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 TRIAL BRIEF ON VENUE JURY INSTRUCTIONS

Defendant, Noor Salman, respectfully submits the following brief requested by this Court.

Background

On July 18, 2017, this Court denied Ms. Salman's motion to dismiss Count II for lack of venue. Doc. 65 at 1. Ms. Salman had argued that venue could not be proper under 18 U.S.C. § 1512(b)(3), because the Government alleged Ms. Salman engaged in misleading conduct in the Southern District of Florida, not the Middle District of Florida. She contended that 18 U.S.C. § 1512(i)'s "official proceeding" prong did not apply to § 1512(b)(3), because § 1512(b)(3) does not require an official proceeding. This Court held that—even though the language of § 1512(b)(3) does not parallel § 1512(i)—the Government could establish venue if it showed, by a preponderance of the evidence, that Ms. Salman intended to affect an official proceeding in the Middle District of Florida. Doc. 65 at 14-15. Relying on the Government's representation that Ms. Salman admitted to being present when Mr. Mateen scouted the Pulse, the Court opined that proving venue would not be difficult. "Defendant knew the Pulse Night

Club was located in Orlando, which one may conclude is indicative of intent to hinder the investigation of a criminal offense in [the middle] district." Doc. 65 at 12.

The Government's proof at trial, however, throws the conclusion that Salman "knew the Pulse Night Club was located in Orlando" into serious doubt. The Government's own evidence established at trial that Mateen did not scout the Pulse on June 10, 2016, as described in the statements attributed to Ms. Salman. Moreover, the Government presented no evidence that Mateen or Salman had ever been to the Pulse at all before Mateen travelled there alone in the early morning hours of June 12, 2016. Even in the light most favorable to the Government, the evidence tends to show that Mateen scouted Disney Springs in the Middle District of Florida and clubs at City Place in the Southern District of Florida. The evidence in the light most favorable to the Government also shows that Salman "suspected it was a club" that Mateen would attack "because of the things he said to" her.[1] As a result, the parties now hotly contest venue for the obstruction charge.

On Friday, March 23, 2018, this Court requested briefing on whether an "official proceeding" includes an FBI investigation. For the following reasons, this Court should conclude that it does not.

I. An FBI investigation is not an "official proceeding" under the obstruction statute's venue provision.

An FBI investigation does not constitute an "official proceeding."

The plain meaning of "official proceeding" as used in the obstruction statute precludes a government investigation:

[1] The defense, of course, strongly disputes that Ms. Salman had any knowledge of her husband's plans and also disputes that the statements attributed to her are her words.

> [T]he 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;
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> (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 venue statute, §1512(i).

Although the Eleventh Circuit Court of Appeals has not resolved the question of whether an "official proceeding" includes a government investigation, the one district court in the Eleventh Circuit to consider the issue concluded that an FBI investigation is not an "official proceeding." *United States v. McDaniel*, No. 2:13-CR-0015-RWS-JCF, 2013 U.S. Dist. LEXIS 187658, at *32 (N.D. Ga. Oct. 1, 2013). The court first noted that the weight of authority provided "persuasive support" for concluding an FBI investigation is not an "official

proceeding." *Id.* (collecting cases). The court then agreed with the Fifth Circuit that "the definition's use of the preposition '"before" in connection with the term "Federal Government agency," . . . implies that an "official proceeding" involves some formal convocation of the agency in which parties are directed to appear, instead of any informal investigation conducted by any member of the agency." *Id.* (quoting *United States v. Ramos*, 537 F.3d 439, 462-63 (5th Cir. 2008)). This Court, like the *McDaniel* court, should follow the clear weight of authority and the plan language of the statute and conclude that an FBI investigation is not an official proceeding.

In opposing the plain language of the statute and the weight of authority, the Government relies solely on *United States v. Gonzalez*, 922 F.2d 1044, 1056 (2d Cir. 1991).[2] In *Gonzalez*, the Second Circuit found that the locus of an FBI investigation could give rise to venue under § 1512(i). *Id.* But this Court should decline to follow *Gonzalez* for two reasons. First, the *Gonzalez* opinion is flawed, because it disregards the plain meaning of "official proceeding" in favor of legislative history and its understanding of congressional purpose. Second, the *Gonzalez* decision is of dubious value even in the Second Circuit, where subsequent precedent has undermined its reasoning.

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

[2] 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.

itself allegedly occurred in the Eastern District of New York. *Id.* at 1046, 1055-56. In making his argument, the defendant 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) (emphasis added).

The *Gonzalez* court agreed that the defendant's argument regarding an official proceeding had "plausible merit" in light of the statute's plain language. But relying on legislative history and its understanding of congressional purpose, the court rejected the defendant's argument and held that an "official proceeding" could include a federal DEA investigation.

This Court should reject the *Gonzalez* court's conclusion 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."). As this Court noted on Friday, it is reluctant to consult legislative history, because few legislators actually read this history and it is often written by lobbyists.

Second and moreover, later Second Circuit cases have cast doubt on the *Gonzalez* decision's continued vitality even 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 (emphasis added). 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.*

Subsequently, in *United States v. Perez*, 575 F.3d 164, 168 (2d Cir. 2009), the Second Circuit 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 adequately preserve error. *Id.* After *Gabriel* and *Perez*, it is an open question whether *Gonzalez* is still controlling even in the Second Circuit where it was conceived.

In light of the plain language of the statute, the clear weight of authority, and the fact that *Gonzalez* has questionable precedential value even in its own circuit, this Court should conclude that an "official proceeding" does not include an FBI investigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On March 26, 2018, 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 all counsel of record.

Respectfully submitted,

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