

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
v.	)	<b>Criminal No. 99-45-P-H</b>
	)	
<b>CARLOS REYES,</b>	)	
<i>Defendant</i>	)	

**RECOMMENDED DECISION ON MOTION TO SUPPRESS AND  
MEMORANDUM DECISION ON MOTION TO STRIKE SURPLUSAGE**

The defendant is charged with knowingly and willfully making a false, fraudulent and fictitious material statement to an agent of the Immigration and Naturalization Service of the United States Department of Justice, in violation of 18 U.S.C. § 10001. He seeks the suppression of statements made by him shortly after his arrest on another charge, which statements provide the basis for the charge he now faces, and the removal from the indictment of the term “A/K/A” before his name. An evidentiary hearing was held on September 13, 1999. I recommend that the following findings of fact be adopted and that the motion to suppress be denied. I deny the motion to strike.

**I. Proposed Findings of Fact<sup>1</sup>**

On April 22, 1999 Shafir, a special agent of the United States Drug Enforcement

---

<sup>1</sup> Counsel for the government and the defendant agreed that the court could consider, in addition to the testimony offered at the hearing, the recorded testimony of Uri Shafir and Gerard Lee Hamilton, Jr., given at a preliminary hearing on May 12, 1999 in the case of *United States v. Colon*, Docket No. 99-M-18-P (Docket No. 14 in that case), and the affidavit of Shafir, attached to the criminal complaint in that case, both of which I admitted at the evidentiary hearing in this case as Government Exhibit 1.

Administration (“DEA”) assigned to Portland, Maine, went to the scene of a vehicle stop by troopers from the Maine State Police on the Maine Turnpike near Kennebunk, Maine. A search of the vehicle was conducted with the driver’s consent. Shafir found in the vehicle a slip of paper behind a cellular telephone bearing eight handwritten names and telephone numbers that were subsequently identified as belonging to known or suspected cocaine dealers. One of the telephone numbers, listed beside the name “Pool,” was the telephone number for Paul Golzbein of 116 Ross Road in Old Orchard Beach, Maine. Two plastic bags containing what was later determined to be 5.75 ounces of cocaine were found behind the dashboard in the vehicle, and the driver, Rene Omar Rosa-Santos, was arrested at the scene on a charge of aggravated trafficking in cocaine. Rosa-Santos was released from custody on April 25, 1999 after posting bail.

On April 28, 1999 Hamilton, a special agent of the Maine Drug Enforcement Agency (“MDEA”), along with another agent, was conducting surveillance of 116 Ross Road in Old Orchard Beach when he saw Golzbein, whom he recognized from earlier law enforcement contacts, enter the house at that address. Approximately an hour later, he saw a van with tinted windows and a Massachusetts license plate pull into the driveway of the house. A Hispanic male who closely resembled Rosa-Santos got out of the driver’s door of the van, reached underneath and retrieved a dark colored package, and got back into the driver’s seat. A few minutes later, this man entered the house. Several minutes later the man left the house, sat inside the van for several minutes, and then entered a trailer on the property, which a man known to Hamilton to be Daniel Guarino had entered after leaving the house a few minutes before the driver of the van. After about 30 seconds, the driver of the van left the trailer, sat again in the van for several minutes, and then drove off.

Hamilton again conducted surveillance of the Ross Road property on May 7, 1999. On that

date, he saw a black extended cab pickup truck enter the driveway and park. There were three Hispanic males inside the cab of the truck. After one or two minutes a woman known to Hamilton as Golzbein's girlfriend came out of the house and spoke briefly to the driver. After she returned to the house, the driver got out of the truck and walked to the door of the house, where he spoke again with the woman. He then returned to the truck and all three occupants remained inside the truck for another five minutes, looking around the area. Golzbein then drove into the driveway and parked his vehicle beside the truck. The woman came out of the house and met Golzbein beside the truck. The three Hispanic men, Golzbein and the woman then entered the house.

Two or three minutes later, the driver of the truck left the house and went to the truck where, after looking around the area for a few seconds, he bent down and reached under the truck about two feet in front of the rear left tire, withdrew a baseball-sized object and stuffed it down the front of his pants. Another truck entered the driveway. The woman came out of the house and gestured for the Hispanic driver to enter the house, which he did. The woman remained outside, talking with the driver of the second truck for about two minutes. She and the second driver then entered the house. Several minutes later the second driver left the house and stood in the driveway.

About three minutes later, the three Hispanic men left the house. The two passengers, one of whom later identified himself as Carlos Reyes, got into the cab of the truck in which they had arrived while the driver went to the front of the truck and reached underneath. The driver did not take anything from under the truck. The driver then got into the truck and sat for several minutes, looking around. He then drove the truck out of the driveway. Upon being advised by Hamilton that the truck had left Golzbein's property, Shafir followed it from the intersection of Ross Road with Cascade Road until it was stopped by an Old Orchard Beach police officer. He then reached under

the front bumper of the truck and found a black plastic baggie containing what he believed to be, and what was later confirmed to be, approximately two ounces of cocaine. No other contraband was found in the vehicle or on the persons of the occupants. The occupants spoke Spanish to each other after the truck was stopped. The defendant and the two other occupants of the truck were arrested. The defendant was charged with conspiracy to distribute and possess with intent to distribute cocaine.<sup>2</sup>

The defendant was taken to the Old Orchard Beach police department after his arrest. Walter Smith, an INS agent assigned to work with the DEA, interviewed the defendant in a detective's office at the police department in order to obtain information to be entered on a DEA personal history report, the final, typed version of which is Government Exhibit 2. Before obtaining biographical information for the form from the defendant, Smith, who had concluded that the defendant could not speak or understand English, read to the defendant the *Miranda* warning in Spanish, from a card printed with such warnings in English and Spanish that Smith carries at all times, and as he had done, in Spanish, as many as a thousand times before. When asked in Spanish whether he understood the *Miranda* warning that Smith had read to him, the defendant replied in the affirmative. He then provided Smith with his name, date of birth and social security number, along with other information recorded on the form, in response to Smith's questions in Spanish.

Smith did not ask for or obtain from the defendant a waiver of his *Miranda* rights. He informed the defendant that lying to him about the requested information would be a crime. He gave this warning to the defendant because he "felt" that the defendant was not a citizen of the United States. At the evidentiary hearing, Smith read the Spanish version of the *Miranda* warning card

---

<sup>2</sup> This charge was dismissed on the motion of the government on June 11, 1999.

aloud at the request of the defendant's attorney. José Soto, who has provided Spanish interpreting services for agents of the INS, including Smith, on two or three occasions, and the court interpreter both testified that Smith's reading of the warning in Spanish was difficult to understand because of his pronounced American accent.

## **II. Discussion**

### **A. Motion to Suppress**

The defendant moves this court to suppress his statements to Smith concerning his name, date of birth and telephone number, which are the statements alleged in the indictment to have been false, on several grounds. First, he contends that there was no probable cause to arrest him on May 7, 1999. Next, he argues that a *Miranda* warning was required under the circumstances of his interview with Smith and that he was questioned before any warning was given. He then argues that he did not waive his *Miranda* rights. Finally, he asserts that he was incapable of making a knowing and intelligent waiver of his *Miranda* rights. Motion to Suppress Statements (Docket No. 10).

There is no evidence to support the contentions that the defendant made the statements at issue before his *Miranda* rights were read to him or that he was incapable of making a knowing and intelligent waiver of his rights. Indeed, the only evidence on the latter point is that he told Smith that he understood the warning as Smith had read it in Spanish. However, there is also evidence that Smith did not obtain a waiver of his *Miranda* rights from the defendant before eliciting the statements at issue. The issues remaining for resolution in connection with the motion to suppress are therefore whether there was probable cause for the May 7 arrest which led to the interview in which the defendant made the statements that are the basis for the current charge, *see Wong Sun v.*

*United States*, 371 U.S. 471, 484-85 (1963), and whether a *Miranda* warning was required under the circumstances.

*1. Probable Cause.* In the First Circuit, the existence of probable cause to arrest must be evaluated in light of the totality of the circumstances. *United States v. Torres-Maldonado*, 14 F.3d 95, 105 (1st Cir. 1994). In order to establish that probable cause existed for an arrest, the government must show that, at the time of the arrest, “the facts and circumstances known to the arresting officers were sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense.” *Id.*

The Supreme Court held in *Ybarra v. Illinois*, 444 U.S. 85 (1979), that police officers lacked probable cause to search a patron who happened to be present in a bar for which a search warrant had been issued, based on information that the bartender was selling heroin:

[T]he police did not recognize Ybarra and had no reason to believe that he had committed, was committing, or was about to commit any offense under state or federal law. Ybarra made no gestures indicative of criminal conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the officers. In short, the agents knew nothing about Ybarra, except that he was present, along with several other customers, in a public tavern at a time when the police had reason to believe that the bartender would have heroin for sale.

*Id.* at 90-91. The Court stated its holding even more succinctly: “[A] person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.” 444 U.S. at 91.

The First Circuit cited *Ybarra* in *United States v. Martinez-Molina*, 64 F.3d 719, 726 (1st Cir. 1995). In that case, the defendants argued that they had been arrested without probable cause. Noting that circumstances in addition to a defendant’s mere propinquity to others independently

suspected of criminal activity were required, the court observed that “it is often difficult to determine precisely what additional factors are sufficient to create the requisite inference of participatory involvement.” *Id.* at 727. After surveying the relevant case law, the court found that “the cases in which courts find that probable cause exists generally involve substantially more than a momentary, random, or apparently innocent association between the defendant and the known criminal activity.” *Id.* Applying this standard, the First Circuit upheld the arrests of four of the defendants because the connection between them and the suspected criminal activity was contemporaneous; “it strain[ed] credulity to suggest that the cocaine transaction was being carried on without the knowledge of all persons present;” and there was a lack of evidence to support their presence for an innocent and unrelated activity. *Id.* at 729. “We do not think officers in the field are required to divorce themselves from reality or to ignore the fact that ‘criminals rarely welcome innocent persons as witnesses to serious crimes and rarely seek to perpetrate felonies before larger-than-necessary audiences.’” *Id.* (quoting *United States v. Ortiz*, 996 F.2d 707, 712 (1st Cir. 1992)).

Similarly, in *United States v. Meade*, 110 F.3d 190 (1st Cir. 1997), the First Circuit held that the agents who arrested the defendant had probable cause to do so when the defendant was observed sitting in a car near the location and at the time of the attempted robbery, which car had been previously seen parked next to a car occupied by the two primary suspects in the attempted robbery, and in which the defendant had been seen earlier riding around with the two suspects, *id.* at 198-99.

The Supreme Court has recently narrowed its *Ybarra* holding in a case in which the person searched was the passenger in a vehicle found to contain contraband by noting that “a car passenger — unlike the unwitting tavern patron in *Ybarra* — will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their

wrongdoing.” *Wyoming v. Houghton*, 119 S.Ct. 1297, 1302 (1999). This holding supports and extends to some degree the First Circuit’s conclusions in *Martinez-Molina* and *Meade*.

Based on the First Circuit and Supreme Court precedent, I conclude that the officers in this case had probable cause to arrest the defendant, who had every opportunity to observe the crime for which he and two others were arrested, which occurred in their presence. The evidence suggests no innocent reason for their presence. They were present in a vehicle carrying a commercial quantity of cocaine. *See United States v. Buckner*, 179 F.3d 834, 839 (9th Cir. 1999). Considering the totality of the circumstances, it was reasonable to view the defendant as more than an innocent bystander and one who had more than a random association with the driver of the truck. *See United States v. Pena*, 51 F.Supp.2d 367, 371 (W.D.N.Y. 1999) (defendant who was passenger in car that closely followed another car driven by clearly implicated drug dealer during possible drug transaction validly arrested).

2. *Need for Miranda warning.* In the First Circuit, “a well-established line of case law authority. . . has created an exception to the *Miranda* rule for ‘routine booking interrogation,’ involving questions, for example, about a suspect’s name, address and related matters.” *United States v. Doe*, 878 F.2d 1546, 1551 (1st Cir. 1989). This exception does not apply “where the law enforcement officer, under the guise of asking for background information, seeks to elicit information that may incriminate.” *Id.* “The question is an objective one; the officer’s *actual* belief or intent is relevant, but it is not conclusive.” *Id.* (emphasis in original). Here, the information at issue is the defendant’s name, date of birth and social security number. Indictment (Docket No. 7).

The Supreme Court has stated that questions regarding a defendant’s name and date of birth, among others, are routine booking questions seeking biographical data necessary to complete

booking services, normally requested only for record-keeping purposes, reasonably related to the police's administrative concerns, and accordingly outside the protections of *Miranda*. *Pennsylvania v. Muniz*, 496 U.S. 582, 601-02 (1990). The defendant's argument, raised at the evidentiary hearing, is that agent Smith's questions concerning the defendant's name, date of birth and social security number sought to elicit incriminating information because Smith believed at the time that the defendant was not a United States citizen, and therefore, presumably, that the defendant was in the United States illegally. However, neither the defendant's name nor his date of birth are relevant to his citizenship. Nothing in agent Smith's testimony suggests any reason to consider his questions of the defendant concerning the defendant's name and date of birth as anything other than the routine booking questions described in *Muniz*.<sup>3</sup> See generally *United States v. Shea*, 150 F.3d 44, 48 (1st Cir. 1998) (question regarding name is routine booking question). In *Doe*, a case cited by the defendant, the question at issue was one seeking the defendant's citizenship, asked when he was in custody on a Coast Guard ship and suspected of a crime that could only be committed by a citizen of the United States. 878 F.2d at 1550-51. The First Circuit held that the booking question exception to the *Miranda* rule did not apply because a question seeking to determine the defendant's citizenship was reasonably likely to elicit information that would be incriminating under these circumstances. *Id.* at 1551. The First Circuit specifically distinguished the circumstances present from those "typically present at a police station, where one officer may book a suspect in one room before another questions the suspect at greater length elsewhere." *Id.* That "typical" situation is precisely what was present in the case at hand: Smith was booking the defendant, who was to be

---

<sup>3</sup> Both of the cases upon which the defendant relies, *Doe* and *United States v. Gonzalez-Sandoval*, 894 F.2d 1043 (9th Cir. 1990), were decided before the Supreme Court issued its opinion in *Muniz*.

questioned later, elsewhere.

The issue presented by the request for the defendant's social security number presents a somewhat closer question, because asking a person in custody suspected of being in the United States illegally for his social security number could be construed to be reasonably likely to elicit the response that he has no social security number. However, even that response is not necessarily incriminating, unlike the responses at issue in *Doe* and *Gonzalez-Sandoval*.<sup>4</sup> A person who is not a citizen of the United States could nonetheless be present in this country without violating any criminal laws. In addition, agent Smith's warning to the defendant that he would be committing a crime if he provided Smith with false answers to any of the biographical questions is inconsistent with any intent to elicit an incriminating response. The social security number is listed on the personal history report used by the DEA for every arrest. Government Exh. 2. In asking the defendant for his social security number, Smith was not making an unusual request or seeking information uniquely significant to the defendant's situation or circumstances.

Considering all of the circumstances, I conclude that a *Miranda* warning was not necessary before the defendant was asked his name, date of birth, or social security number under the circumstances present on May 7, 1999. Accordingly, the failure to obtain a waiver from the defendant of his *Miranda* rights does not warrant suppression of the defendant's responses to those questions.

---

<sup>4</sup> In *Gonzalez-Sandoval*, the questions at issue concerned the defendant's immigration status and place of birth. 894 F.2d at 1046. The defendant was convicted "for being found illegally in the United States after deportation." *Id.* at 1045. The defendant's truthful responses to the questions were used to help prove these charges. *Id.* at 1047. Since the agent who asked the questions "had reason to suspect that" the defendant was guilty of the very charges of which the defendant's answers were used to convict him, the court found that the statements were obtained in violation of *Miranda*. *Id.* Those facts are clearly distinguishable from those present in the instant case.

## **B. Motion to Strike**

The indictment refers to the defendant in its case title as “A/K/A Carlos Reyes.” Indictment. The indictment charges, *inter alia*, that the defendant made a false statement when he said that his name was Carlos Reyes. The defendant asks the court to strike the “A/K/A” from the indictment as surplusage under Fed. R. Crim. P. 7(d) because it is unnecessary to and independent of the allegations to be proved and prejudicial to the defendant in that it “suggests an official belief by the Court that he is not Carlos Reyes.” Defendant’s Motion and Incorporated Memorandum of Law to Strike Surplusage (Docket No. 11) at 2.

To the contrary, while the “A/K/A” may be unnecessary to the allegation that Carlos Reyes is not the defendant’s name, it is neither “independent of” that allegation nor does it suggest that the court believes that the defendant is not Carlos Reyes. The abbreviation for the phrase “also known as” is integral to a charge that the defendant is not the person with the name that he has claimed as his own. *See United States v. Rodriguez*, 734 F. Supp. 116, 128 (S.D.N.Y. 1990) (use of alias in indictment is permissible if use of alias is necessary to identify defendant in connection with acts charged in indictment and government intends to introduce evidence of alias).

In this court, every criminal jury is informed before any evidence is presented that the indictment is a charge brought by the government; that it is “simply the description of the charge against the defendant; it is not evidence of anything;” and that the defendant is presumed innocent “and may not be found guilty by you unless all of you unanimously find that the government has proven [his] guilt beyond a reasonable doubt.” First Circuit Pattern Jury Instructions, Criminal, Preliminary Instruction No. 1.02 (1998). If the defendant believes that the jury may still infer from the indictment after hearing this instruction that the court has taken the position that the defendant

is not Carlos Reyes, he may request an additional preliminary instruction to further clarify the court's lack of involvement in the indictment.

*United States v. Miller*, 471 U.S. 130 (1985), the only case cited by the defendant in support of his motion, does not support his position. In that case, the Supreme Court held only that “[a] part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as ‘a useless averment’ that ‘may be ignored.’” *Id.* at 136 (citation omitted). The Court did not hold that any such surplusage must be stricken from the indictment before trial.

### **III. Conclusion**

For the foregoing reasons, I deny the defendant's motion to strike and recommend that the defendant's motion to suppress be **DENIED**.

### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 16th day of September, 1999.*

---

*David M. Cohen  
United States Magistrate Judge*