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Federal Criminal Procedure-Transfer for Trial Under Rule 21(b)

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FEDERAL CRIMINAL PROCEDURE—TRANSFER FOR TRIAL UNDER RULE 21(b)—Defendant, a Delaware corporation, was indicted in the Eastern District of Illinois for violations of the Sherman Act.[1] Proceeding under Rule 21(b) of the Federal Rules of Criminal Procedure,[2] defendant moved to transfer the trial to the District of Minnesota, where its principal business offices were located. The parties stipulated that the alleged offenses occurred in both Illinois and Minnesota and submitted affidavits, briefs, and oral argument on the transfer motion to petitioner, the district court judge. While evaluating numerous other factors relevant to the transfer motion, the district court gave some weight to the contention of government counsel that impartial jurors would be more difficult to obtain in Minnesota than in Illinois. The district court denied the motion to transfer. Arguing that the district court's consideration of jury bias in the transferee district was improper, the defendant sought a writ of mandamus to compel the transfer. The court of appeals granted the writ and ordered transfer.[3] On certiorari to the United States Supreme Court, *held*, reversed and remanded to the district court for redetermination of the transfer motion without reference to possible jury bias in the transferee district. Appellate supervision by writ of mandamus does not permit a circuit court to order transfer on the basis of its own findings after review discloses that one of the factors which led the district court to deny transfer under Rule 21(b) should not have been considered. *Platt v. Minnesota Mining & Mfg. Co.*, 84 Sup. Ct. 769 (1964).

The Constitution guarantees federal criminal defendants a trial in the state where the crime was committed[4] before a jury drawn from the district and state where the offense was committed.[5] Thus prosecution for a federal offense committed in a single district can be initiated only in that district. Prosecution for a multiple-district federal offense, however, may be brought in any one of the districts where the crime was committed.[6] A multiple-district offense—a single crime committed in more than one district—is frequently involved in a violation of federal antitrust or criminal con-

1 Sections 1, 2, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1958).

2 "The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged." FED. R. CRIM. P. 21(b) [hereinafter cited as Rule 21(b)].

3 Minnesota Mining & Mfg. Co. v. Platt, 314 F.2d 369 (7th Cir. 1963), 63 COLUM. L. REV. 1324 (1963), *rev'd* by principal case.

4 U.S. CONST. art. III, § 2.

5 U.S. CONST. amend. VI.

6 Unless constitutional venue rights are waived, a defendant who commits offense *A* in district *X* and offense *B* in district *Y* must be tried in *X* for offense *A* and in *Y* for offense *B* if he is to be tried for both offenses. A multiple-district offense, however, is a single offense committed in both district *X* and district *Y*, and trial of the defendant in either district *X* or district *Y* satisfies constitutional venue requirements.

spiracy laws.[7] Because there was no general provision for transfer of federal criminal proceedings prior to the adoption of Rule 21(b),[8] the Government's choice of the district in which to prosecute for a multiple-district offense was final and could not be changed by the defendant or the court.[9] Defendants charged with multiple-district offenses frequently faced trial in a district chosen without regard to their convenience or expense.[10] The hardship to defendants, sometimes caused by abusive governmental forum shopping, led to the promulgation of Rule 21(b) in 1946;[11] this provision gives district judges the power to transfer a criminal proceeding, upon defendant's motion, to another district or division in which the offense was committed if transfer would be in the "interest of justice."[12]

The phrase "interest of justice" implies a broad discretionary power; thus, numerous authorities state that the propriety of a Rule 21(b) transfer is a matter for the district court's discretion,[13] and a denial of such a transfer motion cannot be overturned without proof that the district court clearly abused that discretion.[14] In practice, district courts give substance to the abstract standard, "interest of justice," by balancing factors which

7 A corporation may be prosecuted for antitrust violations "not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business . . . ." Clayton Act § 12, 38 Stat. 736 (1914), 15 U.S.C. § 22 (1958). Venue for conspiracy lies in the district where the agreement was made or in any district where an overt act in furtherance of the conspiracy was committed. Hyde v. United States, 225 U.S. 347 (1912); Barber, *Venue in Federal Criminal Cases: A Plea for Return to Principle*, 42 TEXAS L. REV. 39, 42-43 (1963). See generally PROCEEDINGS, N.Y.U. INSTITUTE ON FED. R. CRIM. P. 169-70, 274-75 (1946) (comments of Youngquist and Medalie, JJ.); Freed, *The Rules of Criminal Procedure: An Appraisal Based on a Year's Experience*, 33 A.B.A.J. 1010, 1012 (1947).

8 See U.S. ADVISORY COMM. ON RULES OF CRIM. PROC., NOTES TO THE RULES OF CRIMINAL PROCEDURE FOR DISTRICT COURTS OF THE UNITED STATES 21 (1945); Dession, *The New Federal Rules of Criminal Procedure: II*, 56 YALE L.J. 197, 224 (1947); Orfield, *Transfer of Federal Offenses Committed in More than One District or Division*, 51 MICH. L. REV. 31, 35 (1952). In the case of a few crimes, statutes did provide for transfer for trial. *E.g.*, 18 U.S.C. § 3239 (1958).

9 Gates v. United States, 122 F.2d 571, 577 (10th Cir. 1941), *cert. denied*, 314 U.S. 698 (1942); U.S. ADVISORY COMM. ON RULES OF CRIM. PROC., *op. cit. supra* note 8, at 21; Orfield, *Early Federal Criminal Procedure*, 7 WAYNE L. REV. 503, 517-18 (1961).

10 United States v. White, 95 F. Supp. 544, 548 (D. Neb. 1951); United States v. National City Lines, Inc., 7 F.R.D. 393, 396-97 (S.D. Cal. 1947); PROCEEDINGS, N.Y.U. INSTITUTE ON FED. R. CRIM. P. 274-75 (1946); Dession, *supra* note 8, at 224-25; Freed, *supra* note 7, at 1012.

11 *Ibid.*

12 Rule 21(b). Proposed changes to Rule 21(b) would clarify the disposition to be made of transfer motions when less than all of the counts charge offenses in the transferee district. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments, Rules of Criminal Procedure for the United States District Courts*, 31 F.R.D. 665, 680-81 (1962).

13 *E.g.*, Shurin v. United States, 164 F.2d 566, 570 (4th Cir. 1947), *cert. denied*, 333 U.S. 837 (1948); Kott v. United States, 163 F.2d 984, 987 (5th Cir. 1947), *cert. denied*, 333 U.S. 837 (1948); United States v. United States Steel Corp., 226 F. Supp. 152, 155 (S.D.N.Y. 1964); United States v. Rossiter, 25 F.R.D. 258, 260 (D.P.R. 1960); U.S. ADVISORY COMM. ON RULES OF CRIM. PROC., *op. cit. supra* note 8, at 21.

14 *E.g.*, United States v. Cashin, 281 F.2d 669, 671 (2d Cir. 1960); Shurin v. United States, *supra* note 13, at 570; Kott v. United States, *supra* note 13, at 987.

support and oppose the requested transfer.[15] Practical considerations of fairness, expediency, and convenience underlie the most frequently cited factors, which include the location of a corporate defendant's principal place of business;[16] the place where substantial elements of the alleged offense occurred;[17] the location of relevant documents and records;[18] the residence and convenience of witnesses likely to be called;[19] the amount of increased expense to the parties;[20] the possible disruption of defendant's business;[21] the location of counsel;[22] docket conditions and opportunity for speedy trial in the districts involved;[23] and the timeliness of the transfer motion.[24] No authority, however, prescribes an exclusive list of factors beyond which a court may not inquire when deciding a Rule 21(b) transfer motion. Further, the district court's broad discretionary power implies the absence of hard and fast rules that exclude certain factors from the determination whether transfer is in the "interest of justice."[25] Nonetheless, district court dispositions of transfer motions are subject to some degree of supervision by appellate courts.

Whether mandamus is properly used to review the denial of transfer motions is a somewhat unsettled question.[26] Avoiding discussion of the mandamus issue, the Supreme Court assumed, purely *arguendo*, that the writ would lie in the principal case to compel district court reconsideration

15 See, *e.g.*, United States v. United States Steel Corp., 226 F. Supp. 152, 154-57 (S.D.N.Y. 1964); United States v. National City Lines, Inc., 7 F.R.D. 393, 397-98 (S.D. Cal. 1947); United States v. White, 95 F. Supp. 544, 550 (D. Neb. 1951).

16 *E.g.*, United States v. National City Lines, Inc., *supra* note 15, at 402; see United States v. West Coast News Co., 30 F.R.D. 13, 24 (W.D. Mich. 1962); United States v. General Motors Corp., 194 F. Supp. 754, 756 (S.D.N.Y. 1961).

17 *E.g.*, United States v. Aronson, 319 F.2d 48, 52 (2d Cir.), *cert. denied*, 375 U.S. 920 (1963); United States v. United States Steel Corp., 226 F. Supp. 152, 156 (S.D.N.Y. 1964); United States v. Van Allen, 28 F.R.D. 329, 340 (S.D.N.Y. 1961).

18 *E.g.*, United States v. General Motors Corp., 194 F. Supp. 754, 756 (S.D.N.Y. 1961); United States v. White, 95 F. Supp. 544, 551 (D. Neb. 1951); United States v. Erie Basin Metal Prods. Co., 79 F. Supp. 880, 885 (D. Md. 1948).

19 *E.g.*, United States v. Foster, 33 F.R.D. 506, 509-10 (D. Md. 1963); United States v. General Motors Corp., *supra* note 18, at 756; United States v. Olen, 183 F. Supp. 212, 219 (S.D.N.Y. 1960).

20 *E.g.*, United States v. Olen, *supra* note 19, at 219; see United States v. United States Steel Corp., 226 F. Supp. 152, 155 (S.D.N.Y. 1964).

21 *E.g.*, United States v. United States Steel Corp., *supra* note 20, at 155; United States v. General Motors Corp., 194 F. Supp. 754, 756 (S.D.N.Y. 1961); United States v. Olen, 183 F. Supp. 212, 219 (S.D.N.Y. 1960).

22 *E.g.*, United States v. White, 95 F. Supp. 544, 551 (D. Neb. 1951); United States v. National City Lines, Inc., 7 F.R.D. 393, 398, 402 (S.D. Cal. 1947).

23 *E.g.*, United States v. Warring, 121 F. Supp. 546, 551 (D. Md. 1954); see United States v. Erie Basin Metal Prods. Co., 79 F. Supp. 880, 885 (D. Md. 1948).

24 Shurin v. United States, 164 F.2d 566, 570 (4th Cir. 1947), *cert. denied*, 333 U.S. 837 (1948); United States v. Foster, 33 F.R.D. 506, 509 (D. Md. 1963) (lateness of motion indicated intent to delay proceedings).

25 United States v. National City Lines, Inc., 7 F.R.D. 393, 397 (S.D. Cal. 1947); *cf.* United States v. White, 95 F. Supp. 544, 550 (D. Neb. 1951).

26 *Compare* United States v. Foster, 296 F.2d 249 (4th Cir. 1961), *with* United States v. Cashin, 281 F.2d 669, 671 (2d Cir. 1960). See Note, 63 COLUM. L. REV. 1324, 1326-27 (1963).

of the proper factors relevant to the requested transfer; this assumption was occasioned by the fact that the Government had not challenged the circuit court's position that review by mandamus was proper.[27] In addition, the Government acquiesced in the circuit court's view that the problem of obtaining impartial jurors in the transferee district was an improper factor.[28] Concluding, however, that the court of appeals had exceeded the limits of its supervisory authority, the Supreme Court reversed the order to transfer and held that "the District Court's use of an inappropriate factor did not empower the Court of Appeals to order the transfer."[29] Rather, the appropriate criteria should have been selected and left to the district court to apply on remand.[30] In spite of the saving of judicial energy that might result if appellate supervisory authority included the power to order transfer after review by mandamus, the Supreme Court's decision in the principal case is sound.

Federal courts have power to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[31] Mandamus has traditionally been used at common law and in federal courts to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to act.[32] Use of the writ to usurp the discretionary functions of a lower court, however, is improper.[33] An appellate court transfer order after review by mandamus would deprive the lower court of the discretionary authority to order transfer which Rule 21(b) vests in district courts. Furthermore, the district courts are in the better position to balance the factors relevant to transfer because they initially receive briefs and affidavits and hear oral argument on the transfer motion. Although review of the record below may justify an appellate court's finding that denial of transfer was influenced by an improper factor, the district court still has the most complete and direct knowledge of the factors affecting the requested transfer. Thus the district court is still in a better position than an appellate court to rebalance the opposing interests other than the improper factor and to decide whether transfer should be granted.

The circuit court decision in the principal case strikingly illustrates

27 Principal case at 772.

28 *Ibid.* Arguably, the Supreme Court should have distinguished between the improper consideration that an impartial jury could not be selected in Minnesota and the seemingly proper consideration that, in obtaining an impartial jury in Minnesota, the Government would have to spend more time preparing for and conducting examination of prospective jurors. Although only a minor factor, the increased burden imposed on the Government might in some instances be relevant in the balancing process which determines whether transfer would be in the "interest of justice."

29 Principal case at 772.

30 *Ibid.*

31 28 U.S.C. § 1651(a) (1958).

32 Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943); *Ex parte* Republic of Peru, 318 U.S. 578, 583 (1943); United States v. Hester, 325 F.2d 654, 657 (8th Cir. 1963).

33 See Bankers Life & Cas. Co. v. Holland, 346 U.S. 379 (1953); Johnston v. Marsh, 227 F.2d 528 (3d Cir. 1955).

both the difficulty of ordering transfer on the basis of a lower court record and the confusion that appellate court transfer orders may generate. After determining that an improper factor had been considered,[34] the court of appeals found that the lower court had placed primary emphasis on the improper factor[35] and that essential elements of convenience favored transfer.[36] The court further found transfer consistent with the "fundamental historical right of a defendant to be prosecuted in its own environment or district . . . ."[37] Since, however, the district judge had also considered nine other admittedly appropriate factors before denying the transfer motion,[38] he alone knew what weight had been given to the improper factor. Thus, the Supreme Court observed, upon remand the district judge would know how to redetermine the weight of factors relevant to transfer.[39] Furthermore, the circuit court's findings with respect to the essential elements of convenience flatly contradicted and took no account of the district court's findings.[40] And the view that criminal defendants have the historical or constitutional right to trial in their home district is not only erroneous,[41] but also obscures the criteria relevant to the decision of Rule 21(b) transfer motions. The court of appeals' language suggests that, in addition to considering the numerous practical factors which themselves involve fairness, expediency, and convenience, district courts must also accord some prior and independent significance to the fact the defendant seeks transfer to his home district. Giving independent significance to the fact that defendant seeks transfer to his home district would disrupt the balancing process which district courts have previously employed to take into account with fairness the practical factors relevant to the determination whether a requested transfer under Rule 21(b) would be in the "interest of justice."[42] Finally, it would be unreasonable to assume that a member of the federal judiciary would refuse to give fair consideration to the relevant factors upon remand. In the unlikely event that a district court did refuse to reconsider the decision, or again appraised

34 Minnesota Mining & Mfg. Co. v. Platt, 314 F.2d 369, 373-75 (7th Cir. 1963), *rev'd*, principal case.

35 *Id.* at 371 n.1. The court of appeals reasoned, unpersuasively, that, because the improper factor appeared last on the trial court's memorandum of ten factors relevant to transfer, "we are convinced that he saved the most important item for last." *Ibid.*

36 *Id.* at 375 & n.3.

37 *Id.* at 375.

38 Principal case at 771-72.

39 *Id.* at 772.

40 *Id.* at 771.

41 *Id.* at 772; see notes 4-12 *supra* and accompanying text. The location of a defendant's home district may be relevant when construing venue statutes to determine where prosecution for a crime may be initiated. *E.g.*, United States v. Johnson, 323 U.S. 273, 275 (1944); Barber, *supra* note 7. But in the principal case no question of venue was involved; the alleged offenses had been committed in both Illinois and Minnesota.

42 "The fact that Minnesota is the main office or 'home' of the respondent has no independent significance in determining whether transfer to that district would be 'in the interests of justice,' although it may be considered with reference to such factors as the convenience of records, officers, personnel and counsel." Principal case at 772.

improper factors, an appellate court transfer order upon review by mandamus would seem appropriate if the record clearly demonstrated that transfer would be in the "interest of justice."[43]

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[43] *Cf.* Chicago, R.I. & P.R.R. v. Igoe, 220 F.2d 299 (7th Cir. 1955).