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IN THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JENNIE WEN CHIN PAU,

Defendant.

CRIMINAL CASE NO. 11-00082

**ORDER RE MOTION TO SUPPRESS
ORAL STATEMENTS MADE BY
DEFENDANT ON DECEMBER 14, 2010,
SEPTEMBER 28, 2011, AND DECEMBER
13, 2011**

The Motion to Suppress filed by Defendant Jennie Wen Chin Pau (“Defendant Pau”) came before this court for an evidentiary hearing on December 5, 2012, and December 11, 2012. After hearing the testimony of witnesses and argument from counsel, the court took the Motion to Suppress (ECF No. 142) under advisement. For the reasons discussed more fully herein, the court sets forth the basis for its decision in **DENYING** said motion.

I. FACTS

Two federal agents¹ for the Prosecution testified during the evidentiary hearing, and a declaration of Mr. Rico W.G. Omagap was submitted by co-defendant Wai Kam Ho. No other testimony was offered. It should be noted that the parties do not dispute the fact that Defendant Pau was not warned of her *Miranda* rights.

¹ FBI Special Agent Frank Runles and IRS Special Agent Todd Peterson.

1 Because the court’s factual findings in this instant motion are related and similar, if not
2 the same, to co-defendant Wai Kam Ho’s motion to suppress (ECF No. 149) and motion to
3 dismiss due to alleged violations of the Posse Comitatus Act (ECF No. 155), the court
4 concurrently held the hearing for all of these motions. Although counsel for Defendant Pau did
5 not formally submit a motion to dismiss or suppress pursuant to alleged violations of the Posse
6 Comitatus Act, counsel for Defendant Pau concurred with all of the arguments presented by co-
7 defendant Wai Kam Ho, which included the Posse Comitatus Act issue, during the December 11,
8 2012 hearing. Counsel for Defendant Pau also noted that Defendant Pau was interviewed by
9 NCIS Special Agent Maria Markley on December 14, 2010, in an attempt to establish violation
10 of Posse Comitatus Act.² During the December 11, 2012 hearing, the court permitted the parties
11 to submit supplemental briefing no later than December 21, 2012.

12 **A. December 14, 2010**

13 This court has previously made factual findings of the circumstances surrounding the
14 execution of a search warrant at the MGM Spa Building on December 14, 2010, wherein the
15 court issued its order on co-defendant William M. Perez’s motion to suppress. *See* Order, ECF
16 No. 174. Because the interview of Defendant Pau occurred on the same night at the same
17 location as co-defendant William M. Perez, the court hereby adopts its factual findings from its
18 order dated July 17, 2012. Below is a summary of the court’s factual finding from its July 12,
19 2012 order.

20 On December 14, 2010, between 10:00 p.m. and 12:00 a.m. of December 15,
21 2010, approximately ten (10) to fifteen (15) agents from the Federal Bureau of
22 Investigation (“FBI”), Internal Revenue Service (“IRS”), and Naval Criminal
23 Investigative Service (“NCIS”) executed a search warrant at the MGM Spa Building. The
24

² The Posse Comitatus Act will be addressed in a separate order.

1 agents were wearing raid jackets and bullet proof vests.

2 Prior to entering the building, the agents knocked on the door and the knocking
3 grew progressively louder (“loud banging”) until someone came to the door. Upon
4 entering the door, an agent cuffed and frisked co-defendant William M. Perez. While this
5 was going on, the rest of the agents—with their guns drawn—entered to secure the
6 building. Once the security check was completed, all weapons were holstered and agents
7 were posted at the exits of the building to ensure the agents maintained control of the
8 building. Interviews were then conducted.

9 *See* Order, ECF No. 174.

10
11 FBI Special Agent Frank L. Runles recounted similar factual details during the December
12 5, 2012 hearing. Also, during said hearing, co-defendant Wai Kam Ho submitted Exhibit J,
13 which is a copy of the transcript of the May 30, 2012 evidentiary hearing on co-defendant
14 William M. Perez’s motion to suppress. The transcript reveals that Defendant Pau was not in the
15 building at the time the search warrant was first being executed and that she came to the building
16 at some point later in the evening. *See* Def. Ho’s Exh. J, at 47:17-21; 83:3-4; and 48:22-24.
17 Special Agent Runles testified that he does not know who contacted Defendant Pau or how she
18 came to the building, but she was contacted because she had the keys to a locked safe. *Id.* at
19 49:1-6. Government Exhibit Pau 1 reveals that it was co-defendant Wai Kam Ho who called
20 Defendant Pau because she was the previous manager of MGM Spa and had the keys to the
21 locked safes.

22 After unlocking the safes, Defendant Pau was interviewed at approximately 11:45 p.m.
23 and was “told she could leave whenever.” *See* Def. Ho’s Exh. J at 49:7-9. *See also* Gov’t Exh.

1 Pau 1. Special Agent Maria Markley, in the presence of Special Agent Nicolas P. Wellein,
2 interviewed the Defendant. *See id.*

3 Special Agent Runles testified during the May 30, 2012 hearing that he briefly
4 interviewed Pau sometime after he was done interviewing co-defendant William M. Perez. *See*
5 Def. Ho's Exh. J, at 83:9-13. However, during the December 5, 2012 hearing, Special Agent
6 Runles clarified that he did not formally interview Defendant Pau but rather, he briefly spoke
7 with her in the foyer. Special Agent Runles does not recall informing Defendant Pau that she can
8 leave, but he indicated that it was presumed that she can leave because she "was just there to
9 provide keys to open some safes . . . she wasn't a witness, she wasn't there gambling . . ."

10 At some point after the interview, Defendant Pau left. *See* Def. Ho's Exh. J, at 49:10-11.

11 **B. September 28, 2011**

12 On September 28, 2011, Special Agent Runles and IRS-Criminal Investigation Special
13 Agent Todd Peterson went to Defendant Pau's residence. The agents knocked on Defendant
14 Pau's door and when she answered, they asked if they could speak with her. She agreed to speak
15 with them outside of her residence, by her porch area in front of her door. Special Agent
16 Peterson conducted the interview, which lasted for approximately between 45 minutes to an
17 hour. After the interview ended, the agents left and Defendant Pau returned to her residential
18 unit. As a standard procedure when conducting interviews, the agents carry with them a
19 concealed weapon.

20 Defendant Pau was not informed that she can terminate the questioning any time. Neither
21 agents recall when Defendant Pau became a subject of their investigation, although Special
22 Agent Peterson was treating her more as a potential witness rather than a subject during the
23 September 28, 2011 interview.

24 **C. December 13, 2011**

1 On December 13, 2011, Special Agent Peterson contacted Defendant Pau for another
2 interview. At this point, Defendant Pau was no longer a potential witness but rather a subject of
3 their investigation. Special Agent Peterson and Defendant Pau mutually agreed to meet at the
4 parking lot of the Club Crazy Horse establishment. She drove herself there, and the interview
5 was conducted by Special Agent Peterson outside the front door step of the club. The interview
6 lasted for approximately 30 minutes. Special Agent Runles was also present during the
7 interview. After the interview ended, the agents and Defendant Pau left separately in their
8 respective vehicles.

9 II. DISCUSSION

10 Defendant Pau contends that she should have been given her *Miranda* rights on
11 December 14, 2010, September 28, 2011, and December 13, 2011. Thus, Defendant Pau is
12 asking that the statements she made on these dates be suppressed.

13 On a motion to suppress, the controlling burden of proof imposes no greater burden than
14 proof by a preponderance of the evidence. *See United States v. Matlock*, 415 U.S. 164, 177 n.14
15 (1974). Moreover, the prosecution, as the proponent of the evidence, must bear the burden of
16 proving its admissibility. *See United States v. Coades*, 468 F.2d 1061, 1064 (3d Cir. 1972);
17 *United States v. Colbert*, No. 89-310, 1990 WL 5200 at *1 (D.N.J. January 23, 1990) (citing *Katz*
18 *v. United States*, 389 U.S. 347 (1967)).

19 A. There was no custodial interrogation on December 14, 2010.

20 “No person . . . shall be compelled in any criminal case to be a witness against himself.”
21 U.S. CONST. amend. V. In order to permit a full opportunity to exercise the privilege against
22 self-incrimination, the U.S. Supreme Court in *Miranda v. Arizona* decided that the accused must
23 be adequately and effectively apprised of his rights. 384 U.S. 436, 467 (1966). If a person in
24 custody was questioned without first being apprised of his rights, any statements made at that

1 time may not be admitted as evidence against him. *Stansbury v. California*, 511 U.S. 318, 322.
2 (1994); *United States v. Williams*, 435 F.3d 1148, 1152 (9th Cir. 2006).

3 The obligation to administer a *Miranda* warning is triggered “only where there has been
4 such a restriction on a person’s freedom as to render him ‘in custody.’” *Stansbury*, 511 U.S. at
5 322 (citations omitted). To determine whether the person is “in custody,” the court must examine
6 all of the circumstances surrounding the interrogation. *Id.* However, the ultimate inquiry is
7 whether there was a “formal arrest or restraint on freedom of movement” of the degree
8 associated with a formal arrest. *Id.* See also *United States v. LeBrun*, 363 F.3d 715, 720 (8th Cir.
9 2004), citing *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (The critical question is whether
10 the defendant’s freedom to depart was restricted in any way); *Miranda*, 384 U.S. at 444
11 (*Miranda* warning applies when a person is questioned by a law enforcement officer after being
12 “taken into custody or otherwise deprived of his freedom of action in any significant way.”).

13 The court looks “at the totality of the circumstances while keeping in mind that the
14 determination is based ‘on the objective circumstances of the interrogation, not on the subjective
15 views harbored by either the interrogating officers or the person being questioned.’” *LeBrun*, 363
16 F.3d at 720, citing *Stansbury*, 511 U.S. at 322-23. See also *United States v. Craighead*, 539 F.3d
17 1073, 1082 (9th Cir. 2008). The court asks whether a reasonable person in those circumstances
18 would “have felt he or she was not at liberty to terminate the interrogation and leave.”
19 *Craighead*, 539 F.3d at 1082, citing *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). See also
20 *U.S. v. Revels*, 510 F.3d 1269, 1274 (10th Cir. 2007) (Citing the U.S. Supreme Court in
21 *Berkemer v. McCarty*, 468 U.S. 420, 441-42 (1984), the court indicates that the only relevant
22 inquiry is how a reasonable man in the suspect’s position would have understood his situation).

23 This court has previously found that the interrogation conducted on December 14, 2010 at
24 the MGM Spa for co-defendant William M. Perez was custodial. See Order, ECF No. 174. In his

1 case, Mr. Perez was present from the beginning when the agents first entered the premises until
2 sometime after his interrogation concluded. *Id.* Mr. Perez heard the loud banging on the door. *Id.*
3 Mr. Perez witnessed an army of federal agents barge into the building with guns drawn. *Id.* Mr.
4 Perez himself was pushed against the wall, handcuffed and then frisked. *Id.* The agent that
5 pushed him against the wall had his gun drawn. *Id.* With his hands still cuffed behind his back,
6 Mr. Perez was then escorted to the game room. *Id.* Clearly, the federal agents exerted complete
7 control over Mr. Perez. *Id.* A reasonable person in Mr. Perez’s position would not have felt free
8 to leave or terminate the interrogation.

9 In deciding Mr. Perez’s case, the court used the factors³ set forth by the Ninth Circuit in
10 *Craighead*. *Id.* Mr. Perez’s situation was similar to the defendant in *Craighead* in that both
11 defendants witnessed the execution of the search warrant from the very beginning. Specifically,
12 both defendant Craighead and Mr. Perez saw the presence of a large number of law enforcement
13 officers unholstering their weapons. *See Craighead*, 539 F.3d at 1085 (“[I]f the suspect sees the
14 officers *unholstering their weapons* within his home, the suspect may reasonably believe that his
15 home is no longer safe from the threat of police force. In short, the presence of a large number of
16 *visibly armed* law enforcement officers goes a long way towards making the suspect’s home a
17 police-dominated atmosphere.”)(emphasis added). *See also United States v. Mittel-Carey*, 493
18 F.3d 36, 38-40 (1st Cir. 2007) (finding that the presence of eight officers in the home, *one of*
19 *whom unholstered his gun*, contributed to a police-dominated environment)(emphasis added).

20 Unlike the defendant in *Craighead*, and unlike Mr. Perez’s ordeal from witnessing an
21 assembly of federal agents in raid jackets with guns drawn entering and securing the premises of
22

23 ³ The factors are as follows: (1) the number of law enforcement personnel and whether they were armed; (2) whether
24 the suspect was at any point restrained, either by physical force or by threats or intimidation; (3) whether the suspect
was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the
interview, and the context in which any such statements were made. *Craighead*, 539 F.3d at 1084.

1 the building to being physically restrained, Defendant Pau's experience that evening was
2 different and far from Mr. Perez's experience. Based on the testimony provided during the
3 December 5, 2012 evidentiary hearing and the exhibits submitted by the parties during said
4 hearing, co-defendant Wai Kam Ho called Defendant Pau to come to the MGM Spa building to
5 open two locked safes. Defendant Pau was not there at the beginning of the search warrant
6 execution. Therefore, Defendant Pau did not hear the loud banging on the door. Defendant Pau
7 did not witness the federal agents in their raid jackets with unholstered weapons, swarming the
8 building with unholstered weapons while conducting a security check. Although there were a
9 large number of agents that remained in the building throughout the evening of the execution of
10 the search warrant, there was no longer the type of atmosphere of police domination that Mr.
11 Perez experienced and witnessed. Moreover, Defendant Pau was not pushed against the wall,
12 was not cuffed and was not frisked. Defendant Pau was not physically restrained. The law
13 enforcement agents did not exert complete control over Defendant Pau.

14 What is more appropriate in Defendant Pau's case is the application of case law wherein a
15 defendant was summoned to come into a police station for questioning. Courts have held that
16 *Miranda* warnings are not required if the suspect is not placed under arrest, voluntarily comes to
17 the police station, and is allowed to leave unhindered by police after the interview. In *California*
18 *v. Beheler*, 463 U.S. 1121, 1121-22 (1983), the defendant voluntarily agreed to accompany the
19 police officers to the police station. *Id.* at 1122. The defendant then agreed to talk and after
20 talking, he left the police station unhindered. *Id.* The defendant was not arrested after the
21 interview. *Id.* Based on these facts, the Supreme Court found that "it is beyond doubt that [the
22 defendant] was neither taken into custody nor significantly deprived of his freedom of action.
23 [The defendant's] freedom was not restricted in any way whatsoever." *Id.* at 1123.

24 Similar to *Beheler* is *Mathiason*, 429 U.S. 492 (1977). In that case, the Supreme Court

1 found that the defendant was not in custody, because there was no indication that the questioning
2 took place in a context where the defendant's freedom to depart was restricted in any way. *Id.* at
3 495. The defendant came voluntarily to the police station, where he was informed that he was not
4 under arrest, and he left the police station without hindrance. *Id.*

5 Moreover, the Ninth Circuit found in *United States v. Hayden*, 260 F.3d 1062 (9th Cir.
6 2001), that the defendant cannot be considered "in custody" because the defendant voluntarily
7 went to the FBI office on two separate occasions, provided her own transportation to both
8 meetings, was told she was free to leave, and was not placed under arrest or restrained during the
9 interview. *Id.* at 1063-66.

10 Similarly in this case, Defendant Pau voluntarily went to the MGM Spa building after
11 being asked to come over to open the locked safes. Defendant Pau consented to questioning and
12 after the questioning, Defendant Pau left at some point in the evening of either December 14,
13 2010 or early morning of December 15, 2010. Defendant Pau was not arrested at the end of the
14 interview. Although she was not told that she was free to leave, there was no evidence to show
15 Defendant Pau was restrained or hindered from leaving the building. Defendant Pau was not
16 subjected to the experience that Mr. Perez was subjected to.

17 The Federal Bureau of Investigation report dated December 16, 2010, memorializing the
18 December 14, 2010 interview with Defendant Pau, states that Defendant Pau was escorted into
19 the MGM Spa building and then escorted back to the lobby of the building after she opened the
20 locked safes. *See Gov't Exh. Pau 1.* While being escorted may be argued as a form of custody,
21 determination of custody must be based on the totality of the circumstances and what a
22 reasonable person in the defendant's position would conclude. *See United States v. Gregory*, 891
23 F.2d 732, 735 (9th Cir. 1989). In this case, Defendant Pau voluntarily came to the MGM Spa
24 building when co-defendant Wai Kam Ho called her because she possessed the keys to the two

1 locked safes within the building. *See* Gov't Exh. Pau 1. Looking at the totality of the
2 circumstances, a reasonable person in Defendant Pau's situation—having voluntarily gone to the
3 MGM Spa building and having consented to the interview—would not have felt he or she was in
4 custody.

5 Defendant Pau argues that one of the agents told her the following, "I know you have a
6 daughter, you need to tell me straight, tell the truth. If you are a liar, I can put you in jail." *See*
7 Mot., ECF No. 142 at 2. Although police tactics marginally favor custody, it is not the deciding
8 factor. Interviewing of a suspect will always have coercive aspects to it. *Mathiason*, 429 U.S. at
9 495.

10 **B. There was no custodial interrogation on September 28, 2011.**

11 Defendant Pau contends that on September 28, 2011, she was scared when she was
12 questioned outside her house by two agents. *See* Mot., ECF No. 142. As such, Defendant Pau
13 argues that she should have been given the *Miranda* warnings. *See id.*

14 It is a well-established law that *Miranda* warnings are required only when the suspect is in
15 custody. *See Stansbury*, 511 U.S. 318 (1994). In this case, there is no evidence that Defendant
16 Pau was in custody. Unlike the case in *Craighead*, 539 F.3d 1073 (9th Cir. 2008), wherein the
17 Ninth Circuit found custodial interrogation because eight, visibly armed law enforcement
18 officers in raid jackets from three different agencies entered the defendant's residence and
19 exerted full control of the defendant and the house, the current case does not present the same or
20 similar situation. Based on the testimony presented during the suppression hearing, two agents
21 showed up at Defendant Pau's doorstep and the questioning occurred outside Defendant Pau's
22 home. There is no evidence that the agents exerted complete control over Defendant Pau or that
23 Defendant Pau was ever restrained in any way. *See Stansbury*, 511 U.S. at 322 (The ultimate
24 inquiry is whether there was a "formal arrest or restrained on freedom of movement").

1 Moreover, the Ninth Circuit in *Gregory*, 891 F.2d at 734, found that the defendant was not
2 in custody because (1) when the officers came to his house to ask if they could ask him
3 questions, the defendant consented to the interview, (2) he was interviewed in the presence of his
4 wife, (3) the interview lasted only for a few minutes, and (4) no coercion or force was used. In
5 this instant case, although there was no one around aside from the defendant herself and that the
6 interview lasted for approximately 45 minutes to one hour, there is no evidence of coercion or
7 force and Defendant Pau consented to the interview.

8 **C. There was no custodial interrogation on December 13, 2011.**

9 Although Defendant Pau did not initially assert custodial interrogation when she was
10 questioned on December 13, 2011, she is asserting it now after the Government pointed out that
11 Defendant Pau was also questioned on this date. *See Opp.*, ECF No. 147.

12 This court has previously found that the interrogations conducted on December 17, 2010
13 and December 13, 2011, for co-defendant William M. Perez, were non-custodial. *See Order*,
14 ECF No. 174. On those dates, Mr. Perez provided his own transportation, voluntarily met with
15 the agents in the parking lot of the MGM Spa building, and consented to additional questioning.
16 *Id.* The court's decision was based on the Ninth Circuit's holding in *Hayden*, 260 F.3d 1062 (9th
17 Cir. 2001); and the Supreme Court's holding in *Beheler*, 463 U.S. 1121 (1983) and *Mathiason*,
18 429 U.S. 492 (1977). In these cases, the defendant voluntarily met with a law enforcement
19 officer, provided his or her transportation to the meeting, and was not hindered from leaving the
20 meeting. Similarly in this case, Defendant Pau voluntarily agreed to meet with the agents in front
21 of the Club Crazy House and consented to additional questioning. Defendant Pau provided her
22 own transportation. Also, there is no evidence that Defendant Pau was hindered from leaving.
23 After the interrogation, the agents and Defendant Pau left separately in their respective vehicles.

24 Special Agent Peterson stated that at this point, during the December 13, 2011 interview, it

1 was clear that Defendant Pau was no longer a potential witness but rather a subject to his
2 investigation. The court finds that subjective factor such as “focus of the investigation” is not a
3 proper consideration in determining custodial investigation for purposes of *Miranda* violations.
4 *See Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); *Minnesota v. Murphy*, 465 U.S. 420, 431
5 (1984)(“The mere fact that an investigation has focused on a suspect does not trigger the need for
6 *Miranda* warnings in noncustodial settings.”)(citation omitted); *Beheler*, 463 U.S. at 1124 n.2
7 (The U.S. Supreme Court rejects “the notion that the ‘in custody’ requirement was satisfied
8 merely because the police interviewed a person who was the ‘focus’ of a criminal
9 investigation.”)(citation omitted).

10 **D. CONCLUSION**

11 Based on the evidence and testimony presented during the evidentiary hearings on
12 December 5, 2012 and December 11, 2012, the court finds that a reasonable person in Defendant
13 Pau’s circumstances would *not* have felt that he or she was not at liberty to terminate the
14 interrogation and leave. Therefore, the court finds that there was no custodial interrogation on
15 December 14, 2010, September 28, 2011, and December 13, 2011. Defendant Pau’s Motion to
16 Suppress oral statements made by the Defendant on December 14, 2010, December 28, 2011,
17 and December 13, 2011, is hereby **DENIED**.

18
19 **SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Jan 22, 2013