IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	
v.	**Crim. No. CR-08-360 (RMU)**
PAUL A. SLOUGH, NICHOLAS A. SLATTEN, EVAN S. LIBERTY, DUSTIN L. HEARD, DONALD W. BALL,	**Judge Ricardo M. Urbina**
Defendants.	

DEFENDANTS' MOTION TO COMPEL
THE PRODUCTION OF *BRADY* MATERIAL

Defendants Paul Slough, Nicholas Slatten, Evan Liberty, Dustin Heard, and Donald Ball, by and through undersigned counsel, move to compel the timely production of all documents or information relating to guilt or punishment which might be reasonably considered favorable to the defendants' case. This production is required by *Brady v. Maryland*, 373 U.S. 83 (1963), and subsequent cases. A supporting memorandum of points and authorities and proposed order are filed herewith.

Dated: July 28, 2009

Respectfully submitted,

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DUSTIN L. HEARD,	)	
DONALD W. BALL,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE DEFENDANTS' MOTION TO COMPEL THE PRODUCTION OF *BRADY* MATERIAL

Paul Slough, Nicholas Slatten, Evan Liberty, Dustin Heard, and Donald Ball, by and through undersigned counsel, respectfully submit the following memorandum of points and authorities in support of the Defendants' Motion to Compel the Production of *Brady* Material.[1] In this prosecution for manslaughter and attempted manslaughter in a combat zone, Government prosecutors have knowingly suppressed evidence that directly supports the defendants' most central claims about what happened in Nisour Square: specifically, about who shot whom, and why.

[1] *See Brady v. Maryland*, 373 U.S. 83 (1963). Pursuant to Local Criminal Rule 16.1, the defendants certify that they have made a good faith attempt to secure the relief requested from the Government on a voluntary basis and that the Government has not complied with that request. Indeed, as late as July 24, 2009, the Government was still claiming in discovery correspondence that it had no obligation to disclose the names of eyewitnesses who told investigators back in 2007 that they heard AK-47s (the weapons used by insurgents) and saw individuals dressed as Iraqi police firing toward vehicles in Nisour Square.

For example, the Government is withholding—and claims it is entitled to continue withholding—evidence that some of the alleged victims named in the Indictment were shot by someone *other than these defendants.* Furthermore, despite the Government's inflammatory press statements (for example, accusing the defendants of crimes against humanity),[2] it is increasingly clear that information within the Government's own possession, custody, and control *affirmatively supports the defendants' longstanding contentions* that they were defending themselves under hostile fire from enemy insurgents in Nisour Square. The defendants also have reason to believe the Government is suppressing evidence that casts grave doubts on the quality of the Government's investigation, including evidence of very large discrepancies in the number of dead and wounded thought by the Government to have been in Nisour Square on September 16, 2007.

The Government may disagree about the importance of this evidence, but the defendants' rights to due process do not depend on any meeting of the minds with the prosecutors in this case. Under *Brady*, the job of a prosecutor faced with a pretrial evidentiary request is not to second-guess defense counsel's strategic judgments about the kind of evidence that will prove favorable at trial; it is to "resolve doubtful questions in favor of disclosure." *United States v. Agurs*, 427 U.S. 97, 108 (1976). The four categories of evidence discussed in this motion will strongly favor the defendants at trial, and such favorable evidence cannot be suppressed by the Government without denying the defendants the fundamental fairness guaranteed by *Brady*.

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[2] U.S. Department of Justice, "Transcript of Blackwater Press Conference," (Dec. 8, 2008) (hereinafter "Press Conference") (*available at* http://www.usdoj.gov/opa/pr/2008/December/08-nsd-1070.html (last visited July 15, 2009).

The Defendants therefore ask the Court to order disclosure of the following four categories of information:[3]

(A) evidence that tends to identify a particular alleged shooter for any alleged victim (and therefore tends to rule out four or even five of the defendants as possible shooters);

(B) evidence that tends to cast doubt upon whether the alleged victims named in the Indictment were in fact killed or wounded in Nisour Square on September 16, 2007, by the defendants or by anybody else;

(C) evidence that tends to establish grounds for the defendants' subjective beliefs about potential security threats in Baghdad at the time of the Nisour Square incident; and

(D) evidence that tends to establish the existence of actual security threats in Baghdad.

In each category, the Government's claim that it can withhold such critical facts from the defendants is simply impossible to reconcile with *Brady*. Indeed, the Government's continuing efforts to withhold such exculpatory evidence strongly suggest an institutional hostility to *Brady* that has made the defendants, and should make the Court, extremely skeptical of generalized assurances from the Government that it understands its *Brady* obligations and intends to honor them.

FACTUAL BACKGROUND

On September 16, 2007, the five defendants named in the Indictment were serving in Baghdad, Iraq as part of a nineteen-member diplomatic security detail—designated Raven 23.

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[3] The specific requests and the Government's responses are set forth in the accompanying chart. *See* Attach. A.

Anti-U.S. insurgents, using an automobile loaded with explosives, attacked a State Department official who was escorted by a different security detail. Minutes later, Raven 23 was attempting to secure an escape route for the ambushed U.S. official when it came under fire at a location known as Nisour Square. Based on Raven 23's return fire, the Indictment alleges that each defendant committed fourteen counts of manslaughter and twenty counts of attempted manslaughter, as well as one count of using and discharging a firearm during a crime of violence. The Indictment charges all five defendants with aiding and abetting each other in each and every count of manslaughter, attempted manslaughter, and use and discharge of a firearm during a crime of violence. A sixth member of the detail, Jeremy Ridgeway, pleaded guilty before the five defendants were indicted.

The Indictment does not allege any details about the individual counts of manslaughter and attempted manslaughter except for the names of the alleged victims. Thus, for example, Count One of the Indictment alleges that all five defendants, as well as Ridgeway, committed voluntary manslaughter by killing Ahmed Haithem Ahmed Al Rubia'y. Indictment ¶ 5. The Indictment does not allege a single subsidiary fact to suggest which defendant actually killed Mr. Al Rubia'y, nor does it allege any act of assistance rendered to the killer by any other defendant. Nor, for that matter, does the Indictment allege any facts that explain why Ridgeway and these five defendants have been charged with voluntary manslaughter while thirteen other members of the same detail have not.

Each defendant therefore stands accused of thirty-five individual crimes, each of them extremely serious, without any idea of whether the factual basis for the charge is that he killed someone, or that he tried to kill someone, or that he helped a co-defendant kill someone, or perhaps that he drove a vehicle or fired a warning shot or even just carried a firearm while riding

along with the convoy. Looking *only at Count One* to illustrate the point, each defendant must simultaneously defend himself against the accusation that he killed Mr. Al Rubia'y, *and* the accusation that he aided and abetted the killer; either accusation may be made against him at trial. Regarding aiding and abetting, each defendant must simultaneously defend himself against the accusation that he aided and abetted each person who might have been the killer, whether the killer was Mr. Ridgeway, a co-defendant, or perhaps even another member of Raven 23. The different possible factual scenarios are for the most part mutually exclusive, but the breadth of the Indictment forces each defendant to defend against any and all of these possibilities at once. And this analysis of Count One must be repeated for each of the thirty-four alleged victims. Such is the scope of the Indictment.

In late December 2008, and early January 2009, the defendants, individually and jointly, made formal, written *Brady* requests for information that would tend to exculpate one or more of them under the various charges contained in the Indictment. *See, e.g.*, Ltr. to K. Kohl from T. Connolly (Dec. 18, 2008) (Attach. B); Ltr. to K. Kohl from M. Hulkower (Jan. 7, 2009) (Attach. C). The Government's first production, produced on January 30, 2009, consisted of only four letters to various members of Congress and responded only to the defendants' request concerning jurisdiction. Not until February 13, 2009, almost two months after the first request for documents was served, did the Government begin producing documents responsive to the defendants' many other requests. But these productions, which the Government describes in terms of volume, fall far short of responding to the defendants' *Brady* requests. Indeed, among the completely irrelevant material the Government boasts of having produced are documents spelling out the standard operating procedures for delivering U.S. mail.

On several occasions, the defendants have attempted in good faith to narrow the areas of disagreement. With respect to the four categories of information discussed here, however, the Government has simply refused to produce exculpatory evidence. The Government insists that it is entitled to withhold evidence in each of these four categories, despite the commands of *Brady*. This Court's intervention is therefore necessary to preserve the defendants' rights to a fundamentally fair trial.

ARGUMENT

I. THE GOVERNMENT MUST IMMEDIATELY PRODUCE ALL EVIDENCE FAVORABLE TO THE DEFENSE.

A. The Government's *Brady* Obligation.

In light of recent events in this District and elsewhere,[4] we begin with first principles: The Government is obligated to disclose, upon request, any favorable evidence to the accused where the evidence is material to guilt or punishment. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). Favorable evidence includes both evidence that is directly exculpatory and impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676-77 (1985). The "materiality" of such evidence to guilt or punishment, however, is

[4] Several recent decisions have highlighted the consequences of *Brady* violations by government prosecutors. *See, e.g.*, *United States v. Stevens*, No. 08-cr-231, 2009 U.S. Dist. LEXIS 39046 (Apr. 7, 2009); *United States v. Jones*, No. 07-10289, 2009 U.S. Dist. LEXIS 41902, at * 9 (May 18, 2009) (noting prosecutor's failure to disclose exculpatory material "reflects a fundamentally flawed understanding of her obligations" and ordering re-training of government prosecutors). Chief Judge Lamberth, after noting the government's numerous discovery violations, stated: "The Court has learned that it must watch over the government with heightened supervision to ensure that it performs even its most basic duties . . . [and the Court will] view government assurances that it is making progress in providing discovery to defendants through a much more skeptical lens. This Court—and hopefully other courts in this district—will take note that the government had to be admonished because of its failure to conduct discovery in a professional manner." *United States v. Archbold-Manner*, 581 F. Supp. 2d 22, 2008 U.S. Dist. LEXIS 78802, *10 (D.D.C. Oct. 6, 2008).

"an inevitably imprecise standard." *Agurs*, 427 U.S. at 108. Although the same "imprecise standard" applies in the pretrial and post-trial context, the Supreme Court has recognized a "practical difference" between the pretrial decision of the prosecutor, who must decide what, if anything, to produce to the defense, and the post-trial decision of the judge, who must decide whether a nondisclosure violated due process. *Id.* Consequently, "and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.*; *see also Cone v. Bell*, 129 S. Ct. 1769, 1783 n.15 (2009) ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (stating that "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence").

A number of courts, including this Court, have held that the Government "must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed—with the benefit of hindsight—as affecting the outcome of the trial." *United States v. Safavian*, 233 F.R.D. 12, 14 (D.D.C. 2005); *see also United States v. Naegele*, 468 F. Supp. 2d 150, 152 (D.D.C. 2007) (describing *Safavian* as "clarify[ing] the meaning of *Brady*, how it is to be applied by the Department of Justice and the U.S. Attorney's Office in this Court, and what the government is obligated to do to meet its responsibilities under *Brady*"). This view of the Government's pretrial *Brady* obligation was recently cited by the Ninth Circuit and commended to "trial prosecutors who must regularly

decide what material to turn over." *United States v. Price*, 566 F.3d 900, 914 n.14 (9th Cir. 2009).[5]

Judge Friedman in *Safavian* explained the crucial reason why all "potentially exculpatory or otherwise favorable evidence" must be produced without regard for whether prosecutors believe the evidence is material:

> Most prosecutors are neither neutral (nor should they be) nor prescient, and any such judgment necessarily is speculative on so many matters that simply are unknown and unknowable before trial begins: which government witnesses will be available for trial, how they will testify and be evaluated by the jury, which objections to testimony and evidence the trial judge will sustain and which he will overrule, what the nature of the defense will be, what witnesses and evidence will support that defense, what instructions the Court will ultimately give, what questions the jury may pose during deliberations (and how they may be answered), and whether the jury finds guilt on all counts or only on some (and which ones). The prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial.

Safavian, 233 F.R.D. at 13-14.

The *Safavian* court's observation about the prosecutor's inability to view the evidence impartially takes on added significance when one considers the role of defense counsel. For it is defense counsel who must ultimately decide whether a given piece of evidence is favorable

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[5] Although this motion deals only with the constitutional requirements of due process as interpreted in *Brady* and later cases, a prosecutor in the District of Columbia also has an ethical duty to disclose the evidence discussed in this motion. D.C. Rules of Professional Conduct, Rule 3.8 (entitled "Special Responsibilities of a Prosecutor") (providing that a prosecutor shall not "intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or mitigates the offense"). *See also* ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused"); ABA Model Rule of Professional Conduct 3.8(d) (1984) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

enough to be introduced at trial; evidence that is genuinely not favorable to the accused will generally *not* be introduced. Thus, even if one assumes the purest of motives, a prosecutor who withholds evidence based on his own judgment that it is not "potentially exculpatory or otherwise favorable" is at best substituting his judgment for that of defense counsel. Such arrogation of the defense counsel's role works *systematically* against criminal defendants, because the consequences of a misjudgment by the prosecutor are asymmetrical. That is, if the prosecutor mistakenly turns over evidence that the defense counsel deems unfavorable, that evidence will not be introduced and the prosecutor's mistake will be of no consequence to anyone. But if the prosecutor mistakenly *withholds* evidence that defense counsel *would* deem favorable, then the right of the accused to a fair trial has been abridged in crucial and sometimes irremediable ways. For precisely these reasons, in this Court, the Government's *Brady* obligation includes the disclosure of all favorable evidence, *i.e.*, "any information in the possession of the government . . . that relates to guilt or punishment and that tends to help the defense by either bolstering the defense case or impeaching potential prosecution witnesses." *Id.* at 15-16.

Despite this unambiguous standard, the prosecution and the defense have frequently been "two ships passing in the night when it comes to *Brady*." *Naegele*, 468 F. Supp. 2d at 152. In this case, for instance, the Government has taken the position that *Brady* does not require disclosure of evidence that a particular victim was not shot by *any of these defendants.* If the Government has such a fundamental misconception of its *Brady* obligation, it is impossible for the defendants or the Court to place any reliance on the Government's assurances that it understands its *Brady* obligations or that it is unaware of any responsive *Brady* material. *See Archbold-Manner*, 581 F. Supp. 2d at 22 (stating the Court "will view government assurances

that it is making progress in providing discovery to defendants through a much more skeptical lens"); *Naegele*, 468 F. Supp. 2d at 152 n.2. (stating that the court would no longer accept such conclusory assertions by the Government). Accordingly, the defendants request that the Court order the Government to disclose "all evidence relating to guilt or punishment which might be reasonably considered favorable to the defendants['] case, that is, all favorable evidence that is itself admissible or that is likely to lead to favorable evidence that would be admissible, or that could be used to impeach a prosecution witness." *Safavian*, 233 F.R.D. at 17 (internal quotations and citations omitted).

B. Timely Disclosure of *Brady* Material.

The defendants request that all *Brady* material be disclosed on a timely basis. The Supreme Court has never precisely pinpointed the time at which the disclosure under *Brady* must be made. It is abundantly clear, however, that disclosure must be made at such a time as to allow the defense to use favorable material effectively in the *preparation* and presentation of its case. *United States v. Quinn*, 537 F. Supp. 2d 99, 108 (D.D.C. 2008). "[A] prosecutor's timely disclosure obligation with respect to [*Brady*] material cannot be overemphasized," and the practice of delayed production must be disapproved and discouraged. *United States v. Starusko*, 729 F.2d 256, 261 (3d Cir. 1984) (citations omitted). To allow the Government to purposely conceal known exculpatory material until it chooses to disclose it would sanction gamesmanship at the expense of justice. *See Brady*, 373 U.S. at 87 (emphasizing prosecutor's responsibility is not to win convictions but to see that justice is done). Thus, if the Government now possesses, or in the future becomes aware of, *Brady* material, it should make it available so that the defense, not the Government, may determine for itself how to best make use of the information.

Indeed, the legal profession's regulatory authorities have expressed the propriety of and need for early disclosure of *Brady* material. *See, e.g.*, ABA Standards for Criminal Justice, 11-

2.1(c), 11-2.2(a) (3d ed. 1993) (disclosure "as soon as practicable following the filing of charges"); *id.* 3-3.11(a) ("disclosure *at the earliest feasible opportunity*") (quoted in *Kyles*, 514 U.S. at 437 (emphasis added); D.C. Rules of Professional Conduct, Rule 3.8 (disclosure "upon request and at a time when use by the defense is reasonably feasible"). The prosecutors, no less than any other attorneys, are bound by the ethics rules.[6] "[A] more lenient disclosure burden on the government would drain *Brady* of all vitality." *United States v. Elmore*, 423 F.2d 775, 779 (4th Cir. 1970).

The case for early production of all *Brady* material in this case is compelling. The events giving rise to this extraordinary prosecution did not occur in Washington, D.C., or even the United States. They occurred in a war zone in Baghdad, Iraq. The crime scene, physical evidence, and eye witnesses are all located thousands of miles away. If the defendants learn an exculpatory fact from the Government's *Brady* disclosures, they cannot simply knock on someone's door in Northwest Washington; instead, they must track down witnesses who may be in Iraq or some other foreign country.

Another significant hurdle for the defense is the danger of investigating the charges on the ground. The dangers of investigating this case were so serious that the FBI needed the protection of the U.S. military to conduct its investigation. *See* Press Conference, *supra* Note 2 (stating "FBI and Department of State personnel had to face the dangers of working extensively outside the green zone" and required the protection of the United States military). The same threats and need for security will hamper the defendants' ability to follow up on exculpatory leads

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[6] "An attorney for the Government shall be subject to State laws and rules, and local Federal Court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B(a).

disclosed by the Government. Moreover, the risks of spoliation of evidence, or inability to locate witnesses or refresh recollections, are greatly amplified in a war zone. Given these difficult circumstances, delaying the production of *Brady* material risks delaying the trial as the defense attempts to investigate information learned through the Government's belated *Brady* disclosures.

Since its February 13, 2009, production of Rule 16 documents, which included limited *Brady* material, the Government has settled into a pattern of dribbling out a few additional pages of discovery every few weeks. Indeed, only recently, on July 24, 2009, the Government produced brief summaries of exculpatory witness accounts—*seven months* after they were requested. Perhaps most disturbing, however, is the fact that these witnesses told government investigators in *September 2007* that during the Nisour Square incident they heard the sound of AK-47 fire, a type of weapon not used by any of the defendants, but a weapon frequently used by anti-U.S. forces. Unless the Government is ordered to produce all *Brady* material by a date certain, the defendants have every reason to fear they will continue to receive bits and pieces of exculpatory information until the eve of trial. To make effective use of this information, the defense needs adequate time to consider this information and conduct a thorough investigation. This cannot be accomplished if disclosure is delayed.[7]

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[7] The cumulative significance of the Government's foot-dragging is troubling. Given how extraordinarily difficult it will be for the defendants to conduct further factual investigation, particularly with witnesses who may still be in Iraq, this is the kind of case that cries out for open-file discovery, which the defendants have requested. The Government's specific refusal to adopt such a policy is puzzling at best; at worst, it suggests a win-at-all-costs attitude that is never appropriate, and least of all in a case against five men who were risking their lives to protect U.S. diplomats.

Furthermore, in response to several requests for *Brady* material,[8] the Government stated that because it considered the requests demands for *Giglio* and Jencks material, it would not make such material available until "at or near the time of trial." *See* Ltr. to Def. Counsel from K. Kohl at 2, 4 (Apr. 13, 2009) (Attach. D). The Jencks Act, however, does not vitiate the Government's *Brady* obligation to disclose witness statements well in advance of trial if portions of those statements also fall under *Brady*. *See United States v. Tarantino*, 846 F.2d 1384, 1414 n.11 (D.C. Cir. 1988) (limitations on discovery in Jencks Act do not lessen *Brady* obligation). "Brady always trumps . . . Jencks . . . ." *Safavian*, 233 F.R.D. at 16. And, while the U.S. Attorney's Office has long improperly treated *Giglio* material as a lesser-grade of *Brady* material, permitting it to turn over such material at or near the trial date, it is clear that *Giglio* material is *Brady* material and must be produced in a timely fashion to enable the defense to make meaningful use of that information. *See Bagley*, 473 U.S. at 676 (stating impeachment evidence "falls within the *Brady* rule"); *Kyles*, 514 U.S. at 433 (noting there is no "difference between exculpatory and impeachment evidence" when it comes to the prosecutor's duty to disclose evidence favorable to the accused). Accordingly, the defendants request that the Government be ordered to produce all *Brady* material, including any documents or information the Government considers to be *Giglio* material.

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[8] The Defendants' requests included: (1) documents or information that may serve to impeach any government witness; (2) documents or information tending to show that alleged victims or other individuals at Nisour Square were connected with insurgent or terrorist groups or organizations; (3) documents or information relating to eye witnesses who observed the events of September 16, 2007; and (4) documents or information relating to any witness who has sued Blackwater. *See* Ltr. to K. Kohl from M. Hulkower, § B, Nos. 4, 19, 20, 28, 31, 64 (Attach. C).

II. THE GOVERNMENT HAS FAILED TO PRODUCE *BRADY* MATERIAL.

As noted above, there are four broad categories of defense requests that the Government has rejected: (A) evidence that tends to identify a particular shooter for any alleged victim (and therefore tends to rule out four or even five of the defendants as possible shooters) (*Brady* Req. Nos. 2, 6, 7, 18, 21, 23, 24 & 25); (B) evidence that tends to cast doubt upon the Government's allegations about whether the people named in the Indictment were in fact killed or wounded in Nisour Square on September 16, 2007, by the defendants or by anybody else (*Brady* Req. No. 32); (C) evidence that tends to establish grounds for the defendants' subjective beliefs about potential security threats to U.S. interests in Baghdad at the time of the Nisour Square incident (*Brady* Req. Nos. 45, 46, 58); and (D) evidence that tends to establish the existence of actual security threats to U.S. interests in Baghdad at the time of the Nisour Square incident, (*Brady* Req. Nos. 8, 34, 35, 36, 66). We address the Government's insistence that it may suppress evidence in each of these four categories in turn.

A. Identities of Shooters

No category of contested information illustrates the Government's misunderstanding of *Brady* better than the class of requests that seek information about the identities of the persons who actually shot the alleged victims named in the Indictment. The defendants individually and jointly requested, in a variety of different formulations, any and all information that would tend to establish either that a particular defendant was *not* a shooter, or that some other person (*e.g.*, Ridgeway, or another Blackwater employee, or an Iraqi insurgent, or Iraqi police, or anyone else not charged in the Indictment) *was* a shooter. Ltr. to K. Kohl from M. Hulkower, § B, Nos. 2, 6, 7, 18, 21, 23-25 (Attach. C); Email to K. Kohl from M. Hulkower (April 23, 2009) (Attach. E) (broadening these requests). The exculpatory character of this category of information is clear: The Indictment charges each defendant with shooting one or more, or even all, of thirty-four

named individuals. Any information tending to show that a given defendant *did not shoot* one or more of those alleged victims removes one possible basis of liability, and is therefore favorable to the defendant. To take a concrete example based on *Brady* Request No. 23, if the Government has information tending to show that Jeremy Ridgeway was the lone shooter of Abdul Wahab Qadar Al-Qalamchi (named in Count Twenty-Eight), then that information tends to exculpate all five defendants as to the charge of attempted manslaughter by showing that they did *not* shoot Mr. Al-Qalamchi.

Initially, the Government attempted to "interpret" this request away by treating it as a request for *Giglio* or Jencks material. *See* Ltr. to Def. Counsel from K. Kohl at 4 (Apr. 13, 2009) (Attach. D). Eventually, however, the Government made clear that its real basis for withholding evidence of the shooters' identities is that "[n]on-shooter accomplices" can still be convicted as aiders and abettors. *See* Ltr. to Def. Counsel from K. Kohl at 6-7 (June 1, 2009) (Attach. F). That may well be the Government's theory at trial, but it has no bearing whatsoever on the Government's pretrial obligation to disclose evidence favorable to the accused. The disclosure obligation depends on whether the information in question is *favorable* to the accused; there is no authority for the proposition that it must be *dispositively* favorable.

The facts of *Brady* itself reveal that the Government's position is untenable, for Brady had been convicted of felony murder, and the information improperly suppressed by the state was that his companion, tried separately, had confessed to the actual killing. 373 U.S. at 84. The felony murder doctrine, like the aiding and abetting doctrine on which the prosecution relies here, made it possible for Brady to be convicted of first-degree murder even if he did not do the actual killing. Nonetheless, the Court held that the prosecution's suppression of the actual killer's identity violated Brady's right to due process because that evidence would have been

favorable to him, at least in terms of sentencing. *Brady* is virtually on all fours with this case. It certainly precludes the contention that theories of vicarious liability render the identity of the actual killer irrelevant for purposes of any count in the Indictment.

Even if *Brady* were not so factually similar, the same conclusion would follow from the logic of that decision, particularly when applied to the extraordinarily broad Indictment in this case. *Brady* was an elaboration of earlier decisions in which the Government obtained convictions by misleading the jury about the true facts—such as by knowingly using perjured testimony, or deliberately withholding key information. *See Brady*, 373 U.S. at 86-88; *Kyles,* 514 U.S. at 432 ("The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation . . . ."). The Government seems to believe that it can conceal the identities of the actual shooters at Nisour Square, and simply ask the jury to hold five defendants responsible for shooting thirty-four victims, on the theory that it really doesn't matter who shot whom, because all of the defendants aided and abetted the others anyway. Regardless of what one might think about this expansive theory of group criminality if the identities of the shooters were genuinely unknown, it is unconscionable for the prosecutors here to *have information about* the shooters' identities in their possession and nonetheless *suppress* that information because they would rather let the jury speculate both about who shot whom and about whether the shooter received any discernable assistance from any defendant. Ultimately, the jury must determine who shot whom, and with what (if any) assistance, and the jury cannot properly decide those questions if the prosecution suppresses evidence in its possession that would help to establish the actual facts.

Indeed, the inclusion of "aiding and abetting" allegations actually makes the Government's argument on this point weaker rather than stronger. The aiding and abetting

statute, 18 U.S.C. § 2, permits the Government to convict as principals any non-shooters who are found beyond a reasonable doubt to have aided and abetted the actual shooter. But "[i]n order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). The D.C. Circuit has held that "[a]iding and abetting requires the government to prove: '(1) the specific intent to facilitate the commission of a crime by another; (2) guilty knowledge (3) that the other was committing an offense; and (4) assisting or participating in the commission of the offense.'" *United States v. Wilson*, 160 F.3d 732, 738 (D.C. Cir. 1998) (quoting *United States v. Gaviria,* 116 F.3d 1498, 1535 (D.C. Cir. 1997)). Under this standard, evidence that tended to establish Ridgeway as the lone shooter of Al-Qalamchi would oblige the Government to base aiding and abetting liability only on proof that a particular defendant *shared Ridgeway's specific intent* to commit manslaughter or attempted manslaughter, and *knowingly took some action to assist or participate in* Ridgeway's actions toward that end. Thus, evidence that Ridgeway was the lone shooter would be favorable to everyone other than Ridgeway, for at least two reasons: First, it would negate every other person's potential liability as a shooter. Second, it would negate even aiding and abetting liability for every other person *unless the Government could prove with specificity how that person intentionally aided Ridgeway in the shooting*.

The Government's own United States Attorney's Manual makes explicit the logical connection between the scope of the Indictment and the scope of the disclosure obligation the Indictment creates: "A prosecutor *must disclose* information that is *inconsistent with any element of any crime charged against the defendant* or that establishes a recognized affirmative

defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime." United States Attorney's Manual § 9-5.001(C)(1) (emphasis added). Though framed in prudential rather than constitutional terms, the title to this section clearly recognizes that information must be considered "exculpatory" if it rules out any basis for criminal liability that would be encompassed by the indictment.

Here, for instance, each defendant has been charged with multiple counts of voluntary manslaughter. To prove voluntary manslaughter, the Government must establish, *inter alia*, that the defendant killed the victim. *See* 2-41 Modern Federal Jury Instructions: Criminal § 41.02 (Instruction 41-18). If a particular defendant did not shoot a particular victim and thereby cause his death, information concerning the identity of the individual who did would be exculpatory as to this element of the charge. Nor does it become less exculpatory on this element of the charge simply because the Government has included in the Indictment an alternative basis of culpability, *i.e.*, aiding and abetting. The Government's extraordinarily broad Indictment here charges the five defendants under numerous theories of direct and vicarious liability. Under *Brady* and the U.S. Attorney's Manual, the Government must accept the consequences of that strategic decision: Any information that tends to negate any element of any charge set forth in the Indictment must be considered exculpatory and must be produced.

B. Uncharged Victims

Defense *Brady* Request No. 32 originally sought documents or information about persons who might have been killed in Nisour Square that day but whose deaths did not result in criminal charges. The request arose out of news reports suggesting that as many as seventeen people were once believed to have been killed in Nisour Square that day. As amplified by the April 23, 2009, Email to AUSA Kohl from Mark Hulkower, (Attach. E), this request also covers any

documents or information pertaining to misidentification of the victims, since such evidence tends to cast doubt on the reliability of the Government's investigation and forensic work, or that of other investigators upon whom the FBI has initially relied. Beyond media accounts, however, documents produced in discovery indicate that the number of victims may be different than the number charged in the Indictment. For example, various lists prepared by the Iraqi government identify seventeen victims. A list prepared by the Department of State for the purpose of making condolence payments indicates there were nineteen victims. Discrepancies between the Indictment and these documents also exist with respect to the number and identities of the wounded.

Curiously, the Government attempts to justify the suppression of this evidence simply by reiterating that "the FBI has confirmed" the numbers of killed and wounded given in the Indictment. Ltr. to Def. Counsel from K. Kohl at 7 (June 1, 2009) (Attach. F). The Government adds that the same news stories that reference seventeen deaths in the incident also reference "'11 or more wounded,' which is nine less than the number of wounded victims eventually confirmed by the FBI and identified in the indictment." *Id.* But the *Brady* doctrine would be a fairly empty exercise if *Brady* requests could be rebuffed with the mere observation that the FBI thinks the Indictment is correct. In *Kyles v. Whitley*, for example, the Supreme Court invalidated Kyles's conviction because the prosecution suppressed evidence of internal inconsistencies in the stories given to police by key witnesses. 514 U.S. at 441. Such evidence was exculpatory and material, and was required to be disclosed, both because it undercut the force of the Government's evidence, *id.* at 441-45, and because it could be used to call into question the competence, thoroughness, or good faith of the Government's investigation, *id.* at 445-51.

Alternatively, it might be that the discrepancy between the Indictment and the initial reports of seventeen fatalities stem from a Government determination that one or more of the people killed or wounded in Nisour Square were *shooting at the convoy*. Or, perhaps, a determination that they were known to have been involved in insurgent activity, and therefore *may have been* shooting at the convoy. In fact, as the next two sections reveal, the Government takes the position that *Brady* does not require the disclosure of evidence of insurgent activity—which would permit prosecutors to suppress the names of any uncharged victims who were excluded from the Indictment because they were known insurgents who actually fired on the defendants. Reflecting on this fact is, indeed, one way to appreciate the breathtaking inconsistency between the commands of *Brady* and the Government's apparent understanding of those commands.

Here, as in *Kyles*, any evidence of confusion or uncertainty about the number of people killed or wounded in Nisour Square on September 16, 2007, is favorable to the defense because it raises doubts about the substance of the charges—doubts that range from the simple question of how many people were shot that day to the more difficult question of who shot them. The evidence is also favorable because it gives the defendants an avenue for "attack[ing] the reliability of the investigation." *Id.* at 446; *see also Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation.").[9]

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[9] Furthermore, media reports indicate that the FBI concluded that some of the deaths may have been justified as a legitimate response to an imminent threat. *See, e.g.*, D. Johnston, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. Times, Nov. 14, 2007. If that is an accurate account of the FBI's findings, it is also exculpatory in supporting the defense of defense of self and others. Interestingly, when the defendants specifically inquired concerning whether the

C. Threats at Nisour Square

Defense *Brady* Requests Nos. 45, 46, and 58 all seek information about known threats in the Nisour Square area on September 16, 2007. Request 45 focuses on intelligence that might have been shared with the defendants' security detail; Request 46 focuses on observations made at Nisour Square by a different security detail on the same day. Request 58 concerns the extent to which the vehicles actually in Nisour Square may have been advancing on the defendants when gunfire erupted.

Information responsive to these requests falls squarely within the Government's *Brady* obligation. The prosecution is well aware that the five defendants contend they were under fire from enemy insurgents and in mortal danger during the incident. The defendants' states of mind—both their subjective beliefs about the hostile fire they received and the objective grounds for those beliefs—will be central issues at trial. They are the difference between criminal responsibility (as alleged in the Indictment) and fully justified action in defense of self and others (as the defendants will show at trial). Clearly, any evidence that tends to support an objectively reasonable belief in the dangerousness of the area around Nisour Square is favorable to the accused on these critical issues of justification and state of mind. The Government may not withhold such information without running afoul of *Brady.*

The Government has indicated that to the extent it has information responsive to Request No. 45, it has been provided to the defense. Ltr. to Def. Counsel from K. Kohl (Apr. 13, 2009) (Attach. D). Either the Government does not know *Brady* material when it sees it, or it has

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Government had produced all FBI investigative reports, Mr. Kohl stated only that he could "confirm that we have asked the FBI for any and all reports and investigation memos they have produced in the case." To date, the defendants have not received any FBI report of the type described in the press.

impermissibly narrowed the scope of "possession, custody, or control." One of the items specifically called out in Request No. 45 was the BOLO ("Be on the Lookout") list. This Department of State list described the makes, models, and colors of vehicles that intelligence indicated may be used by insurgents as car bombs and therefore warranted increased scrutiny. To the extent the BOLO lists included vehicles of the type involved in the Nisour Square incident, they support the reasonableness of the defendants' belief that they were faced with imminent threats. Yet these documents have not been produced. In the event the Government has not produced these lists because they are in the possession, custody, or control of the Department of State, the prosecutors have an obligation to obtain all responsive documents from any department or agency of the Executive Branch. *See Safavian*, 233 F.R.D. at 15.

Defense *Brady* Request No. 58 seeks information about vehicles advancing on the defendants when the gunfire erupted at Nisour Square. The Government, apparently perceiving both the relevance of this evidence and the fact that it will tend to be favorable to the defendants, has unilaterally limited its response to this request to "*witness account[s]* . . . that *describe*[] any vehicle that was *perceived* to move toward the [defendants'] convoy *in a threatening manner*." Ltr. to Def. Counsel from K. Kohl at 7 (June 1, 2009) (Attach. F) (emphasis added). And, because the Government recognizes that "[n]early all" of the vehicles involved in this case were moving toward the convoy at the time of the shooting, the Government states that it does not regard movement toward the convoy as "threatening." *Id.* This is less a response than it is a substitution of a new Government-drafted request. Request No. 58 is not limited to witnesses' conclusory characterizations of whether any vehicles were moving "in a threatening manner"— much less the Government's conclusory characterizations on that point. Request No. 58 seeks the actual facts—what vehicles were moving toward the defendants' convoy, and at what speed.

If, as the Government concedes, nearly all of the vehicles were moving toward the convoy, the Government cannot suppress evidence of that fact simply by volunteering that prosecutors at their desks in Washington almost two years later do not think the vehicles were advancing "in a threatening manner."

Once again, the question is whether evidence of a vehicle moving toward the defendants is *favorable* to the defendants; not whether it is dispositive (or alternatively, whether the Government thinks it can explain it away). Evidence that even one vehicle in Nisour Square was moving toward the convoy would be favorable to the defendants, and evidence that "nearly all" of the vehicles in Nisour Square were moving toward the defendants, as the Government has represented in correspondence, would be more favorable still. And in fact, at least one press account carried the observations of an Iraqi police officer who was in Nisour Square at the time and saw a vehicle containing two of the alleged victims driving toward the convoy at a particularly high rate of speed. According to the same article, other witnesses identified this as the beginning of the firefight.[10] By suppressing this evidence, the Government is suppressing the true facts about what actually happened in Nisour Square on September 16, 2007. Under *Brady*, such hostility to the truth is inconsistent with due process.

D. General Threats

Defense *Brady* Requests Nos. 8, 34, 35, 36, and 66 seek information about security conditions in the war zone within which the defendants were constrained to carry out their duties. These security conditions include the actual incidence of attacks by insurgents—an important fact in light of the defendants' contention that they were under fire by Iraqi insurgents and have

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[10] Bernhard Zand, *Blackwater's Hail of Gunfire*, SpiegelOnline, Sept. 4, 2007, http://www.spiegel.de/international/world/0,1518,507513,00.html (last visited July 28, 2009).

been indicted for firing back. Evidence of insurgent attacks on Blackwater contractors (including the defendants), other security contractors, or the U.S. military is favorable to defendants whose defense is that they themselves were under attack.

The Government's response to these requests illustrates very well why a prosecutor should virtually never withhold evidence *sought by the defense* on the ground that he does not personally think it would be favorable. The Government is withholding all information about actual attacks by insurgents except to the extent that the information on these attacks was actually communicated to the defendants prior to September 16, 2007. The Government's theory is that prior attacks by insurgents are not relevant except insofar as they shed light on the defendants' states of mind on that day. Ltr. to Def. Counsel from K. Kohl at 5 (Apr. 13, 2009) (Attach. D). But that mindset grows out of the *Government's* view of the events of that day. The point the Government is missing is that the defendants intend to show they were *actually shot at* in Nisour Square that day, and it is *extremely important* to know who was doing the shooting and why. Viewed from the defendants' perspective, each additional piece of evidence showing the frequency of insurgent attacks is a favorable piece of evidence, because it could and indeed should lead a reasonable juror to believe it more likely that the people shooting at the defendants on September 16 were also insurgents.

Quite apart from the actual events of September 16, 2007, the requested information is also favorable for what it tells the jury about what Baghdad was like in 2007. This will be outside the common experience of a D.C. jury. Deciding whether the defendants reasonably believed that they were in imminent danger requires an understanding of the hostile and deadly conditions in which the defendants operated. Accordingly, the defendants must be able to paint for the jury a realistic picture of Baghdad to give them a proper perspective from which to

evaluate the reasonableness of the defendants' actions. For instance, a D.C. juror is unlikely to consider very seriously the possibility that a group of D.C. Metro police officers are actually enemy insurgents in disguise, who pose an imminent threat to one's life. In Baghdad, however, where the Iraqi police have been infiltrated by insurgents and frequently participate in deadly attacks against U.S. contractors and military personnel, that is not just a real possibility but a commonly observed fact. That difference in context is essential for the jury to understand as it decides whether it is reasonable to return fire at an Iraqi police officer who raises an AK-47 and fires it at a U.S. security detail.

CONCLUSION

For the foregoing reasons, the Court should order the Government to disclose all exculpatory information within its possession, custody, or control, including without limitation the four categories of information discussed above.

Dated: July 28, 2009

Respectfully submitted,

/s/ Thomas Connolly

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July 2009, I caused the foregoing Defendants' Motion to Compel the Production of *Brady* Material, Memorandum of Points and Authorities in Support, accompanying attachments, and proposed Order to be filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to

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