IN THE SUPREME COURT OF THE STATE OF NEVADA

JACOB DANIEL GOSSELIN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 83674

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction following a guilty plea entered by Jacob Daniel Gosselin (hereafter, "Gosselin"). The State charged Gosselin via information with Count I: Murder of the First Degree With the Use of a Deadly Weapon; Count II: Attempted Murder With the Use of a Deadly Weapon; and Count III: Conspiracy to Commit Robbery. Appellant's Appendix, hereinafter "AA," 1-4. On May 14, 2021, he waived preliminary examination. The guilty plea memorandum provided that if Gosselin cooperated in the prosecution of Daniel Munoz, he could later withdraw his guilty plea to murder and be sentenced only on counts II and III. AA, 37-47. Pursuant to negotiations, he pleaded guilty to all three

charges on May 24, 2021. *Id.*, 9-36. Following resolution of the case against Munoz-Negrete, he was sentenced on September 23, 2021. *Id.*, 86-118. On Count II, Gosselin was sentenced to a term of 7 to 20 years, with a consecutive 1 to 20 years for the deadly weapon enhancement. *Id.*, 119-121. On Count III, he wase sentenced to a term of 12 to 30 months, to be served concurrent to the sentence imposed in Count II. *Id.* This appeal followed.

II. ROUTING STATEMENT

Because this is an appeal from a conviction following a guilty plea, this appeal is presumptively assigned to the Court of Appeals. NRAP 17 (b)(1).

III. STATEMENT OF THE FACTS

Because this conviction follows a guilty plea, some of the facts undoubtedly fall outside the record. At sentencing, Gosselin did not object to the factual synopsis in the presentence investigation report, hereinafter "PSI."[1] On January 14, 2020, emergency responders found the victim in his car, which had collided with a tree. PSI, 7. He had been shot in the face, and was pronounced dead at the hospital. *Id.*

A witness observed two men near the victim's vehicle on the day of the murder. *Id.* She recalled that they were yelling, and that one man had a

[1] The State has moved to transmit the PSI.

Spanish accent. *Id.* Surveillance footage showed a silver sedan near the area of the murder, and Munoz-Negrete was identified as a suspect using cell phone tower data. *Id.*, 8. Detectives began surveilling his residence, and saw him riding in a silver sedan with Gosselin. *Id.* During an interview, Munoz-Negrete denied involvement in any murder, but police had not yet asked him about a murder investigation. *Id.* Later, Munoz-Negrete admitted being at the scene, but denied he was the "trigger-man." *Id.* When police searched Munoz-Negrete's phone, they found a text to Gosselin on the day of the murder. *Id.* The text read, "So I'm gonna tell him to pull over then come up with the gun then I'll shoot 'em." *Id.* Further investigation revealed that on January 14, 2020, Munoz-Negrete had been in contact with a prostitute who stated she was having issues with the victim. *Id.* She told Munoz-Negrete that the victim had about $8,000 in cash in his possession. *Id.* Munoz-Negrete called the victim, who had sold him drugs earlier in the day, and arranged to meet for another drug buy. *Id.* This second drug transaction was a ruse to get the victim to meet Munoz-Negrete in order to rob him of the cash. *Id.*

Police later learned that Gosselin met Munoz-Negrete at the area of the victim's vehicle and handed Munoz-Negrete a .38 caliber revolver. *Id.*,

9. Munoz-Negrete then shot the victim in the face and fled on foot. Gosselin drove away in his vehicle. *Id.*

At the arraignment, the prosecutor explained why Gosselin was initially not charged with aiding and abetting the murder because police needed his cooperation to establish that Munoz-Negrete was the shooter. The prosecutor believed that there was proof beyond a reasonable doubt that Gosselin was liable as an aider and abettor, but abided by law enforcement's assessment that Gosselin's cooperation was critical to establishing that Munoz-Negrete shot the victim. When Gosselin later indicated that he would refuse to testify, the prosecutor charged him with offenses supported by the evidence. He explained his motives for this decision when addressing the issue of bail at arraignment:

> I think the evidence in this case clearly indicates that Mr. Gosselin is involved as an aider and abettor, but he is not the shooter. And in this case the police's priority, which I think rightfully so, was the highest priority was to make a case against a shooter who because of his more significant accountability versus the accomplice or the person who was not the shooter, and again, in a perfect world there would be perfect accountability. In this case when the police developed Mr. Munoz and Mr. Gosselin as suspects and ultimately contacted them, Mr. Munoz did not, was not cooperative in the sense of initially giving any type of statement to the police. Mr. Gosselin, and I don't want the Court to come away from the information that he opened up right away and gave full cooperation, I don't believe that represents what happened, but he through a series of interviews, what I would characterize two main interviews with some follow up, he provided ultimately --

so initially I think he was trying to be, I would again characterize his initial kind of statements as attempting to minimize his involvement, but ultimately he acknowledged and provided, he acknowledged his involvement and provided an account of what happened.

The police, and again, I'm summarizing and I am not repeating anything verbatim or purporting to, but I believe the police in the course of their contact with Mr. Gosselin told him that they, their priority was to hold the shooter accountable and be able to successfully prosecute and prove the case against the shooter and that they were willing to use Mr. Gosselin as, again, my summary, not their verbatim words, but they viewed Mr. Gosselin as having lesser involvement, and therefore, having the role of a witness, because at that point they did need information about what happened.

Mr. Gosselin was not arrested. He was at liberty during the investigation stage of the case. He provided some surreptitious recordings, because Mr. Munoz was staying with Mr. Gosselin before the murder and for awhile after. He made some surreptitious recordings of, although I wouldn't characterize them as containing an outright confession, but they did have statements from Mr. Munoz that were, I would say showed guilty knowledge, and did provide helpful information to the police that they ultimately brought to bear when they were able to have an interview with Mr. Munoz. And in that interview I believe Mr. Munoz to a large degree corroborated many of the things that Mr. Gosselin had ultimately told the police in giving his account of the offense.

And so when this, when ultimately the police determined they had sufficient evidence and arrested Mr. Munoz for the murder, it was their determination to use Mr. Gosselin as a witness, because as the Court knows, due to the various rules of evidence and so forth, if he were to be arrested, his statements and his account of the crime would have been off limits to the State. The State would have been unable to use them unless the State negotiated some type of bargain to do so. So it was determined that they were -- again, nobody is suggesting, I'm

not suggesting that is ideal, however, I will suggest that it was tolerable in this case because of the need for evidence and because again, sometimes in these cases and these investigations a determination has to be made that you go after the person with the most culpability or the person who you have the most evidence against, and that's not always a pleasant to make, but it has to be made. And in this case it was made in favor of pursuing the most culpable individual, the person that actually stood in front of the victim and shot the victim.

So this case proceeded on to preliminary hearing and during that time Mr. Gosselin was not under arrest, he was not -- he was at liberty. I subpoenaed him and my intention was to call him to testify at the preliminary hearing. The defendant, Mr. Munoz waived, so we all showed up on the day of the preliminary hearing, including Mr. Gosselin pursuant to subpoena. That morning before the hearing proceeding Mr. Munoz waived his appearance so no preliminary hearing occurred, no testimony was taken.

Now, after that I did have contact with Mr. Gosselin and he indicated to me that he had -- and I was up front with him. I told him my intention was to call him as a witness. I told him that I was making absolutely no promises about what would happen to him, that he was welcome to consult a lawyer if he wished. And so he did later tell me that he had consulted with a lawyer and that his advice from the lawyer was that he should invoke his 5th Amendment privilege as to anything that implicated him in any type of criminal liability, but that he could testify about things that implicated or incriminated Mr. Munoz, and he indicated to me it was his intention to follow that advice. And that knowledge is what ultimately prompted the State to file the charges in this case, because, and again, and that was essentially the extent. I took what he told me. I never gave him any indication that he shared that with me, and then at a later time I determined that that essentially rendered him if he were to try to do what he had indicated, that that was not tenable for me to use him as a witness in that fashion, because it would essentially be impossible and largely render his testimony -- I don't think I could have elicited testimony in the

> case under those circumstances without either granting him immunity or charging him.
>
> And so I made the decision to charge him, because I believe there is truth beyond a reasonable doubt as his involvement as an aider and abettor in this event and ultimately spoke to Mr. Neahusan and negotiated his cooperation.
>
> Now, I tell that to the Court so that the Court can see again, this is not a perfect world and not the choice which faced the police and then later the State in terms of how to go forward; in other words, essentially go forward on both or go forward on the one who is most culpable with the best possible evidence. And that again was not an ideal choice but a choice that was made and again, it's not ideal, but I would have certainly tolerated having Mr. Gosselin out of custody. Had he not determined to invoke his 5th Amendment privilege, I would have tolerated him being out of custody as a witness in this case and had him testify again as I was at the prelim, at the trial. And so from that perspective while again, I don't think it is ideal or working in a perfect world, but in terms of what the Court is presented with I see it in this way. Mr. Gosselin's testimony is significant to the State's case, that's why the negotiation is what it is.

AA, 73-77.

At sentencing, the prosecutor reiterated that "…at the outset I was in a position where I think the evidence is quite strong as an aider and abettor, but we knew […] that he is not the shooter." *Id.*, 106. He went on to explain that the evidence against Munoz-Negrete was not as strong, and that Gosselin's testimony "would be significant in holding the shooter accountable." *Id.* The prosecutor explained that because Gosselin's testimony was critical, and Munoz-Negrete was more culpable, he did not

initially charge Gosselin with the understanding that he would testify as a witness. "I perceive him as the greater future danger were he to be out of custody, and therefore we proceeded against him [...] This negotiation represents a deal for him and in recognition of his contribution to the State being able to hold Mr. Munoz accountable to the degree that we were able based again on the evidence available." *Id.*, 108. Although the case did not go to trial, Gosselin's potential testimony allowed the State to hold Munoz-Negrete accountable for shooting the victim. *Id.*, 107-108.

IV. ISSUES PRESENTED

A. Where Gosselin did not object to the negotiations or otherwise assert any wrongdoing by the State, whether this Court should overturn his conviction based upon his current claim of a vindictive prosecution.

B. Whether the sentence imposed violates the Eighth Amendment prohibition against cruel and unusual punishment.

V. SUMMARY OF ARGUMENT

In this case, both Gosselin and Munoz-Negrete were culpable for robbery and murder. Gosselin brought the murder weapon to Munoz-Negrete despite knowledge that Munoz-Negrete intended to rob and shoot the victim. While faced with substantial admissible evidence against Gosselin, the prosecutor's ability to prove the charge against Munoz-Negrete was largely dependent on Gosselin's cooperation. The record reflects that because Munoz-Negrete was the shooter, and thus more

culpable and dangerous to the community, the prosecutor initially exercised his discretion not to charge Gosselin in order to facilitate prosecution of Munoz-Negrete. After Gosselin indicated that he would not testify against Munoz-Negrete, the prosecutor appropriately re-evaluated his pretrial charging decision with the goal of furthering important societal interests, consistent with his duties. Due to the change in circumstances, the prosecutor exercised his discretion to charge Gosselin. The record is devoid of support for Gosselin's argument that the prosecutor's decision was based on personal animus or any improper motive. Moreover, Gosselin failed to raise a claim of vindictive prosecution below, thereby waiving his claim pursuant to NRS 174.105.

Gosselin's claim that his sentence is cruel and unusual is equally unavailing. The sentence imposed was within statutory limits and not shocking to the conscience in light of Gosselin's actions in this case and his considerable criminal history.

VI. ARGUMENT

A. Gosselin's Claim of Vindictive Prosecution is Without Merit.

1. Standard of Review

Because Gosselin did not object below, this Court reviews his claim of vindictive prosecution for plain error affecting his substantial rights. *Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015)

2. Discussion

Under our system of separation of powers, the decision whether to prosecute, and the decision as to appropriate charges, rests in the discretion of prosecutors. *United States v. Edmonson*, 792 F.2d 1492, 1497 (9th Cir. 1986). Gosselin argues that the prosecutor's decision to charge him after he declined to testify constitutes vindictive prosecution. But this claim is not supported by the record, which reflects instead that the prosecutor's pretrial charging decision changed based on evolving circumstances. Courts have recognized that in discharging their duties, prosecutors must often reconsider their strategy based on available evidence. These pretrial decisions are entitled to deference:

> For good reasons, the Supreme Court has urged deference to pretrial charging decisions. "In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At [the pretrial] stage ..., the prosecutor's assessment of the proper extent of prosecution may not have crystalized." *Goodwin*, 457 U.S. at 381, 102 S. Ct. 2485. Also, in the plea negotiation context, the prosecutor's latitude to threaten harsher charges to secure a plea agreement advances the interest in avoiding trial shared by the prosecutor, defendant, and public. *Bordenkircher*, 434 U.S. at 363–64, 98 S. Ct. 663. Finally, prompting prosecutors to file the harshest possible charges at the outset "would [cause] prejudic[e] to defendants, for an accused 'would bargain against a greater charge, face the likelihood of increased bail, and run the risk that the court would be less inclined to accept a bargained plea.'" *Goodwin*, 457 U.S. at 378 n. 10, 102 S. Ct. 2485.

United States v. Kent, 649 F.3d 906 (9th Cir. 2011) (*quoting United States v. Goodwin*, 457 U.S. 368 (1982) and *citing Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

In *Kent*, *supra*, the prosecutor did not initially allege the defendant's prior convictions, which implicated a substantially increased penalty range. The government sought Kent's cooperation as part of a plea agreement and advised that it would file a charging document alleging the prior convictions if he declined to cooperate. When Kent refused to cooperate, the prosecutor alleged the prior convictions. *Kent*, 649 F.3d 906 at 910. On appeal, Kent alleged that the prosecutor had engaged in vindictive prosecution because the prosecutor's filing of enhanced charges "immediately followed, and was causally related to, his choice to enter an unconditional guilty plea." *Kent* at 913. In rejecting this argument, the 9th Circuit explained that in the context of pretrial plea negotiations, "'vindictiveness will not be presumed simply from the fact that a more severe charge followed on, or even resulted from, the defendant's exercise of a right.'" *Kent* at 913, *quoting United States v. Gamez-Orduno*, 235 F.3d 453 (9th Cir. 2000).

This type of prosecutorial discretion is not only limited to the filing of more serious charges. "We have sanctioned the conditioning of plea agreements on acceptance of terms apart from pleading guilty, including

waiving appeal, *United States v. Navarro–Botello*, 912 F.2d 318, 321 (9th Cir.1990), disclosing evidence, *United States v. Acuna*, 9 F.3d 1442, 1445 (9th Cir.1993), providing testimony, *Morris v. Woodford*, 273 F.3d 826, 836 (9th Cir.2001), and cooperating as an informant against others, *United States v. Gardner*, 611 F.2d 770, 773 (9th Cir.1980)." *Kent* at 914. Here, the prosecutor explained that initially, he did not exercise his discretion to charge Gosselin in this case, despite the ample evidence of his criminal liability in the murder because Gosselin's testimony was necessary to convict Munoz-Negrete, who had pulled the trigger. Both Gosselin and Munoz-Negrete had committed a crime, and the prosecutor was faced with a situation in which he needed Gosselin's testimony to successfully prosecute Munoz-Negrete, whom he assessed as presenting a greater danger to the community. Based on Gosselin's willingness to cooperate and testify against Munoz-Negrete, the prosecutor made the initial decision not to charge him in order to serve the greater interest of prosecuting the person who pulled the trigger. Later, when Gosselin indicated his intention not to cooperate in the prosecution of Munoz-Negrete, the prosecutor elected to file charges against him that were well-supported by the evidence. The prosecutor did this to hold Gosselin accountable for his role in abetting the victim's death, and in effort to obtain incriminating evidence

against Munoz-Negrete. In asserting his vindictive prosecution claim, Gosselin relies primarily on *United States v. Gallegos-Curiel*, 681 F.2d 1164 (1982). This reliance is misplaced. In that case, the Ninth Circuit made clear that "[w]hen there is no evidence of actual vindictiveness and the only question is whether it must be presumed, cases involving increased charges or punishments after trial are to be sharply distinguished from cases in which the prosecution increases charges in the course of pretrial proceedings." *Gallegos-Curiel* at 1167. Pretrial, prosecutors may properly reevaluate information as the case develops, and initial charging decisions "should not freeze future conduct." *Id.* at 1168, *quoting Goodwin*, *supra*.

"A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution." *Goodwin*, *supra*, at 382. "[D]ue process does not in any sense forbid enhanced sentences or charges, but only enhancement motivated by actual vindictiveness toward the defendant for having exercised guaranteed rights." *Wasman v. United States*, 468 U.S. 559, 568 (1984). Contrary to Gosselin's argument, he was not punished for invoking his Fifth Amendment right. There is no evidence that the prosecutor's decision to file criminal charges was motivated by vindictiveness. Instead, the prosecutor's initial assessment was that society would benefit most if a

first-degree murder conviction could be obtained against the shooter, Munoz-Negrete, and refraining from charging the less culpable abettor, Gosselin. Hoping to obtain testimony from Gosselin was in furtherance of this goal. Gosselin's invocation caused the prosecutor to reconsider how best to further this social interest. Because Gosselin declined to be a source of evidence toward Munoz-Negrete's conviction, the prosecutor appropriately considered the compelling interests of community safety and accountability in deciding to charge Gosselin.

Moreover, if a defendant who fails to object based on some defect in institution of the prosecution must raise an objection prior to trial. Failure to do so constitutes a waiver of the claim. *See* NRS 174.105(1) & (2); *Griffo v. State*, 131 Nev. 1286; 2015 WL 5176815 (Table)(where defendant alleged for the first time on appeal that the State added charges for vindictive reasons, he waived his claim pursuant to NRS 174.105). Here, Gosselin failed to assert a claim of vindictive prosecution below. Thus, he has waived this claim.

B. Gosselin's Sentence is Not Cruel and Unusual.

1. Standard of Review

A sentence that is within the statutory limits is not cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the

conscience. *Harte v. State*, 132 Nev. 410, 373 P.3d 98 (2016), *citing Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996).

2. Discussion

In arguing that his sentence constitutes cruel and unusual punishment, Gosselin recognizes that pursuant to *Silks v. State*, 92 Nev. 91, 545 P.2d 1159 (1976), a sentence within statutory limits will not be overturned absent reliance on highly suspect evidence. That is why he invites for this Court to depart from this standard in favor of the dissenting opinion in *Tanksley v. State*, 112 Nev. 844, 944 P.2s 240 (1997). This Court should decline this invitation. Gosselin, who brought the murder weapon to Munoz-Negrete knowing that he intended to rob and shoot the victim, has already been afforded the benefit of withdrawing his plea to murder in favor of an attempted murder charge. Given his involvement in the crime and extensive criminal history (*see* PSI), the sentence imposed is not disproportionate, and certainly does not shock the conscience. The district court's sentencing decision should be upheld.

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VII. CONCLUSION

Based on the foregoing, the State respectfully submits that this Court should affirm the conviction.

DATED: May 31, 2022.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: Jennifer Noble
Chief Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: May 31, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on May 31, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Victoria T. Oldenburg, Esq

/s/ Tatyana Kazantseva
Tatyana Kazantseva