UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 6:17-cr-18-Orl-40KRS

NOOR ZAHI SALMAN

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNT TWO

The government hereby responds in opposition to the defendant's motion to dismiss Count Two for lack of venue and asks this Court to deny the motion. Section 1512(i) provides that venue for any charge under § 1512 is proper in either "the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred." Venue for Count Two of the Indictment is proper in the Middle District of Florida under both prongs of 18 U.S.C. § 1512(i).

I. Venue Is Proper under the Official Proceeding Prong of § 1512(i).

Count Two was brought in the district in which "the official proceeding (whether or not pending or about to be instituted) was intended to be affected." 18 U.S.C. § 1512(i). The official proceedings in this matter are either the law enforcement investigation into the Pulse Night Club shooting or

the almost immediately ensuing grand jury investigation and judicial proceedings. Any of these proceedings is a sufficient basis for venue to be proper in this District.

a. Grand Jury and Judicial Proceedings Are Official Proceedings.

The grand jury investigation in the Middle District of Florida that began almost immediately following the Pulse Night Club shooting and these judicial proceedings constitute an "official proceeding (whether or not pending or about to be instituted)," which Salman intended to affect by her obstructive conduct. 18 U.S.C. § 1512(i); 18 U.S.C. § 1515(a)(1)(A) (including proceedings "before a judge or court of the United States" or "a Federal grand jury" in the definition of official proceedings); *see also United States v. Ermoian*, 752 F.3d 1165, 1171 n.5 (9th Cir. 2013) ("[T]he venue provision could extend to investigations, not through the term 'official proceeding,' but through the subsequent parenthetical phrase—"(whether or not about to be instituted)."); *United States v. McDaniel*, 2013 U.S. Dist. Lexis 187658, *38-39 (N.D. Ga. 2013) ("[C]ourts have repeatedly upheld convictions for obstruction of grand jury investigations, even where the conduct arguably also obstructed a federal law enforcement investigation."); *United States v. Gabriel*, 125 F.3d 89, 105 n.13 (2d Cir. 1997) (holding that actions that interfere with both a criminal investigation and a grand jury proceeding are sufficient for criminal liability);

United States v. Simpson, 2011 U.S. Dist. Lexis 76881, (N.D. Tex. 2011) ("The fruits of the FBI investigation may have led to an official proceeding like the grand jury investigation or the instant criminal case.").

Grand jury and judicial proceedings have obviously taken place in this District as evidenced by the Indictment against the defendant. These proceedings are sufficient to satisfy § 1512(i)'s requirement of an official proceeding in the district where the defendant is charged with obstruction.

b. The Law Enforcement Investigation Is an Official Proceeding.

The investigation into the Pulse Night Club shooting, conducted by Special Agents of the Federal Bureau of Investigation ("FBI"), not to mention numerous other law enforcement agencies, federal, state, and local, is an "official proceeding" sufficient to satisfy § 1512(i) as to § 1512(b)(3). *See* § 1515(a)(1)(C) (defining an "official proceeding" as a "proceeding before a Federal Government agency which is authorized by law"). The FBI investigation into the Pulse Night Club shooting took place in the Middle District of Florida; thus, venue for Count Two of the Indictment is appropriate here, where the investigation the defendant intended to affect took place.

In *United States v. Gonzalez*, 922 F.2d 1044 (2d Cir. 1991), the Second Circuit considered venue for a portion of § 1512 that does not require an

"official proceeding" for substantive liability.[1] That Court held that, in those parts of § 1512 that do not require that an official proceeding be pending, courts should "read the term 'official proceeding' [in § 1512(i)][2] broadly in order to effect Congress' purpose in passing it." *Id.* at 1056. The basis for this broad reading is that "the venue provision could not have been intended to narrow the reach of the substantive criminal subsection." *See United States v. Ramos*, 537 F.3d 439, 463 (5th Cir. 2008) (*citing Gonzalez*, 922 F.2d at 1056). Similarly here, this Court should read § 1512's venue provision broadly to allow for full use of the statute in all relevant jurisdictions, including this one.

While the defendant heaps scorn upon *Gonzalez*, the case is clearly still good law in the Second Circuit and is persuasive authority upon which this Court can rely in holding that venue is proper as to Count Two. *See United States v. Perez*, 575 F.3d 164, 168 (2d Cir. 2009) (noting the distinction between cases that require an official proceeding for criminal liability and those that require an official proceeding for venue purposes); *but see Gabriel*, 125 F.3d at 105 n.13 (stating only in dicta, and without any discussion of *Gonzalez*'s

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[1] The parties in this case agree that § 1512(b)(3) is such a section and that there is no requirement that the government make any showing regarding an official proceeding for purposes of criminal liability. *United States v. Veal*, 153 F.3d 1233, 1251 (11th Cir. 1998); *United States v. Ronda*, 455 F.3d 1273, 1288 (11th Cir. 2006).

[2] *Gonzalez* refers to § 1512(h), which has since been recodified as § 1512(i).

binding precedent, that a conviction under § 1512(b)(1) could not be based on interference with a government investigation).

Similarly, neither the Eleventh Circuit, nor any of the in-Circuit district court precedent on which the defendant relies, addresses the core holding of *Gonzalez*, which is that a criminal investigation will satisfy § 1512's venue provision for those sections of § 1512 that do not require an official proceeding for criminal liability. *United States v. Ronda*, 455 F.3d 1273, (11th Cir. 2006) (addressing § 1512(b)(3) in terms of substantive liability); *McDaniel*, 2013 U.S. Dist. Lexis 187658 (considering corrupt obstruction of an official proceeding under § 1512(c)(2)); *United States v. Peterson*, 544 F. Supp. 2d 1363, (M.D. Ga. 2008) (same); *United States v. Dunn*, 434 F. Supp. 2d 1203 (M.D. Ala. 2006) (considering the applicability of an obstruction of justice enhancement based on § 1512(c)(1) and (c)(2), both of which substantively require an official proceeding).

c. The Government May Rely on the First Prong of § 1512(i).

As noted above, the government agrees with the defendant that a substantive conviction for 18 U.S.C. § 1512(b)(3) does not require any proof regarding an official proceeding. The defendant, however, erroneously and without citation to any authority, attempts to extend this legal principle to mean that venue can never be proper under the first prong of § 1512(i) for a

violation of § 1512(b)(3). Doc. 54 at 4-5. However, the government is allowed to adduce facts at trial necessary to show venue, even if those facts are not necessary for criminal liability. *See, e.g., United States v. Barrett*, 153 F. Supp. 3d 552, 555 n.12 (E.D.N.Y. 2015) (noting the common practice and listing cases in the Second Circuit to deny a pretrial motion to dismiss for lack of venue as "premature where additional evidence may be presented at trial demonstrating the propriety of venue").

The case of *United States v. Baldeo*, 615 F. App'x 26, 27 (2d Cir. 2015), is instructive. The defendant in that case was charged with violation of § 1512(b)(3) and argued on appeal that there was insufficient evidence to support his conviction. The Second Circuit held that venue was sufficiently established because "the government presented evidence that [the defendant] sought to impede grand jury proceedings that were subsequently instituted in the Southern District of New York by attempting to prevent potential witnesses from communicating with FBI agents from that district about suspected federal fraud offenses committed within their jurisdiction." *Id; see also United States v. Baldeo*, 2013 WL 5477373, (S.D.N.Y. 2013) ("The obstruction of justice counts include either general allegations that the criminal acts occurred in the Southern District of New York, or allegations that Baldeo's conduct intended to affect investigation taking place at least in part in

the Southern District of New York. Furthermore, the Government represents that it will prove other facts at trial that show that the Southern District is the proper venue."); *United States v. Baldeo*, 2014 WL 6807833, (S.D.N.Y. 2014) ("Since the venue requirements are not elements of a crime, they do not need to be set forth in an indictment."). Similarly here, the government is proceeding under § 1512(b)(3) and can rely for venue purposes on any official proceeding that was intended to be affected, regardless of whether proof regarding the official proceeding was necessary for criminal liability. *See, e.g., United States v. Salinas*, 373 F.3d 161, 164 (1st Cir. 2004) (holding that determining venue is a two-step process of first looking to the "specific venue provision" in a statue, if there is one, and then looking to "the nature of the crime alleged and the location of the act or acts constituting it").

II. Venue Is Proper in this District Because the Offense Occurred Here.

Venue for Count Two is also proper under the second prong of § 1512(i) because the offense occurred in part within the Middle District of Florida. Section 1512(b)(3) criminalizes misleading conduct toward another person with the intent to hinder, delay, or prevent the communication to a law enforcement officer or a Judge of the United States of information relating to the commission or possible commission of a federal crime. As alleged in the indictment, Salman's misleading statements were made to Officers of the Fort

Pierce, Florida, Police Department and Special Agents of the FBI in order to hinder, delay, and prevent the communication of information to law enforcement officers and judges of the United States related to the Pulse Night Club shooting in Orlando, Florida. These law enforcement officers and judges of the United States were located in the Middle District of Florida. Thus, Salman's conduct occurred in part in this District, where her effort to hinder, delay, and prevent communication was directed, as will be demonstrated by the government's evidence at trial. *See, e.g., United States v. Barnham*, 666 F.2d 521, 524 (11th Cir. 1982) ("It is the impact of the acts, not their location, that controls.") (*quoting United States v. Tedesco*, 635 F.2d 902, 906 (1st Cir. 1980)).

III. Venue in this District Is Constitutional.

Under either prong of § 1512(i), the prosecution of the defendant in the Middle District of Florida clearly falls within the constitutional dictates of venue. *See, e.g., Barham*, 666 F.2d at 524; *United States v. Trie*, 21 F. Supp. 2d 7, 18 (D.D.C. 1998) (holding that § 1512(i) "is an allowable exercise of [Congress'] constitutional power" and that the provision is constitutional).

"[A]n obstruction of justice is 'committed' where the impact of the obstruction is felt. . . . So long as the offense has some minimal contacts with the district, a crime can be committed in a district other than the location of the defendant's acts." *Trie*, 21 F. Supp. 2d at 17-18. Here, there is no question

that the defendant's offense in Count Two had "minimal contacts" with the Middle District of Florida. This is demonstrated in multiple ways, including by reference to the charge in Count One of the Indictment, which alleges that the defendant and her husband both acted in the Middle District of Florida in the commission of an offense. During and following the commission of this offense, the defendant then obstructed justice related to the ensuing investigation, grand jury proceedings, and judicial proceedings in this District. These contacts are more than enough to satisfy the minimal contacts necessary for venue to be constitutionally appropriate. Substantive liability and the minimal contacts necessary to support a prosecution in a certain venue are entirely legally distinct issues. Eleventh Circuit precedent and the weight of precedent in other Circuits makes clear that prosecuting obstruction where the impact of the obstructive acts is felt is constitutional.

The defendant also tries to argue that venue is improper in this matter as the "official proceeding" is a "subsequent event" that cannot satisfy the necessary contacts for venue purposes. Doc. 54 at 18. However, *Trie*'s holding that § 1512(i) is constitutional forecloses this argument. Built into § 1512(i) is the recognition that the official proceeding that the defendant is obstructing may not be "pending or about to be instituted." If this was not constitutionally sufficient, the Court in *Trie* could not have determined that

Congress appropriately defined "where a crime was committed" when it enacted § 1512(i).

IV. Conclusion

For all of the foregoing reasons, the government asks that this Court deny the defendant's motion to dismiss for lack of venue.

Respectfully submitted,

W. STEPHEN MULDROW
Acting United States Attorney

By: *s/ Sara C. Sweeney*
Sara C. Sweeney
Assistant United States Attorney
USA No. 119
400 W. Washington Street, Suite 3100
Orlando, Florida 32801
Telephone: (407) 648-7500
Facsimile: (407) 648-7643
E-mail: Sara.Sweeney@usdoj.gov

By: *s/ James D. Mandolfo*
James D. Mandolfo
Assistant United States Attorney
Florida Bar No. 96044
400 W. Washington St., Suite 3100
Orlando, Florida 32801
Telephone: (407) 648-7500
Facsimile: (407) 648-7643
E-mail: James.Mandolfo@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Charles D. Swift, Esquire (counsel for Defendant)
Fritz J. Scheller, Esquire (counsel for Defendant)
Linda Moreno, Esquire (counsel for Defendant)

s/ Sara C. Sweeney
Sara C. Sweeney
Assistant United States Attorney
USA No. 119
400 W. Washington Street, Suite 3100
Orlando, Florida 32801
Telephone: (407) 648-7500
Facsimile: (407) 648-7643
E-mail: Sara.Sweeney@usdoj.gov

s/ James D. Mandolfo
James D. Mandolfo
Assistant United States Attorney
Florida Bar No. 96044
400 W. Washington St., Suite 3100
Orlando, Florida 32801
Telephone: (407) 648-7500
Facsimile: (407) 648-7643
E-mail: James.Mandolfo@usdoj.gov