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## THE NINTH CIRCUIT’S LEFT HOOK: CRIMINAL VENUE IN THE SKIES AND WHY *LOZOYA* HITS THE MARK

CHRISTOPHER THOMSON\*

“[N]OT EVERY LEGAL QUESTION requires a law review article. Sometimes, common sense is enough.”<sup>1</sup> In *United States v. Lozoya*, the Ninth Circuit created a circuit split concerning proper venue for prosecution of assaults committed onboard aircraft.<sup>2</sup> The court held that, in the case of in-flight assaults, venue is proper in the “district above which the assault occurred,” and declined to find venue statutorily conferred by 18 U.S.C. § 3237(a).<sup>3</sup> Although the court’s holding is sound, its opinion failed to provide guidance on how its narrow interpretation of § 3237(a) is proper in light of constitutional principles. Additionally, the Ninth Circuit did not directly confront the chief criticism of its position—that it produces absurd results through impracticability—even though this critique is antiquated given technological advancement and the realities of modern air travel.

On July 19, 2015, Monique Lozoya boarded Delta Air Lines Flight 2321 from Minneapolis to Los Angeles.<sup>4</sup> While in flight, Lozoya became agitated by disturbances made by a fellow passenger, Oded Wolff, eventually deciding to confront him; during the ensuing encounter, and prior to entering California

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<sup>1</sup> *United States v. Lozoya*, 920 F.3d 1231, 1244 (9th Cir. 2019) (Owens, J., dissenting). Since making its ruling, the Ninth Circuit has elected to rehear the case en banc. *United States v. Lozoya*, 944 F.3d 1229, 1229–30 (9th Cir. Dec. 20, 2019). In turn, it is necessary to examine the court’s initial holding in *Lozoya* to identify what extent, if any, its reasoning should be relied on by the en banc panel and future circuits considering similar questions.

<sup>2</sup> *Lozoya*, 920 F.3d at 1242 (majority opinion).

<sup>3</sup> *Id.* at 1239–41.

<sup>4</sup> *Id.* at 1233.

airspace, Lozoya admitted to striking Wolff in the face.<sup>5</sup> Weeks later, Lozoya was charged with assault pursuant to 18 U.S.C. § 113 and entered a not guilty plea, opting to proceed to a bench trial.<sup>6</sup>

After the government rested at trial, Lozoya “moved for acquittal . . . arguing that venue in the Central District of California was improper.”<sup>7</sup> The magistrate judge denied the motion, finding venue was conferred by paragraph two of 18 U.S.C. § 3237(a),<sup>8</sup> which reads:

Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.<sup>9</sup>

Finding the language of § 3237(a) applicable to offenses committed on airplanes, the magistrate articulated that “to establish venue, the government only needs to prove that the crime took place on a form of transportation in interstate commerce.”<sup>10</sup> At the close of trial, the magistrate found Lozoya guilty of simple assault in violation of 18 U.S.C. § 113(a)(5) and denied Lozoya’s renewed motion for acquittal under Federal Rule of Criminal Procedure 29.<sup>11</sup> Ultimately, Lozoya was fined a total of \$760, and she filed an appeal challenging the magistrate’s finding of venue in the Central District of California.<sup>12</sup>

On appeal, the Ninth Circuit rejected the trial court’s interpretation of § 3237(a) and reversed Lozoya’s conviction.<sup>13</sup> After first concluding Lozoya had not waived her venue challenge,<sup>14</sup> the court found paragraph one of § 3237(a), which conveys venue for offenses “begun in one district and completed in another, or committed in more than one district . . . in any district

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 1234–35.

<sup>7</sup> *Id.* at 1235.

<sup>8</sup> *Id.* at 1236.

<sup>9</sup> 18 U.S.C. § 3237(a) (2018).

<sup>10</sup> *Lozoya*, 920 F.3d at 1235. Notably, this interpretation of § 3237(a) closely resembles the Eleventh Circuit’s reasoning in *United States v. Breitweiser*, 357 F.3d 1249, 1253 (11th Cir. 2004).

<sup>11</sup> *Lozoya*, 920 F.3d at 1236.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1240–41.

<sup>14</sup> *Id.* at 1238.

in which such offense was begun, continued or completed,”<sup>15</sup> was plainly inapplicable because “Lozoya’s offense—the assault—occurred in an instant and likely in the airspace of only one district.”<sup>16</sup>

Next, the court turned to paragraph two of § 3237(a), holding this provision also failed to confer venue to the Central District of California.<sup>17</sup> The court adopted a narrow view of the provision, asserting the § 3237(a) language, “offense[s] involving the . . . transportation in interstate or foreign commerce,” does not necessarily apply to all offenses committed on an airplane.<sup>18</sup> The court reasoned that “although the assault occurred on a plane, the offense itself did *not* implicate interstate or foreign commerce.”<sup>19</sup> Rather, the court concluded the 18 U.S.C. § 113(a) requirement that an assault be committed “within the special maritime and territorial jurisdiction of the United States”<sup>20</sup> constitutes only a “circumstance element” unresponsive of venue.<sup>21</sup> Finding an absence of statutorily conferred venue, the court held venue must be determined by the *locus delicti*;<sup>22</sup> thus, because the government conceded the assault did not occur in Californian airspace, the Ninth Circuit reversed Lozoya’s conviction and remanded with instruction to dismiss the case without prejudice.<sup>23</sup>

In its opinion, the *Lozoya* court openly recognized its stray from sister court precedent.<sup>24</sup> In *United States v. Breitweiser*, the Eleventh Circuit endorsed a broad view of § 3237(a) while considering a sexual assault committed on an aircraft.<sup>25</sup> In that case, the Eleventh Circuit reaffirmed its interpretation of § 3237(a) as “a catchall provision designed to prevent a crime which has been committed in transit from escaping punishment for lack of venue.”<sup>26</sup> The court emphasized “[i]t would be difficult if not impossible for the government to prove, even by a preponder-

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<sup>15</sup> 18 U.S.C. § 3237(a) (2018).

<sup>16</sup> *Lozoya*, 920 F.3d at 1239.

<sup>17</sup> *Id.* at 1240.

<sup>18</sup> *Id.* (citing 18 U.S.C. § 3237(a)).

<sup>19</sup> *Id.* (citing *United States v. Morgan*, 393 F.3d 192, 200 (D.C. Cir. 2004)).

<sup>20</sup> 18 U.S.C. § 113(a) (2018).

<sup>21</sup> *Lozoya*, 920 F.3d at 1240.

<sup>22</sup> *Locus delicti* is defined as “[t]he place where an offense was committed.” *Locus Delicti*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>23</sup> *Lozoya*, 920 F.3d at 1243.

<sup>24</sup> *Id.* at 1240.

<sup>25</sup> *United States v. Breitweiser*, 357 F.3d 1249, 1253–54 (11th Cir. 2004).

<sup>26</sup> *Id.* (quoting *United States v. McCulley*, 673 F.2d 346, 350 (11th Cir. 1982)).

ance of the evidence, exactly which federal district was beneath the plane” at the time of the offense.<sup>27</sup> In *United States v. Cope*, the Tenth Circuit considered an appeal of a pilot’s conviction for operation of a common carrier under the influence of alcohol and applied similar reasoning in concluding that § 3237(a) conferred venue “in any district through which [the flight] traveled.”<sup>28</sup>

Conscious of its sister courts’ precedent, the Ninth Circuit criticized *Breitweiser* and *Cope* as relying on outdated Eleventh Circuit precedent.<sup>29</sup> According to the Ninth Circuit, the Supreme Court’s opinion in *United States v. Rodriguez-Moreno*<sup>30</sup> mandates an analysis of the conduct elements of the offense prior to applying a criminal venue statute; this analysis, the court argued, precludes finding § 3237(a) applies to offenses where the “transportation” element of the offense is only circumstantial.<sup>31</sup>

Although the Ninth Circuit’s opinion in *Lozoya* is ultimately correct, the court declined to consider the constitutional policies underlying criminal venue in its analysis. Its failure to do so comprises a missed opportunity to provide much needed clarification on the proper construction of § 3237(a) and venue granting statutes generally. This is particularly important given the wide range of contexts in which the principles underlying *Lozoya* might arise; in addition to the immediate context of in-flight assaults, *Lozoya* may apply to a laundry list of other traditionally non-continuous offenses committed onboard aircraft, including sexual assault and murder.<sup>32</sup> As such, because construction of venue granting statutes alters constitutional rights, it is necessary to construe these statutes within the framework of the substantive policies underlying venue.

Article III, Section 2 of the Constitution states, “[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed.”<sup>33</sup> The Sixth Amendment requires trial “by an impartial jury of the State and district wherein the crime shall have been committed.”<sup>34</sup> Federal Rule of Criminal

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<sup>27</sup> *Id.* at 1253.

<sup>28</sup> *United States v. Cope*, 676 F.3d 1219, 1225 (10th Cir. 2012) (citing *Breitweiser*, 357 F.3d at 1253).

<sup>29</sup> *Lozoya*, 920 F.3d at 1240–41.

<sup>30</sup> 526 U.S. 275 (1999).

<sup>31</sup> *Lozoya*, 920 F.3d at 1240 (citing *Rodriguez-Moreno*, 526 U.S. at 280 n.4).

<sup>32</sup> *See id.* at 1244 (Owens, J., dissenting).

<sup>33</sup> U.S. CONST. art. III, § 2, cl. 3.

<sup>34</sup> U.S. CONST. amend. VI.

Procedure 18 reads, “[u]nless a statute or these rules permit otherwise, the government *must* prosecute an offense in a district where the offense was committed. The court *must* set the place of trial within the district . . . .”<sup>35</sup> “The result is a safety net, which ensures that a criminal defendant cannot be tried in a distant, remote, or unfriendly forum solely at the prosecutor’s whim.”<sup>36</sup>

The Supreme Court has recognized that venue in criminal proceedings operates primarily as a protection for the accused.<sup>37</sup> Its precedent is exemplary of the Court’s concern for protecting defendants’ fundamental rights when construing statutory grants of venue. In *United States v. Johnson*, the Court emphasized that when “an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it.”<sup>38</sup> Not only does this canon give proper weight to the constitutional rights of defendants, it also encourages public confidence in the fairness of the justice system.<sup>39</sup> Application requires courts to interpret ambiguous criminal venue statutes in favor of the interpretation that provides for the narrowest grant of venue. As applied to § 3237(a), assuming arguendo that the broad *Breitweiser* interpretation and the narrow *Lozoya* interpretation are equally reasonable, the *Johnson* rule of construction requires courts to adopt the narrow interpretation. Put simply, to adopt the *Breitweiser* interpretation

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<sup>35</sup> FED. R. CRIM. P. 18 (emphasis added).

<sup>36</sup> *United States v. Salinas*, 373 F.3d 161, 164 (1st Cir. 2004).

<sup>37</sup> *United States v. Cabrales*, 524 U.S. 1, 6 (1998), *superseded by statute*, USA PATRIOT Act of 2001, Pub. L. No. 107-56, §1004, 115 Stat. 272, 392–93 (codified at 18 U.S.C. § 1956(i)) (articulating that proper criminal venue was a “matter of concern to the Nation’s founders”).

<sup>38</sup> *United States v. Johnson*, 323 U.S. 273, 276 (1944), *superseded by statute*, Act of Oct. 12, 1984, Pub. L. No. 473, § 1204(a), 98 Stat. 1837, 2152 (codified as amended at 18 U.S.C. § 3237(a)); *see* *United States v. Cores*, 356 U.S. 405, 407 (1958) (noting the *Johnson* rule of construction in considering questions of venue); *see also* *United States v. Canal Barge Co.*, 631 F.3d 347, 354 (6th Cir. 2011) (analogizing the *Johnson* rule to the rule of lenity as a tiebreaker to be used when construing statutory grants of venue); *United States v. Morgan*, 393 F.3d 192, 196 (D.C. Cir. 2004) (“Although the specific holding in *Johnson* was mooted by statute in 1948, the rule of construction announced in that case survives.”).

<sup>39</sup> *See Johnson*, 323 U.S. at 275–76 (noting that allowing for too much leeway in selecting venue “opens the door to needless hardship,” and expressing concern for abuses or the “appearance of abuses . . . in the selection of what may be deemed a tribunal favorable to the prosecution.”).

of § 3237(a), a court must find it is the plainly “superior interpretation of the statute.”<sup>40</sup>

Courts adopting a broad interpretation of § 3237(a) have grounded their position by challenging the practicability of the *locus delicti* calculation as applied to in-flight offenses.<sup>41</sup> The dissent in *Lozoya* echoed this sentiment, highlighting the majority’s self-described “creeping absurdity” and framing it as preclusive of the majority’s interpretation.<sup>42</sup> The majority in *Lozoya* noted these considerations but ultimately found them outweighed by the plain meaning of the statute.<sup>43</sup> However, further examination of these issues shows why the narrow construction of § 3237(a) does not create the absurd, impracticable results warned of by proponents of the broad interpretation.

Ascertaining the federal district’s airspace where an offense is committed ultimately requires knowledge of two variables: (1) the location of the plane throughout the flight; and (2) the timing of the incident. As to the first variable, the *Breitweiser* court may have been justified in its concern for the practical ability of government prosecutors to ascertain the location of a plane while in flight given the technology available at the time the case was decided in 2004.<sup>44</sup> However, modern technology makes discovering the location of a plane in transit exceedingly simple. It takes only a basic internet search to find detailed, updated data pertaining to flights still in transit. With just a few clicks, any individual can obtain live flight information, including: (1) latitude and longitude of the plane; (2) direction of the flight path; (3) speed; (4) altitude; and (5) average rate of ascent or descent.<sup>45</sup> This publicly accessible information provides an easy determination of the federal district over which the plane is located throughout the flight.

As to ascertaining the timing of the incident, in-flight crimes are unique in that they are necessarily committed in close prox-

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<sup>40</sup> See *Canal Barge Co.*, 631 F.3d at 354.

<sup>41</sup> See *United States v. Breitweiser*, 357 F.3d 1249, 1253 (11th Cir. 2004).

<sup>42</sup> *United States v. Lozoya*, 920 F.3d 1231, 1244 (9th Cir. 2019) (Owens, J., dissenting) (nevertheless conceding the “Tenth and Eleventh Circuits’ opinions are not ‘tenure track’ in their [textual] analyses”).

<sup>43</sup> *Id.* at 1242 & n.7 (majority opinion).

<sup>44</sup> See *Breitweiser*, 357 F.3d at 1253.

<sup>45</sup> *Live Flight Tracking*, FLIGHT AWARE, <https://flightaware.com> (follow “Live Flight Tracking” hyperlink; then enter information for the desired flight and click “Track Flight”; locate data under “Flight Details”) (last visited May 15, 2020).

imity to witnesses.<sup>46</sup> Consequently, in-flight crimes are often witnessed or reported by someone other than the victim, allowing for objective witness testimony.<sup>47</sup> This, when considered with the growing popularity of smart phones<sup>48</sup>—not to mention tablets, e-readers, wristwatches, or other time-telling personal items—enhances the ability of prosecutors to ascertain the timing of offenses through witness testimony.

But even if every relevant person on a plane is devoid of time-telling instruments, the nature of air travel itself provides excellent benchmarks. For example, in *Lozoya*, even though the exact timing of the assault was unknown, a flight attendant testified as follows: (1) the assault was reported “at least an hour” into the three hour flight; (2) the ensuing investigation lasted “30 to 45 minutes at least”; and (3) after the investigation was completed, a captain’s announcement was made which usually occurs “[t]wenty-five minutes before landing.”<sup>49</sup> This information limits the timing of *Lozoya*’s alleged assault to a fifty- to sixty-five-minute window based solely on the testimony of an individual who did not even witness the altercation.<sup>50</sup> Inclusion of additional victim or witness testimony could narrow this window further. Additionally, other common features of flights may also help condense the relevant timeline.<sup>51</sup>

It is not unreasonable to suppose, as critics of the *Lozoya* approach might, that an in-flight assault could occur in a fifteen-minute window where the plane flew over district A for ten minutes and district B for five minutes. In these situations, the fact that the government need only establish venue by a preponderance of the evidence prevents absurdity by allowing the govern-

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<sup>46</sup> It is true that offenses occurring on private flights with few passengers may present a more difficult determination. But this difficulty is not unique to in-flight crimes; indeed, crimes committed on land near the borderline of districts present the same question. In any event, it should be remembered that the Constitution does not grant a right to venue only in the easy cases. Oral Argument at 3:30, *Lozoya*, 920 F.3d 1231 (2019) (No. 17-50336), [https://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000015302](https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000015302).

<sup>47</sup> Cf. *Lozoya*, 920 F.3d at 1242; *Breitweiser*, 357 F.3d at 1252.

<sup>48</sup> Kyle Taylor & Laura Silver, *Smartphone Ownership Is Growing Rapidly Around the World, but Not Always Equally*, PEW RESEARCH CTR. 3 (Feb. 5, 2019), [https://www.pewresearch.org/global/wp-content/uploads/sites/2/2019/02/Pew-Research-Center-Global-Technology-Use-2018\\_2019-02-05.pdf](https://www.pewresearch.org/global/wp-content/uploads/sites/2/2019/02/Pew-Research-Center-Global-Technology-Use-2018_2019-02-05.pdf) [<https://perma.cc/KR4K-9S4F>].

<sup>49</sup> *Lozoya*, 920 F.3d at 1242.

<sup>50</sup> See *id.*

<sup>51</sup> In-flight meals, movies, and snacks customarily provided by airlines may all operate as helpful benchmarks in discovering the timing of an in-flight incident.



ment to more easily meet its burden using circumstantial evidence.<sup>52</sup> In sum, ascertaining venue by calculating which district's airspace the offense occurred in is practicable, and the characterization of this approach as "producing absurd results" fails. Therefore, given the *Johnson* rule of construction, in combination with the *Lozoya* majority's reasonable statutory interpretation under *Rodriguez-Moreno*, a narrow interpretation of § 3237(a) is mandated.

Ancillary to the statutory construction arguments surrounding § 3237(a), it has been argued that allowing for venue in the aircraft's landing district "creates no unfairness to defendants." And [that] a defendant who is truly inconvenienced may request a transfer of venue" under Federal Rule of Criminal Procedure 21(b).<sup>53</sup> However, implicit in this argument is an untenable idea that a defendant, by purchasing a ticket, is constructively waving their constitutional right to venue.

First, allowing for venue in the landing district replaces the constitutional requirement that crimes be tried in the affected districts with an ad hoc test where the power of determining venue may be left up to a pilot. Situations involving connecting flights, emergency landings, or mere inclement weather may all create venue in landing districts never conceived of by the defendant. In any event, in the absence of statutorily conferred venue, a defendant *must* be prosecuted in the district where the offense was committed.<sup>54</sup> Thus, regardless of whether a court subjectively believes venue in any specific district is fair, a defendant has a right to trial in the district where the offense occurred.

Next, because the burden to prove venue in criminal proceedings rests with the government,<sup>55</sup> allowing venue to be set in the landing district and requiring defendants to request transfer operates as an improper burden shift. Under Rule 21(b), a court *may* grant a defendant's motion to transfer proceedings to another district "for the convenience of the parties, any victim, and the witnesses, and in the interest of justice."<sup>56</sup> Thus, the court's

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<sup>52</sup> See, e.g., *United States v. Lukashov*, 694 F.3d 1107, 1120 (9th Cir. 2012); *United States v. Mendoza*, 587 F.3d 682, 686 (5th Cir. 2009).

<sup>53</sup> *Lozoya*, 920 F.3d at 1245 (Owens, J., dissenting) (quoting *United States v. Hall*, 691 F.2d 48, 50 (1st Cir. 1982)).

<sup>54</sup> FED. R. CRIM. P. 18.

<sup>55</sup> See, e.g., *Lukashov*, 694 F.3d at 1120; *Mendoza*, 587 F.3d at 686.

<sup>56</sup> FED. R. CRIM. P. 21(b).

Rule 18 obligation to set trial “within the district”<sup>57</sup> where the offense occurred is transformed into a discretionary action where the defendant bears the burden of convincing the judge to grant a transfer.<sup>58</sup> Indeed, courts rarely exercise their discretion to grant transfers of venue under Rule 21(b), forcing defendants to accept the original venue.<sup>59</sup> Ultimately, Rule 21(b) is a tool for defendants to transfer themselves from an otherwise proper venue—not to cure improper venue.<sup>60</sup>

The *Lozoya* holding is a clear step in the right direction, but it also illuminates inconsistencies in circuit court jurisprudence surrounding venue.<sup>61</sup> The need for uniformity in interpretation of statutory enactments touching constitutional rights is self-evident. Only by analyzing statutory conferral of venue through a prism of constitutional policy can courts ensure protection of the rights of criminal defendants. Thus, the Ninth Circuit on rehearing and future courts considering the same question should follow *Lozoya* in interpreting § 3237(a) narrowly. Criminal justice exists in the procedural safeguards the Constitution provides American citizens; recognition of these policies within the statutory framework of venue is necessary to foster an American criminal justice system that strives for objectivity, predictability, and equal treatment under the law.

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<sup>57</sup> FED. R. CRIM. P. 18.

<sup>58</sup> See CHARLES DOYLE, CONG. RESEARCH SERV., RL33223, VENUE: A LEGAL ANALYSIS OF WHERE A FEDERAL CRIME MAY BE TRIED 25 (2005).

<sup>59</sup> *Id.* at 26–27.

<sup>60</sup> See *United States v. Canal Barge Co.*, 631 F.3d 347, 359 (6th Cir. 2011) (Batchelder, J., dissenting) (“[c]oncerns of efficiency cannot be allowed to trump constitutional and statutory venue provisions, especially when the government caused the inefficiency by bringing criminal claims in . . . the wrong venue.”).

<sup>61</sup> Notably, circuits have also split in deciding the proper remedy for cases, like *Lozoya*, where venue is found improper post-conviction. See generally Christopher Thomson, Comment, *Off on a Technicality: The Proper Remedy for Improper Venue*, 73 SMU L. REV. (forthcoming 2020).