UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 6:21−cr−00141−RBD−EJK
	)	
EMMET BOWENS,	)	
	)	
Defendant.	)	
	)	

DEFENDANT EMMET BOWENS' MOTION TO DISMISS COUNT TWO OF THE INDICTMENT DUE TO IMPROPER VENUE

The Defendant, Emmet Bowens ("Mr. Bowens"), by and through the undersigned counsel, hereby moves to dismiss Count Two of the Indictment (Doc. 1), pursuant to Fed. R. Crim. P. 12(b)(3)(A)(i), on the grounds that venue for this Count is improper in the Middle District of Florida. In support thereof, Mr. Bowens states as follows:

STATEMENT OF FACTS

Relevant Procedural History

1. On November 10, 2021, a federal grand jury in the Middle District of Florida returned an Indictment charging Mr. Bowens with two counts of wire fraud, in violation of 18 U.S.C. § 1343 (Counts One and Two), and four counts of money laundering, in violation of 18 U.S.C. § 1957 (Counts Three through Six).

Doc. 1. The Indictment blanketly alleged that the wire fraud counts (Counts One and Two) occurred "in the Middle District of Florida, and elsewhere." *Id.* at 4. However, with respect to Count Two, the Indictment specifically alleged that on or about May 20, 2020, Mr. Bowens committed wire fraud by transmitting or causing to be transmitted a "[w]ire transfer in the amount of $739,582.50 from the Lenders' East West Bank account into Emmet Bowens' Trust account ending in 4982, **processed using a server located outside of Florida**." *Id.* at 7 (emphasis added).

2. The deadline for the filing of pretrial motions in this case is May 5, 2022. Doc. 37.

MEMORANDUM OF LAW

The Sixth Amendment of the United States Constitution and Rule 18 of the Federal Rules of Criminal Procedure guarantee the right of a defendant to be tried in the district in which the offense was committed. *United States v. DiJames*, 731 F.2d 758, 761 (11th Cir. 1984) (citations omitted). A defendant may waive such right, however, by failing to raise a venue objection prior to trial. *United States v. Dabbs*, 134 F.3d 1071, 1078 (11th Cir. 1998); *see also United States v. Roberts*, 308 F.3d 1147, 1151-52 (11th Cir. 2002) (concluding that defendant waived his venue challenge by not raising it until the close of the prosecution's case because defendant was aware of the basis for his objection before the close of evidence);

United States v. White, 654 F. App'x 956, 966 (11th Cir. 2016) ("Defendant did not raise the issue of venue until his motion for judgment of acquittal at the close of the Government's case . . . [and] therefore waived this challenge by not timely raising it.").

The government is required to prove venue by a preponderance of the evidence. *See United States v. Stickle*, 454 F.3d 1265, 1271 (11th Cir. 2006) (venue is "non-essential element" of a crime); *United States v. Schlei*, 122 F.3d 944, 974 (11th Cir. 1997) (quoting *United States v. Barnes*, 681 F.2d 717, 722 (quotation omitted), amended by, 694 F.2d 233 (11th Cir. 1982)) ("[T]erritorial jurisdiction and venue are essential elements of any offense in the sense that the burden of proof is on the prosecution to prove their existence. . . . However, venue need only be proved by a preponderance of the evidence as opposed to beyond a reasonable doubt."). The Eleventh Circuit has explained that "the preponderance standard is not toothless [and requires] reliable and specific evidence." *See United States v. Martinez*, 584 F.3d 1022, 1027 (11th Cir. 2009) (internal citations omitted).

"[W]ire fraud [is] a 'continuing offense,' as defined in 18 U.S.C. § 3237(a), [and is] properly tried in any district where a . . . wire communication was transmitted in furtherance of [the] fraud scheme." *United States v. Ebersole*, 411 F.3d 517, 527 (4th Cir. 2005) (quoting *United States v. Kim*, 246 F.3d 186, 191 (2d Cir. 2001)). Here, the Indictment alleges with respect to Count Two that the charged

wire transmission "was processed using a server located outside of Florida." *See* Doc. 1 at 7. Thus, even when construing the Indictment in the light most favorable to the government, it appears that no part of the wire communication charged in Count Two moved through the State of Florida, much less the Middle District of Florida.

Further still, the government will not be able to prove by a preponderance of the evidence that any part of the wire communication charged in Count Two was transmitted to, from, or through the Middle District of Florida. As noted above, the wire communication alleged in Count Two is a wire transfer from East West Bank to Trustco Bank. *Id.* Attached hereto as *Exhibits A* and *B*, respectively, are emails from representatives of East West Bank and Trustco Bank to a Federal Bureau of Investigation ("FBI") agent. These emails were provided to Mr. Bowens as part of the government's discovery production in this case. In these emails, the representatives of East West Bank and Trustco Bank informed the FBI that the bank servers through which the wire communication alleged in Count Two was transmitted, were all located outside the State of Florida. *See Exhibit A* and *B*. Thus, the government will not be able to establish by a preponderance that the wire communication alleged in Count Two of the Indictment was transmitted through the Middle District of Florida. Accordingly, venue for Count Two of the Indictment is improper in this district.

In sum, the government has failed to sufficiently allege that venue for Count Two of the Indictment is proper in this district. Moreover, the government will not be able to establish by a preponderance of the evidence that venue for Count Two lies within this district. Therefore, the Court should dismiss Count Two of the Indictment pursuant to Rule 12(b)(3)(A)(i).

CERTIFICATION OF CONFERRING WITH OPPOSING COUNSEL

Pursuant to the Court's Criminal Scheduling Order (Doc. 16), the undersigned certifies: (1) that the undersigned counsel conferred with opposing counsel; (2) that counsel have been unable to resolve the instant motion by agreement; and (3) that the motion concerns matters not covered by the scheduling order.

CONCLUSION

WHEREFORE, the Defendant, Emmet Bowens, moves this Honorable Court to enter an Order dismissing Count Two of the Indictment on the grounds that venue is improper in the Middle District of Florida.

Respectfully submitted on this 5th day of May, 2022.

s/Andrew C. Searle
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on May 5, 2022, I filed a copy of the foregoing with the Clerk of the Court via the CM/ECF system. I further certify that all parties to this case are equipped to receive service of documents via that system.

s/Andrew C. Searle
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