

No. 12-2047

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MARTIN AGUILAR,

Defendant-Appellant.

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**APPELLANT'S OPENING BRIEF**

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Appeal from the United States District Court for the District  
of New Mexico, the Honorable M. Christina Armijo  
USDC NM CR No. 10-3101 MCA

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ORAL ARGUMENT IS REQUESTED.

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(Attachments in scanned PDF format)

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**STATEMENT REGARDING PRIOR OR RELATED APPEALS**

There have been no prior or related appeals with respect to this cause.

## JURISDICTIONAL STATEMENT

Defendant-appellant Martin Aguilar appeals from an order denying his motion to suppress and an order denying his motion to dismiss by the United States District Court for the District of New Mexico, the Honorable M. Christina Armijo presiding. The district court filed those orders on March 19, 2011. (*Order Denying Motion to Suppress*, Document<sup>1</sup> (“Doc.”) 58; *Order Denying Motion to Dismiss*, Doc. 59). Mr. Aguilar entered into a conditional plea agreement pursuant to Federal Rule of Criminal Procedure 11(a)(2), reserving his right to appeal those orders. (*Plea Agreement*, dated Nov. 16, 2011, Doc. 63, ¶4). The district court entered its judgment and sentence on March 19, 2012. (*Judgment in a Criminal Case*, Doc. 74). The judgment was a final order that disposed of all claims with respect to all parties. Mr. Aguilar timely filed a notice of appeal on March 20, 2012. (*Notice of Appeal*, Doc. 75).

The district court had jurisdiction of the cause below under 18 U.S.C. § 3231. This court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291, Federal Rule of Criminal Procedure 11(a)(2) and Federal Rule of Appellate Procedure 4(b)(1).

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<sup>1</sup> All references to documents are to the docket numbers of the documents in the district court record.

## **ISSUES PRESENTED FOR REVIEW**

I. Was Mr. Aguilar's consent to United States Fish and Wildlife Service agents to enter his home and view eagle feathers involuntary in light of all the circumstances, including his concern that the agents were acting with the approval of the Governor of Kewa Pueblo<sup>2</sup>, requiring by Pueblo custom and tradition his cooperation with the agents?

II. Does application of the Bald and Golden Eagle Protection Act to Mr. Aguilar's taking and possessing a bald eagle for tribal religious purposes violate the Religious Freedom Restoration Act by substantially burdening his exercise of religion without using the least restrictive means to further the interest of protecting bald eagles, given the removal of bald eagles from the list of endangered and threatened wildlife?

## **STATEMENT OF THE CASE**

On November 10, 2010, the grand jury for the United States District Court for the District of New Mexico issued a four-count indictment charging Martin

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<sup>2</sup> Mr. Aguilar will refer to the Pueblo of which he is a member by its current name, Kewa Pueblo. At the time of the events that are the subject of the charges the government filed in this case the Pueblo was known by the name given it by the Spanish colonists, Santo Domingo Pueblo.

Aguilar with knowingly bartering a part of a golden eagle in violation of 16 U.S.C. § 668, Count 1, taking a bald eagle in violation of 16 U.S.C. § 668, Count 2, possessing a part of a bald eagle in violation of 16 U.S.C. § 668, Count 3, and possessing a red-tailed hawk in violation of 16 U.S.C. §§ 703 and 707(a), Count 4. (*Indictment*, Doc. 2). Mr. Aguilar filed a motion to suppress evidence obtained as the result of United States Fish and Wildlife Service (“FWS”) agents’ entries into the Kewa Pueblo main village without the Pueblo Governor’s permission and warrantless entries into his home. (*Defendant’s Motion to Suppress*, dated January 17, 2011, Doc. 14; *Defendant’s Reply Regarding Motion to Suppress*, dated February 7, 2011, Doc. 23; *Defendant’s Supplemental Briefing Regarding Motion to Dismiss*, dated March 25, 2011, Doc. 27; *Defendant’s Proposed Findings of Fact and Conclusions of Law*, dated July 8, 2011, Doc. 44).

Mr. Aguilar also filed a motion to dismiss the indictment on the grounds, among others, that the application of the Bald and Golden Eagle Protection Act (“BGEPA”) to his taking and possessing a bald eagle for tribal religious purposes violated the Religious Freedom Restoration Act (“RFRA”). (*Defendant’s Motion to Dismiss*, dated February 7, 2011, Doc. 22; Transcript<sup>3</sup> (“Tr.”) 254-55, 257-58).

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<sup>3</sup> All transcript references are to the transcript of the evidentiary hearing held on June 23 and 24, 2011.

The government opposed the motions. (*Government's Response to Motion to Suppress*, dated January 19, 2011, Doc. 15; *Government's Response to Motion to Dismiss*, dated February 23, 2011, Doc. 24; *Government's Response to Supplemental Briefing Regarding Motion to Suppress*, dated May 2, 2011, Doc. 34; *Government's Closing Memorandum Regarding Motion to Suppress*, dated July 8, 2011, Doc. 45; Tr. 255-57, 258-59). The district court held an evidentiary hearing on the motion to suppress. Subsequently, the district court issued written orders denying both Mr. Aguilar's motion to suppress and motion to dismiss. (Doc. 58, 59).

The parties entered into a conditional plea agreement pursuant to which Mr. Aguilar pleaded guilty to Counts 2 and 3—the bald-eagle-related counts—in exchange for, among other things, the government's dismissal of Counts 1 and 4. (Doc. 63, ¶¶ 3, 15(a)). As part of the agreement, Mr. Aguilar reserved the right to appeal the district court's orders denying his motion to suppress and motion to dismiss. (Doc. 63, ¶ 4). The district court sentenced Mr. Aguilar to two years of probation. (Doc. 74 at 2).

## STATEMENT OF THE FACTS

### *A. Introduction*

Mr. Aguilar has been a medicine man for the Kewa Pueblo since 1992. On February 6, 2010, Mr. Aguilar and his son shot and killed two bald eagles for use in Kewa Pueblo religious ceremonies. Mr. Aguilar arranged for the feathers to be removed the “Indian way” and stored the feathers in a traditional basket in a shed in the backyard of his home in the Pueblo’s main village.

On February 10th, the Pueblo Governor summoned Mr. Aguilar to the Governor’s office. By custom and tradition, Pueblo members must obey the wishes of the Governor unquestioningly. In response to the Governor’s inquiry, Mr. Aguilar admitted he had shot the eagles. The Governor told him not to do that again.

Two days later, FWS agents Russell Stanford and Jason Riley entered the Pueblo’s main village without the Governor’s permission to talk to Mr. Aguilar about an anonymous tip that Mr. Aguilar had killed eagles. Pueblo rules require that non-Pueblo members, including FWS agents, obtain permission from the Governor before entering the Pueblo’s main village. Imogene Aguilar, Mr. Aguilar’s sister, informed the agents Mr. Aguilar was not there. While the agents waited for Mr. Aguilar’s return, Ms. Aguilar notified them Mr. Aguilar had called

her and wanted to talk with them. Agent Stanford arranged a meeting between the agents and Mr. Aguilar at Sam's Club in Albuquerque, New Mexico.

At the meeting, Agent Stanford told Mr. Aguilar he did not have to talk to the agents and could leave, but also advised Mr. Aguilar it was in his best interests to be truthful with the agents. Because, just two days before, the Governor had investigated the shooting of the eagles and Mr. Aguilar believed, pursuant to Pueblo law, the agents had entered the main village with the Governor's permission, Mr. Aguilar was concerned the agents were acting on the Governor's behalf. As such, he felt compelled to cooperate with the agents. Mr. Aguilar also received the impression the agents were only interested in seeing the feathers, not prosecuting him. Accordingly, Mr. Aguilar acknowledged he had killed the eagles and agreed to show the eagle feathers to the agents in his house later that day. That afternoon the agents entered Mr. Aguilar's home with his consent and observed the eagle feathers Mr. Aguilar had brought inside. They then seized the feathers.

Mr. Aguilar moved to suppress his statements and the evidence the agents acquired. As grounds, among others, Mr. Aguilar contended his consent for the agents to enter his home and observe the feathers was involuntary. He argued the agents had duped him into cooperating primarily by virtue of the concern he had that the agents were acting under the authority of the Pueblo Governor.



Mr. Aguilar also moved to dismiss the indictment. As grounds, among others, he asserted BGEPA's application to him violated RFRA. He noted he indisputably shot and killed the eagles for religious purposes in the traditional way of obtaining eagles. He argued BGEPA substantially burdened his right to exercise his religion by means that were not, as required by RFRA, the least restrictive to accomplish the purpose of protecting bald eagles, given the unpublicized, virtually unknown nature of the FWS process of according permits to take eagles and FWS' removal of bald eagles from the list of endangered and threatened wildlife.

The district court rejected Mr. Aguilar's contentions. It found that Mr. Aguilar's consent for the agents to enter his home and observe the feathers was voluntary. The court ruled that, if Mr. Aguilar's subjective concern that failure to cooperate with the agents would be an act of disrespect to the Governor was part of the totality of circumstances the court could consider, that concern was not entitled to significant enough weight to render his consent involuntary. The court analogized Mr. Aguilar's real concern about disobeying his Governor to the defendant's intangible attitude toward authority in *United States v. Iribe*, 11 F.3d 1553, 1557 (10th Cir. 1993).

With respect to the motion to dismiss, the district court held this court's decision in *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008) governed. The

delisting of the bald eagle did not undermine the purposes of the permit process, the court reasoned. The court did not consider the principle that a more robust eagle population should be factored into RFRA's least restrictive means analysis.

**B. *Mr. Aguilar and his son shoot and kill two eagles for religious purposes.***

Mr. Aguilar has lived his entire life in the Kewa Pueblo. (*Presentence Report* ("PSR") ¶ 49). At the time of the relevant incidents he was forty-five years old. (PSR ¶ 47). He had no criminal history, not even an arrest. (PSR ¶¶ 41-45). He has been a medicine man for the Pueblo since 1992. (Tr. 227).

On February 6, 2010, Mr. Aguilar and his son went to the Rio Grande River bosque in the Pueblo to collect wood. While there, they saw two bald eagles. Mr. Aguilar and his son each shot and killed one of the eagles with Mr. Aguilar's .22 caliber rifle. (Tr. 227). They did this to acquire eagle feathers for use in Pueblo religious ceremonies. (Tr. 22, 79, 244). Eagle feathers are central to Pueblo religious practice. (Tr. 171, 198). Mr. Aguilar was following the many-centuries-old tradition of Pueblo medicine men gathering eagles for religious purposes, as opposed to receiving feathers from someone else. (Doc. 22 at 6; Tr. 257-58).

Mr. Aguilar took the eagles to his home. He then went to his uncle's home to inform his uncle he wanted to remove the feathers the "Indian way." Someone came the next day to remove the feathers in the proper manner. Mr. Aguilar kept

the feathers in a traditional basket in his shed in the backyard. The head medicine man took the carcasses away to dispose of them according to Pueblo custom. (Tr. 171, 209, 227).

*C. The Kewa Pueblo Governor, who is the absolute ruler of the Pueblo, calls Mr. Aguilar to his office to investigate Mr. Aguilar's killing of the eagles.*

On February 10, 2010, the Pueblo Governor summoned Mr. Aguilar to the Governor's office. (Tr. 25, 227). Pueblo custom and law required Mr. Aguilar to obey the Governor. (Tr. 162, 243). The Governor is the absolute ruler of the Pueblo. Pueblo members must do what the Governor tells them to do. (Tr. 40, 52, 163, 164, 242).

Mr. Aguilar went to the Governor's Office in compliance with the Governor's order. (Tr. 242). The Governor asked Mr. Aguilar if he had shot two eagles. Mr. Aguilar admitted that he had. The Governor told Mr. Aguilar not to kill any more eagles. (Tr. 227).

*D. FWS agents enter the Kewa Pueblo main village to interview Mr. Aguilar without the permission of the Governor and without an escort, contrary to Pueblo law and custom.*

Under Kewa Pueblo custom and law and because the Kewa Pueblo is a sovereign nation, the Governor controls the access of non-members of the Pueblo to Pueblo land. Except with respect to retail establishments at the edge of the

Pueblo near the freeway, (Tr. 184-186), no non-member may enter the Pueblo without receiving permission from the Governor and without an escort accompanying him or her. (Tr. 43, 156, 161-62, 165, 169, 173, 183-84, 193-94). When the Governor has approved an outsider's entry and assigned an escort, Pueblo members must cooperate with the outsider because the outsider is then acting pursuant to the Governor's authority. (Tr. 165).

Agents Stanford and Riley did not abide by the Pueblo access rule. On February 10, 2010, Agent Stanford received an anonymous tip alleging Mr. Aguilar illegally shot and killed eagles along the Rio Grande River in the Pueblo. (Tr. 34-35, 101; Doc. 23, Exhibit ("Ex.") A<sup>4</sup> at 1). In the early morning of the next day, the agent and a fellow agent entered Pueblo land without the Governor's permission. They surveilled the river for about three hours. They observed several live bald eagles, but no shootings. (Tr. 46; Doc. 23, Ex. A at 1). Agents Stanford and Riley conducted the same kind of surveillance with the same outcome in the early morning of February 12th. (Tr. 50; Doc. 23, Ex. A at 1).

Following their surveillance that day, the agents visited the Governor's office. They considered their visit a courtesy call. They did not know about

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<sup>4</sup> Exhibit A is Agent Stanford's report of his investigation. His report was admitted into evidence at the evidentiary hearing. (Tr. 37, 42).

Pueblo access law. (Tr. 32-33, 41, 53, 96, 98-99). They had no training in that regard. (Tr. 99). The agents met with the Governor, the Lieutenant Governor and other tribal officials. (Tr. 54). Agent Stanford explained he was investigating the killing of eagles along the river in the Pueblo. Agent Stanford testified he indicated he planned on investigating in the Pueblo, meaning the whole Pueblo. He testified he thought the Governor had permitted him to investigate in the whole Pueblo. (Tr. 46, 55-56, 99-100). However, he did not remember saying during this conversation at the Governor's office that they were planning to go to the main village. (Tr. 57-58)

The testifying Pueblo members who participated in or witnessed the encounter, including the Governor, did not understand the Governor to have given the agents permission to enter the main village. They understood that the Governor only allowed the agents to surveil the river. (Tr. 44, 156-57, 165-67, 170, 181, 192-93, 195-6, 197-98). Nonetheless, Agent Stanford and Agent Riley did drive into the main village where they located Mr. Aguilar's home. (Tr. 9, 44, 58-59, 100-01).

*E. The FWS agents enter Mr. Aguilar's home and convince Mr. Aguilar over the phone to meet them at Sam's Club.*

The Pueblo's main village is a "really small," primarily residential area with narrow streets, in which the agents were sure to stand out. (Tr. 60, 68, 99, 101).

The agents parked their unmarked pickup truck with Mexican plates in front of Mr. Aguilar's house. (Tr. 65-66, 103-04, 105). The agents were in plain clothes. (Tr. 60-61, 102). Each carried a gun on his belt. Each agent's gun may have become visible at times. (Tr. 63-64, 102).

About 10:00 a.m., Agent Stanford knocked on the front door of Mr. Aguilar's home. Mr. Aguilar's sister Imogene answered the door. The agent showed his badge and credentials, identified himself as an FWS agent and asked to speak with Mr. Aguilar. Ms. Aguilar responded that Mr. Aguilar was not there and she did not know when he would return. (Tr. 10-12, 66-67, 104). The agents waited outside the house for about another hour and then again knocked on the Aguilar's door. Ms. Aguilar informed them Mr. Aguilar had not returned. Agent Stanford asked if Ms. Aguilar was aware of Mr. Aguilar dealing with eagles. Ms. Aguilar denied knowing anything about such things. (Tr. 12-14, 67, 104, 105). While at the threshold, Agent Riley noticed a dead hawk lying in a crate outside

near the front door. (Tr. 20, 105). The agents went back to the truck and waited there for Mr. Aguilar to come home. (Tr. 14-15, 67-68).

About a half an hour later, (Tr. 15), Mr. Aguilar called his sister to get a phone number. Mr. Aguilar was at a Sam's Club in Albuquerque. Ms. Aguilar told him there were two "new guys" at the house who wanted to talk to him. Mr. Aguilar agreed to talk to the agents to see what they were interested in. (Tr. 203-04, 210-11). Ms. Aguilar opened the front door and motioned the agents to come over to her. She told them Mr. Aguilar wanted to speak with them. (Tr. 15-16, 69, 106, 107) According to Agent Stanford, Ms. Aguilar gestured for the agent to come inside to the kitchen to talk on the cordless phone. (Tr. 16-18, 70-71, 106, 107).

Agent Stanford identified himself and told Mr. Aguilar the agents wanted to talk with him immediately about a tip they received that he had killed eagles by the river. Mr. Aguilar agreed to meet the agents at the food court of Sam's Club. (Tr. 18, 73-74, 204). Mr. Aguilar testified he did so because he thought the agents had the Governor's permission to talk to him, triggering his duty to comply with the Governor's wishes. (Tr. 204).

*F. The agents interrogate Mr. Aguilar about the killing of the eagles and ask for his consent to enter his home and see the eagle feathers; Mr. Aguilar cooperates because he believes the agents are acting with the authority of the Governor.*

About twenty-five minutes after the phone call ended, the agents arrived at Sam's Club. (Tr. 20). They found Mr. Aguilar sitting at a table in the food court. The agents introduced themselves and displayed their badges and credentials. (Tr. 20-21, 216). They were polite and courteous. (Tr. 216).

Agent Stanford denied the agents did anything to lead Mr. Aguilar to believe they were there at the behest of the Governor. (Tr. 22-23). But he conceded he did not know whether they had inadvertently created the false impression they were acting with the Governor's authority. (Tr. 44). Mr. Aguilar testified he thought the agents were investigating the eagle killing, as the Governor had done two days before, with the Governor's authority. (Tr. 204, 206, 211, 241). Consequently, he believed he had to talk with the agents and cooperate with them<sup>5</sup>. (Tr. 206, 217,

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<sup>5</sup> During the government's cross-examination of him, Mr. Aguilar went along with the government's characterization that he "voluntarily" cooperated with the agents. (Tr. 217, 228, 236 239, 241). But, as the district court found with respect to Mr. Aguilar's agreement with the government's assertion that he voluntarily allowed the agents to seize the eagle feathers, he "did not appear to have much, if any, understanding of the word 'voluntarily' as a term of art in Fourth Amendment jurisprudence." (Doc. 58 at 20, n. 9). And, besides, Mr. Aguilar repeatedly insisted he felt he had to cooperate because of his perception the agents were investigating with the Governor's blessing. (Tr. 206, 217, 242, 243).



242, 243). Indeed, Agent Stanford found Mr. Aguilar to be “very cooperative” and not hesitant at all. (Tr. 22).

Agent Stanford advised Mr. Aguilar he was free to leave and that he did not have to talk to the agents. (Tr. 75). But the agent also told Mr. Aguilar it was in his best interest to be truthful with them. The agent gave that advice because it was against the law to lie to a federal agent. (Tr. 75). The agent did not recall giving Mr. Aguilar any assurances, but he thought it was possible he promised Mr. Aguilar that, if Mr. Aguilar cooperated, they would not arrest Mr. Aguilar that day. (Tr. 75, 76). There is no evidence the agents ever advised Mr. Aguilar he had the right to refuse consent to the agents’ entry into his home. Mr. Aguilar received the impression from the agents that he was not in trouble, i.e., that he was not going to be charged with any offenses. They just wanted to get the feathers, he thought. (Tr. 204, 226, 244).

When Agent Stanford asked Mr. Aguilar about the anonymous tipster’s accusation, Mr. Aguilar related what he had done with respect to the eagles, as described above. (Tr. 22, 23, 204-05, 218-19, 227). He also said he had shot a total of five eagles during his time as medicine man for religious reasons. (Tr. 79, 220, 227). He acknowledged as well that the year before he had traded jewelry for

a set of eagle wings. (Tr. 227). He explained a dog had brought the dead hawk the agents saw at his house. (Doc. 23, Ex. A at 3; Tr. 234).

Agent Stanford wrote out a statement in Mr. Aguilar's words giving an account of what Mr. Aguilar had told the agents. The agent read the statement to Mr. Aguilar, Mr. Aguilar agreed with what was read and signed the statement. (Tr. 24-25, 80, 227-28). Agent Stanford asked to see the eagle feathers. Mr. Aguilar agreed to show the feathers to the agents. They chose 4:00 p.m. as the time when they would meet at Mr. Aguilar's house. (Tr. 24, 80-81, 223). Mr. Aguilar testified he felt he had to show the agents the feathers because they already knew he had them. (Tr. 223-24). The encounter at Sam's Club lasted about an hour. (Tr. 79).

*G. The agents enter Mr. Aguilar's home without a warrant pursuant to Mr. Aguilar's consent and observe the eagle feathers; they seize evidence, despite a Pueblo police officer's request that they first consult with the Governor.*

Mr. Aguilar returned to his home before the agents arrived. (Tr. 26, 81, 206, 228-29). He brought the eagle feathers and the eagle wing set from the shed into the living room. (Tr. 27, 29-30, 229). Shortly thereafter the agents arrived unescorted and without the Governor's permission. (Tr. 26, 81, 169-70, 206, 228-29, 229-230). The agents met Mr. Aguilar outside. He invited the agents into the

living room because the feathers were there and the agents wanted to look at them. (Tr. 26-27, 82, 230, 231). The agents did not have a warrant. (Tr. 63, 85, 103).

After the agents entered Mr. Aguilar's home, he asked his sister to call tribal officials and ask them to come over to witness what the agents were doing and to let him know if the agents really had permission to be there. (Tr. 168-69, 182, 194, 206, 207, 236). In response, the Governor sent tribal law enforcement officers to Mr. Aguilar's home to tell the agents to go to the Governor's office because they did not have permission to investigate in the village. (Tr. 195-96). Officers Kerwin Tenorio and Vincent Aguilar immediately went to Mr. Aguilar's home. (Tr. 169, 172, 195). Meanwhile, Mr. Aguilar told the agents he had requested that tribal officials attend the meeting. He asked the agents to wait until the officials arrived. (Tr. 28, 82).

The officers, who were agitated, asked what was going on. (Tr. 30, 82-83). Mr. Aguilar explained the agents were there to look at his feathers. (Tr. 208). Officer Tenorio asked the agents to go to the Governor's office before they confiscated anything. (Tr. 82, 85, 170). Agent Stanford replied that they would visit the Governor only after they finished their business with Mr. Aguilar. (Tr. 84, 85, 170). The agent told Mr. Aguilar he was going to seize the eagle feathers, the eagle wings, the hawk and Mr. Aguilar's .22 caliber rifle. (Tr. 86-87, 209). Mr.

Aguilar signed an abandonment form acknowledging what items the agents were taking. (Tr. 31, 86). Mr. Aguilar denied Agent Stanford's request to search his shed and refused to let him take the traditional basket that held the feathers because the basket was special to Mr. Aguilar. (Tr. 30, 208-09). The agents disrespectfully dumped the feathers in a plastic bag, collected all the evidence and put it in their truck. (Tr. 32, 170-71, 200, 209).

*H. Tribal officials confront the agents about their unescorted entry into the main village without the Governor's permission and escort the agents off the Pueblo.*

Agent Stanford and Agent Riley then went to the Governor's office. The Governor and other tribal officials reprimanded the agents for going into the main village without the Governor's permission. (Tr. 88, 197). According to Pueblo officer Vincent Quintana, the agents reacted arrogantly and disrespectfully. (Tr. 197). Because the agents had violated Pueblo law, tribal officers escorted the agents out of the Pueblo. (Tr. 177-78).

*I. Mr. Aguilar moves to suppress the seized evidence on the grounds that his consent for the agents to enter his home and view the eagle feathers was involuntary in light of all the circumstances, including his belief the agents were acting with the authority of the Kewa Pueblo Governor.*

Following his indictment, Mr. Aguilar filed a motion to suppress the evidence the officers seized and the statements they obtained from him. As

grounds, Mr. Aguilar contended, in part, that the consent he gave the FWS agents to enter his home and view the eagle feathers was involuntary. He argued he was coerced and duped as a result of his belief that the agents were investigating under the Governor's authority, when in fact they actually defied Pueblo law by entering the Pueblo's main village without the Governor's permission. Mr. Aguilar based his belief on Pueblo law that prohibits non-members of the pueblo to enter the main village obtain unless they obtain the Governor's permission and the fact that the Governor had questioned him about killing eagles two days before. (Doc. 14 at 1-2, 3-5, 6, 8, 9-10, 12-14; Doc. 23 at 1-2, 4-5, 9-10, 12-13; Doc. 27 at 1-2, 4-12; Doc. 44 at 1-2, 3, 5, 7, 9, 10-13). Mr. Aguilar also noted the impression the agents gave him that they were not interested in pursuing criminal charges against him. (Doc. 44 at 8).

*J. Mr. Aguilar moves to dismiss the indictment because applying BGEPA to his taking and possession of a bald eagle for religious purposes violated RFRA given that FWS has removed bald eagles from the list of endangered and threatened wildlife.*

Mr. Aguilar filed a motion to dismiss the indictment in part because application of BGEPA to Mr. Aguilar's taking and possession of a bald eagle for use in religious ceremonies violated RFRA. Mr. Aguilar pointed out that, as a medicine man, he killed a bald eagle and possessed its feathers due to his sincere

religious beliefs. (Doc. 22 at 6). He argued the government could not prove its prosecution of Mr. Aguilar for exercising his religion served the interest of protecting bald eagles through the least restrictive means, as RFRA requires. (Doc. 22 at 6-7; Tr. 254). He indicated obtaining an eagle from the FWS' repository would be inconsistent with the traditional way eagles must be taken for religious purposes. (Tr. 257-58). He also noted the FWS procedure for permitting Native Americans to take a live eagle was "used infrequently and not widely known or advertised." (Doc. 22 at 8).

Mr. Aguilar argued the significant recovery of the bald eagle, which has led to the bald eagle's delisting as an endangered or threatened wildlife, increased the burden on the government to justify its current permit regime. (Doc. 22 at 9-10; Tr. 254). As a result, Mr. Aguilar contended, the least restrictive means consistent with RFRA would be allowing medicine men to take or possess bald eagles without requiring them to submit to a regulatory process as long as they take or possess the bald eagles for religious purposes. Since the FWS has not adopted this method of protecting bald eagles, Mr. Aguilar's prosecution violates RFRA, he concluded. (Doc. 22 at 9, 10-11).

**K.** *The district court denies Mr. Aguilar's motions.*

In written orders, the district court rejected Mr. Aguilar's arguments. With respect to the motion to suppress, the court found Kewa Pueblo has a custom or tradition of deference to the governor. (Doc. 58 at 13). As a consequence, the court determined, if Mr. Aguilar believed the agents went to his home at the Governor's direction, Mr Aguilar "would have felt obligated to cooperate with the agents." (Doc. 58 at 13-14). Accordingly, the court undertook to assess whether Mr. Aguilar actually held that belief. In the course of that assessment, the court noted Mr. Aguilar could have concluded the Governor or someone acting on his behalf informed the FWS about Mr. Aguilar's shooting of eagles, since the Governor had called Mr. Aguilar into his office to investigate the matter. On the other hand, the court felt Mr. Aguilar's meeting with the Governor might have signaled the Governor had resolved the investigation to his satisfaction, making it less likely the Governor had turned to the FWS for help. The court did not consider Mr. Aguilar's main point that he believed the agents were acting under the Governor's authority because they had entered the Pueblo main village—something they could not have done consistent with Pueblo law unless the Governor approved it. (Doc. 58 at 14).

The district court ultimately found that Mr. Aguilar was unsure whether the Governor instigated the FWS investigation or at least authorized it. For that reason the court determined Mr. Aguilar's "subjective concern that the special agents might be acting at the Governor's direction or with his consent contributed to [Mr. Aguilar's] decision to meet with the special agents." (Doc. 58 at 14).

The district court went on to discuss whether Mr. Aguilar's subjective concern played a role in the voluntariness-of-consent-to-search issue. The court noted what it considered conflicting authority regarding the question. (Doc. 58 at 16-19). The court concluded that under a purely objective test limited to consideration of what the agents knew or should have known Mr. Aguilar's words and conduct conveyed a free, intelligent and unequivocal consent to the agents' entry into his home and examination of the eagle feathers. (Doc. 58 at 16, 19). The court opined further that, if Mr. Aguilar's subjective concern is part of the totality of circumstances that the court should take into account, that concern was insufficient to render Mr. Aguilar's consent involuntary. (Doc. 58 at 19). As support for that opinion, the court cited *Iribe*, 11 F.3d at 1557, in which this court held an intangible characteristic such as attitude toward authority should not be given significant weight in the voluntariness-of-consent determination. (Doc. 58 at



19). The district court did not attempt to justify why that intangible characteristic was comparable to Mr. Aguilar's very real concern about disobeying his Governor.

The district court further found that Mr. Aguilar had not consented to the agents' seizure of the evidence at his home. Agent Stanford had already announced the agents would seize the items before Mr. Aguilar signed the abandonment form.

Mr. Aguilar merely acquiesced to the agents' authority. (Doc. 58 at 20).

Nonetheless, the seizure was valid pursuant to the plain view doctrine, the court held. (Doc. 58 at 20-21).

With respect to Mr. Aguilar's motion to dismiss, the district court held this court's decision in *Friday*, in which this court rejected a RFRA challenge to the FWS permit process where the delisting of the bald eagle had not been raised, controlled the outcome in this case. The court reasoned the delisting of the bald eagle did not make the FWS permit process any less important in advancing the compelling goal of preserving the bald eagle. (Doc. 59 at 3-4). The court did not consider the principle that the more robust the eagle population the less restrictive a regulatory scheme must be to pass RFRA muster. *See United States v. Wilgus*, 638 F.3d 1274, 1285 (10th Cir. 2011).

The district court's denial of Mr. Aguilar's motions lead to his conditional plea and convictions, which he challenges here.

## ARGUMENT

**I. Mr. Aguilar's consent to United States Fish and Wildlife Service agents to enter his home and view eagle feathers was involuntary in light of all the circumstances, including his concern that the agents were acting with the approval of the Governor of Kewa Pueblo, requiring by Pueblo custom and tradition his cooperation with the agents.**

### *A. Summary of the Argument*

The district court factually and legally erred when it held Mr. Aguilar's subjective concern that the FWS agents were acting under the Pueblo Governor's authority did not render his consent to their entry into his home involuntary. The court understated the significance of that concern in two respects. First, the court completely disregarded the powerful effect of the agents' initial entry into the Pueblo's main village and his home. As a Pueblo member, Mr. Aguilar understood that Pueblo custom and law prohibited the agents from engaging in that conduct unless the Governor permitted them to do so. Hence, Mr. Aguilar had good reason, in addition to the Governor's own investigation into the killing of the eagles, to believe the Governor approved the agents' investigation.

Second, the district court's analogizing an intangible attitude toward authority to Mr. Aguilar's concern that he had to cooperate with the agents to meet his obligations to the Governor is mistaken. Mr. Aguilar's concern regarding a very real authority that ran his small village as an absolute ruler is far more

substantive than an amorphous fear of a vague authority. According Mr. Aguilar's concern the importance it is due leads to the conclusion Mr. Aguilar's consent to the agents' entry into his home to observe the eagle feathers was involuntary.

The Supreme Court's decision in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), and this court's precedent require consideration of the vulnerable subjective state of a person who consents to an entry into his home in determining whether the consent is voluntary. This is true whether or not the officers acquiring the consent were aware of the person's subjective features.

Therefore, due to the district court's factual and legal errors, this court must vacate Mr. Aguilar's convictions and remand with instructions to grant Mr. Aguilar's motion to suppress.

### **B. *Standard of Review***

Whether consent was voluntarily given is a question of fact this court reviews for clear error. *United States v. Harrison*, 639 F.3d 1273, 1277 (10th Cir. 2011). The clear error standard does not inhibit an appellate court's power to correct errors of law, including those that may infect a mixed finding of law and fact and a finding of fact that is predicated on a misunderstanding of the governing rule of law. *Sanchez v. State of Colorado*, 97 F.3d 1303, 1309 (10th Cir. 1996). When reviewing a decision regarding a motion to suppress, this court reviews the

evidence in the light most favorable to the district court's finding. *Harrison*, 639 F.3d at 1277. The ultimate determination of the reasonableness of officers' conduct is reviewed de novo. *Id.*

*C. The government has the burden to prove a consent to entry of a home is voluntary in light of the totality of the circumstances.*

The "Fourth Amendment has drawn a firm line at the entrance to the house." *Mascorro v. Billings*, 656 F.3d 1206 (10th Cir. 2011) (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)). "A warrantless search of a home is presumptively unreasonable, and evidence obtained from such a search is inadmissible, subject only to a few carefully established exceptions." *Harrison*, 639 F.3d at 1278. One such exception is voluntary consent. *Id.* But the Fourth Amendment "require[s] that a consnt not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion is applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth*, 412 U.S. at 228.

The government bears the burden of proving consent is given freely and voluntarily. *Harrison*, 639 F.3d at 1278. Whether consent is free and voluntary is determined by an examination of the totality of the circumstances. *United States v. Bass*, 661 F.3d 1299, 1304 (10th Cir. 2011). This court employs a two-part test to

make that determination: (1) “the government must proffer clear and positive testimony that consent was unequivocal and specific and freely given;” and (2) “the government must prove that this consent was given without implied or express duress or coercion.” *United States v. Davis*, 636 F.3d 1281, 1292-93 (10th Cir. 2011) (quoting *United States v. Zubia-Melendez*, 263 F.3d 1155, 1162 (10th Cir. 2001)).

Relevant factors under the totality-of-circumstances test include: “use of . . . threats, promises, inducements, deception, trickery, . . . the physical and mental condition and capacity of the defendant, the number of officers on the scene, and the display of police weapons,” the failure to inform the defendant of the right to refuse consent and a claim of lawful authority. *Harrison*, 639 F.3d at 1278 (quoting *United States v. Sawyer*, 441 F.3d 890, 895 (10th Cir. 2006)).

The “Fourth Amendment can be violated by guileful as well as by forcible intrusions into a constitutionally protected area.” *Harrison*, 629 F.3d at 1278 (quoting *Hoffa v. United States*, 385 U.S. 293,301 (1966)). “[G]overnment actions are coercive when they imply an individual has no right to refuse consent.” *Harrison*, 639 F.3d at 1279. For example, when an officer claims the authority to search a home under a warrant, the officer effectively announces the homeowner has no right to refuse consent and a subsequent consent is coerced. *Bumper v.*

*North Carolina*, 391 U.S. 543, 548-49 (1968). Similarly coercive is an officer's indication that "punitive ramifications" will follow the exercise of the right to refuse consent. *Eidson v. Owens*, 515 F.3d 1139, 1147 (10th Cir. 2008).

In this case, Mr. Aguilar's consent for the agents to enter his home and view the eagle feathers was involuntary in particular because he felt he had no choice but to cooperate with the agents and agree to their entry, given his concern they were acting under the authority of the Governor, whom he must obey under Pueblo custom and law.

**D.** *The vulnerable subjective state of a person who consents to an intrusion into a constitutionally protected area is part of the totality of the circumstances that determine whether the consent is voluntary, even if the officers seeking consent are unaware of the person's subjective state.*

The district court was skeptical that an analysis of the totality of circumstances should include subjective factors affecting the consenting person when officers are not aware of those factors. (Doc. 58 at 16-19). But Supreme Court and Tenth Circuit precedent strongly support inclusion of such factors in the voluntariness determination.

In *Schneckloth*, the Supreme Court mandated that "[i]n examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the

possibly vulnerable state of the person who consents.” 412 U.S. at 229. This court as well has noted the mental condition and capacity of the defendant—a factor usually not apparent to an outside observer—is a relevant factor in the voluntariness determination. *Harrison*, 639 F.3d at 1278; *United States v. Pena*, 143 F.3d 1363, 1367 (10th Cir. 1998).

This court has typically framed the voluntariness question in terms of the coercive effect on the person consenting, not whether the officer reasonably could have believed the consent was voluntary. For example, in *Harrison*, the government argued the agents’ statements to the defendant when seeking consent to search his apartment may not have implied a bomb may have been planted in the apartment. This court responded that, even if the government’s interpretation was plausible, what matters is the district court made a permissible interpretation of those statements. 639 F.3d at 1279. This court focused on “the effect of the Agents’ statements,” not on the perspective of the officers. *Id.* at 1280, 1281.

In *United States v. Gay*, 774 F.2d 368 (10th Cir. 1985), where the defendant contended he was too intoxicated to consent voluntarily this court described the voluntariness question as “one of mental awareness so that the act of consent was that of one who knew what he was doing.” *Id.* at 377. In *United States v. Recalde*, 761 F.2d 1448 (10th Cir. 1985), this court held the defendant had not voluntarily

consented to be taken to the station house in part because his upbringing and experiences in Argentina had instilled in him an acquiescence to authority—a fact the officers were not aware of. *Id.* at 1454.

In *United States v. Sims*, 428 F.3d 945 (10th Cir. 2005), this court affirmed it has not applied the “police-perspective test” to the voluntariness of consent question. In that case, this court observed that the Supreme Court applied such a test to confessions in *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). *Sims*, 428 F.3d at 953, n. 2. But this court observed further that that test “has not yet been applied directly to a consent to search in any published circuit case this court has found.” *Id.* This court went on to “note that since *Connelly* our cases have continued to rely on the familiar ‘totality of the circumstances’ test articulated in” *Schneckloth*. *Id.*

This court’s opinion in *United States v. Zapata*, 997 F.2d 751 (10th Cir. 1993), is not contrary authority. In that case, in passing this court suggested that Supreme Court decisions may have cast doubt on the notion that subjective characteristics may be relevant to the voluntariness of a person’s consent. *Id.* at 759. But, as demonstrated above, this court has continued to consider subjective characteristics relevant. The *Zapata* court held that the “intangible” characteristic of a person’s attitude toward authority was so inherently unverifiable and



unquantifiable that it could not be given significant weight in the voluntariness calculus. *Id.* at 759 & n. 6. But that holding is far from a conclusion that subjective characteristics unknown to an officer are irrelevant. In *Zapata*, this court merely downplayed the significance of a particularly inscrutable subjective feature.

While at least two other circuit courts have apparently adopted a reasonable officer standard with respect to the voluntariness of consent, *see United States v. Cedano-Medina*, 366 F.3d 682, 684-85 (8th Cir. 2004); *United States v. Grap*, 403 F.3d 439, 444-45 (7th Cir. 2005), others have abjured that approach and the application of *Connelly* to the Fourth Amendment. In *Lopera v. Town of Coventry*, 640 F.3d 388 (1st Cir. 2011), the First Circuit found no published circuit court decision that applied *Connelly* to questions of consent under the Fourth Amendment. *Id.* at 399. The First Circuit noted two circuit courts had explicitly declined to do so, the Sixth Circuit in *United States v. Montgomery*, 621 F.3d 568, 571-72 (6th Cir. 2010) (coercive police activity “generally is not required in Fourth Amendment consent cases”), and the Eleventh Circuit in *Tukes v. Dugger*, 911 F.3d 508, 516 & n. 13 (11th Cir. 1990) (“we do not understand . . . *Connelly*. to overturn existing fourth amendment consent jurisprudence”). *Lopera*, 640 F.3d at 399.

The First Circuit also noted it “has continued to apply the requirements of *Schneckloth* for consent to a Fourth Amendment search.” *Id.*; *see also United States Hall*, 969 F.2d 1102, 1106 (D.C. Cir. 1992) (“the voluntariness inquiry turns . . . on whether the *accused herself* actually felt compelled to consent” (emphasis in original); *id.* at 1108, n. 6 (*Connelly*’s reasoning has not yet been generally applied to consensual searches”); *United States v. Elrod*, 441 F.2d 353, 356 (5th Cir.1971) (“No matter how genuine the belief of the officers is that the consentor is apparently of sound mind and deliberately acting, the search depending on his consent fails if it is judicially determined that he lacked mental capacity.”).

In sum, adopting the objective officer approach or a requirement that the officer take advantage of a subjective trait known to the officer would contravene the precedent that binds this court and the bulk of other circuit authority. Therefore, this court must consider the vulnerable subjective state of a person who consents as part of the totality of the circumstances that determine whether the consent is voluntary, even if the officers seeking consent are unaware of the person’s subjective state.

*E. The district court factually and legally erred by understating the significance of Mr. Aguilar's subjective concern that the agents were investigating with the approval of the Governor, requiring by Pueblo custom and tradition his cooperation with the agents.*

Based on substantial evidence, (Tr. 40, 52, 162-165, 242-243), the district court found Kewa Pueblo has a custom or tradition of deference to the governor. (Doc. 58 at 13). The court determined the Governor receives so much deference that, if Mr. Aguilar believed the agents went to his home at the Governor's direction, Mr Aguilar "would have felt obligated to cooperate with the agents." (Doc. 58 at 13-14). The court found, however, that Mr. Aguilar was unsure whether the Governor instigated the FWS investigation or at least authorized it. (Doc. 58 at 14). As a basis for that conclusion, the court reasoned that Mr. Aguilar's meeting with the Governor two days before the agents approached Mr. Aguilar gave Mr. Aguilar mixed messages. It indicated the Governor was interested in Mr. Aguilar's killing of eagles, but it also might have indicated the Governor felt the matter had been resolved. (Doc. 58 at 14).

The court determined that Mr. Aguilar's "subjective concern that the special agents might be acting at the Governor's direction or with his consent" had an effect. His concern "contributed to [Mr. Aguilar's] decision to meet with the special agents." (Doc. 58 at 14).

The court ultimately concluded that Mr. Aguilar's subjective concern was insufficient to render Mr. Aguilar's consent involuntary. (Doc. 58 at 19). As support for that opinion, the court cited *United States v. Iribe*, 11 F.3d 1553 (10th Cir. 1993). (Doc. 58 at 14). In that case, this court held an intangible characteristic such as attitude toward authority should not be given significant weight in the voluntariness-of-consent determination.

The district court's analysis gravely understated the significance of Mr. Aguilar's vulnerable state in two respects. First, the court disregarded the primary reason why Mr. Aguilar believed the agents were acting under the Governor's authority: they entered the main village of the Pueblo and his home. Mr. Aguilar established at the evidentiary hearing without contradiction that under Pueblo custom and law no one who is not a member of the Pueblo may enter the main village of the Pueblo without receiving permission from the Governor. (Tr. 43, 156, 161-62, 165, 169, 173, 183-84, 193-94). When the Governor has approved an outsider's entry, Pueblo members must cooperate with the outsider because the outsider is then acting pursuant to the Governor's authority. (Tr. 165).

Consequently, when the agents entered the main village and ultimately his home and talked to Mr. Aguilar on the phone, Mr. Aguilar was bound to believe the agents were investigating the killing of the eagles with the Governor's approval

and that, because the Governor was the absolute ruler of the Pueblo, he must cooperate with them. The district court missed this critical point, which makes Mr. Aguilar's concern that he risked the Governor's opprobrium if he failed to go along with the agents much much stronger than the court thought it was.

Second, by citing to *Iribe*, the district court indicated it felt Mr. Aguilar's trepidation regarding the Governor was akin to a person's intangible attitude toward authority. This is not a fair comparison by a long shot. In *Iribe*, this court did not accord a resident's attitude toward authority significant weight because the defendant's attitude was "inherently unverifiable and unquantifiable." 11 F.3d at 1557 (quoting *Zapata*, 997 F2d at 759). This court explained that factor was especially insignificant because the defendant presented no testimony regarding the resident's national background and unfamiliarity with the law. *Id.*

The circumstances of this case contrast sharply with those in *Iribe*. In this case, as shown above, Mr. Aguilar presented ample evidence that Pueblo members must obey the Governor, who is their absolute ruler, and that the Governor decides who may enter the main village. Mr. Aguilar also presented ample evidence that he believed the Governor authorized the agents' investigation and therefore felt obligated to cooperate, in particular to consent to their entry into his home to view the eagle feathers. (Tr. 204-206, 211, 217, 241-243). Unlike the defendants in

*Zapata* and *Iribe*, Mr. Aguilar submitted plenty of evidence of his tangible, corroborated, quantifiable, concrete belief that he would be defying the venerated Governor if he did not comply with the agents' requests. Thus, the district court's analogy to *Iribe* evidences its misunderstanding of the import of *Iribe* and *Zapata*.

In sum, the district court's egregious factual and legal errors undermine the validity of its conclusion that Mr. Aguilar voluntarily consented to the agents' warrantless entry into his home.

**F.** *The government failed to meet its burden to prove in light of the totality of the circumstances that Mr. Aguilar's consent to enter his home and view the eagle feathers was voluntary.*

Consideration of all the relevant circumstances establishes the government has not met its burden to prove Mr. Aguilar's consent for the agents to enter his home and view the eagle feathers was voluntary. As demonstrated above, given Mr. Aguilar's concern that the agents were acting under the Governor's authority, the agents' request to enter his home and see the feathers was tantamount to a claim of lawful authority to do so. That was enough to render his consent involuntary. *See Bumper*, 391 U.S. at 548-49 (officer's claim that he had a search warrant rendered the consent to search involuntary); *Eidson*, 515 F.3d at 1147 (officer's indication that "punitive ramifications" will follow the exercise of the right to refuse consent renders a consent involuntary).

Mr. Aguilar endured other coercive circumstances as well. Agent Stanford acknowledged he told Mr. Aguilar it was in Mr. Aguilar's best interest to tell the truth. (Tr. 75). This declaration is essentially a promise that Mr. Aguilar would be better off cooperating.

And Mr. Aguilar received the impression from the agents that he was not going to be prosecuted, that they just wanted to get the feathers. (Tr. 204, 226, 244). Thus, Mr. Aguilar was deceived into believing, whether by the agents or his own misinterpretations of what he was told, that he would face no consequences if he cooperated.

In addition, there is no evidence the agents informed Mr. Aguilar of his right to refuse consent. This failure is also a coercive factor. *See Harrison*, 639 F.3d at 1278 (listing informing the defendant of the right to refuse consent as a factor in the voluntariness-of-consent determination).

The agents' politeness, (Tr. 216), and Agent Stanford's advice that Mr. Aguilar was free to leave and not talk, (Tr. 75), could not overcome all the other forces that compelled Mr. Aguilar's cooperation. Mr. Aguilar believed he would suffer the weighty consequences associated with disrespecting his Governor if he left and did not talk and Agent Stanford told Mr. Aguilar he was better off talking.

For all of the above reasons, the government has not proven Mr. Aguilar voluntarily consented to the agents' entry into his home to view the eagle feathers. The district court committed legal error and clear factual error in reaching a different conclusion. This court should vacate Mr. Aguilar's convictions and remand to the district court with instructions to grant the motion to suppress.

**II. Application of the Bald and Golden Eagle Protection Act to Mr. Aguilar's taking and possessing a bald eagle for tribal religious purposes violates the Religious Freedom Restoration Act by substantially burdening his exercise of religion without using the least restrictive means to further the interest of protecting bald eagles, given the removal of bald eagles from the list of endangered and threatened wildlife.**

*A. Summary of the Argument*

According to the FWS, "the bald eagle is now flourishing across the nation." United States Fish and Wildlife Service, *Bald Eagle*, available at, <http://www.fws.gov/midwest/eagle/index.html> (last visited June 24, 2012). So much so that the FWS removed the bald eagle from the list of endangered and threatened wildlife on July 9, 2007. *Endangered and Threatened Wildlife and Plants; Removing the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife*, 72 Fed. Reg. 37346 (July 9, 2007) (hereinafter "Delisting"). As this Court has indicated, this development requires a recalculation of the interests involved and the means required to serve those interests when a defendant raises a RFRA



challenge to a prosecution pursuant to BGEPA. *United States v. Wilgus*, 638 F.3d 1274, 1285 (10th Cir. 2011) (citing *United States v. Hardman*, 297 F.3d 1116, 1128 (10th Cir. 2002) (en banc)). The district court erred when it did not conduct that recalculation.

The FWS procedure to permit the taking of bald eagles, which this court found in *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008) to be the least restrictive means to protect the bald eagle, while respecting Native American religious rights, must be reconsidered in light of the flourishing bald eagle population. Now the government cannot meet its burden to prove a permit process that is accompanied by little, if any, outreach, and is rarely used, is the least restrictive means. Limiting the people who may take bald eagles to those, who, as Mr. Aguilar did in this case, legitimately take the eagles for religious purposes, without requiring them to submit to a regulatory process, is the least restrictive means under RFRA.

Accordingly, the government's prosecution of Mr. Aguilar violates RFRA. This court must therefore vacate his convictions and remand with instructions to grant Mr. Aguilar's motion to dismiss.

**B. *Standard of Review***

Whether the government has chosen the least restrictive means to advance its compelling interest is a question of law this court reviews de novo. *Wilgus*, 638 F.3d at 1284.

**C. *The FWS administers the BGEPA in such a way that very few Native Americans obtain permits to take eagles.***

16 U.S.C. § 668(a) prohibits the taking or possessing of a bald eagle or a golden eagle or any part thereof without obtaining permission from FWS. 16 U.S.C. § 668a provides for an exception when the taking or possessing is done for “the religious purposes of the tribes.” Under that provision, the Secretary of the Interior may authorize the taking and possessing of bald eagles or golden eagles or their parts for those purposes pursuant to regulations the Secretary devises that must be “compatible with the preservation of” the eagles. The Secretary has promulgated such regulations. 50 C.F.R. Ch. I, pt. 22.

The regulations provide that only members of federally-recognized tribes, such as the Kewa Pueblo, who are engaged in religious activities may apply for and obtain permits. 50 C.F.R. § 22.22. The Secretary will only grant permits if doing so is compatible with the preservation of the bald and golden eagles. 50 C.F.R. § 22.22(c). The FWS maintains a National Eagle Repository where FWS agents and

members of the public send the carcasses of eagles who are confiscated contraband or victims of electrocution on power lines or roadkill. *Wilgus*, 638 F.3d at 1278-79; *Friday*, 525 F.3d at 944. The FWS distributes the eagle parts through an application process. The parts in the Repository are in very high demand leading to waits of years to get permits. *Friday*, 525 F.3d at 944.

In any event, “[t]he Repository does not work well for those whose religion requires the eagles to be pure.” *Id.* Most of the time, the eagles are very decomposed. *Id.* Moreover, the Repository does not satisfy the religious needs of those Native Americans, such as the medicine men of the Kewa Pueblo, who must acquire the eagles in a traditional way that is incompatible with acquiring them through a permit process. (Tr. 257-58).

The FWS also maintains a process for awarding permits to “take” live eagles. 50 C.F.R. § 22.22. An applicant must be a member of a federally-recognized tribe and write to the Migratory Bird Permit Office in his region, describing how many eagles of what species he wishes to take and the tribe and ceremony for which they are needed. *Friday*, 525 F.3d at 944. The FWS will grant an application only when it determines the taking “is compatible with the preservation of the bald and golden eagle.” 50 C.F.R. § 22.22(c). The two listed criteria for qualifying for a permit are: the likely “direct or indirect effect” of the permit on the eagle

population, and whether the applicant is a Native American with a “bona fide” religious use. 50 C.F.R. § 22.22. In practice, there is an additional criterion: “special circumstances” must demonstrate that the Repository “could [not] satisfy the need” for the eagle or its feathers. *Friday*, 525 F.3d at 944-45.

This permit process “is used infrequently and is not widely known.” *Id.* at 945. The FWS prefers that people use the Repository because that does not decrease the eagle population. *Id.* As of the time of the testimony in the *Friday* case, the FWS had issued only a few permits to take eagles, all golden eagles: two permits issued to the Navajo tribe and one annually-recurring permit granted to the Hopi to take forty nestling eaglets per year. *Id.* An FWS witness in the *Friday* case testified there had never been in any region a request to lethally take a bald eagle. *Id.* As is true for almost all Native American religious people, Mr. Aguilar has not applied for a permit through this process.

**D.** *Under RFRA, the government must demonstrate a prosecution under BGEPA serves a compelling interest by the least restrictive means.*

Under RFRA, the government “shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.” 42 U.S.C. § 2000bb-1(a). There is one exception to this prohibition: the government may impose a substantial burden “only if it demonstrates that

application of the burden . . . is in furtherance of a compelling government interest; and . . . is the least restrictive means of furthering that compelling government interest.” 42 U.S.C. § 2000bb-1(b).

To make out a prima facie RFRA defense to a prosecution, a criminal defendant must show by a preponderance “that government action (1) substantially burdens (2) a religious belief, not merely a philosophy or way of life, (3) that the defendant sincerely holds.” *United States v. Quaintance*, 608 F.3d 717, 719 (10th Cir. 2010). There was no dispute below that Mr. Aguilar made out a prima facie case. Mr. Aguilar is a medicine man who shot and killed a bald eagle for purposes of a Kewa Pueblo religious ceremony. (Tr. 22, 79, 171, 198, 227, 244). So, he has met the second and third prerequisites. The first prerequisite is met because imposing criminal punishment for conduct performed for religious purposes constitutes a substantial burden. *See id.* at 720.

Since Mr. Aguilar has made out a prima facie case, the government has the burden to show Mr. Aguilar’s prosecution is justified as the least restrictive means of furthering a compelling governmental interest. *Id.* at 719-20. This court has found the BGEPA is meant to serve two compelling interests: (1) protecting eagles and (2) fostering and preserving Native American religion and culture. *Wilgus*, 638 F.3d at 1285. This court has held that the government has a compelling

interest in protecting the bald eagle as our national symbol, even though the bald eagle has been removed from the list of wildlife protected under the Endangered Species Act. *Id.* But “a more robust eagle population could be factored into the least restrictive means analysis.” *Id.* (citing *Hardman*, 297 F.3d at 1128. The more eagles in the wild, the less restrictive a regulatory scheme should be to pass muster under RFRA. *Id.* The “least restrictive means” is a severe form of the more commonly used “narrowly tailored” test. *Hardman*, 297 F.3d at 1180.

**E.** *In Friday*, this court held that the FWS permit process was the least restrictive means to protect the eagle population, but it did not address the effect on that determination of the delisting of the bald eagle.

In *Friday*, the government pointed to three ways in which the current permit system advances the compelling interest of protecting eagles. First, the system allows the government to keep track of which eagles have been legally taken and by whom. This enables the government to distinguish between bona fide religious takings and other depredations on the eagle population. Second, the government has some ability to influence the number, species and age of eagles taken and the season or geographic area from which they are taken. Third, the permit system helps the FWS allocate the right to take eagles among all Native American applicants in the event there are more demands than the population can accommodate. 525 F.3d at 955. Of course, these purposes are essentially just

theoretical. The permit system is currently so little used due to the FWS' poor outreach that it does not realistically serve any real purpose at the moment.

This court rejected the defendant's contention that the government had not done sufficient empirical research to show there would be too many religious takings if there were no permit requirement. This court opined that the government could not be expected to quantify the precise impacts of uncertain future events, especially where the takings would be in secret and would not be reported to governmental authorities. *Id.* This court added that the interest in protecting bald and golden eagles is compelling with respect to small as well as large impacts on the eagle population because the bald eagle is a national symbol and the government has an interest in ensuring no more eagles than necessary are taken. *Id.* at 956.

This court also rejected the defendant's argument that outreach promoting the availability of the permit process is required to render the system the least restrictive means of preserving eagles. This court found no case in which a court held the government violated free exercise rights because the government did not take affirmative steps to help affected religious adherents become aware of the availability of an accommodation to their rights. *Id.* at 957. Nonetheless, the lack

of outreach has the effect of diminishing the free exercise rights of Native Americans, such as Mr. Aguilar, whose religions require the taking of eagles.

In *Friday*, this Court was not faced with an argument that the delisting of the bald eagle undermined the current permit system as a least restrictive means to protect bald eagles. Mr. Aguilar raises that argument in this case.

**F.** *The delisting of the bald eagle undermines the notion that the FWS permit process is the least restrictive means to protect eagles.*

On July 9, 2007, the FWS removed the bald eagle from the list of endangered and threatened wildlife. The FWS pointed out the bald eagle population in the lower 48 states had increased from approximately 487 breeding pairs in 1963 to an estimated 9,789 breeding pairs by then. *Delisting*, 72 Fed. Reg. at 373346. The FWS believes “the bald eagle is now flourishing across the nation.” *Bald Eagle*, supra.

As this court has indicated, the FWS’ determination that now bald eagles are thriving so well they do not need the protection of the Endangered Species Act should be factored into the least restrictive means analysis.” *See Wilgus*, 638 F.3d at 1285 (citing *Hardman*, 297 F.3d at 1128. This court has said this should be so, even though the bald eagle has value as a national symbol regardless of how many there are. *Id.* Consequently, the more eagles in the wild, the less restrictive a



regulatory scheme should be in order to avoid violating RFRA. *Id.* The district court failed to appreciate this concept when it addressed Mr. Aguilar's arguments below. (Doc. 59 at 3-4).

The government did not even try below to meet its burden under the recalibration necessitated by the evidence that the bald eagle population is doing so well. It is true, as the district court noted, that the FWS justified the delisting on the grounds that the BGEPA would still be enforced. (Doc. 59 at 3 (citing *Delisting*, 72 Fed. Reg. at 37353). But Mr. Aguilar is not asking the FWS to abandon enforcement of BGEPA. He is only seeking an exemption from the BGEPA for the taking of eagles in the traditional way for religious purposes by people like himself who are in the religious hierarchy. The government has not shown that exemption would subvert the eagle-protection interest of BGEPA.

Granted, as related above, this court rejected a similar argument in *Friday*, 525 F.3d at 956. But, as Mr. Aguilar has pointed out, the assessment should change in light of the lower danger to the eagle population evidenced by the delisting.

It is also true, as the district court reasoned, that the permit process serves certain purposes no matter how many eagles there are. (Doc. 59 at 3-4). But at some point the important interest of the religious rights of Native American

people—an interest BGEPA is also supposed to serve, *Wilgus*, 638 F.3d at 1285—overrides the interest in maintaining a permit system that has up until now rarely been used and therefore has yet to serve the purposes the government claims it is designed to serve. That point has been reached, given the thriving bald eagle population.

For all of the above reasons, the prosecution of Mr. Aguilar for violations of BGEPA violates RFRA. This court should vacate Mr. Aguilar's convictions and remand with instructions to grant his motion to dismiss.

## CONCLUSION

For the reasons stated above, defendant-appellant Martin Aguilar requests that this court vacate his convictions and remand with instructions to grant his motion to suppress under Point I and to grant his motion to dismiss under Point II.

## REQUEST FOR ORAL ARGUMENT

This case requires the court to address important issues regarding the role of subjective factors in the voluntariness-of-consent determination and the Bald and Golden Eagle Protection Act and the Religious Freedom Restoration Act. Mr. Aguilar requests oral argument in order to clarify his position with respect to those issues and respond to any questions of the panel that the parties have not adequately covered in their briefs.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH FEDERAL  
RULE OF APPELLATE PROCEDURE 32(a)(7)(c)**

I, Brian A. Pori, counsel for defendant-appellant Martin Aguilar, certify that this opening brief conforms to the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(C). The brief is typed in a proportionally spaced 14-point type. Excluding table of contents, table of citations, request for oral argument and certificates of counsel, it contains 10,998 words. To count the words I relied on a word processor program and it is Word Perfect X4. I certify that this certificate of compliance is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

\_\_\_\_s/\_\_\_\_\_  
Brian A. Pori  
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**CERTIFICATE OF PRIVACY REDACTIONS AND VIRUS SCANNING**

I, Brian A. Pori, certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form is an exact copy of the written document filed with the Clerk and that the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, i.e., Symantec AntiVirus Corporate Edition, Version 8.0, updated June 25, 2012, and according to the program, are free of viruses.

\_\_\_\_s/\_\_\_\_\_  
Brian A. Pori  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I, Brian A. Pori, certify that the foregoing was submitted electronically through the CM/ECF system to the Clerk of the Court of Appeals for the Tenth Circuit, Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado 80257, at <http://www.ca10.uscourts.gov> and the electronic filing of the foregoing caused Assistant United States Attorney Fred J. Federici to be served electronically on this 28th day of June, 2012.

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