

Chapter 22: Right to Jury

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Chapter 22: Right to Jury

This is the first of three chapters on issues relating to the right to jury trial. This chapter addresses the scope of the jury trial right under the Sixth Amendment and Article I, § 24 of the North Carolina Constitution. Issues discussed include the types of crimes for which a defendant is entitled to a jury trial, the number of jurors required, and jury unanimity. Chapter 23 covers jury selection issues. A later chapter will address juror misconduct and remedies for misconduct.

22.1 Right to Jury Trial under Sixth Amendment

The Sixth Amendment, as interpreted by the U.S. Supreme Court, establishes a defendant's basic right to a jury trial. The most important recent developments under the Sixth Amendment involve limitations on a judge's ability to make sentencing findings. The current law, discussed further below, is that any fact, other than a prior conviction, that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002) (application to capital sentencing); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004); *see also* 1 NORTH CAROLINA DEFENDER MANUAL § 8.8, at 38–40 (July 2004) (discussing pleading requirements in light of *Apprendi* and *Blakely*).

While North Carolina law has previously permitted judges to make sentencing findings, North Carolina's fair trial provision, discussed *infra* § 22.2, is broader than the Sixth Amendment jury trial right.

A. Application to States

The Sixth Amendment to the United States Constitution states in pertinent part, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed.” The right to a trial by jury has been incorporated into the Fourteenth Amendment and applies to state prosecutions. *See Duncan v. Louisiana*, 391 U.S. 145 (1968).

B. Scope of Sixth Amendment Right

The Sixth Amendment to the United States Constitution guarantees the right to a jury trial for all “serious offenses.” There is no federal constitutional right to a jury trial for “petty” offenses. An offense is “petty” if it carries a maximum prison term of sixth months or less. *See Blanton v. North Las Vegas*, 489 U.S. 538, 543 (1989); *accord Lewis v. United States*, 518 U.S. 322, 326 (1996). A defendant charged with multiple misdemeanor offenses, none of which individually carry a penalty of more than six months

imprisonment, has no Sixth Amendment right to a jury trial. *See Lewis, supra; but see Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) (defendant entitled to jury trial where charged with multiple counts of criminal contempt based on conduct during course of trial and aggregate punishment exceeded six months).

Under North Carolina law, a defendant has a jury trial right for a misdemeanor appealed to or initiated in superior court. *See infra* § 22.2A.

C. Number of Jurors

The Sixth Amendment requires that juries in criminal cases be composed of at least six people. *See Ballew v. Georgia*, 435 U.S. 223 (1978) (five jurors too few); *Williams v. Florida*, 399 U.S. 78 (1970) (six jurors acceptable). North Carolina law requires a jury of twelve. *See infra* § 22.2C.

D. Jury Unanimity

As a matter of federal constitutional law, the decision of a jury of twelve does not have to be unanimous. *See Johnson v. Louisiana*, 406 U.S. 356 (1972) (nine out of twelve majority sufficient to support verdict under Sixth Amendment). Juries that are smaller than twelve must be unanimous in their verdict. *See Burch v. Louisiana*, 441 U.S. 130 (1979) (non-unanimous verdict from jury of six violated Sixth Amendment right to jury trial). Unanimity is required under North Carolina law. *See infra* § 22.2D.

E. Right to Jury Verdict on Every Element of Offense, Including “Sentencing” Factors

Generally. If a defendant has a right to a jury trial, he or she has a right to a jury verdict on every element of the offense. *See Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); compare *Schad v. Arizona*, 501 U.S. 624 (1991) (unanimity not required as to whether defendant committed felony murder or premeditated murder; jury does not have to be unanimous on theory of crime).

Definition of “element of offense.” In *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court defined “element” as “any fact (other than prior conviction) that increases the penalty for the crime beyond the statutory maximum.” *Jones*, 526 U.S. at 243 n.6 (“serious injury” was element of carjacking offense that had to be found by jury); *Apprendi*, 530 U.S. at 474 (hate crime enhancer was element and had to be submitted to jury); see also *Ring v. Arizona*, 536 U.S. 584 (2002) (aggravating factors in capital sentencing must be found by jury). This broad definition of “element” includes traditional sentencing factors, including the defendant’s course of conduct, motivations for the crime, or the particular vulnerability of the victim. *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004) (that defendant acted with “deliberate cruelty” is an element that must be found by a jury). So far, the United States Supreme Court has continued to permit judges to find the fact of a prior conviction as a sentencing factor and has not treated this fact as an

“element” that must be found by a jury. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (no right to jury determination on recidivism or fact of prior conviction, which are considered sentencing factors). However, as discussed further below, the U.S. Supreme Court has suggested that it may be willing to reconsider this rule when a defendant’s prior record increases a sentence beyond the statutory maximum.

The U.S. Supreme Court has also permitted the imposition of a mandatory *minimum* sentence on the basis of a judicial finding that a firearm was brandished. *See Harris v. United States*, 536 U.S. 545 (2002) (reaffirming *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and upholding constitutionality of firearm enhancement statute that required imposition of mandatory minimum sentence if sentencing judge found that firearm was brandished). It is unclear whether *Harris* can be reconciled with *Blakely*, and the *McMillan* line of cases may also be reconsidered by the Court.

Aggravating factors under felony structured sentencing. In *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), the United States Supreme Court defined “statutory maximum” as “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely*, 124 S. Ct. at 2537 (emphasis in original). The judge may not impose an enhanced sentence based on the judge’s own findings.

In *State v. Allen*, ___ N.C. ___, ___ S.E.2d ___ (July 1, 2005), the court recognized that North Carolina’s structured sentencing scheme violates these requirements because it allows a judge to impose an aggravated sentence, beyond the presumptive sentence range prescribed for the offense, based on judicial findings of aggravating factors. The decision applies to offenses committed before June 30, 2005, the date when the revised structured sentencing statutes, discussed below, became effective. The court also stated that its holding applies only to cases that are not yet final on direct review on the decision’s certification date. The principle points of the *Allen* decision are as follows.

- A judge may not impose a sentence above the prescribed presumptive range for an offense unless the aggravating factors are (1) submitted to the jury and found beyond a reasonable doubt or (2) admitted by the defendant.
- For offenses committed before June 30, 2005, there is no statutory authority for a jury finding of aggravating factors. Thus, unless the defendant admits to an aggravating factor, it may not be permissible for a court to sentence the defendant above the presumptive range. *See Allen* (in its conclusion, majority of court stated, “Although this Court might envision several measures which would cure the constitutional defect . . . , we are in agreement that the choice of remedy is properly within the province of the General Assembly”).
- According to *Allen*, aggravating factors need not be alleged in the indictment although the structured sentencing statutes then in effect did not authorize short-form indictments (discussed further below under “Indictments”).
- A judge still may consider mitigating factors and balance aggravators (if properly found) and mitigators in determining whether to impose an aggravated, presumptive, or mitigated sentence.

Effective for offenses committed on or after June 30, 2005, the revised structured sentencing statutes establish a new procedure for determining aggravating factors. *See* S.L. 2005-245 (H 822), posted at <http://www.ncga.state.nc.us/>. In brief, the revised statutes provide as follows:

- Unless admitted by the defendant, the jury must determine beyond a reasonable doubt any aggravating factors other than aggravating factor G.S. 15A-1340.16(d)(18a) (defendant previously adjudicated delinquent of offense that would be Class A through E felony if committed by adult), which continues to be decided by a judge.
- A judge has the discretion to bifurcate the proceedings and allow a jury to determine guilt or innocence first and then the existence of aggravating factors.
- The state need not allege aggravators in the indictment except for aggravating factor G.S. 15A-1340.16(d)(20) (catchall aggravator); however, the state must give notice of any aggravating factors at least 30 days before trial or a plea of guilty or no contest unless the defendant waives notice.
- If aggravating factors are found by the jury or admitted by the defendant, the judge finds any mitigators and balances the aggravators and mitigators.

“Points” for conduct other than prior convictions. Under structured sentencing, a defendant may be assigned an offense level “point” for committing an offense included within a prior offense (repeat offender point) (G.S. 15A-1340.14(b)(6)), or for being on parole or pretrial release when committing the offense. G.S. 15A-1340.14(b)(7). Sometimes that point may bump the defendant up to a higher sentencing level. If so, a judicial finding or assignment of that point may be unconstitutional. For offenses committed on or after June 30, 2005, the revised structured sentencing statutes establish jury trial procedures for aggravating factors and for the prior record point under G.S. 15A-1340.14(b)(7). The revised statute does not address the repeat offender point. If a judge finds a repeat offender point for your client and that point enhances your client’s sentence, you should object under *Blakely* and *Allen*.

Waiving right to jury sentencing. *Blakely* holds that defendants may waive their *Apprendi* rights by pleading guilty and either stipulating to certain facts or expressly consenting to judicial fact-finding. *Blakely*, 124 S. Ct. at 2541; *see also State v. Harris*, 166 N.C. App. 386, 602 S.E.2d 697 (in reversing conviction on other grounds, court states that at any new trial defendant may be sentenced in aggravated range only if aggravating fact is found beyond reasonable doubt by jury, stipulated to by defendant, or defendant waived his right to jury such that judicial fact finding would be appropriate), *temporary stay allowed*, 359 N.C. 193, 605 S.E.2d 472 (2004). However, consenting to judicial fact-finding does not appear to be permissible in North Carolina. *See Allen*, *supra*; *see also infra* § 22.2B (discussing state constitutional right to jury).

Other sentencing enhancements. North Carolina’s firearms enhancement statute, unlike the mandatory minimum statute in question in *McMillan* and *Harris* (discussed above under “Definition of element of offense”), increases the *maximum* sentence a defendant may serve by 60 months. *See* G.S. 15A-1340.16A. In *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001), our Supreme Court held that the use of a firearm under the

statute must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. *Allen, supra*, reversed the requirement that the firearm enhancement be alleged in the indictment; however, the firearm enhancement statute, as well as similar statutes imposing other sentence enhancements (G.S. 15A-1340.16B authorizing sex offender recidivist enhancement; G.S. 15A-1340.16C authorizing bullet-proof vest enhancement; and G.S. 15A-1340.16D authorizing methamphetamine enhancement), all require that the enhancing facts be alleged in the indictment. *See generally* JOHN RUBIN, BEN F. LOEB, JR., & JAMES C. DRENNAN, PUNISHMENTS FOR NORTH CAROLINA CRIMES AND MOTOR VEHICLE OFFENSES 8–9 & n.11 (2005) (discussing these statutes).

Prior convictions. There is interest in the United States Supreme Court in reversing *Almendarez-Torres*, which held that a prior conviction is a sentencing factor and not an element that the jury must decide. *See, e.g., Shepard v. U.S.*, ___ U.S. ___, 125 S. Ct. 1254, 1263–64 & n.5 (2005) (discussed in majority opinion and in Justice Thomas’ concurrence). If a prior conviction is considered an element, an argument could be made that judicially-found prior convictions that increase a defendant’s sentence to a higher sentencing level violate the defendant’s right to a jury trial.

Indictments. North Carolina courts have continued to uphold short-form indictments—that is, indictments that fail to list every element of an offense—notwithstanding the *Jones*, *Apprendi*, and *Blakely* decisions. *E.g., Allen, supra* (indictment not required for aggravating factors under structured sentencing); *State v. Randle*, ___ N.C. App. ___, 605 S.E.2d 692 (2004); *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (2003). Counsel should continue to preserve this issue when aggravators and prior convictions are not alleged because it is still possible that the federal courts will reach the issue and hold that the Fifth Amendment requires an indictment or other charging instrument to include all factors that may contribute to the defendant’s sentence. *See also* 1 NORTH CAROLINA DEFENDER MANUAL § 8.5C, at 19–20 (July 2004) (discussing short-form indictments).

F. Impaired Driving and Other Misdemeanor Offenses

In *State v. Speight*, ___ N.C. ___, 614 S.E.2d 262 (July 1, 2005), the court addressed the application of *Blakely* to misdemeanor impaired driving, holding as follows:

- For impaired driving offenses tried in superior court (either when the offense is the subject of a misdemeanor appeal or is joined with a felony for trial initially in superior court), the principles announced in *Allen, supra*, apply. Aggravating factors other than prior convictions must be found by a jury beyond a reasonable doubt or admitted by the defendant. As with the version of structured sentencing addressed in *Allen*, the current impaired driving statutes do not set forth any procedure for jury fact-finding of aggravators. A bill pending in the General Assembly would establish such a procedure along the lines of the revised structured sentencing statutes, but as of this writing it has not been enacted.
- *Speight* suggests that *Blakely* does not apply to the sentencing of impaired driving offenses in district court because a defendant has no jury trial right. A bill pending in

the General Assembly (not yet enacted) would require, however, that a district court judge find aggravators (other than prior convictions) beyond a reasonable doubt.

The use of prior convictions under structured sentencing to increase the punishment for other misdemeanors is unaffected by *Apprendi* and *Blakely*, whether the case is tried in district or superior court, unless the U.S. Supreme Court reverses the exemption it created for prior convictions. *See also* 1 NORTH CAROLINA DEFENDER MANUAL § 8.8, at 38–40 (July 2004).

G. No Right to Jury Trial in Juvenile Proceedings

A juvenile has no right to a jury trial in a hearing on a charge of delinquency. *See McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (juvenile court proceeding is not “criminal prosecution”; thus, trial by jury in adjudicative stage of juvenile court delinquency proceeding is not constitutionally required).

H. Fairness and Impartiality

Under both the Sixth Amendment and the due process clause of the Fourteenth Amendment, whenever the defendant has a right to a jury trial, he or she has a concomitant right to the selection of a fair and impartial jury. *See Morgan v. Illinois*, 504 U.S. 719 (1992); *Irwin v. Dowd*, 366 U.S. 717 (1961) The Sixth Amendment and the Due Process clause establish two requirements for the selection of juries. First, the venire from which petit juries are chosen must represent a “fair cross section of the community.” *See Taylor v. Louisiana*, 419 U.S. 522 (1975) (systematic exclusion of women violated fair cross-section requirement); *accord Duren v. Missouri*, 439 U.S. 357 (1979). Second, jurors whose prior knowledge or other bias would prevent them from deciding the case on the basis of the evidence presented and the law, must be excused. *See Mu’Min v. Virginia*, 500 U.S. 415 (1991) (defendant has right to jurors who are not prejudiced against him by exposure to pretrial publicity); *Irwin v. Dowd, supra* (defendant has right to change of venue if fair and impartial jury cannot be selected in district where offense occurred).

Other constitutional provisions also come into play in guaranteeing the fairness of juries. The Equal Protection Clause of the Fourteenth Amendment precludes the state or defendant from exercising peremptory challenges in a discriminatory manner. *See Batson v. Kentucky*, 476 U.S. 79 (1986) (prosecutor may not exercise peremptories in discriminatory manner); *Georgia v. McCollum*, 505 U.S. 42 (1992) (*Batson* rule applies to defendants).

The Eighth Amendment permits capital defendants to voir dire potential jurors about racial biases. *See Turner v. Murray*, 476 U.S. 28 (1986) (Eighth Amendment permits voir dire of jurors about race in capital prosecution); *see also Ham v. South Carolina*, 409 U.S. 524 (1973) (defendant had due process right under circumstances presented to voir dire jurors about racial attitudes in non-capital trial).

The above requirements are discussed in more detail in Chapter 23.

22.2 Right to Jury Trial under North Carolina Constitution

Article I, § 24 of the North Carolina Constitution states: “No person shall be convicted of a crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right to appeal for trial de novo.”

Our state constitutional right to a jury trial is broader in several respects than the federal constitutional right to a jury trial. Our state constitutional right should always be cited in objecting to an infringement of the right to a jury trial.

A. Scope of Right

Our state constitution confers a right to a jury trial for all crimes, not just serious ones. There are two exceptions to the jury trial right.

1. The legislature has provided for the initial trial of misdemeanors without a jury in district court. Persons tried without a jury must be afforded the right to appeal for a trial *de novo* before a jury. *See State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971); *State v. Reaves*, 142 N.C. App. 629, 544 S.E.2d 253 (2001).
2. Second, it appears that a judge may hold a defendant in criminal contempt, without affording him or her a jury trial, as long as the punishment is six months or less. *See Blue Jeans Corp. v. Amalgamated Clothing Workers*, 275 N.C. 503, 169 S.E.2d 867 (1969) (court stated general six-month rule, but on facts presented, held only that defendant was not entitled to jury trial where he was charged with criminal contempt punishable by thirty days or less); *State v. Reaves, supra* (noting that *Blue Jeans* court only addressed criminal contempt punishable by thirty days or less); *see also Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) (defendant entitled to jury trial under U.S. Constitution where charged with multiple counts of criminal contempt based on conduct during trial and aggregate punishment exceeded six months).

B. Unwaivable Nature of Right

Under Article I, § 24 the right to a trial by jury in superior court is unwaivable, except by pleading guilty. *See State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971); *State v. Muse*, 219 N.C. 226, 13 S.E.2d 229 (1941) (defendant who pled not guilty could not consent to judicial determination of facts in criminal case); *State v. Rogers*, 162 N.C. 656, 78 S.E. 293 (1913) (where defendant asked to proceed with eleven jurors after twelfth juror fell ill, conviction was nullity). Note that the Sixth Amendment right to a jury trial is waivable. *See Adams v. United States ex rel. McMann*, 317 U.S. 269 (1942) (defendant may waive right to jury trial and be tried by judge).

C. Number of Jurors

Generally. North Carolina juries must be composed of twelve people. “It is elementary

that the jury provided by law for the trial of indictments is composed of twelve persons; a less number is not a jury.” *State v. Hudson*, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971) (jury of eleven could not return valid verdict); *see also State v. Poindexter*, 353 N.C. 440, 545 S.E.2d 414 (2001) (“Article I, Section 24 of the North Carolina Constitution . . . contemplates no more or no less than a jury of twelve persons”; where juror was disqualified after guilt-innocence phase for misconduct during guilt-innocence phase, verdict violated defendant’s constitutional right to jury of twelve qualified jurors); *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975) (alternate juror in jury room during deliberations violated constitutional right to jury of twelve).

Substituting alternate during deliberations. Once the jury has begun its deliberations, an alternate may not be substituted without violating the defendant’s constitutional right to a jury of twelve. *See State v. Bunning*, 346 N.C. 253, 485 S.E.2d 290 (1997). *Bunning* reasoned that a substitution during deliberations results in a verdict of eleven jurors plus two jurors who each participate partially. Such a verdict is unconstitutional.

D. Jury Unanimity

Generally. All jury verdicts in North Carolina must be unanimous. *See* N.C. Const. Art. I, § 24; *State v. Baldwin*, 330 N.C. 446, 412 S.E.2d 31 (1992). The jury must unanimously agree that the state has proven every element of an offense. *See State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982); *State v. Lewis*, 274 N.C. 438, 164 S.E.2d 177 (1968) (defendant entitled to jury verdict on every essential element of the crime charged).

Disjunctive jury instructions. The most common problem with jury unanimity occurs when jury instructions are given in the disjunctive—that is, when the instructions allow jurors to find that the defendant committed one act or another. Disjunctive jury instructions violate the defendant’s state constitutional right to a unanimous jury verdict if the disjunctive alternatives state separate offenses. *See, e.g., State v. Lyons*, 330 N.C. 298, 412 S.E.2d 308 (1991) (disjunctive instructions are fatally ambiguous if the alternatives constitute separate offenses for which the defendant could be separately punished; instruction that permitted jury to find that defendant assaulted one person or another person violated jury unanimity requirement); *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986) (instruction that permitted jury to find that defendant possessed or transported marijuana was fatally defective because possession and transportation are separate offenses).

Jury instructions that disjunctively list alternative ways of committing the same offense are not erroneous; the jury need not be unanimous on the method of committing a single element. *See, e.g., State v. Petty*, 132 N.C. App. 453, 512 S.E.2d 428 (1999) (in first degree sex offense case, disjunctive instructions on whether sex act was cunnilingus or penetration not error because offense could be committed in either of two ways). However, reversal on appeal may still be required if the judge instructs the jury on alternative ways of committing the offense, there is insufficient evidence to support one of those theories, and the record does not indicate on which theory the jury relied. *See,*

e.g., *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987) (insufficient evidence to support one of two felonies submitted to jury in support of felony murder); *State v. Moore*, 315 N.C. 738, 340 S.E.2d 401 (1986) (insufficient evidence to support one of three purposes submitted to jury in support of first-degree kidnapping).

In determining whether two alternatives constitute separate offenses or merely different ways of committing one offense, the court considers legislative intent. *See, e.g.*, *State v. Creason*, *supra*. Keep in mind that, if you object to disjunctive instructions, you may be conceding that the alternatives constitute different offenses for which the defendant could be separately punished if the jury finds both alternatives to exist.

For additional examples of instructions that have been challenged as disjunctive, *see* Robert L. Farb, The “Or” Issue in Criminal Pleadings, Jury Instructions, and Verdicts (Feb. 4, 2005), posted at <http://sog.unc.edu/programs/crimlaw/verdict.pdf>.

Jury unanimity in capital sentencing. The unanimity requirement applies to certain jury sentencing decisions in capital cases. *See State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995). *McCarver* held that the jury must be unanimous on every “outcome determinative” issue in the sentencing decision. Outcome determinative issues are Issues I (existence of aggravating circumstances), III (mitigating circumstances do not outweigh aggravating circumstances), IV (appropriateness of death as punishment). Jurors do not have to be unanimous on Issue II, the existence of mitigating circumstances. *See McKoy v. North Carolina*, 494 U.S. 433 (1990) (8th Amendment requires that individual jurors be allowed to make their own findings with respect to the existence of reasons not to impose sentence of death).

