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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION

UNITED STATES OF AMERICA,	:	Case No. [REDACTED]
	:	
Plaintiff,	:	[Proposed] MEMORANDUM
	:	DECISION AND ORDER
vs.	:	GRANTING MOTION TO
	:	SUPPRESS
[REDACTED],	:	
	:	
Defendant.	:	Chief Judge David Nuffer

This order grants [REDACTED] Motion to Suppress.¹ An evidentiary hearing was held June 21, 2016, on Defendant’s Motion to Suppress.² As directed, the parties submitted draft decisions.³ Argument was heard on October 3, 2016.⁴ This Memorandum Decision and Order is entered after thorough review and consideration of the evidence presented, draft decisions, and argument by the parties.

¹ Docket No. 32.
² Docket No. 34.
³ Transcript of evidentiary hearing on Motion to Suppress (“Transcript”), p.78, lines 5-15.
⁴ Minute Entry, Docket No. **, filed October **, 2016 (*Anticipated*).

FINDINGS OF FACT

Incident and First Contact with Officers

Defendant [REDACTED] has been charged with a single count of Hobbs Act Robbery, as to a [REDACTED] shop in [REDACTED], Utah, on [REDACTED] 2016.⁵ A series of robberies occurred during [REDACTED] 2016, from which law enforcement identified two suspects: [REDACTED] (“defendant”) and [REDACTED].⁶ The officers were not saying that [REDACTED] did the armed robberies.⁷

On January 29, 2016, law enforcement located [REDACTED] car parked at the Colonial Motel on 24th Street in Ogden, Utah.⁸ At approximately 9:00am, law enforcement officers observed [REDACTED] and [REDACTED] getting into [REDACTED] vehicle and drive away from the Colonial Motel.⁹ In an unmarked unit, officers followed the suspects down Wall Avenue, proceeding towards 21st Street.¹⁰ While following the suspects, Officer Pippin, a sixteen year veteran police officer with Riverdale Police Department,¹¹ visually identified [REDACTED] as the passenger in [REDACTED] car when [REDACTED] looked directly at Pippin; Pippin recognized [REDACTED] from known photographs.¹²

⁵ Indictment, count 15. Co-defendant [REDACTED] is charged in all 17 counts as to eight alleged robberies.

⁶ Transcript, p. 13, lines 18-25; Transcript, p. 14, lines 1-3.

⁷ Government’s Exhibit 1 (video recording of interview of [REDACTED]), at 12:05:10, Sergeant Lemberes.

⁸ Transcript, p. 83, lines 12-18; Transcript, p. 14, lines 13-23; Government’s Exhibit 1, 12:05:07-18.

⁹ Transcript, p. 62, lines 2-18; Transcript, p. 15, lines 7-11; Transcript p. 83, lines 16-20.

¹⁰ Transcript, p. 62, lines 19-24.

¹¹ Transcript, p. 60, lines 3-6.

¹² Transcript, p. 63, lines 2-22.

Based upon law enforcement's investigation of the robberies, the video footage of those robberies, statements of those individuals that were robbed¹³, and visual recognition of [REDACTED]¹⁴ and [REDACTED] car (license plate number, color and model),¹⁵ officers initiated a traffic stop in the left-hand turn lane of the Wall and 29th Street area in Ogden.¹⁶ The traffic stop occurred shortly after 9:00am.¹⁷ After the stop, Detective Ryan pointed a rifle at the suspects.¹⁸

First Miranda Admonishment

[REDACTED] was taken into custody and handcuffed behind her back, and placed in the front passenger seat of a marked police vehicle and transported to the Weber County Sheriff's Office.¹⁹ During transport to the sheriff's office Officer Pippin advised [REDACTED] of her Miranda rights, specifically enumerating what those rights were.²⁰ Officer Pippin told the defendant that "she had the right to remain silent; that anything she said could be used in a court of law; that she had a right to an attorney and to have one present while being questioned; and if she couldn't afford one, one would be appointed to her free of charge."²¹

¹³ Transcript, p. 64, lines 11-25; Transcript, p. 65, lines 1-3.

¹⁴ Transcript, p. 63, lines 2-22.

¹⁵ Transcript, p. 14, lines 13-23.

¹⁶ Transcript, p. 64, lines 1-17.

¹⁷ Transcript, p. 65, lines 4-7.

¹⁸ Transcript, p. 52, lines 17-18.

¹⁹ Transcript, p. 65, lines 8-14; court's findings at Transcript, p. 83, lines 20-23.

²⁰ Transcript, p. 66, lines 6-25.

²¹ See, Id.

Officer Pippin further advised [REDACTED] that what the Miranda admonishment meant was that she didn't have to talk to him if she did not want to; that she could stop talking at any time or ask for an attorney at any time.²² Officer Pippin asked [REDACTED] if she understood her rights and she affirmed that she did.²³

When Officer Pippin asked [REDACTED] if she was willing to waive those rights [REDACTED] didn't say yes or no.²⁴ Instead, [REDACTED] replied that she wanted to know what was going on.²⁵ Officer Pippins did not want to elicit any statement from [REDACTED] without her informed waiver of Miranda rights and he did not intend to interview [REDACTED] in his police vehicle because he wanted the interview to take place in an interview room with audio/video recording.²⁶ At no time between the traffic stop and the commencement of the recorded interview did [REDACTED] request an attorney.²⁷

Second Miranda Admonishment while in custody; and advisement that if Defendant asks for a lawyer it is a possibility she can have one if he can come; and disclosure that defendant has a brain injury

Officer Pippin and Weber County Sheriff's Detective Cortney Ryan conducted a video and audio recorded interview with [REDACTED] at the Weber County Sheriff's Office.²⁸

²² Transcript, p. 66, lines 19-25.

²³ Transcript, p. 67, lines 1-3.

²⁴ Transcript, p. 67, lines.

²⁵ Transcript, p. 66, lines.

²⁶ Transcript, p. 67, lines 4-20.

²⁷ Transcript, p. 68, lines 16-23.

²⁸ Government's Exhibit 1, 10:51:07.

The recording features a running digital clock located in the bottom left corner of the screen, indicating that the interview commenced at 10:51:07.²⁹

Officer Ryan testified that Ms. ██████████ was effectively arrested when she was taken into custody on the scene, and that she was in custody throughout being transported and interviewed.³⁰

From the commencement of the recording until Officer Pippin gives begins his second admonishment of Miranda rights to ██████████ at 10:53:01, ██████████ is offered, water, more coffee (she entered the room with a cup of coffee provided by the officers), and is informed that if she needs to use the restroom the officers will take her to the ladies' room. Officer Pippin requests ██████████'s date of birth and social security number, and asks if she is staying at the Western Colony Inn. Officer Pippin then gives a second Miranda admonishment.³¹

Officer Pippin: *“So, real quick, I mean, I explained to you your Miranda rights already in the car on your way over here.”*

██████████: *Yes, sir.*

Officer Pippin: *And uh, like I told you, you're not under arrest, but you have been detained. Okay?*

██████████: *Yes, I understand.*

Officer Pippin: *I just want to make sure that that's the understanding. I'm just going to go over those Rights again real quick before we start talking again, okay?*

██████████: *Okay.*

²⁹ Government's Exhibit 1, 10:51:07.

³⁰ Transcript, p. 50, line 17 through p. 51 line 9.

³¹ Government's Exhibit 1, 10:53:12.

Officer Phippen: *Just to make, like I, like I told you, I want to respect all of your rights and make sure you're in complete understanding of what's going on. And we really want to talk to you and get your side of all of this, and get to all of that. But first I want to let you know what your rights are again. You have the right to remain silent and anything you say can be used against you in a court of law. You have the right to an attorney and to have him or her here present with you while you're being questioned. If you can't afford an attorney one will be appointed to you free of charge, okay? What all that means is you don't have to talk to me if you don't want to. If you choose to, you can stop at any time, or you can ask for an attorney at any time, okay?*

[REDACTED]: *Now, excuse me, what's that, say the last part again.*

Officer Pippin: *So, what it all means is you don't have to talk to me if you don't want to. If you choose to talk to me, you can stop at any time and say, "no, I'm done." Or you can ask for an attorney in the meantime.*

[REDACTED]: *Okay, so if I have a lawyer, I can call him?*

Officer Pippin: *That's a possibility, yeah.³² Okay? That's what I've explained. If you have an attorney, you can call him and have him here with you. Right? If he's willing to come here, that's always a possibility. But we always want to try and get your side of the story on it. So, if at any time we're talking and you decide, 'you know what, maybe I ought to not stop talking, or you know what, maybe do want...'*

[REDACTED] has suffered a traumatic intracranial hemorrhage with cognitive changes, from a head trauma of 2014. As a result, [REDACTED]' physician Doctor Trevor Squire recently observed muscle strength weakness on her left side, and decreased attention span and concentration.³³

At 10:54:40, Ms. [REDACTED] interrupted Officer Pippin and informed him that she doesn't talk fast and may take a minute to respond because she had a brain injury that she sustained from a beating and/or a stroke.

³² Government's Exhibit 1, at 10:54:14.

³³ Defendant's Exhibit C, p.2.

██████████: *I need to let you guys know one thing though, I'm not trying to pull something off, I really do have something wrong with my brain. So if I slur—sometimes I sound like I'm drunk but I'm not. But like, I don't talk fast, 'kay. So, um, it might take me a minute to respond but 'cause I have to think.*

Detective Ryan: *What's going on with your brain?*

██████████: *I was severely beaten to death, left for dead, in Colorado, and I had a stroke. I've had—*

Detective Ryan: *You had a traumatic brain injury?*

██████████: *Yes.*

Detective Ryan: *Do you take any medications for it?*

██████████: *Yes. I haven't taken my medications yet.*

Detective Pippin: *We will get those for you.*³⁴

Detective Ryan had no reason to disbelieve Ms. ██████████' claim of having a brain injury, and he believed what she was telling the officers. Ms. ██████████' statement that she had a brain injury, caused Detective Ryan conclude there was a need for additional explanation of her rights.³⁵

She was asked about medications and she explained that she doesn't take pain pills because she was addicted, and that she is unable to take medical marijuana like she did in Colorado. She only takes Ibuprofen 800mg. She explained that she feels "much better" and that while she had been seeing her neurologist once per month, that had been extended to once every three months, and then extended again to once per year. At 10:56:42, Officer Pippin resumes discussion about ██████████'s Miranda rights:

³⁴ Government's Exhibit 1, at 10:55:09.

³⁵ Transcript p. 58, lines 9-23.

Officer Pippin: *So, real quick, [REDACTED], the Rights that I've explained to you twice now, you understand those, correct? And having those in mind do you want to talk with me today?*

[REDACTED]: *Excuse me?*

Officer Pippin: *Having those in mind, do you want to talk with me today?*

[REDACTED]: *Yeah, well, I mean I'm...*

Officer Pippin: *You can change your mind at any time.*

[REDACTED]: *I, I, Can I try to call my lawyer? Cause I don't want to, how do I say it? Cause sometimes like, like when I read, I have to have someone read it to me for me to understand, okay?. So, like, I can understand, but there are some words I don't.*

Instruction that attorneys don't interpret words, but officers can; defendant asks if she can call Attorney Boyle, and officers say they will call him

At 10:57:19, a discussion occurs between [REDACTED] and Officer Pippin. Officer Pippin informs [REDACTED] that they are happy to try and help her understand words, but if she wants an attorney that that is something else altogether.

Pippin: *You know if it comes down to you not understanding, we can help you out with that. That's fine, and we talk to lots of people every day and everybody has different needs and different things.*

[REDACTED]: *Okay but I'm not trying to pull a fast one on ya'all, I'm not--*

Pippin: *If it's just a matter of you not understanding some words, we can explain that to ya, but if you want your attorney here, then that's a whole different thing, like he's not here helping you understand words, he's here to walk you through the process type of thing. If it just comes down to you not understanding what I'm saying, you can ask me, you can say you know what I don't understand can you ask it a different way, and I can ask it a different way.*

[REDACTED]: *You can break it down for me so I can understand it?*

Pippin: *Yeah. So is that okay, do you want to talk with me?*

[REDACTED]: *Um,*

Pippin: *You can change your mind, you can change your mind anytime, or if you say you know what I do want my attorney here—*

[REDACTED]: *And I can call him?*

Pippin: *Yeah.*

Pippin: *Who is your attorney?*

[REDACTED]: *Mike Boyle.*

Pippin: *Mike Boyle, okay, you would be able to give him a call, I don't know if he would be able to come down right now. So ultimately that's kind of up to you, do you want to talk with us?*

[REDACTED]: *Can I try to call him?* [10:58:40].

Pippin: *Why don't you hang tight, and we'll see if we can get the number for him.*³⁶

At 10:58:34, [REDACTED] asks if she can call her Attorney, Mike Boyle³⁷ [REDACTED] indicated that Mr. Boyle had represented her previously for a drug charge.³⁸ Officer Pippin asked [REDACTED] if she had Mr. Boyle's phone number, which she did not. Officer Ryan took it upon himself to make the phone call to Attorney Boyle. At 10:58:55, Officer Pippin and Detective Ryan leave the room, informing [REDACTED] that they will attempt to contact Mr.

³⁶ Government's Exhibit 1, 10:57:19 to 10:58:40.

³⁷ Government's Exhibit 1, 10:58:14-17.

³⁸ Government's Exhibit 1, 10:58:20-23.

Boyle. [REDACTED] is left alone in the interview room as the officers exit. She can be seen on the video footage pacing, sitting in her chair while she waited.³⁹

Officer Ryan called the phone number of Attorney Boyle. No one answered. The voicemail identified itself as Mike Boyle's phone line. Officer Ryan left a message stating who he was, and asking Mr. Boyle to call them back as to [REDACTED]. Officer Phippen made a single attempt to call Attorney Boyle.⁴⁰

Defendant's further inquiry about Attorney

At 11:22:22, Detective Ryan opens the door into the interview and asks [REDACTED]: "are you good?" "Need some water or anything?" [REDACTED], replied, "Coffee, please."⁴¹ Detective Ryan tells [REDACTED] they are brewing it up and to give them a minute.⁴² There is a brief discussion about whether they have, or whether [REDACTED] wants, cream and sugar in her coffee.⁴³ At 11:22:42, [REDACTED] asks: "Do you know if they got ahold of my lawyer, or what's going on?", to which Detective Ryan replies, "We will. We're trying."⁴⁴ [REDACTED] then inquired about her purse and her phone, indicating that she wanted to call someone to secure her personal belongings. Detective Ryan told her that her possessions were secured by officers.⁴⁵ Detective Ryan exited the room at 11:23:10.

³⁹ Government's Exhibit 1, 10:58:55-11:22:24.

⁴⁰ Transcript p. 70, lines 21-23.

⁴¹ Government's Exhibit 1, 11:22:27-42.

⁴² See, Id.

⁴³ See, Id.

⁴⁴ Government's Exhibit 1, 11:22:42-46.

⁴⁵ Government's Exhibit 1, 11:22:48-11:23:10.

At 11:28:55, Detective Ryan returns to the room with [REDACTED], carrying a pot of coffee. He can be seen refilling [REDACTED]'s cup and heard telling her: "That's nice and hot. Don't burn yourself."⁴⁶ Detective Ryan exits the room at 11:29:13. After Detective Ryan leaves the room, [REDACTED] can be seen alone in the room, sipping her coffee, sitting in her chair, or pacing.⁴⁷

At 11:38:31, [REDACTED] is seen opening the unlocked door to the interview room and sticking her head out into the hallway. [REDACTED] explains that she needs to use the restroom.⁴⁸ She then leaves the room and is taken to the ladies' room.⁴⁹ At 11:41:22, [REDACTED] returns to the interview room, accompanied by an unidentified male. [REDACTED] again expresses her concerns for "her stuff in her room," and the unidentified male responds, "it's all being protected, I guarantee you. You're fine. It's not going anywhere."⁵⁰

Defendant's Third inquiry about Attorney, and Officers' First disclosure that Officers had called attorney

At 11:41:17, Ms. [REDACTED] asks again about her lawyer.

[REDACTED]: *Are they going to let me know what's going on? Are they getting ahold of my lawyer or what?*

Officer: *That's what they're working on right now.*

⁴⁶ Government's Exhibit 1, 11:29:05-07.

⁴⁷ Government's Exhibit 1, 11:29:13-11:38:31.

⁴⁸ Government's Exhibit 1, 11:38:42.

⁴⁹ See, Id.

⁵⁰ Government's Exhibit 1, 11:41:22-39.

From 11:41:39 [REDACTED] can be seen sitting in her chair and pacing until 11:50:12, at which time Detective Ryan opens the door and states: “I called your attorney but nobody answered. I’m just waiting for a phone call back from him.”⁵¹ This was the first notice to Ms. [REDACTED] of the call to her attorney, since previously the statement was, it is being worked on. As Detective Ryan is closing the door, [REDACTED] says “excuse me,” and Detective Ryan re-opens the door.⁵² [REDACTED] asks Detective Ryan: “Can I find out why I am being held, I mean, what is going on?”⁵³ [REDACTED] pauses, but before Detective Ryan can respond she adds: “Or should I just wait until he gets here?” Detective Ryan responds, affirmatively, and [REDACTED] says “okay”; Detective Ryan then left the room.⁵⁴ After Detective Ryan leaves, [REDACTED] can be seen alone in the room, pacing, sitting, stretching her legs.⁵⁵

At 11:58:13, an unidentified officer enters the room and presents to [REDACTED] a copy of a search warrant for her car, explaining to [REDACTED] that officers will be searching her car, looking for evidence of what happened last night at “Fresh Market.”⁵⁶ The officer tells [REDACTED] that it is her copy to give to her lawyer or keep.⁵⁷ As the officer leaves,

⁵¹ Government’s Exhibit 1, 11:50:12-17.

⁵² Government’s Exhibit 1, 11:50:22.

⁵³ Government’s Exhibit 1, 11:50:25-36.

⁵⁴ See, Id.

⁵⁵ Government’s Exhibit 1, 11:50:36-11:58:13.

⁵⁶ Government’s Exhibit 1, 11:58:13-22.

⁵⁷ Government’s Exhibit 1, 11:58:13-26.

[REDACTED] asks if she can “have a smoke.”⁵⁸ The officer instructs her to ask one of the guys out in the hall, and then leaves.⁵⁹

Defendant disclosure to officers that she cannot understand the language in the warrant, and defendant being told that it contains legal jargon

At 12:03:15, [REDACTED] is seen opening the door from the interview room into the hallway and saying, “Hello?” An unidentified voice can be heard to say, “What can we do for you?”⁶⁰ [REDACTED] responds, “I need someone to read [the warrant] to me cause I’m not understanding.”⁶¹ Officer Lemberes enters the room and [REDACTED] says she knows the document she was given is a search warrant.⁶² She then asks again about her purse. The unidentified male tells [REDACTED] that all this (the search warrant) means is that they are going to search your car.⁶³ [REDACTED] seeks clarification concerning the meaning of content in the search warrant.⁶⁴ The following exchange commenced at 12:03:28 and concluded at 12:05:30

[REDACTED]: *but right here, (pointing to text in the warrant) what does this mean?*⁶⁵

Lemberes: *They’re looking for any clothing or any other items that might have been used in, whatever they’re talking to your other boy for. That’s all it is.*

Lemberes: *But don’t it say, look, I don’t know, and maybe I’m reading it wrong; it’s been used or possessed for the purpose of being used to commit wha--t?*

Lemberes: *Where are you reading?*

⁵⁸ Government’s Exhibit 1, 11:58:44-50.

⁵⁹ See, Id.

⁶⁰ Government’s Exhibit 1, 12:03:28-29.

⁶¹ Government’s Exhibit 1, 12:03:29-32.

⁶² Government’s Exhibit 1, 12:03:38.

⁶³ Government’s Exhibit 1, 12:03:45-50.

⁶⁴ Government’s Exhibit 1, 12:03:45-12:05.

⁶⁵ Government’s Exhibit 1, 12:03:50-56.

██████████: *Right here (pointing to the warrant). To commit wha--t?*

Sergeant Lemberes:⁶⁶ *To commit, or, it's legal jargon for their looking, it's basically a to look for anything that may have been used in a crime. That's all that means. It's just legal jargon for.*

██████████: *But what's this? (pointing to the warrant) What's that word?*

Unidentified male: *It's the officer, "Affiant."*

██████████: *The proper...what? "Property and evidence described" what? "Above?"*

Unidentified male: *"Above is evidence of a crime or crimes." (reading from warrant)*

██████████: *But what's armed robbery? What the Hell?*

Unidentified male: *Armed robbery, yeah. That's what they're out there going through.*

██████████: *They're saying I did armed robbery?*

Unidentified male: *No, no, no, no. Don't confuse the two. This just involves your vehicle. They're going to look through your vehicle right now. That's why you got a copy of this, because it's your vehicle. If it would have been his they would have given it to him. That's why.*

██████████: *Oh. I'm like, oh. I'm like what the Hell? I got scared, I was like, what the heck?*

Unidentified male: *No, just sit down and relax.*

██████████: *Can I have a smoke?*

Unidentified voice from hall: *Give me five seconds and I'll take you.*

At 12:07:50, ██████████ is taken outside for a "smoke." ██████████ is off video and audio recording until 12:20:34. After returning from her smoke break, ██████████ is offered water, Coke, coffee, and a donut.⁶⁷ ██████████ is then left alone in the interview room.

⁶⁶ Transcript p. 53, lines 14-16 (identifying the officer).

⁶⁷ Government's Exhibit 1, 12:20:45-12:21:15.

At 12:34:13, [REDACTED] requests an aspirin. An unidentified staff informs [REDACTED] that he will have a nurse come and administer the medicine. At 12:53:24, a nurse enters the room and introduces herself to [REDACTED], as Robyn. She is accompanied by an unidentified man in a black cowboy hat. The nurse checked [REDACTED]'s vitals. She asked orientation questions like, what is the date, what is your birthday, do you know where you are. [REDACTED] knew the correct answers to the nurse's questions. The nurse completed a check-up⁶⁸ of [REDACTED], provided her with "Tylenol" and at 1:01:08, left the room.

At 1:01:12, the man in the black cowboy hat returns to [REDACTED]'s room and delivers a search warrant receipt, showing the items that were seized as part of the search. At 1:02:30, [REDACTED] requests that someone help her read the search warrant receipt because she doesn't have her glasses. Detective Ryan entered the room with [REDACTED]. Detective Ryan tells her he'll get her purse, leaves the room for a moment, and returns with [REDACTED]'s purse.⁶⁹

At 1:03:02, Officer Pippin and Detective Cortney enter and take a seat in the room with [REDACTED]. [REDACTED] asks a few questions about the items listed as seized on the search warrant receipt.⁷⁰

Third Miranda Admonishment, after announcement that Attorney Boyle cannot come

At 1:03:45, Detective Ryan informs [REDACTED] that he was able to make contact with Attorney Mike Boyle. Detective Ryan relays to [REDACTED] that Mr. Boyle stated [REDACTED]

⁶⁸ Government's Exhibit 1, 12:59:53-55.

⁶⁹ Government's Exhibit 1, 1:02:37-1:02:58.

⁷⁰ Government's Exhibit 1, 1:03:08-44.

had not retained him, was not a client, and that he would not be coming to the Weber County Sheriff's Office to represent her.⁷¹

Officer Ryan took the call from Attorney Boyle from his (Ryan's) desk. It was a direct call from Mr. Boyle who identified himself on the phone. There was no request by Mr. Boyle to speak with Ms. [REDACTED]. There was no offer by Detective Ryan to have Attorney Boyle speak with Ms. [REDACTED].⁷² Officer Ryan is not sure whether the phone in the interrogation room was working, but Ms. [REDACTED] could have taken the call, Officer Ryan indicated, at his desk, which was approximately 20 feet away from where [REDACTED] was.⁷³ Officer Pippin's phone conversation with Attorney Boyle was very brief.⁷⁴

Officer Ryan indicated that there is no specific training on what happens when someone asks for an attorney.⁷⁵

Despite Detective Ryan's interactions with Ms. [REDACTED], and her inquiring whether an attorney was coming, there was a delay before Detective Ryan eventually revealed to Ms. [REDACTED] that he had made a call to her attorney.⁷⁶

Upon hearing the news that Mr. Boyle would not be representing her, [REDACTED] places her focus again on the items listed as seized in the search warrant.⁷⁷ At the time she focuses on the search warrant, and commented on items listed on the warrant, she

⁷¹ Government's Exhibit 1, 1:03:45-1:04:05.

⁷² Transcript p. 72 line 10 through p. 73 line 22.

⁷³ Transcript p. 74, lines 8-10.

⁷⁴ Transcript p. 74, lines 11-13.

⁷⁵ Transcript p. 74, line 14.

⁷⁶ Transcript p. 55, lines 10-13.

⁷⁷ Government's Exhibit 1, 1:04:18-1:05:44.

expressed surprise and confusion, that she didn't know about the items and that they were not hers.⁷⁸ Neither Officer Pippin nor Detective Cortney asked [REDACTED] about any of the items on the search warrant list.⁷⁹

Detective Ryan informs [REDACTED] why law enforcement detained her, stating that they have [REDACTED] and [REDACTED] on a number of robberies.⁸⁰ Detective Ryan tells [REDACTED] that she was brought to the sheriff's office so she could have an opportunity to tell them what is going on.⁸¹ Detective Ryan tells [REDACTED] that he knows she is involved, and that he called Mike Boyle like she asked, but he said he was not coming.⁸² The officers told [REDACTED] that they desired to speak to her.⁸³

When Detective Ryan entered back into the room at 1:03:45pm, he intended to interview Ms. [REDACTED] without Mr. Boyle present.

Det. Ryan [13:05:46]: *Okay, so I just going to be open and honest with you right now, okay, because I expect you to do the same with me. You guys are down here, you and [REDACTED], because we have you guys on a bunch of robberies.*

[REDACTED]: *Me? Not me.*

Ryan: [REDACTED], *and you as well, okay. And so we brought you down here for your opportunity to tell us what the hell is going on, okay.*

[REDACTED]: *Yes, I understand that.*

Det. Ryan [13:06:16]: *It's hard for us to talk to you when you tell us that you want an attorney present, but in order for us to kind of get to the bottom of all of this, because we*

⁷⁸ See, Id.

⁷⁹ See, Id.

⁸⁰ Government's Exhibit 1, 1:05:53-1:06:10.

⁸¹ Government's Exhibit 1, 1:06:06-10.

⁸² Government's Exhibit 1, 1:06:17-20.

⁸³ Government's Exhibit 1, 1:06:28-29.

understand that you are involved with it, I'll be honest with you, okay. Until we get the whole story, we don't know what's going on, okay.

██████████: *Okay.*

Det. Ryan: *And so, we would like to talk to ya. I've contacted Mike Boyle just like you asked, um he's not going to come down um and so we don't um have that opportunity for you to have Mike Boyle down here with you while we talk to you—*

██████████: *Okay.*

Det. Ryan: *--to discern the hard words I guess, that you were concerned about. I and Detective Pippin would love to talk to ya to get your side of the story, and because it seems to me that while this stuff is a surprise to you and—*

Det. Pippin: *Sounds like sound of the stuff that is listed there [referring to inventory of search of vehicle] isn't yours.*

██████████: *Isn't mine!*

Det. Ryan: *Okay, so I mean, that's where we need to talk;*

Ms. ██████████ asks what it means to have appointed counsel

The following exchange occurred between 1:07:06-1:08:29.

Detective Ryan: *You need to make a decision now, ██████████, you have been advised of your Miranda rights, twice now today, and uh, so you're well aware of what those mean, okay. And uh, so, we're more than happy to talk to you, if you want to talk to us.*

██████████: *Yeah, but okay, I'm like, what I am I sittin' here doin'? I'm mean I'm like what the heck, I don't know what's going on?*

Detective Ryan: *Yeah, and I'd feel the same way if I was in your position. Your kind of stuck down here, not really knowing what's going on.*

██████████: *Right? And I'm worried about my stuff in my room, and...*

Detective Ryan: *Okay, so I'm going to advise you of your rights a third time, okay. And I want you to make sure you understand, okay? You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to have a lawyer present before any questioning. If you decide to answer questions without*

having counsel present, you can stop answering questions at any time during the questioning and request counsel. If you cannot afford to hire an attorney one will be appointed to represent you before any questioning, okay?

[REDACTED]: *What does that mean? Like, a public defender, or something?*

Detective Ryan: *Yeah, if you, if you, yeah. A public defender. Okay. So, having those rights in mind, do you want to talk to us today?*

[REDACTED]: *Yeah, and I want to know what the Hell's going on, because it's like, what the heck?*

Detective Ryan: *Do you understand all of your rights, and everything?*

[REDACTED]: *Yes, sir.*

Detective Ryan: *Okay, so tell me what's going on...*

Ms. [REDACTED] never told officers that she wanted Attorney Boyle or no one.⁸⁴

DISCUSSION

For the reasons set forth below, the Court finds that Defendant [REDACTED] invoked, but was not afforded, her right to counsel.

1.

WHEN THE DEFENDANT STATES THAT SHE WANTS AN ATTORNEY, INTERROGATION MUST CEASE UNTIL AN ATTORNEY IS PRESENT

In order to protect an accused's Fifth Amendment privilege, police must terminate interrogation if the accused requests the assistance of counsel. "If the individual states

⁸⁴ Transcript p. 58, lines 9-10.

that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.”⁸⁵

Here, Ms. [REDACTED] 1) requested an attorney,⁸⁶ 2) was not afforded the opportunity to confer with the attorney, and 3) did not have the opportunity to have the attorney present during subsequent questioning. Though officers telephoned an attorney, they did not arrange for an attorney to be present, nor allow the defendant to speak with the attorney even when he called to a phone some 20 feet away.⁸⁷

Rather, officers kept Ms. [REDACTED] in limbo as to whether she could receive counsel. Early on when she asked if she could call her attorney, officers told her “That’s a possibility.”⁸⁸ The facts show that even after officers undertook to look for her attorney’s phone number, they then delayed providing information to Ms. [REDACTED] as to the status of her attorney. At 10:58 a.m. Ms. [REDACTED] asks to call her attorney. Not until 11:50 a.m. does Detective Ryan first disclose to Ms. [REDACTED] that they tried to call Attorney Boyle, since previously they told [REDACTED] that it was a possibility that she could speak with her

⁸⁵ Miranda v. Arizona, 384 U.S. 436, 474 (1966).

⁸⁶ Government’s Exhibit 1, at 10:58:10 through 10:58:55 [REDACTED] *And I can call him?* Det. Pippin: *Yeah. Who is your attorney?* [REDACTED]: *Mike Boyle.* Pippin: *Mike Boyle, okay, you would be able to give him a call, I don’t know if he would be able to come down right now.* [REDACTED]: *He represented me on my drug charge before.* Pippin: *So ultimately that’s kind of up to you, do you want to talk with us?* [REDACTED]: *Can I try to call him? Cuz I’ll talk to ya just as long as he’s here ta, cuz I don’t want to get mixed up or confused or--* Pippin: *Do you have a number for him?* [REDACTED]: *Not on me, I don’t remember numbers, that’s why everything is in my phone.* Pippin: *Why don’t you hang tight, and we’ll see if we can get the number for him.*

⁸⁷ Transcript p. 74, lines 8-10.

⁸⁸ Government’s Exhibit 1, at 10:54:14: [REDACTED]: *Okay, so if I have a lawyer I can call him?* Pippin: *That’s a possibility, yeah.*

attorney. And finally at 1:03 p.m. Detective Ryan informs Ms. ██████████ that he made contact with Attorney Boyle and that he can't come. The implication is that officers delayed updating Ms. ██████████ in hopes that she would continue speaking with them as she remained in limbo about the law as to her right to an attorney, and about the fact of whether her "possibility"⁸⁹ of having an attorney would materialize.

Only a single attempt was made by officers to contact Attorney Boyle, and when officers spoke with Boyle the call was very brief. Crucially, officers made no effort to allow Ms. ██████████ to speak with Attorney Boyle, despite Boyle's call to a phone about 20 feet away.

As the U.S. Supreme Court has directed: "It is the State that has the burden of establishing a valid waiver. Doubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel — we presume that the defendant requests the lawyer's services at every critical stage of the prosecution."⁹⁰ Here, it cannot be said that the government meets this burden. Questioning continued for a lengthy period after Ms. ██████████ requested counsel.

⁸⁹ Government's Exhibit 1 at 10:54:14 through 10:54:16. Officer Pippin: *That's a possibility, yeah. Okay? That's what I've explained. If you have an attorney, you can call him and have him here with you. Right? If he's willing to come here, that's always a possibility.*

⁹⁰ Michigan v. Jackson, 475 U.S. 625, 632-633 (1986).

2.

GRIFFIN V. LYNAUGH
FAILS TO CONTROL

The government points to the Fifth Circuit case of Griffin v. Lynaugh for the proposition that one who asks for a specific attorney has failed to invoke the right to counsel. Griffin states that “when an accused makes an unambiguous but limited request for counsel, in the absence of police interference with the accused's fifth amendment guarantee to counsel, interrogation may proceed after satisfaction of that request.” Griffin v. Lynaugh, 823 F.2d 856, 864 (5th Cir. 1987).

The government’s reliance on Griffin as controlling precedent is misplaced: Officers never satisfied Ms. [REDACTED]’s request, in that they never allowed her to speak with Attorney Boyle. In Griffin, 1) the defendant was allowed to speak with the attorney for whom he asked, and 2) then when the attorney would not represent him the officers asked if he wanted another attorney, and the defendant said not at this time. Here in contrast, 1) the defendant was not allowed to speak with the attorney for whom she asked (despite Attorney Boyle’s call to a phone some 20 feet away), and 2) then when the attorney would not represent her the officers did not ask if she wanted another attorney. Thus the facts at bar are materially distinct from those in Griffin.

The case of Davis v. United States, 512, U.S. 452 (1994) is instructive as to whether one can partially invoke the right to counsel:

“Invocation of the Miranda right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning. Rather, the suspect must unambiguously request counsel. As we have observed, a statement either is such an assertion of the right to counsel or it is not. Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.”⁹¹

Parsing the language of Davis helps assess the facts at bar. As to whether Ms. [REDACTED] made a statement that can reasonably be construed to express a desire for the assistance of an attorney, [REDACTED] said she wanted to speak with Attorney Boyle. Her repeated asking if she could call him, was clearly a request that she be allowed to call him.

Davis points out that the suspect must make reference to attorney that is not ambiguous or equivocal, while also pointing out that a statement either is or is not an assertion of the right to counsel. “As we have observed, a statement either is such an assertion of the right to counsel or it is not.”⁹² Thus Davis does not leave a middle

⁹¹ Davis v. United States, 512, U.S. 452, 459 (1994) (internal citations and punctuation omitted).

⁹² Davis v. United States, 512 U.S. 452, 459 (1994), quoting Smith v. Illinois, 469 U.S. 91, 97-98 (1984). In Smith, where officers told the defendant he had a right to consult with a lawyer and

ground, of a suspect invoking a limited right to see a specific attorney and no other.⁹³ It is all or nothing. The light switch is either on or off. Davis makes clear that if the right to counsel has not been invoked, then officers can continue questioning the suspect without getting an attorney. It would be nonsensical in the circumstances at bar, to conclude that the officers could have continued questioning Ms. [REDACTED] without attempting to comply with her request for Mr. Boyle. That is, it is clear that Ms. [REDACTED] had asked for the assistance of an attorney.⁹⁴

have one present during questioning, and he replied “Uh, yeah. I’d like to do that”, the Supreme Court held that the right to counsel had been invoked.

In Davis, where the defendant was advised of the right to counsel, then waived his right to counsel, then about 90 minutes into the interview said, “Maybe I should talk to a lawyer”, the Supreme Court held that the right to counsel was not invoked. Thus in Davis the concern was that defendant was not specific enough. Here, the government argues in essence that Ms. [REDACTED]’ reference to a particular attorney was too specific to invoke the right.

⁹³ Here, the government argues that one can invoke their right to speak with a specific attorney, without invoking the right to speak with counsel in general. In essence, the government is arguing that the right to counsel, as in property law, be likened to a bundle of sticks. This goes beyond the meaning of the Griffin case, and it would be a slippery slope to so hold.

The wisdom of Davis’ observation that the right to counsel either has or has not been invoked is plain to see. Otherwise, one could foresee opening a can of worms consisting of such questions as whether saying one wants counsel means they want competent counsel, counsel tomorrow, counsel at sentencing, counsel licensed in this state, counsel to explain the meaning of words, or counsel to explain legal jargon.

Utah Rule of Professional Conduct 1.2 does allow unbundling of legal services through the informed consent of the client who has conferred with counsel. Here, the defendant was not afforded counsel.

⁹⁴ The Fifth Circuit’s 1987 Griffin case, was decided before the guidance of the Supreme Court’s 1994 Davis case, that counsel either was or was not requested. If Griffin is read as standing for a partial invocation of the right to counsel, this is overruled by Davis’ holding that the right to counsel either is or is not invoked.

To interpret Griffin too broadly, would leave it as unjustified dicta, exemplifying the statement of Benjamin Cardozo that “Justice is not to be taken by storm. She is to be wooed by slow advances.” Lecture at Yale University Law School (1923) as quoted in *The American Journal of International Law* Vol. 29 (1935), p. 32. Courts are not bound to follow dicta in a prior case in which the point now at issues was not fully debated. General expressions are to be taken in connection with the case in which those expressions are used. If they go beyond the case

It cannot be said that the facts of this case lower the standard for the officers. Indeed, if anything, the facts raise the standard. In response to questions from this brain-injured defendant about her right to counsel, officers gave her erroneous legal advice about the scope of available legal advice. They contended that an attorney does not explain the meaning of words,⁹⁵ as that can be left to police officers. After undertaking this role, the officers failed to perform: when Ms. [REDACTED] did ask an officer about the meaning of words, he responded that they are legal jargon.⁹⁶ Officers should not dabble in the unauthorized practice of law.

3.
**ONCE THE RIGHT TO COUNSEL IS INVOKED,
OFFICERS CANNOT KEEP READING MIRANDA AND
ASKING ANEW IF THEY CAN SPEAK WITH DEFENDANT**

Once an accused does request counsel, law enforcement officials may not reinitiate questioning of the accused “until counsel has been made available” to the accused.⁹⁷ A waiver of counsel once invoked, not only must be voluntary, but also must

they may be respected but ought not to control the judgment in a subsequent suit when the very point is presented for decision. Central Virginia Community College v. Katz, 546 U.S. 356, 363 (2006) (considering the interaction of bankruptcy law and state immunity), citing Cohens v. Virginia, 6 Wheat. 264 (1821).

⁹⁵ Government’s Exhibit 1, at 10:57:38 through 10:57:43: Detective Pippin: *But if you want your attorney here, that’s a whole different thing. Like he’s not here to help you understand words.*

⁹⁶ Government’s Exhibit 1, conversation between [REDACTED] and Sergeant Lemberes at 12:03:28 through 12:04:36.

⁹⁷ Edwards v. Arizona, 451 U.S. 477, 484 (1981). See also, Smith v. Illinois, 469 U.S. 91, 97 (1984). In Edwards, the defendant was informed of his Miranda rights and said he wanted an attorney. Questioning then ceased until the following day when officers said they wanted to talk to him, and they again informed him of his Miranda rights.

constitute a knowing and intelligent relinquishment of a known right. An accused having expressed his desire for counsel, is not subject to further questioning until counsel has been made available, unless the accused himself or herself, has initiated further communication, exchanges, or conversations.⁹⁸

Here, [REDACTED] asked for an attorney at 10:58 a.m., and none was provided. Two hours later at 1:06 p.m., after still not providing an attorney, Detective Ryan lamented to Ms. [REDACTED] that, “It’s hard for us to talk to you when you tell us that you want an attorney present.” This statement confirms that officers knew what was obvious, that Ms. [REDACTED] wanted to speak with an attorney.

CONCLUSION

Just as Miranda does not require officers to recite an exacting “talismanic incantation” to satisfy its strictures,⁹⁹ it is unreasonable to require specific incantations for defendant [REDACTED] to invoke her right to counsel. It was clear from her everyday language that she sought the assistance of an attorney.

⁹⁸ Edwards, 451 U.S. 477-478.

⁹⁹ See, California v. Prysock, 453 U.S. 355, 359 (1981).

[REDACTED] expressed her desire to speak with an attorney, but was afforded none. Because defendant invoked, but was denied her right to counsel, all statements made thereafter should be suppressed. Accordingly, Defendant's Motion (docket entry no. 32) to Suppress is GRANTED.

Dated this ___ day of _____ 2016.

BY THE COURT:

DAVID NUFFER
Chief U.S. District Court Judge