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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 STATEMENTS

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 Statements (the “**Motion**”).

EVIDENCE SOUGHT TO BE SUPPRESSED

Mr. Hall’s statements to law enforcement on March 2, 2022.

STANDING

Mr. Hall has standing to make this application as he made the statements at issue.

FACTUAL BACKGROUND

Mr. Hall Retains an Attorney

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 relayed that Mr. Hall had retained an attorney “specifically for this investigation and whatever charges might arise out of this.” In the same report, Special Agent Russell relayed the prosecutor’s instructions that they were *not* to interview Mr. Hall:

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).

Search Warrant and Custodial Interrogation

On March 2, 2022, after executing a search warrant on Mr. Hall’s business and truck, agents brought Mr. Hall to an interview room in a mobile forensic lab parked on scene. Special Agent Downey explained to Mr. Hall that he was *not* free to leave, and then advised him of his Miranda rights. Special Agent Downey then clarified that Mr. Hall did not have to answer any questions and asked if he understood his rights. Mr. Hall said, “I do.”

Special Agent Downey then asked Mr. Hall if he wanted to talk. Mr. Hall answered, “potentially.”

Special Agent Downey then mentioned they already had information on Mr. Hall – that an employee had already talked to agents, so they already knew what happened. Now they just wanted to know why. Special Agent Downey also offered, “we’re not here to judge.”

After agents asked further questions, a long pause followed. Special Agent Downey ultimately broke the silence, reminding Mr. Hall “we’re not taking you to jail, but we are going to detain you.”

Roughly six minutes into the interview, Mr. Hall spoke tentatively: “I’ve had my attorney reach out to [Special Agent Russell] on five different occasions to say, ‘What the hell’s going on? You guys want to talk about this?’ And [Special Agent Russell] finally called him back and said there’s nothing going on, but that was recently, and I guess that’s not the case.”

In response, Special Agent Downey sounded agitated and replied, “We’re not going to go back and forth with you.” He then pressed Mr. Hall: “we have probable cause to book you into jail right now. Okay? We don’t need you to tell us what you did. That’s what I’m telling you, we already know what you did. Okay? We do.” He then continued, “so, the question is do you want to talk to us. We’re not going to dance. We’re not going to sit here and dance with you.”

Thereafter Mr. Hall spoke with the agents.

LEGAL GROUNDS FOR SUPPRESSION

I. The State Violated Mr. Hall’s Fifth Amendment Rights When He Did Not Unequivocally Waive His Miranda Rights

As the Court is well aware, the Fifth Amendment guarantees that a defendant cannot be “compelled in any criminal case to be a witness against himself.” As part of the safeguards for this fundamental right, custodial interrogations require the State to warn a defendant of his right to remain silent and have an attorney present during questioning. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). A defendant may, of course, waive these rights, but the waiver must be knowing, voluntary, and intelligent. *Id.*

When a defendant makes an “ambiguous or equivocal request for an attorney,” the Utah Supreme Court has held that “questioning with respect to the subject matter of the investigation must immediately stop, and any further questioning must be limited to clarifying the request.” *State v. Wood*, 868 P.2d 70, 85 (Utah 1993) overruled on other grounds by *State v. Menzies*, 889 P.2d 393 (Utah 1994). In attempting to clarify, “[a] simple, straightforward effort to clarify the request is appropriate.” *Id.* at 84. That “request for clarification may not, however, be an attempt at persuasion to forego an attorney.” *Id.*

In *State v. Gutierrez*, 864 P.2d 894 (Utah Ct. App. 1993), the Appellate Court held that the defendant’s post-Miranda advisal remark “I ain’t got to say nothin’” “constituted an ‘arguably equivocal’ invocation of her right to terminate questioning[.]” 864 P.2d at 902. As such, “the officers interrogating her were required to clarify this statement.” *Id.* Instead, the officers simply responded “‘You don’t have to,’ and then continued their interrogation.” *Id.* As a result, the Court held that Gutierrez’s confession “was obtained in violation of her fifth amendment rights and the trial court erred in allowing its admission into evidence.” *Id.*

Here, agents had already been made aware that Mr. Hall was represented by counsel. They had further received instructions from the prosecutor *not* to speak with him *because of he was represented*. Apparently disregarding that direction, agents detained and advised Mr. Hall of his *Miranda* rights. And when they asked Mr. Hall if he would speak with them, Mr. Hall responded equivocally: “Potentially.”

After further statements from the agents and series of questions, Mr. Hall paused and responded tentatively, reminding agents he was represented.

These equivocating statements referencing Mr. Hall's attorney should have caused agents to clarify whether Mr. Hall was invoking his right to an attorney. Instead, they applied more pressure and threatened jail as a possibility: "We're not going to go back and forth with you...we have probable cause to book you into jail right now. Okay? We don't need you to tell us what you did. That's what I'm telling you, we already know what you did. Okay? We do." "So, the question is do you want to talk to us. We're not going to dance. We're not going to sit here and dance with you."

The agents' failure to clarify whether Mr. Hall had invoked his right to counsel violated Mr. Hall's Fifth Amendment rights, so any statements he made following that violation should be suppressed.

II. The State's *Ex Parte* Interrogation of Jason Hall Violated Professional Standards and Mandate Suppression.

This Court should further suppress Mr. Hall's statements because the State's conduct violated ethical standards created to protect against compelled and uncounseled disclosure of private information. The primary vehicle for suppression of a confession is ordinarily an argument against the voluntariness of that confession. *See Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). Courts, however, have also suppressed a confession based on a violation of ethical rules where the government interrogated a criminal defendant outside the presence of his known counsel. *See United States v. Koerber*, 966 F. Supp. 2d 1207 (D. Utah 2013).

The Tenth Circuit has held:

[O]nce a criminal defendant has either retained an attorney or had an attorney appointed for him by the court, any statement obtained by interview from such defendant **may not be offered in evidence for any purpose** unless the accused's attorney was notified of the interview which produced the statement and was given a reasonable opportunity to be present. To hold otherwise, we think, would be to

overlook conduct which violated both the letter and the spirit of the canons of ethics. This is obviously not something which the defendant alone can waive.

United States v. Thomas, 474 F.2d 110, 112 (10th Cir. 1973) (emphasis added). The Utah Rules of Professional Conduct provide that “a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.” Utah R. Prof. Conduct 4.2(a) (2012); *see also* Utah Sup. Ct. R. of Prof. Practice 4.2, 4.3 & 8.4. Rule 4.2(a) “contributes to the proper functioning of the legal system by protecting a person . . . represented by a legal professional in a matter against possible overreaching by other lawyers . . . , interference by those lawyers with the client-legal professional relationship, and the uncounseled disclosure of information relating to the representation.” *Id.*, cmt. 2. This rule applies “even though the represented person . . . consents to the communication.” *Id.*, cmt. 4. If, “after commencing communication, the lawyer learns that the person is” represented but presently without counsel, the “lawyer must immediately terminate communication with a person.” *Id.*

Rule 4.2(a), of course, applies to lawyers, but it can also apply to law enforcement officials. *See, e.g., United States v. Ryans*, 903 F.2d 731, 735 (10th Cir. 1990); *Koerber*, 966 F. Supp. 2d at 1226 (finding that, regardless of cmt. 14, Rule 4.2 imputes to the actions of law enforcement officials where acting as agents of the government’s attorneys); *United States v. Buchanan*, 891 F.2d 1436, 1442 (10th Cir. 1989) (imputing police’s knowledge of *Brady* material to prosecutors, finding that since “investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutors, were guilty of nondisclosure”) (citation and internal quotation marks omitted); *United States v. Jamil*, 707 F.2d 638, 645 (2d Cir. 1983) (“The [no-contact rule] DR 7-104(A)(1) may be found to apply in criminal cases . . . to government attorneys [and] to non-

attorney government law enforcement officers when they act as the alter ego of government prosecutors.”) (citation omitted).

In *Koerber*, the court found that the prosecutor knew the target of their investigation was represented by counsel but still instructed investigators to initiate pre-indictment *ex parte* contact with him. 966 F. Supp. 2d 1207, 1213. The court further found prosecutors knowingly “violated [Utah] Rule 4.2 . . . in authorizing the agents to contact him directly and conduct the interviews with him without obtaining consent from his counsel or court approval.” *Id.* As a result, the court suppressed the defendant’s statements. *Id.* (alterations added). The court elaborated why the Utah ethics rules were relevant to its inquiry:

An amendment to Utah’s Rule 4.2 in 2005 has unpegged the consideration of the Rule’s application from principles governing the Sixth Amendment right to counsel analysis, resulting in a broadening of the Rule’s applicability as to overt, pre-indictment, noncustodial *ex parte* contact. As a violation of the no-contact rule, the *ex parte* contact at issue here also constituted a violation of a federal statute—the Citizens Protection Act (the “Protection Act”), 28 U.S.C. § 530B—enacted in 1999 to ensure that U.S. Attorneys and those in their offices, and any other attorney for the Government, conform to the local ethics rules applicable in their jurisdictions of practice. Thus, as a departure also from publicly known internal policies of the DOJ, FBI, and IRS meant to protect citizens’ rights, the statutory ethics violation amounts to a denial of due process under the Fifth Amendment for which exclusion is the appropriate remedy under the unique facts of this case.

United States v. Koerber, 966 F. Supp. 2d 1207, 1213–14 (D. Utah 2013).

This case is similar to *Koerber*, however, the facts here cut deeper against the State. First, there is no question here that the prosecutor and his agents knew that Mr. Hall was represented by counsel in the underlying investigation. In fact, the prosecutor had instructed agents not to speak with him.

Second, despite the fact that the prosecutor had prohibited agents from having his agents interview Mr. Hall *ex parte* without consent of counsel, the State still interrogated Mr. Hall on March 2, 2022. The State’s violation of Rule 4.2 — a rule meant to protect citizens’ rights — amounts to a denial of due process under the Fifth Amendment for which exclusion is the appropriate remedy. *See Koerber*, 966 F. Supp. 2d at 1214. The Court “has broad discretion to fashion an appropriate sanction or penalty to remedy a violation of an ethical rule.” *Weeks v. Indep. Sch. Dist. No. I-89*, 230 F.3d 1201, 12011 (10th Cir. 2000); *see also Hammond v. City of Junction City, Kansas*, 167 F. Supp. 2d 1271, 1288 (D. Kan. 2001); *United States v. Heinz*, 983 F.2d 609, 617 (5th Cir 1993) (“[C]ourts possess inherent supervisory power to safeguard the criminal justice system from overzealous prosecutorial and investigative activities.”). Mr. Hall asks this Court to suppress the statements he made to Special Agents Downey and Cox without the presence of his counsel.

III. The State’s *Ex Parte* Interrogation of Jason Hall Violated His Sixth and Fifth Amendment Rights.

The State knew Mr. Hall was represented and still interrogated him without counsel present. This violated Mr. Hall’s constitutional rights.

Courts are required to “scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant’s basic right to a fair trial.” *United States v. Wade*, 388 U.S. 218, 227 (1967) (vacating conviction based on lineup where counsel was not present); *see also id.* at 226 (finding the accused “need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial”); *Kirby v. Illinois*, 406 U.S. 682, 690 (1972) (finding this scrutiny is “always necessary”).

“[T]he right to counsel granted by the Sixth and Fourteenth Amendments means *at least* that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him ‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’” *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (emphasis added) (internal citations and quotation marks omitted). Ordinarily, the test is met when the suspect becomes the “accused” and judicial proceedings have been initiated against him. *See United States v. Hornsby*, 666 F.3d 296, 310 (4th Cir. 2012); *United States v. McAuliffe*, 490 F.3d 526, 540 (6th Cir. 2007).

At the same time, the Supreme Court has recognized that certain pretrial events may so prejudice the outcome of the defendant’s prosecution that, as a practical matter, the defendant must be represented at those events in order to enjoy genuinely effective assistance at trial. *See, e.g., United States v. Ash*, 413 U.S. 300, 309–310 (1973) (finding “today’s law enforcement machinery involves criminal confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused’s fate and reduce the trial itself to a mere formality”); *Wade*, 388 U.S. at 226 (stating “the right to use counsel at the formal trial would be a very hollow thing if, for all practical purposes, the conviction is already assured by pretrial examination”) (cleaned up). The Supreme Court has upheld the right to counsel at a number of pretrial settings. *See Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970) (preliminary hearing); *Wade*, 388 U.S. at 228-239 (pretrial lineup); *Brewer v. Williams*, 430 U.S. 387, 401 (1977) (pretrial interrogation); *Estelle v. Smith*, 451 U.S. 454, 470–471 (1981) (pretrial psychiatric exam).

Courts have also recognized the possibility that the right to counsel might conceivably attach before any formal charges are made – in circumstances where the “government had crossed

the constitutionally significant divide from fact-finder to adversary.” *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir.1992), cert. denied, 507 U.S. 935 (1993) (internal quotation marks omitted). Other courts have held the crucial moment may occur before the government files charges if the state has committed itself to prosecution. *Matteo v. Superintendent*, 171 F.3d 877, 892 (3d Cir. 1999) (“The right also may attach at earlier stages, when the accused is confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality.”) (citation and internal quotation marks omitted); *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995) (“We recognize the possibility that the right to counsel might conceivably attach before any formal charges are made, or before an indictment or arraignment, in circumstances where the government had crossed the constitutionally significant divide from fact-finder to adversary.” (citation and internal quotation marks omitted); *Larkin*, 978 F.2d at 969; *United States ex rel. Hall v. Lane*, 804 F.2d 79, 81–82 (7th Cir. 1986).

The Tenth Circuit has held that “a defendant may claim his or her rights under the Due Process Clause have been violated by prosecutorial misconduct occurring prior to indictment.” *United States v. Kennedy*, 225 F.3d 1187, 1194 (10th Cir. 2000); *see also United States v. Russell*, 411 U.S. 423, 431–32 (1973) (“[C]onduct of law enforcement agents [may be] so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.”). To successfully raise a claim of outrageousness pertaining to alleged governmental intrusion into the attorney-client relationship, the defendant must demonstrate an issue of fact as to three elements: (1) the government’s objective awareness of an ongoing, personal

attorney-client relationship; (2) deliberative intrusion into that relationship; and (3) actual and substantial prejudice. *Id.* at 1194.

Here, the State was aware of the ongoing attorney-client relationship between Mr. Hall and his counsel. According to Special Agent Russell's own reports, Sgt. Stidham had advised Special Agent Russell that Mr. Hall had retained an attorney "specifically for this investigation and whatever charges might arise out of this." That same day, the prosecutor further advised Special Agent Russell that because Mr. Hall had retained an attorney, they were not to try to interview Mr. Hall.

Further, as Mr. Hall contemplated whether he should speak with the officers, Mr. Hall reminded agents of his attorney and his counsel's efforts to reach out to Special Agent Russell on numerous occasions.

As for the "deliberateness" of this intrusion, the State made direct contact with Mr. Hall without notifying his counsel, after agents had received specific instructions from the prosecutor not to interview him *because he was represented*.

Finally, the "prejudice" to Mr. Hall resulting from the State's actions is substantial. The State used Mr. Hall's statements to obtain its probable cause finding in its prosecution of this case. His family's reputation has also been severely damaged. The deliberate intrusion here into Mr. Hall's attorney-client relationship violated Due Process and warrants suppression of his statements, if not more. *See, e.g., United States v. Marshank*, 777 F. Supp. 1507, 1521-23 (N.D.Cal.1991) (concluding pre-indictment intrusion into the attorney-client relationship was so pervasive and prejudicial as to warrant dismissal of the indictment where the defendant's attorney

participated in the investigation of his client and the government knowingly assisted the attorney in violating the attorney-client privilege).

CONCLUSION

For the foregoing reasons, Mr. Hall requests that his statements to law enforcement on March 2, 2022, be suppressed.

DATED this 14th day of August, 2023.

ARMSTRONG TEASDALE LLP

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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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