IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

*

THE UNITED STATES OF AMERICA

*

v. **Criminal No. AW-09-0232**

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JOHN A. HOUSTON, et al. *

* * * * *

MOTION TO DISMISS FOR LACK OF VENUE
OR IN THE ALTERNATIVE, FOR CHANGE IN VENUE

Defendant John A. Houston, through his attorneys, James Wyda, Federal Public Defender for the District of Maryland, and Michael T. CitaraManis, Assistant Federal Public Defender, hereby requests this Honorable Court to dismiss the indictment herein for lack of venue in Maryland, or in the alternative, to order that this case be transferred to another, more appropriate district. In support of this motion, undersigned defense counsel states as follows:

I. INTRODUCTION

John A. Houston ("Houston") and his co-defendant, Michael Henson ("Henson") are jointly charged with one count of conspiracy, in violation of 18 U.S.C. § 371, and one count of attempted smuggling of non-invoiced merchandise into the United States, in violation of 18 U.S.C. § 545. Henson is also charged with one count of false statements, in violation of 18 U.S.C. § 1001(a)(2).

Houston was arrested in Baghdad, Iraq, on or about September 5, 2008, based on a criminal complaint issued by United States Magistrate Judge William Connelly of this Court. On the same day, a telephonic initial appearance occurred with Magistrate Judge Connelly presiding. At that time, the Federal Public Defender's Office was appointed to represent

Houston and undersigned defense counsel was present in Magistrate Connelly's courtroom in Greenbelt, Maryland to represent Houston. The government was represented by two Department of Justice attorneys also present in Magistrate Judge Connelly's courtroom. In Baghdad, Houston had the benefit of military defense counsel present with him during the telephonic proceeding.

The charges herein are based on allegations that Houston and Henson conspired to smuggle firearms acquired in Iraq into the United States. None of the facts alleged in the complaint or supporting affidavit were committed in Maryland. Indeed, all of the conduct alleged in the affidavit was committed outside the United States, and specifically, in Iraq. Moreover, the situs of the purported attempt to smuggle firearms into the United States was not Maryland but North Carolina.

For the reasons expressed below, proper venue does not lie in Maryland and for this reason, the indictment herein must be dismissed.

II. ARGUMENT

A. Contrary to the government's assertion, proper venue does not lie in Maryland under 18 U.S.C. § 3238 as Houston was not arrested or brought in custody to Maryland.

The indictment herein alleges that venue is proper in the District of Maryland under 18 U.S.C. § 3238. No explanation is given for this conclusory statement in the indictment.

However, it is undisputed that § 3238 is the appropriate venue statute since it "covers "offenses not committed in any district" and the conduct alleged herein occurred in Iraq. Section 3238 provides:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or

> more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

However, § 3238 is not to be ready simply as a statute enacted by Congress. Indeed, it implements important constitutional rights for persons charged with crimes.

The Declaration of Independence denounced King George III "for transporting us beyond Seas to be tried for pretended offenses," and to insure that our fledgling government never resorted to such tactics, the drafters of the Constitution provided that "the Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." U.S. Const., art. III, § 2. Reinforcing this provision, the Sixth Amendment guarantees defendants a trial by jury "of the State and district wherein the crime shall have been committed . . . ." U.S. Const., amend. VI.

In light of these constitutional protections, the Supreme Court has cautioned that "[q]uestions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed." *United States v. Johnson*, 323 U.S. 273, 276 (1944). *Also see United States v. Miller*, 111 F.3d 747, 749 (10th Cir. 1997) ("The Supreme Court has pointed out that failure to treat venue rights seriously not only may impose unfairness and hardship on the accused, but might also encourage forum-shopping by federal prosecutors.")

It is thus obvious that where venue is at issue, defendants "raise more than a pedantic, justice-defeating technicality in asserting venue related rights." *United States v. Kelly*, 535 F.3d 1229, 1233 (10th Cir. 2008) (internal quotation omitted).

It is against this backdrop that § 3238 is to be read. Under the first clause of §3238, venue lies in the district where the offender or a joint offender is "arrested or is first brought." This phrase was interpreted by the Fourth Circuit Court of Appeals in the seminal case of *United States v. Erdos*, 474 F.2d 157, 160-61 (4th Cir. 1973)[1] as meaning:

> . . . *simply "arrested"*: - i.e., that venue is in the district within the United States where the offender is first restrained of his liberty in connection with the offense charged. Obviously, "first brought" could plausibly be interpreted to mean what it says, so that wherever an offender (traveling by air) touches down in the United States, that is the place where trial must be had. But it is settled otherwise. "First brought" within the context of the statute means *first brought in custody with liberty restrained*. [citations omitted]." (Emphasis added) [2]

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In *Erdos*, the defendant, a U.S. citizen, was convicted of killing another U.S. citizen in the American embassy compound in Equitorial Guinea and prosecuted in the Eastern District of Virginia after being served with a summons and complaint at Dulles Airport in Virginia, and thereafter being taken into custody in Alexandria, Virginia.

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The Fourth Circuit's interpretation of §3238 in *Erdos* is appropriate considering that "[q]uestions of venue in criminal cases . . . raise deep issues of public policy" and the Supreme Court has articulated a rule endorsing a restrictive construction of venue provisions:

> If an enactment of Congress equally permits the underlying spirit of the constructional concern for trial in the vicinage to be respected rather than disrespected, ***construction should go in the direction of constitutional policy even though not commanded by it.***

United States v. Johnson, 323 U.S. 273, 276 (1944) (emphasis added)

Moreover, in *United States v. Cores*, 356 U.S. 405, 407 (1958), the Supreme Court stated:

> The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place. Provided its language permits, the Act in question ***should be given the construction which will respect such considerations***. (emphasis added.)

Of course, "[t]he proper construction of § 3238 is a question of law . . . ." *United States v. Layton*, 855 F.2d 1388, 1410 (9th Cir. 1988).

In making its ruling, the *Erdos* court relied on the case of *United States v. Provoo*, 215 F.2d 531 (2nd Cir. 1954), in which the Second Circuit Court of Appeals found that the term "first brought" applies in situations where the offender is returned to the United States already in custody. *Id.* at 537.

Since then, other courts have similarly ruled. *See United States v. Catino*, 735 F2d 718, 724 (2nd Cir. 1984) (". . . 'first brought,'. . . applies only in situations where the offender is returned to the United States already in custody" and "Where a defendant is not taken into custody before his arrival in this country, 'the purpose of the venue statute is not to fix the place of arrest but simply to have the place of trial conform to the place of arrest.' [citation omitted]"); *United States v. Hilger*, 867 F.2d 566, 568 (9th Cir. 1989) ("Here, an indictment was filed before Hilger was 'brought' (meaning first brought into a jurisdiction while in custody. [citation omitted]) into any district, . . ."); *United States v. Feng*, 277 F.3d 1151 (9th Cir. 2002) (same).

In a recent case construing *Erdos*, District Court Judge Robert G. Doumar from the Eastern District of Virginia (Newport News Division), ruled last December in *United States v. Holmes*, ___ F.Supp.2d ___, 2009 WL 4547621 (Dec. 4, 1009 E.D. Va.), that venue was not proper and granted the defendant's motion to dismiss.

In *Holmes*, the defendant was charged with aggravated sexual abuse of a minor which had allegedly occurred while he was in Japan on active duty with the United States Air Force. The procedural history in *Holmes* is somewhat complicated but in essence is as follows: After the defendant was originally charged by the military and those charges dismissed due to a violation of the statute of limitations, he was indicted by a federal grand jury in Newport News but because he was still in the military, those charges were dismissed. After he was discharged by the military, he again was indicted by a federal grand jury in Newport News. At that time, the

defendant was living in Illinois. He was arrested in North Carolina, where he was appearing in court in an unrelated matter.

Judge Doumar reiterated what the Court in *Erdos* stated: "'is arrested or is first brought' means simply 'arrested'. . ." *Holmes*, 2009 WL 4547621, at *7. This meant that the proper venue was in North Carolina (or Illinois or the District of Columbia). In making his decision, Judge Doumar was concerned over the ability of the government to hand-pick the location of the trial and relied on the case of the *Provoo* decision, in which he noted:

> . . . the Second Circuit expressed its concern over the ability of the government to hand-pick the location of its trials. The court concluded that the venue statute must be strictly construed so as to only apply where the defendant was first placed into apprehension, and not so that the place of the trial dictated where the place of the arrest occurred. "To hold otherwise would mean that the Army, acting in cooperation with the Department of Justice, can select any federal district in the United States as the place for trial of a soldier charged with ... any ... offense committed abroad." *Id.*

Holmes, 2009 WL 4547621, at *9.

In the instant case, unquestionably, Houston was "arrested" in Iraq and not within any "district" at that a time. *See* copy of executed arrest warrant, attached as **Exhibit A**. However, Houston was not "brought back" to the United States in custody.

We know this because Magistrate Judge Connelly ordered Houston released during the telephonic initial appearance on September 5, 2008. Attached as **Exhibit B** is a copy of the release order.[3]

Under the terms of this release order, Houston was immediately released to continue on conditions set by the commander of "MNCI" (Multi-National Corps - Iraq) and ordered to

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[3] A transcript of the proceedings on September 5, 2008, is being prepared and will be provided this Court when received.

"present himself for travel" on Sunday, September 8, 2008, to "DCIS" (Defense Criminal Investigative Service) agents, at which time he was to travel to Andrews Air Force Base on Military Air. After Houston arrived at Andrews Air Force Base, he was supposed to appear at the United States Pretrial Office at the federal courthouse in Greenbelt, Maryland, at 10:00 am the next business day.[4]

Between September 5, 2008, when Houston was ordered released, and September 8, 2008, when Houston traveled from Iraq to Andrews Air Force Base, he remained at the Victory Base Complex in Baghdad, Iraq, in accordance with the directive of the Multi-National Corps - Iraq commander. During that time, and pursuant to the "Conditions on Liberty" imposed upon him, Houston was required to report twice a day to a Desk Sergeant. However, he was not confined and instead, he was allowed:

- To work
- Use various facilities, including the PX, "Morale Welfare and Recreation" facilities, and gyms
- All dining privileges
- Continued billeting privileges

See copy of Memorandums from Col. Manuel F. Santiago, attached as **Exhibit C**.

Further, according to a DCIS report, it was understood that once Houston presented himself for military transport to Andrews Air Force Base, "[a]t no time will Houston be shackled or handcuffed, provided he follow all directions of the escorting agents."

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[4] On September 8, 2008, Houston appeared at the Pretrial office. Thereafter, a further hearing before Magistrate Judge Connelly was conducted, at which time Houston's release conditions were modified to allow for his travel home to the State of Washington and to address concerns raised by the government.

Considering that Houston was ordered released pursuant to an Order Setting Conditions of Release, he was not subsequently confined, and his "Conditions on Liberty" allowed for his freedom of movement within a significant geographical area (the Victory Base complex), as both a legal and factual matter, Houston was not "in custody" when he was transported to the United States.[5]

As a consequence, he was not "brought" to the United States in custody and therefore, venue in Maryland is not proper under § 3238.

B. Whether or not Section 3238 allows for venue in Maryland, Houston's Constitutional Right to Proper Venue and Vicinage are violated by venue in the District of Maryland.

Unquestionably, in the instant case, Houston's constitutional rights are at stake. Article III, Section 2 of the Constitution promises a defendant a trial in a location with proper venue. This right is designed to alleviate a defendant from being sent to "a strange locality to defend himself against the powerful prosecutorial resources of the Government." *Dupoint v. United States*, 388 F.2d 39, 44 (5th Cir. 1967). Indeed, our Constitution establishes a presumption that all crimes will be prosecuted in the place where they are committed. Article III, Section 2 of the United States Constitution provides that:

> The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

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5 The release order also states that "until presentment in Maryland while remain in custody (same conditions as previously set) of DCIS agents." The meaning of this passage is not entirely clear. However, due to the reference to "same conditions as previously set," it would appear to mean that Houston was to continue on the same "Conditions on Liberty" noted above and that he was to remain *with* DCIS agents until presented to the Pretrial office in Greenbelt. This does not change the legal status of Houston being on release nor his practical status of not being confined but in fact, being granted liberal privileges while on release.

The importance of the venue provision of Article III was reinforced by the Founding Fathers through the "vicinage" provision of the Sixth Amendment, which provides 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 where the crime shall have been committed* . . . ." U.S. Const. Amend. VI (emphasis added).

These constitutional protections are carried into practical effect by Federal Rule of Criminal Procedure 18, which 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." Because of the constitutional significance placed on venue, "[t]he government bears the burden of establishing by a preponderance of the evidence that venue is proper with respect to each count charged against the defendant." *United States v. Lam Kwong-Wah*, 924 F.2d 298, 301 (D.C. Cir. 1991); *United States v. Morgan*, 393 F.3d 192, 195 (D.C. Cir. 2004).

In this case, if Houston is required to go to trial in the District of Maryland, his fundamental constitutional rights to proper venue and vicinage will be violated. Houston is a United States citizen who has no connection to the District of Maryland and at the time of the alleged offenses was a resident of the State of Washington, where his wife, daughter and other family members lived.[6]

The bulk of venue analysis focuses on the question of where the crime was committed, and our venue statutes refer first and foremost to the location of the crime. Where, however, the offense is committed in a foreign country or on the high seas, venue is governed by § 3238,

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[6] Coincidentally, one of the two informants in this case is also a resident of the State of Washington. Co-defendant Michael Henson is a resident of North Carolina and was arrested there in this case. Currently, Houston is planning on relocating his family to Georgia in order to secure employment and be closer to other family members.

which has been used most often to provide venue for foreign persons who violate United States laws for crimes occurring abroad. In those cases, because the location of the crime cannot determine venue, the statute provides that venue is appropriate where that defendant is arrested, if the arrest occurs in the United States, or first brought to the United States after being arrested abroad.

However, the statute also provides that if not arrested or brought to the United States, ***venue is appropriate in the district in which the defendant last resided.*** This last provision affords the defendant venue in a community in which he has ties, and vicinage, or jury makeup, composed of members of that community.

The right to proper vicinage has been protected under English common law since at least the time of Blackstone. The trial by jury, the "grand bulkwark of [English] liberties, . . . secured . . . by the great charter," included not only the right not to be tried except on the indictment of the grand jury, but also "that the truth of every accusation, whether referred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals *and neighbours*, indifferently chosen, and superior to all suspicion." 4 Wm. Blackstone, *Commentaries on the Laws of England* 343 (1769). The jury panel was to be composed of "freeholders, without just exception, of the *visne* or neighbourhood; which is interpreted to be of the county where the fact is committed." *Id.* at 344 (citation omitted). Thus in the ordinary case, where a crime was tried at the place of commission, the vicinage right required a jury drawn from the community in which the crime was committed. This provision survives into the Sixth Amendment's guaranty of trial by jury "of the State and district wherein the crime shall have been committed." U.S. Const., amend. VI. But where trial at the locus of the

alleged offense is not possible, the vicinage right still protects the defendant's right to a jury composed of his "peers and neighbors," rather than a jury drawn from a distant community.

The Supreme Court has acknowledged that the Framers who wrote the Constitution were "[a]ware of the unfairness and hardship to which trial in an environment alien to the accused exposes him . . . ." *United States v. Johnson*, 323 U.S. 273, 275 (1944). The "inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice . . . [t]hus, it is the jury that is a criminal defendant's fundamental 'protection of life' and liberty." *Holland v. Illinois*, 493 U.S. 474, 511 (1990). Further, "[the Sixth] Amendment insures a jury that will best reflect the views of the community – one that is not arbitrarily skewed for or against any particular group or characteristic." *Id.* at 515. Indeed, "[t]he [constitutional] provision for trial in the vicinity of the crime is ***a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place.***" *United States v. Cores*, 356 U.S. 405, 407 (1958) (emphasis added).

The District of Columbia Court of Appeals has also explained that the constitutional venue limitation is "to assure the availability of witnesses and other evidence and of the solace of family and friends of the accused, as well as to prevent unnecessary hostility from a ***distant community and the financial burden of a remote trial***." *In the Matter of A.S.W.,* 391 A.2d 1385, 1388 (1978) (citing *United States v. Cores*, 356 U.S. at 407) (emphasis added). Indeed, "venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of 'a tribunal favorable' to it." *Johnson*, 323 U.S. at 275.

Under these circumstances, it will violate Houston's constitutional rights to proper venue and vicinage to try him in Maryland. The District of Maryland is a venue remote from Houston's residence and the community in which he has lived, and trying him in Maryland forces him to

travel to a distant location away from the comfort, support and solace of his family, friends and community. It also compels him to be tried in front of a jury which is equally removed from his community and peers. [7]

Given the fact that Maryland is such a remote venue, along with the fact that the alleged crime did not occur in Maryland, Houston should not be tried here. Venue and vicinage would be appropriate in a jurisdiction which either of the defendants resides.

III. CONCLUSION

For the reasons expressed above, undersigned defense counsel respectfully requests that this Court dismiss the instant indictment for lack of venue, or in the alternative, order that this case be removed to a district where either of the defendants reside.

Respectfully submitted,
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[7] The only apparent reason for this case being prosecuted in Maryland is that the case agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives, is from Maryland and the prosecutors work in the District of Columbia. With this in mind, this Court must also protect against the danger of letting the Government "handpick its forum." *Provoo*, 215 F.2d at 539.