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**IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH**

STATE OF UTAH,
Plaintiff,

vs.

JASON CHRISTOPHER HALL,
Defendant.

**MOTION TO SUPPRESS DATA
RETRIEVED FROM CELL PHONE**

Case No. 221906445

Judge Paul B. Parker

Defendant Jason Christopher Hall (“**Defendant**” or “**Mr. Hall**”), by and through his attorneys of record, hereby files this Motion to Suppress Data Retrieved from Mr. Hall’s Cell Phone (the “**Motion**”).

EVIDENCE SOUGHT TO BE SUPPRESSED

The cell phone data retrieved from the search of the Black Apple iPhone seized from Mr. Hall’s person by law enforcement on March 2, 2022.

STANDING

Mr. Hall has standing to make this application because (1) the cell phone is his, (2) he made the statement relating to the passcode for the cell phone at issue, and (3) because Mr. Hall holds the attorney-client privilege over the statements made to his attorney via text that were contained on the cell phone and viewed by law enforcement.

STATEMENT OF RELEVANT FACTS

On February 23, 2022, Special Agent Tom Russell noted in a report that he received a phone call from Sgt. Nick Stidham wherein Sgt. Stidham told him that Jason Hall had retained an attorney, “specifically for this investigation and whatever charges might arise out of this.” The same day, Special Agent Russell contacted the prosecutor in this case, Steve Wuthrich, and informed him of this information. Special Agent Russell noted the following:

Mr. Wuthrich informed SA Russell that if/when he executed a search warrant on HALL and . . . his work place, in an attempt to seize the suspected phones and computers, that he was not to try to interview HALL (since he had retained an attorney), *and that review of any seized computers or phones after today would probably need to be evaluated by a “taint” team* – but that would be decided down the road (since he would now possibly have “attorney-client” material on those items).

On March 1, 2022, Special Agent Russell submitted an affidavit for a search warrant, and on the same day the District Court issued a Search Warrant (No. 2398391), which provided, in part, for a seizure of Mr. Hall’s person for a “cellular telephone (unknown description) owned and utilized by Jason HALL,” and a subsequent search of that phone. Search Warrant No. 2398391 at 2.

On March 2, 2022, Special Agents Downey and Cox located Mr. Hall and detained him in the mobile forensic lab parked on scene at the search of Mr. Hall’s business. Special Agent

Downey told Mr. Hall that he had a search warrant for Mr. Hall's phone at which point Special Agent Cox retrieved a Black Apple iPhone from Mr. Hall's person.

Special Agent Downey then asked Mr. Hall for the passcode to the phone. Mr. Hall asked, "Am I required to give that to you?" And Special Agent Downey replied, "We have a court order to search the phone, so yeah."

At that point, Mr. Hall provided the passcode to the agents believing he was required by a court to do so.

On April 12, 2022, contrary to the prosecutor's indication they would need a taint team to view Mr. Hall's phone contents, Special Agent Russell began searching the phone himself. During this review, Special Agent Russell searched "Gaston" in the iPhone's text messages app, which recovered a message from Mr. Hall's attorney, Tyler Ayers. Special Agent Russell viewed the message and then notified the prosecutor he had seen the message between Mr. Hall and Mr. Hall's attorney. The prosecutor, contrary to his prior comments to Special Agent Russell, allowed Special Agent Russell to continue to search Mr. Hall's phone, advising him to simply disregard the attorney-client message he had viewed. And further, Special Agent Russell was to report back any other instances of attorney-client communications found on the phone.

LEGAL GROUNDS FOR SUPPRESSION

I. The Court Should Suppress the Contents of the Cell Phone Because Mr. Hall Was Compelled to Provide His Passcode in Violation of the Fifth Amendment

The Fifth Amendment of the United States Constitution guarantees the right against self-incrimination by stating that "no person shall be compelled in any criminal case to be a witness against themselves." U.S. Const. Amend. V; *see also* Utah Const. Art. I, Sec. 12 ("The accused

shall not be compelled to give evidence against himself.”). The right against self-incrimination is infringed where the following elements are present: (1) compulsion; (2) a testimonial communication or act; and (3) incrimination. *State v. Valdez*, 2021 UT App 13, ¶ 24, 482 P.3d 861, 870, cert. granted, 496 P.3d 715 (Utah 2021); *see also Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004).

Many courts across the country, including the Utah Court of Appeals, have held that compelling an individual to provide a cell phone password requires the person to make a “testimonial communication” under the Fifth Amendment or a similar state constitutional self-incrimination provision. *See, e.g., Valdez*, 2021 UT App 13; *United States v. Barrera*, 415 F. Supp. 3d 832, 839 (N.D. Ill. 2019); *United States v. Kirschner*, 823 F.Supp.2d 665, 669 (E.D. Mich. 2010); *Commonwealth v. Baust*, 89 Va. Cir. 267, 2014 WL 10355635, at *1-2 (2014); *United States v. Maffei*, No. 18-CR-00174-YGR-1, 2019 WL 1864712, at *6 (N.D. Cal. Apr. 25, 2019).

In *Valdez*, police arrested the defendant and seized an Android phone. 2021 UT App 13, ¶ 7. After obtaining a warrant to search the phone, officers asked the defendant “for his pass code” and explained that if he did not provide it, they would attempt maneuvers with the phone that could destroy it. *Id.* The defendant refused to give the officers the passcode and just told them to destroy the phone. *Id.* At trial, the State called a detective who testified that police were unable to access the contents of the phone, and then began to describe the defendant’s refusal to provide the code. *Id.* ¶ 11. Defense counsel objected, asserting that the defendant had a “Fifth Amendment [r]ight” not to provide the code, and that the State should not be able to present any evidence of his refusal to provide it. *Id.*

On appeal, the Utah Court of Appeals held that the State improperly implied at trial that the defendant had an obligation to provide the code and that he had no right to refuse. *Id.* at ¶ 25. The court explained that “one cannot reveal a passcode without revealing the contents of one’s mind,” and that “[b]y asking a suspect to—orally or in writing—communicate the actual passcode to a cell phone, law enforcement officers seek a response that is testimonial in ways that simply turning over an unlocked phone is not, because such a request asks for the code itself.” *Id.* at ¶¶ 33, 35; *see also Commonwealth v. Davis*, 220 A.3d 534, 548 (Pa. 2019) (finding revealing a computer password is a verbal communication that is “testimonial in nature”); *State v. Pittman*, 367 Or. 498, 510, 479 P.3d 1028 (2021) (compelling a defendant to state the password itself was inappropriate because “[r]equiring her to do so would compel her to make an express verbal or written statement.”).

Here, the State violated Mr. Hall’s Fifth Amendment right when Special Agent Downey lied and stated that a court had ordered Mr. Hall to provide the cell phone’s passcode while he was detained. When Mr. Hall asked Special Agent Downey if he was required to give up that information, Special Agent Downey said he was:

Special Agent Downey: “What’s the passcode to the phone?”

Mr. Hall: “Am I required to give that to you?”

Special Agent Downey: “We have a court order to search the phone, so yeah.”

As in *Valdez*, the State here improperly told Mr. Hall that he had an obligation to provide the passcode to his cell phone and could not refuse. The “code could have led to the ‘discovery of incriminating evidence’ on [Mr. Hall’s] phone.” *See Valdez*, 2021 UT App 13, ¶ 25. Additionally, Special Agent Downey “asked [Mr. Hall] to make an affirmative verbal statement, whether orally

or in writing, that would have unquestionably been testimonial.” *Id.* at ¶ 35. By compelling Mr. Hall to orally communicate the passcode to his cell phone, Special Agent Downey sought an incriminating response that was “testimonial in ways that simply turning over an unlocked phone is not, because such a request asks for the code itself.” *Valdez*, 2021 UT App 13, ¶¶ 33, 35.

As such, the State violated Mr. Hall’s Fifth Amendment right against self-incrimination, and the Court should suppress the evidence obtained as a result of that disclosure.

II. The Court Should Suppress the Contents of the Cell Phone Search Because The State Knew That It Could Contain Privileged Communications but Still Searched The Phone (And Viewed Attorney Client Communications)

The attorney-client privilege, which protects “the giving of professional advice” from counsel to client, is “the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389-90 (1981). An attorney’s “client has a privilege to refuse to disclose and to prevent any other person from disclosing, confidential communications . . . made for the purpose of facilitating the rendition of professional legal services.” Utah R. Evid. 504(b)(1); *see also Snow, Christensen & Martineau v. Lindberg*, 2013 UT 15, ¶ 31, 299 P.3d 1058, 1066.

An intrusion into a defendant’s attorney-client privilege could potentially give rise to a constitutional violation if the privileged information is intentionally obtained and the intrusion causes some substantial prejudice to the defendant. *Weatherford v. Bursey*, 429 U.S. 545, 554 (1977). “Where the government chooses to take matters into its own hands rather than using the more traditional alternatives of submitting disputed documents under seal for *in camera* review by a neutral and detached magistrate or by court-appointed special masters, it bears the burden to rebut the presumption that tainted material was provided to the prosecution team.” *United States*

v. Neill, 952 F. Supp. 834, 841 (D.D.C. 1997) (internal citations omitted); *see also id.* at 840 (presuming that information known to agents is conveyed to the trial team which can be overcome “by showing the existence of suitable safeguards”).

Once a defendant’s attorney-client privilege has been violated, courts often favor the remedy of suppression of privileged information and its fruits rather than dismissal. *See United States v. Morrison*, 449 U.S. 361, 365 (1981); *United States v. Lin Lyn Trading, Ltd.*, 149 F.3d 1112, 1118 (10th Cir. 1998) (holding that the adequate remedy was suppression of the evidence gained after the search and seizure and requiring the government to begin a new investigation without the agents who were exposed to the privileged material).

In *Lin Lyn Trading*, an investigation began after a confidential informant told Customs agents that the defendant was importing trademarked toys illegally. 149 F.3d 1112, 1113. Agents discovered undeclared lace merchandise in a shipment, obtained a warrant to search the defendant’s business premises, and seized a large number of documents. *Id.* The defendant was later detained by Customs inspectors at an airport, where they seized documents he was carrying, including a yellow notepad. *Id.* The defendant told the inspectors the notepad had notes from his conversations with his legal counsel. *Id.* Still, the government agents seized the notepad and copied its contents. *Id.* Soon thereafter, defendants’ counsel asked for the return of the notepad, at which point the prosecutor ordered that the materials be sealed. *Id.* at 1114.

After the defendant was indicted, he filed a motion to suppress the evidence seized on the theory that the illegally seized notepad became a “roadmap” for the case investigation, and as a result, the defendant requested that the indictment be dismissed because the invasions of the attorney-client privilege had interfered with his Sixth Amendment right to counsel. *Id.* The district

court held an evidentiary hearing on the motion, and the government agent testified that once he glanced through the folder and saw what it contained, he refrained from further reading any item in the folder and sent the documents to the prosecutor. *Id.*

The district court dismissed the indictment, finding that the government intentionally seized the notepad with knowledge that it contained privileged information, had access to the notepad, used it to conduct their investigation, “and that the entire investigation was tainted by the illegal seizure.” *Id.* at 1114-15. On appeal, the Tenth Circuit agreed in part, determining that the district court’s remedy to dismiss the indictment was too extreme, but that “[u]nder these circumstances, suppression of all evidence obtained . . . would appear to be an adequate remedy.” *Id.* at 1118 (noting the Supreme Court’s approach has been “to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial”).

Here, as noted above, the State had been made aware on February 23, 2022 – nine days prior to the execution of the search warrant – that Mr. Hall had retained counsel. In fact, that same day, Special Agent Russell reported that the prosecutor had told him “that review of any seized computers or phones after today would probably need to be evaluated by a ‘taint’ team . . . since he would now possibly have ‘attorney-client’ material on those items.”

Even so, in seizing Mr. Hall’s cell phone on March 3, 2022, Special Agent Russell proceeded to search its contents without a filter team and read at least one privileged, confidential text message between Mr. Hall and his attorney.

Furthermore, after reviewing the protected text message, Special Agent Russell recognized the name of the attorney – the same attorney who Special Agent Russell was told was representing

Mr. Hall. Once Special Agent Russell reported this finding to the prosecutor, despite the prior suggestion to the contrary, the same prosecutor inexplicably instructed Special Agent Russell to *continue* his search through the phone (and inform the prosecutor if he found any *further* privileged communications). The contents of the cell phone are now being used as evidence in this case, thus being turned over to the prosecutor.

This search breached Mr. Hall's attorney-client privilege, and the Court should therefore suppress the contents of Mr. Hall's cell phone, as well as any investigative information developed, either directly or indirectly, after the date of the seizure of such items.

CONCLUSION

For the foregoing reasons, Mr. Hall requests that the contents from his cell phone, as well as any fruits thereof, be suppressed.

DATED this 14th day of August, 2023.

ARMSTRONG TEASDALE LLP

/s/ Trinity Jordan
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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2023, a true and correct copy of the **MOTION TO SUPPRESS** was served on the following via the Court's Electronic Filing System:

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