Robert John
Law Office of Robert John
P.O. Box 73570
Fairbanks, Alaska 99707
907-456-6056/907-456-6057 (fax)
Attorney for Francis A. S. Cox

IN THE SUPERIOR COURT OF THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

STATE OF ALASKA	)
	)
Plaintiff,	)
	)
vs.	)
	)
FRANCIS A. S. COX,	)
LONNIE G. VERNON,	)
KAREN L. VERNON,	)
COLEMAN L. BARNEY,	)
MICHAEL O. ANDERSON,	)
RACHEL A. BARNEY,	)
	)
Defendant.	)
_____	)

Case No. 4FA-11-796 CR
Case No. 4FA-11-797 CR
Case No. 4FA-11-798 CR
Case No. 4FA-11-799 CR
Case No. 4FA-11-815 CR
Case No. 4FA-11-896 CR

REPLY TO THE STATE'S OPPOSITION TO MOTION TO SUPPRESS ALL EVIDENCE ARISING FROM THE FEDERAL GOVERNMENT'S ILLEGAL SPYING AND RECORDING WITHIN THE STATE OF ALASKA

VRA Certification

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in A.S. 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

I. OVERVIEW OF THE STATE'S OPPOSITION

The State has provided many interesting details concerning the genesis of Mr. Con's spying on Schaeffer Cox and the course of the concerted efforts between State and federal agents involving Mr. Con. Those efforts apparently ran the gamut, starting with a State referral of Mr. Con to the FBI, followed by joint State-and-federal use of Mr. Con as an informant, followed by the State working with the federal authorities to provide support when Mr. Con was commissioned into the Peacemakers, followed (and preceded) by ongoing sharing of information between the FBI and the Alaska Troopers, and culminating in the extensive involvement of numerous members of State and municipal law enforcement commencing in early to mid-February of this year.

While the above demonstrates an ongoing and concerted effort between State and federal law enforcement dating back to 2010 (and beyond dispute as of February 2011), that is not what this motion is about. Rather, as indicated at page 7 & n.36 of Schaeffer Cox's memorandum in support of this motion, this motion involves the constitutional principle that "the law of the jurisdiction where the search occurred is controlling,"[1] and the simple fact that the jurisdiction where the search occurred is Alaska.

Perhaps the State's strategy is to obscure and confuse by trying to divert the motion to become an examination of the State's contention of non-cooperation between State and federal actors, a contention that is belied by the facts. In any event, in an Orwellian twist, the State seeks to re-define "where" to mean "who." Consistent with

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[1] D'Antorio v. State, 926 P.2d 1158, 1161 n.4 (Alaska 1996).

such redefinition, the State concludes by either completely misconstruing or neglecting to discuss the four cases from other States that Schaeffer Cox cited in support of this motion.

II. DISCUSSION

At page 5 of its Memorandum,[2] the State mistakenly and repeatedly refers to Pooley[3] as being a decision from the Alaska Supreme Court when Pooley is a product of the Alaska Court of Appeals. The Alaska Supreme Court, however, did essentially adopt the reasoning of Pooley in the D'Antorio case.[4]

As the State correctly observes, Pooley itself adopted the reasoning of a California Supreme Court case, People v. Blair.[5] The State is thus equally correct when it observes that "Blair is most instructive in this case."[6]

In Blair, the Court determined that the seizure of telephone records by an FBI agent in Pennsylvania complied with both federal law and the law of Pennsylvania, even though such a seizure would have violated the California Constitution and thus would have rendered the resulting evidence inadmissible if it occurred in California.[7] Accordingly, under the reasoning of Blair, the actions of the FBI in violation of the

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[2] Despite Cox's counsel having pointed out to the State in the Reply memoranda filed August 4 that the State is required to put page numbers on its pleadings, the State has persisted in presenting the Court with unnumbered filings. Thus, Cox's counsel is referring to the pages as he has hand numbered them.

[3] Pooley v. State, 705 P.2d 1293 (Alaska app. 1985).

[4] See D'Antorio, 926 P.2d at 1161 n.4.

[5] People v. Blair, 602 P.2d 738, 159 Cal. Rptr. 818 (Cal. 1979); see Pooley, 705 P.2d 1303.

[6] State's Memorandum at 5.

Alaska Constitution, which occurred within Alaska, render the resulting evidence inadmissible in Alaska.

In declining to exclude the evidence in California's courts, the Blair Court reasoned that "since the seizure was not illegal where it occurred, exclusion would serve no deterrent effect in either jurisdiction."[8] Likewise, in concluding that "the vindication of judicial integrity"[9] did not require suppression, the Court explained:

> Defendant was a resident of the jurisdiction in which the seizure occurred. Since the search was legal there, his expectation of privacy was not impaired under the laws of the state in which he resided. Unlike the situation that arises when a seizure contrary to California law occurs in this state, the venture is not lawless, and the government is therefore not profiting from illegal conduct or acting as a law-breaker.[10]

In contrast to the circumstances in Blair, Alaskans' expectations of privacy are impaired when federal agents engage in warrantless recording of their conversations. "Alaska's Constitution mandates that its people be free from invasions of privacy by means of surreptitious monitoring of conversations."[11] Nor has the Court ever limited such reasonable expectations of privacy to protect against only the intrusions of State agents. Instead, the Alaska Supreme Court "has emphasized that the primary purpose of both Alaska provisions - section 14's search and seizure protection and section 22's

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[7] See Blair, 602 P.2d at 737-38, 159 Cal. Rptr. at 747-48.
[8] Blair, 602 P.2d at 748, 159 Cal. Rptr. at 828 (emphasis added).
[9] Id.
[10] Id. (emphasis added).
[11] Glass v. State, 583 P.2d 872, 881 (Alaska 1978).

privacy guaranty - is to protect personal privacy and dignity against unwarranted intrusion by the State, or other governmental actors."[12]

At pages 6-7 of its Memorandum, the State would rewrite the Alaska Supreme Court's pronouncement that "the law of the jurisdiction where the search occurred is controlling,"[13] to be "the law of the jurisdiction of the government agent who conducted the search is controlling." Not only is the State's construction of D'Antorio contrary to the plain meaning of the operative word "where," the State's construction simply makes no sense because non-Alaskan government agents -- be they from California or the FBI or the KGB -- could simply come to Alaska and violate with impunity the constitutional rights of Alaskans and then turn the illegally-obtained evidence over to Alaskan authorities on a "reverse silver platter" for prosecution.[14]

In Elkins v. United States, 364 U.S. 206, 223 (1960), the United States Supreme Court expressly rejected the "silver platter doctrine," and thus evidence illegally-obtained by State officers is inadmissible in federal court.[15] It would then be odd indeed if, despite the greater protections of privacy found in Alaska's Constitution, Alaska's courts were to admit evidence illegally obtained by federal agents operating within Alaska.[16]

Even if the inadmissibility of the illegally-obtained evidence in this case had not been previously decided in D'Antorio and Pooley, the principles underlying Alaska's

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[12] Anchorage Police Dept. Employees Association v. Municipality of Anchorage, 24 P. 3d 547, 550 (Alaska 2001) (quotation and citation omitted) (emphasis added).
[13] D'Antorio, 926 P.2d at 1161 n.4.
[14] See State v. Torres, 252 P.3d 1229, 1236 n.13 (Hawaii 2011).
[15] See Torres, 252 P.3d at 1236 n.13.

exclusionary rule, and the even-broader protections of Evidence Rule 412, both require that the illegally-obtained evidence be held inadmissible. As the Alaska Supreme Court has explained:

> The purpose of the exclusionary rule is two-fold: to deter police from using unconstitutional methods of law enforcement, and to preserve the integrity of the judicial system by not permitting the courts to be a party to the lawless invasion of a citizen's constitutional rights.[17]

The even-more-protective remedy embodied in Evidence Rule 412 is premised on the same two purposes, plus the additional purpose of safeguarding the constitutional rights of Alaskans.[18] All three purposes are manifestly furthered by suppressing the illegally-obtained evidence in this case.[19] The alternative would be to encourage State and federal cooperation to evade Alaska law.[20]

Perhaps evading Alaska law was the premise behind Investigator Thompson's obtaining search warrants for the illegal recordings, as though he could thereby launder the illegality that had blatantly and repeatedly occurred during the previous six months or more. Of course, the Court cannot and will not sanction such illegality-laundering. It is a "fundamental principle that the product of an unlawful search cannot provide probable cause for the later issuance of a search warrant."[21]

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[16] See Anchorage Police Dept. Employees Association, 24 P.3d 550.
[17] Waring v. State, 670 P.2d 357, 361 (Alaska 1983) (citations omitted).
[18] See Harker v. State, 663 P.2d 932, 934 (Alaska 1983).
[19] See Torres, 252 P.3d at 1236-40.
[20] See id. at 1240.
[21] Schmid v. State, 615 P.2d 565, 575 (Alaska 1980).

At pages 7-8 of its Memorandum, the State mischaracterizes three of the four cases from other States which Schaeffer Cox has cited in support of this motion. As to the fourth case, State v. Cardenas-Alvarez, 25 P.3d 225 (N.M. 2001), the State does not even mention it.

In Cardenas-Alvarez, consistent with Alaska constitutional jurisprudence,[22] the Court concluded that there was no principled reason "to selectively protect New Mexico's inhabitants from intrusions committed by state but not federal governmental actors. Nor do we believe such a limitation is appropriate."[23] As the Court further explained:

> We acknowledge the supremacy of the federal government and encourage federal agents to continue to enforce the law in as vigilant a manner as the federal Constitution permits. When such vigilance violates the protections guaranteed by our state constitution, however, we will not abandon our guard of those protections in order to accommodate evidence thereby yielded. Although we do not claim authority to constrain the activities of federal agents, we do possess the authority - and indeed the duty - to insulate our courts from evidence seized in contravention of our state's constitution.[24]

At page 7 & n.19 of its Memorandum, the State discusses State v. Rodriguez, 854 P.2d 399 (Or. 1993). The State's focus on the discussion in Rodriguez that the Fourth Amendment is not a basis to vindicate violations of State constitutional law[25] is not germane to this case. While the State correctly notes that the Rodriguez Court did not suppress the guns in the State case, the State omits to mention that the reason for that

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[22] See Anchorage Police Dept. Employees Association, 24 P.3d at 550.
[23] State v. Cardenas-Alvarez, 25 P.3d 225, 232 (N.M. 2001).
[24] Id. at 233 (emphasis added).
[25] See State v. Rodriguez, 854 P.2d 399, 409 (Or. 1993).

ruling was that discovery of the guns was not the poisonous fruit of any illegality which occurred.[26]

If, instead, the State had focused on the pertinent part of Rodriguez, the State would have encountered the following:

> If the government seeks to rely on evidence in an Oregon criminal prosecution, that evidence must have been obtained in a manner that comports with the protections given to the individual by Article I, section 9, of the Oregon Constitution. It does not matter where that evidence was obtained (in-state or out-of-state), or what governmental entity (local, state, federal, or out-of-state) obtained it; the constitutionally significant fact is that the Oregon government seeks to use the evidence in an Oregon criminal prosecution. Where that is true, the Oregon constitutional protections apply.[27]

The Rodriguez Court elaborated:

> It is true that Davis itself did not involve conduct by a federal officer acting under the authority of federal law, as does the present case. However, the wording just quoted specifically covers the facts represented here. We see no reason why the factual distinction between a state officer and a federal officer has any legal significance in determining whether certain evidence is admissible in an Oregon criminal prosecution. The rule announced in Davis applies to the arrest that occurred in this case.[28]

At pages 7-8 & n.20 of its Memorandum, the State incorrectly asserts that People v. Griminger, 524 N.E. 2d 409, 529 N.Y.S. 2d 55 (Ct. App. 1988) is based upon federal law and thus, the State claims, Griminger supports the State's position. Instead, Griminger held inadmissible evidence seized under a federal search warrant obtained by a federal agent where the application for the warrant satisfied the federal Constitution but

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[26] See id. at 405-07.

[27] Rodriguez, 854 P.2d at 403 (quoting State v. Davis, 834 P.2d 1008, 1012-13 (Or. 1992)) (emphasis in Davis).

not the more-stringent safeguards of the State Constitution.[29] The Court succinctly explained:

> The People alternatively assert that Federal law should apply in this case, since the warrant was issued by a Federal Magistrate and executed by Federal agents. We disagree. Since defendant has been tried for crimes defined by the State's Penal Law, we can discern no reason why he should not also be afforded the benefit of our state's search and seizure protections.[30]

At page 8 of its Memorandum, the State asserts that in Torres, the "Hawaii analysis, while interesting, has no precedent in Alaska." To the contrary, as discussed previously in this Reply, the Court's analysis in Torres is consistent with Alaska jurisprudence concerning the purposes of the exclusionary rule and with the more-rights-protective provisions of Evidence Rule 412.[31] Moreover, while Torres held that evidence obtained by federal agents on a federal military base in Hawaii[32] would be inadmissible if obtained in violation of the Hawaii Constitution,[33] even the concurring and dissenting Justice agreed that the evidence should be suppressed where the illegal search occurs within the borders of the State itself since "a defendant's notions of individual privacy

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[28] Rodriguez, 854 P.2d at 403.
[29] See People v. Griminger, 524 N.E. 2d 409, 410-12, 529 N.Y.S. 2d 55, 56-58 (Ct. App. 1988).
[30] Id., 524 N.E. 2d at 412, 529 N.Y.S. 2d at 58; see Torres, 252 P.3d at 1240 (agreeing with Griminger). Griminger, Rodriguez, Cardenas-Alvarez, and other cases favoring Schaeffer Cox's motion are discussed in Torres, 252 P.3d at 1240-43.
[31] See Torres, 252 P.3d at 1236-40.
[32] See id. at 1230-31.
[33] See id. at 1244.

derive from the location in which the defendant is physically present,"[34] in this case that location being Alaska.

III. CONCLUSION

For the reasons stated, the Court should grant this motion. Schaeffer Cox respectfully prays that the Court so order.

RESPECTFULLY SUBMITTED this _____ day of August, 2011.

LAW OFFICE OF ROBERT JOHN

_____
Robert John
Alaska Bar No. 8911069
Attorney for Francis A. S. Cox

Certificate of Service
I hereby certify that a true copy of
this document was served
by hand-delivery on:

Gayle Garrigues and Ben Seekins
District Attorney's Office
455 Third Avenue, Suite 150
Fairbanks, AK 99701

Susan Carney and Marna Kranenburg
Office of Public Advocacy
100 Cushman Street, Suite 502
Fairbanks, AK 99701
Counsel for Karen L. Vernon

[34] Id. at 1253 (Nakayama, Acting C.J., concurring and dissenting).

Lori Bodwell
Conflict Counsel, Fairbanks Section
Office of Public Advocacy
100 Cushman Street, Suite 306
Fairbanks, AK 99701
Counsel for Michael O. Anderson

Gary Stapp
225 Wendell Street, Suite A
Fairbanks, AK 99701
Counsel for Rachel A. Barney

and by first-class mail, postage prepaid, on:

Marcelle McDannel
Office of Public Advocacy
Appeals and Statewide Defense Section
1016 W. 6th Avenue, Suite 100
Anchorage, AK 99501
Counsel for Lonnie G. Vernon

Tim Dooley
921 W. 6th Avenue, Suite 200
Anchorage, AK 99501
Counsel for Coleman L. Barney

this ___ day of August, 2011.
Law Office of Robert John
By: _____