is held without a jury is unfair,[55] a defendant may waive the right and go to trial before a judge alone.[56]

The Attributes and Function of the Jury.—It was previously the Court's position that the right to a jury trial meant "a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted."[57] It had therefore been held that this included trial by a jury of 12 persons[58] who must reach a unanimous verdict[59] and that the jury trial must be held during the first court proceeding and not *de novo* at the first appellate stage.[60] However, as it extended the guarantee to the states, the Court indicated that at least some of these standards were open to re-examination,[61] and in subsequent cases it has done so. In *Williams v. Florida*,[62] the Court held that the

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[55] 391 U.S. at 159. Thus, state trials conducted before *Duncan* was decided were held to be valid still. DeStefano v. Woods, 392 U.S. 631 (1968).

[56] Patton v. United States, 281 U.S. 276 (1930). As with other waivers, this one must be by the express and intelligent consent of the defendant. A waiver of jury trial must also be with the consent of the prosecution and the sanction of the court. A refusal by either the prosecution or the court to defendant's request for consent to waive denies him no right since he then gets what the Constitution guarantees, a jury trial. Singer v. United States, 380 U.S. 24 (1965). It may be a violation of defendant's rights to structure the trial process so as effectively to encourage him "needlessly" to waive or to penalize the decision to go to the jury, but the standards here are unclear. *Compare* United States v. Jackson, 390 U.S. 570 (1968), *with* Brady v. United States, 397 U.S. 742 (1970), *and* McMann v. Richardson, 397 U.S. 759 (1970), and *see also* State v. Funicello, 60 N.J. 60, 286 A.2d 55 (1971), *cert. denied*, 408 U.S. 942 (1972).

[57] Patton v. United States, 281 U.S. 276, 288 (1930).

[58] Thompson v. Utah, 170 U.S. 343 (1898). Dicta in other cases was to the same effect. Maxwell v. Dow, 176 U.S. 581, 586 (1900); Rassmussen v. United States, 197 U.S. 516, 519 (1905); Patton v. United States, 281 U.S. 276, 288 (1930).

[59] Andres v. United States, 333 U.S. 740 (1948). *See* dicta in Maxwell v. Dow, 176 U.S. 581, 586 (1900); Patton v. United States, 281 U.S. 276, 288 (1930).

[60] Callan v. Wilson, 127 U.S. 540 (1888). Preserving *Callan*, as being based on Article II, § 2, as well as on the Sixth Amendment and being based on a more burdensome procedure, the Court in Ludwig v. Massachusetts, 427 U.S. 618 (1976), approved a state two-tier system under which persons accused of certain crimes must be tried in the first instance in the lower tier without a jury and if convicted may appeal to the second tier for a trial de novo by jury. Applying a due process standard, the Court, in an opinion by Justice Blackmun, found that neither the imposition of additional financial costs upon a defendant, nor the imposition of increased psychological and physical hardships of two trials, nor the potential of a harsher sentence on the second trial impermissibly burdened the right to a jury trial. Justices Stevens, Brennan, Stewart, and Marshall dissented. Id. at 632. *See also* North v. Russell, 427 U.S. 328 (1976).

[61] Duncan v. Louisiana, 391 U.S. 145, 158 n.30 (1968); DeStefano v. Woods, 392 U.S. 631, 632–33 (1968).

[62] 399 U.S. 78 (1970). Justice Marshall would have required juries of 12 in both federal and state courts, id. at 116, while Justice Harlan contended that the Sixth Amendment required juries of 12, although his view of the due process standard was that the requirement was not imposed on the states. Id. at 117.