IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, No. 75184

Appellant,

vs.

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

Respondent.
_____/

OPPOSITION TO STATE'S BRIEF IN SUPPORT OF GOOD CAUSE FOR APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

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THE STATE OF NEVADA, No. 75184

Appellant,

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TAREN DESHAWN BROWN A/K/A,
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POINTS AND AUTHORITIES IN OPPOSITION TO THE STATE'S BRIEF IN SUPPORT OF GOOD CAUSE FOR APPEAL

Introduction

NRS 177.015(2) allows the State to seek appellate review of a district court's order granting a motion to suppress evidence in a criminal case. But merit review is not automatic; the State must first make a preliminary showing of the propriety of the appeal and whether there may be a miscarriage of justice if the appeal is not entertained. Though stated in the conjunctive, the question whether a miscarriage of justice may result if such an appeal is not entertained informs the Court's determination of the propriety of the appeal. And so, at this

stage, whether a miscarriage of justice may exist if the suppression order is left undisturbed turns on whether the district court's order constitutes a clear error of law. Here, as discussed below, the district court's suppression order is a sound application of controlling law, which is unlikely to be disturbed if reviewed. Because the district court's order is sound, this Court should dismiss the State's appeal.

Background[1]

The State seeks appellate review of the district court's pretrial order granting Mr. Brown's motion to suppress his custodial statements. The district court found that a law enforcement officer failed to properly *Mirandize* Mr. Brown before obtaining statements from him. The district court identified the following exchange between Sergeant Smith and Mr. Brown as the full *Miranda* admonishment given to Mr. Brown:

> 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

[1] The State incorrectly states that Taren Deshawn Brown (Mr. Brown) waived his preliminary hearing. Brief in Support of Good Cause for Appeal at 3 (State's Brief). Mr. Brown was bound over for trial following a preliminary hearing.

> 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 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?

Appellant's Appendix (AA) at 88 (Order Granting Motion to Suppress). The district court concluded that this admonishment did not clearly convey to Mr. Brown his right to have an attorney present during questioning. *Id.* at 94-97. Specifically, the district court found that:

> 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 Brown had the right to 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.

Id. at 96 (bold print omitted).

Because the district court's conclusions are not only correct, but are also unremarkable on this record, no miscarriage of justice will result if the Court declines the State's appeal.

Argument

Because the words used by Sergeant Smith did not reasonably convey to Mr. Brown that he had a right to speak with an attorney before and during his custodial interrogation, the district court correctly concluded that *Miranda* was not satisfied.

A.

In *Miranda v. Arizona*, 384 U.S. 436, 471 (1966)—"a pathmarking decision"—the United States Supreme Court "held that an individual must be 'clearly informed,' prior to custodial questioning, that he has, among other rights, 'the right to consult with a lawyer and to have the

lawyer with him during interrogation.'" *Florida v. Powell*, 559 U.S. 50, 53 (2010). *Miranda* "prescribed the following now-familiar warnings:

> [A suspect] must be warned prior to any questioning [1] that he has 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."

559 U.S. at 59-60 (internal quotation marks omitted, alterations and numbering in the original) (quoting *Miranda v. Arizona*, 384 U.S. at 479). See also *Stewart v. State*, 133 Nev. Adv. Op. 20, 393 P.3d 685, 688 (2017) (quoting *Powell*). The third warning specifically addressed the United States Supreme Court's concern that "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege [to remain silent] by his interrogators." Thus "as 'an absolute prerequisite to interrogation,' ... an individual held for questioning 'must be clearly informed that he has a right to consult with a lawyer and to have the lawyer with him during interrogation.'" 559 U.S. at 60 (citations omitted, alteration in the original).

Recognizing that "the rigidity of *Miranda*" does not extend "to the precise formulation of the warnings given," the warnings given must nonetheless "reasonably conve[y] to [a suspect] his rights as required by *Miranda*." 559 U.S. at 60 (internal quotation marks omitted, alterations in the original) (quoting *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989)). Additionally, the warnings must not "suggest[] any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right to a lawyer before [the suspect] is questioned." 559 U.S. at 61 (citations omitted, second alteration in the original).

In *Powell* the United States Supreme Court found the *Miranda* warnings given in that case were sufficient because (1) they "did not 'entirely omit[]' any information that *Miranda* required them to impart"; (2) had informed Powell that he "had 'the right to talk to a lawyer before answering any of [their] questions'"; and (3) had informed Powell that he had "the 'right to use any of [his] rights at any time [he] want[ed] during th[e] interview.'" 559 U.S. at 62 (alterations in the original). The Court found that the first statement "communicated that Powell could consult with a lawyer *before answering* any particular

question," and that the second statement "confirmed that he could exercise that right *while* the interrogation was underway." "In combination," the Court said, "the two warnings reasonably conveyed Powell's right to have an attorney present, *not only at the outset of interrogation, but at all times." Id.* (italics added).

In contrast, the warnings given to Mr. Brown did omit significant information required by *Miranda*. While Sergeant Smith did inform Mr. Brown of his right to remain silent—"[S]o I just want you to know that you don't have to talk to me. You have the right to remain silent[.]"—Smith's statements concerning the right to counsel—"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."—did not reasonably convey to Mr. Brown his "right to have an attorney present, not only at the outset of [the] interrogation, but at all times." At best, as found by the district court, the message sent was that "Mr. Brown may have an attorney appointed to defend him against whatever charges result from his arrest." That is, that Mr. Brown "had the right to [appointed counsel] at some future point in time after he had been charged with a crime, not prior to and during questioning."

AA at 96. And this is precisely the concern identified in *Powell*: because "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege [to remain silent] by his interrogators," the Court requires "*as an absolute prerequisite for questioning*, that an individual held for questioning must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." 559 U.S. at 60 (internal quotation marks and citations omitted, alterations in the original, italics added). See also *Lujan v. Garcia*, 734 F.3d 917, 931 (9th Cir. 2013) ("The problem here is that the words used by law enforcement did not reasonably convey to Petitioner that he had the right to speak with an attorney present at all times—before and during his custodial interrogations.").[2]

As in *Lujan*, the problem here is that Sergeant Smith's words did not reasonably convey to Mr. Brown that he had a right to speak with a

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[2] Before an initial interrogation Lujan was told: "Your rights are you have the right to remain silent, whatever we talk about or you say can be used in a court of law against you, and if you don't have money to hire an attorney one's appointed to represent you free of charge. So, those are your rights." *Lujan*, 734 F.3d at 931. In a subsequent interrogation Lujan was also not properly informed "of his constitutional right to counsel." *Id.*

lawyer before and during questioning. The district court's order is unassailable.

B.

The State's reliance on *Criswell v. State*, 84 Nev. 459, 443 P.2d 552 (1968), for the proposition that "a Miranda warning that conveys the right to an attorney necessarily conveys that the attorney may be present for questioning," State's Brief at 7, is misplaced. A fair reading of the warnings given to Criswell in the district attorney's office involved a combination of (1) the right to remain silent; (2) the warning that his statements could be used against him; (3) the right to counsel; and (4) the right to appointed counsel if he could not afford counsel. *Id.* at 460, 443 P.2d at 553. There is no indication in the Court's opinion that Criswell was told that counsel could be or would be provided at some future date. Additionally, before a subsequent polygraph test at the Reno Police Department, Criswell was again advised of his rights, this time including the right to have counsel present, and he "stated that he understood his rights and that he had been advised of them before." *Id.* at 461, 443 P.2d at 553. Thus, in this context, the Court's conclusion that that the warnings given to Criswell reasonably

conveyed the right to have counsel present at the moment and during the interrogation, *Id.* at 462, 443 P.2d at 554, is not surprising.

Similarly, this Court should find the State's reliance on *United States v. Lamia*, 429 F.2d 373 (2nd Cir. 1970), and other cases following *Lamia*, unpersuasive in light of *Powell*. See *State v. Carison*, 266 P.3d 369, 373-74 (Ariz. App. 2011) (rejecting *Lamia's* reasoning in light of *Powell*, and noting that *Powell* (in both the majority and minority opinions) "emphasized the requirement that suspects be alerted that the right to counsel attaches before and during questioning."); and *Cf. Stewart v. State*, 393 P.3d at 688 (finding that *Miranda* was satisfied where warnings given to Stewart stated in part: "You have the right to have the presence of an attorney *during* questioning. If you cannot afford an attorney one will be appointed *before* questioning." (internal quotation marks omitted, italics added)). Mr. Brown was never informed of these rights.

Conclusion

To clear the hurdle set by NRS 177.015(2), the State must show good cause why this Court should disrupt on-going district court proceedings and entertain an appeal from the district court's pretrial

order granting a motion to suppress. The State can clear this hurtle if it persuasively shows that without this Court's intervention a miscarriage of justice will result. But here the State has not demonstrated that this Court's intervention is necessary, or that the district court committed clear legal error. In sum, the district court properly ruled and its order should be allowed to stand. This Court should dismiss the State's appeal.

Dated this 23rd day of March 2018.

By: *John Reese Petty*
JOHN REESE PETTY
Chief Deputy

By: *Emilie Meyer*
EMILIE MEYER
Deputy Public Defender

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer 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 answer has been prepared in a proportionally spaced typeface using Century Schoolbook in 14-point font.

2. I further certify that this answer complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points and contains a total of 2,486 words. NRAP 32(a)(7)(A)(i), (ii).

3. Finally, I hereby certify that I have read this answer, 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 answer complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon 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.

DATED this 23rd day of March 2018.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on 23rd day of March 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jennifer P. Noble, Appellate Deputy
Washoe County District Attorney's Office

I further certify that I have on this date, emailed a copy of this document to:

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