

**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 STATEMENTS 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 statements allegedly made by Mr. Hitselberger. Mr. Hitselberger requests an evidentiary hearing on this motion, and in support of the motion, counsel 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) (Counts One, Two and Three) and three counts of unauthorized removal of a public record, in violation of 18 U.S.C. § 2071(a) (Counts Four, Five and Six). According to the discovery provided by the government, the charges arose out of an incident that occurred on April 11, 2012.

On that date, at approximately 11:15 a.m., officers of the United States military stopped and searched Mr. Hitselberger on the United States Naval base in Bahrain, where Mr. Hitselberger had been working as a contract interpreter for the military. According to the officers who stopped Mr. Hitselberger, they found classified documents in his backpack. The officers did not have probable cause to stop Mr. Hitselberger or search his backpack. Following

this unlawful detention and search, the officers permitted Mr. Hitselberger to leave the area and return to his housing on the base.

Minutes later, military officials ordered government agents to bring Mr. Hitselberger back to their offices, and these agents escorted Mr. Hitselberger back to the office. The agents held Mr. Hitselberger there for approximately two hours, before moving him to another office, where they held him for approximately six hours. The agents then took Mr. Hitselberger to the offices of the Naval Criminal Investigation Service (“NCIS”) on the base. The agents did not have probable cause to detain Mr. Hitselberger.

While unlawfully detaining him, from 8:10 p.m. until 11:25 p.m., government agents interrogated Mr. Hitselberger. This interrogation was not video taped. After talking to Mr. Hitselberger for a period of time, the agents presented Mr. Hitselberger with a waiver of rights form, asking him to waive his Fifth Amendment rights. At that time, Mr. Hitselberger asked the agents how he could get a lawyer and whether he could have the services of a lawyer from the military’s Staff Judge Advocate’s office. The agents informed Mr. Hitselberger that he could not have the services of the Staff Judge Advocate’s office because he was not a service member, and they indicated that they did not know how he could get a lawyer since they were in Bahrain. Despite Mr. Hitselberger’s invocation of his right to an attorney, the agents convinced Mr. Hitselberger to sign the waiver form and then interrogated him for more than three hours. During the interview, the agents noted that Mr. Hitselberger was “emotionally distraught” and was “weeping and sobbing.” At the conclusion of the interrogations, the agents asked Mr. Hitselberger to provide a written statement, and he informed them that he did not want to do so without the advice of a lawyer.

After interrogating Mr. Hitselberger on April 11th, government agents informed Mr. Hitselberger that he would not be permitted to return to his previously assigned housing because agents were conducting a search of that location. The agents then escorted Mr. Hitselberger to a room in base housing. The agents also informed Mr. Hitselberger that he would be required to return the following day to the NCIS offices. Mr. Hitselberger arrived back at the NCIS offices the following day later than the scheduled time and asked for permission to return at a later time. When Mr. Hitselberger did not return to the NCIS offices at this later time, government agents went to Mr. Hitselberger's newly assigned room and escorted him to the NCIS offices. There, Mr. Hitselberger again informed the agents that he wanted to consult with a lawyer. Despite this repeated invocation of his constitutional rights, the agents proceeded to again interrogated Mr. Hitselberger for more than three hours. The government has provided undersigned counsel with a classified video tape recording of the interrogation. Following the interrogation, Mr. Hitselberger was released, permitted to return to his quarters to collect some belongs for his travel, and taken to the airport in Bahrain where a flight had been arranged for him to leave Bahrain.

Several months later, Mr. Hitselberger arranged to travel to Kuwait in order to go to the offices of the company that contracted for him to work for the military in Bahrain. These offices were on the military base in Kuwait, and Mr. Hitselberger agreed to go there to arrange for the return of his property that was left behind in Bahrain. Mr. Hitselberger began this travel on October 23, 2012 at approximately 10:30 p.m., Bulgarian time, when he boarded a bus in Sophia, Bulgaria, to travel to Istanbul, Turkey. He arrived in Istanbul, Turkey on October 24, 2012, at approximately 6:30 a.m. on October 24, 2012. He then boarded a flight to Kuwait at

approximately 5:30 p.m., that evening. He arrived in Kuwait at 9:45 p.m., Kuwaiti time, on October 24, 2012. There is a one hour time difference between Turkey and Kuwait, and Mr. Hitselberger had been travel at this point for more than 22 hours.

By prior arrangement with the United States government, Kuwaiti immigration officials denied Mr. Hitselberger entry based on the presentation of a letter by a representative of the U.S. State Department, informing Mr. Hitselberger that his passport had been revoked. Kuwaiti officials then delivered Mr. Hitselberger to the custody of NCIS and Federal Bureau of Investigation (“FBI”) agents, who placed Mr. Hitselberger under arrest in relation to this case. Mr. Hitselberger and the agents then waiting for approximately four hours, before departing Kuwait at approximately 1:30 a.m., on a flight to Dulles International Airport, in Reston, Virginia.

After arriving at Dulles on the morning of October 25, 2012, Mr. Hitselberger was not taken to appear before a magistrate, but was taken to a government office in Sterling, Virginia, where he was interrogated by FBI and NCIS agents. This interrogation began at 8:50 a.m. and ended at 12:30 p.m.. There is an eight hour time difference between Kuwait and Sterling, Virginia, and when this interrogation started, Mr. Hitselberger had been traveling for more than 41 hours, with no sleep. The very beginning of the interrogation was video taped, until Mr. Hitselberger asked that it not be video taped. On the recording, Mr. Hitselberger can be heard telling the agents that he had not slept in days. The government has notified counsel that it does not intend to use any of the statements obtained from Mr. Hitselberger on October 25, 2012, during its case in chief, but may seek to use these statements for impeachment purposes.

Argument

The use of any statements obtained from Mr. Hitselberger on April 11 and 12, 2012 must be suppressed because any such statements were the fruit a violations of Mr. Hitselberger's Fourth Amendment rights. Wong Sun v. United States, 371 U.S. 471, 488 (1963) (if the evidence has been obtained through the exploitation of a Fourth Amendment violation the evidence must be suppressed). As set forth more fully 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, Mr. Hitselberger was unlawfully stopped, searched and detained by the military officers on April 12, 2012. The alleged statements were the fruits of these Fourth Amendment violations.

Any statements made by Mr. Hitselberger also must be suppressed because they were obtained in violation of his Fifth Amendment rights. The Supreme Court has held that, "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the [Fifth Amendment] privilege against self-incrimination is jeopardized." Miranda v. Arizona, 384 U.S. 436, 478 (1966). In order to protect the privilege, the Supreme Court set forth procedural safeguards. The safeguards require that prior to custodial interrogation an individual must be warned "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Id. at 479.

Statements made in response to custodial interrogation may only be used against a defendant if the defendant has been given the Miranda warnings and subsequently makes a

knowing and intelligent waiver of these rights. Id. The government bears the burden of demonstrating that the Miranda warnings were given and that the defendant has made a knowing and intelligent waiver. Id.

The elements of a Miranda violation are present in this case. At the time he was first questioned on April 11, 2012, Mr. Hitselberger was in custody and was not free to leave. The statements he made were made in response to questioning by the officers. At the time he first began answering the agents's questions, Mr. Hitselberger had not been fully advised of his Miranda rights nor had he made a knowing and intelligent waiver of his Fifth Amendment rights. When the agents began to advise him of his rights, Mr. Hitselberger invoked his right to counsel. The agents, nonetheless, questioned Mr. Hitselberger. The statements obtained on April 11, 2012 were therefore taken in violation of these rights and must be suppressed. Similarly, a Miranda violation occurred on April 12, 2013, because Mr. Hitselberger was not free to leave and invoked his right counsel. Finally, a Miranda violation occurred on April 25, 2012 because any waiver of Miranda rights on that date was not voluntary, given Mr. Hitselberger's sleep deprivation and mental state. Miranda waivers must be voluntary and not induced. Miranda, 384 U.S. at 478 ("any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.") See also Morgan v. Burbine, 475 U.S. 412, 421 (waiver must be "product of a free and deliberate choice rather than intimidation, coercion, or deception"); Berkemer v. McCarthy, 468 U.S. 420, 433 (1984) ("purposes of the safeguards prescribed by Miranda are to ensure that the police do not coerce or trick captive suspects into confessing."). Here, the evidence at a hearing will show that any statement made by Mr. Hitselberger was made without a valid waiver of his Miranda

warnings.

Finally, the statements obtained from Mr. Hitselberger must be suppressed because they were not made voluntarily and, therefore, were obtained in violation of his Fifth Amendment rights. The government bears the burden of proving that any statement made by a defendant was voluntary. See Lego v. Twomey, 404 U.S. 477 (1972). The test for voluntariness is whether a statement is the “product of an essentially free and unconstrained choice by its maker.” See, e.g., Culombe v. Connecticut, 367 U.S. 568, 602 (1961). The determination of whether a statement was made voluntarily “requires a careful evaluation of all the circumstances of the interrogation.” See Mincey v. Arizona, 437 U.S. 385, 402 (1978). The Court must consider the “totality of the circumstances” in deciding whether the defendant made his statement voluntarily. Fikes v. Alabama, 352 U.S. 191 (1957). See also Gallegos v. Colorado, 370 U.S. 49 (1962) (determination of whether an accused’s statement was made involuntarily so as to render it inadmissible requires close scrutiny of the facts of each individual case); Clewis v. Texas, 386 U.S. 707 (1967).

Specifically, the Court must examine the efforts to overbear Mr. Hitselberger’s free will in relation to his capacity to resist those efforts. Davis v. North Carolina, 384 U.S. 737 (1966); Culombe v. Connecticut, 367 U.S. 568, 607 (1961). The Court must examine his “background, experience, and conduct,” North Carolina v. Butler, 441 U.S. 369, 375 (1979), to determine whether his statement was the product of a rational intellect and a free will. Blackburn v. Alabama, 361 U.S. 199, 208 (1980). See Hopkins v. Cockrell, 325 F.3d 579, 584-85 (5th Cir. 2003) (confession involuntary when detective misled defendant to believe their conversation was confidential); Hart v. Attorney General of Florida, 323 F.3d 884, 894-95 (11th Cir. 2003)

(confession involuntary despite careful explanation of Miranda warnings and signed waiver because detective contradicted warnings when he said “honesty will not hurt you” and deceptively told defendant disadvantage of having a lawyer present was that the lawyer would tell him not to answer the incriminating questions).

CONCLUSION

For the reasons set forth above, and for such other reasons as may be presented at a hearing on this motion, Mr. Hitselberger respectfully requests that this motion be granted and that the Court suppress the use as evidence of all statements allegedly made by Mr. Hitselberger.

Respectfully submitted,

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FEDERAL PUBLIC DEFENDER

/s/

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