

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

**APPELLANT'S PETITION FOR REHEARING/REQUEST FOR EN BANC
CONSIDERATION**

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ANDERSON hereby petitions for rehearing pursuant to NRAP 40 and requests en banc reconsideration pursuant to NRAP 40A, of this Court's Order Affirming Convictions dated September 5, 2019.

I

ARGUMENT ISSUES

A. PETITION FOR REHEARING

NRAP 40 provides that a petition for rehearing shall state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended.

1. CONFRONTATION ISSUE

The Court panel found that the doctrine of forfeiture applied to allow testimony of an absent witness through a DA investigator. It focused on whether the burden in a forfeiture case had to be supported by clear and convincing evidence or a preponderance of the evidence standard. Finding that the preponderance of the evidence standard applied, it found that the testimony was admissible under the doctrine of forfeiture.

The facts underlying the forfeiture were that ANDERSON had a telephone conversation from jail with someone on the absent witness's phone where he told the person to disappear and leave her phone so that authorities could not find her. Even assuming that ANDERSON was speaking with the absent witness when he

made those comments (which he denied), the panel Court conceded what the state admitted – that the absent witness (ANDERSON's daughter) had an outstanding warrant for her arrest because she had absconded from juvenile probation and both her probation officer and the district attorney were searching for her.

The panel Court misapplied the law because it did not address whether ANDERSON in making that statement to his daughter was merely trying to protect her from being arrested as opposed to keeping her from testifying against him at trial. While there is a split of authority as to what standard should apply in forfeiture cases (clear and convincing or preponderance of the evidence), the United States Supreme Court has made it clear that under any standard, there must be a showing that the statements were made with the **intent** not only of causing the person to be absent, "but...to prevent the person from testifying...."

The manner in which the rule was applied makes plain that unfronted testimony would *not* be admitted **without a showing that the defendant intended to prevent a witness from testifying**. In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying – as in the typical murder case involving accusatorial statements by the victim – the testimony was excluded unless it was confronted....¹ (emphasis added)

The panel Court in this case merely looked at whether or not ANDERSON had intentionally procured the witnesses' absence,² and did not address whether his intent in doing so was to prevent her from testifying against him.

¹ *Giles v. California*, 554 U.S. 353, 361-362 (2008).

² Opinion, page 9-10.

To apply the forfeiture-by-wrongdoing exception to the Confrontation Clause, the trial court must find by a preponderance of the evidence that the defendant intentionally procured the witness's absence.³

That statement misapplies the law. The law requires not only a finding that the defendant intentionally procured the witness's absence, but that he did so to prevent her from testifying. In the case at bar, it appears that if ANDERSON was, indeed, speaking with his daughter, he was giving her advice on how to avoid being picked up on an outstanding arrest warrant. The panel Court noted this.

...Anderson instructed her to leave her phone so she could not be tracked by law enforcement.⁴

There was no discussion during the jail call about testimony or that ANDERSON wanted his daughter absent so she could not testify.

2. RIGHT TO COUNSEL ISSUE

The panel Court merely stated in a footnote without further discussion that the issue regarding denial of ANDERSON's right to counsel had been considered and rejected as lacking merit.⁵ The right to counsel is an important Sixth Amendment right, and ANDERSON is left with no idea whether the panel Court's rejection is based on sound law or a clear understanding of the facts. ANDERSON cited to 12 separate incidents where his problems with his counsel were brought to the attention of the trial court, as well as his repeated requests that alternate counsel

³ Opinion/at p. 9.

⁴ Opinion/at p. 11.

⁵ Opinion/at p. 12.

be appointed to represent him.⁶ ANDERSON believes that this was an important issue for the Court to consider and, in fact, devoted the most time and effort to its discussion in his Opening Brief.

3. COUNT 3 SHOULD BE REVERSED AS REDUNDANT

As with the right to counsel issue, the panel Court stated in a footnote that the issue involving the redundancy of his battery conviction was rejected as lacking merit.⁷ This involved whether ANDERSON could be sentenced on both attempted murder and battery arising out of the same shooting. **The trial court admitted that he could only be sentenced on one of the counts.**⁸ So, ANDERSON is confused as to why the panel Court refused to correct this obvious sentencing error.

B. EN BANC RECONSIDERATION

NRAP 40A(a) provides that “en banc reconsideration of a decision of a panel of the Supreme Court is not favored and ordinarily will not be ordered except when...(2) the proceeding involves a substantial precedential, constitutional or public policy issue.”

1. CONFRONTATION ISSUE

In the case at bar, the panel Court recognized that there is a split of authority

⁶ Op.Brf./11-22.

⁷ Opinion/12.

⁸ AA/1/360-361; Op.Brf./27.

among the courts as to which standard applies in a forfeiture case, and indicated that this Court has not yet taken a position on that issue.⁹ While ANDERSON does not here challenge the standard of preponderance of the evidence adopted by this Court as it recognizes that it is the majority view, ANDERSON does challenge the panel Court's failure to properly consider the intent issue set forth by the United States Supreme Court. It is critical that in viewing a case involving such an important Constitutional right, if the lower standard is to be applied, then the intent aspect must be rigorously analyzed as well. Failure to do so illustrates the danger of using the lower standard.

2. RIGHT TO COUNSEL ISSUE

The right to counsel is also an important Constitutional right, which the panel Court did not discuss. Certainly, this issue should at least be discussed by this Court so ANDERSON can decide if this is a matter for further judicial review.

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⁹ Opinion/6.

II

CONCLUSION

ANDERSON respectfully requests rehearing and en banc reconsideration of his case, as outlined above.

Respectfully submitted,

Dated this 9th day of September, 2019.



SANDRA L. STEWART, Esq.
Attorney for Appellant

III

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Petition, 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 Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the Petition regarding matters in the record to be supported by a reference to the page of the transcript of 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 Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure. I further certify that this Petition 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 Petition has been prepared in a proportionally spaced typeface using Word 14.4.3 For Mac with Times New Roman 14-point. I further certify that this Petition complies with the page-or type-volume limitations of NRAP 40 because it does not exceed 10 pages.

DATED: September 9, 2019



SANDRA L. STEWART, Esq.
Appellate Counsel for
ARNOLD ANDERSON

IV

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the:

**APPELLANT'S PETITION FOR REHEARING/REQUEST FOR EN BANC
CONSIDERATION**

by mailing a copy on September 9, 2019 via first class mail, postage thereon fully prepaid, to the following:

**ARNOLD ANDERSON
INMATE NO. 85509
ELY STATE PRISON
POST OFFICE BOX 1989
ELY, NV 89301**

and by e-filing the original with the Nevada Supreme Court, thereby providing a copy to the following:

**STEVEN B. WOLFSON, ESQ.
CLARK COUNTY DISTRICT ATTORNEY
200 LEWIS AVENUE
LAS VEGAS, NV 89155-2212**



SANDRA L. STEWART