No. __-_____

# In the Supreme Court of the United States

JOHN WAYNE SCANTLEBURY, ALSO KNOWN AS FREDERICK DAVIS, ALSO KNOWN AS JOHN WAYNE TROTMAN; AND SEAN GASKIN,

*Petitioners*,

v.

UNITED STATES,

*Respondent*.

***ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT***

## PETITION FOR WRIT OF *CERTIORARI*

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## QUESTIONS PRESENTED

Petitioners fought extradition for a single sealed trafficking charge from 2004-14, the last 31 months in prison with bail revoked. In a co-defendant's 2007-08 pre-trial process in a related case, the United States admitted that separate third parties committed the charged offense, without amending the extradition request. In 2013, a petitioner waived extradition to fight the charges here, prompting a sealed motion to dismiss under FED. R, CRIM. P. 48(a) and a sealed dismissal without prejudice. After release in 2014, petitioners sued federal officers in a tort suit, leading the district court to unseal the related criminal case. Petitioners moved the court to alter the judgment to dismissal *with prejudice* and for lack of personal jurisdiction. The district court denied relief *inter alia* as a collateral attack on the indictment. Petitioners appealed, with reputational harm as Article III injury. The court of appeals assumed appellate jurisdiction (unlike other circuits) but dismissed under Article III partly on a technical argument about relief available from Rule 48(a); the court did not consider petitioners' personal-jurisdiction argument, which was foreclosed by circuit precedent. The question presented are:

(1) Whether criminal appeals from dismissals without prejudice are "final" under 28 U.S.C. §1291.

(2) Whether personal jurisdiction's minimum-contacts analysis applies in criminal cases, as implied by this Court's extending that analysis to taxation in the supervening decision in No. 18-457.

(3) Whether impact on the cross-border tort suit – a type of federal-officer liability being reviewed in No. 17-1678 – or dismissal for lack of personal-jurisdiction (*i.e.*, showing a lack of contact) satisfy Article III.

## PARTIES TO THE PROCEEDING

The caption lists all parties to the appellate proceeding Frederick Christopher Hawkesworth of Barbados participated in the district court until his death; he is succeeded there by his estate to the extent that the United States or its counsel would be liable for monetary sanctions. Terrence Sugrim of Guyana is a named party in the district court but has not filed an appearance.

## RELATED CASES

The following cases relate directly to this case for purposes of this Court's Rule 14.1(b)(iii):

- *U.S. v. Hawkesworth,* No. 1:04-cr-0285-EGS (D.D.C.). Filed May 19, 2004; dismissed without prejudice Jan. 9, 2014; warrants quashed Jan. 13, 2014; unsealed July 1, 2015; motion to amend judgment denied June 21, 2018.
- *Gaskin v. U.S.,* No. 1:15-cv-0023-EGS (D.D.C.). Filed Jan. 8, 2015; stayed by district court on May 25, 2016 pending proceedings in criminal action.
- *Gaskin v. May,* No. 1:15-cv-0033-EGS (D.D.C.). Filed Jan. 9, 2015; stayed by district court on May 25, 2016 pending proceedings in criminal action.
- *Scantlebury v. U.S.,* Nos. 18-3043 & 18-3044 (D.C. Cir.). Filed July 5, 2018; dismissed Apr. 16, 2019; petition for reconsideration filed Apr. 30, 2019 and denied May 21, 2019.
- *Scantlebury v. U.S.,* No. 19A155 (U.S.). Time within which to petition for a writ of *certiorari* extended to Oct. 18, 2019.

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## PETITION FOR WRIT OF *CERTIORARI*

Petitioners John Wayne Scantlebury and Sean Gaskin (collectively, "Petitioners") respectfully ask this Court to issue a writ of *certiorari* to review the dismissal of their appeal by the United States Court of Appeals for the District of Columbia Circuit for lack of jurisdiction under Article III. In the underlying appeal, Petitioners sought review of the district court's memorandum and order denying their motion to amend the judgment from dismissal without prejudice to dismissal with prejudice or, alternatively, to dismiss for lack of personal jurisdiction.

## OPINIONS BELOW

The D.C. Circuit's decision is reported at 921 F.3d 241 and reprinted in the Appendix ("App.") at 1a. The unreported district court decision is reprinted at 17a.

## JURISDICTION

On April 16, 2019, the D.C. Circuit issued an opinion (App. 1a) dismissing Petitioners' appeal. On April 30, 2019, Petitioners timely sought reconsideration, which the panel and *en banc* court denied by orders dated May 21, 2019 (App. 44a-45a). By order dated August 9, 2019, the Chief Justice acting Circuit Justice extended until October 18, 2019, the time within which to petition for a writ of *certiorari*. *Scantlebury v. U.S.,* No. 19A155 (U.S.). The district court had jurisdiction under 18 U.S.C. §3231, and the court of appeals had jurisdiction under 28 U.S.C. §1291. This Court has jurisdiction under 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

The Appendix excerpts the relevant statutes.

## STATEMENT OF THE CASE

On May 19, 2004, the United States (hereinafter, the "Government") filed a criminal complaint against five men – Petitioners and Frederick Christopher Hawkesworth of Barbados and Raphel Douglas and Terrence Sugrim of Guyana – under seal. On June 17, 2004, a federal grand jury for the District of Columbia returned an indictment (App. 50a-57a) based on – and superseding – the criminal complaint. The allegations cover a major drug-smuggling conspiracy at John F. Kennedy International Airport ("JFK") and a two-kilogram cocaine transaction in Barbados: (1) Count I alleges a major cocaine operation into JFK against all five defendants; and (2) Count II alleges a two-kilogram transaction in Barbados against only Douglas and Hawkesworth.

Except for Douglas, the defendants remained abroad throughout the pendency of the proceedings. Douglas was extradited here, and his pre-trial proceedings circa 2007-08 made clear that unrelated third parties were responsible for the JFK operations alleged in Count I, leaving only the alleged two-kilogram sale to a U.S. informant in Barbados against Hawkesworth and Douglas. Indeed, the Government admitted as much in testimony and filings seeking approval for Douglas's plea agreement to an unrelated charge.

In Barbados, the three Bajan defendants fought extradition. They initially jailed, but all were released on bail by early 2005. The United States was represented by counsel in the Barbadian proceedings, as were the three Bajans. In June 2011, the Barbadian courts exercised their discretion to revoke the three men's bail and remanded them to prison pending extradition. The extradition case still was

pending in mid-November 2013, when Gaskin waived objections to extradition to enable him to fight the charges in Washington. More than a month later, on December 24, 2013, the Government moved to dismiss under FED. R. CRIM. P. 48(a), without serving the defendants or their Barbadian counsel. More than two weeks later, the district judge dismissed without prejudice and vacated the arrest warrants in a series of orders between January 9 and 13, 2014. Only after the district judge ordered dismissal did the Government notify Barbadian officials that the United States no longer sought the men's extradition, and they were released from prison.

Because the case was sealed, neither the Bajans nor their counsel were aware of either the substance or the timing of the Government's motion to dismiss until the district court unsealed the record in September of 2015 in connection with the Bajans' civil claims against the United States and various federal officers and agents in *Gaskin v. U.S.*, No. 1:15-cv-0023-EGS (D.D.C.), and *Gaskin v. May*, No. 1:15-cv-0033-EGS (D.D.C.). Because it would help them in a variety of ways that constitute an Article III case or controversy, *see* Section IV, *infra*, Petitioners and Hawkesworth moved to amend the judgment to dismissal *with* prejudice or dismissal for lack of personal jurisdiction. The district judge *sua sponte* stayed the civil cases, presumably pending the resolution of the motion in the underlying criminal case.

The pertinent facts are set out in the numbered paragraphs below (hereafter, "Facts"), with citations to the relevant pages of the exhibits in the joint appendix from the court of appeals ("CAJA").

**Underlying Charges**

1. On September 20, 2003, at JFK, the U.S. Immigration and Customs Enforcement ("ICE") and Drug Enforcement Administration ("DEA") interdicted a 184-kilogram shipment of cocaine sealed in containers of frozen fish, but no arrests were made that day in connection with the interdicted cocaine. Statement in Support of Request for Extradition, 3, *U.S. v. Hawkesworth*, No. 04-cr-0285-EGS (D.D.C.) (Aug. 3, 2005) (CAJA:154) (hereinafter "May Affidavit regarding Douglas"); News Release, U.S. Department of Justice, Massive Narcotics Importation Conspiracy At JFK Airport Exposed – 25 Defendants Charged, Including 21 Airport Employees (Nov. 25, 2003) (CAJA:93-96) (hereinafter, "JFK News Release").

2. An investigation ensued and culminated with the arrest of twenty-five people on November 23, 2003, according to the press release issued by the Department of Justice ("DOJ") on November 25, 2003. JFK News Release (CAJA:93-96).

3. On November 25, 2003, the United States filed a criminal complaint against the twenty-five defendants in the JFK interdiction. *U.S. v. Adams*, No. 1:03-mj-1753-JMA (E.D.N.Y. filed Nov. 25, 2003).

4. Starting in October of 2000, DEA's "Bridgetown Country Office" in Barbados opened an investigation of Hawkesworth for cocaine trafficking. In that effort, DEA used a confidential informant posing as a New York-based drug dealer. Affidavit in Support of Request for Extradition, at 1-3, *U.S. v. Douglas*, No. 04-cr-0285-EGS (D.D.C.) (July 9, 2004) (CAJA:127-29) (hereinafter "Patten Affidavit").

5. On May 19, 2004, in No. 1:04-0285-EGS filed under seal, the United States charged the five

defendants with distribution of cocaine and conspiracy to distribute cocaine in connection not only with the 184-kilogram JFK shipment but also with an alleged two-kilogram sale in Barbados. Affidavit in Support of Request for Extradition, 9, *U.S. v. Hawkesworth*, No. 04-cr-0285-EGS (D.D.C.) (July 19, 2004) (CAJA:148) (hereinafter "May Affidavit regarding Movants").

6. The Bajans were arrested on provisional warrants in May 2004. Hawkesworth Decl. ¶13 (CAJA:102); Gaskin Decl. ¶6 (CAJA:105); Scantlebury Decl. ¶4 (CAJA:108); *In re Extradition of Hawkesworth*, B'dos Magistrates Court, Jurisdiction "A", at 6 (undated) (CAJA:244).

7. On June 17, 2004, a federal grand jury for the District of Columbia returned an indictment based on and superseding the criminal complaint. Indictment, *U.S. v. Hawkesworth*, No. 04-cr-0285-EGS (D.D.C.) (June 17, 2004) (CAJA:32-39; App. 50a-57a) (hereinafter "DC Indictment"). The indictment lists the 184-kilogram JFK interdiction as an overt act of the trafficking conspiracy charged in Count I. *Id.* at 5 (CAJA:36; App. 54a).

8. On July 19, 2004, the United States formally requested the Bajans' extradition in a certified extradition package (CAJA:167) that includes the Patten Affidavit, the May Affidavit regarding Movants, the DC Indictment, and the informant's affidavit dated July 16, 2004 (CAJA:115-26), with his name and signature redacted (hereinafter, "Informant Affidavit").

9. The United States subsequently sought – and received – Douglas's extradition from Trinidad and Tobago in an extradition package dated August 4,

2005 (CAJA:168), which included the May Affidavit regarding Douglas, among other documents. (CAJA:152-66.) Government counsel May based his August 2005 Douglas affidavit on his July 2004 affidavit regarding the Bajans. Hearing Tr., at 19, *U.S. v. Douglas*, No. 1:07-cr-0137-RJD (E.D.N.Y.) (Dec. 17, 2007) (CAJA:199) ("this affidavit with minor changes focusing on Douglas is the affidavit that I prepared for the extradition of Hawkesworth").

10. The extradition packages include the following: (a) the JFK interdiction was an overt act in a conspiracy by the three Bajans, Douglas, and Sugrim; (b) no arrests had been made in connection with the 184-kilogram JFK interdiction; and (c) the informant was "completely reliable" and had a 100% "success rate" in "six successful cases" including the "indictment and conviction of several major drug traffickers." DC Indictment, 5 (CAJA:36; App. 54a); May Affidavit regarding Douglas ¶26 (CAJA:160); May Affidavit regarding Movants ¶¶20(a), (g)-(h), 21 (CAJA:149-50); Patten Affidavit ¶¶8, 11 (CAJA:129-30); Informant Affidavit ¶14 (CAJA:119).

**Douglas Pre-Trial Proceedings in D.D.C.**

11. While the Bajans fought extradition in Barbados and Sugrim remained at large, Douglas was extradited here, and the Government's case for Count I cratered during his pre-trial proceedings, as did the informant's credibility, because Douglas's counsel identified several misstatements: (a) the arrest of 25 unrelated people for the JFK interdiction, (b) the lack of the claimed recorded telephone conversations, (c) contrary to prior statements, the informant was serving as an informant to avoid prosecution and had never previously testified, (d) the informant was the

right-hand man of narcotics kingpin Charles Miller; (e) the informant dealt drugs while he was a DEA informant; (f) the informant had been convicted of robbery and involved in not only weapons charges but also homicides and fraud. Hearing Tr., at 3-5, 12-15, *U.S. v. Douglas*, No. 04-cr-0285-02-EGS (D.D.C.) (Feb. 12, 2007) (CAJA:179-81, 182-85).

12. Although the case remained sealed as to the other defendants, the district court issued an Order (ECF #38) granting Douglas's motion to unseal the case as to him.

13. After the Government's concessions about the non-viability of the 184-kilogram JFK charges, the district court indicated that "I'm sitting here wondering what the heck does that DC jury care about this case. Two kilos being transferred in Barbados and what , a conspiracy to export some empty duffel bags into the JFK Airport. That's what this case is about now because the government has abandoned the lion's share of this case, you know [the 184] kilos … seized from the airport . That' s not part and parcel of this case anymore." Hearing Tr., at 14, *U.S. v. Douglas*, No. 04-cr-0285-02-EGS (D.D.C.) (Feb. 13, 2007) (CAJA:186).

14. Regarding the Government's extradition counsel, the district court ordered that: "I want to hear from him under oath why he made those misstatements and then we will deal with the appropriate sanction. … And I suggest he bring his attorney." *Id.* at 15 (CAJA:187).

15. On February 20, 2007, the Government moved (ECF #62) to dismiss its D.C. case against Douglas only, which the district court granted by Order dated February 22, 2007 (ECF #64).

**Douglas Pre-Trial Proceedings in E.D.N.Y.**

16. On February 20, 2007, the United States filed an indictment against Hawkesworth, Sugrim, and Douglas (*i.e.*, all defendants except Petitioners) in the Eastern District of New York, *U.S. v. Douglas*, No. 1:07-cr-0137-RJD (E.D.N.Y. Feb. 20, 2007) (CAJA:188-95), which relates to the D.C. indictment as follows: (a) charges all defendant with significant trafficking charges in Counts I, III, and IV; (b) charges Hawkesworth and Douglas with a two-kilogram transaction in Barbados in Count II; and (c) charges only Douglas with telephone-related charges in Counts V and VII. *Id.*

17. In his testimony on December 17, 2007, Agent Patten – and thus the United States' DOJ counsel – was directly aware that "the extradition of Hawkesworth and his co-defendants" was "still going through legal process in Barbados." Hearing Tr., at 131, *U.S. v. Douglas*, No. 1:07-cr-0137-RJD (E.D.N.Y.) (Dec. 17, 2007) (CAJA:231). Government counsel May attributed their no-arrest mistake at JFK as resulting from having relied in 2004-05 on outdated DEA paperwork prepared in September-November 2003 (*i.e.*, before the JFK arrests). *Id.* at 74-80 (CAJA:205-11).

18. Agent Patten acknowledged that the United States had fully resolved the 184-kilogram JFK interdiction: "I did find out that they made a … mass arrest. It was an ongoing investigation, building the case. And eventually they arrested everyone that was involved in that." *Id.* at 125 (CAJA:230). Government counsel May indicated that, although federal authorities in the JFK matter had extensive wiretaps from the co-conspirators, May and Agent Patten did not have access to the evidence that implicates those

third parties – and not Douglas – in JFK matter. *Id.* at 22-24, 79 (CAJA:202-04, 210).

19. The two-kilogram transaction in the New York proceedings refers to the alleged transaction in Barbados between the informant, Hawkesworth, and Douglas: "Eventually, in March 2004, Douglas and Hawkesworth sold the [informant] two kilograms of cocaine which the defendants knew were to be transported to New York." Gov't's Resp. to Venue Mot. at 2-3, *U.S. v. Douglas*, No. 1:07-cr-0137-RJD (E.D.N.Y.) (Sept. 10, 2007) (CAJA:197-98).

20. The United States acknowledged that DEA paid the informant $250,000 for his services. Gov't's Br.in Regards to Plea and Sentencing, at 3, *U.S. v. Douglas*, No. 1:07-cr-0137-RJD (E.D.N.Y.) (Apr. 1, 2008) (CAJA:234) (hereinafter, "U.S. Plea Defense"), and did not dispute the litany of misdeeds on the informant's part that Douglas's DC counsel identified, *see* Facts, ¶11, or that that information about the informant could be obtained in the prosecution records from the United States' case against Charles Miller. Hearing Tr., at 102-19, *U.S. v. Douglas*, No. 1:07-cr-0137-RJD (E.D.N.Y.) (Dec. 17, 2007) (CAJA:212-29).

21. Douglas pleaded guilty to one of the telephony-related charges against him, and the Government dismissed the remaining charges against him. As part of the process of seeking court approval, the Government acknowledged the narrow range of the issues in question: "The case boils down to the testimony of an informant, who can be skillfully impeached by the defense. At bottom, the case involves only two kilograms of cocaine. And though there were some hazy conversations between the [informant] and Hawkesworth about other deals, in

the final analysis the case is about two kilograms of cocaine." U.S. Plea Defense, at 5 (CAJA:236).

22. With Douglas's pleading guilty to a telephone count only against him and the dismissal of the other charges against him, the New York indictment remained open against Hawkesworth and Sugrim. *See* Facts, ¶39.

**Barbados Extradition Proceedings**

23. The United States and Barbados have entered an extradition treaty entitled "Extradition Treaty Between the Government of the United States of America & the Government of Barbados," 1996 U.S.T. LEXIS 143 (Feb. 28, 1996) (hereinafter, "Extradition Treaty") (CAJA:250-73).

24. The Bajans were initially released on bail while they challenged their extradition: Hawkesworth Decl. ¶13 (CAJA:102) (bailed in September 2004); Gaskin Decl. ¶6 (CAJA:105) (bailed in February 2005); Scantlebury Decl. ¶4 (CAJA:108) (bailed in July 2004).

25. The Bajans challenged extradition on a variety of legal theories, but a magistrate judge denied their challenges. *In re Extradition of Hawkesworth*, B'dos Magistrates Court, Jurisdiction "A" (undated) (CAJA:239-46).

26. The United States engaged outside local counsel to represent it in the Barbadian proceedings, *id.* at 5, 8 (CAJA:243, 246); Hawkesworth Decl. ¶¶14-15 (CAJA:102), making the United States aware of the developments therein. *In re Namusyule*, 300 B.R. 100, 103 (Bankr. D.D.C. 2003) ("if notice was properly served upon [counsel] it may fairly be imputed to [the client]") (interior quotations omitted); *Scorteanu v. INS*, 339 F.3d 407, 412 (6th Cir. 2003) (service on

counsel constitutes notification of client); *Brooks v. U.S.*, 396 A.2d 200, 203 n.7 (D.C. 1978) (*dicta*) ("normal rules of agency would have us impute the knowledge of one prosecutor to another prosecutor").

27. The Bajans' challenge to their extradition continued, although their bail was revoked on June 9, 2011, and they were remanded to custody (*i.e.*, imprisoned) pending extradition. Hawkesworth Decl. ¶15 (CAJA:102); Gaskin Decl. ¶7 (CAJA:105); Scantlebury Decl. ¶6 (CAJA:108).

28. Barbados' supreme court denied the Bajans' *habeas corpus* application to regain their release on bail pending extradition as an exercise of that court's discretion, although the court rejected the government's position that the Extradition Act precluded post-committal bail (*i.e.*, under *The Queen v Spilsbury* [1898] 2 QB 615, 624), bail was within the court's discretionary power, but the court denied that remedy under the circumstances of the case). *Hawkesworth v. Superintendent of Prisons*, [unreported] H.C B'dos Civil Suits Nos. 11-1043, 11-1045, 11-1062, 12-2248; Bail Appl. Nos. 11-123, 11-124, slip op. at 36-37 (Dec. 27, 2012) (CAJA:248-49).

29. The U.S.-Barbados extradition treaty authorizes the "Department of Justice of the United States and the Attorney General of Barbados [to] consult with each other directly in connection with the processing of individual cases[.]" Extradition Treaty, art. 18 (CAJA:270).

30. Notwithstanding Article 18's direct-consultation provision, neither the United States' trial counsel nor its extradition counsel consulted with Barbadian authorities about changed developments in this case or the related New York case until after

the district court, by Order dated January 9, 2014, granted the Government's motion to dismiss dated December 24, 2013. Hawkesworth Decl. ¶¶15-16 (CAJA:102); Gaskin Decl. ¶¶10-11 (CAJA:105); Scantlebury Decl. ¶7 (CAJA:108).

31. On or about November 15, 2013, Gaskin waived opposition to extradition to allow him to come to Washington to face the charges against him. Gaskin Decl. ¶¶8-9 (CAJA:105).

**Government's Motion to Dismiss**

32. On December 24, 2013, the United States moved to dismiss the indictment in No. 04-0285-EGS, purportedly "in good faith, and based upon, among other factors, the age of the case, government resources, and other factual and legal issues which indicate the case is no longer viable." Government's Sealed Motion to Dismiss Indictment, at 1 (ECF #78).

33. The United States' sealed motion did not disclose that one of the defendants had waived extradition or that three of the defendants were currently incarcerated awaiting extradition. *Id.*

34. The Certificate of Service on the motion to dismiss states as follows:

> I hereby certify that on the 24th day of December 2013, I filed the foregoing GOVERNMENT'S MOTION TO DISMISS with the Clerk of the Court via CM/ECF. Three of the defendants are in Barbados, and one defendant (Sugrim) is believed to be a fugitive in Guyana, and to the government's knowledge, United States counsel has not been identified, retained, or appointed as counsel for service of process purposes.

*Id.* at 3.

35. The district court granted the United States' motion, and the sealed Order was entered on the docket on January 9, 2014. Order Dismissing Indictment without Prejudice (ECF #79).

36. In a series of sealed orders filed January 13, 2014 (ECF #80-#86), the district court – through a Magistrate Judge – quashed the outstanding warrants for the three Bajans and Sugrim.

37. The United States notified Barbadian authorities that the United States no longer sought the extradition of the three Bajans, and they were released from prison on January 9, 2014, without receiving any explanation in writing. Hawkesworth Decl. ¶¶15-16 (CAJA:102); Gaskin Decl. ¶¶10-11 (CAJA:105); Scantlebury Decl. ¶7 (CAJA:108).

38. As a party to the Barbadian extradition and *habeas corpus* proceedings, *In re Extradition of Hawkesworth*, B'dos Magistrates Court, Jurisdiction "A", at 5, 8 (undated) (CAJA:243, 246); Hawkesworth Decl. ¶14 (CAJA:102), the United States knew that the Bajans had been incarcerated pending extradition since June of 2011. Hawkesworth Decl. ¶15 (CAJA:102).

39. Much later, on May 11, 2015, without attempting to serve the defendants, the Government moved to dismiss the New York proceedings against Hawkesworth and Sugrim without prejudice which the district court granted on May 12, 2015. Order Dismissing Indictment without Prejudice, *U.S. v. Douglas*, No. 1:07-cr-0137-RJD (E.D.N.Y.) (May 12, 2015).

**Dismissed Indictment's Ongoing Effects**

40. Petitioners suffer ongoing reputational injury from the indictment. Gaskin Decl. ¶¶12-13

(CAJA:106); Scantlebury Decl. ¶¶9-10 (CAJA:108-09).

41. With respect to Gaskin, striking the arrest would prevent U.S. immigration officials from using the fact of the arrest against him in their discretionary processing of his planned application to apply to return to the United States on either a tourist or permanent basis to visit or reunite with family. Gaskin Decl. ¶¶12-13 (CAJA:106).

**Lower Courts' Decisions**

42. Petitioners filed their motion on February 2, 2016 (ECF #106), and briefing ended on March 28, 2016 (ECF #111).

43. By Minute Order dated January 29, 2018, the district court denied the motion without a hearing, based on an argument raised by the district judge in his order, with no opportunity to respond; Petitioners moved to reconsider based on contrary controlling precedent from this Court, and he vacated the denial by Minute Order dated February 12, 2018.

44. On June 21, 2018, the district court again denied the motion without hearing (ECF #133), and Petitioners timely appealed on July 5, 2018 (ECF #134).

45. In denying the motion the second time, the district judge relied on three arguments that the Government did not make, without providing an opportunity to respond: (1) reliance on hearsay in Agent Patten's declaration based on the unreliable informant, App. 35a; Facts, ¶21; (2) the dubious holding that the sovereign nation of Barbados – which had released Petitioners on bail for more than six years and revoked that bail under *the Barbadian court's discretion*, Facts, ¶¶24, 27-28 – could not release Petitioners until a U.S. district judge

dismissed U.S. charges, App. 38a; and (3) invoking *Kaley v. U.S.*, 571 U.S. 320, 328-31 (2014), for the proposition that Petitioners' requested relief somehow impermissibly sought to undermine the grand jury's indictment, App. 34a-35a.

46. The court of appeals found that the running of the statute of limitations had mooted some of Petitioners' requested relief, App. 13a, and that Rule 48(a) could not redress the reputational harms that Petitioners assert. App. 11a. In addition, the court distinguished *Camreta v. Greene*, 563 U.S. 692, 702 (2011), on the grounds that the appellants there had a "necessary personal stake" in a lower-court outcome that would compel a change in future conduct, but that "[Petitioners] have not argued that they have been affected similarly in this case, nor do they have any basis upon which to do so." App. 11a.

## REASONS TO GRANT THE WRIT

The petition not only raises important issues of federal jurisdiction and due process but also provides an ideal vehicle for this Court to resolve those issues. This Court should grant the writ of *certiorari* for four distinct reasons.

- Appellate review of legal error is a basic tenet of due process, and Petitioners' requested relief does not invade "inviolable grand jury finding[s]," *Kaley*, 571 U.S. at 328-31, any more than any other pre-trial motion to dismiss that the federal rules allow. *See* Sections I, *infra.*
- The distinguishable weight of circuit authority is that dismissals without prejudice are not "final" under 28 U.S.C. §1291, but *the decision here* is final and, moreover, the withholding of sanctions falls under the collateral order doctrine;

alternatively, if the extra-circuit authority applies here, the court of appeals should have dismissed on that basis, without reaching the constitutional issues it reached. *See* Sections II, *infra.*

- The D.C. Circuit's ignoring personal jurisdiction is inconstant with the decisions of other appellate courts and this Court. In particular, the approach is inconsistent with the supervening decision in *North Carolina Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Tr.*, 139 S.Ct. 2213 (2019), which applied civil litigation's minimum-contacts analysis to taxation. In so doing, *North Carolina* makes clear that the minimum-contacts analysis applies to exercises of government power – by a civil or criminal court or a taxing authority – and not to anything unique to civil litigation or litigants. *See* Section III, *infra.*
- Dismissing for lack of personal jurisdiction would acknowledge Petitioners' innocence sufficiently to redress their reputational harms for Article III purposes, and – partly depending on the outcome in *Hernandez v. Mesa*, 139 S.Ct. 2636 (2019) ("*Mesa II*") – Petitioners' interests in their tort claims make Petitioners "aggrieved" by the lower courts' decisions under *Camreta*, 563 U.S. at 702. Petitioners thus have standing to appeal, even if they "prevailed" in the sense that the district court judgment dismissed the charges. *See* Section IV, *infra.*

These important reasons warrant this Court's review. Moreover, the first argument coalesces with the third and fourth: if the panel could consider the personal-jurisdiction issue barred by Circuit precedent, that would have provided not only an alternate basis for

dismissal but also redress that Rule 48(a) could not provide. *Compare* App. 15a *with* Section IV.A, *infra*.

Alternatively, if the running of the statute of limitations mooted the appeal, *compare* App. 13a with Section IV.C, *infra* (disputing mootness), the proper course would be to vacate the district court's opinion.

## I. DUE PROCESS PROVIDES SCANTLEBURY AND GASKIN AN OPPORTUNITY TO CLEAR THEIR NAMES.

Before Petitioners address appellate jurisdiction to review the district court's action, *see* Section II, *infra*, Petitioners first establish a jurisdictional basis for the district court to amend its prior judgment. The motion to amend was within the district court's power to grant under three alternate procedures:

- A federal court has the inherent power to modify its judgments, decrees and orders, unless that power is otherwise modified by rule or statute. *U.S. v. Benz*, 282 U.S. 304, 306-07 (1931).[1] While various rules set the times for amending sentences or findings and verdicts *of guilt*, FED. R. CRIM. P. 33, 34, 35, no rule limits amending dismissals without prejudice to dismissals with prejudice.
- A district court could grant the requested relief to sanction the Government's conduct. Although the extradition proceedings in Barbados were civil, not criminal, *U.S. v. Cooper*, 85 F.Supp.2d 1, 21

[1] *Benz* limited that inherent power to actions taken with the same court term, but the lower federal courts have eliminated terms. 28 U.S.C. §138 ("district court shall not hold formal term"); *see also* FED. R. CRIM. P. 45 Advisory Committee Notes to Initial Rule and 1966 Amendments; *U.S. v. Ellenbogen*, 390 F.2d 537, 540-41 (2d Cir. 1968).

(D.D.C. 2000) (*citing DeSilva v. DiLeonardi*, 181 F.3d 865, 868 (7th Cir. 1999); *Judd v. Vose*, 813 F.2d 494, 497 (1st Cir. 1987); *McDonald v. Burrows*, 731 F.2d 294, 297 (5th Cir. 1984)); *accord Jhirad v. Ferrandina*, 536 F.2d 478, 485 n.9 (2d Cir. 1976); *Martin v. Warden*, 993 F.2d 824, 829 (11th Cir. 1993), the United States' conduct here resembles a *Brady* violation (*i.e.*, a willful or inadvertent failure to make the required disclosure of favorable exculpatory evidence to a criminal defendant's prejudice).[2] *U.S. v. Pasha*, 797 F.3d 1122, 1133 (D.C. Cir. 2015) (*discussing Brady v. Maryland*, 373 U.S. 83 (1963)). The power to sanction supplements the inherent power to amend decrees, judgments, and orders under *Benz* and is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (interior quotations omitted). The Government's failure to correct the false information conveyed to Barbados in the 2004 extradition request – whether culpable or not in 2004 – became culpable after the Douglas case cratered circa 2007-08. At that point, analogous to the *Brady* duty to disclose, the Government had a duty under both U.S. and Barbadian law to correct the false information previously submitted through the State Department to Barbados. 18 U.S.C.

[2] "[W]hen the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld." *Illinois v. Fisher*, 540 U.S. 544, 547 (2004).

§1001(a); *Briess v Woolley*, [1954] AC 333 (H.L.) 349 ("[i]t was his duty, having made false representations, to correct them before the other party acted on them …, but he continued to conceal the true facts"); *Clerk & Lindsell on Torts* §18-10 (Michael A. Jones *et al.* eds., 21st ed. 2014) (one "who has made a true statement is bound to correct it if, though true when made, it is later to his knowledge falsified by events"). The Government's failure to meet that duty could justify the sanction of dismissal with prejudice.

- Rule 48(a) – the rule under which the Government moved to dismiss – contemplates independent judicial review of a prosecutor's decision to dismiss an indictment voluntarily. FED. R. CRIM. P. 48(a). Although prosecutors historically had "unrestricted authority to enter a *nolle prosequi* at any time before the empaneling of the jury," *U.S. v. Poindexter*, 719 F.Supp. 6, 10 (D.D.C. 1989), Rule 48(a) "seem[s] clearly directed toward an independent judicial assessment of the public interest in dismissing the indictment," *Rinaldi v. U.S.*, 434 U.S. 22, 34 (1977), where "the trial court [cannot] serve merely as a rubber stamp for the prosecutor's decision." *U.S. v. Ammidown*, 497 F.2d 615, 622 (D.C. Cir. 1974). Although the rule primarily "protect[s] criminal defendant[s] from prosecutorial harassment," it also "allow[s] courts to consider public interest, fair administration of criminal justice and preservation of judicial integrity when evaluating motions to dismiss." *U.S. v. Strayer*, 846 F.2d 1262, 1265 (10th Cir. 1988). The Government's surreptitious dismissal (*i.e.*, without disclosing Gaskin's waiving extradition and Petitioners' incarceration, without

notifying Petitioners' counsel) provides ample basis for this Court to find bad faith.[3] *Rinaldi*, 434 U.S. at 30.

The district court found that it could reconsider dismissal under Rule 48 *de novo*. App. 40a. Given that the Government never served the previously sealed documents, the district court had good cause to allow Petitioners to oppose the Rule 48(a) motion and to cross-move for alternate pre-trial relief (*e.g.*, dismissal for lack of personal jurisdiction). *See* FED. R. CRIM. P. 12(c)(3); CAJA:43. Significantly, the district court's allowance of *de novo* review under Rule 48(a) does not foreclose Petitioners' other bases for review.

Against that backdrop, the lower courts' invoking *Kaley* as precluding Petitioners' requested relief, *see* App. 34a-35a (district court), 15a (court of appeals) is misplaced. Rule 48(a) allows evidentiary submissions and goes to consideration of a wide variety of factors to decide the proper form of dismissal. Sanction motions also allow evidentiary submissions, as does the alternate relief of dismissal for lack of personal jurisdiction. *See* FED. R. CRIM. P. 12(b)(1) ("Rule 47 applies to a pretrial motion"), 47(d) ("moving party must serve any supporting affidavit with the motion"). These bases for relief do not challenge the underlying indictment: they challenge continuation of the case after governmental misconduct, admissions against

[3] To file a sealed motion on December 24 without flagging to the court or the defendants' counsel that the Government was dropping the charges against provisionally incarcerated men cruelly invited exactly what happened: a wholly unnecessary 16-day delay in their release, coming after more than 30 months of unnecessary incarceration.

interest, and a permissible dispute about how to end the case considering that misconduct and admissions.

Indeed, Petitioners' evidence consisted primarily of the Government's own admissions against interest:

- Wholly unrelated third parties were convicted for the JFK interdiction, Facts, ¶18 ("they arrested *everyone* that was involved in that") (emphasis added);
- The Government's informant is unreliable, Facts, ¶21 ("case boils down to the testimony of an informant, who can be skillfully impeached by the defense").
- The case is only about Count II (*i.e.*, the two-kilogram sale in Barbados alleged only against Douglas and Hawkesworth), Facts, ¶21 ("the case involves only two kilograms of cocaine" and "though there were some hazy conversations between the [informant] and Hawkesworth about other deals, in the final analysis the case is about two kilograms of cocaine").

Admissions against interest are evidence in criminal cases. *U.S. v. Buttorff*, 572 F.2d 619, 626 (8th Cir. 1978); *Opper v. U.S.*, 348 U.S. 84, 90 (1954); *Lutwak v. U.S.*, 344 U.S. 604, 617-18 (1953) ("admissions … are admissible … under a standard exception to the hearsay rule applicable to the statements of a party"). Moreover, given that Count I's alleged crime requires transactions of five or more kilograms, 21 U.S.C. §§960(b)(1)(B), 963; CAJA:170a-174a, admitting that "the case is about two kilograms of cocaine," Facts, ¶21, undermines any basis for Count I. Insofar as Count I is the only count charged against Petitioners, it remains unclear why the Government believes that it had continued probable cause to pursue Petitioners

after the Douglas proceedings in 2007-08. To say that Petitioners cannot challenge the Government's conduct is simply wrong.

## II. THIS ACTION IS FINAL UNDER §1291.

As a threshold matter, appellate courts must determine not only their jurisdiction, but also the jurisdiction of the lower courts. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998); *In re Sealed Case*, 131 F.3d 208, 210 (D.C. Cir. 1997) ("court [must] examine its own subject-matter jurisdiction in criminal cases as well as civil cases"). The appellate-jurisdiction question is whether Petitioners appealed a "final" judgment under 28 U.S.C. §1291. The D.C. Circuit has not determined whether dismissals of criminal indictments without prejudice are "final" under §1291, *U.S. v. Glover*, 377 F.App'x 20, 21 (D.C. Cir. 2010), and the panel avoided the issue. App. 8a. Before reaching constitutional issues, the court of appeals should have decided finality for purposes of appeal.

### A. The district court's refusal to amend the judgment of dismissal without prejudice is a final order under §1291.

Whether with or without prejudice, a judgment of dismissal is literally final in the sense that it "ends the litigation," *Hall v. Hall*, 138 S.Ct. 1118, 1123-24 (2018) (internal quotations omitted).[4] As indicated in *Parr*, however, appellate jurisdiction is also premised in part on Article III's requirement for a case or

[4] Unlike in *Parr v. U.S.*, 351 U.S. 513 (1956), there is no second indictment in another venue that will provide a *more-final* judgment. *Cf. Klopfer v. North Carolina*, 386 U.S. 213, 214-16 (1967) (*nolle prosequi* that tolls statute of limitations is appealable final order).

controversy: "Only one injured by the judgment sought to be reviewed can appeal." *Parr*, 351 U.S. at 516; *Lewis v. U.S.*, 216 U.S. 611, 612 (1910) ("when discharged from custody he is not legally aggrieved and therefore cannot appeal"). In the interval since *Lewis* came down in 1910, this Court has expanded what constitutes an Article III injury, *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 73-74 (1978) (aesthetic injuries), so a century later "an appeal brought by a prevailing party may satisfy Article III's case-or-controversy requirement." *Camreta*, 563 U.S. at 702. In any event, Petitioners have identified injury from the district court's rulings (*i.e.*, from not only the original dismissal without prejudice, but also the decision denying the motion to amend the judgment) for an appeal to proceed under Article III. *See* Section IV, *infra*. That satisfies §1291.

In the D.C. Circuit, the Government cited a raft of extra-circuit decisions holding that dismissal without prejudice is not final, but those cases virtually all concerned speedy-trial issues, which are inapposite. Dismissal without prejudice of speedy-trial claims is not a collateral order for a first indictment, but could support a motion to dismiss any second indictment "on the grounds that his first indictment should have been dismissed with prejudice under the Speedy Trial Act, and consequently [defendant] should not have been re-indicted." *U.S. v. Stephens*, 511 F.3d 492, 493 (5th Cir. 2007). The one circuit criminal decision that the Government cited outside the speedy-trial context, *U.S. v. Under Seal*, 853 F.3d 706, 718 (4th Cir. 2017), involved dismissal of a sealed juvenile matter, which by definition and design could not injure the unknown juvenile's reputation. Moreover, appellate courts can hear even interlocutory appeals in criminal cases

when the right that the defendant asserts is threatened. *See*, *e.g.*, *Stack v. Boyle*, 342 U.S. 1, 6-7 (1951) (reduced bail); *Abney v. U.S.*, 431 U.S. 651, 662 (1977) (double jeopardy). Far from merely deferring appellate review, the Government's proposed rule would insulate erroneous legal decisions – and Government misconduct – from review and leave Article III injuries without redress.

### B. This Court can review the district court's refusal to sanction prosecutorial misconduct under the collateral-order doctrine.

Even if this Court lacked appellate jurisdiction under §1291 for the refusal to amend the judgment of dismissal under the federal rules and the district court's inherent authority, this Court would still have appellate jurisdiction under the collateral-order doctrine to review the district court's refusal to sanction prosecutorial misconduct. The collateral-order doctrine supplements §1291's jurisdiction under the three conditions that "an order [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 546 U.S. 345, 349 (2006) (internal quotations omitted). The collateral-order doctrine thus expands the scope of direct review under §1291:

> We have repeatedly held that [§1291] entitles a party to appeal not only from a district court decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment, but also from a narrow class of decisions that do not terminate the

> litigation, but must, in the interest of achieving a healthy legal system nonetheless be treated as "final."

*Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 867 (1994) (citations and internal quotations omitted). Petitioners meet all three conditions of the collateral-order doctrine.

First, the district court held both that the prosecution's conduct was proper and, in any event, need not be reviewed. App. 35a-40a. Second, the merits of the action – namely, whether the defendants committed the crime or whether probable cause existed in 2004 or 2011 – is entirely separate from whether prosecutorial misconduct occurred. *See*, *e.g.*, *Coreas v. U.S.*, 585 A.2d 1376, 1379 (D.C. 1991) ("reversal was based on prosecutorial misconduct, and was unrelated to Coreas' guilt or innocence"). Insofar as courts routinely inquire into the relationship between misconduct and the guilt-innocence issue, the two plainly are different things. *Miller v. U.S.*, 444 A.2d 13, 15 (D.C. 1982). Third, no subsequent appellate opportunities will exist to review the denial of sanctions for prosecutorial misconduct. Accordingly, the sanction question would fall within appellate jurisdiction under the collateral-order doctrine, even if a direct appeal under §1291 did not.

### C. Alternatively, if the district court's action does not trigger §1291, the appeal should be dismissed on that statutory basis, rather than on constitutional grounds.

The personal-jurisdiction and standing issues here raise serious questions, *see* Sections III-IV, *infra*, so the court of appeals should have resolved the easier

statutory question before rendering a constitutional decision: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality … unless such adjudication is unavoidable." *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). Petitioners argue for finality but would understand and accept a decision that dismissed for lack of finality.

## III. THE UNITED STATES LACK PERSONAL JURISDICTION OVER SCANTLEBURY AND GASKIN.

The case can – and should – be dismissed for lack of personal jurisdiction instead of subject-matter jurisdiction. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999). Unlike the panel's technical views of redress under Rule 48(a), App. 15a, it would redress Petitioners' reputational harms if this Court dismissed for lack of personal jurisdiction based on the lack of minimum contacts (*i.e.*, because Petitioners simply did not do what the indictment alleged, as the Government has *admitted*). While Circuit precedent prevented the panel from considering this approach, that precedent neither bars this Court nor withstands the supervening *North Carolina* decision.

Although recognizing that Circuit precedent does not recognize personal jurisdiction in for criminal cases, *U.S. v. Ali*, 718 F.3d 929, 943 (D.C. Cir. 2013), Petitioners filed limited appearances *inter alia* to contest personal jurisdiction, *see* Limited Appearance for Three Bajan Defendants, at 1 (ECF #100-102), and have preserved the personal-jurisdiction argument in both lower courts. App. 40a. Petitioners respectfully submit that the personal-jurisdiction issues here are

important because of the international extradition context and this District's role as the default venue for crimes allegedly committed abroad by non-U.S. residents. 18 U.S.C. §3238. Crimes by extraditable non-residents abroad thus constitute a special class of cases where personal jurisdiction is a critical issue.

By contrast, in standard criminal cases, personal jurisdiction does not play a role because jurisdiction is premised on having the defendant before a court, even if the government brings the defendant there by force. *U.S. v. Alvarez-Machain*, 504 U.S. 655, 660-62 (1992). Similarly, with successful extradition, personal jurisdiction usually plays no role: "the requesting state would not have had in personam jurisdiction over the relator if not for the requested state's surrender of that person." M. Cherif Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 515 (4th ed. 2002); *cf. Ali*, 718 F.3d at 932 ("Ali eventually made his way to the United States, where he was arrested"). Less frequently, for parties like Petitioners who are neither brought here, found here, nor extradited here, this Court and other circuits have recognized that personal jurisdiction can be an issue in criminal cases.

Under the circumstances here, Petitioners had the right to seek dismissal of the admittedly baseless charges against them for lack of personal jurisdiction (*i.e.*, Petitioners had no contact with the forum). The lower courts' failure to consider that available relief is both reviewable and reversable error.

### A. The D.C. Circuit's rejection of personal-jurisdiction issues conflicts with other circuits' and this Court's decisions.

The circuits are split – and perhaps confused – on the application of personal jurisdiction to criminal matters: "While the federal constitutional requirements of personal jurisdiction in a civil setting are reasonably well-defined, this is not so in a criminal case." *Boyd v. Meachum*, 77 F.3d 60, 66 (2d Cir. 1996); *U.S. v. Perez*, 752 F.3d 398, 407 (4th Cir. 2014) ("[p]ersonal jurisdiction in a criminal case is still based on physical presence, which is usually acquired by taking the defendant into custody via arrest"). But several circuits recognize that personal jurisdiction is a viable defense in extradition cases. *See U.S. v. Grote*, 632 F.2d 387, 388 (5th Cir. 1980); *U.S. v. Levy*, 947 F.2d 1032, 1034 (2d Cir. 1991); *U.S. v. Anderson*, 472 F.3d 662, 668 (9th Cir. 2006); *U.S. v. Marquez*, 594 F.3d 855, 858 (11th Cir. 2010) ("extradition process … is the means by which a requesting country obtains personal jurisdiction over the defendant"); *see also U.S. v. Rauscher*, 119 U.S. 407, 409-10 (1886) (discussing personal jurisdiction in the extradition context). Thus, the weight of circuit authority and this Court's own cases suggest that personal jurisdiction is a viable defense to criminal charges.

Unlike in *Ali* (where the defendant made his own way to the United States), 718 F.3d at 932, this action presents the situation where Petitioners were not in the United States but wish to attack personal jurisdiction by motion, based on the Government's own post-indictment admissions against interest. Appellate courts review personal jurisdiction *de novo*, *Anderson*, 472 F.3d at 666 (collecting cases), and the Government offered no evidence in opposition.

### B. The D.C. Circuit's rejection of personal-jurisdiction issues conflicts with this Court's supervening *North Carolina* decision.

In *Ali*, the D.C. Circuit rejected the defendant's "panoply of cases concerning personal jurisdiction in the context of civil suits," 718 F.3d at 943, including the familiar *International Shoe* minimum-contacts analysis. *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) ("due process requires … that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice") (interior quotations omitted). Although the Due Process Clause itself does not provide different criteria for civil and criminal cases, *see* U.S. CONST. amend. V, this Court's supervening *North Carolina* decision on taxation makes the D.C Circuit's position even less tenable. *North Carolina*, 139 S.Ct. at 2220-23 (applying minimum-contacts analysis to government's authority to tax).

*North Carolina* makes clear that the minimum-contacts analysis under the Due Process Clause relates to and checks *governmental power* to assert authority over non-residents, not anything unique to civil litigants themselves. In civil litigation, that means the court's authority over defendants; in taxation, it means taxing entities' authority over income or assets. By analogy, in criminal litigation, it means the court's authority over defendants, just like in civil litigation.

### C. Under a minimum-contacts analysis, the United States lacks personal jurisdiction over Petitioners.

Given that minimum-contacts analysis applies for personal jurisdiction, Petitioners now show that those contacts are lacking for three reasons.

First, "[t]he burden of proving jurisdiction is on the party asserting it." *Robinson v. Overseas Mil. Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994); *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990). The Government has admitted against interest that "eventually [the Government] arrested *everyone* that was involved in [the JFK interdiction]," Facts, ¶18, and that "The case boils down to the testimony of an informant, who can be skillfully impeached" and "involves only two kilograms of cocaine" (*i.e.*, Count II against only Hawkesworth and Douglas). Facts, ¶21. In other words, the Government has admitted that Petitioners were not involved in Count I and that the informant was unreliable.

Second, in defending against Petitioners' motion in district court, the Government argued only that "the Government contends that there was some evidence linking Douglas and Hawkesworth to the seized JFK shipment." Opp'n 6 n.1 (ECF #109). Other than that footnote regarding Hawkesworth and Douglas, the Government offered no basis to doubt its admission that this case involves only Count II's two-kilogram sale and nothing about Scantlebury and Gaskin. Although failure to address Petitioners should have waived the issue of their involvement, *FDIC v. Bender,* 127 F.3d 58, 67-68 (D.C. Cir. 1997); *Stephenson v. Cox,* 223 F.Supp.2d 119, 121 (D.D.C. 2002), the district court took another tack: citing the hearsay in a *2004* DEA affidavit about Scantlebury's

involvement with the JFK shipment. CAJA:359. While hearsay can support probable cause, the witness's credibility is an issue, *compare Draper v. U.S.*, 358 U.S. 307, 312 n.4 (1959) *with Coleman v. Burnett*, 477 F.2d 1187, 1206 (D.C. Cir. 1973), and the informant lost credibility circa 2007-08, *see* Facts, ¶21 ("an informant, who can be skillfully impeached"), as the Government admitted. Moreover, Rules 12 and 47 allow motions based on evidence, which necessarily goes beyond the indictment. FED. R. CRIM. P. 12(b)(1), 47(b), (d). That leaves only the alleged two-kilogram Hawkesworth-Douglas transaction with an informant in Barbados (*i.e.*, Count II) and hazy conversations. Facts, ¶21. With respect to Count I, there are *no contacts whatsoever*, much less the minimum contacts with the forum state that personal jurisdiction requires.

Third, Petitioners respectfully submit that the allegations here must be "viewed through the proper lens – whether the *defendant's* actions connect him to the *forum* –" and not whether the United States or its informants have connections to the forum. *Walden v. Fiore*, 571 U.S. 277, 289 (2014) (emphasis in original). As relevant here, at least, the Government cannot and should not be able to create U.S. jurisdiction over foreigners living and acting abroad.

## IV. SCANTLEBURY AND GASKIN HAVE STANDING TO CLEAR THEIR NAMES.

As argued below, Petitioners suffer ongoing reputational injury from the indictment, Facts, ¶¶40-41, and thus have standing to seek to convert the dismissal *without* prejudice into a dismissal that would exonerate them of wrongdoing and redress those ongoing injuries. *Lujan v. Defenders of Wildlife*,

504 U.S. 555, 560 (1992). For each Petitioner, a holding that the United States charged them without probable cause would redeem their reputations. *Cf. Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 612 n.11 (1974); *Hart v. Parks*, 450 F.3d 1059, 1069-70 (9th Cir. 2006). With respect to Gaskin, striking the arrest would prevent U.S. immigration officials from using the fact of the arrest against him in the discretionary processing of his planned application to apply to return to the United States on either a tourist or permanent basis to visit or reunite with family. Facts, ¶41. In addition to these ongoing non-monetary injuries, the fact of Petitioners' tort claims in *Gaskin v. May*, No. 1:15-cv-0033-EGS (D.D.C.), are also in the record. Of course, the absence of probable cause is an element of their tort claims. *DeWitt v. District of Columbia*, 43 A.3d 291, 295-96 (D.C. 2012). As shown in Section IV.B, *infra*, the tort claims provide another basis for standing to challenge the lower courts' actions.

### A. Dismissal on the alternate ground of lack of personal jurisdiction would redress Petitioners' reputational injuries.

Dismissing for lack of personal jurisdiction would dismiss this action without prejudice. *Costello v. U.S.*, 365 U.S. 265, 285 (1961). While that might not *seem* to benefit Petitioners appreciably *vis-à-vis* the dismissal without prejudice already in effect, it would benefit Petitioners on the facts of this case. Specifically, by demonstrating a lack of contact with the forum, it would establish that Petitioners did not conspire to distribute or import cocaine into the United States. That holding by a court would redress

the reputational injuries that Petitioners suffered from the indictment, even if Petitioners cannot recover damages in tort in their related civil litigation. Under the circumstances, dismissal on personal-jurisdiction grounds would obviate the D.C. Circuit panel's technical analysis into whether Rule 48 relief could redress Petitioners' reputational injuries.

### B. Petitioners have standing to challenge the lower courts' decisions based on the effect of those decisions on Petitioners' tort claims.

A prevailing party may appeal, if the party satisfies Article III. *Camreta*, 563 U.S. at 702; *accord Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 334 (1980). Here, civil defendants could rely on the district judge's fanciful arguments in support of probable cause right up to the moment of release, App. 34a-38a, or the court of appeals' gratuitous suggestion that Petitioners "do [not] have any basis upon which to" claim injury from the district court's holding. *Id.* 11a.[5] Petitioners are situated just like the prevailing *Camreta* defendants, who had standing to appeal their district-court win to avoid the impact of that win on other litigation.

Petitioners did not raise the Article III impacts of the holdings in this criminal action on Petitioners' tort

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[5] This Court has not resolved the degree of success needed to support a claim for malicious prosecution or false imprisonment. *McDonough v. Smith*, 139 S.Ct. 2149, 2160 n.10 (2019) (question "of what constitutes 'favorable' termination for purposes of a §1983 false-evidence claim … is not … before us). This litigation could help answer that question it an Article III analysis if the effect of the lower courts' rulings on Petitioners' tort claims were relevant to Petitioners' "aggrievement" to appeal those rulings.

suit until the appellate petition for reconsideration. Nothing precludes Petitioners' using the tort suit as a basis for standing here, notwithstanding that the argument was not raised until late in the appeal. If "jurisdiction … actually exists," a party can cite that jurisdiction for the first time on appeal. *Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826, 831 (1989); 28 U.S.C. §1653. Petitioners did not rely on tort-related standing in the lower courts because that would have complicated an already complex case. As explained later in this section, the issues of federal officers' immunity for cross-border torts is complex and in flux. Because Petitioners' reputational harms sufficed for Article III standing to appeal, Petitioners did not complicate the appeal with tort liability.

This Court's impending decision in *Mesa II* could clarify the liability of federal officers for cross-border torts, which in turn could affect the Article III injury that the district-court and appellate decisions inflict on Petitioners here. For example, the Court could hold that foreign plaintiffs must attempt to sue the federal officer under diversity jurisdiction[6] prior to resorting

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[6] Neither the Federal Tort Claims Act, 28 U.S.C. §§2671-2680 ("FTCA"), nor its exclusivity clause for FTCA-covered actions, 28 U.S.C. §2679(b)(1), prevents an obstacle to diversity suit for cross-border torts. Such torts arise abroad and thus fall outside the FTCA, 28 U.S.C. §2689(k), including its exclusivity provision. *See* 28 U.S.C. §2689 ("provisions *of this chapter … shall not apply* to … [a]ny claim arising in a foreign country") (emphasis added). Although this Court's decision in *U.S. v. Smith*, 499 U.S. 160 (1991), suggests otherwise, "*Smith* does not even cite, let alone discuss, the 'shall not apply' language 'Exceptions' provision." *Simmons v. Himmelreich*, 136 S.Ct. 1843, 1848 (2016). *Smith* is thus neither controlling nor even precedential on the impact of the exclusivity clause to torts arising abroad. *Id.*; *South Central*

to a claim under *Bivens v. Six Unknown Fed'l Narcotics Agents*, 403 U.S. 388 (1971). Under that view, Petitioners could state a claim for damages under Barbadian law. *See Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4-5 (1975) (discussing choice-of-law principles and foreign law). Of course, Commonwealth law has allowed tort suits for false imprisonment since before our Founding. *See Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774).

On the other hand, the sudden and non-judicial nature of the *Mesa II* incident might differ sufficiently from the juridical relationship between the federal officers here and Petitioners, based on the formal prosecution and extradition proceedings. *See U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 275-76 (1990) (Kennedy, J., concurring). Thus, even if the *Mesa II* decision withholds extraterritorial application of the Constitution there, that might not affect Petitioners' ability to bring a *Bivens* claim in their tort suit.

At least until a controlling decision of this Court *rules out* tort liability for federal officers' cross-border torts, Petitioners respectfully submit that they have an Article III interest in their tort claims sufficient to create the right to appeal erroneous and damaging legal conclusions by the district court and court of appeals.

### C. This appeal is not moot, but if it were moot *vacatur* would be the appropriate remedy.

On January 13, 2019, the five-year statute of limitations ran. App. 13a. While the passing of time

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*Bell Tel. Co. v. Alabama,* 526 U.S. 160, 167-68 (1999); *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004).

makes renewed prosecution unlikely, a waivable affirmative defense cannot cause mootness. *Foucha v. Louisiana*, 504 U.S. 71, 103 (1992) ("affirmative defense … does not negate the State's proof, but merely exempts the defendant from … responsibility") (interior quotations and alterations omitted); *Bowden v. U.S.*, 106 F.3d 433, 437 (D.C. Cir. 1997) (statutes of limitations are waivable affirmative defenses). Moreover, the statute of limitation for the underlying crime has no bearing on the issuance of a sanction for government misconduct. *See* Section II.B, *supra* (citing sanction as a collateral-order basis for appellate jurisdiction). Accordingly, the appeal is not moot under Article III.

Alternatively, if Petitioners' challenge to harmful language in the district-court and appellate decisions has become moot on appeal, this Court should vacate the lower courts' decisions. *U.S. v. Munsingwear, Inc.,* 340 U.S. 36, 39 (1950).

## CONCLUSION

The petition for a writ of *certiorari* should be granted.

October 18, 2019

Respectfully submitted,

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