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Venue: A Legal Analysis of Where a Federal Crime May Be Tried

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Venue: A Legal Analysis of Where a Federal Crime May Be Tried

Summary

Federal law promises criminal defendants a proper venue, i.e., trial in the district in which the federal crime was committed. A crime is committed in any district in which any of its “conduct” elements are committed. Some offenses are committed entirely within a single district; there they must be tried. Others begin in one district and are completed in another. They may be tried where they occur unless Congress has limited the choice of venue for the particular offense. Conspiracy may be tried in any district in which an overt act in its furtherance is committed, at least when the commission of an overt act is an element of the conspiracy statute at issue. Crimes committed beyond the territorial confines of the United States are usually tried in the district into which the accused is first brought. The court may grant a change of venue at the behest of the defendant to avoid undue prejudice, for the convenience of the parties, or for sentencing purposes. This report is available in an abridged form as CRS Report RS22361, *Venue: A Brief Look at Federal Law Governing Where a Federal Crime May Be Tried*, by Charles Doyle, stripped of the footnotes and most of the citations to authority found in this report. It will be revised as circumstances warrant. Related reports include CRS Report RS22360, *Venue for Federal Criminal Prosecution: Proposals in the 109th Congress*, by Charles Doyle.

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Venue: Legal Analysis of Where a Federal Crime May Be Tried

Introduction

The Constitution states that those accused of a federal crime shall be tried in the state in which the crime occurred (venue) by a jury selected from the district in which the crime was committed (vicinage).

The Trial of all Crimes . . . shall be by Jury . . . held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed, U.S.Const. Art. III, §2, cl.3.

In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law U.S.Const. Amend. VI.

The Constitution's demands are deceptively simple: juries must be drawn and federal crimes must be tried where the crimes occur; jury selection and the place of trial for crimes that occur beyond the bounds of any state shall be as Congress by law provides. Rule 18 of the Federal Rules of Criminal Procedure is if anything more cryptic, "Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed." But what exceptions exist by statute or rule? What marks the district where the offense was committed? Suppose the crime appears to have been committed in more than one district? How does Congress provide for the trial of overseas crimes? When should the request of an accused for a change of venue be granted?

The Constitution describes venue as the *state* where trial is proper and vicinage as the *district* from which the jury is to be drawn, but with a single recently added exception the two are generally thought of as one and their dual requirements are generally referred to simply as "venue."¹

¹ 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE §301 (Crim. 3d ed. 2000)(“Strictly speaking the former constitutional provision [Art.III, §2, cl.3] is a venue provision, since it fixes the place of trial, while the latter [Amend. VI] is a vicinage provision, since it deals with the place from which the jurors are to be selected. This technical distinction has been of no importance whatever”), *citing inter alia*, Orfield, *Venue of Federal Criminal Cases*, 17 UNIVERSITY OF PITTSBURGH LAW REVIEW 375, 380 (1955).

Professor Wright’s observation may be subject to one small caveat. Following hurricane devastation in the Gulf states, Congress enacted legislation that authorizes the federal district courts to relocate outside their districts in emergency situations, 28 U.S.C.

Background: The Melding of Venue and Vicinage

The melding of venue and vicinage is something of an American phenomenon. Of the two concepts we now think of as venue – where a trial must be held and where the jury must come from – the common law spoke more often of vicinage. The theory that the jury in a criminal trial ought to come from the neighborhood in which the crime was committed pre-dates and is acknowledged in the Magna Charta which declared that “no freeman shall be taken or imprisoned . . . unless by the lawful judgment of his peers. . .” and that punishment would not be “assessed but by the oath of honest men *in the neighborhood,*” Magna Carta, XXXIX, XX. Of course, the jury of Runnymede was a far cry from the jury of today. Then and for sometime thereafter, it was the body whose verdict rested upon the knowledge of its members – their prior knowledge of the circumstances of the offense, of the character of the defendant, and of the credibility of the witnesses.² By the beginning of the colonial period, however, the English jury had been transformed into an institution more familiar to us, an impartial panel rather than one necessarily convened with prior knowledge and thus perhaps with bias. By then, a jury panel could no longer be challenged simply because none of its members came from the neighborhood where the offense had occurred; it was enough that the panel was drawn from the county where the offense had occurred.³

141(b). The provision revives the state (venue)-district (vicinage) distinction. A district court, relocated in the different state, may try criminal cases arising in its former district with the consent of the defendant, but regardless of whether it has relocated in another state or within another district within the same state unless the defendant consents, it must draw jurors from the district in which the crime occurred, 28 U.S.C. 141(b)(2),(3).

As a general rule, each district court must establish a plan for the random selection of jurors representing “a fair cross section of the community in the district or division wherein the court convenes,” 28 U.S.C. 1861, 1863.

Other than section 141 noted above there does not appear to be any authority for a district court to convene other than in the judicial district to which it is assigned.

² PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 112-24 (5th ed. 1956); II POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, 645-56 (2d ed. 1898); 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND, 254-65 (1883); HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, 8 (1951).

³ III BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 359-60 (1768) (“Also, by the policy of the ancient law, the jury was to come *de vicineto*, from the neighbourhood of the vill or place where the cause of action was laid in the declaration; and therefore some of the jury were obliged to be returned from the hundred in which such vill lay; and, if none were returned, the array might be challenged for defect of hundredors. . . for, living in the neighbourhood, they were properly the very country, or *pais*, to which both parties had appealed; and were supposed to know before-hand the characters of the parties and witnesses, and therefore the better knew what credit to give to the facts alleged in evidence. But this convenience was overbalanced by another very natural and almost unavoidable inconvenience; that jurors, coming out of the immediate neighbourhood, would be apt to intermix their prejudices and partialities in the trial of the right. And this our law was so sensible of, that for a long time has been gradually relinquishing this practice. . . At length, by statute 4 & 5 Ann. c.16, it was entirely abolished upon all civil actions, except upon penal statutes; and upon those also by the 24 Geo.II. c.18. the jury being now only to come *de corpore comitatus*, from the body of the county at large, and not *de vicineto*, or from the

In turbulence that lead to the American Revolution, grievances over venue seemed to roil as much as those over vicinage. Unrest in Massachusetts spurred the British Parliament to enact measures under which misconduct in the colonies might be tried in England or Canada. This denied the colonial suspect the advantages of both venue and vicinage, since jurors for a trial in London or Halifax were not likely to be drawn from a county in any of the thirteen colonies. The famous protest of the Virginia House of Burgesses spoke candidly of disadvantages of the change in venue – the hardships faced while awaiting trial and the difficulty of securing the attendance of witnesses. It spoke somewhat more cryptically of the disadvantages of the loss of vicinage – “not to await his Trial before a . . . Jury . . . from a Knowledge of whom [he] is encouraged to hope for speedy Justice.”⁴ Yet when the First Continental Congress later echoed the same objections it did so in terms more clearly grounded in both vicinage and venue:

Whereas . . . it has lately been resolved in Parliament, that by force of a statute made in the thirty-fifth year of the reign of king Henry the Eighth, colonists may be transported to England, and tried there upon accusations for treasons and misprisions, or concealments of treasons committed in the colonies. . . . Resolved, That the following acts of Parliament are infringements and violations of the rights of the colonists; and that the repeal of them is essentially necessary, in order to restore harmony between Great Britain and the American colonies . . . 12 Geo.3, ch. 24 . . . which declares a new offense in America, and deprives the American subject of a constitutional trial by jury of the vicinage, by authorizing the trial of any person charged with the committing [of] any offense described in the said act, out of the realm, to be indicted and tried for the same in shire or county within the realm . . . 1 JOURNAL OF THE CONTINENTAL CONGRESS 69 (Oct. 14, 1774).

particular neighbourhood ”); Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICHIGAN LAW REVIEW 59, 60 (1944); see generally, Kershen, *Vicinage*, 29 OKLAHOMA LAW REVIEW 801 (1976)(Pt.I); 30 OKLAHOMA LAW REVIEW 73 (1977)(Pt.II).

⁴ Letter dated May 17, 1769, to His Royal Majesty, George III, from the Virginia House of Burgesses, JOURNALS OF THE HOUSE OF BURGESSES 1766-1769, 216 (“When we consider, that by the established Laws and Constitution of this Colony, the most ample Provision is made for apprehending and punishing all those who shall dare to engage in any treasonable Practices against your Majesty, or disturb the Tranquility of Government, we cannot, without Horror, thinks of the new, unusual, and permit us, with all Humility, to add, unconstitutional and illegal Mode, recommended to your Majesty, of seizing and carrying beyond Sea, the Inhabitants of America, suspected of any Crime; and of trying such Persons in any other Manner than by the ancient and long established Course of Proceeding: For, how truly deplorable must be the Case of a wretched American, who, have incurred the Displeasure of any one in Power, is dragged from his native Home, and his dearest domestick Connections, thrown into Prison, not to await his Trial before a Court, Jury, or Judges, from a Knowledge of whom is encouraged to hope for speedy Justice; but to exchange his Imprisonment in his own Country, for Fetters amongst Strangers? Conveyed to a distant Land, where no Friend, no Relation, will alleviate his Distresses, or minister to his Necessities; and where no Witness can be found to testify [to] his Innocence; shunned by the reputable and honest, and consigned to the Society and Converse of the wretched and abandoned; he can only pray that he may soon end his Misery with his life”).

On the other hand, when it came time to list colonial complaints against the British Crown in the Declaration of Independence, that document mentioned only venue:

. . . “He [the King of Great Britain] has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended Legislation:

* * *

For transporting us beyond Seas to be tried for pretended offenses.

The men who drafted the Constitution apparently never seriously questioned the proposition that became Article III, §2, cl.3 (“In trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed. . .”), for it was feature of each of the preliminary proposals – as language in the Pinckney Plan,⁵ as well as in the Hamilton Plan,⁶ and in all probability figured in the formulation of the New Jersey or Patterson Plan.⁷ But vicinage was nowhere mentioned.

Some of the delegates to the various states conventions called to ratify the Constitution objected to the omission,⁸ and when the First Congress convened James Madison attempted to meet the objection. He proposed an amendment to appear not

⁵ III FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 600 (1966) (“All Criminal offenses, (except in cases of impeachment), shall be tried in the State where they shall be committed – the trial shall be open & public & be by Jury–”).

⁶ III FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 626 (1966) (“All crimes, except upon impeachment, shall be tried by a Jury of twelve men; and if they shall have been committed within any State, shall be tried within such State . . . ”).

⁷ Farrand quotes the proposals of Convention delegate Roger Sherman of Connecticut which Farrand believed “more probably present[ed] the ideas of the Connecticut delegation in forming the New Jersey Plan,” III FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 615 (1966). Sherman proposed, *inter alia*, “That no person shall be liable to be tried for any criminal offence, committed within any of the United States, in any other state than that wherein the offence shall be committed, nor be deprived of the privilege of trial by a jury, by virtue of any law of the United States,” ID. at 616.

⁸ II ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 109-10 (Holmes-Mass.) (“It is a maxim universally admitted, that the safety of the subject consists in having a right to a trial as free and impartial as the lot of humanity will admit of. Does the Constitution make provision for such a trial? I think not; for in a criminal process, a person shall not have a right to insist on a trial in the vicinity where the fact was committed where a jury of the peers would, from their local situation, have an opportunity to form a judgment of the *character* of the person charged with the crime, and also to judge of the *credibility* of the witnesses. There a person must be tried by a jury of strangers; a jury who *may* be interested in his conviction; and where he *may* by reason of the distance of his residence from the place of trial, be incapable of making such a defence as he is, in justice, entitled to, and which he could avail himself of, if his trial was in the same county where the crime is said to have been committed”); see also, ID. at 400 (Treadway -N.Y.); III ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 545 (Henry-Va.); ID. at 569 (Grayson-Va.); IV ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 150 (McDowall- N.C.).



The House of Representatives and Senate Explained

Congressional Procedure

A Practical Guide to the Legislative
Process in the U.S. Congress

Richard A. Arenberg



as a Sixth Amendment in a Bill of Rights but in Article III of the Constitution under which criminal trials would “be by an impartial jury of freeholders of the vicinage.”⁹ Although the provision passed the House, the Senate would not agree perhaps because the laws of some of the states permitted jurors to be drawn from anywhere within the state.¹⁰ The language upon which the two Houses ultimately agreed is found in the Sixth Amendment today, “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.”¹¹ Story explained the compromise as an effort to ensure that the accused would not be unfairly inconvenienced nor the beneficiary of too parochial a jury.¹²

By the time the Amendments were sent to the states for ratification, the geographical distinction between venue (state in which the crime occurs) and vicinage (district in which the crime occurs) made little difference, for Congress had established the federal courts with a single district for each state, except in Virginia and Massachusetts where separate districts were created for portions of those states which would soon become the states of Kentucky and Maine.¹³ Congress preserved a semblance of common law vicinage distinct from venue, however, when it decreed

⁹ 1 ANNALS 436 (1789).

¹⁰ Letter from James Madison to Edmund Pendleton, dated September 14, 1789, “The Senate have sent back the plan of amendments with some alternations which strike in my opinion at the most salutary articles. In many of the States juries even in criminal cases, are taken from the State at large – in others from districts of considerable extent – in very few from the County alone. Hence a dislike to the restraint with respect to *vicinage*, which has produced a negative on that clause,” 12 THE PAPERS OF JAMES MADISON 402.

¹¹ 1 Stat. 98 (1789).

¹² II STORY, COMMENTARIES ON THE CONSTITUTION §1781 (1833) (“It is observable, that the trial of all crimes is not only to be by jury, but to be held in the State where they are committed. The object of this clause is to secure the party accused from being dragged to a trial in some distant State, away from his friends, and witnesses, and neighborhood, and thus to be subjected to the verdict of mere strangers, who may feel on common sympathy, or who may even cherish animosities or prejudices against him. Besides this, a trial in a distant State or territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence. There is little danger, indeed, that Congress would ever exert their power in such an oppressive and unjustifiable a manner. But upon a subject so vital to the security of the citizen, it was fit to leave as little as possible to mere discretion. By the common law, trial of all crimes is required to be in the county where they are committed. Nay, it originally carried its jealousy still further, and required that the jury itself should come from the vicinage of the place where the crime was alleged to be committed. This was certain a precaution which, however, justifiable in an early and barbarous state of society, is little commendable in its more advance stages. It has been justly remarked, that in such cases to summon a jury laboring under local prejudices is laying a snare for their consciences; and though they should have virtue and vigor of mind sufficient to keep them upright, the parties will grow suspicious, and indulge other doubts of the impartiality of the trial”).

¹³ 1 Stat. 73 (1789).

that in federal capital cases trial had to be held in the county in which the offense occurred, if possible, and jurors had to be drawn from there in any event.¹⁴

The county venue requirement in capital cases survives to this day,¹⁵ but the distinct vicinage component that insisted that jurors be drawn from the county of the crime was repealed in 1862.¹⁶ Thereafter, other explicit vicinage components, distinct from constitutional venue and vicinage requirements surfaced occasionally when Congress divided districts into divisions.¹⁷ The Judicial Code revision of 1911 eliminated the explicit statutory basis for all of these,¹⁸ but up until 1966 divisional vicinage practices continued in some districts under the umbrella of the venue provisions of Rule 18 of the Federal Rules of Criminal Procedure.¹⁹ When the division clause was eliminated from Rule 18 in 1966 at least one commentator concluded that for purposes of federal law the venue has consumed vicinage;²⁰ the

¹⁴ 1 Stat. 88 (1789) (“in cases punishable with death, the trial shall be held in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence”). Early federal capital offenses included piracy, treason, murder, and counterfeiting, 1 Stat. 112-14 (1789).

¹⁵ 18 U.S.C. 3235.

¹⁶ 12 Stat. 588 (1862).

¹⁷ E.g., 20 Stat. 102 (1878) (“All offenses committed in either of the subdivisions shall be cognizable and indictable within said division. . . All grand and petit jurors summoned for service in each division shall be residents of such division”); *see also*, 21 Stat. 64 (1880), 21 Stat. 176 (1880), 25 Stat. 388 (1988), 28 Stat. 68 (1894), 31 Stat. 6 (1900).

¹⁸ 36 Stat. 1169 (1911).

¹⁹ F.R.Crim.P. 18 (1964 ed.) (“. . . if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed”).

²⁰ Kershen, *Vicinage*, 30 OKLAHOMA LAW REVIEW 3, 65, 72, 74-5 (1977) (“After 1911, so far as Congress was concerned, the concept of vicinage had disappeared as an independent, significant concept. . . Hence, after 1911, the federal courts, just like Congress, totally identified the geographical source from which petit jurors were summoned with the place at which the trial was being held. For the courts, too, the concept of vicinage had been subsumed within the concept of venue. . . In light of the legislative and decisional history of the concepts of venue and vicinage. . . it is understandable that Professor Wright could say. . . that the distinction between venue and vicinage is a ‘technical distinction having no importance.’ It is also understandable that Professor Blue could write as early as 1944: ‘The tendency of modern law is to think of the place of trial rather than the place from which the jury must be summoned. From vicinage to venue has been the pattern of development, and the transition is about complete.’ With the deletion of the divisional venue in 1966. . . the transition was complete”), quoting, I WRIGHT, FEDERAL PRACTICE AND PROCEDURE §301, at 579 (Crim. 1969) and Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICHIGAN LAW REVIEW 59, 91 (1944); *see also*, *United States v. Wipf*, 397 F.3d 677, 685-86 (8th Cir. 2005) (the Sixth Amendment does not require summoning jurors from the division of the district in which the crime occurred); *United States v. Miller*, 116 F.3d 641, 659 (2d Cir. 1997) (“The [Sixth] Amendment’s guarantees of an impartial jury ‘of the State and district’ in which the crime was committed does not require a narrower geographical focus than the district itself”).

For arguments in favor of recognizing a community right to vicinage see, Engel, *The Public’s Vicinage Right: A Constitutional Argument*, 75 NEW YORK UNIVERSITY LAW

questions of where have become one. In what district[s] is venue (venue/vicinage) proper?

Threshold Issues

Before a court decides whether venue in a particular district is proper, it would confront the questions of who bears the burden of persuasion on the issue, to what level of persuasion, and whether waiver by the accused obviates the need for further inquiry. It is generally agreed that the government bears the burden of establishing that venue is proper, i.e., that the offense is being prosecuted in the district in which it was committed.²¹ This obligation extends to every count within the indictment or information; there is no supplemental venue.²² Venue, however, is not a substantive element of the offense and consequently the government need only establish venue by a preponderance of the evidence.²³ Moreover, venue is not jurisdictional.²⁴ Therefore, a court in an improper venue enjoys the judicial authority to proceed to conviction or acquittal, if the accused waives objection.²⁵ If the absence of proper venue is apparent on the face of indictment or information, failure to object prior to trial constitutes waiver.²⁶ If the failure of proper venue is not apparent on the face of the charging document and is not established during the presentation of the government's case in the main, objection may be raised at the close of the government's case.²⁷

REVIEW 1658 (2000); Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 SOUTHERN CALIFORNIA LAW REVIEW 1533 (1992).

²¹ *United States v. Salinas*, 373 F.3d 161, 164 (1st Cir. 2004); *United States v. Ramirez*, 420 F.3d 134, 139 (2d Cir. 2005); *United States v. Ebersole*, 411 F.3d 517, 524 (4th Cir. 2005); *United States v. Morgan*, 393 F.3d 192, (D.C.Cir. 2004).

²² *United States v. Ramirez*, 420 F.3d 134, 140 (2d Cir. 2005) ("Because venue must be proper with respect to each count, we may conclude that venue was proper as to some counts but not as to others"); *United States v. Haire*, 371 F.3d 833, 837 (D.C.Cir. 2004); *United Stats v. Wood*, 364 F.3d 704, 710 (6th Cir. 2004); *United States v. Villarini*, 238 F.3d 530, 533 (4th Cir. 2001).

²³ *United States v. Ramirez*, 420 F.3d 134, 139 (2d Cir. 2005); *United States v. Strain*, 396 F.3d 689, 692 (5th Cir. 2005); *United States v. Haire*, 371 F.3d 833, 837 (D.C.Cir. 2004); *United States v. Wren*, 363 F.3d 654, 660 (7th Cir. 2004).

²⁴ *United States v. Calderon*, 243 F.3d 587, 590-91 (2d Cir. 2001); *United States v. Cordova*, 157 F.3d 587, 597 (8th Cir. 1998).

²⁵ *United States v. Ebersole*, 411 F.3d 517, 524 (4th Cir. 2005).

²⁶ *United States v. Grenoble*, 413 F.3d 569, 573 (6th Cir. 2005); *United States v. Strain*, 396 F.3d 689, 693 (5th Cir. 2005); *United States v. Roberts*, 308 F.3d 1147, 1151-152 (11th Cir. 2002).

²⁷ *United States v. Strain*, 396 F.3d 689, 693 (5th Cir. 2005); *United States v. Collins*, 372 F.3d 629, 633 (4th Cir. 2004); *United States v. Roberts*, 308 F.3d 1147, 1152 (11th Cir. 2002); *United States v. Ringer*, 300 F.3d 788, 790 (7th Cir. 2002).

In What District Did the Crime Occur

The district in which venue is proper, the district in which the offense was committed, “the ‘*locus delicti* [of the charged offense,] must be determined from the nature of the crime alleged and the location of the act or acts constituting it.’ In performing this inquiry, a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts.”²⁸ Which is to say, the inquiry begins by identifying (1) the statutory prohibition charged, (2) what acts or omissions of the accused are alleged to have been committed in violation of the prohibition, and (3) where those acts or omissions occurred.

The words Congress uses when it drafts a criminal proscription will establish where the offense occurs and therefore the district or districts in which venue is proper. For some time, the courts and academics used a so-called “verb test” as one means of identify where an offense was committed.²⁹ The test may still be useful to determine where venue is proper, but particularly in the case of purported multi-district offenses it is not necessarily dispositive of where venue is not proper. In the words of the Supreme Court, “the ‘verb test’ certainly has value as an interpretative tool, it cannot be applied rigidly, to the exclusion of other relevant statutory language. The test unduly limits the inquiry into the nature of the offense and thereby creates a danger that certain conduct prohibited by statute will be missed,” *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999).³⁰ The test endorsed in *Rodriguez-Moreno*, is – where did the activity or omission that offends the statute’s “conduct element” occur? Id.

²⁸ *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999), quoting, *United States v. Cabrales*, 524 U.S. 1, 6-7 (1998), and *United States v. Anderson*, 326 U.S. 699, 703 (1946).

²⁹ Dobie, *Venue in Criminal Cases in the Untied States District Court*, 12 VIRGINIA LAW REVIEW 287, 289-90 (1926)(emphasis in the original)(“All federal crimes are statutory, and these crimes are often defined, hidden away amid pompous verbosity, in terms of a single verb. That essential verb usually contains the key to the solution of the question: In what district was the crime committed. . . So in the celebrated Burton case, twice before the Supreme Court, the statute said: ‘No Senator * * * shall receive or agree to receive any compensation’ for a certain kind of service. In the first opinion, the question was where was the compensation *received*, at St. Louis, where the check was mailed and where the ban was on which it was drawn, or in Washington, where defendant deposited it in another bank which placed the amount of the check unconditionally to his credit. The *receipt* was held to be in Washington and the St. Louis conviction reversed[, *United States v. Burton*, 196 U.S. 283 (1906)]. But the second opinion dealt with where the defendant *agreed to receive* the compensation. This the court said, was in St. Louis, the place where the *agreement* was finally accepted and ratified[, *United States v. Burton*, 202 U.S. 344(1906)]”); *United States v. Palma-Ruedas*, 121 F.3d 841, 847-51 (3d Cir. 1997), *rev’d sub nom.*, *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999).

³⁰ For a critical review of *Rodriguez-Moreno* see, *Stretching Venue Beyond Constitutional Recognition*, 90 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 951 (1999).

Multi-District Crimes

Some statutes limit venue to a particular district even though the offense could be said to have been committed in more than one district and thus otherwise might have been tried in any of the two or more districts in which it was committed. Others simply clarify the several districts in which venue for the trial of certain offenses is proper. The general statute that seeks to clarify venue in the case of multi-district crimes is 18 U.S.C. 3237. It consists of three parts: one for continuing offenses generally, another for offenses involving elements of the mails or interstate commerce, and a third for tax offenses.

Crimes Continuing Through More than One District. The first paragraph of section 3237 is the oldest portion of the statute. Originally enacted during Reconstruction as part of the general conspiracy statute now found in 18 U.S.C. 371,³¹ the Revised Statutes made it applicable to all multi-district federal crimes.³² Slightly modified in the 1948 revision, it now provides:

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Over the years, there has been a certain ebb and flow of the Supreme Court's reading of venue requirements of the section. The Court first considered the provision in *Palliser v. United States*, 136 U.S. 257, 267-68 (1890), when it held that prosecution of an offense under the postal bribery statute might be held in the district in Connecticut in which the letter offering the bribe was received even though the accused had acted entirely outside of the district. The Court expressed no opinion as to whether the offense might also have been tried in the district in New York from which the letter had been sent, 136 U.S. at 268. Two years later the Court held that the trial of an indictment for causing the mail delivery of lottery material might be held in the district in which the mail was delivered, but observed that "perhaps" trial might also be held in the district in which the material was deposited in the mail, *Horner v. United States*, 143 U.S. 207, 211-12 (1892).

In later years, it concluded that the failure to file required documentation with immigration officials was not a continuous offense and must be prosecuted in the district where the document had to be filed; *United States v. Lombardo*, 241 U.S. 73, 76-9 (1916), but that an alien crewman's unlawfully remaining in the United States was a continuous offense and consequently that venue "lies in any district where the crewman willfully remains," *United States v. Cores*, 356 U.S. 405, 409 (1958).

More recently, it held that money laundering and the crimes that generated the tainted funds did not automatically form one continuous criminal episode so as to permit trial of the laundering offense in the foreign district in which money-generating offense occurred, *United States v. Cabrales*, 524 U.S. 1, 5-6 (1998). The

³¹ 14 Stat. 484 (1867).

³² Rev. Stat. §731 (1878).

Court was quick to point out, however, that under different circumstances, venue over a money laundering charge might be proper in the district in which its predicate offenses occurred. “Notably, the counts at issue do not charge Cabrales with conspiracy; they do not link her to, or assert her responsibility for, acts done by others. Nor do they charge her as an aider or abettor in the Missouri drug trafficking. . . Cabrales is charged in the money-laundering counts with criminal activity ‘after the fact’ of an offense begun and completed by others,” 524 U.S. at 7. Further, “[m]oney laundering . . . arguably might rank as a continuing offense triable in more than one place, if the launderer acquired the funds in one district and transported them into another. But that is tellingly not this case,” 524 U.S. at 8.

Conspiracy. Conspiracy may be the most commonly recognized “continuing offense,” although whether conspiracy is really a continuing offense or merely shares the attributes of a continuing offense is not clear. When the present, general federal conspiracy statute was first drafted it contained an overt act requirement,³³ as it does today.³⁴ The crime under the general statute was not, and is not, complete until one of the conspirators takes some affirmative action in furtherance of the criminal scheme. An overt act is an element of the crime.³⁵ In such cases, it would come as no surprise if venue were said to be proper wherever an overt act was committed – was proper wherever a conduct element of the crime occurred. Under several individual federal conspiracy statutes, however, an overt act is not required and therefore is not an element of the offense.³⁶ In such cases, is venue nevertheless proper wherever an overt act in furtherance of the conspiracy is committed? It appears so.

Some time ago, the Supreme Court pointed out that conspiracy could be considered something akin to a continuous offense. Conspiracy, it declared, may be tried in any district in which an overt act in its furtherance is committed, at least when the conspiracy statute has an overt act requirement, *Hyde v. United States*, 225 U.S. 347, 360-61 (1912) (“if the unlawful combination and the overt act constitute the offense . . . marking its beginning and its execution or a step in its execution, §731 of the Revised Statutes [18 U.S.C. 3237’s predecessor] must be applied”). Even for those conspiracy offenses for which an overt act is not an element, the Court in *Hyde* implied that a prosecution might be had in any district in which an overt act in their furtherance was committed.³⁷ Without apparent exception, the lower federal

³³ 14 Stat. 484 (1867).

³⁴ 18 U.S.C. 371.

³⁵ *United States v. Dowlin*, 408 F.3d 647, 659 (10th Cir. 2005); *United States v. Beverly*, 369 F.3d 516, 532 (6th Cir. 2004); *United States v. Svoboda*, 347 F.3d 471, 476 (2d Cir. 2003); *United States v. Guerra*, 293 F.3d 1279, 1285 (11th Cir. 2002).

³⁶ *United States v. Shabani*, 513 U.S. 10 (1994)(21 U.S.C. 846, conspiracy to violate the Controlled Substances Act, has no overt act requirement); *Whitfield v. United States*, 543 U.S. 209 (2005)(18 U.S.C. 1956, conspiracy to commit money laundering, has no overt act requirement).

³⁷ “The court, passing on the ruling of the trial court, said by District Judge Carland, and we quote its language to avail ourselves not only of the citation of cases, but of the comments upon them: ‘. . .[At common law] no overt act need be shown or ever performed

appellate courts have followed *Hyde*'s lead and found venue proper for trial of conspiracy charges in any district in which an overt act is committed, regardless of whether the conspiracy statute in question requires proof of an overt act³⁸ or not.³⁹ Nevertheless, it is interesting to note that when *Cabralles* observed that the money launderer might have been tried as a conspirator in the district where the predicate offense (drug trafficking) occurred, it referred to the general conspiracy statute that requires an overt act, 18 U.S.C. 371, rather than the equally applicable drug trafficking conspiracy statute that does not, 21 U.S.C. 846.⁴⁰

Aiding and Abetting. Those who aid and abet the commission of a federal crime are punishable as principals, 18 U.S.C. 2. *Cabralles* suggests they may be prosecuted wherever the underlying offense was committed, 524 U.S. at 7 (“Nor do they charge her as an aider or abettor in the Missouri drug trafficking”). Subsequent lower federal appellate courts have so held.⁴¹

to authorize a conviction. If conspirators enter into the illegal agreement in one county, the crime is perpetrated there, and they may be immediately prosecuted; but the proceedings against them must be in that county. If they go into another county to execute their plans of mischief, and there commit an overt act, they may be punished in the latter county without any evidence of an express renewal of their agreement. . . If this was the law of venue in conspiracies at common law, where proof of an overt act was not necessary to show a completed offense, the same rule can be urged with much greater force [here], as the offense described [here] for all practical purposes is not complete until an overt act is committed . . . It seems clear, then, that whether we place reliance on the common law or on §731, Rev. Stat., the venue of the offense was correctly laid. . .” 225 U.S. at 365-66. For a more extensive discussion of *Hyde*, see, Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 UCLA LAW REVIEW 751 (1962).

³⁸ E.g., *United States v. Nichols*, 416 F.3d 811, 824 (8th Cir. 2005); *United States v. Geibel*, 369 F.3d 682, 696 (2d Cir. 2004); *United States v. Pearson*, 340 F.3d 459, 467 (7th Cir. 2003); *United States v. Robinson*, 275 F.3d 371, 379 (4th Cir. 2002); *United States v. Smith*, 198 F.3d 377, 382 (2d Cir. 1999); *United States v. Schlei*, 122 F.3d 944, 975 (11th Cir. 1997). Each of these cases involves conspiracy under 18 U.S.C. 371 which carries an overt act requirement.

³⁹ E.g., *United States v. Hull*, 419 F.3d 762, 768 (8th Cir. 2005); *United States v. Haire*, 371 F.3d 833, 838 (D.C. Cir. 2004); *United States v. Carbalal*, 290 F.3d 277, 289 (5th Cir. 2002); *United States v. Crozier*, 259 F.3d 503, 519 (6th Cir. 2001); *United States v. Antonakeas*, 255 F.3d 714, 726 (9th Cir. 2001); *United States v. Matthews*, 168 F.3d 1234, 1246 (11th Cir. 1999); *United States v. Cordova*, 157 F.3d 587, 597 (8th Cir. 1998). Each of these cases involves conspiracy under 21 U.S.C. 846 which does not include an overt act requirement (*United States v. Shabani*, 513 U.S. 10 (1994)).

⁴⁰ “If the Government can prove the [conspiratorial] agreement it has alleged, Cabralles can be prosecuted in Missouri for that confederacy, and her money laundering in Florida could be shown as overt acts in furtherance of the conspiracy. See 18 U.S.C. §371 (requiring proof of an act to effect the object of the conspiracy),” 524 U.S. at 9.

⁴¹ *United States v. Stewart*, 256 F.3d 231, 244 (4th Cir. 2001); *United States v. Smith*, 198 F.3d 377, 382 (2d Cir. 1999). Where conduct which constitutes the aiding and abetting is itself a crime, at least one court has held that a defendant may not be tried in one district for selling a precursor chemical and then tried in another district for aiding and abetting the manufacture of a controlled substance by selling the chemical to the manufacturer, *United States v. Valdez-Santos*, 370 F.Supp.2d 1051, 1055 (E.D.Cal. 2005).

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Continuous Offenses. In *Armour Packing Co. v. United States*, 209 U.S. 56, 77 (1908), the Supreme Court upheld a conviction following a trial in the Western District of Missouri for the offense of continuous carriage by rail of the defendant's products from Kansas to New York at an illegally reduced rate. The Court concluded that “[t]his is a single continuing offense . . . continuously committed in each district through which the transportation is received at the prohibited rate,” *id.* The Court's most recent venue decision confirmed the continued vitality of this view when it held that if Congress so crafts a criminal offense as to embed within it a continuing offense as one of the conduct elements of the new crime, venue over the new crime is proper wherever trial over the continuing offense may be had. In *United States v. Rodriguez-Moreno*, 526 U.S. 275, 281 (1999), it held that the constitutional right to a jury trial in the state and district in which the crime occurs did not preclude trial for use of a firearm during the commission of a predicate offense in a state and district – New Jersey – other than that in which the firearm was used – Maryland. The crime in question, 18 U.S.C. 924(c)(1), “contains two distinct conduct elements – as is relevant in this case, the ‘using and carrying’ of a gun and the commission of a kidnaping,” 526 U.S. at 280. A defendant commits a crime and may be tried where *he* commits any of its *conduct* elements.⁴² Kidnaping is a crime that continues from capture until release and therefore can be tried in any place from, through or into which the victim is taken, and the appended gun charge travels with it:

The kidnaping, to which the §924(c)(1) offense is attached, was committed in all of the places that any part of it took place, and venue for the kidnaping charge against respondent was appropriate in any of them. (Congress has provided that continuing offenses can be tried ‘in any district in which such offense was begun, continued, or completed,’ 18 U.S.C. §3237(a).) Where venue is appropriate for the underlying crime of violence [, in this case kidnaping,] so too it is for the §924(c)(1) offense. 526 U.S. at 282.

In addition to kidnaping, the lower federal appellate courts have found venue proper based on the continuing nature of violations involving, *inter alia*:

- false statements (18 U.S.C. 1001);⁴³
- wire fraud (18 U.S.C. 1343);⁴⁴
- mail fraud (18 U.S.C. 1341);⁴⁵
- bank fraud (18 U.S.C. 1344);⁴⁶

⁴² This is the difference between *Cabrales* and *Rodriguez-Moreno*: “The existence of criminally generated proceeds [in *Cabrales*] was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. [In *Rodriguez-Moreno*], by contrast, given the ‘during and in relation to’ language, the underlying crime of violence is a critical part of the §9245(c)(1) offense,” 526 U.S. at 280-81 n.4.

⁴³ *United States v. Ramirez*, 420 F.3d 134, 142-43 (2d Cir. 2005).

⁴⁴ *United States v. Ebersole*, 411 F.3d 517, 525-27 (4th Cir. 2005); *United States v. Pace*, 314 F.3d 344, 350 (9th Cir. 2002); *United States v. Kim*, 246 F.3d 186, 192 (2d Cir. 2001).

⁴⁵ *United States v. Woods*, 364 F.3d 704, 710 (6th Cir. 2004).

⁴⁶ *United States v. Scott*, 270 F.3d 30, 36 (1st Cir. 2001).

- possession of controlled substances with the intent to distribute (21 U.S.C. 841);⁴⁷
- Hobbs Act (violent interference with interstate commerce) (18 U.S.C. 1951);⁴⁸
- unlawful possession of a firearm (18 U.S.C. 922(g));⁴⁹
- Travel Act (interstate travel in aid of racketeering)(18 U.S.C. 1952);⁵⁰
- violent crimes in aid of racketeering (18 U.S.C. 1959);⁵¹ and
- failure to pay child support (18 U.S.C. 228).⁵²

Venue in the Place of Impact. Continuing offenses and the first paragraph of subsection 3237(a) present one other puzzle – when is venue proper in any district in which the crime’s effects are felt? The Court expressly declined to address the issue in *Rodriguez-Moreno*: “The Government argues that venue also may permissibly be based upon the effects of a defendant’s conduct in a district other than the one in which the defendant performs the acts constituting the offense. Brief for the United States 16-17. Because this case only concerns the *locus delicti*, we express no opinion as to whether the Government’s assertion is correct,” 526 U.S. at 279 n.2. The Brief declares that “[v]enue may also be based on the effects of a defendant’s conduct in another district,” and cites *Armour Packing Co.* (rail transportation at unlawful rate), *supra*, and the mail cases discussed below, Brief for the United States at 16-17. It also cites the lower court obstruction of justice and Hobbs Act cases, *id.*

The Hobbs Act outlaws the obstruction of interstate or foreign commerce through the use of violence or extortion.⁵³ Venue for a Hobbs Act violation is generally considered proper in any district in which there is an obstruction of commerce.⁵⁴ Yet obstruction is an element of the offense.⁵⁵ The act is drafted in

⁴⁷ *United States v. Zidell*, 323 F.3d 412 (6th Cir. 2003); *United States v. Solis*, 299 F.3d 420, 445 n.76 (5th Cir. 2002); *United States v. Uribe*, 890 F.2d 554, 559 (1st Cir. 1989); *United States v. Baskin*, 886 F.2d 383, 388 (D.C.Cir. 1989).

⁴⁸ *United States v. Fabian*, 312 F.3d 550, 557 (2d Cir. 2002).

⁴⁹ *United States v. Fleischli*, 305 F.3d 643, 658 (7th Cir. 2002).

⁵⁰ *United States v. Williams*, 291 F.3d 1180, 1189 (9th Cir. 2002).

⁵¹ *United States v. Saavedra*, 223 F.3d 85, 91 (2d Cir. 2000).

⁵² *United States v. Muench*, 153 F.3d 1298, 1303-305(11th Cir. 1998); *United States v. Crawford*, 115 F.3d 1397, 1406 (8th Cir. 1997).

⁵³ “Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both,” 18 U.S.C. 1951(a).

⁵⁴ *United States v. Lewis*, 797 F.2d 358, 367 (7th Cir. 1986)(“venue for a Hobbs Act prosecution lies in any district where the requisite effect on commerce is present, even if the acts of extortion occur outside the jurisdiction”); *United States v. Stephenson*, 895 F.2d 867, 875 (2d Cir. 1990)(“Venue under the Hobbs Act is proper in any district where the interstate

such a way that obstruction is arguably a “conduct” element (“Whoever in any way or degree obstructs . . .”); if so, it would seem to provide little support for “impact” venue in the case of those crimes for whom the effect is not a conduct element.

An earlier line of cases suggested that an obstruction of justice – intimidation or bribery of witness, bail jumping, or the like – might be tried in the district in which the proceedings were conducted even when the act of obstruction was committed elsewhere.⁵⁶ The line gave birth to a suggestion that venue might be predicated upon the impact of the crime within a particular district especially when the offense involved other “substantial contacts” with the district of victimization.⁵⁷

After *Rodriguez-Moreno*, the courts continue to recognize an “effects” or “substantial contacts” test for venue,⁵⁸ but generally hold that the effect must also

commerce is affected or where the alleged acts took place”).

⁵⁵ *Stirone v. United States*, 361 U.S. 212, 218 (1960); *United States v. Vega Molina*, 407 F.3d 511, 526-27 (1st Cir. 2005); *United Sates v. McCarter*, 406 F.3d 460, 462 (7th Cir. 2005); *United States v. Verbitskaya*, 406 F.3d 1324, 1330-331 (11th Cir. 2005).

⁵⁶ *United States v. O'Donnell*, 510 F.2d 1190, 1192-195 (6th Cir. 1975); *United States v. Tedesco*, 635 F.2d 902, 904-906 (1st Cir. 1980); *United States v. Barham*, 666 F.2d 521, 523-24 (11th Cir. 1982); *United States v. Kibler*, 667 F.2d 452, 454-55 (4th Cir. 1975); *United States v. Reed*, 773 F.2d 477, 484-86 (2d Cir. 1985); *United States v. Frederick*, 835 F.2d 1211, 1213-214 (7th Cir. 1988); *contra*, *United States v. Swann*, 441 F.2d 1053, 1055 (D.C. Cir. 1971); *see generally*, *Criminal Venue in the Federal Courts: The Obstruction of Justice Puzzle*, 82 MICHIGAN LAW REVIEW 90 (1983).

⁵⁷ *United States v. Reed*, 773 F.2d 477, 481, 482 (2d Cir. 1985)(emphasis added) (“a review of relevant authorities demonstrates that there is no single defined policy or mechanical test to determine constitutional venue. Rather, the test is best described as a substantial contacts rule that takes into account a number of factors – the site of the defendant's acts, the elements and nature of the crime, *the locus of the effect of the criminal conduct*, and the suitability of each district for accurate finding... places that suffer the effects of a crime are entitled to consideration for venue purposes”); *see also*, *United States v. Williams*, 788 F.2d 1213, 1215 (6th Cir. 1986)(applying “the substantial contacts test as well as the rationale and framework of analysis articulated by the *Reed* court” to venue in a bail jumping case); *United States v. Beddow*, 957 F.2d 1330, 1336 (6th Cir. 1992)(“the funds involved in both money laundering counts were acquired by selling drugs in the Western District of Michigan. . . Under the substantial contacts test used in the Sixth Circuit, venue was proper in the Western District of Michigan”); *United States v. Newsom*, 9 F.3d 337, 339 (4th Cir. 1993); *United States v. Bagnell*, 679 F.2d 826, 832 (11th Cir. 1982)(“prosecution [of the use of interstate carrier to transport obscene material] in the district of receipt is eminently reasonable in view of the fact that it is the recipient community that suffers the deleterious effects of pornography distribution”).

⁵⁸ *United States v. Ramirez*, 420 F.3d 134, (2d Cir. 2005)(“when venue may properly lie in more than one district under a continuing offense theory, we should also ask whether the criminal acts in question bear substantial contacts with any given venue”); *United States v. Brika*, 416 F.3d 514, 527 (6th Cir. 2005)(“The crime is also one in which the locus of the effect of the criminal conduct is to be found more in the district in which the call is received than in the district in which it is placed, meeting the third factor of the substantial contacts test”).

constitute a “conduct element” under the statute defining the offense,⁵⁹ and that venue may not be based on elements of the offense which are not conduct elements.⁶⁰

Mail and Commerce Cases. The second paragraph of subsection 3237(a) expands the number of districts where prosecutions for offenses involving smuggling, the mails or commerce may be brought to any district from, through, or into which “commerce, mail matter, or [an] imported object or person moves.”⁶¹ The paragraph was added when title 18 of the United States Code was revised in 1948. Interstate transportation and mail cases had previously been resolved under the continuing offense language of the first paragraph discussed above. Professor Wright has suggested that the paragraph stems from a misreading of the Supreme Court’s opinion in *United States v. Johnson* and that at its outer limits the paragraph may lie beyond constitutional expectations.⁶² Perhaps for this reason although the paragraph

⁵⁹ *United States v. Bowens*, 224 F.3d 302, 311 (4th Cir. 2000)(“the government argues, venue for a §1071 prosecution should lie in the district where the effects of the criminal conduct are felt. . . Instead, we conclude that the Supreme Court’s recent decisions in *Cabralles* and *Rodriguez-Moreno* require us to determine venue solely by reference to the essential conduct elements of the crime, without regard to Congress’s purpose in forbidding the conduct”); *United States v. Peterson*, 357 F.Supp.2d 748, 752 (S.D.N.Y. 2005)(“all three crimes alleged are continuing offenses that involved conduct in New York and elsewhere. Wire fraud clearly is a continuing offense. The crime of engaging in the insurance business following a felony conviction likewise is a crime that spans space and time, and here Peterson is alleged to have conducted the business of insurance over a period of time, with actions occurring in and having an effect on a number of jurisdictions. The money laundering charge also involves, in the context alleged here, a continuing offense, as the Government alleges that Peterson caused illegal proceeds of his insurance fraud scheme to be cleared through New York for transmission to a bank account in the Cayman Islands. . . All three of these offenses alleged involved some conduct in New York, the effects of the conduct are felt here . . . and this Court certainly is a suitable forum for accurate fact-finding”); *United States v. D-I Mikell*, 163 F.Supp.2d 720, 733 (E.D.Mich. 2001)(“although venue may lie where the effects of the defendant’s conduct are felt, this is true only when Congress had defined the essential conduct elements in terms of those effects”).

⁶⁰ *United States v. Ramirez*, 420 F.3d 134, 144-45 (2d Cir. 2005)(“While a scheme to defraud is certainly one of three essential elements of mail fraud, it is not an essential conduct element. . . [Thus,] having devised or intending to devise a scheme or artifice to defraud, while an essential element, is not an essential conduct element for purposes of establishing venue”); *United States v. Strain*, 396 F.3d 689, 694 (5th Cir. 2005)(“The issuance of the warrant and Strain’s knowledge of it, however, are ‘circumstance elements’ of the offense of harboring, insofar as they do not involve any proscribed conduct by the accused. As such neither may serve as a basis for establishing venue”).

⁶¹ “. . . 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,” 18 U.S.C. 3237(a).

⁶² “Four years earlier the Supreme Court had held that an offense under the Federal Denture Act was complete when the goods are deposited in the mails, and that prosecution could be had at the place of delivery. This construction was required the Court thought, by ‘the large policy back of the constitutional safeguards.’ The Reviser of the Criminal Code read that decision, however, as having ‘turned on the absence of a special venue provision

has been used under a wide range of circumstances, its invocation has not always been successful.⁶³

Tax Cases. The tax provision, subsection 3237(b), is in fact a limited transfer provision under which the accused may opt for trial in the district in which he resided at the time when the alleged offense occurred.⁶⁴ The subsection was added in 1958 upon the view that prosecution in the district where a return was received or due rather than the district in which the taxpayer resided visited inappropriate inconvenience and expense upon taxpayers, their attorneys and witnesses.⁶⁵ The

in the Denture Act' and added the second paragraph to §3237(a) that 'removes all doubt as to the venue of continuing offenses and makes unnecessary special venue provisions* * *.' This of course presupposes that wide choice of venue is necessarily a good thing, a view prosecutors are likely to share but that many persons, include not infrequently a majority of the Supreme Court, have rejected," 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE, §303 (Crim. 3d ed. 2000), referring to *United States v. Johnson*, 323 U.S. 273 (1944).

⁶³ ID. and cases cited therein; *see also, United States v. Rowe*, 414 F.3d 271, (2d Cir. 2005)(venue for prosecution of an Internet offer, transmitted in interstate commerce, to exchange or distribute child pornography was proper in the district where it was received); *United States v. Haire*, 371 F.3d 833, 838 (D.C. Cir. 2004)(venue for unlawful importation of cocaine prosecution was proper under the second paragraph of §3237(a) in the district into which the cocaine was imported); *United States v. Breitweiser*, 357 F.3d 1249, 1253-254 (11th Cir. 2004)(venue for sexual contact within U.S. special aircraft jurisdiction was proper under the second paragraph of §3237(a) in the district in which the plane landed); *United States v. Cole*, 262 F.3d 704, 710 (8th Cir. 2001)(venue for prosecution of a charge of interstate transportation for immoral purposes was proper under the second paragraph of §3237(a) in the district in which the victim was transported); *United States v. Sutton*, 13 F.3d 595, 598-99 (2d Cir. 1994)(venue for prosecution of a charge of producing and transferring false documents was proper under the second paragraph of §3237(a) either in the district in which they were produced or the district into which they were mailed); *contra, United States v. Morgan*, 393 F.3d 192, 197-200 (D.C. Cir. 2004)(venue in the district for the District of Columbia was not proper under the second paragraph of §3237(a) for prosecution of a charge of receiving, in Maryland, federal property stolen in the District of Columbia); *United States v. Villarini*, 238 F.3d 530, 535-36 (4th Cir. 2001)(venue for prosecution of a money laundering charge was not proper under the second paragraph of §3237(a) in the district where the offenses which generated the tainted cash were committed when the laundering occurred elsewhere); *United States v. Brennan*, 183 F.3d 139, 144-49 (2d Cir. 1999)(venue for prosecution of a mail fraud charge was not proper under the second paragraph of §3237(a) in a district through which mail passed from another district in which it was mailed to destinations outside the district of transit).

⁶⁴ "Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1986, or where venue for prosecution of an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law) is based solely on a mailing to the Internal Revenue Service, and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided*, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information," 18 U.S.C. 3237(b).

⁶⁵ "The cost and inconvenience to the defendant may be substantial especially in the case of an extended trial. The additional expense to the defendant of living away from home, the

subsection is only available in the case of prosecutions under 26 U.S.C. 7203 (willful failure to file a return, supply information or pay a tax),⁶⁶ or, if the government seeks to prosecute in a district where venue exists solely because of a mailing to the Internal Revenue Service, under 26 U.S.C. 7201 (attempted tax evasion) or 7206(1),(2), or (5)(various frauds and false statements).⁶⁷

Venue in Murder Cases

Sections 3235 and 3236 provide special venue requirements in murder cases. Section 3235 dates from the First Congress, 1 Stat. 88 (1789), and states that “the trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience.” The cases under the section are few and rarely seem to favor the accused. For instance, more than one court has held that the section does not apply to offenses punishable with death unless the charges are for “unitary” murder offenses.⁶⁸ As in other instances, the benefits of section 3235 can be waived if the accused fails to move to dismiss for improper venue.⁶⁹ Moreover, the determination of the benefit can be afforded “without great inconvenience” is a matter within the trial court’s discretion.⁷⁰ Great inconvenience has been found when there was no federal courthouse within the county in which the crime was committed;⁷¹ when a majority of the government’s

problem of getting his local attorneys to leave their offices and practices for several days or weeks and the increased cost incurred thereby, the inconvenience to witnesses, these are all factors which the committee believes place a heavy burden upon the defendant which can be better borne by the Government. The committee believes, further, that, in the type of case covered by this bill, the acts for which the defendant is really being tried are generally committed in the district in which he resides and certainly bear little or no relationship to the place where his tax return is received,” H.Rep.No. 85-1952, at 2 (1958); *see also*, S.Rep.No. 85-1890 (1958).

⁶⁶ As originally enacted subsection 3237(b) included only 26 U.S.C. 7201 and 7206(1),(2) and (5) cases. Section 7203 cases were added in 1966 for the same reasons as the originals –relative cost and inconvenience to the taxpayers, their attorneys, and witnesses, H.Rep.No. 89-1915, at 5 (1966).

⁶⁷ The transfer option for cases under 26 U.S.C. 7201 (attempted tax evasion) or 7206(1),(2), or (5)(various frauds and false statements) does not apply when venue is proper in a nonresidential district for reasons other than a mailing, *United States v. Humphreys*, 982 F.2d 254, 260 (8th Cir. 1993).

⁶⁸ *United States v. Barnette*, 211 F.3d 803, 814 (4th Cir. 2000)(18 U.S.C. 924(c),(j)(use or carriage of a firearm to commit murder during the commission of crime of violence or drug trafficking crime)); *United States v. Aiken*, 76 F.Supp.2d 1346, 1349-351 (S.D.Fla. 1999)(18 U.S.C. 1959 (murder in aid of racketeering)).

⁶⁹ *Hayes v. United States*, 296 F.2d 657, 667 (8th Cir. 1961); *Bickford v. Looney*, 219 F.2d 555, 556 (10th Cir. 1955); *United States v. Taylor*, 316 F.Supp.2d 722, 728 (N.D.Ind. 2004).

⁷⁰ *United States v. Parker*, 103 F.2d 857, 861 (3d Cir. 1939); *Barrett v. United States*, 82 F.2d 528, 534 (7th Cir. 1936); *Davis v. United States*, 32 F.2d 860, 860 (9th Cir. 1929).

⁷¹ *Hayes v. United States*, 296 F.2d 657, 667 (8th Cir. 1961); *Davis v. United States*, 32 F.2d 860, 860 (9th Cir. 1929).

witness were located outside of the county in which the crime was committed;⁷² and when observance would overburden court resources.⁷³

Section 3236 provides that for venue purposes in murder and manslaughter cases, the offense will be deemed to have occurred where the death causing act is committed.⁷⁴ Congress enacted section 3236 in apparent reaction to a Supreme Court observation that a federal murder case could not be brought if an injury were inflicted within a district in the United States but death occurred elsewhere.⁷⁵ Here too the case law is sparse. Two trial courts have held that the section only applies to “unitary” murder cases and thus does not apply to murders committed in aid of racketeering in violation of 18 U.S.C. 1959.⁷⁶ And an appellate court has held that under the section a father who battered his three-year old daughter in one district may be tried in a second district where she died of pneumonia as a consequence of his negligence there.⁷⁷

Crimes With Individual Venue Statutes

In a few instances, Congress had enacted special venue provisions for particular crimes. The provisions dictate venue decisions unless they contravene constitutional requirements. The list includes:

- 8 U.S.C. 1328 (importation of aliens for immoral purposes);⁷⁸
-

⁷² *United States v. Parker*, 103 F.2d 857, 861 (3d Cir. 1939).

⁷³ *United States v. Taylor*, 316 F.Supp.2d 722, 728 (N.D.Ind. 2004).

⁷⁴ “In all cases of murder or manslaughter, the offense shall be deemed to have been committed at the place where the injury was inflicted, or the poison administered or other means employed which caused the death, without regard to the place where the death occurs,” 18 U.S.C. 3236.

⁷⁵ *Ball v. United States*, 140 U.S. 118, 136 (1891) (“If this section [relating venue over offenses occurring in more than one district] is applicable to the crime of murder, it certainly could not apply if the stroke were given in one district and the death ensued in some other country than the United States”). In *Ball*, the Court also noted that at common law, jurisdiction over the offense of murder required that the assault and resulting death occur within the same jurisdiction, 140 U.S. at 133.

⁷⁶ *United States v. Perez*, 940 F.Supp. 540, 548-49 (S.D.N.Y. 1996); *United States v. Aiken*, 76 F.Supp.2d 1346, 1349-351 (S.D.Fla. 1999).

⁷⁷ *United States v. Eder*, 836 F.2d 1145, 1148 (8th Cir. 1988). *Eder* is reminiscent of the cases that cite section 3236 for the proposition that a violation of 18 U.S.C. 1111, murder within the special maritime and territorial jurisdiction of the United States, occurs when a victim is assaulted outside the territorial jurisdiction of the United States and then brought by the defendant within U.S. territorial jurisdiction and abandoned to the elements there under conditions that lead to the victim’s death, *United States v. Todd*, 657 F.2d 212, 215 (8th Cir. 1981); *United States v. Parker*, 622 F.2d 298, 301 (8th Cir. 1980).

⁷⁸ “. . .The trial and punishment of offenses under this section may be in any district to or into which such alien is brought in pursuance of importation by the persons or persons accused, or in any district in which a violation of any of the provisions of this section occurs. . .” 8 U.S.C. 1328.

- 8 U.S.C. 1329 (immigration offenses generally);⁷⁹
 - 15 U.S.C. 80a-43 (investment company offenses);⁸⁰
 - 15 U.S.C. 298 (falsely stamped gold or silver);⁸¹
 - 18 U.S.C. 228(e)(failure to pay legal child support obligations);⁸²
 - 18 U.S.C. 1073 (flight to avoid prosecution);⁸³
 - 18 U.S.C. 1074 (flight to avoid prosecution for property damage);⁸⁴
 - 18 U.S.C. 1512(i)(obstruction of justice);⁸⁵
 - 18 U.S.C. 1752(c)(secret service offenses);⁸⁶
-

⁷⁹ “. . . [S]uch prosecutions . . . may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under section 1325 or 1326 of this title may be apprehended . . .” 8 U.S.C. 1329.

⁸⁰ “. . . Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. A criminal proceeding based upon a violation of section 80a-33 of this title [destruction and falsification of records], or upon a failure to file a report other document required to be filed under this subchapter, may be brought in the district wherein the defendant is an inhabitant or maintains his principal office or place of business,” 15 U.S.C. 80a-43.

⁸¹ “. . . the district in which such violation was committed or through which has been conducted the transportation of the article in respect to which such violations has been committed. . .” 15 U.S.C. 298.

⁸² “With respect to an offense under this section, an action may be inquired of and prosecuted in a district court of the United States for—(1) the district in which the child who is the subject of the support obligation involved resided during a period during which a person described in subsection (a) (referred to in this subsection as an ‘obligor’) failed to meet that support obligation; (2) the district in which the obligor resided during a period described in paragraph (1); or (3) any other district with jurisdiction otherwise provided for by law,” 18 U.S.C. 228(e).

⁸³ “. . . Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed, or in which the person was held in custody or confinement, or in which an avoidance of service of process or a contempt referred to in clause (3) of the first paragraph of this section is alleged to have been committed, and only upon formal approval in writing by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated,” 18 U.S.C. 1073.

⁸⁴ “Violations of this section may be prosecuted in the Federal judicial district in which the original crime was alleged to have been committed or in which the person was held in custody or confinement: Provided, however, That this section shall not be construed as indicating an intent on the part of Congress to prevent any State, Territory, Commonwealth, or possession of the United States of any jurisdiction over any offense over which they would have jurisdiction in the absence of such section,” 18 U.S.C. 1074(b).

⁸⁵ “A prosecution under this section [witness tampering] or section 1503 [obstruction of judicial proceedings] may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred,” 18 U.S.C. 1512(i).

⁸⁶ “Violation of this section, and attempts or conspiracies to commit such violations, shall be prosecuted by the United States attorney in the Federal district court having jurisdiction of the place where the offense occurred,” 18 U.S.C. 1752(c).

- 18 U.S.C. 1956(i) (money laundering);⁸⁷
- 18 U.S.C. 2339(b) (harboring terrorists);⁸⁸
- 18 U.S.C. 2339A(a)(material support of terrorists).⁸⁹

A few others have special venue provisions that simply replicate the features of rule 18, that is a violation is to be prosecuted in the district in which it occurs:

- 15 U.S.C. 78aa (securities offenses);
- 15 U.S.C. 79y (public utility holding company violations);
- 15 U.S.C. 80a-43 (investment company offenses generally);
- 15 U.S.C. 80b-14 (investment adviser offenses);
- 15 U.S.C. 715i (interstate transportation of petroleum products);
- 15 U.S.C. 717u (natural gas offenses);
- 21 U.S.C. 17 (falsely labeled dairy or food products).

Venue for Crimes Committed Outside Any District

The Constitution recognizes that certain crimes, like piracy, may be committed beyond the geographical confines of any federal judicial district. Article III after declaring that the trial of crimes shall be in the state in which they are committed provides that, “but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”⁹⁰ The First Congress decided that “the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.”⁹¹ The approach changed little

⁸⁷ “(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in— (A) any district in which the financial or monetary transaction is conducted; or (B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted. (2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place. (3) For purposes of this section, a transfer of funds from one place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place,” 18 U.S.C. 1956(i).

⁸⁸ “A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law,” 18 U.S.C. 2339(b).

⁸⁹ “...A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed or in any other Federal judicial district as provided by law,” 18 U.S.C. 2339A(a).

⁹⁰ U.S.Const. Art.III, §2, cl.3.

⁹¹ 1 Stat. 114 (1790).

over the years until the early 1960s.⁹² Then it was amended to address two problems (1) to permit a single trial for crimes committed overseas by a group of offenders who scattered when they returned to this country, and (2) to toll the statute of limitations by permitting indictment when the suspect was overseas but not clearly a fugitive.⁹³ It now reads:

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia. 18 U.S.C. 3238.

Venue cannot be claimed under section 3238 for an offense begun in the United States, even if it were also partially committed overseas.⁹⁴ The district in which a defendant is arrested or into which he is brought for purposes of section 3238 is the district “where the defendant is first restrained of his liberty *in connection with the offense charged*.⁹⁵ Thus, venue in a particular district by operation of section 3238 is no less proper because the defendant was initially arrested in another district under another charge.⁹⁶ Conversely, venue is not proper in a second district after an accused has been arrested for the extraterritorial offense in another.⁹⁷ The “last known address” or District of Columbia basis for venue under section 3238 is an alternative basis for venue over an extraterritorial offense available to the exclusion of venue elsewhere when the offender has not first been arrested in or brought to another district.⁹⁸ Of course, in the case of multiple, joint offenders, venue over an extraterritorial offense is proper for all offenders in any district in which it is proper

⁹² See Rev.Stat. §729 (1878)(“The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he may first be brought”); 18 U.S.C. 3238 (1956 ed.)(“The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he may first be brought”).

⁹³ S.Rep.No. 88-146 (1963); see generally, 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE §304 (Crim. 3d ed. 2000).

⁹⁴ *United States v. Pace*, 314 F.3d 344, (9th Cir. 2002).

⁹⁵ *United States v. Wharton*, 320 F.3d 526, 536-37 (5th Cir. 2003)(emphasis in the original), quoting, *United States v. Erdos*, 474 F.2d 157, 160 (4th Cir. 1973); see also, *United States v. Feng*, 277 F.3d 1151, 1155 (9th Cir. 2002); *United States v. Catino*, 735 F.2d 718, 724 (2d Cir. 1984).

⁹⁶ *United States v. Wharton*, 320 F.3d 526, 536-37 (5th Cir. 2003).

⁹⁷ *United States v. Liang*, 224 F.3d 1057, 1060-62 (9th Cir. 2000).

⁹⁸ *United States v. Feng*, 277 F.3d 1151, 1155 (9th Cir. 2002); *United States v. Fraser*, 709 F.2d 1556, 1558 (6th Cir. 1983); *United States v. Hsin-Yung*, 97 F.Supp.2d 24, 28 (D.D.C. 2000).



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for one of them.⁹⁹ Finally, the fact that venue may be proper elsewhere under other statutory provisions, does not preclude venue under section 3238.¹⁰⁰

There is a second, alternative venue statute for certain espionage related cases:

The trial for any offense involving a violation, begun or committed upon the high seas or elsewhere out of the jurisdiction of any particular State or district, of—
 (1) section 793, 794, 798, [espionage] or section 1030(a)(1)[obtaining classified information by unauthorized computer access] of this title;
 (2) section 601 of the National Security Act of 1947 (50 U.S.C. 421)[disclosure of the identities of covert agents]; or
 (3) section 4(b) or 4(c) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(b) or (c))[receipt of classified information by foreign agents];
 may be in the District of Columbia or in any other district authorized by law.¹⁸ 18 U.S.C. 3239.

Section 3238 permits the government to bring an extraterritorial espionage case in the District of Columbia if the offender's residence is unknown. If the offender's last address in this country is known, section 3238 requires that the case be brought there or in the district in which the offender is first arrested or brought or any other district in which venue is otherwise proper. But without more the option to bring an extraterritorial espionage case in the District of Columbia is not necessarily available in all cases. Section 3239 changes that. It affords the government the option to bring an extraterritorial espionage case in the District Columbia when it would otherwise be precluded from doing so.

Section 3239's limited history suggests proponents may have initially had something else in mind. It was enacted as section 320909 of the Violent Crime Control and Law Enforcement Act of 1994, 108 Stat. 2127 (1994). The committee reports accompanying that legislation barely mention it;¹⁰¹ the conference report acknowledges that it comes from the Senate bill but says no more;¹⁰² there are no Senate reports. The Senate Select Committee on Intelligence, however, had reported out a bill with identical language, the Counterintelligence and Security Enhancements Act of 1994 (S. 2056). The Committee's report indicates that the section was thought to provide a more explicit statement of extraterritorial jurisdiction rather than

⁹⁹ *United States v. Pearson*, 791 F.2d 867, 869-70 (11th Cir. 1986)(venue over offenders first brought into the Southern District of Florida was proper in the Southern District of Alabama in which a joint offender had been first brought).

¹⁰⁰ *United States v. Levy Auto Parts*, 787 F.2d 946, 950-52 (4th Cir. 1986); *United States v. Erwin*, 602 F.2d 1183, 1185 (5th Cir. 1979); *United States v. Stickle*, 355 F.Supp.2d 1317, 1331-333 (S.D.Fla. 2004).

¹⁰¹ H.Rept. 103-324; H.Rept. 103-489 (1994).

¹⁰² H.Rept. 103-711, at 408, reprinted in, 1994 U.S.C.C.A.N. 1876 ("Section 320909 – House recedes to Senate section 2961, optional venue for espionage").

an expansion of venue options.¹⁰³ This may explain why there are no reported cases under section 3239.

Venue Transfers

For Prejudice.

While the Constitution promises the accused a trial in the district in which the offense was committed, it also promises him a trial by an impartial jury. U.S. Const. Amend. VI. To fulfill this second promise, Rule 21(a) of the Federal Rules of Criminal Procedure entitles the accused to a change of venue for trial in another district when “so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.”¹⁰⁴

Pre-trial publicity usually supplies the basis for a change of venue request under Rule 21(a).¹⁰⁵ The applicable standard is a demanding one. A transfer will ordinarily only be granted when no less disruptive curative measures will suffice. To create so great a prejudice that an impartial trial is not possible, media coverage must have been pervasive, inflammatory, contemporaneous to trial, and produced a serious contamination of the jury pool.¹⁰⁶ Requests for transfer under Rule 21(a) have been

¹⁰³ S.Rept. 103-296, at 27 (1994)(“Section 6 would give the U.S. District Court for the District of Columbia and other federal district court authorized by law jurisdiction over trials of offenses involving violations of U.S. espionage statutes and related statutes where the alleged misconduct took place outside the United States. According to Justice Department representatives, the lack of such jurisdiction in U.S. courts has posed, from time to time, a substantial problem in terms of trying U.S. citizens in U.S. courts even [though] their conduct allegedly violated U.S. law, e.g., passing classified U.S. information to a foreign agent. This has led to prosecutions in foreign courts even though the United States had the predominant interest in prosecution. Section 6 is intended to provide an alternative in such circumstances”). This suggests the alternative sought was trial in U.S. courts rather than trial in foreign courts; not trial in the District of Columbia rather than in some other U.S. judicial district. Venue is not mentioned; jurisdiction is.

¹⁰⁴ “Upon the defendant’s motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there,” F.R.Crim.P. 21(a); *see generally, The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution*, 52 UNIVERSITY OF CHICAGO LAW REVIEW 729 (1985).

¹⁰⁵ Requests have also been made on the basis of the demographic composition of the district, but the standard here seems even more demanding than that used in the press cases, e.g., *United States v. Granillo*, 288 F.3d 1071 (8th Cir. 2002)(“Notwithstanding defendant’s evidence suggesting that Hispanics comprise a small portion of the population in the state of Iowa, defendant did not present evidence indicating that his ethnic background would prevent jurors from being fair and impartial or that Hispanics were otherwise the target of purposeful discrimination in the jury selection process within the Southern District of Iowa”)

¹⁰⁶ *United States v. Higgs*, 353 F.3d 281, 307-308 (4th Cir. 2003)(“the determination of whether a change of venue is required as a result of pretrial publicity involves a two-step process. First, the district court must determine whether the publicity is so inherently

rejected when the coverage was less than pervasive,¹⁰⁷ when the coverage had subsided between the commission or discovery of the crime or arrest of the accused and the time of trial,¹⁰⁸ when the coverage was not overwhelmingly inflammatory or sensational,¹⁰⁹ or when evidence suggested that an untainted jury might nevertheless be selected.¹¹⁰ In a compelling case, the court may order trial to be elsewhere within the district under Rule 18, which allows the trial court to set the place of trial,¹¹¹ and in a rare case may grant a change of venue.¹¹²

For Convenience.

Under Rule 21(b) of the Federal Rules of Criminal Procedure, “Upon 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

prejudicial that trial proceedings must be presumed to be stained, and , if so, grant a change of venue prior to jury selection. However, only in extreme circumstances may prejudice to a defendant’s right to a fair trial be presumed from the existence of pretrial publicity itself. Ordinarily the trial court must conduct a *voir dire* of prospective jurors to determine if actual prejudice exists”); *United States v. Nelson*, 347 F.3d 701, 707-708 (8th Cir. 2003)

¹⁰⁷ *United States v. Jamieson*, 427 F.3d 394, 413 (6th Cir. 2005); *United States v. Sherwood*, 98 F.3d 402, 410 (9th Cir. 1996); *United States v. Brandon*, 17 F.3d 409, 441 (1st Cir. 1994); *United States v. Nettles*, 349 F.Supp.2d 1085, 1088 (N.D.Ill. 2004).

¹⁰⁸ *United States v. Nelson*, 347 F.3d 701, 709 (8th Cir. 2003); *United States v. Allee*, 299 F.3d 996, 1000 (8th Cir. 2002); *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003); *United States v. Johnson*, 354 F.Supp.2d 939, 982 (N.D. Iowa 2005).

¹⁰⁹ *United States v. Jamieson*, 427 F.3d 394, 413 (6th Cir. 2005); *United States v. Higgs*, 353 F.3d 281, 308 (4th Cir. 2003); *United States v. Blom*, 242 F.3d 799, 804 (8th Cir. 2001); *United States v. Brandon*, 17 F.3d 409, 441 (1st Cir. 1994); *United States v. Nettles*, 349 F.Supp.2d 1085, 1088 (N.D.Ill. 2004); *United States v. Johnson*, 354 F.Supp.2d 939, 982 (N.D. Iowa 2005).

¹¹⁰ *United States v. Nelson*, 347 F.3d 701, 709 (8th Cir. 2003)(jury pool survey indicated “only 29% of those jurors had formed strong or fixed opinions about the case”); *United States v. Blom*, 242 F.3d 799, 804 (8th Cir. 2001)(jury pool drawn from the entire state, questionnaires to probe impartiality sent to prospective jurors, increase in the number of peremptory strikes).

¹¹¹ *United States v. Knox*, 363 F.Supp.2d 845, 847 (W.D.Va. 2005)(scheduling retrial in another division following media attention surrounding the racketeering trial that ended in a hung jury); *United States v. Dakota*, 197 F.3d 821, 826-27 (6th Cir. 2000)(finding no abuse of discretion when the district court scheduled trial in different city within the same district in a case involving an anonymous jury empaneled “to minimize the prejudicial effects of pretrial publicity and an emotional, political atmosphere”); *but see, United States v. Lentz*, 352 F.Supp.2d 718, 722-23 (E.D.Va. 2005)(denying motion for retrial in another division until after voir dire established it was necessary since nature and level of media coverage was not so inherently prejudicial that taint had to be assumed).

¹¹² *United States v. McVeigh*, 918 F.Supp. 1467 (W.D.Okla. 1996)(Oklahoma City bombing case); *United States v. Gordon*, 380 F.Supp.2d 356, 365 (D.Del. 2005)(extensive press coverage, much of it adverse; substantial evidence that a high percentage of potential jurors had made up their minds and concluded the accused were guilty; trial could be transferred from Wilmington to Philadelphia with little difficulty or inconvenience).

witnesses and in the interest of justice.” When weighing a motion for a transfer under Rule 21(b), the lower federal courts frequently point to the ten factors mentioned in *Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 243-44 (1964):

- (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 place of trial;
- (9) docket condition of each district or division involved; and
- (10) any other special elements which might affect the transfer.¹¹³

The motion runs to the discretion of the trial court, and the trial court’s decision will only be overturned for an abuse of discretion¹¹⁴ such as a failure to apply the proper standard.¹¹⁵ The defendant bears the burden of establishing that convenience and the interests of justice compel a transfer.¹¹⁶ Professor Wright has described the rule as one designed for the convenience of the accused:

Rule 21(b) gives the court ample power in every case to provide for trial in the most convenient forum if the defendant makes such a request . . . One court has said that the rule is only intended to insure defendant a fair trial, and that it must be a rare case in which mere inconvenience to him will prevent a fair and just

¹¹³ *In re United States*, 273 F.3d 380, 387-88 (3d Cir. 2001); *United States v. Morrison*, 946 F.2d 484, 490 (7th Cir. 1991); *United States v. Crutchfield*, 379 F.Supp.2d 913, 923 (W.D. Tenn. 2005); *United States v. Stickle*, 355 F.Supp.2d 1317, 1321 (S.D.Fla. 2004); *United States v. Johnson*, 354 F.Supp.2d 939, 984 (N.D. Iowa 2005); *United States v. Smallwood*, 293 F.Supp.2d 631, 639-40 (E.D.Va. 2003); *United States v. Carey*, 152 F.Supp.2d 415, 421 (S.D.N.Y. 2001).

¹¹⁴ *United States v. Jordan*, 223 F.3d 676, 685 (7th Cir. 2000); *United States v. Perry*, 152 F.3d 900, 904 (8th Cir. 1998); *United States v. Maldonado-Rivera*, 922 F.2d 934, 966 (2d Cir. 1990); *United States v. Fagan*, 821 F.2d 1002, 1008 (5th Cir. 1987).

¹¹⁵ *In re United States*, 273 F.3d 380, 389 (3d Cir. 2001)(record was unclear whether the trial court required to accused to bear the burden of proof on the Rule 21(b) motion); *In re Balsimo*, 68 F.3d 185, 187 (7th Cir. 1995)(trial court erroneously applied a presumption against transfers to a contiguous district except on a showing of truly compelling circumstances); *United States v. McManus*, 535 F.2d 460, (8th Cir. 1976)(finding an abuse of discretion in granting a change of venue to the California district of residence of the defendants because, “in view of the recent decisions of the Supreme Court that obscenity vel non must be determined on a local community standard, we have no choice but to order that this case be tried in Iowa. . . A stronger showing than made here, such as intentional overreaching by the government, must be made, however, to overcome the government’s choice of forum in postal obscenity cases”).

¹¹⁶ *In re United States*, 273 F.3d 380, 388 (3d Cir. 2001); *United States v. Crutchfield*, 379 F.Supp.2d 913, 923 (W.D. Tenn. 2005); *United States v. Stickle*, 355 F.Supp.2d 1317, 1321 (S.D.Fla. 2004); *United States v. Quattrone*, 277 F.Supp.2d 278, 279-80 (S.D.N.Y. 2003); *United States v. Carey*, 152 F.Supp.2d 415, 421-23 (S.D.N.Y. 2001).

trial. This approach seems erroneous. Rule 21(a) is intended to protect defendant's right to a fair trial, while Rule 21(b) looks to a convenient trial. The beneficent purposes of Rule 21(b) will be thwarted, also, if it is supposed that there is a "general rule that a criminal prosecution should be retained in the original district."¹¹⁷

Be that as it may, a number of courts continue to observe a general rule that prosecution should be kept in the district where the government filed it.¹¹⁸ Others appear to exercise their discretion to the same effect.¹¹⁹ Still others speak in terms that seem at odds with the sentiments that led to drafting of the venue provisions in Article III and the Sixth Amendment.¹²⁰ The more recently reported cases indicate that few defendants are able to carry their burden.¹²¹ Those who do fall into two categories – (1) cases involve extraordinary facts,¹²² or (2) cases whose results defy

¹¹⁷ 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE 401-403 (Crim. 3d ed. 2000), citing *United States v. Hinton*, 268 F.Supp. 728, 731 (E.D.La. 1967), and quoting, *United States v. Bloom*, 78 F.R.D. 591, 608 (E.D.Pa. 1977); *see also*, Marcus, *Re-Evaluating Large Multiple-Defendant Criminal Prosecutions*, 11 WILLIAM & MARY BILL OF RIGHTS JOURNAL 67 (2002) ("Federal Rule of Criminal Procedure 21(b) allows the trial judge to transfer the proceedings, at the defendant's request, 'in the interest of justice.' However, the hope of deference to negatively-impacted defendants never has been realized. These provisions... often are not applied in favor of criminal defendants. To the contrary, they usually are construed quite narrowly in response to removal motions based on venue hardships").

¹¹⁸ *United States v. Carey*, 152 F.Supp.2d 415, 421 (S.D.N.Y. 2001); *United States v. Guastella*, 90 F.Supp.2d 335, 338 (S.D.N.Y. 2000); *United States v. Spy Factory, Inc.*, 951 F.Supp. 450 (S.D.N.Y. 1997); *United States v. Wecker*, 620 F.Supp. 1002, 1004 (D.Del. 1985).

¹¹⁹ *United States v. Stickle*, 355 F.Supp.2d 1317, 1321 (S.D.Fla. 2004) ("The burden falls on the defendant to demonstrate a substantial imbalance of inconvenience to himself if he is to succeed in nullifying the prosecutor's choice of venue").

¹²⁰ *United States v. McDade*, 827 F.Supp. 1153, 1191 (E.D.Pa. 1993) ("the government points out that it would be equally, if not more, difficult to get a fair trial in the Scranton area, where nearly everyone at least knows of Mr. McDade, and where his case has received plentiful press coverage. For this reason, the practical effect of this motion is substantial. At oral argument, counsel for Mr. McDade conceded that Mr. McDade would be more likely to get a favorable array of prospective jurors when picking from his friends, neighbors, and constituents, than he would in a relatively strange vicinage. . . It must be remembered that it is not just the defendant, but also the government, that is entitled to a fair trial").

¹²¹ This is not to suggest that inconvenience to the defendant is always greater than inconvenience to the government. Several cases seem to involve some governmental administrative inconvenience and relatively little defendant inconvenience, e.g., cases where defendants sought a transfer between the Eastern District and Southern District of New York or between the Eastern District of Virginia and District of Columbia District, *United States v. Smallwood*, 293 F.Supp.2d 631, 639-44 (E.D.Va. 2003); *United States v. Elson*, 968 F.Supp. 900, 902-904 (S.D.N.Y. 1997); *United States v. Persico*, 621 F.Supp. 842, 858-59 (S.D.N.Y. 1985).

¹²² *United States v. McDonald*, 740 F.Supp. 757, (D.Alaska 1990) ("The unpredictability and probability of volcanic activity could radically disrupt the orderly course of trial. Erratic accessibility is not an asset. Under the circumstances, western [district of] Washington is more accessible than [the district of] Alaska"); *United States v. Coffee*, 113

explanation since their facts seem indistinguishable from those in the cases where the motion was denied.¹²³

For Plea and Sentencing.

Defendants who wish to waive their right to trial may petition the court in the district in which they have been charged for a change of venue, for sentencing purposes, to the district in which they are being held or are present.¹²⁴ By definition, the rule requires the pendency of an indictment, information, or complaint in the district from which the accused seeks a transfer of venue.¹²⁵ Prosecutors in both districts must concur.¹²⁶ Should the defendant subsequently fail to plead as agreed or should the receiving court refuse to accept the plea, the transfer is revoked.¹²⁷

F.Supp.2d 751, 759 (facts so one-sided that the court was driven to observe, “one wonders why the Government brought this prosecution in this district in the first place . . . the Government assures us that this was not a tactic to maximize the pressure for guilty pleas”).

¹²³ *United States v. Lopez*, 343 F.Supp.2d 824, 825-26 (E.D.Mo. 2004)(in which the court rejected the magistrate judge’s recommendation that the motion be denied; the magistrate judge’s report included in the opinion reads like many of the opinions where the motion was ultimately denied); *United States v. Templin*, 251 F.Supp.2d 1223, 1225 (S.D.N.Y. 2003)(“In this case, Factor (8)[accessibility of trial location] has no bearing; and the docket considerations (factor (9) in Indiana as compared to the Southern District of New York have not been addressed by either party. Factors (4)[evidence location] and (7) [counsel location] favor the government marginally. But factors (1)[defendant location], (3)[location of events at issue], (5)[disruption of the defendant’s business], and (6)[party expenses] weigh heavily in favor of the defendant”)(this is an equation that in various other cases in the Southern District presaged denial); *accord*, *United States v. Morris*, 176 F.Supp.2d 668, 672-73 (N.D.Tex. 2001).

¹²⁴ “A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present if: (1) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court’s disposing of the case in the transferee district, and files the statement in the transferee district; and (2) the United States attorneys in both districts approve the transfer in writing,” F.R.Crim.P. 20(a).

¹²⁵ *Id.*; *United States v. Sevick*, 234 F.3d 248, 250 (5th Cir. 2000).

¹²⁶ “A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present if: . . . (2) the United States attorneys in both districts approve the transfer in writing,” F.R.Crim.P. 20(c); *United States v. Lovell*, 81 F.3d 58, 60-1 (7th Cir. 1996); *United States v. French*, 787 F.2d 1381, 1384-385 (9th Cir. 1986); *United States v. Herbst*, 565 F.2d 638, 643 (10th Cir. 1977).

¹²⁷ “If the defendant pleads not guilty after the case has been transferred under Rule 20(a), the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket. The defendant’s statement that the defendant wished to plead guilty or nolo contendere is not, in any civil or criminal proceeding, admissible against the defendant,” F.R.Crim.P. 20(c); *United States v. Khan*, 822 F.2d 451, 455 (4th Cir. 1987)(following transfer under the rule, a district court has no authority to *sua sponte* withdraw the defendant’s guilty plea, substitute a plea of nolo contendere, and acquit the defendant); *In re Arvedon*, 523 F.2d 914, 916 (1st Cir. 1975)(“rules 11 and 20 should be

Juveniles who wish to waive federal delinquency proceedings enjoy similar benefits.¹²⁸

read in harmony with one another. The court is, of course, not obliged to accept an involuntary or improvident plea of guilty because the defendant comes before it on a rule transfer. But, since every defendant who invokes Rule 20 does so from a desire not to return to the indicting district, that desire, by itself, is an impermissible reason to reject a proffered plea of guilty under Rule 11").

¹²⁸ "A juvenile, as defined in 18 U.S.C. § 5031, may be proceeded against as a juvenile delinquent in the district where the juvenile is arrested, held, or present if: (A) the alleged offense that occurred in the other district is not punishable by death or life imprisonment; (B) an attorney has advised the juvenile; (C) the court has informed the juvenile of the juvenile's rights – including the right to be returned to the district where the offense allegedly occurred – and the consequences of waiving those rights; (D) the juvenile, after receiving the court's information about rights, consents in writing to be proceeded against in the transferee district, and files the consent in the transferee district; (E) the United States attorneys for both districts approve the transfer in writing; and (F) the transferee court approves the transfer," F.R.Crim.P.20(d).

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