



1776 K STREET, NW > SUITE 200
WASHINGTON, DC 20006
TEL 202.393.7088 > FAX 202.293.3499
WWW.MALLONANDMcCOOL.COM

March 12, 2013

VIA U.S. MAIL & ELECTRONIC TRANSMISSION

Anthony Ascuncion
(anthony.ascuncion@usdoj.gov)
John K. Han
(john.han@usdoj.gov)
T. Patrick Martin
(thomas.martin@usdoj.gov)
Office of the United States Attorney
for the District of Columbia
555 Fourth Street, N.W.
Washington, D.C. 20530

Re: *United States v. Donald Wayne Ball*, 2008-cr-0360-RCL

Dear Counsel:

As you know, I represent Donald Ball in the above-captioned case. The purpose of this letter is to outline several reasons why the United States Department of Justice ("DOJ") should decline to seek an indictment against Mr. Ball on any charges related to the September 16, 2007 incident at Nisour Square, Baghdad, Iraq. Should you somehow decide to go forward and seek an indictment, this letter sets forth some of the exculpatory evidence that you are obligated to present to the grand jury.

I. Background on Donald Ball

Mr. Ball joined the United States Marine Corps on September 17, 2001 – six days after four coordinated terrorist attacks were launched against the United States in New York City and Washington, D.C. During boot camp, Mr. Ball was meritoriously promoted because he had previously attained the rank of Eagle Scout within the Boy Scouts of America organization. Following boot camp, Mr. Ball attended the School of Infantry at Camp Pendleton, California. He graduated at the very top of his class and was named Honor Graduate.

Mr. Ball served with valor and distinction in the U.S. Marine Corps for four years, from 2001 to 2005, including three combat tours as a Squad Leader in Iraq: Operation Iraqi Freedom – Baghdad (March 2003 to May 2003), Operation Vigilant Resolve – Al Fallujah (February 2004 to July 2004), and Ar Ramadi (February 2005 to July 2005). He was awarded the Navy and Marine Corps Achievement Medal for maintaining his platoon after his commanding officer was shot and killed during combat. Mr. Ball's actions were described, in part, as follows:

Corporal Ball braved numerous improvised explosive devices and small arms attacks and never lost his focus on mission accomplishment and troop welfare.

In April when an enemy sniper attacked, his calm leadership and initiative under extremely dangerous combat operations were key in the success of his Marines. His attitude and devotion to duty were excellent examples for his Marines to follow.

Mr. Ball also received a Certificate of Commendation. His conduct was described, in part, as follows:

In 2004, Corporal Ball began his second combat tour, boldly fighting in a fierce urban battle with insurgents during Operation Vigilant Resolve in the city of Al Fallujah, Iraq. He then displayed great character as he transitioned from intense urban combat into stability and security operations in the city of Al Karma.

Mr. Ball was also awarded the Marine Corps Good Conduct Medal, the Combat Action Ribbon, the Sea Service Deployment Ribbon with two stars, the Iraqi Campaign Medal, the Global War on Terrorism Service Medal, the Global War on Terrorism Expeditionary Medal, the National Defense Service Medal, the Presidential Unit Citation, and the Rifle Expert Badge second Award.

II. The Evidence Is Insufficient To Support Any Charge Against Mr. Ball

Through the United States Attorneys' Manual ("USAM") and other policies, DOJ has issued guidelines to ensure the integrity of the grand jury and the constitutional rights of targeted individuals. The USAM explains the duties of Federal prosecutors with respect to the presentation of exculpatory evidence to a grand jury as follows:

In *United States v. Williams*, 112 S. Ct. 1735 (1992), the Supreme Court held that the Federal courts' supervisory powers over the grand jury did not include the power to make a rule allowing the dismissal of an otherwise valid indictment where the prosecutor failed to introduce substantial exculpatory evidence to a grand jury. It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person. While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review.

USAM 9-11.233.

AUSA Anthony Ascuncion
 AUSA John K. Han
 AUSA T. Patrick Martin
 March 12, 2013
 Page 3

Prior to presenting the government's case to a second grand jury, Assistant United States Attorney Kenneth Kohl prepared a summary of what he claimed was the evidence against each defendant and gave it to the grand jurors. In his summary as to Mr. Ball, Mr. Kohl presented false evidence to the grand jurors. Mr. Kohl wrote:

Most of the Iraqi witnesses on the south side of the traffic circle were focused on the actions of the turret gunners of the last two trucks in the convoy, because those two trucks were blocking the northbound lanes on the south side of the circle. However, one Iraqi witness on the south side of the circle, Zuhari Najim Abboud Al-Ma'amouri, a taxi driver in a black Chevy Suburban (*see* description of victim vehicle no. 12 above), recalls seeing the **rear turret gunner** from the first truck in the convoy fire a machine gun into the white Kia.

Mr. Kohl falsified Mr. Al-Ma'amouri's reported account of the incident before it was presented to the second grand jury.¹ Mr. Al-Ma'amouri did **not** tell anyone in the statements he gave to government agents and prosecutors that he saw the "**rear turret gunner**" fire at the white Kia sedan. Indeed, according to Agent Patarini, Mr. Al-Ma'amouri said "[h]e [could not] remember any specific details about the shooter." *See* 10/14/07 FD 302 Zuhari Najim Abboud Al-Ma'amouri. Mr. Kohl clearly sought to put evidence before the grand jurors that Mr. Ball was identified to the exclusion of Mark Mealy (who occupied the other turret position in Mr. Ball's vehicle ("Vehicle 1")), because Mr. Kohl's theory is that Mr. Mealy did not shoot, and because Mr. Mealy's testimony is critical to the government's case. That said, as explained further below, Mr. Mealy will testify that Mr. Ball did nothing wrong during the Nisour Square incident, and Mr. Kohl hid this fact from the grand jurors.

Mr. Kohl intentionally omitted from his summary the portion of Mr. Al-Ma'amouri's account that the armored vehicle he identified was 20 to 30 feet from the white Kia sedan. Mr. Kohl did this because he knew Mr. Ball's vehicle was positioned farther away from the white Kia sedan, towards the west of the circle. In addition, Mr. Kohl left out from his summary Mr. Al-Ma'amouri's statement that the first vehicle "started shooting." Mr. Kohl did so because this further undercuts his theory of the case that Mr. Ridgeway and another guard (not Mr. Ball) started shooting and killed the occupants of the white Kia sedan. Mr. Kohl also failed to include in his summary Mr. Al-Ma'amouri's statement that the shooter he identified had "an installed machine gun." Mr. Kohl did this because Mr. Ridgeway fired an installed machine gun at the

¹ On October 14, 2007, Mr. Al-Ma'amouri told FBI Special Agent John Patarini:

- "He recalled the first vehicle in the convoy **started shooting** at the white vehicle." *See* 10/14/07 FD 302 Zuhari Najim Abboud Al-Ma'amouri (emphasis added).
- "He **cannot** remember any specific details about the shooter." *Id.* (emphasis added).
- "He described the white vehicle as being directly at the edge of the traffic circle approximately **20-30 feet** from the armored vehicle." *Id.* (emphasis added).
- "Abboud recalled that the shooting occurred from the top of the armored vehicle. The shooter had what was described as an **installed machine gun**." *Id.* (emphasis added).

AUSA Anthony Ascuncion
AUSA John K. Han
AUSA T. Patrick Martin
March 12, 2013
Page 4

white Kia sedan, and Mr. Kohl had no evidence to suggest Mr. Ball used an installed machine gun. Finally, Mr. Kohl stunningly failed to tell the second grand jury that Mr. Ball was briefed on a “Be On the LookOut” Report” to look for a white sedan, as it could be carrying a vehicle born improvised explosive device (“VBIED”). *See* Defendants’ DOJ Presentation (September 16, 2008).

Mr. Kohl further misled the second grand jury when he wrote:

Al-Ma’amouri’s identification of Ball as a participant in the *attack* on the white Kia is corroborated by several of Ball’s teammates. Mark Mealy has testified that he saw Ball engage the white Kia with his M-4 rifle (Mealy 12/4 Tr., at 104) (Mealy 12/11 Tr., at 93). According to Mealy, Ball “fired late” after the Kia was already stopped (Mealy 12/11 Tr., at 95). At some point after the incident, Ball also admitted firing his weapon to Adam Frost, and claimed that he only engaged the white Kia (Frost 11/29 Tr., at 133).

Mr. Al-Ma’amouri did not identify Mr. Ball. Still, Mr. Kohl wrote this, and he then falsely conveyed to the second grand jury that Mr. Mealy and Mr. Frost believed the shooting at the white Kia sedan was illegal, when he wrote that they would corroborate “Al-Ma’amouri’s identification of *Ball as a participant in the attack on the white Kia....*” At the *Kastigar* hearing, Mr. Kohl admitted that Mr. Mealy, Mr. Frost, and his other key witness (Matthew Murphy) believed that any shooting at the white Kia sedan was justified. *See Kastigar Hrg.* 10/28/09 AM, Tr. at 47.² Still neither Mr. Kohl nor Assistant United States Attorney Jonathan Malis, another prosecutor formerly assigned to this case, directed the second grand jury to the part of Mr. Mealy’s testimony where he said, “[he] understood that they were engaging a possible VBIED, a possible car bomb, and [he] wasn’t concerned with it....” *See* Mealy GJ Tr. 12/4/07, at 44.³ Indeed, at the *Kastigar* hearing, Mr. Mealy testified: “if there was one credible threat that day, it would have been the white Kia that was there early on in the engagement that was rolling toward vehicle number four.” *See Kastigar Hrg.* 10/19/09 AM, Tr. at 51. According to Mr. Frost, Mr. Ball took no action during the incident that concerned him, and he “still gave

² As you know, Mr. Murphy was very upset that Mr. Kohl sought an indictment against Mr. Ball. He also told you on November 26, 2012 that he would rather see the shooters go free than see Mr. Ball go to prison.

³ The Court questioned Mr. Malis directly on this point:

Q. [By Mr. Dittoe]: And was this transcript also available for the grand jury?

A. [By Mr. Malis]: This was presented to the second grand jury.

THE COURT: What does that mean, “presented”?

[MR. MALIS]: All of the transcripts of Frost, Mealy, and Murphy, with the redactions, were provided to the second grand jury. We made a record of which portions we read by saying –

THE COURT: So “presented” doesn’t necessarily mean read.

[MR. MALIS]: No, it does not.

AUSA Anthony Ascuncion
AUSA John K. Han
AUSA T. Patrick Martin
March 12, 2013
Page 5

the benefit of the doubt on [the shooting of the white Kia], because the car was moving forward when [he] saw it, and a [VBIED] had blown in the area not 20 minutes before....” See *Kastigar Hrg.* 10/21/09 PM, Tr. at 52-53. Indeed, I am sure you recall that, on January 4, 2012, Mr. Frost, like Mr. Murphy, told you that Mr. Ball should not have been charged in this case.

Mr. Kohl testified that he targeted Mr. Ball because he concluded that Mr. Ball shot west of the circle. Yet, he admitted at the *Kastigar* hearing that Mr. Ball’s team members do not believe that Mr. Ball fired west of the circle. See *Kastigar Hrg.* 10/29/09 AM, Tr. at 136. In fact, in his prosecution memorandum, Mr. Kohl wrote: “Ball’s own team members from the lead vehicle do not believe that Ball fired again after his initial engagement with the white Kia.” Mr. Kohl also conceded at the *Kastigar* hearing that Mr. Mealy and Corey Wainscott, who was also riding in Vehicle 1, told him that they would have heard Mr. Ball’s weapon if he fired west of the circle. *Id.*⁴ None of this information was disclosed to the second grand jury. See 12/2/08 Testimony of FBI Agent Robyn Powell, at 42-46. Mr. Kohl’s failures violated DOJ policies as well as applicable rules of professional responsibility.

Mr. Kohl’s misconduct continued when he wrote the following in his summary as to Mr. Ball and presented it to the second grand jury:

Several other Iraqi witnesses *specifically* recall that a turret gunner in the first truck of the Blackwater convoy fired multiple rounds in a westerly direction at the large red Tata civilian bus (see description of victim vehicle no. 15 above), the blue Kia mini bus (see description of victim vehicle no. 16 above), and the grey Kia sedan (see description of victim vehicle no. 17 above). These witnesses include a construction worker on the north side of the circle (Ahmad Abed Timan Da’yij al-Janabi), three Iraqi police officers at a checkpoint on the southeast edge of the circle (Ahmad Hadi Haran, Sayf Sa’ad al Shujari, and Jalal Abed Alzahra Muhan), and two uniformed patrol officers standing just a few feet from the convoy on the south side of the circle (Ali Ghalaf Salman Al-Hamidi and Sarhan Deab Abudi Moneim Da-Zubaidi).

Not only did Mr. Kohl fail to present the overwhelming evidence that Mr. Ball did not shoot west of the circle, he purposefully manipulated the Iraqi witness accounts so the grand jurors would not learn that some of these witnesses reported seeing gunfire from helicopters or airplanes and that other witnesses saw shots fired from Vehicle 2, where Messrs. Murphy and Frost occupied turret positions. Mr. Kohl did this because he did not want to undercut his theory of the case; that is, no shots were fired from the air or by Messrs. Murphy and Frost.

DOJ policy makes clear that impeachment evidence is exculpatory and must be disclosed. See Memorandum from Deputy Attorney General David Ogden, “Guidance for Prosecutors Regarding Criminal Discovery” (Jan. 4, 2010). In describing DOJ’s policy on the disclosure of

⁴ In the prosecution memorandum, Mr. Kohl wrote: “Mark Mealy and Corey Wainscott would likely testify at trial that Ball could not have shot to the west of the circle without them hearing his weapon.”

AUSA Anthony Ascuncion
AUSA John K. Han
AUSA T. Patrick Martin
March 12, 2013
Page 6

exculpatory evidence, former Deputy Attorney General James M. Cole testified: “[DOJ’s] stand [on *Brady* evidence] is any evidence that is inconsistent with any element of any crime charged against the defendant, turn it over; *any information that casts doubt upon the accuracy of any evidence, including but not limited to witnesses’ testimony, turn it over; and that we tell people; err on the side of disclosure.*” See Statement of Deputy Attorney General James M. Cole before the Senate Judiciary Committee (June 6, 2012) (emphasis added). The U.S. Supreme Court recently held that a prosecutor’s failure to disclose evidence impeaching an eyewitness’s identification violated the prosecution’s *Brady* obligations and required a reversal of the defendant’s conviction. *Smith v. Cain*, 132 S. Ct. 627, 630-31 (2012). Some of the impeachment evidence against each of the so-called eyewitnesses identified above that Mr. Kohl withheld from the grand jurors is described below.

Ahmad Abed Timan Da’yij al-Janabi was interviewed by FBI Agent Murphy and another agent on October 13, 2007. Mr. Timan told the agents that Vehicle 2, again, the vehicle occupied by Mr. Murphy and Mr. Frost, “started firing north at the tanker truck and the Nissan pickup truck.” See 10/13/07 FD 302 Ahmad Abed Timan Da’yij al-Janabi. Mr. Timan reportedly went on to say:

Vehicle 2 shot in the direction of the bus stop south of the circle and shot a man who crossed the street from the bus stop heading west. The man stopped behind a tree in the middle of the road then ran across and was killed. Timan saw the man running and the person on top of vehicle 2 lifted his gun and shot him (Timan showed with his hands how the person raised his rifle to his shoulder and fired).

Id. Mr. Timan is also reported to have said the following:

Timan was asked if he saw anyone exit any of the armored vehicles at any point during the incident. He was also asked if any of the armored vehicles had broken down in the circle. He stated that he did not see anyone get out of the armored vehicles and saw all of them drive out of the circle at a normal speed.

Id. On June 11, 2009, FBI Agent Hansen and DOJ attorney Barry Jonas interviewed Mr. Timan. During that interview, Mr. Timan reviewed his prior statements and added that “there was shooting from the helicopters and swears by this belief despite what he had said in previous interviews regarding not being sure whether the helicopters shot or not.” See 6/11/09 FD 302 Ahmad Abed Timan Da’yij al-Janabi.

On September 17, 2007, Mr. Timan stated: “What was worthy of attention is the presence of two planes which were hovering in the sky (small blue ones) and they provided support to the four vehicles and shot at the citizens coming from Qahtan Square and they hit a large number of citizens.” See 9/17/07 Statement of Ahmad Abed Timan Da’yij al-Janabi. “The planes also injured some people and cars stopped far away from the scene of the incident near the bus stop in front of the Kurdistan Party headquarters.” *Id.*

AUSA Anthony Ascuncion
AUSA John K. Han
AUSA T. Patrick Martin
March 12, 2013
Page 7

FBI Agents O'Connor and Sercher interviewed Ahmed Hadi Haran on October 14, 2007. According to these agents, Mr. Haran told them that he "saw vehicles 1, 2 and 3 shooting in all different directions." *See* 10/14/07 FD 302 Ahmed Hadi Haran. Mr. Haran "recalled the four vehicles all having two turrets on top." *Id.* Mr. Haran also reportedly told FBI agents that he "saw a man hanging out of one of the helicopters fire a rocket or grenade into a white vehicle which was just north of the bust stop []. Ahmed [Haran] said the man in the vehicle was killed." *Id.*

In a statement dated September 26, 2007 to U.S. military investigators, Sayf Sa'ad al Shujari stated that a "helicopter flew over the scene and started firing randomly and intermittent." *See* 9/27/07 Statement of Sayf Sa'ad al Shujari. On July 8, 2012, Mr. Al-Shujari told you that shots were fired from all four vehicles. *See* 7/8/2012 FD 302 Sayf sa'ad Al-Shujari. From a distance of what he said was three car lengths, Mr. Shujari reported, "[t]he first armored vehicle fired two (2) rounds and then the second vehicle fired a few shots." *Id.*

On September 18, 2007, Jalal Abed Alzahra Muhan reported that "... two planes were hovering above al-Nisur Square and they were shooting in three directions." *See* 9/18/2007 National Police Command Center, Witness (Security element) of Jalal Abed Alzahra Muhan. He told FBI agents on October 14, 2007, that he "saw the vehicle identified at #2 shooting down the street to the west of the circle at a bus. He recognized the bus in the parking lot when he came for his interview. After he took cover by the tree root, he did not have a good view of vehicles #1 or #4." *See* 10/14/07 FD 302 Jalal Abed Alzahra Muhan. Mr. Muhan also said that "[n]one of the vehicles appeared to be disabled." *Id.*

Ali Ghalaf Salman Al-Hamidi told FBI agents on October 14, 2007 that he saw all four Raven 23 vehicles firing. *See* 10/14/07 FD 302 Ali Ghalaf Salman Al-Hamidi. He also "stated that he saw a person shooting from the helicopters." *Id.*

Sarhan Deab Abudi Moneim Da-Zubaidi testified before the first grand jury on May 27, 2008. The transcript of Mr. Sarhan's testimony was not presented to the second grand jury. Mr. Sarhan testified: "... there were gunfire from four vehicles." *See* Sarhan GJ Tr. 5/27/08. He again testified, "[f]our vehicles were shooting. Other people tried to escape towards this (indicating) area, which is a little bit lower. We stopped right there (indicating). And I was behind a tree, and I could see the four vehicles." *Id.* at 16. In response to a grand juror's questions, Mr. Sarhan also said he saw shooting from planes. *Id.* at 28.

None of this impeachment evidence was presented to the second grand jury. Indeed, Mr. Kohl went to great lengths to manipulate the evidence in an effort to link Mr. Ball to shots he believes were fired to the west of the circle. For example, Mr. Kohl acknowledged at the *Kastigar* hearing that he knew the shell casings found west of the circle were not matched through ballistics examinations to Mr. Ball's weapon. *See Kastigar Hrg.* 10/29/09 AM, Tr. 132. Still, Mr. Kohl attempted, albeit unsuccessfully, to elicit testimony before the second grand jury that the marks on the shell casings found west of the circle were consistent with having been fired from Mr. Ball's vehicle. *Id.* at 133-34. If Mr. Kohl had done his job honestly and in line

with DOJ policies, there is more than a reasonable probability that Mr. Ball would not have been indicted.

Mr. Kohl's failures did not end with his misleading summary. In his prosecution memorandum, Mr. Kohl wrote: "We also do not have any evidence that Donald Ball fired at the victims who were injured north of the circle." Mr. Kohl did not disclose this to the second grand jury. *Id.* at 137-38.

For some reason, Mr. Malis decided not to present transcripts of a number of Blackwater witnesses who testified in the first grand jury that they took incoming fire on September 16, 2007. *See Kastigar Hrg.* 11/3/09 AM, Tr. at 8. A few examples of this sort of testimony are as follows:

- Jeremy Skinner: He looked down the road and saw "two distinct separate muzzle flashes." *Id.* at 12-13.
- Daniel Childers: He heard incoming gunfire and he identified the source of the gunfire for the first grand jury. *Id.* at 16.
- Thomas Vargas: In a sworn statement, he stated that, approximately 5 seconds after pulling into the circle, the convoy started receiving AK-47 gun fire. *See* May 8, 2009 USAO Letter. Mr. Vargas said that he saw two insurgents, one dressed in an IP (Iraqi Police) uniform and the other dressed in an IA (Iraqi Army) uniform, standing next to each other on the center median south of the circle firing AK-47s at the convoy. *Id.* Mr. Vargas described seeing the white Kia weaving through traffic, seeing a water bottle thrown at that car, and the car continuing to approach the convoy at approximately 10 miles per hour. *Id.*
- Edward Randall: He told government agents that, after the shooting had started, he said he saw rounds hitting the left side of the command vehicle. *Id.* In a sworn statement, he stated that, as the convoy departed the circle, he heard small arms gun fire from the vicinity of the circle. *Id.* Mr. Randall said that he heard Thomas Vargas "calling out contact spots, positions that . . . he's seeing people that are firing at us, I believe." *Id.*
- Adam Frost: He told government agents that he heard a team member say: "There is an IP in the bushes shooting at us!" *Id.* He also stated, in sworn statements, that after the gun fire had already begun, he heard Thomas Vargas say over the radio, "there's an IP in the bushes shooting at us. He's over there. He's over there." *Id.*
- Dustin Hill: He told government agents that he heard a team member from another vehicle say on the radio that the convoy was taking gun fire from sandbags and a wooden shack just off of the southbound lane near the PUK

AUSA Anthony Ascuncion
AUSA John K. Han
AUSA T. Patrick Martin
March 12, 2013
Page 9

compound. *Id.* Mr. Hill said that he did not recall anyone from vehicle one firing rounds and that he believed he would have known if that had occurred. *Id.* Mr. Hill said that a few days before the shooting his team had been briefed on a BOLO alert that indicated the possibility that a white sedan could be used as a VBIED. *Id.*

- Jeremy Krueger: In a sworn statement, he said that “I did and would have perceived it [the white Kia] as a threat . . . it shouldn’t have been as close as it was.” *Id.*
- Mark Mealy: He told government agents that he heard team members calling over the radio that they had enemy contact. *Id.*
- Matthew Murphy: In a sworn statement, he said that “A few minutes into this event, I heard gun fire that wasn’t coming from us. It was fired a little bit – I couldn’t tell you exactly where, but there was definitely gun fire that came from somebody besides us. I heard maybe one or two short bursts of automatic weapons fire or, or it could have been one longer one.” *Id.*
- Kevin Rhodes: He told government agents that the team received gun fire from the left side. *Id.* He also told government agents that, as the convoy departed the circle, the convoy continued to take harassing small arms gun fire from its 6 o’clock position. *Id.*
- Dean Wagler: He told government agents that he took gun fire from his sector, which was the right on the right side of the convoy. *Id.* Mr. Wagler said that he believed the convoy took fire approximately 200 meters after leaving the circle. *Id.*
- Cory Wainscott: He told government agents that he heard small arms gunfire that sounded like multiple gunmen from multiple locations. *Id.*
- Charles Gehrsitz: In a sworn statement, he said that, as he was flying “there was a call that came over the radio that Raven 23 was in, was in, – at Gr[ey 8]7, which is Nisur Square, and that they had [a] possible VBI[E]D at that location and were receiving small arms fire.” *Id.*
- Timothy Spisak: He told government agents that he heard someone say on the radio that there was shooting and that they were taking fire from the south. *Id.*

Indeed, Mr. Malis and Mr. Kohl had statements from other witnesses, not connected with Blackwater, who reported that they heard AK-47 gunfire.

AUSA Anthony Ascuncion
AUSA John K. Han
AUSA T. Patrick Martin
March 12, 2013
Page 10

- Frank Willard Collins: He heard approximately two to three 10 round bursts of automatic AK-47 gunfire. *See* July 29, 2009 USAO Letter. He “heard what sounded like an AK-47 being fired on full auto to the left of Tower 8, and on the outside of the fence.” *Id.*
- Brett E. Fishback: He heard some of the radio traffic from the Raven 23 convoy. *Id.* He heard someone over the radio say that the convoy was “taking fire from our 6 [o’clock position].” *Id.* He heard someone say over the radio that “guys were running at us with video cameras” which Fishback believed to be an insurgent tactic. *Id.* He heard the sound of gunfire from Nisour Square and said that it sounded like a street fight. *Id.* He heard the sound of AK-47 gunfire at the beginning of the shooting. *Id.* He heard a “pop, pop, pop” that was the distinct sound of an AK-47. *Id.*
- Paul Ogira: He saw Iraqi police officers blocking the entry to the “round about.” *Id.* He said IP officers were firing their weapons “up and to the direction of where the vehicles . . . join[ed] the round about.” *Id.* He said that while IPs were still firing their weapons, he saw “the white vehicle exploding in from of [sic] the Iraqi police vehicles which had block[ed] the road entry to the round about.” *Id.* He said that two helicopters flew over and started firing. *Id.*
- Jebraiel Bayiz Khudher: He told government agents that he knows what an AK-47 sounds like when it is fired and that he is certain that he heard the sound of some AK-47 gunfire during the shooting incident at Nisur Square. *See* July 24, 2009 USAO Letter.

Instead of presenting this exculpatory evidence, Mr. Kohl worked hard to keep evidence of incoming gunfire from the grand jurors. Prior to the second grand jury, Mr. Kohl met with the only witness who would actually testify, FBI Agent Powell. Before that meeting, Mr. Kohl sent an email to Agent Powell, outlining the government’s strategy. With respect to the bullet strikes on one of the Blackwater vehicles, Mr. Kohl directed Agent Powell to testify that the marks were not on the side of the vehicle where the victims were shot; the same fleet of trucks were involved in two other shootings that same week; the vehicles did not need to be repainted because they were taken out of service; and a mechanic indicated that a hole in the radiator was not caused by a bullet. *See Kastigar Hrg.* 11/3/09 PM, Tr. at 29.⁵ Agent Powell followed these directions when she appeared before the second grand jury. Agent Powell testified: “For example, Frost and Murphy inside vehicle two, their accounts say that they did not receive fire to their vehicle. The other thing that is problematic is, as I mentioned before, prior to the arrival of the FBI, these vehicles were painted, and some of them were scrubbed with some kind of steel type thing to smooth out some edges.” *Id.* at 31.

⁵ Mr. Kohl left out the fact that this mechanic, who worked for KBR, not Blackwater, said the only thing that would propel a rock with such force was a bullet hitting under the truck. *See* July 29, 2009 USAO Letter.

AUSA Anthony Ascuncion
AUSA John K. Han
AUSA T. Patrick Martin
March 12, 2013
Page 11

Mr. Kohl's repeated decisions to intentionally mislead the second grand jury as to the evidence in this case resulted in a baseless indictment being returned against Mr. Ball. After reviewing the facts, testimony, and other evidence that have been set forth through this letter, I am confident you will not ask another grand jury to return an indictment against Mr. Ball.

III. Prosecutors Must Respect the Integrity of the Grand Jury

Federal prosecutors are required to "ensure that justice is done." USAM 9-11.010. Prosecutors "must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecution but also the protection of the citizenry from unfounded criminal charges." *Id.* "In discharging these responsibilities, the prosecutor must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors." *Id.*

The prosecutors formerly assigned to this case did not follow these DOJ directives. I have outlined a few examples below. Hopefully, if you decide to present evidence to a grand jury in an effort to charge Mr. Ball, you will not repeat this conduct.

At the *Kastigar* hearing, Mr. Malis testified that Mr. Murphy told the first grand jury: "[Ball] clearly wasn't just shooting wildly, or I – I never saw him shooting." "[I]f [Ball] had been, me being the closest one to him, if he had been shooting a lot, I would have known." *See Kastigar Hrg.* 10/29/09 AM, Tr. at 136-37, 138; 11/2/09 PM, Tr. at 115-16. Mr. Malis admitted that this evidence was exculpatory as to Mr. Ball, and that it had nothing to do with any compelled statement, but it was withheld from the second grand jury. *See Kastigar Hrg.* 11/2/09 PM, Tr. at 115-16.

Mr. Kohl improperly commented on Mr. Ball's decision not to testify before the first grand jury. Mr. Kohl told the second grand jury: "[w]e obviously invited all of the men to come in to talk to the investigators, or to the other Grand Jury, and to talk, and to meet with their attorneys that they had hired." Mr. Kohl also stated, "[t]he attorneys did meet with us over this summer...." The character of Mr. Kohl's statement was such that the second grand jury would naturally take it to be a comment on Mr. Ball's decision to remain silent.

Mr. Kohl told the second grand jury that Mr. Ball gave oral and sworn written statements to the State Department. *See Kastigar Hrg.* 11/3/09 AM, Tr. at 22. Mr. Kohl then went on to say that the government promised not to use those statements in any criminal proceeding. *Id.* at 22. Finally, Mr. Kohl told the second grand jury to "make sure that as a decision is made on this case, it is not based at all on what these guys said in their written statement or what they said in their oral statements, or even on witnesses who have been exposed to either of those things." *Id.* at 23-24. The grand jurors would naturally take this to be a comment that Mr. Ball gave an incriminating statement to the State Department.

IV. Conclusion

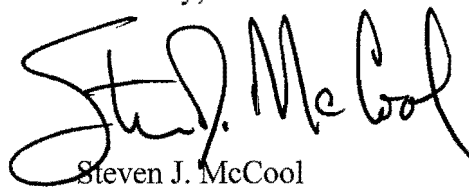
Presenting the evidence set forth in this letter to any grand jury considering charges against Mr. Ball does not satisfy your obligations.

It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant. [*Kyles v. Whitley*, 514 U.S. 419, 437 (1995)].

USAM 9.5-0001(B)(2).

Thank you for your attention. If you have any questions or you would like to discuss these or any other issues related to Mr. Ball, please do not hesitate to contact me.

Sincerely,



Steven J. McCool

cc: AUSA John D. Crabb
AUSA David Mudd
AUSA Gregg Maisel