

1 James A. McDevitt
United States Attorney
2 Eastern District of Washington
Timothy J. Ohms
3 Assistant United States Attorney
Post Office Box 1494
4 Spokane, WA 99210-1494
Telephone: (509) 353-2767
5

6 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
7

8 UNITED STATES OF AMERICA,)
)
9 Plaintiff,) 09-CR-2035-EFS
)
10 vs.) United States' Response to
11 RICKY SAM WAHCHUMWAH,) Defendant's Motion to
) Suppress
12 Defendant.)

13 Plaintiff, United States of America, by and through James A. McDevitt,
14 United States Attorney for the Eastern District of Washington, and Timothy J.
15 Ohms, Assistant United States Attorney for the Eastern District of Washington,
16 responds herewith to Defendant's Motion to Suppress.

17 I. Statement of Facts¹

18 In April of 2008, the U.S. Forest Service (FWS) began an undercover
19 investigation of the Defendant, Ricky Wahchumwah, and his wife, Victoria Jim,
20 based on information that they had been selling eagles and protected migratory
21 birds in violation of federal law. The investigation ultimately grew into a larger,
22 multi-district investigation involving other suspects in addition to Wahchumwah
23 and Jim. As part of the investigation, FWS Special agent had contact with several
24 subjects in an undercover capacity. Several of these subjects knew each other.
25

26
27
28 ¹Based on information set forth in the search warrant affidavit and subsequent reports.

1 On April 19, 2008, FWS Special Agent Robert Romero met the Defendant
2 and Jim in an undercover capacity at the Kyi-yo Pow Wow in Missoula, Montana.
3 Throughout the day, SA Romero engaged in conversation with the Defendant
4 about his involvement in hunting and commercializing in eagles and other
5 migratory birds. The Defendant made several statements indicating that he was
6 selling and trading eagle feathers with others at the pow wow and elsewhere,
7 including five eagle feather bustles that he was making for sale to customers in
8 Canada. Jim also displayed a folder containing eagle plumes that were available
9 for sale or trade and that she kept under her vest. During the afternoon, Jim
10 expressed and interest in obtaining some otter furs. When a woman was pointed
11 out who reportedly had otter furs for sale, Jim indicated that she would talk to her
12 because “owed her” already for several eagle plumes.

13 The Defendant indicated that he obtained feathers by hunting and by trading
14 with another individual, whom SA Romero identified as Alfred Hawk (currently
15 charged with commercializing in eagles and migratory birds in Cause Number CR-
16 09-2034-EFS). The Defendant and Jim ultimately offered a pair of eagle wings to
17 SA Romero for sale, and SA Romero purchased the wings for \$400. In discussing
18 other items that may be for sale, the Defendant said that he had about ten tails
19 saved up, two of which he sold for \$700. SA Romero gave the Defendant his
20 contact number and asked him to text him or give him a call. As the conversation
21 continued, Wahchumwah said, “Shoot, I have to get home . . . I gotta finish those
22 bustles. All together that’ll be about \$2,600. Got those ones from Canada to make
23 and that one from uh Shelton.” Wahchumwah also said that he had a couple of
24 trailers at home that has all his “stuff to work on outside.”

25 On May 12, 2008, SA Romero received a call from the Defendant stating he
26 had three golden eagle tails for sale. SA Romero agreed to purchase one of the
27 tails for \$500. At the Defendant’s direction, SA Romero wired the money to the
28

1 Defendant and the Defendant sent the tail to SA Romero by U.S. mail. SA Romero
2 received the tail in Wilsonville, Oregon, on May 19, 2008.

3 In October of 2008, SA Romero attempted to follow-up on statements made
4 by the Defendant indicating that he kept eagle parts in trailers at his home. On
5 October 7, 2008, SA Romero sent a text message to the Defendant asking if he
6 was going to be available the week of October 13-17, 2008. Ultimately the
7 Defendant sent text messages indicating that he would at a casino-sponsored pow
8 wow in Lapwai that weekend, but that he would “catch [SA Romero] later.”

9 On October 14, 2008, SA Romero called the Defendant confirming a
10 meeting for October 15, 2008, and getting directions to the Defendant’s residence
11 in Granger, Washington. On October 15, 2008, SA Romero contacted the
12 Defendant at the residence. SA Romero wore a video and audio recording device
13 throughout the covert contact. Since SA Romero had not had face-to-face contact
14 with the Defendant and Jim since May, he brought otter fur as a gift to reintroduce
15 himself and reduce suspicion.

16 The Defendant invited SA Romero inside and showed him a fan constructed
17 from Northern harrier tails that the Defendant said he traded for. The Defendant
18 exited the residence and went to a shed outside and removed some plastic storage
19 containers that contained approximately fifteen eagle tails. The Defendant said he
20 bought ten of the tails for approximately \$2000. He also had osprey feathers in the
21 box that he said he “got down by the river.” The Defendant returned to the shed
22 and obtained a small spiral notebook that contained golden eagle plumes on
23 several pages that were identified by length. Some pages had lengths written on
24 the page but the plumes had been removed. Later on, SA Romero asked co-
25 defendant Jim about purchasing some of the plumes. Jim took the notebook from
26 SA Romero and removed a plastic container with additional plumes from their
27 kitchen freezer. Jim said that she was not sure that she wanted to get rid of the
28 plumes from the freezer, but she offered to look through them and decide if she

1 wanted to sell them. She later presented the same notebook to SA Romero with
2 additional plumes taped in it and said that she was willing to sell SA Romero the
3 plumes. With Jim's help, SA Romero picked out two plumes for which he paid
4 \$100. Jim then reminded the Defendant that he needed to replace any plumes that
5 she took from the freezer. As SA Romero was leaving the residence, the
6 Defendant said that he would call SA Romero and let him know what tails he did
7 not use and indicated that he would have some more "black and whites" (immature
8 golden eagle tails) this winter.

9 II. Discussion

10 The Defendant has moved to suppress all evidence obtained from SA
11 Romero's covert meeting with the Defendant and co-defendant Jim on October 15,
12 2008, alleging "outrageous governmental conduct" and claiming that Agent
13 Romero's use of a video and audio recording device during the meeting
14 constituted a warrantless search. The Defendant's motion is without merit. The
15 covert meeting was preceded by two unlawful sales of eagle feathers by the
16 Defendant to SA Romero. The Defendant is the one who indicated that he kept
17 "all of his stuff to work on" in trailers at his residence. The covert meeting was
18 not gratuitously invasive and included criminal conduct by the Defendant that is
19 charged in the superseding indictment. Finally, there is no authority to support the
20 contention that Agent Romero's gift of otter fur constituted outrageous
21 government conduct. The gift did not induce the criminal activity, which was
22 ongoing. Rather, Agent Romero used the gift as a way to gain the trust of persons
23 already engaged in criminal activity.

24 The remedy for outrageous government conduct is the dismissal of the
25 indictment. United States v. Russell, 411 U.S. 423, 431-32 (1973); 93 S.Ct. 1637.
26 The Defendant here seeks suppression of evidence, suggesting that he is alleging
27 something short of the defense of outrageous conduct and seeking the court to
28 adopt a new rule that would allow suppression of evidence for objectionable

1 conduct that does not otherwise rise to the level of outrageousness. The
2 Defendant offers no authority in support of such a rule.

3 The defense of outrageous government conduct is limited to “extreme
4 cases” where the conduct “violates fundamental fairness and is shocking to the
5 universal sense of justice mandated by the Due Process Clause of the Fifth
6 Amendment.” United States v. Williams, 547 F.3d 1187, 1198 (9th Cir. 2008)
7 (internal quotations and citations omitted); United States v. Gurolla, 333 F.3d 944,
8 950 (9th Cir.), cert. denied, 540 U.S. 995 (2003) (quoting Russell, 411 U.S. at 431-
9 32); United States v. Citro, 842 F.2d 1149, 1152 (9th Cir.), cert. denied, 488 U.S.
10 866 (1988); United States v. Bogart, 783 F.2d 1428, 1434-35 (9th Cir.), *vacated as*
11 *to one defendant*, United States v. Wingender, 790 F.2d 802 (9th Cir. 1986)
12 (outrageous government conduct is a narrow category into which falls only the
13 most intolerable government conduct). Such a claim requires the defendant to
14 “meet[] a high standard.” Williams, 547 F.3d at 1198. This “high standard” is
15 met when “the government *engineers and directs* a criminal enterprise from start
16 to finish, but is *not* met when the government merely infiltrates an existing
17 organization, approaches persons it believes to be already engaged in or planning
18 to participate in the [crime], or provides valuable and necessary items to the
19 venture.” Id. (internal quotation marks and citations omitted) (emphasis added).

20 In United States v. Bonanno, the Ninth Circuit set out five factors, that
21 when met, show the government conduct was acceptable in the situation. 852 F.2d
22 434 (9th Cir. 1988). These factors are:

23 (1) defendant was already involved in a continuing series of
24 similar crimes, or the charged criminal enterprise was already in
25 process at the time the government agent became involved; (2) the
26 agent’s participation was not necessary to enable the defendant’s
27 to continue the criminal activity; (3) the agent used artifice and
28 stratagem to ferret out criminal activity; (4) the agent infiltrated a
criminal organization; and (5) the agent approached persons
already contemplating or engaged in criminal activity.

1 852 F.2d at 437-38. The Ninth Circuit has also held that, “as a general rule, courts
2 do not have the authority to supervise out-of-court executive procedure in the
3 absence of a constitutional or statutory violation.” Gurolla, 333 F.3d at 950
4 (internal quotation marks and citations omitted). Actions taken in an undercover
5 capacity to win the confidence of persons engaged in ongoing criminal activity do
6 not satisfy the definition of outrageous conduct. See United States v. Hugs, 109
7 F.3d 1375 (9th Cir 1997). In fact, the Ninth Circuit has found the defense to be
8 “unavailable” in cases where the defendant was “actively engaged in other similar
9 criminal activity.” United States v. Stenberg, 803 F.2d 422 (9th Cir. 1986.

10 In United States v. Hugs, 109 F.3d at 1379, a government agent engaged in
11 illegal hunting on an Indian reservation with a Native American suspect. The
12 agent illegally killed wildlife, brought alcoholic beverages onto the reservation,
13 and allegedly shared these with minors. He explained that he killed wildlife “to
14 maintain his credibility as a supposed hunter.” Id. The court found that the
15 agent’s actions did not meet the legal standard for outrageous government
16 conduct. Specifically, the court noted that the agent did not precipitate the
17 defendant’s criminal activity and that his violations of liquor laws were unrelated
18 to the defendant’s crimes. Similarly, in United States v. Stenberg, 803 F.2d 422,
19 430-41 (9th Cir. 1986), an agent hired a number of guides in an undercover
20 capacity. During the course of the investigation, the agent shot and killed a
21 mountain goat out of season and killed an elk in a no-hunting zone. The court
22 held that the agent’s actions in furtherance of the investigation did not constitute
23 outrageous government conduct—and indeed, as noted above, that the defense was
24 unavailable to the defendants because of evidence that they were involved in
25 ongoing, similarly criminal activity.

26 Finally, in United States v. Winddancer, 435 F.Supp.2d 687, 700
27 (M.D.Tenn. 2006), the defendant alleged outrageous government conduct in an
28 Eagle Act case when an agent posed as a “sympathetic feather aficionado.” Id.

1 Specifically, the agent contacted the defendant “claiming to be a member of a
2 federally recognized Indian tribe. . . . [He] claimed to be in need of feathers to
3 perform a tribute dance for his dead father. [The defendant] agreed to perform a
4 trade. The two performed trades on two successive days.” Id. The court found
5 that this conduct could not give rise to an outrageous conduct defense. Id.

6 Agent Romero’s actions in the current case were justified by the ongoing
7 undercover investigation. He had already purchased eagle feathers from the
8 Defendant on two occasions. It was the Defendant who indicated that his taking
9 and selling of eagles included activity at his residence. Co-defendant Victoria Jim
10 had earlier expressed her interest in otter fur, and Agent Romero used this
11 information as a way to win the Defendant’s confidence and to bridge the gap in
12 contact that he had with the Defendant between May and October of 2008. Agent
13 Romero did not participate in the killing of eagles with the Defendant nor did his
14 ruse include such culturally-based subterfuge as a dead father for whom he needed
15 to perform a religious ceremony (neither of which circumstance triggered the
16 defense in the cases cited above). The Defendant’s claim that Agent Romero’s
17 conduct during his undercover visit to the Defendant’s residence was outrageous
18 is without merit.

19 Similarly, the Defendant’s claim that Agent Romero’s use of a video and
20 audio recording device during his meeting with the Defendant overstepped the
21 legitimate bounds of one-party consent is without merit. The Defendant consented
22 to the meeting at his residence. There is no indication that Agent Romero went to
23 any area in the residence to which he was not invited. The use of audio and video
24 recording devices during undercover meetings is authorized by federal statute and
25 does not violate a suspect’s Constitutional rights. 18 U.S.C. § 2511(2)(c); United
26 Stats v. Myers, 692 F.2d 823, 859 (2nd Cir. 1982) (“[The defendant’s]
27 conversations with undercover agents in whom he chose to confide were not
28 privileged, and mechanical recordings of the sights and sounds to which the agents

1 could have testified were proper evidence.” citing United States v. White, 401
2 U.S. 745, 749-53, 91 S.Ct. 1122, 1124-26 (1971)). In the present case, the
3 meeting was not in any way gratuitous or collateral to the investigation. In fact,
4 two of the criminal acts charged in the superseding indictment occurred during the
5 course of the meeting.

6 The Defendant’s reliance on United States v. Nerber, 222 F.3d 597 (9th Cir.
7 2000), is misplaced. In Nerber, law enforcement *installed* a video camera in a
8 hotel room that they intended to use for a meeting between a confidential
9 informant and members of a drug trafficking organization. Questions in the case
10 emerged when agents continued to record the drug traffickers in the room after the
11 confidential informant had left. At that point, principles of one-party consent were
12 not longer applicable and the subsequent analysis turned upon the level of privacy
13 that a visitor might expect in a hotel room rented and occupied by others. In that
14 context, the “caveat” referenced by the Defendant involves the possible
15 warrantless “installation” of a video camera in another person’s home; it does not
16 warn against the wearing of a recording device in order to gather evidence of
17 criminal conduct occurring in the home.

18 The present case involves an undercover investigation of ongoing criminal
19 conduct, some of which was occurring at the Defendant’s residence. Consistent
20 with the nature of the investigation, the investigating agent used the tools of an
21 undercover investigation. His efforts to win the Defendant’s trust and to record
22 evidence of criminal activity during a meeting at the Defendant’s residence were
23 among these tools. Neither constituted outrageous conduct nor did they violate
24 Constitutional provisions permitting the recording of conversations under the
25 doctrine of one-party consent.
26
27
28

1 III. Conclusion

2 For the foregoing reasons, the Defendant's motion to suppress evidence
3 should be denied.

4
5 DATED April 29, 2009.

6 James A. McDevitt
7 United States Attorney

8 s/Timothy J. Ohms

9 Timothy J. Ohms
10 Assistant United States Attorney

11 I hereby certify that on April 29, 2009, I electronically filed the foregoing
12 with the Clerk of the Court using the CM/ECF System which will send
13 notification of such filing to the following, and/or I hereby certify that I have
14 mailed by United States Postal Service the document to the following non-
15 CM/ECF participant(s):

16 J. Adam Moore
17 The Adam Moore Law Firm
18 217 N. 2nd Street
19 Yakima, WA 98901

20 s/Timothy J. Ohms

21 Timothy J. Ohms
22 Assistant United States Attorney