that would be a good idea, and at 5:26 p.m. Detective Hefner escorted Mr. Sewall to the bathroom to watch him remove the tobacco and wash his mouth out with water.

After asking for a lawyer and being told he cannot leave until they finish several items, the barrage of questioning and cajoling of Mr. Sewall continues. The Detectives use all sorts of tactics to get Mr. Sewall to give them the statement they are looking for. The Detectives bring up the fact that Mr. Sewall's daughter was murdered in Texas and asking him to understand how the victim's family in this case would feel. (Surreptitious Recording, pg. 17).

After being told that he cannot leave until they complete their search warrants, and continuing to be questioned, Mr. Sewall comes to the realization that he is not going home tonight, that he is not free to leave. Mr. Sewall tells the Detectives, " 'Cause from my perspective (unintelligible) [I'm] laying up in a jail cell tonight." (Surreptitious Recording, pg. 39). The Detectives respond that they may not arrest him tonight, but that the Reno Police Department (RPD), may be arresting him for failure to register as an ex-felon. Id.

Mr. Sewall then asks the Detectives if he can speak with his wife. "I need to talk to my wife. Is that possible? Because once again and the way that I see this scenario playing out – I'm gonna end up in a jail cell tonight." (Surreptitious Recording, pg. 42). The Detectives tell Mr. Sewall that he cannot speak with his wife until he has given them a statement, telling him that once he has given a statement they will let him talk with his wife as much as he wants.

> Right. But when you - when you lay out for us and do like - like - and we'll with the recorder -- this is who's present, date and

> time, dah - dah - dah and you tell us. The guarantee with you is that you get that opportunity to talk with your wife about it regardless. I promise. As a man, I promise.
> (Surreptitious Recording, pg. 42).

The Detectives continue to dominate the questioning and barrage Mr. Sewall with stories about how much it would mean to get the truth, about once Mr. Sewall has given a statement he can talk with his wife, about without his statement the DA will be able to say some sick things about Sewall and what they think he did.

Mr. Sewall states very plainly and definitively to Detectives that he is convinced he is going to jail today, "So I am going to jail today." (Surreptitious Recording, pg. 48). The Detectives remind Mr. Sewall that yes RPD could arrest him tonight and take him to jail.

In seeing that Mr. Sewall is vulnerable, the Detectives tell Mr. Sewall, "you start and finish and you talk to you wife. We get the major case prints and you're talkin' to her. Yes?" (Surreptitious Recording, pg. 50).

It was not until after Mr. Sewall acquiesced to the pressure of the Detectives and gave the Detectives the statement that they wanted, that the evidence technicians that they were waiting for, finally came into the room, over two plus hours after Mr. Sewall asked for an attorney.

During this entire period of pressure, the Detectives did not Mirandize Mr. Sewall. They did not notify him of his Constitutional right to remain silent or his right to request an attorney. Once Mr. Sewall's will was overborne by these seasoned Detectives, they again did not Mirandize Mr. Sewall. No where in Mr. Sewall's entire

71 page statement did the Las Vegas Metropolitan Police Detectives Mirandize Mr. Sewall.

POINTS AND AUTHORITIES

Mr. Sewall's statement that he gave to Detectives should be suppressed as he was not free to leave, was not advised of his Miranda Warning, and when he asked for a lawyer in clear and distinct terms his request was ignored. His statement was a product of coercive police tactics that violated Mr. Sewall's constitutional right.

I. In-Custody Statements Made Without Miranda Warnings Are Inadmissible.

The Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." Miranda v. Arizona requires law enforcement to use procedural safeguards to secure this constitutional right.[2] "[I]f a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent."[3] This "warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it."[4] Miranda's warnings will also ensure that waiver of this constitutional right is made freely, knowingly, and voluntarily.[5]

The Sixth Amendment guarantees "the Assistance of Counsel." Miranda holds that, as "an absolute prerequisite to interrogation," the individual in custody "must

[2] Miranda v. Ariz., 384 U.S. 436, 444, 86 S. Ct. 1602, 1624 (1966).
[3] Id. at 467-468.
[4] Id. at 468.
[5] Id. at 468.

be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation."[6]

Miranda warnings are necessary whenever someone is "in custody or otherwise deprived of his freedom of action in any significant way."[7] Whether a person is in custody depends upon "how a reasonable person in the suspect's situation would perceive his circumstances."[8] Central to custody is "how a reasonable person in that position would perceive his or her freedom to leave."[9]

The appropriate Miranda warnings are "prerequisites to the admissibility of any statement made by a defendant."[10] Because the right not to be a witness against oneself and the right to assistance of counsel are trial rights, the admission of statements obtained without appropriate Miranda warnings is itself unconstitutional.[11]

In this particular case, it is clear and should be uncontested that Miranda Warnings were not given to Mr. Sewall at any point during his interrogation. Mr. Sewall was never advised of his constitutional rights during any course of his interrogation.

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[6] Id. at 471.
[7] Id. at 445.
[8] Yarborough v. Alvarado, 541 U.S. 652, 662, 124 S. Ct. 2140, 2148, (2004).
[9] Stansbury v. Cal., 511 U.S. 318, 325, 114 S. Ct. 1526, 1530, 128 L. Ed. 2d 293, 300 (1994).
[10] Id. at 477.
[11] New York v. Quarles, 467 U.S. 649, 660, 104 S. Ct. 2626, 2634 (1984); Chavez v. Martinez, 538 U.S. 760, 770, 123 S. Ct. 1994, 2003 (U2003).

II. When A Person Indicates He Or She Does Not Wish To Be Interrogated, Or Requests An Attorney During Interrogation, Subsequent Statements Made Because Police Denied These Rights Are Inadmissible.

Not only must an individual in custody be informed of his or her rights, law enforcement must also respect the exercise of these rights. "[T]he accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."[12] "[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his right to cut off questioning was scrupulously honored."[13]

If at any time the person tries to end the interrogation, the police must respect this request. "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[14] "[A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise."[15]

The police must also respect a request for the assistance of an attorney by ceasing an interrogation when the suspect requests an attorney. "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present."[16] In other words, Miranda requires that "the police not question a suspect unless he waives his right to counsel."[17] "[When] the suspect has requested and been

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[12] Miranda v. Ariz., 384 U.S. at 467.
[13] Michigan v. Mosley, 423 U.S. 96, 104, 96 S. Ct. 321, 326 (1975), quoting Miranda v. Ariz., 384 U.S. at 467, internal quotes omitted.
[14] Miranda v. Arizona, 384 U.S. at 473-74.
[15] Id. at 474.
[16] Id.
[17] Duckworth v. Eagan, 492 U.S. 195, 204, 109 S. Ct. 2875, 2881 (1989).

denied an opportunity to consult with his lawyer, . . . the accused has been denied the Assistance of Counsel."[18]

The Nevada Supreme Court fully embraces these holdings.

> If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.[19]

In this case, it is clear and obvious that Mr. Sewall absolutely and definitely asked for an attorney. "...whether I'm here voluntary or not - I need a lawyer." (Surreptitious Recording, pg. 13). Furthermore, it is clear that the questioning did not cease, and Mr. Sewall was not offered an opportunity to get an attorney.

III. Law Enforcement Prevented Mr. Sewall From Leaving, Calling His Wife Or Ending The Interrogation With The Request Of An Attorney, Thus Placing Him In Custody

Whether a person is in custody for Miranda purposes depends upon "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave."[20] "There has been a formal arrest, or where there has been a restraint on freedom of movement of the degree associated with a formal arrest so that a reasonable person would not feel free to leave."[21]

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[18] Escobedo v. Ill., 378 U.S. 478, 491, 84 S. Ct. 1758, 1765 (1964).
[19] State v. Billings, 84 Nev. 55, 58, 436 P.2d 212, 214 (1968).
[20] 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.")
[21] State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998)

The mere fact that officers tell a suspect he is free to leave does not make an interrogation non-custodial – the courts must look to the totality of circumstances to determine whether a reasonable person would actually feel free to leave.[22] Telling a suspect is free to leave may be only a "hollow right" if there is no actual ability to leave.[23]

In determining whether objective indicia of custody exists, these factors should be considered: 1) whether the suspect was told that the questioning was voluntary or was free to leave; 2) whether the suspect was not formally under arrest; 3) whether the suspect could move about freely during questioning; 4) whether the suspect voluntarily responded to questions; 5) whether the atmosphere of questioning was police dominated; 6) whether the police used strong arm tactics or deception during questioning; and 7) and whether the police arrested the suspect at the termination of questioning.[24]

In Carroll v. Nevada,[25] the Nevada Supreme Court held that the district court erred in denying Mr. Carroll's Motion to Suppress his statement to the police because the police had subjected Mr. Carroll to custodial interrogation without advising him of his Miranda rights. The Court focused on three main inquiries in the determination of whether custody for purposes of Miranda exists. The main inquiries were as follows: 1) the site of the interrogation; 2) objective indicia of arrest; and 3)

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[22] United States v. Craighead, 539 F.3d 1073, 1083 (9th Cir. Ariz. 2008).
[23] Id.
[24] Carroll v. State, 132 Nev. Adv. Rep. 23, 22, 371 P.3d 1023, 1033 (2016), *citing* Taylor, 114 Nev. at 1082 (footnote 1, citing United States v. McKinney, 88 F.3d 551, 554 (8th Cir 1996).
[25] 371 P.3d 1023. 132 Nev. Adv. Rep. 23 (2016)

the length and form of the questioning.[26] An individual is not in custody for purposes of Miranda if the police are merely asking questions at the scene of a crime or the individual is merely a focus of the criminal investigation.[27]

In this case, identical to the Carroll case, Mr. Sewall was never read his Miranda Warnings and never advised of his rights. The circumstances surrounding the interrogation show that Mr. Sewall was eventually not free to leave and therefore in custody. Although, clearly intimidated by being approached by four different detectives in his apartment parking lot, Mr. Sewall did choose to go to Reno Police Station. Mr. Sewall was also transported to the station without restraints but was surrounded by several law enforcement personnel.

Interrogation at the Police Station

As the Nevada Supreme Court found in Carroll, the questioning at a police station is a strong indicator of a person not feeling free to leave. "Police drove him [Carroll] to the homicide office for questioning, so Carroll could not terminate the interrogation or leave the homicide office unless the detectives agreed and gave him a ride home."[28] In this case, similar to Carroll, Mr. Sewall was surrounded by four different officers and transported in their car to the Reno Police Station. The police could have conducted the interrogation of Mr. Sewall in his apartment where he lived alone, instead the police chose to intimidate Mr. Sewall into going to the Reno Police Station to be interrogated in their interrogation room. The site of the interrogation indicates that Mr. Sewall was not free to leave when he gave his statement.

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[26] Id. at 1032.
[27] Id.
[28] Id. at 1032

Interrogation Room

Once Mr. Sewall was brought into the police station he was placed in a small interrogation room, where the two (2) LVMPD Detectives entered and asked him to turn off his cell phone. Detective Hefner sat in a position against the wall that would indicate that the Detective had control over who would be able to leave the room. Similar to Carroll, the Detective made it seem that in order to leave the room Mr. Sewall would have to physically go through Detective Hefner.

Invoked His Right To Attorney – Denied By Detectives

Once the Detectives started asking him questions, Mr. Sewall started to believe that he was going to be charged with something and invoked his right to an attorney. "...whether I'm here voluntary or not - I need a lawyer." (Surreptitious Recording, pg. 13). Detective Hefner immediately stopped questioning and informed Mr. Sewall that the Detectives' had warrants for his DNA, fingerprints, and picture and once that was done he would be free to leave. However, Detective O'Kelley ignored Mr. Sewall's request for an attorney and continued questioning of Mr. Sewall. Detective O'Kelley's interrogation, along with Detective Hefner, of Mr. Sewall went on for another hour and a half.

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Not Allowed To Leave Without Providing Forensic Evidence

It is clear that at the moment Mr. Sewall exercised his right to an attorney, and that request was ignored that Mr. Sewall was in custody. A reasonable person who requests an attorney at a so-called voluntary interview, would immediately realize that this is not voluntary anymore. This is exactly how it played out in Mr. Sewall's interrogation.

As in Carroll, it is understandable that a reasonable person would believe that they cannot leave the police station when the Detectives are specifically telling you that first you must satisfy the warrants they have. Mr. Sewall had to sit and wait for the Detectives to collect the DNA, then sit and wait for the lab technicians to collect his fingerprints, which did not happen until more than two (2) hours after he requested an attorney, nor did it happen until Mr. Sewall provided the police with the statement they wanted (7:30 p.m.), and then have his picture taken.

The Court Orders directed the Detectives to collect the evidence with force if necessary, this would cause a reasonable person to understand you cannot leave until the Detectives satisfy these Court Orders, a reasonable person has no choice other than just wait. During that forced waiting period, the Detectives used that opportunity to continue to ask questions, after Mr. Sewall had requested an attorney.

It is clear that even Detective Hefner believed that Mr. Sewall was not free to leave after Mr. Sewall asked for an attorney as he stated that, "Um, you know you – you did ask for an attorney and whatever comes after that we can't use." (Surreptitious Recording, pg. 23). If the Detective is telling Mr. Sewall that after he

has asked for an attorney that we cannot use any additional statements from you, then he is implying that Mr. Sewall was in custody. In addition, this statement was also used to coerce Mr. Sewall to give a statement when he believed that anything he said would not be used against him.

Despite what Mr. Sewall actually said, Detective O'Kelley attempted to trick Mr. Sewall to believe that he said he "thinks he needs an attorney". Detective O'Kelley clearly did this as a manipulation ploy to coerce Mr. Sewall to give a statement.

Not Allowed To Use The Phone To Call His Wife

Just as in Carroll, Mr. Sewall asked to use the phone to call his wife before any additional questioning and was denied his right to use the phone to call his wife. In Carroll, the Nevada Supreme Court stated, "Police did not allow Carroll to use his telephone when he said he needed to make a call."[29] The Carroll Court distinguished Silva v. State[30] from Carroll based partly on Carroll being denied the use of a phone.[31]

Just like the Nevada Supreme Court found in Carroll, a reasonable person, under the circumstances that Mr. Sewall was in, would not have felt free to leave, especially when Mr. Sewall asked to use his phone to call his wife. The Detectives clearly and distinctly stated that Mr. Sewall could not use the phone. Mr. Sewall made numerous attempts to explain to the Detectives that he wanted to pause the questioning by asking to speak to his wife. Again and again as the interrogation

[29] Carroll, at 1033
[30] Silva v. State, 113 Nev. 1365, 951 P.2d 591 (1997)
[31] Carroll, at 1033

progressed, it became clear that the detectives would not let him do so, until after he gave them what they wanted. He had to give a statement in order to speak with his wife.

> Sewall: I need to talk to my wife. Is that possible? Because once again and the way that I see this scenario playing out – I'm gonna end up in a jail cell tonight."
>
> O'Kelley: But to say to talk to your wife before you talk to us or I'll give - I'll give you my cellphone and you can talk (unintelligible) - or use or you got your own (unintelligible) - that is an absolute promise that you'll get to talk to her. Nobody's gonna be hooking and booking you without lettin' you be, you know, treated decently."
>
> (Surreptitious Recording, pg. 42).
>
> O'Kelley: But when you - when you lay out for us and do like - like - and we'll with the recorder -- this is who's present, date and time, dah - dah - dah and you tell us. The guarantee with you is that you get that opportunity to talk with your wife about it regardless. I promise. As a man, I promise.
>
> (Surreptitious Recording, pg. 42)
>
> O'Kelley: …and I promise you you're gonna talk to your wife as long as you want. We'll give you privacy…
>
> (Surreptitious Recording, pg. 45)
>
> O'Kelley: You start and finish and you talk to you wife. We get the major case prints and you're talkin' to her. Yes?
>
> (Surreptitious Recording, pg. 50)

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Sewall Believed That He Was Going To Be Arrested By Reno PD

In addition to attempting to speak with his wife over and over again, Mr. Sewall clearly believed that he was not leaving the station voluntarily after the interrogation. In fact, it was strongly implied that Reno Police were going to arrest Mr. Sewall after the interrogation for failure to register, no matter what Sewall did in the interrogation room.

> Sewall: 'Cause from my perspective (unintelligible) layin' up in a jail cell tonight.
>
> ....
>
> Hefner: Now what Reno might do on their own with this is, you know, y- you didn't register as an ex-felon and that's a crime. It's a misdemeanor but it's a crime. Now if – if they decide want do that – that's up to them. We don't have any control over that, um, you know, jurisdiction.
>
> (Surreptitious Recording, pg. 39).
>
> Sewall: Well I'm not certainly l- looking forward to (unintelligible) a jail cell.
>
> Hefner: That's - I've never been to the jail here. That's understandable.
>
> Sewall: (Unintelligible) but I see that happening in my very near future. I'm sure that...
>
> Hefner: (Unintelligible) concentrate so much on the very near future as in, uh, the long term outcome. 'Cause, you know, (unintelligible) this all adjudicated and justice is meted out, uh, and go with what happens with that (unintelligible). And it definitely impact big - big time.
>
> O'Kelley: And, you know, we don't - I - again - we just met these detectives that we're working with here...
>
> Sewall: Mm-hm.

O'Kelley: ...and, uh, you know, we don't know, like I said, I've never been in the Reno jail -I don't know what any - anything about it. But, you know, we'll have discussions with them about you - whatever you accommodations are, like, by yourself …

(Surreptitious Recording, pg. 47)

Sewall: So I am going to jail today.

Hefner: Well it - not so much, like I said, not with us. Uh, i- if you give us a statement -confession tonight, yeah you'll go to jail, um, tonight. Um, you'll be here for a few days until we're start the process to bring back down to Las Vegas. Um, like I said they could arrest you right now - they even mentioned that but (unintelligible) - that's (unintelligible) stuff. That's what you do to people that cause you aggravation and grief, you know, and, uh...

(Surreptitious Recording, pg. 48)

It is clear that not only did Mr. Sewall believe that he was going to jail that night, the Detectives believed that he was going to jail immediately after the interrogation as well. The Detectives are even trying to assure Mr. Sewall that he would be well taken care of in jail and that they would get him his own cell if he wants. Whether he gave a statement or not, it was clear to Mr. Sewall and the Detectives that the Reno Police wanted to arrest him, and whether they arrested him or not was based on whether the Reno Police wanted to "cause you aggravation and grief." Meaning, should the Reno Police want to give Mr. Sewall a hard time they would arrest him on this misdemeanor charge. The only reason the Reno PD would want to cause Sewall aggravation, is the Reno PD believed that he did not cooperate with LVMPD and give them what they wanted. Any reasonable person

would believe that if they do not cooperate they would be arrested, Mr. Sewall definitely believed that very idea.

Mr. Sewall cooperated with LVMPD Detectives, and Reno Police still arrested him on the misdemeanor charge of failure to register. Mr. Sewall remained in the Reno jail on those charges for over a week, until Las Vegas finally filed charges against him and transported him to Las Vegas. This clearly demonstrates that the illusion that Mr. Sewall came to the station voluntarily, or that he remained at the station voluntarily, is nothing more than smoke and mirrors to illicit what LVMPD wanted from Mr. Sewall without reading him his Miranda warnings.

CONCLUSION

Detectives took Mr. Sewall into custody by preventing him from leaving when he requested an attorney. They told him he needed to complete DNA tests, fingerprints, and picturing before he could leave, and then refused to allow him to call his wife until he gave them what they wanted. Mr. Sewall stated over and over again that he did not believe he was free to leave, that he would be going to jail that night. Never once did the Detectives inform Mr. Sewall of his Miranda rights.

Because the detectives did not inform Mr. Sewall of his Miranda rights, statements made during the interrogation must be suppressed.

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In addition, because Mr. Sewall invoked his rights to an attorney, but the detectives refused to respect this right, subsequent statements must be suppressed.

DATED this 19th day of October, 2018.

By: /s/ Christopher Oram, Esq.
CHRISTOPHER R. ORAM, ESQ.
Nevada State Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
Attorney for Sewall

By: /s/ Joel Mann, Esq.
JOEL M. MANN, ESQ.
Nevada State Bar No. 008174
601 South 7th Street
Las Vegas, Nevada 89101
Attorney for Sewall

CERTIFICATE OF SERVICE

The above **MOTION TO SUPPRESS ILLEGALLY OBTAINED STATEMENTS** was made this 19th day of October, 2018, via electronic mail to the Clark County District Attorney:

GIANCARLO PESCI: giancarlo.pesci@clarkcountyda.com

PAMELA WECKERLY: pamela.weckerly@clarkcountyda.com

By: /S/ Maria Moas

Employee of JOEL M. MANN, CHTD.

OPPS
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #6163
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

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 MOTION TO SUPPRESS

DATE OF HEARING: 11/29/18
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 Motion To Suppress.

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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STATEMENT OF FACTS

On May 8, 1997, at approximately 9:42 am, Nadia Lynn Iverson was discovered on the cement floor of a duplex unit under major renovation at 1226 Reed Place, Las Vegas. The unit's walls had been stripped down to the framing studs and openings for doors and windows were not entirely covered, leaving the unit unsecured. The majority of the other duplexes in the Marble Manor complex were in much the same state. Homicide Detectives Chandler and Hardy responded to the scene, as well as Crime Scene Analyst Yolanda McClary.

A spent .357 projectile was recovered on the floor in the unit. However, no cartridge case was found, suggesting that the murder weapon could have been a revolver.

It appeared that Nadia had been shot at that location as there was a large amount of blood pooled under her body and the bottoms of her bare feet were covered in the fine, gray dust and no blood. Nadia's pants had the same dust on both knees. She also had abrasions to her forehead and nose.

On May 9, 1997, Deputy Medical Examiner Dr. R. Bucklin performed the autopsy on the body of Nadia Iverson and determined the cause of death to be a gunshot wound to the back of her head. Dr. Bucklin indicated that the shot in the back of Nadia's head was a contact wound with the bullet traveling upward toward the front of the head and exiting in the vicinity of the left eyebrow. Dr. Bucklin determined the manner of death to be homicide. A sexual assault kit was administered by Crime Scene Analyst McClary during the autopsy.

During the initial investigative stages, detectives learned Iverson had been in Las Vegas for only a few months. She drove out from Pennsylvania with her boyfriend Gregory Viaslisin in late January or early February 1997. Once here, they both fell into using drugs. When Viaslisin went to jail, Iverson had to fend for herself, resorting to prostitution to acquire drugs. It appears all of her time in Las Vegas was spent in and around the area of Downtown/Fremont Street.

In March 1997, Las Vegas Metropolitan Police Officer Arthur Sewall resigned from the police department as criminal charges against him were imminent. Sewall was accused of coercing downtown area prostitutes into having sex with him in exchange for his overlooking

drug or paraphernalia issues and not taking his victims to jail in exchange. Some of the sexual encounters occurred after Sewall's shift had ended and he was in his own clothes and vehicle. He also was caught on video extorting sex after being set up by internal affairs.

Sewall was originally charged with First Degree Kidnapping, Sexual Assault, and Oppression Under Color of Law. After a preliminary hearing, Sewall ultimately pled guilty to two counts of Oppression Under the Color of Law, received five years of probation and a short jail sentence. As part of his probation intake, Sewall provided Parole & Probation officials with a DNA sample.

On July 28, 1999, Sewall was arrested by the San Diego Police Department after soliciting an undercover female detective on the street for sex. Impounded from Sewall's vehicle upon his arrest was a Ruger .357 revolver with serial number 571-87579. Sewall also had his Metro gun registration card for this same weapon which contained additional descriptive information that the gun was a model SP-101, chrome in color with a 3 inch barrel. This gun was destroyed by the San Diego Police Department years later. This same revolver had been impounded from Sewall for safekeeping in 1995 when Metro responded to a domestic disturbance call involving Sewall. It was later released back to him. Sewall's 1999 San Diego arrest resulted in his probation being revoked. He was sent to prison to serve out the remainder of his sentence.

In April 2017, Metro Forensic Scientist Anya Lester examined the expended bullet recovered on the cement floor at the scene. She determined the bullet to be consistent with a .357 but not to the exclusion of a .38 or 9mm bullet. Other screening factors favor the bullet being a .357. The bullet passed through Iverson's head, which also suggests a powerful cartridge. Anya Lester was also able to provide a list of common firearms manufactured with rifling characteristics similar to those present on the bullet to include, but not limited to, INA, Ruger, Smith & Wesson and Taurus.

On April 4, 2017, detectives received a CODIS Hit Notification Report of a match between Sewall's DNA and the suspect DNA found on vaginal and rectal swabs taken at Nadia's autopsy and from the interior surface of the buttock area of Nadia's pants.

On April 12, 2017, detectives surveilled Sewall as he discarded some chewing tobacco from his mouth onto the ground. They recovered the chewing tobacco and it was later impounded to be used as the surreptitious standard for Sewall during later comparisons. On June 1, 2017, Forensic Scientist Cassandra Robertson examined the DNA evidence in this case. She identified Sewall's DNA found on the vaginal and rectal swabs taken from Iverson at autopsy. His DNA was also found in a stained area on the inside buttock area of Iverson's pants.

On January 11, 2018, Cold Case Detectives Hefner and O'Kelley interviewed Sewall in Reno, Nevada. During the interview, he admitted to engaging Iverson in sex for money. During their sexual encounter, Iverson was shot. Sewall could not account for why his gun was out or pointed at Iverson. He knew she was shot in the head and he immediately fled the scene. A buccal swab was obtained during the interview and a confirmatory DNA match was later found with the evidence from autopsy and Nadia's clothing.

Defendant Sewall now moves to suppress the statement he gave to detectives because he was not given a Miranda warning before making the statement. The State opposes. Sewall was not in custody; therefore, detectives were not required to issue a Miranda warning.

POINTS AND AUTHORITIES

In his motion to suppress, Sewall raises the issue of custodial status and that he was not given a Miranda warning. He does not claim that the statement was made involuntarily. As Sewall was not in custody at the time he spoke with detectives, they had no obligation to provide him with an attorney during questioning. In fact, even if Sewall had unequivocally requested an attorney during questioning, detectives were not required to cease questioning nor provide him with an attorney as he was out of custody. "It is well settled that one who is not in custody is not entitled to the Fifth Amendment right to counsel. Therefore, the police may continue asking the suspect questions, even if he asks for an attorney during the interrogation, as long as the statements are voluntary." Silva v. State, 113 Nev. 1365, 1370-71, 951 P.2d 591, 594-95 (1997), citing Minnesota v. Murphy, 465 U.S. 420, 424 n.3, 79 L. Ed. 2d 409, 104 S. Ct. 1136 (1984); State v. Stanley, 167 Ariz. 519, 809 P.2d 944, 950 (Ariz.

1991), cert. denied, 502 U.S. 1014, 116 L. Ed. 2d 751, 112 S. Ct. 660 (1991); Ronnebaum, 449 N.W.2d at 724; State v. Fry, 61 Ohio App. 3d 689, 573 N.E.2d 1108, 1109-10 (Ohio App. 1988). If a suspect is not in custody, there is no Fifth Amendment right to counsel to assert. Silva, 113 Nev. at 1370-71, 951 P.2d at 594-95.

The Nevada Supreme Court has addressed whether a suspect is in custody for the purposes of Miranda. Carroll v. State, 371 P.3d 1023 (2016). "[A] trial court's custody and voluntariness determinations present mixed questions of law and fact subject to this court's de novo review." Id. at 1031, citing Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). In Carroll, the court explained how it reviews such inquiries:

> The proper inquiry requires a two-step analysis. The district court's purely historical factual findings pertaining to the "scene-and action-setting" circumstances surrounding an interrogation [are] entitled to deference and will be reviewed for clear error. However, the district court's ultimate determination of whether a person was in custody and whether a statement was voluntary will be reviewed de novo....
>
> For this standard of review to function properly, "trial courts must exercise their responsibility to make factual findings when ruling on motions to suppress."

Id., quoting Rosky 121 Nev. at 190-91, 111 P.3d at 694-95 (quoting In re G.O., 191 Ill. 2d 37, 727 N.E.2d 1003, 1010, 245 Ill. Dec. 269 (Ill. 2000)). Moreover, where "the trial court's determination that a defendant was not improperly induced to make the statement [to police] is supported by substantial evidence, . . . such a finding will not be disturbed on appeal." Id., quoting Barren v. State, 99 Nev. 661, 664, 669 P.2d 725, 727 (1983). The court additionally reminded trial courts to make factual findings and legal conclusions when ruling on motions to suppress.

A. Sewall's Statement to Detectives Was Voluntary.

As this Court is well aware, the totality of the circumstances is the primary consideration for determining voluntariness. Blackburn v. Alabama, 361 U.S. 199, 206, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960) (quoting Fikes v. Alabama, 352 U.S. 191, 197, 77 S. Ct. 281, 1 L. Ed. 2d 246 (1957)). The Nevada Supreme Court has held that "[t]he question in each case is whether the defendant's will was overborne when he confessed." Passama v. State, 103 Nev.

212, 214, 735 P.2d 321, 323 (1987). The trial court should consider factors such as: "the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep." Id.

In the instant case, Sewall has not claimed that the statement he gave was involuntary. He claims that it is inadmissible because he was not provided with a Miranda warning before making the statement. Sewall possesses a background that not many have when they encounter the police. Sewall was a trained police officer. He had been trained on police interviews and Miranda. In addition, since his employment with Metro, he had several police contacts. He is not youthful nor intellectually disabled. Clearly, his statement is voluntary. Nonetheless, if voluntariness of a confession has been raised as an issue, there must be a hearing pursuant to Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774 (1964), before an accused's statements are brought before a jury. At this hearing, the court must hear what the defendant told the police and the circumstances under which the defendant made the statement. The court must then decide (1) whether his statement was voluntary using the totality of the 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. Brimmage v. State, 93 Nev. 434, 567 P.2d 54 (1977), Falcon v. State, 110 Nev. 530, 874 P.2d 772 (1994). 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 testifies and contradicts the statement. Harris v. New York, 401 U.S. 222, 91 S. Ct. 643 (1971); Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215 (1975); McGee v. State, 105 Nev. 718, 782 P.2d 1329 (1989). If the court finds that it was voluntary and Miranda warnings were not necessary or provided, it can be used for all purposes during trial.

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B. Sewall Was Not In Custody So A Miranda Warning Was Not Required.

As this Court is well aware, "Miranda warnings are "required when a suspect is subjected to a custodial interrogation." Archanian v. State, 122 Nev. 1019, 1038, 145 P.3d 1008, 1021 (2006). A defendant is "in custody" for purposes of Miranda if he or she has been formally arrested or his or her freedom has been restrained to "the degree associated with a formal arrest so that a reasonable person would not feel free to leave." State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998).

"Custody is determined by the totality of the circumstances, 'including the site of the interrogation, whether the objective indicia of an arrest are present, and the length and form of the questioning.'" Carroll, 371 P.3d at 1032, citing Taylor, 114 Nev. at 1081-82, 968 P.2d at 323. Importantly, an "individual is not in custody for Miranda purposes if the police are merely asking questions at the scene of the crime or where an individual questioned is merely the focus of a criminal investigation." Carroll, 371 P.3d at 1032 (internal citations omitted).

1. Site of Interrogation

The Nevada Supreme Court has discussed factors related to the site of interrogation which are relevant to the determination of whether or not an individual is in custody. Most recently, in Carroll, the court discussed distinctions between the circumstances of Carroll, where the court found a suspect was in custody, and those in Silva v. State, 113 Nev. 1365, 951 P.2d 591 (1997), where the court found a suspect was not in custody.

The Nevada Supreme Court recognizes that the fact that questioning occurs at a police station "does not automatically mean that [a suspect] was in custody." Silva, 113 Nev. at 1370, 951 P.2d at 594. Instead, the length of time of the questioning, whether the police withheld food or drink from a suspect or made promises to the suspect are factors which can suggest custodial status. Id. at 1370, 951 P.2d at 594. The position of the parties in the interview room relates to whether a suspect is in custody for the court. If the room is small and the suspect is the furthest from the door, the "environment" suggests custody according to the court. Carroll, 371 P.3d at 1032. In addition, if detectives do not allow an individual to use their phone or refuse to let him leave upon request to do so, the individual is more likely to be deemed in

custody for purposes of Miranda. Id. Finally, if detectives promise to investigate aspects of a suspect's claim, it is suggestive of custodial status, according to the court. Id.

In the instant case, the police did not question Sewall for a very lengthy amount of time. The entire interview was approximately two hours. In addition, they never denied Sewall food or drink. While Sewall was asked to turn off his cell phone, he remained in possession of it. Moreover, the room itself appeared to be an office waiting area more than a suspect interrogation room. The room had a couch, chairs, and a round table. The room was decorated. The person positioned farthest from the door appears to be Detective O'Kelley, not Sewall. The person who is the most blocked in the room is Detective O'Kelley, not Sewall. See attached photographs.

In addition, the detectives did not deny Sewall his request to call his wife, as he claims in his motion. In context, Sewall indicated that he wanted to speak to his wife, but did not specify if he meant before talking to detectives or after. As the conversation progressed, it's clear that he meant after. Moreover, detectives did allow him to make that call.

> Q: Um, wisdom guided by experience says that this is the direction things have gone in the past and where - where they would go in this instance that, you know, you just - you don't know. I mean you got - you can have, like I said - you know, like he was sayin' if you, you know, if you've got like, "I don't know. Or no I've never seen her before. I don't remember." Then you got family who's like well, you know, "Burn him at the stake," kinda thing. You know, you got people...
>
> A: Of course.
>
> Q: ...who are like, "Hey if he's not," you know, you got people that just have that attitude, like, well if given the opportunity (unintelligible) tell - he didn't wanna give us that piece or whatever, you know, people become...I was again on that same case, you know, we're talkin' about the one detective said he gave the family member, um, his - his cellphone and he says, "I've probably gotten, like, at least 200 text messages a month," you know, from

the family. And - and that's one thing (unintelligible) family is it's gonna br- bring great peace to the family to know that an arrest has been made in the case no matter what (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 just what happened that day whoever you came in contact with. So that's - that's different. (Unintelligible).

A: I need to talk to my wife. Is that possible? Because once again and the way that I see this scenario playing out - I'm gonna end up in a jail cell tonight.

Q: What - n- now you're sayin'...

A: Even though I'm here voluntarily...

Q: Right. But to say to talk to your wife before you talk to us or I'll give - I'll give you my cellphone and you can talk (unintelligible) - or use or you got your own (unintelligible) - that is an absolute promise that you'll get to talk to her. Nobody's gonna be hooking and booking you without lettin' you be, you know, treated decently. I'm - I'm tellin' you, there are (unintelligible) two totally different Art Sewalls, man.

A: There are two totally different Art Sewalls.

Q: Okay and I agree with you. I can see that. I know that. So nobody h- nobody here is gonna be a dick to you.

A: And, uh, and you haven't been.

Q: Right and I'm not gonna.

A: I understand that you aren't going to be.

Q: Right. But when you - when you lay out for us and do like - like - and we'll with the recorder -- this is who's present, date and time, dah - dah - dah and you tell us. The guarantee with you is that you get that opportunity to talk with your wife about it regardless. I promise. As a man, I promise.

Q1: Are you sayin' that you'd like to talk to you wife before you go on - before you make any decision? I mean the only issue, I mean, Dean's right, we'll let you talk to your wife. Uh, we'll let you w- talk to your wife quite a bit after we're done. Um...

Q: We're not gonna put a time limit.

Q1: I - the only reason I mention - I'm saying anything right now about that and your wife is that (unintelligible) that's hit her - w- what's...

A: Well it's gonna hit her like it's hitting me.

Q1: Yeah - yeah and I don't think she's gonna be able to - to give you much help. I think she's just gonna add to your - your stress and your burden right now. You follow what I'm saying?

A: I understand what you're saying.

Q: Yeah so let - let's get it over and done with and there's no, I mean, literally not a time limit on how much time you (unintelligible) talk with her. We'll let you do that. And that's simple. I mean, again the date, time, location, who's present and (unintelligible) we'll just let you explain it. And we won't even interrupt you unless we think we need to interrupt you. We're gonna let you lay it out.

A: I'm not sure how much of it I can explain to you.

Q: Well I mean what you...

A: Like - like I told you before...

Q: ...as much as...

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) whether the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated; (6) whether the police used strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning.

Carroll, 371 P.3d at 1033, citing Taylor, 114 Nev. 1071, 1082 n.1, 968 P.2d 315, 323 n.1.

In the instant case, detectives told Sewall that the questioning was voluntary. Page 3. Sewell also acknowledged that he was speaking voluntarily. Page 13. Sewall was not under arrest. Sewall was not handcuffed. Sewall responded to questions voluntarily. The detectives did not yell at or threaten Sewall; the questioning was not police dominated. Further, the detectives did not deceive Sewall. The only factor that weighs in favor of custodial status was that Reno officers arrested Sewall on the failure to register as an exfelon after the interview. Based on an examination of all of the circumstances, Sewall was not in custody when he spoke to detectives.

3. Length and Form of the Questioning

The length and form of the questioning also indicate that Sewall was not in custody. The interview was not very long and the questioning was subdued and methodical. The detectives did not threaten Sewall. Unlike Carroll, Sewall did not experience a series of

questioners. The two detectives sat with Sewall and conducted all of the questioning. They did not take breaks to switch who was doing the questioning. At no time was the questioning aggressive or intimidating. This factor therefore weighs in favor of Sewall not being in custody at the time of the interview.

CONCLUSION

Based on the foregoing, the State asks the Court to review the attached exhibits and deny the instant motion. Sewall's statement is admissible.

DATED this 21ST day of November, 2018.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/PAMELA WECKERLY
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #6163

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 21st day of November, 2018, by electronic transmission to:

JOEL MANN, ESQ.
Email: joel@legalmann.com

CHRISTOPHER ORAM, ESQ.
Email: contact@christopheroramlaw.com

BY: /s/ Deana Daniels
Secretary for the District Attorney's Office

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