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

EMERGENCY MOTION TO STAY PENDING APPEAL

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ATTORNEYS FOR APPELLANT

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, No. 75184

Appellant,

v.

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

_____/

EMERGENCY MOTION TO STAY PENDING APPEAL

Comes now, Appellant, the State of Nevada, and seeks an order staying the above-entitled matter. This Motion to Stay is based on Rule 8 of the Nevada Rules of Appellate Procedure, NRS 177.145, the exhibits attached hereto, and the following points and authorities.

POINT AND AUTHORITIES

Jury trial is currently set to commence in this matter on March 5, 2018. Respondent is charged with Count I: Attempted Murder with a Deadly Weapon, a violation of NRS 193.330, being an attempt to violate NRS 200.010, and NRS 193.165; Count II: Assault with a Deadly Weapon, a violation of NRS 200.471; Count III: Carrying a Concealed Firearm, a

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violation of NRS 202.350, and Count IV: Possession of a Firearm with a Removed or Altered Serial Number, a violation of NRS 202.277(2).

Trial was originally set in this matter for February 26, 2018. On February 6, Respondent's counsel moved to suppress Respondent's statements based on an alleged violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). Appellant opposed the motion on February 20, 2018. Respondent did not file a reply. An evidentiary hearing regarding the motion to suppress was held on February 21, 2018. On February 23, 2018, the Court issued an order granting the motion to suppress. Exhibit A.

Appellant filed a timely Notice of Appeal on February 23, 2018. Exhibit B. The same day, pursuant to NRAP 8, Respondent requested a stay of the trial date in open court. Exhibit C. The district court orally denied the State's motion. *Id*. It continued the case for one week, stating that such time period would allow the State to seek a stay from this Court. *Id*. The Second Judicial District Court issued a Notice of Appeal to this Court on February 26, 2018. The State has filed concurrently herewith a Notice of Appeal in this Court.

The district court having denied the State's request to stay the matter, Appellant requests this Court issue an order staying trial pending resolution of the appeal pursuant to NRS 177.145 (2). The decision of this

Court as to whether to stay a trial pending resolution of an interlocutory appeal following a motion to suppress is discretionary. *State v. Robles-Nieves*, 129 Nev. 437, 306 P.3d 399 (2013). In considering a motion to stay, this Court considers (1) whether the object of the appeal will be defeated if the stay is denied, (2) whether the appellant will suffer irreparable or serious injury if the stay is denied, (3) whether the respondent will suffer irreparable or serious injury if the stay is granted, and (4) whether the appellant is likely to prevail on the merits in the appeal. *Id.*, 129 Nev. at 402 (2013).

The first two *Robles-Nieves* factors weigh in favor Appellant. If trial proceeds, the object of Appellant's appeal will be defeated, because the motion to suppress will be moot. The State will suffer irreparable and serious injury, as it will be forced to proceed to trial without Respondent's statements. Those statements are critical to the prosecution's case against Respondent, and in particular to the State's ability to prove the Attempted Murder Charge. *See* Exhibit C.

The State next addresses the third factor regarding potential injury to Respondent. In this case, Appellant has invoked his speedy trial rights, so analysis of that factor necessitates another four-part inquiry. In examining the third *Robles-Nieves* factor where speedy trial has been invoked, this

Court considers "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant." *Robles-Nieves* at 403.

In order for the length of a delay to prejudice a defendant, the delay must be "long enough to be presumptively prejudicial." Appellant has no indication that appellate review would be so long as to prejudice Respondent's ability to defend against the charges. *Robles-Nieves* at 403 (*citing United States v. Loud Hawk*, 474 U.S. 302, 314, 106 S.Ct. 648 (1986). The reason for the delay is to allow appellate review of the Court's finding that the *Miranda* warning in this case was so inadequate as to violate the constitution. If a stay is denied, the State will be forced to proceed to trial without any review of the district court's finding, and its case will be prejudiced. The appeal is not frivolous, is supported by good cause, and is not for the purpose of delaying trial. Exhibit 3.

Although Respondent asserted his statutory speedy trial right at arraignment, he filed his motion to suppress exactly 20 days prior to trial. This timing meant that in order for the matter to be properly briefed, the Court was forced to decide the issue on the eve of trial. In *Robles-Nieves*, this Court found "at worst, the time consumed by the motion weighs against Robles–Nieves, but we will not treat the motion as a waiver of the

right." *Robles-Nieves* at 405. Appellant suggests the same analysis applies here.

The final speedy-trial inquiry regarding prejudice to the defendant is assessed in light of the interests that the speedy-trial right was designed to protect, i.e., to prevent oppressive pretrial incarceration, minimize anxiety and concern of the accused, and to limit the possibility that the defense will be impaired. *Id.* at 405. The 60–day rule set forth in NRS 178.556 is mandatory only when there is a lack of good cause for the delay. *Huebner v. State*, 103 Nev. 29, 31, 731 P.2d 1330, 1332 (1987). "...The State should have the right to appeal from an order granting a motion to suppress evidence. NRS 177.015(2). That right would be severely limited, if not effectively eliminated, were the delay attributable to such an appeal not considered good cause for purposes of the 60–day rule." *Robles-Nieves* at 405-406. Appellant's interlocutory appeal under NRS 177.015(2) constitutes good cause for delay in bringing a defendant to trial.

With regard to the final factor, likelihood of success on the merits, this Court has explained:

> The final consideration in whether to grant the motion for a stay is the likelihood that the State will succeed on the merits. In some circumstances, this stay factor is significant. But in the context of an interlocutory appeal under NRS 177.015(2), we conclude that it is far less significant than the first stay factor. As we have already explained, the first stay factor takes on

> added significance in the context of an interlocutory appeal from an order granting a suppression motion because denying a stay would effectively eliminate the right to appeal afforded by NRS 177.015(2).

Robles-Nieves at 406 (*internal citation omitted*).

Here, there is legitimate dispute as to whether or not the police officer's *Miranda* warning was so flawed as to be affirmatively misleading with regard to the right to have counsel present during questioning. It is undisputed that the warning at issue was worded 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?

It was based on the above interaction that the district court found that the right to counsel was not adequately conveyed. Exhibit 1. Appellant has argued that the warning adequately conveyed that right, citing *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 in *Criswell*), as well as other persuasive authority. Appellant's statutory right to review of the district court's finding would be subverted if the stay is denied.

Based on the foregoing, Appellant respectfully requests the matter be stayed pending resolution of the interlocutory appeal.

DATED: February 26, 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: February 26, 2018.

CHRISTOPHER J. HICKS
Washoe County District Attorney

BY: JENNIFER P. NOBLE
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EXHIBIT A

EXHIBIT A

FILED
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Clerk of the Court
Transaction # 6547422

CODE NO. 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,

Plaintiff,

vs.

TAREN DESHAWN BROWN, also known as TAREN DE SHAWNE BROWN, also known as "GOLDY-LOX,"

Defendant.
_____/

Case No. CR17-1851

Dept. No. 6

ORDER GRANTING MOTION TO SUPPRESS
OR REQUEST FOR AN EVIDENTIARY HEARING PURSUANT TO LCR 7(C)

Before this Court is a *Motion to Suppress or Request for an Evidentiary Hearing Pursuant to LCR 7(c)* ("*Motion*") filed by Defendant TAREN BROWN ("Mr. Brown") through his counsel Emilie Meyer, Deputy Public Defender. The State of Nevada filed its *Opposition to Motion to Suppress* ("*Opposition*") through its counsel Deputy District Attorney Adam D. Cate. No reply was filed.

On February 21, 2018, the Court held a hearing on all pretrial motions, and the parties presented oral argument on the instant *Motion*. Mr. Brown then submitted the *Motion* for decision. After hearing the evidence and argument, and analyzing the same under the applicable law, the Court finds the *Motion* should be granted/denied.

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I. FACTS AND PROCEDURAL HISTORY

On October 28, 2017, Mr. Brown was apprehended by officers with the Reno Police Department ("RPD") after Mr. Brown allegedly pointed a gun at VINTELL LAMONTTA JOHNSON ("Mr. Johnson") and pulled the trigger. See *Information*, filed November 28, 2017. Officers handcuffed Mr. Brown and conducted a search of his person. *Motion*, p. 2. Shortly after the search, Mr. Brown was placed in an RPD squad car and Sergeant Larmon Smith ("Sergeant Smith") conducted an interrogation. Id. Officer Tasheeka Claiborne ("Officer Claiborne") recorded the interrogation. Id. Said recording was disclosed by the State and provided as Audio Interview 171028_0004 ("Audio Interview"). Id.

Prior to questioning, Sergeant Smith provided the following admonishment,[1] as reflected in Audio Interview at 1:26-1:57:

> 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 that 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 to tell me your side of it and tell me what happened, what led up to this bro?

In response to Sergeant Smith's admonishment, Mr. Brown appeared to waive his rights and made a number of incriminating statements regarding the incident to Sergeant Smith and Officer Claiborne. See Audio Interview, generally. Mr. Brown now seeks to

[1] As the recording has not been professional transcribed, Sergeant Smith's admonishment, alone, was transcribed by defense counsel. The Court listened to the recording in question at the hearing on February 21, 2018 and notes the aforementioned transcription accurately reflects the admonishment given to Mr. Brown by Sergeant Smith.

suppress the recording of his interrogation based on Sergeant Brown's failure to properly Mirandize Mr. Brown and, therefore, lack of voluntariness of Mr. Brown's statements. *Motion*, p. 2.

In his *Motion*, Mr. Brown argues Sergeant Smith's Miranda warning was deficient based on three primary grounds. First, Mr. Brown contends Sergeant Smith failed to communicate Mr. Brown's right to have counsel present during questioning. *Motion*, p. 5. Mr. Brown maintains the information regarding a right to counsel during questioning is "'an absolute prerequisite to interrogation [and] [n]o amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead.'" *Motion*, p. 5, quoting Miranda v. Arizona, 384 U.S. 436, 471-72 (1966). Mr. Brown argues Sergeant Smith's statement, "[i]f 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," suggests the right to an attorney attaches only after charges are filed and not during or before questioning. Id., p. 7.

Second, Mr. Brown contends Sergeant Smith failed to communicate Mr. Brown's ability to exercise his rights at any time. *Motion*, p. 5. While Mr. Brown concedes the language in Miranda is less absolute as to this right, Mr. Brown argues "[w]ithout the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice." Id., quoting Miranda, 384 U.S. at 474.

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Third, Mr. Brown maintains Sergeant Smith improperly warned him regarding the adverse use of his statements in the courtroom. *Motion*, p. 6. Mr. Brown contends Sergeant Smith's statement, "we can use that stuff against you" fails to convey the full exposure faced when making a statement because it omits the phrase "in court," refers to statements as "stuff," and includes the word "we." Id.

Because Sergeant Smith's Miranda warning was constitutionally ineffective, Mr. Brown argues he did not have "full awareness" of his Miranda rights and, therefore, did not voluntarily waive them. Id., p. 9.

The State opposes the *Motion*, maintaining "the precise language of the warning is not to be challenged so long as the proper information is conveyed." *Opposition*, p. 2. The State contends Sergeant Smith conveyed the proper information, as federal courts have consistently found Miranda warnings adequate where the suspect was not specifically warned his statements would be used in a court of law. Id., p. 3, citing United States v. Frankson, 83 F.3d 79, 81 (4th Cir. 1996); United States v. Castro-Higuero, 473 F.3d 880, 886 (8th Cir. 2007); United States v. Crumpton, 824 F.3d 593, 606 (6th Cir. 2016). The State emphasizes Mr. Brown provides no contrary authority.

In addition, the State contends the warning adequately conveyed Mr. Brown's right to an attorney during questioning. Id., p. 4. The State argues the Nevada Supreme Court has explicitly held a Miranda warning that conveys the right to an attorney necessarily conveys that the attorney may be present for questioning. Id.; see also Criswell v. State, 84 Nev. 459, 443 P.2d 552 (1968), disapproved on other grounds by Finger v. State, 117 Nev. 548 (2001). The State also notes various federal court cases reaching similar conclusions. Id., p. 5.

The State also maintains there is no legal requirement to inform a suspect he may terminate questioning at any time, and emphasizes Mr. Brown again provides no contrary authority for his contention. Id., p. 7.

Therefore, the State maintains Mr. Brown's acknowledgment of Sergeant Smith's Miranda warning and subsequent discussion of his participation in the incident in question constituted a valid waiver of his Fifth Amendment privilege. Id., p. 10, citing Allen v. State, 91 Nev. 568 (1975).

On February 21, 2018, the Court heard oral argument on the *Motion*, during which the parties reiterated their respective arguments and responded to the Court's inquiries. Thereafter, the Court took the *Motion* under advisement.

Accordingly, after review of the papers and pleadings filed, the oral argument of the parties, and the applicable law, the Court sets forth its Order as follows.

II. STANDARD OF REVIEW; LAW AND ANALYSIS

The admissibility of any statement given during a custodial interrogation depends on whether the police provided a suspect with four warnings: "(1) the right to remain silent, (2) that anything he says can be used against him in a court of law, (3) that he has the right to the presence of an attorney, and (4) that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." United States v. Perez-Lopez, 348 F.3d 839, 848 (9th Cir. 2003) (emphasis removed) (numbering added). The Supreme Court of the United States has "never insisted that *Miranda* warnings be given in the exact form described in [the *Miranda*] decision," and moreover, "no talismanic incantation [is] required to satisfy its strictures." Duckworth v. Eagan, 492 U.S. 195, 202-03, 109 S. Ct. 2875, 2880 (1989). The inquiry is "whether the warnings reasonably 'conve[y] to [a suspect]

his rights as required by *Miranda*.'" Florida v. Powell, 559 U.S. 50, 60, 130 S. Ct. 1195, 1204 (2010) *citing* Duckworth, *supra*. However, "thoroughness and clarity are especially important when communicating with uneducated defendants." Perez-Lopez, 348 F.3d at 848. To be constitutionally adequate, Miranda warnings must be "sufficiently comprehensive and comprehensible when given a commonsense reading." Powell, 559 U.S. at 63.

As a general rule, "suppression issues present mixed questions of law and fact." State v. Beckman, 129 Nev. Adv. Op. 51, 305 P.3d 912, 916 (2013). When ruling on a motion to suppress, a district court should set forth factual findings in support of its determination in order to aid appellate review. Rosky v. State, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005). Pursuant to Nevada Supreme Court authority, the Court makes its findings of fact and conclusions of law on each of Mr. Brown's grounds for suppression of the *Audio Interview*.

Mr. Brown does not challenge his "right to remain silent," and therefore, the Court does not discuss it here. Instead, the Court analyzes whether Mr. Brown's right to counsel was effectively conveyed and whether Sergeant Smith effectively informed Mr. Brown that anything he said could be used against him "in a court of law."

A. Right of Subject to be Informed Statements May be Used Against Him in a Court of Law.

The second *Miranda* warning requires police to inform a defendant "that anything he says can be used against him in a court of law." Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630 (1966). As Miranda explains, in full,

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> The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

Miranda v. Arizona, 384 U.S. 436, 469, 86 S. Ct. 1602, 1625 (1966).

The Court has not located any United States Supreme Court or Nevada Supreme Court authority directly addressing the sufficiently of a Miranda warning that omits the phrase "in court," but is persuaded by federal circuit court authority. In United States v. Franklin, 83 F.3d 79, 81 (4th Cir. 1996), the Fourth Circuit found it was not critical "that [the officer] failed to state that Frankson's statements could be used against him at a particular location, in court. [The officer]'s instruction unequivocally conveyed that all of Frankson's statements could be used against him anytime, anywhere, including a court of law, a broader warning that Miranda actually requires." In addition, in United States v. Crumpton, 824 F.3d 593, 606 (6th Cir. 2016), the Sixth Circuit found "[a] suspect who is informed of his right to remain silent and the fact that failing to do so will result in his statements being used 'against him' is sufficiently informed of the key information the warning seeks to provide" despite not being warned specifically that the statements could be used in court.

Thus, based upon the aforementioned persuasive authority, the Court finds Sergeant Smith's admonishment that "[y]ou have the right to remain silent, you know, and if we do talk about stuff, you know, we can use that stuff against you," satisfies the requirements of Miranda and does not, itself, warrant suppression of Mr. Brown's interview with Sergeant Smith.

B. Right to Counsel During Questioning.

Miranda requires all individuals "be informed, prior to custodial interrogation, 'that [they have] the right to the presence of an attorney, and that if [they] cannot afford an attorney one will be appointed for [them] prior to any questioning if [they] so desire." U.S. v. Connell, 869 F.2d 1349, 1351 (9th Cir. 1989), quoting Miranda, 348 U.S. at 479. "What Miranda requires 'is meaningful advice to the unlettered and unlearned in language which [they] can comprehend and on which [they] can knowingly act.'" Connell, 869F.2d at 1351, quoting Coyote v. U.S., 380 F.2d 305, 308 (10th Cir. 1967). In order for the warning to be valid, the combination of the wording of its warnings cannot be affirmatively misleading. Id. at 1352. "The warning must be clear and not susceptible to equivocation." U.S. v. San Juan-Cruz, 314 F.3d 384, 387 (9th Cir. 2002). In addition, "a Miranda warning must convey *clearly* to the arrested party that he or she possesses the right to have an attorney present prior to and during questioning." Id. at 388 (emphasis in original).

Here, Sergeant Smith informed Mr. Brown as follows: "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." Sergeant Smith did not explicitly inform Mr. Brown that he had the right to the presence of counsel prior to and during questioning.

The State relies on the Nevada Supreme Court's decision in Criswell for the proposition that a Miranda warning that conveys the right to an attorney necessarily conveys that the attorney may be present for questioning. *Opposition*, p. 4; Criswell, 84 Nev. at 462, 443 P.2d at 554 ("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."). The State also cites to numerous courts that have reached similar conclusions. However, those cases are easily distinguishable from the facts of this case.

In Criswell, prior to questioning, the defendant "was advised of his constitutional right to remain silent, that anything he might say could be used against him in court, that he had the right to counsel, and if he was indigent and could not afford counsel that the counsel would be provided." Id. at 461, 443 P.2d at 553. In addition, in United States v. Lamia, 429 F.2d 373, 375-76 (2nd Cir. 1970), the defendant was advised that "he need not make any statement to us at that time, that any statement he would make could be used against him in court; he had a right to an attorney, if he wasn't able to afford an attorney, an attorney would be appointed by the court." With regard to the defendant's contention that he was not apprised he had the right to the presence of an attorney during questioning, the Second Circuit found, "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." Id. at 377.

However, the State is incorrect that a warning that conveys the right to an attorney **necessarily** conveys that the attorney may be present for questioning. The Ninth Circuit's decision in Connell makes it clear otherwise unobjectionable Miranda warnings have not been found inadequate by courts "simply because they fail explicitly to state that an individual's right to appointed counsel encompasses the right to have that counsel present prior to and during questioning." Connell, 869 P.2d at 1351. Rather, "where individuals have been separately advised both of their right to counsel before and during questioning and of their right to appointed counsel, reviewing courts will assume that a logical inference has been made – that is, that appointed counsel is available throughout the interrogation

process." Id. at 1351-52. However, the Ninth Circuit rejected as "fatally flawed...a version of the Miranda litany if the combination or wording of its warnings is in some way affirmatively misleading, making such an inference less readily available." Id.

Unlike the cases relied upon by the State, Mr. Brown was not separately apprised of his right to an attorney and his right to have an attorney appointed to him such that "no other reasonable inference could be drawn from the warnings as given." See Criswell, at 461, 442 P.2d at 553. Rather, the Court finds the combination of words used by Sergeant Smith was both "affirmatively misleading" and "subject to equivocation." See San Juan-Cruz, 314 F.3d at 387. Sergeant Smith's warning, viewed as a whole, is subject to the reasonable interpretation that Mr. Brown did not have the 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.** In addition, Sergeant Smith's use of the phrase, "regardless of what charges we have for you, we can always provide one of them for you as well," implies Mr. Brown may have an attorney appointed to defend him against whatever charges result from his arrest. Because Mr. Brown had not yet been charged with a crime, Sergeant Smith's warning was 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. As such, Sergeant Smith's warning was ambiguous, unclear, subject to equivocation, and was not the "fully effective equivalent" of the language used in the Miranda decision.

Thus, the Court finds the warning was constitutionally ineffective. Suppression of Mr. Brown's interview with Sergeant Smith is required and may not be used in the State's case in chief.[2]

C. Voluntariness of Statement.

In order to admit statements made during custodial interrogation, the defendant must knowingly and voluntarily waive the Miranda rights. Kroger v. State, 117 Nev. 138, 142, 17 P.3d 428, 430 (2001). The Court reviews "the facts and circumstances of each particular case weighing the totality of the circumstances to determine whether the Miranda warnings were properly given and whether the defendant waived his Miranda rights." Id.

The Court finds Sergeant Smith's admonishment did not adequately and reasonably convey the third warning to Mr. Brown such that it would make him aware that he had the right to the presence of counsel prior to and during questioning. As such, the Court similarly finds Mr. Brown did not "voluntarily, knowingly and intelligently" waive his Miranda rights, requiring suppression of Mr. Brown's interview with Sergeant Smith. See Miranda, 384 U.S. at 444.

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[2] The suppression of Mr. Brown's audio interview does not preclude the State from admitting Mr. Brown's otherwise inadmissible statements for the limited purpose of impeaching Mr. Brown's testimony. In Harris v. New York, 401 U.S. 222, 225-26 (1971) the United States Supreme Court reasoned, "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury... The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (internal citations omitted); see also Allan v. State, 103 Nev. 512, 513, 746 P.2d 138, 140 (1987).

III. CONCLUSION

The Court concludes the audio interview of Mr. Brown should be suppressed for failure to properly Mirandize Mr. Brown. As such, Audio Interview 171028_0004 may not be used by the State in its case in chief.

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED the *Motion to Suppress or Request for an Evidentiary Hearing Pursuant to LCR 7(c)* is GRANTED.

Dated this 22nd day of February, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 23rd day of February, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

ADAM CATE, ESQ.

ERICA FLAVIN, ESQ.

EMILIE MEYER, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Heidi Brey

EXHIBIT B

EXHIBIT B

CODE No. 2515
CHRISTOPHER J. HICKS
#7747
P. O. Box 11130
Reno, Nevada 89520-0027
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR17-1851

TAREN DEHSHAWN BROWN, also known as TAREN DE SHAWNE BROWN, also known as "GOLDY LOX," Dept. No. 6

Defendant.

_____/

NOTICE OF APPEAL

Notice is hereby given that Plaintiff above-named, hereby appeals to the Supreme Court of Nevada from this Court's Order granting Defendant's Motion to Suppress, signed and filed on February 23, 2018.

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AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: February 23, 2018.

CHRISTOPHER J. HICKS
District Attorney

By /s/ JENNIFER P. NOBLE
JENNIFER P. NOBLE
Appellate Deputy

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on February 23, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jim Leslie, Chief Deputy Public Defender

Emilie Meyer, Deputy Public Defender

/s/ JENNIFER P. NOBLE
JENNIFER P. NOBLE

EXHIBIT C

EXHIBIT C

AFFIDAVIT OF ADAM D. CATE

STATE OF NEVADA

COUNTY OF WASHOE

I, ADAM D. CATE, do hereby swear under penalty of perjury that the assertions of this affidavit are true.

1. I am an attorney, licensed to practice law in Nevada, representing the State of Nevada in the action known as State v. Taren Deshawn Brown, Second Judicial District Court Case Number CR17-1851.

2. That on February 23, 2018, the Second Judicial District Court issued an order granting Respondent's motion to suppress the defendant's statements.

3. That on February 23, 2018, the State filed a Notice of Appeal in the Second Judicial District Court.

4. That on February 23, 2018, in open court, I sought a stay of the jury trial, then set for February 26, 2018, pending resolution of the State's appeal.

5. That the State's request to stay the matter was denied by the Honorable Lynn K. Simons via an oral ruling that occurred on February 23, 2018.

6. That instead of granting the State's motion to stay, Judge Simons continued jury trial in this matter until March 5, 2018.

7. That the statements suppressed by the district court's order are critical to the State's case in chief and ability to prove one or more charges contained in the information.

8. That the State's request to stay this matter is in good faith and not for the purpose of delaying trial.

Further your affiant sayeth not.

/s/ ADAM D. CATE
ADAM D. CATE

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on February 26, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jim Leslie
Chief Deputy Public Defender

Erica Flavin
Deputy Public Defender

Emilie Meyer
Deputy Public Defender

/s/ MARGARET FORD
MARGARET FORD