Land & Water Law Review

Volume 20 | Issue 2 Article 16

1985

Criminal Procedure - The State's Right to Appeal in Criminal Cases - State v. Heiner

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Criminal Procedure—The State's Right to Appeal in Criminal Cases. *State v. Heiner*, 683 P.2d 629 (Wyo. 1984).

Fifteen days after his home and possessions were destroyed by fire, Deon Heiner was charged with arson[1] and arson with intent to defraud his insurer.[2] A preliminary hearing was held in the Justice of the Peace Court of Lincoln County where sufficient facts were found to send the case to the district court for trial.[3] The defendant sought to preclude the state from using certain insurance inventory sheets in its prosecution of the case and filed a motion to suppress evidence at the pretrial conference.[4] The district court granted the defendant's motion.[5]

The state then filed a petition in the Wyoming Supreme Court for a writ of review, or writ of prohibition, or writ of certiorari, or writ of mandamus.[6] The supreme court granted certiorari holding that the state was entitled to review because questions of constitutional magnitude were presented concerning the propriety of the district court's order.[7] After reviewing the case the supreme court reversed the district court's order.[8]

The supreme court's decision to grant certiorari raises the issue of whether the court intended to contravene Wyoming's long-standing reliance on the "rule" against appeals by the state in criminal cases.[9] If so, the court has acted beyond its power in granting an appeal to the state without legislative authority. If the state is to be allowed to appeal adverse rulings in criminal cases, the supreme court's jurisdiction must come from the legislature.

Background

As recently as 1983, the Wyoming Supreme Court recognized the "rule" that a bill of exceptions is the only way by which the state can challenge and have reviewed any adverse ruling of a district court in a criminal prosecution.[10] The reason for this rule is that the Wyoming Constitution limits the supreme court's appellate jurisdiction by the legislature and the bill of exceptions is the only procedure enacted by the legislature authorizing an appeal by the state in a criminal prosecution.[11] Under the

1. Wyo. Stat. § 6-7-101 (1977) (amended 1984 and recodified at Wyo. Stat. § 6-3-101).
2. *Id.* § 6-7-105 (1977) (amended 1984 and recodified at Wyo. Stat. § 6-3-102).
3. State v. Heiner, 683 P.2d 629, 630 (Wyo. 1984).
4. *Id.* at 631.
5. *Id.*
6. *Id.*
7. *Id.* at 633.
8. *Id.* at 637.
9. The court's decision was not unanimous. Chief Justice Rooney, Justice Thomas and Justice Brown voted to grant certiorari with Justice Rose opposed. Justice Cardine was not a member of the court when the vote on certiorari in *Heiner* took place. State v. Heiner, 683 P.2d 629 (Wyo. 1984).
10. State v. Heberling, 553 P.2d 1043 n.1 (Wyo. 1983).
11. Wyo. Stat. §§ 7-12-101 to -105 (1977).

bill of exceptions procedure, an appeal is allowed after the trial has been completed but it in no way affects the outcome of the trial. It only serves as a guide for similar cases on points of law in the future and thus has purely prospective effect.[12]

The supreme court's "rule" that the bill of exceptions is the only way by which the state could have an adverse criminal proceeding reviewed was based on solid constitutional interpretation. For instance, in *Mau v. Stoner,* an opinion in which Chief Justice Potter, President of the Wyoming Constitutional Convention, concurred, the supreme court stated:

> It is well settled that in the absence of a direct constitutional requirement, the right of appeal does not exist unless expressly conferred by statute . . . Unless it is guarantied [sic] as a matter of right in the Constitution, the Legislature has power to pass laws not only regulating the mode of proceeding but limiting the cases in which the right may be exercised. The remedy of appeal was unknown to the English common law, hence it may be said that in both England and the United States the whole matter of appellate review is regulated entirely by statute law.[13]

Additionally, a commentator who recently reviewed this area of Wyoming law concluded that "the state cannot appeal until the legislature confers that appellate jurisdiction."[14] Therefore, until the supreme court's decision in *State v. Heiner,* the legislature controlled the supreme court's appellate jurisdiction.

There is another constitutional limitation on the supreme court's appellate jurisdiction to hear appeals from the state in criminal cases. Article 1, section 11 of the Wyoming Constitution provides against double jeopardy for one accused of an offense against the state.[15] Double jeopardy occurs any time an individual is tried for the same offense twice. "Jeopardy" attaches once the actual trial has commenced. Thus, an appeal prior to the commencement of a trial will affect that trial while an appeal after jeopardy has attached cannot reverse any judgment in favor of the defendant. The problem that arises is exactly when the trial begins for purposes of jeopardy attaching. Some courts have avoided determining whether pre-trial rulings, for example, are part of the trial by granting a review by certiorari rather than an appeal. In this way the courts deny any double jeopardy questions under the theory that somehow the writ of certiorari is "different" from an appeal.[16]

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12. *Id.* § 7-12-105 (1977).

13. 14 Wyo. 183, 185, 83 P. 218, 219 (1905).

14. Gallivan, *Supreme Court Jurisdiction and the Wyoming Constitution: Justice v. Judicial Restraint,* 20 LAND & WATER L. REV. 159, 175 (1985).

15. "No person shall be compelled to testify against himself in a criminal case, nor shall any person be twice put in jeopardy for the same offense. If a jury disagree, or if the judgment be arrested after a verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy." WYO. CONST. art. 1, § 11.

16. *See, e.g.,* State v. Heiner, 683 P.2d 629 (Wyo. 1984); State v. Rees, 258 Iowa 813, 139 N.W.2d 406 (1966).

Certiorari

The writ of certiorari is issued by a superior court to review the acts of inferior judicial as well as administrative officers to determine whether they were acting within the scope of their authority.[17] Specifically, certiorari lies whenever an inferior court or tribunal has exceeded its jurisdiction or has proceeded illegally *and* no appeal is allowed or other mode provided for reviewing its proceedings.[18]

Examples of cases where certiorari has been invoked because an appeal was not available include the following situations: where an interlocutory appeal would not lie to review a lower court order in a common law action,[19] where no right of appeal existed because an action was in the nature of a special proceeding,[20] and where no appeal could be taken from the action of a juvenile court.[21] Attempts to define the scope of certiorari have not been very successful, however, because of the broad language used by the courts in connection with the writ.[22]

The Wyoming Constitution grants the supreme court the power to issue writs of certiorari.[23] Because there is no statute defining the scope of the court's certiorari power, the court has been forced to rely on the common law when invoking the writ.[24]

Certiorari as a Bill of Exceptions Substitute in Wyoming

The Wyoming cases where certiorari has been granted are not legion.[25] In the first case bringing certiorari before the court, *City of Sheridan v. Cadle*,[26] the court reiterated the uncontroverted rule that certiorari tests jurisdiction.[27] Although a number of Wyoming Supreme Court cases since *Cadle* have dealt with certiorari, the majority of these have done so only peripherally or as prologues to denying the writ.[28] In the last two years, however, the court has granted certiorari in *State v. Heiner* and *City of Laramie v. Mengel*.[29]

In *City of Laramie*, the supreme court reviewed a municipal court's ruling that a state statute was unconstitutional. This was essentially the

17. 14 AM. JUR. 2D *Certiorari* § 15-28 (1964).
18. *Id.* § 6.
19. Gettles v. Commercial Bank at Winter Park, 276 So. 2d 837 (Fla. Dist Ct. App. 1973).
20. *In re* Blatt, 41 N.M. 269, 67 P.2d 293 (1937).
21. State *ex rel.* Jones v. West, 139 Tenn. 522, 201 S.W. 743 (1918).
22. *E.g.*, "It is the inadequacy—not the mere absence—of all other legal remedies, and *the danger of a failure of justice* without the writ, that must usually determine the propriety of certiorari." 14 AM. JUR. 2D *Certiorari* § 11 (1964).
23. WYO. CONST. art. 5, § 3.
24. City of Sheridan v. Cadle, 24 Wyo. 293, 299, 157 P. 892, 894 (1916).
25. State v. Heiner, 683 P.2d 629 (Wyo. 1984); City of Laramie v. Mengel, 671 P.2d 340 (Wyo. 1983); City of Sheridan v. Cadle, 24 Wyo. 293, 157 P. 892 (1916).
26. 24 Wyo. 293, 157 P. 892 (1916).
27. *Id.* at 299, 157 P. at 895.
28. *See, e.g.*, State *ex rel.* Pearson v. Hansen, 409 P.2d 769 (Wyo. 1966); Call v. Town of Afton, 73 Wyo. 271, 278 P.2d 270 (1954); State *ex rel.* Loomis v. Dahlem, 37 Wyo. 498, 263 P. 708 (1929).
29. 671 P.2d 340 (Wyo. 1983).

same type of situation in which the supreme court had allowed the writ in *City of Sheridan v. Cadle.*[30] In both cases, the prosecuting city did not have access to the bill of exceptions procedure, which is only available to the state under the Wyoming statutes. Because the prosecuting city had no other means of having an adverse ruling reviewed, granting the writ of certiorari was appropriate. Moreover, the court's decision would only have prospective effect just as would the bill of exceptions. In both *City of Sheridan*[31] and *City of Laramie,*[32] therefore, the writ of certiorari became a substitute for the bill of exceptions. All the justices agreed that this was a proper use for the writ of certiorari.

In *State v. Heiner,* a divided court issued the writ of certiorari to review a *pre-trial ruling* in a criminal case where the *state* was a party.[33] The prosecutor in *Heiner,* unlike the prosecutors in *City of Laramie* and *Cadle,* had access to the bill of exceptions. The court's holding in *Heiner* represents a departure from the limited role that the writ of certiorari had traditionally played in Wyoming jurisprudence.

Certiorari as a Means of Appealing Pre-trial Rulings Adverse to the State

The departure that occurred in *Heiner*[34] had its genesis in a 1983 case which came to the supreme court on a bill of exceptions. *State v. Faltynowicz* involved a district court's dismissal of a criminal complaint because the complainant omitted the date.[35] Justice Brown wrote the majority opinion which disapproved of the district court's frivolous dismissal. Justice Raper took the opportunity to write a specially concurring opinion discussing criminal procedure generally and state appeals specifically. With Chief Justice Rooney concurring, Justice Raper stated:

> It may have been partly through past decisions of this court that there has developed a belief—even a rule—that the State may never appeal in a criminal case, regardless of the point in the proceedings at which the alleged error against the State occurs. . . . It was dicta, pure and simple and has been blindly followed ever since and demonstrates how dicta can become settled law, though erroneous."[36]

Justice Raper believed that the bill of exceptions procedure was inadequate because it only provided prospective relief for the state. For this reason, he thought that the state should not be precluded from appealing pre-trial rulings.[37]

30. 24 Wyo. 293, 157 P. 892 (1916).
31. *Id.*
32. 671 P.2d 340 (Wyo. 1983).
33. 683 P.2d 629 (Wyo. 1984).
34. *Id.*
35. 660 P.2d 368 (Wyo. 1983).
36. *Id.* at 372 (Raper, J., specially concurring).
37. "It is shocking to me that the State should be foreclosed from appealing the dismissal of indictments or informations which may have been improvidently set aside. I am also concerned about the instances where a trial judge may have, in a pretrial proceeding, suppressed evidence necessary to the State in proceeding with the prosecution." State v. Faltynowicz, 660 P.2d 368, 376 (Wyo. 1983).

The possibility of using certiorari to review a ruling in a criminal case was raised seven months after *Faltynowicz* when Justice Thomas suggested its propriety in *Wright v. State,* although the writ was neither requested nor granted.[38] Justice Thomas agreed with Justice Raper and saw the writ of certiorari as a mechanism by which the state could reverse erroneous pre-trial rulings and benefit from the reversal in that particular case.[39]

Justice Rose opposed expanding the state's right to appeal in criminal cases in both *Faltynowicz* and *Wright.* In *Faltynowicz,* he responded to Justice Raper's arguments in a specially concurring opinion: "So far as I am concerned, bills of exception remain the only avenue along which the state may travel to find relief from where the decision in the district court is adverse in a criminal prosecution."[40] In *Wright,* Justice Rose issued a lengthy dissent attacking Justice Thomas' suggestion that certiorari could be used to review a ruling in a criminal case. Although Justice Rose stated that common law certiorari will only test jurisdiction and thus is narrow in scope, he went on to state: "This court does not possess the authority to review the sentence by certiorari, since an exclusive, adequate and complete appellate review procedure is available for that purpose, the utilization of which would not result in a failure of justice."[41]

Until 1984, the Wyoming Supreme Court had granted certiorari only twice and both times because the prosecuting cities did not have access to the bill of exceptions procedure. Like the bill of exceptions procedure, the effect in both cases was purely prospective. In 1983, Justice Raper suggested in *Faltynowicz,*[42] that there might be instances where the state could appeal a pre-trial ruling and Justice Thomas suggested in *Wright*[43] that certiorari might be the tool the state could use to receive such review. Both opinions were specially concurring opinions which became law when *State v. Heiner* was decided in 1984.[44]

THE PRINCIPAL CASE

In *State v. Heiner,* the court was divided on the propriety of certiorari. Justices Thomas and Brown and Chief Justice Rooney formed the majority which granted certiorari while Justice Rose dissented. Justice Car-

38. 670 P.2d 1090 (Wyo. 1983) (Thomas, J., specially concurring).
39. *Id.*
40. *Id.* at 377 (Rose, J., specially concurring).
41. 670 P.2d 1090, 1109 (Wyo. 1983) (Rose, J., dissenting).
Although many authorities state that common law certiorari will only test jurisdiction, the history of the writ does not bear this out. Certiorari is a writ of ancient English origin and although it was used to test jurisdiction at its inception its scope expanded rapidly to become a virtual master key to the royal court. In the fifteenth and sixteenth centuries statutory limitations were enacted to check the increasing scope of the writ. *See* Hanus, *Certiorari and Policy Making in English History,* 12 AMERICAN JOURNAL OF LEGAL HISTORY 63 (1968).
42. 660 P.2d 368 (Wyo. 1983) (Raper, J., specially concurring).
43. 670 P.2d 1090 (Wyo. 1983) (Thomas, J., specially concurring).
44. 683 P.2d 629 (Wyo. 1984).

dine also indicated that he would have voted against granting the writ had he been a member of the court at the time.[45]

Chief Justice Rooney and Justice Rose were the primary antagonists on the issue of whether certiorari was properly granted.[46] In a lengthy specially concurring opinion, Chief Justice Rooney argued that certiorari was appropriate while Justice Rose disagreed in an equally protracted dissent.[47] Justice Thomas dealt with certiorari briefly in the majority opinion simply recognizing the writ as proper for review of a pre-trial ruling. In reaching this conclusion he relied on *City of Laramie v. Mengel* as authority.[48]

The Argument for Certiorari in Heiner

First, Chief Justice Rooney agreed with Justice Thomas that *City of Laramie v. Mengel* was authority for granting certiorari in *Heiner.*[49] Second, the Chief Justice contended that the court had made a constitutionally permissible use of certiorari.

Chief Justice Rooney's third and primary argument centered on "justice" as the most compelling reason for granting certiorari in *Heiner.*[50] In arguing that the trial court's suppression of evidence was properly reviewed, the Chief Justice wrote: "it should . . . be kept in mind that justice is a two-way street. A defendant in a criminal case is absolutely entitled to justice. So also are the people of the state entitled to justice in connection with that case."[51] The force of Chief Justice Rooney's argument is undeniable. In arguing that a pre-trial ruling may very well foreclose conviction because the prosecution is denied the use of vital evidence, the Chief Justice wrote:

> Granting the motion would sabotage the people's case. The prosecution could not succeed, and the case would have to be dismissed. Under the dissent, such would leave the defendant his freedom without any determination of his guilt or innocence. Conversely, if the order were subject to appeal, directly or by certiorari, and the trial court were found to have erred, the case would be remanded and the trial would proceed with, perhaps a dangerous rapist being removed from a position of hurting others.[52]

The Argument Against Granting Certiorari in Heiner

Justice Rose was opposed to all three of the Chief Justice's foregoing contentions.[53] Justice Rose pointed out that *City of Laramie* was not con-

45. *Id.* at 645 (Cardine, J., concurring in part and dissenting in part).
46. *Heiner,* 683 P.2d 629 (Wyo. 1984).
47. *Id.*
48. *Id.* at 632.
49. *Id.* at 645 (Rooney, C. J., specially concurring).
50. *Id.* at 639.
51. *Id.* at 640.
52. *Id.* at 639.
53. *Id.* (Rose, J., dissenting).

trolling because certiorari had been granted in that case on the grounds that a city could not avail itself of the bill of exceptions procedure.[54] Furthermore, in *City of Laramie,* the case had been concluded giving the supreme court's decision prospective effect only—just as in the bill of exceptions procedure.[55] Because the state had access to the bill of exceptions in *Heiner,* certiorari was inappropriate.

Justice Rose believed that the court's use of certiorari was unconstitutional. He construed article 5, section 3 of the Wyoming Constitution as being dependent upon article 5, section 2.[56] Justice Rose saw the supreme court's power to grant writs of certiorari under section 3 as dependent upon the language in section 2 that "rules and regulations as may be prescribed by law"[57] control appellate jurisdiction.[58] Thus, Justice Rose argued that certiorari was precluded as an avenue of appeal because the bill of exceptions was the sole method of review granted to the state by the legislature.[59]

Chief Justice Rooney on the other hand distinguished the two sections of article 5 by pointing out that section 2 was entitled "appellate jurisdiction" while section 3 was entitled "original jurisdiction."[60] Section 3, however, discusses the court's power to issue writs of certiorari as part of the court's *appellate* and *revisory* jurisdiction. Despite this, because section 3 is labelled *original jurisdiction,* Chief Justice Rooney did not construe the "rules and regulations" under section 2 as limiting the court's *original* jurisdiction under section 3.[61]

Addressing Chief Justice Rooney's "justice" argument, Justice Rose felt that predictability is a prerequisite for justice. Given the common law rule against state appeals and the lack of statutory law providing for review of pretrial rulings in criminal cases by certiorari, Justice Rose saw an injustice in the defendant being deprived of a speedy trial by what he

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54. *Id.* at 653.

55. *Id.* at 654.

56. *Id.* at 647. WYO. CONST. art. 5, § 2 reads: "The Supreme Court shall have general appellate jurisdiction, co-extensive with the state, in both civil and criminal causes, and shall have general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law."

WYO. CONST. art. 5, § 3 reads in part: "The Supreme Court shall have original jurisdiction in quo warranto and mandamus as to all state officers, and in habeas corpus. The Supreme Court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction".

57. WYO. CONST. art. 5, § 2.

58. *Heiner,* 683 P.2d 629, 647 (Wyo. 1984) (Rose, J., dissenting).

59. *Id.* For an in-depth analysis of the constitutional argument supporting Justice Rose's viewpoint see Gallivan, *Supreme Court Jurisdiction and the Wyoming Constitution: Justice v. Judicial Restraint,* 20 LAND & WATER L. REV. 159, 172-75 (1985). The author states: "The constitution and the case law is thus clear that section 2 of article 5 is not a self-executing grant of jurisdiction, and that the court's appellate jurisdiction is defined by the legislature."

60. State v. Heiner, 683 P.2d 629, 641 (Wyo. 1984) (Rooney, C. J., specially concurring).

61. *Id.* This argument has considerable force except for the fact that Chief Justice Rooney concurred with Justice Raper approximately one year earlier in *State v. Faltynowicz* when Justice Raper wrote: "The appellate jurisdiction of this court is derived from section 2, Article 5, Wyoming Constitution *and* Section 3, Art. 5, Wyoming Constitution. . . ." 660 P.2d 368, 374 (Wyo. 1983) (Raper, J., specially concurring) (emphasis added).

felt was piecemeal litigation.[62] By granting certiorari the court had allowed the state to achieve the equivalent of an appeal even though there was no legislative enactment or established common law rule warning the defendant that such an appeal could be possible. In short, Justice Rose argued that the difference between certiorari and appeal in *Heiner* was purely semantical and the sensed effect on the litigants was the same, whatever its appellation.[63]

ANALYSIS

The Need for Legislative Action

The problem raised by *State v. Heiner* and the supreme court's use of the writ of certiorari is one of balancing justice against the certainty of legal principles. The court's attempt at reaching "justice" appears to have been offset by an unconstitutional use of the writ. Chief Justice Rooney and Justice Rose, however, both had legitimate concerns in their opposing opinions.

The majority's reliance on *City of Laramie v. Mengel* as authority for granting certiorari in *Heiner* was correctly questioned by Justice Rose. *City of Laramie* was simply a case where the city was allowed to use certiorari in the same manner as the bill of exceptions that it could not use. Because the city had no other means of having the completed cases reviewed, the court granted certiorari in *City of Laramie* to overcome the legislature's oversight in not extending the bill of exceptions to cities as well as the state.[64] Additionally, because the case had already been disposed of and jeopardy had attached, certiorari operated exactly like the bill of exceptions in *City of Laramie*, because the supreme court's ruling on the writ had purely prospective effect. The same cannot be said for the writ's use in *Heiner*.

Likewise, Chief Justice Rooney's contention that article 5, section 3 of the Wyoming Constitution is not dependent on the "rules and regulations" under article 5, section 2 is suspect. Although section 3 is entitled "original jurisdiction," the section clearly discusses the court's power to issue writs of certiorari in connection with the court's "appellate and revisory jurisdiction." Under section 2, the court's appellate jurisdiction is controlled by the state legislature.[65]

Chief Justice Rooney's arguments pertaining to justice, however, raise valid questions as to how the state may avoid being erroneously hampered in its prosecution of a criminal case by a lower court's pre-trial ruling. For example, the evidence suppressed in *Heiner* was vital to the prosecution. Unless the trial court's ruling on the motion to suppress was reviewed

62. State v. Heiner, 683 P.2d 629, 639 (Wyo. 1984) (Rose, J., dissenting).

63. In June, 1984, the court again granted certiorari in a criminal case. State v. Sodergren, 686 P.2d 521 (Wyo. 1984). Although Justice Rose stated in a footnote that he recognized the granting of certiorari as the law of the state since *Heiner*, he again published a lengthy dissent reiterating his arguments from his *Heiner* dissent.

64. 671 P.2d 340 (Wyo. 1983).

65. *See supra* note 59.

before jeopardy attached, the state's case would have been severely undermined. But because double jeopardy had not attached, the suppression order was reviewed and the prosecution proceeded to use the evidence. On the other hand, as Justice Rose points out, the exigencies of justice do not warrant the use of the discretionary writ of certiorari in a manner suspiciously similar to an appeal. This use of the writ of certiorari does not insure the type of structure and form in the legal process that both defense counsel and prosecutors should be able to rely on in formulating their litigation strategy.

In order to guarantee that review by the supreme court is constitutional and to establish set criteria for the practicing bar, the legislature has an obligation to enact a statute which grants the state the right to appeal pre-trial rulings in criminal cases. Such a statute would promote effective prosecution by the state under concrete legislative authority because the state could appeal certain rulings before jeopardy had attached. Justice would be pursued in a manner that is within the cognizance of all the participants in a case. Equally, the requirements of the Wyoming Constitution's provisions for appellate jurisdiction would be satisfied.

Proposed Legislative Action

Legislation which creates a right of appeal in the state would not be novel. Unlike Wyoming, a number of other states have passed such legislation.[66] In fact, many state legislatures have done so in response to their state courts granting review of pre-trial rulings under the guise of certiorari.

For example, in *State v. Rees*[67] the Iowa Supreme Court faced the issue of certiorari being used in lieu of an appeal. The facts in *Rees* were almost identical to those in *State v. Heiner*. The state sought certiorari from a pre-trial ruling by the trial court which granted the defendant's motion to suppress evidence in an arson case. The Iowa Supreme Court granted certiorari stating that without review by way of certiorari the state "would be faced with a prosecution of the accused unjustly and irreparably deprived of material evidence."[68] Like the Wyoming Supreme Court, the Iowa court was forced to invoke the ancient but little understood writ of certiorari to reach what it felt was a just result. In 1976, the Iowa Legislature removed the need for this uncomfortable procedure by passing a statute that established a state appeal and explained when it would lie. Most notably, the statute provided for an appeal from orders suppressing evidence.[69]

66. *See, e.g.*, CAL. PENAL CODE § 1238 (West 1970); MICH. STAT. ANN. § 770.12 (West 1976); COLO. REV. STAT. § 16-12-102 (1973); FLA. STAT. ANN. § 924.07 (West 1983); ALASKA STAT. § 22.07.020 (1962); N.Y. CRIM. PROC. LAW § 450.20 (McKinney 1978); OR. REV. STAT. § 138.060 (1981); WIS. STAT. ANN. § 974.05 (West 1972).

67. 258 Iowa 813, 139 N.W.2d 406 (1966).

68. *Id.* at 815, 139 N.W.2d at 408.

69. IOWA CODE ANN. § 814.5 (West 1977).

Other states have held the line and have refused to employ the writ of certiorari without a statute specifically granting the state the right to appeal pre-trial rulings. Until 1981, when the Texas Legislature relaxed by amendment the Texas statute denying state appeals,[70] the Texas courts had construed the constitution[71] and statutes[72] to preclude state appeals. For example, when the state sought review by certiorari in *White v. State*,[73] the Texas Court of Criminal Appeals asserted that to try to distinguish review by certiorari and review by appeal "is to make a distinction without substance, since such review necessarily involves an attempt to persuade a superior court to correct the error of a lower court."[74]

Texas and Iowa are two of many states that have statutes directing when the state may appeal in criminal cases. Of these many states, Montana's statute is typical:

> (1) Except as otherwise specifically authorized, the state may not appeal in a criminal case.
>
> (2) The state may appeal from any court order or judgment the substantive effect of which results in:
>
> (a) dismissing a case;
>
> (b) modifying or changing a verdict as provided in 46-16-702(3)(c);
>
> (c) granting a new trial;
>
> (d) quashing an arrest or search warrant;
>
> (e) suppressing evidence;
>
> (f) suppressing a confession or admission; or
>
> (g) granting or denying a change of venue.[75]

Montana's statute delineates where a state appeal lies and provides a readily ascertainable procedure for review. In other words, review of a ruling does not occur on the authority of an historically flimsy writ.[76] Also, the Montana courts are not forced to distinguish between certiorari and appeal when there is really only a semantic distinction. For example, the Montana statute clearly gives the state the right to appeal an adverse ruling on a motion to suppress evidence. If a Wyoming statute similar to the Montana statute had been passed prior to *State v. Heiner*, the order suppressing evidence would have been reviewable. The Wyoming Supreme Court would have been saved from drawing its questionable distinction

70. TEX. CRIM. PROC. CODE ANN. Art. 44.01 (Vernon, 1964) as amended in 1981: "The State shall have no right of appeal in criminal actions. However, this statute shall not be construed to prevent the State from petitioning the Court of Criminal Appeals to review a decision of a court of appeals in a criminal case, on its own motion."

71. TEX. CONST. art. 5, § 26.

72. TEX. CRIM. PROC. CODE ANN. Art. 44.01 (Vernon 1964).

73. 543 S.W.2d 366 (Tex. Crim. App. 1976).

74. *Id.* at 368.

75. MONT. CODE. ANN. § 46-20-103 (1983).

76. *See supra* note 41.

between certiorari and appeal as well as from making its controversial constitutional interpretation.[77] The Wyoming Legislature should pass a statute, like the Montana statute, which grants state appeals in specified instances.

CONCLUSION

Given the common law's broad scope for the writ of certiorari,[78] the Wyoming Supreme Court's use of the writ in *State v. Heiner* was within the commmon law tradition. There is, however, serious doubt as to the writ's constitutionality under the Wyoming Constitution. To have pretrial rulings reviewed on such controversial authority detracts from the goal of the tribunal—that is, the meting out of justice.

In cases such as *City of Laramie v. Mengel*,[79] where the writ is used as a bill of exceptions substitute, its use would seem to be proper. In such a case the relief is purely prospective and thus the effect on the criminal defendant is non-existent. But in a case such as *Heiner*, the effect on the criminal defendant as well as the prosecution is substantial. Instead, certiorari operates in the same manner as an interlocutory appeal. It affects the outcome of the case as well as future cases.

Both the Wyoming Supreme Court and the Wyoming Legislature should recognize the need for solid authority in correcting the state's unnecessarily deficient posture in criminal prosecutions. Legislation creating the state's right to appeal pre-trial rulings, akin to statutes adopted in many other states, should be passed.[80] Until such legislation is forthcoming, the court should exercise restraint in granting appellate review under the pseudonym of writ of certiorari.

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77. *See supra* text accompanying notes 31-34.
78. *See supra* notes 17-22 and accompanying text.
79. 671 P.2d 340 (Wyo. 1983).
80. *See supra* notes 66, 69, and 75.