

Constitutional Amendment Permitting Waiver of Jury Trial in Criminal Cases

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CURRENT LEGISLATION

CONSTITUTIONAL AMENDMENT PERMITTING WAIVER OF JURY TRIAL IN CRIMINAL CASES.—One of the outstanding defects of our judicial system has been the delay in the administration of justice in our criminal courts. With this in mind the Judicial Council¹ submitted its recommendations for a constitutional amendment whereby trial by jury in all criminal cases, except those punishable by death, might be waived by the defendant. At the last general election this amendment to Article I, Section 2 of the State Constitution was approved by the people.²

Among the advantages expected to be derived from the amendment are: (a) speeding up of criminal procedure, (b) less likelihood of costly mistrials, and (c) a saving to the taxpayers by the elimination of jurors.

There has been a sharp conflict of authority in this country as to the right to waive a jury trial in criminal cases.³ The difficulty lies in just what interpretation is to be given to the constitutional guarantees preserving the right to trial by jury. The public interest school—so called because it bases its decisions on grounds of public policy—construes the constitutional provisions, the general tenor of which is that trial by jury “shall be inviolate,” or “shall remain inviolate forever,”⁴ as mandatory. Instead of being merely a privilege, for the benefit of the accused, the jury trial is a part of the structure of government itself, and cannot be waived by consent. New York has been the leading advocate of this doctrine. In a leading case, *Cancemi v. People*,⁵ the defendant was indicted upon a charge of murder. After the trial had progressed one of the jurors was withdrawn with the consent of the accused, he agreeing to a verdict by the remaining eleven. In reversing the conviction as invalid the Court of Appeals held the defendant could not, by his consent, waive the absence of one juror. In formulating its public policy doctrine the court said, “* * * for no one has a right, by his own voluntary act, to surrender his liberty or part with his life. The state, the public, have an interest in the preservation of the liberties and the lives of the citizens and will not allow them to be taken away ‘without due process of law.’”

¹ JUDICIAL COUNCIL, Second Report (1936).

² N. Y. CONST. art. I, § 2, as amended, is as follows: “but a jury trial may be waived in the manner to be prescribed by law * * * by the defendant in all criminal cases, except those in which the crime charged may be punishable by death.” Approved Nov. 2, 1937, effective Jan. 1, 1938.

³ Grant, *Waiver of Jury Trial in Felony Cases* (1931) 20 CALIF. L. REV. 132; Naff, *Jury, Waiver Thereof and the Alternate Juror* (1933) 22 KY. L. J. 125.

⁴ N. Y. CONST. art. I, § 2.

⁵ 18 N. Y. 128 (1858).

This decision was approved in subsequent New York cases.⁶ One of the later cases,⁷ while approving, based its holding on the wording of Article I, Section 2, which permitted waiver of jury trial in civil cases, the implication being that since there was no mention of waiver in criminal trials, none was permitted. However, all that was said in these decisions in reference to a defendant's right to waive jury trial was mere *dicta*, since the question of waiver of jury trial *in toto* was not before the court. The influence of this *dicta* was so strong, however, that the Judicial Council cited these decisions as making necessary a constitutional amendment.

While New York was confining itself to a rather narrow and strict construction of its constitution, other courts were more liberal.⁸ The Supreme Court of the United States in *Patton v. United States*⁹ cleared up the confusion engendered by earlier federal cases,¹⁰ by definitely stating that there is no constitutional bar to a waiver of jury trial in criminal cases, whether they be felony or misdemeanor. It vigorously attacked the argument that the institution of trial by jury was intended as part of the framework of government. "It is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused. If not, and their intention went beyond this and included the purpose of establishing the jury for crimes as an integral and inseparable part of the court, instead of one of its instrumentalities, it is strange that nothing to that effect appears in contemporaneous literature or in any of the debates or innumerable discussions of the time."¹¹

It would appear that the decisions holding that trial by jury is a privilege to be waived at the discretion of the defendant are fundamentally sound. At common law jury trial by twelve men was regarded as a safeguard against the oppressions of cruel and tyrannical monarchs. But today the historical reason no longer holds true. There is no reason why the accused, if he feels he can receive a fairer

⁶ *Stokes v. People*, 53 N. Y. 164 (1873); *Pierson v. People*, 79 N. Y. 424 (1880); *People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408 (1912).

The constitutional provisions do not apply to petty offenses triable before a Court of Special Sessions, since no jury was permitted therein at common law. *People ex rel. Murray v. Justices, etc.*, of N. Y., 74 N. Y. 404 (1878).

⁷ *People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408 (1912).

⁸ *Patton v. United States*, 281 U. S. 276, 50 Sup. Ct. 253 (1930); *State v. Worden*, 46 Conn. 349 (1878); *People v. Fisher*, 34 Ill. 250, 172 N. E. 722 (1930); *Com. v. Rowe*, 257 Mass. 172, 153 N. E. 537 (1926); *State v. Almy*, 67 N. H. 274, 28 Atl. 372 (1892).

⁹ 281 U. S. 276, 50 Sup. Ct. 253 (1930).

¹⁰ *Dickinson v. United States*, 159 Fed. 801 (C. C. A. 1st, 1908); *Low v. United States*, 169 Fed. 86 (C. C. A. 6th, 1909); see *Thompson v. Utah*, 170 U. S. 343, 18 Sup. Ct. 620 (1898), where the Supreme Court itself, by way of *dicta*, intimated that the constitutional provisions as to trial by jury were something the defendant nor anyone else had the power to change. But see *Schick v. United States*, 195 U. S. 65, 24 Sup. Ct. 826 (1904), upholding the waiver of a jury trial in a case involving a petty offense.

¹¹ See note 9, *supra*, at 279.

trial at the hands of a judge, should not be allowed to do so. Often-times public passions induced by the revolting nature of the crime or unfavorable newspaper publicity make it extremely difficult to obtain an unbiased jury. In such cases the defendant might well prefer to entrust his fate to one who, by reason of training and judicial temperament, is less likely to be swayed. The public policy doctrine has little to uphold it, for it does not appear that men are so anxious to be convicted that they will voluntarily give up the right to trial by jury without first deciding, after careful consideration, that it is to their advantage to do so. Nor does the argument that the public has an interest in the outcome of the trial strike one as very convincing, for a trial judge will have as much interest in preserving law and order as any juror. It is submitted that states which refuse to permit waiver of trial by jury in criminal cases are inconsistent in that they permit other constitutional provisions enacted for the safeguard of the accused to be waived.¹² Some writers have pointed to the practice of allowing a prisoner to plead guilty and so do away with the necessity of a trial as being somewhat similar to the waiver of jury trial where the defendant pleads not guilty.¹³ New York has held that a trial may be waived in all felony cases by a plea of guilty except those punishable by death.¹⁴

Many courts have refused to permit waiver of jury trial, not because it is unconstitutional, but because in some instances statutes have been construed to be mandatory,¹⁵ and in others because of the absence of statute.¹⁶ In the latter it is said to be a lack of jurisdiction. Trial by judges alone (except in petty offenses) or by a jury of less than twelve, was unknown to the common law. Consent of the accused could not therefore confer jurisdiction since that could only be derived from a statute.

The amendment presents some interesting problems which will have to be settled by judicial interpretation.

The first question which presents itself is whether the wording of the amendment is inclusive enough. Should it have made provision for the consent of the prosecution? No mention of the latter is made, for it is provided, "but a jury trial may be waived in the manner to be prescribed by law * * * by the defendant in all criminal

¹² The following waivers were cited by one writer: " * * * the right to a trial in the county where the offense was committed, the right to a speedy trial, the right to unprejudiced jurors, the right to an exclusion of improper testimony, the right to be confronted by the witnesses against him, and the right to be represented by counsel." Naff, *supra* note 3, at 131.

¹³ Oppenheim, *Waiver of Trial by Jury in Criminal Cases* (1927) 25 MICH. L. REV. 695; Harris v. State, 128 Ill. 585, 21 N. E. 563 (1889).

¹⁴ People v. La Barbera, 274 N. Y. 339, 8 N. E. (2d) 884 (1937).

¹⁵ State v. Carman, 63 Iowa 130, 18 N. W. 601 (1884); Com. v. Rowe, 257 Mass. 172, 153 N. E. 537 (1926); *In re McQuown*, 19 Okla. 347, 91 Pac. 689 (1907).

¹⁶ Wilson v. State, 16 Ark. 691 (1855); People v. Smith, 9 Mich. 193 (1861); Neales v. State, 10 Mo. 498 (1847); Mays v. Com., 82 Va. 550 (1886).

cases, * * *"¹⁷ Such a question would not be raised, ordinarily, were it not for certain *dicta* in *Cancemi v. People, supra*.¹⁸ In discussing the right to waive jury trial the court said, "*The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant.*" If this be a correct statement of the law it would seem that the framers of the amendment erred in not including consent by the state. It is to be hoped that the Court of Appeals will disregard this unfortunate *dictum* as bad law.

If we say that no constitutional sanction is necessary for the state to waive, we are faced with still another problem. May the defendant waive trial by jury without anything further, or is the consent of the prosecuting attorney, or the court, or both, necessary? Considerable controversy revolves around this point.¹⁹ Illinois will permit waiver by the defendant only where the prosecution consents.²⁰ Certain *dicta* in *Patton v. United States, supra*,²¹ intimates that the state has as much right to trial by jury as the defendant. The Illinois decision has not escaped criticism,²² and other states have reached a contrary conclusion.²³ Just what stand New York will take will be dependent to a great extent on the type of legislation enacted. Thus it might be provided, as in other states,²⁴ that both parties consent; if, however, the consent of the defendant alone is made a prerequisite, it will be up to the courts to say whether such a statute is valid.

The last question arising is whether the right to waive a jury trial completely, includes the right to consent to be tried by a jury of less than twelve. The weight of authority is in the affirmative.²⁵ The Supreme Court of the United States has held that consent to be tried by a number less than twelve necessarily involves the broader question

¹⁷ N. Y. CONST. art. I, § 2.

¹⁸ 18 N. Y. 128 (1858).

¹⁹ Hall, *Has the State a Right to Trial by Jury in Criminal Cases?* (1932) 18 A. B. A. J. 226.

²⁰ *People v. Scornovache*, 347 Ill. 403, 179 N. E. 909 (1931).

²¹ 281 U. S. 276, 50 Sup. Ct. 253, 312 (1930). " * * * that before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant."

²² Hall, *supra* note 18, at 227. " * * * the tribunal which for centuries was regarded as the safeguard and protection of the accused, can now under the Illinois decision be employed by the state to facilitate conviction."

²³ *Baader v. State*, 201 Ala. 76, 77 So. 370 (1917); *Wadkins v. State*, 127 Ga. 45, 56 S. E. 74 (1906); *State v. Smith*, 123 Ohio St. 237, 174 N. E. 758 (1931); *Moore v. State*, 22 Tex. App. 117, 2 S. W. 634 (1886). These decisions all involve the interpretation of statutes construed as binding upon the state and court.

²⁴ Arkansas, § 3086, DIG. OF STAT. (1921); CALIFORNIA CONST. (1879) art. I, § 7, amendment of Nov. 6, 1928; MARYLAND CONST. (1867) art. IV, § 8.

²⁵ *Patton v. United States*, 281 U. S. 276, 50 Sup. Ct. 253 (1930); *State v. Baer*, 103 Ohio St. 585, 139 N. E. 786 (1921); *Jennings v. State*, 134 Wis. 307, 114 N. W. 492 (1908). *Contra*: *State v. Kaufman*, 51 Iowa 578, 2 N. W. 275 (1879), with which compare *State v. Williams*, 195 Iowa 374, 191 N. W. 790 (1923); *Com. ex rel. Ross v. Egan*, 281 Pa. 341, 140 Atl. 488 (1924), with which compare *Com. v. Hall*, 291 Pa. 341, 140 Atl. 676 (1928).

of the right to waive the jury trial generally.²⁶ New York, although denying the right, has also regarded the problem as being much the same in both cases.²⁷

The actual operation of the waiver has been left to the legislature. At the present writing no legislation has been proposed or enacted. It must be decided whether it shall extend to both felony and misdemeanor cases or confined to the latter. There is no good reason why it should not be applied to both, although other states in some instances have refused to do so. Limiting the amendment to crimes not punishable by death is, on the other hand, reasonable, for the forfeiture of a human life is a serious thing and would tend to place too great a strain on the trial judge.

The correct mode of waiver will have to be determined. It may take the form of a writing, or a statement in open court entered in the record, or both.

On the whole the amendment is a step forward in loosening the fetters on our criminal procedure, and a practical effort to lessen the congestion in the courts.

Whether or not accused persons will take advantage of the new procedure remains to be seen, but if statistics²⁸ available in other states are any criterion, the answer seems to be that they will do so, especially in certain types of crimes.

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RECENT PENAL LAW PROVISIONS IN RELATION TO PUNISHMENT FOR FELONY MURDER.—By the enactment of Chapter 67 of the Laws of 1937,¹ the legislature took the first important step in the history of the state of New York to ameliorate the punishment for murder in the first degree.² The statute was passed by the legislature in the form of an amendment to Section 1045 of the Penal Law, and by the addition thereto of a new section, 1045-a.³

²⁶ *Patton v. United States*, 281 U. S. 276, 50 Sup. Ct. 253 (1930).

²⁷ *Cancemi v. People*, 18 N. Y. 128 (1858).

²⁸ Recent reports show that in Connecticut 70% of the cases were tried by the court; in Maryland, 87.7%; in Michigan, 55.6%; in Ohio, 17.8%; Rhode Island, 11.4%. In California figures from the Superior Court of Los Angeles County as of 1934 show 65% of the defendants waived their right to be tried by a jury. This resulted in an estimated saving of \$60,000 a year. JUDICIAL COUNCIL, Second Report (1936).

¹ SEN. DOC. No. 28 passed March 17, 1937.

² The Duke of York's Laws, 1665-75 (1 Colonial Laws of New York 20) § 2, was the first statute to provide for capital punishment in New York. The provisions of this act were incorporated in the Revised Statutes and have continued to the present day. REV. STAT., pt. 4, c. 1, tit. 1, p. 655.

³ N. Y. Consol. Laws, c. 39.