UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES	:	13 Cr. 168 (JDB)
	:	
V.	:	
HONG VO	:	
Defendant.	:	

DEFENDANT HONG VO'S RENEWED
MOTION TO DISMISS FOR LACK OF VENUE

INTRODUCTION

Defendant Hong Vo files this supplemental memorandum in support of her motion to dismiss the currently pending Superseding Indictment for lack of venue. The defendant's initial pleading demonstrated, *inter alia*, that because no overt act took place in the District of Columbia, venue does not exist in this court. Rather, pursuant to the extraterritorial venue statute, 18 U.S. Code Section 3228, venue for this case exists only in Denver, Colorado – where defendant Hong Vo was arrested on May 8, 2013.

In apparent response, the Government added verbiage in several places in the Superseding Indictment in an effort to cure the defect in venue. First, the Superseding Indictment now asserts that one object of the conspiracy was to conceal either: (1) the existence and source of criminal proceeds; or (2) the existence of the conspiracy itself. The Superseding Indictment also alleges that false statements allegedly made by co-conspirator Michael Sestak to State Department investigators in Washington, D.C. in October 2012 – one month after he left his consular posting in Vietnam – were in furtherance of the conspiracy and were undertaken to conceal its existence.

Notwithstanding these assertions, the Superseding Indictment fails to allege any specific facts to show that there was an "express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission." Grunewald v. United States, 353 U.S. 391, 404 (1957). Absent proof that such special agreement existed, the Government's allegation that co-defendant Michael Sestak's false statements were made in furtherance of the conspiracy fails and venue does not exist in the District of Columbia.

The Government also added language in the Superseding Indictment that repeatedly refers to co-defendant Truc Huynh as a "joint offender who was arrested in the District of Columbia." As a factual matter the representation is subject to significant dispute since co-defendant Huynh was actually first arrested on in Denver, Colorado on May 8, 2013 on a material witness warrant arising out of this case. At the time of her arrest in Denver, she was already a "target" in the bribery/visa fraud investigation. More importantly, for purposes of the extraterritorial venue statute, however, the arrest of defendant Hong Vo in Denver, Colorado on May 8, 2013 fixed venue in that jurisdiction. To the extent that the Government in this case may seek to argue that Truc Huynh's subsequent arrest on a criminal complaint in the District of Columbia on June 3, 2013 vests jurisdiction in the District of Columbia, the position would be contrary to: (1) the plain language of the venue statute; and (2) the litigation position taken by the U.S. Attorney's Office for the District of Columbia in United States v. Slough, et al. Cr. No. 08-360.

FACTS

This Superseding Indictment in this case was returned on July 9, 2013. It charges defendant Hong Vo and four others – Michael Sestak, Binh Vo, Anhdao Nguyen, and Truc

Huyhn - with: (1) one count of conspiracy to commit bribery and visa fraud; (2) thirteen substantive counts of bribery; and (3) thirteen substantive counts of visa fraud. In addition, the Superseding Indictment charges co-defendant Michael Sestak with one count of making material false statements.

The conspiracy count contains several allegations arguably relevant to the issue of venue. First, it alleges that one objective of the agreement was to "conceal the existence and source of the proceeds of the conspiracy." See Para. 12. [1] Second, in the "Manner and Means" section of the conspiracy count, the Indictment alleges that "Defendants SESTAK, BINH VO, and ALICE NGUYEN concealed the source of the proceeds and the existence of the scheme by transferring the money out of Vietnam into bank accounts in the United States and Thailand, and real property in Thailand." See Para. 12L. In the "Overt Acts" section of the conspiracy count, the Indictment alleges that co-defendant Sestak made false statements to State Department investigators in Washington, D.C. in October 2012 concerning whether other consular officers in Vietnam had unexplained wealth or had approved visas for their "personal associates." See para. 17.

The substantive bribery counts contained in Superseding Indictment make no mention of an agreement or acts to conceal. Likewise, the substantive visa fraud counts do not contain any mention of an agreement or acts to conceal. Finally, the false statements count was brought solely against co-defendant Sestak and does not allege that co-defendant Hong Vo, or any other co-defendant, is criminally liable for the commission of this offense.

[1] Undersigned counsel have communicated with the Government concerning the intention of this language. The prosecutors have indicated that the object of the conspiracy was to conceal: (1) the existence of proceeds; and (2) the source of proceeds. This language was not intended to suggest that it was an object to conceal the existence of the conspiracy itself.

LEGAL ANALYSIS

1. No Acts Were Taken In Furtherance Of
   The Alleged Conspiracy In The District of Columbia

For more than fifty years, a line of Supreme Court precedent has held that a criminal conspiracy does not exist in perpetuity and that acts designed to conceal the existence of a conspiracy are part of the inherent nature of the crime. Thus, absent some special agreement among the co-conspirators *ab initio*, false statements such as those allegedly made by co-defendant Sestak are not in furtherance of a conspiracy and do not provide a basis for venue in this jurisdiction. A review of the relevant caselaw follows.

In Krulewitch v. United States, 336 U.S. 440 (1949), the Government attempted to introduce statements made by one co-defendant after the main object of a conspiracy (to transport a woman in interstate commerce for immoral purposes) had been completed. The Government argued that even though the main objective had concluded, the statement was nonetheless admissible "in furtherance of a continuing subsidiary objective of the conspiracy," that is – to conceal its existence. 336 U.S. at 443. The Supreme Court noted that among all conspirators there was "expressly or implicitly [an] agree[ment] to collaborate with each other to conceal facts in order to prevent detection, conviction and punishment." The Court, however, rejected the Government's argument that every "declaration made in furtherance of an alleged implied, but uncharged conspiracy aimed at preventing detection and punishment" was admissible. Id. at 444.

In Lutwak v. United States, 344 U.S. 604 (1953), the defendants were charged with defrauding the United States by obtaining visas as the result of false marriage claims. The Government introduced into evidence certain statements made by one of the co-defendants after he entered the United States. The Court again rejected the Government's argument that implicit

in the conspiracy was an agreement to conceal its existence which rendered the statement admissible. It noted that there was no evidence presented of a specific agreement to conceal the conspiracy's existence. Moreover, although the Government did introduce evidence that one of the co-conspirators made false statements to conceal, the Court noted that this was "not evidence that the conspiracy included the further agreement to conceal. It is in the nature of an afterthought by the conspirator for the purpose of covering up." 344 U.S. at 616. The Court concluded that this false declaration took place after the conspiracy had ended and was therefore, not admissible against the co-defendants. Id. at 617.

Finally, in Grunewald v. United States, 353 U.S. 391 (1957), the defendant was charged with a tax fraud conspiracy and witness tampering. The defense moved to dismiss the case on statute of limitations grounds, which ultimately required the court to determine when the conspiracy ended. The indictment alleged – and the Government argued - that the case was not time barred because of certain acts taken to conceal the existence of the conspiracy. The Supreme Court rejected that argument, noting that the lesson of Krulewitch and Letwak was that

> after 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.

353 U.S. at 401. Moreover, despite the existence of actual instances of efforts by the co-conspirators in Grunewald to conceal their crime, for example, by making false statements, the Supreme Court found that there was not sufficient evidence to establish a separate agreement to conceal. It reasoned as follows:

> Allowing such a conspiracy to conceal to be inferred or implied from mere overt acts of concealment would result in a great widening of the scope of conspiracy prosecutions, since it would extend the life of a conspiracy indefinitely. **Acts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was**

> **part of the initial agreement among the conspirators**. For every conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces. Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators (emphasis added).

Id. at 402.

The reasoning of the Grunewald line of cases has been applied by the courts in the analysis of whether venue exists because of an overt act taken in furtherance of a conspiracy. Thus, in United States v. Turner, 548 F.3d 1094 (D.C. Cir. 2008), the Court of Appeals concluded that venue for a bribery conspiracy case was not proper in the District of Columbia because no overt acts were taken in this jurisdiction. Relying on Grunewald, the Court of Appeals further held that that false statements allegedly made by a co-conspirator to law enforcement agents after the bribes were paid was not part of the charged conspiracy and did not establish a separate, "express" agreement to conceal. The indictment was dismissed for lack of venue. 548 F.2d at 1097-98. Accord United States v. Kang, 715 F.Supp.2d 657 (D.S.C. 2010).

Under this controlling law, the allegations contained in the Superseding Indictment fail to establish venue in this jurisdiction. As an initial matter, no direct overt act in furtherance of the alleged visa/bribery fraud conspiracy is alleged to have taken place in Washington, D.C.
It is beyond dispute that co-defendant Sestak left his consular posting in Ho Chi Minh City in September 2012. As demonstrated in the defendant's original memorandum in support of the motion to dismiss, the conspiracy to commit bribery and/or visa fraud was completed no later than when Sestak left Vietnam.

Although the Government has included certain facts in the Superseding Indictment in an effort to establish a conspiracy to conceal, the matter has not been sufficiently pled to create even

the possibility of venue in the District of Columbia. The facts do no allege a **separate, express agreement from its inception**, to conceal the existence of the alleged bribery/visa fraud conspiracy or its proceeds. Under the Grunewald decisional line, even proof of false statements – such as those allegedly made by co-defendant Sestak to the State Department investigators in October 2012 – would not be sufficient to establish such an agreement absent more specific proof.

Finally, it is significant that only co-defendant Sestak has been charged in the false statements count of the Superseding Indictment. This demonstrates that the Government did not have proof to establish that defendant Hong Vo was responsible for this activity. Because Sestak's alleged false statements were not made in furtherance of the charged conspiracy and they are not otherwise attributable to defendant Hong Vo, venue does not exist in the District of Columbia.

2. The "Arrest" of Co-Defendant Truc Huynh
Does Not Create Venue In This Jurisdiction

The extraterritorial venue statute provides that:

> **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 of more joint offenders, is arrested** or first brought; but if such offender or offenders are not so arrested or brought in any district, an indictment or information may be filed in the district of the last known residence of the offender or 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.

18 U.S. C. Section 3238 (emphasis added).

By its express language, the statute creates a hierarchy of locations for the prosecution of crimes committed outside of the United States. First, venue shall be where any one of two or more joint offenders is arrested. Given the statute's formulation and purpose, the location where the first person is arrested must control. Otherwise, absurd results would occur because in a case

with multiple co-defendants, venue would exist simultaneously in numerous jurisdictions if the defendants were arrested in different places. Thus, in United States v. Levy Auto Parts, 787 F.2d 946 (4th Cir. 1986), the Court of Appeals held that an extraterritorial conspiracy to violate U.S. export control laws could be brought in the Eastern District of Virginia because the first defendants in the case had been arrested there.

Moreover, in United States v. Slough, Cr. No. 08-360, the U.S. Attorney's Office for the District of Columbia brought a homicide prosecution against numerous employees of Blackwater Worldwide for activities alleged to have taken place in Baghdad, Iraq. On December 8, 2008, five co-defendants voluntarily surrendered themselves to the United States Marshal in the District of Utah based upon arrest warrants issued in connection with an indictment returned in the U.S. District Court for the District of Columbia. The defendants ultimately filed a motion to dismiss the indictment in Washington, D.C., arguing that venue did not belong here because they had been "arrested" in Utah. The Government opposed the motion to dismiss, arguing that because a co-defendant had voluntarily surrendered and been arrested in the District of Columbia on November 18, 2008, venue existed only in the District of Columbia pursuant to the provisions of 18 U.S. Code Section 3238. Indeed, the Government specifically argued that the co-defendant's "arrest in this District [of Columbia] served the law enforcement purpose that all further proceedings in his case occur in this district." The motion to dismiss for lack of venue was ultimately denied by the Court. A copy of the motion to dismiss and the Government's reply in Slough are attached hereto as Exhibits 1 and 2.

Thus, under opposite – but otherwise identical circumstances – the Government argued that the *situs* of the first person arrested in a case controlled for purposes of establishing venue in an extraterritorial case. Under the same analysis, venue was established when the first person in

this case was arrested, which was defendant Hong Vo, who was taken into custody on an arrest warrant on May 8, 2013 in Denver, Colorado. Thus, venue in this case exists only in the District of Colorado.

In an apparent effort to circumvent the plain meaning of the statute, the Superseding Indictment refers to co-defendant Truc Huynh as a "joint offender who was arrested in the District of Columbia." The fact that this co-defendant was subsequently arrested is completely irrelevant to the issue of venue under 18 U.S.C. Section 2328. But even assuming *arguendo* that Truc Huyhn's arrest is in any way relevant to the issue, the representations in the Superseding Indictment concerning her arrest are incomplete and indeed, the complete facts support venue in the District of Colorado. [2]

On May 8, 2013, co-defendant Truc Huynh was arrested in Denver, Colorado on a material witness warrant issued from the District of Columbia. The motion filed in support of the request for an arrest warrant states that "it is impractical to secure the witness' testimony by means of a subpoena because the government believes that, **due to her status as a target of this investigation**, the witness is likely to assert her Fifth Amendment privilege regarding any questioning about the ongoing visa fraud investigation" (emphasis added). A copy of the motion and accompanying affidavit are attached hereto as Exhibit 3. Truc Huynh was thereafter brought to the District of Columbia. Upon information and belief, she interview with members of the U.S. Attorney's Office and thereafter, on June 3, 2013, was charged by criminal complaint with conspiracy to commit bribery and/or visa fraud. A copy of the affidavit in support of the complaint is attached hereto as Exhibit 4.

[2] The Indictment is silent as to the fact that co-defendant Michael Sestak was arrested on May 13, 2013 in Los Angeles, California.

As an initial matter, a person is arrested for purposes of this venue statute, when their liberty is "restrained in connection with the offense charged." United States v. Catino, 735 F.2d 718, 724 (2d Cir. 1985). A review of the affidavit in support of Truc Huynh's arrest on the material witness warrant with the affidavit in support of her arrest, reveals substantial overlap between the two documents which both allege a violation of the same criminal conspiracy. Truc Huynh had her liberty restrained when she was taken into custody in Denver and in every real sense, she was "arrested" from the outset as a joint offender on these charges.

Moreover, by the Government's own representations in the Superseding Indictment she is a "joint offender." In United States v. Levy Auto Parts, 787 F.2d 947 (4th Cir. 1986), the Court of Appeals used a practical test to determine if a first arrested co-defendant was arrested was a joint offender with others subsequently arrested. The initial defendant in the Levy Auto Parts case had been arrested in the Eastern District of Virginia upon a complaint charging him with a violation of the general conspiracy statute, but later pled guilty to specific offenses involving the violation of U.S. export regulations. The Government thereafter returned a conspiracy indictment in the Eastern District of Virginia against two Canadian nationals and a corporate entity for violation of the export rules. The Canadian defendants moved to dismiss, claiming that there were no overt acts undertaken in Virginia. The Government claimed that venue was appropriate pursuant to 18 U.S. Code Section 3238 because a joint offender had first been arrested in the district. In making its assessment as to whether the first defendant was a "joint offender," the Court of Appeals reviewed the factual predicate for both arrests, concluding that "[t]he customs agent's affidavit clearly discloses that [the original defendant] and the present defendants were suspected of concerted criminal activity." 787 F.2d at 749. Accordingly, the motion to dismiss was denied.

Under this analysis, Truc Huynh was in fact a joint offender who was arrested in Denver, Colorado on May 8, 2013. The motion in support of her arrest as a material witness states that she was the "target" on a bribery investigation. It appears that she was subsequently charged in by complaint after unsatisfactory debriefing session(s) with the prosecutors and not because of any other changed circumstances. Under the totality of circumstances, Truc Huynh's arrest in Denver supports this motion to dismiss. In any case, the Government's apparent effort to manufacture venue in this jurisdiction based upon Truc Huynh's supposed "arrest" in the District of Columbia must fail.

CONCLUSION

For all of the foregoing reasons, defendant Hong Vo respectfully renews her request that the Indictment be dismissed for lack of venue.

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. and to all other counsel of record, via the Electronic Case Filing System, this day 26th day of July, 2013.

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