IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS	)	**Criminal Case No.00-435-B**
Plaintiff,	)	
vs.	)	**ORDER GRANTING IN PART MOTION TO SUPPRESS**
CHEN, YECHI	)	
Defendant.	)	

I. INTRODUCTION

During the course of what the parties characterize as an administrative embarkation inspection, Defendant Yechi Chen, a Chinese national, produced an altered Korean passport for which she was charged with immigration fraud in violation of 3 CMC § 4363(b). Chen contends that the inspection and the subsequent seizure of her passport violate the Fourth Amendment. Chen moves to suppress the passport and all statements made in connection therewith.

II. FACTS

At Saipan International Airport, the Commonwealth maintains an immigration checkpoint through which all nonresidents are required to pass and produce travel documents prior to leaving the CNMI. At approximately 5:17 p.m. on August 11, 2000, Defendant approached the Immigration Departure Podium at Saipan International Airport for embarkation clearance. Upon **[p. 2]** request,

she presented her travel documents, including her Form 958,[1] passport, and boarding pass. Lt. Lorenzo A. Barcinas, the Immigration Officer on duty, suspected something amiss when the passenger, who appeared to him to be a Chinese national, presented a Korean passport bearing the name So Hee Kim. When the Defendant failed to respond to his questions, Lt. Barcinas asked her to step out of line and called on Inspector K.C. Lee to interpret. *See* Incident Statement of Lorenzo A. Barcinas, attached to Def. Mot. to Suppress as Ex. "A."

Inspector Lee approached the Defendant and asked, in Korean, if she spoke the Korean language. *See* Statement of Maj. John Taitano (August 11, 2000). When the Defendant again failed to respond, Lt. Barcinas notified the carrier that the subject would be detained and be unable to depart on her flight. Inspector Lee and Inspector Santos then escorted the Defendant to the Immigration Office for further investigation by its Enforcement Unit. *See* Barcinas Incident Statement.

Major John Taitano submitted a statement indicating that after learning of the incident, he obtained a printout of the biographical information for So Hee Kim. From the Form 958 which the Defendant had presented to Lt. Barcinas, Major Taitano obtained the sponsor's name and telephone number. After further inquiry of the sponsor, Inspector Lee eventually spoke with So Hee Kim. Lee learned that Kim was on-island and had reported her passport lost.

Immigration translator Virgil Chen also provided a statement in which he indicated that, on the basis of his observations, he believed the Defendant to be a Chinese national.[2] When he spoke to the Defendant in Chinese, she stated that her real name was Yeci Chen and gave her date of birth

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[1] According to Immigration Officer Major Taitano, the Division of Immigration ("DOI") requires each non-resident entering the CNMI to submit a Form 958 indicating, among other things, contact information about the non-resident's sponsor. Upon departure, DOI requires nonresidents to return the 958 Form. DOI utilizes these forms to track non-residents departing from the Commonwealth.

[2] Chen indicates he came to this conclusion because whenever he looked at the Defendant, she glanced down in a manner consistent with the behavior he observed in persons from mainland China.

as August 3, 1969. Defendant told Mr. Chen that she had purchased the Korean passport for $6,000 from a Chinese male known by the name of A-ming. *See* Taitano Statement; Statement of I-Chia L. Chen, Immigration Translator. **[p. 3]**

Although Lt. Barcinas suspected the Defendant of using forged travel documents, none of the statements submitted by Barcinas, Taitano, or Chen reflect that the Defendant was ever given *Miranda* warnings.[3] Arguing that the she was subject to an interrogation and that she was not free to leave at the time that she gave her statement to Immigration officials, Defendant has filed a motion to suppress all statements made on August 11, 2000. Defendant also claims that the passport must be suppressed, as there was no probable cause for what she characterizes as a warrantless search and seizure.

The Commonwealth contends that there was no need to advise the Defendant of her rights as she was not in a custodial situation when Lt. Barcinas initially questioned her. In response to Defendant's motion to suppress and at the hearing on this matter, however, Major Taitano claimed for the first time that after the Defendant disclosed her true identity (but before she admitted purchasing the passport), he instructed Virgil Chen to explain the reason for arrest, her right to counsel, and her right to have her consular official informed of her arrest.[4] Major Taitano, who is not fluent in Chinese, maintains that he understood enough Chinese to know that Chen followed his instructions, informed the Defendant of these rights in Mandarin, and also advised the Defendant that since this was a civil deportation case, she also had the right to hire an attorney of her choice, but at her expense. *See* Taitano Decl. at ¶ 4. Virgil Chen did not appear to testify. According to Major

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[3] *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[4] In its papers, the Government reads Chen's Statement for the proposition that the Defendant's statements were made *after* she had been advised of her rights. Chen's Statement, however, does not even mention any attempt to advise the Defendant of her rights. *See* Def. Ex. "C."

Taitano, however, the Defendant indicated she understood what Chen was telling her, stated that she had no need for counsel, and wanted to cooperate. Although the Commonwealth indicates that the Defendant executed a waiver form, the only form it produced provides no support for its position. A form captioned "Constitutional Rights" indicates that the Defendant was advised in Chinese of her *Miranda* rights at 10:27 that evening. The form further indicates that the Defendant refused to talk without having a lawyer present, and that she was unwilling to make a statement and answer questions. **[p. 4]**

As to the charge that the search was improper, the Commonwealth argues that there was no search, since what transpired was a routine embarkation inspection to confirm identity and the possession of valid travel documents. The Government asserts that pursuant to 1 CMC § 2172,[5] requiring non-residents to submit a Form 958 serves the legitimate administrative purpose of tracking the departure of non-residents, and thus it may require non-residents exiting the Commonwealth to complete a Form 958 and produce a passport and boarding pass in order to confirm the identify of the individual submitting the form. The Commonwealth contends that when Lt. Barcinas, based upon his experience as an immigration officer, was confronted with a foreign national who appeared to lack the ability to converse in her native tongue and who also appeared to be a different nationality than what was stated in her passport, he suspected that there was a violation of CNMI immigration laws and elected to detain her for further questioning. The Commonwealth therefore maintains that the detention and interrogation of the Defendant was appropriate.

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[5] 1 CMC § 2172 provides that "the Immigration Officer is responsible for the day-to-day supervision and administration of matters involving immigration, emigration, and naturalization."

III. ISSUE

1. Whether the stop, detention, and interrogation of the Defendant and the subsequent request to produce travel documents qualify as a "search" and/or "seizure" protected by Article I, § 3 of the Commonwealth Constitution and the Fourth Amendment to the United States Constitution.

2. Whether Defendant's statements concerning her passport, statements concerning its acquisition, and the passport should be suppressed for failure to advise the Defendant of her *Miranda* rights.

IV. ANALYSIS

A.

The Fourth Amendment to the United States Constitution and Article 1, section 3 of the Commonwealth Constitution guarantee the "right of the people to be secure in their persons, **[p. 5]** houses, papers and belongings against unreasonable searches and seizure." U.S. CONST. amend. IV, § 3; N.M.I. CONST. Art. I § 3 (1976). The constitutional requirement that searches and seizures be founded upon an objective justification governs all seizures of the person, "including seizures that involve only a brief detention short of traditional arrest." *See, e.g., Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969); *Terry v. Ohio*, 392 U.S. 1, 16-19, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968). Not every encounter between a citizen and the police, however, amounts to a seizure. Under the Fourth Amendment, a law enforcement officer may approach a citizen without reasonable suspicion or probable cause in order to ask questions and even to request a consent to search. *See Florida v. Royer*, 460 U.S. 491, 497-498, 103 S.Ct. 1319, 1323-1324, 75 L.Ed.2d 229 (1983). Thus, courts have routinely held that brief seizures performed by Border Patrol agents for the purpose of ascertaining citizenship or immigration status may be conducted without any particularized suspicion.

The analysis is governed by three seminal United States Supreme Court cases. In the first, the Court ruled that any seizure (stop) of a vehicle by a roving patrol need only be based on specific articulable facts that reasonably warrant suspicion. *See United States v. Brignoni-Ponce,* 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). In the second, the Court held that a seizure of a vehicle at a fixed checkpoint for a brief questioning of its occupants, for the purpose of ascertaining citizenship or immigration status, may be conducted without any particularized suspicion that the vehicle may contain illegal aliens. *See United States v. Martinez-Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). In the third, the Court reiterated that a brief interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure. *See Florida v. Royer,* 460 U.S. 491, at 497-498, 103 S.Ct. 1319, 1323-1324, 75 L.Ed.2d 229 (1983).(plurality opinion).[6] In light of these cases, **[p. 6]** the court concludes that Immigration Officers may briefly question persons departing the Commonwealth and require them to produce passports and boarding passes.

In reaching its decision, the court is also guided by *I.N.S. v. Delgado,*[7] in which the United States Supreme Court addressed the reasonableness of routine immigration "sweeps" and whether the INS could question individual employees during any of these surveys without the reasonable suspicion that the employee to be questioned was an illegal alien. Acting pursuant to two warrants, the INS conducted a survey of the work force at Southern California Davis Pleating Co. (Davis Pleating) in search of illegal aliens. The warrants had been issued on a showing of probable cause

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[6] In *Royer,* when Drug Enforcement Administration agents found that the respondent matched a drug courier profile, the agents approached the defendant and asked him for his airplane ticket and driver's license, which the agents then examined. A majority of the Court believed that the request and examination of the documents were "permissible in themselves." *Id.,* at 501, 103 S.Ct., at 1326 (plurality opinion); *see id.,* at 523, n. 3, 103 S.Ct., at 1337-1338, n. 3 (opinion of REHNQUIST, J.). *See also United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). In *Mendenhall,* Justice Stewart noted circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *See id.,* citing *Terry v. Ohio,* 392 U.S., at 19, n. 16, 88 S.Ct., at 1879, n. 16. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

[7] 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984).

by the INS that numerous illegal aliens were employed at Davis Pleating, although neither of the search warrants identified any particular illegal aliens by name.

At the beginning of the surveys, several agents positioned themselves near the buildings' exits, while other agents dispersed throughout the factory to question most, but not all, employees at their work stations. The agents displayed badges, carried walkie-talkies, and were armed, although at no point during any of the surveys was a weapon ever drawn. Moving systematically through the factory, the agents approached employees and, after identifying themselves, asked them from one to three questions relating to their citizenship. If the employee gave a credible reply that he was a United States citizen, the questioning ended, and the agent moved on to another employee. If the employee gave an unsatisfactory response or admitted that he was an alien, the employee was asked to produce his immigration papers.

In response to a challenge by the factory workers, the Court held that the individual questioning of the non-resident respondents by INS agents concerning their citizenship did not **[p. 7]** amount to a detention or seizure under the Fourth Amendment. Citing *Martinez-Fuerte*, the Court noted that the Fourth Amendment did not proscribe all contact between the police and citizens, but was instead designed "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116 (1976). The Court characterized the questioning about citizenship and the right to work as "classic consensual encounters" rather than Fourth Amendment seizures. 466 US at 220, 104 S.Ct. at 1765. Citing *Terry v. Ohio*,[8] the Court reasoned that only when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen did a "seizure" occur. The Court reiterated that under *Florida v. Royer*,[9] an interrogation

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[8] *Terry v. Ohio*, 392 U.S. 1, 19, n.16, 88 S.Ct. 1868, 1879, n.16, 20 L.Ed.2d 889 (1968).

[9] *Florida v. Royer*, 460 U.S. 491, 502, 103 S.Ct. 1319, 1326, 75 L.Ed.2d 229 (1983) (plurality opinion). In *Royer*, when Drug Enforcement Administration agents found that the respondent matched a drug courier profile, the agents approached the defendant and asked him for his airplane ticket and driver's license, which the agents then examined. A majority of the Court believed that the request and examination of the documents were "permissible in themselves." *Id.*, at 501, 103 S.Ct., at 1326 (plurality opinion); *see id.*, at 523, n. 3, 103 S.Ct., at 1337-1338, n. 3 (opinion of REHNQUIST, J.).

relating to one's identity or a request for identification by the police did not, by itself, constitute a Fourth Amendment seizure.

B.

Contrary to the Commonwealth's characterization of the events giving rise to this dispute, Defendant insists that what transpired was an unlawful warrantless search and seizure. Defendant argues, first, that a seizure occurred when the Defendant was detained for questioning. *See United States v. Chan-Jiminez*, 125 F.3d 1324, 1326 (9th Cir. 1997). Arguing further that since the seizure was undertaken with the unlawful secondary purpose of searching for general criminal activity, Defendant insists that it violated Chen's fourth amendment rights as an unlawful search.

The court disagrees. Under the Commonwealth Constitution, a "search" is "an intrusion into a constitutionally protected area for the purpose of finding a suspected criminal or evidence of a **[p. 8]** crime."*Id.* at 7-8. "Constitutionally protected areas" with respect to searches and seizures include "persons, houses, papers, and other belongings." *See* Constitution, Art. I, § 3; Constitutional Convention of the Northern Mariana Islands, ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS (Dec. 6, 1976) at 7. There is no dispute that the initial interaction between the Defendant and Immigration officials took place in the exit line where she produced her travel documents. Albeit denominated as a routine embarkation inspection, the court finds that there was no intrusion into any constitutionally protected area.

Nor, as Defendant contends, can a request made of departing passengers for passports and travel documents be invalidated as a general scheme to detect evidence of ordinary criminal wrongdoing. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 453, 148 L.Ed.2d 443 (2000) (checkpoints set up to detect narcotics cannot be justified "only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime"). As an initial matter, the United States Supreme Court has consistently rejected the argument that Fourth Amendment analysis requires an examination of a law enforcement officer's subjective motives in conducting a search or seizure, focusing instead on whether objective circumstances justified the seizure or the search. *E.g., Whren v. United States*, 517 U.S. 806, 808, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) ("the temporary detention of a motorist who the police ha[d]

probable cause to believe ha[d] committed a civil traffic violation" was valid under the Fourth Amendment, even if the officers involved were not "motivated to stop the car by a desire to enforce the traffic laws").[10] Second, all of the evidence supports the **[p. 9]** Government's rationale underlying the single purpose of the embarkation inspection: to confirm the identity of those returning the Form 958. No evidence was offered to establish that only one group of travelers were being targeted to confirm the validity of their passports, nor was there any evidence that the Government was using the inspection as a ruse to catch those violating immigration laws. Accordingly, the court does not find that any impermissible "search" or "seizure" occurred here.

C.

The law of investigatory detentions emanates from *Terry v. Ohio,* 372 U.S. 1, 88 S.Ct. 1868 (1968). *Terry* describes an "investigatory detention" as a brief seizure by police based upon a reasonable suspicion of criminal activity. To justify such a seizure, the officer must be able to point to specific and articulable facts which, taken together with any rational inferences that can be drawn from these facts, reasonably warrant the intrusion into the person's constitutionally protected right of privacy from unreasonable searches and seizures. *Id.* at 21; *see also United States v. Salinas,* 940 F.2d 392, 394 (9th Cir.1991). The facts are to be interpreted in light of a trained officer's experience, and the whole picture must be taken into account. *United States v. Sokolow*, 490 U.S. 1, 8, 109 S.Ct.

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[10] There are two narrow contexts in which the Court has disapproved "police attempts to use valid bases of action against citizens as pretexts for pursuing other investigatory agendas." *See Whren,* 517 U.S. at 811, 116 S.Ct. 1769. The first is the inventory search doctrine, which permits law enforcement officers to search seized property, without a warrant or probable cause, in order to take an inventory of the property, provided the inventory search is conducted pursuant to reasonable, standardized police procedures. *See Illinois v. Lafayette,* 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983); *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). Adherence to standardized police procedures ensures that an inventory search is not merely "a ruse for a general rummaging in order to discover incriminating evidence." *Florida v. Wells,* 495 U.S. 1, 4, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990). In a case approving an inventory search, the Court noted that "there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation." *Colorado v. Bertine,* 479 U.S. 367, 372, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987). The "special needs" administrative inspection is the second context in which the Supreme Court limits pretextual searches. Under the administrative search doctrine, officials may search commercial premises to monitor regulatory compliance in a "closely regulated" industry, without a warrant or probable cause. However, such warrantless inspections are constitutional only if three criteria are met: (1) "there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made," (2) "the warrantless inspections must be 'necessary to further [the] regulatory scheme,' and (3) "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." *New York v. Burger,* 482 U.S. 691, 702, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (citing *Donovan v. Dewey,* 452 U.S. 594, 602, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981)).

1581, 104 L.Ed.2d 1 (1989); *United States v. Cortez,* 449 U.S. 411, 417-18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).[11]

The Government bears the burden of justifying an investigatory stop along with any seizure. *See United States v. Alvarez*, 899 F.2d 833, 836 (9th Cir. 1990), *cert. denied*, 498 U.S. **[p. 10]** 1074, 111 S.Ct. 671, 112 L.Ed.2d 663 (1991). To determine whether the agent's suspicion was reasonable in this case, the court determines whether the factors identified as prompting the search describe behavior that should excite the suspicion of a trained immigration officer that criminal activity was afoot. *See United States v. Rodriguez,* 976 F.2d 592, 594 (9th Cir.), *amended on den. of reh'g*,997 F.2d 1306 (9th Cir. 1993). At a minimum, the suspicious conduct relied upon by Lt. Barcinas to justify the search must have been sufficiently distinguishable from that of innocent people under the same circumstances as to have clearly, if not conclusively, set the Defendant apart from them. *Id*., 976 F.2d at 596.

In support of its suspicion for the stop in this case, the Government relies upon the observations of Lt. Barcinas: an experienced immigration officer confronted with a foreign national who appeared to lack the ability to converse in her native tongue and who appeared to be a different nationality than what was stated in her passport. The Government further points out that the Defendant's destination (Guam) is highly utilized as a port of entry into the United States. Based on these observations and Lt. Barcinas' unchallenged expertise, the court concludes that Lt. Barcinas had a particularized and objective basis for assuming that the Defendant was using a counterfeit passport, and thus he was justified in retaining the passport and in asking the Defendant to step out of line in order submit to further interrogation.

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[11] The Supreme Court has set forth a nonexclusive list of factors upon which border patrol agents may rely in finding reasonable suspicion: "(1) characteristics of the area; (2) proximity to the border; (3) usual patterns of traffic and time of day; (4) previous alien or drug smuggling in the area; (5) behavior of the driver, including 'obvious attempts to evade officers'; (6) appearance or behavior of the passengers; (7) model and appearance of the vehicle; and, (8) officer experience." *United States v. Garcia-Barron,* 116 F.3d 1305, 1307 (9th Cir.1997) (citing *United States v. Brignoni-Ponce,* 422 U.S. 873, 885, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975)).

D.

The parties agree that *Miranda* warnings are required prior to custodial interrogation.[12] The determination of whether a suspect is in custody turns on the perception of a reasonable person in the suspect's position. *See Berkemer v. McCarty*, 104 S. Ct. 3138, 3151 (1984). The movant bears the burden of showing that the interrogation was custodial and therefore that Miranda warnings were required. *Commonwealth v. Santos*, Crim. No. 93-0163 (N.M.I. Super.Ct. Sept.22, 1994) (Decision and Order). Once this showing is made, the burden shifts to **[p. 11]** the government to prove that the proper *Miranda* warnings were administered. *Id*; *see also United States v. Jenkins*, 938 F.2d 934, 937 (9th Cir.1991).

When a claim has been made that a person has been subjected to a custodial interrogation the court is required to consider whether, under the totality of the circumstances, a reasonable person in circumstances faced by the defendant would conclude, after brief questioning, that he or she would not be free to leave. *See Berkemer v. McCarty*,468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). In making its determination, the court considers four factors: (1) The language used by the officer in summoning the person interviewed, (2) the physical characteristics of the place where the interrogation occurred, (3) the degree of pressure applied to detain the person, and (4) the extent to which the person was confronted with evidence of his guilt. *Id.* The test is whether, considering the totality of the circumstances, the free will of the witness was overborne. *See United States v. Washington*, 431 U.S. 81, 189, 97 S.Ct. 1814, 1819, 52 L.Ed.2d 238 (1977).

The Commonwealth does not dispute that the Defendant was relocated to a detention room where Immigration Officials sought to confirm their suspicions that she was carrying a counterfeit passport. Thus the Government does not seriously challenge Defendant's contentions that she was effectively placed "in custody" when she was removed from the line and escorted to the Immigration Office. Defendant maintains, however, that even before the Defendant was questioned in the detention room, she should have been treated as having been in custody and advised of her rights when she was first asked to for her passport and travel documents, because a reasonable person in

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[12] *See generally Commonwealth v. Ramangmau*, 4 N.M.I. 228, 235 (1995).

the Defendant's position would not have felt free to leave. Defendant argues, moreover, that the Immigration Officer expected the answers to her questions to be incriminating and expected to conclude that she was carrying forged documents. Because she was not advised of her rights at this point, Defendant maintains that Defendant's statements must be suppressed.

As an initial matter, the record does not reflect that the Defendant made any statements prior to being removed to the interrogation room. For this reason alone, an order suppressing any **[p. 12]** statements would therefore be unnecessary. More importantly, however, there is no evidence that the Defendant was placed in custody until she was removed to the interrogation room. It was only at this point that she legitimately had cause to believe that she was not free to leave.

In an analogous situation involving the questioning of persons who were suspected to have entered the United States illegally, the Ninth Circuit recently upheld the decision of a trial judge denying a motion to suppress for failure to advise the Defendant of his *Miranda* rights prior to questioning. In *United States v. Gallindo,*[13] two border patrol agents were looking for aliens approximately 1800 feet north of the Mexican border. When they spotted a large group of people running, the agents assumed they were illegal aliens because of the location and the fact that they were running. After stopping them, one of the agents told the people to sit down on the ground. The other agent chased those who ran away. Among those he caught was the appellant, Galindo-Gallegos.

Once the agents had the fifteen or twenty people seated, one of the agents asked the group what country they were from and whether they had a legal right to be in the United States. In response to the questioning, Galindo-Gallegos admitted that he was from Mexico and had no such right. The border patrol agents did not advise the group of their *Miranda* rights prior to this questioning. After Galindo-Gallegos admitted that he was an alien illegally present in the United States, he and others were handcuffed and put into one of the vehicles. Galindo-Gallegos was charged with being a deportable alien found in the United States and convicted after trial.

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[13] *See United States v. Galindo-Gallegos*, --- F.3d ---–, 2001 WL 289956 (9th Cir. Mar 27, 2001).

Prior to trial, Galindo argued that his admissions of alienage and being in the United States illegally should have been suppressed because he was not advised of his *Miranda* rights[14] before he made them. As in this case, Galindo argued that he should have been treated as having been in custody when he made the statements, because a reasonable person would not have felt free to **[p. 13]** leave. Similar to the Defendant in the instant case, moreover, Galindo also argued that the Border Patrol officer expected the answers to her questions to be incriminating and expected to conclude that he was in the country illegally. After all, prior to questioning him, the Border Patrol agents had spotted the group running just north of the border, and knew the defendant was trying to escape.

The trial judge found that although the questions were designed to elicit what could be ultimately incriminating evidence, the questioning did not require a prior *Miranda* warning. In support of its decision, the court looked first at the material factual circumstances: (1) the questioning took place out of doors; (2) the location was isolated, away from view by the general public, but there were fifteen or twenty aliens and only two law enforcement officials; (3) no one was handcuffed, but everyone was required to sit on the ground; (4) the questions were a necessary predicate to letting anyone go free, but were also reasonably likely to elicit incriminating admissions by those for whom the facts were incriminating; and (5) the group of aliens had been caught running in an area very near the border, and Galindo-Gallegos had persisted in running away from the border patrol but was caught and returned to the group that had been seated on the ground. The court then looked to *Berkemer v. McCarty,*[15] in which the United States Supreme Court found that the roadside questioning of a motorist detained for a traffic stop did not constitute "custodial interrogation" for purposes of *Miranda,* and thus that the motorist's pre-arrest statements made in response to such questioning were admissible against him. *Id.* at 442.[16] Based on the circumstances and *Berkemer*,

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[14] *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[15] 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

[16] The Court acknowledged that "a traffic stop significantly curtails the 'freedom of action' of the driver and passengers, if any, of the detained vehicle .... few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so." *Id.* at 436. Nevertheless, the Court held that traffic stops do not exert pressures upon a detained person that sufficiently impair the free exercise of the privilege against self-

the trial court ruled that the immigration **[p. 14]** detention in *Galindo* did not constitute a "custodial interrogation" requiring the Defendant to be advised of his rights. The Ninth Circuit affirmed, ruling that under the circumstances presented, there was no risk of the harm *Miranda* protects against, either in the roadside stop circumstances of *Berkemer* or the more rural stop at issue. The court also regarded the questioning to have taken place in what the court viewed essentially as a *Terry*-type stop.

In *Berkemer*, it was even more plain there than here that the motorist's next stop was jail, because he was weaving all over the road and too impaired to perform a field sobriety test without falling down. *Id.* at 423. In *Berkemer*, moreover, the officer decided as soon as he saw the man step out of his car, before he even talked to him, that he would be taken into custody. Similarly, in *Galindo* as well as *Berkemer*, it was at least as plain that the officer's questions were likely to elicit incriminating answers. In *Berkemer*, the officer asked the man if he had been using intoxicants, he replied that he had drunk "two beers" and "smoked several joints of marijuana." *Id.* In *Galindo*, the agents asked the group whether they had a legal right to be in the United States. Nevertheless, in both cases, the courts ruled that the roadside questioning of persons detained on a *Terry* stop was not custodial interrogation for purposes of *Miranda*. *See* 468 U.S. at 438.[17]

For purposes of *Miranda* warnings, moreover, it is important to note here that the request for travel documents occurred in a line at the airport. The location was not at all isolated or away from view by the general public. There was no testimony that language used by the Lt. Barcinas was at all coercive. Likewise, no one was handcuffed, and the record contains no evidence that any

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incrimination so as to require that person be advised of his or her constitutional rights. *Id.* at 440. The Court also distinguished a traffic stop from a "stationhouse" interrogation on two grounds: (1) a traffic stop is presumptively temporary and brief; and (2) the atmosphere is substantially less "police dominated," because the traffic stop is public and the detained motorist typically is confronted by only one or at most two policemen. *Id.* at 437-39.

[17] There were two reasons. In *Berkemer*, the Court found that such traffic stops are "presumptively temporary and brief," because even if guilty of a traffic infraction, most people just get a traffic ticket and go on their way. *See id.* at 437. Second, and most important to this case, the Court observed that "the typical traffic stop is public." The importance of its being public is that "exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse." *See id.* at 438. For these reasons the Court held that such questioning should be treated as within the category of a *Terry* stop, not as custodial interrogation for *Miranda* purposes. The policeman's intent to arrest was immaterial, because subjective intention was immaterial. "The only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *See id.* at 442.

pressure was applied to detain the Defendant. The test is whether, considering the totality of **[p. 15]** the circumstances, the free will of the Defendant was overborne. Based on these facts and because the Defendant elected to remain silent, the court cannot say that it was.

Because officers are not required to read suspects their *Miranda* rights prior to questioning them during a *Terry* stop, the court concludes that there was no need to read the Defendant her rights before asking to see the passport. *See, e.g., United States v. Woods*, 720 F.2d 1022, 1029 (9th Cir.1983). For this reason, Defendant's reliance upon *Rhode Island v. Innis*[18] is misplaced. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect does amount to an interrogation. *See Innis*, 446 U.S. at 302, 100 S.Ct. at 1690. *Miranda* rights only apply, however, when a Defendant has been placed in custody or otherwise deprived of his freedom of action in any significant way. *See Miranda*, 384 U.S. at 444, 86 S.Ct.at 1612.

As to the warnings allegedly provided to the Defendant once she was placed in custody, the court is troubled by the waiver form and the failure of all three Immigration officials to provide any contemporaneous statements indicating that the Defendant was advised of her rights before she identified herself and provided information about the source of the passport. Although Major Taitano testified that he directed the Defendant to be advised of her rights prior to making any statement, the time indicated on the waiver form indicates that she declined to make a statement at 10:27 p.m. For these reasons, the court concludes that the Government has failed to show that proper *Miranda* warnings were administered. Accordingly, all statements, made by the Defendant after she was taken to the airport Immigration Office concerning her passport as well as her true identity, will be suppressed.

So ORDERED this 11 day of April, 2001.

/s/
TIMOTHY H. BELLAS, Associate Judge

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[18] 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).