UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 6:17-cr-00018-ORL-40KRS

NOOR ZAHI SALMAN,

Defendant.

DEFENDANT'S MOTION TO DISMISS COUNT TWO FOR LACK OF VENUE AND ACCOMPANYING MEMORANDUM OF LAW IN SUPPORT

NOW COMES Defendant, Noor Zahi Salman (Salman), by and through her undersigned counsel, and hereby moves, pursuant to Rule 12(b)(3)(A)(i) of the Federal Rules of Criminal Procedure and the Sixth Amendment of the U.S. Constitution, this Honorable Court for the entry of an order dismissing Count Two of the Indictment for lack of venue. This motion is based upon the accompanying Memorandum of Law in support of the motion.

MEMORANDUM OF LAW

Facts

On January 12, 2017, Salman was arrested in the Northern District of California. The Indictment handed down in Florida charged her with aiding and abetting Omar Mateen with material support of terrorism, in violation of 18 U.S.C. §§ 2339B(a)(1)-(2), and with obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3). Section 1512(b)(3) makes it a crime to

> knowingly . . . engage in misleading conduct toward another person, with intent to . . . hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense[.]

18 U.S.C. § 1512(b)(3).

The entirety of the § 1512(b)(3) obstruction of justice charge reads as follows:

<u>Count Two</u>

> On or about June 12, 2016, in the Middle District of Florida, and elsewhere, the defendant, NOOR ZAHI SALMAN, did knowingly engage in misleading conduct toward another person and persons, that is, Officers of the Fort Pierce, Florida, Police Department and Special Agents of the Federal Bureau of Investigation, with the intent to hinder, delay, and prevent the communication to federal law enforcement officers and judges of the United States of information relating to the commission and possible commission of a federal offense, that is, defendant NOOR ZAHI SALMAN did knowingly mislead Officers of the Fort Pierce, Florida, Police Department and Special Agents of the Federal Bureau of Investigation in order to prevent them from communicating to agents of the Federal Bureau of Investigation and the United States Department of Justice and judges of the United States of America, information relating to the attack on June 12, 2016, at the Pulse Night Club, in Orlando, Florida, in the Middle District of Florida.

This charge is based on Salman's alleged conduct during a 16-hour F.B.I. interrogation soon after Mateen attacked the Pulse Night Club. The interrogation took place in the back of a police car at Salman's home in St. Lucie, Florida, and at the F.B.I. office in Fort Pierce, Florida. Both St. Lucie and Fort Pierce are in the Southern District of Florida.

Arguments and Authorities

The Constitution guarantees criminal defendants the right to be tried in a proper venue. "The importance of this right is emphasized by the fact that it is mentioned not once, but twice, in the text of the Constitution." *United States v. Salinas*, 373 F.3d 161, 162 (1st Cir. 2004) (Selya, J.). Article III provides that "[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." U.S. CONST. art. III, § 2, cl. 3. The Sixth Amendment clarifies that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State **and district** wherein the crime shall have been committed." U.S. CONST. amend. VI (emphasis added). Because of these constitutional dimensions, "[v]enue in a criminal case is not an arcane technicality." *Salinas*, 373 F.3d at 162. Rather, "[i]t involves 'matters

that touch closely the fair administration of criminal justice and public confidence in it.'" *Id.* (quoting *United States v. Johnson*, 323 U.S. 273, 276 (1944)). Accordingly, "[t]he criminal law does not recognize the concept of supplemental venue." *Id.*

Subject to these constitutional constraints, Congress may enact special venue provisions. Federal Rule of Criminal Procedure 18 provides that, "[u]nless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed." But to enact statutes that "permit otherwise," Congress must remain within the confines of the constitutional "framework." *See* FED. R. CRIM. P. 18 advisory committee's note. Consistent with the Constitution, continuous offenses may be "prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237.

Congress enacted 18 U.S.C. §§ 1503 and 1512 to proscribe obstruction of justice. Most provisions of § 1512 require an official proceeding. *See* 18 U.S.C. §§ 1512(a)(1)(A)-(B), (2)(A)-(B), (b)(1)-(2), (c), (d)(1). Similarly, § 1503 references a "proceeding" and applies primarily to officers and jurors in official proceedings. 18 U.S.C. § 1503. Other subsections of § 1512—including § 1512(b)(3)—do not require an official proceeding. Under established Eleventh Circuit law, "unlike § 1512(b)(2), § 1512(b)(3) makes no mention of 'an official proceeding' and does not require that a defendant's misleading conduct relate in any way either to an 'official proceeding' or even to a particular ongoing investigation." *United States v. Ronda*, 455 F.3d 1273, 1288 (11th Cir. 2006). Thus, an official proceeding is not an element of § 1512(b)(3), or even a necessary condition.

Congress enacted 18 U.S.C. § 1512(i) to provide venue in obstruction cases. Section 1512(i) provides that "[a] prosecution under this section or section 1503 may be brought in 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." 18 U.S.C. § 1512(i). But again, application of this provision must comply with the Constitution's guarantee of venue in the district where the crime was allegedly committed.

In the present case, Salman was indicted for obstruction in the Middle District of Florida, despite the fact that her alleged "misleading conduct" occurred during her interrogation in the Southern District of Florida. Venue in the Middle District of Florida relies on the first clause of § 1512(i), which states that a defendant may also be charged in "the district in which the official proceeding . . . was intended to be affected." But the plain language of § 1512(i) does not create venue for § 1512(b)(3) in the Middle District of Florida under the circumstances alleged. Further, reading § 1512(i) to create venue in the Middle District of Florida violates the constitutional limitations on venue. Thus, this Court should dismiss the obstruction offense for improper venue.

I. When the charging statute does not require a "proceeding", under the plain language of § 1512(i), venue is proper only in the district "in which the conduct constituting the alleged offense occurred."

For offenses charged under § 1512(b)(3), this Court may not permit venue where an "official proceeding" is later instituted. The obstruction of justice statutes cover a wide range of conduct. Section 1512 broadly prohibits "tampering with a witness, victim, or an informant." Similarly, § 1503 forbids "[i]nfluencing or injuring [an] officer or juror generally." Some provisions of § 1512 require an intent to interfere with an "official proceeding," and § 1503 prohibits influencing jurors or officers involved in a proceeding, such as a grand jury investigation. Unlike § 1503 and other provisions of § 1512, though, § 1512(b)(3) does not "relate in any way" to an official proceeding. A criminal investigation is not an "official proceeding." Thus, venue for § 1512(b)(3) cannot be proper where "the" official proceeding is instituted, because no official proceeding is required for the offense.

Section 1512(i) allows an obstruction of justice prosecution to "be brought in 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." (emphasis added). The statute defines "official proceeding" as "a proceeding before a Federal Government agency which is authorized by law." 18 U.S.C. § 1515(a)(1)(C). Section 1512(i)'s use of "the" implies that it is referring to a particular "official proceeding" that "was intended to be affected." *See* OXFORD ENGLISH DICTIONARY (2017) (noting that the word "the" marks "an object as before mentioned or already known, or contextually particularized"). For most of the crimes enumerated in § 1512, it is clear what § 1512(i) means by "the official proceeding" because those crimes require an intent to affect an "official proceeding." *See* 18 U.S.C. §§ 1512(a)(1)(A)-(B), (2)(A)-(B), (b)(1)-(2), (c), (d)(1). Section 1503, likewise, refers to officers and jurors in official proceedings. *See* 18 U.S.C. § 1503. But unlike other obstruction offenses, § 1512(b)(3) "makes no mention of 'an official proceeding' and does not require that a defendant's misleading conduct relate in any way either to an 'official proceeding' or even to a particular ongoing investigation." *United States v. Ronda*, 455 F.3d 1273, 1288 (11th Cir. 2006). Applied to § 1512(b)(3), then, § 1512(i)'s reference to "the official proceeding . . . intended to be affected" makes no sense.

It cannot be the case that an FBI investigation constitutes an "official proceeding." This interpretation is precluded by the plain meaning of "official proceeding" as used in the obstruction statutes:

> As used in [18 USCS §§ 1512 and 1513], the term "official proceeding" means—
>
> (A) a proceeding before a judge or court of the United States, a United States magistrate [United States magistrate judge], a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Claims Court [United States Court of Federal Claims], or a Federal grand jury;
>
> (B) a proceeding before the Congress;

> (C) a proceeding before a Federal Government agency which is authorized by law; or
>
> (D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce;

18 U.S.C. § 1515(a)(1). Black's Law Dictionary defines a "proceeding," in relevant part, as "[a]ny procedural means for seeking redress from a tribunal or agency . . . a hearing." *Black's Law Dictionary* 1398 (10th Ed. 2014). Because an FBI investigation is not a "proceeding before" an official body or an insurance proceeding, it is not an "official proceeding" as used in the obstruction statute.

Considering § 1512(b)(3)'s lack of an "official proceeding" requirement, the plain meaning of § 1512(i) is that the first clause—which refers to "the" official proceeding—applies only to offenses requiring an official proceeding. The second clause—which permits venue "in the district in which the conduct constituting the alleged offense occurred"—can, by contrast, apply to any offense under §§ 1503 or 1512. Any other interpretation of § 1512(i) would add an additional venue element to § 1512(b)(3) that the Eleventh Circuit has made clear does not exist. *Compare United States v. Stickle*, 454 F.3d 1265, 1273 (11th Cir. 2006) (stating that the government must prove "non-essential **elements** of a crime, **like venue**," by a "preponderance of evidence") (emphasis added) *with Ronda*, 455 F.3d at 1288 (holding there is no "official proceeding" element in § 1512(b)(3) that the government must prove and that a prosecution need not even relate to an investigation). In other words, venue is an element of an offense, but there cannot be an "official proceeding" element in § 1512(b)(3), and § 1512(i) cannot be read to create one. Thus, for prosecutions under § 1512(b)(3), venue is proper only "in the district in which the conduct constituting the alleged offense occurred." 18 U.S.C. § 1512(i).

It is especially important to apply the plain reading of § 1512(i) here, because, as explained *infra*, any alternate reading would raise grave constitutional concerns. "It is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Sopo v. United States AG*, 825 F.3d 1199, 1210 (11th Cir. 2016) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001)). As the Eleventh Circuit has explained, "the doctrine of constitutional avoidance reflects the basic assumption that Congress intends to legislate within constitutional limits." *Id.* at 1210 n. 6 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998)). Especially in light of the constitutional avoidance doctrine, this Court should dismiss the obstruction charge for improper venue under the plain meaning of § 1512(i), which requires an "official proceeding" for the first prong to apply.

The Second Circuit appears to be the only circuit to consider the question of whether the locus of an FBI investigation may give rise to venue outside the district wherein the alleged obstruction occurred. *See United States v. Gonzalez*, 922 F.2d 1044, 1056 (2d Cir. 1991).[1] In *Gonzalez*, the Second Circuit found that the locus of an FBI investigation could give rise to venue under § 1512(i). *Id.*

This Court should decline to follow *Gonzalez* for three reasons. First, the *Gonzalez* opinion is flawed, because it disregards the plain meaning of "official proceeding" and addresses problems that do not exist. Second, the *Gonzalez* decision is of dubious value even in the Second Circuit, where subsequent precedent has undermined its reasoning. Finally—and most importantly—the

[1] The Second Circuit also briefly considered this issue in *United States v. Baldeo*, 615 F. App'x 26, 27 (2d Cir. 2015). But the *Baldeo* court did not reach the merits of any legal issues, because the *Baldeo* defendant waived any legal objection by failing to object to the jury instructions on venue.

Gonzalez court's reasoning is incompatible with decisions from the Eleventh Circuit Court of Appeals and other courts in the Eleventh Circuit.

In *Gonzales*, the defendant was charged with murdering a witness to obstruct a DEA drug investigation in the Southern District of New York. *Gonzalez*, 922 F.2d at 1046. Gonzalez argued that the Southern District of New York was not a proper venue, because the murder itself allegedly occurred in the Eastern District of New York. *Id.* at 1046, 1055-56. He noted that the first clause of § 1512(i) "does not mirror all of the substantive provisions of § 1512," including the statute under which he was charged (§ 1512(a)(1)(C)). *Id.* at 1055. While "[t]he venue provision . . . contemplates the existence of some 'official proceeding,'" § 1512(a)(1)(C), on the other hand, proscribes killing a person "with intent to prevent the communication of information relating to the commission of a Federal offense" and does not mention an official proceeding. *Id.* The defendant further noted that the statute defined an "official proceeding" as "a proceeding before a Federal Government agency which is authorized by law." *Id.* (quoting § 1515(a)(1)(C)). This definition facially excludes an agency investigation, which is obviously not a "proceeding before a Federal Government agency." 18 U.S.C. § 1515(a)(1)(C).

Considering the plain language of the statute, the *Gonzalez* court conceded that the petitioner's argument had "plausible merit." *Id.* The court further recognized that § 1512's "venue provision could not have been intended to narrow the reach of the substantive criminal subsection." *United States v. Ramos*, 537 F.3d 439, 463 n.17 (5th Cir. 2008). In order to avoid finding improper venue, though, the *Gonzalez* court read "the term 'official proceeding' broadly in order to effect Congress'[s] purpose in passing it." *Gonzalez*, 922 F.2d at 1055. The court explained its reasoning as follows:

> In enacting § 1512(h) [now § 1512(i)], Congress surely did not aim to narrow the reach of the Victim and Witness Protection Act. Were we to adopt defendant's reading of the venue provision and hold that some official proceeding beyond the investigatory stage be pending or contemplated, the effect would be to read out of the statute much of the criminal activity ostensibly covered by § 1512(a)(1)(C). That portion of the statute generally extends protection to individuals willing to furnish information regarding a federal offense. We decline to rule that a person who kills a witness while an official proceeding is pending or in progress cannot escape prosecution, but that same person may escape prosecution if he happens to commit the same murder during the investigatory stage. That loophole is one Congress has already closed. *Cf. Hernandez*, 730 F.2d at 898 (§ 1512 explicitly extends protection to "potential" witnesses, whereas former § 1503 did not).

Id. Utilizing its judicially crafted definition of "official proceeding," the court held that Gonzalez could be tried where the DEA investigation was ongoing.

At the outset, the *Gonzalez* court's reasoning is flawed for at least two reasons. First, the court's definition of "official proceeding" contradicts the definition Congress itself supplied. As the Ninth Circuit recognized, the *Gonzalez* "court never carefully parsed the plain meaning of the definition for 'official proceeding' but instead relied on Congress's 'purpose' to 'protect those persons with knowledge of criminal activity who are willing to confide in the government' to reach its conclusion." *United States v. Ermoian*, 727 F.3d 894, 900 n.5 (9th Cir. 2013); *see also id.* at 902 n.6 (concluding that "the meaning of the term 'official proceeding' is plain and unambiguous" and, thus, declining to "consult the statute's legislative history."). Following the plain language of the statute, the *Ermoian* court concluded that "an FBI investigation is not an official proceeding under the obstruction of justice statute." *Id.* at 902. On this issue, the *Ermoian* opinion is more consistent with the Eleventh Circuit's approach to statutory interpretation. *See, e.g.*, *Gonzalez v. McNary*, 980 F.2d 1418, 1420 (11th Cir. 1993) ("Courts must assume that Congress intended the ordinary meaning of the words used, and absent a clearly expressed legislative intent to the contrary, that language is generally dispositive.").

The *Gonzalez* opinion also attempts to solve a problem that does not exist. The court's concern that a "person may escape prosecution [for obstruction] if he happens to commit . . . murder during the investigatory stage" is unfounded. *Gonzalez*, 922 F.2d at 1056. Section 1512(i) expressly allows a prosecution to be brought "in the district in which the conduct constituting the alleged offense occurred." *Id.* In other words, § 1512(i) would have allowed the prosecution of Gonzalez in the Eastern District of New York where the murder occurred even if prosecution was improper in the Southern District of New York. While it might have been inconvenient for the government to recharge Gonzalez in the Eastern District of New York, the *Gonzalez* court should not have read § 1512(i) in a tortured manner to remedy the government's mistake. *See Salinas*, 373 F.3d at 170 (vacating a conviction for improper venue but allowing the government to re-prosecute in a proper district). Because of these analytical issues, this Court should decline to adopt the *Gonzalez* opinion.

Subsequent Second Circuit cases have cast doubt on the *Gonzalez* decision's continued vitality in its own circuit. *United States v. Gabriel*, 125 F.3d 89, 105 (2d Cir. 1997); *United States v. Perez*, 575 F.3d 164, 168 (2d Cir. 2009). In *Gabriel*, decided six years after *Gonzalez*, the Second Circuit considered a defendant's conviction under § 1512(b)(1), which requires an "official proceeding." *Id.* at 102. A jury had found that Gabriel lied to an investigator with the intent to affect an ongoing grand jury proceeding. *See id.* at 105. Because a proceeding before a grand jury is an "official proceeding," this was enough to sustain Gabriel's conviction. *Id.* Nevertheless, the Second Circuit observed in *dicta* that "the jury also reasonably could have concluded that Gabriel's sole intent was to interfere with the FBI investigation, and if the jury had so concluded, it would have been compelled to find Gabriel innocent." *Id.* at 105 n.13. The *Gabriel* court explained as a

matter of fact that the definition of "official proceeding" in § 1515(a)(1) did "not includ[e] government investigations." *Id.*

The Second Circuit, in *United States v. Perez*, 575 F.3d 164, 168 (2d Cir. 2009), recognized that the language from *Gabriel* contradicted the *Gonzalez* decision. While the *Perez* court did not resolve the apparent inconsistency between *Gonzalez* and *Gabriel*, the court hinted that *Gonzalez* was no longer good law. Considering jury instructions based on *Gonzalez*, the *Perez* court concluded that "this portion of the charge may well have been too expansive" but did reach a conclusion, because the defendant had failed to preserve error adequately. *Id.* After *Gabriel* and *Perez*, it is an open question whether *Gonzalez* is still controlling even in the Second Circuit.

Finally, and most importantly, the Eleventh Circuit has squarely rejected the *Gonzalez* court's reasoning. In *Ronda*, the Eleventh Circuit pointedly distinguished an "official proceeding" from an "ongoing investigation." *See Ronda*, 455 F.3d at 1288. The *Ronda* court stressed that, unlike other provisions of § 1512, § 1512(b)(3) did not require either an official proceeding or an ongoing investigation. Instead, the *Ronda* court held the Eleventh Circuit case law "correctly emphasized that § 1512(b)(3) does not require that a *federal **investigation** be initiated **nor** that an **official proceeding** be ongoing*." *Id.* (emphases added). As recognized in a recent district court decision, these passages from *Ronda* "suggest that the Eleventh Circuit distinguishes federal investigations from 'official proceedings' for purposes of § 1512." *United States v. McDaniel*, No. 2:13-CR-0015-RWS-JCF, 2013 U.S. Dist. LEXIS 187658, at *21 (N.D. Ga. Oct. 1, 2013).

Other courts in the Eleventh Circuit have also rejected the contention that a federal investigation can be an "official proceeding" under § 1512. *See McDaniel*, 2013 U.S. Dist. LEXIS 187658, at *21; *United States v. Peterson*, 544 F. Supp. 2d 1363, 1376 (M.D. Ga. 2008); *United*

States v. Dunn, 434 F. Supp. 2d 1203 (M.D. Ala. 2006). In *Dunn*, the Middle District of Alabama explained its reasoning thoroughly in the context of an ATF investigation:

> The definition of "official proceeding" in § 1515(a)(1) does not expressly include criminal investigations. Nonetheless, the government suggests that the ATF investigation, standing alone, is an "official proceeding" because it is a "proceeding before a Federal Government agency," 18 U.S.C. § 1515(a)(1)(C). This court has not identified a single case that supports this contention. More importantly, it is clear that "a proceeding before a Federal Government agency which is authorized by law," 18 U.S.C. § 1515(a)(1)(C), refers to hearings, or something procedurally similar, held before federal agencies. Not only does the common and ordinary understanding of "proceeding" connote a hearing, see *Black's Law Dictionary* 1221 (7th Ed. 1999) (defining "proceeding" as a hearing or any procedural means of seeking redress from a tribunal or agency), but the term "proceeding" is used throughout § 1515(a)(1) to describe events that are best thought of as hearings (or something akin to hearings): for example, federal court cases, grand jury testimony, Congressional testimony, and insurance regulatory hearings, 18 U.S.C. § 1515(a)(1)(A), (B), & (D).

Id.

Because, in the Eleventh Circuit, an "official proceeding" does not include a federal investigation, the first prong of § 1512(i) cannot apply to an offense under § 1512(b)(3) under the plain meaning of § 1512(i) without impermissibly adding a venue element to § 1512(b)(3). Thus, under the plain meaning of § 1512(i) and Eleventh Circuit case law, this Court should dismiss Count Two, because it was not brought in the Southern District of Florida, where the "conduct constituting the alleged offense occurred." 18 U.S.C. § 1512(i).

II. Reading § 1512(i) to provide venue for a charge under § 1512(b)(3) at the locus of the investigation violates the constitutional limits on venue.

Even if this Court were inclined to adopt the Second Circuit's opinion in *Gonzalez*, case law in the Eleventh Circuit and elsewhere concerning the nature of obstruction charges in the absence of an official proceeding makes clear that extending venue to the locus of the investigation would exceed Congress's constitutional powers. This is because, the case law of the Supreme Court as interpreted by the Eleventh Circuit and elsewhere makes clear that the existence of a

federal investigation is not an element of the crime and as such an offense under § 1512(b)(3) is completed the moment the defendant "engages in misleading conduct." Accordingly, the elements of § 1512(b)(3) have no relationship to an FBI investigation, regardless of whether such an investigation falls within the first clause of § 1512(i). Without a relationship to the elements of § 1512(b)(3), the Middle District of Florida is not a proper venue for the charge alleged in Count Two under the constitutional venue requirements.

A. Under the general constitutional venue rule, venue is not proper in the Middle District of Florida in this case.

In the absence of a controlling venue provision that satisfies the constitutional minimum, a criminal persecution may be brought in any "district in which the offense was committed." FED. R. CRIM. P. 18. The "locus delecti," as it is called, "must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Anderson*, 328 U.S. 699, 703 (1946). "If the crime consists of distinct parts occurring in different places, venue is proper where any part of the crime occurred." *Salinas*, 373 F.3d AT 164 (citing *United States v. Lombardo*, 241 U.S. 73, 77 (1916)). In determining the locations for where a crime is implicated for purposes of venue, "the Supreme Court has rejected the so-called 'verb test'—the notion that action verbs reflected in the text of the statute should be 'the sole consideration in identifying the conduct that constitutes an offense.'" *Id.* Instead, courts should examine the offense elements broadly, focusing on the defendant's conduct. *See id.* In this case, a broad examination of the elements is insufficient to meet the constitutional requirements for venue, because § 1512(b)(3) is a "point-in-time" offense, which, in this case, has insufficient contact with the Middle District of Florida to meet the constitutional requirements for venue.

The First Circuit in *United States v. Salinas* dealt with the question of where venue could constitutionally exist for a point-in-time offense. *See Salinas*, 373 F.3d at 168. In *Salinas*, the

defendant was charged with passport fraud in violation of 18 U.S.C. § 1542. *Id.* at 163. The government alleged that the defendant lied on his passport application, which had been completed in the Eastern District of New York and processed in New Hampshire. *Id.* at 165. Based the location of the passport's processing, Salinas was indicted in the District of New Hampshire. Thereafter, Salinas filed a motion to dismiss for improper venue arguing that the language of § 1542[2] was insufficient to establish venue in the District of New Hampshire. *Id.* at 163. The district court reviewed the defendant's alleged conduct wholesale and denied the motion. *Id.* On appeal, rather than reviewing the indictment as a whole, the First Circuit analyzed the elements of an offense under § 1542 to determine whether venue existed in New Hampshire. *Id.* at 165. In its elements analysis, the Court found that "the relevant portion of the statute makes pellucid that a violation requires only two things: (i) the making of a false statement, (ii) with the intent to secure the issuance of a passport." *Id.*

In view of the elements of the offense, the Court rejected the government's argument that venue was proper in New Hampshire because the crime was not complete until "the false statement is actually communicated to a person who has authority to approve the passport application." *Id.* at 166. In so doing, the Court distinguished § 1542 from other statutes prohibiting false representations like 18 U.S.C. § 1001, which expressly requires materiality, finding that such offenses *are* "continuing offenses." *Id.* at 167. Because "materiality is an element of the offense, a defendant cannot be convicted under section 1001 unless and until such a connection can be shown." *Id.* In contrast, "passport fraud is complete at the moment an applicant makes a knowingly false statement in an application with a view toward procuring a passport." *Id.* at 168. Ultimately, the Court

[2] Section 1542 forbids "willfully and knowingly mak[ing] any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States." 18 U.S.C. § 1542.

concluded that, because the passport fraud was complete the moment Salinas allegedly made a false statement with the requisite intent, venue was proper only in the Eastern District of New York. *Id.*

Here, too, a violation of § 1512(b)(3) is complete the moment the defendant allegedly misleads another person. The statute forbids in relevant part "knowingly . . . engag[ing] in misleading conduct toward another person, with intent to . . . hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. § 1512(b)(3). The structure of this statute is almost identical to the structure of § 1542, at issue in *Salinas*. Like § 1542, § 1512(b)(3) forbids knowingly being misleading with an intent to achieve some future result. And like § 1542, § 1512(b)(3) has no materiality requirement. Section 1512(b)(3) requires only (i) misleading conduct, (ii) with the intent to hinder, delay, or prevent a communication. When the misleading conduct is complete, the offense is complete.

This Court, however, need not conduct its own analysis of the elements § 1512(b)(3) to determine if it is a "point-in-time" or "continuing" offense, because the analysis has already been conducted by the Supreme Court and the Eleventh Circuit. First, the Supreme Court's analysis of a crime with identical language to § 1512(b)(3) in *Fowler v. United States*, 563 U.S. 668, 670 (2011) is consistent with that of a point-in-time offense. In *Fowler*, the Court evaluated a prosecution under § 1512(a)(1)(C), the same statute at issue in *Gonzalez*. Section 1512(a)(1)(C) makes it a crime "'to kill another person, with intent to . . . prevent the communication by any person to a law enforcement officer . . . of the United States' of 'information relating to the . . . possible commission of a Federal offense.'" *Id.* (quoting § 1512(a)(1)(C)). The issue before the Court was whether the defendant could be prosecuted under this statute if he did not have a federal officer or

any particular person in mind. *Id.* The intent requirement of § 1512(a)(1)(C) is identical to the intent requirement of § 1512(b)(3). Interpreting this intent requirement, the *Fowler* Court held that "the [g]overnment need not show *beyond a reasonable doubt* (or even that it is *more likely than not*) that the hypothetical communication would have been to a federal officer." *Id.* (emphasis in original). This is because "[t]he [g]overnment will already have shown beyond a reasonable doubt that the defendant possessed the relevant broad indefinite intent, namely, the intent to prevent the victim from communicating with (unspecified) law enforcement officers." *Id.* In other words, once the act is completed with the requisite intent, the crime is completed, and the government does not have to prove anything further—either a venue element ("more likely than not") or a substantive element ("beyond a reasonable doubt").

The Eleventh Circuit has understood *Fowler* to mean that § 1512(b)(3) is complete at the moment the defendant engages in misleading conduct with the requisite intent. *United States v. Ronga*, No. 15-15542, 2017 U.S. App. LEXIS 4852, at *13 (11th Cir. Mar. 20, 2017). In the context of a prosecution under § 1512(b)(3), the Eleventh Circuit concluded: "the *actus reus* was the defendant's engaging in misleading conduct. The *mens rea* was his intent to hinder, delay, or prevent communication of information relating to a possible federal offense. **The text of the statute does not require the actual transfer of misleading information to a federal official**." *Id.* (emphasis added). In other words, consistent with *Fowler*, the Eleventh Circuit held that an offense under § 1512(b)(3) is complete the moment the defendant engages in misleading conduct, regardless of whether the information is transmitted or not. The intent requirement does not require an "official proceeding" or an ongoing federal investigation.

These cases establish that § 1512(b)(3) is not a continuing offense. Thus, under the general constitutional rule for venue, venue for Count Two is proper **only** in the Southern District of Florida, where Salman allegedly engaged in misleading conduct.

B. Congress may not constitutionally change the location of a crime except by changing the substantive definition of the crime.

As explained *supra*, the first prong of § 1512(i) should not be interpreted to apply to crimes charged under § 1512(b)(3), which does not require an "official proceeding." If the Court does interpret the first prong of § 1512(i) as applying to § 1512(b)(3), § 1512(i) is unconstitutional as applied. Congress may supply venue only where the crime was allegedly committed. While Congress can expand venue by defining an offense broadly, it may not supply venue where no offense conduct is alleged to have occurred. In other words, a special venue provision cannot add an element to the substantive crime. Unlike the other provisions of § 1512, § 1512(b)(3) does not require an "official proceeding." Thus, § 1512(i) could not constitutionally supply venue based solely on where "the official proceeding" occurred even if Congress intended it to supply venue there.

Under the Sixth Amendment's venue guarantee, "specific venue provision[s]" in a statute must "satisf[y] the constitutional minima." *Salinas*, 373 F.3d at 164. This means that a statutory venue provision is constitutional only if the offense has substantial contacts with the venue supplied by Congress. *See United States v. Saavedra*, 223 F.3d 85, 93 (2d Cir. 2000) ("To determine whether the application of a venue provision in a given prosecution comports with constitutional safeguards, a court should ask whether the criminal acts in question bear 'substantial contacts' with any given venue.") (internal citation removed). While Congress can control venue by defining an offense broadly and can limit venue through a specific venue provision, it cannot supply venue in a district unrelated to the substantive crime. *United States v. Johnson*, 323 U.S. 273, 278 (1944)

(Murphy, J., concurring) ("Congress has the constitutional power to fix venue **at any place where a crime occurs**.") (emphasis added).[3]

Here, Salman was charged with a violation of § 1512(b)(3). Section 1512(b)(3), again, "makes no mention of 'an official proceeding' and does not require that a defendant's misleading conduct relate **in any way** either to an 'official proceeding' or even to a particular ongoing investigation." *Ronda*, 455 F.3d at 1288 (emphasis added). Thus, although § 1512(i) purports, under the Government's interpretation, to supply venue "in the district in which **the official proceeding** (whether or not pending or about to be instituted) was intended to be affected," it cannot do so constitutionally with respect to § 1512(b)(3). If Congress could create venue based solely on a possible subsequent event ("the official proceeding") that does not "relate in any way" to the offense, the Constitution's venue guarantees would be meaningless. *Cf. Johnson*, 323 U.S. at 276 (noting that venue in criminal cases involves "matters that touch closely the fair administration of criminal justice and public confidence in it."). While Congress has broad power to expand venue by defining an offense, it may not constitutionally expand venue through a venue provision without expanding "the substantive definition of the crime." *Salinas*, 373 F.3d at 169. This is especially true, where, as here, the Eleventh Circuit has held that the Government does not have to prove, even by a preponderance of the evidence, that a § 1512(b)(3) defendant intended to affect an official proceeding or a federal investigation. *Ronda*, 455 F.3d at 1288

---

[3] *See also* CHARLES DOYLE, CONG. RESEARCH SERV., RS22361, VENUE: A LEGAL ANALYSIS OF WHERE A FEDERAL CRIME MAY BE TRIED 18 (2014) ("In a few other instances, Congress had enacted special venue provisions for particular crimes. The provisions dictate venue decisions **unless they contravene constitutional requirements**.") (emphasis added).

The existence of § 1512(i) does not change this argument. While "Congress is, of course, free (within constitutional limits) to alter [venue] **by amending [the charging statute] and changing the substantive definition of the crime**," *Salinas*, 373 F.3d at 164 (emphasis added), the Eleventh Circuit has squarely foreclosed the theory that § 1512(i) added an element to the substantive definition of a § 1512(b)(3) offense. *See Ronda*, 455 F.3d at 1288.

The only case discovered by the Defendant considering the constitutionality of § 1512(i) is the District Court for the District of Columbia's decision in *United States v. Trie*, 21 F. Supp. 2d 7, 17 (D.D.C. 1998). In *Trie*, the court found that obstruction under 1512(b)(2) could constitutionally be tried in the district in which the official proceeding intended to be affected was later commenced. *Id.* at 17-18. *Trie,* however, should not be read to permit venue outside of the place where the offense occurred for § 1512(b)(3).

In *Trie*, the government charged the defendant with six violations of § 1512(b)(2). *Id.* at 14. Section 1512(b)(2) provides in relevant part:

> Whoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to— . . .
>
> (2) cause or induce any person to—
>
> (A) withhold testimony, or withhold a record, document, or other object, **from an official proceeding**;
>
> (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use **in an official proceeding**;
>
> (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, **in an official proceeding**; or
>
> (D) be absent **from an official proceeding** to which such person has been summoned by legal process . . .

shall be [punished].

18 U.S.C. § 1512(b)(2) (emphasis added). Despite the statute's express requirement of an "official proceeding," the *Trie* defendant argued "that the explicit venue provision in [§ 1512(i)] is unconstitutional because it provides for venue in a place other than the district where the crime was committed." *Trie*, 21 F. Supp. 2d at 17.

Rejecting this argument, the court first acknowledged that "Congress may not constitutionally provide venue in a district where the crime was not committed." *Id.* at 18. Nevertheless, "Congress may define where a crime is committed." *Id.* "In this case," the court reasoned, "Congress has specified that prosecution for the crime of witness tampering may be brought either in the district where the official proceeding is pending or in the district in which the conduct constituting the alleged offense occurred." *Id.* Thus, at least with respect to § 1512(b)(2), which expressly required an official proceeding, "Congress' determination . . . [was] an allowable exercise of its constitutional power." *Id.*

The *Trie* decision, however, cannot be extended to criminal acts charged under § 1512(b)(3). "Unlike § 1512(b)(2), § 1512(b)(3) makes no mention of 'an official proceeding' and does not require that a defendant's misleading conduct relate in any way either to an 'official proceeding' or even to a particular ongoing investigation." *Ronda*, 455 F.3d at 1288. In short whether Salman's alleged misrepresentations impeded or had the potential to impede an investigation situated in the Middle District of Florida is irrelevant to her alleged criminal acts. In contrast to *Trie*, Salman's alleged acts do not meet the substantial contacts required for Congress to constitutionally extend venue outside of the locus of the *actus reus*. *See Saavedra*, 223 F.3d at 93. "[A] court should ask whether the criminal acts in question bear '**substantial contacts**' with any given venue." *Id.* (emphasis added).

In light of the above, the impetus behind *Gonzalez* court's reasoning that the effect of a plain language reading of § 1512(i) "would be to read out of the statute much of the criminal activity ostensibly covered by § 1512(a)(1)(C)" becomes clear. The *Gonzalez* court recognized that a special venue provision cannot change the substantive definition of an offense. The court therefore added a "criminal investigation" element to the offense in order to satisfy the venue requirements and interpreted "official proceeding" to encompass a criminal investigation. As the Fifth Circuit observes in *Ramos*, the *Gonzalez* court realized that a "venue provision could not have been intended to narrow the reach of the substantive criminal subsection." *Ramos*, 537 F.3d at 463 n.17.

Instead of applying the second prong of § 1512(i), though, or holding that § 1512(i) could not constitutionally modify the substantive offense, the *Gonzalez* court tried to fit the term "official proceeding" into a procrustean bed. Recognizing that § 1512(i) did not mirror the substantive statute, the *Gonzalez* court forced "official proceeding" to be synonymous with "a crime or potential crime." This approach, though, is not consistent with *Ronda*'s statement that § 1512(b)(3) "does not require the actual transfer of misleading information to a federal official" or *Ronda*'s observation that § 1512(b)(3) "does not require that a defendant's misleading conduct relate in any way either to an 'official proceeding' or even to a particular ongoing investigation." *Ronga*, 2017 U.S. App. LEXIS 4852, at *13; *Ronda*, 455 F.3d at 1288. It is also inconsistent with the *Ronda* court's implication that an FBI investigation is not an "official proceeding" as used in § 1512(i). *Ronda*, 455 F.3d at 1288. Moreover, the *Gonzalez* court's approach necessarily adds a venue element to the crime—that is, the defendant's knowledge of and intent to affect a federal investigation. The Eleventh Circuit and the Supreme Court rejected adding the element that the Gonzalez court held

was the lynchpin to venue. Without this pin, even the *Gonzalez* court would have to concede that there is no venue at the locus of the federal investigation. *See Saavedra*, 223 F.3d at 93.

Conclusion

In light of the above, this Court should dismiss Count Two for lack of venue. Because Salman's alleged obstruction took place only in the Southern District of Florida, she cannot be tried on that charge in the Middle District of Florida. The first prong of § 1512(i) cannot apply to offenses charged under § 1512(b)(3). Even if Congress intended the first clause of § 1512(i) to apply, Congress cannot constitutionally expand venue without expanding the substantive definition of the crime. From established Eleventh Circuit precedent, it is clear that Congress did not, by enacting § 1512(i), expand the definition of § 1512(b)(3) to require an "official proceeding," whether defined under its plain meaning or defined to include an FBI investigation. Thus, because § 1512(i) does not and cannot constitutionally set venue in a place where no part of a crime occurred, this Court should dismiss Count Two for lack of venue.

Respectfully submitted this 12th day June, 2017,

/s/ Charles D. Swift
Charles D. Swift, Pro Hac Attorney for Noor Salman
Constitutional Law Center for Muslims in America
833 E. Arapaho Rd., Suite 102
Richardson, TX 75074
Phone: (972) 914-2507
cswift@clcma.org
Fax: (972) 692-7454

/s/ Linda Moreno
Linda Moreno, Esq.
Linda Moreno P.A.
P.O. Box 10985
Tampa, Florida 33679
Phone: (813) 247-4500
Fax: (855) 725-7454
lindamoreno.esquire@gmail.com

CERTIFICATE OF SERVICE

On June 12, 2017, I electronically filed the forgoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to all attorneys of record.

/s/ Charles D. Swift
Charles D. Swift, Pro Hac Attorney for Noor Salman
Constitutional Law Center for Muslims in America
833 E. Arapaho Rd., Suite 102
Richardson, TX 75074