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# A View by the Judiciary

The Honorable J. Reuel Armstrong

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# THE WYOMING RULES OF CRIMINAL PROCEDURE A VIEW BY THE JUDICIARY

*The Honorable J. Reuel Armstrong**

WYOMING Rules of Criminal Procedure were adopted by our Supreme Court by Order dated November 21, 1968, to become effective sixty days after publication. Since that time much unpolluted water has gone under the bridge while the Bench and Bar have gingerly acquainted themselves with their provisions. Change in procedures has never been our long suit, but in the main, these rules have been well received by lawyers, law enforcement officers and the judiciary.

As expounded in Rule 2, the purpose of the rules is to provide for the just determination of every criminal proceeding. They are to be construed to secure simplicity in procedure, fairness in administration, and eliminate unjustifiable expense and delay. With time, patience and proper use, these reasonable aims will be accomplished. Of course, we have the disadvantage of inheriting a great body of law from the Federal Courts where the substantial portion of the rules have been used since 1946.

It should also be said that the impact of the decision of the United States Supreme Court in the last decade in the criminal arena played an important part in selecting federal rules over those from a jurisprudence of another state. Es-

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pecially is this so since the United States Supreme Court has now held that the first eight amendments to the United States Constitution apply to the individual states through the process of absorbtion and incorporation under the due process clause of the Fourteenth Amendment. We believe the federal rules come closer to complying with the memorable words of the Bill of Rights than do the rules of any other jurisdiction.

In an effort to update the rules, even from the 1966 extensive federal amendments to their rules, we have made a few additions which will not be found in the federal counterparts. For example, we have added a ground for the issuance of search warrants. This will be found in Rule 40(b)(4) and permits the seizure of things which constitute evidence tending to show a crime has been committed, or that a particular person has committed a crime. The Supreme Court in *Warden v. Hayden,*[1] said in effect that the Fourth Amendment granting "the right of people to be secure in their persons, houses, papers and effects" does not support a distinction between instrumentalities, fruits of crime or contraband and mere evidence. "Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit or contraband."[2]

We have departed from the federal rules by adding Rule 18(c) wherein it is provided that after a witness has testified for the state, the defendant may move, and the court order, the state to produce any written statement of that witness or a substantially verbatim oral recital recorded contemporaneously with the making of such oral statement. This addition originated in 18 U.S.C. 3500 and was upheld in *Jencks v. U.S.,*[3] as a proper tool for impeachment purposes of statements made by government witnesses to government agents. Selective summaries or those resting on memory of the agent are not within the definition of producible statements.[4] However, four of the justices concurring in the result of the majority asserted that other statements outside the

1. 387 U.S. 294 (1967).
2. Wiggins v. State, 28 Wyo. 480, 206 P. 373, 376 (1922).
3. 353 U.S. 65 (1957).
4. Palermo v. United States, 360 U.S. 343 (1959).

coverage of the definition of a statement might be ordered to be produced when fair administration of justice would demand. The views of the four justices were approved by the majority in *Campbell v. United States.*[5]

A further modification of the federal rules appears in Rule 41 on criminal contempt. Subsection (c) proscribes a sentence in excess of six months for contempt unless the Defendant has been afforded the right to a jury trial. It is believed this change comports with the holding in *Bloom v. Illinois,*[6] in which the Court said: "It is old law that the guarantees of a jury trial found in Article III and the Sixth Amendment do not apply to petty offenses." However, . . . when serious punishment for contempt is contemplated, rejecting a demand for jury trial cannot be squared with the Constitution or justified by considerations of efficiency or the desirability of vindicating the authority of the Court."[7]

There are a few rules which are so foreign to our former practice that I should be remiss if I did not mention them. For example, Rule 24 permits the waiver of jury trials by a defendant with the approval of the court and the consent of the state. The waiver must be in writing and signed by the defendant and his counsel as well as by the prosecutor and the court.[8]

Pretrial conferences in criminal cases were unheard of in our practice and did not appear in the federal rules until 1966, although many authors had recommended them for years. In some cases a conference may be very useful. For example, it may save the time required to examine the statement of a witness which is produced under Rule 18(c) if the parties agree. It may reduce friction occasioned by discovery under Rule 18; it could provide for disclosure under *Brady v. Maryland.*[9] Pretrial conferences can be suggested

5. 373 U.S. 487 (1963).
6. 391 U.S. 194, 208 (1968).
7. *See also* Weiss v. State of Wyoming, 455 P.2d 904 (Wyo. 1969) which held that a contemnor who was fined $1000 and sentenced to ninety days in jail was not entitled to a jury trial.
8. Wyoming v. Court of Sheridan County, 74 Wyo. 48, 283 P.2d 1023 (1955); Sullivan v. United States, 348 U.S. 170 (1954); Singer v. United States, 380 U.S. 24 (1965).
9. 373 U.S. 83 (1963).

by the state, the defendant or the court but the defendant's consent is a prerequisite in any case. They should be held in open court with a reporter present. The defendant should also be present unless he has waived his right in writing, and, of course, as provided in the rule, no admissions can be used unless signed by the Defendant and his counsel. A practical guide for such conferences is found in *A Report on Recommended Procedure in Criminal Pretrials.*[10]

Discovery under Rule 18 has probably drawn more fire from the prosecuting attorneys than any other area embraced in the rules. Their objections, of course, are predicated on their reluctance to disclose any more than the necessary prima facie case on preliminary hearing.

I have a high regard for our law enforcement officers and I am convinced that they make an honest and studied attempt to arrest the right people. Their investigatory work done even before arrests will produce solid evidence. Why, then, would the disclosure by the prosecutor of the details of the crime hinder either the prosecution or the officers or jeopardize the outcome of the case? If it is not a strong case, why should they be able to hide their weaknesses behind secrecy?

It is the opinion of most writers that prosecutors are overly fearful of incursions of perjurors and suborners and of bribery and intimidation of witnesses.

Some of the proponents of discovery assert that pleas of guilty result more frequently when the defense counsel knows the details of the state's case. Whether there has been any significant change in the number of guilty pleas is questionable because the state has usually been willing to disclose its case before trial, hence no statistics can be relied upon. This is not, however, the proper measure of the value of discovery.

There is a line of cases which should give the diligent prosecutor caveat and cause to pause in refusing to reveal exculpatory information to the defendant, namely, the

10. 37 F.R.D. 95 (1953).

*Brady*[11] case, supra, and *Giles v. Maryland,*[12] which concerned the use of perjured testimony by the prosecution which was no disclosed to the Defendant. A conviction was reversed in a Fourth Circuit case, *Ingram v. Peyton,*[13] for failure of the prosecution to disclose that the complaining witness had previously been convicted of perjury. A conviction was also reversed in the Fifth Circuit in *Ashley v. Texas,*[14] where the state failed to disclose that one of several examining psychiatrists had declared that the defendant was incompetent.

Some of these last quoted cases were decided even without reference to discovery rules. If prosecutors are obliged to disclose this type of information without discovery they should have no objection to disclosure under the rule. There is also a case that says that the evidence need not be admissible or at least that the defense counsel should be advised of the facts so that he could make up his mind as to admissibility.

Two-way discovery has little chance of success unless the courts are firm in the exercise of sanctions proposed in Rule 18(h). When there is continuing disclosure the state benefits more than the defense counsel if the state has exercised its right to discovery from the defense because many times the defense improves its case by later investigation.

The objections on behalf of the defendant to the discovery rule are based upon the possible violation of the privilege against self-incrimination.[15] The argument contra is that the defendant need not make his motion for discovery, but if he does he knows that the state may obtain the same order against him. This is tantamount to a waiver of his privilege under the Fifth Amendment.

There are many other places where the Fifth Amendment offers no protection against the use of possible incriminating evidence obtained from the defendant himself, for example,

11. Brody v. Maryland, *supra* note 9.
12. 386 U.S. 66 (1967).
13. 367 F.2d 933 (4th Cir. 1966).
14. 319 F.2d 80 (5th Cir. 1963).
15. Objections stated by Mr. Justice Douglas in 39 F.R.D. 69, 276 (1966).

it has been held that fingerprinting, photographing, measurements, blood tests (but not stomach pumping), handwriting exemplars, speaking, standing, assuming a stance, walking, making a particular gesture and line-up identifications are not violations of the Fifth Amendment. In other words, the distinction is that the privilege is a bar against compelling communication or testimony and not a compulsion which makes use of real or physical evidence.[16]

Publication of the seminar held in the Law School at the University of Wyoming gives the reader valuable assistance in the application of all of the rules and for this reason I am constrained not to overlap that publication.

In conclusion, for the skeptics, as well as the practitioner, I quote:[17] No system of procedure, however carefully conceived, can be regarded as a final word. Social and economic conditions change, scholarship produces new insights, and experience demonstrates instances where the prescribed procedure is incomplete or deficient. For all these reasons, amendments from time to time of any set of procedural rules is a necessity.

16. For a full discussion on discovery *see* 44 F.R.D. 481 (1968).
17. 1 FEDERAL PRACTICE AND PROCEDURE § 4, at 14 (1969).