

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARK J. MURRAY,

Defendant.

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Case No. 11-00223-09-CR-W-ODS

**MARK J. MURRAY'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR CHANGE OF VENUE**

Mark J. Murray, through undersigned counsel, respectfully moves this Honorable Court, pursuant to 18 U.S.C. § 3237(b) and Federal Rule of Criminal Procedure 21(b), to transfer venue to the United States District Court for the Middle District of Alabama. For the reasons stated below, Mr. Murray's motion should be granted.

I. INTRODUCTION

The Government has charged Mr. Murray with conspiracy, pursuant to 18 U.S.C. § 286, and filing false claims in violation of 18 U.S.C. § 287. As demonstrated below, this matter is due to be transferred to the United States District Court for the Middle District of Alabama.

II. ARGUMENT

A. Venue should be transferred to the Middle District of Alabama,

Pursuant to 18 U.S.C. § 3237(b), Mr. Murray may elect to be tried for the alleged violation of 18 U.S.C. § 287 in the United States District Court for the Middle District of Alabama because that is the district in which he was living at the time the alleged offense was allegedly committed. 18 U.S.C. § 3237(b). Thus, as will be discussed below, Mr. Murray herein elects to be tried for the alleged violations of 18 U.S.C. § 287 in the Middle District of Alabama. Because Mr. Murray is exercising his right to elect to be tried on Count 2 of the indictment in the Middle District of Alabama, he respectfully requests that, in the interest of justice and judicial economy, the Court exercise its discretion to transfer the remaining count to the same court.

Federal Rule of Criminal Procedure 21(b) confers discretion on this Court to transfer this case to another district “for the convenience of the parties and witnesses and in the interest of justice.” Fed. R. Crim.P. 21(b). In determining whether to transfer venue, a district court must give due regard to the convenience of the defendant, to the convenience of the witnesses and to prompt administration of justice. *United States v. Burns*, 662 F.2d 1378, 1382 (11th Cir. 1981). Moreover, a court should be guided by “the public policy of this Country that one must not arbitrarily be sent, without his consent, into a strange locality to defend himself against the powerful prosecutorial resources of the government.” *Id.* at 1378 (citing *Dupoint v. United States*, 388 F.2d 39, 44 (5th Cir. 1967)).

The factors to be considered in deciding a motion to transfer under Rule 21(b) were established in *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964), a case in which

the Court addressed a motion for of venue as filed by a corporate defendant in a criminal antitrust case. The Supreme Court set forth ten factors that courts should consider in assessing a Rule 21(b) a motion to transfer: (1) the location of the defendant, (2) the location of possible witnesses, (3) the location of events likely to be in issue, (4) the location of documents and records likely to be involved, (5) disruption of defendants' business unless the case is transferred, (6) expense to parties, (7) location of counsel, (8) relative accessibility of the place of trial, (9) docket condition of each district or division involved, and (10) any other special elements which might affect the transfer. *Platt*, 376 U.S. at 243-44. Prior to addressing these factors, however, a court should first determine whether venue is proper in the transferee court.

1. The Middle District of Alabama is the Only Venue Proper for All Counts Alleged in the Indictment

Under Article III, § 2, clause 3 of the United States Constitution, venue in criminal cases is placed “in the State where the said Crimes shall have been committed.” U.S. Const. Art. III, § 2, cl. 3. The Sixth Amendment further requires that criminal trials be held before “an impartial jury of the State and district wherein the crime shall have been committed.” U.S. Const. Amend. VI. Accordingly, Rule 18 of the Federal Rules of Criminal Procedure provides that “the government must prosecute an offense in a district where the offense was committed.” Fed. R. Crim. P. 18. The rule provides that “[t]he court must set the place of trial within the district with due regard for the convenience of the defendant and the witnesses, and the prompt administration of justice.” *Id.*

The Indictment alleges two crimes against Mr. Murray: (1) conspiracy pursuant to 18 U.S.C. § 2386; and (2) filing false claims pursuant to 18 U.S.C. §§ 2387 & 2. While the government may argue venue is proper in the Western District of Missouri with respect to the conspiracy count, only the Middle District of Alabama is proper for all counts of the Indictment. *See generally United States v. Davis*, 666 F.2d 195 (5th Cir. 1982) (venue for narcotic conspiracy was proper in the Middle District of Georgia but venue for substantive charge of possession with intent to distribute was improper since neither defendant actually or constructively possessed contraband until arriving in Florida). Further, the interest of fairness additionally weighs in favor of transferring venue in this case. Thus, Mr. Murray respectfully requests that all charges in the Indictment be transferred to the Middle District of Alabama.

a) Venue For The Conspiracy Charge Is Proper In Alabama

“A conspiracy may be prosecuted in the district where it formed or in any district where an overt act was committed in furtherance of its objects.” *United States v. Schlei*, 122 F.3d 944, 975 (11th Cir. 1997) (citing *United State v. Smith*, 918 F.2d 1551, 1557 (11th Cir. 1990)). While, it is undisputed that the Indictment charges that acts in furtherance of the alleged conspiracy were taken by certain defendants in the Western District of Missouri, making venue for the conspiracy count proper in this district, venue is equally proper for Mr. Murray in the Middle District of Alabama. The only alleged participant in the alleged conspiracy with whom Defendant, Mark J. Murray, is alleged to have had contact was Defendant, Billy Ray Hall. There is no allegation, nor will there be any proof, that

Defendant, Mark J. Murray, knew of any involvement of Billy Ray Hall with any persons in Missouri. Nor are there any allegations of Defendant, Mark J. Murray's participation in the alleged conspiracy to the extent that he could have been placed on notice that he might have to account for his alleged crimes in Missouri. Further, no allegations in the indictment allege that Mr. Murray ever traveled to Missouri for any acts in furtherance of the conspiracy.

b) Venue for Filing False Claims Count is Proper in Alabama

Count Two of the Indictment alleges a violation of 18 U.S.C. § 287. This statute does not proscribe a proper venue, thus it "must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Blecker*, 657 F.2d 629, 632 (4th Cir. 1981) (holding venue was proper in the district in which the false claims were submitted to an intermediary who paid the claims and then transmitted claims for reimbursement based on those payments to a government agency in another district). It has, therefore, been determined that the proper venue for an alleged violation of 18 U.S.C. § 287 lies in either the district where the claim was prepared, mailed or presented to the Government. *See United States v. Wuagneux*, 683 F.2d 1343, 1356 (11th Cir. 1982). The evidence, however, does not have to be direct, rather when circumstantial evidence reasonably supports the inference that the alleged acts constituting a crime were committed in a particular trial district, venue for the alleged offense is proper. *See United States v. Wuagneux*, at 1357.

Mr. Murray and Defendant Hall live in Alabama, and upon information and belief, any alleged fraudulent filing regarding Mr. Murray in relation to Defendant Hall, transpired

in Alabama. The Indictment purports to allege that Mr. Murray was a client of Defendant Hall and that Defendant Poynter directed Defendant Hall to gather certain financial information and list them on the 1099-OID form. The allegations in the Indictment support the inference that the alleged acts underlying the 18 U.S.C. § 287 regarding Mr. Murray, occurred in Alabama; therefore, venue for this claim is proper in Alabama.

c) Mr. Murray has the Right to Elect to be Tried in Alabama.

Count Two alleges that Mr. Murray filed false claims for tax refunds in violation of 18 U.S.C. §§ 287 & 2. Pursuant to 18 U.S.C. § 3237(b), Mr. Murray may elect to be tried for the alleged violation in the Middle District of Alabama because that is the district in which he was living at the time the alleged offense was committed. Through this motion, Mr. Murray hereby exercises his election to be tried for this alleged violation in the Middle District of Alabama at this time.

2. *The Platt Factors Strongly Support the Transfer of this Case to the Middle District of Alabama*

In addition to the fact that venue for all counts of this Indictment only properly lies in the Middle District of Alabama, it is clear that a transfer of venue is also proper in the interest of justice. Indeed, as demonstrated below, the *Platt* factors weigh in favor of transferring venue.

a) Mr. Murray's Location Favors a Transfer to Alabama

Courts have long recognized that because of “‘the unfairness and hardship to which trial in an environment alien to the accused exposes him,’ and the important policies

underlying the venue provisions of the Constitution and Bill of Rights. . .venue statutes should, whenever possible, be construed so as to permit trial at the residence of the defendant.” *United States v. Cashin*, 281 F.2d 669, 675 (2d Cir, 1960) (citing *United States v. Johnson*, 323 U.S. 273, 275 (1944)); *see also Burns*, 662 F.2d at 1382 (holding that it was error to deny an intra-district transfer to “the site of the alleged offenses, as well as the home of the defendants and 22 of the 24 Alabama witnesses”); *McDonald*, 740 F. Supp. at 762 (finding fact that defendants lived and conducted business in the Western District of Washington made it the “natural choice” and favored transfer).

Mr. Murray has maintained his home in Alabama for the entire time period encompassed by the Indictment. Consequently, the first *Platt* factor-location of the defendant-weighs in favor of a transfer.

b) Critical Witnesses Regarding The Charges Against Mr. Murray Live In Alabama.

In this Indictment, the prosecution appears to focus on Mr. Murray’s acts in relation to Defendant Hall, who is also a resident of Alabama. Therefore, any witnesses to the relationship between Mr. Murray and Defendant Hall would be expected to be present in the State of Alabama. Should Mr. Murray elect to call character witnesses, this would hold especially true as to such witnesses. As Justice Murphy explained in his concurrence in *United States v. Johnson, supra.*:

“Very often the difference between liberty and imprisonment in cases where the direct evidence offered by the government and the defendant is evenly balanced depends upon the presence of character witnesses. The defendant is more likely to obtain their presence in the district of his residence, which in this instance is usually the place

where the prohibited article is mailed. The inconvenience, expense and loss of time involved in transplanting these witnesses to testify in trials far removed from their homes are often too great to warrant their use. Moreover, they are likely to lose much of their effectiveness before a distant jury that knows nothing of their reputations.

Johnson, 323 U.S. at 279.

District courts have regularly transferred cases where such character testimony may play a central role at trial. *See e.g., United States v. Martino*, No. 00 CR 389, 2000 WL 1843233, at 6 (S.D.N.Y. Dec. 14, 2000). All of Mr. Murray's potential character witnesses reside and work in Alabama. Further, the impact of these potential witnesses will be greater where they reside and work. *United States v. Ohran*, 99 C.R. 010, 2000 WL 620217, at 3 (S.D.N.Y. May 12, 2000); *United States v. Russell*, 582 F. Supp. 660, at 663 ("[D]efendant has identified a number of New York residents who will testify as character witnesses for him and argues persuasively that the impact of their testimony on a jury would be greater in New York where they live and work than it would be on a jury in Florida."). The *Russell* court went on to state that, "[e]ven if, as is likely, not all of the character witnesses ultimately testify, the ability of the Russells to call them will be much less, and the cost much more, if the case is tried in Florida rather than Memphis. The availability and convenience of these witnesses, while not a controlling factor, is one that should be given considerable weight." *Id.*

c) The Majority Of Events At Issue Relative To Mr. Murray Occurred In Alabama

The Indictment does not allege that Mr. Murray took a single trip to Missouri. Instead, the Indictment alleges that Mr. Murray resides in Newton, Alabama. Any contact

that Mr. Murray might have had with any defendants occurred while he was living in Alabama. Thus, the majority of events that are at issue with respect to Mr. Murray, took place in Alabama.

d) Location Of Documents Does Not Support Venue Remaining In Missouri

The majority of documents related to Mr. Murray are in possession of the prosecutors in their offices in Missouri. This fact does not weigh in favor of keeping venue in Missouri, since the government was responsible for bringing the documents to Missouri. *See United States v. Spy Factory*, 951 F. Supp. 450, 458 (S.D.N.Y. 1997) (“[W]here the government had seized documents from one location and transferred them to, and consolidated them at, the place of trial, the fact that the documents were to be found there could not properly lie in favor of the Government’s opposition to the change of venue.”); *United States v. Bein*, 539 F. Supp. 72, 74 (N.D. Ill. 1982) (observing that it would be “grossly unfair” to allow the government to “create” a convenient venue simply by shipping a mass of records to its office in the district where it indicts). Thus, the government is responsible for transporting these documents from Missouri to Alabama. Further, in this advanced age of technology, many of the documents currently stored are most likely in electronic form or could easily be converted to electronic form and easily transported. As courts have noted, the location of documents should not weigh heavily against transfer where the documents can easily be shipped back to the defendant’s home district. *See McDonald*, 740 F. Supp. at 763.

e) The Expense Of Conducting The Trial Would Be Significantly Reduced If Transfer Is Granted

The expense of conducting the trial in Alabama, as opposed to Missouri, will be greatly reduced in Alabama. If this trial is Missouri, Mr. Murray will have to incur the added travel and lodging expense of staying in Missouri, as opposed to staying at home. Further, as he is both husband and father, if the trial occurs in Missouri, he will have the additional expense of his family staying in Missouri. Thus, the added expenses incurred without a change of venue, further weighs in favor of transferring venue.

f) Mr. Murray's Primary Counsel Are Located In Alabama

Although this factor is generally afforded less weight than others in determining whether to grant a motion to transfer venue, courts have found that where there are measurable benefits to having counsel in a defendant's home venue, transfer may be warranted. *See, e.g., Hanley*, 1995 WL 60019 at 4 (granting motion to transfer venue where, among other factors, defendant "noted the practical difficulties of trial preparation with his New York counsel via telephone," and defendant was initially assigned counsel in his home venue). In this case, Mr. Murray's primary counsel, Stephen T. Etheredge and Dustin Fowler, are located in Dothan, Alabama, which is in the Middle District of Alabama and this will reduce trial costs of travel. While Mr. Murray has employed local counsel, J.R. Hobbs, located in Missouri, it is less expensive for him to travel to court in the Middle District of Alabama. As a result, trial preparation, as well as the trial itself, will be more convenient and significantly less expensive if venue is transferred to Alabama.

g) Alabama Is More Accessible For Mr. Murray Than Missouri

In judging the relative accessibility of the possible venue for trial, courts have considered factors such as the relative number of flights, the percentage of direct and connecting flights, and travel times to bring the parties and witnesses to the place of trial. *See McDonald*, 740 F. Supp. at 763; *Russell*, 582 F. Supp. at 664. It is undisputable that Alabama, where he would be tried within twenty miles of his home, is more easily accessible for Mr. Murray than Missouri. Thus, in addition to not being as accessible for Mr. Murray and potential witnesses, trial in Missouri will further increase the trial costs for Mr. Murray, which would not be necessary should the trial be transferred to Alabama.

h) There Are Unusual Factors Favoring Transfer To Alabama

Finally, an additional contributing factor in support of transferring this case from Missouri to Alabama, is that Mr. Murray owns and operates a sole proprietorship in Alabama and works a second job in an effort to make ends meet. Even the briefest of Court appearances in Missouri require a minimum of two days absence from his business and second job with the attendant loss of income in addition to the expenses related to the appearance.

III. CONCLUSION

Based on the foregoing, Mr. Murray respectfully requests that this case be transferred to the Middle District of Alabama.

Respectfully submitted,

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***ATTORNEYS FOR DEFENDANT
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of October, 2011, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

s/ James R. Hobbs
Attorney for Defendant Murray