IN THE SUPERIOR COURT

FOR THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS **Plaintiff,** **vs.** **JUANITO M. ALCANTARA and ASTERIO F. BAJO,** **Defendant.**	**Criminal Case No.00-00114T** **ORDER GRANTING IN PART MOTION TO SUPPRESS**

I. INTRODUCTION

¶1 During the course of what the parties admit was a custodial interrogation, Defendant Juanito Alcantara made certain incriminating statements. Alcantara argues that prior to making the statements, he was not advised of his *Miranda* rights,[1] that he was never informed of his right to communicate with his country's consular officer as provided by the Vienna Convention on Consular Relations and Optional Protocols of April 24, 1964 (the "Vienna Convention"),[2] and that he was detained illegally. Alcantara contends that the inordinate delay in presenting him to a judge, the failure to provide him with adequate *Miranda* warnings, and the failure to advise him **[p. 2]** of his rights under the Vienna Convention require that all statements made while he was in custody be suppressed.

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

[2] Defendant claims that the apparent failure of the police to inform him of his right to speak with a representative of his consulate violates the Geneva Convention. Brief at 17, 19. In that the right to communicate with a consular representative arises under the Vienna Convention, the court need not address what rights, if any, Defendant has under the Geneva Convention.

¶2 This matter came before the court for hearing on April 18 and April 21, 2001. Thomas Clifford, Esq. appeared for the Defendant, and Assistant Attorney General Kevin Lynch appeared on behalf of the Commonwealth. Following a review of the file and the evidence presented, the court issued its tentative ruling granting the motion to suppress in part. The following represents the court's reasoning in support of its decision.

II. FACTS

¶3 In the early morning hours of February 18, 2000, Tinian Dynasty Hotel employee Yang Hui, also known as Cindy, is reported missing. *See* Incident Suppl Report dated February 22, 2000, attached to Mot. to Suppress as Ex. A-1 at 18. Later that afternoon, Defendant Juanito Alcantara, a driver for Viva Poker, told Tinan Police Officer Kiyoshi that when he arrived at the lobby to give Ms. Yang a ride to Viva Poker, she was not there. *Id.* At 11:00 that morning, however, Detective Matthew C. Masga reviewed the Tinian Dynasty surveillance tapes. According to Detective Masga, the tapes identified Ms. Yang leaving the parking lot in a green, four-door Suzuki, driven by the Defendant, that morning at 00:47 hours. Ex. A-1 at 175.

¶4 Defendant claimed that on his return to Viva Poker, he suffered a flat tire near the former Islander Rent-A-Car office. While waiting for the rain to clear, he fell asleep and later changed the tire. Afterwards, he walked to his barracks to find a tool to tighten the lug nuts. Ex. A-1 at 18; Masga Report, Ex. A-1 at 101. When he could not locate a tire wrench, he walked to Viva Poker where he ran into Officer Kiyoshi. Defendant left Viva Poker with his girlfriend, Eden Lozano, at approximately 11:00 that morning.

¶5 Detective Masga encountered the Defendant at approximately 17:30 or 19:00 hours that same day. Ex. A-1 at 101, 175. Detective Masga told the Defendant he was not under arrest, but asked to meet with him at the Detective Section. During the interview that followed, Detective Masga asked Alcantara about Cindy's whereabouts. In response, Alcantara again stated that when he went to pick her up that night at Tinian Dynasty, Cindy was not there. Alcantara **[p. 3]** also mentioned his flat tire, and stated that while he was waiting for the rain to clear, he fell asleep. Ex. A-1 at 176.

¶6 Masga asked Alcantara to describe the clothing he was wearing when he went to pick up Cindy. After describing the items, Alcantara agreed to give the clothes to Detective Masga. While Alcantara was being interviewed by Lt. Palacios, Masga drove to Alcantara's barracks to pick up the clothes. Ex. A-1 at 101-102. At 20:00 hours, Masga obtained a pair of blue jeans and a white shirt with red sleeves from Ms. Lozano, placed them in an evidence bag, and took the clothing to the Detective Office for storage in the evidence room. Later that night, Masga also obtained permission from the owner of Viva Poker to impound the Suzuki. Ex. A-1 at 177. At approximately 2100 hours, Masga searched the Suzuki and confiscated a number of items bearing what he described as possible blood stains. *Id.*

¶7 At 15:30 on Saturday, February 19, Masga asked Alcantara once again if he could speak with him. Ex. A-1 at 179. Masga recalls telling Alcantara again that he was not under arrest, and that he could leave whenever he wished. *Id.* at 179. Masga did not read the Defendant his rights. Masga maintains, however, that in response to questioning, Alcantara repeated the flat tire story, but later provided a different version of events once he confronted him with the Tinian Dynasty surveillance tapes. Ex. A-1 at 179-180. According to Detective Masga, Defendant then admitted to having picked up Cindy, but claimed to have dropped her off near the entrance because she needed to check with her boyfriend. *Id.*

¶8 Masga maintains that at 17:30 that evening, he told Alcantara to go home. Ex. A-1 at 180. One hour later, however, Alcantara was still at the Detective Office waiting, he stated, for Eden Lozano to finish her interview with Lt. Palacios. *Id.* Detective Masga then asked the Defendant to talk with him once more. Detective Masga continued to question the Defendant about Cindy's whereabouts, and told him that following his review of Lozano's interview, he might call upon him again. *Id.*

¶9 Later that evening, at approximately 22:40 or 23:40 hours, Detective Masga responded to a complaint from Ms. Lozano for assault and battery against Mr. Alcantara. Although Detective **[p.4]** Masga maintains that he arrested the Defendant on the assault and battery charge and read him his rights (Ex. A-1 at 180), there is no waiver of rights form reflecting any such advisement in the file. Detective Masga also indicates that when he arrested Alcantara, he noticed a distinctive gold chain

on top of a cabinet, and that when he questioned Defendant about it, Alcantara claimed that the chain was his. With Defendant's permission, Masga took the chain to the Police Station for further inquiry.

¶10 At 11:00 hours the following morning, February 20, Detective Masga telephoned the Gold Mart and asked the owner whether he could identify the gold chain. Ex. A-1 at 182. Woo Jin, the owner, stopped by the Investigation Section and confirmed the chain was stolen from his shop on December 30, 1999. That same morning, Masga prepared and forwarded a Rule 5 Complaint to the court on the charge of assault and battery. When he did not receive a signed copy in return,[3] he consulted with the Office of the Attorney General, and at 2100 hours that Sunday evening, Detective Masga released the Defendant on the assault and battery case, and re-arrested him on charges of burglary and theft (Ex. A-1 at 102, 182).

¶11 For the remainder of the day on February 21, 2000 and until 2130 the following Monday, there is no indication that any further questioning of the Defendant transpired. At 2130 hours on February 21, however, Defendant asked permission to talk with his girlfriend because he had something important to tell her. See Statement of Officer Peter B. Cepeda, Ex. A-1 at 47. Five minutes later, Officer Cepeda approached the Defendant in the holding facility to find out why he wanted to see or talk with his girlfriend. *Id.* In response to Cepeda's questions, the Defendant stated that he wanted to talk with his girlfriend about what really happened to Cindy on the night of February 18,2000. According to Officer Cepeda, the Defendant told him that he knew who was responsible for Cindy's disappearance, and that after he spoke to his girlfriend, he would then talk to Officer Cepeda and would "cooperate and admit everything." **[p. 5]**

¶12 Cepeda insists that he tried to advise the Defendant of his right to remain silent, but he was unable to do so because the Defendant kept on talking. Cepeda therefore admits that neither he nor anyone else advised the Defendant of his Miranda rights at that time.

¶13 Cepeda further admits that Eden Lozano arrived at the police station at approximately 2230 hours that evening, and talked with the Defendant for approximately twenty minutes. Cepeda

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[3] Detective Masga indicates that the fax machine had jammed, and that he learned on February 21 that the court had in fact executed a bail order but could not return it to the Detective Office because of the malfunctioning fax machine. Ex. A-1 at 182.

indicates that at approximately 2250 hours, and right after Lozano concluded her visit with the Defendant, he went to check on the Defendant. Cepeda made no attempt to read the Defendant his rights, and insists that the Defendant willingly continued to tell him about what had happened to Cindy.

¶14 According to Cepeda, Defendant began talking three minutes after Lozano departed, at 2253 hours. Defendant told Cepeda that on the night of February 18, 2000, he picked up Cindy in the Tinian dynasty parking lot, and drove her from the lot to the coconut tree by the entrance, when she directed him to stop. Defendant claimed that Cindy wanted to tell her boyfriend that she was planing to go to Viva Poker to gamble. Defendant stated that he let Ms. Yang out of the car and drove on alone to Viva (Ex. A-1 at 47). After he arrived at Viva, Cindy telephoned, asking once more for a ride from the Dynasty. After picking her up, Defendant headed towards Viva on the Broadway road. It was at this point, Defendant claimed, that "Bong" flagged him near the Listo Print Shop. When he pulled over, Bong opened the rear passenger door and got inside. Defendant told Cepeda that Bong pointed a screwdriver at him, and told him to make a U-turn and head south.

¶15 Defendant claimed that near the intersection of Broadway and Pacifico Aquiningoc (formerly, the Islander Rent-A- Car office), Bong instructed the Defendant to turn right and park. Bong then instructed the Defendant to get out of the car, and threatened that if he told anyone about what transpired, he would kill the Defendant and his brother. According to the Defendant, Bong then stuffed paper in Cindy's mouth, tied her up, and left her in the rear seat of the car. Bong removed his jacket, directed the Defendant to put it on, tied the Defendant with rope, and placed him on the **[p. 6]** ground. The Defendant claimed that after threatening again to kill him if he talked, Bong stuffed paper in his mouth and placed him in the trunk of the automobile.

¶16 After driving around for several minutes, Defendant felt the car stop, and heard sounds like "grunting or shouting." He then claimed to have heard the door shut, after which the car again began to move. According to the Defendant, the car stopped several minutes later. Bong then opened the trunk and removed him from the compartment. Defendant looked around, and noted the location. He also noticed that Cindy was no longer inside the car. Ex. A-1 at 47-48.

¶17 Defendant told Officer Cepeda that Bong then placed him in the front passenger seat and returned to the Pacifico Aquiningoc building. Defendant claimed that Bong then removed him from the car and tied him to a tree. After this, Defendant claimed that Bong fled and disappeared. Ex. A-1 at 47-48. Officer Cepeda indicated that after the Defendant finished his statement, he requested a paper and pen, and drew a sketch of where he, Bong, and Cindy went. *Id.* at 48; *see also* Sketch drawn by Defendant, Exhibit A.

¶18 Officer Cepeda then contacted Lt. Palacios, who subsequently came to the station. At 00:05 Tuesday morning, February 22, Lt. Palacios read the Defendant his rights in English. *See* Ex. A-1 at 20-21. In the ensuing Q & A that transpired at 00:25 that morning, Defendant responded affirmatively to Palacios' question as to whether he understood all of the rights that were read to him, and that he wanted to speak with Lt. Palacios without having a lawyer present. Ex. A-1 at 21. Although the record contains six pages of typed questions and answers, the statement is unsigned and no original handwritten version or audiotape was provided for review. See Ex. A-1 at 21-27. In the version of events relayed to Lt. Palacios that evening, moreover, Defendant added several additional facts.

¶19 Defendant claimed to have met Bong, who was driving Joseph Mendiola's pickup, when he first picked up Cindy. According to the Defendant, at this time, Bong remarked on how "nice" his passenger was, and asked to borrow twenty dollars for gambling. Bong told the Defendant he would wait for him in front of the barracks at Listo Print Shop. **[p. 7]**

¶21 After he picked Cindy up the second time, Defendant stated that he drove to Bong's barracks to drop off the twenty dollars. Bong then entered the vehicle, and sat in the rear passenger seat next to Cindy. At Bong's request, Defendant headed toward the former Islander Rent-A-Car office so that Bong could borrow additional funds from his boss. It was at this point, Defendant maintained, that Cindy began to cry. Defendant told Lt. Palacios that Bong then brandished a screwdriver and threatened to stab him if he moved.

¶22 Defendant claimed that Bong proceeded to tie Cindy's hands with a fishing rope, and threatened to kill her if she screamed. Bong then confiscated the car keys, told the Defendant to lie on the ground, and ordered him to open the trunk and remove papers which he then stuffed into

Cindy's mouth. According to the Defendant, Bong kicked him in the genitals, after which he almost blacked out. After Bong directed Alcantara to put on Bong's jacket and tied him with a rope, however, Defendant claimed that he did pretend to black out and hid under the vehicle. Bong pulled him out, placed paper inside his mouth, and tied him to a tree.

¶23 At this point, the Defendant claimed, Bong attempted to rape Cindy. After approximately thirty minutes, Bong untied the Defendant from the tree and returned him to the trunk. After driving around for one hour, Defendant claimed to have heard the car door open. Defendant asserted that at this point, Bong removed him from the trunk, and threatened to kill him and his brother if he ran away. Bong then returned him to the trunk.

¶24 From inside the trunk, Defendant claimed to have heard Bong hitting Cindy. According to the Defendant, they proceeded to drive for a short time. At this point, Bong ordered the Defendant to get out of the trunk and watch for cars. Bong then tied him to the trunk so that he would not run away.

¶25 Defendant told Lt. Palacios that he saw Bong walk into the jungle carrying some object on his back. The Defendant also stated that he did not see Cindy. When Bong returned, he placed the Defendant in the trunk, but immediately removed him and pushed him inside the back seat. Before they left the area, Defendant told Lt. Palacios that Bong warned him once again not to tell anyone about what had happened. When he agreed to remain silent, moreover, Bong gave **[p. 8]** him three hundred dollars. They returned to the former Islander office, where Bong tied him to a tree, placed paper in his mouth, and poked a hole in the right front tire. Defendant claimed that when he was able to free himself, he walked to his barracks to find a tool to change the tire.[4]

¶26 At the end of the interview, Defendant admitted providing investigators with a map. *See* Ex. A; Ex. A-1 at 26. After one false start and with the assistance of the Defendant, the police located the corpse at 0510 Tuesday morning, February 22, 2000 near an abandoned runway north of the Tinian airport.

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[4] Defendant estimated arriving at his barracks at approximately 4:00 a.m. After changing his tire, de drove to Viva Poker to wash his hands and met up with Officer Kiyoshi who assisted him in tightening the bolts on the tire. Defendant claimed that after returning to his barracks, he removed Bong's jacket and returned it to him. He also stated that he used the money obtained from Bong to play poker.

¶27 DPS kept the Defendant on Tinian all day on February 22, even though the court was open for business. A Rule 5 Complaint charging the Defendant in the murder and kidnaping of Cindy was nevertheless forwarded by facsimile to the court and signed. Opp. at 4. There is, however, no indication that the Defendant was informed of the murder or kidnaping charges. Nor was the Defendant brought to Saipan for an initial appearance on these charges on Wednesday, February 23, 2000. Instead, he was interviewed at 11:30 that morning by Saipan DPS Sgt. Joseph Aldan and Special Agent Richard Wallace of the FBI. See Ex. B.

¶28 Aldan's initial interrogation of the Defendant lasted just five minutes. It was terminated because Sgt. Aldan would not proceed further without a translator. After informing the Defendant that he had been arrested on an assault and battery complaint and telling him that he was being investigated in connection with the report of a missing person, Sgt. Aldan asked the Defendant certain questions to establish his command of the English language. When the Defendant admitted that he was not comfortable speaking or understanding English, and when he was unable to answer even rudimentary questions about his educational background and the location of his village, Sgt. Aldan terminated the interview at 11:35 and called for a translator.

¶29 There are seven audiotapes of the ensuing interrogation. Although the written Miranda warnings preceding the questioning indicate that the Defendant was advised of his rights in **[p. 9]** Tagalog, Sgt. Aldan never informed the Defendant of the Rule 5 affidavit accusing him of murder, or that he was even suspected, in any manner, of some responsibility for Cindy's death. During the questioning, moreover, the Defendant appeared to indicate that he would have liked to talk to an attorney prior to being questioned. Sgt. Aldan did not terminate the interrogation, but continued on with the advisement of rights.

III. ISSUES

¶30 Whether all custodial statements should be suppressed because of an unnecessary delay in bringing the Defendant before the court and /or because the Defendant was arrested and held for the principal purpose of investigating his part in Hui Yang's murder.

¶31 Assuming, *arguendo*, that the detention of the Defendant was valid, whether the Cepeda Statement, the Palacios Statement, and/or the Aldan Statement should be suppressed as products of an invalid or involuntary waiver of his *Miranda* rights.

¶32 Whether the Defendant, who was clearly in custody at the time at the time he made several statements to the police, was unlawfully interrogated in the absence of counsel, after he had requested counsel.

¶33 Whether Defendant's statements should be suppressed because he was not notified of his consular rights at the time of arrest, as required by Article 36 of the Vienna Convention.

IV. ANALYSIS

A.

¶34 "A confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological.'" *See Upshaw v. United States*, 335 U.S. 410, 413, 69 S.Ct. 170, 172, 93 L.Ed. 100 (1948). Conversely, a subsequent illegality will not render an already competent confession invalid. *See United States v. Leviton*, 193 F.2d 848, 853 (2d Cir. 1951). When an unlawful detention exists, "the evidence, however valuable, which is its fruit is unusable; if it does not, then the evidence (if also uncoerced) is available, no matter how bitter the consequences for the accused." *Leviton*, 193 F.2d at 854; *see also Anderson v. Calderon*, 232 **[p. 10]** F.3d 1053, 1071 (9th Cir. 2000) (appropriate remedy is the exclusion of the evidence of the evidence in question, if it was the "fruit of the poisonous tree"). Accordingly, the court must first determine if the failure to present Alcantara to the court in a timely manner violates the Fourth Amendment to the Constitution. If it did, then one or more of Alcantara's statements may have been unconstitutionally obtained.[5]

¶35 As a general rule, custodial statements that are voluntarily and knowingly made are admissible when a defendant has been charged with a crime within twenty four hours of his arrest, and when his probable cause determination is not delayed for the purpose of gathering additional evidence to justify

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[5] The parties have not raised, and thus the court will not address, any due process concerns or any violation of Article I, section 3 of the Commonwealth Constitution raised by what Defendant characterizes as an unduly lengthy detention.

the arrest. Under 6 CMC § 6105(a), an arrestee must be charged with a crime or released within twenty four hours. Once a suspect has been charged, the police must bring him before the court without unnecessary delay. See Com. R. Crim. P. 5(a). A suspect is "charged," moreover, when he "is informed of the accusation to be formally made against him and not [when] a written complaint or information has been filed with the court." *Commonwealth v. Aguon*, Crim, Case No. 90-0008 (N.M.I.Sup.Ct. March 9, 1990). "Without unnecessary delay" means within 48 hours, absent a bona fide emergency or other extraordinary circumstances. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56, 111 S.Ct. 1661, 14 L.Ed.2d 49 (1991); *Gerstein v. Pugh*, 420 U.S. 103, 125, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). For purposes of Com. R. Crim. P. 5, "without unnecessary delay" means that "an arrestee entitled to Com. R. Crim. P. 5 procedures shall be brought before a Superior Court judge at or before 9:00 a.m. at the next regular session of the court if he is ready for presentment at a time other than when the court is in session." *Aguon*, Slip Op. at 13.

¶36 Due to the holiday weekend, a complaint was faxed to the on-call judge, who reviewed whether there was probable cause to detain defendant on assault and battery charges within the prescribed twenty four hours. *Gerstein*'s requirements, were accordingly satisfied. *See Augon,* **[p.11]** *supra*. The fact that probable cause supported the initial arrest, however, does not automatically render the subsequent detention constitutional. The subsequent arrest on February 20 on the burglary charge, when it was not known whether the court had signed the complaint for assault and battery, does not invalidate the detention, given the identification of the gold chain by Gold Mart owner Woo Jin. In light of the holiday weekend, the court finds that custody was proper through the end of the long weekend on Monday, February 21 and into the early morning hours of Tuesday, February 22. In light of the subsequent filing of the Rule 5 complaint on February 22 and facts reflecting that the Defendant was presented to the court on Thursday, February 24, the court cannot rule, moreover, that the Defendant was detained illegally or that presentment pursuant to Com. R. Crim. P. 5(c) was unduly delayed.

¶37 Assuming, *arguendo*, that the police refrained from bringing the Defendant to Saipan on the assault and battery charge and held the Defendant on Tinian for the purpose of obtaining a confession or further investigating the murder, the question is whether the Defendant can prove that the time for

notifying Defendant of his rights on the charges of murder and kidnaping was unreasonably delayed. A number of courts have held in recent cases that it is improper to delay arraignment in order to investigate the suspect's participation in "additional crimes" (i.e., crimes that were not the basis for arrest). *See United States v. Davis,* 174 F.3d 941, 945 (8th Cir.1999); *Willis v. City of Chicago,* 999 F.2d 284, 289 (7th Cir.1993). *But see United States v. Sholola,* 124 F.3d 803, 823 (7th Cir.1997) (Wood, J., concurring) ("I therefore regard the majority's statement ... that the police may always hold an individual 'while investigating other crimes that he may have committed, so long as they have sufficient evidence to justify holding the individual in custody in the first place,' as inconsistent with the holding of *Willis.*"). *See also Kanekoa v. City & County of Honolulu,* 879 F.2d 607, 612 (9th Cir. 1989) (“”[T]he fourth amendment does not permit the police to detain a suspect merely to investigate”). While there is no question that it is inimical to the Fourth Amendment for the police to arrest now and investigate later for **[p. 12]** probable cause, the court is not convinced that this is what happened.[6] On February 19, the Government arrested Alcantara on charges of assault and battery, only to release him and re-arrest him on charges of theft and burglary on Sunday, February 20. Monday, February 21, was a holiday. On Tuesday, February 22, 2000, the Government prepared a Rule 5 complaint for murder and kidnaping, but did not bring Alcantara before a judge until February 24, approximately forty eight hours later. Because the defendant was in custody legally, and because, as set forth below, the Defendant made certain statements voluntarily, there was no proscription preventing the police from talking with him about Ms. Yang’s murder.

B.

¶38 The right to counsel recognized in *Miranda* is so important to suspects in criminal investigations that it "requir[es] the special protection of the knowing and intelligent waiver

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[6] Even if we were to assume there was a "delay" in bringing Alcantara before a judicial officer, the Defendant's case falls within the *Gerstein and McLaughlin* forty-eight hour limit for presumptively reasonable detentions, which means that Alcantara has the burden of showing that such delay was unreasonable, *i.e.*, that it was for the purpose of gathering additional evidence to justify the arrest, that it was motivated by ill will, or that it was "delay for delay's sake."

standard." *See Edwards v. Arizona,* 451 U.S.477, 483, 101 S.Ct. 1880, 1884, 68 L.Ed.2d 378 (1981). Thus, only after a suspect effectively waives his right to counsel after receiving *Miranda* warnings are law enforcement officers free to question him. *See North Carolina v. Butler,* 441 U.S. 369, 372-376, 99 S.Ct. 1755, 1756-1759, 60 L.Ed. 2d 286 (1979). To be knowing and intelligent, the "waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine,* 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). The court looks at the "totality of the circumstances including the background, experience, and conduct of defendant" in determining whether a waiver was valid. *See, e.g,, United States v. Binder,* 769 F.2d 595, 599 (9th Cir. 1985). **[p. 13]**

¶39 Applying this test to the facts, the court finds the Palacios Statement (Ex. A-1 at 20 through 27) to be plainly invalid. The waiver of rights form indicates that the warnings were read to the Defendant in English. To obtain a subsequent statement, Sgt. Aldan at least attempted to question the Defendant about his capabilities in communicating in English. In contrast to Lt. Palacios, however, Sgt. Aldan abruptly terminated the interrogation and promptly called for a translator. The audiotapes submitted to the court, moreover, conclusively demonstrate that Sgt. Aldan's assessment was correct: given the Defendant's patently limited knowledge of English, a translator insuring that the Defendant understood his rights should have been provided. *See United States v. Garibay*, 143 F.3d 534 (9th Cir. 1998). Notwithstanding police insistence that the Defendant knew enough English to waive his rights, the tapes demonstrate otherwise. The Statement taken by Sgt. Aldan was obtained after the Palacios Statement, and there are no facts even remotely suggesting that the Defendant somehow lost whatever command he had of the English language by then. Accordingly, the court finds that Government's failure to provide the Defendant with a translator proficient in Tagalog or to otherwise establish a knowing and valid waiver of *Miranda* rights renders the Palacios Statement constitutionally infirm. Consequently, any and all evidence obtained from this statement, including the alleged showing to the police of the general area in which the body was located, should be suppressed.

¶40 When an arrestee volunteers a statement, *Miranda* warnings are not required if there is no interrogation, or if the police ask only clarifying questions. *See, e.g., California v. Ray*, 13 Cal.4th 313, 914 P.2d 846 (1996). Although Officer Cepeda should have known that the statement he was about to obtain from the Defendant could have been incriminating, nothing in *Miranda* prevents, impedes, or discourages a guilty person, even one already confined, from freely admitting his crimes, whether the confession relates to matters for which he is already in police custody or to some other offense. *Ray*, 914 P.2d at 859. "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed **[p. 14]** to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make." *Miranda*, 384 U.S. at 478, 86 S.Ct. at 1630 (footnotes omitted). Because the court concludes that the statement given by the Defendant to Officer Cepeda was not elicited as a result of an interrogation, the Cepeda statement and the drawing derived therefrom will not be suppressed.

¶41 Failure to administer *Miranda* warnings creates a presumption of compulsion. *See Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct.1285, 84 L.Ed.2d 222 (1985). Thus, the extraction of an illegal, unwarned statement or confession from a defendant raises a rebuttable presumption that a subsequent confession or statement, even if preceded by proper *Miranda* warnings, could be tainted by the initial illegality. *Elstad*, 470 U.S. at 310; 105 S.Ct. at 1293. When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second

confession. *Id.* [7] An application of these factors to the instant case convinces the court that the Aldan Statement was entirely voluntary and is thus admissible. **[p. 15]**

¶42 As an initial matter, the court notes that in contrast to the Palacios Statement, considerable time and care was taken by Sgt. Aldan to insure that the Defendant understood his rights. He employed a Tagalog translator. He allowed the Defendant to ask, and he responded to, questions. Unlike the Palacios Statement, moreover, Sgt. Aldan did not talk with the Defendant in the wee hours of the morning; the advisement was given to the Defendant in the middle of the day, and at least one and one half days after the Palacios Statement was obtained. There is no indication that the Defendant was hungry, tired or otherwise deprived of anything. There is nothing that leads the court to believe that Alcantara's statements on February 23, 2000 were influenced by the questioning of Lt. Palacios.

¶43 It is true, as Defendant points out, that the waiver of rights form provided to the Defendant in connection with Sgt. Aldan's statement was obtained after Aldan incorrectly stated that the Defendant was still under arrest for assault and battery, and that he was being questioned in connection with the missing person complaint on Ms. Yang. Defendant cites no authority, however, requiring the court to rule that the Aldan statement should be rendered involuntary, simply because a suspect is not told of the possible charges against him, or whether the police intended to charge him. The court does not find that Sgt. Aldan lied to the Defendant or mislead him during the questioning.

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[7] A number of courts have listed a host of additional factors to assess whether a defendant's decision to give a subsequent statement was "sufficiently an act of free will to purge the primary taint": (1) The use of coercive tactics to obtain the initial, illegal confession and the causal connection between the illegal conduct and the challenged, subsequent confession; (2) The temporal proximity of the prior and subsequent confessions; (3) The reading and explanation of *Miranda* rights to the defendant before the subsequent confession; (4) The circumstances occurring after the arrest and continuing up until the making of the subsequent confession including, but not limited to, the length of the detention and the deprivation of food, rest, and bathroom facilities; (5) The coerciveness of the atmosphere in which any questioning took place including, but not limited to, the place where the questioning occurred, the identity of the interrogators, the form of the questions, and the repeated or prolonged nature of the questioning; (6) The presence of intervening factors including, but not limited to, consultations with counsel or family members, or the opportunity to consult with counsel, if desired; (7) The psychological effect of having already confessed, and whether the defendant was advised that the prior confession may not be admissible at trial; (8) 8. Whether the defendant initiated the conversation that led to the subsequent confession; and (9) The defendant's sobriety, education, intelligence level, and experience with the law, as such factors relate to the defendant's ability to understand the administered *Miranda* rights. *Id.* at 919-20. No single factor listed above is determinative. *E.g. Murray v. Alaska*, 12 P.3d 784, 790 (Alaska App. 2000); *Tenn. v. Smith*, 834 S.W.2d 915, 919-920 (Tenn. 1992).

¶44 When a suspect requests counsel at any point during an interview, he cannot be subject to further questioning until a lawyer has been made available, or the suspect himself reinitiates conversation. *See Edwards v. Arizona,* 451 U.S., at 484-485, 101 S.Ct., at 1884-1885. This "second layer of prophylaxis for the *Miranda* right to counsel" is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Davis v. United States,* 512 U.S. 452, 458, 114 S.Ct.2350, 129 L.Ed.2d 362 (1994) (citations omitted). When, however, a request for an attorney is ambiguous or equivocal such that "a reasonable officer, in light of the circumstances, would have understood only that the suspect *might* be invoking the **[p. 16]** right to counsel," an interrogating officer is not required to cease all questioning. *Davis,* 512 U.S. at 459.[8]

¶45 The court finds such a situation to exist in this case. When the Defendant made the statement to Officer Pascua, as to whether he should get an attorney, it was permissible for Sgt. Aldan to ask clarifying questions. Sgt. Aldan told the Defendant that talking to an attorney was his decision. Shortly thereafter, the Defendant indicated that he understood, but stated further that he wanted to talk to the investigators. Under these circumstances, the interrogation need not have been terminated, and the seven audiotapes that followed need not be suppressed.

¶46 Assuming, arguendo, that the Defendant was not notified of his consular rights at the time of arrest as required by the Vienna Convention on Consular Relations,[9] suppression is not the appropriate remedy. *See, e.g., United States v. Lombera-Camorlinga,* 206 F.3d 882, 885 (9th Cir.2000); *United States v. Li,* 206 F.3d 56, 60 (1st Cir.2000); *United States v. Carrillo,* 70 F.Supp.2d 854, 859 (N.D.Ill.1999); *United States v. Rodrigues,* 68 F.Supp.2d 178, 183

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[8] "Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. ... Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel." 512 U.S. at 462.

[9] *See* Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1)(b), 21 U.S.T., 77, 100-01, 595 U.N.T.S. 261, 292 (ratified by the United States on Nov. 24, 1969)).

(E.D.N.Y.1999). Accordingly, Defendant's request to suppress his statements on these grounds shall be denied.

CONCLUSION

¶47 Based upon the foregoing, the court makes the following rulings:

A. The Palacios Statement at Ex. A-1 at 21-27, made on February 22, 2000, including all evidence relating to the alleged showing of the police of the general area in which the body was located, shall be suppressed. **[p. 17]**

B. The motion to suppress the Cepeda Statement and the Aldan Statement is denied.

So ORDERED this 17 day of May, 2001.

/s/
TIMOTHY H. BELLAS, Associate Judge