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Use of Former Testimony as Substantive Evidence in Criminal Cases

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— NOTES —

USE OF FORMER TESTIMONY AS SUBSTANTIVE EVIDENCE IN CRIMINAL CASES

Is the constitutional right of confrontation infringed by the use of testimony obtained at a former trial at which the accused was present and accorded full opportunity for cross-examination through counsel? In the recent Montana case of *State v. Zachmeier*[1] the defendant was convicted of murder. On appeal his conviction was reversed. He was recharged and again brought to trial. At the time of the second trial the prosecution was unable to locate a principal witness who had testified at the first trial. Over defendant's objection the trial court allowed the prosecution to read the absent witness' testimony to the jury sitting in the second trial. Defendant was convicted of manslaughter and on appeal the Supreme Court held that the former testimony was properly admitted.

The effect of this decision is to reaffirm the position taken by the Montana Court three years earlier in *Petition of Tooker*[2] in which Montana returned[3] to the majority view. This prevailing view is that the testimony of a witness given by deposition, at a preliminary hearing, or at a former trial is admissible under certain circumstances when the witness is unavailable at the later trial.[4]

In both civil and criminal cases former testimony has traditionally been admitted as an exception to the hearsay prohibition.[5] Since American constitutional provisions for confrontation[6] were adopted to guarantee the maintenance in criminal cases of the principle of the hearsay

[1].... Mont. ...., ... P.2d .... (decided April 28, 1969).

[2]147 Mont. 207, 410 P.2d 923 (1966).

[3]The first time this question was presented to the Montana court it denied admissibility. State v. Lee, 13 Mont. 248, 33 P. 690 (1893). The second time it allowed admissibility. State v. Byers, 16 Mont. 565, 41 P. 708 (1895). The third time it denied admissibility in two companion cases. State v. Storm, 127 Mont. 414, 265 P.2d 971 (1954); State v. Piveral, 127 Mont 427, 265 P.2d 969 (1954).

[4]McCORMICK ON EVIDENCE, section 230 (1st ed. 1954) (Hereinafter cited as McCormick, Evidence); 5 WIGMORE ON EVIDENCE, section 1398 (3rd ed. 1940) (Hereinafter cited as 5 Wigmore, Evidence).

[5]George v. Davie, 201 Ark. 270, 145 S.W.2d 729 (1941); Lone Star Gas Co. v. State, 137 Tex. 279, 153 S.W.2d 681 (1941); McCORMICK, EVIDENCE, section 230; McKELVEY ON EVIDENCE, section 227 (5th ed. 1944). A few courts and Wigmore view former testimony as a class of evidence where the requirements of the hearsay rule and the right of confrontation are complied with. Habig v. Bastian, 117 Fla. 864, 158 So. 508 (1935); 5 WIGMORE, EVIDENCE, section 1370.

[6]The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"
The Montana Constitution, Article III, sec. 16 provides: "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face."
R.C.M. 1947, sec. 94-4806 states: "In all criminal prosecutions the accused shall have the right — * * * (3) to meet the witnesses against him face to face."

rule, prior testimony has been admitted in criminal cases as an exception to the right of confrontation.[7]

There are two purposes to the process of confrontation. The primary purpose is to secure for the accused the opportunity of cross-examination. The secondary purpose is to provide the jury an opportunity to observe the demeanor of the witness on the stand in order to more accurately weigh his credibility.[8]

In recognition of the value of cross-examination in exposing falsehood, courts have been unanimous in holding that an opportunity for cross-examination is indispensable.[9] Prior testimony, therefore, is not admissible unless the accused had an opportunity to cross-examine the witness when the testimony was originally given. Moreover, the United States Supreme Court in *Pointer v. Texas*[10] held that the Sixth Amendment's guarantee of the right of confrontation is made applicable to the states by the Fourteenth Amendment and that this right is not satisfied unless there is adequate opportunity for cross-examination "through counsel."[11]

Montana, however, seems to be the only state in recent times to have held that the secondary purpose of providing demeanor evidence is also indispensable. In the 1954 cases of *State v. Storm*[13] and *State v. Piveral*[13] the Montana Supreme Court held that the traditional former testimony exception to American constitutional confrontation provisions does not exist with regard to the Montana constitution.

In each of these cases the defendant had been convicted and, on appeal, had been granted a new trial. In each case the principal witness for the prosecution was unavailable to appear at the second trial. The witness' testimony given at the first trial of each case was read to the jury at the second trial. In each case the defendant was convicted at the second trial, and on appeal each case was reversed. The grounds for reversal were identical: the Montana constitutional guarantee of a de-

[7]Cases are collected in the following annotations: 15 A.L.R. 495; 79 A.L.R. 1393; 122 A.L.R. 425; 159 A.L.R. 1240.

[8]5 WIGMORE, EVIDENCE, section 1395; MCCORMICK, EVIDENCE, section 231. McCormick adds a third purpose — to enable the accused to look the witness in the ye, thereby making a false accusation more difficult.

[9]*Supra,* note 7.

[10]380 U.S. 400 (1965); *accord,* Douglas v. Alabama, 380 U.S. 415 (1965). The facts in *Pointer* were that petitioner, unrepresented by counsel, failed to cross-examine the complaining witness who testified against him at a preliminary hearing before a state judge. He was later indicted for robbery. Before the trial, the complaining witness moved from the state. At the trial, a transcript of the witness' testimony at the hearing was introduced over the petitioner's objections that he was denied the right of confrontation. The court held that because the testimony had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine the witness, its introduction amounted to a denial of the right of confrontation guaranteed by the Sixth Amendment.

[11]*Id.* at 407.

[12]127 Mont. 414, 265 P.2d 971 (1954).

[13]127 Mont. 427, 265 P.2d 981 (1954).

fendant to be confronted by the witnesses against him was abridged by the use of such testimony.[14]

The Montana court in both opinions acknowledged the existence of the overwhelming majority view favoring admissibility.[15] But, the court saw those cases as holding that demeanor evidence is unimportant and stated that it could not agree.[16] The court pointed out that demeanor evidence is of added importance in Montana because of R.C.M. 1947, section 93-401-4.[17] That statute provides:

> A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

The court in *Storm* concluded that since the jury neither saw nor heard the witness Hay testify, "the defendant was denied the right to have the credibility of Hay, as a witness judged by the jury; and the jury had no way of determining his credibility as provided by R.C.M. 1947, sec. 93-401.4."[18]

In so concluding the majority ignored the fact that this section is written in the disjunctive and provides five types of evidence by which the jury can judge the credibility of a witness. Four of the five types of evidence were presented to the jury to consider in determining the witness' credibility. Only demeanor evidence was not available. The court itself relied on the other four types of evidence and weighed the credibility of the witness.[19] In rejecting the witness' testimony as untrustworthy the court usurped the jury's rule under 93-401-4 of being "the exclusive judges of his credibility."

Although a defendant is denied use of demeanor evidence—which may be harmful as well as beneficial to him—the use of former testimony certainly does not prevent him from presenting to the jury all other evidence for determining the credibility of the testimony that he would have been able to present if the witness had been actually present.

The cases allowing admission of former testimony do not regard demeanor evidence as "unimportant." Rather, these cases point out that it is a part of the right of confrontation[20] and an "advantage to

[14] *Supra*, note 12, at 973 and *supra*, note 13, at 970.

[15] *Id.*

[16] *Id.*

[17] *Supra*, note 12, at 972 and *supra*, note 13, at 970.

[18] *Supra*, note 12, at 972.

[19] *Supra*, note 12, at 973 the court stated: "Here the conviction of defendant rests upon the testimony of an absent witness: A witness whose promise to mail a letter was made with no intention of keeping it; a bad check artist; an intentional eavsdropper; and a carrier of information to the sheriff. Certainly a person whom the average citizen would not trust with anything of value and one who was rewarded [illegible] jail."

be insisted upon whenever it can be had."[21] It may be dispensed with only in a case of necessity. Courts have simply felt that where the witness—and therefore demeanor evidence—is unavailable, more complete justice will be obtained by admitting the prior testimony as the best evidence obtainable rather than excluding it all together.

The court in the *Storm* opinion stated that the Montana confrontation provision "has but one exception in our state constitution, Article III, sec. 17. . . ."[22] That section provides that the deposition of a person imprisoned for the purpose of securing his testimony in a criminal proceeding, may be taken in the presence of the defendant and used as evidence if the witness is dead or absent from the state at the time of the trial. If the court's statement that this is the only exception to the confrontation provision were followed in subsequent criminal cases, all evidence otherwise admissible by way of recognized exceptions to the hearsay rule would be excluded.

Common law exceptions to the hearsay rule have been generally recognized as exceptions to American constitutional confrontation provisions for over a century.[23] One of these exceptions—dying declarations of homocide victims—was recognized in Montana prior[24] to *Storm* and has been recognized since.[25] Other exceptions general recognized in American jurisdictions as not violating the right of confrontation are: (1) spontaneous or excited exclamations;[26] (2) statements against interest;[27] (3) statements of co-conspirators;[28] (4) official records;[29] (5) regular entries in the course of business;[30] and, (6) reputation.[31]

When one considers that the evidence admissible under a former testimony exception was given under oath, in the presence of the accused, and subject to cross-examination by counsel, together with the accuracy of modern reproduction methods, it is clear that its reliability is far superior to the evidence admissible under most of the other

[20]Mattox v. United States, 156 U.S. 237, 242, 243 (1895).

[21]McBride v. State, 368 P.2d 925, 926 (Alaska 1962), cert. denied, 374 U.S. 811 (1963).

[22]*Supra*, note 12, at 972.

[23]McCORMICK, EVIDENCE, section 231 and cases cited therein at footnotes 36-39. For an important article urging that recent developments in the law of hearsay require consideration of whether the limits of constitutional confrontation provisions can be relegated to the minimally acceptable degrees of trustworthiness controlling the admission of hearsay, see JENNINGS, *Preserving the Right to Confrontation — A New Approach to Hearshay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741 (1965).

[24]State v. Crean, 43 Mont. 47, 114 P. 603 (1911).

[25]State v. Morran, 131 Mont. 17, 306 P.2d 679 (1957).

[26]*E.g.*,Guthrie v. United States, 207 F.2d 19 (D.C. Cir. 1953).

[27]*E.g.*, Donnelly v. United States, 228 U.S. 243, 273 (1913); Mason v. United States, 257 F.2d 359 (10 Cir. 1958).

[28]*E.g.*, Krulewitch v. United States, 336 U.S. 440, 443 (1949).

[29]*E.g.*, White v. United States, 164 U.S. 100 (1896).

[30]Waxler v. State, 67 Wyo. 396, 224 P.2d 514 (1950); State v. Guaraneri, 59 R.I. 173, 194 A. 589 (1937).

[31]*E.g.*, Shibley v. United States, 237 F.2d 327 (9 Cir. 1956).

exceptions. In addition, one factor favoring the reliability of former testimony, even as against the present testimony of the witness, is that of nearness in time and recency of memory.

Montana's statutory law concerning the use of depositions and former testimony has also undergone recent change. The new Montana Code of Criminal Procedure expressly provides that former testimony is admissible. Section 95-1802(e) provides that under certain conditions of unavailability, part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used at a criminal trial or hearing.[32] The last sentence of that section provides:

> For the purposes of this section, the word "deposition" shall in addition include any sworn testimony previously given by a witness which has been recorded and transcribed by a qualified stenographer and given in the presence of the defendant and cross examined by him or his attorney on matters relevant to the trial or hearing where such deposition is sought to be used.

This enactment is a legislative clarification of the same rule which existed under a number of earlier statutory provisions[33] and is applicable only to those prosecutions in which the crime was alleged to have been committed on or after January 1, 1968.

It is submitted that the Montana Court acted properly in returning Montana to the majority rule in the *Tooker* and *Zachmeier* cases. Although the court failed to expressly overrule *Storm* and *Piveral* in so far as they made an accused's right to have the jury observe the witness upon the witness stand an indispensable part of the right of confrontation, the effect of the later decisions in impliedly overruling them cannot be denied. The majority in *Tooker* stated:

> "Here the objection made by petitioner's counsel went only to the fact that the jury 'would not have the opportunity to observe the demeanor and conduct of the witness when he was being examined', and did not go to the showing of absence from the state. We are of the opinion that regardless of the words of the objection, the matter of confrontation was before the court, and it properly allowed admission of the depositions, for by petitioner's very act of participating in the taking of the depositions, the thoroughness of the cross-examination by petitioner's attorney negates any argument by petitioner that he did not have the right of cross-examination of the witnesses."[34]

The court in *Zachmeier* stated that *Storm* and *Piveral* can not be relied upon in a case where the trial is held under the new rules of criminal procedure and section 95-1802(e) are applicable.[35]

[32]R.C.M. 1947, section 95-1802(e).

[33]R.C.M. 1947, section 94-7209 provides that rules of evidence in civil actions are applicable to criminal procedure. Section 93-401-27 (8) provides that former testimony of an unavailable witness may be given as evidence. Section 94-9101, et seq. (Repealed Ch. 196, Laws of 1967) established that depositions could be used in criminal cases.

[34]*Supra*, note 2, at 929.

[35]*Supra*, note 1.

After quoting from *Mattox v. United States* in which the former testimony of a deceased witness was held admissible, the court stated:

> "In our opinion what the United States Supreme Court said in the above cited case with regard to deceased witnesses should also apply with regard to any sworn testimony where the defendant has been afforded an opportunity to cross-examine the witness and where it has also been shown that after due diligence the witness cannot be found, and his absence was not procured by the party offering the testimony."[36]

In both *Tooker and Zachmeier* the court relied on a number of U.S. Supreme Court cases holding former testimony of an unavailable witness admissible as an exception to the confrontation provision of the Sixth Amendment.[37] By thus applying that court's interpretation of the federal constitutional provision to the Montana provision, the Montana court clearly suggests that in the future, exceptions to the federal right of confrontation will be recognized as exceptions to the same right under the Montana Constitution.

Although prior testimony is allowed as not abridging the right of confrontation, its admission is not automatic. There are three requirements for admissibility: (1) The witness must be legally unavailable;[38] (2) A proper foundation must be laid;[39] (3) There must be proof of the accuracy of the reproduction of the testimony.[40]

Until recently the standards for each of these requirements varied among the states according to each state's interpretation of its own constitutional confrontation provision and its local statutes. However, as noted above, the United States Supreme Court in the 1965 case of *Pointer v. Texas* held that the Sixth Amendment's guarantee of the right of an accused to confront the witnesses against him is a fundamental right made obligatory on the states by the Fourteenth Amendment.[41] Thus, the effect of this decision was likewise to make the minimum standards for admissibility under the U. S. Constitution obligatory on the states. Since the court in *Pointer* did not indicate what those standards are, other Supreme Court decisions must be looked to for guidance.

In *Barber v. Page*,[42] decided three years after *Pointer*, the Supreme Court laid down the first post-*Pointer* federal standard for determing whether a witness is unavailable. In that case the principal evidence against the accused at his trial in Oklahoma for armed robbery consisted

[36] *Id.*

[37] Barber v. Page, 390 U.S. 719 (1968); Diaz v. United States, 223 U.S. 442 (1912); *Mattox v. United States, supra,* note 20; Motes v. United States, 178 U.S. 458 (1900).

[38] *Supra,* note 9; 2 WHARTON'S CRIMINAL EVIDENCE, sections 476-484 (12th ed. 1955).

[39] *Supra,* note 9; 2 WHARTON'S CRIMINAL EVIDENCE, sections 485-487 (12th ed. 1955).

[40] *Supra,* note 9; 11 A.L.R.2d 30; 2 WHARTON'S CRIMINAL EVIDENCE, sections 488-492 (12th ed. 1955).

[41] *Supra,* note 10.

[42] 390 U.S. 719 (1968).

of the reading of a transcript of preliminary hearing testimony of a witness who at the time of the trial was incarcerated in federal prison in Texas. It appeared that the witness had not been present to testify in person because the state had not attempted to seek his presence. The court reversed the conviction holding that a witness is not 'unavailable' for purposes of the prior testimony exception to the confrontation requirement "unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."[43]

Prior to *Barber* various courts[44] and commentators[45] had assumed that the mere absence of a witness from the jurisdiction was sufficient ground for admissibility of prior testimony because of inability to compel attendance from without the jurisdiction. However, as the court noted, increased cooperation between the States themselves and between the States and the Federal Governmnt has deprived this reasoning of its validity.[46]

More than forty states,[47] including Montana,[48] have adopted the Uniform Act to Secure The Attendance of Witnesses from Without the State in Criminal Cases. This Act provides a means by which prosecuting authorities from one State can obtain an order from a court in the State where the witness is found directing the witness to appear in court in the first state to testify. For a witness in federal custody a writ of habeas corpus *ad testificandum* may be obtained to secure his presence at trial.[49] The reversal in *Barber* was the result of the state's failure to utilize these procedures.

In addition to absence from the jurisdiction, other circumstances of unavailability which have been held sufficient to justify admissibility include death,[50] illness,[51] insanity,[52] effective claim by the witness of a privilege not to testify,[53] and inability to locate the witness after a diligent search.[54] These cases and the similar circumstances of unavail-

[43]*Id.* at 724, 725.

[44]Cases are collected in 5 WIGMORE, EVIDENCE, section 1404, note 5.

[45]MCCORMICK, EVIDENCE, section 234; WIGMORE, EVIDENCE, section 1404.

[46]*Supra,* note 42, at 723.

[47]9 Uniform Laws Ann. 50 (1967 Supp.).

[48]R.C.M. 1947, 94-9001 to 9007.

[49]28 U.S.C., section 2241 (c) (5) (1964); see Gilmore v. United States, 129 F.2d 199 (10 Cir. 1942); United States v. McGaha, 205 F.Supp. 949 (E.D. Tenn. 1962).

[50]*Mattox v. U.S., supra,* note 20; *State v. Byers, supra,* note 4.

[51]People v. Droste, 160 Mich. 66, 125 N.W. 87 (1910).

[52]Marler v. State, 67 Ala. 55, 42 Am. Rep. 95 (1880).

[53]McCoy v. State, 221 Ala. 446, 129 So. 21 (1930) (privilege of wife not to testify against husband); State v. Rawls, ... Or. ...., 451 P.2d 127 (1969) (privilege of witness against self-incrimination).

[54]*Petition of Tooker, supra,* note 3; *State v. Zachmeier, supra,* note 1; State v. Ortego, 22 Wash. 2d 552, 157 P.2d 320, 159 A.L.R. 1232 (1945).

ability set forth in R.C.M. 1947, section 95-1802(e),[55] must now be read in light of *Barber* and subsequent federal decisions.

The *Barber* case also raises the important question of waiver of a federally guaranteed constitutional right. The right of confrontation is a personal privilege which a defendant may waive.[56] It may be waived, of course, by failure to make sufficient objection to the introduction of the former testimony.[57] The precise question raised in *Barber*, however, was whether an accused can waive this right by not cross-examining the witness at the time the testimony was originally given.

Noting that the defendant could not know that the witness would be in prison at the time of the trial, nor that the State would make no effort to produce him at the trial, the court concluded that there was no waiver.[58]

> "To suggest that failure to cross-examine in such circumstances constitutes a waiver of the right of confrontation at a subsequent trial hardly comports with this Court's definition of a waiver as 'an intentional relinquishment or abandonment of a known right or privilege.' "[59]

This language suggest that one might prevent any future use of a witness' testimony by merely foregoing cross-examination at a preliminary examination or the taking of a deposition. The statement was not, however, so interpreted in a recent case involving a co-defendant of the accused in the *Barber* case. In *In Re Bishop*[60] the Court of Criminal Appeals of Oklahoma limited the statement to the particular facts of the *Barber* case by concluding that an accused's failure to cross-examine a witness at a preliminary hearing may constitute a waiver of the right of confrontation at a subsequent trial if the prosecution properly shows that the witness is actually unavailable to testify and that sufficient effort has been exercised to produce the witness.[61]

This interpretation conforms with a number of earlier decisions directly holding that the right of confrontation may be waived by failure to cross-examine when the testimony was originally given.[62] These

[55]Section 95-1802 (e) provides that former testimony, so far as otherwise admissible under the rules of evidence, may be used if the witness is: (1) dead; (2) out of the state unless it appears that the absence of the witness was procured by the party offering the testimony; (3) unable to attend or testify because of sickness or infirmity; or (4) the party offering the testimony has been unable to procure the attendance of the witness by subpoena.

[56]*Diaz v. United States, supra,* note 37; *Douglas v. Alabama, supra,* note 10; Brookhart v. Janis, 384 U.S. 1 (1966); State v. Vanella, 40 Mont. 326, 106 P. 364 (1910).

[57]*Diaz v. United States, supra,* note 37; Cruzado v. Puerto Rico, 210 F.2d 789 (1954); *State v. Vanella, supra,* note 56.

[58]*Supra,* note 42, at 725.

[59]*Id.*

[60]443 P.2d 768 (Okla. Crim. 1968).

[61]*Id.*, at 769, syl. 4.

[62]Haley v. State, 20 Okla. Crim. 145, 200 P. 1009 (1921); Meyers v. State, 112 Neb. 149, 198 N.W. 871 (1924); State v. Logan, 344 Mo. 351, 126 S.W.2d 256, 122 A.L.R. 417 (1939).

decisions and, in addition, *Pointer* require only that the former testimony must have been taken at a time and under circumstances affording petitioner through counsel "an adequate opportunity" to cross-examine.[63]

CONCLUSION

Under the conditions discussed above former testimony is now admissible as evidence in criminal cases in Montana as in other jurisdictions. The importance of demeanor evidence is not so great as to consider it constitutionally indispensable, thereby excluding all former testimony. However, its value is too great to permit its ommission without requiring the prosecution to use utmost diligence in making witnesses available. Where the former testimony was given by deposition or at a preliminary hearing, cross-examination may not have been as thorough as it would be at trial and therefore should not be substituted for cross-examination at the final trial except in a case of absolute necessity. Future restrictions in this area should come through stricter standards of unavailability rather than wholesale exclusions. As a result of the recent cases defense counsel has a duty to thoroughly cross-examine a witness at all stages of a proceeding since that witness' testimony may be used against the defendant should the witness become unavailable. The prosecutor, likewise, has a responsibility to allow full opportunity for cross-examination by defendant's counsel and to utilize all available means of procuring a witness' attendance since failure to do either renders a witness' former testimony inadmissible.

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[63] *Supra,* note 10, at 407. A related question raised by dictum in *Barber* is whether the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause. The basis for the question is that " A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." The Court stated only that "there may be some justification" for holding that it does satisfy the confrontation clause where the witness is actually unavailable. *Supra,* note 42, at 725, 726.