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9 UNITED STATES DISTRICT COURT  
10 FOR THE EASTERN DISTRICT OF WASHINGTON  
11 (HONORABLE LONNY R. SUKO)

12 UNITED STATES OF AMERICA, )  
13 )  
14 Plaintiff, )  
15 )  
16 vs. )  
17 )  
18 DIXIE ELLEN RANDOCK, )  
19 STEVEN KARL RANDOCK, SR., )  
20 HEIDI KAE LORHAN, and )  
21 ROBERTA LYNN MARKISHTUM, )  
22 )  
23 Defendants. )  
24 )

NO. CR-05-180-LRS  
MOTION AND MEMORANDUM  
TO DISMISS INDICTMENT

**MOTION**

25 The Defendants who remain pending trial move the Court for an order  
26 dismissing the indictment herein with prejudice, or, in the alternative, suppressing  
evidence due to outrageous government misconduct which violate the Defendants'

1 constitutional rights to be free from unreasonable searches and seizures, to remain  
2 silent, to counsel and to due process of law. This motion is based upon the records  
3 and files herein and upon the sub-joined memorandum.  
4

5 **BACKGROUND/FACTS**

6 On March 29, 2005 at approximately 5:15 p.m., Task Force Officers  
7 investigating the case now before the Court served a Search Warrant at a storage area  
8 in the basement of 601 E. Seltice Way in Post Falls, Idaho. (Ct. Rec. 328-2 at 41-42).  
9 That search is the subject of a Motion to Suppress now pending herein. (Ct. Rec.  
10 328). Instead of leaving a copy of the Search Warrant and Inventory for the 11 boxes  
11 of material seized, the officers executing the Search Warrant left a note. The note  
12 purported to be from “an angry tenant” stating “whoever left their boxes...can look  
13 for it at the County landfill.” (Attachment at 27).  
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17 The boxes contained business and personal records belonging to the moving  
18 Defendants. The boxes were covered with lids.  
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20 The boxes were discovered missing on or about May 25, 2005, at which time  
21 the Defendant Roberta Markishtum reported the theft to the Post Fall Police  
22 Department. (Attachment at 16). Task Force Officers investigating this case  
23 informed the Post Falls Police Department that the boxes reported stolen had really  
24 been seized during the execution of the Search Warrant. (Attachment at 21).  
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1 The Task Force Officers in our case contacted Detective Dave Beck of the Post  
2 Falls Police Department to assist them in obtaining additional evidence. Task Force  
3 Officer Bryan Tafoya, masquerading as a Post Falls Police Officer, and Detective  
4 Beck began investigating the “theft” of the boxes.  
5

6 What followed was the pretense of a “theft” investigation but, what was really  
7 investigation leading to the Indictment in this case. Officers Beck and Tafoya  
8 conducted several interviews of the Defendants Dixie Randock, Steve Randock,  
9 Robert Markishtum and Amy Hensley. During these interviews the Officers  
10 questioned the Defendants about the business enterprise now before the Court. The  
11 Officers asked about names of schools, associates and other information to  
12 derivatively develop other evidence to be used against the Defendants. (Attachment  
13 at 21-26). The Officers made several trips to Post Falls, gaining entry to the  
14 Defendants’ business premises on the basis of this deceitful “theft” investigation.  
15 While the Officers were on the premises they looked through boxes of records, file  
16 drawers, took seals, papers, handwriting examples and other items while stating they  
17 were necessary for their “theft” investigation. (Attachment at 21-26). The Officers  
18 stated that they would be looking at the local landfill for the “stolen” boxes while  
19 searching for the missing Groene children, an investigation that was also ongoing.  
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26 Officer Beck prepared a police report of his investigation which is included in

1 the attachment. This is a false police report of the investigative steps Officer Beck  
2 supposedly took to investigate the “theft” The report documents contacts with the  
3 Defendants and an adjuster, Tracy Johnson, at Safeco Insurance, the carrier for  
4 coverage at the Post Falls office. Officer Tafoya is neither named or identified in any  
5 way. Officer Beck clears the case as “Inactive pending further leads” on July 22,  
6 2005. ( Attachment at 14-18).

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9 The Officers enlisted the help of the Defendants’ insurance carrier which  
10 conducted taped interviews of our Defendants in an attempt to obtain incriminating  
11 evidence. (These taped interviews have been provided in Discovery and will be  
12 presented at any hearing on this Motion).

13  
14 This deceitful discovery procedure continued until the numerous Search  
15 Warrants were served on August 11, 2005. After contacting Amy Hensley and  
16 keeping her confined for approximately three hours, but before executing the Search  
17 Warrant at the home of the Defendants Steve Randock and Dixie Randock, the  
18 Officers had Amy Hensley call the Randocks. Ms. Hensley had a script given to her  
19 by the Officers which she read over the phone to the unsuspecting Randocks. Ms.  
20 Hensley stated to the Randocks that the Post Falls Police and an insurance agent were  
21 at her home, that she had to cooperate against the Randocks’ “diploma mill” and that  
22 they were showing her something signed by Steve Randock stating she stole  
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1 \$30,000.00.

2 **ARGUMENT**

3 Outrageous government misconduct started with leaving the phony note about  
4 the Defendants' records being taken to the county landfill, instead of fulfilling the  
5 Fourth Amendment particularity requirement by leaving a copy of the warrant to  
6 "assure [] the individual whose property...[was] seized of the lawful authority of the  
7 executing officer, his need to search, and the limits of his power to search." United  
8 States v. Chadwick, 433 U.S. 1, 9 (1977) (internal citations omitted). This phony  
9 note is also a deliberate and intentional violation of Federal Rule of Criminal  
10 Procedure 41, (f)(3), to "give a copy of the warrant and a receipt to the person from  
11 whom or from whose premises, the property was taken."  
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16 When a theft of the records was reported to the Post Falls Police Department,  
17 the officers investigating our case intentionally interceded requesting the Post Falls  
18 Police Department to assist the investigation now before the Court. (Attachment at  
19 21).

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21  
22 Officers Beck and Tafoya intentionally and deliberately misrepresented their  
23 true purpose in contacting the Defendants. The officers in this case clearly stepped  
24 over the line to outrageous government misconduct.

25  
26 As the Ninth Circuit recently stated in a case examining the use of government

1 stealth to ferret out criminal activity,

2 While we don't generally second guess the government's use of  
3 stealth to ferret out criminal activity, see Dalia, 441 U.S. at 257, we  
4 take a closer look when agents identify themselves as government  
5 officials but mislead suspects as to their purpose and authority. This  
6 is because people "should be able to rely on [the] representations" of  
7 government officials. United States v. Bosse, 898 F.2d 113, 115 (9<sup>th</sup>  
8 Cir. 1990) (per curiam) (internal quotation marks omitted). If people  
9 can't trust the representations of the government officials, the phrase  
10 "I'm from the government and I'm here to help" will become even  
11 more terrifying.

12 This concern is at its zenith when government officials lie in order to  
13 gain access to places and things they would otherwise have no legal  
14 authority to reach. "We think it clearly improper for a government  
15 agent to gain access to [property] which *would otherwise be*  
16 *unavailable to him* by invoking the private individual's trust in his  
17 government . . ." See *id.*  
18 (internal quotation marks omitted) (emphases added).

19 See United States v. Alvarez-Tejeda, Slip Opinion at 7067 (decided June 8, 2007  
20 in Ninth Circuit No. 06-30289).

21 This concern is at its zenith in this case.

22 In United States v. Bosse, 898 F.2d 113, 115 (9<sup>th</sup> Cir. 1990) (per curiam), the  
23 Defendant applied to the State of California for a license to buy and sell automatic  
24 machine guns. California Department of Justice Agent Robert Dunkin, as part of  
25 the application process, inspected Bosse's home. Dunkin was accompanied by  
26 ATF Agent Mark Rusin. *Id.*, at 114. Agent Dunkin stated that ATF Agent Rusin  
"is with me," but was otherwise unidentified to Bosse. *Id.*, at 115.

1 ATF Agent Rusin was not at Bosse's home for the purpose of assisting in the state  
2 licensing process, but to further a federal investigation against Bosse. ATF Agent  
3 Rusin prepared diagrams of Bosse's house to prepare an application for a search  
4 warrant. Id. During execution of the federal search warrant an illegal shot gun was  
5 found. Bosse was charged with unlawfully possessing a sawed-off shot gun in  
6 federal court. Id., 114.

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9 Bosse was convicted. The trial court set aside the judgment and granted a  
10 motion to suppress. Id.

11  
12 On appeal, the Ninth Circuit held, under all the circumstances, the failure to  
13 identify the ATF Agent and his purpose for being in Bosse's house was "a  
14 deliberate misrepresentation of his true purpose" and an illegal surreptitious entry  
15 into Bosse's home in violation of the Fourth Amendment. Id., at 115-16. The  
16 Ninth Circuit remanded for consideration of the independent source rule but, held,  
17 Id., at 115:

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20 "When a government agent presents himself to a private individual,  
21 and seeks that individual's cooperation based on his status as a  
22 government agent, the individual should be able to rely on the agent's  
23 representations. We think it clearly improper for a government agent  
24 to gain access to records which would otherwise be unavailable to him  
25 by invoking the private individual's trust in his government, only to  
26 betray that trust."

The same thing happened here, but the facts are much more egregious. Task

1 Force Officer Tafoya was intentionally misrepresented as a Post Falls Police  
2 Officer. Officer Tafoya cased the office for execution of a subsequent search  
3 warrant noting computer equipment, printers, number of file cabinets and the  
4 layout of the office. (Attachment at 23). But he and Officer Beck went much  
5 further: conducting interviews of the Defendants, looking at and collecting  
6 records. (Id., at 21-26). The Defendants were concerned about identity theft as  
7 credit cards and other sensitive information had been “stolen” and belonged to  
8 third parties they had done business with. The “stolen” boxes contained sensitive  
9 personal and financial information about others that the Defendants sought to  
10 protect.  
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15 Another case that merits analysis in considering this motion is United States v.  
16 Stringer, 408 F. Supp. 2d 1083 (D.Or. 2006), where Chief Judge Haggerty dismissed  
17 the indictment against Stringer for egregious government misconduct. In Stringer the  
18 SEC was conducting a securities investigation. The United States Attorney’s Office  
19 in Oregon decided there was a “high probability” Stringer would be prosecuted  
20 criminally but, it allowed the civil investigation to continue because of the level of  
21 cooperation the SEC was receiving and, therefore, no overt investigation by the FBI  
22 would take place. AUSA Robinson advised the SEC that he was interested in  
23 developing a false testimony case. Id., at 1085-86. Stringer was subpoenaed to  
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1 testify before the SEC and “informed that disclosure of information to the SEC was  
2 mandatory, subject to the valid assertion of any legal right or privilege.” Id. Stringer  
3 was given a standard SEC form that told him he had a right to counsel, Fifth  
4 Amendment rights and that “routine uses” of this testimony could be made, including  
5 sharing it with the United States Attorney’s Office. Id., at 1086-87. At his testimony,  
6 Stringers’ attorney asked the SEC investigator if Stringer was a “target” of the  
7 investigation. The investigator responded, “[t]he SEC does not have targets in this  
8 investigation.” Id., at 1087. The SEC investigator was also asked if the SEC was  
9 working with another Department of the United States, such as the United States  
10 Attorney’s Office. The investigator responded that “routine use” is defined in the  
11 form provided and that it was the SEC’s policy not to answer questions like that. Id.  
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16 The government was concerned a criminal investigation would halt the  
17 successful discovery process by the SEC and make witnesses less likely to cooperate  
18 and invoke their constitutional rights. Id.  
19

20 Judge Haggerty held, “[t]he strategy to conceal the criminal investigation from  
21 the defendant was an abuse of the investigative process.” Id., at 1088.  
22

23 In addition, it is a due process violation if government agents make  
24 affirmative misrepresentations as to the nature or existence of parallel  
25 proceedings or otherwise use trickery or deceit. United States v.  
26 Robson, 477 F.2d 13, 18 (9<sup>th</sup> Cir. 1973).

Id., at 1089. In our case, Officers Beck and Tafoya made an affirmative

1 representation they were investigating a “theft”. The Defendants were told they had to  
2 appear and answer questions and assist in the investigation.

3 The Stringer decision goes on,  
4

5 Moreover, the defendants Fifth Amendment rights were violated. As  
6 defendants were unaware of the involvement of the USAO, it is  
7 “unrealistic to suppose the defendant[s] [would] be on guard against  
8 incriminating [themselves].”

9 Id., at 1089-90, quoting United States v. Rand, 308 F. Supp. 1231, 1237 (N.D.  
10 Ohio 1970). In our case the United States Attorney’s Office had previously  
11 approved the search warrant issued on March 29, 2005. Our Defendants were  
12 unaware of that involvement and were unaware they were being investigated, their  
13 Fifth Amendment right to remain silent was violated and their Sixth Amendment  
14 right to counsel was violated.  
15

16 In deciding that dismissal was the appropriate sanction; the Stringer decision  
17 stated:  
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19 Dismissal of an indictment is warranted if the alleged governmental  
20 misconduct is “so grossly shocking and so outrageous as to violate the  
21 universal sense of Justice.” United States v. Smith, 924 F.2d 889, 897  
22 (9<sup>th</sup> Cir. 1991); United States v. Ramirez, 710 F.2d 535, 539 (9<sup>th</sup> Cir.  
23 1983).

24 Id., at 1089.  
25

26 Like the Stringer case, the Indictment herein should be dismissed.

1 As Justice Brandeis stated in Olmstead v. United States, 277 U.S. 438, 483-  
2 85 (1928) (Brandeis J., dissenting).

3 We believe that a private person has the right to expect that the  
4 government, when acting in its own name, will behave honorably. When a  
5 government agent presents himself to a private individual, and seeks that  
6 individual's cooperation based on his status as a government agent, the  
7 individual should be able to rely on the agent's representations. We think it  
8 clearly improper for government agent to gain access to records which  
9 would otherwise be unavailable to him by invoking the private individual's  
10 trust in his government, only to betray that trust. When that government  
11 agency then invokes the power of a court to gather the fruits of its decision,  
12 we hold that there is an abuse of process.

13 Will this court by sustaining the judgment below sanction such conduct on  
14 the part of the Exectutive? The governing principle has long been settled. It  
15 is that a court will not redress a wrong when he who invokes its aid has  
16 unclean hands... Where the Government is the actor, the reasons for  
17 applying it are even more persuasive.

18 ...  
19 Decency, security, and liberty alike demand that government officials shall  
20 be subjected to the same rules of conduct that are commands to the citizen.  
21 In a government of laws, existence of the government will be imperiled if it  
22 fails to observe the law scrupulously. Our government is the potent, the  
23 omnipresent teacher. For good or for ill, it teaches the whole people by its  
24 example. Crime is contagious. If the Government becomes a lawbreaker, it  
25 breeds contempt for law; it invites everyman to become a law unto himself;  
26 it invites anarchy. To declare that in the administration of the criminal law  
the end justifies the means to declare that the Government may commit  
crimes in order to secure the conviction of a private criminal would bring  
terrible retribution. Against that pernicious doctrine this Court should  
resolutely set its face.

### 24 CONCLUSION

25 The Court should dismiss the Indictment with prejudice due to outrageous  
26 government misconduct. In the event the Court deems dismissal inappropriate,

1 then the Court should suppress all evidence obtained, directly and derivatively, due  
2 to such misconduct.

3  
4 RESPECTFULLY SUBMITTED this 29th day of June, 2007.

5 WALDO, SCHWEDA, & MONTGOMERY, P.S.

6  
7 By: /s/ PETER S. SCHWEDA  
8 Peter S. Schweda, WSBA #7494  
9 Attorney for Defendant Steven Karl Randock, Sr.

10 **CERTIFICATE OF SERVICE**

11 I HEREBY CERTIFY that I electronically filed a true and correct copy of  
12 the foregoing Motion and Memorandum to Dismiss Indictment, by delivering  
13 same to each of the following attorneys of record, as follows:

14 **George JC Jacobs, III** [usa-wae-gjacobs@usdoj.gov](mailto:usa-wae-gjacobs@usdoj.gov)

15  
16  
17 By: /s/ PETER S. SCHWEDA  
18 Peter S. Schweda, WSBA #7494  
19 Attorney for Defendant Steven Karl Randock, Sr