UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	**:**	
	:	
v.		**12-CR-231 (RC)**
	:	
JAMES HITSELBERGER	**:**	

DEFENDANT'S MOTION TO SUPPRESS TANGIBLE EVIDENCE SEIZED FOLLOWING EXECUTION OF COMMAND AUTHORIZATION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Mr. James Hitselberger, the defendant, through undersigned counsel, respectfully moves this Honorable Court to suppress the use as evidence of all tangible objects seized as the result of a search of Room 317 B at the Navy Gateway Inn and Suites on the Naval base in Bahrain on April 11, 2012. Mr. Hitselberger requests an evidentiary hearing on this motion, and in support of the motion submits the following.

Background

Mr. Hitselberger is charged in a six count superseding indictment with three counts of unlawful retention of national defense information, in violation of 18 U.S.C. § 793(e) and three counts of unauthorized removal of a public record, in violation of 18 U.S.C. § 2071(a). According to the discovery provided by the government, these charges are based on part on evidence obtained when officers of the Naval Criminal Investigative Service ("NCIS") searched room 317B at the Navy Gateway Inn and Suites on the U.S. Naval base in Bahrain on April 11, 2012. According to the government, the officers conducted the search under the authority of a Command Authorization for Search and Seizure issued on April 11, 2012 by Captain Colin S.

Walsh, based on a ten-paragraph document apparently written by Special Agent Raffi Kesici of the NCIS, which is entitled "AFFIDAVIT IN SUPPORT OF SEARCH AND SEARCH AUTHORIZATION," but is neither signed nor sworn. See Attachment A (Command Authorization and AFFIDAVIT IN SUPPORT OF SEARCH AND SEARCH AUTHORIZATION).

Argument

Although the search at issue here occurred in Bahrain, as a citizen of the United States, Mr. Hitselberger retained his full constitutional rights while abroad. See Reid v. Covert, 354 U.S. 1, 6 (1957) ("The United States is entirely a creature of the Constitution. . . . It can only act in accordance with all the limitations imposed by the Constitution."). The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

When reviewing the issuance of a warrant by a magistrate, the Court must determine whether the magistrate had a "substantial basis" for finding that there was "a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). As the Supreme Court has noted:

> [t]he point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948) (footnote omitted). A warrant can only be issued when "probable cause" is shown, based on reliable information of sufficient detail, that criminal activity or evidence of criminal activity will be found in the place to be searched. The Supreme Court has specifically held that "[u]nder the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him *under oath or affirmation*." Nathanson v. United States, 290 U.S. 41, 47 (1933) (emphasis added). "A sworn statement of an affiant that 'he has cause to suspect and does believe that'" evidence of a crime will be found in a particular premises is not sufficient to support probable cause because such "wholly conclusory" statements do not provide the magistrate with a "substantial basis" upon which to make an independent probable cause finding. See Gates, 462 U.S. at 239 (citing Nathanson, 290 U.S. 41). "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." Id.

Here, the NCIS officers had no warrant. Instead, the officers secured a "Command Authorization for Search and Seizure." Such a command authorization is the military equivalent of a search warrant. See United States v. Brown, 784 F.2d 1033, 1036 (10th Cir. 1986). Although under some circumstances courts have found that a command authorization could be used to search the property of a civilian on a military base, the procedures used to do so must comport with the Fourth Amendment because civilians on military bases retain their Fourth Amendment rights. See Brown, 784 F.2d at 1037 ("in evaluating the conduct of law enforcement officers, the standard against which that conduct is to be measured is, whether or not it comported with the Forth Amendment."); United States v. Rogers, 388 F. Supp. 298, 301 (E.D.

Va. 1975) (civilians on military base retain substantive rights guaranteed by Fourth Amendment). Here, the procedure used did not comport with the Fourth Amendment, and the search was conducted without a valid warrant or the equivalent of a valid warrant.

I. COMMAND AUTHORIZATION NOT BASED ON ALLEGATIONS SUPPORTED BY OATH OR AFFIRMATION.

Although Agent Kesici's report to Captain Walsh was entitled "AFFIDAVIT IN SUPPORT OF SEARCH AND SEARCH AUTHORIZATION," it was neither signed nor sworn. For this reason it was not an affidavit and did not comport with the Fourth Amendment requirement that a warrant be supported by "Oath or affirmation." See Saylor v. United States, 374 F.2d 894, 179 Ct. Cl. 151 (1967) (general search of civilian's property based on military rules that did not meet Fourth Amendment standards was invalid).

The Military Rules of Evidence do not require that a command authorization be based on oath or affirmation, and searches of the property of servicemen based on command authorizations not based on oath or affirmation have been upheld. See United States v. Chapman, 954 F.2d 1352, 1364 (7th Cir. 1992). Courts have recognized that "the military implementation of [the Fourth Amendment] guarantee is different from that employment in civilian matters." Id. at 1367. This is because "an alternative procedure to a warrant issued by a magistrate is more compatible with the realities of military life." Id. "[T]he military search authorization procedure is a finely tuned accommodation of the *servicemember's* privacy interests grounded in the Fourth Amendment and the specific needs, dictated by military necessity, *for good order and discipline in the armed forces*." Id. at 1369 (emphasis added) (citing United States v. Stuckey, 10 M.J. 347, 358-61 (C.M.A. 1981)). As the Tenth Circuit explained: "The relationship

between a member of the armed forces and a commander is different from the relationship between a civilian and a magistrate. Members of the armed forces have considerably less of an expectation of privacy while living on a military installation, and a military commander has considerably more interest in being informed of all activities in the are under his command." Id.; see also Stucky, 10 M.J. at 360 ("In our view service persons have never expected that, before authorizing a search, a military commander would comply with the warrant procedure required of a federal; magistrate.").

Mr. Hitselberger, however, was not a serviceman and retained his full Fourth Amendment rights. Brown, 784 F.2d at 1037. Thus, regardless of military regulations or rules, Mr. Hitselberger's room could not be searched absent a warrant -- or the valid equivalent of a warrant -- based on an oath or affirmation.[1] "The Oath requirement is no technical or trivial component of the Warrant Clause of the Fourth Amendment." Chapman, 954 F.2d at 1370. The failure to comply with this requirement violated Mr. Hitselberger's Fourth Amendment rights.

One district court has held that a command authorization used to search the property of a civilian was valid, although not based on statements submitted under oath. See Rogers, 388 F. Supp. at 301. The Rogers decision on this point is not well reasoned. While holding that civilians maintain their Fourth Amendment rights on a military base, the Rogers court found that the validity of command authorization not based on a statement made under oath was an

[1]Although the Military Rules of Evidence do not require an oath or affirmation as to searches of the property of servicemen, the NCIS agents investigating Mr. Hitselberger and the base Commander who signed the Command Authorization knew that an oath or affirmation was necessary when seeking to search a civilian's property. According to documents produced pursuant to Federal Rule of Criminal Procedure 16, the agents sought and obtained from Captain Walsh a second Command Authorization to search Mr. Hitselberger's room on April 22, 2012. This Command Authorization was based on a sworn affidavit.

"extremely close question," but the procedure, absent the oath, was "adequate to protect [the defendant] from an unreasonable search and seizure." Id. at 304. The Rogers court noted that warrants issued by civilian authorities were required to be based on evidence submitted under oath, but failed to recognize that this was not merely a requirement of a civilian rule but is a requirement under the plain language of the Fourth Amendment: "no Warrants shall issue, but upon probable cause, supported by *Oath or affirmation* . . . ." (emphasis added). In support of its finding, the district court cited only Cafeteria Workers v. McElroy, 367 U.S. 886 (1961), for the proposition that "[u]nder other circumstances, the Supreme Court has held that military procedure, which was admittedly more summary than would be required of a nonmilitary organization, nevertheless satisfied constitutional requirements." Rogers, 388 F. Supp. at 304 n.4. In Cafeteria Workers -- which has been abrogated on other grounds, see Stidham v. Peach Officer Standards and Training, 265 F.3d 1144 (10th Cir. 2001) -- the Supreme Court addressed a due process claim and not a specific constitutional requirement. See Cafeteria Workers, 367 U.S. at 895 ("consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action"). At issue here is not what constitutes "due process" or what may be "reasonable," but whether or not the government complied with the constitutional requirement that a search warrant (here, the command authorization) be based on oath or affirmation. It was not, and therefore, the search violated Mr. Hitselberger's Fourth Amendment rights.

II. COMMAND AUTHORIZATION NOT SUPPORTED BY PROBABLE CAUSE.

The Command Authorization also was a constitutionally flawed substitute for a warrant

because it was facially deficient and lacking in probable cause. Captain Walsh issued the Command Authorization based on an assertion that he found probable cause to believe that classified information was being concealed in "Navy gateway Inn and Suites, Building S317B, room 317B." This finding was based upon the document entitled "AFFIDAVIT IN SUPPORT OF SEARCH AND SEARCH AUTHORIZATION." This document, however, did not set forth probable cause to believe that any classified information was in room 317B, or that any crime had been or was being committed. The "affidavit" was facially deficient.

First, the "affidavit" made no reference whatsoever to room 317B or any connection that room may have had to criminal activity or to Mr. Hitselberger. The "affidavit" says only: "Identified residence is located in close proximity to work location and subsequent origin of classified material." It does not identify the "identified residence" by address or any other means, and even if the "identified residence" could be presumed to be room 317B, the "affidavit" does not say whose residence this is or what connection this room may have had to classified information or why classified information might have been found there. This complete failure to connect the place to be searched to any criminal activity or the items to be seized is a complete failure to establish probable cause.

This document also alleges no violation of any criminal law. The "affidavit," refers to the "unauthorized storage, reproduction, and dissemination of classified material and/or documents," but gives no indication of what is unauthorized and does not allege that Mr. Hitselberger violated any criminal offense -- the document refers to no code citation or violation of any criminal law. The document does not explain the authorized procedures for handling classified information on the U.S. naval base in Bahrain or what conduct is "unauthorized." Mr. Hitselberger is now

charged with a violation of 18 U.S.C. § 793(e), the unlawful retention of national defense information, but there is no allegation in document that Mr. Hitselberger ever possessed "national defense information."

The "affidavit" contains only one paragraph describing factual allegations. Paragraph 2 provides:

> As a background, NCIS reactive investigation identified as CCN: 11APR12-MEBJ-0209-3XNA and titled S/HITSELBERGER, JAMES FRANCIS was initiated upon receipt of information via signed sworn statements from Master Sergeant Michael A. HOLDEN, Captain Brendan G. Hering, Master Sergeant Dain CRISTENSEN who observed Mr. James Francis Hitselberger, while at his place of work, physically take classified documents from a classified printer and place it into his personal backpack. Mr. Hitselberger was then observed walking out of the office carrying his backpack and the classified document that he had just placed in it. Mr. Hitselberger was followed out of the building and asked about the contents of his backpack while outside, as he was walking away from the building. Mr. Hitselberger volunteered to share the contents of his backpack which disclosed multiple documents that were classified as Secret and Secret No Foreign.[2]

There is no allegation that Mr. Hitselberger was not authorized to have the classified documents in his backpack or that doing so violated law.

Moreover, the "affidavit" makes not factual allegation to support a finding that classified

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[2]As set forth in Defendant's Motion to Suppress Tangible Evidence Seized Following Unlawful Stop and Search of Backpack and Memorandum of Points and Authorities in Support Thereof, the stop of Mr. Hitselberger and the search of his backpack were unlawful. The documents produced pursuant to Rule 16 demonstrate that Mr. Hitselberger did not "volunteer" to share the contents of his backpack, but was unlawfully ordered to do so. Because the stop of Mr. Hitselberger and search of his backpack were unlawful and the Command Authorization to search room 317B was based on this unlawful stop and search, even if the Authorization were not invalid, the fruits of the search must be suppressed as the fruit of the unlawful stop of Mr. Hitselberger and unlawful search of his backpack. Wong Sun v. United States, 371 U.S. 471 (1963).

documents might be found in the room the agents sought authorization to search. The document does contain Agent Kesici's statement that "Based on the affiant's training and knowledge on the behavior of handling classified material and based on the totality of the circumstances surrounding the aforementioned factors and details, it is probable that the classified material and/or documents found in Mr. Hitselberger's backpack was intentionally searched, printed and subsequently removed from his classified work space for unknown reasons. The backpack that was utilized by Mr. Hitselberger was also previously identified as belonging to him and seen in his passion (sic) multiple times in the past." How the agent could surmise Mr. Hitselberger's intentions from his own experience is not explained. While the agents notes that Mr. Hitselberger previously possessed his own backpack, there is no evidence, allegation or even suggestion that he ever took any other classified document out of "the office" (or that doing so would be a crime). Most significantly, there is no explanation of any connection between Mr. Hitselberger and room 317B or any connection between classified documents and room 317B.

Because the Command Authorization was not based on probable cause to search room 317B, even if a Command Authorization can be substituted for search warrant, the Authorization was facially deficient and invalid. Absent a valid warrant, the search of room 317B was illegal. All of the evidence seized as a result of this illegal search must be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963).

Conclusion

For the foregoing reasons, and such other reasons as may be presented at a hearing on this motion, Mr. Hitselberger respectfully moves this Honorable Court to suppress the use as evidence of all tangible objects recovered during the search of room 317B.

Respectfully submitted,

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/s/

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