No. 18-____

In the Supreme Court of the United States

JAMES BRADLEY ANDERSON,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Washington

PETITION FOR WRIT OF CERTIORARI

JAMES BRADLEY ANDERSON
PETITIONER PRO SE
C/O MICHELLE ANDERSON
1052 CROTON ROAD
PITTSTOWN, NJ 08867

APRIL 26, 2019

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

James Bradley Anderson was charged in the state of Washington by information on five counts related to molestation of a child. The information recited the victims and approximate dates and tracked the language of the statute, but provided no detail allowing the defendant to identify the specific conduct in question or distinguish the counts. Although defense counsel twice requested a bill of particulars, no particularity was provided until the end of trial when the prosecutor was permitted to specify which conduct applied to each charge.

On review the Court of Appeals of Washington stated "Nothing else in the record provides adequate assurance that it was manifestly apparent to jurors that each count was based on a separate act." The Court of Appeals of Washington vacated one of the counts, but left intact the remaining counts.

THE QUESTIONS PRESENTED ARE

1. Must the particulars of each count of an information be specified prior to trial, or can a prosecutor be allowed to match alleged acts to the counts in closing arguments?

2. Where the appeals court has held that the jury was not clear that the various counts needed to be based on separate acts, should the convictions be vacated under the plain error doctrine?

3. Has a defense attorney provided ineffective assistance where she proposes instructions that fail to object to the double jeopardy and abet in the confusion on the counts?

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner James Anderson asks this Court to grant review of the unpublished decision of the Court of Appeals of the State of Washington, Division One (the "Court of Appeals") in *State of Washington v. James Bradley Anderson,* No. 75834-9-1, dated July 30, 2018. (App.3a).

OPINIONS BELOW

This Petition, in the case of *State of Washington v. James Bradley Anderson*, involves these opinions and orders:

Supreme Court of Washington,
No. 96290-1, entered November 28, 2018.
(App.1a)

Court of Appeals of Washington,
No. 75834-9-1, entered July 30, 2018.
(App.3a)

Superior Court of the State of Washington,
County of Snohomish,
No. 15-1-01899-4, Judgement and Sentence.
(App.22a)

JURISDICTION

The final opinion of the Supreme Court of the State of Washington was entered on November 28, 2018. (App.1a). Under 28 U.S.C. § 1257, this Court has jurisdiction to review this opinion.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const., amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Criminal Information Lacking Particularity

The State of Washington (the "State") charged Petitioner James Bradley Anderson by information, later modified by the Second Amended Information (App.49a) The information charged five counts (Count 1: Second Degree Child Molestation; Count 2: First Degree Rape of a Child; Count 3: First Degree Child Molestation; Count 4: First Degree Child Molestation; Count 5: Second Degree Rape of a Child).

Each count specified the alleged perpetrator as the defendant/Petitioner James Bradley Anderson and the alleged victim as female minor K.J. (DOB xx/xx/1996). However none of the counts provided any additional details on the counts either in aggregate or individually. The criminal information was lacking many critical details such as the narration of the criminal conduct, the physical contact that occurred, the place the event occurred, or a specific date or narrow date range. The only informational content was a broad date range spanning between 2 and 3 years. The language of the counts merely tracked the statutory language.

The lack of particularity is exemplified in Count 1:

> COUNT 1: SECOND DEGREE CHILD MOLESTATION (sexual contact with defendant) [committed as follows:
>
> > That the defendant, on or about a specific date between the 12th day of May 2008 through the 11th day of May 2010, did have sexual contact with K.J. (DOB: 05/12/1996), who was at least twelve years old but less than fourteen years old and not married to the defendant and not in a state registered domestic partnership with the defendant, and the defendant was at least thirty-six months older than K.J. (DOB:05/12/1996); proscribed by RCW 9A.44.086, a felony.

Here, Count 1 provides no description of what Petitioner Anderson had done wrong other than a vague, over-broad three year window for the alleged bad conduct and a recitation of the Washington criminal code. The other four Counts are similarly vague.

Defense counsel twice moved for a Bill of Particulars. The omnibus defense[1] motion filed November 17, 2015, states, "The accused hereby requests a bill of particulars pursuant to CrR 2.4(e) and 4.1(d)." With none forthcoming, the Defense counsel moved again[2] on May 17, 2016, again stating, "The accused hereby requests a bill of particulars pursuant to CrR 2.4(e) and 4.1(d)." Again, there was no detail provided on each

---

[1] *See* Anderson *Notice of Appearance, Demand Jury Trial, and Demand for Discovery,* Superior Court for Snohomish County, Washington, Case No.: 15-1-01899-4, November 17, 2015.

[2] *See* Anderson *Additional Demand for Discovery,* Superior Court for Snohomish County, Washington, Case No.: 15-1-01899-4, May 17, 2016.

count prior to the start of trial. Other than these two motions, defense trial counsel did not object to the vagueness or multiplicity of the counts.

B. Trial Proceedings, State Provides Particularity in Closing Arguments

The trial proceeded with a number of irregularities unfavorable to the Petitioner. There was four year gap between an initial disclosure by K.J. to law enforcement and the first time she actually disclosed details of the allegations. During this four year gap, K.J. attended counseling sessions wherein details were extracted, impressed, or otherwise subject to manipulation by a therapist. Defense counsel brought a pretrial motion to compel counseling records to see what details were discussed in counseling but the court denied the motion.

At trial, K.J. was permitted to introduce new molestation allegations, which had never been previously discussed with law enforcement. At trial, defense counsel asked if a critical incident taking place in a house had ever been mentioned to detectives previously during any previous interviews, K.J. replied, "no." Thus, since this allegation had never been previously discussed with law enforcement, it could not possibly correspond to any of the 5 counts. Yet, over defense objections, K.J. was allowed to testify to this alleged incident.

It was only in closing arguments that the State, for the first time matched specific incidents to each count, including the new allegation that K.J. had never previously disclosed to investigators. The Court of Appeals noted that the particularity of the criminal

information did not happen until closing arguments, stating:

> In closing, with the aid of a PowerPoint presentation, the prosecutor matched particular incidents described by NJ to each of the five counts. Count 1, second degree child molestation, had a charging period of May 12, 2008, to May 11, 2010. The State elected the couch" incident to support this count . . . Counts 2, 3, and 4—the first degree rape count and the two counts of first degree molestation—shared the same charging period of May 12, 2005, to May 11, 2008. For count 2, first degree rape, the State elected "the trampoline" incident . . . Count 3, first degree child molestation, was "the teddy bear incident . . . " Count 4, the second count of first degree molestation, was "the pink nightgown" incident. Count 5, second degree child rape, had a charging period of May 12, 2008, to May 11, 2010. The State elected "the garage" incident.

(App.4a-5a, emphasis added).

Petitioner was convicted on all five counts and sentenced to 280 months.

C. Appellate Proceedings

On appeal, Anderson requested an assignment of error on seven points, three of which will be reviewed in this petition:

> 1. There is insufficient evidence to support the act the State elected to support one of appellant's convictions under the law of the case.; 2. The jury instructions failed to adequately protect appellant's right to a

> unanimous jury verdict.; 3. The State violated appellant's right to be free from double jeopardy by asking the jury to convict appellant of first and second degree child molestation based on the same act.; 4, Defense counsel was ineffective for proposing jury instructions that exposed appellant to multiple punishments for the same criminal act, violating double jeopardy.; 5. Defense counsel was ineffective for failing to investigate relevant evidence that would have impeached the complaining witness.; 6. The trial court abused its discretion in failing to conduct an in camera review of the complaining witness's counseling records.; 7. The community custody condition requiring appellant to "not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer" is unconstitutionally vague.

On the first assignment of error, the to-convict instruction on that count included the added element "[t]hat K.J. was at least twelve years old but less than fourteen years old at the time of the sexual contact." The conduct "chosen" by the State was one where K.J. clearly testified she was 11, not 12, as the to-convict instruction required. The Court of Appeals accepted the State's concession that the conviction should be dismissed for insufficient evidence. The Court of Appeals stated, "Ambiguities in a jury verdict must be resolved in the defendant's favor. . . . The appropriate remedy is to reverse the conviction for second degree molestation and dismiss the charge with prejudice." (App.7a, internal citations omitted)

On the second assignment of error, Anderson argued that he was exposed to a non-unanimous verdict because there was no particularity of the counts with respect to specific incidents. The brief cites the confusion of the jury, and the use the State's election of charges, stating "the Jury sent out two questions during deliberations suggesting it may not have relied on the State's erroneous election." (Appellant's Brief, p.14). The jury also asked, "Do the events of the counts have to match those indicated on the prosecutor[s] [PowerPoint] slide during the closing statement? [i.e.,]" (Appellant's Brief, p.15). In response, the trial court directed the jury to read their instructions. (Appellant's Brief, p.15).

The Court of Appeals found that the counts in the criminal information did not correspond to any specific alleged actions prior to trial. As the Court of Appeals state that the counts were tied to the State's elections at the end of trial. "Here, the State elected specific incidents to support each count But the State's elections alone did not eliminate the possibility of a double jeopardy violation." (App.15a). The Court of Appeals then goes on to say:

> Nothing else in the record provides adequate assurance that it was manifestly apparent to jurors that each count was based on a separate act. . . . And, as discussed, nothing in the instructions prevented jurors from rejecting the State's elections and using the same event to convict Anderson of two counts.

(App.15a, internal citation omitted)

Though one would expect such a damning conclusion by an appellate court to be accompanied by a vacating of the conviction, the Court of Appeals avoids

unsettling the verdict by characterizing the appeal solely as a "claim of ineffective assistance" where the focus is on "the conduct of the trial counsel."

This was hardly the case. As noted above, Assignment of Error #2 states that the "jury instructions failed to adequately protect appellant's right to a unanimous jury verdict." and Error #3 states that "the State violated appellant's right to be free from double jeopardy..."

Weighing into the Court of Appeals decision was the fact that Defense counsel had submitted jury instructions similar to those of the State which were missing the "separate and distinct" language necessary to protect Anderson from double jeopardy. The Court of Appeals held this to be invited error, and thus evaluated the constitutional claim as an ineffective assistance of counsel claim. (citing *State v. Woods,* 138 Wn. App. 191, 197, 156 P.3d 309 (2007) (recognizing the invited error doctrine generally forecloses review of an instructional error created by defense counsel, "but does not bar review of a claim of ineffective assistance of counsel based on such instruction")).

The Court of Appeals found that defense counsel's proposal of instructions that exposed Anderson to double jeopardy and constituted deficient performance. (App.16a). But the court held Anderson failed to demonstrate prejudice, holding he did not answer the question of whether it was "reasonably probable that the jury would have convicted him on one count less than it did." (App.16a). The court therefore refused to reverse one of the first degree child molestation convictions. (App.16a).

The Court of Appeals did not undertake a plain error review the whether the criminal information, and/or the jury instructions were inherently vague or multiplicitous.

REASONS FOR GRANTING THE PETITION

I. WHERE THE COURT OF APPEALS HAS DETERMINED THAT THE JURY WAS NOT VOTING ON THE SAME ACT FOR EACH COUNT, A NON-UNANIMOUS VERDICT HAS BEEN REACHED.

The Petitioner presented an appeal to the Washington Court of Appeals that should have been resolved easily in Anderson's favor, but was squashed by the failure of defense counsel to make the proper objections to the criminal information/lack of particulars and by the poor jury instructions she submitted, which were noted as the primary reason for rejecting the appeal. Nonetheless, the Court of Appeals should have reviewed the troubled criminal information for plain error.

Although prior proceedings characterized this as an issue of jury instructions, in reality the original problem lies is in the criminal information itself and the lack of a bill of particulars. Despite two requests for a bill of particulars, none was forthcoming, and defense counsel did not make objection to this deficiency. Thus, the trial proceeded in a penumbra of vagueness—a set of five counts with non-detailed allegations that could possibly have happened over a span of years, which were unmatched to specific acts,

until a "PowerPoint" presentation by the State in closing arguments. Even after said PowerPoint, the jury was still confused, asking the most fundamental question in the theory of a criminal conviction, "Do the events of the counts have to match those indicated on the prosecutor[s] [PowerPoint] slide during the closing statement?" The Court of Appeals acknowledged that the jurors were confused as to whether they were voting on one act or several acts, or were convicting Anderson of the same conduct repeatedly.

It is axop,atoc that "[a] crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances" if the charging document is to comport with the Constitution. *United States v. Cruikshank*, 92 U.S. 542, 558 (1875); *see also* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation [against him.]"). To satisfy the protections that the Sixth Amendment guarantees, "facts are to be stated, not conclusions of law alone." *Cruikshank*, 92 U.S. at 558. In other words, "[t]he accusation must be legally sufficient, *i.e.*, it must assert facts which in law amount to an offense and which, if proved, would establish prima facie the accused's commission of that offense." *United States v. Silverman*, 745 F.2d 1386, 1392 (11th Cir. 1984) (citation omitted).

"The requirement that an indictment contain a few basic factual allegations accords defendants adequate notice of the charges against them and assures them that their prosecution will proceed on the basis of facts presented to the grand jury."

United States v. Cecil, 608 F.2d 1294, 1297 (9th Cir. 1979). "The . . . generally applicable rule is that the indictment may use the language of the statute, but that language must be supplemented with enough detail to apprise the accused of the particular offense with which he is charged." *Conlon*, 628 F.2d at 155. Furthermore, and importantly for present purposes, "[i]t is an elementary principle of criminal pleading[] that where the definition of an offen[s]e . . . includes generic terms, it is not sufficient that the indictment shall charge the offen[s]e in the same generic terms as in the definition; but it must state the species[]—it must descend to particulars." *United States v. Thomas*, 444 F.2d 919, 921 (D.C. Cir. 1971) (first alteration in original) (quoting *Cruikshank*, 92 U.S. at 558). Thus, an indictment that mirrors the exact language of a criminal statute may nevertheless be dismissed as constitutionally deficient if it is "not framed to apprise the defendant 'with reasonable certainty[] of the nature of the accusation against him[.]'" *Nance*, 533 F.2d at 701 (quoting *Simmons*, 96 U.S. at 362).

II. THE UNITED STATES 9TH CIRCUIT AND FIFTH CIRCUIT COURT OF APPEALS HAVE HELD THAT A DEFENDANT CAN RAISE A DOUBLE JEOPARDY CHALLENGE EVEN WHEN FAILING TO OBJECT IN DISTRICT COURT.

In *United States v. Zalapa*, case no. 06-50487 (9th Cir. Dec. 5, 2007), citing *Johsnon v. Olano*, 507 U.S. 725, 734 (1993). the Ninth Circuit held that a defendant can raise a double jeopardy challenge to his multiplicitous convictions and sentences on appeal even if he fails to object to them in the district court. Zapala was charged with two counts—possession of

an unregistered machine gun and possession of an unregistered firearm with a barrel less than 16 inches long—under the same statute, 26 U.S.C. § 5861(d). The catch was, those counts were based on possession of the same gun. Zapala did not object to the indictment, pleaded guilty to all charges without a plea agreement, and did not object to convictions or sentences when they were entered by the district court. Until his appeal, that is, when he claimed the convictions on multiple counts under the same statute for possession of the same gun constituted double jeopardy. The challenge is governed by "plain error" review, under which the court readily reverses because the error is obvious, affects Zapala's substantial rights, and affects "the fairness, integrity, or public reputation of judicial proceedings."

This logic was echoed by the Fifth Circuit in *United States v. Ogba*, 526 F.3d 214 (internal citations omitted), "Antoon's sentence of 54 months in prison for healthcare fraud and 54 concurrent months for illegal remuneration is multiplicitous and constitutes plain error...Failing to remedy a clear violation of a core constitutional principle would be error 'so obvious that our failure so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings and result in a miscarriage of justice."

III. THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER PREJUDICE RESULTS WHEN DEFENSE COUNSEL PROPOSES JURY INSTRUCTIONS THAT EXPOSE THE DEFENDANT TO DOUBLE JEOPARDY.

Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22; *Strickland v. Washington,* 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas,* 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the accused. *Strickland,* 466 U.S. at 687; *Thomas,* 109 Wn.2d at 225-26.

Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* The accused "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693.

The right to be free from double jeopardy "is the constitutional guarantee protecting a defendant against multiple punishments for the same offense." *State v. Borsheim,* 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (citing U.S. CONST. amend. V; CONST. art. I, § 9). Jury instructions "'must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.'" *Id.* (quoting *State v. Watkins*, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). The reviewing court considers insufficient instructions "in light of the full record" to determine

if they "actually effected a double jeopardy error." *State v. Mutch,* 171 Wn.2d 646, 664, 254 P.3d 803 (2011). A double jeopardy violation occurs if it is not "manifestly apparent to the jury that each count represented a separate act." *Id.* at 665-66.

The *Borsheim* court held an instruction that the jury must find a "separate and distinct" act for each count is required when multiple counts of sexual abuse are alleged to have occurred within the same charging period. 140 Wn. App. at 367-68. Without this instruction, the accused is exposed to multiple punishments for the same offense, violating the right to be free from double jeopardy. *Id.* at 364, 366-67. The court of appeals vacated three of Borsheim's four child rape convictions for this instructional omission. *Id.* at 371.

In *Mutch*, the State charged five counts of rape, all within the same charging period. 171 Wn.2d at 662. There was sufficient evidence of five separate acts of rape, but the jury was not instructed that each count must arise from a separate and distinct act in order to convict. *Id.* at 662-63. The possibility that the jury convicted Mutch on all five counts based on a single criminal act created a potential double jeopardy problem. *Id.* at 663.

However, the *Mutch* court held the case "presented a rare circumstance where, despite deficient jury instructions," it was nevertheless manifestly apparent the jury based each conviction on a separate and distinct act. *Id.* at 665. Specifically: (1) the victim, J.L., testified to precisely the same number of incidents (five) as there were counts charged and to convict instructions; (2) the defense was consent rather than denial; (3) Mutch admitted to a detective

that he engaged in multiple sex acts with J.L.; and (4) during closing, the prosecutor discussed each of the five alleged acts individually and defense counsel did not challenge the number of episodes, but merely argued consent. *Id.* The court concluded, "[i]n light of all of this, we find it was manifestly apparent to the jury that each count represented a separate act." *Id.* at 665-66. Thus, the *Mutch* court was convinced beyond a reasonable doubt that a double jeopardy violation did not follow from the deficient jury instructions. *Id.* at 666.

In *State v. Land,* the court of appeals considered whether it violated double jeopardy where the jury was not instructed it must find separate and distinct acts of child rape and child molestation. 172 Wn. App. 593, 598-603, 295 P.3d 782 (2013). Land was convicted of one count of child rape and one count of child molestation, both involving the same child and the same charging period. *Id.* at 597-98. Land argued these convictions violated double jeopardy because they might have been based on the same act of oral-genital intercourse. *Id.* at 598-99.

The *Land* court agreed that, where the evidence of sexual intercourse is evidence of oral-genital contact, "that single act of sexual intercourse, if done for sexual gratification, is both the offense of molestation and the offense of rape." *Id.* In such a circumstance, the two offenses "are the same in fact and in law because all the elements of the rape as proved are included in molestation, and the evidence required to support the conviction for molestation also necessarily proves the rape." *Id.* Because of this potential double jeopardy problem, the court considered Land's claim that the

jury instructions exposed him to multiple punishments for the same offense. *Id.*

*L*and's jury was not instructed that the two counts involving the same child, S.H., required proof of separate and distinct acts. *Id.* at 601. However, S.H. did not testify Land's mouth came in contact with her sex organs. *Id.* The only evidence of rape was S.H.'s testimony that Land penetrated her vagina with his finger. *Id.* at 602. Consistent with this testimony, the prosecutor argued in closing that S.H.'s testimony about penetration was the "crucial element proving rape." *Id.* The prosecutor also emphasized S.H.'s testimony about sexual contact proved molestation and her testimony about penetration proved rape. *Id.* Given all these factors, the *Land* court concluded the lack of a separate and distinct instruction "did not violate Land's right to be free from double jeopardy." *Id.* at 603.

Anderson was convicted of one count of first degree child rape and two counts of first degree child molestation, as well as one count of second degree child rape and one count of second degree child molestation. Two double jeopardy errors resulted. First, the jury was not instructed second degree child rape (count 5) and second degree child molestation (count 1) must be based on a separate and distinct act. CP 67 (to-conviction instruction on count 1), 78 (to-convict instruction on count 5). Given the dismissal of count 1 for insufficient evidence, however, this error no longer matters. Opinion, 8 ("Count 1 will be dismissed on a different ground.").

The jury was instructed that the two counts of first degree child molestation (counts 3 and 4) must

be based on separate and distinct acts. CP 74-75. The jury was not instructed, however, that the two counts of first degree child molestation must be separate and distinct from the first degree child rape charge (count 2). CP 71, 74-75. Anderson was therefore exposed to double jeopardy on one of the first degree child molestation convictions.

K.J. testified to multiple instances of oral-genital Because oral-genital contact constitutes both rape and molestation, this creates a potential double jeopardy problem with one of the first degree child molestation counts, because the jury could have relied on the same first degree child molestation acts to also convict Anderson of first degree child rape. Considering the full record, it is not manifestly apparent that the jury based the child rape and child molestation convictions on separate and distinct acts.

The court of appeals agreed the jury instructions created a potential double jeopardy problem on count 2:

> The jury was not instructed that it could not convict Anderson of first degree molestation, as charged in counts 3 and 4, based on the same incident of oral-genital contact used to support count 2, first degree child rape. Thus, jurors theoretically could have had in mind the same act for count 2 as they did for either count 3 or 4 (but not 3 and 4, because the jury was instructed that those counts required proof of separate acts).

(App.12a-13a). The court of appeals further agreed the deficient instructions actually resulted in double jeopardy violation. (App.13a). The State elected specific

incidents to support each count, "[b]ut the State's elections alone did not eliminate the possibility of a double jeopardy violation," under this Court's decision in *State v. Kier,* 164 Wn.2d 798, 194 P.3d 212 (2008). (App.15a). Instead, "the instructions, along with the information and evidence, allowed the jury to use the same act of oral-genital intercourse to convict Anderson of both rape and molestation 'notwithstanding the State's closing argument.'" (App.15a) (quoting *Kier,* 164 Wn.2d at 814).

The court of appeals accordingly concluded:

> If Anderson had been able to challenge the adequacy of the jury instructions directly, as was done in *Mutch*, we would find a double jeopardy violation because, unlike in *Mutch,* the instructions did not avoid the possibility that Anderson would be punished twice for the same act.

(App.15a). The court further concluded that defense counsel's proposal of the faulty instructions constituted deficient performance: "defense counsel acted unreasonably by proposing instructions that exposed Anderson to double jeopardy under our decision in *Land.*" (App.16a).

Thus, the court of appeals held the defective jury instructions violated Anderson's right to be free from double jeopardy. The typical relief would be to reverse one of Anderson's convictions for first degree child molestation (count 3 or count 4) and remand for dismissal of the charge with prejudice. *See Borsheim*, 140 Wn. App. at 371.

The court of appeals held, however, that "Anderson fails to demonstrate that the result of the proceedings would have been different," so "his ineffective assistance claim fails on the prejudice prong of *Strickland*." (App.16a). The court reasoned:

> Anderson has shown that the instructions were not enough to eliminate the possibility that the jury used a single act to convict him on count 2 and either count 3 or 4. But if counsel had insisted on proper instructions, is it reasonably probable that the jury would have convicted him on one count less than it did? Anderson does not answer this question.

(App.16a).

Given the documented confusion of the jury and the statement from the Court of Appeals that jury was not sure they were voting on the same acts, it would seem clear that the trial attorney for the defendant provided ineffective assistance by proposing instructions that fail to object to the double jeopardy and abet in the confusion on the counts

CONCLUSION

For the reasons above, Petitioner requests the issuance of a Petition for Writ of Certiorari

Respectfully submitted,

JAMES BRADLEY ANDERSON
PETITIONER PRO SE
C/O MICHELLE ANDERSON
1052 CROTON ROAD
PITTSTOWN, NJ 08867
(908) 323-4571

APRIL 26, 2019

BLANK PAGE