

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----X

**UNITED STATES OF AMERICA**

- v. -

**BASHIR NOORZAI,**

**Defendant.**

**S1 05 Cr. 19 (LTS)**

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**GOVERNMENT’S MEMORANDUM IN OPPOSITION  
TO DEFENDANT BASHIR NOORZAI’S OMNIBUS MOTION**

**MICHAEL J. GARCIA  
United States Attorney for the  
Southern District of New York  
Attorney for the United States  
of America**

**BOYD M. JOHNSON III  
JOCELYN STRAUBER  
AMY FINZI  
Assistant United States Attorneys  
- Of Counsel -**

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: :  
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: :  
: Defendant. :  
: :  
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GOVERNMENT’S MEMORANDUM IN OPPOSITION  
TO DEFENDANT BASHIR NOORZAI’S OMNIBUS MOTION

The Government respectfully submits this memorandum in opposition to defendant Bashir Noorzai’s omnibus motion (1) to dismiss the indictment with prejudice; (2) to suppress statements; (3) to dismiss the indictment for lack of venue; (4) for a bill of particulars; and (5) to strike alleged surplusage from the indictment. As discussed below, based on the applicable law, and the undisputed facts in the record, the Court should deny Noorzai’s omnibus motion in its entirety without a hearing.

Noorzai’s motion to dismiss the indictment with prejudice must fail because even assuming, arguendo, that the DEA confidential sources (described below) assured Noorzai that he would not be arrested when he traveled to the United States, the confidential sources were not legally authorized to grant such immunity or to make such promises, and these assurances do not bind the Government to dismiss the indictment. Moreover, the cases cited by Noorzai binding the Government to such unauthorized promises are clearly distinguishable from the instant case.

Noorzai’s motion to suppress statements he made after his April 13, 2005, arrival in New York City fails because his statements at the Embassy Suites Hotel in Manhattan were the

product of consensual, noncustodial conversations with the agents. Notwithstanding the general assurances he claims to have received from the DEA confidential sources that he would not be arrested and would be permitted to return from the United States to Pakistan, Noorzai's noncustodial statements were legally voluntary. Moreover, although he was under indictment at the time of his statements, Noorzai's Sixth Amendment right to counsel was not violated because he was advised of and knowingly and voluntarily waived his Miranda rights before every conversation he had with the agents.

Noorzai's motions relating to venue, a bill of particulars, and surplusage all fail as a matter of law. As a result, Noorzai's omnibus motion should be denied in its entirety without a hearing.

## **I. Background**

### **A. The Indictment and Superseding Indictment**

On January 6, 2005, a grand jury in the Southern District of New York returned an indictment (the "Indictment") against Noorzai, charging him in one count. Count One charged Noorzai with participating in a conspiracy to distribute more than one kilogram of heroin outside the United States intending and knowing that the heroin would be imported into the United States, in violation of Title 21, United States Code, Sections 959, 960(a)(3), 960(b)(1)(A), and 963. (See Indictment 05 Cr. 19).

On April 7, 2005, the grand jury returned a superseding indictment (the "Superseding Indictment") against Noorzai, charging him in two counts. Count One charged Noorzai with participating in a conspiracy to distribute heroin outside the United States intending and knowing that the heroin would be imported into the United States, in violation of Title 21, United States

Code, Sections 959, 960(a)(3), 960(b)(1)(A), and 963. (See Indictment S1 05 Cr. 19 (“Sup. Ind.”)). Count Two charged Noorzai with participating in a conspiracy to distribute and possess with the intent to distribute more than one kilogram of heroin, in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A), and 846. (Id.).

\_\_\_\_\_ The Superseding Indictment describes in detail the means and methods of the narcotics conspiracies charged against Noorzai. It alleges that since in or about 1990, Noorzai led an international heroin-trafficking organization (the “Noorzai Organization”) responsible for manufacturing and transporting hundreds of kilograms of heroin in Afghanistan and Pakistan. The Superseding Indictment alleges that the Noorzai Organization then arranged for the heroin to be imported into the United States and other countries and sold for tens of millions of dollars. (See Sup. Ind. ¶ 4(a)).

According to the Superseding Indictment, during the course of the conspiracy, Noorzai controlled opium fields in Afghanistan where poppies were grown and harvested to generate opium. After the opium was harvested, Noorzai is alleged to have used laboratories in Afghanistan and Pakistan to process the opium into heroin. It is alleged that Noorzai and his co-conspirators then arranged to transport the heroin from Afghanistan into the United States and other countries. (Id. ¶ 4(b)).

The Superseding Indictment alleges that during the course of the conspiracy Noorzai was closely aligned with the Taliban in Afghanistan. It is alleged that the Noorzai Organization provided demolitions, weaponry, and manpower to the Taliban in Afghanistan. In exchange for its support, the Taliban provided the Noorzai Organization with protection for its opium crops, heroin laboratories, drug-transportation routes, and members and associates. (Id. ¶ 4(c)).

For both Counts One and Two, the Superseding Indictment details numerous, specific overt acts alleged to have been carried out by Noorzai and his co-conspirators. For example, the Superseding Indictment alleges: “In or about 1990, BASHIR NOORZAI, a/k/a ‘Haji Bashir Noorzai,’ the defendant, met with other co-conspirators not named as defendants herein in Karachi, Pakistan, and offered to provide quantities of heroin for distribution in New York.” (Id. ¶¶ 5(a), 8(a)). In addition, the Superseding Indictment alleges: “In or about 1990, co-conspirators not named as defendants herein met in New York, New York, and discussed receiving heroin from BASHIR NOORZAI, a/k/a “Haji Bashir Noorzai,” the defendant.” (Id. ¶¶ 5(b), 8(b)). The Superseding Indictment also alleges: “In or about 2001 and 2002, other co-conspirators not named as defendants herein imported heroin from Pakistan and Afghanistan into New York, New York.”) (Id. ¶¶ 5(f), 8(f)).

#### **B. The Production Of Discovery**

Beginning on June 24, 2005, the Government has produced extensive discovery, pursuant to Rule 16, to counsel for Noorzai. This discovery has included: the Indictment and the Superseding Indictment; documents from the United States Marshal’s Service; a pen register application and order; digital video disks (“DVDs”); compact discs (“CDs”) containing recordings of Noorzai’s statements in 2004; CDs containing judicially-authorized wiretap recordings from Romania between Noorzai and co-conspirators in 2004 and 2005; draft transcripts of these recordings; photographs; DEA Form 6s detailing Noorzai’s statements to agents in April 2005; Noorzai’s two written statements from April 2005; DEA Form 6s detailing Noorzai’s proffer statements; and waiver forms. In addition to these discovery materials, the Government also produced, at the request of defense counsel, redacted statements of witnesses

against Noorzai that far exceeded the Government's Rule 16 obligations. The Government produced these witness statements to Noorzai in order to assist him in preparing his defense.

### **C. Noorzai's Motions**

Noorzai moves to dismiss the Superseding Indictment with prejudice. He argues that because two DEA confidential sources, whom he knew as "Mike" and "Brian," promised him safe passage to and from the United States, he was essentially conferred immunity from the instant prosecution and should be returned "to the place he was prior to receiving the false promises – in his native Afghanistan." (See Noorzai's Omnibus Motion And Memorandum Of Law ("Noorzai Omnibus Motion") 23). Noorzai also moves to suppress statements he made to agents after his April 13, 2005, arrival in New York City.<sup>1</sup> (Id. at 28-35). Noorzai has submitted an affirmation in support of these motions. (See Bashir Noorzai Affirmation ("Noorzai Aff."), dated August 7, 2007).

In addition to the foregoing, Noorzai also moves to dismiss the Superseding Indictment for lack of venue. (See Noorzai Omnibus Motion at 35-38). Finally, Noorzai moves for a bill of particulars and to strike alleged surplusage from the Superseding Indictment. (See Noorzai's Discovery Motion And Memorandum Of Law ("Noorzai Discovery Motion") at 1).

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<sup>1</sup> Although Noorzai has moved to suppress statements he allegedly made before his April 13, 2005, arrival in New York City, the Government is not going to offer any such statements at any trial in this matter. As a result, the Government does not address the admissibility of any such statements in this brief.

## **II. Statement Of Facts**

### **A. Noorzai And His Claimed History With The U.S. Government**

Noorzai is a 44 year-old man who was born and raised in Afghanistan. (Noorzai Aff. ¶ 1).<sup>2</sup> He is the grandson of Haji Juma Khan Noorzai, the former Chief of the Noorzai Tribe, composed of more than a million people living throughout Southern and Western Afghanistan and the Baluchistan Province of Pakistan. (Id. ¶ 4). In 1982, Noorzai led his own front – called the Front of Haji Bashar – in the war between Afghanistan and the Soviet Union. The Front of Haji Bashar led by Noorzai ultimately grew to include 1,000 fighters. (Id. ¶ 12).

Beginning at the age of 20, Noorzai began handling all of the affairs of the Noorzai Tribe. (Id. ¶ 20.) In 1996, the Taliban occupied Kabul, and Noorzai agreed to disarm the Front of Haji Bashar and give the Front’s support to the Taliban. (Id. ¶ 19). In 2000, after the death of his father, Noorzai became the Chief of the Noorzai Tribe and its more than one million members. (Id. ¶ 20). In 2002, Noorzai fled Afghanistan for Pakistan based on his concerns for his own safety. (Id. ¶ 116). In his affirmation, Noorzai also describes a series of contacts he claims he had with U.S. Government representatives – some of which he depicts as having unpleasant results, see Noorzai Aff. ¶¶ 37-38, 50-52, 54,55 – before meeting with two men he knew as “Mike” and “Brian” in a hotel in Dubai on August 7, 2004. (See Noorzai Aff. ¶¶ 23-56).

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<sup>2</sup> While the Government is not in a position to verify the truth or falsity of a number of statements in Noorzai’s affidavit, several of those statements undermine his claims and are therefore cited to herein.

## **B. The DEA Confidential Sources**

In his affirmation, Noorzai describes a series of contacts he had with two Americans he knew as “Mike” and “Brian” beginning in August 2004. (See Noorzai Aff. ¶¶ 57-135).

According to Noorzai, in 2004, after speaking with Khalid Pashtun and Ahmad Wali Karzai, President Hamid Karzai’s brother, Noorzai was approached by “two friends.” (Id. ¶ 58). According to Noorzai, these friends told him that American representatives wanted to meet with him in Dubai, and that he should speak with the Americans so that he could return to his homes in Kandahar and Maiwand, Afghanistan, if he wanted. (Id. ¶ 59). Noorzai alleges that these communications resulted in him traveling to Dubai in August 2004 to meet with Mike and Brian. (Id. ¶ 60).

Noorzai first met with Mike and Brian on August 7, 2004, at a hotel in Dubai. (Id. ¶ 61). Mike stated that he and Brian had been working for the U.S. Government for many years, Mike with the Department of Defense and Brian with the FBI. Mike stated that he and Brian were working on a special project together “studying and ascertaining the financial support of the terrorists [sic] organizations in Afghanistan.” (Id. ¶¶ 62-63). Mike told Noorzai that the project “had nothing to do with arresting anyone or apprehending anyone.” (Id. ¶ 63).

Noorzai expressed a willingness to work with the Americans and the Karzai government, and told Mike and Brian that he wanted to talk “because there were people in power and with influence in Afghanistan and with the Americans who were saying bad things about [him] and making things difficult for [him] to be in Afghanistan.” (Id. ¶ 64). Noorzai discussed the people who he thought were negatively affecting his personal interests in Afghanistan by speaking “false rumours” about him. (Id. ¶ 68). At this first meeting, Noorzai told Mike that he would be

willing to come to the United States if it would be a “useful trip.” Mike responded that he thought it would be best for Noorzai’s meetings with American officials to occur in the United States, and that “arrangements would be made for [him] to be secure in making and returning from this trip.” (Id. ¶ 70).

The next day, August 8, 2004, Noorzai met again with Mike and Brian. (Id. ¶ 74). They discussed various issues relating to the Taliban, al Qaeda, and whether certain people in Afghanistan were involved in the opium business. At the end of the meeting, Mike and Brian inquired again about narcotics and opium production, including reports that Noorzai himself was involved in the business. (Id. ¶¶ 75-84). Mike and Brian “assured [Noorzai]” that their project “was not a counter narcotics project.” (Id. ¶ 85).

The following day, August 9, 2004, Noorzai met again with Mike and Brian in Dubai. (Id. ¶ 98). Mike and Brian began this meeting by asking him about a report that in 2004 Noorzai had conducted opium business from Pakistan and paid the Taliban for providing security to his drug consignments. Mike and Brian asked Noorzai a similar question about the year 2003. Noorzai denied that he had been so involved in the opium business. (Id.). Noorzai did admit to Mike and Brian that he was present with Gul Agha Sherzai, Khalid Pashtun, and others in 2002 in Dubai when Sherzai and Pashtun received briefcases of money as bribes from Dubai officials. (Id. ¶ 117-19). Mike and Brian questioned Noorzai again about allegations that he had been involved in drug smuggling during the Taliban regime. Noorzai repeated that he had “not worked in the narcotics business.” (Id. ¶ 120).

Towards the end of the August 9, 2004, meeting, Mike and Brian said that they would have to meet one more time before Noorzai “could travel to the United States to meet with

people superior to them.” Mike and Brian suggested that the next meeting could be in Pakistan or wherever Noorzai wanted. (Id. ¶ 123). Mike and Brian told him that after the next meeting “the official posture of the United States government would no longer be one seeking [his] apprehension for any reason, political or otherwise.” (Id. ¶ 124). Noorzai told Mike and Brian that he would travel to the United States and “do whatever was in [his] reach to cooperate with the Americans.” (Id. ¶ 127).

Noorzai next met with Mike and Brian on September 16, 2004, in Peshawar, Pakistan. (Id. ¶ 128). Mike and Brian asked Noorzai about various Taliban commanders, and his knowledge of certain Afghan leaders who were working with the Americans and the Karzai government. They discussed their project to study and impede the flow of money to the Taliban resistance and al Qaeda, and that Noorzai could put them in touch with people with relevant knowledge based on the fact that Noorzai was “a person of a certain financial stature.” (Id. ¶130, 132).

Mike and Brian discussed the possibility of a meeting the following week in Dubai with a U.S. Defense Department representative from Afghanistan and an FBI representative from Washington, D.C. (Id. ¶ 133). Mike and Brian said that after this meeting Noorzai would travel to the United States for two weeks to meet with other U.S. Government representatives to discuss Noorzai’s role in helping the United States with the Taliban leaders in Afghanistan. (Id. ¶ 134). At some point in this meeting, Noorzai expressed his concern about “safe passage to and from the United States, and the possibility that [Mike and Brian] were trying to set him up . . .” (Id. ¶135). Mike and Brian promised him that he would be “allowed to come to the United States, meet with important government officials, and then return to Pakistan.” (Id.).

As discussed in the attached Affirmation of DEA Special Agent Patrick Hamlette, attached hereto as Exhibit A, approximately six months after this meeting, in March 2005, the DEA began working with Mike and Brian (hereinafter referred to collectively as the “CSs”) as DEA confidential sources in connection with the investigation of Noorzai and his drug-trafficking organization. (See Affirmation of DEA Special Agent Patrick Hamlette, dated November 9, 2007 (“Hamlette Aff.”) ¶ 3). On or about April 13, 2005, after working with DEA to obtain the necessary U.S. visa paperwork and airplane tickets, the CSs traveled on a commercial airliner from Dubai to New York City with Noorzai and two of Noorzai’s associates. (Id.).

**C. Noorzai’s Arrival In New York City**

At approximately 2:10 p.m., on April 13, 2005, DEA Special Agent Patrick Hamlette, among other agents, met Noorzai and two of his associates at JFK Airport in Queens, New York. (Id. ¶ 4). Agent Hamlette identified himself to Noorzai as an employee of the Department of Justice, and arranged for transportation for Noorzai from JFK to the Embassy Suites Hotel, located at 102 North End Avenue in Manhattan.

Beginning at approximately 2:40 p.m., Agent Hamlette and other agents drove Noorzai to the Embassy Suites Hotel. A translator who spoke Noorzai’s language accompanied Agent Hamlette and Noorzai during the trip from JFK Airport to the hotel. During the trip, Agent Hamlette asked Noorzai how he felt. Noorzai responded that he felt good and was eager to speak. Agent Hamlette asked Noorzai if he was tired or hungry. He responded that he was not hungry because he was well fed on the flight to the United States, and had received plenty of rest. Noorzai also stated that he was ready and willing to speak with Agent Hamlette and the other

agents. Agent Hamlette and another agent then engaged Noorzai in conversation regarding the weather, the Borough of Manhattan, and New York road conditions. During the conversations in the car, it was clear to Agent Hamlette that Noorzai was intelligent, alert, and understood the subject matter of their conversations. (Id.).

During the trip, Agent Hamlette informed Noorzai that arrangements had been made for Afghan foods to be delivered to his hotel. (Id. ¶ 5). Noorzai thanked Agent Hamlette, and stated that he was eager to speak with him and the other agents. At approximately 3:00 p.m., while in the car, Agent Hamlette advised Noorzai of his Miranda rights through the translator. Noorzai stated that he understood his rights, and that the reason he had decided to leave his Quetta, Pakistan, residence and travel to the United States was to meet with U.S. Government officials and speak about a variety of issues concerning Afghanistan. Noorzai also stated that he was willing to stay in the hotel to speak to U.S. Government officials for as long as necessary. Agent Hamlette told Noorzai that he should notify him or another agent if he needed anything while in the hotel. (Id.).

#### **D. The Embassy Suites Hotel**

During the eleven days that Noorzai stayed at the Embassy Suites Hotel on North End Avenue in Manhattan (the “Hotel”), from April 13-23, 2005, there were at various times a number of federal agents inside the Hotel. (Id. ¶ 6). During the conversations with Noorzai described below, however, there was never more than one other agent and Agent Hamlette, along with a translator, present with Noorzai. With respect to the translators, at no point during Agent Hamlette’s conversations with Noorzai did Noorzai ever indicate any problem understanding the translators or what was being discussed. These conversations always took place inside Noorzai’s

hotel room. During these conversations, Noorzai chose where he sat in the room, and was free to stand up, walk around the room, use the bathroom, or even smoke cigarettes. The conversations were not accusatory in any fashion; Agent Hamlette never demanded answers from Noorzai, but instead engaged in a free flow of information in conversational tones through the translator. Moreover, at no time after Agent Hamlette provided Noorzai with his Miranda warnings did Noorzai state that he did not understand the warnings, or indicate that he believed that the warnings were somehow subject to the no-arrest promise – or any other promise – he had received from the CSs before traveling to the United States. Nor did Agent Hamlette ever make any promises to Noorzai that he would not be arrested in the United States or that he would be permitted to leave the United States and travel to any other country. (Id. ¶ 5).

During his stay at the Hotel, Noorzai had unlimited access in his room to a laptop with Internet service and a telephone. He also was permitted to maintain possession of the passport he had used to travel from Dubai to New York inside his room. (Id.).

At no time in the Hotel from April 13-23, 2005, in Noorzai's presence or otherwise, did Agent Hamlette ever display his weapon, nor did he observe any other agent do so. (Id. ¶ 7). Agent Hamlette never physically touched Noorzai in a forceful way, nor did he observe any other agent do so. Agent Hamlette never raised his voice to Noorzai, nor did he observe any other agent do so. Agent Hamlette never took custody of Noorzai's personal effects, nor did he observe any other agent do so. Until his arrest on April 23, 2005, Agent Hamlette never requested that Noorzai accompany him to any law enforcement office, nor did Agent Hamlette observe any other agent do so. Agent Hamlette never stayed with Noorzai overnight in his hotel room, nor did he observe any other agent do so. (Id.).

## **1. Noorzai's Arrival At The Embassy Suites Hotel**

Upon first arriving at the Hotel on April 13, 2005, Agent Hamlette and other agents showed Noorzai and his two associates their hotel rooms, and provided them with food in one of the rooms. (Id. ¶ 8). During the meal, Noorzai told Agent Hamlette, through the translator, that he was glad he had traveled to the United States. Agent Hamlette advised Noorzai that as a Department of Justice employee, he was eager to speak with Noorzai, and that the next several days would involve lengthy conversations. Noorzai told Agent Hamlette that he was ready to speak for as long as necessary, and that, when ready, the other agents and Agent Hamlette could go to his room to begin the talks. After the meal, Noorzai went into his hotel room alone. (Id.).

## **2. The April 13-16, 2005, Conversations**

At approximately 7:35 p.m., on April 13, 2005, Agent Hamlette and another agent, accompanied by a translator, went to Noorzai's room. (Id. ¶ 9). Agent Hamlette knocked on the door and asked Noorzai if he wanted to speak. Noorzai stated that he wanted to speak, and invited Agent Hamlette and the others into his room. Upon entering Noorzai's room, Agent Hamlette observed one of Noorzai's associates seated in a chair. Noorzai stated that it was fine to begin the conversations with his associate present. Agent Hamlette and the other agent then engaged Noorzai in conversation through the translator. Noorzai's associate remained for the conversation. Agent Hamlette, the other agent, and Noorzai discussed, among other things, the location of various individuals within Afghanistan and Pakistan, the land Noorzai owned in Afghanistan, and the fact that Noorzai believed he could get his tribe to stop growing opium. During the conversation, Noorzai stated, among other things, that he expected the U.S. Government to provide him with a major role in controlling Afghanistan. (Id.).

At approximately 10:40 p.m., Noorzai accompanied Agent Hamlette and two other agents outside the Hotel to the vicinity of West Street and Murray Street. (Id. ¶ 10). During this time, Agent Hamlette and the other agents showed Noorzai the New Jersey skyline. Noorzai then spent the rest of the night in his room. (Id.).

At approximately 8:00 a.m., on April 14, 2005, Agent Hamlette and another agent accompanied Noorzai to breakfast in the lobby of the Hotel. (Id. ¶ 11). During this time, Agent Hamlette and Noorzai had general conversation about the food with the assistance of a translator. After breakfast, Noorzai told Agent Hamlette and the other agent that they could come to his room and speak when ready. Agent Hamlette thanked Noorzai and asked him if 9:35 a.m. was a convenient time to begin the conversation. Noorzai agreed, was accompanied back to his room by Agent Hamlette and another agent, and then went into his room alone. (Id.).

At approximately 9:30 a.m., Agent Hamlette and another agent, accompanied by a translator, arrived at Noorzai's room. (Id. ¶ 12). Agent Hamlette knocked on Noorzai's door, and Noorzai opened the door. Noorzai invited Agent Hamlette and the others into his room. At approximately 9:35 a.m., Agent Hamlette advised Noorzai of his Miranda rights through the translator. Noorzai stated that he understood his rights and wanted to speak about the issues he came to the United States to discuss. Noorzai then stated that he did not want a lawyer. Agent Hamlette and the other agent then had a conversation with Noorzai about a variety of topics. They discussed, among other things, Noorzai's family, Noorzai's land in Afghanistan, and Noorzai's involvement in the war with the Soviet Union. (Id.).

At approximately 12:00 p.m., Noorzai ate lunch. (Id. ¶ 13). Noorzai then relaxed in his room alone. At approximately 5:00 p.m., Noorzai ate dinner. (Id.). At approximately 7:30 p.m.,

Agent Hamlette and another agent resumed their conversation with Noorzai in his room through an interpreter. (Id. ¶ 14). At the beginning of the resumed conversation, Noorzai thanked Agent Hamlette and the other agent, through the interpreter, for their hospitality. Noorzai stated that he was enjoying his stay in the United States. The agents then had a conversation with Noorzai about a variety of topics, including the relationship between the Taliban and officials from Saudi Arabia and the United Arab Emirates. Noorzai then spent the rest of the night in his room. (Id.).

\_\_\_\_\_ At approximately 8:30 a.m. on April 15, 2005, Agent Hamlette and another agent, along with a translator, accompanied Noorzai to breakfast at the Hotel. (Id. ¶ 15). During breakfast, Noorzai told Agent Hamlette and the other agent, through the translator, that he was enjoying his time in the United States. After breakfast, Noorzai told Agent Hamlette that he wanted to rest in his room and begin conversations at 10:30 a.m. Noorzai was accompanied back to his room by Agent Hamlette and another agent, and then went into his room alone. (Id.).

At approximately 10:40 a.m., Agent Hamlette knocked on the door to Noorzai's room. (Id. ¶ 16). Agent Hamlette was accompanied by another agent and a translator. Shortly thereafter, Noorzai answered the door, smiled, and invited Agent Hamlette and the others inside. Once inside the room, Agent Hamlette advised Noorzai of his Miranda rights through the translator. Noorzai responded that he understood his rights, did not want a lawyer present because he was in the United States to speak with the U.S. Government on his own wishes, and that he wanted to continue to speak to Agent Hamlette and the other agent. Agent Hamlette and the other agent then had a conversation with Noorzai about a variety of topics. The agents and Noorzai discussed, among other things, the Taliban and various Taliban leaders. (Id.).

At approximately 12:00 p.m., Agent Hamlette asked Noorzai if he wanted to have lunch. (Id. ¶ 17). Noorzai declined, and stated that he wanted to continue the conversation. Agent Hamlette and the other agent then continued their conversation with Noorzai. They discussed, among other things, a meeting between Noorzai and Mullah Mohammad Omar in Kandahar, Afghanistan, in 2001, at which Noorzai agreed to provide 400 men from his army to Omar. At approximately 12:45 p.m., Noorzai ate lunch. Agent Hamlette and the other agent resumed their conversation with Noorzai at approximately 5:00 p.m. They discussed, among other things, Noorzai's relationship with Ahmad Wali Karzai. At approximately 5:30 p.m., Noorzai had dinner. Agent Hamlette and the other agent resumed their conversation with Noorzai at approximately 6:30 p.m. They discussed, among other things, various crops, including opium, grown on Noorzai's land in Afghanistan. At approximately 7:00 p.m., the conversation with Noorzai ended. Agent Hamlette and two other agents then went outside the Hotel with Noorzai and walked together in the vicinity of North End Avenue. Noorzai then spent the rest of the night in his room. (Id.).

At approximately 8:30 a.m., on April 16, 2005, Agent Hamlette and another agent, accompanied by a translator, went to Noorzai's room. (Id. ¶ 18). Agent Hamlette knocked on the door. A short time later, Noorzai answered the door, and stated, through the translator, that he was not ready for breakfast and to return at 9:00 a.m. (Id.).

At approximately 9:00 a.m., Agent Hamlette and another agent, along with the interpreter, returned to Noorzai's room and accompanied him to breakfast inside the Hotel. (Id. ¶ 19). During breakfast, Noorzai stated, through the interpreter, that he was enjoying himself in

New York and that he was happy to be the guest of the U.S. Government. After breakfast, Noorzai was accompanied back to his room and went inside alone. (Id.).

At approximately 10:15 a.m., Agent Hamlette and another agent, accompanied by a translator, went to Noorzai's hotel room. (Id. ¶ 20). Agent Hamlette knocked on the door. Noorzai answered the door and invited Agent Hamlette and the others inside the room. Once inside, Agent Hamlette advised Noorzai of his Miranda rights through the translator. Noorzai stated that he understood his rights, did not want a lawyer present during the conversations and wanted to speak. Agent Hamlette and the other agent then had a conversation with Noorzai about a variety of topics. They discussed, among other things, the opium trade in Afghanistan and Noorzai's relationship with Gul Agha Sherzai. (Id.).

At approximately 12:00 p.m., Agent Hamlette asked Noorzai if he wanted lunch. (Id. ¶ 21). Noorzai replied that he was not hungry and would inform Agent Hamlette and the other agent when he was ready to eat. Agent Hamlette and the other agent then continued their conversation with Noorzai. They discussed, among other things, the opium trade in Afghanistan, the Noorzai family structure, the hawala money transfer system, and the location of various Taliban leaders. During this conversation, Noorzai stated that if he were given a position in the Afghan government, he would be willing to go back to Afghanistan and tell his tribe to stop growing opium. At approximately 2:30 p.m., Noorzai stated that he was ready for lunch, and lunch was served to Noorzai. (Id.).

The conversation resumed at approximately 6:00 p.m. (Id. ¶ 22). The agents and Noorzai discussed, among other things, the location of various Taliban leaders. At approximately 6:30 p.m., Agent Hamlette asked Noorzai if he wanted dinner. Noorzai responded that he would be

ready at 7:00 p.m. Dinner was ordered for Noorzai at approximately 7:00 p.m., and Noorzai had dinner in his room. The conversation resumed at approximately 8:00 p.m. After the conversations ended, Noorzai then spent the rest of the night in his room. (Id.).

### **3. The April 17-20, 2005, Conversations And Written Statements**

At approximately 8:30 a.m., on April 17, 2005, Agent Hamlette and another agent, along with a translator, went to Noorzai's room to accompany him to breakfast. (Id. ¶ 23). Agent Hamlette knocked on the door to Noorzai's room. Noorzai answered the door, and stated through the interpreter that he needed a few minutes before leaving his room. Noorzai then closed his door, and Agent Hamlette and the others remained in the hallway. A few minutes later, Noorzai came out of his hotel room, and Agent Hamlette and the others accompanied him to breakfast. During breakfast, Noorzai said that he was enjoying himself as the U.S. Government's guest, and that he wanted to stay in the United States to continue his dialogue. (Id.).

After breakfast, Noorzai was accompanied back to his room by Agent Hamlette and another agent, and told Agent Hamlette and the other agent that he wanted to speak in approximately 40 minutes. (Id. ¶ 24). Noorzai entered his room alone. (Id.).

Approximately 40 minutes later, Agent Hamlette and another agent, accompanied by a translator, returned to Noorzai's room. (Id. ¶ 25). Agent Hamlette knocked on the door. Noorzai answered, and he invited Agent Hamlette and the others in the room. At approximately 10:45 a.m., Agent Hamlette advised Noorzai of his Miranda rights through the translator. Noorzai stated that he was a guest of the U.S. Government, that he came to the United States to speak to the U.S. Government about drugs and terrorism issues, that he understood his rights and

did not want a lawyer, and knew that he could stop the conversations at any time. Agent Hamlette and the other agent then had a conversation with Noorzai about a variety of topics. (Id.).

During the course of this conversation, Noorzai, Agent Hamlette, and the other agent discussed issues relating to opium in Afghanistan. (Id. ¶ 26). In addition to discussing these issues verbally, Noorzai provided an explanation in a signed, handwritten statement. This written statement is attached to the Affirmation of DEA Special Agent Hamlette as Exhibit 1. At the bottom of this handwritten statement immediately above Noorzai's signature is the following language:

I Bashir Noorzai provide this written statement on 04-17-05 at approximately 2:00 p.m. at the Embassy Suites, Manhattan, NY of my own free will. I have not been promised anything, nor harmed or threatened.

(See Exhibit 1 to Hamlette Aff.). This language was translated for Noorzai before he signed the statement. (Hamlette Aff. ¶ 26).

At approximately 12:00 p.m., Agent Hamlette asked Noorzai if he wanted lunch. (Id. ¶ 27). Noorzai stated that he would be ready to eat in 40 minutes. At approximately 12:40 p.m., lunch was served to Noorzai. Agent Hamlette and the other agent resumed their conversation with Noorzai at approximately 2:00 p.m. The agents and Noorzai discussed, among other things, Noorzai's payment of money to the Taliban from his opium proceeds. At approximately 3:05 p.m., the conversation ended. Noorzai stated that he would be ready for dinner at 4:00 p.m. At approximately 4:00 p.m., dinner was served to Noorzai. The conversation resumed at approximately 5:05 p.m., and ended at approximately 7:30 p.m. During these conversations, the agents and Noorzai discussed, among other things, Mullah Mohammad Omar providing Taliban

leaders with large sums of cash when he went into hiding after the U.S. invasion of Afghanistan. Noorzai then informed Agent Hamlette and the other agent that he was comfortable and would notify them if he needed anything. Noorzai then spent the rest of the night in his room. (Id.).

At approximately 8:30 a.m., on April 18, 2005, Agent Hamlette and another agent, along with a translator, accompanied Noorzai to breakfast inside the Hotel. (Id. ¶ 28). After breakfast, Noorzai was accompanied back to his room, and went inside alone. (Id.).

At approximately 2:10 p.m., Agent Hamlette and another agent, accompanied by a translator, arrived at Noorzai's room. (Id. ¶ 29). Noorzai invited Agent Hamlette and the others inside his room. Once inside his room, Agent Hamlette advised Noorzai of his Miranda rights through the translator. Noorzai responded that he understood his rights, did not want a lawyer, and wanted to continue his conversations with the agents. Agent Hamlette and the other agent then had a conversation with Noorzai about a variety of topics. They discussed, among other things, the role of Abdul Rashid in managing Noorzai's properties in Afghanistan. At approximately 4:30 p.m., the conversations ended, and Noorzai had dinner. Noorzai then spent the rest of the night in his room. (Id.).

\_\_\_\_\_At approximately 8:30 a.m., on April 19, 2005, Agent Hamlette and another agent, accompanied by a translator, went to Noorzai's hotel room. (Id. ¶ 30). Agent Hamlette knocked on the door, and Noorzai answered the door. Agent Hamlette and the other agent exchanged pleasantries with Noorzai, and he said that he would be ready for breakfast in one hour. (Id.).

Approximately one hour later, Agent Hamlette and another agent, along with a translator, accompanied Noorzai to breakfast inside the Hotel. (Id. ¶ 31). During breakfast, Noorzai stated

that he was enjoying the food in the United States and his conversations with the agents. After breakfast, Noorzai was accompanied back to his room and went inside alone. (Id.).

At approximately 12:00 p.m., Agent Hamlette and another agent, along with a translator, went to Noorzai's hotel room. (Id. ¶ 32). Agent Hamlette knocked on the door, and Noorzai answered. Agent Hamlette asked Noorzai if he wanted to speak, and Noorzai invited Agent Hamlette and the others into his room. After entering the room, Agent Hamlette advised Noorzai of his Miranda rights through the translator. Noorzai stated that he understood his rights, did not want a lawyer and that he took the time to travel to the United States because he wanted to speak to U.S. Government officials. Agent Hamlette and the other agent then had a conversation with Noorzai about a variety of topics. They discussed, among other things, Noorzai's family and his opium fields. (Id.).

During the course of this conversation, Noorzai and Agent Hamlette discussed various issues relating to opium in Afghanistan. (Id. ¶ 33). In addition to discussing these issues verbally, Noorzai provided an explanation in a signed, handwritten statement. This second, written statement is attached as Exhibit 2 to the Affirmation of Special Agent Hamlette. At the bottom of this handwritten statement immediately above Noorzai's signature is the following language:

I Bashir Noorzai, provide this written statement, on [sic] my own free will on 04-19-05 at approximately 1:50 p.m. at the Embassy Suites, Manhattan, NY and was not threatened, or promised anything.

(See Exhibit 2 to Hamlette Aff). This language was translated for Noorzai before he signed the statement. (Hamlette Aff. ¶ 33).

At approximately 3:00 p.m., Noorzai said that he was ready for lunch. (Id. ¶ 34).

Noorzai's lunch selection was placed with the Hotel, and subsequently delivered to his room.

Noorzai ate lunch in his room. (Id.).

Agent Hamlette, the other agent and Noorzai resumed their conversations at approximately 5:00 p.m. (Id. ¶ 35). They discussed, among other things, the fact that in or about 2001 Mullah Mohammad Omar turned the command of Kandahar, Afghanistan, over to Noorzai. At approximately 6:45 p.m., the conversation ended. The conversation resumed again at approximately 7:05 p.m. The agents and Noorzai discussed, among other things, individuals whom Noorzai had heard were money exchangers. Noorzai stated that he would be ready for dinner at approximately 8:00 p.m. At that time, the conversation ended, and Noorzai was served dinner in his room. Noorzai stated that he was comfortable, and that he would notify Agent Hamlette or the other agent if anything was needed. Noorzai spent the rest of the night in his room. (Id.).

At approximately 12:30 p.m., on April 20, 2005, after Noorzai had eaten breakfast inside the Hotel, Agent Hamlette and another agent, accompanied by a translator, went to Noorzai's room. (Id. ¶ 36). Noorzai answered the door, pleasantries were exchanged and Noorzai invited Agent Hamlette and the others into his room. Inside the room, Agent Hamlette advised Noorzai of his Miranda rights through the translator. Noorzai responded that he understood his rights, did not want a lawyer and that he wanted to speak with Agent Hamlette and the other agent. Agent Hamlette and the other agent then had a conversation with Noorzai about a variety of topics. They discussed, among other things, Noorzai's travel to Karachi, Pakistan, during the 1990s. (Id.).

During these conversations, Noorzai stated, among other things, that he had come to the United States willingly with his two associates to discuss Noorzai's future position in Afghanistan. (Id. ¶ 37). Noorzai also stated that he wanted to give one of his associates a position in the Afghanistan Government. Noorzai informed Agent Hamlette and the other agent that he was a guest of the U.S. Government and was enjoying the hospitable treatment he was receiving. (Id.).

Agent Hamlette asked Noorzai if he was ready for lunch. (Id. ¶ 38). Noorzai responded that he was going to pray and would be ready in approximately 30 minutes. Agent Hamlette and the other agent left Noorzai alone in his room so that he could pray. Approximately 30 minutes later, lunch was served to Noorzai in his room. The conversations ended for the day. At approximately 6:00 p.m., Noorzai ate dinner. Noorzai spent the rest of the night in his room. (Id.).

#### **4. April 21, 2005**

At approximately 8:30 a.m., on April 21, 2005, Noorzai ate breakfast with an agent and a translator inside the Hotel. (Id. ¶ 39). After breakfast, Noorzai was accompanied back to his room and went inside alone. (Id.).

At approximately 12:00 p.m., Noorzai was served lunch. (Id. ¶ 40). Later in the afternoon, Noorzai was given a different room in the Hotel. Noorzai was served dinner at approximately 6:00 p.m. While Noorzai was being served dinner, he told Agent Hamlette through a translator that he was enjoying himself as a guest of the U.S. Government. Aside from those related to food orders, agents did not have any other conversations with Noorzai on April 21, 2005. (Id.).

## 5. The April 22-23, 2005, Conversations

At approximately 8:30 a.m., on April 22, 2005, another agent and a translator accompanied Noorzai to breakfast inside the Hotel. (Id. ¶ 41). After breakfast, Noorzai was accompanied back to his room and went inside alone. (Id.).

At approximately 10:45 a.m., Agent Hamlette and another agent, accompanied by a translator, went to Noorzai's hotel room. (Id. ¶ 42). Agent Hamlette knocked on the door. Noorzai answered the door, pleasantries were exchanged and Noorzai invited Agent Hamlette and the others inside. Agent Hamlette then advised Noorzai of his Miranda rights through the translator. Noorzai responded that he understood his rights, was a guest of the U.S. Government, was enjoying his visit and wanted to continue speaking with Agent Hamlette and the other agent. (Id.).

Noorzai then told Agent Hamlette that he had attempted to call his family; however, the call did not go through, and he wanted assistance. (Id. ¶ 43). Noorzai then provided Agent Hamlette with the telephone number in Pakistan he wanted to call, and said that he was trying to contact his cousin. Agent Hamlette asked Noorzai if he would mind if Agent Hamlette, the other agent and the translator remained in the room during his telephone conversation with his cousin. Noorzai said that Agent Hamlette and the others were welcome to be present for his telephone conversations. (Id.).

At approximately 10:51 a.m., Agent Hamlette placed a telephone call to the number in Pakistan that Noorzai had provided. (Id. ¶ 44). A few minutes later, Agent Hamlette placed another telephone call for Noorzai to a different number in Pakistan, and Noorzai spoke with his cousin. Noorzai told his cousin that he was in the United States meeting with U.S. Government

officials, and that the meetings were going well. Noorzai then asked his cousin for a telephone number for Noorzai's brother. Noorzai's cousin told Noorzai to call him back in five minutes. The telephone call ended at approximately 10:57 a.m. Agent Hamlette and the other agent then spoke with Noorzai about various members of Noorzai's family. (Id.).

At approximately 11:26 a.m., Agent Hamlette placed another call from Noorzai's telephone room to Noorzai's cousin in Pakistan. (Id. ¶ 45). Noorzai told his cousin that he was well. Noorzai obtained a telephone number for his brother in Pakistan. At approximately 11:30 a.m., Noorzai used the Hotel telephone to call his brother in Pakistan. During the conversation, Noorzai told his brother that he was doing well in the United States, and that his two associates would be arriving in Pakistan without him because Noorzai had more work to do with the U.S. Government. Noorzai then asked to speak with his mother, and Noorzai's mother got on the phone. Noorzai told his mother that he was fine, that he was busy with work, and that he had not yet scheduled a departure date. Noorzai told his mother that his two associates would be arriving in Pakistan without him because he had work to do with the U.S. Government. At approximately 11:45 a.m., Noorzai's telephone conversation ended. (Id.).

After Noorzai's telephone conversation with his brother and mother, the agents' conversations with Noorzai ended for the day. (Id. ¶ 46). At approximately 12:00 p.m., Noorzai told Agent Hamlette that he would be ready for lunch at approximately 12:30 p.m. At approximately 12:35 p.m., Noorzai was served lunch. At approximately 5:30 p.m., Noorzai was served dinner. Noorzai spent the rest of the night in his room. (Id.).

At approximately 8:30 a.m., on April 23, 2005, Noorzai was served breakfast inside the Hotel. (Id. ¶ 47). After breakfast, Noorzai was accompanied back to his hotel room and went inside alone. (Id.).

At approximately 11:12 a.m., Agent Hamlette and another agent, accompanied by a translator, went to Noorzai's hotel room. (Id. ¶ 48). Agent Hamlette knocked on the door to the room, and Noorzai answered. They exchanged pleasantries, and Noorzai invited Agent Hamlette and the others inside the room. Agent Hamlette told Noorzai that the other agent with him, who had not previously been involved in the conversations with Noorzai, was a Department of Justice employee. At approximately 11:18 a.m., Agent Hamlette advised Noorzai of his Miranda rights through the translator. Noorzai responded that he understood his rights, did not want a lawyer and that he wanted to speak with Agent Hamlette and the other agent. Agent Hamlette and the other agent then spoke with Noorzai about various topics. At approximately 11:45 a.m., the conversation with Noorzai ended, and the agents left his room. (Id.)

**E. The April 23, 2005, Arrest And Waiver Of Speedy Presentment**

Based on the answers Noorzai had provided to a number of questions posed in the immediately preceding days, by April 23, 2005, Agent Hamlette had determined that Noorzai was not being completely truthful. Agent Hamlette therefore believed that further conversations with Noorzai regarding his future cooperation were not likely to be productive. Accordingly, at approximately 12:30 p.m., on April 23, 2005, Agent Hamlette and another agent, accompanied by a translator, went back to Noorzai's room. (Id. ¶ 49). Agent Hamlette knocked on the door to the room and was greeted by Noorzai, who invited Agent Hamlette and the others inside. Once inside the room, Agent Hamlette advised Noorzai that Agent Hamlette and the other agent were

Special Agents with the DEA, and that Noorzai was under arrest, pursuant to an arrest warrant, for violating U.S. narcotics laws. (Id.).

Agent Hamlette then read Noorzai, with the assistance of the translator, a Waiver of Speedy Presentment Form. (Id. ¶ 50). Noorzai stated that he understood his right to a speedy presentment before a judge, and that he chose to waive this right. Noorzai signed the form, and stated that he had voluntarily traveled to the United States to meet with U.S. Government officials. (Id.). The signed waiver form is attached to the Affirmation of Special Agent Hamlette as Exhibit 3.

Shortly thereafter, other agents entered Noorzai's room. (Id. ¶ 51). Agent Hamlette and other agents placed handcuffs on Noorzai, and conducted a search of his person. Agent Hamlette and another agent then transported Noorzai to the DEA office located at 99 10<sup>th</sup> Avenue in Manhattan for processing. (Id.).

After arriving at the DEA office, Agent Hamlette and other agents processed Noorzai. (Id. ¶52). After processing, Agent Hamlette asked Noorzai through a translator if he wanted to speak or had any questions about his current situation. Noorzai stated that he did not know anyone in the United States, and he did not know what lawyer would represent him. Noorzai then stated that he did not want to say anything outside the presence of a lawyer. Agent Hamlette then provided Noorzai with several blankets and a bottle of water. No other questions were asked of Noorzai, other than questions regarding his meal orders. Because April 23, 2005, was a Saturday, and Manhattan federal court was closed, the DEA held Noorzai at the DEA office until his presentment in court on Monday, April 25, 2005. (Id.).

#### **F. Noorzai's Post-Arrest Statements**

On April 24, 2005, while in custody at the DEA office in Manhattan, Noorzai initiated conversation with Agent Hamlette. (Id. ¶ 53). Because Agent Hamlette could not understand what Noorzai was saying, he asked for assistance from a translator. After the translator arrived, Noorzai told Agent Hamlette through the translator that he wanted to speak with the agent without an attorney. Noorzai stated that he came to the United States to assist the U.S. Government. Agent Hamlette reminded Noorzai that the day before he had told him that he did not want to speak without his attorney. Agent Hamlette then advised Noorzai of his Miranda rights through the translator. Noorzai responded that he understood his rights and that he wanted to speak with Agent Hamlette without a lawyer present. Another agent then removed Noorzai from the holding cell where he was located, and they went to an interview room. (Id.).

In the interview room, at approximately 11:02 a.m., Agent Hamlette again advised Noorzai of his Miranda rights through the translator. (Id. ¶ 54). Noorzai responded that he understood his rights, did not want a lawyer present during questioning and wanted to speak with Agent Hamlette. Noorzai then signed a written Miranda waiver form. This form is attached to the Affirmation of Special Agent Hamlette as Exhibit 4. Noorzai then made various statements about the heroin business in Afghanistan. At approximately 3:20 p.m., Noorzai requested an attorney. Agent Hamlette immediately terminated the interview, and returned Noorzai to his holding cell. (Id.).

#### **G. The April 25, 2005, Presentment**

On Monday, April 25, 2005, Agent Hamlette and other agents transported Noorzai from the DEA office to Manhattan federal court, 500 Pearl Street, for his presentment. (Id. ¶ 55). At

approximately 3:35 p.m., Noorzai appeared before the Honorable Douglas F. Eaton, United States Magistrate Judge for the Southern District of New York. Magistrate Judge Eaton ordered Noorzai detained. The U.S. Marshals Service then took custody of Noorzai. (Id.).

## A R G U M E N T

### **I. The Indictment Should Not Be Dismissed With Prejudice**

Noorzai seeks to dismiss the Superseding Indictment with prejudice on the theory that the CSs' assurances of safe passage made to Noorzai outside the United States before he voluntarily traveled to New York on April 13, 2005, prevent the Government from proceeding with the instant prosecution and require the extraordinary measure of dismissal. (See Noorzai Omnibus Motion 11-23, 32-33). The applicable case law, however, contradicts Noorzai's theory that the CSs, even presenting themselves as federal agents, had authority to bind the United States to the promises that they made to Noorzai and to therefore require the Government to abandon this prosecution. Moreover, the cases cited by Noorzai in which courts have enforced certain unauthorized promises are clearly distinguishable from the present case. As a result, Noorzai's motion to dismiss the Superseding Indictment with prejudice should be denied.

#### **A. Applicable Law**

“It is well settled that the government may in its discretion make agreements in which it exchanges various levels of immunity from prosecution for the defendant's cooperation.” United States v. Rudaj, No. 04 Cr. 1110 (DLC), 2005 WL 2508404 at \*2 (S.D.N.Y. Oct. 11, 2005) (quoting United States v. Aleman, 286 F.3d 86, 89 (2d Cir. 2002)). A court relies on the principles of contract law when interpreting these agreements, “whether written or oral, formal or informal.” Id. (citing United States v. Aleman, 286 F.3d at 89); see also United States v. Rexach,

896 F.2d 710, 713 (2d Cir. 1990). “The terms of any agreement are construed against the Government.” United States v. Rudaj, 2005 WL 2508404, at \*2 (citing United States v. Aleman, 286 F.3d at 90). “A court must determine ‘what the parties reasonably understood’ the terms of the agreement to be and what they intended the remedies to be in the case of a breach.” Id.

“‘[A] defendant who seeks specifically to enforce a promise [made by the Government] must show both that the promisor had actual authority to make the particular promise and that he (the defendant) detrimentally relied on it. If either part of this showing fails, the promise is unenforceable.’” Id. (quoting United States v. Flemmi, 225 F.3d 78, 84 (1<sup>st</sup> Cir. 2000) (citations omitted)); see also Doe v. Civiletti, 635 F.2d 88, 96 (2d Cir. 1980) (“[I]t is axiomatic that the United States is not bound by the unauthorized acts of its agents.”).

In 2005, in Rudaj, Judge Cote explained that “[a]lthough the Second Circuit has not yet addressed the question, the First Circuit has held that ‘a promise of use immunity made independently by an FBI agent exceeds the scope of his actual authority (and is, therefore, unenforceable).’” Id. (quoting United States v. Flemmi, 225 F.3d at 88). As Judge Cote described, the First Circuit in Flemmi “began with the principle that ‘[a]ctual authority may be conferred either expressly or by necessary implication.’” Id. (quoting United States v. Flemmi, 225 F.3d at 85); accord Dinaco, Inc. v. Time Warner, Inc., 346 F.3d 64, 68 (2d Cir. 2003). The First Circuit “then noted that no law or regulation expressly grants the FBI the authority to make promises of immunity.” Id. (citing United States v. Flemmi, 225 F.3d at 85). “Nor, the [Flemmi] court reasoned, could this authority be implied as ‘integral to . . . or otherwise necessary for the due accomplishment of those tasks’ that are expressly assigned to FBI agents.” Id. (quoting United States v. Flemmi, 225 F.3d at 85). As a result, the Flemmi court held that FBI agents are

legally unauthorized to make promises of immunity to defendants. United States v. Flemmi, 225 F.3d at 87. Judge Cote concluded: “The First Circuit’s opinion in Flemmi is thoughtful and well reasoned, and its conclusion is adopted here: the agents who interviewed Nuculovic lacked authority to grant him use immunity.” Id. at \*2.

The holdings in Rudaj and Flemmi are consistent with the holdings of numerous other Courts of Appeals that “officials having lesser authority over prosecutions than United States Attorneys, such as FBI agents, may not bind the United States either to dismiss an indictment or to refrain from prosecution.” Id. (quoting United States v. Flemmi, 225 F.3d at 87); see, e.g., United States v. Cordova-Perez, 65 F.3d 1552, 1554 (9<sup>th</sup> Cir. 1995) (INS agent who made a no-prosecution promise could not bind the United States Attorney); Johnson v. Lumpkin, 769 F.2d 630, 634 (9<sup>th</sup> Cir. 1985) (FBI agent’s promise that defendant would serve no prison time for his state convictions if he provided information in federal bribery investigation was not enforceable); United States v. Hudson, 609 F.2d 1326, 1329 (9<sup>th</sup> Cir. 1979) (Secret Service Agent’s promise to drop charges did not bind the United States Attorney); United States v. Streebing, 987 F.2d 368, 373 (6<sup>th</sup> Cir. 1993) (because FBI agent lacked authority to make alleged promise not to prosecute, district court did not err in refusing to dismiss indictment); United States v. Fuzer, 18 F.3d 517, 520-21 (7<sup>th</sup> Cir. 1994) (ATF agents lacked authority to promise that the defendant would not be prosecuted and promise did not bind United States Attorney); United States v. Kettering, 861 F.2d 675, 676 (11<sup>th</sup> Cir. 1988) (DEA agent lacked authority to guarantee immunity); In re Corrugated Container Antitrust Litig., 662 F.2d 875, 888 (D.C.Cir. 1981) (there is "no authority for ruling that oral promises of immunity by an investigator [FBI agent], not in accord with statutory requirements, bind all federal . . . prosecutors").

“A narrow exception to this rule exists where the government’s noncompliance with an unauthorized promise would render a prosecution fundamentally unfair.” United States v. Flemmi, 225 F.3d at 88 (citing United States v. Streebing, 987 F.2d at 373; United States v. Williams, 780 F.2d 802, 803 (9<sup>th</sup> Cir. 1985); and United States v. Costello, 750 F.2d 553, 556 (7<sup>th</sup> Cir. 1984)). In addition, the Second Circuit has held that an ultra vires defense is unavailable to a prosecutor who makes unfulfillable promises during plea negotiations – see Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 296 & n. 16 (2d Cir. 1976) – a principle that is, however, clearly not applicable here.

## **B. Discussion**

Based on the foregoing authorities, Noorzai’s motion to dismiss the Superseding Indictment must fail. In his affirmation, Noorzai contends that at various times before he traveled to New York, Mike and Brian assured him that he would not be arrested and would be allowed to return from the United States to Pakistan. (See Noorzai Affirmation ¶ 63 (Mike said that “the project had nothing to do with arresting anyone or apprehending anyone”); ¶ 85 (Mike and Brian “assured him” that their project “was not a counter narcotics project”); ¶ 135 (Mike and Brian promised him that he would be “allowed to come to the United States, meet with important government officials, and then return to Pakistan”)). Assuming, arguendo, that these promises were extended to Noorzai, and that Mike and Brian held themselves out to be federal agents, they were simply not legally authorized to bind the Government to such promises, regardless of what Noorzai believed. See United States v. Rudaj, 2005 WL 2508404 at \*2; United States v. Flemmi, 225 F.3d at 87. Accordingly, any alleged, general assurances

concerning Noorzai's safe passage to and from the United States are legally insufficient to require the extraordinary remedy of dismissal of the Superseding Indictment. Id.

Nor does Noorzai's case fall within the narrow exception to the actual authority rule applicable where the Government's "noncompliance with an unauthorized promise would render a prosecution fundamentally unfair." See United States v. Flemmi, 225 F.3d at 88. Noorzai clearly considered Mike and Brian's promise of safe passage in deciding to travel to New York, and believed he would meet with high-level U.S. Government officials. However, Noorzai appears to have weighed the risks of such a trip against its possible benefits to him financially and politically, and to have voluntarily chosen to come to the United States despite those risks. In light of Noorzai's voluntary, self-interested decision to travel to the United States, it cannot be said that to prosecute him here would be fundamentally unfair, despite the assurances he received.

In April 2005, Noorzai was a highly-sophisticated actor, having served for five years as the Chief of the Noorzai Tribe with power to arbitrate disputes among more than one million tribe members. (See Noorzai Aff. ¶¶ 4, 20, 90). Before 2005, Noorzai also claims to have had several experiences with U.S. Government representatives, a number of which had unpleasant results for him. (See id. ¶¶ 36-38, 49-51, 53-55). In addition, by April 2005, Noorzai was well aware that the U.S. Government had evidence implicating him in drug-trafficking crimes. (Id. ¶¶ 75-84, 98, 120 (Mike and Brian repeatedly asked Noorzai during August 2004 meetings about reports he was in opium business, and Noorzai consistently denying such involvement)).

Noorzai voluntarily came to the United States to speak with U.S. Government representatives to cooperate out of his own self-interested desire to strike a deal and return to

Afghanistan, reclaim his tribal land and ascend to a position of consequence in the emerging Afghan government. (Id. ¶¶ 64, 68 (Noorzai wanted to talk to U.S. Government “because there were people in power and with influence in Afghanistan and with the Americans who were saying bad things about [him] and making things difficult for [him] to be in Afghanistan” by speaking “false rumours” about him)); see also Hamlette Aff. ¶ 9 (Noorzai stated he expected U.S. Government to provide him with a major role in controlling Afghanistan); ¶ 21 (Noorzai stated that if he were given a position in the Afghan government, he would be willing to go back to Afghanistan and tell his tribe to stop growing opium); ¶ 37 (Noorzai stated that he had come to the United States willingly and to discuss his future position in Afghanistan and that he wanted to give one of his associates a position in the Afghan government)). When Noorzai agreed to travel to the United States, he was clearly not in custody, and his decision was voluntary. See United States v. Rudaj, 2005 WL 2508404, \*2 n. 2 (distinguishing cases enforcing prosecutors’ promises of immunity while defendants were in custody in part because custody is “a context in which due process concerns require a deviation from strict adherence to contract principles ‘in recognition of [the Government’s] superior bargaining power’”).

Under these circumstances, the CSs’ alleged assurances concerning Noorzai’s safe passage to and from the United States – as a factual matter far different from a specific, authorized promise that Noorzai would be legally immunized in exchange for admissions concerning his involvement in drug trafficking – do not implicate the narrow fundamental fairness exception to the actual authority rule discussed in Rudaj and Flemmi. Nor is this case one where a defendant provides extensive, proactive assistance to the authorities in direct response to a no-prosecution promise, a factor that other courts have found to be relevant in

applying the notion of fundamental fairness. See United States v. Carillo, 709 F.2d 35, 37 (9<sup>th</sup> Cir. 1983) (where DEA agent promised defendant he would not have to testify and illiterate defendant as a result signed written DEA cooperation agreement, helped arrest three suspected heroin distributors and then experienced threats against himself and his family, court held that prosecution based on defendant's breach of cooperation agreement violated notions of fundamental fairness); see also In the Matter of John Doe, 410 F.Supp. 1163, 1166 (E.D. Mich. 1976) (where defendant was specifically promised by FBI agent that Government would ask no questions of defendant in exchange for surrender of cocaine, defendant surrendered the cocaine, and defendant's compelled, immunized testimony in the grand jury would have endangered defendant's life, the interests of justice required vacatur of immunity order compelling defendant's testimony).

An examination of the facts presented in the Flemmi case demonstrates that Noorzai's claims – even if accepted as true – in no way render the instant prosecution fundamentally unfair. In Flemmi, the defendant was a long-standing member of Boston's organized crime hierarchy, who sought to ingratiate himself to the authorities by approaching them and offering to provide information. United States v. Flemmi, 225 F.3d at 81. Flemmi started talking to FBI sources about organized crime activities in Boston. Id. After he was indicted on a variety of federal charges, Flemmi moved to dismiss the indictment on the grounds that FBI agents, including an FBI supervisor, had promised him immunity, both from prosecution generally and from the use of certain wiretaps against him. The district judge found that the FBI had in fact made promises of immunity to Flemmi, held that these promises were enforceable against the United States

Attorney, prohibited the Government from using the wiretap evidence and ordered further hearings to determine whether the indictment should be dismissed. Id. at 80, 83.

As discussed above, despite the district judge's finding that an actual promise of immunity had been made by FBI agents, on appeal, the First Circuit reversed, and unequivocally rejected the "district court's premise that officials having lesser authority over prosecutions than United States Attorneys, such as FBI agents, may bind the United States either to dismiss an indictment or to refrain from prosecution." Id. at 87. The Flemmi court also held that the facts presented were "well outside the compass" of the "seldom-seen" fundamental fairness exception. United States v. Flemmi, 225 F.3d at 88 n. 4. Similarly, the facts alleged by Noorzai – which involve his voluntary decision to travel to the United States in an effort to cooperate with U.S. Government representatives out of his own self-interest – simply do not render the instant prosecution fundamentally unfair under the Due Process Clause. Id.; see also Johnson v. Lumpkin, 769 F.2d 630, 634 (9<sup>th</sup> Cir. 1985) (fundamental fairness did not require enforcement of unauthorized promise by FBI agent that defendant would serve no state jail time); Dresser Industries, Inc. v. United States, 596 F.2d 1231, 1237 (5<sup>th</sup> Cir. 1979) (holding that SEC representatives lacked actual authority to limit prosecutorial function of Department of Justice because "[i]f the rule were otherwise, a minor government functionary hidden in the recesses of an obscure department would have the power to prevent the prosecution of a most heinous criminal simply by promising immunity in return for the performance of some act which might benefit his department. Such a result could not be countenanced.").

Noorzai cites a number of additional cases he claims support dismissal of the Superseding Indictment. These cases, however, are distinguishable from the present case and do not alter the

Court's analysis. Initially, a number of these cases involve situations where a prosecutor made promises of immunity directly to a defendant in connection with a defendant's guilty plea, and then reneged on the promises. See Santobello v. New York, 404 U.S. 257, 262 (1971) (when plea "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled"); Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 296 (2d Cir. 1976) (holding that where defendant pleads guilty because he reasonably relied on promises by prosecutors which are in fact unfulfillable, defendant has the right to have promises fulfilled); Bemis v. United States, 30 F.3d 220, 223 (1<sup>st</sup> cir. 1994) (where defendant asserted that during plea negotiations prosecutor told him that promise to secure defendant's placement in Federal Witness Protection Program did not need to appear in plea agreement, evidentiary hearing required to determine whether promises were in fact made and should be enforced); United States v. Rosario, 237 F.Supp.2d 242, 244-45, 252 (E.D.N.Y.2002) (defendant claimed that prosecutor herself had reached immunity agreement with defendant, although court ultimately found that prosecutor had not promised such immunity); see also United States v. Society of Independent Gasoline Marketers, 624 F.2d 461, 469 (4<sup>th</sup> Cir 1979) (where prosecutor in charge of case twice told defendant that he would be granted immunity before the grand jury, statements elicited during grand jury testimony could not be used against defendant); United States v. DiGregorio, 795 F. Supp. 630, 638 (S.D.N.Y. 1992) (reserving for hearing issue of whether prosecutor promised to forego prosecution in exchange for cooperation and then reneged on promise); United States v. Lieber, 473 F.Supp. 884, 892 (E.D.N.Y. 1979) (where defendants entered into plea agreement directly with United States Attorney, promise contained in agreement was enforceable).

Here, Noorzai has not and cannot allege that any prosecutor made any promise to him, and the general assurances he claims the CSs made to him were clearly not in the context of any plea negotiations. See United States v. Rudaj, 2005 WL 2508404 at \*2 n. 2 (noting that in Palermo Second Circuit’s holding was “motivated by a concern with ‘the voluntariness of a plea induced by unfulfillable promises’”).

The First Circuit’s pre-Flemmi decision in United States v. Rodman, 519 F.2d 1058, 1059 (1<sup>st</sup> Cir. 1975), cited by Noorzai, similarly does not support his request for dismissal. The Rodman case did not deal with any alleged promise of immunity, but rather with an SEC representation that it would make a recommendation to the relevant prosecutor, something that was well within the SEC’s actual authority to do. See United States v. Flemmi, 225 F.3d at 90 (“There is no hint that the unfulfilled promise in Rodman – to recommend to the United States Attorney that no prosecution be undertaken – was beyond the promisor’s authority. That places Rodman at a considerable remove from the case at bar.”).<sup>3</sup>

Even assuming, arguendo, all of Noorzai’s claims about the circumstances of his April 13, 2005, arrival in the United States to be true, the facts here are far less extreme than facts that courts have found do not require dismissal under the Due Process Clause. See United States v. Fleming, 225 F.3d at 87; United States v. Rudaj 2005 WL 2508404 at \*4. Indeed, the Supreme Court has held that even the forcible abduction of a foreign national for purposes of prosecution in the United States does not violate that person’s right to due process and does not warrant

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<sup>3</sup> Noorzai cites one additional case that refers to the issue of immunity promises – United States v. Cichon, 48 F.3d 269 (7<sup>th</sup> Cir. 1995) – but there was no finding in that case that any such promise had in fact been made. See id. at 274 (affirming finding that no immunity promise had been made).

dismissal of the indictment. See United States v. Alvarez-Machain, 504 U.S. 655, 670 (1992).

In Alvarez-Machain, the Supreme Court reversed the Ninth Circuit and held that the district court had jurisdiction to try a Mexican national who, through the work of the DEA, had been forcibly abducted from his medical office in Guadalajara, Mexico, and brought to Texas where he was arrested. Id. In holding that the indictment should not have been dismissed, the Supreme Court relied on Ker v. Illinois, 119 U.S. 436 (1886), which held that “such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such court.” United States v. Alvarez-Machain, 504 U.S. at 661 (quoting Ker v. Illinois, 119 U.S. at 444).

In support of its holding, the Alvarez-Machain Court quoted extensively from its previous decision in Frisbie v. Collins, 342 U.S. 519 (1952), in which the Court applied the Ker rule to a case in which the defendant had been kidnaped in Chicago by Michigan officers and brought to trial in Michigan. Id. at 661. As the Alvarez-Mchain Court explained, in upholding the conviction over due process objections, the Frisbie Court stated:

This Court has never departed from the rule announced in [Ker] that the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court’s jurisdiction by reason of a “forcible abduction.” No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

Id. (quoting Frisbie v. Collins, 342 U.S. at 522).

In the end, the facts Noorzai alleges concerning his April 13, 2005, arrival in New York are far removed from the circumstances courts have found insufficient to justify dismissal. Moreover, as discussed above, because the DEA CSs lacked actual authority to bind the Government, and adhering to the actual authority rule under these circumstances does not run afoul of notions of fundamental fairness, the Court should deny Noorzai's motion to dismiss the Superseding Indictment with prejudice.

## **II. Noorzai's Voluntary Statements After His Arrival In New York City Should Not Be Suppressed**

Noorzai argues that his statements to law enforcement officers, both within and outside the United States, must be suppressed because they were obtained in violation of his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel.<sup>4</sup> (Noorzai Omnibus Motion 28). This argument is without merit.

The motion to suppress should be denied without a hearing because Noorzai's statements to the agents were voluntary, and because Noorzai was repeatedly advised of his Sixth Amendment right to have counsel present for his conversations with the agents and consistently voluntarily and knowingly waived that right. The factual record before the Court – consisting of Noorzai's affirmation and the affirmation of Special Agent Patrick Hamlette – indicates that it is presently undisputed that Noorzai was provided with, understood, and waived his Miranda rights. Noorzai's own affirmation depicts Noorzai as a sophisticated individual with prior experience dealing with U.S. Government representatives. Noorzai's statements to the agents took place in the comfortable setting of the Embassy Suites Hotel, where Noorzai drank, ate and slept when he

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<sup>4</sup>As indicated above, the Government does not intend to offer statements made by Noorzai outside the United States and therefore this Court need not address that issue.

chose, and the interactions that he had with the agents at the Hotel are best characterized as cordial conversations.

Against this backdrop, Noorzai contends that his statements were involuntary solely because he had been assured by the CSs before his April 13, 2005, travel that he would not be arrested during his trip to the United States. In particular, Noorzai contends that such promises amounted to a form of coercion, and that they somehow removed the “import and effect” of the Miranda warnings that were subsequently provided. (Noorzai Omnibus Motion 27). Assuming, arguendo, that Noorzai was made such promises by the CSs, Noorzai’s statements in New York were nonetheless voluntarily made following repeated knowing and intelligent waivers of his Sixth Amendment rights. Accordingly, Noorzai’s motion to suppress should be denied without a hearing.<sup>5</sup>

**A. Noorzai’s Statements To The Agents In New York City Were Voluntarily Made**

Noorzai contends, among other things, that the Fifth Amendment bars the use of his statements because the statements were induced by the CSs’ false promises that if he came to the United States he would not be arrested. (Noorzai Omnibus Motion 22). The Government assumes for purposes of this response that Noorzai was promised that he would not be arrested, that in making the promises the CSs were holding themselves out as federal agents. Even

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<sup>5</sup> The Government notes that Noorzai has failed to submit an affidavit based on personal knowledge that sets forth particular facts concerning, among other things, the circumstances of Noorzai’s conversations with the agents in New York and the waiver of his Miranda rights. In that regard, the Government assumes that Noorzai is relying solely on the promises the CSs made to him prior to his trip and the supposed “coercion” resulting therefrom in support of his motion to suppress his statements. The Government further assumes that Noorzai is not claiming that the specific conditions or circumstances of the conversations he had in New York somehow rendered his statements involuntary.

assuming, however, that the CSs' alleged safe-passage promises to Noorzai were a factor in his decision to travel to the United States, waive his Miranda rights, and speak with the agents, these promises were insufficient to render Noorzai's statements legally involuntary. As a result, the motion to suppress should be denied.

### **1. Applicable Law**

The Fifth Amendment provides that a defendant's statement is admissible if it is obtained voluntarily. See United States v. Orlandez-Gamboa, 320 F.3d 328, 332 (2d Cir. 2003). The Government has the burden of proving voluntariness by a preponderance of the evidence. See United States v. Morales, 280 F. Supp. 2d 262, 270 (S.D.N.Y. 2003). A statement's voluntariness is to be determined by examining the totality of the circumstances and assessing whether the conduct of the government agents "was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined . . ." United States v. Kaba, 999 F.2d 47, 51 (2d Cir. 1993) (internal citations omitted). In determining whether a statement was made voluntarily, courts consider a number of factors including "the characteristics of the accused, such as his experience, background, and education; the conditions of the interrogation; and the conduct of law enforcement officials, notably, whether there was physical abuse, the period of restraint in handcuffs, and use of psychologically coercive tactics." See Nelson v. Walker, 121 F.3d 828, 833 (2d Cir. 1997).

As a general matter "ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak" do not render a defendant's statements involuntary. See Illinois v. Perkins, 496 U.S. 292, 297 (1990) (declining to suppress statements made to an undercover law enforcement officer posing as a fellow inmate). As both

the Supreme Court and Courts of Appeals have now held, “it is clear that the voluntariness of the confession does not depend solely upon whether it was made in response to promises. Indeed, we must determine voluntariness by judging the totality of the circumstances.” See United States v. Walton, 10 F.3d 1024, 1028 (3d Cir. 1993) (citing Arizona v. Fulminante, 499 U.S. 279, 284-85 (1991)); United States v. Byram, 145 F.3d 405, 408 (1<sup>st</sup> Cir. 1998) (discussing that notwithstanding historical view that confessions produced by promises not to prosecute were often excluded as involuntary, in recent years, the Supreme Court has confined the voluntariness concept by holding that only confessions procured by coercive official tactics should be excluded as involuntary) (citing Colorado v. Connelly, 479 U.S. 157, 167 (1986)); United States v. Orlandez-Gamboa, 320 F.3d at 333 (a promise of help or leniency alone does not bar the admission of a confession).<sup>6</sup> Indeed, ploys and psychological tactics used to elicit statements from a suspect “may play a part in the suspect’s decision to confess, but so long as that decision is a product of the suspect’s own balancing of competing considerations, the confession is voluntary.” See Miller v. Fenton, 796 F.2d 598, 605 (3d Cir. 1986) (holding that defendant’s confession was voluntary even though investigator lied about timing of victim’s death, told defendant he was not responsible for his conduct and promised to seek psychiatric help for him).

“The mere fact that an unfulfilled promise was made in exchange for a person’s statement does not constitute coercion, rendering the statements involuntary or its fruits inadmissible.”

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<sup>6</sup> In so holding, these Courts have declined to strictly apply the language in cases such as Bram v. United States, 168 U.S. 532 (1897), and the cases that follow it, such as Shotwell Manufacturing Co. v. United States, 371 U.S. 341, 347-348 (1963), on which Noorzai relies, to the effect that a confession is involuntary and inadmissible where it is obtained by any direct or implied promises, however slight. See, e.g., Walton, 10 F.3d at 1028; Orlandez-Gamboa, 320 F.3d at 333.

United States v. Flemmi, 225 F.3d at 91 (citing United States v. Walton, 10 F.3d 1024, 1028 (3d Cir. 1993), and denying motion to suppress because FBI agents' assurances to defendant that he would be held harmless from prosecution did not render statements involuntary); see also United States v. Rudaj, 2005 WL 2508404 at \*4 (denying motion to suppress statements on ground that statements were made in reliance on FBI agents' promise of use immunity because agents were unauthorized to make such promise and, alternatively, defendant did not detrimentally rely on promise). Although in rare circumstances, trickery "can sink to the level of coercion" – see Flemmi, 225 F.3d at 91 n. 5 – suppression is not required simply because an agent's statements to a defendant were "false, misleading, or intended to trick and cajole the defendant into confessing, [rather] specific findings must be made that under the totality of the circumstances . . . the defendant's will was overcome by the agent's conduct." See United States v. Anderson, 929 F.2d 96, 99 (2d Cir. 1991) (rejecting district court's conclusion that agent's trickery precluded finding that defendant waived his rights voluntarily).

False assurances that a suspect is not in danger of prosecution are generally not treated as coercion. See United States v. Byram, 145 F.3d 405, 408 (1<sup>st</sup> Cir. 1998) (holding that even if defendant was tricked into believing that he was not implicated in death, that fact did not constitute coercion). Courts have declined to suppress statements where a defendant was told by agents that he would not be prosecuted for a murder if he acknowledged that the murder was "spontaneous," and the defendant thereafter confessed pursuant to a mistaken belief that he was free from prosecution. See United States v. LeBrun, 363 F.3d 715, 725-726 (8<sup>th</sup> Cir. 2004). Similarly, courts have declined to suppress statements where a defendant was encouraged to cooperate, and leniency was promised in the event of cooperation. See United States v. Ruggles,

70 F.3d 262, 264-265 (2d Cir.1995) (holding that an agent's statement that it would be to the defendant's benefit to cooperate, like a promise of leniency in the event of cooperation, was not improperly coercive). Relatedly, courts have declined to find statements involuntary merely because agents misrepresented the true nature or purpose of their meeting with, and questioning of, the defendant. See United States v. Maney, Slip Op., No. 04-Cr. 106A (Arcara, J.), 2006 WL 3780813 at \*10 (W.D.N.Y. 2006) (defendant voluntarily met with agents but was told purpose of meeting was not to investigate a criminal matter).

Courts addressing a motion to suppress on grounds that a false promise was made have considered the false assurances or misrepresentation as one factor in the "totality of the circumstances," which include the defendant's background and experience, the conditions of the interrogation and the conduct of law enforcement officers. Courts have considered whether, as a whole, the authorities overbore the defendant's will such that the statement was not voluntary. See Ruggles, 70 F.3d at 265. In assessing the totality of the circumstances, courts look to a number of factors including (1) the type and length of questioning; (2) the defendant's age, intelligence and education; (3) the government's method of interrogation, including whether the defendant was subjected to physical punishment; and (4) whether the defendant was advised of his constitutional rights. See Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). In evaluating these factors, courts also consider "[t]he conscious decision of a person to cooperate with law enforcement [as] . . . an important factor in determining whether a statement is voluntary." See United States v. Guarno, 819 F.2d 28, 31 (2d Cir. 1987); see also United States v. Giordano, 259 F.Supp. 2d 146, 158 (D. Conn. 2003) (where a sophisticated individual makes a

“calculated decision” to assist law enforcement in a cordial environment, and is advised of his Miranda warnings, statements are voluntary).

One factor that weighs heavily in the totality of the circumstances evaluation of voluntariness is whether the defendant was given Miranda warnings. Although the giving of Miranda warnings “does not dispense with the voluntariness inquiry, ‘[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was “compelled” despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare.’” Simmons v. Bowersox, 235 F.3d 1124, 1132 (8<sup>th</sup> Cir. 2001) (quoting Dickerson v. United States, 530 U.S. 428 (2000) (finding statement voluntary where defendant was Mirandized and told that telling the truth would be “better for him” because such a promise did not constitute an express promise of leniency rendering confession involuntary)).

Where Courts have suppressed statements that were deemed the product of false promises by law enforcement agents, those false promises “were so manipulative or coercive that they deprived [the defendant] of his ability to make an unconstrained, autonomous decision to confess.” See Miller v. Fenton, 796 F.2d at 604. False promises that fall into this category are typically threats sufficient to overbear the will of the defendant that are made contemporaneously with a request that the defendant cooperate. For example, statements have been suppressed where police told a defendant that unless she cooperated she would lose custody of her children, as well as the public assistance necessary to support them, see Lynnum v. State of Illinois, 372 U.S. 528, 534 (1963) (holding confession coerced); where a prosecutor told the defendant that the charges carried “a possible sentence of one hundred years,” and then read the defendant his Miranda rights and asked if the defendant wished to speak, see United States v. Duvall, 537 F.2d

15, 19-20 (2d Cir. 1976); and where a defendant was informed that if he asked to speak to an attorney, he would never again have the opportunity to cooperate, see Anderson, 929 F.2d at 100.

Courts have also occasionally suppressed statements made in response to a law enforcement officer's specific promise that the defendant's statements would not be used against him. See Walton, 10 F.3d at 1030-1032 (defendant's incriminating statements to agent with whom defendant had a preexisting friendship suppressed where agent indicated to defendant that statements could not be used against him in court); United States v. Swint, 15 F.3d 286, 290 (3d Cir. 1994) (statements suppressed as involuntary where defendant met with state authorities who assured him that his statements would not be used against him and immediately thereafter met with federal authorities who did not give him Miranda warnings and elicited incriminating statements from him); Arnold v. Dutton, 602 F.Supp. 115, 118-119 (M.D. Tenn. 1984) (suppressing statement where defendant was Mirandized but promised in course of interrogation that the statements would not be used against him at trial); compare United States v. Fisher, 700 F.2d 780 (2d Cir. 1983) (acknowledging that a promise by law enforcement that the defendant's statement would not be disclosed to federal authorities was a misrepresentation but declining to suppress statement on the specific facts of that case).

In certain rare circumstances, courts have suppressed statements that were extracted by specific promises of leniency in exchange for a defendant's cooperation, confession or statements, where those specific promises were deemed coercive in light of the particular circumstances in which they were made. See, e.g., United States v. Rogers, 906 F.2d 189, 191 (5<sup>th</sup> Cir. 1990) (statements to federal agents suppressed as involuntary, despite defendant's waiver of Miranda rights, where sheriff promised defendant he would not be prosecuted for

specific conduct (retrieving stolen guns) and defendant thereafter discussed his purchase of those guns with federal agents, believing his conversation was covered by the no-prosecution promise, and court found defendant's intelligence such that he was confused by circumstances of interrogation); see also United States v. Mora, 98 F.Supp.2d 466, 478 (S.D.N.Y. 2000) (statements suppressed where agent told arrested defendant that if he cooperated he would serve one year in jail instead of ten and did not give Miranda warnings prior to questioning the defendant).

## **2. Discussion**

Considering the totality of the circumstances in which Noorzai made the statements he now seeks to suppress, it is clear that Noorzai's statements were entirely voluntary. As a result, Noorzai's motion to suppress should be denied.

First, prior to each meeting with U.S. Government agents at the Hotel, Noorzai was advised of, and waived, his Miranda rights. He was told that any statements that he made could be used against him, that he could have an attorney present and that he had the right not to make any statements. (See, e.g., Hamlette Aff. ¶¶ 5, 12, 16, 25, 29). Each time he was advised of his rights, Noorzai acknowledged that he did not want an attorney and that he wished to speak to the agents. (Id.). These warnings, which were translated for Noorzai, were not qualified by any promise of safe passage or no arrest. He never qualified his response by reference to his understanding that he would be allowed to return back to Pakistan. (Id. ¶ 5). Particularly in light of the other factors weighing in favor of voluntariness, the fact that Noorzai was repeatedly told that his statements could be used against him but nonetheless elected to engage in conversations with the agents is powerful evidence that Noorzai's conversations and discussions with the

agents were not coerced. See Bowersox, 235 F.3d at 1132 (holding that only in rare circumstances will a defendant's post-Miranda statements be deemed compelled).

Second, Noorzai's interactions with the agents, as addressed further below, were non-custodial, consensual encounters. Before each meeting, the agents asked if Noorzai was ready and willing to speak. (See, e.g., Hamlette Aff. ¶¶ 9, 11). The tone of these discussions was cordial: the agents never raised their voices when speaking with Noorzai, never displayed firearms and never used any kind of physical force during their interactions with him. (Id. ¶¶ 4, 7). Unlike the questioning in all of the cases suppressing statements discussed above, Noorzai was not interrogated about specific, suspected criminal conduct; rather, he engaged in a dialogue with the agents about a number of different issues, including the political situation in Afghanistan, the relationship between Afghanistan and the United States and what role Noorzai might play in that relationship. (Id. ¶ 7). Noorzai never indicated to the agents that his willingness to discuss these matters was a product of any no-arrest or safe-passage promise he had received prior to traveling to the United States or that he felt in any way forced to converse with the agents. (Id. ¶ 5). To the contrary, Noorzai provided the agents with two signed statements concerning the opium trade in Afghanistan that expressly stated that he had not been "promised anything" nor "threatened" in connection with the making of those statements. (Exhibits 1 and 2 to Hamlette Aff.; Hamlette Aff. ¶¶ 24, 31).

Third, the setting of Noorzai's meetings with the agents also leads to the conclusion that his statements were voluntary. Noorzai was not held in a jail cell, a police station, the agents' offices or any other setting connected with criminal law enforcement activity. Rather, he and his two associates were provided with hotel rooms at the Embassy Suites Hotel, where they were

supplied with food and drink at regular mealtimes. (Hamlette Aff. ¶¶ 8, 13, 15). Noorzai was permitted to sleep alone in his own room, to make telephone calls to relatives, and to determine when, and whether, he was ready to meet with the agents. (Id. ¶¶ 7, 43, 23). In fact, on several occasions, Noorzai declined the agents' requests to meet and asked for additional time. (Id. ¶¶ 15, 23). On no occasion did agents force Noorzai to participate in a conversation with them. In fact, during virtually every conversation, Noorzai expressed that he was glad to be a guest of the United States, and to be engaged in a dialogue with U.S. Government agents. (Id. ¶¶ 8, 14, 19).

Fourth, Noorzai's age and sophistication also weigh in favor of a determination that his statements were voluntary. Noorzai is approximately 44 years old. (Noorzai Aff. ¶ 1). He leads a tribe of over one million people, has handled all tribal affairs for over twenty years, and has managed hundreds of thousands of dollars of tribal income annually. (Id. ¶¶ 4, 20, 90). During the war against the Russians in the early 1980s, Noorzai led a group of one thousand fighters. (Id. ¶ 12). According to Noorzai, he has been in contact with U.S. Government representatives since 1990, and a number of these contacts had unpleasant results for him. (Id. ¶¶ 37-38, 50-52, 54-55). There is also no question that Noorzai believed, as demonstrated by his own affirmation, that the U.S. Government had evidence of his involvement in narcotics trafficking. (Noorzai Aff. ¶¶ 75-84, 98, 120). Both this awareness and his purported prior contacts with U.S. officials are strong evidence that Noorzai made a conscious decision to come to the United States and to try to cooperate with the U.S. Government, and that in speaking with agents in New York, he was acting of his own free will.

Fifth, the statements made by Noorzai throughout these meetings are further evidence of the voluntary nature of the encounters and of his statements. He used these meetings as an

opportunity to describe his power within Afghanistan as a politically well-connected leader of a large tribe, and to request assistance from the United States in pursuing a major role in the control of Afghanistan. (Hamlette Aff. ¶¶ 5, 9, 16, 17, 27). Noorzai's attempt to cooperate with the United States, as well as his references to high-level officials in Afghanistan with whom he had relationships, are further evidence that he used his meetings with the agents to promote his own abilities and further his own self-interest in an attempt to get support from the U.S. Government. These efforts are further evidence that Noorzai's statements to the agents were voluntarily made. See, e.g., Giordano, 259 F.Supp. at 158 (defendant's statements deemed voluntary where he cooperated with government agents to further his own self-interest).

Against this background of consensual, cordial, voluntary conversations with law enforcement agents – the facts of which are not in dispute – Noorzai contends that because he was promised safe passage by Mike and Brian while he was in Afghanistan, the statements he made in the course of those conversations were coerced, were legally involuntary and should be suppressed. Assuming, arguendo, that Noorzai was promised, by Government agents or their equivalent, that if he traveled to New York to meet with U.S. Government officials, he could go home without being arrested, Noorzai's argument nonetheless fails. While the promises of safe passage may well have factored into Noorzai's decision to travel to the United States for purposes of engaging in such meetings and discussions, they cannot be said to have rendered Noorzai's statements to the agents legally coerced or involuntary so as to require suppression. See Miller, 796 F.2d at 605 (holding that ploys “may play a part in the suspect's decision to confess” without rendering that decision involuntary); see United States v. Flemmi, 225 F.3d at 91 (denying motion to suppress in part because FBI agents' assurances to defendant that he

would be held harmless from prosecution did not render statements involuntary); see also United States v. Rudaj, 2005 WL 2508404 at \*4 (denying motion to suppress statements on ground that statements were made in reliance on FBI agents' promise of use immunity).

The promise of safe passage to and from the United States bears no relationship to the sorts of inducements or promises that have been deemed sufficiently coercive to warrant suppression of statements. First, a promise of safe passage is not akin to false threats that a defendant's job, family or financial situation will suffer if he fails to make statements, that he will face draconian penalties or that he will be permanently barred from cooperation. Compare Lynumn, 372 U.S. at 534 (threats to family and family's financial security); Duvall, 537 F.2d at 19-20 (threat of a one-hundred-year sentence); Anderson, 929 F.2d at 100 (threat of forfeiture of future cooperation). Such threats employ psychological coercion by forcing a defendant to make a false choice between foregoing his right to silence or suffering an exaggerated penalty. In contrast, the promise of safe return alleged here that was not contingent upon cooperating, confessing or even speaking about particular topics cannot be deemed similarly coercive.

Noorzai's situation and the promises made to him are not comparable to circumstances in which law enforcement coupled a request to cooperate with a false promise that any statements made would not be used against the defendant, or that the defendant would not be prosecuted for a particular crime. In such cases, a defendant's statements themselves resulted directly from an assurance that he would not be prosecuted or that a statement would not be used against him. Such promises, in certain circumstances, have been deemed so "uniquely influential" as to render a defendant's subsequent statements involuntary. See, e.g., Walton, 10 F.3d at 1030 (suppressing statement where defendant was told that it would not be used against him and had no reason to

believe he was the subject of a criminal investigation); Dutton, 602 F.Supp. at 118-119 (defendant's confession not "freely self determined" where it was brought about by a promise that defendant's statement would not be used in court, despite Miranda warnings).

Here, by contrast, Noorzai and the agents in New York never discussed a promise of safe passage and certainly never discussed a link between that promise and a requirement that Noorzai confess, cooperate or even speak about particular topics. Nor did they promise Noorzai that if he cooperated, he would not be prosecuted for particular criminal activity. To the contrary, each day Noorzai was expressly warned that the statements he made could be used against him, and nonetheless voluntarily agreed to continue the conversations. This case is therefore distinguishable from those cases in which a defendant was given a specific promise of leniency with respect to a particular charge in connection with his efforts to cooperate: the type of promise that has been deemed coercive in other contexts. See Mora, 98 F.Supp.2d at 479-80 (arrested, un-mirandized defendant coerced by "strong and specific" promise of leniency in exchange for cooperation); Swint, 15 F.3d at 288 (statements excluded as involuntary where un-mirandized defendant was promised by the state that he would not be prosecuted in exchange for cooperation and then questioned by federal authorities who used his statements against him).

Considering the assurance of no arrest that was made to Noorzai as one factor among the totality of the circumstances to be considered in addressing voluntariness, it is plain that Noorzai's statements were not the product of law enforcement conduct so coercive that Noorzai's "will was overborne by the agent's conduct." See Anderson, 929 F.2d at 99. In light of the consensual nature of the conversations with the agents, it is apparent that Noorzai made his statements in a comfortable, non-threatening, non-custodial setting, after repeatedly being

advised of and waiving his Miranda rights. His decision to speak was motivated by a self-interested desire to cooperate with the U.S. Government and to further his own political and financial interests in Afghanistan, not by coercion. Noorzai's statements were entirely voluntary, and his motion should be denied.

**B. Noorzai Knowingly and Voluntarily Waived His Sixth Amendment Right to Counsel**

For the reasons set forth in below, Noorzai was not in custody during his meeting with law enforcement officers from April 13-23, 2007, before his formal arrest on April 23, 2005. The Government concedes, however, that Noorzai's right to counsel had attached at the time of his discussions with the agents in New York because he had been indicted.<sup>7</sup> See Patterson v. Illinois, 487 U.S. 285, 290 (1988). Where a defendant is provided with Miranda warnings and agrees to speak, he has been sufficiently apprised both of the nature of his Sixth Amendment rights and of the consequences of abandoning those rights, and his waiver is a knowing and intelligent one for Sixth Amendment purposes. See Patterson, 487 U.S. at 296. No more is required. See United States v. Charria, 919 F.2d 842, 848 (2d Cir. 1990) (arrested defendant need not be informed that he has been indicted in order to validly waive his Sixth Amendment

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<sup>7</sup> To the extent that Noorzai made statements to the CSs he purportedly believed to be agents of the U.S. Government after January 5, 2005, but before arriving in New York in April 2005, the Government does not intend to offer those statements. To the extent that Noorzai contends that the indictment should be dismissed because the CSs violated his Sixth Amendment right to counsel by approaching him where he was without counsel in an effort to lure him to the United States, he cites no authority for the proposition that such an extraordinary remedy is required, and the Government is aware of none. (Noorzai Omnibus Motion 25). Compare United States v. Morrison, 449 U.S. 361, 364 (1981) (holding dismissal of indictment inappropriate remedy for agents' meeting with indicted defendant without counsel and noting that remedy characteristically imposed is not dismissal but to suppress evidence thereby obtained or order a new trial if evidence has been wrongfully admitted).

right to counsel). Therefore, because Noorzai was repeatedly advised of his right to have counsel present, his right to remain silent, and the fact that his statements could be used against him, and repeatedly waived his rights, he was adequately advised of his Sixth Amendment right to counsel and validly waived it.

The Supreme Court has held that “a valid waiver does not require that an individual be informed of all information ‘useful’ in making his decision or all information that ‘might . . . affec[t] his decision to confess.” See Colorado v. Spring, 479 U.S. 564, 576-77 (1987) (holding agents’ failure to inform a defendant that he would be questioned about a murder did not constitute official “trickery” sufficient to invalidate a Miranda waiver but declining to address whether affirmative misrepresentations made in connection with giving of warnings would invalidate waiver).<sup>8</sup> Nor is law enforcement required to “supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or to stand by his rights.” Id. at 577. The Spring Court also noted that “one who is told he is free to refuse to answer any questions is in a curious posture to later complain that his answers were compelled.” Id. at 576.

While the First Circuit has suggested, in dicta, that a false assurance by law enforcement “might undercut the gist of a warning, raising questions whether Miranda had been satisfied,” Byram, 145 F.3d at 408, the Court did not directly address the issue. In any event, no such assurances were given in connection with the provision of the Miranda warnings to Noorzai. In

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<sup>8</sup> As the Colorado v. Spring Court explained, the Supreme Court has found official coercion sufficient to invalidate a Miranda waiver where agents threaten defendants with deprivation of state financial aid for children or loss of their employment if they refuse to cooperate. See Colorado, 479 U.S. at 576 n. 8.

those rare circumstances where courts have found that a defendant did not waive his rights with the requisite level of comprehension or with full awareness of the consequences of his decision, courts have generally employed a totality of the circumstances analysis which considered, among other factors, the defendant's experience with law enforcement and their level of intelligence and sophistication. See, e.g., Rogers, 906 F.2d at 191-192 (suppressing statements where defendant was promised that state authorities would not prosecute him for particular conduct and defendant did not understand the consequences of waiving his Miranda rights and speaking freely to federal authorities who subsequently prosecuted him).

First, there can be no credible argument that Noorzai mis-understood either the nature of his rights or the consequences of waiving them. He was provided with Miranda warnings, with the aid of a translator, prior to each meeting with the agents during his stay at the Embassy Suites Hotel in New York. Any argument that Noorzai disregarded or misunderstood the significance of those warnings in light of the CSs' no-arrest promise is belied by the fact that, even after his arrest, he initially asked for an attorney but later initiated contact with the agents, waived his Miranda rights, and made additional statements. (Hamlette Aff. ¶¶ 53, 54).

Second, Noorzai's waiver of his Sixth Amendment right to counsel was also voluntarily made with a full understanding of the right he was abandoning and the resulting consequences. Noorzai's waiver of his Miranda rights took place in the context of a consensual encounter with law enforcement agents, in which Noorzai was provided with food, drink and a comfortable hotel room in which to sleep, and in which no threats or promises were made to him in connection with the reading of his Miranda rights. Noorzai repeatedly stated that he did not want an attorney, that he wanted to speak to law enforcement and that he wished to cooperate. Nothing in

the agents' demeanor, attitude or tone of voice conveyed that Noorzai was required to waive his rights or that he could not request an attorney or refuse to answer questions. Indeed, Noorzai's willingness to inform the agents on several occasions that he did not wish to meet with them at a particular time is further evidence of his ability, when he chose, to refuse or to delay meetings and conversations.

Noorzai again appears to rely solely on the promise of safe passage to and from the United States to support his contention that the Miranda warnings given to him had no "import" or "effect." (Noorzai Omnibus Motion 27). But Noorzai fails to identify any support for that proposition. The Miranda warnings, as explained above, were not given in connection with any promises concerning Noorzai's return to Pakistan. Furthermore, the promises of safe passage made to Noorzai did not include a guarantee that statements he might make at meetings in New York could not, at some future time, be used against him. The Miranda warnings were not coupled with any threat that if Noorzai did not waive his rights, or requested an attorney, he would be penalized in some way. There is therefore no reason to conclude that Noorzai's waiver of his Miranda rights was involuntary or otherwise invalid. Because Noorzai knowingly and voluntarily waived his Sixth Amendment rights, Noorzai's motion to suppress should be denied.<sup>9</sup>

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<sup>9</sup> To the extent that Noorzai is moving to suppress his April 24, 2005, post-arrest statements, these statements were clearly made after he re-initiated conversation with the agents and after he was again advised of his Miranda rights and voluntarily and knowingly waived them. (See Exhibit 4 to Hamlette Aff.). Accordingly, these statements are also clearly admissible.

### **C. Any Delay In Presenting Noorzai Does Not Require Suppression Of His Statements**

Noorzai further contends that his admissions should be suppressed pursuant to Rule 5(a) of the Federal Rules of Criminal Procedure and Title 18, United States Code, Section 3501(c), because he was in custody as of April 13, 2005, when he first arrived in the United States and the agents failed to present him before a judge until April 25, 2005. (Noorzai Omnibus Motion 40). The Court need not reach this argument because Noorzai was not “seized” until he was arrested on April 23, 2005, and it is undisputed that he thereafter executed a waiver of his right to speedy presentment. Because there was no unreasonable delay in presenting him on April 25, 2005, after his April 23, 2005, arrest and waiver of speedy presentment, Noorzai’s motion to suppress on this basis should be denied.<sup>10</sup>

#### **1. Applicable Law**

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 the “nearest available federal magistrate judge.” Fed. R. Crim. P. 5(a). At presentment, the

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<sup>10</sup> Should this Court conclude that Noorzai was seized at some point prior to his April 23, 2005, arrest, the Government submits that any delay in presenting Noorzai was nonetheless reasonable in light of the fact that, throughout the intervening time, he was engaged in voluntary conversations with the agents in an effort to cooperate. *See, e.g., United States v. Haouari*, No. S1 00 Cr. 15 (JFK), 2000 WL 1593345, at \*7 (S.D.N.Y. Oct. 25, 2000) (time spent interviewing a defendant is not unnecessary or unreasonable delay under Rule 5(a) and Section 3501). Furthermore, even if the delay is deemed unreasonable, a number of Circuit Courts have held that a defendant’s waiver of his *Miranda* warnings constitutes a waiver of a defendant’s right to speedy presentment, and the Government urges this Court to adopt the reasoning of those decisions. *See Pettyjohn v. United States*, 419 F.2d 651, 656 (D.C. Cir. 1969); *accord United States v. Salamanca*, 990 F.2d 629, 633-34 (D.C. Cir. 1993); *United States v. Binder*, 769 F.2d 595, 598-600 (9th Cir. 1985); *United States v. Barlow*, 693 F.2d 954, 959 (6th Cir. 1982); *O’Neal v. United States*, 411 F.2d 131, 136-37 (5th Cir. 1969).

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. Id. Title 18, Section 3501(d), however, provides for the admission of voluntary statements regardless of any delay when “the person who made or gave such confession was not under arrest or other detention” when the statements were made. See 18 U.S.C. § 3501(d). As the Supreme Court has recognized, “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.” United States v. Alvarez-Sanchez, 511 U.S. 350, 358 (1994).

“[T]o determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.” Florida v. Bostick, 501 U.S. 429, 439 (1991) (Supreme Court has “held repeatedly that mere police questioning does not constitute a seizure”). The test must be conducted from the perspective of an innocent person, not a guilty one with something to hide or reason to be overly concerned about police inquiry. Id. at 438; United States v. Springer, 946 F.2d 1012, 1016 (2d Cir. 1991). “If a reasonable person would feel free to terminate the encounter, then he or she has not been seized.” United States v. Drayton, 536 U.S. 194, 201 (2002). “For an interviewee to feel free to leave, however, there is ‘no requirement that an officer affirmatively advise [him] that he is free to leave or terminate the interview.’” United States v. Peterson, 100 F.3d 7, 10 (2d Cir. 1996) (quoting Springer, 946 F.2d at 1016); see also Gardiner v. Incorporated Village of Endicott, 50 F.3d 151, 155 (2d Cir. 1995).

Among the factors recognized as relevant to this “totality of the circumstances” inquiry are the threatening presence of police officers; the display of weapons; physical contact by the officers; use of language indicating that compliance with the officer is compulsory; whether the subject is searched, frisked, or patted down; prolonged retention of a person’s personal effects, such as identification or airline tickets; and a request by an officer to accompany him to the police station. Kaupp v. Texas, 538 U.S. 626, 630 (2003); Brown v. City of Oneonta, 221 F.3d 329, 340 (2d Cir. 1999); Tankleff v. Senkowski, 135 F.3d 235, 244 (2d Cir. 1998); Gardiner, 50 F.3d at 155. None of these factors is itself dispositive, and the presence or absence of a particular factor does not, by itself, dictate the result, because “no two police-citizen encounters will ever be completely identical.” United States v. Cardoza, 129 F.3d 6, 15 (1st Cir. 1997).

A defendant’s subjective belief regarding his status is not relevant, nor are the uncommunicated intentions of the agents. *See, e.g., United States v. Vargas*, 369 F.3d 98, 101 (2d Cir. 2004) (“[T]he officers’ subjective intent does not calculate into the analysis of when Vargas was arrested.”). Courts must decide objectively whether a particular police-citizen encounter rose to the level of a “seizure.” United States v. Newton, 369 F.3d 659, 669 (2d Cir. 2004) (“the test used in determining whether a defendant was in custody is an objective one”).

## **2. Discussion**

Noorzai was not seized until his formal arrest, on April 23, 2005, after approximately eleven days of conversations with law enforcement agents at the Hotel. In light of the facts that have been set forth above in connection with the voluntariness of Noorzai’s waiver of his Fifth and Sixth Amendment rights, a reasonable person in Noorzai’s position would not have believed that he was not free to leave or to terminate the encounter with law enforcement officers during

that eleven-day period. As already discussed in detail, Noorzai stayed in a Hotel, not a setting typically associated with a custodial situation. Noorzai was accompanied by two associates of his choosing, who were permitted to remain with him during his stay in New York including during his conversations with the agents. (Hamlette Aff. ¶¶ 8, 9). Not only did the agents not remove any personal effects from Noorzai during his stay in the hotel, Noorzai was permitted to retain his travel documents in his room. (Id. ¶¶ 6, 7). Noorzai slept in his own room. (Id. ¶ 7). Noorzai ate and drank at mealtimes. Most importantly, Noorzai was not required to meet with agents at particular times, and on several occasions declined to meet with agents at the times that they had suggested, asking for additional time to get ready or to pray. (Id. ¶¶ 15, 18, 23, 38).

The officers who met with Noorzai did not display their weapons, and did not speak to him or approach him in a threatening manner. (Id. ¶¶ 6, 7). They did not indicate to Noorzai in any way that he was not free to leave. Even their discussions with Noorzai had the tone and character of consensual conversations in which information was freely exchanged, rather than of interrogations. (Id. ¶ 6). Though Noorzai was in the presence of agents at most times during his stay at the Hotel, such treatment was consistent with the purpose of his trip and his status as a tribal leader. A reasonable person in Noorzai's position – a high-level leader in Afghanistan who traveled to New York to meet with U.S. Government officials – would expect to be accompanied by U.S. Government representatives during the duration of his trip, for his own safety as well as other reasons.<sup>11</sup>

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<sup>11</sup> Whether or not the agents expected to arrest Noorzai at some point during his trip to the United States has no bearing on whether a reasonable person in Noorzai's position would have felt free to leave. Furthermore, even if, as Noorzai asserts, the agents understood that they

(continued...)

The above-referenced consensual conditions continued until April 23 2007, when Noorzai was arrested. He waived speedy presentment until April 25, 2007, and was presented on that date. Noorzai's motion to suppress his statements on the grounds that they were obtained in violation of Rule 5(a) and Section 3501(c) should therefore be denied.

### **III. Noorzai's Motions To Dismiss For Lack Of Venue, For A Bill Of Particulars And To Strike Surplusage Should Be Denied**

Noorzai urges the Court to dismiss the Superseding Indictment on the basis of improper venue. (See Noorzai Omnibus Motion 35-38). He also requests a bill of particulars, specifying the identities of, and other information relating to, all of the co-conspirators referenced in the Superseding Indictment, as well as additional information regarding various meetings and other acts detailed in the Superseding Indictment. (See Noorzai Discovery Motion 2-9). Finally, Noorzai moves the Court to strike certain purported surplusage from the Superseding Indictment, including the references to the "Noorzai Organization." (Id.).

Noorzai's motion to dismiss for improper venue is contrary to settled law, and his request for a bill of particulars falls outside the proper scope and function of that remedy, particularly in light of the detailed Superseding Indictment, and extensive discovery produced to Noorzai. The Government agrees to strike certain references to the "Noorzai Organization" from the Superseding Indictment but submits that the remaining allegations that are the subject of Noorzai's motion are relevant to the offenses charged and should not be stricken. Accordingly,

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<sup>11</sup>(...continued)

were obligated to arrest him at some point during their discussions, in light of the indictment and arrest warrant, that requirement is similarly irrelevant to the state of mind of a reasonable person in Noorzai's position. See, e.g., Vargas, 369 F.3d at 101 (officers' subjective intent not relevant to question of when defendant was arrested).

Noorzai's motions to dismiss for lack of venue, for a bill of particulars and to strike surplusage should be denied.

**A. Noorzai's Motion To Dismiss For Lack of Venue Should Be Denied**

\_\_\_\_\_An accused "shall enjoy the right to a speedy and public trial . . . [in] the State and district wherein the crime shall have been committed . . . ." U.S. Const., amend. VI; see also U.S. Const. Art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . ."). Therefore venue must be demonstrated in a criminal case, and "[t]he Government bears the burden of proving, by a preponderance of the evidence, that venue exists." United States v. Naranjo, 14 F.3d 145, 146 (2d Cir. 1994). On a pre-trial motion to dismiss pursuant to Federal Rule of Criminal Procedures 12(b), the allegations of the indictment must be taken as true, see, e.g., Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 343 n.16 (1952); United States v. Goldberg, 756 F.2d 949, 950 (2d Cir. 1985), and the Government need only show that the indictment's allegations, on their face, support venue. See, e.g., United States v. Szur, No. S5 97 Cr. 108 (JGK), 1998 WL 132942, \*9 (S.D.N.Y. Mar. 20, 1998) (internal citations omitted). It is well-settled that where the indictment properly alleges venue, a motion to dismiss on these grounds is properly deferred until the close of the Government's case at trial. See, e.g., United States v. Fama, No. S1 95 Cr. 840 (RO), 1996 WL 438165, at \*1 (S.D.N.Y. Aug. 5, 1996); United States v. Korolkov, 870 F. Supp. 60, 63-64 (S.D.N.Y. 1994).

In a conspiracy case, "venue is proper in any district in which an overt act in furtherance of the conspiracy was committed by any of the coconspirators. . . . The defendant need not have been present in the district, so long as an overt act in furtherance of the conspiracy occurred there." United States v. Naranjo, 14 F.3d at 147; see also United States v. Tannenbaum, 934 F.2d

8, 12 (2d Cir. 1991) ("The crime of conspiracy, 18 U.S.C. § 371, is a continuing offense, the prosecution of which is proper in 'any district in which such offense was begun, continued or completed.'") (quoting 18 U.S.C. § 3237(a)).

\_\_\_\_\_The two-count Superseding Indictment should not be dismissed because it alleges that the offenses occurred, at least in part, within the Southern District of New York. The law requires nothing more. Counts One and Two of the Superseding Indictment both specifically allege that the criminal activity occurred "in the Southern District of New York and elsewhere." (Sup. Ind. ¶¶ 1, 6). These allegations alone are sufficient to survive a motion to dismiss prior to trial for improper venue. See Szur, 1998 WL 132942 at \*9 (allegation in indictment that offense occurred in "Southern District of New York and elsewhere" sufficient to resist motion to dismiss).

The law does not require that Noorzai himself personally performed any act in the Southern District of New York to be properly charged here in a conspiracy where, at a minimum, the acts undertaken by his co-conspirators occurred. See Naranjo, 14 F.3d at 147. Indeed, though not required to survive a pre-trial motion to dismiss on the basis of venue, both Counts One and Two of the Superseding Indictment includes two specific overt acts in furtherance of the charged conspiracy which took place in the Southern District of New York. (Sup. Ind. ¶¶ 5(b), 8(b) ("In or about 1990, co-conspirators not named as defendants herein met in New York, New York, and discussed receiving heroin from BASHIR NOORZAI, a/k/a "Haji Bashir Noorzai," the defendant."); ¶¶ 5(f), 8(f) ("In or about 2001 and 2002, other co-conspirators not named as defendants herein imported heroin from Pakistan and Afghanistan into New York, New York.")).

For these reasons, Noorzai's motion to dismiss the Superseding Indictment for lack of proper venue should be denied.

**B. Noorzai's Motion For A Bill Of Particulars Should Be Denied**

The sole legitimate purpose of a bill of particulars is to furnish those facts that are necessary (i) to apprise the defendant of the charges against him with sufficient precision to enable him to prepare his defense; (ii) to avoid unfair surprise at trial; and (iii) to preclude a second prosecution for the same offense. See, e.g., Wong Tai v. United States, 273 U.S. 77, 80-82 (1927). Therefore, a bill of particulars is only required ““where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused.”” United States v. Torres, 901 F.2d 205, 234 (2d Cir. 1990). The ultimate test for whether a bill of particulars should be granted is not whether the information sought is merely helpful in preparing for trial, but whether it is necessary for the limited notification purposes of a bill of particulars. See United States v. Ramirez, 602 F. Supp. 783, 793 (S.D.N.Y. 1985).

For this reason, a bill of particulars generally is not required where the information sought by the defense is readily accessible in some acceptable, alternative form. United States v. Bortnovksy, 820 F.2d 572, 574 (2d Cir. 1987); see also United States v. Panza, 750 F.2d 1141, 1148 (2d Cir. 1984) (no bill of particulars required where indictment spelled out defendants' conduct in scheme, prosecutor met with defense counsel and explained government's contentions, and provided defense with copies of all relevant documents). Furthermore, a bill of particulars is not to be used to learn: evidentiary detail, Torres, 901 F.2d at 234; the precise manner in which the charged crimes were committed, United States v. Andrews, 381 F.2d 377, 378 (2d Cir. 1967); the manner in which the Government will prove the charges, United States v.

Leonelli, 428 F. Supp. 880, 882 (S.D.N.Y. 1997); all the overt acts in furtherance of a conspiracy, United States v. Carroll, 510 F.2d 507, 509 (2d Cir. 1975); or particular acts that a particular defendant participated in, had knowledge of, or for which he is being held responsible, United States v. Jimenez, 824 F. Supp. 351, 363 (S.D.N.Y. 1993).

The rationale for this highly restricted use of a bill of particulars is simple. First, the Government is not required to provide information tantamount to an itemized preview of its proof because of the very real danger in criminal cases that the defendant will tailor his testimony to explain away the Government's predisposed case. United States v. Cimino, 31 F.R.D. 277, 279 (S.D.N.Y. 1962). Second, detailed inquiries into the Government's case repeatedly have been rejected because they would unduly restrict the Government in presenting its proof at trial. See, e.g., United States v. Jimenez, 824 F. Supp. at 363; United States v. Goldman, 439 F. Supp. 352 (S.D.N.Y. 1977).

Noorzai is charged in a clearly-worded Superseding Indictment detailing the charges that he faces and that is more than sufficient to apprise him of the charges so that he can prepare a defense. In fact, the Superseding Indictment provides specific details of the means and methods of the conspiracy with which Noorzai is charged, including the means by which Noorzai distributed opium and ultimately heroin in Afghanistan and imported it into the United States. The Superseding Indictment's extensive "Overt Acts" sections set forth dates and locations on which Noorzai is alleged to have met with co-conspirators, and when his co-conspirators met with each other. (See Sup. Ind. ¶¶ 5(a), (b), (e), (f); 8(a), (b), (e), (f)). It also describes specifically the means by which Noorzai caused narcotics to be manufactured and distributed outside the United States and to be imported and distributed into and within the United States.

(See Sup. Ind. ¶ 5(c), (d), (g), (h); 8(c), (d), (g), (h)). In light of the level of detail already provided by the Government – much of which was not required – Noorzai cannot seriously contend that there is a risk of unfair surprise at trial.

Furthermore, in addition to the detail set forth in the Superseding Indictment, and the extensive discovery produced by the Government to date, the Government has also provided reports of statements of potential trial witnesses: a production that far exceeds the Government's obligations pursuant to Rule 16 discovery. These reports provide the defense with significant guidance as to the nature of the testimony that such individuals, if called as witnesses, would provide. The production of such statements significantly reduces any risk of surprise to Noorzai at trial that might otherwise result where the conspiracy charged is lengthy and there are large numbers of co-conspirators. Compare United States v. Nachamie, 91 F. Supp. 2d 565, 572 (S.D.N.Y. 2000). As a result, Noorzai's request for a bill of particulars should be denied.

### **C. Noorzai's Motion To Strike Surplusage Should Be Denied**

Noorzai requests that this Court strike references in the Superseding Indictment to (i) the Taliban and its leader, Mullah Mohammad Omar, (ii) the "Noorzai Organization," and (iii) the distribution of narcotics to places and countries outside the United States, as not relevant to the charges against Noorzai and on the ground that such references serve only to prejudice the jury. (See Noorzai Discovery Motion 9-12).

The Government agrees to strike the references to the "Noorzai Organization" in the Superseding Indictment. The allegations in the Superseding Indictment to the Taliban and its leader, however, set forth facts that are relevant to the offenses charged in the Superseding Indictment and therefore should not be stricken. Similarly, the references to the distribution of

narcotics to places and countries outside the United States are directly relevant to the narcotics conspiracy charges contained in the Superseding Indictment.

The Second Circuit has repeatedly held that allegations in an indictment concerning facts that are admissible and relevant to the charges should not be stricken. “Motions to strike surplusage from an indictment will be granted only where the challenged allegations are not relevant to the crime charged and are inflammatory and prejudicial.” United States v. Scarpa, 913 F.2d 993, 1013 (2d Cir. 1990) (emphasis added). Thus, “if evidence of the allegation is admissible and relevant to the charge, then regardless of how prejudicial the language is, it may not be stricken.” United States v. DePalma, 461 F. Supp. 778, 797 (S.D.N.Y. 1978). “This is a rather exacting standard, and only rarely has surplusage been ordered stricken.” 1 Charles Allen Wright, et al., Federal Practice and Procedure § 127, at 636-39 (3d ed. 1999). Moreover, as Judge Sand has observed, “[a]lthough the Federal Rules of Criminal Procedure grant the Court authority to strike surplusage from an indictment . . . , [i]t has long been the policy of courts within the Southern District to refrain from tampering with indictments.” United States v. Bin Laden, 91 F. Supp. 2d 600, 621 (S.D.N.Y. 2000) (citations omitted).

Relevance is a low threshold that is easily satisfied. See, e.g., Fed. R. Evid. 401 (defining “[r]elevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”); Jodoin v. Toyota Motor Corp., 284 F.3d 272, 278 (1st Cir. 2003) (“The Federal Rules of Evidence establish a low threshold of relevance”).

At this stage of the proceedings, it is unnecessary for the Court to consider Noorzai’s motion to strike surplusage from the Indictment, because such a motion is premature. “The

defendant may renew [the] motion after the presentation of the government’s case if it fails to offer proof” of the indictment’s allegations.” See United States v. Scarpa, 913 F.2d 993, 1011 (2d Cir. 1990) (quoting Scarpa district court’s adoption of this procedural approach to surplusage motion). There is no risk of unfair prejudice to the defendant from such an approach because the Superseding Indictment will not be read to the jury until after the evidentiary portion of the trial has ended. Accordingly, the Government need not attempt to explain how any alleged surplusage is relevant at this stage, but may let the evidence at trial speak for itself.

To the extent that the Court addresses Noorzai’s motion to strike surplusage at this time, however, the motion should be denied. The alignment of the narcotics trafficking organization that Noorzai led with the Taliban is clearly relevant to the charges in the Superseding Indictment. The relationship between the drug trafficking organization and the Taliban is necessary to explain how that organization functioned; specifically, how it was able to maintain control of narcotics and transportation routes for the manufacture, distribution, and importation those drugs. The Superseding Indictment specifically alleges that in exchange for the drug conspiracy’s support, the Taliban protected members and associates of the conspiracy. (See Sup. Ind. at ¶ 4(c)). This strategic relationship is part of how the conspiracy operated, and it is therefore clearly relevant to the existence and purpose of the conspiracy.

Similarly, the conspiracy charged in Count One is a conspiracy to distribute narcotics outside the United States, specifically within Afghanistan and Pakistan, with the intent and/or knowledge that the drugs will be imported into the United States. (See Sup. Ind. ¶2). As a result, allegations concerning the manufacture and distribution of narcotics inside Afghanistan, whether

they resulted in importations of narcotics to the United States or other countries, are relevant to the functioning of the charged conspiracy and its objects, and should not be stricken.

Accordingly, the allegations in the Superseding Indictment which the defense seeks to strike as surplusage are thus relevant (and will be proven at trial), and, accordingly, should not be stricken. At this time, the Government intends to offer evidence to prove all of the allegations in the Superseding Indictment. If, at any time, the Government decides not to (or is unable to) prove the specific conduct charged in any overt act, Noorzai can then move to strike the relevant language in the Superseding Indictment before it is read to the jury.

### **VIII. Conclusion**

Noorzai's omnibus motion should be denied in its entirety without a hearing.

Dated: November 9, 2007

Respectfully submitted,  
MICHAEL J. GARCIA  
United States Attorney

s/ Boyd M. Johnson III

By:

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BOYD M. JOHNSON III  
JOCELYN STRAUBER  
AMY FINZI  
Assistant United States Attorneys  
(212) 637-2276/2388/1034

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served on the following  
by overnight courier delivery on November 9, 2007:

Ivan Fisher, Esq.  
251 East 61<sup>st</sup> Street  
New York, New York 10021  
212-517-5000

s/ Boyd M. Johnson III

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Boyd M. Johnson III