

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

ARTHUR LEE SEWALL, JR.,

Respondent.

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Case No. 79437

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**APPELLANT'S APPENDIX
Vol. 2**

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JEV//ed

1 Q Okay.

2 A I wasn't aware, specifically, that he, that that was his belief
3 until he made the statement that you told us you need a lawyer so
4 anything you tell us after this point but you – basically we can't use
5 against you.

6 Q Okay.

7 A And that's when I corrected Investigator Hefner.

8 Q All right. But up until that moment in time, Investigator
9 Hefner's trying to slowly present the case to Mr. Sewall to say kind of, the
10 walls are closing in around you, you need to tell us what's going on,
11 right? That's – that was your investigative process to elicit a confession?

12 A I don't know that I would say the walls are closing in, but
13 certainly let him know that there was –

14 Q Evidence.

15 A -- that we had evidence and that we had – the – what he's
16 referring to as the case file was sitting there, some paperwork, because
17 the actual original envelopes from the .357 from San Diego were sent to
18 us, so they were sitting there as well.

19 Q Okay. So Detective Hefner has this huge binder, 3-ring binder
20 on the desk.

21 A That's a relative term. Certainly when it comes to homicide
22 cases it's one case file. It's one binder, so.

23 Q Okay. But it was not a small binder?

24 A I'd say it's probably – there was probably five inches of
25 paperwork in there.

1 Q Okay. It's a – and it was on the desk. You – Detective Hefner
2 at this moment in time gives him false information or implies false
3 information that it had, that the gun that you guys were referring to had
4 been test fired, had not. That the DNA – that they had his DNA, correct?

5 A Yes, we did.

6 Q Okay. And so at that time when he says, "I need a lawyer,"
7 Investigator Hefner doesn't go on and say, "Okay, well we have more
8 information," you know, whatever. He then responds instead saying,
9 "Hey, we have a search warrant, we're going to take this DNA. We need
10 DNA. We need photos, we need fingerprints, and once we have that
11 we're going to get you out of here." Right? That's the very next
12 statement he makes?

13 A He shifted gears to the actual collection of the –

14 Q All right.

15 A -- fingerprints, yeah.

16 Q So at that moment in time Sergeant or Investigator Hefner
17 switched gears and said, "Okay, we have these search warrants?"

18 A Yes.

19 Q Now, Detective O'Kelly, when you have search warrants you
20 have permission, court authority to do reasonable means to satisfy those
21 warrants, correct?

22 A Correct.

23 Q Okay. And Mr. Sewall would not be leaving there until you
24 satisfied those warrants, correct?

25 A That's correct.

1 Q Okay. And you had to get his DNA, correct?

2 A We actually didn't have to but we – it was part of –

3 Q Well you have a search warrant for his DNA?

4 A Yes, we did.

5 Q Okay. And you had a search warrant for his fingerprints?

6 A For major case prints.

7 Q And a search warrant for photos which goes with the major

8 case prints?

9 A Yes.

10 Q Okay. And until you got those, Mr. Sewall could not leave?

11 A Correct.

12 Q All right. And when he says I need a lawyer, that's when it

13 switched gears to, okay, we need to get a DNA standard from you. And

14 that's when the very next page on page 14 is when Mr. Sewall says,

15 "Hey, I have Copenhagen in my mouth let's – what should I do about

16 that." Right?

17 A Right.

18 Q And although it's been awhile since you've watched the video

19 and you don't remember directly, there may have been a time that Mr.

20 Sewall left the room to spit out that Copenhagen.

21 A He may have, yeah.

22 Q And as soon as the DNA swab was done, you still had the

23 major case prints and the photos to happen, correct?

24 A Actually we didn't – we didn't obtain the buccal swab or the

25 major case prints until we were completely done.

1 Q Okay. Now if you had attained the DNA swab shortly after he
2 spit out the Copenhagen, would you say that you still needed the case
3 prints after that?

4 A Yeah, we would need the major case prints, yes.

5 Q So no matter when he did the DNA swab, you still needed
6 those major case prints and he couldn't leave until that happened?

7 A Correct.

8 Q Okay. And so immediately you then move into your next
9 question of have you spent any time over at Marble Manor?

10 A Yes.

11 Q All right. And there is then you moving into that conversation?

12 A Correct.

13 Q Okay. And then on page 23. Are you there?

14 A I am there.

15 Q Okay, thank you. In the middle, Heffner then goes into this
16 idea of the fact that he had asked for an attorney? Correct?

17 A Yes.

18 Q Okay. And he says, "And they're bringing over some of their
19 lab people or will do the fingerprinting and this shouldn't take long. You
20 know, you, you did ask for an attorney and whatever comes after that we
21 can't use, and we – the only reason we've been talking to you is that."

22 And you then interrupt and say, "No, he said he thinks he
23 needs an attorney."

24 A Yes.

25

1 Q Okay. And obviously, at this point, you had stated that you, if
2 you didn't realize before, definitely realize now that you and Investigator
3 Heffner are – were on two different pages?

4 A Correct.

5 Q About whether Mr. Sewell had requested an attorney now.

6 A That's correct.

7 Q Okay. And you then, out loud, correct Investigator Heffner
8 saying, "No, no, no, he thinks he needs an attorney.

9 A I did.

10 Q Okay.

11 A I actually apologized to him later because it seemed like I
12 jumped on him a little bit.

13 Q Okay. And then from there you continue on questioning
14 Sewell?

15 A That's correct.

16 Q Okay. At that point in time you never Mirandized him because
17 there was this confusion between one experienced investigator and
18 another experienced investigator over what this person had just asked
19 for?

20 A No, we didn't.

21 Q Okay. You never corrected Investigator Heffner about, hold
22 on, he said he thinks he needs an attorney which means we can use
23 everything that he says against him?

24 A No, I didn't do that. I didn't have that counseling session
25 there, no.

1 Q So it's just out there. What Detective Heffner said is,
2 "Anything you say to us can't be used." Right? And the only thing that
3 you fixed is that whether he asked to have an attorney?

4 A That's the only thing that I said.

5 Q Okay. And so in this entire statement that he makes, both the
6 surreptitious recording and the recording to which you then pull out your
7 recorder and direct him to make statements, you never once explained to
8 Mr. Sewell that, hey, look, just making clear anything you say can and will
9 be used against you?

10 A No, we did not.

11 Q Okay. Now how many times did you give him Miranda?

12 A There's no way for me to count how many times.

13 Q Thousands?

14 A I'd say a lot.

15 Q A lot, I think that's fair to say.

16 You have it memorized?

17 A I always read it from the card but, yes.

18 Q Okay. And it takes a matter of seconds to give a Miranda
19 warning?

20 A Very simple, yes.

21 Q And by giving that warning whether he's in custody or not
22 definitely alleviates any sort of potential legal concerns later, right?

23 A It's possible when it's necessary. Every police officer knows
24 the Miranda rights warning.

25

1 Q All right. And now you have two investigators who are
2 confused and give the exact opposite warning of what Miranda says,
3 correct?

4 A No.

5 Q Okay, let's back up. Let me make sure that we're clear.
6 Miranda says, anything you say can and will be used against
7 you in court, correct?

8 A Yes.

9 Q And Heffner said we can't use anything you say against you,
10 correct?

11 A Yes he did. Well, words to that effect.

12 Q Okay. Would you agree that that is the exact opposite of what
13 Miranda says?

14 A In what sense?

15 Q What you're going to use against the person making the
16 statement or not.

17 A No, Miranda says anything you say can and will be used
18 against you in a court of law.

19 Q And Heffner said the exact opposite, correct?

20 A No, we, actually believing that Mr. Sewell had invoked his right
21 to an attorney, told him that at this point, which would be true if that
22 actually had taken place, that anything he was telling us afterwards
23 couldn't be used against him. That's actually an enforcement of Miranda.

24 Q You would agree that Investigator Heffner is a reasonable
25 person?

1 A Yes.

2 Q And you would agree that Investigator Heffner at that moment
3 in time that he said that before you corrected him and had a different
4 opinion, that he believed that Mr. Sewell was in custody and had asked
5 for a lawyer?

6 A Investigator Heffner said nothing about Mr. Sewell being in
7 custody, but he did clearly believe that Mr. Sewell had invoked his right to
8 an attorney.

9 Q Okay. And you being an experienced detective know that the
10 only time a person can actually invoke his right to an attorney and stop
11 the questioning is when someone's in custody, correct?

12 A That's correct.

13 Q Okay. And Detective Heffner definitely knew that as well?

14 A Yes.

15 Q He's a sergeant, he is a higher grade than you were in the
16 police department, correct?

17 MS. WECKERLY: I'm going to object. I think that calls for
18 speculation –

19 THE COURT: Right. I don't know –

20 MS. WECKERLY: -- and a legal conclusion.

21 THE COURT: Well it's sustained in terms of what Detective
22 Heffner knows or remembers, or if we have to ask Investigator Heffner
23 that.

24 MR. MANN: Okay.

25 BY MR. MANN:

1 Q Now after he had asked for a lawyer, he being Sewell, there
2 was a long diatribes and conversations that you and Detective Heffner
3 had to try and convince Mr. Sewell to give a statement, correct?

4 A Well your introduction to that question says that after he had
5 asked for a lawyer and I argue that he did not ask for a lawyer.

6 Q Okay. So after the statement regarding a lawyer, is that fair?

7 A Yes.

8 Q Feel more comfortable with that?

9 A That's correct.

10 Q Okay. That after that there was long diatribes by you and
11 Detective Heffner trying to convince Mr. Sewell to give a statement?

12 A We spoke with him extensively after that, yes.

13 Q And the reason why I say long diatribes is because through
14 this transcript we see pages where it's just one of you talking and no one
15 interrupting, it's just talk, talk, talk. Right?

16 A That's correct. I think there's one point where there's two
17 pages.

18 Q Okay. Now during this, before he gives any sort of statement
19 to you, substantive statement where you pull up your recorder and you
20 start getting to the meat of the matter, he then asks, he being Sewell
21 asks, can I talk to my lawyer?

22 A Yes.

23 Q Okay. Can you turn to page 37?

24 On page 37, at the top, Sewell says, "Well I think I need to call
25 my family." Right?

1 A Yes.

2 Q Okay. That was the first mention of him talking to his family at
3 that point? Correct?

4 A I believe so, yes.

5 Q Okay. Turn to page 42.

6 A I'm there.

7 Q Okay. Towards the middle, he -- Sewell says, "I need to talk
8 to my wife. Is that possible?" Right?

9 A Yes.

10 Q Okay. "Because once again and the way that I see this
11 scenario playing out, I'm going to end up in a jail cell tonight." Right?

12 A Yes.

13 Q Okay. Now you don't allow him to talk to his wife at that
14 moment in time, do you?

15 A No.

16 Q In fact, you encourage him to give you a statement first and
17 then he can talk to his wife as long he wants?

18 A Yes.

19 Q Okay. In fact, on page 43 you specifically say, right in the
20 middle it says, "Right, but when you lay out for us and do like, like, and
21 will with the recorder, this is who's present, date and time, dah, dah, dah,
22 and tell you -- and you tell us, the guarantee with you is that you get that
23 opportunity to talk to your wife about it, regardless, I promise. As a man,
24 I promise."

25 A Yes. that was me.

1 Q Okay. So he has now asked to talk for his wife, talk to his
2 family at least twice at this point?

3 A Yes.

4 Q Okay. And then Heffner jumps in and says –

5 A And I think I reversed that. I think that's a –

6 Q I'm sorry.

7 A And I don't know that Q1 is always accurate.

8 Q Yeah, I agree that they – it's maybe not as clear as it can be.

9 A Right.

10 Q Okay. But then you would agree that throughout the pages
11 before he gives a statement, you guys are promising him over and over
12 again that as soon as he's done giving a statement we'll let you talk to
13 your wife?

14 A Yes.

15 Q Okay. Now a person that's not in custody should be able to
16 talk to his wife any time, correct?

17 A No. We're in the middle of having a conversation. It's – we
18 had had our phones shut off and so that wasn't the time for him to be
19 calling and making phone calls, nor for us. We weren't communicating
20 with anybody either.

21 Q In fact, Detective Heffner on page 43 says, "Yeah, yeah, and I
22 don't think she's, the wife, gonna be able to give you much help. I think
23 she's just gonna add to your stress and your burden right now. Right?

24 A Yes.

25 Q You didn't want him talking to his wife?

1 A No.

2 Q Because she was probably going to tell him, shut up. Right?

3 A Yes. It's possible.

4 Q And that would be counterproductive to what you wanted?

5 A Yes.

6 Q And, but your statement is, hey, he and I are having a
7 conversation. When we're having a conversation, he doesn't just get to
8 call his wife. Right?

9 A It was not the appropriate time for him to be getting on the
10 phone and having a conversation with somebody outside that room. We
11 were having a conversation, the three of us together. That wasn't the
12 time for it. And he was given assurances that he would be able to call his
13 wife, and did.

14 Q Okay, so you set the timeframe when it is the time for it and
15 when it isn't the time for it? And you said the time for it was after you
16 give us this statement, not before?

17 A Yes.

18 Q Okay. Now before you went up to Reno, you did a lot of
19 investigation into Mr. Sewell, right?

20 A Yes, we did.

21 Q You looked into his background?

22 A Yes.

23 Q You looked into his troubles back in the '90's?

24 A Yes.

25 Q You looked into his family?

1 A Yes.

2 Q You knew that he had suffered a tragic loss with his daughter
3 being killed, correct?

4 A Yes.

5 Q And while in this interview and before he gives a substantive
6 statement, and after he has asked for a lawyer, you bring up the death of
7 his daughter?

8 A No, he did.

9 Q You purposely brought up this issue of Nadia's family and how
10 would they feel? Correct?

11 A That's not, that's not an unusual –

12 Q Did you bring up this issue of Nadia and her daughter?

13 A Yes.

14 Q And you knew, him being in that exact position as Nadia's
15 family, that he would relate to that?

16 MS. WECKERLY: Objection, calls for speculation.

17 THE COURT: Yeah, it's sustained. You can ask what the
18 point was in bringing it up, but he did -- it's speculation.

19 MS. WECKERLY: The other objection I have is that doesn't
20 relate to custodial status which is the subject of their motion. They didn't
21 raise voluntariness so, I mean, to me this is irrelevant.

22 MR. MANN: First of all, Your Honor, that's not accurate. We
23 definitely raised voluntariness.

24 THE COURT: Well I'll let him, I mean –

25 MS. WECKERLY: Not in the written motion.

1 MR. MANN: I think it's pretty clear in the reply that –

2 THE COURT: Okay. You can ask him why did he say that or
3 what – was he trying to induce a feeling of sympathy on the part of, but
4 he can't answer what the effect it had on Mr. Sewell because that's
5 speculation, and he obviously can say how he reacted, but he doesn't
6 know what's going on in his head.

7 So you need to rephrase your question.

8 BY MR. MANN:

9 Q Okay. Detective O'Kelley, on page 17.

10 A Okay.

11 Q You say in the middle of your first statement, "I mean it's – I
12 don't know, it's a tough situation hard, you know? I know it's not easy to
13 hear, especially, you know, given the fact that lost a daughter to a violent
14 death and murder, right?"

15 And he responds, "Um hmm."

16 And then you say, "You know that um, that Nadia had, Nadia
17 had family, too. You got answers to what happened to your daughter."
18 Right?

19 A Yes.

20 Q Okay. And you are using the death of his daughter to try and
21 illicit a confession from him. Correct?

22 A No, I – it is – there's never been a time that I've investigated a
23 homicide where I've spoken to someone who potentially may have been
24 involved that I don't bring up the fact that the person has family members
25 and people that care about them and want to have answers. That's -- I

1 can say probably every homicide investigation that I've ever had, that's
2 brought up at some point in time. That's what human beings do.

3 Mr. Sewell is the one that brought up his daughter and the
4 situation he was going through after I discussed that.

5 Q And you used that, correct?

6 A We had a discussion about it.

7 Q And saying do you want an answer with your daughter and
8 Nadia's family wants answers for their daughter.

9 A Both of those are true statements.

10 Q Now we had talked about that Mr. Sewell was unable to leave
11 until you satisfied those search warrants, correct?

12 THE COURT: Can you keep your voice up?

13 MR. MANN: Sure. I'm always yelled at that I talk too loud, so.

14 Q You had – you agreed and you had stated that Mr. Sewell was
15 not allowed to leave until you had satisfied those search warrants,
16 correct?

17 A Those are thoughts in my head, yes.

18 Q Okay.

19 A That those needed to be done before he could leave.

20 Q And, again, that was the DNA swab, the finger, the major case
21 prints, and the photos, correct?

22 A Yes.

23 Q Now you didn't get the fingerprints or the photos until 7:30
24 P.M. that night, correct?

25

1 A After the conclusion of the final interview, that's when the
2 buccal swabs, the fingerprints, and the photographs were taken by the
3 CSAs for Reno.

4 Q Okay. And so Mr. Sewell was not allowed to leave until that
5 happened?

6 A That's the way the timing worked out is it was done after he
7 was done with his statement.

8 Q All right. Court's indulgence.

9 At this time I'll pass it.

10 THE COURT: All right. Redirect.

11 MS. WECKERLY: Sure.

12 **REDIRECT EXAMINATION**

13 BY: MS. WECKERLY:

14 Q Detective O'Kelley, did Mr. Sewell ever say that he wanted to
15 leave the interview?

16 A No.

17 Q Did he ever say this is over, I'm done talking to you?

18 A No.

19 Q Did he, or was he ever prevented by yourself or Detective
20 Heffner from leaving?

21 A No.

22 Q He never even brought it up?

23 A No.

24 Q I'd like to have you look at page 23, and this is towards the
25 bottom. And this was a discussion that defense counsel was asking you

1 about where he's discussing the issue with an attorney. And I'm looking
2 at the bottom third of the page. There's a question from either yourself or
3 Detective Heffner, I think it's you, where you said, no, he said he thinks
4 he needs an attorney. Correct?

5 A That's me, yes. That's where I corrected Investigator Heffner.

6 Q Okay. What is the next line that you say?

7 A Well the unintelligible part I'd have to review it because I could
8 probably pick up what that is, but I'd say that's true, and do you, if you do
9 want to talk to us, if you don't want to talk to us then say I'm done talking.
10 He says –

11 Q You inform him that if he wants this over with he could just say
12 I'm done talking?

13 A Correct.

14 Q Now a Miranda warning is required when someone's in
15 custody, right?

16 A That's correct.

17 Q And if you're in custody and you request a lawyer or you say
18 you want to remain silent, that's when the questioning ceases?

19 A That's true.

20 Q If you're not in custody and you request an attorney, there's no
21 significance?

22 A That's correct.

23 Q I mean, maybe voluntariness, but there's no trigger that stops
24 the interview?

25 A That's correct.

1 Q And if you are not in custody and you say you don't want to
2 talk anymore but you continue to talk without being coerced, there's no
3 significance legally to –

4 MR. MANN: Objection, calls for a legal –

5 THE COURT: Aren't we calling for a legal conclusion here?

6 MR. MANN: Yes.

7 Q In your mind as the detective, if someone is not in custody and
8 they say they don't want to talk anymore but they continue to talk, is the
9 interview voluntary?

10 A It is.

11 THE COURT: Well, I think a better question is do you believe
12 that you need to end the interview or do you believe that you could
13 continue with the interview, because otherwise it calls for a legal
14 conclusion?

15 So the question is, do you believe that you can continue the
16 interview or do you believe that you have to terminate or end the
17 interview.

18 THE WITNESS: Non-custodial I believe I can continue the
19 interview.

20 THE COURT: All right.

21 THE WITNESS: If they respond to me they do.

22 BY MS. WECKERLY:

23 Q Now let's look at the actual interview itself on page 17. Not
24 the – do you have that with you?

25 A I do.

1 Q Okay. On page 17 in the middle, there's actually a discussion
2 with Mr. Sewell about what he said about an attorney, correct?

3 MR. MANN: Page 17?

4 THE COURT: Seventeen is talking about the murder of Mr. –

5 MS. WECKERLY: No, in the statement.

6 THE WITNESS: The actual recorded statement.

7 MR. MANN: Oh. Sorry.

8 Q There's discussion about what he had said earlier regarding
9 an attorney? Are you with me?

10 A Yes.

11 Q Okay. And he said, "I did not explicitly ask for an attorney."

12 A Yes.

13 Q Okay. So he acknowledged that he didn't actually ask for an
14 attorney as well?

15 A Yes.

16 Q Now I'd also – I'd like to move then to back to the other
17 statement, the earlier statement on page 12.

18 MR. MANN: I'm sorry, is this on surreptitious?

19 THE COURT: Now we're on the surreptitious statement
20 again.

21 MS. WECKERLY: Right.

22 MR. MANN: That we can maybe just –

23 MS. WECKERLY: On page 12 at the bottom.

24 THE WITNESS: I'm on page 12.

25

1 Q Okay. He's asked by either yourself or Detective Heffner,
2 "You came down here voluntarily." Do you see that at the bottom of the
3 page?

4 A I do.

5 Q And he says what?

6 A "I did."

7 Q And then one of you says, "Yeah, I mean, nobody, you weren't
8 even placed in handcuffs?

9 And what is his response?

10 A "No, ah, you're absolutely correct."

11 Q And then one of you says, "I mean that's true, you agreed to
12 come down here with us, right?"

13 And what is his response?

14 A "Yes."

15 Q Now let's talk about the Reno detectives. When you
16 encountered – well when you went up to Reno you said initially in the
17 briefing there were about 10 detectives or 10 officers.

18 A There were 10 people in the room. I'm not sure what
19 everybody's assignment was or, you know, there could have been a
20 couple people in there for curiosity sake that had no input.

21 Q How long was that briefing?

22 A I'd say no more than 20 minutes.

23 Q Okay. Was there any sort of special tactical plan developed in
24 that meeting, you know, about how to handle Mr. Sewell?

25

1 A No, the several people had obviously been to the apartment
2 complex so they knew where it was and they knew where Mr. Sewell
3 parked his vehicle and so they just – we just followed them over and they
4 set up wherever they did, and then we knew where the building was and
5 so we parked up against the curb or the sidewalk adjacent to where his
6 building was.

7 Q When the two Reno officers approach Mr. Sewell and then
8 yourself and Detective Heffner get out, were all four of you talking at once
9 to him?

10 A No.

11 Q Did one person speak at a time?

12 A Yes, well, we had one of their pac sets, too, so we knew when
13 he had pulled in, so we were kind of all prepared to, you know, it's going
14 to be time to get out of the vehicle, so.

15 MR. MANN: I'm sorry, I – you had what?

16 THE WITNESS: One of their pac sets, one of their radios, so
17 we heard radio communications of when he was entering the complex, so
18 we were prepared to exit the vehicle. We saw where he parked and so
19 we were exiting our vehicles at the same time that the Reno detectives
20 were so.

21 There was one Reno detective that spoke to him basically
22 saying who he was and there was some investigators from Las Vegas
23 who wanted to speak to you, and then Investigator Heffner spoke to Mr.
24 Sewall.

25

1 Q Did he, meaning Mr. Sewell, request to talk to you at his
2 apartment?

3 A No, he didn't.

4 Q Did he request to drive himself?

5 A No.

6 Q When you got to the interview room at the Reno police station
7 did he complain at all about how he was treated in the car ride with the
8 Reno detectives?

9 A No.

10 Q Did he say, hey, look, I was questioned by those guys already,
11 I've already gone over this, I don't want to talk, or anything like that?

12 A No.

13 Q Did he mention anything at all about how he was treated by
14 the Reno detectives?

15 A No.

16 Q Did the Reno detectives, when you arrived in the room, say,
17 hey, look, we already patted him down for weapons, he's good to go?

18 A No.

19 Q Did they give you any kind of briefing at all about anything that
20 was said in the vehicle?

21 A No.

22 Q Did they give you any indication that there had been anything
23 of significance that happened in the ride over?

24 A No.

25

1 Q This investigation, the very inception of it, do you know if it
2 started from testing of a sexual assault kit?

3 A Yes. It, well, from our end, yes, it did. The sexual assault kit
4 was tested and came back positive to Mr. Sewall.

5 Q And do you have any knowledge if part of that testing was
6 funded by a federal grant in testing old SA kits?

7 A It's my understanding that it was.

8 Q In total, the contact that you had with Mr. Sewell, how long
9 would you say that interview was?

10 A I'd say that the pre-interview or what is marked as
11 surreptitious interviews, probably approximately an hour, maybe a little bit
12 longer. And the actual recorded statement that he gave us I would say is
13 somewhat less than a half hour, between 27 minutes, half hour, 26
14 something.

15 Q Okay. During that entire time, was he ever denied the ability
16 to leave the interview?

17 A No.

18 Q And did he ever even request it?

19 A No.

20 MS. WECKERLY: Thank you, I have nothing else.

21 THE COURT: Mr. Mann.

22 MR. MANN: Court's indulgence.

23 **RECROSS EXAMINATION**

24 BY MR. MANN:

25

1 Q Detective O'Kelley, were you aware that the Reno police
2 department took a knife from Mr. Sewall?

3 A No.

4 Q Okay. So you had no knowledge of that?

5 A I believe that there was some discussion about Mr. Sewall
6 having a knife. As I recall, he put it in his lunchbox or whatever he was
7 carrying with him and that was -- then he put it back in his truck.

8 Q Okay. So --

9 A Nobody confiscated a weapon.

10 THE COURT: I'm sorry, was the discussion with Mr. Sewall
11 about the knife, or the discussion with the Reno officers about the knife?

12 THE WITNESS: We didn't talk to him about the knife. Just
13 that Mr. Sewall had a knife with him and he was allowed to put it in his
14 lunchbox or bag or whatever, and put it in his truck.

15 THE COURT: So you learned that from the Reno officers?

16 THE WITNESS: Yes.

17 THE COURT: Okay.

18 BY MR. MANN:

19 Q Did you learn that from the Reno officers or you witnessed that
20 interaction where he was then allowed to walk to his car, put the knife in.

21 A I saw him go to his truck. I didn't know at that time what it was
22 -- what the reason was for it.

23 Q Okay, so there was definitely a lapse in your ability to hear
24 conversations between Mr. Sewall and the Reno P.D.?
25

1 A We were on the other side of where their vehicle was over by
2 our rental car after the initial conversation that we had with him, and prior
3 to him getting in the vehicle and heading over to Reno.

4 Q Okay. So just to make sure I get this timeline correct, the four
5 of you approach him, say we'd like to talk to you, and there's at some
6 point in time an agreement to go to the Reno police station, correct?

7 A Yes.

8 Q And he goes to the Reno PD's undercover car, you go to your
9 rental car?

10 A Yes.

11 Q And while you're at your rental car, you don't know the
12 conversation that's happening between Reno PD and Mr. Sewall,
13 correct?

14 A No.

15 Q And but you see at some point Mr. Sewall go to his car and
16 put something there and come back?

17 A Right. His – I want to say it was like a Yetti-type lunch box or
18 lunch pail that he had with him and what I understood at the time is he
19 was just putting his stuff back in his truck. I didn't know that he had
20 placed a knife in there until later.

21 Q Okay, but you did learn that, in fact, Reno PD said, hey, if you
22 have any weapons or whatever, we need to take those out now, correct?

23 A What I learned is that Mr. Sewall placed a knife in his lunch
24 pail or bag, whatever, and was allowed to put it back in his truck.

25

1 Q All right. And so when Ms. Weckerly asked you that was he
2 patted down or searched for weapons, there's this information about a
3 knife that you are now telling us about where he was de-weaponized,
4 correct?

5 A What I learned is that he placed a knife in his lunch pail and
6 put it in his truck.

7 Q All right. And this was before he went down to the Reno
8 police station and before he gets into the Reno car, correct?

9 A Yes.

10 Q Okay. Now Ms. Weckerly asked you about page 12 to 13 of
11 surreptitious recording, right?

12 A I'm on page 13 currently.

13 Q Okay. She starts off with 12 –

14 A Yes.

15 Q -- where you say, hey, you weren't placed in handcuffs, you
16 can leave, right?

17 A You came down here voluntarily. I did, yeah. I mean, yes?

18 Q Right. And immediately from that point on page 13 he goes
19 into, hey, how I see it, this is going down a path where I'm gonna end up
20 in a jail cell and so I need a lawyer. Right? The bottom of page 13.

21 A Right, that was down – yeah. The top is where he was saying
22 that he agreed to come down there voluntarily, and then my partner told
23 him if he felt uncomfortable at any point that he could say that he was
24 done. And then the bottom is when he said I can see where this is going
25 and at this point I think I need an attorney.

1 Q Okay. Well, he says whether I'm here voluntarily or not, I
2 need an attorney. So you guys just gone through the fact that, okay,
3 you're here voluntarily, and then he says I need an attorney. Right?

4 A Yes.

5 Q Okay. And so this idea that Mr. Sewall could leave at any time
6 is not accurate, correct?

7 A It is accurate at this point. There's eight –

8 Q Okay, except for what's the next statement after I need an
9 attorney? What does Detective Heffner say? We have search warrants
10 and we need to fulfill those search warrants and you can't leave until that
11 happens. Right?

12 A Well, immediately after –

13 MS. WECKERLY: Objection. That's not what the transcript
14 says.

15 THE WITNESS: Right. I can read the transcript –

16 THE COURT: Yeah, I think the transcript speaks for itself.

17 MR. MANN: Okay.

18 THE COURT: So let's not rephrase.

19 BY MR. MANN:

20 Q Well you had testified that he could not leave until the
21 warrants were satisfied?

22 A He wasn't going to be able to leave until after we had the
23 warrants satisfied, yes.

24 Q Okay, that's fine.

25 A That wasn't expressed to him but, yes.

1 Q Now –

2 THE COURT: Can I interrupt the questioning for a second? I
3 actually set three evidentiary hearings today. There's so many murders.

4 How much longer, and we'll take as much time on this as we
5 need, how much longer with this witness do we think?

6 MR. MANN: Your Honor, I can –

7 THE COURT: No, no, no. Don't rush.

8 MR. MANN: I have a matter of minutes left with Mr. O'Kelley.

9 THE COURT: Okay, and then do we have another witness?

10 MS. WECKERLY: No, I mean, I think this is covered.

11 THE COURT: No, no, no, that's fine. So we'll finish up
12 relatively quickly.

13 Would you mind, I'm watching, okay. –

14 MR. MANN: Just one thing to be –

15 THE COURT: I'm watching my Marshal through the window
16 and I don't know what he's telling them. And so I don't want him to send
17 the lawyers on the next evidentiary hearing away because if we're going
18 to finish this up quickly.

19 So, Kenny, it sounds like we're going to finish this up pretty
20 quickly so just have them hang around.

21 MR. MANN: Just to be clear, Your Honor, I do want to
22 question Sergeant Heffner as well.

23 THE COURT: But is Sergeant Heffner here?

24 MS. WECKERLY: He is here –

25 THE COURT: Oh, okay.

1 MS. WECKERLY: But, I mean, I – if –

2 THE COURT: You don't have to call him. I mean, I didn't – I
3 misunderstood.

4 MS. WECKERLY: Yeah, no, I'm not – sorry, I'm not going to
5 call him. I would just say if the Court has a scheduling issue he can
6 always, you know, he's Metro so he can come back.

7 THE MARSHAL: I don't know if this matters but I informed the
8 attorneys that we're probably 30 minutes or so and they seemed fine with
9 that, so. They didn't seem to have issues with it, and we're still waiting
10 on Mr. Winder to get here.

11 THE COURT: Okay, so, that's fine.

12 MR. MANN: And –

13 THE COURT: Let's do as much as we can today then.

14 MS. WECKERLY: Sure.

15 MR. MANN: And, Your Honor, I also believe in talking to Mr.
16 Oram as well that –

17 THE COURT: Mister.

18 MR. MANN: Mr. Oram –

19 THE COURT: Yes.

20 MR. MANN: -- right here.

21 THE COURT: I know, I thought you were – I was jumping
22 ahead of you but I won't do that.

23 MR. MANN: That's – whatever the testimony is today that I
24 believe that we would want the transcripts and do supplemental briefing
25 as well.

1 THE COURT: Okay. So let's forge on. Sorry to interrupt you.

2 **RECROSS EXAMINATION CONTINUED**

3 BY MR. MANN:

4 Q All right. And you would also agree that – let me back up, I'm
5 sorry.

6 Detective O'Kelley, you've done hundreds of interviews,
7 correct?

8 A That's correct.

9 Q Okay. And you're trained in how to do that?

10 A Yes, I received quite a bit of training, yes.

11 Q Okay. And in that training, one of those things is really kind of
12 connecting with the interviewee, correct?

13 A Yes.

14 Q And part of that is slowly getting them to start accepting some
15 of your factual basis to then move them where you want them to go,
16 correct?

17 A Yes.

18 Q Okay. And so when you have Sergeant Heffner saying he
19 asked for an attorney and you said, no, no, no, he said he thinks he
20 needs an attorney, and then keep on that mantra of he said he thinks he
21 needs an attorney, that in the statement, not the surreptitious statement
22 but the statement, page 17, where you then ask him, hey, you just said
23 that you think you need an attorney. That was him just adopting your
24 statement, correct?

25 MS. WECKERLY: Objection, calls for speculation.

1 THE COURT: State –

2 MR. MANN: And you are experienced –

3 THE COURT: -- I'm sorry, state your question again.

4 MR. MANN: Sure.

5 Q You had developed a relationship with Mr. Sewell during these
6 conversations, correct?

7 A I don't know to what extent but we were talking together well.

8 Q You had gone through with him the feelings of Nadia's family,
9 how they would feel and how he should feel knowing that he was in a
10 similar experience, correct?

11 A Yes.

12 Q You went over the fact that as a man you promised him that
13 he would be able to talk to his wife afterwards, right?

14 A Yes.

15 Q You went over the fact that he needed to go through the
16 statement and show that he's not an evil person, right?

17 A Yes.

18 Q And so through time he starts coming on your side, right?

19 MS. WECKERLY: Objection. Calls for speculation.

20 MR. MANN: Well he was in the room. He knows, he's said
21 he's done thousands of interviews –

22 THE COURT: I – okay. I'm going to listen to the testimony,
23 not in terms of what Mr. Sewell was thinking, but in terms of the flow of
24 the answering and the interview, okay? So I'm just interpreting in that
25 way. So he can answer.

1 Q And so his agreement of that he said he just thinks he needs
2 an attorney was him just agreeing with you, correct?

3 A No. I believe that Investigator Heffner, after I almost
4 aggressively corrected him, realized that what the actual situation was
5 and at the end –

6 THE COURT: Well don't speculate as to what he –

7 A Right, well at the end of the interview that is actually
8 Investigator Heffner going through much of the standard thing that you
9 would say to a person who had given a voluntary – a statement
10 voluntarily. Nobody's promised you anything, nobody's made any threats
11 towards you, and in and amongst those he said and that point which I
12 thought, being Investigator Heffner, I thought that you had asked for an
13 attorney and then Mr. Sewall said, no, I was staying that I think I need.

14 Q Last series of questions. You said that when you approached
15 Mr. Sewall you had the Reno's radio, is that correct?

16 A No, we left it in the car.

17 Q Okay, but before you approached Mr. Sewall while you were
18 in the car, you had Reno's radio?

19 A Right, to be told when he came into the complex, yes.

20 Q Okay, and so you could hear the chatter between the two?

21 A It was pretty much that. His vehicle is here so as soon as we
22 heard that then we were able to look over our shoulders and see when
23 his truck came into view.

24 Q Okay, so it's fair to say that Reno PD gave you some of their
25 equipment?

1 A The one radio, yes.

2 MR. MANN: Okay. No further questions.

3 THE COURT: Ms. Weckerly.

4 MS. WECKERLY: Just very briefly.

5 **FURTHER REDIRECT EXAMINATION**

6 BY MS. WECKERLY:

7 Q Mr. Sewall is a former Metro officer, correct?

8 A Yeah, several years on the department.

9 Q That positions him quite a bit differently than many suspects
10 that you've interviewed?

11 A It does, it's I think the first time for me personally.

12 Q And in your knowledge to become a police officer, is there
13 training given at the academy, and Miranda and when it's required?

14 A Yes.

15 Q And a suspect's rights during an interview?

16 A Yes, extensive.

17 Q So he would have been trained on that?

18 A Yes.

19 MS. WECKERLY: Thank you.

20 **FURTHER RECROSS EXAMINATION**

21 BY MR. MANN:

22 Q The law changes constantly, correct?

23 A It does.

24 Q And you as a active law enforcement officer have to keep up
25 as to how that law impacts you?

1 A Yes.

2 Q Okay. Someone that is no longer on law enforcement doesn't
3 have to keep up on that, correct?

4 A They wouldn't have to, no.

5 Q So you have no understanding whether Mr. Sewall understood
6 what his rights were or not at that moment in time?

7 A Miranda hasn't changed since I went through the academy.

8 Q One thing you do know for sure is you didn't remind him what
9 his rights were, correct?

10 A We did not talk about Miranda rights.

11 MR. MANN: No further questions.

12 THE COURT: Anything else, Ms. Weckerly?

13 MS. WECKERLY: No, Your Honor.

14 THE COURT: All right. Thank you.

15 THE WITNESS: Thank you, Your Honor.

16 THE COURT: I'm not sure, do I call you Investigator, do I call
17 you Marshal, I don't know. Sir –

18 THE WITNESS: Depends on how I look, Your Honor.

19 THE COURT: -- you are excused at this time.

20 THE WITNESS: I know what to refer to you each time, so.

21 THE COURT: Don't discuss your testimony with the other
22 investigator who may be called as a witness.

23 Give me one second.

24 And then, Ms. Weckerly, you don't intend to call any other
25 witnesses, correct?

1 MS. WECKERLY: No, Your Honor.

2 THE COURT: And, Mr. Mann, you've indicated you'd like to
3 hear from the other –

4 MR. MANN: Investigator/Detective/Sergeant Heffner.

5 THE COURT: Okay, and he is in the hallway?

6 MS. WECKERLY: He's here, yes.

7 THE COURT: Okay, but –

8 MR. MANN: I mean, if you want I can come back and do
9 another hearing.

10 THE COURT: Hang on one second, okay?

11 May I see counsel on the other evidentiary hearing at the
12 bench, and I'm going to figure out our scheduling. So before we take a
13 break because why have you folks wait around while we're on a break if
14 we're just going to --?

15 THE MARSHAL: The officer, too?

16 THE COURT: Yeah.

17 THE MARSHAL: The other inmate may have been taken
18 back to eat lunch or something.

19 THE CORRECTIONS OFFICER: No, no, I called him up.

20 THE MARSHAL: Okay.

21 **[Bench Conference, Not Recorded]**

22 THE COURT: Their witnesses aren't here yet so they're going
23 to find out when they're going to get here. Can we just take like a real
24 brief recess and then we'll figure out if we can finish up today, or
25

1 scheduling or whatever. Since we're waiting around for witnesses on the
2 other one, we may as well keep going on this.

3 MS. WECKERLY: Sure.

4 THE COURT: Okay? So if any – just a brief recess.

5 MR. MANN: Thank you, Your Honor.

6 **[Brief Recess at 10:57 A.M.]**

7 **[Proceeding resumed at 11:08 A.M.]**

8 THE COURT: Counsel's pleasure. Do you want to start, we
9 can start and then take a break, or if you just want to have him testify
10 without interruption, we can do that?

11 MR. MANN: I think that's better, Your Honor.

12 THE COURT: Okay. All right, so everybody look at their
13 calendars. Obviously we don't have a trial until November so we have
14 some time here. Do you want to do this, how about Friday, February 8th?

15 MS. WECKERLY: I can't, but –

16 MR. ORAM: Also, Your Honor, could we – I'd have to go out
17 about ten days past that point at least.

18 THE COURT: Fine.

19 MR. ORAM: And I wondered if we can get a copy of the
20 transcript of today's hearing. Is that possible? If you want, we can
21 formally order it if you'd like.

22 THE COURT: Susie, you are ordered. There.

23 MR. ORAM: So we – okay.

24 THE COURT: That's horrible.

25

1 Okay, so she'll do that and then, so what, Mr. Oram, when
2 would you be available.

3 MR. ORAM: Any time after the 19th of February.

4 THE COURT: Okay, so.

5 MR. MANN: How about March 8th? It's a Friday.

6 MR. ORAM: That's a bad day, Your Honor.

7 THE COURT: I like to do Fridays at 9:00.

8 MR. MANN: Yeah, February 22nd's fine, I'm sorry.

9 THE COURT: I'm sorry?

10 MR. MANN: February 22nd.

11 THE CLERK: So we do that at 9:00 A.M?

12 MS. WECKERLY: So maybe I can do that. I might be in trial.
13 Obviously, it could not go and then I can be here. So I don't mind setting
14 it then –

15 THE COURT: Okay.

16 MS. WECKERLY: -- or maybe we can start the trial, you
17 know, in the afternoon.

18 THE COURT: Right. Well that's why I like to Friday mornings
19 because even I'm in trial, we can do this and then I can start my trial, like,
20 at 11:00 or whatever.

21 MS. WECKERLY: Yeah, I don't think it's this department so I
22 would just need a little.

23 THE COURT: Okay, sure. Do you know – you don't know
24 where it is?

25 MS. WECKERLY: I can't –

1 THE COURT: Who is it?

2 MS. WECKERLY: I think it's in front of Judge Villani and I
3 think that, I mean, it's – it's not likely to go so I think we'll be fine.

4 THE COURT: Okay. All right, so we'll set that.

5 MR. MANN: February 22nd at 9:00 A.M.

6 THE COURT: Right. All right, sounds like a plan. And then
7 the officers can switch out the inmates.

8 THE CORRECTIONS OFFICER: Do you want me to get the
9 other guy right now, Your Honor?

10 THE COURT: Yeah, because then we can start right away as
11 soon as – but wait, we have to finish up with Mr. Sewall before.

12 MR. MANN: Can we just admonish Detective/Investigator
13 Heffner and just so it'll be clear.

14 THE COURT: Sure. Okay, Kenny, would you get him?

15 THE MARSHAL: Absolutely, Judge.

16 THE COURT: We're actually going to make you come back.

17 MR. HEFFNER: Okay.

18 THE COURT: But at counsel's request, I'm admonishing you
19 that you're not to discuss with Detective O'Kelley his testimony.

20 MR. HEFFNER: Okay.

21 THE COURT: And we came up with the date of February 22nd
22 which is a Friday at 9:00 A.M. Are you available on that date?

23 MR. HEFFNER: Yes, ma'am.

24 THE COURT: Sorry you have to come back but I was told two
25 hours for this hearing. We have another hearing starting at 11:00 and

1 another hearing starting at 1:00 on trials that are in the next, well, the
2 next trial is a week from now, a week from Monday, so we have to get
3 that one done.

4 MR. HEFFNER: Okay.

5 THE COURT: Okay, thank you. Sorry you had to wait
6 around, Detective, Sergeant, Investigator.

7 MR. HEFFNER: Just part of the job.

8 THE COURT: All right. So that's it and then the officers can
9 switch out the inmates.

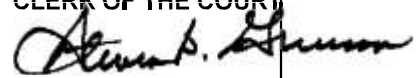
10 MR. ORAM: Thank you, Your Honor.

11
12 [Hearing concluded at 11:13 P.M.]
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19

20 ATTEST: I do hereby certify that I have truly and correctly transcribed the
21 audio/video proceedings in the above-entitled case to the best of my
22 ability.

23 

24 SUSAN SCHOFIELD
25 Court Recorder/Transcriber



1 RTRAN

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4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 THE STATE OF NEVADA,
9 Plaintiff,

CASE#: C-18-330650-1
DEPT. XXI

10 vs.

11 ARTHUR LEE SEWALL aka
12 ARTHUR LEE SEWALL, JR.,
13 Defendant.

14 BEFORE THE HONORABLE VALERIE P. ADAIR, DISTRICT COURT JUDGE
15 FRIDAY, MARCH 8, 2019

16 **RECORDER'S TRANSCRIPT OF PROCEEDINGS:**
17 **JACKSON V. DENNO HEARING**

18 APPEARANCES:

19 For the State:

GIANCARLO PESCI, ESQ.
PAMELA WECKERLY, ESQ.
Chief Deputy District Attorneys

22 For the Defendant:

23 JOEL M. MANN, ESQ.
CHRISTOPHER R. ORAM, ESQ.

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25 RECORDED BY: SUSAN SCHOFIELD, COURT RECORDER

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1 FRIDAY, MARCH 8, 2019, AT 9:02 A.M.

2
3 THE COURT: All right. So, we'll get started on the Sewall
4 matter, and who is the next witness?

5 MS. WECKERLY: Ken Hefner.

6 THE COURT: All right.

7 THE COURT CLERK: Please raise your right hand.

8 **KEN HEFNER**

9 [having been called as a witness and being first duly sworn,
10 testified as follows:]

11 THE COURT CLERK: Please be seated and please state and
12 spell your first and last name for the record.

13 THE WITNESS: My name is Ken Hefner, H-E-F-N-E-R.

14 THE COURT: Ken, K-E-N?

15 THE WITNESS: Yeah, it's actually Kenneth, yeah, K -- Ken,
16 K-E-N, yes.

17 THE COURT: All right. Maybe before we get started with
18 your -- we could quickly do the Leandre Lacey. Just stay up there.

19 THE WITNESS: Okay.

20 THE COURT: Unless you want to run back --

21 THE WITNESS: No, that's --

22 THE COURT: -- and forth.

23 [Proceedings trailed at 9:03 a.m.]

24 [Proceedings recalled 9:17 at a.m.]

25 THE COURT: All right. Sorry about that. All right.

1 MS. WECKERLY: That's okay. He was sworn in; yeah?

2 THE COURT: Yes, he was --

3 MS. WECKERLY: Okay.

4 THE COURT: -- sworn in, and you may proceed.

5 MS. WECKERLY: Thank you.

6 **DIRECT EXAMINATION**

7 BY MS. WECKERLY:

8 Q Sir, how are you employed?

9 A I'm a cold case investigator with the Las Vegas Metropolitan
10 Police Department.

11 Q How long have you worked for Metro?

12 A As a cold case investigator about three and a half years.

13 Q Prior to that?

14 A I worked for the department for 31 years. The bulk of my time
15 was spent as a sergeant in homicide.

16 Q And you were working in cold case in January of '18?

17 A Yes.

18 Q On that date did you have a partner that you were working
19 with?

20 A Yes, Dean O'Kelley.

21 Q Okay. Did you and Detective Kelley [sic] -- were you
22 investigating a murder that involved a suspect by the name of Arthur
23 Sewall?

24 A Yes.

25 Q Can you explain to the Court how you went about trying to

1 contact Mr. Sewall once he became a suspect?

2 A We had a pretty firm idea of where he was living and we had
3 the Reno Police Department assist us with that, and then there came a
4 point in time when we wanted to go up to Reno and speak with him.

5 Q And did you also want to collect a DNA sample from him?

6 A Yes, and some major case prints and photographs.

7 Q I think you mentioned that you determined through
8 investigation that he was living in the Reno area?

9 A Yes.

10 Q That's, obviously, outside of Metro's jurisdiction?

11 A Correct.

12 Q Did you -- prior to going up to Reno, did you make contact with
13 that agency to let them know that you were coming up?

14 A Yes.

15 Q And did you describe to any Reno detectives or sergeants
16 what the nature of the -- the purpose of going up there was?

17 A I did.

18 Q Can you tell the Court what you explained to them?

19 A That we were investigating a homicide in which Mr. Sewall --
20 there was a CODIS hit on him, a DNA match. We wanted to come up
21 and interview him regarding his association with the victim and his
22 knowledge of the case, of the crime, and we believed -- we told them
23 where we believe he was working and living, and they did confirm that
24 prior to our coming up, and we asked for their assistance in making
25 contact with Mr. Sewall because it would be in their jurisdiction.

1 Q On the 11th of January were you actually up in Reno to make
2 that contact?

3 A Yes.

4 Q When you and Detective O'Kelley arrived did you meet with
5 Reno detectives prior to contacting Mr. Sewall?

6 A Yes.

7 Q And did that take place at the Reno Police Department?

8 A Yes.

9 Q How many people would you estimate were in that meeting?

10 A There might have been ten or so of Reno PD people. I don't
11 think they were all detectives. Some of them might have been the
12 support personnel.

13 Q And yourself and Detective O'Kelley?

14 A Correct.

15 Q In terms of yourself and Detective O'Kelley, were you in
16 uniforms or plain clothes?

17 A Plain clothes.

18 Q After that meeting what was the plan in terms of making
19 contact with Mr. Sewall?

20 A We were going to go to his apartment. We had reason to
21 believe he got off around -- he would get home around 3, 3:30, so myself
22 and Detective Kelley [sic] parked outside his apartment along with
23 another two Reno detectives. There were some more Reno personnel
24 manning the outer and inner perimeter to, you know, let us know if and
25 when he was coming in and things like that. I never saw those

1 personnel, but there was the two of us and two Reno PD guys in the
2 immediate area of his apartment, and we made contact with him when
3 he arrived home.

4 Q And I think you said yourself and Detective Kelley [sic] were in
5 a car just the two of you?

6 A Yes, a rental car.

7 Q A rental car? At some point over a radio or by some means
8 you become aware that Mr. Sewall's arriving back at his apartment?

9 A Yes.

10 Q And was that via a radio with the Reno detectives or a phone
11 or do you --

12 A My -- I believe it was phone.

13 Q Okay. Do you actually see him drive in?

14 A Yes.

15 Q And you see him park his vehicle?

16 A Yes.

17 Q What did you observe after that?

18 A As we were getting out of the vehicle, Mr. Sewall started
19 walking from his vehicle towards his apartment building. The two Reno
20 detectives, who, I guess, must have parked closer than we, had made
21 initial contact with him, and then -- well, this is while we were -- I
22 observed this while we were walking up to the three of them from our
23 car.

24 Q Did you see anybody, yourselves or the Reno detectives, draw
25 weapons or anything like that?

1 A No.

2 Q So, the way you're describing it, it -- the Reno detectives make
3 contact with him first?

4 A Yes.

5 Q And then yourself and Detective O'Kelley are shortly
6 thereafter?

7 A Seconds later, yes.

8 Q Okay. When you guys get up to Mr. Sewall, do you identify
9 yourselves?

10 A Yes.

11 Q And did you explain to Mr. Sewall why it is that you were
12 there?

13 A Yes.

14 Q And what did you -- just, generally, what did you tell him?

15 A We told him here -- we were here investigating a case and
16 that we had information that we thought he'd want to hear from us.

17 Q And --

18 A And then asked him if he'd be willing to go to the Reno station
19 where we could sit down and talk.

20 Q And did he agree to do that?

21 A Yes.

22 Q Was that sort of the extent of the conversation that you had
23 with him in the parking lot at the apartment complex?

24 A Yes, substantially.

25 Q After that did you return to your rental car?

1 A Yes.

2 Q And where did Mr. Sewall go?

3 A He rode back to the station with the two Reno detectives that
4 were with us right there that made contact with him.

5 Q At any point did you see Mr. Sewall return to his car prior to
6 getting in the vehicle with the Reno detectives?

7 A Yes, he had his lunch cooler, and one of the Reno detectives
8 asked him if he had any weapons on him, and he said he did, some type
9 of utility knife, I think, related to his work as an electrician, and so he
10 took that out with his lunch box, went back to his car, put those items in,
11 and then got in the car with the -- or the Reno guys.

12 Q When he went back to his car with his lunch box was a
13 detective, either yourself or the Reno detectives or Detective O'Kelley --
14 was anyone following him back to his car?

15 A Not directly. I mean, from where we were and where he
16 walked to his car it was line of sight, we could see him, but I don't think
17 there was anybody on his heels or looking over his shoulder.

18 Q Okay. And when he -- or after he does that, does he get in a
19 Reno vehicle?

20 A Yes.

21 Q Do you recall where he was sitting?

22 A I was told he rode in the front passenger seat.

23 Q You -- you're not -- you didn't --

24 MR. MANN: Objection.

25 BY MS. WECKERLY:

1 Q -- observe that?

2 A No, I didn't.

3 Q Okay.

4 THE COURT: All right. Sustained.

5 BY MS. WECKERLY:

6 Q So, yourself and Detective O'Kelley drive to the Reno Police
7 Department?

8 A Right.

9 Q And when you get there could -- and you park can you tell
10 whether or not Mr. Sewall had arrived with the other detectives?

11 A He did because we were -- arrived pretty much in caravan, so
12 we all five got out of the cars. We parked there right at the front curb of
13 the Reno station, which is a relatively small building.

14 Q How did you gain entry to the police department?

15 A Well, right there when we get out there's a public entrance, a
16 ramp that goes up to a door. That ramp has a wall alongside of it; it's a
17 half wall for the ramp because of -- the station's kind of a tri-level
18 configuration, so -- and then next to that ramp entrance is another
19 entrance into the building, which I believe is their employee entrance.

20 We went in one door that would eventually take us through
21 their work area for their other staff and detectives at work, and they went
22 on, continued on to -- a short distance to another door, which, I think,
23 takes them to an inner staircase, which led to where they eventually put
24 Mr. Sewall in the room.

25 Q So, as you proceed through the public entrance and they go in

1 through the employee entrance, how much time passed, do you think,
2 before you were back in contact with Mr. Sewall?

3 A A couple minutes.

4 Q Okay. Where do you eventually make contact again?

5 A In the room where the interview was conducted.

6 Q When you go into that room was Mr. Sewall already present?

7 A Yes.

8 Q Was he with another officer or was he by himself?

9 A He was by himself.

10 Q And was he standing, seated?

11 A He was sitting in a chair at the table.

12 Q Okay. And that table is the one that eventually we see in the
13 videotape of the interview?

14 A Yes.

15 Q When you all walk in is it just yourself and Detective O'Kelley?

16 A Right.

17 Q And did you have any plan with Detective O'Kelley about how
18 you were going to sit in the room?

19 A Sit? No.

20 Q Okay. So, you go in the room and you eventually take seats?

21 A Yes.

22 Q In terms of the configuration of the room, was Mr. Sewall
23 blocked or could he exit the room if he had wanted to?

24 A Yes.

25 Q I -- that was a bad question. Could Mr. Sewall have exited the

1 room if he had wanted to?

2 A Yes.

3 Q Okay. And there was no, like, locking mechanism or anything
4 like that?

5 A No.

6 Q The room itself can you give use the approximate
7 dimensions?

8 A Reno PD reported to me it's about 15x12. It's a soft interview
9 room where they do their sensitive interviews of, maybe, young victims
10 of crimes or family members and things like that. So, it's a room, but it's
11 not a hardened room at all.

12 Q And when you say a hardened room, what is a hardened
13 room?

14 A A table in a room with permanently mounted restraint holders,
15 someplace where you can handcuff somebody to a bar on the side of
16 the room or in the center of the table, and perhaps a locking mechanism
17 that can't be operated from the inside; it has to be operated from the
18 outside.

19 Q And this room wasn't like that?

20 A Not at all.

21 Q Was anything removed from the room to, you know, ensure
22 your safety or Detective O'Kelley's safety or anything like that?

23 A No.

24 Q So, this is like a -- when you say a soft interview room, like a
25 witness interview?

1 A Witness from the -- I think it's their intent to have it look like a
2 living room.

3 Q Okay. Once you start speaking to Mr. Sewall, do you explain
4 to him a little bit -- in a little bit more detail about what the investigation is
5 and why you're there?

6 A Yes.

7 Q At that point are you aware of whether or not the interview or
8 the contact is being videotaped?

9 A Yes, I'm aware it's -- that the room is being taped.

10 Q Did you make arrangements for it to be taped prior to going
11 into the room?

12 A I didn't make specific arrangements. I'd asked and the Reno
13 people told me yeah, it's already on.

14 Q And then the interview itself can you give us an estimate of
15 how long it lasted?

16 A I think just under two hours.

17 Q Okay. And was there a point in the interview where Mr.
18 Sewall had to leave the interview to go to the restroom?

19 A Yes.

20 Q Did you accompany him?

21 A Yes.

22 Q How far into the interview was that?

23 A Oh, maybe halfway.

24 Q Okay.

25 A And I only accompanied him because I had to go to the

1 bathroom too, so --

2 Q Okay. When you did that did you have a weapon drawn or
3 cuff him or anything like that?

4 A No.

5 Q You returned back and, obviously, the interview takes place,
6 and the Court has the videotape of that. During the initial sit-down with
7 him for the interview, did yourself or Detective Kelley [sic] ever pat him
8 down for weapons?

9 A No.

10 Q Did you take his cell phone from him?

11 A No.

12 Q Did he remain in -- in fact remain in possession of his phone?

13 A He did.

14 Q And I think you said you explained to him what the nature of
15 the investigation was and then had a conversation with him?

16 A Yes.

17 Q At the conclusion of the interview were there the DNA sample
18 and the major case prints taken from him?

19 A Yes.

20 Q During the course of the interview did he ever ask to leave?

21 A No.

22 Q Did he ever say he didn't want to talk anymore?

23 A No.

24 Q The room itself is it enclosed by opaque walls or is there
25 glass?

A It's glass. I believe the lower half of the glass was painted, probably, and so you couldn't see through it, but the door's completely glass, top to bottom, and then the rest of those hallway walls were glass.

MS. WECKERLY: I'll pass the witness, Your Honor.

THE COURT: All right. Thank you.

Cross?

CROSS-EXAMINATION

BY MR. MANN:

Q Investigator Hefner, you've been a sergeant you said 31 years?

A I was -- I worked for Metro for 31 years, 22 of which I was a sergeant.

Q Okay. And a proportion of that -- a good proportion of that was in homicide?

A Yes.

Q All right. And so you're, obviously, very aware of interrogating potential murder suspects?

A Yes.

Q You've been trained to do that?

A Yes.

Q And you know different techniques in order to elicit statements from suspects that -- about what you're investigating?

A I would take exception to the word techniques. It's just a result of experience, trial and error, and benefiting from watching other detectives. I mean, I don't -- there's no planned named technique. We'll

1 do this; we'll try that. So, I don't employ any techniques. I just go by
2 what experience and my gut tells me.

3 Q When you were a sergeant did you ever go to any sort of
4 training that talked about interviewing witnesses?

5 A No.

6 Q No.

7 A No.

8 Q So, any sort of experience you have about interviewing
9 potential suspects comes purely from your 31 years' experience?

10 A Right, and benefiting from the experience and training of other
11 people that I work closely with.

12 Q All right. So, when did you reach out to Reno Police
13 Department about Mr. Sewall? Do you know the month?

14 A Not exactly, it would be probably a week or so in advance of
15 our trip.

16 Q Okay. Now, was there a time that Reno PD or Las Vegas
17 Metro did any sort of surveillance on Mr. Sewall where you collected
18 more surreptitious evidence?

19 A Here in Las Vegas we did, yes.

20 Q Here in Las Vegas.

21 A Yes.

22 Q And when was that?

23 A Shortly way after we got the CODIS hit; I believe it was in
24 summer of 2018. We sought to get our own DNA sample, so I had the
25 surveillance squad watch Mr. Sewall.

1 Q I'm sorry, what squad?

2 A Surveillance squad.

3 Q Okay.

4 A And they obtained a surreptitious standard when he discarded
5 some chewing tobacco on the ground.

6 Q All right. And so you said a week or two before you were
7 going to head out to Reno to attempt to talk to Mr. Sewall you contacted
8 Reno Police Department?

9 A Yes, but I'm not certain on the time of that.

10 Q Okay. Do you remember who you spoke to?

11 A Sergeant Myers.

12 Q Okay. And do you know what Sergeant Myers' position is at
13 the Reno Police Department?

14 A He's a detective sergeant in their -- I believe they call it major
15 crimes bureau subsection.

16 Q Okay. And when you had this conversation with Sergeant
17 Myers, you explained to Sergeant Myers that you were investigating a
18 homicide?

19 A Yes.

20 Q That you believe Mr. Sewall was in his jurisdiction?

21 A Yes.

22 Q And that you wanted him to, one, verify that he was there in
23 Reno?

24 A I was more than confident that he was there.

25 Q Okay. So, you didn't need any verification?

1 A No, I believe they did go out for me and re-verify that he had
2 renewed his lease there. So, he was still there.

3 Q Okay. But you didn't need any verification; you were pretty
4 certain that he was there?

5 A Yes.

6 Q All right. And did you explain to Sergeant Myers that Mr.
7 Sewall had been previously convicted of a felony?

8 A Yes.

9 Q Okay. And so Sergeant Myers, two weeks ahead of time,
10 knew that Mr. Sewall, who was a felon, was living in his midst?

11 MS. WECKERLY: I'm going to object. I don't think he said
12 two weeks.

13 THE COURT: I'm sorry?

14 MS. WECKERLY: I don't think the witness said two weeks.

15 THE COURT: Oh, right.

16 You didn't establish when he would have told that.

17 MR. MANN: Well, he said --

18 THE COURT: Okay. It -- was it --

19 MR. MANN: -- one to two weeks was kind of what he
20 remembered.

21 THE COURT: Was that -- did you have just the one
22 conversation with Sergeant Myers or were there successive
23 conversations?

24 THE WITNESS: There were successive conversations and
25 that's why I'm saying I'm not exactly sure when they started.

1 MR. MANN: Okay.

2 THE WITNESS: But the best I could tell you right now is
3 probably a week or two in advance.

4 THE COURT: And do you recall when you told Sergeant
5 Myers that Mr. Sewall was a felon? Was that the first conversation or
6 sometime later? Do you remember?

7 THE WITNESS: No, I don't know if I would -- I probably told
8 him everything I knew at that point, so I wouldn't --

9 THE COURT: In the beginning.

10 THE WITNESS: Yes.

11 THE COURT: Okay. All right.

12 BY MR. MANN:

13 Q So, you said that you had multiple conversations with
14 Sergeant Myers before you came out?

15 A Yes, yeah.

16 Q And if you would have normally, kind of, laid it all out for
17 Sergeant Myers in the first conversation, what was the point of the
18 successive conversations?

19 A You know, organizing when it would be convenient for us to
20 come up for them and, you know, where we should stay and how far
21 away he is from them and just minutiae of the event --

22 Q Okay.

23 A -- that we foresaw coming.

24 Q Now, was Sergeant Myers stationed in the police department
25 that, ultimately, the interview was conducted?

1 A Yes.

2 Q Okay. And how would -- did that just happen to be the station
3 that was closest to Mr. Sewall's apartment or you specifically went to
4 that station?

5 A I went where he works, so it was to that station. I don't know if
6 they have more than one.

7 Q Okay. So, you didn't know if there was a substation or
8 anything else closer, that's just where, kind of, you followed Sergeant
9 Myers' lead as to where to go?

10 A Yes, yes.

11 Q Okay. And when you arrived you said that there was a
12 meeting of the Reno Police Department at the station; is the correct?

13 A Yes.

14 Q And you said there was at least ten officer personnel there?

15 A Yes.

16 Q Or police personnel, I guess --

17 A Yes.

18 Q -- is a better way to put it.

19 A Yes.

20 Q Multiple detectives?

21 A Yes.

22 Q Sergeant Myer [sic]?

23 A Right.

24 Q Also some uniformed officers?

25 A I don't think so.

1 Q Okay. So, mainly detectives then?

2 A Yes.

3 Q All right. And there was a discussion the fact that Mr. Sewall
4 had committed a crime in Reno of failing to register; correct?

5 A They were aware of that, yeah --

6 Q Okay.

7 A -- that he was an ex-felon and that he had not registered.

8 Q Okay. And there was also a discussion about whether he
9 should be detained for that crime; correct?

10 A We never really coordinated that effect. You know, if Reno
11 wanted to arrest him that was fine, if they didn't want to arrest him that
12 was fine. You know, we can't control that. It's their community. It's their
13 decision. I don't know what the current status of arresting
14 misdemeanor offenders is up there, so, you know, I can't push that
15 agenda on them. It was up to them.

16 Q Oh, I didn't ask you if you were going to push the agenda on
17 them, I asked you if there was a discussion regarding that.

18 A During the actual meeting? I don't think so during the -- in the
19 initial meeting.

20 Q So, now, obviously, the Reno Police Department put forth ten
21 detective-grade officers there; correct?

22 A No, that's not correct. There was ten police personnel there;
23 several of which, I believe, were support personnel, and -- two or three
24 of those perhaps. So, six or seven, eight, perhaps, cops at the most.

25 Q Okay. So, when I had asked you mainly detectives, you're

1 now saying that they weren't detective-grade, but other officers?

2 A And I think I've stated that clearly in the first -- that there were
3 ten people there, but not all of those were police officers, some of which
4 were support personnel.

5 Q All right. And when you say support personnel, do you mean
6 commissioned officers?

7 A No, I mean --

8 THE COURT: Do you mean like secretaries or --

9 THE WITNESS: Civilians, secretaries, analysts or whatever.

10 THE COURT: What were they doing that you concluded they
11 were support staff?

12 THE WITNESS: Just going by general experience, I think that
13 they were there so that they would know what was going on --

14 THE COURT: Mm-hmm.

15 THE WITNESS: -- if they had to help and support those guys
16 if they made some phone calls, and then they have something clarified
17 run or checked, that these people that were doing it would know why
18 and what's happening.

19 BY MR. MANN:

20 Q All right. And during that meeting there was a discussion of
21 when you brought Mr. Sewall in where he would go?

22 A I don't know if at that point they clarified which room they
23 would be using. Yeah, they did. They told us that they had a soft
24 interview room.

25 Q All right. And -- but the -- every intention was go out, meet

1 with Mr. Sewall, and bring him into the police department?

2 A Well, ask him if he would come with us to the police
3 department.

4 Q Okay. But bring him there; correct?

5 A If he was willing to do so, yes.

6 Q Okay. So, that was every intention from the moment you guys
7 left that debriefing room was to do that?

8 A Well, if he had said let's go in the apartment and talk, we
9 would have went where he would have talked with us.

10 Q Okay. But, again, at the station is where you prefer?

11 A Yes.

12 Q And when you met with -- well, you waited outside at Mr.
13 Sewall's apartment?

14 A Yes.

15 Q And that was a gated community?

16 A Yes.

17 Q Okay. So, you had to go through the gate?

18 A Yes.

19 Q And was it guard gated?

20 A No.

21 Q And there was the Reno detectives that were in the parking lot
22 in their car, and you were in the parking lot in your car?

23 A Yes.

24 Q All right. And your car was a rental car?

25 A Yes.

1 Q And their car was an undercover car?

2 A Yes.

3 Q There -- in addition to that, there were other police personnel, I
4 believe, commissioned officers around the area providing information to
5 you and the Reno detectives inside -- in the parking lot?

6 A Yes.

7 Q Okay. All right. And when Mr. Sewall arrived you received
8 audio communications that he was coming in; correct?

9 A Correct.

10 Q How far before he actually crossed through the gate did he --
11 did you receive notice that he was almost on his way?

12 A My recollection is, when we were told he was coming in and
13 then being able to see him coming in and arriving, I would probably say
14 he was at the gate or at the main entrance into the complex because the
15 gate's not at the main entrance. So, it wasn't very long after we were
16 told he was coming that he arrived, that we could see him arrive.

17 Q All right. And how far did the Reno detectives park from
18 where you were?

19 A The two that were with us?

20 Q Yes.

21 A I'd say they were probably a little closer to where Mr. Sewall
22 ended up parking than we were.

23 Q Okay. But my question was how far from you did the Reno
24 PD park?

25 A Forty feet, 45 feet.

1 Q Okay. And so when he parks, Reno PD gets out of their
2 vehicle and start to approach Mr. Sewall?

3 A Yes.

4 Q And at the same time you guys, you and Detective O'Kelley,
5 same thing, get out of your car and move towards that direction?

6 A Yes.

7 Q All right. And it was Reno PD that engaged Mr. Sewall in
8 conversation initially?

9 A Yes, but I don't think they had an extensive conversation. I
10 think they told him who they were, and then by that point we were
11 coming in and they said these guys are from Las Vegas and they want
12 to talk to you.

13 Q Okay. Did you approach Mr. Sewall from behind?

14 A No.

15 Q Approached him from the front?

16 A From the side, a little a more towards the front.

17 Q Okay. Any other Reno Police Department personnel that
18 engaged in the conversation with Mr. Sewall?

19 A No, just those two.

20 Q Any others that approached the area where the conversation
21 was going?

22 A Not that I could tell.

23 Q Okay. Now, you had a conversation with Mr. Sewall saying
24 that you'd like to speak with him?

25 A Yes.

1 Q Okay. And according to your testimony, you told him that
2 you're working a case?

3 A Mm-hmm.

4 Q Is that correct?

5 A Yes, words to that effect, yes.

6 Q Well, you said mm-hmm. I'm just making sure that was a yes.

7 THE COURT: Yeah, for the taped --

8 THE WITNESS: Yes.

9 THE COURT: -- record we can't have mmm, mmm, mmm.

10 BY MR. MANN:

11 Q And that you believed you had information that he would be
12 interested in?

13 A Yes, I believe the phrase was -- what we wanted to -- have a
14 sit-down with him because I thought we had information he would like to
15 hear.

16 Q Okay. But you didn't tell him this was a homicide
17 investigation?

18 A We may have, I don't know. I may have started out by saying
19 we're investigating an old homicide. I may have started out by saying
20 we're investigating a crime. I can't recall.

21 Q Okay. And you never offered to Mr. Sewall saying look, we'd
22 like to sit down with you wherever you'd like, if you want to go to your
23 apartment or back to the station it's up to you? You never said that;
24 correct?

25 A We asked him if he'd be willing to accompany us back to the

1 station so we could talk.

2 Q Okay. So, you never offered the apartment; correct?

3 A I believe that's correct, yes.

4 Q All right. And it was never suggested that he had a choice of
5 location to have this conversation other than the station?

6 A Yes.

7 Q And so you didn't bring Mr. Sewall to the station; correct?

8 A Yes, correct.

9 Q Reno PD did?

10 A Yes.

11 Q All right. And before Reno PD put him in their undercover car
12 they asked him if he had any weapons; correct?

13 A Yes.

14 Q All right. And he said he had that utility knife; correct?

15 A Right.

16 Q To which they then had him put it in his car?

17 A Yes.

18 Q And after that, they got in the Reno PD car and you guys got
19 in your car?

20 A Yes.

21 Q All right. So, you don't know what was said in the Reno PD
22 car after this point?

23 A I asked them if he said anything.

24 Q You personally don't know; correct?

25 A No, because I wasn't in the car.

1 Q All right. And you didn't have any audio in the car where you
2 could --

3 A No.

4 Q -- hear anything that's being said?

5 A No.

6 Q All right. So, again, you don't know?

7 A Correct. I'm relying on the word of some other police officers,
8 yes, but --

9 Q Now, how far of a drive was it from the apartment down to the
10 station?

11 A It's not far; I'd say less than ten minutes.

12 Q Now, in that ten-minute time you're riding behind the car that
13 was taking Mr. Sewall?

14 A Yes.

15 Q All right. And you were in a rental car; you said?

16 A Yeah.

17 Q Now, you ended up parking towards the front of the building,
18 where they went through a back entrance; correct?

19 A No, we parked together.

20 Q You parked right next to each other?

21 A Yes.

22 Q Okay. Now, why is it then that you didn't go into the same
23 door that the Reno PD went in with Mr. Sewall?

24 A We had some coordinating we wanted to do first and --

25 Q What does that mean coordinate?

1 A Getting organized, getting ourselves ready to go in and
2 conduct the interview. And I'm not sure if we left some of our material in
3 their workspace, so we just, you know, had to get together and make our
4 final arrangements before we went in and sat down and talked to him.

5 Q Okay. So, why wouldn't you just follow in -- I mean, did you
6 have a key to the building?

7 A No.

8 Q And the entrance that they took Mr. Sewall, they obviously
9 needed some sort of access to get into that entrance; correct?

10 A Yes, I believe it's an employee entrance, yes.

11 Q All right. And the entrance that you went into, that was a
12 public entrance; correct?

13 A No, it's also an employee entrance.

14 Q And did you have access to get into that entrance?

15 A No.

16 Q How did you get in there if you didn't have access?

17 A We were let in there.

18 Q By whom?

19 A I think Sergeant Myers took us that way; probably at his
20 direction is why we went through with him. And we went up to the office,
21 got ourselves situated, came in and conducted the interview.

22 THE COURT: So, does Sergeant Myers wait there with you or
23 is he standing there holding the door open or are you banging on the
24 door and he opens the door, what happens?

25 THE WITNESS: We -- the three of us --

1 THE COURT: Okay.

2 THE WITNESS: -- with Sergeant Myers go in and up into the
3 common work area. I believe the other detective took -- went with Mr.
4 Sewall; they went through that other door. We went up in the office, got
5 ourselves situated, Dean and I, and then we're led to where the
6 interview room was and we conducted the interview.

7 BY MR. MANN:

8 Q All right. And I guess I should have asked this, but was
9 Sergeant Myers one of the Reno PD that initially addressed Mr. Sewall
10 in his parking lot?

11 A Yes.

12 Q All right. And so now we have Mr. Sewall being escorted into
13 a back entrance. The two Reno PD officers that were driving him, one of
14 them takes you guys into another entrance, and the other one escorts
15 Mr. Sewall?

16 A Yes.

17 Q And you don't know what happened to Mr. Sewall once he
18 goes into that other entrance; correct?

19 A Right, we next saw him when we entered the interview room.
20 He was already there.

21 Q Now, you said you had to coordinate yourselves; correct?

22 A Yes.

23 Q All right. How long does it take to coordinate yourself?

24 A It wasn't long; a matter of minutes.

25 Q Okay. Now, you had all your stuff in the back of your car

1 when -- because you had a rental car; correct?

2 A Yes.

3 Q All right. And you, in fact, had your case binder in the back of
4 the car?

5 A Yes.

6 Q So, what items did you possibly have at the Reno PD that you
7 needed to coordinate yourself?

8 MS. WECKERLY: Objection, relevance.

9 THE COURT: He can answer.

10 BY MR. MANN:

11 A Probably make sure we had our tape recorder, then verified
12 that they had coverage of the room, maybe a notepad.

13 Q So, you keep saying maybe. You don't remember
14 specifically?

15 A Yeah, you know, I don't -- it's such a common event. We're
16 getting ready to go do an interview, it's, you know, do you have to go to
17 the bathroom, do you need to sharpen your pencil, what are you going to
18 do. You know, you want to be ready when you go in and sit down to talk
19 to somebody, so we got ready.

20 Q All right. And so if you had to use the bathroom you would
21 have used it then?

22 A Yes.

23 Q All right. So, then you go into the room. Do you know what
24 time you actually go into the room?

25 A You know, the exact timing and time of day -- you know, at

1 this point, no, I don't know the exact --

2 Q Do you have your -- do you have a copy of the surreptitious
3 recording and --

4 A Yes.

5 Q Okay. In front of you?

6 A Yes.

7 Q Now, in the normal process of preparing voluntary statements
8 or recording or transcripts it is a common practice for police personnel to
9 say out loud what time it is, where you are, et cetera; correct?

10 A When we take statements, yes.

11 Q Okay. Now, in this case did you do that?

12 A The statement has a header with the time and date.

13 Q Okay.

14 A And it says 6:20, 1820 hours.

15 Q All right.

16 A And that's with --

17 Q So -- and just to be clear, when you say the statement, that is
18 the statement that is not entitled surreptitious recording?

19 A Right.

20 Q Okay.

21 A And it was done last.

22 Q Okay. So, do you have a copy of the transcripts of the
23 surreptitious recording?

24 A Yes.

25 Q All right. Now, if -- on there, it says that the tape recording

1 started on January 11th at 1704 hours. Does that sound accurate to
2 you?

3 A Well, it's -- it probably is. I mean, that's why we put it down
4 there. We --

5 Q Okay. So, you believe that 1704, which translates to people
6 that use a clock at a 12-hour basis -- would be 5:04 p.m.; correct?

7 A Yes.

8 Q All right. And so you believe that's essentially when, inside
9 the interview room, you and Detective O'Kelley engaged into
10 conversation with Mr. Sewall?

11 A Yes, based on that.

12 Q Okay. And during that conversation he was -- Mr. Sewall was
13 not Mirandized; correct?

14 A Right.

15 Q All right. And you guys start the process of talking about the
16 fact that you're investigating a case?

17 A Yes.

18 Q And you start the technique of slowly laying out evidence that
19 you believe you have against Mr. Sewall?

20 A Yes.

21 Q All right.

22 MS. WECKERLY: Your Honor, I'm going to object at this
23 point. The Court has the video, and so whatever -- I mean --

24 THE COURT: Right.

25 MS. WECKERLY: -- the Court is reviewing it for its own

1 determination, so it seems like why are we going through, sort of, the
2 rendition of what's actually --

3 THE COURT: Right.

4 Mr. Mann?

5 MS. WECKERLY: -- for the Court's review?

6 MR. MANN: Well, Your Honor, I think it's extremely relevant
7 to talk about because we actually have two detectives that are on two
8 different pages as to how the interview went down. Detective O'Kelley
9 specifically testified --

10 THE COURT: Doesn't -- I'm --

11 MR. MANN: -- to that.

12 MS. WECKERLY: But it doesn't matter.

13 THE COURT: Excuse me, Ms. Weckerly.

14 Doesn't -- the issue is doesn't the tape speak for itself. So,
15 regardless of what this former detective or former Detective
16 Kelley [sic] -- you're not a detective anymore, right, since you're working
17 cold cases?

18 THE WITNESS: Right, right.

19 THE COURT: Okay -- testifies to, even if it's inconsistent, isn't
20 the ultimate record of what happened. The tape itself -- so, that --

21 MR. MANN: Now, I don't --

22 THE COURT: I think that's Ms. Weckerly's objection.

23 MR. MANN: And --

24 THE COURT: I'm sorry.

25 MR. MANN: If I may, Your Honor.

1 THE COURT: Yes.

2 MR. MANN: Yeah, I do believe the tape, obviously, is
3 extremely impactful to Your Honor's decision; however, I believe that
4 talking about what was on it and thoughts and patterns and why it was
5 done is not on the tape, and that's why we have Detective Hefner here
6 so that we can have that conversation as to what was going on.

7 MS. WECKERLY: But that's not the legal question.

8 MR. MANN: Well, they --

9 MS. WECKERLY: The legal question is, was he in custody,
10 and the Court makes that determination by viewing the circumstances of
11 the interview, how they -- what words were used in the interview. And,
12 certainly, the before the interview is relevant --

13 THE COURT: Right.

14 MS. WECKERLY: -- for the Court's determination, but their
15 subjective impressions or why they might have asked questions in a
16 certain way doesn't matter. It doesn't matter if there's a difference
17 between the two detectives. The Court observes the interview and
18 makes its own determination based on the circumstances it reviews and
19 makes a determination about whether or not it was custodial or voluntary
20 for that matter.

21 THE COURT: I don't know that either detectives' subjective
22 intent or thoughts are relevant here. Certainly, anything that wouldn't be
23 seen on the tape is completely relevant because there's no way for me
24 to evaluate that. I mean, you can get into this a little bit, but I think we
25 are getting too, kind of, superfluous testimony.

1 MR. MANN: Well, I'll -- I'm going to get into some things that I
2 think are relevant to our motion. Obviously, I'm not reading the entire
3 transcript line by line. I'm highlighting those areas that I think are
4 important for Your Honor to understand in her decision of our motion to
5 suppress.

6 MS. WECKERLY: I mean, to that I'd just say you will have the
7 audio and you have the transcript.

8 THE COURT: I have the audio, yes.

9 MR. MANN: Well, and --

10 MS. WECKERLY: And you know what it says.

11 MR. MANN: -- just to be clear --

12 THE COURT: All right. Just --

13 MR. MANN: Your Honor?

14 THE COURT: Yes.

15 MR. MANN: Just to be clear, when you say you have the
16 audio, I want --

17 THE COURT: Oh, I'm sorry.

18 MR. MANN: The video.

19 THE COURT: Right, the video.

20 MR. MANN: Okay. I just wanted to be clear.

21 THE COURT: No, no, the video, which is -- right.

22 MR. MANN: And the video is both of the surreptitious and the
23 voluntary statement.

24 THE COURT: Right. So, I guess, let me ask you this. Where
25 are you going with this?

1 MR. MANN: There's a lot of areas I'm going with this, Your
2 Honor, but, specifically, we have someone that --

3 THE COURT: Cover your ears. I'm kidding.

4 I mean, if you want to excuse him when we talk about this
5 that's fine or, you know -- go on. I'm sorry, I interrupted you.

6 MR. MANN: Well, yes, I mean, I would prefer if he was
7 excused while I --

8 THE COURT: All right. Detective, when we argue about what
9 you're going to say, typically, we make the witness -- I almost called you
10 a victim.

11 THE WITNESS: I understand.

12 THE COURT: We make the witness sit out in the vestibule.

13 THE WITNESS: Okay.

14 THE COURT MARSHAL: Right this way, Detective.

15 THE COURT: That's sort of my standard procedure.

16 Hopefully no one's offended by that.

17 All right. Mr. Mann, where are we going with this?

18 MR. MANN: So, I mean, we are specifically talking about my
19 client asking for a lawyer. Mr. -- I'm sorry -- Detective Hefner had one
20 reaction, Detective O'Kelley had a completely different reaction. I am
21 asking --

22 THE COURT: Well, we can -- I'm sorry, I didn't mean to
23 interrupt you. Although, I did it on purpose, but --

24 MR. MANN: You did mean it, but it's okay.

25 THE COURT: Maybe I should have said I didn't mean to

1 rudely interrupt you or to -- right.

2 MR. MANN: Got it.

3 THE COURT: What -- I think then focus in on that part of the
4 interview, but with respect to the rest of the interview, I think the tape
5 does speak for itself. And in terms of what either detectives thought or
6 why they asked a question a certain way, I don't know -- you know, if
7 there's anything with body language or proximity that's not visible on the
8 tape, then, certainly, you can ask about anything like that, and, again,
9 anything that's not on the tape, clearly, that's appropriate, but I would
10 say then let's get to the part about the lawyer and how he took it and --

11 MR. MANN: Okay.

12 THE COURT: -- we can highlight that. I think that's fair and
13 we got into that with Detective Kelley [sic].

14 MR. MANN: Yeah.

15 THE COURT: So, Ms. Weckerly, anything else?

16 MS. WECKERLY: No, I would just say however they reacted
17 to it is depicted on the tape, and the Court still makes the determination.

18 THE COURT: And I think that's true

19 But fair enough?

20 MR. MANN: I believe I understand, but I'm sure there will be
21 concerns when I get into certain areas and we'll address them then.

22 THE COURT: All right. So, I'm sorry, Kenny, bring him back?

23 THE COURT MARSHAL: Absolutely, Judge.

24 [Colloquy between the Court, the Marshal, and counsel]

25 THE COURT: Were your ears burning?

1 All right. Mr. Mann, you may proceed based on the Court's
2 ruling.

3 MR. MANN: All right.

4 **CROSS-EXAMINATION CONTINUED**

5 BY MR. MANN:

6 Q Detective Hefner, we had talked previously that the interview
7 started roughly around 1504 -- I'm sorry -- 1704, which is 5:04 p.m.;
8 correct?

9 A Well, that's the time on the transcript, yes.

10 Q Okay. And you have the surreptitious recording in front of
11 you. Can you turn to page 13?

12 A Okay.

13 Q Can you read to yourself the line that -- with the -- in the
14 middle that says A but being straightforward with you?

15 A It starts off with but being straightforward with you?

16 Q Yeah.

17 MR. MANN: Your Honor, if I may approach and point to it?

18 THE COURT: Sure.

19 THE WITNESS: On page 13?

20 MR. MANN: Yep, on -- at the surreptitious recording?

21 THE WITNESS: Yeah.

22 THE COURT: I think it's in the middle.

23 MS. WECKERLY: And, Your Honor, the only -- the objection I
24 have is this is not what the Court just directed him to.

25 THE COURT: It is sort of, what I'm looking at, page 13,

1 because I marked it at the last hearing.

2 MR. MANN: So, Your Honor, the surreptitious recording that
3 Mr. Hefner has does not seem to coordinate with the page numbers --

4 THE COURT: Okay.

5 MR. MANN: -- that we --

6 THE COURT: I might be looking at the -- I'm -- maybe I'm
7 looking at the wrong recording, but page 13, question one: Yeah, I
8 mean, I just laid it out for you. Answer: But being straight forward with
9 you --

10 MR. MANN: Yeah, that one.

11 THE COURT: Is that what you're looking at?

12 MR. MANN: That --

13 THE COURT: Is that the part?

14 MR. MANN: That is the part, but --

15 THE COURT: Okay. Because I -- like I said, I marked it at
16 the last hearing.

17 MR. MANN: Detective Hefner, is this a printout that you have
18 that someone gave to you?

19 THE WITNESS: Yeah, it's -- we made it. Yes, it's ours now.

20 MR. MANN: Okay. Do you mind if I take a look at that?

21 THE WITNESS: No problem.

22 MR. MANN: Thank you.

23 THE COURT: It's a surreptitious recording, page 13 in the
24 middle.

25 MS. WECKERLY: Right.

1 THE COURT: So, that's what --

2 MS. WECKERLY: It's just whether one's printed as a PDF, I
3 think, or a Word document.

4 THE COURT: Right.

5 MS. WECKERLY: So, that's the distinction.

6 THE COURT: I can hand him my copy or --

7 MR. MANN: I actually -- I believe I brought an extra one.

8 BY MR. MANN:

9 Q So, Detective Hefner, that one's yours. I'm going to hand you
10 this one, which says surreptitious recording on top.

11 A Okay.

12 Q Can you flip to page 13?

13 A Okay.

14 Q All right. And within 13 pages of transcripts there is then a
15 conversation where Mr. Sewall says to you that he's not a rocket
16 scientist, but leading down the path where he believes he's being
17 charged with something; correct?

18 A Yes.

19 Q Okay. And then two statements after that he says whether I'm
20 here voluntarily or not I need a lawyer; correct?

21 A But that's --

22 Q Is that what he says? Correct?

23 A That's what's written, yes.

24 Q Okay. And then you immediately upon hearing that go into
25 the fact that you have warrants that you need to collect evidence for;

1 correct?

2 A Yes.

3 Q All right. And those warrants that you needed to collect
4 evidence for were for DNA?

5 A Yes, and --

6 Q And major case prints?

7 A Yeah, I want to correct what was just gone over. The thing
8 whether or not here voluntarily I need a lawyer is a continuation of his
9 answer beginning up above where it says so, I think, at this point in time,
10 whether I'm here voluntarily or not I need a lawyer. So it's --

11 Q Okay.

12 A That's all -- now, there -- he was interrupted by --

13 Q All right. Detective Hefner, I'm sure Ms. Weckerly's going to
14 get into all that --

15 A Yeah.

16 Q -- for you, but I'm asking you very specific questions.

17 A Go ahead.

18 Q All right.

19 A I'm sorry.

20 Q And so based on that, you then switch gears and say okay,
21 Mr. Sewall, we have warrants for you; correct?

22 A Yes.

23 Q All right. You say you have a DNA, major case prints, and
24 photos that need to be done?

25 A Yes.

1 Q All right. And then after that we have the next page -- so, I
2 mean, 13 pages into your initial conversation he says I need a lawyer,
3 and then the next page, on page 14, we have Detective O'Kelley
4 continuing on with the conversation; correct?

5 A I would take exception to how the question is phrased
6 because he says I think, at this point, whether I'm here voluntarily or not
7 I need a lawyer.

8 Q All right. So, you're saying that you took it that he was saying
9 I think I need a lawyer?

10 A That's what was said.

11 Q Now, I'm asking you if you took it at the time as him saying I
12 think I need a lawyer or actually saying I need a lawyer.

13 A There came a point in time, yes, when I mistakenly thought he
14 had said he needed a lawyer.

15 Q Well, immediately upon being -- giving that statement of
16 saying --

17 A Mm-hmm.

18 Q -- I need a lawyer or some variation of that, you then shift
19 gears and say okay, we have these warrants, we're going to take --
20 collect evidence from you; correct?

21 A Yes.

22 Q All right. And then the conversation goes on where you talk
23 about his lost daughter, where you talk about the family needing
24 resolution, and at roughly 5:33 -- the conversation started at 5:04. At
25 5:33 you say -- you tell him on page 21 towards the bottom that I

1 appreciate you continuing to talk to me and that we -- that the family
2 personally wants answers; correct?

3 A I don't know if that's me or Dean, but --

4 Q Fair enough.

5 A -- yes.

6 Q But one of you say that?

7 A Yes.

8 Q And then at 5:36 on page 23 --

9 A Well, let me back up and correct myself here because I'm
10 saying I know you said you think you need an attorney after she'd talked
11 to -- well --

12 Q I believe that's Detective O'Kelley that says that.

13 A You're right.

14 Q And we can go back to see who Q1 is.

15 A That's okay. I won't contest that.

16 Q Okay. And then at page 23 at 5:36 you then say and they're
17 bringing some -- bringing over some lab people and we'll do the
18 fingerprinting and this shouldn't take long. You know, you did ask for an
19 attorney, and whatever comes after that we can't use?

20 A Yes.

21 Q All right. So, it's fair to say that on page 23 you at least
22 believe that Mr. Sewall had asked for an attorney?

23 A I mistakenly believed, yes.

24 Q Okay. But you believed it at that time?

25 A Yes.

1 Q And then you gave him information that was not correct; right?

2 A I'm sorry. I don't follow the question.

3 Q Okay. Did you give him information that was not legally
4 correct?

5 THE COURT: Well, I don't -- I -- I'm going to object to the
6 term legally.

7 MR. MANN: Okay. Fair enough.

8 THE COURT: I think that what you --

9 MR. MANN: All right.

10 THE COURT: -- want to know is, was the information correct
11 or incorrect.

12 MR. MANN: Now, I'll rephrase --

13 THE COURT: Okay.

14 MR. MANN: -- Your Honor.

15 THE COURT: All right.

16 BY MR. MANN:

17 Q You specifically told him hey, look, I appreciate you asking for
18 a attorney, but whatever you say after that we can't use.

19 A Yeah.

20 Q So, is that a true statement or a false statement?

21 A Oh, I said that, but, like I said --

22 Q Is that a true statement or a false statement?

23 A I said that, that's true.

24 MS. WECKERLY: I'm going to object. This calls for --

25 THE COURT: Yeah, that's sustained.

1 MS. WECKERLY: -- a legal conclusion.

2 THE COURT: Yeah, it's sustained. That was --

3 MS. WECKERLY: That's the Court's purview.

4 THE COURT: Yeah.

5 BY MR. MANN:

6 Q All right. So, you told a suspect that you had, in the police
7 station at that moment in time, hey, look, whatever you say after this we
8 can't use?

9 A Yes.

10 Q All right. Now, between that conversation and asking for an
11 attorney, you actually escorted Mr. Sewall to the bathroom to have him
12 remove the Copenhagen chew out of his mouth; correct?

13 A Well, I accompanied him to the bathroom, like they mentioned
14 earlier, because I had to go, and, yes, it -- the goal was for him to get rid
15 of the chew and rinse his mouth out before we did the buccal swab.

16 Q All right. And, Detective Hefner, I'm a little confused because
17 the interview started at 5:04 where you had the opportunity to coordinate
18 yourself where you go the bathroom, do things like that, and 22 minutes
19 later you need to go the bathroom again?

20 A Hey, I'm getting to be an old man.

21 Q Fair enough, fair enough. All right. So -- but 22 minutes later
22 you're going to the bathroom with Mr. Sewall. He's not there alone. You
23 were there in the bathroom. Whether you had to go or not you're there
24 with him.

25 A Yes.

1 Q All right. And then do you know at what time the
2 non-surreptitious recording started?

3 A At what time, no. It's about page seven or eight of the
4 surreptitious transcript.

5 Q Okay. Let me rephrase then because I don't think I was clear.
6 There was a surreptitious recording and you have those transcripts and
7 it's fair to say that those transcripts are 51 pages long?

8 A Yep.

9 Q All right. And in the course of the discussion with Mr. Sewall,
10 we have this so-called surreptitious recording where then it turns to a
11 point where Detective O'Kelley brings out his own recording device and
12 records a voluntary statement?

13 A Yes.

14 Q All right. And the only reason why I'm using the word
15 voluntary statement is that's what it's entitled --

16 A Yes.

17 Q -- in there. Okay. And do you know what time the so-called
18 voluntary statement starts?

19 A Only by what's written on the transcript.

20 Q Okay. And on there what time does it say?

21 A 1820.

22 Q Okay. And 1820 would be how long after 1704?

23 A An hour and 15 minutes.

24 Q Fifteen, 16 minutes?

25 A Fifteen, 16 minutes.

1 Q Okay. And then you continue -- so, if it was 5:04 this is
2 roughly 6:20 when this part of the discussion goes on?

3 A Okay.

4 Q Is that correct?

5 A Yes.

6 Q You can buy that?

7 A According to what's on the transcript, yes.

8 Q All right. And do you know what time the lab people come in
9 to take his pictures and his fingerprints?

10 A No.

11 Q Okay.

12 A Not exactly.

13 Q When's the last time you watched the recording in its entirety?

14 A It's been a while.

15 Q Okay. What did you do to prepare for this hearing today?

16 A I reviewed my reports and these transcripts.

17 Q Did you have discussions with the District Attorney?

18 A Yes.

19 Q Okay. When's the last time you had a discussion about this
20 case with Detective O'Kelley?

21 A I have not seen or spoken to Detective O'Kelley since we
22 were last here in court together. We have exchanged a few emails, but
23 not on this case.

24 Q Okay. Now, you had a meeting you said with the District
25 Attorney. When was that?

1 A About a week ago.

2 Q Okay. And did they go over the content of your hearing
3 today -- of your testimony?

4 A Well, we reviewed the statements and what they expected my
5 testimony might cover.

6 Q All right. Now -- but you did review the entire video at some
7 point in time, just not recently?

8 A Correct.

9 Q All right. And in that entire video, you would know that at the
10 end of the video is when the lab people come in to take the major case
11 prints along with his picture?

12 A You know, I'd have to -- right now, no, I don't know. I know on
13 the transcript here that I'm stopping him and saying hey, we're going to
14 go do this, but it could be that shortly thereafter that Dean interjected
15 and Mr. Sewall corrected me that he did not request an attorney, he said
16 he was only thinking about it, and we continued on, and then perhaps
17 after we got the statement done we did the search warrant work for the
18 samples that we took.

19 Q All right. But it's fair to say that -- well, I get the video can
20 testify for itself.

21 A Yeah, I don't recall exactly.

22 Q All right. And that until you had retrieved that evidence from
23 Mr. Sewall that he needed to remain there?

24 A Yes --

25 Q Okay.

1 A -- we needed to execute the search warrant.

2 MR. MANN: No further questions, Your Honor.

3 MS. WECKERLY: No redirect.

4 THE COURT: All right. Thank you for your testimony. You
5 are excused at this time.

6 Do we have any other witnesses?

7 MS. WECKERLY: No, not on behalf of the State.

8 THE COURT: Mr. Mann?

9 MR. MANN: Court's indulgence. No, Your Honor.

10 THE COURT: All right. I'm assuming you want to make
11 argument?

12 MR. MANN: Well, Your Honor, we had talked about doing --
13 sorry, excuse me -- supplemental briefing regarding the testimony. We
14 have the transcripts of Detective O'Kelley. We'd like the transcripts of
15 Detective Hefner. And you had, obviously, talked about reviewing the
16 video, and I believe that probably looking at our supplemental while you
17 review the video is probably most helpful to Your Honor.

18 THE COURT: Ms. --

19 MS. WECKERLY: I do not --

20 THE COURT: Are you -- I mean --

21 MS. WECKERLY: I --they can file, I guess, whatever they
22 want. I don't see any real need. The Court has the video. So, if they
23 file something we'll respond. Otherwise, I'm prepared to argue today.

24 THE COURT: I mean, if you want to file something I'll let you
25 file something. Although, honestly, I don't know the need for you to file

1 something based on the testimony because I think the testimony is what
2 the testimony is; you know what I'm saying?

3 MR. MANN: Well, I mean, obviously, testimony is what the
4 testimony is, but logging or plugging in the factual testimony into the
5 legal arguments is what I think would be most helpful to Your Honor.

6 THE COURT: All right. Susie, how long to prepare a
7 transcript of today's hearing?

8 THE COURT RECORDER: It's exactly an hour, so a week or
9 two.

10 THE COURT: Well, we have a trial starting next week.

11 THE COURT RECORDER: Oh.

12 THE COURT: And another evidentiary hearing on Monday,
13 so --

14 THE COURT RECORDER: I might be able to get somebody
15 to help.

16 THE COURT: Okay. So, when can you get your -- if we get
17 the -- you've already got the Dean O'Kelley transcript; correct?

18 MR. MANN: Yes, yes.

19 THE COURT: So, if you --

20 MR. MANN: So, if -- let's just assume two weeks for
21 transcripts; does that seem fair?

22 THE COURT RECORDER: Yeah, that's fair.

23 THE COURT: Okay.

24 MR. MANN: And then can we have another two weeks to file
25 our supplemental?

1 THE COURT: And then ten days for the State's response.

2 MS. WECKERLY: Sure.

3 THE COURT: If there is going to be one.

4 MS. WECKERLY: Probably something.

5 THE COURT: All right. And -- okay. Do we need to come
6 back for oral argument? I mean, to me, if we're going to do the
7 supplements, then I don't know that there's any need for additional oral
8 argument of what's in the supplement, unless the Court has questions or
9 something like that, in which case I can place it on calendar for further
10 proceedings.

11 MS. WECKERLY: That's fine with the State.

12 THE COURT: Once I review everything, if I say oh, gee, what
13 about this or I'm confused about that then I can put it on calendar.

14 MS. WECKERLY: That's fine with the State, Your Honor.

15 MR. MANN: Your Honor, if there is no oral argument, how
16 long after the supplementals are filed do you think that you would have a
17 decision?

18 THE COURT: Hold on a second.

19 MR. MANN: Sure.

20 THE COURT: I'm pulling the case up in Odyssey -- or not
21 because it's not cooperating with me. When is our trial date?

22 MS. WECKERLY: December.

23 MR. MANN: November. Oh, December. I was going to say
24 that.

25 MS. WECKERLY: Isn't it?

1 MR. PESCI: Nope, November.
2 THE COURT CLERK: November.
3 MR. MANN: It's November.
4 MS. WECKERLY: Oh, November. Sorry.
5 THE COURT: Let's do --
6 And we don't have any upcoming status checks on trial
7 readiness; correct?
8 THE COURT CLERK: No.
9 THE COURT: So, what we need to do -- here's what I'm
10 going to do. I'm going to set this out about six weeks for if there's any
11 additional argument and status check trial readiness.
12 MR. MANN: Okay.
13 THE COURT: Six to -- let's go seven weeks. That will give
14 everybody plenty of time to get their supplements in and the Court to
15 review everything, and then if I have an issue or a question or something
16 like that I can raise it at the time, and then also it's going to be a status
17 check on trial readiness.
18 THE COURT CLERK: So, seven weeks?
19 THE COURT: What's that? Seven weeks?
20 THE COURT CLERK: From today or on the normal calendar?
21 THE COURT: Yes, from today.
22 THE COURT CLERK: Okay. April 26th.
23 THE COURT: Well, not on a Friday though.
24 THE COURT CLERK: Okay. I'm sorry.
25 THE COURT: So, it will be a Tuesday or a Thursday just on

1 the regular calendar.

2 THE COURT CLERK: Okay. April 25th at 9:00 a.m. -- 9:30?

3 MR. ORAM: 9:30?

4 THE COURT CLERK: Yes.

5 MR. MANN: And then -- so, by March 29th we should have
6 our supplemental filed.

7 THE COURT: Right.

8 MR. MANN: And then by April 8th the State should have theirs
9 filed.

10 THE COURT: Does that give you enough time, State?

11 MS. WECKERLY: Yes. Thank you, Your Honor.

12 THE COURT: All right.

13 MR. ORAM: Thank you, Your Honor.

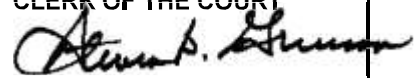
14 THE COURT: Okay.

15
16 [Proceedings concluded at 10:19 a.m.]
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20

21 ATTEST: I do hereby certify that I have truly and correctly transcribed
22 the audio/video proceedings in the above-entitled case to the best of my
23 ability.

24 

25 Trisha Garcia
Court Transcriber



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Attorney for Defendant:
ARTHUR SEWALL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

*** * ***

THE STATE OF NEVADA,
Plaintiff,

vs.

ARTHUR SEWALL,

Defendant

Case No.: C-18-330650-1

Dept. No.: XXI

Argument:

June 13, 2019

**SUPPLEMENTAL BRIEF TO
DEFENDANT'S MOTION TO SUPPRESS ILLEGALLY OBTAINED STATEMENTS**

COMES NOW, Defendant ARTHUR SEWALL, by and through his attorneys of record, CHRISTOPHER R. ORAM, ESQ., and JOEL M. MANN, ESQ., who hereby files the instant supplemental brief to defendant's motion to suppress illegal obtained statement. This supplement is made and based upon the attached Point and Authorities, the papers and pleadings on file herein, evidentiary hearing, together with arguments of counsel for defendant's motion to suppress Defendant's statement.

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STATEMENT OF THE CASE

On October 19, 2019, the Defendant filed a Motion to Suppress Illegally Obtained Statements. The Court determined that it would be appropriate to conduct a Jackson v. Denno hearing. On January 18, 2019, the State called former Detective and cold case investigator, Dean O'Kelley to testify. Due to scheduling issues, the hearing was bifurcated. On March 8, 2019, the Jackson v. Denno hearing resumed with the State calling former Detective and cold case investigator, Ken Heffner to testify. At the conclusion of testimony, the Defense requested that it be able to file a supplemental brief.

SUPPLEMENTAL POINTS AND AUTHORITIES

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I. Mr. Sewall's Statement Was Not Voluntary and the Product of Coercive Tactics.

Mr. Sewall's statement was a product of coercion that developed an involuntary statement that must be suppressed. Mr. Sewall's will was overborne by such coercive police tactics that forced him to give a statement that was not a product of his free will. The coercive police tactics include the police deception stating that they would not use Sewall's statement, the police denying Sewall's request for an attorney, the police denying Sewall's request to speak with his wife, the police using the memory of Sewall's murdered daughter as a psychological inducement to confess, and the police denying his ability to leave the questioning. In looking at the totality of the circumstances it is clear and obvious that the police overborne Sewall's will and his statement must be suppressed.

1 A confession is only admissible if it is made freely and voluntarily, without
2 compulsion or inducement.¹ A confession must be the product of a rational intellect
3 and free will.² “A confession is involuntary whether coerced by physical intimidation
4 or psychological pressure.”³

5
6 The United States Supreme Court provides that Miranda encompasses four distinct
7 warnings. These four warnings include: 1) that the defendant has the right to remain
8 silent, 2) that anything he says can be used against him in a court of law, 3) that he
9 has the right to the presence of an attorney, and 4) that if he cannot afford an
10 attorney one will be appointed for him prior to any questioning if he so desires.⁴

11
12 In determining whether police officers adequately relay the four warnings, the
13 United States Supreme Court has announced that reviewing courts are not required
14 to examine the words employed "as if construing a will or defining the terms of an
15 easement". The inquiry is simply whether the warnings reasonably convey to a
16 suspect the rights required by Miranda.⁵ Here, Detective Hefner specifically
17 informed Mr. Sewall that whatever Mr. Sewall says cannot be used against him.

18
19 Detective Hefner: “Um, you know, you – you did ask for
20 an attorney and **whatever comes after that we can’t use.**
21 (Surreptitious Recording, pg. 23)(emphasis added)

22
23 The Ninth Circuit has considered the issue of Miranda warnings provided by a
24 detective which downplayed the warnings significance and deviated from an
25

26
27
28 ¹ Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987) *citing* Franklin v. State, 96 Nev. 417, 421, 610 P.2d 732, 734-35 (1980)

² Id. at 214, 735 P.2d at 323-24

³ Townsend v. Sain, 372 U.S. 293, 307 (1963)

⁴ Powell v. Florida, 559 U.S. 50, 59-60, 130 S. Ct. 1195, 175 L. Ed. 2d 209,210

⁵ Duckworth v. Eagan, 492 U.S. 195, 203, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (quoting Prysock, 453 U.S. at 361, 101 S. Ct. 2806, 69 L. Ed. 2d 696).

1 accurate reading of Miranda.⁶ In Doody, the detective informed the defendant that
2 he was only entitled to counsel if he was involved in the crime.⁷ The detective also
3 minimized the importance of Miranda and deviated from an accurate reading. The
4 Ninth Circuit found that the detectives "downplayed, obfuscated and garbled
5 warnings" ran afoul of the mandates of Miranda.⁸

6
7
8 "What Miranda requires is meaningful advice to the unlettered and unlearned
9 in language which they can comprehend on which they can knowingly act"⁹. In
10 order for the warning to be valid the combination or the wording of its warning
11 cannot be affirmatively misleading.¹⁰

12
13 In Isaac San Juan-Cruz, the Ninth Circuit explained, "when a warning not
14 consistent with Miranda, is given prior to, after, or simultaneously with Miranda
15 warning, the risk of confusion is substantial so much that the onus is on the
16 government to clarify to the arrested party the nature of his or her rights under the
17 fifth amendment."¹¹

18
19
20 The statement by Detective Hefner, that anything Mr. Sewall said could not
21 be used against him, was clearly and obviously the antithesis of an explanation of a
22 person Miranda rights. This statement was nothing more than a coercive and
23 impermissible police tactic that tricked Sewall into giving a statement that was not a
24 product of his free will. By having a detective tell a person that anything you say
25
26
27

28

⁶ Doody v. Ryan, 649 F.3d 986, 1003 (2011)

⁷ Id. at 1005

⁸ Id. at 1006

⁹ See, United States v. Isaac San Juan-Cruz, 314 F. 3d 384,387 (2002) (Citing, Coyote v. United States, 380 F.2d 305, 308 (10th Cir. 1967)

¹⁰ Isaac San Juan-Cruz, 314 F.3d 384,387

¹¹ Id. at 389.

1 CANNOT be used against you, it invites a person to state whatever the detective is
2 asking him in order to get out of the uncomfortable situation. This situation, in
3 looking at series of other issues below including Sewall's request for an attorney,
4 demonstrates that Sewall was desperate to relieve himself of the coercive
5 environment presented by the detectives in the interrogation room. When a
6 detective not only fails to provide the prophylactic that Miranda requires but instead
7 provides to a suspect the exact and direct opposite instruction, creating a confession
8 based on a lie. A confession that is not a product of free will, but a confession that is
9 a product of coercive police tactics.
10

11
12 When you have a detective telling you that no matter what you say it cannot
13 be used against you, and then you have request that you speak with your wife and
14 the detectives tell you over and over again that once you have given a statement you
15 can speak with your wife, it is clear that your statement is a product of coercion.
16 There is no basis for the State to be able to argue Sewall's statement was voluntary
17 after the clearly and obvious coercive police tactics.
18
19

20
21 Despite being told that they can't use his statement, prohibiting him from
22 being able to call his wife, the police continued with even more coercion. The police
23 used the horrific murder of Sewall's daughter as another coercive tactic to force him
24 to give a statement. They used the pain that he felt from losing his child at the
25 hands of another to argue that Sewall must provide relief to the family of Nadia.
26 This tactic of using Sewall's murdered daughter as an emotional plea, placed on top
27
28

1 of the lie that Sewall's statement could not be used against him adds to the totality
2 of the circumstances that his statement was a product of coercion.

3
4 In looking at the totality of the circumstances, this Court can see that Sewall's
5 statement was nothing but a coerced statement. The police lied to Sewall by telling
6 him his statement would not be used against him. The police only would let Sewall
7 talk to his wife after he gave them what they wanted. The police then used the
8 emotion and memory of Sewall's murdered daughter as an emotional plea to give
9 something for Nadia's family to get closure. All these factors coerced Sewall to give
10 an involuntary statement to the police and must be suppressed.

11 II. Mr. Sewall was In-Custody at The Time Of Questioning

12 A person is in custody for Miranda purposes when "the circumstances
13 surrounding the interrogation" would case a reasonable person to have felt that he or
14 she was not free to leave.¹² "There has been a formal arrest, or where there has been
15 a restraint on freedom of movement of the degree associated with a formal arrest so
16 that a reasonable person would not feel free to leave."¹³

17 All of the following circumstances and more would lead a reasonable person to
18 believe he was not free to leave: detectives arrive at Sewall's apartment and drive
19 him down to the Reno Police Station, detectives take Sewall into an interrogation
20 room where they have him shut off his cell phone, shortly into questioning Sewall
21 asks for an attorney, detectives tell him he cannot leave until they satisfy a warrant
22 and get his fingerprints and DNA, Sewall asks to call his wife where detectives tell

¹² Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 465, (1995), Silva v. State, 113 Nev. 1365, 951 P.2d 591 (1997) ("The test for whether one is in custody is if a reasonable person would believe he was free to leave.")

¹³ State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998)

1 him that once he has given a statement he can speak as long as he likes, Sewall
2 states that he is certain he is going to jail tonight and the detectives tell him that the
3 Reno PD may arrest him for failing to register, detectives talk to Sewall about
4 making accommodations in jail for him (before he gave substantive information).
5 These facts clearly show that a reasonable person would believe that he was not free
6 to leave.
7

8
9 In Mr. Sewall's interrogation a reasonable person would not have felt free to
10 leave. Mr. Sewall's statement was the product of coercive police tactics that coerced
11 him into giving a statement. When you look at the totality of the circumstances
12 surrounding the interrogation it is clear that Sewall was not free to leave. Therefore
13 Mr. Sewall's statement must be suppressed as the police conducted a custodial
14 interrogation without informing Mr. Sewall of his Miranda rights.
15
16

17
18 ***Not Allowed To Leave***

19 During the hearing the two Detectives, made it abundantly clear that when
20 Mr. Sewall was not free to leave without Mr. Sewall satisfying the warrants that the
21 Detectives had for his DNA, case fingerprints, and photos.
22

23 Q. Now, Detective O'Kelly, when you have search warrants you
24 have permission, court authority to do reasonable means to
25 satisfy those warrants, correct?

26 A. Correct.

27 Q. Okay. And Mr. Sewall would not be leaving there until you
28 satisfied those warrants, correct?

A. That's correct.
(Transcripts 1/18/19, pg 56)

...

1
2 Q. Okay. And until you got those, Mr. Sewall could not leave?

3 A. Correct.

4 (Transcripts 1/18/19, pg 57)

5 The Detectives started the interview with Mr. Sewall knowing that they must
6 satisfy these search warrants before he was able to leave the police station. From the
7 very moment the Detectives started the interview with Mr. Sewall they were not
8 honest with Mr. Sewall. They lied to him about being able to leave the interview.
9

10
11 Q. I think it's better for you and you know the names and - this
12 is all voluntary and you get tired of it or you wanna go, you
13 know, you just let us know and we've got to accommodate it.
(Surreptitious Recording, pg. 3)

14 The Detectives telling Mr. Sewall that he can leave was flat out not true. The
15 Detective's admissions in the Jackson v. Denno hearing that Mr. Sewall was not free
16 to leave until they satisfied the search warrant was proof that no matter what Mr.
17 Sewall stated he was not free to leave.
18

19
20 Q. Well you had testified that he could not leave until the
21 warrants were satisfied?

22 A. He wasn't going to be able to leave until after we had the
23 warrants satisfied, yes.

24 (Transcripts 1/18/19, pg 81)

25 ...

26 Q. All right. And that until you had retrieved that evidence
27 from Mr. Sewall that he needed to remain there?

28 A. Yes -

(Transcripts 3/8/19, pg 49)

The State is going to argue that Mr. Sewall could leave at anytime, he just
needed to complete the search warrant requirements and he was free to leave. This

1 is obviously not true, as when Mr. Sewall requested an attorney (or even if you
2 believe that Mr. Sewall only said he thinks he needs an attorney), Detective Hefner
3 took that statement as Mr. Sewall was requesting to leave and first informed Mr.
4 Sewall that he was not really free to leave but rather he had to stay first to complete
5 the warrant requirements. That request of an attorney by Mr. Sewall occurred at
6 5:21 p.m. At 5:22 p.m. Detective Hefner is stating that "we will get that done quickly
7 and get you on your way." (Surreptitious Recording, pg. 14). But it was not until
8 after 7:30 p.m. that the lab people came in and finally satisfied the search warrant.
9

10
11
12 Q. So no matter when he did the DNA swab, you still needed
13 those major case prints and he couldn't leave until that
14 happened?

15 A. Correct.
16 (Transcripts 1/18/19, pg 58)

17 ...

18 Q. You had – you agreed and you had stated that Mr. Sewell
19 was not allowed to leave until you had satisfied those search
20 warrants, correct?

21 A. Those are thoughts in my head, yes.

22 Q. Okay.

23 A. That those needed to be done before he could leave.
24

25 Q. And, again, that was the DNA swab, the finger, the major
26 case prints, and the photos, correct?

27 A. Yes.

28 Q. Now you didn't get the fingerprints or the photos until 7:30
P.M. that night, correct?

1 A. After the conclusion of the final interview, that's when the
2 buccal swabs, the fingerprints, and the photographs were
3 taken by the CSAs for Reno.

4 Q. Okay. And so Mr. Sewell was not allowed to leave until that
5 happened?

6 A. That's the way the timing worked out is it was done after he
7 was done with his statement.
8 (Transcripts 1/18/19, pg 69-70)

9 If the State is to be believed that Mr. Sewall was free to leave at anytime, it
10 begs the question why the Detectives would fulfill the warrants at the end? If Mr.
11 Sewall could say I want to go now and get up and leave, then the Detectives would
12 not have risked Mr. Sewall leaving the police station without the Detectives fulfilling
13 the warrant requirements. If the warrants were not going to be used as a custody
14 mechanism, then the Detectives would have taken the DNA, photos, and case prints
15 in the very beginning and then attempted to interview Mr. Sewall. Instead, the
16 Detectives used the warrants as handcuffs to keep Mr. Sewall in that room to answer
17 their questions. Once Mr. Sewall requested an attorney the situation changed for the
18 Detectives and they were forced to place those warrant handcuffs on Mr. Sewall and
19 keep him in the room. Once they did that, they continued to barrage Mr. Sewall with
20 questions. Even when Mr. Sewall was asking to call his wife, they continued to
21 coerce him to make a statement. Even when Mr. Sewall was informing the
22 Detectives that he believed he was going to jail, the Detectives continued to barrage
23 him with questions hoping to coerce a statement. Never did the Detectives read Mr.
24 Sewall his Miranda rights.

1 It is clear that Mr. Sewall believed he was in custody and then exercised his
2 right to an attorney, and that request was ignored by Detective O'Kelley when he
3 continued to question Mr. Sewall. At the same time that Detective O'Kelley was
4 ignoring Mr. Sewall's request, Detective Hefner believed that Mr. Sewall was in
5 custody and requested an attorney. Detective Hefner stopped his questioning of Mr.
6 Sewall and moved to the fact that Mr. Sewall was not free to leave without fulfilling
7 the warrant requirements. Furthermore, Detective Hefner believed that Mr. Sewall
8 was in custody and had invoked his right to counseling, that Detective Hefner told
9 Mr. Sewall that anything he told the Detectives they could not use against him later.
10
11
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14 A reasonable person, in Mr. Sewall's situation, did not feel free to leave. In
15 addition two Detectives in the room with Mr. Sewall stated that Mr. Sewall was not
16 free to leave. Since reasonable people would not feel free to leave in Mr. Sewall's
17 situation, Mr. Sewall was clearly in custody for purposes of Miranda.
18

19 *A Reasonable Person Believed that Sewall was in custody*
20

21 The most telling evidence that Mr. Sewall was in custody at the time of the
22 questioning is when Sewall stated that he wanted an attorney. When Detective
23 Hefner heard that Mr. Sewall wanted an attorney, believing that Mr. Sewall was in
24 custody, Detective Hefner stopped his questioning and shifted gears to collect the
25 evidence that the warrant required. Detective Hefner's reaction to Mr. Sewall's
26 request for an attorney demonstrates that a reasonable person believed that Sewall
27 was in custody. If Hefner did not believe Sewall was in custody, then according to
28 the State's argument, there was no reason to stop questioning because a defendant

1 does not have a right to an attorney when they are not in custody, even if they ask for
2 one. The Detective being an experienced detective believed that only a person that is
3 in custody is the only time that a person that can invoke his right to an attorney.
4

5 A. Investigator Heffner said nothing about Mr. Sewell being in
6 custody, but he did clearly believe that Mr. Sewell had
7 invoked his right to an attorney.

8 Q. Okay. And you being an experienced detective know that the
9 only time a person can actually invoke his right to an attorney
10 and stop the questioning is when someone's in custody,
11 correct?

12 A. That's correct.

13 Q. Okay. And Detective Heffner definitely knew that as well?

14 A. Yes.
15 (Transcripts 1/18/19, pg 62)

16 ...

17 A. There came a point in time, yes, when I mistakenly thought
18 he had said he needed a lawyer.

19 Q. Well, immediately upon being -- giving that statement of
20 saying --

21 A. Mm-hmm.

22 Q. -- I need a lawyer or some variation of that, you then shift
23 gears and say okay, we have these warrants, we're going to
24 take -- collect evidence from you; correct?

25 A. Yes.
26 (Transcripts 3/8/19, pg 43)

27 ...

28 Q. All right. So, it's fair to say that on page 23 you at least
believe that Mr. Sewall had asked for an attorney?

A. I mistakenly believed, yes.
(Transcripts 3/8/19, pg 44)

1 ...

2 Q. You would agree that Investigator Heffner is a reasonable
3 person?

4 A. Yes.
5 (Transcripts 1/18/19, pg 61-62)

6
7 Mr. Sewall and Detective Hefner both believed that Sewall was in custody at
8 the moment that Sewall stated he wanted an attorney. Hefner immediately stopped
9 questioning and informed Mr. Sewall that the Detectives' had warrants for his DNA,
10 fingerprints, and picture and once that was done he would be free to leave.
11

12 Sewall exercised his constitutional right to an attorney and the detectives flat
13 out ignored that request. The reaction of Detective Hefner clear that the detectives
14 had control over Sewall, and that he was not free to leave. Therefore, Detective
15 Hefner proves that a reasonable person believed Sewall was in custody.
16

17
18 ***Interrogation at the Police Station***

19 It was made clear in the hearing that the Reno Police Department had
20 invested significant man hours and time into "helping" the Las Vegas Metropolitan
21 Police Department Cold Case Investigators. Reno provided only Detective grade
22 police officers, they had several support staff assisting, they staked out Mr. Sewall's
23 property well in advance, had detectives sitting outside the gate of Sewall's complex
24 to watch for Sewall to come home, and they had two detectives in the parking lot
25 with the two LVMPD detectives. This clearly was not a simple, "please come down to
26 the station to talk to us." Rather this was a thoroughly thought out and planned
27 confrontation of Mr. Sewall.
28

1 When they asked Sewall to “volunteer” to go to the police station, they
2 searched him and placed him inside the Reno PD police car. When they arrived, they
3 took Mr. Sewall not through the public entrance of the police station but rather they
4 took Mr. Sewall through the back door where in-custody suspects enter. In fact, the
5 Detectives testified that they were not even allowed to follow Mr. Sewall through the
6 same door he entered. The LVMPD Detectives had to go through the front public
7 entrance. (Transcripts 1/18/19, pg 35). This demonstrates that Mr. Sewall’s
8 movements were being controlled. This also demonstrates that the Reno Police
9 Station was not a warm and friendly environment, but rather a calculated and
10 deliberate operation to demonstrate that Mr. Sewall had no control over the
11 situation.

12 The Carroll Court has indicated that the questioning at a police station is a
13 strong indicator of a person not feeling free to leave. “Police drove him [Carroll] to
14 the homicide office for questioning, so Carroll could not terminate the interrogation
15 or leave the homicide office unless the detectives agreed and gave him a ride
16 home.”¹⁴ In this case, similar to Carroll, Mr. Sewall was surrounded by four different
17 officers, that he saw, and transported in their car to the Reno Police Station. The
18 police could have conducted the interrogation of Mr. Sewall in his apartment where
19 he lived alone, instead the police chose to intimidate Mr. Sewall into going to the
20 Reno Police Station to be interrogated in their interrogation room. The site of the
21 interrogation indicates that Mr. Sewall was not free to leave when he gave his
22 statement.

23 ¹⁴ Id. at 1032

1 The detectives specifically give, Mr. Sewall a ride down to the police station. If
2 Mr. Sewall was going to be leaving the police station after the interview, then they
3 would have allowed him to drive his own car and meet him there. However, they
4 controlled the situation by forcing him to get a ride with them. The police, with their
5 actions, demonstrate that they believed that Sewall was not going home that night.
6 This is obvious with the fact that the Reno Police Department already knew that
7 they were going to arrest him on the charge of felon failure to register. By making
8 him leave his car in his apartment complex they prevent him from having an
9 opportunity to leave the police station and go home and also demonstrates the police
10 mentality at the time of initial contact.¹⁵

15 ***Interrogation Room***

16 Mr. Sewall was brought into an interrogation room. The State is attempting to
17 represent that the room was set up in such a way that Mr. Sewall could just walk out
18 the door without any resistance. This was demonstrated and fundamentally untrue
19 in the hearing. Detective O'Kelley admitted that Detective Hefner was between Mr.
20 Sewall and the door and that Detective Hefner was required to move out of anyone's
21 way to leave the room. This was a small room with a table, a couch, a chair into the
22 police station he was placed in a small interrogation room, where the two (2) LVMPD
23 Detectives entered and asked him to turn off his cell phone. Detective Hefner sat in
24 a position against the wall that would indicate that the detective had control over
25 who would be able to leave the room. Similar to Carroll, the detective made it that in

¹⁵ Sewall catches on to the fact the Reno Police were going to arrest him and that he was not free to leave during the interrogation. He even states to the detectives that he is being taken to jail tonight all before the detectives start substantively questioning him.

1 order to leave the room Mr. Sewall would have to physically go through Detective
2 Hefner. (Transcripts 1/18/19, pg 39, 40).

3
4 The significance of an interrogation room is whether the Defendant believed,
5 or a reasonable person would believe, that they had the ability to move freely. This
6 room was small enough to limit the amount of movement that Mr. Sewall had inside
7 this room. It is convincingly clear that Mr. Sewall could not just walk out of the room
8 at any time. In order to leave the room, he would have to go through Detective
9 Hefner. The interrogation room is another factor demonstrating that Sewall was in
10 custody and not free to leave.

11
12
13 *Not Allowed To Use The Phone To Call His Wife*
14

15 It is clear from Detective O'Kelley's testimony that Mr. Sewall was not allowed
16 to call his wife. The Detective stated that Mr. Sewall was not allowed to use the
17 phone at that time because the Detective was having a "conversation." The fact that
18 the Detectives prevented Mr. Sewall from being able to call his wife, before he gives
19 the Detectives the statement that they want Mr. Sewall to give, demonstrates clearly
20 that Mr. Sewall was clearly in custody.
21

22
23 Q. Okay. Now a person that's not in custody should be able to
24 talk to his wife any time, correct?

25 A. No. We're in the middle of having a conversation. It's we had
26 had our phones shut off and so that wasn't the time for him
27 to be calling and making phone calls, nor for us. We weren't
28 communicating with anybody either.

(Transcripts 1/18/19, pg 65)

1 According to Detective O'Kelley a person that is not in custody does not get to
2 talk to his wife at anytime. The Detectives prohibiting Mr. Sewall from being able to
3 call his wife demonstrates that Mr. Sewall was not free to leave, was not free to do
4 anything other than what the Detectives wanted him to do. As this Court is able to
5 see through the testimony, the unambiguous position of Detective O'Kelley that Mr.
6 Sewall was not allowed to use the phone is clear evidence that Mr. Sewall did not
7 have any freedom of movement and therefore was in custody at the time of the
8 coercive statement.

9
10 In Carroll, the Nevada Supreme Court stated, "Police did not allow Carroll to
11 use his telephone when he said he needed to make a call."¹⁶ The Carroll Court
12 distinguished Silva v. State¹⁷ from Carroll based partly on Carroll being denied the
13 use of a phone.¹⁸

14
15 Q. You didn't want him talking to his wife?

16
17 A. No.

18
19 Q. Because she was probably going to tell him, shut up. Right?

20
21 A. Yes. It's possible.

22
23 Q. And that would be counterproductive to what you wanted?

24
25 A. Yes.

26
27 Q. And, but your statement is, hey, he and I are having a conversation.
28 When we're having a conversation, he doesn't just get to call his wife.
Right?

¹⁶ Carroll, at 1033

¹⁷ Silva v. State, 113 Nev. 1365, 951 P.2d 591 (1997)

¹⁸ Carroll, at 1033

1 A. It was not the appropriate time for him to be getting on the phone and
2 having a conversation with somebody outside that room. We were
3 having a conversation, the three of us together. That wasn't the time for
4 it. And he was given assurances that he would be able to call his wife,
and did.

5 (Transcripts 1/18/19, pg 65-66)

6
7 "It was not the appropriate time for him to be getting on the phone." Detective
8 O'Kelley. The Detective made his position clear when the three of them were in the
9 room, and again in the hearing the Detective made it clear Mr. Sewall did not have
10 the freedom to make a phone call. A person that is prevented from being able to do
11 everyday functions such as calling a loved one on the phone does not have their
12 freedom. They are not free to leave or do what they wish.
13
14

15 Just like the Nevada Supreme Court found in Carroll, a reasonable person,
16 under the circumstances that Mr. Sewall was in, would not have felt free to leave,
17 especially when Mr. Sewall asked to use his phone to call his wife. The Detectives
18 clearly and distinctly stated that Mr. Sewall could not use the phone. Mr. Sewall
19 made numerous attempts to explain to the detectives that he wanted to pause the
20 questioning by asking to speak to his wife. Again and again as the interrogation
21 progressed, it became clear that the detectives would not let him do so, until after he
22 gave them what they wanted. He had to give a statement in order to speak with his
23 wife. This again demonstrates that Sewall was not free to leave and therefore in
24 custody.
25
26
27
28

1 *Detectives Used Deception In Order To Elicit A Statement*

2 The Detectives used deceptive practices in order to elicit a statement from Mr.
3
4 Sewall. The practice of using deception in the interrogation not only demonstrates
5 that the interview was not voluntary, but that that the deception is another
6 indicator of an arrest.
7

8 In State v. Taylor, the Nevada Supreme Court adopted the indicia of arrest to
9 include “whether the police used strong-arm tactics or deception during questioning,”
10 among other factors discussed above. 114 Nev. 1071, 1082, 968 P.2d 315, 321 (1998)

11 *Footnote 1.*

12
13 During the hearing, Detective O’Kelley admitted that they lied to Mr. Sewall
14 during their interrogation. They specifically told Mr. Sewall that evidence of his gun
15 being test fired was going to be evidence against him on this murder.
16
17

18 Q. And in that conversation Investigator Hefner told him that the
19 gun that was seized in San Diego had been test fired, is that
20 correct?

21 A. He suggested that the destroyed firearm in 2004 had been test
22 fired.

23 Q. Okay. But that is not an accurate statement, is it?

24 A. No.
25 (Transcripts 1/18/19, pg 44)

26 But the Detectives’ deception during the interrogation went far behind lying
27 about the state of the evidence. The Detectives told Mr. Sewall that they cannot use
28 any of his statements against Mr. Sewall. This is absolutely and entirely a false

1 statement as Mr. Sewall is moving this Court to prevent the Detectives from using
2 that very statement, to not be used against him in a trial for murder.

3
4 Q. All right. So, you told a suspect that you had, in the police
5 station at that moment in time, hey, look, whatever you say
6 after this we can't use?

7 A. Yes.
8 (Transcripts 3/8/19, pg 46)

9 A Detective, during an interrogation, explaining to a defendant that his
10 statements will not be used against him is nothing more than a flat-out deceptive
11 practice that is used to elicit a statement from the defendant. This deception marks
12 another indicia of an arrest and that Mr. Sewall was in-custody.

13
14 **III. Sewall's In-Custody Statements Made Without Miranda Warnings Are**
15 **Inadmissible.**

16 The Fifth Amendment guarantees that no person "shall be compelled in any
17 criminal case to be a witness against himself." Miranda v. Arizona requires law
18 enforcement to use procedural safeguards to secure this constitutional right.¹⁹ "[I]f a
19 person in custody is to be subjected to interrogation, he must first be informed in
20 clear and unequivocal terms that he has the right to remain silent."²⁰ This "warning
21 will show the individual that his interrogators are prepared to recognize his privilege
22 should he choose to exercise it."²¹ Miranda's warnings will also ensure that waiver of
23 this constitutional right is made freely, knowingly, and voluntarily.²²
24
25
26
27
28

¹⁹ Miranda v. Ariz., 384 U.S. 436, 444, 86 S. Ct. 1602, 1624 (1966).

²⁰ Id. at 467-468.

²¹ Id. at 468.

²² Id. at 468.

1 The Sixth Amendment guarantees “the Assistance of Counsel.” Miranda holds
2 that, as “an absolute prerequisite to interrogation,” the individual in custody “must
3 be clearly informed that he has the right to consult with a lawyer and to have the
4 lawyer with him during interrogation.”²³

5
6 Miranda warnings are necessary whenever someone is “in custody or
7 otherwise deprived of his freedom of action in any significant way.”²⁴ Whether a
8 person is in custody depends upon “how a reasonable person in the suspect's
9 situation would perceive his circumstances.”²⁵ Central to custody is “how a
10 reasonable person in that position would perceive his or her freedom to leave.”²⁶

11
12 In this particular case, it is clear and should be uncontested that Miranda
13 Warnings were not given to Mr. Sewall at any point during his interrogation. Mr.
14 Sewall was never advised of his constitutional rights during any course of his
15 interrogation.

16 CONCLUSION

17 Detectives took Mr. Sewall into custody by preventing him from leaving when
18 he requested an attorney. They told him he needed to complete DNA tests,
19 fingerprints, and picturing before he could leave, and then refused to allow him to
20 call his wife until he gave them what they wanted. Mr. Sewall stated over and over
21 again that he did not believe he was free to leave, that he would be going to jail that
22 night. Never once did the Detectives inform Mr. Sewall of his Miranda rights.

23 Id. at 471.

24 Id. at 445.

25 Yarborough v. Alvarado, 541 U.S. 652, 662, 124 S. Ct. 2140, 2148, (2004).

26 Stansbury v. Cal., 511 U.S. 318, 325, 114 S. Ct. 1526, 1530, 128 L. Ed. 2d 293, 300 (1994).

1 Because the detectives coerced a statement from Mr. Sewall and failed to
2 inform Mr. Sewall of his Miranda rights, statements made during the interrogation
3 must be suppressed.
4

5 In addition, because Mr. Sewall invoked his rights to an attorney, but the
6 detectives refused to respect this right, subsequent statements must be suppressed.
7

8 DATED this 21st day of May, 2019.
9

10
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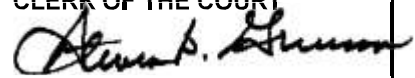
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ARTHUR LEE SEWALL, aka
Arthur Lee Sewall, Jr., #1030933

Defendant.

CASE NO: C-18-330650-1

DEPT NO: XXI

**STATE'S OPPOSITION TO DEFENDANT'S SUPPLEMENTAL BRIEF TO
SUPPRESS ILLEGALLY OBTAINED STATEMENTS**

DATE OF HEARING: 6/13/19
TIME OF HEARING: 9:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through PAMELA WECKERLY, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Supplemental Brief to Suppress Illegally Obtained Statements.

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2
3 **STATEMENT OF FACTS**

4 On May 8, 1997, at approximately 9:42 am, Nadia Lynn Iverson was discovered on the
5 cement floor of a duplex unit under major renovation at 1226 Reed Place, Las Vegas. The
6 unit's walls had been stripped down to the framing studs and openings for doors and windows
7 were not entirely covered, leaving the unit unsecured. Most of the other duplexes in the Marble
8 Manor complex were in much the same state. Homicide Detectives Chandler and Hardy
9 responded to the scene, as well as Crime Scene Analyst Yolanda McClary.

10 A spent .357 projectile was recovered on the floor in the unit. However, no cartridge
11 case was found, suggesting that the murder weapon could have been a revolver.
12 It appeared that Nadia had been shot at that location as there was a large amount of blood
13 pooled under her body and the bottoms of her bare feet were covered in the fine, gray dust and
14 no blood. Nadia's pants had the same dust on both knees. She also had abrasions to her
15 forehead and nose.

16 On May 9, 1997, Deputy Medical Examiner Dr. R. Bucklin performed the autopsy on
17 the body of Nadia Iverson and determined the cause of death to be a gunshot wound to the
18 back of her head. Dr. Bucklin indicated that the shot in the back of Nadia's head was a contact
19 wound with the bullet traveling upward toward the front of the head and exiting in the vicinity
20 of the left eyebrow. Dr. Bucklin determined the manner of death to be homicide. A sexual
21 assault kit was administered by Crime Scene Analyst McClary during the autopsy.

22 During the initial investigative stages, detectives learned Iverson had been in Las Vegas
23 for only a few months. She drove out from Pennsylvania with her boyfriend Gregory Viaslisin
24 in late January or early February 1997. Once here, they both fell into using drugs. When
25 Viaslisin went to jail, Iverson had to fend for herself, resorting to prostitution to acquire drugs.
26 It appears all of her time in Las Vegas was spent in and around the area of Downtown/Fremont
27 Street.
28

1 In March 1997, Las Vegas Metropolitan Police Officer Arthur Sewall resigned from
2 the police department as criminal charges against him were imminent. Sewall was accused of
3 coercing downtown area prostitutes into having sex with him in exchange for his overlooking
4 drug or paraphernalia issues and not taking his victims to jail in exchange. Some of the sexual
5 encounters occurred after Sewall's shift had ended and he was in his own clothes and vehicle.
6 He also was caught on video extorting sex after being set up by internal affairs.

7 Sewall was originally charged with First Degree Kidnapping, Sexual Assault, and
8 Oppression Under Color of Law. After a preliminary hearing, Sewall ultimately pled guilty
9 to two counts of Oppression Under the Color of Law, received five years of probation and a
10 short jail sentence. As part of his probation intake, Sewall provided Parole & Probation
11 officials with a DNA sample.

12 On July 28, 1999, Sewall was arrested by the San Diego Police Department after
13 soliciting an undercover female detective on the street for sex. Impounded from Sewall's
14 vehicle upon his arrest was a Ruger .357 revolver with serial number 571-87579. Sewall also
15 had his Metro gun registration card for this same weapon which contained additional
16 descriptive information that the gun was a model SP-101, chrome in color with a 3 inch barrel.
17 This gun was destroyed by the San Diego Police Department years later. This same revolver
18 had been impounded from Sewall for safekeeping in 1995 when Metro responded to a
19 domestic disturbance call involving Sewall. It was later released back to him. Sewall's 1999
20 San Diego arrest resulted in his probation being revoked. He was sent to prison to serve out
21 the remainder of his sentence.

22 In April 2017, Metro Forensic Scientist Anya Lester examined the expended bullet
23 recovered on the cement floor at the scene. She determined the bullet to be consistent with a
24 .357 but not to the exclusion of a .38 or 9mm bullet. Other screening factors favor the bullet
25 being a .357. The bullet passed through Iverson's head, which also suggests a powerful
26 cartridge. Anya Lester was also able to provide a list of common firearms manufactured with
27 rifling characteristics similar to those present on the bullet to include, but not limited to, INA,
28 Ruger, Smith & Wesson and Taurus.

1 On April 4, 2017, detectives received a CODIS Hit Notification Report of a match
2 between Sewall's DNA and the suspect DNA found on vaginal and rectal swabs taken at
3 Nadia's autopsy and from the interior surface of the buttock area of Nadia's pants.

4 On April 12, 2017, detectives surveilled Sewall as he discarded some chewing tobacco
5 from his mouth onto the ground. They recovered the chewing tobacco and it was later
6 impounded to be used as the surreptitious standard for Sewall during later comparisons. On
7 June 1, 2017, Forensic Scientist Cassandra Robertson examined the DNA evidence in this
8 case. She identified Sewall's DNA found on the vaginal and rectal swabs taken from Iverson
9 at autopsy. His DNA was also found in a stained area on the inside buttock area of Iverson's
10 pants.

11 On January 11, 2018, Cold Case Detectives Hefner and O'Kelley interviewed Sewall
12 in Reno, Nevada. During the interview, he admitted to engaging Iverson in sex for money.
13 During their sexual encounter, Iverson was shot. Sewall could not account for why his gun
14 was out or pointed at Iverson. He knew she was shot in the head and he immediately fled the
15 scene. A buccal swab was obtained during the interview and a confirmatory DNA match was
16 later found with the evidence from autopsy and Nadia's clothing.

17 Defendant Sewall now moves to suppress the statement he gave to detectives because
18 he was not given a Miranda warning before making the statement. The State opposes. Sewall
19 was not in custody; therefore, detectives were not required to issue a Miranda warning. This
20 Court held a hearing on the matter on January 18, 2019 and March 8, 2019. At the conclusion,
21 Defendant Sewall asked to file a supplemental brief. The State still opposes.

22 POINTS AND AUTHORITIES

23 In his original motion to suppress, Sewall raised the issue of custodial status and that
24 he was not given a Miranda warning. He did not claim that the statement was made
25 involuntarily. Now, in the supplemental filing, Sewall raises the issue of voluntariness for the
26 first time. As this Court has heard testimony as well as reviewed a videotape of the interview,
27 there is no need for an additional hearing. It is evident that Sewall's discussion with detectives
28 was completely voluntary. In addition, as previously briefed, because Sewall was not in

1 custody at the time he spoke with detectives, they had no obligation to provide him with an
2 attorney during questioning. In fact, even if Sewall had unequivocally requested an attorney
3 during questioning, detectives were not required to cease questioning nor provide him with an
4 attorney as he was out of custody. "It is well settled that one who is not in custody is not
5 entitled to the Fifth Amendment right to counsel. Therefore, the police may continue asking
6 the suspect questions, even if he asks for an attorney during the interrogation, as long as the
7 statements are voluntary." Silva v. State, 113 Nev. 1365, 1370-71, 951 P.2d 591, 594-95
8 (1997), citing Minnesota v. Murphy, 465 U.S. 420, 424 n.3, 79 L. Ed. 2d 409, 104 S. Ct. 1136
9 (1984); State v. Stanley, 167 Ariz. 519, 809 P.2d 944, 950 (Ariz. 1991), cert. denied, 502 U.S.
10 1014, 116 L. Ed. 2d 751, 112 S. Ct. 660 (1991); Ronnebaum, 449 N.W.2d at 724; State v. Fry,
11 61 Ohio App. 3d 689, 573 N.E.2d 1108, 1109-10 (Ohio App. 1988). If a suspect is not in
12 custody, there is no Fifth Amendment right to counsel to assert. Silva, 113 Nev. at 1370-71,
13 951 P.2d at 594-95.

14 A. Sewall's Interview with Detectives Was Voluntary.

15 As this Court is aware, the voluntariness of a statement is assessed according to the
16 totality of the circumstances surrounding the statement. Blackburn v. Alabama, 361 U.S. 199,
17 206, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960) (quoting Fikes v. Alabama, 352 U.S. 191, 197, 77
18 S. Ct. 281, 1 L. Ed. 2d 246 (1957)). The Nevada Supreme Court has held that "[t]he question
19 in each case is whether the defendant's will was overborne when he confessed." Passama v.
20 State, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987). The trial court should consider factors
21 such as: "the youth of the accused; his lack of education or his low intelligence; the lack of
22 any advice of constitutional rights; the length of detention; the repeated and prolonged nature
23 of questioning; and the use of physical punishment such as the deprivation of food or sleep."
24 Id.

25 In Chambers v State, 113 Nev. 974, 944 P.2d 805 (1997), the Supreme Court of Nevada
26 stated:

27 ///

28 ///

1 A confession is inadmissible unless freely and voluntarily given. Echavarria
2 v. State, 108 Nev. 734, 742, 839 P.2d 589, 595 (1992); Rowbottom v. State,
3 105 Nev. 472, 482, 779 P.2d 934, 940 (1989). "In order to be voluntary, a
4 confession must be the product of a 'rational intellect and a free will.' "
5 Passama v. State, 103 Nev. 212, 213-14, 735 P.2d 321, 322 (1987) (quoting
6 Blackburn v. Alabama, 361 U.S. 199, 208, 80 S. Ct. 274, 280, 4 L.Ed.2d 242
7 (1960)). In determining whether a confession is the product of a free will, this
8 court employs a totality of the circumstances test: [t]he court must consider
9 the effect of the totality of the circumstances on the will of the defendant. See
10 Schneckloth v. Bustamonte, 412 U.S. 218, 226-227, 93 S. Ct. 2041, 2047-
11 2048, (1973). The question in each case is whether the defendant's will was
12 overborne when he confessed. Id. at 225-226 [93 S. Ct. at 2046-2047].
13 Factors to be considered include: the youth of the accused; his lack of
14 education or his low intelligence; the lack of any advice of constitutional
15 rights; the length of detention; the repeated and prolonged nature of
16 questioning; and the use of physical punishment such as the deprivation of
17 food or sleep. Id. at 226 [93 S. Ct. at 2047]. Passama, 103 Nev. at 214, 735
18 P.2d at 323. The question of the admissibility of a confession is primarily a
19 factual question addressed to the district court: where that determination is
20 supported by substantial evidence, it should not be disturbed on appeal.
21 Echavarria, 108 Nev. at 743, 839 P.2d at 595.

22 Id. at 981.

23 Nonetheless, once voluntariness of a confession has been raised as an issue, there must
24 be a hearing pursuant to Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964), before an
25 accused's statements are brought before a jury. At this hearing, the court must hear what the
26 defendant told the police and the circumstances under which the defendant made the statement.
27 The court must then decide (1) whether his statement was voluntary using the totality of the
28 circumstances, and (2) whether Miranda was violated. In this regard, Nevada adopted the
"Massachusetts rule." See Grimaldi v. State, 90 Nev. 89, 518 P.2d 615 (1974).

The State's burden of proof at a Jackson v. Denno hearing is a preponderance of the
evidence, both with respect to voluntariness, Brimmage v. State, 93 Nev. 434, 567 P.2d 54
(1977), Falcon v. State, 110 Nev. 530, 874 P.2d 772 (1994), and with respect to Miranda. Id.

If the court finds that the statement was involuntary, it ceases to exist legally and cannot
be used for any purpose. Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978). If it was
voluntary but Miranda was violated, it can only be used for impeachment if the defendant

1 testifies and contradicts the statement. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971);
2 Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215 (1975); McGee v. State, 105 Nev. 718, 782 P.2d
3 1329 (1989). If the court finds that it was voluntary and Miranda warnings were not necessary
4 or provided, it can be used for all purposes during trial.

5 Sewall's complaint, again, raised for the first time in the supplemental briefing, is that
6 his statement was coerced by detectives. Sewall complains "the police deception stating that
7 they would not use Sewall's statement, the police denying Sewall's request for an attorney,
8 the police denying Sewall's request to speak with his wife, the police using the memory of
9 Sewall's murdered daughter as a psychological inducement to confess, and the police denying
10 his ability to leave the questioning" all rendered his statement involuntary. Supplemental
11 Motion at 2. As the question regarding Sewall's alleged request to speak with his wife and
12 whether he had the ability to leave are factors that affect custodial status, those claims will be
13 discussed in that section.

14 Sewall claims that Detective Hefner did not adequately explain the Miranda warning
15 and cites to Ninth Circuit cases in which a Miranda warning was issued with simultaneously
16 with information contradictory to a Miranda warning. In those cases, the courts held that in
17 such situations, the burden was on law enforcement to clarify the constitutional rights afforded
18 to the arrested party. In this case, Sewall was not in custody, so no warning was required.
19 Nonetheless, the detectives in this case were clear about Sewall's rights and it was clear that
20 Sewall knew that his words could be used against him. Defendant Sewall indicated that
21 Detective Hefner informed Sewall "that whatever Mr. Sewall says cannot be used against
22 him." Supplemental Motion at 3. Tellingly, Defendant Sewall fails to include the next words
23 that were said in the interview. Immediately after Detective Hefner said the words relied upon
24 by Sewall, Detective O'Kelley stated, "No, he said he thinks an attorney. (Unintelligible)
25 that's true. An (unintelligible) do you—if you don't wanna talk to us then say, 'I'm done
26 talkin'.'" Defendant Sewall then responds, "I-I understand that. I-I-I totally understand."
27 Detective O'Kelley then states, "Then say, 'I want an attorney.' That's -so that why I
28

1 continued to talk to you. . .” To which Defendant Sewall states, “Right.” Interview Transcript
2 at 23-25.

3 Moreover, it is quite clear that Defendant Sewall knew that the words he was saying
4 would be used against him and were incriminating. Repeatedly, during the interview, he
5 acknowledged that he was going to incriminating himself with his statement. He tells the
6 detectives, “It’s not cause from my perspective, I’m laying up in a jail cell tonight.” Voluntary
7 at 39. He added, “Because once again, the way that I see this scenario playing out, I’m gonna
8 end up in a jail cell tonight.” Voluntary at 42. He further stated, “I’m not certainly, looking
9 forward to a jail cell” and “I see that happening in my near future.” Voluntary at 47. Far from
10 not understanding the importance of what he was saying, Sewall knew that he was implicating
11 himself in a crime.

12 Sewall also acknowledged that he never asked for an attorney during the interview. At
13 the end of the interview, Sewall discussed the previously mentioned conversation about
14 whether he requested an attorney between himself and detectives. Detective Hefner stated,
15 “Okay, and then when we’ve been talking to you here, uh, there came a point in time, uh,
16 where you were talking about maybe you need an attorney, maybe not. Dean, uh, heard it as
17 you were saying, maybe you needed an attorney and I’m I’m inclined to believe that’s that
18 you said. Is that—” To which Defendant Sewall responded, “That’s what I said.” Defendant
19 Sewall continued, “I, I specifically---stated that with what you had presented that I think I need
20 an attorney. I did not explicitly ask for an attorney.” Second Voluntary at 17.

21 Regarding the reference to Defendant Sewall’s murdered daughter, the argument
22 appears to be a complaint about the detectives highlighting a parallel between Sewall’s
23 experience and the experience of Ms. Iverson’s family. First, it should be noted that it was
24 Defendant Sewall who first mentioned that his daughter had been murdered. Voluntary at 11.
25 Thereafter, the detectives mention the common experience of Sewall and Ms. Iverson’s family.
26 The reference by detectives is brief and not excessive. That commonality is true. The
27 detectives ask Defendant Sewall and he gives a version of events. The reference to Sewall’s
28

1 daughter's murder is simply a factor the Court is to consider along with all other factors
2 bearing upon voluntariness. See Stawicki v. Israel, 778 F.2d 380, 383 (7th Cir. 1985).

3 B. Sewall Was Not in Custody.

4 As previously briefed, the Nevada Supreme Court has addressed whether a suspect is
5 in custody for the purposes of Miranda. Carroll v. State, 371 P.3d 1023 (2016). "[A] trial
6 court's custody and voluntariness determinations present mixed questions of law and fact
7 subject to this court's de novo review." Id. at 1031, citing Rosky v. State, 121 Nev. 184, 190,
8 111 P.3d 690, 694 (2005). In Carroll, the court explained how it reviews such inquiries:

9 The proper inquiry requires a two-step analysis. The district court's purely
10 historical factual findings pertaining to the "scene-and action-setting"
11 circumstances surrounding an interrogation [are] entitled to deference and will
12 be reviewed for clear error. However, the district court's ultimate determination
13 of whether a person was in custody and whether a statement was voluntary will
14 be reviewed de novo... .

15 For this standard of review to function properly, "trial courts must exercise
16 their responsibility to make factual findings when ruling on motions to
17 suppress."

18 Id., quoting Rosky 121 Nev. at 190-91, 111 P.3d at 694-95 (quoting In re G.O., 191 Ill. 2d 37,
19 727 N.E.2d 1003, 1010, 245 Ill. Dec. 269 (Ill. 2000)). Moreover, where "the trial court's
20 determination that a defendant was not improperly induced to make the statement [to police]
21 is supported by substantial evidence, . . . such a finding will not be disturbed on appeal." Id.,
22 quoting Barren v. State, 99 Nev. 661, 664, 669 P.2d 725, 727 (1983). The court additionally
23 reminded trial courts to make factual findings and legal conclusions when ruling on motions
24 to suppress.

25 A defendant is "in custody" for purposes of Miranda if he or she has been formally
26 arrested or his or her freedom has been restrained to "the degree associated with a formal arrest
27 so that a reasonable person would not feel free to leave." State v. Taylor, 114 Nev. 1071, 1082,
28 968 P.2d 315, 323 (1998).

1 “Custody is determined by the totality of the circumstances, ‘including the site of the
2 interrogation, whether the objective indicia of an arrest are present, and the length and form
3 of the questioning.’” Carroll, 371 P.3d at 1032, citing Taylor, 114 Nev. at 1081-82, 968 P.2d
4 at 323. Importantly, an “individual is not in custody for Miranda purposes if the police are
5 merely asking questions at the scene of the crime or where an individual questioned is merely
6 the focus of a criminal investigation.” Carroll, 371 P.3d at 1032 (internal citations omitted).

7 1. Site of Interrogation

8 The Nevada Supreme Court has discussed factors related to the site of interrogation
9 which are relevant to the determination of whether an individual is in custody. Most recently,
10 in Carroll, the court discussed distinctions between the circumstances of Carroll, where the
11 court found a suspect was in custody, and those in Silva v. State, 113 Nev. 1365, 951 P.2d 591
12 (1997), where the court found a suspect was not in custody.

13 The Nevada Supreme Court recognizes that the fact that questioning occurs at a police
14 station "does not automatically mean that [a suspect] was in custody." Silva, 113 Nev. at 1370,
15 951 P.2d at 594. Instead, the length of time of the questioning, whether the police withheld
16 food or drink from a suspect or made promises to the suspect are factors which can suggest
17 custodial status. Id. at 1370, 951 P.2d at 594. The position of the parties in the interview room
18 relates to whether a suspect is in custody for the court. If the room is small and the suspect is
19 the furthest from the door, the “environment” suggests custody according to the court. Carroll,
20 371 P.3d at 1032. In addition, if detectives do not allow an individual to use their phone or
21 refuse to let him leave upon request to do so, the individual is more likely to be deemed in
22 custody for purposes of Miranda. Id. Finally, if detectives promise to investigate aspects of
23 a suspect’s claim, it is suggestive of custodial status, according to the court. Id.

24 In the instant case, the police did not question Sewall for a very lengthy amount of time.
25 The entire interview was approximately two hours. In addition, they never denied Sewall food
26 or drink. While Sewall was asked to turn off his cell phone, he remained in possession of it.
27 Moreover, the room itself appeared to be an office waiting area more than a suspect
28 interrogation room. The room had a couch, chairs, and a round table. The room was decorated.

1 The person positioned farthest from the door appears to be Detective O'Kelley, not Sewall.

2 The person who is the most blocked in the room is Detective O'Kelley, not Sewall.

3 In addition, the detectives did not deny Sewall his request to call his wife, as he claims
4 in his motion. In context, Sewall indicated that he wanted to speak to his wife, but did not
5 specify if he meant before talking to detectives or after. As the conversation progressed, it's
6 clear that he meant after. Moreover, detectives did allow him to make that call.

7 Q: Um, wisdom guided by experience says that this is the direction things
8 have gone in the past and where - where they would go in this instance
9 that, you know, you just - you don't know. I mean you got - you can
10 have, like I said - you know, like he was sayin' if you, you know, if
11 you've got like, "I don't know. Or no I've never seen her before. I
12 don't remember." Then you got family who's like well, you know,
13 "Burn him at the stake," kinda thing. You know, you got people...

14 A: Of course.

15 Q: ...who are like, "Hey if he's not," you know, you got people that just
16 have that attitude, like, well if given the opportunity (unintelligible) tell
17 - he didn't wanna give us that piece or whatever, you know, people
18 become...I was again on that same case, you know, we're talkin' about
19 the one detective said he gave the family member, um, his - his
20 cellphone and he says, "I've probably gotten, like, at least 200 text
21 messages a month," you know, from the family. And - and that's one
22 thing (unintelligible) family is it's gonna br- bring great peace to the
23 family to know that an arrest has been made in the case no matter what
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(unintelligible) happens. Um, I think they also appreciate more someone that admits to what they did and apologizes for it - shows that they are sorry about it. Um, we - you've probably seen in the media and stuff where the families say, uh, "We understand, uh - we forgive you." Um, just (unintelligible) because they have an understanding of what the ser- the situation is.

A: Mm-hm.

Q1: And they're not saying we forgive you and, um, (unintelligible) or and they'll want justice carried out. But then that they understand, you know what - they drop it at that point. They drop the hurt. They drop the anger. And, you know, you're - you're (unintelligible) now and I don't even know, you know, I hope I'm never in that kind of situation. Well and you are though - you are in that situation.

A: Yes (unintelligible).

Q1: (Unintelligible).

Q: You know? Yeah you are currently there. And so knowing that you can then put yourself - you cannot sympathize but empathize with what Nadia's family has gone through but for a lot longer.

Q1: It's a little different, you know, with your daughter. It was more personal contact - more trust. Uh, you know, and, uh, more hatred. There could be more hatred beyond killing somebody. Uh, (unintelligible) if the scenario we're posing is true - it's kinda like a - a random situation. There was no hate directed towards her. That was

1 just what happened that day whoever you came in contact with. So
2 that's - that's different. (Unintelligible).

3 A: I need to talk to my wife. Is that possible? Because once again and the
4 way that I see this scenario playing out - I'm gonna end up in a jail cell
5 tonight.

6 Q: What - n- now you're sayin'...

7 A: Even though I'm here voluntarily...

8 Q: Right. But to say to talk to your wife before you talk to us or I'll give -
9 I'll give you my cellphone and you can talk (unintelligible) - or use or
10 you got your own (unintelligible) - that is an absolute promise that
11 you'll get to talk to her. Nobody's gonna be hooking and booking you
12 without lettin' you be, you know, treated decently. I'm - I'm tellin'
13 you, there are (unintelligible) two totally different Art Sewalls, man.

14 A: There are two totally different Art Sewalls.

15 Q: Okay and I agree with you. I can see that. I know that. So nobody h-
16 nobody here is gonna be a dick to you.

17 A: And, uh, and you haven't been.

18 Q: Right and I'm not gonna.

19 A: I understand that you aren't going to be.

20 Q: Right. But when you - when you lay out for us and do like - like - and
21 we'll with the recorder -- this is who's present, date and time, dah - dah
22 - dah and you tell us. The guarantee with you is that you get that
23 opportunity to talk with your wife about it regardless. I promise. As a

1 man, I promise.

2 Q1: Are you sayin' that you'd like to talk to you wife before you go on -

3 before you make any decision? I mean the only issue, I mean, Dean's

4 right, we'll let you talk to your wife. Uh, we'll let you w- talk to your

5 wife quite a bit after we're done. Um...

6

7 Q: We're not gonna put a time limit.

8

9 Q1: I - the only reason I mention - I'm saying anything right now about that

10 and your wife is that (unintelligible) that's hit her - w- what's...

11

12 A: Well it's gonna hit her like it's hitting me.

13

14 Q1: Yeah - yeah and I don't think she's gonna be able to - to give you much

15 help. I think she's just gonna add to your - your stress and your burden

16 right now. You follow what I'm saying?

17

18 A: I understand what you're saying.

19

20 Q: Yeah so let - let's get it over and done with and there's no, I mean,

21 literally not a time limit on how much time you (unintelligible) talk with

22 her. We'll let you do that. And that's simple. I mean, again the date,

23 time, location, who's present and (unintelligible) we'll just let you

24 explain it. And we won't even interrupt you unless we think we need to

25 interrupt you. We're gonna let you lay it out.

26

27 A: I'm not sure how much of it I can explain to you.

28

Q: Well I mean what you...

A: Like - like I told you before...

Q: ...as much as...

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A: Right.

Q: ...well this is a long time ago - as much as you remember.

A: Not much of a choice here from my perspective - there are choices...

Q: There are choices...

A: ...don't get me wrong.

Q: ...with drastically different outcomes I think.

A: All right.

Q: I just do. I mean I see, again, wisdom guided by experience in what directions that we've seen things go. And I have to tell you even though people think, you know, "The best thing for me to do is just shut up right now," insist on but not think of havin' an attorney but ask for one - I have seen it so many times where - where people are just like, dude, you laid it out. You didn't try and keep that from us. You know things can happen and there's still consequences but they're not the consequences that - they're not the consequences of someone executing someone while they're having sex with them. Right?

A: True.

Pages 40-45.

The circumstances of the location indicate that Sewall was not in custody.

2. Objective indicia of arrest

The Nevada Supreme Court has stated that objective "indicia of arrest comprise the following:

///

///

1 (1) whether the suspect was told that the questioning was voluntary or that he
2 was free to leave; (2) whether the suspect was not formally under arrest; (3)
3 whether the suspect could move about freely during questioning; (4) whether
4 the suspect voluntarily responded to questions; (5) whether the atmosphere of
5 questioning was police-dominated; (6) whether the police used strong-arm
6 tactics or deception during questioning; and (7) whether the police arrested the
7 suspect at the termination of questioning.

8 Carroll, 371 P.3d at 1033, citing Taylor, 114 Nev. 1071, 1082 n.1, 968 P.2d 315, 323
9 n.1.

10 In the instant case, detectives told Sewall that the questioning was voluntary. Page 3.
11 Sewall also acknowledged that he was speaking voluntarily. Page 13. Sewall was not under
12 arrest. Sewall was not handcuffed. Sewall responded to questions voluntarily. The
13 detectives did not yell at or threaten Sewall; the questioning was not police dominated.
14 The fact that the detectives has search warrants for his DNA is irrelevant. As a previously
15 trained police officer, Defendant Sewall would know that the detectives could satisfy
16 the warrants without him speaking about the crime. He stayed because he decided to tell his
17 version of events. The detectives had no obligation to administer the search warrants at
18 the beginning of the conduct. Moreover, the fact that they did not administer them until the
19 end does not render the consensual nature of the interview custodial. The only factor that
20 weighs in favor of custodial status was that Reno officers arrested Sewall on the failure to
21 register as an exfelon after the interview. Based on an examination of all the circumstances,
22 Sewall was not in custody when he spoke to detectives.

23 3. Length and Form of the Questioning

24 The length and form of the questioning also indicate that Sewall was not in custody.
25 The interview was not protracted and the questioning was subdued and methodical. The
26 detectives did not threaten Sewall. Unlike Carroll, Sewall did not experience a series of
27 questioners. The two detectives sat with Sewall and conducted all the questioning themselves.
28 They did not take breaks to switch who was doing the questioning. It was a subdued

1 conversation. At no time was the questioning aggressive or intimidating. This factor therefore
2 weighs in favor of Sewall not being in custody at the time of the interview.

3 CONCLUSION

4 Based on the foregoing, the State asks the Court to deny the instant motion. Sewall's
5 statement is admissible.

6 DATED this 10th day of June, 2019.

7 Respectfully submitted,

8 STEVEN B. WOLFSON
9 Clark County District Attorney
Nevada Bar #001565

10 BY /s/PAMELA WECKERLY
11 PAMELA WECKERLY
12 Chief Deputy District Attorney
13 Nevada Bar #6165

14
15 CERTIFICATE OF ELECTRONIC TRANSMISSION

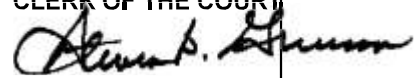
16 I hereby certify that service of the above and foregoing was made this 10th day of June,
17 2019, by electronic transmission to:

18 CHRISTOPHER ORAM, ESQ.
19 Email: contact@christopheroramlaw.com

20 JOEL MANN, ESQ.
21 Email: joel@legalmann.com

22 BY: /s/ D. Daniels
23 Secretary for the District Attorney's Office

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RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
ARTHUR SEWALL,
Defendant.

CASE NO: C-18-330650-1
DEPT. XXI

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE
THURSDAY, JUNE 13, 2019

**RECORDER'S TRANSCRIPT OF HEARING RE:
STATUS CHECK: ARGUMENT ON MOTION TO SUPPRESS**

APPEARANCES:

For the State:

PAMELA C. WECKERLY, ESQ.
GIANCARLO PESCI, ESQ.
Chief Deputy District Attorneys

For the Defendant:

JOEL M. MANN, ESQ.
CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: ROBIN PAGE, COURT RECORDER

1 Las Vegas, Nevada; Thursday, June 13, 2019

2
3 [Proceeding commenced at 10:13 a.m.]

4 THE COURT: State versus Arthur Sewall, who's present in
5 custody with Mr. Oram and Mr. Mann. We've got Mr. Pesci and
6 Ms. Weckerly representing the State.

7 This was set over for the supplemental briefing after the
8 evidentiary hearing. The Court has received the supplements and
9 reviewed the supplements from both sides.

10 So does the defense have anything they would like to add to
11 what's already been provided to the Court?

12 MR. MANN: Your Honor, I just wanted to make just a couple
13 of brief statements.

14 THE COURT: Sure

15 MR. MANN: In the State's opposition to my supplement -- or
16 response to my supplement, they seem to indicate that we never raised
17 this issue of voluntariness or coerciveness, which is just not true. In the
18 motion we reached, raised it in page 8; in the reply, we raised it in page
19 2; and the supplement, we clearly raised it. So, I mean, that's a
20 continuing on issue.

21 Plus Your Honor granted a *Jackson v. Denno* hearing, which
22 is for the exact purpose of the issue of voluntariness. So I just wanted to
23 make sure the Court was aware of that.

24 Obviously, we have, you know, two main issues that we are
25 arguing before this Court. One, that his statement was not, in fact,

1 voluntary; that he was presented with lies that coerced him into giving a
2 statement. Specifically, the detective telling him, don't worry, anything
3 you say we cannot use against you, which is absolutely and
4 fundamentally untrue, which coerced him to continue on in giving a
5 statement.

6 And then the other issue is the -- my client being in custody at
7 the time of him giving that statement, never being read *Miranda*. Even
8 when there is this issue of, you know, misinformation, regarding whether
9 his statements could be used against him or not, they still didn't provide
10 *Miranda*. He was in custody, he asked to -- he asked to leave, he asked
11 for a lawyer, he asked to call his wife. He clearly made indications that
12 he was going to jail that night and not being able to -- free to leave.

13 So, I believe, based on the fact that it was coerced and he
14 was in custody at that time, two separate issues, that the statement
15 should be suppressed.

16 THE COURT: Ms. Weckerly.

17 MS. WECKERLY: Just briefly, Your Honor. Obviously, the
18 Court had the benefit of watching the entire statement, so you've seen
19 the statement; you've seen the conduct of the detectives in this case and
20 also the Court --

21 THE COURT: The room.

22 MS. WECKERLY: The room. Where he was sitting, what was
23 said in the context of Detective Hefners's statement and, of course,
24 Mr. Sewall's response afterwards, indicating that he understood that
25 what he was saying might implicate him in a crime, rather than a general

1 comment about *Miranda*.

2 In addition, I'd also point out Mr. Sewall is a former officer. I
3 believe he has a pretty good understanding of what the *Miranda* warning
4 is.

5 Moreover, as the Court just alluded to with the videotape, you
6 can go through all the factors that are present in *Carroll*. Given both of
7 those issues, it's the State's position that the Court should not suppress
8 this statement.

9 THE COURT: All right. Yes.

10 MR. MANN: And just quick response. The fact that he was
11 an officer over 20 years ago, laws change. Even the witnesses on the
12 stand testify to the fact that, yeah, laws change, we have to keep up to
13 what the laws are. So he may not understand exactly what the laws are
14 at the time and that doesn't negate the fact that people that are currently
15 in law enforcement should be able to provide correct information to the
16 people they're talking to.

17 THE COURT: Well, I think what Ms. Weckerly means is as a
18 former police officer, he would have been familiar with the *Miranda*
19 warning.

20 MR. MANN: If it was read to him.

21 THE COURT: Even though there's been case law that's
22 clarified what the requirements, I guess, are for the police and whatnot.
23 He might not be familiar with that, but I think what she means is he
24 would certainly be familiar with the *Miranda* warning.

25 Is that what you meant Ms. Weckerly?

1 MS. WECKERLY: That's correct, Your Honor.

2 MR. MANN: And so my only response is, you know, you had
3 two seasoned detectives there; both misinterpreted the facts that were
4 presented before them. One, thinking one; the other thinking a complete
5 opposite where they actually were at odds with each other so even the
6 law enforcement in the room, doing the interview, were confused as to
7 that. And so to have someone that's been out of law enforcement for
8 over 20 years, doesn't make sense to hold that against him.

9 THE COURT: All right. I'm going to issue a decision and
10 findings from chambers.

11 MS. WECKERLY: We're not until later in the year, Your
12 Honor.

13 THE COURT: Right. And then put it on for a subsequent
14 date. Is that fair enough?

15 MS. WECKERLY: Sure.

16 THE COURT: Or do you want to just set a date right now for
17 another status check?

18 MR. MANN: Set a date now for the status check, I guess.

19 THE COURT: Yeah. We can set a date now. Why don't we
20 come back in 30 days? Does that work for everyone?

21 MR. MANN: Sure.

22 MR. ORAM: Yes, Your Honor.

23 MS. WECKERLY: Yes.

24 THE CLERK: July 11th, at 9:30.

25 THE COURT: All right. Thank you.

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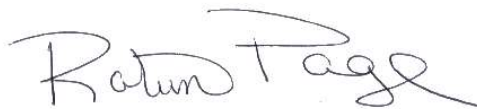
MR. MANN: Thank you, Your Honor.

MR. ORAM: Thank you, Your Honor.

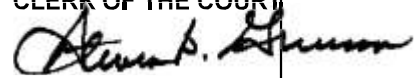
[Proceeding concluded at 10:18 a.m.]

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Robin Page
Court Recorder/Transcriber



1 **RTRAN**

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5 **DISTRICT COURT**
6 **CLARK COUNTY, NEVADA**

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8 **THE STATE OF NEVADA,**
9 **Plaintiff,**
10 **vs.**
11 **ARTHUR SEWALL,**
12 **Defendant.**

13
14 **CASE NO: C-18-330650-1**
15 **DEPT. XXI**

16 **BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE**
17 **THURSDAY, JULY 11, 2019**

18 ***RECORDER'S TRANSCRIPT OF HEARING RE:***
19 ***STATUS CHECK: ARGUMENT ON MOTION TO SUPPRESS***

20 **APPEARANCES:**

21 **For the State:**

22 **PAMELA C. WECKERLY, ESQ.**
23 **GIANCARLO PESCI, ESQ.**
24 **Chief Deputy District Attorneys**

25 **For the Defendant:**

JOEL M. MANN, ESQ.
CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: ROBIN PAGE, COURT RECORDER

1 Las Vegas, Nevada; Thursday, July 11, 2019

2
3 [Proceeding commenced at 9:45 a.m.]

4 THE COURT: State versus Arthur Lee Sewall, who's present
5 in custody with Mr. Oram and Mr. Mann. We've got Ms. Weckerly and
6 Mr. Pesci.

7 This is calendared as argument on a motion to suppress. But
8 I think it's really on for the Court's findings and then, sort of, a general
9 status check beyond that, so I'm just going to state my findings, my
10 factual findings.

11 All right. As to -- the two main issues are the voluntariness of
12 the confession and whether or not the Defendant was in custody, thus
13 triggering the need for the *Miranda* warnings.

14 As to the voluntariness issue, the Court finds that the
15 confession was -- or the statement was voluntary. I don't think that there
16 was anything coercive about the way Mr. Sewall was treated. The
17 location or anything highlighted was the issue that the detectives brought
18 up the death of Mr. Sewall's daughter; I don't find that that was unduly
19 coercive or even coercive at all.

20 Particularly, in view of the timing, I mean, had the murder of
21 the daughter, his daughter, just occurred, then I think maybe they'd have
22 a better argument as to coerciveness. But under these circumstances, I
23 don't find that that was coercive and I think given the totality of the
24 circumstances, the statement was voluntary.

25 I think the issue of custodial status is a little more difficult. I

1 find that the factors weighing in favor of the State to show that the
2 Defendant was not in custody, you know, at the time he encountered the
3 police at his residence/apartment, he was not in custody. The room,
4 there was nothing custodial or coercive about the room. I mean, it was
5 not a, you know, interrogation-type room that we've all seen. It was,
6 kind of, like a pleasant looking room, for lack of a better term.

7 The, you know, even though the detectives were closer to the
8 door, they weren't physically imposing or anything like that towards the
9 Defendant. Although, he was asked to turn off his phone, he was
10 allowed to keep it. I think a non-custodial interpretation could be that, of
11 course, he -- they don't want interruptions; they don't want him recording
12 things, something like that. So I don't find that that indicates a custodial
13 status. And, in fact, the Defendant himself said he came there
14 voluntarily which was reiterated, I came there voluntarily.

15 So I think all of those factors speak out against it being
16 custodial, as well as the facts the detective -- the fact that the detectives
17 said, you know, we're not going to arrest you unless you confess. We're
18 going to be getting a warrant from the District Attorney's office. So I
19 think that all of those facts indicated that he was not in custody.

20 A little more problematic is the fact that the warrant, the
21 misdemeanor warrant, was mentioned. And so the question then
22 becomes, well, you know, at the time of the statement he's still not in
23 custody, but does he -- he has a reasonable believe he can leave, based
24 on the fact that they'd mentioned this misdemeanor warrant. It's
25 unfortunate that they did because it raises the issue that I don't think that

1 there would have even been an issue.

2 And the second thing that, kind of, weighs in the defense's
3 favor is the issue that he clearly wasn't free to leave until the DNA and
4 the fingerprint or the handprint was taken. And that was conveyed that,
5 no, you can't leave until that's done. Although, the implication, I think,
6 even expressed statement was, well, after we do that, you can leave.

7 So really the most troubling thing of all of this and, in my mind,
8 really sole factor that weighs in favor of finding for the defense is this
9 issue of the misdemeanor warrant and the fact that the police mentioned
10 it. Had they never mentioned it, I don't think that would have been a
11 problem at all, so that -- that's my concern there. Those are my factual
12 findings.

13 The Court is going to continue to weigh them in terms of the
14 custodial issue. And, obviously, if I find he was in custody at the time
15 the warrant was mentioned, I think, prior to that, you know, there was no
16 talk about this warrant. And we don't know that he knew about the
17 warrant or was concerned about a misdemeanor or anything like that. I
18 don't know why the detectives mentioned it. I think that's creating an
19 issue there.

20 And, as I said, I think, those are all the main facts and issues
21 that the Court needed to consider, so those are my findings on that and
22 how they all balance out.

23 I know this -- the defense raised, you know, the room and
24 things like that. And I thought that the room, you know, again, for lack of
25 a better word, kind of, in terms of rooms in police stations was, kind of,

1 pleasant looking. And, you know, like I said, watching the tape, there's
2 no physical intimidation going on or anything like that. So I don't think
3 that a reasonable person would have felt that they were in custody
4 based on all of those things.

5 So that's it where we are right now on the motion.

6 Just general status check. And that's not -- doesn't appear on
7 calendar for that. But I think last time I said I'd like this also to be a
8 general status check, so where are we in terms of the defense's
9 preparation?

10 MR. ORAM: We're moving forward, Your Honor. And we
11 anticipate, absent any difficulty, obviously, we have to wait for the ruling.
12 And we've talked to and continue to talk to the State about possible
13 resolutions and we're moving towards trial.

14 THE COURT: State?

15 MS. WECKERLY: We anticipate being ready for trial, Your
16 Honor. Mr. Oram's representations are correct in terms of --

17 THE COURT: All right. Is there anything outstanding --

18 MS. WECKERLY: No.

19 THE COURT: -- from discovery or forensic? There's nothing;
20 right?

21 MR. ORAM: No.

22 THE COURT: From the State?

23 MS. WECKERLY: No.

24 THE COURT: Okay. All right. So I'll just issue a final minute
25 order on that.

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MR. ORAM: Yes, Your Honor.

THE COURT: Sole issue.

And let's come back -- and we have a current trial date, a firm trial date in November, let's just come back in, I don't know, about 40 days.

THE CLERK: August 20th, at 9:30.

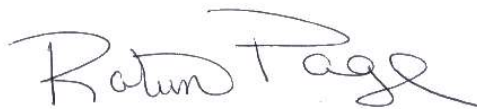
MR. MANN: Thank you.

MR. ORAM: Thank you.

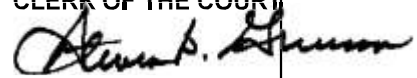
[Proceeding concluded at 9:53 a.m.]

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Robin Page
Court Recorder/Transcriber



RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
ARTHUR SEWALL,
Defendant.

CASE NO: C-18-330650-1
DEPT. XXI

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE
TUESDAY, AUGUST 20, 2019

**RECORDER'S TRANSCRIPT OF HEARING RE:
STATUS CHECK: MOTION TO SUPPRESS**

APPEARANCES:

For the State:

PAMELA C. WECKERLY, ESQ.
GIANCARLO PESCI, ESQ.
Chief Deputy District Attorneys

For the Defendant:

JOEL M. MANN, ESQ.
CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: ROBIN PAGE, COURT RECORDER

1 Las Vegas, Nevada; Tuesday, August 20, 2019

2
3 [Proceeding commenced at 10:06 a.m.]

4 THE COURT: State versus Arthur Sewall.

5 All right. This has status check, motion to suppress.

6 Court's gone back and forth on this issue. I've read it over
7 and over again.

8 And while, I think, everything else speaks to the statement
9 being non-custodial, the Court does find that when the Metro detective
10 stated that Reno could arrest Mr. Sewall on the misdemeanor, his
11 expectation became that he wasn't free to go. I think that's made clear.
12 Then if you go to page 40 of the transcript and 41 where he says, either
13 way, I'm not going to be able to leave tonight.

14 Obviously -- let me just back up.

15 Obviously, the Metro detective saying that they're not going to
16 arrest him unless he confesses speaks to him not being in custody. But
17 when they say Reno can arrest him on the misdemeanor and he then
18 later says -- I didn't mark the page -- either way, I'm not going home
19 tonight. He believes he's not going anywhere. And Metro didn't try to
20 straighten that up. They didn't say, well, we're not arresting you and
21 Reno probably won't or whatever.

22 And then getting to where he wants to call the wife. To me,
23 reading that in context, it's -- it appears that he wants to call his wife to
24 determine whether or not he wants to make the statement to police.

25 Although he says, look, this is going to hit her hard. It's hit me hard. So

1 at that point, it's quite clear he thinks he's not going home tonight and
2 he's going to be arrested. And he's going to have to, basically, spill the
3 beans to her. And, again, Metro never says, oh, you can talk to her in
4 person, blah, blah, blah. They just dissuade him from wanting to call her
5 at that moment prior to giving the statement.

6 So I think that tips the scale. And I think at that point, he's in
7 custody. And so, I think, *Miranda* warning should have been given at
8 that point which, on the transcript, is page 39. I don't really think he
9 makes any admissions or anything prior to that of significance. But
10 before that, I think yes, it's still all, you know, he's just there and talking
11 to him.

12 But once they start talking about that misdemeanor and he's
13 clearly understanding, to me, that he's not going anywhere; and, like I
14 said, Metro doesn't say, you can talk to your wife at home or anything
15 like that. They don't try to clarify that. I think the reasonable belief is
16 he's in custody at that point.

17 I went back and forth on this, as I've already told you, but I
18 think the scales tip at that point. So anything prior to that, I'm okay with
19 as the triggering event, so to speak, is 39 and then you get into calling
20 the wife and all of that stuff. And, like I said, he dissuaded at that point
21 in time from calling his wife. When he first says, I'd like to call my wife, I
22 interpreted that as he's -- he's rustling with, do I make this statement, do
23 I, you know, come clean on this whole thing. Even though he later says,
24 well, this is going to hit her hard. It's hit me hard.

25 At that point, clearly, he thinks he's not going home and he's

1 going to have to explain to the wife why I'm not going home, why am I
2 here in Reno. I'm a -- you know, him thinking to himself, he's a sex
3 offender. He's not registered. He's, you know, a suspect in a murder in
4 Las Vegas. So I think, to me, that's -- the scale tips at that point.

5 All of the other things, as I've said before, either tip in favor of
6 not being in custody or neutral, including entering through the back door.
7 I don't -- didn't touch on this last time, but that's where they would have
8 been parking. Of course, the Reno cops are going to park in their own
9 spaces. They're not going to park in some different space just because
10 he's there. So I didn't think that was -- that was brought up and I didn't
11 really think that cut against or cut in his favor, so to speak.

12 So, defense, you need to prepare the order. As I said, I made
13 a lot of findings at the last hearing, so you might want to get a transcript
14 of that as well as today.

15 And, again, I did find the statement to be voluntary because
16 that ruling favors the State.

17 State [sic], I'd ask that you run that by the State and if the
18 State wants to do its own findings on the voluntariness, I --

19 MS. WECKERLY: Well, we --

20 THE COURT: -- you're welcome to do that if you feel like their
21 findings are somehow insufficient or something like that.

22 MS. WECKERLY: We just would like the defense to notify us
23 when they submit the order to the Court because we have, like, a 48
24 hour, sort of, timing thing in that.

25 THE COURT: Okay, okay. And, like I said, I would assume

1 you would like them to run that by you?

2 MS. WECKERLY: Yeah.

3 THE COURT: In case you want to do your own order on the --

4 MS. WECKERLY: Sure.

5 THE COURT: -- voluntariness issue. Because I ruled in your
6 favor on that. And so if you feel like they didn't adequately address
7 those findings, you're welcome to submit your own order on that.

8 MS. WECKERLY: Okay, thank you.

9 MR. MANN: Thank you.

10 THE COURT: All right.

11 Was there anything else we need to discuss on the -- just sort
12 of general trial readiness?

13 MR. ORAM: No.

14 MS. WECKERLY: Well, the date of 11/4, if Eisenman
15 moves, I won't be available because I'll be --

16 THE COURT: Right.

17 MS. WECKERLY: -- doing Eisenman so that's, kind of, the
18 issue.

19 THE COURT: Right. And then I'm assuming then the State is
20 considering filing a writ.

21 MS. WECKERLY: We are.

22 THE COURT: Okay.

23 MR. ORAM: So I think we just --

24 THE COURT: I don't know if this -- defense is considering
25 filing a writ on the voluntariness issue, but sounds to me only the State is

1 considering that.

2 MS. WECKERLY: Yeah, and it -- if we do and they entertain
3 it, I'm sure they'll encompass that as well, so.

4 THE COURT: Right. So, okay, fair enough.

5 MR. ORAM: Great. Thank you very much, Your Honor.

6 MR. MANN: Thank you.

7 THE COURT: Do we want to come -- excuse me.

8 THE MARSHAL: Counsel.

9 THE COURT: Do we want to set another status check?

10 MR. ORAM: Do you want to set another status check, Judge?

11 THE COURT: Yeah, let's go -- let's go beginning -- when is
12 Eisenman?

13 MS. WECKERLY: So, Your Honor, the date -- the next date
14 you set on that was the status check on 9/17.

15 THE COURT: Okay. Maybe on this one let's go to early
16 October for another status check.

17 Obviously, if the Supreme Court entertains the writ, then that
18 will take care of itself.

19 MS. WECKERLY: No problem.

20 THE COURT: Right.

21 MS. WECKERLY: No conflict.

22 THE CLERK: August 8th, at 9:30. Excuse me, October 8th, at
23 9:30.

24 MR. ORAM: Your Honor.

25 THE COURT: Well, at that point at our status check, we'll be

1 vacating the trial date and then just setting it over for status checks for
2 the Supreme Court's ruling, so assuming they want to entertain the writ.

3 MR. ORAM: Your Honor, could you go October 17th, the
4 original date? I'm in a federal trial and Judge Navarro is giving us court
5 dates for all of those dates and I'm in trial that day. Is it possible?

6 THE COURT: Right.

7 THE CLERK: October 17th, at 9:30.

8 MR. ORAM: Thank you very much, Your Honor.

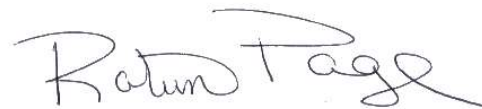
9 MR. MANN: Thank you.

10 MR. PESCI: Thank you.

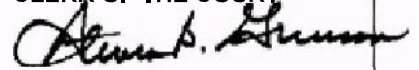
11 [Proceeding concluded at 10:13 a.m.]

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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio/video proceedings in the above-entitled case to the best of my ability.

23
24 

25 Robin Page
Court Recorder/Transcriber



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ORDR

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

v.

ARTHUR SEWALL,

Defendant.

Case No.: C-18-330650-1

Dept. No.: XXI

ORDER GRANTING IN PART DEFENDANT'S MOTION TO SUPPRESS
STATEMENT

On October 12, 2018, Defendant Arthur Sewall (Defendant) filed a Motion to Suppress Illegally Obtained Statements (Defendant's Motion), alleging violations of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966) from a January 11, 2018 interview with Las Vegas Metropolitan Police Department (LVMPD) detectives. The State filed its Opposition to Defendant's Motion (State's Opposition) on November 21, 2018. Defendant filed his Reply to the State's Opposition (Defendant's Reply) on December 21, 2018. In his Motion and Reply, Defendant argues that he was entitled to, and did not receive a reading of his *Miranda* rights, that he invoked his Fifth Amendment right to an attorney, that the request was ignored, and that his entire statement was involuntary and the product of coercive police tactics.¹ The State argues that Defendant voluntarily spoke with Detectives, was not entitled to his *Miranda* rights, and that officers had no duty to cease questioning

¹ Defendant's Motion, at 8:5-10. Defendant's Reply, at 2:6-19.

1 when Defendant asked for an attorney because he was not in custody when he made the
2 request.²

3 This Court considered the Motion and Opposition and scheduled a *Jackson v. Denno*
4 hearing at the request of counsel. That hearing took place on January 18, 2019 then
5 continued and concluded on March 8, 2019, with Pamela Weckerly and Giancarlo Pesci,
6 Chief Deputy District Attorneys, appearing on behalf of the State; and Joel Mann and
7 Christopher Oram, appearing on behalf of Defendant. In preparation for the evidentiary
8 hearing, this Court considered Defendant's Motion, the State's Opposition, Defendant's
9 Reply, and a recording of the questioning that took place on January 11, 2018 (and
10 transcript of the same). At the evidentiary hearing, this Court heard testimony from retired
11 Las Vegas Metropolitan Police Department (LVMPD) Detective Dean O'Kelley and
12 LVMPD Detective Ken Hefner.

13 At the conclusion of the evidentiary hearing, counsel for Defendant requested the
14 opportunity to file supplemental briefing on Defendant's Motion, which this Court
15 allowed. Defendant filed his Supplemental Briefing (Defendant's Supplement) on May 21,
16 2019, wherein he reiterated his request to suppress his statements due to alleged violations
17 of *Miranda v. Arizona*. The State filed its Supplemental Opposition (State's Supplement) to
18 Defendant's Motion on June 10, 2019.

19 Based on the papers and pleadings on file in this matter, the arguments of counsel,
20 and the testimony of the witnesses at the evidentiary hearing, the Court makes the
21 following findings, conclusions, and orders as follows:

22 FINDINGS OF FACT

23 Cold case detectives connected Defendant to the 1997 murder of Nadia Lynn
24 Iverson, a prostitute found dead from a gunshot wound to the head, when they matched
25 Defendant's DNA to that found on Iverson's body.³ On January 11, 2018, LVMPD

26 ² State's Opposition, at 4: 19-23.

27 ³ State's Opposition, at 2: 2.

1 Detectives Hefner and O'Kelley approached Defendant, a former LVMPD officer, outside of
2 his home in Reno, Nevada and asked Defendant if he would voluntarily speak with them at
3 the Reno Police Station.⁴ Defendant agreed and Reno Police detectives drove him to the
4 station.⁵ At the station, detectives placed Defendant in an interview room containing a
5 couch, and a round table with three chairs.⁶ This interview room was used by Reno police
6 to interview child abuse victims. Detective Hefner sat against the wall closest to the door,
7 Detective O'Kelley sat at the table in the chair farthest from the door, and Defendant sat at
8 the table in between the two.⁷

9 The interview lasted about two hours. For the first hour and a half, Detectives
10 attempted to convince Defendant to tell them about his involvement in Iverson's death.
11 Detectives told Defendant that his DNA was found on Iverson's body,⁸ that a spent
12 cartridge casing recovered from the scene matched the caliber gun he carried at the time,⁹
13 and that the Reno Police Department could arrest him that night for failing to register as an
14 ex-felon.¹⁰ Detectives also spoke with Defendant about his daughter's murder and asked
15 Defendant to understand what the Iverson's family must be going through.¹¹

16 Throughout the interview, Defendant acknowledged that he was voluntarily
17 speaking to Detectives.¹² Defendant also stated that he thought he needed an attorney
18 within fifteen minutes of the interview beginning.¹³ Detective Hefner explained that he
19 could not leave until they executed a warrant for his DNA, and Detective O'Kelley
20

21 ⁴ Defendant's Motion, at 3:15-28. Recorder's Transcript of *Jackson v Denno* Hearing, Jan. 18, 2019
(Transcript) at 5:17- 8:9.

22 ⁵ Defendant's Motion, at 4:2. Transcript at 8:13-15.

23 ⁶ Defendant's Motion, at 4:8-11. Exhibits A and B (photos) to State's Opposition. Transcript at 10:5-
22.

24 ⁷ Defendant's Motion, at 4:11-14. Transcript at 10:20-22.

25 ⁸ Surreptitious Recording at 8, 10, & 11.

26 ⁹ Surreptitious Recording at 10.

27 ¹⁰ Surreptitious Recording at 39.

28 ¹¹ Surreptitious Recording at 17.

¹² Surreptitious Recording at 13 & 42.

¹³ Surreptitious Recording at 13.

1 continued asking Defendant about his involvement in the murder.¹⁴ As the interview
2 progressed, Defendant stated that he believed that he was going to jail that night and asked
3 to call his wife. Detective O'Kelley explained that Defendant was not under arrest in this
4 case, but Detective Hefner informed Defendant that the Reno Police Department could
5 arrest him that night for failure to register as an ex-felon:

6
7 Defendant: 'Cause from my perspective (unintelligible) layin' up in a jail cell
8 tonight.

9 Detective O'Kelley: mm-hm. No, I mean, well we still – like we said we gotta –
10 things gotta get typed up and approved and all that. So ...

11 Detective Hefner: If – if – if you, I mean, didn't say another word to use, we'll go
12 back to – back to Las Vegas and we'll submit the case. And I have every
13 confidence that an I – a warrant will be issued.

14 Defendant: Oh I'm quite sure it will be.

15 Detective Hefner: Now what Reno might do on their own with this is, you know,
16 you did not register as an ex-felon and that is a crime. It's a misdemeanor but it's a
17 crime. Now if – if they decide want do that – that's up to them. We don't have any
18 control over that, um, you know, jurisdiction.¹⁵

19 When Defendant asked again to speak to his wife because he believed he was
20 "gonna end up in a jail cell," Detective O'Kelley acknowledged his arrest as a possibility and
21 Detective Hefner made clear that he could not talk to his wife until he was through talking
22 to them:

23 Defendant: I need to talk to my wife. Is that possible? Because once again and that
24 way that I see this scenario playing out - I'm gonna end up in a jail cell tonight.

25 Detective O'Kelley: What n- now what you're sayin'...

26 Defendant: Even though I'm here voluntarily...

27 ¹⁴ Surreptitious Recording at 14–15.

28 ¹⁵ Surreptitious Recording at 39.

1 Detective O'Kelley: Right. But to say to talk to your wife before you talk to us ...

2 Detective Hefner: "Uh, we'll let you w- talk to your wife quite a bit after we're
3 done."¹⁶

4
5 Defendant and Detectives continued discussing the possibility that Reno Police
6 could arrest Defendant that night and, for a third time, Defendant stated, "So I am going to
7 jail today." Detective Hefner replied, "If you give us a statement - a confession tonight, yeah
8 you'll go to jail, um, tonight."¹⁷ Defendant then agreed to speak with Detectives and
9 confessed to shooting Iverson.¹⁸ At no point did Detectives inform Defendant of his rights
10 under *Miranda*.

11 CONCLUSIONS OF LAW

12 1. "A confession is inadmissible unless freely and voluntarily given." *Chambers v. State*,
13 113 Nev. 974, 981, 944 P.2d 805, 809 (1997). The totality of the circumstances is the primary
14 consideration for determining voluntariness. *Blackburn v. Alabama*, 361 U.S. 199, 206, 80 S.Ct.
15 274, 4 L.Ed.2d 242 (1960) (quoting *Fikes v. Alabama*, 352 U.S. 191, 197, 77 S.Ct. 281, 1 L.Ed.2d
16 246 (1957)). The question in cases involving a challenge to the voluntariness of a statement
17 is whether the defendant's will was overborne at the time of the confession. *Passama v. State*,
18 103 Nev. 212, 214, 735 P.2d 321, 323 (1987). To evaluate whether a defendant's will was
19 overborne, a Court must consider factors such as "the youth of the accused; his lack of
20 education or his low intelligence; the lack of any advice of constitutional rights; the length
21 of detention; the repeated and prolonged nature of questioning; and the use of physical
22 punishment such as the deprivation of food or sleep." *Id.* Though courts should consider
23 police deception when evaluating voluntariness of a confession, it is not automatic grounds
24 for suppression, and is permissible if "the methods used are not of a type reasonably likely

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26 ¹⁶ Surreptitious Recording at 42-43.

27 ¹⁷ Surreptitious Recording at 48.

28 ¹⁸ Voluntary Statement at 4.

1 to procure an untrue statement.” *Carroll v. State*, 132 Nev. 269, 280, 371 P.2d 1023, 1031 (2016)
2 (quoting *Sheriff, Washoe Cty. v. Bessey*, 112 Nev. 322, 325, 914 P.2d 618, 619 (1996)).

3
4 2. A *Jackson v. Denno* “hearing is required only when the defendant challenges the
5 voluntariness of his confession.” *Guynes v. State*, 92 Nev. 693, 695 (1976). The State has the
6 burden of showing, by a preponderance of the evidence, that the confession was voluntary.
7 *Falcon v. State*, 110 Nev. 530, 874 P.2d 772 (1994). If the court finds that the statement was
8 involuntary, it ceases to exist legally and cannot be used for any purpose. *Mincey v. Arizona*,
9 437 U.S. 385, 98 S. Ct. 2408 (1978).

10 3. A person is entitled to *Miranda* warnings whenever they are in custody and
11 subjected to interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444, 8 S. Ct. 1602, 1624 (1996). A
12 person is in custody when the situation would lead a reasonable person to believe they
13 were not free to leave. *Id.* To determine whether a person was in custody and entitled to
14 *Miranda*, courts should look to the “totality of the circumstances, ‘includ[ing] the site of the
15 interrogation, whether the objective indicia of arrest are present, and the length and form of
16 the questioning.’” *Carroll*, 371 P.3d at 1032. Courts are more likely to determine that a
17 suspect is in custody if the suspect is not permitted to make a phone call, despite a request
18 to do so. *Silva v. State*, 113 Nev. 1365, 1370, 951 P.2d 591, 951 (1997). If a person is questioned at
19 a police station, courts should consider whether police withheld food or drink or made
20 promises they could not keep, and the position of the parties in the interview room. *Id.*

21 4. If a person is not in custody, they are not entitled to a Fifth Amendment right to
22 counsel, and police can continue questioning the suspect as long as the statements remain
23 voluntary. *Silva v. State*, 113 Nev. 1365, 1370-71, 951 P.2d 591, 594-95 (1997). If a statement is
24 voluntary, but *Miranda* is violated, that statement can only be used for impeachment if the
25 defendant testifies and contradicts the statement. *Harris v. New York*, 401 U.S. 222, 91 S. Ct.

1 643 (1971); *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215 (1975); *McGeev. State*, 105 Nev. 718, 782
2 P.2d 1329 (1989).

3 5. The Court concludes that Defendant's statements were voluntary. Defendant was
4 not formally arrested when detectives first made contact with him outside his apartment
5 and Defendant agreed to accompany them to the police station to answer questions. At the
6 police station, Detectives confirmed—and Defendant agreed—that he was speaking with
7 them voluntarily. The room where detectives interviewed Defendant was not an
8 interrogation room and Defendant was not handcuffed. During the interview, Detectives
9 did not yell, threaten or deceive Defendant. Though Detectives mentioned the murder of
10 Defendant's daughter and appealed to his sense of empathy, this was not coercive.

11 6. The Court concludes that as the interview progressed, Defendant was entitled to
12 his *Miranda* warnings because he stated that he reasonably believed he was going to jail and
13 Detectives failed to correct his statement. Defendant first stated that he believed he was
14 going to jail that night at page 39 of the surreptitious recording. Instead of contradicting
15 him, Detectives told him that the Reno police could arrest him for his failure to register as
16 an ex-felon. Defendant made two other comments that he believed he was going to jail that
17 night and needed to call his wife, presumably to inform her that he would not be coming
18 home. Detectives not only refused to let him call his wife, but again failed to correct his
19 statements about his custodial status. Under the totality of the circumstances, the Court
20 finds that a reasonable person would believe, as the Defendant did, that he was not free to
21 leave and in custody. Therefore, Defendant was entitled to his *Miranda* warnings after page
22 39 of the surreptitious recording. Because Detectives failed to issue those warnings, all
23 subsequent statements must be suppressed.

24 7. The Court further concludes that that Defendant did not invoke his right to an
25 attorney. While Defendant initially stated he needed an attorney, he was not in custody
26 when he made that request and therefore had no Fifth Amendment right to invoke.

1 Defendant was not in custody until detectives informed him that he could be arrested by
2 Reno police, Defendant told them he believed he was going to jail, and detectives did not
3 contradict that statement. Defendant did not then ask for an attorney.

4 CONCLUSION

5 The Court concludes that all statements made after page 39 of the Surreptitious
6 Recording and all statements in the Voluntary Statement must be suppressed. Defendant
7 reasonably believed he was in custody and was therefore entitled to his *Miranda* warnings.
8 Detective's failure to issue those warnings renders his statements inadmissible. The Court
9 further concludes that Defendant's statement was voluntary and not the product of
10 coercive police tactics and, thus, may be used for impeachment.

11
12 ORDER

13 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Arthur
14 Sewall's Motion to Suppress Illegally Obtained Statements is GRANTED as to any
15 statement made past page 39 of the Surreptitious Recording and the entire Voluntary
16 Statement.

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18 Dated this 16 day of September, 2019.

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21 DISTRICT COURT JUDGE
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1 I hereby certify that on or about the date signed, a copy of this order was electronically
2 served and/or placed in the attorney folder maintained by the Clerk of the Court and/or
3 mailed by U.S. mail to the following:

4 Pamela Weckerly, Deputy District Attorney
Joel Mann, Esq, Law Office of Joel Mann.

5 
6 for Susan Schofield, Judicial Executive Assistant