

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

RESPONDENT'S ANSWERING BRIEF

**State's Appeal From District Court's Granting of Respondent/Defendant's
Motion to Suppress Illegally Obtained Statement¹**

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¹ The State's Opening Brief incorrectly states that is an appeal from the grant of a motion to dismiss.

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POINTS AND AUTHORITIES

INTRODUCTION

The district court's order suppressing Mr. Sewall's illegally obtained statement should be affirmed. The district court found through a totality of the circumstances that a reasonable person would have not felt free to leave and therefore determined to be "in custody" for purposes of Miranda. Specifically, the district court found, after an evidentiary hearing, that the Detectives refused to let Mr. Sewall call his wife after repeated requests. In addition, the district court found that Mr. Sewall reasonably believed that he was going to jail and the Detectives did not correct him or provide to him the appropriate Miranda warnings.

STATEMENT OF THE ISSUE

The district court's findings and conclusions that Mr. Sewall was in custody for purposes of Miranda should be affirmed.

STATEMENT OF THE CASE

Respondent adopts the Appellant's Statement of the case.

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ARGUMENT

I. THE DISTRICT COURT WAS CORRECT WHEN IT FOUND THAT THE RESPONDENT WAS IN CUSTODY DURING HIS STATEMENT AND THE STATE FAILED TO ADVISE HIM OF HIS MIRANDA WARNINGS

“It was not the appropriate time for him to be getting on the phone and having a conversation with somebody outside that room. We were having a conversation, the three of us together. That wasn’t the time for it.”

(Detective O’Kelley)(AA 262)

The district court correctly granted the Respondent’s motion to suppress his illegally obtained statement. The district court specifically found that Mr. Sewall was in custody when the Detectives refused to let him call his wife, after repeated requests. In addition, the district court found that Mr. Sewall reasonably believed he was going to jail, and the Detectives failed to correct him about his custodial status. Finally, the district court found that based on the totality of the circumstances that a reasonable person would not feel free to leave and that the Respondent was in custody and never provided Miranda. Based on the district court’s ruling this Court should uphold the district court’s findings and conclusions.

The Nevada Supreme Court has stated that when reviewing custody determinations “[t]he district court’s purely historical factual findings pertaining to the ‘scene – and action-setting’ circumstances surrounding an interrogations is entitled to deference and will be reviewed for clear error.” Rosky v. State, 121 Nev.

184, 190, 111 P.3d 690, 694 (2005). “However, the district court’s ultimate determination of whether a person was in custody...will be reviewed de novo.” Id.

In this case the district court based its legal conclusion on the totality of the circumstances surrounding what led Mr. Sewall to be brought to the Reno Police Station; how Mr. Sewall during the interview requested an attorney; how the Detectives said Mr. Sewall could not leave until he provided DNA, fingerprints, and pictures; how Mr. Sewall was not allowed to go to the bathroom without a Detective escort; how the Detectives provided advice that was contrary to the Miranda warnings; how the Detectives provided Mr. Sewall with false information during their interrogation; how the Detectives convinced Mr. Sewall that he was going to jail that night; and how the Detectives refused to let Mr. Sewall call his wife upon his request.

Although there were a lot of factors that weighed into the district court’s totality of the circumstances findings it was the fact that the Detectives refused to let Mr. Sewall call his wife after repeated requests, and Mr. Sewall’s repeated statements that he did not believe he was going home that night because he was going to jail, that the district court found that Mr. Sewall was “in custody” for purposes of Miranda.

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.” 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.”). “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.” 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. United States v. Craighead, 539 F.3d 1073, 1083 (9th Cir. Ariz. 2008). Telling a suspect he is free to leave may be only a “hollow right” if there is no actual ability to leave. Id.

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. 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)).

In Carroll v. Nevada, 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) the length and form of the questioning. Id. 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. Id.

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.

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.” Carroll, at 1033. The Carroll

Court distinguished Silva v. State, 113 Nev. 1365, 951 P.2d 591 (1997), from Carroll based partly on Carroll being denied the use of a phone. Carroll, at 1033.

Just like this 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 at that time. 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 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.

The State attempts to argue in their opening brief that whether Mr. Sewall wanted to call his wife was not clear whether he meant to call his wife before or after the Detectives forced him to make a statement. However, the district court found factually that Mr. Sewall had requested to call his wife and the Detectives refused to let him. (AA 409). This was the final straw that demonstrated that Mr. Sewall was not free to leave, and his movements were restricted to such a degree that a reasonable person would not feel free to leave. The State's new argument that Mr. Sewall's request to call his wife was really a request to call his wife after he gave a

statement is belied by the record and not supported by the district court's findings. (AA 409).²

On Page 37 of the surreptitious recording, 52 minutes into the interrogation, Mr. Sewall first requests that he speak with his family. (AA 140). It is ignored by the Detectives and they continue to try and convince him to give a statement to them. (This request to call his wife was made after he emphatically requested an attorney.) (AA 116). It appeared to the Detectives that Mr. Sewall was on the edge of giving them exactly what they wanted, but he was starting to waver and having a conversation with his family would hinder their mission of getting a statement from Mr. Sewall. Mr. Sewall tries to resist the pressure of the circumstances and requests the ability to speak with his wife again. "I need to talk to my wife. Is that possible?" (AA 145). The Detectives don't allow Mr. Sewall to speak with his wife at that moment in time, instead they explain to him that once he gives them the statement that they want that they will allow him to speak with his wife. The Detectives knew that if they allowed Mr. Sewall the freedom to speak with his wife, he would no longer be on the edge of giving the Detectives what they needed from Mr. Sewall.

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

[Detective O'Kelley:] No.

² Pursuant to Rosky, this Court must apply deference to the district court's findings that Mr. Sewall was requesting to speak with his wife at that moment. At the State's request the district court reviewed the video tape of the interrogation and that obviously was weighed into the district court's findings.

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

A. Yes. It is possible.

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

A. Yes.
(AA 262).

“I need to talk to my wife. Is that possible?” (AA 145). The mere fact that someone is asking for permission to speak with their significant other demonstrates that Mr. Sewall’s frame of mind was that he was in custody. The State wants this Court to believe that Mr. Sewall had the freedom to call his wife at any time, but that is simply not true. Mr. Sewall’s freedom was significantly restricted by the presence of authority and the indication that he was no longer able to decide his movements for himself. He was now required to clear his movements through the approval of the government authority of the Detectives. But Mr. Sewall still had something that the Detectives wanted and therefore the Detectives made a deal with him that they would allow him to speak with his wife, after he gave them what they wanted, his statement. Mr. Sewall’s response was, “not much of a choice here from my perspective.” (AA 147).

It became very evident that Mr. Sewall believed that he was not going home that night. Mr. Sewall’s repeated statements that he believed he was not going home

that night was all stated before he gave any substantive statement to the Detectives. When Mr. Sewall said over and over again that he believed he would end up in jail tonight, was never corrected by the Detectives and never met with the appropriate Miranda warnings.

It is imperative for this Court to realize, that Mr. Sewall believed he was going to jail that night after he was surrounded by police officers and requested that he come to the station (AA 225-227), after he was brought into the back of the police station (AA 231), after he was ordered to shut off his phone (AA 104), after he was seated further from the door (AA 235), after he was told lies that the police had proof that his gun was used (AA 240), after Mr. Sewall is told that he is going to be charged with something (AA 116), after he requested an attorney and was denied (AA 116), after he was told he could not leave until they satisfied the warrants (AA 116-117)(AA 252-253), after he was escorted to the bathroom, and after he repeatedly asked to speak with his wife and denied (AA 261-262). It was after these sequences of events, and all before he gave any substantive statement, that Mr. Sewall believed that he was going to jail that night. The district court believed that all of those circumstances that led up to Mr. Sewall being told by Detectives that Reno Police Department could do what they wanted and arrest him for being an unregistered ex-felon is another indicator that Mr. Sewall was “in custody.”

The State attempts to argue that the Detectives had no clue whether the Reno Police Department would arrest Mr. Sewall at that time for failing to register as a felon. From the circumstances surrounding the interview, it was very apparent that the Reno Police Department was extremely invested in what happens to Mr. Sewall and the Detectives were being disingenuous when they implied that they did not know what Reno's intentions were. First, Reno police department put significant man hours to develop a profile by surveilling his apartment, knowing where he parked and knowing what his normal hours were. (AA 271). Second, on the day of questioning the Reno Police held a briefing where ten (10) Detectives and one Sergeant were present to strategize their interactions with Mr. Sewall. (AA 222). Third, at the point of contact Reno PD had Detectives inside and outside Mr. Sewall's gated apartment complex "manning the outer and inner perimeter." In addition, Reno had one Detective and one Sergeant that first approached Mr. Sewall when he got out of his car in his apartment complex. (AA 295-296). To put that much time into a so-called "voluntary" conversation with a suspect seems to defy logic.

Detective Hefner even admitted to Mr. Sewall that Reno Police Department mentioned that Reno wanted to arrest Mr. Sewall. "like I said they could arrest you right now – **they even mentioned that** but (unintelligible) – that's (unintelligible) stuff." (AA 151)(emphasis added). But the State is trying to argue to this Court that

LVMPD had not clue whether Reno wanted to arrest the Mr. Sewall or not. It seems very far fetched to believe the State, that LVMPD Detectives had no clue whether Reno Police had any intentions of detaining Mr. Sewall. The State instead attempts to argue that the LVMPD Detectives were just being honest when they told Mr. Sewall that they did not know what Reno's intentions were. But that argument is belied by the record and belied by just plain common sense. It was LVMPD Detectives that informed Reno Police Department that Mr. Sewall was an unregistered felon that was living in their city. (AA 310). After LVMPD informed Reno, the Reno PD then dedicates significant time and money on apprehending Mr. Sewall. It is a farce to believe that LVMPD did not know that Reno intended to arrest Mr. Sewall. No matter what Mr. Sewall did, Mr. Sewall was going to end up in a jail cell that night, and Mr. Sewall knew it, even if the LVMPD Detectives can't admit that they knew it too.

Mr. Sewall said over and over again that he believed he was going to jail. "So I am going to jail today." (AA 151). Mr. Sewall told the Detectives over and over again that he believed he was not free to leave because he was going to end up in a jail cell after the Detectives were finished with him. "Cause from my perspective (unintelligible) layin' up in a jail cell tonight." (AA 142). "Well I'm not certainly I – looking forward to (unintelligible) a jail cell... but I see that happening in my very near future." (AA 150).

The amazing thing is that the only thing the Detectives had to do when Mr. Sewall stated over and over again that he believed that some law enforcement entity was going to place him in a jail cell, was to provide to Mr. Sewall his Miranda warnings. Five little sentences, could have cured all that was going on with the Detectives pressuring, deceiving, and manipulating Mr. Sewall to give a statement to them. However, instead these seasoned Detectives chose not to provide Mr. Sewall with this advisement, which begs the question of why? Why did two extremely seasoned Detectives not want to advise a suspect of his Miranda warnings, when the Detectives believed Mr. Sewall was not free to leave,³ and one of the Detectives believed that Mr. Sewall had invoked his right to an attorney⁴. The answer is simple, they did not want anything to interfere with their attempt to push and manipulate Mr. Sewall from giving them what the Detectives so desperately wanted, a confession.

What is absolutely clear is that Mr. Sewall, as would any reasonable person, did not believe that he was free to leave.

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³ Detectives O'Kelly and Hefner stated that Mr. Sewall was not free to leave until the warrants were satisfied. (AA 254), (AA 265), (AA 277), (AA 338)

⁴ Detective Hefner understood that Mr. Sewall had requested an attorney and based on that understanding informed Mr. Sewall that everything that Sewall was stating could not be used. (AA 116), (AA 332), (AA 335).

1. Totality of the Circumstances

In looking at the factors spelled out in Carroll it is apparent that the totality of the circumstances would lead to the conclusion that Mr. Sewall was “in custody” for purposes of Miranda during the questioning.

A. Site of the Interrogation

Mr. Sewall was pressured to go to the Reno police station. The interview was not required to be conducted at the Reno Police station but that gave the Detectives the advantage over Mr. Sewall in order to assert authority over Mr. Sewall. So when Mr. Sewall was surrounded by four Detectives and they asked him to come down to the station, he acquiesced and agreed. Mr. Sewall was never given an option to do the interview anywhere other than the police station. (AA 316) Similar to Carroll, The Detectives did not allow him to drive his own car, but rather they searched him and transported him to the Reno Police Department. 132 Nev. Adv. Rep. at 20, 371 P.3d at 1033. This is a standard tactic used by Detectives so that a person that wants to leave can’t just walk out of the station and get into his car and leave. Id.

When Mr. Sewall arrived at the police station, he was taken in through a door that was not for the public, but for police personnel and suspects. (AA 299). The State was unable to present any evidence that Mr. Sewall had not been searched before he was placed into the interview room. (AA 319). The interview room was a room with a table, a couch and some chairs. Although this room has been described

as a soft interview room it is still a room within a police station where a reasonable person would not believe that they could just get up and walk out of that room. Mr. Sewall needed the police to provide a ride back to his apartment. Mr. Sewall was not free to move about the police station, for example, when Mr. Sewall needed to spit out Copenhagen tobacco chew, he was required to have a police escort into the bathroom. (AA 335). A person is not free to leave on their own if they are required to be escorted throughout the building. One of the most private of bodily functions required a police escort.

In addition to being in a police station for an interview, the interrogation was conducted in a room where Detective Hefner was blocking the only door. In order for Mr. Sewall to exit the room he would be required to go through Detective Hefner. (AA 103), (AA 235). This becomes another barrier to any person believing that they are free to leave.

B. Objective Indicia of Arrest

In looking at the totality of the circumstances surrounding the interrogation of Mr. Sewall it becomes clear that Mr. Sewall was not free to leave. In fact, the very Detectives that were interrogating Mr. Sewall believed that Mr. Sewall was not free to leave. Even after Mr. Sewall asked for an attorney, the Detectives did not allow Mr. Sewall to leave. Any reasonable person would have felt trapped and not free to

leave. All the elements of an arrest were present during the interrogation that would prohibit any person from being able to leave.

i. Mr. Sewall was Initially Informed that the Questioning was Voluntary or that He was Free to Leave.

Initially Mr. Sewall was told that the questioning was voluntary and that he could leave at any time. However, in looking at what happened during, and between those statements, it becomes clear that these words were hollow statements that held no actual value. *See* United States v. Craighead, 539 F.3d 1073, 1083 (9th Cir. Ariz. 2008). Mr. Sewall was not free to leave and everyone in that room knew it.

Not Allowed to Leave

During the evidentiary hearing the two Detectives, made it abundantly clear that Mr. Sewall was not free to leave without Mr. Sewall satisfying the warrants that the Detectives had for his DNA, case fingerprints, and photos.

Q. Now, Detective O’Kelly, when you have search warrants you have permission, court authority to do reasonable means to satisfy those warrants, correct?

A. Correct.

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

A. That’s correct.
(AA 252)

...

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

A. Correct.
(AA 253)

The Detectives started the interview with Mr. Sewall knowing that they must satisfy these search warrants before he was able to leave the police station. From the very moment the Detectives started the interview with Mr. Sewall they were not honest with Mr. Sewall. They lied to him about being able to leave the interview. The Detectives telling Mr. Sewall that he can leave was flat out not true. The Detective's admissions that Mr. Sewall was not free to leave until they satisfied the search warrant was proof that no matter what Mr. Sewall stated he was not free to leave. Detective O'Kelley: "He wasn't going to be able to leave until after we had the warrants satisfied, yes." (AA 277).

The State argues that Mr. Sewall could leave at any time. This is obviously not true, as when Mr. Sewall requested an attorney, Detective Hefner took that statement as Mr. Sewall was requesting to leave and first informed Mr. Sewall that he was not really free to leave but rather he had to stay first to complete the warrant requirements. That request of an attorney by Mr. Sewall occurred at 5:21 p.m. At 5:22 p.m. Detective Hefner is stating that "we will get that done quickly and get you on your way." (AA 116). But it was not until after 7:30 p.m. that the lab people came in and finally satisfied the search warrant. "After the conclusion of the final interview, that's when the buccal swabs, the fingerprints, and the photographs were

taken by the CSAs for Reno.” (AA 265). Yet between that time, the Detectives continued to “work” on Mr. Sewall by asking him questions and wear him down until he gave them what they wanted.

If the warrants were not going to be used as a custody mechanism, then the Detectives would have taken the DNA, photos, and case prints in the very beginning and then attempted to interview Mr. Sewall. Instead, the Detectives used the warrants as handcuffs to keep Mr. Sewall in that room to answer their questions. As soon as Mr. Sewall requested an attorney the situation changed for the Detectives and they were forced to place those warrant handcuffs on Mr. Sewall and keep him in the room. Once they did that, they continued to barrage Mr. Sewall with questions. Even when Mr. Sewall was asking to call his wife, they continued to coerce him to make a statement. Even when Mr. Sewall was informing the Detectives that he believed he was going to jail, the Detectives continued to barrage him with questions hoping to coerce a statement. Never did the Detectives read Mr. Sewall his Miranda rights.

It is clear that Mr. Sewall believed he was in custody and then exercised his right to an attorney, and that request was ignored by Detective O’Kelley when he continued to question Mr. Sewall. At the same time that Detective O’Kelley was ignoring Mr. Sewall’s request, Detective Hefner believed that Mr. Sewall was in custody and requested an attorney. The two Detectives in the room with Mr. Sewall

stated that Mr. Sewall was not free to leave. Since reasonable people would not feel free to leave in Mr. Sewall's situation, Mr. Sewall was clearly "in custody" for purposes of Miranda.

A Reasonable Person Believed that Sewall was in custody

The most telling evidence that Mr. Sewall was "in custody" at the time of the questioning, is when Mr. Sewall stated that he wanted an attorney. When Detective Hefner heard that Mr. Sewall wanted an attorney, believing that Mr. Sewall was "in custody", Detective Hefner stopped his questioning and shifted gears to collect the evidence that the warrant required. Detective Hefner's reaction to Mr. Sewall's request for an attorney demonstrates that a reasonable person believed that Sewall was in custody. If Hefner did not believe Sewall was in custody, then according to the State's argument, there was no reason to stop questioning because a defendant does not have a right to an attorney when they are not in custody, even if they ask for one. The Detective being an experienced detective believed that only a person that is in custody is the only time that a person that can invoke his right to an attorney.

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

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

A. That's correct.

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

A. Yes.
(AA 258).

...

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

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

A. Mm-hmm.

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

A. Yes.
(AA 332).

...

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.
(AA 333).

...

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

A. Yes.
(AA 257-258).

Mr. Sewall and Detective Hefner both believed that Sewall was "in custody" at the moment that Sewall stated he wanted an attorney. 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.

Sewall exercised his constitutional right to an attorney and the detectives flat out ignored that request. The reaction of Detective Hefner clear that the detectives had control over Sewall, and that he was not free to leave. Therefore, Detective Hefner proves that a reasonable person believed Sewall was in custody.

ii. Not Formally Under Arrest

It is clear that Mr. Sewall was not formally arrested, with handcuffs, at the time he was transported to the Reno Police Station.

iii. Whether the Suspect Could Move About Freely

As discussed above, *supra*, Mr. Sewall was not free to move about during questioning. When he was brought into the police station through a backdoor and placed into the interview room, he was told to shut off his cellphone. At that point two detectives sat in the room, with one closer to the door. Towards the beginning of the interrogation, Mr. Sewall was required to spit out his Copenhagen chew and he was escorted to the bathroom by Detective Hefner.

As discussed *supra*, Mr. Sewall's restrained movement became very evident when he asked to call his wife, or his family, and he was denied that ability by the Detectives. A person cannot move freely during questioning if they cannot even make a call to their loved ones. But this request was not done one time, it was asked

again and again, and in the context of Mr. Sewall stating that he did not believe he was going to jail.

Mr. Sewall was not free to move during questioning. In fact, his movement was restrained to a degree that did not allow him to perform regular movements without the approval of the Detectives.

iv. Whether the Suspect Voluntarily Responded to Questions

Mr. Sewall did initially voluntarily respond to questions presented by the Detectives. However, through the actions of the Detectives Mr. Sewall's statement became the product of coercion.

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.

Although, Mr. Sewall did respond to questions the Detectives posed without being physically forced to answer, Mr. Sewall was coerced through emotional and psychological manipulation and abuse.

v. The Atmosphere of Questioning Was Police Dominated

In their desperation to get Mr. Sewall to give a statement, the Detectives in the room went on long diatribes of speech. (AA 259). The Detectives dominated the

conversation where Mr. Sewall would only add a statement here and there. The Detectives were motivated to get Mr. Sewall to talk and they were going to throw everything they could in order to get what they wanted.

vi. Strong Arm Tactics or Deception

In State v. Taylor, this Court adopted the indicia of arrest to include “whether the police used strong-arm tactics or deception during questioning,” among other factors discussed above. 114 Nev. 1071, 1082, 968 P.2d 315, 321 (1998) *Footnote 1*.

When the Detectives get Mr. Sewall into a police interrogation room, the police start off with lies and deceit to manipulate Mr. Sewall into giving them what they want. Detective Hefner started off by telling a lie about the quality of evidence the Detectives had against Mr. Sewall. Detective Hefner told Mr. Sewall they can tie his gun to the crime. (AA 112). “Shot with a weapon that, uh, we know – we can justify that you have and we – we recently got a test fire.” (AA 112). However, that statement was completely and utterly false. (AA 240). Detective O’Kelley admitted during the evidentiary hearing that the gun was never test fired and they had no information about the gun to link it directly to the crime. (AA 240).

But the Detectives’ deception during the interrogation went far behind lying about the state of the evidence. The Detectives told Mr. Sewall that they cannot use

any of his statements against Mr. Sewall. The exact antithesis of what the Miranda warnings state.

Detective Hefner: “Um, you know, you – you did ask for an attorney and **whatever comes after that we can’t use.**
(AA 126)(emphasis added)

This statement by Detective Hefner was a coercive and impermissible police tactic that tricked Sewall into giving a statement that was not a product of his free will. By having a detective tell a person that anything you say CANNOT be used against you, it invites a person to state whatever the detective is asking him in order to get out of the uncomfortable situation. This situation, in looking at series of other issues including Sewall’s request for an attorney, demonstrates that Sewall was desperate to relieve himself of the coercive environment presented by the detectives in the interrogation room. When a detective not only fails to provide the prophylactic that Miranda requires but instead provides to a suspect the exact and direct opposite instruction, creating a confession based on a lie. A confession that is not a product of free will, but a confession that is a product of coercive police tactics.

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

A. Yes.
(AA 335).

It is one thing to have a Detective lie about the state of the evidence against a person, but it is on a whole new diabolical level to have a Detective give legal advice

that is the exact opposite of what the law actually requires. A Detective, during an interrogation, explaining to a defendant that his statements will not be used against him is nothing more than a flat-out deceptive practice that is used to elicit a statement from the defendant. This deception marks how the form of the questioning demonstrated another element of how Mr. Sewall was “in custody”.

From a policy point of view, this type of police tactic crosses a line that demonstrates the complete and utter break down of Miranda. To allow police to be able to tell any suspect, incorrectly, that what they say cannot be used against them, would be the destruction of over 50 years of jurisprudence. To believe the State’s argument that this type of police tactic is allowed because the State believes that a suspect is not in custody, crosses into the illogical. The abuse that this sort of tactic would allow would be unending. Imagine a police walks up to a suspect on the street and immediately tells him, “don’t worry whatever you tell me I cannot use against you,” then continues to question him where he later uses that statement against the suspect. This would allow an agent of the government to flat out lie about a fundamental right that a person has. It is one thing for the police to not tell someone about their right to remain silent, it is on a whole new level to tell them it can’t be used against them, when it can and will be used against them. This Court cannot allow this sort of police tactic to continue.

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vii. Mr. Sewall was arrested at the Conclusion of the Interrogation

It is unequivocal that Mr. Sewall was formally arrested at the conclusion of the interrogation. Since being coerced into the Reno police car he has not returned home from that day. However, in the State's brief they malign the facts to make it seem that Mr. Sewall was not arrested at the conclusion of his interview because he was not arrested by LVMPD Detectives. What is amazing about that argument is that in the very same brief, the State wants this Court to believe that the State should not be penalized because allegedly LVMPD had "no idea" what Reno PD was going to do about arresting Mr. Sewall. For the purposes of understanding the indicia of arrest it doesn't matter who arrested Mr. Sewall, he did not go home after his interview which is another circumstance to demonstrate that he was "in custody."

This prong of the analysis is better served not by focusing on who arrested Mr. Sewall but rather that Mr. Sewall believed he was being arrested and going to be placed into jail at the conclusion of the interview. In fact, the Detectives, even before Mr. Sewall gave any substantive statement was already discussing the jail conditions and how they could accommodate Mr. Sewall. (AA 150-151). When any person is discussing their accommodations in the jail with Detectives, they have no question in their mind that they are going to jail. Mr. Sewall had no question that he was going to jail and not going home. He was right, he was formally arrested after the interview.

C. Length and form of Questioning

The length and form of the questioning of Mr. Sewall also demonstrates that he was in custody during the questioning. The Police used tactics that were used to elicit a statement from Mr. Sewall.

As stated above, Mr. Sewall was coerced into being questioned at the Reno Police Station when four different Detectives approached and surrounded Mr. Sewall at his apartment complex's parking lot. Throughout the questioning, Mr. Sewall believed he was going to be arrested at the end of questioning. That is exactly what happened that night. After being surrounded in the parking lot of his apartment. He never went back home again.

It is unclear when the police surrounded Mr. Sewall in his apartment parking lot but he was placed into the interview room around 5:04 p.m. So, it would be assumed a minimum of 30 minutes before he was placed into the room that he was being placed into the Reno Police undercover car. At 5:21 p.m. Mr. Sewall made a request that he needed an attorney. At 5:22 p.m. Detective Hefner is stating that "we will get that done quickly and get you on your way." (AA 117). But it was not until after 7:30 p.m. that the lab people came in and finally satisfied the search warrant. This idea that Mr. Sewall had a short time being interviewed is not accurate. He was in police custody for more than 3 hours before he was formally arrested.

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CONCLUSION

The district court order suppressing Mr. Sewall's in custody statement should be affirmed. It was clear that Mr. Sewall was not free to leave when he requested, several times, to speak with his wife and was denied. It was also clear that Mr. Sewall believed he was going to jail that night when the Detectives informed him that Reno Police may arrest him for being an unregistered felon, and therefore he was not free to leave. In looking at the totality of the circumstances a reasonable person would not be free to leave and therefore, Mr. Sewall was "in custody" for purposes of Miranda.

Dated this 23rd day of December 2019.

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ATTORNEY’S CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using **Microsoft Word 2019** in **14-point font** of the **Times New Roman** style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains **7,284** words.

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Finally, I hereby certify that I have read this Respondent's Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd day of December 2019.

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PROOF OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 23rd day of December 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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