

The Defendants have been charged with 34 counts of manslaughter and attempted manslaughter in violation of 18 U.S.C. §§ 1112 and 1113, as well as one count of using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). Because the offenses, if any, did not occur within the United States or its special maritime and territorial jurisdiction, the indictment asserts extraterritorial jurisdiction only through MEJA, 18 U.S.C. §§ 3261, 3267. MEJA extends the reach of American criminal laws, which ordinarily do not apply beyond U.S. borders, to cover American civilians, including contractors, who *work for the Department of Defense* or whose work *relates to supporting the mission of the Department of Defense overseas*. *Id.* § 3267(1)(A)(ii) (emphasis added).

The first section of MEJA, 18 U.S.C. § 3261(a), defines the conduct that may be prosecuted under the statute: conduct (i) outside the United States, (ii) that would constitute an offense punishable by imprisonment for more than 1 year if it had been committed within the special maritime and territorial jurisdiction of the United States, (iii) while the defendant was employed by the Armed Forces outside the United States. Thus, MEJA both provides jurisdiction and also defines substantive elements of the charged offenses.¹ In addition to proving conduct overseas that would be punishable by more than one year if committed within the United States' special maritime and territorial jurisdiction, the Government must also prove beyond a reasonable doubt that these Defendants, who worked for the Department of State and received direction solely from the State Department, nonetheless actually supported the mission of the Department of Defense overseas.

¹ See Feb. 17, 2009 Tr. 46 (noting that the jurisdictional requirement is also a substantive element of the offense charged).

The Defendants now respectfully request that the Court bifurcate the trial in this matter. The first phase of the bifurcated trial would address whether the Government has proved MEJA jurisdiction beyond a reasonable doubt. The Defendants are willing to waive a jury trial on this issue and have it tried by the Court. If that verdict is in the Government's favor, the trial would proceed to a second phase addressing the remaining elements of the charges set forth in the indictment. Bifurcation will promote judicial economy, a clear presentation of the evidence, and the reasoned consideration of the issues by the court and the jury.

The determination of whether to bifurcate trial of the issues within an indictment lies in the sound discretion of this Court and will be reviewed only for abuse of discretion. *See United States v. Magnum*, 100 F.3d 164, 171 (D.C. Cir. 1996) (“the district court did not . . . abuse its discretion by deciding not to bifurcate the ex-felon element and the other elements of [the felon-in-possession count.]”); *United States v. Moore*, 376 F.3d 570, 573 (6th Cir. 2004); *United States v. Belk*, 346 F.3d 305, 310 (2d. Cir. 2003). Although circumstances justifying bifurcation of trial on the elements of particular counts do not arise frequently, bifurcation is both permissible and advisable where, as in this case, bifurcation will eliminate the likelihood of substantial prejudice to the defendants from a unitary trial and promote efficiency for the jury and the Court. *See United States v. Amante*, 418 F.3d 220, 222-23 (2nd Cir. 2005) (bifurcation of single count may be warranted to reduce prejudice).

As the Court knows, there is serious doubt whether MEJA affords jurisdiction over these Defendants. Indeed, at the hearing on Defendants' motion to dismiss for lack of jurisdiction, the Court stated, “I think the defendants' points on this issue as they relate to jurisdiction are rather strong in that they point to what could very well turn into a vulnerability in the government's case when it comes time for the Court to rule on the motion for judgment of acquittal . . .” Feb.

17, 2009 Tr. 46. The Court further stated it would “closely scrutinize [the government’s] additional evidence . . . and how, if at all, it addresses this issue of whether or not the case should survive a motion for judgment of acquittal.” *Id.*²

Where the jurisdictional question is antecedent to the merits of the criminal charges, and raises issues of fact and law that are completely separate and independent from the complex and hotly disputed substantive charges, the prevention of confusion, the prevention of unfair prejudice, and considerations of judicial economy all militate strongly in favor of deciding the potentially dispositive threshold question first. To establish jurisdiction under MEJA, the Government must prove that the Defendants’ employment as security contractors for the Department of State related to supporting the mission of the Department of Defense overseas. § 3267(1)(A)(ii)(II).³ On that issue, the fact-finder need know nothing about the events at Nisur Square on September 16, 2007. The inquiry instead will focus on the type of work that the Defendants performed under their employment contract with the Department of State and whether that work “relates to supporting the mission of the Department of Defense overseas.” *Id.* Conversely, the scope of Defendants’ contract work for the Department of State and the scope of the Department of Defense’s mission overseas have no bearing at all on the question

² At the grand jury stage, then-Chief Judge Hogan expressed similar doubts, noting the Court was “not convinced the government has jurisdiction in this case,” and that “it’s not unreasonable to challenge the jurisdiction the government’s asserted in this case, but I think it has to be done at the end of the process when there’s an indictment issued.” *United States v. [Under Seal]*, No. MISC 07-516, Nov. 27, 2007 Tr. 53, 55-56, *attached as Ex. 37 to Defs. Reply Mem. Supp. Mot. to Dismiss for Lack of Juris.*, Dkt. 56-17 (Feb. 2, 2009).

³ Defendants are covered by MEJA only if the conduct alleged occurred while they were “employed by the Armed Forces outside the United States.” 18 U.S.C. § 3261(a)(1). The statute defines “employed by the Armed Forces outside the United States” to mean “(A) employed as— (ii) a contractor (including a subcontractor at any tier) of—(I) the Department of Defense . . . ; or (II) any other Federal agency, . . . to the extent such employment relates to supporting the mission of the Department of Defense overseas.” *Id.* § 3267(1)(A)(ii)(II) (emphasis added).

whether the Defendants committed manslaughter or attempted manslaughter at Nisur Square on September 16, 2007. The latter inquiry instead will rest upon whether the Defendants fired shots that resulted in death or injury to persons at Nisur Square and whether those shots were justified under the circumstances. Because the jurisdictional issue and the merits of the criminal charges present entirely separate and independent questions that will be decided based on completely distinct evidence, bifurcation will be easy to accomplish and, in fact, will result in a far more focused, fair and efficient presentation than would occur if both issues were tried simultaneously.

Bifurcation in this case is not only feasible, but it is also vital to ensuring that the Defendants receive a fair trial on the jurisdictional element of the serious offenses with which they have been charged. The Government has made no secret of the fact that its case against the Defendants on the substantive criminal charges will include graphic evidence regarding injuries suffered by those injured or killed at Nisur Square, as well as emotionally-charged testimony from those individuals or their family members. There is a clear and significant danger that the evidence offered to support the substantive criminal charges—evidence that has *nothing to do with* the jurisdictional element—will overwhelm the jurors’ emotions and impair them from fairly and objectively considering the more mundane but vital threshold issue of jurisdiction under MEJA. *Cf. Old Chief v. United States*, 519 U.S. 172, 180 (1997) (“‘Unfair prejudice’ within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”) (quoting Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C.App., p. 860). It is in precisely these circumstances—where prejudicial spillover of evidence is likely to impair a defendant’s right to a fair trial—that bifurcation is both appropriate and necessary. *See United States v. Dockery*, 955 F.2d 50, 54-56 (D.C. Cir. 1992) (noting district court should exercise its discretion to prevent prejudicial spillover from nature of

felony conviction in felon-in-possession cases); *United States v. Daniels*, 770 F.2d 1111, 1117 (D.C. Cir. 1985).⁴

In *United States v. Amante*, 418 F.3d 220 (2nd Cir. 2005), the Second Circuit noted in the context of a felon-in-possession weapons charge that “[B]ifurcation of a single count . . . might be appropriate in an ‘extraordinarily unusual case,’ such as where the facts of the prior felony would be admitted into evidence and are of such a heinous nature as to overwhelm the trial on possession.” *Amante*, 418 F.3d at 222-23 (quoting *United States v. Belk*, 346 F.3d 305, 311 (2^d Cir. 2003)). This is precisely such a case. The graphic and emotional testimony and evidence that the Government will introduce on the substantive manslaughter charges against the Defendants, without a doubt, will overwhelm the fact-finder’s fair and impartial consideration of the jurisdictional issue, which a layperson may perceive to be merely a “legal technicality” that should not stand in the way of prosecution of the Defendants for the crimes alleged in such graphic detail by the Government. Put differently, even a reasonable juror will be hard pressed to calmly and rationally assess the technical but legally dispositive question of jurisdiction after hearing months of testimony regarding the events of September 16, 2007 in horrific detail. The

⁴ Decisions distinguishing the *Dockery* bifurcation approach in the felon-in-possession context, such as *United States v. Mangum*, 100 F.3d 164 (D.C. Cir. 1996), and *United States v. Mathews*, 62 F. Supp. 2d 59 (D.D.C. 1999), have been based on concern that a jury not told of a defendant’s prior felony conviction may not understand why the remaining conduct it is asked to consider—the defendant’s simple possession of a gun—is illegal. *See Mangum*, 100 F.3d at 355 & n.11 (discussing cases); *Mathews*, 62 F. Supp. 2d at 63-64 (citing *Mangum*). That concern is not present here, where the charges of manslaughter, attempted manslaughter, and use of a firearm in those alleged offenses stand completely independent of the jurisdictional issue proposed to be bifurcated.

Here, the issue proposed to be bifurcated—the applicability of MEJA—cuts across all counts charged, so count-by-count severance—the remedy suggested in *Mangum*, 100 F.3d at 171—is impossible. In these circumstances, one of the other remedies discussed in *Mangum*—a separate or bench trial of the segregable issue, 100 F.3d at 171 (citing *Dockery*), or withholding evidence on the potentially overwhelming issue until after the issue less fraught with emotion is decided, *id.*—is appropriate.

danger of such a spillover effect occurring in a unitary trial of this case is substantial and overwhelmingly supports a discretionary decision by this Court to order bifurcation.

Finally, while it is not determinative, bifurcation also will serve interests of judicial economy. If the finder of fact were to determine in the first phase of a bifurcated trial that the Government failed to prove jurisdiction under MEJA beyond a reasonable doubt, there would be no need for jurors and the Court to proceed with a lengthy trial on the merits of the manslaughter and attempted manslaughter charges. And if the Government cannot prove that it has jurisdiction to prosecute the Defendants, the Defendants should not be made to endure a lengthy and traumatic trial on the substantive charges of the indictment. *Cf.* Mem. Order granting *Kastigar* Hrg. at 22 (Sept. 8, 2009) (noting that “[i]t would make little sense to force the defendants, the court and jurors to endure the cost and uncertainty of what could be a lengthy trial” if the prosecution is not legally viable).

CONCLUSION

For the reasons set forth above, the Defendants respectfully ask the Court to bifurcate the trial in this matter. We ask that the Court first try the question of whether there is jurisdiction under MEJA and, then, and only if that decision is in the Government's favor, proceed to trial on the substantive charges set forth in the indictment.

Respectfully submitted,

/s/ Mark Hulkower

Mark Hulkower
Michael Baratz
STEPTOE & JOHNSON, LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 429-6221
Facsimile: (202) 429-3902
Email: mhulkower@steptoe.com
Email: mbaratz@steptoe.com

Counsel for Paul Slough

/s/ David Schertler

David Schertler
Danny Onorato
SCHERTLER & ONORATO, L.L.P.
601 Pennsylvania Avenue, NW
North Building-9th Floor
Washington, DC 20004
Telephone: (202) 628-4199
Facsimile: (202) 628-4177
Email: dschertler@schertlerlaw.com
Email: donorato@schertlerlaw.com

Counsel for Dustin Heard

/s/ William Coffield

William F. Coffield
COFFIELD LAW GROUP LLP
1330 Connecticut Ave., N.W., Suite 220
Washington, D.C. 20036
Telephone: (202) 429-4799
Email: wcoffield@coffieldlawgroup.com

Counsel for Evan Liberty

/s/ Steven McCool

Steven McCool
MALLON & MCCOOL, LLC
1776 K Street, N.W., Suite 200
Washington, DC 20006
Telephone: (202) 680-2440
Facsimile: (410) 727-4770
Email: smccool@mallonandmccool.com

Counsel for Donald Ball