

DEPARTMENT OF THE NAVY
JUDGE ADVOCATE GENERAL’S CORPS

2009 NATIONAL MOOT COURT COMPETITION
TABLE OF CONTENTS

Fact Pattern.....2

Attachment 1 – Charge Sheet.....26

Attachment 2 – Diagram Drawn as Part of CDR Norris’ Testimony...28

Attachment 3 – Command Authorization for Search and Seizure.....29

Attachment 4 – Permissive Authorization for Search and Seizure.....30

Attachment 5 – Four Photographs of the Automobile

Attachment 6 – Defense Motion to Suppress Physical Evidence
Seized From the Residence.....34

Attachment 7 – Defense Motion to Suppress Physical Evidence
Seized From the Automobile.....45

Attachment 8 – Defense Motion to Suppress Statements of
The Accused.....51

Attachment 9 – Government Opposition to Defense Motion
to Suppress Physical Evidence Seized from the Residence.....58

Attachment 10 – Government Opposition to Defense Motion
to Suppress Physical Evidence Seized from the Automobile65

Attachment 11 – Government Opposition to Defense Motion
to Suppress Statements of the Accused.....74

Attachment 12 – Findings of Fact and Rulings of Law on Defense
Motion to Suppress Physical Evidence Seized from the Residence.....79

Attachment 13 – Findings of Fact and Rulings of Law on Defense
Motion to Suppress Physical Evidence Seized from the Vehicle.....86

Attachment 14 – Findings of Fact and Rulings of Law on Defense
Motion to Suppress Statements of the Accused.....91

November 2009 Moot Court Problem

The National Moot Court Competition Problem is a post trial argument to the Navy-Marine Corps Court of Criminal Appeals (“NMCCA”). The cast of characters for this fact pattern are as follows:

Accused/Convicted:	Lieutenant Commander (LCDR) Kosmo Kramer
LCDR Kramer’s wife:	Parish Holten
Tipster to NCIS:	Intelligence Specialist Petty Officer Second Class (IS2) Squeaky Clean
NCIS Special Agent #1:	Special Agent Jack Closeau
NCIS Special Agent #2:	Special Agent Martin Colombo
NCIS Special Agent #3:	Special Agent Magnum T.I.
NCIS Special Agent #4:	Special Agent Jenny Gumshoe
NCIS Special Agent #5:	Special Agent L.J. Gebbs
Apprehender:	CDR Huck Norris, SEAL
Facebook woman:	Ms. Meghan Foxy
LCDR Kramer’s Commanding Officer	Captain (CAPT) Jon Morgan
LCDR Kramer’s Executive Officer:	CDR Jack Spurrow
Bookie:	Mr. Huggy Bear
Limegreenland national:	Mr. Raz Algule
Military Judge:	Lieutenant Colonel (LtCol) Roger Hua, USMC
Detailed Trial Counsel:	LCDR Jack McCoy, JAGC, USN
Assistant Trial Counsel:	LT Angie Harmonious, JAGC, USN
Private Defense Counsel:	Alan Chore, Esq. of Crain, Peel, & Schlit, LLP
Detailed Defense counsel:	LT Tim Cruz, JAGC, USN
Assistant Defense Counsel:	LCDR Demina Moore, JAGC, USN

The tip to NCIS

NCIS Special Agent Closeau received a call on Thursday, 23 April 2009, from Intelligence Specialist Second Class (IS2) Squeaky Clean who works with the accused. IS2 Clean informed Special Agent Closeau that he believed the accused was selling classified information to raise money to cover massive gambling debts. IS2 Clean informed Special Agent Closeau that he has answered calls for the accused from an individual that identified himself as Mr. Huggy Bear. Huggy Bear made various threats that were to be conveyed to LCDR Kramer. Mr. Bear called LCDR Kramer a deadbeat degenerate gambler who had run up quite a tab down at the Black Pearl. Mr. Bear explained the Black Pearl is a gambling hall and LCDR Kramer is a regular.

Huggy Bear indicated LCDR Kramer had been able to raise large sums on short notice in the past to pay off debts, to bring his account current, and it was time for him to do so again. IS2 Clean told Special Agent Closeau that LCDR Kramer does seem to have a high volume of classified documents in his office, including documents that do not seem relevant to his immediate needs. IS2 Clean informed Special Agent Closeau that based on the calls from Huggy Bear and the high volume of classified documents LCDR Kramer has access to he thinks may be selling classified documents to cover his gambling debts. Special Agent Closeau asked if there was anything else IS2 wanted to share and IS2 responded that he had seen LCDR Kramer popping pills from bottles that do not look like prescription pill bottles from the pharmacy. IS2 did not know what the pills were or have any other information about them.

Special Agent Closeau made an appointment for IS2 Squeaky Clean to come to the Naval Criminal Investigative Services (NCIS) offices the next morning, Friday, 24 April 2009, for an appointment with his superior, Special Agent Colombo, to give a signed, sworn statement and a video recorded interview.

The initial investigation

IS2 Clean did not appear for his Friday morning appointment with NCIS. Special Agent Colombo attempted to contact IS2 Clean at his workspace that morning to ask why he did not appear for the interview but IS2 Clean was not there. IS2 Clean did not report for duty at all that morning. He never contacted the command to request leave or a sick-in-quarters chit. He simply failed to report for duty that morning. Special Agent Colombo went to IS2 Clean's residence that evening to follow up. There was a light on inside the house but no one answered the door. Special Agent Colombo noticed the light bulb to the front porch light had been removed. He retrieved a flashlight and observed a small blood spatter on the front door. Special Agent Colombo then peered through the first floor windows inside the house. The house was in disarray.

In an effort to gather additional information, NCIS Special Agent Magnum T.I. attempted to access LCDR Kramer's Facebook page. The security settings on the Facebook page would not allow Special Agent Magnum T.I. to see anything other than the fact that LCDR Kramer had an account. Special Agent Magnum T.I. enlisted the assistance of a confidential informant, Ms.

Meghan Foxy, to help him gain access to LCDR Kramer's Facebook account. Ms. Foxy befriended the suspect by using a photo of herself and requesting his help as a poker tutor. She indicated that she saw him do very well in a poker game at the Black Pearl, an unlicensed illegal gambling hall. Ms. Foxy was granted "friend status" by LCDR Kramer within an hour of her request. Special Agent Magnum T.I. then used that status to investigate LCDR Kramer's Facebook page. While exploring around the Facebook page, Special Agent Magnum T.I. discovered posts made by LCDR Kramer about several large sports bets he had won and poker games where he had won big. Additionally, there were posts about tough bets and huge losses he had incurred. There were also posts about the use of, and amazing properties of, the prescription drug, Provigil.

Special Agent Colombo sought out authorization to search LCDR Kramer's office on board Naval Air Station Jacksonville (NAS JAX) from the Commanding Officer of the base, CAPT Jon Morgan, USN. Special Agent Colombo had two affidavits in support of his request. The first was from Special Agent Closeau regarding the information received via telephone call from IS2 Squeaky Clean. The second was from Special Agent Magnum T.I. regarding the information gathered from LCDR Kramer's Facebook page. By the time Special Agent Colombo got the affidavits together it was Friday evening and CAPT Morgan had already left the office to fly to Washington D.C. for the weekend, to attend a conference at the Washington Navy Yard. The Executive Officer of the base, CDR Jack Spurrow, returned to the office and met with Special Agent Colombo. After reviewing the affidavits, CDR Spurrow signed the Command Authorization for Search and Seizure as the acting Commanding Officer. See Attachment 2.

The NCIS Agents wanted to search both LCDR Kramer's office and his off base residence. To accomplish their goal they split into three teams acting in concert. Team 1 was to search LCDR Kramer's office on base while Teams 2 and 3 went to the off base residence. Team 2 was to get LCDR Kramer to come to the NCIS office building on board NAS JAX for an interview regarding the missing IS2 Clean. While LCDR Kramer was being interviewed, Team 3 was to obtain consent from LCDR Kramer's wife, Parish Holten, to search their residence.

Teams 2 and 3 arrived at LCDR Kramer's residence at 1900 on Friday evening. Special Agent Colombo, approached the house, a single family residence with a small front porch, and rang the doorbell. LCDR Kramer answered the door. Special Agent Colombo identified himself and informed LCDR Kramer that NCIS was looking into the disappearance of IS2 Clean. LCDR Kramer asked why NCIS was involved for a one-day unauthorized absence. Special Agent Colombo informed him there were suspicious circumstances surrounding IS2 Clean's disappearance and NCIS is taking it seriously. Special Agent Colombo asked LCDR Kramer to come down to NCIS for an interview. LCDR Kramer initially resisted and Special Agent Colombo rephrased his request, making it clear that one of LCDR Kramer's sailors was missing and NCIS was seeking his cooperation in their investigation. LCDR Kramer reconsidered and agreed to go to NCIS for a video recorded interview. LCDR Kramer got in his car and drove from his house. Special Agent Colombo followed in his vehicle.

Obtaining consent to search the residence

Team 3, consisting of Special Agents Magnum and Closeau were on the scene while Special Agent Colombo approached the house and had the conversation with LCDR Kramer on the front stoop. They waited in their vehicle parked in front of the next door neighbor's house. Agents Magnum and Closeau watched LCDR Kramer drive from his house and Special Agent Colombo follow him from the house. Several minutes later, Special Agent Magnum received a phone call from Special Agent Colombo. Special Agent Colombo relayed that he had LCDR Kramer in an interview room in the NICS building and he had refused to give consent to search his house. Following the phone call they exited their vehicle and approached the Kramer residence.

Special Agent Magnum T.I. knocked on the door and Mrs. Parish Holten answered. The Special Agents identified themselves with their badges and confirmed she was married to LCDR Kramer. The Agents then requested her permission to search the house for evidence. She asked them what they were looking for. The NCIS Agents informed her they had information that her husband was engaged in massive illegal gambling and drug use. They explained that they have to follow up on the accusations so it would be easiest if she would let them look around so they can put the matter to rest. She laughed and said, "Hilarious! Big time gambler? No way." She refused to give them her consent. The Agents suggested if she is uncomfortable that she call her husband, so they do not have to go all the way to the base to get his permission, and then come back and look around. She agreed to call him, "Sure, I'm gonna call him, this is funny." She attempted to call her husband and did not get an answer on either his cell phone or his work phone. The Special Agents again requested consent to search. She again refused.

The agents pressed on by telling her they already had command authorization to search his office. They told her they can get authority to search the house as well. They told her that would make it a lengthy process and they will have to keep everybody up all night. The agents told her that if she will let them look around now, they will be quick and get this thing done. They further prompt her by stating, "We are not going to find anything anyway, right?" She relented, laughed and she, "Big time gambling? Not a chance. We're broke. If he was making big bucks gambling or dealing drugs, we wouldn't be so broke all the time. You guys want to look around lets get it over with, no loose cash or drugs around here. You are only going to find unpaid bills and booze in this place. Besides, I could use the company while you look around." She signed the Permissive Authorization to Search Form.

The search of the residence

Special Agents Magnum and Closeau conducted the search. The majority of the search was uneventful. The final room the agents searched was the den. As the agents approached the door, Parish Holten told them the room belonged to her husband, that it was his "man room." She told them it was his room, that she was not in charge of the room and they should not hold his poor decorating tastes against her. The door to the den was closed. While the door did have a lock it was unlocked. The den contained a poker table, a desk with a computer, a wet bar, a big

flat screen TV, a couple of chairs, and a closet. Special Agent Closeau went to the computer desk and began rummaging while Special Agent Magnum went to the closet and began rummaging. Parish Holten told Special Agent Magnum that the closet was used by her husband to store his Navy uniforms and gear. The closet had military uniforms hanging and military gear folded and placed on the shelving units. Several pairs of military boots and shoes were neatly aligned on the floor. There was also a black leather briefcase on the floor of the closet. Special Agent Magnum placed the briefcase on the bar and examined it. The briefcase had brass hardware engraved with the initials "KK". The briefcase was closed but unlocked. Special Agent Magnum opened the briefcase and discovered a large amount of U.S. currency, a cellular telephone, and a pill bottle.

Special Agent Magnum removed the pill bottle and examined it and its contents, then placed it back inside the briefcase. He then removed the cell phone --- an Apple iPhone, and turned it on. He checked the call log to check for recent phone calls. No phone calls had been made from the phone. He then checked the text message history. There was only one exchange stored on the phone. It read:

To Pre-programmed number 1: have docs u want but taking big risk-reward better match risk. Double last price
From Pre-programmed number 1: Deal - use same exchange arrangements

Special Agent Magnum T.I. noted the phone was capable of taking photographs and he opened the stored photographs on the phone. There were photos of over 100 documents stored on the phone. The documents appeared to pertain to contingency plans for invading the nation of Limegreenland. Special Agent Magnum showed his partner Special Agent Closeau what he had found and they called Special Agent Colombo, the lead agent on the case to report their findings.

The interview at NCIS

Meanwhile, the accused arrived at NCIS on board NAS JAX and was escorted to an interview room. Special Agent Colombo took his time questioning the accused. Special Agent Colombo started off with a few preliminary questions and asked for consent to search his residence. LCDR Kramer answered the questions but expressly refused to give consent to search his residence. Special Agent Colombo told LCDR Kramer he needed to grab a cup of coffee. He left the interview room and called Special Agent Magnum T.I. on his cell phone to give him an update and tell him to seek consent from the wife. Special Agent Colombo returned to the interview room and begins going into excruciating detail about IS2 Clean. After ninety minutes of answering questions, LCDR Kramer began to get frustrated and asked how much longer the interview was going to take. Special Agent Colombo told him that one of his sailors had gone missing under suspicious circumstances and NCIS needed everyone's help to find out what happened. LCDR Kramer acknowledged he would help. He continued answering questions for about another thirty minutes before he refused to answer any more questions and concluded the interview. He stormed out of NCIS mumbling about how they should not be wasting their time asking him questions, they should be out looking for IS2. Nearly immediately after LCDR Kramer stormed out of NCIS, Special Agent Colombo received a call on a land line from Special

Agent Closeau at the Kramer residence. Special Agent Closeau informed Special Agent Colombo that after getting consent from LCDR Kramer's wife they had searched his house. They found a briefcase containing approximately \$200,000 in cash, a bottle of pills without a prescription label, and a cell phone containing pictures of classified documents and a very suspicious text message exchange. They had not yet read the documents but they appeared to pertain to contingency plans to invade the nation of Limestone. Special Agent Colombo told them to exit the residence, but stay outside the house, and apprehend LCDR Kramer on sight.

Special Agent Colombo then called Team 1, Special Agents Gumshoe and Gebbs, who were searching LCDR Kramer's office to update them. Special Agent Colombo informed Special Agents Gumshoe and Gebbs that evidence was found at the residence and instructed them they are to apprehend LCDR Kramer on sight. Special Agent Gebbs informed Special Agent Colombo that they were nearly done searching the office but had not found anything noteworthy.

Pursuit and apprehension

While Special Agent Gebbs was standing at the window of LCDR Kramer's office speaking to Special Agent Colombo on his cell phone, LCDR Kramer appeared in the doorway of the foyer into his office. LCDR Kramer observed the two NCIS Agents in his office, Special Agent Gebbs standing by his window talking on his cell phone and Special Agent Gumshoe going through the contents of his credenza. Special Agent Gebbs saw LCDR Kramer in the foyer doorway, dropped his cell phone, reached for his weapon, and shouted, "freeze, you are under arrest!" LCDR Kramer turned in the doorway and ran. Special Agent Gebbs drew his weapon and gave chase. Special Agent Colombo overheard the "Freeze you are under arrest" exclamation through the cell phone and he immediately called base security and told them to lock down the base and send cars to LCDR Kramer's building for support.

LCDR Kramer fled the building with both NCIS Agents in pursuit. LCDR Kramer ran from the building into the parking lot towards his car. Both Agents had their guns drawn and Special Agent Gumshoe shouted, "freeze, NCIS, you are under arrest." LCDR Kramer disregarded her and kept running towards his car, a convertible with the top down. The sirens of the base security vehicles could be heard in the background approaching the building.

CDR Huck Norris, an experienced Navy SEAL operative, happened to be out for a run that Friday night, getting a late night workout. CDR Norris was just approaching the parking lot as he heard Special Agent Gumshoe shout, "Freeze, NCIS, you are under arrest." He could hear the sirens in the background and he could see LCDR Kramer rapidly approaching his car, the only one in the vicinity in the parking lot. The agents were about 100 feet behind him in pursuit. As LCDR Kramer reached his convertible with key in hand he was preparing to leap into the car without using the door when CDR Norris on a full sprint, took him down to the ground via a full body tackle. LCDR Kramer is six feet tall and an average build. Upon subduing him CDR Norris demanded to know what he was running from. LCDR Kramer did not respond as the wind had been knocked from him during the tackle. CDR Norris tied LCDR Kramer's hands

behind his back using LCDR Kramer's own belt and again demanded, "What in the hell is going on here?" LCDR Kramer responded, "I did some very bad stuff. And it just caught up with me."

Special Agents Gumshoe and Gebbs arrived on the scene of the downed LCDR Kramer. Special Agent Gebbs stood over LCDR Kramer and provided cover while Special Agent Gumshoe frisked him for weapons. Upon finding none, Special Agent Gumshoe removed the belt that was securing LCDR Kramer's hands and stood him on his feet. As she began to escort him from the scene to her vehicle he was never closer to his vehicle than when CDR Norris tackled him. As Special Agent Gumshoe and CDR Norris were removing LCDR Kramer from the scene, Special Agent Gebbs conducted a search of LCDR Kramer's convertible.

In the passenger seat of the vehicle Special Agent Gebbs noticed a gym bag. The bag was only partially zipped closed. Special Agent Gebbs pat the exterior flap of the bag and felt a pill bottle in the exterior flap. The exterior flap was capable of being secured but was unsecured. Special Agent Gebbs lifted up the flap and discovered a standard pharmacy prescription medication pill bottle. The prescription label was for LCDR Kramer and the medication prescribed was Lortab. However, the prescription date was from 2006. Special Agent Gebbs placed the pill bottle on the trunk of the vehicle and removed the entire bag from the vehicle and placed it on the trunk as well. Special Agent Gebbs then opened the car door and began to search the interior of the vehicle. The driver's side door contained a storage compartment. The storage compartment is not a closed container, rather open to view. Inside the compartment, Special Agent Gebbs found a cellular telephone -- an Apple iPhone. The phone was powered off. He seized the cell phone. Special Agent Gebbs then returned to the pill bottle he had placed on the trunk. He opened the pill bottle and saw there were several pills inside. Special Agent Gebbs seized the pill bottle, its contents, and the gym bag.

The first of the base security vehicles arrived on scene and parked about 20 feet away from LCDR Kramer's vehicle as Special Agent Gebbs was beginning his search of the vehicle. As LCDR Kramer was being placed into hand cuffs at the base security vehicle Special Agent Gebbs was examining the cellular phone. LCDR Kramer was placed in the backseat of one of the base security vehicles. LCDR Kramer was driven from the scene by base security while Special Agent Gebbs returned to the items he had placed on the trunk of the convertible. The next morning a tow truck was brought to the scene to remove the convertible from its parking spot in the parking lot. Special Agent Gebbs was present and completed a written inventory of the contents of the vehicle before it was towed. The vehicle was towed to the NCIS building for storage.

The iPhone seized from LCDR Kramer's vehicle was analyzed after it was brought back to NCIS. The phone had photos of classified documents saved on its memory. The pills were analyzed at the drug lab on board NAS JAX. The drug lab reported the pills were Modafinil, otherwise known as Provigil.

The custodial NCIS interview

Base security took LCDR Kramer to NCIS for a video recorded interview. Special Agent Gumshoe took LCDR Kramer into the NCIS interview room. Special Agent Magnum T.I. of Team 3 arrived at the NCIS building with the briefcase that was seized from the residence. After meeting briefly with Special Agent Colombo and developing a plan for the interrogation he walked into the room and without saying anything placed the black briefcase he seized from LCDR Kramer's residence on the table. Special Agent Colombo then entered the interview room and informed LCDR Kramer that they were video recording the interview and advised him again of his Uniform Code of Military Justice Article 31(b) rights warnings against compulsory self-incrimination. The conversation went as follows:

Colombo: You are suspected of the following offenses: homicide; espionage; accumulation of massive gambling debts; and flight from apprehension. You have the right to remain silent, any statement you make may be used against you in a trial by court-martial. You have the right to consult with a lawyer before questioning, your own civilian lawyer, or a military lawyer appointed to you, or both. You have the right to have that lawyer present during this interview. If you decide to answer questions now without a lawyer present, you have the right to stop this interview at any time. You have the right to stop answering questions at any time to obtain a lawyer. Do you understand?

Kramer: Yes I understand.

Colombo: Do you understand the offenses you are suspected of?

Kramer: Yes.

Colombo: Do you understand that you can remain silent?

Kramer: Yes.

Colombo: Do you understand that you have a right to an attorney, either before you answer questions, or with you while you are answering questions?

Kramer: Yes.

Colombo: Do you want a lawyer?

Kramer: What would be the point? You just took my money. I can't afford to hire one.

Colombo: Do you understand that you have a right to a military lawyer appointed to you at no cost?

Kramer: I understand and I waive my right to a lawyer's presence.

Colombo: Do you want to answer questions and make a statement?

Kramer: Yes.

Colombo: While you were at NCIS, a team of Special Agents was searching your house. They found the briefcase. This briefcase. We have been inside the briefcase, we both know what was inside the briefcase. Let's start with a simple question, is this your briefcase?

Kramer: Yes it is.

Colombo: And the contents are yours as well?

Kramer: Kind of. The cell phone in there is not really mine. There is a guy who provides the phones. I would take pictures with the phones, then give the phones back to him.

Colombo: So the phone is not actually yours, but it was in your custody, and you used it?

Kramer: Yes.

Colombo: What about the rest of the stuff in the briefcase?

Kramer: The rest of the stuff in the briefcase is mine.
Colombo: The pills?
Kramer: Yes, the pills are mine
Colombo: The money?
Kramer: The money is mine but not from what you think. I won that money gambling. It is not money from selling documents...

After completing the interview LCDR Kramer was taken to the brig on board NAS JAX.

NCIS handing over investigation to RLSO

Special Agent Colombo completed and submitted a report of his investigation to the Region Legal Service Office Southeast (“RLSO SE”). Special Agent Colombo had a meeting the next day with the officer responsible for the daily operations of RLSO SE, the Senior Trial Counsel, to brief him as to the status of the investigation. The Senior Trial Counsel detailed LCDR Jack McCoy as lead Trial Counsel to prosecute the case. A charge sheet was drafted and charges were preferred against LCDR Kramer. See attachment 1. Unfortunately, Special Agent Colombo was never able to develop enough evidence to charge LCDR Kramer with the disappearance of IS2 Squeaky Clean.

Two JAG Corps attorneys from the Navy Region Legal Services Office Southeast (“NLSO SE”) were detailed to the case to defend LCDR Kramer. LCDR Kramer also hired a private attorney to assist in his defense, Alan Chore of the well-known Boston firm of Crain, Peel, & Schlit. CAPT Morgan, acting as the Special Court-Martial Convening Authority (“SPCMCA”), then appointed an investigating officer (“IO”) to serve in a quasi-judicial capacity and conduct a pretrial investigation hearing under Article 32 of the Uniform Code of Military Justice (“UCMJ”) to make recommendations regarding whether the preferred charges should be dismissed, referred to a Special Court-Martial, or referred to a General Court-Martial.

Article 32 hearing

An Article 32 hearing was conducted to investigate the preferred charges. After hearing all of the witnesses, the investigating officer issued a report to CAPT Morgan, the SPCMCA, recommending that the case proceed to General Court-Martial. Trial Counsel concurred in that recommendation. The SPCMCA accepted the recommendation and the preferred charges were forwarded to Admiral (“ADM”) Ratta Tuie, the regional General Court-Martial Convening Authority (“GCMCA”). ADM Tuie’s staff lawyer, known as his Staff Judge Advocate, reviewed the NCIS investigation, the charge sheet, the Article 32 investigation and the recommendations of the investigating officer, the Trial Counsel, and the SPCMCA. Pursuant to UCMJ Article 34, the Staff Judge Advocate recommended the charges be referred to a General Court-Martial. ADM Ratta Tuie concurred and referred the case to a General Court-Martial.

Motions preceding the General Court-Martial

The Defense submitted three motions. See Attachments 6, 7, and 8. The first was a motion to suppress the following items of evidence seized by the agents during the search of his residence:

- 1) The currency found within the briefcase;
- 2) The pill bottle and 37 pills contained therein; and
- 3) The cellular phone found within the briefcase along with the text message exchange found on the phone and the 141 images stored in the phone's memory.

The second motion was to suppress the following items of evidence seized by Special Agent Gebbs during the search of LCDR Kramer's vehicle:

- 1) The pill bottle and the 15 pills contained within the pill bottle; and
- 2) The cellular phone seized from inside the vehicle and the 47 images stored in the phone's memory.

The third motion was to suppress the statements made by the accused to CDR Huck Norris. The Government opposed all three motions. Attachments 9, 10, and 11.

Hearing on defense motion to suppress contents of residence search

On 13 July, 2009 evidentiary hearings were conducted on the defense motions. The first hearing was in connection with the defense motion to suppress the evidence seized in the consent based search of LCDR Kramer's residence. The Military Judge indicated the defense motion was sufficient to raise the issue of the validity of the consent given by Mrs. Parish Holten to search the residence. The Government called NCIS Special Agent Magnum T.I. to the stand. The trial counsel, LCDR Jack McCoy, JAGC, laid a foundation that Special Agent Magnum T.I. was involved in the investigation; that he was on the scene when the accused volunteered to drive from his house to the NCIS office for an interview; that he was one of the two agents that went to the front door of the house after LCDR Kramer left. The following testimony was elicited as well:

Q: After you knocked on the door to the residence of the accused, who answered?

A: Parish Holten, the wife of the accused.

Q: How did you know she was LCDR Kramer's wife?

A: I had reviewed his service record book as part of the investigation and I knew he was married. I asked if she was married to LCDR Kramer and responded affirmatively.

Q: Did you know anything else about Mrs. Parish Holten?

A: Yes. I knew that she was 29 years old and college educated.

Q: How did you know those things?

A: That information was in LCDR Kramer's service record book.
Q: Turning back to that night, was there anyone other than Mrs. Holten in the doorway?
A: No.
Q: What happened next?
A: I identified myself and my partner, Special Agent Closeau, then asked for her consent to search her residence.
Q: Did she give consent?
A: Not at first. We had a conversation for a few minutes at the doorway.
Q: What was the result of that conversation?
A: She gave Special Agent Closeau and myself consent to search her residence.
Q: When she gave you consent to search her residence was there anyone else in the doorway?
A: No.
Q: Was the consent verbal?
A: Yes, but I had her sign a PASS form.
Q: Please explain what you mean by a PASS form.
A: PASS stands for Permissive Authorization to Search and Seize. It is the form we use to create a written record when a person gives us consent to search.

LCDR McCoy handed the witness a PASS form and the witness authenticated the document as the one signed by Mrs. Holten on the evening in question. The Trial Counsel offered the document into evidence. Defense Counsel made no objection and the document was received into evidence. Attachment 3.

Q: Did she appear to understand what she was signing?
A: Yes, we spoke for several minutes in the doorway and she understood that we wanted to look around inside her house for evidence of crime.
Q: Did she understand that she could refuse consent?
A: Yes.
Q: How do you know she understood she could refuse consent?
A: Because she did initially refuse. But after we talked at the door for a bit she changed her mind and decided to give us consent.
Q: Did you construe any limitations on her consent to search?
A: No, she consented to a search of her residence.
Q: Did you execute the search of the residence of the accused?
A: Yes, Special Agent Closeau and I executed the search.
Q: At any time after Mrs. Holten gave you consent did she revoke the consent?
A: No.
Q: At any time during the search did anyone attempt to stop you from searching further?
A: No.
Q: In executing that search, did you seize anything?
A: Yes, I seized a briefcase and its contents.
Q: What were the contents of the briefcase you seized from the residence of the accused?
A: A bottle of pills, a cell phone, and \$200,000 cash.
Q: Was that \$200,000 in U.S. currency?
A: Yes.

Q: You mentioned a bottle of pills, please describe it?
A: A standard kind of pill bottle you get from a pharmacy.
Q: Was the bottle empty?
A: No, there were several pills inside the bottle, 37 pills to be exact.
Q: Can you tell us anything else about the bottle?
A: There was no prescription label on the bottle.
Q: What if anything did you infer from that?
A: Based on my training and experience, I inferred that the pills were not legitimately prescribed.
Q: Why did you reach that conclusion?
A: People keep prescription meds in the bottles they are prescribed in, in order to not confuse the meds and to have the instructions for how to follow the prescriptions with the meds. This bottle did not have a prescription label. That suggested to me that there was no prescription for the pills.
Q: Anything else?
A: Yes, based on information we had developed as part of the investigation we believed the accused to be abusing prescription medications, specifically Provigil.
Q: Please explain how your investigation uncovered such information?
A: There were repeated references to Provigil on the Facebook page belonging to the accused.
DC: Objection, hearsay.
TC: Your honor, the statements from the Facebook page of the accused fall within the hearsay exception for statements by a party opponent.
DC: Your honor, the hearsay exception only applies if the Government can prove the statements were actually typed by the accused. The government has not offered any evidence on the point.
MJ: Objection sustained, for now.
Q: Special Agent Magnum, as part of your investigation did you examine the online activities of the accused?
A: Yes.
Q: Please elaborate.
A: We got a look at his Facebook account.
Q: Is there any security on Facebook accounts?
A: Yes, they are password protected.
Q: How did you know it was his Facebook account?
A: It was registered under his name, it had personal information about him and his family posted, there were pictures of him and his wife posted.
Q: Was there anything else of note on the Facebook sight?
DC: Objection. Hearsay.
TC: Your honor, the Government has laid a foundation demonstrating the Facebook account belonged to the accused, it was password protected, the accused made the entries on the account, they are his statements and therefore fall within the hearsay exception for statements by a party opponent.
MJ: Objection overruled. Answer the question.
A: Yes. The accused bragged about his gambling prowess. He really laid it on thick, like he was Doyle Bronson himself.

Q: Please explain.
A: He bragged about his exploits in Texas Hold Em, in both online tournaments, and in live games.
Q: Did he explain where these live games took place?
A: Yes, at clubs in Jacksonville, Florida. He only mentioned one location by name, The Black Pearl. But he stated he gambled at lots of other clubs as well.
Q: Any other references to gambling?
A: Yes, he bragged about wagering hundreds of thousands of dollars on sports. Both on line, with companies based out of the Bahamas and through local bookies.
Q: Did he mention any other hobbies on his Facebook page?
A: He spoke very highly of the drug, Provigil.
Q: What exactly did he say about Provigil?
A: That it was a wonder drug. That he could go on a weekend bender, then pop a pill and be absolutely fine for work on Monday after no sleep.
Q: Have the mystery pills from the briefcase been identified?
A: Yes. They were sent to the drug lab on board NAS JAX and identified as Modafinil, otherwise known as Provigil.
Q: You mentioned that aside from the \$200,000 and the bottle of prescription medication there was a cell phone in the briefcase.
A: Yes, I seized a cell phone, specifically, an Apple iPhone, from the briefcase.
Q: Why did you seize the cell phone?
A: Two reasons. There was a text message of interest and there were photographs taken with the phone that were stored on the phone

Detailed defense counsel, LT Tim Cruz, JAGC handled the cross examination of NCIS Special Agent Magnum T.I. and the relevant portions are as follows:

Q: You were at the residence for several minutes before you approached the front door, weren't you?
A: Yes.
Q: Over 15 minutes, isn't that correct?
A: Yes.
Q: Just waiting there for over 15 minutes before you approached the door to ask for consent to search, correct?
A: Kind of.
Q: You were on scene when Special Agent Colombo first approached the residence, weren't you?
A: Yes.
Q: Yet, you and Special Agent Closeau did not go to the door with Special Agent Colombo, correct?
A: Correct.
Q: You waited in your car, right?
A: Yes.
Q: And the two of you waited in your car about 50 yards down the road, correct?
A: I did not measure the distance but it could have been as far as 50 yards.
Q: You observed LCDR Kramer leave his residence, correct?

A: Yes.

Q: You waited in your parking spot for over 15 minutes, didn't you?

A: I was not keeping a close eye on my watch but probably 15 minutes.

Q: After 15 minutes passed, you and your partner then approached the front door, right?

A: Yes.

Q: What triggered you to approach the house after 15 minutes had passed?

A: I don't understand your question.

Q: Why did you wait 15 minutes before approaching the house?

A: I was waiting for the lead agent to call me and tell me to go.

Q: Did the lead agent call you?

A: Yes.

Q: Then you approached the house and knocked on the door, didn't you?

A: Yes.

Q: Both you and your partner were armed, weren't you?

A: Yes.

Q: And you both showed her your badges when Mrs. Parish Holten answered the door, didn't you?

A: Yes.

Q: She had a martini glass in her hand didn't she?

A: Yes.

Q: And the martini glass was nearly empty, wasn't it?

A: I don't recall.

Q: Mrs. Holten told you she had been drinking that evening, didn't she?

A: Yes.

Q: She told you she had already had more than one, didn't she?

A: Yes, she did

Q: Even after she knew you were NCIS Agents on duty, she offered to mix you a martini, didn't she?

A: Yes, she did.

Q: During that conversation at the doorway, she was slurring her words, wasn't she?

A: Yes she was.

Q: And she was stumbling a bit wasn't she?

A: A bit.

Q: She was unsteady on her feet, wasn't she?

A: A bit unsteady but she was not falling down

Q: She actually spilled her near empty martini while she was there in doorway, didn't she?

A: Yes she did.

Q: She spilled it on your shirt, didn't she?

A: Yes.

Q: Lets turn from the topic of how intoxicated Mrs. Holten was that evening, you have business cards, don't you?

A: Yes.

Q: Those cards have your office phone number on them, don't they?

A: Yes.

Q: You have a cellular phone, don't you?

A: Yes.

Q: AT&T is your cell phone provider, aren't they?
A: Yes.
Q: NCIS has a building on board Naval Air Station Jacksonville, correct?
A: Yes.
Q: You have an office in the NAS JAX NCIS building, don't you?
A: Yes.
Q: You work in that office at least part of the time, correct?
A: Yes.
Q: The cell phone coverage on the base is not very good, correct?
A: Correct.
Q: You do not get a signal for your cell phone in that office, do you?
A: No, I do not,
Q: You have to exit the NCIS building and walk about 10 feet into the parking lot to get a cell signal, isn't that true?
A: Ten feet give or take.
Q: During your conversation with Mrs. Holten in her doorway she initially refused your request for consent to search didn't she?
A: Yes.
Q: You kept after it after she refused didn't you?
A: We continued our conversation.
Q: After she refused, you told her that you were just looking for evidence of massive gambling, didn't you?
A: I did not specify that we were only looking for evidence of gambling
Q: But gambling is the only offense that you expressly mentioned correct?
A: Yes.
Q: She still refused consent, didn't she?
A: But she eventually changed her mind and gave us consent.
Q: Next you told her she should just call her husband and run it by him, get his OK, so she will feel better and it could just get done.
A: More or less.
Q: She tried to call her husband, didn't she?
A: Yes.
Q: She did not get through to him did she?
A: No.
Q: You testified previously that you knew LCDR Kramer was going to NCIS for an interview with Special Agent Colombo correct?
A: Yes.
Q: And you testified previously that you know that AT&T does not get a signal through into the NCIS building, didn't you?
A: Yes.
Q: You knew that AT&T was his service provider, didn't you?
A: Yes.
Q: Did you offer her the land line number to the NCIS building?
A: No.
Q: Did you offer her one of your business cards that has the land line number to NCIS on it?
A: No.

Q: After she was unable to get a hold of her husband, you kept asking her questions, didn't you?

A: We continued our conversation.

Q: You told her that you already had a warrant to search her husband's office didn't you?

A: No.

Q: You told her that you had command authorization to search her husband's office, didn't you?

A: Yes.

Q: You told her that her refusal to consent was just delaying the process and going to keep everyone up later that night because you had to get the search done, didn't you?

A: I don't think I used those exact words.

Q: She eventually relented to your interrogation and signed the PASS form correct?

A: It wasn't an interrogation and she did sign the form.

Q: Lets turn to the search itself. Did you talk to Mrs. Holten as you were conducting the search?

A: Some.

Q: Did she tell you that she works as a model and gets paid appearance fees to just show up at places?

A: Yes, she did.

Q: You seized a briefcase correct?

A: Yes.

Q: The briefcase was black leather, correct?

A: Yes.

Q: The briefcase you seized is in compliance with Navy regulations for use while in uniform, correct?

A: Yes it is, black leather with subtle brass hardware.

Q: The briefcase had initials engraved on it, didn't it?

A: Yes.

Q: The initials were "KK", correct?

A: Yes.

A: You seized the briefcase from a closet, correct?

A: Yes, from the floor of a closet.

Q: The only things in the closet were Navy uniforms and gear, correct?

A: I did not inventory the closet.

Q: But you were searching the closet, correct?

A: Yes.

Q: In conducting the search of the closet you noticed the items in it were all military in nature, didn't you?

A: I noticed there were uniforms and military gear, could have been other things as well.

Q: You noticed the room you were in, didn't you?

A: Yes.

Q: The room was a game room, wasn't it?

A: Well I remember a poker table, a bar, and a computer desk in the room

Q: Mrs. Holten told you that the room was her husband's game room, didn't she?

A: Yes.

Q: You did not ask her any clarifying questions, did you?

A: No.

The defense attorney, Alan Chore, called Mrs Parish Holten to the stand and after being sworn in by the trial counsel she testified in part as follows:

Q: What sort of experience have you had with law enforcement?

A: Not much. A speeding ticket once. And police broke up a party I was at once.

Q: Have you ever been arrested?

A: No

Q: Has an immediate family member ever been arrested?

A: Not before this.

Q: Tell us what happened when you answered the door and the NCIS Agents were there.

A: There were two of them at the door, crowding me. They both had badges and guns. They kind of demanded I allow them to search the house.

Q: What happened next?

A: I tried to tell them I did not want them to.

Q: What happened after you told them no.

A: I told them I had been drinking and I wasn't sure about having them in the house. I told them I wanted to talk to my husband.

Q: Then what happened?

A: I tried to call him on his cell phone, several times, never got through. Straight to voice mail each time. I tried his office to, but he wasn't there either.

Q: What happened after you couldn't get a hold of your husband?

A: They told me they already had a warrant for my husband's office and if I made them get one for the house everybody would be up all night.

Q: Had you consumed any alcohol that evening?

A: Yes, I had been drinking and I told them that. I am not a big woman and I had already had several martinis when they came to the door. I was drunk when they were talking to me. I couldn't think straight.

Q: Did they tell you what they suspected your husband of?

A: They told me they were looking for evidence of massive gambling. Which is funny, because we are broke. He isn't doing any gambling. They also said they were looking for evidence of drug dealing. Again, ridiculous, we are broke.

Q: Why did you allow the agents to search your house?

A: I did not feel like I had a choice. They just kept leaning on me. Not physically leaning on me, I mean pressuring me. I was drunk. I was not thinking straight, and they knew it!

Q: Before you signed the PASS form, did you read it?

A: No. I was in no condition to read anything.

Q: Did you give them unlimited consent to search?

A: No. They were talking about gambling and drugs. I thought they were looking for drugs and money. I thought that was all they were looking for.

The questions eventually turned to focus on the search of the den:

Q: Were you with the agents when they entered the den?

A: Not with them exactly, more behind them. I was curious what they were doing.

Q: Did you tell them anything about the room?
A: I told them it was my husband's game room. I told them I did not go in there. I told them they should not hold the state of disarray of the room or his decorating choices against me.
Q: Did they ask you to clarify what you meant by that?
A: No.
Q: What did you mean by that?
A: I do not go in that room, that is my husband's room.
Q: What about the closet?
A: I do not go into the room. The closet is in the room. He keeps his Navy stuff, his uniforms in there.
Q: What about laundry and stuff?
A: I don't do laundry. If you looked at the stuff in the closet you would see that everything was in the plastic wrapping you get from the dry cleaner. His uniforms are always cleaned at the dry cleaner on base.
Q: When the agents were in the room did they look at anything closely?
A: Yes, one of them went through the computer desk and the other went through the closet.
Q: What happened in the closet?
A: The agent took a briefcase from the closet and opened it up.
Q: Did the agents ever ask you any questions about the den itself?
A: No, they were not really talking to me.
Q: Did the agents ask you any questions about the closet?
A: No
Q: Did the agents ask you any questions about the briefcase?
A: No.

Hearing on defense motion to suppress contents of vehicle search

The defense filed a motion to suppress the evidence seized in the search of LCDR Kramer's vehicle. The Government called CDR Huck Norris to the stand and LCDR Jack McCoy conducted a direct examination. Relevant portions are as follows:

Q: Where were you on the evening of Friday, 24 April 2009?
A: I was on temporary additional duty at NAS JAX in April of 09. On the evening of Friday the 24th I was out for a run on base.
Q: Were you wearing Navy PT gear?
A: No. We are only required to wear Navy PT gear during official command PT sessions. I was out getting some extra PT in so I was not wearing official gear.
Q: What were you wearing?
A: Black t-shirt, black shorts, and running shoes. Very stealthy.
Q: Anything unusual happen on that run?
A: Yes. I was approaching a building on base, the parking lot actually and I heard sirens in the background, then I saw a guy running in the parking lot. It was pretty late at night, well after working hours so the parking lot was empty except for the convertible this guy was running towards and a couple of government vehicles.

Q: You said the guy was running towards a convertible, how did you know it was a convertible?

A: The top was down.

Q: What happened after you saw the guy running towards the convertible?

A: I heard a woman that was chasing him yell, "freeze, NCIS, you are under arrest" but he just kept running towards his car.

Q: What did you do next?

A: I turned and ran towards the car

Q: What happened next?

A: The guy got close to his car and slowed up like he was going to jump in without using the door

Q: What if anything did you do?

A: I detained him

Q: Please explain what you mean by that

A: I tackled him and subdued him without intent to cause injury. So the pursuers could catch up and the situation could get sorted out.

Q: How far from his vehicle was he when you brought him down?

A: He was right next to his car, just a couple of feet away when I first collided with him, but he went down to the ground five feet from his car.

Q: Are you sure about that distance?

A: Yes. I am a trained operator. He was five feet from his vehicle on the ground.

Q: Would it help explain your testimony if you were able to draw a picture of where he was and where you approached him from?

A: Yes, I think it would.

TC: Your honor may the witness step down and make some markings on the easel?

MJ: He may.

Q: CDR Norris, please draw the vehicle that you saw in the parking lot that night from an overhead view .

A: Done. [Attachment 2]

Q: Please now indicate with an X, where LCDR Kramer was when you collided with him

A: Done.

Q: Please make a legend explaining what the X mark is

A: Done.

Q: How far from the vehicle was he when you collided with him?

A: Approximately 2 feet.

Q: Please indicate that on the diagram.

A: Done.

Q: Please draw an arrow to indicate the direction that you were coming from before you collided with the accused.

A: Done.

Q: You testified that you brought him to the ground, please indicate with a Y where you brought him down.

A: Done.

Q: Please mark the legend that Y is where he was on the ground.

A: Done.

Q: You testified previously that he was five feet from the vehicle when he was on the ground, please mark the diagram to reflect that distance

A: Done.

Q: Did you tie him up or restrain him in any manner?

A: Not really. I used his belt to tie his hands behind his back.

Q: Did he resist you?

A: Briefly. I put him prone on his stomach and he realized resistance was pointless.

A: Did you identify yourself to LCDR Kramer?

A: No I did not.

Q: Did you speak with him?

A: I asked him what was going on.

Q: Did he respond?

A: Yes.

Q: What did he say?

A: He said that he had done some bad stuff and it was catching up with him.

Q: After he told you that he had done some bad stuff and it was catching up with him what happened next?

A: The NCIS Agents that were chasing him arrived. One of them frisked LCDR Kramer for weapons while the other read him his rights.

Q: What direction did the NCIS Agents come from?

A: The Agents approached from the West.

Q: After the agents frisked LCDR Kramer and read him his rights what happened?

A: A base security vehicle had arrived and parked about 20 feet away from his car. The Agent removed the belt around his hands, stood him up, and walked him back towards the base security car.

Q: How close to his car was he while he was being walked away from the scene?

A: Never closer than where I took him down.

Q: Please mark on the diagram an arrow to indicate the direction in which the accused was removed from the scene.

A: Done.

Q: Was he handcuffed?

A: Not until they got him over to the base security vehicle. They put him in cuffs there. Then they put him in the back of the car.

Q: Who escorted him from where you brought him down to the base security vehicle where he was cuffed?

A: Special Agent Gumshoe and I.

Trial counsel tendered the witness to the defense. LT Tim Cruiz, one of the detailed defense attorneys handled the cross examination of the witness. A relevant excerpt follows:

Q: You hold the rank of Commander, correct?

A: Yes.

Q: You tackled LCDR Kramer when he was just a couple of feet from his vehicle, correct?

A: Yes.

Q: And then you hog tied him with his own belt, correct?

A: I bound his hands with his belt.

Q: After tackling him, restraining him, and tying his hands, you then asked him a question, didn't you?

A: I asked what was going on.

Q: Isn't it true that you demanded to know what the hell was going on?

A: I do not remember my exact words.

Q: You testified that you are an experienced operator, correct?

A: Yes.

Q: In the special ops community, correct?

A: Yes.

Q: You have received special training as part of that community, haven't you?

A: Yes.

Q: You have received specialized training in gathering intelligence, haven't you?

A: Yes, I am well trained

Q: Before you interrogated LCDR Kramer, who you outranked, who you had just tackled, who you had just restrained and tied up, you did not warn him that he was suspected of a crime did you?

A: I did not know what was going on.

Q: You did not warn him he was suspected of crime, did you?

A: You want answers?

Q: I think I'm entitled.

A: You want answers?

Q: I want the truth.

A: You can't handle the truth!

Q: You did not give LCDR Kramer any 31(b) warnings or notify him he was suspected of any crime before you questioned him, did you?

A: No.

Q: You testified previously that Special Agent Gumshoe and one of the base security personnel escorted LCDR Kramer to the vehicles, correct?

A: Yes.

Q: You were with them as well, weren't you?

A: Yes.

Q: And there was another NCIS Agent on the scene, wasn't there?

A: Yes, but after he read the guy his rights he went over to the car.

Q: He was searching the car, wasn't he?

A: Not sure, I was more focused on the perp.

Q: You are an experienced operator, correct?

A: Yes.

Q: You are trained to mind your surroundings, aren't you?

A: Yes. The agent at the car was looking inside the vehicle.

Q: When LCDR Kramer was being escorted from the scene Special Agent Gumshoe was between him and the vehicle, wasn't she?

A: I don't remember who was where.

Q: The vehicle was parked in a parking space, wasn't it?

A: Yes, I suppose it was.

Q: It was not obstructing the flow of traffic in the parking lot, was it?

A: No it was not.

The Government also called Special Agent Gebbs to the stand. After some introductory questions they moved into the apprehension of LCDR Kramer.

- Q: What did you do after exiting the vehicle?
A: I approached the suspect with my weapon drawn.
Q: Then what?
A: Special Agent Gumshoe instructed CDR Norris to step back and she frisked LCDR Kramer while I read him his rights.
Q: What happened next?
A: Special Agent Gumshoe removed the belt tying his hands and stood him up. She escorted him to the base security vehicle that had arrived on scene.
Q: What were you doing?
A: I was looking his vehicle.

At this time a series of four photographs of the vehicle were authenticated by Special Agent Gebbs and received into evidence. Attachment 5.

- Q: Why were you searching his vehicle?
A: Incident to apprehension or arrest.
Q: Was it standard operating procedure to search a vehicle incident to arrest at that time?
A: If the suspect was apprehended from inside the vehicle or the immediate proximity of the vehicle it was SOP to search the vehicle.
Q: Has that standard operating procedure changed?
A: Yes. There was a training session the following week where the SOP was changed. Vehicle searches are no longer automatic.
Q: When was the training session announced and when was it conducted?
A: The training was announced on Thursday the 23 April and it was scheduled for Tuesday afternoon, 28 April.
Q: Did you attend the training session.
A: Yes.
Q: Turning back to the convertible in question, LCDR Kramer's convertible, what happened to that vehicle?
A: It was towed away from the scene the next morning.
Q: Where was it towed to?
A: It was stored at NCIS headquarters on board NAS JAX.
Q: Were you involved in that process at all?
A: Yes, I completed the inventory of the contents of the vehicle before it was towed.

The private defense attorney Alan Chore conducted a brief cross examination of Special Agent Gebbs:

- Q: The base security vehicle was over 20 feet from LCDR Kramer's vehicle, wasn't it?
A: I did not measure it but that sounds about right.
Q: CDR Norris was with them as well, wasn't he?
A: Yes he was.

Q: You were with them as well, weren't you?
A: Not really.
Q: You were not with them because you were searching his vehicle, correct?
A: Correct.
Q: During that search you seized a gym bag, didn't you?
A: Yes and its contents.
Q: Then once LCDR Kramer was being placed into handcuffs at the base security vehicle you continued your search, didn't you?
A: Yes.
Q: And you seized a cellular phone from inside the car, didn't you?
A: Yes.
Q: LCDR Kramer's vehicle was parked in a parking spot, wasn't it?
A: Yes, in the parking lot in front of the building where he worked on base.
Q: It was validly parked, wasn't it?
A: I do not understand the question.
Q: The vehicle was authorized to be in the parking spot it was located in, wasn't it?
A: Yes.
Q: You knew that LCDR Kramer was married to Mrs. Parish Holten, didn't you?
A: I knew that he was married, I never met his wife.
Q: You never contacted his wife about the car, did you?
A: No.

The Government then played the introduction to the video recorded interview of the accused conducted by Special Agent Colombo wherein the accused was notified of the crimes he was suspected of. *See Supra* Pages 9-10. No additional witnesses were called for the defense motion to suppress the statements made by LCDR Kramer to CDR Huck Norris.

Rulings on the Defense motions to exclude seized evidence

The military judge denied the motions and issued findings of fact and conclusions of law on all three. Attachments 11, 12, and 13.

The General Court-Martial

The trial began on 3 August 2009 and concluded on 7 August 2009. The Government called all of the NCIS Special Agents that had been involved in the investigation to the stand. The Government also called CDR Huck Norris to the stand to testify about the apprehension and the admission made by LCDR Kramer. The seized physical evidence was offered and received into evidence. Testimony was provided that the classified material on the phone was outside the scope of LCDR Kramer's official duties. Documents from the drug lab were admitted into evidence to confirm the pills found in the residence and in the vehicle were in fact Provigil (a.k.a. Modafinil). There were additional witnesses and documents that traced the seized cell phones back to their point of purchase where the purchaser was identified as Raz Algule, a Limegreenland national.

The defense argued the \$200,000 were winnings from LCDR Kramer's various gambling activities. The offered no defense as to the pills and claimed the classified documents were actually work brought home. LCDR Kramer was convicted of the following charges and specifications:

- Charge I: Violation of the Uniform Code of Military Justice, Article 95 –
Flight from apprehension
Specification: In that LCDR Kosmo Kramer, USN, Naval Air Station Jacksonville, on active duty, did, at or near Jacksonville, Florida, on or about 24 April 2009, flee apprehension by an armed force policeman, a person authorized to apprehend the accused.
- Charge II: Violation of the Uniform Code of Military Justice, Article 106a –
Attempted espionage
Specification: In that LCDR Kosmo Kramer, USN, Naval Air Station Jacksonville, on active duty, did, at or near Jacksonville, Florida, on or about 24 April 2009, with intent or reason to believe it would be used to the injury of the United States or to the advantage of Limegreenland, a foreign nation, attempt to communicate information relating to the national defense, which directly concerns a major element of defense strategy, to an agent of a foreign government.
- Charge III: Violation of Uniform Code of Military Justice, Article 112a –
Wrongful possession of controlled substances
Specification: In that LCDR Kosmo Kramer, USN, Naval Air Station Jacksonville, on active duty, did, at Naval Air Station Jacksonville, Florida, on or about 24 April 2009, wrongfully posses 52 tablets of Modafinil, a scheduled IV controlled substance, with the intent to distribute the said controlled substance.

The sentence

He was sentenced to a Dishonorable Discharge, 53 years of confinement, and total forfeitures.

The Appeal

The evidentiary rulings made by the Military Judge are now being appealed.

- (1) Did the Military Judge err by refusing to suppress the physical evidence seized from the residence of the accused?
- (2) Did the Military Judge err by refusing to suppress the physical evidence seized from the vehicle of the accused?
- (3) Did the Military Judge err by refusing to suppress the statements made by the accused to both CDR Norris and to NCIS Special Agent Colombo?

CHARGE SHEET				DOB: 15 APR 1969	
I. PERSONAL DATA					
1. NAME OF ACCUSED (<i>Last, First, MI</i>) KOSMO, KRAMER R.		2. SSN 123-45-6789		3. RANK/RATE LCDR	4. PAY GRADE 0-4
5. UNIT OR ORGANIZATION NAVAL AIR STATION JACKSONVILLE				6. CURRENT SERVICE	
				a. INITIAL DATE 17 OCT 2004	b. TERM 4 YRS
7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED None		9. DATE(S) IMPOSED N/A
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL			
\$5,041.80	N/A	\$5,041.80			
II. CHARGES AND SPECIFICATIONS					
10. CHARGE: I VIOLATION OF THE UCMJ, ARTICLE 95					
Specification: In that LCDR Kosmo Kramer, USN, Naval Air Station Jacksonville, on active duty, did, at or near Jacksonville, Florida, on or about 24 April 2009, flee apprehension by an armed force policeman, a person authorized to apprehend the accused.					
CHARGE: II VIOLATION OF THE UCMJ, ARTICLE 106a					
Specification: In that LCDR Kosmo Kramer, USN, Naval Air Station Jacksonville, on active duty, did, at or near Jacksonville, Florida, on or about 24 April 2009, with intent or reason to believe it would be used to the injury of the United States or to the advantage of Limegreenland, a foreign nation, attempt to communicate information relating to the national defense, which directly concerns a major element of defense strategy, to an agent of a foreign government.					
CHARGE: III VIOLATION OF THE UCMJ, ARTICLE 112a					
Specification: In that LCDR Kosmo Kramer, USN, Naval Air Station Jacksonville, on active duty, did, at or near Jacksonville, Florida, on or about 24 April 2009, wrongfully posses 52 tablets of Modafinil, a schedule IV controlled substance.					
III. PREFERRAL					
11a. NAME OF ACCUSER (<i>Last, First, MI</i>) Roberts, Bartholomew A.		b. GRADE LNC	c. ORGANIZATION OF ACCUSER Region Legal Service Office Southeast		
d. SIGNATURE OF ACCUSER Bartholomew Roberts				e. DATE 28 April 2009	
AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this <u>28th</u> day of <u>April</u> , 2009, and signed the foregoing charges and specifications under oath that he /she is a person subject to the Uniform Code of Military Justice and that he /she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his /her knowledge and belief.					
<u>Angie Harmonious</u> <i>Typed Name of Officer</i>			<u>Region Legal Service Office Southeast</u> <i>Organization of Officer</i>		
<u>LT, JAGC, USN</u> <i>Grade and Service</i>			<u>Trial Counsel</u> <i>Official Capacity to Administer Oaths</i> <i>(See R.C.M. 307(b)--must be commissioned officer)</i>		
<u>Angie Harmonious</u> <i>Signature</i>					

12. On 28 April ^{,2}₀ 09, the accused was informed of the charges against him/~~her~~ and of the name(~~s~~) of the accuser(~~s~~) known to me. (See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)

Jack A. McCoy
Typed Name of Immediate Commander

RLSO SE
Organization of Immediate Commander

LCDR, JAGC, USN
Grade

Jack A. McCoy
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1100 hours, 28 April 20 09 at Naval Station Mayport
Designation of Command or

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE⁴ _____

Jon Morgan
Typed Name of Officer

Commanding Officer
Official Capacity of Officer Signing

CAPT, USN
Grade

Jon Morgan
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
Commander, Navy Region Southeast	Jacksonville, Florida	30 APR 2009

Referred for trial to the General court-martial convened by Convening Order 4-09

Of 29 APR, _____ 20 09, subject to the following instructions:² None

By _____ of _____
Command or Order

Ratta Tuie
Typed Name of Officer

Commander, Navy Region Southeast
Official Capacity of Officer Signing

ADM, USN
Grade

Ratta Tuie
Signature

15. On 30 APR ^{,2}₀ 09, I (caused to be) served a copy hereof on ~~(each of)~~ the above named accused.

Jack A. McCoy
Typed Name of Trial Counsel

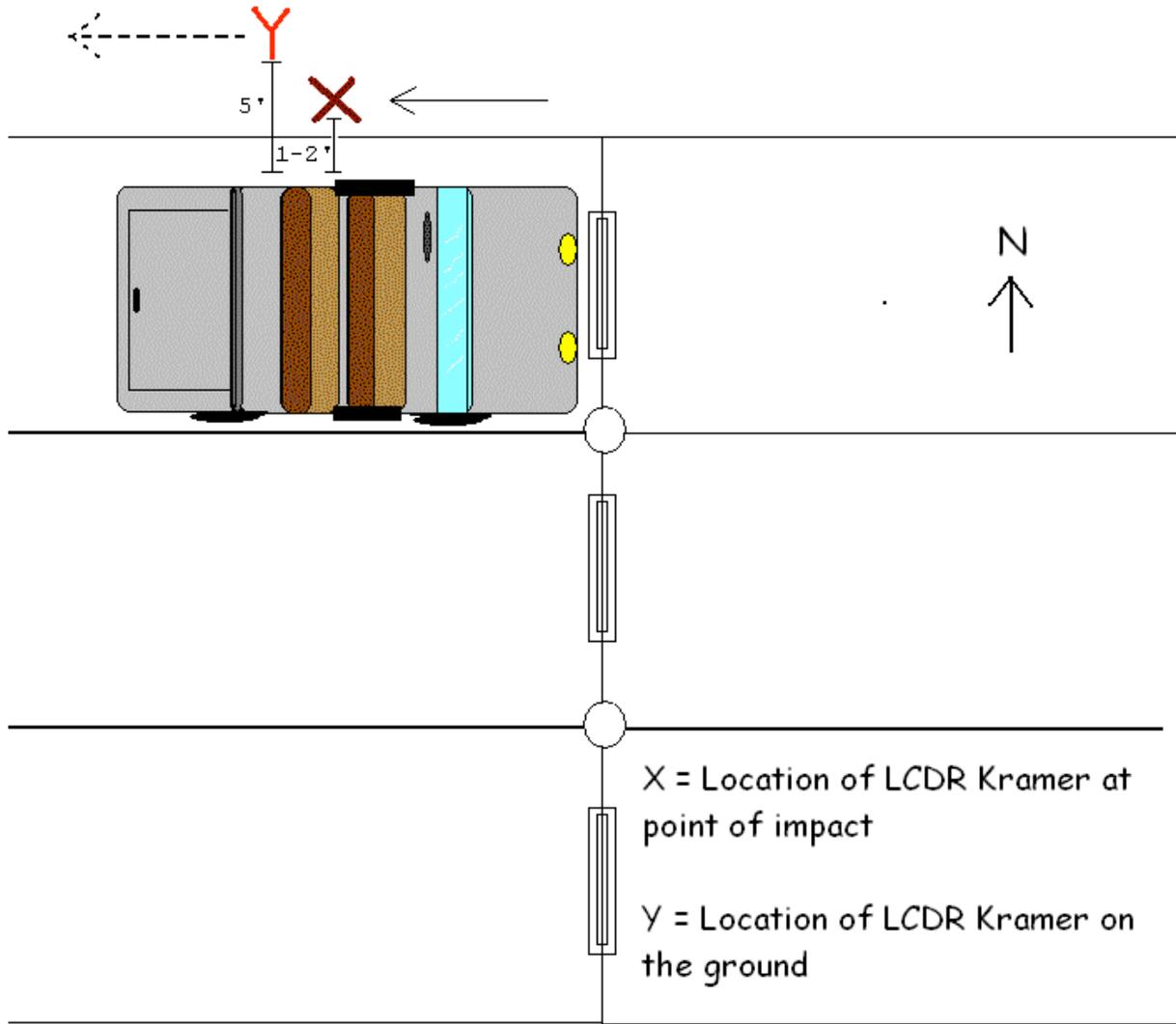
LCDR, JAGC, USN
Grade or Rank of Trial Counsel

Jack A. McCoy
Signature

FOOTNOTES

- 1 -- When an appropriate commander signs personally, inapplicable words are stricken.
- 2 -- See R.C.M. 601(e) concerning instructions. If none, so state.

Attachment 2 – Diagram drawn as part of CDR Norris’ testimony



Command Authorization for Search and Seizure

UNITED STATES OF AMERICA
VS.
LCDR Kosmo Kramer

To: NCIS Special Agent Martin Colombo

Affidavit(s) having been made before me by NCIS Special Agents Jack Closeau, Magnum T.I., and Martin Colombo.

That there is reason to believe that on the person of and /or on the premises known as:
The office space of LCDR Kosmo Kramer on board Naval Air Station Jacksonville

which is under my jurisdiction,

there is now being concealed certain property, namely:
Classified documents, U.S. currency, and instrumentalities used to make copies of documents

I am satisfied that there is probable cause to believe that the property so described is being concealed on the person and/or premises above described and that grounds for application for issuance of a command authorized search exist as stated in the supporting affidavit(s).

YOU ARE HEREBY AUTHORIZE TO SEACH the person and/or place named for the property specified and if the property is found there to seize it, leaving a copy of this authorization and receipt for the property taken. You will provide a signed receipt to this command, containing full description of every item seized.

Any assistance desired in conducting this search will be furnished by this command.

Dated this 24th day of April, 2009.

Sparrow_____

Jack

Signature of Person Authorizing Search

CDR, USN, Commanding officer, acting
Rank, Service, Title

Command

Attachment 4 – Permissive Authorization for Search and Seizure

PERMISSIVE AUTHORIZATION FOR SEARCH AND SEIZURE

Date: 24 April 2009

I, Mrs. Parish Holten, after being advised by NCIS Special Agent Magnum T.I. that the Naval Criminal Investigative Service is conducting an investigation into my husband, LCDR Kosmo Kramer, have been requested to permit a search of my residence.

I have been informed of my constitutional right to refuse to permit this search in the absence of a search warrant. In full understanding of this right, I have nevertheless decided to permit this search to be made.

This search may be conducted on 24 April 2009 by NCIS Special Agents Magnum T.I. and Jack Closeau, and I hereby give my permission to remove and retain any property or papers found during the search which are desired for investigative purposes.

I make this decision freely and voluntarily, and it is made with no threats having been made or promises extended to me.

Signed: **P~h H~lt~n**

Magnum T. I.
Representative, Naval Criminal Investigative Service

Jack Closeau
Representative, Naval Criminal Investigative Service

Command Representative

TIMES OF SEARCH

Start : 1931 _____
End : 2030 _____

Attachment 5 – Photos of LCDR Kramer’s vehicle

Photograph (a)



Photograph (b)



Photograph (c)



Photograph (d)



Kramer's residence. The search was conducted based on the purported consent of the wife of the accused, Parish Holten.

NCIS Special Agents acted in concert to remove LCDR Kramer from the residence because they believed he would refuse consent. Special Agent Colombo lured LCDR Kramer from his residence by claiming his assistance was required at NCIS headquarters on board Naval Air Station Jacksonville for a video recorded interview on an unrelated matter. Special Agent Colombo did not at the time he requested assistance inform LCDR Kramer that he was a suspect, nor did he advise LCDR Kramer of his rights under Article 31(b) of the Uniform Code of Military Justice, nor did he ask for consent to search the residence. Special Agent Colombo also failed to inform LCDR Kramer that there was an additional team of NCIS agents who were going to approach his residence and seek permission to search the residence from his wife just as soon as LCDR Kramer was no longer there.

Once LCDR Kramer was at NCIS headquarters he expressly refused a request for consent to search his residence. At that point, once LCDR Kramer had refused consent himself and he was safely removed from the residence so that he could not interfere, other members of the NCIS team approached the residence and sought consent from Parish Holten.

Special Agents Magnum T.I. and Closeau knocked on the door which was answered by Ms. Holten who was holding a martini glass in her hand. The two agents established their identity by showing their badges and stating they were NCIS agents. Both agents were openly carrying guns when they spoke to Ms. Holten. Ms. Holten was told that her husband was suspected of having engaged in illegal gambling and drug use. At no time did they inform her that LCDR Kramer was a suspect in the disappearance of IS2 Clean or that he was suspected in engaging in espionage.

Ms. Holten was visibly intoxicated. The agents could smell a strong odor of alcohol on her, heard her slur her words, and see she was visibly swaying. Ms. Holten also displayed behavior consistent with heavy intoxication by repeatedly laughing about the situation and by both verbally and physically flirting with the investigating officers. Ms. Holten informed the agents she had had several drinks and actually spilled the drink in her hand on the shirt of Special Agent Magnum.

Ms. Holten repeatedly refused consent at which point the NCIS agents disingenuously suggested she call her husband and see if he would approve of giving them consent. The agents also implied that if she did not call then they would go to the base, get the consent from him and then come back and search the residence. Ms. Holten tried to call her husband on both his cellular phone and in his office. As the NCIS agents had

planned, these calls failed as LCDR Kramer was at their office where his cell phone would not function.

The agents repeated their request for consent to search the residence, adding that they already had received command authorization to search LCDR Kramer's office and stating they could go and get authorization to search her residence even without her consent but it would be a long drawn out process that would keep everyone up all night. They also promised her that any search would be quick.

Ms. Holten then consented to allowing NCIS to conduct a quick search for loose cash and drugs. Ms. Holten signed the Permissive Authorization for Search and Seizure form without reading it.

The NCIS agents then conducted a search of the residence. After searching most of the house without finding anything of evidentiary value, they came to a final room that Ms. Holten told them was under the exclusive control of her husband. Despite this warning the NCIS agents still proceeded into the room.

In searching this room, the NCIS agents found LCDR Kramer's military uniforms as well as a briefcase with the letters "K.K." on it. Without getting permission to do so, NCIS Special Agent Magnum T. I. opened the briefcase. Inside the briefcase, he

found a large amount of U.S. currency, a cell phone, and a pill bottle.

Special Agent Magnum T. I. then turned on the cell phone and checked the call log and text message history. In the text message history he observed a text message that he believed had evidentiary value. Special Agent Magnum T. I. also realized the cell phone had photographic capability and opened the stored photographs on the phone. There he observed photographs which reportedly dealt with contingency plans for military operations.

3. Discussion.

Special Agents T. I. and Closeau conducted an illegal search on or about 24 April 2009 and accordingly the fruits of that search should be suppressed. The consent to search LCDR Kramer's residence was wrongfully obtained as NCIS maneuvered LCDR Kramer away from his own home so he would not be able to deny consent, and was involuntary given by Ms. Holten.

In the alternative even if the initial consent was found to be valid, the NCIS agents exceeded the scope of the consent by relying on the consent of Ms. Holten to justify searching LCDR Kramer's private room and going into what appeared to be his briefcase. The agents then again exceeded the scope of their consent, which was limited to a search for drugs and money, by conducting a search of a cell phone.

NCIS wrongfully removed LCDR Kramer from his residence

The United States Supreme Court has established that if a resident objects to a search of his residence, law enforcement lacks consent even if another resident is willing to grant them consent. *Georgia v. Randolph*, 547 U.S. 103 (U.S. 2006). The Court of Appeals for the Armed Forces (CAAF) clarified this principle by establishing that the objecting resident must be physically present to void the consent of his co-resident. *United States v. Weston*, 67 M.J. 390, 393 (C.A.A.F. 2009).

In the present case there is clear evidence NCIS removed LCDR Kramer from his residence, so he would not be able to object to consent being granted. Two separate teams of NCIS agents were sent to LCDR Kramer's residence, with the first team specifically tasked with getting LCDR Kramer away from his home to a location where it was known LCDR Kramer's cell phone would not work. Only after LCDR Kramer had been lured away from his home did the second team attempt to gain consent. These two teams were in communication with each other, showing a common scheme to get access to LCDR Kramer's home despite his objections, thereby vitiating any consent that was obtained.

Ms. Holton's grant of consent was not voluntary

A search of a private residence, conducted without a search warrant or search authorization, will only be valid under very

narrow circumstances. One such circumstance is if lawful consent is granted. Mil.R.Evid. 314(e) MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2008 ED.) For consent to be lawful it must be voluntary. The voluntariness of consent will be determined by considering "the totality of the circumstances." *United States v. Goudy*, 32 M.J. 88, 91 (C.M.A. 1991.)

In the present case it is clear the totality of the circumstances show Ms. Holten did not voluntarily give consent to the search of her residence. Her mental state was clearly impaired due to substantial intoxication. She was deceived by the NCIS agents, who suggested she call her husband to see if he was okay with her giving consent, when they already knew that her husband had already denied consent and that his cell phone would not work where he was. The NCIS agents also failed to inform Ms. Holten she had a right to refuse consent. Instead, they again lied to her by stating if she refused to consent they would just get legal authority to search when the agents knew they lacked probable cause to search the residence. The NCIS agents also failed to inform Ms. Holten that her husband was suspected in the disappearance of a sailor, instead suggesting they were only interested in illegal gambling and drugs. The agents, who were openly carrying weapons, descended upon Ms. Holten when she was alone and vulnerable and took advantage of her vulnerability to manufacture consent from her.

Additionally, the Agents tricked Mrs. Holten into believing they had legal authority already. The Agents implied they had the equivalent of a warrant to search the house. By telling Mrs. Holten, an individual inexperienced with the law, they had authorization to search her husband's office and they could get the authorization to search her house they essentially lied to her that they already had legal authority. Such deceptive coercive police conduct renders any consent involuntary. See *United States v. Richter*, 51 M.J. 213, 221 (C.A.A.F. 1999) (explaining lying about having legal authority vitiates subsequent consent).

The NCIS Agents improperly search the briefcase

Assuming in arguendo that Ms. Holten's consent to search was voluntary, the NCIS agents still exceeded the scope of that search when they went into LCDR Kramer's private room and searched his briefcase.

A person may only grant consent to search property when that person exercises control over the property. Mil.R.Evid. 314(e)(2) MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2008 ED.) In the present case Ms. Holten had no authority over the briefcase that was located during the search of the residence. The briefcase had LCDR Kramer's initials on it and was held in a room that contained only LCDR Kramer's effects; a room which had been described to the NCIS agents as being exclusively under the

control of LCDR Kramer. While common authority to consent to a search normally extends to all items within the home, there is an exception if "the item reasonably appears to be within the exclusive domain of a third party." *Weston* at 392. Here, accessing the briefcase was done without proper authority and was therefore unlawful.

The NCIS agents improperly searched the cell phone

Assuming *arguendo* that the search of the briefcase was valid, the NCIS agents exceeded the scope of the consent they had been granted when they searched the cell phone located within the briefcase.

Consent may be limited in any way by the person who grants consent. Mil.R.Evid. 314(e)(3) MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2008 ED.) In the present case Ms. Holten limited her consent to allowing the NCIS agents to search for drugs and money. She might have granted broader consent if the NCIS agents had requested greater authority, but since they told her that was all they were interested in looking for, that was as far as her grant of consent went.

Accessing the content on the cell phone went beyond the granted scope of the consent. Special Agent Magnum T. I. had no grant of authority to conducting a warrantless search of the cell phone. *United States v. Conklin*, 63 M.J. 337 (C.A.A.F.

2006.) (explaining accessing files on computer constitutes search). Accordingly, the search of the cell phone was illegal.

4. Relief Requested.

The accused respectfully requests that all evidence obtained as a result of the 24 April 2009 search of LCDR Kramer's residence be suppressed.

5. Oral Argument.

The defense requests oral argument in support of this motion.

6. Burden of Proof.

The burden of proof is on the government to show by clear and convincing evidence that consent to search was voluntary. Otherwise, the burden of proof is on the government to show by a preponderance of evidence that evidence was not obtained as a result of an unlawful search or seizure.

T. Cruiz

T. Cruiz, LT, JAGC, USN
Detailed Defense Counsel

DATE: 3 July 2009

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion entitled, Motion for Appropriate Relief: Suppression of Evidence Seized from the Residence was served on Government counsel on the 3rd day of July, 2009.

T. Cruiz

T. Cruiz, LT, JAGC, USN
Detailed Defense Counsel

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

)	
UNITED STATES)	
)	MOTION FOR APPROPRIATE RELIEF:
v.)	SUPPRESSION OF PHYSICAL EVIDENCE
)	SEIZED FROM THE AUTOMOBILE
KOSMO KRAMER)	
LCDR, U.S. NAVY)	

1. Nature of Motion.

Per U.S. CONST. amend. IV, and UNITED STATES Mil.R.Evid. 311 MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2008 ED.), the defense respectfully brings this motion for appropriate relief seeking suppression of all items of physical evidence obtained from the illegal search of LCDR Kramer’s automobile on 24 April 2009.

2. Summary of the Facts.

On the evening of 24 April 2009, Naval Criminal Investigative Service (NCIS) decided to apprehend LCDR Kramer. Upon seeing LCDR Kramer appear at his office, NCIS Special Agent Gebbs notified him he was under arrest and initiated pursuit through the building. NCIS Special Agent Gebbs was joined in the pursuit by Special Agent Gumshoe and the pursuit continued into the parking lot in front of the office building.

As LCDR Kramer approached his automobile in the parking lot, he was attacked by CDR Huck Norris, USN. After CDR Norris had subdued LCDR Kramer over five (5) feet from the vehicle, he tied LCDR Kramer's hands behind his back and then began to interrogate him. Following the interrogation by CDR Norris the NCIS Agents who were in pursuit arrived. Agent Gebbs read LCDR Kramer his rights while Special Agent Gumshoe searched LCDR Kramer for weapons. After finding no weapons, Special Agent Gumshoe brought him to his feet and escorted him from the scene.

As Special Agent Gumshoe and CDR Norris were removing LCDR Kramer from the scene, Special Agent Gebbs initiated a search of LCDR Kramer's vehicle. This search led to Special Agent Gebbs seizing a gym bag which contained a bottle of pills. Special Agent Gebbs also seized a cellular telephone from the compartment in the driver's side door. LCDR Kramer never gave permission for his vehicle to be searched and the NCIS agents did not have a search authorization permitting the search.

3. Discussion.

The search of LCDR Kramer's automobile was improper. LCDR Kramer had an objectively reasonable expectation of privacy in the contents of his automobile. NCIS Special Agent Gebbs searched LCDR Kramer's automobile without a search authorization or valid legal exception to justify the search, making all evidence obtained from that search inadmissible.

The search incident to arrest doctrine does not apply.

The vehicle search was not a valid search incident to arrest. LCDR Kramer was not apprehended from inside his vehicle, nor was he apprehended immediately after exiting his vehicle. He was apprehended in a parking lot. An apprehension that occurs near a vehicle does not automatically justify a warrantless search of the vehicle. *Arizona v. Gant*, 129 S. Ct. 1710 (U.S. 2009.) LCDR Kramer was taken to the ground and tied up over five (5) feet away from the vehicle. At all times relevant, he was in the custody of two NCIS agents and a trained Navy Seal. LCDR Kramer did not represent a threat of reaching into his vehicle to retrieve a weapon while being guarded by three trained individuals, two of which were armed and the third who could be considered a weapon in and of himself. Additionally, there was no reasonable basis to believe there was evidence of the crime he was being arrested for within the vehicle.

As there was absolutely no danger of LCDR Kramer obtaining any weapon from the automobile or destroying any evidence located within the automobile there was no justification for the NCIS agents to search the vehicle incident to the apprehension.

The plain touch doctrine does not apply.

The search of the automobile can also not be justified under either the plain touch or plain view doctrines. The

vantage point from where LCDR Kramer felt the exterior of the gym bag was not a vantage point he was authorized to be in. Further, merely feeling a hard object within a gym bag does not instantly confer probable cause. The feel of the object would make clear it was not a weapon and beyond that there was no way for the NCIS agent to know exactly what he was feeling.

Plain touch and plain view have always been interpreted narrowly. A law enforcement officer seeing or feeling something interesting does not justify seizure of the item. The officer must have probable cause to associate the item with criminal activity before he can lawfully conduct a seizure. *United States v. Wisniewski*, 21 M.J. 370 (C.M.A. 1986.)

In the current case the officer had no way of knowing what exactly he was feeling and therefore did not have probable cause. Without probable cause, Special Agent Gebbs decision to reach into LCDR Kramer's gym bag and seize LCDR Kramer's personal effects, was an illegal search that must be suppressed.

Inevitable discovery does not apply.

Nor can any claim of inevitable discovery justify the illegal search of the automobile. The government will no doubt attempt to argue that since LCDR Kramer's vehicle was towed the next day, an inventory search would have been performed and thus the pill bottle and cell phone would have been found anyway. This argument is disingenuous for two reasons.

No legitimate claim of inevitable discovery justifies this illegal search after the fact. NCIS had no legal basis to search the vehicle. They did not have probable cause to get a search authorization for the vehicle as there was no nexus between the crime and the location. Additionally, there was no basis on which to take the car into custody. The search of LCDR Kramer's vehicle was a fishing expedition of the type the Constitution specifically prohibits. It was without legal warrant and therefore fruits of the search must be suppressed.

There was no legitimate reason to tow LCDR Kramer's vehicle. The vehicle was not involved in an offense, was legally parked on the base, and had all the necessary registration and licensing documentation. The vehicle was towed after the fact because the NCIS agents realized they had conducted an illegal search and were trying to find justification after the fact. This is exactly the kind of governmental misconduct the exclusionary rule is designed to prohibit.

Alternatively, even if the search of the vehicle was permissible as an inventory search, it certainly exceeded the bounds of an inventory search for NCIS to submit the pills they found to a crime lab and to search the contents of the cell phone. A proper inventory search would just have listed that they found a pill bottle containing a certain number of pills,

and that they found a cell phone. Neither the pill bottle nor the cell phone was contraband on its face, so there was no justification for NCIS to conduct further testing and searches on these items after the initial inventory was concluded.

4. Relief Requested.

The accused respectfully requests that all evidence seized from LCDR Kramer's automobile be suppressed.

5. Oral Argument.

Defense requests oral argument in support of this motion.

6. Burden of Proof.

The burden of proof is on the government to show the statement made to CDR Norris was voluntary and that the evidence obtained from LCDR Kramer's automobile was not obtained as a result of an unlawful search and seizure.

T. Cruiz

T. Cruiz, LT, JAGC, USN
Detailed Defense Counsel

DATE: *3 July 2009*

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion entitled, Motion for Appropriate Relief: Suppression of Physical Evidence Seized from the Vehicle was served on Government counsel on the 3rd day of July, 2009.

T. Cruiz _____

T. Cruiz, LT, JAGC, USN
Detailed Defense Counsel

Attachment 7 – Defense Motion to Suppress Statements of the Accused

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES)
)
) MOTION FOR APPROPRIATE RELIEF:
 v.) SUPPRESSION OF STATEMENTS MADE
) BY THE ACCUSED
KOSMO KRAMER)
LCDR, U.S. NAVY)

1. Nature of Motion.

Per U.S. CONST. amend. IV, and UNITED STATES Mil.R.Evid. 304 (2008 ED.), the defense respectfully brings this motion for appropriate relief seeking suppression of the statements illegally obtained from LCDR Kramer on 24 April 2009 by both CDR Norris and NCIS Special Agent Colombo respectively.

2. Summary of the Facts.

On the evening of 24 April 2009, LCDR Kramer was in the parking lot in front of his office building on board Naval Air Station Jacksonville. As LCDR Kramer approached his vehicle in the parking lot he was attacked by CDR Huck Norris, USN. After CDR Norris tackled and subdued LCDR Kramer on the ground, he tied LCDR Kramer's hands behind his back. While LCDR Kramer lay on his stomach, disoriented from being tackled with his hands

bound behind his back CDR Norris began his interrogation, demanding, "What in the hell is going on here?" A disoriented and intimidated LCDR Kramer responded to the interrogation question by stating, "I did some very bad stuff. And it just caught up with me." Neither CDR Norris nor the NCIS Special Agents advised LCDR Kramer of his rights under Article 31(b), Uniform Code of Military Justice, prior to this questioning. Only after the interrogation did the NCIS agents finally inform LCDR Kramer of his legal rights. The NCIS agents then searched LCDR Kramer for weapons, found none, and escorted him away from the scene to NCIS for a video recorded interrogation.

Special Agent Colombo began this interrogation by informing LCDR Kramer that he was suspected of homicide, espionage, accumulating massive gambling debts, and flight from apprehension. At no time did Special Agent Colombo inform LCDR Kramer that he was also suspected of illegal drug possession.

As this interview was conducted, Special Agent Colombo was aware that another NCIS search team had located illegal drugs at LCDR Kramer's residence in a briefcase believed to be under the exclusive control of LCDR Kramer.

During the interview Special Agent Colombo brought out this briefcase and questioned LCDR Kramer about the briefcase and its contents. Special Agent Colombo got LCDR Kramer to

confirm that both the briefcase and the pills within the briefcase belonged to him.

3. Discussion.

Statements were collected from LCDR Kramer in response to interrogation questions without proper Article 31(b) warnings being administered. CDR Norris interrogated and obtained a statement from LCDR Kramer without advising him of any rights under Article 31(b) of the Uniform Code of Military Justice. Such an action makes the statement inadmissible. Subsequently, Special Agent Colombo improperly interrogated LCDR Kramer and obtained statements from him without fully advising him of the offenses for which he suspected LCDR Kramer.

CDR Norris' interrogation violated Art. 31(b)

Prior to any interrogation of a suspect that suspect must be advised of what he is suspected of, his right to remain silent, and that any statement he makes may be used against him. UNITED STATES Mil.R.Evid. 305(c) MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2008 ED.)

In the present case CDR Norris took LCDR Kramer into custody by tackling him, manipulating him into the prone position on the ground, and then hog tying him. CDR Norris then initiated an interrogation by questioning LCDR Kramer. CDR Norris failed to give the required rights advisory and that automatically renders LCDR Kramer's statement to CDR Norris

involuntary. An involuntary statement may not be used as evidence against the accused and accordingly this statement must be suppressed. UNITED STATES Mil.R.Evid. 304 MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2008 ED.)

Special Agent Colombo's interrogation violated Art. 31(b)

Military Rule of Evidence 305 mandates that no interrogation of a suspect may take place until the interrogator has informed the suspect of the nature of the accusation. UNITED STATES Mil.R.Evid. 305(c)(1) MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2008 ED.) While the notice does not technically have to include every offense for which the person is suspect, it must be sufficient to orient the suspect to the transaction or incident for which he is allegedly involved. *United States v. Simpson*, 54 M.J. 281, 284 (C.A.A.F. 2000.)

In the present case Special Agent Colombo utterly failed to advise LCDR Kramer he was suspected of a drug offense. Special Agent Colombo suspected LCDR Kramer of this offense based on the report that he received from Special Agent Magnum T.I., the Agent that seized the pills from the residence. Special Agent Colombo asked questions that related solely to the drug offense, yet he could not be bothered to advise LCDR Kramer that he was a suspect of that offense.

Special Agent Colombo's failure to properly advise LCDR Kramer that he was suspected of illegal drug possession renders

the 31(b) rights given to LCDR Kramer defective. Without a proper right advisement, the entire statement made by LCDR Kramer to Special Agent Colombo is an involuntary statement and must be suppressed in its entirety.

4. Relief Requested.

The accused respectfully requests that all statements made by LCDR Kramer to CDR Norris be suppressed and that the interview conducted on the evening of 24 April 2009 at NCIS on board Naval Air Station Jacksonville be suppressed.

5. Oral Argument.

The defense requests oral argument in support of this motion.

6. Burden of Proof.

The burden of proof is on the government to show the statements made to CDR Norris and to NCIS Special Agent Colombo were voluntary.

T. Cruiz

T. Cruiz, LT, JAGC, USN
Detailed Defense Counsel

DATE: *3 July 2009*

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion entitled, Motion for Appropriate Relief: Suppression of Evidence was served on Government counsel on the 3rd day of July, 2009.

T. Cruiz _____

T. Cruiz, LT, JAGC, USN
Detailed Defense Counsel

Attachment 9 – Government Opposition to Defense Motion to Suppress Physical Evidence Seized from the Residence

DEPARTMENT OF THE NAVY
 NAVY-MARINE CORPS TRIAL JUDICIARY
 SOUTHERN JUDICIAL CIRCUIT
 GENERAL COURT-MARTIAL

)
 UNITED STATES)
)
 v.) GOVERNMENT RESPONSE TO
) DEFENSE MOTION TO SUPPRESS
) PHYSICAL EVIDENCE SEIZED
 KOSMO KRAMER) FROM THE RESIDENCE
 LCDR, U.S. NAVY))
)

1. Nature of Motion.

Per UCMJ Article 39(a) and Navy-Marine Corps Trial Judiciary Southern Circuit Instruction [SOUTHERNJUDCIRINST] 5810.1D, Rule 7, now comes the government and respectfully moves this Honorable Court to deny the defense motion to suppress physical evidence seized in the above captioned matter.

2. Summary of Facts.

The accused was charged with violating Uniform Code of Military Justice Article 95, Article 106a, and Article 112a. The charges allege that the accused fled from apprehension, attempted to engage in espionage, and wrongfully possessed a controlled substance.

On 23 April, NCIS received a telephonic tip that the accused was engaging in espionage from Intelligence Specialist

Second Class Squeaky Clean. When IS2 Clean failed to appear for a scheduled in-person interview the following morning or for his scheduled duty that day NCIS initiated an investigation. As part of that investigation, NCIS Special Agent Colombo requested LCDR Kramer make an in person appearance at NCIS on board Naval Air Station Jacksonville for a video recorded interview. LCDR Kramer agreed to assist NCIS in its investigation and made himself available for a video recorded interview.

As time was of the essence, other NCIS Agents approached Mrs. Holten, the wife of the accused, for consent to search their off-base residence in Jacksonville, Florida. Mrs. Holten, consented to a search of her residence. Agents Magnum T.I. and Jack Closeau had Mrs. Holten sign a permissive authorization for search and seizure before they conducted the search. See Attachment 3.

In executing the search of the marital residence, Special Agent Magnum T.I. located a briefcase on the floor of a closet. The briefcase was not locked and within it several items were found. The briefcase contained a pill bottle that did not contain a prescription label and was full of pills, an Apple iPhone cellular telephone capable of taking photographs, and \$200,000 in U.S. currency. Special Agent Magnum T.I. turned on the cellular phone and accessed its text message history where he observed a message exchange reading:

To Pre-programmed number 1: have docs u want but taking big risk-reward better match risk. Double last price

From Pre-programmed number 1: Deal - use same exchange arrangements

After reading the text message exchange, the agent accessed the photographs stored on the telephone. He observed several photographs of documents that appeared to be military plans. The Special Agent seized the briefcase and its contents.

3. Discussion.

THE SEARCH OF THE MARITAL RESIDENCE WAS LAWFULLY CONDUCTED PURSUANT TO VOLUNTARILY GIVEN CONSENT FROM MRS. PARISH HOLTEN.

Individuals with common authority over an area can consent to its search. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). Consent to search a residence is valid as long as another with common authority is not physically present refusing consent. *Georgia v. Randolph*, 547 U.S. 103, 120 (2006). Consent is valid only where it is voluntarily given. MIL.R.EVID. 314(e)(4). The voluntariness of a consent is determined from consideration of the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Several factors are considered in determining the voluntariness of consent including age, intelligence, experience, length of military experience, whether the request was made in a custodial environment or an overly coercive environment, and whether they had knowledge of their

right to refuse. *Schneckloth*, 412 U.S. at 227; *United States v. Salazar*, 44 M.J. 464, 468 (C.A.A.F. 1996).

Here, Mrs. Holten had actual authority to consent to a search of her residence. Mrs. Holten exercised her common authority over her marital residence and granted the NCIS Agents consent to search. There was no other person present refusing consent. Her consent was given to the NCIS agents voluntarily. Mrs. Holten is a college-educated woman approaching thirty (30) years of age. Her consent was given on the front porch of her residence, not in a custodial interrogation. Additionally, the NCIS Agents informed her prior to seeking that consent that her husband was suspected of criminal activity and they were requesting her permission to search the house for evidence.

While Mrs. Holten may have consumed alcoholic beverages during the evening, she was in control of her faculties. She engaged the agents in conversation, asked intelligent questions, and exercised a reasoned decision making process. Further, she signed the permissive authorization for search and seizure form. Attachment 4.

Mrs. Holten was not overwhelmed by the situation, her consent was freely given. The Agents merely identified themselves with their badges while still outside her home. They explained their reasons for being there and requested her consent. Mrs. Holten demonstrated she was not intimidated by

the by the fact that she initially refused consent and engaged the agents in conversation asking follow up questions.

There is no requirement that law enforcement explain all possible evidence they might seize during the execution of a search before obtaining consent. Even if such conduct were considered deceptive, the mere use of deception as a tactic by law enforcement does not negate consent. *United States v. Richter*, 51 M.J. 213, 221 (C.A.A.F. 1999).

IN EXECUTING THE SEARCH OF THE MARITAL RESIDENCE THE AGENTS DID NOT EXCEED THEIR AUTHORIZED SCOPE BY LOOKING IN THE CLOSET OF A ROOM IN THE HOUSE, OPENING A BRIEFCASE, OR ACCESSING THE CELLULAR TELEPHONE.

The NCIS Agents acted reasonably in executing their search of the marital residence. *Brigham City v. Stuart*, 547 U.S. 398, 402 (2006) (explaining touchstone of the Fourth Amendment is reasonableness). The den of the home was a room under the roof of the marital residence. The den was not locked and the agents were never informed the den was under the exclusive control of another. It was objectively reasonable for them to consider the den within their grant of authority to search.

Opening the briefcase found inside the house was within their grant of authority. The agents were authorized to search the entire residence by Mrs. Parish Holten. The briefcase was found within the closet attached to the den, a room within the marital residence, therefore it was within their grant of

authority. *Florida v Jimeno*, 500 US 248, 250 (1991) (holding consent to search a space is consent to search containers within the space). The briefcase was not locked and the agents were not informed it was the exclusive property of another. The briefcase was capable of holding evidence of the criminal activity the agents were investigating, therefore they were within their authorization to open the briefcase. *United States v. Ross*, 456 U.S. 798, 820-821 (1982)(explaining authorization to search for an item is authorization to open closed containers capable of concealing said item).

Evidence of criminality may be seized without a warrant if the officer was lawfully in the position from which the object seized was in view and the object's incriminating character was immediately apparent. *Horton v. California*, 496 U.S. 128, 136 (1990)); *United States v. Fogg*, 52 M.J. 144, 149 (1999). Here, the agents were within their authorized scope when they observed the images of documents containing classified information.

The agents were searching for evidence of illegal gambling activities and illegal drug transactions. Bets can be placed by telephone, which means bets can be placed by text message, which means the agents were authorized to look in the call history and the text message history of the phone. See *United States v. Ross*, 456 U.S. 798, 820 (1982) (explaining authorization to search a location for an item is authorization to search all

closed containers in the location that could contain the item sought). The agents were also authorized to access the photographs stored on the phone. Documents could be stored as photographs on a phone. Photographed documents could pertain to illegal gambling or drug transactions.

4. Relief Requested.

The government respectfully requests this Honorable Court deny the defense motion to suppress physical evidence.

5. Oral Argument.

The government respectfully requests the opportunity for oral argument on this motion.

Respectfully Submitted,

6 July 2009
Date

J. McCoy
LCDR J. McCoy, JAGC, USN

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion entitled, Government Response to Defense Motion to Suppress Physical Evidence Seized From the Residence of the Accused, was served on defense counsel on the 6th day of July, 2009.

J. McCoy
LCDR J. McCoy, JAGC, USN

Attachment 10 – Government Opposition to Defense Motion to Suppress Physical Evidence Seized from the Automobile

DEPARTMENT OF THE NAVY
 NAVY-MARINE CORPS TRIAL JUDICIARY
 SOUTHERN JUDICIAL CIRCUIT
 GENERAL COURT-MARTIAL

)
 UNITED STATES)
)
 v.) GOVERNMENT RESPONSE TO
) DEFENSE MOTION TO SUPPRESS
) PHYSICAL EVIDENCE SEIZED
 KOSMO KRAMER) FROM THE AUTOMOBILE
 LCDR, U.S. NAVY))
)

1. Nature of Motion.

Per UCMJ Article 39(a) and Navy-Marine Corps Trial Judiciary Southern Circuit Instruction [SOUTHERNJUDCIRINST] 5810.1D, Rule 7, now comes the government and respectfully moves this Honorable Court to deny the defense motion to suppress physical evidence seized in the above captioned matter.

2. Summary of Facts.

The accused was charged with violating Uniform Code of Military Justice Article 95, Article 106a, and Article 112a. The charges allege that the accused fled from apprehension, attempted to engage in espionage, and wrongfully possessed a controlled substance.

On 24 April NCIS Special Agent Colombo communicated to his team of agents they were to apprehend LCDR Kramer on sight.

Subsequent to that notification, LCDR Kramer appeared in his office foyer while an NCIS team was executing a search of his office. NCIS Special Agent Gebbs informed LCDR Kramer he was under arrest. LCDR Kramer fled the scene. Special Agents Gebbs and Gumshoe pursued LCDR Kramer through building 1 and into the parking lot outside building 1.

CDR Norris observed the chase in the parking lot and intervened once LCDR Kramer reached his vehicle, a convertible with the top down. CDR Norris tackled LCDR Kramer to the ground and subdued him. The Special Agents caught the subdued LCDR Kramer and took him into formal custody. They read him his rights and searched his person for weapons. Special Agent Gumshoe stood him on his feet, not more than five feet from his automobile. Special Agent Gebbs meanwhile pat the exterior flap of the gym bag in the passenger seat of the vehicle. Special Agent Gebbs was able to feel a pill bottle in the exterior flap compartment of the gym bag. He reached into the flap and retrieved the pill bottle. He looked at the prescription label and noticed it was issued in 2006. He placed the pill bottle on the trunk of the car. He removed the gym bag and placed it on the trunk of the car as well. Special Agent Gebbs then opened the vehicle door and discovered an Apple iPhone in the storage compartment in the driver side door.

LCDR Kramer was escorted away from the vehicle by Special Agent Gumshoe. A base security vehicle had arrived on scene and was parked approximately 20 feet to the west of LCDR Kramer's Volkswagen EOS. Special Agent Gumshoe escorted LCDR Kramer to the base security vehicle where he was placed in hand cuffs and seated in the back of the vehicle. Base security drove LCDR Kramer to NCIS for a video recorded interview.

The following morning, the Volkswagen was scheduled to be towed from the building 1 parking lot to NCIS for storage. Special Agent Gebbs completed an inventory of the contents of the vehicle that morning before it was towed.

3. Discussion.

The fourth amendment was not implicated by the seizure of the pill bottle or the Apple iPhone from LCDR Kramer's automobile because he did not have an objectively reasonable expectation of privacy in the contents of his vehicle due to the convertible top being down. Additionally, the agents were authorized to conduct a full search of the vehicle incident to the lawful apprehension of LCDR Kramer. Further, no deterrent effect would be realized from any possible exclusion of the seized items. Finally, the items would have been inevitably discovered in the inventory search prior to towing the vehicle.

THERE WAS NO SEARCH IN THE CONSTITUTIONAL SENSE OF THE AUTOMOBILE BECAUSE THE ACCUSED HAD NO OBJECTIVELY REASONABLE EXPECTATION IN THE CONTENTS OF HIS CONVERTIBLE WHILE THE TOP WAS DOWN.

An individual's subjective expectation of privacy does not alone create fourth amendment protections. *Katz v. United States*, 389 U.S. 347 (1967). There must be an objectively reasonable expectation of privacy in an area as well for it to be protected by the fourth amendment. *California v. Greenwood*, 486 U.S. 35, 41 (1988). Knowingly exposing an area to public view eliminates an objective expectation of privacy. See *Florida v. Riley*, 488 U.S. 445 (1989).

Here, no search in the Constitutional sense implicating the Fourth Amendment was conducted because there was no objectively reasonable expectation of privacy in the contents of the convertible. The top to the car was down, thereby exposing the contents of the vehicle to all passers by. Further, the car was parked in a parking lot that any of the thousands of people with base access had access to.

The cellular phone was properly seized after it was observed in plain view. An officer that is lawfully in the vantage point from which an object is observed may seize an object of incriminating character. See *Horton v. California*, 496 U.S. 128, 136-137 (1990). Here, Special Agent Gebbs was lawfully in the vantage point form which he observed the

cellular phone, the parking lot of building 1. The cellular phone was an object of incriminating character based on the surrounding circumstances. Special Agent Gebbs had knowledge that a cell phone containing evidence of espionage had been discovered earlier that evening at LCDR Kramer's home and LCDR Kramer had just been taken into custody after fleeing apprehension trying to get to his vehicle. Further, Special Agent Gebbs was concerned about spoliation of evidence due to the portability of the object, its inherent value, and its exposure to any passersby. Inadvertent discovery is not a requirement of the plain view doctrine, therefore it is not dispositive that Special Agent Gebbs was intentionally looking into the vehicle. *Horton v. California*, 496 U.S. 128, 137 (1990).

The pill bottle was discovered following a plain feel observation. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993)(explaining plain view doctrine includes other senses including tactile). Special Agent Gebbs was legitimately in his vantage point, standing in the parking lot of building 1, when he pat the exterior flap of the unzipped bag exposed to passers by in the passenger seat of the top down convertible. Special Agent Gebbs felt the pill bottle in the exterior flap. The incriminating character of the object was apparent to Special Agent Gebbs due to his knowledge of the surrounding

circumstances. Special Agent Gebbs was aware of the pill discovery at LCDR Kramer's residence earlier in the evening.

THE FOURTH AMENDMENT WAS NOT VIOLATED AS ANY SEARCH CONDUCTED OF THE VEHICLE WAS AUTHORIZED INCIDENT TO A LAWFUL ARREST.

A person lawfully apprehended may be searched incident to the apprehension. MIL.R.EVID. 314(g)(1). A search incident to arrest extends to the area within the individual's "immediate control." MIL.R.EVID. 314(g)(2). When a vehicle is within the individual's area of immediate control the interior of the vehicle is included in the scope of the search incident to apprehension. *Chimel v. California*, 395 U.S. 752, 764 (1969). Search incident to arrest is justified by the need for officer safety and to prevent destruction of evidence of the crime being arrested for. *Arizona v. Gant*, 129 S.Ct. 1710, 1723 (2009). Objects that come into view during appropriately limited searches incident to arrest may be seized without a warrant. *Chimel v. California*, 395 U.S. 752, 762-763 (1969).

Here, the accused was apprehended approximately two feet from his vehicle as he was attempting to enter it. He was not in handcuffs and a single NCIS agent, Special Agent Gumshoe, escorted him from the scene. When the suspect was on his feet, not handcuffed, approximately five feet from his vehicle the search incident to arrest was initiated by Special Agent Gebbs.

The vehicle searched was a convertible with the top down. The search was justified by the facts that LCDR Kramer was not in hand cuffs, that a single agent was detaining him, his proximity to the vehicle, and the nature of the vehicle. LCDR Kramer's vehicle was a convertible with the top down. He could have broken free of Special Agent Gumshoe and reached into the exposed vehicle to retrieve a weapon. Special Agent Gebbs was justified in conducting a search of the vehicle incident to the apprehension of LCDR Kramer.

NO DETERRENT EFFECT WOULD BE REALIZED FROM EXCLUSION OF THE SEIZED EVIDENCE WHICH WOULD HAVE BEEN INEVITABLY DISCOVERED A FEW HOURS LATER IN THE INVENTORY SEARCH OF THE VEHICLE BEFORE IT WAS TOWED FROM THE SCENE.

The extreme remedy of exclusion is only applicable where it will create appreciable deterrence. *United States v. Leon*, 468 U.S. 897, 909 (1984). Excluding evidence obtained from law enforcement errors stemming from simple negligence as opposed to systemic errors or reckless disregard would create only marginal deterrence. *Herring v. United States*, 129 S.Ct. 695, 704 (2009). Here, Special Agent Gebbs was acting within the standard operating procedures of his office. He was conducting a search of the vehicle incident to arrest on 24 April 2009. The Supreme Court created a significant change in the permissible scope of vehicle searches incident to arrest just

three days prior on 21 April 2009. The complexities of the new legal opinion changing had not yet been digested and incorporated into new training for the Special Agents. The training program was set for the following work week. AS in Herring, Special Agent Gebbs was acting in good faith, following his standard operating procedures. Any possible non-compliance with Fourth Amendment requirements was based on simple negligence as opposed to recklessness, therefore no effective deterrent could be realized from excluding the seized evidence.

The seized items should not be excluded from evidence because they would have been inevitably discovered the following morning. The exclusionary rule is not warranted where evidence would have been discovered by other lawful means. *Nix v. Williams*, 467 U.S. 431, 444 (1984). Here, a few hours after Special Agent Gebbs discovered the cell phone and the pill bottle an inventory search of the vehicle was completed. The inventory search of the vehicle was completed according to standard procedure before a vehicle is taken into NCIS custody. The vehicle was to be towed to NCIS from the building 1 parking lot for storage purposes. During the inventory search of the vehicle both the pill bottle and contents as well as the cellular telephone would have been discovered. As the lawful inventory search would have resulted in discovery of the items they should not be subject to the exclusionary rule.

4. Relief Requested.

The government respectfully requests this Honorable Court deny the defense motion to suppress physical evidence.

5. Oral Argument.

The government respectfully requests the opportunity for oral argument on this motion.

Respectfully Submitted,

6 July 2009
Date

J. McCoy
LCDR J. McCoy, JAGC, USN

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion entitled, Government Response to Defense Motion to Suppress Physical Evidence Seized From the Vehicle of the Accused, was served on defense counsel on the 6th day of July, 2009.

J. McCoy
LCDR J. McCoy, JAGC, USN

initial request but subsequent requests as well as he fled the scene on foot. The NCIS agents pursued LCDR Kramer through building 1 on board Naval Air Station Jacksonville and into the parking lot.

CDR Huck Norris, a U.S. Navy Seal, observed LCDR Kramer fleeing from NCIS and ignoring orders to stop. CDR Norris had no involvement in the investigation against LCDR Kramer but felt it was his duty to prevent a fugitive from escaping from law enforcement. Accordingly, CDR Norris tackled the fleeing LCDR Kramer. CDR Norris then asked out loud what was going on. LCDR Kramer then freely chose to volunteer an answer to what was obviously a rhetorical question. The NCIS agents who were in pursuit arrived on the scene and took LCDR Kramer into custody. LCDR Kramer was transported to NCIS headquarters for an interview with Special Agent Colombo.

NCIS Special Agent Colombo met with LCDR Kosmo Kramer, USN, the accused. Special Agent Colombo advised LCDR Kramer of the nature of the charges against him and of his rights under Article 31(b) of the Uniform Code of Military Justice. LCDR Kramer indicated he understood these rights and then knowingly and voluntarily waived the rights. LCDR Kramer then proceeded to make a sworn statement to NCIS.

3. Discussion.

CDR Huck Norris, USN, was not required to give the accused Article 31(b) warnings. Further, CDR Norris asked a rhetorical question that was not designed to elicit a response. In the subsequent interview at NCIS, Special Agent Colombo properly advised LCDR Kramer of his Article 31(b) warnings. Accordingly, both statements of the accused were voluntary and are admissible and the defense motion to suppress should be denied.

CDR Norris was not required to give the accused 31(b) warnings

CDR Norris was not a law enforcement official, was not part of the investigation against LCDR Kramer, was not a member of LCDR Kramer's command, nor did he ask LCDR Kramer a question with any intent to obtain evidence. CDR Norris's question was that of a curious by-stander not an investigatory interrogatory. CDR Norris was not in uniform and therefore his rhetorical question lacked any coercive authority. Since the rhetorical question was not being asked by a law enforcement person or for a law enforcement purpose and it lacked any inherent coercion from rank, there can be no justification for extending the requirements of Article 31(b) to CDR Norris.

Special Agent Colombo properly advised the accused of his rights

Questioners are required only to advise the accused of the general nature of the charges he is suspected of. *See United States v. Rice*, 11 U.S.C.M.A. 524, 526 (1960). A valid rights

advisory need not include every possible charge the accused may face, rather it need only inform the accused of the general nature of the charged offenses and orient them to the general area of suspicion. *United States v. Simpson*, 54 M.J. 281, 284 (C.A.A.F. 2000).

Here, Special Agent Colombo provided sufficient notice to the accused of the nature of the accusations against him. Special Agent Colombo warned the accused he was suspected of homicide, espionage, illegal gambling and fleeing apprehension. In the present case by advising the accused about the espionage charge Special Agent Colombo oriented the accused to the drug possession charge as well. Those two charges were closely related as the evidence for the espionage charge, the cell phone, was being stored in the same briefcase as the evidence for the drug charge, the pill bottle. Thus by orienting the accused to the espionage charge, Special Agent Colombo effectively warned the accused of all related charges which would include the drug charge.

Since the accused was provided with proper notice of the general nature of the accusations he was suspected of, the Article 31(b) warnings given to him were legally sufficient. And since the defense has made no other challenge to the voluntariness of the accused's statement to LCDR Kramer, that statement was voluntary and therefore should be admissible.

4. Relief Requested.

The government respectfully requests this Honorable Court deny the defense motion to suppress the statements made to Special Agent Colombo and CDR Norris.

5. Oral Argument.

The government respectfully requests the opportunity for oral argument on this motion.

Respectfully Submitted,

6 July 2009_____
Date

J. McCoy_____
LCDR J. McCoy, JAGC, USN

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion entitled, Government Response to Defense Motion to Suppress Statements of the Accused, was served on defense counsel on the 6th day of July, 2009.

J. McCoy_____
LCDR J. McCoy, JAGC, USN

Attachment 12 – Findings of Fact and Rulings of Law on Defense Motion to Suppress Physical Evidence Seized from the Residence

DEPARTMENT OF THE NAVY
 NAVY-MARINE CORPS TRIAL JUDICIARY
 SOUTHERN JUDICIAL CIRCUIT
 GENERAL COURT-MARTIAL

)
 UNITED STATES)
)
 v.) DEFENSE MOTION FOR APPROPRIATE
) APPROPRIATE RELIEF:
) SUPPRESSION OF EVIDENCE SEIZED
 KOSMO KRAMER) FROM THE RESIDENCE
 LCDR, U.S. NAVY)
)

MILITARY JUDGE’S RULING
DENYING THE MOTION

THIS MATTER came before the court during an Article 39(a), UCMJ, session on the 13th day of July 2009 on the Defense’s motion to exclude from evidence certain items obtained by NCIS during its investigation of the above referenced matter, to wit: \$200,000 in U.S. currency, a pill bottle and the pills contained there in, an Apple iPhone cellular telephone, a printout of a text message exchange from the Apple iPhone, and 141 images that were retrieved from the memory of the Apple iPhone. The Government appeared for argument by LCDR J. McCoy, JAGC, U.S. Navy, and LT Angie Harmonious, JAGC, U.S. Navy. The accused appeared in person and by his Detailed Defense Counsel, LT Tim Cruiz, JAGC, U.S. Navy, and LCDR Demina Moore, JAGC, U.S. Navy, as well as his private attorney, Alan Chore, Esq. of Crain, Peel, & Schlit, LLP. There were no other appearances.

WHEREUPON, the Defense presented its evidence, consisting of its motion Appellate Exhibit I without attachments. The Government presented its motion, Appellate Exhibit II.

WHEREUPON, the parties presented argument to the court. The Government offered the testimony of Naval Criminal Investigative Service Special Agent Magnum T.I., and introduced Appellate Exhibit III, the Permissive Authorization for Search and Seizure. The Defense offered the testimony of Mrs. Parish Holten, the wife of the accused.

NOW, having heard argument of counsel, having personally observed the witnesses, and having carefully reviewed the evidence, this court makes the following essential findings of fact based on the evidence of record, and the following conclusions of law based on those facts:

ESSENTIAL FINDINGS OF FACT

1. The accused is an active duty member of the United States Navy. He is a line officer holding the rank of Lieutenant Commander.
2. The accused is married to Parish Holten and has no children.
3. On 24 April 2009 the accused lived in an off base residence with his wife in Jacksonville, Florida. The residence was a single family home.
4. The accused is stationed at Naval Air Station Jacksonville.
5. CAPT Morgan was the commanding officer of the accused on 23 and 24 April 2009.
6. NCIS Special Agent Colombo had a brief conversation with the accused on his front porch at approximately 1900 on 24 April 2009 wherein he asked the accused to come to NCIS on board NAS JAX.
7. The accused voluntarily drove himself to NCIS on board Naval Air Station Jacksonville on the evening of 24 April 2009 to be interviewed in connection with a missing petty officer.
8. While being interviewed at NCIS the accused did refuse consent to search his residence.
9. Special Agent Magnum T.I. and Special Agent Jack Closeau knocked on the door to the residence of the accused later that evening.
10. The wife of the accused, Mrs. Parish Holten, answered the door.
11. The Agents confirmed her identity and identified themselves to her using their badges.

12. A conversation took place between Mrs. Parish Holten and the two Agents on the front porch of the residence.
13. There were three participants to the conversation, Special Agent Magnum T.I., Special Agent Jack Closeau, and Mrs. Parish Holten.
14. Mrs. Holten is 27 years of age.
15. Mrs. Holten has never been arrested or had any other significant interaction with law enforcement.
16. Mrs. Holten is not on active duty and never has been. Further, the Agents were aware Mrs. Holten works as a model and is paid to make public appearances at various locations around town.
17. Mrs. Holten is approximately 5 foot 10 inches tall and is of an extremely slender build.
18. Mrs. Holten was holding a martini glass and informed the Agents that she had consumed alcoholic beverages over the course of the evening.
19. Mrs. Holten demonstrated visible signs of intoxication such as slurring her words, being unsteady on her feet, and spilling the beverage she was holding.
20. Mrs. Holten did carry on a conversation with the Agents on her porch.
21. She appeared to understand the nature of the conversation.
22. During the conversation the Agents suggested she place a telephone call to her husband to discuss the matter.
23. Mrs. Holten did attempt to telephonically contact her husband more than one time.
24. The Agents did tell Mrs. Holten they suspected her husband of massive gambling and drug transactions.
25. Mrs. Holten did sign the Permissive Authorization for Search and Seizure form presented to her by the Agents.
26. Special Agents Magnum and Closeau executed a search of the residence.

27. Mrs. Holten followed the Agents while they searched the house.
28. At no time did Mrs. Holten revoke her consent to search the house.
29. At no time during the execution of the search were any persons other than Mrs. Holten and the executing Agents present.
30. The den was within the marital residence.
31. The den was capable of being locked but was unlocked.
32. The Agents did hear Mrs. Holten comment about her husband's use of the den as a game room.
33. Mrs. Holten did explain she did not decorate the room, rather her husband had done that.
34. The room contained a poker table, a computer desk, a television, a bar, and a closet.
35. The closet contained military uniforms, both folded and on hangers in the plastic packaging common from a dry cleaner.
36. On the floor in the closet were shoes and boots in compliance with military uniform regulations.
37. A black leather briefcase with brass hardware was located on the floor of the closet.
38. The briefcase was within Navy uniform regulations.
39. The hardware of the briefcase was engraved with the letters "KK". The briefcase was capable of being locked.
40. Mrs. Holten observed the Agent retrieve the briefcase from the closet.
41. Mrs. Holten did not volunteer any information about the briefcase.
42. Special Agent Magnum did not ask Mrs. Holten about the briefcase.

43. Special Agent Magnum T.I. opened the unlocked briefcase and discovered the U.S. currency, the pill bottle, and the cell phone inside.
44. The pill bottle was a standard pill bottle used by a pharmacy.
45. The pill bottle did not have a prescription wrapped around it.
46. The pill bottle contained 37 pills.
47. The Apple iPhone located inside the briefcase was powered off.
48. Special Agent Magnum T.I. turned the phone on and checked the call log, followed by the text message log, followed by the stored photographs on the phone.
49. The phone contained one text message exchange.
50. The phone contained 147 images stored in its memory.

RULINGS OF LAW

1. Evidence obtained pursuant to an unlawful search or seizure is generally inadmissible against an accused. MIL.R.EVID. 311(a).
2. The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).
3. Searches conducted pursuant to consent need not be based on probable cause. MIL.R.EVID. 314(e)(1).
4. Individuals with common authority over an area can consent to its search. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). As a resident of the marital home, Mrs. Holten had authority to consent to its search.
5. Consent from an individual with common authority is vitiated by another individual with common authority being physically

present and refusing consent. *Georgia v. Randolph*, 547 U.S. 103, 120 (2006). Mrs. Holten's consent was not contradicted by any one physically present at the residence.

6. To be valid, consent to search must be voluntarily given. MIL.R.EVID. 314(e)(4).
7. Voluntariness of consent is determined from consideration of the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).
8. An individual being under the influence of alcohol at the time of making a statement is a factor for consideration. See generally *United States v. Jones*, 34 M.J. 899, 906-907 (N.M.C.M.R. 1992); *United States v. Logan*, 2001 CCA LEXIS 165 (A.F.C.C.A. 2001).
9. Use of deception by law enforcement does not automatically render consent involuntary. *United States v. Richter*, 51 M.J. 213, 221 (C.A.A.F. 1999).
10. Granting consent to search a space includes closed containers within the space. *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).
11. If it is objectively reasonable for law enforcement to believe the consenting party had common authority over an area the law enforcement officer can rely on the consent given to search the area. See *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).
12. A valid search may include any area, place, or container reasonably capable of containing the object of the search. See *Horton v. California*, 469 U.S. 128, 141 (1990); See also *United States v. Ross*, 456 U.S. 798 (1982).
13. In executing a search, Agents are authorized to exercise their judgment. See *United States v. Fogg*, 52 M.J. 144, 148 (C.A.A.F. 1999). Here, the Agents reasonably interpreted the consent to search as covering the entire residence.
14. When conducting a lawful search, within their authorized scope, agents may seize contraband, even unrelated to the purpose of their search. *United States v. Fogg*, 52 M.J. 144, 149 (C.A.A.F. 1999); but see *Arizona v. Hicks*, 480 U.S. 321, 328 (1987) (holding plain view doctrine does not extend a specific search into a general search).

CONCLUSIONS

- 1) The Motion for Appropriate Relief seeking suppression of the U.S currency is hereby DENIED. The consent granted by Mrs. Parish Holten to search the residence was voluntarily given. Mrs. Holten is a college educated adult woman who engaged in conversation with the Agents in the non-coercive environment of her front porch. After the conversation she signed a Permissive Authorization for Search and Seizure form in addition to verbally granting the Agents consent to search her residence. Mrs. Holten had common authority over the marital residence and therefore had authority to grant consent. No other person was present refusing consent. The Agents were within their authorized scope to search the den of the house, the closet of the den, and the briefcase found within the closet. It was objectively reasonable for the Agents to believe Mrs. Holten had common authority over the entire house as the door to the den was not locked and she entered the den with them and never informed them to the contrary. Additionally, the unlocked briefcase in which the currency was found was a container of sufficient size to contain evidence.

- 2) The Motion for Appropriate Relief seeking suppression of the pill bottle and pills contained there in is hereby DENIED. For the reasons listed above the Agents were within their lawful authority to open the briefcase. The Agent was authorized to be where he was when he observed the pill bottle and its contents. The pill bottle and contents were properly seized pursuant to the authorization given by Mrs. Holten.

- 3) The Motion for Appropriate Relief seeking suppression of the cellular phone as well as the text message exchange and the stored photographs contained on the cellular phone is hereby DENIED. For the reasons listed above the Agents were within their lawful authority when they opened the briefcase and examined its contents. The cellular phone was properly seized pursuant to the authorization given by Mrs. Holten.

Issued this 13th day of July 2009

Roger Hua
LtCol Roger Hua
Military Judge

Attachment 13 – Findings of Fact and Rulings of Law on Defense Motion to Suppress Physical Evidence Seized from the Automobile

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

 UNITED STATES)
)
) DEFENSE MOTION FOR APPROPRIATE
 v.) APPROPRIATE RELIEF:
) SUPPRESSION OF EVIDENCE SEIZED
 KOSMO KRAMER) FROM THE AUTOMOBILE
 LCDR, U.S. NAVY)
)

MILITARY JUDGE’S RULING
DENYING THE MOTION

THIS MATTER came before the court during an Article 39(a), UCMJ, session on the 13th day of July 2009 on the Defense’s motion to exclude from evidence certain items obtained by NCIS during its investigation of the above referenced matter, to wit: 15 pills of Modafinil, otherwise known as Provigil, and an Apple iPhone cellular telephone along with 47 images stored in the memory of said telephone. The Government appeared for argument by LCDR J. McCoy, JAGC, U.S. Navy, and LT Angie Harmonious, JAGC, U.S. Navy. The accused appeared in person and by his Detailed Defense Counsel, LT Tim Cruiz, JAGC, U.S. Navy, and LCDR Demina Moore, JAGC, U.S. Navy, as well as his private attorney, Alan Chore, Esq. of Crain Peel, & Schlit, LLP. There were no other appearances.

WHEREUPON, the Defense presented its evidence, consisting of its motion Appellate Exhibit I without attachments. The Government presented its motion, Appellate Exhibit II.

WHEREUPON, the parties presented argument to the court. The Government offered the testimony of CDR Huck Norris, the testimony of Naval Criminal Investigative Service Special Agent L.J. Gebbs, and the video recorded interview of the accused conducted by Naval Criminal Investigative Services Special Agent Colombo.

NOW, having heard argument of counsel, having personally observed the witnesses, and having carefully reviewed the evidence, this court makes the following essential findings of fact based on the evidence of record, and the following conclusions of law based on those facts:

ESSENTIAL FINDINGS OF FACT

1. The accused is an active duty member of the United States Navy. He is a line officer holding the rank of Lieutenant Commander.
2. The accused is married to Parish Holten and has no children.
3. On April 24 2009 the accused lived in an off base residence with his wife in Jacksonville, Florida.
4. The accused is stationed at Naval Air Station Jacksonville.
5. The accused maintained an office in building 1 on board Naval Air Station Jacksonville, the headquarters of the base.
6. CAPT Morgan was the commanding officer of the accused on 24 April 2009.
7. On the evening of 24 April 2009, NCIS Special Agents Jenny Gumshoe and L.J. Gebbs were in pursuit of LCDR Kramer on foot exiting building 1 on board Naval Air Station Jacksonville.
8. CDR Huck Norris tackled LCDR Kramer to the ground in the parking lot in front of building 1.
9. LCDR Kramer was approximately two feet from his vehicle and he had his key in his hand when he was tackled.
10. LCDR Kramer was brought to the ground approximately five feet from his automobile.
11. LCDR Kramer owns a 2009 Volkswagen EOS convertible.
12. The convertible top to LCDR Kramer's vehicle was down.
13. CDR Norris positioned LCDR Kramer in the prone position on the ground, removed LCDR Kramer's belt, and used it to bind his hands behind his back.

14. Special Agents Gumshoe and Gebbs approaching from the West arrived at LCDR Kramer laying on the ground.
15. Special Agent Gumshoe searched LCDR Kramer for weapons and found none.
16. Special Agent Gumshoe removed the belt binding LCDR Kramer's hands and stood him on his feet.
17. CDR Norris was still in the immediate area while LCDR Kramer was brought to his feet.
18. As Special Agent Gumshoe stood LCDR Kramer up, Special Agent Gebbs began a search of the automobile.
19. Special Agent Gebbs found a pill bottle in the exterior flap of a gym bag located in the passenger seat of the car.
20. Special Agent Gumshoe escorted LCDR Kramer West from the vehicle towards the base security vehicle that had arrived on scene.
21. Special Agent Gebbs found an Apple iPhone cellular telephone in the storage compartment in the driver side door.
22. The base security vehicle was over 20 feet from LCDR Kramer's vehicle in the parking lot.
23. Once at the base security vehicle, LCDR Kramer was placed into handcuffs and put in the back seat of the base security vehicle.
24. The automobile was parked in a marked parking space it was authorized to be in and was not impeding traffic in the parking lot.
25. The automobile was inventoried and towed from the building 1 parking lot to NCIS on the morning of 25 April.
26. LCDR Kramer's wife, Parish Holten, was not contacted to claim the automobile before it was towed.

RULINGS OF LAW

1. Evidence obtained pursuant to an unlawful search or seizure is generally inadmissible against an accused. MIL.R.EVID. 311(a).

2. The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).
3. Fourth amendment protections are implicated where there is both a subjective expectation of privacy and an objective expectation of privacy society accepts as reasonable. *California v. Greenwood*, 486 U.S. 35, 39 (1988).
4. Knowingly exposing something to the public vitiates fourth amendment protection. *California v. Greenwood*, 486 U.S. 35, 41 (1988).
5. The exclusionary rule only applies where it will produce an appreciable deterrence. *United States v. Leon*, 468 U.S. 897, 909 (1984).
6. Where law enforcement errors resulting in violations of fourth amendment protections are the result of negligence, exclusion does not warrant marginal deterrence achieved. *Herring v. United States*, 129 S.Ct. 695, 704 (2009).
7. An individual may be searched incident to a lawful apprehension. MIL.R.EVID. 314(g)(1).
8. The permissible scope of a search incident to arrest includes the area within the individual's "immediate control." MIL.R.EVID. 314(g)(2); *Chimel v. California*, 395 U.S. 752, 764 (1969).
9. Closed containers within the area of immediate control are searchable under the incident to lawful arrest warrant exception. *New York v. Belton*, 453 U.S. 454, 460-461 (1981).
10. Search of a vehicle incident to arrest is only permissible for officer safety or to prevent destruction of evidence of the crime being arrested for. *Arizona v. Gant*, 129 S.Ct. 1710, 1723 (2009).
11. Conducting an inventory search of a vehicle prior to taking it into police custody is reasonable. *South Dakota v. Opperman*, 428 U.S. 364 (1976).

CONCLUSIONS

- 1) The Motion for Appropriate Relief seeking suppression of the pill bottle and 15 pills contained therein is hereby DENIED. LCDR Kramer was lawfully apprehended in the immediate vicinity of his automobile. A search incident to that arrest on the basis of officer safety was conducted of his vehicle. The evidence was seized during that search.

- 2) The Motion for Appropriate Relief seeking suppression of the Apple iPhone cellular telephone is hereby DENIED.

Issued this 13th day of July 2009

Roger Hua
LtCol Roger Hua
Military Judge

Attachment 14 – Findings of Fact and Conclusions of Law on Defense Motion to Suppress Statements of the Accused

DEPARTMENT OF THE NAVY
 NAVY-MARINE CORPS TRIAL JUDICIARY
 SOUTHERN JUDICIAL CIRCUIT
 GENERAL COURT-MARTIAL

)
 UNITED STATES)
)
 v.) DEFENSE MOTION FOR APPROPRIATE
) APPROPRIATE RELIEF:
) SUPPRESSION OF EVIDENCE SEIZED
 KOSMO KRAMER) FROM THE AUTOMOBILE
 LCDR, U.S. NAVY)
)

MILITARY JUDGE’S RULING
DENYING THE MOTION

THIS MATTER came before the court during an Article 39(a), UCMJ, session on the 13th day of July 2009 on the Defense’s motion to exclude from evidence certain statements made by the accused, to wit: all statements made in the parking lot of building 1 on board Naval Air Station Jacksonville on 24 April 2009 to CDR Huck Norris and all statements made in an interview conducted by NCIS Special Agent Martin Colombo conducted on 24 April 2009 after LCDR Kramer had been apprehended. The Government appeared for argument by LCDR J. McCoy, JAGC, U.S. Navy, and LT Angie Harmonious, JAGC, U.S. Navy. The accused appeared in person and by his Detailed Defense Counsel, LT Tim Cruz, JAGC, U.S. Navy, and LCDR Demina Moore, JAGC, U.S. Navy, as well as his private attorney, Alan Chore, Esq. of Crain, Peel, & Schlit, LLP. There were no other appearances.

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NOW, having heard argument of counsel, having personally observed the witnesses, and having carefully reviewed the evidence, this court makes the following essential findings of fact based on the evidence of record, and the following conclusions of law based on those facts:

ESSENTIAL FINDINGS OF FACT

1. The accused is an active duty member of the United States Navy. He is a line officer holding the rank of Lieutenant Commander.
2. On April 24 2009 the accused lived in an off base residence with his wife in Jacksonville, Florida.
3. The accused is stationed at Naval Air Station Jacksonville.
4. The accused maintained an office in building 1 on board Naval Air Station Jacksonville, the headquarters of the base.
5. CAPT Morgan was the commanding officer of the accused on 24 April 2009.
6. On the evening of 24 April 2009, NCIS Special Agents Jenny Gumshoe and L.J. Gebbs were in pursuit of LCDR Kramer on foot exiting building 1 on board Naval Air Station Jacksonville.
7. CDR Norris observed the NCIS agents in pursuit of LCDR Kramer in the parking lot of building 1.
8. CDR Huck Norris is on active duty in the U.S. Navy in the Special Operations community. On 24 April 2009 he was on temporary additional duty in Jacksonville, Florida.
9. CDR Huck Norris tackled LCDR Kramer to the ground in the parking lot in front of building 1.
10. CDR Norris is not affiliated with law enforcement and acted of his own independent volition in tackling LCDR Kramer.
11. CDR Norris was not in uniform on the evening of 24 April 2009. He was wearing black shorts and a black t-shirt.
12. CDR Norris did not provide an Article 31(b) rights advisory to LCDR Kramer.

13. CDR Norris made the following statement, "What in the hell is going on here"
14. LCDR Kramer verbally responded to CDR Norris' statement.
15. Special Agents Gumshoe and Gebbs arrived on the scene and formally apprehended LCDR Kramer.
16. LCDR Kramer was placed into hand cuffs and transported by base security to NCIS headquarters for an interview.
17. NCIS Special Agent Colombo conducted a video recorded interview of LCDR Kramer.
18. Special Agent Colombo administered Article 31(b) and advised LCDR Kramer he was suspected of homicide, espionage, accumulating massive gambling debts, and flight from apprehension.
19. While the Article 31(b) warnings were being administered LCDR Kramer's black leather briefcase sat on the interview room table in plain sight.
20. The briefcase was the same briefcase seized from LCDR Kramer's residence earlier that evening.
21. The briefcase contained several items, including a pill bottle which held 37 pills.
22. Special Agent Colombo was aware pills had been discovered in the briefcase.
23. The pills had not been tested to confirm their chemical composition by the time of the 24 April video recorded interview.
24. LCDR Kramer waived his Article 31(b) rights and agreed to make a statement.
25. Special Agent Colombo then advised LCDR Kramer that they had the briefcase from his house and had seen its contents.
26. LCDR Kramer then proceeded to make incriminating statements.

RULINGS OF LAW

1. Statements made in the absence of required Article 31(b) warnings are inadmissible involuntary statements. MIL.R.EVID. 305(a).
2. Persons subject to the Uniform Code of Military Justice themselves are required to administer Article 31(b) warnings before interrogating a suspect. MIL.R.EVID. 305(c).
3. Interrogation includes any questioning where an incriminating response is sought or is a reasonable consequence. MIL.R.EVID. 305(b)(2).
4. Every case involving Article 31(b) warnings "turn[s] on its own facts." *United States v. Nietschke*, 12 C.M.A. 489, 492 (1961).
5. Article 31(b) requires a suspect be alerted as to the general nature of the charge they are suspected of before being interrogated. *United States v. Simpson*, 54 M.J. 281, 284 (C.A.A.F. 2000).
6. The purpose of advising a suspect as to the general nature of the possible charges is to orient them to the transactions or incident they are suspected of being involved in. *United States v. Rice*, 11 U.S.C.M.A. 524, 526, 29 C.M.R. 340, 342 (1960).
7. Suspects need not be warned of all possible charges that could arise from an event. *United States v. Simpson*, 54 M.J. 281, 284 (C.A.A.F. 2000).

CONCLUSIONS

- 1) The Motion for Appropriate Relief seeking suppression of the statement made by LCDR Kramer in the presence of CDR Huck Norris is hereby DENIED. CDR Norris was not seeking an incriminating response in his rhetorical comment, nor was an incriminating response a reasonable consequence of the remark.
- 2) The Motion for Appropriate Relief seeking suppression of the video recorded interview of LCDR Kramer conducted by NCIS Special Agent Colombo is hereby DENIED. LCDR Kramer

was placed on notice as to the general nature of the charges he was suspected of through the express list recited by Special Agent Colombo at the initiation of the interview. Article 31(b) does not require an individual be notified of the exact charges they will face as long as they are alerted as to the general nature of the charges. Here, LCDR Kramer was made aware of the general nature of the charges he was facing from the express list coupled with Special Agent Colombo's comments that they had been inside the briefcase which contained the drugs earlier in the evening.

Issued this 13th day of July 2009

Roger Hua

LtCol Roger Hua
Military Judge

