



Nelson, to Inspector Thompson. She had told the officers performing the primary inspection that she was a permanent resident of the United States who had lost her “green card.”<sup>1</sup> Nelson had presented a Canadian passport containing a folded I-90, the immigration form for an application for a replacement permanent resident card, but she had been unable to present a valid permanent resident card.

Thompson identified Nelson by her picture in the Canadian passport and since she had been referred to him as a permanent resident of the United States, he again asked her for her “green card.” Nelson then told Thompson directly that she had lost it. Thompson informed Nelson that it was her responsibility to have that document with her at all times when traveling because it served as her entrance document for the United States. Nelson informed Thompson that she was married to a citizen of the United States. Thompson then inquired if Nelson was prepared to file the I-90 application form she had in her passport at that time. Thompson was authorized to issue a temporary permanent resident card if Nelson filed the I-90 application, but she indicated that she intended to file the application when she returned to Maryland, where she now lived. This initial exchange took no longer than a few minutes.

At that point Thompson asked Nelson to have a seat in the public waiting area of the border inspection station. Nelson’s traveling companion, a Mr. Harrison, was free to come and go in the waiting area and apparently did so during the ensuing forty-five to fifty minutes. Inspector Thompson remained behind the counter in the same waiting area, using his computer and databases to attempt to verify that Nelson held a valid

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<sup>1</sup> “Green card” is the expression that was used during the hearing. In actuality the card is a permanent resident card, the document carried by individuals who have adjusted their status to become permanent residents of the United States, although they may retain citizenship in another country. As testimony developed, I learned the fabled “green card” is actually salmon pink in color and has been that color since the very early 90’s or late 80’s. (Tr. at 45- 46).

permanent resident card. Thompson engaged in a long set of queries into his various databases attempting to find an alien registration number for Tracy Lynn Nelson.

Thompson asked Nelson for her maiden name and once she had provided it, he repeated his database queries using that name. He was still unable to locate an alien registration number for Nelson. During this time period Thompson either remained seated at his computer or got up and came to the end of the counter to ask her these identification questions. During this time he also asked her husband's name and used that name to query his databases as well.

When Thompson could not find any alien registration numbers associated with Tracy Nelson, born MacDonald, or John Nelson, her husband, he proceeded to rerun the names "every which way" by using phonetic spellings, partial names, first names without a date of birth, and so forth. (Tr. at 32). While Thompson attempted these various computer searches he remained behind the counter but he did ask Nelson various additional questions such as when she had received her green card, when she had been married, and when she had adjusted her status to permanent resident. According to Nelson, she received her permanent resident card in December of 1995.

As Thompson continued with his database searches his suspicions became aroused in part because the search did reveal Nelson had entered the country at least twice since marrying a citizen of the United States and allegedly becoming a permanent resident in 1995. In 1996, she had entered the United States under the name of MacDonald, allegedly on a pleasure trip from Canada. The second entry showed that she entered the United States through Philadelphia (she explained in her testimony that she had actually cleared customs at the United States Virgin Islands, St. Thomas) using only

a Maryland driver's license for identification. Thompson explained that in order to clear customs in that fashion, Nelson would have been considered a citizen of the United States by the inspector.

Harboring these suspicions, Thompson then repeated his primary questions in succession. He again asked Nelson when she was married, when she applied for an adjustment of her status, and when did she get her card. When Nelson responded that she had received her card within a month of filing for her adjustment status, Thompson's suspicion became even more heightened. I infer that the reason for his heightened suspicion was INS would not have processed an adjustment in status application that quickly. (Tr. at 38).

At this point Thompson rose from the computer and approached the counter. He asked Nelson to come to the counter as well. He also asked Harrison to step out of the waiting room while he spoke privately with Nelson. By this point in time almost an hour had elapsed. Thompson, while standing behind the counter, by his own admission confronted Nelson with his findings. (Tr. at 39). Thompson questioned her about her two earlier entries into the United States, about the fact that the I-90 application in her Canadian passport was dated five days prior to her Philadelphia flight, and about the appearance and color of her "lost" permanent resident card. (Tr. at 43- 44). Thompson also told Nelson that he was going to check with her employers to ascertain what documents she used to obtain employment and he was going to contact her husband in Maryland to find out when and what paperwork he had filed to obtain her permanent resident card. At that point Nelson indicated that she would not be happy with Thompson undertaking such inquiries because she had not been telling him the truth about her status.

Nelson made this admission at approximately 12:10 p.m. (Tr. at 47). By that point in time she had been in the border inspection station waiting for approximately one hour and ten minutes. Thompson had been seated at his computer or standing behind the counter throughout the encounter.<sup>2</sup> Nelson had been seated on the bench or standing by the counter. The sorts of questions Thompson asked arose logically from the objective data he received from Nelson and his computer queries. Nelson was in a general public waiting area and never subjected to isolation or intense interrogation about extraneous matters.

Once Nelson admitted that she had lied to the inspector, he then advised her of her Miranda rights. Thompson used a form to advise her of those rights. (Ex. # 4). The documentary evidence establishes that Miranda warnings were given at 12:25 p.m. and Nelson agreed to waive those rights and speak with the officer at 12:27 p.m.<sup>3</sup> Following the Miranda warnings, Thompson alleges that Nelson repeated the incriminating statements and according to Exhibit # 2 she told him that she had made up the story beforehand. I make no findings about what Nelson said after the administration of the Miranda warnings because that was beyond the scope of the hearing. However, Nelson denied making any incriminating statements either prior to or following the administration of the Miranda warning. I have resolved those factual discrepancies regarding pre-Miranda statements as set forth above.

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<sup>2</sup> Nelson disputes this contention, maintaining that Thompson came out from behind the counter one time prior to the point when he called her to the counter to discuss notifying her husband and employer. (Tr. at 70-72). Even if Thompson did come out from behind the counter and speak curtly to Harrison as alleged by Nelson, it does not change the basic tenor of the encounter.

<sup>3</sup> Nelson disputes this documentary evidence. She says that when she signed the form the times had not been filled in and that it was actually after 1:30 p.m. when she was advised of her Miranda rights. I am fully satisfied that the form was completed in the manner described by Thompson at the times noted. (Tr. at 49 – 50).

I also find, based upon the testimony of both Thompson and Nelson, that after Nelson admitted to lying to the inspector and prior to the administration of the Miranda warning there was an exchange between the two that took place in front of the counter when Thompson came into the waiting area pointing his finger at Nelson. (Tr. at 53 – 54). During this exchange, Thompson may well have expressed some anger at Nelson’s deception and indeed his face may have gotten red. It appears that there may have been up to ten minutes between the discovery of the deception and the administration of the Miranda warnings and that during that time Thompson may well have been upset with Nelson. However, under the timeline established by the evidence, Nelson did not make any new or different incriminating statements during that segment of the interview.

### **Discussion**

As the First Circuit Court of Appeals has succinctly explained:

It is well established that Miranda warnings must be communicated to a suspect before she is subjected to “custodial interrogation.” United States v. Ventura, 85 F.3d 708, 710 (1st Cir. 1996). A “custodial situation necessitating Miranda warnings arises . . . where ‘there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.’” United States v. Masse, 816 F.2d 805, 809 (1st Cir.1987) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)). The term “interrogation” encompasses not only express questioning but also “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (internal footnotes omitted).

U.S. v. Li, 206 F.3d 78, 83 (1st Cir. 2000).

Border crossings by their very nature are likely to involve some type of interrogation. Determining when such an interrogation becomes custodial can be a little tricky, but the degree of restraint inherently associated with routine Customs questioning is not custodial. United States v. Tajeddini, 996 F.2d 1278, 1288 (1st Cir. 1993). The

First Circuit has made clear that even secondary inspections at a border crossing do not per se constitute custodial interrogation. United States v. Pratt, 645 F.2d 89, 90-91 (1st Cir. 1981). Instead, the court encourages a holistic approach to border crossing interrogations, reminding the lower courts to take into account the strong governmental interest in controlling our borders. Id.; see also United States v. Moya, 74 F.3d 1117, 1119-20 (11th Cir. 1996). It has been suggested that the court might consider the following: (1) the nature of the surroundings; (2) the extent of police control; (3) the degree of physical restraint placed upon the defendant; and (4) the duration and character of the questioning. United States v. Fernandez-Ventura, 132 F.3d 844, 846 (1st Cir. 1998); see also Pratt, 645 F.2d at 90-91.

I have applied those factors to the events of September 27. I note first that the surroundings in this instance were extremely benign. Nelson was seated in a public waiting area and by her own testimony a number of civilians, including her friend Harrison, were freely walking in and out of the room. She was separated from the inspector by a counter, negating any sort of physical restraint or even heavy-handed police control. Although she was escorted into the office by another officer, that officer left and only Thompson interacted with her. The only evidence even remotely favorable to Nelson is the amount of time by which Nelson was delayed: one hour and ten minutes. However, it is evident that during much of this time Nelson was simply sitting idly by in a public waiting room as Thompson attempted to verify her statements—she was not subjected to constant questioning. Moreover, what questioning did occur was extremely low key until the last ten minutes. Furthermore, the extent of this delay was occasioned by Nelson’s own false statements, not by an “interrogation.” That Thompson made every

effort to verify these statements, in order to permit Nelson to enter the country, was as much a service to Nelson as to the government.

As for the last ten minutes, Thompson admits that when he went to the counter, called Nelson to stand in front of the counter and asked Harrison to leave the room, he did become more confrontational. However, he was seeking “an explanation” concerning “objectively peculiar circumstances about which a reasonable person could have understood [his] inquisitiveness.” Pratt, 645 F.2d at 90. I conclude that the ten minutes or so that Thompson spent with Nelson standing by the counter did not rise to the level of a custodial interrogation under the existing precedents involving border inspections of this nature.

### **Conclusion**

Based upon the foregoing, I recommend that the Court adopt the proposed findings of fact and **DENY** the motion to suppress.

### 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 of 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.

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Margaret J. Kravchuk  
U.S. Magistrate Judge

Dated February 12, 2003

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