IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	**:**	**CRIMINAL NO. 12-231 (RC)**
	:	
v.	**:**	
	:	
JAMES F. HITSELBERGER,	**:**	
	:	
Defendant.	**:**	

GOVERNMENT'S SUPPLEMENTAL MEMORANDUM
IN OPPOSITION TO MOTION TO SUPPRESS STATEMENTS

Following testimony and argument at a motions hearing in this case on September 6th and 9th, 2013, the Court requested supplemental briefing on the following questions: (1) Did the questions posed to defendant by NCIS agents prior to the administration of *Miranda* warnings on April 11, 2012, constitute "interrogation," such that defendant's statements in response should be suppressed? (2) Did this pre-*Miranda* conversation somehow invalidate the subsequent *Miranda* waiver, such that defendant's post-*Miranda* statements should also be suppressed? and (3) Were the NCIS agents required to stop questioning Hitselberger when he referred to consulting an attorney before making a written statement?[1] The answer to all of these questions is "No," and none of defendant's statements should be suppressed.

I. The Pre-*Miranda* Conversation Should Not Be Suppressed

Defendant moved to suppress all statements he made during the approximately thirty-five minutes in which he talked with NCIS agents prior to administration of *Miranda* warnings on April 11, 2012. During this conversation, Hitselberger shared some of the issues that caused him to be disgruntled at work and described a collection of documents he had established at the

[1] The Court also requested briefing on the question of whether, if the pre-*Miranda* statements were suppressed, this would also require suppression of materials obtained during a search of the Hoover Institution. As discussed more fully below, defense counsel has acknowledged that *United States v. Patane*, 542 U.S. 630 (2004), answers this question in the negative, and therefore defendant has withdrawn his request for suppression of these items.

Hoover Institution, which agents later learned contained unlawfully retained classified documents. Prior to the *Miranda* warnings, Hitselberger was not asked, and did not talk about, the actual retention of documents on April 11, 2012, that was being investigated at that time. Under *Miranda v. Arizona*, 384 U.S. 436 (1966), "the prosecution may not use an incriminating statement that the defendant made during a custodial interrogation unless the prosecution demonstrates" that the defendant was advised of his rights and waived them. *United States v. Bogle*, 114 F.3d 1271, 1274 (D.C. Cir. 1997). Because Hitselberger's statements were not made in response to "interrogation," there was no *Miranda* violation.

A. The Interview

NCIS Special Agent Raffi Kesici testified about the April 11 interview at the motions hearing. Mr. Hitselberger did not testify. Kesici explained that he and Special Agent John Fowler began talking to Hitselberger at approximately 8:14 p.m. on April 11 and advised him of his *Miranda* rights from 8:49-8:52 p.m., before obtaining a written waiver, according to a log maintained by Kesici. *See* Government Ex. 11 (Interview Log Timeline); *see also* Motions Hearing Transcript, Testimony of Raffi Kesici ("Tr.") 122:14-15, 123:8-11. The agents did not ask Hitselberger a single question about the offense at hand until after the *Miranda* warnings. Tr. 125:5-7. Instead, they asked questions focused on how Hitselberger was feeling and his background biographical information. This is evidenced by the questions Kesici wrote on his log in the section "Questions Prior to Warning," consisting of "How are you," "how long in Bahrain," and "bio data info," Government Ex. 11, which captured the topics covered before the warnings. Tr. 123:6-7. At the very outset of this conversation, Hitselberger was asked "how he has been doing and how things are going," and in response he "became emotional," "was crying" and "sobbing," and "needed a few minutes to recover because he seemed very upset." Tr.

121:13-21. Hitselberger explained that he was upset because of tensions with his co-workers, who did not invite him to a party. The agents spent the first roughly ten minutes of the interview trying to calm defendant and allowing him to compose himself, which he did. Tr. 175:2-8. Agent Kesici did not think it was appropriate to administer *Miranda* warnings while Hitselberger was upset. Tr. 189:25-190:2.

The remainder of the pre-*Miranda* conversation consisted of questions about the "bio data info" that was called for on the "Personal Data Sheet." *See* Government Ex. 12. It was typical for agents to start interviews by obtaining information to fill out this pre-printed form, which calls for such basic background facts as the subject's "name, residences, education, employment, physical characteristics." Tr. 124:2-4; Ex. 12. Kesici explained that such questions can also help build rapport and make a suspect feel comfortable with the agents. In this instance, "we didn't want to necessarily begin based on the defendant's condition. We advised that for him to take his time, if he needed any tissues. We wanted to take our time, fill out this bio data sheet when he was ready….But primarily it is rapport." Tr. 123:16-21. Kesici acknowledged that good rapport can contribute to a suspect waiving his *Miranda* rights, which would be Kesici's "preference." Tr. 164:21-23. Kesici explained that "I wanted him to feel relaxed. I wanted to, at a minimum, obtain information to fill out the bio data sheet." Tr. 164:12-13.

When asked about his educational background for the Personal Data Sheet, Hitselberger was "very talkative, very forthcoming," and "[a]bsolutely" cooperative, Tr. 124:13-15, and was "forthcoming regarding his background, his work experiences, his life experiences" to such an extent that Kesici "recall[s] listening more than speaking during the interview." Tr. 190:6-12. Because "the amount of information" Hitselberger provided about his background "was lengthy," it took "a bit longer" than usual to complete the Personal Data Sheet. Tr. 191:9-22.

While reciting his scholarly history at length, Hitselberger boasted that he had established a collection at the Hoover Institution of pamphlets and other materials he had collected in Iran that pre-dated that country's 1979 revolution. When Agents Kesici and Fowler started the interview, they did not know about Hitselberger's connections to Hoover or that he had sent classified materials there, and therefore they did not ask questions about Hoover. Tr. 192:9-25. Rather, Hitselberger volunteered that information. *Id*. NCIS did not learn until later that Hitselberger's Hoover connection might involve unlawful retention of classified documents.

Kesici said that he used a "conversational tone" in the interview, a "tone similar to what [Hitselberger] was using." Tr. 124:18-19. The interview was "very cordial," a "give-and-take" in which "there was a lot of information we were receiving. He was very forthcoming about his extensive education and places that he lived and worked." *Id*. 124:19-22. Prior to the *Miranda* warning, Hitselberger learned that Kesici spoke another language and then "spoke in that language with me to demonstrate that he knew some." Tr. 163:10-14.

At 8:49 p.m., having completed the background sections of the Personal Data Sheet, Kesici administered *Miranda* warnings, reading verbatim from a pre-printed form. Tr. 125:10-16; Government's Exhibit 10 ("Civilian Suspect's Acknowledgement and Waiver of Rights"). After reading from the form, Kesici presented it to Hitselberger, explaining to him that "if he was choosing to waive his rights, to read each of the portions of the form and to initial the form that he understood." Tr. 126:10-16, 20-22. Without hesitation, Hitselberger read the form, initialed each line, and then signed his name at the bottom, under a section stating: "I understand my rights as related to me and as set forth above. With that understanding, I have decided that I do not desire to remain silent, consult with a retained or appointed lawyer, or have a lawyer present at this time. I make this decision freely and voluntarily. No threats or promises have been made

to me." Ex. 10; *see also* Tr. 126:25-127:4. Agent Fowler then witnessed the form and signed it. Tr. 126:7-8. Only after Hitselberger executed the waiver did the agents start asking questions about the incident they were investigating. Tr. 127:5-9. The agents then questioned Hitselberger from 8:52 to 11:25 p.m., taking two breaks of roughly ten minutes each. *See* Ex. 11. Hitselberger answered the "majority" of questions posed to him, but declined to answer some. Tr. 127:13-16. For instance, he "refused to give us the name" of a local taxi driver with whom he was friends. *Id*. 127:18-22. Kesici believed that Hitselberger also mentioned his Hoover Institution collection again after the *Miranda* waiver. Tr. 168:16-169:1. During this portion of the interview, Hitselberger admitted taking the documents that were found in his backpack that day and concocted various excuses for his actions, among other things.

B. The Pre-Warning Conversation Was Not An "Interrogation"

The pre-warning conversation is not governed by *Miranda*, which applies only to custodial "interrogation" and is not triggered any time an agent merely speaks to a defendant. *Miranda*, 384 U.S. at 478 ("The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated.") "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions (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. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Rhode Island v. Innis*, 446 U.S. 289, 301 (1980). The D.C. Circuit has held that because no *per se* rule equates "express questioning" with "interrogation," "questioning" must be assessed the same as other "words and actions" under *Innis*. *United States v. Bogle*, 114 F.3d 1271, 1275 (D.C. Cir. 1997).

"[O]nly questions that are reasonably likely to elicit incriminating information in the specific circumstances of the case constitute interrogation within the protections of *Miranda*." *Id.*

"A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of the police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Innis*, at 301-02 (emphasis in original). While the test "focuses primarily upon the perceptions of the suspect," *Innis* at 301, "a court should consider only those facts an officer 'should have known.'" *United States v. Chase*, 179 Fed. Appx. 57, 58 (D.C. Cir. 2006).

In *Bogle*, the D.C. Circuit held that there was no interrogation where Bogle, who was under arrest for a murder, was questioned by a police detective about a different crime, the murder of his brother a few days earlier. In the course of talking about his brother's murder, Bogle said "Let me tell you what happened," and proceeded to make statements incriminating himself in the murder for which he had been arrested. The detective's questioning about the brother's murder was not "interrogation," the Court of Appeals held, because there was "no evidence in the record indicating that when [the detective] and Bogle met, the detective (or any other police officer) had reason to believe that there was any connection between the murders," and therefore it was not reasonably likely that questions about the second murder would elicit statements about the first. *Bogle*, 114 F.3d at 1275.

Here, there is no evidence that the agents knew or should have known that questions about Hitselberger's academic and work history would elicit incriminating information. The agents did not ask about any crimes at all prior to the *Miranda* warnings, merely asking

Hitselberger how he was and seeking very basic biographical information. As Kesici testified, the agents did not possess any information that a "how are you?" question would cause the defendant to unburden himself about his grudges at work, or that routine background questions would cause the defendant to divulge the existence of a collection of papers that, after much further investigation, was revealed to contain classified documents. The agents had no prior knowledge at all about the collection of documents at the Hoover Institution. They had never even met Hitselberger before, and did not know of any particular sensitivities he might have.

The defense did not identify any facts that should have put the agents on notice that their routine questions were likely to elicit incriminating responses in this case. The agents did not know enough at the time of the interview to even recognize the responses as incriminating. When Hitselberger described his Hoover collection, the agents made brief notes of the fact, assigning it no incriminating value. On the Personal Data Sheet, Agent Fowler recorded in the "Remarks" section, "Stanford University, Herbert Hoover, collection of Islamic information from the Revolution." Government Ex. 12. In their written report, the agents wrote merely that Hitselberger "donates academic materials to the Hoover Institute at Stanford University in California," and "claims that the Hoover Institute accredited him with donating the largest collection of pre-Islamic Revolution of Iran items . . .." *See* Defense Ex. 12. Had the agents known their questions were likely to prompt incriminating responses, surely they would have recognized and noted the incriminating value of the responses they received.

Kesici's testimony indicated that he did not intend his background questions to elicit incriminating facts, and that the agents gave warnings before transitioning to questions they viewed as incriminating, including all questions about the incident that day. While the subjective intent of the agents is not dispositive, it is evidence that they did not know their questions were

going to elicit incriminating responses. *See, e.g.*, *Innis*, at 302 n.7 ("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."); *Bogle*, 114 F.3d at 1275 ("the subjective intent of the officer is relevant but not dispositive.").

Questions of the sort asked here, which concern basic biographical and administrative information, are so unlikely to elicit incriminating responses in the bulk of cases that courts have adopted the "routine booking questions" exception for such questions. *See Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990) (plurality) (questions about name, address, height, weight, eye color, date of birth, and current age were "reasonably related to the police's administrative concerns," were unlikely to elicit incriminating information, and therefore did not constitute interrogation). "It is well-settled that routine biographical data is exempted from *Miranda*'s coverage." *United States v. Brown*, 101 F.3d 1272, 1274 (8th Cir. 1996); *see also United States v. Gaston*, 357 F.3d 77, 82 (D.C. Cir. 2004) (recognizing exception for routine booking questions); *Bogle*, 114 F.3d at 1275 (collecting cases from other circuits that recognize exception for routine booking-type questions). "Only if the government agent should reasonably be aware that the information sought, while merely for basic identification purposes in the usual case, is directly relevant to the substantive offense charged, will the question be subject to scrutiny." *United States v. McLaughlin*, 777 F.2d 388, 391-92 (8th Cir. 1985). The questions asked by the agents in this case fall within the heartland of this well established exception.

Hitselberger's incriminating statements about the Hoover collection were especially unforeseeable because they were not even responsive to the questions about where he had studied and worked. "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Miranda*, 384 U.S. at

478. In the course of explaining that he had studied in Iran, Hitselberger was "overly forthcoming with information regarding the bio data sheet." Tr. 163:7-9. "It wasn't simply where did you attend school but a background on it and whether he enjoyed it." *Id*. 163:7-10. Though not asked specifically about the Hoover Institution, Hitselberger volunteered unexpected information about his collection at Hoover, where he had never worked, taught, or attended school. "The unexpected and unresponsive reply cannot retroactively turn a non-interrogation inquiry into an interrogation." *United States v. Woods*, 711 F.3d 737, 741 (6th Cir. 2013); *see also Innis*, 446 U.S. at 301-02 ("[T]he police surely cannot be held accountable for the unforeseeable results of their words or actions . . ."); *United States v. Walls*, 70 F.3d 1323, 1326 (D.C. Cir. 1995) ("[This] case thus fits squarely within the line of decisions holding that officers do not violate a defendant's right to counsel when the defendant volunteers information about his offense while officers ask routine booking questions.").

C. Any *Miranda* violation in the first thirty-five minutes of the interview would result only in suppression of those statements in the government's case

Even if the Court found the pre-*Miranda* conversation constituted interrogation and that Hitselberger's statements in response were obtained in violation of *Miranda*, that violation should result only in suppression of those specific statements in the government's case-in-chief. Because the statements were voluntarily made, they could still be used to impeach defendant if he testified.[2] "The Supreme Court has emphasized that some form of government overreaching is required for a statement to be involuntary." *United States v. Hsin-Yung*, 97 F. Supp.2d 24, 34 (D.D.C. 2000) (*citing Colorado v. Connelly*, 479 U.S. 147, 163-64 (1986) ("Absent police conduct causally related to the confession, there is simply no basis for concluding that any state

[2] Hitselberger's statements during his April 12, 2012 interview are not affected by any *Miranda* violation occurring on April 11. At the outset of the April 12 interview, Hitselberger reviewed his *Miranda* waiver form from the night before, affirmed that he understood it, and proceeded to speak to the agents, constituting a new waiver.

actor has deprived a criminal defendant of due process of law.")). There is no evidence that Hitselberger's pre-*Miranda* statements were involuntary due to coercion. Kesici described his entire conversation with Hitselberger as a cordial give-and-take, in which all parties used a conversational tone and in which Hitselberger chatted with Kesici about his own travels and Kesici's ethnic background. These facts are all signs of a defendant whose will was not overborne. *See Hsin-Yung*, 97 F.Supp.2d at 34 (fact that defendant "appeared to be at ease in speaking with" law enforcement officer, and "even showed [the officer] a photograph of his girlfriend and discussed his life back home," was all evidence that he "did not display any signs of feeling pressured or coerced").

Furthermore, if the Court did suppress the pre-*Miranda* April 11 statements, this would not justify suppression of the results of the later search conducted at the Hoover Institution. As defense counsel has acknowledged, the Supreme Court has held that failure to provide *Miranda* warnings does not require suppression of the physical fruits of a suspect's unwarned but voluntary statements. *United States v. Patane*, 542 U.S. 628 (2004). Since Hitselberger's statements were voluntarily made, there is no basis to suppress the Hoover search.[3]

II. The Pre-*Miranda* Conversation Did Not Invalidate Defendant's Later *Miranda* Waiver

Defense counsel has argued that the pre-warning conversation in this case was coercive, so much so that it should invalidate defendant's written *Miranda* waiver and justify suppression

[3] Even if Hitselberger's statements are somehow found to be involuntary, the physical fruits of those statements still should not be suppressed, because the government can establish that it had independent sources of the information at issue (that defendant had a collection of documents at the Hoover Institution), which would have led to the inevitable discovery of the classified documents he sent to Hoover. *See, e.g.*, Defendant's Exhibit 18A at ¶ 78 (during April 11, 2012 search of Hitselberger's room, which occurred simultaneously with his interview, agents discovered mailing envelopes addressed from defendant to Hoover); *id*. at ¶ 81 (in late April 2012, agents conducted "Google" search of defendant's name, which revealed that he had established a collection in his name at Hoover). "[W]hen . . . the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible." *Nix v. Williams*, 467 U.S. 431, 448 (1984). *See also United States v. Gale*, 952 F.2d 1412, 1416 (D.C. Cir.), *cert. denied*, 503 U.S. 923 (1992).

of his post-warning statements. Nothing in the pre-warning conversation suggests that the subsequent waiver was not the "product of a free and deliberate choice rather than intimidation, coercion, or deception." *Colorado v. Spring*, 479 U.S. 564, 573 (1987). The D.C. Circuit has found that "police coercion is a necessary prerequisite to a determination that a waiver was involuntary." *United States v. Bradshaw*, 935 F.2d 295, 299 (D.C. Cir. 1991). Here, the government has carried its burden of showing by a preponderance of the evidence that the waiver was "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception." *Colorado v. Connelly*, 479 U.S. 157, 170 (1986).

All the record evidence shows that rather than minimizing the *Miranda* warning and waiver process, the agents approached the *Miranda* warning with an appropriate degree of formality. The agents spent three minutes reviewing the rights with Hitselberger, using a pre-printed form that describes the rights and the waiver in great detail. Hitselberger, a highly educated, mature man, initialed each line of the form to show his understanding.

The cases cited by defendant at the hearing bear no factual resemblance to this case, as they involved egregious police conduct calculated to create an atmosphere of extreme psychological pressure that would coerce suspects into *Miranda* waivers. For instance, in *Missouri v. Siebert*, 542 U.S. 600 (2004), the Supreme Court denounced two detectives who conspired to evade *Miranda* by intentionally obtaining a full, unwarned confession, and only then obtaining a *Miranda* waiver and a repetition of the same confession. The pre-warning interrogation, which focused entirely on the offense at issue, was so coercive that it invalidated the subsequent *Miranda* waiver, because the interrogation was so "systematic, exhaustive, and managed with psychological skill," that when "the [detective was] finished there was little, if anything, of incriminating potential left unsaid." *Id.* at 616. The defense also cited *Edwards v.*

United States, 923 A.2d 840 (D.C. 2007), where a detective intentionally interrogated a suspect who was under arrest without providing *Miranda* warnings, knowing that defendant's answers would likely be incriminating. After obtaining a false exculpatory statement, the detective procured a *Miranda* waiver and used the un-warned statement to elicit a conflicting, more incriminating statement. The D.C. Court of Appeals found this practice similar to that in *Siebert* and suppressed the pre- and post-warning statements for the same reasons.

Defendant also argued that suppression is supported by *United States v. Aguilar*, 384 F.3d 520 (8th Cir. 2004), which is radically different from this case. Aguilar was arrested and interrogated for ninety minutes before he was read his *Miranda* rights. Only after Aguilar waived his rights did the officers begin recording the interview. The videotaped portion lasted only twenty minutes and was clearly a recitation of facts to which Aguilar had already confessed during the unwarned, ninety-minute interrogation. Further, during the unwarned interrogation, the officers grew angry, kicked Aguilar's desk, and swore at him when he provided answers they did not anticipate. The officers promised to release Aguilar if he cooperated and threatened that if he behaved incorrectly in the videotaped interview, the previous interrogation would do him no good. *Id*. at 522. The Eighth Circuit agreed that suppression of all of Aguilar's statements was warranted, since under the circumstances "providing Aguilar the *Miranda* warnings between the two questioning sessions did not serve the purpose of the dictates in *Miranda*, because it did not provide Aguilar with a meaningful opportunity to make an informed choice regarding his right to provide police with an admissible statement." *Id*. at 525.

The circumstances here are vastly different, because the pre-warning conversation between Hitselberger and the NCIS agents contained no interrogation, no threats or promises, and none of the intimidating psychological ploys at play in *Aguilar*. While defense counsel

suggested that Kesici engaged in a psychological ploy by being nice to Hitselberger, no precedent supports the proposition that rapport-building alone is unduly coercive, and there is no evidence that Kesici's politeness undermined Hitselberger's free will. *See, e.g., Wallace v. Branker*, 354 Fed. Appx. 807, 825 (4th Cir. 2009) (*Miranda* waiver was voluntary where officers built rapport with defendant by conversing with him for three hours about sports and his employment and military history, prior to obtaining *Miranda* waiver and conducting interrogation). Polite conversation certainly was not among the long litany of coercive ploys listed in *Miranda*, 384 U.S. at 442-458, which denigrated "Mutt and Jeff" or "good cop/bad cop" routines in which one officer plays the nice-guy foil to the other officer's intimidating heavy. *Id.* at 452. For good reason, the Supreme Court has not spoken out against the kind of "good cop/good cop" approach adopted in this case, in which both agents chatted for a limited time with the defendant in even tones about background issues in order to put him at ease. Hitselberger clearly understood his rights and was uncowed in exercising them, refusing to divulge the names of his local friends and declining to write a statement. Hitselberger's manner of exercising his right to choose demonstrates that he received a meaningful opportunity to do so.

Most importantly, the agents here did not indulge in the cardinal sin condemned in *Siebert*, *Edwards*, and *Aguilar*, which was to intentionally elicit detailed, unwarned confessions that could be used as powerful leverage to coerce a suspect into waiving *Miranda* and confessing again. In those cases, *Miranda* was deployed at a tactical moment in the middle of one uninterrupted, undifferentiated stream of interrogation. Here, the agents elicited very little incriminating evidence before the warning, and not even a fraction of a confession. They used the *Miranda* warning to mark a significant transition from one phase, consisting only of chit-chat and biographical questions, to a new, decidedly different phase of interrogation about the offense

at issue. This transition provided Hitselberger a meaningful opportunity to make an informed decision about how to exercise his rights, and the record gives every indication that he did so.

Just as it has condemned the kind of calculated, coercive tactics employed in *Siebert*, the Supreme Court has also emphasized that where none of those tactics are present, "there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary." *Oregon v. Elstad*, 470 U.S. 298, 317-18 (1985). There is no evidence that the pre-warning conversation invalidated the voluntariness of Hitselberger's subsequent written waiver, and thus no grounds for suppression.

III. Hitselberger's Alleged Invocation of the Right to Counsel Did Not Require Agents to Stop Questioning Him

Defendant argues that during the April 11, 2012, interview, he invoked his right to counsel for all purposes and that any statements made thereafter should be suppressed. Hitselberger's statements should not be suppressed because any invocation was for the limited purpose of making a written statement, which did not require the agents to stop questioning him.

Agent Kesici testified that, over ninety minutes after Hitselberger executed a written waiver of his *Miranda* rights and as the interview was winding down, the agents made a standard request for a written statement. Upon this request, 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 it to us." Tr. 128:10-12. Hitselberger did not ask to see a lawyer at that time. *See, e.g.,* Tr. 172:2-5 ("He didn't tell me – he didn't ask. He said that he would prefer to [see an attorney] prior to any written statements."). In order to be "extra certain," Agents Kesici and Fowler "asked specifically just for the statement or to continue, and I recall making comments regarding that he was only requesting that on the rights advisement sheet, was for a written statement." Tr. 189:1-6; *see also* Government Ex. 12. Agent Kesici said that "I wanted to

clarify basically that he wasn't asking for an attorney at that time to continue speaking to us; that he just wasn't comfortable with a written statement and wanted an attorney for that purpose." Tr. 129:14-17. After discussing this with Hitselberger, the agents felt clear that Hitselberger was not asking to obtain a lawyer before answering further questions. *Id.* 129:18-19.

The agents continued talking to Hitselberger, but made no other reference to a written statement. Tr. 177:4-7. At the end of the interview, Hitselberger "said he enjoyed the conversation, he enjoyed our company, and, on second thought, he would like to provide a written statement," which he was willing to do the next day. Tr. 188:16-18. *See also* Tr. 176:15-18 ("He asked for a lawyer to consult prior to or to review his statement. We agreed and said that was perfectly acceptable. Before the end of the interview, he stated to us that, after second thought, he did prefer to provide a written statement."). The agents honored Hitselberger's request and Hitselberger chose a time the next day when he wanted to write a statement.[4]

"[A]fter a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." *Davis v. United States*, 512 U.S. 450, 461 (1994). Where a suspect is "indecisive in his request for counsel" or "the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Id.* at 459-60, 462.

While Hitselberger's allusions to a lawyer were prospective, equivocal, and ambiguous, the agents asked clarifying questions and made certain that Hitselberger was not requesting the presence of counsel before continuing the interview. It is "entirely proper" for agents to ask such

[4] At the beginning of the next day's interview, Hitselberger said he was willing to write a statement. After being shown his April 11 *Miranda* waiver form, Hitselberger then went back and forth about whether he wanted to consult a lawyer before making a written statement. *See* Government's Ex. 21 (video excerpt of April 12, 2012 interview); Testimony of Special Agent Adlin Velez, Tr. 228-245. Hitselberger clarified that he was not requesting a lawyer at that time, and proceeded to speak at length with the agents, who never did obtain a written statement from him.

clarifying questions, though they are not obligated to do so. *Davis*, 512 U.S. at 461-62. *See also Gresham v. United States*, 654 A.2d 871, 873 (D.C. 1995). Treating Hitselberger's references to an attorney as a request for counsel, the agents clarified with him that it was only for the purpose of making a written statement. *See* Tr. 176:15-18 ("He asked for a lawyer to consult prior to or to review his statement. We agreed and said that was perfectly acceptable."). Strictly limited to making a written statement, this invocation did not prohibit further questioning.

An invocation "serves as an absolute prohibition on further interrogation only if an accused invokes his right to counsel for all purposes." *United States v. Martin*, 664 F.3d 684, 688 (7th Cir. 2011). When the invocation is limited to a specific purpose, it does not prohibit continued questioning where the suspect has already waived the right to silence. The Supreme Court addressed this very issue in *Connecticut v. Barrett*, 479 U.S. 523 (1987), where police sought to question Barrett in connection with a sexual assault. After signing a *Miranda* waiver, Barrett said "he would not give the police any written statements but he had no problem in talking about the incident." *Id*. at 525. The police went on to question him and obtain a confession, several times, in fact, due to tape recording malfunctions. The Supreme Court reversed the Connecticut Supreme Court's suppression of the confessions, holding that Barrett's "limited invocation of his right to counsel" for the purpose of making a written statement did not bar the police from questioning him. *Id*. at 528. "Nothing in our decisions," the Court explained, "requires authorities to ignore the tenor or sense of a defendant's response to [*Miranda*] warnings," whose "fundamental purpose" is "to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process.'" *Id*. (*quoting Miranda*, 384 U.S. at 469). Hitselberger's clear choice here was to speak to the agents but not to write a statement, and the agents respected that choice.

The D.C. Circuit reached the same conclusion as *Barrett* a decade before, in *United States v. Frazier*, finding suppression unwarranted where a Mirandized defendant repeatedly declined to sign a statement, yet continued answering questions. 476 F.2d 891, 899 (1973) ("We cannot see how, under these circumstances . . . allowing appellant to pursue his evident desire to keep on talking was either an unreasonable or deceptive tactic . . . falling short of those concepts of ordered liberty which are at the core of the concept of due process."). Similarly, in *United States v. Martin*, 664 F.3d 684, 688 (7th Cir. 2011), after waiving his *Miranda* rights, the defendant was asked to make a written statement, and said "I'd rather talk to an attorney first before I do that." The Seventh Circuit found this invocation "unambiguous in light of the circumstances and clearly limited to written statements" and it did not prohibit officers from continuing to interrogate the defendant. *Id*. at 689. Even though Martin "never affirmatively expressed a desire to continue speaking with law enforcement officers without an attorney present" after saying he would not write a statement without an attorney, "[w]e can infer from Martin's actions, however, that he was not unwilling to do so" because "[h]e freely answered all of Deputy Morath's questions" and agreed to speak with detectives from another state. *Id*.

In this case, Hitselberger is much the same as Barrett, whose "limited requests for counsel . . . were accompanied by affirmative announcements of his willingness to speak with the authorities." *Barrett*, 479 U.S. at 529. In addition to specifically clarifying that he was comfortable talking to the agents, Hitselberger demonstrated that comfort by continuing to talk to them at length and voluntarily returning the next day to do so again. The agents asked questions to clarify Hitselberger's intent, and scrupulously recorded these efforts on the interview log. *Barrett* and *Frazier* clearly control here, and dictate that any invocation of the right to counsel by

Hitselberger was limited in scope and did not bar further questioning. Suppression of his subsequent statements therefore is not justified.

CONCLUSION

For the foregoing reasons, as well as those stated at the motions hearing and in the Government's Response to Motion to Suppress [Docket No. 46], defendant's Motion to Suppress Statements [Docket No. 42] should be denied.

Respectfully submitted,

RONALD C. MACHEN JR.
UNITED STATES ATTORNEY

By:
_____/s/_____
THOMAS A. BEDNAR
Assistant United States Attorney
National Security Section
555 4th Street, NW, 11th Floor
Washington, D.C. 20530
(202) 252-7877
D.C. Bar No. 493640
Thomas.bednar@usdoj.gov

JAY I. BRATT
Assistant United States Attorney
National Security Section
555 4th Street, NW, 11th Floor
Washington, D.C. 20530
(202) 252-7789
Illinois Bar No. 6187361
jay.bratt2@usdoj.gov

MONA N. SAHAF
Assistant United States Attorney
555 4th Street, NW
Washington, D.C. 20530
(202) 252-7080

D.C. Bar 497854
mona.sahaf@usdoj.gov

DEBORAH CURTIS
Trial Attorney, Counterespionage Section,
National Security Division
U.S. Department of Justice
600 E Street, NW, 10th Floor
Washington, D.C. 20530
(202) 233-2113
deborah.curtis@usdoj.gov

Certificate of Service

I, Thomas A. Bednar, certify that I served a copy of the foregoing Government's Supplemental Memorandum in Opposition to Motion to Suppress Statements by ECF on Mary Petras, Esq., counsel for defendant, this 13th day of September, 2013.

_____/s/ Tom Bednar_____
Thomas A. Bednar