
24.1 Right to Jury Trial under Sixth Amendment

"The jury is a central foundation of our justice system and our democracy. . . . The jury is a tangible implementation of the principle that the law comes from the people." *Pena-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855, 860 (2017). The Sixth Amendment to the U.S. Constitution, as interpreted by the U.S. Supreme Court, establishes a defendant's basic right to a jury trial. *See also* U.S. CONST. art. III, § 2 (establishing a defendant's right to a jury trial in federal court). In discussing the right to a jury, the Court has stated:

> [T]he primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who, at the same time, are less likely to function or appear as but another arm of the Government that has proceeded against him.

Baldwin v. New York, 399 U.S. 66, 72 (1970); *see also Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (explaining that framers of our state and federal constitutions provided defendants with the right to a jury trial to give them "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge").

Significant developments under the Sixth Amendment's jury trial provision include limitations on a judge's ability to make sentencing findings. The law, discussed further below, is that any fact, other than a prior conviction, that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. *See Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *see also Ring v. Arizona*, 536 U.S. 584 (2002) (application to capital sentencing); *cf.* 1 NORTH CAROLINA DEFENDER MANUAL § 8.7, *Apprendi* and *Blakely* Issues (2d ed. 2013) (discussing pleading requirements in light of *Apprendi* and *Blakely*). These cases brought about a sea change in how sentences are to be determined

and necessitated a change in North Carolina structured sentencing. *See infra* § 24.1E, Right to Jury Verdict on Every Element of Offense, Including "Sentencing" Factors.

A. Application to States

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

B. Scope of Sixth Amendment Right

The Sixth Amendment guarantees the right to a jury trial for all "serious offenses." There is no federal constitutional right to a jury trial for "petty" offenses. An offense is presumptively "petty" if it carries a maximum prison term of six months or less. *See Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989). However, a defendant charged with an offense for which the maximum penalty is six months imprisonment or less is entitled to a jury trial under the Sixth Amendment if he or she "can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Id.* at 543.

A defendant charged with multiple misdemeanor offenses, none of which individually carry a penalty of more than six months imprisonment, has no Sixth Amendment right to a jury trial. *See Lewis v. United States*, 518 U.S. 322 (1996). *But see Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) (defendant entitled to jury trial where charged with multiple counts of criminal contempt based on conduct during course of trial and aggregate punishment exceeded six months).

The right to a jury trial does not extend to proceedings in juvenile court. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (trial by jury in adjudicative stage of juvenile court delinquency proceeding is not constitutionally required). Nor does the right extend to hearings on probation violations. *See Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1984) (noting in dicta that "there is no right to a jury trial before probation may be revoked").

North Carolina law is broader. A defendant has a jury trial right for all felonies in superior court and also for all misdemeanors appealed to or initiated in superior court. *See infra* § 24.2A, Scope of Right.

C. Number of Jurors

The Sixth Amendment requires that juries in criminal cases be composed of at least six people. *See Ballew v. Georgia*, 435 U.S. 223, 228 (1978) (concluding that five jurors is too few); *Williams v. Florida*, 399 U.S. 78, 89–90, 103 (1970) (finding state's decision to provide six jurors acceptable and explaining that the twelve-person jury required by

common law was "a historical accident, unrelated to the great purposes which gave rise to the jury in the first place").

In North Carolina, a jury must be comprised of twelve members. *See infra* § 24.2C, Number of Jurors.

D. Jury Unanimity

In *Apodaca v. Oregon*, 406 U.S. 404 (1972), the U.S. Supreme Court found that the Sixth Amendment, applicable to the states through the Fourteenth Amendment, does not require that the decision of a jury of twelve in a state criminal prosecution be unanimous. *See also Johnson v. Louisiana*, 406 U.S. 356, 362 (1972) (holding that nine jurors out of twelve majority sufficient in state court to support verdict). However, if a jury is comprised of only six members, the verdict must be unanimous. *See Burch v. Louisiana*, 441 U.S. 130 (1979) (leaving open the question whether verdicts of juries composed of more than six but fewer than twelve members must be unanimous).

Unanimity is required under North Carolina law. *See infra* § 24.2D, Jury Unanimity. Unanimity also is required in federal criminal trials as mandated by Rule 31(a) of the Federal Rules of Criminal Procedure.

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

Generally. If a defendant has a right to a jury trial, he or she has a right to a jury verdict on every element of the offense. *See, e.g., Jones v. United States*, 526 U.S. 227, 251-52 (1999) (construing a federal statute as establishing separate offenses, "each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict"); *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (confirming principle expressed in *Jones* and applying it to a state statute); *compare Schad v. Arizona*, 501 U.S. 624 (1991) (jury unanimity not required as to whether defendant committed felony murder or premeditated murder because either means of commission satisfied the element of mens rea; jury does not have to be unanimous on theory of crime). For a discussion of disjunctive jury instructions, see *infra* § 24.2D, Jury Unanimity.

Definition of "element of offense." In *Jones* and *Apprendi*, the U.S. Supreme Court distinguished "elements" from "sentencing factors," defining an element as "any fact (other than prior conviction) that increases the maximum penalty for a crime . . . ." *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) ("serious bodily injury" was element of carjacking offense that had to be found by jury); *Apprendi v. New Jersey*, 530 U.S. 466, 474 (2000) (hate crime enhancer was element and had to be submitted to jury); *see also Alleyne v. United States*, 570 U.S. 99 (2013) (under Sixth Amendment, any fact that increases the mandatory minimum sentence is an element that must be submitted to a jury and proved beyond a reasonable doubt); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (aggravating factors in capital sentencing must be found by jury). This broad definition of "element" includes traditional sentencing factors, including the defendant's course of conduct, motivations for the crime, or the particular vulnerability of the victim. *See*

Blakely v. Washington, 542 U.S. 296, 303–04 (2004) (that defendant acted with "deliberate cruelty" is an element that must be found by a jury).

The U.S. Supreme Court has continued to permit judges to find the fact of a prior conviction as a sentencing factor and has not required that this fact be treated as an "element" that must be found by a jury. *See Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998) (refusing to treat recidivism as an element of the offense). *But cf. infra* § 24.1G, Prior Conviction as Element of Offense (reviewing North Carolina statutes that make prior convictions an element of the offense, which must be submitted to the jury).

Aggravating factors under felony structured sentencing. In *Blakely v. Washington*, 542 U.S. 296 (2004), the U.S. Supreme Court defined "statutory maximum" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id*. at 303 (emphasis in original). Thus, a judge violates the Sixth Amendment if he or she imposes an enhanced sentence based on his or her own findings of aggravating factors (unless those factors relate solely to the defendant's recidivism or to the fact of a prior conviction). If the defendant does not admit the existence of the alleged aggravating factors, a jury must be impaneled to determine beyond a reasonable doubt whether the factors exist. A defendant may also waive his or her federal constitutional right to a trial by jury and consent to a bench trial on the aggravating factors. *See id.* at 310 (defendants who plead guilty or are tried may still waive their rights under *Apprendi* and consent to judicial factfinding of sentence enhancements); *see also infra* § 24.1I, Waiver of Right (discussing waivable nature of federal constitutional right to jury); § 24.2B, Waiver of Right (discussing waivable nature of state constitutional right to jury).

In *State v. Allen*, 359 N.C. 425 (2005), *opinion withdrawn on other grounds*, 360 N.C. 569 (2006), the court recognized that North Carolina's structured sentencing scheme violated these Sixth Amendment requirements because the scheme allowed a judge to impose an aggravated sentence, beyond the presumptive sentence range prescribed for the offense, based on judicial findings of aggravating factors. The *Allen* Court limited its holdings to those cases "in which the defendants have not been indicted as of the certification date of this opinion [July 21, 2005] and to cases that are now pending on direct review or are not yet final." *Id.* at 427; *see also State v. Coleman*, 181 N.C. App. 568 (2007) (holding that defendant was not entitled to *Blakely* review of his sentence because his case was final when the *Blakely* decision was rendered on June 24, 2004); *State v. Simpson*, 176 N.C. App. 719, 722 (2006) (denying defendant relief for *Blakely* error because defendant's conviction was "already final when *Allen* was certified on 21 July 2005").

Effective for offenses committed on or after June 30, 2005, the General Assembly revised North Carolina's structured sentencing statutes and established a new procedure for determining aggravating factors. *See* 2005 N.C. Sess. Laws Ch. 145; 2008 N.C. Sess. Laws Ch. 129. In brief, the statutes provide as follows:

- Unless admitted by the defendant, the jury must determine beyond a reasonable doubt any aggravating factors *other than* the aggravating factor in G.S. 15A-1340.16(d)(12a) (defendant during the previous 10-year period has been found to be in willful violation of the conditions of probation, parole, or post-release supervision) [effective December 1, 2008], or the aggravating factor in G.S. 15A-1340.16(d)(18a) (defendant previously adjudicated delinquent of offense that would be Class A through E felony if committed by adult). The statutes provide that these aggravating factors continue to be decided by a judge. *See* G.S. 15A-1340.16(a3), (b). The N.C. Court of Appeals has issued conflicting opinions, however, on whether a judge may decide the juvenile adjudication factor. *Compare State v. Yarrell*, 172 N.C. App. 135, 141–42 (2005) (holding that judge may not find this factor), *with State v. Boyce*, 175 N.C. App. 663, 669 (2006) (treating juvenile delinquency adjudication as conviction and holding, without discussing *Yarrell*, that judge could find prior adjudication as aggravating factor), *aff'd*, 361 N.C. 670 (2007). *See also State v. Rivens*, 198 N.C. App. 130 (2009) (aggravating factor that juvenile was previously adjudicated delinquent was submitted to the jury; propriety of submission to jury was not addressed by court in reaching another issue); Jamie Markham, *Juvenile Adjudications . . . Aggravating*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (March 17, 2009).
- A judge has the discretion to bifurcate the proceedings and allow a jury to determine guilt or innocence first and then the existence of aggravating factors. *See* G.S. 15A-1340.16(a1).
- The State does not need to allege aggravating factors in the indictment except for aggravating factor G.S. 15A-1340.16(d)(20) (catchall aggravator); however, the State must give notice of any aggravating factors at least 30 days before trial or a plea of guilty or no contest unless the defendant waives notice. *See* G.S. 15A-1340.16(a4), (a6).
- If aggravating factors are found by the jury or admitted by the defendant, the judge finds any mitigators and balances the aggravators and mitigators. *See* G.S. 15A-1340.16(b).

A defendant may also waive the right to a jury trial as to aggravating factors and other sentencing enhancements, discussed below under "Waiving right to jury sentencing." *See also infra* § 24.2B, Waiver of Right (discussing waivable nature of state constitutional right to jury).

Practice note: If your client is being tried for an offense that occurred before the effective date of the above legislation, June 30, 2005, you must make sure that the trial judge complies with *Blakely* by submitting aggravating factors to the jury via the common law special verdict procedure. The judge must instruct the jury to use the "beyond a reasonable doubt" standard and require the jury to apply the law to the facts. *See State v. Blackwell*, 361 N.C. 41 (2006) (although structured sentencing statutes then in effect did not contain procedure for submitting aggravating factors to jury, trial judge could submit aggravating factors via a special verdict in cases subject to those statutes); *State v. Wilson*, 181 N.C. 540, 544–45 (2007) (trial judge "followed the clear edict from the

United States Supreme Court in *Blakely* and properly submitted the alleged aggravating factors to the jury through the use of a special verdict").

Points for prior convictions (in-state and out-of-state) and other conduct. Under structured sentencing, a defendant may be assigned prior record level "points," primarily for prior convictions but also for other conduct. In order to comply with *Blakely*, the statutes provide for different procedures for different types of points.

- The judge determines the points assigned to each of the defendant's prior convictions. *See* G.S. 15A-1340.14(a).
- The judge determines whether an out-of-state conviction is substantially similar to a North Carolina offense in determining the prior record level points to assign to the conviction. G.S. 15A-1340.14(e); *see also State v. Hanton*, 175 N.C. App. 250, 254 (2006) (concluding that "whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law that must be determined by the trial court, not the jury"). A stipulation of "substantial similarity" is not sufficient to support the assessment of points; the judge must make the determination. *See, e.g.*, *State v. Lee*, 193 N.C. App. 748 (2008).
- The judge decides whether to assign a point for the commission of an offense that includes all the elements of a prior offense for which the defendant was convicted (repeat offender point). *See* G.S. 15A-1340.14(b)(6); *State v. Poore*, 172 N.C. App. 839, 843 (2005) (finding that the trial judge's assessment of a prior record point for being a repeat offender "is not something that increases the 'statutory maximum' within the meaning of *Blakely* or *Allen*").
- Unless a jury determination is waived by the defendant, the jury must determine whether to assign a point where it is alleged that the defendant committed the present offense while on probation, parole, or post-release supervision, while serving a sentence, or while on escape from a correctional facility (the "under supervision" point). *See* G.S. 15A-1340.14(b)(7); *State v. Wissink*, 172 N.C. App. 829 (2005), *rev'd and remanded*, 361 N.C. 418 (2007) (per curiam) (remanding to Court of Appeals for determination of whether defendant admitted or stipulated to the existence of the "under supervision" point found by the trial judge, and if defendant did not, whether the error was harmless beyond a reasonable doubt). For offenses committed on or after June 30, 2005, the revised structured sentencing statutes establish jury trial procedures for finding this point. *See* G.S. 15A-1340.16(a5), (a6).

Waiving right to jury sentencing. *Blakely* held that defendants may waive their Sixth Amendment right to a jury determination of aggravating factors by pleading guilty and either stipulating to certain facts or expressly consenting to judicial factfinding. *Blakely v. Washington*, 542 U.S. 296, 310 (2004).

Consenting to judicial factfinding on sentencing issues is also now expressly permissible under the North Carolina Constitution and under North Carolina's revised structured sentencing statutes under certain circumstances. Effective December 1, 2014, a defendant arraigned in superior court may waive his or her state constitutional right to a jury determination with regard to the finding of aggravating factors by waiving his or her right

to a jury trial on the underlying offense. *See* G.S. 15A-1201(b) (when a defendant accused of a noncapital crime waives the right to a jury trial, the jury is "dispensed with" and "the whole matter of law and fact," including aggravating factors, "shall be heard and judgment given by the court."); *see also* G.S. 15A-1340.16(a7) (stating that "[i]f a defendant waives the right to a jury trial under G.S. 15A-1201, the trial judge shall make all findings that are conferred upon the jury under the provisions of this section."). Because G.S. 15A-1201(b) states that "the whole matter of law and fact" is heard by the trial judge when a defendant waives his or her right to a jury trial, it appears that the jury determination of the "under supervision" point set out in G.S. 15A-1340.14(b)(7) is likewise waived when a defendant waives the right to a jury trial on the underlying offense.

It also appears that a defendant may opt to plead guilty to the underlying offense and then request a bench trial as to the aggravating factors. *See* G.S. 15A-1201(b) (referencing G.S. 15A-1340.16(a3), which provides for a jury determination of aggravating factors when a defendant pleads guilty to a felony but contests the existence of aggravating factors). Although G.S. 15A-1201(b) does not specifically address the situation where a defendant desires a jury trial on the underlying offense but would like a bench trial on the aggravating factors or the "under supervision" point, no statute prohibits this. For further discussion of jury trial waivers and the procedures required when seeking a waiver, see *infra* § 24.2B, Waiver of Right (discussing waivable nature of state constitutional right to jury).

A defendant may also waive his or her right to a jury determination under the provisions of the structured sentencing statutes by admitting properly alleged aggravating factors or the "under supervision" point in G.S. 15A-1340.14(b)(7). In accepting the defendant's admission, the judge generally must engage in the colloquy for accepting a guilty plea under G.S. 15A-1022(a) and must follow the procedures in G.S. 15A-1022.1, including advising the defendant of his or her rights, determining that there is a factual basis for the factors and points admitted by the defendant, and determining that the decision to admit is the informed choice of the defendant. *See* G.S. 15A-1022.1(b), (c); 15A-1340.16(a1). For further discussion of the procedures that must be used when a defendant admits to aggravating factors or to the "under supervision" point, see *supra* § 23.5A, Aggravated Sentences.

Although not expressly provided for in the structured sentencing statutes, a defendant's stipulation to aggravating factors or the "under supervision" point has been deemed sufficient under certain circumstances to waive the right to a jury determination without the trial judge engaging in the plea colloquy procedures. *See, e.g.*, *State v. Khan*, 366 N.C. 448 (2013) (ruling that where defendant stipulated to the existence of an aggravating factor in the Transcript of Plea and orally at the plea hearing, trial judge's procedure satisfied the requirements of G.S. 15A-1022.1); *State v. Marlow*, 229 N.C. App. 593 (2013) (citing G.S. 15A-1022.1(e) and holding that where defense counsel stipulated to defendant's record that included an "under supervision" point, trial judge was not required to follow guilty plea procedures and conduct questioning of defendant because the context revealed that it was inappropriate and unnecessary in that case).

Other sentencing enhancements. North Carolina's firearms enhancement statute increases the *maximum* sentence a defendant may serve by as much as 72 months. *See* G.S. 15A-1340.16A(c). This statute requires that the firearm enhancement be alleged in the indictment or information. G.S. 15A-1340.16A(d); *see also State v. Lucas*, 353 N.C. 568 (2001) (holding that previous version of G.S. 15A-1340.16A was unconstitutional because it did not require that the firearm enhancement be submitted to the jury), *overruled on other grounds*, *State v. Allen*, 359 N.C. 425 (2005), *opinion withdrawn on other grounds*, 360 N.C. 569 (2006). The defendant is entitled to a jury determination on the firearm enhancement issues unless he or she waives that right and pleads guilty or no contest to those issues. If the defendant contests the existence of the enhancement issues, the State must prove their existence to the jury beyond a reasonable doubt. G.S. 15A-1340.16A(e).

Other statutes imposing sentencing enhancements likewise recognize the defendant's entitlement to notice in the indictment or information and to a jury determination of the enhancements. *See* G.S. 15A-1340.16B (authorizing sex offender recidivist enhancement); G.S. 15A-1340.16C (authorizing bullet-proof vest enhancement); G.S. 15A-1340.16D (authorizing methamphetamine enhancement); G.S. 15A-1340.16E (authorizing enhanced sentences for offenses committed by gang members as part of criminal gang activity).

As discussed above, criminal defendants may now choose to waive the right to a jury trial and have a judge hear the evidence and render judgment. A defendant who waives the right to a jury trial on underlying offenses also waives the right to a jury determination with regard to the finding of aggravating factors. *See* G.S. 15A-1201(b) (when a defendant accused of a noncapital crime waives the right to a jury trial, the jury is dispensed with "and the whole matter of law and fact," including aggravating factors, "shall be heard and judgment given by the court."). Although sentencing enhancement statutes are not specifically referenced in G.S. 15A-1201, since subsection (b) explicitly states that "the whole matter of law and fact" is heard by the trial judge when a defendant waives his or her right to a jury trial, it appears that the jury determination of enhancements is likewise waived when a defendant waives the right to a jury trial on the underlying offense. The most recently enacted sentencing enhancement statute, G.S. 15A-1340.16E (gang activity enhancement), supports this proposition since it states that the enhancement issues "shall be proven and found in the same manner as provided for aggravating factors in G.S. 15A-1340.16(a1), (a2), or (a3) as applicable." *See* G.S. 15A-1340.16E(e); *see also* Jamie Markham, *New Gang Sentencing Enhancements*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (November 9, 2017) (noting that G.S. 15A-1340.16E's "express mention of G.S. 15A-1340.16(a1) and (a3) probably brings these enhancements within the coverage of G.S. 15A-1201, allowing them to be found by a judge when a defendant has waived his or her right to a jury trial.").

For further discussion of jury trial waivers and the procedures required when seeking a waiver, see *infra* § 24.2B, Waiver of Right (discussing waivable nature of state constitutional right to jury).

Egregious aggravation unconstitutional. In 2008, the General Assembly added the offenses of rape and sexual offense by an adult involving a child under age 13. *See* G.S. 14-27.2A, 14-27.4A [now codified as G.S. 14-27.23 and 14-27.28]. These statutes establish a mandatory minimum sentence of 300 months but allow a judge, on determining "egregious aggravation," to impose a sentence of up to life without parole. The portions of these statutes that provide for an increased sentence upon a finding of "egregious aggravation" by the trial judge are unconstitutional.

In *State v. Singletary*, 247 N.C. App. 368 (2016), the N.C. Court of Appeals held that the sentencing provisions of G.S. 14-27.4A(c) [now 14-27.28(c)] that allowed a trial judge to find egregious aggravation and increase the defendant's sentence beyond the 300-month minimum set by the statute violated the defendant's right to a jury trial under the Sixth Amendment to the U.S. Constitution. The State conceded error but argued that the error could be fixed in the future by the trial judge if he or she submitted the alleged egregiously aggravating factors to a jury through the use of a special verdict. The court disagreed and held that "[b]ased upon the clear statutory text and the inherently judicial nature of the inquiry required by the statute, we reject the State's contention." *Id*. at 385. Since G.S. 14-27.23(c) sets out the identical procedure for use in the offense of rape by an adult involving a child under age 13, it is also unconstitutional. Until the General Assembly amends the statutes to conform with *Blakely*, a defendant should be sentenced in accordance with the regular structured sentencing grid for B1 felonies, "subject to the additional rule that the minimum sentence must be at least 300 months." *See* Jamie Markham, *Egregious Aggravation Is Unconstitutional*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 12, 2016). The court in *Singletary* stated that it was not addressing the constitutionality of the 300-month mandatory minimum set out in G.S. 14-27.4A(b) because the defendant did not challenge it.

Indictments. North Carolina courts have continued to uphold short-form indictments—that is, indictments that fail to list every element of an offense—notwithstanding the *Jones*, *Apprendi*, and *Blakely* decisions. *See, e.g.*, *State v. Morgan*, 359 N.C. 131, 147 (2004) (holding that "the short-form indictment is sufficient to charge first-degree capital murder without the inclusion of aggravating circumstances"); *see also Allen v. Lee*, 366 F.3d 319, 323–24 (4th Cir. 2004) (en banc) (holding that North Carolina's "short-form" first-degree murder indictment is constitutionally adequate).

F. Impaired Driving and Other Implied-Consent Offenses

In *State v. Speight*, 359 N.C. 602 (2005), *vacated on other grounds*, 548 U.S. 923 (2006), the court addressed the application of *Blakely v. Washington*, 542 U.S. 296 (2004), to misdemeanor impaired driving and held that, for impaired driving offenses tried in superior court (either when the offense is the subject of a misdemeanor appeal or is joined with a felony for trial initially in superior court), aggravating factors other than prior convictions must be found by a jury beyond a reasonable doubt or admitted by the defendant.

The General Assembly thereafter enacted legislation to address aggravating factors in impaired driving cases tried in district and superior court:

> After *Blakely*, the General Assembly amended G.S. 20-179 to require that aggravating factors in impaired driving cases, which increase the maximum sentence a defendant may receive, be proved beyond a reasonable doubt and, in superior court, to require that the state provide notice of its intent to prove such factors and that the jury determine whether the factors exist. In effect, aggravating factors are now treated as elements of the offense of impaired driving.

Shea Denning, *What's Blakely got to do with it? Sentencing in Impaired Driving Cases after Melendez-Diaz*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 24, 2009).

The provisions of G.S. 20-179 also apply to other implied consent offenses. *See* G.S. 20-179(a) (statute applicable to impaired driving in a commercial vehicle; second or subsequent violations for operating a commercial vehicle after consuming alcohol; or second or subsequent violations for operating a school bus, school activity bus, or child care vehicle after consuming alcohol).

The defendant may waive the right to a jury determination and admit the existence of an aggravating factor or factors. G.S. 20-179(a1)(2). G.S 20-179(a1) and (a2) set out the jury procedures related to the finding of aggravating factors in superior court. Effective December 1, 2014, a defendant may also waive his or her right to a jury determination and consent to judicial factfinding of the aggravating factors referred to in G.S. 20-179. *See* G.S. 15A-1201; *see also infra* § 24.2B, Waiver of Right (discussing waivable state constitutional right to jury).

G. Prior Conviction as Element of Offense

The U.S. Supreme Court has not required the submission of prior convictions to the jury when the convictions enhance a defendant's sentence for an offense. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Some North Carolina statutes, however, treat a defendant's prior conviction as an element of the offense being tried. In these circumstances, if the defendant does not admit the existence of the prior conviction or waive a jury trial on the issue, the jury must decide the prior conviction in determining the defendant's guilt or innocence of the offense.

Some statutes, such as the habitual felon, violent habitual felon, armed habitual felon, and habitual breaking and entering statutes, require a bifurcated procedure for the jury to determine whether the defendant has the required prior convictions. *See* G.S. 14-7.5 (habitual felon); G.S. 14-7.11 (violent habitual felon); G.S. 14-7.30 (habitual breaking and entering); G.S. 14-7.40 (armed habitual felon).

Other recidivist statutes, such as the habitual impaired driving statute (G.S. 20-138.5), habitual misdemeanor assault statute (G.S. 14-33.2), and shoplifting statute (G.S. 14-

72.1(e)), are subject to G.S. 15A-928, which requires the jury to determine a defendant's prior conviction when the prior conviction "raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter . . . ." *Id.* This statute allows the jury, during the principal trial, to determine those convictions that are elements of the offense if the defendant does not admit the convictions.

H. Fairness and Impartiality

Under both the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, whenever the defendant has a right to a jury trial, he or she has a concomitant right to the selection of a fair and impartial jury. *See Morgan v. Illinois*, 504 U.S. 719 (1992); *Irvin v. Dowd*, 366 U.S. 717 (1961); *see also Parker v. Gladden*, 385 U.S. 363 (1966). The Sixth Amendment and the Due Process Clause establish two requirements for the selection of juries. First, the venire from which petit juries are chosen must represent a "fair cross section of the community." *See Taylor v. Louisiana*, 419 U.S. 522, 535–36 (1975) (systematic exclusion of women violated fair cross-section requirement); *accord Duren v. Missouri*, 439 U.S. 357 (1979). Second, jurors with prior knowledge or other bias that would prevent them from deciding the case on the basis of the evidence presented and the law must be excused. *See Mu'Min v. Virginia*, 500 U.S. 415 (1991) (defendant has right to jurors who are not prejudiced against him by exposure to pretrial publicity); *Irvin*, 366 U.S. 717, 720–21 (defendant has right to change of venue if fair and impartial jury cannot be selected in district where offense occurred).

Other constitutional provisions also come into play in guaranteeing the fairness of juries. The Equal Protection Clause of the Fourteenth Amendment precludes the State or defendant from exercising peremptory challenges in a discriminatory manner. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (prosecutor may not exercise peremptories in discriminatory manner); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (*Batson* rule applies to defendants); *see also Powers v. Ohio*, 499 U.S. 400, 415 (1991) (Equal Protection Clause prohibits use of peremptory challenges to discriminate based on race even where the defendant is not the same race as the excluded jurors).

The Sixth Amendment and the Fourteenth Amendment permit capital defendants to voir dire potential jurors about racial biases. *See Turner v. Murray*, 476 U.S. 28 (1986); *see also Ham v. South Carolina*, 409 U.S. 524, 526–27 (1973) (defendant had due process right under circumstances to voir dire jurors about racial attitudes in non-capital trial).

The above requirements are discussed in more detail in Chapter 25. The right to a fair and impartial jury as it relates to juror misconduct is discussed in Chapter 26. For an in-depth discussion about race on voir dire, see ALYSON A. GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES § 8.3 (Jury Selection) (2014).

I. Waiver of Right

In 1930, the U.S. Supreme Court recognized that a criminal defendant in federal court could waive his or her right to a jury trial under Article III, Section 2 and the Sixth Amendment, and submit to a trial by a jury of less than twelve persons, or by the court. *See Patton v. United States*, 281 U.S. 276 (1930). The Court noted that because the right to a trial by jury is such an important and jealously-guarded right, "before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant." *Id.* at 312. This right to waive a jury trial in federal court has been codified as Rule 23 of the Federal Rules of Criminal Procedure.

States also may allow a waiver of the right to jury trial without violating the U.S. Constitution. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court held that the Sixth Amendment right to jury trial is applicable to the states through the Due Process Clause of the Fourteenth Amendment. The Court in *Duncan* made it clear, however, that the constitution did not prohibit state or federal courts from continuing the common practice of "accepting waivers of jury trial . . . ." *Id.* at 158. North Carolina law now allows a defendant to waive the right to a jury trial. *See infra* § 24.2B, Waiver of Right. This includes the right to waive a jury determination of sentencing factors. *See supra* § 24.1E, Right to Jury Verdict on Every Element of Offense, Including "Sentencing" Factors.

While a criminal defendant may choose to waive the right to a jury trial, he or she does not have a federal constitutional right to have a trial before a judge alone. *See Singer v. United States*, 380 U.S. 24, 36 (1965) (finding no absolute right to a bench trial and stating that there is no "constitutional impediment" to conditioning a defendant's waiver of jury trial on the consent of the prosecutor and the trial judge as required by Fed. R. Crim. P. 23(a)).