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Trial By Jury in a Felony Case - A Mandatory Requirement

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TRIAL BY JURY IN A FELONY CASE—A MANDATORY REQUIREMENT?

May one, in a felony case, waive his "right" to a trial by jury and be tried by a court if he desires, or can he be forced to face the verdict of a jury? This can be a very important question to an accused in a situation where he is charged with murder, rape, child abuse or other crimes of a type likely to arouse considerable emotional reaction from lay juries. Defendants in such cases often prefer trial to the court without a jury—the reverse of the usual situation.

This question has never arisen in the Wyoming Supreme Court, but there seems to be a belief among certain Wyoming District Court Judges that one cannot be tried in a felony case without submitting to a jury trial. Why should this be? Upon what do the District Judges base this belief?

There are no specific Wyoming statutes pertaining to this problem. Article I, Section 9 of the Constitution of Wyoming provides that "The right of trial by jury shall remain inviolate in criminal cases . . ." Whether one *must* have a jury trial will depend upon the interpretation which the Supreme Court of Wyoming gives to this language.

The word "inviolate" as used here is the same as used by the California Constitution in the Declaration of Rights, Article I, Section 7,[1] and in the NJSA Constitution, 1844, Article I, Section 7,[2] which provide that the right of a trial by jury shall remain inviolate. The California and New Jersey courts have held that the word "inviolate" connotes no more than having a freedom from substantial impairment or partial destruction; and that the legislature has a right to make any reasonable regulations or conditions respecting the enjoyment of a trial by jury, provided that the essentials of a jury trial, as they were known at common law, remained unchanged.[3] These essentials are number of jurors, impartiality, and unanimity as to verdict. As was summarized by the author of a *Virginia Law Review* article,[4] while these "essentials" do not include the requirement of an accused consenting to a jury trial, it must be pointed out that historically such consent was the actual basis of such a trial; if the defendant did not consent to be tried "by God and the country" no jury could be empanelled and sworn to try him. This consent actually made little difference, however, because if he refused to give it, he was subject to be tortured until he either changed his mind or he died! As fruitless as it may seem, still the important fact is that at the early common law the defendants' consent was a *sine qua non* to his being tried by a jury.

As the religious sects and other groups migrated from England and settled the early American colonies, it can be noted that at different periods

1. Calif. Const., Declaration of Rights, Art. I, § 7, "The right of trial by jury shall be secured to all, and remain inviolate . . ."
2. N. J. Const. (1844), Art. I § 7; "The right of trial by jury shall remain inviolate, but the legislature may authorize the trial of civil suits. . . "
3. Humphrey v. Eakley, 72 NJLR 424, 60 A. 1097, 1098 (1905). People v. Peete, 54 Cal. App. Rep. 333, 202 P. 51, 66 (1921).
4. 20 Va. L. Rev. 655, 657 (1934).

of time the colonies themselves allowed an accused to waive his right to a jury trial.[5] From this, one could draw the conclusion that at the time of the framing of the United States Constitution, the framers did not intend to exclude one's right to waive a trial by jury, when they provided, in Article III, Section 2, paragraph 3, that "The trial of all crimes . . . shall be by jury . . .", and in the Sixth Amendment, that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

Regardless of this historical background, from the time of the ratification of the Federal Constitution until 1930 the federal courts were having much difficulty with jury waiver, as evidenced by two typical decisions of this era—*Thompson v. Utah*[6] and *Schick v. United States*.[7] The former of these two sustained the theory that there could be no waiver of a jury in any criminal action, at least in the absence of statutory authorization, while the latter followed the idea that since Congress had not acted so as to require a jury trial for all offenses, and since the court was fully organized to transact business without a jury being present, one simply was not needed and could be waived. This situation remained until 1930, when the United States Supreme Court decided *Patton v. United States*.[8] Although, strictly speaking, this case did not directly involve the legality of a non-jury trial, it does contain some interesting and important decisions as to this question. This was a case where the appellant had consented to being tried by a partial jury (eleven members instead of twelve) and when the verdict was rendered against him he appealed to the Supreme Court on the ground that he could not be tried by a jury of less than twelve. The Court, when speaking of total waiver, swept aside the distinction of a partial waiver saying, "we must treat both forms of waiver as in substance amounting to the same thing."[9] The partial waiver by the accused was upheld. This decision has been regarded as a holding that the defendant in a federal criminal case may waive a jury entirely.[10]

Until 1930 there had been two strong arguments that were always brought out when one mentioned the waiver of a jury trial—this case ended both of these as pertaining to the federal courts. First, it had long been argued that at common law the accused generally was not allowed to waive any right which was established or intended for his protection, and therefore he should not be allowed to waive any of them now. The Supreme Court answered this by saying that common law rules, whether absolute or subject to

5. Colonial Laws of Mass. (1889) 29-61.
1 N.H. Laws, Province Period (1904) 25.
Slade, Vermont State Papers (1823).
Conn., 1 Root 226 (1790).
Patterson, N.H. Laws (1800) 213, 221, 23, 79.
6. 170 U.S. 343 (1897).
7. 195 U.S. 65 (1903).
8. 281 U.S. 276 (1930).
9. *Id.* at 290. Note this statement rejects any state decisions holding that there is a distinction between waiving part of a jury and waiving all of the jury.
10. 20 Va. L. Rev. 655 (1932-1934).

exceptions, were justified at that time by conditions that today no longer exist. At common law an accused needed a jury because he could not testify on his own behalf, he was not furnished with counsel and there was a fear of being sentenced to a punishment out of proportion to the gravity of his crime. The Court pointed out that these infirmities no longer exist, and that, as said in *Reno Smelting Works v. Stevenson*,[11] "It is contrary to the spirit of common law itself to apply a rule founded on a particular reason . . . when that reason utterly fails. . . . "[12]

The second argument disposed of by the *Patton* opinion was that of public policy. Previously a few courts had said that waiver would be against strong public policy, and therefore should not be allowed. The *Patton* case considered that this was unsound thinking,[13] for four reasons: (1) Earlier cases had held that to allow waiver would be "highly dangerous" and "should not be tolerated"[14] but the opinions never explained why. (2) If the accused may plead guilty and thus dispense with the trial altogether, which many courts allowed, surely he could waive a trial *by jury;*[15] (3) The common law rules were no longer justified because those conditions no longer existed[16] and (4) The public policy idea seemed to draw a distinction between felonies and misdemeanors, based upon the serious consequences in the form of punishment between them, and as stated in *Commonwealth v. Beard*:[17] "It surely cannot be true that the public is interested in the protection of an accused in proportion to the magnitude of his offending—that its solicitude goes out to the greater offender but not to the smaller—that there is a difference in point of sacredness between constitutional rights when asserted by one charged with a grave crime and when asserted by one charged with a lesser one."[18]

In the *Patton* decision the Court recognized the *value* and *appropriateness* of a jury trial as had been established by long experience, and agreed that it should not now be denied its importance; rather, such a right should be jealously preserved with the jury being kept, where possible, as the trier of the facts. For these reasons, said the Court, the trial judge must be vested with the sound discretion of determining whether a requested waiver should or should not be accepted, notwithstanding the defendant's wish to be tried by the court without a jury—in other words, that the right to waive is qualified and not an absolute right.[19]

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11. 20 Nev. 269, 279 (1889).
12. *Supra* note 7 at 306.
13. *Supra* note 7 at 308.
14. *Supra* note 7 at 305.
15. *Ibid.*
16. *Supra* note 7 at 306.
17. 48 Pa. Super. 319 ( ).
18. *Supra* note 7 at 310.
19. Mason v. U.S. 250 F.2d 704 (10th Cir. 1957). This court relied upon the Federal rules of Criminal Procedure Rule 23 in determining that his was a qualified right and should be left up to the court's decision. 18 USCA 23 (A) "Trial by jury. Cases required to be tried by jury shall be so tried unless the Defendant waives a jury in writing with the approval of the court and the consent of the government."

From this and subsequent court decisions the federal courts have now laid down a standard that must be met before the accused may waive his right to a jury trial: We must, in writing, acquire the consent of the court and of his counsel and show that he is doing this act with intelligent and full understanding of its consequences.[20] If, after the waiver has been allowed, the appellate court finds that this standard was not met, there must be a new trial; but if the accused is convicted and he then attacks the trial court's decision on the grounds of failing to fulfill the standard, the appellant must shoulder the burden of proof.[21]

As to the states, the situation is somewhat unsettled. Here, the problems are generally the same, but there is such an array of differently worded constitutions that it is hard to find any general rule which adequately covers the subject. A large majority of the state constitutions, with some slight variations, provide that an accused has the "right" to an impartial jury in all criminal cases,[22] but in a minority of state constitutions, including Wyoming's, the language is that the right of trial by jury shall remain "inviolate" in criminal, or sometimes in capital,[24] cases. Some state courts' interpretations are based on a technical construction of the word "inviolate".

After the different constitutions have been sorted into these two groups, we find different interpretations that have been reached within each of the groups themselves. It must be noted that there have been a few states which have, by constitutional provision, specifically enacted regulations so as to eliminate the problem of waiver in at least some criminal cases.[25]

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20. Patton v. United States, 281 U.S. 276 (1930).
People v. Diaz, 8 N.Y. App. Rev.2d 1061, 170 N.E.2d 411 (1960).
People v. Duchin, 12 N.Y. App. Rev.2d 351, 190 N.E.2d 17 (1963).
Mason v. U.S. 250 F.2d 704 (10th Cir. 1957).
21. Adams, Warden v. U.S. ex rel. McCann 317 U.S. 269 (1942).
22. Ariz. Const., Art. II. § 24; Ark. Const., Art. II, § 10; Del. Const., Art. I, § 7, Art. IV, § 30; Fla. Declaration of Rights 11; Ga. Const., Art. I. § 15; Hawaii Const., Art. I, § 11; Ill. Const., Art. II, § 9; Ind. Const., Art. I, § 13; Iowa Const., Art. I, § 10; Kans. Bill of Rights 10; Md. Declaration of Rights 21; Me. Const., Art. I, § 6; Mich. Const., Art. II, § 19; Minn. Const., Art. I, § 6; Mo. Const., Art. I, § 18a; Mont. Const., Art. III, § 16; Nebr. Const., Art. I, § 11; N.J. Const., Art. I, § 10; N. Mex. Sonst., Art. II, § 14; Ohio Const., Art. I, § 10; Okla. Const., Art. II, § 20; Ore. Const., Art. I, § 11; R. I. Const., Art. I, § 10; S. C. Const., Art. I, § 18; S. Dak. Const., Art. VI, § 7; Texas Const., Art. I, § 10; Vt. Const., Art. I, § 10; Va. Const., Art. 22; Wash. Const., Art I, § 22.
23. Colo. Const., Art. II, §§ 16, 23; Wyo. Const., Art. I, §§ 9, 10.
24. Utah Const., Art. I, §§ 10, 12.
25. Calif. Const., Art. I, § 7; in all criminal cases by consent of both parties, expressed in open court by defendant and his counsel; Idaho Const., Art. I, § 7, in criminal cases not amounting to a felony, by consent of both parties express in open court; Me. Const., Art. I, § 22(a), with assent of court, defendant may waive jury trial; Mont. Const., Art. II, § 23, in criminal cases not amounting to a felony, upon default of appeafance, or by consent of parties expressed in manner prescribed by law; N.Y. Const., Art. I, § 2, except in capital cases, by defendant personally signing written instrument in open court, before, and with approval of a judge; Ore. Const., Art. I, § 11, in other than capital cases, with consent of trial judge and in writing; Va. Const., Art. I, § 8, defendant pleads not guilty, gives consent and concurrence of state's attorney and of court of record; Vt. Const., Art. I, § 10, offenses not punishable by death or imprisonment in state prison, with consent of prosecuting officer, in open court and by signed writing.

When we try to analyze the different constitutions under which waiver is permitted, we are faced with the further problem of whether in these states the right to waiver is an absolute right or one which is qualified or conditional, i.e. whether the right is set up only to insure that the accused has been informed of the seriousness of his waiver, thus reducing the approval of the court to a purely ministerial function or, as under the qualified interpretation, whether the granting or refusal of the right lies within the court's sound discretion. The determination of this problem is almost solely one of constitutional or statutory interpretation, with the decisions of other jurisdictions generally giving little help.[26] There have been twelve states holding that the waiver of a jury trial is a qualified right, three states holding it as being an absolute right, and decisions in other states going both ways.[27]

Some states have shifted their positions with respect to the right to waive jury trials. Typical of the turmoil that frequently exists within a state is New York. This state started early in the 1930's to enact laws to meet the problem, and in 1938 its constitution was amended so as to allow waiver of a jury trial in criminal actions. This amendment adopted a version of the standard set out in *Patton v. United States*[28] by providing that a defendant may waive a jury trial in all criminal cases, except those punishable by death, by a written instrument signed by the defendant in open court, before and with the approval of the judge of a court having jurisdiction to try such offense.[29] But this provision did not answer all of New York's troubles. In *People v. Diaz*,[30] which was a case involving co-defendants, the court held that the constitution made the waiver a qualified right, it being within the discretion of the trial judge as to whether the right should be granted, and that to deny such a waiver was not an abuse of the judge's discretionary power. However, in the recent case of *People v. Duchin*,[31] which was a first degree murder case, after recognizing the standard set out in the state constitution, the court held that if a defendant by pleading guilty cannot be compelled to stand trial against his will, then a defendant should not be forced to face a trial by jury if he satisfies the above standard. This is equivalent to holding that the defendant has an absolute right to waive a jury trial even though the constitution has expressly set forth limitations upon the right of such waiver: that after the standard is satisfied, the judge has no discretion except to approve the request. There was a very strong dissenting opinion which took the position that the constitution recognized a waiver of a jury trial in all criminal cases except capital cases, which the constitution explicitly excluded from receiving a full and free choice of waiver. The dissenting judge argued that where the constitution granted a jury trial that right should remain

26. 35 St. John's L. Rev. 372, 375 (1961).
27. *Id.* at 375, 376.
28. *Supra* note 7.
29. N. Y. Const., Art. I, § 2.
30. 8 N. Y. App. Rev.2d 1061, 170 N.E.2d 411 (1960).
31. 12 N. Y. App. Rev.2d 351, 190 N.E.2d 17 (1963).

"inviolate" forever[32] and that the framers of the constitutional amendment did not intend to give the defendant one right and then in the next breath give him just the opposite right—we must, said the dissenter, have a strict construction of the constitution's words.

The above New York cases are good illustrations of the problems which have been faced in this and other states. Indiana, for instance, has interpreted its constitution[33] as setting forth a right which operates strictly for the defendant's benefit, thus following the 1963 case of *People v. Diaz.*[34] Under this view ordinarily an individual may waive any right which is provided for his benefit either by contract, statute or constitution. This position is founded upon the fact that the section of the constitution, the Bill of Rights, which gives the accused a right to a jury trial also gives him other privileges, many of which the courts have recognized he can waive; why should a distinction be drawn as to the right to a jury trial?[35]

Kansas, which has a constitutional clause[36] identical to that of Indiana, has held almost to the contrary in that the accused has a conditional right to waive his jury trial; he must *force* the court to accept or recognize his exercise of this right.[37] Although it is a personal right which does not need to be exercised for one's own protection, and is therefore subject to waiver, the state according to the *Ricks* opinion, is a party to the trial and has an interest therein because of public policy, therefore, the order to protect the interests of society in general, the court must also give its consent to any waiver. The Kansas Court thus used the "public policy" idea as a basis for holding that the accused *has* a qualified right to waive a jury.

Although the above cases show the general spectrum of the problems in this area it should be noted that the language of the WYOMING CONSTITUTION speaks of the right to a jury trial being "inviolate". The NEW YORK and INDIANA CONSTITUTIONS do not use such a phrase. Accordingly, we must consider states with constitutions similar in wording to Wyoming's;[38] such as Montana,[39] Utah,[40] and Colorado.[41]

The Supreme Court of Montana, in *State v. Scalise,*[42] stated that if the defendant is charged with a felony and desires a trial he shall have one before

32. *Supra* note 27.
33. Ind. Const., Art. I, § 13, "In all criminal prosecutions the accused shall have the right to a public trial, by an impartial jury."
34. *Supra* note 28.
35. Brown v. State, 219 Ind. 251, 37 N.E.2d 73 (1941).
36. Kans. Bill of Rights, Art. 10.
37. State v. Ricks, 170 Kans. 660, 250 P.2d 773 (1952).
38. Wyo. Const., Art. I, § 9; "The right of trial by jury shall remain inviolate in criminal cases."
39. Mont. Const., Art. III, § 23; "The right to trial by jury shall be secured to all and remain inviolate."
40. Utah Const., Art. I, §§ 10, 12; "The right of trial by jury shall remain inviolate in capital cases."
41. Colo. Const., Art. III, § 23, "The right of trial by jury shall remain inviolate in criminal cases."
42. 131 Mont. 238, 309 P.2d 1010, 1018 (1957).

a jury but he may not waive a jury trial in favor of having one by the court—to use the court's terms, the constitution guarantees a jury trial when such is "desired and requested"—they consider this as being a sacred right of the accused and as preserving their Bill of Rights. A later Montana case, *State v. Peters*[43] upheld the dictum of the previous case in saying that one can waive his right to a jury trial only by entering a plea of guilty.

At the other end of the scale, Utah in *Barlow v. Young*,[44] although not citing the *Patton* case, held that a jury may be waived and stated many of the principles of the *Patton* test, *i.e.*, consent by the attorney and of defendant given in open court.

This leaves only the Colorado cases which, because of the complete identity of constitutional clauses, should bear most strongly on future Wyoming actions. Colorado first held in *Weiss v. People*,[45] which involved first degree murder, that under the constitution a murderer *must* have a trial by jury. The court considered this imperative because the jury must determine the facts, and is to be the sole judge of the credibility of all witnesses including the defendant—no judge acting alone could invade the jury's province. Then, in the 1950 case of *Munsell v. People*,[46] which pertained to the crime of confidence game, the court qualified its former view and held that under the constitution one could waive his rights to a jury trial and, on a plea of not guilty, be tried by the court. In dictum the court said, "nothing herein shall be construed as countenancing the waiver of a jury where the charge is murder of the first degree." This dictum was later upheld in *Graham v. People*,[47] where it was said that in a trial for murder the mandatory provisions of the statute require that a jury fix the degree of the murder, and that therefore the trial judge has no duty other than imposing a sentence in accordance with the jury's verdict. Finally, in *Geer v. Alaniz*,[48] the Colorado court held that as to all crimes but murder the right to trial by jury and related matters are known as alienable rights, or as rights in the nature of personal privileges, and as such, whenever they are assentable, they may be waived. In this particular case the court said the party had waived his rights to a jury trial by failing to expressly ask that he be granted a jury trial.

Let us evaluate the holdings in Montana, Utah and Colorado. In Montana, although the cases cited hold that one may not waive his jury trial except by pleading guilty, it would seem that the Montana court has left much to be desired—one might say that Montana has only found a starting point but nothing more. The opinion in the *Scalise* case seems contradictory, by first holding the accused cannot waive a jury trial, then saying that the constitu-

43. 140 Mont. 162, 369 P.2d 418 (1962).
44. 100 Utah 523, 161 P.2d 927 (1945).
45. 87 Colo. 44, 285 P. 162 (1930).
46. 122 Colo. 420, 222 P.2d 615 (1956).
47. 134 Colo. 290, 302 P.2d 737 (1956).
48. 138 Colo. 177, 331 P.2d 260 (1958).

tion guarantees a jury trial when such is "desired or requested." What does the court mean by using these words? May you have a jury only if you want or ask for one? What if you do neither of these things, but instead remain silent? Secondly, the court felt that to refuse waiver is to enforce the state's Bill of Rights, the "public policy" argument. But we may point out, by using the logic of the *Patton* case and the Indiana case of *Brown v. State* that defendants have been allowed to waive other rights given by the same Bill of Rights—and which at common law and today are thought to be just as "sacred", to use the Montana court's words, as the right of a felony defendant to have a jury trial. Thus, the Montana decisions are of questionable value.

As to the Utah decisions, it is submitted that these should be avoided as a primary example of state action because their constitution expressly limits our question to the narrow field of capital offenses. However, these decisions, along with New York and others do stress the fact that the trend today seems to be the following of the federal court decisions and manner of reasoning.

The Colorado cases seem sound. Colorado's constitution is phrased exactly like Wyoming's. It is submitted that the Colorado Court is correct in allowing the accused a qualified right to waive a jury in all criminal cases except capital offenses. This qualified right is subject only to the court's discretion. Since in Wyoming the jury sets the penalty for first degree murder,[49] our court should make the same exception to the waiver privilege as to first degree murder as Colorado has made.

There have been and still are, in a few states, arguments that public policy should militate against waiver—the state having an interest in the trial. As pointed out in the *Patton* case and the Indiana cases, this line of thought may have been good and necessary under common law conditions, but today these conditions no longer exist and there is no reason, as the proverb says, to beat a dead horse—the common law did not stand for this!

If waiver is allowed, of course there may be appeals from the lower court's decision on the grounds that the defendant's constitutional rights were not adequately explained, or that the judge was incompetent or prejudiced. If, however, a careful standard upon which waiver is granted or denied is set up and followed, as indicated by the *Patton* case and thus, the chances of error would be minimal. Such a standard should require that the defendant must, in writing, apply for and obtain the consent of the court which has jurisdiction to try such a case; secondly, get the consent of his own counsel; and thirdly, that these consents would be granted only if the record shows that the defendant had his rights explained, and recognized the consequences and seriousness of his request. After doing this, if he wants to appeal claiming unfair treatment, his signed waiver of the jury trial would stand in his path and by court decision he must carry the burden of proving that the standard

49. State v. Brown, 60 Wyo. 379, 151 P.2d 950 (1944).

was not faithfully and completely fulfilled. If the accused does successfully prove such a contention, then as a matter of right he must be granted a new trial. By this standard we can, as we must, realize and retain the value and importance of preserving the accused's right to a trial by jury, while still reserving to him the full benefit of his personal privilege to waive such right, if he so desires.

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