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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEONEL MICHEL VARGAS,

Defendant.

No: CR-13-6025-EFS

GOVERNMENT'S MOTION TO
RECONSIDER

Plaintiff, United States of America, by and through Michael C. Ormsby, United States Attorney for the Eastern District of Washington, and Benjamin D. Seal, Assistant United States Attorney for the Eastern District of Washington, submits this motion to reconsider Defendant's motion to suppress, and states to the Court as follows:

I. FACTS

In support of this motion to reconsider, attached is an affidavit of Corporal Aaron Clem (Attachment 1), several photographs of Defendant's residence and the surrounding area (Attachments 2-4), and a disc containing a video recording of a drive by of Defendant's residence (Attachment 5).

1 **II. ARGUMENT**

2 **A. The Government's Motion for Reconsideration is timely.**

3 No specific rule governs the timeliness of a motion for reconsideration,
4 however, the Supreme Court has held that a motion for reconsideration is timely at
5 least "when filed within the original period for review." *United States v. Healy*, 376
6 U.S. 75, 78 (1964); *United States v. Jones*, 608 F.2d 386, 390 (9th Cir. 1979) (stating
7 that a motion for reconsideration of suppression order filed within thirty day appeal
8 period was timely).

9 In this case, the detailed Order granting Defendant's motion to suppress was
10 filed on December 15, 2014, and this motion for reconsideration was filed within
11 thirty days of that date.

12 **B. The Government did not delete any pole camera footage.**

13 Law enforcement did not delete any segments of the pole camera recording of
14 Defendant's residence. *See* Attachment 1. Segments on the hard-drive recording that
15 "jump" in time are the result of a mechanical or equipment malfunction. *See*
16 Attachment 1.

17 **C. The activities in Defendant's front yard are easily viewed from
18 multiple directions, and Defendant had no reasonable
19 expectation that others would not observe his front yard
20 activities.**

21 Defendant's residence is not located in the middle of Sherwood Forest. Rather,
22 his residence is located in a thriving agricultural area, and is easily viewable from
23 multiple directions.

24 The view of Defendant's property is completely unobstructed as one
25 approaches from the south. *See* Attachment 1. The ground between the front of
26 Defendant's residence and Arousa Road is level. *See* Attachment 1. There are trees
27 along a portion of the east side of Defendant's property, however, the shape, height,
28 and spacing are such that the trees do not significantly obstruct the view of

1 Defendant's house from the road. *See* Attachment 1. There is some vegetation in the
2 front yard, however, it is all of a short height and does not obstruct the view. *See*
3 Attachment 1. The parking structure to the south of Defendant's residence is open on
4 three sides and does not obstruct the view of Defendant's residence. *See* Attachment
5 1.

6 A person traveling on Arousa Road has a full view of Defendant's front yard.
7 *See* Attachment 1. Attachment 4 is a photograph which shows the view of
8 Defendant's residence from Arousa Road. Attachment 5 is a disc that contains a
9 video recording, created in March, 2013, during a drive by of Defendant's residence.

10 Approximately 125 feet to the south of Defendant's front yard, there is a wood
11 structure that appears to be a well house. *See* Attachment 1. According to the
12 Franklin County Assessor records, the well house and Defendant's residence are on
13 separate parcels with different owners. *See* Attachment 1. The well house has a
14 window on the east side, and a door on the south side. *See* Attachment 1. A person
15 inside the well house has a full view of traffic approaching Defendant's residence, and
16 has a partial view of Defendant's drive way. *See* Attachment 1. If a window were
17 added to the north side, a person inside the well house would have a close and
18 unobstructed view of Defendant's front yard. *See* Attachment 1. Attachment 2 is a
19 photograph which shows the well house relative to Defendant's residence. If law
20 enforcement wished to perform a stake out or other physical surveillance in person,
21 the well house provides an ideal location.

22 Approximately 500 feet to the northwest of Defendant's driveway, there is a
23 mobile home. *See* Attachment 1. This residence has windows facing southeast which
24 provide a view of Defendant's residence and front yard. *See* Attachment 1.
25 Attachment 3 is a photograph which shows the view of the northwestern neighbor's
26 residence taken from Arousa Road in front of Defendant's residence. The activities in
27 Defendant's front yard are viewable from the neighbor's windows.

1 There are orchards to the south and west of Defendant's property. *See*
2 Attachment 1. Workers in the orchards would have a full view of Defendant's front
3 yard from both the south and the northwest. *See* Attachment 1.

4 **D. Defendant cannot claim curtilage protection for shooting**
5 **firearms across a public road and into his neighbor's cow**
6 **pasture.**

7 The pole camera in this case recorded Defendant and two others standing in
8 Defendant's front yard shooting at objects placed on or near fence posts. *See*
9 Attachment 1. The pole camera shows Defendant and the others shooting in a
10 southeasterly direction. The rounds from the firearms therefore travelled out of
11 Defendant's property, across Arousa Road, and into the neighbor's pasture. *See*
12 Attachment 1. This pasture is used by the neighbor to graze cattle. *See* Attachment 1.

13 Shooting firearms into the neighbor's cow pasture is a physical trespass, and a
14 life threatening one at that. This sort of physical intrusion into a neighbor's property
15 is not consistent with the private activities in a home's curtilage.

16 Nor is it reasonable for Defendant to expect this front yard activity to go
17 unseen. For example, the neighbor residing just to the north of Defendant's property
18 would undoubtedly have heard the gunshots, and from inside his or her residence
19 could have viewed Defendant shooting across Arousa Road into the other neighbor's
20 cow pasture.

21 **E. The Government continues to rely on its earlier briefing.**

22 In light of the facts discussed above, and for the reasons argued in its earlier
23 briefing, the Government requests the Court deny Defendant's motion to suppress.
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1 DATED this 31st day of December, 2014.

2 MICHAEL C. ORMSBY
3 United States Attorney

4 s/ Benjamin D. Seal
5 BENJAMIN D. SEAL
6 Assistant United States Attorney

7
8 I hereby certify that on December 31, 2014, I electronically filed the foregoing
9 with the Clerk of the Court using the CM/ECF System which will send notification of
10 such filing to counsel of record in this case.
11

12
13 s/ Benjamin D. Seal
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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEONEL MICHEL VARGAS,

Defendant.

No: CR-13-6025-EFS

ORDER GRANTING
GOVERNMENT'S MOTION TO
RECONSIDER

(Proposed)

BEFORE THE COURT is Plaintiff's Motion to Reconsider (Ct. Rec.).

For the reasons set forth in Plaintiff's motion, IT IS HEREBY ORDERED that Plaintiff's Motion to Reconsider (Ct. Rec.) is GRANTED.

The District Court Executive is directed to enter this Order and provide copies to counsel.

Dated this ____ day of _____, 20____.

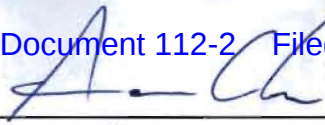
EDWARD F. SHEA
SENIOR UNITED STATES DISTRICT COURT JUDGE

AFFIDAVIT OF AARON CLEM
IN SUPPORT OF MOTION TO RECONSIDER

1. I have been a duly commissioned police officer with the Kennewick Police Department since June of 1996. In 1996, I graduated from the Washington State Basic Law Enforcement Academy where I received basic narcotics investigation and identification training. I was assigned to the Tri-Cities Metro Drug Task Force from November of 2002 to November of 2005. From 2007 to March, 2014, I was a Detective with the Kennewick Police Department assigned as a Task Force Officer (TFO) with the Tri-Cities Violent Gang Task Force (TVGTF), a Task Force which is tied to and run by the FBI. I am currently a patrol supervisor, and am scheduled to rejoin the Tri-Cities Violent Gang Task Force in January, 2015.
2. I served as the case agent in the investigation and prosecution of Leonel Michel Vargas. I was responsible for reviewing the pole camera footage of Defendant's residence.
3. Law enforcement did not delete any segments of the pole camera recording of Defendant's residence. Segments on the hard-drive recording that "jump" in time are the result of a mechanical or equipment malfunction.

4. I have conducted surveillance of Defendant's residence on numerous occasions, and I am personally familiar with the lay of the land of Defendant's residence and the surrounding area.
5. Approximately 125 feet to the south of Defendant's front yard, there is a wood structure that appears to be a well house. According to the Franklin County Assessor records, the well house and Defendant's residence are on separate parcels with different owners. The well house has a window on the east side, and a door on the south side. A person inside the well house has a full view of traffic approaching Defendant's residence, and has a partial view of Defendant's drive way. If a window were added to the north side, a person inside the well house would have a close and unobstructed view of Defendant's front yard. Attachment 2 is a photograph which shows the well house relative to Defendant's residence.
6. There are orchards to the south and west of Defendant's property. Workers in the orchards would have a full view of Defendant's front yard from both the south and the northwest.
7. Approximately 500 feet to the northwest of Defendant's driveway, there is a mobile home. This residence has windows facing southeast which provide a view of Defendant's residence and front yard. Attachment 3 is

- a photograph which shows the view of the northwestern neighbor's residence taken from Arousa Road in front of Defendant's residence.
8. A person traveling on Arousa Road has a full view of Defendant's front yard. Attachment 4 is a photograph which shows the view of Defendant's residence from Arousa Road. Attachment 5 is a disc that contains a video recording, created in March, 2013, during a drive by of Defendant's residence. The view of Defendant's property is completely unobstructed as one approaches from the south. The ground between the front of Defendant's residence and Arousa Road is level. There are trees along a portion of the east side of Defendant's property, however, the shape, height, and spacing are such that the trees do not significantly obstruct the view of Defendant's house from the road. There is some vegetation in the front yard, however, it is all of a short height and does not obstruct the view. The parking structure to the south of Defendant's residence is open on three sides and does not obstruct the view of Defendant's residence.
9. The target practice occurred as Defendant and the others shot a pistol and rifle at objects placed on or near fence posts, so that the bullets travelled out of Defendant's property, across Arousa Road, and onto the neighbor's pasture. I know that this pasture is used to graze cattle.



Aaron Clem
Kennewick Police Department

SUBSCRIBED AND SWORN TO before me this 30th day of December, 2014.











U.S. v. Leonel Michel Vargas
2:13-cr-06025-EFS

Attachment 5 -

Video recording of a drive by of Defendant's residence
(filed separately as non-scannable exhibit)