



(granting a pretrial motion to dismiss for lack of proper venue); *United States v. Crop Growers Corp.*, 954 F. Supp. 335, 354 (D.D.C. 1997) (granting a pretrial motion to dismiss for improper venue). This Circuit has held that the “general issue” for purposes of Rule 12(b)(1) “has been defined as ‘evidence relevant to the question of guilt or innocence.’” *United States v. Yakou*, 428 F.3d 241, 246 (D.C. Cir. 2005). “A defense is thus ‘capable of determination’ if the trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense.” *United States v. Covington*, 395 U.S. 57, 60 (1969).

Following *Covington*, courts in this and other circuits have allowed evidence outside the four corners of the Indictment to be presented and considered in support of pretrial motions to dismiss under Rule 12. *See, e.g., Yakou*, 428 F.3d at 246-47 (noting Government provided discovery and litigated issue of Defendant’s “U.S. person” status); *United States v. Naegele*, 367 B.R. 1, 5-9, 14 (D.D.C. 2007) (analyzing affidavits and testimony to determine that signature page containing oath was never submitted to bankruptcy court); *United States v. Dransfield*, 913 F. Supp. 702, 708 (E.D.N.Y. 1996) (evaluating agency contracts proffered by Government to determine whether agency federal funding required by jurisdictional element of statute). Indeed, the Government concedes in its Opposition that the Court can consider extrinsic evidence and relies on authorities that support such a position. *See Opp.* at 6 (citing *United States v. Cobar*, No. 05-451, 2006 U.S. Dist. LEXIS 81973, at \*16 (D.D.C. Nov. 9, 2006) (considering “discovery materials” on a pretrial motion)).<sup>1</sup> In fact, the Government relies on extrinsic

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<sup>1</sup> Defendants respectfully submit that *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996) is not dispositive here. *First*, *Jensen* reflects only the ruling of a sister circuit and does not control the decision here. *Second*, Defendants have found no comparable case law in this circuit and indeed the cases cited above appear to suggest a contrary rule here and elsewhere. *Third*, Judge Fletcher, while concurring in the result, disagreed with the majority’s ruling, concluding that “[t]here is no prohibition against the consideration of extrinsic evidence for purposes of a Rule 12(b) motion to dismiss.” *Jensen*, 93 F.3d at 670. *Fourth*, and finally, given that

evidence including “publicly-available court documents, and additional proffered facts” to support its position on venue. Opp. at 7.

Courts in other circuits, including the Ninth Circuit, have also considered extrinsic evidence on a pretrial motion for reasons of judicial economy. See e.g., *United States v. Flores*, 404 F.3d 320, 324 (5th Cir. 2005) (“As a number of other courts have recognized, ‘a district court may make preliminary findings of fact necessary to decide the questions of law presented by pre-trial motions so long as the court’s findings on the motion to not invade the province of the ultimate finder of fact.’”) (internal citations and quotations omitted); *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986) (“[A] district court may make preliminary findings by pre-trial motions so long as the Court’s findings on the motion do not invade the province of the ultimate finder of fact”); *United States v. Jones*, 542 F.2d 661, 664 (6th Cir. 1976) (noting that Rule 12 “clearly envision[s] that a district court may make preliminary findings of fact necessary to decide the questions of law presented by pre-trial motion so long as the court's findings on the motion do not invade the province of the ultimate finder of fact”).

Here, the argument for receiving limited evidence on the venue issue is compelling. Both sides agree that venue in this case is governed by 18 U.S.C. § 3238 and that the determinative facts are simple and straightforward. Under § 3238, venue in this District depends on whether government witness Jeremy Ridgeway was “arrested” here, and whether he can be considered a “joint offender” with the Defendants. These are limited questions that involve events occurring long after the charged crimes and which are thus distinct from the general issue of guilt or innocence. The facts relevant to the venue have no relevance to a trial on the merits.

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Defendants are presenting the evidence of a Government witness who is cooperating under a plea agreement and grant of leniency, it is unlikely that the prosecutors will challenge his evidence.

The evidentiary hearing Defendants propose is confined to a very limited set of facts. As stated in the Reply, Defendants do not generally contest the facts (as opposed to the conclusions) proffered by the Government in its Opposition, which are almost identical to those set forth in the Defendants' initial motion to dismiss.<sup>2</sup> Defendants submit that the testimony of Mr. Ridgeway at the evidentiary hearing on the venue motion will not put the Court in a position of resolving factual disputes, but instead will provide the Court with a more detailed understanding of the undisputed facts surrounding Mr. Ridgeway's purported arrest and his status as a joint offender. The purpose of calling Mr. Ridgeway as a witness in the hearing is not to resolve disputed facts, but to allow the Court to inform itself of the facts relevant to the resolution of the venue issue.

Finally, refusing evidence on the venue motion at this stage would risk a tremendous waste of judicial resources. As Judge Fletcher stated in his concurring opinion in *Jensen*, "the same issue – with the same evidence – will be raised at trial, the defendants will again move to dismiss for improper venue, the district court will again rule on the motion, and the issue will be back before this court." *Jensen*, 93 F.3d at 671. Otherwise, this Court is faced with a prolonged and complex trial, which will require calling dozens of witnesses from half-way around the world, with the possible end result being a finding that venue was not proper in this district, thus necessitating a repetition of the entire proceeding in a different district. Such a result would lead to a tremendous waste of time and resources on the part of the Court as well as the parties.

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<sup>2</sup> The Indictment itself proffers no facts that would establish venue in this case and merely makes the conclusory statement that the conduct alleged in the indictment is "within the venue of the United States District Court for the District of Columbia, as provided by 18 U.S.C. § 3238."

For these reasons, this Court has the authority and should, in the interests of justice, hear the Defendants' extrinsic evidence in the form of testimony from Mr. Ridgeway, on the limited issue of whether venue is appropriate in this District.

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Respectfully submitted,

/s/ David Schertler

David Schertler (No. 367203)  
Danny Onorato (No. 480043)  
Veronica R. Jennings (No. 981517)  
SCHERTLER & ONORATO, L.L.P.  
601 Pennsylvania Avenue, NW  
North Building-9th Floor  
Washington, DC 20004  
Telephone: (202) 628-4199  
Facsimile: (202) 628-4177

*Counsel for Dustin L. Heard*

/s/ Mark Hulkower

Mark J. Hulkower (No. 400463)  
Bruce C. Bishop (No. 437225)  
Michael J. Baratz (No. 480607)  
STEPTOE & JOHNSON, LLP  
1330 Connecticut Ave., N.W.  
Washington, D.C. 20036  
Telephone: (202) 429-6221  
Facsimile: (202) 429-3902

*Counsel for Paul A. Slough*

/s/ Thomas Connolly

Thomas G. Connolly (No.420416)  
Steven A. Fredley (No. 484794)  
HARRIS, WILTSHIRE & GRANNIS LLP  
1200 Eighteenth St., N.W.  
Washington, D.C. 20036  
Telephone: (202) 730-1300  
Facsimile: (202) 730-1301

*Counsel for Nicholas A. Slatten*

/s/ William Coffield

William F. Coffield (No. 431126)  
COFFIELD LAW GROUP LLP  
1330 Connecticut Ave., N.W., Suite 220  
Washington, D.C. 20036  
Telephone: (202) 429-4799

*Counsel for Evan S. Liberty*

/s/ Steven McCool

Steven McCool (No. 429369)  
MALLON & MCCOOL, LLC  
1776 K Street, N.W., Suite 200  
Washington, DC 20006  
Telephone: (202) 680-2440  
Facsimile: (410) 727-4770

*Counsel for Donald W. Ball*