UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.: 11-00223-09-CR-W-ODS
	)	
	)	
GERALD A. POYNTER ET AL	)	
	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF THE MOTION FOR CHANGE OF VENUE

Factual Background

In the summer of 2008, Billy Ray Hall (hereinafter "Hall"), an acquaintance and now co-defendant of Mark J. Murray (hereinafter "Murray") in this case, began talking to Murray about an Internal Revenue Service filing by which the Defendant could recoup money from the Internal Revenue Service.

Later, Murray, a resident of Alabama, was invited to Billy Ray Hall's home, located within just a few miles of the Murray's home. At that meeting he was introduced to a person identified to him as "Jerry Love," but not assumed to have been Gerald A. Poynter, (hereinafter "Love"). Love presented information regarding the recoupment process (1099-OID) to Murray and to others who were present. Following the presentation by Love, Billy Ray Hall presented Murray with a list of the items which would be necessary to provide for the filing of amended returns for the 2005 and 2006 tax years.

The Indictment

Mark Murray, identified in the indictment as a resident of Newton, Alabama, is mentioned in only paragraph forty-five (45) of the "Background and General Allegations" section of the indictment. That paragraph describes Murray as a "client of Billy Ray Hall," also identified in the indictment as a resident of Newton, Alabama. Nowhere in the in the indictment is any relationship established between Murray and any other defendant.

Count One of the indictment incorporates the "Background and General Allegations" paragraphs of the indictment and charges a conspiracy **"in the Western District of Missouri, and elsewhere"** to defraud the Internal Revenue Service "by obtaining and attempting to obtain the payment and allowance of false, fictitious and fraudulent claims for refunds of withheld income tax." (bold emphasis added)

Count Three and Four charge Mark Murray with having "made and presented, and caused to be made and presented, and aided and abetted the same, to the Internal Revenue Service, …claims against the United States for payment of tax refunds, which [he] knew to be false, fictitious and fraudulent, by preparing and causing to be prepared, and filing and causing to be filed, purported individual tax returns on Forms 1040, 1040A, and 1040X…".

Therefore, from the allegations in the indictment, Mark Murray's involvement is restricted to Newton, Alabama and would fit into the "and elsewhere" allegation of the situs of a conspiracy as charged in Count One of the indictment. Counts Three and Four do not aid in placing venue in the Western District of Missouri, ad those Counts have no allegations relating to where the alleged criminal actions occurred. A review of the indictment, as a whole, reveals no allegations relating or connecting Mark Murray to any location other than Newton, Alabama.

ARGUMENT

Mark J. Murray is charged with making false claims in violation of 18 U.S.C. § 287, which provides, in part, that "whoever makes or presents to any person…..of the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine….."

Murray has submitted a motion seeking to transfer venue to the Middle District of Alabama under 18 U.S.C. § 3237(b), which provides the basis for transfer of venue where the charged offense is based solely on a mailing to the Internal Revenue Service for an offense "described in section 7203 of the Internal Revenue Code of 1986, or where *venue for prosecution of an offense described in* section 7201 or 7206(1), (2), or (5) of such Code…" A review of 26 U.S.C. § 7206(1) reveals that it describes the offense of presentment of the false claim as that document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which the person does not believe to be true and correct as to every material matter. Therefore, the factual allegations underlying the charged offense of a false claim could have been brought under 26 U.S.C. § 7206(1) or 18 U.S.C. § 287.

In *United States v. Kimble*, 186 F.Supp. 616 (D.C.S.D.N.Y. 1960), one of the earliest cases to consider the application of 18 U.S.C. § 3237(b) to prosecutions other than those specifically enumerated in the statute, the court observed, at page 617, that the acts constituting the offenses charged in the indictment (18 U.S.C. §§ 287 and 1001) "also constitute an offense under section 7206(1) of the Internal Revenue Code of 1954." At page 618 of the opinion, the court says:

> "The language of section 3237(b) and its legislative history make it altogether clear that Congress' purpose in enacting it was to grant, despite the strong opposition of the Treasury and Justice Departments, a limited choice of venue

> under certain circumstances, to defendants indicted in a judicial district different from that of their residence, for (a) attempts to evade or defeat any tax imposed by the Internal Revenue Code of 1954 or the payment thereof (section 7201), or (b) the making or assisting another in making false returns, statements, etc. in connection with tax matters (section 7206(1), (2), and (5). There are, as indeed the instant indictment shows, other provisions of law under which such conduct may be prosecuted. However, it is also clear from the language of section 3237(b) that Congress was aware of this. Surely, then, in view of the government's expressed opposition, it cannot be supposed that Congress thwarted its own declared purpose by making the applicability of the statute depend on which provision of law the prosecutor chooses to charge was violated. Accordingly, the first test of availability must be, and I hold it is, the nature and effect of the acts alleged. If these would support a charge under one of the specified provisions of the Internal Revenue Code, it is immaterial that the charge is laid under another applicable provision of law."

In the case *United States v. Dalitz*, 248 F.Supp. 238 (D.C.Cal. 1965), the Court, citing the decision in *United States v. Rosenberg*, 226 F.Supp. 199 (D.C.S.D.Fla. 1964), held that although the moving defendants were charged under the conspiracy section (18 U.S.C. § 371), the substantive offense charged was described in said Section 7201, Title 26 and the application of 18 U.S.C. § 3237(b) was therefore appropriate to transfer venue to the defendant's state of residence. Noting that the indictment under the conspiracy section should not circumvent the intent of Congress in the circumstances.

Section 18 U.S.C. 3237(b), by its plain terms, provides Murray with an absolute right to transfer alleged tax offenses to his home district. *United States v. Nathanson*, 813 F.Supp. 1433, 1436 (E.D. Cal. 1993). The Constitution, in amendment VI provides that a defendant has a right to stand trial in the district in which the crime was allegedly committed and, as a result, determinations of venue must be made as to each count in the indictment. See *United states v. Hirschfeld*, 964 F.2d 318, 321 (4th Cir. 1992), *cert. denied*, 506 U.S. 1087, 113 S.Ct. 1067, 122 L.Ed.2d 371 (1993); *United States v. Feola*, 651 F.Supp. 1068, 11-25-26 (S.D.N.Y. 1987), *aff'd* 875 F.2d 857 (2nd Cir.), *cert. denied*, 493 U.S. 834, 110 S.Ct. 110, 107 L.Ed.2d 72 (1989);

United States v. DeFabritus, 605 F.Supp. 1538, 1543-44 (S.D.N.Y. 1985). Because venue must be determined on a count-by-count basis, the fact that the rules permit joiner cannot be allowed to be dispositive of the effect of a statute, such as Section 3237(b). *United States v. Nathanson*, 813 F.Supp. at 1435.

The Government argues that because it chose not to charge Mark Murray with violation any of the specific Internal Revenue Code provisions enumerated in 18 U.S.C. § 3227(b), he is not entitled to the venue protections of that section. One of the earlier cases interpreting the application of 18 U.S.C. § 3237(b) is *United States v. Kimble*, 186 F.Supp. 616 (D.C.S.D.N.Y. 1960). In that case, Kimble was charged with violation of §§ 18 U.S.C. 287 and 1001. The Court noted that the acts constituting the offenses charged in the indictment, also constitute an offense under Section 7206(1) of the Internal Revenue Code and held that if the acts alleged would support a charge under one of the specified provisions of the Internal Revenue Code, it is immaterial that the charge is laid under another applicable provision of law. Noting that to hold otherwise would allow the prosecutor to control the applicability of statute. 186 F.Supp., at 618. The Government cites, in brief, the case of *United States v. Oster*, 458 F.Supp. 540 (S.D.N.Y. 1978), as a case holding contrary to *Kimble*, *surpa*. In *Oster*, two defendants were charged in the same indictment. Rita Oster was charged with a violation of 26 U.S.C. § 7201 while her co-defendant was charged with three non-tax crimes. The *Oster* Court refused to apply 18 U.S.C. § 3237(b) in such manner as to cause the transfer of venue of a defendant who was not even charged with a tax offense. *Oster* is therefore clearly distinguishable from both the *Kimble* decision and that presently before this Court.

Moreover, *United States v. Youse*, 387 F.Supp. 132 (D.C. Wis. 1975), in citing 18 U.S.C. § 3237(b) stated:

> "Statute giving defendants charged with internal revenue offenses involving use of mails a right to trial in district of their residence was intended to permit a defendant to be tried in the district of his residence, thus avoiding the necessity of a defendant charged with specified violations of the Internal Revenue Code from having to defend a charge in the district chosen by the Government."

The Court said further:

> "Congress intended that the defendants be given an absolute right to be tried for alleged violations enumerated therein in the district of their residence regardless of considerations of convenience." *United States v. Whortman*, 26 F.R.D. 183 (E.D. Ill. 1960).

In *United States v. Youse*, supra., Youse was charged with eight separate violations of Section 7201 and during the time period when the alleged offenses occurred, Youse was a resident of Nevada. Nothing stated within the statute, itself, its legislative history, or subsequent cases arising under the statute indicates that Congress intended the phrase "use of the mails" to apply only to the mailing of tax returns for filing. Thus, the Court held that since Youse used the mails to "attempt to evade or defeat the income tax," he is entitled to a transfer to the district of his residence, Nevada.

In the case at bar, Mark Murray never traveled outside of the State of Alabama to further any matter incorporated within the indictment. Mark Murray came into physical contact with Billy Ray Hall and Gerald A. Poynter in his home county and state and Billy Ray Hall was the link into the entire scheme. Moreover, Billy Ray Hall and Mark Murray both maintained residence in the Middle District of Alabama, and continue to do so; therefore, another venue element has been satisfied for 18 U.S.C. § 3237(b). 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." With regards to Rule 18, venue is proper in the Middle District of Alabama as all transactions involving Mark Murray were executed on Alabama soil, not

Missouri.

The Government contends that the Western District of Missouri is the "only proper venue for the false claims charge because the tax returns containing false claims were prepared, mailed, or otherwise submitted and presented to the government in Western Missouri." In response, the Court's attention is directed again to 18 U.S.C. § 3237(b), where it is explicitly stated that grounds for change of venue are absolute when the defendant utilizes the "mail" to "attempt to evade or defeat the income tax." Additionally, 18 U.S.C. 3237(b) provides, "….defendants be given an absolute right to be tried for alleged violations enumerated therein in the district of their residence regardless of considerations of convenience." For further guidance, *United States v. Wuagneux*, 683 F.2d 1343, 1356 (11th Cir. 1982) provides that venue is proper in "the district where the claim was prepared, mailed, or presented to the Government."

Defendant would also ask the Court to review this matter with respect to the ten factors set forth by the Supreme Court in *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964), which are: (1) location of defendant, (2) location of possible witnesses, (3) location of events likely to be an issue, (4) location of documents and records likely to be involved, (5) disruption of defendant's business unless the case is transferred, (6) expense to the parties, (7) location of counsel, (8) relative accessibility of place of trial, (9) docket condition of each district or division involved, and (10) any other special elements which might affect the transfer. All of the above factors are elements to be considered when determining a change of venue under Rule 21(b). Even if the Court should deem the alleged offenses may have been committed in more than one district the interest of justice requires transfer of the case to the Middle District of Alabama.

Mark Murray submits that based upon the indictment, 18 U.S.C. § 3237(b), and prior case law, transfer of venue to the Middle District of Alabama is proper, for the reasons provided in this Memorandum.

Respectfully submitted this the 23rd day of December 2011.

/s/ Stephen T. Etheredge
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CERTIFICATE OF SERVICE

I certify that on December 23, 2011, the foregoing Memorandum in Support of the Motion to Change Venue on Mark J. Murray was filed with the Clerk of the Court using the CM/ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

/s/ Stephen T. Etheredge
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Attorney for Defendant