STANDBY JUDGES

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INTRODUCTION

What should a judge do when something goes wrong that unfairly prejudices a criminal defendant at a jury trial? It's a question that has plagued and perplexed American courts since the first jury trial was held in the American colonies in 1630.[1] Imagine the following representative situations that recur with some frequency: (1) a police officer improperly testifies that the defendant failed a polygraph test;[2] (2) a prosecutor asks a question or makes a comment inviting the jury to

1. *Learn About The History Of The Jury System*, MASS.GOV (Feb. 27, 2023), https://www.mass.gov/info-details/learn-about-the-history-of-the-jury-system [https://perma.cc/C7XG-XJHD] ("In 1630, the first jury trial in the American Colonies was held in Plymouth when John Billington was accused of murdering fellow Mayflower colonist John Newcomin.").

2. *See, e.g.*, United States v. Burk, No. 1:12-cr-1, 2016 WL 3747608, at *2 (M.D. Ga. July 11, 2016) ("But where a witness makes reference to a polygraph test or a defendant's willingness to take a polygraph test, the Eleventh Circuit has held repeatedly that a curative instruction can prevent a mistrial.").

resolve a case on grounds of racial or religious prejudice;[3] or (3) a witness for the prosecution testifies on direct examination before clamming up on cross-examination.[4] What can and what should a judge do in these situations?

Currently, courts have only come up with two solutions, both of which are fraught with peril: (1) issue a curative instruction; or (2) declare a mistrial.[5] With a curative instruction, the judge asks the jurors to ignore what they just heard (*e.g.*, telling the jury to "disregard any statement with respect to a polygraph in this case").[6] But curative instructions can be bad for defendants because such instructions might fail to minimize unfair prejudice or, worse, have the boomerang effect of heightening it, leading to wrongful convictions.[7] Nonetheless, courts frequently find that curative instructions can erase unfair prejudice.[8] Conversely, when an appellate court concludes that a curative instruction was ineffective, the State might lose a conviction otherwise based on strong evidence and have to spend tens or even hundreds of thousands of taxpayer dollars on a retrial.[9]

The State (and the taxpayers) must bear these same costs of a new trial in the rare instances in which the judge finds that a prejudicial error mid-trial requires a mistrial.[10] But a mistrial is also no panacea for a defendant. Courts have concluded that mistrials and retrials increase both the financial and emotional burden on the accused and the likelihood of wrongful convictions.[11]

This Article advances the following proposal: A judge at any jury trial can and should inform both parties at the start of trial that she is designating herself as a standby judge. By designating herself as such, the judge would be available to serve as the trier of fact should the jury

3. *See, e.g.*, State v. Pouncey, 699 A.2d 901, 907 (Conn. 1997) (noting that the assistant state attorney made remarks during closing arguments that "reasonably could have been construed as an appeal to racially based fears of urban crime").

4. *See, e.g.*, United States v. Valdez-Soto, 31 F.3d 1467, 1473 (9th Cir. 1994) (addressing an appeal in a case in which the ex-girlfriend of one of the defendants started testifying and then stopped answering questions).

5. *See, e.g.*, 32 N.J. PRAC., CRIMINAL PRACTICE AND PROCEDURE § 38:17 (2023 ed.) ("Trial judges confronted with this situation generally have two options available: the extreme option of declaring a mistrial and the more common option of giving an immediate curative instruction to the jury.").

6. Garza v. State, No. 13-06-584-CR, 2007 WL 2429366, at *2 (Tex. Ct. App. Aug. 28, 2007).

7. *See, e.g.*, Julie A. Singer et al., *The Impact of DNA and Other Technology on the Criminal Justice System: Improvements and Complications*, 17 ALB. L.J. SCI. & TECH. 87, 117 (2007) ("Many psychological studies suggest that jurors are often unable to comply with a judge's curative instructions, and that such an order may lead to a 'backfire effect' in which jurors are more likely to rely on the very thing the judge advised them to ignore.").

8. *See infra* notes 17–49 and accompanying text.

9. *See infra* notes 75–110 and accompanying text.

10. *See infra* notes 109–110, 129–130 and accompanying text.

11. *See infra* notes 115–28 and accompanying text.

receive improper argument, testimony, or evidence. Under this proposal, in such a situation, the defense could still move for a curative instruction or a mistrial. But the defense could also file a written motion to shift the trial from a jury trial to a bench trial. The government would not need to consent to such a motion; instead, the judge would grant it if she believed that the jury might not be able to abide by a curative instruction.

This Article will proceed in three parts. In Part I, the Article will discuss the current binary choice that a judge must make between a curative instruction and a mistrial when something occurs that unfairly prejudices a criminal defendant. It will detail how both of these choices are fraught with peril for the defendant, the prosecution, and the public. Part II will discuss a similar situation in which a judge must make corrective measures midtrial: a defendant representing herself at a criminal trial. It will note how the Supreme Court has authorized the appointment of standby counsel who can step in if a *pro se* defendant is unable to represent herself mid-trial, obviating the need for a mistrial.

Finally, Part III will use the appointment of standby counsel as the foundation for this Article's proposal for standby judges. This Part will explain the proposal, discuss the haphazard ways in which judges currently try to switch to bench trials mid-trial, set forth various legal justifications for the proposal, and assess benefits and potential issues that would be created by the proposal.

I. CURATIVE INSTRUCTIONS AND MISTRIALS

A. Introduction

Criminal jury trials are rarely error-free.[12] Indeed, with the stakes so high for both sides and society at large, it would be unreasonable to expect many trials heard by twelve lay women and men to go off without a hitch.[13] So, what should judges do when jurors are exposed to improper testimony, evidence, or argument? The Part sets forth the binary choice judges must currently make when an error unfairly prejudices a criminal defendant at a jury trial. It will further explain why both choices in the binary can be problematic to the defendant, the prosecution, and the public.

12. *See, e.g.*, Smith v. State, 762 So. 2d 969, 971 (Fla. 4th DCA 2000).

13. *See, e.g., id.* ("Indeed it would be unreasonable to expect perfect trials in a setting in which the interests of society in vindicating its criminal laws are so important, and where the stakes—life or liberty—to the accused are so high, the consequences so grave.").

B. Curative Instructions

Imagine a case in which improper testimony, evidence, or argument reaches the jury. In response, the judge can issue a curative instruction telling the jurors to disregard what they have just heard or seen.[14] Notably, a judge does not issue a curative instruction solely for the benefit of the defendant.[15] Instead, such an instruction is also intended to secure the public's interest in "fair trials designed to end in just judgments."[16]

While any number of trial errors could prompt a curative instruction,[17] this Article will highlight three representative examples.

1. State's Witnesses Who Stop Answering Questions

The first example involves a witness for the prosecution who implicates the defendant before subsequently refusing to answer additional questions during direct or cross-examination. In such a case, a judge could issue a curative instruction because the defendant lacked a full and fair opportunity to confront and cross-examine the witness.[18] Courts generally have found that such an instruction is sufficient to cure any prejudice unless the witness had a "special relationship" with the defendant (*e.g.*, if the witness was a co-conspirator).[19]

A vivid example of such a case was the prosecution of Karl Willis and Wayne Braddy. Willis and Braddy were arrested and charged with the murder of thirteen-year-old Maurice Purifie in Toledo, Ohio.[20] Essentially the only evidence against them was the confession of alleged accomplice Travis Slaughter, who implicated Willis and Braddy in the crime.[21] The prosecutor took the case to a grand jury to confirm his claim of probable cause, with grand juries returning indictments in approximately 99% of cases.[22] But the grand jurors found Slaughter's testimony so riddled with inconsistencies that they refused to find probable cause and indict.[23]

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14. *See, e.g.*, United States v. Graham, 47 F.4th 561, 566 (7th Cir. 2022) ("[T]he judge determined that a curative instruction directing the jury to disregard the statements would adequately address any prejudice to Graham.").

15. *See, e.g.*, Carter v. State, 785 A.2d 348, 355 (Md. 2001).

16. *Id.* (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)).

17. *See, e.g.*, Belisle v. State, 11 So. 3d 256, 300 n.6 (Ala. Crim. App. 2007) ("We have held that curative instructions are sufficient to cure many errors.").

18. *See* United States v. Valdez-Soto, 31 F.3d 1467, 1473 (9th Cir. 1994).

19. *Id.* at 1473.

20. *The State v. Willis and Braddy – Episode 1 – Ham Sandwich*, UNDISCLOSED, at 03:10 (Feb. 7, 2022), https://undisclosed-podcast.com/episodes/state-v-willis-and-braddy/ [https://perma.cc/FBA3-4JWJ].

21. *Id.* at 09:50.

22. *Id.* at 11:40.

23. *Id.* at 14:05.

Nine months later, the prosecutor took the case to a new grand jury and corroborated Slaughter's confession with testimony by his girlfriend, Shondrea Rayford.[24] According to Rayford, before Slaughter spoke to the Toledo police, he confessed to her that he committed the crime with Willis and Braddy.[25] This testimony contradicted the claim that the Toledo police fed Slaughter his confession during his custodial interrogation.[26]

Subsequently, at trial, the prosecutor called Rayford, who began backing up Slaughter again with her testimony.[27] Then, the prosecutor asked her, "Shondrea, did you call the police about what you knew about the murder," and she refused to answer.[28] After excusing the jury, the judge asked Rayford whether she was deciding not to cooperate in answering questions.[29] When Rayford indicated that she was, the judge held her in contempt.[30] The judge subsequently gave the following curative instruction to the jury: "Members of the Jury, you are instructed to disregard the direct testimony of Ms. Reyford [sic] since she's unavailable for cross-examination. As far as you're concerned, she was not a witness in this case."[31]

The jury ultimately found Willis and Braddy guilty of murder. Therefore, if the jurors adhered to the cautionary instruction, they found Willis and Braddy guilty beyond a reasonable doubt based upon essentially the same evidence that led the first grand jury to conclude that there was not even probable cause to believe they killed Purifie. Willis and Braddy remain incarcerated today, despite Travis Slaughter recanting his confession and claiming that he falsely implicated himself, Willis, and Braddy.[32]

2. References to Inadmissible Polygraph Evidence

A second situation in which courts typically issue curative instructions is cases in which witnesses improperly reference polygraph evidence. With limited exceptions, courts across the country have deemed evidence connected to polygraph examinations inadmissible.[33]

24. *Id.* at 16:45.

25. *Id.* at 16:45, 18:30.

26. *Id.* at 09:48.

27. *Id.* at 29:26.

28. *Id.* at 21:28.

29. *Id.* at 21:36.

30. *Id.* at 21:50.

31. *Id.* at 23:40.

32. *The State v. Willis and Braddy – Episode 3 – Crying Wolf*, UNDISCLOSED, at 06:02, (Feb. 21, 2022), https://undisclosed-podcast.com/episodes/state-v-willis-and-braddy/ [https://perma.cc/ZUE5-7H5X].

33. *See, e.g.*, State v. Crosby, 927 P.2d 638, 642-43 (Utah 1996) ("[E]very court that has examined this issue, save one, has held that polygraph evidence is either inadmissible *per se*

Moreover, courts have generally found that curative instructions are sufficient to purge the prejudice of jurors hearing that a defendant failed a polygraph test or refused to take one.[34]

A troubling example of such a case can be found in the Supreme Court of Ohio's opinion in *State v. Holt*.[35] In *Holt*, Raymond Ross Holt was charged with kidnapping and related crimes.[36] At trial, a detective testified that Holt had taken a lie detector test and failed it.[37] The judge denied defense counsel's motion for a mistrial and instead issued a curative instruction directing the jurors to ignore the testimony.[38] At the close of the case, the jurors deliberated "far into the night" and notified the judge that a verdict could not be reached; however, the judge told them to continue deliberating, and they finally returned a guilty verdict.[39]

Despite the jury clearly having difficulty finding Holt guilty, the Supreme Court of Ohio found no error with the trial judge issuing a curative instruction rather than declaring a mistrial.[40] The court acknowledged that the detective's testimony about the failed lie detector test "was highly improper and no doubt damaging to the defendant."[41] But the court found that the trial judge's prompt curative instruction was sufficient to undo that damage.[42]

3. Appeals to Racial or Religious Bias

A third situation in which courts typically issue curative instructions is cases in which prosecutors and/or witnesses attempt to appeal to possible juror racial or religious bias. While there are exceptions,[43] courts generally hold that curative instructions are sufficient in these cases to prevent stereotypical thinking by jurors.[44]

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or admissible only in cases where the parties have waived reliability concerns by stipulating to the evidence's admission.").

34. *See, e.g.*, United States v. Burk, No. 1:12-cr-1 (WLS), 2016 WL 3747608, at *2 (M.D. Ga., July 11, 2016) ("But where a witness makes reference to a polygraph test or a defendant's willingness to take a polygraph test, the Eleventh Circuit has held repeatedly that a curative instruction can prevent a mistrial.").

35. *See, e.g.,* 246 N.E.2d 365 (Ohio 1969).

36. *Id.* at 366.

37. *Id.* at 367.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *See infra* notes 99-107 and accompanying text.

44. *See, e.g.*, People v. Aliwoli, 606 N.E.2d 347, 356 n.1 (Ill. App. Ct. 1992) (collecting cases).

One example of such a case can be found in *People v. Mays*.[45] In *Mays*, Michael Mays was charged with two robberies committed on the same night within a two-block area of Brooklyn.[46] During trial, the prosecutor made comments "concerning the racial composition of the neighborhood in which the[] crimes were committed," which the appellate court concluded were "deplorable and should not be repeated."[47] The court also held that the comments were "beyond the evidence and had no relevance to any issue in the trial."[48] Nonetheless, the appellate court upheld Mays's convictions, concluding that the trial judge issued a curative instruction promptly after each improper comment, "alleviat[ing] any prejudice which might have arisen from any of the prosecutor's remarks."[49]

The question in cases like these three is whether the jury in fact did follow the judge's curative instructions. If not, there would clearly be severe prejudice to the defendant. Moreover, the use of curative instructions can also cause harm to the prosecution and the public. This potential prejudice will be explored in the following subsections.

4. Issues With Curative Instructions

(a) Harm to the Defendant and Public

When a judge issues a curative instruction after the jury is exposed to something prejudicial, the potential for harm to the defendant and the public is straightforward. The concern is that the jury will ignore the curative instruction, or, worse, use it to highlight the harm it was supposed to erase. Courts across the country have largely waved away this concern. The United States Supreme Court has held that

> "[w]e normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions . . . and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant."[50]

And yet, it is clear that jurors do disobey curative instructions in at least some cases. The previously mentioned case involving Karl Willis and Wayne Braddy provides one such example.[51] As noted, the judge in that case gave a curative instruction after Shondrea Rayford started

45. 527 N.Y.S.2d 859 (N.Y. App. Div. 1988).

46. *Id.* at 860.

47. *Id.*

48. *Id.*

49. *Id.*

50. Greer v. Miller, 483 U.S. 756, 766 n.8 (1987) (citations omitted). In *Greer*, the Supreme Court applied this general principle to find that there was no reason to believe that the jury in the case before it was incapable of obeying multiple curative instructions.

51. *See* UNDISCLOSED, *supra* notes 20-32 and accompanying text.

corroborating Travis Slaughter's testimony, incriminating Willis and Braddy, but then refused to answer further questions.[52] A reporter for WTOL later interviewed jury foreman Jon Crye.[53] Crye told the reporter that the jury ignored the curative instruction and considered Rayford's testimony in reaching a guilty verdict.[54] He also added that the jurors figured that Rayford stopped answering questions because she was scared of Willis and Braddy.[55] Rayford, however, has filed an affidavit indicating that Slaughter pressured her into giving false testimony corroborating his claims and that she clammed up because she didn't want to perjure herself.[56]

Such anecdotal cases are buttressed by empirical data that jurors frequently disobey curative instructions. The leading study on the subject remains the groundbreaking book, *The American Jury*, by Harry Kalven, Jr. and Hans Zeisel.[57] The book contains an "analytic summary of [] data from [questionnaires completed by] judges who presided over 3,576 criminal jury trials, [and] post-trial interview responses from 1,500 jurors in 225 trials."[58] The jury responses revealed two key things: First, "jurors are deeply affected by prejudicial comments and evidence and that curative instructions tend to increase the prejudice rather than decrease it."[59] Second, defendants are disproportionately harmed by curative instructions when the evidence against them is weak as opposed to strong.[60]

Specifically, Kalven and Zeisel concluded from the questionaries "that when there was doubt as to evidence, the juror was liberated from factual constraints and as a result more likely to be influenced by affective factors."[61] This theory is known as the "liberation hypothesis," which posits "that when cases are close on the evidence, juries are 'liberated' from the dictates of the law and use extralegal factors, like criminal and gender stereotypes, in arriving at verdicts."[62]

52. UNDISCLOSED, *supra* notes 23-31 and accompanying text.

53. UNDISCLOSED, *supra* note 20, at 24:40.

54. *Id.*

55. *Id.* at 25:00.

56. *Id.* at 27:20.

57. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966).

58. Dennis J. Devine et al. *Evidentiary, Extraevidentiary, and Deliberation Process Predictors of Real Jury Verdicts*, 40 L. & HUM. BEHAV. 670, 670 (2016); *id.*

59. Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(b)*, 38 EMORY L.J. 135, 175 (1989).

60. *Id.*

61. Denis Chimaeze E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCH. 133, 143 (1979).

62. Valerie Gray Hardcastle, M.K. Kitzmiller & Shelby Lahey, *The Impact of Neuroscience Data in Criminal Cases: Female Defendants and the Double-Edged Sword*, 21 NEW CRIM. L. REV. 291, 293 (2018).

This hypothesis is also consistent with the "modern racism perspective, which suggests that discriminatory behavior will only occur when it can be justified on nonracial grounds."[63] To test this modern racism perspective, Professor James D. Johnson conducted an experiment with primarily white students from southeastern North Carolina.[64] Professor Johnson gave the students a fictional case in which a robber stole $650 from a bank, with the police soon thereafter arresting a defendant with $630 in cash who explained that he got the money from a loan shark.[65] One of the variables in the experiment was the defendant's race.[66] The other variable involved a wiretap recording in which the loan shark said he would never loan money to the defendant.[67] The students either (1) were not told about the recording, (2) were told about the recording, or (3) were told about the recording and also given a curative instruction informing them that the wiretap was illegal and to ignore the recording as evidence.[68] Finally, Professor Johnson asked the students to rate the defendant's culpability on a 9-point scale, with 1 representing "definitely innocent" and 9 representing "definitely guilty."[69]

There was no statistically significant difference in the level of culpability by race in the conditions in which the students were merely told or not told about the wiretap recording.[70] But there was a statistically significant difference in the average culpability score when students were told about the wiretap recording but also given the curative instruction directing them to ignore it as evidence: 6.1 for the Black defendant versus 5.1 for the white defendant.[71] Professor Johnson concluded that these results confirmed the modern racism perspective, with the students in the illegal wiretap condition able to "justify the high verdict scores given to the Black defendant on nonracial grounds (i.e., not allowing a guilty person to go free, etc.)."[72]

In conclusion, based upon the work by Kalven and Zeisel, as well as subsequent studies,[73] it seems clear that curative instructions are ineffective and perhaps even have a boomerang effect. Moreover, the liberation hypothesis and studies on it suggest that curative instructions

63. James D. Johnson et al., *Justice is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence*, 21 PERSONALITY & SOC. PSYCH. BULL. 893, 896 (1995).

64. *Id.* at 894-95.

65. *Id.* at 895.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 896.

71. *Id.*

72. *Id.*

73. *See, e.g.*, Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235, 251-52 (1976).

can be especially damaging to racial minorities. Therefore, there is a significant potential for harm when a judge gives a curative instruction instead of declaring a mistrial after the jury receives improper argument, evidence, or testimony that prejudices a criminal defendant. Simply put, the judge failing to stop the trial could be the difference between a conviction and an acquittal. This obviously causes harm not only to the defendant who is wrongfully convicted, but also to the public's interest in "fair trials designed to end in just judgments."[74]

(b) Harm to the Prosecution and the Public

As noted previously, courts generally find curative instructions sufficient to dissipate the taint that results from jurors hearing improper argument, evidence, or testimony.[75] That said, it can certainly be said that the exception proves the rule because there are many cases with strong evidence of guilt where appellate courts have reversed convictions based on the belief that curative instructions were insufficient. This Section will use the same three types of cases referenced above as examples of situations in which appellate courts have found curative instructions insufficient and then explain the harm that flows to the prosecution and the public.

1) State's Witnesses Who Stop Answering Questions

As noted, when State's witnesses start and then stop testifying, courts typically have found that a curative instruction is sufficient to erase any prejudice.[76] That said, there are a number of cases in which courts have reached the opposite conclusion. One good example is the opinion of the Supreme Court of Maine in *State v. Warren*.[77]

In *State v. Warren*, Rodney Warren and Alton Phinney were officials of a meat cutters union charged with conspiracy to blow up a supermarket in connection with a labor dispute.[78] The chief witness for the prosecution, Frank Price, claimed that Warren and Phinney discussed their plans with him over the course of several conversations.[79] The prosecution sought to corroborate this testimony through a second witness, Kevin Vickers, who allegedly committed the crime with Warren and Phinney.[80] While Vickers was testifying, he refused to answer

74. *See, e.g.*, Carter v. State, 785 A.2d 348, 355 (Md. 2001) (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)).

75. *See supra* notes 17-49 and accompanying text.

76. *See supra* notes 18-34 and accompanying text.

77. 312 A.2d 535, 536-37 (Me. 1973).

78. *Id.*

79. *Id.*

80. *Id.*

a question suggesting he was involved in the crime.[81] Instead, he was held in contempt after unsuccessfully invoking his privilege against self-incrimination despite being granted immunity.[82] The trial judge denied the defendants' motion for a mistrial and instead issued a curative instruction directing jurors to "put that out of your minds completely."[83]

After the defendants were convicted, they appealed, claiming that the curative instruction was insufficient to dissipate the prejudice caused by Vickers' aborted testimony.[84] The Supreme Judicial Court of Maine agreed, concluding that

> Vickers' refusal to answer the question which suggested that he was involved in that 'activity', on the ground that his answer 'may tend to incriminate me' would clearly suggest to the jury that, if he answered truthfully, such answer would lead to an acknowledgement of the truthfulness of Price's testimony.[85]

Therefore, the court reversed the convictions of Warren and Phinney, finding that the prejudice created by Vickers' testimony was "not easily erased from the minds of jurors."[86]

2) References to Inadmissible Polygraph Evidence

Again, as noted, courts routinely find that curative instructions can undo any harm caused by a State's witness referencing a defendant's polygraph exam or her (un)willingness to submit to one.[87] In several cases, however, courts have found that this damage could not be undone.[88] One such example can be found in the Fourth Circuit case *United States v. Brevard*.[89]

In *United States v. Brevard*, Godfrey Brevard was charged with armed bank robbery.[90] While there were some issues with the State's case,[91] five bank employees identified Brevard as one of the robbers, and the prosecutor proved that Brevard's car was used in the robbery.[92] In addition, an FBI agent testified about a polygraph test

81. *Id.* at 537.

82. *Id.*

83. *Id.* at 542.

84. *Id.* at 542-43.

85. *Id.* at 543.

86. *Id.*

87. *See supra* notes 33-42 and accompanying text.

88. *See, e.g.*, State v. Chambers, 459 S.E.2d 112, 114 n.2 (W. Va. 1995) ("We note that the trial judge's curative instruction, merely advising the jury that the results of polygraph tests are not admissible over objection in criminal trials, was insufficient.").

89. 739 F.2d 180 (4th Cir. 1984).

90. *Id.*

91. *Id.* at 180. Specifically, Brevard presented an alibi defense although the State claimed he still had time to take part in the robbery. *Id.* at 180-81.

92. *Id.* at 181.

administered to Brevard.[93] While the agent did not explicitly reference the result, he noted that a decision had not been made about whether to charge Brevard before he took the test.[94] The trial judge denied the defendant's motion for a mistrial and instead issued a curative instruction directing the jurors to ignore the agent's testimony about the polygraph.[95]

The Fourth Circuit reversed Brevard's conviction, distinguishing a prior opinion in which it had denied an appeal under somewhat similar circumstances.[96] First, the court found that the jury could have inferred from the agent's testimony that Brevard failed the polygraph because the State subsequently charged him.[97] Second, the court found that Brevard's credibility was critical because there was a dispute over his alibi defense and whether it left him enough time to commit the crime.[98]

3) Appeals to Racial or Religious Bias

As noted, courts generally find that curative instructions are sufficient to solve the prejudice cause by improper appeals to juror racial religious bias.[99] But again, there are exceptions to the rule. For example, in *Weddington v. State*, Dennis Weddington, an African American man, was charged with the attempted murder of Terry Hopson, a white woman.[100] During cross-examination of Weddington, the prosecutor asked him about a trip he had made to visit Hopson, including the following question and answer:

> Q. Mr. Weddington, isn't it true that you got [Edmund] Blue and [William] Henry to go up to Indiana with you because you told them there was [sic] some *loose white women* up there?
>
> A. I don't know what you're talking about.[101]

Upon defense counsel's objection and motion for a mistrial, the judge asked the prosecutor whether he had a basis for asking this question, and the prosecutor responded, "Your Honor, as far as information, statements from witnesses, or verifiable police reports, no, I do not."[102] The judge was then faced with the binary decision of whether to grant

93. *Id.*

94. *Id.*

95. United States v. Brevard, 739 F.2d 180, 1181-82 (4th Cir. 1984).

96. *Id.* at 183 (distinguishing United States v. Smith, 565 F.2d 292 (4th Cir. 1977), which had applied "the general rule" and denied an appeal when a curative instruction was given after testimony about a polygraph exam).

97. *Id.*

98. *Id.* at 182-83.

99. *See supra* notes 43-49 and accompanying text.

100. 545 A.2d 607, 608-09 (Del. 1988).

101. *Id.* at 610.

102. *Id.*

a mistrial or issue a curative instruction.[103] The judge chose the latter option, instructing the jurors "to disregard the question as well as the answer."[104] Weddington was subsequently convicted.[105]

On appeal, the State acknowledged that the prosecutor's question "could be viewed as raising the specter of racial bias against Weddington based on a cultural fear of miscegenation" but claimed that the curative instruction rendered the question harmless.[106] The Supreme Court of Delaware reversed, concluding that "the right to a fair trial that is free of improper racial implications is so basic to the federal Constitution that an infringement upon that right can never be treated as harmless error."[107]

4) Conclusion

There is the potential for serious harm to the prosecution and the public in cases like the ones discussed in the prior three subsections. Namely, if the defendants in those cases were guilty, the use of curative instructions led to the reversal of convictions of defendants who committed the crime(s) charged. This would cause several harms. First, the prosecution, and thus the public (as well as the defendant), would have to pay the costs of the appeal, likely in the range of $30,000.[108] Second, if the prosecution decides it cannot or should not re-try the defendant, there would be no justice for the crime victim and a guilty party would be released into the community to possibly re-offend. On the other hand, if the prosecution does decide to take the case to another trial, there would be even more significant costs to the State and the public, likely to the tune of tens of thousands of dollars,[109] if not more.[110]

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103. *Id.* at 610-11.

104. *Id.* at 612 n.4.

105. *Id.* at 608.

106. *Id.*

107. *Id.* at 614-15.

108. *See, e.g.*, Vikramaditya S. Khanna, *Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve?*, 82 B.U. L. REV. 341, 369 (2002) ("Let us begin by assuming that the appeals court overturns false acquittals 80% of the time and correct acquittals 20% of the time, and that an appeal costs the government $30,000."); James D. Ridgway, *Changing Voices in a Familiar Conversation about Rules vs. Standards: Veterans Law at the Federal Circuit in 2011*, 61 AM. U. L. REV. 1175, 1189 n.91 (2012) ("Asimow and Lubbers note that the Australian system spends over $30,000 USD per appeal").

109. *See, e.g.*, Zachary Mesenbourg, Comment, *Voir Dire in the #LOL Society: Jury Selection Needs Drastic Updates to Remain Relevant in the Digital Age*, 47 J. MARSHALL L. REV. 459, 482 n.145 (2013) (citing a case in which a retrial after a mistrial was expected to cost the State over $50,000).

110. *See, e.g.*, Russell Gold, *Counties Struggle with High Cost of Prosecuting Death-Penalty Cases*, WALL ST. J. (Jan. 9, 2002, 12:01 AM), http://www.wsj.com/articles/SB1010527927506582520 [https://perma.cc/U59Y-L3SK] (noting that the average cost of a retrial in a homicide case is $200,000-$300,000).

C. *Mistrials*

When improper testimony, evidence, or argument reaches the jury, a judge only currently has one other option: declaring a mistrial.[111] If a judge declares a mistrial, the current trial ends, and both the prosecution and defense are back at square one, meaning that there might now be dropped charges, a plea/plea deal, or a new trial.[112] Courts have characterized a mistrial as a drastic and rare remedy that should only be granted when a judge believes that prejudice will remain even if jurors are given a curative instruction.[113] For example, courts typically grant mistrials when witnesses testify about other criminal behavior by the defendant after such acts have already been deemed inadmissible.[114]

1. *Harm to the Defendant*

When a judge declares a mistrial, a criminal defendant can be harmed in several ways. In many cases, the prosecution will take the case back to trial. In such cases, two distinct interests of the defendant are implicated: "her interest in avoiding burdens incurred even if acquitted upon retrial . . . and her interest in limiting the risk of erroneous conviction."[115] Specifically, the Supreme Court has held that a second prosecution after mistrial "may be grossly unfair" because "[i]t increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted."[116]

There are "a variety of reasons" why an innocent defendant faces a heightened risk of wrongful conviction on retrial.[117] At an initial trial, the State could suffer a tactical setback that only it realizes, such as "fail[ing] to elicit from one witness proof that no other witness can supply."[118] Moreover, "[t]he government may be aided upon retrial merely

111. *See, e.g.*, United States v. Alvarez, 696 F.2d 1307, 1310 (11th Cir. 1983).

112. *See, e.g.*, Harrod v. State, 31 A.3d 173, 180 (Md. 2011) ("[T]he grant of a new trial after a mistrial creates a 'tabula rasa,' we go back to square one to determine what the parties' responsibilities were.").

113. *See, e.g.*, Orellana v. State, 381 S.W.3d 645, 657 (Tex. Ct. App. 2012) ("Because a mistrial is an extreme remedy, it should be granted only when prejudice remains even after less drastic measures, including curative instructions, are used.").

114. *See, e.g.*, State v. Nelson, 390 P.3d 418, 420 (Idaho 2017) ("The first trial ended in a mistrial after the State presented evidence the district court had ordered inadmissible."); McDaniel v. United States, No. 3:09cv366, 2011 WL 940505, at *1 n.3 (W.D.N.C. Mar. 15, 2011) ("Petitioner's first trial ended in a mistrial after witnesses testified regarding inadmissible other bad acts by the defendant.").

115. Michael J. Klarman, Note, *Mistrials Resulting from Prosecutorial Error: Double Jeopardy Protection*, 34 STAN. L. REV. 1061, 1063 n.14 (1982) (citation omitted).

116. Arizona v. Washington, 434 U.S. 497, 503-04 (1978).

117. Stephen J. Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 505 (1977).

118. *Id.*

by having observed defense counsel's tactics on cross-examination or by having learned the nature of any substantive defense."[119] Notably, this is "an advantage frequently not offset in practice by the reciprocal revelation of prosecution strategy to the defense," which already has insight into the prosecution's strategy through the preliminary hearing and bill of particulars.[120]

As one judge has noted, "[i]f the prosecution has the chance to try its case more than once, its case becomes stronger through rehearsal and the likelihood of convicting an innocent defendant increases. Witnesses become more expert at relating their stories and more adept at fending off cross-examination."[121] Given that most of the types of improper argument, evidence, and testimony occur during the State's case, this is a unique advantage enjoyed by the prosecution on retrial, given that defense witnesses would not yet have testified.

A good example of this phenomenon can be found in the two trials of Adnan Syed, whose case was famously covered on the *Serial* podcast. At a first trial, the judge declared a mistrial after all but two of the State's witnesses had testified (and none of the defense witnesses had testified).[122] After the judge declared a mistrial, an attorney who represented Syed during pretrial proceedings spoke to five jurors who said that they would have voted "not guilty" and overheard two other jurors saying they had difficulty with the State's case.[123] After the retrial, in which many believe the State's key witness performed better on the stand, a jury found Syed guilty after two hours of deliberations.[124] Syed was exonerated twenty-three years later based upon a *Brady* violation and DNA testing.[125]

In other cases, the prosecution will offer the defendant a plea deal after a mistrial. This can be problematic because "[a] second trial depletes the defendant's financial resources, thus increasing the possibility that she will not be able to present an adequate defense."[126] As just noted, this can increase the odds of wrongful conviction should a defendant reject such a plea deal and proceed to retrial. But, the financial and emotional strain of facing a second trial can also drain a

119. *Id.* at 506.

120. *Id.*

121. United States v. Green, 636 F.2d 925, 932 (4th Cir. 1980) (Winter, J., dissenting).

122. Def.'s Aff. At *passim* State v. Syed, 204 A.3d 139 (Md. 2019) (199103042-199103046) [https://perma.cc/7UU2-RPEF].

123. *Id.*

124. Eli Hager, *Our Jury is on "Serial"*, MARSHALL PROJECT (Dec. 10, 2014, 12:52 PM), https://www.themarshallproject.org/2014/12/10/our-jury-is-in-on-serial [https://perma.cc/E2FP-3B6U].

125. Innocence Staff, *DA Drops Charges Against Adnan Syed of "Serial" After 23 Years in Prison*, INNOCENCE PROJECT (Sept. 19, 2022), https://innocenceproject.org/statement-adnan-syeds-conviction-is-vacated/ [https://perma.cc/A24U-DSGM].

126. Klarman, *supra* note 115, at 1064 n.16.

defendant and cause her to accept a plea deal even if she is innocent.[127]

Moreover, this strain on a defendant after a mistrial is meaningfully different than the one endured by a defendant before a first trial due to being placed back in legal limbo after a resolution was in sight.[128]

2. Harm to the Prosecution and the Public

The harm that a mistrial causes to the prosecution and the public is similar to the harm that is caused when an appellate court reverses a conviction based on a finding that a curative instruction was insufficient. When a mistrial occurs, if the prosecution decides to take the case to another trial, it would likely cost the State and the public tens of thousands of dollars,[129] if not more.[130]

II. STANDBY COUNSEL

A. Introduction

The prior Part identified the issue a judge faces when something prejudicial happens to a defendant at a criminal trial. This Part analyzes a situation in which a judge must make a similar difficult decision. The goal of this Part is to assess the Supreme Court's solution to this similar situation to determine whether it could serve as the inspiration for addressing the issue identified in this Article.

That similar situation involves a defendant of borderline competence moving to represent herself at a criminal trial. In such a situation, the judge can deny the defendant's motion, which can result in reversal if an appellate court finds the decision deprived the defendant of her right to self-representation.[131] Alternatively, the judge can grant the defendant's motion but then have to declare a mistrial mid-trial when the defendant begins being erratic or ineffective.[132] Judges in such situations, however, have a third option to front-end both of these issues: appointing standby counsel. This option of appointing standby counsel provides a model for the concept of the standby judge.

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127. Samantha M. Cira, Note, *Stuck in Ohio's Legal Limbo, How Many Mistrials are Too Many Mistrials?: Exploring New Factors That Help a Trial Judge in Ohio Know Whether to Exercise Her Authority to Dismiss an Indictment with Prejudice, Especially Following Repeated Hung Juries*, 66 CLEV. ST. L. REV. 181, 200 (2017).

128. *Id.*

129. *See supra* note 109 and accompanying text.

130. *See supra* note 110 and accompanying text.

131. *See, e.g.*, State v. Kennedy, 586 A.2d 1089, 1092 (R.I. 1989) ("[W]e believe that the trial justice erred in not allowing defendant to proceed pro se.").

132. *See infra* notes 174-180 and accompanying text.

The following subsections will address (1) the Supreme Court's recognition of the right of self-representation; (2) the issues created by recognition of the right to self-representation; (3) the Supreme Court's creation of the concept of standby counsel; and (4) the use of standby counsel to prevent mistrials and claims of incompetence by *pro se* defendants.

B. The Right to Self-Representation

1. The Recognition of the Right

The Supreme Court recognized that criminal defendants have the right to self-representations in its 1975 opinion in *Faretta v. California*.[133] In *Faretta*, the State charged Anthony Faretta with grand theft, and the judge appointed a public defender to represent him.[134] Well before trial, however, Faretta requested that he be able to represent himself.[135] During a colloquy with the judge, Faretta explained that he (1) had previously represented himself in a criminal case; (2) had graduated from high school; and (3) was concerned about the heavy caseload burdening the public defender's office.[136] While observing that he thought Faretta was making a mistake and that he might change his mind, the judge preliminarily granted Faretta's request to proceed *pro se*.[137]

Subsequently, however, the judge held a hearing and asked Faretta questions designed to probe his knowledge of issues such as the rule against hearsay and how to make challenges to prospective jurors.[138] Dissatisfied with the defendant's answers, the judge ruled that Faretta had not knowingly and intelligently waived his right to counsel.[139] Moreover, the judge held that there is no constitutional right to self-representation.[140] Accordingly, the judge appointed a public defender for Faretta, who was convicted after a jury trial.[141]

On appeal, the United States Supreme Court reversed, holding that "[t]he right of self-representation finds support in the structure of the Sixth Amendment, as well as in the English and colonial jurisprudence from which the Amendment emerged."[142] The Sixth Amendment provides a criminal defendant with, *inter alia*, the right to "the Assistance

133. 422 U.S. 806 (1975).
134. *Id.* at 807.
135. *Id.*
136. *Id.*
137. *Id.* at 807-08.
138. *Id.* at 808.
139. Faretta v. California, 422 U.S. 806, 808-10 (1975).
140. *Id.* at 810.
141. *Id.* at 810-11.
142. *Id.* at 818.

of Counsel for his defence."[143] According to the *Faretta* Court, the use of the word "[A]ssistance" implies that defense counsel is merely an assistant who aids an accused in her defense.[144] In other words, "counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally."[145]

Moreover, the *Faretta* Court concluded that the right to self-representation was recognized in both pre-colonial England and the American colonies.[146] Overall, the *Faretta* Court found "no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel."[147]

Therefore, the Supreme Court held that a criminal defendant has a right to self-representation as long as she is competent to defend herself and clearly asserts her right before the trial begins.[148] The Court also made clear that "a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation . . . ."[149] Beyond this, however, the Supreme Court had done little to clarify the question of when a criminal defendant is competent to represent herself at trial despite being given the opportunity to do so in *Indiana v. Edwards*.

2. The Question of Competence

In *Indiana v. Edwards*,[150] the State of Indiana asked the United States Supreme Court to answer the question of when a defendant is competent to represent herself at trial. The Court had previously offered a simple solution to a similar question in its prior opinion in *Godinez v. Moran*.[151] In *Moran*, Richard Moran waived his right to counsel, proceeded *pro se*, and pleaded guilty to three counts of first-degree murder.[152] Moran thereafter appealed, claiming that he was incompetent to proceed *pro se* for his guilty plea.[153]

143. U.S. CONST. amend. VI.
144. *Faretta*, 422 U.S. at 820.
145. *Id.*
146. *Id.* at 821-29.
147. *Id.* at 832.
148. *Id.* at 835.
149. *Id.*
150. 554 U.S. 164 (2008).
151. 509 U.S. 389 (1993).
152. *Id.* at 391-92.
153. *Id.* at 393.

In rejecting Moran's appeal, the United States Supreme Court cited the test for competence to stand trial.[154] That test focuses upon whether a defendant can consult with her counsel with a reasonable degree of rational comprehension and understand the nature of the proceeding against her.[155] The Supreme Court simply took this test and applied it to defendants who proceed *pro se* and enter guilty pleas.[156] In other words, a defendant who is competent to stand trial is *per se* competent to proceed *pro se* and plead guilty.[157]

In *Indiana v. Edwards*, however, the Supreme Court concluded that a criminal defendant who is competent to plead guilty *pro se* might not be sufficiently competent to represent herself at trial.[158] Therefore, competence to stand trial might not necessarily mean competence to self-represent at trial. The *Edwards* Court reached this conclusion for a number of reasons. For example, as noted, the test for competence to stand trial focuses in part on the defendant's ability to consult with counsel.[159] That test therefore assumes representation by counsel, meaning that a defendant who seeks to represent herself at trial "presents a very different set of circumstances."[160]

Unfortunately, the *Edwards* opinion gave little guidance to lower courts about how to address competence to proceed *pro se* at trial beyond finding that it involves a separate analysis than determining whether a defendant is competent to stand trial.[161] Indeed, the State of Indiana asked the Supreme Court to adopt "a more specific standard that would 'deny a criminal defendant the right to represent himself at trial where the defendant cannot communicate coherently with the court or a jury.'"[162] The Court, however, found that it was uncertain how this specific standard would apply in practice and accordingly declined to set forth a standard for lower courts.[163]

3. The Difficult Decision

Because of the lack of clarity regarding competence to self-represent at trial, judges face a difficult decision when faced with a defendant of borderline competence who seeks to proceed *pro se*. When faced

154. *Id.* at 396.

155. *Id.*

156. *Id.* at 399-400.

157. *Id.*

158. 554 U.S. 164, 173-74 (2008).

159. *Id.* at 174.

160. *Id.* at 174-75.

161. *See, e.g.*, E. Lea Johnston, *Representational Competence: Defining the Limits of the Right to Self-Representation at Trial*, 86 NOTRE DAME L. REV. 523, 526 (2011) ("Post-*Edwards*, we are left to ask which abilities are necessary for self-representation. Lower courts have yet to provide much guidance on how to go about answering this question.").

162. *Edwards*, 554 U.S. at 178.

163. *Id.*

with a possible *pro se* defendant with a condition such as intellectual disability or mental illness, a judge has two options: (1) preventing the defendant from proceeding *pro se*; or (2) permitting the defendant to proceed *pro se*. Given that both of these options are plagued with possible peril, such judges face a difficult dilemma. As the Supreme Court of Iowa has noted, trial "judges are often called upon to navigate the 'thin line' presented in [such] cases . . . , where they must refrain from 'improperly allowing the defendant to proceed *pro se*, thereby violating his right to counsel, and improperly having the defendant proceed with counsel, thereby violating his right to self-representation."[164] The next two subsections will deal with the dilemma confronted by judges faced with cases toeing both sides of this thin line.

(a) Preventing Pro Se Representation

First, as noted by the Supreme Court of Iowa, when confronted with a defendant with borderline competence, a trial judge can decide to deny the defendant's motion to proceed *pro se* and force her to be represented by counsel. The problem with such a decision is that an appellate court could find that the defendant was competent and thus order a new trial.

People v. Tafari is an example of such a case.[165] In *Tafari*, Injah Tafari was charged with assault in the second degree (two counts), assault in the third degree, and criminal mischief in the third degree.[166] After moving to represent himself at trial, the trial judge ascertained that he was taking the drugs "Paxil, Seroquel, and Risperdal" as part of psychiatric care because he was hearing voices.[167] When the trial judge asked Tafari whether these medications affected his ability to think clearly, he responded, "I'm not really sure."[168]

The trial judge thereafter denied the defendant's request to proceed *pro se*, "apparently based upon defendant's mental illness and the perception that medication for his condition affected defendant's ability to understand the proceedings."[169] The defendant subsequently appealed after he was convicted.[170] The appellant court then reversed the defendant's convictions, concluding that the trial judge had acted paternalistically and that the evidence "sufficiently established that

164. Hannan v. State, 732 N.W.2d 45, 54 (Iowa 2007) (quoting Fields v. Murray, 49 F.3d 1024, 1029 (4th Cir. 1995)).

165. 68 A.D.3d 1540 (N.Y. App. Div. 2009).

166. *Id.* at 1540.

167. Appellant's Brief at *4, People v. Tafari, 68 A.D.3d 1540 (N.Y. App. Div. 2009) (Nos. 101777, 102293), 2009 WL 8709343, at *1.

168. *Id.* at *7.

169. *Tafari*, 68 A.D.3d at 1541.

170. *Id.*

defendant was capable of waiving his right to counsel and could proceed unrepresented."[171]

Similarly, in *People v. Rodriguez-Aranda*, the trial court denied a defendant's motion to self-represent because he had schizophrenia, was prescribed the psychotropic medication Zyprexa, had attempted suicide, spoke only Spanish, and exhibited unspecified courtroom behavior.[172] In reversing the defendant's ensuing conviction, the appellate court ruled that "the trial court did not consider or discuss any particular symptoms that would have made it difficult for defendant to represent himself."[173]

(b) Permitting Pro Se Representation

Second, as noted by the Supreme Court of Iowa, when confronted with a defendant of borderline competence, a trial judge can decide to grant the defendant's motion proceed *pro se* and allow her to represent herself at trial. The problem in such a case is that an issue might arise with self-representation mid-trial, causing the judge to have to declare a mistrial. Such issues can come in several forms, two of which will be mentioned here.

First, the defendant herself might realize in the middle of trial that she is in over her head and ask for a mistrial. For example, in 2018, Nytilex Jones was prosecuted for the 2013 murder of Samuel Kelly.[174] Jones moved to represent himself at trial, and the judge granted his motion after finding him competent at a mental status hearing.[175] Thereafter, during *voir dire*, Jones did not ask questions of prospective jurors, instead just informing them that "there's two sides to a story."[176] Subsequently, after the prosecutor gave his opening statement to the jury, the judge asked Jones whether he wanted to give an opening statement.[177] Jones answered, "Is it really lawful to take me to trial without representation?" and indicated that he no longer wanted to represent himself.[178] As a result, the judge had to declare a mistrial.[179]

171. *Id.* at 1542.

172. 219 N.E.3d 481, 481 (Ill. App. Ct. 2022).

173. *Id.* at 487.

174. Heather Nolan, *Mistrial Declared After Defendant Changes His Mind About Wanting to Represent Himself in Murder Case*, NOLA.COM (June 5, 2018, 11:26 PM), https://www.nola.com/news/crime_police/article_8bfd9c6c-904c-567a-887b-057e9ddec495.html [https://perma.cc/R7G6-8ECY].

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

Second, a judge might have to declare a mistrial mid-trial after a *pro se* defendant starts acting erratically. For instance, in November 2022, a judge allowed Ramello Randle to represent himself at his trial for murdering his ex-girlfriend.[180] During trial, however, Randle began acting erratically on several occasions, including interrupting the prosecutor's opening statement and saying, "Don't answer shit this [gay slur] has to say" when the prosecutor was cross-examining Randle's mother.[181] Finding that the trial could not proceed with Randle's "antics," the judge had to declare a mistrial despite being "so far into th[e] trial."[182]

C. The Standby Counsel Solution

While the Supreme Court recognized a right to self-representation in *Faretta*, as the Court noted, criminal defendants have been representing themselves since the founding.[183] In many of these cases, a court would appoint an attorney to assist a defendant and step in if issues arose with her self-representation.[184] The Supreme Court, however, was the first court to use the term "standby counsel" in the context of self-representation, prompting the first true guidance on how judges should handle these attorneys-on-call.[185] Chief Justice Burger made this first reference in his concurring opinion in the 1971 case *Mayberry v. Pennsylvania*.[186] In *Mayberry*, Richard Mayberry and two co-defendants represented themselves at a trial for prison breach and holding hostages in a penal institution.[187] At the close of trial, the judge found the defendants guilty of criminal contempt, specifically concluding that Mayberry had committed one or more acts of contempt during eleven of the twenty-one days of trial.[188] Some of these acts of contempt included (1) calling the judge a "dirty sonofabitch;" (2) calling the judge a "tyrannical old dog;" (3) telling the judge to "[g]o to hell;" and (4)

180. Jay Barmann, *Mistrial Declared in Antioch Murder Case After Defendant, Representing Himself, Shouts Profanities at Prosecutor and Judge*, SFIST (Nov. 30, 2022), https://sfist.com/2022/11/30/mistrial-declared-in-antioch-case-after-defendant-representing-himself-shouts-profanities/ [https://perma.cc/QE28-9TGW].

181. *Id.*

182. *Id.*

183. *See* Faretta v. California, 422 U.S. 806, 818 (1975) ("The right of self-representation finds support in the structure of the Sixth Amendment, as well as in the English and colonial jurisprudence from which the Amendment emerged.").

184. *See* Mayberry v. Pennsylvania, 400 U.S. 455, 467 (1971) (Burger, J., concurring).

185. *Id.* The only prior court to use the term "standby counsel" was the District Court of Appeal of Florida, Second District in its 1961 opinion in Maistrosky v. Harvey, 133 So. 2d 103, 105 (Fla. 2d DCA 1961). The court, however, was referencing standby counsel as a possible replacement for existing counsel and not dealing with a case of self-representation.

186. *Mayberry*, 400 U.S. at 467-68.

187. *Id.* at 455.

188. *Id.*

telling the judge that he needed "to have some kind of psychiatric treatment."[189]

Mayberry subsequently appealed, claiming, *inter alia*, that he should have been entitled to have his criminal contempt charges considered by a judge other than the judge who presided over his trial.[190] That appeal eventually reached the United States Supreme Court, which held that Mayberry's conduct was not befitting an American courtroom, including "tactics taken from street brawls and transported to the courtroom."[191] That said, the Court concluded that a judge holding a defendant in contempt of court at the end of trial is different than holding him in contempt contemporaneously with his misconduct.[192] The Court thus vacated Mayberry's contempt convictions, concluding that a defendant has a right under the Due Process Clause of the Fourteenth Amendment to a public contempt trial before a judge other than the presiding judge at his trial in such circumstances.[193]

In his concurring opinion, Chief Justice Burger added that when a defendant decides to represent himself, "a trial judge is well advised—as so many do—to have such 'standby counsel' to perform all the services a trained advocate would perform ordinarily by examination and cross-examination of witnesses, objecting to evidence and making closing argument."[194] Chief Justice Burger then defended this expansive view of the role of standby counsel by adding that "[n]o circumstance that comes to mind allows an accused to interfere with the absolute right of a trial judge to have such 'standby counsel' to protect the rights of accused persons 'foolishly trying to defend themselves.'"[195]

The Supreme Court's opinion in *Mayberry* prompted the American Bar Association Project for Criminal Justice to draft a new Standard Relating to the Function of the Trial Judge.[196] This new standard stated:

> When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his own motion. Standby counsel should

189. *Id.* at 456-59.

190. Brief for the Petitioner at *37, Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (No. 121), 1970 WL 122635.

191. *Mayberry*, 400 U.S. at 462.

192. *Id.* at 463-64.

193. *Id.* at 466.

194. *Id.* at 467-68.

195. *Id.* at 468.

196. *See* United States v. Dougherty, 473 F.2d 1113, 1125 n. 19 (D.C. Cir. 1972).

> always be appointed in cases expected to be long or complicated or in which there are multiple defendants.[197]

The last sentence of this standard makes clear one of the reasons why it was passed: to prevent mistrials, which are likelier and/or more damaging when cases are long, complicated, or involve multiple defendants.

In a footnote in *Faretta*, the Supreme Court announced a second reason for the rule and also gave guidance about the role of standby counsel. In that footnote, the *Faretta* Court explained that "[w]e are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials."[198] The Court then questioned this information, noting that defendants have been representing themselves since the founding, with no significant evidence of this phenomenon.[199]

Next, the Court added that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."[200] Finally, and critically, the Court observed that "a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary."[201]

The concept of standby counsel proffered by the *Faretta* Court represents a solution to the situation in which a judge is confronted with a defendant of borderline competence who wants to proceed *pro se*.[202] First, by appointing standby counsel who can advise the defendant during trial, a judge insulates a verdict from the defendant's claim that she was incompetent to represent herself.[203] Second, as is critical for this Article's proposal, standby counsel can take over for an erratic or ineffective *pro se* defendant mid-trial, obviating the need for a

197. *Id.*

198. Faretta v. California, 422 U.S. 806, 834 n.46 (1975).

199. *Id.*

200. *Id.*

201. *Id.* at 835.

202. *See, e.g.*, *In re* Civil Commitment of D.Y., 95 A.3d 157, 167 (N.J. 2014) (noting that appointment of standby counsel is "an effective solution to these challenges"); *but see* People v. Hui, 198 N.E.3d 305, 322 (Ill. App. Ct. 2022) ("The appointment of standby counsel frequently creates more problems than it solves.").

203. *See, e.g.*, Cannon v. LeFevre, 508 F.Supp. 789, 791 (S.D.N.Y. 1981) (citing the fact that the trial judge appointed "standby counsel who is not claimed to have been incompetent" in rejecting a defendant's claim that he was incompetent to represent himself at trial); State v. McLauren, 563 S.E.2d 346, 349-50 (S.C. Ct. App. 2002) (citing appointment of standby counsel as a factor cutting against a defendant's claim that he was incompetent to represent himself).

mistrial.[204] For example, in *Mable v. Bell*, the trial judge had standby counsel step in after a *pro se* defendant "sent threatening letters to various people, bragging about his ability to use the subpoena process for harassment."[205] And, in *United States v. Maggert*, a *pro se* defendant allowed standby counsel to take over after it was clear he lacked the skill to cross-examine witnesses for the prosecution.[206] The question this Article addresses is whether a judge could similarly appoint herself as a standby judge, ready to grant a defense motion to switch to a bench trial if something prejudicial happens at a jury trial that might not be fixed by a curative instruction.

III. STANDBY JUDGES

A. Introduction

Using standby counsel as a model, this Section proffers the proposal for standby judges who are able to take over for jurors should they receive prejudicial information that a curative instruction might not erase. In the following subsections, this Article will (1) lay out the proposal; (2) explain the benefits of the proposal; (3) describe the primary obstacle to the proposal; (4) discuss existing examples of cases in which a switch to a bench trial was considered or implemented; (5) analyze possible sources of authority for the proposal; and (6) address possible issues with the proposal.

B. Standby Judges Proposal

This Article advances the following proposal: A judge at any jury trial could and should inform both parties at the start of trial that she is designating herself as a standby judge. By designating herself as such, the judge would be available to serve as the trier of fact should the jury receive improper argument, testimony, or evidence. Under this proposal, in such a situation, the defense could still move for a curative instruction or a mistrial. But the defense could also file a written motion to shift the trial from a jury trial to a bench trial. The government would not need to consent to such a motion; instead, the judge would grant it if she believed that the jury might not be able to abide by a curative instruction.

C. Benefits of the Proposal

The benefits of this proposal are straightforward compared to the status quo. Currently, if the jury is exposed to improper argument,

204. *See, e.g.*, United States v. Mack, 362 F.3d 597, 599 (9th Cir. 2004) (noting that it was "regrettable" that standby counsel was not appointed when issues arose with the defendant's *pro se* representation mid-trial).

205. No. 19-2163, 2021 WL 5123705, at *1 (7th Cir. Nov. 4, 2021).

206. 428 Fed.Appx. 874, 877 (11th Cir. 2011).

evidence, or testimony, the judge can only give a curative instruction or declare a mistrial.[207] As noted, a curative instruction can cause many kinds of harm, such as failing to minimize unfair prejudice or even heightening it, leading to wrongful convictions.[208] Moreover, mistrials can lead to costly retrials, emotional trauma, and wrongful convictions.[209] Conversely, if we believe that a standby judge could take over and issue an unbiased verdict, all of these harms would be avoided. This Article will break down this harm avoidance more specifically with three examples.

First, let's reconsider a case such as the Willis and Braddy case, where (1) a first grand jury refused to indict; (2) a second grand jury indicted after Shondrea Rayford testified; (3) Rayford started and then stopped testifying at trial; (4) the judge instructed the jury to ignore Rayford's testimony; (5) the jury found Willis and Braddy guilty of murder; (6) the jury foreman admitted that jurors considered Rayford's testimony; and (7) the State's only other witness has since recanted.[210] Based on these facts, the curative instruction was ineffective, and there is a strong argument that Willis and Braddy were wrongfully convicted, despite their appeals being unsuccessful.

Under this Article's proposal, after Rayford stopped testifying, the defense would have had the option of moving to shift the trial to a bench trial. If the judge granted the motion and disregarded Rayford's testimony, there is a high likelihood that Willis and Braddy would have been acquitted. After all, without Rayford's testimony, the first grand jury rejected the prosecutor's claim that even probable cause existed to believe that Willis and Braddy were guilty.[211] Therefore, in such a case, this Article's proposal could prevent a wrongful conviction (as well as the costs of numerous appeals in the ensuing years).

Second, let's reconsider a case with a curative instruction and a successful appeal, such as *Brevard*, in which the Fourth Circuit reversed an armed bank robbery conviction because an FBI agent implied that the defendant failed a polygraph test.[212] Again, under this Article's proposal, the defense would have had the option of filing a motion to shift the trial to a bench trial. Then, if the judge granted the motion and ignored the testimony about the polygraph test, the judge could have issued a fair verdict. If that verdict was "not guilty" and we believe the defendant in *Brevard* was actually innocent, the switch to a bench trial would have prevented a wrongful conviction. If that verdict was "guilty" and we believe the defendant was guilty, the judge's verdict

207. *See supra* note 5 and accompanying text.

208. *See supra* notes 50-74 and accompanying text.

209. *See supra* notes 115-130 and accompanying text.

210. *See* UNDISCLOSED, *supra* notes 20-32 and accompanying text.

211. *See* UNDISCLOSED, *supra* note 23 and accompanying text.

212. *See* United States v. Brevard, 739 F.2d 180, 182-83 (4th Cir. 1984).

would have been more insulated from reversal, given that an appellate court would be unlikely to find that the trial judge improperly considered the polygraph testimony.[213] (Of course, as will be addressed *infra*, if we believe that the judge was prejudiced to the same extent as the jury by the polygraph testimony, this would be a bad outcome.)

Third, let's look at two representative cases in which courts have declared mistrials after jurors were exposed to improper argument, evidence, or testimony. In one case, during the 1987 trial of Joel Alcox for murder and related crimes, the judge declared a mistrial after the prosecutor made improper comments.[214] At a retrial, Alcox was wrongfully convicted and served twenty-six years in prison before being granted parole in 2012.[215] Finally, in 2016, a federal judge vacated Alcox's convictions based upon strong evidence of his innocence, including alibi testimony.[216]

In a second case, the judge declared a mistrial at Michael Johnson's trial in 2014 because the prosecution twice exposed the jury to evidence that was supposed to be inadmissible at trial.[217] After legal wrangling took almost four years, John's retrial was held in 2018, with the judge granting the defense's motion to acquit after four weeks based upon the lack of evidence of Johnson's guilt.[218]

If either of these defendants had the standby judge option, it is easy to see the judge taking over their initial trials and finding them not guilty based upon subsequent courts finding that they were clearly innocent of the crimes charged. Doing so could have prevented Alcox's wrongful conviction and Johnson's nearly four-year legal odyssey between mistrial and acquittal.

This leaves the question of whether a judge can grant a defendant's unilateral motion to switch to a bench trial. To answer this question, we must address Federal Rule of Criminal Procedure 23(a).

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213. Indeed, the defense is much less likely to appeal the verdict in such a case. One review of data found that "55 percent of appeals originate from cases resolved by pleas, 40 percent originate from cases resolved through jury trials, and 5 percent originate from cases resolved by bench trials." Anna Harvey & Sidak Yntiso, *Judicial Accountability and Racial Disparity in Criminal Appeals*, 50 J. LEGAL STUD. 261, 273 (2021). This suggests cost savings to both the State and the defense due to the relative lack of appeals.

214. Maurice Possley, *Joel Alcox*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4906 [https://perma.cc/ZLN3-QTP7].

215. *Id.*

216. *Id.*

217. Maurice Possley, *Michael Johnson*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5310 [https://perma.cc/K58G-XZG2].

218. *Id.*

D. Federal Rule of Criminal Procedure 23(a)

The primary obstacle to this proposal is Federal Rule of Evidence 23(a). Rule 23(a) is the main federal rule dealing with bench trials. It reads as follows:

> (a) Jury Trial. If the defendant is entitled to a jury trial, the trial must be by jury unless:
>
> (1) the defendant waives a jury trial in writing;
>
> (2) the government consents; and
>
> (3) the court approves.[219]

In other words, if a defendant is charged with a "serious" offense and has the right to a jury trial,[220] she cannot unilaterally waive that right and proceed with a bench trial. Instead, if the government refuses to consent[221] and/or the judge refuses to approve the waiver,[222] there will be a jury trial. Plainly, under the proposal in this Article, a judge who appoints herself as standby counsel would be willing to approve a jury trial waiver mid-trial and convert the trial to a bench trial if something prejudicial occurred that a curative instruction might not fix. The issue, then, is that the government might refuse to consent to such a switch.

Beyond federal court, this same issue would exist in most state court prosecutions because the majority of states have bench trial rules that largely mirror Federal Rule of Criminal Procedure 23(a).[223] Only

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219. FED. R. CRIM. P. 23(a).

220. *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989) (noting that criminal defendants are *per se* entitled to trial by jury if they are charged with a crime with a maximum punishment of more than six months and rarely entitled to a jury trial if the maximum punishment is six months or less).

221. *See, e.g.*, United States v. Drefke, 707 F.2d 978, 983 (8th Cir. 1983) ("Denying Jameson a non-jury trial was not error because the government refused to consent to Jameson's waiver of his right to a jury trial, as is required by Rule 23(a) of the Fed.R. of Crim.P.").

222. *See, e.g.*, United States v. Joyce, 499 F.2d 9, 21 (7th Cir. 1974) (finding no error with a judge denying a motion for severance so that some defendants in a joint trial could have a bench trial).

223. ALA. R. CRIM. P. 18.1(b); ALASKA R. CRIM. P. 23(a); ARIZ. CONST. art. VI, § 17; ARIZ. R. CRIM. P. 18.1(b)(1); ARK. CONST. art. II, § 7; ARK. R. CRIM. P. 31.1, 31.4; CAL. CONST. art. I, § 16; COLO. R. CRIM. P. 23(a)(5)(I); DEL. SUPER. CT. CRIM. R. 23(a); D.C. CODE § 16-705(b)(2) (2022); D.C. SUPER. CT. R. CRIM. P. 23(a); FLA. R. CRIM. P. 3.260; IDAHO CONST. art. I, § 7; IND. CODE § 35-37-1-2 (2022); KAN. STAT. ANN. § 22-3403(1) (2021); KY. CRIM. P. 9.26(1); MICH. COMP. LAWS § 763.3(1) (2022); MICH R 6.401; Evans v. State, 547 So.2d 38, 40 (Miss. 1989) (citing UNIF. CRIM. RULES OF CIR. CT. PRAC. 5.13) ("It is well settled that trial by jury in criminal cases may be waived by agreement of the prosecution except where the death penalty is involved."); NEV. REV. STAT. § 175.011(1) (2022); N.M. R. CRIM. P. 5-605(A); N.D. R. CRIM. P. 23(a)(2); Valega v. City of Oklahoma City, 755 P.2d 118, 119 (Okla. Crim. App. 1988) (requiring prosecutor and court consent to waive jury trial); PA. R. CRIM. P. 620; SCR CRIMP 14(b); S.D. CODIFIED LAWS § 23A-18-1 (2022); TENN. R. CRIM. P. 23(b)(2)(B); TENN. CODE ANN. § 39-13-205(a); TEX. CODE CRIM. PROC. ANN. art. 1.13(a); UTAH R. CRIM. P. 17(c); VA. CONST. art. I, § 8; VT. CONST. ch. I, art. X; VT. R. CRIM. P. 23(a); W. VA. R. CRIM. P. 23(a);

eight states have rules that allow for a defendant charged with a serious crime to unilaterally opt for a bench trial.[224] Moreover, a handful of states allow for a defendant to choose a bench trial with just judicial approval, but only in limited circumstances.[225]

Therefore, lack of government consent could doom this paper's proposal in most jurisdictions. Before addressing possible legal bases to support this Paper's proposal of bypassing government consent, this Article will survey the existing landscape to show that some change must be made to the status quo.

E. Existing Examples of Attempts to Switch to Bench Trials Mid-Trial

A review of the status quo reveals that there have been a number of cases in which judges have considered or implemented a switch to a bench trial mid-trial. This review will show that these attempts have been done in a haphazard way that should be regulated, whether it be by the proposal in this Paper or of some other regulation. Specifically, this Paper will address four representative situations where a switch to a bench trial has been considered or implemented.

1. Judicial Approval of a Defendant's Unilateral Motion to Switch to a Bench Trial

The first type of case is a case in which a judge has done something similar to what this Paper proposes: judicial approval of a defendant's unilateral motion to switch to a bench trial. For example, in *Barnes v. State*, Anthony Ray Barnes was convicted of first-degree premeditated murder and aggravated assault.[226] According to the opinion of the Court of Appeals of Kansas, Barnes's trial began as a jury trial.[227] Mid-trial, however, Barnes's ex-wife testified about his bizarre and paranoid behavior, including his belief that someone had surgically implanted a tracking device in his body.[228] After describing this testimony, the Court of Appeals simply noted that, "[a]t this point in the jury trial, Barnes waived his right to a jury, the jury was excused, and

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WIS. CONST. art. I, § 5; WIS. STAT. § 972.02(1) (2022); WYO. R. CRIM. P. 23(a). Moreover, some states require the court to waive jury trial on agreement of the parties and others require the court to agree independently. *See* FLA. R. CRIM. P. 3.260; Guha Krishnamurthi, *The Constitutional Right to a Bench Trial*, 100 N.C. L. REV. 1621, 1638 n.74 (2022).

224. *See* Krishnamurthi, *supra* note 223, at 1638 n. 73 ("In my research, I have found eight states, Connecticut, Illinois, Iowa, Louisiana, Maryland, Nebraska, New Hampshire, and Ohio, that offer this right to defendants.").

225. *Id.* at 1639 n.75 (citing examples, including Minnesota's rules, which only apply in cases with prejudicial publicity of a case).

226. No. 110,305, 2014 WL 7653859 at *1 (Kan. Ct. App., June 29, 2015).

227. *Id.* at *2.

228. *Id.*

the proceeding continued as a bench trial."[229] This mid-trial switch was not part of Barnes's appeal, and the opinion doesn't mention the prosecution consenting to it.[230] The applicable Kansas statute does generally require the prosecution's consent for a bench trial in a felony case.[231]

2. The Judge Pitches, but the Defendant Rejects, a Switch to a Bench Trial

The second type of case is a case in which a judge pitches, but the defendant rejects, the idea of switching to a bench trial. For instance, in *Barkley v. State*, Keith S. Barkley was charged with drug-related offenses.[232] His trial started as a jury trial where he was represented by counsel.[233] In the middle of trial, Barkley moved to discharge his attorney and proceed *pro se* because she allegedly failed to properly cross-examine a witness who perjured himself.[234] During Barkley's colloquy with the judge on his motion to discharge, the discussion moved to the question of whether there should be a switch to a bench trial, leading to the following exchange:

> THE DEFENDANT: Okay. Then what if I say okay, I just shut down the jury thing today and I want to postpone and then go ahead and have a bench trial.
>
> THE COURT: Well, it's not going to be postponed. We're not going to postpone your trial, you've started with a jury trial. If you want to excuse the jury now and have a bench trial, we'll continue forward because I've heard the witnesses. There's no need to start over.
>
> THE DEFENDANT: And still I can't start over?
>
> THE COURT: No.
>
> THE DEFENDANT: So I can't establish the fact of what he said. You're not going to allow the establishment to show that he perjured.
>
> THE COURT: From what I'm hearing you don't want to discharge [Defense Counsel] so she will continue in the case as your attorney. Bring back in the jury.[235]

229. *Id.*

230. *Id.* at *1.

231. *See* KAN. STAT. § 22-3403(1) (2023) ("The defendant and prosecuting attorney, with the consent of the court, may submit the trial of any felony to the court. All other trials of felony cases shall be by jury.").

232. 98 A.3d 1111 (Md. Ct. Spec. App. 2014).

233. *Id.*

234. *Id.* at 1124-25.

235. *Id.* at 1125.

The Court of Special Appeals of Maryland subsequently found no error with the way that the trial judge handled the defendant's motion to discharge defense counsel.[236]

Another example of this second kind of case can be found in *Commonwealth v. Hoovler*.[237] In *Hoovler*, Gregory Paul Hoovler was charged with indecent assault, indecent exposure, and corruption of minors.[238] Hoovler's jury trial was in Pennsylvania, which follows the federal rule requiring governmental consent and court approval for a bench trial.[239] At trial, while testifying, the State's sole eyewitness testified that she could not recall a conversation with defense counsel in which she stated that the charges against Hoovler were unfounded.[240]

When Hoovler sought to call his attorney to testify and rebut this claim, the trial judge offered him three options: (1) continuing with the jury trial without defense counsel testifying; (2) shifting to a bench trial, if the government consented, where defense counsel could testify; (3) a new jury trial where defense counsel could testify.[241] Hoovler chose the third option, and the judge declared a mistrial.[242] At retrial, the court denied Hoovler's claim that his second prosecution violated Double Jeopardy, finding that he had consented to the mistrial.[243]

3. The Judge Pitches, and the Defendant Accepts, a Switch to a Bench Trial

The third type of case is a case in which the judge pitches, and the defendant accepts, a switch to a bench trial. For instance, in *Sudler v. State*, Alonzo Sudler was charged with several drug-related offenses in Delaware, which requires governmental consent for a bench trial.[244] Closing arguments were made in his jury trial late on a Thursday, just before Good Friday, a legal holiday in Delaware.[245] Therefore, the judge had a colloquy with jurors, determining that five had conflicts the following week due to their children having spring break.[246] The judge then gave the defendant three options: a mistrial, a verdict by seven jurors, or a judicial decision without jury involvement.[247] After

236. *Id.* at 1128.
237. 880 A.2d 1258 (Pa. Super. Ct. 2005).
238. *Id.*
239. *See* PA. R. CRIM. P. 620; S.C. R. CRIM. P. 14(b).
240. *Hoovler*, 880 A.2d at 1259.
241. *Id.*
242. *Id.*
243. *Id.* at 1260-61.
244. 611 A.2d 945 (Del. 1992).
245. *Id.* at 945-46.
246. *Id.* at 946.
247. *Id.*

considering the options over the weekend, Sudler chose a judicial decision, and the judge found him guilty.[248]

Sudler thereafter appealed, claiming that his waiver of his right to trial by jury was meaningless because the trial judge dismissed the five jurors without a showing of "manifest necessity."[249] The Supreme Court of Delaware agreed, reversed Sudler's conviction, and found that a retrial was barred by Double Jeopardy.[250]

4. Judicial Rejection of a Defendant's Motion to Switch to a Bench Trial

The fourth type of case is a case in which a defendant moves to switch to a bench trial mid-trial and the judges denies the motion. An especially good example can be found in *State v. Hernandez*.[251] In *State v. Hernandez*, Jose Hernandez was charged with attempted aggravated murder with a firearm and related crimes.[252] According to the opinion of the Court of Appeals of Oregon, in the middle of Hernandez's jury trial, he moved to switch to a bench trial because the judge "decided to admit evidence it had previously indicated it would likely find inadmissible."[253] Oregon is one of the handful of states in which a defendant charged with a serious crime just needs the judge's approval to proceed with a bench trial.[254] And, in *Hernandez*, the judge withheld this approval, informing the defendant:

> And what I explained to your attorney was that I'm not comfortable at this stage of the trial, I'll note the State objected, but the State also rightly pointed out they don't have any real say in this, it's my decision, I told your attorney I'm not comfortable doing that at this stage of the trial, we've had the jury sit here for two days, I don't think—so I'm not going to let you waive jury as to me, so I appreciate that you want to do that and that may be a change, but I'm not going to allow that based on jury's heard two days of testimony and that's why I'm going to allow them to make a decision.[255]

248. *Id.*

249. *Id.* at 947.

250. Sudler v. State, 611 A.2d 945, 948-49 (Del. 1992).

251. 481 P.3d 959 (Or. Ct. App. 2021).

252. *Id.* at 961.

253. *Id.* at 965. The court's opinion doesn't indicate the nature of this piece of evidence.

254. *See* O.R.S. § 136.001(2) ("Both the defendant and the state may elect to waive trial by jury and consent to a trial by the judge of the court alone, provided that the election of the defendant is in writing and with the consent of the trial judge."). In State v. Baker, 976 P.2d 1132, 1137 (Or. 1999), the Supreme Court of Oregon found that the portion of this provision allowing the State alone to elect for a bench trial with judicial approval was unconstitutional.

255. 481 P.3d at 965-66.

The Court of Appeals concluded that this decision was erroneous.[256] It found that "[a]lthough the trial court weighed some judicial economy considerations around excusing the jury after two days of trial, the court's articulated reason was insufficient to deny defendant consent to waive his right to a jury trial."[257] Specifically, the Court of Appeals determined that the trial judge should have applied the same factors that Oregon courts are supposed to consider when a defendant makes a pre-trial motion for a bench trial:[258] "improving judicial economy, taking into account considerations of speed, economy, and the prosecutor's expressed preference for or against defendant's waiver, and the continued protection of the defendant's rights."[259]

5. Conclusion

The above review of the status quo reveals that judges are acting haphazardly with regard to mid-trial switches to bench trials. Notably, in the three scenarios in which defendants moved for or accepted switches to bench trials, judges acted improperly, leading to two reversals. In *Hernandez*, the Court of Appeals of Oregon reversed the defendant's conviction, finding that the trial judge should have granted his mid-trial motion to switch to a bench trial.[260] The Supreme Court of Delaware reversed the defendant's conviction in *Sudler*, finding that the trial judge improperly dismissed five jurors before asking him if he wanted to switch to a bench trial.[261] And, in *Barnes*, the trial court granted the defendant's unilateral motion to switch to a bench trial despite Kansas law requiring government consent.[262] This then leads to the question of whether there is legal authority for what the judge did in *Barnes* and the proposal advanced in this Article.

F. Authority for Standby Judges

1. Introduction

This Article identifies four possible legal justifications for the standby judges proposal. The following subsections assess the viability of each of these legal justifications.

256. *Id.* at 966.

257. *Id.*

258. *Id.*

259. *Id.* at 965 (quoting State v. Harrell, 297 P.3d 461, 471 (Or. 2013)).

260. *Id.* at 966.

261. Sudler v. State, 611 A.2d 945, 947-48 (Del. 1992).

262. Barnes v. State, No. 110,305, 2014 WL 7653859, at *2 (Kan. Ct. App. Dec. 24, 2014).

2. The Right to An Impartial Trial

(a) Singer and the Right to an Impartial Trial

A first possible legal basis for the concept of standby judges is the possibility that criminal defendants have the right to an impartial trial. Of course, in pertinent part, the Sixth Amendment provides that criminal defendants have the right to an "impartial jury."[263] Moreover, in bench trials, the United States Supreme Court has held that a criminal defendant has the right to an impartial judge.[264] Does this then mean that a criminal defendant has the right to an impartial judge if it becomes clear that the jury in her case cannot be impartial? Put another way, does a criminal defendant have a broader right to an impartial trial?

The United States Supreme Court has hinted that the answer to these last two questions is yes in its opinion in *Singer v. United States*.[265] In *Singer*, Mortimer Singer was charged with thirty counts of mail fraud based on allegedly "us[ing] the mails to dupe amateur songwriters into sending him money for the marketing of their songs."[266] On the first day of trial, Singer offered to file a written waiver of his right to a jury trial, and the trial judge indicated a willingness to proceed with a bench trial.[267] The prosecutor, however, refused to consent to a bench trial, so the case proceeded as a jury trial that ended with the jury finding Singer guilty of twenty-nine counts of mail fraud.[268]

Singer subsequently appealed, claiming that, just as he had the right to trial by jury, he also had "a correlative right to have his case decided by a judge alone if he considers such a trial to be to his advantage."[269] That appeal eventually reached the United States Supreme Court, which rejected Singer's argument, holding that (1) there was no evidence that the common law recognized the right to a bench trial; and (2) Rule 23(a)'s procedure for attempted waivers of jury trials was reasonable.[270] Instead, the Court concluded that "[a] defendant's only constitutional right concerning the method of trial is to an impartial trial by jury."[271]

That said, the Court felt the need to address Singer's argument "that there are occasions when a jury might be influenced by passion,

263. U.S. CONST. amend. VI.

264. *See* Tumey v. Ohio, 273 U.S. 510, 535 (1927).

265. 380 U.S. 24, 24 (1965).

266. *Id.* at 25.

267. *Id.*

268. *Id.*

269. *Id.* at 25-26.

270. *Id.* at 26.

271. *Id.* at 36.

prejudice, or public feeling, or lack sufficient knowledge, experience, or insight to give the defendant a fair trial."[272] In its opinion, the Court noted Singer's argument "that there might arise situations where 'passion, prejudice * * * public feeling' or some other factor may render impossible or unlikely an impartial trial by jury."[273] But the Court held that "[w]e need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial."[274] Specifically, the Court concluded that it could bypass this claim because Singer "gave no reason for wanting to forgo jury trial other than to save time."[275]

Since *Singer*, a number of courts have concluded that the Court created the right to an impartial trial, allowing for a judge to approve of a bench trial *before* trial based solely on a criminal defendant's unilateral motion in certain circumstances. This Article will cite a few representative examples.

First, in *United States v. Schipani*, Joseph Schipani was charged with five counts of income tax evasion.[276] Subsequently, Schipani and the prosecution stipulated to a bench trial, which ended with Schipani being convicted.[277] But, based upon the Solicitor General admitting that some of the evidence used to convict Schipani could have come from an improper source, the United States Supreme Court vacated these convictions.[278]

Before retrial, Schipani indicated a desire for a bench trial while the prosecution informed the judge that it wanted a jury trial and claimed that the stipulation only applied at the first trial.[279] The United States District Court for the Eastern District of New York cited *Singer* and used it to conclude that Schipani had the right to a bench trial.[280] The court reached this conclusion on a few factors.[281] First, the starting point of the case against Schipani was a statement he made to prison officials, while being locked up for a prior crime, that he had no assets.[282] Therefore, the court determined that the jury would know

272. Brief for the Petitioner at *24, Singer v. United States, 380 U.S. 24 (1965), 1964 WL 81227, at *24.

273. *Singer*, 380 U.S. at 37-38.

274. *Id.* at 37.

275. *Id.* at 38.

276. 44 F.R.D. 461, (E.D.N.Y. 1968).

277. *Id.*

278. *Id.* at 461-62.

279. *Id.* at 462.

280. *Id.* at 463.

281. *Id.*

282. United States v. Schipani, 44 F.R.D. 461, 463 (E.D.N.Y. 1968).

from the start of the case that Schipani had a prior criminal record.[283] Second, the jury might connect Schipani with organized crime due to his extravagant lifestyle combined with the absence of evidence of any legitimate source of income.[284] Because the nature of the case would require rigorous exploration of both of these issues, the court approved a bench trial, concluding that "no disinfecting admonition by the Court and no minor exclusions of evidence can prevent the jury from becoming aware of the stench."[285]

Second, in *United States v. Lewis*.[286] In *Lewis*, various defendants were charged with conspiracy to hold children in involuntary servitude at the "House of Judah" residential camp.[287] Before trial, the defendants moved to strike the prosecution's demand for a jury trial, claiming that their religious beliefs forbade them from submitting to the judgment of lay jurors.[288]

The United States District Court for the Western District of Michigan cited *Singer* and analyzed the case at hand to determine whether requiring the defendants to submit to a jury trial imposed an undue burden on their free exercise of religion.[289] The court found that it did because it meant they had to choose among abandoning their religious beliefs, pleading guilty, or refusing to participate in trial, risking further sanction.[290]

Next, the court had to decide whether there was a compelling governmental interest that justified this undue burden.[291] The court noted that the prosecution had advanced two.[292] The first interest proffered by the prosecution was its interest in a fair and impartial trial.[293] The court turned this argument aside in several ways, including two that will be highlighted. First, it noted that several states allow criminal defendants to move for a bench trial without State sign-off.[294] Second, the court concluded that "[o]ur society has long recognized that bench trials provide a fair and impartial mechanism for adjudication of criminal prosecutions."[295]

283. *Id.*
284. *Id.*
285. *Id.*
286. 638 F. Supp. 573, 573 (W.D. Mich. 1986).
287. *Id.* at 575.
288. *Id.*
289. *Id.* at 576-81.
290. *Id.* at 578.
291. *Id.* at 578-81.
292. United States v. Lewis, 638 F. Supp. 573, 578 (W.D. Mich. 1986).
293. *Id.*
294. *Id.* at 579.
295. *Id.*

This then left the court with the State's second proffered compelling interest: "guaranteeing community input into criminal verdicts."[296] The court acknowledged the validity of this interest, observing that "[a]s the lid of a tea kettle releases steam, jury trials in criminal cases allow peaceful expression of community outrage at arbitrary government or vicious criminal acts."[297] But the court then added that "[t]he Sixth Amendment guarantees the right to trial by jury solely for the benefit of the accused and not for the benefit of the government or the community."[298] Therefore, though the government has a valuable interest in community input, the court held that interest neither constitutional nor compelling.[299] Finally, the court noted that the government could not have an overriding interest in community input given that Rule 23(a) does allow prosecutors to consent to a bench trial with no community involvement.[300]

Third, in *United States v. Panteleakis*, various defendants were indicted "on twenty-one counts alleging fraud in the administration of the Federal Medicare Program as health care providers operating nursing homes . . . ."[301] The defendants moved to waive a jury trial so that they could be tried by a judge, but the prosecution refused to consent to the waiver.[302]

The United State District Court for the District of Rhode Island cited *Singer and* claimed that it "suggests an exception to Rule 23 when 'passion, prejudice or public feelings', would deny an accused a fair and impartial trial."[303] The court then cited five reasons proffered by the defendants for why a jury could not be impartial:

> (1) "There are twenty-one counts in the indictment which present complicated issues of law and accounting which are beyond the comprehension of the average juror.
>
> (2) Because of the complicated nature of the multiple issues to be presented, it would be unusually difficult to reduce the issues to meaningful instructions for jury guidance.
>
> (3) Since there are multiple defendants, rulings will have to be made on the admissibility of evidence as it relates to each individual defendant and a jury will have great difficulty in its deliberations in separating such comingled evidence.

296. *Id.* at 579-80.
297. *Id.* at 580.
298. *Id.*
299. *Id.*
300. *Id.*
301. 422 F. Supp. 247, 248 (D.R.I. 1976).
302. *Id.* at 248.
303. *Id.*

> (4) The trial of the matter to a jury would approximately double the length and the cost of the trial and will work unreasonable hardship on the defendants.
>
> (5) There have been inflammatory and prejudicial articles appearing in local newspapers concerning alleged fraud in the Federal Medicare Program, making it impossible to obtain a fair and impartial jury."[304]

The court honed in on the third reason, noting that the trial would involve intricate rulings on the admissibility of many pieces of evidence against each particular defendant.[305] Based upon this reality, the court concluded that the jurors could not be trusted to respect instructions directing them to avoid using certain pieces of evidence against some of the defendants. Instead, the court concluded that "[i]t is unrealistic to expect a jury to hear all the evidence over a three month period, weigh approximately 1,000 exhibits and then categorize everything as it pertains to each particular defendant to the exclusion of others against whom it is inadmissible without prejudice to all."[306]

Even courts rejecting similar pre-trial, unilateral motions for bench trials have suggested that they might approve them under different circumstances. For instance, in *United States v. U.S. District Court for East District California*, four defendants were accused of ritualistic sexual abuse against children.[307] Before trial, the defendants unilaterally moved for a bench trial, claiming that no jury could fairly consider their defense based on the nature of the allegations against them.[308] The trial judge granted the motion, prompting the government to seek mandamus relief with the Ninth Circuit.[309]

The Ninth Circuit cited *Singer* and found that, as in that case, it didn't need to decide whether this was the type of case in which the circumstances were "'so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial.'"[310] Specifically, the Ninth Circuit noted that the trial judge could front end any issues by doing things such as engaging in extensive *voir dire* of prospective jurors and limiting the admissibility of character evidence.[311] The Ninth Circuit's opinion thus implies, as does *Singer*, that there may be some cases in which trial judges cannot prophylactically prevent prejudice and must grant unilateral motions for bench trials brought by defendants before trial.

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304. *Id.* at 249.
305. *Id.* at 250.
306. *Id.*
307. 464 F. 3d 1065, 1067 (9th Cir. 2006).
308. *Id.*
309. *Id.* at 1068.
310. *Id.* at 1071 (quoting Singer v. United States, 380 U.S. 24, 37 (1965)).
311. *Id.* at 1071-72.

Of course, the proposal in this Paper differs from *Singer* and the other cases cited in this subsection because it deals with the question of whether there should be a bench trial *after* something prejudicial happens and the judge thinks a curative instruction might be insufficient to erase that prejudice. In this way, the dichotomy between *Singer* and this Paper's proposal is similar to the dichotomy between motions to transfer venue based on inherent and actual prejudice.

(b) The Motion to Transfer Analog

In *Murphy v. Florida*, the United States Supreme Court held that there are two cases in which a court must grant a motion to transfer venue: (1) cases in which the setting of the trial is inherently prejudicial; and (2) cases in which the jury-selection process allows for an inference of actual prejudice.[312] A defendant files a motion to transfer venue based up inherent prejudice before jury selection.[313] In such a case, the defendant asks the judge to presume that the jury will be prejudiced against her based upon pre-trial publicity where the trial is scheduled to be held.[314] Such motions almost always fail, including in the current prosecution of former Baltimore City State Attorney Marilyn Mosby.[315] As the Eighth Circuit has noted, "the presumption of inherent prejudice is reserved for rare and extreme cases," with all other cases hinging on whether the defense can prove actual prejudice during jury selection.[316]

In turn, a defendant can establish actual prejudice. To prove actual prejudice, the defendant must show that prospective jurors' responses to jury questionnaires and *voir dire* reveal pervasive prejudice against the defendant that could not be cured through jury instructions.[317] For example, Justin Ross Harris moved to transfer venue out of Cobb County, Georgia in his trial for murder based upon leaving his young son in a hot car for hours.[318] The trial judge granted the motion based upon a significant number of prospective jurors expressing prejudice against Harris in both their juror questionnaires and *voir dire*.[319]

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312. 421 U.S. 794, 803 (1975).

313. *See, e.g.*, United States v. Livoti, 8 F. Supp. 2d 246, 249 (S.D.N.Y. 1998) ("Because Livoti moves for a change of venue before voir dire, I need only determine whether the trial setting is inherently prejudicial.").

314. United States v. Mosby, No. 22-CR-00007-LKG, 2023 WL 220130, *2 (D. Md., Jan. 17, 2023).

315. *Id*. at *6.

316. United States v. Blom, 242 F.3d 799, 803 (8th Cir. 2001).

317. *See* Christian Boone, *Judge Grants Change of Venue in Justin Ross Harris Trial*, ATLANTA J.-CONST. (May 2, 2016), https://www.ajc.com/news/local/judge-grants-change-venue-justin-ross-harris-trial/raIjsXki6gsIm513jPgdMM/ [https://perma.cc/6JQG-UC4A].

318. *Id.*

319. *Id.*

(c) Conclusion

This dichotomy between inherent prejudice and actual prejudice suggests that *Singer* provides a stronger basis for granting a defendant's unilateral motion for a bench trial brought mid-trial as opposed to pre-trial. In cases such as *Schipani*, *Lewis*, and *Panteleakis*, courts have granted such unilateral motions based upon the fear of possible prejudice pre-trial and doubt about whether jury instructions could cure that prejudice. This is similar to pre-trial motions to transfer venue based upon inherent prejudice.

Conversely, this Paper's proposal is more analogous to motions to transfer venue based upon actual prejudice. This Paper deals with situations in which (1) we know that jurors were exposed to unfairly prejudicial argument, testimony, or evidence; and (2) the judge thinks that a curative instruction might not erase that prejudice. Therefore, *Singer* and the right to an impartial trial provides strong support for a judge granting a defendant's motion to switch to a bench trial after such prejudice has occurred, even in the absence of government consent.

3. Federal Rule of Criminal Procedure 2

A second possible legal basis for the concept of standby judges can be found in Federal Rule of Criminal Procedure 2. Referencing the other Federal Rules of Criminal Procedure, Rule 2 states that "[t]hese rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."[320] In applying this rule, the United States District Court for the Western District of Pennsylvania noted that it gives trial judges leeway in applying the other federal rules to ensure that trials are both fair and efficient.[321] As support for this position, the court cited the United States Supreme Court's opinion in *Geders v. United States* that "'if truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings.'"[322]

In turn, courts have cited Rule 2 to ensure both fair and efficient bench trials when jury trials would be impossible. A good example of a court applying Rule 2 to secure a *fair* trial can be found in *United States v. Braunstein*.[323] In *Braunstein*, five defendants were charged with a flurry of felonies based upon a fraudulent scheme involving the

320. FED. R. CRIM. P. 2.

321. United States v. Lynch, 227 F. Supp. 3d 421, 431 (W.D.Pa. 2017).

322. *Id.* (quoting Geders v. United States, 425 U.S. 80, 87 (1976)).

323. 474 F. Supp. 1 (D.N.J. 1978).

Liberty House Nursing Home of Jersey City.[324] The defendants moved for a bench trial, but the State refused to sign off on it.[325]

In deciding whether to nonetheless proceed with a bench trial, the court cited both *Singer* and *Panteleakis*, noting the factual similarity to the latter case.[326] The court then added that the trial it would hold was even more complicated than the trial in *Panteleakis* because there were also income tax charges, creating even more complicated jury instructions.[327] Therefore, denying the defendants a bench trial "would carry a heavy risk that the jury may hold against one defendant evidence admissible only as to another."[328] The court thus granted the defendants a bench trial.[329]

But while *Singer* suggested—and the court in *Panteleakis* applied—a Sixth Amendment right to a bench trial where an impartial jury was impossible, the court in *Braunstein* claimed its ruling was "not based on constitutional grounds."[330] Instead, the court said its ruling was based "on a reading of Rule 23(a) together with Rule 2," "the pole star" of the Federal Rules of Criminal Procedure.[331] The court was quick to add, though, that its ruling did "not preclude a determination, should it ever be necessary (and which the court cannot foresee) that the totality of the circumstances are of constitutional magnitude."[332]

Courts have also applied Rule 2 to ensure *efficient* trials. *United States v. Cohn* is a prime example of a COVID-era case where a court invoked the rule.[333] In *Cohn*, a former SEC employee was indicted in February 2019 on charges of obstruction of justice and unauthorized disclosure of confidential information.[334] The defendant's trial kept getting delayed as the parties plea bargained, and the State ultimately secured a superseding indictment in October 2019 on an additional charge.[335] This was followed by "vigorous litigation" that pushed the trial date into the COVID pandemic.[336]

Due to the delays with jury trials resulting from COVID, the judge advised the parties that they may want to proceed with a bench trial.[337]

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324. *Id.* at 3.
325. *Id.* at 12.
326. *Id.* at 12-13.
327. *Id.* at 13.
328. *Id.* at 14.
329. 474 F. Supp. 1, 14 (D.N.J. 1978).
330. *Id.*
331. *Id.* at 13-14.
332. *Id.*
333. 481 F. Supp. 3d 122 (E.D.N.Y. 2020).
334. *Id.* at 124.
335. *Id.*
336. *Id.*
337. *Id.* at 125.

The defendant agreed to a bench trial, but the prosecution refused to consent to one.[338] In considering whether to proceed with a bench trial despite the State's objection, the court reviewed existing caselaw on the issue and found that courts have considered four factors in such cases.[339]

First, courts have looked at whether the prosecution objected to a bench trial for improper reasons, such as punishing a defendant for exercising a right.[340] Second, in cases like *Lewis*, courts have analyzed whether a jury trial would interfere with a defendant's constitutional rights.[341] Third, courts have considered "whether the government's insistence on a jury trial implicates the *public's* right to a speedy trial."[342] Fourth, courts have assessed whether the nature of the case would make obtaining an impartial jury trial difficult or impossible.[343] Applying these four factors, the trial judge granted the defendant's unilateral motion for a bench trial.[344]

It is easy to see a court similarly using Rule 2 to consider a defendant's unilateral motion to shift to a bench trial after something prejudicial happens mid-trial. Moreover, a court in such a case could decide whether to grant such a motion without government consent by applying the four factors cited by the court in *Cohn*.

This Article argues, however, that cases such as *Cohn* and *Braunstein* are improperly premised on Rule 2 rather than the right to an impartial jury suggested in *Singer*. In *Carlisle v. United States*, the United States Supreme Court concluded that Rule 2 "sets forth a principle of interpretation to be used in construing ambiguous rules, not a principle of law superseding clear rules that do not achieve the stated objectives."[345] Therefore, "[i]t does not . . . provide that rules shall be construed to mean something other than what they plainly say."[346]

Federal Rule of 23(a) plainly says that the government must consent to a bench trial. There is no ambiguity in the rule. As a result, it is difficult to see how lower courts are applying Rule 2 to supersede a clear rule requiring government consent and allowing defendants to unilaterally move for bench trials. This limitation thus prompts this Article's proposal for a third possible legal authority for standby judges.

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338. *Id.*
339. 481 F. Supp. 3d 122, 129 (E.D.N.Y. 2020).
340. *Id.*
341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.* at 135.
345. 517 U.S. 416, 424 (1996).
346. *Id.*

4. Amending Federal Rule of Criminal Procedure 23(a)

The third possible legal basis for the concept of standby judges would be the Supreme Court amending Federal Rule of Criminal Procedure 23(a). As noted, Rule 23(a) currently states the following:

> "(a) Jury Trial. If the defendant is entitled to a jury trial, the trial must be by jury unless:
>
> (1) the defendant waives a jury trial in writing;
>
> (2) the government consents; and
>
> (3) the court approves."[347]

If the Supreme Court were to agree with the argument in this Article, it could add a fourth subsection to Rule 23(a), allowing for a bench trial if:

> (4) the court finds good cause for a bench trial, and the defendant waives a jury trial in writing.

This would not be the first time that the Supreme Court amended Rule 23 to prevent the harm caused by issues that arise during jury trials. Prior to 1983, Federal Rule of Criminal Procedure 23(b) stated that a federal criminal jury had to consist of twelve persons, except in two circumstances.[348] First, under Rule 23(b)(2)(a), with the judge's approval, the prosecutor and defense counsel could stipulate in writing that they agreed to a jury of fewer than twelve people returning a verdict.[349] So, imagine that, in the middle of the State's case, there were twelve jurors and no alternate jurors when Juror #6 contracted pneumonia and needed to be dismissed. If the prosecutor, defense counsel, and the judge all agreed, the trial could proceed with eleven jurors.[350] Conversely, if any of the three did not sign off on a jury of eleven, the judge had to declare a mistrial.[351]

Second, under Federal Rule of Criminal Procedure 23(b)(2)(B), with the judge's approval, the prosecutor and defense counsel could prestipulate in writing that they would agree to a jury of fewer than twelve people returning a verdict if that circumstance arose.[352] For example, take a case in which jury selection resulted in twelve jurors and no alternate jurors being chosen. At the start of trial, with the judge's

347. FED. R. CRIM. P. 23(a).

348. *Id.* at 23(b)(1)&(2).

349. *Id.* at 23(b)(1).

350. *See, e.g.*, United States v. Murphy, 483 F.3d 639, 642 (9th Cir. 2007) ("[T]his and other courts have dealt with similar situations and have interpreted Rule 23(b) to allow the parties to stipulate to removing a juror and gamble on the effect that removal will have on the verdict, as long as that verdict is unanimous on the part of the remaining jurors.").

351. *See, e.g.*, United States v. Davis, 708 F.3d 1216, 1222 (11th Cir. 2013) ("Because of Rule 23(b), the trial in this case could not continue with fewer than twelve jurors unless Davis gave his written consent.").

352. *See* FED. R. CRIM. P. 23(b)(2)(B).

approval, the prosecutor and defense counsel could stipulate in writing that they would agree to a jury of fewer than twelve people if one or more jurors needed to be dismissed during trial. Again, assume that, in the middle of the State's case, Juror #6 contracted pneumonia and needed to be dismissed. Because the prosecutor and defense counsel pre-stipulated to a jury of fewer than twelve people, the trial would proceed.[353]

In many cases, however, the jury never dipped below twelve jurors. Pursuant to Federal Rule of Criminal Procedure 23(c), a judge could (and still can) empanel up to six alternate jurors who can "replace any jurors who are unable to perform or who are disqualified from performing their duties."[354] Therefore, if a judge empaneled, say, four alternate jurors, a federal criminal trial could continue without the need for stipulations even if up to four jurors needed to be dismissed during the trial because they could be replaced by alternate jurors.

Conversely, the interplay between Federal Rules of Criminal Procedure 23(b) and 24(c) created the very real possibility of a judge having to declare a mistrial during jury deliberations, even after a lengthy and expensive trial. Back in 1983, Rule 24(c) provided that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."[355] So, imagine a lengthy murder trial in which the judge empaneled six alternate jurors to hedge the risk of jurors needing to be dismissed during trial. At the end of trial, the judge would need to dismiss any remaining alternate jurors after sending the twelve jurors back to deliberate. Then, imagine that, during the second day of deliberations, Juror #6 contracted pneumonia and needed to be dismissed. Unless there was a pre-stipulation to a jury of fewer than twelve members, the judge would need to declare a mistrial if either the prosecutor or defense did not want deliberations to proceed with only eleven jurors.[356]

Based upon the costs associated with such a situation, the Supreme Court amended Rule 23(b) in 1983 to add subsection (3).[357] Federal Rule of Criminal Procedure 23(b)(3) now provides that "[a]fter the jury

353. *See, e.g.*, United States v. Longwell, 410 Fed. Appx. 684, 689 (4th Cir. 2011) (enforcing the defendant's pre-stipulation to a jury of fewer than twelve deciding her case).

354. *See* FED. R. CRIM. P. 24(c)(1). Before a 1966 amendment, judges could only empanel up to four alternate jurors. *See* FED. R. CRIM. P. 24(c)(1) advisory committee's note to 1966 amendment.

355. David Paul Nicoli, Comment, *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, 655 n.33 (1982) (quoting FED. R. CRIM. P. 24(c)). The current version of Rule 24(c) does not have this limitation. *See* FED. R. CRIM. P. 24.

356. *See, e.g.*, United States v. Huntress, 956 F.2d 1309, 1314 (5th Cir. 1992) ("Rule 24(c) required, as it still does, that alternate jurors be discharged once the jury retires to deliberate. Thus, unless the parties agreed to proceed to verdict with 11 jurors, the only other option was a mistrial.").

357. *See* United States v. Araujo, 62 F.3d 930, 933 (7th Cir. 1995).

has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror."[358] According to the accompanying Advisory Committee's Note,

> The amendment to subdivision (b) addresses a situation which does not occur with great frequency but which, when it does occur, may present a most difficult issue concerning the fair and efficient administration of justice. This situation is that in which, after the jury has retired to consider its verdict and any alternate jurors have been discharged, one of the jurors is seriously incapacitated or otherwise found to be unable to continue service upon the jury. The problem is acute when the trial has been a lengthy one and consequently the remedy of mistrial would necessitate a second expenditure of substantial prosecution, defense and court resources.[359]

The 1983 amendment to Rule 23(b) thus provides an intriguing model for a similar amendment to Rule 23(a) that would allow for a judge to transform a jury trial to a bench trial based upon the jurors receiving improper argument, evidence, or testimony. Both the amendment to Rule 23(b) and the proposed amendment to Rule 23(a) address situations in which it would be harmful and damaging to call a mistrial during trial. And both allow for the judge to take corrective action without the consent of both parties. Indeed, Rule 23(b)(3) allows the judge to act without the consent of either party while the proposed amendment still requires the consent of the defendant.

Another difference is that Rule 23(b)(3) only applies once a trial has reached jury deliberations while the proposed amendment to Rule 23(a) could apply at any point during a trial when something prejudicial has happened. This Paper argues, however, that proposed amendment to Rule 23(a) makes more sense than the 1983 amendment that added Rule 23(b)(3). Under Rule 23(b)(3), after a one-day trial, a judge could order a case to continue after one hour of jury deliberations should the jury dip to eleven members. Conversely, unless the parties consented, a judge would have to declare a mistrial on day twenty of a longer trial, just before closing arguments, if a juror needs to be dismissed and there are no remaining alternate jurors. It is hard to see how Rule 23(b)(3) preserves resources when judges lack the authority to order deliberations to continue in the latter scenario.

On the other hand, the proposed amendment to Rule 23(a) would allow a judge to consider a variety of factors when deciding whether to offer the defendant the option of switching to a bench trial after something prejudicial happens. The judge could balance factors such as degree of prejudice, likelihood a curative instruction would be

358. FED. R. CRIM. P. 23(b)(3).

359. FED. R. CRIM. P. 23(b)(3) advisory committee's note to 1983 amendment.

(in)effective, likely length of trial, and how early/late the error occurred in deciding whether a switch to a bench trial might make sense.

5. Federal Rule of Evidence 103(d)

The fourth possible legal basis for the concept of standby judges is Federal Rule of Evidence 103(d). Rule 103(d) states that "[t]o the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means."[360] Facially, the rule would seem to have no bearing on this paper's proposal; instead, it appears to be a rule aimed at preventing the jury from hearing inadmissible evidence rather than a rule directing the judge to take remedial action after an error has occurred.

That said, the Advisory Committee's Note to the rule is intriguing. In pertinent part, it states, "This subdivision proceeds on the supposition that a ruling which excludes evidence in a jury case is likely to be a pointless procedure if the excluded evidence nevertheless comes to the attention of the jury. *Bruton v. United States*."[361] As noted previously, courts across the country have commonly issued curative instructions when inadmissible evidence reaches the jury, finding that mistrials are a rare remedy to be granted in only the most extreme cases.[362] Conversely, the Advisory Committee seems to be saying that inadmissible evidence reaching the jury likely makes the judge's ruling on that evidence "pointless procedure."

Such a reading is corroborated by the committee's citation to the Supreme Court's opinion *Bruton*, which dealt with the issue of confessions by non-testifying co-defendants at joint jury trials.[363] In *Bruton*, the Court concluded that such confessions (*e.g.,* Carla saying, "Dana and I robbed the bank") are inadmissible because the jury would likely be unable to obey a limiting instruction directing the jurors to ignore the confession against the other defendant (Dana).[364]

The Advisory Committee's Note thus suggests that the heavy reliance by courts on curative instructions is unwarranted.[365] If that's true, that leaves two options: (1) many more mistrials than we

360. Fed. R. Evid. 103(d).

361. Fed. R. Evid. 103(d)., adv. comm. note. Federal Rule of Evidence 103 was amended, so this note refers to subsection (c), which is now subsection (d).

362. *See supra* note 113 and accompanying text.

363. Bruton v. United States, 389 U.S. 818 (1968).

364. *Id.* at 137 ("Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all.").

365. *See, e.g.,* State v. Blotske, 899 N.W.2d 661, 667 (N.D. 2017) (citing Rule 103(d) to find that a limiting instruction was inadequate and that a mistrial should have been granted).

currently have, multiplying the harms mentioned above;[366] or (2) creating some other mechanism for dealing with inadmissible evidence reaching the jury, such as this paper's proposal.

G. Possible Issues With the Proposal

In this final subsection, this paper will address potential objections to the concept of standby judges.

1. Judges Are Just as Biased by Inadmissible Evidence as Jurors

The first possible objection to standby counsel is that judges are just as biased by inadmissible evidence as jurors. Specifically, there is some "empirical evidence suggesting that judges are worryingly susceptible to bias, and at the same level as juries."[367] Moreover, there is a worry that "judges might be overconfident about their abilities to control their own biases."[368]

That said, other empirical studies have shown that "[a]t least with respect to applying the law to facts properly, it does seem very likely that judges are better than juries."[369] Furthermore, an empirical study found that the acquittal rate is 15% at jury trials vs. 46% at bench trials, although the authors suggest that some of this disparity may be due to defendants with solid acquittal prospects preferring bench trials.[370]

Additionally, if we were to believe that judges are just as prejudiced by inadmissible evidence as jurors, we would seemingly need to abandon the bench trial. As noted in the prior subsection, the *Bruton* doctrine prevents the prosecution from admitting confessions by non-testifying co-defendants at joint jury trials due to the belief that jurors could not abide by limiting instructions.[371] On the other hand, every court that has addressed the issue has found that there is no problem with the admission of such confessions at bench trials because judges will understand that they can only use the confession against the confessor.[372]

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366. *See supra* notes 115-130 and accompanying text.

367. Krishnamurthi, *supra* note 223, at 1649-50.

368. Jeffrey J. Rachlinski & Sheri Lynn Johnson, *Does Unconscious Racial Bias Affect Trial Judges*, 84 NOTRE DAME L. REV. 1195, 1225 (2009).

369. Krishnamurthi, *supra* note 221, at 1649.

370. *See* Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1495, 1504-05 (2006).

371. *See supra* notes 361-362 and accompanying text.

372. *See, e.g.,* State v. Ruiz, 437 So.2d 330, 335 (La. Ct. App. 2d Cir. 1983) ("[T]he Federal Courts of Appeal have made it clear that *Bruton* is inapplicable to bench trials.") (emphasis added).

More generally, in a bench trial, the same judge who rules on the admissibility of evidence later serves at the trier of fact at trial.[373] Therefore, bench trials currently occur across the country in which judges deem unfairly prejudicial evidence inadmissible and then render a verdict. This is because the system "trusts judges to be able to see inflammatory and unfairly prejudicial evidence and then to be able to put it into perspective, not allowing it to warp their judgment."[374]

Finally, and maybe most importantly, this Paper's proposal would not force a defendant to opt for a bench trial. Defendants would still be able to move for curative instructions and/or mistrials. On the other hand, if the defense thought that a switch to a jury trial was the best option, it could move for one. For example, it is easy to imagine the defense moving for a bench trial with a judge with a good civil rights record after the prosecutor makes a comment inviting the jury to resolve the case on grounds of racial prejudice. Moreover, in a case in which a witness mentions that the defendant failed a polygraph test, the defense might think she would more easily set aside that result as compared to a jury. Conversely, the defense might think that a judge is no better than a jury at ignoring testimony by a witness who clams up on cross-examination. The point is that it would be completely up to the defense to make these types of decisions.

2. Litigating a Case Before Two Possible Triers of Fact is Unfair and Unduly Complicated

A second possible objection to standby judges is the argument that litigating a case before two possible triers of fact is unfair and unduly complicated. The proposal in this paper is explicitly designed to address the first of these criticisms. The status quo, in which some judges make the ad hoc decision to allow the defendant to switch to a bench trial mid-trial,[375] could be seen as unfair to the prosecution, which had been directing its case toward the jury. Of course, the same goes for the defense. As noted previously, however, this paper proposes that a judge designate herself as a standby judge at the start of trial so that both parties know there could be a mid-trial switch to a bench trial.

This leads to the related argument that it is unduly complicated to force parties to direct their argument to two possible triers of fact. The answer to this argument is that there are certain situations in which

373. *See* Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 330-31 (2013).

374. *See id.* (quoting LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 25 (2006)).

375. *See supra* notes 224-257 and accompanying text.

courts already allow for two triers of fact.[376] The *Bruton* doctrine again is informative. If a non-testifying co-defendant's confession implicates another defendant, that confession is only admissible against the confessor. Therefore, Carla's confession, "Dana and I robbed the bank," would only be admissible against Carla. As a result, many courts have approved two separate juries at joint trials, with only the confessor's jury in the courtroom when evidence of her confession is introduced.[377] If courts have found that attorneys can argue to two sets of twelve jurors, they should similarly find that attorneys can present cases that would be compelling to both the jury and the judge.

3. Denying Community Input Into Criminal Verdicts

The third second possible objection to standby judges is the argument that switching to a bench trial denies community input into criminal verdicts through jury involvement. This was the argument rejected by the court in *United States v. Lewis* with regard to granting a defendant's pre-trial motion for a bench trial.[378] The same arguments used by the court in that case apply with even more force here. First, if, as *Singer* implied, criminal defendants have the Constitutional right to an impartial trial, any non-Constitutional interest the State has in community involvement must be subservient.[379] Second, the fact that the State can, and does, waive jury trials in favor of bench trials proves that the interest in community involvement cannot override the interest in an impartial trial.[380] Third, unlike in a case like *Lewis*, there is a jury, and thus community involvement, in a standby judge trial. That jury simply does not decide the case when something goes horribly wrong at trial, often during the State's case.

IV. CONCLUSION

It seems shocking that in almost four hundred years of jury trials in this country, going back to the American colonies, we have not come up with a compelling solution to the common problem of criminal defendants being unfairly prejudiced mid-trial. Studies suggest that curative instructions do not diminish, and instead heighten, the harm caused when inadmissible argument, evidence, or testimony reaches

376. *See, e.g.,* United States v. Wilchcombe, 838 F.3d 1179, 1185 (11th Cir. 2016) ("The district court empaneled two juries, one for Rolle and Wilchcombe and the other for Beauplant, to avoid any potential prejudice that could result from evidence of Beauplant's prior criminal trafficking."); People v. Thomas, 256 P.3d 603, 610 (Cal. 2011) ("[T]he court empaneled two juries, one for each defendant, because defendant faced the death penalty in the Grote case and Cooksey was not charged in that matter.").

377. *See, e.g.,* State v. Beam, 710 P.2d 526, 533 (Idaho 1985) ("We uphold the use of two juries in the instant case, but like many other courts, our decision is not to be taken as a blanket endorsement.").

378. 638 F.Supp. 573, 573 (W.D. Mich. 1986).

379. *See id.* at 580.

380. *See id.*

the jury. Meanwhile, mistrials can be even more harmful to both defendants and the State due to the cost of retrial, the increased chance of a wrongful conviction, and the additional trauma inflicted on the defendant.

The concept of standby judges, modeled after the standby counsel solution, offers the promise of solving these problems. If a defendant can opt to switch to a bench trial after unfairly prejudicial evidence reaches the jury, there would be no need for a mistrial and less concern that the judge will use the evidence against her, at least in certain cases. Moreover, this Paper's proposal is not a pie in the sky plan that courts are unlikely to adopt. Instead, judges are already suggesting or implementing mid-trial switches to bench trials, albeit in ad hoc and haphazard ways. This Paper's proposal standardizes this process and allows judges to make such a switch in a fair and equitable way that provides notice to both parties.