Land & Water Law Review

Volume 25
Issue 2 *Tribute to Twenty-Five Years of the Land and Water Law Review*

Article 16

1990

Criminal Procedure - When Should a Jury Trial Be Required in the Wyoming Municipal Courts - City of Casper v. Cheatham

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CASENOTE

CRIMINAL PROCEDURE—When Should a Jury Trial be Required in the Wyoming Municipal Courts? *City of Casper v. Cheatham*, 739 P.2d 1222 (Wyo. 1987).

On December 26, 1985, officers of the Casper City Police Department arrested William Frank Cheatham on charges of driving while under the influence of intoxicating beverages (DWUI) and resisting arrest.[1] Under Casper city ordinances, neither charge was punishable by jail.[2] At his initial appearance, Cheatham pleaded not guilty, demanding a jury trial upon the DWUI charge.[3] The municipal judge denied the demand. Cheatham was convicted at a bench trial and fined $750.00.[4]

Cheatham appealed to the district court. He claimed a right to jury trial on three separate grounds. First, he argued that DWUI is not a petty offense. Therefore a jury trial must be provided on constitutional grounds.[5] Second, he maintained that under certain uniformity requirements of Wyoming law,[6] a jury trial must be offered for DWUI charges as a substantive right.[7] Finally, he argued that Wyoming's automatic driver's license suspension provisions[8] are in themselves sufficient to trigger the right to jury trial under Wyoming law.[9] The district court agreed, reversed Cheatham's conviction, and remanded the case for trial by jury in the municipal court.[10]

The Wyoming Supreme Court rejected the City of Casper's appeal. Because the fine was substantial, because a subsequent conviction would result in a mandatory jail sentence, and because the legislature had recently increased the penalties for drunk driving convictions, the court

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1. Brief of Appellant at 1, City of Casper v. Cheatham, 739 P.2d 1222 (Wyo. 1987) (No. 86-307) (hereinafter Brief of Appellant).
2. *Id.* Cheatham was charged with violating Casper City Ordinance §§24-27 (DWUI) and 26-36(a) (resisting arrest). CASPER, WYO. ORDINANCES §§ 24-27, 26-36(a). The disposition of the resisting charge is not indicated, but that charge was not at issue on appeal. Brief of Appellant at 1.
3. Brief of Appellee at 1, City of Casper v. Cheatham, 739 P.2d 1222 (Wyo. 1987) (No. 86-307) (hereinafter Brief of Appellee).
4. City of Casper v. Cheatham, 739 P.2d 1222, 1223 (Wyo. 1987).
5. Brief of Appellee at 6.
6. The Wyoming Constitution requires that all general laws be of uniform application. WYO. CONST. art 1, §34. Wyoming Statute section 31-5-108 provides that the provisions of the Uniform Act Regulating Traffic on Highways shall be of uniform application throughout the state, but that local authorities may adopt similar or additional regulations not in conflict with the Act, and may enforce such local regulations in the municipal courts. WYO. STAT. §31-5-108 (1989).
7. Brief of Appellee at 10.
8. Wyoming Statute section 31-7-128(b) provides that a motor vehicle operator's license must be suspended upon conviction of violating the state DWUI statute *or similar law prohibiting DWUI.* WYO. STAT. §31-7-128(b) (1989) (emphasis added).
9. Brief of Appellee at 17.
10. *Id.* at 1.

held that DWUI is a serious offense for which a jury trial must be afforded as a matter of right.[11]

By allowing a jury trial under these circumstances, *Cheatham* departed from existing precedent. Under the municipal courts' rule of criminal procedure, defendants may demand a jury trial only when a jail sentence is provided by ordinance.[12] Prior to *Cheatham,* the decisions of the Wyoming Supreme Court had consistently adhered to that same principle.[13] *Cheatham* was the first decision to hold that a non-jailable offense may nevertheless be serious enough to mandate a jury trial.[14] This casenote examines that holding, attempting to identify when an offense is serious enough to require a jury trial upon demand. It concludes that *Cheatham* simply provides too little guidance to indicate what constitutes "seriousness" with any precision. The casenote suggests that the Wyoming Supreme Court promulgate a new court rule making jury trials available for all municipal offenders.

BACKGROUND

Federal Law

Persons charged with a "crime" under federal law are guaranteed the right to a jury trial under both article III and the sixth amendment of the United States Constitution.[15] However, the United States Supreme Court has long recognized that this right does not extend to petty offenses.[16]

In *Duncan v. Louisiana,* the Court held that the due process clause of the fourteenth amendment[17] extends the sixth amendment jury trial right to defendants in the courts of the various states.[18] The Court reiterated that defendants charged with petty offenses do not enjoy a jury trial entitlement.[19]

Duncan did not indicate when an offense would be considered "petty" for purposes of jury trial entitlement. As the Court stated in *Duncan,* "the boundaries of the petty offense category have always been ill-defined, if not ambulatory."[20] However, the earlier case of *District of Columbia v. Clawans* indicated that offenses should be classified based on objective criteria, such as how the offense is treated under existing

11. *Cheatham,* 739 P.2d at 1224.
12. W.R.CR.P.J.C. 5(d).
13. *See infra* pp. 5-7 for discussion of pre-*Cheatham* case law.
14. *Cheatham,* 739 P.2d at 1223.
15. U. S. CONST. art. III, §2, cl. 3 states, in part: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U. S. CONST. amend. VI states, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."
16. Callan v. Wilson, 127 U.S. 540, 557 (1888).
17. U.S. CONST. amend. XIV, § 1 states, in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."
18. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).
19. *Id.* at 159.
20. *Id.* at 160.

law.[21] The *Clawans* Court further noted that the penalty authorized for a crime may in itself mandate sixth amendment guarantees.[22]

The federal criminal system exemplifies the kind of "objective criteria" which *Clawans* advocated. Federal crimes are explicitly classified under federal law.[23] The United States Code currently classifies petty offenses as misdemeanors punishable by no more than six months imprisonment and infractions punishable by fine not exceeding five thousand dollars for an individual violator, or ten thousand for a corporation.[24] The classification scheme in effect when *Duncan* was decided used a similar six-month cutoff.[25] Under these objective criteria, six months imprisonment would appear to mark the outer boundary of the petty offense for sixth amendment purposes.

Developing case law also indicated that a potential jail term of six months would entitle a federal offender to a jury trial.[26] For example, in *Cheff v. Schnackenberg,* a criminal contempt case where no maximum penalty was specified by law, the Supreme Court held that no jury trial is required if the sentence actually imposed does not exceed six months.[27] In *Frank v. United States,* the Court declined to require a jury trial before the judge could impose a three-year probation in lieu of sentencing.[28] The Court noted, however, that if probation should be revoked, the maximum imprisonment could not exceed six months.[29] Finally, in *Codispoti v. Pennsylvania,* the Court considered a case where the sentences imposed for separate counts of direct contempt did not exceed six months but were directed to run consecutively, thereby aggregating in excess of two years.[30] The Court held that no one could be imprisoned for more than six months without jury entitlement.[31]

Under the United States Constitution, a defendant's right to a jury trial depends upon the nature of the alleged offense. If it is a serious crime, such as one punishable by more than six months imprisonment, a jury trial must be offered.[32] For petty crimes, no such right

21. District of Columbia v. Clawans, 300 U.S. 617, 627 (1937).
22. *Id.*
23. *See* 18 U.S.C. §3559 (1988).
24. 18 U.S.C. §§ 19, 3571 (1988).
25. Act of June 25, 1948, ch. 645, 62 Stat. 684 (formerly codified at 18 U.S.C. §1).
26. *See infra* text accompanying notes 27-31.
27. 384 U.S. 373, 379-80 (1966) (plurality opinion, per Clark, J.).
28. 395 U.S. 147, 150 (1969).
29. *Id.* at 150 n.4.
30. 418 U.S. 506, 507-10 (1974).
31. *Id.* at 517. Justice White's majority opinion offers the six month limit as a settled rule of law. The opinion notes that in *Baldwin v. New York,* 399 U.S. 66 (1970), the six months rule announced by the three-justice plurality received the concurrences of Justices Black and Douglas (who believed that a jury trial was required for *all* crimes, 399 U.S. at 74-75, and thus would certainly be required for crimes providing for more than six months imprisonment). Thus, five members of the eight-member *Baldwin* Court had agreed, at the very least, that six months imprisonment denotes a serious offense requiring that a jury trial be available. *Codispoti,* 418 U.S. at 512 n.4.
32. Under the federal offense classification scheme, an "infraction" punishable by a fine of more than $5,000 ($10,000 for a corporation) is not "petty," and hence would entail a right to jury trial. 18 U.S.C. §19 (1988). It is not clear whether this entitle-

exists.[33] However, a right to jury trial may arise under state law as well. A state's constitution might provide a jury trial guarantee which exceeds the scope of that provided by the fourteenth and sixth amendments.[34] Moreover, a state statute may provide a more extensive jury trial entitlement than required by constitution.[35] Thus, one must look to Wyoming law and precedent to fully identify when a Wyoming municipal court defendant is entitled to a jury trial.

Wyoming Law

The Wyoming Constitution guarantees the right to jury trial in all criminal cases.[36] However, this constitutional provision apparently does not assure a jury trial for petty offenses.[37] In order to determine what constitutes a "petty" offense under Wyoming law, it is necessary to examine the background of statute, rule and case law which preceded the *Cheatham* decision.

Prior to the adoption of the Wyoming Rules of Criminal Procedure for Justice of the Peace and Municipal Courts (W.R.Cr.P.J.C.), a statute prohibited jury trials in the municipal courts.[38] However, municipal court defendants were entitled to appeal an adverse decision to the district court.[39] Such appeals were not conducted on the record, but rather resulted in a trial *de novo*.[40] At the trial *de novo* the defendant could demand a jury trial.[41]

The above statute guaranteed to each defendant a right to trial by jury. However, this right could only be exercised upon appeal, and the jury trial itself would take place only in the district court.

Under its rule-making authority, the Wyoming Supreme Court may supercede existing statutes of a merely procedural nature, but may not

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ment is of constitutional or statutory origin. Though dicta in *Duncan* approved of the federal classification scheme then in existence, 391 U.S. at 161, the Court has never explicitly held that this classification scheme defines the "petty" offense for sixth amendment purposes. It may be that the sixth amendment guarantees a jury trial *only* when more than six months imprisonment is possible. The right to jury trial afforded for more serious infractions (but nevertheless punishable by not more than five days imprisonment) may be a statutory right only, not one which derives from the constitution.

33. *See supra* text accompanying notes 15-19.

34. Brenner v. City of Casper, 723 P.2d 558, 561 (Wyo. 1986).

35. *See* WYO. STAT. §7-16-112 (1977) (repealed 1985).

36. WYO. CONST. art. 1, §9 states, in part: "The right of trial by jury shall remain inviolate in criminal cases. . . ."

37. *See* Shafsky v. City of Casper, 487 P.2d 468, 471 (Wyo. 1971) (noting that Wyoming Constitution article 1, section 10 [now section 9] is similar to United States Constitution amendment VI, which does not require jury trials in such cases); *see also* Lapp v. City of Worland, 612 P.2d 868, 874 n.7 (Wyo. 1980) (refusing to reach the question of whether the legislature could eliminate jury trials in petty offenses, but noting that many states have so construed similar provisions of their respective constitutions and pointing to the above statement in *Shafsky*).

38. WYO. STAT. §5-6-207 (1977), *declared unconstitutional* in Brenner v. City of Casper, 723 P.2d 558 (Wyo. 1986).

39. WYO. STAT. §5-6-302 (1977) (*superseded by* W.R.CR.P.J.C.).

40. *Id.*

41. *Shafsky*, 487 P.2d at 469 (citing State *ex rel.* Suchta v. District Court, 74 Wyo. 48, 283 P.2d 1023 (1955)).

extend or enlarge upon a substantive right.[42] The court recognized in *Lapp v. City of Worland* that a right to jury trial conferred by statute is a substantive right.[43] However, it held that such details as to where and when the trial should take place are merely procedural.[44] Accordingly, the statutory scheme outlined above could be changed under the rule-making authority of the Wyoming Supreme Court.[45]

In 1974 the court's adoption of the W.R.Cr.P.J.C. dramatically changed the statutory scheme.[46] The W.R.Cr.P.J.C. provided in Rule 5(d) that a municipal court defendant had the right to a jury trial in the municipal court whenever jail time would be imposed.[47] The new rules superseded the statutory provisions which denied the right to jury trial at the municipal court level and provided for trial *de novo* upon appeal.[48]

State ex rel. Weber v. Municipal Court of the Town of Jackson presented the first challenge to the provisions of the newly-adopted Rule 5(d).[49] In *Weber,* the judge denied the defendant's jury trial demand, indicating that he did not intend to impose a jail sentence upon conviction.[50] Weber petitioned the Wyoming Supreme Court for a writ of prohibition and was denied on procedural grounds.[51] The court did not reach the underlying issue of whether the judge could deny a jury trial demand by declaring that he would not incarcerate the defendant upon conviction.[52]

The issue surfaced again in *Lapp.*[53] The circumstances in *Lapp* resembled those in *Weber,* but *Lapp* presented the issue on direct appeal.[54] The Wyoming Supreme Court reversed Lapp's conviction, construing Rule 5(d) to mean that a jury trial must be afforded if the ordinance under which the defendant is charged provides that a jail sentence may be imposed upon conviction.[55] The court later amended Rule 5(d) to provide that a jury trial entitlement exists whenever the ordinance provides for a jail sentence.[56]

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42. WYO. STAT. §§5-2-114, 115 (1977).
43. 612 P.2d at 873.
44. *Id.* at 872-73 (citing Stutsman v. City of Cheyenne, 18 Wyo. 499, 501, 113 P. 322, 323 (1911)).
45. *Lapp,* 612 P.2d at 873.
46. *Id.* at 870.
47. As originally adopted on October 23, 1974, Rule 5(d) provided, in pertinent part: "(d) Jury in municipal court. - There shall be no right to demand a jury trial in municipal courts unless a jail sentence is to be imposed upon conviction. . . ." W.R.CR.P.J.C. 5(d).
48. W.R.CR.P.J.C. 29.
49. 567 P.2d 698 (Wyo. 1977).
50. *Id.*
51. *Id.* at 700-01.
52. *Id.* at 700.
53. 612 P.2d 868 (Wyo. 1980).
54. *Id.* at 870.
55. *Id.* at 875.
56. The pertinent section now reads: "[t]here shall be no right to demand a jury trial in municipal courts unless a jail sentence is provided for by ordinance." W.R.CR.P.J.C. 5(d).

In cases following *Lapp,* the Wyoming Supreme Court steadfastly adhered to the basic principle that in the municipal courts, a possible jail sentence entitles the defendant to a jury trial. In *Brenner v. City of Casper,* a DWUI case, the court considered whether Wyoming Statute section 5-6-207,[57] which denied the right to jury trial in municipal court for any offense, was constitutional.[58] The court found that it was not, and held that any offense punishable by incarceration is a serious offense which triggers a constitutional right to a jury trial.[59] In *Nollsch v. City of Rock Springs,* the court disregarded the defendant's claim of a constitutional right to jury nullification (i.e., *de facto* repeal of an existing statute by juries which refuse to convict) and held that he had no right to a jury trial since his offense was not punishable by a jail sentence.[60] And in *Dawson v. City of Casper,* the court stated that since the ordinance did not provide a jail sentence for the offense charged, the defendant could not demand a jury trial.[61]

Since the adoption of Rule 5(d), Wyoming's municipal judges, attorneys, and defendants have had little difficulty determining whether a jury trial could be demanded for a given offense. They had only to determine whether the ordinance provided for a jail sentence. No jail, no jury. *Cheatham,* however, changed that standard.

THE PRINCIPAL CASE

The only question presented by *Cheatham* was whether a defendant charged with DWUI in a municipal court should be entitled to a jury trial, even when the ordinance did not provide for a jail sentence.[62] Casper's municipal judge answered that question in the negative.[63] When Cheatham appealed, the district court disagreed, and remanded for a new trial before a jury.[64] The City of Casper then appealed the district court's decision and presented the issue to the Wyoming Supreme Court.[65]

In their briefs to the Wyoming Supreme Court, the parties offered several arguments in support of their respective positions.[66] Cheatham argued three separate grounds for affirming a jury trial entitlement.

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57. *See supra* note 38 and accompanying text.
58. 723 P.2d 558, 559 (Wyo. 1986).
59. *Id.* at 561.
60. 724 P.2d 447, 450 (Wyo. 1986).
61. 731 P.2d 1186, 1187 (Wyo. 1987). Dawson had been convicted of speeding, and raised a number of issues on appeal, including Casper's jurisdiction to bring the charge and Dawson's right to non-attorney counsel of his choice. The court found no merit in his arguments and dismissed each in virtual summary fashion. *Id.* at 1187-88.
62. *Cheatham,* 739 P.2d at 1223.
63. *Id.*
64. *Id.*
65. *Id.*
66. These arguments are summarized here not only to illuminate the issues presented, but also because these arguments, though facially persuasive, were *not* adopted by the court. Since *Cheatham* leaves so many questions unanswered, *see infra* text accompanying notes 96-107, municipal practitioners may find it helpful to know what the court did *not* find persuasive.

First he argued that DWUI is a serious offense *per se*.[67] As evidence, he pointed to the legislature's considerable investment of time and energy in refining the DWUI statute[68] which formed the basis of Casper's DWUI ordinance.[69] He also pointed out that a second conviction under either Casper's ordinance or the state statute would result in a mandatory jail sentence.[70] Cheatham's second argument emphasized the uniformity requirements of the Wyoming Constitution and statutes.[71] Since persons charged with DWUI under state statute are entitled to a jury trial, he argued that persons charged with a similar offense under a city ordinance should be similarly entitled to a jury trial.[72] Finally, Cheatham argued that since he faced automatic suspension of his driver's license upon conviction, a jury trial should be his by right.[73] For one, he claimed it would be fundamentally unfair to deprive him of such a valuable privilege without affording that right.[74] Moreover, the driver's license suspension statute only operates upon conviction of a DWUI ordinance which "substantially conforms" to Wyoming's DWUI statute.[75] Since defendants charged under the state DWUI statute are entitled to a jury trial, Cheatham argued that a municipal DWUI ordinance must also provide for a jury trial to be substantially conforming.[76]

The City of Casper (Casper) argued that the "incidental consequences" of a DWUI conviction are not sufficient to make DWUI a serious offense.[77] Casper pointed out that a number of petty offenses have many of the same repercussions as a DWUI conviction.[78] Casper also cited authority holding that incidental consequences are not part of the sentence.[79] Finally, Casper noted that municipalities are expressly authorized to regulate traffic.[80] Casper emphasized that local traffic ordinances need not provide the same penalties as their state statute counterparts.[81]

In analyzing the case, the Wyoming Supreme Court paid little attention to the arguments of the parties, focusing instead on other issues. The court first questioned whether the fine itself might be sufficient to confer "seriousness." The court noted that the maximum fine of

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67. Brief of Appellee at 5.
68. WYO. STAT. §31-5-233 (Supp. 1986) (current version at *id.* (1989)). With the exception of the penalty clause, the ordinance under which Cheatham was charged was identical to this statute. *Cheatham*, 739 P.2d at 1223.
69. Brief of Appellee at 5-6.
70. *Id.* at 6.
71. WYO. CONST. art. 1, §34; WYO. STAT. §31-5-108 (1989). *See supra* note 6.
72. Brief of Appellee at 11-12.
73. *Id.* at 17.
74. *Id.* at 17-18.
75. WYO. STAT. §31-5-233(e) (1989).
76. Brief of Appellee at 18-19.
77. Brief of Appellant at 6.
78. *Id.* at 6-7.
79. *Id.* at 6 (citing Keller v. State, 723 P.2d 1244 (Wyo. 1986)).
80. *Id.* at 8. Brief of Appellant at 8.
81. *Id.* at 9.

$750.00 is "not an insubstantial amount."[82] The majority considered whether it should draw a "bright line" test of seriousness based upon the amount of the fine, but ultimately declined to do so.[83] The court then determined that factors other than the fine should be considered in deciding whether an offense is serious.[84]

The mandatory jail sentence for a second offender weighed most heavily in the *Cheatham* court's analysis. The court noted that if Cheatam were subsequently convicted under the state DWUI statute, his earlier conviction under the Casper DWUI ordinance would trigger a mandatory jail sentence. Because of this, the court viewed the Casper ordinance as being "involved in" a jail sentence.[85] More important, the court noted that such offenses as burglary and manslaughter do not require a mandatory jail term upon second conviction, even though they are clearly serious offenses.[86] Finally, the court took note of the legislature's action in significantly increasing the penalties for DWUI convictions.[87] In view of all these factors, the court held that "the offense of DWUI is a serious offense for which there is a right to a jury trial."[88]

ANALYSIS

Perhaps the most important point to be derived from *Cheatham* is one never acknowledged in the opinion. Though not explicitly stated, *Cheatham* has essentially declared Rule 5(d) unconstitutional.

Cheatham held that "the offense of DWUI is a *serious* offense for which there is a right to a jury trial."[89] The court does not state the legal foundation for this holding. However, in summarizing prior decisions on the jury trial issue, the court emphasizes *Brenner v. City of Casper*.[90] The *Cheatham* court characterizes the issue in *Brenner* as being whether a municipal ordinance DWUI charge was "a *serious* offense for which a jury trial must be offered pursuant to Article I, §9 of the Wyoming Constitution."[91] This discussion of the "seriousness"

82. *Cheatham,* 739 P.2d at 1224.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* In 1977, the penalty for 1st offense DWUI was no more than 30 days in jail and a fine of $100, while second offense was 60 days and $200. In 1986, first offense posed a possible sentence of six months and $750, while second offense added a mandatory jail sentence of not less than seven days and mandated a fine of not less than $200. *Compare* WYO. STAT. §31-5-233 (1977) to *id.* (Supp. 1986). In the same time period, driver's license suspensions which had earlier ranged from 30 days (1st offense), 60 days (2nd), and one year (3rd), increased to 90 days (1st), one year (2nd), and three years (3rd). *Compare id.* (1977) to *id.* §§31-7-127, 128 (Supp. 1986). Finally, by 1986 the legislature had added a provision that an offense charged under section 31-5-233 or similar local ordinance could not be reduced or dismissed unless the prosecuting attorney filed a statement and supporting facts with the court indicating there was insufficient evidence to convict as charged. *Id.* §31-5-233(h) (Supp. 1986).
88. *Cheatham,* 739 P.2d at 1224.
89. *Id.* (emphasis added).
90. 723 P.2d 558 (Wyo. 1986).
91. *Cheatham,* 739 P.2d at 1223 (emphasis in original).

of the offense is relevant only to a constitutional inquiry.[92] In holding that DWUI is a "serious offense" requiring a jury trial, *Cheatham* was clearly construing the Wyoming Constitution.[93]

The inescapable conclusion from *Cheatham* is that under the Wyoming Constitution, an offense may be a serious offense, conferring a right to jury trial, even if no jail sentence may be imposed upon conviction. But Rule 5(d) states that "[t]here shall be no right to demand a jury trial in municipal courts unless a jail sentence is provided for by ordinance."[94] The contradiction is undeniable. And since, as just demonstrated, the holding of *Cheatham* was of constitutional basis, Rule 5(d) clearly violates the Wyoming Constitution.

Since Rule 5(d) is unconstitutional, it no longer determines when a jury trial may be demanded of right. Wyoming practitioners must turn to the case law, and particularly to *Cheatham,* to determine when a defendant is entitled to a jury.

Brenner held that "a crime punishable by any jail term . . . is a serious crime subject to the constitutional right to a jury trial."[95] *Cheatham* did not disturb this holding, so jail continues to be a factor which makes an offense "serious."[96] The question is, what other factors might have this effect?

The first factor discussed in *Cheatham* was the size of the fine that may be imposed.[97] The court declined to draw a bright line test of seriousness based upon the fine, but clearly considered doing so.[98] This might imply that any offense is potentially serious if a substantial fine is authorized. But such an implication would not be warranted. The Wyoming legislature has authorized municipalities to impose fines of up to $750.00 for any violation of municipal ordinance.[99] While some municipalities may ordain specific ranges of fines for particular offenses, others have simply declared that any offense against their municipal code may be punished by a fine of up to $750.00.[100] In such communities, reference to the maximum fine as an indicator of seriousness would

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92. Neither "petty" nor "serious" appear in the relevant Wyoming rules or statutes, nor are these words employed in discussion of construction of Wyoming rules or statutes. By their very presence, these words signify that the right being determined is of constitutional dimension. *See Brenner,* 723 P.2d at 561.

93. *See Cheatham,* 739 P.2d at 1223 (quoting from *Brenner* that a crime punishable by jail is a *serious* offense subject to a constitutional right to jury trial, followed immediately by asking whether DWUI is a *petty* offense for which no such right exists).

94. W.R.CR.P.J.C. 5(d).

95. 723 P.2d at 561.

96. 739 P.2d at 1223.

97. *Id.* at 1224.

98. *Id.*

99. WYO. STAT. §15-1-103(a)(xli) (Supp. 1989).

100. *See, e.g.,* PINEDALE, WYO. MUNICIPAL CODE §§9.36.010,.020 (1985) (all offenses against Title 9, Public Peace, are punishable by a fine of up to $750.00 plus costs, or for more serious offenses, a fine of up to $750.00 and/or jail of up to six months, plus costs). For minor offenses, the municipal judge often will establish a schedule of customary fines and/or bond amounts, in order to assure uniform sentencing. In aggra-

result in all offenses being considered serious. This is hardly consistent with the distinction which has been drawn between "serious" and "petty" offenses. The size of the maximum fine ordained could not serve as a realistic indicator of seriousness.

In holding that DWUI is a serious offense, the *Cheatham* court relied heavily upon the fact that a second conviction would result in a mandatory jail sentence.[101] The court contrasted DWUI to a number of serious felonies which have no mandatory jail sentence for second conviction.[102] In essence, DWUI is inherently serious because it places the offender "at risk" of serious consequences upon a subsequent conviction. By logical extension, any other offense where a subsequent conviction would result in penalty enhancement must be closely scrutinized.[103] If the enhanced penalty would be "serious," such as a mandatory jail sentence, then the original offense which places the offender "at risk" might also be considered serious.

Another factor considered by the *Cheatham* court was recent legislative action to increase the penalty for drunk driving in response to public outcry.[104] This factor was relevant in *Cheatham* and the court properly noted it as evidence that DWUI is a serious offense. But this factor is not likely to assist the municipal practitioner in determining whether a different offense is serious. Public outcries and legislative responses are, by their very nature, isolated occurences. Most laws do not generate that kind of scrutiny.

Finally, one factor should be noted which was argued in the briefs but not addressed by the court. This is the issue of incidental consequences.

The loss of a driving privilege is not considered to be part of the sentence imposed for a DWUI conviction. The sentence consists only of the fine and imprisonment imposed by the judge as authorized by statute.[105] Because of this, Casper argued that driver's license suspen-

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vated cases, the arresting or citing officer would have the option of requiring a mandatory appearance before the judge. Since the alleged offender would not then be permitted to post and forfeit bond, the judge would be free to impose upon conviction a greater fine than provided by the schedule, up to the maximum $750.00, if warranted by the facts. This discussion is principally drawn from the personal knowledge and practices of the writer, who was a Wyoming municipal judge from 1979-84. This practice is also followed by the City of Laramie. Telephone interview with Laramie Chief of Police George Parker (Oct. 17, 1989). *See also* the Wyoming Uniform Traffic Citation and Complaint form used by the Wyoming Highway Patrol and most Wyoming municipalities (which includes a provision for requiring a mandatory appearance instead of allowing forfeiture of bond).

101. *Cheatham,* 739 P.2d at 1224.

102. *Id.*

103. An example might be a municipal ordinance providing that a second conviction for driving while suspended would be punishable by a mandatory jail sentence.

104. *Cheatham,* 739 P.2d at 1224.

105. The DWUI statute provides for punishment by fine of up to $750.00, six months jail, or both. WYO. STAT. §31-5-233(e) (1989). Casper's ordinance provides only for the fine. CASPER, WYO. ORDINANCE §24-27. Driver's licenses are suspended pursuant to a different statute, which is triggered by the DWUI conviction. WYO. STAT. §31-7-128 (1989).

sion should not be a factor in determining whether to grant a jury trial.[106] Fundamental fairness suggests otherwise.

While loss of privilege is not part of the *sentence* handed down by the judge, it is certainly a *consequence* of the offender's conviction. And it is a consequence imposed by law.[107] The value of that privilege is part of the price the offender pays as a result of his conviction—perhaps the biggest part. And he pays it because the law requires him to. The offender neither knows nor cares that his license will be suspended through administrative proceedings in a different government agency. He knows and cares only that a valuable privilege has been taken from him by force of law. What matters to him, and what should matter to the constitutional lawyer, is the value of that privilege, and how that value is to be balanced against the competing interests of the state.

The Wyoming Supreme Court disposed of *Cheatham* on other grounds. The driver's license issue was never mentioned. If the court ever finds it necessary to resolve that issue in the future, it should take care to choose substance over form. A driver's license suspension may or may not be a "serious" consequence. But it is not an irrelevant consequence merely because it happens according to administrative proceedings.

The most important aspect of *Cheatham* is not what the case adds to Wyoming law, but rather what it has taken away. *Cheatham* has effectively eliminated Rule 5(d). And the impact of that loss can be devastating.

Rule 5(d) no longer sets the standard for determining when a jury trial must be offered, and nothing else has taken its place. Wyoming municipalities need guidance. On a practical level, jury trials cost money. If municipalities do not know when they may be required to offer a jury trial, they cannot anticipate what those costs will be. The allocation of scarce resources becomes more of a crap shoot than a budget. On a more philosophical level, municipal practitioners and offenders, indeed, all Wyoming citizens, have a vital interest in knowing that the criminal justice system will function as the state's constitution demands. With such a central issue as jury trial entitlement in limbo, this knowledge simply isn't possible. And the entire system suffers as a result.

The *Cheatham* court declared, in effect, that the "no jail, no jury" standard of Rule 5(d) was unconstitutional.[108] Unfortunately, *Cheatham* did not provide an adequate substitute. The *Cheatham* case tells us that if the offender faces mandatory jail the *next* time, his offense is already serious.[109] The case also tells us that the degree of public attention the

106. Brief of Appellant at 6-8.
107. WYO. STAT. § 31-5-233(f) (1989) (declaring that in addition to punishment, those convicted of DWUI shall suffer suspension or revocation of driver's license).
108. *See supra* text accompanying notes 89-94.
109. *Cheatham,* 739 P.2d at 1224.

offense has gathered may be an indication that the offense is serious.[110] Beyond these, it tells us very little.

Rule 5(d) should be replaced as soon as possible. The new rule should indicate precisely when the municipal courts of this state need offer a jury trial. The most appropriate replacement for Rule 5(d) would be a return to what prevailed before Rule 5(d) was adopted.

Prior to Rule 5(d), municipal court defendants could always appeal their convictions to district court.[111] There the offender could demand a jury trial for any offense, no matter how trivial.[112] When Rule 5(d) was adopted, this universal right to a jury trial was restricted to offenses punishable by jail.[113] It would now be fitting to replace Rule 5(d) with a rule restoring that right. In short, to provide that all defendants in municipal courts shall have a right to jury trial for any offense.

A universal jury trial entitlement might not seem attractive to Wyoming's municipalities. Nevertheless, there are several points to recommend it.

First, an absolute right to jury trial has the virtue of being both precise and universal. Municipalities know immediately what the standard calls for and to whom it applies. This aids the policy makers and fiscal planners, who must estimate the needs of their criminal justice system and allocate their resources accordingly. While this standard might increase overall demand for jury trials, the advantage of knowledge would make up for the additional cost.[114]

Some have argued that expanded access to jury trials would make law enforcement prohibitively expensive.[115] This is a persuasive argument, but it simply is not true. In 1982, the Wyoming Supreme Court held in the case of *Goodman v. State* that under Wyoming law, any defendant tried before a justice of the peace is entitled to a jury trial for any offense.[116] Though all five justices joined or concurred in this

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110. *Id.*

111. *See supra* text accompanying note 39.

112. *See supra* text accompanying notes 40-41.

113. W.R.CR.P.J.C. 5(d). Two justices have argued that in so doing, the Wyoming Supreme Court exceeded its statutory authority. *Weber,* 567 P.2d at 703 (McClintock, J., dissenting) and at 704-10 (Rose, J., dissenting); *see also Lapp,* 612 P.2d at 876 (Rose, J., dissenting in part).

114. For most municipalities, the total demand for available resources habitually outstrips resource availability. Thus, the question is not whether there is enough money—there isn't—but rather how to distribute the shortfalls. In this environment, one of the fiscal planner's biggest nightmares is an unavoidable expenditure—such as a jury trial required by law—which cannot be estimated with reasonable precision. The fear is that by the time the magnitude of the demand becomes known, so much may have been expended on discretionary programs that the entity will have lost its flexibility to meet that nondiscretionary demand. As a former city administrator, this writer was more than willing to exchange a larger demand of known dimension for a more restricted demand of unknown dimension. *See* D. AXELROD, BUDGETING FOR MODERN GOVERNMENT, ch. 7.

115. *See, e.g., Cheatham,* 739 P.2d at 1224-25 (Brown, C. J., dissenting).

116. 644 P.2d 1240, 1242-43 (Wyo. 1982).

decision, three were fearful of its anticipated consequences. They strongly suggested that the legislature act promptly to limit jury trial availability.[117] Yet in 1986, the state's justice courts had a total misdemeanor caseload of 30,115 new cases, and only 41 jury trials.[118] As the majority noted in *Cheatham,* an expansion of jury trial entitlement may be marked by increased demand initially, but the demand should soon return to its previous level.[119] And as the opinion stated, "the cost of prosecution—or better, the cost of justice . . . simply cannot be a consideration."[120]

A third factor is the value of consistent treatment between defendants in municipal courts and those appearing before the justice of the peace. In the justice court, the defendant may demand a jury trial for any offense.[121] If, however, she is charged with the exact same conduct in municipal court, and faces the same precise penalties, she is entitled to a jury only if the offense charged is "serious" under the vague principles of *Cheatham.*[122] This disparity must be quite disturbing to the average citizen. By adopting a rule which provides the same jury trial entitlement to defendants in either court, the Wyoming Supreme Court could take a significant step toward restoring public confidence in the integrity and fundamental fairness of the criminal justice system.

CONCLUSION

By discarding the "no jail, no jury" standard for municipal courts, the *Cheatham* decision has thrown Wyoming municipalities into a state of marked disarray. There is now no rule governing when municipal ordinance violators are entitled to a jury trial, and *Cheatham* itself does little to clarify this issue. The state's municipal courts need guidance, and they need it as soon as possible.

The Wyoming Supreme Court should acknowledge that Rule 5(d) has been struck by implication and should promulgate another rule in its place. That new rule should indicate clearly when a jury trial must be offered. An appropriate rule would be to extend this right to all defendants, as it was before Rule 5(d)'s adoption. In so doing, the court would restore a substantive right which was lost when Rule 5(d) was adopted. At the same time, the court would return the Wyoming judicial system to its rightful place, in the vanguard of those institutions seeking to uphold the liberty of Wyoming citizens.

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117. *Id.* at 1243-45 (Raper, J., concurring), 1245-48 (Rooney, J., specially concurring), 1248 (Brown, J., specially concurring).

118. E. Spencer, Justice of the Peace Courts, 1986 Annual Report (Apr. 8, 1987) (unpublished memorandum prepared for R. Duncan, Court Coordinator, Wyoming Supreme Court).

119. *Cheatham,* 739 P.2d at 1224.

120. *Id.*

121. *Goodman,* 644 P.2d at 1242-43.

122. *Cheatham,* 739 P.2d at 1224.