

1 J. Adam Moore
2 The Adam Moore Law Firm
3 217 N. 2nd Street
4 Yakima, WA 98901
5 (509) 575-0372
6 Of Attorneys for Defendant
7 RICKY S. WAHCHUMWAH

8 UNITED STATES OF AMERICA
9 EASTERN DISTRICT OF WASHINGTON

10 UNITED STATES OF AMERICA,)
11) NO. CR-2:09-cr -02035-EFS
12 Plaintiff,)
13 vs.) DEFENDANT RICKY S.
14) WAHCHUMWAH'S
15 RICKY S. WAHCHUMWAH,) MOTION TO SUPPRESS
16)
17 Defendant.)

18 **I. MOTION**

19 **COMES NOW** the defendant, by and through his attorney, and moves the
20 court for an Order Suppressing all evidence concerning and surrounding the arrest
21 of the defendant and/or the obtaining of physical evidence as well as oral
22 statements from the defendant, and any other evidence seized or obtained which
23 the Government intends to use at the trial of this action on the grounds that the
24 obtaining of said physical evidence, oral statements and other evidence was the
25 direct result of an illegal arrest and search. Further, it is asserted that this same
arrest and search do not come within any exceptions to the warrant requirements of

1 the United States Constitution. This motion is based on F.R.Cr.P. 12(b)(3)(C), the
2 Fourth Amendment to the United States Constitution, and the files and records
3 herein, and the basis set forth below.
4

5 DATED this 17th day of April, 2009.

6 s/ J. Adam Moore, Jr.

7 J. Adam Moore, Jr., WSBA# 4458

8 Attorney for Defendant Noyes

9 **II.**

10 **BASIS**

11 1. On October 15, 2008, Agent Romero personally went to 4630 S. Track
12 Road, Granger, Washington, the home of defendant Ricky S. Wahchumwah. The
13 agent was equipped with a sophisticated electronic device concealed under his
14 clothing. It apparently included a video camera, the lens of which was probably a
15 shirt button mid-chest over his sternum. He also had an audio recording device.
16 The entire visit was thus recorded by video and audio. The video was in color.
17

18 2. The recording device was kept hidden throughout. The agent's hands
19 and steering wheel are visible for several minutes, as he drove into the curtilage of
20 the defendant's home. His footfalls are recorded as he approaches the front door of
21 what appears to be a double-wide manufactured home. He knocked, and a smiling
22 Ricky Wahchumwah opened the door. The agent ascended the front steps, and,
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1 with the button-recorder, made a visual record of some attractive feathered regalia
2 situated on portions of the living room wall.

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4 3. The two exchange small-talk for about half an hour, the camera
5 recording a section of the living room ceiling. The talk does not appear to be
6 culpable during this time. The agent jokes and does little probing. They appear to
7 be friends.

8
9 4. After approximately 29 minutes, the agent mentions that he has some
10 otter pelts out in his car which are presented as a gift to his host. The two men
11 walk out to the agent's vehicle, he opens the door, and furry portions of the otter
12 pelts are briefly visible.

13
14 5. The agent advises Mr. Wahchumwah the pelts are valued at \$200 to
15 \$300, and he gives them to the defendant as they re-enter the home.

16
17 6. From that point on, the conversation is directed to the agent's now
18 obvious goal of leading Mr. Wahchumwah into discussing and displaying his
19 craftsmanship and skill at assembling traditional regalia.

20
21 7. This portion of the conversation is represented in paragraphs 52-53 of
22 the Search Warrant affidavit. After a while, Ms. Victoria Jim, the co-defendant,
23 arrives home. More feathers were displayed, more work in progress and/or
24 finished regalia was admired. The whole visit appears to have taken well over an
25 hour, possibly more.

1 8. The color, clarity and apparent lack of interruption is so consistent that
2 to call this electronic anything but a “search” strains credulity.

3
4 9. It is anticipated that the Government will argue that undercover police
5 may use subterfuge and misrepresent their true identity to obtain entry:

6 It is well-settled that undercover agents may misrepresent their
7 identity to obtain consent to entry. Lewis v. United States, 385 U.S.
8 206, 211, 87 S. Ct. 424, 427-28, 17 L. Ed. 2d 312 (1966); United
9 States v. Bosse, 898 F.2d 113, 115 (9th Cir. 1990); United States v.
10 Glassel, 488 F.2d 143, 145 (9th Cir. 1973), cert. denied, 416 U.S. 941,
11 40 L. Ed. 2d 292, 94 S. Ct. 1945 (1974). Bramble concedes as much,
12 but argues that although agents may initially misrepresent their
13 identity, they may not flatly deny they are police officers when
14 directly confronted. This contention is wholly inconsistent with the
15 plain holding of Lewis. A direct denial that an agent is a police
16 officer is no more a misrepresentation than the agent's declaring he is
17 someone who he is not. See Lewis, 385 U.S. at 207, 87 S. Ct. at 425
18 (federal agent falsely identified himself as "Jimmy the Pollack").

15 - United States v. Bramble, 103
16 F.3d 1475, at 1500 (9th Cir.,
17 1996)

18 The Bramble case is also an Eagle Protection Act case, and it involved otter pelts,
19 making the distinction between sea otter pelts (protected), and river otter pelts (not
20 protected). The Fourth Amendment protects against unreasonable searches and
21 seizures. The defendant here alleges that to proffer the otter pelts on the second
22 entry, was to proffer something of considerable value. This exceeds the limits of
23 mendacity and enters the troubling area of outrageous government conduct.
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1 Moreover, the sheer intrusiveness of the video/audio recording, its excessive
2 detail, drama and duration, amounts to an unreasonable search, and a warrantless
3 one at that.
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5 It is anticipated that the Government will argue that covert surveillance is
6 constitutional as long as one party, the agent, is present:

7 The objective reasonableness of defendants' privacy expectation
8 presents a closer question. The governmental intrusion was severe. Hidden video surveillance is one of the most intrusive investigative
9 mechanisms available to law enforcement. The sweeping, indiscriminate manner in which video surveillance can intrude upon
10 us, regardless of where we are, dictates that its use be approved only in limited circumstances. As we pointed out in Taketa, the defendant
11 had a reasonable expectation to be free from hidden video surveillance because "the video search was directed straight at him, rather than
12 being a search of property he did not own or control [and] the silent, unblinking lens of the camera was intrusive in a way that no
13 temporary search of the office could have been." 923 F.2d at 677. As Judge Kozinski has stated, "every court considering the issue has
14 noted [that] video surveillance can result in extraordinarily serious intrusions into personal privacy If such intrusions are ever
15 permissible, they must be justified by an extraordinary showing of need." United States v. Koyomejian, 970 F.2d 536, 551 (9th Cir. 1992)
16 (Kozinski, J., concurring). And, as the Fifth Circuit said, hidden video surveillance invokes images of the "Orwellian state" and is regarded
17 by society as more egregious than other kinds of intrusions. Cuevas, 821 F.2d at 251. See also United States v. Mesa-Rincon, 911 F.2d
18 1433, 1442 (10th Cir. 1990) ("Because of the invasive nature of video surveillance, the government's showing of necessity must be very high
19 to justify its use"); United States v. Torres, 751 F.2d 875, 882 (7th Cir. 1984) ("We think it . . . unarguable that television surveillance is
20 exceedingly intrusive, especially in combination (as here) with audio surveillance, and inherently indiscriminate, and that it could be
21 grossly abused - to eliminate personal privacy as understood in modern Western nations").
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2 Despite the pause the government's use of video surveillance gives us,
3 we agree with the district court that defendants had no reasonable
4 expectation that they would be free from hidden video surveillance
5 while the informants were in the room. Defendants' privacy
6 expectation was substantially diminished because of where they were.
7 They were not "residents" of the hotel, they were not overnight guests
8 of the occupants, and they were there solely to conduct a business
9 transaction at the invitation of the occupants, with whom they were
10 only minimally acquainted. Moreover, as the parties agree, when the
11 informants were in the room the video surveillance was conducted
12 with their consent, and defendants bore the risk that their activities
13 with the informants were being surveilled. Cf. Hoffa v. United States,
14 385 U.S. 293, 302, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966). These
15 factors coalesce to support the district court's finding that the
16 defendants may not invoke the Fourth Amendment to suppress the
17 evidence gathered during this period.⁵

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19 - United States v. Nerber, et.al., 222
20 F.3d 597, at 603-605 (9th Cir. 2000).

21 The defendant urges this Court to heed the Nerber court's cautionary caveat:

22 That highly intrusive video surveillance in the home can present substantial risk to
23 privacy. As stated in footnote 5 to the opinion:

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25 ⁵ We do not intend to imply that video surveillance is justifiable
whenever an informant is present. For example, we suspect an
informants' presence and consent is insufficient to justify the
warrentless installation of a hidden video camera in a suspect's home.
We hold only that when defendants' privacy expectations were already
substantially diminished by their presence in another person's room to
conduct a brief business transaction, the presence and consent of the
informants was sufficient to justify the surveillance.

- Nerber, supra, 222 F.3d 597 at p.
604.

1 The defendant submits with respect that this search was tainted by two disparate
2 elements: manipulative use of traditional Indian mores through the gifting of
3 valued artifacts, while at the same time, the employment of electronic equipment
4 the Framers could never have foreseen. Use of this evidence at trial would render
5 the 4th Amendment a vacuous nullity.
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7 Respectfully Submitted this 17th day of April, 2009.
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10 s/ John Adam Moore, Jr.

11 J. ADAM MOORE, JR., WSBA# 4458

12 Attorney for Defendant Noyes
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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/EC System which will send notification of such filing to the following: Timothy Ohms, A.U.S.A., and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF Participants: _____

s/ Robin C. Emmans
Robin C. Emmans
The Adam Moore Law Firm
217 North 2nd Street
Yakima, WA 98901
Phone 509-575-0372
Fax 509-452-6771
mooreadamlawfirm@qwest.net