UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

Pending before the Court is Mr. Hitselberger's Motion to Suppress Statements [Dkt. # 42]. The Court held a hearing on this and other pending motions on September 6th and 9th, 2013. At the Court's request, Mr. Hitselberger respectfully submits the following additional support for his Motion to Suppress Statements.[1]

Factual Background

On April 11, 2012, Mr. Hitselberger was detained by government agents for approximately eight and a half hours and then questioned by agents of the Naval Criminal Investigation Service ("NCIS") for more than three hours. Tr. 149. The questioning began at 8:14 p.m., but the agents did not advise Mr. Hitselberger of his Fifth Amendment (*Miranda*) rights until 8:49 p.m. Tr.122, 125; Gov't Ex. 11. During the 35 minutes between the beginning of the questioning and the advisement of rights, the NCIS agents asked Mr. Hitselberger not only about his biographical data, but also "how he has been doing lately and how things are going."

[1]At the hearing, undersigned counsel also moved to suppress the evidence recovered at the Hoover Institution as a fruit of the *Miranda* violation, and the Court instructed counsel to include this issue in the supplemental briefing. After reviewing *United States v. Patane,* 542 U.S. 630 (2004), counsel respectfully withdraws the request to suppress the evidence recovered at the Hoover Institution as a fruit of the *Miranda* violation.

Tr. 121; *see also* Gov't. Ex. 11 (pre-rights questions asked included "how long in Bahrain, how are you, bio data info"). At that point, Mr. Hitselberger "became emotional," "crying" and "sobbing," for approximately ten minutes. Tr. 189, 121.

During the 35 minutes prior to the rights advisement, the agents engaged Mr. Hitselberger in a general discussion that included not only questioning about his residences, education and employment, but also discussions regarding the languages Mr. Hitselberger spoke, Mr. Hitselberger's donations to the Hoover Institution (where the government claims it subsequently found classified documents) and a party to which Mr. Hitselberger was not invited. Tr. 124, 162, 165, 167, 169; Def. Ex. 12. When questioning Mr. Hitselberger about this party, the NCIS agents knew that Mr. Hitselberger connected this event to the specific event they were investigating. Tr. 207-08 (testimony of LTC Peck regarding discussion with Special Agent Kesici); *see also* Gov't Ex. 13 (Special Agent Kesici's April 11, 2012 affidavit in support of Command Authorization for Search and Seizure noting agent reviewed statement of MSG Holden); Tr. 73 (testimony of MSG Holden that immediately after finding classified documents in Mr. Hitselberger's backpack, Mr. Hitselberger began speaking about party he was not invited to); Attachment A (MSG Holden's April 11, 2012 statement, referring to statements about party). NCIS Special Agent Kesici testified that his purpose for questioning Mr. Hitselberger for 35 minutes before advising him of his rights was primarily to establish a "rapport" with him, in order to get him to waive his *Miranda* rights. Tr. 123, 162-64.

When the agents finally advised Mr. Hitselberger of his rights at 8:49 p.m., Mr. Hitselberger signed a form indicating that he waived those rights. Gov't Ex. 10. The agents then continued questioning Mr. Hitselberger for an hour and forty minutes until 10:29, when they

asked him to provide a written statement. Tr. 128-29. At that point, Mr. Hitselberger "hesitated and said that he'd feel more comfortable either consulting with a lawyer first or having a lawyer review his statement prior to providing [a written statement to the agents]." Tr. 128. Mr. Hitselberger also asked about military "SJA" or "JAG" lawyers and whether or not he could have such a lawyer. Tr. 171. At that time, Special Agent Kesici wrote on the waiver form, "requests lawyer regarding statement." Tr. 128; Gov't Ex. 10. Special Agent Kesici also wrote "clarified JAG request only for statement not for continue to discuss the interview," on his interview log. Tr. 129; Gov't Ex. 11. Special Agent Kesici explained that he wrote this after he questioned Mr. Hitselberger to clarify that "he wasn't asking for an attorney at that time to continue speaking with [the agents]; that he just wasn't comfortable with a written statement and wanted an attorney for that purpose." Tr. 129; *see also* Tr. 189. Rather than providing Mr. Hitselberger with a lawyer at this point or advising him on how to get a lawyer or whether he could have assistance from an SJA, the agents continued to orally question Mr. Hitselberger for another hour, until 11:25 p.m. Tr. 175. Within that hour, Mr. Hitselberger agreed to provide a written statement without a lawyer and to return the next day to do so. Tr. 129, 176. The following day, Mr. Hitselberger was again questioned by NCIS agents for several hours. Although no written statement was provided, the interview was videotaped. Tr. 237.

Argument

I. STATEMENTS OBTAINED FROM MR. HITSELBERGER DURING THE 35 MINUTES PRIOR TO THE ADVISEMENT OF HIS FIFTH AMENDMENT RIGHTS WERE OBTAINED IN VIOLATION OF *MIRANDA*.

A. For *Miranda* Purposes, Interrogation includes Express Questioning and Words or Actions Reasonably Likely to Elicit an Incriminating Response.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that statements made by a defendant during custodial interrogation may not be admitted into evidence unless prior to making the statements the defendant was notified of his Fifth Amendment rights and waived those rights. In 1980, the Court defined "interrogation" for purposes of *Miranda*. *See Rhode Island v. Innis*, 446 U.S. 291 (1980). The Court held that "interrogation" is defined as any "express questioning" *or* "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 302-01. The Court defined "incriminating response" as "any response -- whether inculpatory or exculpatory -- that the *prosecution* may seek to introduce at trial." *Id.* at 302 n.5 (emphasis in original).

Here, the government concedes that Mr. Hitselberger was in custody from the very beginning of the interrogation on April 11, 2012, and Special Agent Kesici conceded that he questioned Mr. Hitselberger during this time period. Tr. 162. Because this was "express questioning," *Miranda* applies, and the Court need not consider whether Special Agent Kesici's words or actions were the "functional equivalent" of questioning or "reasonably likely to elicit an incriminating response." *See Innis*, 446 U.S. at 302-01.

At the hearing in this matter, the government suggested that because the questioning was not directly "about the offense at hand prior to administering the *Miranda* warnings," tr. 125, 127, it did not constitute "interrogation." This argument is based on cases in which courts have found that questioning was exempt from *Miranda* because the police asked only routine booking questions. *See United States v. Bogle*, 114 F.3d 1271, 1274-75 (D.C. Cir. 1997) (collecting cases); *see also Pennsylvania v. Muniz*, 496 U.S. 582, 601-02 (1990) (recognizing a "routine

booking question" exception to *Miranda* for " questions to secure the biographical data necessary to complete booking or pretrial services." (internal quotations omitted)). Here, the questioning went well beyond "routine booking questions." Mr. Hitselberger was questioned by the agents investigating him about the circumstances that led to the investigation -- his employment, background, "how he was doing lately," and the party that the agents knew Mr. Hitselberger linked to the circumstances that led to his detention. Moreover, Mr. Hitselberger was not being asked "routine booking questions" because he was not being booked -- he ultimately was released and was not arrested in Bahrain. The routine booking question exception cannot apply where the questions are not " questions to secure the biographical data necessary to complete booking or pretrial services." *Pennsylvania v. Muniz*, 496 U.S. at 601-02 (1990) (internal quotations omitted). The NCIS agents were not booking Mr. Hitselberger -- they were interrogating him.

In *Bogle*, the D.C. Circuit found that there was no interrogation for *Miranda* purposes when a defendant in custody on a murder charge was questioned by a detective investigating the murder of the defendant's brother, when the detective was not investigating the charged murder, had no reason to believe there was a connection between the murders and was careful to inform the defendant that he did not want to talk about the charged murder. *Id*. The court reasoned that "only questions that are reasonably likely to elicit incriminating information in the specific circumstances of the case constitute interrogation within the protections of *Miranda*." *Id.*

Here, unlike in *Bogle*, there was express questioning directly related to the topics at issue -- Mr. Hitselberger's work and relationships with co-workers -- and these questions were likely to elicit incriminating responses. In *Innis*, the Court explained that when looking at words other

than "express questioning" to determine whether the police used "words or actions" that were "reasonably likely to elicit an incriminating response," the focus should be "primarily upon the perceptions of the suspect, rather than the intent of the police." *Innis*, 446 U.S. at 301. The Court explained that "[t]his focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." *Id.* However, "this is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response." *Id*. As the Court noted, "where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." *Id.* As the D.C. Circuit explained, "this is an objective inquiry; the subjective intent of the officer is relevant but not dispositive." *Bogle*, 114 F.3d at 1275.

Considered objectively, the circumstances here demonstrate that the questions asked of Mr. Hitselberger were reasonably likely to elicit an incriminating response. Mr. Hitselberger had been detained for more than eight hours after being accused of taking classified documents out of the restricted access area where he worked. He was then taken to a room where he knew he would be interviewed about this incident. The agents then asked him, "how he has been doing lately and how things are going." Tr. 121. Under the circumstances here, this question alone was reasonably likely to elicit an incriminating response -- lately he had been accused of taking classified documents out of the restricted access area. In response to these questions, he began weeping, sobbing, and discussing his work relationships and the party he felt his coworkers had

excluded him from. *See* Def. Ex. 12. The agents then asked not only his name and address, but engaged him in a lengthy discussion about his education, his background, how long he had been in Bahrain. Under these circumstances, these questions were likely to elicit incriminating answers -- that is answers that the prosecution would seek to introduce at trial. *Innis,* 446 U.S. at 302 n.5.

Moreover, the evidence of Special Agent Kesici's intent demonstrates that his questions were, in fact, designed to elicit an incriminating response. He admitted that his initial questioning of Mr. Hitselberger was designed to get Mr. Hitselberger to waive his rights. Tr. 123, 162-64. For these reasons, the questioning constituted "interrogation" for *Miranda* purposes. Because Mr. Hitselberger was interrogated while in custody prior to any waiver of rights, all statements made during the 35 minute time period prior to the rights advisement must be excluded.

II. THE AGENTS USE OF A TWO-PART QUESTIONING TECHNIQUE TO OBTAIN A CONFESSION INVALIDATED ANY MIRANDA WAIVER.

Special Agent Kesici testified that his questioning of Mr. Hitselberger for 35 minutes before advising him of his rights was for the purpose of building a "rapport" with Mr. Hitselberger and getting him to waive his rights. This two-part strategy for obtaining a statement from Mr. Hitselberger undermined the *Miranda* requirement and invalidated the waiver. *See Missouri v. Seibert*, 542 U.S. 600 (2004).

In *Seibert*, the Supreme Court examined "[t]he technique of interrogating in successive, unwarned and warned phases " in which police officers (often trained to do so) questioned suspects prior to providing the *Miranda* warnings, draw out a confession, issue the warnings and

then have the confession repeated. *Id.* at 609-10. In a plurality opinion, the Court found "[b]ecause the question-first tactic effectively threatens to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Seibert's post warning statements are inadmissible." *Id.* at 617. Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, found that "[t]he threshold issue when interrogators question first and warn later is . . .whether it would be reasonable to find that in these circumstances the warning could function "effectively" as *Miranda* requires." *Id*. at 611-12. Justice Souter found that "unless the warnings could place a suspect who has just been interrogated in a position to make . . . an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment." *Id.* at 612. Justice Breyer wrote separately to explain his view that the test should function as a "fruits" test in which the fruits of the unwarned statements (the post-warning interrogation) should be suppressed "unless the failure to warn was in good faith." *Id.* at 618 (Breyer, J., concurring). Justice Breyer noted that the plurality's "truly 'effective' *Miranda* warnings . . . will occur only when certain circumstances -- a lapse in time, a change in location or interrogating officer, or a shift in the focus of the questioning -- intervene between the unwarned questioning and any postwarning statement." *Id.* Justice Kennedy concurred in the judgment, finding that the exclusionary rule should apply when "the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warnings" and no curative measures are taken between the two-steps, such as a substantial break in time or an explaining to the accused that

inadmissibility of the pre-warning statements. *Id.* (Kennedy, J. concurring).

When determining whether the *Miranda* warnings were undermined, the plurality opinion in *Seibert* considered several factors, including the extent of the pre-warning questioning, the extend of overlapping questioning pre- and post-warning, the time and setting of the pre- and post-warning questioning, the continuity of the questioning agents, and whether the interrogators treated the post-warning questioning as a continuation of the pre-warning questioning. *See United States v. Aguilar*, 384 F.3d 520, 524 (8th Cir. 2004) (citing *Seibert*, 124 S.Ct. at 2612). Here, these factors demonstrate that Special Agent Kesici purposefully undermined the *Miranda* warnings and there were no curative steps taken prior to the post-warning interrogation -- satisfying even Justice Kennedy's narrower test. Special Agent Kesici first questioned Mr. Hitselberger without warning him of his rights for the purpose of "building a rapport" in the hopes Mr. Hitselberger would start talking and then waive his rights when he finally heard them. Although the agents did not ask Mr. Hitselberger directly about taking documents from the restricted access area, they questioned him regarding his employment and background, asked him how he had been doing "lately" and discussed the party with him. Only after questioning him for 35 minutes, did the agents read the *Miranda* warnings. There was no break between pre-warning and post-warning questioning; the same agents in the same room continued to question Mr. Hitselberger without pause. Although the agents did not obtain a confession regarding what occurred earlier that day, the questioning undermined the *Miranda* warnings. *See Edwards v. United States*, 923 A.2d 840, 850 (D.C. 2007) ("Limiting *Seibert* to full confessions as the government urges would encourage police to withhold *Miranda* warnings at the beginning of interrogations and bring the suspect to the brink of confessing."). The confession

Mr. Hitselberger ultimately made related directly to the pre-warning discussion of Mr. Hitselberger's exclusion from the party, his work relationships and the stress he felt based on those circumstances. *See* Def. Ex. 12. The technique designed and used by the agents to undermine the effective functioning of the *Miranda* warnings did exactly as the agent had hoped -- prior to being warned of his Fifth Amendment rights, Mr. Hitselberger began discussing the circumstances that led to the day's events, and as a natural progression, rather than a knowing and voluntary choice, he continued those discussions after hearing the *Miranda* warnings.

III. ONCE MR. HITSELBERGER ASKED FOR A LAWYER THE AGENTS WERE REQUIRED TO STOP QUESTIONING UNTIL A LAWYER COULD BE PROVIDED.

Special Agent Kesici testified that when asked to provide a written statement, Mr. Hitselberger "hesitated and said that he'd feel more comfortable either consulting with a lawyer first or having a lawyer review his statement prior to providing [a written statement to the agents]." Tr. 128. Mr. Hitselberger also asked about the military lawyers ("SJA" or "JAG") and whether or not he could have assistance from one of them. Tr. 171. At this point, all questioning should have stopped until Mr. Hitselberger was provided with a lawyer. *See Miranda v. Arizona*, 384 U.S. 436 (1966) (when a suspect "states that he wants an attorney, the interrogation must cease until an attorney is present"). Mr. Hitselberger did not affirmatively state that he wanted to continue talking to the agents when he said that he wanted a lawyer to provide a written statement. This request was an unequivocal request for counsel and questioning should have ceased. T he agent's decision to then "clarify" this unambiguous statement by asking whether Mr. Hitselberger would continue to speak orally was a violation of the requirements of *Miranda*.

The Supreme Court has held that a defendant who states that he wants an attorney before

making a written statement, but at the same time affirmatively states that he will speak to the police can continue to be questioned orally. *See Connecticut v. Barnett*, 479 U.S. 523, 529 (1987). In *Barnett*, however, the Court emphasized that the defendant's request for a lawyer for a written statement was "accompanied by affirmative announcements of his willingness to speak with the authorities." *Id.* Mr. Hitselberger did not, as in *Barnett*, make clear an intention to continue speaking to the police. Instead, the agents continued to question him and, according to Special Agent Kesici, obtained "clarification" regarding his request for counsel. No such clarification was required or permissible because Mr. Hitselberger's request for counsel was unequivocal and not accompanied by an expressed desire to continue talking. For this reason, all of the statements made by Mr. Hitselberger on April 11, 2012 should have been suppressed.

The government argues that Mr. Hitselberger later agreed to make a written statement and returned on April 12, 2013 to do so. This occurred only after the police continued to question Mr. Hitselberger after he invoked and rights, and therefore, the statements made on that date were a product of the violations that occurred on April 11, 2013, and must be suppressed. *See Edwards v. Arizona*, 451 U.S. 477 (1981) (when accused invokes right to counsel, valid waiver cannot be based on further custodial interrogation; further questioning permissible only if counsel provided or accused initiates further communication).

Conclusion

Because Mr. Hitselberger was in custody and interrogated on April 11, 2013 before beginning advised of his rights, the statements made prior to the rights advisement must be suppressed. Because the agents' two-part questioning strategy was designed to and did undermine the *Miranda* warnings, all statements made after that waiver must be suppressed,

including the statements made on April 12, 2013. In addition, because Mr. Hitselberger invoked his right to counsel, all statements obtained after he invoked his right to counsel must be suppressed.

Respectfully submitted,

A. J. KRAMER
FEDERAL PUBLIC DEFENDER

/s/

MARY MANNING PETRAS
Assistant Federal Public Defender
625 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 208-7500

ATTACHMENT A

SWORN STATEMENT

For use of this form, see AR 190-45; the proponent agency is PMG.

PRIVACY ACT STATEMENT

AUTHORITY:	Title 10, USC Section 301; Title 5, USC Section 2951; E.O. 9397 Social Security Number (SSN).
PRINCIPAL PURPOSE:	To document potential criminal activity involving the U.S. Army, and to allow Army officials to maintain discipline, law and order through investigation of complaints and incidents.
ROUTINE USES:	Information provided may be further disclosed to federal, state, local, and foreign government law enforcement agencies, prosecutors, courts, child protective services, victims, witnesses, the Department of Veterans Affairs, and the Office of Personnel Management. Information provided may be used for determinations regarding judicial or non-judicial punishment, other administrative disciplinary actions, security clearances, recruitment, retention, placement, and other personnel actions.
DISCLOSURE:	Disclosure of your SSN and other information is voluntary.

1. LOCATION	2. DATE (YYYYMMDD)	3. TIME	4. FILE NUMBER
JSOTF-GCC, NSA-Bahrain	2012/04/11	1222	

5. LAST NAME, FIRST NAME, MIDDLE NAME	6. SSN	7. GRADE/STATUS
Holden, Michael A.	313-84-0906	MSG/E8

8. ORGANIZATION OR ADDRESS

J3, JSOTF-GCC

9.

I, Michael Alan Holden, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

On 11 April, 2012 approximately 1200 hours, James Hitselberger asked MSG Dain Christensen if he could get into his computer to. MSG Dain Christensen logged out and James logged in on the SIPR portal. I observed Mr. Hitselberger for about approximately 10-15 mins reading SECRET//NOFORN documents and also SITREPS. I observed him print out one document, and fold it in half and put it into his Arabic dictionary. MSG Christensen and myself walked a few feet away and had a conversation as we watched Mr. Hitselberger. We spoke about our observations of Mr. Hitselberger printing out SECRET documentation. We both kept an eye on him. MSG Christensen told Mr. Hitselberger he needed to log off, Mr. Hitselberger replied with "ok, let me print something real quick". I observed Mr. Hitselberger print another SECRET document, he then grabbed his back pack and put the Arabic dictionary inside along with the other document.

I then grabbed CPT Brendan Hering and said I needed him to follow me because I needed a witness. I explained to CPT Hering as we followed behind Mr. Hitselberger of the situation. We caught up to Mr. Hitselberger as he walked outside the building and stopped him. I asked Mr. Hitselberger to stop outside beside the picnic table, I then told him to open his backpack, I asked him to pull the documents out that he had taken from the office, I immediately folded the documents and put them in my pocket. I asked Mr. Hitselberger why he had classified documents, he denied knowing they were classified, I explained to him the legalities of taking SECRET//NOFORN documents out of the building. The documents were clearly marked SECRET//NOFORN. During this Mr. Hitselberger tried changing the subject, he was talking about not being invited to CPT Thiels going away party and how he did not want to be friends with people he worked with. He also stated that the unit had perceived him as being socially awkward. I told him that was all irrelevant to this situation. I also asked him if he had ever printed out SECRET documents before, he said no. I also asked if he had SECRET documents in his room, he said no. I told Mr. Hitselberger that we were going to report this, we let him go and went inside and reported it immediately to LTC Standridge. We were directed to get him back immediately. We called him and also went to find him. We brought him back and turned him over to LTC Standridge along with the documentation.

10. EXHIBIT	11. INITIALS OF PERSON MAKING STATEMENT	PAGE 1 OF 2 PAGES

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF _____ TAKEN AT _____ DATED _____"

THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT, AND PAGE NUMBER MUST BE INDICATED.

STATEMENT OF Michael A. Holden TAKEN AT JSOTF-GCC DATED 2012/04/11

9. STATEMENT *(Continued)*

AFFIDAVIT

I, Michael Alan Holden, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1, AND ENDS ON PAGE ____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

(Signature of Person Making Statement)

WITNESSES:

Luis F. NEBEL SOCS
JSOTF J3
ORGANIZATION OR ADDRESS

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 11 day of April, 2012 at J3 Operations Room

(Signature of Person Administering Oath)

DAVID STANDRIDGE LTC, SF
(Typed Name of Person Administering Oath)

Commissioned Officer U.S. Army
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

DA FORM 2823, NOV 2006

APD PE v1.01ES