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5
6 IN THE UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON

8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 vs.

11 LEONEL MICHEL VARGAS,

12 Defendant.
13
14

No: CR-13-6025-EFS

GOVERNMENTS MEMORANDUM
REGARDING TAKING WITNESS
TESTIMONY ON VIDEO
SURVEILLANCE POLE CAMERA

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16 Plaintiff, United States of America, by and through Michael C. Ormsby, United
17 States Attorney for the Eastern District of Washington, and Alexander C. Ekstrom,
18 Assistant United States Attorney for the Eastern District of Washington, submits
19 additional briefing regarding the issue of taking witness testimony on the specific
20 capabilities of the camera at issue in this case (ECF No. 73), as follows:

21 **I. SUMMARY OF ARGUMENT**

22 For the Fourth Amendment analysis in this case, the relevant inquiry is not the
23 ultimate capabilities of the camera in this case, but rather what capabilities of the
24 camera were in fact used on May 6, 2013 and subsequently relied upon in securing the
25 search warrant for the Defendant's residence. The Government's previously
26 submitted materials are sufficient to conduct this inquiry under either a pure
27
28

1 tresspassory or *Katz*¹ analysis. By way of example, Government's *Exhibit 2*, a two-
2 hour selection of the surveillance that encompasses the incriminating photographs
3 attached to and relied upon in the application for search warrant, is an accurate
4 depiction of those capabilities as they were used in fact on May 6, 2013. The make,
5 model and capabilities of the device are irrelevant. The nature of the intrusion, if any,
6 is measured by the way in which the device was used in fact, in this case, an ambient
7 light video-only recording from which still photographs were made.

8 Even under *Kyllo*², where one prong of the inquiry addresses whether the item
9 used constitutes, "a device that is not in general public use," Government's *Exhibit 2*,
10 as well as the other submissions, which show the placement of the camera and its
11 distance from the subject property, are sufficient for the Court to conduct this analysis.
12 *Kyllo v. United States*, 533 U.S. at 40. This is the case because, while *Kyllo* uses the
13 word "device" in its conclusion, the opinion itself makes clear that it is the
14 "technology" that is the focus of the Court's inquiry. *Id.* at 34. Because the
15 Government's previous submissions, including hyperlinks, allow the Court to
16 determine that the "technology" at issue here is in general public use, in the form of a
17 multitude of devices with similar capabilities, the make, model and ultimate
18 capabilities of the device are again irrelevant.

19 Finally, assuming for the purpose of argument that this Court determines that it
20 must receive specific information regarding the camera used in this case, the
21 information is sensitive law enforcement information and entitled to protection from
22 disclosure under the law enforcement privilege. Because the arguments to establish
23 this privilege would reveal information regarding sources and methods, and in so
24 doing reveal the information sought to be protected, the Government will submit the
25 affidavits in support of the privilege ex parte for review by this Court in camera. The

26 ¹ *Katz v. United States*, 389 U.S. 347 (1967).

27 ² *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038 (2001).

1 Government will argue that any specific information regarding the make, model,
2 capabilities and production numbers of the camera, along with any additional
3 information regarding its installation, concealment, or operation be received by the
4 Court by affidavit in camera. The Court can receive and review such information and
5 made findings that do not disclose the privileged information.

6 **II. FACTS**

7 The Court has to date received the following evidence with respect to this
8 matter:

9 1) Four photographs showing: a) a view of the pole upon which the camera was
10 affixed, with the Defendant's residence in frame; b) a view of the Defendant's
11 residence from the pole; and c) an aerial view of the pole and residence, with a scale
12 showing distance. ECF No. 49 (*Attachment A*).

13 2) A single page of a police report regarding the surveillance. ECF No. 53.

14 3) Five photographs showing the same items listed in a-b) above, but with two
15 additional aerial views of the surrounding area, with a scale showing distance in the
16 second photo. ECF No. 60-1 (*Attachment 1*).

17 4) A copy of an e-mail between counsel. ECF No. 68-1.

18 5) A copy of the Search Warrant and Affidavit in this matter, with still
19 photographs from the camera attached. (ECF No. 72)(*Government's Exhibit 1*).

20 6) A copy of a two-hour selection of the video recording from the camera,
21 covering the time period for the still photographs attached to *Government's Exhibit 1*,
22 above. (ECF No. 72) (*Government's Exhibit 2*).

23 7) The testimony of Task Force Officer Clem at the prior hearing. *Attachment*
24 *AA* to this filing.

25 Pursuant to this Court's instructions, the Government will also submit the
26 following:

1 8) A copy of a non- scannable exhibit, consisting of the entirety of the video
2 surveillance in this matter, contained on a hard-drive. The Government will, at the
3 next hearing on this matter, ask that this exhibit be marked and admitted as
4 *Government's Exhibit 3*³.

5 **III. ARGUMENT**

6 **A. The Actual Use Of An Item Is The Measure Of Its Intrusion 7 Under *Katz***

8 The Government has argued in prior briefing that, visual surveillance of this
9 intensity and duration is never a search. (ECF No. 60). Under a pure trespassory
10 analysis, there was no physical intrusion upon or occupation of property, and thus no
11 search. (ECF No. 60). The next issue is what evidence is relevant, under a *Katz*
12 analysis, to determine the level of intrusion upon the Defendant's expectation of
13 privacy. The Government would submit that, rather than any hypothetical or potential
14 capability of the camera, the relevant inquiry is the manner in which the camera was
15 actually used in this case. Because the camera's actual use is accurately reflected in
16 the photographs and video, the totality of the information submitted is sufficient for
17 this Court to determine that this ambient light video-only recording from
18 approximately 150 yards away did not constitute a search. Other capabilities of the
19 camera not actually employed are not germane.

20 The distinction between actual and potential invasions of privacy under *Katz*
21 was addressed by the United States Supreme Court in *Karo*. *United States v. Karo*,
22 468 U.S. 705 (1984). In discussing the transfer of the unmonitored beeper the Court
23 stated:

24
25 _____
26 ³ A copy of this exhibit was provided to the Defendant in discovery on July 1, 2013.
27 The Government will also provide a copy of the instructions it received for opening
28 and viewing the drive, previously provided to the Defendant, to the Court with a copy
to the Defendant.

1 To be sure, [the transfer of the beeper] created a potential for an invasion of
2 privacy, but we have never held that potential, as opposed to actual, invasions
3 of privacy constitute searches for the purposes of the Fourth Amendment. A
4 holding to that effect would mean that a policeman walking down the street
5 carrying a parabolic microphone capable of picking up conversations in nearby
6 homes would be engaging in a search even if the microphone were not turned
7 on. It is the exploitation of technological advances that implicated the Fourth
8 Amendment, not their mere existence.

9 *Karo*, 468 U.S. at 712. By the same token, it is the actual manner in which the
10 camera was used that implicates the Fourth Amendment, not a potential and/or unused
11 capability of the camera. For this reason, the make, model and ultimate capabilities
12 are not necessary for the determination because its actual use was to create an
13 ambient-light video only recording. The actual use and the fact that this use did not
14 result in any intrusion into any area of the interior of the Defendant's residence are
15 readily apparent from the best evidence: the video itself.

16 The sufficiency of the actual output of the device to determine the potential
17 infringement was further confirmed two years later in *Dow Chemical. Dow Chemical*
18 *Company v. United States*, 476 U.S. 227 (1986). Therein, the Supreme Court
19 reached its decision by examining the photographs taken by aerial camera⁴. *Id.* at 238
20 FN 5. ("On these facts, nothing in these photographs suggests that any reasonable
21 expectations of privacy have been infringed"). The Supreme Court, again looking at
22 the resulting photographs, found that "[t]he mere fact that human vision is enhanced
23 somewhat, *at least to the degree here*, does not give rise to constitutional problems."
24 *Id.* (italics added), *see also Id.* at FN 5 ("But a glance at the photographs in issue

25 ⁴ The make and model of the camera was part of the record in *Dow Chemical. Brief of*
26 *the United States*, 1985 WL 670132, at *3 (1985). However, as indicated above, it
27 was the resulting output of the camera that was the basis for decision. Further, none
28 of the concerns regarding disclosure of information regarding the device in this case
were present in *Dow Chemical*. The camera in that case was presumably mechanical.

1 shows that...”). Addressing the defendant’s concerns regarding, among others, the
2 potential for enlargement or magnification of the photos, the Supreme Court noted,
3 “Fourth Amendment cases must be decided on the facts of each case, not extravagant
4 generalizations.” *Id.* at FN 5.

5 In this case, the Court has available to it the complete output of the device, as
6 well as the information regarding the location of the installation relative to the area
7 observed. This information allows the Court to render a decision under *Katz*.

8 **B. The Actual Use Of An Item In Comparison With Other**
9 **Similar Items Allows The Court To Determine Whether The**
10 **Technology Is In “General Public Use” under *Kyllo***

11 The Government has previously argued that, because what was observed
12 occurred in the Defendant’s front yard, as opposed to the “details of the home,” resort
13 to the other part of the test in *Kyllo* is unnecessary. (ECF No. 60). While
14 unnecessary, the other part of the test can be addressed based on the present evidence.
15 In *Kyllo*, the Court’s holding addressed the use, in 1992⁵, of an Agema Thermovision
16 210 thermal imager. *Kyllo v. United States*, 533 U.S. 27, 40 (2001)(“ Where, as here,
17 the Government uses a device that is not in general public use...”). That said, the
18 concern of the court was on the technology itself, of which the device was merely an
19 exemplar, as made clear earlier in the opinion:

20 We think that obtaining by sense enhancing technology any information
21 regarding the interior of the home that could not otherwise have been obtained
22 without physical “intrusion into a constitutionally protected area,” *Silverman*,

23 ⁵ By the time the case was heard, the technology was nine years old, and there is no
24 indication that knowledge of the make and model of the imager would accrue to the
25 advantage to those who would seek to thwart its future use. *Kyllo*, 533 U.S. at 36
26 (“...the technology used in the present case was relatively crude...”) *see also Id.* at 52
27 (Appendix)(photographs from imager).

1 365 U.S. at 512, 81 S.Ct. 679, constitutes a search – at least where (as here) the
2 technology in question is not in general public use.

3 *Id.* at 34. Clearly, because the focus of the concern is the technology, if similar
4 devices exist in general public use, the decision does not rise or fall on the availability
5 of one of the many examples of the technology.

6 Here again, because the capabilities of the camera that were actually used, the
7 “technology” at issue, are accurately reflected in the photographs and video and the
8 Court has accurate placement and distance information, the Court can through the use
9 of a standard search engine determine that similar exemplars of this technology are in
10 general public use. Simply by way of example, the Government previously provided
11 a hyperlink to a site where a device possessing some of the same characteristics, in
12 this case zoom, can be remotely operated. (ECF No. 60, pg. 4). The Court can
13 presently determine that the technology of which this device is an example is clearly
14 in general public use.

15 **C. Further Information Regarding The Camera, Other**
16 **Components, Their Installation and Their Concealment Are**
17 **Law Enforcement Sensitive And Should Be Received, If At All,**
18 **For *Ex Parte* Review And Decision By The Court**

19 The Government has argued above that further information regarding the
20 camera, or other aspects of its installation, are not necessary for this Court’s
21 determination of the issue before for it. Assuming the Court is unpersuaded by the
22 arguments above, any additional information regarding the camera should be received
23 and considered *ex parte*. While the option of closed and sealed proceedings and
24 protective orders have been discussed as a baseline to protect the information, given
25 its nature, *ex parte* submission in the form of affidavits is appropriate. The Supreme
26 Court, in *Roviaro*, recognized an “informer’s privilege” that protects the identity of
27 government informants and allows the government to withhold from disclosure the
28 identity of persons who furnish information of violations of law to officers charged

1 with enforcement of that law. The purpose of the privilege is the furtherance and
2 protection of the public interest in effective law enforcement. *United States v.*
3 *Roviaro*, 353 U.S. 53, 59 (1957). The privilege applies in a pre-trial suppression
4 hearing. *McCray v. Illinois*, 386 U.S. 300 (1967).

5 Courts have since extended the qualified privilege in *Roviaro* to cover other
6 investigative techniques, including traditional and electronic surveillance. For
7 example, in *United States v. Green*, the D.C. Circuit upheld the privilege over the
8 defendant's request to learn the location of an observation post used in a drug
9 investigation in the context of a motion to suppress:

10 Just as the disclosure of an informer's identity may destroy his future usefulness
11 in criminal investigations, the identification of a hidden observation post will
12 likely destroy the future value of that location for police surveillance. The
13 revelation of a surveillance location might also threaten the safety of police
14 officers using the observation post, or lead to adversity for cooperative owners
15 or occupants of the building. Finally, the assurance of nondisclosure of a
16 surveillance location may be necessary to encourage property owners or
17 occupants to allow the police to make such use of their property.

18 *United States v. Green*, 670 F.2d 1148, 1155 (D.C. Cir. 1981).

19 Courts have held that given "the public interest in effective law enforcement,"
20 the FBI may assert a qualified privilege through the filing of an ex parte motion and
21 affidavit in camera and under seal to protect sensitive law enforcement techniques and
22 procedures from disclosure. *Commonwealth of Puerto Rico v. United States*, 490 F.3d
23 50, 62-64 (1st Cir. 2007). With respect to Title III electronic surveillance equipment,
24 the Eleventh Circuit has held that the privilege applies, because if information about
25 the equipment is provided to defendants and the public, it will:

26 [E]ducate criminals regarding how to protect themselves against police
27 surveillance. Electronic surveillance is an important tool of law enforcement,
28 and its effectiveness should not be unnecessarily compromised.

1 *United States v. Van Horn*, 789 F.2d 1492, 1508 (11th Cir.), *cert. denied*, 479 U.S.
2 854 (1986). The same concerns obtain to video surveillance outside of Title III.

3 Even where some aspects of a protected technique are known to the public,
4 “there is no principle . . . that requires an agency to release all details of a technique
5 simply because some aspects are known to the public.” *Barnard v. U.S. Dep’t of*
6 *Homeland Security*, 598 F. Supp.2d 1, 23 (D. D.C. 2009); *see also Piper v. Dep’t of*
7 *Justice*, 294 F. Supp.2d 16, 31 (D. D.C. 2003) (in FOIA case, court accepted
8 arguments that disclosure of the identity, functions and capabilities of an electronic
9 device used for monitoring purposes would reduce its effectiveness and allow for
10 individuals being investigated by the FBI to take countermeasures to circumvent the
11 technique).

12 The risk of circumvention of an investigative technique if information is
13 released has been accepted by numerous courts when reviewing exceptions for law
14 enforcement sensitive information. *See James v. U.S. Customs and Border*
15 *Protection*, 549 F.Supp.2d 1, 10 (D.D.C. 2008) (in FOIA case, the law enforcement
16 sensitive exception was properly invoked where the agency can demonstrate release of
17 the information “could enable [others] to employ measures to neutralize the
18 technique.”); *Judicial Watch v. U.S. Dep’t of Commerce*, 337 F. Supp.2d 146, 181 (D.
19 D.C. 2004) (risk of future circumvention sufficient for invocation of law enforcement
20 sensitive exception under FOIA).

21 The law enforcement sensitive evidentiary privilege is “grounded in well-
22 established doctrine and is widely recognized by the federal courts.” *In re The City of*
23 *New York*, 607 F.3d 923, 942 (2nd Cir. 2010). The privilege is designed, *inter alia*, to
24 prevent disclosure of law enforcement techniques and procedures that, once revealed,
25 could risk future circumvention of the law or compromise of the technique. *See*
26 *generally, Id.* at 944; *see also Van Horn*, 789 F.2d at 1507-1508 (finding the existence
27 of a qualified government privilege not to disclose sensitive investigative techniques);
28

1 *Dellwood Farms v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997); *In re Dep't of*
2 *Investigation*, 856 F.2d 481, 483-84 (2nd Cir. 1988) (stating that the law enforcement
3 privilege exists and prevents the “disclosure of law enforcement techniques and
4 procedures...”).

5 The law enforcement privilege is a qualified, not absolute privilege, and,
6 therefore, there are circumstances in which information subject to the privilege must
7 nevertheless be disclosed. *See In re The City of New York*, 607 F.3d at 940. Recently,
8 the Second Circuit analyzed, in depth, the actual procedure that should be followed by
9 a court in determining whether the privilege bars disclosure. *Id.* at 923.

10 As a threshold matter, the party asserting the law enforcement privilege bears
11 the burden of demonstrating that the material the government seeks to protect is the
12 type of material that the law enforcement privilege is intended to protect – in this case,
13 information pertaining to law enforcement materials, techniques and procedures, as
14 well as information that would seriously impair the ability of a law enforcement
15 agency to conduct future investigations. *Id.* at 948.

16 Once the party asserting the privilege successfully shows that the law
17 enforcement privilege applies, “there ought to be a pretty strong presumption against
18 lifting the privilege.” *Id.* at 945 (*quoting Dellwood Farms*, 128 F.3d at 1125 n. 22).
19 The court must balance the public interest in non-disclosure against the need of a
20 particular litigant for access to the privileged information. *Id.* at 948; see also
21 *Dellwood Farms*, 128 F.3d at 1125 (holding that the actual determination of the
22 existence of the law enforcement sensitive privilege is a “particularistic and
23 judgmental task” involved in balancing the “need of the litigant who is seeking
24 privileged investigative materials ... against the harm to the government if the
25 privilege is lifted.”). To rebut the presumption, the party seeking disclosure must
26 show (1) that its request is “non-frivolous and brought in good faith,” (2) that “the
27 information sought is [not] available through other discovery or from other sources,”
28

1 and (3) that there is a “compelling need” for the information relevant to the party’s
2 case. *Id.* at 948. Other relevant criteria courts have used in determining whether the
3 party seeking disclosure has rebutted the privilege with respect to investigative
4 equipment, often called the *Frankenhauser* criteria, includes: (1) whether the party
5 seeking discovery is an actual or potential defendant in any criminal proceeding either
6 pending or reasonably likely to follow from the incident in question; (2) whether the
7 investigation has been completed; whether the information sought is available through
8 other discovery or from other sources; and (3) the importance of the information
9 sought to the plaintiff’s case. *See Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D.
10 Pa. 1973), *Tuite v. Henry*, 181 F.R.D. 175 (D. D.C. 1998), *In re Sealed Case*, 856 F.2d
11 268, 272 (D.C. Cir. 1988). Even if the party seeking disclosure successfully rebuts
12 (by a showing of, among other things, a “compelling need”), the court must then
13 weigh the public interest in non-disclosure against the need of the litigant for access to
14 the privileged information before ultimately deciding whether disclosure is required.
15 *See In re The City of New York*, 607 F.3d at 948.

16 To assess both the applicability of the privilege and the need for the materials,
17 the court must ordinarily review the materials in question or hold an evidentiary
18 hearing in chambers. Frequently, because filing documents under seal may
19 inadequately protect particularly sensitive information, the court may, in the exercise
20 of its informed discretion and on the basis of the circumstances presented, require that
21 the party possessing the materials appear *ex parte* in chambers to submit the materials
22 for in camera review by the judge. *Id.* at 948-49. In this case, the Government will
23 submit materials *ex parte* for review as part of the motion to establish the privilege in
24 the first instance, and has suggested further submission for the Court’s determination
25 if necessary regarding specific information with respect to the camera.

26 If the court determines that the law enforcement privilege is not sufficient to
27 protect disclosure of the materials at issue, the materials must be disclosed. *In re The*
28

1 *City of New York*, 607 F.3d at 949. However, to minimize the effects of disclosure,
2 the court can restrict the manner in which the documents are provided through the
3 issuance of a protective order. See FED. R. CIV. P. 26(c)(1)(G). The Second Circuit
4 suggested that where release is directed, the documents should be available only on an
5 “attorneys’ eyes only” basis or requiring that the documents-and other submissions
6 that reference them-be filed under seal. *In re The City of New York*, 607 F.3d at 949.

7 Here, the FBI is asserting the privilege by ex parte affidavit, and the
8 Government’s concern regarding the threat to the privilege is borne out by defense
9 questioning at the prior hearing. See Attachment AA (Excerpt of Motion Hearing
10 Transcript of February 11, 2014). Despite being advised and having the agent testify
11 that he had no knowledge regarding even the camera itself, other than being told it
12 was commercially available, the agent was questioned on subjects far afield of the
13 general use of the camera, subjects on which he had no knowledge⁶. *Id.* at 17-20. The
14 following colloquy by defense counsel is indicative of the concern:

15 Q: Is this called hot wi-fi, the radio signal?

16 A: I don’t know.

17 Q: So the frequency of the radio connection is not something with which you
18 are familiar?

19 A: Correct.

20 *Id.* at 20; see also *Id.* at 21 (Q: So whatever software capability of the device you’re
21 functioning, it is all localized in the device; there’s nothing exported to other devices,
22 as far as you know?), and see *In re U.S. Dep’t of Homeland Security*, 459 F.3d 565,
23 569-71 (5th Cir. 2006) (finding that “in today’s times the compelled production of
24 government documents could impact highly sensitive matters relating to national
25 security. The days of using a suction cup microphone on the back of a telephone
26 handset connected to a cassette recorder are over. Therefore, the reasons for

27 _____
28 ⁶ This of course demonstrates that the privileged information is tightly controlled.

1 recognizing the law enforcement privilege are even more compelling now than when
2 [prior cases in the 5th Circuit] were decided.”).

3 The FBI uniformly and without exception asserts this privilege concerning this
4 technology because the release of technical data on the FBI’s operation and
5 deployment of these investigative tools will adversely impact upon and will
6 compromise the future use of the tools. For example, with specific knowledge of the
7 technique used (and, as importantly, the limitations thereof), a criminal defendant
8 could defeat the purpose of the system.

9 The Court considers the defendant’s “need [for] the evidence to conduct his
10 defense and [whether] there are . . . adequate alternative means of getting at the same
11 point. The degree of the handicap [to the defendant] must then be weighed by the trial
12 judge against the policies underlying the privilege.” *United States v. Harley*, 682
13 F.2d 1018, 1020 (D.C. Cir. 1982); *see also United States v. Cintolo*, 818 F.2d 980,
14 1002 (1st Cir. 1987) (the question is “whether the [defendant] demonstrate[s] an
15 authentic ‘necessity,’ given the circumstances, to overbear the qualified privilege”);
16 *United States v. Foster*, 986 F.2d 541, 543 (D.C. Cir. 1993) (balancing defendant’s
17 need for information against importance of government’s interest in avoiding
18 disclosure).

19 Here, the public interest in nondisclosure significantly outweighs the
20 Defendant’s need for the information. While the option of closed and sealed
21 proceedings and protective orders have been discussed as a baseline, given the nature
22 of the information, *ex parte* submission in the form of affidavits is appropriate. The
23 Court can receive by way of further *ex parte* submission, additional information
24 regarding its installation, concealment, or operation of the camera for its review and
25 determination on any remaining issues it determines are not sufficiently addressed by
26 the existing factual record. The Defendant would receive the benefit of the Court’s
27 ruling, but the privilege would be properly preserved. The Court can receive and
28

1 review such information and make findings that do not disclose the privileged
2 information.

3 **IV. CONCLUSION**

4 As argued above, the Government submits that further disclosure is
5 unnecessary, but that, in the alternative, any further disclosure of this privileged
6 information should be considered *ex parte* by this Court.

7
8 DATED this 7th day of March, 2014.

9
10 MICHAEL C. ORMSBY
United States Attorney

11 s/ Alexander C. Ekstrom
12 ALEXANDER C. EKSTROM
Assistant United States Attorney

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1 I hereby certify that on March 7, 2014, I electronically filed the foregoing with
2 the Clerk of the Court using the CM/ECF System which will send notification of such
3 filing to the following: John Matheson, Robert M. Seines (for Electronic Frontier
4 Foundation), Hanni M. Fakhoury (for Electronic Frontier Foundation), Jennifer Lynch
5 (for Electronic Frontier Foundation).
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

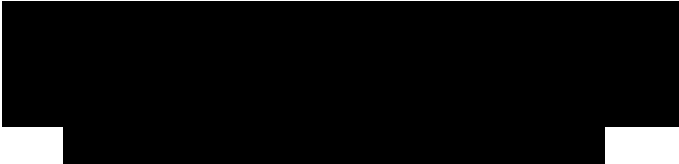
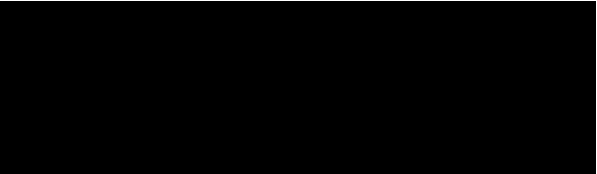
UNITED STATES OF AMERICA,)	Case No. 13-CR-6025-EFS
)	
Plaintiff,)	February 11, 2014
)	Richland, Washington
v.)	
)	Excerpt of Motion Hearing
LEONEL MICHEL VARGAS,)	Transcript
)	Pages 1 to 36
<u>Defendant.</u>)	

BEFORE THE HONORABLE EDWARD F. SHEA
SENIOR UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:	Alexander Carl Ekstrom
	 Office

For the Defendant:	John S. Matheson
	

Amicus Curiae Counsel:	Robert M. Seines
	
	Hanni M. Fakhoury (<i>pro hac vice</i>)
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Court-Certified Interpreter: Estela Castro

Official Court Reporter:



ouse

Proceedings reported by mechanical stenography; transcript produced by computer-aided transcription.

1 (Additional proceedings were reported but not requested to be
2 transcribed.)

3 (February 11, 2014; 10:25 a.m.)

4 MR. EKSTROM: Government would call Task Force Officer
5 Clem.

6 THE COURT: Good morning. Please raise your right hand.

7 AARON CLEM,

8 called as a witness on behalf of the Government, having first
9 been duly sworn, testified under oath as follows:

10 THE COURT: Tell us your first and last name, please and
11 spell them both for the record.

12 THE WITNESS: Aaron Clem.

13 THE COURT: You need to make sure that -- let's see if
14 that's on. The green light should be showing.

15 THE WITNESS: Aaron Clem; A-A-R-O-N, C-L-E-M.

16 THE COURT: Your first name was what?

17 THE WITNESS: Aaron.

18 THE COURT: A-A-R-O-N? Thank you.

19 THE WITNESS: A-A-R-O-N.

20 THE COURT: Okay. Let's proceed.

21 DIRECT EXAMINATION

22 BY MR. EKSTROM:

23 Q Sir, by whom are you employed?

24 A I am employed by the City of Kennewick as a detective.

25 Q And what is your current assignment?

USA v Vargas/13-CR-6025-EFS
Excerpt of Motion Hearing/February 11, 2014
A. Clem/D/Ekstrom

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1 A I am a task force officer with the FBI's Tri-Cities Violent
2 Gang Task Force.

3 Q And how long have you been designated to that task force?

4 A Uh, just under seven years.

5 Q And are you the case agent in this matter?

6 A I am.

7 Q We're here today regarding a camera installed on a utility
8 pole in Franklin County.

9 A Yes.

10 Q And were you involved in requesting the installation of
11 that camera?

12 A Yes.

13 Q And could you tell the Court in general terms how that
14 process occurs if you wish to use such a camera?

15 A Uh, I make a request to the tech agents and to the --

16 THE COURT: To the what?

17 THE WITNESS: To the technical agents, the FBI technical
18 agents.

19 THE COURT: Okay.

20 THE WITNESS: And the supervising agent, uh, for a
21 camera.

22 BY MR. EKSTROM: (Continuing)

23 Q And in April of last year, 2013, is that what you did?

24 A Yes.

25 Q And as a result of that, was a camera installed on a

1 utility pole near the residence of 531 Arousa Road?

2 A Yes.

3 Q And if you know, where exactly was that camera installed?

4 A South of the location, across the street on the top of a
5 hill.

6 Q And --

7 A An elevated position. I don't know that I would call it a
8 hill. An elevated position.

9 Q What type of an object or fixture was it attached to?

10 A It was attached to the pole.

11 Q A utility pole?

12 A Yes.

13 Q And who was the owner of that pole, if you know?

14 A I don't recall. I believe it was the PUD, but I'm not
15 sure, the Franklin County PUD.

16 Q If you know, was the pole owned by the defendant in this
17 case?

18 A It was not.

19 MR. MATHESON: I'm sorry, what was your response?

20 THE WITNESS: "It was not."

21 BY MR. EKSTROM: (Continuing)

22 Q If you recall, when did the camera become operational?

23 A I believe April. April -- I don't remember the exact date.

24 Q Would it be fair to say early April?

25 A Yes.

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1 THE COURT: What year?

2 BY MR. EKSTROM: (Continuing)

3 Q Of what year?

4 A Of 2013.

5 Q And was that camera still operational on May 6th of 2013?

6 A Yes.

7 Q Can you tell the Court what, if anything, you did with that
8 camera once installed and operational?

9 A I viewed the residence of 531 Arousa Road, front yard, uh,
10 carport, front door; uh, that area.

11 Q And the Court and the parties --

12 THE COURT: Excuse me a second.

13 When you say -- did you say you viewed?

14 THE WITNESS: Yes.

15 THE COURT: Okay. Well, technically -- okay. Well, I
16 guess we'll come back to that. Go ahead.

17 BY MR. EKSTROM: (Continuing)

18 Q And for the record, the Court and the parties have received
19 a DVD recording constituting two hours of video recording.

20 Are you familiar with that recording?

21 A Yes.

22 Q How are you familiar with it?

23 A Uh, with the assistance of the technical agent, I -- he,
24 uh, placed that recording on the DVD.

25 Q And what was -- and what was the source of that recording?

1 A The camera, or the hard drive, um, that was recorded -- the
2 hard drive that had the recording from the camera on it.

3 Q All right. And is that a fair and accurate representation
4 of the view from the camera during the time period depicted?

5 A Yes.

6 THE COURT: During the what?

7 MR. EKSTROM: Time period depicted on the disc.

8 THE COURT: On the day of the recording?

9 MR. EKSTROM: Yes.

10 THE COURT: Thank you.

11 BY MR. EKSTROM: (Continuing)

12 Q Now, for that exhibit, is there movement of the camera
13 reflected, the camera moving back and forth?

14 A Yes.

15 Q Is there pan and zoom on that exhibit?

16 A Yes.

17 Q Who was creating those movements on the camera?

18 A I was.

19 Q How were you doing that?

20 A Uh, with the controls associated with the -- with the
21 camera or with the recording device.

22 Q Have you reviewed Government's Exhibit 1, the search
23 warrant and attachments?

24 A Yes.

25 Q Who is the affiant of that search warrant?

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1 A I am.

2 Q And are there photographs attached to that search warrant?

3 A Yes.

4 Q And where did those photographs come from?

5 A Those came from the monitoring device.

6 Q From the -- from the video camera attached to the pole?

7 A From the software associated with the camera, yes.

8 Q Who selected the still photographs that were attached to
9 Exhibit 1?

10 A I did.

11 Q And are those fair and accurate representations of what you
12 observed through the camera at those dates and time?

13 A Yes.

14 Q When you prepared the DVD exhibit of the continuous video,
15 what was your intent in selecting that two-hour period?

16 A To encompass the time period of those pictures.

17 Q "Those pictures" being the pictures in Exhibit 1?

18 A Yes.

19 MR. EKSTROM: No further questions. Yield the witness.

20 THE COURT: Thank you.

21 Mr. Matheson.

22 MR. MATHESON: Thank you, Your Honor.

23 CROSS-EXAMINATION

24 BY MR. MATHESON:

25 Q Is it appropriate to refer to you as Agent Clem or

1 Officer Clem?

2 A Detective Clem.

3 Q Detective Clem. How long have you been associated with the
4 use of pole cameras?

5 A Several years. Um, probably since I started with the task
6 force.

7 Q You weren't familiar with them as an officer at KPD?

8 A I knew they existed, um, but didn't really use them, no.

9 Q Have you used the same pole camera since you started, or
10 have they evolved over time?

11 A I don't know.

12 Q Have you always been able to operate them remotely?

13 A Uh, the ones that I've used, yes.

14 Q Have you always been able to zoom and then follow subjects;
15 that sort of thing?

16 A Yes.

17 Q How far away from the defendant's front door is the pole on
18 which this camera was situated?

19 THE COURT: The distance from the camera to the -- to
20 what?

21 MR. MATHESON: To the front door.

22 THE COURT: To the front door.

23 MR. MATHESON: To the front door.

24 A A hundred and fifty yards, guessing.

25 THE COURT: A hundred and fifty yards?

1 THE WITNESS: Hundred and fifty yards.

2 BY MR. MATHESON: (Continuing)

3 Q And it's fair to say as you approach the defendant's house
4 from the pole camera, you're cresting a hill there; is that
5 correct?

6 A Yes.

7 Q And at what point is it that the house becomes visible to
8 either someone walking up the road or driving up the road?

9 A About the same place that the camera is at, or the utility
10 pole is at.

11 Q Isn't it true that the pole is at -- sits above the level
12 of the top of a car? In other words, if a car was parked there
13 at the base of the subject pole, it would not be visible from
14 the front door.

15 A I am not sure that -- I don't know at this point whether
16 the -- whether the pole is right at the top of the crest of the
17 hill or if it's on the back side of the hill. If it was on the
18 back side of the hill, south side of the hill, then you wouldn't
19 be able to see the house until you crested the hill.

20 Q And there's a number of poles along that same road.

21 A Yes.

22 Q And what -- what is immediately to -- as you come over the
23 hill in the same direction from the pole to the front door,
24 what's to the right, on the right side of the road?

25 A There's brush, there's a fence, there's a ranch to the

1 east, to the right side of the road.

2 Q Undeveloped sagebrush ground; is that correct?

3 A Yes.

4 Q And to the left is irrigated orchard and other farm ground?

5 A Yes.

6 THE COURT: So when you used the term "ranch," you
7 weren't implying or connoting a ranch house, you were just
8 saying ranch land?

9 THE WITNESS: Ranch land, yes. There's an orchard to
10 the right. There's -- there's vacant -- it's not vacant.
11 There's a ranch where cows graze. Um --

12 THE COURT: Not a structure but land.

13 THE WITNESS: Correct.

14 THE COURT: Thank you.

15 THE WITNESS: Immediately to the right as you go further
16 to the right, there's structures.

17 BY MR. MATHESON: (Continuing)

18 Q Quite a ways towards --

19 A Quite a ways away.

20 Q And that's towards the river, is it not?

21 A No, it's directly to the east, uh, but it's a -- it's a
22 little over a hill, but there's buildings there.

23 Q Not visible from the front door.

24 A It may not be visible from the front door, yes.

25 Q And when you approach -- have you approached the house from

1 the other side?

2 A On the north?

3 Q Well, and I'm a little --

4 A Yes. Yes.

5 Q I drove out there, but I can't swear I got north and south
6 down. The opposite side from where the pole was situated --

7 A Yes.

8 Q -- there's an intersection; isn't that correct?

9 A Yes.

10 Q And how far from the front door is that intersection?

11 A Probably also I'm guessing about 150 yards.

12 Q Did you approach the house from that direction at any time?

13 A Yes.

14 Q And that's a gravel road in front of the house?

15 A Dirt road, yes.

16 Q And the road that we're just talking about that runs down
17 to the intersection, is that also gravel?

18 A Yes.

19 THE COURT: He said "dirt road." You said "gravel."

20 MR. MATHESON: Well, and they vary a little bit.

21 BY MR. MATHESON: (Continuing)

22 Q The one in front of the house is more dirt than gravel?

23 A Yes.

24 Q And the one down at the bottom of the hill is perhaps --

25 A I think that's also -- it's --

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1 Q -- more gravel?

2 A It's dirt/gravel mixture.

3 THE COURT: Thank you.

4 BY MR. MATHESON: (Continuing)

5 Q Throws up dust --

6 A Yes.

7 Q -- makes noise?

8 The Government has attached to its filings, and the
9 document number is punched out on that one --

10 MR. EKSTROM: ECF 60.

11 MR. MATHESON: ECF 60 --

12 MR. EKSTROM: It's Attachment 1.

13 MR. MATHESON: 1. Okay.

14 If I may approach, Your Honor.

15 THE COURT: You may.

16 BY MR. MATHESON: (Continuing)

17 Q The red dot, if I were to suggest to you that that
18 indicates the location of the pole camera, would that be
19 consistent with your observation?

20 A Yes.

21 Q And if this is the subject home (indicating), would that be
22 consistent with your --

23 A Yes.

24 Q And the -- well, I guess --

25 THE COURT: Counsel, it's better off if you use the Elmo

1 so everybody knows what you're talking about, and he'll have it
2 on his screen, so let's -- actually, it's a sort of a camera, so
3 we can use that. It would be a bit of irony to be using a
4 camera in this instance, but go right ahead.

5 MR. EKSTROM: Do you want me to assist you on that?

6 THE COURT: And we thank the U.S. Attorney for his
7 assistance.

8 MR. EKSTROM: We are adversaries, not enemies, Your
9 Honor.

10 THE COURT: Well put, Counsel. It will serve you well
11 in your future.

12 BY MR. MATHESON: (Continuing)

13 Q The two spots that we've just been discussing, can you --
14 can you see this?

15 A Yes. Is there any way you can zoom that in, or can I from
16 here?

17 THE COURT: No, you can't zoom; he can.

18 Mr. Matheson, the machine itself has the capacity to
19 and --

20 BY MR. MATHESON: (Continuing)

21 Q Is that better?

22 A Yes. Thank you.

23 MR. EKSTROM: And, Your Honor, just to identify, may we
24 identify that as ECF 60-1, Page 20?

25 THE COURT: 60-1, Page 20. Thank you.

1 BY MR. MATHESON: (Continuing)

2 Q And there are two red spots on there. One, this one
3 (indicating), depicting the location of the pole?

4 A Yes.

5 Q And this one depicting at least the -- near the house,
6 which is also depicted here (indicating), correct?

7 THE COURT: You need to use the microphone.

8 BY MR. MATHESON: (Continuing)

9 Q The two red spots indicate proximity to the pole and the
10 defendant's home; is that correct?

11 A Yes.

12 Q And you've estimated that this distance from the pole to
13 the front door is about 150 yards?

14 A Yeah, it's an estimate.

15 Q And then if you look to here (indicating), you see the
16 intersection I was referring to.

17 Do you see that?

18 A Yes.

19 Q And that would be perhaps a little longer, but in that
20 same --

21 A Certainly a little longer, yes.

22 Q And the -- the hill that I'm talking about is -- is along
23 this area (indicating), is it not?

24 A Yes.

25 Q So you -- you're -- you're coming up a hill to here and

1 then you go down a hill that could go way down to here
2 (indicating); is that correct?

3 A Yes.

4 THE COURT: So would it be accurate to say that the
5 property in question sits sort of at the crest of a hill or --
6 and as you approach it from the pole side, you come up, and then
7 as you pass by the house you start going down?

8 THE WITNESS: No, you start going down the hill. The
9 crest of the hill is about the same location as the utility pole
10 itself.

11 THE COURT: Okay.

12 THE WITNESS: So you crest about there (indicating), and
13 then you're going down as you pass the house.

14 THE COURT: All right. Thank you.

15 BY MR. MATHESON: (Continuing)

16 Q But the slope of the going down becomes much greater the
17 closer you get to this intersection; is that correct?

18 A Yeah, I don't want to give the impression it's super steep,
19 but it does -- it does get steeper as you pass the house.

20 Q When you installed the camera, it was installed in such a
21 way as to be secretly installed; in other words, hidden?

22 A It was concealed, yes.

23 Q And that was of your intent? In other words, that was part
24 of the surveillance, secret surveillance?

25 A Concealed, yes.

1 Q Can you -- do you -- to your knowledge is this camera
2 available like to purchase at Best Buy?

3 A I don't know where it is commercially available. I asked
4 our tech agent, our technical agent, and I was advised that it's
5 commercially available.

6 Q That would mean that various police departments can
7 purchase them, correct?

8 A I would assume so, yes.

9 Q Do you know if the public can purchase this camera?

10 A Uh, that is my understanding, that it's commercially
11 available.

12 Q In terms of the magnification of the zoom, do you have the
13 ability to tell the Court what the magnification level is with
14 the zoom?

15 A I do not.

16 Q And in terms of the pan, is -- do you have the capability
17 of telling the Court how much motion you are able to direct with
18 the camera?

19 A I do not.

20 Q Was it capable of directing vision to all parts of the
21 defendant's yard that were visible from the pole?

22 A Yes.

23 Q So whatever its panning and zooming capability, you could
24 see his house and you could see the entirety of his front yard,
25 so to speak?

1 A Yes.

2 Q Do you have an idea of how many hours of video were
3 captured on the hard drive?

4 A Um, it would have been for 24 hours a day for a month and a
5 half.

6 Q Just so we're clear, isn't it true that the camera was
7 disabled or removed when the search warrant was issued?

8 A Yes.

9 Q Okay.

10 A Um, it was -- it was removed -- it was turned off the
11 morning of the search warrant, and then it was removed whenever
12 the technical agent could get out there to remove it.

13 Q Okay.

14 A It was turned off the day of the search warrant.

15 Q Can you employ the zoom function on recorded information?
16 In other words, the camera is sitting there; obviously you're
17 not in front of it 24/7. Can you come in later and then zoom?

18 A No, I cannot control the zoom, uh, on recorded material. I
19 can enlarge the recorded material, but I can't actually zoom the
20 camera.

21 Q I'm not sure I understand the difference. You make --

22 A So I can make, just like you did --

23 Q -- make the picture of my hand bigger --

24 A Just like you did with -- with this, you made this picture
25 larger (indicating). I can make -- I can go in and highlight an

1 area of the recording and make that area bigger, but it highly
2 distorts the picture.

3 Q Okay.

4 A But I can't -- I can't alter what the camera sees after the
5 recording has been recorded.

6 Q So the aperture is set, when it's on record it's set; it's
7 not going to change?

8 A Yes.

9 Q Okay. Does the camera have night vision?

10 A No.

11 Q Does the camera have infrared capability?

12 A Not -- not that I'm aware of.

13 Q Heat-sensing capability?

14 A Not that I'm aware of.

15 Q Is the camera capable of being hooked to a computer?

16 A I don't --

17 THE COURT: The camera itself? Because this sounds like
18 there's a wireless transmission from the video cam to the
19 computer, and that's how he can access it from his office and
20 manipulate the camera. It's not hardwired. It's got to be a
21 wireless transmission or a radio signal of some sort.

22 THE WITNESS: That is accurate.

23 BY MR. MATHESON: (Continuing)

24 Q And so it's, of its nature, hooked to a computer?

25 THE COURT: Well, "hooked to" implies hardwire. It's

1 connected; there's connectivity between the camera and the
2 computer either through a radio device -- a radio signal or
3 digital signal.

4 Is that right?

5 THE WITNESS: I don't know what it's connected to. It's
6 connected to something that transmits a signal to --

7 THE COURT: Right.

8 THE WITNESS: -- to where I'm at or to the -- to the
9 hard drive.

10 BY MR. MATHESON: (Continuing)

11 Q And that's where the controls are, is where you are.

12 A Yes.

13 Q And, presumably, that is a computer-like device --

14 A Yes, it's on my --

15 Q -- that runs the camera.

16 A It's on my desktop.

17 Q Is this called hot wi-fi, the radio signal?

18 A I don't know.

19 Q So the frequency of the radio connection is not something
20 with which you're familiar?

21 A Correct.

22 Q Does the computer or device that you control at the station
23 have face recognition software capability?

24 A No.

25 Q Is there an interface between that and something that does?

1 A No.

2 THE COURT: Is this something that you know or something
3 that you don't know?

4 THE WITNESS: As far as I know, it does not.

5 THE COURT: Okay. Well, I'm respectful of your role in
6 this matter, and like many people, we defer to the tech people
7 on a host of issues. I do all the time here in court. So I
8 need to make a distinction between what you personally have
9 knowledge of and what you really ask the tech people about.

10 THE WITNESS: Okay.

11 THE COURT: Okay. So just so the record is clear, it's
12 that you're not saying "no" because you know the technical
13 capacities of the camera but, rather, you don't know because you
14 don't know the technical capacities of the camera.

15 THE WITNESS: Correct. As far as I know, it does not
16 have that capacity. I do not know the technical capacities of
17 the camera.

18 THE COURT: Okay. That's a different answer.

19 Go ahead.

20 I'm not being critical. I just want the record to be
21 clear. That's all.

22 BY MR. MATHESON: (Continuing)

23 Q So whatever the software capability of the device you're
24 functioning, it is all localized in the device; there's nothing
25 exported to other devices, as far as you know?

1 A Not as far as I know. I --

2 THE COURT: I'm not sure I know what you mean by that
3 question, Mr. Matheson. If you have digital recordings, what
4 you can do with those digital recordings is not within the
5 purview of this officer's expertise, as I understand what he's
6 saying.

7 THE WITNESS: I can tell you that -- that the data is
8 sent however it's sent, uh, to a location where there's a hard
9 drive and the -- and the controls are, and then I have controls
10 at my desktop to control, zoom, and pan and -- and to review
11 recordings.

12 BY MR. MATHESON: (Continuing)

13 Q And you were monitoring the device on the day that the
14 first target shooting episode took place?

15 A Yes.

16 Q And were you able to zoom in to verify that firearms were
17 being employed?

18 A Let me go back. I don't recall if I was -- if I was
19 viewing on the first day that -- or if I saw that on a
20 recording. Um, on the days that -- that, uh, the two-hour
21 recording is and the pictures on the search warrant are from, I
22 was watching at that time.

23 Q Do you know, as case agent, when it was that you ran the
24 defendant with ICE to determine his immigration status?

25 A I don't recall right -- as I sit here right here.

1 THE COURT: Well, relative to the installation of the
2 camera. I mean, using that as a date, before or after that
3 date?

4 THE WITNESS: I'm guessing it would have been before,
5 but I'm not -- like I said, I don't remember.

6 BY MR. MATHESON: (Continuing)

7 Q Could it have been after installation?

8 A It could have been after, yes.

9 MR. MATHESON: I believe that's all I have. If I could
10 confer for one minute.

11 (Pause in proceedings.)

12 THE COURT: Off the record for a second.

13 (Discussion held off the record.)

14 BY MR. MATHESON: (Continuing)

15 Q Given the remoteness of the location of the pole cam in
16 this case, it's clear that there wouldn't be a wi-fi stand
17 close, like a Starbucks or that sort of thing, and wouldn't it
18 be fair to say that you would have to rely on satellite or
19 actual radio transmission of some kind to communicate with the
20 pole camera from the police station?

21 A I don't know.

22 MR. EKSTROM: Object as asked and answered and --

23 THE COURT: He doesn't know. I think that's a fair
24 position. The detective is telling you what he knows, and
25 that's not within his knowledge.

1 BY MR. MATHESON: (Continuing)

2 Q You were assigned. Were others also assigned to monitor
3 the recordings?

4 A No.

5 Q No?

6 A No.

7 Q You personally reviewed all of the video?

8 A Yes.

9 Q And presumably you'd go in and start monitoring -- rather
10 than sit there 24/7, you'd monitor on your work schedule?

11 A Yes, and I would -- and I would show it to others, other
12 members of our -- of our task force, ask their opinion, but it
13 was my case. I did the controlling; I did the monitoring.

14 MR. MATHESON: Okay. I think that's all I have. Oh,
15 one second.

16 (Pause in proceedings.)

17 BY MR. MATHESON: (Continuing)

18 Q Was there any audio capability with this camera? Could you
19 hear anything?

20 A I could not, no, but I don't know if there is audio or not.

21 Q If there was, it wasn't functioning in a way that you could
22 employ it in this case?

23 A If there was I'm not -- I'm not aware of it.

24 Q And when you installed the camera, what was your intent
25 with respect to how long it would be installed?

1 A I didn't install the camera. The technical agent installed
2 the camera --

3 Q How long did you request that it be installed?

4 A -- but to answer your question, um, I did not have an end
5 date in mind.

6 Q So it was, in effect, the observations of the target
7 shooting that ended the --

8 A Correct.

9 Q -- process?

10 MR. MATHESON: I think that's all I have.

11 THE COURT: Thank you.

12 Counsel.

13 REDIRECT EXAMINATION

14 BY MR. EKSTROM:

15 Q Detective, we discussed earlier Government's Exhibit 1,
16 which --

17 THE COURT: Which is?

18 MR. EKSTROM: The search warrant and affidavit.

19 THE COURT: All right. That's 1.

20 Have we marked the DVD as an exhibit?

21 MR. EKSTROM: It was marked as an exhibit, but I don't
22 believe it was given a specific alphanumeric designation.

23 THE COURT: Shall we?

24 MR. EKSTROM: Certainly. Could it be 2?

25 THE COURT: What would you suggest? Do you want to --

1 I'm sorry, Mr. Matheson, do you have something you want to say?

2 MR. MATHESON: Probably ought to mark this particular
3 page, too.

4 THE COURT: That's ECF 60-1, Page 20, you want to mark
5 that?

6 MR. EKSTROM: I have no objection.

7 THE COURT: I assume not.

8 MR. EKSTROM: It was attached to my submission.

9 MR. MATHESON: Yeah, I got it.

10 MR. EKSTROM: It's right here.

11 THE COURT: This is what we received, and it's the
12 nonscannable exhibit?

13 MR. EKSTROM: Yes, Your Honor. I don't -- I left my
14 exhibit stickers in the office. It's the --

15 THE COURT: It just turns out Ms. Brasel usually has
16 some of those, thank goodness.

17 MR. EKSTROM: I think that's where mine came from, Your
18 Honor.

19 THE COURT: Okay. There you go.

20 THE COURTROOM DEPUTY: So this is going to be 2.

21 THE COURT: Show it to counsel to make sure it's
22 acceptable to him.

23 (Exhibit 2 marked and offered.)

24 MR. EKSTROM: Your Honor, the DVD is marked and offered
25 as 2.

1 THE COURT: Okay. Thank you. Exhibit 2, right.

2 THE COURTROOM DEPUTY: Mr. Matheson --

3 THE COURT: Is 3?

4 THE COURTROOM DEPUTY: No, we'll do his as Defendant's
5 500.

6 THE COURT: Defendant's 500. Okay.

7 Mr. Ekstrom, you may proceed.

8 BY MR. EKSTROM: (Continuing)

9 Q Detective, your Affidavit in Support of Search Warrant,
10 Government's Exhibit 1, that contains the start date for the
11 video surveillance?

12 A Yes.

13 Q And so while you don't have a memory of that right now, you
14 would have had a memory and accurately reported that in your
15 affidavit.

16 A Yes.

17 Q And it's your previous testimony that you made some
18 observations on May 6th of 2013 that were included in the
19 warrant.

20 A Yes.

21 Q And that you served the search warrant, which was signed on
22 May 14th, and it was at that time, the date of the service of
23 that search warrant after the 14th, that the camera was turned
24 off.

25 A I requested -- when we got back from the search warrant, I

1 requested that the tech agent turn the camera off. I don't
2 recall that I went back and looked at it to make sure it was
3 off, but I requested that he turn it off.

4 Q You testified previously that the pan function of the
5 camera allowed you, from that vantage point, to cover the
6 entirety of the defendant's residence.

7 A Yes.

8 Q And Exhibit 2, the DVD, shows you zooming in on various
9 portions of the property?

10 A Yes.

11 Q If you know and if you recall, did you employ maximum zoom
12 at any point during that two-hour selection?

13 A I don't know what the maximum zoom capabilities are, so I
14 don't know if I did or not.

15 MR. EKSTROM: Nothing further.

16 THE COURT: Give me a moment.

17 So my understanding, Detective Clem, is that once it was
18 installed, it was left on both when you were at work and when
19 you were not at work.

20 THE WITNESS: Correct.

21 THE COURT: And then the next day when you returned to
22 the task force venue where this was available to you, this
23 particular computer, you would fire it up and access the video
24 that had occurred while you were off duty.

25 THE WITNESS: Yes.

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1 THE COURT: Okay. And then you'd view it for things of
2 interest to you.

3 THE WITNESS: Yes.

4 THE COURT: And then you could manipulate so that you
5 could take your video and take a closer look at the video
6 signal -- or the digital recording that was made, you could
7 actually take a closer look at it but the quality would
8 deteriorate as you did it.

9 THE WITNESS: Yes.

10 THE COURT: Okay. So when you were actually at the
11 console or computer on duty, you could actually zoom in and that
12 would give you the clarity the camera was capable of, correct?

13 THE WITNESS: Yes.

14 THE COURT: Okay. So that's different in kind than
15 expanding the picture that had already been recorded. When
16 you're live, you can actually use the zoom capacity itself, and
17 you did.

18 THE WITNESS: Yes.

19 THE COURT: Okay. Sometimes tech people are really
20 proud of their, like all of us, they're proud of their
21 expertise, and they often say, "Watch this" or, "Let me show you
22 that."

23 Did the tech people who installed this camera give you a
24 "gee whiz" demonstration of its capacities?

25 THE WITNESS: No.

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1 THE COURT: Okay. All right. When I say tech people
2 who installed, I misspoke; it was an officer who installed or a
3 detective who installed the camera on the pole, but the tech
4 people got it up and running on the computer? Is that correct?

5 THE WITNESS: It is a -- it is a tech agent with the FBI
6 that we talk with to install the camera. Uh, it's my
7 understanding that sometimes they install the cameras, and
8 sometimes they employ others --

9 THE COURT: All right.

10 THE WITNESS: -- whoever the owner of the pole is to
11 install the camera. But they do the -- they do the installing,
12 and then they explain to us how to use it.

13 THE COURT: When you say talk to the tech agent, is that
14 somebody local?

15 THE WITNESS: Uh, the person that we use is out of
16 Spokane.

17 THE COURT: Okay. So a tech agent is in Spokane, and
18 that's the person you would have talked with about the
19 installation of this camera?

20 THE WITNESS: Yes.

21 THE COURT: And when you say "tech agent," that's FBI
22 Spokane?

23 THE WITNESS: Yes.

24 THE COURT: Okay. So when you come in the next day, do
25 you have the capacity to simply rewind and -- and view the

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1 entire video that occurred while you were off duty?

2 THE WITNESS: Yes.

3 THE COURT: Okay. And so whether you can rewind or fast
4 forward, it has to do with the thing that's already been
5 recorded.

6 THE WITNESS: Correct.

7 THE COURT: Okay. When I look at the Exhibit No. 1,
8 which is the search warrant, the probable cause paragraphs on
9 Page 5 and 6 talk about -- excuse me, I apologize, it wasn't 5
10 and 6. It was beginning on page Bates No. 153 when you start
11 with background. There you recite what you did.

12 Do you have that in front of you?

13 THE WITNESS: I do not, no.

14 THE COURT: Okay. Here, just take a look at it. That's
15 Exhibit 1, and that starts on Bates 153. Paragraph 1 sets out
16 the background, the steps you took preliminary to the
17 installation of the video, right?

18 THE WITNESS: Yes.

19 THE COURT: And I don't want to put words in your mouth.
20 Are those paragraphs -- tell me what those paragraphs represent.

21 THE WITNESS: Uh --

22 THE COURT: Those are Paragraphs 1 through 7 on Pages 2,
23 3, and 4. I don't know whether that's a chronology, because
24 some of the paragraphs don't have an actual date of action in
25 the paragraph.

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1 So give me an idea of what you were saying there by way
2 of chronology. Because in Paragraph 7 you say on April 4th,
3 2013, a pole camera was placed.

4 So did the paragraphs that preceded that, had those
5 things been done prior to the placement of the pole camera? I'm
6 just wondering. If you know. And take your time.

7 THE WITNESS: (Reviewing document.)

8 THE COURT: And the reason I ask you that is just
9 because Paragraph 7 states the date of installation doesn't mean
10 that you performed those other actions before that date. This
11 was all -- you recited all this after that camera had been taken
12 down -- actually, when you were trying to get the -- when you
13 were trying to get the search warrant. So I don't know when you
14 did these things, but if you know, tell us.

15 THE WITNESS: Yeah, some of this is -- is -- it's all
16 chronological, but if I recall, as I look at this, I believe
17 that --

18 THE COURT: And take your time.

19 THE WITNESS: I believe that when I spoke to the HSI
20 special agents and when I acquired the Everett Police Department
21 report, if I remember correctly, that was after.

22 THE COURT: After you started --

23 THE WITNESS: After the installation of the pole camera.

24 THE COURT: Okay.

25 THE WITNESS: And potentially, though I'm not -- I'm not

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1 exactly sure, but it may have been, um -- it may have been after
2 we observed the, what we saw with the -- with the firearms. Um,
3 and the problem I don't remember -- the reason I don't remember
4 is because we often work a lot with HSI, and we have contact
5 with them throughout the investigation.

6 THE COURT: Okay. That's -- I understand your answer.
7 Thank you. Okay. Let me just check a couple of things.

8 The totality of the recording is stored someplace? I
9 mean, the recording that was made during this time period is
10 stored someplace?

11 THE WITNESS: Yes.

12 THE COURT: Okay. I have no other questions.

13 Any follow up, Mr. Ekstrom?

14 MR. EKSTROM: No follow up other than to tell the Court
15 that an exact copy of the totality of the camera's observation
16 is present in court, as per the Court's order; we have a
17 duplicate hard drive mounted and available.

18 THE COURT: Okay.

19 MR. EKSTROM: And I can speak to counsel, but if there's
20 some -- some issue, I believe we could even submit the totality.

21 THE COURT: I think it probably ought to be. I think it
22 ought to be marked as an exhibit and just made a part of the
23 file, because I think that's potentially important for people
24 who might view this case, whether it's the Ninth Circuit or
25 others, given what I've seen of the opinions and how video plays

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1 into that and digital recordings play into the opinions of that
2 court or both courts. So that said --

3 MR. EKSTROM: One recalls that a picture was attached to
4 one of the opinions in Kyllo.

5 THE COURT: Yes.

6 Okay. Anything else for this witness?

7 No.

8 Okay. You may step down. Thank you very much.

9 (End of excerpt of proceedings.)

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C E R T I F I C A T E

I, KIMBERLY J. ALLEN, do hereby certify:

That I am an Official Court Reporter for the United States District Court for the Eastern District of Washington in Richland, Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on the first page hereto; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 20th day of February, 2014.

/s/ Kimberly J. Allen

Kimberly J. Allen, CRR, RMR, RPR, CSR
Washington CCR No. 2758
Official Court Reporter
Richland, Washington