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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO
(HONORABLE B. LYNN WINMILL)

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	CR-08-96-E-BLW
)	
Vs.)	Defendant's Response to
)	Shoshone-Bannock Tribe's
ALFRED WAHTOMY)	Motion to Quash Subpoenas
and MARTIN AUCK,)	
)	
Defendant.)	
)	

TO: THOMAS E. MOSS, UNITED STATES ATTORNEY
Michelle R. Mallard, ASSISTANT UNITED STATES ATTORNEY

Comes Now, Alfred Wahtomy, by and through Nicolas Vieth,
Assistant Federal Defender, and responds to the Shoshone-Bannock
Tribes Motion to Quash Subpoenas. This response is based under
the 5th and 6th Amendment's right to due process and confrontation
and under the 4th Amendment's right to be protected from
unreasonable searches.

BACKGROUND

On August 27, 2008, a motion to suppress was filed. This

1 motion argued that Federal Rule of Criminal Procedure 41(a)
2 (hereinafter "FRCP") was violated and a Constitutional violation
3 of the 4th Amendment has now surfaced. In an attempt to ferret
4 out whether or not a 4th Amendment issue exists, subpoenas were
5 issued to determine the hiring criteria for tribal judges and
6 specifically the actual qualifications, training, education,
7 experience of Tribal Judge Rosephine Coby. Furthermore, there is
8 also concern over the Judge's relationship with Mr. Wahtomy, with
9 local law enforcement and with the FBI Agent and FBI Victims
10 Advocate who both assisted in the investigation, search warrant
11 applications, various searches, evidence collection, two
12 interrogations and various other interviews pertaining to this
13 case.

14 Last week, an attorney for the Shoshone-Bannock Tribe issued
15 a motion and memorandum to Quash four subpoenas, to which the
16 government has now joined. This motion argued that first, the
17 Shoshone-Bannock Tribes have not waived sovereign immunity
18 relating to the Tribal Documents demanded in the subpoenas and
19 second, that the subpoenas, as commanded, would subject the
20 tribal members to disciplinary action and potential criminal
21 liability in *Tribal Court*. The motion largely points to *United*
22 *States v. James*, 980 F.2d 1314 (9th Cir. 1992) for support of
23 these propositions.

24 **ARGUMENT**

25 Our case can be distinguished in several areas from the
26 *James* case. First, we are dealing with not only a procedural
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1 issue, FRCP 41 violation, but also a Constitutional violation of
2 Mr. Wahtomy's 4th (the search), 5th (due process) and 6th
3 (compulsory process) Amendments of the Constitution. Second, the
4 Subpoenas request the actual appearance of the individuals and
5 second that they bring various documents and records. Therefore
6 no violation of tribal law if the individuals appear personally
7 as commanded and we would waive the second command to bring
8 various documents and records.

9 On the first issue, Tribal sovereign immunity is a judge-
10 made, common law doctrine. *E.g. Three Affiliated Tribes fo Fort*
11 *Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890-91 (1986).
12 As such, the doctrine is subject to constitutional restrictions.
13 *United States v. Lara*, 541 U.S. 193, 205 (2004) ([T]he
14 Constitution does not dictate the metes and bounds of tribal
15 autonomy...") and *Oliphant v. Suquamish Indian Tribe*, 435 U.S.
16 191, 206 (1978) ("`Indian Law' draws principally upon the
17 treaties drawn and executed by the Executive Branch and
18 legislation passed by Congress. These instruments... form the
19 backdrop for the intricate web of judicially made Indian
20 law...").

21 In this case, Mr. Wahtomy seeks to subpoena tribal officials
22 in order to support his argument that his 4th Amendment rights
23 were violated. Regarding this, the court in *James* never
24 considered the interplay between a tribe's interest in
25 maintaining self-government and a criminal defendant's
26 constitutional right under the 5th Amendment to due process and
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1 his right under the 6th Amendment to compulsory process. That
2 fact has served as a basis for vigorous distinguishment of *James*
3 by other district and circuit courts. See, *United States v.*
4 *Snowden*, 879 F. Supp. 1054, 1057 (D. Or. 1995) ("James does not
5 control because the defendant did not raise constitutional
6 challenges to the claim of immunity."); *United States v. Juvenile*
7 *Male 1*, 431 F. Supp. 2d 1012, 1018 (D. Ariz. 2006) ([W]e agree
8 with the juvenile here, and the court in *Snowden*, that *James* does
9 not control because the defendant there did not raise
10 constitutional challenges to the claim of immunity. The mischief
11 caused by an extension of immunity beyond its purpose was neither
12 presented to nor considered by the court in *James*. Indeed, we
13 believe that if given and opportunity there is every likelihood
14 that the United States Court of Appeals for the Ninth Circuit
15 would revisit the issue"); *United States v. Velarde*, 40 F. Supp.
16 2d 1314, 1315-16 (8th Cir. 1999) (I disagree with the *James*
17 conclusion... The *James* court did not take into account the duty
18 of this Court, as well as tribal police and other tribal
19 officials, to comply with federal statutory and constitutional
20 protections.").

21 The courts in *Snowden* and *Velarde* employed a balancing test,
22 weighing the respective interests of the tribe and the defendant.
23 *Snowden*, 879 F. Supp. at 1058 ("I conclude that *Snowden's*
24 constitutional rights would be infringed if the subpoena were
25 quashed and that the Tribes' interest in preventing disclosure is
26 not as substantial."); *Velarde*, 40 Supp. 2d at 1316 (same). On
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1 the other hand, the court in *Juvenile Male 1* did not base its
2 decision on a balancing test but instead on the inherent limits
3 of sovereign immunity, i.e., constitutional rights always trump
4 sovereign immunity because the latter is completely dependant on
5 Congress, and Congress is constrained by the Constitution. Here
6 we would ask the same. Mr. Wahtomy, with Mr. Auck joining, have
7 several procedural and Constitutional concerns as to why the
8 warrant was issued, who issued the warrant, whether there was
9 probable cause, and potentially other concerns that may surface
10 after testimony has been given and to clarifying the record as to
11 why law enforcement officials did what they did regarding the
12 searches in question.

13 On the second issue, the subpoenas command the appearance of
14 these individuals and that they bring the rules/required
15 qualifications to become a Fort Hall judge and the "actual
16 qualifications" for Judge Rosephine Coby. At the time of the
17 issuance of these subpoenas it was not known of the actual rule
18 prohibiting the dissemination of any Tribal records without the
19 Tribal Counsel's consent. Therefore as a concession we would
20 withdraw the actual demand to produce the records and only
21 request and command that the individuals who were subpoenaed be
22 commanded to appear and testify in Mr. Wahtomy's case.

23 CONCLUSION

24 Mr. Wahtomy has several procedural and Constitutional
25 concerns that compel the actual appearance of those individuals
26 previously subpoenaed. His request is well within his
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1 Constitutional rights under both the 5th and 6th Amendments right
2 to due process and to compel process. Without these safeguards
3 it is feared that Mr. Wahtomy will be unable to properly defend
4 himself against some very serious accusations. As such, it is
5 requested that the Court deny the Shoshone-Bannock Tribes motion
6 to quash and command the appearance of those subpoenaed.

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8 Dated: October 20, 2008

9 Respectfully Submitted,

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12 Nicolas V. Vieth
13 Federal Defender
Services of Idaho
Attorneys for Alfred Wahtomy

14 Naomi Leiserowitz
15 Kumm Law Offices
Attorneys for Martin Auck

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17 CERTIFICATE OF SERVICE

18 I HEREBY CERTIFY that the foregoing document was
19 electronically filed with the Clerk of the Court using the
20 CM/ECF system which sent a Notice of Electronic
21 Filing to the following person(s):
22 Michelle.Mallard@usdoj.gov

23 Dated this 20th day of October, 2008

24 /s/

25 _____
Nicolas V. Vieth