IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA

Appellant,

v.

TAREN DESHAWN BROWN A/K/A,
TAREN DE SHAWNE BROWN A/K/A,
"GOLDY-LOX",

Respondent.
_____/

No. 75184

BRIEF IN SUPPORT OF GOOD CAUSE FOR APPEAL

JEREMY T. BOSLER
Washoe County Public Defender

JOHN PETTY
Chief Appellate Deputy

EMILIE MEYER
Deputy Public Defender
P. O. Box 11130
Reno, Nevada 89520-0027

ATTORNEYS FOR RESPONDENT

CHRISTOPHER J. HICKS
Washoe County District Attorney

JENNIFER P. NOBLE
Appellate Deputy

ADAM CATE
Deputy District Attorney
P.O. Box 11130
Reno, Nevada 89520

ATTORNEYS FOR APPELLANT

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BRIEF IN SUPPORT OF GOOD CAUSE FOR APPEAL

I. ROUTING STATEMENT

This is an appeal of a pretrial order pursuant to NRS 177.015. The charges involved include two category B felonies, attempted murder and assault with a deadly weapon. As such, it would be appropriately retained by the Nevada Supreme Court. NRAP 17(b).

II. JURISDICTIONAL STATEMENT

This is a brief in support of good cause for the State's appeal from a district court order granting a motion to suppress in a criminal case charging Brown with count I, attempted murder with the use of a deadly weapon; count II, assault with a deadly weapon; count III, carrying a

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concealed firearm; and count IV, possession of a firearm with an altered or removed serial number. Appellant's Appendix, hereafter "AA," 1-3.

A hearing on Brown's motion to suppress was held on February 21, 2018. *Id*., 30-70. The State filed a timely notice of appeal. *Id*., 100-130. The district court filed a written order granting the motion on February 23, 2018. *Id*., 87-99. The State filed a second notice of appeal with this Court. *Id*., 131-132. Accordingly, the Court has jurisdiction under NRS 177.015(2)("The State may, upon good cause shown, appeal to the Supreme Court from a pretrial order of the district court granting or denying a motion to suppress evidence made pursuant to NRS 174.125. Notice of the appeal must be filed with the clerk of the district court within 2 judicial days and with the Clerk of the Supreme Court within 5 judicial days after the ruling by the district court.").

Good cause supports this appeal. The district court suppressed key evidence: Brown's admissions about why he ran up to the victim and pointed a gun at him. It did so based on an erroneous finding that the right to counsel had not been adequately conveyed.

III. STATEMENT OF ISSUES

A. Whether the right to counsel portion of the Miranda admonishment was inadequately conveyed.

IV. STATEMENT THE CASE

After Brown waived preliminary hearing, the State charged him via information with count I, attempted murder with the use of a deadly weapon; count II, assault with a deadly weapon; count III, carrying a concealed firearm; and count IV, possession of a firearm with an altered or removed serial number. AA, 1-3. Brown filed a motion to suppress in the district court, and after the State opposed the motion, the district court held an evidentiary hearing on the motion. *Id.*, 5-16; 17-29; 30-70. After the hearing, the district court granted the motion to suppress. *Id.*, 87-99. The State appeals the district court order.

V. STATEMENT OF FACTS

On October 20, 2017, Sergeant Larmon Smith was traveling on Lake Street in downtown Reno to meet some fellow officers for lunch at the Eldorado casino. AA, 56. As he was passing the bus station, he noticed commotion out of the corner of his eye. Two people were running into the street toward his vehicle. *Id*. He proceeded to investigate the situation. In the course of doing so, he responded to a nearby parking lot, where Brown was being held in the back of a patrol unit. *Id*., 57. He made contact with Brown, and recorded their interview. Exhibit A; 58. Brown was immediately cooperative, talkative and emotional. *Id*., 58. Sergeant Smith

interrupted Brown to advise him of his rights. It is undisputed that the admonition was as follows:

> Sergeant Smith: You are in custody man. You have rights, okay, so I just want you to know that you don't have to talk to me. You have the right to remain silent, you know, and if we do talk about stuff, you know, we can use the stuff against you. Obviously if you can't afford an attorney, or something like that, regardless of what charges we have for you, we can always provide one of them for you as well. Now, do you understand your rights everything (indistinct) just said, Mr. Brown.
>
> Mr. Brown: Yes, I heard you.
>
> Sergeant Smith: Okay now do you understand that your rights and stuff. Do you want me to tell your side of it and tell me what happened, what led up to this bro?

AA, 88; Exhibit A.

After the admonition, Brown went on to make several incriminating statements and admission about why he had approached the victim with drawn handgun. Exhibit A.

VI. SUMMARY OF ARGUMENT

In this case, there is no factual dispute about the substance of the *Miranda* warning at issue. There is also no dispute that the law enforcement officer quickly interrupted a talkative suspect in order to advise him of his constitutional rights. The district court's legal conclusion that the advisement regarding the right to counsel was invalid simply because it was phrased as "if you can't afford an attorney, or something like

that, regardless of what charges we have for you, we can always provide one of them for you as well" was in error and at odds with both controlling and persuasive authorities. The appeal should be heard by this Court.

VII. STANDARD OF REVIEW

On appeal of an order granting a motion to suppress, the Court reviews the district court's legal conclusions *de novo* and its factual findings for clear error. *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005).

VIII. ARGUMENT

A. Brown Was Adequately Advised of His Right to Counsel.

There is no factual dispute that Brown was under arrest at the time of the police interview, and no factual dispute about the words used in the pre-interview admonition. AA, 88. The district court suppressed all statements made by Brown based on its finding that with regard to the right to counsel:

> ...the Court finds the combination of words used by Sergeant Smith was both 'affirmatively misleading' and 'subject to equivocation.' Sergeant Smith's warning, viewed as a whole, is subject to the reasonable interpretation that Mr. Brown did not have a right to counsel during questioning. The Court notes a defendant is entitled to be informed of **both** his right to the presence of counsel during questioning **and** his right to be appointed counsel to represent him if he is indigent. These are separate admonishments that were apparently merged into one by Sergeant Smith such that Mr. Brown was never explicitly informed he had the right to an attorney **during questioning**.

AA, 96 (*bolded emphasis in original; internal citation omitted*).

In its analysis, the district court relied on *United States v. San Juan-Cruz*, 314 F.3d 384 (9th Cir. 2002). That reliance was misplaced, because the totality of circumstances in *San Juan-Cruz* are readily and meaningfully distinguishable from the circumstances in this case. In that case, a Mexican national was detained by Border Patrol agents on suspicion of illegal re-entry. *San Juan-Cruz*, 314 F.3d at 386. He was advised of his Administrative Rights pursuant to the Code of Federal Regulations; that advisement included telling San Juan-Cruz that he could have counsel present during questioning, but not at government expense. *Id*. Following that advisement, the agent advised San Juan-Cruz of his *Miranda* rights from a pre-printed card. *Id*. In finding the totality of the circumstances militated suppression of San Juan-Cruz's statements, the 9th Circuit reasoned: "when one is told clearly that he or she does not have the right to a lawyer free of cost and then subsequently advised, '[i]f you can't afford a lawyer, one will be appointed for you,' it is confusing." *Id*., 389. It held that "when a warning, not consistent with Miranda, is given prior to, after, or simultaneously with a Miranda warning, the risk of confusion is substantial." *Id*.

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In this case, just after being told that he did not have to speak with police and that he had the right to remain silent, Brown was informed that he would be provided with an attorney if he could not afford one. While the warning did not specifically provide that the attorney could be present during questioning, numerous courts, including the Nevada Supreme Court, have concluded that the warning regarding an attorney just after being warned of the right to remain silent, and in the clear context of an interrogation, clearly implies that the attorney may be present for questioning.

In *Criswell v. State*, 84 Nev. 459 (1968), *disapproved of on other grounds by Finger v. State*, 117 Nev. 548 (2001)*(acknowledging change in insanity defense discussed elsewhere is Criswell*), the Court explicitly held that a *Miranda* warning that conveys the right to an attorney necessarily conveys that the attorney may be present for questioning. "While the warnings given in the district attorney's office did not specifically advise the appellant that he was entitled to have an attorney present at that moment and during all stages of interrogation, no other reasonable inference could be drawn from the warnings as given." *Id*. at 462. While the *Criswell* decision remains binding in Nevada, it is important to note that many other courts have reached a similar conclusion.

The district court found that the admonition as given by Sergeant Smith was misleading because the phrase "regardless of what charges we have for you, we can always provide one of them for you as well" rendered the warning invalid. AA, 96. It found that those words made the warning "subject to the reasonable misinterpretation that Mr. Brown had the right to have counsel appointed at some future point in time after he had been charged with a crime, not prior to and during questioning." *Id*.

In *United States v. Lamia*, 429 F.2d 373, 376-77 (2nd Cir. 1970), "Lamia was also told that he had the 'right to an attorney' and if he was not able to afford an attorney one would be appointed by the court." Lamia argued that this did not adequately warn him of his right to an attorney during questioning, and implied the right only applied to future proceedings. The Second Circuit disagreed.

> Lamia had been told without qualification that he had the right to an attorney and that one would be appointed if he could not afford one. Viewing this statement in context, Lamia having just been informed that he did not have to make any statement to the agents outside of the bar, Lamia was effectively warned that he need not make any statement until he had the advice of an attorney.
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> *Id*. at 377.

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Lamia, decided in 1970, was actually cited by the Supreme Court of the United States eleven years later when it decided *Prysock*. *California v. Prysock*, 453 U.S. 355, 359 (1981). ("This Court has never indicated that the "rigidity" of *Miranda* extends to the precise formulation of the warnings given a criminal defendant. *See, e.g., United States v. Lamia*"). Many courts have gone on to reach the same conclusion reached in *Lamia*. *See, e.g., United States v. Caldwell*, 954 F.2d 496, 504 (8th Cir. 1992) (stating that "the general warning that [the defendant] had the right to an attorney, which immediately followed the warning that he had the right to remain silent, could not have misled [the defendant] into believing that an attorney could not be present during questioning"); *United States v. Adams*, 484 F.2d 357, 361–62 (7th Cir.1973) (relying in part on Lamia); *Eubanks v. State*, 240 Ga. 166, 240 S.E.2d 54, 55 (1977) (holding that where defendant was advised of right to remain silent and "that he had a right to any attorney," warnings were sufficient because it was "implicit in this instruction that if the suspect desired an attorney the interrogation would cease until an attorney was present"); *United States v. Frankson*, 83 F.3d 79, 81 (4th Cir. 1996) (the advice to the defendant that he had "the right to an attorney" would necessarily be understood to comprehend the specific right to the presence of counsel before and during questioning).

The majority of courts have found that in order for an admonishment regarding the right to counsel to be valid, it need not be accompanied by a specific reference to the application of that right during questioning. In this case, the mere juxtaposition by Sergeant Smith of the right to counsel and reference to "whatever charges we may have for you," did not not render the advisement regarding a right to counsel meaningless and void. Sergeant Smith made a point of interrupting Brown, who was eager to talk, in order to advise him of his constitutional rights, including the right to an attorney. Brown could not have reasonably understood that right only applied after the commencement of court proceedings, because Sergeant Smith immediately stopped him from talking in order to advise him of that right.

IX. CONCLUSION

This Court should hear the State's appeal, as it is supported by good cause. The district court based its decision to suppress all statements made in the interview based on a misapplication of *San Juan-Cruz, supra.*

DATED: March 12, 2018.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: JENNIFER P. NOBLE
Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: March 12, 2018.

CHRISTOPHER J. HICKS
Washoe County District Attorney

BY: JENNIFER P. NOBLE
Appellate Deputy
Nevada State Bar No. 9446
P. O. Box 11130
Reno, Nevada 89520
(775) 328-3200

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on March 12, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

John Petty, Chief Appellate Deputy, Washoe County Public Defender

Emilie Meyer, Deputy Public Defender

/s/ Margaret Ford
MARGARET FORD