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The Constitutional Right to a Jury under Blakely v. Washington: Can North Carolina Defendants Waive Their State Right

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The Constitutional Right to a Jury Under *Blakely v. Washington*: Can North Carolina Defendants Waive Their State Right?

In June of 2004, the United States Supreme Court handed down a new interpretation of the Sixth Amendment[1] that came as a shock to criminal justice systems in many states.[2] In *Blakely v. Washington*,[3] the Supreme Court purported to merely reinforce the existing constitutional precedent of *Apprendi v. New Jersey*[4] on the role of juries in modern criminal proceedings.[5] However, the *Blakely* Court's clarification—or expansion—of the *Apprendi* rule meant that North Carolina and at least twelve other states[6] would have to eliminate their practices of allowing judges to adjust sentences without a jury trial on additional facts alleged at sentencing.[7] One significant

1. U.S. CONST. amend. VI ("In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

2. *See* Jon Wool & Don Stemen, *Aggravated Sentencing:* Blakely v. Washington *Practical Implications for State Sentencing Systems*, POL'Y & PRAC. REV., Aug. 2004, at 1–3, *at* http://www.vera.org/publication_pdf/242_456.pdf (claiming that the *Blakely* decision "roiled many states' criminal justice systems") (on file with the North Carolina Law Review); *see also* Benjamin Niolet, *Judges' Sentencing Latitude Restricted*, NEWS & OBSERVER (Raleigh, NC), Sept. 9, 2004, at 1A (describing the impact of the application of the *Blakely* rule to North Carolina sentencing laws as "sen[ding] legal experts in both state and federal courts into a tizzy as they tried to cope with the ramifications").

3. 542 U.S. 296, 124 S. Ct. 2531 (2004). Throughout the remainder of this Recent Development, the Supreme Court Reporter is used for citations to *Blakely v. Washington* because pinpoint citations to the United States Reports were unavailable at the time of publication.

4. 530 U.S. 466 (2000) (holding that a twelve-year sentence based on a judicial finding that the defendant committed a "hate crime" unconstitutional where the statutory range for the defendant's convicted offense was five to ten years).

5. *Blakely*, 124 S. Ct. at 2536 (asserting that "[t]his case requires us to apply the rule we expressed in *Apprendi v. New Jersey*" (citation omitted)).

6. *See* Wool & Stemen, *supra* note 2, at 1–2 (explaining why Alaska, Arizona, California, Colorado, Indiana, Kansas, Minnesota, New Jersey, New Mexico, North Carolina, Ohio, Oregon, and Tennessee were "fundamentally affected" by *Blakely* and listing eight other states whose courts will have to determine the effect of *Blakely* on sentencing laws).

7. Under the structured sentencing guidelines of many states, including North Carolina, a conviction qualifies a defendant for the presumptive, or standard, sentence range within a larger grid that is divided based on the class of the offense and the defendant's prior record. *See* MINN. STAT. § 244.10 (2003); N.C. GEN. STAT. §§ 15A-1340.13–17 (2003); OR. REV. STAT. §§ 137.080, .090 (2003); TENN. CODE ANN. § 40-35-202 (2003); WASH. REV. CODE §§ 9.94A.510, .530, .533, .535 (2003); *see also* IRVING JOYNER, CRIMINAL PROCEDURE IN NORTH CAROLINA § 12.8 (2d ed. 1999); Wool & Stemen, *supra* note 2, at 2 (defining "presumptive" and "determinate" sentencing as used in state

qualification to the rule of jury factfinding in Justice Scalia's majority opinion came in dicta that "nothing prevents a defendant from waiving his *Apprendi* rights."[8] The Court suggested that defendants could opt for judicial factfinding at sentencing, but North Carolina and other affected states will have to determine whether state laws can support the waiver of a jury trial right.[9]

The *Blakely* majority based much of its reasoning about the scope of the jury trial right on the original intent of the Framers of the Federal Constitution and the historical role of juries.[10] As policymakers in North Carolina adjust sentencing laws to conform to the *Blakely* Court's expansive view of a jury trial, they must consider whether the state's constitutional and legal histories compel a similar expansion of the state right to a jury trial. Furthermore, the state must determine whether anything in North Carolina's constitution prohibits a defendant from waiving his *Apprendi* rights.

This Recent Development will argue that in spite of *Blakely*'s acceptance of waivers of the Sixth Amendment right to a jury trial, North Carolina should prohibit waivers of jury factfinding at sentencing in order to uphold the state's constitutional tradition. This paper will compare the proper scopes of the state and federal rights to a jury trial by examining historical differences between the North Carolina and United States Constitutions. It will also consider the

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criminal justice systems). The appropriate class of offense also contains aggravated and mitigated ranges, and a judge may depart into these ranges if he finds, by a preponderance of evidence, that statutory sentencing factors justify the departure. *See* JOYNER, *supra*. Before *Apprendi*, some states allowed a judge to sentence above the aggravated range, whereby the prison term for a second-degree kidnapping conviction might be just as long as a standard sentence for first-degree kidnapping. *See, e.g.*, N.J. STAT. ANN. § 2C:44-3(e) (West 1995) (allowing extended imprisonment where the judge finds that the defendant committed a hate crime). Since *Apprendi*, states have forbidden judges to sentence above the aggravated range based on their own findings of aggravating facts. *See, e.g.*, State v. Johnson, 766 A.2d 1126, 1138 (N.J. 2001), *overruled on other grounds by* State v. Stanton, 820 A.2d 637, 646 (N.J. 2003); State v. Lucas, 353 N.C. 568, 597–98, 548 S.E.2d 712, 731 (2001).

8. *Blakely*, 124 S. Ct. at 2541.

9. While the United States Supreme Court has ultimate authority over the interpretation of the United States Constitution and the Sixth Amendment, the Supreme Court of North Carolina has the power to interpret the state constitutional right to a jury trial differently than the federal right. *See* Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) (holding that state supreme courts have ultimate authority over their constitutions); State v. Carter, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988) ("Even were the two provisions identical, we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision.").

10. *See Blakely*, 124 S. Ct. at 2538-39.

implications of North Carolina's history of prohibiting waivers of the state right to a jury trial. This Recent Development will conclude that North Carolina must treat sentencing hearings as an essential part of the non-waivable right to a criminal jury trial. Accordingly, the state must require jury determinations of all disputed facts used to support an aggravated sentence.

In *Blakely*, the Court held that a statute within Washington State's structured sentencing guidelines violated the Sixth Amendment by giving judges the discretion to enhance sentences based on aggravating facts not tried to a jury.[11] Having pled guilty to second-degree kidnapping, the defendant qualified for a standard sentence range of forty-nine to fifty-three months, according to the statutory guidelines.[12] However, after hearing the victim's emotional testimony at the sentencing hearing, the trial judge found that the defendant acted with "deliberate cruelty," an aggravating factor under Washington sentencing statutes.[13] Thus, the judge departed from the standard sentence range and imposed an exceptional sentence of ninety months. The sentence fell below the statutory maximum sentence of ten years for that class of felony but exceeded the standard sentence by thirty-seven months.[14]

Justice Scalia's majority opinion relied on the *Apprendi* holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."[15] Justice Scalia explained that "the 'statutory maximum' for

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11. *Id.* at 2538.
12. *Id.* at 2535.
13. *Id.*
14. *Id.*
15. *Id.* at 2536 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)). The New Jersey statute held unconstitutional in *Apprendi* allowed the judge to consider evidence and find, by a mere preponderance of the evidence, that the defendant committed a "hate crime." *See Apprendi*, 530 U.S. at 491. Likewise, prior to the "Blakely Act," North Carolina's aggravated sentencing statute provided a preponderance of evidence standard for judicial consideration of aggravating facts. N.C. GEN STAT. § 15A-1340.16(a) (2003). *See infra* text accompanying note 28 (explaining the evolution of the "Blakely Act," legislation amending state law to conform to the *Blakely* decision).

This rule also requires the prosecution to allege all facts relevant to the elements and to sentencing in the indictment so that a defendant may either plead guilty to all facts that affect his punishment, go to trial, or plead guilty to the essential elements but agree to a bench trial on the sentencing facts. *See* Memorandum from Professor Robert L. Farb, University of North Carolina Institute of Government, *Blakely v. Washington* and Its Impact on North Carolina's Sentencing Laws 11, *at* http://ncinfo.iog.unc.edu/programs/crimlaw/faculty.htm (expressing some doubt as to whether the defendant could waive his right to a jury at sentencing in North Carolina) (July 9, 2004) (on file with the North Carolina Law Review).

Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[16] The Court's concern with surpassing statutory maximums derived from an understanding of common law principles that no person may be punished for a crime unless a jury has found facts to support each essential element of that crime.[17] Because modern structured sentencing laws list factors necessary or essential to support "aggravated sentences," Justice Scalia suggested that such factors and enhancements should be treated as additional crimes and punishment.[18] In his view, aggravating facts must be tried to the jury to maintain the constitutional intent.[19] The Court thus held that if states choose to set mandatory or "presumptive" sentencing ranges for criminal offenses, state court judges may not determine the existence of aggravated sentencing elements unless the defendant waives his right to a jury trial at the guilt or sentencing phases.[20]

In his dissent, Justice Breyer noted that some states may disallow waivers of the right to a jury at sentencing.[21] He argued that under the majority's new rule, such states may force defendants to choose between two inadequate options of either pleading guilty to *all* elements of the crime and punishment, "or proceed[ing] with a (likely prejudicial) trial on all . . . elements."[22] Justice Breyer expressed the fear that these no-waiver states will not give defendants the option of having a jury trial for the conviction phase and, in the event of a guilty verdict, will ask a judge to determine the aggravating factors.[23]

Blakely sent shockwaves through the legal community, forcing many state courts to rule quickly on the constitutionality of sentencing statutes. On September 7, 2004, in *State v. Allen*,[24] the Court of Appeals of North Carolina found that *Blakely* applied to a

16. *Blakely*, 124 S. Ct. at 2537.

17. *Id.* at 2536–37 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769) and 1 J. BISHOP, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872)).

18. *See Blakely*, 124 S. Ct. at 2539 nn.10–11 (expressing the fear that legislatures would allow judges to impose greatly enhanced sentences without relying on jury trials by labeling a great number of types of behavior as "sentencing factors" rather than additional "elements" or separate offenses).

19. *See id.*

20. *See id.* at 2541.

21. *Id.* at 2555–56 (Breyer, J., dissenting).

22. *Id.*

23. Prior to *Blakely*, North Carolina did provide this option, but did not allow a jury trial on the sentencing factors regardless of the defendant's wishes. *See* JOYNER, *supra* note 7, § 12.7.

24. 166 N.C. App. 139, 601 S.E.2d 299 (2004).

state statute that authorized a judge to depart from the presumptive range into the aggravated range for an offense based on her own finding of aggravating facts.[25] Thus, North Carolina judges may not continue to sentence in the aggravated range of the state sentencing guidelines based on facts that have not been tried to a jury or admitted, as such practice would violate the Sixth Amendment.[26]

Accordingly, the North Carolina General Assembly asked the state's Sentencing and Policy Advisory Commission ("Commission") to consider options for conforming its sentencing laws to the *Blakely* rule. In January of 2005, the Commission returned a proposal for amending structured sentencing laws to require jury findings on all facts used to justify an aggravated sentence.[27] In June of 2005, the General Assembly enacted the Commission's proposed amendments to the sentencing guidelines for aggravated and mitigated sentences (the "Blakely Act").[28] Judges in North Carolina may no longer impose aggravated sentences on the basis of their own findings of aggravating factors.[29] The Blakely Act also raises the State's burden of proof for aggravating factors from a preponderance of the evidence

25. *See id.* at 149, 602 S.E.2d at 306 (finding the application of North Carolina's "Aggravated and Mitigated Sentence" statute unconstitutional and "substantially similar to the portion of Washington's criminal sentencing statute analyzed in *Blakely*"). North Carolina's criminal procedure statutes provide three sentencing ranges for each class of offense: presumptive, mitigated, and aggravated. *See* N.C. GEN. STAT. § 15A-1340.16 (2003). Conviction of the essential elements of the crime qualifies the defendant for the presumptive range. *See id.* § 15A-1340.17(c)(2).

26. *See* U.S. CONST. art VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

27. *See* Sentencing Commission, *Blakely* Subcommittee Draft Legislation, Second Draft of N.C.G.S. § 15A-1340.16 (Dec. 6, 2004) [hereinafter Draft Legislation] (leaving intact the bulk of the structured sentencing act). The reasons why the Commission chose to require jury factfinding rather than broaden presumptive sentence ranges to allow judicial discretion to adjust sentences without surpassing the "statutory maximum" are beyond the scope of this Recent Development. However, it is interesting to note that the decision to maintain narrow sentencing ranges (if accepted by the General Assembly) will protect the state's capacity to predict and control the use of limited prison space. *See generally* Ronald F. Wright, *Managing Prison Growth in North Carolina Through Structured Sentencing*, NATIONAL INSTITUTE OF JUSTICE: PROGRAM FOCUS (U.S. Dept. of Justice) (Feb. 1998) (describing the massive problem of prison shortages that threatened North Carolina's criminal justice system in the 1980s and early 1990s, and praising the state's response of enacting mandatory, tightly-structured sentencing guidelines and developing a computer software system to estimate future sentences under the Structured Sentencing Act of 1994) (on file with the North Carolina Law Review).

28. *See* 2005 N.C. Sess. Laws 145 (naming the act "An Act to Amend State Law Regarding the Determination of Aggravating Factors in a Criminal Case to Conform with the United States Supreme Court Decision in Blakely v. Washington").

29. *See* N.C. Gen. Stat. § 15A-1340.16(a1) (2005).

to beyond a reasonable doubt, as required by the *Blakely* decision.[30] However, unlike the Supreme Court opinion in *Blakely*, neither the court in *State v. Allen* nor the Commission addressed waivers. Thus, the Blakely Act does not specifically grant or deny the right to waive a jury trial on aggravating factors in favor of judicial factfinding at the sentencing phase.[31] Allowing waivers of the right to a jury trial may appear to offer an attractive means of reducing the fiscal and administrative impact of complying with *Blakely*'s general holding. However, aspects of the North Carolina Constitution weigh heavily against the use of waivers in the manner suggested by the *Blakely* Court.[32]

Prior to *Blakely*, North Carolina understood the right to a jury trial to guarantee a jury finding on the essential elements of the crime charged,[33] but not on sentencing factors.[34] In *State v. Denning*,[35] the Supreme Court of North Carolina held that:

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30. *Id.* § 15A-1340.16(a).

31. *See id.* § 15A-1340.16(a3). Two other components of the amendments to North Carolina's procedure for structured sentencing raise interesting issues about the relationship between the State and the individual defendants. First, the Blakely Act allows defendants to admit to aggravating factors, meaning that neither judges nor juries will determine the truth of the alleged facts that are necessary to support enhanced sentences. *Id.* § 15A-1340.16(a1). Second, the Blakely Act gives judges the option—based on "the interests of justice"—to bifurcate trials so that separate juries hear the facts supporting convictions of offenses and those facts supporting aggravated sentences. *Id.* § 15A-1340.16(a1). Whether bifurcated trials and the right to admit aggravating factors enhance or diminish the state's protection of individual rights were not discussed by the *Blakely* Court and are beyond the scope of this Recent Development.

32. Some practitioners do not believe that the conflict in constitutional law surrounding waivers will seriously affect North Carolina's response to *Blakely* because, as a practical matter, courts will allow waivers at the sentencing phase in order to facilitate speedier trials. *See* Telephone Interview with Bruce Lillie, Assistant District Attorney, Charlotte, N.C. (Sept. 3, 2004). *But see* Telephone Interview with Lyle Yurko, Attorney, Yurko & Owens, P.A. (Sept. 1, 2004) (agreeing that the waiver issue must be addressed in light of *Blakely*). Because the Sentencing Commission has recognized the need to address the state constitutional issues surrounding the use of waivers, this Recent Development will seek to provide some guidance. *See generally* Professor Jim Drennan, Address at the North Carolina Sentencing and Policy Advisory Commission Meeting (Sept. 10, 2004) (posing similar options to the Sentence Commission) (on file with the North Carolina Law Review).

33. *See, e.g.*, State v. Lewis, 274 N.C. 438, 442, 164 S.E.2d 177, 180 (1968) ("Defendant was entitled as of right to a jury trial as to *every* essential element of the crime charged, including the question as to his identity.").

34. *See* State v. Williams, 295 N.C. 655, 674, 249 S.E.2d 709, 722 (1978) (excluding mitigating factors from the scope of the right to a jury trial); State v. Field, 75 N.C. App. 647, 648, 331 S.E.2d 221, 222 (1985) (distinguishing elements of a driving-while-impaired offense from statutory sentencing factors for federal and state constitutional purposes).

35. 316 N.C. 523, 342 S.E.2d 855 (1986).

> [B]ecause the factors before the trial judge in determining sentencing are not elements of the offense, their consideration for purposes of sentencing is a function of the judge and therefore not susceptible to constitutional challenge based upon either the sixth amendment right to a jury trial or article I, section 24 of the North Carolina Constitution.[36]

Though *Apprendi* held that judicial findings of aggravated facts which enable a sentence above the statutory maximum *do* violate the Sixth Amendment, the North Carolina courts did not initially read *Apprendi* to invalidate *Denning* and the practice of judicial finding of sentencing facts altogether.[37] Because *Blakely* expanded the scope of the Sixth Amendment right to a jury trial under structured sentencing schemes to include sentencing factors,[38] *Denning*'s analysis of this right cannot stand. The United States Supreme Court has determined that if the state legislature established maximum punishments for criminal convictions, the imposition of any sentence above the statutory limit must be prefaced by the (waivable) right to a jury trial.[39] Now, North Carolina must decide whether the right to a jury trial under Article I, Section 24 of the state constitution should also include sentencing factors.[40] Having purported to accept *Apprendi's* expansion of the right to a jury trial in *State v. Lucas*,[41] the state courts will need a strong argument for rejecting *Blakely*'s clarification of *Apprendi*. If North Carolina does find that the scope of the state constitutional right should be as broad as its federal counterpart, the state's longstanding prohibition on waivers of the right to a jury trial would prevent defendants from electing to have a judge find any aggravating facts.[42] The state may consider reversing constitutional precedent, but if the state cannot justify such a reversal,

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36. *Id.* at 524, 342 S.E.2d at 856.

37. *See* State v. Lucas, 353 N.C. 568, 596, 548 S.E.2d 712, 731 (2001) (finding the statutory maximum for a criminal offense in North Carolina to be the highest possible sentence from within the range presented by the chart in section 15A-1340.17(e) of the state sentencing statute).

38. Blakely v. Washington, 124 S. Ct. 2531, 2536 (2004).

39. *See id.*

40. When the *Allen* court recognized that the defendant's aggravated sentence based on judicial factfinding violated the Sixth Amendment, it did not consider whether such factfinding would violate the parallel right in the state constitution. *See* State v. Allen, 166 N.C. App. 139, 147-50, 601 S.E.2d 299, 305–06 (2004) (finding that the defendant's aggravated sentence based on judicial factfinding violated the Sixth Amendment).

41. 353 N.C. at 597, 548 S.E.2d at 731 (following *Apprendi*).

42. *See* State v. Thompson, 118 N.C. App. 33, 41, 454 S.E.2d 271, 276 (1995); *see also infra* note 86 and accompanying text (discussing the prohibition of waivers of the state constitutional right to jury trial in criminal cases).

even in light of a broadening view of the scope of the federal right, then state courts must begin holding jury trials on all alleged aggravating factors.

To be sure, the Supreme Court of North Carolina has the authority to reject *Blakely*'s definition of the right to a jury trial as it applies to Article I, Section 24,[43] but the distinction between the similar federal and state constitutional provisions ought to rest on solid reasoning and legitimate interpretive methods.[44] Consideration of the text and intent of the framers of each constitution must be part of the evaluation.

The text of Article I, Section 24 provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court."[45] On one hand, the word "convicted" suggests that factors not affecting the statutory elements of the crime need not fall within the constitutional guarantee.[46] However, this language must be read in historical context. The *Blakely* opinion provides useful insight into the origins of the American right to a jury trial. Though the Federal Constitution does not contain the limiting word "conviction," Justice Scalia prompted a Supreme Court debate over the history of sentencing and conviction phases by focusing on common law use of juries.[47]

As Justice Breyer noted in dissent, in the late eighteenth century when the constitutions were written, the punishment for most felonies

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43. *See supra* note 9 and accompanying text.

44. *See* Harry C. Martin, *The State as a "Font of Constitutional Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. REV. 1749, 1752 (1992). Justice Martin argued that:

> [W]hen the state court merely parrots the United States Supreme Court in decisions involving rights guaranteed by the state constitution, it forsakes its duty to develop a body of state constitutional law necessary to protect the rights of the people. Such failure would frustrate the very purpose of having a state constitution.

Id.

45. N.C. CONST. art. I, § 24.

46. *See* State v. Baldwin, 330 N.C. 446, 454, 412 S.E.2d 31, 36 (1992) ("Art. 1, § 24, as its plain language states, applies to the determination of a defendant's guilt of the crime charged.").

47. *See* Blakely v. Washington, 124 S. Ct. 2531, 2558–59 (2004) (Breyer, J., dissenting) (making a constitutional distinction between common law elements and factors that judges traditionally considered when imposing sentences even before the enactment structured sentencing statutes); *id.* at 2546, 2548 (O'Connor, J., dissenting) (same); *id.* at 2536 n.5 (dismissing the dissenters' interpretation of common law); *see also id.* at 2536 (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872) for the proposition that a punishment must be based on the truth of accusations relevant to the punishment as well as to the crime).

was death.[48] Juries made all factual findings supporting capital punishments, but in minor, non-capital cases, judges often held the authority to choose between several forms of punishment.[49] As states replaced capital punishment with imprisonment for felony convictions, judicial discretion to vary sentence lengths grew substantially in most states.[50] Thus, the *Blakely* dissenters suggest that the common law right to a jury trial included only the conviction phase and should not now be extended to include statutory sentencing factors. The majority dismissed this argument,[51] contending, in part, that the justification would authorize legislatures to reclassify elements of an offense as sentencing factors under structured sentencing.[52] In the Court's view, this shift gives an unconstitutional degree of discretion to judges.[53] Justice Scalia contended that modern structured sentencing laws are evolving in ways that take facts which should be "essential to the punishment," and thus the realm of the jury, and label them "sentencing factors" for a judge to consider.[54] Justice Scalia worries that the logical conclusion of this legislative trend will be a situation where "a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene."[55] The *Blakely* majority thus found that judicial findings of

48. *Id.* at 2559 (Breyer, J., dissenting) (citing Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings about* Apprendi, 82 N.C. L. REV. 621, 628–30 (2003)). Lillquist explains that imprisonment did not emerge as a significant alternative to capital punishment in America until the later eighteenth and early nineteenth century. Lillquist, *supra*, at 641–42. *But see id.* at 640 n.83 (arguing that colonial North Carolina courts resisted imposing the death penalty based on the fact that the state sentenced only sixty-seven white defendants to death in the entire colonial period).

49. *See* Lillquist, *supra* note 48, at 629, 642–43 (finding courts' discretion in punishment to be generally true in England and the American states).

50. *See id.* at 642–43 (citing Virginia and Georgia as the only clear exceptions among the original thirteen colonies). *But see id.* at 642 n.94 (noting that North Carolina was much slower than most states to achieve this reform because it did not build a state penitentiary until after the Civil War).

51. *See Blakely*, 124 S. Ct. at 2537 n.5.

52. *See id.* at 2539 (arguing that rejecting *Apprendi* would allow legislatures to exclude juries from factors it chose to label as sentencing factors, "no matter how much they may increase the punishment").

53. *See id.*

54. *Id.* at 2539, 2543.

55. *Id.* at 2539 n.10 (rejecting Justice O'Connor's counterargument that the political branch would provide a check on such extreme judicial behavior because, as Justice Scalia sees it, "the many immediate practical advantages of judicial factfinding . . . suggest that political forces would, if anything, pull in the opposite direction," and furthermore, "the Framers' decision to entrench the jury-trial right in the Constitution shows that they did not trust government to make political decisions in this area").

aggravated sentencing facts violated the original intent of the Framers to ensure the right to a judgment by a jury of one's peers. Justice Scalia illustrated the Framers' intent by citing their own external writings[56] and other common law authorities on the tremendous importance of juries.[57]

Before North Carolina rejects the United States Supreme Court's definition of the scope of a jury trial for state constitutional purposes, the state should also consider whether the Supreme Court's original intent analysis logically applies to the drafters of the state constitution as well. On one hand, the state constitution's reference to "convicted" in 1776 when the North Carolina Constitution was adopted may have meant the determination of which crimes were committed and thus which punishment should apply. Translated into modern structured sentencing contexts with multiple punishment options, "conviction" could include the identification of aggravating facts of the crime required to depart from the statutory maximum. If North Carolina courts agree with this analysis of original intent, they should not tolerate the state legislature's distinctions between sentencing facts and "essential elements" within the state constitutional framework. Thus, the state prohibition on waivers of the right to a jury trial could not be made to apply only to the first phase of a criminal trial.

On the other hand, if the state finds that the framers did not use "conviction" to refer to both a finding of guilt and an imposition of punishment, then the state can continue with its current procedure of judicial factfinding for aggravated sentences. It can require non-waivable jury trials under the state constitution for the guilt phase and then permit criminal defendants to waive their jury trial right under the United States Constitution at the sentencing phase.

However, this latter course—imposing the *Blakely* result on North Carolina courts—would be the wrong choice for two reasons. First, as discussed in greater detail below, this conclusion would cut against North Carolina's constitutional tradition of stringently protecting individual rights.[58] Furthermore, it would create a confusing legal rule for defendants pleading not-guilty to the essential

56. *See id.* at 2539 (citing John Adams, Diary Entry (Feb. 12, 1771), *reprinted in* 2 WORKS OF JOHN ADAMS 252, 253 (C. Adams ed., 1850) and Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), *reprinted in* 15 PAPERS OF THOMAS JEFFERSON 282, 283 (J. Boyd ed., 1958)).

57. *See id.* at 2536 (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769) and 1 J. BISHOP, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872)).

58. See *infra* notes 63–67 and accompanying text.

elements of their crime and to an alleged aggravating fact. Defendants would know that *Blakely* gives them the freedom to ask for judicial determinations on the aggravating conduct, but they could not similarly ask the judge to rule on the truth of the alleged conduct that supports the base-level conviction.

The differences between the histories and structures of the United States and North Carolina Constitutions shed light on the drafters' intent and undercut the logic of narrowly interpreting the state right to a jury trial in modern criminal procedure. Whereas the Framers of the United States Constitution added the Bill of Rights and its provision for jury trials four years after signing the primary text of the Constitution,[59] North Carolina's constitutional drafters set forth the state's jury trial provision in a declaration of rights which was passed one day prior to the rest of the North Carolina Constitution.[60] The Supreme Court of North Carolina stated, in *Corum v. University of North Carolina*,[61] a case involving freedom of speech, that the prior passage of the provision for individual rights manifests "the primacy of the Declaration [of Rights] in the minds of the framers."[62]

Additionally, the Federal Bill of Rights protects only specifically enumerated rights.[63] In contrast, the state drafters not only guaranteed specific rights but also included broad principles of self-government and individual rights.[64] In the provision for civil juries, the state drafters called the jury trial "one of the best Securities of the Rights of the People . . . ."[65] Thus, state constitutional scholars have noted that "North Carolina places a higher emphasis on jury trials than the [federal government]."[66] This emphasis favors the state's

59. *See* MELVIN I. UROFSKY & PAUL FINKLEMAN, DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 97 (2d ed. 2002) (noting that the first ten amendments of the U.S. Constitution, which itself was ratified in 1787, were not ratified until December 15, 1791).

60. *See* 10 THE COLONIAL RECORDS OF NORTH CAROLINA 973–74 (William L. Saunders ed., Raleigh, Jesphus Daniels, Printer to the State, 1890). Later versions of the constitution incorporated the rights originally provided in the Declaration into the primary articles of the current state constitution. *See* John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1795 (1992) (noting the declaration of rights became Article I in the Constitution of 1791).

61. 330 N.C. 761, 413 S.E.2d 276 (1992).

62. *Id.* at 782, 413 S.E.2d at 289–90.

63. U.S. CONST. amend. I–X.

64. *See, e.g.*, N.C. DECLARATION OF RIGHTS of 1776, § 1 ("That all political Power is vested in and derived from the People only.").

65. N.C. DECLARATION OF RIGHTS of 1776, § 14.

66. E-mail from Harry C. Martin, former justice of the Supreme Court of North Carolina, to author (Sept. 20, 2004) (on file with the North Carolina Law Review). *See*

acceptance of *Blakely*'s expansive interpretation of the right to a jury under structured sentencing schemes as being equally applicable to Article I, Section 24. Rejecting a broad reading of the state right to a jury trial contradicts the understanding of the drafters that a jury trial was one of the best means of securing the rights of the people.[67]

The historical contexts surrounding the passage of each document point to overlapping protective intents of the North Carolina drafters and the federal Framers. For example, the Declaration of Independence specifically cites the deprivation of jury trials as one of the grievances against the King.[68] The Declaration likely left powerful impressions on the drafters of both constitutions,[69] not only because it triggered the Revolutionary War but also because it was signed in the same year as the North Carolina Constitution and eleven years before the United States Constitution.[70] Further illustrating the commitment of state leaders to jury trials at the time of the constitutional framing, North Carolina recommended that the 1788 Constitutional Convention add a bill of rights because of the state leaders' perception that the primary articles of the Constitution did not sufficiently guarantee individual rights.[71] Because North Carolina's drafters were at least as committed as the Framers to the revolutionary principles of individual rights, subtracting from the

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also Paul H. Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of* Batson v. Kentucky *in North Carolina*, 69 N.C. L. REV. 1533, 1575–76 (1991) (suggesting that the use of peremptory challenges in North Carolina courts threatens the "special protections against discrimination in jury selection" offered by the North Carolina Constitution).

67. *See* N.C. DECLARATION OF RIGHTS of 1776, § 14.

68. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) ("For depriving us of many Cases, of the Benefits of Trial by Jury . . . .").

69. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 9 (2d ed. 2002) ("Although it has no binding legal authority . . . [the Declaration of Independence's] complaints about British rule foreshadowed the protections that were placed in the Constitution and its Bill of Rights."); JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION 3 (1993) ("The declaration of rights and the constitution (narrowly considered) form an effective blend of revolutionary theory and practical politics.").

70. U.S. CONST. of 1787; THE DECLARATION OF INDEPENDENCE (U.S. 1776); N.C. CONST. of 1776. Professor Orth credits one of the signers of the Declaration of Independence, North Carolinian William Hooper, as having profoundly influenced the state constitution, because he sent a letter to the drafting committee that provided important constitutional models enabling the rapid enactment of the North Carolina Constitution. *See* ORTH, *supra* note 69, at 2.

71. *See* 2 U.S. DEP'T OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION 266–76, 290 (1894) (providing documentation of the North Carolina constitutional convention in 1788 that adopted a resolution that Congress ought to provide a declaration of rights), *available at* http://www.yale.edu/lawweb/avalon/const/ratnc.htm (on file with the North Carolina Law Review).

federal definition of a jury trial for the purposes of state constitutional interpretation contradicts the drafters' original intent.

In addition to the political and legal setting for the drafting of the state constitution, early North Carolina cases provide support for interpreting the scope of the state right to a jury trial in accordance with that of the Sixth Amendment. Furthermore, once constitutional conventions set up the frameworks for self-government under the state and federal constitutions, the early American state courts referred to English common law when interpreting their constitutions and developing legal principles of fairness and individual rights.[72] Early North Carolina and United States cases cited the Magna Charta and Blackstone in decisions regarding the fundamental importance of the jury.[73] As discussed above, the eighteenth century common law sheds light on the historical tradition of using juries to hear all facts relevant to the conviction of a crime and imposing punishment.[74] Justice Scalia also noted in *Blakely* that Blackstone's *Commentaries* and Bishop's *Criminal Procedure*, two quintessential common law compilations, provide powerful evidence that the Framers expected the jury to provide a check on the power of the judicial branch to take away individual liberties[75] by entrusting the jury to conduct all factfinding relevant to state punishment.[76] Similarly, *State v. Holt*,[77]

72. *See, e.g.*, Waring v. Clarke, 46 U.S. 441, 491 (1847) (Woodbury, J., dissenting) (" 'The common law of England, and every statute of that country made for the benefit of the subject before our ancestors migrated to this country, were, so far as the same were applicable to the nature of their situation, and for their benefit, brought over hither by them' . . . ." (citations omitted)).

73. *E.g.*, State v. Holt, 90 N.C. 749, 750 (1884) ("The substance of [Article I, Section 24] is taken from *Magna Charta*. For centuries the right of trial by jury in criminal cases has been regarded by the English people as one of their chief and sure defenses against arbitrary power."); State v. Stewart, 89 N.C. 563, 564 (1883) ("It is a fundamental principle of the common law, declared in '*Magna Charta*,' and again in our Bill of Rights, that 'no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court.' " (quoting N.C. CONST. art. I, § 24)); Mitchell v. Harmony, 54 U.S. 115, 142 (1851) (Daniel, J., dissenting) (quoting Blackstone for his prediction that the trial by jury will be remembered as the "glory of the English law").

74. *See* Lillquist, *supra* note 48, at 628–50; *supra* notes 48–50 and accompanying text.

75. *See* Blakely v. Washington, 124 S. Ct. 2531, 2536 (2004) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)) (discussing the requirement that a unanimous verdict be reached by twelve of the defendant's " 'equals and neighbours' "); *id.* at 2543 (citing Blackstone as support for the traditional preference for adversarial testing of facts before a jury rather than judicial inquisition).

76. *See id.* at 2536 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)) (stating that " 'the truth of every accusation' against a defendant 'should afterwards be confirmed by the [jury]' "); *id.* (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872)) (stating that accusations must contain all facts relevant to the punishment).

77. 90 N.C. 749 (1884).

an early North Carolina case on the state constitutional right to a jury trial, also cites Blackstone on the importance of maintaining the role of juries.[78] Thus, a rejection of Justice Scalia's gloss on the common law history of jury trials runs contrary to the history of state constitutional principles.

The second constitutional question North Carolina lawmakers and courts must consider in light of *Blakely* is whether the United States Supreme Court's allowance for waivers of the federal right to a jury trial on aggravating factors should apply to the parallel state constitutional right.[79] The textual differences between the state and federal constitutions lend support to a prohibition of jury trial waivers at the state level in spite of the federal allowance for waivers. In contrast to the North Carolina Constitution's mandate that "[*n*]*o person* shall be convicted,"[80] the language of the United States Constitution seems to merely offer the right to a jury trial to all who choose it in their own self-interest.[81] The Sixth Amendment states that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[82] The Framers' adoption of the individual defendant's perspective suggests the Framers' view that if individuals did not consider the right "enjoyable," they need not exercise it. This analysis supports the United States Supreme Court's consistent acceptance of waivers of the right to a jury trial since *Patton v. United States*.[83] In *Patton*, the Court found that the absence of a prohibition on waivers gave

78. *Id.* at 753 (quoting Blackstone at length on the evil of a system lacking justices of the peace and other representatives of government, regardless of any advantages of efficiency or convenience that stem from displacing a jury).

79. The *Blakely* opinion fails to cite any language in the text of the Constitution for evidence that waivers are permissible. *See Blakely*, 124 S. Ct. at 2541. Instead it cites *Duncan v. Louisiana*, in which the Court allowed defendants to waive the "fundamental" federal right to a jury trial based on the Court's understanding that judge-conducted trials could be administered as fairly as jury trials in some cases. *Id.* (citing Duncan v. Louisiana, 391 U.S. 145, 158 (1968)).

80. N.C. CONST. art. I, § 24 (emphasis added).

81. *See* Adams v. United States, 317 U.S. 269, 275 (1942) ("There is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer.").

82. U.S. CONST. amend. VI.

83. 281 U.S. 276 (1930). Since *Patton*, the principle of freedom to waive a jury trial has extended to give defendants the option of a trial presided over by a judge as the trier of fact. *See* Adams v. United States, 317 U.S. 269, 275–81 (1942) (relying on the lack of anything in the Constitution prohibiting waivers of rights to uphold a defendant's waiver of a jury trial and the trial court's determination of his guilt).

individuals the right to waive a twelve-member jury trial.[84] Most states likewise permit waivers of the right to a jury trial either by statute, express constitutional provision, or case law.[85]

In contrast, the Supreme Court of North Carolina has long prohibited criminal defendants from waiving the right to a jury trial based on its reading of the text and original intent of the North Carolina Constitution.[86] In *State v. Thompson*,[87] the Court of Appeals of North Carolina emphasized that the "defendant possesses an *absolute* constitutional right to plead not guilty and be tried before a jury."[88] To protect this right, the appellate court declared that the defendant's desire to plead not guilty and exercise the right to a jury could not serve as any basis for the trial court's choice of punishment at sentencing.[89] In *State v. Camby*,[90] the Supreme Court of North Carolina invalidated the negotiation of nolo contendere pleas to bypass jury trials, stating that "the parties are not permitted to change the policy of the law and substitute a new method of trial in criminal prosecutions for that of a trial by jury as guaranteed by the Constitution. Nor can this be done by act of assembly."[91] Thus,

84. *See Patton*, 281 U.S. at 299 (finding there to be no constitutional violation where a district judge accepts a defendant's waiver of the right to a full twelve-person jury).

85. *See* Annotation, *Waiver, After Not Guilty Plea, of Jury Trial in Felony Case*, 9 A.L.R.4th 695, 697, 718–19 (1981) (providing a host of sample state cases and citing primarily to North Carolina cases for exceptions to the rule, but also noting that *State v. Scalise*, 131 Mont. 238, 309 P.2d 1010 (1957), found waivers prohibited under the Montana Constitution). Looking to the fact that the vast majority of states allow an individual to waive his right to a jury trial, North Carolina might be tempted to rest its decision on the widespread acceptance of this practice and the fairness of judge-conducted trials in other states. However, instead of a blind acceptance of the majority position, a thoughtful analysis of the state's unique constitutional traditions and views on individual rights would produce a much more honest and informed decision about this state's jury trial right.

86. *See* State v. Hudson, 280 N.C. 74, 78–80, 185 S.E.2d 189, 192–93 (1971) (ordering a new trial where defendant waived his right to a full jury and asked that the court proceed with eleven jurors after one became ill); State v. Camby, 209 N.C. 50, 51–52, 182 S.E.2d 715, 715–16 (1935) (invalidating a statute that allowed defendants to enter a conditional plea and have the judge consider the evidence and determine guilt); State v. Stewart, 89 N.C. 563, 564 (1883) (finding the right to a jury trial contained in Section 24 of the North Carolina Constitution to be absolute such that a defendant who pled not guilty could not waive the right to a trial by jury); State v. Thompson, 118 N.C. App. 33, 41, 454 S.E.2d 271, 276 (1995) (holding that the right to a jury trial cannot be waived by a criminal defendant who pleads not guilty).

87. 118 N.C. App. 33, 454 S.E.2d 271 (1995).

88. *Id.* at 41; 454 S.E. 2d at 276.

89. *See id.* at 41–43, 454 S.E.2d at 276–77 (scrutinizing the impact of the prosecutor's statements at trial about the defendant "hiding behind the law" by insisting on a jury trial but concluding that the error was harmless).

90. 209 N.C. 50, 182 S.E. 715 (1935).

91. *Id.* at 51–52, 182 S.E. at 715–16.

North Carolina's commitment derives from the state courts' willingness to protect fundamental constitutional principles of protecting individual rights. As the Supreme Court of North Carolina reasoned in *Corum*, "[t]he very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State."[92]

Despite the protective basis of the state's prohibition on waivers, preventing a defendant from choosing between a judge or jury trial could constitute a form of oppression or limitation of rights.[93] However, the original version of the state constitution illustrates why the state's insistence on jury trials actually protects individual rights. The 1776 North Carolina Declaration of Rights asserted that "the ancient Mode of Trial by jury is one of the best Securities of the Rights of the People . . . ."[94] The drafters declared that the right "ought to remain sacred and inviolable."[95] Though this pronouncement came in the provision for juries in civil cases, it speaks generally to power relationships between the State and the people.[96] The drafters' certainty of the fundamental value of jury trials therefore suggests that the state drafters did not see a need for the option of waiving a jury trial.[97] Allowing a judge to displace the jury in determining the punishment of a defendant does not square with the North Carolina drafters' view of the jury as "sacred and inviolable."

Additionally, the choice of the words "*mode* of trial by jury," rather than the *opportunity* for such, implies that the drafters provided a constitutional right to jury trials not only to protect individuals, but to prevent the gradual increase in government oppression. This macro view of the value of jury trials deserves credit

92. Corum v. Univ. of N.C., 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992).

93. *See* Blakely v. Washington, 124 S. Ct. 2531, 2555–56 (2004) (Breyer, J., dissenting) (arguing that the problem with amending criminal offense statutes to include highly specific sentencing factors is that defendants will be forced to choose between pleading guilty to all elements of these complex offenses or proceeding "with a (likely prejudicial) trial" on all elements).

94. N.C. DECLARATION OF RIGHTS of 1776, § 14.

95. *Id.*

96. *See Blakely*, 124 S. Ct. at 2543 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373–74, 379–81 (1769)) (suggesting that, in civil trials, the facts relating to criminal sentences are better discovered by juries than by judges).

97. For further examination of the common law conception of the jury trial as an institution needed to uphold self-government, see the reference to juries as a "sacred bulwark of the nation" in 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 344 (1769).

because, for example, if citizens, who do not work within the judicial branch, control the outcome of all criminal cases, prosecutors will know that political or personal relationships with judges cannot influence the outcome of trials.[98] Thus, prosecutors will be more careful deciding which defendants to prosecute and assembling their cases.[99] Demonstrating a similar macro view of individual rights, the United States Supreme Court observed that

> the guarantee [of public grand jury proceedings] has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.[100]

While this observation does not speak directly to the issue of waiving the right to a jury trial, it suggests that enforcement of constitutional rights ensures the fairness of the criminal justice system as a whole.

Beyond the original intent of the state constitutional drafters specific to jury trials, constitutional precedent also informs the understanding of the nature of Article I, Section 24 in several ways. First, North Carolina case law has praised the state constitution for better protecting the rights of individuals than even the United States Constitution.[101] Second, in an early state case on the police power, *State v. Harris*,[102] the Supreme Court of North Carolina noted that "[t]here is a fundamental canon or construction that a Constitution should receive a liberal interpretation in favor of a citizen . . . ."[103]

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98. For a similar argument about how zealous advocacy by criminal defense attorneys for clients they know to be guilty ensures the fairness of the system as a whole, see John B. Mitchell, *The Ethics of the Criminal Defense Attorney – New Answers to Old Questions*, 32 STAN. L. REV. 293, 320–21 (1980).

99. *Id.*

100. *In re* Oliver, 333 U.S. 257, 270 (1948).

101. In *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992), the Supreme Court of North Carolina explained that "[o]ur Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens . . . ." *Id.* at 783, 413 S.E.2d at 290 (citing Lamb v. Wedgewood South Corp., 308 N.C. 419, 302 S.E.2d 868 (1983)). The court also noted that, "[w]e give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens . . . ." *Id.* (citing State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1939)). *See also* Martin, *supra* note 44, at 1751 ("When faced with an opportunity to provide its people with increased protection through expansive construction of state constitutional liberties, a state court should seize the chance . . . . During the past decade, North Carolina has been at the head of the movement to energize state constitutional law.").

102. 216 N.C. 746, 6 S.E.2d 854 (1940).

103. *Id.* at 764–65, 6 S.E.2d at 866 (quoting 11 AM. JUR. 670).

Guaranteeing the absolute right to jury factfinding on the conviction elements and sentencing factors more liberally construes the protection of citizens provided in Article I, Section 24 than the *Denning* rule,[104] which limits the scope of the right to the essential elements.[105] Thus, neither a reversal of the prohibition on waivers nor a rejection of *Blakely*'s expansion of the scope of a jury trial would square with North Carolina's constitutional tradition.

Admittedly, this precedent and canon of construction do not inform the issue of waivers as clearly as they inform the expansion of the scope of jury trials because the option to have a judge hear sentencing factors may favor defendants.[106] However, strong language in other state cases supports the continued prohibition of waivers of the right to a trial by jury. In *State v. Moss*,[107] the Supreme Court of North Carolina held that the defendant could not be tried and convicted by an officer in the police department, even where he "acquiesced" to such jurisdiction because the right to a jury trial was "absolute and unconditional."[108] Likewise, in *State v. Stewart*,[109] the state's high court found the defendant's waiver of the right to a jury trial to be "in violation of the constitution, and in subversion of a fundamental principle of the common law."[110] Because the prohibition of waivers in North Carolina reflects the state's interpretation of the fundamental principles of individual rights under its own constitution, state courts must not replicate the United States Supreme Court's allowance for waivers of the right to a jury at any phase of state criminal trials.

In conclusion, although allowing defendants to waive their right to a jury trial may seem to be an attractive procedural solution to the challenges of *Blakely* for structured sentencing, courts should not

104. *See supra* notes 35–36 and accompanying text.

105. *See* State v. Baldwin, 330 N.C. 446, 454, 412 S.E.2d 31, 36 (1992).

106. In *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968), the Supreme Court observed that, while the intent of the provision for jury trials in all non-petty criminal cases was to counter unfairness of judge trials, in some criminal cases the defendant will be treated as fairly by a judge as by a jury. Thus, the Court found no Sixth Amendment problem with allowing a defendant to waive the right to a jury in a misdemeanor case carrying a two-year punishment. Likewise, in *Adams v. United States*, 317 U.S. 269, 276 (1942), the Court noted that "since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury."

107. 47 N.C. (2 Jones) 64 (1854).

108. *Id.* at 67 (invalidating the judgment of the local Intendant of Police and allowing the county prosecutors to proceed with a proper subsequent trial).

109. 89 N.C. 563 (1883).

110. *Id.* at 564.

narrow the scope of jury trials from *Blakely*'s expansive guarantee. A narrow individual right would violate the state drafters' intent to protect the role of juries. At the same time, important differences exist between the language and intent of the state and federal constitutions that should dissuade courts from reversing the North Carolina precedent prohibiting waivers of the Article I, Section 24 right to a jury trial simply because the United States Supreme Court has accepted waivers of the Sixth Amendment. The solution to the North Carolina's *Blakely* dilemma must be to pass the Commission's Draft Legislation providing for jury trials on aggravating facts and to apply this procedure in every case where a defendant contests the existence of aggravating circumstances. The General Assembly has enacted a sentencing framework that will uphold the state's constitutional intent to protect individual rights and the United States Supreme Court's new interpretation of the right to a jury trial by requiring juries to determine the existence of all aggravating factors before judges can impose aggravated sentences. Despite the Blakely Act's silence on the question of waivers, the requirement for jury trials must be read to prohibit waivers of the right to a jury trial on the existence of any contested aggravating factors. The North Carolina General Assembly's willingness to reinvigorate the role of the jury deserves recognition for upholding the state's constitutional traditions and the state's precedent of protecting the rights of criminal defendants.

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