

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

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UNITED STATES OF AMERICA)
)
v.)
)
PAUL A. SLOUGH,)
EVAN S. LIBERTY, and)
DUSTIN L. HEARD,)
)
Defendants.)
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UNITED STATES OF AMERICA)
)
v.)
)
NICHOLAS A. SLATTEN,)
)
Defendant.)
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No. 1:08-cr-360-RCL

No. 1:14-cr-107-RCL

Judge Royce C. Lamberth

**DEFENDANTS' EMERGENCY MOTION TO CONTINUE SENTENCING
TO ALLOW NEW TRIAL MOTION BASED ON NEWLY DISCOVERED
EXCULPATORY EVIDENCE**

Defendants respectfully move on an emergency basis, under Local Criminal Rules 47 and 52.7, to continue the sentencing currently scheduled for Monday April 13, 2015, to allow the parties to present, and this Court to consider, a motion for a new trial based on new exculpatory evidence first disclosed by the government on Wednesday afternoon, April 8, 2015.

Rule 33 of the Federal Rules of Criminal Procedure permits defendants to move for a new trial in the interest of justice based on newly discovered evidence. On Wednesday, April 8, the government disclosed with its sentencing memorandum new evidence, in the form of a Victim Impact Statement from one of its key witnesses, that directly contradicts the government's case regarding the shooting of the driver and passenger of the white Kia sedan and

the instigation of the entire Nisur Square incident. Defendants have promptly alerted the Court (through this motion and through informal communication with Chambers) of the implication of this newly discovered evidence, but will not have time between now and Monday's sentencing to prepare and file motions for new trial, much less to permit the government to respond and the Court to consider such a motion before sentencing.

The new evidence flatly contradicts the government's case as to how the Nisur Square incident started, and as to the who, how, and why of the shooting of Ahmed Al Rubai'y, the driver of the white Kia. It destroys the government's case against Nicholas Slatten (who is charged with murdering Mr. Al Rubai'y). It also fundamentally undercuts the government's theory of the case as to all of the Defendants, both as to Count Two, the shooting of the passenger of the white Kia, and also as to whether Defendants reasonably perceived and reasonably responded to an apparent attack against the convoy. Because the new evidence calls the trial result into doubt, Defendants should have the opportunity to present their new trial motion for the Court's consideration before the Court imposes sentence and enters judgment.

PROCEDURAL BACKGROUND

Trial began with opening statements on June 17, 2014, and ended with closing arguments on August 27 and 28, 2014. The jury deliberated for seven weeks, and returned its verdict on October 22, 2014. Sentencing is set for Monday, April 13, 2015. *See* Order, Feb. 2, 2015 (ECF No. 721).

On Wednesday afternoon, April 8, 2015, the government submitted its sentencing memorandum (ECF No. 742). Among the six exhibits submitted in support of the government's memorandum was an 83-page collection of Victim Impact Statements (ECF No. 742-6).

One of those statements, by an Iraqi traffic policeman named Sarhan Dheyab Abdul Monem,¹ appears at pages 72-73 of ECF No. 742-6. That statement to this Court is dated March 20, 2015, but was not disclosed to Defendants until April 8, 2015.

ARGUMENT

I. THE NEWLY DISCLOSED WITNESS STATEMENT DIRECTLY AND FUNDAMENTALLY CONFLICTS WITH MR. MONEM'S TRIAL TESTIMONY AND THE THEORY OF THE CASE THE GOVERNMENT PRESENTED TO THE JURY

Mr. Monem's newly disclosed Victim Impact Statement fundamentally conflicts with his testimony at trial and with the theory of the case the government argued in its opening statement and closing argument. These conflicts eviscerate the government's case against Nicholas Slatten. They also fundamentally undercut its case against the remaining defendants, both as to Count Two (involving the passenger of the white Kia) and as to the reasonableness of the Defendants' perception of threats and assessment of a reasonable response to them as to all counts and all actions taken in the Nisur Square firefight.

A. The Government's Account of the White Kia Driver (Count One, as to Nicholas Slatten)

The government's theory of the case was that the Nisur Square incident began when Mr. Slatten, from a hidden location and without provocation, shot the driver of the white Kia in the head, killing him instantly. That contention is the sum total of the one-count first-degree murder charge against Mr. Slatten:

¹ This spelling is given in the transcript of the witness's testimony at trial. 6/19/14 Tr. 46:12. The witness's name is spelled Serhan Diab Abdulmuna'm Alzubaidi on his Victim Impact Statement. ECF No. 742-6 at 73. This motion will refer to him as Mr. Monem, as he was called at trial. See 6/19/14 Tr. 46:12, 58:19

[A]s Ahmed Al Rubai'y sits in that car waiting patiently with his mother beside him, he does not know that he is in the crosshairs of Nicholas Slatten. He does not know that he may be breathing his last breath. He does not know within minutes he and his mother will be dead and incinerated. And Nicholas Slatten pulls the trigger. When he does he sends a bullet outside of his rifle that is speeding toward Ahmed and hits him right smack in the forehead, exploding through his head, immediately incapacitating Ahmed and causing him to slump over. His mother, who's seated right next to him, does not know that is coming, but sees the violent result of that shot from Slatten's rifle. . . .
6/17/14 PM Tr. 7-8 (opening statement)

. . . .

Unbeknownst to them, as they are seated, waiting their turn, waiting for traffic to clear, unbeknownst to them they are being watched by Nicholas Abram Slatten, sitting, hiding, hidden from everyone else in an armored vehicle, the command vehicle that you've heard so much about at this point. Watching with his SR25 rifle, which you heard so much about, you saw a lot about, which you heard so much testimony about. A new weapon for him. You heard that he pointed that weapon out of the portal. We will show you, you have seen what the effect of the magnification does of the scope. You will hear at one point that he pulled the trigger, not once, but twice, hitting his victim, he found his mark. His mother, not knowing what had happened, only to know that one second ago her vibrant young son, full of hope, was no longer.
8/27/14 AM Tr. 8-9 (closing argument).

According to the prosecution, Slatten's unprovoked ambush killing of Mr. Al Rubai'y caused Mr. Rubai'y's foot to come off the Kia's brake, allowing the Kia to roll slowly forward toward the convoy:

And then the vehicle begins to move. Because you see, by shooting and incapacitating Ahmed that day in that circle while he was the driver of an automatic vehicle, he does not have the ability to apply pressure to the brakes, the most basic of functions. The functions you and I perform every day, he cannot do it. And that vehicle starts to roll forward on its own drive power.
6/17/14 PM Tr. 7-8 (opening statement).

. . . .

Defendant Slatten's deadly shot had a second deadly consequence. Because you now know that when he shot the driver, he put in motion a series of events that would involve everyone else. You heard that now with the driver, you heard it was an automatic. . . . [T]he driver now dead. The automatic car did what you would expect an automatic car to be doing, it

started to move forward, it's in gear, it's moving forward, it's on its own drive power. 8/27/14 AM Tr. 48 (closing argument).

The government's principal witness for this account of an unprovoked ambush killing was Mr. Monem. The government elicited testimony from Mr. Monem that he saw rifle barrels sticking out from the convoy trucks, that he heard the first shots from the trucks; that "almost instantly" after hearing them he heard screaming from the white Kia; and that he went to the Kia, where he saw a baseball-size hole in the windshield, a quarter-size hole in the middle of the driver's forehead, and much blood. Mr. Monem testified he returned to his place in front of the convoy, and signaled to the convoy to stop shooting, saying "stop" in Arabic and holding his hands up in the air. He said he returned to the vehicle to try to help the woman passenger get out, and walked alongside the vehicle trying to open the door, but was unable to do so. *See* 6/23/14 AM Tr. 8-19.

Again, the prosecutors echoed Mr. Monem's testimony in their arguments to the jury:

[T]here are two Iraqi traffic police officers who have played a part in stopping the traffic. And they hear those screams and they run to the car. One runs to the side of the car where the driver is, sees there's a hole in the windshield, sees that the young man has been shot in the head and there is blood over his face and on the front windshield. . . . And both try to provide assistance, but cannot get the doors open. 6/17/14 PM Tr. 7-8 (opening statement).

...

Now let's talk about Sarhan, remember, he's one of the traffic policemen. He helps stop traffic. What did he say? He described a shot, a pause, and a shot. . . . Was he entirely clear whether the shots came from within the vehicle or the turret of the vehicle? No. But he did tell you one thing, right? He noticed rifles sticking out of the holes, I think that was his phrase, sticking out of the holes of the armored vehicles. Who is sticking his SR25 [sniper rifle] out of the portal? You can reasonably conclude Nicholas Abram Slatten. Sarhan also talked about observing the victim's forehead, a wound that he described, it's not much bigger than an American quarter. 8/27/14 AM Tr. 38 (closing argument).

B. Mr. Monem's Statement: The Kia Driver Was Alive During the Incident, and Mr. Monem Was Hiding In His Booth

Mr. Monem's Victim Impact Statement, signed March 20, 2015 and disclosed Wednesday afternoon, April 8, 2015, tells a very different story. Far from an unforeseen ambush, Mr. Monem describes crystal clear recollection of the Kia driver, Mr. Al-Rubai'y, *being alive during the incident and talking with his mother as they feared for their lives:*

I saw many things on that day. I saw a mother crying for her son, who was a doctor and she had a feeling that he would be killed. She was unable to move, *and her son was trying to get her out of that damned car* The mother cried and hugged her son *as 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. . . .* I still hear that wom[a]n and her son's voices until now. VIS of Serhan Diab Abdulmuna'm Alzubaidi, Mar. 20, 2015, ECF No. 742-6, at 72.

Mr. Monem's vivid recollection of Mr. Al-Rubai'y and his mother crying and begging one another to go or not go, as they feared for their lives, *shows he was alive after gunfire began in Nisur Square.* This absolutely eviscerates the government's argument to the jury that Mr. Al-Rubai'y was the victim of an unprovoked ambush by Mr. Slatten, as he and his mother waited patiently in stopped traffic, unaware of any imminent danger. Had that been the case, there is no reason they would have cried to one another "we will be killed," or to implore one another to get out, or for Mr. Monem to have traumatically remembered, "[s]he was unable to move, and her son was trying to get her out of that damned car." Mr. Monem's statement shows that the unprovoked ambush killing by Mr. Slatten that the prosecution described to the jury *categorically did not happen.*

Mr. Monem's statement also shows he did not try to help the Kia's passengers, or witness the driver's injuries or the damage to the Kia as he testified. In stark contrast to that account at

trial, Mr. Monem now tells this Court that in fact he stayed in his police booth, unable to move or to act:

I feel guilty for not being able to help the doctor and his poor mother in the incident, I could not do anything. . . . I was afraid and stayed in my police booth, I was unable to move or think. . . . [H]er son was trying to get her out of that damned car, but I was unable to move and help him. So I gave up and just watched. . . . I am watching the scene without doing anything. I just hid in that booth They died because of me, because I did not help them. But I could not help them, because I was unable to move ECF No. 742-6, at 72.

Because Mr. Monem was rooted in his booth, unable to move, he did not go to the driver's window, and did not witness the driver's injury or the damage to the Kia's windshield as the prosecution to vividly highlighted at trial. Mr. Monem's new statement completely undoes the government's account of the death of the Kia's driver. It also proves that Mr. Monem perjured himself at trial to support the government's theory of the case. As will be discussed further in the forthcoming motions for new trial, that narrative was built on the flimsiest of evidence, chief among it Monem's false testimony.

C. Mr. Monem's New Account Also Eviscerates the Prosecution's Arguments Regarding Mr. Slough Shooting the Kia, and Regarding the Kia Shooting's Catalyst Effect on the Entire Incident

The effect of Mr. Monem's reversed story goes beyond Mr. Slatten. According to the prosecution, Paul Slough, when he saw the car rolling slowly toward the convoy, ignored the hole in the windshield, ignored the mother's screams, ignored the fact that traffic policemen were running toward, not away from, the car, and engaged the car anyway with automatic weapons and a grenade. According to the government, others joined in, and the rest of the Nisur Square incident followed:

And as [the Kia] rolls forward Defendant Paul Slough, seated right here, sees it coming. Now, mind you, Defendant Slough as you'll learn is in a turret in the convoy vehicle where Defendant Slatten has taken that shot. That first shot on September 16th 2007 was taken no more than feet from him. He is facing the south. He decides to ignore the hole in the windshield. He ignores the screams of the mother. He ignores the traffic men coming up to aid assistance, coming to, not going away, coming to, and he shoots. He shoots into the windshield of that car a series of shots from his rifle. And by shooting, ladies and gentlemen, he draws the attention of other members in the convoy. Others join in, they see this crawling vehicle coming towards the convoy and they join in. 6/17/14 PM Tr. 9 (opening statement).

....

You're going to hear that Nick Slatten fired his sniper rifle at the outset, lit the match, and the other defendants fanned the flames of destruction that day. *Id.* at 45.

....

The traffic officers, the Iraqi traffic officers stationed nearby talked about their observations, that they rushed to the vehicle. That they tried to stop it, that they tried to -- doing their jobs. One of them waved and signaled to the convoy that there is no threat. They tried to open Mahassin's door to get her out of the car. And you remember those two officers? One of them was Sarhan. He was one who began signaling to the turret gunners not to fire anymore at the white Kia, there's no threat here. The second officer, Ali Salman, went up to the car to try to calm the mother down. He also tried to slow the vehicle. Notwithstanding these efforts by these police officers, a hail of bullets began to rain down on that white Kia. Everything that followed, all that carnage, all the firing and fleeing men and women and children was an unreasonable response and was excessive. 8/27/14 AM Tr. 48-50 (closing argument).

....

Now, keep in mind about the placement of the individuals. The turret gunners, of course, they're up, they're out, they can see, they can observe, they can hear. They would have seen the efforts of the traffic officer, Sarhan and Ali, to inform the gunners that the driver was killed, that there was no reason to shoot at that white Kia, that there was not a threat, it was not a threat, no reason to continue shooting. *Id.* at 75.

In fact, as we now know from Mr. Monem's statement, Mr. Monem did not rush to the vehicle. He did not wave and signal to the convoy that there is no threat, as he testified at trial.

Instead, he hid in his booth. He was not out waving to Paul Slough or the other Defendants not to shoot, as he and the government claimed.

Furthermore, the Kia did not have an obvious hole in the windshield as it advanced on the convoy, nor was the driver dead. Though the prosecution elicited testimony from Monem that he saw those injuries “almost immediately” after hearing the “shot, pause, shot” that the prosecution characterized as the incident’s first gunfire, Mr. Monem’s current statement shows that *Mr. Al-Rubai’y was alive in the Kia*, talking with his mother and fearing for their lives, *after the gunfire began*. The government’s account at trial—that Mr. Slough ignored the hole in the windshield, the obviously dead driver, and Mr. Monem’s waving and signaling that there was no threat—cannot be true.

Indeed, Mr. Monem’s new account strongly suggests the opposite—that Mr. Al-Rubai’y tragically tried to drive the Kia out of the situation, and was very much alive as he drove toward the convoy. Mr. Monem reports that the mother “was telling him ‘don’t go, don’t go, we will be killed,’ and was “begging him not to go,” while he was telling her, “get out of the car, we’ll be killed,” but “she was unable to move,” despite “her son . . . trying to get her out of that damned car.” ECF No. 742-6 at 72. This account, which Mr. Monem vividly recalls (“still hear[ing] [their] voices now,” *id.*), suggests Mr. Al-Rubai’y’s mother, Mahassin, was begging him not to *drive the car*, but that he tragically ignored that advice and tried to drive away, advancing on the convoy in doing so. That sight looked very different—like an advancing car bomb threat—than the picture that Mr. Monem and the prosecutor painted at trial, which cannot be true in light of Mr. Monem’s statement to this Court.

In the government's rebuttal argument, the prosecutor made clear that Mr. Monem's testimony was central to its argument:

Now, you've heard a lot of testimony about first shots. There are about two or three things you need to decide. One, was the vehicle stopped or not before the first shots? *There are only three people, only three*, that were paying attention to this vehicle before those first shots. The two individuals, the traffic cops, that didn't want to get run over, right? . . . And then the VW Caddy guy, Majed, is kind of paying attention to where it is. And they tell you – they tell you – more so the two traffic guys, Moniem and Salman – say: Yeah, that was stopped. We did our jobs. We stopped. 8/28/14 PM at 65 (rebuttal argument).

Thus, Mr. Monem's testimony was not merely the testimony of one witness among many. It was *the* testimony on which the government based its argument that Mr. Slatten ambushed and murdered Mr. Al-Rubai'y, unprovoked. And it was *that* alleged unprovoked act, based on Mr. Monem's testimony, that the government characterized as having "lit the fuse" to the whole incident:

There's nothing moving, ladies and gentlemen. That's them telling you there's nothing moving. And only after those first two shots did you get to moving. . . . [I]f you see it from the beginning, like the two traffic officers and Majed there, then you know it was stopped, it wasn't posing a threat. And only by virtue of -- and we'll get to this -- Mr. Slatten's first shot -- does it actually start moving. *Id.* at 66-67.

[Slatten] is, after all, the one who lit the match that ignited the firestorm that went on to engulf so many. . . . 8/27/14 AM Tr. 27 (closing argument).

. . . .

Everything that followed, all that carnage, all the firing and fleeing men and women and children was an unreasonable response and was excessive. *Id.* at 50.

Mr. Monem's statement now shows it did not happen that way. The government's entire theory about Mr. Slatten's alleged unprovoked attack on Mr. Al-Rubai'y, and all that followed, is wrong.

II. THIS COURT SHOULD CONTINUE SENTENCING TO CONSIDER DEFENDANTS' NEW TRIAL MOTION

Presenting this argument in the context of a fully briefed Rule 33(b) motion, addressing the legal standard and authorities and surveying the effect of the evidence in light of the full evidentiary record, will take more time than exists between now and Monday's scheduled sentencing. Defendants, who have been confined since the verdict, do not lightly seek delay, or seek delay for its own sake. But these issues deserve full consideration by the Court: it would be unfair to proceed to impose sentence and enter judgment when this new evidence, disclosed less than two days ago, leaves the trial result fundamentally in doubt. This Court should grant a short continuance of sentencing to permit briefing and consideration of Defendants' motion for a new trial.

Dated: April 10, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 2015, I caused the foregoing to be filed using the CM/ECF system, which caused electronic service on all counsel of record.

/s/ Brian M. Heberlig