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

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Summary

The United States Constitution assures those charged with a serious federal crime that they will be prosecuted in the state and district in which the crime occurred. A crime occurs in any district in which any of its "conduct" elements are committed. Some offenses are committed entirely within a single district; there they may be tried. Other crimes have elements that have occurred in more than one district. Still other crimes have been committed overseas and so have occurred outside any district. Statutory provisions, court rules, and judicial interpretations implement the Constitution's requirements and dictate where multi-district crimes or overseas crimes may be tried.

Most litigation involves either a question of whether the government's selection of venue in a multi-district case is proper or whether the court should grant the accused's request for a change of venue. The government bears the burden of establishing venue by a preponderance of the evidence. The defendant may waive trial in a proper venue either explicitly or by failing to object to prosecution in an improper venue in a timely manner.

Section 3237 of Title 18 of the *U.S. Code* supplies three general rules for venue in multi-district cases. Tax cases may be tried where the taxpayer resides. Mail and interstate commerce offenses may be tried in any district traversed during the course of a particular crime. And continuous or overlapping offenses may be tried in any district in which they begin, continue, or are completed. For example, conspiracy, perhaps the most common continuous offense, may be tried where the scheme is joined or where any overt act in its furtherance is committed. These general rules aside, a few crimes, like murder or immigration offenses, have individual venue provisions. In most instances, overseas crimes are tried in the district in which the accused is arrested or into which he is first brought from abroad.

An accused may request a change of venue for reasons of prejudice, convenience, plea, or sentence. Besides his venue rights, an accused is entitled to trial by an impartial jury. Inflammatory pre-trial publicity and other circumstances may hopelessly taint the pool of potential jurors. Nevertheless, before granting a change of venue, the courts will ordinarily exhaust alternative measures such as examination of potential jurors to ensure their impartiality. Beyond prejudice, a court may also grant a change of venue for the convenience of the accused, the government, the victim, or the witnesses. It rarely does. Finally, with the government's concurrence, the court may grant a defendant's request to plea or be sentenced in the district in which they are found.

"Venue" ordinarily refers to both where a crime may be tried and the district from which the trial jury must be drawn, although technically the latter is more properly referred to vicinage.

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Introduction

The Constitution states that those accused of a federal crime shall be tried in the state in which the crime occurred and by a jury selected from the district in which the crime occurred:

> 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.[1]
>
> 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. . . .

The Federal Rules of Criminal Procedure mirror the Constitution's requirements: "Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. . . ." Statutory provisions supplement the rules, and the courts implement them in light of constitutional demands.

Threshold Issues

Subject to constitutional or statutory limitations, the government decides where a prosecution is to begin and bears the burden of establishing that the place it has selected is permissible. This obligation extends to every count within the indictment or information. Courts differ over whether venue can be accurately described as an element of the offense, but agree that the government need only establish venue by a preponderance of the evidence. Moreover, venue is not considered jurisdictional. Therefore, a court in an improper venue enjoys the judicial authority to proceed to conviction or acquittal, if the accused waives objection. If the absence of proper venue is apparent on the face of indictment or information, failure to object prior to trial constitutes waiver. 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.

In What District Did the Crime Occur?

Absent a contrary statutory provision, 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."

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 identifying where an offense was committed. So, for example, an offense that applied to anyone who received a bribe could be tried where a bribe was received. 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 the last word. As the Supreme Court explained in *United States v. Rodriguez-Moreno*, "the 'verb test' certainly has

[1] This report is an abridged version of CRS Report RL33223, *Venue: A Legal Analysis of Where a Federal Crime May Be Tried*, by Charles Doyle, stripped of the footnotes, most of the citations to authority, and an addendum that discusses the modern merger of venue and vicinage found in the longer version.

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." The test endorsed in *Rodriguez-Moreno*, looks to where the "conduct" element or elements of the offense occur.

Crimes Occurring in More Than One District

Other than when the accused seeks a change of venue, venue is only an issue when a crime occurs, or can be said to occur, in more than one district or outside of any district. Section 3237 governs venue for certain multi-district crimes. 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.

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, the Revised Statutes made it applicable to all multi-district federal crimes. 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 in the Supreme Court's reading of the venue requirements of the section. The Court first considered the provision in 1890 in *Palliser v. United States*, when it held that prosecution of an offense under the postal bribery statute might be held in the District of Connecticut in which the letter offering a 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. 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.

In later years, the Court 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; 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."

In 1998, in *United States v. Cabrales*, the Supreme Court held that money laundering and the crimes that generated the laundered funds did not *automatically* form one continuous criminal episode. Thus, Cabrales's offense of laundering drug proceeds, generated by drug trafficking in Missouri, but laundered in Florida, should not have been tried in Missouri. The 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. The next year, the Court confirmed in *United States v. Rodriguez-Moreno* that venue is proper in any district in which a conduct element of the offense occurs.

Continuing Offenses and Conspiracy

Conspiracy, with its multiple players with multiple roles, would seem to fit Section 3237's description of a crime that may begin, continue, or end in more than one district. The crime of conspiracy under the general statute is not complete until one of the conspirators takes some affirmative action in furtherance of the criminal scheme. This affirmative action (overt act) is an

element of the crime. In such cases, it would come as no surprise if venue were said to be proper wherever an overt act was committed, that is, wherever a conduct element of the crime occurred. An overt act, however, is not an element of several individual federal conspiracy statutes, such as the controlled substance conspiracy statute, for example. In such cases, is venue nevertheless proper wherever an overt act in furtherance of the conspiracy is committed? It appears so. At least one federal appellate court has muffled the impact of the overt act rule by limiting it to cases in which co-conspirator's venue-expanding overt act is foreseeable by his fellows.

Aiding and Abetting

Those who aid and abet the commission of a federal crime are punishable as principals. The government may try aiders and abettors either where they provided assistance or where the underlying offense may be prosecuted.

Other Continuous Offenses

As early as 1908 in *Armour Packing Co. v. United States*, 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 for venue purposes "[t]his is a single continuing offense … continuously committed in each district through which the transportation is received at the prohibited rate." The Court's most recent venue decision in 1999 confirmed the continued vitality of this view when it held that if Congress so crafts a criminal offense as to embed as one of its elements a predicate continuing offense, venue over the new crime is proper either wherever the new offense is committed or wherever the continuing predicate offense occurs. In *United States v. Rodriguez-Moreno*, the defendant had been tried in New Jersey for using a firearm in Maryland during and in relation to a crime of violence, *i.e.,* a kidnapping that had begun in New Jersey. The Court pointed out that 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." A defendant commits a crime and may be tried where *he* commits any of its *conduct* elements, it explained. 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. As the Court explained:

> 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.

In addition to kidnaping, the lower federal appellate courts have found venue proper based on the continuing nature of violations involving, e.g., (1) failure to pay child support (18 U.S.C. § 228); (2) unlawful possession of a firearm (18 U.S.C. § 922(g)); (3 false statements (18 U.S.C. § 1001); (4) mail fraud (18 U.S.C. § 1341); (5) wire fraud (18 U.S.C. § 1343); (6) bank fraud (18 U.S.C. § 1344); (7) violent crimes in aid of racketeering (18 U.S.C. § 1959); and (8) possession of controlled substances with the intent to distribute (21 U.S.C. § 841).

Venue in the Place of Impact

Continuing offenses and the first paragraph of subsection 3237(a) present one other puzzle: 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. Because this case only concerns the *locus delicti*, we express no opinion as to whether the Government's assertion is correct." The government's brief in the case declared that "[v]enue may also be based on the effects of a defendant's conduct in another district," and cited *Armour Packing Co.* (multi-state rail transportation at unlawful rate), *supra*, and the mail cases discussed below. The brief also cited lower court obstruction of justice and Hobbs Act cases.

The Hobbs Act outlaws the obstruction of interstate or foreign commerce through the use of violence or extortion. Venue for a Hobbs Act violation is generally considered proper in any district in which there is an obstruction of commerce. 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 occurred elsewhere. 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.

After *Rodriguez-Moreno*, the courts continue to refer to an "effects" or "substantial contacts" test for venue. Some have held that the effect must also constitute a "conduct element" under the statute defining the offense; and that venue may not be based on elements of the offense which are not conduct elements. Yet, the courts are divided over the question of whether venue can be proper in a district based only on effect or substantial contacts there.

Mail and Commerce Cases

The second paragraph of Section 3237(a) authorizes the prosecution of offenses involving importing, travel in interstate or foreign commerce, or use of the mail in any district from, through, or into which "commerce, mail matter, or [an] imported object or person moves." The paragraph first appeared in the revision of Title 18 of the *United States Code* in 1948. In 1944, the Supreme Court in *United States v. Johnson* had held that under the statute at issue an unlawful use of the mail had to be tried in the place from which the mail was sent rather than in the place in which it was received. The Reviser's Notes that accompany Section 3237 explain that the subparagraph is a response to the decision in *Johnson*. One scholar has questioned whether the Court's *Johnson* decision warranted such an expansive response. Perhaps for this reason although the subsection has been used under a wide range of circumstances, its invocation has not always been successful.

Tax Cases

The tax subsection of the multi-district provision, Subsection 3237(b), is in fact a limited transfer provision under which the accused may ask to be tried in the district in which he resided at the time when the alleged offense occurred. Subsection 3237(b) applies only in the case of prosecutions under 26 U.S.C. § 7203 (willful failure to file a return, supply information or pay a tax), 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). Congress added Subsection 3237(b) in 1958 under 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. A qualified defendant must file his request to be tried in his home district within 20 days. The court may not grant a request that is not timely.

Venue in Murder Cases

Sections 3235 and 3236 provide special venue requirements in murder cases. Section 3235 dates from the First Congress, 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. As in other instances, the benefits of Section 3235 can be waived if the accused fails to move to dismiss for improper venue. Moreover, the determination that the benefit can be denied in the face of "great inconvenience" is a matter within the trial court's discretion. Courts have found great inconvenience when there was no federal courthouse within the county in which the crime was committed; when a majority of the government's witnesses were located outside of the county in which the crime was committed; and when observance would overburden court resources.

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. 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. Here too the case law is sparse. Two trial courts have held that Section 3236 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. A third held that Section 3236 must yield where Section 3237 (venue in multiple districts) is applicable. And an appeals court has held that under Section 3236 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 negligent there.

Crimes with Individual Venue Statutes

Occasionally, Congress has enacted special venue provisions for particular crimes. These provisions dictate venue decisions unless they contravene constitutional requirements *e.g.*, (1) 8 U.S.C. § 1328 (importation of aliens for immoral purposes); (2) 8 U.S.C. § 1329 (immigration offenses generally); (3) 15 U.S.C. § 80a-43 (investment company offenses); (4) 15 U.S.C. § 298 (falsely stamped gold or silver); (5) 18 U.S.C. § 228(e) (failure to pay legal child support obligations); (6) 18 U.S.C. § 1073 (flight to avoid prosecution); (7) 18 U.S.C. § 1074 (flight to avoid prosecution for property damage); (8) 18 U.S.C. § 1512(*i*) (obstruction of justice); (9) 18 U.S.C. § 1956(*i*) (money laundering); (10) 18 U.S.C. § 2339(b) (harboring terrorists); (11) 18 U.S.C. § 2339A(a) (material support of terrorists); (12) 21 U.S.C. § 959(d) (manufacturing or distributing controlled substances abroad for importation into the United States); and (13) 46 U.S.C. § 70504(b) (Maritime Drug Law Enforcement offenses).

Special venue provisions governing prosecution of a few other crimes simply replicate the features of Rule 18, *i.e.*, a violation is to be prosecuted in the district in which it occurs: (1) 15 U.S.C. § 78aa (securities offenses); (2) 15 U.S.C. § 80b-14 (investment adviser offenses); (3) 15 U.S.C. § 715i(c) (interstate transportation of petroleum products); (4) 15 U.S.C. § 717u (natural gas offenses); and (5) 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, adds, "but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." 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." The approach changed little over the years until the early 1960s. Then, Congress amended the provision 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. Section 3238 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.

The federal appellate courts disagree over whether Section 3238 may apply when an offense is committed in part within the United States and in part outside the United States. The Ninth Circuit and perhaps the Second Circuit believe that Section 3238 only applies to offenses that, as the caption says, are "not committed in any district." The Third, Fourth, and Fifth Circuits believe that it need not be restricted to offenses committed wholly outside the United States, and applies to offenses that, as the section says, are "begun or committed ... elsewhere."

The district to which Section 3238 refers includes the districts of the U.S. District Courts in the territories, but does not include the geographical confines of the other courts of the U.S. territories that have not been designated "district courts." The district in which a defendant is first arrested for purposes of Section 3228 is the district "where the defendant is first restrained of his liberty *in connection with the offense charged*." 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, or because he entered the United States in another district prior to his indictment in the District of Columbia and subsequent arrest. Conversely, venue is not proper in a second district after an accused has been arrested for the extraterritorial offense in another district. 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. In the case of multiple co-defendants, venue over an extraterritorial offense is proper for all offenders in any district in which it is proper for one of them. Venue is no less proper because the authorities arranged for the arrest of a co-defendant within a particular district.

There is another, alternative venue statute for certain espionage related cases, Section 3239:

> 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.

Section 3239 affords the government the option to bring an exterritorial espionage case in the District Columbia when it would otherwise be precluded from doing so under section 3238. 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 under Section 3238. Section 3239 changes that.

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. 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."

Pre-trial publicity usually supplies the basis for a change of venue request under Rule 21(a). 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. Courts have rejected transfer requests under Rule 21(a) in the face of one or more factors suggesting a fair trial was possible or had been conducted: for example, when the pool of potential jurors was large and diverse; when the coverage was less than pervasive; when the coverage had subsided between the commission or discovery of the crime or arrest of the accused and the time of trial; when the coverage was not overwhelmingly inflammatory or sensational; when prospective jurors were subject to thorough voir dire, particularly if the defendant raised no objections at the time; or when evidence suggested that an untainted jury nevertheless might be or might have been selected. In a compelling case, the court may order trial to be held elsewhere within the district under Rule 18, which allows the trial court to set the place of trial, and in a rare case may grant a change of venue.

In some instances, a superseding indictment from the original district may follow the defendant to the district to which his case has been transferred.

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, any victim, and 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 10 factors mentioned in the Supreme Court's 1994 decision, *Platt v. Minnesota Mining & Manufacturing Co.*: (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.

The motion runs to the discretion of the trial court, and an appellate court will only overturn the trial court's decision for an abuse of discretion such as a failure to apply the proper standard. The defendant bears the burden of establishing that convenience and the interests of justice compel a transfer. Courts often begin with the observation that, basic venue requirements having been

satisfied, trial should be held in the original district, *i.e.*, where the government elected to bring the case. Even if the prospective inconvenience for witnesses and prosecutors do not trump a defendant's transfer request, the interests of the court may.

For Plea and Sentencing: A defendant, charged with an indictable offense in another district who wishes to plead guilty, may petition the court in that district for a transfer of venue to the district in which he is located. By definition, the rule requires the pendency of an indictment, information, or complaint in the district from which the accused seeks the transfer of venue. Prosecutors in both districts must concur. Should the defendant subsequently fail to plead as agreed or should the receiving court refuse to accept the plea, the transfer is revoked. Juveniles who wish to waive federal delinquency proceedings enjoy similar benefits.

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