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.

APPELLANT'S REPLY BRIEF

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

(No Attachments)

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Defendant-appellant Martin Aguilar submits the following reply brief in response to the government's answer brief ("AB").

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. *Introduction*

For the first time in this case, the government makes the unusual argument that the good faith exception to the exclusionary rule applies to the issue of the voluntariness of consents to warrantless searches. The government claims the Supreme Court's good-faith-exception jurisprudence precludes consideration of subjective factors in resolving that issue. But the government conflates two separate inquiries: whether constitutional rights were violated and, if so, whether the exclusionary rule is a remedy for the constitutional violation. Contrary to the government's apparent position, the good-faith-exception jurisprudence plays no role in the determination whether the United States Fish and Wildlife Service ("FWS") agents' violated Mr. Aguilar's Fourth Amendment rights. With respect to that question, precedent requires consideration of Mr. Aguilar's subjective vulnerability.

This court should not apply the good faith exception to the exclusionary rule in this case for at least three reasons. First, the government has not preserved its argument in that regard. Second, such an application would stretch the good faith exception far beyond where the Supreme Court and this court have gone. Third, the agents involved in this case, and their agency which failed to properly train them, were not blameless. They recklessly disregarded the customs and tradition of a sovereign Indian Pueblo. By doing so they intimidated a Kewa Pueblo member into consenting to their entry into his home.

The government grossly understates the strength and impact of Mr. Aguilar's concern that the agents were acting with the Pueblo Governor's authority. The record establishes that concern powerfully motivated Mr. Aguilar's cooperation with the agents up to and including the time of the agents' entry into his home. In ruling Mr. Aguilar's concern did not render involuntary his consent to the agents' entry, the district court factually erred by failing to take into account a substantial component of that concern: the agents' initial entry into the main village and his home. The district court legally erred when it analogized an amorphous intangible fear of authority involved in prior Tenth Circuit cases with Mr. Aguilar's concrete belief that he would be defying the venerated Governor if he did not comply with the agents' requests.

Viewing the record from the proper perspective demonstrates the government has not met its burden to proffer clear and positive testimony that Mr. Aguilar's consent was unequivocal and specific and freely given without duress or coercion. Accordingly, this court must vacate Mr. Aguilar's convictions and remand with instructions to grant Mr. Aguilar's motion to suppress.

B. *The jurisprudence concerning the good faith exception to the exclusionary rule has no bearing on the question whether Mr. Aguilar's consent to the agents' entry into his home was involuntary.*

The government relies on Supreme Court cases applying the good faith exception to the exclusionary rule in arguing that the subjective vulnerable state of a defendant that is unknown to officers is not part of the totality of the circumstances a reviewing court must consider in determining whether a defendant's consent to search is voluntary. (AB 23-35). The government contends that, since those Supreme Court cases indicate the exclusionary rule applies only in circumstances where the rule would deter police misconduct, subjective factors of which officers are unaware are never relevant to the voluntariness question.

But the government's contention jumbles together two completely distinct inquiries. As the Supreme Court has said: "[w]hether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is an issue

separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *United States v. Leon*, 468 U.S. 897, 906 (1984). Thus, the government gets ahead of itself when it jumps to the rationale for refraining from applying the exclusionary rule to justify its position that Mr. Aguilar's unapparent state of mind plays no role in the consent-voluntariness question.

C. *This court should not apply the good faith exception to the exclusionary rule in this case.*

The good faith exception to the exclusionary rule has no proper place in this case for at least three reasons. First, the government has not preserved for review that defense to Mr. Aguilar's motion to suppress. While on occasion this Court may affirm a district court's decision on a supported ground upon which the district court did not rely, *see Reedy v. Werholtz*, 660 F.3d 1270, 1276 (10th Cir. 2011), that principle has limits, including that the successful party must not have waived or forfeited the issue below. The government did waive, or at least forfeit, the good faith issue it now raises for the first time.

The government never argued below that by virtue of the good faith exception the district court should decline to exclude the evidence the agents uncovered. Nor did the government even contend suppression would be

inappropriate because it would not deter officers. The district court did not sua sponte address whether the good-faith-exception applied. (Doc 58 at 13-19). In light of the government's failure in this regard, this Court should refuse to consider its belated good faith claim. *See United States v. Cousins*, 455 F.3d 1116, 1126-27 (10th Cir. 2006) (government waived its argument that a Supreme Court decision could not be applied retroactively by failing to raise it below); *United States v. Dewitt*, 946 F.2d 1497, 1499 (10th Cir. 1991) (government waived where it failed to raise the standing issue below); *United States v. Scales*, 903 F.2d 765, 769-70 (10th Cir. 1990) (because the government did not argue below that there was probable cause prior to the dog sniff it was precluded from making that argument on appeal); *United States v. Maez*, 872 F.2d 1444, 1451-53 (10th Cir. 1989) (declining to consider an exigent circumstances argument the government had not raised below); *United States v. Francis*, 183 F.3d 450, 452 (5th Cir. 1999) (reviewing the government's good-faith-exception argument only for plain error because the government did not raise the argument in its objections to the magistrate's report).

Second, applying the good faith exception to an involuntary consent to a warrantless entry would expand the exception far beyond where the Supreme Court has so far been willing to take it. The circumstances in which the Supreme

Court has applied the exception are extremely different from the circumstances in this case.

In *Davis v. United States*, ___ U.S. ___, 131 S. Ct. 2419 (2011), the Court applied the good faith exception where police conducted a search in compliance with binding judicial precedent that was later overruled. *Id.* at 2428-29. In *Herring v. United States*, 555 U.S. 135 (2009), the Court declined to suppress evidence obtained pursuant to a recalled warrant where the police "error was the result of isolated negligence attenuated from the arrest." *Id.* at 140-48. In *Hudson v. Michigan*, 547 U.S. 586 (2006), the Court held the exclusionary rule should not apply to violations of the "knock and announce" rule. *Id.* at 594-602. In *Leon*, the Court first applied the good faith exception to officers who reasonably relied on a warrant to search a residence. 468 U.S. at 913-26.

In these situations, officers acted in objectively reasonable reliance upon a mistake made by someone other than the intruding officers or in violation of a technical rule governing only the execution of a warrant. These situations are a far cry from officers invading a home pursuant to an involuntary consent rather than a valid warrant.

This court has exhibited reluctance to extend the good faith exception to circumstances beyond those the Supreme Court has explicitly identified as

deserving of the exception. In *United States v. Herrera*, 444 F.3d 1238 (10th Cir. 2006), this court concluded: "L*eon*'s good faith exception applies only narrowly, and ordinarily only when an officer relies, in an objectively reasonable manner, on a mistake made by someone other than the officer." *Id.* at 1249. Consequently, this court declined to apply the good faith exception when a state trooper conducted a random, warrantless inspection of a truck based on the officer's mistaken belief that the truck was a commercial vehicle subject to such inspections under state law. *Id.* at 1240-41, 1248-55. This court did so even though the trooper was mistaken by only one pound in believing the defendant's truck was a commercial vehicle subject to the state regulatory scheme, *Id.* at 1246; *see United States v. Cos*, 498 F.3d 1115, 1132 (10th Cir. 2007) (making this observation about *Herrera*).

In *Cos*, this court refused to apply the good faith exception where officers entered the defendant's apartment based on the mistaken belief the occupant had the authority to consent to their entry. *Id.* at 1131-33. In that case, this court also opined the Supreme Court's decision in *Hudson* was "based on considerations pertaining to the knock-and-announce requirements in particular rather than to other Fourth Amendment violations." *Id.* at 1132, n. 3.

In *Scales*, this court held the good faith exception was not applicable to officers' warrantless seizure of a suitcase. 903 F.2d at 767-68. This court reasoned that *Leon* did not apply "in cases in which the good faith of the officer cannot be presumptively established by the existence of a warrant valid on its face." *Id.* at 768.

This court must now still continue to resist expanding the good faith exception to circumstances very unlike those to which the Supreme Court has applied that exception, as the government asks this court to do in this case. *See also United States v. Hardin*, 539 F.3d 404, 426, n. 13 (6th Cir 2008) (good faith exception did not apply to officers entry into an apartment without the requisite quantum of proof that the subject of the arrest warrant was in the apartment; the *Hudson* holding is based on considerations pertaining to the "knock and announce" requirement, not other Fourth Amendment violations); *United States v. Mowatt*, 513 F.3d 395, 405 (4th Cir. 2008) (*Leon* did not apply to officers' Fourth Amendment violations committed prior to seeking a warrant), *abrogated on other grounds by*, *Kentucky v. King*, 131 S. Ct. 1849, 1859-61 (2011); *United States v. Milian-Rodriguez*, 759 F.2d 1558, 1563 (11th Cir. 1985) (good faith exception did not apply where officers searched beyond the scope of consent); *United States v. Martinez*, 686 F. Supp. 2d 1161, 1204-05 (D.N.M. 2009) (court was "not

convinced that *Herring* . . . stands for the proposition that, *any time* an officer in the field negligently violates someone's constitutional rights, exclusion of the evidence is justified" (emphasis in original)), *aff'd*, 643 F.3d 1292 (10th Cir. 2011).

The Supreme Court appears to have rejected the notion espoused by the government that the exclusionary rule is nothing more than an optional remedy tied exclusively to the function of deterrence. *See* Wayne R. LaFave, et al., 2 *Criminal Procedure*, § 3.1(b), n. 25 (3d ed. 2011) (making this observation). In *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the Court, in an opinion written by Chief Justice Roberts, noted "the Constitution requires the exclusion of evidence obtained by certain violations of the Fourth Amendment." *Id.* at 2680. Similarly, in *United States v. Grubbs*, 547 U.S. 90 (2006), the Court, in an opinion written by Justice Scalia, asserted without qualification that the "Constitution protected property owners . . . by providing, ex post, a right to suppress evidence improperly obtained. . . ." *Id.* at 99.

The government's argument in reliance on the deterrence rationale and the good-faith-exception jurisprudence containing that rationale seeks a vast departure from the precedent of the Supreme Court and this court. This court should not adopt that unchartered, boundless course.

Third, the agents involved in this case and their agency were far from blameless. The agency never trained the agents regarding the customs of the Indian Pueblos and in particular of the Kewa Pueblo. (Transcript ('Tr.") 99). The agents barged into the main village of the Pueblo without the Governor's permission and without an escort, contrary to Kewa Pueblo custom and law, which protect Pueblo sovereignty. (Tr. 9, 44, 58-59, 100-01, 156-57, 165-67, 170, 181, 192-93, 195-6, 197-98). They carried their firearms into the Pueblo and took photographs in the Pueblo, despite signs at the entrance to the Pueblo prohibiting such conduct. (Tr. 63-64, 102, 105, 187). As discussed in more detail below, their disregard for Pueblo sovereignty lead Mr. Aguilar to believe they were investigating with the Governor's approval, since, as far as Mr. Aguilar knew, they could not have entered the main village and his home without the Governor's authorization. (Tr. 204, 206, 211, 241). As a consequence, Mr. Aguilar believed he had to talk with the agents and cooperate with them. (Tr. 206, 217, 242).

While the agents apparently did not know about the Pueblo access rule, they should have understood, and should have been trained to understand, that the Kewa Pueblo is a sovereign nation deserving of respect. They recklessly disregarded the impact their disrespectful behavior would have on Mr. Aguilar. So, the agents were in a very real sense at fault for Mr. Aguilar's subjective

concern that he was obligated to cooperate with the agents. The agents had ample opportunity and bases to seek a warrant to search Mr. Aguilar's home. They chose instead to seek consent. *See United States v. Stokely*, 733 F. Supp. 2d 868, 906-07 (E.D. Tenn. 2010) (noting that the officers had ample opportunity and bases to seek a search warrant, but they instead sought consent in support of the court's application of the exclusionary rule). They and the FWS engaged in misconduct that should be deterred.

For all of the above reasons, this court should apply the full force of the exclusionary rule to this case.

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 government attempts to no avail to avoid the import of the precedential and other-circuit cases Mr. Aguilar cites in support of his position that a consenter's subjective state is a part of the totality of circumstances a reviewing court must consider to determine whether a consent is voluntary. Much of the steam of its arguments in this regard disappear in light of the demonstrated irrelevance of the Supreme Court's good-faith-exception jurisprudence. (AB 27, 28, 29, 30, 32, 34-35) (noting the cases predate *Herring* and *Davis*).

The government weakly addresses the Supreme Court's statement in *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973), that the "possibly vulnerable state of the person who consents" is a factor a court must consider to determine if a consent is voluntary. It contends the issue of the relevance of a consenter's vulnerable state was not at issue in *Schneckloth*. (AB 27-28). But in *Schneckloth* the Supreme Court set out to establish the standard by which all the inferior courts were to assess a consent to search from then on. Moreover, even if the Court's reference to a vulnerable state was dictum, "this court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings." *United States v. Nelson*, 383 F.3d 1227, 1232 (10th Cir. 2004) (quoting *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996)).

This court has followed *Schneckloth*'s approach. The government tries to get around the import of this court's opinion in *United States v. Harrison*, 639 F.3d 1273 (10th Cir. 2011), by claiming the discussion about the defendant's subjective state was very brief and not on point. (AB 28). But in that case, as this court has done before, this court explicitly noted the relevance of the physical and mental condition and capacity of the defendant in assessing the voluntariness of a consent to search. *Id.* at 1278; *see also United States v. Sawyer*, 441 F.3d 890, 895 (10th Cir. 2006); *United States v. Pena*, 143 F.3d 1363, 1367 (10th Cir. 1998).

And in *Harrison*, rather than focusing on the perspective of the officers, as the government suggests this court should do, this court focused on "the effect of the Agents' statements" on the defendant. 639 F.3d at 1280, 1281. This is consistent with this court's declaration long ago in the context of the voluntariness of consent to search that the "state of mind of the police is irrelevant to the question of the intelligence and voluntariness of [defendant's] election to abandon his rights." *United States v. Carson*, 793 F.2d 1141, 1149 (10th Cir. 1986) (quoting *Moran v. Burbine*, 475 U.S. 412, 423 (1986)).

The government's attempt to minimize the significance of *United States v. Sims*, 428 F.3d 945 (10th Cir. 2005), is equally unavailing. The government says that in *Sims* this court declined to decide whether a defendant's subjective vulnerable state unknown to officers was a relevant factor in the voluntariness inquiry. (AB 30). But in *Sims* this court made it clear the state of the law in other circuits and this circuit supported Mr. Aguilar's position. This court stated it had not found any published circuit case that had applied the police-perspective test to the voluntariness of a consent to search. *Id.* at 953, n. 2. This court also noted that since *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), it had continued to apply the totality of the circumstances test of *Schneckloth*, rather than *Connelly*, to the consent-to-search voluntariness issue. *Sims*, 428 F.3d at 953, n. 2.

The government does not deny that in *United States v. Gay*, 774 F.2d 368 (10th Cir. 1985), and *United States v. Recalde*, 761 F.2d 1448 (10th Cir. 1985), this court indicated a defendant's subjective mental state of which officers are unaware is a factor in the consent-voluntariness calculus. The government simply claims that feature of those decisions was insignificant. (AB 28-29). But in *Gay* this court analyzed the circumstances surrounding the consent to search to determine whether the defendant had the sufficient "metal awareness so that the act of consent was that of one who knew what he was doing." 774 F.2d at 377. In *Recalde*, this court certainly found the defendant's consent to be taken to the station house was involuntary in part due to his upbringing and experiences in Argentina concerning which the officers had no knowledge. 761 F.2d at 1454. Thus, this court's precedent supports Mr. Aguilar's position. None of this court's cases has applied the reasonable police officer test the government proposes.

The government essentially admits the majority of other circuit courts that have addressed the question have held a defendant's vulnerable subjective state is part of the totality of circumstances a court must considered in determining the voluntariness of a consent to search. (AB 33-35). *See Lopera v. Town of Coventry*, 640 F.3d 388, 399 (1st Cir. 2011); *United States v. Montgomery*, 621 F.3d 568, 571-72 (6th Cir. 2010); *Tukes v. Dugger*, 911 F.2d 508, 516 & n. 13

(11th Cir. 1990); *United States v. Elrod*, 441 F.2d 353, 356 (5th Cir. 1971). The government's only criticism of those decisions is founded on its demonstrably erroneous notion that the Supreme Court's good-faith-exception cases of *Davis* and *Herring* contradict those holdings. (AB 33-35).

The government also argues that, because an objective test applies to the issues of seizure[1] and the scope of consent, such a test applies to the issue of the voluntariness of a consent to search. (AB 31-32). There is no particular reason why this should be so. The consent-voluntariness question is a distinct question. *See United States v. Jones*, 678 F.3d 293, 299, n. 2 (4th Cir. 2012) (whether consent to search is freely and voluntarily given involves subjective criteria and is therefore distinct from the question whether an objectively reasonable person would have considered himself free to go).

That related matters differ as to whether they involve a subjective or a police perspective is not unusual. For example, whether post-*Miranda* statements of a defendant in custody are constitutionally admissible depends on the resolution of a police-perspective test and a subjective test. First, the government must show

[1] The government claims *Florida v. Bostick*, 501 U.S. 429 (1991), involved the consent to speak. (AB 32). But, as the *Bostick* Court said, "[t]he sole issue presented for our review is whether a police encounter on a bus of the type described above necessarily constitutes a 'seizure' within the meaning of the Fourth Amendment." *Id.* at 433.

the defendant's statements were not coerced by police conduct. *Connelly*, 479 U.S. at 167. Then, the government must show the defendant had sufficient mental capacity to understand the rights he was waiving. If the defendant does not possess that capacity, the defendant's statements are inadmissible even in the absence of intentional police coercion. *Collins v.* Gaetz, 612 F.3d 574, 587 & n. 6 (7th Cir. 2010); *see also Smith v. Mullin*, 379 F.3d 919, 933 (10th Cir. 2004) (a defendant's mental capacity is relevant to whether he or she is capable of waiving *Miranda* rights). This court has applied the *Miranda*-waiver concept that the state of mind of the police is irrelevant to the question of the voluntariness of consent to search. *Carson*, 793 F.2d at 1149

In sum, Supreme Court and Tenth Circuit precedent, supported by most of the circuit courts addressing the question, require this court to consider Mr. Aguilar's vulnerable subjective state in determining whether his consent to the agents' entry into his home was involuntary, even if the agents were not aware of that subjective state.

E. *Mr. Aguilar's subjective concern that the agents were acting with the approval of the Pueblo Governor along with other circumstances rendered his consent to enter his home involuntary.*

Contrary to the government's mistaken arguments, the record does not establish in light of the totality of the circumstances that the government has met its burden to prove Mr. Aguilar gave consent to enter his home freely and voluntarily. *See Harrison*, 639 F.3d at 1278 (noting the burden). The government attacks several of the facets of Mr. Aguilar's contention that he felt coerced into allowing the agents to enter his home due to his concern that the agents were acting pursuant to the Pueblo Governor's authority to the point of challenging some of the district court's findings. Those attacks are misguided and result from a misinterpretation of the transcript.

The government questions whether the Pueblo Governor has tremendous power over Pueblo members. (AB 37-38 & n. 10). Pueblo member and police officer Kerwin Tenorio testified that the Governor is the "boss" of the Pueblo. If he tells a member to help digging ditches, the member has to do so. If the Governor summons a member to his office they are expected to do so. Officer Tenorio had never seen any member refuse to comply with the Governor's orders. (Tr. 162, 163). Mr. Aguilar testified he was duty-bound to cooperate with the Governor. (Tr. 242, 243). FWS Agent Russell Stanford acknowledged the Pueblo

Governor was an "absolute" ruler. (Tr. 40, 52). Based on this evidence, the district court found that if Mr. Aguilar believed the agents had been sent to his house at the direction of the Governor, Mr. Aguilar "would have felt obligated to cooperate with the Agents." (Doc. 58 at 13-14). The record establishes the Pueblo Governor must be obeyed pursuant to Pueblo custom.

The government also expresses doubts that outsiders' access to the Pueblo was limited. It points to testimony that without the Governor's permission outsiders could attend an arts and crafts fair or visit a home when jewelry or pottery was advertised for sale along the highway and Pueblo members can invite friends to their homes. (AB 38). But the FWS agents in this case did not fit in any of those categories. They entered the main village of the Pueblo to conduct a criminal investigation. So the noted exceptions to the requirement that the Governor permit access to the Pueblo have no bearing on this case.

There was plenty of testimony establishing the strict restrictions on the agents' access to Kewa Pueblo. The Governor himself testified that people who want to visit the Pueblo have to stop at the Governor's office to get permission to enter the Pueblo. "We have every rights, and that's our village," he explained. (Tr. 156). Officer Tenorio confirmed Pueblo custom and law require outsiders to "go through the Governor[] first" before they may enter the Pueblo. (Tr. 162, 165,

183). Pueblo officer Vincent Quintana verified this. (Tr. 194). Once an outsider obtains the Governor's permission, he or she must have an escort. (Tr. 165). Agent Stanford admitted these Pueblo access rules existed. (Tr. 43). The FWS agents violated these rules by entering the main village and speaking to Pueblo members without the Governor's permission and without an escort. (Tr. 169, 173, 193).

Officer Tenorio's testimony established that when an outsider enters the Pueblo with an escort, the Pueblo member with whom the outsider meets must cooperate with the outsider. (Tr. 165, 176). He testified Pueblo members usually cooperate in those circumstances and on the rare occasions that they do not do so, he sends them to the Governor to explain their intransigence. (Tr. 176).

The government claims a Pueblo member's duty to cooperate is not so clear. As support for this notion, it feebly points to Imogene Aguilar's failure to directly answer the question whether she had to answer the questions of someone with the Governor's permission to go to her house. (AB 39; Tr. 117). It also notes Officer Tenorio's initial response that a Pueblo member would not disrespect the Governor if the member refused to turn over a car to a repossessor. (AB 39; Tr. 176). But, as the government concedes in a footnote, (AB 39-40), Officer Tenorio immediately retracted his answer, saying I just don't understand the question."

(Tr. 176). In short, the government proffers no reason to doubt that a Pueblo member is obligated to cooperate with an outsider who is admitted into the Pueblo with the Governor's permission and accompanied by an escort.

As a consequence, when Mr. Aguilar learned the agents had entered the main village and his home, and in light of his prior conversation with the Governor about his eagle shooting, he inferred that they were there with the Governor's imprimatur and he must cooperate with them[2]. Contrary to the government's contentions, (AB 40-41 & nn. 12 & 13), the evidence supports this proposition.

While the agents never told Mr. Aguilar they were acting on behalf of the Governor, (Tr. 22-23), Agent Stanford admitted he did not know whether or not FWS Agent Jason Riley and he had inadvertently created the false impression they were acting with the Governor's authority. (Tr. 44). Mr. Aguilar repeatedly testified he believed they were and that that belief prompted his cooperation. He averred: "I thought they have the governor's permission to talk to me, so I wait - - - cooperate and wait over there." (Tr. 204). He later answered: "I thought that

[2] That Ms. Aguilar thought the agents did not have the Governor's permission to be there, as the government points out, (AB 40; Tr. 146), does not undermine the conclusion that Mr. Aguilar believed the opposite, particularly given that Ms. Aguilar knew the agents were not accompanied by an escort whereas Mr. Aguilar could not discern that over the phone.

was" when he was asked whether he believed the agents were acting with the Governor's authority. (Tr. 211). Tying his belief to his discussion with the Governor and the agents' entry into his home, he explained: "I thought they have permission 'cause they say there was an anonymous tip. I didn't know . . . they stop at the governor's or I thought they would stop over there and so I cooperate." (Tr. 206). He testified further: "I thought they knew, the governor knew. They lied to me and they lied to the governor." (Tr. 241). The district court found Mr. Aguilar did at least have a "concern that the special agents might be acting at the Governor's direction or with his consent." (Doc. 58 at 14).

The government makes much of Mr. Aguilar's affirmative answers to cross-examination as to whether he acted "voluntarily" and as a "free man." (AB 42-43; 217, 228, 236, 239, 241). But he also testified "I have to talk to them," (Tr. 217), and, as discussed above, he thought he had to cooperate with the agents to satisfy his obligations to the Governor. Thus, when Mr. Aguilar responded to cross-examination as he did, he probably meant he made a free choice to cooperate with the agents rather than face unwanted consequences, such as disrespecting the Governor. Or, as the district court found with respect to Mr. Aguilar's agreement with the prosecutor's assertion that he "voluntarily" allowed the agents to seize the eagle feathers, when in fact he did not, he may not have understood what the

prosecutor meant by "'voluntarily' as a term of art in Fourth Amendment jurisprudence." (Doc. 58 at 20, n. 9).

Finally, the government claims Mr. Aguilar acknowledged that at the time he allowed the agents to enter his home he did not believe they were acting with the Governor's approval. (AB 43-44). An objective evaluation of the record and the context of Mr. Aguilar's testimony upon which the government relies shows otherwise. The testimony of Mr. Aguilar and the tribal officials who responded to his call indicates that, after the agents entered Mr. Aguilar's home to view the eagle feathers, Mr. Aguilar asked his sister to call the Governor's office to ask tribal officials to witness what the agents were doing and let him know whether the agents really had permission to be there. (Tr. 168-169, 182, 194, 206, 207, 236). Thus, when the agents entered his home Mr. Aguilar still was concerned that he had to cooperate with them because they came in accordance with the Governor's wishes. Mr. Aguilar refused to let the agents search his shed and take his basket, (Tr. 30, 208-09, 231, 235 241), after the tribal officials arrived and harangued the agents for entering the main village without the Governor's permission, (Tr. 30, 82-83, 85, 170), making it obvious the agents were not in fact acting on the Governor's behalf.

The government cites to an exchange between the prosecutor and Mr. Aguilar in which the prosecutor tried to pin down Mr. Aguilar to an admission that he knew the Governor had not approved the agents' investigation before the agents entered his home. (AB 43, 44; Tr. 239-242). But the prosecutor never succeeded. Mr. Aguilar, who is a simple man whose primary language is keresan, obviously could not separate what he knew at the time of the suppression hearing from what he knew at the time of the agents' entry into his home. The prosecutor asked repeated variations of the question "even though they didn't have the governor's permission to be in your house and even though they were not there with the governor's authority, you complied with their requests, correct?" (Tr. 240, 241, 243). Some times Mr. Aguilar answered just "yeah." (Tr, 240, 241, 243). Other times he answered enigmatically: "Yeah. I mean like if I'm on the backyard . . . they're not allowed to go in the backyard" and ""Yeah. . . . I thought they knew, the governor knew. They lied to me and they lied to the governor." (Tr. 240, 241).

It is apparent the district court thought that at the time of the agents' entry into Mr. Aguilar's house, Mr. Aguilar retained a concern that the agents were pursuing an investigation with the Governor's blessing. That is evidenced by the

court's consideration of Mr. Aguilar's concern in that regard as part of the totality of circumstances surrounding his consent to the agents' entry. (Doc. 58 at 19).

While the district court correctly determined Mr. Aguilar continued to have concern that the agents were acting pursuant to the Governor's authority when the agents entered his home to view the feathers, the court did not accord that concern the proper weight in its totality-of-the-circumstances analysis. First, in measuring the level of concern, the court failed to consider the impact of the agents' initial entry into his home and the concomitant inference that the agents were there with the Governor's approval requiring full cooperation. The court only took into account the effect of Mr. Aguilar's meeting with the Governor. (Doc. 58 at 14). Second, the district court erroneously analogized Mr. Aguilar's tangible, corroborated, quantifiable, concern to the "inherently unverifiable and unquantifiable" attitude toward authority involved in *United States v. Iribe*, 11 F.3d 1553, 1557 (10th Cir. 1993). (Doc. 58 at 19). The government does not specifically respond to either of these points Mr. Aguilar made in his opening brief. (OB 34-36).

Nor does the government respond to Mr. Aguilar's point that other coercive circumstances surrounded Mr. Aguilar's consent to the agents' entry. (OB 37). Agent Stanford told Mr. Aguilar it was in his best interest to tell the truth. (Tr.

75). *See United States v. Tatman*, 397 Fed. App'x 152, 165-66 (6th Cir. 2010) (unpublished) (affirming district court's finding that the defendant's wife's consent to search the home was involuntary in part because the officer told the wife it would be in her best interest to allow the search). Mr. Aguilar received the impression from the agents that he was not going to be prosecuted, that they just wanted the feathers. (Tr. 204, 226, 244). And there is no evidence the agents informed Mr. Aguilar of his right to refuse consent. *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).

Evaluation of all the relevant circumstances leads to the conclusion that the government has not met its burden to prove by clear and positive testimony that Mr. Aguilar's consent was unequivocal and specific and freely given without implied or express duress or coercion. *See United States v. Davis*, 636 F.3d 1281, 1292-93 (10th Cir. 2011) (setting out the test). 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. *Introduction*

The government does not prove in its answer brief that the current rarely-used permit system accompanied by little, if any, outreach is the least restrictive means to accomplish the goals of the Bald and Golden Eagle Protection Act ("BGEPA"). The government speculates that adopting Mr. Aguilar's proposal to limit the taking of bald eagles without permits to those in the religious hierarchy of Native American tribes who take eagles for religious purposes could lead to catastrophic declines in the eagle population. That speculation is insufficient to meet the government's burden under the Religious Freedom Restoration Act ('RFRA"). Accordingly, the government's prosecution of Mr. Aguilar violates RFRA. This court must vacate his convictions and remand with instructions to grant his motion to dismiss.

B. *The government must demonstrate a prosecution under BGEPA and the permit process as administered by FWS serve a compelling interest by the least restrictive means.*

For the first time the government claims Mr. Aguilar has not shown the government substantially burdened his exercise of religion. This contention comes too late to warrant this court's consideration. Despite ample opportunity to do so, the government never made the substantial-burden argument below. (Doc. 24 at 4-6; Tr. 255-57, 258-259). For that reason, the district court never addressed the issue. (Doc. 59).

The government has waived, or at least forfeited, the substantial-burden issue. This Court should refuse to consider it. *See Cousins*, 455 F.3d at 1126-27 (government waived its argument that a Supreme Court decision could not be applied retroactively by failing to raise it below).

The government states this court decided in *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008), that the bare requirement of applying for a permit could not constitute a substantial burden under RFRA. (AB 50). This is not completely accurate. This court did opine that, without any evidence the defendant's religious tenets are inconsistent with using an application process, it could not find a substantial burden under the theory that the mere obtaining of a permit was offensive to the defendant's religion. *Id.* at 948. But this court went on to say it

would not rest its decision on the lack of a substantial burden. *Id.* In this case, because of the position the government took below, Mr. Aguilar did not present any evidence on the substantial burden the permit process imposed on him. It would be unfair to penalize Mr. Aguilar for that now.

The government complains Mr. Aguilar presented no evidence he had to kill a "pure" eagle to satisfy his religion. (AB 50, n. 15). But the evidentiary hearing was held below solely to address the motion to suppress. Mr. Aguilar's counsel did assert below that the Repository does not satisfy the religious needs of 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 government did not contest that assertion.

For all of these reasons, this court should place on the government the RFRA burden to prove a prosecution under BGEPA and the permit process as administered by FWS serve a compelling interest by the least restrictive means.

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

The government recites the district court's explanation as to why the current permit process still serves compelling interests, despite the flourishing of the bald eagle population. (AB 52; Doc. 59 at 3-4). But it ignores the reality that the

eagle-taking permit process, as the FWS currently administers it, does not serve any of those purposes because it is so little used due to the virtually nonexistent outreach by FWS.

The government asserts Mr. Aguilar's proposed system would create substantial law enforcement difficulties on the grounds that law enforcement officers would have to apply a religious litmus test. (AB 52-53). But Mr. Aguilar's proposal that only medicine men within the hierarchy of the Native American tribe obviates the need for a problematic investigation into the religious bona fides of the eagle taker. That is why the difficulties this court foresaw in *United States v. Wilgus*, 638 F.3d 1274, 1293 (10th Cir. 2011), where the defendant was not a Native American, would not arise under Mr. Aguilar's proposed regime.

The government suggests that under that regime the eagle population might face extinction. (AB 53-54). This bald speculation does not satisfy the government's burden under RFRA. 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 and in his opening brief, 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.

STATEMENT REGARDING ORAL ARGUMENT

The government agrees with Mr. Aguilar that oral argument would assist this court in reaching a decision in this case. (AB 55).

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 reply 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 6,649 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
Attorney for Petitioner-Appellant

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 September 3, 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 an original and seven copies of the foregoing was sent by Federal Express overnight to the Clerk of the Court of Appeals for the Tenth Circuit, Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado 80257, and 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 4th day of September, 2012.

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