UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTIONS TO SUPPRESS

Pending before this Honorable Court are Defendant's Motion to Suppress Tangible Evidence Seized Following Execution of Command Authorization [Dkt. #38] and Defendant's Motion to Suppress Tangible Evidence Seized Following Unlawful Stop and Search of Backpack [Dkt. # 39]. On September 6 and 9, 2013, the Court held hearings on these and additional pretrial motions. On October 31, 2013, the Court issued an Order for Supplemental Briefing [Dkt. #73], directing the parties to answer specific questions regarding the motions to suppress. In response, James Hitselberger, through undersigned counsel, respectfully submits the following.

I. MASTER SERGEANT HOLDEN VIOLATED MR. HITSELBERGER'S FOURTH AMENDMENT RIGHTS WHEN HE ORDERED MR. HITSELBERGER TO OPEN HIS BACKPACK AND WHEN HE ORDERED HIM TO REMOVE DOCUMENTS FROM THE BACKPACK.

According to the evidence presented at the September 6, 2013 hearing, on April 11, 2012, Master Sergeant Michael Alan Holden saw Mr. Hitselberger print documents, place them in his backpack, zip up the backpack and walk out of a restricted access area on the United States

Naval Base in Bahrain. Tr. 20-22.[1] Master Sergeant Holden followed Mr. Hitselberger out of the restricted access area and ordered him to "stop." Tr. 24:11-12. Mr. Hitselberger complied. *Id.* Master Sergeant Holden then ordered Mr. Hitselberger to put his backpack on a picnic table. Tr. 24:12. Mr. Hitselberger complied. *Id.* Master Sergeant Holden next ordered Mr. Hitselberger to "open it up," and "pull out" the documents. Tr. 24:15-16. Mr. Hitselberger complied by opening the backpack, pulling a document out and handing it to Master Sergeant Holden. Tr. 24:17-18. Believing there to be additional documents in the backpack, Master Sergeant Holden then ordered Mr. Hitselberger to "[p]ull the rest of them out," and Mr. Hitselberger again complied with the order. Tr. 24:22-23.

If a government agent has "probable cause to believe that a container holds contraband or evidence of a crime," the agent may seize the container "pending issuance of a warrant to examine its contents ." *United States v. Place*, 462 U.S. 696, 701 (1983); *United States v. Taylor*, 497 F.3d 673, 679 (D.C. Cir. 2007) ("[A]s a rule, even when officers may lawfully *seize* a package, they must obtain a warrant before examining its contents."); *United States v. Repress*, 9 F.3d 483, 486 (D.C. Cir. 1993) (practice of seizing container based on probable cause in order to get warrant approved long before *Place*). Here, rather than seizing Mr. Hitselberger's backpack and obtaining a command authorization to search, Master Sergeant Holden searched the backpack without a warrant. That Master Sergeant Holden ordered Mr. Hitselberger to unzip his backpack and remove documents, rather than searching the backpack himself, is of no moment because submission to demands made under the color of authority are not voluntary

[1]"Tr." refers to the transcript of the September 6, 2013 hearing, during which the government presented its evidence.

actions or consent. *See, e.g., Bumper v. North Carolina*, 391 U.S. 543, 549 (1968) (acquiescence to claim of lawful authority not valid consent); *United States v. Branch*, 545 F.2d 177, 184 n.12 (D.C. Cir. 1976) (searches and seizures cannot be validated by defendants' actions in submission to claim of lawful authority); *Lawyer v. City of Council Bluffs*, 361 F.3d 1099, 1103 (8th Cir. 2004) ("[A]ctions taken in response to a demand under color of authority may constitute a search, even where the officer conducts no physical search."). Because Master Sergeant Holden's actions constituted a search of the backpack and no exception to the warrant requirement applies, the use of the evidence seized from the backpack must be suppressed.

The Court has asked counsel to answer the following questions with regard to the search of the backpack.

A. Assuming that Mr. Hitselberger had a reasonable expectation of privacy in his backpack, was that expectation violated simply because he was required to unzip the bag? Or would a violation only occur if a government agent actually saw (or otherwise sensed) the contents of the bag?

When Master Sergeant Holden ordered Mr. Hitselberger to unzip his backpack and Mr. Hitselberger complied, a search occurred. *See United States v. Askew*, 529 F.3d 1119 (D.C. Cir. 2008). In *Askew*, the D.C. Circuit held that a police officer's unzipping of a defendant's jacket during a *Terry* stop constituted a search. *Id*. at 1127. The Court held that "[b]y zipping up his jacket, appellant unquestionably evidenced an intent to keep private whatever lay under it," and "[t]he involuntary opening of someone's clothing reveals to the world at large (not just to the searching police officer) what an individual obviously intends to keep private." *Id*. at 1127-28. The Court rejected the government's argument that a search did not occur because the police intended only to reveal a sweatshirt under a jacket, finding that the police could not have known

what other private information the unzipping would reveal. *Id*. at 1128-29. Similarly, here, by zipping his backpack, Mr. Hitselberger evidenced an intent to keep the contents private, and the unzipping of the backpack revealed "to whomever happens to be on the street," *id.*, the contents that were otherwise private. Whether or not anyone in fact saw the contents of the bag is irrelevant -- it is the act of exposing the contents that constitutes the search.

B. Did any government agent see or sense the contents of Mr. Hitselberger's backpack, apart from the documents that he produced?

Because the government did not argue that the required unzipping of the backpack did not constitute a search -- either because the contents were not revealed or for any other reason -- there is no evidence in the record regarding whether or not anyone saw anything in Mr. Hitselberger's backpack apart from the documents. Because the government did not raise or present evidence on this issue, the Court should not make a factual finding on this point.

C. If Mr. Hitselberger's bag was not searched when he was ordered to open it, did a search occur when he was forced to remove two documents from the bag and hand them to Master Sergeant Holden?

Even if a search only occurs where there is proof that someone actually saw something that was intended to be kept private, a search occurred when Master Sergeant Holden ordered Mr. Hitselberger to remove the documents and he complied. The documents were contained in the zipped backpack. "Closed packages or containers, such as [a] backpack, 'are in the general class of effects in which the public at large has a legitimate expectation of privacy,' making warrantless search of them 'presumptively unreasonable.'" *United States v. Young*, 573 F.3d 711, 721 (9th Cir. 2009) (quoting *United States v. Jacobsen*, 466 U.S. 109, 114-15 (1984)). The contents of Mr. Hitselberger's backpack were removed and revealed only upon Master Sergeant

Holden's demand, constituting an unlawful search. *See Askew*, 529 F.3d at 1127-28 (unzipping jacket, revealing what was underneath, constituted search).

D. Did Mr. Hitselberger have a reasonable expectation of privacy either in the fact that he was carrying those official documents -- which he had been seen to print and place in his backpack minutes before -- or in the contents of the documents themselves? Put differently, did Master Sergeant Holden's viewing of official documents that he knew to be within Mr. Hitselberger's backpack violate a constitutionally protected privacy interest?

Mr. Hitselberger had a reasonable expectation of privacy with regard to the contents of his backpack, even if the contents were illegal contraband. The Supreme Court has frequently held that "a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *United States v. Di Re*, 332 U.S. 581, 595 (1948). Even if the Court finds that the documents were contraband, this finding cannot justify the search. A search must be lawful from its inception, regardless of whether the result of the search is contraband or non-contraband. As the D.C. Circuit has explained:

> Neither police nor court, consistently with the Fourth Amendment, can reason backward to determine that no warrant was required if the container searched in fact concealed evidence of crime. Similarly, as to the reasonableness of a privacy expectation, the innocence or evil of the goods concealed cannot determine Fourth Amendment protection. . . . One has no greater or lesser expectation of privacy in a bag when it contains drugs prescribed by a physician for an embarrassing ailment than when it contains contraband.

United States v. Ross, 655 F.2d 1159, 1171 (D.C. Cir. 1981) (citations omitted), *reversed on other grounds,* 456 U.S. 798 (1982).

The Court's questions suggest that Master Sergeant Holden *knew* with absolute certainty that the documents in Mr. Hitselberger's backpack were classified documents that could not be

removed from the restricted access area. Whether or not the documents were classified or could be removed, of course, are disputed factual issues to be decided at trial. Moreover, regardless of Master Sergeant Holden's level of certainty with regard to whether or not classified documents were unlawfully contained in the backpack, he needed a warrant to search the backpack. *See, e.g., Johnson v. United States*, 333 U.S. 10, 14 n.14 (1948) ("Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.").

The circumstances here are no different than when a police officer sees a drug dealer put what the officer believes to be drugs into a sealed container. Regardless of how certain the officer is that he has seen drugs, the officer cannot search the container without a warrant, unless an exception to the warrant requirement applies -- for example, if he arrests the suspect and searches the container incident to the arrest. Here, no exception to the warrant requirement applied. To be clear, Master Sergeant Holden was not without recourse and was not required to simply let Mr. Hitselberger leave with the backpack. Assuming the Court finds that Master Sergeant Holden had probable cause to believe that the backpack contained contraband, he could have stopped Mr. Hitselberger, seized the backpack, and sought a warrant or a command authorization to the search of the backpack -- if the warrant was approved, he could then search the backpack. Master Sergeant Holden also may have been authorized to arrest Mr. Hitselberger and search the backpack incident to the arrest, but he did not arrest Mr. Hitselberger and a warrantless search cannot be justified as incident to an arrest unless an arrest occurs. *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 added)). Because no exception to the warrant requirement applies, the search of the backpack violated Mr. Hitselberger's Fourth Amendment rights, and the use of the evidence seized must be suppressed.

II. THE SIGN ALLEGEDLY POSTED AT THE ENTRANCE TO THE NAVAL BASE IN BAHRAIN DID NOT AUTHORIZE THE SEARCH OF MR. HITSELBERGER'S BACKPACK OR LIVING QUARTERS.

At the September 6, 2013 hearing in this matter, Naval Criminal Investigative Service Special Agent Raffi Kesici testified that signs were posted at the entrances to the Naval Base which read:

WARNING

U.S. NAVY PROPERTY

AUTHORIZED PERSONNEL ONLY

AUTHORIZED ENTRY ONTO
THIS INSTALLATION CONSTITUTES
CONSENT TO SEARCH OF
PERSONNEL AND THE PROPERTY
UNDER THEIR CONTROL

INTERNAL SECURITY ACT OF 1950
SECTION 21; 50 U.S.C. 797[[2]]

Tr.:102-03; Gov't Ex. 6, 9. Special Agent Kesici explained that he could not say with certainty

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[2] Section 797 provides that willful violations of defense property security regulations constitute misdemeanor offenses punishable by imprisonment of not more than one year.

that these were the same signs posted between September of 2011 and April of 2012, when Mr. Hitselberger worked on the base, but he was certain that signs similar in appearance with similar writing were posted. Tr. 142:13-14. Assuming the Court finds that these signs were posted when Mr. Hitselberger entered the base, the signs do not constitute implied consent to search Mr. Hitselberger's backpack or living quarters, as the government has argued.

As set forth in 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 [Dkt. #45], these signs authorized only searches *upon entering* the base. The evidence presented by the government at the September 6th hearing demonstrates that this was the intent, purpose, and general understanding of these signs. Staff Judge Advocate ("SJA") David Peck was the officer in charge of the Regional Legal Service Office, Europe, Africa, and Southwest Asia detachment, at the Naval base in Bahrain during the time that Mr. Hitselberger worked on the base. Tr. 199. One of his primary functions on the base was to provide legal advice to the commanding officer. Tr. 200. On direct examination by government counsel, he testified as follows:

> Q. What is the difference between an inspection and a search in the Naval context?
>
> A. Yeah, generally, inspection is not a quest for evidence in a criminal case. An inspection is being done for security reasons. For example, you know, you're searching people coming on and off the installation, and that's a security -- has a security purpose, not a criminal investigatory purpose. We have what is called health and comfort inspections in the units that they do in the barracks rooms to ensure that the people are maintaining the barracks in an appropriate sanitary manner, they have all the

> equipment they're supposed to have so they're operationally ready. They conduct those types of inspections. But a search authorization would be sought when there was an actual desire to look for evidence for use in potential criminal circumstances.
>
> Q. And then security-related searches of the type that you discussed, would those occur only at the entrances of the base or could those occur throughout the base?
>
> A. Normally, they were only at the entrance of the base. There was a banner, that's where they had the scheduled searches, either random bag searches or random vehicle searches, whatever the particular scheme was at the time. *There was a banner that was up that said that, you know, you were subject to being searched upon entry on the base.*

Tr. 204-05 (emphasis added). SJA Peck was the commander's attorney and the most authoritative voice with regard to searches that were authorized on the base. His testimony demonstrates that the signs posted on the base provided implied consent only for searches *upon entry* -- not searches at anytime or place on the base, as the government has argued. SJA Peck explained that whenever the authorities wanted to search somewhere on the base where someone had a reasonable expectation of privacy, a command authorization for search (the military functional equivalent of a warrant) was sought. Tr. 203: 1-10. Special Agent Kesici testified that a command authorization was not needed for every search conducted on the base, "[d]epending on who's doing the search and for what purpose." Tr. 196:6-8; *see also* Tr. 194:9-15. The same is true outside of military bases -- warrants are not required for vehicle searches based on probable cause, searches incident to arrest, searches of abandoned property, or other searches where an exception to the warrant requirement applies. Special Agent Kesici did not testify that the signs posted at the entrances to the base authorized searches of anyone at any time, as the government argues. Nonetheless, the government would have the Court find that the signs

implied consent for all searches, and therefore, no one on the base had a reasonable expectation of privacy in any area or any container on the base. The evidence does not support such a finding. This would abrogate the need for the whole command authorization procedure. No evidence before the Court contradicts SJA Peck's testimony with regard to the intent, purpose, and meaning of the signs or would support a finding that the signs authorized anything more than a search upon entering the base.

Despite SJA Peck's testimony and the evidence before the Court, the government continues to argue that the signs authorized military personnel to search anyone on the base or their belongings at any time. According to the government, entering a base with these signs posted constitutes implied consent. The Court has asked counsel to answer the following questions with respect to this argument.

A. Does the 'implied consent to search at any time' argument made by the government apply with equal force to Mr. Hitselberger who, although a civilian, was not a visitor to the base?

Civilians do not relinquish their Fourth Amendment rights when they agree to work on a military base. *See United States v. Rogers*, 388 F.Supp. 298, 301-02 (E.D. Va. 1975) (civilian military employee retains substantive rights guaranteed by Fourth Amendment). The government asks the Court to find that Mr. Hitselberger, as civilian employee, was subject to search at anytime while on the base -- in other words a finding that there is no reasonable expectation of privacy for anyone on the base. Neither the practice on the base in Bahrain -- where SJA Peck testified that a command authorization was sought anytime someone had an expectation of privacy where officials intended to search -- nor the case law supports such a broad finding. *See*, *e.g., Morgan v. United States*, 323 F.3d 776, 781 (9th Cir. 2003) ("A person presenting himself at

a military gate is similar to a person presenting himself at a security checkpoint at an airport, and in both situations there *may be* implied consent for a search." (emphasis added)). In *Morgan*, the court found that the district court went "too far in allowing a categorical exception to the probable cause rule for all searches on closed military bases," concluding that "the probable cause requirement is only obviated if the defendant impliedly consented to the search." *Id.* In support of its opposition to Mr. Hitselberger's motion, the government cited *Morgan v. United States (Morgan II)*, 166 F. App'x 292, 295 (9th Cir. 2006), which upheld the district court's finding, after remand, that the plaintiff implicitly consented to a search of his vehicle upon entering a military base, but in citing *Morgan II*, the government failed to acknowledge that the Ninth Circuit had previously rejected the same broad claim the government makes here -- that there is implied consent for all searches.

That fact that Mr. Hitselberger was a resident on the base in Bahrain, rather than merely a visitor, highlights the absurdity of the government's position. Under the government's theory, visitors would at least retain their expectation of privacy in their residence and their belongs that they choose not to bring with them onto the base. Residents, however, would have no expectation of privacy once they move onto the base.

The Court's October 31, 2013 Order notes that the government cited a number of cases in which civilian visitors to military installations were searched. Notably, these cases do not stand for the proposition that all visitors (or civilian employees or even military personnel) on every military base are subject to search at any time on any base. *See United States v. Jenkins*, 986 F.2d 76, 78 (4th Cir. 1993); *United States v. Roundtree*, No. 3:08mj109/EMT, 2008 WL 4327365, at *2-4 (N.D. Fla. Sept. 17, 2008); *Sanders v. Nunley*, 634 F. Supp. 474, 477 (N.D. Ga.

1985).

Jenkins stands only for the proposition that when a sign is posted that explicitly provides: "While on this installation all personnel and the property under their control are subject to search," searches are permissible of anyone at anytime. *Jenkins,* 986 F.2d at 77. As SJA Peck confirmed, this was not the case on the base in Bahrain, and the signs introduced by the government did not authorizes searches "while on this installation" but searches upon entering. Tr. 205:5.

Roundtree stands only for the proposition that when a sign indicating that vehicles entering the base are subject to search, there is implied consent to search a vehicle *when entering* a military base, just as SJA Peck testified there was in Bahrain. *Roundtree*, 2008 WL 4327365, at *2-4.

And *Nunley*, only stands for the proposition that when deciding a civil motion for summary judgement, all facts alleged by a defendant that are not denied by a plaintiff must be deemed admitted by the plaintiff. *Nunley*, 634 F. Supp. at 477. The defendant in that civil matter, a detective at the Navy Exchange on a base in Florida, alleged in his summary judgement motion 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." *Id.* The plaintiff did not specifically deny this statement, and thus the court treated it as conceded for the purposes of that litigation. Here, the government has cited the defendant's statement as persuasive authority for this proposition. It is not, and the governments citation of *Nunley* for this proposition demonstrates how far the government is stretching find support for its

position. The court in *Nunley* made no finding on this issue, but rather merely accepted defendant's statement as true for purposes of the summary judgment motion as the local rules required -- and this particular uncontested factual allegation did not bear on the result of the motion in *Nunley* because the court in *Nunley* found that the plaintiff was properly detained based on probable cause that she was committing a crime. More importantly, SJA Peck's testimony demonstrates that the proposition quoted from *Nunley* is not an accurate statement of permissible searches on the base in Bahrain -- no such general understanding existed and no such routine searches occurred in Bahrain. Rather, searches were authorized at the entrance; otherwise, unless an exception to the warrant requirement applied, a Command Authorization for Search and Seizure was required. No exception applied under the circumstances of this case.

B. Do members of the military also implicitly consent to search in the same circumstances, or are such searches governed by a different body of law?

Members of the military retain Fourth Amendment protections against unreasonable searches and seizures, but have less expectation of privacy on a military base. *See, e.g., Henson v. United States*, 27 Fed. Cl. 581, 592-93 (1993). However, as SJA Peck and Special Agent Kesici testified, even members of the military have a reasonable expectation of privacy in some areas of the base in Bahrain and when law enforcement want to search such areas, a command authorization is sought. The military has developed an entire body of law governing the requirements for obtaining command authorization for searches of property on military bases when there is a reasonable expectation of privacy. *See* Military Rule of Evidence 315. The government's reading of the signs at issue here -- that they imply consent to search anyone at anytime -- would render this entire body of law unnecessary. Under the government's theory, as

long as the signs are posted -- and agent Kesici testified that similar signs are posted at the dozens of bases that he has been on, Tr. 195:14-22 -- no command authorization would ever be necessary. The Fourth Amendment does no permit such a broad finding.

Conclusion

For the foregoing reasons, and such other reasons as previously presented to the Court, 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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