



Judicial Impact Statement

www.ohiojudges.org

October 19, 2011

Christina Madriguera, Esq., Legislative Analyst

Sponsor Representatives

Lynn Slaby
Sean O'Brien

House Bill 265 Right to Jury Trial

TITLE INFORMATION

Grant prosecutors the right to demand a jury trial. The legislation specifies that this right survives the defendant's objection and that these cases cannot be tried by a magistrate.

IMPACT SUMMARY

The Jury Service Committee and the Criminal Law and Procedure Committee of the Ohio Judicial Conference have reviewed House Bill 265 and determined that, according to the Constitution of Ohio, the provisions cannot be implemented until the Ohio Rules of Criminal Procedure are amended accordingly. This legislation also represents a policy shift that will have implications for the administration of justice and may also impact public confidence in the courts.

What is a Judicial Impact Statement?

A Judicial Impact Statement describes as objectively and accurately as possible the probable, practical effects on Ohio's court system of the adoption of the particular bill. The court system includes people who use the courts (parties to suits, witnesses, attorneys and other deputies, probation officials, judges and others). The Ohio Judicial Conference prepares these statements pursuant to R.C. 105.911.

BACKGROUND

The right to trial by jury is a right specifically guaranteed by Article III, Section 2 and the Sixth Amendment of the Constitution of the United States, and by Article I, Section 5 of the Constitution of the State of Ohio.¹ In Singer v. United States, the Supreme Court of the United States examined whether a criminal defendant in a federal criminal case has an unconditional constitutional right to a trial by jury, and whether there is also a correlative constitutional right for a

¹ Article III, Section 2 of the United States Constitution provides: "The Trial of all Crimes, except in cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

The Sixth Amendment of the United States Constitution provides: "In all Criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

Article I, Section 5 of the Constitution of the State of Ohio provides: "The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

criminal defendant to have his/her case decided by the judge alone if s/ he considers such a trial to be to her/ his advantage.² The Court held that there is no constitutional or federally recognized right to a criminal trial before a judge sitting alone, and, citing Patton v. United States, the Court reaffirmed their previous holding that a defendant can waive the right to trial by jury.³

In Singer, the defendant challenged Federal Rule of Criminal Procedure 23(a) which conditions waiver of jury trial on the approval of the court and the prosecuting attorney.⁴ The Court upheld the validity of the Federal Rule finding that a defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. Writing for the Court, Chief Justice Warren wrote, "the ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite...We find no constitutional impediment to conditioning a waiver of the 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."⁵

Historically trial by jury occurred in all criminal cases. In the early days of our nation juries investigated and collected information about crimes and criminal defendants and the judge applied the law to the facts found by the jury. In addition to being a right conferred to protect individuals from government tyranny, trial by jury was viewed as a community right, the right of the British colonies to judge its own people and pronounce their punishment.⁶

Ohio is one of twenty-one states granting criminal defendants the right to choose whether they will be tried by jury or by the judge.⁷ The Ohio General Assembly and the Supreme Court of Ohio have agreed that criminal defendants in Ohio have this right. In State v. Smith, the Supreme Court of Ohio upheld the validity of the General Code 1334-2 statute that in all criminal cases pending in state courts of record in this state, the defendant shall have the right to trial by jury, and may, if s/he so elects, be tried by the court without a jury.⁸

In Ohio the vast majority of criminal cases are settled or otherwise terminated in the pre-trial phase of the criminal justice process, either via dismissal for want of evidence or a procedural flaw, or with a conviction via plea negotiation.⁹ Certainly, the primary reason a case is not settled with a plea agreement is the criminal defendant's desire to avoid conviction. The use of a trial to the court to resolve criminal cases varies widely throughout the state. On average, of the cases that proceed to trial, about a third (32.7%) proceed by a trial to

² Singer v. US, 380 US 24 (1965).

³ Patton v. US, 281 US 276 (1930).

⁴ Rule 23(a) of the Federal Rules of Criminal Procedure provides: "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."

⁵ Singer v. US, 380 US 24, 25, 26 (1965).

⁶ Appleman, Laura I, *The Lost Meaning of the Jury Trial Right*, 84 Ind. L.J. 397, 399 (2009)

⁷ See data compiled by Ohio Prosecuting Attorneys Association listing states and relevant statutory language. Twenty-nine states, plus the Federal system, and Washington D.C. require the consent of the prosecuting attorney in order to waive trial by jury. Ohio is one of twenty-one states that does not require the consent of the prosecuting attorney to waive trial by jury.

⁸ State v. Smith, 123 Ohio St 237 (1931) In applying a statute (13442-4 of the General Code) stating that all criminal cases pending in courts of record in this state, the defendant shall have the right to waive a trial by jury, and may, if he so elect, be tried by the court without a jury . . . The court held that the trial judge had no discretion to reject the accused's waiver of jury trial, unless suggestion of present insanity is made by the accused's counsel. In such cases, the court may impanel a jury to determine insanity. The court cannot reject the defendant's waiver and order him to be placed on trial. If the accused is found insane, he shall be sent to a mental hospital. If the accused is found sane, he is restored to the same rights any other accused would have, respecting his right of election to be tried by the court under the provision 13442-4.

General Code 13442-4 provided that in all criminal cases pending in courts of record the defendant has the right to waive a jury trial and may be tried by the court without a jury if he elects.

⁹ Ohio Courts Summaries for 2006-2010 indicate that, on average, 2.8 percent of common pleas criminal cases and 3.99 percent of municipal cases go to trial.

the court in common pleas courts. In some counties, in some years the number may exceed 80%. In municipal and county courts, the vast majority of cases resolved by trial are resolved by trial to the court (94.8%).¹⁰ There are various reasons a criminal defendant may wish to waive their right to trial by jury.

While a majority of criminal defendants in the common pleas court are indigent and represented by a public defender or court appointed counsel, some do not qualify and must retain a lawyer. These non-indigent defendants will bear the burden of legal fees and court costs both of which increase dramatically in the event of a jury trial. With counsel's advice, they may choose to take a less expensive course of trial to the court. This is more likely the case in municipal and county courts where retained counsel is more prevalent, particularly for OVI and Domestic Violence cases.

Aside from cases where the defendant has nothing to lose by going to trial, the defense is most likely to seek a trial where the prosecution's case is weak. The defendant may choose trial by judge if the nature of the crime creates some emotional bias that would interfere with the jury's ability to be an impartial finder of fact and counsel advises the defendant to rely on the independent fairness and impartiality of the judge.

A trial to the court is clearly a more economical way to determine a criminal case. The time to try a case to the court is dramatically reduced by avoiding all of the process required for the selection and instructing of a jury as well as the jury's time to deliberate. Time is an extremely valuable resource in the justice system where massive caseloads bear on all of the participants, prosecution, defense and the court alike. Greater time spent in trial also increases cost on the state that pays the salaries of judges, prosecutors, public defenders, and appointed counsel. The cost to summon the needed jurors and the economic burden that some jurors bear in order to serve are also factors.

House Bill 265 proposes to condition the defendant's ability to waive a jury trial on the consent of the court and the prosecuting attorney. Twenty-nine states, the Federal criminal justice system, and Washington D.C. require the consent of the court and the prosecuting attorney in cases where a criminal defendant wishes to waive their right to trial by jury. This is a significant shift from the long standing policy in Ohio that the defendant alone has the right to demand a jury trial. Although the General Assembly may desire to express its will that prosecutors also be able to demand a trial by jury, the General Assembly does not have the authority to establish court procedures in conflict with an existing Ohio Rule of Criminal Procedure.

Interestingly, in 2008 the Supreme Court of Ohio Commission on the Rules of Practice and Procedure actually considered changing Criminal Rule 23, at the request of the Ohio Prosecuting Attorneys Association, and instead reconfirmed the Commission's intention to retain existing procedures that only provide for the defendant to request and/or waive a jury trial. The Commission's refusal, by a 3-10 vote, to establish procedures for prosecutors to demand a jury trial over the objection of defendants was based on the Commission's determination, among other reasons, that to do so was "patently unfair to defendants."

Indeed, it was only after rejection of their idea by the Commission that the Ohio Prosecuting Attorneys Association turned to the Ohio General Assembly to adopt a statute authorizing prosecutors to demand a jury trial over the objection of defendants.

JUDICIAL IMPACT

¹⁰ Ohio Courts Summaries for 2006-10 indicate that trials in common pleas courts are decided by juries 67.3 percent of the time and by the bench in 32.7 percent of the cases. In contrast, trials in municipal courts are decided by the bench 94.848 percent of the time and by a jury in only 5.15 percent of the cases.

Conflict with the Ohio Constitution.

The Modern Courts Amendment of the Ohio Constitution (Article IV, Section 5) expressly grants the authority to the Supreme Court of Ohio to prescribe the rules governing court process and trial procedure. This section of the Ohio Constitution states that all laws that are in conflict with such rules shall be of no further force or effect after such rules have been adopted.

Rules of court process and trial procedure are the conduit on which substantive rights are delivered. The rules provide an ordered method for addressing complex issues and give notice to the parties. Consistent adherence to the rules in matters of process and procedure strengthens substantive law as enacted by the General Assembly and promotes public confidence in the criminal justice system.

As stated in Rule 1 of the Ohio Rules of Criminal Procedure, the rules prescribe the procedure to be followed in all Ohio courts in the exercise of criminal jurisdiction. The “rules are intended to provide for the just determination of every criminal proceeding. They shall be construed and applied to secure the fair, impartial, speedy, and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expense and delay.”

Ohio Criminal Rule 23 was originally promulgated by the Supreme Court Rules Advisory Committee in 1973 and was last amended in 1980. As the rule is currently drafted it provides the procedures that courts follow when addressing situations where a defendant wishes to exercise or waive their right to jury trial. It conforms with and supports the substantive right to a jury trial as authorized in the Constitution and the Ohio Revised Code. Likewise, it prescribes the procedures courts will use when defendants wish to waive their right to jury trial. The rule provides:

Ohio Criminal Rule 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. In petty offense cases, where there is a right of jury trial, the defendant shall be tried by the court unless he demands a jury trial. Such demand must be made in writing and filed with the clerk of court not less than ten days prior to the date set for trial, or on or before the third day following receipt of notice of the date set for trial, whichever is later. Failure to demand a jury trial as provided in this subdivision is a complete waiver of the right thereto.
- (B) **Number of jurors.** In felony cases juries shall consist of twelve. In misdemeanor cases juries shall consist of eight. If a defendant is charged with a felony and with a misdemeanor or, if a felony and a misdemeanor involving different defendants are joined for trial, the jury shall consist of twelve.
- (C) **Trial without a jury.** In a case tried without a jury the court shall make a general finding.

Plainly, prior to the commencement of the trial, there is no procedure in Ohio Criminal Rule 23 for a prosecutor to demand a trial by jury over the objection of the defendant. As a practical matter, in serious offense cases, the defendant could continue to present a valid waiver in response to each demand the prosecutor makes for a jury trial. And, in petty offense cases, those processed by municipal and county courts, failure to demand a jury trial as provided by the rule constitutes a complete waiver. There is no procedure drafted into the rule for the prosecutor to demand a jury trial over the objection of the defendant in serious or petty offense criminal cases.

House Bill 265 proposes to amend eight sections of the Ohio Revised Code. Of these eight Revised Code sections, three explicitly defer to the court rules regarding the manner in which defendants can validly exercise or waive their right to a jury trial.¹¹

For the code sections that explicitly give deference to the court rules, not only does House Bill 265 create a conflict with the Criminal Rules of Procedure, it also creates an explicit internal conflict within the code sections it amends. Although the other five sections that House Bill 265 seeks to amend, do not explicitly reference the rules of court, the language of the rule mirrors the procedural language of the statute thus avoiding a procedural conflict.¹²

House Bill 265 proposes to grant additional powers to the prosecution not currently recognized by court rule. Until the Supreme Court Commission on the Rules of Practice and Procedure recommends a rule of criminal procedure in accordance with that additional power, and such rule is adopted by the Supreme Court of Ohio, House Bill 265 cannot be implemented.

Ohio judges encourage the Ohio General Assembly to carefully scrutinize and cautiously deliberate legislation that would challenge a recent decision of the Commission on the Rules of Practice and Procedure. For the General Assembly to act contrary in an attempt to coerce action by the Commission after the Commission fully considered the issue submitted by the Ohio Prosecuting Attorneys Association is unwise. To do by statute what has been rejected by the judicial branch by rule is an unwarranted interference with the Court's authority.

Decrease in Public Confidence in the Law

House Bill 265 marks a change in Ohio's long-standing position that the defendant has the right to decide whether the judge or the jury will be the trier of fact. This constitutes a significant shift in the balance of power between the prosecutor and the defense counsel. Presumably, the current provision is designed to give the defendant the advantage and protection of a jury trial. This might be warranted by an underlying mistrust of government and the perception that the judge is part of the same government establishment that includes the prosecutor. Alternatively, where the nature of the crime creates some emotional bias that would interfere with the jury's ability to be an impartial fact finder the defendant may prefer to rely on the independent fairness and impartiality of the judge. Giving the defendant the option to choose the trier of fact enhances public confidence in the legal system and government's role in protecting the rights of the accused.

The same is not true for granting the prosecution such an option where that legally trained professional is fully aware of the independent, fair and impartial nature of the judge's role. To offer the option to the prosecution suggests that the prosecution is seeking something other than an independent, fair and impartial trier of fact. The appearance to the defendant is that the prosecution is seeking a conviction through emotional or confusing persuasive techniques that would not be effective on the judge. Prosecutors may argue that they are seeking this option not for their own advantage but to give the people of the state who they represent the same protection that a jury offers to the defendant. That argument only prevails if you accept the notion that the people of the state are suspect of the judge's ability to be fair and impartial and independent of the criminal defense. Such an argument is absurd in a state where the judges, like the prosecutor, are selected by general vote of the people they serve. It is also important to point out that under current law, it is not the defense attorney that decides on a

¹¹ Revised Code Sections: 1901.24 Jury demand, Number of jurors. 1907.29 Jury trial procedure. 2945.06 Procedure for trial by court.

¹² Revised Code Sections: 2152.67 Jury trial procedure. 2937.08 Action on pleas of "not guilty," or "once in jeopardy," in misdemeanor case.; 2938.04 Jury Trial. 2938.05 Withdrawal of claim for jury. 2945.05 Defendant may waive jury trial.

jury trial but the defendant. HB 265 would give the choice of the trier of fact to the states lawyer, a subtle though significant difference in an adversarial system where successful prosecution may have its own value. Similarly, this option is not an appropriate avenue to avoid a truly biased judge. The Ohio Constitution at article IV, section 5(C) specifically provides for the disqualification of judges. The proper procedure to challenge a judge for true bias is to move for disqualification or to file an affidavit of disqualification pursuant to revised Code sections 2701.03 and 2701.031.

Under Ohio Law, Criminal Rule 29 provides that in a trial by jury or without, the judge retains the authority to enter judgment of acquittal if the evidence presented is insufficient to sustain a conviction. The judge may be less likely to do so when a jury is in place and has already spent time and effort in attending to their civic duty and possibly rendered its verdict. This is an advantage the prosecutors will gain in House Bill 265.

The prosecution will gain increased leverage in plea bargaining by threat of increasing the economic burden on the other participants in the trial. For the non-indigent defendant the personal costs are dramatic even in the event of acquittal. For those represented at the states expense this threat is a real one felt by the defense counsel. Although the defense may use this exact same threat for leverage in plea bargaining, it is presumed that those who established this protection felt that the reasons to provide the substantive right to a jury trial understood the burdens and costs it would place on the state and opted in favor of increasing public confidence in the justice system.

This added leverage allowed to the prosecution may lead to more convictions in cases where evidence is weak either by plea or by jury. Due to the nature of the case a defendant may believe that the outcome of their case will be less favorable if the jury is the trier of fact. In the course of the criminal proceedings prior to trial, if the prosecutor asserts their right to a jury trial over the defendant's objection, the defendant may be more inclined to accept the prosecutor's plea offer rather than undergo a jury trial. In the event that this new prosecutorial authority results in jury trials rather than trials to the judge there will be an increased number of jury trials, increasing the economic cost to the local funding authorities and reducing the efficient use of the court's limited time. Although it is customary to require the convicted offender to pay the court costs, it seems particularly unfair to charge a defendant for the added costs of a jury trial that the defendant did not request.

Ultimately, this legislation seeks to redefine the fundamental fairness provided by the criminal justice system to the criminal defendant in the State of Ohio and reduce the burden that state officials bear to achieve conviction. Despite the fact that other states and the federal courts have adopted this procedure, Ohio has a long tradition of reserving the choice of the trier of fact to the person charged by the state with a crime. If the General Assembly adopts this legislation it will have abandoned that tradition in favor of a more powerful prosecutorial institution.

RECOMMENDATIONS

Recommendation 1: The Ohio Constitution assigns the Supreme Court of Ohio the responsibility to establish court practices and procedures. In order for the prosecutor to demand a jury trial over the objection of the defendant, Criminal Rule 23, Trial by Jury or By the Court, must be amended to include appropriate court procedures. In deference to the Supreme Court and the judicial branch and with respect for the previous determination of the Supreme Court Commission on the Rules of Practice and Procedure, the Ohio General Assembly should accept that determination, or at most, use uncodified law to communicate the nature of its support for a change in state policy and request the Supreme Court to re-consider changes to Criminal Rule 23 to provide for prosecutors to demand jury trials over the objection of defendants.

Recommendation 2: In the event that the prosecution is granted the authority to demand a jury trial or deny the defendants jury waiver such change should include a stipulation that the prosecution will pay the costs associated with any jury trial wherein the defendant offers a waiver of trial by jury or objects to the prosecutor's demand for a jury trial. Such a provision will support fundamental fairness to the defendant and encourage the prosecution to give full consideration to the added expense and burden their strategic choice will place on the local justice system.

Sources:

Appleman, Laura I., *The Lost Meaning of the Jury Trial Right*, 84 Ind. L.J. 397 (2009).

Hamilton, Alexander, *The Judiciary Continued in Relation to Trial by Jury*, The Federalist No. 83, (July 5 – 12, 1788). In Federalist No. 83, Alexander Hamilton discussed whether or not the standard of trial by jury should be applied to civil matters. In this paper Hamilton acknowledges the criminal standard of the jury as finder of fact and asserts the position that the trial by jury system is inappropriate for civil cases. Writing about civil cases in courts of equity Hamilton asserts that “Juries cannot be supposed competent to investigations that require a thorough knowledge of the laws and usages of nations . . . (T)hough the proper province of juries be to determine matters of fact, yet in most cases legal consequences are complicated with fact in such a manner as to render separation impracticable.” Hamilton further asserts and warns that, “The nature of a court of equity will readily permit the extension of its jurisdiction to matters of law; but it is not a little to be suspected, that the attempt to extend the jurisdiction of the courts of law to matters of equity will not only be unproductive of the advantages which may be derived . . . but will tend gradually to change the nature of the courts of law, and to undermine the trial by jury, by introducing decisions too complicated for a decision in that mode.”

Landis, Debra T. Esq., *Right of accused, in state criminal trial, to insist, over prosecutor's or court's objection, on trial by court without jury*. 37 A.L.R.4th 304 (2011).

Likavec, Michael A., Hodson, Judge Thomas S., *Journalists' Handbook to Ohio Courts*, The Harrison Company, (1982)