

SM-21 WAIVER OF JURY TRIAL: ACCEPTANCE, WITHDRAWAL, AND RELATED ISSUES

The following is intended for use when a defendant with counsel wishes to waive a jury trial.¹ If the defendant is without counsel, it may be necessary to obtain or renew a waiver of counsel. See SM-30, Waiver and Forfeiture of Counsel.

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I. Accepting or Rejecting a Proposed Jury Trial Waiver

A. Consent of the State

The court should first ask the prosecutor whether the State consents to a proffered jury trial waiver. Section 972.02(1) provides that a jury trial waiver requires the consent of the state. The State is not required to offer reasons for refusing to consent.²

B. Trial Court Authority to Reject a Waiver

The trial court has authority to reject a jury trial waiver even if the State consents. Like the State's decision to withhold consent, the trial court need not explain its decision and, absent extraordinary circumstances, that decision is not reviewable.³

II. Determining the Defendant's Ability to Understand the Waiver

As with any waiver, the waiver of the right to a jury trial requires that the defendant make an understanding and intelligent decision. This may require an investigation of the defendant's background, present mental condition, etc. For suggested questions designed to explore this aspect of a waiver decision, see SM-32, ACCEPTING A PLEA OF GUILTY, at section II.

III. Determining that the Waiver is Knowing and Voluntary

A jury trial waiver must be made personally, knowingly, and voluntarily. A personal inquiry is required and the record must clearly indicate the defendant's willingness and intent to waive the right to a jury trial.⁴ The following are examples of questions that should be asked. Answers indicating the need for more information should be pursued.

Before your waiver of your constitutional right to a jury trial is accepted, the court will ask you some questions to decide whether your waiver should be accepted. If you have any trouble understanding the questions, please tell me, and take all the time you need to confer with your attorney.

Do you understand that you have the right to a jury trial, that is to have twelve people hear all the evidence in the case and decide whether you are guilty or not guilty?

Do you understand that in a jury trial, the State must convince each member of the jury beyond a reasonable doubt that you committed the crime?⁵

Do you understand that by giving up your right to a jury trial, this court, after hearing all of the evidence, will make a decision on whether you are guilty beyond a reasonable doubt or not guilty?

Has anyone promised you anything to get you to give up your right to a jury trial?

Has anyone threatened you to get you to give up your right to a jury trial?

Knowing what I have just told you, do you still wish to give up your right to a jury trial?

Have you had enough time to discuss this with your attorney?

Has your attorney explained your right to a jury trial to you?

Do you understand the questions I have asked and understand what your attorney has told you?

DIRECT THE FOLLOWING QUESTION TO DEFENSE COUNSEL:

Do you believe that the defendant understands the right to a jury trial and the right to a unanimous verdict and is giving up those rights freely, voluntarily, and intelligently?

IF THE COURT IS SATISFIED THAT DEFENDANT'S WAIVER OF A JURY TRIAL IS MADE FREELY, VOLUNTARILY, AND KNOWINGLY, AND THE COURT APPROVES, THE COURT SHOULD MAKE FINDINGS OF FACT, ON THE RECORD, SUBSTANTIALLY AS FOLLOWS:

The court finds that the defendant understands the constitutional right to a jury trial and that the defendant freely and voluntarily waives that right.

IV. Related Issues

A. Agreeing to a Jury of Less Than Twelve

Section 972.02(2) provides as follows:

At any time before the verdict in a felony case, the parties may stipulate in writing or by statement in open court, on the record, with the approval of the court, that the jury shall consist of any number less than 12.

The procedures required for waiver of trial by jury apply equally to waiver of a full 12-member jury. State v. Cooley, 105 Wis.2d 642, 646, 315 N.W.2d 369 (Ct. App. 1981).

B. Waiver of a Unanimous Verdict

This question was referred to in State v. Koput, 142 Wis.2d 370, 418 N.W.2d 804 (1988), in connection with the second phase of the bifurcated trial held where a defendant enters a plea of not guilty by reason of mental disease or defect. At the time of the decision, the statute did not, as it does now, provide explicitly for a 5/6 verdict at the second phase. There was uncertainty about whether the second phase verdict had to be unanimous. The court of appeals held that a unanimous verdict was required and that it was so fundamental a right that it could not be waived. State v. Koput, 134 Wis.2d 195, 396 N.W.2d 773 (Ct. App. 1986). The supreme court reversed, but because it held that the verdict was to be 5/6, it did not have to address the waiver issue.

The rule that a unanimous verdict is a right too fundamental to be waived is apparently the common law rule. However, several states do allow such waivers.⁶ The ABA Standards for Criminal Justice allow a waiver of a unanimous verdict. Standard 15-1.3(b) (2nd ed. 1980). The court of appeals decision in Koput had relied on a previous holding that there could be no waiver of the unanimous verdict. That holding, Holland v. State, 87 Wis.2d 567, 275 N.W.2d 162 (Ct. App. 1978), was reversed on other grounds, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

C. Partial Jury Trial Waiver

In some situations, a defendant may wish to stipulate that one element of an offense is established. This might be viewed as a waiver of the right to a jury trial on that element. If so, does the acceptance of the stipulation require a partial jury trial waiver and an appropriate inquiry into the defendant's ability to give that waiver? In State v. Villarreal, 153 Wis.2d 323, 450 N.W.2d 519 (Ct. App. 1989), the trial court accepted a stipulation from the prosecutor and defense counsel that the question of whether the offense was committed while armed with a dangerous weapon would be decided by the court instead of the jury. The court of appeals held that this was error: withdrawal of that element from the jury required a personal waiver from the defendant.

V. Withdrawal of a Jury Trial Waiver

In State v. Cloud, 133 Wis.2d 58, 393 N.W.2d 123 (Ct. App. 1986), the court characterized the question of "[w]hether, and under what circumstances, a defendant may withdraw a valid jury waiver" as one "of first impression in this state." 133 Wis.2d 58, 63. The court adopted an abuse of discretion standard for evaluating a trial court's refusal to allow withdrawal of a jury trial waiver, but went further to hold "that it is an abuse of discretion for a trial court to deny a criminal defendant's motion to withdraw a jury waiver if there is no showing that granting withdrawal would have substantially delayed or impeded the cause of justice." 133 Wis.2d 58, 65.

COMMENT

SM-21 was originally published in 1990. Footnote 3 was modified in April 1991. This revision was approved by the Committee in August 2004.

Section 972.02(1) provides that "criminal cases shall be tried by a jury . . . unless the defendant waives a jury in writing or by statement in open court . . . on the record, with the approval of the court and the consent of the state." (The statute allows the waiver to be accepted by telephone under § 967.08.)

The Wisconsin statute was modeled after Rule 23 of the Federal Rules of Criminal Procedure. State v. Cook, 141 Wis.2d 42, 413 N.W.2d 647 (Ct. App. 1987).

Also see CR16-1, Wisconsin Judicial Benchbook - Criminal-Traffic.

All the requirements of § 972.02 and the case law interpreting it do not apply to jury trial waivers in Chapter 980 commitment proceedings. See § 980.05(2). State v. Bernstein, 231 Wis.2d 292, 605 N.W.2d 555 (Ct. App. 1999); State v. Denman, 2001 WI App 96, 243 Wis.2d 14, 626 N.W.2d 296.

1. The procedure recommended here applies regardless of the time the waiver is offered. In Warrix v. State, 50 Wis.2d 368, 184 N.W.2d 189 (1971), the court interpreted § 957.01, the predecessor to present § 972.02. It held that nothing in the statute prohibited the acceptance of a jury waiver after the trial to a jury had begun. The court noted, however, that "[i]f a judge believes he cannot recollect the testimony or did not make notes to help him or for any reason he cannot function as the trier of the facts he needs only to refuse to accept the offer to waive the jury." 50 Wis.2d 368, 372.

2. Section 972.02(1) provides that a jury trial waiver requires the consent of the state. In State v. Cook, 141 Wis.2d 42, 413 N.W.2d 647 (Ct. App. 1987), the Wisconsin Court of Appeals held that the state is not required to justify its refusal to consent to a defendant's jury trial waiver. It relied on Singer v. United States, 380 U.S. 24 (1965), which reached the same result in interpreting Rule 23 of the Federal Rules of Criminal Procedure. Section 972.02 was modeled after Rule 23. The court did note that a different result might be required if there was a showing of exceptional circumstances, such as denial of equal protection.

3. In State v. Burks, 2004 WI App 14, 268 Wis.2d 747, 674 N.W.2d 640, the court held that "the trial court's 'approval' of a defendant's jury-trial waiver under Wis. Stat. § 972.02(1) is not [a] quasi-ministerial rubber-stamping of the parties' request. . . . Rather, . . . , like the prosecution's decision to withhold consent to a defendant's request to waive his or her right to a jury trial, the trial court also need not explain its decision to withhold its approval, and absent extraordinary circumstances not present here, its decision to withhold approval, like the prosecution's decision to withhold consent, is not reviewable." Burks, ¶10.

4. In State v. Anderson, 2002 WI 7, ¶29, 249 Wis.2d 586, 638 N.W.2d 301, the court stated: "Although Anderson submitted a written jury trial waiver form, we find that the circuit court erred by failing to engage Anderson in a personal colloquy regarding the jury trial waiver. . . . [W]e mandate the use of a personal colloquy in every case . . ." The court identified four matters that the personal colloquy must cover: 1) a deliberate choice, absent threats or promises, to proceed without trial; 2) awareness that

a jury consists of 12 people who must all agree on all elements of the crime charged; 3) awareness that in a court trial the judge decides whether the defendant is guilty; and, 4) that there was enough time to discuss the decision with counsel. Anderson, ¶24.

Also see State v. Cloud, 133 Wis.2d 58, 62, 393 N.W.2d 123 (Ct. App. 1986), citing State v. Moore, 97 Wis.2d 669, 671, 294 N.W.2d 551, 553 (Ct. App. 1980).

Section 972.02 and appellate decisions emphasize that the record must reflect the jury trial waiver and that a waiver will not be implied from a defendant's acquiescence in a trial to the court. In State v. Krueger, the Wisconsin Supreme Court held: ". . . henceforth a record demonstrating the defendant's willingness and intent to give up the right to be tried by a jury must be established before the waiver is accepted." 84 Wis.2d 272, 282, 267 N.W.2d 602 (1978).

However, the Krueger decision did not adopt a specific procedure for making the required record. It cited two methods with approval:

- 1) having the district attorney develop the record by asking questions of the defendant. See White v. State, 45 Wis.2d 672, 682, 173 N.W.2d 649 (1970).
- 2) placing the responsibility on the trial court as suggested by the ABA Standards Relating to Trial by Jury, sec.1.2(b) (1968). Commentary to that section [which is sec. 15-1.2(b) of the 2nd edition, 1980] was cited with approval in State v. Cloud, *supra*:

It may well be that a defendant who has been informed by counsel or is otherwise aware of the right to trial by jury may intelligently waive that right without further admonishment from the court. However, consistent with the approach which has been taken with regard to entry of a plea of guilty, the better practice is for a court to advise a defendant of the right to jury trial before accepting a waiver. As one court has observed: "'[T]he serious and weighty responsibility' of determining whether [the defendant] wants to waive a constitutional right requires that he be brought before the court, advised of that right, and then permitted to make 'an intelligent and competent waiver.'" When the record or a written waiver establishes that a defendant was specifically advised that he or she could be tried by a jury, a subsequent attack on the waiver by the defendant is not likely to prevail.

3 Standards for Criminal Justice, sec. 15-1.2(b) commentary at 15.24 (2d ed. 1980), cited at 133 Wis.2d 58, 62.

The requirement that the defendant personally waive the right to a jury trial was reemphasized in State v. Livingston, 159 Wis.2d 561, 464 N.W.2d 839 (1991):

... we hold that any waiver of the defendant's right to trial by jury must be made by an affirmative act of the defendant himself. The defendant must act personally; he and only he has the power and authority to waive his right to a jury trial, and that power and authority is legally effective only by virtue of an affirmative act by him. Neither counsel nor the court nor any other entity can act in any way or to any degree so as to waive on the defendant's behalf his right to trial by jury. The affirmative act by the defendant, in order to constitute a personal waiver, must be such as to comply with at least one of the specific means of effecting a waiver provided in sec. 972.02(1), and the court and the state must consent in order for a waiver to occur in accordance with the statute. The record must clearly demonstrate the defendant's personal waiver; the personal waiver may not be inferred or presumed. All of these concerns reflect the fact that the ultimate question is what the defendant wants a court trial or a jury trial; it is his decision, no matter what advice he has received. If the defendant waives the jury "in writing" under the statute when accepting the written waiver, the judge still should question the defendant as to the voluntariness and understanding of his action.

159 Wis.2d 561, 569-70.

The questions suggested here assume that the court will conduct the inquiry. While the recent jury trial waiver cases seem to assume that the court will do so, there appears to be no prohibition against having the prosecutor or defense counsel take the responsibility. This was noted by the Wisconsin Supreme Court in the Livingston case, supra:

... we would add that defense counsel has a corresponding responsibility to ensure that the record of jury waiver is developed and failure to meet this responsibility can sometimes be considered inadequate representation by counsel. We also consider that in accordance with sec. 972.02(1), Stats., the district attorney bears a professional responsibility to develop an adequate record of the defendant's personal waiver of the jury.

159 Wis.2d 561, 570-71.

5. This question is based on the statement recommended in SM-32, Accepting a Plea of Guilty. It is intended to comply with the requirement imposed in State v. Resio, 148 Wis.2d 687, 436 N.W.2d 603 (1989). The court held:

Although we have determined that knowledge of the unanimity requirement is not constitutionally required for a valid jury waiver, as a matter of judicial administration pursuant to our powers under Art. VII sec. 3 of the Wisconsin Constitution, we direct that, from the date of the mandate of this decision, a circuit court in a criminal case must advise

the defendant that the court cannot accept a jury verdict that is not agreed to by each member of the jury.

148 Wis.2d 687, 696-97.

6. Cases are collected at Annotation: Validity and Efficacy of Accused's Waiver of Unanimous Verdict, 97 A.L.R.3d 1253.