UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

- v. -

MANSSOR ARBABSIAR,
a/k/a "Mansour Arbabsiar,"

Defendant.

: 11 Cr. 897 (JFK)

- x

MEMORANDUM OF LAW OF THE UNITED STATES OF AMERICA IN OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS OR SUPPRESS

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PRELIMINARY STATEMENT

The Government respectfully submits this memorandum of law in opposition to the defendant's motion to dismiss indictment 11 Cr. 897 (JFK) (the "Indictment") or to suppress statements made by the defendant. Specifically, the defendant argues that: (i) the Indictment should be dismissed, or in the alternative the defendant's post-arrest statements should be suppressed, because the defendant was not presented before a judicial officer in violation of Rule 5 of the Federal Rules of Criminal Procedure; and (ii) the defendant's post-arrest statements should be suppressed because they were not voluntarily made and were made in violation of *Miranda*. In light of the defendant's affidavits in support of his motion, in which he disputes certain material factual issues and raises claims regarding his mental state during the time that he waived his rights and confessed to his crimes, the Government has consented to an evidentiary hearing. For the reasons set forth below, and as will be further developed at the hearing, the defendant's motion to suppress should be rejected in its entirety. In addition, the defendant's motion to dismiss the Indictment fails as a matter of law and should be denied.

BACKGROUND

I. The Investigation

A. May 2011: Arbabsiar's Initial Meeting with CS-1

On or about May 24, 2011, the defendant Manssor Arbabsiar traveled from Texas to Mexico and met with a Drug Enforcement Administration ("DEA") confidential source ("CS-1") in Mexico. (Compl. ¶ 16).[1] During this meeting, and all others with Arbabsiar, CS-1 posed as an associate of a drug-trafficking cartel. (*Id.* ¶ 18). During the meeting, Arbabsiar inquired as to

[1] "Compl." denotes the complaint filed on October 11, 2011 (11 MAG 2617). The facts in the "Background" section are based on the Complaint and the expected testimony of the Government's witnesses at the hearing scheduled to begin on October 22, 2012.

CS-1's knowledge of explosives. Arbabsiar explained to CS-1 that he was interested in, among other things, attacking an embassy of Saudi Arabia. CS-1 responded that he was knowledgeable with respect to C-4 explosives. (*Id.*). Arbabsiar returned to Texas and then left the United States about a week later. (*Id.* ¶ 19).

B. June and July 2011: Arbabsiar Meets Again with CS-1

On or about June 23, 2011, Arbabsiar returned to Mexico. (*Id.* ¶ 20). In late June and July, Arbabsiar met again with CS-1 in Mexico. (*Id.* ¶ 21). Over the course of a series of meetings, Arbabsiar explained to CS-1 that his associates in Iran had discussed a number of violent missions for CS-1 and CS-1's purported criminal associates to perform, including the murder of the Ambassador of Saudi Arabia to the United States (the "Ambassador"). (*Id.*).

On or about July 14, 2011, Arbabsiar met again with CS-1 in Mexico. During this meeting, CS-1 told Arbabsiar that he would need a team of at least four men to assassinate the Ambassador and that the price for conducting the assassination would be $1.5 million. (*Id.* at ¶ 22(a)). CS-1 and Arbabsiar also discussed the method by which Arbabsiar would pay CS-1. (*Id.* ¶ 22(b)). Arbabsiar then said that he had been told that $100,000 was available in Iran to pay CS-1 as a first installment toward the assassination of the Ambassador. (*Id.*). During the course of the same meeting, Arbabsiar stated that his cousin worked in other countries on behalf of the Iranian government and had requested that Arbabsiar find someone who could carry out the plot to kill the Ambassador. (*Id.*).

On or about July 17, 2011, Arbabsiar met again with CS-1 in Mexico. (*Id.* ¶ 23). During the meeting, after Arbabsiar identified a photograph of the Ambassador, CS-1 informed Arbabsiar that one of CS-1's associates had already traveled to Washington, D.C. to surveil the Ambassador. (*Id.* ¶ 23(a)). CS-1 asked exactly what Arbabsiar's cousin wanted him to do, and

Arbabsiar stated that his cousin wanted CS-1 to kill the Ambassador. (*Id.* ¶ 23(b)). Arbabsiar also said that it would be permissible for CS-1 to kill the Ambassador even if it resulted in bystander casualties. (*Id.*). Arbabsiar further assured CS-1 that CS-1 would be paid for his work and said that Arbabsiar's cousin had the Iranian government behind him. (*Id.* ¶ 23(c)). During the course of the meeting, Arbabsiar also explained that his cousin and an individual who worked for his cousin had paid Arbabsiar's expenses related to the assassination plot. (*Id.*). At the end of the meeting, Arbabsiar reiterated that the potential for civilian casualties should not dissuade CS-1 from killing the Ambassador. (*Id.* ¶ 23(e)). On or about July 20, 2011, Arbabsiar left Mexico. (*Id.* ¶ 24).

C. August 2011: Arbabsiar Confirms Payments to CS-1

On or about August 1, 2011, an overseas wire transfer of approximately $49,960 was sent through Manhattan to the FBI undercover bank account (the "UC Bank Account") that CS-1 had identified to Arbabsiar. (*Id.* ¶ 26). On or about August 6, 2011, Arbabsiar spoke with CS-1 by telephone, and the conversation was recorded by CS-1. (*Id.* ¶ 27). During the conversation, Arbabsiar said that he had sent the other half of the down payment the previous day. (*Id.*). On or about August 9, 2011, another overseas wire transfer of approximately $49,960 was sent through Manhattan to the UC Bank Account. (*Id.* ¶ 28). On or about August 11, 2011, Arbabsiar spoke with CS-1 on the telephone, and the conversation was recorded by CS-1. (*Id.* ¶ 29). During the call, Arbabsiar asked CS-1 whether he had received the second half of the down payment. (*Id.*).

D. September 2011: Arbabsiar Returns to Mexico

On or about September 20, 2011, Arbabsiar spoke with CS-1 over the telephone, and CS-1 again recorded the conversation. (*Id.* ¶ 32). During the call, CS-1 stated that he wanted

Arbabsiar and his associates to make an additional payment of half of the total payment for the assassination or for Arbabsiar to go personally to Mexico to serve as collateral for the final payment. (*Id.*). Arbabsiar ultimately agreed to travel to Mexico to guarantee payment for the Ambassador's assassination. (*Id.*).

On or about September 28, 2011, Arbabsiar flew to Mexico. (*Id.* ¶ 33). Arbabsiar was denied entry into Mexico, and then flew on to John F. Kennedy International Airport ("JFK") on September 29, 2011. During the flight to JFK, law-enforcement officials aboard the plane conducted surveillance of the defendant without alerting him to their presence. (*Id.*; Shroff Decl., Ex. A at 558).

E. Arbabsiar's Arrest and Confession

Arbabsiar exited the plane upon its arrival at JFK, and he was placed under arrest at approximately 8:40 p.m. (Shroff Decl., Ex. A at 558). From the airport, Arbabsiar was brought to a hotel room with two FBI special agents (the "Agents"). The Agents removed Arbabsiar's handcuffs and spoke with him about matters unrelated to the investigation as a way to build rapport. After Arbabsiar was given an opportunity to eat, the Agents asked Arbabsiar about his knowledge of a possible imminent threat to public safety involving a bomb near the border between the United States and Mexico. Arbabsiar denied any knowledge of such a threat.

At approximately 11:50 p.m., on September 29, 2011, after he was given an opportunity to smoke a cigarette, the defendant was advised of his *Miranda* rights, agreed to waive his rights, and signed a written waiver to that effect. The *Miranda* waiver signed by the defendant was entitled "Advice of Rights" and included language that stated that "you have the right to remain silent;" "[a]nything you now say can be used against you in court;" "[y]ou have the right to have a lawyer with you during questioning;" and "[i]f you cannot afford a lawyer, one will be

appointed for you before any questioning if you wish." (Shroff Decl., Ex. B. at 57). The waiver form also stated that "[y]ou do not need to speak with us now just because you have spoken with us before. This is a clean slate and a fresh start." (Shroff Decl., Ex. B. at 57). In addition, the form stated that "[i]f you decide to answer questions now without a lawyer present, you have the right to stop answering at any time." (*Id.*).

At approximately 11:59 p.m., less than three and a half hours after his arrest at JFK Airport, the defendant was advised of his right to a presentment without undue delay. The defendant agreed to waive this right as well, and signed a written waiver to that effect. The prompt presentment waiver form was captioned, "UNITED STATES OF AMERICA – v – MANSSOR ARBABSIAR, defendant." (Shroff Decl., Ex. B at 58). The form stated in part:

> 1. I was arrested today in connection with, among other things, my involvement in a conspiracy to murder the Ambassador of a Middle-Eastern country to the United States.
>
> ****
>
> 6. I have a right to be brought without undue delay before a United States Magistrate Judge or other judicial officer who, in accordance with the Federal Rules of Criminal Procedure, would:
>
> a. Formally advise me of the charges against me;
>
> b. Make a determination whether probable cause exists to believe that I committed a violation of federal criminal law;
>
> c. Appoint a lawyer to represent me if I cannot afford one or give me an opportunity to retain my own lawyer;
>
> d. Determine whether I should be released on bail pending indictment and/or trial of the case against me.
>
> I understand all of these rights and I hereby choose to waive my right to a speedy initial appearance before a United States Magistrate Judge or other judicial officer. I also waive all the other rights referenced in this Waiver form. I understand that I am not required to waive the rights referred to herein merely because I may have previously done so….
>
> ****
>
> I understand that I will, at a future time, be presented before a United States Magistrate Judge or other judicial officer on a Complaint and/or either an Information or Indictment charging me with a violation of federal criminal law, and that I will/may remain in custody until that time.

(*Id.* at 58-59).

The defendant subsequently waived both his *Miranda* rights and his right to a prompt presentment at the start of each successive day following his arrest, until October 10, 2011.

On October 10, 2011, after again signing his *Miranda* waiver and prompt presentment waiver forms, the defendant invoked his right to counsel, and agents ceased their interview of him. (Shroff Decl., Ex. A at 633). Because October 10th was a court holiday, Columbus Day, the defendant was presented before Magistrate Judge Michael Dolinger on October 11, 2011. (*See* Docket Entry dated 10/11/11).

ARGUMENT

The defendant knowingly and voluntarily waived both his right to a presentment without undue delay and his *Miranda* rights.

I. The Defendant Waived His Right to Prompt Presentment

The Government expects the evidence adduced at the hearing to establish that the defendant was arrested by the FBI at JFK Airport at approximately 8:40 p.m., on September 29, 2011. A little over three hours later, the defendant knowingly and voluntarily waived his right to prompt presentment. Moreover, at the start of each successive day following his arrest, for eleven days straight, the FBI presented the defendant with an opportunity to either waive his prompt presentment right or go to court. On each of those days, the defendant knowingly and voluntarily waived that right.

A. The Right to Prompt Presentment

Once a suspect has been placed under arrest, Rule 5(a) of the Federal Rules of Criminal Procedure requires that a defendant be taken "without unnecessary delay" for presentment before a federal magistrate judge. Fed. R. Crim. P. 5(a)(1)(A). At presentment, the defendant is to be advised of, among other things, the charges against him, his right to retain or request appointment of counsel, and his right not to make post-arrest statements. Fed. R. Crim. P. 5(d); *see also Corley* v. *United States*, 556 U.S. 303, 320 (2009).

If a defendant makes statements following his arrest, Section 3501 of Title 18 applies to any motion to suppress those statements based on an alleged delay in presentment. That section provides, in pertinent part:

> (c) In any criminal prosecution by the United States . . . , a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States . . . if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.
>
> (d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

18 U.S.C. § 3501 (emphasis in original).

In *Corley*, the Supreme Court addressed the interplay between Rule 5(a) and Section 3501.[2] *See* 556 U.S. at 321-22. Among other things, the Supreme Court concluded that Section 3501(c) was meant to provide a safe-harbor for confessions made within six hours of arrest. *See Corley*, 556 U.S. at 322. After six hours, a confession could still be admissible, but its admissibility is subject to the district court's determination of whether the delay was unreasonable or unnecessary. *See id.* The *Corley* Court stated:

> a district court with a suppression claim must find whether the defendant confessed within six hours of arrest (unless a longer delay was "reasonable considering the means of transportation and the distance to be traveled to the nearest available [magistrate judge]"). If the confession came within that period, it is admissible, subject to the other Rules of Evidence, so long as it was "made voluntarily and . . . the weight to be given [it] is left to the jury." *Ibid.* If the confession occurred before presentment and beyond six hours, however, the court must decide whether delaying that long was unreasonable or unnecessary under the *McNabb–Mallory* cases, and if it was, the confession is to be suppressed.

Id.

B. The Right to Prompt Presentment Can be Waived

As the defendant concedes, numerous courts in this Circuit have held that a defendant can waive the right to prompt presentment. *See, e.g., United States* v. *Berkovich*, 932 F. Supp. 582, 588 (S.D.N.Y. 1996) ("A defendant may waive his right to be presented promptly."); *United States* v. *Pena Ontiveros*, 547 F. Supp. 2d 323, 339 (S.D.N.Y. 2008) ("Of course, a defendant

[2] More particularly, the Court analyzed the impact of Section 3501 on the *McNabb-Mallory* rule, which "generally render[s] inadmissible confessions made during periods of detention that violat[e] the prompt presentment requirement of Rule 5(a)." *See Corley*, 556 U.S. at 309 (internal quotes omitted). The *McNabb-Mallory* rule was derived from two cases in which statements were suppressed for unnecessary delay in presentment before the enactment of Rule 5(a) (*McNabb* v. *United States*, 318 U.S. 332 (1943)) and after its enactment (*Mallory* v. *United States*, 354 U.S. 449 (1957)). *Id.* at 307-09.

may also waive his or her right to be presented promptly."); *United States* v. *Cabrera*, No. 05 Cr. 1278 (NRB), 2008 WL 2803902, at *5 (S.D.N.Y. July 15, 2008) ("Delays attributable to a defendant's cooperation with law enforcement officials, particularly when the defendant has knowingly and voluntarily waived his right to speedy presentment, have been routinely found to be reasonable by the district courts in the Second Circuit."); *United States* v. *Torres*, No. 98 Cr. 183 (AGS), 2002 WL 72929, at *8 (S.D.N.Y. Jan. 17, 2002) ("A defendant may waive his right to speedy presentment before a court."); *United States* v. *Garcia*, No. 09 Cr. 330 (DLI), 2011 WL 6010296, at *4 (E.D.N.Y. Nov. 30, 2011) ("An arrested person may waive his right to be brought before a magistrate judge without unnecessary delay."); *United States* v. *Markoneti*, Cr. 92-0169 (JBW), 1993 WL 180355, at *2 (E.D.N.Y. May 25, 1993) ("Voluntary delays in arraignment are not unusual or undesirable where a person who is believed to be engaged in criminal activity volunteers to assist the government in catching other criminals.").

Courts in other circuits have reached the same conclusion. *See, e.g.*, *United States* v. *Gibson*, 530 F.3d 606, 613 (7th Cir. 2008) (upholding district court's finding that multiple waivers of prompt presentment were voluntary and valid); *United States* v. *Annoreno*, No. 06 Cr. 33-1, 2009 WL 3518155, at *4 (N.D. Ill. Oct. 28, 2009) ("[T]he right to prompt presentment can be waived."); *United States* v. *Jacques*, 784 F.Supp.2d 48, 56-58 (D. Mass 2011) (recognizing defendant's ability to waive right to prompt presentment).

In the face of these holdings, the defendant urges this Court to find that the right to prompt presentment is not waivable. The defendant, however, has not identified a single case supporting this proposition. Furthermore, the defendant's contention is inconsistent with the well-established proposition that constitutional and statutory rights are generally waivable. *See New York* v. *Hill*, 528 U.S. 110, 114 (2000) ("We have . . . in the context of a broad array of

constitutional and statutory provisions, articulated a general rule that presumes the availability of waiver, . . . and we have recognized that the 'most basic rights of criminal defendants are . . . subject to waiver.") (internal citations and quotations omitted). Just as a defendant is permitted to waive his rights to remain silent and to consult with an attorney before speaking with government agents, so is he permitted to knowingly and voluntarily waive his right to be presented without delay.

The defendant's argument that the right to prompt presentment should not be waivable is premised largely on an inapposite analogy to the limitation on *prospective* waivers of the right to a speedy *trial*. (Def. Mem. at 28-31). The defendant argues that because Rule 5 serves the public interest, a defendant should not be permitted to prospectively waive his right to prompt presentment, just as a defendant cannot prospectively waive his rights under the Speedy Trial Act. This analogy fails in at least two respects.

First, the defendant asserts that both the Speedy Trial Act and Rule 5 protect a larger public interest as well as a defendant's individual rights. However, Rule 5 protects a public interest only to the extent that *any* statute protecting individual rights can be said to protect a larger public interest. That is to say, while individual rights – like the right to prompt presentment or the right to remain silent – of course serve to protect society as a whole, that societal interest does not generally limit an individual's execution or waiver of that right. By contrast, the Speedy Trial Act is an outlier; it limits an individual defendant's right to waive certain statutory rights by balancing the defendant's desire (for a waiver) against the public's interest. *See* 18 U.S.C. § 3161(h)(7)(A) (excluding from the computation of time within which trial must begin "[a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for

the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh *the best interest of the public and the defendant* in a speedy trial." (emphasis added)). *See also Zedner* v. *United States*, 547 U.S. 489, 501 (2006) ("[T]he [Speedy Trial] Act was designed not just to benefit defendants but also to serve the public interest by, among other things, reducing defendants' opportunity to commit crimes while on pretrial release and preventing extended pretrial delay from impairing the deterrent effect of punishment.").

But a defendant's speedy trial rights are emphatically different than other rights – even other rights that are said to protect both the defendant and society as a whole. As the Supreme Court has emphasized, "It is *not* true that any private right that also benefits society cannot be waived." *Hill*, 528 U.S. at 117 (emphasis in original). The Supreme Court has "articulated a general rule that presumes the availability of waiver" and has permitted the waiver of "numerous constitutional protections for criminal defendants that also serve broader social interests," such as the right to a jury trial and the right to counsel. *Id.* at 114, 117. The "general rule" articulated in *Hill* is dispositive here; waiver in the speedy trial context is exceptional and has no bearing here.

The second problem with the defendant's analogy to prospective waivers of speedy trial rights is that there was no *prospective* waiver in this case. The defendant's argument rests primarily on *Zedner*. In that case, the defendant was asked on one occasion to give a "blanket, prospective" waiver of his right to speedy trial "for all time," resulting in a delay of trial of nearly seven years. *Id.* at 492-94. The Supreme Court found that such a waiver by the defendant was insufficient, in part because it did not fall within the specific categories of permissible exclusions set forth under the Speedy Trial Act, and because of the requirement under the

Speedy Trial Act that the court balance the ends of justice against the interest of the public when considering whether to grant a continuance under the relevant provision in the Act. *Id.* at 500-01 (noting that the "public interest cannot be served . . . if defendants may opt out of the Act entirely").

Zedner is readily distinguishable. As an initial matter, unlike the Speedy Trial Act, Rule 5 contains no provisions that would be inconsistent with a defendant's waiver of its requirements. In addition, in this case the defendant was advised of his prompt presentment right on each of the twelve days he was in custody, and he waived that right every day before any questioning started. Although the defendant argues that the absence of an end date in the prompt presentment waiver forms suggests that the defendant was being asked to prospectively waive his right to presentment without undue delay, this argument is meritless. Unlike in *Zedner*, the defendant was not asked on one occasion to waive his right to presentment for all time. Rather, the defendant was presented with the waiver form *every* day he was held in the custody of agents. As a result, the effect of each waiver was that it was a waiver for the day on which it was signed. Moreover, the waiver form did not include language indicating that the defendant was indefinitely waiving his right to prompt presentment. To the contrary, it explicitly stated that the defendant had "a right to be brought *without undue delay* before a United States Magistrate Judge or other judicial officer." (Shroff Decl., Ex. B at 58) (emphasis added).[3]

[3] The defendant also argues that unlike the right to remain silent or to have an attorney, the potential benefits of a prompt presentment are not likely to be apparent to the average defendant, absent consultation with an attorney. (*See* Def. Mem. at 30). This argument should be swiftly rejected. Among other things, the waiver form presented to Arbabsiar spelled out for him in black and white the rights associated with presentment – including being advised by a judge of the charges, having a lawyer appointed, and potentially being released on bail. (Shroff Decl., Ex. B at 58-59). Moreover, those rights are no more complex than the rights waived in the context of, for example, *Miranda*.

C. The Defendant Knowingly and Voluntarily Waived His Right to Prompt Presentment

The Government anticipates presenting evidence during the upcoming hearing that will establish that the defendant knowingly and voluntarily waived his right to prompt presentment on each day, from September 29, 2011 to October 10, 2011. Accordingly, all of the defendant's post-arrest statements are admissible against him.

1. The Defendant's Prompt Presentment Right Was Triggered When He Was Arrested at JFK Airport on September 29, 2011

As an initial matter, the defendant was first placed in custody on federal charges when he was arrested by the FBI at JFK Airport, at approximately 8:40 p.m., on September 29, 2011. Thus, the defendant's arrest by the FBI is the proper starting point from which to calculate the amount of time that elapsed before the defendant waived his right to prompt presentment at 11:59 p.m. that night. The defendant, on the other hand, argues that his right to presentment without undue delay was triggered shortly after he arrived in Mexico, on September 28, 2011, when he was held by Mexican immigration authorities who refused to allow him to enter their country. (*See* Def. Mem. at 24-25). This is not the law.

In *United States* v. *Alvarez-Sanchez,* 511 U.S. 350 (U.S. 1994), the Supreme Court held that the plain language of Section 3501(c) makes clear that the statute comes into play "only when there is some 'delay' in presentment" and that "there can be no 'delay' in bringing a person before a federal magistrate until, at a minimum, there is some obligation to bring the person before such a judicial officer in the first place." *Id*. at 357, 358. The Court further found that "[u]ntil a person is arrested or detained for a federal crime, there is no duty, obligation, or reason to bring him before a judicial officer 'empowered to commit persons charged with offenses against the laws of the United States,' and therefore, no 'delay' under § 3501(c) can occur." *Id.*;

s*ee also United States* v. *Fullwood*, 86 F.3d 27, 31 (2d Cir. 1996) (finding that Section 3501(c) is "implicated only when a defendant is arrested or detained for a federal crime and, thus, is in federal detention at the time the challenged statement is made"). As the Second Circuit emphasized in *Fullwood*, determining the nature of the charge underlying the arrest is the relevant inquiry for Section 3501(c):

> The touchstone of determining the applicability of 3501(c), therefore, is the governmental source of the charge underlying the arrest, not the law enforcement agency involved.

Fullwood, 86 F.3d at 31. *See also United States* v. *Frank*, 8 F. Supp. 2d 284, 298 (S.D.N.Y. 1998) ("Section 3501 applies . . . only to prisoners arrested for *federal* crimes by any law enforcement agency, state or federal." (emphasis in original)).

As a corollary, even when there is a foreign arrest, the arrest does not necessarily trigger the prompt presentment duty under Section 3501 when the arrest is not on a federal charge. The two leading cases addressing the applicability of Rule 5 and Section 3501 to overseas detentions involved actual *arrests* by foreign law enforcement followed by lengthy overseas interrogations about events that were later the basis for U.S. criminal charges. In neither case did the court find that the prompt presentment clock was initiated when the defendants were overseas. In *United States* v. *Bin Laden*, 132 F. Supp. 2d 198 (S.D.N.Y. 2001), the defendants sought to suppress post-arrest statements for claimed violations of Rule 5(a) relating to their detention in Kenya in connection with their alleged involvement in the 1998 embassy bombing in Nairobi. Both defendants were initially arrested in Pakistan before being transported to Kenya where they were questioned by Kenyan and U.S. law enforcement agents for over two weeks. At the end of the two-week period, each defendant was transported to the United States and brought before a magistrate judge. *Id*. at 204-206.

Judge Sand denied the defendants' motions. He first found that when a defendant is held overseas, the reality of relationships between sovereign nations – which carries "inherent and important" differences from the relationships between U.S. federal and state law enforcement agencies – makes it unreasonable to require prompt presentment to a U.S. judicial officer. *See id*. at 208. Thus, Judge Sand concluded that, "[i]f the Kenyans were holding [the defendants] on Kenyan charges, then the Americans could not reasonably be expected to arrange presentment before a United States magistrate." *Id*. That is to say, the reality of relations with foreign sovereigns makes it impossible to burden U.S. law enforcement with having to race against the clock to present a defendant who is detained overseas by foreign officials to a U.S. judge.

Second, Judge Sand determined that the defendants failed to establish, under the "working arrangement" rule, that the U.S. agents had colluded with the Kenyan officials to improperly circumvent the U.S. presentment requirements. *See id*. at 209. To establish an improper "working relationship," a defendant has the burden of establishing that the Government made deliberate use of foreign custody to postpone its presentment requirements. *Id*. There, even though the defendant was questioned by both Kenyan and U.S. officials for two weeks, Judge Sand held that the defendants could not establish that the U.S. had collaborated with the Kenyans to deliberately avoid the defendants' prompt presentment rights. *Id*. at 211.

Similarly, in *United States* v. *Abu Ali*, 528 F.3d 210 (4th Cir. 2008), the Fourth Circuit rejected the defendant's argument that his arrest in Saudi Arabia by Saudi law enforcement triggered the "prompt presentment guarantee." *See id.* at 226. The defendant, an American citizen, was arrested in Saudi Arabia in connection with a Saudi investigation of al Qaeda suicide bombings in Riyadh that killed 34 people, including nine Americans. *See id*. at 221-224. Although American officials were notified of Abu Ali's arrest, they were only permitted to be

present for the interrogations and to submit questions to the Saudis to ask the defendant. *See id.* at 225. The Fourth Circuit stated that "any prompt presentment guarantee applies only to actions undertaken by domestic authorities," such that the Saudi arrest did not implicate either the Fourth Amendment or Section 3501. *Id.* at 226 (citing *Alvarez-Sanchez*, 511 U.S. at 359-60). Turning to the "working arrangement" question, the *Abu Ali* court also affirmed the district court's finding that the U.S. authorities had not colluded with Saudi authorities to have the Saudis hold the defendant so that the U.S. authorities could "evade their constitutional duties." *Id.* at 226-27.

Simply put, the Mexican authorities' stop and expulsion of Arbabsiar could not reasonably have triggered an obligation on the part of U.S. authorities to promptly present the defendant when he was in Mexico. The defendant's stop in Mexico, as he himself alleges, was made by Mexican immigration authorities who declined to let him enter Mexico. (*See* Arbabsiar Decl. ¶ 3). A Mexican immigration authority's determination of the defendant's ability to enter Mexico is not a U.S. charge. Moreover, Arbabsiar has made no allegation – nor is there any evidence – that U.S. law enforcement authorities engaged in any conduct while Arbabsiar was in Mexico aimed at postponing his presentment before a U.S. magistrate judge. In addition, no law enforcement officials – Mexican or American – participated in questioning of the defendant regarding his U.S. charges while he was in Mexico. (S*ee* Def. Decl. ¶¶ 3-4). In both *Abu Ali* and *Bin Laden*, not only did the defendants' incriminating statements result from extensive overseas interrogations, but the U.S. authorities either took part in the questioning (*Bin Laden*) or were made aware of it and were present for parts of it (*Abu Ali*). In both *Abu Ali* and *Bin Laden*, Section 3501 was not triggered despite the fact that the defendants had been arrested and interrogated about matters relevant to the charges later brought against them in American courts. In the face of that authority, it cannot be argued that the defendant's short stay in Mexico, during

which he was not arrested on any U.S. charge and not interrogated at all, triggered an obligation to present him promptly to a U.S. judicial officer.

In support of his claim that the prompt presentment clock started when Mexican immigration authorities detained him in a Mexican airport and prevented him from entering Mexico, the defendant cites to two cases in which district courts found that something less than a formal arrest amounted to a detention under Section 3501(c). (*See* Def. Mem. at 24-25). These cases provide no support for the defendant's argument because neither stands for the proposition that action by foreign officials abroad can trigger the Rule 5 duty to promptly present a defendant to an American judicial officer. The cases simply set forth case-specific facts in which a defendant, *confronted by questioning by United States law enforcement officials in the United States*, could be deemed to be detained despite the absence of a formal arrest.

For example, in *United States v. Ramirez*, 696 F. Supp. 2d 246 (E.D.N.Y. 2010), the defendant was determined to have been detained for purposes of the prompt presentment clock after he arrived at JFK Airport where he was held by U.S. immigration officials. *See Ramirez*, 696 F. Supp. 2d at 261. A United States Customs and Border Patrol ("CBP") officer performed a secondary immigration inspection on the defendant and determined that the defendant's fingerprints matched a 2005 immigration violation. *Id*. at 248-50. The officer informed the defendant of his finding and the defendant admitted to the earlier immigration violation. *Id.* at 250. The defendant was held overnight in CBP custody for further criminal investigation before being interviewed more than six hours after his initial detention. *Id*. The district court concluded that the defendant was in custody such that the defendant's right to prompt presentment was triggered, *i.e*., he was detained under Section 3501, when it was determined that the defendant

was the person involved in the 2005 immigration violation because the defendant was not free to leave CBP custody, and he was going to be charged with a U.S. crime. *Id*. at 261.

The defendant here, unlike the defendant in *Rodriguez*, was stopped at a Mexican airport by Mexican immigration authorities who prevented him from entering Mexico, not by American immigration authorities at an American airport. (*See* Arbabsiar Decl. ¶ 3). Moreover, unlike the defendant in *Ramirez*, the defendant does not allege that his time in detention in Mexico was used to further investigate his U.S. charges. The defendant makes no claim that he was questioned by the Mexicans about any possible U.S. federal charges. (S*ee* Arbabsiar Decl. at ¶ 3). Rather, the defendant contends that the Mexican immigration authorities "held" him for mere hours before putting him on a plane routed through New York. (*Id*. at ¶¶ 3-4). In all, unlike the defendant in *Rodriguez* who was held overnight so he could be interrogated, the defendant's time in Mexico was nothing more than a stopover, not a means to interrogate him without bringing him before a U.S. judge.

Gonzalez v. *United States*, No. S1 08 Cr. 684 (SAS), 2011 WL 5994791 (S.D.N.Y. Nov. 30, 2011) – which also involved questioning of a defendant by U.S. authorities – is similarly inapplicable. In that case, the district court held that the defendant was "constructively arrested" for purposes of Rule 5(a) and the six-hour prompt presentment clock when he was interrogated by U.S. authorities while in prison. *See* 2011 WL 5994791 at *8. *Gonzalez* stands for the proposition that a formal arrest is not required to trigger a defendant's right to prompt presentment. It has no other application here and is otherwise not instructive. The defendant was not – nor does he allege that he was – incarcerated or questioned by anyone – much less by U.S. officials – about his U.S. criminal conduct when in Mexico.

The defendant also argues that the presence of the U.S. law enforcement agents on the defendant's flight from Mexico to the United States triggered the defendant's right to presentment without undue delay. (*See* Def. Mem. at 25). Again, this argument has no legal support. The agents did not make their presence known to Arbabsiar, nor does Arbabsiar claim that he knew that they were there. Further, there are no allegations that the agents on the plane restrained Arbabsiar in any way, questioned Arbabsiar, or otherwise used the transit time on the plane to investigate the charges or delay Arbabsiar's presentment before a U.S. judicial officer.

In light of the foregoing, because the evidence at the hearing will show that the defendant knowingly and voluntarily waived his prompt presentment right within six hours of his arrest at JFK Airport, the defendant's argument that his post-arrest statements should be suppressed because of a Rule 5 violation should be denied.

2. The Defendant's Waiver of His Prompt Presentment Right Was Knowing and Voluntary

The defendant advances a litany of arguments in support of his claim that his multiple written waivers of the right to prompt presentment were not voluntary or knowing. For instance, the defendant asserts, among other things, that "English is his second language" and "he did not have his reading glasses with him," "he did not read the documents," "agents never read the documents to him," and "agents required [the defendant] to sign these documents before he could have any conversation with them." (Def. Mem. at 32). The Government anticipates that it will prove at a hearing that the defendant understood his prompt presentment right and waived the right knowingly and voluntarily within six hours of his arrest at JFK Airport, and each day forward until his presentment before Magistrate Judge Dolinger on October 11, 2011. As set forth in the submission by Dr. Gregory B. Saathoff, the Government anticipates proving that the defendant does not suffer from bipolar disorder and was not experiencing manic episodes while

he was being questioned by agents. (*See* Attachment A, Forensic Psychiatric Evaluation of Dr. Gregory B. Saathoff).[4] The Government expects that law enforcement officials who were present for the defendant's waivers of prompt presentment will provide testimony that is consistent with Dr. Saathoff's expert opinion regarding the defendant's mental state, as well as evidence of the defendant's voluntary and knowing waivers.

3. There Was No Delay in Presenting the Defendant

The defendant argues that the delay in presenting the defendant was unreasonable and unnecessary. (Def. Mem. at 40-41). Because the defendant knowingly and voluntarily waived his right to prompt presentment from September 29, 2011 to October 10, 2011, whether the delay in presentment was "reasonable" pursuant to Section 3501 is irrelevant. *See, e.g.*, *Berkovich*, 932 F. Supp. at 588 ("Here, the Court declines to suppress statements made . . . because the Government has proved by a preponderance of the evidence that the defendant knowingly and voluntarily waived his right to a prompt presentment."). That said, in any event the delay in presenting the defendant was plainly reasonable. *See Cabrera*, 2008 WL 2803902, at *5 ("Delays attributable to a defendant's cooperation with law enforcement officials, particularly when the defendant has knowingly and voluntarily waived his right to speedy presentment, have been routinely found to be reasonable by the district courts in the Second Circuit.").

The defendant argues that the delay in his presentment was unreasonable because the delay's sole purpose was to interrogate the defendant. (*See* Def. Mem. at 40-41). The cases cited by the defendant in support of his argument are inapplicable because they involve circumstances where, as here, the defendant waived his right to prompt presentment. *See Corley*,

[4] The Government also expects to establish at the hearing that the conclusion of the defendant's neuropsychological expert, Dr. Joel Morgan, that the defendant suffers from bipolar disorder is without support. The Government also expects that a neuroradiologist will testify that Arbabsiar's MRI results from June 13, 2012 do not reveal brain abnormalities.

556 U.S. at 311 (addressing delay in presentment where no waiver obtained from defendant); *United States* v. *Perez*, 733 F.2d 1026, 1028 (2d Cir. 1984) (same). Setting aside the fact that the evidence at the hearing will show that the defendant validly waived his right to prompt presentment, as the defendant acknowledges, agents questioned Arbabsiar about possible co-defendants and also arranged for Arbabsiar to place recorded phone calls to a co-conspirator, which have been deemed reasonable causes for delay in presentment. *See Pena Ontiveros*, 547 F. Supp. 2d at 339 ("Delays attributable to routine processing, transportation, overnight lodging, *and a defendant's cooperation with authorities* have all been found by courts in the Second Circuit to be reasonable or 'excludable' under § 3501(c) or its predecessor, the *McNabb–Mallory* rule." (emphasis added)). Accordingly, statements made by the defendant more than six hours after he was taken into custody at JFK should not be suppressed. *Corley*, 556 U.S. at 322.

4. Dismissal of the Indictment is Not Appropriate

The defendant argues that dismissal of the Indictment is the appropriate remedy for a violation of the defendant's right to prompt presentment. (Def. Mem. at 41-42). Even assuming *arguendo* that the defendant's right to presentment without undue delay was violated, dismissal of the Indictment would not be an appropriate remedy. As the defendant is forced to concede, courts in this District have held that the remedy for a violation of Rule 5(a) is suppression of statements. *See, e.g.*, *United States* v. *DiGregorio*, 795 F. Supp. 630, 634 (S.D.N.Y. 1992) (denying defendant's motion to dismiss the indictment on grounds of a Rule 5(a) violation and holding that the remedy for a Rule 5(a) violation is "suppression of any prejudicial statements made during the period of pre-arraignment delay"); *United States* v. *Perez-Torribio*, 987 F. Supp. 245, 247 (S.D.N.Y. 1997) ("Unnecessary delay violations of Rule 5(a) warrant suppression of evidence."). The sole case cited by the defendant in support of his argument is

United States v. *Osunde*, 638 F. Supp. 171 (N.D. Cal. 1986), which has appropriately been criticized by other courts within the Ninth Circuit for its "sparse reasoning," *United States* v. *Cuenca-Vega*, No. Cr.10-00419 (SI), 2012 WL 1067393, at *3 (N.D. Cal. Mar. 28, 2012) (quoting *United States* v. *Savchenko*, 201 F.R.D. 503, 507 (S.D. Cal. May 18, 2001), is easily distinguishable, as it also involved a Speedy Trial Act violation which required dismissal of the indictment.

II. The Defendant Knowingly and Voluntarily Waived His *Miranda* Rights

The defendant also argues that he did not knowingly and voluntarily waive his *Miranda* rights. In support of his assertion, the defendant first argues that he was never read his *Miranda* rights. (Def. Mem. at 44). The defendant next argues that he could not have knowingly waived his *Miranda* rights given a multitude of factors, including his claimed mental illness and his mental state during the time when he was detained by agents. (*Id.* at 44-45). The Government submits that it will introduce evidence at the hearing that will establish that the defendant was advised of his *Miranda* rights each and every day he was detained. Moreover, as set forth in the accompanying report of Dr. Saathoff, and as will be demonstrated during the hearing, the defendant was capable of waiving his *Miranda* rights and knowingly and voluntarily did so each day he was questioned.

A. Applicable Law

When a confession is obtained by interrogation of a defendant who is in custody, the Government must demonstrate that the defendant was informed of, and validly waived, his Fifth Amendment rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). To prove a valid waiver of *Miranda* rights, the Government must show, by a preponderance of the evidence, that the defendant relinquished his rights voluntarily and that the defendant had a full awareness of the

right being waived and the consequences of waiving that right. *See Colorado* v. *Connelly*, 479 U.S. 157, 167-69 (1986); *United States* v. *Jaswal*, 47 F.3d 539, 542 (2d Cir. 1995). Where the totality of the circumstances reveals an uncoerced choice and the requisite level of comprehension, a court may conclude that *Miranda* rights have been waived. *See Moran* v. *Burbine*, 475 U.S. 412, 421 (1986). Factors that courts should consider when evaluating the totality of the circumstances include: (1) the conduct of the law enforcement officers, (2) the conditions of the interrogation, and (3) the background of the accused. *United States* v. *Valdez*, 16 F.3d 1324, 1329 (2d Cir. 1994) (citing *United States* v. *Anderson*, 929 F.2d 96, 99 (2d Cir.1991)). These circumstances are relevant, however, only as they pertain to the critical issue of whether the defendant's will was "overborne" by the conduct of law enforcement officers such that his statements cannot be deemed to be "the product of a rational intellect and a free will." *Lynumn* v. *Illinois*, 372 U.S. 528, 534 (1963) (citations omitted).

A confession is "involuntary" within the meaning of the Fifth Amendment 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) (quoting *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963)). Hence, a confession can be voluntary even when the defendant is seriously ill or has a diminished mental state, if it is made in the absence of police coercion. *See Connelly*, 479 U.S. at 167-69 (noting that "mental condition is surely relevant to an individual's susceptibility to police coercion," but holding that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'"); *United States* v. *Salameh*, 152 F.3d 88, 117 (2d Cir. 1998) ("'A diminished mental state is only relevant to the voluntariness inquiry if it made mental or

physical coercion by the police more effective.'") (quoting *United States* v. *Chrismon*, 965 F.2d 1465, 1469 (7th Cir. 1992)).

B. Discussion

The Government anticipates that the evidence at the hearing will establish that the defendant: (i) was advised of his *Miranda* rights daily; (ii) indicated that he understood his rights; (iii) was capable of making an informed decision as to whether to waive his rights; and (iv) waived his rights each day until he requested an attorney on October 10, 2011.

CONCLUSION

For the reasons set forth above, the Government respectfully submits that the defendant's motion to dismiss the Indictment fails as a matter of law and should be denied. In addition, the Government respectfully submits that based on the foregoing and the anticipated testimony at the suppression hearing, the defense motion to suppress should be denied.

Dated: New York, New York
October 3, 2012

Respectfully submitted,

PREET BHARARA
United States Attorney for the
Southern District of New York

By: _____/s/_____
Edward Y. Kim
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Assistant United States Attorneys

AFFIRMATION OF SERVICE

EDWARD Y. KIM, pursuant to Title 28, United States Code, Section 1746, hereby declares under the penalty of perjury:

That I am an Assistant United States Attorney in the Office of the United States Attorney for the Southern District of New York. That, on October 3, 2012, I caused copies of the Government's Memorandum of Law to be delivered by ECF and electronic mail to:

Sabrina Shroff, Esq.
Sabrina_Shroff@fd.org

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: New York, New York
October 3, 2012

_____/s/_____
Edward Y. Kim
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