

CONNECTICUT LAW REVIEW

VOLUME 43

NOVEMBER 2010

NUMBER 1

Note

TO EACH HIS OWN JURY: DUAL JURIES IN JOINT TRIALS

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This Note explores the dual jury system in which each defendant in a joint trial has his or her own jury to decide guilt or innocence. In 1968, in Bruton v. United States, the Supreme Court ruled that despite any limiting instruction, a defendant's right to confrontation is violated when an incriminating out-of-court confession is admitted against him when the confessor does not testify. This decision called into question courts' ability to try defendants jointly. Shortly thereafter, courts began impaneling two juries simultaneously to decide the guilt or innocence of each defendant. This procedure was first approved by the federal courts in 1972 and has continued to withstand defendant challenges for nearly four decades. In addition to remedying the dilemma stemming from Bruton, impaneling dual juries also is a way to promote judicial economy and grant partial severance based on antagonistic defenses. Many courts, however, are reluctant to endorse the procedure despite their affirmation of convictions of defendants tried by dual juries. This Note argues that courts should endorse the dual jury trial procedure. It also urges the adoption of detailed guidelines to assist judges in implementing the dual jury practice and proposes a model of such guidelines.

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TO EACH HIS OWN JURY: DUAL JURIES IN JOINT TRIALS

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I. INTRODUCTION

Article III of the United States Constitution provides that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”¹ The Sixth Amendment of the Constitution requires that criminal defendants “shall enjoy the right to a speedy and public trial, by an impartial jury of the State.”² The Supreme Court has recognized that the right to a jury has grown to be a “deep commitment of the Nation . . . in serious criminal cases.”³ Certainly, Americans consider trial by jury an essential freedom of citizenship and a check on government power.⁴ Perhaps because this right is so ingrained in society, proposed changes to the current system risk being met with stark criticism. Reforms are often necessary, however, in order to achieve the dual goals of preserving defendants’ rights and ensuring speedy trials.⁵

One such innovation to trial by jury is the multiple jury system in which each defendant in a joint trial has his or her own jury. The procedure was used as early as 1914 in a California Court of Appeal case in which two defendants were convicted of murder.⁶ There, in response to defendants’ request for separate trials, the court simultaneously impaneled two separate juries.⁷ The defense counsel expressly stated in court that he did not object to the procedure, and as a result the appeals court refused to hear any argument that the defendants’ motion for a separate trial was denied or that they were prejudiced by the dual juries.⁸

This so-called “experiment”⁹ of simultaneous juries was first examined

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¹ U.S. CONST. art. III, § 2, cl. 3.

² U.S. CONST. amend. VI.

³ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (holding that the right to trial by jury is also applicable to state courts via the Fourteenth Amendment).

⁴ *Id.* at 155 (“A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.”).

⁵ See *Byrne v. Matczak*, 254 F.2d 525, 528–29 (3d Cir. 1958) (“[T]he constitutional conception of jury trial is not inflexible in all details, so long as the essential elements of the institution are preserved.”); see also *Williams v. Florida*, 399 U.S. 78, 102–03 (1970) (holding that a six-member jury did not violate defendant’s Sixth Amendment rights as applied through the Fourteenth Amendment).

⁶ *People v. Ho Kim You*, 141 P. 950, 951 (Cal. Ct. App. 1914).

⁷ *Id.* at 954.

⁸ *Id.* at 954–55.

⁹ *United States v. Sidman*, 470 F.2d 1158, 1168 (9th Cir. 1972).

by the federal courts in 1972 in *United States v. Sidman*.¹⁰ In *Sidman*, the Ninth Circuit heard a challenge by a defendant that his dual jury trial denied him due process.¹¹ In unanimously upholding the defendant's conviction and the use of two juries,¹² the court found that the defendant's rights were preserved, but it also cautioned that its holding should not be construed as "a blanket endorsement" of the procedure.¹³ Nearly forty years have passed since the *Sidman* court upheld multiple juries as consistent with due process. Since then, both federal¹⁴ and state¹⁵ courts have heard challenges to the procedure and have overwhelmingly affirmed defendants' convictions. Many courts, however, are still reluctant to endorse dual juries¹⁶ and little literature has been written on the practice over the last four decades.¹⁷

¹⁰ *Id.* at 1167–70.

¹¹ *Id.* at 1169.

¹² *Id.* at 1160, 1170.

¹³ *Id.* at 1170.

¹⁴ On the federal level, in addition to the Ninth Circuit, the First, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits have also affirmed convictions of defendants tried by the use of multiple juries. See *Wilson v. Sirmons*, 536 F.3d 1064, 1100 (10th Cir. 2008); *Brown v. Sirmons*, 515 F.3d 1072, 1077–79 (10th Cir. 2008); *Padilla v. Dorsey*, No. 00-2043, 2000 WL 1089502, at *1 (10th Cir. Aug. 4, 2000); *Mack v. Peters*, 80 F.3d 230, 235, 238 (7th Cir. 1996); *United States v. Lebron-Gonzalez*, 816 F.2d 823, 830–31 (1st Cir. 1987); *United States v. Lewis*, 716 F.2d 16, 18–21 (D.C. Cir. 1983); *United States v. Hayes*, 676 F.2d 1359, 1366–67 (11th Cir. 1982); *United States v. Rimar*, 558 F.2d 1271, 1273 (6th Cir. 1977); *United States v. Rowan*, 518 F.2d 685, 689–90 (6th Cir. 1975).

¹⁵ See generally Fern L. Kletter, Annotation, *Propriety of Use of Multiple Juries at Joint Trial of Multiple Defendants in State Criminal Prosecution*, 41 A.L.R.6th 295 (2009) (collecting state cases).

¹⁶ The majority of criticism comes from state courts. See, e.g., *State v. Scroggins*, 716 P.2d 1152, 1155 (Idaho 1985) ("While we conclude that the use of the dual jury system in the present case does not pose grounds for reversal, the potential for serious error in a complicated case may caution against its use."); *People v. Church*, 429 N.E.2d 577, 584 (Ill. App. Ct. 1981) (finding the two jury system not "particularly attractive"); *Scarborough v. State*, 437 A.2d 672, 676 (Md. Ct. Spec. App. 1981) ("strongly condemning the use of dual juries"); *Ewish v. State*, 871 P.2d 306, 313 (Nev. 1994) (rejecting an optimistic view of multiple juries and expressing that they can be "a breeding ground for confusion"); *State v. Corsi*, 430 A.2d 210, 213 (N.J. 1981) (concluding that "there are too many opportunities for reversible error to take place" and therefore refusing to recommend it); *People v. Ricardo B.*, 535 N.E.2d 1336, 1339 (N.Y. 1989) (expressing reservations and recommending multiple juries "to be used sparingly and then only after a full consideration of the impact the procedure will have on defendants' due process rights"); *Wilson v. State*, 983 P.2d 448, 458 (Okla. Crim. App. 1998) ("[W]e would be remiss if we did not caution the trial courts in Oklahoma to bear in mind that the dual jury procedure has the potential for engendering error, especially in complex cases."), *aff'd in part and vacated in part* by *Wilson v. Sirmons*, 536 F.3d 1064, 1070 (10th Cir. 2008).

¹⁷ The few articles that have been published on dual juries are relatively brief as well. See Alex A. Gaynes, *Two Juries/One Trial—Panacea of Judicial Economy or Personification of Murphy's Law*, 5 AM. J. TRIAL ADVOC. 285, 285–292 (1981) (discussing general background of the dual jury procedure and profiling *United States v. Hanigan*, 681 F.2d 1127 (9th Cir. 1982), to show potential errors); Adam Hersh, *Joint Criminal Trials with Multiple Juries: Why They Are Used and Suggested Ways to Implement Them*, FLA. BAR J., Apr. 1999, at 72, 72–74 (discussing a general background of multiple jury trials and Florida's use of the procedure); Judson W. Morris & Robert E. Savitt, *Bruton Revisited—One Trial/Two Juries*, PROSECUTOR, Nov.–Dec. 1976, at 92, 92–94 (discussing general background of dual juries and profiling a Los Angeles Superior Court case using dual juries); Marie G. Santagata, *One Trial, Two Juries—It Works in Extraordinary Cases*, N.Y. L.J., May 11, 1988, at 1, 32 (reporting that the expected benefits of the dual jury system, including reduced burden on witnesses, reduced costs, and an efficient use of the court's time, were all realized in *People v. Ricardo B.*, 535

This Note argues that both state and federal courts should endorse dual jury trials and cease condemning the practice while simultaneously upholding convictions by multiple juries. This Note will show the advantages of the procedure. Dual juries are well tested in court, having withstood multiple defendants' arguments over the last four decades. To ease the transition to more uniform endorsement, each jurisdiction that has upheld convictions of defendants tried by multiple juries should adopt detailed guidelines, such as those in this Note, and incorporate them into their rules.

Part II provides a broad overview of the dual jury system, including the various contexts in which dual juries have been employed, the authority courts have cited for impaneling dual juries, the standard of review courts have used to examine challenges to the practice, and rationales courts have advanced for using the procedure. Part III argues that the advantages of the dual jury system outweigh the disadvantages, and accordingly, courts should move toward embracing multiple juries in the appropriate contexts. Several arguments frequently raised by defendants against dual juries and courts' responses to these challenges will be examined. This Part demonstrates that the procedure has been extensively tested in the courts and defendants' challenges have been overwhelmingly rejected. Part IV proposes detailed model guidelines that jurisdictions using multiple juries should adopt in order to achieve the appropriate balance between judicial economy and defendants' rights. Finally, Part V concludes with a brief summary of why more courts should impanel dual juries.

II. THE DUAL JURY SYSTEM EXPLORED

The decisional authority reviewing dual juries is substantially greater in the criminal context, but recently one circuit has approved the use of dual juries in the civil context.¹⁸ Moreover, when faced with a motion to impanel dual juries, a court traditionally must evaluate two considerations. First, a court must determine whether it has authority to order dual juries. Second, a court must decide what standard of review to use. In addition to examining these considerations, this Part concludes by discussing rationales for implementing the procedure.

A. *Contexts in Which Dual Juries Have Been Impaneled*

Dual juries were first upheld by the federal circuit in 1972 in *United*

N.E.2d 1336 (N.Y. 1989)); Note, Richardson v. Marsh: *Codefendant Confessions and the Demise of Confrontation*, 101 HARV. L. REV. 1876, 1890–94 (1988) (discussing the benefits and procedural considerations of impaneling dual juries); Note, *On the Joint Trial of Two Defendants, the Empanelling of Two Juries Simultaneously is Permissible*, 2 FORDHAM URB. L.J. 407, 407–17 (1974) (providing a general background of dual juries and profiling *United States v. Sidman*).

¹⁸ *In re High Fructose Corn Syrup Antitrust Litig.*, 361 F.3d 439, 441 (7th Cir. 2004).

States v. Sidman.¹⁹ In *Sidman*, both codefendants were convicted of armed robbery.²⁰ The first state court case that could be found after 1972 to uphold the procedure was decided by the District Court of Appeal of Florida in 1978.²¹ In *Feeney v. State*,²² the court affirmed a defendant's conviction of robbery by use of a firearm by a dual jury trial—even in the absence of cited authority to conduct the procedure—because the record did not indicate prejudice and there was substantial overlap in the evidence against both defendants.²³ Further, the court noted that the law was evolutionary in nature and dual juries support this idea.²⁴ Finally, the court noted the broad discretion that trial judges hold over their courts.²⁵ That same year, the Superior Court of New Jersey found no prejudice in the “unorthodox” procedure of three juries in one trial and upheld a conviction of conspiracy to commit robbery, armed robbery, and assault with intent to rob while armed.²⁶ Other states followed in upholding convictions based on the procedure over the next three years.²⁷ All of these cases were criminal cases—the predominant context in which dual juries are used by courts.

Recently, the Seventh Circuit addressed the issue of whether a court may impanel multiple juries in a civil trial. The matter arose when direct purchasers of high fructose corn syrup brought a class action suit against the principal manufacturers of the product alleging a price fixing conspiracy in violation of Section One of the Sherman Act.²⁸ The district court expressed its view that dual juries were favored in the case due to concerns over judicial economy and because limiting instructions would be

¹⁹ 470 F.2d 1158, 1170 (9th Cir. 1972).

²⁰ *Id.* at 1160.

²¹ *Feeney v. State*, 359 So. 2d 569, 570 (Fla. Dist. Ct. App. 1978). In 1975, the Supreme Court of Louisiana denied the state's motion for a dual jury to resolve the dilemma where defendants were allowed to choose which state constitution to be tried under and each chose a different one. *State v. Thomas*, 319 So. 2d 789, 792–93 (La. 1975). The court there declined to impanel dual juries even when failing to do so resulted in severance in defiance of Louisiana's Code of Criminal Procedure. *Id.* at 793. The court “fe[lt] that [the procedure] would cause numerous other complications,” but did not provide any explanation of which “complications” they feared would occur. *Id.*

²² 359 So. 2d 569 (Fla. Dist. Ct. App. 1978).

²³ *Id.* at 570.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *State v. Hernandez*, 394 A.2d 883, 884–85 (N.J. Super. Ct. App. Div. 1978).

²⁷ See, e.g., *People v. Wardlow*, 173 Cal. Rptr. 500, 505 (Ct. App. 1981) (finding no prejudice and affirming defendant's conviction for two counts of robbery and one count of murder in the second degree); *People v. Church*, 429 N.E.2d 577, 585 (Ill. App. Ct. 1981) (finding authorization for the two jury procedure and affirming defendant's conviction of murder and armed violence); *Scarborough v. State*, 437 A.2d 672, 676 (Md. Ct. Spec. App. 1981) (finding no reversible error and thus upholding defendant's conviction for robbery); *People v. Brooks*, 285 N.W.2d 307, 307–08 (Mich. Ct. App. 1979) (approving the dual jury procedure and upholding conviction for breaking and entering); *State v. Corsi*, 430 A.2d 210, 210–11, 213 (N.J. 1981) (finding no reversible error and affirming a conviction of conspiracy to commit robbery, armed robbery with a dangerous instrument, murder, and, with respect to one defendant, atrocious assault and battery).

²⁸ *In re High Fructose Corn Syrup Antitrust Litig.*, 361 F.3d 439, 440 (7th Cir. 2004).

insufficient to overcome prejudicial evidence admissible against only one defendant.²⁹ The court, unsure of its authority to impanel dual juries in antitrust cases, certified the question to the circuit court.³⁰ Writing for a unanimous Seventh Circuit, Judge Posner³¹ held that there was no bar to the practice and even encouraged it: “Imaginative procedures for averting jury error, as long as they do not violate any legal norm, are to be encouraged rather than discouraged.”³² Further, the court found the procedure to be “orthodox in criminal cases” and could not identify any reason why it should be met with disapproval in the civil context.³³ This case has yet to be cited by other civil cases, but one state court has cited it in a criminal case to provide support for a trial court judge’s inherent discretion to impanel dual juries.³⁴ Moreover, at least one state court has expressed approval of dual juries in civil suits.³⁵

B. Authority to Order Dual Juries

One of the most common arguments made by defendants against multiple juries is that courts lack the authority to employ them.³⁶ Courts offer several explanations for rejecting this claim. Most are rooted in procedural rules, but some courts have also advanced policy reasons.

Many courts have found that authority for dual juries lies in their classification as a partial form of severance.³⁷ Courts have held that the

²⁹ *In re High Fructose Corn Syrup Antitrust Litig.*, 303 F. Supp. 2d 971, 973 (C.D. Ill. 2004).

³⁰ *Id.* at 973–74.

³¹ Judge Posner also wrote the Seventh Circuit’s opinion in *Smith v. DeRobertis*, 758 F.2d 1151, 1151 (7th Cir. 1985), in which the court held that dual juries do not violate the due process clause. *Id.* at 1152.

³² *High Fructose Corn Syrup*, 361 F.3d at 441.

³³ *Id.* For a discussion of the Seventh Circuit’s opinion in *High Fructose Corn Syrup*, see generally Todd Lochner, Legal Note, *Impaneling Multiple Juries in Civil Suits*, 26 JUST. SYS. J. 226 (2005).

³⁴ *Woolbright v. State*, 160 S.W.3d 315, 324 (Ark. 2004). For further discussion of *Woolbright*, see Ralph Quanah Stewart, *Annual Survey of Caselaw: Criminal Law*, 27 U. ARK. LITTLE ROCK L. REV. 701, 707–09 (2005).

³⁵ *Ford v. Uniroyal Goodrich Tire Co.*, 476 S.E.2d 565, 568 (Ga. 1996) (holding that the dual jury procedure was governed by statutory authority).

³⁶ See, e.g., *People v. Wardlow*, 173 Cal. Rptr. 500, 502 (Ct. App. 1981) (rejecting defendants’ argument that the trial court exceeded its statutory authority in impaneling two juries); *People v. Trice*, 577 N.E.2d 1195, 1203 (Ill. App. Ct. 1991) (finding no merit in defendant’s argument that the trial court was not authorized to permit dual juries since Illinois courts have sanctioned the procedure); *State v. Bowman*, 588 A.2d 728, 732 (Me. 1991) (rejecting defendant’s argument that there is no statutory authorization for a dual-trial four-jury procedure); *Alverson v. State*, 983 P.2d 498, 506 (Okla. Crim. App. 1999) (rejecting defendant’s argument that Oklahoma law precluded the court from using dual juries).

³⁷ See *United States v. Rowan*, 518 F.2d 685, 689–90 (6th Cir. 1975) (noting that the district court granted severance but impaneled two juries); *People v. Hana*, 524 N.W.2d 682, 693 (Mich. 1994) (finding that the use of dual juries is a partial form of severance); *People v. Ricardo B.*, 535 N.E.2d 1336, 1338 (N.Y. 1989) (concluding that “the use of multiple juries is merely a partial form of severance” and citing other courts that have reasoned the same); *State v. Avery*, 571 N.W.2d 907, 909 (Wis. Ct. App. 1997) (agreeing with the State’s argument that “because a single trial to multiple juries

same purpose of, and protection provided by, severance is preserved in the multiple jury system.³⁸ The primary purpose of severance is to avoid confusion over which evidence applies to which defendant. In a dual jury trial conducted correctly, each jury only hears evidence applicable to its respective defendant. In addition, when one codefendant makes an out-of-court confession incriminating another codefendant, but then refuses to testify, the latter defendant's right to confrontation is implicated. This is because the codefendant who has been incriminated cannot then confront his accuser—his codefendant—since that codefendant does not take the stand. Severance thus preserves defendants' Sixth Amendment rights in such scenarios.³⁹ Because total severance is within the sound discretion of the trial judge,⁴⁰ it follows that partial severance is also within the court's discretion.

An alternative source of authority for multiple juries stems from federal rules and many states' procedural rules providing whatever relief justice requires in joint trials. The Federal Rules of Criminal Procedure permit the court to sever defendants' trials—or “provide any other relief that justice requires”⁴¹—if there is prejudice from joinder. Some state rules also have such a clause.⁴² In fact, this provision has also been used by a state court to approve the use of four juries in a dual trial.⁴³ A state's ability to use this provision, however, would depend upon the language of the rule.⁴⁴

Another way that courts authorize multiple juries is by citing the traditional preference for joint trials and that impaneling dual juries preserves this practice. Rule 8(b) of the Federal Rules of Criminal Procedure allows joinder of defendants if both defendants “are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses.”⁴⁵ States' rules of

provides the individual defendants with the same protection they receive in separate trials, the dual jury trial should be considered a form of severance”).

³⁸ See, e.g., *Avery*, 571 N.W.2d at 909.

³⁹ See discussion *infra* Part II.D (discussing avoidance of the *Bruton* problem as a rationale for permitting dual juries).

⁴⁰ FED. R. CRIM. P. 14(a).

⁴¹ *Id.*

⁴² See, e.g., ME. R. CRIM. P. 8(d) (authorizing the court to “provide whatever . . . relief justice requires”); see also *People v. Church*, 429 N.E.2d 577, 584 (Ill. App. Ct. 1981) (finding statutory authority for a dual jury joint trial in the state's code of criminal procedure that grants courts discretion to “provide any other relief as justice may require” in the face of prejudice to the defendant).

⁴³ *State v. Bowman*, 588 A.2d 728, 733 (Me. 1991).

⁴⁴ In *State v. Avery*, for example, the Court of Appeals of Wisconsin cited the State's argument in the alternative that the dual jury procedure was authorized by “other relief justice requires” in a state statute. 571 N.W.2d 907, 909 n.3 (Wis. 1997). The court, however, acknowledged the defendant's counterargument that the language of the statute did not appear to provide this authorization where mandatory severance was required in the case of a codefendant's confession. *Id.*

⁴⁵ FED. R. CRIM. P. 8(b).

criminal procedure also explicitly provide for joint trials.⁴⁶ Whether to try defendants accused of crimes arising from the same transaction together or separately is within the discretion of the trial court,⁴⁷ and generally, courts have expressed a preference for joint trials of codefendants.⁴⁸ Further, the Supreme Court has recognized the “vital role”⁴⁹ that joinder plays in the criminal justice system: joint trials “conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial.”⁵⁰

Dual juries are particularly favored when there is admissible evidence against one defendant that is inadmissible against the other defendant.⁵¹ The procedure allows the removal of the defendant’s jury against whom the evidence is inadmissible. Accordingly, the evidence against each defendant is exactly the same as the evidence would have been had the defendants been tried separately.⁵² This admissibility difficulty is known as the “*Bruton*” problem and is discussed below.⁵³

Finally, courts have found authority to impanel dual juries in the inherent discretion vested in courts to address increasing case loads on their dockets and have looked favorably upon innovative efforts to do so. When the Ninth Circuit first upheld dual juries in 1972, it cited the Third Circuit’s reasoning in a case holding that the decision of whether to allow dispersal of a jury while deliberation on the verdict is in progress is within the discretion of the trial judge: “[F]air new procedures, which tend to facilitate proper fact finding, are allowable, although not traditional.”⁵⁴ This has been the foundation for other courts’ reasoning that their

⁴⁶ See, e.g., ARIZ. R. CRIM. P. 13.3(b), (c); ME. R. CRIM. P. 8(c); see also *State v. Anderson*, 409 A.2d 1290, 1297 (Me. 1979) (noting that “joint trials are generally favored in the interest of conserving judicial resources, avoiding duplicative trials, minimizing the public expenditure of funds and promptly bringing the accused to trial”).

⁴⁷ Wayne R. LaFave et al., *Court’s Authority to Consolidate and Sever*, 5 CRIM. PROC. § 17.3(a) (3d ed. 2009).

⁴⁸ See *Carr v. Warren*, No. 05-CV-73763-DT, 2007 WL 2389816, at *7 (E.D. Mich. July 9, 2007) (citing that courts favor joint trials); *State v. VanHorn*, No. L-98-1171, 2000 WL 234557, at *6 (Ohio Ct. App. Mar. 3, 2000) (“The trial court’s *sua sponte* order [to impanel dual juries for the codefendants] recognized that the joinder of defendants is the rule rather than the exception because the law favors avoiding multiple trials.”).

⁴⁹ *Richardson v. Marsh*, 481 U.S. 200, 209 (1987).

⁵⁰ *Bruton v. United States*, 391 U.S. 123, 134 (1968); see also Robert O. Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 MICH. L. REV. 1379, 1381–97 (1979) (discussing the efficiencies and other benefits of joint trials).

⁵¹ See *infra* note 80 (noting that both federal and state jurisdictions have used multiple juries to remedy *Bruton* problems).

⁵² See *State v. Avery*, 571 N.W.2d 907, 910 (Wis. Ct. App. 1997) (concluding that the evidence before the defendant’s jury at his dual jury trial was exactly what it would have been had he had his own trial).

⁵³ See discussion *infra* Part II.D.

⁵⁴ *United States v. Sidman*, 470 F.2d 1158, 1168 (9th Cir. 1972) (quoting *Byrne v. Matczak*, 254 F.2d 525, 529 (3d Cir. 1958)).

discretion encompasses the use of multiple juries.⁵⁵ As one Florida state judge wrote, “[t]he law is, and must be, dynamic and not static. Procedural law is no exception.”⁵⁶ Such “flexibility and discretion”⁵⁷ afforded to judges benefits the judicial process. Dual juries—it has been concluded—are merely a case-by-case “exercise of an individual judge’s discretion to use a particular technique in order to meet a specific problem.”⁵⁸ At least one state appellate court has even upheld the dual jury procedure when ordered by the judge *sua sponte*, finding that “it is fundamental that the trial court may control its own docket and courtroom proceedings.”⁵⁹

C. Standard of Review

Since many courts find that impaneling dual juries is a form of partial severance,⁶⁰ they apply the standard of review for severance to dual jury trials. Reviewing courts evaluate whether there has been “identifiable prejudice or ‘gross unfairness . . . such as to deprive the defendant of a fair trial or due process of law.’”⁶¹ All federal circuits that have evaluated the dual jury procedure have held that it is not a *per se* violation of due process.⁶² Rather, courts require a showing of *specific* prejudice and have held that a generalized claim of prejudice is not sufficient to prove deprivation of rights.⁶³ The Seventh Circuit has gone further in requiring a showing of specific *and undue* prejudice to the defendant from the use of multiple juries.⁶⁴ In assessing whether there has been prejudice, courts look to whether juries were confused or were unable to render their verdict fairly and whether the trial court adequately instructed the juries about

⁵⁵ See, e.g., *United States v. Gonzalez*, 610 F. Supp. 568, 571 (D.P.R. 1985); *People v. Brooks*, 285 N.W.2d 307, 309 (Mich. Ct. App. 1979).

⁵⁶ *Feeney v. State*, 359 So. 2d 569, 570 (Fla. Dist. Ct. App. 1978).

⁵⁷ *Hedlund v. Sheldon*, 840 P.2d 1008, 1009 (Ariz. 1992).

⁵⁸ *Id.* at 1011 (quoting *State v. Lambright*, 673 P.2d 1, 16 (Ariz. 1983) (Feldman, J., concurring)).

⁵⁹ *State v. VanHorn*, No. L-98-1171, 2000 WL 234557, at *6 (Ohio Ct. App. Mar. 3, 2000).

⁶⁰ See *supra* text accompanying notes 37–40 (discussing the authority for dual juries as stemming from courts’ power to sever cases).

⁶¹ *People v. Cummings*, 850 P.2d 1, 35 (Cal. 1993) (alteration in original) (quoting *People v. Turner*, 690 P.2d 669, 675 (Cal. 1984), *overruled on other grounds by* *People v. Anderson*, 742 P.2d 1306, 1309 (Cal. 1987)); see also *People v. Hana*, 524 N.W.2d 682, 693 (Mich. 1994) (“The dual-jury procedure should be scrutinized with the same concern in mind that tempers a severance motion, i.e., whether it has prejudiced the substantial rights of the defendant.”).

⁶² See *supra* note 14 (citing circuit court cases that have affirmed convictions of defendants tried by the use of double juries); see also *State v. Padilla*, 964 P.2d 829, 832 (N.M. Ct. App. 1998) (noting that “[n]o other jurisdiction has determined that severance by using dual juries is *per se* prejudicial”).

⁶³ See *United States v. Hayes*, 676 F.2d 1359, 1366 (11th Cir. 1982) (finding that appellants had not alleged “any more than a generalized possibility of harm”); *People v. Knight*, 486 N.E.2d 1356, 1361 (Ill. App. Ct. 1985) (upholding a triple-jury procedure when defendant failed to allege any specific prejudice).

⁶⁴ *Smith v. DeRobertis*, 758 F.2d 1151, 1152 (7th Cir. 1985).

their role.⁶⁵ In applying this standard, the vast majority of courts have upheld convictions,⁶⁶ even while criticizing the practice.⁶⁷

D. Rationales Provided for Impaneling Dual Juries

There are three reasons courts have impaneled dual juries. The first is to avoid the so-called *Bruton* problem when a defendant makes an out-of-court statement about one of his or her codefendants and the defendant who made the confession does not testify. The second is to grant partial severance based on antagonistic defenses. The third is to promote judicial economy.

During the joint trial of defendants Evans and Bruton—both accused of armed postal robbery—a postal inspector testified that Evans had confessed that he and Bruton committed the robbery.⁶⁸ At the end of the government's case, the trial judge instructed the jury that the postal inspector's testimony was admissible against only Evans and not Bruton since it was hearsay, explaining that "[a] confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession."⁶⁹ Both Evans and Bruton were convicted.⁷⁰ On appeal, the circuit court set aside Evans's conviction, finding that the confession should not have been admitted against him.⁷¹ Conversely, Bruton's conviction was affirmed.⁷² In so holding, the circuit court relied on the trial judge's limiting instruction to the jury to disregard the hearsay testimony.⁷³ Bruton appealed and the U.S. Supreme Court reversed his conviction, holding that despite the judge's instruction, the incrimination "posed a substantial threat to [Bruton's] right to confront the witnesses against him [guaranteed by the Sixth Amendment] The effect [wa]s the same as if there had been no instruction at all."⁷⁴

⁶⁵ See, e.g., *People v. Mack*, 606 N.E.2d 165, 171 (Ill. App. Ct. 1992) (finding no indication of confusion or unfairness in the jury's decision and concluding that the trial judge's instructions were adequate).

⁶⁶ See *supra* note 14 (citing cases that have upheld convictions, finding no prejudice).

⁶⁷ See *supra* note 16 (citing cases that have upheld convictions, yet criticized the use of dual juries); cf. *People v. Brown*, 624 N.E.2d 1378, 1389 (Ill. App. Ct. 1993) (holding that defendant was prejudiced by dual juries when testimony and closing argument confused portions of one defendant's confession with his codefendant's confession); *People v. Garcia*, 754 N.Y.S.2d 138, 140 (Sup. Ct. 2002) (holding that the potential benefits of multiple juries were outweighed by the potential prejudice and thus denying the State's application for a multiple jury trial); *State v. Dellinger*, 79 S.W.3d 458, 468 (Tenn. 2002) (expressly refusing to condone dual juries in Tennessee and finding no abuse of discretion when the trial court denied dual jury trial).

⁶⁸ *Bruton v. United States*, 391 U.S. 123, 124 (1968).

⁶⁹ *Id.* at 125 n.2.

⁷⁰ *Id.* at 124.

⁷¹ *Id.*

⁷² *Id.* at 124–25.

⁷³ *Id.*

⁷⁴ *Id.* at 137.

This holding called into question the ability of courts to hold joint trials. If a defendant did not testify, any out-of-court confessions she made implicating other defendants would be inadmissible against her codefendants and thus could not be heard by the jury at a joint trial. Three solutions emerged to address this dilemma, which became known as the *Bruton* problem. First, the court could completely exclude the confession at the joint trial.⁷⁵ A confession, however, is often valuable evidence, and this option may come at the expense of the state's ability to prove its case.

Second, the court may delete from the confession any references to the codefendant against whom the confession is inadmissible.⁷⁶ Unfortunately, this can still lead to prejudice, particularly in the context of oral testimony. The Supreme Court in *Bruton* addressed the inherent difficulty in these circumstances:

Where the confession is offered in evidence by means of oral testimony, redaction is patently impractical. To expect a witness to relate *X*'s confession without including any of its references to *Y* is to ignore human frailty. Again, it is unlikely that an intentional or accidental slip by the witness could be remedied by instructions to disregard.⁷⁷

The third method to address a *Bruton* problem is to sever the defendants' trials.⁷⁸ This ignores the preference for joint trials, however, and can lead to inefficient usage of time and money due to unnecessary duplication of much of the same evidence.

A few years after the *Bruton* ruling, a fourth option emerged that did not require the prosecutor to forego using a defendant's out-of-court confession, delete any references, or waste time or money conducting two separate trials; the court could order the defendants tried in a joint trial, but by separate juries.⁷⁹ In a multiple jury trial, only the jury that is determining the guilt or innocence of the defendant who made the out-of-court statement is present when it is admitted to the court. This allows a

⁷⁵ DONALD S. VOORHEES, *MANUAL ON RECURRING PROBLEMS IN CRIMINAL TRIALS* 156 (Genevra Kay Loveland ed., 5th ed. 2001).

⁷⁶ *Id.*

⁷⁷ *Bruton*, 391 U.S. at 134 n.10 (quoting Note, *Codefendants' Confessions*, 3 COLUM. J.L. & SOC. PROBS. 80, 88 (1967)); see also *id.* (citing cases where courts required deletions of references to codefendants where practicable and law journal articles criticizing the efficacy of such deletions). The holding in *Bruton* was further clarified by two subsequent Supreme Court rulings addressing redacted confessions. In *Richardson v. Marsh*, the Court held that the Sixth Amendment right to confrontation is not violated when a redaction eliminates any reference to a codefendant's existence when paired with a limiting instruction. 481 U.S. 200, 211 (1987). In *Gray v. Maryland*, the Court held that redactions replacing the defendant's name with blank spaces or deletions violate *Bruton* because the jury will almost certainly realize that the deletion refers to a codefendant and thus will know of the existence of the defendant in relation to the confession. 523 U.S. 185, 192-95 (1998).

⁷⁸ VOORHEES, *supra* note 75, at 156.

⁷⁹ *Id.*

joint trial but alleviates any need for redaction and insufficient limiting instruction to a jury. In order to avoid a *Bruton* problem by using multiple juries, however, the prosecution must anticipate beforehand whether it will introduce testimony potentially contradictory to the holding in *Bruton*. Nevertheless, prosecutors in criminal trials often have all the evidence against defendants prior to a trial and thus should be able to make a motion for multiple juries.⁸⁰

The second rationale advanced for multiple juries is that the defendants plan to present antagonistic defenses. Antagonistic defenses are present “when one person’s claim of innocence is predicated solely on the guilt of a co-defendant.”⁸¹ When multiple defendants are tried together, a defendant has the right to request a severance if he believes his defense is antagonistic to that of his codefendant to the extent that he would not receive a fair trial.⁸² In a joint trial, a defendant has the added burden of defending against both the government’s case and any accusatory aspect of his codefendants’ statements.⁸³ Dual juries alleviate this burden by providing each defendant with a jury that has heard only the evidence against him, and forces the prosecution to prove its case rather than allowing the jury to “convict[] one defendant through the efforts of the other.”⁸⁴ It is important to note, however, that courts often differ in their definitions of antagonistic defenses.⁸⁵ Finger-pointing alone or mere inconsistencies in defenses is usually insufficient; the defenses must be mutually exclusive.⁸⁶

⁸⁰ See *United States v. Lewis*, 716 F.2d 16, 19 (D.C. Cir. 1983) (citing that the prosecutor sought to introduce testimony against one of the codefendants that was inadmissible under *Bruton* and that the court’s response was to hold a joint trial before two juries rather than sever the cases). Both federal and state jurisdictions have used multiple juries to remedy *Bruton* problems. See, e.g., *id.*; *People v. Ricardo B.*, 535 N.E.2d 1336, 1337 (N.Y. 1989) (impaneling two juries over the objections of both the People, who wanted a joint trial with one jury, and the defendants, who wanted total severance, in order to remedy a *Bruton* problem).

⁸¹ *Barron v. Renico*, No. 04-CV-73788, 2006 WL 1663320, at *8 (E.D. Mich. June 13, 2006) (quoting *United States v. Harris*, 9 F.3d 493, 501 (6th Cir. 1993)).

⁸² *People v. Johnson*, 594 N.E.2d 253, 261 (Ill. 1992) (upholding trial court’s decision to impanel dual juries based on the antagonistic defenses of both defendants); see also *Ricardo B.*, 535 N.E.2d at 1339 (N.Y. 1989) (finding cases involving antagonistic defenses as particularly attractive to employ multiple juries).

⁸³ *Dawson*, *supra* note 50, at 1422; see also *People v. Brooks*, 285 N.W.2d 307, 308 (Mich. Ct. App. 1979) (reasoning that a joint trial allows a state to “‘pit[] one defendant against the other, each trying to save himself at the detriment of the other’” (quoting *People v. Hurst*, 238 N.W.2d 6, 10 (Mich. 1976))).

⁸⁴ *Brooks*, 285 N.W.2d at 308.

⁸⁵ See *Dawson*, *supra* note 50, at 1423–26. See generally Michele Meyer McCarthy, Annotation, *Antagonistic Defenses as Ground for Separate Trials of Codefendants in State Homicide Offenses—Applicable Standard and Extent of Antagonism Required*, 24 A.L.R.6th 591 (2007) (discussing differing applicable standards for determining whether antagonistic defenses warrant severance and the extent of antagonism required under the applicable standard).

⁸⁶ See *Barron*, 2006 WL 1663320, at *8 (“The mere fact that each defendant points the finger at another is insufficient [to require severance]; the defendant must show that the antagonism confused the jury” (alteration in original) (quoting *United States v. Horton*, 847 F.2d 313, 317 (6th Cir. 1988)));

The final rationale proposed for using multiple juries is to advance judicial economy, which is most often an underlying concern when dual juries are used under one of the two foregoing rationales. The American Bar Association⁸⁷ and the Eleventh Circuit⁸⁸ have endorsed the use of dual juries for the purpose of promoting judicial economy. The Eleventh Circuit reasoned: “Contrary to the stance of our appellants, who would impugn such concerns for judicial economy as illegitimate, we applaud innovative efforts to resolve the overwhelming obstacles facing trial judges, particularly in the context of multi-defendant, multi-count cases.”⁸⁹ Indeed, there was a savings of eighty-six pages of testimony transcript that would have been repeated had there been two separate trials in the case before the Eleventh Circuit.⁹⁰ In the next section, the advantages of impaneling dual juries, including the promotion of judicial economy, are discussed further.

III. THE CASE FOR DUAL JURIES

This Part examines the many advantages to impaneling dual juries. Courts’ concerns regarding the practice as well as defendants’ arguments against the procedure are also discussed. The advantages clearly outweigh any concerns expressed by courts, and as discussed, defendants’ arguments have been rejected absent a showing of specific prejudice. Dual juries have been challenged on numerous occasions by numerous defendants yet courts continue to uphold the procedure.⁹¹ Courts should recognize the strong legal foundation that dual juries have earned over the years and should endorse the procedure for future cases.

A. *Advantages*

There are three advantages to using simultaneous juries during a joint trial. The primary benefit is to promote judicial economy by saving time and money of two trials and making it more convenient for witnesses to testify. Second, some courts have found that dual juries reduce prejudice against defendants present in traditional joint trials. Finally, where there are victims, dual juries relieve the victims’ families of sitting through more than one trial and allow the victim to testify only once.

22A C.J.S. *Criminal Law* § 820 (2010) (discussing the varying degrees of antagonism necessary to warrant severance).

⁸⁷ AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS 20 (2005), available at www.abanet.org/juryprojectstandards/principles.pdf (“Dual juries also may be used in order to promote judicial economy by presenting otherwise duplicative evidence in a single trial.”).

⁸⁸ *United States v. Hayes*, 676 F.2d 1359, 1367 (11th Cir. 1982).

⁸⁹ *Id.*

⁹⁰ *Id.* at 1367 n.4.

⁹¹ See *infra* Part III.C (discussing courts’ overwhelming rejection of defendants’ arguments against dual juries).

Judicial economy is one of the predominant advantages that courts have cited for impaneling dual juries. The procedure allows the court system to realize the financial benefits of joint trials despite the need for separate juries. The Supreme Court acknowledged in *Bruton v. United States* that “[j]oint trials do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial.”⁹² In order to realize these benefits, much of the evidence should be the same.⁹³ It is not clear that there is a percentage of evidence that must overlap, but the charges against the defendants should arise from the same transaction, and sources have quantified adequate commonalities of evidence at seventy-five percent⁹⁴ and ninety percent.⁹⁵ Indeed, when a substantial majority of the evidence against all defendants overlaps, dual juries preserve the preference for joinder and prevent “needless duplication.”⁹⁶ For instance, in the first New York state court case to utilize dual juries, the court of appeals held that “[t]he risk of error arising from the procedure was clearly outweighed by judicial economy” when “the trial involved over 25 witnesses, five of them reconstruction experts.”⁹⁷

Avoiding unnecessary expenditures of time and money are significant considerations,⁹⁸ particularly in jurisdictions with large dockets, and should

⁹² 391 U.S. 123, 134 (1968).

⁹³ See *McKinney v. Ryan*, No. CV 03-774-PHX-DGC, 2009 WL 2432738, at *6 (D. Ariz. Aug. 10, 2009) (“Because virtually all of the other evidence appeared to be admissible against both Petitioner and Hedlund, however, the judge ordered that dual juries would be impaneled to hear the case.”); *Carr v. Warren*, No. 05-CV-73763-DT, 2007 WL 2389816, at *8 (E.D. Mich. July 9, 2007) (“[Codefendants’] joint trial involved numerous witnesses and substantially identical evidence. To hold two trials on these substantially identical cases would have been unnecessarily duplicative and excessive.”); *People v. Gholston*, 464 N.E.2d 1179, 1191 (Ill. App. Ct. 1984) (“Because a substantial portion of the State’s testimonial evidence proffered during the course of the proceedings was admissible as against all of the defendants, two simultaneous jury trials were certainly preferable [sic] in the interests of judicial economy.”).

⁹⁴ *Court Grants Prosecution’s Motion for Dual Juries Given the Minimal Intrusion Dual Juries Entails*, N.Y. L.J., Nov. 27, 2007, at 25.

⁹⁵ Thomas J. Prohaska, *One Trial, Two Juries Proposed in Youth Home Slaying*, BUFFALO NEWS, Nov. 11, 2009, at B3.

⁹⁶ Santagata, *supra* note 17, at 32; see also *People v. Brooks*, 285 N.W.2d 307, 308 (Mich. Ct. App. 1979) (“Things have gone quite smoothly . . . [Impaneling dual juries] has helped the Court, assisted the Court in that where it has taken us four days, we have been able to handle it in a little over two days.”).

⁹⁷ *People v. Ricardo B.*, 535 N.E.2d 1336, 1339 (N.Y. 1989); see also Santagata, *supra* note 17, at 32 (reporting that the expected benefits of the dual jury system, including reduced burden on witnesses, reduced costs, and an efficient use of the court’s time, were all realized in *People v. Ricardo B.*, 535 N.E.2d 1336 (N.Y. 1989)). Further, in one of the earliest state courts to examine dual juries, the Court of Appeals of Michigan upheld a conviction of the defendant after the trial court ordered a dual jury “in the interest of judicial economy.” *Brooks*, 285 N.W.2d at 307.

⁹⁸ See, e.g., *Hedlund v. Sheldon*, 840 P.2d 1008, 1009 (Ariz. 1992) (“[J]udicial process benefits from according flexibility and discretion to judges in their efforts to manage a large and complex caseload.”); *Ricardo B.*, 535 N.E.2d at 1339 (“In this day of massive caseloads and an overburdened criminal justice system judicial economy is not a negligible consideration and joint trials with multiple

not be dismissed as ancillary concerns. Indeed, the multiple jury system's innovative nature has been praised, especially in light of the U.S. Supreme Court's ostensibly open attitude toward new methods that address the costliness of jury trials.⁹⁹ Jury trials are particularly costly; in 1976, they cost an estimated \$3,000 per day¹⁰⁰ and an estimate from 1999 puts the figure at \$5,000 a day.¹⁰¹ Because dual juries allow one trial where traditionally there would be two, the procedure allows for substantial savings.

Further, dual juries minimize the burden on witnesses. By preserving a joint trial, witnesses need only be available for one trial and thus do not have to lose as much time from employment; indeed, sometimes witnesses are only available for one trial.¹⁰² Simultaneous juries also avoid the tension and strain on witnesses of having to repeat their testimony at separate trials¹⁰³ and do not require witnesses to remember details as long as they would if there were two trials.

A second reason for impaneling dual juries is that it may lessen prejudice to defendants in joint trials where defendants advance antagonistic defenses:

Where mutually antagonistic defenses are presented in a joint trial, there is a heightened potential that a single jury may convict one defendant, despite the absence of proof beyond a reasonable doubt, in order to rationalize the acquittal of another. That dilemma is not presented to dual juries. Each jury is concerned only with the culpability of one defendant;

juries have obvious attractions, particularly in cases involving *Bruton* problems or antagonistic defenses.” (citation omitted)).

⁹⁹ *Smith v. DeRobertis*, 758 F.2d 1151, 1152 (7th Cir. 1985) (noting that the Supreme Court previously upheld a six-person jury in a criminal case (citing *Williams v. Florida*, 399 U.S. 78, 102–03 (1970))). Other courts have also expressed their approval of innovation. See *Lambright v. Stewart*, 191 F.3d 1181, 1184 (9th Cir. 1999) (“[M]any experiments lead to better and stronger institutions.”); *United States v. Hayes*, 676 F.2d 1359, 1367 (11th Cir. 1982) (“[W]e applaud innovative efforts to resolve the overwhelming obstacles facing trial judges, particularly in the context of multi-defendant, multi-count cases.”).

¹⁰⁰ *Morris & Savitt*, *supra* note 17, at 92.

¹⁰¹ Vin Suprynowicz, *Jury Trials Too Costly . . . Or Just Too Hard to Control?*, ENTER STAGE RIGHT (Mar. 1999), <http://www.enterstageright.com/archive/articles/0399jury.htm>; see also Malaika Fraley, *Dual Juries Seated in West Contra Costa County Gang Murder, Conspiracy Trial*, CONTRA COSTA TIMES (Cal.), Oct. 27, 2010 (noting in 2010 that the cost of court staff and jury pay alone is about \$2,950 per day in one California courthouse).

¹⁰² See, e.g., *Hersh*, *supra* note 17, at 72 (noting that separate trials become “especially problematic in cases with recalcitrant, hard-to-locate or petrified witnesses”); *Court Grants Prosecution’s Motion*, *supra* note 94 (profiling *People v. Bostick* in which Justice Seth L. Marvin held that dual juries posed a minimal intrusion when the People expected to call sixteen witnesses at trial, four of whom would testify before both juries, and the People argued that they would only be able to produce the witnesses in court once).

¹⁰³ *Santagata*, *supra* note 17, at 32; see also *Morris & Savitt*, *supra* note 17, at 92 (“[T]he patience of even the most cooperative witness will start to wear thin when they are told they must return once more to testify at a second trial.”).

thus, they both can find the defendants innocent or guilty without the uneasiness of inconsistency that would be presented to a single jury in a joint trial. The chance for prejudice is therefore significantly lessened.¹⁰⁴

Additionally, because a defendant's jury is excused from the courtroom when inadmissible and potentially inculpatory statements are made regarding the defendant, using dual juries reduces prejudice.¹⁰⁵ The American Bar Association has also advocated the use of dual juries in part because they reduce the likelihood that juries will use evidence in an impermissible way.¹⁰⁶ In addition, in his dissent in *Bruton v. United States*, Justice White emphasized that joint trials often prevent inconsistent verdicts against "legally indistinguishable defendants."¹⁰⁷ He wrote that codefendants often "strenuously jockey[]" to be tried first in order to avoid the potential unfairness of varying outcomes.¹⁰⁸ Dual juries prevent either defendant from benefiting from the order in which they are tried. For instance, one commentator has argued that dual juries prevent the second defendant from realizing the advantages of having the first trial's transcript.¹⁰⁹ In these ways, dual juries may make joint trials fairer.

Finally, where the crime has a victim, having one trial instead of two may significantly lessen the emotional burden on the victim and the victim's family. A court in the district of Oklahoma recognized this advantage in a murder case, even informing the juries that this was one of the rationales for using dual juries.¹¹⁰ The American Bar Association has also recognized that dual juries reduce the emotional burden on victims who testify.¹¹¹ Particularly in rape and murder cases, one trial is often emotional,¹¹² and utilizing dual juries enables a speedier outcome rather than forcing families to undergo two trials. Further, like witnesses, sometimes victims are only available to testify for a limited time. For example, in a state court case in New Jersey, the appellate court found no prejudice where three juries were impaneled in one trial because of a

¹⁰⁴ *People v. Hana*, 524 N.W.2d 682, 696–97 (Mich. 1994).

¹⁰⁵ See *McKinney v. Ryan*, No. CV 03-774-PHX-DGC, 2009 WL 2432738, at *7 (D. Ariz. Aug. 10, 2009) (concluding that "dual juries help[ed] assure . . . compartmentalization by keeping dangerous evidence away from the ears of the jurors for the defendant to whom it does not apply" (alterations in original) (quoting *Lambright v. Stewart*, 191 F.3d 1181, 1186 (9th Cir. 1999))).

¹⁰⁶ AMERICAN BAR ASSOCIATION, THE ABA PRINCIPLES FOR JURIES AND JURY TRIALS (AND COMMENTARY) 106 (2005), available at http://www.abanet.org/juryprojectstandards/The_ABA_Principles_for_Juries_and_Jury_Trials.pdf.

¹⁰⁷ *Bruton v. United States*, 391 U.S. 123, 143 (1968) (White, J., dissenting).

¹⁰⁸ *Id.*

¹⁰⁹ Santagata, *supra* note 17, at 32.

¹¹⁰ *Brown v. Simons*, 415 F. Supp. 2d 1268, 1281 (N.D. Okla. 2006), *aff'd* 515 F.3d 1072, 1077–79 (10th Cir. 2008).

¹¹¹ AMERICAN BAR ASSOCIATION, *supra* note 106, at 106.

¹¹² See Hersh, *supra* note 17, at 72 (noting that separate trials and thus successive testimony can lead to a victim's inability to testify, particularly in sexual battery and child abuse cases).

Bruton problem and because the elderly victim had traveled from Puerto Rico to testify.¹¹³

B. Courts' Concerns

Although dual juries have been impaneled for several decades and as early as almost 100 years ago, courts are often reluctant to embrace the practice. While courts have consistently upheld the practice, they have also expressed reservations and identified what they perceive as disadvantages to dual juries. This Part explores three ostensible disadvantages and analyzes their merits.

1. Potential Burdens

One of the problems that courts have discussed is the various burdens that dual juries appear to place on defense counsel, court reporters, and judges. The Tenth Circuit has asserted that dual juries impose an added burden on defense counsel to ensure that no prejudicial evidence is entered against other defendants, thus decreasing the attention attorneys pay to their own clients.¹¹⁴ In order to prevent inadmissible evidence from being presented, each defendant's counsel must inform the court whenever he or she is about to present evidence or a defense antagonistic to a codefendant so that the court may remove the codefendant's jury.¹¹⁵

Although this is an added burden in comparison to a traditional single jury trial, as long as most of the evidence is the same, there should only be a few instances where this would occur. Further, in the case before the Tenth Circuit, as in most trials in which dual juries are impaneled, each defendant was represented by his own attorney¹¹⁶ who was charged with being watchful of potential prejudicial evidence against his own client. Although counsel is required to guard against prejudice affecting other defendants, the ultimate responsibility should be with the codefendant's counsel. While this is an additional consideration that defense counsel must be cautious of, any harm to defendants is purely speculative and must be assessed for prejudice on a case-by-case basis.¹¹⁷

Further, at least one court has commented on the effect of dual juries on court reporters. A Michigan state court acknowledged that there is an

¹¹³ *State v. Hernandez*, 394 A.2d 883, 885 (N.J. Super. Ct. App. Div. 1978).

¹¹⁴ *Wilson v. Sirmons*, 536 F.3d 1064, 1099 (10th Cir. 2008); *see also* *Brown v. Sirmons*, 515 F.3d 1072, 1079 (10th Cir. 2008) (expressing concerns about the potential for dual juries to impose "unique burdens" on defense counsel to anticipate the path of particular lines of questioning in order to ensure that no inadmissible evidence against one codefendant is admitted in the presence of a codefendant's jury).

¹¹⁵ *Brown*, 515 F.3d at 1079 (noting that counsel had to inform the judge "when his questions might lead to answers that would not be admissible in the codefendant's trial").

¹¹⁶ *Wilson*, 536 F.3d at 1098.

¹¹⁷ *See infra* Part III.B.2 (discussing the potential for increased prejudice to defendants).

added burden on court reporters to keep separate records of the proceedings.¹¹⁸ Ultimately, the court found that this did not outweigh the advantages of using dual juries and affirmed the defendant's conviction.¹¹⁹

The most significant burden imposed by using dual juries falls on the trial judge. The judge is charged with addressing potentially "burdensome administrative problems in caring for the juries and maintaining proper courtroom decorum."¹²⁰ He or she is charged with ensuring the proper procedural safeguards so that a defendant's right to a fair trial is not infringed upon by using simultaneous juries. This includes providing the jury with appropriate instructions and monitoring whether the proper jury is present in the courtroom. Accordingly, appeals courts examine whether the trial judge has taken great care in ensuring that nothing occurred during the trial to deprive defendants of a fair trial.¹²¹ Essentially, the trial judge can make or break the propriety of dual juries; while the burden is certainly stronger on the judge, as long as he or she is willing to show extra care, there is no inherent loss of rights to the defendant.

Some courts have expressed concern that these potential additional burdens make dual juries unsuitable for capital trials.¹²² For example, the Tenth Circuit worried that having to monitor potential prejudice against codefendants "increases the already difficult job of the capital defense lawyer."¹²³ In 1992, the Supreme Court of Arizona cautioned that courts must be extra vigilant when employing any innovative technique in capital

¹¹⁸ *People v. Brooks*, 285 N.W.2d 307, 309 n.1 (Mich. Ct. App. 1979).

¹¹⁹ *Id.* at 309.

¹²⁰ *People v. Rainge*, 445 N.E.2d 535, 550–51 (Ill. App. Ct. 1983) (quoting *People v. Williams*, No. 51870, slip op. at 4–7 (Ill. App. Ct. 1982)); see also Note, *Richardson v. Marsh*, *supra* note 17, at 1893 (noting that "the trial judge must take special care in handling the juries and defense counsel").

¹²¹ See *Brown v. Simons*, 515 F.3d 1072, 1078 (10th Cir. 2008) ("The trial court was careful and meticulous in its instructions."); *United States v. Hayes*, 676 F.2d 1359, 1367 (11th Cir. 1982) (stating that the record reflected that the trial judge was meticulous in instruction and procedural mechanisms to keep the juries separated); *United States v. Sidman*, 470 F.2d 1158, 1168 (9th Cir. 1972) ("The Judge was meticulous in explaining to the entire panel and to each jury that there would be two juries, one to try the guilt or innocence of Sidman and the other to try the guilt or innocence of Clifford, and instructed each jury not to talk to anyone about the trial and particularly not to talk to any of the other jurors in the other case."); *People v. Gholston*, 464 N.E.2d 1179, 1190–91 (Ill. App. Ct. 1984) ("The record in the present case is replete with admonitions by the lower court to each jury that its sole concern was the particular offender whose guilt or innocence they would eventually determine. The experienced trial judge exercised great care and patience in stressing repeatedly the nature of each jury's responsibilities It is also readily apparent that the court exercised great caution in retiring each jury when certain inculpatory evidence not relevant to its respective case was introduced."); *People v. Smith*, 419 N.E.2d 404, 409 (Ill. App. Ct. 1981) ("[T]he record discloses that the trial court thoroughly prepared the jurors for the procedure.").

¹²² In capital cases, two juries are sometimes impaneled in a different context than to try multiple defendants, which is the focus of this paper. One jury is used to determine the guilt or innocence of the defendant and a separate jury is impaneled to impose a sentence. This method of employing multiple juries is outside the scope of this paper. For a brief examination of dual juries in this context, see Kyle Wackenheim, *State v. Fry: Reconsidering Death-Qualification in New Mexico Capital Trials*, 38 N.M. L. REV. 627, 649–52 (2008).

¹²³ *Wilson v. Simons*, 536 F.3d 1064, 1099 (10th Cir. 2008).

cases.¹²⁴ It also held, however, that approval of dual juries by the Supreme Court of Arizona was not required,¹²⁵ thus partially overruling a previous case that held that capital cases are not appropriate for “experimentation”¹²⁶ such as the use of simultaneous juries.

Although capital cases carry the potential for the death penalty in some cases, such instances are not inherently different from a constitutional standpoint. The Ninth Circuit¹²⁷ held that any potential unreliability as a result of impaneling dual juries is not related to whether a capital crime is involved:

Whatever additional constitutional constraints exist on the use of dual juries in capital trials would be a consequence of the greater reliability demanded of verdicts upon which a sentence of death is based, and not upon any additional uncertainty created by the fact that the trial is capital in nature.¹²⁸

Further, the Ninth Circuit expressly overruled any suggestion from previous rulings that there is a constitutional barrier to the use of dual juries in capital cases.¹²⁹ This ruling drew a heated dissent from Judge Reinhardt, who argued that the potential for death changes the constitutional landscape and that dual juries have not been thoroughly tested.¹³⁰ Accordingly, Judge Reinhardt argued such experimental measures should not be used in capital cases where the potential penalty is so harsh.¹³¹ He was the lone dissenter, however, and as the Tenth Circuit has asserted, most of the purported dangers potentially present when using dual juries in capital cases are also possible risks associated with all joint trials.¹³²

2. *An Inherent Risk of Prejudice?*

Another potential problem with dual juries is that the risk of prejudice is inherently too high. The Supreme Court of Bronx County New York expressed concern about the potential prejudice stemming from a failure to

¹²⁴ Hedlund v. Sheldon, 840 P.2d 1008, 1011 (Ariz. 1992).

¹²⁵ *Id.*

¹²⁶ State v. Lambright, 673 P.2d 1, 8 (Ariz. 1983), *overruled in part by Hedlund*, 840 P.2d at 1011.

¹²⁷ Note that the Ninth Circuit was the first circuit to examine the dual jury procedure in *United States v. Sidman*, 470 F.2d 1158, 1167–70 (9th Cir. 1972).

¹²⁸ Beam v. Paskett, 3 F.3d 1301, 1304 (9th Cir. 1993), *overruled on other grounds by Lambright v. Stewart*, 191 F.3d 1181, 1187 (9th Cir. 1999).

¹²⁹ *Lambright*, 191 F.3d at 1187.

¹³⁰ *Id.* at 1187–88 (Reinhardt, J., dissenting).

¹³¹ *Id.* at 1188.

¹³² Wilson v. Sirmons, 536 F.3d 1064, 1099 (10th Cir. 2008) (“[M]any of the potential harms from a dual jury procedure, including the inadvertent introduction of prejudicial evidence against one defendant, are also present and possibly magnified in a trial where the defendants are tried jointly.”).

anticipate when a defendant's jury needs to be excused and of the "ever-looming risk" that an impermissible statement will be made in the presence of the wrong jury.¹³³ A few other courts, particularly state courts, have expressed similar reluctance about the procedure.¹³⁴ This is precisely the type of speculative reasoning, however, that has been rejected by circuit courts and other state courts in a demand to show specific prejudice.¹³⁵ Courts have even identified the reduction of prejudice that dual juries have achieved.¹³⁶ Nevertheless, courts considering whether to grant a motion for a dual jury trial should weigh factors that may increase this risk, such as how many times each jury needs to be excluded from the courtroom.

Dual juries have been impaneled for several decades across numerous jurisdictions and verdicts have been overturned for prejudice only a handful of times.¹³⁷ In fact, in 1999, the Ninth Circuit reasoned that "we now know that dual juries are in wide use and that they have worked out just fine."¹³⁸ The Ninth Circuit also found that any potential problems are not inevitable in dual juries.¹³⁹ Accordingly, all federal circuits that have considered the procedure have upheld its constitutionality absent specific indicia of prejudice.¹⁴⁰ The First Circuit has even stated that "[a] defendant carries the *heavy burden* of making a strong showing of prejudice."¹⁴¹ Further, as argued above,¹⁴² dual juries help to lessen the prejudice that is present in joint trials¹⁴³ and thus preserve the Supreme Court's preference

¹³³ *People v. Garcia*, 754 N.Y.S.2d 138, 140–41 (Sup. Ct. 2002).

¹³⁴ See *supra* note 16 (citing cases expressing reservations about the use of dual juries).

¹³⁵ See, e.g., *United States v. Lewis*, 716 F.2d 16, 20 (D.C. Cir. 1983) (rejecting the argument that it is "impossible to identify any specific prejudice because the prejudice is to be found in the subjective response of the jury" and finding this argument to be mere "idle speculation" that is insufficient to warrant the "extraordinary relief" of overturning a jury's verdict); *State v. Padilla*, 964 P.2d 829, 833 (N.M. Ct. App. 1998) ("The prejudice at issue must be both actual, not based on pure conjecture, and substantial in its impact on the defense. Prejudice, though conceivable, remains speculative unless there is appreciable risk that the jury convicted the defendant for illegitimate reasons" (citation omitted)).

¹³⁶ See *supra* text accompanying notes 105–09 (discussing how dual juries reduce the risk of prejudice).

¹³⁷ See, e.g., *People v. Brown*, 624 N.E.2d 1378, 1389 (Ill. App. Ct. 1993) (holding that the defendant was prejudiced by dual juries when testimony and closing argument confused portions of one defendant's confession with his codefendant's confession); *Garcia*, 754 N.Y.S.2d at 140 (holding that the potential benefits of multiple juries were outweighed by the potential prejudice and thus denying the State's application for a multiple jury trial); see also *State v. Dellinger*, 79 S.W.3d 458, 468 (Tenn. 2002) (expressly refusing to condone dual juries in Tennessee and finding no abuse of discretion when trial court denied dual jury trial).

¹³⁸ *Lambright v. Stewart*, 191 F.3d 1181, 1185 (9th Cir. 1999).

¹³⁹ *Id.* at 1185, 1186.

¹⁴⁰ See, e.g., *Mack v. Peters*, 80 F.3d 230, 235 (7th Cir. 1996) ("For [a simultaneous trial of two defendants in the same courtroom before two juries] to be unconstitutional, a defendant tried in such a trial must show some specific, undue prejudice.").

¹⁴¹ *United States v. Lebron-Gonzalez*, 816 F.2d 823, 831 (1st Cir. 1987) (emphasis added).

¹⁴² See *supra* text accompanying notes 105–09 (discussing ways in which dual juries lessen prejudice present in joint trials).

¹⁴³ See *Lebron-Gonzalez*, 816 F.2d at 831 (stating in dictum that impaneling dual juries was a method of "minimizing any prejudice from jointly trying the defendants").

for joinder.

3. *The Potential for Confusion*

Finally, to the extent that the procedure may infringe upon defendants' right to a fair trial, courts have expressed concern over potential jury confusion.¹⁴⁴ Juries must know when they are supposed to be in the courtroom and must only hear evidence admissible against the defendant for whom they are responsible. Unless specific incidents of confusion can be identified that are so pervasive as to render the trial unfair, courts affirm convictions.¹⁴⁵

The extent of confusion necessary to warrant reversal is demonstrated by *People v. Brown*.¹⁴⁶ In *Brown*, when testifying to the jury and then again during closing argument, the assistant state's attorney confused one defendant's confession with another defendant's confession.¹⁴⁷ The prosecutor also referred to portions of a witness's testimony to a jury that had not heard that testimony.¹⁴⁸ In light of these mistakes, and because the court found that there was insufficient independent indicia to convict defendants without the inadmissible evidence, the court found prejudice.¹⁴⁹

People v. Brown, however, is an outlier, and generally, instances of confusion do not rise to the level of reversal. For instance, in *Ewish v. State*,¹⁵⁰ despite finding that the facts demonstrated how dual juries can become "a breeding ground for confusion in process and results alike," any prejudice resulting from this confusion was insufficient for reversal due to the overwhelming evidence of guilt.¹⁵¹ In addition, in *United States v. Rimar*,¹⁵² there were moments of confusion about which jury was to be present and the judge and defense counsel made misstatements in referring

¹⁴⁴ See, e.g., *United States v. Rimar*, 558 F.2d 1271, 1273 (6th Cir. 1977) ("The primary concern of this court . . . was whether the unusual procedure implemented in the district court of simultaneous prosecutions before two juries and the judge created an atmosphere so confusing as to deprive these appellants of a fair trial."); *People v. Rainge*, 445 N.E.2d 535, 551 (Ill. App. Ct. 1983) ("Issues and facts before each jury, who testified before which jury, and even which jury is hearing which testimony can all too easily become confused." (quoting *People v. Williams*, No. 51870, slip op. at 4-7 (Ill. App. 16, 1982))).

¹⁴⁵ See, e.g., *People v. Mack*, 606 N.E.2d 165, 171 (Ill. App. Ct. 1992) (finding no indication of confusion or unfairness in the jury's decision); *People v. Gholston*, 464 N.E.2d 1179, 1191 (Ill. App. Ct. 1984) ("Although we recognize the possibility of confusion inherent in the multiple jury procedure, we find nothing in the record before us indicative of prejudicial error."); *People v. Church*, 429 N.E.2d 577, 585 (Ill. App. Ct. 1981) ("[W]here there is no confusion which is so pervasive as to render the trial unfair, even though moments of confusion appear in the record, the two-jury procedure has been endorsed."); *Scarborough v. State*, 437 A.2d 672, 674-75 (Md. Ct. Spec. App. 1981) (finding no prejudice and thus no merit to defendant's claim of confusion).

¹⁴⁶ 624 N.E.2d 1378 (Ill. App. Ct. 1993).

¹⁴⁷ *Id.* at 1389.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1390.

¹⁵⁰ 871 P.2d 306 (Nev. 1994).

¹⁵¹ *Id.* at 313, 315-16.

¹⁵² 558 F.2d 1271 (6th Cir. 1977).

to the attorneys or their clients by incorrect names.¹⁵³ Despite this, the Sixth Circuit affirmed the defendants' convictions because most of these misstatements took place out of the presence of the jury and the judge promptly corrected himself or the attorney and instructed the jury accordingly.¹⁵⁴ Overall, although courts have acknowledged the potential for confusion, such worries have rarely come to fruition or warranted reversal of a defendant's conviction.

C. *Rejection of Defendants' Arguments*

Defendants have frequently challenged courts' impaneling of multiple juries, resorting to a wide variety of arguments in an effort to obtain reversal of their convictions—from the novelty of dual juries to the potential to jeopardize the right to a fair trial due to one jury sitting on harder seats than another jury.¹⁵⁵ This section explores these arguments and discusses why courts have generally found that they fail to require reversal. The overwhelming rejection of defendants' arguments shows the strong legal foundation upon which dual juries rest. Accordingly, courts should recognize and encourage this tested and beneficial legal procedure.

1. *Constitutional Arguments*

Defendants have made several arguments against dual juries invoking their constitutional rights. Many defendants have challenged the procedure on Fourteenth Amendment due process grounds and on the basis that they have been deprived of their right to a fair trial guaranteed by the Sixth Amendment. Still, no court has held that the use of dual juries is a per se constitutional violation.¹⁵⁶ In fact, the first federal circuit to consider the procedure held that the defendant “enjoyed each and every right given to him by the Constitution, the Sixth Amendment, and by rule.”¹⁵⁷ In order to prevail on a constitutional claim, a defendant must show that the use of dual juries caused a specific due process violation.¹⁵⁸ This is generally a fact-specific analysis and requires the court to consider specific instances that a defendant can identify that caused him prejudice.

A common challenge is that cross-examination was hindered in some

¹⁵³ *Id.* at 1273.

¹⁵⁴ *Id.*

¹⁵⁵ *People v. Patterson*, 610 N.E.2d 16, 43 (Ill. 1992).

¹⁵⁶ *See Brown v. Simons*, 415 F. Supp. 2d 1268, 1279 (N.D. Okla. 2006), *aff'd* 515 F.3d 1072, 1079 (10th Cir. 2008) (collecting cases).

¹⁵⁷ *United States v. Sidman*, 470 F.2d 1158, 1169 (9th Cir. 1972).

¹⁵⁸ *See United States v. Lewis*, 716 F.2d 16, 20 (D.C. Cir. 1983) (“[T]his court’s task is to determine whether the procedure imposed by the district court comports with the basic norms of due process [We must] determin[e] whether any evidence indicates that the procedure specifically prejudiced a litigant’s defense.”); *Hedlund v. Ryan*, No. CV 02-110-PHX-DGC, 2009 WL 2432739, at *11 (D. Ariz. Aug. 10, 2009) (citing cases indicating this requirement).

way.¹⁵⁹ Still, a generalized allegation of repression will not suffice.¹⁶⁰ Additionally, the Arizona district court rejected a challenge to cross-examination when the evidence would have been admissible notwithstanding the impanelment of dual juries.¹⁶¹ The Tenth Circuit also found no merit in an argument that the defense attorney did not cross-examine certain witnesses because he did not want to remove the jury for fear of causing a spectacle.¹⁶² The court rejected this argument because the defendant could identify no specific testimony that could have been presented but was not.¹⁶³ On the whole, courts require particular instances of actual prejudice and defendants generally fail to identify any.

In addition, in support of an alleged constitutional violation, defendants claim that the procedure created a conflict of interest for their attorneys. For instance, in *Wilson v. Sirmons*, in support of his Sixth Amendment claim, the defendant argued that there was a conflict of interest by requiring his attorney to inform the court of impending potential prejudicial testimony.¹⁶⁴ The Tenth Circuit rejected this argument since he cited no specific instances of a conflict.¹⁶⁵ The court also reasoned that this additional obligation on counsel “did not diminish his presence at counsel table during all stages of the trial, nor did it prevent him from acting as counsel, as he was free to ask all questions and present all evidence.”¹⁶⁶ The court concluded that “[w]hatever minimal obligation he had did not materially limit his ability zealously to represent Mr. Wilson.”¹⁶⁷ An Oklahoma appellate court also held that requiring one defendant’s counsel to inform the court when another defendant’s jury needs to be excused did not rise to the level of a conflict of interest for the attorney.¹⁶⁸ One state court has also upheld a waiver of a conflict of interest made prior to the

¹⁵⁹ See *Hedlund*, 2009 WL 2432739, at *12 (holding that petitioner provided no support for his allegation that cross-examination was impeded due to dual juries).

¹⁶⁰ See *id.* (rejecting petitioner’s argument that counsel “were forced to tiptoe around various subjects with two key witnesses . . . because of the risk of *Bruton* error”); *Brown v. Sirmons*, 415 F. Supp. 2d 1268, 1282 (N.D. Okla. 2006) (rejecting defendant’s claim that dual juries stifled cross-examination when defendant failed to identify any specific instances of alleged stifling), *aff’d* 515 F.3d 1072, 1079 (10th Cir. 2008); *Alverson v. State*, 983 P.2d 498, 507 (Okla. Crim. App. 1999) (finding insufficient defendant’s claim that cross-examination was chilled when defendant failed to cite any specific incidents and no indication was present that cross would have been different without the dual jury procedure).

¹⁶¹ See, e.g., *McKinney v. Ryan*, No. CV 03-774-PHX-DGC, 2009 WL 2432738, at *8 (D. Ariz. Aug. 10, 2009).

¹⁶² *Wilson v. Sirmons*, 536 F.3d 1064, 1100 (10th Cir. 2008).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Alverson v. State*, 983 P.2d 498, 507 (Okla. Crim. App. 1999) (“All Alverson’s lawyer had to do was ask the court to remove Harjo’s jury if he wanted to proceed along lines which were damaging to Harjo. This is no way made him an advocate or a co-counsel for Harjo . . .”).

motion to impanel dual juries.¹⁶⁹

Similarly, some defendants have made the argument that their counsel was ineffective. For example, in *State v. Avery*,¹⁷⁰ the defendant appealed his conviction claiming that his counsel was ineffective because the attorney did not object to the use of dual juries, since Wisconsin law does not allow for the procedure.¹⁷¹ The Court of Appeals of Wisconsin rejected the defendant's argument, finding that he did not meet the burden to establish that counsel's performance was deficient and that prejudice resulted. According to the appellate court, Wisconsin law does, in fact, allow dual juries and the trial court meticulously utilized the procedure.¹⁷²

Another constitutional argument that defendants make is that juries were so confused that defendants' due process rights were violated. These challenges are generally rejected unless specific instances can be identified showing that there was pervasive confusion that robbed the defendant of a fair trial.¹⁷³ Courts examine whether a defendant had as fair a trial using dual juries as she would have had were she tried alone.¹⁷⁴

Finally, some defendants have argued that despite impaneling dual juries, a *Bruton* violation still occurred. These—like most other inquiries of prejudice—are fact-specific and depend on the admissibility of evidence during the trial. For instance, the First Circuit rejected both codefendants' claims of *Bruton* violations because the testimony at issue did not mention the defendant in question and the judge offered sufficient limiting instructions.¹⁷⁵ In addition, the Supreme Court of Louisiana found no *Bruton* violation when one jury discovered a codefendant's confession which implicated the defendant for whom they were responsible because the information could have been admitted without prejudice in a joint trial.¹⁷⁶ Generally, courts also look at whether the defendant objected to the admission during trial. If there was no objection then the court will not review the admission.¹⁷⁷

2. Authorization

Defendants have also challenged the procedure on the grounds that courts are not authorized to use dual juries. Courts have overwhelmingly

¹⁶⁹ *Roberts v. State*, 573 So. 2d 964, 964–65 (Fla. Dist. Ct. App. 1991).

¹⁷⁰ 571 N.W.2d 907 (Wis. Ct. App. 1997).

¹⁷¹ *Id.* at 908.

¹⁷² *Id.*

¹⁷³ See discussion *supra* Part III.B.3 for courts' responses to jury confusion claims.

¹⁷⁴ See, e.g., *Barron v. Renico*, No. 04-CV-73788, 2006 WL 1663320, at *8 (E.D. Mich. June 13, 2006) (examining admissibility of evidence presented to determine whether defendant had a fair trial).

¹⁷⁵ *United States v. Lebron-Gonzalez*, 816 F.2d 823, 831 (1st Cir. 1987).

¹⁷⁶ *State v. Watson*, 397 So. 2d 1337, 1340–41 (La. 1981).

¹⁷⁷ See, e.g., *Probus v. Horel*, No. EDCV 09-1470-AG(CT), 2009 WL 5195953, at *6 (C.D. Cal. Dec. 29, 2009) (“The failure to object at trial is a longstanding appellate procedural bar.”); *Woolbright v. State*, 160 S.W.3d 315, 322–23 (Ark. 2004) (affirming defendant's conviction because he did not object to the testimony of witnesses during trial).

rejected this argument, whether grounded in lack of statutory authority or court rules. Courts examine whether there is an express prohibition on the procedure, and if not, courts hold that they have the authority to impanel dual juries.¹⁷⁸

3. *Novelty*

Courts reject novelty arguments against the impanelment of dual juries. For instance, the Ninth Circuit explicitly stated that while the defendant called the procedure an “experiment,” this did not lend support to his argument since it did not inform the practice’s reliability.¹⁷⁹ In fact, as other courts have found, new procedures are allowable and may even lead to improvements.¹⁸⁰ Similarly, even though some courts have voiced criticism of the practice, defendants have been unsuccessful in raising courts’ disapproval as a valid argument against the procedure. As the District of Columbia Circuit found, “[t]his court’s task is not to determine whether the district court made the optimal decision . . . to impanel two juries Rather this court’s task is to determine whether the procedure imposed by the district court comports with the basic norm of due process.”¹⁸¹ Novelty and popularity are not relevant to this determination.

4. *Effect on Juries*

Defendants have challenged the effect of dual juries on the juries themselves, but courts have rejected any speculative arguments about juror misconduct. For example, in *People v. Cummings*,¹⁸² the court rejected the defendant’s argument that the use of dual juries led both juries to convict out of fear that the other jury would not convict and the murderer would go unpunished.¹⁸³ In *People v. Harris*,¹⁸⁴ the defendant challenged the dual jury procedure’s impact on the jury on four grounds:

- (1) it is “cumbersome” and causes inconvenience to the jurors;
- (2) by increasing the projected duration of the trial, [it] decreases the number of jurors on the panel from which the jury is to be selected who are able to serve without hardship and thus threatens the defendant’s right to a jury drawn from a representative cross-section of the community;

¹⁷⁸ For a more detailed examination of courts’ authority to impanel dual juries, see discussion *supra* Part II.A.

¹⁷⁹ *Lambright v. Stewart*, 191 F.3d 1181, 1184–85 (9th Cir. 1999); see also *United States v. Sidman*, 470 F.2d 1158, 1168 (9th Cir. 1972) (rejecting the argument that because the dual jury procedure was novel, it infringed upon the defendant’s rights); *Ewish v. State*, 871 P.2d 306, 314 (Nev. 1994) (“[N]ovelty alone is not enough to reverse appellants’ respective convictions.”).

¹⁸⁰ See *supra* note 54–55 and accompanying text.

¹⁸¹ *United States v. Lewis*, 716 F.2d 16, 20 (D.C. Cir. 1983).

¹⁸² 850 P.2d 1 (Cal. 1993).

¹⁸³ *Id.* at 34, 36.

¹⁸⁴ 767 P.2d 619 (Cal. 1989).

(3) [it] creates a danger that jurors frustrated by the delay and inconveniences caused by the procedure will blame the defendant for their discomfiture; and (4) [it] invites each jury to speculate that, during the time it is excluded, evidence damaging to the defendant whose case that jury is trying is being presented to the second jury.¹⁸⁵

All of these arguments were rejected by the court as pure speculation unsupported by the record.¹⁸⁶ Specifically, the court found that jurors were simply informed when they needed to return to the courtroom, causing no inconvenience, and that any breaks in the presentation of evidence were not out of the ordinary.¹⁸⁷ The court also declined to speculate about any potential inferences the jury may have made when it was not in the courtroom and noted that the jury may not have been aware that the codefendant's jury was in session.¹⁸⁸ Overwhelmingly, if the record does not reflect any specific instances of prejudice and the trial judge meticulously instructed the jury that they are not to speculate, courts will uphold the use of dual juries.¹⁸⁹

5. Courtroom Layout and Juror Accommodations

A common argument by defendants is that the courtroom layout or accommodations of the jurors was prejudicial. Defendants have advanced a wide variety of claims in this area, but courts have rejected speculative claims regarding courtroom configuration. Courts have found no merit in claims that due process rights were violated due to positioning defendants facing the jurors thus potentially causing intimidation,¹⁹⁰ or by defendants

¹⁸⁵ *Id.* at 633–34.

¹⁸⁶ *Id.* at 634.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ See, e.g., *Lambright v. Stewart*, 191 F.3d 1181, 1186 n.5 (9th Cir. 1999) (“The argument that each defendant’s jury will ‘necessarily speculate’ about the evidence being heard by the other defendant’s jury is itself rank speculation” (citing *People v. Harris*, 767 P.2d 619, 634 (Cal. 1989) (en banc)); *United States v. Lewis*, 716 F.2d 16, 20 (D.C. Cir. 1983) (declining to reverse defendant’s conviction based on defendant’s claim that jurors were speculating about why they had to leave the courtroom); *People v. Patterson*, 610 N.E.2d 16, 43 (Ill. 1992) (finding no merit in defendant’s argument that the jury assumed that the State properly brought charges and that the evidence the jury was not allowed to hear was related to its defendant); *State v. Watson*, 397 So. 2d 1337, 1341–42 (La. 1981) (rejecting the contention that the dual jury system caused jurors to speculate whether the other jury would reach the same conclusion in light of no claim by the defendant that the evidence did not support the verdict); *State v. VanHorn*, No. L-98-1171, 2000 WL 234557, at *7 (Ohio Ct. App. Mar. 3, 2000) (finding no merit in defendant’s claim of the possibility of juror speculation); *Alverson v. State*, 983 P.2d 498, 506–07 (Okla. Crim. App. 1999) (rejecting defendant’s claim that the jury was left to improperly speculate when it was excused because defendant cited no instances showing prejudice and the trial judge “painstakingly” instructed the jury about the procedure); *Wilson v. State*, 983 P.2d 448, 457 (Okla. Crim. App. 1998) (finding no merit in defendant’s argument that the jury speculated particularly in light of the trial court’s instructions and no indication that the jury did not adhere to them), *aff’d in part and vacated in part* by *Wilson v. Simons*, 536 F.3d 1064, 1070 (10th Cir. 2008).

¹⁹⁰ *State v. McKinney*, 917 P.2d 1214, 1232 (Ariz. 1996).

being allowed to sit together and referred to as codefendants.¹⁹¹ Courts have also found no error when a defendant's jury sat closer to the victim's family than the codefendant's jury,¹⁹² when only one jury could sit in the jury box at a given time,¹⁹³ and when juries were able to observe each other.¹⁹⁴ In addition, one court found meritless an argument that a defendant's jury sat on harder seats than his codefendant's jury.¹⁹⁵ Further, "traffic jams" in the courtroom without any indication of "rowdiness or breach of decorum" were found not to warrant reversal.¹⁹⁶

Some defendants have also advanced arguments rooted in a violation of their right to a public trial resulting from the juries' placement in the courtroom. In the first federal circuit to examine dual juries, the defendant "hint[ed]" that the procedure robbed him of his right to a public trial because space outside the jury box was occupied by jurors.¹⁹⁷ The Ninth Circuit rejected this argument, however, because the jury was within the space reserved for counsel and "did not in the slightest encroach on any space reserved for the public."¹⁹⁸ Still, later courts upheld convictions when jurors sit in the audience.¹⁹⁹ Further, in 1972, the Ninth Circuit stated that the argument of encroachment might gain legitimacy if three or four juries were present in the courtroom.²⁰⁰ Since then, however, courts have upheld the impaneling of three juries and a dual-trial four-jury procedure.²⁰¹

Accordingly, defendants have not been successful in challenging the dual jury procedure. Courts have not held the procedure to be inherently prejudicial, and overwhelmingly, courts have not found it to be executed prejudicially. After nearly four decades of affirming convictions, courts

¹⁹¹ *People v. Trice*, 577 N.E.2d 1195, 1203 (Ill. App. Ct. 1991).

¹⁹² *Wilson*, 983 P.2d at 458.

¹⁹³ *People v. Wardlow*, 173 Cal. Rptr. 500, 502 (Ct. App. 1981); *see also* *People v. Brooks*, 285 N.W.2d 307, 308 (Mich. Ct. App. 1979) (rejecting defendant's challenge of the dual jury procedure based on the seating of one of the juries outside the jury box because "there is nothing sacrosanct in the placement of the jury in the jury box").

¹⁹⁴ *Brooks*, 285 N.W.2d at 308–09.

¹⁹⁵ *People v. Patterson*, 610 N.E.2d 16, 43 (Ill. 1992).

¹⁹⁶ *Brooks*, 285 N.W.2d at 308–09.

¹⁹⁷ *United States v. Sidman*, 470 F.2d 1158, 1170 (9th Cir. 1972).

¹⁹⁸ *Id.*

¹⁹⁹ *See* *People v. Harris*, 767 P.2d 619, 630, 637 (Cal. 1989) (en banc) (finding no prejudice when one jury was seated in the jury box and one jury was in seats normally reserved for the audience and the juries switched locations each week); *State v. Watson*, 397 So. 2d 1337, 1339 n.2 (La. 1981) (finding no prejudice when one jury was seated in the jury box while the other jury was seated in the front row of the courtroom).

²⁰⁰ *Sidman*, 470 F.2d at 1170.

²⁰¹ *People v. Knight*, 486 N.E.2d 1356, 1361 (Ill. App. Ct. 1985) (finding no violation of defendant's rights from a triple-jury trial); *State v. Bowman*, 588 A.2d 728, 732, 734 (Me. 1991) (finding proper discretion for trial court to use dual-trial four-jury procedure); *Ewish v. State*, 871 P.2d 306, 316 (Nev. 1994) (finding no prejudice from the three-jury procedure); *State v. Hernandez*, 394 A.2d 883, 885 (N.J. Super. Ct. App. Div. 1978) (finding no prejudice from the impaneling of three separate juries).

should recognize the solid legal foundation upon which dual juries rest. To provide further legal support for the procedure, the next Part proposes detailed model guidelines that jurisdictions should adopt to help ensure that dual juries continue to be implemented efficiently and justly.

IV. MODEL GUIDELINES FOR IMPANELING MULTIPLE JURIES IN JOINT TRIALS

Since the Ninth Circuit upheld the dual jury procedure almost forty years ago, there have been many calls for guidelines, including by the Ninth Circuit in *United States v. Sidman*.²⁰² Only a few limited sources have suggested any guidance for trial courts.²⁰³ For example, in 1997, the Court of Criminal Appeals of Oklahoma adopted the following guidelines for impaneling dual juries:

Guideline 2. Impaneling Dual Juries.

In a case where co-defendants are charged, the trial court may, at its discretion, order two juries impaneled, one for each co-defendant. Both juries will be seated in the jury box and the evidence pertaining to both defendants will be presented to both juries simultaneously. Evidence admissible as to one co-defendant shall be presented to that defendant's jury only.

Comment: This procedure is intended to balance, in appropriate cases, defendants' rights to separate trials and speedy trials, and concerns of fairness and judicial economy.²⁰⁴

Although these guidelines are a good starting point, they are brief and

²⁰² 470 F.2d 1158, 1170 (9th Cir. 1972) ("Although we uphold the trial by two juries in this case, we think that unless some guidelines are established by court rule at the District Court level . . . our holding is not to be read as an endorsement of the 'experiment' that was carried out in this case."); see also *Woolbright v. State*, 160 S.W.3d 315, 324–25 (Ark. 2004) ("[W]e condemn the practice and prohibit the use of dual juries until such time as a rule has been implemented to specifically address the practical considerations necessary for safeguarding the defendants' rights."); *Watson*, 397 So. 2d at 1342 (discouraging dual juries until guidelines are incorporated into Louisiana's Code of Criminal Procedure); *Ewish*, 871 P.2d at 316 ("Without guidelines authorized by this court or sanction from our state's legislature, the courts of this state are instructed to refrain from conducting [multiple jury] trials in this manner."); *Hernandez*, 394 A.2d at 886 (suggesting that dual juries be studied by a committee of the state supreme court); *State v. Dellinger*, 79 S.W.3d 458, 468 (Tenn. 2002) ("We do not condone the practice in Tennessee at this time when no rule has been implemented to specifically address the practical considerations necessary for safeguarding defendants' rights under the multiple jury procedure.").

²⁰³ For a discussion of potential guidelines, see *Hedlund v. Sheldon*, 840 P.2d 1008, 1011–13 (Ariz. 1992); *Gaynes*, *supra* note 17, at 291–92; *Hersh*, *supra* note 17, at 73–74; Robert E. Larsen, NAVIGATING THE FEDERAL TRIAL § 3:42 (2010); Note, *Richardson v. Marsh*, *supra* note 17, at 1893 n.99.

²⁰⁴ *Cohee v. State*, 942 P.2d 211, 213 (Okla. Crim. App. 1997).

do not address the myriad issues with which a trial judge may have to contend.²⁰⁵ The following proposed guidelines are meant to be applicable to any jurisdiction that wishes to have detailed procedural safeguards to ensure that judicial economy is preserved without compromising defendants' constitutional rights. Such guidelines may be incorporated into a district court's rules or a state's code of criminal procedure.

A. *Guidelines for Impaneling Multiple Juries in Joint Trials*

This court/code recognizes that in the interest of judicial economy and to avoid unnecessary duplication and expenditure of the court's resources, multiple juries may be impaneled. Such a procedure, however, must meet the dual goals of conserving court resources and preserving defendants' constitutionally protected rights. At all times, the court must remember that justice takes priority over judicial economy.²⁰⁶

In order to assess whether a multiple jury procedure is appropriate for a case, the judge must try to determine how much of the evidence against the defendants overlaps. A significant majority of the evidence should be common to the defendants.²⁰⁷ Further, with the assistance of counsel, the judge should attempt to estimate how many times each jury must be excluded from the courtroom.²⁰⁸ Excessive removal may negate any time saving advantages of the procedure and could lead to confusion.

1. *Voir Dire*

There should be a separate and perhaps mutually exclusive voir dire for each jury.²⁰⁹ The defendant and the defendant's counsel should be present throughout the selection of his jury. Any codefendants should only be present briefly to ensure that no jurors on any jury know the defendants.²¹⁰ Any jurors who are selected to serve on the first jury should be excused while selection of the remaining juries is completed. During

²⁰⁵ The Court of Criminal Appeals of Oklahoma, which adopted the guidelines just a year earlier, remarked in 1998 that "[v]ery little guidance was given to trial courts in the implementation of [dual juries]." *Wilson v. State*, 983 P.2d 448, 456 (Okla. Crim. App. 1998), *aff'd in part and vacated in part* by *Wilson v. Simons*, 536 F.3d 1064, 1070 (10th Cir. 2008).

²⁰⁶ *United States v. Rowan*, 518 F.2d 685, 690 (6th Cir. 1975) ("[J]ustice, not judicial economy, is the first principle of our legal system." (alteration in original) (quoting *United States v. Crane*, 499 F.2d 1385, 1388 (6th Cir. 1974))).

²⁰⁷ For a list of cases in which the court noted the importance of substantial overlap in the evidence against all defendants, see *supra* note 93.

²⁰⁸ *People v. Harris*, 767 P.2d 619, 632–33 (Cal. 1989) (en banc) (noting that one jury was removed three times while the other jury was excused five times); *Santagata*, *supra* note 17, at 32 (noting that this is a "crucial determination" and that in *People v. Ricardo B.*, the juries were excused eleven times).

²⁰⁹ See *Hedlund v. Sheldon*, 840 P.2d 1008, 1011 (Ariz. 1992); *Hersh*, *supra* note 17, at 73; Note, *Richardson v. Marsh*, *supra* note 17, at 1893 n.99; *cf.* *People v. Hana*, 524 N.W.2d 682, 697 (Mich. 1994) (finding no prejudice where a single jury venire was used).

²¹⁰ *Hedlund*, 840 P.2d at 1012.

the voir dire, the judge should explain that there will be more than one defendant on trial but that each jury will be responsible for the determination of the guilt or innocence of only one defendant. The jury is not to consider or speculate on the guilt or innocence of any other defendant. During the trial, each jury may be excused and should not speculate about the reasons for removal.²¹¹ The judge should ask each prospective juror whether there is anything about this procedure that would hinder his or her ability to follow the judge's instructions.²¹²

Separation of the venires is particularly important when defendants are presenting antagonistic defenses.²¹³ Great care must be taken to avoid exposing one defendant's jury to the antagonistic defense of another codefendant.

2. *Explanation to the Jury*

Each jury should receive separate explanations as to the procedure prior to the start of the trial. Each should be informed whose guilt or innocence it is charged with determining. The juries should be told that they will not be present at all times in the courtroom but that they are not to speculate as to why they are excused or about evidence presented while they are gone.²¹⁴ They should also be told to carefully adhere to any instruction that the judge provides and not to draw any inferences from the fact that the defendants are seated at one table.²¹⁵ The judge should also explain to them why the court is conducting the procedure, particularly that it will save the court time and money.

3. *Opening and Closing Statements*

Each jury should be given separate opening statements.²¹⁶ Closing statements may be separate or together depending on whether or not counsel plans to reference evidence inadmissible against one defendant.²¹⁷ No references to other defendants should be made. Counsel and the judge must ensure that counsel does not mention evidence inadmissible to the defendant or that was not presented to that defendant's jury.

²¹¹ See, e.g., *Brown v. Sirmons*, 415 F. Supp. 2d 1268, 1281–82 (N.D. Okla. 2006), *aff'd* 515 F.3d 1072, 1079 (10th Cir. 2008).

²¹² *Santagata*, *supra* note 17, at 32; see also *Wilson v. State*, 983 P.2d 448, 457 (Okla. Crim. App. 1998) (noting that trial court explicitly asked both juries if they could assure the court that they would not infer or speculate about what evidence is being presented while outside the courtroom), *aff'd in part and vacated in part* by *Wilson v. Sirmons*, 536 F.3d 1064, 1070 (10th Cir. 2008).

²¹³ *Hana*, 524 N.W.2d at 709 (Levin, J., dissenting).

²¹⁴ *Hedlund*, 840 P.2d at 1012.

²¹⁵ *People v. Trice*, 577 N.E.2d 1195, 1203 (Ill. App. Ct. 1991) (holding that defendant was not prejudiced by sitting at the same table as his codefendant at trial); *Santagata*, *supra* note 17, at 32.

²¹⁶ See, e.g., *Hedlund*, 840 P.2d at 1012.

²¹⁷ *Hersh*, *supra* note 17, at 74.

4. *Exhibits*

Each jury should receive a copy of the exhibits admissible against their defendant.²¹⁸ This will decrease the chances that one jury will speculate about the deliberations of the other.²¹⁹ Any exhibits that are not capable of duplication should be distributed between the juries per request and discretion of the trial judge.

5. *Presentation of Evidence*

A jury should only be present in the courtroom if the evidence presented is admissible against its defendant. As a result, the trial court and counsel must do their best to predict when inadmissible evidence will be presented against one defendant in order to excuse that defendant's jury prior to the admission of this evidence. The ideal procedure is for the judge to review with counsel which jury—or juries—to bring back to the courtroom prior to calling the next witness.²²⁰ Although this is an extra burden on defense counsel and the trial court judge,²²¹ if each is vigilant and takes extra care to anticipate lines of questioning, each jury should only hear the evidence that it is permitted to hear. If inadmissible evidence is presented by accident in front of a defendant's jury, the trial judge must determine whether the error is capable of being corrected through instruction, and, if appropriate, provide the jury with a proper limiting instruction.²²² Ultimately, the discretion rests with the trial judge. The goal is to ensure that the evidence against one defendant is the same in the joint trial as if he or she would have had a trial alone.²²³

6. *Direct Examination and Cross-Examination*

Normal direct examination should occur unless evidence requires otherwise.²²⁴ The trial judge has the discretion to hold direct examination separately for each defendant or to allow all juries to be present. Of course, a jury must be excused if any evidence inadmissible against its defendant is about to be presented.²²⁵ The court and attorneys should also

²¹⁸ *Hedlund*, 840 P.2d at 1012; Gaynes, *supra* note 17, at 291; Gary Muldoon, *Dual (Multiple) Jury Trials May Be Held*, HANDLING A CRIM. CASE IN N.Y. § 14:19 (2009).

²¹⁹ Gaynes, *supra* note 17, at 291.

²²⁰ *State v. Avery*, 571 N.W.2d 907, 910 (Wis. 1997) (“Prior to resuming testimony and before bringing the panels into the courtroom, the court reviewed with counsel whether both or only one panel should be brought in for the next witness.”).

²²¹ See discussion *supra* Part III.B.1.

²²² See, e.g., *United States v. Rimar*, 558 F.2d 1271, 1273 (6th Cir. 1977) (noting that the trial judge instructed the jury accordingly when misstatements occurred during defendant's dual jury trial and thus the trial was not unfair).

²²³ See *People v. Smith*, 419 N.E.2d 404, 409 (Ill. App. Ct. 1981) (finding no prejudice when defendant was “given every opportunity to present a complete defense before one jury, coterminous with what would have attached had there been no co-defendant”).

²²⁴ *Hedlund v. Sheldon*, 840 P.2d 1008, 1012 (Ariz. 1992).

²²⁵ See discussion *supra* Part II.D (discussing the *Bruton* problem).

be aware of antagonistic defenses. During cross-examination, only the jury of the defendant whose case it pertains to, whether just one defendant or all defendants, should be present.²²⁶

7. Errors

If any error occurs during the proceedings, the judge must use his or her discretion to determine whether such error may be corrected with proper limiting instruction²²⁷ or if a mistrial is necessary.²²⁸ Examples of such errors include bringing the wrong jury back into the courtroom; counsel, the trial court judge, or a witness calling the defendant by a codefendant's name; or presentation of evidence in front of a defendant's jury that is inadmissible against that defendant.

8. Repeated Admonishments

It is essential that the trial judge repeat the instructions to the jury of its role in the proceeding. The judge must continually remind the jury that it must only consider the guilt or innocence of its defendant; that even though all defendants will be in the courtroom, the jury may draw no inference regarding an association between them; and that no speculation must be made regarding the reasons for removal or any other aspect of the procedure. It is hard to imagine that such instructions could ever be excessively repeated.²²⁹

9. Court Reporter

The court reporter should, to the extent possible, keep separate records of the proceedings and must note which jury or juries are present.²³⁰

10. Jury Instructions

It is within the trial judge's discretion to hold joint jury instructions, in whole or in part, if he or she determines it will comport with defendants'

²²⁶ *People v. Leak*, 925 N.E.2d 264, 292 (Ill. App. Ct. 2010) (noting that cross-examination of the State's witness was conducted separately); *Hersh*, *supra* note 17, at 74 (asserting that "[t]he better practice, especially when a defense attorney seeks to emphasize greater culpability of a codefendant, would be for only the cross-examining defendant's jury to be present").

²²⁷ *Bruton v. United States*, 391 U.S. 123, 135 (1968) ("It is not unreasonable to conclude that in many such cases [in which inadmissible evidence is admitted] the jury can and will follow the trial judge's instructions to disregard such information.").

²²⁸ *Id.* ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."); *see also* *State v. Padilla*, 964 P.2d 829, 833 (N.M. Ct. App. 1998) (noting that the trial court informed the State that the defendant would receive a mistrial if any inadmissible statements were heard by the defendant's jury).

²²⁹ *People v. Irizarry*, 634 N.E.2d 179, 181 (N.Y. 1994) (indicating that the trial judge repeated over twenty times the instructions that the jury was not to gain knowledge of the other jury's activities and to avoid contact with each other).

²³⁰ *State v. Avery*, 571 N.W.2d 907, 910 (Wis. 1997).

rights.²³¹ Defendants should not be referred to together in the jury instructions, either by the use of “and/or” or other words or phrases that would link them together. Jurors should be informed that they should consider all evidence as a whole but must remember what evidence is applicable to their defendant. The juries should again be reminded not to speculate about reasons for their removal from the courtroom and that they are required adhere to all instructions given throughout the trial.

11. *Jury Sequestration*

All juries should be sequestered from one another,²³² with separate jury rooms and separate restrooms designated for each jury.²³³ Lunch should be at different times. Jurors should be instructed not to contact any jurors from other juries even in passing. Each jury should also be labeled to reduce the likelihood of confusing them. They may wear labeled or colored badges.²³⁴ A single court officer should be assigned to each jury and should stay with the jury whenever the judge or counsel is absent from the courtroom.²³⁵

Each jury may also be sequestered to prevent exposure to media coverage about evidence against codefendants.²³⁶ This is particularly important in highly publicized cases.

12. *Courtroom Layout and Jury Accommodations*

Accommodating multiple juries in one courtroom can often be challenging. Ideally, each jury would have its own jury box, but courtroom facilities do not always allow for this opportunity. The goal should be to ensure that each jury has as adequate a view of the witnesses and defendants as the other jury or juries. If two jury boxes are unavailable, other feasible options include: (1) one jury seated in the jury box and the other seated in chairs in front of²³⁷ or perpendicular²³⁸ to the jury box or (2) one jury seated in the jury box and one jury in seats

²³¹ Compare *Irizarry*, 634 N.E.2d at 181 (noting that juries were instructed separately with regard to charges and defenses for each defendant), with *People v. Ricardo B.*, 535 N.E.2d 1336, 1337 (N.Y. 1989) (noting that one charge was given to both juries without the use of either defendant's name).

²³² Cf. *People v. Rainge*, 445 N.E.2d 535, 550 (Ill. App. Ct. 1983) (finding no indication of impropriety even though the juries were not sequestered during trial); *Scarborough v. State*, 437 A.2d 672, 675 n.1 (Md. Ct. Spec. App. 1981) (finding no reversible error when juries stayed in the same jury room except during final deliberation since trial judge specifically instructed jurors not to speak to one another).

²³³ *Avery*, 571 N.W.2d at 910.

²³⁴ *United States v. Hayes*, 676 F.2d 1359, 1367 (11th Cir. 1982); *Larsen*, *supra* note 203; *Muldoon*, *supra* note 218; *Santagata*, *supra* note 17, at 32.

²³⁵ *Irizarry*, 634 N.E.2d at 181.

²³⁶ *Avery*, 571 N.W.2d at 910.

²³⁷ *United States v. Sidman*, 470 F.2d 1158, 1168 (9th Cir. 1972).

²³⁸ *Santagata*, *supra* note 17; see also *id.* (providing a diagram of the courtroom layout in *People v. Ricardo B.*, 535 N.E.2d 1336, 1339 (N.Y. 1989)).

otherwise used by the audience.²³⁹ If the latter option is selected, the court must ensure that the jury in public seating does not occupy excessive space such that the defendant's right to a public trial is infringed.²⁴⁰ The juries should switch places every other day or at an interval that the trial judge determines is appropriate.²⁴¹

13. *Verdict*

Each jury renders its own verdict and verdicts should be sealed until all are reached.²⁴² This is particularly important in highly publicized cases. The jury rendering a verdict first may be sequestered until the remaining verdict(s) are reached. Alternatively, they may be excused and advised that they may not reveal anything about the verdict until such time that the court contacts them rescinding the order.

V. CONCLUSION

This Note has examined dual juries in joint trials. It has endorsed the procedure and provided detailed model guidelines. Dual juries have been consistently used for over forty years, yet courts continually refer to the procedure as novel and caution against its use. Instances of prejudice that courts fear so deeply have materialized in only a handful of cases, while the vast majority of dual jury joint trials have gone relatively smoothly. Indeed, the use of dual juries allows joint trials even when all the evidence is not admissible against all defendants, thus preventing needless duplication of evidence and excessive expenditures of time and money.

The trial judge is the most important aspect to impaneling a dual jury. It is within the judge's power and responsibility to properly advise the jury of its role so that the defendants are not prejudiced by the procedure. The judge, as well as counsel, must be vigilant throughout the trial in order to guard against any potentially prejudicial evidence. These burdens increase as the amount of independent evidence against each defendant increases. Accordingly, the benefits of dual juries are only realized if there is substantial overlap between the evidence against all defendants. When this condition is met, however, and counsel as well as the judge have cooperated in ensuring a fair trial, dual juries have proven to be not only

²³⁹ *People v. Harris*, 767 P.2d 619, 630 (Cal. 1989) (en banc); *State v. Watson*, 397 So. 2d 1337, 1339 n.2 (La. 1981).

²⁴⁰ See *supra* text accompanying notes 197–201 (discussing defendants' arguments about infringement of right to a public trial from impaneling dual juries).

²⁴¹ See, e.g., *Hedlund v. Sheldon*, 840 P.2d 1008, 1012 (Ariz. 1992) (noting in trial procedures that "juries will switch places every other day"); *Harris*, 767 P.2d at 630 (noting that juries changed positions every week); Note, *Richardson v. Marsh*, *supra* note 17, at 1893 n.99 (suggesting that juries' "positions should be rotated regularly to avoid disadvantaging one").

²⁴² *Hersh*, *supra* note 17, at 74; cf. *People v. Irizarry*, 634 N.E.2d 179, 182–83 (N.Y. 1994) (holding that failure to seal verdict of first jury until second jury returned verdict was not reversible error).

workable, but valuable. Hopefully, with the benefits outlined and the detailed model guidelines provided in this Note, more courts will take advantage of this sensible and beneficial innovation.