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 PETITION FOR REHEARING/REQUEST FOR EN BANC CONSIDERATION (FROM 11-27-19 OPINION)

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NEVADA RULES AND STATUTES

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 November 27, 2019.

A previous petition for rehearing en banc was filed on September 9, 2019 from an original Opinion filed on September 5, 2019. An Order Withdrawing the September 5, 2019 Opinion was filed on October 31, 2019 stating that a separate concurring opinion by Justice Silver had been inadvertently omitted. A new Opinion was issued on November 27, 2019 which includes Justice Silver's concurring opinion. This is a new Petition For Rehearing En Banc from that November 27, 2019 Opinion.

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.

a. <u>INTENT ISSUE</u>

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 unconfronted 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.

> 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

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1 *Giles v. California,* 554 U.S. 353, 361-362 (2008).
2 Opinion/at p. 9-10.
3 Opinion/at p. 9.
4 Opinion/at p. 11.

ANDERSON wanted his daughter absent so she could not testify.

In her concurring opinion, Justice Silver agreed that, "[i]t is completely unclear from the record whether the witness's absence from trial occurred as a result of ANDERSON's jail call to the witness, or whether it was because she absconded from probation six months prior to trial and had an outstanding warrant for her arrest."[5] Justice Silver went on to note that, "[t]his is further complicated by the fact that the State never served the witness with a subpoena advising the witness when to come to court, nor did the State ever apply to the district court for a material witness warrant prior to trial in order to actually procure the adverse witness's presence for trial."[6] Justice Silver went on to conclude that, "...under these particular facts, I believe that the district court erred by allowing the district attorney's investigator to testify as to what the witness said during the State's case-in-chief."[7]

b. <u>HARMLESS ERROR ISSUE</u>

Justice Silver, however, went on to conclude that the error was harmless owing to overwhelming evidence of guilt, "including the victim's and ANDERSON's girlfriend's testimony that ANDERSON was the shooter..."[8] This

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5 Opinion/at p. 1 of Concurrence.
6 Opinion/at p. 1 of Concurrence.
7 Opinion/at p. 1 of Concurrence.
8 Opinion/at p. 2 of Concurrence.

last comment revealed a misapplication of the facts in that defendant's girlfriend did not testify that ANDERSON was the shooter – it was the *victim's* girlfriend who so testified; a significant error given the implied bias of the victim's girlfriend in favor of the victim and against ANDERSON.

Additionally, this Court in *Medina v. State,*[9] applying the harmless error standard, stated that in reviewing a Confrontation Clause error, the case must be reversed unless the state can show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.[10] In this case, there was no more damning evidence than the testimony that ANDERSON's own daughter claimed he was the shooter – testimony which ANDERSON had no ability to confront, which was offered by an investigator for the state with an obvious bias against ANDERSON.

2. RIGHT TO COUNSEL ISSUE

In the November 27, 2019 Opinion, the Court beefed up its analysis of the right-to-counsel issue from a footnote to a one-page discussion.

First of all, it asserts that it was reviewing the issue for abuse of discretion.[11] In *Frazier v. United States,*[12] the Ninth Circuit stated that claims of

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9 *Medina v. State,* 122 Nev. 346, 355 (2006).
10 *Medina, supra,* at p. 355.
11 Opinion/at p. 11.
12 *Frazer v. United States,* 18 F.3d 778, 781 (9th Cir. 1994).

denial of counsel are to be reviewed de novo. Therefore, the panel Court applied the incorrect standard of review on this issue.

Second of all, the Court found that there was an adequacy of the inquiry into the conflict between ANDERSON and his attorney where it stated, that "[t]he record reflects that the trial court's inquiries into ANDERSON's conflicts with appointed counsel were thorough and adequate..."[13] This conflicts with Ninth Circuit case law which has suggested that where the attorney-client relationship is so bad that a defendant elected to proceed in pro se, that was evidence of a complete breakdown of the attorney-client relationship.[14] That is exactly what occurred in this case.

Additionally, in *United States v. D'Amore,*[15] the Ninth Circuit set forth several inquiries which the court should have made but did not, leading to the conclusion that the inquiry was inadequate. Those things included, (1) how long a delay would be required for substitute counsel, (2) gauging how much inconvenience would be caused by a delay in the proceedings, and (3) the degree to which the animosity and lack of communication between attorney and client had prevented adequate preparation for the hearing. In the case at bar, the district court did not inquire at all into the first two items above. There was no evidence

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13 Opinion/at p. 12.

14 *United States v. Williams,* 594 F.2d 1258, 1260 (9th Cir. 1979).

15 *United States v. D'Amore,* 56 F.3d 1202, 1205 (9th Cir. 1995).

whatsoever that appointing new counsel for ANDERSON would have inconvenienced anyone or delayed the trial at all. In ANDERSON's Opening Brief, he devoted nine (9) pages to setting forth, in many cases verbatim, the nature of the conflict between ANDERSON and his attorney and the Court's remarks regarding these problems.[16]

On 1-24-17, the Court said that it was going to deny the motion, without explanation. On 2-8-17, ANDERSON filed a civil rights complaint against his attorney. On 3-7-17 ANDERSON told the Court that his attorney was not communicating with him; that in six months, he had only seen him twice. The Court said that was not a legal basis to have another attorney substituted in his place. At that point, ANDERSON requested to represent himself. On 3-16-17, the Court stated that while ANDERSON was entitled to an attorney, he was not entitled to an attorney of his choosing. On 3-23-17, the Court learned that ANDERSON's attorney had not communicated a plea offer to him. It learned that his attorney was not available by telephone. The Court inquired if ANDERSON wanted to represent himself, and went right to the *Faretta* canvas, appointing his attorney (who was not communicating with him, and who he could not get along with) as standby counsel. This was outrageous. On 4-1-17, ANDERSON had not received photo arrays from his attorney which the state had previously served on

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16 Op.Brf./at p. 12-21.

ANDERSON's stand-by counsel. On 5-25-17, ANDERSON was back in court advising the court that his stand-by counsel was receiving documents from the state which it was not turning over to ANDERSON. On 6-13-17, ANDERSON's stand-by counsel admitted that he had no first-hand knowledge that anything was being turned over to ANDERSON, and that he was relying on his investigator. The Court refused to appoint alternate stand-by counsel, even though she admitted that stand-by counsel was not timely providing documents ANDERSON needed to put on his own defense. On 7-25-17, ANDERSON was back in court claiming once again that he was not receiving documents from his stand-by counsel, whereupon such counsel made a big show of handing over documents not previously provided to ANDERSON, including color photos which he had in his file for three months! On 8-22-17 at calendar call, ANDERSON discovered for the first time that a second offer had been tendered by the state to stand-by counsel, which had never been communicated to ANDERSON. On 8-29-17, trial began and ANDERSON again told the Court that he was not getting any assistance from his stand-by counsel. On 8-30-17, ANDERSON told the Court that he was unable to conduct research from jail and that stand-by counsel was not returning his calls. This is all set forth in the Opening Brief with cites to the record.

The 6th Amendment to the Constitution insures an indigent defendant the right to counsel. It is an important Constitutional right, that deserves solemn

consideration on appeal, especially in a case such as this where the record has been cited so extensively to show this Court the many, many instances where this issue was brought before the trial Court where ANDERSON's rights were disregarded time and again.

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 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.[17] 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

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17 Opinion/at p. 6.

of using the lower standard.

2. RIGHT TO COUNSEL ISSUE

The right to counsel is also an important Constitutional right, to which the panel Court gave very little attention. ANDERSON was denied his right to counsel, and it appears that the panel Court in reviewing that issue has used the wrong standard of review and has not fully considered the factual basis for the claim.

II

CONCLUSION

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

Respectfully submitted,

Dated this 15th day of December, 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 the substantive potion of the Petition does not exceed 10 pages, and it contains only 2,584 words.

DATED: December 15, 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 (FROM 11-27-19 OPINION)

by mailing a copy on December 15, 2019 via first class mail, postage thereon fully prepaid, to the following:

ARNOLD ANDERSON
INMATE NO. 85509
LOVELOCK STATE PRISON
1200 PRISON ROAD
LOVELOCK, NV 89419

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

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SANDRA L. STEWART