No. 10-3006

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
v.

PAUL ALVIN SLOUGH, NICHOLAS ABRAM SLATTEN, EVAN SHAWN LIBERTY, DUSTIN LAURENT HEARD, and DONALD WAYNE BALL,
Defendants-Appellees.

On Appeal From The United States District Court
for the District of Columbia
The Hon. Ricardo M. Urbina

APPELLEES' PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

INTRODUCTION

Appellees are former State Department security contractors who have been indicted for their alleged actions in a September 2007 firefight in Baghdad, Iraq. The firefight occurred as appellees attempted to secure a safe return route for a government official after a car bombing. Each appellee faces manslaughter and attempted manslaughter charges, as well as a mandatory consecutive thirty-year prison term for using a (government-issued) machine gun during an alleged "crime of violence" in this wartime setting. Appellees "maintain that they came under attack by insurgents and that their actions constituted a legitimate response to a mortal threat." *United States v. Slough*, 677 F. Supp. 2d 112, 116 (D.D.C. 2009)

The government has conceded that appellees were compelled to speak to State Department investigators about the events for which they are now being prosecuted, and that the prosecutors sought out and were thoroughly exposed to appellees' compelled statements as they investigated the case and obtained the indictment. After an evidentiary hearing under *Kastigar v. United States*, 406 U.S. 441 (1972), the district court dismissed the indictment without prejudice based on lengthy written findings that the government had: (1) failed to carry its burden to prove all the grand jury evidence was untainted under *Kastigar*; (2) made extensive nonevidentiary use of the compelled statements, including relying on two defendants' compelled statements to decide to indict them and to obtain authorization for their indictment; and (3) "utterly failed" to show the *Kastigar* violations were

harmless beyond a reasonable doubt. *Slough*, 677 F. Supp. 2d at 144-66 & n.67.

In an April 22, 2011, opinion, a panel of this Court vacated and remanded the district court's ruling. The panel's opinion fundamentally altered this Court's *Kastigar* jurisprudence. The opinion restructures critical aspects of *Kastigar* analysis in this Circuit by relieving the government of burdens that binding precedent has squarely placed upon it, and shifting those burdens in part to the district court and in part to the defense. In addition to conflicting squarely with Supreme Court and Circuit precedent, the panel's ruling creates a dramatic new burden for district courts conducting future *Kastigar* proceedings. The panel's opinion also holds for the first time, and with minimal legal analysis on the subject of an acknowledged circuit split, that *Kastigar* has no application to a prosecutor's use of a defendant's compelled statements to decide to indict that defendant and, in this case, as the explicit rationale for obtaining authorization to seek the indictment.

Appellees submit that these matters warrant en banc review. This Court's *Kastigar* jurisprudence constitutes the seminal case law in this important area of federal criminal law, which defines how prosecutors must preserve a defendant's Fifth Amendment rights before proceeding with a prosecution that has been tainted by the extraction of compelled statements from the accused. This Court has developed its case law through detailed decisions that carefully assess burdens between the parties. By departing from these precedents, the panel's decision creates uncertainty and inequity in this recurring area of law. And by setting this Circuit on a

course that approves, apparently without condition, of prosecutors' nonevidentiary use of a defendant's compelled statements, the panel opinion goes beyond even the extra-Circuit authorities on which it purports to rely. These matters warrant consideration by the full Court.

STATEMENT OF ISSUES AND REASONS FOR REHEARING

When the government prosecutes persons from whom it has previously compelled statements relating to the case, the government bears the affirmative burden to prove that *every* piece of evidence before the grand jury was untainted and derived wholly from independent sources. *Kastigar*, 406 U.S. at 460; *United States v. North*, 910 F.2d 843, 854, 862, 872 ("*North I*"), *reh'g denied*, 920 F.2d 940 (D.C. Cir. 1990) ("*North II*"). This "heavy" burden rests at all times with the government. *Kastigar*, 406 U.S. at 460; *North I*, 910 F.2d at 862, 872-73; *North II*, 920 F.2d at 943. The government must satisfy this burden "witness-by-witness," and, "if necessary," "line-by-line and item-by-item." *North I*, 910 F.2d at 872. If the government fails to carry its burden as to *any* piece of grand jury evidence, the indictment must be dismissed unless the violation is harmless beyond a reasonable doubt. *Id.* at 873; *United States v. Poindexter*, 951 F.2d 369, 377 (D.C. Cir. 1991).

The district court's 90-page *Kastigar* opinion, based on a three-week hearing at which the court considered all evidence the government chose to put on, vigilantly followed these principles. *See* 677 F. Supp. 2d at 115-16, 130-32, 166. The panel nonetheless vacated and remanded, finding "the district court made a number

of systemic errors based on an erroneous legal analysis." Op. 8. Three of the panel's legal rulings warrant en banc review because they conflict with Supreme Court and Circuit authority and are otherwise exceptionally important.

1. Though the district court identified numerous pieces of grand jury evidence for which the government failed to carry its burden of proof, the panel held the trial judge erred by not going beyond that tainted evidence to classify the rest of the government's evidence as tainted or untainted. According to the opinion,

> *North I* requires *the court* to parse the evidence 'witness-by-witness' and 'if necessary, . . . line-by-line and item-by-item,' 910 F.2d at 872, and *to 'separate the wheat of the witnesses' unspoiled memory from the chaff of [the] immunized testimony,' id.* at 862.

Op. 7 (emphasis added). The panel found the district judge erred by not segregating *all* of the government's evidence as tainted or untainted. Op. 8-9.

This ruling conflicts with the Supreme Court's decision in *Kastigar* and this Court's decisions in *North I* and *Poindexter*, by requiring findings beyond what is necessary for determination under *North I*, and by shifting the burden of the *Kastigar* inquiry from the government—where those cases squarely place it—to the district court. In addition, this unprecedented extension of *North I* is exceptionally important because it creates a significant new burden for district courts conducting already fact-intensive *Kastigar* hearings. No other court of appeals has imposed such a burden on district courts.

2. The panel further erred by imposing a burden of proof on *defendants*, Op. 9, despite the bedrock requirement of *Kastigar* that it is the *government* that

bears the burden of proof. *Kastigar*, 406 U.S. at 460; *North I*, 910 F.2d at 862, 872-73. The panel's requirement that *defendants* carry a burden to show taint at the *Kastigar* hearing conflicts squarely with *Kastigar*, *North I*, and *North II*.

3. The panel also broke new ground regarding the *Kastigar* treatment of "nonevidentiary use" of compelled statements. Op. 14-15. The question is exceptionally important: it was the subject of a circuit split when this Court left it open in *North I*, 910 F.2d at 856-58, and that split remains today, Op. 15. Unlike in *North I*, it is necessary to the decision here: in a finding accepted by the panel, the district court found the prosecutors decided to indict defendants Ball and Heard based on their concededly compelled statements. Op. 14-15.[1]

In a single paragraph containing minimal legal analysis, the panel has joined the Eleventh Circuit (and purportedly joined the Seventh Circuit, which has not reached the same conclusion), to hold that *Kastigar* does not apply to prosecutors' decisions to indict. That ruling runs counter to *North I*, where this Court stated (in *dicta*) that it found such cases "troubling." 910 F.2d at 859-60. More important, the panel's ruling conflicts with *Kastigar* itself, which holds that use immunity (like the Fifth Amendment, with which it is coextensive) bars *any* use of a defend-

[1] In their memo seeking permission to indict, the prosecutors cited Heard's statements at his compelled interview as evidence of guilt. *Slough*, 677 F. Supp. 2d at 158-59. Though the lead prosecutor testified he had other reasons for indicting Ball and Heard, the district court found that testimony not credible, and found that the government sought Ball's and Heard's indictment based on their compelled statements. *Id.* at 159-60. The panel accepted that finding. Op. 15.

ant's statement in *any* way to inflict criminal penalties on him. *See* 406 U.S. at 453, 461. Indicting a defendant based on his compelled statement certainly uses that statement to inflict criminal penalties on him. It hardly leaves him in the same position as if he had remained silent, which is required if use immunity is to satisfy the Fifth Amendment. *See Kastigar*, 406 U.S. at 457, 458-59, 462.

ARGUMENT

I. The panel's requirement that the district court parse every line of the government's evidence to identify *untainted* as well as tainted evidence contravenes *Kastigar* and *North*, and creates a new and unwarranted burden for district courts

Kastigar's command, articulated in *North I*, is clear and emphatic: the *government* bears the "heavy burden . . . to show that it has made *no use, directly or indirectly,* of the compelled testimony." 910 F.2d at 862. The government must carry this affirmative burden for *every piece* of evidence before the grand jury:

> *For each grand jury and trial witness, the prosecution* must show by a preponderance of the evidence that *no use whatsoever* was made of *any* of the immunized testimony either by the witness or by the [prosecutor] in questioning the witness. . . . Unless the District Court can make express findings that *the government has carried this heavy burden* as to the content of *all* of the testimony of *each* witness, that testimony cannot survive the *Kastigar* test.

Id. at 872-73 (emphasis added). The government must carry its burden for *every* piece of its evidence:

> *Kastigar* does not prohibit simply 'a whole lot of use,' or 'excessive use,' or 'primary use' of compelled testimony. It prohibits *any* use,' direct or indirect.

Id. at 861. Thus, if the government put *any* evidence before the grand jury that

fails the *Kastigar* analysis, and that evidence was not harmless beyond a reasonable doubt, "then the indictment must be dismissed." *Id.* at 873. This heavy burden, to disprove taint for *every* item of evidence and to dismiss if *even one* non-harmless item went to the grand jury, belongs exclusively to the government. *North I*, 910 F.2d at 862, 873; *North II*, 920 F.2d at 943.

Here, the district court found the government failed to carry its *Kastigar* burden as to numerous pieces of grand jury evidence: the testimony of team members Adam Frost and Matthew Murphy, *Slough*, 677 F. Supp. 2d at 144-48; Frost's journal, *id.* at 148-53; the plea proffer of cooperating defendant Jeremy Ridgeway (whom the government did not present at the *Kastigar* hearing) and a hearsay summary of his statements, *id.* at 153-55; and the hearsay summary of statements by Iraqi witnesses (whom the government also did not call), *id.* at 155-57. The government conceded that Frost and Murphy's testimony was tainted as to defendant Slatten, *id.* at 115 n.2, 146 & n.42, and that parts of Murphy's testimony and Ridgeway's statement were tainted as to Slough. Gov. Br. at 61-62, 91.

Under *North I*, if *any* piece of grand jury evidence is found to be tainted, the district court must analyze whether that evidence was harmless beyond a reasonable doubt, and if it was not, must dismiss the indictment. 910 F.2d at 873. The panel's opinion, however, holds that a district court conducting a *Kastigar* inquiry may not stop upon finding and analyzing tainted grand jury evidence. Instead, the panel held the district court must go on, and parse the *entire record*

> 'witness-by-witness' and 'if necessary, . . . line-by-line and item-by-item,' . . ., and to 'separate the wheat of the witnesses' unspoiled memory from the chaff of [the] immunized testimony[.]'

Op. 7 (quoting *North I*, 910 F.2d at 872 and 862); *accord* Op. 8-9.[2]

This requirement—line-by-line parsing of the *entire* record, to segregate *all* evidence into "tainted" and "untainted" piles—is not the mandate of *North*. Although the *North I* opinion states the *Kastigar* inquiry "must proceed witness-by-witness; if necessary, it will proceed line-by-line and item-by-item," it does so in the context of delineating the *government's* obligation to satisfy its burden of proof for every piece of evidence. 910 F.2d at 872. *North* does not impose a freestanding obligation for the *district court* to analyze every line of witness testimony, *even after finding multiple failures of the government to carry its burden*. *Cf.* Op. at 7, 9. Nor does it require the district court to segregate every piece of the government's evidence into "wheat" and "chaff." Op. 7, 8. The passage of *North* that the panel quotes for this proposition did not create such a mandate, but instead simply discussed the difficulty of parsing a witness's claimed recollection—noting that

> "*[i]t may be possible* . . . to separate the wheat of the witnesses' unspoiled testimony from the chaff of [the] immunized testimony, *but it may not.*"

[2] *See* Op. 8 ("*North I* requires the court to segregate tainted parts of the evidence from those parts that either could not have been tainted . . . or were shown to be untainted by a preponderance of the evidence."); Op. 9 (holding that "*North*'s mandate that the district court parse the record 'line-by-line' clearly requires such review, not only for the rest of Frost's and Murphy's testimony, but also for the Iraqi witnesses' testimony and Ridgeway's proffer and statement.').

910 F.2d at 862 (emphasis added). *North's* rule of disposition, on page 873 of the opinion, does not require the court to separate all wheat from all chaff. Instead it states clearly that if *any* chaff makes it before the grand jury, and was not harmless beyond a reasonable doubt, dismissal is required. *Id.* at 873.[3]

The panel's new ruling that district courts have their own obligation to parse the *entire* record witness-by- witness and line-by-line, Op. 7, 9, and to segregate *every* piece of evidence into "wheat" and "chaff," Op. 7, 8, creates an enormous and unprecedented burden for district courts. We are aware of no such require-

[3] The panel ruled the district court was required to make a line-by-line determination before it supposedly "excluded" large blocks of testimony *in toto*. Op. 8, 12. But the district court did not "exclude" any evidence. (Indeed, the panel stated elsewhere that excluding trial evidence would be premature. Op. 16-17.) Instead, the district court *dismissed the indictment without prejudice*, because it found the prosecutors used defendants' compelled statements and evidence derived therefrom to obtain the indictment. 677 F. Supp. 2d at 115-16, 166. This Court reviews that *judgment*, not statements in the opinion. *See California v. Rooney*, 483 U.S. 307, 311 (1987). If dismissal was required because non-harmless tainted evidence was before the grand jury—as it was—that judgment may not be vacated to require additional findings that do not affect the judgment. *See Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("Our power is to correct wrong judgments, not to revise opinions.").

To the extent there is any concern that additional findings were required to allow weighing of tainted versus untainted evidence in the harmless error analysis, the government forfeited that contention (and in any event failed to carry its burden, *Slough*, 677 F. Supp. 2d at 166) by making no attempt to show harmlessness in the district court. The government told the district court it did not have to show harmlessness, because, it claimed, defendants' statements were not compelled, and thus carried no *Kastigar* protection at all, JA.4455 (a position abandoned on appeal, Gov. Br. at 59). Accordingly, the government made no attempt below to show that any of its evidence, if found tainted, was harmless beyond a reasonable doubt. *See* JA.4345-90, 4452-76.

ment in any other circuit. Instead, other circuits follow the same rule articulated in *North I*, 910 F. 2d at 872-73: if the government fails to meet its *Kastigar* burden as to *any* evidence, the analysis proceeds to harmlessness beyond a reasonable doubt, without any mention of line-by-line sorting of remaining evidence.[4]

II. The panel's imposition of a burden on *defendants* to show taint at the *Kastigar* hearing contravenes *Kastigar* and *North*

The first premise of *Kastigar* analysis is that the *government* bears the burden of proof. Once a defendant shows he has been compelled to speak relating to a matter under prosecution, *the prosecution* has the affirmative burden to prove that all of its evidence is untainted and derived from independent sources. *Kastigar*, 406 U.S. at 460 (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 n.18 (1964)); *North I*, 910 F.2d at 862, 872-73; *North II*, 920 F.2d at 943.

Here, the panel erred by imposing a burden of proof on *defendants*. In analyzing whether the witnesses' testimony was tainted and whether it had been adequately parsed, the panel invoked a footnote in *North II* for the proposition that "*the defendant bears the burden* of laying 'a firm 'foundation' resting on more than 'suspicion'' that proffered evidence was tainted . . . ." Op. 9 (quoting 920 F.2d at 949 & n.9) (emphasis added). The panel ruled the defense did not "meet

[4] *See, e.g.*, *United States v. Pelletier*, 898 F.2d 297, 303 (2d Cir. 1990); *United States v. Harris*, 973 F.2d 333, 338 (4th Cir. 1992); *United States v. Beery*, 678 F.2d 856, 860, 863 (10th Cir. 1982); *United States v. Schmidgall*, 25 F.3d 1523, 1531 (11th Cir. 1994).

that burden" for "non-overlapping" statements here, but could try to "fill that gap by submitting additional evidence." Op. 9, 10. This imposition of a burden of proof on the defense conflicts with *Kastigar* and *North I*.

The panel took *North II*'s footnote statement out of context: that footnote addressed not the burden of proof at a *Kastigar* hearing, but rather the threshold showing that a defendant must make *to obtain a Kastigar hearing*:

> Of course, *to be entitled to a hearing* on whether immunized testimony was before the grand jury, a defendant must lay a firm 'foundation' resting on more than mere 'suspicion' that this may in fact have happened.

North II, 920 F.2d at 949 n.9 (citation omitted). That showing was satisfied well before the *Kastigar* hearing in this case, and was not contested on appeal. *Slough*, 677 F. Supp. 2d at 129 (citing Sept. 8, 2009 Mem. Op., JA.1597-98, 1607).

Once the threshold showing is made and the district court holds the *Kastigar* hearing, "the government *always* bears the burden of proof." *North I*, 910 F.2d at 867. The defense has no burden to show tainted evidence; rather, *the government* bears the affirmative and heavy duty to prove that *every* piece of its evidence was *untainted*. *Kastigar*, 406 U.S. at 460; *North I*, 910 F.2d at 862, 872-73. If there is a failure of proof, that burden falls on the government, not the defense. *See North II*, 920 F.2d at 944; *North I*, 910 F.2d at 867. The Fifth Amendment requires no less. *North I*, 910 F.2d at 861, 862-63, 868.

Indeed, the dissent in *North I*, like the panel here, faulted the defense for not citing sufficient examples of trial testimony reflecting taint. *Compare* 910 F.2d at

867-68 *with* Op. 9-10. The *North* majority rejected that view because it impermissibly shifted the burden of proof to the defense. 910 F.2d at 867-68; *accord North II*, 920 F.2d at 944. *North II* is pellucid on this point:

> [T]he burden of disproving use cannot, under *Kastigar*, be shifted onto the defendant, *nor can the defendant be required to assume the burden of going forward with evidence that puts in issue the question of use.*

Id. at 943 (emphasis added).[5] The panel's imposition of a burden on defendants here (both in the *Kastigar* inquiry under review and on remand, Op. 9-10) fundamentally violated *Kastigar* and *North*, and creates bad law for future cases.

III. The panel's ruling that *Kastigar* is not implicated where a prosecutor indicts two defendants based on their compelled statements is in conflict with *Kastigar*, departs from this Court's guidance in *North*, and is the subject of an acknowledged circuit split

Wading into an acknowledged circuit split, the panel devoted only a single paragraph to its decision to join the Eleventh Circuit[6] and purportedly the Seventh Circuit,[7] in opposition to the Third and Eighth Circuits,[8] to hold that "*Kastigar* is

[5] *Accord Schmidgall*, 25 F.3d at 1530 ("The burden of proof remains with the government; the defendant is not required to present evidence that the grand jury testimony was in fact tainted.").

[6] *See United States v. Byrd*, 765 F.2d 1524, 1530 (11th Cir. 1985).

[7] Contrary to the panel's opinion, the Seventh Circuit did not hold in *Cozzi* "that *Kastigar* is not concerned with 'the exercise of prosecutorial discretion.'" Op. 15. That clause on the cited page of *Cozzi* appears only in a parenthetical quotation of the Eleventh Circuit's opinion in *Schmidgall*, 25 F.3d at 1529. The proposition for which *Cozzi* cited *Schmidgall* was only that "mere tangential influence . . . on the prosecutor's thought process in preparing for trial is not an impermissible 'use' of that information" under *Kastigar*." *Cozzi*, 613 F.3d at 729 (quoting *United States v. Velasco*, 953 F.2d 1467, 1474 (7th Cir. 1997)).

not concerned with 'the exercise of prosecutorial discretion'" in charging decisions. *Id.* (quoting *United States v. Cozzi*, 613 F.3d 725, 729 (7th Cir. 2010)). This ruling conflicts with the fundamental principles set out in *Kastigar* and departs from this Court's strong guidance in *North I*.

In *North I*, this Court noted that although *Kastigar* did not discuss nonevidentiary use expressly, it did set out a broad prohibition on *any* use of defendants' compelled testimony to advance a criminal prosecution. Quoting *Kastigar* at length, this Court emphasized the breadth of *Kastigar*'s prohibition:

Later in *Cozzi*, in reasoning that is in tension with the panel opinion here, the Seventh Circuit stated "[t]here is no question that *Kastigar* bars not only evidentiary use of compelled testimony *but also non-evidentiary, or derivative, use*," *id.* at 730, and that "*Kastigar* immunity is primarily concerned with *the prosecutor's use of compelled testimony* because *it is the prosecutor who actually initiates and pursues criminal proceedings* against a defendant." *Id.* (emphasis added). *Cozzi*'s *holding* that *Kastigar* was not implicated was *not* based on a refusal to inquire into charging decisions. Instead, it was based on the fact that the defendant's statements were *never communicated to the prosecutor*. *Id.* at 731-32.

The positions of the First, Second, and Ninth Circuits are also not as strong as the panel opinion suggests. Like the Seventh Circuit, the First and Second Circuits have stated only that *tangential* nonevidentiary use does not violate *Kastigar*, while reserving decision on more significant nonevidentiary use. *See Serrano*, 870 F.2d at 17; *United States v. Mariani*, 851 F.2d 595, 600-01 (2d Cir. 1988). Similarly, the Ninth Circuit rejected a *per se* rule requiring disqualification of any prosecutor exposed to compelled statements, *United States v. Crowson*, 828 F.2d 1427, 1429-30 (9th Cir. 1987), but did not otherwise address the permissibility of nonevidentiary use, finding there had been none. *Id.* at 1431-32; *accord United States v. Daniels*, 281 F.3d 168, 181-82 (5th Cir. 2002).

[8] *See United States v. Semkiw*, 712 F.2d 891, 895 (3d Cir. 1983); *United States v. McDaniel*, 482 F.2d 305, 311-12 (8th Cir. 1973) (both discussed in *North I*, 910 F.2d at 857, 858-59).

> [T]he use immunity statute 'prohibits the prosecutorial authorities from using the compelled testimony in ***any*** respect, and it therefore ensures that the testimony cannot lead to the infliction of criminal penalties on the witness.' . . .
>
> . . . [T]he statute provides a *sweeping* proscription of *any* use, *direct or indirect*, of the compelled testimony *and* any *information* derived therefrom. . . . This *total prohibition on use* provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.' . . . [The use immunity statute] is constitutional, the Court concluded, because it 'leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege.'

North I, 910 F.2d at 858 (quoting *Kastigar*) (bold emphasis in *Kastigar*; all other emphasis by *North I* court). Thus, having defined nonevidentiary use to include "deciding to initiate prosecution," *id.* at 857 (citation omitted), this Court in *North I* strongly suggested that *Kastigar*'s "*total prohibition*" on "*any* use" "in *any* respect" to "inflict[] criminal penalties," *id.*, meant *Kastigar* would prohibit at least significant, non-tangential nonevidentiary use of compelled testimony to advance a prosecution. Addressing cases from the First, Second, and Eleventh Circuits that suggested "that *Kastigar* allows nonevidentiary use of compelled testimony under all circumstances," the *North I* court "[found] those cases troubling." *Id.* at 859-60. Though the *North I* court ultimately did not have to decide the question of nonevidentiary use, *id.* at 862, its discussion reflects a strong suggestion by this Circuit that significant nonevidentiary use of compelled statements to advance the infliction of criminal penalties would violate *Kastigar* because it would not leave the defendant in the same position as if he had remained silent.

The panel in this case has now departed from *North I*'s reading of *Kastigar*, and indeed from the broad prohibition set out in *Kastigar* itself. Adopting the Eleventh Circuit's reasoning in *Byrd*, which "troubl[ed]" this Court in *North I*, the panel has ruled that in this Circuit, *Kastigar* simply does not apply where a prosecutor decides to indict a defendant based on his compelled statements, and uses those statements to obtain authorization to indict. Op. 15. The panel declines to address any of the concerns expressed by its predecessor panel in *North I*. Its holding is at odds with the positions of the Third and Eighth Circuits (and even potentially the Seventh Circuit, which the panel purports to join, *see* note 7, *supra*), and most importantly it is in conflict with *Kastigar* itself. *Kastigar* imposes a "total prohibition" on "*any* use" of defendants' compelled statements "in *any* respect" to "inflict[] criminal penalties" on them. *Kastigar*, 406 U.S. at 453; *North I*, 910 F.2d at 858 (quoted *supra*). It certainly advances the "infliction of criminal penalties" when a prosecutor uses a defendant's compelled statement to decide to indict the defendant, and to obtain authorization from DOJ to seek the indictment, as happened here. *Slough*, 677 F. Supp. 2d at 158-60; Op. 15. A defendant who is indicted as a result of his compelled statements is hardly in the same position as if he had stood on his privilege. *Kastigar*, 406 U.S. at 453, 462.

CONCLUSION

For all of the foregoing reasons, this Court should grant rehearing *en banc*.

Respectfully submitted,

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June 6, 2011

ADDENDUM

A. Panel Opinion: *United States v. Slough et al.*, No. 10-3006 (Apr. 22, 2011)

Note: The full panel opinion remains under seal. 19 sealed copies of the full opinion are being lodged with the Clerk separately.

The copy of the opinion appearing in this Addendum is the publicly filed redacted version.

B. Certificate under Cir. R. 28(a)(1)(A)

C. Certificate of Service

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

The parties who appeared in the district court and who are parties in this Court are Appellant the United States of America, and Defendants-Appellees Paul Alvin Slough, Nicholas Abram Slatten, Evan Shawn Liberty, Dustin Laurent Heard, and Donald Wayne Ball. There are no intervenors or amici.

The Center on Administration of Criminal Law unsuccessfully sought leave to file an amicus brief in the district court on an issue unrelated to this appeal.

B. Rulings Under Review

The United States appealed the district court's dismissal of the indictment in a criminal case, D.C. No. 08-360-RMU (the Hon. Ricardo M. Urbina). The district court's opinion was entered December 29, 2009, and is reported at 677 F. Supp. 2d 112. The memorandum opinion appears at JA.4566.

Panel Review

The following rulings were reviewed by a panel of this Court (the Hon. S. Williams, the Hon. D.H. Ginsburg, and the Hon. M. Garland):

1. The district court's findings that the government made evidentiary use of the defendants' compelled statements to obtain the indictment, in violation of *Kastigar v. United States*, 406 U.S. 441 (1972). 677 F. Supp. 2d at 144-57; JA.4616-40.

2. The district court's ruling that a prosecutor's use of a defendant's compelled statement to decide to indict that defendant and to obtain authorization to indict that defendant constituted an impermissible nonevidentiary use of the statement under *Kastigar*, and the court's findings that the government made significant non-evidentiary use of the defendants' compelled statements to obtain the indictment. 677 F. Supp. 2d at 158-65; JA.4640-50.

3. The district court's finding that the government "utterly failed to make [the] demanding showing" that its *Kastigar* violations were harmless beyond a reasonable doubt. 677 F. Supp. 2d at 165-66; JA.4653-54.

Petition for Rehearing En Banc and for Panel Rehearing

In an opinion and judgment issued April 22, 2011, a panel of this Court (the Hon. S. Williams, the Hon. D.H. Ginsburg, and the Hon. M. Garland) vacated and remanded the district court's judgment. The panel opinion, not yet reported in the Federal Reporter (3d), is available at 2011 WL 1516148.

The redacted public version of the panel opinion is included in the Addendum above. The full version of the panel opinion remains under seal. Appellees have lodged with the Clerk the required number of sealed copies to accompany this petition under Circuit Rule 35(b) and (c).

Appellees seek en banc review of the following rulings of the panel:

1. The panel's ruling that *United States v. North*, 910 F.2d 843,

862, 872 (D.C. Cir. 1990) ("*North I*") requires district courts to segregate every line of witness testimony into tainted and untainted categories, even where the court has already found that tainted evidence (even concededly tainted evidence) was introduced in the grand jury, Op. 7-9;

2. The panel's imposition of a burden of proof on the *defendants* in a *Kastigar* proceeding, Op. 9-10; and

3. The panel's ruling that *Kastigar* is not implicated where prosecutors decide to indict a defendant based on his compelled statement, and use that compelled statement directly to obtain authorization to seek his indictment, Op. 14-15.

C. Related Cases

After the district court dismissed the indictment without prejudice, it denied defendants Slatten's and Ball's motions to dismiss with prejudice based on prosecutorial misconduct. That opinion was entered by the district court on January 19, 2010 (JA.4664), and is reported at *United States v. Slough*, 679 F. Supp. 2d 55 (D.D.C. 2010).

The *Kastigar* hearing was closed to the public. At the conclusion of the hearing, the district court ordered that the *Kastigar* materials remain under seal pending the government's decision to seek appeal, but also ordered that the materials be unsealed on February 2, 2010, the day after the government's deadline for noticing an appeal. That opinion in D.C. No. 1:10-mc-0005 (JA.4657), which also

ordered release of redacted versions of the parties' pre- and post-hearing memoranda, was issued on January 7, 2010, and is reported at *United States v. Slough*, 677 F. Supp. 2d 296 (D.D.C. 2010). On January 29, 2010, the district court denied the joint motion by the government and defendants to maintain the *Kastigar* materials under seal (JA.4676).

The government's appeal of the above disclosure ruling, *Washington Post et al. v. United States et al.*, is appeal No. 10-3007 in this Court. That appeal was held in abeyance after the parties negotiated a compromise resolution of the disclosure issues presented. On May 20, 2011, this Court restored that appeal to the active docket and ordered the parties to file motions to govern future proceedings by June 20, 2011. No. 10-3007, dkt. entry 1308991.

Counsel is aware of no other related cases.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June 2011, I caused copies of the foregoing petition for rehearing en banc to be served electronically and by U.S. mail, first-class postage prepaid, on the following:

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