IN THE SUPREME COURT OF THE STATE OF NEVADA

ARNOLD K. ANDERSON, Appellant, vs. STATE OF NEVADA, Respondent.	)	SUPREME COURT NO. 74076 **APPEAL** DISTRICT COURT NO. C-16-319021-1

APPELLANT'S OPENING BRIEF

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I[1]

JURISDICTIONAL STATEMENT

A. BASIS FOR APPELLATE JURISDICTION

NRAP 4(b); NRS 177.015(3)

B. FILING DATES ESTABLISHING TIMELINESS OF APPEAL

12-04-17: Judgment of Conviction filed[2]

12-12-17: Notice of Appeal filed[3]

C. ASSERTION OF FINAL ORDER OR JUDGMENT

This appeal is from a judgment of conviction.

II

ROUTING STATEMENT

This case is a direct appeal from a judgment of conviction based on a jury verdict that involves at least one conviction for an offense that is a Category A or B felony. As such, this case is not within those categories presumptively assigned to the Court of Appeals under NRAP 17(b).

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1 Hereafter AA shall refer to ANDERSON's Appendix filed herewith.

2 AA/8/1809.

3 AA/8/1817.

III

STATEMENT OF ISSUES

ISSUE NO. 1: WHETHER ANDERSON'S 5TH, 6TH, AND 14TH AMENDMENT RIGHTS TO COUNSEL AND A FAIR TRIAL WERE VIOLATED AMOUNTING TO PREJUDICIAL ERROR AND REQUIRING REVERSAL OF HIS CONVICTIONS WHERE HIS MOTIONS FOR NEW COUNSEL DUE TO DISINTEGRATION OF THE ATTORNEY-CLIENT RELATIONSHIP, WERE DENIED.

ISSUE NO. 2: WHETHER ANDERSON'S 5TH AND 14TH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL AND AGAINST DOUBLE JEOPARDY, REDUNDANT CONVICTIONS, AND MULTIPLE UNITS OF PROSECUTION FOR THE SAME ACTS WERE VIOLATED AMOUNTING TO PREJUDICIAL ERROR AND REQUIRING REVERSAL OF HIS CONVICTION FOR *BATTERY RESULTING IN SUBSTANTIAL BODILY HARM* (COUNT 3) WHERE THE ACTS SUPPORTING THAT CONVICTION HAVE ALREADY BEEN PROSECUTED AND PUNISHED PURSUANT TO HIS CONVICTION FOR *ATTEMPTED MURDER* (COUNT 1) WHERE BOTH CONVICTIONS ARE BASED ON THE SAME SET OF FACTS OCCURRING AT THE SAME TIME.

ISSUE NO. 3: WHETHER ANDERSON'S 5TH, 6TH, AND 14TH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM AND TO A FAIR TRIAL WERE VIOLATED AMOUNTING TO PREJUDICIAL ERROR AND REQUIRING REVERSAL OF HIS CONVICTIONS WHERE THE COURT ALLOWED AN INVESTIGATOR EMPLOYED BY THE DISTRICT ATTORNEY TO TESTIFY TO WHAT ANDERSON'S DAUGHTER HAD ALLEGEDLY TOLD HIM DURING A PROFFER.

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IV

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a case where ANDERSON was convicted of shooting BOLDEN on August 23, 2016, in the presence of BOLDEN's girlfriend (Rhonda Robinson) and ANDERSON's daughter (Jad Anderson).[4] ANDERSON claimed that he was in California with family at the time of the shooting, and that he had a picture of him (taken by his sister, Latish Anderson) standing on the beach in Santa Monica on the date of the shooting.[5] Latish was unable to make it to Nevada to testify at time of trial,[6] and the Court refused to allow her to testify via video.[7]

Despite ongoing conflicts with his court-appointed attorney (Frizzell) from November 11, 2016[8] until March 16, 2017[9], the court continuously denied ANDERSON's requests to appoint new counsel to represent him, forcing ANDERSON to opt to represent himself,[10] and adding insult to injury by having the same attorney act as standby counsel.[11] On May 25, 2017, ANDERSON

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4 AA/1/2-6, 88.
5 AA/1/84
6 AA/7/1551.
7 AA/7/1500.
8 AA/1/109-110.
9 AA/2/270.
10 AA/2/282:10-12.
11 AA/6/1301.

brought a motion to dismiss Frizzell as standby counsel.[12] The court refused.[13] From that date until the day of trial (08-28-17), [14] ANDERSON was complaining that he had not received discovery from Frizzell and that Frizzell had neglected to convey plea deals offered by the state, would not conduct research for him, and refused to answer his phone calls.[15]

During trial, the court permitted testimony to come in through the district attorney's investigator[16] about what ANDERSON's daughter (Jad) had purportedly told him during a proffer meeting.[17] Jad was not present to testify at time of trial.[18] Despite this being a violation of the Confrontation Clause, the testimony was permitted under the rule of forfeiture, pursuant to the state's claim that Jad was unavailable because ANDERSON had told her during a jail call to her phone number to leave her cell phone where it was so she couldn't be tracked and to leave the jurisdiction. There was no indication during the phone call that ANDERSON was actually talking to Jad, and ANDERSON denied that he had been talking to her.[19] Moreover, there was evidence that Jad was in violation of

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12 AA/3/595.
13 AA/3/647.
14 AA/4/775.
15 AA/3/626, 630, 641-642; AA/4/714-716, 747, 750, 755, 757-758; AA/5/1160-1161, 1163, 1186, 1302; AA/6/1308-1309.
16 AA/7/1412-1413.
17 AA/7/1413.
18 AA/5/1059-1060.
19 AA/5/1063.

her probation and there was a warrant for her arrest, so she would not have appeared at trial regardless of what ANDERSON said to her, for fear of being arrested.[20] ANDERSON's objection on hearsay and confrontation grounds was overruled.[21]

ANDERSON was convicted of attempted murder with use (Count 1) and battery with use (Count 3).[22] Both crimes are alleged in the information to have been committed "by shooting at or into the body of the said TERRY BOLDEN."[23] Accordingly, ANDERSON contends that he was convicted and sentenced twice for committing the same acts, and that the battery conviction should be reversed because it is redundant to the attempted murder conviction.

B. COURSE OF PROCEEDINGS

Please see the Appendix table of contents which is sorted chronologically.

C. DISPOSITION BY THE COURT BELOW[24]

COUNT	CHARGE	SENTENCE
1	Attempted Murder With Use (NRS 193.330, 193.165)	8-20 years
2	Robbery with Use (NRS 200.380)	Not guilty
3	Battery with Use (NRS 200.481)	4-10

20 AA/5/1069-1070.
21 AA/7/1413-1414.
22 AA/8/1809.
23 AA/1/102.
24 AA/1/101; AA/8/1809.

All counts to run consecutive to each other. ANDERSON will not be eligible for parole until he has served 12 years in prison. At time of sentencing, ANDERSON was 44.[25] He will not be eligible for parole until he is 56 years old.

V

STATEMENT OF RELEVANT FACTS

The main relevant facts surrounding this case which have not already been discussed above under "Nature Of The Case," revolve around the actual shooting of Bolden and arrest of ANDERSON. Those are discussed here. Remaining facts are discussed below in the context of the issues to which they relate.

According to Bolden, AJ claimed that Bolden owed him $200.[26] On August 23, 2016, AJ called Bolden who was visiting his brother and told him that he (AJ) was coming over.[27] When AJ arrived, he told Bolden he wanted his $200. Bolden said he didn't have it, whereupon AJ asked if Bolden could loan him some gas money. Bolden pulled out about $200 to give AJ some gas money, whereupon AJ snatched the entire $200. At that point, Bolden attacked AJ and a fight ensued.[28] At some point, AJ told his daughter in the car with him (Jad) to get his gun. She did so. Then, AJ took the gun and shot Bolden five times.[29] This was witnessed

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25 AA/1/1.
26 AA/6/1201.
27 AA/6/1196-1197.
28 AA/6/1201.
29 AA/6/1201-1202.

by Bolden's girlfriend, Rhonda Robinson.[30] AJ and Jad then drove away in AJ's car which was described by many witnesses as an older dark-colored Chevy Camaro.[31]

Bolden had known AJ for a few weeks and had ridden in his Camaro previously.[32] Days after the incident he remembered that AJ had told someone in a phone conversation that he would pick up his mail at 3070 South Nellis. Bolden communicated this to Officer Valenzuela, who went to that location and located a car which answered the description of the vehicle witnesses had seen leaving the scene.[33] He obtained the license number of that vehicle which was 24F401, and then did a DMV search which indicated the car was registered to Arnold Anderson. From that, Officer Valenzuela obtained a copy of Anderson's photo from his driver's license on file with the DMV and put together a six-picture photo array which included the Anderson photo.[34]

Officer Valenzuela and Detective Mendoza went to Bolden's home and showed the photo array to Bolden and his girlfriend Rhonda. The photo arrays were shown separately to Bolden (by Valenzuela in the living room) and Rhonda (by Mendoza in the bedroom). They both identified Anderson as the person who

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30 AA/5/1118-1127.
31 AA/6/1237.
32 AA/6/1198.
33 AA/7/1474.
34 AA/7/1475-1476.

had shot Bolden and whom they both knew as AJ. These identifications gave police probable cause to arrest Anderson. They were hoping to arrest him in the car with the gun which they had been told he carried with him in the glove compartment when he was in the vehicle.[35]

Valenzuela and Mendoza put out a metro briefing stating that they were looking for the dark Camaro with license number 24F401. Officer Duke spotted the Camaro being driven by Jad with ANDERSON as a passenger, and he stopped it. ANDERSON was arrested and the Camaro was impounded pending obtaining a search warrant. [36] No gun was found in the car.

ANDERSON has at all times denied committing the crime, and denied even knowing Bolden or his girlfriend.[37] He asserts that he was never been known by the nickname of AJ.[38] He testified at his preliminary hearing that he was in California visiting family at the time of the shooting, and a picture of him taken by his sister, Latish Anderson, at 5:00 p.m. on August 23, 2016 on the beach in California, was admitted into evidence at that hearing.[39] ANDERSON further asserted that he had an auto repair receipt from a car repair shop in California showing that his car was being repaired while he was in California visiting his

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35 AA/7/1475-1483.
36 AA/7/1483.
37 AA/1/6.
38 AA/1/84.
39 AA/1/84-86, 89, 92.

family.[40] ANDERSON has at all times claimed that this is a case of mistaken identity.

VI

SUMMARY OF ARGUMENT

ANDERSON was improperly denied his Sixth Amendment right to counsel.

Alleged statements of ANDERSON's daughter were improperly admitted through an employee of the district attorney, denying ANDERSON his Sixth Amendment right to confront witnesses against him. In connection with that error, a jail call where he allegedly forfeited his right to confront that witness was also erroneously admitted over his objection that it was irrelevant and highly prejudicial.

Finally, Counts 1 and 3 were allowed to go forward to trial based on the court's statement that they were alternate theories and that ANDERSON would not be sentenced for both.[41] However, ANDERSON ***was*** sentenced separately under both counts and they were run consecutive. Sentencing ANDERSON under both counts amounts to double jeopardy or redundant convictions for the same crime (unit of prosecution). Accordingly, the conviction for Count 3 should be reversed.

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40 AA/1/207-208.

41 AA/2/360-361.

VII

ARGUMENT

A. ANDERSON WAS DENIED HIS RIGHT TO COUNSEL

(Standard of Review: abuse of discretion)[42]

ANDERSON contends that he was denied his Sixth Amendment right to counsel because the district court refused his many requests to substitute appointed counsel, Kenneth Frizzell, with alternate counsel where ANDERSON had difficulty communicating with Frizzell and did not believe that Frizzell was adequately representing his interests. Finally, ANDERSON opted to represent himself after a year of unsuccessfully attempting to get the court to appoint alternate counsel. To add insult to injury, the court also appointed Mr. Frizzell to act as standby counsel while ANDERSON was representing himself. During the three-month period that Frizzell was acting as standby counsel, ANDERSON requested that different standby counsel be appointed as Mr. Frizzell was not helping him, and was not answering his phone calls. The court refused to even appoint alternate standby counsel.

In *Brown v. Craven,* the Ninth Circuit held that "...to compel one charged with grievous crime to undergo a trial with the assistance of an attorney with

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42 *Young v. State,* 120 Nev. 963, 968 (2004); *Jefferson v. State,* 2014 WL 3764809, at 8 (Nev. July 29, 2014); *United States v. Moore,* 159 F.3d 1154, 1158-1159 (9th Cir. 1998).

whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever."[43]

Likewise, the Washington appellate court found a denial of *Sixth Amendment* rights in a similar situation where a defendant requested several times before trial that her attorney be replaced, refused to talk to her attorney because the relationship had irretrievably broken down, and in fact refused to even attend her own trial unless another attorney was appointed.[44] In that case, the defendant asserted that counsel had threatened her, failed to consult the discovery before urging her to accept a plea offer, and failed to talk to her proposed defense witnesses. The Court in *Brady* observed that, "[a] defendant's *Sixth Amendment* right to effective assistance of counsel is violated if the relationship between lawyer and client completely collapses."[45] The Court further held that in order "[t]o determine whether an irreconcilable conflict exists, the Washington Supreme Court has adopted the Ninth Circuit's three-part test. The factors include '(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion.'"[46] This Court adopted the same test in the decision of *Young v. State.*[47]

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43 *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970).

44 *State of Washington v. Brady*, 2003 Wash. App. LEXIS 1105 (2003).

45 *Brady, supra,* at 7, citing, *In re Personal Restraint of Stenson,* 142 Wn.2d 710, 722, 16 P.3d 1 (2001) (citing *United States v. Moore,* 159 F.3d 1154, 1158 (9th Cir. 1998)).

46 *Brady, supra,* at 8.

47 *Young v. State,* 120 Nev. 963, 966-968 (2004).

1. SIXTH AMENDMENT RIGHT WAS VIOLATED

Analyzing these factors in the context of this case, it is clear that ANDERSON's Sixth Amendment right to counsel was violated.

a. Extent Of Conflict

ANDERSON represented to the court that his attorney failed to communicate with him, failed to locate witnesses, failed to file appropriate motions, and failed to accumulate documents and evidence.[48]

01-24-17

> THE DEFENDANT: I don't want him as counsel, period, because I can't even talk to that man.
>
> ....
>
> THE COURT: But at this point I'm going to deny the motion. In a week you can come back and you can make further representations to the Court. So, one week. [49]

02-08-17

On February 8, 2017, ANDERSON filed a civil rights complaint against his attorney.[50] He asserted that his attorney had failed to file motions to dismiss, failed to challenge redundant charges, and that he had failed to follow up on pictures taken by ANDERSON's sister of ANDERSON in California at the time of the shooting.[51]

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48 AA/2/168-169.
49 AA/2/210-211.
50 AA/1/216.
51 AA/1/221.

03-07-17

ANDERSON brought a motion to dismiss counsel. At the hearing on that motion, the following colloquy took place.

> THE DEFENDANT: Me and him are having problems communicating. I called him 26 times and haven't got to talk to him not one time. When we had the last hearing in January you asked if I've ever talked to him and you would order him to visit me in the jail....He did....I've been incarcerated six months and I've only seen him twice. He's not doing the things that I'm asking him to do as far as part of my defense. I don't understand what's happening here. He's not doing anything I ask him. You said I need a legal basis. What kind of legal basis do I need not to have him represent me because there's a conflict. I don't understand what's going on here, I really don't.
> THE COURT: Okay. Well I can tell you you have not stated a legal basis. Your attorney, Mr. Frizzell, you are communicating with him; correct?
> MR. FRIZZELL: Yes, Your Honor.
> THE COURT: You've already made a record of the times you've gone over there and your investigator has gone over there as well....
> MR. FRIZZELL: At least at this point that particular alibi witness is not panning out to what Mr. Anderson told me that this witness would pan out to.
> THE COURT: So, at this time the motion is denied. But you've also asked -- if you want to represent yourself, I don't think that's a good idea.
> THE DEFENDANT: It's the same thing having him as a lawyer. Nothing's gonna get done.
> THE COURT: Okay. Well, at this time I'm going to deny your motion. If you want to represent yourself you can let me know and I'll set it for you to have an opportunity to have a *Faretta* canvass.
> THE DEFENDANT: Yeah. I would like to represent myself.
> THE COURT: You want to represent yourself? Okay. We'll set it for one week for a *Faretta* canvass.[52]

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[52] AA/2/247-249.

03-16-17

At a hearing on March 16th, the following exchange occurred:

> THE COURT: You've indicated you want to represent yourself; correct?
> THE DEFENDANT: Correct. [53]
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> ....
>
> THE DEFENDANT: Yes. ***If Kenneth Frizzell wasn't ineffective I wouldn't be standing to represent myself*** if he was [indiscernible].
> THE COURT: Okay. That's – I repeatedly told you you're entitled to an appointed counsel. You're not entitled to an attorney of your choice, and I'm not sure I could ever satisfy you.[54] (emphasis added)

03-23-17

The matter was continued to March 23, 2017, at which time the following exchange took place, which made it clear that Mr. Frizzell was not communicating with ANDERSON who did not even know that a plea deal had been made or that he was facing life in prison:

> THE DEFENDANT: Yeah, like I was forcing (sic) this situation because you wouldn't replace the counsel. I've explained it for you like [indiscernible].....I wasn't trying to start anything.
> THE COURT: Here's – I'm going to remind you. You are entitled to have appointed counsel. You are not entitled to have counsel of your choice. Okay. I do not find a legal basis – if I thought there was a legal basis I would appoint alternative counsel. Okay. I don't think there is.[55]
>
> ....
>
> THE DEFENDANT: I get the idea that he's not going to help me when I ask him – when I felt this case was getting kind of complicated, when I felt like I wasn't getting anywhere, I asked him I said have you thought about trying to resolve this case. He told me I'm not going to resolve this while

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53 AA/2/270.
54 AA/2/282.
55 AA/2/326.

you're trying to fire me and represent yourself. So, that's where I got that idea from. This, Your Honor, like I'm being forced in this situation today to represent myself and try to --

....

THE COURT: Okay. Well he did give you a deal from the State?
THE DEFENDANT: No, he didn't.
THE COURT: He didn't?
MR. FRIZZELL: It's right there. [56]

....

THE COURT: You're awful young to be facing life in prison; do you understand that?
THE DEFENDANT: Yeah.
THE COURT: Okay. Did you know that before today?
THE DEFENDANT: No.[57]

Once again, ANDERSON reiterated that if he had to continue with Mr. Frizzell, he might as well represent himself. The judge seemed to only hear that he wanted to represent himself, and completely discounted the fact that all communication between Frizzell and ANDERSON had broken down and that was why ANDERSON was seeking to represent himself.

THE DEFENDANT: It seemed like after being in the Clark County for six months it seemed like nothing was getting done and couldn't communicate with Mr. Frizzell, calling his office and not talking to him, and not talking strategy and it got real frustrating. It seemed like well if he's not going to do anything I might as well try to do something myself to try to get some kind of results here because I had been in that jail six months and I'm not getting any answers, its frustrating getting locked up -- [58]

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THE COURT: ....Have you made a decision as to whether you want to represent yourself?
THE DEENDANT: Yes.

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56 AA/2/355-356.
57 AA/2/359-360.
58 AA/2/361-362.

THE COURT: And what's that decision?
THE DEFENDANT: I would like to represent myself.

....

THE COURT: At this time I'm going to make a finding that you have waived your right to be represented by counsel, that you've done it freely and voluntarily and intelligently. I'm going to allow you to represent yourself.[59]

At that point, Mr. Frizzell was appointed to act as standby counsel. ANDERSON continuously pointed out to the court that he was not getting documents he needed to represent himself. He had still not received the photo arrays[60] or prior statements of witnesses who might testify.[61]

04-13-17

ANDERSON brought another motion for the photo arrays on April 13, 2017. The state said it would produce them.[62] On April 28, 2017, the state attached color photos of the six-pack photo arrays to its opposition to ANDERSON's habeas writ.[63]

05-25-17

As of May 25, 2017, ANDERSON asserted he had still not received color copies of the photo arrays.[64] It appears that Mr. Frizzell was receiving documents that he was not turning over to ANDERSON, thereby impeding ANDERSON's

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59 AA/2/366.
60 AA/2/304.
61 AA/2/304.
62 AA/2/449-450.
63 AA/3/486-489.
64 AA/3/626.

ability to represent himself, and without question abandoning Frizzell's duties as standby counsel. On May 25, 2017, there was a hearing on ANDERSON's motion to dismiss Frizzell as standby counsel.[65] The state claimed that it had provided Frizzell with requested discovery documents the court had ordered. Frizzell claimed that he had turned over everything he had to ANDERSON. That was patently false since we know that color copies of the photo array had been attached one month prior to the May 25th hearing, to the state's habeas opposition (filed on April 28, 2017), and yet ANDERSON still did not have color copies of those.[66] At the time of the May 25th hearing, Frizzell further admitted that he had been in negotiations with the state but had not communicated the substance of those conversations to ANDERSON.[67]

06-13-17

On June 13, 2017, another hearing was held on ANDERSON's motion to dismiss Frizzell as standby counsel. Frizzell represented to the court that everything had been turned over to ANDERSON the day before (June 12, 2017).[68] They had not been turned over by Mr. Frizzell, himself, but by his investigator. The court refused to replace Mr. Frizzell with different standby counsel, stating:

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65 AA/3/595.
66 AA/3/487-489, AA/3/626.
67 AA/3/630.
68 AA/3/641-642.

> THE COURT: The next is your motion to dismiss standby counsel....I'm not going to dismiss him. You don't have to like him, you don't have to get along with him. He's just required to be here to answer your questions and assist you with any preparation and to make sure you get all your discovery....[69]

The court acknowledged that one of Frizzell's duties was to get discovery to ANDERSON and she knew from all the hearings and motions that had taken place that Frizzell was not timely providing discovery and other documents that ANDERSON needed, but she was still unwilling to replace Frizzell who ANDERSON had been claiming for six months that he could not work with or communicate with.

07-25-17

On July 25, 2017, ANDERSON brought another motion, again claiming that he had still not received color photocopies of the photo arrays.[70] The state handed the photos to Mr. Frizzell, who made quite a point of stating that he was, in turn, handing those documents to ANDERSON.[71] As stated above, Frizzell had the color photocopies of the photo arrays in his possession for three months at that time, but had never provided them to ANDERSON.

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69 AA/3/647.

70 AA/4/715-716.

71 AA/4/714-716.

08-22-17

Calendar call occurred on August 22, 2017, and ANDERSON discovered for the first time at that hearing that another offer had been made by the state.[72]

> THE COURT: ....Mr. Anderson, you ready to go to trial?
> THE DEFENDANT: Yes.
> ....
> MR. FRIZZELL: ....Mr. Palal stated to me this morning – actually yesterday when I saw him – that the offer that was previously revoked would have been – was back on the table for me to let Mr. Anderson know....
> ....
> THE COURT: Okay. And that offer was conveyed to you; correct?
> THE DEFENDANT: No.
> THE COURT: That offer was not conveyed to you? Okay.
> MR. FRIZZELL: I just told it.[73]

ANDERSON claimed that Frizzell had not provided him a copy of the repair shop receipt showing that his car was being repaired in California at the time of the shooting. ANDERSON denied that he had received it, and noted for the court that one of the problems was that Frizzell was doing everything through his investigator and then making representations to the court that documents had been turned over to ANDERSON without personal knowledge that that had been done.[74]

> THE DEFENDANT: The notice – the auto repair receipt that Ken Frizzell has from a – my vehicle that was in the repair shop, I don't have that. He has it.
> THE COURT: Okay. Well then that's not a discovery motion. Then you ask Mr. Frizzell to give it to you. Okay.

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72 AA/4/747.
73 AA/4/747.
74 AA/4/750-758.

THE DEFENDANT: He's not going to give it to me because when I call his office they don't accept my calls and he doesn't make jail visits.
THE COURT: Mr. Frizzell, will you make sure whatever receipt he's talking about he gets a copy of it?
MR. FRIZZELL: Yes, Your Honor. It was something that was emailed to me. So, I'll just have to print it out and see if I can't get it over there to him.[75]

08-29-17

August 29th was the first day of trial, and ANDERSON was coming undone. He told the court that he could not get along with Frizzell, that Frizzell was not getting witnesses he needed, and that they might just as well take ANDERSON back to jail because he wasn't getting the help he needed to conduct his defense.[76]

08-30-17

On August 30th, ANDERSON told the court that he was unable to conduct necessary research from the jail, that Mr. Frizzell was not returning his calls, and that he was suicidal. The court told him that the trial was going forward and that he could chose to attend or not.[77]

It is clear from the foregoing that there was a conflict between ANDERSON and Frizzell almost from the beginning when Frizzell was appointed to represent ANDERSON. ANDERSON repeatedly asked the court to appoint alternate

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75 AA/4/750.
76 AA/6/1160-1167, 1186.
77 AA/6/1302-1309.

counsel. The court repeatedly refused, which refusal constituted an abuse of discretion entitling ANDERSON to a new trial.

b. Adequacy Of Inquiry

The court was made well aware of the conflict between ANDERSON and Frizzell for eight months leading up to trial. The court simply had her heels dug in and had decided she was not going to replace Frizzell no matter what ANDERSON said. It's not as if ANDERSON had been through several attorneys. He first had the public defender, and that attorney withdrew because he was representing the victim, Bolden.[78] Then Frizzell was appointed on September 21, 2016.[79] Certainly, under the circumstances of this case, and the repeated representations of a complete breakdown of the attorney-client relationship between ANDERSON and Frizzell, it was an abuse of discretion for the court to adamantly refuse to withdraw Frizzell and appoint alternate counsel at least one time. If this were an ongoing request no matter who the attorney was, that would be a different situation, but that was not the case. ANDERSON and Frizzell just could not get along, could not communicate, and forcing ANDERSON to go to trial with Frizzell or represent himself was a violation of ANDERSON'S Sixth Amendment right to counsel.

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78 AA/1/21.

79 AA/1/31.

c. Timeliness Of Motion

There can be no question but that ANDERSON timely moved for appointment of substitute counsel on many, many occasions from the beginning of 2017 up to and through trial. He made repeated requests for alternate counsel, and outlined in great detail the problems he was having with Mr. Frizzell. The dates and times of those requests are outlined above.

2. REMEDY

The only remedy when a person's Sixth Amendment right to counsel is violated, is to reverse his convictions and remand for a new trial where the defendant is adequately represented.

As the United States Supreme Court recently held, it does not matter whether ANDERSON was prejudiced by the violation of his right to counsel. The fact that the right was violated, alone, constitutes the prejudice, and requires that his convictions be reversed and the matter remanded for a new trial.

> In *United States v. Gonzalez-Lopez, 548 U.S. 140 (2006)*, the Government argued that illegitimately denying a defendant his counsel of choice did not violate the *Sixth Amendment* where "substitute counsel's performance" did not demonstrably prejudice the defendant. This Court rejected the Government's argument. "[T]rue enough," the Court explained, "the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." If a "particular guarantee" of the *Sixth Amendment* is violated, no substitute procedure can cure the violation, and "[n]o additional showing of prejudice is required to make the violation 'complete.'[80]

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80 *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2716 (2011).

However, even though a showing of prejudice is not required for reversal, in this case, ANDERSON was prejudiced by not being assigned competent counsel who would adequately follow up on ANDERSON's assertion that he was not the perpetrator, but that he was in California with family at the time of the incident. There were pictures taken by family members of ANDERSON while he was in California. Those pictures were admitted at the Preliminary Hearing. However, ANDERSON's attorney did not follow up to have ANDERSON's sister who actually took the photos appear at ANDERSON's trial to lay a foundation for admission of the photos.[81] There were many family members who were present at the family gathering in California. There were affidavits from family members. ANDERSON's attorney never followed up with those family members to have them present during trial to testify that ANDERSON had been in California with them at the time of the shooting.[82] There was an auto repair receipt for repair of ANDERSON's car while he was in California that was never admitted into evidence because his attorney never followed up with the repair facility to get the owner of the facility to trial to lay a foundation for admission of the repair receipt. The owner only spoke Spanish, but instead of hiring an interpreter to communicate with the repair shop owner, ANDERSON's attorney tried to communicate through

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81 AA/1/64-67, 84-85, 89, 90-92; AA/4/818-819, 828; AA/8/1688, 1693.

82 AA/1/84-92; AA/8/1689-1691.

his legal assistant.

> MR. FRIZZELL: Well, Your Honor, I have sent – I have sent my investigator over there numerous times. My investigator and I both have been in contact with this garage that is alleged to have had his vehicle there which would then give him an alibi. The owner of the garage only speaks Spanish so I had to speak through my gal at my office, my legal assistant at my office.[83]

In a case similar to the one at bar, the Ninth Circuit reversed all convictions where the defendant opted to represent himself after the trial court refused many times to appoint alternate counsel.[84]

> "We think, however, that to compel one charged with (a) grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever." The instant case differs from *Brown* only in that in *Brown* the defendant was represented during the trial by the attorney he sought to be rid of, while here Williams chose to go the pro se route because he could not obtain a different counsel. The end result is the same. Under either circumstance the defendant is deprived of the constitutionally guaranteed right to have the effective assistance of counsel at trial.[85]

As in *Williams*, ANDERSON's convictions should be reversed and the matter remanded for a new trial where he is represented by counsel that he can directly communicate with and who has the time and inclination to develop ANDERSON's alibi and other defenses.

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83 AA/1/207-208; AA/4/822.

84 *United States v. Williams,* 594 F.2d 1258, 1259-61 (9th Cir. 1979).

85 *Williams, supra,* at 1259-1261, citing to *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970).

B. ANDERSON WAS DEPRIVED OF HIS CONFRONTATION RIGHTS

(Standard of Review: de novo)[86]

The state sought to introduce ***through an employee of the District Attorney*** statements allegedly made by ANDERSON's daughter, Jad, during a proffer[87] which were neither recorded nor statementized in any manner.[88] The gist of the statements was that she was with ANDERSON when the shooting occurred, he was the shooter, and he had told her to claim that he was in California at the time the shooting took place.[89]

Jad could not be found by the state to serve with a subpoena so she was unavailable to testify in person at trial. The state claimed that ANDERSON should not be able to exclude the district attorney's employee from testifying about what Jad had told him because it was ANDERSON's fault that she was not present for trial. The state asserted that it had a jail call from ANDERSON to Jad's phone number placed a few days before trial where he had told the person he was talking to to leave her phone where it was and leave without it so she could not be traced.[90] ANDERSON did not deny that he had talked to someone on his daughter's phone but denied he had been talking to his daughter. He pointed out that her name was

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86 *Farias-Munguia v. State,* 2014 WL 504757, at 1 (Nev. Jan. 16, 2014).
87 AA/7/1412-1413.
88 AA/7/1422.
89 AA/7/1414-1415.
90 AA/5/1059-1060.

not mentioned during the phone call, and asserted that he was not talking to her; he was talking to someone else.[91] The state did not call an expert on voice recognition to refute ANDERSON's claim that he had not been talking to his daughter. Moreover, the state admitted that Jad had absconded from probation a few months prior,[92] which meant that she would not have appeared for trial where she would be arrested, regardless of what ANDERSON said to her.[93]

ANDERSON objected to any testimony about what Jad had allegedly said during the proffer, especially through ***an employee of the District Attorney***. He asserted that allowing such testimony violated his right to confront witnesses against him.[94] The court allowed the testimony pursuant to the doctrine of forfeiture, finding that the state had shown by a preponderance of the evidence that Jad was unavailable because of ANDERSON's own actions.[95] But, the evidence did not preponderate in favor of such a finding. It was ANDERSON's assertion that he had not asked his daughter to absent herself from trial -- against the state's evidence that because he had spoken to someone on Jad's phone that he must have been speaking to Jad. The testimony came in through Marco Rafalovich, ***a***

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91 AA/5/1063.
92 AA/5/1068.
93 AA/5/1069-1070.
94 AA/6/1260.
95 AA/6/1261.

criminal investigator employed by the district attorney's office.[96]

A criminal defendant has a constitutionally guaranteed right to confront and cross-examine the witnesses against him.[97] However, this constitutional right is not absolute. An exception exists where the witness is unavailable, has given testimony at a previous judicial proceeding against the same defendant, and was subject to cross-examination by that defendant.[98] In this case, while Jad was apparently unavailable, she had not previously been subjected to cross-examination by ANDERSON. Therefore, the District Attorney's investigator should not have been permitted to testify to what she allegedly said. This testimony was inherently unreliable, especially since there was no recording or written transcription of the alleged statement, and it was being introduced through ***an employee of the district attorney*** which was the very entity that was prosecuting ANDERSON! For the foregoing reasons, all convictions should be reversed and the matter remanded for a new trial.

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96 AA/7/1412; AA/7/1413-1415.

97 U.S. Const. Amend. VI; *Delaware v. Van Arsdall,* 475 U.S. 673, 678 (1986).

98 *Barber v. Page,* 390 U.S. 719, 722 (1968); *see also Crawford v. Washington,* 541 U.S. 36, 59 (2004).

C. COUNT 3 SHOULD BE REVERSED AS REDUNDANT

(Standard of Review: de novo)[99]

Early on in this case, ANDERSON claimed that he should not be tried on the attempted murder (Count 1) and battery (Count 3) charges as they were one and the same. The court told him that he had to go to trial on both counts but that he could only be sentenced on one.

> THE COURT: You have to go to trial on both and you could be convicted of both. ***Now I wouldn't sentence you on both***...
> ....
> THE COURT: Okay. ***But you would only be sentenced on one of them.*** But if you were convicted of the attempt murder, you're still looking at the 20 years.[100] (emphasis added)

After he was sentenced on both counts, ANDERSON moved to vacate sentencing due to a double jeopardy violation, claiming that based on the way they were pled, the attempted murder and battery counts constituted the same crime by "shooting at or into the body of the said TERRY BOLDEN."[101] The court denied that motion.[102] ANDERSON received consecutive sentences for attempted murder with use and battery with use, both of which arose out of the same shooting of BOLDEN on the same date and at the same time of day.

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99 *United States v. Patterson,* 292 F.3d 615, 622 (9th Cir. 2002); *Washington v. State,* 376 P.3d 802, 806 (Nev. 2016).

100 AA/1/360-361.

101 AA/8/1663; AA/8/1787.

102 AA/8/1769.

The Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.[103] This case involves multiple punishments under Counts 1 and 3 for the same offense – shooting Bolden. ANDERSON believes that the question at issue here involves a question about the "unit of prosecution" as enunciated by this Court in *Washington*, and that it therefore raises an issue of redundancy, and not double jeopardy.[104]

This Court stated that, "[w]hile often discussed along with double jeopardy, a claim that convictions are redundant stems from the legislation itself and the conclusion that it was not the legislative intent to separately punish multiple acts that occur close in time and make up one course of criminal conduct. We have declared convictions redundant when the facts forming the basis for two crimes overlap, when the statutory language indicates one rather than multiple criminal violations was contemplated, and when legislative history shows that an ambiguous statute was intended to assess one punishment. When a defendant receives multiple convictions based on a single act, this court will reverse redundant convictions that do not comport with legislative intent. After the facts

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[103] *Williams v. State,* 118 Nev. 536, 548 (2002); *Byars v. State,* 336 P.3d 939, 948 (Nev. 2014).

[104] *Washington v. State,* 376 P.3d 802, 806 (Nev. 2016).

are ascertained, an examination of whether multiple convictions are improperly redundant begins with an examination of the statute."[105]

The statutes in question here are NRS 193.330 (attempted murder with use) and NRS 200.481 (battery with use)[106] which provide that:

> **Count 1**
>
> **NRS 193.330 Punishment for attempts.**
>
> 1. An act done with the intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime.
>
> **Count 3**
>
> **NRS 200.481 Battery. Definitions; penalties.**
>
> 1. As used in this section:
>
> (a) "Battery" means any willful and unlawful use of force or violence upon the person of another.

In the Complaint, Count 1 is alleged under NRS 193.330 as "attempt to kill TERRY BOLDEN, a human being, with use of a deadly weapon, to wit: a firearm, *by shooting at or into the body of the said TERRY BOLDEN.*[107] Count 3 is alleged under NRS 200.481 as "us[ing] force or violence upon the person of another: to-wit TERRY BOLDEN, with use of a deadly weapon, to-wit: a firearm, *by shooting*

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105 *Wilson v. State,* 121 Nev. 345, 355-356 (2005).
106 AA/1/13.
107 AA/1/13.

at or into the body of the said TERRY BOLDEN..."[108]

In one count, the state claims that ANDERSON attempted to kill Bolden by shooting him. In the other it claims that he committed a battery by shooting him. The acts asserted in Counts 1 and 3 arise out of the same altercation and allege the same acts constituting the attempted murder and the battery. For the foregoing reasons, Count 1 (attempted murder by shooting Bolden) and Count 3 (battery by shooting Bolden) are the exact same offense. Accordingly, as the district court acknowledged at the beginning of the case, ANDERSON should not have been sentenced on both counts, and therefore, Count 3 should be reversed by this court.

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[108] AA/1/14.

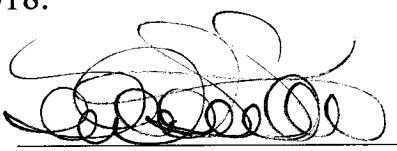
VIII

CONCLUSION

All convictions should be reversed because ANDERSON was denied his Sixth Amendment right to counsel and because alleged statements of his daughter, Jad, were admitted through an employee of the District Attorney with no opportunity for ANDERSON to cross-examine Jad, in violation of his Sixth Amendment right to confront witnesses against him. Finally, Count 3 should be reversed since it is redundant to Count 1.

Respectfully submitted,

Dated this 18th day of April, 2018.



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