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To Crim 8/24

This is in reply to your memorandum of August 8, 1966, asking our opinion on certain questions on trial venue raised by a change in California's judicial districts to be effective September 18, 1966.

Factual and legal background: California is presently divided into two judicial districts, the Northern District and the Southern District, and the Southern District is in turn divided into three divisions, the Northern, Central and Southern Divisions. As of September 18, 1966 the Southern Division will become the new Southern District, the Central Division will become the new Central District, and the Northern Division will become part of the new Eastern District. The other part of the new Eastern District will be made up from a part of the present Northern District. It has been the practice in the present Southern District that all criminal actions arising from offenses committed in a division of the district be indicted and tried in that same division; the practice for civil actions is not stated in the materials at our disposal but is presumably similar.

Mr. Manuel L. Real, United States Attorney for the present Southern District, has forwarded to you two proposed orders from the district court for the present Southern District directing the disposition of civil and criminal cases among the new districts after September 18 and has asked our opinion on the proposed orders.

The proposed order for criminal cases directs that any case for which an indictment or information has been filed prior to September 18 in the present Southern District be proceeded with in the new district that corresponds to, or overlaps, the present division in which the indictment or information was filed. The proposed order for civil actions directs a similar disposition for civil actions filed prior to September 18.

Recommendation:

The order for criminal cases should be expanded to cover all prosecutions for offenses allegedly committed prior to September 18, whether or not an indictment or information has been filed before that date. The proposed disposition of cases in the present Southern and Central Divisions is acceptable. The proposed disposition of cases arising in the present Northern Division is acceptable only if all such cases are to be tried in the new Eastern District before juries selected only from those counties in the new district which are also included in the present Northern Division. And if juries for such cases in the new Eastern District are to be so selected, and if Title I of the proposed Civil Rights Act of 1966 is enacted in its present form, such juries must be selected from such counties in compliance with the provisions of section 101 of that title (creating new sections 28 U.S.C. 1864, 1865 and 1870(c)), which also requires, inter alia, that the court, when using such juries, itself sit in one of such counties. Alternatively, cases arising from offenses allegedly committed in the present Northern Division could be tried in the new Central District. If this alternative is chosen, we recommend that motions by defendants whose trials, if the alternative were not chosen, would have been tried in the new Eastern District, requesting transfer to that district, be liberally granted; but the granting of such motions would not be legally necessary.

7 The proposed order for civil cases is proper.

13 Criminal Actions

7 The Sixth Amendment provides in part:

10 "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, which district shall have been previously ascertained by law"

7 18 U.S.C. 3240 provides:

10 "Whenever any new district or division is established, or any county or territory is transferred from one district or division to another district or division, prosecutions for offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the case to be removed to the new district or division for trial."

Criminal
Federal Rule of ~~Civil~~ Procedure No. 18, effective as of July 1, 1966, provides:

10 "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses."

Old FRCP No. 18 directed that offenses be tried in the division in which they were allegedly committed. It has been ordered that the new rules "shall govern all criminal proceedings . . . commenced [after July 1, 1966] and so far as practicable all proceedings then pending."

Lewis v. United States, 279 U.S. 63 (1929), upheld the convictions of defendants charged with offenses allegedly occurring in Tulsa, Oklahoma, when Tulsa was part of the Eastern District of Oklahoma, although the convictions were obtained in a trial held in a newly formed Eastern District that did not include Tulsa and before a jury that was drawn only from the new district. All the judges in the new district had previously been judges of the old Eastern District, but one of the judges of the old Eastern District had been assigned to a newly created Northern District. The Supreme Court reasoned that under the circumstances the court for the new Eastern District was also, simultaneously, the court for the old Eastern District, and that nothing in law required that defendants be tried before a jury drawn from those particular portions of the (new or old) district in which their offenses were committed. A statute in all significant respects identical to 18 U.S.C. 3240 was in effect at the time Lewis was decided and of course the 6th Amendment was also taken into account.

It follows from the foregoing authorities that the proposed disposition of cases arising in the present Southern and Central Divisions is proper, except that it should be extended to apply to all offenses committed in those divisions before September 18, whether indictments or informations thereon are filed before or after September 18. The Constitution and the Criminal Code would permit trial of such cases within either the new Southern District or new Central District, but it is consistent with FRCP No. 18 to allocate trials between the new districts in accord with the location of the offenses as between the old divisions, so the proposed order seems entirely proper in that respect.

But if trials are had in the new Eastern District before juries drawn from parts of that district formerly included in the present Northern District, without the consent of the defendants, both the Sixth Amendment and 18 U.S.C. 3240 will have been violated. Compliance with the Amendment and section 3240 requires that such cases be tried before juries drawn entirely from the present Southern District. That requirement can be met under either of the alternatives offered in the "Recommendation" section of this memorandum. Either of those alternatives could also be followed consistently with 28 U.S.C. 1865, the existing statute controlling the geographical area from which jurors are to be selected. And either alternative could be followed consistently with Title I, section 101 of the proposed Civil Rights Act of 1966 (creating new sections 28 U.S.C. 1864, 1865 and 1870(c)) if it is enacted in its present form. However, Title I imposes certain additional procedural requirements apparently not now mandatory and, in addition, requires that jurors be selected from counties or other subdivisions "surrounding the places where court is [actually] held" if they are to be selected from less than the entire district in a district which has not been formally divided into divisions. So under Title I, cases tried in the new Eastern District before juries drawn from the counties that were formerly within the present Northern Division of the Southern District would have to be tried in a court actually sitting in one of those counties.

¹³ Civil Cases

7 28 U.S.C. 1405 reads:

¹⁰ "Creation or alteration of district or division.

¹⁰ "Actions or proceedings pending at the time of the creation of a new district or division or transfer of a county or territory from one division or district to another may be tried in the district or division as it existed at the institution of the action or

proceeding, or in the district or division so created or to which the county or territory is so transferred as the parties shall agree or the court direct."

Consequently, the proposed order for civil cases is proper.