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Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

DONALD BALL, DUSTIN HEARD,
NICHOLAS SLATTEN, PAUL SLOUGH,
AND EVAN LIBERTY,

Defendants.

**DEFENDANTS' MOTION FOR
PROBABLE CAUSE HEARING UNDER
FED. R. CRIM P. 5(c)(3)(C), 5.1 and 18
U.S.C. § 3265(b)**

Case No.:

Magistrate Judge Paul M. Warner

**DEFENDANTS' MOTION FOR PROBABLE CAUSE
HEARING UNDER FED. R. CRIM. P. 5(c)(3)(C), 5.1 and 18 U.S.C. § 3265(b)**

Defendants, jointly through counsel, and pursuant to Fed. R. Crim. P. 5(c)(3)(C), 5.1, and 18 U.S.C. § 3265(b), respectfully move this Court for an immediate probable cause hearing. In support of the request, Defendants respectfully submit the accompanying memorandum of law in support of this motion.

WHEREFORE, Defendants respectfully request that this motion be granted and that the Court order an immediate probable cause hearing. A proposed order is attached.


Dated this 8th day of December 2008

Respectfully submitted,

HATCH, JAMES & DODGE, P.C.

By: 

Brent O. Hatch

By: 

Paul G. Cassell

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December 2008, I caused a true and correct copy of the foregoing to be served as indicated on the following persons at the following addresses:

Via Hand Delivery and Electronic Transmission:

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DONALD BALL, DUSTIN HEARD,
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Defendants.

**[PROPOSED] ORDER REGARDING
DEFENDANTS' MOTION PROBABLE
CAUSE HEARING UNDER FED. R. CRIM
P. 5(c)(3)(C), 5.1 AND 18 U.S.C. § 3265(b)**

Case No.:

Magistrate Judge Paul M. Warner

[PROPOSED] ORDER

Upon Consideration of Defendants' Motion for Probable Cause Hearing Under Fed. R. Crim. P. 5(c)(3)(C), 5.1 and 18 U.S.C. § 3265, the arguments in support thereof and any opposition thereto, said motion is and shall be, GRANTED.

Magistrate Judge Paul M. Warner
United States Magistrate Judge

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD BALL, DUSTIN HEARD,
NICHOLAS SLATTEN, PAUL SLOUGH,
AND EVAN LIBERTY,

Defendants.

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR
PROBABLE CAUSE HEARING
UNDER FED. R. CRIM. P. 5(c)(3)(C),
5.1 AND 18 U.S.C. § 3265(b)**

Case No.:

Magistrate Judge Paul M. Warner

The above-named Defendants, jointly through counsel, and pursuant to Fed. R. Crim. P. 55(c)(3)(C), 5.1 and 18 U.S.C. § 3265(b), respectfully move this Court for an immediate probable cause hearing.

I. BACKGROUND

Upon information and belief, by way of an indictment issued in the District of Columbia on or about December 4, 2008, the Defendants, who at the time of the alleged offenses were security guards providing armed security to State Department officials in Baghdad, Iraq, were

indicted on multiple charges arising out of a fire at the Nisour Square in Baghdad on September 16, 2007.

As we understand the indictment, the Government's criminal subject matter jurisdiction against the defendants is based on an alleged violation of the substantive criminal offense set out in the Military Extraterritorial Jurisdiction Act of 2000 ("MEJA"), 18 U.S.C. § 3261 *et seq.* In our companion pleadings, we have moved for a finding of no probable cause on two grounds. First, there is no probable cause for this case to proceed under MEJA since that statute does not confer jurisdiction over these defendants and the alleged offenses. Second, irrespective of the lack of subject matter jurisdiction, the District of Columbia does not have proper venue in which to bring charges against these defendants and there is not probable cause to establish venue in that jurisdiction.

To provide the Court with a brief overview, under MEJA, "[w]hoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States . . . while employed by or accompanying the Armed Forces outside the United States . . . shall be punished as provided for that offense." 18 U.S.C. § 3261(a). Thus, the Government may only assert MEJA jurisdiction over these defendants if they were "*employed as . . . a contractor (including a subcontractor at any tier) of—any other Federal agency . . . to the extent such employment relates to supporting the mission of the Department of Defense overseas.*" 18 U.S.C. § 3267(a)(1)(A)(ii) (emphasis added). The defendants in this case were not so employed.

MEJA establishes a substantive criminal offense for which probable cause must be established just as with any other criminal offense. In this case, the application of MEJA to these defendants raises an unprecedented jurisdictional issue of a constitutional magnitude, i.e., whether the defendants are even subject to criminal prosecution for the acts alleged in the indictment. As we explain in our jurisdictional motion, the answer to that question is no. Regardless, the MEJA statute requires this Court to hold a probable cause hearing “to determine whether there is probable cause to believe that an offense under section 3261(a) was committed . . .” 18 U.S.C. § 3265(a)(2). By necessity the probable cause hearing contemplated under section 3265(a)(2) must address the issue of whether the substantive criminal offense under MEJA applies to these particular defendants. If it does not, the Government has failed to establish probable cause that these defendant violated MEJA and the case must be dismissed.

In addition, venue for an offense occurring outside the United States must be determined under 18 U.S.C. § 3238, which covers “offenses not committed in any district.” This statute provides:

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

None of the defendants resides in the District of Columbia nor have they been arrested or brought to that jurisdiction.

Section 3265 of the MEJA statute sets forth the initial proceedings that are required when any person is arrested for or charged with a violation of Section 3261(a). It provides first that

any person so arrested or charged shall have an initial appearance by a Federal magistrate judge. 18 U.S.C. § 3265(a)(1)(A). Section 3265(a)(2) provides that “in conducting the initial appearance, the Federal magistrate judge shall also determine whether there is probable cause to believe that an offense under section 3261(a) was committed and that the person committed it.”

Both the venue and the jurisdictional issues that we raise in our companion pleadings invoke constitutional protections of the highest magnitude. As we point out in our venue motion, the Tenth Circuit, too, has noted that “[t]he Supreme Court has pointed out that failure to treat venue rights seriously not only may impose unfairness and hardship on the accused, but might also encourage forum-shopping by federal prosecutors.” *United States v. Miller*, 111 F.3d 747, 749 (10th Cir. 1997). “[T]he proper construction of § 3238 is a question of law” *United States v. Layton*, 855 F.2d 1388, 1410 (9th Cir. 1988). This Court must address the venue issue in the course of a probable cause hearing and determine whether there is probable cause for the case to proceed. As we explain below, under 18 U.S.C. § 3265(a)(2) and Fed. R. Crim. P. 5.1, this Court must make a finding of “probable cause” before the defendants can be forced to face further proceedings. Venue is “a constitutional consideration and an element of every crime.” *Kelly*, 535 F.3d at 1233.

With respect to jurisdiction under MEJA, the statute itself provides that a hearing must be held to establish probable cause that the defendants committed an act that violated that statute. In doing so, the statute merely incorporates the fundamental due process rights established by the U.S. Supreme Court in *Gerstein v. Pugh*, 420 U.S. 103 (1975).

II. MEJA ADOPTS THE PROCEDURES SPECIFIED IN FED. R. CRIM. P. 5.1 FOR A PRELIMINARY HEARING, INCLUDING THE DEFENDANTS' RIGHT TO INTRODUCE EVIDENCE.

In calling for the magistrate judge to “determine whether there is probable cause to believe that an offense under section 3261(a) was committed and that the person committed it,” 18 U.S.C. § 3265(a)(2), MEJA obviously envisions that the judge will follow appropriate procedures for making that determination. There can be no doubt that MEJA envisioned that the procedures for this probable cause determination would be found in the Federal Rules of Criminal Procedure, for two reasons. First, MEJA explicitly refers to the Federal Rules. Several sentences before the “probable cause” language, MEJA refers to appearance of a defendant “under the Federal Rules of Criminal Procedure.” 18 U.S.C. § 3265(a)(1). Second, MEJA implicitly refers to the Federal Rules by using identical language regarding the probable cause determination to that found in the Federal Rules. Thus, MEJA requires a magistrate judge to “determine whether there is probable cause to believe that an offense under section 3261(a) was committed and that the person committed it.” 18 U.S.C. § 3265(a)(2). In parallel, virtually identical language, Fed. R. Crim. P. 5.1(e) requires a magistrate judge to determine whether there is “probable cause to believe that an offense has been committed [and] the defendant committed it.” The identical language is telling, because it reveals Congress’ plan not only to have the Federal Rules in general govern the probable cause hearing, but more particularly to have Rule 5.1 establish the procedures. Indeed, any other reading of the statute would make no sense. Rule 5.1 is *the* rule governing probable cause hearings. Therefore, under the plain language of the statute, Rule 5.1 governs probable cause hearings under MEJA.

Under Rule 5.1, both prosecutors and defendants are given certain rights. Prosecutors are allowed to introduce hearsay evidence. Similarly, prosecutors are not required to respond to any motions to suppress evidence, as defendants “may not object to evidence on the ground that it was unlawfully acquired.” Fed. R. Crim. P. 5.1(e). On the other hand, defendants “may cross-examine adverse witnesses and may introduce evidence” Fed. R. Crim. P. 5.1(e). It is precisely these rights that the defendants intend to exercise during the probable cause hearing specified by MEJA.

The Government may try to introduce the indictment in this matter as evidence supporting the probable cause determination. The defendants agree that this document can be introduced, as the ordinary rule against hearsay evidence is inapplicable at a preliminary hearing. The introduction of that document, however, does not end the hearing. Most important, it does not preclude the defendants from exercising their rights under the Rules to “cross-examine adverse witnesses and . . . introduce evidence.” Fed. R. Crim. P. 5.1(e). Any other reading of MEJA would defy the plain language of the statute, common sense, and the constitutional rights of the defendants.

The plain language of MEJA makes clear that the mere fact of an indictment does not obviate the need for a probable cause hearing. Congress obviously could have specified that no such hearing should be held after an indictment had been returned. Indeed, Rule 5.1 itself indicates that for criminal offenses outside of MEJA the magistrate judge shall not hold a hearing if “the defendant is indicted.” Fed. R. Crim. P. 5.1(a)(2). MEJA, however, eschews that approach, explicitly requiring a probable cause determination in every case without exception.

This reading of MEJA is not only dictated by its plain language but also makes common sense. In passing a new law providing for extraterritorial application of federal criminal laws to the men and women serving in the nation's armed forces or contract workers serving the mission of the Department of Defense, Congress would no doubt have recognized that difficult and complex cases might arise. Before subjecting anyone who is "a member of the Armed Forces" or "employed by or accompanying the Armed Forces outside the United States," 18 U.S.C. § 3261(a)(1) & (2), to a burdensome requirement to respond to felony criminal charges, Congress wanted the ordinary protections that apply at a probable cause hearing to be in place. In the context of this case, before subjecting the five defendants that were providing services to the Department of State – not the Department of Defense -- to trial on extremely serious felony charges, involving severe mandatory minimum punishments, the court should at least take the brief period of time necessary to determine that probable cause underlies the charges against them.

Finally, any reading that denies the defendants a probable cause hearing would raise significant constitutional issues. Congress has guaranteed the defendants that they will receive from the magistrate judge his own "determin[ation]" of probable cause. That determination is understood to have constitutional dimensions, with constitutional protections attaching. *See generally Gerstein v. Pugh*, 420 U.S. 103 (1975). If the Government could turn what is supposed to be a meaningful hearing into a mere "rubber stamp" approval of a grand jury indictment, then the defendants will not receive the rights to which they are entitled.

These constitutional protections apply with particular force in this case, with not only complex factual questions but a vital jurisdictional issue in play. A grand jury is not well suited

to determining its own jurisdiction, particularly where complex legal issues of first impression are at stake. This is such a case, which cries out for the court to review the question of MEJA's application to State Department contractors and make its own, independent legal determination of jurisdiction. At a minimum, the court should review this legal issue, along with the related legal issue of whether venue is proper in this case.

In addition, the court will not be particularly burdened by following the ordinary Rule 5.1 procedures with regard to factual issues. The defendants fully understand that a preliminary hearing is not a full trial on the merits. To that end, the defendants have no objection to the Government proceeding by way of proffer and offering the Indictment in support of that proffer. In response, the defendants propose only that they be allowed to proceed by way of counterproffer and to call only three witnesses at the hearing. First, they intend to call the Government's "case agent" who is generally familiar with the facts of the incident. Second, they intend to call the federal agent who purportedly "arrested" Jeremy Ridgeway in the District of Columbia to attempt to establish venue there. (It may turn out that the case agent and the arresting agent are one and the same person, in which event the defendants would only intend to call one fewer witness at the probable cause hearing.) Third, they intend to call Jeremy Ridgeway to inquire into circumstances related to his "arrest" and subsequent plea and whether he was a "joint offender" under the venue statute. The defendants notified AUSA Kohl of their intention of calling these three witnesses on Friday, December 5. Moreover, MEJA itself simplifies the procedures by providing that the probable cause hearing "may be carried out by telephony or such other means that enables voice communication" 18 U.S.C. § 3265(a)(1)(B). Arranging a limited appearance by telephone of three government witnesses can hardly be

viewed as a burdensome requirement, particularly where such important interests of the defendants are at stake.

CONCLUSION

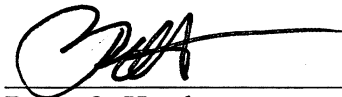
WHEREFORE based on the foregoing reasons and any others that may appear to the Court, the Defendants respectfully request that this Court hold a probable cause hearing on the issues of whether there is probable cause to establish venue in the District of Columbia and whether there is probable cause to establish subject matter jurisdiction under MEJA.

Dated this 8th day of December 2008

Respectfully submitted,

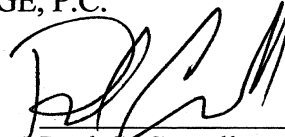
HATCH, JAMES & DODGE, P.C.

By:



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Attorneys for Defendants

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Via Electronic Transmission

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