district of his arrest or presence. This would advance the interests of both the prosecution and defendant in a timely entry of a plea of guilty. No change has been made in the requirement that the transfer occur with the consent of both United States attorneys.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 20 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

New Rule 20(d)(2) applies to juvenile cases and has been added to parallel a similar provision in new Rule 20(b). The new provision provides that after the court has determined that the provisions in Rule 20(d)(1) have been completed and the transfer is approved, the file (or certified copy) must be transmitted from the original court to the transferee court.

AMENDMENT BY PUBLIC LAW

1975—Subd. (d). Pub. L. 94–64 amended subd. (d) generally.

EFFECTIVE DATE OF AMENDMENTS PROPOSED APRIL 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub. L. 94–64, effective Dec. 1, 1975, see section 2 of Pub. L. 94–64, set out as a note under rule 4 of these rules.

Rule 21. Transfer for Trial

(a) FOR PREJUDICE. 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.

(b) FOR CONVENIENCE. 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 the witnesses, and in the interest of justice.

(c) PROCEEDINGS ON TRANSFER. When the court orders a transfer, the clerk must send to the transferee district the file, or a certified copy, and any bail taken. The prosecution will then continue in the transferee district.

(d) TIME TO FILE A MOTION TO TRANSFER. A motion to transfer may be made at or before arraignment or at any other time the court or these rules prescribe.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 28, 2010, eff. Dec. 1, 2010.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

Note to Subdivisions (a) and (b). 1. This rule introduces an addition to existing law. ''Lawyers not thoroughly familiar with Federal practice are somewhat astounded to learn that they may not move for a change of venue, even if they are able to demonstrate that public feeling in the vicinity of the crime may render impossible a fair and impartial trial. This seems to be a defect in the federal law, which the proposed rules would cure.'' Homer Cummings, 29 A.B.A.Jour. 655; Medalie, 4 Lawyers Guild R. (3)1, 5.

2. The rule provides for two kinds of motions that may be made by the defendant for a change of venue. The first is a motion on the ground that so great a prejudice exists against the defendant that he cannot obtain a fair and impartial trial in the district or division where the case is pending. Express provisions to a similar effect are found in many State statutes. See, e.g., Ala. Code (1940), Title 15, sec. 267; Cal.Pen.Code (Deering, 1941), sec. 1033; Conn.Gen.Stat. (1930), sec. 6445; Mass.Gen.Laws (1932) c. 277, sec. 51 (in capital cases); N.Y. Code of Criminal Procedure, sec. 344. The second is a motion for a change of venue in cases involving an offense alleged to have been committed in more than one district or division. In such cases the court, on defendant's motion, will be authorized to transfer the case to another district or division in which the commission of the offense is charged, if the court is satisfied that it is in the interest of justice to do so. The effect of this provision would be to modify the existing practice under which in such cases the Government has the final choice of the jurisdiction where the prosecution should be conducted. The matter will now be left in the discretion of the court.

3. The rule provides for a change of venue only on defendant's motion and does not extend the same right to the prosecution, since the defendant has a constitutional right to a trial in the district where the offense was committed. Constitution of the United States, Article III, Sec. 2, Par. 3; Amendment VI. By making a motion for a change of venue, however, the defendant waives this constitutional right.

4. This rule is in addition to and does not supersede existing statutes enabling a party to secure a change of judge on the ground of personal bias or prejudice, 28 U.S.C. 25 [now 144]; or enabling the defendant to secure a change of venue as of right in certain cases involving offenses committed in more than one district, 18 U.S.C. 338a(d) [now 876, 3239] (Mailing threatening communications); *Id.* sec. 403d(d) [now 875, 3239] (Threatening communications in interstate commerce).

Note to Subdivision (c). Cf. 28 U.S.C. 114 [now 1393, 1441] and Rule 20, *supra*.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

Subdivision (a).—All references to divisions are eliminated in accordance with the amendment to Rule 18 eliminating division venue. The defendant is given the right to a transfer only when he can show that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in the district. Transfers within the district to avoid prejudice will be within the power of the judge to fix the place of trial as provided in the amendments to Rule 18. It is also made clear that on a motion to transfer under this subdivision the court may select the district to which the transfer may be made. Cf. *United States v. Parr*, 17 F.R.D. 512, 519 (S.D.Tex. (1955); *Parr v. United States*, 351 U.S. 513 (1956).

Subdivision (b).—The original rule limited change of venue for reasons other than prejudice in the district to those cases where venue existed in more than one district. Upon occasion, however, convenience of the parties and witnesses and the interest of justice would best be served by trial in a district in which no part of the offense was committed. See, e.g., *Travis v. United States*, 364 U.S. 631 (1961), holding that the only venue of a charge of making or filing a false non-Communist affidavit required by §9(h) of the National Labor Relations Act is in Washington, D.C. even though all the relevant witnesses may be located at the place where the affidavit was executed and mailed. See also Barber, Venue in Federal Criminal Cases: A Plea for Return to Principle, 42 Tex.L.Rev. 39 (1963); Wright, Proposed Changes in Federal Civil, Criminal and Appellate Procedure, 35 F.R.D. 317, 329 (1964). The amendment permits a transfer in any case on motion of the defendant on a showing that it would be for the convenience of parties and witnesses, and in the interest of justice. Cf. 28 U.S.C.

§1404(a), stating a similar standard for civil cases. See also *Platt v. Minnesota Min. & Mfg. Co.*, 376 U.S.C. 240 (1964). Here, as in subdivision (a), the court may select the district to which the transfer is to be made. The amendment also makes it clear that the court may transfer all or part of the offenses charged in a multicount indictment or information. Cf. *United States v. Choate*, 276 F.2d 724 (5th Cir. 1960). References to divisions are eliminated in accordance with the amendment to Rule 18.

Subdivision (c).—The reference to division is eliminated in accordance with the amendment to Rule 18.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 21 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 21(d) consists of what was formerly Rule 22. The Committee believed that the substance of Rule 22, which addressed the issue of the timing of motions to transfer, was more appropriate for inclusion in Rule 21.

COMMITTEE NOTES ON RULES—2010 AMENDMENT

Subdivision (b). This amendment requires the court to consider the convenience of victims—as well as the convenience of the parties and witnesses and the interests of justice—in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.

Changes Made to Proposed Amendment Released for Public Comment. No changes were made after the amendment was released for public comment.

Rule 22. [Transferred]

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Rule 22 has been abrogated. The substance of the rule is now located in Rule 21(d).

TITLE VI. TRIAL

Rule 23. Jury or Nonjury Trial

(a) JURY TRIAL. If the defendant is entitled to a jury trial, the trial must be by jury unless:

(1) the defendant waives a jury trial in writing;

(2) the government consents; and

(3) the court approves.

(b) JURY SIZE.

(1) *In General.* A jury consists of 12 persons unless this rule provides otherwise.

(2) *Stipulation for a Smaller Jury.* At any time before the verdict, the parties may, with the court's approval, stipulate in writing that:

(A) the jury may consist of fewer than 12 persons; or

(B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins.

(3) *Court Order for a Jury of 11.* After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.

(c) NONJURY TRIAL. In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion.

(As amended Feb. 28, 1966, eff. July 1, 1966; Pub. L. 95–78, §2(b), July 30, 1977, 91 Stat. 320; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

Note to Subdivision (a). 1. This rule is a formulation of the constitutional guaranty of trial by jury, Constitution of the United States, Article III, Sec. 2, Par. 3: ''The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *''; Amendment VI: ''In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *.'' The right to a jury trial, however, does not apply to petty offenses, *District of Columbia v. Clawans*, 300 U.S. 617; *Schick v. United States*, 195 U.S. 65; Frankfurter and Corcoran, 39 Harv.L.R. 917. Cf. Rule 38(a) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix].

2. The provision for a waiver of jury trial by the defendant embodies existing practice, the constitutionality of which has been upheld, *Patton v. United States*, 281 U.S. 276; *Adams v. United States ex rel. McCann*, 317 U.S. 269; Cf. Rules 38 and 39 of Federal Rules of Civil Procedure [28 U.S.C., Appendix]. Many States by express statutory provision permit waiver of jury trial in criminal cases. See A.L.I. Code of Criminal Procedure Commentaries, pp. 807–811.

Note to Subdivision (b). This rule would permit either a stipulation before the trial that the case be tried by a jury composed of less than 12 or a stipulation during the trial consenting that the case be submitted to less than 12 jurors. The second alternative is useful in case it becomes necessary during the trial to excuse a juror owing to illness or for some other cause and no alternate juror is available. The rule is a restatement of existing practice, the constitutionality of which was approved in *Patton v. United States*, 281 U.S. 276.

Note to Subdivision (c). This rule changes existing law in so far as it requires the court in a case tried without a jury to make special findings of fact if requested. Cf. Connecticut practice, under which a judge in a criminal case tried by the court without a jury makes findings of fact, *State v. Frost*, 105 Conn. 326.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

This amendment adds to the rule a provision added to Civil Rule 52(a) in 1946.

NOTES OF ADVISORY COMMITTEE ON RULES—1977 AMENDMENT

The amendment to subdivision (b) makes it clear that the parties, with the approval of the court, may enter into an agreement to have the case decided by less than twelve jurors if one or more jurors are unable or disqualified to continue. For many years the Eastern District of Virginia has used a form entitled, ''Waiver of Alternate Jurors.'' In a substantial percentage of cases the form is signed by the defendant, his attorney, and the Assistant United States Attorney in advance of trial, generally on the morning of trial. It is handled automatically by the courtroom deputy clerk who, after completion, exhibits it to the judge.

This practice would seem to be authorized by existing rule 23(b), but there has been some doubt as to whether the pretrial stipulation is effective unless again agreed to by a defendant at the time a juror or jurors have to be excused. See 8 J. Moore, Federal Practice ¶23.04 (2d. ed. Cipes, 1969); C. Wright, Federal Practice and Procedure: Criminal §373 (1969). The proposed amendment is