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3 UNITED STATES COURT OF APPEALS
4
5 FOR THE SECOND CIRCUIT
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8
9 August Term, 2010

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11 (Argued: March 22, 2011 Decided: August 9, 2011)

12
13 Docket No. 10-419-cr
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17 UNITED STATES,

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19 *Appellee,*

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21 - v. -

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23 FNU LNU, a/k/a SANDRA CALZADA,

24
25 *Defendant-Appellant.*
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29 Before: JACOBS, *Chief Judge*, and CALABRESI and LOHIER, *Circuit Judges*.

30 Appeal of the defendant's conviction on immigration offenses after the district court
31 (Weinstein, J.) denied her motion to suppress testimony from the officer who questioned her
32 without *Miranda* warnings on her arrival at John F. Kennedy International Airport. Finding that,
33 though for reasons different from those the district court gave, *Miranda* warnings were not
34 required on the facts of this case, we AFFIRM.

35 Chief Judge Jacobs concurs in the judgment of the Court and files a separate opinion.

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37 New York, Inc., Appeals Bureau, New York, N.Y., *for*
38 *Defendant-Appellant.*
39

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4 N.Y., *for Appellee*.
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7 CALABRESI, *Circuit Judge*:

8 The district court (Weinstein, J.) denied the defendant's motion to suppress testimony
9 from the Customs and Border Patrol (CBP) officer who questioned her without *Miranda* warnings
10 on her arrival at John F. Kennedy International Airport. We reject the district court's reasoning
11 that either a general exception to *Miranda* for border questioning exists or that the officer's intent
12 in posing the questions is relevant. But, based on the totality of the circumstances, we conclude
13 that the defendant was not in custody during the questioning and so *Miranda* warnings were
14 unnecessary. Accordingly, we affirm the defendant's conviction.

15 Background

16 The defendant, traveling under the name Sandra Calzada, arrived at John F. Kennedy
17 International Airport in New York on December 29, 2008, on a flight from the Dominican
18 Republic. In preparing to process the passengers from this flight, CBP Officer Frank Umowski
19 ran the flight's manifest through a database of outstanding warrants and received notice that
20 Calzada's name appeared on a New York Police Department (NYPD) arrest warrant. Umowski
21 verified that the date and place of birth of the person on the warrant matched that listed on the
22 passport for the passenger and flagged Calzada for "secondary inspection." Upon arrival, an
23 armed guard escorted her to the secondary inspection room, which, Umowski concedes, she was
24 not free to leave, and Umowski questioned her.

1 She presented a U.S. passport in the name of Sandra Calzada. He asked her: her name, her
2 citizenship, and where and when she was born. She responded: Sandra Calzada, U.S. citizen,
3 Puerto Rico, and gave a date of birth matching the passport. He asked if she had ever been
4 arrested; she said no. He took her fingerprints, which failed to match those in the NYPD warrant.
5 After a brief computer search, he found her 2008 passport application, which requested renewal of
6 a 1998 passport, and determined that the application contained the same photograph and
7 information as the passport the defendant presented. He then examined the 1998 application,
8 which bore a photograph that he thought depicted someone else. Umowski confronted her with
9 that older photograph, and she said she did not recognize the person pictured.

10 Umowski again questioned the defendant about her name and background, including her
11 parents and siblings, this time using a translator. She responded that she had one brother, whereas
12 the 1998 passport application listed only one sister. She was unable to recall any addresses where
13 she had lived in Puerto Rico. In total, the questioning lasted for about 90 minutes. Umowski then
14 delivered the defendant to another officer, to whom she gave a sworn statement.¹ CBP deemed her
15 inadmissible at that time and held her over for a hearing with an immigration judge. At some later
16 time, different federal agents arrested her on an indictment for making a false statement in a
17 passport application, 18 U.S.C. § 1542; misusing a passport, *id.* § 1544; and aggravated identity
18 theft, *id.* § 1028A(a)(1) & (c)(7).

19 In the district court, the defendant moved in limine to suppress her statements to
20 Umowski, whom the government had slated as a trial witness, because he failed to provide her
21 with the prophylactic warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). The district

¹ The government never sought to admit this statement at trial.

1 court held a hearing and found *Miranda* inapplicable to this situation. It first held that *Miranda*
2 warnings are not required where a person is questioned in a “routine border crossing inquiry.”
3 *United States v. FNU LNU*, No. 09-CR-415, 2009 U.S. Dist. LEXIS 88225, at **6 (E.D.N.Y. Sept.
4 25, 2009). It further explained that *Miranda* warnings were unnecessary because it believed
5 Umowski’s testimony that his “purpose . . . was to verify if [the defendant], in fact, was admissible
6 into the U.S. as a U.S. citizen.” *Id.* (internal quotation marks omitted). The court also explained
7 that the interrogation constituted routine border questioning because “Umowski’s function or
8 intent” was only to determine the defendant’s true identity. *Id.* It therefore denied the motion.

9 Umowski and the translator testified at trial. The government also presented testimony
10 from the real Sandra Calzada, who testified that when she had been a cocaine addict, she had sold
11 her passport, birth certificate, and social security card to her drug dealer. She had presented two
12 different stories to the authorities before the one she told at trial and testified pursuant to a non-
13 prosecution agreement covering her passport offenses, her cocaine offenses, and a more recent
14 state shoplifting charge. A State Department agent, Eric Donelan, testified that the defendant
15 possessed a receipt for the 2008 passport renewal and a social security card in the name Sandra Iris
16 Calzada. He also testified that her boyfriend had brought the canceled 1998 passport, which bore
17 her picture, to the airport after her detention and that her boyfriend had provided CBP with a
18 birth certificate matching the information on both passports. Finally, the government called a
19 Department of Homeland Security document expert, Wayne Laptosh, who testified that the 1998
20 passport had been altered.

21 The defendant presented no affirmative case, and the jury convicted her on all three
22 counts. The district court sentenced her to 25 months’ imprisonment, three years of supervised

1 release, and the mandatory special assessment. The defendant timely appealed, challenging only
2 the district court's suppression decision.

3 Discussion

4 This case presents the question of whether the district court correctly ruled that Officer
5 Umowski's questioning failed to rise to the level of a "custodial interrogation" under *Miranda* and
6 thus whether that court properly admitted into evidence the defendant's statements to Umowski.
7 Though we generally review a district court's evidentiary decisions for abuse of discretion, *United*
8 *States v. Quinones*, 511 F.3d 289, 307 (2d Cir. 2007), we review decisions on suppression motions
9 de novo, *In re Terrorist Bombings of U.S. Embassies in E. Afr. v. Odeh*, 552 F.3d 157, 167 (2d Cir.
10 2008). We may, however, uphold the district court's ultimate decision on any ground supported in
11 the record. *United States v. Green*, 595 F.3d 432, 436 (2d Cir. 2010).

12 An interaction between law enforcement officials and an individual generally triggers
13 *Miranda*'s prophylactic warnings when the interaction becomes a "custodial interrogation." This
14 determination has two parts: (a) there must be an interrogation of the defendant, and (b) it must
15 be while she is in "custody." See *Cruz v. Miller*, 255 F.3d 77, 80–81 (2d Cir. 2001) (recognizing
16 custody and interrogation as separate elements of the *Miranda* determination); accord *United States*
17 *v. Ali*, 68 F.3d 1468, 1473 (2d Cir. 1995). Neither the government nor the district court suggests
18 that Umowski's direct questioning of the defendant fails to qualify as an interrogation. An
19 interrogation consists of "express questioning or its functional equivalent," which aptly describes
20 the interaction between Umowski and the defendant. *Rhode Island v. Innis*, 446 U.S. 291, 300–01

1 (1980).² Under standard *Miranda* analysis, the only issue in the instant case would be whether the
2 defendant was in “custody” during the interrogation. The government, however, urges that an
3 altogether different analysis should apply in the context of questioning at the border.³ We take up
4 this contention first.

5 Though accepting that *Miranda* applies when the questioning constitutes custodial
6 interrogation, the government insists that “[r]outine border questioning does not constitute
7 ‘custodial interrogation’ for *Miranda* purposes.” Appellee’s Br. 17. Indeed, it claims there exists a
8 “routine border questioning exception to *Miranda*,” dating back several decades and undisturbed
9 by developments in Fifth Amendment law. *Id.* at 20. This exception stems, it asserts, from the
10 government’s “broad powers to detain, search, and question individuals even absent any
11 reasonable suspicion of wrongdoing” at “border entry points.” *Id.* at 16. In support of this
12 argument, the government relies primarily on three cases: *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir.
13 2007), *United States v. Silva*, 715 F.2d 43 (2d Cir. 1983), and *United States v. Rodriguez*, 356 F.3d
14 254 (2d Cir. 2004). We address each case in turn.

15 Relying on *Tabbaa*, the government contends that border questioning requires *Miranda*
16 warnings only when it becomes “non-routine.” *Tabbaa* rejected a Fourth Amendment challenge to

² An exception exists for “routine booking question[s],” but aside from the fact that Umowski was not booking the defendant during the questioning here, the questions asked far exceeded the scope of that exception. *Pennsylvania v. Muniz*, 496 U.S. 582, 601–02 (1990) (establishing the exception for questions about the suspect’s “name, address, height, weight, eye color, date of birth, and current age”).

³ The international arrivals section and Customs area of a U.S. airport undisputedly constitute the “border” for constitutional purposes. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) (“[A] search of the passengers and cargo of an airplane arriving at a [U.S.] airport after a nonstop flight from [abroad] would clearly be the functional equivalent of a border search.”); *United States v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006) (“An airport is considered the functional equivalent of a border and thus a search there may fit within the border search exception.”).

1 a series of border searches involving pat downs, fingerprinting, photographing, and questioning
2 lasting several hours. 509 F.3d at 94–95, 100–01. Under Fourth Amendment case law, routine
3 border searches fall within a well-established exception to the warrant requirement. The term
4 “routine” delineates the exception’s scope, thus explaining the term’s significance in this line of
5 jurisprudence. *See, e.g., United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985)
6 (“Routine searches of the persons and effects of entrants are not subject to any requirement of
7 reasonable suspicion, probable cause, or warrant”); *United States v. Martinez-Fuerte*, 428 U.S.
8 543, 566 (1976) (authorizing warrantless, suspicionless stops for “brief questioning routinely
9 conducted at permanent checkpoints” near the border).

10 But Supreme Court precedents establish no similar exception to *Miranda*’s prophylactic
11 requirement under the Fifth Amendment. *Cf. Pennsylvania v. Muniz*, 496 U.S. 582, 601–02 (1990)
12 (adopting an exception to *Miranda* for “routine booking question[s]”); *New York v. Quarles*, 467
13 U.S. 649, 657–58 (1984) (recognizing a limited public-safety exception to *Miranda*); *Harris v. New*
14 *York*, 401 U.S. 222, 224–26 (1971) (holding that statements that were otherwise inadmissible due
15 to a *Miranda* violation were admissible to impeach the defendant’s trial testimony).

16 Similarly, *Tabbaa* says nothing about *Miranda* or the Fifth Amendment, and, indeed, as we
17 have previously said, “whether a ‘stop’ was permissible under [Fourth Amendment doctrine] is
18 irrelevant to the *Miranda* analysis.” *Ali*, 68 F.3d at 1473. Though *Tabbaa* provides a useful guide
19 for delineating the boundaries of “routineness” as that word is used in the specific context of
20 Fourth Amendment warrantless border searches, its usefulness outside that context is inherently
21 limited. *United States v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006) (discussing the “routine”-border-

1 search exception to the Fourth Amendment and noting that “the level of intrusion into a person's
2 privacy is what determines whether a border search is routine”). *Tabbaa* does not speak to the
3 primary question we face here: does a border-questioning exception to the requirement of *Miranda*
4 warnings—whether limited by routineness or not—exist at all. Accordingly, *Tabbaa* is of little help
5 to the government here.

6 The government argues, however, that *Silva* establishes just such a border-questioning
7 exception for our circuit. It is *Silva*, also, that forms the core of the district court’s decision
8 admitting the evidence in this case. In *Silva*, the defendant was convicted of making a false
9 statement to a federal official and of attempting to bring a large sum of currency into the country
10 without declaring it. 715 F.2d at 44. After initial questioning at the Canadian border during which
11 the defendant claimed to be a U.S. citizen, an immigration agent searched her purse, in which he
12 found her Venezuelan passport and a bundle of currency. *Id.* at 45–46. Customs officials then
13 asked her additional questions about the currency, which led to establishing her criminal
14 conduct.⁴ *Id.* Noting that the questioning “amounted to no more than routine customs and
15 immigration inquiries,” we held that the officers’ un-Mirandized questioning of the defendant at
16 the border was permissible. *Id.* at 46. Critically, in so holding, we rejected the defendant’s
17 argument that she was entitled to *Miranda* warnings as soon as any agent had probable cause to
18 arrest her, that is, as soon as they discovered her Venezuelan passport after she had claimed to be a
19 U.S. citizen. *Id.* at 47.

⁴ The law governing undeclared importation of currency applies only over a given threshold. See 31 U.S.C. § 5322 (providing criminal penalties for willful violation of 31 U.S.C. §§ 5311–32); 31 U.S.C. § 5316 (1984) (prohibiting the undeclared importation of more than \$5,000 in U.S. currency) (amended by Pub. L. 99-570, § 1358(c) (increasing the threshold to \$10,000)). Until agents questioned her and counted the currency, whether the defendant possessed more than that threshold was unclear.

1 To reach this conclusion, we distinguished a prior case, *United States v. Moody*, 649 F.2d
2 124 (2d Cir. 1981), in which we had held that customs agents erred in failing to give *Miranda*
3 warnings to a suspect once they saw her carrying what appeared to be drugs—that is, at the moment
4 probable cause arose for her arrest. Her response “was elicited for the purpose of incriminating
5 her” and *Miranda* applied. *Id.* at 128.

6 The *Silva* court reasoned in two steps. First, it separated the fact that immigration agents
7 had probable cause to arrest the defendant on the false statement offense—as to which no
8 challenged questions had been posed—from the issue of whether customs agents had probable
9 cause to suspect a crime with respect to the currency. *Silva*, 715 F.2d at 48. Then, it found that the
10 customs agents acted properly in questioning her about the currency because transporting
11 currency—unlike transporting drugs, as in *Moody*—is not inherently illegal and, therefore, creates no
12 automatic suspicion of criminal wrongdoing. *Id.* In all this, the court continued to focus on
13 whether the agents thought they had probable cause to believe a crime was being committed as the
14 key to determining whether the situation consisted of “routine customs and immigration
15 inquiries.” *Id.* at 46. Because the inquiries were routine, it concluded, *Miranda* warnings were not
16 required.

17 On appeal, as she did also below, the defendant argues that reliance on *Silva* is misplaced
18 because a series of later Supreme Court cases, most notably *Berkemer v. McCarty*, 468 U.S. 420
19 (1984), and *Stansbury v. California*, 511 U.S. 318 (1994), have undercut its bases and, therefore, its
20 current validity. *Berkemer* involved a traffic stop during which the officer elicited incriminating
21 statements from the suspect. In concluding that the traffic stop, though a seizure, failed to

1 implicate the coercive aspects of stationhouse interrogation that animated *Miranda*, and thus failed
2 to constitute custody, the Court rejected the contention that the officer's "unarticulated plan" to
3 arrest the suspect had any bearing on the determination of custody. 468 U.S. at 442. The motive
4 of the questioner was thus deemed irrelevant.⁵ Similarly, in *Stansbury*, a man considered a witness
5 rather than a suspect accompanied police to their stationhouse for questioning. During the course
6 of that questioning, police began to suspect him of having committed the crime, ceased the
7 interview, and read him the *Miranda* warnings. At trial he moved to suppress his pre-warning
8 statements. The trial court denied the motion and the California Supreme Court affirmed,
9 reasoning that the interrogation became custodial only when suspicion focused on the defendant.
10 511 U.S. at 320–22. The Court remanded the case for reconsideration, explicitly stating more
11 than once that the officer's subjective beliefs about whether the interviewee was a suspect were
12 irrelevant to the *Miranda* determination. *Id.* at 323–26.

13 Together, these and subsequent Supreme Court cases establish that the test for when
14 *Miranda* warnings are mandated is objective with respect to the personal attitudes and knowledge
15 of both the questioner and the person questioned. It depends on how a *reasonable person* in the
16 suspect's position would view the situation. *See, e.g., Stansbury*, 511 U.S. at 323 ("Our decisions
17 make clear that the initial determination of custody depends on the objective circumstances of the
18 interrogation, not on the subjective views harbored by either the interrogating officers or the

⁵ The *Berkemer* court also considered a test based only on the existence of probable cause. 468 U.S. at 435 n.22. The Court rejected probable cause as the dividing line because probable cause rests, in part, on what the officer knows but the suspect may not, making it subjective, and because "[t]he threat to a citizen's Fifth Amendment rights that *Miranda* was designed to neutralize has little to do with the strength of an interrogating officer's suspicions."

1 person being questioned.”).⁶ To the extent that *Silva* and *Moody* rely on the officer’s subjective
2 motives for the interrogation (including the uncommunicated existence of probable cause or
3 intent to arrest) in determining whether the interaction qualifies as custodial, we agree with the
4 defendant that *Berkemer* and *Stansbury* abrogate them. This does not mean, however, that *Silva* does
5 not remain important and, indeed, binding on us in some particulars that do not depend on its
6 reliance on the subjective intent of the questioner. Specifically, *Silva*’s holding with respect to the
7 (a) routineness of the (b) questioning (c) at the border, remains our circuit law and distinguishes
8 our approach from both the Third Circuit in *United States v. Kiam*, 432 F.3d 524 (3d Cir. 2006),
9 and the First Circuit in *United States v. Ventura*, 85 F.3d 708, 711 (1st Cir. 1996), discussed *infra*.

10 *Rodriguez*, the final case on which the government’s relies, has little bearing on this case.
11 There the defendant, while incarcerated on unrelated state charges, submitted to an interview with
12 a federal immigration officer. No *Miranda* warnings were given. The defendant’s responses during
13 that interview established that his presence in the United States was unauthorized and, on his
14 release from state custody, the federal government deported him. A year later, he returned to the
15 United States and was arrested at the airport while attempting to enter the country illegally. At his
16 trial for unauthorized reentry and visa fraud, the immigration agent testified regarding the
17 defendant’s nationality, based on the then-four-year-old interview. 356 F.3d at 256–57. The trial
18 court denied the defendant’s motion to suppress this evidence pursuant to *Miranda*, and we
19 affirmed.

⁶ Fourth Amendment doctrine, which uses a similar reasonable-person test, holds that the relevant perspective is that of a reasonable, innocent person. *Florida v. Bostick*, 501 U.S. 429, 438 (1991) (rejecting the argument that a suspect’s consent to search his luggage must be invalid because no reasonable person in his actual shoes—who knows the luggage contains contraband—would consent). Whether the reasonable person in the Fifth Amendment *Miranda* inquiry is similarly innocent seems to be an open question.

1 To begin with, the *Rodriguez* court’s precise holding evades easy discernment. In *Rodriguez*,
2 we found both (a) that Rodriguez’s interrogation did not require a *Miranda* warning and (b) that
3 sufficient other evidence existed to render harmless any error in admitting the agent’s testimony.
4 *Id.* at 260–61. Furthermore, we have generally treated the issue of whether questioning requires
5 *Miranda* warnings differently depending on whether the suspect was already incarcerated on
6 unrelated grounds at the time of the interrogation. *See, e.g., United States v. Willoughby*, 860 F.2d 15,
7 23 (2d Cir. 1988) (holding that though the defendant’s incarceration was undeniably custody in
8 the colloquial sense, the conversation at issue involved no additional coercion and so *Miranda*
9 warnings were not required). Therefore, because Rodriguez was incarcerated during his
10 questioning, how that court analyzed whether *Miranda* warnings were required is not directly
11 apposite to whether they were required in the instant case, where the defendant was not in prison.

12 Most important, moreover, in reaching its conclusion that Rodriguez’s interrogation was
13 not custodial, the court distinguished a seemingly similar Supreme Court case that had excluded
14 the evidence, *Mathis v. United States*, 391 U.S. 1 (1968). *Mathis*, the court noted, involved
15 administrative questioning in an ongoing investigation into the crime for which the defendant was
16 ultimately prosecuted, whereas the crime for which Rodriguez was prosecuted—illegally reentering
17 the country after being deported—had yet to occur when Rodriguez’s interview with the INS agent
18 took place. *Rodriguez*, 356 F.3d at 260. Clearly, the instant case lies closer to *Mathis* than to
19 *Rodriguez* in this regard: for here, as in *Mathis*, Umowski’s questioning of the defendant focused on
20 precisely the set of facts underlying the conviction she now appeals.⁷

⁷ The government also seeks to base *Rodriguez* on an earlier circuit decision that *Rodriguez* quotes as asking whether the “‘officers . . . are aware of the potentially incriminatory nature of the disclosures sought.’” *Rodriguez*, 356 F.3d at 259 (quoting *United States v. Morales*, 834 F.2d 35, 38 (2d Cir. 1987)). But,

1 We, therefore, conclude (a) that the government’s position is not supported by binding
2 precedent in this circuit, but (b) that *Silva* continues to guide our approach to the case before us.

3 The question thus becomes: was the defendant in the case before us in “custody” during
4 the questioning. The district court—believing that it was bound by *Silva*’s reliance on the
5 questioner’s intent—admitted the evidence without reaching the issue of custody. *See FNU LNU*,
6 2009 U.S. Dist. LEXIS 88225, at **6–7. In such circumstances, we would normally remand the
7 case to the district court to determine, in the first instance, whether custody existed. *See Ali*, 68
8 F.3d at 1473. Here, however, the district court admirably compiled an extensive record
9 documenting the circumstances of the defendant’s questioning. As a result, we are at no
10 disadvantage in examining the issue first. Given, moreover, that we would review the district
11 court’s custody conclusion de novo in any event, *United States v. Badmus*, 325 F.3d 133, 138 (2d
12 Cir. 2003) (per curiam), considerations of judicial efficiency lead us to resolve the case ourselves.

13 We pause to clarify that “custody” for Miranda purposes is not coterminous with, though it
14 is often informed by, the colloquial understanding of custody. For example, in *Berkemer*, even
15 though state law required the defendant to stop when the highway patrolman flashed his lights
16 and the defendant was not free to leave the traffic stop, either as a legal matter or in terms of how
17 a reasonable person would view the situation, the stop did not constitute “custody” for *Miranda*
18 purposes. 468 U.S. at 435–39; *see also Willoughby*, 860 F.2d at 23 (holding that incarceration does
19 not necessarily constitute *Miranda* “custody”). As stated by the Supreme Court and our cases, the
20 overarching “custody” question is whether “a reasonable [person] in the suspect’s position would

significantly, *Morales*, and hence this aspect of *Rodriguez*, preceded *Stansbury* and its rejection of subjective intent. The basis of *Rodriguez* noted above—the time of the interview in relation to the crime charged—is, instead, completely consistent with the Supreme Court’s requirement of an objective *Miranda* test.

1 have understood” herself to be “subjected to restraints comparable to those associated with a
2 formal arrest.” *Georgison v. Donelli*, 588 F.3d 145, 155 (2d Cir. 2009) (quoting *Berkemer*, 468 U.S.
3 at 441)).

4 Imagining oneself in “the suspect’s position” necessarily involves considering the
5 circumstances surrounding the encounter with authorities. Those circumstances include, inter alia,
6 the interrogation’s duration; its location (e.g., at the suspect’s home, in public, in a police station,
7 or at the border); whether the suspect volunteered for the interview; whether the officers used
8 restraints; whether weapons were present and especially whether they were drawn; whether officers
9 told the suspect he was free to leave or under suspicion, *see Yarborough v. Alvarado*, 541 U.S. 652,
10 661–63, 664–65 (2004) (recounting the development of *Miranda* case law); and, now, a juvenile
11 suspect’s age, if known to the officer or readily apparent, *J.D.B. v. North Carolina*, 131 S. Ct. 2394,
12 2406 (2011). *See also Ali*, 68 F.3d at 1472–73 (looking at the “objective circumstances of the
13 interrogation” such as its location out of public view, the fact that officers drew weapons and
14 surrounded the defendant, and the fact that they confiscated his travel documents, without which
15 he could not leave (quoting *Stansbury*, 54 U.S. at 322)). The circumstances also include, and
16 especially so in border situations, the nature of the questions asked. *See United States v. Galloway*,
17 316 F.3d 624, 631 (6th Cir. 2003) (considering the content of the CBP officer’s questioning in
18 evaluating whether custody existed in an airport).

19 A reasonable person’s expectations about how the questioning is likely to unfold are also
20 relevant. Again, in *Berkemer*, the Court explained that “[a] motorist’s expectations, when he sees a
21 policeman’s light flashing behind him, are that he will be obliged to spend a short period of time

1 answering questions and waiting while the officer checks his license and registration, that he may
2 then be given a citation, but that in the end he most likely will be allowed to continue on his way.”
3 468 U.S. at 437. Because one expects the detention to be brief and the questioning to be
4 circumscribed and related to the driver’s identification, authorization to drive, and conduct on the
5 roadway, one need not fear the coercion present in stationhouse interrogations that prompted
6 *Miranda*, in which “questioning will continue until [the suspect] provides his interrogators the
7 answers they seek.” *Id.* at 438.

8 Similarly, in the context of arriving at an American airport, (a) in which compulsory
9 questioning—with no freedom to enter the United States and with nowhere else to go—inheres in
10 the situation and (b) in which the traveler has voluntarily submitted to some degree of
11 confinement and restraint by approaching the border, a reasonable traveler will expect some
12 constraints as well as questions and follow-up about his or her citizenship, authorization to enter
13 the country, destination, baggage, and so on. That one expects both constraints and
14 questions—and that, at least initially, every traveler in the airport must submit to the same sort of
15 questioning while not free to leave—reduces the likelihood that reasonable persons in that
16 situation would consider themselves to be under arrest.

17 Moreover, because the questions asked are, by definition, communicated to the
18 suspect—unlike the officer’s subjective intent to arrest the suspect or the existence of probable
19 cause—they are a proper part of the objective *Miranda* inquiry. *Cf. Stansbury*, 511 U.S. at 323. In the
20 context of both the roadside traffic stop and the border, the content of the officer’s questions
21 substantially inform whether a reasonable person would feel restrained in a way similar to a formal
22 arrest. Indeed, in many such cases, the fact that the questions asked fall within the range of

1 inquiries one expects will, by itself, be enough to assure a reasonable person that he or she is not
2 under arrest.

3 This is not to say, however, that the nature of the questions asked is the only relevant
4 factor. Cf. *Kiam*, 432 F.3d at 528–29 (adopting a border-questioning exception to *Miranda* and
5 rejecting the need for any inquiry into the conditions of the interrogation as well as—in
6 contradistinction to *Silva*—any distinction between “routine” and “non-routine” questioning);
7 *Ventura*, 85 F.3d at 711 (noting the importance of the questions asked but seemingly not giving
8 that factor the priority we did in *Silva*). To look only at any single factor would be inconsistent
9 with *Miranda*’s role as a protection against coercion. The rule exists to temper the “potentiality for
10 compulsion” that exists when an individual is “cut off from the outside world” and subjected to
11 “incommunicado interrogation . . . in a police-dominated atmosphere.” *Miranda*, 384 U.S. at 457,
12 445. That potential comes from the “inherently coercive pressures that tend to undermine the
13 individual’s will to resist and to compel him to speak” in such an environment. *United States v.*
14 *Morales*, 834 F.2d 35, 38 (2d Cir. 1987). *Silva*, with its emphasis on what is normally asked at the
15 border, suggests that it is possible, though unlikely, for such an environment to exist even at the
16 border, and if it does, so, too, must *Miranda*’s protections.

17 As in the traffic-stop context, the inquiry remains a holistic one in which the nature and
18 context of the questions asked, together with the nature and degree of restraints placed on the
19 person questioned, are relevant. *Berkemer*, 468 U.S. at 441 n.34 (contrasting the facts of
20 *Berkemer*’s traffic stop with those in *Commonwealth v. Meyer*, 488 Pa. 297, 301 (1980), which
21 found a traffic stop that lasted more than 30 minutes “custodial”). This holding comports with

1 those in several of our sister circuits that *Miranda* warnings might be required even at the border if
2 the interrogation occurs while the defendant is “handcuffed to a bench in a locked security office
3 . . . for . . . four hours,” *United States v. RRA-A*, 229 F.3d 737, 741 (9th Cir. 2000), “placed in a
4 locked cell,” *United States v. Butler*, 249 F.3d 1094, 1100 (9th Cir. 2001), or “physically . . .
5 restrained” while officers had weapons drawn, *see United States v. Moya*, 74 F.3d 1117, 1119 (11th
6 Cir. 1996). But we need not decide today where any such lines would be drawn; that is, we need
7 not speculate on the appropriate outcome in cases in which *Kiam* and *Ventura* might lead to
8 different results. This case does not ultimately turn on that.

9 Several facts about the interrogation of the defendant before us militate in favor of finding
10 it “custodial”: it took place in a closed room, out of public view; armed guards escorted the
11 defendant there and remained in the vicinity; it lasted for 90 minutes, substantially longer than
12 most interviews that we have deemed non-custodial in other contexts, *see, e.g., Cruz*, 255 F.3d at
13 81–86 (contrasting “brief,” noncustodial questioning with a traffic stop that lasted more than 30
14 minutes and was custodial); Umowski took the defendant’s fingerprints and did not inform her
15 she was free to go. She was not, in fact, free to go. On the other hand: the officers never drew their
16 weapons; no physical restraints were used; and, crucially, a reasonable person would recognize all
17 Umowski’s questions as relevant to her admissibility to the United States. Such a person would
18 consider them par for the course of entering the country from abroad.

19 In light of the totality of these circumstances, we conclude that a reasonable person in the
20 defendant’s position would not have considered what occurred to be the equivalent of a formal
21 arrest. It follows that the defendant was not in “custody” and that, for this reason alone, *Miranda*

warnings were not required. Accordingly, the district court correctly denied the motion to suppress Umowski's testimony.

Conclusion

We hereby AFFIRM the defendant's conviction.

1 DENNIS JACOBS, Chief Judge, concurring:

2 I concur in the result.

3
4 **I.**

5 I am unable to sign the majority opinion for
6 several reasons. First, the case of First-Name-Unknown
7 Last-Name-Unknown ("FNU LNU") is the easiest of cases, in
8 which the questions asked of her had bearing on the most
9 routine issues of identity: her name, where she was born,
10 her country of citizenship, the contact information of her
11 friends and family, details about the city in Puerto Rico
12 where she purported to live for over thirty years, etc.
13 Moreover, the location and circumstances of her confinement
14 were unremarkable.

15 After the 90-minute interview, the Customs and
16 Border Patrol officers were unable even to ascertain FNU
17 LNU's name. Indeed, if she was subjected to questioning at
18 the airport until her name *was* known, she would be there
19 still. So if she was being questioned (and detained) for 90
20 minutes, it is only because she declined to say who she is.

1 This case therefore does not remotely present the occasion
2 for a tour d’horizon of Miranda law, or for pages of
3 tendentious analysis in which useful precedents of this
4 Circuit are deconstructed. See Majority Op. at 7-13.

5 This case is important nonetheless because
6 muddling up Miranda law in the context of questioning
7 entrants at the border is very dangerous. The majority
8 opinion unnecessarily complicates what should be a
9 straightforward holding. Point II of this concurrence
10 abstracts the holding from the surrounding commentary and
11 dicta in the majority opinion. I do so for the benefit of
12 future parties and panels of this Court.

14 II.

15 Our holding in United States v. Silva, 715 F.2d 43
16 (2d Cir. 1983) was abrogated by both Berkemer v. McCarty,
17 468 U.S. 420 (1984) and Stansbury v. California, 511 U.S.
18 318 (1994) to the *limited* extent that the subjective
19 intentions of an officer should not be considered in the
20 Miranda analysis. Otherwise, Silva remains the law of this
21 Circuit and guides our analysis here.

1 Silva: (1) rejected the proposition that “from the
2 moment [the entrant] was directed to the secondary
3 inspection area she was in a custodial environment,” 715
4 F.2d at 46 (internal quotation marks omitted); reiterated
5 that “Miranda warnings need not be given to one detained at
6 the border and subjected to a routine customs inquiry,” id.;
7 and observed that “questions . . . necessary to enforce
8 immigration and customs regulations” generally will not
9 require Miranda warnings, id. at 47. Unlike the Third
10 Circuit in United States v. Kiam, 432 F.3d 524, 530 (3d Cir.
11 2006), however, Silva refrained from adopting a bright-line
12 exception to Miranda at the border and instead recognized
13 Miranda’s limited application to non-routine customs
14 inquiries. See Silva, 715 F.2d at 46-47.

15 Practically speaking, the *most* important factor in
16 determining whether Miranda applies at our borders will
17 often be the objective function of an inspector’s questions,
18 not the custodial nature of the questioning.

19 Miranda warnings are not required in a routine
20 secondary inspection when, as in this case, a reasonable
21 person would consider the questions asked (e.g., name,

1 country of birth, citizenship, etc.) to be relevant to an
2 admissibility or customs determination. True, some events
3 or factors might tip the balance in *another* case. When the
4 custodial conditions become clearly exceptional rather than
5 routine--handcuffs, drawn weapons, administration of Sodium
6 Pentothal, etc.--questions that objectively bear on
7 admissibility *might* require a Miranda warning. Those
8 circumstances, however, are not present here and remain to
9 be decided in future cases.

10 The views expressed in this Point are common
11 ground among the panel members, and are expressed without
12 fear of contradiction.