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IN THE SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY

STATE OF UTAH

STATE OF UTAH, **Plaintiff,** **vs.** **PASCUAL URBINA GOMEZ,** **Defendant**	**MOTION TO SUPPRESS** **ORAL ARGUMENT REQUESTED** **Case No.: 111900602** **Judge: HADLEY**

COMES NOW, Defendant, by and through his attorney of record, Brian E. Arnold of ARNOLD & WADSWORTH, and hereby moves to suppress the evidence obtained through unlawful contact with Defendant under the Fifth and Sixth Amendment of the United States Constitution, and Utah Constitution Article I Section 12. A Memorandum in Support of this Motion is submitted herewith.

DATED this 12 day of April, 2011.

ARNOLD & WADSWORTH

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Attorney for Defendant

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COMES NOW, Defendant, by and through his attorney of record, Brian E. Arnold of ARNOLD & WADSWORTH, and hereby submits his Memorandum in Support of Motion to Suppress. Defendant moves to suppress the evidence obtained through unlawful contact with Defendant under the Fifth and Sixth Amendment of the United States Constitution, and Utah Constitution Article I Section 12:

POINTS AND AUTHORITIES

I. MIRANDA WARNINGS

The Sixth Amendment of the United States Constitution guarantees a defendant's right to counsel. There are procedural safeguards that are established to protect these fundamental rights. The Fifth Amendment to the United States Constitution guarantees that a person shall not be "compelled in any criminal case to be a witness against himself."

Courts protect this right by excluding from a defendant's criminal trial any incriminating statement that the defendant made to police officers if the officers did not give a Miranda warning, so long as the facts of the case meet certain criteria. Rhode Island v. Innis, 446 U.S. 291, 297, 300-01, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Chief Justice Durham of the Utah Supreme Court stated in Salt Lake City v. Carner that

> "the courts have developed two tests for determining at what point Miranda applies: (1) the "focus" test of Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), and (2) the objective-subjective test. *See* Smith, The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation, 25 S.C.L.Rev. 699 (1974). See also, State v. Paz, 31 Or.App. 851, 572 P.2d 1036 (1977). Under the "focus" test, Miranda applies when the investigation focuses on a particular suspect and the officer has probable cause to believe that a particular crime has been committed. See, e.g., State v. Simpson, Utah, 541 P.2d 1114 (1975). See also, Annot., 31 A.L.R.3d 565 (1970). Under the objective-subjective test, Miranda applies if the actions of the police and the surrounding circumstances, fairly construed, would reasonably have led the defendant to believe that he was not free to leave at will. See Smith, supra, at 710-14." Salt Lake City v. Carner, 664 P.2d 1168 (1983).

Based on the foregoing, both the Escobedo 'focus' test and Paz 'objective-subjective' test require a Miranda warning to be given. If the Miranda warnings are not given, then any information obtained from the subsequent questioning should be deemed the "fruit of the poisonous tree" and should be suppressed.

II. THE 'FOCUS' TEST OF ESCOBEDO.

"An accused **must** be apprised of his Miranda rights if the setting is custodial or accusatory rather than investigatory. In other words, at the point the environment becomes custodial or accusatory, a police officer's questions **must** be prefaced with a Miranda warning." Salt Lake City v. Carner, 664 P.2d 1168, 1170 (Utah 1983) (emphasis added).

The US Supreme Court, in Escobedo v. State of Illinois, held that "when the process shifts from investigatory to accusatory-when its focus is on the accused and its purpose is to elicit a confession-our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." Escobedo v. State of Ill., 378 U.S. 478, 492, 84 S. Ct. 1758, 1766, 12 L. Ed. 2d 977 (1964).

This right to consult with a lawyer when an investigation shifts to adversarial was later expanded to fall under the Miranda warnings. This fact was solidified in the case of Salt Lake City v. Carner, in which the states that "the courts have developed two tests for determining at what point Miranda applies: (1) the "focus" test of Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) ... " Salt Lake City v. Carner, 664 P.2d 1168 (1983).

"Under the "focus" test, Miranda applies when the investigation [1.] focuses on a particular suspect and [2] the officer has probable cause to believe [3] that a particular crime has been committed." Salt Lake City v. Carner, 664 P.2d 1168 (1983).

II. THE OBJECTIVE-SUBJECTIVE TEST OF PAZ.

"Under the objective-subjective test, Miranda applies if the actions of the police and the surrounding circumstances, fairly construed, would reasonably have led the defendant to believe that he was not free to leave at will." Salt Lake City v. Carner, 664 P.2d 1168 (1983), See Smith, supra, at 710-14.

The objective-subjective test is broken into two separate subcategories, which were specifically set forth in Miranda. Miranda v. Arizona required that an accused be advised that he has the right to remain silent, that anything he says can be used against him, that he has the right to an attorney, and the officer must ask whether the accused understands these rights. Miranda warnings are required prior to a custodial interrogation. To determine whether a custodial interrogation existed, the Court must apply the objective-subjective standard. Generally, custodial interrogation consists of questioning or use of other techniques of persuasion " 'initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " State v. Levin, 2006 UT 50, 144 P.3d 1096, 1105 (quoting Innis, 446 U.S. at 298-99, 100 S.Ct. 1682 (quoting Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966))); accord Stansbury v. California, 511 U.S. 318, 323, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994).

Thus, custodial interrogation occurs where there is both (1) custody or other significant deprivation of a suspect's freedom and (2) interrogation.

a. When a suspect is considered "in custody"

Courts often describe the first element as an inquiry into whether a suspect was "in custody." A person is in custody when "[the person's] freedom of action is curtailed to a degree associated with formal arrest." State v. Levin, 2006 UT 50, 144 P.3d 1096, 1109 quoting Berkemer v. McCarty, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (internal quotation marks omitted); see also State v. Mirquet, 914 P.2d 1144, 1147 (Utah 1996).

The inquiry into whether a suspect was "in custody" is objective and considers "how a reasonable man in the suspect's position would have understood his situation." Stansbury, 511 U.S. at 324, 114 S.Ct. 1526 (internal quotation marks omitted); accord Mirquet, 914 P.2d at 1147. A suspect may understand himself or herself to be in custody based either on physical evidence or on

the nature of the officer's instructions and questions. Therefore, a Court must focus on both the evidence of restraint and on objective evidence of the officers' intentions. State v. Levin, 2006 UT 50, 144 P.3d 1096, 1109 See also Berkemer, 468 U.S. at 442, 104 S.Ct. 3138; Salt Lake City v. Carner, 664 P.2d 1168, 1170 (Utah 1983).

As stated by the U.S. Supreme Court,

> "[A]n officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave. Stansbury, 511 U.S. at 325, 114 S.Ct. 1526.

"For instance, when investigatory questioning shifts to accusatory questioning, the existence of custody is likely because this often indicates to the defendant that he or she is not free to leave. By making accusations, the police officer indicates that there are reasonable grounds to believe that a crime has been committed and that the defendant committed it." State v. Levin, 2006 UT 50, 144 P.3d 1096 See also Mirquet, 914 P.2d at 1148 (indicating that accusatory questioning is relevant, but does not necessarily establish a coercive environment); Carner, 664 P.2d at 1170 (recognizing import of accusatory statements); State v. Snyder, 860 P.2d 351, 357 (Utah Ct.App.1993)(same).

In Salt Lake City v. Carner, Chief Justice Durham set forth four factors that aid in determining whether a defendant is "in custody" for purposes of the Miranda protections: "(1) the site of interrogation; (2) whether the investigation focused on the accused; (3) whether the objective indicia of arrest were present; and (4) the length and form of interrogation." State v. Wood, 868 P.2d 70, 82 (Utah 1993); quoting Salt Lake City v. Carner, 664 P.2d 1168, 1171 (Utah 1983)); see State v. Bishop, 753 P.2d 439, 465 (Utah 1988); State v. Kelly, 718 P.2d 385, 391 (Utah 1986), see Mirquet, 914 P.2d at 1147 n. 2 (explaining that although Carner was decided under Article I, section 12 of the

Utah Constitution, the same test applies under the Fifth Amendment of the United States Constitution).

b. Whether the incriminating statement was the product of interrogation.

Once a trial court determines that the defendant was "in custody," it must then decide whether the incriminating statement was the product of interrogation. Rhode Island v. Innis, 446 U.S. 291, 298-301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Interrogation is "either express questioning or its functional equivalent" and it incorporates any "words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." Id. at 300-02, 100 S.Ct. 1682.

In Muzychka, the United States Court of Appeals found that the sixth amendment right to counsel attaches " 'at or after the initiation of adversary judicial criminal proceedings-whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " Moore no previous cite, 434 U.S. at 226, 98 S.Ct. at 463, quoting *Kirby*, 406 U.S. at 689, 92 S.Ct. at 1882. United States v. Muzychka, 725 F.2d 1061, 1068 (3d Cir. 1984). *See also*, Brewer v. Williams, 430 U.S. 387, 398, 97 S.Ct. 1232, 1239 (1977). Further, "Until adversary judicial proceedings have commenced, coercive methods of eliciting information from a defendant are governed by Miranda and due process and self-incrimination analyses." United States v. Muzychka, 725 F.2d 1061, 1069 (3d Cir. 1984).

RULE 6 of the Utah Rules of Criminal Procedure:

> (a) Upon the return of an indictment the magistrate shall cause to issue either a warrant for the arrest or a summons for the appearance of the accused. Upon the filing of an information, if it appears from the information, or from any affidavit filed with the information, that there is probable cause to believe that an offense has been committed and that the accused has committed it, the magistrate shall cause to issue either a warrant for the arrest or a summons for the appearance of the accused. Utah R. Crim. P. 6

RULE 5 of the Utah Rules of Criminal Procedure:

(a) Unless otherwise provided, all criminal prosecutions whether for felony, misdemeanor or infraction shall be commenced by the filing of an information or the return of an indictment. Prosecution by information shall be commenced before a magistrate having jurisdiction of the offense alleged to have been committed unless otherwise provided by law.(b) Unless otherwise provided, no information shall be filed before a magistrate charging the commission of a felony or class A misdemeanor unless the prosecuting attorney shall first authorize the filing of such information. This restriction shall not apply in cases where the magistrate has reasonable cause to believe that the person to be charged may avoid apprehension or escape before approval can be obtained. Utah R. Crim. P. 5

Utah Constitution Article I Section 12 states:

Article I, Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

FACTS

1. On or about March 15, 2011 the Defendant was brought to the police station and was interrogated by two police officers.
2. Right before the Miranda warnings were given, the Defendant clearly stated that he had a hard time understanding all English and requested a Spanish Interpreter.
3. The police officers then told the Defendant that they could get an interpreter in a couple of minutes but never even attempted to do so.

4. The police officers then continued their interrogation by trying to use simply English and putting words into the Defendant's mouth, by coaching and completing sentences for him.

5. Because of such the Defendant could not have understood the very Miranda warnings that were given because he in fact requested an interpreter.

ISSUES

1. Should the Defendant have been provided an interpreter prior to being given his Miranda warnings and throughout his interrogation?

   a. Did the "focus" test of Escobedo apply?

   b. Did the "objective-subjective" test of Paz apply?

2. Had the Defendant's sixth amendment right to counsel attached at the time of the interrogation of Defendant at the Riverdale Police Station?

ARGUMENT

"[W]hether a defendant was subjected to custodial interrogation is a mixed question of fact and law..." State v. Levin, 2006 UT 50, 144 P.3d 1096, 1105. "After an officer has informed a suspect of his *Miranda* rights and has determined that the suspect understands those rights, the officer must then determine if the suspect is willing to waive those rights and answer questions. If the suspect responds ambiguously or equivocally, the officer must then focus on clarifying the suspect's intent." State v. Leyva, 951 P.2d 738, 744 (Utah 1997) (emphasis added).

I. THE DEFENDANT COULD NOT AND DID NOT UNDERSTAND THE MIRANDA WARNINGS.

As the police officer begins to notify the Defendant of his Miranda rights, Defendant stops the officer and asks if he can have the aid of someone that speaks Spanish, because he lacks complete English comprehension. The officer tells the Defendant that he has someone that can be there in a couple minutes to interpret. The officer asks the Defendant again if he can understand. Defendant responds by stating that he does not understand 100% and would feel better, hence implying the need for a Spanish interpreter. Rather than cease the interrogation until an interpreter is present, the police officers tell the Defendant the explanation that if he does not understand something, they will stop and keep explaining until he understands. Never, do the police stop to clarify anything, nor do the police officers provide the interpreter despite their representations that one was readily available. Even when Defendant becomes quiet and starts repeating the same phrases, indicating a lack of understanding, the police officers continue questioning him without providing Defendant the assistance of a Spanish interpreter. The police systematically denied the Defendant of his rights in an attempt to put words into the Defendant's

mouth. The officers deliberately denied the Defendant of his right to understand the rights that are afforded him.

The United States Supreme Court has stated "We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present. But the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves. '**[F]ull comprehension** of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process.' A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted." Davis v. United States, 512 U.S. 452, 460-61, 114 S. Ct. 2350, 2356, 129 L. Ed. 2d 362 (1994) (internal citations omitted) (emphasis added).

Therefore only after a after a "knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." Davis v. United States, 512 U.S. 452, 461, 114 S. Ct. 2350, 2356, 129 L. Ed. 2d 362 (1994) (emphasis added). *See also*, (Emspak v. United States, 349 U.S. 190, 194, 75 S. Ct. 687, 690, 99 L. Ed. 997 (1955) ("As pointed out in *Quinn v. United States*, 349 U.S. 155, 75 S.Ct. 668, no ritualistic formula or talismanic phrase is essential in order to invoke the privilege against self-incrimination. All that is necessary is an objection stated in language that a committee may reasonably be expected to understand as an attempt to invoke the privilege.")

It is clear that the Defendant lacked full comprehension because of the linguistic barrier, and the Defendant even states "My English is not perfect" therefore conveying to the officers that he would like an interpreter. He further states that he does have full English comprehension and specifically requests an interpreter. Despite the officers' representations that there was an interpreter readily available, no interpreter was ever provided, thus inhibiting Defendant's ability understand his rights and compromising the integrity of the interview. See, State v. Gutierrez, 864 P.2d 894, 899-900 (Utah Ct. App. 1993) ("*Miranda*'s allowance of an invocation of the right to remain silent "in any manner" arguably encompasses both equivocal and unequivocal requests.")

The Supreme Court actually outlined what police officers could do in light of confusion or if it is a question that the Defendant understands Miranda, It is clear that the Defendant lacked full comprehension because of the linguistic barrier, and the Defendant even states "My English is not perfect" therefore conveying to the officers that he would like an interpreter. See, State v. Gutierrez, 864 P.2d 894, 899-900 (Utah Ct. App. 1993) ("*Miranda*'s allowance of an invocation of the right to remain silent "in any manner" arguably encompasses both equivocal and unequivocal requests.")

> "Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. That was the procedure followed by the NIS agents in this case. Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel." Davis v. United States, 512 U.S. 452, 461, 114 S. Ct. 2350, 2356, 129 L. Ed. 2d 362 (1994).

As the Defendant could not fully understand what the officers were saying and told the officers as much, an interpreter should have been provided to the Defendant. If an interpreter

would have been provided then it would be clear if the Defendant fully comprehended his Miranda rights and knowingly and voluntarily proceeded to speak with the officers.

CONCLUSION

Inherent in the protections provided by the Fifth & Sixth Amendments of the United States Constitution and Article 1 Section 12 of the Utah Constitution is the right to understand what those rights are. Defendant was deprived on that because the officers failed to provide a Spanish interpreter, even after Defendant clearly stated that he did not fully comprehend English and requested the aid of an interpreter. Accordingly, any and all evidence obtained from information learned from Defendant's interrogation must be suppressed.

DATED this 12 day of April, 2011.

ARNOLD & WADSWORTH PLLC

Brian E. Arnold, Esq.
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I personally cased to be mailed by First-Class Mail, postage prepaid, a true and correct copy of the foregoing to the following, on this 13 day of April, 2010:

Dee Smith
Weber County Attorney
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Legal Assistant