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DISTRICT COURT OF GUAM
TERRITORY OF GUAM

UNITED STATES OF AMERICA,
Plaintiff,
vs.
ZYLZOHNI PANGELINAN,
Defendant.

Criminal Case No. 10-00040

**ORDER RE: MOTION TO DISMISS
INDICTMENT, OR, IN THE
ALTERNATIVE, TO SUPPRESS
EVIDENCE BASED ON VIOLATION
OF THE POSSE COMITATUS ACT**

On November 29, 2010, the court heard Defendant’s Motion to Dismiss, or in the Alternative, to Suppress Evidence Based on Violation of the Posse Comitatus Act. After hearing the testimony of witnesses and argument from counsel, the court hereby **DENIES** Defendant’s motion.

I. FACTUAL BACKGROUND

On October 1, 2008, NCIS Special Agents Daniel Simpson, Joseph Twilley, John Connell, and Robert Vogt went to 671 Reggae Club—a club frequented by active duty Navy personnel—to further an ongoing narcotics operation. Docket No. 10-1 at 3, ¶ 2. Acting in a shallow undercover agent capacity, Special Agent Simpson surveyed the outside of the club and smoked a cigarette that emitted a smell similar to that of marijuana. *Id.* at 3, ¶¶ 2–3. When Special Agent Simpson approached the front of the club to re-enter, two civilian bouncers

1 identifying themselves as “Zone” and “Keith” offered to sell marijuana to Special Agent
2 Simpson. *Id.* at 3, ¶ 4. Special Agent Simpson accepted the offer and purchased four marijuana
3 cigarettes from Zone and Keith. *Id.* Special Agent Simpson exchanged cellular phone numbers
4 with Zone so they could arrange deals in the future. *Id.*

5 On October 2, 2008, Zone telephoned Special Agent Simpson and offered to sell Special
6 Agent Simpson “a bag of weed.” *Id.* at 5, ¶ 2. Special Agent Simpson informed Zone that he
7 was interested in purchasing marijuana and that he would also like to find some ice for his
8 girlfriend. *Id.* at 5, ¶ 3. Zone told Special Agent Simpson that he also sold ice and was willing
9 to sell some to Special Agent Simpson. *Id.* In the evening of October 2, 2008, Special Agents
10 Simpson and Connell met with Zone and purchased a bag of marijuana and a quarter gram of ice
11 from Zone. *Id.* at 6, ¶¶ 6–7.

12 On October 9, 2008, Special Agent Simpson informed Zone that he wanted to purchase a
13 half gram of ice to sell to his co-workers on Naval Base Guam. *Id.* at 8, ¶ 1. Zone agreed to sell
14 the ice to Special Agent Simpson the following day. *Id.* On October 10, 2008, Special Agent
15 Simpson met with Zone to complete the transaction. *Id.* at 8, ¶ 5. Special Agent Simpson gave
16 Zone three hundred dollars and Zone left to obtain the ice from his supplier. *Id.* at 8–9, ¶¶ 5–6.
17 However, Zone was unable to consummate the deal with his supplier, and he returned the three
18 hundred dollars to Special Agent Simpson. *Id.* at 9, ¶ 7. After the failed deal, Special Agent
19 Simpson repeatedly tried to contact Zone on his cellular phone, but the attempts were
20 unsuccessful. *Id.* at 15, ¶ 1 & 17, ¶ 1.

21 On or around September 22, 2009, Special Agent Twilley identified Zone as Defendant
22 Zylzohni Pangelinan. *See id.* at 25, ¶ 2. On July 11, 2010, U.S. Marshal John Taijeron arrested
23 Defendant, and he was charged with Distribution of Methamphetamine and Distribution of
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Marijuana, both in violation of 21. U.S.C. § 841(a)(1). *See* Docket No. 3.

II. DISCUSSION

A. The Posse Comitatus Act

By way of historical background, the Posse Comitatus Act was originally enacted as part of the Army Appropriations Act of 1878 to prevent the use of military troops to secure Southern elections during the post-Reconstruction era. *See Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948); *see also* Commander Gary Felicetti & Lieutenant John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage is Done*, 175 Mil. L. Rev. 86, 91 (2003). The act effectively served its purpose and then fell into a prolonged state of obscurity. *Chandler*, 171 F.2d at 936. The contemporary purpose of the act is “to uphold the American tradition of restricting military intrusions into civilian affairs, . . .” *United States v. Al-Talib*, 55 F.3d 923, 929 (4th Cir. 1995) (citations omitted).

In its entirety, the Posse Comitatus Act provides—

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1385 (2006). The act expressly prohibits using the “Army or the Air Force” to execute laws, but it makes no mention of the Navy. *See id.* Despite the omission of the Navy, some circuit courts—the Ninth Circuit included—have interpreted a related statute, 10 U.S.C. § 375,¹ as incorporating the Navy into the Posse Comitatus Act. *See United States v. Khan*, 35

¹ Section 375 provides—

The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a

1 F.3d 426, 431 (9th Cir. 1994) ("Regulations issued under 10 U.S.C. § 375 require Navy
2 compliance with the restrictions of the Posse Comitatus Act. . . .") (quoting *United States v.*
3 *Yunis*, 924 F.2d 1086, 1094 (D.C. Cir.1991)) (internal quotation marks omitted). The Ninth
4 Circuit has further found that Naval Criminal Investigative Service (NCIS) civilian special
5 agents are also subject to the Posse Comitatus Act.² See *United States v. Chon*, 210 F.3d 990,
6 993–94 (9th Cir. 2000). Thus by way of incorporation, the Posse Comitatus Act applies to the
7 Navy and NCIS civilian special agents.
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9 **B. There is No Authority to Support a Motion to Dismiss for a Violation of the Posse**
10 **Comitatus Act**

11 Defendant moves to dismiss the indictment on the ground that the use of NCIS special
12 agents in the investigation of this case violated the Posse Comitatus Act. However, Defendant
13 fails to provide authority for the contention that dismissing the indictment is a proper remedy for
14 a violation of the Posse Comitatus Act.

15 On October 5, 2010, the parties filed a stipulated motion to eliminate the trial date and
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19 member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other
20 similar activity unless participation in such activity by such member is otherwise authorized
21 by law.

22 10 U.S.C. § 375 (2006) (emphasis added).

23 ² The Government argues that 10 U.S.C. § 7480, which was passed on October 30, 2000,
24 exempts NCIS civilian agents from the Posse Comitatus Act. The language of § 7480 authorizes
25 NCIS civilian employees to execute warrants and make arrests—an exception to the Posse
26 Comitatus Act—but it does not completely remove NCIS civilian agents from the scope of the
27 Posse Comitatus Act. See 10 U.S.C. § 7480 (2006). Moreover, the Government concedes that there
28 are no cases that construe § 7480 as a blanket exemption from the Posse Comitatus Act. Thus, the
court disagrees with the Government's contention that NCIS civilian agents are exempt from the
Posse Comitatus Act by way of 10 U.S.C. § 7480.

1 schedule a suppression hearing. Docket No. 15. In the motion, the parties agreed that the
2 only issue before the court is the issue of suppression. *Id.* at 1:17. Given the stance of the
3 parties, the court hereby denies Defendant’s motion to dismiss the indictment as moot.³

4 **C. The Application of the Exclusionary Rule Is Not Warranted**

5 In the alternative, Defendant moves to suppress evidence allegedly obtained in violation
6 of the Posse Comitatus Act.⁴ Under the act, the exclusive remedies for a violation are a fine, a
7 term of imprisonment, or both, not suppression of evidence. 18 U.S.C. § 1385. Defendant,
8 however, argues that the motion to suppress should be granted pursuant to *United States v.*
9 *Roberts* because there is a need to deter NCIS special agents from violating the Posse Comitatus
10 Act in the future.⁵

11 In *Roberts*, the Ninth Circuit determined that the Navy violated statutes related to the
12 Posse Comitatus Act, but refused to apply the exclusionary rule to suppress the evidence

15 ³ Even if the court delved into the merits of the motion, the result would still be denial of the
16 motion. Under the Posse Comitatus Act, the proper remedial action for a violation is a fine, a
17 maximum of two years imprisonment, or both. 18 U.S.C. § 1385. There is nothing on the face of
18 the statute to support the position that a violation warrants dismissal of an indictment. In fact, the
19 Ninth Circuit has held—contrary to Defendant’s initial position—that dismissing an indictment is
20 an inappropriate remedy for violations of the act. *See United States v. Cotten*, 471 F.2d 744, 749
(9th Cir. 1973) (denying the defendant’s motion to dismiss based on an alleged violation of the
21 Posse Comitatus Act and stating, “[t]he remedy requested exceeds that required by the conduct.”).

22 ⁴ Several defendants have asserted similar positions in other federal courts, but not a single
23 federal court has extended the exclusionary rule to apply to Posse Comitatus Act violations. *See*
24 *United States v. Roberts*, 779 F.2d 565, 568 (9th Cir. 1986) (determining that the exclusionary rule
25 did not apply to violations of the Posse Comitatus Act and related statutes); *Al-Talib*, 55 F.3d at 930
26 (“as a general matter, the exclusionary rule is not a remedy for violations of the PCA”) (citations
27 omitted).

28 ⁵ Because the Ninth Circuit has refused to apply the exclusionary rule in the case of an
isolated violation of the Posse Comitatus Act, the court does not find it necessary to decide the issue
of whether the NCIS special agents’ direct participation in the investigation of Defendant violated
the Posse Comitatus Act in this particular case. *See* discussion of *Roberts* *infra* p. 6.

1 obtained via the violation. 779 F.2d 565, 568 (9th Cir. 1986). In the dicta of the opinion, the
2 court stated that the exclusionary rule should not be applied unless there were “widespread and
3 repeated violations of the Posse Comitatus Act” that demonstrated a need to adopt the
4 exclusionary rule to deter future violations. *Id.* (adopting the approach in *United States v.*
5 *Wolffs*, 594 F.2d 77, 85 (5th Cir. 1979) and *United States v. Walden*, 490 F.2d 372, 376–77 (4th
6 Cir. 1974)) (internal quotation marks omitted).

7 Defendant relies on the Government’s Opposition to support his position that there are
8 widespread violations that require the application of the exclusionary rule. Docket No. 14 at 2.
9 Specifically, Defendant asserts that NCIS’s “long history of involvement deterring narcotics
10 trafficking on Guam” and NCIS participation in joint investigations of narcotics with Drug
11 Enforcement Administration and Guam Police Department constitute widespread violations. *Id.*
12 at 2–3 (quoting Government’s Opposition, Docket No. 13 at 3) (internal quotation marks
13 omitted). Defendant also contends that Special Agent Daniel Simpson’s testimony that he
14 participated in sixty to seventy narcotics investigations on Guam further supports that there are
15 widespread violations.
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17 Defendant’s argument relies on a mistaken assumption that any NCIS involvement in
18 narcotics investigations is a per se violation of the Posse Comitatus Act. However, the Posse
19 Comitatus Act is not a blanket prohibition on the involvement of Armed Forces in the execution
20 of civilian laws. Rather, the act provides an exception for “circumstances expressly authorized
21 by the Constitution or Act of Congress.” 18 U.S.C. § 1385. There are several regulations
22 adopted pursuant to federal statute that authorize NCIS special agents to participate in narcotics
23 investigations, or in other words, there are situations in which NCIS special agents may
24 participate in narcotics investigations without violating the Posse Comitatus Act. To illustrate
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1 such possible situations, the court notes two examples; however, these examples are by no means
2 exhaustive.

3 First, there is the independent military purpose exception to the Posse Comitatus Act,
4 which permits direct military assistance to execute civilian laws if it is “for the primary purpose
5 of furthering a military or foreign affairs function.” *Chon*, 210 F. 3d at 994 (citing Dept. of
6 Defense Directive 5525.5(A)(2)(a)(5)). The Navy has an independent interest in investigating
7 illegal drug transactions involving Navy personnel both on and off military installations. *See*
8 *Applewhite v. U.S. Air Force*, 995 F.2d 997, 1001 (10th Cir. 1993); *see also* SECNAVYINST
9 5430.107 (2005) (“NCIS has primary investigative and counterintelligence jurisdiction within
10 the DON . . . on and off naval installations). Moreover, NCIS special agents, in particular,
11 are responsible for “investigating any federal criminal offense with a nexus to the Department of
12 the Navy . . .” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/GGD-96-154, FEDERAL LAW
13 ENFORCEMENT: INVESTIGATIVE AUTHORITY AND PERSONNEL AT 13 AGENCIES, at 10 (1996)
14 (“NCIS investigates narcotics trafficking offenses that involve Navy personnel . . . or that have
15 the potential to impact on [sic] Navy personnel.”). It is possible that the NCIS direct
16 involvement that Defendant relies upon to demonstrate widespread violations was carried out for
17 an independent military purpose and thus did not violate the Posse Comitatus Act.

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19 Second, the Inspector General of the Department of Defense issued a memorandum
20 pursuant to federal statute that authorizes military criminal investigative organizations, including
21 NCIS, to investigate drug offenses outside of military installations “if there are reasonable
22 grounds to believe that such person has committed a drug offense in conjunction with a member
23 of the Armed Forces.” DEPT. OF DEFENSE INSPECTOR GENERAL, CRIMINAL POLICY
24 MEMORANDUM 5, at 3 (Oct. 1, 1987). The memorandum further authorizes military personnel to
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1 act as informants or undercover agents to carry out drug investigations. *Id.* Again, it is possible
2 that the NCIS conduct that Defendant cites was authorized under the Criminal Policy
3 Memorandum and thus did not violate the Posse Comitatus Act.

4 Defendant's generalized assertions of NCIS's past involvement in narcotics
5 investigations are insufficient to establish widespread violations that require the application of
6 the exclusionary rule to deter future violations. Defendant does not offer any evidence that the
7 cited NCIS conduct actually violated the Posse Comitatus Act. Suppressing evidence is an
8 extreme remedy, and Defendant failed to establish widespread violations to support his argument
9 for suppression. Therefore, the court hereby denies Defendant's Motion to Suppress Evidence.

10 III. CONCLUSION

11 Based on the foregoing, the court finds that Defendant failed to make a sufficient
12 showing to justify dismissing the indictment or suppressing the evidence. Accordingly, the court
13 **DENIES** the Defendant's motion.

14 **SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Dec 01, 2010