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 RESPONSE
TO DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

In reply to the Government's Response to Defendant's Motion to Suppress Statements [Dkt. #46], Mr. James Hitselberger, through undersigned counsel, respectfully submits that an evidentiary hearing is necessary to resolve his motion because the government relies on disputed factual issues. The government claims that Mr. Hitselberger was lawfully detained prior to his interrogations in April, that he did not invoke his right to counsel prior to any of the interrogations, that he was not in custody during his second interrogation on April 12, and that his statements made on October 25, 2012 were voluntary. As set forth in his motion, Mr. Hitselberger was not properly detained, did invoke his right to counsel, was in custody, and the statements obtained on October 25th were involuntary due to Mr. Hitselberger's mental state and sleep deprivation.[1]

To resolve these issues, the Court must schedule an evidentiary hearing. *See United States v. Law*, 528 F.3d 888 (D.C. Cir. 2008) (defendant entitled to evidentiary hearing if motion

[1]As to the statements made on October 25, 2012, Mr. Hitselberger has not raised a *Miranda* issue with regard to the October statements because the government has indicated that it does not intend to use these statements in its case-in-chief and seeks only to preserve the right to use the statements for impeachment purposes. Because the statements were involuntary, they are not admissible for any purpose. *Mincey v. Arizona*, 437 U.S. 385 (1978).

to suppress based on factual allegations that would warrant relief). At the hearing, the government will bear the burden of demonstrating that *Miranda* warnings were given and that Mr. Hitselberger made a knowing and intelligent waiver. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). The government also will bear the burden of proving that any statement was voluntary. *See Lego v. Twomey*, 404 U.S. 477 (1972). Because the government will be unable to meet these burdens, and for the reasons set forth in Mr. Hitselberger's motion and such other reasons as may be presented at the hearing, the use as evidence of all statements allegedly made by Mr. Hitselberger must be suppressed.

Finally, with regard to the government's assertion that Mr. Hitselberger was not in custody at the time of the April 12, 2012 interrogation, the evidence at a hearing on Mr. Hitselberger's motion will demonstrate that he was in custody. However, even if he was not in custody for purposes of *Miranda*, the statements were compelled in violation of the Fifth Amendment because he was a government employee required to give a statement. Although unbeknownst to him his job was likely lost before he provided this statement, Mr. Hitselberger was not told he had lost his job and was led to believe that if he did not provide a statement, he would lose his job. *See Garrity v. New Jersey*, 385 U.S. 493 (1967) (statements inadmissible where government employees given choice between job loss and self-incrimination).

Respectfully submitted,

A. J. KRAMER
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/s/

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