No. 11-30101

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

vs.

RICKY S. WAHCHUMWAH,

Defendant - Appellant

On Appeal From the United States District Court
for the Eastern District of Washington
District Court No. CR-09-02035-EFS-1
The Honorable Judge Edward F. Shea
United States District Court Judge

DEFENDANT – APPELLANT'S OPENING BRIEF

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1. STATEMENT OF JURISDICTION

A. District Court Jurisdiction.

On April 21, 2009, defendant Ricky Wahchumwah was charged by superseding indictment with five separate counts of the violation of and conspiracy to violate the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668(a), the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707, and the Lacey Act, 16 U.S.C. §§ 3372(a) and 3373(d)(1)(B). There were two additional forfeiture counts. CR 58; ER 1.[1]

B. Court of Appeals Jurisdiction.

This Court has jurisdiction over the appeal pursuant to 28 U.S.C. §§ 1291 and 1294, and 18 U.S.C. § 3742.

C. Timeliness of Appeal.

The District Court entered its final judgment and sentence on April 13, 2011. Mr. Wahchumwah filed his Notice of Appeal on the same day. The Appeal is timely pursuant to Fed.R.App. P. 4(b)(1)(A)(i). CR 387; ER 6).

D. Appealability of Judgment.

[1] The abbreviation "CR" refers to the Clerk's Record and will be followed by the event number designated in the Clerk's file. The abbreviation "ER" refers to the Excerpt of Record and will be followed by

The judgment is appealable because it is final.

E. Defendant's Bail Status.

Mr. Wahchumwah was sentenced to 30 days in jail. He served his sentence and he is not presently confined.

II. ISSUES PRESENTED FOR REVIEW

1. Is the government required to have a warrant to conduct a search of the inside of a home using a hidden audio/video recording device.

2. Did the trial court err by not dismissing or merging duplicitous charges in the Superseding Indictment.

3. Did the trial court err by allowing the admission of redundant photographs showing the same eagle feathers or parts and by allowing the admission of photos of other species of birds, which were lawful for Mr. Wahchumwah to possess.

4. Did the trial court violate Mr. Wahchumwah's right of confrontation by admitting testimonial hearsay from non-testifying declarants.

III. STATEMENT OF THE CASE

A. Nature of the Case. On March 11, 2009 Ricky Wahchumwah and his partner, Victoria Jim, were arrested at their home in Granger, Washington. The arrests were made by U.S. Fish and Wildlife officers while a search pursuant to a warrant was being executed.

Mr. Wahchumwah and Ms. Jim have been together for nearly 20 years. They have two children and they are foster parents for an additional 7 children. Mr. Wahchumwah and Ms. Jim are tribal members of the Yakama Nation. They are traditional Native Americans. Mr. Wahchumwah supports the family by fishing the Columbia River at traditional sites during the salmon and steelhead runs. Prior to his conviction he was a hunter and provided meat for his family and Tribal Elders. He was also frequently given the honor of securing venison and other game for funerals and other ceremonies. Mr. Wahchumwah was well known as a feather tier and made regalia used at Powwows and other ceremonial articles.

Mr. Wahchumwah and Ms. Jim were targets of an investigation into the commercialization of bald and golden eagle feathers and the feathers of protected migratory birds, including hawks, ospreys and woodpeckers. They came to the attention of law enforcement after an unnamed Tribal member reported that Mr. Wahchumwah was allegedly selling eagle

feathers at the 2006 annual Labor Day Powwow at the Spokane Reservation. Tribal Officer William Matt relayed that information to Federal Fish and Wildlife Agent, Charles "Corky" Roberts and "Operation Hanging Rock" began.

Undercover agent Robert Romero approached Mr. Wahchumwah, Ms. Jim and their children at a Powwow in Missoula, Montana on April 19, 2008. He quickly established rapport by praising their children's dancing and regalia and buying food for the family. He also showed Mr. Wahchumwah some feathers he "inherited" and Mr. Wahchumwah gave him suggestions how to fashion the feathers into a fan. In the course of this relationship building Mr. Wahchumwah gave Romero two golden eagle wing sets and Romero gave Mr. Wahchumwah $400.

Agent Romero maintained contact by phone calls and texts up to October 15, 2008 when he secured an invitation to visit Ms. Jim and Mr. Wahchumwah at their home on the Yakama Reservation. He brought two otter pelts as a gift to Ms. Jim, hoping that Mr. Wahchumwah and she would reciprocate with eagle feathers. He made a video and audio recording of the 2 hour visit with a camera and listening device hidden in a button of his shirt. Ms. Jim was very happy with the gift of otter pelts and she permitted him to purchase two eagle plumes and loaded him down with

dried fish, ground corn and huckleberry preserves.

We respectfully request this Court view the video that was admitted as the government's Exhibit 25, and transcript, which was admitted as government's Exhibit 26. The video is extraordinary for the breadth of the government's warrantless intrusion into their home and the private lives of Mr. Wahchumwah, Ms. Jim and their children.

There was no further contact between any agents and Mr. Wahchumwah and Ms. Jim from October 15, 2008 until five months later, March 11, 2009, when the search warrant was executed at their home and they were arrested.

B. District Court Proceedings. On April 21, 2009 the U.S. Attorney for the Eastern District of Washington filed a Superseding Indictment. CR 58; ER 1. Mr. Wahchumwah was charged in Count 1 with conspiring with Ms. Jim and unnamed others to violate the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668(a); the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707; and the Lacey Act, 16 U.S.C. § 3372(a) and §3371(d)(1)(B).

The allegations of overt acts in furtherance of the alleged conspiracy included the sale of a golden eagle wing set on April 19, 2008 and possession of golden and bald eagle feathers and parts and migratory bird

feathers and parts on March 11, 2009.

Mr. Wahchumwah was charged in Count 2 with knowingly offering to sell or barter golden eagle feathers on May 12, 2008 in violation of the Bald and Golden Eagle Protection Act 16 U.S.C. § 668(a).

He was charged in Count 3 with engaging in conduct involving the sale, offer of sale, and intent to sell wild life; to wit, one golden eagle tail with a market value in excess of $350 on May 15-19, 2008, in violation of Bald and Golden Eagle Protection Act, 16 U.S.C. § 668(a) and the Lacey Act, 16 U.S.C. § 3372(a) and §3371(d)(1)(B).

Ms. Jim and he were charged in Count 4 with offering to sell feathers and plumes from bald and golden eagles on October 15, 2008 in violation of the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668(a) and 18 U.S.C. §2.

Ms. Jim and he were charged in Count 5 with selling two bald eagle plumes on October 15, 2008 in violation of the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668(a) and 18 U.S.C. § 2.

Count 4 and Count 5 are from the same transaction. Count 4 was for the offer to sell and Count 5 was for the sale.

Counts 7 and 8 were forfeiture counts. It is noteworthy that after a

two-day forfeiture hearing much of the feathers and parts that were seized and used as evidence at trial were returned to the defendants. CR 353; ER 24, CR 382; ER31.

The case was **extensively** litigated and the district court declared the case complex. CR 107; CR 33.

Of note was the defendants' motion to dismiss the Count 1 conspiracy related to the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707. The district court granted the motion, finding that the Act did not abrogate the Treaty Rights of members of the Yakama Nation to kill and possess the feathers of birds such as hawks, ospreys, and woodpeckers. CR 129; ER 107.

Nevertheless, the district court denied defendants' motion to exclude those feathers and parts from evidence and many such feathers; carcasses and parts were depicted in photos submitted in evidence by the government. CR 243.1; ER 301.

The eight-day jury trial began September 13, 2010 and concluded on September 23, 2010. The government presented twelve witnesses and 232 exhibits including many photographs of the feathers and bird parts when they were at the home and the same feathers while they were being analyzed by the government at a laboratory in Ashland Oregon. The

government also presented many of the actual feathers and parts that were depicted in the photographs. CR 243.1; ER 301. The defense called 7 defense witnesses and admitted 28 exhibits.

C. Disposition. Mr. Wahchumwah was found guilty on all five counts. A two day bifurcated forfeiture hearing was conducted on November 16, 2010 and December 17, 2010. Sentencing occurred on April 13, 2011.

At sentencing, the court granted Mr. Wahchumwah's and Ms. Jim's motions for downward departure and reduced their Offense Level by 10 points each. Mr. Wahchumwah was sentenced to 30 days confinement; two years supervised release and a penalty assessment of $425. CR 383; ER 11.

IV. STATEMENT OF RELEVANT FACTS

Ricky Wahchumwah and Victoria Jim came to the attention of law enforcement at the annual Labor Day Powwow at the Spokane Reservation in 2006. Officer William Matt, a Conservation Officer for the Spokane Tribe, testified that he had received a complaint from an unidentified tribal member from another tribe about the sale of eagle parts by Mr. Wahchumwah. The details about the complaint were not revealed in Officer Matt's testimony. ER 174. Officer Matt did not take any official action

during the Powwow. He later contacted U.S. Fish and Wildlife Officer Charles (Corky) Roberts and relayed that information to him. ER 176.

Victoria Jim's attorney objected to Officer Matt's testimony about the complaint from the unidentified person. ER 174. The evidence was also the subject to a motion in liminie filed July 29, 2010. CR 231; ER 245, and addressed again in defendant's trial brief, CR 260; ER 271.

U.S. Fish and Wildlife Officer Charles Roberts testified over objection that Tribal Officer Matt relayed a complaint about Mr. Wahchumwah selling eagle feathers in September 2006. ER 180. Accordingly, he wrote up a proposal to conduct a multistate undercover investigation to investigate the allegations. He gave the investigation the name of Operation Hanging Rock. ER 181. He also testified he had continued to receive complaints from "some tribal authorities." ER 185.

Officer Roberts also related a voice mail he received regarding an incident that occurred around November 27, 2007 where an unidentified citizen accused Mr. Wahchumwah of killing an eagle on the Klickitat River. ER 186 –even though the incident had been investigated by a Klickitat Sheriff's deputy who found no evidence substantiating the allegation. ER 195.

Officer Roberts was then permitted to testify about a broader

investigation involving at least two other suspects, Alfred Hawk and William Wahsise. ER 194.

Then, on redirect Officer Roberts went back over his prior testimony about the incident on the river, adding his own opinions inculpating Mr. Wahchumwah. ER 200.

U.S. Fish and Wildlife Agent Robert Romero was assigned to act as an undercover officer to make contact with Mr. Wahchumwah, Ms. Jim, and other individuals suspected of being involved in the illegal marketing of eagle feathers and parts.

Agent Romero arranged to attend a Powwow at the University of Montana in April 2008. Mr. Wahchumwah and Ms. Jim were there with their nine children. Romero approached them in the stands after their son had finished dancing. Romero complimented them on Tyson's dancing and started to establish rapport and to ingratiate himself into the family. ER 202. Mr. Wahchumwah and he talked about "fixing feathers," which means fashioning them into traditional Native American regalia for dancing or ceremonies. Romero then told Mr. Wahchumwah that he had a golden eagle tail that he inherited and wanted to fix into a fan ER 204.

Agent Romero was able to quickly gain the trust of Mr. Wahchumwah and Ms. Jim at the Powwow, in part, because he bought food and drinks for

their children and them. ER 210. At that time he was given a set of golden eagle plumes by Ms. Jim to reciprocate the gift. Agent Romero testified he was aware of the concept of gifting among traditional Native Americans. (ER 212). Defendants' expert, Professor Spero Manson, Ph.D., testified that Romero was setting up a cycle of reciprocity according to the Culture of the Tribes of the Columbia Plateau. ER 217, ER 234.

Romero was essentially adopted into the family at that time as evidenced by Ms. Jim's permission for the children to call Romero "Uncle." ER 348. This was a substantial honor under traditional practices and relevant to the gifting practices, as evidenced by the testimony of Agent Romero, ER 346, and Professor Manson. ER 219.

Romero's next face-to-face contact was on October 15, 2008 when he traveled to the defendants' home at 4630 South Track Road, Granger, WA, which is within the Yakama Reservation. Romero was equipped with a sophisticated electronic surveillance device concealed in his clothing that recorded the entire contact in the home by video and audio. The government did not obtain a court order or warrant authorizing the recorded surveillance.

We respectfully request this Court to view the video that was admitted as the government's Exhibit 25, and the transcript, which was admitted as government's Exhibit 26. A Timeline of the video is set forth in Appendix 3

to the May 5, 2009 response memo for defendants' motion to suppress the video. CR 81-2; ER 237.

The recording starts after Romero calls into service at 12:53 p.m. He arrives about 00:04:05. You hear his footfalls and dogs barking as he approaches the residence. He knocks and a smiling Ricky Wahchumwah invites him inside. As Romero enters the house he scans around the living area, recording images of the feathers and regalia on the walls (00:05:15).

At 00:11:49 Romero states he has otter pelts and an eagle feather fan in his car. He remembered that Victoria was looking for otter pelts at the Missoula Powwow. Ricky replied that they had made some otter hair ties for the girls since then. Romero states that he got the pelts for a couple hundred bucks. He was going to "swing them by" and have a visit too.

At 00:18:00 they talk about the money Ricky made fishing during the last season and that he was able to purchase some vehicles and go-carts with the fishing income. Ricky also said they made about $3,000 selling fireworks.

At 00:20:00 Romero moves his position to film the walls by the front door, showing drums and some feathers. He also turned to view other feathers on the walls.

At 00:23:00 they discuss the regalia on the walls. Ricky says that

some of the bustles are old, two were his, two are Tyson's, and one he is making for someone. Ricky also indicates he has been making regalia for others.

At 00:26:45 Romero tells Ricky that he wants to show him the fan he made. He gets up and Ricky follows him to his car. Ricky inspects the fan and comments that it looks like one Ricky made. They return to the house and you can see the otter pelts in Romero's hands. Ricky brings out a Roach (head gear) and some fans Ricky had made. They go into Tyson's room and Ricky shows Romero Tyson's regalia that are hanging on the walls. Romero comments that he likes the teenager's mildly prurient posters. They discuss Ricky's work on the regalia and Romero comments that it might be easy after you learn how to do it.

At 00:33:30 Ricky tells Romero that he made one of the fans with feathers he got from his friend who he is making the bustle for. Romero walks back into the main room scanning the regalia on the walls. Then they compare Romero's fan with Ricky's handiwork. The scanning of the regalia continues and they take a close look at the items on the wall.

At 00:37:30 they turn their attention to the otter pelts. Romero says that the girls could get some use out of them for hair ties. The video continues to scan around the room.

At 00:40:30 Romero asks if Ricky has been hunting. They talk about deer hunting and that Romero needs to draw tags to hunt deer in New Mexico.

At 00:45:30 Ricky says he got some tails, “old ones.” They walk out to the shed where Ricky gets a plastic container and they return to the house. Ricky says he bought the loose feathers from an “old guy.” Ricky relates that this person had his Bustle stolen by his girlfriend. Romero comments that some feathers looked old. Ricky says some of the feathers in the box were his and that he had bought the others for $2,000.

At 00:50:00 they talked about the Flicker and Osprey feathers in the box.

At 00:51:00 Romero asks if Victoria has any big quill plumes. Ricky answers that he doesn’t know. They talk about some sage grouse feathers that Ricky said he was going to make into chicken bustles for the girls.

At 00:54:00 Ricky says that Victoria has plumes in a “peechee” (a tablet). Romero asked Ricky if he was going to get rid of the feathers in the box. Ricky answers no, and that he is going to use them to make a large golden eagle bustle for Tyson. Romero comments that Tyson and the girls are set (with Powwow dancing regalia).

At 00:56:30 Ricky says there are lots of “balds” near the home.

Romero. At 00:57:00 Romero asks, “He [unnamed person] must go out and get them those around here, the balds.” Ricky makes a non-committal response, as if he does not know for sure. Romero answers that he should give Ricky a jingle every now and then to see what you run into. Ricky does not respond, but said he was going to try and get some plumes for the girls but that the other man’s girlfriend had stolen everything.

At 00:59:00 Romero returns to the subject of Vicky selling plumes and that he knows someone that would be interested. Ricky makes no response to that. However, Romero goes back and asks again if Vicky is selling plumes. Ricky says “yeah,” again, in a noncommittal way. Romero then asked how much she is getting for the tall ones. Ricky answers $150 - $125, but that he is not sure and she has not sold any for a long time. Romero asked if Ricky wanted to sell any of the feathers in the box. Ricky again states he is going to make a bustle for Tyson.

At 01:03:40 Romero comments, “lot’s of work to do, man” (making regalia for the children). Ricky answers that he needs to get his wood in first.

At 01:05:30 Ricky leaves Romero alone while he walks out to the

shed to get the tablet with plumes. The camera keeps rolling while Romero positions himself so the camera can scan the feathers on the floor and wall.

Ricky returns at 01:06:00 and hands the tablet to Romero. The tablet contains plumes taped to the pages. Romero and the camera scan over all of the pages of plumes.

Victoria enters the room at 01:07:45 while Romero is looking at the tablet. She looks down at the feathers on the floor and comments that Ricky is showing off his toys. Romero asks her if she has any long plumes left. Vicky said that they could have gotten some from their friend but his girlfriend had stolen them all. Victoria said she could probably look for a couple more to put in there.

At 01:09:10 Romero says he brought some otters for the kids. Vicky is very pleased. Romero gets up and pans around the room again. Romero comments that Ricky is already putting regalia together from the feathers on the floor.

At 01:12:00 Ricky comments that the other person still has five tails that were in a bustle and that is where he got some of the feathers on the floor. Romero asked if the feathers were from a bustle that Ricky had taken apart. Ricky answers that the tails or feathers were on sticks laying them out to see how they looked.

At 01:17:09 the kids return from school. Ricky tells Romero they have 5 boys and 4 girls. Romero is amused by the children as they play their video games and interact with each other and him. Ricky continues working on the feathers while Vicky was in the other room looking for something. Romero observes it is a "mass search party" at 01:25:50 and asks if she is still looking for plumes.

At 01:26:40 Romero observed that 'your buddy must have really pissed his girlfriend off (laughing)." Ricky answers that he does not know but the whole family are "messed up in the head." They are his cousins but they are "all screwed up" … "like bragging around and all that." Ricky also said he had lent one of the cousins some feathers that the cousin took to Albuquerque and sold.

At 1:36:30 Romero engages one of the children in a conversation about her video game. The girl explains Guitar Hero in great detail. And, Romero reminisces about his old black and white Nintendo and Super Mario.

At 01:40:40 Victoria returns to the room with the notebook and gives it to Romero. Romero said the plumes were not for him but he wanted ones that were as long as possible. They looked through the pages. Romero picks out a pair and said, "She will be happy with these." Romero gave

Vicky $100.

Right after that, at 01:43:00, Vicky asks how much they should pay Romero for the otters. Romero said nothing - they were gifts for the kids.

At 01:47:50 Romero says he needs to hit the road. Vicky protests and starts loading him down with salmon. They talk about the abundance of salmon they have in their locker and freezer and that Ricky will continue to hunt and fish, and that Ricky hunts all of the time. Romero acknowledges they are talking about hunting deer.

While Vickie is digging through the freezer, Ricky tells Romero that the girls are learning how to dry salmon and asks Vickie to get some of that. Romero samples some and Vickie gives him a container full, that Vickie explains is from the girls' "first drying." She also explains they are supposed to give it away. 01:53:00. Romero is now in the kitchen and the camera records Vickie and three of the girls packing the gifts for Romero. They give him huckleberry preserves and syrup and the oldest daughter's first corn. Vickie tells him that it is not everyday that someone brings them otters. Romero tells them that is because they helped him out. They are all laughing and celebrating the special event.

At 01:58:00 Ricky explains that they are supposed to give away the

girls' first roots, dried corn, jam, or dried fish. Vickie also explains it is the Old Way.

At 02:04:00 Vickie tells the children to "tell their Uncle bye" and Romero gets up and leaves the house. Ricky tells him that in the winter they will have some black and whites. Romero says, "what ever you don't use – let me know." Romero walks back to his car and as he is leaving he reads off the license plate number of a Jeep. At 02:07:15 Romero notes he is clear of his contact at 2:58 p.m.

V. SUMMARY OF ARGUMENT

1. Agent Romero conducted a warrantless search inside Mr. Wahchumwah and Ms. Jim's home using a sophisticated electronic surveillance device that was hidden on his person. Existing Supreme Court and Ninth Circuit precedent recognizes the sanctity of the home, and with few exceptions, a warrantless search of a home is unconstitutional. Existing precedent also recognizes that video surveillance is an extraordinarily serious intrusion into personal privacy. This case provides an opportunity to draw a bright and clear boundary between the home and the government's unfettered use of modern electronic surveillance technology. The court will accomplish this by holding that Agent Romero was required to have a

warrant to take his hidden audio/video recorder inside Mr. Wahchumwah's and Ms. Jim's home.

2. All of the statutory elements of Count 2 of the Superseding Indictment, charging a violation of the Bald and Golden Eagle Protection Act are found in Count 3, charging a violation of the Lacey Act. The charges are therefore multiplicitous under the Blockburger test, and one of the charges should have been dismissed.

Count 4, charges a violation of the Bald and Golden Eagle Protection Act by Ms. Jim's offer to sell feathers. Count 5 is for the sale of those same feathers a few minutes later. This court should find that the term "sale" means the entire transaction. Therefore, Count 4, regarding the offer to sell, should have been dismissed.

3. The trial court erred by allowing the admission of multiple and redundant photographs of the same eagle feathers or parts and by allowing the admission of photos of other species of birds which were lawful for Mr. Wahchumwah to possess. The redundant photos were cumulative and unfairly prejudicial because of their potential to mislead the jury into believing that Mr. Wahchumwah possessed more feathers and parts than he actually did.

The photos of the lawfully possessed non-eagle feathers were not relevant, or at most, of very little probative value. On the other hand, they were very prejudicial as the jury could find they demonstrated Mr. Wahchumwah's propensity to hunt and kill protected birds, including eagles.

4. A Spokane Tribal officer and federal agent were permitted to testify that they had received reports from unnamed individuals and law enforcement agencies that Mr. Wahchumwah was killing eagles and selling eagle feathers. This highly prejudicial evidence was about uncharged criminal activity and was therefore testimonial hearsay. The government emphasized this in closing argument. Mr. Wahchumwah had no opportunity to cross- examine any of the unnamed declarants. Accordingly, his right of confrontation under Crawford v. Washington was violated.

VI. ARGUMENT

A. The district court committed reversible error when it denied defendant's motion to suppress the evidence derived from Agent Romero's warrantless audio/video surveillance of the inside of Mr. Wahchumwah's home.

1. Standard of Review.

The appellate court reviews motions to suppress de novo. The district court's factual findings are reviewed for clear error and the lawfulness of the search is reviewed de novo. The court also reviews de novo whether a citizen's expectation of privacy is objectively reasonable. United States v.

Shyrock, 342 F.3d 948, 977 (9th Cir. 2003). Citing; United States v. Jones, 286 F.3d 1146, 1150 (9th Cir. 2002) and United States v. Nerber, 222 F.3d 597, 599 (9th Cir. 2000).

The lawfulness of electronic surveillance involving audio and video recording is governed by separate standards.

The audio portions are governed by the wiretap statute, 18 U.S.C.§§ 2510, et seq, which contains an exception to the warrant requirement permitting warrantless audio recording where one party to the monitored conversation (i.e.; the government agent) consents. Shyrock, 342 F.3d at 977.

The admissibility of the video recording is governed by Fourth Amendment analysis and the issue is whether the video recording violates a person's legitimate expectation of privacy. Shyrock, 342 F.3d at 978; citing Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507 (1967), and, Smith v. Maryland, 442 U.S. 735, 74, 99 S.Ct. 2577 (1979). A person's legitimate expectation of privacy may depend on the nature of the intrusion. *Id*, citing Minnesota v. Carter, 525 U.S. 83, 88, 119 S.Ct. 469 (1998).

In United States v. Torres, 751 F.2d 875, 878 (7th Cir. 1984) the Seventh Circuit observed, "It is true that secretly televising people (or taking still or moving pictures of them) while they are in what they think is a

private place is an even greater intrusion on privacy than secretly recording their conversations."

2. Analysis.

As set forth in the Statement of Facts above, on October 15, 2008 Agent Romero conducted a two-hour warrantless search of the defendants' home. The search was recorded by a sophisticated electronic surveillance device. The audio recordings capture the conversations between Romero and the defendants, and their children. The video portion records the interior of the home with the feather regalia on the walls and the "old feathers" that Mr. Wahchumwah stated he intended to use to make dancing regalia for the children.

Charles Roberts recites the scenes from the audio/video recording in his affidavit in support of the warrant authorizing the search of the home. CR 82.2; ER 349. Portions of the video were played to the jury. ER 387.

Mr. Wahchumwah's attorney, John Adams Moore, had moved to suppress the recordings and all other evidence tainted by the illegal search. (CR 53; ER 242-243 and ER 253-258). He argued that "… [T]he sheer intrusiveness of the video/audio recording, its excessive detail, drama and duration, amounts to an unreasonable search, and a warrantless one at that." ER 255.

The government responded that the use audio and video recording devices were authorized by the federal wiretap statute regarding one party consent, 18 U.S.C. § 2511(2)(c). The government also argued that Wahchumwah's citation to United States v. Nerber, 222 F.3d 597 (9th Cir. 2000) was misplaced because in Nerber the video camera was installed in a hotel room – and here, the video camera was concealed in Agent Romero's clothing. CR 76; ER 259.

The district court denied the motion to suppress and found that Mr. Wahchumwah and Ms. Jim did not have a legitimate expectation of privacy because they invited undercover Agent Romero into their home and freely shared information with him. Also, the video camera was not installed in the home nor was the camera present in areas where Romero was not. CR 107; ER 33. Mr. Wahchumwah's motion for reconsideration was also denied. CR 108; ER 47.

Both the government and district court judge failed to use the correct analysis regarding covert audio and video surveillance inside someone's home.

As stated above, the lawfulness of covert audio and video recording are analyzed under different principles. The audio portions are governed by the one party consent rule under the wiretap statute, 18 U.S.C.§§ 2510, et

seq. The lawfulness of the video recordings is governed by the Fourth Amendment, which protects a person's legitimate expectation of privacy. Shyrock, 342 F.3d at 977-978.

Mr. Wahchumwah's counsel cited United States v. Nerber, 222 F.3d 597, 599 (9th Cir. 2000), arguing that Romero's search employing his hidden audio/video device required a warrant. In Nerber the Ninth Circuit analyzed whether warrantless secret videotaping in a hotel room was acceptable under the Fourth Amendment. In this case, local police installed a video recorder in a hotel room rented by the officers. Informants brought the defendants to the hotel room and conducted a drug transaction. The informants showed the defendants a kilogram of sample cocaine and the defendants "flashed" a briefcase full of money. This took six minutes. The informants then went to get 24 more kilograms, leaving the defendants alone in the room for about three hours. 222 F.3d at 599.

The Nerber court first noted that for Fourth Amendment purposes, a hotel room is essentially the same as a home. 222 F.3d at 600. The court observed that the video intrusion was severe and rejected the government's arguments that the severity of the intrusion is not relevant in determining a person's reasonable expectation of privacy. *Id.*

The court then determined that the nature of the intrusion by the government can have an effect on whether the citizen has a reasonable expectation of privacy, citing Bond v. United States, 529 U.S.334, 120 S.Ct 1462, 1463-1465 (2000), (a border patrol agent's manual feeling of a bag is a more severe intrusion than a visual inspection).

The Nerber court then noted the extreme and egregious intrusion presented by hidden video surveillance:

> **Hidden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement**. The sweeping, indiscriminate manner in which video surveillance can intrude upon us, regardless of where we are, dictates that its use be approved only in limited circumstances. As we pointed out in *Taketa*, the defendant had a reasonable expectation to be free from hidden video surveillance because "the video search was directed straight at him, rather than being a search of property he did not own or control .... [and] the silent, unblinking lens of the camera was intrusive in a way that no temporary search of the office could have been." *Id.* at 677. As Judge Kozinski has stated, "**every court considering the issue has noted** [**that**] **video surveillance can result in extraordinarily serious intrusions into personal privacy** .... **If such intrusions are ever permissible**, **they must be justified by an extraordinary showing of need**." *United States v. Koyomejian*, 970 F.2d 536, 551 (9th Cir. 1992) (Kozinski, J., concurring). And, as the Fifth Circuit said, hidden video surveillance invokes images of the "Orwellian state" and is regarded by society as more egregious than other kinds of intrusions. *Cuevas-Sanchez,* 821 F.2d at 251, *See also United States v. Mesa-Rincon*, 911 F.2d 1433, 1442 (10th Cir 1990) ("**Because of the invasive nature of video surveillance, the government's showing of necessity must be very high to justify its use**"); *United States v. Torres*, 751 F.2d 875,882 (7th Cir. 1984) ("We think it ... unarguable that television surveillance is exceedingly intrusive, especially in combination (as here) with audio surveillance, and inherently indiscriminate, and that it could be grossly abused-to

> eliminate personal privacy as understood in modern Western nations"). Nerber, 222 F.3d at 603-604 (emphasis in original and added)

The Nerber Court ultimately found that the defendants did not have a reasonable expectation of privacy in the hotel room because they were not "residents" of the hotel or overnight guests of the occupants. They were there just to do a drug deal with persons they barely knew. 222 F.3d at 604. The court held that the six minutes of warrantless video surveillance while the informer and defendants were together was lawful. But, it affirmed the suppression of the three hours of surveillance when the defendants were alone in the room. *Id* at 605-606.

The Court, in dicta, indicated that warrantless video and audio surveillance may be unlawful if the surveillance was in the suspect's home:

> **Footnote 5**. We do not intend to imply that video surveillance is justifiable whenever an informant is present. **For example, we suspect an informant's presence and consent is insufficient to justify the warrantless installation of a hidden video camera in a suspect's home**. We hold only that when defendants' privacy expectations were already substantially diminished by their presence in another person's room to conduct a brief business transaction, the presence and consent of the informants was sufficient to justify the surveillance. Nerber 222 F.3d at 604. (Emphasis added).[2]

[2] The Shyrock court addressed Footnote 5; "The majority's dicta makes it clear that the panel was not addressing whether an informant's consent is sufficient to allow warrantless videotaping in all circumstances, such as where the defendant rents the hotel room." 342 F.3d at 979.

After Nerber, the Supreme Court decided Kyllo v. United States, 533 U.S. 27, 121 S.Ct 2038 (2001). In Kyllo, a federal law enforcement officer suspected the defendant was growing marijuana inside his unit in a triplex. The agent scanned the triplex with a thermal imager, which detects infrared radiation and converts the data into images showing relative warmth. The brief scan revealed an image showing a hot spot in the roof above a part of the attic. The agent then gathered electric bills and other information and applied for a warrant that was granted by the magistrate judge. The warrant was executed, and sure enough, a marijuana grow operation was found in the attic. 533 U.S. at 30.

The issue was whether the use of thermal imaging equipment from a city street was a search and what limits must be placed on surveillance technologies not generally available to the public. 533 U.S. at 34.

The Court started with the fundamental principle that the warrantless search of a home is almost always unreasonable:

> The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505,511 (1961). **With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no**. See *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *Payton v. New York*, 445 U.S. 573, 586 (1980).

553 U.S. at 31.[3] (Emphasis added).

The Court recognized that inside the home, "all details are intimate details, because the entire area is held safe from prying government eyes." 553 U.S. at 37. This is plainly evident in Agent Romero's audio/video recording in our case. His video shows intimate details of the main living area, kitchen and a teenage boy's bedroom - and even the activities of the small children when they return home from school.

The Court held that gathering information regarding the interior of a home with sense-enhancing technology that is not used by the general public constitutes a search:

> We have said that the Fourth Amendment draws "a firm line at the entrance to the house," *Payton*, 445 U.S. at 590. **That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant**. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no "significant" compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.

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[3] The Supreme Court in United States v. Jones, ---U.S.---, 132 S.Ct 945, (2012) has recently reiterated this principle; "We are not dealing with formalities. "*McDonald*, 335 U.S. 335 U.S. at 455, because " 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion' " stands " '[a]t the very core' of the Fourth Amendment, "*Kyllo v. United States*, 533 U.S.27, (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961), our cases have firmly established the " 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable, "*Payton v. New York*, 455 U.S. 5743, 586 (1980 (footnote omitted)." 132 S.Ct at 954.

> "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Carroll v. United States*, 267 U.S. 132, 149 (1925).
>
> **Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant**. 553 U.S. at 40. (Emphasis added).

The point of Kyllo is that homes are and always have been specially protected from government intrusion by the Fourth Amendment. And, the government is not permitted to do an end-around the Fourth Amendment with the use of electronic surveillance technology or devices.

Agent Romero's buttonhole video surveillance camera is not generally available to the public – and the issue is whether his search of the inside of the home with such a device required a warrant.

The point of Nerber and Shyrock is that covert audio/video recording is a severe intrusion against the expectation of privacy and that the use of this technology without a warrant depends in large part where the recording occurred.

Nerber posits that "… we suspect an informant's presence and consent is insufficient to justify the warrantless installation of a hidden video camera in a suspect's home." 222 F.3d at 604 n. 5. (Emphasis added).

We respectfully request this court to consider the Kyllo holding regarding the sanctity of the home and translate the dicta in Nerber's Footnote 5 into a bright line rule, holding that the government must first obtain a warrant before its agents may use hidden audio/video devices inside a suspect's home.

Or, in the alternative, the Court should find that at some point during the search of the home, the sheer intrusiveness of the video/audio recording, its excessive detail, drama and duration, amounts to an unreasonable search.

Finally, this Court should find that the search warrant obtained by the government using Agent Romero's audio/video recording was invalid, and therefore reverse the trial court's order denying defendants' suppression motion. Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407 (1963) (re: fruit of the poisonous tree doctrine).

B. The District Court Committed Reversible Procedural Error by Not Dismissing or Merging Duplicitous Counts.

Mr. Wahchumwah's counsel moved to dismiss Count 2 or Count 3 and Count 5 or Count 5. CR 264; ER 268, or in the alternative, that the

charges be merged. [4]

Counsel moved to dismiss Count 2 or Count 3 because the counts were multiplicitous. Counsel also moved in the alternative to merge Count 2 into Count 3 and limit the charge to one unit of prosecution because all of the elements of Count 2 (Bald and Golden Eagle Protection Act) were contained in Count 3 (Lacey Act).

Counsel moved to dismiss Count 4 or Count 5 because Count 4 charged the offer to sell and Count 5 charged the sale of plumes – all from the same transaction.

A hearing on the motion was held on the first day of trial, September 13, 2010. ER 81. The district court judge denied the motion regarding Count 2 and Count 3 and held his ruling in abeyance for Count 4 and Count 5. With regard to the latter, the judge stated; "Just as a general observation, a contemporaneous offer, if you will, followed immediately by a sale, it seems to me, is not in the mind of Congress to be punished as anything but one act." ER 101. The order was entered as a text entry. CP 288; ER105.

Multiplicity occurs when the government charges one offense in more than one charge in the indictment. The test applied by the Ninth Circuit is set forth in United States v. Chacko, 169 F.3d 140, 146-147 (9th Cir. 1999):

[4] The Motion is CR 264; ER 268, which was supported with the legal authorities set forth in Defendants' Trial Brief (CR 260; ER 271) and Reply (CR 280; ER 290)

> To assess whether two offenses charged separately in the indictment are really one offense charged twice, the "same elements" test or the "*Blockburger*" test is applied. See *Blockburger v. United States*, 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932); *Dixon* 509 U.S. at 696 (affirming application of the *Blockburger* test). **The Blockburger test examines whether each charged offense contains an element not contained in the other** charged offense. See Dixon, 509 U.S. at 696. If there is an element in each offense that is not contained in the other, they are not the same offense for purpose of double jeopardy, and they can both be prosecuted, See id.; *Knapp v. Leonardo*, 46 F.3d 170, 178 (2d Cir. 1995). (*Emphasis supplied*)

When applying the Blockburger test, the court focuses on the elements in the charging statutes rather than the evidence presented at trial. United States v. Wolfswinkle, 44 F.3d 782, 784 – 785 (9th Cir 1995); citing, Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 2265 (1980).

1. Count 2 and Count 3.

Count 2 states a violation of the Bald and Golden Eagle Protection Act regarding the sale of a Golden Eagle tail to Agent Romero:

> On or about May 12, 2008, in the Eastern District of Washington, RICKY S. WAHCHUMWAH, without permission under law to do so, did knowingly offer to sell and barter feathers from Golden eagles (*Aquila chrysaetos*) in violation of 16 U.S.C. §668(a).

Count 3 states a violation of the Lacey Act for the same purchase:

> On or about may 15-19, 2008, in the Eastern District of Washington, RICKY S. WAHCHUMWAH, without permission under law to do so, did knowingly and unlawfully engage in conduct involving the sale,

> offer of sale, and intent to sell wildlife with a market value in excess of $350 by selling wildlife, that is, one Golden Eagle (*Aquila chrysaetos*) tail, for money and other consideration, knowing that the wildlife had been taken, possessed, and transported in violation of the laws of the United States, to-wit: Title 16, United States Code, § 668(a), all in violation of Title 16, United States Code, § 3372(a)(1) and § 3373(d)(1)(b).

Count 2 and Count 3 fail the Blockburger test because all of the elements of the statute cited in Count 2 are found in Count 3 (along with an additional element in Count 3 that the wildlife had a market value greater than $350). Or, stated another way, there are no statutory elements set forth in Count 2 that are not found in Count 3.

Therefore, this court should reverse Mr. Wahchumwah's conviction for Count 2.

2. Count 4 and Count 5.

Count 4 states a violation of the Bald and Golden Eagle Protection Act regarding Victoria Jim's **offer to sell** two plumes from bald and golden eagles to Agent Romero during his visit to their home on October 15, 2008:

> On or about October 15, 2008, in the Eastern District of Washington, RICKY S. WAHCHUMWAH and VICTORIA M. JIM, without permission under law to do so, did knowingly **offer to sell** and barter feathers and plumes from Bald Eagles (*Haliaeetus leucocephalus*) and Golden Eagles (*Acquila chrysaetos*) in violation of 16 U.S.C. § 668(a) and 18 U.S.C. §2. (*Emphasis added*)

Count 5 states a second violation of the Bald and Golden Eagle Protection Act for the **sale** of the plumes in the same transaction:

> On or about October 15, 2008, in the Eastern District of Washington, RICKY S. WAHCHUMWAH and VICTORIA M. JIM, without permission under law to do so, did knowingly **sell** two plumes from Bald Eagles (*Haliaeetus leucocephalus*) and Golden Eagles (*Acquila chrysaetos*) in violation of 16 U.S.C. § 668(a) and 18 U.S.C. §2. (*Emphasis added*).

Mr. Wahchumwah's counsel argued below that a "sale" is the entire transaction including the offer and transfer of the purchase. Therefore, the offer and sale should be one unit of prosecution, not two. He cited United States v. Iverson, 162 F.3d 1015 (9th Cir. 1998) for the basic rule of statutory construction:

> When a statute does not define a term, we generally interpret that term by employing the ordinary, contemporary, and common meaning of the words that Congress used. See *United States v. Akintobi*, 159 F.3d 401 … (9th Cir. 1998)("In the absence of a statutory definition, words will be interpreted as taking their ordinary, contemporary, common meaning.") (citation and internal quotation marks omitted); *Leisnoi v. Stratman*, 154 F.3d 1062, 1069 (9th Cir. 1998) … As pertinent here, the word "responsible" means "answerable" or "involving a degree of accountability." Webster's Third New Int'l Dictionary, 1935 (unabridged ed. 1993). 162 F.3d at 1024-1024.

The common meaning of the term "sell" is set forth in the Random House Webster's Dictionary (1995) and the definition includes the offer; and the transfer of goods, property, or services:

> **Sell** (sel).*v*. **Sold**, **sell-ing**, *n*.-v.t. 1. To transfer (goods or property) or render (services) in exchange for money. 2. To deal in; keep or offer for sale; *to sell insurance*. 3. To make an offer for sale to. 4. To persuade or induce to buy. 5. To promote or effect the sale of; *packaging sells many products*. … 14. To offer something for sale. 15. To be offered for sale at the price indicated (fol. By *at* or *for*). To be engage or be employed in selling something. 17. To promote sales. (italics supplied, emphasis added, 6 through 15 omitted).

The government may argue to the facts of this case and say that Ms. Jim made two offers to sell different sets of plumes, but only one of the offers was consummated by the sale of one of the sets of plumes. This argument is contrary to pertinent legal authority. And, as stated above, when applying the Blockburger test, the court focuses on the elements in the charging statutes, and not the evidence presented at trial. United States v. Wolfswinkle, 44 F.3d 782, 784 – 785 (9th Cir 1995); citing, Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 2265 (1980).

Finally, if there is any doubt about whether Congress intended that the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668(a) allowed separate charges for both the offer to sell and the sale of feathers in a single transaction, the ambiguity should be resolved in defendants' favor under the rule of lenity.

In Bell v. United States, 349 U.S. 81, 75 S.Ct. 620 (1955), the defendant was charged with two separate counts for violating the Mann Act by transporting two prostitutes across state lines. The Court reversed, stating:

> When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. … **[I]f Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses**. 349 U.S. at784-785. (Emphasis added).

Therefore, the court should reverse Mr. Wahchumwah's conviction under Count 4 because the offer to sell should have been merged by the trial court into Count 5 for the sale.

C. The District Court Committed Reversible Error by Admitting Redundant Photographs of the Same Eagle Feathers and by Admitting Feathers of Birds Other than Eagles.

On August 23, 2010 the district court by Minute Entry ordered the government to provide defense the color photographs it intended to use as exhibits at trial and a list identifying multiple photographs of the same carcass. (CR 242; ER 106).

The government submitted its list of the 160 photographs it intended to offer as individual exhibits. CR 243-1; ER 301. The list shows in Column 3, "Other views of Item," which means that the same feathers or parts are

shown in more than one photograph. Adding up the "Other views of Item" reveals that 64 of the feathers and parts were depicted in more than one photographic exhibit.

Mr. Wahchumwah's trial counsel objected and argued that showing multiple photos of the same item to the jury is misleading and creates the appearance of more feathers and parts than were actually possessed by the defendants. CR 258; ER 334.

Counsel also objected to photographs depicting other non-eagle migratory birds. *Id*. 12 of the photographic exhibits depicted non-eagle species. CR 243.1; ER 301.

The District Court had previously ruled that Yakama Tribal members, such as Mr. Wahchumwah and Ms. Jim had treaty rights to possess, kill, and sell migratory birds such as osprey, hawks, and woodpeckers. CR 129; ER 107. Counsel argued that introducing evidence that Mr. Wahchumwah hunted and possessed these birds (lawful behavior) demonstrates the propensity to hunt and kill eagles. *Id*.

On September 8, 2010 the district court, after applying the FRE 403 balancing test, ruled that the government would be allowed to present evidence and testimony regarding the defendants' alleged possession of non-eagle feathers and parts. The court invited the parties to present a limiting

instruction. CR 286 (Order); ER 111. CR 305; ER 113 (Instruction).

The court also partially granted defendants' motion in liminie regarding redundant eagle photos and struck 12 of the 64 redundant eagle photos. CR 286; ER 110.

FRE 403 allows a court to exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The Rule favors admissibility and relevant evidence must be included unless its probative value is substantially outweighed by its unfair prejudice, or its tendency to confuse the jury. United States v. Hankey, 203 F.3d 1160, 1172 (9th Cir. 2000).

The appellate court reviews FRE 403 rulings over objection for abuse of discretion. Hankey, 203 F.3d at 1169.

We suggest that this Court should determine that the trial court should have excluded *all* of the redundant photos of eagle feathers and parts because the needless presentation of this cumulative evidence clearly had the potential to mislead the jury, regarding the amount of feathers Mr. Wahchumwah possessed, thereby causing substantial and unfair prejudice to the defendants.

We also suggest that this Court should determine that evidence of defendants' lawful killing, possession, or sale of non-eagle migratory bird species had little relevance to the alleged commercialization or unlawful possession of eagle feathers and parts. The presentation of this evidence was clearly prejudicial to defendants, regarding the propensity to kill protected birds, and that prejudice clearly and unfairly outweighed its probative value.

D. The District Court Committed Reversible Error by Admitting Highly Prejudicial Testimonial Hearsay Statements From Non-testifying Declarants.

As discussed at the start of this brief, Ricky Wahchumwah and Victoria Jim came to the attention of law enforcement at the annual Labor Day Powwow at the Spokane Reservation in 2006. Conservation Officer William Matt, testified that he had received a complaint from an unidentified tribal member from another tribe about the sale of eagle parts by Mr. Wahchumwah. ER 176. Federal agent, Charles Roberts, also testified that he had other similar referrals from tribal members and tribal law enforcement officers. ER 185.

Victoria Jim's attorney objected to Officer Matt's testimony about the complaint from the unidentified person. ER 174. The evidence was also the subject to a motion in liminie filed July 29, 2010 CR 231; ER 245, and

addressed again in defendant's trial brief. CR 260; ER 271. Mr. Wahchumwah's attorney also argued the Crawford issue at the hearing on September 8, 2010. ER 244. However, the Court's order set forth in CR 286; ER 110 makes no mention to this particular matter.

At trial the court overruled the objection about the referrals from unidentified individuals, stating that the referrals were to set some context and for what the officers did next and not for the truth of it. The court then instructed the jury:

> Ladies and Gentlemen, I allow this testimony not for the truth of it about what somebody said about something, but only to establish why this witness did what he did. That will be offered for the truth. ER 175.

The trial court was later proven wrong about the use of the testimony when, in closing argument, the government ignored the limiting instruction and argued that the unnamed referrals about Mr. Wahchumwah's commercialization in eagles were factual and the complaints reflected the disapproval of the Native American community regarding the sale of eagle feathers. ER 249 and ER 252 - 253.

In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), the Supreme Court held that hearsay that is "testimonial" is inadmissible under the Sixth Amendment Confrontation Clause unless; (1) the declarant is unavailable at trial, and (2) the defendant had an opportunity to cross

examine the declarant under oath at an adversarial hearing. 541 U.S. at 49-69.

"Testimonial" hearsay includes "statements that declarants would reasonably expect to be used prosecutorially" or "statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id* at 52.

The statements made by the unidentified Tribal member to Officer Matt are hearsay because they were offered to prove "the truth of the matter asserted" – that is; Mr. Wahchumwah was selling eagle feathers at the powwow. They are testimonial because the declarant would reasonably expect their statement would be used prosecutorially.

Finally, the statements from the unnamed declarants were highly prejudicial on their face and were later emphasized in the government's closing argument for the purpose of showing that the Native American community as a whole disapproved of Mr. Wahchumwah's actions.

The government's attorney in closing argument stated:

> The investigation that led to the search warrant began in September 2006 when Spokane Tribal Officer Bill Matt contacted Agent Charles Roberts and relayed a complaint to him that he had received from a member of the Native American community, and that complaint was that one of the defendants, in this case, Mr. Ricky Wahchumwah, was commercializing in eagles – eagle feathers at the Spokane powwow in Wellpinit over the Labor Day weekend.

> …
>
> That complaint, as it turned out, was the first of other complaints that Special Agent Robert[s] received from within the Native American community, basically, along the same lines, that the defendants were commercializing in eagles at powwows. (ER --- 1392)
> …
>
> These defendants were committing multiple crimes. The U.S. Fish and Wildlife Service got a legitimate complaint from within the Native American community, more than one. … . (ER--- 1417-1417)

Mr. Wahchumwah was never given the opportunity to confront and cross-examine the unnamed Tribal member declarant(s), and his Sixth Amendment rights were accordingly violated.

VI. CONCLUSION

In this country, the right to be left alone by the government while you are inside your home is a foundational and basic right. The courts have also recognized the extreme intrusiveness of hidden video surveillance and have limited the government's use of surveillance technology that invades an individual's legitimate expectation of privacy. Therefore, the courts have held that the government must demonstrate an extraordinary showing of need before hidden video surveillance is permissible.

A person's right to privacy inside his home and the government's legitimate interest in investigating crime can easily be

balanced by a rule requiring the government to first obtain a warrant before it takes its hidden camera into the home.

Or, in the alternative, the Court should find that at some point during the October 15, 2008 search of the home with the hidden camera; the sheer intrusiveness of the video/audio recording, its excessive detail, drama and duration, amounted to an unreasonable invasion of Mr. Wachumwah's and his family's privacy.

Accordingly, this court should find that the trial court erred when it denied defendants' motion to suppress the evidence obtained and derived from agent Romero's warrantless video recording of the inside of Mr. Wahchumwah's home.

The district court also committed reversible error by denying the defendant's motions to dismiss or merge duplicitous charges; by allowing the admission of redundant photos of the same eagle feathers; by allowing photos of legally possessed non-eagle species; and by admitting highly prejudicial testimonial hearsay from unnamed, non-testifying declarants.

Based on the foregoing, Mr. Wahchumwah respectfully requests this Court to reverse the district court judgment and remand the case for further proceedings.

DATED this 24th day of April, 2012

Respectfully submitted,

/s/ Robert M. Seines
Attorney for Defendant – Appellant
Ricky S. Wahchumwah

CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, I certify that the foregoing brief uses a proportionately spaced font with a 14-point typeface, and contains 9,773 words. (Opening, answering, and second and third briefs filed in cross appeals must not exceed 14,000 words, and reply briefs must not exceed 7,000 words).

/s/ Robert M. Seines
Attorney for Appellant

CERTIFICATE OF RELATED CASES

United States v. Victoria Jim, U.S.C.A. No. 11-30102; U.S.D.C. No. CR-09-2035-EFS-2 is related to this case.

/s/ Robert M. Seines
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on 4-24-12 I electronically filed the foregoing with the Clerk of Court using the CM/ECF System which will send notification of such to: PHILIP NINO, attorney for VICTORIA JIM and TIMOTHY E. OHMS and TYLER TORNABENE Assistant United States Attorneys.

/s/ Robert M. Seines
Attorney for Appellant