STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'clock _____M
CLERK, DISTRICT COURT

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Deputy

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,

vs.

JACOB OLIVER MONTEGARY,

Defendant.

Case No. **CRF 2010 3948**

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

Defendant JACOB OLIVER MONTEGARY's Motion to Suppress is **GRANTED**.
Deputy Prosecuting Attorney Arthur Verharen, lawyer for the Plaintiff.
Dominic M. Bartoletta, lawyer for Defendant Montegary.

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I. FACTUAL AND PROCEDURAL BACKGROUND.

Defendant Jacob Montegary (Montegary) claims his Sixth Amendment right to counsel was violated when police conducted and recorded a telephonic interview with Montegary on March 9, 2010, without his attorney present.

On February 8, 2010, the police received a report of a burglary at 2333 N. 12th Street in Coeur d'Alene, Idaho. Coeur D'Alene Police Report, p. 2. Detective Mark Knapp was assigned to the case and contacted Brian Walther (Walther), the owner of the house, who lived there with his three children; Jordan, Kyle and Emily. *Id.* On February 8, 2010, after Walther had left for work and the boys had left for school, his daughter Emily reported

hearing footsteps in the house, and told her brothers about it later that day. *Id.* The boys proceeded to talk to the neighbors. *Id.*, p. 2.

Next door to the Walther house is a halfway house known as "Men's Clean and Sober Recovery House," located at 2326 North 12th Street. *Id.*, p. 1. Residents of this house include; defendant Jacob Montegary (Montegary), Steven Dingman (Dingman) and Robert Desaussure (Desaussure). *Id.*, p. 2-3. On the morning of February 8, 2010, Dingman discovered twenty dollars missing from his wallet. *Id.*, p. 1. Dingman suspected Montegary and subsequently told Montegary that he would have to leave the house. *Id.* After Montegary had left, Dingman and Desaussure discovered a DeWalt Reciprocating Saw underneath the bed while cleaning Montegary's room. *Id.*, p. 2. The saw was found to be Walther's, and Walther further discovered Xbox games and a Nintendo DS missing from his basement. *Id.*, p. 2; Supplement to Police Report, p. 2.

On information from Desaussure, Officer Knapp went to JSM Pawn, owned by John Marshall (Marshall), and discovered that Montegary had pawned a Nintendo DS on February 8, 2010. Supplement to Police Report, p. 2. Walther later identified the Nintendo DS as his. *Id.* Based on this information, Officer Knapp requested an Arrest Warrant for Montegary charging him with Residential Burglary. *Id.*

On March 3, 2010, a criminal complaint was filed and a warrant of arrest was issued for Montegary for the felony crime of burglary under Idaho Code §18-1401. Criminal Complaint, p. 1; Warrant of Arrest, p.1. On March 26, 2010, attorney Dominic Bartoletta filed a Notice of Appearance on behalf of Montegary. Notice of Appearance, p. 1. Montegary was arrested on April 13, 2010, and on that same day, Montegary asserted his Fifth, Sixth and Fourteenth Amendment rights in a request for a preliminary hearing. Notice of Appearance and Request for Preliminary Hearing, p.1.

At the preliminary hearing, Montegary stated that though formal charges had been filed on March 3, 2010, Officer Knapp conducted and recorded a telephonic interview with Montegary on March 9, 2010, regarding the February 8, 2010, incident, without his attorney present. Court Minutes 5-4-10, p. 14. Montegary further asserted that he was not advised of his right to counsel prior to or during the interview and that, during the interview, he made a number of incriminating statements. *Id.*

On June 15, 2010, Montegary filed his Motion to Suppress and Memorandum in Support Thereof. Montegary moves to suppress all statements made during that telephonic conversation with Officer Knapp in violation of Montegary's Sixth Amendment right to counsel. Motion to Suppress and Memorandum in Support Thereof, p. 1. The State field its Brief in Opposition to Defendant's Motion to Suppress on July 22, 2010. Montegary filed Defendant's Brief in Reply on July 26, 2010.

On July 28, 2010, this Court heard oral argument on Montegary's Motion to Suppress. At that hearing, additional cases were cited by Montegary's counsel: *Gilbert v. California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); *Moore v. Illinois,* 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977); *State v. Ventris***,** 285 Kan. 595, 176 P.3d 920 (Kan. 2008); and *People v. Gonzalez-Ramirez,* Not Reported in Cal.Rptr.3d, 2009 WL 497735 (Cal.App. 1 Dist.,2009).

At that July 28, 2010, hearing, the State asked the Court to take judicial notice of the following facts: 1) that the Complaint in this case was filed on March 3, 2010, 2) that the conversation between Montegary and Knapp occurred on March 9, 2010, and 3) Montegary did not make his initial appearance until April 13, 2010. No objection was made to this request by counsel for Montegary, so the request was granted.

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II. STANDARD OF REVIEW.

In an appeal from an order denying a motion to suppress, the Court of Appeals will not disturb findings of fact supported by substantial evidence, but will freely review whether the trial court's determination as to whether constitutional requirements were satisfied in light of the facts. *State v. Whiteley,* 124 Idaho 261, 264, 858 P.2d 800, 803 (Ct. App. 1993). When evaluating the trial court's determination of voluntariness of consent given, reviewing courts will not disturb such a decision on appeal if the trial court's finding is based on reasonable inferences to be drawn from the record. *State v. Post,* 98 Idaho 834, 837, 573 P.2d 153, 156 (1978). Whether consent to a search was voluntary is a question of fact and reviewing courts accept the factual findings of a trial court unless they are clearly erroneous. *State v. McCall,* 135 Idaho 885, 886, 26 P.3d 1222, 1223 (2001). Findings are not deemed clearly erroneous when supported by substantial evidence in the record. *State v. Benson,* 133 Idaho 152, 155, 983 P.2d 225, 228 (Ct.App. 1999).

III. ANALYSIS.

An accused person's right to counsel is expressly guaranteed by the Sixth Amendment. *State v. Contreras-Gonzalez*, 146 Idaho 41, 45, 190 P.3d 197, 201 (Ct.App. 2008). This right is critical to the fair administration of our adversarial justice system because an ordinary layperson typically does not possess the legal skills necessary to adequately defend himself and therefore requires counsel. *State v. Valdez*, 117 Idaho 302, 304, 787 P.2d 288, 290 (Ct.App. 1990).

The right to counsel "…applies to all 'critical stages' of the proceedings, starting when adversary judicial proceedings are initiated, whether by formal charge, preliminary hearing, indictment, information, or arraignment." *Contreras-Gonzalez*, 146 Idaho 41, 45, 190 P.3d 197, 201, citing *Kirby v. Illinois,* 406 U.S. 682, 689, 92 S.Ct. 1877 1882, 32

L.Ed.2d 411, 417-18 (1972); *State v. Bagshaw,* 141 Idaho 257, 260 n. 2, 108 P.3d 404, 407 n. 2 (Ct.App. 2004); *State v. Shelton,* 129 Idaho 877 880-81, 934 P.2d 943, 946-47 (Ct.App. 1997). This concept has been consistently upheld by the United States Supreme Court decisions. *Brewer v. Williams*, 430 U.S. 387, 398, 97 S.Ct. 1232, 1239 (1977).

In the present case, the State argues:

> This Sixth Amendment protection does not attach immediately upon charging, it attaches when an adversary judicial proceedings has [sic] been initiated. *Rothgery v. Gillespie County,* 554 U.S. 191 (2008). The phrase "adversary judicial proceedings" has been clearly defined by the Supreme Court:
>
> > A criminal defendant's initial appearance before a magistrate judge, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel. Id at 192.

Brief in Opposition to Defendant's Motion to Suppress, p. 2. This argument by the State that "adversary judicial proceedings" does not occur until "a criminal defendant's initial appearance before a magistrate judge", attributed to *Rothgery*, completely ignores *Contreras-Gonzalez*, but more importantly, completely ignores the following quote from *Rothgery*:

> The Sixth Amendment right of the "accused" to assistance of counsel in "all criminal prosecutions" is limited by its terms: "it does not attach until a prosecution is commenced." *McNeil v. Wisconsin,* 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991); see also *Moran v. Burbine,* 475 U.S. 412, 430, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). We have, for purposes of the right to counsel, pegged commencement to " 'the initiation of adversary judicial criminal proceedings-**whether by way of formal charge, preliminary hearing, indictment, information, or arraignment**,' " *United States v. Gouveia,* 467 U.S. 180, 188, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984) (quoting *Kirby v. Illinois,* 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (plurality opinion)). The rule is not "mere formalism," but a recognition of the point at which "the government has committed itself to prosecute," "the adverse positions of government and defendant have solidified," and the accused "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby, supra,* at 689, 92 S.Ct. 1877.

554 U.S. 191, 128 S.Ct. 2578, 2583, 171 L.Ed.2d 366 (2008). (footnote omitted, bold added).

Though the U.S. Supreme Court has stated that the Sixth Amendment applies at the first appearance before a judicial officer in *Rothgery v. Gillespie County*, (a case dealing with a 42 U.S.C. § 1983 claim, not a motion to suppress in a criminal proceeding) the Supreme Court also expressly *included* proceedings such as formal charges, preliminary hearings, indictments, information, or arraignments. *Rothgery v. Gillespie County*, 128 S.Ct. 2578, 2584 (2008). The Sixth Amendment is limited in that it doesn't attach until "prosecution commences." *Id*. However, the listed proceedings are all events which the Supreme Court acknowledges as falling under the Sixth Amendment. *Id*. A "proceeding" may include the institution of an action. BLACK'S LAW DICTIONARY 1221 (7th ed. 1999). A "complaint" (in criminal law) is a *formal charge*, accusing a person of an offense. BLACK'S LAW DICTIONARY 279 (7th ed. 1999).

Once adversary proceedings have commenced against an individual, he has a right to legal representation when questioned by the government. *Brewer*, 430 U.S. 398, 97 S.Ct. 1239. Under *Miranda*, the defendant must be warned of his right to counsel before interrogation. *Carter v. State*, 108 Idaho 788, 792, 702 P.2d 826, 830 (1985) quoting *Miranda v. Arizona*, 384 U.S. 475-472, 86 S.Ct. 16, 26-27 (1966). This right to counsel, however, is not dependent on the defendant's request. *Brewer*, 430 U.S. 404, 97 S.Ct.1242.

The Sixth Amendment right to counsel may be waived by a defendant only when it constitutes an intentional relinquishment or abandonment of a known right. *Contreras-Gonzalez*, 146 Idaho 41, 45, 190 P.3d 197, 201. Such a waiver is valid only if the relinquishment is voluntary, knowing and intelligent. *Montejo v. Louisiana*, 129 S.Ct. 2079,

2085 (2009). A waiver is valid if the accused is "made sufficiently aware of his right to have counsel present during the questioning, and of the possible consequences of a decision to forgo the aid of counsel." *Patterson v. Illinois*, 487 U.S. 285, 292-293, 108 S.Ct. 2389, 2394-2395 (1988). The United States Supreme Court in *Patterson* stated that when a defendant is read his *Miranda* rights (which do include the right to have counsel present during questioning) and agrees to waive those rights, that typically is sufficient to be considered a knowing and intelligent waiver of right to counsel. *Id*. at 296, 2397.

If a defendant invokes his right during custodial interrogation, further interrogation by the authorities is forbidden, unless the defendant subsequently initiates the contact. *Edwards v. Arizona*, 451 U.S. 477, 484-485, 101 S.Ct. 1880, 1884-1885 (1981). The State bears the burden that an alleged waiver is valid and when evaluating the validity of a waiver, courts should "indulge every reasonable presumption against waiver of a fundamental constitutional right. *Contreras-Gonzalez*, 146 Idaho 41, 45, 190 P.3d 197, 201.

The U.S. Supreme Court has touched on the scenario when the defendant is not in custody in *Montejo v. Louisiana*. 129 S.Ct. 2090. In such situations, it is very unlikely, in the event of a waiver, that it is involuntary and coerced because when a defendant is not in custody, he is in control and can shut his door or walk away from questioning. *Id*.

In this case, Montegary's Sixth Amendment right was invoked when the Criminal Complaint was filed against him on March 3, 2010, because a complaint is defined as a "formal charge," which is one of the examples of critical proceedings identified by both the Unites States Supreme Court and the Idaho Courts in *Contreras-Gonzalez* and *Rothgery*. With the attachment of that right comes the requirement that the defendant be advised of his right to counsel before questioning, as stated in *Carter*. Throughout his telephone

conversation with Officer Knapp, Montegary was never advised of his right to counsel.

Furthermore, if Montegary was never advised of his right to counsel, then it is impossible for him to waive his right to counsel. *Patterson* requires for a waiver to be valid, a defendant must first be made sufficiently aware of his right to counsel and the potential consequences of foregoing that right. Because there was no waiver, there is no issue whether or not any waiver would be considered coerced, whether Montegary was in custody or not. Therefore, there could not have been a waiver of right here because Montegary was never advised of his right to counsel.

The cases cited by Montegary at the July 28, 2010, hearing must be discussed. In *State v. Ventris***,** 285 Kan. 595, 606, 176 P.3d 920, 928 (Kan. 2008), the Kansas Supreme Court held:

> A criminal prosecution commences when a complaint is filed and a warrant issued. The defendant's Sixth Amendment right to counsel attaches at that point. *State v. McCorgary* 218 Kan. 358, 361, 543 P.2d 952 (1975) *cert. denied* 429 U.S. 867, 97 S.Ct. 177, 50 L.Ed.2d 147 (1976). Once a criminal prosecution has commenced, the defendant's statements made to an undercover informant surreptitiously acting as an agent for the State are not admissible at trial for any reason, including the impeachment of the defendant's testimony. *Cf. State v. Pennington* 276 Kan. 841, 846, 80 P.3d 44 (2003) (allowing statements from an undercover jailhouse informant acting as an agent for the State because the defendant had not been charged with the crime at issue). Although trial judges are called upon to determine the admissibility of evidence to effectuate the courts' truth-seeking function, there is nothing in our federal or state constitutions that requires us to make truth-seeking the overriding principle that trumps our constitutionally protected rights. By following the first approach, the Court of Appeals primarily focused on admissibility of rebuttal evidence rather than the impact of such a glaring violation of a constitutional right.

In *Gilbert v. California,* 388 U.S. 263, 87 S.Ct. 1951, 1953, 18 L.Ed.2d 1178 (1967), the United States Supreme Court held:

> The taking of the exemplars was not a ‘critical’ stage of the criminal proceedings entitling petitioner to the assistance of counsel. Putting aside

> the fact that the exemplars were taken before the indictment and appointment of counsel, there is minimal risk that the absence of counsel might derogate from his right to a fair trial.

Montegary's attorney argued that *Gilbert* stands for the proposition that the right to counsel is not simply limited to "trial." Certainly, the United States Supreme Court did not limit the "critical stage" analysis to simply mean "trial", but beyond that, *Gilbert* is not really very instructive to the issue to be decided by this Court in Montegary's motion to suppress. In *Moore v. Illinois,* 434 U.S. 220, 226-27, 98 S.Ct. 458, 463-64, 54 L.Ed.2d 424 (1977), the United States Supreme Court held:

> In *Kirby v. Illinois,* 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), the plurality opinion made clear that the right to counsel announced in *Wade* and *Gilbert* attaches only to corporeal identifications conducted "at or after the initiation of adversary judicial criminal proceedings-whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." 406 U.S., at 689, 92 S.Ct., at 1882. This is so because the initiation of such proceedings "marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Id.,* at 690, 92 S.Ct., at 1882.

And when confronted with the issue as to when adversary proceedings are initiated, the United States Supreme Court held under Illinois law: **"**The prosecution in this case was commenced under Illinois law when the victim's complaint was filed in court. *See* Ill.Rev.Stat., ch. 38, § 111 (1975)." 434 U.S. 220, 228, 98 S.Ct. 458, 464. Finally, *People v. Gonzalez-Ramirez,* Not Reported in Cal.Rptr.3d, 2009 WL 497735 (Cal.App. 1 Dist.,2009), reiterates what this Court stated above regarding the State's overly narrow interpretation of *Rothgery,* above. In *Gonzalez-Ramairez,* the California Court of Appeal, First District, Division 3, held:

> The more recent decision of the United States Supreme Court in *Rothgery v. Gillespie County* (2008) --- U.S. ---- [128 S.Ct. 2578, 2581] does not undercut the unequivocal decision in *Viray.* In that case the high court stated that "the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are

> imposed on his liberty." (*Ibid.*) There, however, the court was considering a claim for damages under 42 United States Code section 1983 by a person who had wrongly been accused of a crime but not provided a lawyer and consequently retained in custody for three weeks after he was brought before a magistrate and informed of the accusation against him. The court was not considering whether the right to counsel may attach when an individual has been formally charged but not arraigned, although in dicta it implied that the right can attach sooner, at the point of arrest. (*Id.* at p. ---- [*id.* at p. 2590].) Indeed, the *Rothgery* court reiterated its statement in *Kirby v. Illinois* that "[w]e have for purposes of the right to counsel, pegged commencement to ' "the initiation of adversary judicial criminal proceedings-whether by way of formal charge, preliminary hearing, indictment, information, or arraignment ." ' " (*Id.* at p. ---- [*id.* at p. 2583].)

IV. CONCLUSION AND ORDER.

For the reasons stated above, Montegary's Motion to Suppress must be granted.

IT IS HEREBY ORDERED Montegary's Motion to Suppress is GRANTED. All statements made by Montegary to Detective Mark Knapp on March 9, 2010, are suppressed.

DATED this 28th day of July, 2010

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of July, 2010 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Dominic M. Bartoletta
Prosecuting Attorney – Arthur Verharen/Amy Borgman

CLERK OF THE DISTRICT COURT KOOTENAI COUNTY

BY:_____
Deputy