No. _____

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

ARIE ROBERT REDEKER, Petitioner,

v.

DWIGHT NEVEN, WARDEN; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Petitioner Arie Robert Redeker asks for leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed *in forma pauperis*. Petitioner has been granted leave to so proceed in the federal district court for the District of Nevada and in the United States Court of Appeals for the Ninth Circuit. The United States District Court for the District of Nevada appointed counsel for Redeker for his post-conviction proceedings under 18 U.S.C. § 3599(a)(2).

Granting leave to proceed in forma pauperis is authorized by Supreme Court Rule 39.1.

Dated this 19th Day of June 2019.

Respectfully submitted,

Rene Valladares
Federal Public Defender of Nevada

/s/ ***Jason F. Carr***

_____

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QUESTION PRESENTED

WHETHER FRUIT OF THE POISONOUS TREE DOCTRINE APPLIES TO A CUSTODIAL INTERROGATION THAT HAS BEEN TAINTED BY:

1). LAW ENFORCEMENT FORCING THE INTERROGATED INDIVIDUA TO REMAIN IN HIS FRONT YARD FOR MORE THAN SIX HOURS IN THE MIDDLE OF THE NIGHT WITHOUT WARM CLOTHING;

2). SUBJECTING THE INDIVIDUAL TO REPEATED INTERROGATIONS INCLUDING AN HOUR INTERVIEW IN A POLICE VEHICLE WHERE THE ACCUSED FREQUENTLY VOICED HIS DESIRE TO END HIS CONFINEMENT AND INTERROGATION;

3). LAW ENFORCEMENT REFUSED HIS REQUESTS TO GO INTO THE HOUSE TO, AMONG OTHER THINGS, RETRIEVE HIS MEDICATION; AND

4). THE ACCUSED REPEATEDLY REFUSED TO ANSWER QUESTIONS AND DID NOT CONFESS UNTIL THE PROLONGED DETENTION CULMINATED IN HIS EARLY MORNING HOUR INTERROGATION IN A POLICE INTERVIEW ROOM?

LIST OF PARTIES

There are no parties to the proceeding other than those listed in the caption.

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On August 23, 2017, the United States District Court for the District of Nevada filed a written order dismissing Petitioner Redeker's 28 U.S.C. § 2254 petition for writ of habeas corpus. (*See* Appendix (App.) B.) The United States Court of Appeals for the Ninth Circuit filed an unpublished memorandum denying Redeker's appeal of that decision on March 21, 2019. (*See* App. A.) Both decisions are unpublished.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its unpublished memorandum and order denying Redeker' federal post-conviction appeal on March 21, 2019. (*See* App. A, 1-2.) Redeker mails and electronically files this petition within ninety days of the entry of that order. *See* Sup. Ct. R. 13(1).

Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition implicates Title 28 U.S.C. § 2254, which states in pertinent part:

> The Supreme Court . . . shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

The standards and requirements for acquiring relief from a state court conviction in federal court is set forth in 28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Fifth Amendment to the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. Petitioner Redeker's Arrest, Trial, and Sentence

This case challenges Redeker's jury trial conviction for murder. The trial court entered the relevant judgment on October 6, 2006, in Clark County, in *State of Nevada v. Arie Robert Redeker,* Case No. C188510. (*See* App. D.) The judgment sentences Redeker to two consecutive terms of ten-years to life for a second-degree murder with use of a deadly weapon conviction.

Redeker is serving out his sentence at the Nevada Department of Corrections' Facility, High Desert State Prison.

The case began with a missing person report. At approximately 8:30 p.m., law enforcement learned that Ms. Skawduan Lannan [hereinafter "Tuk" or "Ms. Lannan"] did not pick her daughter up from day care at 5:00 p.m. Redeker was Tuk's significant other although their relationship was tumultuous and Tuk no longer resided with Redeker.

Law enforcement proceeded to Redeker's residence arriving at approximately 10:00 p.m. After six hours of "investigative detention," and two separate

interrogations, law enforcement finally arrested Redeker on October 22, 2002 at approximately 5:30 a.m. at a Las Vegas Metropolitan Police Station.

On October 28, 2002, the District Attorney for Clark County, Nevada [hereinafter DA] filed a criminal complaint charging Redeker with open murder. The DA filed an amended complaint November 27, 2002, charging Redeker with murder with use of a deadly weapon.

A Nevada justice court held a preliminary hearing on November 27, 2002, which the court continued to December 5, 2002. At the conclusion, the justice court bound Redeker over to the district court as charged.

On December 10, 2002, the DA filed an Information charging Redeker with murder with use of a deadly weapon. On the same date, the State filed a Notice of Intent to Seek the Death Penalty identifying two aggravating factors.

On February 9, 2006, in a published en banc opinion, the Nevada Supreme Court struck down one of the aggravators. *See Redeker v. Eighth Judicial Dist. Ct. of Nev.*, 127 P.3d 520 (Nev. 2006). Applying a hybrid categorical approach, the court found that the DA failed to plead with sufficient specificity that Redeker's prior conviction for arson involved the use or threat of violence to the person of another. *See id.* at 526. Accordingly, the Nevada Supreme Court issued a writ of mandamus and instructed the state district court to strike the alleged aggravating circumstance.

This is somewhat academic, however, as a jury would eventually find Redeker guilty of only second-degree murder thereby taking death off the table.

Redeker's case proceeded to trial on July 10, 2006 and continued through July 20, 2006, with the Honorable, and now retired, Donald Mosley presiding. Redeker was present throughout and represented by attorneys Coffee and Silverstein.

The jury found Redeker guilty of second-degree murder with use of a deadly weapon; in this case a telephone cord. The trial court sentenced Redeker to an aggregate sentence of twenty-years to life. The court filed its original judgment on

September 7, 2006, followed by a superseding, and now operative, amended judgment on October 6, 2006. (*See* App. D.)

B. The Nevada Supreme Court Rejects Redeker's Fifth Amendment Claim but with a Strong Dissent.

Redeker, through counsel, filed a timely notice of appeal after the entry of the amended and final judgment

Redeker's opening brief in the Nevada Supreme Court raised a number of issues. The only one of relevance to this appeal is his contention that law enforcement violated his Fifth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Missouri v. Seibert*, 542 U.S. 600 (2004).

The Nevada Supreme Court filed an unpublished order denying Redeker's Fifth Amendment claim. (*See* App. C, at 31-45 (majority opinion).) Two judges dissented, believing that law enforcement violated Redeker's Fifth Amendment rights. (*See id.* at 46-68 (dissent).)

C. Federal Post-Conviction Proceedings

Redeker mailed his 28 U.S.C. § 2254 federal petition on or about March 8, 2012, which a District of Nevada filed on March 21, 2012. The lower court appointed the Federal Public Defender. With the assistance of counsel Redeker filed a protective petition. The court also granted leave for Redeker to file a final amended petition.

Redeker later filed his Second Amended Petition, the operative petition for this appeal. The claim at issue is Ground Five, which alleges that the trial court erroneously admitted Redeker's statements to law enforcement in violation of his Fifth Amendment rights.

After full merits briefing, the lower court denied all of Redeker's remaining claims in a detailed written order. (*See* App. B.)

D. The Ninth Circuit's Decision

The Ninth Circuit denied Redeker's appeal. The court found that, even under a de novo review without resort to Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) deference, Redeker was not in custody at the time of his incriminating statements. (*See* App. A, at 1.) The court discounted the fact that Redeker was subject to custodial interrogation and had been in de facto custody for almost six hours before being read his *Miranda* rights. (*See id.*)

The court found "no prejudice" in the fact that Redeker was interrogated before being read *Miranda* rights. (*Id.*) In essence, because Detective Hardy, the final interrogator, eventually read Redeker his rights, the preceding constitutional violations did not matter. The court refused to consider this Court's line of authority regarding fruit of the poisonous tree. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963) (explaining that evidence is inadmissible if law enforcement derived it from an unbroken casual chain of events stemming from an initial constitutional violation).

In order to appreciate the errors embedded in the Ninth Circuit's decision, it is necessary to examine the facts of Redeker's protracted detention.

E. Law Enforcement Detained Redeker for More than Six Hours and Subjected him to Multiple Interrogations.

On the evening of October 21, 2002, around 10:00 p.m., Officer Jensen went to Redeker's house after receiving a missing person report regarding Skawduan Lannan (Tuk). Jenson and his partner Burnett intended to perform a "welfare check" to locate Tuk. They found nobody home but the lights and television on. Jensen knew Redeker because of a prior domestic violence incident at the residence. While Tuk and Redeker used to live together, and did at the time of the prior domestic violence call, Tuk had since moved out of the home.

Because no one at Redeker's residence would answer the doorbell or calls, Officers Jensen and Burnett "jumped the wall" into Redeker's backyard and entered his home through an unlocked sliding-glass door. Once inside they conducted a protective sweep lasting from four to ten minutes. The only suspicious items found by law enforcement were a bare mattress, a piece of phone cord tied to a headboard, and a red mark near that mattress that may have looked like blood. The officers found no indications of Tuk's presence.

Around 10:00 p.m., Redeker drove up in Tuk's vehicle and then kept going past his home. Officer Burnett, back at his vehicle after the protective sweep of Redeker's home, yelled: "Arie, stop." After a pause Redeker stopped and exited his vehicle. Burnett hand-cuffed Redeker. For approximately forty minutes the officers asked Redeker questions to which Redeker made both incriminating and exculpatory responses.

Redeker knew that law enforcement had already been in his house. He therefore consented to a further search of his home.

In order to sign the consent form the officers let Redeker out of his handcuffs. They did not reapply apply them. While, Officers Jensen and Burnett released Redeker from handcuffs they made him wait approximately two-and-a-half hours in his front yard until homicide detective Jackson arrived and examined the residence.

The record is clear that Redeker, who would remain in front of his home for another five hours, was not free to leave. Redeker, despite his requests, was not allowed into his home or permitted any food or water. There was a police-dominated

atmosphere in the front yard with multiple officers, some in uniform and armed, entering and exiting the residence.

Around 1:00 a.m., Detective Jackson took Redeker to his marked squad vehicle and began an hour-long interrogation. Redeker was not responsive and would mutter incoherent phrases such as "please, go to bed." Redeker specifically requested he be allowed into his home. Redeker denied hurting Tuk but admitting to meeting her earlier the previous day.

The state trial court found that Detective Jackson did not read Redeker *Miranda* warnings before the interrogation. Since the questioning was hard-hitting and Redeker was in "de facto arrest" status, Redeker's statement violated the Fifth Amendment and was excluded from trial.

After interrogation, Redeker sat in a lawn chair while officers continued to search his house. At 3:40 a.m. Detective Hardy from the homicide division arrived. At approximately 4:00 a.m. Hardy brought Redeker to the police station with his partner. They used a police vehicle complete with red lights and a siren. Hardy, however, did not handcuff Redeker and allowed him to sit in the front seat with his partner sitting in the back.

Hardy began the interview at 4:36 a.m. in the police station in an unlocked five-by-five foot room with a bar upon which to affix handcuffs.

Hardy did not begin the interview with *Miranda* warnings. Once he began asking questions about "what happened" between Redeker and Tuk, Redeker interjected asking "can somebody get me help" and noted that he was "just so tired of

talking and so forth." The officers responded, "Yeah. We're here to help you," Hardy continued to ask Redeker questions about whether he and Tuk argued and if he would take them to her body.

Redeker finally told Hardy that Tuk was dead. When Hardy asked "why?" Redeker responded "I don't now [sic]. That's why I need some help." Redeker then stated she died of strangulation. At that point, Hardy issued *Miranda* warnings. Redeker admitted he understood the rights but never affirmatively waived them. Hardy nonetheless resumed questioning, using Redeker's pre-warning admissions against him.

This is the moment when Redeker provided the police with substantial incriminating information.

REASONS FOR GRANTING THE PETITION

THIS HONORABLE COURT SHOULD GRANT THE WRIT IN ORDER TO VACATE THE NINTH CIRCUIT'S DECISION AND DETERMINE WHETHER REDEKER'S PROTRACTED PERIOD IN CUSTODY AND REPEATED INTERROGATIONS WITHOUT MIRANDA WARNINGS WERE CURED WHEN, SIX HOURS LATER, LAW ENFORCEMENT FINALLY COMPLIED WITH THE FIFTH AMENDMENT AND DUE PROCESS BY READING REDEKER HIS MIRANDA RIGHTS.

Redeker argues that he was in custody for *Miranda* purposes and that pre-*Miranda* custodial interrogations tainted the final interrogation by Detective Hardy.

Over the course of nearly seven hours, Las Vegas Metropolitan Police Department officers interrogated an exhausted, hungry, bipolar Redeker about Tuk's disappearance. Responding officers Jensen and Burnett questioned him first; followed by general assignment Detective Jackson (who, as the trial court noted, "hammered" him); and last, but not least, at 4:30 in the morning, homicide Detective Ken Hardy.

During these multiple interrogations, the officers, through their words and conduct, made clear that Redeker was not free to leave. Many factors support this assertion. Law enforcement handcuffed him (albeit only for approximately a half hour), denied Redeker access to own home, and made him stay outdoors all night in October, confiscated the vehicle he was driving, kept him under constant surveillance, and subjected him to numerous interrogations.

The first two interrogations occurred in a police dominated atmosphere where a half-dozen or more Las Vegas Metropolitan Police officers, sergeants, detectives, and criminalists teemed in and around Redeker's residence. Over the six-hour period

not one of these officers read Redeker his *Miranda* rights until after he admitted his guilt.

The degree of restraint law enforcement placed upon Redeker, when examined in light of the attendant circumstances, would convince an objective person that he was not free to leave. Both the Nevada Supreme Court and the trial court erred in finding that Redeker was not in custody for *Miranda* purposes. Since no one disputes that law enforcement's questioning constituted interrogation, *Miranda* warnings were required. They were not given until it was too late.

Redeker's statements were the foundation upon which the prosecution built its case. Few pieces of evidence carry more weight, or tell a more compelling story, than a defendant's own admissions. Thus, the trial court's constitutionally erroneous admission of Redeker's statements amounts to harmful error.

The lower court's order should be reversed and Redeker granted a writ of habeas corpus and new trial.

A. The Trial Court's Admission of Redeker's Statements and Confession Violated his Fifth Amendment Right Against Self-Incrimination Because They were the Product of Coercive Law Enforcement Tactics Rendering the Statements Unknowing and Involuntary.

"To be 'free' to leave is a hollow right if the one place the suspect cannot go is his own home."

United States v. Craighead, 539 F.3d 1073, 1083 (9th Cir. 2008).

A person cannot be compelled to be a witness against himself in a criminal case. U.S. Const. amend. V. This Court long has recognized that custodial interrogations are inherently coercive. *See Dickerson v. United States*, 530 U.S. 428, 435 (2000). Because of this, statements given by a suspect during custodial interrogation must be preceded by a warning. *See Miranda v. Arizona,* 384 U.S. 436,

467-69 (1966); *accord Pope v. Zenon*, 69 F.3d 1018, 1023 (9th Cir. 1996) ("Before the police can subject a suspect in custody to interrogation, they must advise the person of his constitutional rights . . . .").

The purpose of the warning is to guard against self-incrimination during interrogation of individuals in a police-dominated atmosphere. *See Illinois v. Perkins*, 496 U.S. 292, 296 (1990); *cf. United States v. Craighead*, 539 F.3d 1073, 1083-84 (9th Cir 2008) (describing situations where de facto custody is found even inside a defendant's home because of a "police-dominated atmosphere"); *United States v. Mittel–Carey*, 493 F.3d 36, 40 (1st Cir. 2007) (finding suspect was in custody although interrogated in his home because of the "level of physical control that the agents exercised over" the suspect); s*ee also New York v. Quarles*, 467 U.S. 649, 654 (1984) ("Requiring *Miranda* warnings before custodial interrogation provides 'practical reinforcement' for the Fifth Amendment right.").

Statements are the product of custodial interrogation if questioning was initiated by a law enforcement officer after the accused is in custody or otherwise deprived of his freedom to act in a significant way. *See Miranda,* 384 U.S. at 444; *cf. United States v. Beraun-Panez*, 812 F.2d 578, 580 (9th Cir. 1987). Custody is an actual formal arrest or a restriction on freedom to a degree associated with a formal arrest. *See Miranda*, 384 U.S. at 444; *cf. California v. Beheler*, 463 U.S. 1121, 1125 (1983).

Formal arrest is not required to establish the interrogation was custodial. *Cf. Stansbury v. California*, 511 U.S. 318, 322 (1994) (per curium) (describing the ultimate inquiry as "whether there was 'a formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest" (quoting *Beheler*, 463 U.S. at 1125)). Rather, a suspect is in custody for purposes of *Miranda* if the suspect has been "deprived of [her] freedom of action in any significant way." *Miranda*, 384 U.S. at 444; *accord Dickerson*, 530 U.S. at 444. This deprivation occurs when the

"suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curium)).

A person is "in custody" for purposes of *Miranda* "when based upon a review of all pertinent facts, 'a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave.'" *United States v. Wauneka*, 770 F.2d 1434, 1438 (9th Cir. 1985) (quoting *United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981)).

Redeker maintains he was in custody for *Miranda* purposes at the time of the statements at issue. Objectively, law enforcement subjected Redeker to meaningful restriction of his freedom.

Among many other factors, the six-hour duration of the detention, and the multiple interrogations, weighs in favor of finding Redeker in custody. Here there were multiple interrogations that lasted much more than an hour when summed together. Indeed, they lasted closer to three hours. In the meantime, law enforcement detained Redeker on his front lawn until the early morning hours on a cold October night. The length of Redeker's detention weighs in favor of a finding of de facto custody.

B. Redeker's Agreement to Go with Detective Hardy to the Police Station after Five Hours of Detention Did Not Change his Custodial Status or Remove the Taint of the Law Enforcement's Unlawful Detention and Interrogation

The totality of the circumstances weighs in favor of a finding that Redeker was in custody at the time of interrogation. Yet the Ninth Circuit determined Redeker was not in custody after agreeing to travel with Detective Hardy to the police station for further questioning at 4:00 in the morning. (*See* App. A, at 1-2.)

Redeker was in custody for hours before Detective Hardy showed up. At 10:17 p.m. Officers Brian Jensen and Drew Burnett ordered Redeker out of his car,

handcuffed him, and placed under him investigative detention. According to the suppression hearing testimony of both officers, he was not free to leave. Redeker remained under investigative detention for an hour and forty-five minutes, until at least midnight, and he was not free to leave at any point. After the cuffs were removed an officer watched Redeker at all times.

At 1:09 a.m., Officer Jackson took Redeker into his police car and put him in the back seat. (*See id.* at 509, 514.) Officer Jackson interviewed him from just after 1:00 a.m. until about 2:00 a.m. (*See id.* at 511.) Redeker tried not to answer questions but Officer Jackson persisted and never told him he was free not to answer questions. (*See id.* at 515-17.)

Officer Jackson was clear that if Redeker had asked to cease the questioning or leave, Jackson would not have complied. In fact, when Redeker asked to leave and go to bed, Jackson denied the request. (*See* Ex. 250; ER 1020.) Jackson then told him "You have to talk to me. You know you're not under arrest here. You're not bein' [sic] accused of anything." (*See id.* ER 1021.)

Redeker expressed that he was tired, hungry, and needed medication. Jackson responded that Redeker had to make a statement before he could eat, smoke, or rest. When Redeker once again asked to go inside and go to sleep, Jackson told him "No. What's gonna [sic] happen here is . . . is we're gonna [sic] find out where she's at. You're not gonna [sic] go in there and go to bed, because you can't, 'cause [sic] you don't even sleep in that bed." (*See id.* at 1035.)

After Officer Jackson's interrogation, law enforcement kept Redeker in the front yard, in sight of armed, uniformed officers, for another hour. At this point Redeker had been in custody under police authority for nearly five hours. He was never allowed back into his house or his car, nor provided with food or water, and was watched by police at all times. Critically, none of the officers ever told Redeker he was free to leave at any point during the evening. The "circumstances surrounding

the interrogation" therefore included nearly five hours of uninterrupted police custody prior to Detective Hardy taking Redeker to the police station.

Detective Hardy approached Redeker at 3:30 in the morning, after police had seized Redeker's car, wallet, and house. They continued to deny him sleep, food, water, medication, and the opportunity to leave. Detective Hardy testified that he approached Redeker and asked him to go down to the police station with him. Detective Hardy claimed Redeker went with him voluntarily. The absence of resistance, however, is not the same as voluntariness. *See, e.g., United States v. Ollie*, 442 F.3d 1135, 1138 (8th Cir. 2006) ("Mr. Ollie's conduct revealed little more than an absence of resistance . . . while a defendant does not need to be enthusiastic about an interview for us to conclude that he voluntarily acquiesced, we think it clear here that Mr. Ollie was responding to pressure.").

Moreover, Hardy never told Redeker he was free not to come to the station. Whether a suspect is told they are not under arrest is the factor "most significant for resolving the question of custody." *United States v. Crawford*, 372 F.3d 1048, 1060 (9th Cir. 2004) (en banc); *see also United States v. Bassignani*, 575 F.3d 879, 886 (9th Cir. 2009) ("We have consistently held that a defendant is not in custody when officers tell him that he is not under arrest and is free to leave at any time."); *United States v. Norris*, 428 F.3d 907, 912 (9th Cir. 2005) ("[The suspect] was told that his cooperation was voluntary and that he was free to terminate the interview at any time."); *United States v. LeBrun*, 363 F.3d 715, 722 (8th Cir.2004) (en banc) ("[T]he defendant was not in custody because, among other things, the officers told him that he was free to leave and that he would not be arrested....").

Before his confession at the station, law enforcement never told Redeker he was free to leave nor that he was not under arrest. Rather, he had been told numerous times over the course of the night that he was not free to leave. It is reasonable to assume Redeker would not have known on his own that he could say

no to Detective Hardy's request. Nor does the record indicate any other officer told Redeker he was free to leave.

Hardy brought Redeker to the police station and took him to a five-foot by five-foot interrogation room crowded with two homicide detectives.

A few minutes into the interview, in response to Detective Hardy's questions, Redeker asked "Um, if, if . . . can somebody get me help?" Instead of seeing what help he needed, Hardy merely lied stating "we're here to help you." That statement effectively communicated to Redeker that he would get no help unless he worked with the police. Shortly after asking for help, Redeker gave in and confessed to killing Tuk.

Redeker never had any meaningful choice about his participation in the interview as he was subject to coercion from the moment Detective Hardy approached him up to the moment that he confessed. No reasonable person in Redeker's position, given the nature of the interrogation and the lengthy custodial detention that occurred beforehand, would have felt free to terminate the interrogation and leave the police station.

C. The Ninth Circuit Failed to Examine the Situation in Line with this Court's Jurisprudence on "Fruit of the Poisonous Tree."

Under the Court's precedents, the exclusionary rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" and, relevant here, "evidence later discovered and found to be derivative of an illegality," the so-called "fruit of the poisonous tree." *Segura v. United States*, 468 U.S. 796, 804 (1984).

Although Redeker briefed the issue of poisonous fruit, the Ninth Circuit's decision ignores that area of the law. (*Compare* App. A, at 1-2.)

Fruit doctrine applies in this case. For the duration of the protracted period of his detention, law enforcement did not read Redeker his *Miranda* warnings. Finally,

at 4:00 a.m., police pressure broke Redeker's will and he confessed. Then, and only then, did law enforcement read Redeker his rights.

The pre-*Miranda* custodial interrogations tainted the final *Mirandized* interrogation. It is fruit of the poisonous tree as well as a violation of the two-part interrogation tactic found unconstitutional in *Missouri v. Seibert*, 542 U.S. 600 (2004). *See also United States v. Gorman*, 859 F.3d 706, 716-19 (9th Cir. 2017) (finding that the first unlawfully prolonged traffic stop prevented law enforcement from using evidence found at a second stop because it was "fruit of the poisonous tree").

The exclusionary rule encompasses "evidence seized during an unlawful search," and also the "indirect ... products of such invasions." *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). Evidence derivative of a constitutional violation—the so-called "fruit of the poisonous tree"—is ordinarily "tainted" by the prior "illegality" and thus inadmissible, subject to a few recognized exceptions. *See, e.g., United States v. Washington*, 490 F.3d 765, 774 (9th Cir. 2007).

Evidence qualifies as the "fruit of the poisonous tree" when "the illegal activity tends to significantly direct the investigation to the evidence in question." *United States v. Johns,* 891 F.2d 242, 245 (9th Cir. 1989) (quoting *United States v. Chamberlin*, 644 F.2d 1262, 1269 (9th Cir. 1980)). "The focus," in other words, "is on the causal connection between the illegality and the evidence." *Id.* (citation omitted).

"[T]he Supreme Court has developed three exceptions to the 'fruit of the poisonous tree' doctrine which allow the admission of evidence derived from official misconduct" in some special circumstances. *See United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1396 (9th Cir. 1989). These exceptions are the "independent source" exception, the "inevitable discovery" exception, and the "attenuated basis" exception. *Id.*

"First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source." *Utah v. Strieff*, 136 S.Ct. 2056, 2061 (2016) (citing *Murray v. United States*, 487 U.S. 533, 537 (1988)).

The only factor potentially relevant is "attenuation doctrine." This exception applies when "the connection between the illegality and the challenged evidence" has become so attenuated "as to dissipate the taint caused by the illegality." *See United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1396 (9th Cir. 1989); *see also Strieff*, 136 S.Ct. at 2061 ("Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'").

In evaluating whether the connection between an antecedent constitutional violation and subsequently discovered evidence is sufficiently attenuated to "purge" the "taint," this Court considers "the temporal proximity" of the illegal conduct and the evidence in question, "the presence of intervening circumstances," and "the purpose and flagrancy of the official misconduct." *Brown v. Illinois,* 422 U.S. 590, 603-04 (1975).

Here, nothing attenuated the connection between Redeker's unlawful detention and his inculpatory statements.

The Ninth Circuit erred in not considering poisonous fruit doctrine in its decision. This Court should clarify this area of the law by granting this Petition for Certiorari and deciding whether Redeker's confession was tainted by the preceding six hours of unlawful law enforcement detention and interrogation.

CONCLUSION

For the aforementioned reasons, and in the interests of justice, the Petitioner Arie Robert Redeker respectfully requests that the Court grant this Petition for a Writ of Certiorari and require further briefing on the following important federal question: "Does the Poisonous Fruit Doctrine Apply to Interrogations that were Tainted by Initial Illegality"?

DATED this 19th Day of June 2019.

Respectfully submitted,

Rene Valladares
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/s/ Jason F. Carr

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II. CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 5,790 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 19th day of June 2019.

Respectfully submitted,

/s/ Jason F. Carr

JASON F. CARR
ASST. FED. P. DEFENDER

CERTIFICATE OF SERVICE

I hereby declare that on the 19th day of June 2019, I served this Petition for Writ of Certiorari, including the appendix, on the State of Nevada by depositing an envelope containing the petition in the United States mail, with first-class postage prepaid, addressed as follows:

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APP. 001

764 Fed.Appx. 606 (Mem)
This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Arie Robert REDEKER, Petitioner-Appellant,
v.
D. W. NEVEN; Attorney General for the State of Nevada, Respondents-Appellees.

No. 17-16917
|
Argued and Submitted February 14, 2019 San Francisco, California
|
Filed March 21, 2019

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Appeal from the United States District Court for the District of Nevada, Andrew P. Gordon, District Judge, Presiding, D.C. No. 2:12-cv-00397-APG-GWF

Before: SCHROEDER, O'SCANNLAIN, and RAWLINSON, Circuit Judges.

***607** MEMORANDUM [*]

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Petitioner Arie Redeker was convicted in Nevada state court of second degree murder and now appeals the district court's denial of his habeas petition after it found Redeker was not in custody for the purposes of a possible *Miranda* violation, and that even if Redeker had been in custody, he failed to establish any constitutional violation.

As a preliminary matter, the Government argues that the Nevada Supreme Court's decision was entitled to deference under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). We need not decide that issue because the district court, exercising *de novo* review, decided there was no custodial interrogation, so the standard of review is not material in this case. Also, we need not decide whether Redeker was in custody during the hours he spent in his front yard as argued by Redeker, or under arrest in the police station, as urged by the dissenting opinion in the Nevada Supreme Court, because even assuming there was a *Miranda* violation before Redeker was given his *Miranda* rights, there was no prejudice.

Redeker voluntarily admitted to the crime after being administered his *Miranda* warnings. Detective Hardy took the necessary steps to ensure that Redeker understood the import and effect of the *Miranda* warning. *See Missouri v. Seibert*, 542 U.S. 600, 622, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (Kennedy, J., concurring); *see also United States v. Williams*, 435 F.3d 1148, 1157–58 (9th Cir. 2006) (holding that Justice Kennedy's concurring opinion sets forth the controlling rule in *Seibert*). Redeker's unambiguous, affirmative answers demonstrate he recognized the import and effect of the *Miranda* warning. *See Reyes v. Lewis*, 833 F.3d 1001, 1027 (9th Cir. 2016). Thus, the district court correctly concluded that Redeker's post-*Miranda* statements were admissible because Detective Hardy did not deliberately withhold the *Miranda* warning, and Redeker voluntarily admitted to the crime. *See Williams*, 435 F.3d at 1158.

AFFIRMED.

All Citations

764 Fed.Appx. 606 (Mem)

APP. 003

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Arie Robert Redeker

Petitioner

v.

Dwight Neven, et al.,

Respondents

2:12-cv-00397-APG-GWF

Order of Dismissal

Petitioner Arie Robert Redeker, a prisoner in the custody of the State of Nevada, brings this habeas action under 28 U.S.C. § 2254 to challenge his 2006 Nevada state conviction for second-degree murder with the use of a deadly weapon. After evaluating his claims on the merits, I deny Redeker's petition for a writ of habeas corpus, dismiss this action with prejudice, and deny a certificate of appealability as to all grounds except for Ground 5, as to which I grant a certificate of appealability.

Background

Tuk Lannon was strangled to death. Arie Robert Redeker was bound over after a preliminary hearing on December 10, 2002, on charges of first-degree murder. (Exhibit 6).[1] The State filed a notice of intent to seek the death penalty nine days later alleging two aggravating circumstances, only one of which survived a petition to the Supreme Court of Nevada for a writ of mandamus: Redeker was under a sentence of imprisonment at the time of the murder, namely that he was on parole. (Exhibit 7; Exhibit 82; Exhibit 83).

Following a jury trial, Redeker was convicted of second-degree murder with the use of a deadly weapon on July 20, 2006. (Exhibit 134; Exhibit 137). He was sentenced to two terms of life

[1] The exhibits referenced in this order are found in the Court's record at ECF Nos. 18–22 (Exhibits 1–220), ECF No. 33 (Exhibits 221–247), and ECF No. 60 (Exhibits 248–251).

in prison with the possibility of parole after ten years, to run consecutively. (Exhibit 139; Exhibit 140).

Redeker appealed, and the Supreme Court of Nevada affirmed. (Exhibit 152; Exhibit 159). Remittitur issued on February 17, 2009. (Exhibit 162). Redeker filed a petition for a writ of habeas corpus in state court. (Exhibit 174; Exhibit 175). After holding an evidentiary hearing, the state district court denied the petition. (Exhibit 183; Exhibit 184). Redeker appealed, and the Supreme Court of Nevada affirmed. (Exhibit 199; Exhibit 204). Remittitur issued on June 4, 2012. (Exhibit 207).

Redeker then filed a petition for a writ of habeas corpus with this Court. (ECF No. 1). Redeker filed a second amended petition on January 18, 2013. (ECF No. 28). The State moved to dismiss, which I granted in part and denied in part. (ECF No. 41). In response to that order, Redeker elected to abandon the claims that I found unexhausted. (ECF No. 44).[2]

Standard of review

When a state court has adjudicated a claim on the merits, the Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a "highly deferential" standard for evaluating the state court ruling: that standard is "difficult to meet" and "demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170 (2011). Under this highly deferential standard of review, a federal court may not grant habeas relief merely because it might conclude that the state court decision was incorrect. *Id.* at 202. Instead, under 28 U.S.C. § 2254(**d**), the court may grant relief only if the state court decision: (1) was either contrary to or involved an unreasonable application of clearly established law as determined by the United States Supreme Court, or (2) was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. *Id.* at 181–88. The petitioner bears the burden of proof. *Id.* at 181.

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[2] Redeker's Declaration (ECF No. 44) says at 2:8-10: "Given the options presented by the order, I therefore elect to fully and forever abandon the Grounds that the Court has deemed unexhausted, and proceed on the unexhausted grounds." Obviously, that is a typographical error as Redeker cannot abandon the unexhausted claims and proceed on those same claims. Based on the context of his Declaration and my prior order, I read his Declaration to say that he has abandoned his unexhausted claims and has elected to proceed on his exhausted claims.

A state court decision is "contrary to" law clearly established by the Supreme Court only if it applies a rule that contradicts the governing law set forth in Supreme Court case law or if the decision confronts facts that are materially indistinguishable from a Supreme Court decision and nevertheless arrives at a different result. *See, e.g., Mitchell v. Esparza*, 540 U.S. 12, 15–16 (2003). A state court decision is not contrary to established federal law merely because it does not cite the Supreme Court's opinions. *Id.* The Supreme Court has held that a state court need not even be aware of its precedents, so long as neither the reasoning nor the result of its decision contradicts them. *Id.* And "a federal court may not overrule a state court for simply holding a view different from its own, when the precedent from [the Supreme] Court is, at best, ambiguous." *Id.* at 16. A decision that does not conflict with the reasoning or holdings of Supreme Court precedent is not contrary to clearly established federal law.

A state court decision constitutes an "unreasonable application" of clearly established federal law only if it is demonstrated that the state court's application of Supreme Court precedent to the facts of the case was not only incorrect but "objectively unreasonable." *See, e.g., id.* at 18; *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004). When a state court's factual findings based on the record before it are challenged, the "unreasonable determination of fact" clause of 28 U.S.C. § 2254(d)(2) controls, which requires federal courts to be "particularly deferential" to state court factual determinations. *See, e.g., Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004). This standard is not satisfied by a mere showing that the state court finding was "clearly erroneous." *Id.* at 973. Rather, AEDPA requires substantially more deference:

> [I]n concluding that a state-court finding is unsupported by substantial evidence in the state-court record, it is not enough that we would reverse in similar circumstances if this were an appeal from a district court decision. Rather, we must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.

Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir. 2004); *see also Lambert*, 393 F.3d at 972.

Under 28 U.S.C. § 2254(e)(1), a state court's factual findings are presumed to be correct and the petitioner must rebut that presumption by "clear and convincing evidence." In this inquiry,

federal courts may not look to any factual basis not developed before the state court unless the petitioner both shows that the claim relies on either (a) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or (b) "a factual predicate that could not have been previously discovered through the exercise of due diligence," and shows that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2).

When a state court summarily rejects a claim, it is the petitioner's burden still to show that "there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 562 U.S. 86, 98 (2011).

Discussion

A. Ground 1

In Ground 1, Redeker argues that his "constitutional guarantees of due process, equal protection, and a reliable sentence" were violated "because the trial court refused to strike the aggravating circumstance that the killing was committed 'by a person under sentence of imprisonment.'" (ECF No. 28 at 9). The Supreme Court of Nevada summarily rejected this claim. (Exhibit 159 at 1 n.1). In its notice of intent to seek the death penalty, the State cited the aggravating circumstances that "[t]he murder was committed by a person under sentence of imprisonment." (Exhibit 7 at 1); *see* Nev. Rev. Stat. § 200.033(1). Redeker's "sentence of imprisonment," the State contended, was his five-year period of probation that he was still serving when he committed the murder. (Exhibit 7 at 1).

In *Zant v. Stephens*, 462 U.S. 862 (1983), the Supreme Court held that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Id.* at 877. The aggravator in question here applies only to the "narrow class" of individuals who are on probation (or serving some other sentence of imprisonment) and that reasonably justifies treating them more harshly than others found guilty of the same offense.

Someone who commits murder while on probation can reasonably be treated differently than someone who either was never convicted of a crime or no longer on probation. No Supreme Court case clearly says otherwise. And interpretations of state law are outside the scope of a federal habeas court, barring constitutional concerns not raised here. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

Notably Redeker was not actually sentenced to death—the jury refused to find him guilty of first-degree murder. Nonetheless, Redeker argues that he was prejudiced. But the U.S. Supreme Court has explicitly rejected that argument. *See Lockhart v. McCree*, 476 U.S. 162 (1986). The Supreme Court of Nevada's rejection of Redeker's claim was in accordance with, rather than contrary to, clearly established U.S. Supreme Court precedent. Redeker contends that social science, relied on in *Lockhart*, now suggests a different outcome. Redeker has not shown that the consensus of the social science community has changed so much in the past thirty years as to render a state court's not-abrogating a holding of a U.S. Supreme Court case an unreasonable application of that case.

Thus, he has failed to meet his burden of showing that "there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98.

Ground 1 provides no basis for habeas relief.

B. Ground 2

In Ground 2, Redeker argues that "the trial court deprived [him] of his right to a fair and impartial jury, a fair trial and due process when it imposed improper and arbitrary limitations on voir dire, in violation of . . . the Fifth, Sixth, and Fourteenth Amendments." Redeker's trial counsel wanted to provide the jury with a juror questionairre about the death penalty, and specifically ask the following question:

> 56. If you were convinced beyond a reasonable doubt that the defendant was guilty of first degree murder, would you say that: (circle one)
> A. Your beliefs about the death penalty are such that you would AUTOMATICALLY vote IN FAVOR of the Death Penalty regardless of the facts and circumstances of the case.

> B. Your beliefs about the Death Penalty are such that you would AUTOMATICALLY vote AGAINST the Death Penalty regardless of the facts and circumstances of the case.

(Exhibit 32 at 25). The trial court denied the motion. Redeker claims that, "[a]s a result of the court's limitation of the voir dire, the defense was unable to properly identify pro-death jurors and jurors who could not consider mitigation." (ECF No. 28 at 11). The Supreme Court of Nevada summarily rejected this claim. (Exhibit 159 at 1 n.1).

The trial judge did not do what Redeker claims. The judge explained that instead of "ambush[ing]" the prospective jurors by giving them a hypothetical and asking them what they would do, defense counsel had to say: "these things will be presented and you are required to consider them, are willing to consider them, or something of that ilk." (Exhibit 123 at 8).

Redeker provides two citations for his assertion that "[t]he court refused to allow counsel to question juror regarding whether they would automatically vote for the death penalty in certain circumstances. Instead, the court limited question to asking jurors only whether they could 'follow the law.'" One citation (Exhibit 123 at 3) is to Redeker's trial counsel's characterization of what happened—a characterization that was rebuffed by both the court and the government. The other (Exhibit 120 at 15-6) has the trial judge asking that question, hut nothing more. The record belies Redeker's contention that his counsel was prohibited from asking *any* specific questions. What's more, though, is the specific question that he claims he was not allowed to ask, he did in fact ask, of each juror, many times. He asked the juror in question, "In that sort of instance would you vote for the death penalty automatic?" (Exhibit 120 at 12). He then followed it up by asking "[Would you] start with the assumption of a death penalty?" (*Id.* at 12–13). After more back and forth, the prospective juror came to her decision that she would start with the assumption of a death penalty "[a]s long as it follows the guidelines that we're given." (*Id.* at 13–14). And after the trial judge's questioning, trial counsel came back to the same vein of questions. (*Id.* at 17–19). Trial counsel asked of another juror, near the end of *voir dire*, "I know I've asked everybody this. I want to make sure that everybody has answered this question. . . . [C]ould you consider a sentence less than

death?" (*Id.* at 171). The record shows that Redeker's counsel was not improperly prevented from asking questions during voir dire.

Now, Redeker tries to characterize that as requiring defense counsel "to use a peremptory challenge on Juror Boyle instead of dismissing her for cause based on her inability to consider mitigating factors." (ECF No. 59 at 18). Redeker's argument lacks logic. Indeed, right before the page that Redeker cites for that proposition, Juror Boyle explains that she *would* consider a small sentence even though she might start with a presumption toward the death penalty, which, if anything, leads to the conclusion that she would entertain mitigating factors to impose something less than the death penalty. Another juror did, in fact, say that a defendant's background, which is a mitigating factor, "wouldn't have anything to do with it. Just the current charge." Of course, as the judge pointed out, no one had yet told him whether he should consider background and he was just going from his gut. (Exhibit 120 at 171–72). When then asked if he would consider background, he replied, "If the Court tells me to look at it I will look and listen to it. . . . Just mainly on the crime itself." (*Id.* at 172). He explained, "Depends on what you come up with as far as what it is, but I would consider it then . . . ." (*Id.* at 173).

Redeker's factual characterizations are belied by the record. As the record appears to the unadulterated eye, none of the constitutional violations described by Redeker occurred. He has thus failed to meet his burden of showing that "there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98. Of course, all these questions only went to whether jurors would automatically assume/impose the death penalty—which Redeker did not receive. And, as discussed above in Ground 1, having a death-penalty eligible jury does constitute prejudice. Redeker's explanations for prejudice would therefore fail in any event.

Ground 2 provides no basis for habeas relief.

C. Ground 3

In Ground 3, Redeker argues that "the trial court admitted evidence of extraneous bad acts in violation of Redeker's right to a fair trial, right of confrontation and due process as guaranteed by the Fifth, Sixth, and Fourteenth Amendments." (ECF No. 28 at 12). Specifically, Redeker contends that

the trial court improperly admitted evidence that he was convicted of arson of the home he shared with the victim, Tuk, while it was unoccupied, that he made threatening remarks about the victim to third parties, and that he made inappropriate/threatening remarks about the victim's eight-year-old daughter, B.T. (*Id.*).

Testimony was admitted that Redeker "said he was going to have somebody take care of [Tuk]" (Exhibit 124 at 63); "would say [Tuk] talked too much. She couldn't keep her mouth shut. [Redeker] would call her names" (*Id.* at 74); said "it would be easy to have someone take her out, um, to have her whacked" (*Id.* at 75); said the same thing about B.T. (*Id.* at 84–85); according to a witness who heard it from B.T., "says [B.T. is] a whore, like [her] mom" (*Id.* at 86); and that according to that same witness, Redeker "would refer to [B.T.] by bad names, as well" in conversations with the witness. (*Id.*). Testimony was admitted that the garage of the home that Redeker and Tuk co-owned together was burned via arson in June 2001; Redeker was residing there, but Tuk had moved and was living with her mother and stepfather when the arson occurred. (*Id.* at 103–04; *see id.* at 90; Exhibit 128 at 53). Some time after the arson, Tuk moved back in with Redeker. (Exhibit 124 at 105). She again moved out about three to four weeks before her death. (*Id.* at 93). On cross-examination, defense counsel elicited that Redeker possibly took medication for being bipolar and pleaded guilty to second-degree arson for setting the garage on fire. (*See id.* at 104–05). Lastly, defense counsel elicited that Redeker's parents testified that, perhaps a week before the fire, Redeker was "ranting and raving" and made some threat "to the effect of doing something to the house." (Exhibit 128 at 51–53). After that, he went on medication. (*Id.* at 55). On cross-examination, the State elicited that "he did threaten, you know, again, that he would—he was going to do some harm [to Tuk]," specifically "something to [the] effect" of him saying "that he was going to cut off Tuk's ears and send one to his parents . . . and then one to Tuk's parents" and "that he would kill Tuk and bury her in the desert." (*Id.* at 63–64).

Redeker challenges the admission of this testimony—presumably, only the testimony elicited by the State, but I will analyze it all as if elicited by the State anyway. The Supreme Court of Nevada rejected Redeker's argument. (Exhibit 159 at 10–14). While there might be some confusion

as to whether the court addressed Redeker's constitutional argument on its merits (or at all, actually) or "did [not] dispute" the constitutional error and only applied harmless error analysis to reject the claim, I will address the merits de novo assuming that the court did not reach the claim.[3]

The federal courts "are not a state supreme court of errors; we do not review questions of state evidence law." *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991). Instead, the federal courts on habeas review care only "whether the admission of the evidence so fundamentally infected the proceedings as to render them fundamentally unfair," and thus constitutionally impermissible. *Id.* Not only must there be "*no* permissible inference the jury may draw from the evidence," but also the evidence must "be of such quality as necessarily prevents a fair trial." *Id.* at 920 (citation omitted); *see also Windham v. Merkle*, 163 F.3d 1092, 1103 (9th Cir. 1998). In other words, the evidence is not constitutionally suspect unless it is irrelevant and has no probative value. *See McGuire*, 502 U.S. at 68–69. Whether the admission of evidence violated state law "is no part of a federal court's habeas review of a state conviction." *Id.* at 67.

None of this evidence was admitted only for an impermissible purpose. As the Supreme Court of Nevada noted, the evidence "was relevant to the crime charged because of it was probative of Redeker's intent and motive to commit murder, as well as his ill will against Tuk." (Exhibit 159 at 12; *see also id.* at 13–14). I agree and therefore find that the admission of the evidence did not render the trial fundamentally unfair.

Redeker also argues that the admission of the statement that Redeker called B.T. a "whore, like [her] mom," violated his rights under the Confrontation Clause. A witness testified that B.T. had told her that Redeker said that to B.T. (*See* Exhibit 124 at 86). The witness also testified that Redeker "would refer to [B.T.] by bad names, as well" in conversations with the witness. (*Id.*). In light of the minor effect that such a statement would have on the verdict and the fact that the witness corroborated similar statements in statements that did not run afoul of the Confrontation Clause,

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[3] My reading of its affirmance is that the Supreme Court of Nevada did not address Redeker's argument that the introduction of the evidence violated his federal constitutional rights. Rather, it addressed only whether the admission of the evidence was proper under Nevada state law. (*See* Exhibit 159 at 10–14).

even if the statement from B.T. violated the Confrontation Clause, the error was harmless beyond a reasonable doubt. *See United States v. Brooks*, 772 F.3d 1161, 1171 (9th Cir. 2014); *Chapman v. California*, 386 U.S. 18, 24 (1967).

Ground 3 provides no basis for habeas relief.

D. Ground 5

In Ground 5, Redeker argues that the "trial court erroneously admitted Redeker's statements to police and confession to Detective Hardy, in violation of Redeker's Fifth Amendment right to remain silent." (ECF No. 28 at 16).

The police received a tip that about a missing person (Tuk) and Officers Jensen and Burnett, in full uniforms, went to Tuk and Redeker's co-owned home to investigate and perform a welfare check. (Exhibit 46 at 53, 64, 94). Around 10:15 pm, Redeker arrived at his house in a white SUV that belonged to Tuk while the officers were across the street parked along the curb, and after he drove past the house, Burnett shouted, "Arie, stop." (*Id.* at 62). After a pause, the vehicle stopped, Redeker got out, and Burnett put him in handcuffs for safety given his prior history of domestic violence, mental health, and arson. (*See id.* at 62–63; 99–100). When asked if he knew the whereabouts of Tuk, he responded that Tuk had given him her car, the white SUV, around 4:30 pm, after which they got into an argument about "the child" and she drove away. (*See id.* at 64–66). Burnett removed the handcuffs about twenty minutes after the initial stop so that Redeker could sign a consent form allowing the officers to search the house and the car to see if they could find any leads in helping locate Tuk. (*See id.* at 70–73). While the officers were looking around, Redeker was left "to meander around the front yard," sometimes sitting in a chair smoking cigarettes and eating McDonalds, all the while "[s]omebody kept an eye on him." (*Id.* at 80–81, 101, 117). Redeker asked to go inside the house; but he was not allowed to do so. (*See id.* at 89). Jensen and Burnett explained that if Redeker had asked to leave, they would not have let him. (*Id.* at 92, 104).

Detective Jackson arrived around midnight. (*Id.* at 124). Around 1:00 am, Jackson asked Redeker if he could talk with him about trying to find a missing person. Redeker agreed, and they spoke in Jackson's car—although it is unclear if Redeker was in the front seat or the back seat. (*Id.* at

115–16). Redeker was not the most responsive, and oftentimes did not reply to Jackson's questions. Jackson told him that he was not under arrest. (*Id.* at 116; Exhibit 250 at 12 ("You have to talk to me. You know you're not under arrest here. You're not bein' accused of anything.")). Jackson said that if Redeker wasn't "tired of trying to help [the police] find her," "then go on and talk to me real quick [because] anytime you make a police report, with a missing person or what, you have to make a statement. You have to do that." (Exhibit 250 at 12–13). Jackson offered and Redeker accepted two cigarettes. (*Id.* at 14–15). Redeker muttered, "please, go to bed," and later asked to go into the house, but Jackson said that he couldn't go back in there right now. (Exhibit 250 at 26, 31). Jackson told Redeker that he was "gonna be out here for a long time . . . because at this point, you're not bein' helpful to me at all." (*Id.* at 28). On the other hand, though, after Redeker had been unhelpful for a while, Jackson said that "when you wanna talk to me . . . we can talk." (*Id.* at 31). Redeker ended up explaining that he and Tuk had gotten into a verbal argument, Tuk handed him the car keys, and then she walked away—he stated that he had not harmed her in any way. (*Id.* at 32–33). The interview lasted for about an hour, ending at 1:58 am. (Exhibit 46 at 117). Jackson testified that if Redeker had asked to leave, he would not have let him. (*Id.* at 126). Around 2:30am, homicide detectives arrived. (*Id.*).

Detective Hardy arrived at 3:40 am, left with Redeker around 4:00 am, and ultimately interviewed Redeker at the police station at 4:30 am. (*Id.* at 150). When Hardy arrived, Redeker was sitting in a folding chair on his front walkway with cigarette butts and a bag of food. (*Id.* at 133). Hardy testified that he asked, exactly, "Would you come to the station so that we can talk about this incident away from the scene, talk to us about the incident at our office?" (*Id.* at 141). Redeker agreed and rode in the front seat of Hardy's car without handcuffs—as Redeker's car was still under police control from when Redeker consented to having it searched. (*See id.* at 142–43). Once at the station, Hardy and his partner walked Redeker to a room—a five-foot-by-five-foot room with three chairs and a small table. Redeker sat down in one of the chairs upon walking in. The door was not locked, Hardy got Redeker a soda, and Redeker was not told that he was being taped. (*See id.* at 146–49). Hardy testified that it was a "consensual encounter," that he should have "fel[t] free [to]

leave," and that "[i]f he got up to walk out, I would let him walk out." (*Id.* at 148). After Hardy asked Redeker some basic biographical questions, he asked him where Tuk was living and what happened between Tuk and him. (Exhibit 251 at 1–4). Redeker drew him a map and admitted to strangling her. (*See id.* at 5–6; *see also* Exhibit 128 at 12). Hardy then *Mirandized* Redeker, and Redeker elaborated on what had happened to Tuk. (*See* Exhibit 251 at 6–7).

Redeker argues that he was in custody for purposes of *Miranda* for the entirety of the evening and that, therefore, nothing he said that night before the *Miranda* warning should have been used against him at trial nor should the statement he made after being *Mirandized* been used because the pre-*Miranda* statements tainted the *Miranda* waiver. The Supreme Court of Nevada rejected Redeker's arguments. (Exhibit 159 at 5–14). It held that he was not in custody for purposes of *Miranda* before he was read his *Miranda* rights, rejected Redeker's argument that the initial detention morphed into a custodial arrest at the house, and refused to hold any of his statements inadmissible. (*See id.*). Redeker responds that the court's decision is not entitled to deference under AEDPA because it "contains several critical misstatements of fact as to material factual issues." (ECF No. 59 at 29–30). Indeed, "where the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable." *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004); *see also Milke v. Ryan*, 711 F.3d 998, 1008 (9th Cir. 2013). I will assume for the sake of argument that the factual errors that Redeker points to for the first time in his Reply brief are, in fact, errors and that they warrant jettisoning AEDPA's deferential standard of review. But reviewing Redeker's claim de novo, I find that he was not in custody for purposes of *Miranda* at the challenged times.

Miranda warnings are required only if someone is subject to a "custodial interrogation." *J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011). Redeker was clearly being interrogated, and so the only question is whether he was "in custody," which is an objective inquiry. *Id.* "The benefit of the objective custody analysis is that it is 'designed to give clear guidance to the police.'" *Id.* at 271 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004)).

> Two discrete inquiries are essential to this determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.

Id. at 270 (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)). Courts are to "examine all the circumstances surrounding the interrogation." *Id.* at 270–71 (citation omitted). But "officers are not required to 'make guesses' as to circumstances 'unknowable' to them at the time." *Id.* at 271 (citation omitted).

To summarize the evidence described above, Redeker was: handcuffed for thirty minutes before consenting to having police officers look through his house and car to try to locate Tuk early in the encounter; asked if he felt like talking and didn't respond; told that he was not under arrest; told that he could not go back into the house; told that he had to talk to Jackson *if* he wanted to help find Tuk; allowed to "meander" around the front yard smoking cigarettes and eating McDonalds; asked if he would come to the police station; transported to the police station in the front seat of a unmarked car without handcuffs; given a soda when he arrived; allowed to voluntarily sit down in the room, where he was not told that he was being taped; and questioned for a total of under two hours over a timespan of six-and-a-half hours before the confession. *Cf. United States v. Crawford*, 372 F.3d 1048, 1060 (9th Cir. 2004) (noting that whether a suspect is told they are not under arrest is the factor "most significant for resolving the question of custody"). Moreover, officers throughout the day were appealing to Redeker's desire to find Tuk more than threatening him with arrest. *See Yarborough*, 541 U.S. at 664 ("Instead of pressuring Alvarado with the threat of arrest and prosecution, she appealed to his interest in telling the truth and being helpful to a police officer."). Admittedly, this is far from a clear case. But in sum, a reasonable person would have felt that this was more an attempt to find Tuk than incriminate Redeker; this falls short of the "ultimate inquiry" of there being "a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *J.D.B.*, 564 U.S. at 270 (citation omitted). Therefore, Redeker's claim that his

statements were elicited in violation of *Miranda* fail, and for the same reason, his claim that he was under *de facto* arrest fails.

But even if Redeker's statements at his house were in violation of *Miranda* because he was "in custody," the intervening facts between leaving his house with Hardy and confessing to Hardy preclude a finding that he was in custody at the police station. And because the admission of any statements that Redeker made to the detectives was harmless beyond a reasonable doubt in light of the other evidence, Redeker's claim to suppress the police station interrogation would still fail. *See Chapman*, 386 U.S. at 24.

Alternatively, even if Redeker's statements before being *Mirandized* were the result of a custodial interrogation in violation of his constitutional rights, he would not be entitled to relief. The admission of any pre-*Miranda* statements would be harmless beyond a reasonable doubt if the post-*Miranda* statement were admissible. *See Chapman*, 386 U.S. at 24. The question in such a case would be whether the *post-Miranda* statements were still elicited in violation of *Miranda* under *Missouri v. Seibert*, 542 U.S. 600 (2004). *Seibert* holds that *Miranda* warnings are inadequate if the police deliberately use a two-step process to first extract an unwarned confession and then re-extract the confession after giving a warning unless adequate curative measures are taken "to ensure that later *Miranda* warnings are genuinely understood." *Reyes v. Lewis*, 833 F.3d 1001, 1029 (9th Cir. 2016). Thus, to be excluded, the two-part strategy must have been used deliberately and the later curative *Miranda* warnings must have been inadequate.

To determine if the two-step strategy was deliberate, I look at both objective and subjective evidence "to support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning." *United States v. Williams*, 435 F.3d 1148, 1158 (9th Cir. 2006). The Ninth Circuit has provided a "nonexhaustive list of probative objective evidence of deliberateness" including "the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements." *Reyes*, 833 F.3d at 1030 (quoting *Williams*, 435 F.3d at 1159). "Once a law enforcement officer has detained a subject and *subjects him to interrogation* . . . there is rarely, if ever, a legitimate reason to delay

giving a *Miranda* warning until after the suspect has confessed. Instead, the most plausible reason for the delay is an *illegitimate* one, which is the interrogator's desire to weaken the warning's effectiveness." *Williams*, 435 F.3d at 1159.

This, though, is far from the typical case. The police officers were not responding to a homicide—they were responding to a missing person report, a basic welfare check. While there was, of course, always the possibility that it was a homicide—and, indeed, homicide detectives were called—the questions were primarily focused on trying to locate Tuk. Giving *Miranda* warnings has the partially-intended consequence of having people actually choose to exercise their rights to remain silent or to a have an attorney—both of which would be unlikely to aid in finding Tuk. And while Redeker's seeming desire not to answer questions at times might lead some to think that he was trying to hide something, his mental health history and the fact that he might have been intoxicated that evening provide another reasonable explanation. Moreover, even if they thought Redeker was trying to hide something, it is not clear what. Perhaps after their fight, Tuk drove off and got injured, and Redeker blamed himself. Or he rammed her car and left her in a ditch. These are, of course, pure conjecture, but they are relevant to whether Hardy *deliberately* sought an unwarned confession in the hopes of re-*Mirandizing* him and getting a new confession afterward.

Moreover, how the first confession played out, and the types of questions that Hardy was asking, shows that he was more focused on finding Tuk than on incriminating Redeker. After general questions about Tuk and Redeker had come to a standstill, Redeker drew a map, pointed to a road, and said "that's where she's at." (Exhibit 251 at 4–5; *see also* Exhibit 128 at 12). He was asked how she got there, why she was out there, and if she was okay. He said "earlier today," and "no, she'd dead." (Exhibit 251 at 5). Detective Hardy asked him why she was dead—perhaps she might have only been in an accident still needing medical help—and Redeker responded "I don't know." (*Id.*). Hardy asked whether they had an argument earlier in the day, to which Redeker responded yes. (*Id.*). He then tried to get Redeker to take them to Tuk and asked if he would at least help them find the right road. After trying to narrow down which road, Hardy finally asked how she died. (*Id.* at 5–6). Redeker responded "Strangulation." (*Id.* at 6). Hardy asked "Did you strangle her

or did somebody else?" and Redeker replied "I did." (*Id.*). Hardy then read Redeker his *Miranda* rights. (*Id.*).

Hardy then starting asking questions that were focused more on inculpating Redeker than on finding or saving Tuk. He asked "how'd you strangle her?" and tried to find out "what, ah, led up to all this" and whether he "mean[t] for it to happen" or if he "felt bad about" it. (*Id.* at 7–8). He then asked whether Redeker had been drinking and what led up to Tuk's death. (*Id.* at 8). Hardy ended up getting a detailed explanation of the events that led up to what happened and why Redeker became so upset with her. (*See id.* at 9–38).

On the one hand, the two interrogations happened back-to-back, in the same place, without a break, and with the same two law enforcement officers. But on the other hand, there was a substantial difference between the content and degree of specificity elicited in the two interviews. *See Reyes*, 833 F.3d at 1030 (noting that factors include "the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements" (quoting *Williams*, 435 F.3d at 1159)). While consideration of only these factors might lead to the conclusion that the two-step process was deliberate, they are non-exhaustive. *See id.* Based on the totality of the circumstances as described above, I find that the two-step inquiry was not deliberate and that, therefore, the second confession was not tainted by the lack of a *Miranda* warning before the first one.

Ground 5 provides no basis for habeas relief. Nonetheless, because Redeker has made a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c), I issue a certificate of appealability as to Ground 5. *See* Fed. R. App. P. 22(b); *United States v. Asrar*, 116 F.3d 1258, 1270 (9th Cir. 1997).

E. Ground 6

In Ground 6, Redeker argues that the "trial court erroneously admitted post-it notes found in Redeker's home, in violation of his right to be free of unlawful searches and seizures, his right to confrontation and his right to due process as guaranteed by Amendments four, five, six and fourteen

of the United States Constitution." (ECF No. 28 at 20). The Supreme Court of Nevada summarily rejected this claim. (Exhibit 159 at 1 n.1).

Trial counsel had objected to the admission of the Post-it notes—his "position was that the notes aren't relevant . . . . I think it's kind of cryptic and has the potential to be confusing for the jury." (Exhibit 128 at 42). The State explained that "[t]hese notes bear on his thought process and elements of First Degree Murder" because, for example, Redeker "writes on one of the post-it's the word losses, then he puts a colon and writes child, vehicle, house, good citizen standing, life." (*Id.* at 43; *see* Exhibit 128A at 3 (the Post-it notes)). The trial court ruled that the evidence "tends to buttress or assist in [the State's] theory of the case" and asked "is there anything else?" (Exhibit 128 at 44). Redeker's counsel responded "No." (*Id.*). At trial, then, Redeker objected only to the relevance of the Post-it notes, and that objection was overruled.

Detective Hardy testified that the notes were given to him in a manila envelope by the district attorney's office and that it was "labeled as notes written by Arie Redeker I found in [his] home by George Savage." (*Id.* at 16–18). After the State moved to admit the notes, the court asked "[I]s there any opposition other than what we discussed?" (*Id.* at 18). Redeker's counsel replied "No." (*Id.*).

Redeker now argues that the Post-it notes and Savage's note describing where they were found were admitted "in the absence of proper foundation," "in the absence of proper authentication testimony identifying the handwriting," and as inadmissible hearsay. (ECF No. 28 at 20). As discussed above in Ground 3, on federal habeas review we determine only "whether the admission of the evidence so fundamentally infected the proceedings as to render them fundamentally unfair." *Jammal*, 926 F.2d at 919. The admission of the Post-it notes and Savage's note does not meet that high standard.

First, as discussed above, the notes were primarily used as evidence of first-degree murder, which the State did not win a conviction on anyway. Second, trial counsel did not object, thus indicating that the Post-it notes actually *were* written by Redeker. Third, the state called as a witness Savage, the person who found the Post-it notes and wrote the note saying where they were found. (Exhibit 124 at 89). Admittedly, this was done on July 13, 2006, before the State called Hardy and

introduced the Post-it notes on July 17, 2006. Fourth, Savage discussed the Post-it notes, and testified that he found them in the home, that he turned them over to the police, that only Redekter, Tuk, and the kids lived at the house, and that the Post-it notes were not in Tuk's handwriting. (*Id.* at 102–03). The notes referenced a "child," so it likely wasn't written by a young child. Fifth, when the notes were introduced, Redeker sole objection was to relevance.

Redeker also argues that "the trial court's admission of the Post-its, together with George Savage's note [identifying where they were found], violated Redeker's and [sic] constitutional rights." (ECF No. 28 at 20). Because the trial was not fundamentally unfair, the only remaining constitutional claim is Redeker's argument that the "admission of the notes violated Redeker's confrontation right [under the Sixth Amendment] since [Savage] was never examined regarding the circumstances of the notes." (ECF No. 47 at 47). Redeker concedes that Savage was called as a witness, but argues that "the critical question is whether there was also an opportunity to cross-examine the declarant." (*Id.* at 48). He argues that there was not such an opportunity because the State introduced the evidence after Savage was off of the witness stand. (*See id.*). But counsel was given that opportunity: as discussed above, the State asked Savage about the notes, where he found them, and what he thought of the handwriting during direct examination. (*See* Exhibit 124 at 102–03). All of that content explained the note and Savage's basis for the note. Redeker opted not to explore this content on cross-examination or re-cross-examination. (*See id.* at 104–07; *id.* 108–09). Moreover, as discussed above, Redeker did not object at the time beyond relevance, never mentioned the Confrontation Clause or even hearsay, and never tried to recall Savage—who, as the victim's step-father, likely would have been more than happy to re-explain how he deduced what he wrote on the note. While there might be a technical argument that this violated the Confrontation Clause, the Supreme Court of Nevada's determination that this was not a violation was not an unreasonable application of United States Supreme Court law in light of the fact that it was not raised before the trial court, and Redeker has therefore not met his burden of showing that "there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98.

Ground 6 provides no basis for habeas relief.

F. Ground 7

In Ground 7, Redeker argues that the "court's jury instruction defining the use of a deadly weapon was unconstitutionally broad and the state failed to corroborate Redeker's confession, resulting in violation of Redeker's right to due process guaranteed by the Fourteenth Amendment to the Constitution of the United States." (ECF No. 28 at 21).

Redeker was found guilty of second-degree murder with use of a deadly weapon on July 20, 2006. (Exhibit 134). The indictment identifies the weapon as a "cord and/or ligature" according. (Exhibit 6 at 2). According to Redeker's confession, he used a telephone cord. (Exhibit 251 at 14–15). The jury was instructed that

> "Deadly weapon" means any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death or any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing substantial bodily harm or death.

(Exhibit 136 at 20). Redeker argues that the text of Nevada Revised Statute § 193.165(6), on which the jury instruction was based, "defines 'deadly weapon' in a constitutionally overbroad and vague manner." (ECF No. 59 at 53). The statute defines "deadly weapon" as "[a]ny instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death" or "[a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death." Nev. Rev. Stat. § 193.165(6)(a), (b). Redeker made no objection to the statute to the state trial court but did raise the issue on appeal to the Supreme Court of Nevada, which summarily rejected his claim. (Exhibit 159 at 1 n.1).

The Supreme Court of the United States has held that, under the Due Process Clause, "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The question is whether ordinary people would know "with sufficient definiteness" what this statute prescribes, and specifically, whether strangling someone with a telephone cord "was readily capable of causing

substantial bodily harm or death." Nev. Rev. Stat. § 193.165(6)(b). The Supreme Court of Nevada could have reasonably held, without running afoul of clearly established Supreme Court law, that the answer to both questions was yes. Moreover, that court similarly could have concluded that the statute did not run afoul of "the requirement that the legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358. The statute considers a deadly weapon anything that is "readily capable" of causing substantial bodily harm or death when used in the manner in which it was used. The Supreme Court of Nevada would not have made a decision contrary to, or an unreasonable application of, clearly established U.S. Supreme Court law in concluding that this standard is easily understandable and provides adequate guidelines to law enforcement.

Redeker's argument that the statute is overbroad fails because statutes are overbroad only if they prohibit conduct that is constitutionally protected. *See Zwickler v. Koota*, 389 U.S. 241 (1967); *Schwartzmiller v. Gardner*, 752 F.2d 1341 (9th Cir. 1984). There is no indication of that here.

Redeker also argues that the trial court "improperly instructed the jury on the Use of a Deadly Weapon allegation" because doing so violated the *corpus delicti* rule. (ECF No. 28 at 21). Under Nevada state law, the *corpus delicti* rule prohibits the admission of a confession unless there is independent evidence "permitting a reasonable inference that a crime was committed." *Doyle v. State*, 921 P.2d 901, 910 (Nev. 1996) (citation omitted), *overruled on other grounds by Kaczmarek v. State*, 91 P.3d 16 (Nev. 2004). Because that definition of the rule is a state rule of evidence, its violation cannot warrant federal habeas relief. *McGuire*, 502 U.S. at 67. Instead, the question is whether the admission of the challenged evidence rendered the trial "fundamentally unfair." *Jammal*, 926 F.2d at 919. In federal courts, the *corpus delicti* rule "requires that a conviction must rest on more than a defendant's uncorroborated confession." *United States v. Niebla-Torres*, 847 F.3d 1049, 1054 (9th Cir. 2017). The government must "introduce corroborating evidence 'to support independently only the gravamen of the offense—the existence of the injury that forms the core of the offense and a link to a criminal actor.'" *Id.* at 1055 (quoting *United States v. Lopez-Alvarez*, 970 F.2d 583, 591 (9th Cir. 1992)); *see also Opper v. United States*, 348 U.S. 84, 92–94 (1954). Here,

the State introduced more than sufficient evidence independent of Redeker's confession to corroborate the "existence of the injury" and "a link to a criminal actor" to survive a due process challenge: Tuk's body was located and she had been strangled (Exhibit 124 at 40–45); half a telephone cord was found in a trash can and the other half was found, along with a single hoop earring, in the master bedroom in Redeker's home (Exhibit 125 at 11–16, 22–24); and Redeker had a history of threatening to grievously injure Tuk (Exhibit 124 at 74–75; Exhibit 128 at 51–53, 63–64).

Ground 7 provides no basis for habeas relief.

G. Ground 8

In Ground 8, Redeker argues that he invoked his right to proceed pro se, but that the trial court "failed to have a hearing on Redeker's request to represent himself in violation of [his] right to counsel and due process as guaranteed by the Sixth Amendment of the United States Constitution." (ECF No. 28 at 22). The hearing that Redeker points to was for his "Pro Per motion to have counsel withdrawn and have appointed alternate counsel." (Exhibit 13 at 1; *see* Exhibit 12 at 3 ("Therefore, it is asked by the defendant, that this court appoint an [sic] Court-appointed attorney, and that his name and address be provided to the defendant."); *see also* Exhibit 11 ("At this time, the defendant is asking for a court-appointed attorney.")). During the hearing, Redeker first requested a different court-appointed counsel but later requested to dismiss his attorney to proceed pro se, at least "until [he was] able to find other representation." (Exhibit 13 at 8). Redeker then explained his reasons, which his counsel neutered. (*See id.* 8–9). His real problem, it turns out, was that his counsel didn't file a motion. The court responded that "it was early for that," and counsel explained that he wasn't going to file every motion that could be filed. So, the court said that "when the time comes for these motions to be seriously considered," "the attorney is the one that makes the decision as to whether or not the motion is to be made." (*Id.* at 9). Redeker said that he understood. (*Id.* at 10). The trial court then said that, sometime the following week or so, "we can entertain a *Faretta* Canvass [sic] and see where he's at on the issue. . . . I understand you want to have a hearing. I'll tell you you're going to have a hearing on that issue." (*Id.* at 10). There is no evidence that hearing was ever held. However, some months later, Redeker filed a motion for a substitution of counsel—he did not request to

proceed pro se, and in explaining the history of his requests as to counsel he did not claim to have ever requested to proceed pro se. (*See* Exhibit 85).

The Supreme Court of Nevada summarily rejected this claim. (Exhibit 159 at 1 n.1). The Ninth Circuit has held that when a defendant "makes an unequivocal request to proceed pro se, the court must hold a hearing." *United States v. Farias*, 618 F.3d 1049, 1051–52 (9th Cir. 2010). The Supreme Court of Nevada could have reasonably concluded that Redeker did not unequivocally request to proceed pro se. First, the hearing was initially about asking the court to appoint new counsel, not to allow Redeker to proceed pro se. When that didn't work, Redeker asked to represent himself, at least until he could find new counsel, which led to the discussion above and a possible amelioration of Redeker's request. With this context, the Supreme Court of Nevada could have reasonably held that Redeker equivocated in his request. Moreover, even if his request was unequivocal, there is no Supreme Court case holding that when such a request is made and then forgotten about and never raised again even though other requests for new court-appointed counsel are made, that the initial denial violated constitutional rights. Redeker contends that *Faretta* says that, but I cannot find it therein. *See Faretta v. California*, 422 U.S. 806, 815–16 (1975). Therefore, Redeker failed to meet his burden of showing that "there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98.

Ground 8 provides no basis for habeas relief.

H. Ground 9

In Ground 9 Redeker argues that "the prosecutor committed acts of misconduct in closing argument in violation of Redeker's right to a fair trial and due process as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution."

Redeker argues:

> In rebuttal summation, the prosecutor argued: "During the jury selection process we asked you repeatedly if we prove to you the elements of First Degree Murder would you convict? You all assured us that you would. We've certainly satisfied testified [sic] our obligation in this case." This amounted to misconduct. A prosecutor is not supposed to inject his personal beliefs into the case.

> Additionally, the prosecutor argued that: "Justice in this case demands a verdict of First Degree Murder. Tuk Lannan is not entitled to less justice simply because Arie Redeker couldn't cope with his problems. . . ." This amounted to misconduct in that the prosecutor was attempting to inflame the jurors into determining guilt through vengeance.

(ECF No. 28 at 23 (citations omitted)). The Supreme Court of Nevada summarily rejected the claim. (Exhibit 159 at 1 n.1). Redeker's rights are violated in instances such as this only if the statements so fundamentally infected the proceedings as to render them fundamentally unfair. *See McGuire*, 502 U.S. at 68–69. These statement do not come close to meeting this bar, and he has thus failed to carry his burden of showing that "there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98.

Ground 9 provides no basis for habeas relief.

I. Ground 10

In Ground 10, Redeker argues that the "prosecution failed to present sufficient evidence to sustain Redeker's second-degree murder with use of a deadly weapon conviction. As such, Redeker is imprisoned in violation of his right [to] due process as guaranteed by the Fourteenth Amendment to the United States Constitution." (ECF No. 28 at 24). This argument hinges on *Jackson v. Virginia*, 443 U.S. 307 (1979), where the Supreme Court held that due process does not allow a conviction if, viewing the evidence in the light most favorable to the prosecution, "no rational trier of fact could have found essential elements of the crime beyond a reasonable doubt." *Id.* at 319. The Supreme Court of Nevada summarily rejected the claim. (Exhibit 159 at 1 n.1).

Redeker argues that the only evidence of what happened that night came from Redeker's mouth, and that all that evidence necessarily pointed to manslaughter rather than second-degree murder. (ECF No. 28 at 24; ECF No. 29 at 73). However, a rational trier of fact did not have to believe Redeker's comments about drug use and mental health problems; rather, it could have focused on his threats and the planning that came with it, discounting the drug use or health problems. He has thus failed to carry his burden of showing that "there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98.

Ground 10 provides no basis for habeas relief.

J. Ground 11

In Ground 11, Redeker argues that his trial counsel was ineffective for failing to "take reasonable steps to raise issues regarding website postings made by jurors in his case" in violation of his Fifth, Sixth, and Fourteenth Amendment rights. (ECF No. 28 at 25). To succeed on a typical ineffective assistance of counsel claim on direct appeal, a defendant must show that counsel's representation fell below an objective standard of reasonableness and a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Courts evaluate counsel's performance from counsel's perspective at the time and begin with a strong presumption that counsel's conduct well within the wide range of reasonable conduct. *See, e.g.*, *Beardslee v. Woodford*, 358 F.3d 560, 569 (9th Cir. 2004). When a state court has reviewed a *Strickland* claim, a federal court's habeas review is "doubly deferential"—the reviewing court must take a "highly deferential" look at counsel's performance through the also "highly deferential" lens of § 2254(d). *Cullen*, 563 U.S. at 190, 202.

Redeker was found guilty of second-degree murder with use of a deadly weapon on July 20, 2006. (Exhibit 134; Exhibit 137). Two days later, Juror 4 wrote in his blog that "[i]n light of the fact that the defense failed to implant for me any reasonable doubt about these three elements [willfulness, deliberateness, and premeditation] it was a simple deduction that we had a clear case of first-degree murder." (Exhibit 202 at 15). Redeker contends that this statement indicated that this juror improperly shifted the burden of proof onto the defendant from the State. (*See* ECF No. 59 at 69). On July 24, two days after the juror made the initial post, Redeker's trial counsel seemingly acknowledged as much, writing that Juror 4's "interpretation places a burden on the defense to prove a defendant wasn't guilty, which is wrong." (Exhibit 202 at 22–23). According to Redeker, the blog post showed juror misconduct because the "jury failed to follow the court's instructions with regard to . . . proof beyond a reasonable doubt," trial "[c]ounsel should have moved for a mistrial," and trial counsel was ineffective for failing to do so. (ECF No. 59 at 70–72).

The Supreme Court of Nevada applied the proper *Strickland* standard and rejected Redeker's claim on its merits for failing to demonstrate either deficiency or prejudice. (Exhibit 204 at 2). It referenced a possible problem with the blog even being admissible evidence under Nevada Revised Statute § 50.065(2) but "assum[ed] without deciding" that it was admissible. (*Id.*). The court held that "the blog did not necessarily indicate that the juror was using the wrong standard but rather that once the State put on its case and met its burden of proof, the defense would need to rebut that evidence to avoid a conviction." (*Id.*). In other words, the State met its burden of proving Redeker's guilt beyond a reasonable doubt; after it did so, nothing Redeker did changed that. Therefore, trial counsel was not ineffective for not raising the issue and, even if he were, no prejudice could have resulted. Under the federal court's doubly deferential review of ineffective assistance of counsel claims on habeas, this holding was neither an unreasonable determination of fact nor an unreasonable application of Supreme Court case law.

Ground 11 provides no basis for habeas relief.

K. Ground 12

In Ground 12, Redeker argues that his trial counsel was ineffective for failing to "investigate and present evidence regarding Redeker's mental health issues" in violation of his Fifth, Sixth, and Fourteenth Amendment rights. (ECF No. 28 at 27). The standards for ineffective assistance of counsel are discussed above in regards to Ground 11.

Trial counsel explained, during the evidentiary hearing on Redeker's state petition for a writ of habeas corpus, that he did not raise a mental health defense "because it would subject the defendant to having to undergo a mental health evaluation from the State." (Exhibit 183 at 45). Moreover, he knew that the State would not have Redeker undergo such a mental health evaluation at the penalty phase, but if he put Redeker's mental health into issue at the guilt phase, the State would request a mental health evaluation that it would subsequently be able to use at the penalty phase. (*Id.* at 48–49). Additionally, he thought that "the issue of hipolar disorder, while compelling during a penalty phase, was evaluated as only being marginally relevant to the issue of guilt, because Nevada does not recognize diminished capacity." (*Id.* at 49).

The Supreme Court of Nevada accepted this "strategic decision" and therefore rejected Redeker's claim. (Exhibit 204 at 2). Under the federal court's doubly deferential review of ineffective assistance of counsel claims on habeas, this holding was neither an unreasonable determination of fact nor an unreasonable application of Supreme Court case law.

Ground 12 provides no basis for habeas relief.

L. Ground 13

In Ground 13, Redeker argues that his trial counsel was ineffective for failing to "properly litigate the Fourth Amendment and *Miranda* issues" in violation of his Fifth, Sixth, and Fourteenth Amendment rights. (ECF No. 28 at 29). In his Reply, Redeker concedes that, because

> this Court has now determined that the majority of the underlying claims were properly raised below as substantive issues and are now before this Court on the merits, . . . this Court need not consider whether counsel was ineffective for failing to raise the issues, other than to the extent any such failures contribute to cumulative error as pled in Ground Fifteen.

(ECF No. 59 at 80–81).

Ground 13 provides no basis for habeas relief.

M. Ground 14

In Ground 14, Redeker argues that his trial counsel was ineffective because he "was not qualified to handle Mr. Redeker's case when he undertook representation of him" in violation of his Fifth, Sixth, and Fourteenth Amendment rights. (ECF No. 28 at 30). The reason that counsel was not qualified, according to Redeker, is that he was not "death-penalty qualified" because he had not served as co-chair on a case where the State sought the death penalty, which is required for an attorney to handle a capital case under Nevada state law. (*Id.*). That requirement is triggered when the State informs the defense that it plans to seek the death penalty, as it did here. *See* Nev. Sup. Ct. Rule 250(2).

Redeker's trial counsel, upon being appointed, informed the court that he was not death-penalty qualified at the preliminary hearing. (*See* Exhibit 5 at 4; Exhibit 183 at 11). At that stage, the State had not yet decided if it was going to seek the death penalty. (*See* Exhibit 5 at 4). Nonetheless, the State asked that the trial court find that Redeker fell into the exception of "otherwise [having] the

competence to represent an indigent person in a capital case." Nev. Sup. Ct. R. 250(e)(2). (Exhibit 5 at 4–5). The state court so found. (Exhibit 5 at 6). And on state habeas review, the state court recognized that the trial court did so. (Exhibit 184 at 1). Therefore, trial counsel was death-penalty qualified, and Redeker's ineffective assistance of counsel claims relying on him not being death-penalty qualified fails. Even if trial counsel were not death-penalty qualified, Redeker does not carry his burden of establishing a constitutional violation.

Ground 14 provides no basis for habeas relief.

N. Ground 15

In Ground 15, Redeker argues "[c]ummulative error warrants reversal of Redeker's conviction under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution." (ECF No. 28 at 31). The Ninth Circuit has held that

> the Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal. . . . [T]he fundamental question in determining whether the combined effect of trial errors violated a defendant's due process rights is whether the errors rendered the criminal defense "far less persuasive" and thereby had a "substantial and injurious effect or influence" on the jury's verdict.

Parle v. Runnels, 505 F.3d 922, 928 (9th Cir. 2007) (citations omitted).

Redeker argues that "[f]or all of the reasons set forth in the [Second] Amended Petition and [the] Reply, Redeker's case was rife with error during every stage [and that all] of these errors combined to violated Redeker's right to a fair trial and due process." (ECF No. 59 at 88). The Supreme Court of Nevada summarily rejected Redeker's claim. (Exhibit 159 at 1 n.1). As supported in part by the reasons above, most of the alleged errors were not actually errors, and regardless they did not amount to a fundamentally unfair trial.

Ground 15 provides no basis for habeas relief.

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APP. 030

Conclusion

Accordingly, IT IS HEREBY ORDERED that **Redeker's petition for a writ of habeas corpus is DENIED** on the merits, and this action is **DISMISSED with prejudice.**[4]

IT IS FURTHER ORDERED that a **certificate of appealability is GRANTED as to Ground Five and DENIED as to all other grounds**. The Clerk of Court is directed to enter judgment, in favor of respondents and against Redeker, dismissing this action with prejudice.

DATED August 23, 2017.

Andrew P. Gordon
United States District Judge

[4] A petitioner may not use a reply to an answer to present additional claims and allegations that are not included in the federal petition. *See, e.g., Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994). To the extent that Redeker has done so in his federal reply, this Court does not consider these additional claims and allegations.

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARIE ROBERT REDEKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48121

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. The district court sentenced appellant Arie Redeker to life imprisonment with the possibility of parole after ten years for the second-degree murder charge, plus an equal and consecutive life sentence with the possibility of parole after ten years for the use of a deadly weapon. The district court gave Redeker 459 days' credit for time served.

This case arises from an incident in which Redeker killed his estranged wife, Skawduan Lannan (Tuk). On appeal, we address whether the district court abused its discretion when it admitted evidence seized inside of Redeker's home without a search warrant, Redeker's two confessions to the homicide detectives, and multiple pieces of bad act evidence without conducting a Petrocelli hearing.[1] We disagree with each

[1]Redeker also challenges the district court's refusal to strike the State's notice of intent to seek the death penalty, the district court's limitations on voir dire, the district court's admission of post-it notes from his home, the constitutionality of NRS 193.165, the district court's denial of his motions to dismiss counsel, the prosecutor's conduct in closing arguments, and the sufficiency of the evidence. He further claims that

continued on next page . . .

of Redeker's contentions. Therefore, we affirm the district court's judgment of conviction. The parties are familiar with the facts and we do not recount them except as necessary to our disposition.

Evidence from the two searches of Redeker's home

Redeker argues that the district court violated his federal and state constitutional rights when it admitted evidence seized from the warrantless searches of his home. We disagree.

A district court's decision whether to admit evidence is a mixed question of law and fact.[2] This court reviews legal determinations de novo and factual determinations for sufficient evidence.[3]

The United States and Nevada Constitutions ban unreasonable searches and seizures.[4] A warrantless search is unreasonable per se and any seized evidence is excluded unless an exception to the warrant requirement applies.[5]

The initial warrantless search

Under the emergency doctrine, a law enforcement officer may constitutionally conduct a warrantless search if the law enforcement

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. . . continued

cumulative error warrants reversal. We have considered these issues and conclude that each of these additional challenges fails.

[2]Camacho v. State, 119 Nev. 395, 399, 75 P.3d 370, 373 (2003).

[3]Id.

[4]U.S. Const. amend. IV; Nev. Const. art. 1, § 18; Herman v. State, 122 Nev. 199, 204, 128 P.3d 469, 472 (2006).

[5]Camacho, 119 Nev. at 399, 75 P.3d at 373.

officer reasonably believes there is an urgent need to enter the private premises not to arrest or search, but to protect life or property or investigate a "substantial threat of imminent danger."[6] Further, the law enforcement officers must limit their search to the area associated with the emergency.[7]

In this case, the responding officers jumped over a brick wall at Redeker's home and entered the dwelling through an unlocked back door without a warrant. Although the officers did not have a search warrant, we conclude that the search was constitutional because an emergency justified the warrantless search.

There are sufficient facts to suggest that the responding officers' reasonably believed there was an urgent need to enter the house to protect Tuk or investigate a substantial threat of imminent danger. First, by 8 p.m. Tuk had failed to pick-up her young child from daycare, which she usually did by 5 p.m. Second, no one was able to reach Tuk on her cell phone. Third, the police had previously responded to instances of domestic violence between Redeker and Tuk at Redeker's home. Fourth, no one answered Redeker's phone or his front door when the officers arrived. Finally, the police officers' entrance into Redeker's backyard revealed lights and a television on inside the home.

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[6]Koza v. State, 100 Nev. 245, 252-53, 681 P.2d 44, 48 (1984); see U.S. v. Russell, 436 F.3d 1086, 1090 (9th Cir. 2006).

[7]Russell, 436 F.3d at 1090 (quoting U.S. v. Cervantes, 219 F.3d 882, 888 (9th Cir. 2000), overruled on other grounds by Brigham City, Utah v. Stuart, 547 U.S. 398, 404-06 (2006)).

Further, the police did not seize any evidence during this search, but merely scanned the home to make sure Tuk was not inside and in need of assistance. Under the circumstances, it was reasonable for the responding officers to believe that Tuk was in the home or that she needed assistance.

The second warrantless search

Redeker argues that he did not voluntarily consent to the police officers' second warrantless search of his home because his consent resulted from an unlawful search of his home and an unlawful arrest of his person. We conclude that Redeker's argument lacks merit.

Consent is an exception to the warrant requirement.[8] In determining whether a person voluntarily consented to a search, we examine the totality of the circumstances surrounding his consent.[9] "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents."[10] Relevant factors include: the person's age, education, and intelligence; the administration of Miranda warnings; the length of the detention and any questioning; and whether the government

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[8]Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Herman, 122 Nev. at 204, 128 P.3d at 472.

[9]Schneckloth, 412 U.S. at 248-49; Canada v. State, 104 Nev. 288, 290-91, 756 P.2d 552, 553 (1988).

[10]Schneckloth, 412 U.S. at 229.

used physical coercion or intimidation, including the deprivation of food or sleep.[11]

We conclude that under the totality of the circumstances, Redeker voluntarily consented to the second warrantless search of his home. The following factors support our conclusion that Redeker voluntarily consented: he was thirty-two years old at the time of the murder; he had a college degree; his degree and employment at Citibank suggests at least an average level of intelligence; he was detained and questioned for only thirty minutes before consenting; there was no evidence of physical coercion or intimidation; at the time of consent, approximately 10 p.m., sleep was not an issue; and Redeker had access to food, drink, and cigarettes. The totality of these circumstances suggests that Redeker's consent was voluntary. As a result, the district court did not abuse its discretion when it admitted the evidence seized from the second warrantless search of Redeker's home because there was sufficient evidence to find that the first search was permitted under the emergency doctrine, and Redeker voluntarily consented to the second search.

Redeker's two confessions

Redeker contends that his Fourth and Fifth Amendment rights were violated when the district court admitted into evidence his two confessions to the homicide detectives. We conclude that Redeker's argument lacks merit.

The initial detention

This court reviews de novo whether a detention has evolved into a de facto arrest.[12] An investigative detention, or Terry stop, is based

[11]Id. at 226.

on reasonable suspicion, and the detention must be limited in scope and duration.[13] An investigative detention becomes a seizure if a reasonable person would conclude that he was not free to leave or the detention was excessive in length, scope, and purpose.[14]

"Under NRS 171.123(1), Lisenbee, and Terry v. Ohio, police officers may temporarily detain a suspect when officers have reasonable articulable suspicion [of criminal activity]."[15] Further, a limited search for weapons is permitted so long as the police reasonably believe the suspect is armed and dangerous.[16] "Such reasonable belief, in both instances, must be based on specific articulable facts that warrant the search and seizure."[17] Nevertheless, conducting an investigative detention that lasts longer than 60 minutes without arresting the individual is per se unreasonable.[18]

We conclude that Redeker's initial detention was within the boundaries of an investigative detention and, therefore, there was no de facto arrest. Our conclusion is based on the following facts in the record:

. . . continued

[12]State v. McKellips, 118 Nev. 465, 471, 49 P.3d 655, 659 (2002).

[13]Florida v. Royer, 460 U.S. 491, 500 (1983).

[14]McKellips, 118 Nev. at 469-71, 49 P.3d at 659-60.

[15]Somee v. State, 124 Nev. ___, ___, 187 P.3d 152, 158 (2008) (footnotes omitted).

[16]Id.

[17]Id.

[18]McKellips, 118 Nev. at 471-72, 49 P.3d at 660.

the responding officers had the discretion to handcuff Redeker during the detention to protect themselves; the responding officers removed the handcuffs after thirty minutes; and there is no evidence that Redeker was not free to leave the scene thereafter. Thus, we conclude that the initial detention did not violate Redeker's Fourth or Fifth Amendment rights because the investigative detention was limited in scope and duration and, therefore, it was not a de facto arrest.

The police station confessions

Redeker argues that his police station confessions were inadmissible because he gave his first confession during a custodial interrogation without the benefit of a Miranda warning, and the homicide detectives employed a two-step interrogation technique in violation of Missouri v. Seibert[19] to elicit his second confession. We conclude that Redeker's argument lacks merit.

This court applies a two-step analysis in reviewing a district court's ruling on whether a defendant was subject to a custodial interrogation.[20] First, this court gives great deference to the district court's factual findings and reviews them only for clear error.[21] Second, this court reviews de novo the district court's ultimate determination of whether the defendant was in custody.[22]

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[19]542 U.S. 600 (2004).

[20]Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005).

[21]Id., 111 P.3d at 694.

[22]Id., 111 P.3d at 694.

Under the United States and Nevada Constitutions, a person cannot be compelled to be a witness against himself in a criminal case.[23] "The Fifth Amendment privilege against self-incrimination provides that a suspect's statements made during custodial interrogation are inadmissible at trial unless the police first provide a Miranda warning."[24] Interrogation is "express questioning or its functional equivalent."[25] In determining whether a person is in custody for Miranda purposes, we consider the totality of the circumstances.[26]

In State v. Taylor, this court concluded that a person is in custody when "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."[27] This court further concluded that an individual is not in custody if "police officers only question [him or her] on-scene regarding the facts and circumstances of a crime or ask other questions during the fact-finding process. A suspect's or the police's subjective view of the circumstances does not determine whether the suspect is in custody."[28]

In determining whether objective indicia of custody exist, this court considers the following factors:

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[23]U.S. Const. amend. V; Nev. Const. art. 1, § 8.

[24]State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998).

[25]Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980).

[26]Taylor, 114 Nev. at 1082, 968 P.2d at 323.

[27]Id., 968 P.2d at 323.

[28]Id., 968 P.2d at 323 (citations omitted).

> (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.[29]

We conclude that Redeker was not in custody when he made the initial statement at the police station and as such, there was no violation of his Miranda rights. As noted earlier, Redeker was not in custody during the initial detention at his residence. Further, Redeker was not in custody during his initial statement at the police station based on the totality of the following circumstances: Redeker voluntarily went to the police station as evidenced by his riding in the front seat of the police car with no handcuffs; Redeker was not formally under arrest; Redeker's movement was not restricted in the interrogation room; Redeker voluntarily answered the homicide detective's general questions and provided additional information including a spontaneous drawing of a map locating Tuk's body; the homicide detective was the only law enforcement officer present during the questioning. The homicide detective's general line of questioning did not exhibit strong-arm tactics or deception; and Redeker was not arrested until after he voluntarily confessed and was given his Miranda warnings.

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[29]Id. at 1082 n.1, 968 P.2d at 323 n.1.

In conclusion, the homicide detective's questioning was general in nature and consistent with a fact-finding investigation. Under the totality of the circumstances, Redeker was not in police custody when he first confessed, and he was given his Miranda warnings before the second confession. As a result, the district court did not abuse its discretion when it admitted Redeker's two confessions and, therefore, there was no violation of Redeker's Fifth Amendment right against self-incrimination. Because we conclude that Redeker's first confession was not the result of a custodial interrogation, there is no need for this court to apply the Missouri v. Seibert analysis.

Other bad act evidence

Redeker contends that the district court committed prejudicial error and violated his statutory, due process, and confrontation rights when it admitted multiple pieces of bad act evidence. Redeker particularly argues that the district court erred when it admitted, over his objection and without a Petrocelli hearing, the following bad acts evidence: his threats against Tuk, his 2001 arson conviction, and his defamatory comments about B.L., Tuk's daughter from a previous relationship. We conclude that Redeker's argument lacks merit.

This court will overturn a district court's decision whether to admit bad act evidence only if the ruling was manifestly wrong.[30] If a district court fails to conduct a Petrocelli hearing before admitting prior bad act evidence, then this court will reverse the judgment of conviction unless it is clear from the record that the evidence was admissible or the

[30]Mortensen v. State, 115 Nev. 273, 280, 986 P.2d 1105, 1110 (1999).

error was harmless in that the evidence did not have a prejudicial effect on the verdict.[31]

If the district court admits the prior bad act evidence under one of the NRS 48.045 exceptions, it must give a limiting instruction when the evidence is admitted and in the final charge to the jury.[32] If the district court fails to give a limiting instruction, then this court will determine whether the district court's failure was harmless.[33]

As a general rule, "proof of a distinct independent offense is inadmissible" during a criminal trial.[34] Prior bad act evidence, however, is admissible under NRS 48.045(2) for other purposes, such as to show the defendant's motive or intent or the absence of mistake or accident.[35] But before the bad act evidence may be admitted under NRS 48.045(2), a district court is generally required to prescreen the evidence[36] under Petrocelli v. State.[37] In a Petrocelli hearing, "the trial court must determine, outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing

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[31]Qualls v. State, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998); Carter v. State, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005).

[32]Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001).

[33]Rhymes v. State, 121 Nev. 17, 24, 107 P.3d 1278, 1282 (2005).

[34]Nester v. State of Nevada, 75 Nev. 41, 46, 334 P.2d 524, 526 (1959).

[35]NRS 48.045(2); Rosky v. State, 121 Nev. 184, 194, 111 P.3d 690, 697 (2005).

[36]Carter, 121 Nev. at 769, 121 P.3d at 598-99.

[37]101 Nev. 46, 692 P.2d 503 (1985).

evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."[38]

The admission of Redeker's threats against Tuk

Redeker argues that the district court improperly admitted witness testimony about his threats against Tuk. We conclude that Redeker's argument lacks merit.

Although the district court received an offer of proof in lieu of a formal Petrocelli hearing, it did not abuse its discretion. The record suggests that Redeker made the threats and then on October 21, 2002, he carried them out. The district court ruled that the threat evidence was probative of intent, motive, and ill will toward Tuk. We agree that the evidence was relevant to the crime charged because it was probative of Redeker's intent and motive to commit murder, as well as his ill will against Tuk.[39] Additionally, the record demonstrates that the threats were proven by clear and convincing evidence and that the probative value of the evidence was not substantially outweighed by its prejudicial effect. Thus, the district court did not abuse its discretion.

The district court did, however, fail to give a limiting instruction on the use of the evidence. To the extent that this was error, we conclude that it was harmless. In particular, given the strength of the other evidence against Redeker, including his admissions and the physical

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[38]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (footnote omitted).

[39]See Solorzano v. State, 92 Nev. 144, 145, 546 P.2d 1295, 1295-96 (1976); Hogan v. State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987) (concluding that the district court properly allowed testimony concerning how the defendant injured the victim just days before the killing).

evidence located at his residence, we conclude that the threat evidence did not have a substantial and injurious effect on the jury's second-degree murder verdict. Moreover, it seems unlikely that the jury afforded the threat evidence much weight since the evidence would have been most relevant to a determination that Redeker deliberated and premeditated the murder and the jury found Redeker guilty of second-degree murder, not first-degree murder.

Redeker's 2001 arson conviction

Redeker argues that the district court improperly admitted evidence of his 2001 arson conviction because the arson and the homicide were completely unrelated. We conclude that Redeker's argument lacks merit.

The arson evidence was relevant to the charged offense in that, like the threat evidence, it showed Redeker's ill will against Tuk. The parties do not dispute that the State proved the arson with clear and convincing evidence, and we conclude that the probative value of the arson evidence was not substantially outweighed by the danger of unfair prejudice. Finally, although the district court did not give proper limiting instructions regarding use of the evidence, any error was harmless because the strength of the other evidence against Redeker, including his confessions and the physical evidence located at his residence, convinces us that the arson-conviction evidence did not have a substantial and injurious influence on the verdict.

Admission of Redeker's defamatory comments about B.L.

Redeker asserts that the district court improperly allowed his neighbors to testify about defamatory comments he had made about B.L. because the evidence was impermissible under NRS 48.045 as prior bad act evidence. We conclude that Redeker's argument lacks merit.

Like the other bad act evidence discussed above, the district court did not conduct a Petrocelli hearing before allowing testimony about Redeker's disparaging comments concerning B.L. After sustaining Redeker's objection, the district court concluded that the testimony regarding Redeker's statement that B.L. was a "whore" and that Redeker mistreated her was relevant to the murder charge because it established the depth of Redeker's animosity against Tuk. We conclude that the district court did not abuse its discretion in finding that the evidence was admissible. Although the district court again did not give the jury limiting instructions regarding the use of this evidence, as explained above, any error in this respect did not have a substantial and injurious influence on the jury's verdict.

Having considered Redeker's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

CHERRY, J., with whom SAITTA, J., agrees, concurring in part and dissenting in part:

I respectfully disagree with the majority's conclusion with respect to the two principal constitutional criminal procedure issues involved in this appeal. First, Redeker's Fourth Amendment rights were violated when the district court admitted evidence retrieved during a warrantless search of his home. And the State failed to meet its burden of proving that its warrantless search satisfied an exception to the warrant requirement. Second, Redeker's Fifth Amendment rights were violated when the district court admitted his confession, which was elicited during a custodial interrogation without a Miranda[1] warning. The State failed to satisfy its burden of demonstrating that the detectives' subsequent Miranda warning cured the constitutional defect.

While the record indicates that Redeker killed Tuk, this fact does not abrogate law enforcement's sacred duty to follow the United States and Nevada Constitutions. Redeker's Fourth and Fifth Amendment rights were violated and the challenged evidence was highly prejudicial. For these reasons, I would reverse Redeker's judgment of conviction and remand for a new trial. Therefore, I respectfully dissent.

Because this appeal is factually complex, I will first set forth the pertinent background facts before proceeding to address the merits of Redeker's contentions.

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

Background facts

In 1999, Redeker met Tuk while they were working together at a Citibank branch in Las Vegas. The couple began dating and, sometime thereafter, purchased a home and had a daughter named Arieanne. After a few years, their relationship became turbulent as Redeker developed mental health problems, financial difficulties, and alcoholism. In February 2002, law enforcement officers responded to their residence based on a report of domestic disturbance, but no arrests were made and no charges were filed. In early October 2002, Tuk and Arieanne moved out of the residence and moved in with Tuk's parents.

In the afternoon of October 21, 2002, Tuk drove over to her former home to try and convince Redeker to seek medical treatment. Tuk and Redeker argued, and Redeker strangled her with a telephone cord. He dumped Tuk's body in a deserted location outside of Las Vegas. Around 8:00 that night, Tuk's parents arrived at their home, but Tuk had not returned as expected. Shortly after their arrival, they received a phone call, informing them that Tuk had not yet picked up Arieanne from day care. Concerned, Tuk's stepfather (Savage), called Tuk's cell phone, but she did not answer. Thereafter, Savage called the police and informed them that Tuk might be in danger.

At approximately 9:00 p.m., Officers Brian Jensen and Drew Burnett (hereinafter, the responding officers) arrived at Redeker's residence. The responding officers rang the doorbell, but nobody answered. The responding officers then instructed dispatch to call the home telephone, but again there was no answer. Unable to get a response, the responding officers did not seek a search warrant. Instead, the responding officers jumped over a brick wall and into the backyard so that they could better see into the home. The responding officers noticed that a

television and some lights were on, and coupled with the fact that Tuk had not picked-up her daughter from day care and the instance of domestic violence six months prior, the officers believed that an emergency entrance was warranted. The responding officers entered the home through an unlocked rear sliding glass door. Inside of the master bedroom, they observed a skewed mattress with no sheets, a drop of blood on the mattress, and a single gold hoop earring. They also discovered a telephone cord tied to the bed's headboard and draped across the mattress. Suspecting that a crime may have been committed, the responding officers exited the residence and summoned for back-up.

At approximately 10:00 p.m., the responding officers saw Redeker drive by the home in Tuk's vehicle, and they immediately ordered him to stop and exit it. Redeker complied. The responding officers handcuffed him and frisked him for weapons, finding none. Without advising Redeker of his Miranda rights, the responding officers questioned him about Tuk's whereabouts. During their questioning, the responding officers specifically asked him about the incriminating evidence that they had seen inside the residence. Redeker denied any wrongdoing but indicated that he had argued with Tuk earlier that day. The responding officers denied Redeker's requests for food, water, and to enter his home. The officers asked Redeker for consent to search his home and vehicle. Only after Redeker agreed to their request and signed a consent-to-search card, did the responding officers remove his handcuffs. The responding officers questioned Redeker for approximately 30 to 40 minutes, during which time he remained handcuffed, and at no point was Redeker given a Miranda warning.

At around 12:00 a.m., approximately two hours after the initial stop, frisk, and detention, Detective Mel Jackson ordered Redeker

into the back seat of a police car for a videotaped interview. Detective Jackson did not inform Redeker of his Miranda rights. Instead, Jackson interrogated Redeker about Tuk's whereabouts, which the district court judge later described as "hammering." With sometimes slurred responses, Redeker repeatedly denied any wrongdoing and asked to leave the vehicle. Detective Jackson's interrogation lasted for approximately an hour, and at no point was Redeker advised of his Miranda rights.

After Redeker was released from the police car, he was allowed to remain in his front yard and smoke a cigarette, but he was denied reentry into his home. A law enforcement officer supervised Redeker at all times. At around 4:00 a.m., homicide Detectives Ken Hardy and George Sherwood arrived at the scene (collectively, homicide detectives). Detective Hardy asked Redeker to accompany them to the Las Vegas police department to discuss Tuk's disappearance, and Redeker agreed.

Before commencing the interrogation into Tuk's disappearance, the detectives did not inform Redeker of his Miranda rights. Detective Hardy asked a number of background questions, during which Redeker twice asked for "help." Detective Hardy did not advise Redeker that he had the right to an attorney or the right to remain silent. After a number of additional probing questions, Redeker confessed to murdering Tuk. Detective Hardy immediately administered an oral Miranda warning, and Redeker orally acknowledged his rights. After receiving the acknowledgment, Detective Hardy then asked: "Okay. How, how'd you strangle her?" Redeker again admitted to killing Tuk and informed the detectives of the location of her body. Redeker was thereafter placed under arrest.

The State charged Redeker with premeditated murder with the use of a deadly weapon and sought the death penalty. The district court denied Redeker's pretrial motions to suppress the evidence seized from his home and his confessions made to the police. The jury subsequently found Redeker guilty of second-degree murder with the use of a deadly weapon.

This factual backdrop provides the basis for my conclusion that Redeker's constitutional rights were violated by the admission of evidence recovered during a warrantless search of his home and his confessions to police officers.

Search of Redeker's residence and vehicle

Redeker argues that the district court violated his federal and state constitutional rights when it admitted evidence seized from the warrantless searches of his home and vehicle. I agree. A warrantless search is per se unreasonable under the United States and Nevada constitutions, and thus, the burden shifts to the State to demonstrate that evidence seized during a warrantless search satisfies an exception to the warrant requirement.[2] Here, the responding officers did not have a search warrant for either search of Redeker's home. Accordingly, any evidence obtained during these searches was per se unconstitutionally obtained and inadmissible at trial unless the State satisfied its burden of proving that an exception to the warrant requirement applied. Contrary to the majority, for the reasons discussed below, I believe that the State did not

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[2]U.S. Const. amend. IV; Nev. Const. art. 1, § 18; Herman v. State, 122 Nev. 199, 204, 128 P.3d 469, 472 (2006); Camacho v. State, 119 Nev. 395, 399, 75 P.3d 370, 373 (2003).

satisfy its burden and the district court abused its discretion in admitting evidence recovered during the searches.[3]

The emergency exception

The State contends that the responding officers' initial warrantless search was justified under the emergency doctrine to the warrant requirement. I disagree.

The United States Supreme Court held in Brigham City, Utah v. Stuart that police officers may enter a residence without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with serious injury.[4]

Here, the record indicates that the responding officers did not have reasonable grounds to believe that there was an urgent need for assistance or that there was an imminent danger because Tuk had been missing a short time—approximately one hour—before the search commenced, and the responding officers were not aware that any crime had been committed before entering the residence. And Tuk had moved out of Redeker's house several weeks prior to her death and she did not alert anyone that she was going to visit Redeker on the day she was killed. Officer Jensen testified that when he entered the home, he had no proof that Tuk had been inside that day. Further, the neighbors did not report any suspicious noises or sounds emanating from the residence. While the record indicates that the police had responded to a domestic disturbance

[3]Means v. State, 120 Nev. 1001, 1007-08, 103 P.3d 25, 29 (2004).

[4]547 U.S. 398 (2006).

call at the residence approximately eight months before Tuk's death, this fact does not rise to the level of an ongoing emergency. When the officers first arrived at the residence, they did not observe any signs of a struggle or any indication that an emergency was ongoing inside of the home; instead the facts simply indicate that nobody answered the front door or the telephone.

While the majority relies on the responding officers' observation that a television and lights were left on, these facts cannot support the emergency exception because the warrantless search commenced when the officers jumped over the backyard fence to reach their vantage point. Moreover, a television and lights left on are not indicative of an ongoing emergency. Further, contrary to the majority's conclusion, Savage's inability to reach Tuk on her cell phone, just a few hours after she normally got off of work, does not indicate that there was an emergency at Redeker's residence. And in my view, the responding officers' scan of the residence's interior without seizing any evidence, does not make their warrantless entry and search any less unconstitutional.

Probable cause plus exigent circumstances exception

The State argues that the responding officers' initial warrantless search was justifiable by the existence of probable cause and exigent circumstances. I disagree. The warrant requirement is excused when law enforcement officers conduct a search with probable cause and under exigent circumstances.[5] The government bears the burden of proving that exigent circumstances justified a warrantless search.[6]

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[5]Doleman v. State, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991).

[6]State v. Hardin, 90 Nev. 10, 13, 518 P.2d 151, 153 (1974).

Probable cause to conduct a warrantless search exists only when "law enforcement officials have trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for are: seizable and will be found in the place to be searched."[7] Exigent circumstances exist when the situation would lead "'a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers and other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.'"[8]

Here, the record does not support a conclusion that probable cause existed to justify a warrantless search. Officer Jensen testified that he did not have probable cause to arrest Redeker even after searching his home and that he had no proof that Tuk had been inside the residence that day or that a crime had even been committed before he entered the home. Further, none of the neighbors reported hearing any screams or suspicious noises emanating from inside of the home, nor did the responding officers hear any suspicious sounds when they arrived at the residence.

The record also indicates that exigent circumstances did not exist when the responding officers searched Redeker's residence. In particular, the responding officers did not enter the home to prevent physical harm to themselves, they did not know whether anyone was

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[7]Keesee v. State, 110 Nev. 997, 1002, 879 P.2d 63, 66 (1994).

[8]Doleman, 107 Nev. at 414, 812 P.2d at 1290 (quoting United States v. MaConney, 728 F.2d 1195, 1199 (9th Cir. 1984)).

inside, nobody had reported any suspicious behavior from inside of the home, they were not seeking to prevent the destruction of relevant evidence, and they were not chasing an escaping suspect. While Tuk's whereabouts had not been determined in approximately an hour, this fact was not sufficient justification for an exigent search.

Tainted consent

Redeker contends that his consent to the second search, while perhaps voluntarily given for Fifth Amendment purposes, was tainted by the initial Fourth Amendment violation. I agree. Although I agree with the majority that the district court did not err when it determined that Redeker voluntarily consented to the second search of his residence for Fifth Amendment purposes, the analysis of Redeker's claim does not end there. Instead, the next inquiry is whether the initial unconstitutional search tainted Redeker's consent. I believe that it did.

If a court determines that law enforcement officers conducted an unconstitutional search and thereafter, for Fifth Amendment purposes a suspect voluntarily consents to a later search, a court must determine whether the initial Fourth Amendment violation tainted the voluntariness of the consent to search.[9] In determining whether the subsequent consent is tainted, a court must determine whether it was "'sufficiently an act of free will to purge the primary taint of the unlawful invasion.'"[10] Whether free will existed depends on whether the suspect knew of the prior

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[9]U.S. v. Furrow, 229 F.3d 805, 813 (9th Cir. 2000), overruled on other grounds by U.S. v. Johnson, 256 F.3d 895, 913 n.4 (9th Cir. 2001).

[10]Id. (quoting United States v. George, 883 F.2d 1407, 1416 (9th Cir. 1989) (quoting Wong Sun v. United States, 371 U.S. 471, 486 (1963))).

unconstitutional search,[11] and intervening factors such as time, space, and events.[12]

The district court erred when it determined that the responding officers' initial unconstitutional search did not taint Redeker's consent to the second search because four pertinent facts in the record indicate that his consent was not sufficiently an act of free will necessary to purge the taint of the initial violation. First, and most critically, Redeker knew that the responding officers had already searched his home before he consented.[13] While Redeker sat on the sidewalk handcuffed, police officers questioned him about things seen inside the home such as the cord tied to the headboard in the master bedroom. Second, the time factor weighs in favor of concluding that Redeker's consent was tainted because only an hour separated the initial warrantless search and Redeker's consent. Third, the space factor weighs in favor of concluding that Redeker's consent was tainted because the search and Redeker's consent occurred at the exact same place, at his residence. Fourth, the events factor weighs in favor of concluding that Redeker's consent was tainted because no intervening events separated the responding officers' initial search and Redeker's consent, aside from the responding officers'

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[11]Id. at 814 (explaining that if defendant knew of prior unconstitutional search, then his consent might be tainted; however, if defendant was unaware of prior unconstitutional search when he consented, then his voluntary consent was not tainted).

[12]Id. at 813-14.

[13]See id. at 814.

short wait for Redeker's arrival at the residence and the approximately 30 minutes of questioning while Redeker was handcuffed.

In sum, Redeker's United States and Nevada constitutional rights were violated when the district court admitted the evidence that was seized, without a warrant, from inside of his residence and vehicle. The State was unable to satisfy it burden of demonstrating that a warrant exception applied. Accordingly, the district court abused its discretion when it admitted the evidence. Having concluded that the challenged evidence was erroneously admitted, I now turn to the issue of prejudice.

Prejudicial error

"In deciding whether error is harmless or prejudicial, this court must consider such factors as whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged."[14] When an error occurs, this court will reverse a conviction and remand for a new trial unless this court can conclude "without reservation that the verdict would have been the same in the absence of error."[15]

As discussed above, the district court abused its discretion when it admitted the unconstitutionally seized evidence from Redeker's home. The error was highly prejudicial because the gold hoop earring, the blood stain on the mattress, and the torn telephone cord all identified Redeker as the perpetrator of Tuk's murder and supported the State's premeditation theory. And the torn telephone cord was highly prejudicial because it was the key piece of evidence supporting the State's deadly

[14]Schoels v. State, 115 Nev. 33, 35, 975 P.2d 1275, 1276 (1999).

[15]Id.

weapon enhancement. I cannot say without reservation that the verdict would have been the same without the introduction of this unconstitutionally obtained evidence. Accordingly, Redeker deserves a new trial.

Redeker's confessions at the police station

Redeker contends that his Fourth and Fifth Amendment rights were violated when the district court admitted into evidence his two confessions to the homicide detectives. More particularly, Redeker argues that law enforcement officers elicited the confessions during an arrest unsupported by probable cause and in violation of his Miranda rights. I agree.

"The Fifth Amendment privilege against self-incrimination requires that a suspect's statements made during custodial interrogation not be admitted at trial if the police failed to first provide a Miranda warning."[16] A district court's determination as to whether a person is in custody is reviewed de novo.[17] This court will review for clear error a district court's determination of facts surrounding an interrogation.[18] Substantial evidence review applies to a district court's decision whether to admit a confession because the inquiry "is primarily a factual question."[19]

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[16]Koger v. State, 117 Nev. 138, 141, 17 P.3d 428, 430 (2001).

[17]Casteel v. State, 122 Nev. 356, 361, 131 P.3d 1, 4 (2006).

[18]Id.

[19]Floyd v. State, 118 Nev. 156, 171-72, 42 P.3d 249, 260 (2002), abrogated on other grounds by Grey v. State, 124 Nev. ____, ____, 178 P.3d 154, 160 (2008).

For the reasons explained below, I conclude that the district court erred by admitting Redeker's confessions, which were obtained in violation of his constitutional rights.

Improper arrest

Redeker contends that he confessed to homicide detectives during an unconstitutional arrest. I agree. Law enforcement officers may detain a suspect when the officers have a reasonably articulable suspicion that criminal activity is afoot.[20] An investigative detention must be based on reasonable suspicion and the duration must be limited in scope and duration.[21] An investigative detention becomes a seizure when it lasts "longer than is necessary to effectuate the purpose of the stop"[22] and when a reasonable person would conclude that he or she was not free to leave.[23] In undertaking this inquiry, this court reviews whether the detention was excessive in length, scope, and/or purpose.[24] As the majority noted above, pursuant to NRS 171.123(1) and NRS 171.123(4), a detention statutorily becomes per se unreasonable and thus ripens into an arrest requiring probable cause when the detention lasts longer than 60 minutes.[25] "It is the State's burden to demonstrate that the seizure it seeks to justify on

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[20]Somee v. State, 124 Nev. ___, ___, 187 P.3d 152, 158 (2008) (footnotes omitted).

[21]Florida v. Royer, 460 U.S. 491, 500 (1983).

[22]Id.

[23]McKellips v. State, 118 Nev. 465, 469-70, 49 P.3d, 655, 659 (2002).

[24]Id. at 471, 49 P.3d at 660.

[25]See id. at 471-72, 49 P.3d at 660 (interpreting NRS 171.123).

the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure."[26]

The district court erred when it determined that the State satisfied its burden of demonstrating that the responding officers' investigative detention did not evolve into a de facto arrest because (1) Redeker was detained by the police for over six hours before he confessed; (2) the responding officers ordered him to pull his vehicle over and exit it; (3) the responding officers handcuffed him for approximately 30 to 40 minutes and questioned him about Tuk's disappearance; (4) the responding officers denied Redeker's requests for food, water, and entry into his home; (5) Redeker was constantly surrounded by multiple uniformed officers during the evening; (6) Detective Jackson ordered Redeker into the back seat of a police cruiser and interrogated him for approximately an hour in a fashion that the district court described as "hammering;" (7) Redeker accompanied homicide detectives from his residence to the police station for questioning at approximately 4:00 a.m.;[27] and (8) homicide detectives escorted Redeker into a small interrogation room and started interrogating him about Tuk's whereabouts at around 4:30 a.m on October 22. Additionally, the record

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[26]Royer, 460 U.S. at 500.

[27]While the record indicates that Redeker voluntarily agreed to accompany the homicide detectives to the station, the record indicates that he did not voluntarily consent to their request as a submission to authority. See Arterburn v. State, 111 Nev. 1121, 1125, 901 P.2d 668, 670 (1995) (concluding that defendant's detention following traffic stop evolved into arrest requiring probable cause and that defendant's consent to accompany officer to station was involuntary because it was submission to authority).

indicates that Redeker did not speak or interact with anyone other than law enforcement following his initial detention at around 10:00 p.m. on October 21.

I find unpersuasive the State's argument that even if the law enforcement officers did not believe that probable cause existed to arrest Redeker, his confession was still admissible because probable cause actually existed and there was a sufficient break between Redeker's initial unconstitutional arrest and his subsequent confession.

If law enforcement officers arrest a person without probable cause in violation of his or her Fourth Amendment rights, a district court is not required to suppress a confession if the State can demonstrate that (1) probable cause actually existed,[28] or (2) there was a sufficient break in the events between the constitutional violation and the subsequent confession.[29] "Probable cause to arrest 'exists when police have reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution to believe that [a crime] has been . . . committed by the person to be arrested.'"[30] In determining whether a sufficient break in the circumstances occurred, this court will consider the following three factors: "(1) 'the temporal proximity of the arrest and the confession,' (2) 'the presence of intervening

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[28]State v. McKellips, 118 Nev. 465, 472-73, 49 P.3d 655, 660-61 (2002) (reversing district court's grant of defendant's motion to suppress results of his blood and urine test because probable cause supported law enforcement officer's de facto arrest).

[29]Arterburn, 111 Nev. at 1126, 901 P.2d at 671.

[30]McKellips, 118 Nev. at 472, 49 P.3d at 660 (alterations in original) (quoting Doleman v. State, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991)).

circumstances,' and (3) 'the purpose and flagrancy of the official misconduct.'"[31]

The State failed to satisfy its burden of demonstrating that probable cause supported Redeker's arrest. Even after viewing the inside of Redeker's home, the responding officers acknowledged that they did not have probable cause to arrest Redeker when they apprehended him. Additionally, Detective Hardy testified that he did not have probable cause to arrest Redeker until after he confessed to the murder. Therefore, the record indicates that a person of reasonable caution would not believe that Redeker had committed a crime when his detention had evolved into an arrest at the police station.

The State also failed to satisfy its burden of alternatively demonstrating that there was a sufficient break in events between Redeker's unconstitutional arrest and his subsequent confession. The temporal proximity factor weighs against concluding that there was a sufficient break because the record indicates that Redeker was under constant police supervision from the moment he was ordered out of his vehicle and placed into handcuffs until he confessed more than six hours later.[32] The presence of intervening circumstances also weighs against concluding that there was a sufficient break because the record indicates that Redeker did not leave his home or speak to anyone besides law enforcement between the time of his initial detention and his subsequent

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[31]Arterburn, 111 Nev. at 1126, 901 P.2d at 671 (quoting Brown v. Illinois, 422 U.S. 590, 603-04 (1975)).

[32]See id.

confession.[33] Lastly, the purpose and flagrancy of the official misconduct factor also militates against a sufficient break because the record indicates that the law enforcement officers, during the more than six-hour detention, did not administer a single Miranda warning until his confession.[34]

Accordingly, Redeker's confessions emanated from an unconstitutional arrest, and the district court abused its discretion when it admitted the confessions.[35] Further, as discussed below, the subsequent Miranda warning did not cure this Fourth Amendment violation for a variety of reasons.

Miranda violation

Redeker argues that the district court erred by denying his motion to suppress because he gave his first confession during a custodial interrogation without the benefit of a Miranda warning. Further, although Redeker was advised of his Miranda rights, his second confession was obtained in violation of Missouri v. Seibert.[36]

First confession

The majority erroneously concludes that, under the totality of the circumstances, Redeker was not in custody for Miranda purposes when he confessed at the police station because the record indicates that a reasonable person would not have felt free to leave the police station

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[33]See id.

[34]See id.

[35]See People v. Harris, 762 P.2d 651, 659 (Colo. 1988).

[36]542 U.S. 600 (2004).

interrogation room at 4:45 a.m. In State v. Taylor, this court set forth several factors to consider in determining whether a person is in custody.[37] The first Taylor factor, the site of the interrogation, weighs in favor of concluding that Redeker was in custody because he confessed in a police station interrogation room.[38] Other indicia of arrest, as articulated in Taylor, also weigh in favor of concluding that Redeker was in custody for Miranda purposes. In particular, the record indicates that (1) the detectives did not tell Redeker that he was free to leave; (2) Redeker was a suspect as evidenced by the responding officers' search of his residence, the interrogation in the squad car, and Tuk's whereabouts had not been determined by 4:30 a.m.; (3) Redeker was confined to a small interrogation room; (4) the atmosphere was clearly police dominated as he confessed inside a police station interrogation room while surrounded by two detectives; (5) the detectives arrested Redeker at the conclusion of the questioning; and (6) the interrogation occurred at the police station.[39]

While the majority points out that the record indicates that Redeker voluntarily accompanied the police detectives to the station, this factor weighs minimally in favor of concluding that he was not in custody for Miranda purposes because Redeker may have interpreted the request as an implied obligation.[40] Further, although the record indicates that

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[37]114 Nev. 1071, 968 P.2d 315 (1998).

[38]Id. at 1082, 968 P.2d at 323.

[39]See id.

[40]See People v. Byers, 421 N.Y.S.2d 462, 464 (App. Div. 1979) ("The request to come to the police station may easily carry an implication of

continued on next page . . .

Redeker voluntarily responded to Detective Hardy's questions, this factor does not strongly weigh in favor of concluding that he was not in custody for Miranda purposes because he twice indicated during the questioning that he needed "help."[41] Further, while the record indicates that the detectives did not employ strong-arm tactics or deception during the questioning, this factor also does not strongly weigh in favor of concluding that Redeker was not in custody. In particular, the record indicates that law enforcement had previously weakened Redeker's resolve following (1) the responding officers' approximately 30 to 40 minutes of questioning while he sat handcuffed on the sidewalk and (2) Officer Jensen's approximately hour-long interrogation in the back of the squad car.[42] Further, the record indicates that Redeker had been under constant police supervision for more than six hours and had not interacted with anyone else before he confessed at approximately 4:45 a.m. Most problematic, the majority concludes that Redeker was not in custody for Miranda purposes because the atmosphere inside the police interrogation room was not police dominated. To the contrary, a police interrogation room is the archetype example of a police-dominated atmosphere where Miranda warnings are required.[43] Further, although Redeker was not handcuffed

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. . . continued

obligation, and the appearance itself, unless clearly shown to be voluntary, may be an awesome experience for the ordinary citizen").

[41]See Taylor, 114 Nev. at 1082, 968 P.2d at 323.

[42]See id.

[43]See, e.g., U.S. v. Butler, 249 F.3d 1094, 1101 (9th Cir. 2001); U.S. v. Guarino, 629 F. Supp. 320, 324-26 (D. Conn. 1986); State v. Rodriguez,

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while riding to the police station, he had been handcuffed just a few hours earlier in the evening. Lastly, while Detective Hardy testified that he did not know that Redeker had been detained for several hours and that he would have been free to leave the police station, Detective Hardy's subjective knowledge and beliefs do not determine whether Redeker was in custody for Miranda purposes.[44]

Under the totality of the circumstances, the record indicates that Redeker was in custody for Miranda purposes. Further, the detectives' questioning constituted an interrogation as they particularly asked him about Tuk's disappearance and his involvement in it.[45] Accordingly, Redeker's first confession was inadmissible because he was subjected to custodial interrogation without the benefit of a Miranda warning.[46] And the State failed to show that Detective Hardy's subsequent Miranda warning alleviated the constitutional defect.

. . . continued

921 P.2d 643, 649 (Ariz. 1996); U.S. v. Little, 851 A.2d 1280, 1286-87 (D.C. Ct. App. 2004); State v. Houser, 450 N.W.2d 697, 700-01 (Neb. 1990).

[44]See State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998).

[45]See Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) (explaining that interrogation is "express questioning or its functional equivalent").

[46]Taylor, 114 Nev. at 1081, 968 P.2d at 323 ("The Fifth Amendment privilege against self-incrimination provides that a suspect's statements made during custodial interrogation are inadmissible at trial unless the police first provide a Miranda warning.").

Second confession

As stated above, Redeker admitted to killing Tuk before he was advised of his Miranda rights. After this first admission, Redeker was advised of his rights and again admitted to killing Tuk. However, in my view, Redeker's second confession is inadmissible as well.

If a defendant makes incriminating statements during a custodial interrogation without the benefit of a Miranda warning and thereafter voluntarily and intelligently waives his rights, then any subsequent statements are admissible unless the investigation is tainted by "actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will . . . ."[47] However, when a law enforcement officer intentionally withholds a Miranda warning until midstream in an interrogation, a defendant's subsequent statements are inadmissible unless the warnings effectively communicated the fact that his prior statements were inadmissible and that he could discontinue the interrogation.[48] In determining whether a midstream Miranda warning dispelled a suspect's uncertainty about the effect of his prior incriminating remarks and his ability to terminate the interrogation, a court should consider the following factors:

> [1] the completeness and detail of the questions and answers in the first round of interrogation, [2] the overlapping content of the two statements, [3] the timing and setting of the first and the second, [4] the continuity of police personnel, and [5] the degree to which the interrogator's questions

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[47]Oregon v. Elstad, 470 U.S. 298, 309 (1985).

[48]See Missouri v. Seibert, 542 U.S. 600, 611-15 (2004).

> treated the second round as continuous with the first.[49]

Considering these five factors, I believe that Redeker did not voluntary waive his Miranda rights. First, the completeness and detail of the questions and answers in the first interrogation weighs against a voluntary waiver because Detective Hardy and Redeker talked about Redeker's and Tuk's biographical backgrounds, the location of Tuk's body, and the cause of her death. Second, the overlapping content of the second confession weighs against a voluntary waiver because Redeker admitted that he strangled Tuk and described the location of her body in both confessions. Third, the timing and setting of the two statements strongly weighs against a voluntary waiver because the first confession occurred inside the police station interrogation room shortly after 4:36 a.m. and the second confession occurred just moments after Redeker was advised of his Miranda rights. Fourth, the continuity of police personnel also weighs against a voluntary waiver because the same police detectives elicited both confessions. Fifth, the degree to which the interrogator's questions treated the second interrogation as a continuation of the first interrogation also weighs against a voluntary waiver because the homicide detectives did not take a break after the first confession or even wait for Redeker to sign a Miranda waiver. Instead, after receiving Redeker's oral acknowledgement of his Miranda rights, Detective Hardy immediately asked: "Okay. How, how'd you strangle her?"

Redeker was under custodial interrogation at the moment the interview began at the police station because a reasonable person would

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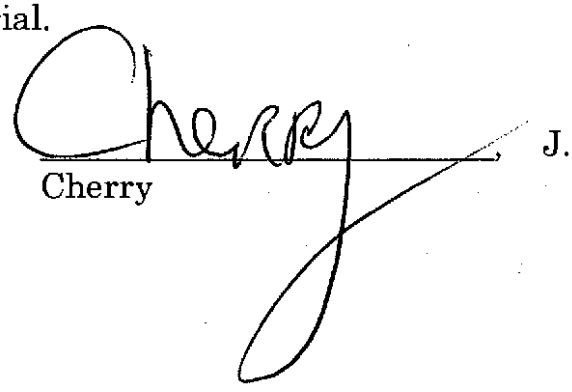
[49]Id. at 615.

not have felt free to leave. Redeker's first confession was made without the benefit of a Miranda warning and was inadmissible on this basis. The State failed to satisfy its burden of proving by a preponderance of the evidence that Redeker knowingly and voluntarily waived his Miranda rights because the record indicates that Redeker's Miranda waiver was tainted pursuant to the Seibert voluntariness factors. Accordingly, the district court abused its discretion by admitting his confessions into evidence. Further, admitting Redeker's confessions into evidence was highly prejudicial because of the character and import of the erroneously admitted evidence and the gravity of the crime charged, murder.[50] I cannot conclude without reservation that the verdict would have been the same if the confessions had not been admitted.[51] Therefore, I would reverse and remand for a new trial.



Cherry, J.

I concur:

Saitta, J.

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[50]Schoels v. State, 115 Nev. 33, 35, 975 P.2d 1275, 1276 (1999).

[51]Id.

JOC

ORIGINAL

FILED
Oct 6 1 46 PM '06
Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ARIE ROBERT REDEKER
#1653747

Defendant.

CASE NO. C188510

DEPT. NO. XIV

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crime of MURDER WITH THE USE OF A DEADLY WEAPON (Category A Felony), in violation of NRS 200.010, 200.030, 193.165; and the matter having been tried before a jury and the Defendant having been found guilty of the crime of SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON (Category A Felony), in violation of NRS 200.010, 200.030, 193.165; thereafter, on the 30TH day of August, 2006, the Defendant was present in court for sentencing with his counsels SCOTT L. COFFEE and DAN SILVERSTEIN, Deputy Public Defenders, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said crime as set forth in the jury's verdict and, in addition to the $25.00 Administrative Assessment Fee, $150.00 DNA Analysis Fee including testing to determine genetic markers, and $9,428.00 Restitution, the Defendant is SENTENCED as follows: TO LIFE with the possibility of parole after serving TEN (10) YEARS, plus an EQUAL and CONSECUTIVE term of LIFE with the possibility of parole after serving TEN (10) YEARS, for the Use of a Deadly Weapon, in the Nevada Department of Corrections (NDC), with FOUR HUNDRED FIFTY-NINE (459) DAYS credit for time served.

DATED this 5th day of October, 2006

Donald D. Mosley

DONALD D. MOSLEY
DISTRICT JUDGE

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

STATE OF NEVADA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. C188510
	)	Dept. XIV
ARIE ROBERT REDEKER,	)	
	)	
Defendant.	)	
	)	

REPORTER'S TRANSCRIPT
OF
DEFENDANT'S MOTIONS/HEARING

BEFORE THE HONORABLE DONALD M. MOSLEY

DISTRICT JUDGE

Taken on Monday, January 5, 2004

At 2:00 p.m.

APPEARANCES:

For the State: PAM WECKERLY, ESQ.
LINDA LEWIS, ESQ.
Deputy District Attorneys

For the Defendant: SCOTT L. COFFEE, ESQ.
CHARLES A. CANO, ESQ.
Deputy Public Defenders

Reported by: Maureen Schorn, CCR No. 496, RPR

THE COURT: But we don't really know if Young and Rob entreated Hardy to act, or he acted on his own volition.

MS. WECKERLY: I don't know that. We know that.

MR. COFFEE: We don't.

THE COURT: I don't know that's important, but I was trying to determine just how we got from the scene, from the home to the station, and how that actually occurred.

All right. Starting with the entry into the home by Officer Jensen and Burnett, clearly in my mind there were exigent circumstances. There was a missing person reported, they look into the window and saw the TV on. I think it would have been rather clumsy of them not to look into it more fully.

I will tell you that I had some misgivings earlier on when I was briefed by my clerk about the circumstances surrounding this investigation. One of the things that I was concerned about was this Terry v. Ohio Stop where you have handcuffs.

Terry v. Ohio has nothing to do with handcuffs. It was a pat, frisk, discuss things. So I was a little taken aback when I heard about the handcuffs.

Now, we have this scenario, if you will, set

out that there is an entry into a home. There is some suspicious circumstances there, blood on the mattress and a few things that are certainly, I would think, alert any experienced officer there might be some problems with criminality.

Then they see the defendant here driving the missing person's car driving by the home as if to ignore the fact that there are two police cars in front of his house. And they call to him and he eventually stops in a kind of furtive way, according to what we hear, and he is handcuffed.

I'm trying to envision all of this transpiring. There's no question there was an investigative detention, to use the phrase. Being handcuffed, being in detention, if you will, I have to think was reasonable.

Because if the defendant had stopped, gone back to talk to the officer and said: I'm kind of busy, I've got to go to work tomorrow and I'm staying with my friend across town and they just let him walk off, that would have just been incredibly sloppy police work if you're looking for a missing person that this person obviously had a relationship with, driving her car, et cetera.

So the keeping him in custody, if you will,

was reasonable. The questioning by Officers Jensen and Burnett seemed to me have to be essentially investigative. Obviously, questions are going to be asked.

Now we come to a troubling aspect of this Detective Jackson, it appears. And he begins a recorded interview of the defendant in his car, clearly past the hour that you alluded to, Mr. Coffee.

And in the transcript, and I did not read the entire transcript, but I read the first part of it and then we jumped to a part that you brought my attention to, Mr. Coffee.

And, frankly, Detective Jackson is hammering this guy somewhat. I forget the verbiage that was used. You do all these things, and I know that you've done these things in the past. And he's giving him a little inquisition, if you will, trying to prompt him to respond.

And as I recall, and it was alluded to on the record, that many questions were not answered, just absolute silence, according to what I read here.

And then some time passes and Officer Hardy appears and he spends a short time, relatively short time speaking to Detective Young and Detective Rob and then asks, according to the testimony, requests him to go to the station and he agreed. That's what I have here.

Now, my thinking is this: I think Officer

Jackson inquired of the defendant in a de facto custodial status, the time having lapsed and the person of which he inquires is, I think, beyond investigative.

I'm going to order stricken anything that was adduced during the Jackson interview.

I firmly believe, however, that the Hardy matter was a separate event. Time passed, there was no cuffing at that point when Officer Hardy arrived. The testimony is that he requested the defendant to go down to the station.

Now, there is a number of things that could be possibilities here. Mr. Coffee would suggest that the defendant felt coerced. He just as easily could have seen light at the end of the tunnel and said: Here's a new face go down here and schmooze away, everything be will be great. We don't know what went through his mind.

But the indication is, he agreed to go to the station for whatever reason, and I've heard nothing that would indicate his reluctance; not, gee, I'm hungry and tired, I need to go to work, any of these things.

And the indicia of free will not only to go to the station, but to involve himself in the interview, was that Detective Hardy states that he was told he would be free to go. The detective said he was free if he walked out of there, he could have gone, which is in

keeping with the whole idea of voluntarily asking to come down to the station.

He was not in custody. He was kept in a room very close to the entrance, and from what I understand he was given a soda. He was interviewed in there, according to what I read here, and we read it together on the record.

The defendant in kind of a disjointed way lapses into these inculpatory things and claims West Charleston and goes on and starts drawing maps and things.

Now we come to this Miranda warning. He could have been, I think, a little more clear as to what was said both before and after the Miranda warning was given.

But when I read it in its context, it's clear that Detective Hardy stopped the defendant from making further declarations when he saw where he was headed. He had to have some indication when he saw when to start Miranda, and that was done timely.

He's saying, in essence, stop, you have the right, et cetera, et cetera. I believe the defendant at one point said I understand. Then he finished the Miranda warnings and I think he went right into how did you strangle her, or something like that.

Now, I'm not told that Mr. Redeker is

retarded or of some mental disability. Logically, it follows, stop, here's your rights; do you understand?

Yes. He said he understood. Then there was some more testimony about now what happened, how did you strangle her. Granted, it's not pristine. It could be better, in my judgment, if you want to follow all this.

But if we're talking about people with ordinary intelligence, I don't see that there's a problem that the Miranda warning was not understood. And then, of course, Mr. Redeker goes on and tells us all this that happened, supposedly.

So what has come of this, in my judgment, is that Detective Hardy's interview was a separate event and it wasn't part of this hour-long situation. Mr. Jackson's was, and it is excluded.

And as to the interview, which I don't think really amounts to much, but what Officer Hardy and Officer Burnett adduced was just investigative, and it is what it is.

MS. WECKERLY: Judge, you mean Jensen and Burnett?

THE COURT: Jensen and Burnett. It is what it is. I don't think it's particularly inculpatory or anything, it's just what it is, but there's no reason to exclude it that I can see.

Now, counsel, what I would like to do is begin jury selection tomorrow at 1:30. At some point, probably just after the jury is selected, depending on how this comes down with our time, go into the Petrocelli hearing. And we'll have advanced discussion on that so we can contact any witnesses and not inconvenience them any more than we have to.

MR. COFFEE: Three things real briefly. Mr. Redeker is not retarded. There was an indication, at least in a transcript, that he smelled of alcohol. Just so it's clear in the record that it's some place in one of the transcripts.

Our position has been that those were involuntary, the questions were involuntary. I don't know if he simply used this language for the purpose of the Fourth and Fifth Amendment, just so we're clear for federal proceedings later on.

THE COURT: Understood.

MR. COFFEE: Also, the Miranda warnings were inadequate as a matter of law. We just got exactly what the Miranda warnings were from Detective Hardy concerning whether or not he had a right to cease questioning at any point, whether or not there was a specific waiver.

We would move to suppress it on that basis,

and I understand the Court is going to rule against it, but I wanted the record to be clear in this case.

MS. WECKERLY: Is the Court going to make a ruling today on the suppression of the search?

THE COURT: I'm sorry. There's really nothing to suggest the consent to search was tainted in any way. Granted, there was a close nexus between the time consent was given and his being released, as far as cuffs taken off.

But I don't see anything coercive. There's nothing inappropriate about the search.

Counsel, thank you.

MR. COFFEE: Thank you, Judge.

ATTEST: Full, true and accurate transcript of proceedings.

MAUREEN SCHORN, CCR NO. 496, RPR