ROBERT M. SEINES (WSBA No. 16046)
Attorney at Law
P.O. Box 313
Liberty Lake, WA 99019
Phone: 509-844-3723
Fax: 509-255-6003
Email: rseines@msn.com

Hanni M. Fakhoury (admitted *pro hac vice*)
Jennifer Lynch (CA SBN 240701)
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Phone: 415-436-9333
Fax: 415-436-9993
Email: hanni@eff.org

Counsel for Amicus Curiae
ELECTRONIC FRONTIER FOUNDATION

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. LEONEL MICHEL VARGAS, Defendant.	Case No.: 13-cr-06025-EFS **BRIEF *AMICUS CURIAE* OF ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF DEFENDANTS' MOTION TO SUPPRESS POLE CAMERA EVIDENCE** Hearing Date: February 11, 2014 Time: 10:00 a.m. Location: Richland Courthouse

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INTRODUCTION[1]

The government's warrantless use of a pole camera to monitor defendant Leonel Vargas' home for one month, requires this Court to confront the "power of technology to shrink the realm of guaranteed privacy." *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

In April 2013, police officers installed a camera on top of a pole near Vargas' house at 531 Arousa Road in Pasco, Washington. Complaint at ¶ 7. The camera was aimed at the front yard and driveway of his house, where it could see the front door and allowed officers to remotely watch the house from the police station. *Id.* at ¶ 7, 11. For almost a month, agents monitored Vargas' home around-the-clock, waiting to catch him in criminal activity. When officers finally saw Vargas firing weapons outside his home almost one month after the surveillance began, the camera allowed officers to zoom in close enough to determine the color and type of weapon he was carrying. *Id.* at ¶¶ 11, 18. The camera ultimately permitted the officers to obtain a search warrant for Vargas' home, which resulted in the seizure of the gun and drugs that form the basis of the charges against Vargas. *Id.* at ¶¶ 20-22.

But the Fourth Amendment demanded that the officers obtained a search warrant before monitoring Vargas' home for a month. Any other rule would allow the police free reign to silently watch and record those they dislike, waiting for someone to inevitably

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[1] Counsel for *amicus curiae* thanks the Court for allowing EFF to appear as an *amicus* and would be eager to participate in oral argument during the pretrial conference on February 11, 2014, if permitted by the Court. No one, except for undersigned counsel, has authored the brief in whole or in part, or contributed money towards the preparation of this brief.

commit one of the myriad federal crimes.[2] Thus, this Court must suppress both the video evidence and the fruits of the illegal surveillance.

ARGUMENT

The Fourth Amendment protects people in their "persons, houses, papers, and effects," from "unreasonable" searches and seizures. U.S. Const. amend. IV. A "search" occurs "when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo*, 533 U.S. at 33 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). A "search" also occurs when the government "physically occupie[s] private property for the purpose of obtaining information." *United States v. Jones*, 132 S. Ct. 945, 949 (2012). Warrantless searches inside the home are "presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980). That extends to warrantless searches of a home's curtilage, which is considered part of the house. *United States v. Perea-Rey*, 680 F.3d 1179, 1184 (9th Cir. 2012) (citing *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

The warrantless installation and use of the pole camera to record all activities in the front of Mr. Vargas's house continously for almost a month was a warrantless "search" under the Fourth Amendment, and thus unreasonable. Mr. Vargas had a reasonable expectation of privacy to be free from continuous video monitoring. Further, the installation of the pole camera allowed officers to effectively trespass into the curtilage of Vargas' home for the purpose of obtaining information about him. The fruit of that illegal search—the search warrant and the evidence obtained during its

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[2] *See* Gary Fields and John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, The Wall Street Journal, July 23, 2011, http://online.wsj.com/news/articles/SB10001424052702304319804576389601079728920 (estimating 3,000 federal crimes).

execution—must be suppressed.

A. The Front Yard, Driveway and Front Door Were Constitutionally Protected "Curtilage."

At the outset, it is important to note the camera was aimed at and recorded activity occurring in the constitutionally protected "curtilage" of Vargas' home. The Supreme Court recently explained that the "front porch is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends,'" and thus qualifies as "curtilage" protected under the Fourth Amendment. *Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013) (quoting *Oliver*, 466 U.S. at 182, n. 12); *see also Perea-Rey*, 680 F.3d at 1184-85 (carport attached to the front of the home qualified as "curtilage"). To determine whether an area surrounding a home meets the definition of curtilage, courts look to four factors: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, 480 U.S. 294, 301 (1987).

The area recorded by the video camera in this case clearly meets these four factors. The pole camera provided officers with a view of an area very close to Vargas' home, including "the front yard and driveway area" and the "front door of the residence." Complaint at ¶ 7. Moreover, the area was included in an enclosure surrounding the house because it was physically connected to the house itself. The front driveway and front door of the house, where the resident of the home meets and greets guests and enters and exits the home, are areas "to which the activity of home life extends." *Jardines*, 133 S. Ct. at 1415. Finally, although Mr. Vargas did not have a fence surrounding his front yard, the house was in such an isolated area that it was reasonable for him to expect that not many people passing by would observe it or enter onto his property.

Since the area recorded clearly was the "curtilage" of Vargas' home, it was

subject to Fourth Amendment protection.

B. Because Vargas Could Reasonably Expect that He Would Not Be Subjected to Invasive, Around the Clock Monitoring, the Month Long Video Surveillance Violated His Reasonable Expectation of Privacy.

1. Due to the Extremely Intrusive Nature of Secret Video Recording, Warrantless Use of Such a Camera Violates a Person's Reasonable Expectation of Privacy.

Secretly video recording an individual in his home is one of the most invasive forms of electronic surveillance possible. With video surveillance, officers can capture the details of a person's life, whether big or small, in high definition. They can enhance their senses by cataloging details that could be easily forgotten. They can silently rewind and rewatch over and over again without being detected. These concerns are amplified when it comes to video surveillance of a person's home, even if the footage captures the curtilage, rather than the interior of the home.

The Ninth Circuit has made clear "the legitimacy of a citizen's expectation of privacy in a particular place may be affected by the nature of the intrusion that occurs." *United States v. Nerber*, 222 F.3d 597, 601 (9th Cir. 2000). This comes from *Katz* itself, which found a person had a reasonable expectation of privacy in a phone call placed from a public phone booth. Because the "Fourth Amendment protects people, not places[,]" what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz*, 389 U.S. at 351. Even though the booth was accessible to the public and could be observed from the street, the intrusiveness of eavesdropping on an otherwise private conversation meant the Fourth Amendment applied.

Since *Katz*, the Supreme Court has repeatedly looked at the intrusiveness of the government's action when assessing whether an expectation of privacy is reasonable. *See generally Nerber*, 222 F.3d at 600-03 (citing *United States v. Place*, 462 U.S. 696,

707 (1983) and *Bond v. United States*, 529 U.S. 334, 337 (2000)). Supreme Court decisions approving warrantless surveillance by airplane confirms this.

In *California v. Ciraolo*, 476 U.S. 207 (1986), officers flew a plane 1000 feet above the defendant's home, observing and taking pictures of marijuana being grown in the backyard. 476 U.S. at 209. The Supreme Court ruled that anyone flying over the area could have seen what the officers observed, and therefore the officers' actions did not violate the Fourth Amendment. *Id.* at 213-14. However, the Court recognized that aerial observation "of curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens." *Id.* at 215. Similarly, in *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), while the Court ultimately approved the warrantless surveillance of an industrial complex because the photographs did not capture "intimate details," the Court cautioned that "surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant." *Id.* at 238; *see also Florida v. Riley*, 488 U.S. 445, 452 (1989) (plurality opinion) (upholding warrantless visual surveillance of greenhouse by helicopter since "no intimate details connected with the use of the home or curtilage were observed").

Prolonged and pervasive video monitoring of the front door and front yard of the home exponentially increases the intrusiveness of the government's action because it records intimate details connected with the use of the home and curtilage, including "associations, objects or activities otherwise imperceptible to police or fellow citizens." *Ciraolo*, 476 U.S. at 215, n.3. It permits the government to know who visits and associates with the homeowner, when that person comes and goes from their home, and the routes they take. The invasiveness is further amplified when video surveillance is continuous. "Prolonged surveillance reveals types of information not revealed by short-

term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble." *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010), *aff'd sub nom. United States v. Jones*, 132 S. Ct. 945 (2012).

Courts have consistently expressed concerns about the government's unsupervised use of covert video surveillance. The Ninth Circuit has specifically noted there is "a stronger claim to a reasonable expectation of privacy from video surveillance than against a manual search." *United States v. Gonzalez*, 328 F.3d 543, 548 (9th Cir. 2003). Because of its intrusiveness, the Ninth Circuit has permitted defendants to raise Fourth Amendment challenges to video surveillance that may be foreclosed to other, less invasive surveillance techniques.

For example, in *United States v. Taketa*, 923 F.2d 665 (9th Cir. 1991) agents broke into a DEA agent's office to physically search and install a secret video camera to investigate criminal activity. 923 F.2d at 668-69. The surveillance captured the activities of both the occupant of the office and a co-worker. *Id.* at 677. The Ninth Circuit held that although the co-worker did not have standing to challenge the physical search of the office, he did have standing to challenge the video surveillance since he had a reasonable expectation of privacy against being videotaped in the office. *Id.* at 676-77. The court noted "[p]ersons may create temporary zones of privacy within which they may not reasonably be videotaped, however, even when that zone is a place they do not own or normally control, and in which they might not be able reasonably to challenge a search at some other time or by some other means." *Id.* at 677.

In *Trujillo v. City of Ontario*, 428 F. Supp. 2d 1094 (C.D. Cal. 2006), police officers sued the city and department for violating the Fourth Amendment when they discovered a covert video camera was installed in the officers' locker room. 428 F. Supp. 2d at 1097. The defendants argued the officers had a diminished expectation of privacy in the locker room because the room was accessible to visitors and other employees, and the camera only recorded public areas, and not any restrooms or shower stalls. *Id.* at

1099, 1104. But the district court disagreed, ruling the officers had an expectation of privacy even if they knew there were others in the locker room because the video surveillance "distinguishe[d] this search from an average visual search and [wa]s far more intrusive than a search of someone's property." *Id.* at 1107 (citing *Taketa*, 923 F.2d at 677); *see also Richards v. County of Los Angeles*, 775 F. Supp. 2d 1176, 1184-86 (C.D. Cal. 2011) (surreptitious video recording of a "dispatch" room shared by public employees violated Fourth Amendment).

Similar to what occurred here, in *Shafer v. City of Boulder*, 896 F. Supp. 2d 915 (D. Nev. 2012), the district court found a Fourth Amendment violation when the government provided a private citizen with video equipment that the citizen installed to allow the police to look into his neighbor's backyard. *Id.* at 928. The court found the surveillance, which lasted for 56 days, intruded upon the neighbor's expectation of privacy in part because of the "intensity of the surveillance[,]" noting that the camera was "long range" and "contained superior video recording capabilities than a video camera purchased from a department store." *Id.* at 932.

These cases make clear that the invasiveness of secret video surveillance means the continuous recording of the constitutionally protected curtilage of a person's home without a search warrant violates the Fourth Amendment.

2. Even if the Curtilage of Vargas' Home Was Exposed to the Public, He Did Not Actually Expose His Home to Constant Video Surveillance.

No person expects that the front of his home will be exposed to video-recorded police surveillance all day, every day for more than a month. The government's primary argument in its opposition to Vargas' motion to suppress is that there is no expectation of privacy to be free from video recordings that only capture "activities that could otherwise be seen by the naked eye from any passerby." Government's Response to

Defendant's Motion Suppress, ECF No. 48 ("Gov. Response") at 2.[3] According to the government, regardless of whether Vargas was in the curtilage of his home or not, when Vargas "conducted target practice near a road where [he] could easily be observed, [he] exposed [his] activities to the public." Gov. Response at 4.

But in determining whether something is "exposed" to the public, the Court must "ask not what another person can physically and may lawfully do but rather what a reasonable person expects another might actually do." *Maynard*, 615 F.3d at 559. Stated differently, whether something is exposed to the public "depends not upon the theoretical possibility, but upon the actual likelihood, of discovery by a stranger." *Id.* at 560. This approach to the Fourth Amendment is consistent with the Supreme Court's recent decision in *Jones* concerning GPS tracking.

While the majority opinion in *Jones* held that the installation of a GPS device onto a car was a trespass onto private property, 132 S. Ct. at 954, Justices Alito and Sotomayor's concurring opinions—constituting five members of the Court—demonstrated that a majority of the Justices were concerned with the capabilities of

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[3] The government also cites two cases, *United States v. Vankesteren*, 553 F.3d 286 (4th Cir. 2009) and *Oliver*, 466 U.S. at 170, to suggest the pole camera only recorded activity occurring in "open fields," an area that is not protected by the Fourth Amendment. *See* Gov. Response at 2; *Oliver*, 466 U.S. at 179. But as explained above, the camera was clearly pointed at and recorded activities occurring in the curtilage of Vargas' home, and thus the open fields cases do not apply here. *See Vankesteren*, 533 F.3d at 290 ("…camera was not placed within or even near the curtilage of his home."); *see also United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999) (no Fourth Amendment violation when officers used video camera without a warrant to capture defendants growing marijuana on government park land open to the public).

technology to cheaply and efficiently aggregate reams of data to create new and unknown intrusions into previously private places. *See id.* at 954-57 (Sotomayor, J., concurring) and 957-64 (Alito, J., concurring in the judgment). Although a person exposes small details of their public movements and may have no reasonable expectation of privacy in those movements, *see United States v. Knotts*, 460 U.S. 276, 281 (1983), aggregating those movements through technologies that can reveal much more than discrete pieces of information raises different Fourth Amendment concerns. *See Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) (technology advances that make "available at a relatively low cost such a substantial quantum of intimate information about any person" to the Government "may alter the relationship between citizen and government in a way that is inimical to democratic society.") (citations and quotations omitted).

Both concurring opinions in *Jones* doubted that people reasonable expect that their public movements could be aggregated and monitored for an extensive period of time. Justice Sotomayor's opinion questioned "whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain . . . their political and religious beliefs, sexual habits, and so on." *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring); *see also id.* at 964 (Alito, J., concurring) (noting that "society's expectation has been that law enforcement agents and others would not . . . secretly monitor and catalogue every single movement of an individual's car for a very long period").

Since *Jones*, numerous courts have relied on these concurring opinions to find that prolonged surveillance of a person's public movements is a "search" under *Katz* because a reasonable person does not *actually* expect that the totality of their movements will be revealed over an extended period of time. *See, e.g., State v. Zahn*, 812 N.W.2d 490, 496 (S.D. 2012); *United States v. Lopez*, 895 F. Supp. 2d 592, 602 (D. Del. 2012); *see also State v. Earls*, 70 A.3d 630, 642 (2013) (relying on concurring opinions in *Jones* to find prolonged location monitoring through cell site data a "search" under state constitution);

Commonwealth v. Rousseau, 990 N.E.2d 543, 553 (2013) (relying on *Jones* concurring opinions to find prolonged GPS surveillance a "search" under state constitution).[4]

This Court should reach the same conclusion with respect to video surveillance. Just as a person would not expect their public movements to be tracked continuously for a month and thus does not actually "expose" these movements to others, no member of the public actually expects that their home would be subject to continuous, around-the-clock video surveillance through the use of a pole camera and thus does not "expose" the full mosaic of activities that occur there to others. While Vargas may have expected passersby to casually glance at the front of his home for brief fleeting moments, he could not have expected someone to use a video camera to record all activities occurring outside his home continuously for more than a month. The Supreme Court has already explained that with aerial observation of a person's home, what matters is the actual, not theoretical, likelihood of being watched by the government.

In *Florida v. Riley*, a plurality of the Supreme Court found that visual surveillance without a search warrant by a helicopter flying 400 feet above a greenhouse did not violate the Fourth Amendment. 488 U.S. at 445-46. The plurality opinion noted that any member of the public could have flown over the property and observed the greenhouse, particularly because nothing suggested the helicopter was flying outside of FAA regulations. *Id.* at 450-51. But in a concurring opinion that provided the crucial fifth vote upholding the surveillance, Justice O'Connor explained that just because a helicopter "could conceivably observe the curtilage at virtually any altitude or angle" did not

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[4] Even before *Jones*, a number of state courts found GPS surveillance to be a "search" under their state constitutions for that same reason. *See, e.g., People v. Weaver*, 909 N.E.2d 1195 (2009); *State v. Campbell*, 759 P.2d 1040 (1988); *State v. Jackson*, 76 P.3d 217 (2003).

necessarily mean there was no expectation of privacy from observation. *Id.* at 454 (O'Connor, J., concurring). Instead, "consistent with *Katz*, we must ask whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial observation" was unreasonable. *Id.* (citing *Katz*, 389 U.S. at 361). Thus, it was not "conclusive that police helicopters may often fly at 400 feet" because "if the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public" and therefore the area would not be exposed to the public. *Riley,* 488 U.S. at 454. She noted that there was no evidence that suggested helicopters do not routinely fly at that altitude, and thus the surveillance was permissible. *Id.* at 455.

Conversely, a person does not expect the front of their home to be exposed to the police all day, every day for more than a month. For that reason, the Fifth Circuit ruled in *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987) that the use of a pole camera to record activities occurring in the defendant's front yard was a "search" under the Fourth Amendment. *Id.* at 251. It distinguished *Ciraolo* by noting "unlike in *Ciraolo*, the government's intrusion is not minimal" and was not "a one-time overhead flight or a glance over the fence by a passer-by." *Id.* It found *Ciraolo* did not authorize "any type of surveillance whatever just because one type of minimally-intrusive aerial observation is possible." *Id.* Instead, the court looked to expectations of society and found that continuous video surveillance of a person's backyard conducted by a pole camera "provokes an immediate negative visceral reaction," "raises the spectre of the Orwellian state" and, most importantly, violates the Fourth Amendment if not authorized

beforehand by a search warrant. *Id.* at 248, 251, 252.[5] The district court reached the same result in *Shafer*, finding there is a reasonable expectation of privacy from "constant video surveillance" which permits an officer "to turn on his television and watch everything going on" in someone's home, a far cry from the situation in *Ciraolo*. *Shafer*, 896 F. Supp. 2d at 931-32 (citing *Nerber*, 222 F.3d at 603-04 and *Cuevas-Sanchez*, 821 F.2d at 251).[6]

While Vargas may have exposed discrete bits of his activities to the public, he did not actually "expose" his home to continuous video surveillance. He had a reasonable expectation of privacy that was violated by the prolonged video surveillance of his home.

C. Using a Video Camera to Record Activities at the Curtilage of Vargas' Home Constitutes a Warrantless Trespass and Violates the Fourth Amendment.

The Supreme Court recently explained that *Katz*'s reasonable expectation of privacy test "has been *added to*, not *substituted for*, the common-law trespassory test." *Jones*, 132 S. Ct. at 952 (emphasis in original). Because the camera allowed the officers

[5] As explained in more detail below, the Fifth Circuit and other courts, including the Ninth Circuit, require more than just a simple search warrant to authorize covert video surveillance.

[6] Even though the Sixth Circuit in an unpublished opinion ultimately found no Fourth Amendment violation in the use of a pole camera installed without a search warrant to look at the defendant's house, it expressed "misgivings" about allowing the government to conduct long-term video surveillance. *United States v. Anderson-Bagshaw*, 509 Fed. Appx. 396, 405 (6th Cir. 2012). It noted that *Ciraolo* involved "a brief flyover, not an extended period of constant and covert surveillance" and observed that the five members of the Supreme Court who signed onto concurring opinions in *Jones* shared "our concerns about certain types of long-term warrantless surveillance." *Id.*

to enter the protected curtilage of Mr. Vargas's home in order to obtain information about him, the surveillance was a trespass under the Fourth Amendment.

Under the Supreme Court's renewed focus on trespass, an officer's ability to obtain information is restricted "when he steps off [public] thoroughfares and enters the Fourth Amendment's protected areas." *Jardines*, 133 S. Ct. at 1415. The focus is not on technical trespass but whether there is "actual intrusion into a constitutionally protected area." *Silverman v. United States*, 365 U.S. 505, 512 (1961). Thus, although the officers did not physically enter Vargas' property, the video camera effectively allowed the officers to do so, meaning the officers conducted a "search" under the Fourth Amendment.

Jardines is illustrative. Without a search warrant, officers entered the defendant's front porch and permitted a drug-detecting dog to smell the defendant's home. *Jardines*, 133 S. Ct. at 1413. In finding the officers had "searched" the curtilage and thus the home under the Fourth Amendment, the Supreme Court noted that when agents intrude onto a "constitutionally protected extension" of a home, the "only question is whether [the homeowner] had given his leave (even implicitly) for them to do so." *Id.* at 1415. It noted the officers had no license, either explicit or implicit. *Id.* at 1415-16. While most homeowners may permit a Girl Scout or trick-or-treater to enter a person's front porch, there was no "customary invitation" to permit a police dog to enter the front of the home and smell for drugs. *Id.* at 1416.

The same is true here. While the video camera was not physically installed on Vargas' property, "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search" at least when the technology is "not in general public use." *Kyllo*, 533 U.S. at 34 (quoting *Silverman*, 365 U.S. at 512). Thus, the camera effectively entered Vargas' home for the purpose of obtaining information. As in *Jardines*, while a homeowner may have an understanding

that his home may be visually observed by passersby for brief moments, a homeowner would never invite someone to monitor their house all day, every day for more than a month, whether remotely by camera or by physically standing on the property.

By using a video camera to intrude onto Vargas' home for the purpose of obtaining information, then, the officers "searched" the curtilage under the Fourth Amendment.

D. Failure to Obtain a Warrant Meeting the *Koyomejian* Standard Means the Evidence Seized Under the Search Warrant Must Be Suppressed.

Since the video surveillance was a "search" under both the expectation of privacy and trespass tests of the Fourth Amendment, police needed to obtain judicial authorization before installing and using the video camera But given how intrusive video surveillance is, the Ninth Circuit and other federal circuit courts have required police do more than obtain a mere search warrant. *See United States v. Koyomejian*, 970 F.2d 536, 542 (9th Cir. 1992) (en banc). Instead, police must make an additional showing, borrowed from the requirements of the Wiretap Act and specifically 18 U.S.C. § 2518, before they are permitted to engage in covert video surveillance. Those requirements are:

- the judge must find that normal investigative techniques have been tried and failed or are unlikely to succeed or too dangerous;
- the warrant must contain a particular description of the activity to be recorded and a statement of the specific crime of which it relates;
- the warrant cannot permit surveillance longer than necessary to achieve the objective of the investigation up to 30 days, though the government can ask for extensions; and
- the warrant must require the surveillance be conducted in a way that minimizes videotaping of activity that should not be surveilled.

Koyomejian, 970 F.2d at 542 (quoting *Cuevas-Sanchez*, 821 F.2d at 252).[7] Since the officers engaged in a "search" of Vargas' home by using a secret video camera, they had to obtain a warrant that satisfied the *Koyomejian* requirements before recording. By recording without any warrant whatsoever, the officers violated the Fourth Amendment.

Evidence obtained as the result of "illegal action of the police is 'fruit of the poisonous tree'" and must be suppressed. *United States v. Crawford*, 372 F.3d 1048, 1054 (9th Cir. 2004) (en banc) (quoting *Brown v. Illinois*, 422 U.S. 590, 599 (1975)). That extends to evidence seized pursuant to a warrant that was a "fruit" of the original illegal search. *See United States v. Duran-Orozco*, 192 F.3d 1277, 1281 (9th Cir. 1999). Here, the video surveillance was clearly the basis for the search warrant to search Vargas' home, as demonstrated by the fact the agents observed Vargas' home for close to a month and did not apply for a search warrant until *after* they saw him on video with the weapons. As the search of Vargas' home was clearly a fruit of the illegal video surveillance, the evidence seized as a result of the search warrant must be suppressed.

CONCLUSION

For the reasons stated above, this Court should find the video surveillance violated the Fourth Amendment. The fruits of that illegal surveillance – the search warrant and the evidence seized from Vargas' residence – must be suppressed as a result.

Dated: December 2, 2013

Respectfully submitted,

/s/ Robert M. Seines
ROBERT M. SEINES
Attorney at Law
P.O. Box 313

[7] *See also United States v. Williams*, 124 F.3d 411, 418 (3d Cir. 1997); *United States v. Falls*, 34 F.3d 674, 680 (8th Cir. 1994); *United States v. Mesa-Rincon*, 911 F.2d 1433, 1437 (10th Cir. 1990); *United States v. Biasucci*, 786 F.2d 504, 510 (2d Cir. 1986); *United States v. Torres*, 751 F.2d 875, 883-84 (7th Cir. 1984).

Liberty Lake, WA 99019
Phone: 509-844-3723
Fax: 509-255-6003
Email: rseines@msn.com

/s/ Hanni M. Fakhoury
Hanni M. Fakhoury
Jennifer Lynch
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Phone: 415-436-9333
Fax: 415-436-9993
Email: hanni@eff.org

Counsel for Amicus Curiae
ELECTRONIC FRONTIER FOUNDATION

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Eastern District of Washington by using the appellate CM/ECF system on December 2, 2013. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 2, 2013

Respectfully submitted,

/s/ Robert M. Seines
ROBERT M. SEINES

Counsel for Amicus Curiae
ELECTRONIC FRONTIER FOUNDATION