IN TH SUPREME COURT, STATE OF YOMING

OCTOBER TERM, A.D., 1982

IN THE MATTER OF AMENDING RULE 40.1, WYOMING RULES OF CIVIL PROCEDURE; RULE 23, WYOMING RULES OF CRIMINAL PROCEDURE; RULES 12.09, 12.11 AND 14, WYOMING RULES OF APPELLATE PROCEDURE.

IN THE SUPREME COURT
STATE OF WYOMING
FILED

MAR 10 1983

[illegible] WHITE
DEPUTY

ORDER

The following amendments to the above numbered court rules having been found advisable by the court and the recommendations of the Permanent Rules Advisory Committee having been considered,

IT IS ORDERED that the following rules be, and they are hereby, amended to read as follows:

Rule 40.1, Wyoming Rules of Civil Procedure--as attached.

Rule 23, Wyoming Rules of Criminal Procedure--as attached.

Rules 12.09, 12.11 and 14, Wyoming Rules of Appellate Procedure--as attached.

IT IS FURTHER ORDERED that the above amended rules be published in the April 8, 1983 Advance Sheets of the Pacific Reporter and become effective on June 13, 1983, which date shall be at least sixty (60) days after such publication and distribution by the publisher; that the amended rules as set out herein shall be spread at length on the journal of this court, but the stricken words of the original rules and the capitalized added words thereof shall not be shown as stricken or capitalized in the publication in the Wyoming Court Rules.

Dated this 10 day of March, 1983.

By the Court*

John J. Rooney

John J. Rooney
Chief Justice

*Justice Rose's dissent is attached.

ROSE, Justic) dissenting.

On January 14, 1983 Chief Justice Rooney forwarded to the Permanent Rules Committee proposed amendments to Rule 40.1(b), W.R.C.P. and Rule 23(d), W.R.Cr.P., the effect of which would be to abolish the peremptory challenge of trial judges. The cover letter said that the changes are such as are "desired by the court." The amendments do not, however, express my desires. The court has, by its order of this date, abolished the peremptory challenge of trial judges in this state. I think this is a mistake.

By this communication, I therefore express my dissent to the deletion of the peremptory challenge provisions of Rule 40.1(b) and Rule 23(d), for the following reasons.

In the first place, to my knowledge at least, this court has not been the recipient of any recent requests to abolish the provisions pertaining to the peremptory challenge of a trial judge from our rules of either civil or criminal procedure. The last such communication that this court received--of which I have any knowledge--was in 1978. This communication came from the Judicial Conference, and the court has not received any formal expressions from the trial judges in this regard since 1978--at least none have come to my attention. In addition to that, there has been no move for abolition in the Judicial Council, nor has the Wyoming Bar Association indicated its disfavor with the peremptory challenge rules. Prior to the Chief Justice's letter of January 14, 1983, this court had not previously notified the trial bench, Bar, or rules committees that it intended that the peremptory challenge would be abolished--at least it has not expressed any such desire or intent in the eight years that I have been on the court.

To be sure, various efforts have been made in the past to see to it that the rules permitting peremptory challenge of trial judges would be drafted in such a way so that they could not be utilized to interrupt the orderly processes of the court system. To this end, various interested groups have, from time to time, addressed ways to structure the rules so that this purpose would be accomplished, and I would give my support to any such legitimate purpose asuming, of course, a need for change could be demonstrated. With one exception, the history of peremptory challenge change proposals does not, however, indicate that those concerned see a need for change. The minutes of the Judicial Conference under date of September 4, 1980, reveal that the Judicial Conference adopted a motion to amend and tighten the peremptory challenge rules pertaining to both civil and criminal procedure. An amendment was considered by the Permanent Rules Committee and was rejected by a rather formidable majority. The minutes of the Wyoming State Bar for 1980 show that the Permanent Rules Committee considered the peremptory challenge rule amendment but did not recommend any changes to the Wyoming Bar Association. Even though there have been these various attempts at and suggestions for

amendment and cha. e--and indeed there was amendment to civil rule 40.1(b)(i) and criminal rule 23(d) in 1975--this, I believe, is the first time that abolition has been contemplated by this court.

There are numerous reasons why the peremptory challenge should not be excised from our rules--and I will mention a few of them later--but I first need to express my strong disagreement with the way that this proposal to abolish the peremptory challenge was called to the attention of the Permanent Rules Committee and then--when that Committee reported to us that a majority favors the retention of the peremptory challenge--we of this court now undertake to override the Committee's considered judgment and abolish the peremptory challenge provisions of the rules anyway.

The proposed abolition of the peremptory challenge first came to the attention of the Permanent Rules Committee by way of communication from this court on January 14, 1983. The abolition suggestion was transmitted without prior consultation with those who are to be affected--namely, the trial judges, the Bar, the Permanent Rules Committee and the Criminal Rules Advisory Committee. Notice came in the form of a "desire" of the members of the Supreme Court without a showing first having been made indicating either a need or a reason for change. The court's "desires" were forwarded without any indication of the sins that are purportedly being committed under the present rules--and they came after previous restrictive efforts to make more stringent the provisions of the rules had been rejected. They came without any hue and cry for change having been raised-- indeed, they came from out of the blue, riding only upon the whim and impulse of our court. I feel strongly that this is not the way for the Supreme Court to adopt rule changes. Before undertaking such rule change as the majority adopts today, it seems to me that the court should seek the counsel of the judges affected--the counsel of the Wyoming State Bar Association, the Wyoming Trial Lawyers and the Wyoming Defense Lawyers Associations and the advice of the Permanent Rules and the Criminal Rules Advisory Committees. I would suggest that before we override the wishes of our rules committees and the apparent unanimous wishes of the lawyers of this state, we of this court should first be convinced, through searching inquiry, that the change must, nevertheless, be effected. No such need to override the wishes and desires of the lawyers and the majority of the membership of the rules committees has been demonstrated in this instance.

I do not suggest that this court is obliged to follow the wishes of those affected in all instances, but, before acting in a way which is either contrary or not in response to the desires of those who must live with a rule, its amendment or its abolition, it is only proper that those interested should be heard and their wishes seriously considered. Once this courtesy has been extended, this court should then be inclined to overrule the will of those consulted and affected only in those rare circumstances where the need to correct a wrong is imperative and overwhelming

--and, perhaps, those instances where the justification for change is either overlooked, misunderstood or will not seriously affect those who have been consulted.

There is no such need present in today's peremptory challenge abolition. Those affected do not complain and the orderly function of the system does not call out for change.

I would have this last thought. The peremptory challenge rule allows for the removal of judges without abrasive discourse between the attorneys and the judge. It relieves tension and stress where attorneys and judges are not comfortable with one another in that it obviates the necessity of the attorney undertaking the onerous, distasteful and embarrassing task of attempting to prove bias and prejudice. We would be less than realistic if we were to assume that these human realities are never present in the judge-attorney relationship. Thus, the peremptory challenge is simply a devise for minimizing the aggravation of these occasional but natural and inevitable human feelings.

I would, for these and other reasons too numerous to mention, dissent from the action taken by the majority of the court today.

W.R.C.P. Rule 40.1 Transfer of trial and change of judge.

(b) Change of judge.

~~(1) Peremptory Disqualification.----A party may peremptorily disqualify a district judge by filing a motion requesting a change of judge. The motion must be filed at least fifteen (15) days before the date set for the hearing on any motion or application filed pursuant to Rule 12, 42, 56, 65, 71.1, or 72.1, or if there be no such motion hearing set, then at least fifteen (15) days before the date set for pretrial, and if there be no pretrial set, then at least fifteen (15) days before the date set for trial, or if the date is set within fifteen (15) days after the order of setting, within five (5) days after receipt of such order; provided, however, that no more than one (1) such motion shall be filed by the parties plaintiff or parties defendant. After the filing of such motion, the presiding judge shall forthwith call in another district judge to try the action.~~

~~(2)~~(1) Disqualification for Cause. -- ~~After the time for filing a motion for peremptory disqualification of the presiding judge has expired,~~ WHENEVER THE GROUNDS FOR SUCH MOTION BECOME KNOWN, any party may move for a change of district judge on the ground that the presiding judge (A) has been engaged as counsel in the action prior to his election or appointment as judge, (B) is interested in the action, (C) is related by consanguinity to a party, (D) is a material witness in the action, or (E) is biased or prejudiced against the party or his counsel. The

motion shall be supported by an affidavit or affidavits of any person or persons, stating sufficient facts to show the existence of such ground~~, together with an affidavit of the party's attorney showing that the facts stated were unknown to him and to the party and could not have been discovered by the exercise of reasonable diligence prior to the expiration of the time for filing a motion for peremptory disqualification~~. Prior to a hearing on the motion any party may file counter-affidavits. The presiding judge shall rule on the motion and if he grants the same shall immediately call in another district judge to try the action.

~~(3)~~(2) Effect of Ruling. -- A ruling on a motion for a change of district judge shall not be an appealable order, but the ruling shall be entered on the docket and made a part of the record and may be assigned as error in an appeal of the case.

~~(4)~~(3) Motion by Judge. -- The presiding judge may at any time on his own motion order a change of judge when it appears that the ends of justice would be promoted thereby.

~~(5)~~(4) Probate Matters. -- In any controverted matter arising in a probate proceeding, a change of judge, or in cases where a jury is demandable, a transfer of trial, or both, may be had for any cause authorizing such change in a civil action. The procedure for such change shall be in accordance with this rule. Except for the determination of such controverted matter, the judge having original jurisdiction of such probate proceeding shall retain jurisdiction in all other matters in connection with said proceeding.

W.R.Cr.P. Rule 23. Transfer from the county for trial or for change of judge.

~~(d) Peremptory Disqualification. -- The state or the defendant may peremptorily disqualify a district judge by filing a motion for a change of judge. Such motion shall be filed at least fifteen (15) days before the date set for the hearing on any motion filed pursuant to Rule 16, W.R.Cr.P., or if there be no such motion hearing set, at least fifteen (15) days before the date set for pretrial, and if there be no pretrial set, then at least fifteen (15) days before the date set for trial, or if the date is set within fifteen (15) days after the order of setting, within five (5) days after receipt of such order; provided, however, that no more than one (1) such motion shall be filed by the state or by any defendant. After the filing of such motion for change of judge, the presiding judge shall immediately call in another district judge to try the action.~~

~~(e)~~(d) Disqualification for Cause. -- ~~After the time for filing a motion for peremptory disqualification of the presiding judge has expired,~~ WHENEVER THE GROUNDS FOR SUCH MOTION BECOME KNOWN, the state or the defendant may move for a change of district judge on the ground that the presiding judge is biased or prejudiced against the state, the prosecuting attorney, the defendant or his

attorney. The motion shall be supported by an affidavit or affidavits of any person or persons stating sufficient facts to show the existence of such ground~~, together with an affidavit of the prosecuting or defense attorney showing that the facts stated were unknown to him and could not have been discovered by the exercise of reasonable diligence prior to expiration of the time for filing a motion for peremptory disqualification~~. Prior to a hearing on the motion any party may file counter-affidavits. The presiding judge shall rule on the motion, and if he grants the same shall immediately call in another district judge to try the action. A ruling on a motion for a change of district judge shall not be an appealable order, but the ruling shall be entered on the docket and made a part of the record, and may be assigned as error in an appeal of the case.

RULE 12.09. Extent of Review.

The review shall be conducted by the court without a jury and shall be confined to the record as supplemented pursuant to Rule 12.08, W.R.A.P., and to the issues raised before the agency. The court's review shall be limited to a determination of the matters specified in § 16-4-114(c).

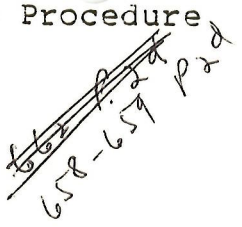
If after such review, the district court concludes the matter to be appropriate for determination by the Supreme Court, the district court may certify the case to the Supreme Court. ~~and transmit the record to the Supreme Court.~~ Upon notification of such certification, the petitioner shall pay the required docketing fee.

THE DISTRICT COURT MAY RECEIVE WRITTEN BRIEFS AND HEAR ORAL ARGUMENT IN ITS DISCRETION. THE BRIEFING SCHEDULE SHALL BE FIXED BY THE DISTRICT COURT. THE DISTRICT COURT MAY, IN ITS DISCRETION, REMAND THE CASE TO THE AGENCY FOR PROCEEDINGS IN ACCORDANCE WITH THE DIRECTION OF THE COURT. IF THE MATTER IS NOT CERTIFIED TO THE SUPREME COURT, THE DISTRICT COURT SHALL ENTER JUDGMENT, AFFIRMING, MODIFYING, OR REVERSING THE ORDER OF THE AGENCY.

RULE 12.11. Review by Supreme Court.

(a) An aggrieved party may obtain a review of any final judgment of the district court by appeal to the Supreme Court. ~~The appeal shall be taken as in other civil cases.~~

(B) IF THE MATTER IS CERTIFIED TO THE SUPREME COURT, OR IF THE FINAL JUDGMENT OF THE DISTRICT COURT IS APPEALED TO THE SUPREME COURT, THE FILING OF THE RECORD, BRIEFS, AND ORAL ARGUMENT IN THE SUPREME COURT SHALL BE AS IN CIVIL CASES PURSUANT TO RULES 4, 5, AND 6, W.R.A.P.



RULE 14. SERVICE OF PAPERS AND computation of time

RULE 14.01. SERVICE; HOW MADE.

WHENEVER UNDER THESE RULES SERVICE IS REQUIRED OR PERMITTED TO BE MADE UPON A PARTY REPRESENTED BY AN ATTORNEY, THE SERVICE SHALL BE MADE UPON THE ATTORNEY UNLESS SERVICE UPON THE PARTY HIMSELF IS ORDERED BY THE COURT. SERVICE UPON THE ATTORNEY OR UPON THE PARTY SHALL BE MADE BY DELIVERING A COPY TO HIM OR BY MAILING IT TO HIM AT HIS LAST KNOWN ADDRESS, OR BY LEAVING IT WITH THE CLERK OF THE COURT. COPIES DEPOSITED WITH THE CLERK SHALL BE PROMPTLY MAILED OR DELIVERED BY HIM TO THE ATTORNEY OF THE PARTY ENTITLED THERETO, OR TO THE PARTY IF HE HAS NO ATTORNEY OF RECORD. DELIVERY OF A COPY WITHIN THIS RULE MEANS HANDING IT TO THE ATTORNEY OR TO THE PARTY; OR LEAVING IT AT HIS OFFICE WITH HIS CLERK OR OTHER PERSON IN CHARGE THEREOF; OR LEAVING IT IN A CONSPICUOUS PLACE THEREIN, OR, IF THE OFFICE IS CLOSED OR THE PERSON TO BE SERVED HAS NO OFFICE, LEAVING IT AT HIS DWELLING HOUSE OR USUAL PLACE OF ABODE WITH SOME MEMBER OF THE FAMILY OVER THE AGE OF FOURTEEN (14) YEARS THEN RESIDING THEREIN. SERVICE BY MAIL IS COMPLETE UPON MAILING.

RULE 14.02. COMPUTATION.

In computing any period of time prescribed or allowed by these rules, or by order of court, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the governor or legislature of the State of Wyoming.

RULE 14.03. ADDITIONAL TIME AFTER SERVICE BY MAIL.

WHENEVER A PARTY HAS THE RIGHT OR IS REQUIRED TO DO SOME ACT OR TAKE SOME PROCEEDINGS WITHIN A PRESCRIBED PERIOD FROM OR AFTER THE SERVICE OF A BRIEF, NOTICE OR OTHER PAPER UPON HIM, AND THE BRIEF, NOTICE OR OTHER PAPER IS SERVED UPON HIM BY MAIL OR BY DELIVERY TO THE CLERK, THREE (3) DAYS SHALL BE ADDED TO THE PRESCRIBED PERIOD.