

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

NO. 5:06-CR-41-1-FL  
NO. 5:06-CR-41-2-FL

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 AVEDIS DJEREDJIAN )  
 CARMEN BADRIAN )  
 Defendants. )

ORDER

This matter comes before the court on the government’s motion for reconsideration (DE # 114), filed April 20, 2007. The government requests the court reconsider its order of April 9, 2007 (DE # 101), transferring this case as against defendants Avedis Djeredjian and Carmen Badrian, husband and wife, to the Central District of California, pursuant to Fed. R. Crim. P. 21(b) (hereinafter the “Transfer Order”).<sup>1</sup> Upon motion of the government, the court stayed the transfer pending briefing and hearing on the instant motion. On May 10, 2007, the court convened a hearing on the instant motion and on a motion to transfer filed by defendants, as claimants, in the related civil forfeiture case, United States v. \$19,985.99 in U.S. Currency, et al., Case No. 5:05-CV-767-FL. The motion for reconsideration is now ripe for ruling. For the reasons discussed below, the government’s motion is denied.

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<sup>1</sup> The court incorporates herein the factual and procedural history of this case, as discussed at greater length in the Transfer Order. (See Transfer Order at 1-3.)

## STANDARD OF REVIEW

The Federal Rules of Criminal Procedure do not expressly provide for motions to reconsider. See United States v. Srivastava, 476 F. Supp. 2d 509, 511 (D. Md. March 6, 2007) (denying government's motion for reconsideration of suppression order). Courts usually apply Fed. R. Civ. P. 59(e) as an "apt analogy." Id.; see also United States v. Dickerson, 166 F.3d 667, 678-79 (4th Cir. 1999) (applying relaxed Fed. R. Civ. P. 59(e) standard to motion for reconsideration), *rev'd on other grounds*, Dickerson v. United States, 530 U.S. 428 (2000). Fed R. Civ. P. 59(e) provides, "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Courts interpreting this rule "have recognized three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not previously available; or (3) to correct a clear error of law," Srivastava, 476 F. Supp. 2d at 511, or to "prevent manifest injustice," United States v. Gross, 2002 WL 32096592, \*3 (E.D.N.Y. 2002) (unpublished) (denying government's motion to reconsider order dismissing indictment).

Reconsideration is within the trial court's sound discretion, and "will be denied unless the moving party can point to matters 'that might reasonably be expected to alter the conclusion reached by the court.'" Gross, 2002 WL 32096592 at \*4 (quoting Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995)). "[T]he Federal Rules of Civil Procedure are not *binding* in criminal proceedings," and therefore "that evidence was [previously] available to the movant . . . does not, *as a matter of law*, defeat a motion for reconsideration in a criminal case." Dickerson, 166 F.3d at 679 (emphasis added). Nonetheless, the court can consider the availability of evidence, because "the district court has a strong interest in controlling its docket and avoiding piecemeal litigation." Id. The Fourth Circuit has therefore stated that "when the evidence forming the basis for a party's

motion for reconsideration was in the movant's possession at the time of the initial hearing . . . the movant must provide a *legitimate reason* for failing to introduce that evidence prior to the district court's ruling on the motion." Id. (emphasis added).

In this case, the court conducted a hearing on defendant Djeredjian's original motion to transfer on June 23, 2006. The court denied that motion. After the superseding indictment, defendant Djeredjian again moved to transfer the case, and his wife, defendant Badrian, now a defendant, joined in the motion. All parties briefed the motion and had ample opportunity to present evidence and argument in support of their respective positions. Nonetheless, the government and defendants have produced additional evidence in the course of these proceedings on the instant motion, and the court has considered all relevant evidence of matters that could potentially alter the conclusion reached in the Transfer Order.

#### DISCUSSION

Fed. R. Crim. P. 21(b) provides, "[u]pon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties and witnesses and in the interest of justice." The court considers ten factors on a motion to transfer under Fed. R. Crim. P. 21(b): (1) location of the defendant; (2) location of possible witnesses; (3) location of events likely to be in 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 the place of trial; (9) docket condition of each district involved; and (10) any other special elements which might affect the transfer. See Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240, 244-45 (1964); United States v. Heaps, 39 F.3d 479, 483 (4th Cir. 1994) (holding district court did not abuse discretion in applying Platt test

and denying motion).

In the Transfer Order, the court held, “[c]onsidering the Platt factors as applied to both defendants, continued prosecution of this case in the Eastern District of North Carolina would result in a substantial balance of inconvenience to the parties.” (Transfer Order at 14.) See United States v. Ferguson, 432 F. Supp. 2d 559 (E.D. Va. 2006) (applying the “substantial balance of inconvenience” test); United States v. Hurwitz, 573 F. Supp. 547 (S.D. W. Va. 1983) (same). In the motion for reconsideration and at hearing, the government presented its arguments in the context of these factors, and the court undertakes a similar analysis.

**1. Location of defendants**

The government repeats its argument that defendant Djeredjian repeatedly traveled to North Carolina in the course of the alleged crimes. The court previously discounted this argument. The government also noted there is no evidence that defendant Badrian ever traveled to this state prior to her indictment in this case. The government did not challenge the fact that, indeed, defendants reside in the Central District of California. The location of defendants favors transfer.

**2. Location of possible witnesses**

The government’s primary argument on reconsideration is that the court erroneously determined that the location of possible witnesses favored transfer. In the latest briefing, the government undertakes a specific listing of witnesses from North Carolina and from California, which it previously declined to do. The government identifies nineteen (19) North Carolina witnesses it would likely call, and up to seven additional witnesses it might call. The government also identified up to seventeen (17) California witnesses it would likely call. At hearing, counsel for the government argued there were about the same number of government witnesses from North

Carolina and California.

Also at hearing, defendant Djeredjian produced a list of seventy six (76) possible witnesses from California, that might testify for the government or either defendant. (See Defs. Hrg. Ex. 1.) The government identified several individuals on this list as likely government witnesses; however, counsel for the government did not attempt to contravene the relevance or likelihood that any specific witness listed would be called. Considering all the evidence presented, the court finds no reason to alter its conclusion that this factor favors transfer.

### **3. Location of events likely to be in issue**

The government next challenges the location of events likely to be in issue, and in its briefing identifies relevant conduct that allegedly occurred in North Carolina, which was not previously discussed at the prior hearing or in briefing on the transfer motions. Despite the government's protestations to the contrary, and the fact that some overt acts in furtherance of the conspiracy may well have occurred in this district, the key events *likely to be in issue* – receipt, transfer, and storage of cigarettes in California; licensing by the California Board of Equalization; possession of counterfeit cigarette tax stamps and paraphernalia; and non-payment of California cigarette taxes – all occurred in California, favoring transfer.<sup>2</sup>

### **4. Location of documents**

While the government argues that numerous documents were generated in North Carolina, the court previously found that “[t]his factor is of little significance today, due to the rapidity with

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<sup>2</sup> The government produced a chart at hearing, purporting to compare the number of overt acts allegedly committed in North Carolina and California. (See Gov't Hrg. Ex. 1.) The court is not persuaded that the delineation of actions identified by the chart counsels against transfer. For instance, the chart identifies nine overt acts in North Carolina relating to Count One, conspiracy to engage in contraband cigarette trafficking, but only two overt acts in California. One of those two acts, “sold non-California taxed cigarettes,” appears to include the substantial part of the conduct that will likely be in issue, which is the relevant consideration under this factor.

which documents can be transported to other districts.” (Transfer Order at 10.) See also United States v. Oster, 580 F. Supp. 599, 602 (S.D. W. Va. 1984); Hurwitz, 573 F. Supp. at 553.

**5. Disruption of defendants’ businesses**

The government’s brief casts doubt on the legitimacy of defendant Djeredjian’s current business endeavors, and argues that defendant Badrian’s efforts as a real estate agent have been largely unsuccessful, and will not be significantly disrupted by trial in this district. However, the government did not expand upon its vague challenge to defendant Djeredjian’s work status at hearing, and did not previously make such arguments. The court previously rejected the government’s other arguments on this factor, specifically as they relate to defendant Badrian. In the Transfer Order, the court found this factor “only marginally favors transfer,” and the government has not now shown this finding to be incorrect. (Transfer Order at 11.)

**6. Expense to the parties**

The court previously found this factor “strongly” favored transfer. (*Id.*) If this case went forward in this district, defendants would have to maintain a defense over 2,000 miles from their home.<sup>3</sup> The government now argues that its resources are not effectively unlimited, and that the cost of defense has not stalled defendants’ efforts in this case and the civil forfeiture case. The government does not, and cannot, argue however that continued prosecution of this case in this district, including trial anticipated to last approximately two weeks, will not represent a significant

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<sup>3</sup> Included in this cost would be the expense of arranging travel and testimony of witnesses called by defendant Djeredjian, who has not been found indigent for purposes of this criminal case. The government correctly notes that it is the prosecution’s expense to arrange the travel of government witnesses, but counsel identified less than two dozen of the seventy six (76) individuals on defendant Djeredjian’s list, produced at hearing, as government witnesses.

cost to defendants.<sup>4</sup> See Ferguson, 432 F. Supp. 2d at 567-68 (finding this factor favored the defendants, wealthy executives, who faced a sixteen-day trial in Virginia, instead of their home state, Connecticut).<sup>5</sup> The court does not consider in this regard the fact that defendants-claimants Djeredjian and Badrian have vigorously defended the criminal and civil actions, as is their right. The government has not shown the court's original finding on this factor to be incorrect.

#### 7. Location of counsel

The government argues there are five attorneys in the criminal case, and four of them practice in North Carolina: Assistant United States Attorneys Felice Corpening and Joshua Royster, Joseph Zeszotarski for defendant Djeredjian, and James Saunders for defendant Badrian. The fifth attorney, Michael Mayock, represents defendant Djeredjian and practices in California.<sup>6</sup> However, Mr. Zeszotarski appears as local counsel, as required by the court's rules, see Local Criminal Rule 57.1(d), EDNC, and Mr. Saunders is appointed from the CJA list, and represented at hearing that he can easily transfer the case to appointed counsel in California, see United States v. Lopez, 343 F. Supp. 2d 824, 826 (E.D. Mo. 2004) (recognizing relative ease with which CJA attorney can request new appointed counsel for the defendant, after transfer of case to another district).

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<sup>4</sup> Defendant Badrian has been found indigent, and for that reason currently has counsel appointed pursuant to the Criminal Justice Act. Both defendants have been found indigent for purposes of the Farmer hearing in the civil forfeiture case. (See Case No. 5:05-CV-767, DE # 107, Order denying motion for release of funds.)

<sup>5</sup> The court in Ferguson further noted its disagreement with the government's arguments on this point, "because '[t]he United States of America has, for all practical purposes, unlimited financial resources to bring to bear.'" Ferguson, 432 F. Supp. 2d at 567 (quoting United States v. Coffee, 113 F. Supp. 2d 751, 757 (E.D. Pa. 2000)). Therefore, although "[i]t is true that Defendants are people of significant financial means . . . when compared to . . . the government's resources, they pale in comparison. Here, the government is in a better position to bear the additional expense of trying the case in Connecticut." Id. at 567-68.

<sup>6</sup> The court disagrees with the government's argument that defendant Djeredjian's choice of California counsel should count against this factor. If a defendant's choice of counsel from outside the district of indictment was to be disregarded, this factor would be rendered meaningless.

Mr. Saunders stated he has already begun the transfer process; additionally, the record in the civil forfeiture case reflects defendant Badrian's repeated attempts to secure funds to hire counsel of choice from California.<sup>7</sup> The court thus discounts the weight afforded to the location of Mr. Zeszotarski and Mr. Saunders, in considering this factor.

Furthermore, Mr. Royster practices in the civil division of the United States Attorney's Office for the Eastern District of North Carolina, and his appearance in this matter appears substantially related to the civil forfeiture case, where he is the only government counsel to make an appearance. To the extent the government requests the court consider the location of counsel in the civil forfeiture case, defendants-claimants are in that matter also represented by an additional California attorney. (See Docket for Case No. 5:05-CV-767.) The government has not shown the court's original finding on this factor to be incorrect.

#### **8. Other special elements**

The government's arguments on this factor regard related proceedings. For example, the government argues that the pending cases against co-conspirators Masis Geragosian (Case No. 5:06-CR-31-FL) and Roobik Ohaniansaki (Case No. 5:06-CR-41-3-FL), who have or are anticipated to plead guilty in this district, counsel against transfer. In this regard, the court previously noted that Fed. R. Crim. P. 20 permits transfer of a case for purposes of receiving a plea and for sentencing. (See Transfer Order at 13.) Additionally, a sentencing court can take judicial notice of another court's rulings on common sentencing issues. In short, the court and parties are well equipped to mitigate any negative impact in this regard arising from the transfer of the case against defendants

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<sup>7</sup> The court previously authorized Mr. Saunders to travel to California, in furtherance of his representation of defendant Badrian. The trip was cancelled by counsel upon issuance of the transfer order. Defendant Badrian did not meet face-to-face with her counsel until her travel to North Carolina for hearing on the instant motion.

Djeredjian and Badrian. See Ferguson, 532 F. Supp. 2d at 570 (rejecting government's argument that two co-conspirators' guilty pleas in the district of indictment counseled against transfer); c.f. United States v. Morrison, 946 F.2d 484, 489 (7th Cir. 1991) (affirming denial of motion to transfer by one defendant, where five co-defendants faced trial in the district of indictment and therefore the transfer and severance "would have given rise to a 'multiplication of litigation'" (citation omitted)).

Next, the government argues for the first time that the pendency of the related civil forfeiture case counsels against transfer, in part because the government relied on Fourth Circuit precedent on the pretrial restraint of substitute assets, in bringing the cases in this district. At hearing, the government and defendants described these cases as intertwined. By separate order entered today in Case No. 5:05-CV-767 (hereinafter the "Forfeiture Transfer Order"), the court also transfers that case to the Central District of California, upon finding that in these circumstances the civil case should follow the criminal case. It is the criminal case, and the Platt factors as applied to the facts of the criminal case, that are most at issue, not a stayed civil forfeiture proceeding.<sup>8</sup> However, as noted in the Forfeiture Transfer Order, application of 28 U.S.C. § 1404(a) to the facts of that case counsels in favor of its transfer.

The other arguments made by the government, not otherwise addressed with particularity in this order, are similarly unavailing. The government has not produced sufficient evidence of, or otherwise shown through argument, matters that might reasonably be expected to alter the conclusion reached by the court in the Transfer Order.

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<sup>8</sup> The court does not consider in this regard the ability, or lack thereof, of the government to restrain substitute assets prior to trial in the transferee district. Such practice is clearly permitted within the Fourth Circuit. See In re Billman, 915 F.2d 916 (4th Cir. 1990); United States v. Woods, 436 F. Supp. 2d 753, 755 (E.D.N.C. 2006) (denying the defendants' motion to cancel notice of *lis pendens*, in accordance with Billman).

## CONCLUSION

After careful consideration, for the reasons set forth above, the government's motion for reconsideration (DE # 114) is DENIED. The stay of transfer effected by the court's order of April 13, 2007 (DE # 111) is hereby LIFTED, and the Clerk is directed to resume forthwith the transfer of this case, as against defendants Avedis Djeredjian and Carmen Badrian, to the United States District Court for the Central District of California, in accordance with the order of April 9, 2007 (DE # 101).

SO ORDERED, this 16<sup>th</sup> day of May, 2007.

  
LOUISE W. FLANAGAN  
Chief United States District Judge