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Criminal Law - Post-Submission Juror Substitution in the Third Circuit: Serving Judicial Economy While Undermining a Defendant's Rights to an Impartial Jury under Rule 24(c)

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CRIMINAL LAW—POST-SUBMISSION JUROR SUBSTITUTION IN THE THIRD CIRCUIT: SERVING JUDICIAL ECONOMY WHILE UNDERMINING A DEFENDANT'S RIGHTS TO AN IMPARTIAL JURY UNDER RULE 24(c)

I. INTRODUCTION

At common law, courts would discharge a juror and declare a mistrial if he or she became incapacitated or disqualified during a criminal trial.[1] This practice resulted in a substantial expenditure of resources by the prosecution, defense and court.[2] Losses were especially acute where the trial had already extended for a considerable period of time.[3]

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1. *See* Joshua G. Grunat, Note, *Post-Submission Substitution of Alternate Jurors in Federal Criminal Cases: Effects of Violations of Federal Rules of Criminal Procedure 23(b) and 24(c)*, 55 FORDHAM L. REV. 861, 861 (1987) (discussing how mistrial declared in criminal case when juror became incapacitated after jury was impaneled); Douglas J. McDermott, Note, *Substitution of Alternate Jurors During Deliberations and Implications on the Rights of Litigants: The Reginald Denny Trial*, 35 B.C. L. REV. 847, 847 (1994) (same); David Paul Nicoli, Note, *Federal Rules of Criminal Procedure 23(b) and 24(c): A Proposal to Reduce Mistrials Due to Incapacitated Jurors*, 31 AM. U. L. REV. 651, 651 (1981) (commenting that "when a juror in a criminal trial became incapacitated by illness or death, or for other reasons after the jury was impaneled, the proper procedure was to declare a mistrial and begin *de novo* by forming a new jury").

Jurors are discharged when they can no longer serve on the jury because they are mentally or physically ill. *See, e.g.*, Claudio v. Snyder, 68 F.3d 1573, 1574 (3d Cir. 1995) (upholding discharge of juror because he became ill after six and one-half hours of deliberations), *cert. denied*, 116 S. Ct. 1329 (1996); Peek v. Kemp, 784 F.2d 1479, 1482-85 (11th Cir. 1986) (en banc) (upholding discharge of juror because of extreme nervousness); United States v. Hillard, 701 F.2d 1052, 1055-57 (2d Cir. 1983) (upholding discharge of juror when juror became ill after two and one-half days of deliberations and three-day holiday recess); United States v. Barone, 83 F.R.D. 565, 565-68 (S.D. Fla. 1979) (upholding removal of juror upon recommendation of psychiatrist during deliberations after about six months of trial).

When a juror cannot deliberate with an open mind, a court will "disqualify" and discharge the juror. *See, e.g.*, United States v. Josefik, 753 F.2d 585, 587 (7th Cir. 1985) (finding juror unqualified because she had trouble hearing during trial); United States v. Barker, 735 F.2d 1280, 1282-83 (11th Cir. 1984) (finding juror unqualified because she touched defendant's arm and smiled at him).

2. *See* McDermott, *supra* note 1, at 847 (discussing substantial expenditures caused by mistrials at common law); *see also* FED. R. CRIM. P. 23(b) advisory committee's note, 97 F.R.D. 245, 298-301 (1983) (discussing solution to substantial expenditures of legal resources). In 1983, the Advisory Committee for the Federal Rules of Criminal Procedure reviewed an amendment to Rule 23(b) allowing for the validity of 11-member jury verdicts to be in the discretion of the judge in cases where a juror had been excused. *Id.* at 245, 297-301. The committee was concerned with the "fair and efficient administration of justice" in these difficult situations. *Id.* at 298.

3. *See* FED. R. CRIM. P. 23(b) advisory committee's note, 97 F.R.D. at 298 (discussing problems arising if juror is lost after deliberations commence). The Advisory Committee admitted that the removal of jurors after the beginning of

To alleviate the problems associated with mistrials, the Supreme Court and Congress adopted Rules 23(b) and 24(c) of the Federal Rules of Criminal Procedure.[4] Both rules approach these problems in unique ways. Rule 24(c) allows a judge to replace one of the original jurors with an alternate juror prior to deliberation.[5] Rule 23(b) allows a judge to use his or her discretion on whether to continue with only eleven jurors, without needing to obtain the permission of either the defense or prosecution.[6]

Even though the directives of Rules 23(b) and 24(c) are clear, many federal courts have continued to disregard the rules and have adopted their own procedures to deal with these post-submission substitution of juror cases.[7] Some courts will allow alternates to sit in on the deliberation process in case one of the original jurors becomes incapacitated or disqualified.[8] Other courts sequester alternate jurors separately until the

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deliberations did not "occur with great frequency," but it presented a difficult problem when it did appear. *Id.*

4. *See* Preliminary Draft of Proposed Amendment to the Federal Rules of Criminal Procedure, 91 F.R.D. 289, 337-45 (1981). Rules 23(b) and 24(c) were adopted in response to this problem in 1946 and 23(b) was later amended in 1983. *See generally* FED. R. CRIM. P. 23(b) advisory committee's note, 97 F.R.D. at 298-301 (discussing amendment to Rule 23(b) as solution to post-submission juror substitution after deliberations begin); Lester B. Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43 (1962) [hereinafter Orfield, *Trial Jurors*] (discussing history of Rule 24 in response to mistrials from discharge of jurors); Lester B. Orfield, *Trial by Jury in Federal Criminal Procedure*, 1962 DUKE L.J. 29 (discussing history of Rule 23 as response to mistrials from discharge of jurors).

5. FED. R. CRIM. P. 24(c). Rule 24(c) provides: "[A]lternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties." *Id.* In addition, Rule 24(c) provides: "Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors." *Id.*

6. FED. R. CRIM. P. 23(b). For a further discussion of the amendments to Rule 23(b), see *infra* notes 66-71 and accompanying text.

7. For a discussion of the improvised procedures federal courts use when deciding post-submission substitution cases, see *infra* notes 8-10, 79-121 and accompanying text.

8. *See, e.g.*, United States v. Olano, 507 U.S. 725, 741 (1993) (allowing presence of silent alternates during deliberations because defense counsel failed to object to their presence and defendants not prejudiced), *cert. denied*, 17 S. Ct. 303 (1996); Johnson v. Duckworth, 650 F.2d 122, 126 (7th Cir. 1981) (allowing alternate to attend but not participate in jury deliberations); United States v. Allison, 481 F.2d 468, 470-72 (5th Cir. 1973) (allowing sit-in procedure when parties agree to stipulation); La-Tex Supply Co. v. Fruehauf Trailer Div., 444 F.2d 1366, 1367 (5th Cir. 1971) (allowing alternate to be present during deliberation because both counsels consented). *But see, e.g.*, United States v. Ottersburg, 76 F.3d 137, 139 (7th Cir. 1996) (holding that allowing two alternate jurors to sit-in on deliberations and to sign verdict form was reversible error); United States v. Chatman, 584 F.2d 1358, 1361 (4th Cir. 1978) (holding reversible error is present when trial court allows alternate's presence in deliberation room); United States v. Beasley, 464 F.2d 468, 470-71 (10th Cir. 1972) (holding mistrial was necessary when alternate observed deliberations and helped select foreperson); United States v. Vir-

original twelve jurors have completed deliberations.[9] Finally, a number of courts continue to permit the post-submission substitution of alternate jurors after the jury begins deliberations.[10]

Thus, there is a building trend in our federal system for courts to implement their own procedures to sidestep Rule 24(c)'s mandatory discharge of alternate jurors after deliberations begin[11] and Rule 24's prohibition against post-submission substitution of jurors.[12] Currently, the circuit courts appear to disagree over whether a clear violation of 24(c) amounts to a reversible error in all cases.[13]

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ginia Erection Corp., 335 F.2d 868, 871-72 (4th Cir. 1964) (holding reversible error occurs when district court permitted alternate to retire with jury to observe deliberations).

9. *See, e.g.*, Claudio v. Snyder, 68 F.3d 1573, 1574 (3d Cir. 1995) (permitting alternate jurors to be separately sequestered), *cert. denied*, 116 S. Ct. 1329 (1996); United States v. Rubio, 727 F.2d 786, 799 (9th Cir. 1983) (same); United States v. Hillard, 701 F.2d 1052, 1055 (2d Cir. 1983) (allowing two alternates to be separately sequestered during deliberations); United States v. Hayutin, 398 F.2d 944, 950 (2d Cir. 1968) (holding retention of alternate jurors did not prejudice defendant).

10. *See, e.g.*, United States v. Quiroz-Cortez, 960 F.2d 418, 421 (5th Cir. 1992) (allowing juror substitution after deliberations because defendant was not prejudiced); United States v. Guevara, 823 F.2d 446, 448 (11th Cir. 1987) (holding defendant was not prejudiced by post-submission substitution when defendant expressly demanded that alternate be impaneled rather than continue with only 11 jurors); Peek v. Kemp, 784 F.2d 1479, 1485 (11th Cir. 1986) (en banc) (holding defendant suffered no prejudice by post-submission substitution); Miller v. Stagner, 757 F.2d 988, 995 (9th Cir. 1985) (upholding post-submission substitution procedure because it "preserved the 'essential feature' of the jury"); United States v. Josefik, 753 F.2d 585, 587-88 (7th Cir. 1985) (holding post-submission substitution of jurors permissible when defendant not prejudiced); *Hillard*, 701 F.2d at 1061 (holding post-submission substitution is permissible when efforts are taken to ensure that defendant is not prejudiced); United States v. Evans, 635 F.2d 1124, 1127-28 (4th Cir. 1980) (upholding post-submission substitution procedure because prejudicial effect was eliminated by defendant's consent and absence during previous deliberations); Henderson v. Lane, 613 F.2d 175, 179 (7th Cir. 1980) (allowing juror substitution after deliberations if "essential feature of the jury was preserved"); United States v. Baccari, 489 F.2d 274, 275 (10th Cir. 1973) (upholding post-submission substitution because defendant consented and knowingly waived any objections); Leser v. United States, 358 F.2d 313, 317 (9th Cir. 1966) (holding post-submission substitution is permissible if defendant suffers no prejudice and defendant knowingly consents). *But see* United States v. Lamb, 529 F.2d 1153, 1156 (9th Cir. 1975) (holding post-submission substitution impermissible if defendant does not consent to procedure).

11. For a review of cases that violate rule 24(c)'s mandatory discharge of alternate jurors once deliberations begin, see *supra* notes 8-10 and *infra* notes 79-121 and accompanying text.

12. *See* Grunat, *supra* note 1, at 863-64 (commenting that many courts now allow post-submission substitution); McDermott, *supra* note 1, at 848 (discussing how increasing number of courts create post-submission procedures in violation of Rule 24(c)). For a review of cases that violate Rule 24(c)'s prohibition against post-submission substitution, see *supra* note 10 and *infra* notes 79-121 and accompanying text.

13. For a discussion about the debate among the circuits over post-submission substitution, see *infra* notes 79-121 and accompanying text.

Recently, the United States Court of Appeals for the Third Circuit in *Claudio v. Snyder*,[14] held that post-submission substitutions are permissible if the defendant is not prejudiced by the substitution and the "essential feature" of the jury is preserved.[15] *Claudio* has special significance because it presented a question of first impression in the Third Circuit.[16] The Court reasoned that post-submission substitution of alternates does not violate a defendant's right to a jury trial under the Sixth and Fourteenth Amendments if the court's instructions to the newly formed jury acts as the "functional equivalent" of instructing the jury to begin deliberations again.[17] In addition, the Third Circuit held that reversal is not required as long as the substitution of the alternate juror does not compromise the "essential feature" of a trial by jury.[18]

This Casebrief argues that the Third Circuit's judicially improvised post-submission substitution procedure promotes judicial economy and efficiency, but endangers the defendant's right to a trial by jury under the Sixth and Fourteenth Amendments. Part I of this Casebrief reviews the importance of the jury system and deliberation process in the American legal system.[19] Part II discusses the development of Rules 24(c) and 23(b).[20] Next, Part III reviews the various approaches to post-submission substitution in the federal system.[21] Part IV analyzes the Third Circuit's view of post-submission substitution in *Claudio*.[22] Part V explains how the Third Circuit's ruling has compromised the sanctity and impartiality of the jury deliberation process.[23] Finally, Part VI recommends how attorneys in the Third Circuit should proceed in the future.[24]

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14. 68 F.3d 1573 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1329 (1996).

15. *Id.* at 1576-77. The Court of Appeals for the Third Circuit held that post-submission substitution is constitutional as long as the "essential feature" of a jury trial is preserved and the defendant suffers "no prejudice as a result." *Id.* at 1576 (citing *Hillard*, 701 F.2d at 1056-57).

16. *Id.* at 1574.

17. *Id.* at 1577. The court concluded that the judge's instructions to "take whatever time is necessary" to the reconstituted jury was the functional equivalent of instructing the jury to begin deliberations anew. *Id.* For a further discussion of the Third Circuit's analysis of post-submission substitution in *Claudio*, see *infra* notes 135-47 and accompanying text.

18. *Claudio*, 68 F.3d at 1577.

19. For a discussion of the development of the American jury system, see *infra* notes 25-55 and accompanying text.

20. For an analysis of Rules 23(b) and 24(c), see *infra* notes 56-78 and accompanying text.

21. For a review of circuit court decisions on post-submission substitution, see *infra* notes 79-121 and accompanying text.

22. For a review of the Third Circuit's approach toward post-submission substitution, see *infra* notes 135-47 and accompanying text.

23. For an analysis of the Third Circuit's ruling in *Claudio*, see *infra* notes 148-88 and accompanying text.

24. For a guide to interpreting the Third Circuit's ruling on post-submission substitution and the impact on defendants, see *infra* notes 189-95 and accompanying text.

II. THE JURY SYSTEM

The English colonists who emigrated to America brought with them the common law right to a jury trial in criminal justice cases.[25] Thus, traditionally the right to a jury trial has been one of the most important rights for any criminal defendant.[26] Further, the Sixth Amendment guarantees a trial by an impartial jury.[27] The founders of this nation believed

25. Duncan v. Louisiana, 391 U.S. 145, 151-52 (1968) (tracing history of jury trial). The colonists' passion towards the use of the jury trial can be traced to their deep resentment towards royal interference with the jury trial. *Id.*

The importance of the jury trial can be traced back to the 18th century, when Blackstone wrote:

> Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and perogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of oyer and terminer occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrive that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion.

Id. (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349, 349-50 (Thomas M. Cooley ed., 1899)).

For a historical perspective of juries in America, see McDermott, *supra* note 1, at 849-53.

26. Thompson v. State of Utah, 170 U.S. 343, 349-50 (1898) (noting colonists believed that right to trial by their peers was their birthright and inheritance from England). On October 14, 1774 at the First Continental Congress, the colonists objected to trials before judges paid by the Crown and trials held in England for crimes allegedly committed on colonial soil. *Duncan*, 391 U.S. at 152 (citing SOURCES OF OUR LIBERTIES 270, 288 (Richard L. Perry ed., 1959)). The Congress declared: "'That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.'" *Id.* (quoting SOURCE OF OUR LIBERTIES 288 (R. Perry ed., 1959)). The Constitution answered the colonists concerns by mandating jury trials. U.S. CONST. art. III, § 2 cl. 3 ("The trial of all Crimes . . . shall be by Jury."). Next, the Sixth Amendment provided that an individual shall enjoy a trial by an impartial jury. U.S. CONST. amend VI. Finally, the importance of the jury trial was applied to the states through the Fourteenth Amendment. *See Duncan*, 391 U.S. at 157-88 ("[I]n the American States . . . a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."). The Fourteenth Amendment reads in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

27. U.S. CONST. amend. VI. The Sixth Amendment states:

> 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

that the jury trial was an essential ingredient for a thriving democracy.[28] Therefore, this right is guaranteed in Article III, section 2, clause 3 of the United States Constitution: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury."[29]

Many commentators believe the use of a twelve member jury is superior to a system relying only on professional judges to render verdicts.[30] Many supporters of the jury system praise the current system's ability to carve out a representative cross-section of society that can apply its overall common sense judgement to the particular facts at hand.[31] Some critics argue, however, that the jury system is plagued with problems because the best qualified individuals usually are exempted, while uneducated, less-qualified individuals are chosen instead.[32]

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crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

28. *See* 3 LESTER B. ORFIELD, ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 23:2, at 4-5 (1966) (viewing jury trial as "traditionally . . . one of the most important rights of the criminal defendant"); *see also* Philip H. Corboy, *The Right to Trial by Jury*, 4 AM. J. TRIAL ADVOC. 65, 68 (1980) (discussing founders praise of jury system). The importance of the jury trial in our legal system is demonstrated by the Constitution's original guarantee to a trial by jury and by the fact that every state which has entered the union has protected the jury trial in one form or another. *Duncan*, 391 U.S. at 153-54.

29. U.S. CONST. art. III, § 2, cl. 3.

30. *See* Corboy, *supra*, note 27, at 68-69 (criticizing commentators who believe professional judges possess superior fact-finding abilities over jury of peers); *see also Duncan*, 391 U.S. at 156 (commenting that jury provides protection against corrupt prosecutor or biased judge); Singer v. United States, 380 U.S. 24, 31 (1965) (opining that jury system was "clearly intended to protect the accused from oppression by the Government"); SIR PATRICK DEVLIN, TRIAL BY JURY 164 (1956) (recognizing that one of tyrant's main objectives would be to eliminate trial by jury); McDermott, *supra* note 1, at 850 (discussing how commentators label jury process as "remarkable political institution"). One commentator notes that the jury system is "an exciting experiment in human affairs." *Id.* at 850 n.27 (citing HARRY KALVERN, JR. & HANS ZEISEL, THE AMERICAN JURY 1 (1966)).

31. *See Duncan*, 391 U.S. at 156 (commenting that framers felt "[i]f the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it"); *see also* McDermott, *supra* note 1, at 851, n.32 (citing REID HASTIE ET. AL., INSIDE THE JURY 5 (1983) (opining "[b]y bringing together representative cross-sections of the community and their aggregate common sense judgment, the process promotes accurate and reliable findings of fact")).

32. *See Duncan*, 391 U.S. at 157 (commenting "at the heart of the dispute have been express or implicit assertions that juries are incapable of adequately understanding evidence or determining issues of fact, and that they are unpredictable, quixotic, and little better than a roll of dice").

Nevertheless, juries historically have been a mechanism designed to prevent oppression by the government.[33] In *Duncan v. Louisiana*,[34] the Supreme Court commented that "providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[35] This thought reflects the views of the framers of the Constitution that a professional judge does not possess superior fact-finding abilities over a jury of our peers to guard against violations of our constitutional rights.[36] Therefore, the *Duncan* Court decided that the best way to protect against governmental infringement of a defendant's rights is through a jury composed of a representative cross-section of the community.[37]

The right to a twelve-member jury developed through the Magna Carta and English common law before being brought to the United States.[38] Therefore, the Supreme Court originally held that a jury must

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33. For a discussion of the development of the jury as a way to combat against government oppression, see *supra* notes 34-37 and accompanying text.

34. 391 U.S. 145 (1968).

35. *Id.* at 156. In *Duncan*, the defendant was convicted of simple battery under Louisiana law. *Id.* at 146. Simple battery was considered a misdemeanor, punishable by a maximum of two years in prison and a fine of $300. *Id.* The trial court denied the defendant's request for a jury trial because the Louisiana Constitution only granted a jury trial in cases in which capital punishment or imprisonment at hard labor may be imposed. *Id.* The defendant was sentenced only to serve 60 days in jail in a parish prison and pay a $150 fine. *Id.* The defendant sought review from the Supreme Court, alleging his Sixth and Fourteenth Amendments right to a jury trial were violated by the trial court's ruling. *Id.* at 146-47. The Supreme Court held that the trial court's denial of a jury trial violated the defendant's Sixth Amendment guarantee to a jury trial. *Id.* at 149-50. The Court concluded "[i]t is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense. Consequently, appellant was entitled to a jury trial and it was error to deny it." *Id.* at 161-62.

36. *Id.* at 156. The Court opined "the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id.*

37. *Id.* The *Duncan* Court explained that the:

> Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

Id.

38. Thompson v. Utah, 170 U.S. 343, 349-50 (1898). The Court opined: "Those who emigrated to this country from England brought with them [the right to a jury of twelve members] 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'" *Id.* (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1779). *But see* Felix

contain twelve members to be constitutional.[39] The Court continued to mandate the need for a twelve-member jury in federal criminal cases.[40] Then, in the seminal case *Williams v. Florida*,[41] the Supreme Court held that although the federal Constitution does not preserve the common law right to a jury of twelve persons, it does preserve the "essential feature" of the jury's deliberative process at common law.[42] The Court described the "essential feature" of the jury's deliberative process as "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."[43] The Court concluded that the precise number twelve was simply

Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 922 n.14 (1926) (disagreeing with *Thompson* Court's reliance on Magna Carta as historians have discovered number 12 was historical accident).

39. Thompson, 170 U.S. at 349-50. In *Thompson*, the defendant was convicted by a jury of only eight members in a Utah court. *Id.* at 344. The Supreme Court reversed the conviction of the defendant because Utah's constitutional provision allowing for a jury of eight members was an ex post facto law as applied to the defendant. *Id.* at 355. The Court concluded that the Sixth Amendment's guarantee to a jury trial required 12 jurors to deliberate. *Id.* The Court reasoned that at common law a jury of "twelve persons, neither more nor less" was required. *Id.* at 349. The Court stated that the words "jury" and "trial by jury" in the Constitution encompassed the common law requirement of twelve jurors. *Id.* at 350. The Court further reasoned that if a jury is reduced from 12 jurors to eight, there is no way to prevent the eventual erosion of the jury system altogether. *Id.* at 353.

40. *See* Stewart v. United States, 366 U.S. 1, 10 (1961) (holding that "under our system, a man is entitled to the findings of 12 jurors on evidence fairly and properly presented to them").

41. 399 U.S. 78 (1970).

42. *Id.* at 100 (proclaiming jury number should be large enough to promote deliberation free from outside intimidation and provide for cross-section of community); *see* Grunat, *supra* note 1, at 865-66 ("The Court found that one essential feature is the 'commonsense judgment of a group of laymen,' free from outside influences.").

The *Williams* Court found, after carefully tracing the history of 12 jurors throughout common law, that the precise number 12 was simply a "historical accident." *Williams*, 399 U.S. at 102. The Court relied on Justice Harlan's dissent in *Duncan v. Louisiana*. *Id.* (citing *Duncan*, 391 U.S. at 182 (Harlan, J., dissenting)). In *Duncan*, Justice Harlan opined: "I should think it equally obvious that the rule, imposed long ago in federal courts, that 'jury' means 'jury of exactly twelve,' is not fundamental to anything: there is no significance except to mystics in the number 12." *Duncan*, 391 U.S. at 182 (Harlan, J., dissenting).

In *Williams*, the defendant claimed that the Florida court violated his Sixth Amendment right to a jury trial by refusing to grant his pretrial motion to impanel a 12-member jury. *Williams*, 399 U.S. at 79-80. The Florida court had impanelled a six-member jury pursuant to state law, which provided that a six-member jury was appropriate in all but capital cases. *Id.* at 80.

43. *Williams*, 399 U.S. at 100. The Court commented that neither the performance of this "essential feature," nor the reliability of the jury as a fact-finder were a function of its size. *Id.* Admittedly, the Court noted that the size of the jury should "probably be 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." *Id.* The Court, however, espoused

a historical accident, and a jury's size should be left up to the legislature to decide.[44] Therefore, a jury composed of less than twelve jurors is constitutional in federal criminal cases even though twelve-member juries are the national norm.[45]

One of the most integral ingredients to a successful deliberation process is an impartial jury.[46] The Sixth Amendment guarantees the right to be tried by an impartial jury that is free from outside influences.[47] An integral aspect of preserving an impartial jury is protecting the privacy and secrecy of jury deliberations.[48] Many commentators and courts believe that an individual juror's prejudices are conquered by the "free and uncoerced" participation of all the jurors.[49] In order to preserve this free

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that a jury comprised of six members would achieve these goals when the requirement of unanimity is retained. *Id.*

44. *Id.* at 102-03. The *Williams* Court opined:

> 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.

Id.

The Court made it clear that they did not mean to discourage legislatures from concluding that there can not be good reasons to prefer a 12-member jury to a smaller jury. *Id.* at 103. To guide legislatures, the Court commented that a 12-member jury may be more preferable in capital cases in recognition of the value of a larger juror group as a means of legitimating society's decision to impose the death penalty. *Id.* Subsequent to Congress' grant of procedural rule-making authority to the Supreme Court, the Court enacted Rules 23 and 24. *See* 18 U.S.C. § 3771 (1982) (authorizing Supreme Court rule-making authority); *see also* FED. R. CRIM. P. 23(b) (providing for 11-member jury verdicts).

45. *See* FED. R. CRIM. P. 23(b) (recommending juries of 12). Rule 23(b) states: "Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than twelve . . . ." *Id.*

46. *See* United States v. Chatman, 584 F.2d 1358, 1361 (4th Cir. 1978) (opining that even silent alternate's presence during deliberations would violate privacy and secrecy of jury); United States v. Leser, 358 F.2d 313, 318 (9th Cir. 1966) (discussing possibility of impinging upon secrecy and privacy of jury by allowing post-submission substitution); United States v. Virginia Erection Corp., 335 F.2d 868, 872 (4th Cir. 1964) (holding that "the presence of the alternate in the jury room violated the cardinal principle that the deliberations of the jury shall remain private and secret in every case"); *see also* Grunat, *supra* note 1, at 866 (recognizing need to protect privacy and secrecy of jury deliberations); McDermott, *supra* note 1, at 851-52 (same).

47. U.S. CONST. amend VI.

48. *See* Grunat, *supra* note 1, at 866 (emphasizing need to protect privacy and secrecy of jury).

49. *See* McDermott, *supra* note 1, at 852 (presenting views of social scientists). Courts and social scientists agree that the free and uncoerced participation of all jurors overcomes each individual's biases and allows a more accurate and objective determination of fact. *Id.* at 852 n.41 (citing REID HASTIE ET. AL., INSIDE THE JURY 5 (1983)). The intentional secrecy surrounding jury deliberations encourages the sharing of information. *Id.* at 852 n.42 (citing CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES & PROBLEMS 12 (1988));

exchange of ideas and mutual trust between jurors, the drafters of the Federal Rules of Evidence purposely preserved the secrecy of the deliberation process.[50]

One obstacle to free and uncoerced deliberations is the composition of the actual jury; some social scientists have found that a jury's demographics may affect the deliberation process.[51] Courts have commented on how the substitution of alternate jurors after the original jury has begun deliberations can adversely impact the deliberation process.[52] The drafters of the Federal Rules of Criminal Procedure recognized that when an alternate joins a jury after deliberations begin, the original jury usually has a coercive influence on the alternate; thus, the original jury may force the alternate to prematurely agree with its decision.[53] Research also illustrates that a new group member will usually find it difficult to change the opinions of an established group and may even favor the incorrect perceptions of the group.[54] These studies and opinions have lead to

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see also United States v. Watson, 669 F.2d 1374, 1391 (11th Cir. 1982) (preserving impartiality of jury through private deliberations free from external influences).

50. *See* FED. R. EVID. 606(b) (preserving sanctity of deliberations). Rule 606(b) reads as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Id.

51. *See* REID HASTIE ET AL., INSIDE THE JURY 5, 121 (1983) (discussing effects of factors such as age, sex and socio-economics on deliberation process). The way a juror interacts and deliberates with the other jurors may be governed by their social characteristics and thus impacts the dynamics of the jury. *Id.*

52. *See, e.g.*, United States v. Lamb, 529 F.2d 1153, 1156 (9th Cir. 1975) (commenting that "[t]he inherent coercive effect upon an alternate juror who joins a jury that has, as in this case, already agreed that the accused is guilty is substantial"); United States v. Beasley, 464 F.2d 468, 469-70 (10th Cir. 1972) (discussing application of prejudice test if alternate retires with jury).

53. *See* Orfield, *Trial Jurors, supra* note 4, at 50. The drafters of the Rules of Criminal Procedure were worried that if post-submission substitutions were allowed, "the members of the regular jury might bring such influence on a dissenter as to disable him and then require an alternate." *Id.* For example, "the alternate may have been exposed to improper influences before he takes part as he does not previously sit in the jury room." *Id.*

54. Grunat, *supra* note 1, at 878-79 nn.124-25. One study concentrated on what happens when a child with leadership qualities and a strong personality associates with an established group of children with their own traditions and rules. *Id.* at 878 n.124 (citing Merei, *Group Leadership and Institutionalization*, 2 HUM. REL. 23 (1949)). The study revealed that the new child's personality was engulfed into the established group, and the child's original ideas were never accepted by the group. *Id.* Similarly, this study has been applied to jurors, revealing that newcomers usually cannot change the ideas of the established group of jurors and soon succumb

an increased debate among courts over whether post-submission substitution of alternate jurors endangers the impartiality of the jury.[55]

III. DEVELOPMENT OF FEDERAL RULES OF CRIMINAL PROCEDURE: RULES 24(C) AND 23(B)

A. *The Original Rules*

Rules 24(c) and 23(b) were adopted to preserve the impartiality of the jury when juror substitution became necessary.[56] Under Rule 23(b), if a juror became incapacitated or disqualified during deliberations, the case would most likely end in mistrial.[57] This resulted in a substantial expenditure of prosecution, defense and court resources.[58] Rule 24(c) allows an

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to their beliefs. *Id.* (citing J. FREEDMAN ET AL., SOCIAL PSYCHOLOGY 157-58 (1970); Note, *Criminal Procedure—Jury Trial—Rule 24(c) of the Federal Rules of Criminal Procedure Requires Discharge of Alternate Juror When Jury Acts As Separate Entity*, 19 WAYNE L. REV. 1605, 1614 n.57 (1973)). Further, studies show that a new group member may internalize the incorrect perceptions of an established group rather than stick to his or her correct perceptions. *Id.* at 878 n.125. One study placed individuals into groups of eight male college students. *Id.* (citing Solomon E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgements*, 2 READINGS IN SOC. PSYCHOL. 2 (1952)). The group was then asked a series of questions and seven out of the eight students would answer the questions incorrectly. *Id.* On most occasions, the subject would conform to the group's answer and adopt an answer contrary to the objective facts. *Id.* Similarly, commentators have applied this study to jury deliberations, finding that an alternate juror could be pressured into adopting the opinions of the original jurors. *Id.* (citing HARRY KALVERN, JR. & HANS ZEISEL, THE AMERICAN JURY 462-63 (1966)).

55. For a review of cases discussing the constitutionality of post-submission substitution, see *infra* notes 79-121 and accompanying text.

56. *See* FED. R. CRIM. P. 23(b) advisory committee's note, 97 F.R.D. 245, 298-301 (1983) (discussing amendment to Rule 23(b) as solution to post-submission juror substitution after deliberations begin). The original Rule 23(b) read:

> Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any cause after trial commences.

FED. R. CRIM. P. 23(b).

57. FED. R. CRIM. P. 23(b) advisory committee's note, 97 F.R.D. at 298; *see also* FED. R. CRIM. P. 24(c), 23(b); United States v. Quiroz-Cortez, 960 F.2d 418, 419 (5th Cir. 1992) (upholding replacement of juror after deliberations because of hearing disability); Miller v. Stagner, 757 F.2d 988, 995 (9th Cir. 1985) (upholding dismissal of two jurors during deliberations because one became ill with flu and other had been intoxicated); United States v. Lamb, 529 F.2d 1153, 1155 (9th Cir. 1975) (excusing juror during deliberations because of death of friend was reversible error); Leser v. United States, 358 F.2d 313, 314-17 (9th Cir. 1966) (allowing replacement of juror because juror scheduled important medical procedure and defendant stipulated to replacement).

58. FED. R. CRIM. P. 23(b) advisory committee's note, 97 F.R.D. at 298. For a discussion concerning the probability of a mistrial if a juror was removed after deliberation began, see *supra* notes 1-3 and accompanying text.

alternate juror to replace one of the original jurors prior to deliberation.[59] Also under the original Rule 23(b), if a juror became incapacitated after deliberations, then the jury could proceed with less than twelve members where the defense and prosecution consented and the judge approved.[60]

The original rules gave the defendant a tactical advantage because he or she would never consent to a jury of less than twelve members when some advantage could be gained by a mistrial.[61] In response to this problem, courts created their own post-submission substitution procedures in direct contravention to Rule 24(c).[62]

The Supreme Court never directly addressed the constitutionality of the post-submission substitution of alternates for regular jurors.[63] Nevertheless, in 1942, the Supreme Court did question the constitutionality of such a procedure when it was proposed by the Federal Rules Committee as an amendment to Rule 24(c).[64] In fact, when the Supreme Court expressed their doubts as to the desirability and constitutionality of the proposal to permit the post-submission substitution of an alternate juror during deliberations, the Federal Rules Committee abandoned the idea.[65]

B. *The Amended Rules After 1983*

In an attempt to alleviate the dilemma caused by the post-submission discharge of jurors, the Federal Rules Committee presented the Supreme

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59. FED. R. CRIM. P. 24(c). For a review of the applicable text of Rule 24(c), see *supra* note 5 and accompanying text.

60. FED. R. CRIM P. 23(b); *see* Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 91 F.R.D. 289, 337-38 (1981) (discussing problems associated with original enactment of Rule 23(b)). The Committee favored amending Rule 23(b). *Id.* The Committee found this to be a better approach, rather than amending Rule 24(c) to allow for substitution of incapacitated or disqualified jurors with alternate jurors after deliberations began. *Id.*

61. FED. R. CRIM. P. 23(b) advisory committee's note, 97 F.R.D. at 299. Without the defendant's consent, Rule 24(b) mandated that a mistrial be declared. *Id.* at 298.

62. For a review of courts that improvised their own post-submission procedures, see *supra* notes 8-10 and *infra* notes 79-121 and accompanying text.

63. Claudio v. Snyder, 68 F.3d 1573, 1575 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1329 (1996). The Third Circuit opined "[t]he Supreme Court has not specifically ruled on the constitutionality of substituting an alternate juror after jury deliberations have begun." *Id.* The closest the Supreme Court has come to ruling on this issue was in *United States v. Olano*, 507 U.S. 725, 741 (1993), *cert. denied*, 117 S. Ct. 303 (1996). In *Olano*, the Supreme Court held that the defendant was not prejudiced by the alternate's presence in the jury deliberation room because the alternate was told not to participate. *Id.* at 739-41.

64. Orfield, *Trial Jurors*, *supra* note 4, at 44-54. When the Committee submitted one of its drafts providing for post-submission substitution to the Supreme Court, the Court questioned the constitutionality of such a procedure. *Id.* at 46. The Court asked "[h]as the committee satisfied itself that it is desirable or constitutional that an alternate juror may be substituted after the jury has retired and begun its deliberation?" *Id.*

65. *Id.* at 47.

Court with two solutions.[66] The first proposal was to amend Rule 23(b) to permit an eleven-juror verdict at the discretion of the trial judge, even if the defense counsel objected.[67] The second proposal was to amend Rule 24 to permit the substitution of an alternate juror during deliberations, as long as the judge instructs the jury to begin deliberations again.[68]

The Advisory Committee adopted the discretionary eleven-member deliberation process.[69] The Committee believed that the Rule 24 propo-

66. Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, advisory committee's note, 91 F.R.D. 289, 337-45 (1981).

67. *Id.* at 337-38. The proposal read "[e]ven absent [stipulation by parties agreeing to 11-member jury], if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors." *Id.* This proposal would remove the defendant's tactical advantage because a judge would no longer need the defendant's consent to proceed with less than 12 jurors. *Id.* at 339.

68. *Id.* at 341-45. The Committee proposed to amend Rule 24 by adding 24(d). *Id.* at 342-43. Proposed Rule 24(d) stated:

> Alternate jurors in the order in which they are called shall replace jurors who become or are found to be unable or disqualified to perform their duties. After the jury has retired to consider its verdict, a juror may be replaced only by an alternate juror retained as provided in subdivision (c) of this rule, in which case the court shall instruct the entire jury to commence their deliberations anew.

Id.

Also, the Committee proposed to amend Rule 24(c) by adding the language: "Alternate jurors shall not be present at the deliberations of the jury, but such number as the court shall, in its discretion, decide to be necessary shall be retained and not discharged while the jury is deliberating." *Id.* at 342. Further, the proposal would have removed 24(c)'s language stating "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." *Id.*

69. *See* Amendments to the Federal Rules of Criminal Procedure, 97 F.R.D. 245, 297-98 (1983) (amending Rule 23(b)). The 1983 amendment to 23(b) added one provision to the end of the original rule: "Even absent [defense and prosecution] stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors." *Id.*

The Advisory Committee believed proceeding with 11 jurors was "constitutionally permissible." *Id.* at 298 (citing Williams v. Florida, 399 U.S. 78 (1970)). The Committee opined that to proceed with 11 jurors was much less objectionable than declaring a mistrial and expending substantial funds on a retrial. *Id.* at 299. When discussing the impact of the original 23(b)'s defendant's consent requirement, the Committee commented "[f]or 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." *Id.* at 299-300.

In the introductory note to the proposed amendments to Rules 23 and 24, the Committee commented that "[a]t present, a majority of the Advisory Committee favors the Rule 23 approach. However, the Committee is interested in maximum input from the bench and bar on this problem, and to that end is circulating both the Rule 23 and Rule 24 alternatives for comment." Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, advisory committee's note, 91 F.R.D. at 337. The Supreme Court adopted the Rule 23 proposal, showing its approval for an 11-member jury and its indirect condemnation of the post-

sal to allow for post-submission substitution would endanger the defendant's Sixth Amendment right to a trial by an impartial jury because of the inability to nullify the influences of the earlier deliberations of the regular jurors, possible invasions of jury privacy and coercive effects on the alternate juror.[70] Moreover, the ABA's Standards for Criminal Justice also rejected the post-submission substitution procedure and found it undesirable to allow a juror to join the group without the benefit of earlier group discussions.[71]

C. *Effects on the Defendant's Substantial Rights as the Standard for Reversal*

Although the Federal Rules of Criminal Procedure are meant to simplify criminal procedures and ensure fairness in the administration of justice,[72] many federal courts have departed from the procedures set forth by

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submission substitution proposal under the Rule 24 proposal. Proposed Amendments to Federal Rules of Criminal Procedure, 97 F.R.D. 245 (1983).

70. Preliminary Draft of Proposed Amendment to the Federal Rules of Criminal Procedure, 91 F.R.D. at 301. The Committee opined:

> The central difficulty with substitution . . . 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."

Id. (quoting United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964)).

71. *See* 3 ABA STANDARDS FOR CRIMINAL JUSTICE § 15-2.7, commentary at 15-74 (1980) (criticizing post-submission substitution). The commentary stated "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 discussions." *Id.*

Most commentators agreed with the Committee's rejection of post-submission substitution for the same reasons. See, e.g., CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURES § 388, at 384-93 (2d ed. 1996) (criticizing post-submission substitution). Wright concluded that:

> To permit substitution[s] 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.

Id. at 393; *see also* JAMES MOORE ET AL, MOORE'S FEDERAL PRACTICE para. 24.05 (2d ed. 1996) ("The inherent coercive effect upon an alternate who joins a jury leaning heavily toward a guilt verdict may result in the alternate reaching a premature guilty verdict.").

72. *See* FED R. CRIM P. 2 ("[The rules] shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.").

the Supreme Court and Congress by allowing post-submission substitution.[73] The Federal Rules of Criminal Procedure provide two rules that set forth the standard of review for departures from the rules.[74] Rule 52(a) explains that any deviations that do not affect the substantial rights of the defendant are harmless errors and are not subject to reversal.[75] Rule 57 further allows district courts to regulate their practice in any way not inconsistent with the Federal Rules of Criminal Procedure.[76] Therefore, when evaluating a court's procedural deviations from Rule 24(c) in allowing for post-submission substitution in direct violation of Rule 24(c), a reversal is not proper unless the deviation affects the defendant's substantial rights.[77] Thus, the question courts have faced is whether substitution of a regular juror with an alternate juror after deliberations begin endangers the substantial rights of a defendant.[78]

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73. For a discussion of courts that improvise their own post-submission procedures in violation of Rule 24(c), see *supra* notes 8-10 and *infra* notes 79-121 and accompanying text.

74. *See* FED. R. CRIM. P. 52(a) (discussing harmless errors); FED. R. CRIM. P. 57 (providing procedure for adoption of local rules). For a discussion of Rules 52(a) and 57, see *infra* notes 75-78 and accompanying text.

75. FED. R. CRIM P. 52(a). Rule 52(a) states: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." *Id.*

76. FED. R. CRIM. P. 57(a). Rule 57(a) provides, in pertinent part: "Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice . . . consistent with . . . Acts of Congress and rules adopted under 28 U.S.C. § 2072 . . . ." *Id.*

77. *See* FED. R. CRIM. P. 52(a) advisory committee's notes, 97 F.R.D. 245 (1983) (noting that current rule is based upon 28 U.S.C. former § 391 and 18 U.S.C. former § 556 that judgment should stand unless it affects substantial rights or is prejudicial to defendant); *see also* Claudio v. Synder, 68 F.3d 1573, 1575-77 (3d Cir. 1995) (holding post-submission substitution procedure is harmless error). For a discussion of cases when defendants challenge post-submission procedures under Sixth and Fourteenth Amendments, see *infra* notes 79-121 and accompanying text.

78. *See Claudio*, 68 F.3d at 1575 (discussing rights involved in post-submission substitution cases including defendant's right to trial by jury under Sixth and Fourteenth Amendments).

The plain language of Rule 24(c) allows for the substitution of a regular juror when he or she is incapacitated or disqualified prior to the start of deliberations. FED. R. CRIM. P. 24(c). For a discussion of Rule 24(c) and its adoption, see *supra* notes 5-8, 63-71 and accompanying text.

Courts are in agreement that substitution prior to deliberation is constitutional. *See, e.g.*, United States v. Floyd, 496 F.2d 982, 990 (2d Cir.) (replacing juror due to prejudice); United States v. Domenech, 476 F.2d 1229, 1232 (2d Cir. 1973) (removing juror because tardy); United States v. Cameron, 464 F.2d 333, 334-35 (3d Cir. 1972) (replacing juror for being asleep 50% of time); United States v. Hoffa, 367 F.2d 698, 712 (7th Cir. 1966) (replacing juror because his mother went through surgery and was not expected to live); United States v. Houlihan, 332 F.2d 8, 12-13 (2d Cir. 1964) (excusing juror because she was nurse and her patient suffered heart attack); United States v. Goldberg, 330 F.2d 30, 43 (3d Cir. 1964) (removing juror because placed on jury erroneously after responding to another juror's name); United States v. Zambito, 315 F.2d 266, 269 (4th Cir. 1963) (replacing juror because he had not truthfully responded during voir dire as to whether

IV. POST-SUBMISSION SUBSTITUTION IN FEDERAL COURTS

Eight United States Circuit Courts of Appeals have addressed whether post-submission juror substitution is constitutional.[79] There is a growing trend among some of the circuits to sidestep Rule 24(c)'s mandatory prohibition against post-submission substitution.[80]

A. *The Liberal Approach: Procedural Precautions to Eliminate Prejudice*

The United States Courts of Appeals for the Seventh, Ninth and Eleventh Circuits have adopted a liberal approach to post-submission juror substitutions through reasoning that substitutions do not endanger a defendant's right to a fair trial and an impartial jury if procedural precautions are taken.[81] These circuits believe that procedures, such as obtaining the defendant's consent and properly instructing the jury, eliminate any prejudice to the defendant.[82]

The Seventh Circuit, for example, has held that post-submission substitution procedures violate Rule 24(c), but do not constitute reversible errors unless the violation is prejudicial to the defendant.[83] The Seventh

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federal gambling stamp was issued to him or his family); Banks v. United States, 204 F.2d 666, 671 (8th Cir. 1953) (replacing juror because during voir dire examination he had misstated extent of his own tax problems), *vacated*, 348 U.S. 905 (1955); Gillars v. United States, 182 F.2d 962, 980 (D.C. Cir. 1950) (replacing juror because she misrepresented herself during voir dire by answering questions dishonestly concerning her opposition to the death penalty).

79. For a discussion reviewing the post-submission juror substitution procedures in these circuits, see *infra* notes 82-123 and accompanying text.

80. For a discussion of the trend among the circuits to improvise their own post-submission procedures in violation of Rule 24(c), see *supra* notes 14-16 and *infra* notes 89-134 and accompanying text.

81. For a discussion regarding the liberal approach taken by the Seventh, Ninth and Eleventh Circuits see *infra* notes 93-105 and accompanying text.

82. For a discussion of improvised post-submission substitution procedures in the liberal circuits, see *infra* notes 93-105 and accompanying text.

83. *See, e.g.*, United States v. Josefik, 753 F.2d 585, 589 (allowing post-submission substitution); Johnson v. Duckworth, 650 F.2d 122, 125-26 (7th Cir. 1981) (allowing alternate juror to witness deliberations); Henderson v. Lane, 613 F.2d 175, 179-80 (7th Cir. 1980) (allowing post-submission substitution).

In *Johnson v. Duckworth*, the Seventh Circuit held that the defendant's right to a jury trial under the Sixth and Fourteenth Amendments is not violated by allowing an alternate juror to be present during deliberations. *Duckworth*, 650 F.2d at 125-26. In *Duckworth*, the trial judge instructed an "alternate juror to attend, but not participate in the jury's deliberations." *Id.* at 123. The district court advised the alternate:

> Alternate juror, Harold Lett, you will retire with the jury. But unless, and until, we excuse a juror and you are directed to actively serve, you are not to vote or participate in the deliberations. You should, however, listen, so that should you be called upon to serve, you will have the benefit of the preceding discussions.

Id. at 123 n.1.

The *Duckworth* court commented that alternate jurors are indistinguishable from regular jurors because they not only participate in the same strict selection process, but also witness the same events as the original jurors. *Id.* at 125. When

Circuit, however, has stated that the language behind Rule 24(c) forbids post-submission substitutions.[84] Nevertheless, the Seventh Circuit in *United States v. Josefik*[85] held that the substitution of an alternate juror was not a reversible error because procedural precautions eliminated any prejudice to the defendants, and the defendants consented to the court recalling the alternate.[86] Recently, however, the Seventh Circuit in *United States v. Ottersburg*[87] held that allowing two alternate jurors to deliberate with the original twelve jurors and sign a verdict form was highly prejudicial to the defendants and thus, required reversal.[88]

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an alternate accompanies the original jurors into deliberations, he or she has no more or less knowledge about the case than the others and is no more biased than any of the other jurors. *Id.* The court recognized the necessity for privacy and secrecy in jury deliberations, but stated, "[w]e do not agree that alternate jurors pose the inherent risk of influencing the jury's judgement, or inhibiting its debate, that is posed by the presence of other strangers." *Id.* at 126.

Furthermore, in *Henderson v. Lane*, the Seventh Circuit ruled that "the essential feature of the jury" was preserved when the defendant's attorney examined the alternate juror and decided he was able to deliberate fairly with the others. *Henerson*, 613 F.2d at 179. In *Henderson*, the trial court discharged the two alternates when the regular jurors retired to deliberate. *Id.* at 176. Subsequently, one of the regular jurors suffered a heart attack after two and one-half hours of deliberations. *Id.* The trial court recalled the two alternates and the judge questioned them on their activities since discharge. *Id.* The alternates promised that they had not made a decision about the defendant's guilt, but one admitted talking to his wife about the facts of the case. *Id.* Defense counsel refused to stipulate to an 11-member jury. *Id.* As a result, counsel implicitly agreed to allow an alternate to replace the ill juror. *Id.* Within five hours, the reconstituted jury found the defendant guilty of murder. *Id.* at 177.

The Seventh Circuit held that the defendant's right to a jury trial was not undermined by the substitution procedure. *Id.* at 179. The court held that the "essential feature of the jury" was preserved because the alternate was subject to the same selection procedures as the other jurors. *Id.* at 178. Moreover, the defense attorney was present during the reinstatement proceedings and was permitted to examine the alternate juror. *Id.* Finally, the alternate juror assured the court that he had not formed any opinions on the defendant's guilt or innocence. *Id.* at 179. Thus, the substitution was appropriate. *Id.*

84. *Josefik*, 753 F.2d at 587. The Seventh Circuit opined that: "There is no provision for recalling an alternate after he is discharged and we think policy as well as statutory language . . . forbid[s] the practice." *Id.*

85. 753 F.2d 585 (7th Cir. 1985).

86. *Id.* at 587-88. During the trial, the remaining alternate juror was excused when the regular jurors began deliberations. *Id.* at 587. After nine minutes of deliberations, one of the regular jurors informed the judge that she should be excused because she had trouble hearing during the trial. *Id.* The judge immediately called the alternate and informed her not to discuss the case with anyone. *Id.* After questioning the alternate, the parties agreed to the substitution of her for the regular juror. *Id.* In affirming this decision of the lower court, the Seventh Circuit held that the defendant was not prejudiced by this substitution because the reconstituted jury was instructed to begin deliberations anew, the parties' counsels consented to the substitution after questioning the alternate, and the alternate only missed nine minutes of deliberations. *Id.* at 587-88.

87. 76 F.3d 137 (7th Cir.), *decision clarified on denial of reh'g by* 81 F.3d 657 (7th Cir. 1996).

88. *Id.* at 140.

Similarly the Ninth Circuit has concluded that post-submission substitutions are permissible under Rule 24(c) if the defendant suffers no prejudice and he or she knowingly and intelligently consents to the substitution.[89] The Ninth Circuit has held that without the knowing and intelligent consent of the defendant, post-submission substitution was a reversible error because the new juror was placed into a coercive atmosphere where the jury had already reached a verdict.[90] Nevertheless, the

89. *See, e.g.*, Leser v. United States, 358 F.2d 313, 317 (9th Cir. 1966) (allowing post-submission substitution when defendant consents). In *Leser*, the Ninth Circuit affirmed a post-submission substitution by the trial court because the defense counsel stipulated to the substitution in the presence of the defendants. *Id.* Before deliberations began, one of the jurors informed the court that he had scheduled a medical procedure during deliberations, and both parties so stipulated to allowing the substitution of the juror after the beginning of deliberations if necessary. *Id.* at 314-16. The day before the case was submitted to the jury for consideration, the court informed the attorneys that one of jurors had to go into the hospital for a serious operation. *Id.* at 314. The juror told the court that he would postpone the operation if the case would go to the jury the next day. *Id.* The court suggested to the attorneys that they stipulate to allowing a post-submission substitution of an alternate juror for the ill juror. *Id.* at 315. The defense counsel agreed to retaining the alternates in case any juror became ill and could not participate in deliberations. *Id.* After the jury could not come to a conclusion, on the following day, the judge excused the ill juror and substituted the alternate in his place. *Id.* at 316.

The Ninth Circuit found that no prejudice occurred from this substitution because the defendant and its counsel knowingly consented earlier in the trial. *Id.* at 317. The *Leser* court pointed out that the defense had every opportunity to refuse to the stipulation. *Id.* Because the defendant did not express any dissent when his counsel stipulated to the post-submission substitution, the defendant knowingly waived his rights. *Id.*

90. United States v. Lamb, 529 F.2d 1153, 1156 (9th Cir. 1975). In *Lamb*, the Ninth Circuit limited the holding in *Leser* to cases when both sides agree to the substitution. *Id.* at 1157. During the trial, after the district judge instructed the jury, the judge told the alternate to go home, but be ready to return if necessary. *Id.* at 1154-55. After lunch recess, the judge received a note from one of the regular jurors that read: "Your Honor, due to the sudden accidental death of one of my close co-workers during the course of this trial, I feel emotionally unable to come to a decision." *Id.* at 1155. The trial judge then called the alternate and asked her to return to court. *Id.* Subsequently, the jury informed the judge that it had reached a verdict. *Id.* Thereafter, the judge called the alternate and told her not to return. *Id.* After questioning the depressed juror, the judge excused the juror and asked the defense counsel to agree to substituting an alternate. *Id.* The defense counsel objected, but the judge called back the alternate and had her join the jury. *Id.* The judge ordered the jury "to begin at the beginning, and begin all you deliberation just as if the case had been submitted to you this instant." *Id.* Despite the district court judge's instructions to the reconstituted jury to begin deliberations anew, the jury rendered a guilty verdict in 29 minutes, despite taking four hours before the substitution. *Id.*

The Ninth Circuit refused to extend the *Leser* stipulation to cases where the defense counsel implied consent by not objecting to the judge's instructions to an alternate to remain ready. *Id.* at 1157. In fact, the defense attorney objected to the substitution of the alternate juror. *Id.* The Ninth Circuit concluded:

> That impermissible coercion upon the alternate juror in this case was manifestly inherent, and that there was not the conscientious, careful reconsideration by the twelve of the newly constituted jury would seem ap-

Ninth Circuit held that California's procedure for substitution of jurors after beginning deliberations preserves the "essential feature" of the jury as required by the Sixth and Fourteenth Amendments when the defendant consents.[91]

Likewise, the Eleventh Circuit has traditionally taken a liberal stance towards post-submission substitutions.[92] The Eleventh Circuit has allowed

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parent from the fact that, despite the district judge's instruction to the jury to "begin at the beginning," a jury that had required almost four hours to reach its initial verdict needed, after being reconstituted, only twenty-nine minutes to find the appellant guilty a second time.

Id. at 1156.

The *Lamb* Court further commented that even if there was a clear stipulation by the defendant agreeing to the substitution, the court would still reverse and remand this case. *Id.* at 1157. It determined that the original jury's guilty verdict and the judge's instructions to the alternate that she was no longer needed compromised the defendant's right to a jury trial. *Id.* The *Lamb* court stated that when the trial judge released the alternate, her duties, including confidentiality, were no longer applicable. *Id.* Thus, the trial judge could never know whether the alternate discussed the case with others. *Id.*

91. Miller v. Stagner, 757 F.2d 988, 995 (9th Cir. 1985). In *Miller*, over the objections of defense counsel, two jurors were dismissed on the fifth day of jury deliberations and replaced with alternates. *Id.* One of the regular jurors called in sick with the flu and counsel agreed that the ill juror should be discharged and replaced with an alternate. *Id.* Then one of the bailiffs informed the judge that a juror had been intoxicated the previous morning. *Id.* Also, the judge noted for the record that the juror had been sleeping during the re-reading of the day's testimony. *Id.* The juror denied that he was intoxicated, but admitted that he did fall asleep. *Id.* Two bailiffs and the jury foreman said that they smelled alcohol on the juror's breath. *Id.* The judge removed the juror and replaced him with an alternate. *Id.* The trial judge then instructed the reconstituted jury to disregard earlier deliberations and begin deliberations anew. *Id.* On appeal, the Ninth Circuit concluded that the trial court's decision to follow California's post-submission substitution procedure "preserved the 'essential feature' of the jury required by the Sixth and Fourteenth Amendments." *Id.*

The *Miller* court was analyzing a California state law that permitted substitution of an alternate when a regular juror is discharged for good cause. *Id.* at 995 n.3. The case came to federal court on a writ of habeas corpus. *Id.* at 991. Therefore, the state law only had to fulfill the necessary constitutional requirements. *Id.* at 995. Unlike Rule 24(c), the California Penal Code does not mandate the discharge of alternates at the beginning of deliberations. *Id.* (citing CAL. PENAL CODE §§ 1089, 1123 (West 1996)).

92. *See, e.g.*, Peek v. Kemp, 784 F.2d 1479 (11th Cir. 1986). In *Peek*, the jury had been deliberating for only two hours when the jury foreman requested that the court excuse a juror who appeared mentally unstable. *Id.* at 1481-82. The jury began deliberations at 10:27 p.m. and at midnight the jury was asked if they would like to retire for the evening. *Id.* The jury asked to continue for a few more minutes and approximately 30 minutes later, the jury foreman asked to speak with the judge. *Id.* at 1482. The foreman informed the judge that one of the jurors was "extremely nervous and almost at the breaking point." *Id.* The foreman also told the trial judge that the distressed juror asked to be excused. *Id.* Thereafter, both counsels agreed to stipulate to the juror's replacement with an alternate. *Id.*

After the foreman informed the trial judge that the ill juror wanted to be dismissed, the judge told the foreman that he was not going to start excusing people at random. *Id.* The foreman asked the trial judge if the ill juror could just leave, rather than come out in front of the judge. *Id.* The foreman informed the

post-submission substitutions when the defendant objects to Rule 23(b)'s eleven-juror verdict and demands that an alternate be impaneled.[93] In these instances, however, the trial judge must take procedural safeguards to insure that the defendant is not prejudiced by the substitution.[94]

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judge that the ill juror did not want to make a great deal about it. *Id.* Thus, the trial judge excused the distressed juror without ever interviewing him. *Id.* The trial judge never instructed the reconstituted jury to begin deliberations anew and sent the alternate into the deliberation room without any further instructions. *Id.*

Subsequent fact-finding efforts showed that the replaced juror was the lone holdout for acquittal. *Id.* The court and the attorneys were unaware that the distressed juror was the lone holdout as to guilt. *Id.* Later, at the state habeas court proceeding, the distressed juror explained:

> Well, I got sick—I got so upset, I couldn't stand it anymore and it looked like I couldn't make a verdict . . . . Well, it seemed like that I couldn't make the decision and I just kept getting more and more upset . . . . And I just got so upset, I—it seemed like—I had to disqualify myself . . . I got so physically—well, mental upset that I knew I couldn't make a decision.

Id. at 1483 (citations omitted in original).

Almost immediately after the reconstituted jury returned to deliberations it rendered a guilty verdict that would send the defendant to his death. *Id.* at 1482. The trial transcript showed that only three minutes passed before the reconstituted jury entered a guilty verdict. *Id.* at 1482 n.2. The testimony of the trial judge, attorneys and jury foreperson indicated, however, that it took between 15 and 30 minutes. *Id.*

The Eleventh Circuit concluded that the district court's failure to question the distressed juror and instructions to the reconstituted jury to begin anew did not amount to any prejudice against the defendant and affirmed the district court's decision. *Id.* at 1483-85. The Eleventh Circuit held that the defendant did not suffer any prejudice from the trial judge's failure to question the distressed juror before dismissing him. *Id.* at 1484. In the Eleventh Circuit's opinion, the distressed juror was too ill to debate or vote at the time he was excused. *Id.* The court determined that the defendant's argument that an error occurred when the judge failed to inform the reconstituted jury to begin deliberations anew was without merit. *Id.* at 1485. Further, the *Peek* court explained that the alternate was present throughout the entire trial, heard the charge to the original jury and reviewed the case with the jury once he joined them. *Id.* The Eleventh Circuit determined that the defendant's constitutional rights were not violated because the alleged prejudice was "speculative at best." *Id.*

93. United States v. Guevara, 823 F.2d 446, 448 (11th Cir. 1987). The Eleventh Circuit, in *United States v. Guevara*, held that the defendant waived any challenge to the substitution of an alternate juror after jury deliberations began because the defendant expressly demanded that the alternate be impaneled rather than continue with only 11 jurors. *Id.* In *Guevara*, the trial judge questioned the alternate to make sure he had neither been influenced by the media nor had already decided the case. *Id.* at 447. Defense counsel stipulated to impaneling the alternate in place of an ill juror. *Id.* The trial judge instructed the reconstituted jury to begin deliberations anew. *Id.* The Eleventh Circuit held that the procedure was permissible because the defendant knowingly consented to impanelling the alternate juror. *Id.* at 448. Furthermore, the *Guevara* court explained that the defendant was given an opportunity to proceed with an 11-member jury pursuant to Rule 23(b), but refused this option. *Id.* Thus, the defendant waived his rights to challenge the post-submission substitution procedure. *Id.*

94. *Id.* The *Guevara* court stated that "a procedure constitutes reversible error only if the defendant is prejudiced by the substitution." *Id.* In *Guevara*, the judge asked the alternate juror whether he had discussed with anyone or exposed himself to extrinsic information involving the case. *Id.* The trial judge also asked the

Therefore, as long as there is not unfair prejudice, if a defendant knowingly consents to the substitution, the defendant waives any right to appeal the procedure.[95]

B. *The Conservative Approach: Following Rule 23(b)'s Eleven-Juror Verdict*

The United States Courts of Appeal for the Second, Third and Fifth Circuits have adopted a conservative approach to post-submission juror substitutions finding that post-submission juror substitutions unnecessarily endanger a defendant's right to an impartial jury because Rule 23(b) provides the perfect solution.[96] The Fifth Circuit prefers Rule 23(b)'s eleven-juror verdict because it eliminates the risk of prejudice to the defendant from a post-submission substitution.[97] In the past, the Fifth Circuit allowed post-submission substitutions if the judge applied procedural safeguards to eliminate any prejudice to the defendant.[98] Then, in *United*

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remaining 11 jurors whether they could begin deliberations anew. *Id.* Then the judge confiscated the materials the original 11 jurors used during the first deliberation. *Id.* All of these safeguards sought to prevent harmful prejudice to the defendant from the inclusion of the new juror.

95. *Id.* The Eleventh Circuit stated that "[w]here the defendant knowingly consents to the addition of an alternate juror, as was obviously the case here, he waives any challenge to that procedure on appeal." *Id.*

96. For a discussion about the conservative approach taken by these circuits, see *infra* 108-111 notes and accompanying text.

97. *See* United States v. Quiroz-Cortez, 960 F.2d at 420 (stating that "[r]ather than replace a regular juror with an alternative juror after the jury has begun deliberations, the proper procedure is for the district court to proceed with an eleven-person jury"); United States v. Huntress, 956 F.2d 1309, 1315 (5th Cir. 1992) (discussing that Rule 23(b) removes trial judge's discretion to use post-submission substitution).

98. *See, e.g., Quiroz-Cortez*, 960 F.2d at 421 (allowing post-submission substitution under limited circumstances and when defendant suffered no prejudice); United States v. Helms, 897 F.2d 1293, 1299 (5th Cir. 1990) (allowing post-submission substitution if *Phillips* procedures followed), *overruled by Huntress*, 956 F.2d at 1317; United States v. Phillips, 664 F.2d 971, 996 (5th Cir. 1981) (allowing post-submission substitution if procedural safeguards followed), *overruled by Huntress*, 956 F.2d at 1317; United States v. Allison, 481 F.2d 468, 472 (5th Cir. 1973) (allowing alternate's presence in jury room); La-Tex v. Freuhauf, 444 F.2d 1366, 1367-68 (5th Cir. 1971) (same); *see also* United States v. Barone, 83 F.R.D. 565, 573-74 (S.D. Fla. 1979) (allowing post-submission substitution).

In *United States v. Allison*, the Fifth Circuit held that a plain error reversal was not proper when the parties stipulate that an alternate juror be present during deliberations. *Allison*, 481 F.2d at 470-72. In *Allison*, the trial judge instructed an alternate to observe deliberations in case an ill juror could not continue through deliberations, but not to participate in any way. *Id.* at 470. Both counsels stipulated to the alternate's presence. *Id.* The alternate was instructed not to disturb the deliberation process nor take part in any jury votes. *Id.* After continuing deliberations for another hour and one-half, the regular juror was feeling better, so the trial judge immediately discharged the alternate. *Id.*

The Fifth Circuit stated that while Rule 24(c) prohibits the presence of an alternate in the jury room, a plain error reversal is improper when both parties stipulate to the alternate's presence and the alternate follows the court's instructions not to participate in the deliberations. *Id.* at 472. The *Allison* court re-

manded the case to conduct an evidentiary hearing to determine whether the alternate participated in the jury deliberations in a way that could have possibly prejudiced the defendant. *Id.*

Likewise, the Fifth Circuit in *La-Tex*, held that in a civil case, the defendant's right to a jury trial was not abrogated by allowing an alternate juror to be present during deliberations because both counsels consented and the judge instructed the alternate not to speak during the deliberation process. *La-Tex*, 444 F.2d at 1367-68. At the end of the *La-Tex* trial, the judge learned that one of the regular jurors might have to be excused in order to attend a funeral. *Id.* at 1367. The court instructed an alternate juror to observe deliberations, but not participate unless the regular juror was excused. *Id.* Both counsels agreed to this procedure. *Id.* During deliberations, the alternate made at least one remark and conversed with several regular jurors, including the foreman, saying: "Let's listen to the foreman." *Id.* The Fifth Circuit found her remarks to be insignificant and not prejudicial enough to warrant a new trial. *Id.* Moreover, the court noted that defense counsel agreed to the substitution procedure before the judge admitted the alternate juror. *Id.*

A district court in the Fifth Circuit has even allowed the substitution of an alternate juror after the jury began deliberations after a seven-month criminal trial. *Barone*, 83 F.R.D. at 573-74. In *Barone*, the district court judge replaced a regular juror who became ill with an alternate juror. *Id.* at 567. The alternate had been discharged and was home already for six days. *Id.* During the questioning by the judge, the alternate responded that she could deliberate impartially and continue to give all parties a fair trial. *Id.* The remaining 11 jurors were also questioned by the judge and all responded that they could begin deliberations from the beginning. *Id.* The judge then instructed the reconstituted jury to begin deliberations anew. *Id.* The judge reasoned that the defendant did not suffer prejudice because the alternate was not formally discharged and had no contact with the original jurors or the outside world. *Id.* at 572-74. The district judge concluded that because the benefits derived from deviating from Rule 24(c) were great in this case and the possible prejudice almost nonexistent, it would be foolish to not depart from the Rule. *Id.* at 574.

In *Phillips*, the Fifth Circuit expanded the district courts' powers by permitting post-submission substitutions in cases of "exceptional circumstances" and where the defendant does not suffer from prejudice. *Phillips*, 664 F.2d 971, 996 (5th Cir. 1981). The Fifth Circuit held that:

> [T]he court's decision to substitute the alternate was made in the context of a most complex and protracted trial, lasting over four months, of multiple defendants on numerous substantive and conspiracy charges . . . . Our conclusion that the district court committed no reversible error must likewise be understood as limited to such an exceptional context.

Id.

At the end of the *Phillips* trial and despite the defense counsel's objections, the district court ordered that the alternate juror be sequestered separately from the original jurors. *Id.* at 990. After the jury was instructed, the court discussed with counsel the possible procedural options if one of the jurors became incapacitated or disqualified after jury deliberations began. *Id.* The defense counsel objected to two possible procedural options. *Id.* First, they refused to stipulate to a jury of less than 12 under Rule 23(b). *Id.* Second, they objected to the impaneling of one of the alternates if necessary. *Id.* Nevertheless, the trial judge decided to separately sequester the last alternate while the other jurors deliberated. *Id.*

After two days in deliberations, one of the jurors suffered a heart attack. *Id.* The court discharged the ill juror and substituted the alternate juror in his place. *Id.* The Fifth Circuit determined that Rule 24(c) is not constitutionally mandated, and a court may deviate procedurally in situations involving exceptional circumstances. *Id.* at 992, 996. The Fifth Circuit agreed with the Government's position that the language of Rule 24(c) is not constitutionally mandated. *Id.* at 992. The

States v. Huntress,[99] the Fifth Circuit held that Rule 23(b)'s eleven juror verdict is mandatory, but failure to follow Rule 23(b) is not always reversible error.[100] If a trial judge allows a post-submission substitution, the reviewing court can still resort to an analysis of the judicially crafted procedural safeguards used by the Fifth Circuit in the past to salvage the

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court, using the reasoning of the California Supreme Court, opined that no constitutional objection occurs when there is good cause for the original juror's dismissal and the jury is instructed to begin anew. *Id.* at 992-93. The *Phillips* court stated that the most substantial concern about post-submission substitution is the danger that the regular jurors may coerce the alternate if they already decided the defendant's guilt. *Id.* at 995. Nevertheless, the *Phillips* court believed that this coercive atmosphere was eliminated by the procedural mechanisms utilized by the trial judge. *Id.* at 996. The *Phillips* court concluded that the defendant was not prejudiced because "the instructions to the jury to begin anew, the jurors' individual assurances that they could in fact begin anew, and the full participation of the substituted alternate in the deliberations, which lasted six days, obviated the danger of undue prejudice." *Id.*

99. 956 F.2d 1309 (5th Cir. 1992).

100. *Id.* at 1315. In *Huntress*, the trial judge dismissed the alternate juror once deliberations began. *Id.* at 1311. After two days of deliberations, one of the jurors checked himself into a hospital and threatened to ingest fire ant killer if the hospital did not allow him to stay. *Id.* The trial judge called the disturbed juror's doctor, and the doctor informed the judge that the juror was distraught and suicidal and suffered from paranoia stemming from a history of drug abuse. *Id.* The doctor told the trial judge that the ill juror could not participate in the deliberations. *Id.* at 1312. The trial judge followed the doctor's advice and dismissed the juror without holding an evidentiary hearing to investigate the incident. *Id.* The defendant refused to stipulate to a Rule 23(b) 11-juror verdict and objected to recalling the alternate. *Id.* The defendant then asked that the alternate juror be recalled and questioned to see whether she could be reimpaneled. *Id.* After concluding the alternate juror could fairly deliberate, the trial judge instructed the other 11 jurors that they would have to set aside their previous discussions and begin deliberations anew. *Id.* All of the jurors were confident that they could begin deliberations again. *Id.* Thereafter, the reconstituted jury returned a guilty verdict after three hours. *Id.*

The defendant argued that the verdict should have been reversed for two reasons: (1) the judge should have followed Rule 23(b)'s 11-juror verdict; and (2) the alternate's presence was highly prejudicial to his case. *Id.* at 1314. The Fifth Circuit agreed that the judge should have followed Rule 23(b), but stated that the defendant waived his right to complain once he agreed to the substitution of the alternate. *Id.* The Fifth Circuit opined that Rule 23(b) eliminates the risk of prejudice to the defendant and should be used whenever a juror becomes incapacitated during deliberations, however, failure to use Rule 23(b) is not fatal. *Id.* at 1317.

The *Huntress* court opined that district judges should no longer resort to the judicially crafted post-submission substitutions and procedural safeguards found in two earlier cases that the court overruled. *Id.* (citing *Helms*, 897 F.2d at 1293; *Phillips*, 664 F.2d at 971). If a post-submission substitution takes place and a reconstituted jury renders a verdict, however, the verdict will not be reversed unless the substitution was prejudicial to the defendant. *Id.* at 1316. The *Huntress* court held that the substitution did not prejudice the defendant in the lower court. *Id.* at 1316-17. In fact, the *Huntress* court still compared the procedural safeguards taken not to prejudice the defendant with the procedures used in *Phillips* and *Helms*, even though both cases were overruled by *Huntress*.

verdict.[101] The Fifth Circuit, however, clearly stated that "the amendment to Rule 23(b) removes from district judges any choice between proceeding with 11 jurors and using [improvised post-submission substitution] procedures."[102]

In light of the 1983 amendments to Rule 23(b), the Second Circuit has doubts whether post-submission substitutions are permissible.[103] In the past, the Second Circuit approved of post-submission substitutions in limited circumstances.[104] In *United States v. Strat-*

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101. *See, e.g., Quiroz-Cortez*, 960 F.2d at 420-21 (holding that when juror is removed from deliberations, proper procedure is to proceed under Rule 23(b), but if post-submission substitution occurs, verdict should stand if defendant suffers no prejudice); *Huntress*, 956 F.2d at 1315-17 (same).

At the end of the trial, the district court in *United States v. Quiroz-Cortez* dismissed the two alternates, but warned them not to discuss the case with anyone until the jury's verdict was returned. *Quiroz-Cortez*, 960 F.2d at 419-20. The jury had only deliberated for 45 minutes when the district court learned one of the regular jurors had a hearing problem that may have caused him to miss some of the testimony. *Id.* The parties agreed to dismiss the juror. *Id.* Defense counsel, however, refused to stipulate to an 11-member jury and wanted to move for a mistrial. *Id.*

After the district court denied the request for a mistrial, defense counsel settled for the first alternate. *Id.* The district court questioned the alternate who informed the court that she had not discussed the case with anyone. *Id.* Thereafter, the court ordered the reconstituted jury to begin deliberations from the beginning so that the alternate could witness everything the jurors discussed. *Id.* Although the reconstituted jury only deliberated for an hour and a half before rendering a verdict, the court reasoned that the defendant was not prejudiced because the judge instructed the jurors to begin deliberations again. *Id.* at 420-21. The *Quiroz-Cortez* court reasoned that if the defendant suffers no prejudice from the post-submission substitution, the error is harmless and the conviction stands. *Id.* at 420. The *Quiroz-Cortez* court explained that prejudice is evaluated by examining, among other things, the length of the original jury's deliberations compared to the reconstituted jury's deliberations and the judge's instructions to the reconstituted jury to begin deliberations anew. *Id.* In this case, the court held that the possibility of prejudice here was minimal because the original jury deliberated for only 45 minutes and the alternate's exposure to outside influences was minimal. *Id.* at 420-21.

102. *Huntress*, 956 F.2d at 1315. The *Huntress* court also opined:

> The virtues of the 11-juror verdict allowed by Rule 23(b) are that it eliminates the risk of prejudice that arises whenever an alternate juror is recalled and does not require the agreement of the parties. District judges in this circuit therefore should no longer resort to the procedures used in *Phillips* and *Helms*.

Id. at 1317.

103. *See* United States v. Stratton, 779 F.2d 820, 831-32 (2d Cir. 1985) (casting doubt on whether post-submission substitutions are permissible with Rule 23(b)'s amendments).

104. *See, e.g.*, United States v. Hillard, 701 F.2d 1052, 1061 (2d Cir. 1983) (allowing post-submission substitution if defendant not prejudiced); United States v. Hayutin, 398 F.2d 944, 950-51 (2d Cir. 1968) (allowing retention of alternates after deliberation if no prejudice to defendant).

The Second Circuit first addressed this issue in 1968. *United States v. Hayutin*, 398 F.2d at 950-51. In *Hayutin*, the district court judge did not replace any jurors after deliberations began, but refused to discharge three alternates at the com-

ton,[105] however, the Second Circuit affirmed a trial judge's decision to accept a Rule 23(b) eleven-juror verdict after a juror was excused to celebrate a religious holiday.[106]

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mencement of deliberations, even though the defendant requested their discharge. *Id.* at 950. In *Hayutin*, the trial judge separately sequestered three alternates after the jury retired to consider its verdict. *Id.* The judge ordered that they be brought back every time the jury comes in to ask a question or for any other reason. *Id.* Separate marshals were assigned for the regular and alternate jurors. *Id.* The court noted that "[n]owhere does it appear that they ate in the same restaurant, rode in the same conveyance, or slept in the same hotel." *Id.*

The Second Circuit, in *Hayutin*, admonished the district court's retention of the alternates because Rule 24(c) mandates the discharge of alternates at the outset of deliberations and retention of alternates without a clear benefit may result in prejudice. *Id.* The Second Circuit recognized that Rule 24(c)'s provision providing for the discharge of alternate jurors is mandatory. *Id.* A danger exists that a defendant runs the risk of having his guilt determined by the 12 jurors and an additional three alternates. *Id.* The *Hayutin* court stated "[t]he absence of benefit being so clear and the danger of prejudice so great, it seems foolhardy to depart from the command of Rule 24." *Id.* Nevertheless, the Second Circuit did not reverse the district court's error because the act of retaining alternates did not prejudice the defendant. *Id.* The *Hayutin* court found that the alternates were not in a position to influence the jury during deliberations. *Id.* They were separately sequestered and commanded not to talk with the regular jurors. *Id.* Thus, the court held that the defendants were not prejudiced by the presence of the alternates. *Id.*

The Second Circuit expanded its *Hayutin* holding in 1983 when it decided *United States v. Hillard*. 701 F.2d at 1057. As in *Hayutin*, the trial judge separately sequestered two alternates during the jury's deliberations, but allowed the alternates to join the jury whenever it returned to the courtroom to hear testimony or instructions. *Id.* at 1055. In *Hillard*, the trial court then substituted an alternate juror for a regular juror who became ill after the jury had deliberated for two and one-half days and a subsequent three day holiday recess. *Id.* at 1054-55. The defense refused to stipulate to an 11-member jury and objected to a one-day adjournment in case the ill juror became well. *Id.* at 1055. The trial judge refused to declare a mistrial because it would be a waste of judicial resources. *Id.* The court decided to replace the ill juror with one of the alternates. *Id.* Each alternate was interviewed by the judge. *Id.* The jurors admitted to discussing the case generally with each other. *Id.* In fact, the first alternate admitted he had formed a preliminary opinion, but believed he could fairly deliberate with the regular jurors. *Id.* Nevertheless, the judge permitted the substitution. *Id.* The trial judge then instructed the reconstituted jury to begin deliberations "from scratch." *Id.*

The Second Circuit, in *Hillard*, concluded that this post-submission substitution did not prejudice the defendant and preserved "the essential feature of the jury" because, among other things, the judge instructed the reconstituted jury to start deliberations anew and the jury's "verdict was the product of the thought and mutual deliberation" of all 12 jurors. *Id.* at 1057. The *Hillard* court supported their holding by explaining that alternates were chosen in the same manner as the regular jurors and heard all the evidence and instructions that the regular jurors heard. *Id.* Additionally, the alternate indicated he could fairly deliberate, and the judge ordered the reconstituted jury to begin deliberations anew. *Id.* Finally, the Second Circuit opined that the length of deliberation for the reconstituted jury reflected that the defendant suffered no prejudice. *Id.*

105. 779 F.2d 820 (2d Cir. 1985).

106. *Id.* at 831-35. In *United States v. Stratton*, a juror informed the trial court before the commencement of deliberations that she had to leave early because of upcoming Jewish holiday of Succoth. *Id.* at 830. The judge recommended than an alternate be substituted before deliberations begin, but the defense counsel ob-

Similar to the Second and Fifth Circuits, the Third Circuit has favored Rule 23(b)'s eleven-juror verdicts rather than substituting alternate jurors.[107] In *United States v. Gambino*,[108] for example, the Third Circuit found that a district judge did not abuse his discretion when proceeding with Rule 23(b)'s eleven-juror verdict.[109] In fact, the Third Circuit seemed to disapprove of the possibility of a post-submission substitution procedure which is "explicitly disfavored as a remedial device by the Rules Committee that studied and revised Rule 23(b)."[110]

C. *Intermediate Approach: Condemning Sit-In Procedures, But Allowing Substitution When Alternate Is Absent from Previous Deliberations*

The Fourth and Tenth Circuits have adopted an intermediate approach to post-submission juror substitutions holding that post-submission substitutions with an alternate who has already witnessed prior deliberations is a greater danger to the defendant than continuing with an alternate juror who was not exposed to the prior deliberations.[111] For

jected to the substitution. *Id.* After deliberations began, the juror had to be excused because of the holiday. *Id.* at 831. If the judge waited for the juror to return, the deliberations would be halted for four and a half days. *Id.* The judge decided to follow Rule 23(b) and proceed with only 11 jurors, despite defense counsel's request to adjourn until the juror returned from her holiday. *Id.* Thereafter, the 11 jurors returned a guilty verdict later that day. *Id.*

The Second Circuit agreed with the trial judge's decision to proceed with an 11-juror verdict. *Id.* The court noted that Rule 23(b) was designed for these type of dilemmas and "provide[s] a preferred mechanism for avoiding a mistrial." *Id.* Further, the court recognized that post-submission substitutions poses problems. *Id.* The court stated "[e]ven though the jurors will be instructed to disregard previous deliberations upon empaneling of an alternate, they may not be able to nullify the effect of past discussions." *Id.*

107. *See* United States v. Gambino, 788 F.2d 938, 948-49 (3d Cir. 1986) (expressing preference for 11-member jury over post-submission substitution).

108. 788 F.2d 938 (3d Cir. 1986).

109. *Id.* at 948-49. In *Gambino*, the judge separately sequestered two alternate jurors. *Id.* at 947. After 20 hours of deliberation, the judge was informed that two jurors had seen unauthorized exhibits. *Id.* Only one juror had actually viewed a document that could be considered prejudicial to the defendant. *Id.* Both the government and the defense attorneys asked the trial court to replace the original juror with an alternate juror. *Id.* The court refused to substitute the alternate because in the trial judge's view Rule 23(b) mandated that he proceed with only 11 jurors. *Id.* Thereafter, the remaining 11 jurors rendered a guilty verdict the same day. *Id.*

The Third Circuit, in *Gambino*, found that the trial judge did not abuse his discretion when he opted for an 11-member jury. *Id.* 948-49. The *Gambino* court reviewed the reasons behind the 1983 amendments to Rules 23(b) and 24(c) and concluded that the Rules Committee amended the rules to avoid post-submission substitution dilemmas. *Id.* The *Gambino* court furthered observed that the trial judge clearly violated Rule 24(c) by separately sequestering the two alternates after deliberations began. *Id.* at 948. The defendants, however, did not allege error in violation of Rule 24(c) on appeal. *Id.*

110. *Id.* at 949.

111. For a discussion concerning the Fourth and Tenth Circuits' post-submission substitution procedures, see *infra* notes 112-18 notes and accompanying text.

example, the Fourth Circuit has held that a reversible error exists when alternate jurors attend prior deliberations before being substituted.[112] A reversible error is present even when defense counsel consents to allowing an alternate juror in the jury room during deliberations if the defendant can prove that prejudice resulted from the trial court's deviation from Rule 24(c)'s mandate to discharge alternates at the beginning of deliberations.[113] Contrastingly, the Fourth Circuit allowed the substitution of a

112. *See* United States v. Virginia Erection Corp., 335 F.2d 868, 870-73 (4th Cir. 1964) (holding that allowing presence of alternate in jury room is reversible error). In *Virginia Erection*, the Fourth Circuit overturned a jury verdict because the defendant did not personally consent to the substitution, and the sanctity of the jury's deliberations was violated by allowing an alternate juror to witness the original jury's deliberations. *Id.* at 870-73. Before deliberations, one of the original jurors said she felt ill, but was well enough to continue for the present time. *Id.* at 869. The court was worried about the possibility of a mistrial, so it permitted an alternate to retire with the jury in case the original juror became too ill. *Id.* at 869-70. Although the record seemed to indicate that counsel for both parties agreed to the alternate's presence, the record does not show that the defendant personally accepted the decision. *Id.* at 870. The Fourth Circuit opined that there was no way to know if the alternate obeyed the judge's instructions to be remain silent during deliberations. *Id.* at 872. The court commented: "However, if he heeded the letter of the court's instructions and remained *orally* mute throughout, it is entirely possible that his attitude, conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors." *Id.* The court concluded that "the presence of the alternate in the jury room violated the cardinal principle that the deliberations of the jury shall remain private and secret in every case." *Id.* The Fourth Circuit feared that the alternate's presence may have acted as a restraint upon the jurors and their ability to express their views. *Id.*

113. United States v. Chatman, 584 F.2d 1358, 1361 (4th Cir. 1978). In *Chatman*, the court held that reversible error is present even when defense counsel consents to allowing an alternate juror in the jury room during deliberations. *Id.* at 1361-62. A thirteenth juror, who was not excused, retired with the regular jurors. *Id.* at 1361. She remained with the jury for 45 minutes before this mistake was discovered. *Id.* When the alternate was excused, neither side moved for a mistrial. *Id.* There was also no evidentiary inquiry to learn whether the alternate juror participated with the jury during deliberations. *Id.* After the alternate was excused, the jury returned a verdict within 15 minutes. *Id.* The Fourth Circuit ruled that the consent of counsel did not matter because the alternate's mere presence was plain error. *Id.* Reversal was required because of the lack of the defendant's consent to the procedure, the presence of the alternate in violation of 24(c) and the possible effects on jury privacy and secrecy. *Id.*

According to the Supreme Court, however, this rule of reversible error is not a per se rule. United States v. Olano, 507 U.S. 725, 737-41 (1993). The Supreme Court held that the presence of alternate jurors in the deliberating room did not substantially affect the rights of the defendant, although the trial court's decision was a plain error. *Id.* The Court held that there is not a presumption of prejudice when a juror sits in deliberations and is told not to participate. *Id.* Although, if the defendant can show that he or she was prejudiced by an alternate juror's presence, than a reversal may be in order. *Id.* Appellate courts continue to find defendants prejudiced by the presence of alternates in the jury room. *See, e.g.*, U.S. v. Ottersburg, 73 F.3d 137, 140 (7th Cir. 1996) (holding that presence of two alternates in deliberation room required reversal of conviction because defendant's substantial rights violated). Therefore, the Fourth Circuit's holdings have only been modified by this recent development. Similarly, the Tenth Circuit's holding in *United States v. Beasley*, is only modified by the *Olano* case. *Compare* United States

discharged alternate juror who was not present during earlier deliberations because the defendant knowingly and intelligently consented to the substitution, and any prejudicial effect was eliminated by the alternate's absence during previous deliberations.[114] Thus, it appears that the Fourth Circuit believes that proceeding with an alternate juror previously discharged prior to deliberations endangers the impartiality of the jury more than continuing with an alternate not exposed to prior deliberations.[115]

Likewise, the Tenth Circuit has adopted the Fourth Circuit's intermediate approach towards the presence of alternates during the deliberation process.[116] The Tenth Circuit holds that an alternate's presence in the

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v. Beasley, 464 F.2d 468 (10th Cir. 1972), *with Olano*, 507 U.S. at 725. For a discussion of *Beasley* and the Tenth Circuit's view of sit-in procedures, see *infra* notes 116-17 and accompanying text.

114. United States v. Evans, 635 F.2d 1124 (4th Cir. 1980). In *Evans*, the Fourth Circuit allowed the substitution of a discharged alternate juror who was not present during earlier deliberations. *Id.* at 1128. One of the regular jurors informed the judge that he had overheard a discussion between outsiders about the defendant. *Id.* at 1126. The judge decided to remove the juror. *Id.*

The court distinguished this case from *Virginia Erection*, 335 F.2d 868 (4th Cir. 1964) and *Chatman*, 584 F.2d 1358 (4th Cir. 1978) by demonstrating that the defendant knowingly and intelligently consented to the substitution, and any prejudicial effect was eliminated by the alternate's absence during previous deliberations. *Evans*, 635 F.2d at 1127-28. The Fourth Circuit found this post-submission substitution to be fundamentally fair. *Id.* A defendant should have the ability to knowingly choose to proceed with the alternate or declare a mistrial. *Id.* The defendant is in a superior position to know what is best for him, not the judge. *Id.*

In fact, the court gave the defendant the option of proceeding under Rule 23(b) with the 11 remaining jurors or insisting upon a mistrial, but contrary to his defense counsel's advice, the defendant opted to substitute the alternate juror. *Id.* at 1126-27. The court questioned the juror on her ability to render a fair decision, and she responded that she could be impartial. *Id.* at 1127. The Fourth Circuit concluded that "the twelve member jury as ultimately constituted was the intelligent, preferred choice of the defendant himself, and that implicitly the defendant had made clear his preference to it over a jury made up of only the original eleven members still remaining." *Id.* The defendant's counsel informed the defendant about the possible adverse effect of anything the alternate juror may have heard after being discharged. *Id.* at 1127 n.3. The defendant consciously chose to proceed with the alternate. *Id.*

115. *Evans*, 635 F.2d at 1128. The Fourth Circuit distinguished the holdings in *Virginia Erection* and *Chatman*, from this case. *Id.* at 1128 n.5 (distinguishing *Virginia Erection*, 335 F.2d at 868; *Chatman*, 584 F.2d at 1358). In *Virginia Erection* and *Chatman*, the Fourth Circuit found the presence of an alternate in the deliberation room was highly prejudicial for three reasons: (1) there was no personal consent of the defendant; (2) the presence of a thirteenth juror violated the Federal Rules maximum of twelve jurors and; and (3) the presence of the thirteenth juror presented a possibility of impermissible coercion. *Id.*

In *Evans*, none of these concerns were present in the Fourth Circuit's opinion. *Id.* The defendant knowingly consented to the substitution and there was never more than 12 jurors deliberating at one time. *Id.* Therefore, the Fourth Circuit held that the presence of an alternate juror in the original jurors' deliberation process was more prejudicial than separately sequestering the alternate and then placing the alternate into a reconstituted jury. *Id.*

116. *See, e.g.*, United States v. Baccari, 489 F.2d 274, 275 (10th Cir. 1973) (allowing post-submission substitution because defendant consented); United States

jury room after the jury retires is grounds for a mistrial.[117] The Tenth Circuit, however, will uphold the substitution of an alternate juror not present during earlier deliberations if a defendant and his or her counsel stipulate to the substitution.[118]

When faced with the post-submission substitution of a juror in contradiction of Rule 24(c), most circuits seem willing to improvise their own procedures in an attempt to sidestep the Federal Rules of Criminal Proce-

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v. Beasley, 464 F.2d 468, 470-71 (10th Cir. 1972) (holding presence of alternate in jury room while jurors deliberate is grounds for mistrial).

117. *Beasley*, 464 F.2d at 470-71. In *Beasley*, the Tenth Circuit was faced with a thirteenth juror because an alternate juror was inadvertently allowed to witness the jury's deliberations. *Id.* at 469. The alternate retired with the 12 original jurors, voted with the jury to select a foreperson and even voted to go to lunch. *Id.* After about 20 minutes, the trial judge realized he forgot to discharge the alternate after the jury retired. *Id.* Immediately, the judge advised the attorneys about the problem. *Id.* A motion for a mistrial was made, but the judge denied it after holding a brief hearing to determine the extent that the alternate participated. *Id.*

The Tenth Circuit followed the Fourth Circuit's approach in *Virginia Erection* and concluded that the privacy and sanctity of the deliberation process was violated and thus the presence of the alternate juror was grounds for a mistrial. *Id.* (*citing Virginia Erection*, 335 F.2d at 868). In the Tenth Circuit's view, once the jury retires it should only consist of the prescribed number of jurors. *Id.* Once deliberations begin, the alternate is like any other stranger to the proceeding because Rule 24(c) mandates the discharge of alternates. *Id.* The Tenth Circuit opined that the prejudice standard is unworkable in these situations because it is difficult to know what impact the alternate had on the deliberation process. *Id.* at 469-70. Simply put, the Tenth Circuit found that the alternate's "presence destroys the sanctity of the jury and a mistrial is necessary." *Id.* at 470.

118. *Baccari*, 489 F.2d at 274. In *Baccari*, the Tenth Circuit was confronted with the same situation found in the Fourth Circuit's *Evans* decision. *Id.* at 275 (discussing *Evans*, 635 F.2d at 1124). Similar to the court in *Evans*, the *Baccari* court allowed the post-submission substitution of an alternate juror. *Baccari*, 489 F.2d at 275. Here, the alternate was discharged pursuant to Rule 24(c) at the close of both attorneys' arguments. *Id.* After the original jurors began deliberations, one of the jurors became ill and had to be hospitalized. *Id.* Then both parties agreed to call back the alternate to continue deliberations. *Id.* Each defendant and their counsel agreed to this plan for the record. *Id.*

The defendants argued that the post-submission procedure was unconstitutional, so their assent to it could not cure this defect. *Id.* The defense relied on the Fourth Circuit's holding in *Virginia Erection*, arguing that a per se rule of reversal applies to this case. *Id.* (*Virginia Erection*, 335 F.2d at 868). The *Baccari* court distinguished the *Virginia Erection* holding for two reasons. *Id.* First, a thirteenth juror situation did not arise here since the alternate was discharged and then recalled to become part of the 12-member jury. *Id.* Second, both the defendants and their counsel consented to the substitution, unlike in *Virginia Erection*, where there was no showing that the defendants had personally consented to the additional juror. *Id.* The Tenth Circuit concluded that substitution would have been improper and grounds for a new trial if the defendants did not consent, but here the defendants knowingly waived any objection to this procedure. *Id.*

The Fourth Circuit relied on the *Baccari* decision when rendering its opinion in *Evans*. *Evans*, 635 F.2d at 1128 n.5. The *Evans* court commented that in *Baccari* the Tenth Circuit upheld the post-submission substitution of an alternate because the defendant knowingly consented to the procedure and a thirteenth juror dilemma was not present because the alternate was not present for the previous deliberations before being impaneled. *Id.*

dure.[119] Liberal circuits rely mostly on the prejudice standard for reversal and the clear stipulation and waiver among the parties to evade Rule 24(c).[120] Recently, the Third Circuit in *Claudio* approached a post-submission substitution dilemma in a similar fashion.[121]

IV. THE THIRD CIRCUIT'S APPROACH TO POST-SUBMISSION SUBSTITUTION: *CLAUDIO V. SYNDER*

A. *Factual Background*

In *Claudio*, the Third Circuit for the first time addressed the constitutionality of substituting an alternate juror after beginning deliberations.[122] A Delaware district court replaced an ill juror with an alternate after deliberations began, but did not officially instruct the jury to restart deliberations.[123] The reconstituted jury then deliberated and found both defendants guilty on all counts.[124] The defendants argued that this procedure violated their Sixth and Fourteenth Amendment rights to a fair trial because the substitution of alternates after deliberation had started violated Federal Rule of Criminal Procedure 24(c).[125]

At the start of the defendant's state trial, the trial judge read his instructions to the jury and the three alternate jurors and then separately

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119. For a discussion of how circuits improvise their own post-submission substitution procedures to work around Rule 24(c), see *supra* notes 79-118 and accompanying text.

120. For a discussion of methods such as the prejudice standard and the stipulation of the parties, see *supra* notes 81-95 and accompanying text.

121. *See* Claudio v. Snyder, 68 F.3d 1573, 1577 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1329 (1996) (allowing post-submission substitution of alternate juror because "essential feature" of jury trial was not compromised).

122. *Id.* at 1573-74. The Third Circuit decided to hear this case because the constitutionality of the trial court's decision to substitute an alternate juror after deliberations begin presented a question of first impression in this circuit. *Id.* at 1574.

123. *Id.* Instead of instructing the jury to begin deliberations anew, the trial judge told the reconstituted jury to "take whatever time is necessary" to inform the replacement juror of all previous deliberations. *Id.*

124. *Id.* at 1575. The reconstituted jury convicted the defendants of first degree robbery, four counts of possession of a deadly weapon during the commission of a felony, two counts of first degree conspiracy, and one count each of first degree murder and first degree attempted murder. *Id.* at 1573.

125. *Id.* at 1575. The defendants argued that the trial court erred by substituting an alternate after deliberations began. *Id.* at 1573-74. The defendants also argued that the trial court erred in two other ways. *Id.* First, the defendants claimed that the trial court erred by failing to issue a curative instruction to remedy inflammatory remarks made by the prosecutor after some physical evidence was excluded. *Id.* Second, the defendants argued that the state court erred by instructing the jury on accomplice liability in a way that would lead the jurors to believe that the defendants bore the burden of proof on that issue. *Id.* at 1574. The Third Circuit affirmed the district court's denial of habeas corpus relief on all three grounds but elaborated only on the post-submission substitution claim. *Id.*

sequestered the three alternates during deliberations.[126] After the first day of deliberations, one of the regular jurors became ill and the next morning the trial judge replaced the ill juror with one of the alternates.[127] The defense counsel moved for a mistrial, but the trial judge denied the motion.[128] The judge instructed the original eleven jurors to "take whatever time is necessary, even though it may be repetitious and time consuming, to completely update [the alternate juror] as to the stage of deliberations you as a group have reached."[129] The judge then specifically instructed the alternate juror to take as much time as necessary to acquaint herself with the thinking of the other jurors and to proceed with deliberations once she fully understood the case.[130] The reconstituted jury deliberated for approximately nine and one-half hours, while the original jury deliberated for about six and one-half hours.[131]

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126. *Id.* at 1574. On December 1, 1987, the jury began its deliberations at approximately 10:30 a.m. and deliberated until 5:00 p.m. *Id.* When the jury requested to view the defendant, Claudio, the court agreed, but required the three alternates to be present with the original 12 jurors to view Claudio. *Id.* After the first day of deliberations, the jury could not reach a verdict. *Id.* The trial judge sequestered the original jurors for the night and separately sequestered the alternates. *Id.* The trial judge separately sequestered the alternates to the end of the trial because the original jury came back with a guilty verdict, the defendants would have to be present in a post-verdict hearing on the issue of capital punishment. *Id.* at 1574 n.2.

127. *Id.* at 1574. One of the original jurors became ill during the night, so the trial judge excused the ill juror and replaced the juror with one of the alternates. *Id.* Before impaneling the alternate, the trial judge asked the three alternates whether they read anything about the case. *Id.* All three alternates told the judge that they had not read anything about the trial. *Id.* Then the trial judge impaneled the first alternate. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* The trial judge's instructions to the alternate read in pertinent part:

> You find yourself [sic] somewhat of a disadvantage. Fortunately however, with your diligence and the cooperation of your fellow jurors, you will be able to familiarize yourself with the deliberations concluded thus far, so that you are not at any disadvantage with regard to understanding all of the evidence and the views of your fellow jurors. It is essential and critical that you take whatever time is necessary to familiarize yourself with the evidence and the thinking and views of the jurors. You must guard against the natural feeling to rush or hasten in order to keep up with the majority or the other 11. I instruct you to be conscious, and forthright in telling the others if you feel at a disadvantage with regard to the level of your understanding. When and only when you feel yourself adequately and reasonably equipped to understand what has transpired thus far in the deliberations, should you signal to your fellow jurors your desire to move forward.

Id. at 1574 n. 3. (citing Claudio v. State, 585 A.2d 1278, 1284 n.9 (Del. 1991)).

131. *Id.* at 1575. The jury found the defendants guilty on all counts. *Id.* The defendants were sentenced to life imprisonment without the possibility of parole for first degree murder, life imprisonment with the possibility of parole for attempted murder and an additional 45 years for other offenses. *Id.*

On direct appeal, the Supreme Court of Delaware held that the trial court violated Delaware Superior Court Criminal Rule 24(c),[132] which is identical to the Federal Rule of Criminal Procedure 24(c), but concluded that the substitution of the alternate juror was a harmless error.[133] The federal district court declined to review the defendant's petition for habeas corpus relief, but the United States Court of Appeals for the Third Circuit decided to hear the defendant's constitutional challenge to this post-submission substitution procedure.[134]

B. *The Third Circuit's Analysis*

The Third Circuit relied on the federal precedent developed by its fellow circuits because the constitutionality of the post-submission procedure presented a question of first impression.[135] In upholding the constitutionality of the post-submission procedure, the Third Circuit adopted the two approaches developed by the other circuits: (1) the "essential feature of the jury test" and (2) the prejudice standard for reversal.[136] The Third Circuit held that the substitution of the alternate juror did not com-

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132. DEL. SUPER. CT. CRIM. R. 24(c). Superior Court Criminal Rule 24(c) provides:

> Alternate Jurors. The Court may direct that not more than 4 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

Id.

133. *Claudio*, 585 A.2d at 1289. The Delaware Supreme Court concluded that "the violation of the federal Constitution in this case was harmless beyond a reasonable doubt." *Id.*

134. *Claudio*, 68 F.3d at 1574. The defendants obtained jurisdiction in the district court pursuant to 28 U.S.C. § 2254(a) after the defendants exhausted all their state court remedies. *Claudio*, 68 F.3d at 1574. The defendants appealed to the Third Circuit Court on a certificate of probable cause issued pursuant to 28 U.S.C. § 2253. *Claudio*, 68 F.3d at 1574.

135. *Claudio*, 68 F.3d at 1574-77. The Third Circuit recognized that the Supreme Court has not ruled on the constitutionality of post-submission substitutions. *Id.* at 1575.

136. *Id.* at 1575-77. The Third Circuit commented:

> Most of the federal courts that have addressed the issue, however, have held that when circumstances require, substitution of an alternate juror in place of a regular juror after deliberations have begun does not violate the Constitution, so long as the judge instructs the reconstituted jury to begin its deliberations anew and the defendant is not prejudiced by the substitution."

Id. at 1575.

promise an "essential feature" of a trial by jury and thus did not prejudice the defendant.[137]

In order to preserve the "essential feature of a jury trial," the Third Circuit recognized the need to preserve the sanctity of the deliberative process.[138] While acknowledging the defendant's fears that post-submission substitution may disrupt the sanctity of the jury, the Third Circuit rejected this argument in favor of the liberal approach.[139] The Third Circuit agreed with the majority of circuits, holding that these concerns are nullified when the judge instructs the reconstituted jury to begin deliberations anew.[140] Therefore, the court held that the defendant is not prejudiced by this post-submission substitution.[141]

The Third Circuit cited cases from almost every circuit to support the constitutionality of post-submission substitutions.[142] The court noted that both the Ninth Circuit in *Miller* and the Eleventh Circuit in *Peek* recognize that the "essential feature" of the jury is preserved in post-submission substitution cases by procedural precautions that guard against violations of the defendant's Sixth and Fourteenth Amendments rights.[143]

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137. *Id.* at 1577. The Third Circuit concluded "[b]ecause the trial court's instructions were the functional equivalent of an instruction to 'begin anew,' we find no evidence that the substitution of the alternate juror compromised the 'essential feature' of a trial by jury." *Id.*

138. *Id.* at 1575. The Third Circuit noted that the Supreme Court in *Williams v. Florida* summarized the essential feature of a jury trial as providing the defendant with the right to be tried by his peers and safeguarding against the "corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge." *Id.* (citing Williams v. Florida, 399 U.S. 78, 100 (1970)).

139. *Id.* at 1575-77. The Third Circuit recognized that the defendants feared that the introduction of an alternate juror after the commencement of jury deliberations violates "the sanctity of the deliberative process." *Id.* at 1575. The defendants argued that "the introduction of an alternate juror after deliberations had begun vitiated the essential purpose of the jury by disrupting the community participation and shared responsibility that the Supreme Court deemed essential." *Id.*

140. *Id.* at 1577. The Third Circuit found that the trial court's instruction was "functionally equivalent" to "begin anew" instruction. *Id.* Based on this finding, the Third Circuit relied on the majority of other circuits to conclude the sanctity of the deliberation process had been preserved. *Id.*

141. *Id.* at 1575. The Third Circuit recognized that most federal courts allow post-submission substitution when the defendant is not prejudiced by the procedure and the reconstituted jury is instructed to begin deliberations anew. *Id.* For a discussion of other circuits' approach towards post-submission substitution, see *supra* notes 79-121 and accompanying text.

142. *Claudio*, 68 F.3d at 1575-76. *See, e.g.*, United States v. Guevara, 823 F.2d 446, 448 (11th Cir. 1987) (allowing post-submission substitution); Miller v. Stagner, 757 F.2d 988, 995 (9th Cir. 1985) (en banc) (same); United States v. Josefik, 753 F.2d 585, 587 (7th Cir. 1985) (same); United States v. Hillard, 701 F.2d 1052, 1056-57 (2d Cir. 1983) (same); United States v. Evans, 635 F.2d 1124, 1127-28 (4th Cir. 1980) (same). But, the Third Circuit relied mostly on opinions in the Second, Ninth, and Eleventh Circuits when rendering its opinion. *Claudio*, 68 F.3d at 1575-76.

143. *Claudio*, 68 F.3d at 1576. The Third Circuit emphasized that the courts in both *Peek* and *Miller* allowed the substitution of one or more alternates after jury deliberations began. *Id.* (distinguishing Peek v. Kemp, 784 F.2d 1479 (11th Cir.

The Third Circuit further acknowledged that the trial court did violate Rule 24(c) of the Delaware Superior Court Criminal Rules, but concluded that federal case law makes it clear that a violation of an established criminal procedure is not sufficient in itself to create a violation of the defendant's Sixth and Fourteenth Amendment rights to a jury trial.[144] In support of this position, the Third Circuit relied on the Second Circuit's ruling in *Hillard* which held a trial court's violation of Rule 24(c) was not constitutionally objectionable because of the in-depth procedural precautions taken by the judge to preserve the "essential feature" of the jury.[145] The Third Circuit acknowledged that the trial judge never explic-

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1986) (en banc); *Miller*, 757 F.2d at 988). The Third Circuit recognized that in *Miller*, the Ninth Circuit allowed the substitution of alternate jurors because the court's improvised post-submission procedure "preserved the 'essential feature' of the jury." *Id.* (citing *Williams*, 399 U.S. at 100; *Miller*, 757 F.2d at 995); *see also* Grunat, *supra* note 1, at 879 (illustrating inherently coercive effects that arise from post-submission substitution). For a further discussion of the holdings of *Peek* and *Miller*, see *supra* notes 91-92 and accompanying text.

144. *Claudio*, 68 F.3d 1576. The Third Circuit recognized that "[a]nalogous federal cases make clear that a violation of the established criminal procedure is not sufficient in itself to create a constitutional violation." *Id.* The Third Circuit opined "despite the characterization of Rule 24(c) as 'a mandatory requirement that should be scrupulously followed,' federal courts have generally ruled that the substitution of a juror after deliberations have begun does not violate the United States Constitution, provided the defendants suffered no prejudice as a result." *Id.*

145. *Id.* at 1576-77. In *Hillard*, the Second Circuit upheld the post-submission substitution of an alternate in direct violation of Rule 24(c). *Hillard*, 701 F.2d at 1056-57. The *Hillard* Court allowed this post-submission substitution because the essential feature of the jury was preserved by procedural precautions taken by the judge. *Id.* In *Hillard*, the alternate was chosen by the same procedures as the regular jurors, heard all the same evidence as the regular jurors and reaffirmed his ability to consider the evidence impartially. *Id.* Therefore, even though a criminal rule of procedure was violated, the Second Circuit held that the defendant was not prejudiced because of these procedural precautions. *Id.* Likewise, the Third Circuit held the defendant in *Claudio* was not prejudiced because similar precautions were taken. *Claudio*, 68 F.3d at 1577. For a further discussion of *Hillard*, see *supra* note 104 and accompanying text.

Similar to the *Hillard* holding in the Second Circuit, the Third Circuit could find no prejudice that would elevate a violation of Rule 24(c) to a violation of the United States Constitution. *Claudio*, 68 F.3d at 1577. The Third Circuit opined that proper procedural precautions were taken to guard against prejudicing the defendant. *Id.* The alternates were chosen by the same procedures as the regular jurors and heard all of the same evidence as the regular jurors. *Id.* In addition, the alternate juror explained that she had not discussed the case or been exposed to media coverage. *Id.* Also, the trial judge instructed the original jurors to "take whatever time is necessary" to completely bring the alternate juror up to date and directed the alternate to take as much time as necessary to familiarize herself with the evidence and the views of the jurors. *Id.*

The Third Circuit, however, failed to mention the Second Circuit's decision in *United States v. Stratton*, 779 F.2d 820, 831-32 (2d Cir. 1985), which affirmed a trial judge's decision to accept a Rule 23(b) 11-juror verdict. This decision casts doubt on whether post-submission substitutions are permissible in the Second Circuit after Rule 23(b)'s amendments. *Id.* For a further discussion concerning the impact of the *Stratton* case on the Second Circuit, see *supra* notes 105-06 and accompanying text.

itly told the reconstituted jury to begin deliberations anew, but held the instructions were the functional equivalent of telling the jury to restart deliberations.[146] The court concluded by opining "[t]he words 'begin anew' carry no talismanic power, and we would exalt form over substance were we to ignore the salutary effect of the trial court's instructions in this case."[147]

V. POST-SUBMISSION SUBSTITUTION IN THE THIRD CIRCUIT—SERVING JUDICIAL ECONOMY WHILE UNDERMINING A DEFENDANT'S RIGHT TO AN IMPARTIAL JURY

The Third Circuit's holding in *Claudio* follows the liberal trend of allowing for improvised procedures that evade Rule 24(c)'s prohibition against post-submission substitution of jurors.[148] Clearly, the circuits have implemented these improvised procedures in an attempt to promote judicial economy.[149] The circuits' improvised procedures may guard against the possibility of costly mistrials, but the Federal Rules of Criminal Proce-

146. *Claudio*, 68 F.3d at 1577. The Third Circuit opined that the judge's instructions were the functional equivalent of directing the jury to begin deliberations again because "[t]he instructions were designed to eliminate any disadvantage that the alternate juror may have felt as a result of her late introduction into the deliberations and to ensure her full, effective, and uncoerced participation in all aspects of the deliberations." *Id.*

147. *Id.*

148. *Id.* at 1575-77. For a further discussion of other circuit's precedent allowing for post-submission substitution procedures, see *supra* notes 79-121 and accompanying text. The Third Circuit correctly recognized that in order to preserve the essential feature of a jury trial, the court must protect the sanctity of the deliberative process by guarding against external influences. *Claudio*, 68 F.3d at 1575. Similar to the Seventh, Ninth and Eleventh Circuits, the Third Circuit believes the sanctity of the jury is protected by procedural precautions such as instructing the reconstituted jury to begin deliberations anew, sequestering the alternate jurors separately at the beginning of the original deliberations, questioning the alternate's ability to begin deliberation with an open mind and directing the alternate jurors to familiarize themselves with the evidence and the views of the original jurors. *Id.* at 1575-77.

In *Claudio*, the defendants believed that the judge's instructions did not adequately protect their rights. *Id.* at 1573-74. Unlike most of the post-submission substitution cases found in other circuits, here the trial judge did not specifically instruct the reconstituted jury to restart deliberations, but directed them to "take whatever time necessary before beginning deliberations again." *Id.* at 1574. The Third Circuit held that these instructions were the "functional equivalent" of such an instruction because they were designed to eliminate any of the disadvantages the alternate may experience. *Id.* at 1577.

149. *See, e.g.*, United States v. Guevara, 823 F.2d 446, 448 (11th Cir. 1987) (holding post-submission substitution is justifiable when long and complex trial); United States v. Hillard, 701 F.2d 1052, 1061 (2d Cir. 1983) (holding that post-submission substitution is better alternative than mistrial and promotes elimination of unjustifiable expense and delay); Henderson v. Lane, 613 F.2d 175, 179 (7th Cir. 1980) (viewing post-submission substitution as way of dealing with difficult and unforeseeable circumstances); United States v. Barone, 83 F.R.D. 565, 573 (S.D. Fla. 1979) (finding post-submission substitution provides opportunity to preserve fair trial while avoiding another trial).

dure already provide the necessary safeguards against the substantial expenditure of resources by the prosecution, defense and court.[150] By following the post-submission substitution precedent set by other circuits, the Third Circuit has joined these circuits in undermining a defendant's right to an impartial jury under the Sixth and Fourteenth Amendments.[151]

A. *Compromising the Deliberation Process*

Post-submission substitution of jurors after the beginning of deliberations infringes upon the sanctity and privacy of the deliberation process.[152] The Supreme Court has held that protecting the privacy and secrecy of jury deliberations is essential to preserve the "essential feature" of a trial by jury.[153] Courts ensure this privacy by keeping the jurors free from external influences such as family, friends, news and all outsiders.[154]

150. *See* FED. R. CRIM. P. 23(b) advisory committee's note, 97 F.R.D. 245, 297-301 (1983) (providing necessary safeguards against mistrials in post-submission substitution dilemmas). The advisory committee recommended amending Rule 23(b) to allow for 11-member juries in case one of the jurors became incapacitated after deliberations began, rather than amending Rule 24 to allow for post-submission substitutions. *Id.* The committee found post-submission substitutions to be constitutionally objectionable. *Id.* at 301. On the other hand, the committee found 11-member juries as a way to prevent a costly mistrial and stop the expenditure of substantial prosecution, defense and court resources. *Id.* at 298. The committee commented that:

> 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 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 more likely to opt for continuing with the remaining 11 jurors.

Id. at 301.

151. For a discussion of reasons why post-submission substitution endangers a defendant's right to a fair trial, see *infra* notes 152-78 and accompanying text.

152. *See* United States v. Chatman, 584 F.2d 1358, 1361 (4th Cir. 1978) (arguing that presence of juror would violate privacy and secrecy of jury deliberations); United States v. Beasley, 464 F.2d 468, 469 (10th Cir. 1972) (holding presence of alternate endangers sanctity of jury); United States v. Virginia Erection Corp., 335 F.2d 868, 872 (4th Cir. 1964) (holding presence of alternate in jury room violated cardinal principle that deliberation of jury shall remain private and secret); *see also* Grunat, *supra* note 1, at 876-77 (arguing that sanctity of jury is violated by post-submission substitutions).

153. *See* Williams v. Florida, 399 U.S. 78, 100 (1970) (commenting that "essential feature" of jury is promoted by "group deliberation, free from outside attempts at intimidation . . . provid[ing] a fair possibility for obtaining a representatives cross-section of the community").

154. *See* FED. R. EVID. 606(b) (mandating need for jury privacy free from outside influence); Remmer v. United States, 350 U.S. 377, 382 (1956) (holding sanctity of jury violated by outside intrusions such as bribes). For a discussion of the importance of preserving the privacy and secrecy of deliberations, see *supra* notes 46-50 and accompanying text.

Rule 24(c) mandates the discharge of alternate jurors "after the jury retires to consider its verdict."[155] Once these alternate jurors are discharged, they are considered outsiders to the deliberation process.[156]

An alternate's subsequent presence in the deliberation room dissolves the jury's sanctity, especially if the alternate has had contact with the outside world.[157] In *United States v. Virginia Erection Corp.*,[158] the Fourth Circuit noted that even the silent alternate may convey messages to the deliberating jurors through "facial expressions, gestures or the like."[159] Therefore, an alternate's presence after jury deliberations begin may improperly influence the jury's verdict and prejudice the defendant's right to a jury trial under the Sixth and Fourteenth Amendments.

An alternate placed into a jury after deliberations begin undermines the group dynamics involved in the deliberative process.[160] When an alternate juror enters deliberations, he or she is forced into a coercive atmosphere.[161] Both federal courts and the drafters of the Federal Rules of Criminal Procedure recognize that this coercive atmosphere may pressure the alternate to prematurely agree with the original jurors.[162] Also, alter-

155. FED. R. CRIM. P. 24(c). For a further discussion of the purpose of Rule 24(c), see *supra* notes 56-71 and accompanying text.

156. *See* Grunat, *supra* note 1, at 876-77 (commenting that alternate is outsider to deliberations and violates jury's privacy); *see also* FED. R. CRIM. P. 24(c) (mandating discharge of alternate jurors at beginning of deliberations). Because Rule 24(c) requires that alternate jurors be discharged at the outset of deliberations, it logically follows that these alternates are outsiders who may come into contact with a number of corruptive influences. Grunat, *supra* note 1, at 876-77.

157. *See* FED. R. CRIM. P. 23(b) advisory committee's note, 97 F.R.D. 245, 301 (1983) (commenting that even if reconstituted jury was required to begin deliberations anew, "the continuing jurors would be influenced by the earlier deliberations and . . . the new juror would be somewhat intimidated by the others by virtue of being a newcomer to the deliberations"); *see also* United States v. Lamb, 529 F.2d 1153, 1157 (9th Cir. 1975) (commenting that alternate loses obligation as juror and confidentiality once released by court).

158. 335 F.2d 868 (4th Cir. 1964).

159. *Id.* at 872. For a further discussion of *Virginia Erection*, see *supra* note 112 and accompanying text.

160. *See* 3 ORFIELD, *supra* note 27, at 94 (discussing how original drafters of Federal Rules of Criminal Procedure feared that regular jurors would cause sole dissenter to quit, causing replacement of alternate who could easily be swayed); *see also* HASTIE ET AL., *supra* note 51, at 121 (discussing importance of group dynamics in deliberation process); Grunat, *supra* note 1, at 879-80 (discussing how post-submission substitution undermines group dynamics by interfering with jury's ability to reach group consensus).

161. *See Lamb*, 529 F.2d at 1156 (discussing possible coercive effects on alternate juror who joins jury after deliberations begin). For a discussion of studies that illustrate the difficulty an alternate experiences when trying to change the opinions of the original jurors, see *supra* note 54 and accompanying text.

162. *See Lamb*, 529 F.2d at 1156 (commenting "[t]he inherent coercive effect upon an alternate juror who joins a jury that has, as in this case, already agreed that the accused is guilt is substantial"); United States v. Beasley, 464 F.2d 468, 469 (10th Cir. 1972) (discussing possible prejudice to defendant from alternate's presence); *see also* FED. R. CRIM. P. 23(b) advisory committee's note, 97 F.R.D. at 301

nates miss part of the crucial deliberation process because they participate only in part of the deliberations.[163]

Post-submission substitution also undermines the possibility of a hung jury and thus decreases the defendant's chances of obtaining a mistrial.[164] Commentators and social scientists believe that post-submission substitution may cause jurors in favor of conviction to influence the sole juror in favor of acquittal to feign illness and thus place the burden of the decision on a more impressionable alternate juror.[165] In the Eleventh Circuit decision *Peek v. Kemp*,[166] the jury sentenced the defendant to death within minutes after an alternate was replaced because he allegedly became sick two hours into deliberations.[167] The judge did not question the ill juror before discharging him, but later fact-finding efforts revealed that the sick juror was the lone hold-out for acquittal.[168] Similarly, in the Ninth Circuit decision *United States v. Lamb*,[169] a reconstituted jury rendered a verdict in twenty-nine minutes, while taking four hours before the substitution.[170] The Ninth Circuit reversed the decision because the new juror was placed

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(discussing coercive atmosphere present when alternate joins jury after deliberations begin).

163. *See* FED. R. CRIM. P. 24(c) (mandating discharge of alternate once deliberations begin). If alternates miss a crucial part of the deliberation process, it may hinder their ability to deliberate fairly.

164. *See Lamb*, 529 F.2d at 1156 (discussing how post-submission substitution significantly limits accused's right to mistrial in case when original jury cannot reach agreement); McDermott, *supra* note 1, at 881 (same). McDermott describes how post-submission substitution may decrease the likelihood of a hung jury in two ways. *Id.* First, if a jury wants to ensure a verdict, it may pressure a sole dissenter out of the jury. *Id.* Second, "studies demonstrate that hung juries are more likely when a lone dissenter, supporting the defendant, receives support for his or her position early in deliberations." *Id.* at n.367 (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 1, 462-63 (1966)). The Supreme Court commented that this study is "the most ambitious empirical study of jury behavior that has been attempted." Grunat, *supra* note 1, at 881 n.143 (citing Spencer v. Texas, 385 U.S. 554, 575 (1967)).

165. *See* ORFIELD, *supra* note 163, at 94 (discussing how regular jurors may pressure one dissenter to quit); *see also Lamb*, 529 F.2d at 1156 (commenting that "[a] lone juror who could not in good conscience vote for conviction could be under great pressure to feign illness or incapacity so as to place the burden of decision on an alternate juror"). For a further discussion of studies revealing the pressure of an alternate when he or she enters reconstituted jury, see *supra* notes 53-54 and accompanying text.

166. 784 F.2d 1479 (11th Cir. 1986) (en banc).

167. *Id.* at 1482. For a further discussion of the facts of *Peek* and the Eleventh Circuit's holding, see *supra* note 92 and accompanying text.

168. *Peek*, 784 F.2d at 1482.

169. 529 F.2d 1153 (9th Cir. 1975).

170. *Id.* at 1155. For a further discussion of the facts of *Lamb* and the Ninth Circuit's holding, see *supra* note 90 and accompanying text.

into a coercive atmosphere in which the jury had already reached a verdict.[171]

Like the judge in *Peek*, the trial judge in *Claudio* did not question the ill juror but merely excused him.[172] Nevertheless, the Third Circuit approved of this post-submission procedure and found that a coercive atmosphere did not exist.[173] The Third Circuit reaffirmed its belief that the alternate juror participated in an uncoerced atmosphere because the reconstituted jury deliberated for slightly longer than the originally impaneled jury, and the judge instructed the reconstituted jury "to take whatever time necessary."[174] This fact alone does not remove the possibility of coercion.[175] It is possible that the ill juror was also a lone hold-out who was pressured into feigning illness.[176]

If courts refuse to follow the uniform Rules of Criminal Procedure promulgated by the Supreme Court, then a constant danger exists that a defendant's substantial right to a trial by an impartial jury will be undermined.[177] Even though the tactic of separately sequestering the alternate juror before impaneling him or her to the reconstituted jury may help

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171. *Lamb*, 529 F.2d at 1156-57. The *Lamb* Court concluded "[t]hat impermissible coercion upon the alternate juror in this case was manifestly inherent." *Id.* at 1156.

172. Claudio v. Snyder, 68 F.3d 1573, 1574 (3d Cir. 1995). Many other circuits make a point of discussing how the trial judge usually will question the disabled juror before allowing him or her to be excused. For a discussion of cases where trial judges interview the incapacitated juror, see *supra* notes 79-121 and accompanying text.

173. *Claudio*, 68 F.3d at 1577. The Third Circuit argued that the judge's instructions to the reconstituted jury ensured the alternate's full, effective and uncoerced participation in the deliberation process. *Id.*

174. *Id.* In *Claudio*, the original jury deliberated for about six and one-half hours, while the reconstituted jury deliberated for about nine and one-half hours. *Id.* at 1575. For a further discussion of the facts of *Claudio* including the judge's instructions to the jury, see *supra* notes 122-34 and accompanying text.

175. *See Lamb*, 529 F.2d at 1157 (opining that despite judge's instruction to "begin at the beginning," the alternate juror was coerced into agreeing with original jurors). In *Lamb*, the Ninth Circuit commented that the 29-minute deliberation period of the reconstituted jury was not a factor in reversing the district court's holding. *Id.* at 1156 n.7. The Ninth Circuit opined that "[t]he mandatory provision of Rule 24 having been violated, the period of time during which the substitute juror participated in the deliberations is essentially irrelevant." *Id.*

176. *See* Peek v. Kemp, 784 F.2d 1479, 1482 (11th Cir. 1986) (en banc) (discussing how subsequent fact findings showed that replaced juror was lone holdout for acquittal). For a further discussion of the facts and court's analysis in *Peek*, see *supra* note 92 and accompanying text.

177. *See* FED. R. CRIM. P. 2 (stating that Federal Rules are meant to secure simplicity in procedure and fairness in administration). Therefore, Rules 23(c) and 24(b) were enacted to promote fair deliberations on behalf of the defendant. By creating improvised post-submission substitution procedures, courts are violating Rule 24(c) and undermining the "fairness and simplicity goals" of the Federal Rules of Criminal Procedure.

preserve the jury's secrecy, the Third Circuit's abandonment of Rules 23(b) and 24(c) may have compromised the jury's secrecy.[178]

B. *Denying Supreme Court Approval of Rule 23(b)'s Procedural Option*

The Third Circuit's improvised post-submission substitution procedure also undermines the intent of the drafters of the Federal Rules of Criminal Procedure, the Advisory Committee and the Supreme Court to preserve a defendant's right to an impartial jury.[179] The Supreme Court has twice rejected proposals to amend 24(c) to allow for post-submission substitutions in favor of 23(b)'s procedural solution.[180] In 1983, the Advisory Committee, the Supreme Court and the ABA's Standards for Criminal Justice amended 23(b) to permit an eleven-juror verdict at the discretion of a trial judge, rather than accept a post-submission substitution amendment to 24(c).[181]

When a judge is faced with the loss of a juror during deliberations, a viable 23(b) option exists that already has Supreme Court approval.[182] It is difficult to understand why the circuits continue to use improvised post-submission substitution procedures and risk compromising a defendant's right to an impartial jury when 23(b)'s eleven-member jury verdict provides the perfect solution.[183] Both the Fifth and Second Circuits recommend that trial judges proceed with Rule 23(b)'s eleven-juror verdict

178. *See Claudio*, 68 F.3d at 1574 (observing trial court's separate sequestering of alternate jurors). The Third Circuit believes the sanctity of the jury is protected by procedural precautions such as instructing the reconstituted jury to begin deliberations anew, sequestering the alternate jurors separately at the beginning of the original deliberations, questioning the alternate's ability to begin deliberation with an open mind and directing the alternate jurors to familiarize themselves with the evidence and the views of the original jurors. *Id.* 1575-77. Many of the other circuits believe that these same procedural precautions guard against violations of the jury's sanctity and preserve the "essential feature" of the jury. For a discussion of the procedural precautions that circuits employ, see *supra* notes 79-121 and accompanying text. For a discussion of why courts should use the 23(b) option, see *infra* notes 79-88 and accompanying text.

179. For a discussion of why the drafters, advisory committee and Supreme Court did not favor post-submission substitution procedures, see *supra* notes 56-71 and accompanying text.

180. *See* FED. R. CRIM. P. 23(b) advisory committee notes, 97 F.R.D. 245 (adoption of Rule 23(b) by Supreme Court, rather than Rule 24's post-submission substitution proposal); Orfield, *Trial Jurors*, *supra* note 4 at 46 (commenting that Supreme Court questioned constitutionality of post-submission substitution procedure). For a further discussion of the Supreme Court's indirect disapproval of post-submission substitution, see *supra* notes 63-65 and accompanying text.

181. For a discussion of the views of the Advisory Committee, Supreme Court and the ABA's Standards for Criminal Justice, see *supra* notes 66-71 and accompanying text.

182. *See* FED. R. CRIM. P. 23(b) (providing 11-member jury in discretion of judge when juror is lost after beginning of deliberations).

183. For a discussion regarding the circuits' improvised post-submission substitution procedures, see *supra* notes 79-121 and accompanying text.

rather than rely on improvised post-submission procedures.[184] Even the Third Circuit in *Gambino* favored Rule 23(b)'s eleven-juror verdict rather than deviate from Rule 24(c)'s directives.[185]

In *Claudio*, however, the trial judge never gave the defendant the option of proceeding with an eleven member jury.[186] The Third Circuit never addressed the 23(b) eleven-juror option in their opinion, except to acknowledge in a footnote that it was not considered.[187] Rather than permit improvised post-submission substitution in direct contradiction to Rule 24(c), the Third Circuit should have directed the trial court to proceed with a discretionary eleven-member jury pursuant to Rule 23(b).[188] This approach would not have the potentially damaging effect on a defendant's substantial rights because no danger exists of an alternate juror disturbing the sanctity and impartiality of the jury.

VI. CONCLUSION

While the Third Circuit's improvised post-submission substitution procedure may promote judicial economy,[189] it undermines an "essential feature" of the jury process and may possibly prejudice a defendant.[190] The Third Circuit has set a dangerous precedent by following the improvised post-submission substitution procedures set forth by its fellow circuits.[191] Attorneys must be aware that this holding increases the risk that the sanctity and impartiality of jury deliberations may be compromised and decreases the probability of a hung jury and a defendant's chances of obtaining a mistrial.[192] Therefore, attorneys must approach these post-submission substitution problems strategically. If attorneys find that the

184. For a discussion of the Second, Third and Fifth Circuits views on post-submission substitutions, see *supra* notes 96-110 and accompanying text.

185. United States v. Gambino, 788 F.2d 938, 948-49 (3d Cir. 1992). For a discussion of the *Gambino* opinion, see *supra* notes 107-10 and accompanying text.

186. Claudio v. Synder, 68 F.3d 1573, 1575 n.4 (3d Cir. 1995). The trial court never asked the parties whether they wanted to accept the unanimous verdict of 11 jurors pursuant to Delaware Superior Court Rule 23(b). *Id.*

187. *Id.* If the parties agreed to an 11-member jury verdict, the whole problem would have been resolved. *Id.*

188. FED. R. CRIM. P. 23(b). If the Third Circuit supported a 11-member jury verdict, there would be no danger of compromising the sanctity of the jury because courts would then follow Rule 24(c)'s mandate to discharge alternates at the outset of deliberations. FED. R. CRIM. P. 24(c).

189. For a discussion of how post-submission substitution serves judicial economy, see *supra* note 149 and accompanying text.

190. For a discussion of how post-submission substitution procedures undermine the sanctity and impartiality of the jury, see *supra* notes 152-78 and accompanying text.

191. For a discussion of how the Third Circuit followed federal precedent, see *supra* notes 135-95 and accompanying text. For a discussion of other circuits' approach towards post-submission substitution, see *supra* notes 79-121 and accompanying text.

192. For a discussion of how post-submission substitution may endanger the sanctity of the jury, see *supra* notes 46-55, 152-78 and accompanying text.

post-submission substitution may prejudice their client, they should bring Rule 23(b)'s discretionary eleven-member jury procedure to the court's attention.[193]

Rule 23(b)'s eleven-member jury is clearly a better alternative because no outside influences threaten the sanctity and impartiality of the jury.[194] Nevertheless, until the Supreme Court rules differently, courts in the Third Circuit will follow *Claudio* and continue to violate Rule 24(c)'s mandatory language and thus continue to endanger a defendant's right to a trial by an impartial jury.[195]

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193. FED. R. CRIM. P. 23(b).

194. For a discussion of the promulgation of Rule 23(b) and why it is a better alternative than Rule 24(c), see *supra* notes 56-71, 179-88 and accompanying text.

195. *See* Claudio v. Snyder, 68 F.3d 1573, 1575 (3d Cir. 1995) (discussing how Supreme Court has not specifically ruled on constitutionality of post-submission substitutions).