

without an attorney, Mr. Tolley said “no, I have one, I would like for him to be here.” (*Id.* at 66.) When the agent explained “look, this is the only chance you’re going to be able to talk to me. I’m not coming back and I’m not waiting around for a lawyer,” Mr. Tolley then agreed to be interviewed. (*Id.* at 61).

Mr. Tolley’s testimony on this point was neither inherently incredible nor directly contradicted by the government’s witnesses. Agent Beccio offered no testimony on this point. He explained that Mr. Tolley was advised of his rights and indicated he understood them prior to signing the advice of rights card; he also testified that no threats or promises were made, and that Mr. Tolley agreed to speak with him. (*Id.* at 45-46.) He was not asked and did not indicate whether there was any conversation concerning Mr. Tolley’s interest in talking with his attorney. The advice of rights card did not contain any waiver of Mr. Tolley’s rights. (Gov’t. Supp. Resp., Ex. 7.) Finally, Det. Rickwood, who observed but did not take notes of the conversation, testified only that he did not “recall” or “remember” Mr. Tolley asking for an attorney.¹ (Hearing Tr., 69, May 11, 2009.)

¹ In contrast, when pressed by counsel as to whether Agent Beccio promised to make a recommendation to the Magistrate Judge if Mr. Tolley spoke to him, Det. Rickwood stated that “It did not occur.” (Hearing Tr., 69, May 11, 2009.)

Finding that the preponderance of the evidence thus establishes that Mr. Tolley made an unequivocal assertion of his wish to have counsel present, which was not honored by the government's agent, I will grant the motion to suppress on that basis.²

October 8, 2009
Date

/s/
Catherine C. Blake
United States District Judge

² I would deny the motion if it were based only on a violation of the prompt presentment rule. *See Corley v. United States*, 129 S.Ct. 1558 (2009). Mr. Tolley was in state custody and had been presented to a state judicial officer prior to the time of the questioning, unlike the defendant in *Corley*. *See id.* at 1565 (explaining that the defendant was not presented before a Magistrate Judge until 29 hours after his arrest). Further, I denied during the hearing any claim that the statement was involuntary as a result of coercion or inducement. (Hearing Tr., 92-93, May 11, 2009.)