



Understanding North Carolina's Proposed Constitutional Amendment Allowing Non-Jury Felony Trials

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Contents

Executive Summary	iv
Introduction	1
Current Law	1
The Proposed Amendment	2
The Constitutional Amendment Process	2
The Proposed Amendment Regarding Jury Trials	3
Arguments in Favor of the Amendment	4
Efficiency	4
Accuracy	5
Choice	5
Arguments against the Amendment	5
Undue Favoritism	6
Judge Shopping	6
Pressure to Waive	7
More Appeals	7
Reduced Citizen Participation in the Criminal Justice System	8
What Other Jurisdictions Do	8
Consent of the Court and the Prosecution	8
Cases in Which Waiver Is Not Permitted	10
Frequency of Waiver	10
Conviction Rates	12
Appeals Related to Waiver	13
Conclusion	14
Appendix A. Amendments to the 1971 N.C. Constitution	16
Appendix B. Laws of Other American Jurisdictions	19
Appendix C. National Center for State Courts Bench vs. Jury Trial Data	30

Executive Summary

This November, North Carolina voters will decide whether to amend the state constitution to allow a criminal defendant to waive his or her right to a jury trial. The proposed amendment would make a fundamental change in how criminal trials may be conducted in this state. But neither the media nor advocacy groups have paid much attention to it, and as a result, voters may know little about it. This non-partisan, non-advocacy report provides the information voters need to make an informed decision about the proposed amendment. This Executive Summary is a brief guide to the key points in the report.

Current law. The North Carolina Constitution has been interpreted to mean that a criminal defendant in a felony case who wants to have a trial in superior court must have a jury trial. He or she cannot waive, or relinquish, the right to a jury trial and have a trial at which the judge determines guilt or innocence. Such a trial is called a “bench trial.” Misdemeanor cases in district court are heard at bench trials.

The proposed amendment. The amendment would change the state constitution to allow a defendant to waive his or her right to a jury trial and instead choose a bench trial. Such a waiver would require the consent of the trial judge and would not be possible in a capital case.

Arguments in favor of the amendment. The other forty-nine states and the federal criminal justice system allow defendants to waive the right to a jury trial, and the bill that proposed the amendment passed the General Assembly almost unanimously. The court system could save time and money if a significant number of defendants were to choose bench trials, which tend to be shorter and less expensive than jury trials. And judges may be better suited than juries to decide certain types of cases, such as those involving highly technical evidence or those involving horrific crimes or unpopular defendants.

Arguments against the amendment. On the other hand, allowing bench trials concentrates more power in the hands of judges. That creates a risk that judges will favor certain defendants, especially those represented by influential lawyers, or that lawyers will waste time and energy trying to secure the most favorable possible judge. Further, some believe that if defendants are allowed to waive the right to a jury trial, they will be pressured to do so by busy prosecutors or even by judges. This, in turn, might lead to more appeals. Finally, allowing defendants to choose bench trials rather than jury trials could reduce citizen participation in the criminal justice system.

Experience in other jurisdictions. Looking at jurisdictions that allow waiver of the right to a jury trial, three findings stand out.

- First, most jurisdictions require the consent of the prosecutor before a bench trial may be had. Such a requirement allows prosecutors to block bench trials in cases in which they believe that influential defense lawyers might seek preferential treatment for their clients. The proposed amendment does not require prosecutor consent, and it is not clear whether a requirement of prosecutor consent could be added later by the General Assembly.
- Second, in most jurisdictions only a minority of defendants—usually between 5 percent and 30 percent of those defendants who go to trial—choose a felony bench trial over a jury trial. If North Carolina were to have a similar experience, any cost savings or efficiency gains from the proposed amendment would likely be rather modest.
- Finally, there is some evidence that judges are more likely than juries to acquit defendants. Although the reasons for this are not completely clear, it contradicts the conventional wisdom that defendants are better off with a jury than with a judge.

Introduction

In November 2014, North Carolina voters will decide whether to amend the state constitution to allow a criminal defendant to waive his or her right to a jury trial. The proposed amendment would make a fundamental change in how criminal trials may be conducted in this state. But neither the media nor advocacy groups have paid much attention to it, and as a result, voters may know little about it.¹ This report provides the information voters need to make an informed decision about the proposed amendment. Consistent with the School of Government's educational and non-advocacy purpose, this report is not meant to argue for or against the proposed amendment.

Our state constitution guarantees a person charged with a crime the right to a jury trial. The same is true in other states. But in the other forty-nine states, and in the federal courts, a defendant may waive—that is, voluntarily relinquish—the right to a jury trial and choose instead to have his or her guilt or innocence determined by a judge at what is called a “bench trial.” North Carolina is unique in that it does not allow bench trials, with a limited exception for misdemeanor cases in district court. A defendant may plead guilty, but if the defendant wants a trial, he or she must be tried by a jury rather than a judge.

The proposed amendment would allow a defendant to waive his or her right to a jury trial, subject to the judge's approval. The amendment would exclude capital cases, which would still require a jury. This report explains the amendment in detail and discusses the arguments in favor of and against the amendment. The report also presents information about how other jurisdictions handle waivers of the right to a jury trial.

Current Law

Article I, Section 24 of the North Carolina Constitution is captioned “Right of jury trial in criminal cases.” It reads:

No person shall be convicted of any 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 of appeal for trial de novo.

This provision has been interpreted to mean that a criminal defendant in a felony case who wants to have a trial must have a jury trial. He or she cannot waive the right to a jury trial and have a bench trial.² A criminal defendant in a misdemeanor case may have a bench trial in

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1. When contacted by the authors, the following groups indicated that they had no position on the amendment: the North Carolina Conference of District Attorneys, the North Carolina Advocates for Justice, and the American Civil Liberties Union of North Carolina. The North Carolina Administrative Office of the Courts, a state agency that supports the court system, also expressed no position. However, at a legislative committee hearing concerning the bill, a district attorney and the CEO of the North Carolina Advocates for Justice “were recognized to speak in favor of the bill.” Minutes of the N.C. Senate Judiciary II Committee, Apr. 23, 2013 (on file with authors).

2. *State v. Hudson*, 280 N.C. 74, 79 (1971) (“a trial by jury in a criminal action cannot be waived by the accused”); *State v. Rogers*, 162 N.C. 656 (1913) (“The defendant may plead guilty . . . but when he pleads

district court—in fact, jury trials in criminal cases are not permitted in district court. However, if the defendant appeals for a trial *de novo* in superior court, any trial must be a jury trial.³

Because the state constitution does not allow a defendant to waive the right to a jury trial, the General Assembly has never enacted a statutory procedure for such a waiver.

The United States Constitution also guarantees criminal defendants the right to a jury trial.⁴ However, the United States Supreme Court has ruled that the federal constitutional right may be waived by a defendant.⁵

The Proposed Amendment

The Constitutional Amendment Process

Before discussing the specific amendment in question, it is important to understand the process for amending the state constitution. The North Carolina Constitution may be amended in two ways: by constitutional convention and by legislative initiative. The latter is the more common mechanism and the one through which the current proposal has arisen. To effect an amendment by legislative initiative, three-fifths of the members of each house of the General Assembly must vote in favor of submitting the proposal to voters. If a majority of voters then vote in favor of the proposal, the constitutional amendment becomes effective the following January, unless otherwise specified by the proposal itself.

Amendments to the state constitution are common. The current constitution took effect in 1971.⁶ Since then, forty-six proposed amendments have passed both chambers of the North Carolina General Assembly.⁷ Of those, thirty-seven were adopted, eight were rejected, and one was repealed and did not go to a vote of the people.⁸ For readers interested in additional detail, Appendix A summarizes the proposed amendments and lists the number of votes each proposed

not guilty . . . he must be tried by a jury of 12 men and he cannot waive it.”); *State v. Stewart*, 89 N.C. 563 (1883) (“The court here has undertaken to serve in the double capacity of judge and jury, and try the defendant without a jury, which it had no authority to do, even with the consent of the prisoner.”).

3. North Carolina has two levels of trial court: district court and superior court. Felony charges normally are resolved in superior court. G.S. 7A-271 (establishing superior court jurisdiction over felony cases). Misdemeanor charges normally are resolved in district court. G.S. 7A-272(a) (stating that in general, “the district court has exclusive, original jurisdiction for the trial of criminal actions . . . below the grade of felony”). In the district court, “the judge is the finder of fact in criminal cases,” and there are no jury trials. G.S. 15A-1201. However, a defendant who is convicted of a misdemeanor in district court has a right to a new trial, called a trial *de novo*, before a jury in superior court. G.S. 15A-1431(b) (“A defendant convicted in the district court before the judge may appeal to the superior court for trial *de novo* with a jury as provided by law.”).

4. U.S. CONST. amend. VI.

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

6. JOHN V. ORTH & PAUL M. NEWBY, *THE NORTH CAROLINA STATE CONSTITUTION* 32 (2013).

7. For comparison, during the 2013–14 session more than twenty bills were filed by North Carolina General Assembly members to amend the North Carolina Constitution. Bills filed by General Assembly members can be found on the North Carolina General Assembly website at www.ncleg.net, using the navigation box on the home page.

8. N.C. LEGISLATIVE LIBRARY, *Amendments to the North Carolina Constitution of 1971*, www.ncga.state.nc.us/library/Documents/NCConstAmendsince1971.pdf (last visited July 9, 2014).

amendment received. The previous version of the North Carolina Constitution was also amended frequently, unlike the federal Constitution.⁹

The Proposed Amendment Regarding Jury Trials

The current proposed amendment would amend Article I, Section 24 of the state constitution to read as follows, with the new language underlined:

No person shall be convicted of any crime but by the unanimous verdict of a jury in open court, except that a person accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, in writing or on the record in the court and with the consent of the trial judge, waive jury trial, subject to procedures prescribed by the General Assembly. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.¹⁰

Thus, the proposal would generally allow defendants, including felony defendants, to waive their right to a jury trial with the trial judge's consent. However, waiver of a jury trial would not be permitted in capital cases. The bill containing the proposed amendment passed unanimously in the state senate, and with a single dissenting vote in the house.¹¹

The North Carolina Constitutional Amendments Publication Commission drafted the official explanation of the proposed amendment that will appear on the ballot in the fall. It reads as follows:

The North Carolina Constitution currently states that a person accused of a crime and who is not pleading guilty to that charge cannot be convicted unless a jury decides the person is guilty.

The proposed Amendment to the Constitution would allow a person accused of a crime to choose to be tried by either a judge or a jury. Choosing not to have a jury trial is called waiving the right to a jury trial. If passed, the proposed amendment would require a person wanting to waive the right to a jury trial to say so in court or in writing. A judge would then have to agree to that request. If a person accused of a crime waives the right to a jury trial, a judge would decide whether the person is guilty.

Jury trials would still be required in all cases with a possibility of a death sentence. Nothing in this proposed amendment changes federal law regarding criminal trials.

9. The first North Carolina Constitution, which took effect in 1776, was infrequently modified. But the second North Carolina Constitution, which took effect in 1868 and is the direct predecessor of the current state constitution, saw 105 amendments submitted to voters in its lifespan of just over 100 years. Of the 105 proposed amendments, seventy-six were ratified and twenty-nine were rejected, so amendments took place slightly less than once per year, approximately the same rate the state has experienced since 1971. By contrast, the United States Constitution has been amended just twenty-seven times in 225 years, a rate of about one amendment per eight years. That pace is artificially inflated by the Bill of Rights, which was enacted shortly after the Constitution was ratified. Since 1870, there have been just twelve amendments, a rate of one every twelve years. Since 1970 there have been just two amendments, a rate of one every twenty-two years.

10. S.L. 2013-300.

11. SB 399, vote history available online: www.ncleg.net/gascrpts/BillLookUp/BillLookUp.pl?Session=2013&BillID=S399&votesToView=all.

If the majority of voters vote “FOR” the Amendment, a person accused of a crime will be able to waive the right to a jury trial in cases as described above.

If the majority of voters do not vote “FOR” the Amendment, the law will not change and a person accused of a crime will not be able to waive the right to a jury trial.¹²

The bill that contained the proposed constitutional amendment also contained a conditional revision to G.S. 15A-1201, the statute that addresses the right to trial by jury. If the amendment passes, G.S. 15A-1201 will be revised to allow a defendant to make a “knowing and voluntary” waiver of his or right to a jury trial in writing or on the record in superior court, if the judge agrees. The statute will apply to all noncapital cases, whether felony cases or misdemeanors appealed to superior court for trial de novo.¹³

Arguments in Favor of the Amendment

Given the overwhelming vote in favor of the proposed amendment in the General Assembly and the fact that most American court systems allow a defendant to waive his or her right to a jury trial, it is clear that there is considerable support for allowing bench trials in criminal cases. Several key arguments are advanced by those who support allowing waiver of the right to a jury trial.

Efficiency

One argument is that allowing bench trials will save time that would otherwise be spent on jury selection and money that would otherwise be spent paying jurors.¹⁴ Indeed, it seems that the original purpose of the proposed amendment was to reduce the burden on the superior courts.¹⁵ And there is some evidence that “bench trials have a big advantage” in cost.¹⁶ This is an important consideration, especially in light of the court system’s limited budget. However, the experience of other states, discussed in detail later in this report, suggests that any efficiency gains and cost savings may be rather modest.¹⁷

12. N.C. DEP’T OF THE SEC’Y OF STATE, *Public Notice, Text of the Official Explanation Adopted by the NC Constitutional Amendments Publication Commission for the Proposed Jury Trial Waiver Amendment to the NC Constitution*, www.secretary.state.nc.us/NCCConstitution/thenccconstitution2014.aspx (Mar. 27, 2014).

13. S.L. 2013-300.

14. Adam M. Gershowitz, *12 Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases*, 2011 U. ILL. L. REV. 961, 963 (2011) (arguing, in the DWI context, that bench trials would “vastly improve the efficiency of processing” criminal cases).

15. *NC Jury Trials Could Be Waived In Amendment Change*, ASSOCIATED PRESS, May 14, 2013 (“Bill sponsor Sen. Pete Brunstetter of Forsyth County says the legislation was initially conceived as a way to reduce Superior Court case loads.”).

16. Samuel R. Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y.L. SCH. L. REV. 1009, 1023 (2011/2012) (noting that “jury trials are famously time consuming [and] expensive”).

17. See *infra* page 11 (forecasting North Carolina’s likely experience if jury waivers are allowed).

Accuracy

A second argument in favor of bench trials is that in some cases, they may yield more accurate results than jury trials. For example, judges likely are more familiar than most jurors with DNA analysis, crime scene processing, and other forensic techniques, and so may be better able to determine whether the scientific evidence in a particular case is strong or weak.¹⁸ Furthermore, judges may be more dispassionate than jurors. Because they are used to dealing with cases involving serious, violent crimes, judges may be less influenced by the nature of the charges and better able to focus carefully on whether the defendant is culpable.¹⁹ Similarly, defendants who are unpopular in the community or who have extensive criminal histories that might come out at trial may view judges as preferable decision-makers.²⁰

Choice

A related argument is that the amendment would give defendants an additional choice and take nothing away from them. Defendants would still have “their constitutional right to a jury trial if they want one.”²¹ From this perspective, allowing bench trials simply provides defendants with more options and more control over their cases.

Arguments against the Amendment

Just as there are several arguments in favor of the amendment, there are several against it.

18. See, e.g., Adam H. Kurland, *Providing a Federal Criminal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. DAVIS L. REV. 309, 312 (1993) (stating that a defendant may “feel that the case raises factual and legal issues too complex for a jury”); *Ognowski v. State*, 589 A.2d 513, 516 n.1 (Md. Ct. Spec. App. 1991) (noting that a defendant may prefer a bench trial if he or she has “a technical defense better understood by a judge”).

19. See, e.g., Kurland, *supra* note 18, at 332 (stating that a defendant may “prefer a bench trial in a case that has aroused particular public passions,” and that a defendant may “fear that the public outcry following highly publicized heinous crimes . . . will be so influential that even a supposedly impartial jury may not find innocence a sufficient defense”); *People v. Davenport*, 779 N.W.2d 257, 261 (Mich. Ct. App. 2009) (ruling that it was reasonable for defense counsel to recommend that the defendant waive his right to a jury trial because counsel was “concerned about a jury’s emotional response to the allegations [of child sexual abuse] and the victim’s potential testimony”).

20. “Fear of the effect of popular prejudice upon a jury . . . is a very frequent ground of choice. It is common for defendants with known bad records to prefer trial before the court alone. And when the crime has aroused anger in the community from which the jury is chosen, trial before the court is frequently preferred.” WAYNE R. LAFAVE, ET AL., *CRIMINAL PROCEDURE* § 22.1(h) (3d ed. 2007) (quoting Carroll T. Bond, *The Maryland Practice of Trying Criminal Cases by Judges Alone, Without Juries*, 11 A.B.A. J. 699, 702 (1925)).

21. Jorge Valencia, *Criminal Defendants In North Carolina Could Waive Right To Jury Trial* (WUNC radio broadcast, transcript Mar. 3, 2014) (quoting Greg Hurley, an analyst at the National Center for State Courts), <http://wunc.org/post/criminal-defendants-north-carolina-could-waive-right-jury-trial>.

Undue Favoritism

One concern is that defendants with influential lawyers may receive unfairly favorable treatment from judges at bench trials. The news media and others have suggested that this type of favoritism exists now in impaired driving cases, which normally are heard at bench trials in district court.²² More generally, a recent study of federal trials found that judges acquitted defendants at about three times the rate that juries do.²³ The difference may result from different kinds of cases being presented to judges and to juries, or from some other factor.²⁴ But one justification for leaving trials in the hands of juries is that jurors normally have little familiarity with the lawyers and are not beholden to either side, and so are unlikely to play favorites.

Judge Shopping

A related concern is that concentrating more power in the hands of the judge increases the incentive for lawyers on both sides to engage in “judge shopping”—seeking to have a case heard before a particular judge who is likely to rule one way or the other.²⁵ This is an inefficient practice that benefits the side with the most sophisticated lawyer rather than the strongest case. There is already some incentive to judge shop, as the judge decides what evidence is admissible and determines the defendant’s sentence if the defendant is convicted. But the greater the judge’s control of the trial, the greater the parties’ motivation to maneuver the case in front of a sympathetic judge.²⁶ There is some evidence that judge shopping is a problem in bench trials for impaired driving cases in district court,²⁷ which suggests that it would also be a problem in felony bench trials.

22. Ames Alexander, *Judges Under the Influence?*, CHARLOTTE OBSERVER, May 15, 2005 (discussing influential attorneys with unusually high acquittal rates in DWI trials, and noting that certain attorneys may “nominate candidates for District Court bench openings,” often “contribute heavily to . . . judicial races and campaigns,” and therefore can “put pressure on judges, who know they may lose favor with the defense lawyers who supported them if they’re too tough on defendants”).

23. Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?* 83 WASH. U. L.Q. 151 (2005) (noting that federal judges acquit 45 percent of defendants while federal juries acquit 16 percent).

24. Judge Richard Posner suggests that innocent defendants may be more likely to choose bench trials: “[T]he conviction rate is lower in bench trials than in jury trials. This is significant because in most states the decision in a criminal case as to whether to be tried by a judge or by a jury is entirely the defendant’s. If juries are less accurate guilt determiners than judges, innocent defendants will choose to be tried by judges rather than run the risk of jury mistake, while guilty defendants will choose to be tried by juries, hoping for a mistake. The acquittal rate should therefore be higher in bench trials--and it is.” Richard Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1501 (1999).

25. Becki Gray, *Constitutional Change Merits Full Attention*, CAROLINA JOURNAL, Apr. 2014, at 27.

26. A related point is that there may be greater variability among judges than among juries. *Cf.* John E. Coons, *Consistency*, 75 CAL. L. REV. 59, 87 (1987) (“If there is no science of judge shopping, there is clearly an art From studies of awards in similar civil bench trials, it appears that disparity among judges is significantly greater than that among juries. This is plausible, because the trial judge is not subject to the ‘checking’ influence of peers that is experienced by every juror.”).

27. Ames Alexander, *Judge Alters Who Will Hear DWI Cases*, CHARLOTTE OBSERVER, Sept. 19, 2004 (noting that “defense attorneys often try to avoid tough judges by postponing cases, hoping they’ll get more lenient judges when the case is rescheduled” and describing “judge shopping” as something that “happens regularly,” especially in DWI cases).

Pressure to Waive

Another concern is that if a defendant is allowed to waive his or her right to a jury trial, he or she will be pressured to do so. Certainly prosecutors with busy dockets may offer incentives to defendants who are willing to waive their jury trial rights. For example, in the Maryland case of *Smith v. State*,²⁸ the defendant agreed to have a bench trial instead of a jury trial in exchange for the prosecutor's dismissal of some of the charges against the defendant. The Maryland Supreme Court approved of the agreement and ruled that the defendant's waiver of his jury trial right was voluntary notwithstanding the incentive, noting that the defendant received a substantial benefit from the deal.

A more troubling possibility is that judges may pressure defendants to waive their jury trial rights. This is generally prohibited by law,²⁹ and express encouragement of waiver by judges appears to be rare.³⁰ However, some judges may subtly, perhaps even unintentionally, influence defendants' decisions. For example, a judge who frequently imposes more severe sentences after jury trials and more lenient ones after bench trials may create the perception among defendants that waiver is advisable.³¹

Although pressure to waive is a legitimate concern, the cumulative effect of pressure from prosecutors and judges does not appear to be overwhelming in most jurisdictions that allow waiver. As discussed later in this report, most defendants who take their cases to trial continue to choose jury trials.³²

More Appeals

When a defendant waives his or her right to a jury trial, the defendant may later argue on appeal that he or she didn't really understand what he or she was doing, that he or she was improperly pressured to waive the right, or that he or she received bad advice from counsel when making the decision. In jurisdictions where waiver is permitted, such claims appear to be common,³³ although few such claims are successful.

28. 825 A.2d 1055 (Md. 2003). *See also* *State v. Baxter*, 204 S.W.3d 650, 654 (Mo. 2006) (noting that the defendant "and the prosecutor struck a bargain for lesser charges in exchange for the waiver" and that the waiver was nonetheless voluntary).

29. LAFAVE ET AL., *supra* note 20, at § 22.1(h) (noting that the practice of "expressly assuring the defendant of certain concessions in exchange for the waiver . . . is unobjectionable so long as the negotiations were with the prosecutor rather than the trial judge").

30. A case in which a judge did expressly encourage a defendant to waive his right to a jury trial is *Ealey v. State*, 714 S.E.2d 424 (Ga. Ct. App. 2011) (ruling that a defendant's waiver of a jury trial was involuntary where the trial judge offered the defendant a reduced sentence and an appeal bond if he chose a bench trial rather than a jury trial). *See also* *People v. Collins*, 27 P.3d 726 (Cal. 2001) (reversing conviction where trial judge offered "some benefit" to the defendant if he chose a bench trial rather than a jury trial).

31. LAFAVE ET AL., *supra* note 20, at § 22.1(h) (discussing defendants' motivations for choosing bench trials and the evidence that judges may be more lenient in sentencing after bench trials).

32. *See infra* pages 10–11 (discussing the frequency, or infrequency, with which defendants in other jurisdictions waive their jury trial rights).

33. *See infra* pages 13–14 (discussing the types of appeals that are frequently made in other jurisdictions).

Reduced Citizen Participation in the Criminal Justice System

Finally, some argue that the current system of mandatory jury trials ensures the involvement of citizens in the criminal justice system, and that allowing bench trials would reduce that engagement. The United States Supreme Court has ruled that increasing citizen participation in government is not the purpose of the jury trial guarantee in the federal Constitution. In *Patton v. United States*,³⁴ the Court considered the claim that the Constitution's jury trial provisions "concern[] both [the defendant] and the public" and were intended to "establish a [jury] as a part of the frame of government," rather than to give defendants the option of having their cases heard by a jury.³⁵ After examining historical authorities, the Court ultimately rejected that perspective and ruled that the Constitution "was meant to confer a right upon the accused which he may forego at his election."³⁶

As to the state constitution, the fact that the jury trial provision of Article I, Section 24 is placed among other guarantees of individual rights tends to support a similar interpretation. But even if the jury trial requirement was not *intended* as a means of involving citizens in the criminal justice system, it has that *effect*, and allowing bench trials would diminish that to some extent. Of course, while citizen involvement in the justice system is valuable, it is also an inconvenience, and a reduction in the number of citizens required to serve on juries might be welcomed by some North Carolinians.

What Other Jurisdictions Do

In assessing the merits of the proposed amendment, it may be worth considering how other jurisdictions handle the right to a jury trial. Historically, "most American jurisdictions were reluctant to allow a defendant in a criminal proceeding to waive his right to a trial by jury."³⁷ Today, however, all forty-nine states other than North Carolina routinely allow felony defendants to waive their right to a jury trial. So do the federal courts and the courts of the District of Columbia, Puerto Rico, Guam, and the United States Virgin Islands. However, the various American court systems differ somewhat in their approach to waiver.³⁸ Appendix B provides a detailed look at the law in each jurisdiction. A summary of the most important variations is provided below.

Consent of the Court and the Prosecution

In most jurisdictions, while a defendant may waive his or her right to a jury trial, he or she does not have a right to a bench trial upon request. Some jurisdictions require the prosecutor to consent before a bench trial will be allowed; some require the judge to consent; and some require

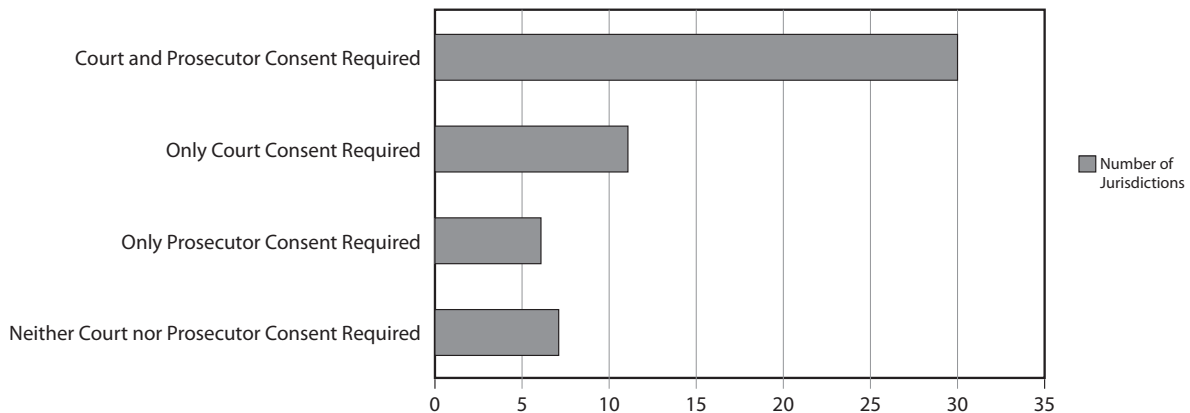
34. 281 U.S. 276 (1930).

35. *Id.* at 294, 293, respectively.

36. *Id.* at 298.

37. LAFAYETTE ET AL., *supra* note 20, at § 22.1(h). See also Kurland, *supra* note 18, at 317 (noting that "[t]he right to a bench trial did not exist at common law" and describing the origins of the jury system and the evolution towards a waivable right to a jury trial).

38. Kurland, *supra* note 18, at 322–23 ("At present, some states provide for a defendant's unilateral right to a bench trial. Other states require prosecutorial and court consent. Still others allow for a defendant to waive a jury trial in all but capital cases or cases where the death penalty is sought. In some jurisdictions, the court must consent to the defendant's waiver. In other states, the court accepts the defendant's waiver only upon consent of the Government.").

Figure 1. Requirements that Court and/or Prosecutor Consent to Bench Trial

both. The United States Supreme Court has ruled that it is constitutional to require court or prosecutor consent.³⁹ Figure 1, above, shows the relative prevalence of the requirements.

The proposed amendment in North Carolina requires the “consent of the trial judge,” but not the prosecutor, before a bench trial may take place. As Figure 1 reflects, two-thirds of the jurisdictions that allow bench trials in felony cases (36 out of 54) require the consent of the prosecutor, either alone or in conjunction with the consent of the court. The American Bar Association also supports a requirement of prosecutor consent.⁴⁰ Such a requirement may guard against some of the risks noted above. For example, if a defendant is represented by a lawyer who is perceived to have inappropriate influence with a particular judge, the prosecutor might object to a bench trial as a way of minimizing the risk of favoritism.⁴¹ On the other hand, such a requirement would reduce the defendant’s control over his or her case, and potentially could be used to block waiver in cases in which the defendant had a legitimate reason for preferring a bench trial.

The proposed amendment allows a defendant’s waiver of a jury trial to be made “subject to procedures prescribed by the General Assembly”;⁴² it is unclear whether this language would

39. *Singer v. United States*, 380 U.S. 24, 36 (1965) (ruling that there is “no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury – the very thing that the Constitution guarantees him”).

40. American Bar Association, *Criminal Justice Standards: Trial by Jury*, Standard 15-1.2(a) (“Cases required to be tried by jury should be so tried, unless jury trial is waived with the consent of the prosecutor.”).

41. LAFAYETTE ET AL., *supra* note 20, at § 22.1(h) (“In support of requiring the consent of the prosecutor, it is argued that the government and defendant should have an equal voice as to the method of trial, that the prosecutor should be allowed to prevent trial before a biased judge, that the prosecutor should be entitled to prevent a defendant from waiving his rights when it is against his best interests, and that the prosecutor is also entitled to protect the public interest in maintaining the role of the jury in the criminal process.”).

42. S.L. 2013-300.

allow a requirement of prosecutor consent to be added later by the legislature.⁴³ Of course, even if prosecutor consent is not required, a court might give some weight to a prosecutor's objection when deciding whether to allow a bench trial.⁴⁴

Cases in Which Waiver Is Not Permitted

In most jurisdictions that allow waiver in felony cases, a defendant may choose to waive his or her right to a jury trial in any kind of case. However, ten jurisdictions do not permit waiver in certain kinds of cases. Generally, the exemptions cover capital cases or first-degree murder cases, perhaps because of a sense that it is especially important to have jurors serve as the conscience of the community in such trials. The proposed amendment contains an exception for cases in which the State is seeking the death penalty.

Frequency of Waiver

Other jurisdictions provide useful data on the frequency with which defendants waive the right to a jury trial. This information is important because it sheds light on how many jury trials may be avoided if the proposed amendment becomes law, and therefore on how substantial the cost savings and efficiency gains from allowing bench trials might be.

From 1976 to 2005, the National Center for State Courts (NCSC) collected data on "the frequency of jury trials relative to bench trials by state."⁴⁵ In 2006, the NCSC stopped collecting such data due to administrative difficulties.⁴⁶ The data set is not ideal because it includes fewer than half the states and because the various court systems did not report their data in a consistent manner. For example, some included both misdemeanor and felony cases, while others included only felony cases.

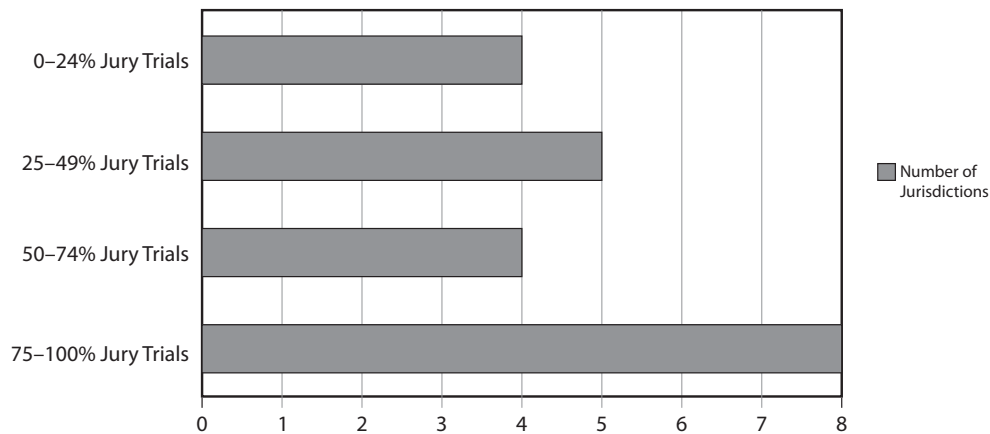
43. Such a provision might be vulnerable to a constitutional challenge. The proposed amendment expressly refers to the consent of the court, and the decision to exclude any reference to the consent of the prosecutor may have been an intentional choice. If so, one could argue that any attempt to add by statute a requirement of prosecutor consent would be inconsistent with the amendment's implicit rejection of such a requirement. *See State v. Baker*, 976 P.2d 1132, 1137 (Or. 1999) ("The constitution grants to only one person, the trial judge, the discretionary choice to deny a criminal defendant in a noncapital criminal case the right to waive trial by jury. The legislature's choice to provide such a right to the district attorney [by statute] infringes on the right granted by . . . the Oregon Constitution."). *Cf. People ex rel. Daley v. Joyce*, 533 N.E.2d 873 (Ill. 1988) (holding that a statute that required prosecutor consent to a bench trial in drug cases violated the state constitution, which did not require prosecutor consent and instead reflected the view that the right to a jury trial was the defendant's right to assert or to waive). *But cf. People v. Kirby*, 487 N.W.2d 404 (Mich. 1992) (ruling that a statutory requirement of prosecutor consent did not violate the state constitution where the state constitution provided only that the right to trial by jury should remain "inviolable" and did not expressly discuss the procedure for waiving that right); *State ex rel. Turner v. McDonald*, 676 S.W.2d 371, 373 (Tex. Crim. App. 1984) (noting that the state constitution contained no express provision allowing for a defendant to waive trial by jury, and ruling that the right to waive is "a right conveyed by statute" that may be limited by statute, including by requiring prosecutor consent).

44. *See, e.g., State v. Harrell*, 297 P.3d 461, 470 (Or. 2013) (internal quotation marks omitted) (discussing the waiver provision of the state constitution, which requires only court consent, and stating that "the prosecutor's preference should be weighed by the trial judge" when deciding whether to consent to a waiver).

45. T. Ward Frampton, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CAL. L. REV. 183 (2012).

46. *Id.* at 191 n.51.

Figure 2. Frequency of Jury Trials in States Permitting Waiver



Appendix C provides the NCSC data from 2001 to 2005. There are twenty-two jurisdictions for which data on the frequency of jury trials relative to bench trials are available. One of those is North Carolina, where bench trials are not permitted. That leaves twenty-one jurisdictions where waiver is possible. Of those twenty-one, the percentage of jury trials reported ranged from 2 percent in Puerto Rico to 95 percent in Alaska. Figure 2, above, summarizes the diversity in rates of jury trials among all reported criminal trials.

Thirteen states provided the NCSC with data specifically limited to felony trials. This is more relevant to the proposed amendment in North Carolina, as the principal effect of the proposed amendment would concern felony cases. Excluding North Carolina, where waiver is not permitted, this data set consists of twelve states. In eleven of the twelve, between 70 percent and 95 percent of all felony trials are before a jury. Indiana was the sole exception; there, only about 45 percent of felony trials were jury trials.⁴⁷

A third data set comes from the Bureau of Justice Statistics. Looking only at select large urban counties, the data show that the percentage of felony trials that are jury trials ranges from 33 percent in Philadelphia to 93 percent in Los Angeles.⁴⁸

Finally, information is available regarding the frequency of waivers in the federal courts. In 2010, only 3 percent of federal felony cases went to trial, but of those, 93 percent were jury trials, while bench trials accounted for just 7 percent.⁴⁹

Forecast for North Carolina

Together, these data sets suggest that if North Carolina were to allow felony defendants to choose bench trials, a modest number would do so. The NCSC data on felony trials may be the most relevant data set, and it suggests that somewhere between 5 percent and 30 percent—perhaps on the order of 15 percent—of defendants who plead not guilty might choose bench trials, while the remainder of felony trials would continue to be jury trials.

47. *Id.* at 195.

48. *Id.*

49. MARK MOTIVANS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2010 - STATISTICAL TABLES (Dec. 2013), www.bjs.gov/content/pub/pdf/fjs10st.pdf (last visited July 9, 2014).

This likely would result in a rather limited savings in time and money. First, some bench trials would probably substitute for guilty pleas rather than for jury trials.⁵⁰ Because even a bench trial is much more time-consuming and expensive than a guilty plea, any substitution of bench trials for pleas would tend to offset any efficiency gains resulting from fewer jury trials. But even assuming that all bench trials would take place in cases that would otherwise have been resolved by jury trials; that 15 percent of felony trials would be bench trials; and that bench trials take only half as long as jury trials, the total amount of time spent by the courts on felony trials would be reduced by just 7.5 percent. Given that the overwhelming majority of criminal cases are resolved by guilty plea or by dismissal rather than by trial,⁵¹ the courts' total criminal workload would be reduced by even a smaller fraction. And the criminal workload itself represents only a portion of the courts' total work. Thus, even under optimistic assumptions, the courts would be only slightly less expensive and more efficient. If a substantial number of additional appeals were to result from allowing defendants to waive their rights to jury trials, or if a substantial number of bench trials were to take place in cases that would otherwise have resulted in guilty pleas, the efficiency benefits might disappear altogether.

Conviction Rates

As noted above, there is some evidence that defendants fare better at bench trials, on average, than they do at jury trials. A recent analysis of data concerning the federal court system concluded that “[s]tatistically, federal judges are significantly more likely to acquit than a jury is.”⁵² The average conviction rate between 1989 and 2002 for federal criminal defendants was 84 percent in jury trials, compared to just 55 percent in bench trials.⁵³

A similar result was found in Massachusetts, where a *Boston Globe* story about bench trial acquittal rates in impaired driving cases led to an investigation by the state's highest court. The court found that “[o]f those defendants who proceeded to a trial by jury, fifty-eight per cent were acquitted. Of those who proceeded to a bench trial, eighty-six per cent were acquitted.”⁵⁴

These observations are somewhat surprising. Multiple academic studies have suggested that judges and juries view most cases the same way. If anything, this research suggests that judges

50. See Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?* 97 HARV. L. REV. 1037, 1047–48 (1984) (discussing the evidence that many bench trials are “not fully adversarial proceedings” but instead represent a “slow plea” of guilty). Currently, defendants often have two options: a jury trial on all charges or a guilty plea to reduced charges. If bench trials are allowed, some defendants will have three options: a jury trial on all charges; a bench trial on reduced charges; and a guilty plea to even lesser charges. Some defendants who would have pled guilty if given just two choices likely will elect to have a bench trial if given three options.

51. North Carolina Administrative Office of the Courts, *North Carolina Judicial Branch Statistical and Operational Report: Trial Courts, July 1, 2012 – June 30, 2013*, at 5, www.nccourts.org/Citizens/SRPlanning/Documents/2012-13_trial_courts_statistical_and_operational_report.pdf (noting that a total of 2,110 felony cases were the subject of jury trials during the fiscal year, while 71,260 were resolved by guilty plea and 40,331 by some form of dismissal).

52. Leipold, *supra* note 23, at 151.

53. *Id.* at 152. See also *id.* at 167–281 (considering possible explanations for the disparity).

54. Statement of the Justices of the Supreme Judicial Court, Nov. 1, 2012, at 2, <http://www.mass.gov/courts/docs/sjc/docs/sjc-statement-110112.pdf>. For the original story, see Marcella Bobardieri et al., *For Drunk Drivers, a Habit of Judicial Leniency*, BOSTON GLOBE, Oct. 30, 2011 (stating that “[t]he judges’ acquittal rate now exceeds 80 percent . . . a degree of leniency virtually unsurpassed in the United States”).

overall are slightly more likely than juries to convict.⁵⁵ In keeping with this understanding, criminal defense lawyers sometimes express a preference for juries, on the grounds that the requirement of unanimity means that each juror represents an opportunity to win, or at least to hang, a case.⁵⁶

Perhaps the federal and Massachusetts data are a result of different types of cases being tried to judges rather than juries. For example, perhaps prosecutors with weak cases are more inclined to agree to, or to suggest, bench trials as an efficient way of resolving doubtful cases.⁵⁷ But it is also possible that judges hold the prosecution to a higher standard than juries do; that judges are reluctant to bear sole responsibility for finding defendants guilty in all but the most clear-cut cases; or even that some judges, intentionally or not, favor certain types of defendants or certain defense attorneys.

Appeals Related to Waiver

Other states also provide some insight into the types of appeals that may arise if defendants are permitted to waive their right to a jury trial. Generally, defendants who waive the right to a jury trial may later argue that the waiver was not knowing and voluntary, which is the legal standard for a proper waiver of a defendant's right to a jury trial.⁵⁸

The cases can be broken down into two major groups. The first concerns whether a defendant's waiver was an informed decision—or as courts sometimes put it, knowing and intelligent. In *Patton v. United States*,⁵⁹ the United States Supreme Court stated that any waiver must include “the express and intelligent consent of the defendant.” Defendants sometimes argue that their waiver was not made knowingly and intelligently, whether because of bad advice from their attorneys⁶⁰ or an inadequate colloquy by the judge during the waiver process.⁶¹ These appeals mostly fail but sometimes succeed, and if North Carolina does allow defendants to waive jury trials, a waiver form and a standard colloquy for judges to use in taking waivers should be developed as a way of reducing the incidence of questionable waivers.⁶²

55. Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?* 32 FLA. ST. U. L. REV. 469, 476–79 (2005) (discussing three previous studies involving criminal cases).

56. *See, e.g.*, Frank Green, *Jury Trial Rate at All-Time Low in Virginia*, RICHMOND TIMES-DISPATCH, Oct. 18, 2009 (quoting criminal defense attorney as saying that a jury “is much more likely to find a client not guilty” than a judge); Kurland, *supra* note 18 at 310 (“Today, most federal criminal defendants do not wish to waive a jury trial, opting, understandably, to have their fate determined by twelve persons drawn from a fair cross-section of the community.”).

57. *See also* Posner, *supra* note 24 (suggesting that innocent defendants are more likely to seek out bench trials).

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

59. 281 U.S. 276, 312.

60. *See, e.g.*, *Burrage v. State*, 317 S.W.3d 628 (Mo. Ct. App. 2010) (rejecting defendant's claim that his attorney “tricked him into waiving a jury” by claiming to be on good terms with the trial judge and predicting a positive outcome from a bench trial).

61. *See, e.g.*, *United States v. Shorty*, 741 F.3d 961, 968 (9th Cir. 2013) (internal quotation marks omitted) (ruling that “the district court did not fulfill its serious and weighty responsibility of ensuring that [the defendant's] waiver was knowing and intelligent” where the defendant had a learning disability and a low IQ and the district court did not specifically advise the defendant that he could participate in selection of the jury or that the jury verdict must be unanimous when accepting the defendant's waiver).

62. The legal staff of the Administrative Office of the Courts has already begun work on a waiver form to be used if the amendment passes.

The second major category of appeals involves defendants who claim that their waiver was coerced rather than voluntary. As noted above,⁶³ prosecutors generally are allowed to incentivize waivers, but judges are not. Sometimes a defendant claims that a judge crossed the line and pressured the defendant to have a bench trial, as in a Virginia case where a judge threatened to revoke a defendant's pretrial release if he did not agree to a bench trial.⁶⁴ In other instances, defendants claim that a judge's legal error had an unintentional coercive effect. For example, in the Michigan case of *People v. Rodgers*,⁶⁵ the trial judge mistakenly ruled that if the defendant testified, "the prosecutor could ask the defendant whether or not he had ever been convicted of a felony within the past ten years without specifying the felony." The defendant then waived his right to a jury trial. The appellate court found that the "defendant waived the right to a jury trial because of the trial court's erroneous ruling, preferring a bench trial to the risk of prejudice from having evidence of the unnamed felonies placed before a panel of jurors."⁶⁶ In other words, the appellate court ruled that the trial court's errors coerced the defendant's waiver.

The waiver of a jury trial is a judicial procedure, which means that it is a human procedure. Therefore, error is possible, and appeals are inevitable. However, it is unknown precisely how many more appeals will arise if North Carolina allows felony defendants to waive the right to a jury trial. In other jurisdictions, it appears that relatively few appeals are based exclusively on claims about unknowing or involuntary waivers, so perhaps most defendants who raise such claims are defendants who would appeal other issues in any event. If so, the burden of additional appeals may be modest.

Conclusion

This report is intended to provide background and context to voters as they head to the polls. The proposed amendment would bring North Carolina in line with the other forty-nine states, enjoyed overwhelming support in the General Assembly, and has several potential advantages. Yet some of the advantages may not be fully realized, and the proposed amendment is not without risks. It would represent a major change in the state's criminal justice system and merits careful consideration.

63. See *supra* page 7 (discussing who may offer incentives to defendants to waive their jury trial rights).

64. See *Robinson v. Commonwealth*, 548 S.E.2d 227, 229 (Va. Ct. App. 2001) ("[T]he judge threatened to revoke Robinson's bail and then threatened to increase the amount of bail. The judge did so only after Robinson requested a jury trial. In this manner, the trial judge hampered Robinson's exercise of his constitutional right to a jury trial. In view of this patent coercion, we hold that the record fails to establish that Robinson's election of a bench trial was a knowing and voluntary waiver of his right to a jury trial.").

65. 327 N.W.2d. 353, 354 (Mich. Ct. App. 1982) (summarizing trial judge's amended order).

66. *Id.* at 355.

Appendixes

Appendix A. Amendments to the 1971 N.C. Constitution⁶⁷

Session Law	Article Affected	Topic	Date	Result
1969, ch. 1258	--	Revising and Amending the Constitution of North Carolina	11/03/1970	Adopted
1969, ch. 827	Art. IX, sec. 10	Reassigning Benefits of Escheats	11/03/1970	Adopted
1969, ch. 872	Art. V, sec. 2(6)	Authorizing the General Assembly to Fix Personal Income Tax Exemptions	11/03/1970	Adopted
1969, ch. 932	Art. III, sec. 5(10)	Executive Reorganization Amendment	11/03/1970	Adopted
1969, ch. 1004	Art. VI, sec. 4	Repealing Literacy Requirement for Voting	11/03/1970	Rejected
1969, ch. 1200	Art. V	Revising Finance Article	11/03/1970	Adopted
1969, ch. 1270	Art. II	Authorizing Calling of Extra Legislative Sessions on Petition of Legislators	11/03/1970	Adopted
1971, ch. 201	Art. VI, sec. 1	Lowering Voting Age to 18	11/07/1972	Adopted
1971, ch. 451	Art. IV, sec. 8	Requiring Legislative Age Limit for Justices and Judges	11/07/1972	Adopted
1971, ch. 560	Art. IV, sec. 17	Authorizing Legislative Provision for Censure or Removal of Justices and Judges	11/07/1972	Adopted
1971, ch. 630	Art. XIV, sec. 5	Declaring State Policy to Conserve and Protect Natural Resources	11/07/1972	Adopted
1971, ch. 857	Art. VII, sec. 1	Limiting the Incorporation of Towns Near Existing Towns	11/07/1972	Adopted
1973, ch. 394	Art. IV, sec. 18	Changing Title of Solicitor to District Attorney	11/05/1974	Adopted
1973, ch. 1222		Authorizing Legislation to Provide for Tax-Exempt Industrial Revenue Bonds	11/05/1974	Rejected
1975, ch. 641	Art. V, sec. 8	Authorizing the Issuance of Revenue Bonds to Finance or Refinance Health Care Facility Projects	03/23/1976	Adopted
1975, ch. 826	Art. V, sec. 9	Authorizing the Issuance of Revenue Bonds to Finance Industrial Development and Pollution Control Projects for Public Utilities	03/23/1976	Adopted
1977, ch. 80	Art. X, sec. 2	Extending the Benefit of the Homestead Exemption to Surviving Spouses of Either Sex	11/08/1977	Adopted
1977, ch. 115	Art. X, sec. 5	Permitting Any Person (Not Only a Husband) to Insure His or Her Own Life for the Benefit of His or Her Spouse or Children or Both, free from Claims of Creditors of the Insured or the Insured's Estate	11/08/1977	Adopted

67. Information in this Appendix comes from N.C. LEGISLATIVE LIBRARY, *Amendments to the North Carolina Constitution of 1971*, www.ncga.state.nc.us/library/Documents/NCConstAmendsince1971.pdf (last visited July 10, 2014).

Appendix A. Amendments to the 1971 N.C. Constitution (continued)

Session Law	Article Affected	Topic	Date	Result
1977, ch. 363	Art. III, sec. 2(2)	Empowering the Voters to Elect the Governor and Lieutenant Governor for Two Consecutive Terms	11/08/1977	Adopted
1977, ch. 528	Art. V, sec. 10	Permitting Municipalities That Generate or Distribute Electric Power to Own and Operate Generating and Distribution Facilities Jointly with Public or Private Entities Engaged in That Business	11/08/1977	Adopted
1977, ch. 690	Art. III, sec. 5(3)	Requiring That the State Budget Be Balanced at All Times	11/08/1977	Adopted
1979, ch. 638	Art. IV, sec. 22	Providing that Only Persons Authorized to Practice Law in the Courts of This State Are Eligible to Be Justices and Judges of the General Court of Justice	11/04/1980	Adopted
1981, ch. 504		Increasing the Terms of State Senators and Representatives from Two to Four Years	06/29/1982	Rejected
1981, ch. 513	Art. IV, sec. 8	Authorizing Legislation to Provide for the Recall of Retired State Supreme Court Justices and Court of Appeals Judges to Serve Temporarily on Either Court	06/29/1982	Adopted
1981, ch. 803	Art. IV, sec. 12(1)	Authorizing Legislation to Grant the State Supreme Court Jurisdiction to Review on Direct Appeal a Final Order or Decision of the N.C. Utilities Commission	06/29/1982	Adopted
1981, ch. 808		Authorizing Legislation to Empower Public Bodies, in Order to Develop N.C. Seaports and Airports, to Acquire, Construct, Finance, Refinance, Sell, or Lease Lands and Facilities and to Finance for Private Interests Seaport, Airport, and Other Related Commercial Facilities	06/29/1982	Rejected
1981, ch. 887		Authorizing Legislation to Permit the State to Issue Tax-Exempt Revenue Bonds to Finance or Refinance the Acquisition and Construction of Facilities for Private Institutions of Higher Education	06/29/1982	Rejected
1981, ch. 1241	Art. II, sec. 9	Providing That the Terms of State Senators and Representatives Shall Begin January 1 Next After Their Election	11/02/1982	Adopted
1981, ch. 1247		Authorizing Legislation to Permit Municipalities to Issue Tax Increment Bonds	11/02/1982	Rejected
1983, ch. 298	Art. III, sec. 7(7); Art. IV, sec. 18(1)	Providing That Only Persons Authorized to Practice Law in the Courts of this State are Eligible to Be Attorney General or District Attorney	11/06/1984	Adopted

Appendix A. Amendments to the 1971 N.C. Constitution (continued)

Session Law	Article Affected	Topic	Date	Result
1983, ch. 765	Art. V, sec. 11	Authorizing Legislation to Permit the Issuance by the State of Tax-Exempt Revenue Bonds to Finance and Refinance Agricultural Capital Facilities	05/08/1984	Adopted
1985, ch. 61, repealed by 1985, ch. 1010		Authorizing Legislation to Prohibit Future Governors and Lieutenant Governors from Succeeding Themselves Except for the Present Governor and Lieutenant Governor	N/A	N/A
1985, ch. 768		Authorizing Legislation to Provide for Election of State and County Officers in Odd-Numbered Years	05/06/1986	Rejected
1985, ch. 814	Art. V, sec. 12	Permitting the General Assembly to Enact Laws to Allow Revenue Bonds to Be Issued to Finance or Refinance Higher Education Facilities for Private Nonprofit Institutions	11/04/1986	Adopted
1985, ch. 920	Art. III, sec. 7(3); Art. IV, sec. 19	Providing for Elections to Be Held to Fill the Remainder of an Unexpired Term if Vacancy Occurs 60 Days Before Next Election	11/04/1986	Adopted
1985, ch. 933	Art. V, sec. 13	Permitting the General Assembly to Assist in the Development of New and Existing Seaports and Airports	11/04/1986	Adopted
1993, ch. 497		Authorizing Counties and Cities to Issue Tax Increment Bonds Without Voter Approval	11/02/1993	Rejected
1995-5, sec. 3	Art. II, sec. 22; Art. III, sec. 5	Veto Power for Governor	11/05/1996	Adopted
1995-429, sec. 3	Art. XI, sec. 1	Require Alternative Punishments	11/05/1996	Adopted
1995-438, sec. 2	Art. I, sec. 37	Victims Rights Amendment	11/05/1996	Adopted
1999-268, sec. 3, <i>amended by</i> 2001-217, sec. 3, <i>amended by</i> 2002-3, sec. 1 (Extra Session)	Art. XIV, sec. 5	State Nature and Historic Preserve	11/05/2002	Adopted
2003-403, sec. 1	Art. V, sec. 14	Local Option Project Development Financing	11/02/2004	Adopted
2003-423, sec. 1	Art. IX, sec. 7	School Fines and Forfeitures	11/02/2004	Adopted
2004-128, sec. 16	Art. IV, sec. 10	Amend Magistrate Term	11/02/2004	Adopted
2010-49, sec. 2	Art. VII, sec. 2	No Felon as Sheriff	11/02/2010	Adopted
2011-409	Art. XIV, sec. 6	Defense of Marriage	05/08/2012	Adopted

Appendix B. Laws of Other American Jurisdictions⁶⁸

Jurisdiction/ (Authority)	Provision Regarding Waiver	Consent of Court (C), Prosecutor (P) Required	Cases in Which Waiver Not Permitted
Alabama (State Rules of Criminal Procedure (AL ST RCRP))	Rule 18.1. Trial by jury. (b) WAIVER OF TRIAL BY JURY. In all cases, the defendant may waive his [or her] right to trial by jury, with the consent of the prosecutor and the court, as follows: (1) When the defendant is tried in circuit court other than on appeal for trial de novo, waiver of the right to trial by jury must be made by the defendant in writing or in open court upon the record and with the consent of the prosecutor and the court. Before accepting a waiver, the court shall address the defendant personally in open court and shall advise the defendant of his or her right to a trial by jury, and shall ascertain that the waiver is knowing, voluntary, and intelligent; (2) When the defendant appeals for trial de novo in the circuit court, he or she must demand a jury trial in writing at the time of filing notice of appeal for trial de novo, or within seven . . . days thereafter. Failure of a defendant to make a timely demand for trial by jury shall be deemed to be a waiver by the defendant of his or her right to trial by jury; (3) With consent of the court, the defendant may withdraw or set aside any waiver of jury trial, but no withdrawal shall be permitted after the court begins taking evidence; or (4) If trial has commenced before a jury on a plea of not guilty, the defendant may withdraw the plea of not guilty and enter a plea of guilty, in which event the court shall proceed as provided in [AL ST RCRP] Rule 14.4, and it shall not be necessary that the plea or sentence be presented to, consented to, or approved by the jury, except in capital cases.	C, P	None
Alaska (Rules of Criminal Procedure)	Rule 23. Trial by Jury or by the Court. (a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial. In felony cases, the waiver must be in writing with the approval of the court and the consent of the state. In misdemeanor cases, the waiver may be in writing or made on the record in open court.	C, P	None
Arizona (Rules of Criminal Procedure)	Rule 18.1. Trial by jury . . . b. Waiver. The defendant may waive the right to trial by jury with consent of the prosecution and the court. In a capital case, the defendant may also waive the right to have a jury determine aggravation or the penalty if the prosecution and the court concur.	C, P	None
Arkansas (Rules of Criminal Procedure)	Rule 31.1. Waiver Of Trial By Jury: Assent By Prosecutor. No defendant in any criminal cause may waive a trial by jury unless the waiver is assented to by the prosecuting attorney and approved by the court.	C, P	None
	<i>See also</i> Section 16-89-108 of the Arkansas Code Annotated.		

68. This table is based primarily on research done by the National Center for State Courts. It was cross-checked by the authors against a similar survey done by Westlaw and further updated and amended as appropriate. Any remaining errors or lack of completeness are, of course, the authors' responsibility.

Appendix B. Laws of Other American Jurisdictions (*continued*)

Jurisdiction/ (Authority)	Provision Regarding Waiver	Consent of Court (C), Prosecutor (P) Required	Cases in Which Waiver Not Permitted
California (State Constitution)	Article 1, Section 16. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel.	P	None
Colorado (State Rules of Criminal Procedure (CO ST RCRP))	Rule 23. Trial by Jury or to the Court. . . . (a)(5)(I) The person accused of a felony or misdemeanor may, with the consent of the prosecution, waive a trial by jury in writing or orally in court. Trial shall then be to the court. (II) The court shall not proceed with a trial to the court after waiver of jury trial without first determining: (a) That the defendant's waiver is voluntary; (b) That the defendant understands that: (i) The waiver would apply to all issues that might otherwise need to be determined by a jury[,] including those issues requiring factual findings at sentencing; (ii) The jury would be composed of a certain number of people; (iii) A jury verdict must be unanimous; (iv) In a trial court, the judge alone would decide the verdict; (v) The choice to waive a jury trial is the defendant's alone and may be contrary to the counsel's advice. (III) In a proceeding where the waiver of a jury trial is part of a determination preceding the entry of a guilty or nolo contendere plea, the court need only make the determinations required by [CO ST RCRP] Rule 11(b) and not those required by this rule. (6) A defendant may not withdraw a voluntary and knowing waiver of trial by jury as a matter of right, but the court, with the consent of the prosecution, may permit the withdrawal of the waiver plea to the commencement of the trial. <i>See also</i> Section 18-1-406 of the Colorado Revised Statutes (waiver permitted except in Class 1 felony cases).	P	Class 1 felonies
Connecticut (Superior Court Criminal Rules)	Rule 42-1. Jury Trials - Right to Jury Trial and Waiver. The defendant in a criminal action may demand a trial by jury of issues which are triable of right by jury. If at the time the defendant is put to plea, he or she elects a trial by the court, the judicial authority shall advise the defendant of his or her right to a trial by jury and that a failure to elect a jury trial at that time may constitute a waiver of that right. If the defendant does not then elect a jury trial, the defendant's right thereto may be deemed to have been waived. <i>See also</i> Section 54-82b of the Connecticut General Statutes.	None	None
Delaware (Superior Court Criminal Rules)	Rule 23. Trial by Jury or by the Court. (a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the state.	C, P	None
Federal (Rules of Criminal Procedure)	Rule 23. JURY OR NONJURY TRIAL (a) Jury Trial. If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves.	C, P	None

Appendix B. Laws of Other American Jurisdictions (continued)

Jurisdiction/ (Authority)	Provision Regarding Waiver	Consent of Court (C), Prosecutor (P) Required	Cases in Which Waiver Not Permitted
Florida (State Rules of Criminal Procedure)	Rule 3.260. Waiver of Jury Trial. A defendant may in writing waive a jury trial with the consent of the state.	P	None
Georgia (Case law)	"Having adopted those principles in Glass, and having recognized . . . their pertinence to a waiver of a jury trial, we conclude their application to the present case requires affirmance of the trial court's denial of appellants' demand for a bench trial. <i>Although appellants' waiver of the right to trial by jury appears adequate, the refusal of the prosecution to consent left the trial court with no choice but to deny the demand.</i> " Zigan v. State, 638 S.E.2d 322, 324 (Ga. 2006) (emphasis added).	C, P	None
Hawaii (Rules of Penal Procedure)	Rule 23. Trial by Jury or by the Court. (a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court. The waiver shall be either by written consent filed in court or by oral consent in open court entered on the record. <i>See also</i> Section 806-61 of the Hawaii Revised Statutes.	C	None
Idaho (Criminal Rules)	Rule 23. Trial by Jury or by the Court - Waiver of Jury – Number of Jurors. (a) Felony Cases. In felony cases issues of fact must be tried by a jury, unless a trial by jury is waived by a written waiver executed by the defendant in open court with the consent of the prosecutor expressed in open court and entered in the minutes.	C	None
Illinois (Compiled Statutes)	Chapter 725, Act 5, Section 103-6. Waiver of jury trial. Every person accused of an offense shall have the right to a trial by jury unless (i) understandingly waived by defendant in open court or (ii) the offense is an ordinance violation punishable by fine only and the defendant either fails to file a demand for a trial by jury at the time of entering his or her plea of not guilty or fails to pay to the clerk of the circuit court at the time of entering his or her plea of not guilty any jury fee required to be paid to the clerk.	None	None
Indiana (State Code)	Section 35-37-1-2. The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court. All other trials must be by jury.	C, P	None
Iowa (Rules of Criminal Procedure)	Rule 2.17. Trial by Jury or Court. (1) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant voluntarily and intelligently waives a jury trial in writing and on the record within 30 days after arraignment, or if no waiver is made within 30 days after arraignment the defendant may waive within ten days after the completion of discovery, but not later than ten days prior to the date set for trial, as provided in these rules for good cause shown, and after such times only with the consent of the prosecuting attorney. The defendant may not withdraw a voluntary and knowing waiver of trial by jury as a matter of right, but the court, in its discretion, may permit withdrawal of the waiver prior to the commencement of trial.	None, except for late waivers	None

Appendix B. Laws of Other American Jurisdictions (*continued*)

Jurisdiction/ (Authority)	Provision Regarding Waiver	Consent of Court (C), Prosecutor (P) Required	Cases in Which Waiver Not Permitted
Kansas (Statutes Annotated)	Section 22-3403. Method of Trial in Felony Cases. (1) The defendant and prosecuting attorney, with the consent of the court, may submit the trial of any felony to the court. All other trials of felony cases shall be by jury.	C, P	None
Kentucky (Rules of Criminal Procedure)	Rule 9.26. Trial by Jury or by the Court. (1) Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the Commonwealth.	C, P	None
Louisiana (Code of Criminal Procedure Annotated)	Article 780. Right to Waive Trial by Jury. (A) A defendant charged with an offense other than one punishable by death may knowingly and intelligently waive a trial by jury and elect to be tried by the judge. (B) The defendant shall exercise his [or her] right to waive trial by jury in accordance with Article I, Section 17 of the Constitution of Louisiana. The waiver shall be by written motion filed in the district court not later than forty-five days prior to the date the case is set for trial. The motion shall be signed by the defendant and shall also be signed by defendant's counsel unless the defendant has waived his [or her] right to counsel. (C) With the consent of the district attorney the defendant may waive trial by jury within forty-five days prior to the commencement of trial. (D) A waiver of trial by jury is irrevocable and cannot be withdrawn by the defendant.	P	Capital cases
Maine (Rules of Criminal Procedure)	Rule 23. Trial by Jury or by the Court. (a) Trial by Jury; Waiver. The defendant with the approval of the court may waive a jury trial. In any case in which the crime charged is murder, or a Class A, Class B, or Class C crime, the waiver shall be in writing and signed by the defendant; but the absence of a writing in such a case shall not be conclusive evidence of an invalid waiver.	C	None
Maryland (Rules of Criminal Procedure)	Rule 4-246. Waiver of Jury Trial - Circuit Court. (a) Generally. In the circuit court, a defendant having a right to trial by jury shall be tried by jury unless the right is waived pursuant to section (b) of this Rule. The State does not have the right to elect a trial by jury. (b) Procedure for Acceptance of Waiver. A defendant may waive the right to a trial by jury at any time before the commencement of trial. The court may not accept the waiver until, after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that the waiver is made knowingly and voluntarily. (c) Withdrawal of a Waiver. After accepting a waiver for jury trial, the court may permit the defendant to withdraw the waiver only on motion made before trial and for good cause shown. In determining whether to allow a withdrawal of the waiver, the court may consider the extent, if any, to which trial would be delayed by the withdrawal.	None	None

Appendix B. Laws of Other American Jurisdictions (*continued*)

Jurisdiction/ (Authority)	Provision Regarding Waiver	Consent of Court (C), Prosecutor (P) Required	Cases in Which Waiver Not Permitted
Massachusetts (Rules of Criminal Procedure)	<p>Rule 19. Trial by Jury or by the Court. (a) General. A case in which the defendant has the right to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and files the waiver with the clerk, in which instance he [or she] shall be tried by the court instead of by the jury. If there is more than one defendant, all must waive the right to trial by jury, and if they do not so waive, there must be a jury trial, unless the court in its discretion severs the cases. The court may refuse to approve such a waiver for any good and sufficient reason provided that such refusal is given in open court and on the record.</p> <p><i>See also</i> Chapter 263, Section 6 of the Massachusetts General Laws (“Any defendant in a criminal case other than a capital case . . . may . . . waive his right to trial by jury by signing a written waiver thereof and filing the same with the clerk of the court. If the court consents to the waiver, he shall be tried by the court instead of by a jury.”).</p>	C	Capital cases
Michigan (State Court Rules, Rules of Criminal Procedure)	<p>Rule 6.401. Right to Trial by Jury or by the Court. The defendant has the right to be tried by a jury, or may, with the consent of the prosecutor and approval by the court, elect to waive that right and be tried before the court without a jury.</p> <p><i>See also</i> Section 763.3 of the Michigan Compiled Laws (“In all criminal cases arising in the courts of this state the defendant may, with the consent of the prosecutor and approval by the court, waive a determination of the facts by a jury and elect to be tried before the court without a jury.”).</p>	C, P	None
Minnesota (Rules of Criminal Procedure)	<p>Rule 26.01. Trial by Jury or by the Court. (2) Waiver of Trial by Jury.</p> <p>(a) Waiver on the Issue of Guilt. The defendant, with the approval of the court, may waive a jury trial on the issue of guilt provided the defendant does so personally, in writing or on the record in open court, after being advised by the court of the right to trial by jury, and after having had an opportunity to consult with counsel. (b) Waiver on the Issue of an Aggravated Sentence. Where the prosecutor seeks an aggravated sentence, the defendant, with the approval of the court, may waive a jury trial on the facts in support of an aggravated sentence provided the defendant does so personally, in writing or on the record in open court, after being advised by the court of the right to a trial by jury, and after having had an opportunity to consult with counsel. (c) Waiver Necessitated by Prejudicial Publicity. The defendant must be permitted to waive a jury trial whenever the court determines: (i) the defendant knowingly and voluntarily waived that right; and (ii) reason exists to believe that, because of the dissemination of potentially prejudicial material, the waiver must be granted to assure a fair trial. (3) Withdrawal of Jury-Trial Waiver. The defendant may withdraw the waiver of a jury trial any time before trial begins.</p>	C	None

Appendix B. Laws of Other American Jurisdictions (*continued*)

Jurisdiction/ (Authority)	Provision Regarding Waiver	Consent of Court (C), Prosecutor (P) Required	Cases in Which Waiver Not Permitted
Mississippi (Case law)	Bishop v. State, 812 So. 2d 934 (Miss. 2002) (holding that a defendant may waive the right to a jury trial, even in a capital case); Robinson v. State, 345 So. 2d 1044, 1045 (Miss. 1977) (holding that waiver is permissible "by the agreement of the defendant and the prosecution").	P	None
Missouri (Supreme Court Rules)	Rule 27.01. Misdemeanors or Felonies - Trial by Jury - Waiver. (a) All issues of fact in any criminal case shall be tried by a jury to be selected, summoned and returned in the manner prescribed by law, unless trial by jury be waived as provided in this Rule. (b) The defendant may, with the assent of the court, waive a trial by jury and submit the trial of any criminal case to the court, whose findings shall have the force and effect of the verdict of a jury. In felony cases such waiver by the defendant shall be made in open court and entered of record.	C	None
Montana (State Code Annotated)	Section 46-16-110. Right to jury trial – waiver. (1) The parties in a felony case have a right to trial by a jury of 12 persons. (2) The parties may agree in writing at any time before the verdict, with the approval of the court, that the jury shall consist of any number less than that to which they are entitled. (3) Upon written consent of the parties, a trial by jury may be waived.	P	None
Nebraska (Case law)	State v. Godfrey, 155 N.W.2d 438 (Neb. 1968) (ruling that a defendant may waive the right to a jury trial; that the prosecution cannot require a jury trial; and that the court may refuse a waiver if there is reason to do so).	C	None
Nevada (Revised Statutes (NRS))	Section 175.011. Trial by Jury. (1) In a district court, cases required to be tried by jury must be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the State. A defendant who pleads not guilty to the charge of a capital offense must be tried by jury. (2) In a Justice Court, a case must be tried by jury only if a defendant so demands in writing not less than 30 days before trial. Except as otherwise provided in NRS 4.390 and 4.400, if a case is tried by jury, a reporter must be present who is a certified court reporter and shall report the trial.	C, P	Capital cases
New Hampshire (Revised Statutes Annotated)	Section 606: 7. Waiver of Jury Trial in Certain Cases. Any defendant in the superior court in a criminal case other than a capital case may, if he shall so elect, when called upon to plead, or later and before a jury has been impanelled to try him, waive his right to trial by jury by signing a written waiver thereof and filing the same with the clerk of the court, whereupon he shall be tried by the court instead of by a jury, but not, however, unless all the defendants, if there are 2 or more to be tried together for the same offense, shall have exercised such election before a jury has been impanelled to try any of the defendants. In every such case the court shall have jurisdiction to hear and try the case and render judgment and sentence thereon.	None	Capital cases

Appendix B. Laws of Other American Jurisdictions (continued)

Jurisdiction/ (Authority)	Provision Regarding Waiver	Consent of Court (C), Prosecutor (P) Required	Cases in Which Waiver Not Permitted
New Jersey (Court Rules)	Rule 1:8-1. Trial by Jury. (a) Criminal Actions. Criminal actions required to be tried by a jury shall be so tried unless the defendant, in writing and with the approval of the court, after notice to the prosecuting attorney and an opportunity to be heard, waives a jury trial. In sentencing proceedings conducted pursuant to [Section] 2C:11-3(c)(1) [of the New Jersey Statutes Annotated], the consent of prosecutor shall be required for such waiver.	C (P consent not required but must be given opportunity to be heard; the reference to P consent is to New Jersey's now-repealed capital punishment scheme)	None
New Mexico (Rules of District Court, Rules of Criminal Procedure)	Rule 5-605. A. Trial by jury; Waiver. Criminal cases required to be tried by jury shall be so tried unless the defendant waives a jury trial with the approval of the court and the consent of the state.	C, P	None
New York (Criminal Procedure Law)	Section 320.10. Non-jury trial; when authorized. (1) Except where the indictment charges the crime of murder in the first degree, the defendant, subject to the provisions of subdivision two, may at any time before trial waive a jury trial and consent to a trial without a jury in the superior court in which the indictment is pending. (2) Such waiver must be in writing and must be signed by the defendant in person in open court in the presence of the court, and with the approval of the court. The court must approve the execution and submission of such waiver unless it determines that it is tendered as stratagem to procure an otherwise impermissible procedural advantage or that the defendant is not fully aware of the consequences of the choice he is making. If the court disapproves the waiver, it must state upon the record its reasons for such disapproval. <i>See also</i> Article 1, Section 2 of the New York Constitution.	C (limited)	First-degree murder cases
North Carolina	No waiver permitted in felony trials	N/A	N/A
North Dakota (Rules of Criminal Procedure)	Rule 23. Trial by Jury or by Court. (a) Jury Trial. If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing or in open court; (2) the prosecuting attorney consents; and (3) the court approves. <i>See also</i> Section 29-16-02 of the North Dakota Century Code ("In any case . . . a trial jury may be waived by the consent of the defendant and the state's attorney.").	C, P	None

Appendix B. Laws of Other American Jurisdictions (*continued*)

Jurisdiction/ (Authority)	Provision Regarding Waiver	Consent of Court (C), Prosecutor (P) Required	Cases in Which Waiver Not Permitted
Ohio (Rules of Court, Rules of Criminal Procedure)	<p>Ohio Crim. R. 23. Trial by Jury or by the Court. (A) Trial by jury. In serious offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney.</p> <p><i>See also</i> Section 2945.05 of the Ohio Revised Code Annotated (“In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury.”)</p>	None (except during trial)	None
Oklahoma (Case law)	Hinsley v. State, 280 P.3d 354, 355, 356 (Okla. Crim. App. 2012) (“A defendant may waive his right to jury trial. . . . [A] defendant cannot waive a jury trial without the consent of both the State and the trial court.”)	C, P	None
Oregon (Revised Statutes)	<p>Section 136.001. Right to public trial by impartial jury; waiver. (1) The defendant and the state in all criminal prosecutions have the right to public trial by an impartial jury. (2) Both the defendant and the state may elect to waive trial by jury and consent to a trial by the judge of the court alone, provided that the election of the defendant is in writing and with the consent of the trial judge. But see <i>State v. Baker</i>, 976 P.2d 1132, 1135 (1999) (ruling that requirement of prosecutor consent violated the state constitution).</p> <p><i>See also</i> Article I, Section 11 of the Oregon Constitution (providing in part that “any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing”).</p>	C	Capital cases
Pennsylvania (Rules of Criminal Procedure)	Rule 620. Waiver of Jury Trial. In all cases, the defendant and the attorney for the Commonwealth may waive a jury trial with approval by a judge of the court in which the case is pending, and elect to have the judge try the case without a jury. The judge shall ascertain from the defendant whether this is a knowing and intelligent waiver, and such colloquy will appear on the record. The waiver shall be in writing, made a part of the record, and signed by the defendant, the attorney for the Commonwealth, the judge, and the defendant’s attorney as a witness.	C, P	None
Rhode Island (General Laws)	<p>Section 12-17-3. Waiver of jury trial – Special findings and rulings. In all criminal cases the accused may, if he or she shall so elect and with the leave of the court, waive a trial by jury, and in those cases the court shall have jurisdiction to hear and try the cause without a jury and render judgment and pass sentence. In cases so tried the court shall, upon request of the accused, make special finding upon any issue of fact and special ruling upon any question of law arising in the case.</p> <p><i>See also</i> Rule 23 of the Rhode Island Rules of Superior Court, Rules of Criminal Procedure.</p>	C	None

Appendix B. Laws of Other American Jurisdictions (continued)

Jurisdiction/ (Authority)	Provision Regarding Waiver	Consent of Court (C), Prosecutor (P) Required	Cases in Which Waiver Not Permitted
South Carolina (Rules of Criminal Procedure)	Rule 14. Trial by Jury . . . (b) Waiver. A defendant may waive his right to a jury trial only with the approval of the solicitor and the trial judge.	C, P	None
South Dakota (Codified Laws)	Section 23A-18-1. Trial by Jury Unless Waived by Parties. Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing or orally on the record with the approval of the court and the consent of the prosecuting attorney.	C, P	None
Tennessee (Rules of Criminal Procedure)	Rule 23. Trial by Jury. (a) Right to Jury Trial. In all criminal prosecutions except for small offenses, the defendant is entitled to a jury trial unless waived. (b) Waiver. (1) Timing. The defendant may waive a jury trial at any time before the jury is sworn. (2) Procedures. A waiver of jury trial must: (a) be in writing; (b) have the consent of the district attorney general; and (c) have the approval of the court. <i>See also</i> Section 39-13-205 of the Tennessee Code Annotated (waiver permitted in first-degree murder cases, including penalty phase).	C, P	None
Texas (Criminal Procedure Code Annotated)	Article 1.13. Waiver of Trial by Jury. (a) The defendant in a criminal prosecution for any offense other than a capital felony case in which the State notifies the court and the defendant that it will seek the death penalty shall have the right, upon entering a plea, to waive the right of trial by jury, conditioned, however, that, except as provided by Article 27.19, the waiver must be made in person by the defendant in writing in open court with the consent and approval of the court, and the attorney representing the State. The consent and approval by the court shall be entered of record on the minutes of the court, and the consent and approval of the attorney representing the State shall be in writing, signed by that attorney, and filed in the papers of the cause before the defendant enters the defendant’s plea. (b) In a capital felony case in which the attorney representing the State notifies the court and the defendant that it will not seek the death penalty, the defendant may waive the right to trial by jury but only if the attorney representing the State, in writing and in open court, consents to the waiver. (c) A defendant may agree to waive a jury trial regardless of whether the defendant is represented by an attorney at the time of making the waiver, but before a defendant charged with a felony who has no attorney can agree to waive the jury, the court must appoint an attorney to represent him.	C, P	None
Utah (Rules of Criminal Procedure)	Rule 17. The Trial. (c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.	C, P	None

Appendix B. Laws of Other American Jurisdictions (*continued*)

Jurisdiction/ (Authority)	Provision Regarding Waiver	Consent of Court (C), Prosecutor (P) Required	Cases in Which Waiver Not Permitted
Vermont (Rules of Criminal Procedure)	<p>Rule 23. Trial by Jury or by the Court. (a) Trial by Jury; Waiver. The defendant may in a signed writing or in open court, with the consent of the prosecuting attorney and the court entered of record, waive a jury trial in offenses not punishable by death. The court shall not accept the defendant's waiver of the right to trial by jury without first, by addressing the defendant personally in open court, informing that person of, and determining that the person understands, the following: (1) That the jury consists of 12 members of the community, and that the defendant may participate in their selection; (2) That before the defendant can be convicted, all 12 members of the jury must agree on the defendant's guilt; (3) That where a jury is waived, the court alone decides guilt or innocence in accordance with the facts and the law.</p> <p><i>See also</i> Chapter I, Article 10 of the Vermont Constitution (stating in part that "in criminal prosecutions for offenses not punishable by death, the accused, with the consent of the prosecuting officer entered of record, may in open court or by a writing signed by the accused and filed with the court, waive the right to a jury trial and submit the issue of the accused's guilt to the determination and judgment of the court without a jury").</p>	C, P	Capital cases
Virginia (Supreme Court Rules)	<p>Rule 3A:13. Trial by Jury or by Court. . . (b) Waiver of Jury in Circuit Court. If an accused who has pleaded not guilty in a circuit court consents to trial without a jury, the court may, with the concurrence of the Commonwealth's attorney, try the case without a jury. The court shall determine before trial that the accused's consent was voluntarily and intelligently given, and his consent and the concurrence of the court and the Commonwealth's attorney shall be entered of record.</p>	C, P	None
Washington (State Court Rules, Superior Court Criminal Rules)	<p>Rule 6.1. Trial by Jury or by the Court. (a) Trial by jury. Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.</p> <p><i>See also</i> Section 10.01.060 of the Washington Revised Code ("No person informed against or indicted for a crime shall be convicted thereof, unless by admitting the truth of the charge in his or her plea, by confession in open court, or by the verdict of a jury, accepted and recorded by the court: PROVIDED HOWEVER, That except in capital cases, where the person informed against or indicted for a crime is represented by counsel, such person may, with the assent of the court, waive trial by jury and submit to trial by the court.").</p>	C	Capital cases
West Virginia (Rules of Criminal Procedure)	<p>Rule 23. Trial by Jury or by the Court. (a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the state.</p>	C, P	None

Appendix B. Laws of Other American Jurisdictions (continued)

Jurisdiction/ (Authority)	Provision Regarding Waiver	Consent of Court (C), Prosecutor (P) Required	Cases in Which Waiver Not Permitted
Wisconsin (State Statutes)	Section 972.02. Jury Trial; waiver. (1) Except as otherwise provided in this chapter, criminal cases shall be tried by a jury selected as prescribed in [Section] 805.08, unless the defendant waives a jury in writing or by statement in open court or under [Section] 967.08 (2) (b), on the record, with the approval of the court and the consent of the state.	C, P	None
Wyoming (Rules of Criminal Procedure)	Rule 23. Trial by Jury or Court. (a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial with the approval of the court and the consent of the state. A waiver of jury shall be made in writing or on the record. There shall be no right to a jury trial, except: (1) when a statute or ordinance so provides, or (2) when the offense charged is driving under the influence of alcoholic beverages or controlled substances, or (3) when the offense charged is one for which the statute or ordinance alleged to have been violated provides for incarceration as possible punishment.	C, P	None
Guam (Code Annotated)	Title 8, Section 85.10. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.	C, P	None
Puerto Rico (Laws Annotated)	Title 34, Part II, Rule 111. Questions of fact in felony cases and, except as provided by special statutes, in misdemeanor cases, provided that the information was originally filed in the Court of First Instance and was also within the jurisdiction of the District Court, shall be tried by jury unless the defendant expressly, intelligently and personally waives the right to trial by jury. . . The court shall grant the trial by jury at any time after the arraignment. If the waiver to the right of trial by jury is filed after the beginning of trial, the trial judge is authorized to discretionally allow it to continue by court of law with the consent of the government attorney.	None (except during trial)	None
USVI	Uses the Federal Rules of Criminal Procedure, discussed above under the entry for the federal system.	C, P	None
DC (District Code)	Section 16-705. (a) In a criminal case tried in the Superior Court in which, according to the Constitution of the United States, the defendant is entitled to a jury trial, the trial shall be by jury, unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto.	C, P	None

Appendix C. National Center for State Courts Bench vs. Jury Trial Data⁶⁹

	<i>Bench Trials</i>	<i>Jury Trials</i>	<i>Jury Trial Rate</i>
Alaska	8	150	95
Arizona	191	1,326	87
California ¹	27,507	8,479	24
Delaware	22	226	91
District of Columbia	642	439	41
Florida	359	3,872	92
Hawaii*	79	157	66
Indiana	5,527	1,321	19
Kansas	836	603	42
Maryland	1,712	1,314	43
Michigan	1,023	1,900	65
Missouri	1,595	660	29
New Jersey*	221	1,301	85
North Carolina	0	2,853	100
Ohio	950	1,717	64
Pennsylvania ²	5,106	2,661	34
Puerto Rico	7,734	195	2
South Dakota ³	1,713	247	13
Texas	1,157	3,470	75
Vermont	32	126	80
Washington	753	1,564	68
<i>Federal Courts</i>	3,638	835	81

* Data does not include misdemeanors

1. Data does not include bench trial figures for 2005

2. Data does not include bench or jury trial figures for 2005

3. Data does not include bench trial figures for 2004 or 2005

69. See Frampton, *supra* note 45, at 192.