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Constitutional Law—Petty Offender's Right to Demand Trial by Jury: Petty Offenders Have Peers in Alaska—Baker v. City of Fairbanks, 471 P.2d 386 (Alas. 1970)

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CONSTITUTIONAL LAW—PETTY OFFENDER'S RIGHT TO DEMAND TRIAL BY JURY: PETTY OFFENDERS HAVE PEERS IN ALASKA—*Baker v. City of Fairbanks*, 471 P.2d 386 (Alas. 1970).

Procter J. Baker was charged with violation of a Fairbanks ordinance for the offense of assault[1] and demanded a trial by jury in the district court. Baker contended that the holding of the United States Supreme Court in *Duncan v. Louisiana*[2] was dispositive of his case and that he was entitled to a jury trial as a matter of constitutional right,[3] even though the maximum possible punishment was limited to $600 fine or 60 days imprisonment or both.[4] Upon the trial court's denial of his asserted right, Baker petitioned for direct review[5] by the Alaska Supreme Court. The Alaska court declined to rule on the petition on the basis of federal constitutional law, as expressed in *Duncan*, but reversed the trial court's ruling on the basis of the jury trial guarantee of the Alaska constitution.[6] In applying article I, section 11 of the Alaska constitution, the court held that the accused was guaranteed the right to demand trial by jury in any criminal prosecution which carried the possible penalty of incarceration, the loss of an important license or occupational permit or the social stigma arising from conviction for an offense commonly regarded by the community as criminal. *Baker v. City of Fairbanks*, 471 P.2d 386 (Alas. 1970).

The United States Supreme Court in *Duncan v. Louisiana* held that the right to jury trial guaranteed by the sixth amendment of the federal constitution was applicable to the states under the fourteenth amendment.[7] In announcing the national standard the Supreme Court based its decision on the concept that the jury trial was fundamental in the

1. The offense charged was also a violation of a state statute. ALASKA STAT. § 11.15.230 (1962).
2. 391 U.S. 145 (1968).
3. *Baker* relied upon 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. . . .
4. The maximum punishment that could have been imposed in *Duncan* included two years imprisonment, a $300 fine or both. 391 U.S. at 146.
5. ALAS. SUP. CT. R. 23-24.
6. ALAS. CONST. art. I, § 11:
In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record. . . .
7. 391 U.S. at 156.

systems of criminal justice found in the states.[8] Since the right was deemed fundamental, the federal notion of due process of law guaranteed by the fourteenth amendment extended the right to a jury trial to accused persons in state criminal proceedings.[9] The sweep and effect of *Duncan* were restricted, however, in one important respect: the right to a jury trial was not guaranteed to persons who would not be entitled to the right if tried for the same or comparable offense in a federal court. As a minimum standard the Supreme Court suggested that a "petty" offense carrying a possible sentence of up to six months imprisonment would not require a jury trial.[10] A significant feature of the *Duncan* decision is the absence of firm guidelines to assist in distinguishing the "petty" offense that does not entitle the offender to demand trial by jury, from the "serious" offense that does carry the guarantee.[11] In fashioning a "petty" offense exception to the seemingly comprehensive sixth amendment jury trial provision, the Supreme Court relied on the English and American common law practice at the time the Constitution was framed,[12] the widespread acceptance of the categorization,[13] and the policy considerations which favor expediting and simplifying judicial administration when relatively minor offenses are involved.[14]

8. 391 U.S. at 149 & n.14.

9. The right to trial by jury was the last of the sixth amendment rights to be applied to state criminal proceedings under the "incorporation" theory. Its predecessors were *in re* Oliver, 333 U.S. 257 (1948) (right to a public trial); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront opposing witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to a speedy trial); and Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process to obtain presence of witnesses).

10. 391 U.S. at 159. The six month standard adopted by the Supreme Court was apparently based on the delineation prescribed by Congress for the federal court system. *See* 18 U.S.C. § 1(3) (1964).

11. The absence of firm guidelines has been corrected somewhat by the additional guidance found in Baldwin v. New York, 399 U.S. 66 (1970), in which the Supreme Court rejected a proposed misdemeanor-felony distinction and required that if the maximum authorized penalty exceeded six months confinement the accused had the right to demand trial by jury.

12. 391 U.S. at 160; Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury,* 39 HARV. L. REV. 917 (1926).

13. For example, the Washington Supreme Court has followed the petty-serious formula in determining the petty offender's right to jury trial. State *ex rel.* O'Brien v. Towne, 64 Wn. 2d 581, 392 P.2d 818 (1964). In a pre-*Duncan* decision involving the right to jury trial, the Washington court anticipated the Supreme Court's extension of the federal standard to the states as a federal constitutional requirement. George v. Day, 69 Wn. 2d 836, 420 P.2d 677 (1966).

14. The Supreme Court regarded the benefit of the accused of trial by jury as "insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive non-jury adjudications" 391 U.S. at 160.

In considering petitioner's main contention that *Duncan* was dispositive of his right to trial by jury, the Alaska court reasoned that the Supreme Court did not intend to make the federal petty offense standard a mechanical test for the states to apply, and determined that further analysis was necessary.[15] After reviewing the line of decisions in which the right to jury trial was held to exist for some offenses but not for others, the court found that the recurring question had been where the petty-serious offense line should be drawn.[16] The Alaska court, however, asked why it should be necessary to draw a line at all, when the language of the sixth amendment is free of any mention of exceptions to the stated right, and concluded that the common law and historical bases for denial of the right to jury trial were inconclusive and inadequate.[17] Unlike the Supreme Court, which emphasized historical custom in *Duncan*,[18] the Alaska court in *Baker* found the historic

15. Mr. Justice White, writing for the majority in *Duncan*, emphasized that the maximum possible penalty authorized for the offense was a controlling factor but concluded that other factors, such as the social consequences attaching to a criminal conviction, were likewise significant. 391 U.S. at 159. This view of the maximum authorized penalty was reaffirmed in Baldwin v. New York, 399 U.S. 66 (1970).

16. That there should be a petty-serious delineation was espoused in Frankfurter and Corcoran's classic discussion of the historic common law right to jury trial. Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926). *But cf.* Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245 (1959).

The Supreme Court's difficulty in ascertaining where the petty-serious line should lie is illustrated by the following cases: District of Columbia v. Clawans, 300 U.S. 617 (1937) (sale of unused railway tickets held petty); District of Columbia v. Colts, 282 U.S. 63 (1930) (reckless driving held serious); Schick v. U.S., 195 U.S. 65 (1904) (violation of oleomargarine stamp statute held petty); Callan v. Wilson, 127 U.S. 540 (1888) (labor conspiracy offense, punishable by 30 days confinement or $25 fine, held serious); Natal v. Louisiana, 139 U.S. 621 (1891) (municipal market permit violation, carrying the same maximum penalty as the offense in *Callan*, held petty).

The court's inconsistency and reliance on historical and common law bases to distinguish petty from serious offenses have led to ridiculous results in the lower federal courts; *see, e.g.*, Gaithor v. United States, 251 A.2d 644 (D.C. Mun. Ct. App. 1968), where it was held that the accused was not entitled to trial by jury for the offense of solicitation for oral sodomy, since the penalty included only 90 days imprisonment or $250 fine or both.

17. The Alaska court concluded that there was no firm line drawn between those offenses that merited a jury trial at the time the federal Constitution was drafted and those offenses that did not. 471 P.2d at 391-92. *See* Frankfurter & Corcoran, *supra* note 16, at 927. Common law history reveals such vagaries as a summary trial proceeding leading to a sentence of up to seven years imprisonment. *See* sources in note 12, *supra*.

18. The Supreme Court weighed the long-standing practice carefully:

> So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions.

391 U.S. at 160.

The Alaska court does not meet the historical argument in *Duncan* squarely, but the

pattern insufficient to support continuation of the petty-serious distinction as an implied exception to the right to jury trial "in all criminal prosecutions."

The policy reasons found in *Duncan* to justify and support denial of jury trials for petty offenders were discussed at length by the Alaska court in *Baker* and it is in this area that the court's analysis is most significant. At a time in our national history when the effectiveness of our criminal justice system is undergoing considerable critical scrutiny,[19] expediency and convenience in criminal procedure are valuable policy considerations, according to *Duncan*.[20] Although the Alaska court conceded that expediency was a valid objective, it reasoned that the expressly-given constitutional right to a jury trial could not be subordinated to expediency considerations unless they were also derived from the Constitution.[21] The court found no authority among the enumerated powers of the Constitution to justify expediency as a basis for distinguishing between the rights of the petty offender on the one hand and the serious offender on the other. Further, the court found that expediency was not a controlling factor in guaranteeing each defendant other individual constitutional rights, including the right to counsel.[22] Central to the court's rejection of expediency as a controlling

court's view of the inertia of custom as a limiting factor on the development of the law is characterized by the following:

> We recognize that this decision represents an advance from what historically was thought by some to be the necessary extent of jury trial in criminal cases. But the evolving spirit of due process must be discerned and made effective as civilization advances. We reach a point when the crudities of an earlier time must be abandoned.

471 P.2d at 403.

19. *E.g.*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, REPORT ON THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

20. The Supreme Court in *Duncan* viewed the burdensome consequences of providing jury trials to petty offenders with some alacrity. 391 U.S. at 160. Experience with jury trials for misdemeanors in areas where they are afforded has revealed, however, that the right has not been subject to abuse and that jury trials for petty offenses are relatively infrequent. LAW ENFORCEMENT IN THE METROPOLIS 141 (D. McIntyre, Sr., ed. 1967).

21. The unequivocal language of the sixth amendment leaves no doubt as to the *literal* scope of the right to jury trial in criminal prosecutions. Under a constitutional theory of enumerated and reserved powers, convenience and expediency seemingly do not have and should not have priority over the retained rights of the individual.

22. The Alaska court cited *in re* Johnson, 62 Cal. 2d 325, 398 P.2d 420 (1965), in which it was held that the accused has the right to counsel if conviction results in incarceration. *But cf.* Hendrix v. Seattle, 76 Wn. 2d 142, 456 P.2d 696 (1969), *noted in* 46 WASH. L. REV. 185 (1970), in which the Washington court adhered to the view that an accused charged with a minor offense was not entitled to counsel furnished at public expense. *See* Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685 (1968).

policy consideration is the idea that efficient administration of the criminal justice system should not create a significant implied exception to an express fundamental right.

Although the decision rested on the determination of a state constitutional issue,[23] the court, in dictum, stated that it was not limited to federal standards of interpretation when comparable constitutional rights were in issue.[24] It appears certain, however, that *Duncan* was not intended to establish a maximum standard for application of a federal constitutional right for petty offenders, but rather that the Supreme Court intended to fashion minimum standards only.[25] It follows from this analysis that the Alaska court would not have been in conflict with the intent of the Supreme Court in *Duncan* even if *Baker* had been decided on federal constitutional grounds. Although the basis of the *Baker* decision was an analysis of Alaska constitutional law, the reasons advanced by the court involving federal constitutional law do

23. Defendants in the Territory of Alaska could demand trial by jury in any justice court proceeding which might result in punishment by fine or imprisonment. Act of March 3, 1899, ch. 41, §§ 410, 419, 30 Stat. 1253. The Alaska court determined that this right had continued without substantial change or modification and was in existence at the time the state constitution's jury trial provision was drafted and adopted. The right to demand jury trial had been available on a broad basis for virtually all offenses and the court found that the framers intended it to continue; the Alaska court therefore held, as a matter of state constitutional law, that Baker was entitled to demand trial by jury for his municipal code violation. 471 P.2d at 398-401. The court expressly overruled its earlier decision in Knudsen v. City of Anchorage, 358 P.2d 375 (Alas. 1960), in which the court had adopted the petty offense rule.

24. Other jurisdictions have chosen to act in areas of doctrinal importance before the Supreme Court has either been presented with an opportunity or undertaken to decide significant constitutional issues: People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963) (right to counsel during police interrogation); Perez v. Lippold, 32 Cal. 2d 711, 198 P.2d 17 (1948) (miscegenation statute held unconstitutional); People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955) (exclusionary rule of evidence). It appears that few courts, if any, have erred, if their decisions came down on the side of individual rights.

The view more typically encountered concerning the weight usually afforded Supreme Court interpretations of language similar to that found in state constitutions and undergoing construction by state courts is expressed in the following terms by the Washington court:

> [W]here the language of the state constitution is similar to that of the federal constitution, the language . . . should receive the same definition as that which has been given . . . by the United States Supreme Court.

Tacoma v. Heater, 67 Wn. 2d 733, 736, 409 P.2d 867, 869 (1966). *See also* State v. Moore, 79 Wn. 2d 51, 56-57, 483 P.2d 630, 634 (1971).

25. The petty-serious formulation expressed in *Duncan* does not restrict the power of the states to exceed the national standard in affording jury trials for offenses other than those in the "serious" category. The Supreme Court anticipated that most states would continue to apply the petty offense rule, as specified in *Duncan* and elaborated upon in Baldwin v. New York, 399 U.S. 66 (1970), rather than emasculate it as Alaska has done. 391 U.S. at 158.

not appear precluded or limited by *Duncan*. At the heart of the Alaska court's reasoning, however, is a fundamental divergence from the reasoning found in *Duncan*. Throughout the opinion the court maintains that the plain language of the sixth amendment is clear and that the court is merely giving that language its obviously correct meaning.[26] The effect of *Baker*, however, is a firm rejection of the bases supporting the petty-serious dichotomy of the *Duncan* opinion. While it is true that Alaska has a history of affording jury trials to petty offenders,[27] the Alaska court's view and analysis of what is fundamentally fair in criminal proceedings make the *Baker* decision far more significant than simply a determination of state law.[28]

Rather than attempting to draw lines between types of offenses and degrees of punishment, the Alaska court seeks to appraise the true impact of any criminal conviction, whether petty or serious, on the individual offender and the community in which he functions.[29] The policy considerations of expediency and efficiency do not muster persuasiveness when considered in light of the social and economic consequences of a criminal conviction. Of particular importance to the court was the situation of the defendant whose offense is minor in the view of the court personnel who administer the system but catastrophic to the nonrecidivist, first-time offender experiencing unique contact with the criminal courts. It is not the possible punishment that weighs heavily on such a defendant, but rather his very appearance before the court as an accused. Accordingly, it is at this moment that the offender must be afforded those rights that are regarded as fundamental if due process of law is to carry its full and intended meaning. Though not discussed by the court, the situation of the recidivist cannot be considered

26. 471 P.2d at 388, 395, 403.

27. Note 23, *supra*.

28. An intriguing problem involving the concept of federalism and the criminal law is presented in light of the Alaska court's decision to proceed beyond the national standard prescribed in *Duncan*. An assumption implicit in the *Baker* approach is that the constitutional due process standards framed by the Supreme Court are minimal guidelines only and that the states can take creative steps to afford criminal defendants protection beyond that which has been termed a federal code of criminal procedure. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965). No critical or irreconcilable problem exists, however, because, in the words of Justice Brandeis, "[O]ne of the happy incidents of the federal system [is] that a single courageous State may, if its citizens choose, serve as a laboratory . . . ." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (dissenting opinion).

29. 471 P.2d at 395, 396.

less serious because he has encountered the criminal system on previous occasions; the consequences of conviction for a minor offense can be more far-reaching for such an accused, especially if a parole or probationary status is involved.[30]

It is likely that conditions unique to Alaska, including its previous history of affording jury trials for minor offenses during its existence as a territory, make the policy approach taken by the Alaska court feasible. While other states experiment with various means[31] to ease clogged criminal dockets which may result in increased impersonalization and decreased concern for individual defendants, Alaska is proceeding in the opposite direction toward increased recognition of the individual and his rights.

Whether a similar approach to the right to jury trial would be taken by the courts of other states is uncertain, but it should be noted that the United States Supreme Court recently held that a six-member jury satisfied the requirements of due process,[32] thus making possible reduced costs and delays for states, like Alaska, choosing to extend the right to trial by jury. Washington, for example, has a constitutional provision authorizing the legislature to provide for six-member juries in courts not of record, indicating that the framers of the state constitution contemplated simplified jury trials in those courts which ordinarily hear and determine less serious violations.[33]

While it could be argued that the decision of the Alaska court was

30. *See, e.g.*, WASH. REV. CODE § 72.04A.090 (1969). The summary arrest and confinement procedures to which the parolee is subject in the event of his violation of state law demand close scrutiny of the factual issues leading to the subsequent charge. In view of the dual nature of the punishment facing the parolee, the need for strict adherence to sixth amendment guarantees is more urgent in his situation than for the first offender.

31. The most common means are increased funding and staffing for the criminal judicial machinery. *E.g.*, the difficulties encountered in New York City are perhaps extreme, but the language of the court in these cases is illustrative: People v. Moses, 57 Misc. 2d 960, 294 N.Y.S.2d 12 (N.Y. City Ct. 1968); People v. Bowdoin, 57 Misc. 2d 536, 293 N.Y.S.2d 748 (N.Y. City Ct. 1968). Additional descriptions of the problem and suggested remedies are found in Conference on Legal Manpower Needs of Criminal Law, *Report*, 41 F.R.D. 389 (1966).

32. Williams v. Florida, 399 U.S. 78 (1970).

33. WASH. CONST. amend. X. Evidence of early action taken by the Washington legislature is found in WASH. REV. CODE § 10.04.050 (1956):

> In all trials for offenses within the jurisdiction of a justice of the peace, the defendant . . . may demand a jury, which shall consist of six, or a less number, agreed upon by the state and the accused, to be impaneled and sworn as in civil cases . . . .

It would appear that the legislative authority exists to implement a stream-lined jury system for minor offenses of the type that was approved by the Supreme Court in *Williams*.

made easier due to the absence of congested urban areas, combined with an abundance of natural wealth, the court did not fail to consider the decision's impact on the state's judicial administration. The court relied on data available from jurisdictions in which the right to jury trial was available to petty offenders; those states did not and have not yet experienced any paralyzing effects due to the availability of jury trials for minor offenses.[34] Nor should it be assumed that the right to trial by jury in Alaska is available in all cases heard in criminal courts; expressly excluded are offenses in violation of regulatory rather than criminal statutes and proceedings in which possible license revocation would be based on public health or welfare criteria. The court also limited the right to demand trial by jury for offenses which did not carry the possible punishment of imprisonment.[35] The exceptions framed by the court appear to be valid for the reason that enforcement of statutes directed at the regulation of property are not strictly criminal prosecutions within the language of the sixth amendment. In addition, licenses which may be revoked pursuant to violations of public health and safety regulations are not considered to belong to the defendant as a matter of right when countervailing considerations of public protection under the state's police power are involved.

The posture of the Alaska court regarding the petty offender's right to jury trial raises the question whether a similar approach will be taken with respect to the right to counsel, which is also guaranteed by the sixth amendment. From a practical point of view the right to a trial by jury seems of little utility if counsel is not afforded the defendant. The role of counsel in assuring the accuracy and integrity of the proceedings is of at least equal importance to the legitimate interests of a defendant as the right to a jury of his peers.[36] As a matter of constitu-

34. A significant number of Southern states have historically afforded petty offenders jury trials, notably Georgia, Texas, Alabama, Tennessee and North Carolina; California likewise does not recognize an implied exception to the right to jury trial. For a summary of data on the status of the right to jury trial and statistics resulting therefrom, see H. KALVEN & H. ZEISEL, THE AMERICAN JURY 18-19, app. A (1966).

35. 471 P.2d at 402.

36. In fact, until recently, it could be persuasively argued that refusing a defendant counsel would impair his legitimate interests to a far greater degree than would refusing him the right to a jury trial. Recent empirical data indicates, however, that jury trials show a significant net leniency in favor of the defendant in contrast to trials at the bench. This new data indicates only that trial by jury is important, of course, and not that the right to counsel is not equally vital. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 708 (1968). Professor Junker relies on data collected in H. KALVEN & H. ZEISEL, THE AMERICAN JURY 59 (1966).

tional interpretation, the language guaranteeing every criminal defendant the right to counsel is as broad as the language referring to the right to trial by jury.[37] Thus the Alaska court's rejection of the petty-serious standard in giving the state constitution its plain and obvious meaning would seem to require a similar result concerning the right to counsel.

The policy reasons discussed in *Baker* are also supportive of a broad right to counsel. Both the right to counsel and the right to a trial by jury are distinguishable from other sixth amendment rights in that they require sizable expenditures of state funds.[38] The *Baker* court's weighing of the fundamental rights of a defendant more heavily than the resulting cost to society should also extend to the equally important right to counsel. An objection to broader application of the right to counsel is inadequate lawyer manpower.[39] This problem was not dealt with in *Baker*, but if a serious deprivation results from an implied exception to an otherwise fundamental right, personnel shortages lack persuasiveness as a controlling policy criterion. The court's unwillingness to see expediency and economy as determinative seems equally applicable to manpower considerations. In sum, the approach adopted by the Alaska court in *Baker* raises the likelihood that the right to counsel may be similarly broadened in the future.

CONCLUSION

It is doubtful that other state courts will reach the same result as the Alaska court on the issue of the petty offender's right to demand trial by jury; tradition, custom, the inertia of stare decisis and pressures focused on the streamlining of judicial machinery are major obstacles difficult to overcome. But this is not to discredit the Alaska court's perspicacity in the area of fundamental fairness in criminal proceedings. The fact that Alaska is in a unique position because of its history to afford a broader range of constitutional rights to petty offenders

37. ALAS. CONST. § 11 provides in part:
Rights of Accused. In *all* criminal prosecutions, the accused shall have the right to . . . have the assistance of cousel for his defense. (Emphasis added).

38. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 707 (1968).

39. *Id.* at 716.

within its borders which is not available in most other jurisdictions does not diminish the important constitutional progress that marks the *Baker* decision. While the court professes to give both the federal and Alaska constitutions their obvious and simple meanings, the philosophic basis of the decision advances an important individual right far beyond the national standard established in *Duncan*. The Alaska court has added an important dimension to the concept of due process of law "in this dawning of the Age of Aquarius."[40] If other states similarly conclude that the practical problems arising from such an expansion of the rights of accused are not prohibitive, *Baker* stands as a model for further reform at the state level.

40. *Baker*, 471 P.2d at 403.