

March 10, 2023

By Electronic Mail

H. Thomas Byron III, Secretary  
Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
One Columbus Circle, NE, Room 7-300  
Washington, D.C. 20544  
RulesCommittee\_Secretary@ao.uscourts.gov

Re: **Proposed Amendment to Rule 23(a) of the Federal Rules of Criminal Procedure**

Dear Mr. Byron:

This letter is submitted on behalf of the American College of Trial Lawyers, Federal Criminal Procedure Committee, which I currently chair. We write to respectfully request that the Advisory Committee on Criminal Rules of the Judicial Conference of the United States (the “Advisory Committee”) consider proposing to the Judicial Conference certain amendments to Federal Rule of Criminal Procedure 23(a). The proposed amended rule is attached to this letter, both with changes tracked, *see* Exhibit A, and as a clean copy, *see* Exhibit B. The basis for the amendment is described in the attached paper published by the ACTL Federal Criminal Procedure Committee, entitled “Rule 23(a) of the Federal Rules of Criminal Procedure Should Be Amended to Eliminate the Requirement that the Government Consent to a Defendant’s Waiver of a Jury Trial.” *See* Exhibit C (*available at* [https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/2023---rule-23\(a\)-of-the-federal-rules-of-criminal-procedure-should-be-amended.pdf?sfvrsn=48630b5a\\_2](https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/2023---rule-23(a)-of-the-federal-rules-of-criminal-procedure-should-be-amended.pdf?sfvrsn=48630b5a_2)).

The paper recommends amendment of Rule 23(a) to allow a criminal defendant to obtain a non-jury bench trial without the government’s consent if the defendant presents reasons sufficient to overcome the presumption in favor of jury trials. The paper explores the constitutional, legal, and practical issues with eliminating government consent, and explains our reasoning behind the specific proposed amendments to Rule 23(a).

H. Thomas Byron III, Secretary  
Committee on Rules of Practice and Procedure  
March 10, 2023  
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The mission statement of the American College of Trial Lawyers provides:

The American College of Trial Lawyers is an invitation only fellowship of exceptional trial lawyers of diverse backgrounds from the United States and Canada. The College thoroughly investigates each nominee for admission and selects only those who have demonstrated the very highest standards of trial advocacy, ethical conduct, integrity, professionalism and collegiality. The College maintains and seeks to improve the standards of trial practice, professionalism, ethics, and the administration of justice through education and public statements on important legal issues relating to its mission. The College strongly supports the independence of the judiciary, trial by jury, respect for the rule of law, access to justice, and fair and just representation of all parties to legal proceedings.

The ACTL Federal Criminal Procedure Committee's membership consists of nearly fifty current and former federal prosecutors and defense attorneys from around the United States whose principal area of practice is in federal criminal cases nationwide. The ACTL's Board of Regents recently approved the attached paper for publication.

We appreciate the opportunity to submit the ACTL Federal Criminal Procedure Committee's proposal to you and are available to answer any questions and provide any additional information requested by the Advisory Committee.

Respectfully submitted,



---

Brian M. Heberlig  
Chair, Federal Criminal Procedure Committee  
American College of Trial Lawyers

cc: The Honorable James C. Dever III, Chair, Advisory Committee on Criminal Rules  
Prof. Sara Sun Beale, Co-Reporter, Advisory Committee on Criminal Rules  
Prof. Nancy King, Co-Reporter, Advisory Committee on Criminal Rules

# **EXHIBIT A**

## Rule 23. Jury or Nonjury Trial (*WITH CHANGES TRACKED*)

(a) (1) JURY TRIAL. If the defendant is entitled to a jury trial, the trial must be by jury unless:

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

~~(2B)~~ the government consents; and

~~(3C)~~ the court approves.

(2) NONJURY TRIAL WITHOUT GOVERNMENT CONSENT. If the government does not consent, the court may permit a defendant to present reasons in writing for requesting a nonjury trial and may require the government to respond. The court may approve a defendant's waiver of a jury trial without the government's consent if it finds that the reasons presented by the defendant are sufficient to overcome the presumption in favor of jury trials.

COMMENT. The proposed amendment permits a court to let a defendant waive trial by jury without the government's consent. The Supreme Court has suggested that there may be circumstances where the right to a fair trial will overcome the government's objection to a bench trial. *Singer v. United States*, 380 U.S. 24, 37 (1965) ("We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial."). Creating a complete list of such circumstances is not possible. However, a non-exclusive list of reasons for permitting a non-jury trial includes concerns about speedy trial, jury bias or prejudice (giving due consideration to the possibility of a change of venue and careful voir dire of the jury panel), or the technical nature of the charges or defenses.

Some courts have permitted non-jury trials because of prejudice. *United States v. Schipani*, 44 F.R.D. 461 (E.D.N.Y. 1968) (barring the government from withdrawing its consent before a second trial); *United States v. Panteleakis*, 422 F. Supp. 247 (D.R.I. 1976) (multiple defendants in a complex case in which not all evidence would be admissible against all defendants); *United States v. Cohn*, 481 F. Supp. 3d 122 (E.D.N.Y. 2020) (numerous factors, including speedy trial and other issues caused by a mid-Covid pandemic trial). Although the rule recognizes that technical issues may be appropriate for a non-jury trial, the complexity of the subject matter alone is not a basis for overruling the government's demand for trial by jury. *United States v. Simon*, 425 F.2d 796, 799 n.1 (2d Cir. 1969).

Any decision must be weighed against the constitutional preference for trial by jury. *Singer v. United States*, 380 U.S. 24, 36 (1965) ("The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result."); *Patton v. United States*, 281 U.S. 276, 312 (1930) ("Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses.")

# **EXHIBIT B**

## **Rule 23. Jury or Nonjury Trial (CLEAN)**

**(a) (1) JURY TRIAL.** If the defendant is entitled to a jury trial, the trial must be by jury unless:

**(A)** the defendant waives a jury trial in writing;

**(B)** the government consents; and

**(C)** the court approves.

**(2) NONJURY TRIAL WITHOUT GOVERNMENT CONSENT.** If the government does not consent, the court may permit a defendant to present reasons in writing for requesting a nonjury trial and may require the government to respond. The court may approve a defendant's waiver of a jury trial without the government's consent if it finds that the reasons presented by the defendant are sufficient to overcome the presumption in favor of jury trials.

**COMMENT.** The proposed amendment permits a court to let a defendant waive trial by jury without the government's consent. The Supreme Court has suggested that there may be circumstances where the right to a fair trial will overcome the government's objection to a bench trial. *Singer v. United States*, 380 U.S. 24, 37 (1965) ("We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial."). Creating a complete list of such circumstances is not possible. However, a non-exclusive list of reasons for permitting a non-jury trial includes concerns about speedy trial, jury bias or prejudice (giving due consideration to the possibility of a change of venue and careful voir dire of the jury panel), or the technical nature of the charges or defenses.

Some courts have permitted non-jury trials because of prejudice. *United States v. Schipani*, 44 F.R.D. 461 (E.D.N.Y. 1968) (barring the government from withdrawing its consent before a second trial); *United States v. Panteleakis*, 422 F. Supp. 247 (D.R.I. 1976) (multiple defendants in a complex case in which not all evidence would be admissible against all defendants); *United States v. Cohn*, 481 F. Supp. 3d 122 (E.D.N.Y. 2020) (numerous factors, including speedy trial and other issues caused by a mid-Covid pandemic trial). Although the rule recognizes that technical issues may be appropriate for a non-jury trial, the complexity of the subject matter alone is not a basis for overruling the government's demand for trial by jury. *United States v. Simon*, 425 F.2d 796, 799 n.1 (2d Cir. 1969).

Any decision must be weighed against the constitutional preference for trial by jury. *Singer v. United States*, 380 U.S. 24, 36 (1965) ("The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result."); *Patton v. United States*, 281 U.S. 276, 312 (1930) ("Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses.").

# **EXHIBIT C**



RULE 23(a) OF THE FEDERAL RULES OF  
CRIMINAL PROCEDURE SHOULD BE AMENDED TO  
ELIMINATE THE REQUIREMENT THAT THE GOVERNMENT  
CONSENT TO A DEFENDANT'S WAIVER OF A JURY TRIAL

Federal Criminal Procedure Committee

Approved by the Board of Regents  
February 2023



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***“In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships.”***

—Hon. Emil Gumpert,  
Chancellor-Founder, ACTL

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**WILLIAM P. KEANE**  
SAN FRANCISCO, CA

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# **RULE 23(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE SHOULD BE AMENDED TO ELIMINATE THE REQUIREMENT THAT THE GOVERNMENT CONSENT TO A DEFENDANT’S WAIVER OF A JURY TRIAL**

## **I. INTRODUCTION**

The backlog of federal criminal cases created by the COVID-19 pandemic exposed the logistical and constitutional issues that arise when the availability of a bench trial is conditioned on the government’s consent. Forced to await the empanelment of at least twelve jurors willing to sit in close proximity in a windowless courtroom, defendants have endured prolonged pretrial detentions and systematic burdens on their rights to speedy trials.

This situation triggered discussion in the Federal Criminal Procedure Committee of the American College of Trial Lawyers (the “Committee”) about the broader question of whether a defendant should be allowed to waive the right to a jury trial without the consent of the government. The Committee examined the constitutional, legal, and practical issues with eliminating government consent.

The Committee’s examination revealed that the requirement in Federal Rule of Criminal Procedure 23(a) that the government consent to a defendant’s waiver of a jury trial significantly limits the number of bench trials because the government rarely consents. Moreover, when the government withholds consent, a defendant has little recourse, since judicial review of the prosecutor’s decision is unavailable except in rare circumstances involving manifest bad faith.

The government’s exercise of its discretion to withhold consent to a bench trial often translates into longer and less efficient trials. Many of the issues that complicate and lengthen jury trials – such as evidentiary objections, limiting instructions, sidebars, shackling, and sequestration – can be managed more easily at a bench trial. As a result, jury trials can be longer and more expensive than bench trials. More efficient bench trials may also be easier to schedule on courts’ crowded calendars, thereby reducing delays and minimizing burdens on the right to a speedy trial.

Under the current version of Rule 23(a), the government need not supply a reason for its decision to withhold consent to a bench trial. The traditional justification for this rule is the government’s interest in a fair trial. But the defendant shares that interest to an equal or greater degree, and the Supreme Court has expressly recognized that there will be “occasional exceptions” to the default preference for trial by jury in criminal cases.<sup>1</sup> It follows that on the occasions when a defendant seeks a trial before a judge rather than a jury, it is reasonable both to require the government to articulate a basis for its contrary view and to empower trial courts to authorize a bench trial without the government’s consent

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1 *Patton v. United States*, 281 U.S. 276, 312 (1930).

This white paper describes the Committee’s review of the case law interpreting the constitutional right to trial, the history and application of Rule 23(a), the law of the 50 states, and practical experience. While there were divergent views within the Committee, the Committee ultimately determined to recommend amendment of Rule 23(a) to eliminate the need for governmental consent, and to authorize a court to approve a defendant’s waiver of a jury trial based on the court’s review of the totality of the circumstances.

## II. THE BACKGROUND OF RULE 23(A)

Article III, Section 2 states that the “[t]he trial of all Crimes . . . shall be by jury.” Similarly, the Sixth Amendment provides, in part, that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” Consistent with those constitutional commands, Rule 23(a), adopted in 1944, provides: “If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves.”<sup>2</sup> The United States Supreme Court, as well as lower federal courts, state courts and commentators, have examined the efficacy of Rule 23 and its state court equivalent throughout the years.<sup>3</sup>

Historically, the modes of trial for criminal defendants have diverged.<sup>4</sup> In America, beginning in the late 17th century, the waiver of a jury trial in favor of a bench trial was prominent in the Massachusetts and Maryland courts.<sup>5</sup> In the 19th century, however, English common-law defendants typically had no choice but trial by jury.<sup>6</sup> There was an option for those defendants who feared the King and wished to pay a fine without overtly admitting guilt; in those instances of “implied confession,” the Court decided whether to discharge the defendant after hearing the evidence.<sup>7</sup>

The United States Supreme Court first interpreted the jury trial right in 1898 in *Thompson v. Utah*.<sup>8</sup> Following his conviction in a state district court, the defendant moved for a new trial on the basis that the jury consisted of only eight jurors.<sup>9</sup> The Utah Supreme Court denied his motion for a new trial and affirmed his conviction in part based on its view that the United States Constitution permitted an eight-person jury.<sup>10</sup> Further, the Utah Supreme Court reasoned that the Utah Constitution allowed eight jurors, except in capital cases.<sup>11</sup> On review, the Supreme Court considered whether the Sixth Amendment to the U.S. Constitution required a jury to consist of twelve persons.<sup>12</sup> The Supreme Court held that, although the Sixth Amendment does not specify the number of jurors, a jury must consist “of twelve persons, neither more nor less.”<sup>13</sup> In addressing the Utah Constitution, the Supreme Court noted that the provision permitting an eight-person jury deprived the defendant of

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2 Fed. R. Crim. P. 23.

3 *Singer v. United States*, 380 U.S. 24, 26 (1965); *Patton v. United States*, 281 U.S. 276, 286 (1930), abrogated by *Williams v. Fla.*, 399 U.S. 78 (1970).

4 *Singer*, 380 U.S. at 26.

5 *Id.* at 29.

6 *Id.*

7 *Id.*

8 *Thompson v. Utah*, 170 U.S. 343, 344 (1898), overruled by *Collins v. Youngblood*, 497 U.S. 37 (1990), and abrogated by *Williams v. Fla.*, 399 U.S. 78 (1970).

9 *Thompson*, 170 U.S. at 620.

10 *Id.*

11 *Id.* at 621.

12 *Id.* at 622.

13 *Id.*

“a substantial right involved in his liberty” and resulted in a material disadvantage to the defendant.<sup>14</sup> The Supreme Court ultimately determined that an accused did not have the authority to consent to a jury of only eight persons.<sup>15</sup>

In 1930, the United States Supreme Court again examined the composition of a jury in *Patton v. United States*.<sup>16</sup> In *Patton*, the Supreme Court considered whether a defendant could choose to proceed to verdict with only eleven jurors after one of the twelve jurors became severely ill and was unable to complete the trial. Both the government and the defendant agreed to waive the presence of the twelfth juror and to continue the trial with only eleven jurors.<sup>17</sup> However, after the defendant was convicted, he appealed on the grounds that he had no ability to waive his constitutional right to a trial by a twelve-person jury, rendering his waiver unconstitutional.<sup>18</sup> Since a conflict existed among the Federal Circuits in allowing a waiver, the Eighth Circuit certified this question to the Supreme Court.

In *Patton*, the Supreme Court held that a defendant has a constitutional right to waive trial by a twelve-person jury and, in turn, to consent to a trial with fewer than twelve jurors, or to a trial by the court alone with no jury.<sup>19</sup> In other words, the Court concluded that trial by jury is a privilege (waivable right) of the accused and not a jurisdictional requirement. The Court determined that Article III, Section 2 of the Constitution is “meant to confer a right upon the accused which he may forego at his election” and instead, opt for a bench trial with the consent of the government and court.<sup>20</sup> The Court stated that, “to deny his power to do so is to convert a privilege into an imperative requirement.”<sup>21</sup> The Court further noted that in preserving the right of trial by jury, the principal intent of the framers of the Constitution was to protect the accused.<sup>22</sup> However, the Court observed that trial by jury also involves interests of the public.<sup>23</sup> For this reason, the Court held that government consent and judicial authorization is required before the accused may choose to waive trial by jury.<sup>24</sup> The Court’s holding resulted in what is now Rule 23(a).<sup>25</sup>

In 1965, the United States Supreme Court again considered the issue in *Singer v. United States*, which assessed the constitutionality of Rule 23(a)’s requirement of government consent and court approval before a defendant may waive a jury and obtain a bench trial.<sup>26</sup> At the start of the trial, the defendant expressed his desire to decrease the length of the trial and thus attempted to waive a trial by jury.<sup>27</sup> Although the court was willing to authorize the defendant’s waiver, the government refused to consent and the defendant was convicted by a jury.<sup>28</sup> On appeal, the defendant challenged

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14 *Id.* at 623.

15 *Id.* at 624. Six years later in 1904, the United States Supreme Court held that the Constitution did not require that petty offenses be tried by jury at all. *Schick v. United States*, 195 U.S. 65, 70 (1904).

16 *Patton v. United States*, 281 U.S. 276, 286 (1930), *abrogated by Williams v. Fla.*, 399 U.S. 78 (1970).

17 *Id.*

18 *Id.* at 287.

19 *Id.* at 290.

20 *Id.* at 298.

21 *Id.*

22 *Id.* at 294.

23 *Id.* at 305.

24 *Id.* at 312.

25 Adam H. Kurland, *Providing A Federal Criminal Defendant with A Unilateral Right to A Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. Davis L. Rev. 309, 325 (1993).

26 *Singer*, 380 U.S. at 25.

27 *Id.* at 25.

28 *Id.*



the constitutionality of Rule 23(a) on the grounds that he had a constitutional right to waive a jury trial, “regardless of whether the prosecution and the court are willing to acquiesce in the waiver.”<sup>29</sup> The defendant asserted that Article III, Section 2 and the Sixth Amendment were solely designed to protect the accused, and because other constitutional guarantees are waivable without government consent, defendants should be permitted to waive trial by jury and proceed to a bench trial without government consent and approval of the court.<sup>30</sup> The Supreme Court rejected this argument and upheld Rule 23(a) as constitutional.<sup>31</sup>

The Supreme Court in *Singer* held that criminal defendants do not have the constitutional right to choose unilaterally a bench trial without the consent of the government and the court, as required by Rule 23.<sup>32</sup> In so holding, the Court stated that “[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.”<sup>33</sup> However, the Court limited its holding, stating that

[W]e need not determine in this case whether there might be some circumstances where a defendant’s reasons for wanting to be tried by a judge alone are so compelling that the Government’s insistence on trial by jury would result in the denial to a defendant of an impartial trial. The petitioner argues that there might arise situations where ‘passion, prejudice ... public feeling’ or some other factor may render impossible or unlikely an impartial trial by jury.<sup>34</sup>

The *Singer* Court relied on the holding and language in *Patton*. Read together, the cases establish that a defendant has a constitutional right to a jury trial, but no constitutional right to waive unilaterally a jury trial and obtain a bench trial. In upholding Rule 23(a), the Court observed that “the States have adopted a variety of procedures relating to the waiver of jury trials in state criminal cases,” suggesting that the Federal Rules of Criminal Procedure could be amended to dictate a different outcome.<sup>35</sup> In other words, only Rule 23(a) of the Federal Rules of Criminal Procedure, not the U.S. Constitution, requires the defendant to obtain the consent of both the government and the court. Notably, the Sixth Amendment to the U.S. Constitution utilizes the word “enjoy,” indicating a defendant’s right to a jury trial is more of a sacrosanct right, but in appropriate circumstances, can be waived. Amending Rule 23(a) to grant trial courts the authority to approve a defendant’s waiver of a jury trial without government consent would, therefore, be constitutionally permissible under the Supreme Court’s guidance in *Patton* and *Singer*.

Although the Court in *Patton* and *Singer* noted that the government and the courts were focused on safeguarding the defendant’s right to a jury trial, a jury trial might not always be in the defendant’s best interest.<sup>36</sup> Rule 23(a) was adopted well before the Supreme Court’s decision in *Gideon v. Wainwright*,<sup>37</sup> when a substantial number of defendants were not represented by counsel,

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29 *Id.*

30 *Id.* at 26.

31 *Id.*

32 *Id.*

33 *Id.* at 34.

34 *Id.* at 37-38.

35 *Id.* at 36-37.

36 *See, e.g., Singer*, 380 U.S. at 35.

37 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

and needed protection. Following *Gideon*, the defendant has less of a need for the court's or the government's protection because the defendant has now been supplied his own counsel.<sup>38</sup> If the defendant can plead guilty and thus waive a jury trial if it is in his best interest, he should be permitted to waive a jury for trial, if the defendant similarly concludes that a bench trial is in his best interest. The defendant's choice is much different today for additional reasons. When Rule 23(a) was promulgated, cases were much less complex, media was less of an issue, and dockets were less crowded. Also, while COVID-19 problems may resolve, other unforeseen situations will surely arise.

### III. STATE LAWS REGARDING A DEFENDANT'S ABILITY TO OBTAIN A BENCH TRIAL

The Committee surveyed state law to determine whether state criminal procedure is consistent with Fed. R. Crim. P. 23(a) in preventing a defendant from obtaining a bench trial without the consent of the government and approval of the court. A comprehensive summary of state law on this subject is set forth in Appendix A to this article.

In summary, twenty-eight states are essentially aligned with Rule 23, requiring both the prosecution's consent and the court's approval for the waiver of a jury trial.<sup>39</sup> One state is aligned with Rule 23(a) except in capital cases, where the prosecution has no ability to veto the defendant's request for a bench trial and the court's determination is limited to whether the defendant's waiver is voluntary.<sup>40</sup> Two states require the prosecution's consent, but afford the trial court no discretion to deny the waiver of a jury trial if both the prosecution and defendant consent.<sup>41</sup> Eleven states require the court's approval of the waiver of jury trial, but not the prosecution's consent.<sup>42</sup> Eight states grant the defendant a right to waive right to jury trial, subject to the court's finding that the waiver is knowing, intelligent and voluntary, but do not otherwise require the court's approval or the prosecution's consent.<sup>43</sup> In total, thirty-one states require the prosecution to consent to the waiver of a jury trial, while nineteen states do not take the prosecution's perspective into consideration at all.<sup>44</sup>

### IV. BENCH TRIAL POLICIES IN U.S. ATTORNEY'S OFFICES

The Committee informally surveyed our colleagues to identify any policies on bench trials in U.S. Attorney's Offices around the country. We were unable to identify any formal policies on bench trials. In at least one district, it appears that the government has never consented to a defendant's bench trial request.<sup>45</sup> In several districts, requests to consent to a bench trial were considered on a case-by-case basis, but rarely resulted in the government consenting to a defendant's request.<sup>46</sup> Fellows from some districts reported that the government periodically agreed to bench trials at the

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38 *Id.*

39 AL, AK, AZ, CA, CO, DE, GA, ID, KS, KY, LA, MI, MS, NV, NW, ND, OK, PA, SC, SD, TN, TX, UT, VT, VA, WV, WI, WY.

40 AR.

41 FL, MT.

42 HI, IL, MD, MA, MN, MO, NE, NY, NC, OR, WA.

43 CT, IL, IN, IA, MD, NH, OH, RI.

44 Notably, while forty-eight states apply the same standard of review to factual findings at trial regardless of whether the conviction results from a bench trial or a jury trial, one state (Rhode Island) appears to require that its appellate court afford more deference to the factual findings of a trial court sitting without a jury, whereas another state (Utah) gives less deference to the factual findings of a trial court sitting without a jury. How the federal courts resolve this issue in a bench trial will be significant if a party requests specific findings of fact under Federal Rule of Criminal Procedure 23(c).

45 A responding Fellow could not recall the government ever consenting to a bench trial in the Northern District of Alabama.

46 Iowa N.D., Iowa S.D., Georgia and North Carolina districts, S.D.N.Y., South Carolina, Kentucky, Tennessee.

defendant's request.<sup>47</sup> Although anecdotal and not comprehensive, the responses we received suggest that federal prosecutors rarely consent to a defendant's request for a bench trial.<sup>48</sup>

## V. STATISTICS ON THE BACKLOG OF CRIMINAL CASES IN THE FEDERAL COURT SYSTEM CREATED BY THE COVID-19 PANDEMIC

The COVID-19 pandemic has created a backlog of cases that the courts must address. Statistics from the Administrative Office of Courts illustrate the problem.<sup>49</sup>

### Criminal defendants pending

|      |                       |
|------|-----------------------|
| 2019 | 113,987 <sup>50</sup> |
| 2020 | 115,398 <sup>51</sup> |
| 2021 | 126,258 <sup>52</sup> |

### Criminal cases terminated

|      |                      |
|------|----------------------|
| 2019 | 85,478 <sup>53</sup> |
| 2020 | 71,485 <sup>54</sup> |
| 2021 | 63,725 <sup>55</sup> |

As of September 30, 2022, there were 122,812 criminal cases pending, representing an increase of approximately 8% over the number of cases pending as of September 30, 2019.<sup>56</sup>

## VI. COURT CONDITIONS RELATED TO COVID-19 LEAD THE COURT IN UNITED STATES v. COHN TO AUTHORIZE A BENCH TRIAL OVER THE GOVERNMENT'S OBJECTION

In *United States v. Cohn*, a case arising out of a securities fraud prosecution in the Eastern District of New York, District Judge Gary R. Brown granted the defendant's application for a bench trial in the absence of the government's consent in light of the extraordinary and unprecedented circumstances presented by COVID-19.<sup>57</sup> In a thorough and carefully-considered opinion, the court described the unique challenges presented by the pandemic at that time (August 2020, before the availability of vaccines), weighed the competing rights and interests underlying the application, and

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47 N.D. Cal., D. Montana, E.D. Va.

48 Data from the federal judiciary confirms that bench trials are rare in federal criminal cases. In the most recent twelve-month period from September 30, 2021 until September 30, 2022, the Administrative Office of Courts reported the disposition of 1,669 cases by trials in the federal system – 1,475 in a trial by jury and 194 by bench trial. <https://www.uscourts.gov/statistics/table/d-4/judicial-business/2022/09/30>.

49 The Committee recognizes that the pandemic is not entirely responsible for the increased backlog since most cases are resolved by pleas, not trial, and further, because many defendants do not want a speedy trial.

50 [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_d8\\_0930.2019.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_d8_0930.2019.pdf)

51 [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_d8\\_0930.2020.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_d8_0930.2020.pdf)

52 [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_d8\\_0930.2021.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_d8_0930.2021.pdf)

53 [https://www.uscourts.gov/sites/default/files/data\\_tables/jff\\_5.4\\_0930.2019.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jff_5.4_0930.2019.pdf)

54 [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_d9\\_0930.2020.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_d9_0930.2020.pdf)

55 [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_d4\\_0930.2021.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2021.pdf)

56 [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_d\\_0930.2022.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_d_0930.2022.pdf)

57 481 F. Supp.3d 122 (E.D.N.Y. 2020).

ultimately concluded that the government’s objection to a nonjury trial was far outweighed by the defendant’s and the public’s constitutional and statutory rights. Other case-specific factors supported moving forward with the trial in a reasonable timeframe.

*Cohn* involved charges of alleged obstruction of justice and unauthorized disclosure of confidential information against a former official of the Securities and Exchange Commission (“SEC”), who was accused of improperly accessing information from the SEC’s computer system regarding a pending investigation of the private equity firm he would soon join as its chief compliance officer.<sup>58</sup> The indictment was filed on February 26, 2019 and superseded twice, in October 2019 and in July 2020, to add counts charging a violation of the Computer Fraud and Abuse Act and theft of public property.<sup>59</sup> The court scheduled a jury trial for September 2020. Considering that the Eastern District of New York had not conducted a jury trial since the pandemic began in March 2020, the date was ambitious.

As the prosecution slowly moved forward, *Cohn*’s lawyer raised concerns regarding the need for the defendant to wear a mask during the anticipated trial, in light of his age and health condition, as well as the appearance of the masked defendant before the jury. In light of those concerns and other anticipated complications in conducting a jury trial during the pandemic, the court proposed the parties consider a bench trial.<sup>60</sup> In written submissions in response to the court’s proposal, the defendant consented, but the government did not. Notwithstanding the government’s objection, the defense filed a motion to proceed with a nonjury trial due to the “extraordinary circumstances presented by the COVID-19 pandemic” and its “desire to have a speedy trial pursuant to [the defendant’s] rights under the Sixth Amendment.”<sup>61</sup> After considering the parties’ competing arguments, the court granted the motion.

In the opinion announcing the decision, Judge Brown stressed that it was the court, not the defendant, that proposed the idea of a bench trial and, therefore, the case did not present a situation in which the defendant was trying to “select his own tribunal.”<sup>62</sup> The court recognized an accused’s constitutional right to “a speedy and public trial, by an impartial jury,” but also noted that “our society has long recognized that bench trials provide a fair and impartial mechanism for adjudication of criminal prosecutions.” *Id.* (citations omitted). The court then addressed the Supreme Court’s decision in *Singer v. United States*, 380 U.S. 24 (1965), and the central issue it addressed: whether a defendant’s waiver of a jury trial can be conditioned upon the consent of the prosecutor and the court, as provided in Federal Rule of Criminal Procedure 23(a). While *Singer* upheld the procedure set forth in Rule 23(a), Judge Brown pointed out the Supreme Court’s important caveat that there “might be some circumstances where a defendant’s reasons for wanting to be tried by a judge alone are so compelling that the Government’s insistence on trial by jury would result in the denial to a defendant of an impartial trial,” such as “situations where passion, prejudice . . . public feeling or some other factor may render impossible or unlikely an impartial trial by jury.”<sup>63</sup>

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58 *Id.* at 124.

59 *Id.*

60 *Id.* at 125.

61 *Id.* at 128.

62 *Id.* at 128 (citing *United States v. Sun Myung Moon*, 718 F.2d 1210, 1217 (2d Cir. 1983)).

63 *Cohn*, 481 F. Supp.3d at 129 (citing *Singer*, 380 U.S. at 37-38).

After reviewing the sparse case law on the subject, the *Cohn* court distilled four factors that courts have considered in reviewing the efficacy of a criminal defendant’s waiver of a jury trial in the absence of government consent: (1) “whether a governmental objection is made for an improper purpose”; (2) “whether the government’s insistence on a jury trial unfairly interferes with the defendant’s exercise of a separate constitutional right”; (3) “whether the government’s insistence on a jury trial implicates the *public’s* right to a speedy trial;” and (4) “whether case-specific factors, such as the nature of the evidence or the predominance of legal issues over factual issues, would render obtaining an impartial jury trial difficult or unworkable.”<sup>64</sup>

In considering the first factor, the court recognized that the government is not required to articulate a reason for withholding its consent to a nonjury trial.<sup>65</sup> Having done so in *Cohn*, however, the court rejected the government’s explanation for its objection as “simply untrue.” Specifically, despite the government’s claim that it was unaware of any case in recent memory in which the government consented to a nonjury trial in the Eastern District of New York, the defense identified thirteen Second Circuit cases reported on Westlaw in which the U.S. Attorney in that district consented to bench trials in criminal cases. The court identified two additional examples through its own research.<sup>66</sup> Nonetheless, since the defense had not challenged the prosecutors’ motives, the court found the first factor to be neutral.

Judge Brown found the second factor—whether conducting a jury trial would conflict with the exercise of other rights by the defendant—weighed heavily in favor of granting the defendant’s jury trial waiver.<sup>67</sup> The court recognized that, pursuant to *Singer*, the defendant’s right to a speedy trial was alone insufficient to overrule the government’s objection to a bench trial under Rule 23(a).<sup>68</sup> But the defendant’s proffered infringement of his right to testify in his own defense was found to be a far greater concern. Judge Brown credited that the defendant would have to remove his mask in order to testify effectively on his own behalf but that requiring the defendant to do so in the early stages of the pandemic would present an unacceptable risk. According to the court, the necessity of masks “effectively pit[ted] this defendant’s right to a jury trial against his right to testify at that trial[,] . . . a problem of constitutional dimension.”<sup>69</sup> In contrast, a bench trial would provide flexibility for the defendant—such as testifying remotely—without concerns of jury prejudice that could arise from such a procedure.<sup>70</sup>

Likewise, the court found the third factor, the public’s right to a speedy trial, weighed in favor of a bench trial. Noting that the Speedy Trial Act was designed “not just to benefit defendants but also to serve the public interest,” the court found the public interest to be better served by a bench trial, given that it remained unclear when, and if, a jury trial could commence.<sup>71</sup> While conceding that a bench trial would present some of the same safety risks as a jury trial, the court found “the increased number of individuals involved in jury selection and trial, and the invariably longer amount

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64 *Id.* (citations omitted) (emphasis in original).

65 Because of “confidence in the integrity of the public prosecutor,” the government is not required to provide a basis for its Rule 23(a) decision. *United States v. Sun Myung Moon*, 718 F.2d 1210, 1217-18 (2d Cir. 1983).

66 *Cohn*, 481 F. Supp.3d at 130-31.

67 *Id.* at 131, 132.

68 *Id.* at 131 (citing *Singer*, 380 U.S. at 38).

69 *Id.*

70 *Id.* at 132.

71 *Id.* at 134.

of time consumed in a jury trial, greatly increase both the disease transmission risk and the space and resources required.”<sup>72</sup>

Finally, the court found that other case-specific factors also weighed in favor of a bench trial. The court explained that there were complex legal issues that could “expose a jury to inadmissible and confusing evidence,” and the “defendant’s health conditions . . . require[d] that he be masked throughout the proceeding, posing some danger of jury prejudice,” even if all in the courtroom were required to wear a mask.<sup>73</sup>

After weighing all of these factors, the Court overruled the government’s objection and ordered that the case proceed to a nonjury trial, provided that the defendant submit a written jury trial waiver and confirm the waiver in open court.<sup>74</sup> This exercise of the Court’s discretion to grant a defendant’s request for a bench trial after careful consideration of several competing factors suggests to the Committee a possible template for an amended Rule 23.

## VII. RECOMMENDATION

The Committee recommends amendment of Rule 23(a) to remove the automatic veto power of the government without impairing the defendant’s constitutional right to a fair trial or the government’s interest in the integrity of the judicial process. Specifically, the Committee recommends that the rule be amended as follows:

(a) (1) JURY TRIAL. If the defendant is entitled to a jury trial, the trial must be by jury unless:

- (A) the defendant waives a jury trial in writing;
- (B) the government consents; and
- (C) the court approves.

(2) NONJURY TRIAL WITHOUT GOVERNMENT CONSENT. If the government does not consent, the court may permit a defendant to present reasons in writing for requesting a nonjury trial and may require the government to respond. The court may approve a defendant’s waiver of a jury trial without the government’s consent if it finds that the reasons presented by the defendant are sufficient to overcome the presumption in favor of jury trials.<sup>75</sup>

In evaluating possible amendments, the Committee considered recommending an amendment eliminating both the need for government consent and the requirement of court approval. Such an

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72 *Id.*

73 *Id.* at 134-35.

74 *Id.* at 135. There was no trial and no review of the Court’s decision in *Cohn* on the defendant’s jury trial waiver. That is because, one week after the Court’s decision, the defendant pled guilty to one-count Misdemeanor Information and was sentenced to time served.

75 See Appendix B for a full draft of the proposed amendment to Rule 23(a), including a proposed comment.

amendment, in the Committee’s opinion, has little chance of adoption by the Judicial Conference given the absence of authority for that proposal.<sup>76</sup>

The Committee also considered, but rejected, a potential amendment that would require random selection of a new trial judge where a defendant’s request for a bench trial is granted. The Committee concluded that the uncertainty introduced by this requirement would discourage many defendants from requesting bench trials. A further difficulty enforcing such a rule concerns a defendant’s potential withdrawal of a jury trial waiver after reassignment to a new judge.

Instead, the Committee recommends removing the need for government consent to a defendant’s waiver of a jury trial. The court’s approval would still be required, and the court, at its discretion, could require the defendant and the government to submit reasons (*ex parte* if appropriate) supporting their positions. The court would be free to consider a variety of factors, like those set forth by the court in *Cohn*, in deciding whether to grant a bench trial. The court could also *voir dire* the defendant to ensure the defendant freely and knowingly waives the right to a jury trial.

The Committee submits that its proposed amendment to Rule 23(a) would promote both fairness and efficiency, and would ultimately lead more defendants to exercise their constitutional right to trial.

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76 As noted in *United States v. Armbruster*, 2021 WL 2322566 (E.D. Wis. 2021), a case after *Cohn*, “no United States Court of Appeals appears to have approved a defendant’s waiver of a jury over the government’s objection. Indeed, the circuits that have considered this issue have uniformly upheld the trial court’s refusal to grant such waivers without governmental consent.” *United States v. United States Dist. Court*, 464 F.3d 1065, 1070 (9th Cir. 2006); see also *United States v. Clark*, 943 F.2d 775, 784 (7th Cir. 1991) (affirming denial of bench trial); *United States v. Alpern*, 564 F.2d 755, 758 (7th Cir. 1977) (same).

**State Survey on Jury Trial Waivers**

APPENDIX A



| State    | Authority re: When and How Defendant Can Waive Right to Trial By Jury   |  |  | Does the prosecutor have the ability to veto a defendant's request for a bench trial? | What measure of discretion does the Court have in the process?                       | Standards of Appellate Review (Sufficiency of Factual Findings)   |  |  |
|----------|---|--|--|---|--|---|--|--|
|          | State Procedural Rule   | Statute                                    | Constitutional Provision   |   |  | Standard of Appellate Review from a Bench Trial   | Standard of Appellate Review from Jury Trial   | Which standard is given more deference?  |
| Alabama  | In writing or in open court on record<br>AL R RCRP Rule 18.1  | Ala.Code 1975 § 15-14-30                   | No constitutional right for accused to waive trial by jury, Ala.Const. Art. I, § 11, Prothro v. State, 370 So. 2d 740 (Ala. Crim. App. 1979) | Yes, prosecution must consent to waiver (Rule 18)                                     | Court must approve, Rule 18, Prothro v. State, 370 So. 2d 740 (Ala. Crim. App. 1979) | Verdict will stand unless the judge's factual findings are "clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence" Baily v. City v. Ragland, 136 So.3d 498 (Ala. Ct. Crim. App. 2013). A presumption of correctness applies. | An appellate court may interfere with the jury's verdict only where it reaches "a clear conclusion that the finding and judgment are wrong." White v. State, 546 So. 2d 1014, 1017 (Ala. Crim. App. 1989). Presumption of correctness applies. | N/A. Same level of deference given to both. Messelt v. State, 351 So.2d 640 (Ala. Ct. Crim. App. 1977) ("[O]n appeal, the judgment of a trial court upon evidence taken ore tenus is to be treated like the verdict of a jury, and will not be disturbed unless plainly contrary to the weight of the evidence."). |
| Alaska   | In writing for felony cases; for misdemeanor cases waiver may be in writing or made on the record in open court<br>AK R RCRP Rule 23  | None                                       | No constitutional right for accused to waive trial by jury, AK CONST. Art. I, § 11   | Yes, prosecution must consent to waiver (Rule 23)                                     | Court must approve, Rule 23  | Substantial Evidence Standard: The substantial evidence test governs appellate review of verdicts in judge-tried cases. Y.J. v. State, 130 P.3d 954 (Alaska 2006). Verdict will stand as long as "evidence exists to support the judge's conclusion." Id.                             | Substantial Evidence Standard: The "same test that an appellate court applies to jury verdicts" also applies to judge-tried cases. Shayan v. State, 373 P.3d 532 (Alaska 2015).  | N/A. Same level of deference given to both. Shayan v. State, 373 P.3d 532 (Alaska 2015) (recognizing that the "same test that an appellate court applies to jury verdicts" also applies to judge-tried cases).   |
| Arizona  | In writing or on the record in open court on record; the court must address the defendant personally, inform the defendant of the defendant's right to a jury trial, and determine that the defendant's waiver is knowing, voluntary, and intelligent<br>AZ ST RCRP Rule 18.1 | None                                       | AZ CONST Art. 6 § 17: a jury may be waived by the parties in a criminal case with the court's consent  | Yes, State must consent to waiver (Rule 18.1)   | Court must approve, Rule 23  | Substantial Evidence Standard. State v. Natzke, 25 Ariz. App. 520 (1976).   | Substantial Evidence Standard. State v. Flowers, 110 Ariz. 566 (1974)  | N/A. Same level of deference given to both.  |
| Arkansas | In writing or in open court or through counsel in open court in presence of defendant<br>AR R RCRP Rule 31.2; In fine only misdemeanor case trial may be waived by attorney, corporation by waive through attorney or corporate officer<br>AR R RCRP Rule 31.3                | AR ST § 16-89-108 Waivers in certain cases | AR CONST Art. 2, § 7 Jury trials; rights   | Yes, except in capital cases  | In capital cases, the court must determine that the defendant's waiver is voluntary  | Substantial Evidence Standard. Colen v. State, 2022 Ark. App. 148   | Substantial Evidence. See Harjo v. State, 2017 Ark. App. 337.  | N/A. Same level of deference given to both. Cook v. State, 878 S.W.2d 765 (Ark. App. 1994) (en banc) ("If the decision of the court or jury is supported by substantial evidence, we will affirm.").   |

| State       | Authority re: When and How Defendant Can Waive Right to Trial By Jury       |                                |   | Does the prosecutor have the ability to veto a defendant's request for a bench trial?   | What measure of discretion does the Court have in the process?  | Standards of Appellate Review (Sufficiency of Factual Findings)   |  |   |
|-------------|---|--------------------------------|---|---|---|---|--|---|
|             | State Procedural Rule   | Statute                        | Constitutional Provision  |   |   | Standard of Appellate Review from a Bench Trial   | Standard of Appellate Review from Jury Trial   | Which standard is given more deference?   |
| California  | CA PENAL § 1167 Waiver of jury trial; announcement of findings; form; entry | None                           | CA CONST Art. 1, § 16 Jury trial; in open court by defendant and defendant's counsel      | Yes, "by consent of both parties," See CA CONST Art. 1  | "[T]he court retains the right to require a jury trial." People v. Kipnis, 85 Cal. Rptr. 547 (Ca. Ct. App. 1970).   | Substantial Evidence Standard: In reviewing a judgment based upon a statement of decision following a bench trial, Court of Appeal applies substantial evidence standard of review to the trial court's findings of fact, and under this deferential standard of review, findings of fact are liberally construed to support the judgment and Court considers evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings. Thompson v. Asimos, 6 Cal. App. 5th 970, 212 Cal. Rptr. 3d 158 (2016).<br><br>We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. People v. Perryman, No. B265183, 2016 WL 7217187, at *5 (Cal. Ct. App. Dec. 12, 2016). A reversal for insufficient evidence is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" the trial court's verdict. Id. | Substantial Evidence Standard: To prevail on a sufficiency of the evidence argument on appeal, defendant must present his case to appellate court consistently with the substantial evidence standard of review. People v. Paredes, 61 Cal. App. 5th 858, 276 Cal. Rptr. 3d 165 (2021), review denied (May 26, 2021). To prevail on a sufficiency of the evidence argument on appeal, defendant must set forth in his opening brief all of the material evidence on the disputed elements of the crime in the light most favorable to the People, and then must persuade appellate court that evidence cannot reasonably support the jury's verdict. Id. | N/A. Same level of deference given to both.   |
| Colorado    | CO ST RCRP Rule 23  | CO ST § 16-10-101              | No. People v. Dist. Ct. of Colorado's Seventeenth Jud. Dist., 843 P.2d 6, 8 (Colo. 1992). | YES. Prosecution has right to refuse to consent to waiver in all cases in which the accused has the right to request a trial by jury. CO ST § 16-10-101 | Where the prosecution objects to defendant's waiver of trial by jury, and the defendant contends that trial by jury would result in a due process violation, the decision as to waiver rests with the trial court. People v. Dist. Ct. of Colorado's Seventeenth Jud. Dist., 843 P.2d 6, 11 (Colo. 1992). | Manifestly Erroneous Standard. Vigil v. Lamm, 190 Colo. 180 (1976).   | Manifestly Erroneous standard.   | N/A. Same level of deference given to both. People v. Tomaske, 2022 WL 1573059 (Colo. Ct. App. May 19, 2022), reh'g denied (June 2, 2022) ("[S]ufficiency challenges after a bench trial are no different than those after a jury trial").  |
| Connecticut | None (see statute)  | Conn. Gen. Stat. Ann. § 54-82b | Ct. Const. art. 1, § 8  | Not specified. CT ST § 54-82b, CT R SUPER CT CR § 42-1.   | Court examines totality of the circumstances surrounding the waiver to determine if defendant intentionally relinquished or abandoned defendant's constitutional right to jury. State v. Ells (1995) 667 A.2d 556, 39 Conn.App. 702.  | . Same standard applies to both. State v. Weathers, 339 Conn. 187 (Conn. 2021).   | Same standard applies to both. State v. Weathers, 339 Conn. 187 (Conn. 2021).  | N/A. Same level of deference given to both. State v. Weathers, 260 A.3d 440 (Conn. 2021) (recognizing that in bench trials "the normal rules for appellate review of factual determinations apply and the evidence must be given a construction favorable to the court's verdict"). |
| Delaware    | DE R SUPER CT RCRP Rule 23  | None. See state rule.          | None. See state rule.   | YES. DE R SUPER CT RCRP Rule 23   | Court must consent to waiver for it to be valid. DE R SUPER CT RCRP Rule 23.  | Clear Error Standard: A deferential standard of review is applied to factual findings by a trial judge: those factual determinations will not be disturbed on appeal if they are based upon competent evidence and are not clearly erroneous. Burrell v. State, 953 A.2d 957 (Del. 2008).   | Clear Error Standard. Banther v. State, 823 A.2d 467 (Del. 2003).  | N/A. Same level of deference given to both.   |

| State   | Authority re: When and How Defendant Can Waive Right to Trial By Jury |                       |                               | Does the prosecutor have the ability to veto a defendant's request for a bench trial? | What measure of discretion does the Court have in the process?  | Standards of Appellate Review (Sufficiency of Factual Findings)  |   |  |
|---------|---|-----------------------|-------------------------------|---|---|--|---|--|
|         | State Procedural Rule   | Statute               | Constitutional Provision      |   |   | Standard of Appellate Review from a Bench Trial  | Standard of Appellate Review from Jury Trial  | Which standard is given more deference?  |
| Florida | FL ST RCRP Rule 3.260<br>Waiver of jury trial                         | None. See state rule. | None. See state rule.         | YES. FL ST RCRP Rule 3.260  | No. Trial by judge is mandatory when both parties agree. Warren v. State, 632 So.2d 204 (Fla. Dist. Ct. App. 1994). | "Competent Substantial Evidence" Standard: When a decision in a non-jury trial is based on findings of fact from disputed evidence, it is reviewed on appeal for competent, substantial evidence because the trial judge is in the best position to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses. Harrington v. State, 238 So. 3d 294, 297 (Fla. Dist. Ct. App. 2018).   | Same standard applies to both.  | N/A. Same level of deference given to both. Siewert v. Casey, 80 So. 3d 1114 (Fla. Dist. Ct. App. 2012) ("It is the role of the finder of fact, whether a jury or a trial judge, to resolve conflicts in the evidence and great deference is afforded the finder of fact."). |
| Georgia | GA R UNIF SUPER CT Rule 33.8  | GA ST § 15-10-61      | None. See state rule/statute. | YES. Zigan v. State, 281 Ga. 415, 638 S.E.2d 322 (2006)                               | Court may deny request. See Zigan, 281 Ga. 416 (2006).  | Clearly Erroneous Standard: In bench trials, the findings of the trial court will not be set aside unless clearly erroneous and regard must be given to the trial court's opportunity to assess the credibility of the witnesses. Brown v. State, 351 Ga. App. 808, 808, 833 S.E.2d 302, 303 (2019). When evaluating the sufficiency of evidence, the proper standard for review is whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Hayes v. State, 292 Ga. 506, 506, 739 S.E.2d 313, 314 (2013).<br><br>The clearly erroneous test is the same as the any-evidence rule, and, as a result, the Court of Appeals will not disturb fact findings of a trial court if there is any evidence to sustain them. Serdula v. State, 356 Ga. App. 94, 845 S.E.2d 362 (2020), cert. denied (Apr. 5, 2021) | Same standard applies. Moore v. State, 321 Ga. App. 813, 814, 743 S.E.2d 486, 487 (2013). | N/A. Same level of deference given to both. Moore v. State, 743 S.E.2d 486, 487 (Ga. 2013) ("The trial court sits as the trier of fact; its findings are akin to a jury verdict and will not be disturbed if there is any evidence to support them.").                       |

| State    | Authority re: When and How Defendant Can Waive Right to Trial By Jury |                              |                          | Does the prosecutor have the ability to veto a defendant's request for a bench trial?   | What measure of discretion does the Court have in the process?   | Standards of Appellate Review (Sufficiency of Factual Findings)   |  |  |
|----------|---|------------------------------|--------------------------|---|--|---|--|--|
|          | State Procedural Rule   | Statute                      | Constitutional Provision |   |  | Standard of Appellate Review from a Bench Trial   | Standard of Appellate Review from Jury Trial   | Which standard is given more deference?  |
| Hawaii   | Haw. R. Penal P. 23; Haw. R. Penal P. 5(b)(3)                         | Haw. Rev. Stat. § 806-61     | Haw. Const. art. I, § 14 | NO. Only court consent required. Haw. Rev. Stat. § 806-61.  | "Although the rule indicates the waiver may be given by written or oral consent, the rule does not relieve the court of its obligation to ensure, through an appropriate oral colloquy in court, that the waiver was knowingly, intelligently, and voluntarily given." State v. Gomez-Lobato, 312 P.3d 897, 901 (Haw. 2013). | Clearly Erroneous Standard: Trial court's findings of fact will not be disturbed unless clearly erroneous. State v. Kwong, 149 Haw. 106, 482 P.3d 1067 (2021). "A finding of fact is clearly erroneous when the record lacks substantial evidence to support the finding or, despite substantial evidence in support of the finding, we are nonetheless left with a definite and firm conviction that a mistake has been made." State v. Park, 495 P.3d 392 (Hawaii Court of Appeals 2021). | The Supreme Court reviews the sufficiency of the evidence under the following standard: evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or jury, and the test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact. State v. Delos Santos, 124 Haw. 130, 238 P.3d 162 (2010). | N/A. Same level of deference given to both. State v. Matavale, 166 P.3d 322, 331 (Haw. 2007) ("Evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or a jury"). |
| Idaho    | I.C.R. 23   | Idaho Code § 19-1902         | Idaho Const. art. I, § 7 | YES. Prosecutor's consent is required.  | Level of discretion unclear, but Idaho Supreme Court held that trial court may deny accused's waiver of right to jury trial without violating constitutional rights. State v. Creech, 589 P.2d 114 (Idaho 1979).   | Substantial Evidence Standard. State v. Clark, 168 Idaho 503, 506-07, 484 P.3d 187, 190-91 (2021).  | Substantial Evidence Standard: The appropriate standard of review on an allegation of insufficiency of evidence "is whether there is substantial and competent evidence to support the jury's verdict. State v. Thomas, 133 Idaho 172, 174, 983 P.2d 245, 247 (Ct. App. 1999).   | N/A. Same level of deference given to both.  |
| Illinois | IL R 18 CIR Rule 30.13; IL R 22 CIR Rule 10.23                        | 725 Ill. Comp. Stat. 5/103-6 | Ill. Const. art. I, § 13 | No.   | No consent or approval required. Discretion limited to whether waiver is voluntary.  | Beyond-a-reasonable-doubt standard of review: "A conviction will not be set aside on appeal unless the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of the defendant's guilt." People v. Walls, 2022 WL 2035719 (Ill. App.).  | Beyond-a-reasonable-doubt standard. People v. Bush, 2022 IL App. (3d) 190283   | N/A. Same level of deference given to both. People v. Belk, 326 Ill. App. 3d 290 (2001) (recognizing that the "same standard of review" governing sufficiency challenges applies "regardless of whether the defendant receives a bench or jury trial").  |
| Indiana  | Ind. R. Crim. P. 22   | Ind. Code § 35-37-1-2        | Ind. Const. art. I, § 13 | NO. State does not have the right to demand a jury trial over an accused's objection. State v. Bonds, 94 N.E.3d 333, 338-39 (Ind. Ct. App. 2018). | Not specified but but court must determine if waiver is voluntarily, knowingly and intelligently made with sufficient awareness of relevant circumstances surrounding its entry and its consequences.  | Substantial Evidence. Scott v. State, 895 N.E.2d 369 (Ind. Ct. App. 2008).  | Substantial Evidence Standard.   | N/A. Same level of deference given to both.  |
| Iowa     |   |                              | Iowa Const. art. I, § 9  | No. Defendant has absolute right to nonjury trial. State v. Henderson, 287 N.W.2d 583 (Iowa 1980).  | No consent or approval required. Discretion limited to whether waiver is voluntary.  | Substantial Evidence Standard: Trial court's verdict in jury-waived trial is binding on appellate court, and appellate court will uphold it unless the record lacks substantial evidence to support such a finding. State v. Fordyce, 940 N.W.2d 419 (Iowa 2020).   | Appellate court reviews a trial court's findings in a jury-waived case as it would a jury verdict. State v. Kemp, 688 N.W.2d 785 (Iowa 2004).  | N/A. Same level of deference given to both. State v. Kemp, 688 N.W.2d 785 (Iowa 2004) ("An appellate court reviews a trial court's findings in a jury-waived case as it would a jury verdict.")  |

| State     | Authority re: When and How Defendant Can Waive Right to Trial By Jury |                   |                             | Does the prosecutor have the ability to veto a defendant's request for a bench trial? | What measure of discretion does the Court have in the process?  | Standards of Appellate Review (Sufficiency of Factual Findings)  |  |   |
|-----------|---|-------------------|-----------------------------|---|---|--|--|---|
|           | State Procedural Rule   | Statute           | Constitutional Provision    |   |   | Standard of Appellate Review from a Bench Trial  | Standard of Appellate Review from Jury Trial   | Which standard is given more deference?   |
| Kansas    | N/A   | KSA § 22-3403(1)  | Kan. Const. pmb. § 5        | Yes. Prosecution consent required. State v. Mullen, 51 Kan.App.2d 514 (2015).         | Court's consent is required by statute.   | Substantial Evidence Standard  | Substantial Evidence Standard  | N/A. Same level of deference given to both. State v. Reichenberger, 495 P.2d 919 (1972) (recognizing that in a judge-tried case "the facts found, if supported by substantial competent evidence, must be accorded on appellate review the same weight as if found by a jury").   |
| Kentucky  | Ky. RCr. 9.26   | K.R.S. § 29A. 270 | Ky. Const. art. II § 2      | Yes. Commonwealth's consent is required.  | Court's consent is required.  | Substantial Evidence Standard. Anderson v. Commonwealth, 352 S.W.3d 577 (Ky. 2011)   | Same standard applies.   | N/A. Same level of deference given to both. Simpson v. Commonwealth, 244 S.W. 65 (1922) (recognizing that upon review of a sufficiency challenge from a bench trial "the same effect should be given to the finding of the facts by the court as is given to the verdict of a properly instructed jury").                                 |
| Louisiana | La. C. Cr. P. Art. 780, 782   | None              | La. Const. amd. § 17(A)     | Yes, per statute.   | Court has some discretion to approve defendant's request for trial by jury, separate and apart from deciding whether or not the waiver was voluntary. See State v. Guy, 16 So. 404 (La. 1894) (finding no abuse of discretion based on trial court's refusal to allow defendant to waive trial by jury, where the court had concurred with the jury in the verdict in a motion for new trial, giving the defendant the benefit of a trial by court as well as by jury). | Manifestly/Clearly Erroneous Standard: Trial judge's factual determination is given great weight and will not be disturbed upon appeal unless clearly erroneous. State v. Colomb, 261 La. 548, 260 So. 2d 619 (1972).<br><br>Under standard for sufficiency of evidence, the pertinent appellate inquiry regarding the sufficiency of the evidence in judge trials must remain, as it does in jury trials, on the rationality of the result and not on the thought processes of the particular fact finder. State v. Marshall, 2004-3139 (La. 11/29/06), 943 So. 2d 362.<br><br>The standard of appellate review for a sufficiency of the evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). | The appellate standard of review in jury and non-jury trials are the same and the appellate courts are to decide whether the trial court's judgment was manifestly erroneous or clearly wrong. The Court of Appeal's function on appellate review is to determine whether evidence was sufficient for the trial court's factual findings, and whether those findings were clearly wrong. Burkett v. Crescent City Connection Marine Div., 98-1237 (La. App. 4 Cir. 2/10/99), 730 So. 2d 479, 484, writ denied, 99-1416 (La. 9/3/99), 747 So. 2d 543. | N/A. Same level of deference given to both. State v. Marshall, 943 So.2d 362 (La. 2006) (explaining that on appellate review of a sufficiency challenge "the pertinent inquiry in judge trials must remain, as it does in jury trials, on the rationality of the result and not on the thought processes of the particular fact finder"). |
| Maine     | Me. R. U. Crim. P. 23   | None              | M.R.S.A. Const. Art. 1, § 6 | No.   | Court approval required by rule.  | Clearly Erroneous Standard: Factual finding in criminal case in which jury has been waived is only clearly erroneous if there is no competent evidence in record to support it. State v. Bartlett, 661 A.2d 1107 (Me. 1995).   | When reviewing challenge to sufficiency of evidence to support verdict in bench trial, standard of review is same as that for jury verdict. State v. Gorman, 648 A.2d 967 (Me. 1994).  | N/A. Same level of deference given to both. State v. Gove, 379 A.2d 152 (Me. 1977) (rejecting argument that a different standard of appellate review applied to sufficiency challenge from a bench trial, and holding that the same standard applies in both bench trials and jury trials).   |

| State         | Authority re: When and How Defendant Can Waive Right to Trial By Jury |                              |                           | Does the prosecutor have the ability to veto a defendant's request for a bench trial?   | What measure of discretion does the Court have in the process?   | Standards of Appellate Review (Sufficiency of Factual Findings)  |  |   |
|---------------|---|------------------------------|---------------------------|---|--|--|--|---|
|               | State Procedural Rule   | Statute                      | Constitutional Provision  |   |  | Standard of Appellate Review from a Bench Trial  | Standard of Appellate Review from Jury Trial   | Which standard is given more deference?   |
| Maryland      | Rule 4-246  | MD Crim Proc § 6-101         | Md. Const. art. 21        | No, per rule.   | No consent or approval required. Discretion limited to whether waiver is voluntary.  | Clearly Erroneous Standard: When reviewing bench trials, an appellate court will review findings of fact under the "clearly erroneous standard," meaning that a finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion. <i>Scriber v. State</i> , 236 Md. App. 332, 181 A.3d 946 (2018).   | Court reviews a challenge to the sufficiency of the evidence in a jury trial by determining whether the evidence, viewed in a light most favorable to the prosecution, supported the conviction and whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. <i>Smith v. State</i> , 415 Md. 174, 184, 999 A.2d 986, 991 (2010). | N/A. Same level of deference given to both. <i>Chisum v. State</i> , 132 A.3d 882 (Md. 2016) (holding that "the test of the legal sufficiency of the evidence to support the conviction is the same in a jury trial and in a bench trial"). |
| Massachusetts | Mass. R. Crim. P. 19 (a)  | Mass. Gen. Laws ch. 263, § 6 | Mass. Const. art. XII     | NO. Prosecutor has no say over the decision. See Mass. R. Crim. P. 19 (a); Mass. Gen. Laws ch. 263, § 6; Mass. Const. art. XII.   | Court may deny defendant's waiver of trial by jury "for any good and sufficient reason provided that such refusal is given in open court and on the record." See Mass. R. Crim. P. 19 (a); <i>Commonwealth v. Gebo</i> , 188 N.E.3d 80, 90 (Mass. 2022). | Clearly Erroneous Standard: On review of a jury-waived trial, the Supreme Judicial Court generally accepts the trial judge's findings of fact unless they are clearly erroneous. <i>Com. v. Pugh</i> , 462 Mass. 482, 969 N.E.2d 672 (2012). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court of the entire evidence is left with the definite and firm conviction that a mistake has been committed." <i>Id.</i>  | Appellate court reviews "the evidence presented at trial, otgether with reasonable inferences drawn therefrom, in the light most favorable to the Commonwealth to determine whether any rational jury could have found each element of the offense beyond a reasonable doubt." <i>Commonwealth v. Morrison</i> , 150 N.E.3d 826 (Mass. App. 2020).   | N/A. Same level of deference given to both.   |
| Michigan      | Mich. Ct. R. 6.401  | Mich. Code Crim. P. 763.3    | Mich. Const. art. I, § 20 | YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver). See Mich. Code Crim. P. 763.3; <i>People v. Kirby</i> , 487 N.W.2d 404, 406 (Mich. 1992). | Court's approval is required. See Mich. Code Crim. P. 763.3; <i>People v. Kirby</i> , 487 N.W.2d 404, 406 (Mich. 1992).  | Clear Error Standard: Trial court's factual findings in a bench trial are reviewed for clear error. <i>People v. Anderson</i> , No. 354860, 2022 WL 981299 (Mich. Ct. App. Mar. 31, 2022).<br><br>Standard of review for sufficiency of evidence in bench trial is whether trial court clearly erred in its ruling, or viewing evidence in light most favorable to prosecution, whether rational trier of fact could find essential elements of crime were proven beyond reasonable doubt. <i>People v. Gay</i> , 149 Mich. App. 468, 386 N.W.2d 556 (1986). | Same standard applies as in bench trials. <i>People v. Oros</i> , 917 N.W.2d 559, 564 (2018).  | N/A. Same level of deference given to both.   |

| State       | Authority re: When and How Defendant Can Waive Right to Trial By Jury   |   |   | Does the prosecutor have the ability to veto a defendant's request for a bench trial?   | What measure of discretion does the Court have in the process?  | Standards of Appellate Review (Sufficiency of Factual Findings)  |  |   |
|-------------|---|---|---|---|---|--|--|---|
|             | State Procedural Rule   | Statute   | Constitutional Provision  |   |   | Standard of Appellate Review from a Bench Trial  | Standard of Appellate Review from Jury Trial   | Which standard is given more deference?   |
| Minnesota   | Minn. R. Crim. P. 26.01   | None (see State Procedural Rule)  | Minn. Const. art. I, § 4  | NO. Prosecutor has no say over the decision. See State v. Lessley, 779 N.W.2d 825 (Minn. 2010).   | Yes. Court's approval is required   | Clearly Erroneous Standard: A trial court's findings, as trier of fact in a criminal case, will not be set aside unless clearly erroneous. State v. Wiley, 348 N.W.2d 86 (Minn. Ct. App. 1984), aff'd, 366 N.W.2d 265 (Minn. 1985).  | Where defendant waived his right to jury trial in criminal prosecution, trial court's findings will be given the same weight as a jury verdict. State v. Knowlton, 383 N.W.2d 665 (Minn. 1986).<br><br>Findings of the district court, after waiver of a jury trial by a defendant, are entitled to the same weight on appeal as a jury verdict. State v. Tracy, 667 N.W.2d 141 (Minn. Ct. App. 2003).   | N/A. Same level of deference given to both. State v. Holliday, 745 N.W.2d 556 (Minn. 2008) ("The appellate court reviews criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain convictions."). |
| Mississippi | Miss. R. Crim. P. 18.1  | None (see State Procedural Rule)  | Miss. Const. art. 3, § 31   | YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver). See Miss. R. Crim. P. 18.1. | Court must consent to the waiver before it can be valid. See Miss. R. Crim. P. 18.1   | Manifestly Erroneous/ Substantial Evidence Standard: "For review of the findings of a trial judge sitting without a jury, this Court will reverse 'only where the findings of the trial judge are manifestly erroneous or clearly wrong.'" Amerson v. State, 648 So. 2d 58, 60 (Miss. 1994). Such error does not occur if there is substantial, credible, and reasonable evidence supporting the decision. Briggs v. State, 337 So. 716 (Miss. 2022). There must be substantial evidence showing that the trial judge was manifestly wrong. Solitro v. State, 246 So.3d 941 (Miss. Ct. App. 2018). | Appellate court "will not disturb a verdict when substantial evidence supports it." Bridges v. State, 716 So.2d 614, 617 (Miss. 1998).   | N/A. Same level of deference given to both.   |
| Missouri    | Mo. R. RCRP Rule 27.01, in felony cases, waiver must be made in open court with the defendant present or present by video and entered on the record | None (other than an ordinance for traffic violations), MO R. ORD AND TRAF VIOL Rule 37.61 | Mo. Const. Art. 1, § 22a, in every criminal case, any defendant with the assent of the court may waive a jury trial and submit the trial of such case to the Court. | Not by statute, but the court has discretion and must assent in order for the defendant to have a bench trial.                            | Waiver may only be made "with the assent of the court." Mo. R. RCRP Rule 27.01(B). "There is no absolute right to be tried by court rather than jury." State v. Hornbuckle, 746 S.W.2d 580 (Mo. App. 1988). | The standard of review is the same for a bench trial as it is for a case tried before a jury. "This court's review of a court-tried case is the same as for a case tried by a jury." State v. Bledsoe, 920 S.W.2d 538, 539 (Mo. App. 1996). The court "view[s] all evidence in the light most favorable to the state and affirm the trial court's judgment if there is substantial evidence to support its findings." State v. Bledsoe, 920 S.W.2d 538 (Mo. App. 1996)   | The standard of review is the same for a bench trial as it is for a case tried before a jury. "This court's review of a court-tried case is the same as for a case tried by a jury." State v. Bledsoe, 920 S.W.2d 538, 539 (Mo. App. 1996). The court "view[s] all evidence in the light most favorable to the state and affirm the trial court's judgment if there is substantial evidence to support its findings." State v. Bledsoe, 920 S.W.2d 538 (Mo. App. 1996) | N/A. Same level of deference given to both. State v. Bledsoe, 920 S.W.2d 538, 539 (Mo. App. 1996) ("This court's review of a court-tried case is the same as for a case tried by a jury.").   |

| State         | Authority re: When and How Defendant Can Waive Right to Trial By Jury |  |                          | Does the prosecutor have the ability to veto a defendant's request for a bench trial?  | What measure of discretion does the Court have in the process?   | Standards of Appellate Review (Sufficiency of Factual Findings)   |   |   |
|---------------|---|--|--------------------------|--|--|---|---|---|
|               | State Procedural Rule   | Statute  | Constitutional Provision |  |  | Standard of Appellate Review from a Bench Trial   | Standard of Appellate Review from Jury Trial  | Which standard is given more deference?   |
| Montana       | None  | Mont. Code Ann. § 46-16-110. Waiver may be made with the written consent of both parties.  | Mont. Const. Art. 2 § 26 | Written consent "of the parties" is required for the defendant to waive his/her right to a jury trial. Mont. Code Ann. § 46-16-110. This has been construed as requiring written consent from the prosecutor. State ex. Rel. Long v. Justice Court, Lake County, 156 P.3d 5, 8 (Mont. 2007). | Not clear. The statute requires court approval to try case to less jurors than the constitution guarantees, but the following provision allowing waiver by written consent of the parties does not contain similar language requiring court approval. Mont. Code Ann. 46-16-110. | "On appeal, we simply determine if there is substantial evidence to support the defendant's guilt beyond a reasonable doubt." State v. Longacre, 542 P.2d 1221, 1222 (Mont. 1975). "[I]n determining whether there is substantial evidence to support the verdict entered by the trial court, this Court will examine the evidence in the light most favorable to the state." State v. Duncan, 593 P. 2d 1026, 1030 (Mont. 1979)."  | Same standard as bench trial. "Thus, the substantial evidence test applies to appeals both from judge and jury convictions. Therefore, in determining whether there is substantial evidence to support the verdict entered by the trial court, this Court will examine the evidence in the light most favorable to the state." State v. Duncan, 593 P. 2d 1026, 1030 (Mont. 1979).  | N/A. Same level of deference given to both. State v. Duncan, 593 P. 2d 1026, 1030 (Mont. 1979) ("Thus, the substantial evidence test applies to appeals both from judge and jury convictions.")   |
| Nebraska      | None  | There is no statute specific to waiver in criminal cases, except for waiver to as jury trial in cases involving obscenity. See Neb. Stat. Ann. § 28-814. Neb. Stat. Ann. § 25-1126 discusses waiver of jury trials but is not specific to criminal cases. The Nebraska Supreme Court has held that a written waiver of jury trial signed by defense counsel in a criminal case and acquiesced in by defendant is a valid waiver. State v. Klatt, 219 N.W.2d 761 (Neb. 1974). | None                     | No prosecutor consent required. State v. Carpenter, 150 N.W.2d 129 (Neb. 1967)   | Consent of court required, but courts should permit waiver "whenever it will promote the fair, reasonable, and efficient administration of justice." State v. Godfrey, 155 N.W.2d 438 (Neb. 1968).   | "A trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous." State v. Masters, 524 N.W.2d 342, 345 (Neb. 1994). "A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction." State v. Masters, 524 N.W.2d at 345.   | "On review, criminal conviction must be sustained if the evidence, viewed and construed most favorably to the state, is sufficient to support the conviction; in determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury, which are within the jury's province for disposition." State v. Larsen, 586 N.W. 2d 641, 646-647 (Neb. 1998). | N/A. Same level of deference given to both. State v. Masters, 524 N.W.2d 342, 345 (Neb. 1994) ("A trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.") |
| Nevada        | None  | Prosecutor consent is required to waive criminal trial by jury. Nev. Rev. Stat. § 175.011.1. Defendant can waive a trial by jury if done so in writing with the approval of the court and consent of the prosecutor not less than 30 days before trial except for capital cases, which much be tried by jury.  | None                     | Prosecutor consent is required to waive criminal trial by jury. Nev. Rev. Stat. § 175.011.1  | Court approval is required to waive criminal trial by jury. Nev. Rev. Stat. § 175.011.1  | "[W]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Mitchell v. State, 192 P.3d 721, 727 (Nev. 2008).  | "The standard of review for sufficiency of the evidence in a criminal case is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution." Morgan v. State, 416 P.3d 212 (Nev. 2018).   | N/A. Same level of deference given to both.   |
| New Hampshire | NH R. Crim. Rule 21   | NH Rev. Stat. Ann. § 606:7. Defendant may waive the right in writing at the time of a plea or before the jury is impaneled, and file the written waiver with the clerk of court. Court or prosecutorial approval is not required.  | None                     | Consent of the state is not required. NH R. Crim. Rule 21(b).  | Court approval is not required. NH Rev. Stat. Ann. § 606:7   | " A challenge to the sufficiency of the evidence raises a claim of legal error; therefore, our standard of review is de novo. To prevail upon a challenge to the sufficiency of the evidence, the defendant must prove that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt." State v. Vincelette, 214 A.3d 158 (N.H. 2019) (internal citations omitted). | Same as for bench trial. See State v. Morrill, 156 A.3d 1028, 1036 (N.H. 2017).   | N/A. Same level of deference given to both.   |



| State      | Authority re: When and How Defendant Can Waive Right to Trial By Jury |         |                          | Does the prosecutor have the ability to veto a defendant's request for a bench trial?                               | What measure of discretion does the Court have in the process?   | Standards of Appellate Review (Sufficiency of Factual Findings)  |  |   |
|------------|---|---------|--------------------------|---|--|--|--|---|
|            | State Procedural Rule   | Statute | Constitutional Provision |   |  | Standard of Appellate Review from a Bench Trial  | Standard of Appellate Review from Jury Trial   | Which standard is given more deference?     |
| New Jersey | N.J. Ct. R. 1:8-1   | None    | None                     | No; but notice must be given to the prosecuting attorney who shall have an opportunity to be heard. (Rule 1:8-1(a)) | Court must approve waiver. (Rule 1:8-1(a)). A defendant must sign a jury waiver form which advises that (i) a jury is composed of 12 members of the community, (ii) the defendant may participate in the selection of jurors, (iii) all 12 jurors must unanimously vote to convict, and (iv) if a jury trial is waived, a judge alone will decide guilt or innocence. If signed, the trial judge must engage in a colloquy to address these four points and the voluntariness of the waiver). See State v. Blann, 217 N.J. 517, 519, 90 A.3d 1253, 1254 (2014) (NJ Supreme Court exercised its supervisory powers to establish these two mandates to ensure full understanding in waiver of jury trial). | Appellate court must have a definite conviction that the trial court went so wide of the mark that a mistake must have been made. State v. \$36,560.00 in U.S. Currency, 673 A.2d 810 (N.J. App. Div. 1996). | Appellate court can only disturb jury findings if the jury could not have reasonably used the evidence to reach its verdict. State v. Morgan, 33 A.3d 527 (N.J. App. Div. 2011). | N/A. Same level of deference given to both. |

| State      | Authority re: When and How Defendant Can Waive Right to Trial By Jury                        |  |                             | Does the prosecutor have the ability to veto a defendant's request for a bench trial?  | What measure of discretion does the Court have in the process? | Standards of Appellate Review (Sufficiency of Factual Findings)  |   |   |
|------------|--|--|-----------------------------|--|--|--|---|---|
|            | State Procedural Rule  | Statute                                | Constitutional Provision    |  |  | Standard of Appellate Review from a Bench Trial  | Standard of Appellate Review from Jury Trial  | Which standard is given more deference?   |
| New Mexico | N.M. R. Crim. P. Dist. Ct. 5-605; NM R MAG CT RCRP Rule 6-602; NM R METRO CT RCRP Rule 7-602 | in metropolitan court: NM ST § 34-8A-5 | N.M. Const., art. II, § 12. | In metropolitan court and magistrate court, jury trial for misdemeanors or offenses where the potential aggregate penalty includes imprisonment in excess of 6 months can be waived with court and prosecutor consent. NM R METRO CT RCRP Rule 7-602; NM R MAG CT RCRP Rule 6-602. In district court, may waive with court and prosecutor consent. NM R DIST CT RCRP Rule 5-605. | Same   | “The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction.... In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict.” State v. Knight, 2019-NMCA-060, ¶ 11, 450 P.3d 462, 465-66 (bench trial). | The standard by which an appellate court reviews a jury verdict for sufficiency of the evidence is well-established. “Evidence is viewed in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict.” State v. Garcia, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (internal quotation marks and citations omitted). We then determine “whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction.” Id. We have made clear that “[b] ecause an appellate tribunal does not enjoy the same exposure to the evidence and witnesses as the jury at trial, our review for sufficiency of the evidence is deferential to the jury’s findings.” Id. And we have explicitly said that: New Mexico appellate courts will not invade the jury’s province as fact-finder by second-guess[ing] the jury’s decision concerning the credibility of witnesses, reweigh[ing] the evidence, or substitut[ing] its judgment for that of the jury. So long as a rational jury could have found beyond a reasonable doubt the essential facts required for a conviction, we will not upset a jury’s conclusions. Id. (alterations in original) (internal quotation marks and citations omitted). | N/A. Same level of deference given to both. State v. Quintin C., 451 P.3d 901 (N.M.C.A. 2019) (“In a bench trial, the trial judge takes the place of the jury as the finder of fact, and in this respect, the situation in this appeal is similar to an appeal predicated upon an error in an instruction of law given to a jury.” (quotation omitted) (cleaned up)). |

| State          | Authority re: When and How Defendant Can Waive Right to Trial By Jury |                  |                          | Does the prosecutor have the ability to veto a defendant's request for a bench trial? | What measure of discretion does the Court have in the process?   | Standards of Appellate Review (Sufficiency of Factual Findings)   |  |  |
|----------------|---|------------------|--------------------------|---|--|---|--|--|
|                | State Procedural Rule   | Statute          | Constitutional Provision |   |  | Standard of Appellate Review from a Bench Trial   | Standard of Appellate Review from Jury Trial   | Which standard is given more deference?  |
| New York       | NY CRIM PRO § 320.10  | None             | NY CONST Art. 1, § 2     | No.   | Consent of court. NY CONST Art. 1, § 2   | Although the defendant was convicted after a nonjury trial, the appropriate standard for evaluating his weight of the evidence argument is the same, regardless of whether the fact-finder was a judge or jury. <i>People v. Zephyrin</i> , 52 A.D.3d 543, 543, 860 N.Y.S.2d 149, 150 (2008). Thus, we must first determine, based upon the credible evidence, whether a different result would have been unreasonable, and if it would not have been, then we must “weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony.” <i>Id.</i>  | In assessing whether a verdict is supported by the weight of the evidence, we must first determine whether, based upon all of the credible evidence, a different finding would have been unreasonable; if not, we must then “weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony” to determine whether the jury gave “the evidence the weight it should be accorded.” <i>People v. Wilder</i> , 200 A.D.3d 1303, 158 N.Y.S.3d 422, 424 (2021). However, we also accord “[g]reat deference” to the jury’s credibility determinations, given that the jurors have the “opportunity to view the witnesses, hear the testimony and observe demeanor” <i>Id.</i> | N/A. Same level of deference given to both. <i>People v. O’Neill</i> , 169 A.D.3d 1515 (N.Y. Supr. Ct. 2019) (“In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference.”).                      |
| North Carolina |   | NC ST § 15A-1201 | None                     | Opportunity to object. NC ST § 15A-1201   | Consent of trial judge required; hearing required in open court for judicial consent; judge must address defendant personally to determine if defendant fully understands waiver, and determine if state objects to waiver. NC ST § 15A-1201 | “In reviewing a trial judge’s findings of fact, we are ‘strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.’” <i>State v. Williams</i> , 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting <i>State v. Cooke</i> , 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); see also <i>Sisk v. Transylvania Cmty. Hosp., Inc.</i> , 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (“[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.” (quoting <i>Tillman v. Commercial Credit Loans, Inc.</i> , 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))). | “There was sufficient evidence, in law, to support the finding of the jury, and when this is the case and it is claimed that the jury have given a verdict against the weight of all the evidence, the only remedy is an application to the trial judge to set aside the verdict for that reason.” <i>Pender v. North State Life Ins. Co.</i> , 163 N.C. 98, 101, 79 S.E. 293, 294 (1913). “We cannot interfere with the jury in finding facts upon evidence sufficient to warrant their verdict.” <i>West v. Atlantic Coast Line R.R. Co.</i> , 174 N.C. 125, 130, 93 S.E. 479, 481 (1917).   | N/A. Same level of deference given to both. <i>State v. Pavkovic</i> , 833 S.E.2d 383 (N.C. App. 2019) (“When the trial court sits without a jury, the standard of review for this Court is whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts.”). |

| State        | Authority re: When and How Defendant Can Waive Right to Trial By Jury |                             |                                 | Does the prosecutor have the ability to veto a defendant's request for a bench trial?  | What measure of discretion does the Court have in the process?  | Standards of Appellate Review (Sufficiency of Factual Findings)  |  |  |
|--------------|---|-----------------------------|---------------------------------|--|---|--|--|--|
|              | State Procedural Rule   | Statute                     | Constitutional Provision        |  |   | Standard of Appellate Review from a Bench Trial  | Standard of Appellate Review from Jury Trial   | Which standard is given more deference?  |
| North Dakota | ND R RCRP Rule 23   | ND ST 29-16-02              | None                            | Consent of prosecutor. ND ST 29-16-02  | Consent of court. ND RCRP Rule 23   | "In an appeal challenging the sufficiency of the evidence, we look only to the evidence and reasonable inferences most favorable to the verdict to ascertain if there is substantial evidence to warrant the conviction. A conviction rests upon insufficient evidence only when, after reviewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational fact finder could find the defendant guilty beyond a reasonable doubt. In considering a sufficiency of the evidence claim, we do not weigh conflicting evidence, or judge the credibility of witnesses." State v. Rufus, 2015 ND 212, ¶ 6, 868 N.W.2d 534, 538 | Same standard applies.   | N/A. Same level of deference given to both. State v. Rufus, 868 N.W.2d 534, 538 (N.D. 2015) ("[S]tandard of review for a criminal trial before the district court without a jury is the same as a trial with a jury").   |
| Ohio         | Ohio Crim. R. 23(a)   | R.C. 2945.17; R.C. 2945.05. | Ohio Const. art. I, § 10        | No.  | None. "[T]he trial court cannot reject a defendant's waiver of the right to a jury trial." State v. Van Sickle, 629 N.E.2d 39, 44 (Ohio App. 1993). | Same standard as jury trial, but in a bench trial there is a rebuttable presumption that that the court considered the relevant evidence. State v. Pepin-McCaffrey, 929 N.E.2d 476 (Ohio App. 2010).   | "When reviewing sufficiency of the evidence, an appellate court must determine "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." State v. Rucker, 113 N.E.3d 81, 91-92 (Ohio App. 2018) (quotation omitted). | N/A. Same level of deference given to both. State v. Webb, 1991 WL 253811, at *3 (Ohio Ct. App. Nov. 15, 1991) ("The same standard applies if the criminal conviction is the result of a bench trial, rather than a trial to a jury." (citing State v. Swiger, 214 N.E.2d 417 (Ohio 1966))).                             |
| Oklahoma     | None  | None                        | Okla. Const. art. II, §§ 19, 20 | Yes. "[A] defendant cannot waive a jury trial without the consent of both the State and the trial court." Hinsley v. State, 280 P.3d 354, 356 (Okla. Ct. Crim. App. 2012). | Yes. The trial court must consent to the waiver.  | "[W]here a jury is waived, and the case tried to the court, his findings, as to the guilt of the defendant, will not be reversed where there is any competent evidence in the record, together with reasonable inferences and deductions, to be drawn therefrom supporting the court's findings." Kinder v. State, 438 P.2d 302, 303 (Okla. Ct. Crim. App. 1968).  | "[W]hether the evidence, taken in the light most favorable to the prosecution, permits any rational trier of fact to find the essential elements of the crime charged beyond a reasonable doubt." Thompson v. State, 429 P.3d 690, 694 (Okla. Ct. Crim. App. 2018).  | N/A. Same level of deference given to both. Martin v. State, 547 P.2d 396 (O.C.C.A. 1976) ("Where a jury is waived and the case is tried before the court, the weight and credibility of the evidence as determined by the court is the same as if determined by the jury and will be given the same force and effect"). |

| State          | Authority re: When and How Defendant Can Waive Right to Trial By Jury |  |                                  | Does the prosecutor have the ability to veto a defendant's request for a bench trial?  | What measure of discretion does the Court have in the process?   | Standards of Appellate Review (Sufficiency of Factual Findings)  |  |  |
|----------------|---|--|----------------------------------|--|--|--|--|--|
|                | State Procedural Rule   | Statute  | Constitutional Provision         |  |  | Standard of Appellate Review from a Bench Trial  | Standard of Appellate Review from Jury Trial   | Which standard is given more deference?  |
| Oregon         | None (criminal procedural rules are statute-based only)               | O.R.S. § 136.001   | Or. Const. art. I, § 11          | No. Oregon Supreme Court held that the statute granting prosecution right to veto defendant's waiver of jury trial was unconstitutional under Oregon Constitution.   | Court has discretion to allow defendant to waive a jury trial, though not controlling, must consider the prosecutor's expressed preference for or against defendant's waiver | ““This court reviews questions of the sufficiency of the evidence . . . by examining the evidence in the light most favorable to the state to determine whether a rational trier of fact, accepting reasonable inferences and reasonable credibility choices, could have found the essential element of the crime beyond a reasonable doubt. . . . This court's decision is not whether we believe that defendant is guilty beyond a reasonable doubt, but whether the evidence is sufficient for the jury to so find.” State v. Moore, 927 P.2d 1073, 1094 (Or. 1996) (quoting State v. Cunningham, 880 P.2d 431 (Or. 1994)). | Same standard as bench trial   | N/A. Same level of deference given to both. State v. Lammers, 562 P.2d 1223 (Ore. App. 1977) (“The court's findings on factual matters are as binding as a jury verdict.”).  |
| Pennsylvania   | Pa. R. Crim. P. 620   | None (42 Pa.C.S. 5104 held unconstitutional)   | Pa. Const. art. 1, § 6           | YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver)   | Court's approval is required. Commonwealth v. Giaccio, 457 A.2d 875 (Pa. Super. 1983).   | “[W]hether, when viewed in a light most favorable to the verdict winner, the evidence at trial and all reasonable inferences therefrom are sufficient for the trier of fact to find that each element of the crimes charged is established beyond a reasonable doubt.” Commonwealth v. Akhmedov, 216 A.3d 307, 322 (Pa. Super. 2019).  | Same standard as bench trial. Commonwealth v. Lee, 956 A.2d 1024 (Pa. Super. 2008).  | N/A. Same level of deference given to both. Commonwealth v. Lee, 956 A.2d 1024 (Pa. Super. 2008) (recognizing that the same “standard of deference” applies in bench trials and jury trials).                            |
| Rhode Island   | R.I. Super. R. Crim. P. 23  | Gen. Laws § 12-17-3.   | R.I. Const. art. 1, §§ 10, 15    | No.  | No consent or approval required. Discretion limited to whether waiver is voluntary.  | Same standard as jury trial with this additional qualification: The “appellate court will uphold the findings of a trial justice presiding over a criminal bench trial unless it can be shown that he overlooked or misconceived relevant and material evidence or was otherwise clearly wrong.” State v. Berroa, 6 A.3d 1095, 1100 (R.I. 2010).   | Whether, “viewing the light most favorable to the prosecution, no reasonable jury could have rendered [the guilty verdict].” State v. Gaffney, 63 A.2d 888, 893 (R.I. 2013). | Bench trial. State v. Gianquitti, 22 A.3d 1161, 1165 (“[F]actual findings of a trial justice sitting without a jury are granted an extremely deferential standard of review.”)   |
| South Carolina | SCRCrimP 14   | S.C. Code Ann. § 22-2-150 (Applies to Magistrates only)<br>S.C. Code Ann. § 14-25-125 (Applies to Municipal Courts only) | S.C. Const. art. I, § 14         | Prosecution has veto power over defendant's ability to waive (i.e., A defendant may waive his right to a jury trial only with the approval of the solicitor and the trial judge.)  | Yes. The trial court must consent to the waiver.   | Clear Error Standard. State v. Black, 400 S.C. 10 (2012).  | Same as bench trial.   | N/A. Same level of deference given to both.  |
| South Dakota   | S.D. Codified Laws § 23A-18-1   | S.D. Codified Laws § 23A   | S.D. Const. art. VI, § 6 and § 7 | Prosecution has veto power over defendant's ability to waive. (i.e., “Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing or orally on the record with the approval of the court and the consent of the prosecuting attorney.”) | Yes. The trial court must approve the waiver.  | Clear Error: “Findings made pursuant to rule granting a criminal court authority to find facts specially in a case tried without a jury are not to be set aside unless clearly erroneous.” State v. Catch the Bear, 352 N.W.2d 640 (S.D. 1984).  | Same standard as bench trial.  | N/A. Same level of deference given to both. State v. Nekolite, 851 N.W.2d 914 (S.D. 2014) (“A general finding of guilt by a judge [in a nonjury trial] may be analogized to a verdict of ‘guilty’ returned by a jury.”). |

| State     | Authority re: When and How Defendant Can Waive Right to Trial By Jury  |   |                                   | Does the prosecutor have the ability to veto a defendant's request for a bench trial?  | What measure of discretion does the Court have in the process?   | Standards of Appellate Review (Sufficiency of Factual Findings)  |   |  |
|-----------|--|---|-----------------------------------|--|--|--|---|--|
|           | State Procedural Rule  | Statute   | Constitutional Provision          |  |  | Standard of Appellate Review from a Bench Trial  | Standard of Appellate Review from Jury Trial  | Which standard is given more deference?  |
| Tennessee | Tenn. R. Crim. P. 23   | Tenn. Code Ann. § 27-3-131 (Appeals in Misdemeanor cases)<br>Tenn. Code Ann. § 39-13-205 (1st degree murder; jury trial; waiver)<br>Tenn. Code Ann. § 39-13-204 (1st degree murder; sentencing factors)<br>Tenn. Code Ann. § 40-1-109 (Misdemeanor cases in general session courts)<br>Tenn. Code Ann. § 40-20-105 (Guilty pleas; waiver of jury trial)<br>Tenn. Code Ann. § 40-35-203 (Imposition of sentence) | Tenn. Const. art. I, § 6 and § 9  | Prosecution has veto power over defendant's ability to waive (i.e., A defendant may waive his right to a jury trial at any time before a jury is sworn. A waiver of jury trial must be: (A) in writing; (b) have the consent of the district attorney general; and (C) have the approval of the court.)  | Yes. The trial court must approve the waiver.  | Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Van De Geuchte, No. M201701173CCAR3CD, 2018 WL 5883972 (Tenn. Crim. App. Nov. 9, 2018)  | Same standard as bench trial  | N/A. Same level of deference given to both. State v. Hatchett, 560 S.W.2d 627 (Tenn. 1978) ("In a case tried without a jury, the verdict of the trial judge is entitled to the same weight on appeal as a jury verdict.").   |
| Texas     | Tex. Code Crim. Proc. Ann. art. 1.13 (Unwaivable in capital felony cases unless attorney representing the state informs court/defendant that it will not seek the death penalty)<br>Tex. Code Crim. Proc. Ann. art. 45.025 (Bench trial) | None  | Tex. Const. art. I, § 10 and § 15 | Prosecution has veto power over defendant's ability to waive (i.e., A defendant's waiver of a jury is conditioned on the consent and approval of the attorney representing the State. The consent and approval of the prosecutor must be in writing, signed by the prosecutor, and filed in the court of records before the defendant enters his or her pleas.)  | Court has discretion to allow defendant to waive a jury trial subject to the prosecution's veto power (i.e., The consent and approval by the court shall be entered of record on the minutes of the court.). | "We review the legal sufficiency of the evidence by considering all of the evidence in the light most favorable to the verdict to determine whether any rational fact-finder could have found the essential elements of the offense beyond a reasonable doubt. Evidence is legally insufficient when the only proper verdict is acquittal. We give deference to the jury's responsibility to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from the facts. We review the factual sufficiency of the evidence under the same appellate standard of review as that for legal sufficiency." Infante v. State, 404 S.W.3d 656, 660 (Tex. App. 2012) | Same standard as bench trial  | N/A. Same level of deference given to both. A.T.S. v. State, 694 S.W.2d 252 (Tex. Ct. App. 1985) ("Findings of fact entered in a case tried to the court are of the same force and dignity as a jury's verdict upon special issues.")  |
| Utah      | Utah R. Crim. P. 17  | Utah Code Ann. § 76-3-207 (Capital felony-Sentencing proceeding)  | Utah Const. art. I, § 10 and § 12 | Prosecution has veto power over defendant's ability to waive (i.e., "All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution. All other cases shall be tried without a jury UNLESS the defendant makes written demand at least 14 days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.") | Court has discretion to allow defendant to waive a jury trial subject to the prosecution's veto power.   | Clear Error. State v. Finalayson, 362 P.3d 926 (Utah Ct. App. 2014). "When reviewing a bench trial for sufficiency of the evidence, our review is less deferential, and we sustain the district court's judgment unless it is against the clear weight of the evidence, or if we otherwise reach a definite and firm conviction that a mistake has been made." State v. Washington, 2021 UT App 114, ¶ 8, 501 P.3d 1160, 1163, cert. denied, 509 P.3d 198 (Utah 2022)  | "When reviewing a jury verdict on an insufficiency of the evidence argument, we view the evidence and all inferences drawn therefrom in a light most favorable to the verdict. And we will reverse the verdict only when, after viewing the evidence and all inferences drawn therefrom in a light most favorable to the verdict, we find that the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust. So long as some evidence and reasonable inferences support the jury's findings, we will not disturb them." State v. Quintana, 2019 UT App 139, ¶ 16, 448 P.3d 742, 744-45 | Jury Trials. State v. Walker, 743 P.2d 191 (Utah 1987) (holding that different standards of review apply to sufficiency challenges arising from bench trials versus jury trials); State v. Goodman, 763 P.2d 786 (Utah 1988) (recognizing that the standard of review for sufficiency challenges resulting from bench trials is "less deferential"). |

| State         | Authority re: When and How Defendant Can Waive Right to Trial By Jury |                                  |                              | Does the prosecutor have the ability to veto a defendant's request for a bench trial?   | What measure of discretion does the Court have in the process?  | Standards of Appellate Review (Sufficiency of Factual Findings)  |   |  |
|---------------|---|----------------------------------|------------------------------|---|---|--|---|--|
|               | State Procedural Rule   | Statute                          | Constitutional Provision     |   |   | Standard of Appellate Review from a Bench Trial  | Standard of Appellate Review from Jury Trial                              | Which standard is given more deference?  |
| Vermont       | Vt. R. Crim. P. 23  | None (see State Procedural Rule) | Vt. Const. Ch. 1, art. 10    | YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver). See Vt. R. Crim. P. 23.                               | Court must consent to the waiver before it can be valid. State v. Ibey, 352 A.2d 691, 692 (Vt. 1976).         | Clear Error. State v. Amsden, 194 Vt. 128 (2013). "[W]hether the evidence, viewed in the light most favorable to the state and excluding modifying evidence, fairly and reasonably supports a finding beyond a reasonable doubt." State v. Amsden, 75 A.3d 612, 616 (Vt. 2013) (citations omitted).                        | Same standard applies. State v. Brochu, 949 A.2d 1035 (Vt. 2008)          | N/A. Same level of deference given to both.  |
| Virginia      | Va. Sup. Ct. Rules, R. 3A:13  | Va. Code Ann. § 19.2-257;258     | Va. Const. art. I, § 8       | YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver) - Pope v. Commonwealth, 360 S.E.2d 352, 358 (Va. 1987) | Court must consent to the waiver before it can be valid. Pope v. Commonwealth, 360 S.E.2d 352, 358 (Va. 1987) | "When a defendant is convicted by a circuit court sitting without a jury, the circuit court's judgment is entitled to the same weight as a jury verdict and will not be distributed on appeal unless it is plainly wrong or without evidence to support it." Caldwell v. Commonwealth, 298 Va. 517 (Va. 2020).             | Same standard as bench trial.   | N/A. Same level of deference given to both. Caldwell v. Commonwealth, 298 Va. 517 (Va. 2020) ("When a defendant is convicted by a circuit court sitting without a jury, the circuit court's judgment is entitled to the same weight as a jury verdict and will not be distributed on appeal unless it is plainly wrong or without evidence to support it.")  |
| Washington    | Wash. St. Super. Ct. Cr. CrR 6.1                                      | Wash. Rev. Code § 10.01.060      | Wash. Const. art. I, § 21    | NO. Prosecutor has no say over the decision. See Wash. St. Super. Ct. Cr. CrR 6.1; see Wash. Rev. Code § 10.01.060; see Wash Const. art. I, §§ 21, 22.              | Court must consent to the waiver before it can be valid. State v. Wicke, 591 P.2d 452, 455 (Wash. 1979).      | "Following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." State v. Yallup, 416 P.3d 1250 (Wash. App. 2018).  | Substantial evidence standard. State v. Green, 616 P.2d 628 (Wash. 1980). | N/A. Same level of deference given to both.  |
| West Virginia | W. Va. R. Crim. P. 23(a)  | W. Va. Code § 50-5-8             | W. Va. Const. art. III, § 14 | YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver) - State v. Redden, 487 S.E.2d 318, 327 (W. Va. 1997)   | Court must approve waiver before it can be valid. State v. Redden, 487 S.E.2d 318, 327 (W. Va. 1997)          | Clear Error. State v. J.S., 233 W.Va. 198 (2014). "[W]hether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." State v. White, 722 S.E.2d 566, 576 (W. Va. 2011).              | Same standard applies.  | N/A. Same level of deference given to both.  |
| Wisconsin     | None (see statute)  | Wis. Stat. Ann. § 972.02         | Wis. Const. art. I, § 7      | YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver) - State v. Denson, 799 N.W.2d 831, 846 (Wis. 2011).    | Court must approve waiver before it can be valid. State v. Denson, 799 N.W.2d 831, 846 (Wis. 2011).           | "[W]hether, after viewing the evidence presented in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. LaCount, 750 N.W.2d 780, 788 (Wis. 2008) (quoting State v. DeLain, 695 N.W.2d 484, 488 (Wis. 2005)). | Same standard applies.  | N/A. Same level of deference given to both. State v. Bowden, 288 N.W.2d 139 (Wis. 1980) ("This court, like all appellate courts, accords substantial deference to the trier of fact in a criminal trial. Whether trial is before a jury or to the court, the question on appeals is not whether the reviewing court is convinced of the defendant's guilt beyond a reasonable doubt, but whether it is possible for the trier of fact, acting reasonably, to have been so convinced.") |

| State   | Authority re: When and How Defendant Can Waive Right to Trial By Jury |                                  |                          | Does the prosecutor have the ability to veto a defendant's request for a bench trial?  | What measure of discretion does the Court have in the process?                                    | Standards of Appellate Review (Sufficiency of Factual Findings)   |  |   |
|---------|---|----------------------------------|--------------------------|--|---|---|--|---|
|         | State Procedural Rule   | Statute                          | Constitutional Provision |  |   | Standard of Appellate Review from a Bench Trial   | Standard of Appellate Review from Jury Trial | Which standard is given more deference?   |
| Wyoming | Wyo. R. Crim. P. 23.  | None (see State Procedural Rule) | Wyo. Const. art. I, § 9  | YES. Prosecution has veto power over defendant's ability to waive (i.e., prosecution must consent to waiver) - Taylor v. State, 612 P.2d 851, 854 (Wyo. 1980). | Court must approve waiver before it can be valid. Taylor v. State, 612 P.2d 851, 854 (Wyo. 1980). | "[W]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Willis v. State, 46 P.3d 890, 894 (Wyo. 2002). | Same standard as bench trial                 | N/A. Same level of deference given to both. Mathewson v. State, 431 P.3d 1121 (Wyo. 2018) (In reviewing a claim that the evidence was not sufficient to support a guilty verdict after a bench trial, we apply the same standards as for reviewing a verdict after a jury trial."). |



**Rule 23(a) Amendment Draft**

APPENDIX B

**(a) (1) JURY TRIAL.** If the defendant is entitled to a jury trial, the trial must be by jury unless:

- (A) the defendant waives a jury trial in writing;
- (B) the government consents; and
- (C) the court approves.

**(2) NONJURY TRIAL WITHOUT GOVERNMENT CONSENT.** If the government does not consent, the court may permit a defendant to present reasons in writing for requesting a nonjury trial and may require the government to respond. The court may approve a defendant’s waiver of a jury trial without the government’s consent if it finds that the reasons presented by the defendant are sufficient to overcome the presumption in favor of jury trials.

**COMMENT.** The proposed amendment permits a court to let a defendant waive trial by jury without the government’s consent. The Supreme Court has suggested that there may be circumstances where the right to a fair trial will overcome the government’s objection to a bench trial. *Singer v. United States*, 380 U.S. 24, 37 (1965) (“We need not determine in this case whether there might be some circumstances where a defendant’s reasons for wanting to be tried by a judge alone are so compelling that the Government’s insistence on trial by jury would result in the denial to a defendant of an impartial trial.”). Creating a complete list of such circumstances is not possible. However, a non-exclusive list of reasons for permitting a non-jury trial includes concerns about speedy trial, jury bias or prejudice (giving due consideration to the possibility of a change of venue and careful voir dire of the jury panel), or the technical nature of the charges or defenses.

Some courts have permitted non-jury trials because of prejudice. *United States v. Schipani*, 44 F.R.D. 461 (E.D.N.Y. 1968) (barring the government from withdrawing its consent before a second trial); *United States v. Panteleakis*, 422 F. Supp. 247 (D.R.I. 1976) (multiple defendants in a complex case in which not all evidence would be admissible against all defendants); *United States v. Cohn*, 481 F. Supp. 3d 122 (E.D.N.Y. 2020) (numerous factors, including speedy trial and other issues caused by a mid-Covid pandemic trial). Although the rule recognizes that technical issues may be appropriate for a non-jury trial, the complexity of the subject matter alone is not a basis for overruling the government’s demand for trial by jury. *United States v. Simon*, 425 F.2d 796, 799 n.1 (2d Cir. 1969).

Any decision must be weighed against the constitutional preference for trial by jury. *Singer v. United States*, 380 U.S. 24, 36 (1965) (“The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result.”); *Patton v. United States*, 281 U.S. 276, 312 (1930) (“Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses.”).

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