

Magistrate Judge J. Kelley Arnold

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,)	NO. CR07-5656-JKA-03
)	
Plaintiff,)	
)	
v.)	GOVERNMENT'S MEMORANDUM
)	IN OPPOSITION TO DEFENDANT
)	NOEL'S MOTION IN LIMINE
)	
FRANKIE GONZALES, et al.,)	
)	
Defendants.)	
_____		[Oral Argument: January 29, 2008]

The United States of America, by Jeffrey C. Sullivan, United States Attorney for the Western District of Washington, and James D. Oesterle, Assistant United States Attorney for said District, submits this memorandum opposing in part Defendant Andrew Noel's motion in limine.

A. Statements Made By Defendant Noel Prior To Detention Are Admissible

The government agrees that statements made by Defendant Noel while he was detained by United States Coast Guard personnel would not be admissible in its case-in-chief without Defendant Noel having been informed of, and waiving, his rights. The issue, however, is whether Defendant Noel was detained for purposes of invoking his Fifth Amendment privilege. *Miranda* warnings need only be given when a suspect is in custody. *Illinois v. Perkins*, 496 U.S. 292, 297 (1990).

Coast Guard personnel initially contacted Defendant Noel and his co-defendants after receiving third party reports of shots being fired. A Coast Guard boat came alongside one of the small personal fishing boats used by the defendants to locate and pursue the whale. Once alongside, Coast Guard personnel asked Defendant Noel and his co-defendants some preliminary questions in an effort to assess the situation before deciding whether to remove the defendants from their boats. Any statements made during this initial contact were offered before the defendants were detained under any reasonable interpretation of the circumstances and should be admissible.

Defendant Noel bears the burden of proving custody. *United States v. Charles*, 738 F.2d 686, 692 (5th Cir. 1984). He offers no factual allegations from which this court could assess whether that burden has been met¹. While the government will not offer any statements made by Defendant Noel subsequent to his detention, it reserves the right to seek introduction of statements made during the initial contact.

Courts consider the totality of the circumstances when making an objective determination of whether the suspect was in custody. *See Cal. v. Beheler*, 463 U.S. 1121, 1125 (1983)(per curiam). In this case, Defendant Noel's freedom of action was not limited when the Coast Guard personnel initially approached his boat. The contact occurred on open water. The Coast Guard made no effort to prevent Defendant Noel's boat from leaving the area.

B. The Government Will Not Offer Inadmissible Hearsay

The second and third issues raised by Defendant Noel seek the exclusion of statements similar to those made by NOAA Special Agent Giles during his grand jury testimony. The government is aware of its obligation to offer competent testimony consistent with the Federal Rules of Evidence and will honor that obligation.

¹An evidentiary hearing may be necessary to fully explore the issue of whether Defendant Noel was in custody when Coast Guard personnel initially contacted him on September 8, 2007.

C. The Government Will Not Offer Impermissible Conclusions of Law

The fourth and fifth issues raised by Defendant Noel seek the exclusion of statements which he considers conclusions of law. The government is aware of its obligation to present competent testimony consistent with the Federal Rules of Evidence and will not offer conclusions of law without a good faith basis grounded in the Rules..

D. Viability Of The Makah Tribe's Gray Whale Management Plan Is An Essential Legal Issue This Court May Need To Resolve

Defendant Noel argues that any evidence concerning application of the Makah Tribe's Gray Whale Management Plan (Plan) is inadmissible because it is either irrelevant or unduly prejudicial. According to Defendant Noel, the Plan had expired in 2002, and is not relevant to these proceeding. Both the government and the Makah Tribe disagree.² For purposes of this motion, the government adopts the arguments presented in the Makah Tribe's amicus brief as if fully set forth herein.

The issue of whether the Plan remained viable in September 2007 has legal significance bearing directly on the defendants' potential use of Treaty rights as a defense to the charged conduct. As noted by Defendant Noel in his motion to dismiss count one of the Indictment, some courts have required the government to prove conservation necessity before imposing wildlife laws against tribal members with hunting and fishing rights. *Antoine v. Washington*, 420 U.S. 194, 207, 43 L. Ed. 2d 129, 95 S. Ct. 944 (1975); *United States v. Sohapp*, 770 F.2d 816, 824 (9th Cir. 1985).

The Ninth Circuit addressed the conservation necessity issue in *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004)(second amended opinion), finding that application of the Marine Mammal Protection Act (MMPA) to the Makah Tribe's whaling activities was necessary to satisfy the conservation purposes of the Act. This finding has precedential

² The government does not oppose the Makah Tribe's Motion for Leave to File Amicus Brief. The government believes this court would benefit from considering the Tribe's position regarding validity of the Plan. For this reason, the government urges the court to grant the Tribe's motion seeking leave to file an amicus brief. The Tribe is uniquely positioned to assist in interpreting the Plan and presenting the legal interpretation necessary to evaluate challenges to its validity.

1 effect in this case, foreclosing assertion of Treaty rights as a defense to both counts one
2 (Conspiracy) and two (MMPA).

3 There is no similar judicial interpretation of the Whaling Convention Act.
4 Consequently, this court may be called upon to answer the legal question of whether
5 established Treaty rights are a defense to the conduct charged in count three of the
6 Indictment. The issue would necessarily require this court to evaluate whether
7 application of the Whaling Convention Act to the Makah's exercise of their Treaty rights
8 is reasonably necessary to promote conservation. This evaluation would require
9 consideration of whether the Plan retained viability as Tribal law in September 2007.

10 Ninth Circuit authority severely restricts a Tribal member's ability to assert a
11 Treaty rights defense to federal charges where the charged conduct also violates Tribal
12 Law. *United States v. Williams*, 898 F.2d 727, 729-730 (9th Cir. 1990); *United States v.*
13 *Sohappy*, 770 F.2d 818, 824 (9th Cir. 1985). The defendant in *Williams*, a member of the
14 Nez Perce Tribe, challenged his conviction for illegal hunting under the Lacey Act. He
15 argued on appeal that the government failed to establish that the underlying state wildlife
16 laws were reasonable and necessary for conservation purposes. Absent a showing of
17 conservation necessity, the laws could not be enforced against Tribal members with
18 hunting and fishing rights.

19 The Ninth Circuit in *Williams* affirmed the conviction, holding that while the
20 government must establish the requisite conservation purpose, similar Tribal laws to those
21 being enforced create a presumption of validity. 898 F.2d at 730 ("Trial courts need only
22 establish the existence of such similar laws in to establish the validity of the state or
23 federal laws.") In *Williams*, Nez Perce Tribal law prohibited the same activity outlawed
24 under state law. The government was not required to establish the conservation necessity
25 of the tribal laws as "tribal wildlife laws are per se valid against tribe members." 898
26 F.2d at 729. Based on the common language found in both tribal and state laws, the court
27 concluded:
28

1 The requirement of a full hearing to establish the validity of the state wildlife laws
 2 is superfluous if, as in this case, the tribe enacted similar laws which are clearly
 3 valid.

4 *Id.*

5 The court's analysis in *Williams* underscores the significance of a judicial
 6 determination regarding the validity of the Makah Tribe's Whale Management Plan.
 7 If valid, the Plan demonstrates a Tribal commitment to conduct whaling activities
 8 consistent with the conservation measures prescribed by the Whaling Convention Act.
 9 The Plan, or more accurately, Tribal law enacting the Plan into law, creates a presumption
 10 of validity. A separate hearing to determine conservation necessity under the Whaling
 11 Convention Act would be "superfluous."

12 **E. Evidence Concerning The Condition Of The Whale Is Relevant And**
 13 **Defendant Was Not Prejudiced When The Carcass Sank**

14 Defendant Noel contends evidence related to the whale's condition should be
 15 "precluded or severely limited" because the government allegedly destroyed the evidence.
 16 This contention ignores the elements of the charged offenses and overstates the
 17 evidentiary value of the whale carcass.

18 Defendant Noel and his co-defendants are charged substantively with "taking" a
 19 marine mammal in violation of the MMPA and "whaling" in violation of the Whaling
 20 Convention Act. The MMPA defines the term "take" to mean harassing, hunting,
 21 capturing, or killing, or attempting to harass, hunt, capture, or kill any marine mammal.
 22 16 U.S.C. § 1362(13). Thus, establishing that the defendants killed a gray whale on
 23 September 8, 2007 is not an essential element of the MMPA violation. Similarly, the
 24 WCA defines the term "whaling" to include in part "scouting for, hunting, killing, taking,
 25 towing, holding onto..." 16 U.S.C. § 916(j). There is no statutory requirement that the
 26 defendants' actions killed the whale under either charged offense.

27 Testimony concerning the condition of the whale is, however, relevant to the
 28 issues of whether defendants both "took" a marine mammal and were engaged in
 "whaling." Relevant evidence is any evidence having a "tendency to make the existence

1 of any fact that is of consequence to the determination of the action more probable or less
2 probable than it would be without the evidence.” Fed. R. Evid. 401. Any particular item
3 of evidence is not inherently relevant without considering the relationship between the
4 item and a matter of consequence in the case. Consequently, the court must engage in a
5 two step process to determine whether evidence is relevant: (1) does the evidence make
6 the existence of some fact more probable or less probable? and (2) is the fact to which the
7 evidence is directed a fact of consequence to the determination of the action?

8 The determination of whether a fact is of consequence is governed by the
9 substantive law. In this case, the substantive law requires the government to prove the
10 defendants “harassed, hunted, captured, or killed, or attempted to harass, hunt, capture or
11 kill” the whale. The elements of the charged substantive offenses undeniably call into
12 question the condition of the whale. Evidence of that condition, including eyewitness
13 accounts and photographs, would greatly assist the jury in determining whether the
14 government can meet the statutory elements.

15 Defendant Noel was not prejudiced by the government’s decision to allow the
16 whale carcass to sink after the Makah Tribe’s marine biologist determined that the whale
17 had died. First, Defendant Noel offers no explanation of how the carcass could have any
18 evidentiary value. Other than a general reference to unspecified “forensic evidence”,
19 there is no reference to tests or analyses that could develop potentially exculpatory
20 evidence.

21 Second, even if Defendant Noel could articulate some evidentiary value that was
22 lost when the carcass was allowed to sink, he must also show that the government acted
23 in bad faith or that the lost evidence would have been both material and favorable to his
24 defense. *Arizona v. Youngblood*, 488 U.S. 51, 102 L. Ed. 2d 281, 109 S. Ct. 333, 336-337
25 (1988); *California v. Trombetta*, 467 U.S. 479, 489, 104 S. Ct. 2528, 81 L. Ed. 2d 413
26 (1984) (duty to preserve evidence “must be limited to evidence that might be expected to
27 play a significant role in the suspect’s defense).
28

1 Finally, it is important to note that the whale carcass itself is not the only evidence
 2 of the whale's condition. Numerous photographs were taken immediately after Coast
 3 Guard personnel intervened and stopped the hunt. All of those photographs, many of
 4 which provide close-up views of the harpoons and apparent bullet holes, have been
 5 produced. In addition, the government has disclosed a lengthy report prepared by the
 6 Makah Tribal biologist who observed the whale beginning shortly after the hunt was
 7 stopped and continuing throughout the day. His observations will likely be offered to the
 8 jury. Those observations will be subject to cross examination and presumably review and
 9 critique by defense experts.

10 **F. The Government Will Not Offer Inadmissible Expert Testimony**

11 The final issue raised by Defendant Noel seeks exclusion of statements by a
 12 NOAA law enforcement agent concerning the ceremonial practices of the Makah Tribe.
 13 To the extent such testimony is relevant, the government is aware of its obligation to offer
 14 competent testimony consistent with the Federal Rules of Evidence and will honor that
 15 obligation.

16 **G. Conclusion**

17 For the reasons stated, the government respectfully requests that the Court deny
 18 Defendant's Motion in Limine.

19 DATED this 11th day of January, 2008.

20 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorneys of record for the defendants. I hereby certify that I have served the attorneys of record for the defendants that are non CM/ECF participants via United States Mail and/or Telefax.

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