

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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<b>UNITED STATES OF AMERICA</b>	)	
	)	
<b>v.</b>	)	<b>No. 1:08-cr-360-RMU</b>
	)	
<b>PAUL ALVIN SLOUGH,</b>	)	
<b>NICHOLAS ABRAM SLATTEN,</b>	)	
<b>EVAN SHAWN LIBERTY,</b>	)	
<b>DUSTIN LAURENT HEARD, and</b>	)	
<b>DONALD WAYNE BALL,</b>	)	
	)	
<b>Defendants.</b>	)	
_____	)	

**DEFENDANTS’ RESPONSE TO THE GOVERNMENT’S  
MOTION FOR CLARIFICATION AND/OR RECONSIDERATION**

**I. INTRODUCTION**

On August 6, 2009, the Court ordered the government to file a bill of particulars setting forth the specific acts that each Defendant allegedly committed in furtherance of each count in the Indictment. The Court concluded that such basic information was necessary for each Defendant to understand the charges, to prepare for trial, to avoid inappropriate surprise, and to protect against the possibility of retrial on the same charges in violation of the Double Jeopardy Clause. Transcript of August 6, 2009 Hearing (“August 6 Tr.”) at 5-6. More than three weeks later, with no prior notice and no attempt to meet and confer, the government filed a motion for “clarification and/or reconsideration” in which it (1) admits that it cannot provide the particulars ordered by the Court, and (2) asks to be excused from complying with the Court’s order by instead producing statements of all “percipient witnesses” to the incident in Nisur Square in the possession of the “prosecution team.” The government fails to explain why it did not mention that it cannot prove what any Defendant did in furtherance of any count in the Indictment in its opposition or at the August 6 hearing. Neither did the government explain why it did not

mention this gaping hole in its case over six months ago when it delayed responding to Defendants' motion for a bill of particulars by claiming the requested particulars would be forthcoming in discovery, when it has clearly known since indictment that it could not provide an individualized showing of how each Defendant committed the charged offenses.

The Court should deny the government's motion for reconsideration. Given the government's concession that it cannot provide the requested particulars, however, Defendants respectfully ask the Court to (1) hold in abeyance its August 6 Order compelling the government to provide a bill of particulars, (2) order the government to produce immediately, but no later than September 15, 2009, the statements of *all witnesses* with knowledge of the incident at Nisur Square within the possession or control of the government, and (3) grant Defendants leave to seek to enforce the August 6 Order or obtain other appropriate relief no later than the current motions deadline of October 16, 2009, if the witness statements fail to provide sufficient information about the Defendants' individual roles in each offense charged in the Indictment.

## **II. BACKGROUND**

### **A. The Court's August 6, 2009 Order**

On August 6, 2009, the Court granted in part Defendants' motion for a bill of particulars and ordered the government to satisfy Defendants' requests 2-29 and 35-74, which sought information about "what act or acts (or what omission or omissions) were allegedly performed (or not performed) by each Defendant and the alleged 'joint offender known to the Grand Jury'" for each count of Voluntary Manslaughter (requests 2-29) and each count of Attempt to Commit Manslaughter (requests 35-74). In so ruling, the Court noted that the purpose of a bill of particulars is to "mak[e] sure that the defendant is allowed to understand the charges, to prepare a defense, and, perhaps, also to be protected against the possibility of retrial." August 6 Tr. at 5; *see also id.* at 6 ("the main thing is to ensure that the defendant goes to trial without unnecessary

exposure to surprise, inappropriate surprise in the case, so that there are no ambiguities that might create or that might hamper the defendant's ability to do what he is entitled to do, which is to put up a good defense." The Court made clear that a bill of particulars was appropriate in this case because of the "*complexity of the charges,*" which "*stem from the concentrated chaos that occurred over the span of just a few minutes in a foreign war zone.*" *Id.* at 9 (emphasis added). In such a case, the Court noted, "the fundamental inquiry is whether the defendants have sufficient notice of the *essential facts of the allegations levied against them* to prepare a defense and avoid prejudicial surprise." *Id.* (emphasis added).<sup>1</sup>

In granting Defendants' motion for a bill of particulars, the Court expressly held that Defendants did not have such notice:

[T]he government's failure to identify each defendant's role in the shooting has significance beyond the principal aider and abettor distinction. The defendants assert that after neutralizing the perceived threat from the white sedan, the convoy came under fire from locations in and around Nisur Square and that members of the convoy engaged their attackers until such time as they were able to exit Nisur Square and return to the Green Zone.

For each defendant, *the strength of his defense will turn on the circumstances surrounding his actions, something that he cannot be expected to explain or prepare for unless he is aware of what actions he is alleged to have committed.*

August 6 Tr. at 12-13 (emphasis added).

After the Court issued its oral ruling, it asked the parties whether they had any questions.

August 6 Tr. at 16. At no time did the government indicate that it was unable to comply with the Court's Order and could not furnish the requested particulars.

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<sup>1</sup> The government proposes providing what are likely conflicting and inconsistent witness statements in lieu of advising Defendants of "the essential facts of the allegations levied against them" by the grand jury and the prosecution. As discussed below, we do not believe that the former is an adequate substitute for the latter.

**B. The Government's Motion For Clarification And/Or Reconsideration**

Approximately one week after the Court's Order, on August 13, 2009, counsel for Mr. Ball sent a letter, via email, to the government requesting that the government serve the bill of particulars on the Defendants by August 31, 2009. *See* Declaration of Steven J. McCool ("McCool Decl.") ¶ 10. The government did not respond to this letter. *Id.* ¶ 11. On August 21, 2009, counsel for Mr. Ball sent the government an email seeking an answer to his letter and received a response indicating that the government would respond to the letter early the following week. *Id.* ¶¶ 12 - 14. Once again, the government did not respond. *Id.* ¶ 15. And for obvious tactical reasons it never suggested to the Court that it could not even provide particulars. Instead, on August 28, 2009, the government for the first time claimed that it was incapable of complying with the August 6 Order and requested "clarification and/or reconsideration." Despite the Defendants' repeated attempts to communicate with the prosecutors about a reasonable deadline for compliance with the Court's Order, *see id.* ¶¶ 10-14, the government never revealed to any of Defendants' counsel its intention to file the present motion. *Id.* ¶ 15. Instead, it filed its motion on a Friday afternoon in late-August without notice to the Defendants or the Court and with no effort whatsoever to comply with the Court's meet and confer requirements. *Id.*

Now, nearly a month after this Court's Order and more than seven months after Defendants first sought particulars, the government concedes for the first time that it cannot provide the particulars ordered by the Court. Remarkably, the government admits that although it has indicted each Defendant on 14 counts of manslaughter and 20 counts of attempted manslaughter for numerous alleged victims, "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 in the indictment." Government's Motion For Clarification And/Or Reconsideration

(“Gov’t Mot.”) at 2. The government further acknowledges that “there is no forensic match between an individual defendant’s weapon and any bullet or bullet fragment recovered from a victim’s body.” *Id.* at 2. In other words, the prosecution now concedes for the first time that it does not know what any Defendant did or did not do.<sup>2</sup>

Instead of complying with the Court’s Order, the government proposes to produce to Defendants, by the end of September 2009, the statements of all witnesses who were present at Nisur Square at the time of the incident. *Id.* at 3. Yet the government does not represent that the witness statements will provide each Defendant with the individualized allegations supporting each count of the Indictment that the Court deemed necessary for Defendants to prepare a defense and avoid unfair surprise at trial. Quite the contrary, the government flatly concedes that the facts and evidence do not permit an “accounting of the conduct of each defendant in a bill of particulars.” *Id.* at 4.

In the alternative, the government asks the Court to reconsider its August 6th ruling based on its claim that no individualized allegations are necessary because the Defendants and Mr. Ridgeway “were the six shooters at Nisur Square who killed or wounded the 34 victims named in the indictment,” and the government seeks to hold them criminally liable as a group “by virtue of their participation as shooters in the overall shooting at Nisur Square.” *Id.* at 2, 3. The government does not explain why it did not raise these arguments during the earlier briefing of Defendants’ motion. In addition to the obvious legal flaws in seeking to hold the Defendants

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<sup>2</sup> Clearly, the government does have some knowledge of what these Defendants did given its almost unfettered, improper access to each Defendant’s *Garrity*-protected statement, which we anticipate being able to demonstrate at a *Kastigar* hearing. We understand the government’s reluctance to admit this fact given that what it does know from its review and use of Defendants’ *Garrity*-protected statements is as fatal to this prosecution as what it does not know due to the lack of evidence linking any particular Defendant to the death or injury of any particular alleged victim.

liable as a group without an individualized showing of causation on a defendant-by-defendant, victim-by-victim basis, the government does not acknowledge the gaping hole in its theory: it cannot exclude other shooters in the Nisur Square incident. As indicated by *Brady* disclosures the government did not provide until late-July 2009, multiple witnesses have informed the government that they observed many other shooters at Nisur Square -- including individuals dressed as Iraqi police officers, individuals in helicopters flying above Nisur Square, other non-defendant members of Raven 23, and unseen individuals firing distinctive sounding AK-47 rifles not used by Blackwater security contractors. The government does not explain how -- if it cannot prove who shot whom, and cannot exclude outside shooters -- the government can possibly prove that these Defendants killed and wounded all (or any) of the victims alleged in the Indictment. The government also fails to explain why it has not disclosed under *Brady* the obviously exculpatory information that it does not know what if anything each Defendant has done in furtherance of the charged offenses.

### III. DISCUSSION

The government makes no attempt whatsoever to meet the exacting standard required to prevail on a motion for reconsideration.<sup>3</sup> As this Court has held, “[t]o prevail on a motion for reconsideration, the moving party must demonstrate either that (1) there has been an intervening change in controlling law, (2) there is new evidence, or (3) there is a need to correct clear error or prevent manifest injustice.” *United States v. Booker*, 613 F. Supp. 2d 32, 34 (D.D.C. 2009)

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<sup>3</sup> Although the government styles its motion in part as a motion for “clarification,” the government identifies no part of the Court’s Order that was confusing or unclear. Indeed, the Court’s Order could not have been more straightforward: the Court ordered the government to provide a bill of particulars responsive to Defendants’ requests 2 through 29 and 35 through 74. August 6 Tr. at 12-13. The Court in *United States v. Libby* treated a similar government motion for clarification or, in the alternative, for reconsideration, as a motion for reconsideration. 429 F. Supp. 2d 46, 46-47 (D.D.C. 2006). The Court should do the same here.

(Urbina, J.) (citing *United States v. Ferguson*, 574 F. Supp. 2d 111, 113 (D.D.C. 2008); *United States v. Libby*, 429 F. Supp. 2d 46, 47 (D.D.C. 2006)). Moreover, “the Court will take an unusually dim view of arguments that are raised for the first time in the Government’s Motion for Reconsideration.” *Ferguson*, 574 F. Supp. 2d at 113. Here, the government does not even acknowledge, much less try to satisfy, this standard. It cites no change in controlling law, no new evidence, no clear error and no manifest injustice that would occur if the Court’s order is enforced. And its sole argument that it cannot actually say what each Defendant did or did not do was clearly known to the government since indictment yet is raised for the first time now three weeks after the Court has ruled. For these reasons alone, the Court should summarily deny the government’s motion.

**A. The Government Failed To Disclose Previously That It Could Not Provide Individualized Allegations And Has Engaged In Tactical Gamesmanship**

First and foremost, the Court should deny the prosecution’s motion because the government failed to disclose previously that it could not provide individualized allegations in a bill of particulars and never offered to produce witness statements until it lost the motion. Everything the government has to say now it could have said before August 6, or indeed in January 2009 when Defendants first sought a bill of particulars. The government’s belated concessions reveal that it has been engaged in a pattern of delay and obfuscation purely for tactical reasons.

The government surely has known since it indicted this case that it could not “pars[e] . . . the conduct of each defendant” for each (or indeed any) of the counts in the Indictment. Gov’t Mot. at 2. Yet the government did not front its current “urban gun battle” theory of group liability when the Defendants filed their motion for a bill of particulars on January 20, 2009. Instead, the government lulled the Defendants into agreeing to postpone indefinitely the

government's opposition to that motion by claiming that the requested particulars would be disclosed in the forthcoming discovery. *See* McCool Decl. ¶ 4-5. More than six months later, after it became apparent that the discovery contained no information whatsoever to elucidate the role of each Defendant in the charged offenses, Defendants were forced to ask the Court to direct the government to respond to the motion. *See id.* ¶ 6-7.

Then, in its July 9, 2009 brief opposing a bill of particulars, the government again said nothing about its unprecedented theory of group liability. Instead, it argued the Defendants had been given sufficient notice of their individual roles in the alleged offenses through the government's statements in other pleadings and the discovery materials. Incredibly, even though the prosecution knew (as it now admits) that forensics provided no answers to the requests for particulars, the government touted the forensic evidence it had provided in discovery, arguing that the Court should deny the motion because "[t]he defendants were provided with 90 pages of FBI laboratory reports for trajectory, ballistics, metallurgy, and other forensic testing, including graphic displays of the trajectory of certain bullet rounds that impacted damaged vehicles." Gov't Opp. to Def. Mot. for a Bill of Particulars (# 96), at 8. Nowhere did the government disclose, as it does now, that "*there is no forensic match* between an individual defendant's weapon and any bullet or bullet fragment recovered from a victim's body." Gov't Mot. at 2 (emphasis added). With this recent revelation, the government's prior claim that the Defendants already had notice of their individual roles from the forensic evidence can only be described charitably as highly misleading.

Even at the August 6 hearing, after the Court ordered the government to provide the requested particulars and asked if the parties had any questions, the government stood silent and said nothing about its inability to provide particulars. The prosecutors waited more than three weeks after the Court's ruling to finally disclose this information. And now they incredibly ask

for *an additional five weeks* to “assemble, organize, Bates stamp, and produce” the witness statements that are concededly insufficient to provide the particulars the Court ordered. Gov’t Mot. at 3. As this sequence of events reveals, the government has strung along the Defendants (and the Court) for more than seven months with the repeated promise that the particulars would be forthcoming in discovery, when in fact it knew all along that such particulars and such discovery *simply do not exist*. The Court should not condone this conduct.

We note further that the government’s troubling conduct here extends to the discharge of its *Brady* obligations as well. Although it is difficult to imagine anything more exculpatory in a manslaughter case than evidence that the defendant did not aim at or shoot an alleged victim, the government has maintained consistently that this evidence is not exculpatory. Rather than admit that it could not allege which Defendant did what – if anything – the government again strung Defendants along for more than seven months by participating in multiple meet and confer sessions and ultimately forcing Defendants to file a motion to compel *Brady*. The government’s conduct reveals that it has no understanding of its *Brady* obligations. This continues a troubling pattern of recent cases in this District and elsewhere, which by now are so well-documented we think further discussion is unnecessary. The Court should grant the Defendants’ pending motion to compel *Brady* information and order the production of *all* witness statements in the government’s possession or control based on the concessions in the motion for reconsideration.

**B. The Court Should Decline To Reconsider Its Order Based On The Inapplicable “Urban Gun Battle” Theory Of Group Liability**

As set forth above, the government cannot prevail on its motion for reconsideration because it cites no change in controlling law, no new evidence, no clear error and no manifest injustice that would occur if the Court’s Order is enforced. Moreover, as this Court has held in denying a motion for reconsideration, “[a]rguments that could have been, but were not, raised

previously . . . are not appropriately raised in a motion for reconsideration.” *Booker*, 613 F. Supp. 2d at 34. Or as Judge Kessler aptly put it, “[t]he Government has provided no explanation for why these arguments were not raised previously, despite several opportunities to do so during the briefing of the Motion to Dismiss. It is now far too late in the proceedings to consider these arguments.” *Ferguson*, 574 F. Supp. 2d at 116. Here, the government attempts to obtain reconsideration based on the supposed “urban gun battle” theory of group liability. The government could have raised this argument in response to the original request for a bill of particulars, or in its July opposition brief, or again at the August 6 hearing. It did not do so. The Court should not allow the government a second (or even third) bite at the apple.

Although resolution of the validity of the government’s “urban gun battle” theory of group liability is unnecessary to the disposition of the motion, we continue to be stunned by the government’s efforts to import the ruling of a single D.C. local case into this federal prosecution involving conduct in Baghdad, Iraq, where jurisdiction is present, if at all, based solely on the Military Extraterritorial Jurisdiction Act. The government fails to acknowledge that the Indictment charges violations of the federal manslaughter and attempted manslaughter statutes, 18 U.S.C. §§ 1112 and 1113, not any violation of D.C. local law. As courts have recognized, manslaughter “is defined and punished by federal law under § 1112 and, consequently, United States law preempts state manslaughter law.” *United States v. Benally*, 756 F.2d 773, 776 (10th Cir. 1985); *see also United States v. Pardee*, 368 F.2d 368, 373 (4th Cir. 1966) (holding that Maryland manslaughter statute was “preempted by the Federal manslaughter act,” 18 U.S.C. § 1112). The sole basis for the government’s claim that Defendants can be convicted as a group on an “urban gun battle” theory is *Roy v. United States*, 871 A.2d 498 (D.C. 2005), a case involving a second-degree murder charge under D.C. Code §§ 22-2403, 3202, in which the D.C. Court of Appeals interpreted “the law of homicide liability in the District of Columbia.” 871

A.2d at 507. The government cites no *federal case* from the District of Columbia in which a court adopted this theory. Indeed, to our knowledge, no court in a federal manslaughter case has approved the theory of group liability discussed in *Roy*. For many reasons, the Court should not be the first federal court to adopt this controversial theory here.

The government seeks to extend this theory to this case for the proposition that the government need not show how each Defendant committed each offense charged in the Indictment because the Defendants can be held criminally liable as a group merely “by virtue of their participation as shooters in the overall shooting in Nisur Square.” Gov’t Mot. at 3. In other words, according to the government, each of the Defendants may be held liable for each of the counts in the Indictment simply because the Defendants and Mr. Ridgeway allegedly “fired well over a hundred rounds of ammunition and several grenades” during the incident at Nisur Square. *Id.* at 2. The Court should decline to reconsider the August 6 Order based on this inapposite “hail of bullets” or “urban gun battle” theory of group liability that the government first identified two weeks ago. *See* Government’s Omnibus Opposition to Defendants’ Motions to Compel (# 114), at 24-31.<sup>4</sup>

As the Defendants explained in their reply memorandum in support of their motion to compel *Brady* information, the government’s reliance on *Roy* for the proposition that the Defendants can be convicted as principals on an “urban gun battle” theory is misplaced because the conditions in Baghdad are completely different from those in Washington, D.C. Washington, despite the violence that plagues large cities nationwide, is a peacetime civilian city with anti-handgun laws. Here, those ‘armed and prepared’ to engage in a gun battle” with illegal

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<sup>4</sup> At the appropriate time, whether in a motion to dismiss or at the Rule 29 stage, the Defendants will fully brief the inapplicability of the government’s “urban gun battle” theory. Defendants address the theory briefly here simply to make it clear that it has no place in this case.

handguns, who kill a bystander with a stray bullet, may be criminally responsible for the foreseeable consequences of their gun battle. *Roy*, 871 A.2d at 506-507 & n.8 This is because “an individual’s participation in such a battle represents a depraved indifference to human life such that he or she meets the *mens rea* for second-degree depraved heart murder.” *Id.* at 507 n.10. As the *Roy* court recognized, the use of automatic and semiautomatic weapons in domestic urban gun battles leads to “pocket wars with no rules of engagement resulting in a highly increased risk to noncombatants. It is this increased risk to innocent bystanders which justifies the application of proximate cause liability to those participants who willfully choose to engage in these battles.” *Id.* at 507.

Baghdad, however, is in a *war zone*. U.S. officials there must live in a fortified compound, and must contend with daily threats from insurgents who try to kill Americans, frequently by roadside or car bombs. When they leave the fortified Green Zone, those officials travel in armored convoys with the protection of armed guards. The Defendants – trained and decorated U.S. veterans hired by the State Department to protect U.S. officials – were “armed and prepared to engage in a gun battle” not because of recklessness or criminality, but because *their job, every day, is to protect noncombatants from insurgents’ efforts to kill them. It would violate the terms of their employment to deploy without being “armed and prepared to engage in a gun battle.”* Unlike the illegally armed urban combatants in *Roy*, the Defendants were required to carry weapons and were subject to – and followed – rules of engagement issued by the State Department. And while the conditions of war certainly present risk to bystanders, it cannot be said that by driving armed to Nisur Square on September 16, 2007 to carry out a mission for the U.S. Department of State, the Defendants acted with “depraved indifference to human life” sufficient to warrant group liability for casualties resulting from a firefight in which they defended themselves from hostile fire.

Even if the “hail of bullets” theory has any validity, which Defendants dispute, there simply was no single “hail of bullets” that killed or injured all of the alleged victims in this case. Each of the Defendants was positioned in a different location with a different vantage point, some from different vehicles in the convoy. For instance, Mr. Ridgeway was the rear turret gunner on the last vehicle in the convoy. He has pled guilty to shooting at an individual to the south while the convoy was exiting Nisur Square to the north. At that time, when the first three vehicles had already departed the traffic circle, it cannot be said that a Defendant who may have fired shots at a different target earlier, when the incident first erupted in Nisur Square, in any way caused, aided or abetted the death of the individual shot by Mr. Ridgeway. Although this presents perhaps the starkest example of the flaw in the government’s theory, there are similar causation problems associated with trying to hold a Defendant who may have shot only at discrete threats on one side of the circle responsible for deaths and injuries that resulted from others shooting at different threats at other times on other sides of the circle.

Finally, the government’s theory is inapplicable because it is based on facts the government knows to be false. The government claims the evidence will show that the Defendants and Mr. Ridgeway “*were the six shooters* at Nisur Square who killed or wounded the 34 victims named in the indictment.” Gov’t Mot. at 2 (emphasis added). At the same time, however, the government concedes “there is no forensic match” between any individual Defendant’s weapon and any bullet recovered from any of the alleged victims. *Id.* For the government’s premise to be true, therefore, the evidence must establish that there were no other shooters at Nisur Square who could have killed or wounded the victims. Based on information in its possession, the government knows full well that this premise is false.

Among other things, the government's *Brady* disclosures<sup>5</sup> reveal that:

- Two (non-Blackwater) U.S. Government contractors in the vicinity of Nisur Square at the time of the incident and one Iraqi witness informed government agents that they heard AK-47 gunfire during the incident. The (non-Blackwater) U.S. Government contractors reported that the AK-47 gunfire came from outside the traffic circle toward where Raven 23 was positioned and occurred at the beginning of the incident. Neither the Defendants nor Mr. Ridgeway carried an AK-47, the preferred weapon of Iraqi insurgents, during the incident;
- One (non-Blackwater) U.S. Government contractor informed government agents that Iraqi police officers were firing their weapons at the Raven 23 convoy before the white vehicle approached the convoy;
- A (non-Blackwater) equipment supervisor told government agents that he believes the hole in the radiator of the Bearcat (3rd) vehicle, which caused the vehicle to become disabled during the incident, was caused by a rock that ricocheted into the radiator after an incoming bullet hit below the undercarriage of the Bearcat;
- A draft report prepared by the Regional Security Office of the U.S. State Department regarding the Nisur Square incident notes that:
  - Seventeen AK-47 shell casings were found in areas south and southwest of the traffic circle, and bullet strikes were found to the northwest of the traffic circle, reflecting possible opposing gunfire;
  - Bullet strikes were located on the Follow Vehicle (4th vehicle) and both sides of the Bearcat Command Vehicle (3rd vehicle) after the incident, suggesting incoming fire from the south while the convoy was stationary and from the west while the convoy departed the circle; and
  - A (non-Blackwater) U.S. government contractor reported hearing AK-47 fire coming from the northeast of the traffic circle and a Kurdish guard at the PUK headquarters near Nisur Square reported hearing AK-47 fire coming from southwest of the traffic circle during the incident.

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<sup>5</sup> The *Brady* material provided by the government is subject to the Protective Order entered by the Court on April 13, 2009, which states that the parties "shall not disclose the names of witnesses publicly except to the extent that disclosure is required in this judicial proceeding, including in motions, hearings, trial or appeal." Protective Order ¶ 2. In an abundance of caution, the Defendants are not disclosing the names of the witnesses at issue or filing the government's *Brady* letters on the public docket. Defendants would be happy to provide these materials to the Court upon request.

- The non-Defendant members of Raven 23 confirmed that the convoy received incoming fire at Nisur Square in various ways:
  - Ten Raven 23 members witnessed or heard incoming gunfire, including shots being fired by individuals with AK-47 rifles and by individuals dressed as Iraqi police officers;
  - Nine Raven 23 members reported hearing reports by fellow team members during the Nisur Square incident, either in person or through radio communications, that the convoy was taking incoming fire, including reports of “contact” (a term used to describe engagement with a threat), Iraqi police officers shooting, threats in the “woodline,” “taking fire,” “being engaged by 8 to 10 insurgents,” “muzzle flash,” “they’re still shooting at us,” and “two insurgents, left flank, about 40 meters away, firing AK-47s”; and
  - Seven Raven 23 members reported observing fresh bullet marks or other damage to the vehicles in Raven 23 following the Nisur Square incident.
- Fourteen different Iraqi witnesses and two (non-Blackwater) U.S. Government contractors who witnessed the incident at Nisur Square told government agents that they saw shots being fired from helicopters that circled Nisur Square during the incident. Many of these accounts are detailed and note specific locations at which the helicopters were firing, including witness accounts from two of the alleged victims named in the Indictment, one of whom informed government agents that he took fire from two helicopters and received shrapnel wounds from a grenade that came from one of the helicopters;
- A report prepared by the Government of Iraq regarding the Nisur Square incident concluded that two helicopters fired shots randomly at citizens while they were in their cars during the incident; and
- Seven Iraqi witnesses informed government agents that they saw shots fired during the Nisur Square incident from individuals in the second car in the Raven 23 convoy. None of the Defendants nor Mr. Ridgeway was positioned in the second car of the convoy during the incident.

All of the foregoing *Brady* information in the government’s possession reveals that the government’s claim that the Defendants and Mr. Ridgeway were the only shooters at Nisur

Square is false. Thus, the prosecutors' "hail of bullets" theory, which rests on the assertion that Defendants were the sole source of the bullets fired in Nisur Square, fails miserably.<sup>6</sup>

**C. The Court Should Order The Government To Produce All Witness Statements To The Defense And Hold In Abeyance Its August 6 Order**

In light of the government's representations in the motion for reconsideration, the Court should order the government to produce all statements of witnesses with knowledge of the Defendants' roles in the events at Nisur Square. This information is no substitute for a bill of particulars.<sup>7</sup> Rather, the government's concession that the evidence in its possession does not permit an "accounting of the conduct of each defendant" makes clear that the witness statements are *Brady*.

The Court should decline the government's attempt to limit its disclosure to only the statements of "percipient witnesses" to the Nisur Square incident in the possession of the "prosecution team." Gov't Mot. at 1; *see also id.* at 3 (suggesting that it produce the statements of witnesses "who were present in or around Nisur Square at the time of the shooting"). The Court should order the government to produce *all* statements of *any* witness with information about the Defendants' role in the Nisur Square incident. For instance, a witness who spoke with one of the Defendants after the shooting may well have provided the government with

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<sup>6</sup> We note further that the government acts at its own peril if it continues to claim that the Defendants were the sole shooters at Nisur Square and did not receive any incoming fire. *See United States v. Reyes*, No. 08-10047, 2009 WL 2501920, at \*7 (9th Cir. Aug. 18, 2009) (reversing conviction where "the prosecution argued to the jury material facts that the prosecution knew were false, or at the very least had strong reason to doubt.").

<sup>7</sup> Although the government cites one case in which the production of witness statements obviated the need for a bill of particulars, Gov't Mot. at 3-4, a number of other cases have held that discovery is not an adequate substitute for a bill of particulars. *See Reply Memorandum in Support of Defendants' Motion for a Bill of Particulars (# 101)*, at 6-7. As the Court noted at the August 6 hearing, precedent in this area is "all over the place" and essentially states that the decision whether to grant a bill of particulars is "within the broad discretion of the Court." August 6 Tr. at 5.

information about the Defendant's role in the shooting that the government may seek to introduce at trial. The Court should order the government to produce all such statements tending to show the Defendants' roles in the incident even if the witness at issue was not present at Nisur Square.<sup>8</sup> The Court should also order the production of statements within the possession or control of the government, whether the "prosecution team," the *Garrity* team, other executive branch agencies such as the Departments of State and Defense, or anyone else aligned with the prosecution.

Given the government's tactical delays in this case, the Court should order the government to produce these witness statements immediately, but in any event no later than September 15, 2009. The government knew long before the August 6 hearing that it could not provide the requested particulars, yet it waited more than three weeks after the Court's ruling to seek reconsideration, at which time it requested an additional *five weeks* to photocopy and Bates stamp the relevant witness statements. This is information the Court deemed necessary for the Defendants to prepare a defense and such further delay is unacceptable.

Finally, the Court should temporarily hold the August 6 Order in abeyance while the Defendants evaluate the witness statements to determine if they provide adequate notice of the Defendants' individual roles in the charged offenses. Defendants suspect that the witness statements will be a series of conflicting accounts, reflecting no more than "the concentrated chaos that occurred over the span of just a few minutes in a foreign war zone" that led the Court

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<sup>8</sup> In light of the admissions and representations made in the government's motion, the government should not be heard to protest that Defendants are seeking early *Jencks* or other discovery to which they are not entitled. The government has been ordered to provide particulars, has protested that it is unable to do so, and has offered a subset of witness statements as a substitute for the particularization to which this Court has found the Defendants are entitled. Without waiving their right to particulars as ordered by this Court, Defendants respectfully submit that if the government is to be allowed to produce evidence as a substitute for particularization, that production must be complete and must hold nothing back.

to order a bill of particulars in the first place. August 6 Tr. at 9. Accordingly, Defendants respectfully request permission to ask the Court, no later than the October 16, 2009 motions deadline, to enforce the August 6 Order or grant such other relief as may be appropriate if the witness statements fail to provide sufficient notice of the role that each Defendant is alleged to have played in the charged offenses.

#### **IV. CONCLUSION**

For the foregoing reasons, this Court should deny the government's motion for clarification and/or reconsideration. The Court should instead (1) hold in abeyance its August 6 Order compelling the government to provide a bill of particulars, (2) order the government to produce immediately, but no later than September 15, 2009, the statements of *all witnesses* with knowledge of the incident at Nisur Square within the possession or control of the government, and (3) grant Defendants leave to seek to enforce the August 6 Order or obtain other appropriate relief no later than the current motions deadline of October 16, 2009.

A proposed Order is attached.

Dated: September 4, 2009

Respectfully submitted,

By: /s/ Mark J. Hulkower

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of September 2009, I caused the foregoing Defendants' Response to the Government's Motion for Clarification and/or Reconsideration, Declaration of Steven J. McCool, 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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