SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2006-005932-033 DT 06/09/2006

HONORABLE THOMAS W. O'TOOLE

CLERK OF THE COURT
G. Nevitt
Deputy

FILED: 06/12/2006

STATE OF ARIZONA

VICKI L KRATOVIL
SETH W PETERSON
SALLY WOLFGANG WELLS

v.

ANTONIO GONZALEZ ALVARADO (033)

JUAN R RIVERA

VICTIM SERVICES DIV-CA-CCC

RULING

The following Motions have been under advisement following oral argument on 05/23/2006:

Defendant Evangelina Espinoza's **Motion to Dismiss for Lack of Jurisdiction** and **Motion to Dismiss For Lack Of Venue**;

Defendant Cupertino H. Salazar's **Motion to Remand/Dismiss, Motion to Dismiss** and **Motion to Dismiss (Federal Preemption)**

Defendant Jose Carreto's **Motion to Sever** and **Motion to Dismiss for Incurable and Ongoing Violations of Constitutional Rights**[1]

BACKGROUND

The Defendants seek dismissal of Count 1 of the Indictment, which charges 48 of the 49 defendants with Conspiracy To Commit Smuggling, in violation of

[1] This motion to dismiss is moot because defense counsel has talked to her client.

A.R.S. §13-1003 and §13-2319.[2] In essence, they claim that the conspiracy charge must be dismissed because 1) this Court lacks jurisdiction and venue; 2) based on Wharton's Rule and Arizona case law, it is legally impossible to conspire to commit human smuggling or be an accomplice thereto when the objective of the conspiracy is to smuggle themselves; 3) legislative history concerning the human smuggling statute, A.R.S. §13-2319, shows that it was intended to prosecute only the smuggler, not the illegal aliens being smuggled; and 4) state prosecution of conspiracy to commit human smuggling is preempted by the federal constitution, statutes and case law. For reasons outlined below,

IT IS ORDERED denying all of these claims. [3]

JURISDICTION AND VENUE CLAIMS

The Court finds that the indictment properly alleges jurisdiction and venue in Maricopa County, Arizona. A reading of Count 1 and the statutes cited therein shows that probable cause has been found that the Defendants are illegal aliens who conspired to engage in the crime of human smuggling amongst themselves and with others, that they crossed the Mexican-American border into Arizona, that they were transported by another smuggler, and committed at least part of the conspiracy and one overt act in Maricopa County. Assuming arguendo that a substantial part of the conspiracy occurred in Mexico, the ongoing nature of the conspiratorial conduct, including the commission of the overt act(s) in Arizona and in Maricopa County is sufficient to confer jurisdiction and venue in Maricopa County, as defined by the controlling jurisdiction and venue statutes, A.R.S. §13-108(A)(1) & (2) and A.R.S. §13-109. See *State v. Willoughby*, 181 Ariz. 530, 535-540 (1995) and *State v. Flores*, 195 Ariz. 199, 205-206 (App. 1999) where on similar facts the court of appeals held that because essential elements of the

[2] In Count 1, the State alleges that on or between February 27, 2006 and March 2, 2006, with the intent to promote or aid in the commission of the offense of human smuggling, a violation of A.R.S. §13-2319, the 48 named defendants agreed with one or more persons that at least one of them or another would engage in conduct that constituted the offense of human smuggling, in violation of A.R.S. §13-2319, and that one or more persons committed the following overt act(s); each named defendant individually crossed the United States-Mexican border and was physically present in Maricopa County, Arizona on March 2, 2006, in violation of A.R.S. §13-1003 (conspiracy), A.R.S. §13-2319 (human smuggling), and other cited statutes. In Count 2, the State alleges that Javier Ruiz, Defendant 49, smuggled the 48 illegal aliens named as defendants in Count 1.

[3] Defendants in other similar cases have joined in these motions to dismiss. Separate minute orders will be issued as to these defendants.

conspiratorial and criminal conduct occurred in both Mexico and Arizona, as well as in different counties, jurisdiction and venue in Arizona and in counties where the criminal conduct occurred was proper. However, should jurisdiction become a fact issue at trial, the State will be required to prove jurisdiction beyond a reasonable doubt to a jury. *State v. Willoughby*, 181 Ariz. at 539-540.

DISMISSAL CLAIMS

The Court finds that the Defendants may be prosecuted for conspiracy to smuggle themselves, a violation of the conspiracy and human smuggling statutes, A.R.S. §13-1003(A) and §13-2319. To prove this conspiracy the state must prove that one or more of the Defendants, with the intent to promote or aid in the commission of human smuggling, agreed with one or more other persons that at least one of them or another person would engage in the smuggling of illegal aliens for profit or commercial purpose by providing them transportation or procuring transportation knowing or having reason to know that the persons are illegal aliens not lawfully in Arizona. Given the circumstances alleged, the State will also be required to prove that the Defendant and other illegal alien co-defendants supplied themselves as human cargo to be smuggled.[4]

Wharton's Rule, relied on by the defendants as grounds to dismiss the conspiracy charge, is a long recognized rule of statutory construction that bars prosecution for conspiracy and the underlying substantive offense. It applies only in very limited fact situations where there is a necessary congruence of the agreement and the completed substantive offense, e.g., adultery, incest, bigamy and dueling. See *U.S. v. Iannelli*, 420 U.S. 770, 779-782(1975), where, after a detailed discussion of the rule, the U.S. Supreme Court held that the defendants were properly convicted of conspiracy to violate the federal anti-gambling statute and of violating the statute, as they were separate offenses and that this rule of merger did not apply.

In *State v. Chitwood*, 73 Ariz. 161, 166(1952) the Arizona Supreme Court applied the rule and described it as follows:

[4] The sufficiency of the evidence to prove this highly unusual conspiracy allegation is not an issue before the Court at this time.

> "The law is that where the agreement is to commit an offense which can only be committed by the concerted action of the two persons to the agreement, such agreement does not amount to a conspiracy." (Emphasis added).

The Court explained that this constitutes a merger of offenses, which precludes conviction for both conspiracy and the substantive offense. The Court explained, however, that the rule does not apply when the conspiracy involves more than two people:

> "Likewise, if the alleged conspiracy is not between the immediate participants in the offense, but between one or more such participants and a third party or parties, the theory of the rule would render it inapplicable, even though the substantive offense is one which requires concerted action." 73 Ariz. at 166.

As in *Chitwood*, the rule does not apply to the facts of this case. Here each of the 48 defendants could be found guilty of a conspiracy to commit human smuggling, while not being exposed to criminal liability for the substantive offense of human smuggling, even though they are the illegal aliens being smuggled.

In *Iannelli*, 420 U.S. at 780-782, the Court discussed the application of the rule in its earlier decision, *U.S. v. Holte*, 236 U.S. 140(1915). In *Holte,* the Defendant was charged with conspiracy to violate the Mann Act, which criminalized the interstate transportation of a female for purposes of prostitution. In rejecting the Defendant's claim that Wharton's Rule prevented charging and convicting her with conspiracy to violate the Mann Act when she was the person being transported in interstate commerce, the Court held that rule applied only when it was impossible for the transported woman to be guilty of conspiracy regardless of the facts of the case. The Court cited many factual scenarios, including conspiring with a third person to commit the crime, where the transported woman could also be prosecuted and found guilty of conspiracy to violate the Mann Act. *Id.* at 144-145. Here, as in *Holte*, Wharton's Rule doesn't apply. Proof that the defendants committed the crime of conspiracy to commit human smuggling, including smuggling themselves, does not necessarily require proof that the same defendants committed the substantive offense of human smuggling for profit or commercial purpose and vice versa.

The Defendant's claim that the conspiracy charge must be also dismissed because it is factually analogous to *State v. Cota*, 191 Ariz. 380 (1998), which held that a person cannot sell or transfer drugs to himself or be an accomplice in a sale to himself, also fails. Unlike the facts in *Cota* and cases cited therein, here a Defendant can supply himself and others as cargo for the human smuggling venture while at the same time conspiring to engage in such activity for profit or commercial purpose. Again, neither *Cota* nor Wharton's Rule applies when the charged conspiracy involves more conspirators than are required to commit the underlying offense of human smuggling. *Iannelli*, 420 U.S. at 782, n. 15.

The Defendant's related claim that he cannot be subjected to criminal liability as an accomplice pursuant to A.R.S. §13-301 et seq., must also fail. Conspiracy and accomplice liability are separate and distinct rules of criminal liability. See A.R.S §13-1003(A) and (B), which provides for conspiracy liability for a wide variety of conduct, including the unknown acts of third party co-conspirators. Here the defendants are only charged with conspiracy, not the underlying substantive offense of human smuggling, so accomplice liability is not relevant. Although a person charged with both conspiracy and the substantive offense can be found guilty of the underlying substantive offense either as a principle or an accomplice, he cannot be found guilty as an accomplice to the conspiracy. *State ex rel. Woods v. Cohen*, 173 Ariz. 497, 498-501(1993).

The Defendants are also incorrect in claiming that the plain language of A.R.S. §13-2319 and its legislative history do not allow the smuggled aliens to also be held liable for conspiracy to commit alien smuggling. The purpose of A.R.S. §13-2319 is clear and unambiguous, and there is no evidence from the legislative history that the legislature intended to exclude any prosecution for conspiracy to commit human smuggling. A fair reading of the conspiracy statute and other statutes of the Arizona criminal code establishes that the legislature has authorized prosecution for the crime of conspiracy to commit various substantive offenses. See *State v. Rodriguez*, 205 Ariz. 392, 396(App. 2003) (In statutory interpretation the Court will employ a common sense approach, interpreting the statute by reference to its stated purpose and the system of related statutes of which it forms a part.) Pursuant to A.R.S. §13-1003, a person may be guilty of conspiracy if, with the intent to promote or aid in the commission of another offense, the person agrees with one or more persons that at least one of them or another person will

engage in conduct constituting that offense and then one of them commits an overt act in furtherance of that offense. Thus, unless it explicitly foreclosed such prosecution, the Court must presume that when the legislature enacted A.R.S. §13-2319, it knew and intended that a person could be prosecuted for both conspiracy to commit human smuggling and human smuggling. *Iannelli*, 420 U.S. at 789.

FEDERAL PREEMPTION

IT IS ORDERED denying the claim that Count 1 must be dismissed because the Arizona human smuggling statute, A.R.S. §13-2319, as applied herein or on its face violates the Supremacy Clause of the U.S. Constitution and is preempted by federal law. In particular, citing *De Canas v. Bica*, 424 U.S. 351(1956), *Hines v. Davidowitz*, 312 U.S. 52(1941) and other preemption cases, the Defendants claim that preemption exists because 1) this prosecution is an invasion of the exclusive power of the federal government to regulate immigration; 2) it injects the State into a field fully occupied by federal immigration laws; and 3) it irreconcilably conflicts with and is an obstacle to the full and proper enforcement of federal immigration laws. *De Canas*, 424 U.S. at 354-363. These issues are addressed below.

BURDEN OF PROOF

There is a strong presumption against federal preemption of state law. "In all preemption cases…we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was a clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485(1996) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In addition, for this Court to declare A.R.S. §13-2319 or any other statute unconstitutional, the Defendant must establish beyond a reasonable doubt that the statute is in conflict with the federal or state constitutions. *State ex rel. Thomas v. Foreman*, 211 Ariz. 153, 156 (App. 2005). In other words, "Congress' intent to supercede or exclude state action is not lightly inferred. The intent to do so must definitely and clearly appear." *State v. McMurry*, 184 Ariz. 447, 449 (App. 1995) (Citations omitted) (State prosecution and conviction for forgery based on possession of counterfeit U.S. currency is not preempted by comparable federal counterfeiting statutes).

PREEMPTION CLAIMS

Factually similar cases have rejected the claim that comparable federal law preempts laws like A.R.S. §13-2319. In 1976, in *De Canas v. Bica*, supra, the Supreme Court held that a California statute and regulations penalizing employers for employing illegal aliens was not preempted by the exclusive federal power to regulate immigration and comparable federal immigration laws. In explaining the interrelationship between the exclusive federal power to regulate immigration and the exercise of concurrent state power over certain immigration matters, the Court said that it "…has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power, whether latent or exercised." 424 U.S. at 355. In rejecting the claim that comparable federal immigration laws preempted California from exercising its power to penalize state employers who knowingly employ illegal aliens, the Court stated,

> "Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was "'the clear and manifest purpose of Congress'" would justify that conclusion." *Id*. at 357 (citations omitted). [5]

The Court also reiterated that States have broad authority under their power to enact statutes and regulations concerning illegal immigration as long there is no manifest intent of Congress to "occupy the field" and they do not burden or conflict in any matter with federal laws and treaties. *Id*. at 358.

Applying *De Canas* and other relevant preemption cases, it is clear that Arizona has not been preempted from enacting and enforcing the human smuggling statute, ARS §13-2319. As is evident from the legislative history leading up to its passage and signing by the Governor in 2005, it was determined that the problem of smuggling and transporting illegal aliens for profit in Arizona

[5] Subsequently, in reaction to the *De Canas* decision, Congress amended 8 U.S.C. § 1324a(h)(2), to expressly preempt state civil and criminal sanctioning of employers who hire illegal aliens.

directly impacted the safety and welfare of the citizens of the state. Thus, the statute was enacted.[6]

Subsequent to *De Canas*, other courts have rejected claims that federal immigration smuggling laws preempt state authority to regulate immigration. In *Gonzales v. City of Peoria*, 722 F. 2nd 468 (9th Cir. 1983), the Ninth Circuit determined that the criminal provisions of the Federal Immigration and Naturalization Act (INA), 8 U.S.C. 1324, 1325 and 1326, were not so pervasive as to preempt state action whereby local police arrested illegal aliens for violating federal immigration laws. The Court noted that the federal laws regulating criminal activity by illegal aliens was limited in nature and insufficient to support the inference that the federal government had fully occupied the field of criminal immigration enforcement. *Id*. at 475.[7] More recently, other federal circuits have reached this same conclusion. See discussion and cases cited in *U.S. v. Santana-Garcia*, 264 F 3rd 1188, 1194(10th Cir. 2001). Also, in an analogous circumstance, in *State v. McMurry*, *supra*, the Court said that while the federal government has primary jurisdiction over prosecution of crimes related to counterfeiting, the federal statutes do not wholly occupy the field and the state has concurrent jurisdiction to prosecute counterfeiting crimes to protect its citizens from fraud. *Id*. at 449-450.

The Defendant has also failed to show that A.R.S. §13-2319 stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' exclusive authority over immigration and is therefore preempted by federal legislation. Instead, a fair reading of the legislative history, as well as the interaction of A.R.S. §13-2319 and equivalent provisions of the federal criminal code, 8 U.S.C. §1324 et seq., shows that concurrent state and federal enforcement of illegal alien smuggling and conspiracy to smuggle illegal alien laws serves both federal and state law enforcement purposes and is highly compatible. In fact, concurrent enforcement enhances rather than impairs federal enforcement objectives. Thus, because federal and State enforcement have compatible purposes, and Congress has not expressly preempted state prosecution of such conduct, preemption does not exist. *Gonzales v. City of Peoria*, 722 F 2nd at 474.

[6] The debate recognized that both the federal and state governments have a mutual interest in addressing the smuggling and transportation of illegal aliens at the border and within the state.
[7] In 1983, Arizona had not yet criminalized the smuggling of illegal aliens so no state prosecution could follow the arrests.

In conclusion, the defendants have failed to carry their heavy burden of showing that the U.S. Constitution and federal immigration laws have preempted Arizona and other states from passing and enforcing laws such as A.R.S. §13-2319. In addition, the claim that this conspiracy to commit human smuggling prosecution violates the intent of the legislature is incorrect and cannot be resolved judicially. Legislative action, either federal or state, or both, is the proper way to address the issues raised by the Defendants.

SEVERANCE

IT IS ORDERED denying **Defendant Carretto's Motion to Sever.** At the direction of the court, the State has severed the trial of the 49 co-defendants into small group trials of no more than five defendants each. A joint trial of the defendants is now proper and likely free of any prejudice. In addition, as it does in any conspiracy trial, the court will carefully instruct the jury on what the law requires proving a conspiracy and membership therein, and that they are to consider the evidence against each defendant separately. However, if during any of the small joint trials a defendant suffers unfair prejudice due to such factors as a gross disparity in the evidence, the "rub-off effect" from evidence introduced only against another co-defendant, presentation of antagonistic defenses, significant disparity in evidence presented against various defendants, the court will address the prejudice by giving limiting or curative jury instructions. *State v. Grannis*, 183 Ariz. 52, 58(1995)(citations omitted). Finally, the court will sever the defendant's trial from that of some or all co-defendants if it becomes evident that such is "necessary to promote a fair determination of guilt or innocence of any defendant…" Rule 13.4(a), Rules of Criminal Procedure.