IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

UNITED STATES OF AMERICA,

PLAINTIFF,

V. CASE NO.: 2:24-cr-00192

KISHA SUTTON,

DEFENDANT.

DEFENDANT KISHA SUTTON'S REPLY TO RESPONSE IN OPPOSITION (ECF 216)

Now comes the Defendant, Kisha Sutton, by and through counsel, Connor Robertson, and hereby replies to the United States' Response in Opposition (ECF 216) and states as follows:

Continuing Offense

1. Defendant, Kisha Sutton, recognizes that Bank Fraud is a continuing offense, but the offense ends upon the application submission and the movement of funds.

Acts in Furtherance Do Not Count

2. The Government would like the Court to believe this means that acts occurring after the "execution" of the bank fraud scheme count. As applied, they want the Court to believe that the co-defendants' acts of providing "kickback" payments in the Southern District of West Virginia fall within the continuing nature of Bank Fraud. However, this is against 4th Circuit case law as pointed out in Defendant Sutton's original Objections. "Similarly, acts which occur only in furtherance of the crime or after a crime is complete cannot provide a basis for venue because they

are not essential to the underlying offense." *United States v. Jefferson*, 674 F.3d 332, 367 (4th Cir. 2012) (finding venue improper for a wire fraud case because although acts in furtherance of the crime occurred in the relevant district, "the physical act of transmitting the wire communication for the purpose of executing the fraud scheme," did not); *United States v. Harris,* No. 3:12-cr-170, 2013 WL 1790140, at *2 (E.D. Va. Apr. 26, 2013) (action taken after a crime is complete "does not qualify as essential conduct of the offense for the simple reason that the crime has already been completed").

3. *United States v. Harris*, No. 3:12-cr-170, 2013 WL 1790140, at *2 (E.D. Va. Apr. 26, 2013) (action taken after a crime is complete "does not qualify as essential conduct of the offense for the simple reason that the crime has already been completed").

Essential Conduct Element Count

4. The Defendant's fixation on the "essential conduct element" of bank fraud is because the 4th circuit has determined that is what the Court should evaluate when determining venue. "[V]enue is generally limited to the place in which the "essential conduct" elements of the offense occurred." *United States v. Sterling,* 860 F.3d 233, (4th Cir. 2017). It is universal that the "execution" of the bank fraud is the essential element of the crime. **"The bank fraud statute punishes the execution of the scheme."** *United States v. Lemons,* 941 F.2d 309, 318 (5th Cir. 1991).

5. "A scheme is executed by the movement of money, funds or other assets from the institution," *United States v. Mancuso,* 42 F.3d 578, 847 (4th Cir. 1994), and this

movement of the money from the financial institution completes the execution of the scheme. *United States v. Christo,* 129 F.3d 578, 580 (11th Cir. 1997).

6. Based on the case law, the fact that the Indictment lists that the co-defendants were in the Southern District of West Virginia when they provided the "kickback" is of no moment to this court.

7. *United States v. Adkinson*, 158 F.3d 1147 (11th Cir. 1998) is an analogous case pointing out that only one phase of the usual three phases that happen in a bank fraud case matter. In *Adkinson*, to rebut the attack on the sufficiency of the evidence challenge the Government wanted the Court to consider evidence of the three phases of a scheme to defraud. *Id. at 1160.* ("The first phase was the negotiations to buy the property, the second was the application for and receipt of the loans from Hill and Vision Banc; the third was the cover-up of the fraud and diversion of the funds.") (In comparison to the case before this court, the first phase would be the co-defendants providing their personal information to Ms. Sutton, the second phases would be the application and movement of funds by Ms. Sutton, and the third would be the "kickback".) The *Adkinson* Court held that only relevant phase of bank fraud is the second – the application for and receipt of the loans:

> "The only phase of this scheme that is relevant to the substantive offense of bank fraud is the second - - the application for and receipt of the loans. Bank fraud consists of making of material misrepresentations during that process. . . ."

8. The 4th Circuit has likewise held that the scheme to defraud is an essential element of wire fraud, but not an "essential conduct element" for venue purposes. "Indeed, the court determined that devising a scheme to defraud is clearly an essential element, but not an essential conduct element, of wire (or mail) fraud." *United*

States v. Jefferson, 674 F.3d 332, 366 (4th Cir. 2012). "Rather, 'the essential conduct prohibited by [the wire fraud statue] is the misuse of wires as well as any acts that cause such misuse." *Id. at 366.* "Thus, because the essential conduct, the actual wire transmission, did not involve the Eastern District of Virginia, venue was improper there." *Id.*

9. The same analysis goes for major fraud crimes. In *United States v. Verclas*, Case No.: GJH-18-160 (D. Md. Jan. 03, 2019), the Court dismissed an Indictment for lack of venue where there was no allegation that Verclas executed her alleged scheme in the District of Maryland when she submitted her fraudulent application from her office in New York. Importantly, the court found that "[o]nce the Defendant submitted the application, the scheme had been executed and she did not need to engage in any additional conduct to commit the crime of Major Fraud." *Id.*
10. All of these cases point out that the Government must allege that the execution portion of the bank fraud occurred in the Southern district of West Virginia. The Indictment before this Court, and the argument of the Government, only rely on acts that occurred after the execution of the PPP loan applications in New Jersey. For this reason, the Indictment is insufficient to establish venue.

Conclusion

WHEREFORE, the Defendant respectfully requests the Court enter an Order dismissing Counts Two through Ten for lack of venue and for other such relief as is necessary and proper.

Respectfully submitted,
By Counsel

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UNITED STATES OF AMERICA,

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KISHA SUTTON,

DEFENDANT.

CERTIFICATE OF SERVICE

I, Connor Robertson, certify that on the 30th day of May, 2025, a copy of the foregoing motion was served on the United States by ECF, to Jonathan Storage, Assistant United States Attorney to the following:

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