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STATE OF IDAHO
COUNTY OF KOOTENAI } SS
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, Plaintiff, V. **JOSEPH E. DUNCAN, III** Defendant.	**CASE NUMBER CRF-05-13674** **REPLY MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS AND EXCLUDE STATEMENTS**

The defendant, Joseph E. Duncan, III, by and through his attorney, John M Adams, Public Defender, hereby submits the following Reply Memorandum in Support of Motion to Suppress and Exclude Statements.

A. PRE MIRANDA STATEMENTS TO OFFICERS

The State's argument here seems to be that since Duncan requested an attorney in the parking lot of Denny's, placing him in an interview room with Deputy Dollard for an hour to await the arrival of a detective to interrogate him is not the functional equivalent of custodial interrogation and therefore no Miranda warnings were required until the detective arrived. However, the State's argument ignores both the facts and the law.

Duncan invoked his right to an attorney and to remain silent several times before the detective arrived and finally Mirandized him. What possible purpose was there to placing a

suspect, who had already invoked his rights, alone in an interview room with a policeman for one hour, if not to set the stage for eliciting statements from the suspect? Actions by police that are designed to elicit incriminating responses are the functional equivalent of interrogation. *Rhode Island v. Innis*, 446 U.S. 291 (1980).

The police chose to ignore Duncan's invocation of his rights; the police chose to withhold Miranda warnings; the police chose to place Duncan in an interrogation room with a policeman for more than an hour without Miranda warnings. Now, the State chooses to ignore the facts and to ask this Court to do so also. The State also asks this Court to simply accept that no questions, other than routine booking questions, were asked of Duncan by any police before Detective Maskell Mirandized Duncan more than an hour after custody began. This is the type of trial practice that ensures decades of appellate litigation in capital cases.

B. STATEMENTS TO CAPTAIN CHAPLAIN SMALLEY

Chaplain Smalley is a Captain in the Kootenai County Sheriff's Department. Captain Smalley either met with Duncan in his capacity as a law enforcement officer or as a Chaplain. Before meeting with Duncan in his capacity as a law enforcement officer, Smalley needed to Mirandize Duncan. *Miranda v. Arizona*, 384 U.S. 436 (1966). Any person subject to a custodial interrogation must be advised of certain rights, including the right to remain silent and the right to counsel. *Id.* at 444-445. If police conduct a custodial interrogation of a suspect without issuing Miranda warnings the suspect's comments are inadmissible. *Id.* In the present case, Captain Smalley asked Duncan questions and conducted a 45-minute interview with Duncan without ever issuing the Miranda warnings. Because no Miranda warnings were issued, Duncan's statements to Captain Smalley are inadmissible. *Miranda, supra.*

In the alternative, Duncan's statements to Captain Smalley, in his capacity as Chaplain, are privileged communications under IRE 505. IRE 505 does not contain any exceptions to religious privilege; in other words, the privilege is absolute. Captain Smalley's warnings to Duncan regarding privileged communication during their meeting are ineffective at waiving confidentiality because privilege is the communicator's choice to invoke and rescind not the clergyman's. See I.C. § 9-203(3). Moreover, Duncan never acknowledged that he understood the warnings regarding confidentiality.

The State cites *State v. Hedger*, 768 P.2d 1331 (1989) to support its proposition that Smalley and Duncan's communication is not privileged. However, *Hedger* is not even remotely on point. *Hedger* deals with a third person overhearing a potentially privileged communication, not simply the fact that a communication between a clergyman and a lay person took place. *Hedger, supra.*

C. STATEMENTS TO HODGSON

The State incorrectly distinguishes the instant case from *Estelle v. Smith*, 452 U.S. 454 (1981). While on the facts the case is distinguishable, it is obvious that the rule applies to this situation. In *Buchanan v. Kentucky*, 483 U.S. 402 (1987), the Supreme Court clarified its position in *Estelle v. Smith*, stating "thus, in our view, *Smith* had not received the opportunity to discuss with his counsel the examination or its scope." *Buchanan*, 483 U.S. at 424. In *Buchanan*, the Supreme Court reasoned that *Smith* stands for the proposition that when a defendant is subject to examination by a psychologist and his Sixth Amendment right to counsel has attached, counsel must be informed that such an examination is going to take place. *Buchanan*, 483 U.S. at 424-425.

In the present case, there was no notification to defense counsel. This prevented counsel from advising his client on how to proceed. *See Estelle v. Smith, supra; Buchanan, supra.* Moreover, the psychologist was not court ordered but sent on the orders of the State. The State contends that Hodgson's interview is not coercive because it was not court ordered and then cites *State v. Curless* to support its position. *Curless* involved a court ordered psychological evaluation. *Curless*, 44 P.3d 1193.

In fact, when the State sends a mental health expert, without court orders, to see a defendant, in an effort to elicit information, under the auspices of regular procedure, any defendant would suspect he has to comply. Such a maneuver by the State creates a presumption of coerciveness because it leaves the defendant without any options when he is not Mirandized. The entire point of *Miranda* is to let a defendant know that he can choose to remain silent and that he can have his attorney present. *See Miranda, supra.* Here, without a court order, the State sent in a mental health expert. That mental health expert conducted a custodial interrogation, asking the defendant specific questions while he was not free to leave. *See Miranda, supra; Rhode Island v. Innis*, 446 U.S. 291 (1980). Duncan had the right to remain silent and the right to his attorney during the evaluation but the State failed to advise him of his rights. *See Miranda; Estelle v. Smith, supra.* Therefore, the statements made by Duncan to Hodgson are inadmissible.

D. FBI STATEMENTS

The State correctly points out that *Miranda v. Arizona* stands for the proposition that once a defendant invokes his right to remain silent and requests counsel that the interrogation must cease. *Miranda, supra.* A custodial interrogation exists when the defendant or suspect is not free to leave and law enforcement is expressly asking questions, or making statements or

conducting actions that are reasonably likely to elicit an incriminating response. *State v. Monroe*, 645 P.2d 363 at 364 (Idaho 1982) *citing Innis, supra.* For a valid waiver of these rights to exist the State must show that the waiver was voluntary, knowingly and intelligently made. *Miranda*, 384 U.S. at 444.

The State does not acknowledge the fact that undersigned counsel called the jail, in response to a request from Duncan to contact his attorney, at 10pm the evening the FBI agents interrogated Duncan. Counsel told Sgt. Forsyth that if Duncan requests to speak with him again, have Duncan call him. Counsel gave his telephone number to Sgt. Forsyth. Counsel also told Sgt. Forsyth that no one was to speak with his client without counsel present. Minutes later, Duncan again asked to speak with his attorney but Sgt Forsyth told Duncan that his attorney was not available until the next day.

When the FBI agents returned at 11pm, at the request of Duncan, Duncan was under the impression that his attorney was unavailable, a deliberate misrepresentation of the truth by Sgt. Forsyth. Agent Sotka then told Duncan that if he wanted to tell the truth, now would be a good time. All of this created a coercive environment for Duncan. *See Innis, supra.*

Duncan cannot initiate a conversation that he was coerced into having. Duncan requested his attorney, but was expressly denied that option by Sgt Forsyth. Then the FBI agents returned and created an environment that coerced Duncan into talking by making subtle statements designed to get Duncan to talk. Therefore, Duncan's statements to the FBI are inadmissible because they violated *Miranda, Innis, and Monroe, supra.*

As a result of the repeated attempts by State and federal agents to talk with Mr. Duncan without the presence of his attorney and the State misleading Duncan into believing his attorney was unavailable when he actually was, First District Court Judge John P. Luster issued a

Temporary Writ of Mandate to the State to prevent further contact with Duncan. The Writ was issued in Kootenai County Case No. SP-05-5517, entitled *Duncan v. Rocky Watson.* A copy of the Writ is attached hereto and incorporated herein as Exhibit A. This Court is requested, . pursuant to IRE 201, to take judicial notice of the Writ.

In issuing the Writ, Judge Luster specifically found that Duncan properly presented the State with his invocation of rights to remain silent and to counsel. Judge Luster also found that the State was not honoring those constitutional rights. *See*, Exhibit A.

Both Duncan and his counsel informed government agents on many, many occasions that he desired to communicate through counsel only, if at all. However, despite the repeated invocation of the right to remain silent and to the presence of counsel, government agents persisted and persisted in communicating with and interrogating Duncan.

The statements that are alleged to have been made by Duncan under these circumstances are not the product of a knowing, voluntary waiver of his rights.

CONCLUSION

The statements referred to in Duncan's Motion to Suppress were all the product of unconstitutional practices by the State and its agents. The Motion should be granted.

DATED this 15 day of June, 2006.

OFFICE OF THE KOOTENAI
COUNTY PUBLIC DEFENDER

BY: ____________________

JOHN M. ADAMS
PUBLIC DEFENDER

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox on the 15th day of June, 2006, addressed to:

Kootenai County Prosecutor