UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| UNITED STATES | : No. 13 Cr. 168 |
| | : |
| V. | : |
| HONG VO | : |
| Defendant. | : |

DEFENDANT HONG VO'S MOTION
TO DISMISS FOR IMPROPER VENUE

**INTRODUCTION**

Defendant Hong Vo and four others have been charged in a one count indictment with conspiracy to commit bribery and/or visa fraud, in violation of the general conspiracy statute, 18 United States Code Section 371. The defendant was originally arrested on a criminal complaint and the factual predicate for the alleged offense was set out more fully in the accompanying affidavit of State Department Diplomatic Security Section agent Simon Dimits (attached hereto as Exhibit 1). In summary, the Government alleges the existence of a conspiracy to pay bribes to co-defendant Michael Sestak, who at the time was a United States consular officer stationed in Ho Chi Minh City, Vietnam. In return, Sestak issued visas to applicants who were not otherwise eligible to come to the United States.

As set forth more fully herein, the Indictment must be dismissed because venue is not proper in the District of Columbia. The alleged conspiracy was formed and operated in Vietnam, no overt acts were committed in the District of Columbia, and the conspiracy terminated no later than September 2012 when Sestak left his overseas posting. Thus,

under the special extraterritorial venue statute, this case must be prosecuted in the jurisdiction where defendant Hong was arrested or previously resided – which in both instances is Denver, Colorado. See Cobar v. United States, 2006 WL 3289267 (D.C.)(Lamberth, C.J.).

Moreover, the Government cannot salvage – or manufacture - venue in this jurisdiction by the expedient of alleging as an overt act in the Indictment that co-conspirator Sestak made false statements to law enforcement agents in the District of Columbia in October 2012. Any such false statements were made after Sestak left his consular posting in Vietnam and are thus outside the scope of the alleged bribery/visa fraud conspiracy either because they were: (1) made after the conspiracy terminated; or (2) not in furtherance of the conspiratorial agreement. See Lutwak v. United States, 344 U.S. 604 (1953).

Accordingly, the case must be dismissed. See United States v. Liang, 224 F.3d 1057 (9th Cir. 2000)(federal courts have no power to transfer criminal cases; remedy for improper venue is dismissal). United States v. Moore, 582 F.Supp. 1575 (D.D.C. 1984). Because the defendant is being held without bond, the defense respectfully requests a prompt hearing on the motion.

**FACTUAL SUMMARY**

Defendant Hong Vo is a twenty five year old United States citizen, who was born and raised in Denver, Colorado. She was arrested on May 8, 2013 in Denver, Colorado, based upon a criminal complaint and supporting affidavit. According to the affidavit, the defendant conspired "to solicit bribes from visa applicants in exchange for which SESTAK facilitated the approval of their visas through the Consulate." Aff. at para. 1.

The affidavit alleges that in furtherance of the conspiracy Vietnamese nationals who might otherwise not have been visa eligible paid bribes to Sestak, who would approve the visa. Sestak "ultimately moved the money out of Vietnam by using money launderers through off-shore banks, primarily based in China, to move funds to a bank account in Thailand that he opened in May 2012." Aff. at para. 7. The affidavit further describes that certain funds were transferred by Sestak to the United States and other payments were allegedly made to Sestak through deposits in the United States. None of the factual representations in the affidavit concerning the movement of money, however, allege any contact between the conspiracy and the District of Columbia.

Finally, the affidavit states that Sestak left his posting in Vietnam on September 6, 2012 in preparation for a tour of active duty with the U.S. Navy. Aff. at p. 3, n.2. The affidavit does not allege any subsequent contact between Sestak and the other alleged co-conspirators. Rather, the only factual allegations concerning events after September 6, 2012 involve an interview given by Sestak, who was apparently brought to the District of Columbia under the "pretext" that the Diplomatic Security Service was investigating a Vietnamese national who had been working at the U.S. Embassy in Ho Chi Minh City. Aff. at para. 54. According to Agent Dimits, Sestak made false statements concerning whether other U.S. consular officers in Vietnam had accumulated unexplained wealth or were "adjudicating" visas for their "personal associates." Aff. at para. 55. Sestak was arrested on May 13, 2013 in Los Angeles, California. [1] See Docket 13 MJ 339 (a copy of the arrest warrant is attached hereto as Exhibit 2).

[1] The remaining defendant in custody, Truc Hyunh, was arrested on a material witness warrant on May 8, 2013 in Denver, Colorado. She was then transported to the District of Columbia and after her arrival, law enforcement agents from the Diplomatic Security Section obtained a warrant for her arrest in connection with the alleged bribery/visa fraud conspiracy. She was presented before Magistrate Deborah Robinson on

## LEGAL ANALYSIS

1. Venue Generally

The concept of venue - that a criminal prosecution should be maintained in a jurisdiction with some relationship to the events alleged in the case - is embodied in the U.S. Constitution, which provides that the "[t]rial of all Crimes ... shall be held in the State where the said Crimes shall have been committed." See Art. III, Section 2, cl. 3. The Sixth Amendment also specifically directs that criminal trials shall be held before an impartial jury "of the State and district wherein the crime shall have been committed." United States v. Cabrales, 524 U.S. 1, 6 (1998). Finally, Federal Rule of Criminal Procedure 18 states that "the government must prosecute an offense in the district where the offense was committed."

In this case, the charged conspiracy appears to have been formed, existed, and terminated completely outside of the territorial confines of the United States. Assuming *arguendo* that the underlying predicate bribery and visa fraud offenses have extraterritorial application, venue in this case is therefore determined by the provisions of 18 United States Code Section 3238. This special venue statute provides that the prosecution of an offense "begun or committed out of the jurisdiction of any particular State or district" shall be prosecuted in hierarchical order in the following locations: (1) in the judicial district where the offender is first arrested or first brought; (2) if neither the defendant (nor any co-defendant) is first arrested or brought to the United States, then the case may be indicted in the district of the last known residence of the offender in the

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the criminal complaint on June 3, 2013. See Docket 13 MJ 463. A copy of the arrest warrant is attached hereto as Exhibit 3.

United States; or (3)"if no such residence is known," the case may be brought in the District of Columbia. 18 United States Code Section 3238. [2]

Accordingly, venue in this case is appropriate in the U.S. District Court for the District of Colorado under both the first and second provisions of the special venue statute for extraterritorial crimes. Defendant Hong Vo was the first person arrested in connection with this case on May 8, 2012 in Denver, Colorado. In the alternative, she could have been indicted before her arrest in the district of her last known residence – which again is Denver, Colorado. Venue in the District of Columbia would only be proper if the defendant had not been arrested elsewhere in the United States or she had no prior residence in this country.

In reliance upon these principles, the Court in Cobar v. United States, 2006 WL 3289267 (D.D.C.), recently dismissed the prosecution of an international narcotics conspiracy which had been wrongly charged in the U.S. District Court for the District of Columbia. The activities of a foreign national co-defendant in that case named Luis Gonzales-Largo, took place entirely outside of the United States. Gonazales-Largo had not been first brought to the District of Columbia for prosecution (he had been arrested in Arizona) and had no prior residence in the United States. Finally, the Government could not allege any nexus between the criminal conspiracy and the District of Columbia. The Court concluded that venue in the District of Columbia therefore did not exist and the case was dismissed because the requirements of 18 United States Code Section 3238 were not met. Cobar, 2006 WL 3289267 at p. 5. See also United States v. Hilger, 867 F.2d 566 (9th Cir. 1989)(extraterritorial murder case dismissed for improper venue when

[2] The term "first brought" applies only to those circumstances where the defendant enters the United States already in custody. United States v. Catino, 735 F.2d 718, 724 (2d Cir. 1984). It has no application to this case.

defendant not first arrested in jurisdiction where case was prosecuted and the indictment was not returned in the district of his last known residence).

These principles apply with equal force to the facts presented herein and likewise mandate dismissal of the Indictment.

2. There Is No Independent Venue For The Conspiracy to Commit Bribery And/Or Visa Fraud in the District of Columbia

In general, a conspiracy case may be prosecuted in any district in which the conspiracy was "formed," Cobar v. United States, 2006 WL 3289267 (D.C.) or "an overt act in furtherance of the conspiracy was committed by any of the coconspirators." United States v. Singhal, 876 F.Supp.2d 82, 101-102 (D.D.C. 2012). Accord United States v. Hsia, 24 F.Supp.2d 14, 22 (D.D.C. 1998). The Indictment in this case alleges a conspiracy to violate both the federal bribery statute and the visa fraud statute. As demonstrated by the following analysis, neither alleged crime took place in the District of Columbia and venue is therefore not otherwise proper in this jurisdiction.

The Indictment references two provisions of the federal bribery statute - 18 United States Code Sections 201(b)(1) and (b)(2). In essence, these sections criminalize: (1) any effort to corruptly influence a public official in the performance of his duties; or (2) any solicitation by a public official for a bribe. It is well settled in this jurisdiction, that venue in a bribery case "lies only in a district in which the defendant committed unlawful acts and is not proper in a district where only the effects of the crime occur. . . ." United States v. White, 877 F.2d 267, 272 (D.C. Cir. 1989). In White, the Court of Appeals reversed a bribery conviction brought in the District of Columbia where the conspirators planned the crime in Virginia and North Carolina and the payments were made to a public official named Finotti in Maryland. The Court noted that the crime was

"completed upon the public officer's receipt or agreement to receive payments for an official act" and the fact that Finotti committed official acts in the District of Columbia did not create venue. 877 F.2d at 272. Accordingly, the conviction was reversed for lack of venue. Accord United States v. Trie, 21 F.Supp.7 (D.D.C. 1998)(venue for obstruction of justice, like bribery, exists only in the district where the defendant committed unlawful acts and not where effects of crime occur). In this case, the alleged unlawful acts in furtherance of the alleged bribery took place almost exclusively in Vietnam, where Sestak allegedly received payments. Moreover, no other overt act in furtherance of the bribery conspiracy is alleged to have been accomplished in the District of Columbia and thus, venue is not proper in this jurisdiction.

Similarly, the Government alleges that the other object of the conspiracy was to commit visa fraud in violation of 18 United States Code Section 1546(a). This statute criminalizes all manner of conduct in relation to visas, including, *inter alia*, obtaining a visa by "any false claim or statement," or otherwise possessing one "unlawfully obtained." In United States v. Ramirez, 420 F.3d 134 (2d Cir. 20015), the Second Circuit concluded that venue for visa fraud was in the jurisdiction where the fraudulent application was made. Similarly, in United States v. Quirke, 2012 WL 4369304 (R.I), the court held that the offense of passport fraud takes place and is completed in the jurisdiction where the application to obtain the passport is submitted. The court concluded that passport fraud is a "point-in-time offense," and that venue exists only where the action to falsely obtain the passport took place. Quirke, at p. 2.

In this case, any alleged visa fraud also took place in Vietnam – the situs where the visa application was submitted or approved. There is certainly no factual connection

between the visa fraud and the District of Columbia and no independent basis for venue in this jurisdiction.

3. The Alleged False Statements By Sestak Do Not Create Venue In The District of Columbia

The Government – no doubt in anticipation of a motion to dismiss for lack of venue – included as an alleged overt act in the Indictment, the making of false statements by co-defendant Michael Sestak in Washington, D.C. on October 19, 2012. While the statements may possibly demonstrate consciousness of guilt on the part of Sestak, they do not create venue in this jurisdiction because they were not made within the scope of the charged conspiracy to commit bribery and/or visa fraud.

As an initial matter, the language of the indictment concerning the duration of a conspiracy is not controlling on the court. United States v. Turner, 548 F.3d 1094 (D.C. Cir. 2008)(Government's argument that the court "need look only at the indictment to determine the duration of the conspiracy . . . is quite mistaken"). In general, a criminal conspiracy ends when its central purpose has been accomplished, Grunewald v. United States, 353 U.S. 391, 202 (1957), or the "ends [of the conspiracy have] been so frustrated or its means so impaired that its continuation was no longer plausible." United States v. Gibbs, 739 F.2d 838, 845 n. 18 (3d Cir. 1984).

In reliance on this principle, the Court in United States v. Hitt, 107 F.Supp.2d 29, 33 (D.D.C. 2000) concluded that the central purpose of an alleged conspiracy to falsely obtain export licenses to send good to China terminated when the licenses were obtained and not as the Government alleged, a year later when the goods were ultimately exported to China. The ruling in Hitt is completely consistent with the Supreme Court's pronouncement that "[t]here can be no furtherance of a conspiracy that has ended.

Therefore, the declarations of a conspirator do not bind the co-conspirator if made after the conspiracy has ended." Lutwak v. United States, 344 U.S. 604, 617-18 (1953).

Similarly, in this case, the alleged criminal conspiracy must have ended no later than September 2012 when Sestak left his consular posting in Ho Chi Minh City and was no longer able to accomplish the goal of the conspiracy as defined by the Indictment – to issue visas in return for bribes. The affidavit in support of the criminal complaint against defendant Hong does not allege any other activity taken in furtherance of the conspiracy after Sestak left Vietnam, nor does the affidavit allege – directly, indirectly, by implication or otherwise – that the scheme to obtain visas remained ongoing. Thus, any alleged false statements uttered to the Diplomatic Security Service agents on October 19, 2012 were made after the conspiracy terminated cannot serve as the basis for venue in this case.

Even assuming *arguendo*, that the conspiracy was somehow still ongoing when Sestak made the allegedly false statements, they would not provide a basis for venue because they were not made "in furtherance" of the bribery and/or visa fraud conspiracy. Although the Government has not alleged directly in the Indictment, the only possible relevance of the supposedly false statements would be to "conceal" the alleged criminal conspiracy. The Supreme Court has clearly held, however, that there is no implied agreement to "conceal" in every conspiracy case. Krulewitch v. United States, 336 U.S. 440, 443-44 (1949). In Grunewald v. United States, 353 U.S. 391 (1957), the Court held that acts of a co-defendant to actually conceal the crime did not imply the existence of a subsidiary conspiracy to conceal. "[A]fter the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from

circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." Grunewald, 353 U.S. at 401-02. See also Lutwak v. United States, 34 U.S. 604, 617-18 (1953).

As a result of the principle articulated in Krulewitch, Grunewald, and Lutwak, it is clear that the alleged acts of concealment alleged in the Indictment were not made in furtherance of the alleged conspiracy to commit bribery and/or visa fraud. In United States v. Hsia, 24 F.Supp.2d 14 (D.D.C. 1998), the Government included numerous references to alleged false statements made to cover up the conspiracy after it was completed. The Court specifically noted that these allegations would be subject to a motion to strike under the following analysis:

> If the alleged acts of concealment and cover-up were taken after the original conspiracy was completed or in furtherance of a subsequent and separate conspiratorial agreement, however, the acts are neither overt acts in furtherance of the alleged conspiracy charged in the indictment nor the manner and means of committing the alleged conspiracy.

Hsia, 24 F.Supp.2d at 26.

An almost identical set of facts was presented in United States v. Turner, 548 F.3d 1094 (D.C. Cir. 2008). The defendant, Peter Turner was charged with fraud and bribery in connection with the forging of a signature on a life insurance benefits form. The actual forgery was committed in 2001 by his co-defendant LaTanya Adams. In 2005, law enforcement agents spoke with Adams, who lied about her relationship with Turner and her involvement in the case. The Government argued that the conspiracy remained ongoing until 2005 as a result of the false statements, but the Court of Appeals rejected the argument, noting that the Indictment did not allege a specific conspiracy to conceal and that the case fell squarely within the rule laid down in Krulewitch and its progeny.

The same conclusion is mandated here. Any false statements made by Sestak to the law enforcement agents in the District of Columbia in 2012 are outside the scope of the alleged conspiratorial agreement and cannot serve as a principled basis for venue in this case. The Government cannot by the simple tactic of alleging an overt act in the Indictment create venue where none exists. As a result, this case must be dismissed.

CONCLUSION

For all of the foregoing reasons, defendant Hong Vo respectfully requests that the Indictment be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent, via the Electronic Filing System to Assistant United States Attorneys Brenda Johnson and Mona Sahaf, 555 4th Street, N.W., Washington, D.C. via the Electronic Case Filing System, this day 20th day of June, 2013.

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