

§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 multi-count 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 constitutional-ity 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

intended to make clear that the pretrial stipulation is an effective waiver, which need not be renewed at the time the incapacity or disqualification of the juror becomes known.

In view of the fact that a defendant can make an effective pretrial waiver of trial by jury or by a jury of twelve, it would seem to follow that he can also effectively waive trial by a jury of twelve in situations where a juror or jurors cannot continue to serve.

As has been the practice under rule 23(b), a stipulation addressed to the possibility that some jurors may later be excused need not be open-ended. That is, the stipulation may be conditioned upon the jury not being reduced below a certain size. See, e.g., *Williams v. United States*, 332 F.2d 36 (7th Cir. 1964) (agreement to proceed if no more than 2 jurors excused for illness); *Rogers v. United States*, 319 F.2d 5 (7th Cir. 1963) (same).

Subdivision (c) is changed to make clear the deadline for making a request for findings of fact and to provide that findings may be oral. The oral findings, of course, become a part of the record, as findings of fact are essential to proper appellate review on a conviction resulting from a nonjury trial. *United States v. Livingston*, 459 F.2d 797 (3d Cir. 1972).

The meaning of current subdivision (c) has been in some doubt because there is no time specified within which a defendant must make a "request" that the court "find the facts specially." See, e.g., *United States v. Rivera*, 444 F.2d 136 (2d Cir. 1971), where the request was not made until the sentence had been imposed. In the opinion the court said:

This situation might have raised the interesting and apparently undecided question of when a request for findings under Fed. R. Crim. P. 23(c) is too late, since Rivera's request was not made until the day after sentence was imposed. See generally *Benchwick v. United States*, 297 F.2d 330, 335 (9th Cir. 1961); *United States v. Morris*, 263 F.2d 594 (7th Cir. 1959).

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 95-354; 1977 AMENDMENTS PROPOSED BY THE SUPREME COURT

Subsection (b) of section 2 of the bill simply approves the Supreme Court proposed changes in subdivisions (b) and (c) of rule 23 for the reasons given by the Advisory Committee on Rules of Practice and Procedure to the Judicial Conference.

CONGRESSIONAL APPROVAL OF PROPOSED 1977 AMENDMENTS

Pub. L. 95-78, §2(b), July 30, 1977, 91 Stat. 320, provided that: "The amendments proposed by the Supreme Court [in its order of Apr. 26, 1977] to subdivisions (b) and (c) of rule 23 of such Rules of Criminal Procedure [subd. (b) and (c) of this rule] are approved."

NOTES OF ADVISORY COMMITTEE ON RULES—1983 AMENDMENT

*Note to Subdivision (b).* The amendment to subdivision (b) addresses a situation which does not occur with great frequency but which, when it does occur, may present a most difficult issue concerning the fair and efficient administration of justice. This situation is that in which, after the jury has retired to consider its verdict and any alternate jurors have been discharged, one of the jurors is seriously incapacitated or otherwise found to be unable to continue service upon the jury. The problem is acute when the trial has been a lengthy one and consequently the remedy of mistrial would necessitate a second expenditure of substantial prosecution, defense and court resources. See, e.g., *United States v. Meinster*, 484 F.Supp. 442 (S.D.Fla. 1980), aff'd sub nom. *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981) (juror had heart attack during deliberations after "well over four months of trial"); *United States v. Barone*, 83 F.R.D. 565 (S.D. Fla. 1979) (juror removed upon recommendation of psychiatrist during deliberations after "approximately six months of trial").

It is the judgment of the Committee that when a juror is lost during deliberations, especially in circum-

stances like those in *Barone* and *Meinster*, it is essential that there be available a course of action other than mistrial. Proceeding with the remaining 11 jurors, though heretofore impermissible under rule 23(b) absent stipulation by the parties and approval of the court, *United States v. Taylor*, 507 F.2d 166 (5th Cir. 1975), is constitutionally permissible. In *Williams v. Florida*, 399 U.S. 78 (1970), the Court concluded

the fact that the jury at common law was composed of precisely 12 is an historical accident, unnecessary to effect the purposes of the jury system and wholly without significance "except to mystics."

\* \* \* To read the Sixth Amendment as forever codifying a feature so incidental to the real purpose of the Amendment is to ascribe a blind formalism to the Framers which would require considerably more evidence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions. \* \* \* Our holding does no more than leave these considerations to Congress and the States, unrestrained by an interpretation of the Sixth Amendment which would forever dictate the precise number which can constitute a jury.

*Williams* held that a six-person jury was constitutional because such a jury had the "essential feature of a jury," i.e., "the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility which results from that group's determination of guilt or innocence," necessitating only a group "large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community." This being the case, quite clearly the occasional use of a jury of slightly less than 12, as contemplated by the amendment to rule 23(b), is constitutional. Though the alignment of the Court and especially the separate opinion by Justice Powell in *Apodoca v. Oregon*, 406 U.S. 404 (1972), makes it at best uncertain whether less-than-unanimous verdicts would be constitutionally permissible in federal trials, it hardly follows that a requirement of unanimity of a group slightly less than 12 is similarly suspect.

The *Meinster* case clearly reflects the need for a solution other than mistrial. There twelve defendants were named in a 36-count, 100-page indictment for RICO offenses and related violations, and the trial lasted more than four months. Before the jury retired for deliberations, the trial judge inquired of defense counsel whether they would now agree to a jury of less than 12 should a juror later be unable to continue during the deliberations which were anticipated to be lengthy. All defense counsel rejected that proposal. When one juror was excused a day later after suffering a heart attack, all defense counsel again rejected the proposal that deliberations continue with the remaining 11 jurors. Thus, the solution now provided in rule 23(b), stipulation to a jury of less than 12, was not possible in that case, just as it will not be possible in any case in which defense counsel believe some tactical advantage will be gained by retrial. Yet, to declare a mistrial at that point would have meant that over four months of trial time would have gone for naught and that a comparable period of time would have to be expended on retrial. For a variety of reasons, not the least of which is the impact such a retrial would have upon that court's ability to comply with speedy trial limits in other cases, such a result is most undesirable.

That being the case, it is certainly understandable that the trial judge in *Meinster* (as in *Barone*) elected to substitute an alternate juror at that point. Given the rule 23(b) bar on a verdict of less than 12 absent stipulation, *United States v. Taylor*, supra, such substitution seemed the least objectionable course of action. But in terms of what change in the Federal Rules of Criminal Procedure is to be preferred in order to facilitate response to such situations in the future, the judgment of the Advisory Committee is that it is far better to permit the deliberations to continue with a jury of 11 than to make a substitution at that point.

In rejecting the substitution-of-juror alternative, the Committee's judgment is in accord with that of most commentators and many courts.

There have been proposals that the rule should be amended to permit an alternate to be substituted if a regular juror becomes unable to perform his duties after the case has been submitted to the jury. An early draft of the original Criminal Rules had contained such a provision, but it was withdrawn when the Supreme Court itself indicated to the Advisory Committee on Criminal Rules doubts as to the desirability and constitutionality of such a procedure. These doubts are as forceful now as they were a quarter century ago. To permit substitution of an alternate after deliberations have begun would require either that the alternate participate though he has missed part of the jury discussion, or that he sit in with the jury in every case on the chance he might be needed. Either course is subject to practical difficulty and to strong constitutional objection.

Wright, *Federal Practice and Procedure*, §388 (1969). See also Moore, *Federal Practice* par. 24.05 (2d ed. Cipes 1980) ("The inherent coercive effect upon an alternate who joins a jury leaning heavily toward a guilty verdict may result in the alternate reaching a premature guilty verdict"); 3 *ABA Standards for Criminal Justice* §15-2.7, commentary (2d ed. 1980) ("It is not desirable to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without the benefit of earlier group discussion"); *United States v. Lamb*, 529 F.2d 1153 (9th Cir. 1975); *People v. Ryan*, 19 N.Y.2d 100, 224 N.E.2d 710 (1966). Compare *People v. Collins*, 17 Cal.3d 687, 131 Cal.Rptr. 782, 522 P.2d 742 (1976); *Johnson v. State*, 267 Ind. 256, 396 N.E.2d 623 (1977).

The central difficulty with substitution, whether viewed only as a practical problem or a question of constitutional dimensions (procedural due process under the Fifth Amendment or jury trial under the Sixth Amendment), is that there does not appear to be any way to nullify the impact of what has occurred without the participation of the new juror. Even were it required that the jury "review" with the new juror their prior deliberations or that the jury upon substitution start deliberations anew, it still seems likely that the continuing jurors would be influenced by the earlier deliberations and that the new juror would be somewhat intimidated by the others by virtue of being a newcomer to the deliberations. As for the possibility of sending in the alternates at the very beginning with instructions to listen but not to participate until substituted, this scheme is likewise attended by practical difficulties and offends "the cardinal principle that the deliberations of the jury shall remain private and secret in every case." *United States v. Virginia Election Corp.*, 335 F.2d 868 (4th Cir. 1964).

The amendment provides that if a juror is excused after the jury has retired to consider its verdict, it is within the discretion of the court whether to declare a mistrial or to permit deliberations to continue with 11 jurors. If the trial has been brief and not much would be lost by retrial, the court might well conclude that the unusual step of allowing a jury verdict by less than 12 jurors absent stipulation should not be taken. On the other hand, if the trial has been protracted the court is much more likely to opt for continuing with the remaining 11 jurors.

#### COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 23 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.

In current Rule 23(b), the term "just cause" has been replaced with the more familiar term "good cause," that appears in other rules. No change in substance is intended.

#### EFFECTIVE DATE OF 1977 AMENDMENT

Amendment of this rule by order of the United States Supreme Court on Apr. 26, 1976, approved by Pub. L. 95-78, effective Oct. 1, 1977, see section 4 of Pub. L. 95-78, set out as an Effective Date of Pub. L. 95-78 note under section 2074 of Title 28, Judiciary and Judicial Procedure.

#### Rule 24. Trial Jurors

##### (a) EXAMINATION.

(1) *In General*. The court may examine prospective jurors or may permit the attorneys for the parties to do so.

(2) *Court Examination*. If the court examines the jurors, it must permit the attorneys for the parties to:

(A) ask further questions that the court considers proper; or

(B) submit further questions that the court may ask if it considers them proper.

(b) *PEREMPTORY CHALLENGES*. Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.

(1) *Capital Case*. Each side has 20 peremptory challenges when the government seeks the death penalty.

(2) *Other Felony Case*. The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.

(3) *Misdemeanor Case*. Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.

##### (c) ALTERNATE JURORS.

(1) *In General*. The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties.

##### (2) Procedure.

(A) Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror.

(B) Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors.

(3) *Retaining Alternate Jurors*. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

(4) *Peremptory Challenges*. Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below. These additional challenges may be used only to remove alternate jurors.

(A) *One or Two Alternates*. One additional peremptory challenge is permitted when one or two alternates are impaneled.