

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA)	
)	
v.)	
)	Crim. No. CR-08-360 (RMU)
PAUL A. SLOUGH,)	
NICHOLAS A. SLATTEN,)	Judge Ricardo M. Urbina
EVAN S. LIBERTY,)	
DUSTIN L. HEARD,)	
DONALD W. BALL,)	
Defendants.)	

**DEFENDANTS’ REPLY TO GOVERNMENT’S OPPOSITION TO
MOTION TO DISMISS FOR LACK OF VENUE**

The Defendants, jointly and through undersigned counsel, submit this Reply to the Government’s Opposition to our motion to dismiss the indictment for lack of venue. Under Rule 12(b) of the Federal Rules of Criminal Procedure, this Court must dismiss an indictment (or separate counts within it) “where [there are] material facts [that] are undisputed and only an issue of law is presented.” *United States v. Yakou*, 428 F.3d 241, 247 (D.C. Cir. 2005). Here, the Government has proffered the material facts that it contends require resolution of the venue issue in its favor. At this time, the Defendants do not seek to challenge the accuracy of those facts (although they reserve the right to do so at trial if necessary). The Defendants do, however, dispute the legal consequences, for purpose of venue, of those proffered facts. In that posture, the venue issue can and should be adjudicated pretrial by the Court, a point the Government appears to concede. (Gov’t Opp’n at 6.) *See United States v. Cobar*, 2006 WL 3289267, Cr. No. 05-451 (RCL) (D.D.C. Nov. 9, 2006); *United States v. Crop Growers Group*, 954 F. Supp. 335, 351-52 (D.D.C. 1997). Further, “[w]hen venue is improperly laid in

a criminal case, dismissal is the appropriate remedy because a district court has no power to transfer such a case to a proper venue.” *United States v. Hilger*, 867 F.2d 566, 568 (9th Cir. 1989); *United States v. Swann*, 441 F.2d 1053, 1054 (D.C. Cir. 1971); 8A Moore’s Federal Practice, Rule of Criminal Procedure, ¶ 21.02 (2d ed. 1987).

INTRODUCTION

The Government agrees that venue in this case is governed by 18 U.S.C. § 3238. The Government also concedes that the only basis upon which this Court can find proper venue in the District of Columbia under 18 U.S.C. § 3238 is to rely on the first clause of the statute and to find that Jeremy P. Ridgeway was “arrested” in the District of Columbia and is a “joint offender” with the five Defendants in this case. Put differently, the Government’s claim to venue in the District of Columbia rests entirely on its claim to have “arrested” the alleged “joint offender” Mr. Ridgeway, an individual who will *not* stand trial in this District or anyplace else. The Government’s position is in direct tension with the legislative history of section 3238. In addition, the Government’s argument fails under the terms of the statute: the facts proffered by the Government establish neither that Mr. Ridgeway was “arrested” within the meaning of 18 U.S.C. § 3238 nor that he is a “joint offender” with the five defendants before the Court.

As an initial matter, and borrowing a phrase from the Government, it is “richly ironic” (*see* Gov’t Opp’n at 21) that the Government would rely upon and attach the legislative history of the 1963 amendment to 18 U.S.C. § 3238 as supportive of its views. That legislative history makes clear that the first clause of section 3238 was enacted in response to Justice Department complaints that the statute, as it was previously drafted, imposed “a substantial burden on the Government,” (*see* Gov’t Opp’n, Ex. 3 at 2), by requiring it to separately indict and try joint offenders who committed offenses abroad. The amendment of the statute was intended to spare

the government and its witnesses from the burden and expense of multiple trials, but it was not intended to permit the Government unilaterally to select a trial forum where none of the defendants contesting guilt could properly be tried alone. In this case, venue in the District of Utah, where every Defendant was arrested and where one of the Defendants resides, gives the government the exact benefit Congress intended it to have under section 3238: *a single trial in a single forum*.

Relatedly, the Government's claim that it had no true alternative but to indict the Defendants in the District of Columbia is self-serving and without merit. The Government's claim that "at the time the United States Attorney first convened a Grand Jury to receive evidence in this case, it was unknown who, if anyone, would eventually become a target of the Grand Jury's investigation," (Gov't Opp'n at 9), is belied by the Government's admission that it "quickly determined that there were nineteen members of the Raven 23 convoy who entered Nisur Square on September 16, 2007. . . ." *Id.* The Government knew at the very outset that no member of Raven 23 resided in the District of Columbia and that there was no basis upon which venue in this District would be appropriate. Further, since the Government made no effort to arrest any member of Raven 23 in Iraq, but rather permitted all members of the team to return to their homes, it knew when it commenced its grand jury investigation that it was doing so in a district where no Defendant either resided or had been "brought" from abroad. Thus, from the very outset, the only way the Government could ever obtain venue here would be by engineering the "arrest" in the District of Columbia of a defendant who did not reside here and had never been brought here. The location of the grand jury's investigation in this District occurred for one reason only; the convenience of the prosecuting authority. That is not a proper basis for venue under 18 U.S.C. § 3238, the Constitution, or any other provision of law. The Government

committed itself prematurely to returning an indictment in a district without regard to whether it was an appropriate venue and placed itself in the position of having to manufacture venue after the fact to avoid re-presenting the case in a district of proper venue.

After admitting that none of the possible targets resided in the District of Columbia, the Government nonetheless attempts to justify its use of a grand jury based in the District of Columbia because “the nineteen members of the Raven 23 convoy had last known residences in twelve different states” (Gov’t Opp’n at 9.) Just because venue may be proper in a number of other Districts throughout the United States does not mean the Government may seat its grand jury investigation in a District where venue does not exist, simply as a matter of its own choice or convenience. The Government began its grand jury investigation in this District at its own peril, knowing full well that venue was not appropriate here.

In sum, contrary to Congress’s intent in enacting 18 U.S.C. § 3238, the Government seeks to establish venue in a District in which none of the Defendants resides or was arrested and to which the Defendants have absolutely no ties, rather than properly return an indictment in a venue in which one of the joint offenders does reside or was arrested. The only proper venue in this case is the District of Utah, where one of them, Donald Ball, resides and where all of the Defendants were arrested.

LEGAL DISCUSSION

A. Mr. Ridgeway Was Not “Arrested” Within the Meaning of Section 3238.

In its Opposition, the Government proffers a recitation of facts concerning the purported “arrest” of Mr. Ridgeway. Even the Government’s own facts, however, demonstrate that Mr. Ridgeway’s liberty was never restrained to a degree sufficient to constitute an arrest for purposes of § 3238. Mr. Ridgeway’s liberty was not restrained when a government agent handed him an arrest warrant and walked with him to the courtroom for his voluntary plea. *See, e.g., United*

States v. Erdos, 474 F.2d 157, 160 (4th Cir. 1973) (in all versions of § 3238 that have existed over time, courts have agreed that “the Congress had restraint in mind”). Thus, Mr. Ridgeway’s plea in the District of Columbia does not establish venue here even if he could be considered a “joint offender” under § 3238.

The Government concedes Mr. Ridgeway was not handcuffed or otherwise physically restrained at the time he was purportedly arrested. Moreover, after showing Mr. Ridgeway the arrest warrant, government agents remarkably *never booked or processed him*, procedures that are not only attendant to any arrest, but required. Precisely as the Defendants contend, the arrest of Mr. Ridgeway was merely a sham designed to create venue. Even in its attempt to manufacture venue, however, the Government’s machinations fail because Mr. Ridgeway’s FBI escort to the courthouse does not constitute an arrest. A close examination of the Government’s facts shows that there was never a restraint of Mr. Ridgeway’s liberty commensurate to an arrest.

The Government states that “Mr. Ridgeway voluntarily surrendered on the warrant issued for his arrest” (Gov’t Opp’n at 5.) While we do not dispute that Mr. Ridgeway and his attorney met an FBI agent outside of the FBI offices in Washington, that meeting can hardly be characterized as a voluntary surrender. Rather, it is typical of situations in which a defendant agrees to meet prosecutors and agents in connection with a pre-existing plea agreement in order to appear in court and enter a pre-indictment plea. It is the usual and common practice of the U.S. Attorney’s Office in this District to allow defendants to enter pre-indictment pleas in precisely this manner, where no arrest is made.

The Government also claims that although Mr. Ridgeway was told by an FBI agent that he was “under arrest” and would remain in “continuous custody” until he appeared in Court, he was *never* handcuffed or otherwise physically restrained, nor was he “booked.” This

representation flies directly in the face of accepted FBI procedures and policies. For a variety of reasons, law enforcement officials are not permitted to place an individual under formal arrest (1) without handcuffing or otherwise restraining that person in large measure to assure the safety of the officers, and (2) without appropriately booking and processing that person according to standard operating procedures of both the FBI and the MPD.

According to the FBI Manual of Investigative Operations and Guidelines, the definitive manual specifying rules, policies, and procedures for agents, “[a]gents are fully responsible for the welfare and condition of a person once he/she is placed under arrest, and it is *required that all arrested persons be handcuffed* with hands behind the back, back to back, and double locked.” FBI Manual of Investigative Operations and Guidelines, Part II, at 11-1.5 (1998) (attached as **Exhibit 1**) (emphasis added). Just as an arrestee should have his liberty restrained by handcuffs, “[a] person under arrest should be made to understand that [a]gents will demand prompt and absolute obedience,” he “should not be granted personal privileges immediately following arrest,” and he “should not be permitted to move about, unless authorized by arresting [a]gents.” *Id.* at 11-1.2(1) & (3) (attached as **Exhibit 2**). Following arrest, normal FBI procedure (and common sense) dictate that the arrestee be booked. According to the FBI Legal Handbook for Special Agents, which contains the guidelines for agents regarding identification, arrest, and interrogation, “[f]ollowing arrest, the person in custody should be brought to the nearest FBI office for fingerprinting, photographing, and interview, where appropriate. Police departments or sheriffs’ offices may be used for this purpose where FBI facilities are not available. This “booking” process generally should not exceed six hours, measured from the time of arrest to the time of arrival before the magistrate.” FBI Legal Handbook for Special Agents, Part I, at 3-5.3 (2003) (attached as **Exhibit 3**).

The Government admits Mr. Ridgeway was neither handcuffed nor booked.¹ His “arrest” was in blatant contravention of the FBI’s own procedures and was nothing more than a sham. This Court must look to the *substance* of the events, not the *form* that the Government attempts to attach to them. The Government’s “let’s-walk-to-the-courthouse-together-and-call-it-an-arrest” maneuver did not restrain Mr. Ridgeway’s liberty in any way and therefore does not create venue in this District under 18 U.S.C. § 3238.

B. Mr. Ridgeway Was Not A “Joint Offender” with these Defendants.

The Government challenges the contention that Mr. Ridgeway is not a joint offender with the Defendants before the Court. The Government claims that “[n]umerous publicly-filed documents in this case and Mr. Ridgeway’s case demonstrate that the defendants and Mr. Ridgeway engaged in concerted conduct in a single criminal episode, establishing their joint offender status.” (Gov’t Opp’n at 11.) The Government’s analysis is simplistic and fatally flawed. The fact that the offenses against Mr. Ridgeway and these five Defendants arise from the same “incident” at Nisour Square while they were all employed by the Department of State to provide security services in Iraq does not alone make them joint offenders. Nor are they joint offenders simply because they are charged with similar offenses. (Gov’t Opp’n at 11.) Rather, the analysis must focus on whether there was a conscious joint effort and a shared intent to commit criminal acts between these Defendants and Mr. Ridgeway. There was not. Mr. Ridgeway has pled guilty to two offenses in which he acknowledged only that he was the “shooter,” and that he alone had the requisite state of mind to act criminally.

¹ The Government also makes reference to Mr. Ridgeway’s second arrest on December 5, 2008. Regardless of the circumstances of Mr. Ridgeway’s second arrest, it can offer no support for the Government’s venue argument since the indictment in this case alleging venue in the District of Columbia was returned the day before Mr. Ridgeway’s second arrest.

The Government strains to find support for its claim of joint conduct in the arrest warrant affidavit and Mr. Ridgeway's "Factual Proffer in Support of Guilty Plea." (Gov't Opp'n at 12.) Contrary to the Government's claim, nothing in either document establishes that Mr. Ridgeway, when he fired shots at Nisour Square, was acting jointly or in concert with any of the Defendants. While the affidavit alleges that a number of the Raven 23 security guards were firing their weapons at Nisour Square, it is conspicuous in its failure to allege that Mr. Ridgeway either acted in concert with or shared any criminal intent with any of the Defendants here. In fact, the affidavit merely states that "Mr. Ridgeway has agreed to a written factual proffer describing *his* actions on September 16, and acknowledging that *his* use of deadly force against the Iraqi civilians was not objectively reasonable." (Gov't Opp'n, Ex. 1 at 2 (emphasis added).) The affidavit alleges nothing about joint conduct or joint offenders.

Similarly, the written factual proffer of Mr. Ridgeway's conduct as set out in Paragraphs 9 through 15, (Gov't Opp'n at Ex. 4), is devoid of support for the Government's claim that Mr. Ridgeway was acting in concert with the Defendants. It shows that Mr. Ridgeway was firing at persons and objects based on his perspective alone, without having any knowledge of what other Raven 23 members were seeing or doing. The shots fired by Mr. Ridgeway were shots he elected to fire; the proffer does not allege (much less conclusively establish) that they were fired in concert with or in an effort to aid and abet the conduct of other members of Raven 23. And the Factual Proffer does not state otherwise. The fact that Mr. Ridgeway pled guilty to essentially overreacting in a manner that was "not objectively reasonable under all of the circumstances as they appeared to him at the time" defeats the Government's claim that the record somehow demonstrates that Mr. Ridgeway was acting in a knowing, concerted, and joint effort with other members of Raven 23. (*See* Gov't Opp'n, Ex. 4 ¶ 13.)

To the contrary, so far as the record shows, Mr. Ridgeway “over-react[ed]” based on his subjective perceptions of the situation — perceptions that he did not share with other members of Raven 23. By the same token, the other members of Raven 23 are not alleged to have shared any of their perceptions with Mr. Ridgeway. Because the facts proffered to the Court allege no common state of mind or shared intent between Mr. Ridgeway and these Defendants to engage in criminal conduct, there can be no joint action.

In sum, Mr. Ridgeway did not “jointly” commit manslaughter and attempted manslaughter — he undertook those actions himself. The Government’s assertion that the alleged crimes were committed “on the same day at the same location by a group of men all traveling together in the same convoy” even if true, does not make Mr. Ridgeway a “joint offender” with these Defendants. (Gov’t Opp’n at 12.)

The Government is incorrect in asserting the Defendants have suggested that “nothing short of an initial conspiracy charge could confer joint offender status for section 3238 purposes.” *Id.* We make no such claim. One does not necessarily have to be charged as a coconspirator to be a joint offender, but there must be *some* common intent to act in concert for the purpose of committing criminal acts. No such joint common intent is alleged in this case.

Both sides invoke the Fourth Circuit’s decision in *United States v. Levy Auto Parts*, 787 F.2d 946 (4th Cir. 1986), to support its position. *Levy Auto Parts* shows precisely what is lacking in this case: The type of concerted criminal activity among individuals that must be alleged to establish that they were joint offenders. The facts in *Levy Auto Parts* are instructive because they highlight the elements of joint offender status that are missing in this case. In *Levy Auto Parts*, a co-conspirator (Zakaria) was first arrested in the Eastern District of Virginia. The arrest warrant and accompanying complaint not only explicitly alleged that Zakaria was a coconspirator with

his other defendants, but set out the joint criminal conduct and scheme in which Zakaria knowingly engaged with others. *Id.* at 949. Zakaria's status as a joint offender was established by evidence showing that he shared an intent to engage in criminal wrongdoing with others. The evidence thus made it clear that Zakaria was a joint offender at the time of his arrest. For the reasons already stated, that is simply not true with respect to Mr. Ridgeway.

C. Venue In This Case Was "Manufactured" And Therefore Does Not Create a Right For The Government To Try The Case In The District Of Columbia.

Even if the events surrounding Mr. Ridgeway's pre-indictment guilty plea were viewed as an "arrest" of a "joint offender," it is clear that the "arrest" was a sham designed solely to manufacture venue in the District of Columbia. The Court should not sanction the Government's gamesmanship, and it would not be alone in reaching that result. In *United States v. Hilger*, 867 F.2d 566 (9th Cir. 1989), the Ninth Circuit rejected the Government's claim that venue under Section 3238 was proper simply because the defendant had been "arrested" in a district. In *Hilger*, the Government returned an indictment outside the district in which the defendant resided and then arrested the defendant after he appeared in compliance with a summons issued in response to the indictment. The government argued that venue was proper in that district because it was where Hilger was "arrested or first brought." The Ninth Circuit rejected the Government's reliance on the defendant's arrest and explained that the Government was obligated to return its indictment in a proper venue:

To determine whether this indictment was proper in Northern California, we must look to the second clause of § 3238, which allows the government to indict in the district of the last-known residence of the offender, or if no residence is known, in the District of Columbia. Here, Hilger's residence was known to the government to be in Massachusetts. Therefore, the indictment in the Northern District of California was improper.

Id. at 568.

As in *Hilger*, the Government seeks to obscure the fact that it returned an indictment in an improper venue simply for its own convenience. To allow an artificially arranged “arrest” to dictate the venue of the Defendants’ trial in a District that has no proper basis for venue and no connection to these Defendants or the conduct charged would permit the Government to handpick a forum through the manipulation of its arrest power.

CONCLUSION

Venue in this case does not lie in this District. The crimes alleged in the Indictment were not committed here; no defendant named in the indictment lives here; and, for the reasons set forth above, no defendant or joint offender was “arrested” here. Under these circumstances, the only venue in which the defendants may be tried is the venue in which all five *were* arrested: the District of Utah. Because venue in this case does not lie in the District of Columbia under any statute or rule, the indictment must be dismissed.

Dated: February 3, 2009

Respectfully submitted,

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