after the incident. 1 AA 048, 052.

⁷ The prosecutor summarily noted he felt there was proof beyond a reasonable doubt that Mr. Gosselin was an aider an abettor. *Id.*

At sentencing, the prosecutor again stated that had Mr. Gosselin participated as a witness, rather than inform the prosecutor he would invoke his Fifth Amendment rights, he would not have charged him. 1 AA 086, 107. The prosecutor stated:

I would not have charged him had he participated as a witness. However, he did indicate – there came a point where he told me he had consulted a lawyer, that he would be invoking his right to counsel, which, again, that's his absolute privilege, that is his right, but it left me in the position of proceeding against him with criminal charges.

1 AA 107:4-15.

SUMMARY OF THE ARGUMENT

Given the circumstances of this case, in that Mr. Gosselin was a free man for approximately a year after Munoz shot the victim because the prosecutor was fine with allowing Mr. Gosselin his liberty, and the fact that Mr. Gosselin was only charged because he invoked his Fifth Amendment rights against self-incrimination if subpoenaed to testify against Munoz, there is a clear and un-rebuttable presumption that the prosecutor's decision to charge Mr. Gosselin was vindictive. The prosecutor admitted he would not have charged Mr. Gosselin had he not invoked his Fifth Amendment rights, thus the charges were clearly not brought against Mr. Gosselin to further the interests of justice. In addition, under these facts the district court erred in not *sua sponte* rejecting Mr. Gosselin's guilty plea.

Moreover, Mr. Gosselin's sentence of 8 to 40 years is excessive and constitutes cruel and unusual punishment given the unique circumstances of this

case. The State was not going to levy *any* charges against Mr. Gosselin until he informed the State he had spoken to an attorney and would be invoking his rights against self-incrimination if called to testify at Munoz's trial. The evidence is clear that but for Mr. Gosselin receiving questionable legal advice on invoking his Fifth Amendment rights the State never would have charged him with murder - a charge that could not have been successful given it was clear Munoz shot the victim and Mr. Gosselin's involvement was not considered significant enough to charge him at the onset of the case in January, 2020 – or charged him with attempted murder, and conspiracy to commit robbery. The fact that Mr. Gosselin received such an excessive sentence under these circumstances shocks the conscious.

ARGUMENT

- A. Mr. Gosselin's conviction should be overturned because the prosecutor engaged in vindictive prosecution in violation of Mr. Gosselin's due process rights when he made the determination to charge Mr. Gosselin with murder, attempted murder, and conspiracy to commit robbery solely because Mr. Gosselin informed the prosecutor he would be exercising his Fifth Amendment Rights against self-incrimination if called to testify against Munoz. In addition, the district court erred in not *sua sponte* rejecting the guilty plea of Mr. Gosselin given the clear evidence the charges were predicated on prosecutorial misconduct.**

Standard of Review.

Unpreserved claims of prosecutorial misconduct may be reviewed for plain error. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465 (2008). In conducting plain error analysis, the court must determine whether there was error and whether

the error was plain from the record. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

Legal Authorities.

Prosecutors possess substantial discretion concerning whether, and to what extent, to pursue criminal charges. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). However, such power is not unfettered and the criminally accused may not constitutionally be subjected to prosecution brought in response to the exercise of their rights. *Blackledge v. Perry*, 417 U.S. 21 (1974). The government violates a person's due process rights if it files charges to penalize a person for exercising a protected statutory or constitutional right. *See United States v. Goodwin*, 457 U.S. 368, 372, 102 S.Ct. 2485 (1982). A person may establish prosecutorial vindictiveness by producing direct evidence of the prosecutor's punitive motivation towards him. *See United States v. Gallegos-Curiel*, 681 F.2d 1164, 1168 (9th Cir. 1982). Alternatively, a person is entitled to a presumption of vindictiveness if he can show that the charges were filed because he exercised a constitutional right in circumstances that give rise to an appearance of vindictiveness. *Id.*

To establish a presumption of vindictiveness, the defendant need not show "that the prosecutor acted in bad faith" or that he "maliciously sought" the charges. *United States v. Groves*, 571 F.2d 450, 453 (9th Cir. 1978). Rather, the defendant must show a reasonable likelihood that the prosecutor would not have brought the

charges had he not elected to exercise a constitutional right. *Gallegos-Curiel*, 681 F.2d at 1169. The mere appearance of prosecutorial vindictiveness places the burden, which is a heavy one, on the prosecutor as the doctrine of vindictive prosecution "seeks to reduce or eliminate apprehension on the accused" that he may be punished for exercising his rights. *United States v. Ruesga-Martinez*, 534 F.2d 1367, 1369 (9th Cir. 1976).

Here, the prosecutor was clear that he only charged Mr. Gosselin because Mr. Gosselin invoked his Fifth Amendment rights regarding testimony at Munoz's trial and the Prosecutor needed to do something to secure his testimony, not because the prosecutor was compelled to charge Mr. Gosselin in the interests of justice. The Prosecutor stated he would not have charged Mr. Gosselin if he had participated as a witness, and he would have remained a free man. Because Mr. Gosselin invoked the Fifth Amendment, the prosecutor levied charges against Mr. Gosselin because he would not give the prosecutor what he wanted.

Under *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1168 (9th Cir. 1982), direct evidence exists based upon the prosecutor's own testimony that the prosecutor's motive was vindictive because Mr. Gosselin exercised his Fifth Amendment rights regarding testimony in the Munoz trial. In addition, prosecutorial misconduct is also supported by the fact that Mr. Gosselin was charged with open murder, a charge that the prosecutor knew could not be proven based upon the

admittedly lack of material involvement and culpability of Mr. Gosselin as expressed by the prosecutor. The prosecutor was well aware Mr. Munoz was not the shooter, as was alleged in the Information. 1 AA 074:6-16. The very serious open murder charge was clearly a punishment and done in order for the prosecutor to get what he wanted – Mr. Gosselin's testimony at the Munoz trial. This is exactly what happened as in exchange for the testimony the open murder charge was dropped.

Moreover, Mr. Gosselin has shown a reasonable likelihood that the prosecutor would not have brought the charges had he not elected to exercise his constitutional rights. Therefore, there is a presumption of prosecutorial vindictiveness placing the burden on the prosecutor to rebut that presumption. Under the totality of the circumstances in this case: (1) that Mr. Gosselin cooperated with law enforcement prior to being charged; (2) was not charged until a year after the shooting and only when Mr. Gosselin informed the prosecutor he would be invoking his Fifth Amendment rights; (3) the prosecutor's own statement that he would not have charged Mr. Gosselin if he had participated as a witness, and that had Mr. Gosselin determined not to invoke his Fifth amendment rights he would have tolerated him being out of custody as a witness and had him testify at the trial, the State cannot rebut the presumption of prosecutorial vindictiveness.

In addition, the district court, well aware of these circumstances, erred by not refusing to accept Mr. Gosselin's guilty plea where prosecutorial misconduct was

clear from the record and from the statements of the prosecutor. A district judge may, in his or her discretion, refuse to accept guilty pleas. *Sandy v. Fifth Judicial District Court*, 113 Nev. 435, 439, 935 P.2d 1148, 1150 (1997).

B. The District Court imposed an unduly and unfairly excessive sentence in violation of Mr. Gosselin's Eighth Amendment Right under the U.S. Constitution and under Article 1, Section 6 of the Nevada Constitution which prohibits the imposition of cruel and unusual punishment given that his guilty plea was based on charges resulting from prosecutorial vindictiveness, and the fact Mr. Gosselin was not charged or in custody for a year after the shooting because he provided helpful information to law enforcement which resulted in the arrest of Munoz for the murder and was considered to have less involvement and to be more in the role as a witness.

Standard of Review.

A defendant's challenge of a sentence will be reviewed for an abuse of discretion on appeal. *Randell v. State*, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993).

Legal Authorities.

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. A sentence within the statutory limits is not cruel and unusual punishment unless the sentence is so unreasonably disproportionate to the offense as to shock the conscience. *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996), quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).

The discretion afforded a district court in imposing a sentence enables the sentencing judge to consider a wide, largely unlimited variety of information to

ensure that the punishment fits not only the crime, but also the individual defendant. *Norwood v. State*, 112 Nev. 438, 915 P.2d 277, 278 (1996); *Martinez v. State*, 114 Nev. 735, 961 P.2d 143, 145 (1998).

This Court has expressed the view that, absent a court's reliance on highly suspect evidence, it would not interfere with the district court's imposition of a sentence. *Silks v. State*, 92 Nev. 91, 545 P.2d 1159 (1976); *Arajakis v. State*, 108 Nev. 976, 843 P.2d 800 (1993). However, there is another judicial view which Mr. Gosselin believes should be adopted by this Court under the particular facts of this case including the fact Mr. Gosselin cooperated with law enforcement, has shown remorse, and most importantly, was not considered culpable enough to be charged for almost a year, and not charged until he informed the State he intended to invoke his Fifth Amendment rights if called to testify against Munoz.

In the Dissent by Justice Rose in *Tanksley v. State*, 113 Nev. 844, 944 P.2d 240 (1997) (Rose, J. Dissenting), Justice Rose opines on three important reasons for a more stringent review of sentencing decisions that a judge may legally impose: (1) the part of the criminal process that has the greatest ultimate effect on the defendant, the imposition of his sentence, is the part the high court declines to review; (2) the high court reviews every discretionary act performed by the district court but will not scrutinize the sentence imposed in felony crimes, and; (3) the failure to conduct an appellate review of the sentencing process is an abdication of the high court's

inherent authority to ensure that justice is achieved in sentencing matters. *Tanksley*, 113 Nev. 852-853 (quotations omitted), *citing Sims v. State*, 107 Nev. 438, 814 P.2d 63 (1991) (Rose, J. Dissenting).

A more stringent review of the district court's imposition of Mr. Gosselin's sentence should be conducted. In doing so the result is that Mr. Gosselin's sentence is excessive and disproportionate and should be set aside. Mr. Gosselin's sentence of 8 to 40 years is excessive, unfair, and so disproportionate to the offense as to shock the conscious given that Mr. Gosselin was never going to be charged in the victim's murder until Mr. Gosselin informed the State he would invoke his Fifth Amendment rights against self-incrimination if called to testify against Munoz, the person who shot and killed the victim.

Based upon the State's own statements at the OR hearing, Mr. Gosselin culpability was never believed to be significant, or arguably, provable beyond a reasonable doubt. Rather than arrest and charge Mr. Gosselin in early 2020, when the victim was killed, the State was willing, for almost a year, to use Mr. Gosselin to get to the real killer and allow him his freedom.

Mr. Gosselin was not arrested for over a year after the shooting and would have remained a free man had he not consulted with an attorney when the State informed him they wanted him to testify against Munoz at the trial. Mr. Gosselin was not charged because he was a danger to society and deserved to go to prison for

8 to 40 years, purposes which could serve the interests of justice. He was charged because he invoked his Fifth Amendment rights. Therefore, under the unique circumstances of this case, the fact that Mr. Gosselin received a sentence of 8 to 40 years, rather than probation or the minimum sentence, both of which were available to the district court, is excessive, shocks the conscious, and deserves a more stringent review by this Court. The sentence of 8 to 40 years is not in the interest of justice.

CONCLUSION

Due to the clear prosecutorial misconduct in this case, and the fact the sentence imposed derived from such misconduct and was additionally unduly and unfairly excessive under the circumstances of this case, Mr. Gosselin's conviction should be reversed.

DATED this 15th day of March, 2022.

VICTORIA T. OLDENBURG, ESQ.
Attorney for Appellant

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) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14 points.

2. I further certify that this brief complies with the page- or type volume limitations of NRAP 32(a)(7) as, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and it contains 4349 words.

3. Finally, I certify that I have read the 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 15th day April, 2022.

VICTORIA T. OLDENBURG, ESQ.
Attorney for Appellant

CERTIFICATE OF SERVICE

Electronically

I hereby certify that on this date the foregoing document was filed electronically with the Nevada Supreme Court. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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DATED this 15th day of April, 2022.

Victoria T. Oldenburg
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