UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
	:	
v.	:	**Crim. No.: 11-cr-356 (RDM)**
	:	
	:	
IRFAN DEMIRTAS	:	
	:	
also known as "Nasrullah,"	:	
	:	
Defendant.	:	

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S MOTION TO SUPRESS STATEMENTS

The United States opposes the defendant's motions to suppress statements pursuant to the Fifth Amendment to the United States Constitution.

The defendant requests suppression of statements he made on two different dates. First, the defendant requests suppression of statements made by him during an interview conducted on September 24, 2009, while he was in French custody on the basis that he "was not advised of his right to have a United States lawyer with him during the questioning and did not make a valid waiver of his right to counsel." (Defendant's Motion to Suppress Statements, Dkt. No. 32 ("Def. Motion") at 2). This request should be denied because the defendant was given the required *Miranda* warnings and made a valid waiver of his right to remain silent. (*See* Section B, *infra*).

Second, defendant requests suppression of statements made by him on July 17, 2015, during his transport to the United States on the basis that "[h]e was not advised of his *Miranda* rights prior to making these statements." (Def. Motion at 3). This request should be denied because the defendant was not subject to a custodial interrogation, and any questions asked by the

agents were purely administrative – thus *Miranda* warnings were not required. (*See* Section C, *infra*).

I. Background

On September 24, 2009, the defendant was interviewed by an FBI special agent at the office of a French Magistrate Judge in Paris, France. The defendant was in the custody of French criminal justice authorities at the time. At the interview, the defendant was represented by two French lawyers who also represented him in his French criminal case. Also present at the interview were an Assistant U.S. Attorney, a French magistrate judge, a French clerk, two interpreters and two guards. The interview was conducted pursuant to a mutual legal assistance treaty request from the United States to France.

The interview took place in the office of the French magistrate. It was a large open room with seating for all those in attendance. Prior to the interview, the defendant was unhandcuffed and seated next to his counsel. Before the interview began, the French magistrate judge advised the defendant that because he was in custody and being questioned by the FBI, American legal procedure required that he be advised of certain rights. The French judge read aloud a French translation of the FBI FD-395 form, advising the defendant: (1) you have the right to remain silent; (2) anything you say can be used against you in court; (3) you have the right to talk to a lawyer for advice before we ask you any questions; (4) you have the right to have a lawyer with you during any questioning; (5) if you cannot afford a lawyer, one will be appointed for you before any questioning if you wish; and (6) if you decide to answer any questions now without a lawyer present, you have the right to stop answering at any time. One of the interpreters orally translated the above statements into Turkish, a language the defendant understood. In addition, the

defendant was given a written version of the FD-395 that had been translated into Turkish. (*See* FD-395, Advice of Rights, attached as Exhibits A and B). Before the interview began, the defendant read and signed the written form, acknowledging: "I have read this statement of my rights and I understand what my rights are." *Id.*

After the French judge read the statement of rights aloud and the defendant had read the written statement of rights, one of the defendant's French lawyers advised the defendant not to speak. Despite this admonishment, the defendant stated that he was willing to waive his right to silence and continue with the interview.

The interview lasted for approximately three and one half hours. During the interview, the defendant remained uncuffed and seated next to his two French attorneys. The questions to the defendant were asked through the French magistrate judge. At no time was the defendant threatened, coerced, or induced in any way to make a statement.

On July 17, 2015, the defendant was arrested in Germany by special agents of the FBI pursuant to an arrest warrant issued by the United States District Court for the District of Columbia. At the time of the arrest, the defendant was already in the custody of the German authorities. The arrest took place at a German police station located outside Dusseldorf International Airport in Dusseldorf, Germany, and consisted of a transfer of custody of the defendant from the German authorities to the American authorities. At the time of the transfer, the German police provided to the FBI approximately 55 items of the defendant's personal property, including clothes, shoes, caps, eye glasses, prayer beads, a comb, nail clippers, money, a pen, a cell phone, a binder, a media card, and other items. The defendant then boarded an airplane bound for the United States with FBI personnel.

While aboard the plane, the FBI agents offered the defendant water and food, and explained to him what would happen after the plane landed in the United States. The agents provided the defendant with a copy of the Koran and a mat so that he could pray. The agents did not give the defendant *Miranda* warnings and did not question him. The agents reviewed with the defendant the list of property that the German police had provided to the FBI and confirmed that the property belonged to him. The agents also asked the defendant to sign consent forms to allow a search of his cell phone, binder, and media card, but the defendant declined.

II. Analysis

A. Legal Framework under the Fifth Amendment and *Miranda*

The Fifth Amendment's self-incrimination clause provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V; *see also United States v. Straker*, 800 F.3d 570, 613-14 (D.C. Cir. 2015).

The Supreme Court held in *Miranda v. Arizona*, that the privilege against compelled self-incrimination is "applicable during a period of custodial interrogation." 384 U.S. 436, 460-61 (1966). That is because "the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations," *id.* at 461, which "heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself,'" *Dickerson v. United States*, 530 U.S. 428, 435 (2000) (quoting *Miranda*, 384 U.S. at 439). To protect against that risk, *Miranda* set forth "concrete constitutional guidelines for law enforcement agencies and courts to follow." 384 U.S. at 442. "Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the

suspect with [*Miranda*] warnings" prior to any questioning. *Dickerson*, 530 U.S. at 435 (quoting *Miranda*, 384 U.S. at 479).

While the Supreme Court suggested language for the *Miranda* warnings, it has "never insisted that *Miranda* warnings be given in the exact form described in [the *Miranda*] decision." *Duckworth v. Eagan*, 492 U.S. 195, 201-202 (1989). Notably, "where *Miranda* has been applied to overseas interrogations by U.S. agents, it has been so applied in a flexible fashion to accommodate the exigencies of local conditions." *United States v. Odeh (In re Terrorist Bombings of the U.S. Embassies in E. Afr.)*, 552 F.3d 177, 204 (2d Cir. 2008).

Regardless of whether a statement is made in the United Stated or abroad, *Miranda* is not implicated when a suspect in custody volunteers a statement in the absence of a custodial interrogation. *Miranda*, 384 U.S. at 478; *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980). This is because "volunteered statements of any kind are not barred by the Fifth Amendment . . . therefore, any statement given freely and voluntarily without any compelling influences is admissible regardless of whether *Miranda* warnings were given." *United States v. Richardson*, 36 F. Supp. 3d 120, 127-28 (D.D.C. 2014) (internal punctuation omitted) (quoting *Bosley v. United States*, 426 F.2d 1257, 1260 (D.C. Cir. 1970)).

Because *Miranda* warnings are not necessary for statements made outside the context of an interrogation, a key question in the *Miranda* analysis is whether or not an interrogation was conducted. "[T]he term "interrogation" under *Miranda* refers . . . to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. at 301; *see also United States v. Bogle*, 114 F.3d 1271, 1275 (D.C. Cir. 1997)

("express questioning constitutes interrogation only when it is reasonably likely to elicit an incriminating response").

The Supreme Court has made clear that questions that are "requested for record-keeping purposes only" and that are "reasonably related to the police's administrative concerns" do not constitute interrogation. *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (U.S. 1990) (citation omitted). Accordingly, "officers asking routine booking questions 'reasonably related to the police's administrative concerns' are not engaged in interrogation within *Miranda*'s meaning and therefore do not have to give *Miranda* warnings." *United States v. Gaston*, 357 F.3d 77, 82 (D.C. Cir. 2004) (quoting *Muniz*, 496 U.S. at 601-02); *see also United States v. Hitselberger*, 991 F. Supp. 2d 130, 138 (D.D.C. 2014) (finding that a 35-minute pre-*Miranda* interview was not an interrogation because "[s]tandard questions that ask the suspect basic identifying questions are unlikely to elicit incriminating responses and are thus not coercive enough to establish an 'interrogation'").

While the determination of whether a custodial interrogation has been conducted is a threshold issue in the *Miranda* analysis, even in the case of a custodial interrogation, a defendant may voluntarily waive the protections afforded by *Miranda*. *See Miranda*, 384 U.S. at 444 ("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently"); *United States v. Yunis*, 859 F.2d 953, 964 (D.C. Cir. 1988) ("A waiver may be knowing and intelligent in the sense that there was awareness of the right to remain silent and a decision to forego that right").

To prove that a defendant waived *Miranda*, the Government must show by a preponderance of the evidence that a *Miranda* warning was given, that it was understood, and that the subsequent statement was not coerced. *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010).

Regarding non-American defendants, "the inquiry as to whether a defendant understood the recitation of the Fifth Amendment rights focuses not on the defendant's understanding of the U.S. criminal justice system, the democratic form of government, and/or the concept of individual rights, but rather on whether the defendant could, merely as a linguistic matter, comprehend the words spoken to him." *United States v. Hasan*, 747 F. Supp. 2d 642, 670 (E.D. Va. 2010) (collecting appellate cases). Accordingly, "[t]he fact that a defendant's alien status may have prevented him from understanding the full, tactical significance of his decision to confess will not invalidate his waiver." *Yunis*, 859 F.2d at 966.

Sections B and C below apply this legal framework to the statements that defendant made on September 24, 2009, and July 17, 2015, respectively, and show that the statements are admissible under the Fifth Amendment.[1]

1 Nonetheless, consistent with well-established Supreme Court precedent, the government reserves its right to use these statements in rebuttal to challenge the defendant's credibility, should the defendant testify at trial in a mannner that is inconsistent with his earlier statements. *See Oregon v. Haas*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222, 224 (1971) ("It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards."); *Walder v. United States*, 347 U.S. 63, 65 (1954) ("there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance of the Government's disability to challenge his credibility"); see also *United States v. Havens*, 446 U.S. 620 (1980) (defendant's statement made in response to proper cross-examination reasonably suggested by defendant's direct examination are subject to otherwise proper impeachment by the government, even by evidence that has been illegally obtained and that is inadmissible in the government's direct case, or otherwise, as substantive evidence of guilt).

B. Defendant's statement while in French custody is admissible because the defendant received *Miranda* warnings and made a valid waiver of his rights

As described above, on September 24, 2009, the defendant was interviewed by the FBI at the office of a French Magistrate Judge in Paris, France. Prior to the commencement of the interview, he was orally informed of his *Miranda* rights and given a written copy of the rights, which he signed. The defendant was represented at the interview by two French lawyers who also represented him in his French criminal case. Because the defendant was provided with *Miranda* warnings prior to the interview and proceeded to waive his rights, the statements that he made are admissible.

As to the defendant's argument that he should have been provided explicit warnings as to a supposed right to an American lawyer during the interview, this argument should be rejected because the defendant had no right to be provided an American lawyer and the Government had no obligation to provide any such statement.

Courts that have examined the issue of *Miranda* warning for overseas interviews have concluded that, "the rights of foreign detainees to the presence and appointment of counsel will depend on foreign law" in the location where the interview takes place, not on the law of the United States. *Odeh*, 552 F.3d at 204-05. Because the interview was conducted in France, according to French law, "it would be misleading to inform [the defendant] falsely that he was guaranteed the presence or appointment of an [American] attorney--and *Miranda* does not require the provision of false assurances." *Id.* at 207.

In *Odeh*, the defendant was interviewed by the FBI while he was in custody in Kenya. The U.S. authorities provided *Miranda* warnings, which stated in part that no American lawyer was available and no local lawyer would be provided under Kenyan law. *Id.* at 186. The Court

found that the *Miranda* warning sufficiently apprised the defendant of his rights and that the defendant knowingly and voluntarily waived those rights. *Id.* at 212-13. The Court concluded:

> Foreign detainees may, of course, insist that they receive local counsel or U.S. counsel as a condition of making a statement. [. . .] Alternatively, foreign detainees may determine that, in light of the difficulty of obtaining or unavailability of counsel under local law, it is in their best interests to waive their right to counsel and make a statement to U.S. agents. We see nothing contrary to the spirit or letter of *Miranda* . . . in either of these results.

Id. at 208. In either event, the court was clear that, whether the interview takes place domestically or abroad, "Miranda does not require the provision of legal services. It requires only that, until legal services are either provides or waived, or no interrogation takes place." *Id.*

Odeh is instructive regarding the principle that defendants interviewed overseas have no right to be provided an American lawyer nor specific *Miranda* warnings to that effect and that a defendant's waiver can be valid even when local counsel is not available.

The present case, however, is even clearer on the validity of the defendant's waiver. The defendant in this case, unlike the defendant in *Odeh*, was represented at the interview by local counsel. The fact that he was represented by counsel and the other facts and circumstances surrounding the interview demonstrate that the waiver was voluntary, knowing, and intelligent.

First, and most importantly, defendant was given *Miranda* warnings orally by the French judge before the interview and was given a written copy of the warnings, which he read and signed before the interview. *See* Exhibt A; *see also North Carolina v. Butler*, 441 U.S. 369, 373 (1979) ("An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver").

Second, the *Miranda* warnings were given in a language that the defendant understood – Turkish – and the defendant signed a written waiver form indicating that he understood his rights.

Third, there is no evidence that the defendant lacked the mental capacity to understand the *Miranda* warnings or to make an intelligent choice of whether or not to waive them. To the contrary, the defendant was a fifty-year-old dual Turkish/Dutch citizen who had traveled widely and who gave intelligent responses to the questions he was asked during the interview. The fact that he may not have been familiar with American law did not invalidate his waiver. *See Yunis*, 859 F.2d at 966.

Fourth, there is no evidence that the defendant was coerced to make a statement. The interview took place, not in a jail cell or a police station, but in the office of a French magistrate, where the defendant was uncuffed and seated next to his lawyers. Additionally, it was the French magistrate, and not the FBI, who asked the questions. The entire interview lasted three and one half hours.

Additionally, the defendant's French lawyers were present during the entire interview. Significantly, one of the lawyers advised the defendant not to speak, but the defendant indicated that he wished to speak notwithstanding the advice of his local counsel.

Thus, the totality of the citrcumastances demonstate that defendant gave the statement voluntarily and that his waiver of his *Miranda* rights was valid.

In sum, the U.S. authorities were under no additional obligation to provide the defendant with an American lawyer in France or to advise him about a right he did not have under French law. The Government fully satisfied its obligations under the Fifth Amendment by ensuring that the defendant's rights under *Miranda* were fully explained to him, orally and in writing, in a language that the defendant understood. Defendant's waiver of his rights and decision to speak to the agents in the presence of his French counsel was valid under the totality of the circumstances.

Accordingly, the defendant's statement to the FBI while in French custody is admissible.

C. Defendant's statement during transport to the U.S. is admissible because it was voluntarily made outside the context of an interrogation and thus not subject to *Miranda*

As described above, the defendant requests suppression of statements made by him on July 17, 2015, during his transport to the United States on the basis that "[h]e was not advised of his *Miranda* rights prior to making these statements." (Def. Motion at 3). This request should be denied because there was no requirement that the defendant be given *Miranda* warnings with regard to statements he made voluntarily outside the context of a custodial interrogation. Moreover, any questions posed by the agents were exclusively for administrative/ record-keeping purposes and thus not subject to *Miranda*.

As detailed above, "[t]he Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that [the defendant] invoked and there would be no occasion to determine whether there had been a valid waiver." *Edwards v. Arizona*, 451 U.S. 477, 485-86 (U.S. 1981).

The special agents on the plane transporting the defendant did not give the defendant *Miranda* warnings because they had no intention to, and did not, interrogate the defendant. As the record makes clear, the defendant was not subject to coercion. He was offered food and water, a copy of the Koran, and a mat to pray with, and the agents provided him with information about what would happen next. The agents did not question him about the case.

Moreover, there was no requirement of *Miranda* warnings before the agents reviewed the defendant's property with him because any questions asked were purely administrative and were

not "reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. at 301.

The agents reviewed with the defendant the list of property items that they had received from the German authorities. The purpose of the review was to complete an FBI form, FD-597, inventorying the defendant's property at the time of the arrest. Other than verifying whether or not the property actually belonged to the defendant, the agents asked no other questions. Additionally, the agents asked the defendant for permission to search several items, which the defendant refused, and thus the items were not searched. Whether the defendant would sign a search waiver was a purely administrative question that did not constitute interrogation. *See Muniz*, 496 U.S. at 601. Thus, there was no requirement that defendant be given *Miranda* warnings for his statements to be admissible.

The Court of Appeals has reached the same result in a similar case. In *United States v. Gaston*, 357 F.3d 77, 82 (D.C. Cir. 2004), the court found that no interrogation had taken place when officers asked the defendant whether he owned a house that they were about to search pursuant to a warrant. Such a question, the court observed, was asked so that the police could document the property taken during the search to comply with their legal obligations, and thus was related to "administrative concerns" and "record-keeping," rather than interrogation. *Id*. The court concluded that the officers were entitled to ask "routine questions" about the ownership of the property "without having to advise [the defendant] of his right to counsel and his privilege against self-incrimination." *Id.*; *see also United States v. Peterson*, 506 F. Supp. 2d 21, 25 (D.D.C. 2007) (general questions about ownership of property were administrative, whereas more specific attempts to connect defendant to certain seized contraband were interrogation).

As in *Gaston*, the agents in this case conducted an administrative review of property they had received from the German authorities in order to comply with record-keeping requirements, *i.e.*, completing the FBI form, FD-597. The agents were not aware of specific contraband within the defendant's property, and they conducted no further search of the property after the defendant declined to sign a waiver. Accordingly, any statements made in response to the agents' review of the property are admissible without *Miranda* warnings.

In sum, the defendant's statements during his transport to the United States are admissible under the Fifth Amendment because the defendant made the statements voluntarily outside the context of a custodial interrogation.

III. Conclusion

For the foregoing reasons, this Court should deny the defendant's motions to suppress statements.

Respectfully submitted,

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FD-395 (Değiştirildi 05-11-2002)

FEDERAL SORUŞTURMA BÜROSU
HAK BİLDİRİSİ

YER

Mekan: Paris Tarih: 24 Sept 2009 Saat: 3:41

HAKLARINIZ

Size soru sormadan önce haklarınızı bilmeniz gerekli.

Sessiz kalma hakkına sahipsiniz.

Söyleyeceğiniz her şey mahkemede aleyhinizde kullanılabilir.

Size soru sormadan önce avukat isteme hakkınız vardır.

Sorgulama sırasında avukatla birlikte bulunma hakkına sahipsiniz.

Bir avukata sahip olma gücünüz yoksa, eğer isterseniz sorgulamadan evvel size bir avukat atanacaktır.

Şimdi bir avukat mevcut olmadan sorulara cevap vermeye karar verirseniz, istediğiniz zaman soruya cevap vermemeye hakkınız vardır.

RIZA

Haklarım hakkındaki bu beyannameyi okudum ve haklarımın ne olduğunu anladım. Şu anda avukat mevcut olmadan sorulara cevap vermeye razıyım.

İmza: [signature]

TANIK

Tanık: [signature]

Tanık: _____

Saat: 3:46

FD-395
Revised
11-05-2002

FEDERAL BUREAU OF INVESTIGATION

ADVICE OF RIGHTS

LOCATION

Place:	Date:	Time:

YOUR RIGHTS

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions.

You have the right to have a lawyer with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you have the right to stop answering at any time.

CONSENT

I have read this statement of my rights and I understand what my rights are. At this time, I am willing to answer questions without a lawyer present.

Signed: _____

WITNESS

Witness: _____

Witness: _____

Time: _____