

Alabama Rules of Criminal Procedure

Rule 18. Trial by jury; waiver; selection and preparation of petit jurors.

Rule 18.1. Trial by jury.

(a) RIGHT TO TRIAL BY JURY. Defendants in all criminal cases shall have the right to be tried by a jury. In cases triable in the first instance in district or municipal courts, the defendant shall have the right to trial by jury only on demand upon appeal to the circuit court for trial de novo as provided in Rule 30.1. Upon conviction in municipal or district court, the defendant shall be advised of the right to appeal for trial de novo and to demand a jury trial.

(b) WAIVER OF TRIAL BY JURY. In all cases, the defendant may waive his 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 (7) 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 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) JURY OF LESS THAN TWELVE (12) MEMBERS. At the commencement of trial, or at any time before return of a verdict, and with the consent of the court, the defendant and the prosecutor may stipulate in writing, or in open court upon the record, that the jury may consist of any number of jurors less than twelve (12) and more than five (5). The court shall not accept an agreement to trial by less than twelve (12) jurors unless the defendant, after being advised by the court of

the right to trial by twelve (12) jurors, personally waives the right. In any trial by a jury of less than twelve (12), the verdict must be unanimous. This section does not apply to prosecutions for capital offenses. See Ala.Code 1975, § 12-16-232(c).

Committee Comments

Section (a) recognizes a defendant's fundamental right to a trial by jury. This right has been jealously guarded in Alabama through the Alabama Constitution, by statute, and by case law. Art. I, § 6, Alabama Constitution of 1901, provides in pertinent part "That in all criminal prosecutions, the accused has a right ... [to] a speedy, public trial, by an impartial jury of the county or district in which the offense was committed"

More emphatically, Art. I, § 11, Alabama Constitution of 1901, provides, "That the right of trial by jury *shall remain inviolate*." (Emphasis added.) The phrase "shall remain inviolate" has been interpreted to mean that the state is forbidden "through the legislative, judicial, or executive department—one or all—from ever burdening, disturbing, qualifying or tampering with this right to the prejudice of the people." *Gilbreath v. Wallace*, 292 Ala. 267, 271, 292 So.2d 651 (1974); *Alford v. State*, 170 Ala. 178, 54 So. 213 (1910). Finally, Amendment No. 328, § 6.11, to the Alabama Constitution of 1901 (the Judicial Article), illustrates that the right to trial by jury remains inviolate. That section permits the Alabama Supreme Court to promulgate rules of court practice and procedure with the limitation that "the right of trial by jury as at common law and declared by Section 11 of the Constitution of Alabama of 1901 shall be preserved to the parties inviolate."

Since all felonies must be prosecuted on indictment by the grand jury, it is clear that the trial of all felonies must be by jury unless waived. Art. I, § 6, Alabama Constitution of 1901. The situation is more complicated with regard to misdemeanors.

A defendant has a statutory right to a jury trial upon timely demand when charged with the commission of *any* misdemeanor. Ala.Code 1975, § 15-14-30. The provisions of this statute go beyond decisions of the United States Supreme Court. In *Duncan v. Louisiana*, 391 U.S. 145, 160, 88 S.Ct. 1444, 1453, 20 L.Ed.2d 491 (1968), the Court held that "petty offenses" need not be tried with a jury. The Court defined "petty offenses" in *Baldwin v. New York*, 399 U.S. 66, 70, 90 S.Ct. 1886, 1889, 26 L.Ed.2d 437 (1970), and held that "no offense can be deemed 'petty' for the purposes of the right to trial by jury where imprisonment for more than six months is authorized." Although § 15-14-30, Ala.Code 1975, specifically addresses jury demand in circuit court, that section has been construed by the Court of Criminal Appeals to apply also to an appeal to circuit court from municipal court. *Day v. City of Mobile*, 439 So.2d 812

(Ala.Crim.App.1983). The rule applies to state laws and municipal ordinances alike.

The first sentence of section (a) presumes that the petit jury will be composed of twelve members. Although the United States Supreme Court has upheld a state's right to provide for a jury composed of less than twelve (12) members, *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Alabama Supreme Court has held in a long line of decisions that the jury contemplated by Art. I, § 11, Alabama Constitution of 1901, is a common law jury of twelve (12) and that a jury which consists of a lesser number is not constitutional. *Baader v. State*, 201 Ala. 76, 77 So. 370 (1917); *Collins v. State*, 88 Ala. 212, 7 So. 260 (1889); *Woodward Iron Co. v. Cabaniss*, 87 Ala. 328, 6 So. 300 (1889). In its most recent decision upholding a twelve-member jury, the Court concluded its unanimous opinion with the statement, "In our considered judgment, if such a radical restructuring of the judicial process is deemed wise or necessary, it must be accomplished by constitutional amendment or enactment." *Gilbreath v. Wallace*, 292 Ala. 267, 273, 292 So.2d 651, 656 (1974). Of course, these cases do not pertain to the situation where the parties consent to trial by less than 12 jurors. See Rule 18.1(c).

In *Singleton v. State*, 288 Ala. 519, 262 So.2d 768 (1971), the Alabama Supreme Court held that waiver of jury trial in a noncapital felony case must be made knowingly and intelligently and that the prosecutor and the court must consent to it. To ensure that these requirements are met, subsection (b)(1) requires the court to advise the defendant personally of his or her right to a jury trial and further requires that the waiver be made either in writing or in open court on the record.

The question has been raised whether a defendant has a right *not* to be tried by a jury, i.e., if the defendant waives the right, can the state refuse to consent and demand that the defendant be tried by jury. The United States Supreme Court in *Singer v. United States*, 380 U.S. 24, 34-35, 85 S.Ct. 783, 789-90, 13 L.Ed.2d 630 (1965), rejected the defendant's argument that he had an unconditional right to have his case tried by a judge alone, regardless of whether the prosecution and the court consented to waive the jury. The majority opinion held:

"The ability to consent to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right....

"The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result."

However, the Alabama Supreme Court has held that a statute which requires the consent of the state and the court to a defendant's waiver of jury trial does not entitle the state to request or the court to require a jury trial where the defendant has waived the right. *Ex parte Hall*, 255 Ala. 98, 50 So.2d 264 (1951); *Baader v. State*, supra. Thus, under Alabama cases, while the state could not demand a jury trial, it was uncertain whether the state and court had to consent to a defendant's waiver. Under these rules, a defendant may not waive trial by jury unless consented to by the court and the prosecution.

There has been much debate over whether the defendant's right to waive trial by jury should be absolute, i.e., without the consent of either the court or the prosecution. ABA, Standards for Criminal Justice, *Trial by Jury* 15-1.2 (2d ed. 1986), left the issue open, providing for waiver of trial by jury. The Advisory Committee concluded that although neither waiver as a matter of right nor conditional waiver was "obviously superior" to the other. The arguments for waiver tend to put the prosecution on more even ground with the defendant, in effect giving "the people" a right to have a defendant's guilt or innocence determined by a jury.

Section (a) is patterned after Ala.Code 1975, § 15-14-30, but differs in one significant respect. Section (a) does not provide for a jury trial for a "minor misdemeanor" as defined in Rule 1.4, since the defendant is in no danger of confinement. The second sentence of section (a) is not in accord with *Alford v. State*, 170 Ala. 178, 194, 54 So. 213, 217 (1911), where the court in an opinion by Justice Mayfield said (at p. 194, 54 So. 213):

"But none of these statutes so upheld by this court required the defendant to first submit to a conviction by the court or judge, before he was entitled of right to demand or have a jury trial—thus compelling him to submit to two trials, or, as it were, to be twice put in jeopardy for the same offense, in order to obtain a jury trial. While in some cases they did provide for an appeal to a jury from a conviction by the court or justice, they provided that the defendant might obtain a jury trial in the first instance if he so desired."

Under this rule, the defendant cannot avoid being tried in the district or municipal court and cannot go directly to the circuit court for trial by jury in the first instance other than by simply not contesting the issue and appealing the result. Of course, in most instances the defendant will want both chances at an acquittal and would not elect to remove his case if he could.

Section (b) provides for waiver of the right to a jury trial. Where the defendant is charged with a felony offense, the heavier burden is on the State to show an affirmative waiver. However, as to misdemeanor offenses [§ 15-14-30], failure by the defendant to make a timely demand for a jury trial constitutes waiver of the right. In *Singleton v. State*, 288 Ala. 519, 262 So.2d 768 (1971), the

Alabama Supreme Court held that a defendant may waive his or her right to a jury trial in a non-capital felony case.

Subsection (1) sets forth the requirements for waiver of jury trial when the defendant is charged with a felony offense. This rule is based upon Rule 23(a), Fed.R.Crim.P., and ABA, Standards for Criminal Justice, *Trial by Jury* 15-1.2 and -1.3 (2d ed. 1986).

Subsection (2) restates the requirements of Ala.Code 1975, § 15-14-30, and provides for waiver if the defendant fails to make a timely demand for a jury trial where the defendant is in circuit court on an appeal for trial de novo. Failure to make timely demand is a waiver. Due process requires that the waiver not be made without any knowledge of the right, thus the requirement of informing the defendant falls on the trial judge at the conclusion of the first trial. (See Section (a).) The defendant can be tried before the judge and still have his appeal for trial de novo by jury in the circuit court. Leaving this double trial provision hopefully will avoid congestion of the circuit court dockets.

Subsection (3) provides that the court can allow a withdrawal of waiver (either affirmative or by delay) for good cause, but not after taking evidence begins. Conversely, subsection (4) allows a defendant to withdraw a not guilty plea and a jury demand and proceed on a guilty plea to the judge alone. Since it is a knowing waiver, it may apply as well to capital as to noncapital cases.

Section (c) allows the defendant to waive trial by a twelve-member jury. The purpose of the addition is to provide a procedure for allowing a trial to begin with less than twelve (12) jurors or, if begun with a twelve-member jury, to proceed where a juror or jurors must be excused and there has been no provision for alternatives. *Kirk v. State*, 247 Ala. 43, 44, 22 So.2d 431 (1945), provides authority for this provision. In that decision, the Alabama Supreme Court upheld a local act applicable to Jefferson County that provided as follows:

“At any stage of a trial [before verdict] ... the parties may unanimously consent in open court with legal effectiveness, to a discharge from further duty of any member of the jury trying the case and to a continuation of the trial and the rendition of a verdict by the remaining jurors. A verdict returned by the remaining jurors shall be as valid and as legally effective as if it had been returned by the full jury.”

To protect the defendant, Section (c) requires that the defendant understand that he has a right to be tried by a twelve-member jury and that he may consent to be tried by a lesser number. The provisions of section (c) are essentially the same as those of ABA, Standards for Criminal Justice, *Trial by Jury*, 15-1.3 (2d ed. 1986). The minimum limitation prevents falling below six (6) jurors even with consent. It should be noted that while the ABA Standard would

allow for less than a unanimous verdict, subsection (c) requires that the verdict be unanimous.