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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 15-3078

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

UNITED STATES OF AMERICA,
APPELLEE

v.

NICHOLAS ABRAM SLATTEN,
DEFENDANT-APPELLANT

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

CORRECTED FINAL REPLY BRIEF OF DEFENDANT-APPELLANT NICHOLAS ABRAM SLATTEN

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GLOSSARY OF ABBREVIATIONS

A.___	Appendix
GB.___	Brief for the United States
JB.___	Brief of Appellants Slough, Liberty, and Heard
MEJA	Military Extraterritorial Jurisdiction Act
SA.___	Sealed Appendix
SB.___	Brief of Defendant-Appellant Nicholas Abram Slatten

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INTRODUCTION

The government's response ignores and misconstrues the law and facts of this case. The government ignores the overwhelming evidence of Slatten's innocence, and instead argues that the Court should accept that the jury bought the government's highly conjectural theory. It ignores that [redacted] exculpated Slatten, but was withheld from the jury. The government also ignores that its claim that a presumption of vindictiveness cannot arise pretrial because it falls squarely within the bounds of prosecutorial discretion was already *rejected* by this Court, and that the circumstances of this case plainly warrant a presumption—which the government still does not seriously attempt to rebut. It ignores that the new evidence from Monem would probably result in Slatten's acquittal, especially where the verdict is already unsupported by the evidence. And the government ignores that Slatten and Ridgeway are not joint offenders under its own view of this case, and that Slatten should therefore have been tried in Tennessee. When the uncontroverted facts are considered and the law properly applied, it leads to the inescapable conclusion that Slatten's conviction must be reversed.

ARGUMENT

I. NICHOLAS SLATTEN IS INNOCENT.

The government correctly notes that this Court must reverse Slatten's conviction if it determines that no reasonable juror could find Slatten guilty beyond

a reasonable doubt. GB.99. But the government then ignores that standard. Rather, it argues that it had a theory, albeit a tenuous one contradicted by substantial evidence, the jury bought it, and that is the end of it. But that the jury bought it is not the end of it when what the government sold was a first-degree murder conviction backed by rank speculation. Applying the proper standard here, no reasonable jury could find Slatten guilty beyond a reasonable doubt.

A. Having a Theory of Guilt Is Not Enough to Affirm the Verdict.

The proper question here is not whether the jury bought the government's theory, but whether the jury's conclusion flowed from proof beyond a reasonable doubt or from speculation. It is black-letter law that a jury "may not base a verdict on mere speculation." *United States v. Harrison*, 103 F.3d 986, 991 (D.C. Cir. 1997) (internal quotation omitted). And there comes a point when "the government's web of inference is too weak to meet the legal standard of sufficiency." *United States v. Teffera*, 985 F.2d 1082, 1086 (D.C. Cir. 1993).

This Court's cases show where that point is. The Court has stated that "when faced with an innocent explanation sufficiently supported by the evidence to create a reasonable doubt about the defendant's guilt," the government must "present evidence sufficient to dispel that doubt." *United States v. Law*, 528 F.3d 888, 896 (D.C. Cir. 2008). Moreover, where the evidence supports "an equally plausible if not more plausible account"—under which the defendant is *not*

guilty—"than the government's theory," the government "cannot prevail on the basis of jury speculation." *United States v. Wilson*, 160 F.3d 732, 738 (D.C. Cir. 1998); *see also United States v. Moreland*, 665 F.3d 137, 149 (5th Cir. 2011) ("[N]o reasonable jury could find a defendant guilty of an offense where the 'evidence gives equal or nearly equal circumstantial support to a theory of guilt, as well as to a theory of innocence.'").

The evidence here does not merely give "equal or nearly equal" support to Slatten's innocence, but rather gives overwhelming support. Indeed, the government itself introduced compelling evidence that Slatten did *not* kill Al-Rubia'y. SB.47-52. That evidence included eye-witness accounts from *two* police officers who positively identified the actual killer as a turret gunner. SB.47-48. Specifically, Al-Hamidi testified that the first shots fired at Al-Rubia'y came from a turret gunner who fired "three to four shots." A.1247-49. Monem did not recall the number of rounds, but described it as "light shooting" from a turret gunner. A.793-96. Al-Hamidi's and Monem's accounts that a turret gunner fired the first shots were further corroborated by other witnesses. SB.47-48.

The government contends that this Court should ignore this evidence because the police officers were "unable to see what was going on *inside*" Slatten's vehicle. GB.105 (emphasis added). But Al-Rubia'y was not killed inside Slatten's vehicle. Both officers testified that they could see—*outside* the vehicles—that the

first shots fired at the Kia came from a turret gunner, *not* Slatten. Indeed, Monem, when pressed by the government regarding the location from which the shots were fired, testified: "In the beginning when I mentioned that there was firing, I meant it was coming from the turrets and not from the holes or the windows that are in the vehicles." A.797.

With its theory of the case contradicted by its own eyewitnesses, the government relies on snippets of circumstantial evidence from which it argues the jury could have inferred that Slatten killed Al-Rubia'y—Slatten fired two rounds early in the engagement; those rounds were fired toward the same compass quadrant (south) from which Al-Rubia'y's car approached and toward which numerous members of Raven 23 fired their weapons; and Slatten stated after the engagement that he had shot an "active shooter" in the head. GB.103. From this evidence, the government claims, the jury could have concluded that one of Slatten's rounds *might* have been fired at Al-Rubia-y—whom all agree was *not* a shooter—and that round *might* have killed him. However, at *best* for the government, the evidence supported two theories, one directly corroborating Slatten's innocence and the other speculating as to Slatten's guilt. "[T]hat is not enough," *United States v. Campbell*, 702 F.2d 262, 267 (D.C. Cir. 1983), and no reasonable juror could conclude otherwise.

B. Watson's Testimony Does Not Conflict with the Exculpatory Testimony of the Police Officers.

The government dismisses the exculpatory evidence by suggesting that the jury could credit allegedly conflicting evidence from Watson over the testimony of the police officers who saw Al-Rubia'y get shot. GB.105. This is wrong because, among other things, Watson has *always* described hearing shooting *before* he heard Slatten fire. The government simply ignores this.

Watson testified at trial that "[i]mmediately upon stopping the motorcade, [he] remember[ed] hearing pops," and that he had no idea from where the shots originated. A.1990-91. Watson was asked about these shots in the grand jury, where the government claims Watson "'spoke nothing but the truth.'" GB.105; *see also* A.3127 (government's closing argument). Watson there stated that he "recollect[ed] hearing like pop, pop, pop outside." A.1992. Then, sometime *after* hearing these pops, Watson heard Slatten fire two rounds. A.1994-97.

Watson also consistently testified that Slough, the turret gunner on top of his and Slatten's vehicle, fired from a belt-fed machine gun—an M-240—*after* Watson heard the initial gunshots he described as "pops." Specifically, Watson testified that he was first aware of Slough shooting when he felt "hot brass" (shell casings) fall from Slough's position on top of the vehicle, and could feel the Command vehicle vibrating from Slough's mounted weapon. A.2001-02. Slough had two guns, however: the mounted M-240 (GX52) and an M-4 rifle (GX18).

Slough *first* fired limited shots with his M-4 at the Kia, and only later fired his mounted M-240. *See, e.g.*, A.2129; A.2306. Likewise, Ridgeway testified that he initially fired limited shots at Al-Rubia'y with an M-4, before any turret gunner fired an M-240. SB.48-49.

So to put things together: Watson testified that he first heard a "pop, pop, pop outside," and only *later* heard Slatten fire two rounds at the same time that he felt "hot brass" and vibrations from Slough's M-240. A.2001-02; A.4140 (government closing). To the extent, then, that the government insists on pitting Watson against the police officers, the shots that Watson heard *well before* he heard Slatten fire are in fact *consistent* with the police officers' testimony that a turret gunner shot and killed Al-Rubia'y with "light shooting" from a rifle.

That part of Watson's testimony also belies the government's only explanation for how both Monem and Al-Hamidi could have misperceived a turret gunner to have shot Al-Rubia'y. The government claims that the officers were confused because, as Watson reported, "the turret guns 'just roar[ed]'" after Slatten fired. GB.105. But neither police officer reported "roaring" turret guns any time near when Al-Rubia'y was killed. They both reported a limited number of clear, individual shots from a turret gunner. Only *after* they approached the car and it

moved forward was it re-engaged with "intense shooting."[1] A.805. That is consistent with the fact that the "roaring" gun that Watson described was the M-240 that Slough fired well *after* Slough and Ridgeway fired M-4 rifles. The government is thus wrong that Watson's testimony conflicts with the police officers' testimony.

C. The Weakness of the Government's Case is Betrayed by the Extent to Which It Mischaracterizes the Evidence.

The government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . [A prosecutor] may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). The government here does not adhere to this ideal.

As noted above, the government's omits any mention of Monem and Al-Hamidi seeing a turret gunner kill Al-Rubia'y. GB.12-16. But even more troubling are the liberties it takes with Watson's testimony, because those liberties are both essential to its case and more obfuscatory.

In addition to omitting that Watson heard shooting *before* Slatten fired, *see supra* at 5-6, the government misleadingly claims that Watson testified that Slatten

[1] In this regard, the government's description of the Kia's initial engagement is highly misleading as it attempts to portray that there were two shots (supposedly from Slatten) that no one could identify and that Slough, Ridgeway, and others "open[] up" on the Kia only after the police officers ran to it. GB.15.

was "positioned 'exactly' toward the Kia." GB.13, 102. In truth, Watson was clear that he had "no idea" at what Slatten shot. A.2060-61. Watson made clear that *all* he intended to convey was that the Kia approached from the south of the convoy, and that Slatten was positioned out the left side of the vehicle that was facing south. A.2063-64 ("There's millions of square feet to the south; correct? A. Yes. Q. . . . all you were saying is the car was to the south, coincidentally Mr. Slatten shot to the south somewhere? A. That's correct.").

The government also mischaracterizes testimony from Edward Randall, a Raven 23 member in the vehicle behind the Command vehicle. According to the government, Randall "believed the first shots came from Slatten's vehicle, but not the turret." GB.102. That is false. Randall testified that he heard shots but did not try to determine who in the Command vehicle had fired, and was looking to his left (and so not at Slough) because he was trying to identify what had been shot at. A.2489. And when asked whether there was anything in Slough's appearance that suggested whether he had fired, Randall stated only that he "really can't remember exactly what [Slough's] position was." *Id.* Randall's testimony does not suggest that the firing came from someone *other* than Slough.

The government also misleadingly suggests that Slatten was the only one on the team who could have shot Al-Rubia'y. Slatten, however, was *not* the only

Raven 23 member who had a scoped rifle.[2] *See* A.2113. More importantly, the evidence showed that every member of Raven 23 was capable of accurately hitting a target at the distance of the Kia "in a heartbeat." A.1208-09; *see also* A.2113; A.2257-58 (Ridgeway "took aim" and fired at the Kia—"a target that [he] could hit pretty accurately under those circumstances"); A.2689-90 ("Even newly instructed personnel could, within an hour, place well aimed shots within a three inch circle").

In sum, *nothing* reliably links Slatten to the killing of Al-Rubia'y. Moreover, as we show next, [redacted] which strongly supports the conclusion that Slatten is not guilty—but the jury was not allowed to hear that evidence.

II. [redacted] STATEMENTS ARE ADMISSIBLE.

Slatten sought to introduce at trial [redacted]. The government incorrectly argues that [redacted] statements are inadmissible because they were not (1) [redacted] or (2) sufficiently corroborated.

[2] The government introduced exhibits showing the view through the ACOG scope used by other members of Raven 23. *See, e.g.*, A.3839; A.3840.

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A. [redacted]

The government's new lead argument is that [redacted] But in *United States v. Slough*, this Court ruled that the government *could* use *Kastigar*-protected statements to make charging decisions. 641 F.3d 544, 553-54 (D.C. Cir. 2011). In this case, the government initially [redacted] and did not charge Watson, who, though he later admitted under immunity to firing scores of shots, originally denied shooting. [redacted].

[redacted]

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The government asserts that [redacted], and so the statements that Slatten sought to admit must be excluded. The government claims that [redacted]. GB.121-22. The Supreme Court, however, has interpreted [redacted]. So the government is wrong to rely on parts of [redacted]. The cases on which the government relies—from *other* circuits—are either readily distinguishable, *see* SB.40-41, or simply wrong.

The government also offers the counter-intuitive speculation that [redacted] GB.122. But the simpler explanation makes more sense: [redacted]

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[redacted]

B. [redacted] Statements Were Corroborated.

The government next argues that there were insufficient corroborating circumstances indicating the trustworthiness of [redacted] statement. This requirement does not even apply if [redacted] In any event, the corroboration standard is met here.

The plain language of the rule asks whether the *circumstances of the making* of the statement corroborate trustworthiness, not whether evidence corroborates the substance of the statement. [redacted]. Although there is no definitive list of what *circumstances* are corroborating, this Court has indicated that the "consistency of declarant's statements" is a relevant factor, [redacted]

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[redacted]. Here, all of that and more is satisfied: [redacted], timely made, [redacted]

In opposition to all of this, the government argues only that [redacted] GB.123. But that is the circumstance that *proves* reliability: it is *because* [redacted] that he was so likely to be telling the truth when he nevertheless [redacted].

[redacted]. Courts have cautioned that "the district judge does not need to be completely convinced that exculpatory statements are true prior to their admission," *Garcia*, 986 F.2d at 1141, and that the trial court should *not* require the accused to "prove the declarant's guilt beyond a reasonable doubt," *Laumer v. United States*, 409 A.2d 190, 202 (D.C. 1979). Here, however, *nearly all* of the record evidence corroborates the statements that Slatten seeks to admit. [redacted]

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The government breathes not a word about this evidence, though, instead asserting only that Watson testified "[u]nder oath" about his "'clear' recollection" that Slatten fired first. GB.124, 128. That testimony was not offered at trial, but before a grand jury where Watson was not subject to cross-examination; and at trial, Watson admitted he was not certain about the sequence of firing between Slatten and . A.1995. More importantly, however, Watson's testimony about the first "pops" he heard is *consistent* with

The government also argues that *other* statements by , namely, the elements of the statement that Slatten did not seek to introduce, "simply do not ring true." GB.124. There, too, the government ignores significant record evidence. *See* JB.17-18. But, the issue is irrelevant. Assuming that corroboration of the substance of the statement matters at all, the question is not whether the whole statement is true, but whether the elements of statement that Slatten seeks

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to introduce are corroborated by other record evidence. The answer there is overwhelmingly yes.

The only other challenge that the government makes to [redacted] statement is that [redacted]. GB.124. But that is no basis for finding the statement unreliable. The jury can and should weigh [redacted] asserted [redacted] does not make the statement somehow less reliable or inadmissible. If anything, it suggests honesty. So this argument, too, is unavailing.

C. [redacted] Statements Are Admissible Under the Business Records Exception and the Residual Hearsay Exception.

With respect to the business records exception, the only new authority that the government offers is *Palmer v. Hoffman*, 318 U.S. 109 (1943), a case in which a railroad employee's accident report was not admitted as a business record. That case, however, turned on the fact that "[t]he business of the petitioners is the railroad business," *id.* at 111, and so the accident report was not "typical of entries made systematically or as a matter of routine," *id.* at 113. Here, to the contrary, Blackwater's business *was* the lawful use of force, and recording every use of force *was* "systematic[]" and "routine." The government has asserted since this case began that each of the guards initially reported their account of the event

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"because it was part of their job, just like a police officer." SA.24. *Palmer* therefore reinforces that these records are in fact legitimately business records.

As for the residual exception, the government makes *no* argument against the application of that rule except to assert that, "[j]ust as [redacted] statements are untrustworthy under Rules [redacted] and 803(6), so they are under Rule 807, too." GB.128 n.54. The government has thus conceded all elements of the residual hearsay exception except whether the statements bear indicia of reliability—presumably because the government recognizes that this is precisely the kind of statement for which the residual exception was created, and for which the Fifth Amendment precludes the "mechanistic[]" application of the hearsay rule. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). [redacted]. And yet the government seeks to apply the hearsay rule to exclude that statement—not in the interests of justice, but in the interests of winning. If no other exception to the hearsay rule applies here, the residual exception should.

D. Exclusion of [redacted] Statements was Not Harmless.

Finally, the government argues that exclusion of [redacted] statements was harmless because "the evidence amply proved that Slatten fired the first shots that hit Al-Rubia'y." GB.128. The government again relies on the out-of-court

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testimony that Watson rejected when he testified at trial that he did *not* have a "clear" recollection of Slatten firing before [redacted], and ignores Watson's testimony that he heard "pops" before Slatten fired, and the other substantial evidence showing [redacted] Otherwise, the "ampl[e]" evidence amounts to baseless inferences from Slatten's comment to Ridgeway that he shot an "active shooter" at some point during the engagement, and a propensity argument based on comments taken out of context. GB.128-29. None of that is sufficient to uphold a conviction—but at a minimum it does not render [redacted] statements irrelevant. [redacted] . In short, the district court committed reversible error in holding [redacted] statements inadmissible.

III. THE GOVERNMENT MISSTATES AND MISAPPLIES THIS COURT'S VINDICTIVE PROSECUTION STANDARD.

Slatten's opening brief argued that under the unique circumstances of this case there is a "realistic likelihood of vindictiveness" justifying a presumption of vindictiveness under this Court's totality of the circumstances test. *United States v. Meyer*, 810 F.2d 1242, 1246 (D.C. Cir. 1987). Slatten further argued that the government has not and cannot overcome that presumption.

The government does not even attempt to argue (except in a brief footnote) that it could overcome a presumption of vindictiveness. Instead, it maintains that Slatten is not entitled to the presumption because the "realistic likelihood" standard does not mean what it says. According to the government, a "realistic likelihood" actually requires the defendant to show that the prosecutor could have had *no* "'legitimate reason (other than vindictiveness) for increasing the charges.'" GB.87 (internal quotation omitted). The government's arguments, however, improperly conflate the "realistic likelihood" standard with *actual* vindictiveness, are inconsistent with this Court's case law, and rely almost entirely on misleading quotes from non-binding cases.

A. The Unique Circumstances of this Case Indicate a "Reasonable Likelihood" of Vindictiveness.

To establish a presumption of vindictiveness in the pretrial setting, this Court considers whether "'all of the circumstances [surrounding the increase in charge], when taken together, support a realistic likelihood of vindictiveness.'" SB.19-20 (quoting *Meyer*, 810 F.2d at 1246).

Though Slatten detailed the relevant circumstances in his opening brief, *see* SB.3-12, 20-25, several key facts bear reemphasis: First, the government here *twice* investigated Slatten—over a period of *six years*—and *twice* charged manslaughter. The government had thus fully developed the facts and legal theory of its case *before* upping the charge after Slatten successfully asserted his statute of

limitations rights—accordingly, as in *Meyer*, "the prosecutor increased the charges not because of any further factual investigation or legal analysis, but because the defendant[] chose to exercise his rights." *Meyer*, 810 F.2d at 1247. Indeed, the government concedes that "the first degree murder charge was based on substantially the same evidence as the 2013 manslaughter charge." GB.91.

Second, also as in *Meyer*, the prosecutors charged all the defendants with manslaughter at the outset of this case, *before* Slatten asserted his rights. But the government singled Slatten out for harsher disparate treatment *after* he asserted his rights. *Meyer*, 810 F.2d at 1246. Third, the *Meyer* court found that the government's "motivation to act vindictively" on both a personal and an institutional level supported a presumption of vindictiveness. That motivation was far greater in Slatten's case, where the government faced a stern rebuke from this Court for the prosecutors' "inexplicable failure" to proceed against Slatten in a timely fashion. Finally, after Slatten prevailed on mandamus in this Court, the government offered to proceed as if *it* had prevailed and reinstate the manslaughter charge—evincing a "disturbing willingness to toy with" Slatten. SB.22.

In short, the unique facts of this case indicate a "reasonable likelihood" of vindictiveness. The government's contrary view stems from a misunderstanding of applicable precedent.

B. The Government's Arguments that a Presumption is not Warranted are Illogical and Contrary to Precedent.

The government devotes little effort to disputing that "all of the circumstances" of this case support a "realistic likelihood of vindictiveness,'" *Meyer*, 810 F.2d at 1246, within the ordinary meaning of that phrase. Instead, the government first claims that "prosecutorial discretion" is so broad in the pretrial context that the defendant can demonstrate a "realistic likelihood" only if he shows that the "charging decision . . . 'result[ed] solely from the defendant's exercise of a protected legal right.'" GB.87 (internal quotation omitted). Similarly, the government maintains that a "realistic likelihood" is present only if the defendant can show that that the prosecutor had *no* "'legitimate reason (other than vindictiveness) for increasing the charges.'" GB.87 (internal quotation omitted). Both arguments are wrong.

1. The Government's "Prosecutorial Discretion" Claim Is a Variation on the Argument Rejected by This Court in *Meyer*.

The government's view that Slatten is not entitled to the presumption because "a pretrial decision to reindict" on a higher charge purportedly falls "squarely within the bounds of prosecutorial discretion," GB.84, is not the law. This Court has squarely *rejected* that claim. *See Meyer*, 810 F.2d at 1246.

In *Meyer*, the government argued that the Supreme Court's decision in *United States v. Goodwin*, 457 U.S. 368 (1982), stands for the "broad principle that

a presumption of vindictiveness can never apply in a pretrial context." 810 F.2d at 1246. But this Court found the government's reading of *Goodwin* unpersuasive, stating that "[t]he lesson of *Goodwin* is that proof of a prosecutorial decision to increase charges after a defendant has exercised a legal right does not *alone* give rise to a presumption in the pretrial context." *Id.* (emphasis added). But, the Court explained, "when additional facts combine with this sequence of events to create a realistic likelihood, a presumption will lie in the pretrial context." *Id.* As set forth above, "additional facts" here *do* "combine with" the increase in charge to create a realistic likelihood of vindictiveness—and, particularly in light of *Meyer*, the government's incantation of "prosecutorial discretion" is no answer.

2. The Government's Understanding of a "Realistic Likelihood" Is Both Illogical and Inconsistent with the Precedents of this Court and the Supreme Court.

The government ultimately concedes that "prosecutorial discretion" alone cannot answer the *Meyer* question—again, "whether the defendant[] ha[s] shown that all of the circumstances . . . together . . . support a realistic likelihood of vindictiveness." 810 F.2d at 1246. The government's primary argument is thus that the term "realistic likelihood" does not mean what it says, but rather requires that the defendant show that the charging decision "'result[ed] solely from the defendant's exercise of a protected legal right.'" GB.87 (internal quotation omitted).

But that abrogates *Blackledge* and *Meyer*, which relieve defendants from the virtually impossible burden of showing what actually was going through prosecutors' minds. The *Meyer* Court noted that "there are *two* ways in which a defendant may demonstrate prosecutorial vindictiveness." 810 F.2d at 1245 (emphasis added). The first way, of course, is that "a defendant may show 'actual vindictiveness'—that is, he may prove through objective evidence that a prosecutor intended to punish him for standing on his legal rights." *Id.* The government's argument here is that, when a lesser charge becomes unavailable, that is what the "realistic likelihood" standard always requires. But that is wrong.

Meyer focuses on the *second* way that a defendant may show vindictiveness: "when the facts indicate a realistic likelihood of vindictiveness, a presumption will arise obliging the government to come forward with *objective evidence* justifying the prosecutorial action." *Id.* Under the precedents of the Supreme Court and this Court, that second analysis is the heart of the vindictive prosecution doctrine, and it applies here. *See Blackledge v. Perry*, 417 U.S. 21 (1974) ("There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously . . . [our decision] was not grounded upon the proposition that actual retaliatory motivation must inevitably exist . . . [but on eliminating] the fear of such vindictiveness." (internal quotation omitted)).

The government pays little attention to the circumstances giving rise to a presumption of vindictiveness here, because it asserts that the unavailability of the lesser charge controls. The government does claim, however, that it did *not* treat Slatten differently from other defendants when he exercised his statute of limitations rights because Slatten's co-defendants did not have statute of limitations rights to exercise. GB.90. That response makes no sense. What matters is that *Slatten* exercised a right and the government treated him differently from a contemporary who did not—regardless of whether those other defendants could have chosen to follow Slatten's footsteps.

The government likewise dismisses the substantial evidence of motivation for self-vindication (*e.g.*, the national importance of the case, this Court's rebuke, the negative press, the government's claim that Slatten's exercise of rights was a "desperate ploy," etc.) as resting on "rank speculation." GB.85. But this is only more indication that the government is applying the wrong standard. Slatten need not prove "actual retaliatory motivation," but must simply identify circumstances that make it "reasonably likely." No speculation is needed to recognize that likelihood here. The burden then shifts to the government to come forward with *objective* evidence indicating that the increase in charge was not retaliatory, which the government has not even attempted to do—its claim that it upped the charge

out of desire to hold Slatten "accountable" is a claim about its *subjective* intent, not objective evidence.

The government also argues that its offer to return to manslaughter charges—that is, its offer to act as if it, not Slatten, had prevailed on the statute of limitations issue—does not show vindictiveness. GB.92-93. The government maintains that "if a prosecutor can threaten to bring stiffer charges when a defendant refuses to waive a legal right, *see Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978), the inverse, surely, does not raise a presumption of vindictiveness." GB.92-93. Again, the government is wrong.

Bordenkircher does *not* authorize the government to require a defendant, particularly outside of the plea bargaining phase, to forfeit just any procedural right that the government names or else be subject to a higher charge. Nothing in *Bordenkircher* suggests that the government can, for example, require a defendant to forfeit his right to exculpatory evidence or his right to a lawyer. Nor may the government require that a defendant give up his statute-of-limitations defense or else be subject to higher charges—and, indeed, *Bordenkircher* itself makes that clear. *Bordenkircher* recognized that during (and, of course, after) plea bargaining the defendant *is* entitled to be "*advised by competent counsel and protected by other procedural safeguards*." 434 U.S. at 363 (emphasis added). Statutes of limitations are precisely such procedural safeguards. That is why the Sixth Circuit

has found that "*Bordenkircher* must be confined to the plea bargaining context in which it arose . . . [because] [a]n expansive reading of *Bordenkircher* makes that decision irreconcilable with *Blackledge* and *Pearce*." *United States v. Andrews*, 633 F.2d 449, 457 (1980).

The government maintains that *Goodwin* rejected the Sixth Circuit's view of *Bordenkircher*, GB.93, but it did no such thing. As this Court expressly held in *Meyer*, "[t]he lesson of *Goodwin* is that proof of a prosecutorial decision to increase charges after a defendant has exercised a legal right does not *alone* give rise to a presumption in the pretrial context." 810 F.2d at 1246 (emphasis added). In *Goodwin*, the Supreme Court rejected a presumption of vindictiveness, but began by reaffirming that the presumption *should* apply "in cases in which a reasonable likelihood of vindictiveness exists." 457 U.S. at 373. The Court concluded, however, that the "possibility that a prosecutor would respond [with retaliation] to a defendant's pretrial demand for a jury trial" was so "*unlikely* that a presumption of vindictiveness is certainly not warranted." *Id.* at 384.

In sum, then, the Supreme Court's vindictive prosecution precedents indicate that a presumption of vindictiveness should apply when a "reasonable likelihood of vindictiveness exists," because "[m]otives are complex and difficult to prove." *Id.* at 373. But *Bordenkircher* held that the typical "'give-and-take' of plea bargaining" gives rise to no such reasonable likelihood." 434 U.S. at 363. And

Goodwin found that the mere fact of an increase in charge after defendant's pre-trial invocation of the right to a jury trial does not alone reflect a reasonable likelihood of vindictiveness. 457 U.S. at 381. Plainly, however, neither *Bordenkircher* nor *Goodwin* has any application here, and the fact that the government cannot charge Slatten with manslaughter does not somehow change that. The question here, under *Meyer*, is whether the totality of the circumstances indicates a "reasonable likelihood of vindictiveness." 810 F.2d at 1246. And the answer is that it does.

3. The Government's Reliance on Cases from Outside this Circuit is Misplaced.

Because the government's arguments directly conflict with *Meyer*, it is obliged to rely primarily on cases from *other* circuits, while barely mentioning this Court's precedents. *See, e.g.*, GB.84-89 (relying on carefully edited excerpts of cases from the Second, Third, Fifth, Ninth, and Eleventh Circuits and the Supreme Court of Missouri). Most of those snippets do not bear discussion. But the government's claim that "*Paradise v. CCI Warden*, 136 F.3d 331 (2d Cir. 1998), is squarely on point" is fundamentally misleading. The government argues that the court there held that "because the government could proceed on the capital felony charge or 'not at all,' its decision to prosecute was not presumptively vindictive." GB.89. Not so. As Slatten set forth in his opening brief, the law of the Second Circuit is 180 degrees from *Meyer*—and frankly inconsistent with *Blackledge*,

Bordenkircher, and *Goodwin* as well. Specifically, the Second Circuit adheres to the rule that *Meyer* rejected. What the *Paradise* court actually ruled is that "this court has consistently adhered to the principle that the 'presumption of prosecutorial vindictiveness does not exist in a pretrial setting.'" 136 F.3d at 335. That view was correctly rejected by this Court in *Meyer*, and *Paradise* is accordingly inapposite.

The government's response to the distinction of *Paradise* on other grounds also misses the point. *Paradise* involved prosecutors who brought a more serious charge that was based on the *same elements* as the original charges in that case. There was no need for an objective explanation for charging the same elements that the government had always charged. Here, in contrast, the government's allegation of *new* elements required to show first-degree murder with *no new evidence* does require objective explanation under this Court's case law. No such explanation exists, and Slatten is entitled to a judgment of acquittal.

IV. THE NEW STATEMENTS FROM MONEM MERIT A NEW TRIAL.

The government asserts that the new statements from Monem do not warrant a new trial because it does not think they would result in an acquittal. GB.160-62. That is wrong.

Before considering what the government argues here, it is helpful to note what it does not. The government appears now to recognize that, unlike witnesses

who know the defendant and recant under pressure, Monem acted without ulterior motive and in response to a government request, and so there is no reason to view his new statement askance. Similarly, the government does not defend the district court's inexplicable claim that, when telephoned by investigators, Monem withdrew his new statement that Al-Rubia'y survived the first shooting in Nisur Square. Monem did retract *some* of his new statement, but said nothing to that effect.

The government now argues that Monem called his statement an "'expression' of emotions," GB.49, 155-56, making it unworthy of regard. Again, however, the government takes liberties with the record. Monem did tell government investigators that the statement was an "expression," but he never said it was an expression "of emotions." A.687. The government's notes from the interview suggest that Monem was telling what he imagined to be happening in the Kia. What made it an "expression" was that it was not obvious that he could actually hear what was said in the car, not that it described how Monem felt. But whether or not Monem accurately recounted the words that Al-Rubia'y and his mother said, he plainly reported witnessing Al-Rubia'y and his mother survive the initial shooting.

From there, the government turns to its primary argument, that, with or without Monem at a new trial, Slatten would be convicted. Plainly Slatten has a

different view of the evidence that, unlike the government's, does not ignore central parts of the record. Since the record does not support Slatten's conviction, even a minor change in the balance of evidence would likely lead to an acquittal.

But even if the evidence against Slatten were not so weak, Monem's new statement remains meaningful and weighty. As the government implicitly acknowledges, Monem did *not* withdraw the essential element of his new statement, which is that Al-Rubia'y was *alive* after shooting started. But the government's theory at trial—contrary to its own eyewitnesses' testimony—was that Slatten fired first and instantly killed Al-Rubia'y. That theory is destroyed by evidence that Al-Rubia'y survived the initial shooting and engaged in animated conversation with his mother. Indeed, the government does not deny the centrality of the evidence that "[Monem's new] statement … portrays Al-Rubia'y as alive after the shooting began," GB.155, but instead concludes that Monem is "likely" to "come to a new trial" and "testify as he did (and has) before," GB.161. Notably missing, however, is any explanation for this conclusion. The government instead simply implies that Monem will reaffirm his trial testimony because that is what the government would like. But even when the government had Monem, alone, on the telephone, he did not do that. The record, then, shows that Monem would offer new, exculpatory evidence for Slatten, and an acquittal is probable at a new trial. The Court should therefore reverse.

V. SLATTEN'S CHARGED OFFENSE WAS NOT JOINTLY COMMITTED BY RIDGEWAY.

Slatten again adopts the venue arguments set forth in his co-defendants' reply. *See* Reply Br. of Appellants Slough, Liberty, and Heard, Part III.[3]

Slatten's opening brief argued that because he and Ridgeway had no overlapping charged offenses—and because Slatten's alleged offense was complete before any of Ridgeway's offenses began—the two are not "joint offenders." SB.57-59. The government responds only in a footnote,[4] claiming that "Slatten prompted Ridgeway to shoot Al-Rubia'y, too – making them 'joint offenders' with respect to that shooting in even the narrowest sense of the term." GB.140 n.58. That argument is meritless. The government charged that Slatten killed Al-Rubia'y before Ridgeway shot at him, and did not charge Ridgeway with any offense related to Al-Rubia'y, making whatever, or whoever, "prompted Ridgeway" to shoot Al-Rubia'y irrelevant. Slatten and Ridgeway are not joint offenders under any reasonable reading of the venue statute, and the Court should reverse.

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[3] Slatten does not contend venue was proper in Utah. Rather, venue over Slatten's murder charge was proper only in Tennessee, where he was arrested. SB.57.

[4] *Nat'l Oilseed Processors Ass'n v. Occupational Safety & Health Admin.*, 769 F.3d 1173, 1184 (D.C. Cir. 2014) ("[T]he court generally declines to consider an argument if a party buries it in a footnote").

VI. SLATTEN WAS NOT "EMPLOYED BY THE ARMED FORCES" UNDER MEJA.

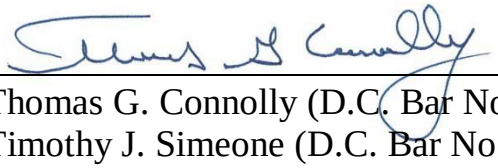
Under Appellate Procedure 28(i), Slatten adopts and incorporates the MEJA arguments in his co-defendants' reply. *See* Reply Br. of Appellants Slough, Liberty, and Heard, Part I.

CONCLUSION

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

Date: June 24, 2016

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,952 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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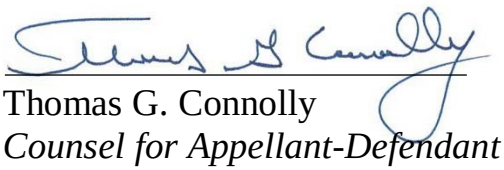

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June 24, 2016

CERTIFICATE OF SERVICE

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

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