ORAL ARGUMENT NOT YET SCHEDULED
Nos. 15-3078(L), 15-3079, 15-3080, 15-3081

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA
Appellee

v.

NICOLAS SLATTEN, PAUL A. SLOUGH,
EVAN S. LIBERTY, DUSTIN L. HEARD,

Appellants

On Appeal from the United States District Court
for the District of Columbia (Judge Royce A. Lamberth)

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANTS, SUPPORTING REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

LIST OF PARTIES AND *AMICUS CURIAE*

Appellants are Paul A. Slough, Evan S. Liberty, Dustin L. Heard and Nicholas A. Slatten. Appellee is the United States. The *Amicus Curiae* in support of Appellants is the National Association of Criminal Defense Lawyers ("NACDL").

RULINGS UNDER REVIEW

The district court rulings being appealed are the district court's judgment of conviction, entered on April 23 and 24, 2015, and its order denying Appellants' motion for a new trial, entered November 10, 2015.

RELATED CASES

This Court has already heard a number of interlocutory appeals and mandamus petitions arising out of the prosecution of the defendants in this case. These related cases are described in detail in Appellants' briefs. NACDL is not aware of any currently pending related cases.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for NACDL states that NACDL is a non-partisan professional bar association that seeks to advance the mission of the nation's criminal defense lawyers to ensure equal protection and the fair administration of justice for persons

accused of crime or other misconduct. NACDL is a non-profit corporation, NACDL has no parent corporations, and no publicly held company has a 10 percent or greater ownership interest in NACDL.

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STATEMENT OF INTEREST

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of the Appellants. NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 9,200 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

NACDL has frequently appeared as *amicus curiae* before this Court, before the Supreme Court, and before the highest courts of numerous states. In furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association often appears as *amicus curiae* in cases involving the unwarranted expansion of federal criminal laws, and the manner in which the expansion of such laws can lead to prosecutorial overreaching and unfairness.[1]

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[1] NACDL certifies pursuant to Fed. R. App. P. 29(a) and Circuit Rule 29(b) that all parties have consented to the filing of this *amicus* brief. NACDL also hereby certifies pursuant to Fed. R. App. P. 29(c)(5) that no counsel for a party authored this brief in whole or in part; that no party or counsel for a party contributed money

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INTRODUCTION

There can be no doubt that what happened in the Nisur Square traffic circle, in September 2007, was a tragedy, leaving many people, including unarmed civilians, dead or wounded. The trial below was ostensibly designed to resolve whether the shootings amounted to an unprovoked, criminal massacre (as alleged by the government) or whether they were justified, the lawful result of American security contractors attempting to defend themselves and others in an impossibly hostile and dangerous situation. Unfortunately, the record suggests that the trial in this case strained the capacity of the American criminal justice system to adjudicate such issues fully and fairly. As one might expect when a trial occurs in a different country located half a world away from the shooting, evidence was difficult to preserve and collect, witnesses were difficult to locate and interview, meaningful defense investigation was impossible, issues of witness collusion arose, and a civilian jury in Washington, D.C., was given the unenviable task of attempting to gauge the dangers presented in a foreign war zone, based on this partial, and sometimes unreliable, evidence.

The temptation to use the American criminal justice system to address this

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that was intended to fund preparation or submission of this brief; and that no person other than NACDL, its members, and its counsel, contributed money that was intended to fund preparation or submission of this brief.

sort of tragedy is understandable. But as history has taught us, the desire to provide "justice" in just these sorts of high-profile cases often comes at the expense of critical legal safeguards, and ultimately produces a second "injustice" on its own terms. Such appears to have been the case here.

For many years, NACDL has been concerned about the manner in which an expansive reading of federal criminal statutes can stretch the scope of the American justice system beyond its capacity, and can likewise permit (and even encourage) prosecutorial overreaching and unfairness. Indeed, NACDL has long argued that "expansive and ill-considered criminalization has cast the nation's criminal law enforcement adrift from [its] anchor." Brian W. Walsh and Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, The Heritage Found. & NACDL, at vi (Apr. 2010), http://s3.amazonaws.com/thf_media/2010/pdf/WithoutIntent_lo-res.pdf#page=17.

A review of the record in this case raises serious concerns in terms of the expansive construction of federal criminal statutes and the extent of prosecutorial overreaching and unfairness. NACDL will leave to the parties a discussion of the specific facts and issues in the case, but we highlight in the sections below the four issues raised by the parties of the most concern to the *amicus*. As a result of what appear to have been serious, fundamental errors below, NACDL urges this Court to reverse the judgments of conviction.

SUMMARY OF ARGUMENT

First, the district court's construction of the Military Extrajudicial Jurisdiction Act ("MEJA"), 18 U.S.C. § 3261(a)(1) – the statute that allows federal prosecution for extraterritorial conduct committed "while employed by . . . the Armed Forces" was fraught with problems. On its face, the statute does not apply to the Appellants, who were indisputably not "employed by . . . the Armed Forces" at the time of the shootings; rather they were civilian contractors employed by the State Department to provide security for diplomats overseas. The plain language of this statute alone should have been enough to resolve this issue, but if there were any doubt, the presumption against extraterritoriality – created precisely to prevent American courts from being forced to confront the types of intractable evidentiary and sovereignty problems exemplified by this case – should have ended the debate. Simply put, Congress did not expressly authorize the sort of overseas prosecution undertaken by the government here, and this prosecution should have never happened. The failure to heed this presumption, moreover, gave rise to the very sort of difficulties that the presumption is designed to prevent.

Second, the district court's expansive construction of the pertinent venue statute, 18 U.S.C. § 3238, suffered from similar flaws, and gave rise to similar problems. In relevant part, that statute provides that trial "shall be in the district in which the offender, or any one of two or more joint offenders, is arrested."

18 U.S.C. § 3238. All of the alleged offenders in this prosecution – the Appellants in this appeal – were originally arrested in Utah. Under the plain terms of the statute, this prosecution could properly have been brought only in Utah. (Slatten, whose 2008 prosecution was dismissed and who was arrested in Tennessee after his 2014 indictment, could only be properly venued in Tennessee.) But the district court allowed the government to avoid this result and permitted it to prosecute this case thousands of miles away from the proper venue, by choreographing the voluntary surrender of a cooperating witness in the District of Columbia and labeling that surrender an "arrest." Permitting the government to create venue in this fashion not only contravenes the plain meaning of the statutory terms "joint offender" and "arrest," but also subverts the important values that gave rise to the two venue clauses in our Constitution. *See* U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI.

Third, NACDL is also deeply concerned by two other indications of prosecutorial overreaching and vindictiveness. The first of these arose when one of the government's trial witnesses submitted an unsolicited "victim impact statement" that contradicted important parts of his trial testimony. The government did not disclose the exculpatory statement to the defense until 5 days before the sentencing hearing, and even then the statement was buried toward the end of a lengthy package of victim impact statements. When the defense objected,

the government called the witness, conducted an *ex parte* interview regarding the new statement, and then prepared a one-page memorandum about the interview. That memorandum was not a model of clarity (according to the district court), but it appears to recount the witness's claim that his factual statement about the incident submitted to the court before sentencing was not really a factual statement but rather his "expression" of what he imaged it would be like to be the driver of one of the vehicles in the Square. Although the statement submitted to the court itself triggered a host of questions, the district court refused to inquire further, denying the Appellants' new trial motion without holding a hearing, and without even directing further inquiry into the witness's contradictory and incongruous statements. That cannot possibly be the proper way for a district court to respond.

Finally, prosecutorial overreaching extended to the manner in which the government charged Mr. Slatten, increasing the charges after Mr. Slatten filed a successful appeal. Mr. Slatten was initially charged with manslaughter and the government twice determined that was the appropriate charge. He pursued a successful mandamus petition in this Court, and secured a ruling that the manslaughter charges against him were time-barred. After the successful appeal, the government decided to increase the charge to murder, all the while informing Mr. Slatten that it would reduce the charges back to manslaughter if he would forfeit what he had gained in his successful appeal. A more textbook case of

vindictive prosecution can scarcely be imagined, and to countenance this result will ensure that defendants think twice before validly exercising their legal rights.

ARGUMENT

I. THE DISTRICT COURT'S EXPANSIVE, EXTRATERRITORIAL INTERPRETATION OF THE MEJA, ON WHICH EACH OF THE CONVICTIONS BELOW RESTS, VIOLATES THE PRESUMPTION AGAINST EXTRATERRITORIALITY, IS CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE, AND GAVE RISE TO PRECISELY THE SORT OF PROBLEMS INHERENT IN EXTRATERRITORIAL PROSECUTIONS

A. The prosecutions in this case were contrary to the presumption against extraterritoriality

One issue that has long been of concern to NACDL is the ever-increasing use of the American criminal justice system to address issues that are beyond its capacity to resolve. The presumption against extraterritoriality is, at bottom, designed to prevent such a result. It does so in two ways: a strict presumption against the extension of U.S. law beyond the limits of international law, and a softer presumption against its extension to situations within the territorial jurisdiction of other countries. *See, e.g., EEOC v. Arabian Am. Oil Co*., 499 U.S. 244, 248 (1991) ("*Aramco*"); *Morrison v. Nat'l Austl. Bank, Ltd.*, 561 U.S. 247 (2010); *Microsoft Corp. v. AT&T Corp*., 550 U.S. 437, 455–56 (2007). In both circumstances, the presumption is applied "unless there is 'the affirmative intention of the Congress clearly expressed'" to give a statute extraterritorial effect, *Aramco*, 49 U.S. 248 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147

(1957)), and the presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173-74 (1993).

In describing the presumption against extraterritoriality, the Supreme Court has long expressed a general reluctance for the judicial branch to insert itself into questions of foreign policy, which should be left to Congress and the executive branch. The Court has stated that the judiciary has no expertise in foreign relations and whenever possible courts should take care not to create political or collateral issues for those with responsibility in this area. *See*, *e.g.*, *Benz*, 353 U.S. at 147; *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004); *Sale*, 509 U.S. at 174; *Aramco*, 499 U.S. at 248.

As a result, the focus should be on the statutory language and Congress's policy concerns; the judiciary's assessment of policy or history is not properly part of the calculus. As the Supreme Court explained in *Morrison,* the presumption's "function [is] to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve." *Morrison*, 561 U.S. at 270. The presumption is also important to "preserv[e] a stable background against which Congress can legislate with predictable effects."

Id. at 261. Lastly, legal scholars have explained that the presumption is sometimes envisioned as a limit on activist judicial interpretations, noting that "the executive branch may seek to apply certain statutes in a manner that Congress never intended to authorize. Such concerns are amplified in the criminal setting because prosecutors, as opposed to private litigants, purport to speak on behalf of the U.S. government." David Keenan and Sabrina P. Shroff, *Taking the Presumption Against Extraterritoriality Seriously in Criminal Cases after Morrison and Kiobel*, 45 Loyola U. Chi. L. J. 71, 89-90 (2013).

The Court's policy of avoiding interference with matters of foreign policy is particularly important in criminal prosecutions in extraterritorial cases, where despite an increasing framework for international cooperation, both prosecutors and defendants face significant challenges preparing for trials that are based on actions abroad. *See* U.S. Sec. Exch. Comm'n, Response of the United States, Questions Concerning Phase 3, Organisation for Economic Co-operation and Development (OECD) Working Group on Bribery 22 (May 3, 2010) http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/response3.pdf. (noting the lack of information sharing by foreign governments in response to mutual legal assistance requests by the U.S. government). In the instant case, this concern is amplified because the acts in question took place in a war zone.

Further, frequent and unavoidable delays often mark each stage of the pre-trial process in extraterritorial prosecutions; during that delay, witnesses' memories may fade, or the witnesses may become unavailable to testify. Evidence that is collected can become stale or corrupted. Authenticating evidence obtained abroad for admission at trial is also often difficult. These principles should have come into play in interpreting the MEJA here.

B. The prosecutions in this case were not authorized under the plain language of the statute

On its face, the statute allows federal prosecution of criminal conduct that occurs while an individual is "employed by the Armed Forces," a status non-Defense contractors hold only to the extent their employment as contractors "relates to supporting the mission of the Department of Defense." 18 U.S.C. § 3267(1)(A)(ii)(II). Specifically, MEJA applies U.S. criminal laws to cover persons "while employed by or accompanying the Armed Forces outside the United States . . . .." *Id*. § 3261(a)(1). Under the statute's definition, "[t]he term 'employed by the Armed Forces outside the United States' means— (A) employed as— (i) a civilian employee . . . , (ii) a contractor (including a subcontractor at any tier) . . ., or (iii) an employee of a contractor (or subcontractor at any tier) of (I) the Department of Defense . . .; or (II) any other Federal agency . . . to the extent such employment relates to supporting the mission of the Department of Defense overseas . . . ." 18 U.S.C. § 3267(1)(A)(i), (ii), (iii) (2006).

Here, the plain language of the statute, the contracts between Blackwater and the State Department, and the contracts between each defendant and Blackwater, leave no ambiguity. The Appellants' employment related to supporting the State Department's statutory diplomatic security mission, not the Defense Department.

C. The prosecutions in this case posed precisely the types of problems inherent in extraterritorial prosecutions and resulted in an unfair trial

The Appellants have identified many other reasons for limiting the MEJA to its terms, and NACDL will not repeat those arguments here. NACDL writes separately on this issue to highlight that the very concerns that have provoked the Supreme Court to form and reaffirm its presumption against extraterritoriality appear starkly in this case. This trial bore the hallmark problems of an extraterritorial prosecution. Evidence was difficult, and at times impossible, to collect. Even for the government, it appears that the witnesses were difficult to locate and interview. And for the defense, meaningful investigation was completely impossible. None of this is surprising given that the incident took place outside of the Green Zone in Iraq, and these evidentiary challenges had a devastating effect on the Appellants' ability to defend themselves. The trial was designed to resolve whether the shootings amounted to an unprovoked, criminal massacre or whether they were justified, in an effort by the American security contractors to defend themselves from perceived or real threats. The factual

dispute is heavily dependent on the existence of bullets, shell casings, bullet trajectory analysis and credible witness accounts, to assess the existence and level of threats to the Appellants.

The trial record suggests that the Appellants did not receive fair treatment not only in some, but in each, of these areas. With regard to evidence collection, the record suggests that the extraterritorial nature of this proceeding presented many challenges – challenges that do not appear to have been met in a way that comports with our notions of what a full and fair proceeding should look like. For example, United States government officials did not access the scene for days or even weeks. What immediate investigation that did occur was conducted by Iraqi police, who themselves may have been infiltrated by insurgents. The defense had no access to the scene. And the manner in which evidence was handled was problematic; the cars involved in the acts in question were moved after the incident, meaning useful bullet trajectory analysis was impossible. The apparent inadequacies in evidence collection meant that the primary evidence review needed for an argument of self-defense – review of the identity, source, and trajectory of the bullets and shell casings – was hampered by the lack of any control of the crime scene.

Similarly, it appears that there were significant challenges in finding and maintaining access to reliable witnesses. This was true not only because the

actions took place thousands of miles away from the United States, but also because they took place in a country with individuals predisposed to be hostile and fearful of the U.S. and its legal system, and with significant language and cultural differences.

These challenges do not mean that extraterritorial prosecutions cannot occur at all, and they do not necessarily mean that all extraterritorial prosecutions will be infected by the same degree of unfairness. But these challenges do highlight the importance of limiting extraterritorial prosecutions to those that Congress has specifically authorized, and refusing to expand the U.S. Code otherwise. Even the most compelling policy concerns should not be used to expand the scope of criminal laws beyond any extraterritorial boundaries clearly drawn by Congress. Such an unjust and erroneous construction of the MEJA cannot undo the harm done at Nisur Square, but instead simply compounds it.

II. THE DISTRICT COURT'S EXPANSIVE INTERPRETATION OF THE VENUE STATUTE IS NOT SUPPORTED BY THE PLAIN LANGUAGE OF THE STATUTE, PERMITTED UNRESTRICTED FORUM SHOPPING, AND EXCEEDED CONSTITUTIONAL VENUE LIMITATIONS

The Constitution and the Bill of Rights guarantee a criminal defendant both the right to trial in, and the right to a jury drawn from, the state where the alleged

crime "shall have been committed."[2] Courts from around the country have observed that "[p]roper venue in criminal trials is more than just a procedural requirement; it is a safeguard guaranteed twice in the United States Constitution itself." *United States v. Baxter*, 884 F.2d 734, 736 (3d Cir. 1989); *see also United States v. Morgan,* 393 F.3d 192, 195 (D.C. Cir. 2004); U.S. Const. art. III, § 2; U.S. Const. amend. VI. These limits ensure that "the accused not be subject to the hardship of being tried in a district remote from where the crime was committed[,]" *United States v. Saavedra*, 223 F.3d 85, 88 (2d Cir. 2000), and they prevent the government from shopping for its "'choice of 'a tribunal favorable' to it.'" *Id.* at 92 (citing *Travis v. United States*, 364 U.S. 631, 634 (1961) (quoting *United States v. Johnson*, 323 U.S. 273, 275 (1944))).

These concerns are of critical importance to NACDL, as one of the main evils that the constitutional venue provisions were designed to prevent was governmental forum shopping. In the Declaration of Independence, for example, the Founders condemned King George for *extraterritorial* forum shopping – namely, for "transporting us beyond Seas to be tried for pretended Offences." Declaration of Independence. para. 21 (U.S. 1776). Earlier, in the

[2] U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI; *see also* Fed. R. Crim. P. 18 ("Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.").

1769 "Virginia Resolves," colonists registered a similar complaint after "Parliament had decreed that colonists charged with treason could be tried in England." *United States v. Cabrales*, 524 U.S. 1, 6 n.1 (1998). "In response, the Virginia House of Burgesses unanimously passed a resolution condemning the practice of sending individuals 'beyond the Sea, to be tried' as 'highly derogatory of the Rights of British subjects.'" *Id*. (citation omitted).

In light of this historical experience, the Framers explicitly intended "to guard against a repetition of the colonial era abuse." *United States v. Muhammad*, 502 F.3d 646, 651 (7th Cir. 2007). In particular, "the federal government would be prevented from trying to make it inconvenient and expensive for a defendant to present an adequate defense to the accusation of criminal conduct," and the prosecution's options for "jury-shopping" would be constrained. Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 811, 839 (1976).

Thus, given the significant values at issue, if a venue statute "equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it." *Johnson,* 323 U.S. at 276; *accord Morgan,* 393 F.3d at 196. Put another way, venue statutes "should not be so freely construed as to give the Government the choice of 'a tribunal favorable' to it." *Travis*, 364 U.S. at 634.

In extra-territorial criminal cases, venue is governed by 18 U.S.C. § 3238, which provides in relevant part that trial "shall be in the district in which the offender, or any one of two or more joint offenders, is arrested." Appellants have set forth in their briefs the many reasons why this statutory language required that this case be venued in Utah – the place where the *Slough* Appellants were originally arrested – or Tennessee, in the case of Mr. Slatten.[3] NACDL will not repeat that discussion here, other than to agree with Appellants' construction of the plain statutory language, particularly in light of the Constitutional import of venue provisions like this one and NACDL's strong support (absent fairness concerns raised by, for example, pre-trial publicity) for holding trials in the defendant's community.

NACDL feels the need to write separately, however, to expand on the forum-shopping concerns raised by the district court's construction of the statute. If it is true, as the district court held, that the government can orchestrate the arrest of a cooperating witness in any jurisdiction of its choosing and thereby establish venue under 18 U.S.C. § 3238, then the constitutional protections against

[3] The original prosecution against Mr. Slatten was dismissed with prejudice, and he was later arrested separately on his operative indictment, returned in 2014. That arrest occurred in Tennessee. Mr. Slatten accordingly has a strong argument, as raised in his brief, that his case should have been venued there. For current purposes, however, the important point is that whatever permissible venues existed under § 3238, Washington, D.C., was not one of them for any of the defendants.

governmental forum shopping are meaningless. It is indisputable that a cooperating witness will travel wherever the government requests to face the sort of "arrest" and release that occurred here. Regardless of whether such tactics give rise to the sort of "manufactured venue" claim this Court articulated in *United States v. Spriggs*, 102 F.3d 1245, 1250 (D.C. Cir. 1996) – and NACDL agrees with the Appellants that they do – it is beyond reasonable dispute that such tactics would allow the government complete and unlimited control over the forum in every extraterritorial criminal case. If this construction stands, the district court will have effectively construed § 3238 to mean that venue shall be proper in "whatever district the government prefers" – as that will be the practical result of such a ruling. The Constitution cannot tolerate such a result and this Court should not either.

III. THE DISTRICT COURT'S DECISION TO DENY THE APPELLANTS' MOTION FOR A NEW TRIAL BASED ON A KEY TRIAL WITNESS'S NEW STATEMENT, WHICH FUNDAMENTALLY CONTRADICTED BOTH THAT WITNESS'S TRIAL TESTIMONY AND THE GOVERNMENT'S THEORY OF THE CASE AT TRIAL, WAS AN ABUSE OF DISCRETION

One of NACDL's primary missions is to safeguard the fairness of criminal trials. The right to a fair trial depends, in part, on the prosecutor playing fair and putting justice ahead of victory. As the Supreme Court articulated it in *Berger v. United States*, 295 U.S. 78, 88 (1935), the government's interest in a criminal prosecution is "not that it shall win a case, but that justice shall be done." It has

been NACDL's observation that all too often, however, the desire to win subverts this pursuit of justice.

In this case, prosecutors revealed new evidence to the Appellants only five days before the Appellants were scheduled to be sentenced. Only then did the government disclose a "victim impact statement" from one of its key trial witnesses, Sarhan Dheyab Abdul Monem. Based on our review of the record and the statement itself, Mr. Monem's sentencing statement appears on its face to directly contradict his trial testimony. *United States v. Slough*, No. 08-cr-00360, DE 744 at 2-3 (D.D.C. filed Apr. 10, 2015). At the trial, Mr. Monem said that after he heard the convoy fire shots, he heard screaming from someone inside a Kia, and he ran to the vehicle, where he saw that the driver was dead from a gunshot wound to the head. The written statement that Mr. Monem prepared and submitted to the Court on his own volition appears to say that he never ran to the car, rather he cowered in his kiosk during the incident, and he heard the driver of the car speaking to the other passenger, the driver's mother, after shooting began. Thus, Monem's new statement contradicts the most important aspects of his testimony at trial. At the time it was revealed, the statement was buried near the back of a large collection of victim impact statements attached to the government's sentencing memorandum and was dated March 20, 2015, more than two weeks before the date it was disclosed.

NACDL is not aware of any indication in the record that the prosecutors were subjectively aware of the statement's content or import at the time it was disclosed to the Appellants. Nevertheless, it is significant to note that this important exculpatory evidence might never have been discovered because of the nature and manner of the disclosure. Often individuals are represented at sentencing by attorneys who were not even present for the trial, and often individuals are represented by attorneys with far fewer resources than the attorneys in this case. Here, the attorneys had the resources to immediately and closely review all of the victim impact statements submitted with the government's sentencing memorandum, and, because they had also been counsel for the trial, they were in a position to immediately grasp the evidentiary import of the recent statement. Moreover, these attorneys were in the fortunate position that they could divert resources to filing an emergency motion with the district court – and ultimately a motion for a new trial – while still preparing for the sentencing.[4]

The new trial motion filed by the Appellants suggested that Monem's new statement created serious questions surrounding the fairness and reliability of the trial – especially when considered in light of the other circumstances surrounding

[4] The defense received the government's sentencing memorandum on the afternoon of April 8, 2015. On April 10, 2015, they filed an emergency motion to continue the April 13, 2015 sentencing date. The district court denied the motion and the Appellants were sentenced on April 13, 2015.

that same witness's testimony. For example, the trial record indicates that Mr. Monem's testimony had been challenged heavily at trial on the grounds that it was inconsistent with that of other witnesses, and it was possibly coordinated with other witnesses' testimony by an officer with the Iraqi National Police. While it was certainly within the jury's province to reject such arguments at trial, Monem's new statement would have given jurors the ability to consider that impeachment evidence in an entirely new and perhaps compelling light. Such a statement, offered directly by Monem to the court at a time when the trial was behind him and he was away from anyone who would be influencing his testimony, could have been fairly viewed by jurors as finally providing Monem's unsolicited, candid, and exculpatory version of events. Its potential impact on the trial – even a lengthy and complicated trial such as this one – cannot be underestimated.

Indeed, the government's response to the defense's discovery of the statement suggests that the government understood the potential power of this statement, and actively worked to undermine it. Immediately after learning of the defense's intention to seek a new trial (on April 10, 2015, the very day the defense notified the government of its intent to move for a new trial), the government telephoned Monem to interview him – an interview that was conducted *ex parte* by interested investigators and was not transcribed. All that remains from the interview are the memories of the government agents present during the call, and

the FBI's notes of that interview. But those notes fail to explain or even address the contradictions between Monem's trial testimony and his sentencing statement. Instead, the notes – without indicating what Monem was asked by the agents during the call – provide an incongruous and inconsistent account of some aspects of Monem's trial testimony and a conclusory assertion that Monem's sentencing statement was an "expression" of what he imagined it would be like to be the driver of the Kia.

The manner in which the government addressed Mr. Monem's sentencing statement raised more questions than it answered. Unfortunately, the district court did not ask those questions or require that they be answered. Instead, in resolving the new trial motion, the district court announced that the defense "had not shown to the Court's satisfaction that Monem's [trial testimony was false]," *see United States v. Slough*, No. 08-cr-00360, DE 821 at 8 (D.D.C. filed Apr. 10. 2015), but denied the defense the opportunity to make such a showing through an evidentiary hearing. Moreover, the district court's decision reveals a disappointing tendency to treat both Monem's new statement and the government's notes as a literary exercise in which his objective was to interpret Monem's statement in as government-friendly a fashion as possible. *Id*. at 12 ("But Monem did not say in his April 10 conversation that every word of the VIS was written from the perspective of the murdered victim. *The more sensible interpretation* is that

Monem tried to imagine what Al-Rubia'y and his mother experienced for those portions of the VIS dealing with what they experienced. *Works of fiction* routinely adopt third-person omniscient narration, and that Monem did so in part of his VIS rather than throughout it is hardly proof his VIS is true" and "Nevertheless, Monem's April 10 statements *are more reasonably interpreted* to mean that he denied the VIS's implication that Al-Rubia'y survived the initial burst of gunfire.") (emphasis added).

There is no justification for the district court's decision to use literary insights to interpret what Monem probably meant in both his sentencing statement and his subsequent *ex parte* conversation with the government, rather than to hold a hearing where what Monem actually meant and what he told the government could be explored on cross-examination. *See, e.g.*, *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1261 (D.C. Cir. 1991) (A hearing, with its cross-examination and opportunities to observe the demeanor of witnesses, can frequently resolve a conflict that appears irresolvable on paper; indeed, determining which of several conflicting accounts is accurate "is precisely the function of an evidentiary hearing."); *United States v. Woolfolk*, 197 F.3d 900, 905 (7th Cir. 1999) (noting in deciding a motion for a new trial that "The purpose of the evidentiary hearing was for the district court to assess the credibility of the new witness and to determine the materiality of her testimony."); *In re Kunstler*, 914 F.2d 505, 520 (4th Cir.

1990) ("[D]eterminations of credibility are best made after an evidentiary hearing . . . When there are issues of credibility, disputed questions of fact, and rational explanations of purpose given, an evidentiary hearing may well be necessary to resolve the issues."); *see also Blackston v. Rapelje*, 780 F.3d 340, 357-59 (6th Cir. 2015) ("We cannot consider such a cursory and immediately-halted exchange constitutionally adequate. Posing futile questions to a non-responsive witness is not constitutionally adequate cross-examination, because '[c]onfrontation means more than being allowed to confront the witness physically.' . . . Zantello failed to respond or even acknowledge the question in a meaningful way, and the judge's swift intervention robbed the exchange of whatever substance it might have enjoyed.") (internal citations omitted).

The district court should either have granted the Appellants' motion for a new trial or, at the very least, conducted an evidentiary hearing where Monem could be cross-examined and his credibility could be tested. The district court's decision to deny the motion without an evidentiary hearing was an abuse of discretion. While district courts are understandably reluctant to reopen lengthy trials in most circumstances, Monem's statement constituted precisely the sort of serious and extraordinary event that warrants setting reluctance aside. When the courts refuse to treat such events with the care they deserve, the integrity of the criminal justice system is compromised. *See* Kathleen "Cookie" Ridolfi, *et al.*,

NACDL, *Material Indifference: How Courts Are Impeding Fair Disclosure in Criminal Cases*, https://www.nacdl.org/discoveryreform/materialindifference/ and click "Read the Report" (Nov. 17, 2014) (focusing on the role of courts in fostering a "culture of non-disclosure" when resolving *Brady* violation claims). The trial court's decision to substitute his own literary critique of Mr. Monem's statement in place of reasoned, adversarial testing and judicial assessment of the new evidence should not be countenanced by this Court.

IV. THE PROSECUTION OF MR. SLATTEN FOR FIRST DEGREE MURDER, ONLY AFTER HE SUCCESSFULLY DEFEATED THE GOVERNMENT IN THIS COURT ON LESSER CHARGES, RAISES TROUBLING QUESTIONS OF PROSECUTORIAL VINDICTIVENESS

NACDL has long believed that "[p]rosecutorial overreaching and misconduct distort the truth-finding process and taint the credibility of the criminal justice system . . . ." NACDL, *Criminal Defense Issues: Prosecutorial Misconduct*, https://www.nacdl.org/prosecutorialmisconduct/ (last visited Feb. 8, 2016). Similar concerns animated the Supreme Court's seminal decision in *Blackledge v. Perry*, 417 U.S. 21, 28 (1974), in which the Court first articulated the doctrine of vindictive prosecution, establishing that the due process clause prohibits prosecutors from using their charging authority to retaliate against a defendant who exercises a legal right. This Court's decision in *United States v. Meyer*, 810 F.2d 1242 (D.C. Cir. 1987), established how the *Blackledge* rule

applies in this Circuit, with this Court determining that when a defendant exercises a right and a prosecutor in turn increases the charge against that defendant, a court must first evaluate the totality of the circumstances to determine whether "other circumstances in the case [] suggest a retaliatory motivation." *Meyer*, 810 F.2d at 1246. If "all of the circumstances [surrounding the increase in charge], when taken together, support a realistic likelihood of vindictiveness," then the court adopts a presumption of vindictiveness. *Id.* The government can then overcome this presumption only by placing a valid reason for its decision on the record at the time of charging. *Id.*

Much more recently, in *United States v. Safavian*, 649 F.3d 688 (D.C. Cir. 2011), this Court applied the *Meyer* rule in holding that, where the government adds new charges after a successful appeal, a presumption of vindictiveness arises. But *Safavian* then went on to hold that such a presumption can be rebutted where the government shows that the new charges are based on a change in circumstances that the government "*through no fault of its own* simply d[id] not learn until after the first indictment," *United States v. Jamison*, 505 F.2d 407, 416-17 (D.C. Cir. 2011) (emphasis added), and that such circumstances justified the addition of new charges. *Safavian*, 649 F.3d at 694.[5]

[5] Mr. Slatten persuasively argues that, under this Court's precedents, the government's rebuttal must occur at the time it brings the new charges. While

(footnote continued on next page)

The undisputed facts here, as NACDL understands them, present troubling issues about prosecutorial overreaching in its charging decisions. In 2008, the government charged Mr. Slatten with manslaughter. After an evidentiary hearing revealed legal infirmities in the government's case, s*ee United States v. Slough*, 677 F. Supp. 2d 112, 127-28 (D.D.C. 2009), Mr. Slatten's indictment was dismissed by the district court and affirmed by this Court. The government then, by its own account, conducted a new investigation of the facts and, in 2013, again brought manslaughter charges against Mr. Slatten. But in May 2014, after Mr. Slatten successfully asserted a statute-of-limitations defense—and this Court ruled on mandamus that the government had "inexplicabl[y]" allowed the statute of limitations for charging Slatten with manslaughter to run, Order Denying Petition for Rehearing at 2, *In re Slatten*, No. 14-3007 (D.C. Cir., filed Apr. 18, 2014), the government re-indicted Mr. Slatten for first-degree murder on the same evidence.

Under this Court's precedents – and NACDL believes, under the only faithful reading of the Supreme Court's precedents, including *Blackledge* – such circumstances indisputably give rise to a presumption of vindictiveness. Just as in *Safavian*, the government increased the charges after Mr. Slatten successfully

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NACDL agrees with that position, it does not rely on it in its argument because it believes that the government has failed to rebut the presumption of vindictiveness at any time.

asserted his legal rights on appeal, and a presumption of prejudice must accordingly arise from its charging decisions. The only real question before the Court, therefore, is whether the presumption of vindictiveness has been rebutted.

This Court must therefore determine whether the government's explanation for its new charging decision – its desire to hold Mr. Slatten "accountable" for his actions – is enough to save that decision from constitutional infirmity. The problem with allowing it to do so is that the government can always assert after every successful criminal appeal that new charges are necessary to hold the defendant "accountable." NACDL believes that due process requires more and, as we understand this Court's precedents, those precedents do as well. In particular, there is a critical difference between the government's explanation for its charging conduct here and its charging conduct in *Safavian* – namely, that here nothing material happened between the government's decision to charge manslaughter in 2013 and the government's decision to charge murder in 2014 – other than Mr. Slatten's successful appeal to this Court. In *Safavian*, by contrast, an entire trial had occurred between the two charging decisions – a trial in which the government had gotten a better look at both its evidence and the defense's, and the rules for trying the case had themselves changed. Thus, the relevant charging circumstances **had** changed between the two charging decisions – through no fault of the government's. By contrast, the only change between the two operative charging

decisions here – the manslaughter charge in 2013 and the murder charge in 2014 – was the government's failure to timely indict Mr. Slatten on what the government had twice deemed the appropriate charge. Just as in *Meyer*, in other words, "the prosecutor increased the charges not because of any further factual investigation or legal analysis, but because the defendant[] chose to exercise" his rights. 810 F.2d at 1247.

One of the main concerns animating the vindictive prosecution doctrine is how the government's actions would appear to an objective observer. *Blackledge*, 417 U.S. at 28 ("There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously," but explaining that this factor did not matter "since the fear of [] vindictiveness may unconstitutionally deter a defendant's exercise of [rights], due process also requires that a defendant be freed of apprehension of such a retaliatory motivation"); *United States v. DeMarco*, 550 F.2d 1224, 1227 (9th Cir. 1977) (*Blackledge*'s prophylactic rule is designed "to prevent chilling the exercise of such rights by other defendants who must make their choices under similar circumstances in the future."); *United States v. Rosenthal*, No. CR 02-0053, 2007 WL 801647, at *6 (N.D. Cal. Mar. 14, 2007) (dismissing a prosecution as vindictive because "[a] reasonable observer would interpret the government's conduct as a warning;" if defendants successfully exercise

their rights "the government will punish them by bringing more serious charges"). This is simply a corollary of the fundamental principle that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). When the government makes a widely publicized blunder in a high-profile case, and then seeks to rectify that mistake by indicting a defendant on charges it has twice considered and declined to pursue, it is difficult to say that the "appearance of justice" standard is satisfied. An objective observer would believe that Mr. Slatten was being punished for exercising his legal rights. Due process forbids such a result.

CONCLUSION

For the forgoing reasons, NACDL urges this Court to reverse the judgments of conviction.

February 8, 2016

Respectfully submitted,

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February 8, 2016
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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2016, I electronically filed the foregoing **BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANTS, SUPPORTING REVERSAL** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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