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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

**MOTION TO SUPPRESS ALL EVIDENCE ARISING FROM THE FEDERAL
GOVERNMENT'S ILLEGAL SPYING AND RECORDING WITHIN THE
STATE OF ALASKA IN BLATANT, REPEATED, AND PROLONGED
VIOLATION OF THE CONSTITUTIONAL RIGHT TO PRIVACY
GUARANTEED TO ALL ALASKANS**

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.

Francis August Schaeffer Cox (Schaeffer Cox) hereby moves to suppress all evidence arising from the federal government's warrantless electronic monitoring and recording of his activities within the State of Alaska from August 13, 2010 through March 10, 2011.

This motion is supported by the accompanying memorandum, and an appropriate order granting the motion is lodged herewith.

RESPECTFULLY SUBMITTED this _____ day of July, 2011.

LAW OFFICE OF ROBERT JOHN

Robert John
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Attorney for Francis A. S. Cox

Certificate of Service

I hereby certify that a true copy of this document, and the accompanying memorandum and order were served by hand-delivery on:

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this ____ day of July, 2011.
Law Office of Robert John
By: _____

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**MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS ALL EVIDENCE
ARISING FROM THE FEDERAL GOVERNMENT'S ILLEGAL SPYING AND
RECORDING WITHIN THE STATE OF ALASKA IN BLATANT, REPEATED,
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I. LEGAL BACKGROUND

In 1972, the citizens of Alaska expressly amended our Constitution to provide: "The right of the people to privacy is recognized and shall not be infringed."¹ Six years later, the protection of privacy against warrantless electronic monitoring and recording was addressed by the Alaska Supreme Court in State v. Glass, 583 P.2d 872 (Alaska 1978).

In Glass, the Alaska Supreme Court concluded:

One who engages in a private conversation is entitled to assume that his words will not be broadcast or recorded absent his consent or a warrant. Similarly, we believe that Alaska's privacy amendment prohibits the secret electronic monitoring of conversations upon the mere consent of a participant. Alaska's Constitution mandates that its people be free from invasions of privacy by means of surreptitious monitoring of conversations.²

In thus rendering its decision, the Glass Court explained:

The corrosive impact of warrantless participant monitoring on our sense of security and freedom of expression is every bit as insidious as electronic surveillance conducted without the consent of any of the parties involved. Extensive police-instigated and clandestine participant recordings, coupled with their use as evidence of any self-incriminating remarks of the speaker, pose a grave danger of chilling all private, free, and unconstrained communication. In a free society, people ought not to have to watch their every word so carefully.³

¹ Alaska Constitution, Article I, §22; see Gray v. State, 525 P.2d 524, 528 (Alaska 1974).

² State v. Glass, 583 P.2d 872, 875, 879, 881 (Alaska 1978) (brackets and ellipses omitted).

³ Glass, 583 P.2d at 877 (quotation, citations, and ellipses omitted).

In Glass, the State's principal contention was that there is no difference between talking to a friend who then repeats confidences and talking to one who is wired with a transmitter or a recorder.⁴ The Glass Court countered:

Certainly, many of the casual, the caustic, the irreverent remarks would be inhibited, as would criticism of individuals and policies. Clever prodding may elicit thoughtless comments about sex, religion, politics, acquaintances, personal finances and even one's innermost thoughts. One takes the risk that his friend may repeat what has been said. One shouldn't be required to take the additional risk of an entirely different character that his conversation is being surreptitiously transcribed or broadcast.⁵

As a last gasp in Glass, the State apparently contended that the ends justify the means -- that spying via warrantless, secret monitoring and recording is justified by the supposedly-more-reliable evidence thereby gathered.⁶ The Court responded as follows:

To argue that monitored conversation is admissible because it is merely a more reliable version of the informant's testimony is to respond to an irrelevant question. We exclude the evidence not because it is unreliable but because the transcendent values preserved by constitutional guarantee are of greater societal moment than the use of that evidence to obtain a criminal conviction. It is axiomatic that police conduct may not be justified on the basis of the fruits obtained.

It is, of course, easy to say that one engaged in illegal activity has no right to complain if his conversations are broadcast or recorded. If, however, law enforcement officials may lawfully cause participants secretly to record and transcribe private conversations, nothing prevents monitoring of those persons not engaged in illegal activity, who have incurred displeasure, have not conformed, or have espoused unpopular causes.⁷

⁴ See id. at 877.

⁵ Id. at 877-78 (ellipsis omitted).

⁶ See id. at 878.

⁷ Glass, 583 P.2d at 878 (citations and ellipsis omitted, emphasis added).

II. FACTUAL BACKGROUND

In the Spring of 2010, the Federal Bureau of Investigation (FBI) in Anchorage began investigating Schaeffer Cox.⁸ This occurred after the Salt Lake City division of the FBI reported that Schaeffer Cox was making speeches in the Lower 48 allegedly threatening the government.⁹

Around the same time, the State had a confidential informant who was working with the Alaska State Troopers (AST) in order to minimize the consequences of pending felony charges he was facing.¹⁰ Prior to the felonies he was facing, the confidential informant already had a criminal record.¹¹ At the Grand Jury, the State referred to that confidential informant as Mr. Confidential.¹² In this memorandum, he will be referred to as Mr. Con for short.

As to confidential informants, the State and federal agents work together in cooperation.¹³ Thus, when AST found out that Mr. Con had information related to Schaeffer Cox because Mr. Con had become a member of the Alaska Peacemakers Militia in Fairbanks (the Peacemakers), AST put Mr. Con in touch with the FBI circa

⁸ See Grand Jury Transcript (GJ Tr.) at 40-41. All references herein are to the Grand Jury Transcript which the State has previously furnished to the Court and the parties.

⁹ See GJ Tr. at 40-41.

¹⁰ See GJ Tr. at 53, 58-60.

¹¹ See GJ Tr. at 53, 60.

¹² See GJ Tr. at 46, 64.

¹³ See GJ Tr. at 58-59.

early August of 2010.¹⁴ This contact was initiated by Trooper Joshua Moore who became involved at the beginning of the FBI's investigation of Schaeffer Cox.¹⁵

Commencing on August 13, 2010 and acting as a clandestine government agent, Mr. Con began secretly recording the vast majority of all his meetings with Schaeffer Cox and other members of the Peacemakers.¹⁶ The government wanted to "see what it was they talked about behind closed doors."¹⁷

Some of the recordings Mr. Con made were audio recordings and some were video recordings.¹⁸ All, however, were made without obtaining a warrant to do so.¹⁹

Between August 13, 2010 and March 10, 2011, the government used Mr. Con to record between 70 and 110 hours of Mr. Con's interactions with Schaeffer Cox and other Peacemakers, based on the estimate of Special Agent Richard Sutherland.²⁰

After Mr. Con would record an interaction with one or more of the Peacemakers, Agent Sutherland or another FBI agent would listen to the recording after debriefing Mr. Con.²¹ The FBI would then prepare written summaries of what Schaeffer Cox and other persons had said on the recordings.²²

¹⁴ See GJ Tr. at 53, 65-68.

¹⁵ See GJ Tr. at 178.

¹⁶ See GJ Tr. at 48, 61.

¹⁷ GJ Tr. at 44.

¹⁸ See GJ Tr. at 48.

¹⁹ See GJ Tr. at 47-48.

²⁰ See GJ Tr. at 61, 249-250.

²¹ See GJ Tr. at 49-50.

²² See GJ Tr. at 250.

Around February 12, 2011, Trooper Moore became more intensely involved in the investigation of Schaeffer Cox and the other Peacemakers.²³ Shortly before that, on February 7, 2011, Investigator Avery Thompson of the Fairbanks Police Department was tasked to the FBI.²⁴ As part of his role, Investigator Thompson listened to 20 or more hours of the recordings made by Mr. Con.²⁵ Both Agent Sutherland²⁶ and Investigator Thompson²⁷ have already testified extensively before the Grand Jury as to their versions of what they purportedly heard on the recordings made by Mr. Con.

III. DISCUSSION

Under Glass, the federal government's repeated and prolonged use of Mr. Con to secretly electronically monitor and record his interactions with Schaeffer Cox and the other Peacemakers is a blatant violation of all of their privacy rights.²⁸ The remedy for such unconstitutional conduct is to suppress the recordings themselves, as well as any testimony based upon the recordings.²⁹ In addition, the Court must suppress any other evidence that is derived from or is otherwise the fruit of the privacy invasion.³⁰

Where, as here, federal agents act within the borders of the State of Alaska, they must honor the constitutional rights of Alaskans or else evidence obtained in violation of

²³ See GJ Tr. at 178.

²⁴ See GJ Tr. at 196-197.

²⁵ See GJ Tr. at 197.

²⁶ See GJ Tr. at 51-52, 55-56, 61-62, 243-244, 250-251.

²⁷ See GJ Tr. at 198-199, 207-208, 212-217, 218-220, 226-229, 233-234, 239.

²⁸ See Glass, 583 P.2d at 875-81.

²⁹ See Coffey v. State, 585 P.2d 514, 518 (Alaska 1978); Glass, 583 P.2d at 874, 882.

³⁰ See Moore v. State, 119 P.3d 1018, 1020-21 (Alaska App. 2005); see also Joseph v. State, 145 P.3d 595, 601-05 (Alaska App. 2005).

those rights will be inadmissible in Alaska's Courts.³¹ In Pooley, the Alaska Court of Appeals adopted the reasoning of the California Supreme Court in People v. Blair, 159 Cal. Rpt. 818, 827-28, 602 P.2d 738, 747-48 (Cal. 1979).³² The Blair Court reasoned that when a search or seizure "contrary to . . . law occurs in this state, the venture is . . . lawless, and the government is therefore. . . profiting from illegal conduct or acting as a law-breaker."³³

Subsequent to Pooley, the Alaska Court of Appeals in Schaffer was presented with a case where federal agents in Alaska violated an individual's Alaska constitutional rights, but the Court side-stepped deciding whether to suppress, indicating instead that it did not decide that issue in Pooley because the search there occurred in California and would not decide the issue in Schaffer in the context of the State's Petition for Rehearing.³⁴ Schaffer, however, overlooked two points. The first point is that the Blair case, whose reasoning Pooley adopted, involved the actions of an FBI agent.³⁵ Moreover, prior to Schaffer, the Alaska Supreme Court weighed in and construed Pooley as holding:

Where there is no "ongoing or concerted effort" between Alaska and the foreign jurisdiction, the law of the jurisdiction where the search occurred is controlling.³⁶

³¹ See Pooley v. State, 705 P.2d 1293, 1302-03 (Alaska App. 1985).

³² See Pooley, 705 P.2d at 1303.

³³ People v. Blair, 159 Cal. Rptr. 818, 828, 602 P.2d 738, 748 (Cal. 1979).

³⁴ See Schaffer v. State, 988 P.2d 610, 617-18 (Alaska App. 1999).

³⁵ See Blair, 159 Cal. Rptr. at 824, 827-28, 602 P.2d at 744, 747-48.

³⁶ D'Antonio v. State, 926 P.2d 1158, 1161 n.4 (Alaska 1996) (citing Pooley, 705 P.2d at 1302-03). While there may well have been an ongoing and concerted effort between Alaska law enforcement and federal agents in this case, that is not the focus of this

Finally, Schaeffer Cox would add that the highest courts of numerous other states have construed their Constitutions to require suppression of illegally-obtained evidence where federal agents have obtained that evidence in violation of the privacy rights embodied in State Constitutions. Most recently, the Hawaii Supreme Court held that evidence obtained by a federal agent on federal property within the State must be excluded if it was obtained in a manner inconsistent with the guarantees of the State Constitution.³⁷ Among the other cases that have held similarly in regard to the actions of federal agents are State v. Cardenas-Alvarez, 25 P.3d 225 (N.M. 2001); People v. Griminger, 524 N.E.2d 409, 529 N.Y.S. 2d 55 (Ct. App. 1988); and State v. Rodriguez, 854 P.2d 399 (Or. 1993). While the above cases involve isolated violations of rights, the privacy invasion in Schaeffer Cox's case is far more insidious as this case concerns a repeated, prolonged, undercover campaign to violate the privacy rights of all Alaskans.

IV. CONCLUSION

For the reasons stated, the Court should grant the motion and suppress the unlawfully-obtained evidence. Schaeffer Cox respectfully prays that the Court so order.

motion, and that issue is expressly being reserved for later motion practice should Schaeffer Cox not prevail on this motion.

RESPECTFULLY SUBMITTED this _____ day of July, 2011.

LAW OFFICE OF ROBERT JOHN

Robert John
Alaska Bar No. 8911069
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³⁷ See State v. Torres, 252 P.3d 1229, 1243-44 (Hawaii 2011).

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**ORDER GRANTING MOTION TO SUPPRESS ALL EVIDENCE ARISING
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The Court, having duly considered the matters presented, hereby orders that the motion is GRANTED. The Court holds that the federal government's warrantless electronic monitoring and recording of the activities of Francis August Schaeffer Cox (Schaeffer Cox) within the State of Alaska from August 13, 2010 through March 10, 2011 are illegal spying in violation of Schaeffer Cox's constitutional right to privacy guaranteed by Article I, §§14 and 22 of the Alaska Constitution. Accordingly, the recordings made, any testimony as to the substance or contents of the electronic monitoring and recordings made, and any other evidence derived from or otherwise the fruit of the electronic monitoring or recording of the activities of Schaeffer Cox from August 13, 2010 through March 10, 2011 are hereby SUPPRESSED.

ENTERED at _____, Alaska this _____ day of _____, 2011.

DAVID C. STEWART
SUPERIOR COURT JUDGE