UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S REPLY TO GOVERNMENT'S CONSOLIDATED RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS TANGIBLE EVIDENCE SEIZED FOLLOWING UNLAWFUL STOP AND SEARCH OF BACKPACK AND DEFENDANT'S MOTION TO SUPPRESS TANGIBLE EVIDENCE SEIZED FOLLOWING EXECUTION OF COMMAND AUTHORIZATION

Mr. James Hitselberger, the defendant, through undersigned counsel respectfully submits the following in reply to the Government's Consolidated Response to Defendant's Motion to Suppress Tangible Evidence Seized Following Unlawful Stop and Search of Backpack And Defendant's Motion to Suppress Tangible Evidence Seized Following Execution of Command Authorization [Dkt. #45].

I. AN EVIDENTIARY HEARING IS NECESSARY TO RESOLVE FACTUAL ISSUES.

In opposition to Mr. Hitselberger's Fourth Amendment motions, the government makes factual allegations which are disputed. The government asserts that Mr. Hitselberger implicitly consented to the searches of his person and property because a sign was posted at the entrance to the naval base in Bahrain where the searches occurred. Mr. Hitselberger submits that no sign was posted at the time he worked on the base and no sign provided notice of searches such as those at issue here. The government asserts that exigent circumstances justified the stop of Mr. Hitselberger and search of his backpack. An evidentiary hearing will demonstrate that no

exigency required the warrantless search of the backpack. The government argues that the government agents had probable cause to stop Mr. Hitselberger and search his backpack. An evidentiary hearing will demonstrate that the circumstances under which Mr. Hitselberger left his work area on the date at issue and the observations of the agents who stopped and searched him did not amount to probable cause. Finally, the government apparently acknowledges that the "affidavit" in support of the Command Authorization for Search and Seizure ("CASS") alone was not sufficient to support the issuance of the CASS, but argues that the government agents orally provided additional and sufficient information to the commanding officer who issued the CASS. Even if such an oral supplement to an affidavit could support a CASS, the commanding officer in this case was not provided sufficient information.

To resolve these issues, the Court must hold an evidentiary hearing. *See United States v. Law*, 528 F.3d 888 (D.C. Cir. 2008) (defendant entitled to evidentiary hearing if motion to suppress based on factual allegations that would warrant relief). At the hearing, the government will bear the burden of demonstrating that the warrantless stop of Mr. Hitselberger and the warrantless searches of his backpack and living quarters fall within one of the "few specifically established and well delineated exceptions" to the warrant requirement. *Coolidge v. New Hampshire,* 403 U.S. 443, 455 (1971).

II. MR. HITSELBERGER DID NOT IMPLICITLY CONSENT TO A SEARCH OF HIS PERSON OR BELONGINGS.

The government argues that a sign posted at the entrance to the base in Bahrain authorized military personnel to search anyone on the base or their belongings at any time. According to the government, entering the base with this sign posted constituted implied consent.

First, as noted above, Mr. Hitselberger submits that no such sign was posted when he entered the base, and a hearing is necessary for the government to attempt to establish that the sign was posted and constituted implied consent.

Moreover, even if a sign could be sufficient to authorize any searches on the base at any time, the sign the government submits was posted in Bahrain did not authorize such searches. In support of its argument, the government cites *United States v. Jenkins*, 986 F.2d 76, 78 (4th Cir. 1993), but the facts of that case are not analogous. In *Jenkins*, the search occurred on Andrews Airforce Base, where a sign was posted, stating: "While on this installation all personnel and the property under their control are subject to search." *Id.* at 77. The sign the government claims was posted in Bahrain refers only to searches when entering the base. Gov't Opp'n Ex.1. It does not state that searches can occur at anytime while an individual is on the base, as the sign in *Jenkins* specifically provided. *See also Morgan v. United States*, 166 F. App'x. 292, 295 (9th Cir. 2006) (posted sign included warning: "While on this installation all personnel and the property under their control are subject to search.").

The other cases cited by the government also do not support its claim, but rather support a finding of implied consent to search *when entering* a military base -- not implied consent to any search at any time. *United States v. Roundtree*, No. 3:08mj109/EMT, 2008 WL 4327365, at *2-4 (N.D. Fla. Sept. 17, 2008) (search of vehicle entering base authorized where signs posted "indicating that all vehicles entering [base] are subject to search"); *United States v. Doran*, 482 F.2d 929, 932 (9th Cir. 1973) (consent to search before boarding airplane where signs and announcements provided notice that all passengers were subject to search); *United States v. Prevo*, 435 F.3d 1343, 1348 (11th Cir. 2006) (search of car entering prison grounds authorized

where sign warned: "any vehicle beyond this point subject to search"); *United States v. Kelley*, 393 F. Supp. 755, 757 (W.D. Okl. 1975) (search of person entering prison authorized where signs warned that persons and packages entering facility were subject to search).[1]

III. EXIGENT CIRCUMSTANCES DID NOT WARRANT THE SEARCH OF MR. HITSELBERGER'S BACKPACK.

In the alternative, the government argues that the agents who stopped Mr. Hitselberger were operating under "exigent circumstances" that required them to act without a warrant. As will be demonstrated at an evidentiary hearing on this motion, no such exigency existed under the circumstances of this case. Mr. Hitselberger submits that the agents did not have probable to arrest him or seize his backpack, but assuming the agents had probable cause, the agents could have seized the backpack and obtained a search warrant (or CASS), with no danger to anyone. Thus, the warrantless search of the backpack was unlawful.

IV. THE SEARCH OF MR. HITSELBERG'S BACKPACK WAS NOT A LAWFUL SEARCH INCIDENT TO ARREST.

Mr. Hitselberger respectfully submits that the agents who stopped him and searched his backpack did not have probable cause to arrest him. Moreover, even if the agents had probable cause to arrest, as the government notes, Mr. Hitselberger was not arrested prior to the search of his backpack. Because there was no arrest, the search cannot be justified as incident to an arrest.

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[1]The government also cites *Sanders v. Nunley*, 634 F. Supp. 474, 477 (N.D. Ga. 1985), for the proposition that "[i]t is generally understood in the military community that access to the Naval Air Station facilities is conditioned upon consent to be searched at any time, and it is routine for security personnel to search persons who have entered the Naval Air Station, including the Navy Exchange." Gov't Opp'n 10. The validity of the search in *Nunley*, however, was not at issue and the quoted statement at best referred to evidence introduced regarding that particular base -- no such general understanding existed and no such routine searches occurred in Bahrain.

See United States v. Powell, 483 F.3d 836, 839 (D.C. Cir. 2007) (search preceding arrest may be valid as incident to arrest if arrest follows quickly on heels of search); *United States v. Brown*, 463 F.2d 949 (D.C. Cir. 1972) ("Even though a suspect has not formally been placed under arrest, a search of his person can be justified as incident to an arrest if an arrest is made immediately after the search, and if, *at the time of the search*, there was probable cause to arrest." (emphasis in original)).

V. NO EXCEPTION TO THE WARRANT REQUIREMENT AUTHORIZES SEARCHES OF CONTAINERS BASED ON PROBABLE CAUSE.

As the D.C. Circuit has noted, "probable cause alone will not ordinarily justify a search. Subject to specific, narrowly defined exceptions, a judicial warrant is also required." *See United States v. Most*, 876 F.2d 191, 195 (D.C. Cir. 1989). Although here a CASS may have sufficed, the agents did not get such an authorization. There is no probable cause exception to the warrant requirement for the search of personal containers, and the government cites no authority for such a warrantless search. The cases cited by the government refer to (1) the automobile exception to the warrant requirement, which is not applicable, and (2) the search-incident-to-an-arrest exception to the warrant requirement, which is not applicable because Mr. Hitselberger was not arrested. The government offers no other justification for the warrantless search of the backpack, and therefore the use as evidence of the contents of the backpack must be excluded. *See Most*, 876 F.2d at 193 ("The burden is on the government to establish that a particular exception to the warrant requirement applies.").

VI. THE COMMAND AUTHORIZATION WAS FACIALLY INVALID AND NOT SUPPORTED BY PROBABLE CAUSE.

In addition to the reasons set forth in Mr. Hitselberger's motion, the CASS was invalid

because it failed to particularly describe the place to be searched. The government does not dispute that the affidavit in support of the CASS did not connect the searched residence to Mr. Hitselberger or the alleged criminal activity, nor does the affidavit identify the place to be searched by address. In fact, the only reference to the place to be searched was on the CASS and it identified the place to be searched as "Navy gateway Inn and Suites, Building S317B, room 317B." Thus, as the government now admits, there was no CASS to search Mr. Hitselberger's residence (the place that was searched) which was at the Navy Gateway Inn and Suites, Building 264, Room 317B. The government dismisses the failure to identify the place to be searched as "a typographical error." This error was a fatal flaw. The CASS cannot constitute a reasonable substitute for the warrant requirement if it fails even to list the place to be searched with particularity.

The Fourth Amendment requires a warrant to "particularly describe[] the place to be searched." In order to be valid, a warrant must sufficiently describe the place to be searched and does so only if an "officer with a search warrant can, with reasonable effort ascertain and identify the place intended." *United States v. Vaughn*, 830 F.2d 1185 (D.C. Cir. 1987) (internal quotation marks omitted). No reasonable officer could look to the CASS and reasonably determine the place to be searched because the CASS does not identify the building, among the many on the base in Bahrain, in which room 317B was to be searched.

The affidavit, which makes no reference to the address of the place to be searched, provides no help in identifying the place to be searched. Even if it did, the CASS did not specifically incorporate the affidavit and cannot be used to support a finding of particularity. "[I]n order for an affidavit to be viewed as limiting the scope of a warrant, the warrant must not

only attach the affidavit, but must also contain 'suitable words of reference' evidencing the magistrate's explicit intention to incorporate the affidavit." *United States v. Maxwell*, 920 F.2d 1028, 1032-33 (D.C. Cir. 1990). Although the CASS states that "Affidavit(s)" had been presented, no words of incorporation are on the CASS. *Id.* (affidavit with preprint language saying affidavit was presented, not sufficient to incorporate affidavit).

VII. THE GOOD FAITH EXCEPTION TO THE WARRANT REQUIREMENT DOES NOT APPLY TO COMMAND AUTHORIZATION.

The government argues that when determining the validity of the CASS, the Court should look not only to the affidavit in support of the CASS, but also to the additional facts provided to the issuing officer as he was advised during the course of the investigation of Mr. Hitselberger. According to the government, the Court can go beyond the four corners of the affidavit because military rules do not require the use of a sworn affidavit -- essentially arguing that a command authorization may be valid while not meeting all the requirements of a warrant because it need not be the exact equivalent of a warrant. While recognizing that a CASS is not the equivalent of a warrant, the government argues that even if the CASS was not sufficient, the agents executing the search relied in good faith on the CASS, and therefore, the "good faith" exception to the exclusionary rule should be applied. This "good faith" exception to the warrant requirement, should not be applied to command authorizations, particularly under the circumstances of this case.

The Supreme Court has held that evidence obtained pursuant to an improperly issued warrant must be excluded if the officer's reliance on the warrant was not "objectively reasonable." *United States v. Leon*, 468 U.S. 897, 919-20 (1984); *see also Massachusetts v.*

Sheppard, 468 U.S. 981, 990 (1984). In *Leon*, the Court established the good faith exception to apply to the execution of improperly issued warrants, because the purpose of the exclusionary rule is to deter police officers and the exclusionary rule would not deter neutral and detached magistrates. Under the circumstances of this case, the commanding officer who issued the CASS was not the same as a neutral and detached magistrate, but was involved in the investigation and as such would be deterred by the exclusionary rule. As one court has observed:

> A neutral and detached military commander may authorize a search, *not* because the commander and the authorization are equivalent to a magistrate and a warrant, but "because it complies with the Fourth Amendment's basic norm of reasonableness . . . in light of his responsibilities and the expectations of the persons who will be affected by the searches and seizure." *United states v. Stuckey*, 10 MJ at 361 (footnote omitted). Simply because a particular commander may be "detached and neutral" enough to conclude that a search pursuant to his or her authorization based on probable cause was "reasonable" under the Fourth Amendment does not ineluctably lead to a conclusion that that commander's authorization is entitled to the "great deference" of a magistrate's warrant if later that authorization is found not to have been based on probable cause.

United States v. Lopez, 35 M.J. 35, 51 (U.S. Military Court of Appeals 1992) (Wiss, J., concurring).

Here, Captain Walsh should not be equated to a neutral and detached magistrate for purposes of applying the good faith exception because he was not

> the sort of official that the Supreme Court in *Leon* had in mind -- one who is akin to a "judicial officer[]" with "no stake in the outcome of particular criminal prosecutions." *United states v. Leon*, 468 U.S. at 917, 104 S.Ct. at 3417. It is only *this* sort or commander who, in practical reality, will not be deterred by the exclusionary rule; thus it is only *this* sort of commander whose authorizations are entitled to be relied upon in reasonable good faith.

Lopez, 35 M.J. at 52. Here, as the government explains, Captain Walsh was not merely a neutral commanding officer presented with facts upon which to consider a CASS. Captain Walsh was involved with and briefed on the investigation of Mr. Hitselberger from the beginning. Gov't Opp'n 6-7. He was briefed about the incident that occurred and then briefed several times as the investigation progressed, obtaining "continuing updates." *Id.* Captain Walsh consulted not only with the attorney (SJA) in charge of the investigation, but also the Assistant Special Agent in Charge. *Id.* at 7. Thus, he was actively involved in the investigation and not the equivalent of a neutral and detached magistrate.

Even if the good faith exception could be applied to a CASS issued under these circumstances, the burden is on the government to establish objective good faith, and the government cannot meet that burden here. *Leon,* 468 U.S. at 924. In *Leon*, the Court held that the exclusionary rule may not bar introduction of evidence obtained pursuant to a warrant issued by a neutral magistrate later found to be invalid for lack of probable cause, where the police officers executing the warrant reasonably relied on the warrant. However, this good faith exception to the warrant requirement does not apply (1) where the requesting officer recklessly misleads the magistrate; (2) "where the issuing magistrate wholly abandoned his judicial role;" (3) where a warrant is based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;" or (4) where the warrant itself is so "facially deficient" for, among other things, failing to particularize the things to be seized, that the officers cannot reasonably presume it to be valid. *Leon*, 468 U.S. at 923; *see United States v. Barrington*, 806 F.2d 529, 531 (5th Cir. 1986) (*Leon* inapplicable where warrant based on bare bones affidavit and reliance thereon not objectively reasonable); *United States v. Jackson*, 818 F.2d

345, 350 n.8 (5th Cir. 1987) (*Leon* inapplicable where affidavit totally lacking in indicia of reliability and therefore a bare bones affidavit); *United States v. Fuccillo*, 808 F.2d 173 (lst Cir. 1987) (*Leon* inapplicable where officers reckless in preparing affidavit); *United States v. Leary*, 846 F.2d 592 (10th Cir. 1988) (warrant which was over broad due to insufficient description of items to be seized not saved by *Leon* as agents cannot reasonably rely on such a warrant); *United States v. Crozier*, 777 F.2d 1376 (9th Cir. 1985) (search warrant authorizing a general search facially overbroad and not saved by *Leon*); *United States v. Strand*, 761 F.2d 449 (8th Cir. 1985) (*Leon* inapplicable where search went beyond face of warrant).

Here, the CASS and affidavit were facially deficient, negating any assertion that it was acted upon in good faith. The CASS did not accurately identify the building to be searched. The affidavit failed to connect the place to be searched to criminal activity by failing to allege any connection between the two. Finally, the affidavit alleged no violation of any criminal offense and no factual basis to believe evidence would be found at the unidentified residence to be searched. Given these flaws, no agent could objectively rely on this CASS.

Conclusion

For the foregoing reasons, and such other reasons as may be presented at an evidentiary 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 his backpack and the search of room 317B in Building 264.

Respectfully submitted,

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/s/

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