

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v.

PAUL ALVIN SLOUGH,  
NICHOLAS ABRAM SLATTEN,  
EVAN SHAWN LIBERTY,  
DUSTIN LAURENT HEARD,  
DONALD WAYNE BALL,

Defendants

Cr. No. 08-360 (RMU)

**GOVERNMENT’S OPPOSITION TO DEFENDANTS’  
MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE**

The United States, by the United States Attorney for the District of Columbia and the undersigned attorneys, submits this opposition to the defendants’ jointly-filed motion to dismiss the indictment for failure to state an offense. See Defendants’ Motion to Dismiss the Indictment for Failure to State an Offense under the Military Extraterritorial Jurisdiction Act [**Document 146**] (“Def. Mot.”). The defendants move for dismissal pursuant to Fed. R. Crim. P. 12(b)(3)(B), contending that the indictment fails to state any offense under the Military Extraterritorial Jurisdiction Act (“MEJA”), 18 U.S.C. § 3261, *et seq.* Def. Mot. at 1. In their memorandum in support of their motion (“Def. Mem.”), the defendants concede that the indictment “tracks the language of the statute.” Def. Mem. at 2. The defendants nevertheless argue that the indictment is fatally defective because of a “failure to allege facts” concerning one of the several jurisdictional elements of MEJA. *Id.* at 2. Specifically, the defendants contend that the indictment must be dismissed because it does not specify how the defendants’ employment related to supporting the

mission of the Department of Defense overseas. Id. In support of this purely legal argument, the defendants rely principally on Russell v. United States, 369 U.S. 749 (1962). See Def. Mem. at 5-8, 11, and 12 (citing Russell).

As described more fully below, the Court has already received briefing, heard argument, and considered the issue presented by the defendants' motion, as it was raised in their prior motion to dismiss the indictment on jurisdictional grounds. See Defendants' Motion to Dismiss for Lack of Jurisdiction, and Memorandum of Points and Authorities in Support [**Document 34**]. In denying the defendants' prior motion to dismiss on February 17, 2009, the Court considered Russell, along with other pertinent authorities. See Transcript of Oral Argument on February 17, 2009, at 45 (citing Russell, Hamling v. United States, 418 U.S. 87 (1974), and United States v. Stavroulakis, 952 F.2d 686 (2nd Cir. 1992)). In their instant motion, the defendants inexplicably ignore the Court's prior ruling on jurisdiction and two of the three decisions that the Court considered "informative and useful in the Court's analysis" (Transcript at 45), namely the Hamling and Stavroulakis opinions. For the reasons that follow, the Court correctly denied the defendants' prior motion to dismiss on jurisdictional grounds and should do so again.

## **I. Procedural Background**

On December 4, 2008, a federal grand jury empaneled in the United States District Court for the District of Columbia returned a thirty-five count indictment against the defendants. The indictment alleges offenses under the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261(a) ("MEJA"). All of the defendants have been charged jointly with all of the offenses alleged in the indictment. The indictment charges each of the defendants with fourteen counts of Voluntary Manslaughter, in violation of 18 U.S.C. §§ 3261(a), 1112, and 2; twenty counts of Attempt to

Commit Manslaughter, in violation of 18 U.S.C. §§ 3261(a), 1113, and 2; and one count of Using and Discharging a Firearm During and in Relation to a Crime of Violence, in violation of 18 U.S.C. §§ 3261(a), 924(c), and 2.

As it relates to jurisdiction, the indictment recites all of the pertinent language of MEJA. Compare Indictment, ¶¶ 1-3, with 18 U.S.C. §§ 3261(a) and 3272(1). The indictment also alleges additional facts concerning jurisdiction. Each of these additional factual allegations concerns the defendants' overseas employment. In its first paragraph, the indictment alleges who the defendants' employer was, namely Blackwater Worldwide (Indictment, ¶ 1a); which federal agency Blackwater Worldwide contracted with, namely the State Department (id.); the nature of the defendants' employment, namely the provision of personal security services (id.); and where the defendants supported the mission of the Department of Defense overseas, namely Iraq (id.).

On January 13, 2009, following the defendants' arraignment, the defendants jointly moved to dismiss the indictment for lack of jurisdiction pursuant to Fed. R. Crim. P. 12(b)(3)(B). See Document 34.<sup>1</sup> In their memorandum in support of that prior motion, the defendants acknowledged that the indictment directly quoted from section 3267(1)(a)(ii)(II) of MEJA, where the indictment alleges that the defendants' "employment related to supporting the mission of the United States Department of Defense in the Republic of Iraq." See Document 34-2 at 5. The defendants complained, however, that "Other than naming the country of Iraq, this statutory quotation states a pure legal conclusion, containing no facts that state in what way the Defendants' employment allegedly related to supporting the mission of the Department of Defense." Id. at 6. The defendants'

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<sup>1</sup> The instant motion is actually the defendants' third attempt to have the case dismissed on jurisdictional grounds. The defendants filed a similar motion in the District of Utah upon their self surrender in that district.

prior motion to dismiss was directed solely at this particular jurisdictional allegation and not at any of the other jurisdictional allegations in the indictment.

No doubt anticipating the government's response, the defendants argued in their opening brief on that motion that the indictment's "verbatim quotation of the statutory language providing jurisdiction (here, that Defendants' employment 'related to supporting the mission of the Department of Defense,' 18 U.S.C. § 3267(1)(A)(ii)(II); Indictment ¶ 1.a) is not conclusive on a motion to dismiss." See **Document 34-2** at 11. The defendants urged the Court in their prior motion: "[J]ust as 'it is not sufficient that the indictment shall charge the offense in the same generic terms as in the [statute]; but it must state the species; it must descend to the particulars,' United States v. Hess, 124 U.S. 483, 486 (1888); accord Russell v. United States, 369 U.S. 749, 765 (1962), so also the Court must look to the Indictment's factual allegations, not its legal conclusions, to determine whether the Indictment invokes the Court's jurisdiction." Id. In the very next sentence, the defendants quoted again from the Supreme Court's decision in Hess for the proposition that: "[F]acts are to be stated [in the indictment], not conclusions of law alone." Id. (quoting Hess, 124 U.S. at 486). Relying on these and other authorities, the defendants invited the Court to look behind the "four corners of the indictment" (id.) and consider what the defendants mis-characterized as the uncontested evidence concerning this particular jurisdictional allegation.

On January 27, 2009, the United States filed its opposition to the defendants' prior motion to dismiss. See **Document 51**. As the defendants anticipated, the United States directly responded to their contention that the indictment was defective "because its averments are legal conclusions rather than factual allegations." Id. at 10 n. 7. In a separate section devoted to the sufficiency of the jurisdictional allegations in the indictment, the United States discussed the Supreme Court's decision

in Hamling, other federal court decisions applying the Hamling standard, and the defendants' treatment of pre-Hamling caselaw. Id. at 15-19.

On February 3, 2009, the defendants filed their reply brief in support of their prior motion to dismiss. See Document 56. The defendants were dismissive of the government's reliance on the statutory language in the indictment. Id. at 6 (characterizing the jurisdictional language in the indictment as a "conclusory quotation of the statute"). The defendants emphasized their view that: "Judicial scrutiny of the indictment's jurisdictional sufficiency is . . . critical." Id. In a lengthy footnote, the defendants then replied to the government's discussion of the sufficiency of the jurisdictional language in the indictment. Id. at 6-7 n. 8. Among other things, the defendants addressed the Supreme Court's decisions in Hamling and Russell. Id. In that same footnote, the defendants made clear that their motion was "directed only at lack of jurisdiction under the Military Extraterritorial Jurisdictional Act." Id. The defendants appeared to reserve any claim about the sufficiency and specificity of the indictment in other respects. Id.

On February 17, 2009, the Court heard oral argument on the defendants' prior motion to dismiss. In the defendants' main argument, the Court inquired of defense counsel about how the Court should consider the jurisdictional allegations in the indictment:

THE COURT: Would you say that the primary issue of jurisdiction stems from what is alleged and its soundness or vulnerability[;] or the uncontested facts in the case? In other words, if we have a composite of uncontested facts in the case, would that be the dominant factor in determining jurisdiction?

MR. HULKOWER: Well, I think they both apply. I think if the government had failed to allege jurisdiction, then the case fails; but the fact that they simply have said, this was a mission in support of the Department of Defense doesn't end the inquiry.

....

MR. HULKOWER: So the answer to your question, Your Honor, is that both inquiries are appropriate, and on both inquiries, the government's showing fails because the critical evidence is undisputed.

Transcript at 23-24.

Following oral argument, the Court denied the motion to dismiss from the bench. In its oral ruling on the motion, the Court noted that "Cases that have been informative and useful in the Court's analysis on this point include the Hamling case, the Stavroulakis case, . . . and Russell." Transcript at 45. The Court held that where the "question of federal subject matter jurisdiction is intermeshed with questions going to the merits, the issue should be determined at trial." Id. at 45-46.

The Court also observed that the defendants improperly raised new arguments concerning jurisdiction in their reply brief, citing Rollins Environmental Services (NJ), Inc. v. U.S. Environmental Protection Agency, 937 F. 2d 649, 652 n. 2 (D.C. Cir. 1991). Transcript at 46. The Court's observation appears to have been directed at footnote eight of the defendants' reply brief, cited above. The Court mentioned that "the parties will provide additional briefings on this issue, if indeed . . . the Court's ruling and the Court's considerations have not included the specifics of that claim." Id. at 47.

Eight months later, the defendants filed the instant motion to dismiss the indictment. The defendants make the same argument that they made previously, namely that the indictment's jurisdictional allegations are fatally defective. The defendants restate their prior contention that, even though its jurisdictional allegations track the language of MEJA, the indictment must be dismissed because it does not allege facts showing how the defendants' employment "relate[d] to supporting the mission of the Department of Defense." Id. at 2. The defendants' motion is replete with references to Russell and other pre-Hamling cases that were cited in the defendants' prior motion to dismiss. But the defendants fail even to mention Hamling, let alone attempt to distinguish

that controlling authority.

## II. Legal Argument

Preliminarily, the Court should treat its prior ruling on the defendants' earlier motion to dismiss as having encompassed the specific claim presented here, namely the sufficiency of the jurisdictional allegations in the indictment. The defendants raised the same claim in their opening brief, the United States responded to that same claim, defense counsel addressed that claim at oral argument, and the Court considered the pertinent authorities cited by the parties in denying the defendants' prior motion. The defendants should not be permitted to raise the same issue in successive Rule 12(b)(3)(B) motions to this Court to try to get a different ruling. See LaShawn A. v. Barry, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc) (emphasis in original) (“[T]he *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*.”). There has been “no intervening change in controlling legal authority” since the Court issued its prior ruling. Id. (citing McKesson Corp. v. Islamic Republic of Iran, 52 F.3d 346, 350 (D.C. Cir. 1995)). Nor do the defendants suggest otherwise.

The fact that the defendants made additional arguments in their earlier reply brief should not deter the Court from adhering to its prior ruling. As mentioned, the defendants raised the same claim in their opening brief on the prior motion to dismiss. Furthermore, the defendants rely again in their opening brief on Russell, United States v. Hess, 124 U.S. 483 (1888), and other pre-Hamling decisions but are silent as to Hamling. Their silence as to Hamling can hardly be inadvertent, because the Court expressly relied on Hamling in denying the defendants' prior motion to dismiss. Thus, notwithstanding the Court's admonition not to raise new arguments in a reply brief, the defendants appear poised to do so again. The defendants should not be permitted to raise the same

claim in the same case before the same Court in the hopes of obtaining a different result, particularly where they appear ready to do so in the same incorrect manner as before.

In any event, for the reasons stated in the prior round of briefing and oral argument, the defendants' claim fails on the merits. The defendants acknowledge, as they must, that the indictment contains all of the pertinent jurisdictional language from MEJA. Def. Mem. at 2. The defendants' narrow claim is that the indictment is legally insufficient because it does not detail how their contract employment "relate[d] to supporting the mission of the Department of Defense." See Def. Mem. at 2, 4. This argument simply disregards settled principles of law governing the legal sufficiency of an indictment.

In Hamling v. United States, 418 U.S. 87 (1974), the Supreme Court held that, under the Fifth and Sixth Amendments of the Constitution:

an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. . . . It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words themselves, fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.

Id. at 117. Thus, to satisfy the Hamling standard, "an indictment need do little more than track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." United States v. Stavroulakis, 952 F.2d 686, 693 (2d Cir. 1992) (citations and internal quotation marks omitted). Accord United States v. Thomas, 348 F.3d 78, 82 (5th Cir. 2003) ("an indictment is sufficient if it contains the elements of the charged offense, fairly informs the defendant of the charges against him, and ensures that there is no risk of future prosecutions for the same offense"); United States v. Davis, 336 F.3d 920, 922 (9th Cir. 2003) ("In cases where the indictment

tracks the words of the statute charging the offense, the indictment will be held sufficient so long as the words unambiguously set forth all the elements necessary to constitute the offense.”); United States v. Akers, 215 F.3d 1089, 1101 (10th Cir. 2000) (“[I]t is generally sufficient that the indictment set forth the offense in the words of the statute itself, as long as those words, of themselves fully, directly and expressly . . . set forth the elements necessary to constitute the offense intended to be punished”) (internal quotation marks omitted); United States v. Haldeman, 559 F.2d 31, 123 (D.C. Cir. 1976) (“[t]he validity of alleging the elements of the offense in the language of the statute is, of course, well established”).

To enforce these constitutional requirements, Fed. R. Crim. P. 7(c)(1) provides in part that “[t]he indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged[.]” That is precisely what the indictment accomplishes here. Consistent with the jurisdictional requirements of MEJA, the introductory paragraphs not only allege that the defendants’ “employment related to supporting the mission of the United States Department of Defense in the Republic of Iraq,” but also that they were “present and residing outside the United States in connection with [such] employment;” that they “were not nationals of nor ordinarily residents in the Republic of Iraq;” and, finally, that the conduct alleged in the indictment constitutes offenses each of which would be punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States. Indictment ¶¶ 1(a)-(c), 3.

The indictment also alleges additional facts concerning jurisdiction. In its first paragraph, the indictment alleges who the defendants’ employer was, namely Blackwater Worldwide; which federal agency Blackwater Worldwide contracted with, namely the State Department; the nature of

the defendants' employment, namely the provision of personal security services; and where the defendants supported the mission of the Department of Defense, namely Iraq. Indictment, ¶ 1(a). The indictment further sets out with particularity the precise date and location where the alleged offenses occurred; the identities of the victims; and the substantive offenses, assimilated by MEJA, that the alleged misconduct entails. These allegations, particularly those relating to jurisdiction, more than satisfy the Hamling standard, serve to preclude pretrial dismissal on the ground of failure to allege an offense, and provide adequate notice to the defendants. See United States v. Vega Molina, 407 F.3 511, 527 (1st Cir. 2005) (Hobbs Act indictment legally sufficient under Hamling as it tracked the Act's jurisdictional language and therefore adequately put defendant on notice of that element).

The defendants rely primarily upon pre-Hamling caselaw to support their claim that, in addition to tracking the elements of the offense, the indictment must “descend to the particulars” of the jurisdictional allegations so as to demonstrate precisely how their employment supported the mission of the Department of Defense. See Def. Mem. at 5 (citing Russell, 369 U.S. at 765 (quoting United States v. Hess, 124 U.S. 483, 487 (1888))). The Russell decision, upon which the defendants appear to place their primary reliance, has, however, been confined to the specific offense of which the defendants in that case were charged and which bears no resemblance to MEJA. In that case, the Supreme Court deemed legally insufficient an indictment that alleged the refusal to respond to a question “pertinent to the question under inquiry” before a Congressional Committee without further particularizing the subject of the inquiry. The Russell Court reasoned that such allegations were “central to every prosecution under the statute [and] guilt depends . . . crucially upon such specific identification of fact.” 369 U.S. at 764.

In United States v. Resendiz-Ponce, 549 U.S. 102 (2007), the Supreme Court recently revisited its decision in Russell and confined the holding in that case to the particular statute that it construed. It reasoned that, because the relevant Congressional hearing's subject was frequently uncertain, particularization of the subject matter of the inquiry was necessary both to afford fair notice to defendants and to ensure that any conviction would arise out of the theory of guilt presented to the grand jury. 549 U.S. at 109-110. The Resendiz-Ponce Court expressly declined to extend Russell's reasoning concerning factual averments to cases where "guilt does not depen[d] so crucially upon such a specific identification of fact." Id. (internal quotation marks and citations omitted). And, it observed that "[w]hile detailed allegations might well have been required under common-law pleading rules, . . . they surely are not contemplated by Rule 7(c)(1) . . ." Id.

The Supreme Court's reasoning in Resendiz-Ponce was presaged by the similar reasoning of the Fifth Circuit in United States v. Kay, 359 F.3d 738 (5th Cir. 2004). In Kay, the defendants were charged with violations of the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-1, *et seq.*, which, in pertinent part, prohibited payments to foreign officials to "obtain or retain" business. At issue was whether the indictment was legally insufficient as a consequence of its failure to aver how alleged bribes paid to Haitian officials were linked to the getting or keeping of business in that nation. Or, in the Kay court's words, "whether the lack of detail in that part of the indictment that deals with th[e] [business nexus] element is more like the absence of detail as to how the crime was committed than a failure to specify what the crime was." Id. at 758-759.

Addressing that issue, the Kay court confined Russell's requirement of factual particularization in the indictment to matters that relate to the very "core of criminality" under the particular statute at issue. Id. at 756 (citing Russell, 369 U.S. at 771). Noting that "there are many

crimes that include nexus elements, such as effects on interstate commerce or the use of the mails in connection with a scheme to defraud,” (id. at 759), it observed that “the nexus element [of federal criminal statutes] cannot be said to go to the core of criminality.” Id. Consequently, “the courts appear to take the approach that those kinds of nexus elements can be alleged without factual detail and still not violate the Fifth or Sixth Amendments.” Id. at 759. Reasoning that “the [FCPA] indictment’s sufficiency hinges on a determination whether the business nexus element of the crime is core” (id. at 760), it concluded that:

as important to the statute as the business nexus element is, it does not go to the FCPA’s core of criminality. When the FCPA is read as a whole, its core of criminality is seen to be bribery of a foreign official to induce him to perform an official act in a corrupt manner. The business nexus element serves to delimit the scope of the FCPA by eschewing applicability to those bribes of foreign officials that are not intended to assist in getting or keeping business . . . . Therefore, the indictment’s paraphrasing of the FCPA’s business nexus element passes the test for sufficiency, despite alleging no details regarding what business is sought or how the results of the bribery are meant to assist[.]

Id. at 761.

Here, specificity as to how the defendants’ work as Blackwater contract employees “related to supporting the mission of the United States Department of Defense in Iraq” (Indictment ¶1.a), was neither a fact that was central to the issue of their criminal culpability to the charged offenses (Resendiz-Ponce, 549 U.S. at 108) nor at MEJA’s “core of criminality.” Kay, 359 F.3d at 757. Thus, just as the “core of criminality” in Kay involved the payment of a bribe, in the instant case it involved the commission of manslaughter and attempted manslaughter, in violation of the federal statutes assimilated by MEJA. And just as the “business nexus” in Kay was merely intended to “delimit the scope of the FCPA” (id. at 761), the requirement under MEJA that the defendants’ overseas employment relate to supporting the mission of the Department of Defense is likewise

merely a jurisdictional hook designed by Congress to confine the breadth of that statute. As such, the relational nexus in MEJA is not only virtually indistinguishable from the “business nexus” in Kay, it is indistinguishable from jurisdictional elements that the Kay court expressly identified as the “kind of nexus elements that can be alleged without factual detail . . . .” 359 F.3d at 759. See also Vega Molina, 407 F.3d at 527 (indictment legally sufficient where jurisdictional element tracks the statutory language). Consequently, even if Russell were to govern the disposition of the defendants’ motion to dismiss, the indictment in this case would still pass muster under that decision as the formal jurisdictional elements of MEJA have no bearing whatsoever upon the core criminality of the offenses charged thereunder.<sup>2</sup>

### III. Conclusion

For the foregoing reasons and for any other such reasons as may appear to the Court, the United States requests that the defendants’ Motion to Dismiss the Indictment for Failure to State an Offense under the Military Extraterritorial Jurisdiction Act be denied.

Respectfully submitted,

CHANNING D. PHILLIPS  
D.C. Bar No. 415793

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<sup>2</sup> The defendants maintain that, as a consequence of the indictment’s failure to particularize the jurisdictional elements, “they are at an absolute loss as to what they must meet at trial” in order to respond to the government’s jurisdictional theories. See Def. Mem. at 10. In the government’s prior opposition to the defendants’ motion to dismiss on jurisdictional grounds, however, the United States summarized two bases upon which it maintains the defendants’ employment supported the mission of the Department of Defense in Iraq, and it expressly invited the Court to address the legal sufficiency of such theories. See Document 51 at 15, 32-34. Despite the defendants’ instant complaint that they are incapable of anticipating and responding to the jurisdictional theories on which the prosecution will proceed, their simultaneously-filed “Motion To Dismiss the Indictment Due To Misinstruction of the Grand Jury Regarding the Military Extraterritorial Jurisdiction Act” [Document 147] is entirely predicated upon a challenge to the adequacy of those two theories.



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CERTIFICATE OF SERVICE

\_\_\_\_\_ I HEREBY CERTIFY that I have caused a copy of the foregoing notice to be served through the Court's Electronic Case Filing System, on counsel for the defendants, this 18<sup>th</sup> day of November, 2009.

\_\_\_\_\_  
/s/  
JONATHAN M. MALIS