UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- v. -	:	**S1 11 Cr. 93 (JSR)**
SIAVOSH HENAREH a/k/a "Siyavesh Henareh," a/k/a "the Doctor,"	:	
BACHAR WEHBE, a/k/a "Farez," and CETIN AKSU,	:	
Defendants.	:	

GOVERNMENT'S OMNIBUS MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' PRETRIAL MOTIONS

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The Government respectfully submits this memorandum in response to the suppression motions of defendants Siavosh Henareh and Cetin Aksu and in response to Henareh's motion to sever. The Government consents to an evidentiary hearing concerning Aksu's claims that he did not knowingly waive his *Miranda* rights and that his statement on November 17, 2011, was involuntary. For the reasons set forth below, Aksu's remaining claims and all of Henareh's claims, including Henareh's request for a severance, should be denied without an evidentiary hearing.

CASE HISTORY

Defendants Henareh and Aksu are charged in Indictment S1 11 Cr. 93 (JSR) (the "Indictment"). Both Henareh and Aksu are charged with conspiring to distribute one kilogram and more of heroin knowing or intending that such heroin would be unlawfully imported into the

United States, in violation of Title 21, United States Code, Sections 963 and 959(a) (Count One). In addition, Aksu is charged with conspiring to provide material support and resources to terrorists, namely, Hizballah (Count Two), and with conspiring to acquire, transfer, and possess anti-aircraft missiles, in violation of Title 18, United States Code, Section 2332g (Count Three).

As set forth in the Indictment and sworn affidavits in support of the defendants' extradition, the defendants conspired to transport vast quantities of heroin into the United States for distribution. In addition, in dealings with the same confidential sources involved in the narcotics transactions, Aksu agreed to provide material support, including enormous quantities of weapons and surface to air missiles, to Hizballah.

Henareh and Aksu were arrested in Bucharest, Romania, on July 25, 2011. Each made Mirandized statements following their arrests. In particular, Special Agents of the Drug Enforcement Administration ("DEA") conducted an initial interview of Aksu while he was held in Romanian custody on July 26, 2011, and conducted a second, lengthier interview of Aksu as he was transported by plane to the United States in the custody of DEA agents on November 17, 2011. Henareh, who had refused to speak to American agents immediately following his arrest in Romania, also gave a Mirandized statement to agents on November 17, 2011, while en route to the United States in the custody of the DEA.

On or about February 27, 2012, Aksu filed a motion to suppress his post-arrest statements. Aksu submitted a sworn declaration in support of the motion. Aksu's counsel also submitted a sworn declaration annexing the defendant's waivers of *Miranda* rights.[1] On or about

[1] Aksu's sworn declaration is referred to herein as "Aksu Aff." The declaration filed on behalf of Aksu's counsel, Natali Todd, is referred to herein as "Todd. Decl." The memorandum in support of Aksu's suppression motion is referred to as "Aksu Mem."

March 12, 2012, Henareh filed a motion to suppress his post-arrest statements and to sever his trial from that of his co-defendant and an accompanying memorandum of law ("Henareh Mem."). Henareh's counsel submitted an affidavit in support of his suppression motion.[2]

I. All of Henareh's Suppression Claims And Many of Aksu's Suppression Claims Should Be Denied Without a Hearing

The Government respectfully submits that an evidentiary hearing is warranted regarding none of Henareh's claims and only certain of Aksu's claims. In particular, Henareh's claims that his statements were involuntary, given without a knowing waiver of *Miranda* rights, and made after an unambiguous invocation of the right to counsel should be denied because the facts alleged in Henareh's affidavit, even if fully credited, would not be sufficient to justify suppression under any of these theories. While Aksu's claim that his July 26, 2011, statement was involuntary should be denied on the same grounds, the Government consents to an evidentiary hearing regarding Aksu's claims that Aksu's November 17, 2011 statement was involuntary and that Aksu's waivers of his *Miranda* rights were not knowing. Finally, because Aksu's remaining claims – which challenge agents' statements regarding the availability of counsel abroad; agents' not having made arrangements to have defense counsel present in

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[2] Henareh's affidavit ("Henareh Aff.") has not yet been signed or adopted by Henareh. If the Court concludes a hearing is warranted on Henareh's claims, the Government respectfully requests that Henareh's motion be denied if Henareh has not adopted the affidavit filed on his behalf five days before any hearing. *See, e.g., United States* v. *Caruso*, 684 F. Supp. 84, 86 (S.D.N.Y. 1988) (motion must be supported by affidavit by person with personal knowledge of facts underlying claim). The proposed deadline, which represents a lengthy extension of the filing deadline, is expected to allow the Government to avoid flying a foreign witness to the United States in the event that Henareh does not intend to adopt the affidavit.

Romania; and an alleged violation of Romania's consular notification obligations – are each rejected by relevant authority, these claims should be denied without a hearing.

A. Applicable Law

1. Voluntariness

A confession is "involuntary" if it is obtained by "'techniques and methods offensive to due process' or under circumstances in which the suspect clearly had no opportunity to exercise 'a free and unconstrained will.'" *Oregon* v. *Elstad*, 470 U.S. 298, 304 (1985) (citation omitted). The test "depends upon examining all of the circumstances surrounding the interrogation to see if police overreaching overcame a suspect's will and led to an involuntary confession, one not freely given." *Weaver* v. *Brenner*, 40 F.3d 527, 536 (2d Cir. 1994); *see also, e.g.*, *Colorado* v. *Spring*, 479 U.S. 564, 573 (1987) (waiver is voluntary "[a]bsent evidence that [defendant's] 'will [was] overborne and his capacity for self-determination critically impaired' because of coercive police conduct") (citations omitted; second alteration in original).

When a defendant claims that government coercion rendered his statements involuntary, a court assesses the totality of the circumstances surrounding the alleged overbearing conduct, including the defendant's "background and experience, the conditions of the interrogation and the conduct of the law enforcement officers" who took the statement, in order to determine whether the defendant's statement was involuntary. *United States* v. *Ruggles*, 70 F.3d 252, 265 (2d Cir. 1995). An important factor in this analysis is whether *Miranda* warnings were given, *see, e.g.*, *United States* v. *Thompson*, 35 F.3d 100, 106 (2d Cir. 1994), because "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that law enforcement authorities adhered to the dictates of *Miranda* are rare," *Berkemer* v. *McCarty*, 468 U.S. 420, 433 n.20 (1984). While a defendant's physical condition is

a relevant factor, a defendant's claim that he was uncomfortable — or even in some pain — is not dispositive. *See*, *e.g.*, *Campaneria* v. *Reid*, 891 F.2d 1014, 1020 (2d Cir. 1989) (though defendant was in intensive care unit and "suffer[ing] pain and discomfort," pain was not "so severe as to render him unable to make a voluntary statement"); *see also Pagan* v. *Keane*, 984 F.2d 61, 63 (2d Cir. 1993). Rather, the controlling question is whether the totality of the circumstances indicate that the defendant's will was so overborne that he could not make a voluntary choice. *Campaneria*, 891 F.2d at 1020.

Because "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary,'" *Colorado* v. *Connelly*, 479 U.S. 157, 167 (1986), a hearing on voluntariness is not warranted unless the defendant claims overreaching government conduct. In *Connelly*, the Supreme Court declined to suppress the confession of a mentally-ill suspect – who believed that the voices in his head required him to confess – because "[t]he sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion." *Id.* "*Miranda*," the Court explained, "protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that." *Id.* at 170.

The Second Circuit has accordingly made clear that no hearing on voluntariness is warranted if a defendant does not allege overreaching conduct by U.S. agents. Thus, there was "no basis" for a hearing regarding the voluntariness of a statement given to American agents after what the defendant claimed was ten days of interrogation and torture in Egyptian custody, because the defendant had not alleged coercive conduct by U.S. agents. *United States* v. *Salameh*, 152 F.3d 88, 117 (2d Cir. 1998); *see also United States* v. *Toro*, 359 F.3d 879, 885 (7th Cir. 2004) ("[s]ince Toro did not detail any facts showing mental or physical coercion by the police, he did not meet his burden of showing a prima facie case of involuntariness and therefore

was properly denied an evidentiary hearing"); *United States* v. *Johnson*, 131 F.3d 132, 1997 WL 792443, *3 (2d Cir. Dec. 30, 1997) (motion denied because of "no indication of out-of-the-ordinary conduct on the part of the law enforcement officers that amounted to coercion").[3]

2. Miranda *Rights*

Statements made after *Miranda* warnings are admissible so long as the defendant knowingly and voluntarily waives his *Miranda* rights. *See United States* v. *Jaswal*, 47 F.3d 539, 542 (2d Cir. 1995) (per curiam). To prove a valid waiver, the government must show by a preponderance of the evidence "(1) that the relinquishment of the defendant's rights was voluntary, and (2) that the defendant had a full awareness of the right being waived and of the consequences of waiving that right." *Id.; see also United States* v. *Male Juvenile*, 121 F.3d 34, 41 (2d Cir. 1997) (citation omitted). The defendant must "know[] that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time," but need not "know and understand every possible consequence of a waiver of the Fifth Amendment privilege." *Spring*, 479 U.S. at 574; *accord Elstad*, 470 U.S. at 316 ("The Court has

[3] District courts thus routinely deny hearings to defendants who claim that factors other than the conduct of U.S. agents compelled their statements. *See*, *e.g.*, U*nited States* v. *Knorr*, No. 04 Cr. 406, 2005 WL 356803, *1-2 (S.D.N.Y. Feb. 14, 2005) (denying suppression motion without a hearing because "[d]efendant's allegation that he was too hung over, sick and tired to fully understand proceedings is thus insufficient, absent police misconduct, to make out a *Miranda* violation"); *United States* v. *Amery*, No. 02 Cr. 143, 2002 WL 31027514 (S.D.N.Y. Sept. 10, 2002) (denying hearing when the "defendant has failed to allege any coercive action or unreasonable behavior by the governmental agents to induce him to waive his *Miranda* rights and make certain statements"); *United States* v. *DiLorenzo*, No. 94 Cr. 303, 1995 WL 366377, *8 (S.D.N.Y. June 19, 1995) ("a claim that a defendant was exhausted or suffering from the effect of alcohol is not, in the absence of coercive law enforcement activity, sufficient to characterize his confession as involuntary"); *United States* v. *Feola*, 651 F. Supp. 1068, 1119 (S.D.N.Y. 1987) (rejecting claim that statement was involuntary because attorney affirmation did not allege government coercion).

never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness"). Applying these standards,

> Generally the courts will hold that a defendant's waiver is knowing if he understands that he can refuse to talk to the people asking him questions or stop the questioning once it begins; that the people asking him questions are not his friends but are police or law enforcement personnel who are trying to show he is guilty of a crime; that he can ask for and get a lawyer who will help him; and that he does not have to pay for that lawyer.

Collins v. *Gaetz*, 612 F.3d 574, 589 (7th Cir. 2010) (citations omitted).

Law enforcement officers must stop questioning a defendant if, at any time, the defendant clearly and unambiguously invokes his right to counsel. *Davis* v. *United States*, 512 U.S. 452, 59 (1994). In contrast, however, they may continue speaking with an interviewee whose invocation is "ambiguous or equivocal." *Id.* Applying this rule, police were permitted to continue questioning a defendant who stated that "[m]aybe I should talk to a lawyer," *id.*, a defendant who asked "Do you think I need a lawyer," *Diaz* v. *Senkowski*, 76 F.3d 61, 63 (2d Cir. 1996), and a defendant who asked to "call his mother… to inquire about possible representation," *Flamer* v. *Del.*, 68 F.3d 710, 725 (3d Cir. 1995). In addition, when a defendant unambiguously invokes his right to remain silent, but then asks agents additional questions, the officers may answer the defendant, *see United States* v. *Guido*, 704 F.2d 675, 678 (2d. Cir. 1983), and may ask questions themselves if the defendant, rather than the agents, re-initiated contact. *See United States* v. *Montana*, 958 F.2d 516, 519 (2d Cir. 1992); *see also Edwards* v. *Arizona*, 251 U.S. 477, 486 n.9 (1981).

B. Henareh's Suppression Motion Should Be Denied Without a Hearing

This Court should deny without a hearing the three claims that Henareh advances as grounds to suppress his Mirandized statement to law enforcement officers. Henareh contends

(1) that his statements were involuntary, Henareh Mem. 4-6; (2) that the Government cannot establish his oral and written *Miranda* waivers were valid because he was "confused about his requirement to answer the agents and the availability of a lawyer when he was given his advisement on the airplane," Henareh Mem. 6-7, and (3) that one of the many inquiries he made to agents regarding his legal options amounted to an invocation of his right to counsel, Henareh Mem. 7-9. Because, as set forth below, none of the factual claims in Henareh's affidavit would justify suppression of his statements under the proffered theories in light of other undisputed facts set forth in Henareh's affidavit, each of Henareh's suppression claims should be denied.

1. Voluntariness

First, Henareh's motion to suppress his statement on voluntariness grounds should be denied without a hearing because his affidavit is bereft of any allegations of overbearing conduct by the Government. Henareh alleges no physical abuse or verbal abuse, deceit, threats, or promises by government agents. On the contrary, on his own account, agents went out of their way to advise him that he had no obligation to speak with them. Agents not only told Henareh of his rights to remain silent and to consult with an attorney but added that if Henareh "was more comfortable speaking with an attorney appointed for [him] in New York or one that [he] hired," the agents "would wait to speak to [him] until then" and that "no one would force [him] to do anything." Henareh Aff. ¶ 20. Indeed, Henareh does not claim any hardship or deprivation whatsoever during his time with the agents.[4] Rather, the principal fact cited in the defendant's

[4] This is not surprising, for the Government expects that the evidence at a hearing would establish that during the plane ride during which he made his statement, Henareh was provided, at various intervals, with a bottle of water, banana, and pastry; an omelet with bacon, sausage, and potatoes; hot tea; a second blueberry muffin; and mixed nuts. In addition, the Government expects that the evidence would establish, Henareh was offered stretch breaks and bathroom breaks and, before being interviewed by agents, took a nap of approximately an hour and a half.

memorandum in support of Henareh's claim that his statement was involuntary is the far-from-coercive circumstance that Henareh was on an airplane for nine hours, and – though Henareh was advised that he need not answer questions on the plane and that agents would wait until he had counsel appointed if he wished – that Henareh believed there was no lawyer aboard. Henareh Mem. 5 (citing "confined, nine hour flight" without "recourse to legal or other assistance of any kind"). Since the defendant alleges no "out-of-the-ordinary conduct on the part of law enforcement officers that amounted to coercion" whatsoever, *Johnson*, 1997 WL 792443 at *3, Henareh's challenge to the voluntariness of his statement should be swiftly denied.

2. Miranda Waiver

Henareh's claim that he is entitled to a hearing on whether he knowingly and voluntarily waived his *Miranda* rights fares no better, because Henareh's own affidavit sets forth facts sufficient to establish a knowing and voluntary waiver of his *Miranda* rights, while setting forth no facts that, if proven, would undermine the validity of his waiver. As an initial matter, Henareh's own description of his July 2011 meeting with agents establishes that Henareh understood the concept of an attorney and understood he could end questioning by law enforcement agents who sought to interview him. Henareh Aff. ¶ 10. Moreover, Henareh's affidavit establishes that on his plane trip to the United States, Henareh asked sophisticated questions regarding his options for representation – which the agents accurately answered – before electing to waive his rights. *See* Henareh Aff. ¶¶ 16-19. Finally and most critically, Henareh's affidavit establishes that after Henareh was fully advised of his rights orally and in

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(After his interview, the Government expects the evidence would establish that Henareh slept intermittently until the plane landed in New York.)

writing, Henareh stated both orally and in writing that he understood his rights and that he wished to answer agents' questions. Henareh Aff. ¶¶ 15-16; 22-23.

In the face of these facts, the remaining assertions in Henareh's affidavit, even if credited, simply would not undermine the validity of the defendant's oral and written acknowledgments that he understood his rights and wished to speak to agents.[5] While Henareh claims an unspecified "confus[ion]" because "the agents wanted to ask [him] questions on the airplane but a lawyer would not be provided to me until we landed in New York," Henareh Aff. ¶ 21, he nowhere claims lack of comprehension regarding his right to "choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time," *Spring*, 479 U.S. at 574. Indeed, Henareh could hardly make a credible claim of such ignorance, given the prior interaction in which he invoked his Fifth Amendment rights, his sophisticated questions to agents regarding representation, and the agents' statements (repeated by Henareh in his affidavit) that if Henareh wished, an interview could be delayed until after counsel was appointed in New York. Because nothing in Henareh's affidavit amounts to an "allegation that [he] failed to understand the basic privilege guaranteed by the Fifth Amendment" or that he "misunderstood the consequences of speaking freely to the law enforcement officials," *id*. at 575,

[5] In addition to the factual claims discussed above, Henareh's affidavit contains a recitation that he "did not knowingly, intelligently, and voluntarily waive his rights," Henareh Aff. ¶ 24, which by itself does not amount to a "definite, specific, detailed, and nonconjectural" factual claim that, it is well-established, is required to warrant a hearing. *See In Re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 165 (2d Cir. 2008); *Toro*, 359 F.3d at 884 (claim that statement was not "voluntary," among other things, was "too conclusory to make a prima facie showing that his confession was involuntary," in light of burden of presenting "definite, specific, detailed, and nonconjectural facts").

Henareh simply does not allege facts that, if true, would establish that he did not understand his rights or voluntarily waive them.[6]

3. *Purported Invocation*

No hearing is warranted concerning Henareh's contention that he invoked his *Miranda* rights in one of his many questions regarding his legal options, because Henareh's own account establishes that his question fell far short of establishing an unambiguous invocation. On Henareh's account, Henareh stated that he wanted agents to contact a particular organization on his behalf for a lawyer, but then asked additional questions regarding his options for counsel and for speaking with agents. Henareh Aff. ¶¶ 16-17; 19. After agents responded that, among other things, Henareh would be able appointed counsel free of charge in New York and that agents would wait until counsel had been appointed for an interview if Henareh wished, Henareh elected instead to proceed with an interview, and signed an affirmation that he would "freely and voluntary answer questions without a lawyer present." *See* Henareh Aff. Ex. A.

On these facts, no hearing is warranted because Henareh's own accounts of his questions to agents, taken as a whole, indicated that Henareh was exploring multiple legal options rather than clearly invoking his right to counsel. As an initial matter, as *Flamer* indicates, even standing alone, a request that a specific person or institution be contacted concerning arrangements for a lawyer does not always amount to an unambiguous invocation of the right to counsel. *See* 68 F.3d at 725 (no invocation when defendant asked to contact mother so she could make inquiries about counsel). Here, however, as Henareh makes clear, Henareh followed his initial question regarding an international humanitarian organization with other questions that

[6] Henareh's other specific claim of misunderstanding regarding his rights is one that he acknowledges the agents immediately rebutted. *See* Henareh Aff. ¶¶ 19-20 (when asked if required to sign the form, agent clarified "no one would force him to do anything").

indicated Henareh was still weighing his options in the case. In particular, Henareh asked questions indicating he was considering obtaining appointed counsel in New York, *see* Henareh Aff. ¶¶ 16-17 ("The agent told me that I would probably have an attorney appointed for me later in the day when I arrived in New York to appear in front of a judge. . . . I asked the agent if I would be forced to keep the same attorney once one was assigned to represent me"), and was considering speaking to agents immediately, *see* Henareh Aff. ¶ 19 ("I asked the agent… if the agents would only speak with me [if] I signed the form"). Because Henareh's account makes clear that Henareh's rights-association question was one of a series of inquiries regarding his options that, taken together, hardly signaled an unequivocal invocation of the right to counsel, no hearing is warranted on Henareh's invocation claim.

C. Aksu Should Receive an Evidentiary Hearing Only With Respect To Certain Claims

This Court should deny some of Aksu's suppression claims on the papers and deny others following an evidentiary hearing. Aksu contends, variously, that his statements were involuntary, Aksu Mem. 7-8; 10, and that his waiver of *Miranda* rights was not valid, Aksu Mem. 8-9. In addition, Aksu suggests that his statements should be suppressed because agents advised him that counsel might not be available immediately in Romanian custody, Aksu Mem. 9-10, because agents could have sought to ensure availability of an attorney in Romania, Aksu Mem. 13, and because Romania did not offer Aksu consular notification upon his arrest, Aksu Mem. 11. As described below, a hearing is warranted only on Aksu's claims that he did not knowingly waive his *Miranda* rights and that his November 17 statement was involuntary.

1. *Voluntariness*

The Government consents to an a hearing regarding the voluntariness of Aksu's interview en route to the United States on November 17, 2011, but submits that no hearing is warranted concerning the voluntariness of Aksu's statement of July 26, 2011. Aksu's request for a hearing regarding the July statement should be denied because Aksu's own account, if credited, falls short of providing evidence of coercion by American police. Aksu acknowledges that the American agents who questioned him in Romanian custody soon after his arrest advised him of his rights in Turkish. *See* Todd. Decl. Ex. A. And while Aksu states that agents declined to "come back after I had gotten some rest," there is no dispute that they advised him he need not speak at all, stating that Aksu "ha[d] the right to remain silent," and "the right to talk to a lawyer before we ask you any questions." Todd Decl. Ex. A. Once advised of his rights, Aksu does not claim that agents threatened him, lied, or even raised their voices; rather, he claims the agents told him that "if I spoke with them with them at that time, America would be grateful." Aksu Aff. ¶ 12. His chief complaints regarding American agents' conduct appear to be that in a two-and-a-half-hour meeting while Aksu was in Romanian custody, American agents neither granted Aksu's request that they provide water (which he acknowledges had been provided to him earlier that night) nor loosened his handcuffs.[7] Because even if proven, these omissions by agents conducting a brief interview of a person in foreign custody would not amount to "mental or physical coercion by the police" — let alone coercion that could overbear the will of a person advised of his rights — these claims do not meet Aksu's "burden of showing a prima facie case of involuntariness," *Toro*, 359 F.3d at 885.

[7] The Government expects that the evidence at a hearing would fail to establish that Aksu made such requests.

The Government consents to an evidentiary hearing concerning the voluntariness of the defendant's statements while en route to the United States from Romania on November 17, 2011. The Government expects that evidence at a hearing will establish that the defendant's statements on that plane flight were far from coerced. While Aksu contends he was in pain during the flight due to recent surgery and the manner in which he was handcuffed – pain which he states were compounded by anxiety, Aksu Aff. ¶ 19 – the Government expects evidence will establish that Aksu never complained of physical pain and that his hands were secured in a manner that permitted him a significant range of motion. Moreover, the Government expects evidence to establish that Aksu appeared comfortable and relaxed throughout the flight. In addition, the Government expects that evidence will establish that the defendant was not interviewed until after he was advised of his *Miranda* rights, given an explanation of the charges and the extradition process, given restroom breaks, and provided a meal of pancakes, potatoes, sausage, and bacon. In sum, the Government expects that the evidence will both undermine Aksu's claims of physical discomfort and anxiety and establish that under the totality of the circumstances, agents' conduct was more solicitous than coercive.

2. Waiver of Counsel

The Government consents to an evidentiary hearing concerning whether Aksu had sufficient understanding of the concept of a lawyer to knowingly and voluntarily waive his *Miranda* rights prior to his interviews with American agents on July 25, 2011, and November 17, 2011. Unlike Henareh, Aksu squarely contends that he did not understand the right to counsel, stating in his declaration that "the words, 'lawyer,' 'counsel' and 'attorney' as used were meaningless to me." Aksu Aff. ¶ 14; *see also* Aksu Aff ¶ 22. The Government therefore consents to a hearing at which it expects the evidence will show that Aksu knowingly waived his

right to counsel. In particular, the Government expects that evidence will show that Aksu acknowledged orally and in written waivers that he understood his right to an attorney. In addition, the Government expects the evidence will show that nothing in Aksu's demeanor or subsequent conduct called into question Aksu's statements of understanding. On the contrary, Aksu, who displayed relative sophistication in both his meetings with agents and in his criminal conduct, neither questioned the agents concerning the term "lawyer" nor appeared confused by the advice of rights. In sum, the Government expects Aksu's own statements and the other evidence will establish that Aksu had the basic understanding of his right to counsel necessary to make a knowing and intelligent waiver of his right to counsel. *See Collins*, 612 F.3d at 589.

3. Additional Claims

Finally, to the extent that Aksu claims that his statements should be suppressed because the warnings he received were not sufficiently extensive, Aksu Mem. 9-10, because agents did not arrange to have an attorney on-call during their meetings outside the United States, Aksu Mem. 13, or because Romanian authorities did not make consular notification, Aksu Mem. 10-12, these claims should be swiftly rejected as contrary to law.

Precedent forecloses the defendant's suggestion that agents violated his rights by informing him, truthfully, that while he could "insist that [he] receive[d] local or American counsel as a condition of speaking with us," agents "ability to provide [Aksu] with counsel at this time… may be limited by the decisions of the local authorities or the availability of a local or American trained-attorney." Todd Decl. Ex. A. While Aksu relies in his challenge to this warning on *United States* v. *Twomey*, 467 F.2d 1248 (7th Cir. 1972), which faulted an officer's statement that an appointed attorney could be obtained "if and when you go to court," Aksu fails to acknowledge that *Twomey* has been overruled by the Supreme Court, which approved

warnings, such as those in *Twomey*, which make clear that an attorney may not be immediately available. *Duckworth* v. *Eagan*, 492 U.S. 195 (1989). Similarly, while Aksu suggests that the American government should have offered to finance a Romanian attorney at Criminal Justice Act rates or should have flown a defense attorney into Romania with the agents, Aksu Mem. 13, it is well-established that no such steps are required for a *Miranda* waiver to be valid. *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 177, 198-99 (2d Cir. 2008).

Finally, in contending that his statement should be suppressed because he was not advised of his right to consular notification when in Romanian custody, Aksu ignores apparently uniform authority that suppression is unwarranted based on a failure of consular notification, even when the responsibility for notification lies with American agents rather than (as here) with foreign authorities. *See, e.g.*, *United States* v. *Jiminez-Nava*, 243 F.3d 192, 198 (5th Cir. 2001) ("All of our sister circuits have held that suppression of evidence is not a remedy for an Article 36 violation"); *Sanchez-Lamas* v. *Oregon*, 548 U.S. 331, 348-349 (2006) (consular-notification treaty does not require suppression remedy, particularly when "[t]he violation of the right to consular notification … is at best remotely connected to the gathering of evidence," right "has nothing whatsoever to do with searches or interrogations" and "[t]he failure to inform a defendant of his Article 36 rights is unlikely, with any frequency, to produce unreliable confessions"). In sum, because they are not supported by the governing legal authorities, Aksu's remaining suppression claims should be swiftly denied.[8]

[8] Aksu also moves for the disclosure of *Brady* material, *Giglio* material, and 404(b) evidence. Aksu Mem. 14-21. The Government recognizes its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963). Should the Government become aware of *Brady* material, it will promptly produce it. In addition, the Government will make timely *Giglio* and 404(b) disclosures as discussed on the record at the conference held in this case on March 20, 2012.

II. Henareh's Severance Motion Should Be Denied

Henareh requests severance because of the purported substantial prejudicial spillover effect from a joint trial with his co-defendant Aksu. He also contends that a limiting instruction would not be adequate. Henareh Mem. 10-12. Henareh's motion should be swiftly rejected.

A. Relevant Factual Background

The Government expects the evidence at trial to show that, beginning in June 2010, two Confidential Sources of the Drug Enforcement Administration ("Confidential Source-1" and "Confidential Source-2") had numerous meetings with Henareh and Aksu regarding criminal activity. During those meetings, the Confidential Sources presented themselves as drug traffickers who brokered the sale of weapons from a Russian arms dealer. They also represented themselves to be associates of Hizballah who would use the proceeds of drug sales to support Hizballah, including by purchasing weapons.

While Henareh ultimately arranged a narcotics transaction with the Confidential Sources, he was sometimes present when the Confidential Sources and co-conspirators explored possible weapons trafficking. For example, on March 27, 2011, the Confidential Sources met with Henareh and a narcotics co-conspirator ("CC-1") and displayed on a laptop a presentation of the kinds of weapons they could provide, including handguns, automatic assault rifles, and Igla anti-aircraft missiles. CC-1 then introduced the Confidential Sources to Aksu, to whom the Confidential Sources showed a similar presentation. Similarly, on March 29, 2011, Henareh and Aksu met with the Confidential Sources and again discussed the types, quantities, and prices of various weapons the Confidential Sources could supply, including thousands of Kalashnikov rifles and pistols. *See* Indictment ¶ 6(d).

In addition, because Aksu was working with the Confidential Sources toward deals

involving both drugs and weapons, Aksu's conduct in regard to the anticipated weapons transaction often provided evidence of the narcotics conspiracy in which Henareh is charged. For example, after Aksu brokered a weapons deal between the Confidential Sources and weapons-buyer Bachar Wehbe in or about July 2011, Aksu gave the Confidential Sources some of Wehbe's deposit from the deal in cash, while telling the Confidential Sources that Aksu had given 1000 Euros to a potential narcotics supplier on the Confidential Sources' behalf as well.

In calls and meetings later that month, Aksu, Wehbe, and the Confidential Sources then negotiated to complete a deal for more than 100 kilograms of heroin. As part of that deal, on July 25, 2011, the Confidential Sources received what turned out to be approximately 40 kilogram-sized packages of sham heroin provided by a particular supplier ("CC-2"). While the purported heroin ultimately tested negative for controlled substances, there was no indication that either Henareh or Aksu knew that the transaction involved anything other than heroin.

B. Applicable Law

Rule 14 of the Federal Rules of Criminal Procedure permits severance of properly joined charges, at the discretion of the trial court, to avoid prejudice to a defendant or the Government. However, any analysis of prejudice under a Rule 14 motion must be viewed through the lens of the strong presumption in favor of joint trials. As the Supreme Court has explained:

> It would impair both the efficiency and the fairness of the criminal justice system to require . . . that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the

> interests of justice by avoiding the scandal and inequity of inconsistent verdicts.

Richardson v. *Marsh*, 481 U.S. 200, 210 (1987); *see also United States* v. *Zafiro*, 945 F.2d 881, 886 (7th Cir. 1991) (Posner, J.) (joint trials reduce not only litigation costs but also "error costs," *i.e.*, the costs associated from depriving jury from making its determinations based on "the full picture"), *aff'd*, 506 U.S. 534 (1993).

Quite simply, the strong presumption is that defendants who are indicted together will be tried together. *See, e.g.*, *Zafiro* v. *United States*, 506 U.S. 534, 537 (1993) ("[t]here is a preference in the federal system for joint trials of defendants who are indicted together"); *United States* v. *Blount*, 291 F.3d 201, 208-09 (2d Cir. 2002); *United States* v. *Diaz*, 176 F.3d 52, 102 (2d Cir. 1999); *United States* v. *Henry*, 861 F. Supp. 1190, 1199 (S.D.N.Y. 1994); *United States* v. *Kalevas*, 622 F. Supp. 1523, 1528 (S.D.N.Y. 1986). "This preference is particularly strong where . . . the defendants are alleged to have participated in a common plan or scheme." *United States* v. *Salameh*, 152 F.3d 88, 115 (2d Cir. 1998).

Given this presumption, the "prejudice" standard is difficult to satisfy and "defendants are not entitled to severance [under Rule 14] merely because they may have a better chance of acquittal in separate trials." *Zafiro*, 506 U.S. at 540. Even assuming that a particular defendant is somehow prejudiced by joinder, the issue under Rule 14 is whether that prejudice "is sufficiently severe to outweigh the judicial economy that would be realized by avoiding lengthy multiple trials." *United States* v. *Lanza*, 790 F.2d 1015, 1019 (2d Cir. 1986) (citation omitted). Thus, under the Supreme Court's decision in *Zafiro*, a discretionary severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of

the defendants, or prevent the jury from making a reliable judgment about guilt or innocence," *Zafiro*, 506 U.S. at 539.[9]

C. Discussion

Here, the federal system's preference for a single, joint trial, *see Zafiro*, 506 U.S. at 537, is particularly clear. There is no question that Henareh and Aksu participated in a common scheme or plan. *Salameh*, 152 F.3d at 115. Both defendants participated in the same charged narcotics conspiracy (Count One) aimed at importing huge quantities of heroin into the United States. Indictment ¶¶ 1-3. Moreover, as set forth above, the facts underpinning the narcotics conspiracy are directly linked to the weapons deal in which Aksu participated. Henareh was himself present at meetings in which the Confidential Sources discussed possible weapons transactions, and one of Henareh's narcotics co-conspirators introduced the Confidential Sources to Aksu, who set the weapons deal into motion. In addition, since Aksu conspired to conduct both weapons and drug transactions simultaneously with the Confidential Sources, much of the same evidence regarding Aksu's conduct is relevant to both the weapons and drug charges.

Moreover, because both defendants were charged as a result of the same investigation, at trial, the Government's evidence against the defendants will include many of the exact same recordings, lay witnesses, law enforcement witnesses, and foreign witnesses, including Romanian law enforcement agents. Were the defendants severed and tried separated, aside from

[9] Because of the preference for joint trials of defendants indicted together, and the near-total discretion afforded the trial judge in addressing any potential prejudice, a defendant seeking review of denial of severance under Rule 14 bears the "extremely difficult burden," *United States* v. *Casamento*, 887 F.2d 1141, 1149 (2d Cir. 1989) (internal citation omitted), of showing that he was so prejudiced by joinder that he suffered a "miscarriage of justice" or was denied a constitutionally fair trial. *See United States* v. *Yousef*, 327 F.3d 56, 149-150 (2d Cir. 2003).

the obvious waste of judicial resources of having to call the same agents (foreign and domestic), translators, and witnesses (again, foreign and domestic), one defendant would gain an unfair advantage by obtaining a preview of the Government's evidence. Thus, judicial economy and equity compels that Henareh and Aksu be tried together.

Henareh's severance argument is based on the general claim of a purported "substantial prejudicial spillover" from being tried together with Aksu, the defendant in all three counts of the Indictment. *See* Henareh Mem. 10. As an initial matter, Henareh's claim that he will be prejudiced through the introduction of evidence pertaining to weapons and Hizballah deserves little weight because, even at a trial of Henareh alone, evidence of weapons-dealing and of purported Hizballah ties would properly come into evidence. As set forth above, the Confidential Sources represented themselves to be Hizballah associates who engaged in drug trafficking to support Hizballah's weapons purchases. And Henareh was present, along with other narcotics co-conspirators, when the Confidential Sources made presentations regarding weapons they could sell.

In any event, Henareh's is an unremarkable concern shared by every defendant charged together with his co-conspirators, namely, that the jury will not consider his case separate and apart from that of his co-defendant. That concern is based on speculation that runs counter to the repeated teachings of this Circuit that juries are presumed to follow instructions. *See, e.g.*, *United States* v. *Whitten*, 610 F.3d 168, 191 (2d Cir. 2010) ("We presume that juries follow instructions."). As the Second Circuit noted in another context, "[t]o say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies

upon the ability of a jury to follow instructions." *United States* v. *Bozza*, 365 F.2d 206, 229 (2d Cir. 1966) (internal quotation marks omitted)).

Henareh's vague argument about the purported prejudicial "spillover" effect is also insufficient to constitute "substantial prejudice." *See United States* v. *Gallo*, 763 F.2d 1504, 1526 (6th Cir. 1985); *United States* v. *Rittweger*, 524 F.3d 171, 179 (2d Cir. 2008). And, as Henareh concedes, *see* Henareh Mem. 11, this Court can provide a limiting instruction at the trial to prevent any possible, potential spillover. *See, e.g.*, *United States* v. *Fernandez*, 559 F.3d 303, 317 (5th Cir. 2009); *United States* v. *Kennard*, 472 F.3d 851, 859 (11th Cir. 2006); *United States* v. *Wilson*, 605 F.3d 985, 1018 (D.C. Cir. 2010). Accordingly, the Court should deny Henareh's severance motions without a hearing.

CONCLUSION

For the foregoing reasons, the Government consents to an evidentiary hearing concerning whether Aksu knowingly waived his right to counsel and whether his statement to agents on November 17, 2011, was involuntary. The Government respectfully submits that Henareh's motions and Aksu's remaining motions should be denied without an evidentiary hearing.

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Respectfully submitted,

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