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### Anderson v. State, 135 Nev. Adv. Op. 56 (Nov. 27, 2019)

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BURDEN OF PROOF: CONFRONTATION CLAUSE, FORFEITURE

**Summary**

The Court determined that (1) when the government relies on the forfeiture exception of the Confrontation Clause to introduce a witness's out-of-court statements, the burden of proof the litigant must meet is that of preponderance of the evidence; and (2) that a trial court does not abuse its discretion in denying a motion to substitute counsel and thereby violate the Sixth Amendment right to counsel when the trial court holds a *Young* hearing for each motion and enough evidence indicates there is not a complete breakdown in the attorney-client relationship.

**Background**

Anderson was charged with attempted murder, robbery, and battery – all with the use of a deadly weapon. Arndaejae Anderson, Anderson's daughter, witnessed the shooting. Once the Clark County District Attorney's office charged Anderson, they sent an investigator to a juvenile detention center where Arndaejae was serving time to secure her testimony. In that interview, Arndaejae identified Anderson as the shooter and admitted he told her to lie and say he had been in California during the shooting. The interview was not recorded.

At trial, the government sought to introduce Arndaejae's out-of-court statements incriminating Anderson. The government subsequently presented evidence that Anderson called a female from the jail and was recorded telling the female to disappear and "leave her phone" to prevent tracking. The government further produced evidence that the number belonged to Arndaejae because Anderson had called it before to wish that person a happy birthday, and it was on Arndaejae's birthday.

Anderson, however, argued the government could not introduce his daughter's out-of-court statements because the government lacked sufficient evidence to prove he procured Arndaejae's absence because she left juvenile probation months ago and the State had a warrant out for her arrest, which is the real reason she refused to come in and testify.

The court disagreed and found by a preponderance of the evidence that he procured his daughter's absence; therefore, the court permitted Arndaejae's out-of-court statements.

Additionally, Anderson submitted three timely motions for substitute counsel, which the trial court denied.

The jury subsequently found Anderson guilty of all charges except robbery with a deadly weapon, and the court sentenced him to 25-30 years in prison. Anderson now appeals.

**Discussion**

While the Sixth Amendment does prevent introducing an individual's out-of-court statements, the Supreme Court has ruled that a defendant forfeits that right whenever they

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<sup>1</sup> By Tayler Bingham

procure the would-be witness's absence through wrongdoing.<sup>2</sup> For forfeiture to apply, the government need only show the defendant "intended to prevent a witness from testifying."<sup>3</sup> But the Supreme Court has never directly addressed the burden of proof required to prove forfeiture.

*Preponderance of evidence is the appropriate standard of proof*

While the Court recognizes there is a federal circuit split on this issue, the Court follows the majority approach in only requiring a preponderance of the evidence burden of proof standard. The Court argues that the forfeiture doctrine rests on equitable concerns of preventing gain from wrongdoing rather than the reliability of the presented evidence, a lower standard of proof is needed.<sup>4</sup> Indeed, the Court reasoned that a higher burden of proof would have the opposite effect: it would *encourage* malfeasance and erode the integrity of judicial proceedings.

*The trial court did not err in its application of the forfeiture-by-wrongdoing exception to admit Arndaejae's out-of-court statements*

During trial, the State argued that Anderson sought to prevent his daughter from testifying. To prove this, the State presented evidence that Anderson called Arndaejae's cellphone and told her "to disappear for a week" and "leave [her phone]" to prevent her from being tracked. However, Anderson also showed that Arndaejae had absconded from probation, that there was a warrant for her arrest, and these reasons, not his phone call, prevented her from coming in to testify.

However, the Court found that "to procure" a witness's absence means "affirmative effort or collusion with a witness," to secure an absence, even if the witness has an independent intent not to testify.<sup>5</sup> Thus, the witness's absence need only be a foreseeable result of the defendant's actions.<sup>6</sup> Consequently, the trial court did not err in finding by a preponderance of the evidence that Anderson sought to procure Arndaejae's absence because the State presented evidence that Anderson actively sought to prevent Arndaejae from connecting with authority through calling her, telling her to leave, and telling her to leave her phone so the government could not track her.

*Anderson's Sixth Amendment right to counsel was not violated*

The Court evaluates a trial court's decision to not substitute a defendant's counsel when requested under an abuse of discretion standard. The Court further analyzes a denial of such a motion via the three-part *Young* test: 1) extent of the conflict, 2) adequacy of the inquiry, and 3) timeliness of the motion.<sup>7</sup> Though Anderson filed three times motions to substitute counsel, the Court held a *Young* hearing for each one, and each time the evidence supported the trial court's finding that there was not a complete breakdown in the attorney-client relationship.

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<sup>2</sup> Davis v. Washington, 547 U.S. 813, 833 (2006).

<sup>3</sup> Giles v. California, 554 U.S. 355, 361 (2008).

<sup>4</sup> See *Crawford*, 541 U.S. at 62; Reynolds v. United States, 98 U.S. 145, 158–59 (1879).

<sup>5</sup> See *Giles*, 554 U.S. at 360; Carlson v. Att'y Gen. of Cal., 791 F.3d 1003, 1010 (9th Cir. 2015); Commonwealth v. Edwards, 830 N.E.2d 158, 171 (Mass. 2005).

<sup>6</sup> *Edwards*, 830 N.E.2d at 171.

<sup>7</sup> Young v. State, 120 Nev. 963, 968 (2004).

## **Conclusion**

The Court concluded that for the forfeiture-by-wrongdoing exception to work, the government must prove by a preponderance of the evidence that a witness is absent, that the defendant's acted to procure the absence, and that the defendant intended to procure the absence.