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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 15-3078

CONSOLIDATED WITH NOS. 15-3079, 15-3080, 15-3081

UNITED STATES OF AMERICA,
APPELLEE

v.

NICHOLAS ABRAM SLATTEN,
DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (CRIM. NO. 14-107) (THE HONORABLE ROYCE C. LAMBERTH)

CORRECTED FINAL BRIEF OF DEFENDANT-APPELLANT NICHOLAS ABRAM SLATTEN

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June 24, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES AND AMICI

Appellant Nicholas A. Slatten was the Defendant below (No. 1:14-CR-107-RCL-1).

Slatten was originally indicted with Defendants-Appellants Paul A. Slough, Evan S. Liberty, and Dustin L. Heard. Defendant Donald W. Ball was dismissed with prejudice before trial and is not involved in this appeal. *See* No. 1:08-CR-360-RCL-2. The indictment in Case No. 1:08-CR-360 against Mr. Slatten was dismissed with prejudice, on a motion to enforce this Court's writ of mandamus. A.381; *see* A.341-42 (mandamus order).[1] The government responded by indicting Slatten separately on a new charge. A.382. Appellant was tried and sentenced in joint proceedings with Defendants-Appellants Slough, Liberty, and Heard, who are the Appellants in companion appeals Nos. 15-3079, 15-3080, and 15-3081.

There were no intervenors or amici below.

An amicus brief urging reversal may be filed in this appeal by the National Association of Criminal Defense Lawyers ("NACDL").

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[1] Slatten's mandamus petition to this Court is set out in the list of Related Cases, *infra* at vii.

B. RULINGS UNDER REVIEW

Slatten challenges the following district court (the Hon. Royce C. Lamberth) rulings:

1. Motion to Dismiss for Vindictive Prosecution.

Slatten challenges the district court's denial of his motion to dismiss the indictment for vindictive prosecution based on the government's decision to increase the severity of the charge following Slatten's successful assertion of his statutory rights.[2] This order is reported at *United States v. Slatten*, 22 F. Supp. 3d 9 (D.D.C. 2014).

2. Evidentiary Rulings Made in Denying Motion to Reconsider Joinder and to Sever.

Slatten challenges the district court's joinder of his case with Case No. 1:08-CR-360-RCL-2, and the evidentiary rulings it made in denying Slatten's motion to reconsider joinder so that Slatten could offer exculpatory evidence on his behalf.[3] This order is not reported, and the memorandum opinion is under seal.

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[2] A.440, A.452 (6/5/14) (Mem. Op. and Order); *see* A.420 (5/19/14) (motion to dismiss).

[3] A.453 (6/16/14) (Order); SA.39 (6/16/14) (Mem. Op.) (under seal); A.391 (5/12/14) (granting government's motion to join); *see* SA.36 (5/21/14) (Def.'s Mot. to Reconsider Order Joining Cases and Mot. to Sever, or, in the Alt., for Seating a Second Jury) (filed under seal).

3. Conviction of First Degree Murder.

Slatten challenges his conviction of First Degree Murder, 18 U.S.C. § 1111, based on insufficient evidence.[4]

4. New Trial Motion.

Slatten challenges the district court's denial of his motion for a new trial based on new evidence.[5] This order is not reported.

5. Rulings Regarding Venue.

Slatten challenges the following rulings with respect to venue:

(A) the denial of Defendants' motions for judgment of acquittal or dismissal based on lack of venue[6]; and

[4] A.549 (4/17/15) (Judgment); A.3016 (8/21/14 (PM)) (denying motion for judgment of acquittal at close of government's evidence); A.3068-69 (8/25/14 (PM)) (denying renewed motion at close of defendants' evidence); A.3115-16 (8/26/14 (PM)) (renewing motion at close of all evidence); A.3300 (10/22/14 (AM)) (renewing motion after verdict rendered); A.529 (4/9/15) (denying renewed motion); *see* A.461 (8/19/14) (motion for judgment of acquittal).

[5] A.688, A.689 (11/10/15) (Order and Mem. Op.); *see* A.628, A.629 (4/27/15) (motion for new trial).

[6] A.454 (6/16/14) (Order); A.3016 (8/21/14 (PM)) (denying motions at close of government's evidence); A.529 (4/13/15) (order denying renewed motion); *see* A.2885 (8/20/14 (AM)) (motion at close of government's evidence); A.2994-95, A.2997 (8/21/14 (PM)) (motion argument); A.3068-69 (8/25/14 (PM)) (renewing motion at close of defense evidence); A.3115-16 (8/26/14 (PM)) (renewing at close of all evidence); A.3300 (10/22/14 (AM)) (renewing after verdict rendered).

(B) the trial court's taking the issue of venue from the jury and finding venue element satisfied without jury determination.[7]

6. Rulings Under the Military Extraterritorial Jurisdiction Act.

Slatten challenges the following rulings of the district court concerning whether he was "employed by the Armed Forces outside the United States" under the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261(a)(1) ("MEJA"):

(A) the denial of Defendants' motions for judgment of acquittal based on lack of evidence to satisfy MEJA[8];

(B) the trial court's error in instructing the jury on the proof required to satisfy MEJA[9]; and

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[7] A.3114 (8/26/14 (PM)) (ruling at jury charge conference); *contra* A.3113 (8/26/14 (PM)) (court's initial ruling, subsequently vacated, that "I think the defendant is right, you're entitled to have the jury decide the question"); *see* A.476-78 (8/25/14) (Def. Corr. Prop. Instr. 18); A.3105-12 (8/26/14 (PM)) (charge conference argument) (also incorporating earlier briefing and argument, *see* A.419 (5/19/14) (mot. to dismiss)); *see also* A.3295-96 (9/2/14 (AM)) (preserving objection).

[8] A.3016 (8/21/14 (PM)) (denying motion at close of government's evidence); A.529 (4/13/15) (order denying renewed motions); *see* A.463-65 (8/19/14) (motion for judgment of acquittal); A.2885 (8/20/14 (AM)) (motion at close of government's evidence); A.2964-65, A.2978-81, A.2997 (8/21/14 (PM)) (motion argument); A.3068-69 (8/25/14 (PM)) (renewing at close of defense evidence); A.3115-16 (8/26/14 (PM)) (renewing at close of all evidence); A.3300 (10/22/14) (renewing after verdict).

[9] A.497-99 (9/2/14) (written jury charge); A.3292-93 (9/2/14 (AM)) (jury charge transcript); *see* A.3074-87 (8/26/14 (AM)) (charge conference argument and ruling); A.467-69 (8/25/14) (defense objections); A.472-74 (Def. Corr. Prop. Instr. 18); A.3116-17 (8/26/14 (PM)) (preserving objection); A.3295 (9/2/14 (AM)) (same).

(C) the trial court's refusal to inform the jury that by statute the provision of diplomatic security in a foreign nation is the responsibility of the State Department.[10]

With respect to his challenges to the rulings regarding venue and MEJA, Slatten joins and incorporates by reference pursuant to Federal Rule of Appellate Procedure 28(i) Defendants-Appellants Slough's, Liberty's, and Heard's arguments set forth in their opening and reply briefs.

C. RELATED CASES

1. Prior *Kastigar* proceedings.

This Court heard the government's previous appeal from the district court's dismissal, reported at 677 F. Supp. 2d 112 (D.D.C. 2009), of the indictment on *Kastigar* grounds. *United States v. Slough et al.*, No. 10-3006, 641 F.3d 544 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2710 (2012).

The earlier *Kastigar* appeal concerned the effect of witnesses' and prosecutors' pretrial exposure to Defendants' compelled post-incident statements, which were protected from use or derivative use under *Kastigar v. United States*,

[10] *See* A.475 (8/25/14) (Def. Corr. Prop. Instr. 16); A.3087-88 (8/26/14 (AM)) (charge conference denial); A.3088 (requesting alternative instruction, and denial of same); A.3089-90 (submitting Def. Corr. Prop. Instr. 16A); A.3095 (8/26/14 (PM)) (additional argument and denial); A.3116-17 (preserving objection); A.3208-11 (8/27/14 (PM)) (submitting and arguing Def. Corr. Prop. Instr. 16B); A.3215 (8/28/14 (AM)) (denying same); *see* A.3279-80 (8/28/14 (PM)) (same); A.3295 (9/2/14 (AM)) (preserving objection).

406 U.S. 441 (1972), and *Garrity v. New Jersey*, 385 U.S. 493 (1967). *See Slough*, 641 F.3d at 547, 549-50. To prevent disclosure and further dissemination of those compelled statements or evidence derived from them, the briefs in No. 10-3006 were submitted under seal, and the appeal was argued in a closed courtroom. (Redacted copies of the briefs, record, and argument transcript were subsequently made public.)

To further protect against the compelled statements infecting the trial proceedings below in any way, on remand the government employed a separate team of "filter" prosecutors to ensure that only evidence free from *Kastigar* taint was furnished to the trial prosecutors and used at trial. *See generally United States v. Slough*, 36 F. Supp. 3d 37, 42 (D.D.C. 2014) (describing filter procedures).

Thus, the 2011 *Kastigar* appeal focused principally on tainted evidence that was filtered from this trial record to protect Defendants' Fifth Amendment rights. The 2011 appeal did not address the merits of the case, or any issues that will be addressed in this appeal.

2. Prior disclosure proceedings.

In 2010, the press filed motions seeking disclosure of the sealed *Kastigar* record from the district court. *See Washington Post v. United States*, No. 1:10-mc-0005-RMU (D.D.C.), *on appeal*, No. 10-3007. Pursuant to a negotiated resolution, the district court's disclosure order was stayed by the motions panel until

completion of this criminal matter, including appellate review. Order, No. 10-3007, Doc. 1388557 (D.C. Cir. Aug. 10, 2012) (per curiam).

The disclosure appeal, like the *Kastigar* appeal, did not address the merits of the case, or any issues that will be addressed in this appeal.

3. *United States v. Nicholas Slatten*:

In Spring 2014, Slatten filed two petitions for mandamus in this Court. In *In re Slatten*, No. 14-3007 ("*Slatten Mandamus I*"), this Court granted Slatten's petition and directed the district court that Slatten's indictment in No. 08-CR-360, dismissed in 2009, was not revived by this Court's judgment in *Slough II*, *supra*. *See Slatten Mandamus I*, Doc. 1487269 (Order) (April 7, 2014) (per curiam) (A.341). The result was that the charges against Slatten in the October 2013 superseding indictment in No. 08-CR-360 were time-barred. This Court denied the government's petition for rehearing. *Id.*, Doc. 1489094 (Order) (April 18, 2014) (per curiam) (A.432).

After the government responded by indicting Slatten for first-degree murder, Slatten petitioned this Court for a mandamus order directing dismissal of the murder indictment as vindictive. This Court denied relief, ruling that Slatten's vindictive prosecution claim could be raised in this direct appeal from any conviction. *In re Slatten*, No. 14-3033 ("*Slatten Mandamus II*"), Doc. 1496551 (Order) (June 6, 2014) (per curiam).

4. *United States v. Paul A. Slough, et. al*.

Defendants Paul A. Slough, Evan Liberty, and Dustin L. Heard were indicted in No. 1:08-CR-360-RCL below. They were tried, convicted, and sentenced in joint proceedings with the Defendant. Their companion appeals are Nos. 15-3079, 15-3080, 15-3081.

5. *United States v. Jeremy Ridgeway*.

Cooperating witness Jeremy Ridgeway pleaded guilty under a plea and cooperation agreement, and testified against Defendants under that agreement. *United States v. Ridgeway*, No. 1:08-CR-341-RCL (D.D.C.).

6. Immunized Witnesses.

Witnesses Adam Frost, Mark Mealy, Jimmy Watson, and Donald Ball were granted statutory immunity. *In re Frost*, Misc. No. 07-513 (D.D.C. Nov. 21, 2007); *In re Mealy*, Misc. No. 07-514 (D.D.C. Nov. 21, 2007); *In re Watson*, Misc. No. 13-206 (D.D.C. Mar. 11, 2013); *In re Ball*, Misc. No. 07-513 (D.D.C. Oct. 4, 2013).

7. Motion to Quash Grand Jury Subpoenas.

In 2007, a number of witnesses who were subpoenaed to the grand jury filed unsuccessful motions to quash their subpoenas. *United States v. (Under Seal)*, No. MISC 07-516 (D.D.C.) (before then-Chief Judge Hogan).

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GLOSSARY OF ABBREVIATIONS

A.___	Appendix
MEJA	Military Extraterritorial Jurisdiction Act
SA.____	Sealed Appendix

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. Final judgment was entered on April 23, 2015. A.138 (R.656). On April 27, Slatten filed a new trial motion based on newly discovered evidence, suspending the time to appeal. Fed. R. App. P. 4(b)(3)(A)(ii). The court denied that motion on November 10, 2015. A.688. Slatten filed his notice of appeal on November 20, 2015. A.708.

INTRODUCTION

This high-profile case stems from U.S. operations in wartime Iraq, and the government has been determined to win at all costs. So when this Court agreed with Appellant Slatten that the government's missteps time-barred the manslaughter charges that it had twice brought against him for the death of Ahmed Al-Rubia'y, prosecutors sought to vindicate their mistakes by charging Slatten with first-degree murder. The prosecutors based the first-degree murder charge on the same evidence that the government had asserted for seven years supported manslaughter charges. The government then successfully excluded multiple statements in which another Blackwater guard, [redacted]. At trial, the government produced no physical or eyewitness evidence of Slatten killing Al-Rubia'y; instead, it introduced evidence that Slatten had made derogatory remarks about Iraqis and

once fired into an empty tin shed (thinking it contained Iraqi insurgents). Government witnesses consistently reported that guards mounted in turrets on top of Blackwater vehicles, *not* Slatten, who sat inside a vehicle, shot Al-Rubia'y. Slatten was nonetheless convicted. Afterward, a key government witness made a new statement showing that Slatten did *not* shoot Al-Rubia'y with the first rounds fired that day, as the government had claimed, but the district court denied Slatten's request for a new trial.

Slatten now appeals on six grounds. First, the government's two-step increase in charge resulting from Slatten's successful assertion of the statute of limitations constituted vindictive prosecution. Second, Slatten was deprived of his fundamental right to present exculpatory evidence through the exclusion of [redacted] Third, the government failed to provide evidence from which a reasonable jury could conclude beyond a reasonable doubt that Slatten killed Al-Rubia'y. Fourth, the district court erred in not granting a new trial based on the new exculpatory evidence provided by a government witness. Fifth, venue did not properly lie in the District of Columbia. Sixth, the Military Extraterritorial Jurisdiction Act does not apply in this case.

STATEMENT OF THE ISSUES

1. Whether the government vindictively prosecuted Slatten by reindicting him for first-degree murder after twice charging him with

manslaughter, after two lengthy investigations, because this Court ordered the second manslaughter indictment dismissed as barred by the statute of limitations.

2. Whether the district court erred in excluding [redacted] exculpatory [redacted] statement, [redacted]

3. Whether the government failed to present sufficient evidence that Slatten killed Al-Rubia'y.

4. Whether the district court erred in failing to grant a new trial based on new exculpatory evidence from an eyewitness.

5. Whether the district court erred in finding that venue was proper in the District of Columbia.

6. Whether the district court erred in applying the Military Extraterritorial Jurisdiction Act and charging the jury on the law regarding the Act.

CONSTITUTIONAL PROVISIONS AND STATUTES

Relevant constitutional provisions, statutes, and rules appear in the Addendum.

STATEMENT OF THE CASE

A. The Nisur Square Incident.

On September 16, 2007, Slatten was serving as a member of a Blackwater team known as "Raven 23," providing security to State Department personnel in Baghdad, Iraq. That morning a large car bomb exploded near a State Department

official, and Raven 23 departed Baghdad's "Green Zone" to secure a safe return for the official. The convoy proceeded to a traffic circle called Nisur Square and took up positions blocking traffic from entering.

When the convoy came to a stop, Iraqi police officers Ali Ghalaf Salman Mansur Al-Hamidi and Sarhan Dheyab Abdul Monem stopped civilian traffic coming into the square. A white Kia driven by Ahmed Al-Rubia'y initially stopped as it neared the circle, but then began to approach the Blackwater convoy. At the time of the incident, U.S. intelligence services were listing a "white Kia" as a possible car-bomb threat. Witnesses later disputed when and how fast the Kia moved—some witnesses asserted that the Kia moved only very slowly or only after it had been shot, but several Blackwater guards perceived the Kia's movements as threatening. One witness, a former U.S. Army Captain, recounted that several Iraqi witnesses reported to him that the white Kia "punche[d] forward towards the convoy similar to a [car bomb]. And that's when the vehicle was engaged." A.2622.

Officers Al-Hamidi and Monem later testified that, after stopping traffic and before shooting began, they turned to face the Blackwater convoy, and could see guards mounted on top of the Blackwater vehicles (called "turret gunners"). Both officers recounted that the first shooting that they saw or heard that day was these

turret gunners firing at the white Kia and striking the vehicle's driver. A.1269-71; A.795-97.

Slatten was not mounted on top of a Blackwater vehicle. Slatten was the team's "designated-defensive marksman" and was positioned inside the third of the four vehicles that entered the square, armed with an SR-25 rifle firing a uniquely identifiable 7.62 mm round. Forensic analysis of the Kia after the event revealed no bullet or fragment matching Slatten's weapon, but rather produced evidence matching an M-4 rifle, which fires a 5.56 mm round.

[redacted]

Consistent with the testimony from the Iraqi officers and the forensic evidence, [redacted]. Ridgeway testified that very early in the encounter, he fired "three to five" well-aimed shots at "the driver of the white Kia"—Al-Rubia'y. A.2256-58. [redacted]

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But the jury never learned about [redacted] statements, which were [redacted] admissible vis-à-vis Slatten (though not vis-à-vis [redacted] because the statements were compelled). The government successfully opposed their admission on grounds that [redacted].

The government's case against Slatten relied largely on testimony from Jimmy Watson, the Raven 23 team leader who was inside Slatten's vehicle. Watson testified that shortly after the convoy stopped in Nisur Square, he heard the sound of gun fire or "pops." A.1990-91. *After* hearing these "pops," he then heard Slatten fire his rifle twice to the south of the square, though he did not see where Slatten had aimed. A.2060-64. The government argued that this inculpated Slatten in Al-Rubia'y's death, despite the Iraqi police officers' certainty that they saw turret gunners shoot Al-Rubia'y.

The government also relied on somewhat tangential testimony from Ridgeway. Ridgeway testified that Slatten later told him that he had shot an "active shooter" in the head, causing him to slump forward. The government asserted that this was a coded admission from Slatten that he had killed Al-Rubia'y. The government maintained—notwithstanding that Al-Rubia'y was the opposite of an "active shooter"—that Slatten shot Al-Rubia'y because he, too, was

shot in the head and had supposedly slumped over (though sidewise, not forward) after being shot.

Based on this evidence, the government argued to the jury that Slatten's supposed hatred for Iraqis in general led him to kill Al-Rubia'y while he sat patiently in traffic. The government offered no explanation for the eye-witness evidence contradicting its theory, or the absence of either physical or eyewitness evidence against Slatten.

B. 2008 Indictment.

The theory that the government presented at trial was not the theory under which it had originally indicted Slatten. Following the incident, the government conducted a ten-month investigation—including extensive witness interviews and onsite investigation—that found no evidence linking any individual defendant to any particular person injured or killed. The government later explained that "the facts and evidence in this case do not lend themselves to individual parsing of the conduct of each defendant with respect to each named victim," and that "there is no way to determine conclusively who fired the fatal shot or shots that killed a particular victim." A.272-73. Indeed, it informed the court that "there is no forensic match between an individual defendant's weapon and any bullet or bullet fragment recovered from a victim's body," and that, at most, the "trial evidence

[would] show that the defendants and their joint offender, Jeremy P. Ridgeway, were the six shooters at Nisur Square." A.272.

The government obtained an indictment against Slatten and his co-defendants in 2008, charging all of them with manslaughter and attempted manslaughter. The defendants challenged that indictment on the basis that the government had improperly used Fifth Amendment-protected statements. Those proceedings revealed the government's honest assessment of the manslaughter charges against Slatten—specifically, that "relative to the other defendants the evidence against Mr. Slatten was weak." SA.16. The district court (Judge Urbina) concluded that the government had obtained Slatten's indictment by using tainted evidence, manipulating testimony, and intentionally excluding exculpatory evidence. *See United States v. Slough*, 677 F. Supp. 2d 112, 127-28, 145-47 (D.D.C. 2009). Following the hearing on the issue, the government itself moved to dismiss Slatten's indictment.

C. Government's Reinvestigation and the 2013 Indictment.

After the dismissal of the original indictment, Slatten and his co-defendants followed different procedural paths. This Court reinstated the co-defendants' indictments on appeal, but affirmed the district court's dismissal as to Slatten. *See United States v. Slough*, 641 F.3d 544, 547 (D.C. Cir. 2011). Accordingly, because

Slatten was not under indictment, any new manslaughter charges were subject to the five-year statute of limitations, which ran on September 16, 2012.

Following this Court's 2011 decision, a new government trial team conducted a second lengthy investigation. In October 2013, that investigation led to a new indictment against Slatten and his former co-defendants, which again charged manslaughter and attempted manslaughter. Slatten made clear that he stood on his statute of limitations rights, but the government claimed that the appeal process for the other defendants had also reinstated the prior indictment against Slatten.

D. Petition for Writ of Mandamus.

After his October 2013 indictment, Slatten moved to dismiss on statute of limitations grounds. The district court (now Judge Lamberth) denied Slatten's motion and Slatten filed an emergency petition for a writ of mandamus, which the district court called "frivolous." This Court granted that writ, confirming that it had *not* reversed the dismissal of the charges against Slatten, which meant that the 2013 indictment was time-barred. A.424. The government then asked this Court to withdraw its 2011 mandate, arguing that charging Slatten with manslaughter was necessary to "hold[] Slatten accountable for his role in the shooting," and that to do otherwise would result in a "miscarriage of justice." A.4004. The Court denied the government's petition, noting that "[i]f there was a 'miscarriage of

justice' here, it was caused by the government's inexplicable failure to reindict Slatten by the deadline." A.433.

E. Indictment for First-Degree Murder.

This Court's rebuke was embarrassing, and observers noticed. *See*, *e.g.*, *D.C. Circuit Criticizes Prosecutors in Blackwater Case*, LEGAL TIMES, Apr. 21, 2014; Matt Apuzzo, *Trying to Salvage Remains of Blackwater Case*, N.Y. TIMES, May 11, 2014. In addition, the potential for Slatten's unexplained absence at trial—or worse, the testimony that he might offer in support of the other defendants—threatened to disrupt the government's entire case. Thus, not only had Slatten's exercise of his rights embarrassed the government, but it threatened further, and perhaps greater, embarrassment to follow.

So on May 8, 2014, the government indicted Slatten for the premeditated murder of Al-Rubia'y, for which there is no statute of limitations. The prosecutors made clear, however, that the new first-degree murder indictment was *not* based on any new evidence or a change in the law, stating that, "the evidence that [the government] expect[s] to submit, through testimony and otherwise, with respect to Mr. Slatten's new charges is substantially the same, if not identical, to what [the government] had originally planned." A.389.

After charging Slatten with a new, more serious crime—which the government *in six years* had never even intimated that Slatten had committed—the

government contacted Slatten with an offer to return to the 2013 manslaughter indictment if he agreed to "waive" the statute of limitations defense on which he had already prevailed. The government thus indicated that if Slatten were willing to act as if he had never exercised his rights, it would do the same. Slatten did not respond, and instead sought a second writ of mandamus from this Court for vindictive prosecution. This Court denied that writ on grounds that such relief could be sought post-trial.

On May 12, 2014, the district court arraigned Slatten on the new first-degree murder charge, and granted, without permitting a written opposition, the government's motion to join Slatten's prosecution to that of his co-defendants. Slatten, in turn, moved unsuccessfully to be tried by a different jury so that he could offer as exculpatory evidence [redacted].

F. Monem Presents New Evidence.

After trial but before sentencing, Monem—one of the Iraqi officers who had testified that a turret gunner shot and killed Al-Rubia'y—changed his description of the Nisur Square incident to further exculpate Slatten. Monem wrote in a victim impact statement that he had seen Al-Rubia'y and his passenger alive *after* shooting had started, and reported seeing Al-Rubia'y and his passenger argue over whether they would be safer inside or outside of their car. A.524. Since this

contradicted the government's claim to the jury that Slatten set the incident in motion by shooting Al-Rubia'y while he sat unsuspecting in traffic, the government telephoned Monem to question him further. According to the government's account of the call, Monem clarified that he had not heard Al-Rubia'y say anything *after* he was shot. But Monem did not retract the core of his exculpatory evidence—which, again, indicated that Al-Rubia'y was still alive after shooting began in Nisur Square. The district court denied Slatten's motion for a new trial to allow Monem to present his testimony.

SUMMARY OF ARGUMENT

I. This appeal arises from a firefight in wartime Iraq. After a thorough investigation, the government acknowledged that it was impossible to tell who fired "the fatal shot or shots that killed a particular victim." A.273. Following the initial indictments of all defendants (including Slatten) for manslaughter, the government stated that, at most, the "trial evidence [would] show that the defendants and their joint offender, Jeremy P. Ridgeway, were the … shooters at Nisur Square." A.272. Even then, the government acknowledged that "relative to the other defendants the evidence against Mr. Slatten was weak." SA.16.

Against this backdrop, the government's later indictment of Slatten alone for the first-degree murder of Al-Rubia'y—after Slatten alone obtained dismissal of the manslaughter charges against him on statute-of-limitations grounds—violates

the doctrine of vindictive prosecution. This Court holds that a defendant is entitled to a *presumption* of vindictiveness when the totality of the circumstances surrounding the increase in charge supports a realistic likelihood of vindictiveness. That standard is met here. Slatten twice faced the same charges as his co-defendants. The government upped his charge to premeditated murder (a death-eligible crime not subject to any limitations period) only *after* Slatten successfully exercised his rights. Moreover, the government specifically acknowledged that it based its murder charge on evidence identical to that which had supported the manslaughter charge. In short, the government upped the charges against Slatten not based on new evidence, but rather to vindicate itself after failing to seek his timely reindictment.

The government has not and cannot overcome the presumption of vindictiveness to which Slatten is entitled. While the government asserts that its subjective desire to "hold Slatten accountable" is sufficient to overcome the presumption of vindictiveness, that claim is inconsistent with this Court's precedents. Regardless of the prosecutors' subjective states of mind—which were likely concerned primarily with vindicating their mistakes—the prosecutors' charging decision here chills the exercise of rights in violation of due process.

II. The district court erred in granting the government's motion to join Slatten's trial with the *Slough* case, a ruling that depended on the court's exclusion

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of statements by [redacted] that exculpated Slatten. The government agreed that joinder would be improper if [redacted] statements were admissible vis-à-vis Slatten, but convinced the district court that they were not. That decision was erroneous and requires a new trial.

Both immediately after the incident and repeatedly in the days that followed, [redacted]. The district court erroneously found that [redacted]—even though [redacted]. The district court found [redacted] statements were, moreover, admissible under the residual exception for hearsay and as records of a regularly conducted activity. Excluding [redacted] statements was *not* harmless error because they show that [redacted]—which undermines the central tenet of the government's case against Slatten.

III. The government failed to introduce evidence sufficient to sustain Slatten's conviction for first-degree murder—in fact, the evidence offered by the government's own witnesses *disproves* that charge. Al-Hamidi and Monem both

testified to observing the shooting of Al-Rubia'y. Neither testified that Slatten or any person located *inside* a convoy vehicle shot Al-Rubia'y. Rather, both testified that the first shots fired from the convoy and the first shots directed at Al-Rubia'y came from a turret gunner.

Ridgeway—a turret gunner on the fourth vehicle—testified that he shot Al-Rubia'y, and otherwise corroborated the police officers' accounts in detail. Specifically, Ridgeway testified that he saw Slough firing his M-4 at Al-Rubia'y's white Kia, and then he (Ridgeway) immediately fired three to five shots with his M-4 rifle at Al-Rubia'y. Another government witness, Jeremy Krueger, corroborated this account. Krueger testified that the first sounds that he heard that day were "5.56 rounds"—a 5.56 round being the ammunition fired from an M-4 rifle. Krueger specifically explained that he was able to distinguish a 5.56 round from a 7.62 round like Slatten would have fired from his SR-25 rifle.

There was no physical evidence linking Slatten to Al-Rubia'y's death. In fact, the physical evidence recovered from the white Kia's steering wheel (a fragment from a 5.56 mm round) did not match Slatten's weapon, but matched an M-4 rifle, the weapon type that the turret gunners used. On this record, no reasonable juror could conclude beyond a reasonable doubt that Slatten killed Al-Rubia'y.

IV. The district court further erred in holding that new exculpatory evidence from a key government witness did not require a new trial. Two police officers testified that a turret gunner—not Slatten—fired the first shots at Al-Rubia'y. After the trial, one of those officers, Monem, gave a victim impact statement completely at odds with the government's theory that Slatten committed first-degree murder. Monem's statement describes a mother and son who "hugged" and cried in the white Kia, fearing for their lives. With respect to Slatten, this is critical, fundamental exculpatory evidence, because the government claimed that Slatten shot and *instantly killed* Al-Rubia'y as Al-Rubia'y sat calmly in traffic, and it only attempted to identify Slatten as Al-Rubia'y's assailant by matching the *first sound* of gunfire in Nisur Square as shots from Slatten. Monem's new testimony renders that already highly speculative match simply impossible by showing that Al-Rubia'y was still alive *after* shooting began. This new evidence is direct evidence that Slatten is not guilty of the premeditated murder of Al-Rubia'y, and would likely lead to an acquittal.

V. The district court also erred in denying Slatten's motion for judgment of acquittal for lack of venue. As set forth in Slatten's co-defendants' brief, which he adopts and incorporates pursuant to Rule of Appellate Procedure 28(i), venue was not proper in the District of Columbia. Slatten alone was charged

with murder and with killing Al-Rubia'y; as such, Ridgeway's "arrest" on *different* charges involving *different* victims does not confer venue here.

VI. The district court erred in applying the Military Extraterritorial Jurisdiction Act. Slatten joins and incorporates pursuant to Rule of Appellate Procedure 28(i) the arguments of his co-defendants.

ARGUMENT

I. THE GOVERNMENT'S VINDICTIVE PROSECUTION OF SLATTEN VIOLATES DUE PROCESS.

After two lengthy investigations, the government twice charged Slatten (together with his co-defendants) with voluntary manslaughter in connection with the Nisur Square incident. But after Slatten alone asserted a statute-of-limitations defense—and this Court ruled on mandamus that the government had "inexplicabl[y]" allowed the limitations period for charging Slatten with manslaughter to run, A.433—the government singled out Slatten and reindicted him for first-degree murder based on the same evidence. The government's reindictment of Slatten for first-degree murder constitutes vindictive prosecution.

This Court should overturn a trial court's ruling on vindictive prosecution "when a review of all of the evidence leaves the court 'with the definite and firm conviction that a mistake has been committed.'" *United States v. Meyer*, 810 F.2d 1242, 1244 (D.C. Cir. 1987) (citation omitted). Here, that standard is satisfied.

A. This Court's Precedents Show that the Government Violated Due Process by Indicting Slatten for Murder.

In *Blackledge v. Perry*, the Supreme Court established that the due process clause prohibits prosecutors from using their charging authority to retaliate against a defendant who exercises a legal right. 417 U.S. 21, 28 (1974). The Court provided prophylactic protection against this, prohibiting the government not just from *actually* punishing the exercise of rights, but also from *seeming* to punish the exercise of rights so as to discourage future defendants from doing so. *Id.* (acknowledging that there was "no evidence that the prosecutor in this case acted in bad faith or maliciously," but explaining that, "since the fear of [] vindictiveness may unconstitutionally deter a defendant's exercise of [rights] … due process also requires that a defendant be freed of apprehension of such a retaliatory motivation"). The reason for this is that both actual vindictiveness and apparent vindictiveness unconstitutionally chill the exercise of rights by future litigants. *Id.*; *United States v. Rosenthal*, 02-cr-0053, 2007 WL 801647, *6 (N.D. Cal. Mar. 14, 2007) (dismissing a prosecution as vindictive because "[a] reasonable observer would interpret the government's conduct as [a] warning;" if defendants successfully exercise their rights "the government will punish them by bringing more serious charges"). *Blackledge* therefore established that courts will *presume* prosecutors to have acted unconstitutionally when it appears that they have, and that the government takes on the burden to show otherwise. 417 U.S. at 28.

This Circuit crystalized the practical application of the doctrine of vindictive prosecution in two leading cases: *United States v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974), and *United States v. Meyer*, 810 F.2d 1242 (D.C. Cir. 1987). *Jamison* held that any time a defendant exercises a legal right and the government in turn increases the charge against him, a presumption of vindictive prosecution arises. 505 F.2d at 413. The *Jamison* court acknowledged that the government may "justify [its] harsher treatment of the defendant in a way which negate[s] the possibility of vindictiveness," but explained that the government may meet that burden only by making "the reasons for such increases, as well as their factual bases … a part of the record at the time the higher indictment is filed." *Id.* at 416.

In *Meyer*, decided a decade after *Jamison*, this Court pared *Jamison*'s holding back by incorporating lessons from two intervening Supreme Court cases. Those two cases, *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), and *United States v. Goodwin*, 457 U.S. 368 (1982), acknowledged that the government *could* properly increase charges against a defendant who exercised a right without offending due process, *if* that sequence occurs in the context of plea bargaining or after the exercise of a merely routine pre-trial right.

Meyer thus modified the *Jamison* rule to provide that when a defendant exercises a right and a prosecutor in turn increases the charge against that defendant, a court must *first* evaluate the totality of the circumstances to determine

whether "other circumstances in the case [] suggest a retaliatory motivation." *Meyer*, 810 F.2d at 1246. If "all of the circumstances [surrounding the increase in charge], when taken together, support a realistic likelihood of vindictiveness," then the court adopts a presumption of vindictiveness. *Id.* at 1246. Consistent with *Jamison*, the government can overcome this presumption only by placing a valid reason for its decision on the record at the time of charging.

1. The Government's First-Degree Murder Charge Raises a Presumption that it Violated Due Process.

In 2008, the government indicted Slatten for manslaughter. Even after completely reinvestigating the case (an investigation that began in 2012), the government still indicated to this Court in 2014 that this was the only appropriate charge that it could assert against him. A.4004 (arguing that permitting manslaughter charges was necessary to "hold[] Slatten accountable for his role in the shooting")).[11] Nevertheless, once Slatten successfully asserted his rights under the manslaughter statute of limitations, prosecutors charged Slatten with murder

[11] The government claimed below that it had suggested to this Court only that dismissal of the manslaughter indictment against Slatten would result in him escaping liability "for the charged offenses." A.436. But before this Court, the government had unquestionably argued that "holding Slatten accountable for his role in the shooting of 32 unarmed Iraqi civilians" was of such overriding public importance that the Court should retrospectively modify a years-old decision and revive time-barred charges. A.4004. Those claims are difficult to square. In any event, there is no doubt that the government never suggested to this Court (or to Slatten) that it was contemplating murder charges. That lack of forthrightness with this Court (and Slatten) is itself unacceptable.

based on the same evidence. Slatten's co-defendants, who did not assert statute of limitations rights, remained under indictment for manslaughter. Consistent with *Meyer*, that increase in charge requires a court to evaluate whether "other circumstances in the case [] suggest a retaliatory motivation." *Meyer*, 810 F.2d at 1246. Here, the totality of the circumstances plainly does.

Meyer identified four circumstances that combined with an increase in charge to support a presumption of vindictiveness in that case, and all four are present here. First, "[p]erhaps the most important of the circumstances" was that prosecutors treated defendants who exercised rights more harshly than defendants who did not exercise their rights. *Id.* The "disparate treatment" identified in *Meyer* was that prosecutors charged defendants who forfeited their rights with one misdemeanor, and charged those who asserted their rights with two misdemeanors. Slatten—who *twice* faced manslaughter charges just like his co-defendants—saw his charge upped to premeditated murder (a death-eligible crime) after asserting his rights, while the other defendants remained charged with voluntary manslaughter, attempted manslaughter, and a weapons charge. Obviously, the discrepancy in treatment in this case is substantially more profound than in *Meyer*.

Second, the *Meyer* court found support for the presumption in the fact that the government there had fully developed the facts and legal theory of their case before initially charging the defendants. The only relevant intervening event

before the government brought more serious charges was the defendants' exercise of their rights. *Id.* at 1246–47. The same is true here: the government conducted two detailed investigations and charged Slatten with manslaughter after each. The fact that the government charged murder only after Slatten exercised his rights shows that, just as in *Meyer*, "the prosecutor increased the charges not because of any further factual investigation or legal analysis, but because the defendant[] chose to exercise" his rights. *Id.* at 1247.

Third, also as in *Meyer*, the government's actions *after* charging Slatten similarly support the presumption. In *Meyer*, the government dropped the higher charge it had brought once the court began to evaluate whether it had acted vindictively, which the court thought evinced "a disturbing willingness to toy with the defendants." *Id.* at 1247. Here, the government similarly offered to return to manslaughter charges against Slatten if he forfeited the statute of limitations rights that he had already successfully exercised. A.427; A.429-30. This not only confirmed that the goal of the government's increased charge was to chill Slatten's exercise of his rights—and presumably that of future similarly situated defendants—but also showed a similar "disturbing willingness to toy with" Slatten.

Fourth, and finally, the *Meyer* court found that the government's "motivation to act vindictively" on both a personal and an "institutional" level favored a presumption of vindictiveness, particularly given the government's

"interest in discouraging unexpected and burdensome assertions of legal rights," when they threatened general embarrassment or burden for the government. 810 F.2d at 1247. Here, Slatten's successful exercise of rights certainly surprised prosecutors—before he prevailed in this Court, prosecutors called Slatten's motion to dismiss on statute of limitations grounds a "desperate ploy." Moreover, Slatten's efforts embarrassed the government on both a personal and institutional level. Top government officials in the U.S. and Iraq had closely watched this case for years, and its outcome carried international political ramifications. *See, e.g.*, "*Biden Says U.S. Will Appeal Blackwater Case Dismissal*," *N.Y. TIMES*, Jan. 23, 2010 (noting that Vice President Biden had expressed "personal regret" to Iraq's president for the events in Nisur Square); A.4004 (asking this Court to reinstate the manslaughter indictment against Slatten because it was "an indictment of such national and international importance")). Slatten's vindication of his rights on the eve of trial appeared to force the government to concede defeat with respect to Slatten, and potentially also to explain away his conspicuous absence—or even exculpatory testimony from him—at the trial against the other defendants. And according to this Court, the only reason for these looming problems was the ineptitude of the prosecutors who had "inexplicabl[y]" failed to timely indict Slatten. Even more than *Meyer*, then, this case presents circumstances that strongly support a presumption of vindictiveness.

The government will, of course, maintain that it charged Slatten with murder to hold him accountable *for murder*. But even if that were subjectively the case—and the totality of the circumstances here strongly suggests that it is not—that is not enough. Prosecutors' claims about their subjective mental states do not overcome the due process clause's prohibition on chilling the valid exercise of rights—if they did, vindictive prosecution could never be demonstrated. *See, e.g.*, *Blackledge*, 417 U.S. at 28; *see also Meyer*, 810 F.2d at 1247 (noting the possibility that prosecutors acted in good faith, but finding it "difficult to accept"). The relevant consideration is not whether, after being embarrassed and publicly chided, prosecutors claim that they had always privately believed murder charges were appropriate. It is whether, taking all of the objective evidence together, it would appear to the defendant—or to a future defendant deciding whether to stand on a right—that prosecutors used their authority for self-vindication when the defendant exercised a right. *See, e.g.*, *Meyer*, 810 F.2d at 1245. Here, the *objective* evidence strongly suggests that the government did the latter.

Finally, cases outside this Circuit support a presumption of vindictiveness here. *United States v. Korey* dismissed a prosecution as vindictive based on remarkably similar facts. 614 F. Supp. 2d 573, 586 (W.D. Pa. 2009). There, the defendant was indicted on a weapons charge, which he successfully petitioned the court to dismiss without prejudice. *Id.* at 576. When the government missed a

limitations deadline for reindictment, it used the same evidence to indict the defendant on a more serious charge of using a weapon while committing murder—a capital offense to which no limitations period applied. *Id.* at 581. The court held that the "egregious circumstances of this case, as a whole … compel a presumption of vindictiveness." *Id.* at 585; *see also United States v. Groves*, 571 F.2d 450, 453 (9th Cir. 1978) (dismissing increased charge after defendant moved to dismiss original charge as barred by the Speedy Trial Act and stating that "it is the appearance of vindictiveness, rather than vindictiveness in fact, which controls"). The same is true here.[12]

2. The Government Did Not Provide a Valid Justification For its Charging Decision.

The circumstances here show that prosecutors increased the charge against Slatten to vindicate their prior errors and to coerce Slatten into giving up his statute-of-limitations rights. Under *Meyer* and *Jamison*, the government is

[12] Also instructive is *United States v. Krezdorn*, in which the Fifth Circuit found that "[w]ithout in any way impugning this prosecutor's [actual] motives," there was a "clear likelihood that the decision to increase the number of charges *could* have been affected" by defendant's exercise of his rights. 693 F.2d 1221, 1227 (5th Cir. 1982) (emphasis added). The court explained that "this prosecutor's evidentiary theory was found to be erroneous, giving rise to a temptation to engage in 'self-vindication,'" which, whether acted upon or not, would "cause a reasonable apprehension of vindictiveness" discouraging defendants from exercising rights. *Id.* Similarly, in this case the prosecutors' statute-of-limitations theory was found to be erroneous and its failure to timely reindict Slatten "inexplicable." A.433. That certainly could give rise to a desire for self-vindication.

therefore presumed to have violated the due process clause unless it gave a valid reason for the increased charge at the time of indictment. Here, instead, the government affirmed at the time of charging that "the evidence … with respect to Mr. Slatten's new charges is substantially the same, if not identical, to what [the government] had originally planned [in support of his manslaughter charges]." A.389. The government thus failed to overcome the presumption of vindictiveness.

Even if the *timing* of the government's explanation did not matter under *Jamison*—which it does—the fact remains that the government failed to offer *any* permitted reason at *any* time for increasing the charge against Slatten because no such justification exists. *Jamison* described three situations that might justify an increased charge: (1) situations where "the more serious charge could not have been brought when the lesser one was because the elements of the more serious crime" were not yet present; (2) the possibility of "intervening events" of which the government "*through no fault of its own* simply does not learn until after the first indictment;" and (3) "new evidence" of which the government was "*excusably unaware* at the time of the first indictment." 505 F.2d at 416-17 (emphasis added). None of these conditions existed here. All of the relevant underlying events took place seven years before the government increased the charge against Slatten, and no new evidence came to light between the manslaughter charge and the murder

charge.[13] The only relevant "intervening event" that took place between the lesser charge and the greater charge was Slatten's exercise of his rights.

In prior briefing, the government has asserted that its desire to "hold Slatten accountable" for his alleged bad acts is sufficient to overcome the presumption of vindictiveness. As a threshold matter, again, that assertion is untimely under *Jamison*, which requires that the government state its reason for the increased charge *at the time of charging*. *Id.* at 416. Moreover, as explained above, regardless of the prosecutors' *subjective* states of mind—which were most likely concerned primarily with vindicating their mistakes—their charging decision here *objectively* chills the exercise of rights in violation of due process and should not be permitted to stand.

[13] In opposing Slatten's motion to dismiss for vindictive prosecution, the government claimed in a footnote to have developed additional evidence after the October 2013 indictment for manslaughter. Specifically, the government pointed to expert testimony regarding the crash analysis of the Kia's bumper and expert testimony that the trigger mechanism on Slatten's rifle was changed to function with less trigger pressure. This is pure revisionism, illustrated primarily by the fact that when asked by the district court immediately after filing the new charge whether there was any difference in the evidence between the new charge and the original charge, the government said there was none. A.388-89. Moreover, all of this evidence was known or available to the government since its first investigation began in 2007. For instance, the crash analysis, as the government acknowledged, only purported to confirm what the government had learned in 2007 from numerous witnesses who claimed the Kia was moving slowly. Similarly, the FBI tested Slatten's weapon in December 2007, and concluded it functioned normally.

In the mandamus proceedings, the government also relied on *United States v. Safavian*, 649 F.3d 688 (D.C. Cir. 2011), to argue that it had rebutted the presumption of vindictiveness. But *Safavian* only reaffirms *Jamison*'s holding that the government may rebut the presumption of vindictiveness when it increases charges based on "intervening events" of which the government "*through no fault of its own* simply does not learn until after the first indictment." *Jamison*, 505 F.2d at 416-17.

In *Safavian*, this Court reaffirmed that when the government adds new charges after a defendant's successful appeal—as happened there—a presumption of vindictiveness *does* attach, since "a prosecutor, like a judge, being but human 'may have a personal stake in [a] prior conviction and a motivation to engage in self-vindication.'" 649 F.3d at 692 (citation omitted). The *Safavian* court found, however, that there were intervening events that the government *through no fault of its own* could not have known at the time of the first indictment. Specifically, the Court pointed out that the appellate decision preceding the new charges required the admission of certain defense expert testimony that the government had thought inadmissible, and that the earlier trial on the lesser charges had revealed the defendant's trial strategy—both circumstantial changes that the government could not have taken into account at the time of the initial charge. *Id.* at 694.

Here, in contrast, it was the government's *own* "inexplicable" failure to timely indict that made manslaughter charges unavailable, giving rise to a motivation for self-vindication absent in *Safavian*. *Safavian* is also distinguishable because the new charges there were based on acts *distinct from the previously charged conduct*, which prosecutors determined merited a higher charge. Here, in contrast—as discussed above—the prosecutors imposed a two-fold increase in charge based on the *same conduct* and, indeed, the *same evidence*. Moreover, the government here—through its seven-year course of conduct and in its reconsideration petition to this Court—consistently indicated to both Slatten and the public that the alleged crime for which the government sought to hold him accountable was manslaughter, not murder. The government's change of course here based on the same conduct and the same evidence chills the exercise of rights by future defendants in a way that the conduct in *Safavian* did not.

In sum, under this Circuit's well-established procedure for evaluating vindictive prosecution claims, the government's murder charge against Slatten is infirm. The Court should reverse the district court, and enter a judgment of acquittal.

B. The Policy Goals Established by Supreme Court Cases on Vindictive Prosecution Support a Finding of Vindictive Prosecution.

The Supreme Court's precedents articulate broader policy goals served by the doctrine of vindictive prosecution, which support precluding just the kind of conduct that the government engaged in here.

As noted above, the Supreme Court established the doctrine of vindictive prosecution in *Blackledge v. Perry*, 417 U.S. 21 (1974), where the primary policy consideration was that defendants should be free from the "apprehension" that prosecutors would use their power to retaliate against defendants who exercise rights. In its later decisions, the Court made clear that there are situations in which a defendant may exercise a right, and the government can in turn legitimately increase the charge against him without a court presuming a violation of due process. But those later cases actually highlight why a presumption of vindictiveness *is* appropriate here.

First, in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the Supreme Court held that the presumption of vindictiveness will not apply when the government increases charges against a defendant in the context of plea bargaining. The Supreme Court began by noting that the doctrine of vindictive prosecution protected against the "danger that the State might be retaliating against the accused" for exercising his legal rights, which is "patently unconstitutional." *Id.* at

363. But the Court explained that, "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation *so long as the accused is free to accept or reject the prosecution's offer*." *Id.* (emphasis added). To the contrary, plea bargaining involves the "*mutuality of advantage*" to both defendants and prosecutors, whereby "[d]efendants advised by competent counsel" are "capable of intelligent choice in response to prosecutorial persuasion." *Id.* at 363 (emphasis added). *Bordenkircher* thus distinguished between situations in which the State may be *retaliating* for defendant's exercise of his rights—thereby creating an apprehension of retaliation discouraging future defendants from exercising their rights—as opposed to engaging in "forthright" dealings where the "accused is free to accept or reject the prosecution's offer." *Id.* at 363-65; *see also United States v. Andrews*, 633 F.2d 449, 456-57 (6th Cir. 1980) ("*Bordenkircher* must be confined to the plea bargaining context … [because] [a]n expansive reading of *Bordenkircher* makes that decision irreconcilable with *Blackledge* and *Pearce*.").

Here, it is undisputed that the government charged murder years *after* the plea bargaining phase had ended, and that there was no "mutuality of advantage," no "give-and-take" of negotiation, and no opportunity for Slatten to make an "intelligent choice" to forgo certain rights in exchange for other benefits. Slatten simply "pursue[d] his statutory right[s]" and the "State … retaliate[d] by substituting a more serious charge for the original one." *Blackledge*, 417 U.S. at

28. The government's conduct was not part of a bargain—in contravention of *Blackledge*, it was a powerful implicit threat to future defendants *not* to exercise their rights under statutes of limitations lest they be charged with a far more serious crime.

The second Supreme Court case establishing an exception to the doctrine was *United States v. Goodwin*, 457 U.S. 368 (1982). There, the Court began by reaffirming that the presumption *should* apply "in cases in which a reasonable likelihood of vindictiveness exists." *Id.* at 373. But the defendant in that case had done nothing more than assert a routine right to a jury trial. The Court concluded that the "possibility that a prosecutor would respond [with retaliation] to a defendant's pretrial demand for a jury trial" was so "*unlikely* that a presumption of vindictiveness is certainly not warranted." *Id.* at 384.

The Court explained that there were "good reason[s]" to reject "an *inflexible presumption* of prosecutorial vindictiveness" in the pre-trial setting of *Goodwin*. *Id.* at 381 (emphasis added). First, at that stage of proceedings, "the prosecutor may uncover additional evidence that suggests a further basis for prosecution," or his "assessment of the proper extent of prosecution may not have crystallized." *Id.* The Court also explained that prosecutors expect "routine[] … pretrial motions" like those to suppress evidence, to obtain government files, or to be tried by a jury; accordingly, "[i]t is unrealistic to assume that a prosecutor's probable response to

such motions is to seek to penalize and deter." *Id.* Moreover, such motions do not require any party "to do over what it thought it had already done correctly"—and a prosecutor therefore has no "personal stake," and thus "no reason to engage in 'self-vindication'" when defendants invoke these rights. *Id.* at 383.

As with *Bordenkircher*, *Goodwin* highlights why a presumption of vindictiveness *should* apply here. *Goodwin* made clear that, when a defendant exercises a routine pretrial right, there is little reason for prosecutors to "engage in self-vindication" that violates due process. 457 U.S. at 381-83. Here, however, for all of the reasons noted above, Slatten's emergency petition for a writ of mandamus was anything but routine, and gave prosecutors substantial reason to "engage in self-vindication." *Goodwin* also suggested that, when prosecutors' investigations and analysis are still in flux, the presumption is less likely to lie. As discussed at length already, that was plainly not the case here.

C. The Government's Authorities Do Not Support its Position.

In prior briefing, the government has relied on a number of authorities from *outside* of this Circuit to suggest that the court should not find a presumption that the government violated due process. None of that authority, however, actually supports the government's position.

First, the government's cases come primarily from the handful of circuits that have incorrectly interpreted Supreme Court precedent as precluding any

presumption of vindictiveness before trial—regardless of the totality of the circumstances.[14] But, of course, this Circuit in *Meyer* expressly (and correctly) rejected that argument. *Meyer*, 810 F.2d at 1246. The law of this Circuit is that a presumption of vindictiveness *does* arise in the pretrial setting when supported by the facts. *Id.* And this Circuit appears to be in the majority among those circuits that have expressly considered the issue. *See, e.g.*, *United States v. LaDeau*, 734 F.3d 561, 567 (6th Cir. 2013) (holding that a presumption may lie pretrial); *United States v. Barner*, 441 F.3d 1310, 1317-18 (11th Cir. 2006) (same); *United States v. Raymer*, 941 F.2d 1031, 1040 (10th Cir. 1991) (same); *United States v. Krezdorn*, 718 F.2d 1360, 1364-65 (5th Cir. 1983) (same); *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1168-69 (9th Cir. 1982) (same).

The government also placed particular emphasis on the Second Circuit's decision in *Paradise v. CCI Warden*, 136 F.3d 331 (2d Cir. 1998). In that case, the defendant successfully challenged charges on statute of limitations grounds, and when the government in turn brought more serious charges that were timely, the

[14] For instance, the government cited *United States v. Perry*, in which the court found that the issue was "whether the lodging of a new charge following an unopposed mistrial … is more akin to the post-trial or the pre-trial prosecutorial vindictiveness decisions," and found it was the latter. 335 F.3d 316, 324 (4th Cir. 2003). Notably, however, even applying the *Perry* standard, the hotly contested dismissal on statute-of-limitations grounds here is plainly "more akin" to post-trial proceedings.

Second Circuit declined to presume that the government had violated due process. *Id.* at 336. But that decision is distinguishable on both the law and the facts.

First, the Second Circuit declined to presume vindictiveness there because Second Circuit law *never* permits a court to presume vindictive prosecution if the government increases charges before trial. *Id.* at 335 (stating that "the presumption of prosecutorial vindictiveness does not exist in a pretrial setting" (internal quotation omitted)); *see also Meyer*, 810 F.2d at 1245 (noting that a showing of *actual* vindictive prosecution—as opposed to presumptive vindictive prosecution—is "exceedingly difficult to make"). This Circuit's law is, of course, just the opposite, *requiring* a presumption pretrial upon a showing that vindictive prosecution was likely *under the totality of the circumstances*. *See Meyer*, 810 F.2d at 1246.

Second, and just as importantly, the prosecutors in *Paradise* charged the defendant with the *same predicate acts* under both their lesser and greater charges. Although the more serious charge in *Paradise* had a longer statute of limitations, it was no more than a rearrangement of the elements underlying the original charges. *Compare* 136 F.3d at 333 n.1 (describing the elements of the original charges) *with id.* at 334 n.4 (describing the elements of the new charge). Since the government alleged no new elements against the defendant, the court reasonably credited the state's assertion that it sought to "punish [the defendant] not for the right exercised,

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but for the crime committed." *Id* at 336. Here, of course, the government *did* add new elements when it charged Slatten with first-degree murder—including premeditation, an extraordinary allegation under the wartime circumstances of this case. The fact that the government did so belies its alleged desire to punish "the crime committed" rather than "the right exercised."

II. THE DISTRICT COURT ERRED IN EXCLUDING EXCULPATORY EVIDENCE FROM [redacted].

The government's determination to win this case drove its misuse of power in charging Slatten with murder, and also its efforts to exclude [redacted]. The district court erred in siding with the government and depriving Slatten of critical exculpatory evidence.

Just hours after the incident on September 16, 2007, [redacted]

15 [redacted]

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[redacted]

A. [redacted] Prior Recorded Statements Are Admissible.

At Slatten's arraignment, and without affording Slatten the opportunity to file a written opposition, the district court granted the government's motion to join Slatten's case with the *Slough* case. A.388-91. Indeed, even before Slatten's reindictment, the district court rejected severance out of hand, stating "I can almost guarantee I am not trying this case twice." A.359-60. The refusal to keep the cases separate precluded Slatten from introducing [redacted] statements because of [redacted] Fifth Amendment rights. Slatten moved for reconsideration and severance, and in response, the government agreed that joinder would be improper if [redacted] statements were admissible and accordingly argued they were not. SA.43. The district court found [redacted] statements to be inadmissible.

Because Slatten had no power to compel [redacted] to testify, he was an unavailable witness. *See, e.g.*, *United States v. Harris*, 846 F. Supp. 121, 124 n.6 (D.D.C. 1994). Yet, his prior statements are admissible if they satisfy one of the

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hearsay exceptions for unavailable witnesses. Here, [redacted] statements are admissible under three exceptions.

1. [redacted] Statements Are Admissible [redacted].

[redacted] statements are admissible [redacted]

[redacted] In fact, [redacted]

[redacted] statements also have significant indicia of reliability. His written statement was made under oath, and all three statements were made subject to 18 U.S.C. § 1001 liability for lying to federal agents. Moreover, all of the statements were made in close temporal proximity to the incident—in one case, just hours after it happened. Thus, [redacted] statements bear "persuasive assurances of trustworthiness" and should be admissible. *Chambers v. Mississippi*,

410 U.S. 284, 302 (1973) (finding due process violation where out of court admissions against penal interest were excluded from evidence).

Before the district court, the government opposed admission primarily by arguing that [redacted] statements were [redacted], inadmissible. The government asserted that because [redacted] —his statements [redacted] But even the government recognizes that [redacted] The court below appears to have concluded that because the [redacted]. But this is wrong; [redacted].

The court below apparently accepted the government's argument that even if [redacted], and, therefore, inadmissible. This, too, is wrong. Not only are the two statements conceptually

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distinct, but as a practical matter, simple redaction or a jury instruction would readily separate admissible statements from inadmissible ones.

[redacted].

This is not an analogous fact pattern. Here, Slatten seeks to admit [redacted] statements for [redacted]. Unlike the defendant in [redacted], Slatten does not rely for this purpose on the portions of [redacted] statement that the government claims are [redacted]

The Supreme Court in [redacted]

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[redacted] The court below made the same error here, only in the other direction—it erroneously held that because [redacted] That is not the law. [redacted]

2. [redacted] Statements Are Admissible Under the Residual Hearsay Exception.

[redacted] statements not only satisfy Federal Rule of Evidence 804(b)(3), but are also admissible under the residual exception for hearsay. Rule 807 of the Federal Rules of Evidence permits the admission of hearsay when:

> (1) the statement has equivalent [to Rule 803 or 804] circumstantial guarantees of trustworthiness;
>
> (2) it is offered as evidence of a material fact;
>
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
>
> (4) admitting it will best serve the purposes of these rules and the interests of justice.

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Fed. R. Evid. 807(a). [redacted] statements meet all of these requirements.

First, there are significant guarantees of trustworthiness here: [redacted] statements were made under oath and/or subject to 18 U.S.C. § 1001 liability, are corroborated by testimony from other Blackwater guards, and were made very shortly after the incident. Second, [redacted], two issues that are obviously relevant to a material fact. Third, if [redacted] is unavailable to testify, these statements are the most probative evidence of [redacted] To exclude them would violate Slatten's due process rights. *See Chambers*, 410 U.S. at 302 ("In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.").

3. [redacted] Statements Are Admissible as Records Kept in the Regular Course of Business.

[redacted] statements are independently admissible for another reason: they are records of a regularly conducted activity under Federal Rule of Evidence 803(6). Rule 803(6) provides that the hearsay rule does not apply to:

A record of an act, event, condition, opinion, or diagnosis if:

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> (A) the record was made at or near the time by– or from information transmitted by– someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making the record was a regular practice of that activity;
>
> (D) all these conditions are shown by the testimony of the custodian …; and
>
> (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6). *Every* Blackwater guard involved in *any* shooting incident was required to document the event:

> The [State Department] required all Blackwater personnel involved in a shooting incident to report immediately to the Regional Security Office Tactical Operations Center for a debriefing by State Department officials. … [redacted].

[redacted] statements are thus records kept in the regular course of his work, and meet all of the other prongs of Rule 803(6): they were made shortly after the relevant incident, the records were kept as part of the regular course of State Department and Blackwater operations in Iraq, the keeping of those records was a regular practice of that activity, the documents can be verified by government custodians, and, as discussed above, there are significant indicators of trustworthiness here.

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Courts—including this Court—have commonly reached a similar conclusion when analyzing the admissibility of analogous documents, including police reports. For instance, in *United States v. Smith*, the D.C. Circuit established that police reports were admissible as business records insofar as they reflected the knowledge of individuals who were "acting in the regular course of business, and who ha[d] personal knowledge." 521 F.2d 957, 964 (D.C. Cir. 1975); *see also Haskell v. United States Dep't of Agric.*, 930 F.2d 816, 819 (10th Cir. 1991) ("records and reports, prepared in the regular course of federal agency law enforcement investigations, are admissible under hearsay exceptions"). Here, [redacted] was acting with knowledge and within the regular course of business when he made statements to federal investigators and prepared his written statement, and this therefore qualifies his statements for admission under Federal Rule of Evidence 803(6).

B. The District Court's Exclusion of [redacted] Statements Was Not Harmless Error.

This Court reviews the district court's evidentiary rulings for abuse of discretion. *United States v. Whitmore*, 359 F.3d 609, 616 (D.C. Cir. 2004). If the district court erred, then the government must prove that the error was harmless. *Id.* at 623. Where, as here, the error also implicated the defendant's constitutional right to due process, the government must show that the error was harmless "beyond a reasonable doubt." *Id.* (internal quotation omitted).

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The district court's error here was not harmless. As a whole, [redacted], and the jury's ignorance of this should alone merit a new trial for Slatten. The government nevertheless argued below that this was irrelevant because it claimed Slatten shot Al-Rubia'y in the head [redacted], thus rendering [redacted] unhelpful to Slatten. But even if a mere theory were enough to render exculpatory evidence irrelevant—and it is not—[redacted]. A reasonable jury would likely find [redacted] version of events highly exculpatory of Slatten.

[redacted] First, [redacted] statements have important unique aspects: [redacted]. More fundamentally, the fact is that [redacted]. That is paradigmatic exculpatory testimony, and would never be "redundant" in any reasonable sense of

the word. The Court should grant Slatten a new trial admitting this exculpatory evidence.

III. THE GOVERNMENT FAILED TO INTRODUCE EVIDENCE SUFFICIENT TO SUSTAIN A CONVICTION FOR FIRST-DEGREE MURDER.

The government presented virtually no evidence in support of its theory that Slatten committed murder, and the evidence on which it relied in asking the jury to speculate that he did is not sufficient for any reasonable juror to find Slatten guilty *beyond a reasonable doubt*. The jury concluded otherwise, and the Court considers the evidence supporting the verdict in the light most favorable to the government. *See United States v. Wilson*, 160 F.3d 732, 737 (D.C. Cir. 1998). But this Court "must make [its] own independent judgment regarding the sufficiency of evidence." *United States v. Singleton*, 702 F.2d 1182, 1183 (D.C. Cir. 1983) (per curiam) (en banc). "A verdict will be overruled only if no reasonable juror could accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." *United States v. Campbell*, 702 F.2d 262, 264 (D.C. Cir. 1983). This Court has observed, however, that "[t]his review, although deferential, is not servile:"

> "We do not … fulfill our duty through rote incantation of these principles followed by summary affirmance. We must ensure that the evidence adduced at trial is sufficient to support a verdict as a matter of law. A jury is entitled to draw a vast range of reasonable inferences from evidence, but may not base a verdict on mere speculation."

Wilson, 160 F.3d at 737 (citations omitted). But here, that is exactly what the jury did. The evidence showed that Slatten did not kill Al-Rubia'y, and the verdict of guilty should be overturned, and judgment of acquittal entered.

A. The Government's Evidence Affirmatively Shows that Slatten Did Not Kill Al-Rubia'y.

The evidence offered by the government's witnesses *disproves* the government's theory that Slatten killed Al-Rubia'y. Iraqi police officers Al-Hamidi and Monem both testified to observing the shooter that first shot Al-Rubia'y. Neither testified, however, that Slatten or a person located inside one of the vehicles was that person. Rather, both testified that turret gunners fired the first shots that killed Al-Rubia'y.

Al-Hamidi, who stopped traffic in Nisur Square as the Blackwater convoy entered, was standing "within feet" of the Blackwater convoy when it came to rest in the circle. A.1247-48. While he was looking at the convoy, Al-Hamidi observed "three to four shots" fired by a *turret gunner*, and was absolutely confident this was the first firing. *Id.*; A.1269-71. Al-Hamidi then immediately heard a woman screaming in Al-Rubia'y's car, moved toward the car, and saw that "the window [to the car] had three to four shots" in it, and that Al-Rubia'y's face was "bloodied." A.1249-50. Majeed Al-Gharbawi, who was stopped in traffic, testified that he heard but did not see the initial shots, and corroborated that after the initial shots, Al-Hamidi moved to the driver's side of the Kia. A.865-67.

Al-Hamidi's partner that day, Monem, also confirmed that a turret gunner, *not Slatten*, fired the first shots that struck Al-Rubia'y in the head. Monem, who could clearly see both the turret gunners and the weapons sticking out of the portholes on the sides of the convoy, testified that he saw the first shots from the Blackwater vehicles "coming from the turrets and not from the holes or the windows that are in the vehicles."[16] A.795-97.

Blackwater guard Jeremy Ridgeway also corroborated all of this. Ridgeway was located in a turret, and testified that he saw Slough firing an M-4 at the white Kia, and then he immediately fired "three to five" shots with his M-4 at "the driver of the white Kia." A.2239-40; A.2256-58; *see also* A.2217-20; A.2131-32. Ridgeway then corroborated the details of Al-Hamidi's account of what happened next, explaining that directly after he fired "three to five rounds into [Al-Rubia'y's] windshield," he observed "a uniformed traffic official or a police officer" run to the driver's side door of the Kia. A.2277; A.2281-82. That police officer was, of

[16] The government repeatedly tried to elicit from Monem that the first shots came from inside the vehicle, but he was unequivocal in testifying that the first shots came from the turret. A.795-97. Nevertheless, in closing argument, the government misled the jury regarding Monem by suggesting he was not sure who fired. A.3128 ("Now let's talk about a Sarhan [Monem]. … Was he able to pin those [first] shots on a specific individual? No. Was he entirely clear whether the shots came from within the vehicle or the turret of the vehicle? No.").

course, Al-Hamidi, who testified that when he "saw that the [car's] window had three to four shots, … [he] went and [] wanted to save this man." A.1248-49.

Another witness, Jeremy Krueger, corroborated this version of events. Krueger testified that the first sounds he heard that day were "several single pops or shots," which he identified as either "pen flares" or "5.56 rounds"—a 5.56 round being the ammunition fired from an M-4. A.2302-03. Critically, Krueger specifically explained that he was able to distinguish the sound of a 5.56 round being fired from the sound of a 7.62 round, the ammunition that Slatten would have fired from his SR-25 rifle. *Id.* Krueger identified the former, not the latter, as the source of the first sounds he heard that day.

As for physical evidence linking Slatten to Al-Rubia'y's death, there was none. A.2462-63. In fact, the physical evidence recovered from the white Kia's steering wheel did not match Slatten's weapon, but matched the type of weapon (an M-4) used by turret gunners. A.3715.

The combination of testimony and physical evidence pointing away from Slatten is insurmountable for the government. No best light in favor of the verdict would permit any reasonable juror to conclude beyond a reasonable doubt that Slatten killed Al-Rubia'y.

B. The Government Failed to Produce Evidence that Slatten Caused the Death of Al-Rubia'y.

The zenith of the government's case against Slatten is that he fired two rounds during the Nisur Square engagement and that he later acknowledged engaging an "active shooter," *i.e.*, an individual firing on the convoy. There was no evidence, however, that the two rounds Slatten fired were aimed at or hit Al-Rubia'y, or that Al-Rubia'y was the active shooter Slatten engaged.

Watson was the *only* percipient witness of Slatten's conduct. He testified that he had "no idea" what Slatten shot at. A.2060. Watson testified that shortly after Raven 23 stopped in Nisur Square, he heard the sound of gunfire, A.1990-92, and that *later*, he heard Slatten fire two rounds from his SR-25, A.1993-2000. Watson added that he was not sure if Slatten fired before or after the turret gunners fired.[17] A.1996. Importantly, Watson was able to identify only the general direction—south—in which Slatten was oriented when he fired, which also happened to be the direction from which the white Kia approached. A.1999-2000; A.2061-64. But as Watson agreed, there were millions of square feet "south" of the convoy, and his testimony regarding Slatten's general orientation in no way suggested that Slatten shot the white Kia.

[17] Watson had previously testified before a grand jury that after hearing the first sound of gunfire, he believed Slatten was the first to fire from his vehicle.

While the government offered no evidence proving that Slatten fired at Al-Rubia'y, it did offer evidence that explained at what or whom Slatten was firing. Watson testified that he perceived the initial gunfire he heard to be from an AK-47. A.1990-91. Almost immediately thereafter, another member of Raven 23 began reporting over the team's internal radio "contact, contact, contact"—meaning incoming fire. A.1992. Several other witnesses testified that they heard the sound of AK-47 fire or perceived incoming fire directed at the convoy. A.2518-20; A.2360-61; A.2541-43; A.1121-22; A.3021-27. Similarly, following the engagement, members of Raven 23 identified impact marks on the south-facing side of Slatten's vehicle to be bullet impacts. A.1192-1200; A.2418-20; A.2818-19; A.2370-72. The government sponsored *all* of this exculpatory evidence—with the exception of one witness called by the defense.

What is more, this evidence was all consistent with Slatten's comment to Ridgeway following the engagement that he engaged an "active shooter" firing at the convoy. That "active shooter" was plainly not Al-Rubia'y, whom the government claims was simply driving his car through Nisur Square that day. The government argued that Slatten was cryptically describing to Ridgeway his shooting of Al-Rubia'y and that it had deciphered Slatten's coded communication because Slatten said that the person he shot "slumped forward" after he was shot,

and, at least according to the government's theory, Al-Rubia'y also "slumped forward" after being shot.

The audacity of the government's conclusion is remarkable, but all the more so given that the conclusion primarily depends on Al-Rubia'y having slumped forward when shot, when Monem testified that Al-Rubia'y fell to the side. A.803. Either way, the conclusion the government invited the jury to make was not based on a legitimate inference that could be drawn from the evidence but rather on rank speculation. In Ridgeway's telling, Slatten never admitted to shooting Al-Rubia'y, and no reasonable juror could conclude that the words Ridgeway attributed to Slatten proved otherwise beyond a reasonable doubt.

The evidence as a whole, even taken in the best light for the government, does not support a finding of guilt beyond a reasonable doubt. The Court should, therefore, reverse Slatten's conviction.

IV. NEW EVIDENCE FROM MONEM MERITS A NEW TRIAL.

After trial, Monem, who testified that a turret gunner had killed Al-Rubia'y, volunteered new exculpatory evidence. Responding to the government's request for victim impact statements, he described his experience at Nisur Square:

> I saw a mother crying for her son, who was a doctor [Monem learned after the incident that Al-Rubia'y was training to be a doctor, and that Al-Rubia'y's passenger was his mother] and she had a feeling that he was going to be killed. She too was unable to move, and her son wanted to get her out of that damned car, but I was unable to move and help him. So I gave up and just watched. The mother cried and hugged her

> son as if she was telling him "don't go, don't go, we will be killed." The son was telling her "get out of the car, we'll be killed," she was hugging him and begging him not to go.

A.524.

Monem thus described seeing Al-Rubia'y *alive* after the shooting had begun in Nisur Square—directly contradicting the government's theory that Slatten fired the first shots that day, killing an unsuspecting Al-Rubia'y instantly before the barrage of fire from the turret gunners could do so. In Monem's new statement, Al-Rubia'y was not sitting calmly in traffic, but was instead terrified, signifying that weapons were fired before anyone targeted Al-Rubia'y's car. This is essential exculpatory evidence, particularly relevant because the government *only* attempted to identify Slatten as Al-Rubia'y's assailant by matching—speculatively—the *sound* of his shots as the *first* fired in Nisur Square and claiming—without corroboration—that Al-Rubia'y was the first person shot. Monem's new testimony makes this match not only impossible, but irrelevant to Slatten's murder charge because it means Al-Rubia'y was alive after the shooting began.

Prosecutors initially made no mention of this new evidence when it came in, providing it to Slatten more than two weeks later, buried in an eighty-two page attachment to its sentencing memorandum. The government's choice not to further investigate the issue was notable—although unfortunately not surprising—because other evidence had already suggested that the Iraqi official who initially

interviewed Iraqi witnesses, Colonel Faris, had consistently coached witnesses' testimony. Among other things, both Monem's and Al-Hamidi's earliest statements shared nearly a paragraph of verbatim text, and government witness Mohammed Al-Kinani later told the FBI that if Faris told the witnesses to go left, they would go left, and if he told them to go right they would go right. A.778-87.

When Slatten raised the exculpatory nature of Monem's new testimony with the district court, government investigators promptly telephoned him *ex parte* to re-interview him. According to cursory notes of the conversation, Monem affirmed to the government that the "[d]river was dead after being shot," and that he "[d]id not hear the driver talk or move [sic] after being shot." A.686. But Monem said nothing to interviewers about what he observed of Al-Rubia'y *before* he was shot, leaving intact his statement that Al-Rubia'y was *alive* after the first shots were fired in Nisur Square.

In general, the district court should grant a motion for a new trial premised on newly discovered evidence when (1) evidence is discovered after trial, (2) which the defendant diligently attempted to procure, (3) and is not merely cumulative or impeaching, (4) but is material, and (5) would probably lead to an acquittal. *See United States v. Jones*, 84 F. Supp. 2d 124, 126 (D.D.C. 1999) (citations omitted). This Court will overturn a district court's ruling on a new trial

motion when it finds that the district court either abused its discretion or "misapplied the law." *United States v. Kelly*, 790 F.2d 130, 133 (D.C. Cir. 1986).

Here, there is no dispute that the first two elements of the five-part test are satisfied. The third and fourth elements—that the new evidence not be merely cumulative or impeaching and that it be material—are also satisfied. As described above, the new evidence speaks to Slatten's innocence in a way that other evidence does not, and directly undermines the government's theory of guilt. *See, e.g.*, *United States v. Carmichael*, 269 F. Supp. 2d 588, 597-98 (D.N.J. 2003) (ordering a new trial when "the new evidence starkly calls into question the validity of defendant's guilt, and clearly has a potential exculpatory relationship to defendant's conviction"). The new evidence does not merely suggest that Monem had lied in other circumstances, that he is in some way biased, or that he had misstated his qualifications. It is instead direct evidence that Slatten is not guilty on the only theory—already strained—that the government advanced. For the same reasons, the fifth factor, that the evidence would probably lead to an acquittal, is also satisfied.

Notwithstanding the concerns that Monem's new statement raised, prosecutors opposed a new trial, claiming that Monem had fully repudiated his victim impact statement in his *ex parte* telephone interview. The district court agreed, and denied a new trial without a hearing on grounds that Monem's

statement was "pure impeachment evidence." A.702. According to the court, Monem's statements to investigators "are more reasonably interpreted to mean that [Monem] denied the [victim impact statement's] implication that Al-Rubia'y survived the initial burst of gunfire." A.700-01. As described above, however, any reasonable reading of both Monem's statement and the government's interview notes refutes this conclusion.

The district court's reasoning to the contrary is confusing. Apparently, the court concluded that the better reading of Monem's original statement was that it described Al-Rubia'y's conduct *after* he was struck by the first shots in Nisur Square but *only injured* by them. *Id.* Based on this, the court then concluded that, when Monem later told investigators that Al-Rubia'y was "dead after being shot," Monem was denying that he *ever* saw Al-Rubia'y do anything described in the victim impact statement.

The basis for this reading is hard to fathom, because Monem never suggested in his victim impact statement that Al-Rubia'y was shot or injured, and he had otherwise described Al-Rubia'y as being struck in the *head* by a bullet. *Id.* In fact, the court itself recognized that its own reading was "implausible." *Id.* But the court nevertheless suggested that it was "less implausible" than the plain meaning of the statement, because its reading was "most corroborated by the evidence in the record." *Id.* Setting aside whether it was corroborated by record

evidence or not, the court distorted the meaning of the text based on its view of what *other* witnesses had said. That is the opposite of what the due process clause requires courts to do with new exculpatory evidence. The obvious—and correct—interpretation of Monem's new statement is that it is material exculpatory evidence, and that it merits a new trial.

V. VENUE WAS NOT PROPER IN THE DISTRICT OF COLUMBIA.

The venue for Slatten's trial did not properly lie in the District of Columbia, but rather Tennessee where Slatten was arrested. A.384; A.393-94. Pursuant to Rule of Appellate Procedure 28(i), Slatten adopts and incorporates the venue arguments of his co-defendants. *See* Br. of Appellants Slough, Liberty, and Heard, Part III (Nos. 15-3079, 15-3080, 15-3081). The absence of proper venue, however, is especially apparent with respect to Slatten.

Section 3238 of Title 18 provides that venue shall lie in the district "'where the defendant [or "joint offender"] is first restrained of his liberty *in connection with the offense charged*.'" *United States v. Hong Vo*, 978 F. Supp. 2d 49, 58 (D.D.C. 2013) (quoting *United States v. Catino*, 735 F.2d 718, 724 (2d Cir. 1984)). As the Fourth Circuit recently explained, "[t]he court must look at the *offenses* for which the defendant is facing punishment, and then determine where he was 'arrested or first brought' for those *offenses*." *United States v. Holmes*, 670 F.3d 586, 594 (4th Cir. 2012) (emphasis added). This offense-specific focus applies

equally to all offenders. *See* 18 U.S.C. § 3238 (referring to "the offender" or "any one of two or more joint offenders"). Here, the offense-specific focus leads to the inescapable conclusion that Ridgeway, on whom venue is predicated, is not a "joint offender."

Ridgeway was not arrested in connection with the murder of Al-Rubia'y. He was purportedly arrested in connection with the offense of manslaughter and attempted manslaughter. That distinction is critical. In defending its choice of venue in *Slough*, the government argued that the court had to consider the *offenses* charged against Ridgeway and the *offenses* charged against the *Slough* defendants. It asserted, and the district court agreed, that Ridgeway was a "joint offender" *because* "the Court [was] presented with *identical* United States Code violations, *identical* victims, an *identical* aiding and abetting allegation." A.193 (emphasis added).[18] After Slatten was charged with murder on the government's belief that Slatten was different than the other defendants, that no longer was the case. Slatten and Ridgeway were *not* charged with identical United States Code violations, identical victims, or identical aiding and abetting allegations.

Even if the government's venue theory was valid when it was originally made, when the government charged Slatten with murder, it no longer applied.

[18] The government adopted its pleadings in *Slough* in opposing Slatten's motion to dismiss for lack of venue.

Slatten was no longer simply one of the participants charged with joining the others in an allegedly excessive response to a perceived threat. Instead, allegedly acting alone, deliberately, and with premeditation, he was accused of murdering the driver of the white Kia. That removed Slatten from any conceivable group of alleged "joint offenders" who acted jointly in the commission of identical offenses. And for purposes of venue, it entirely undermines Ridgeway's purported status as a "joint offender" in Slatten's alleged offense. The district court erred in deciding the contested venue issue itself and in refusing to acquit Slatten when the government failed to prove venue existed in the District of Columbia.

VI. THE MILITARY EXTRATERRITORIAL JURISDICTION ACT DOES NOT APPLY.

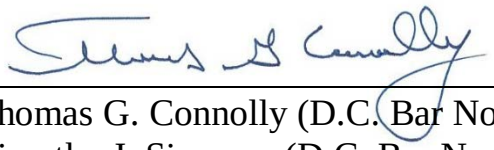
Pursuant to Rule of Appellate Procedure 28(i), Slatten adopts and incorporates the Military Extraterritorial Jurisdiction Act arguments of his co-defendants. *See* Br. of Appellants Slough, Liberty, and Heard, Part I (Nos. 15-3079, 15-3080, 15-3081).

CONCLUSION

For the foregoing reasons, the Court should enter a judgment of acquittal, or, in the alternative, order a new trial.

Date: June 24, 2016

Respectfully submitted,



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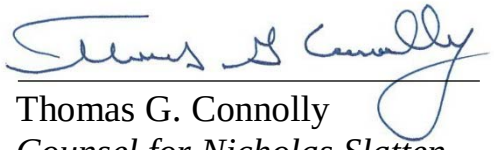
CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,671 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word and Times New Roman fourteen-point font.



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June 24, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June 2016, I caused the foregoing Corrected Final Brief of Appellant Nicholas Slatten to be filed electronically via the CM/ECF system, which resulted in service on the following counsel who has consented to electronic service. I also caused a copy to be served by United States mail, first-class postage prepaid.

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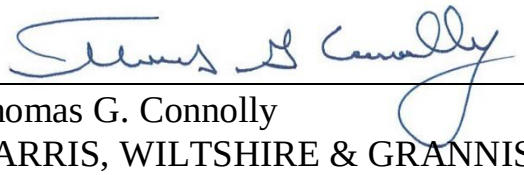

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ADDENDUM

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FED. R. EVID. 804(B)(3)

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

* * *

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

FED. R. EVID. 807(A)

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

FED. R. EVID. 803(6)

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

18 U.S.C. § 3238

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

U.S. CONSTITUTION AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

process of law; nor shall private property be taken for public use, without just compensation.