



January 1949

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Recommended Citation

Charles S. Potts, *Waiver of Indictment in Felony Cases*, 3 Sw L.J. 437 (1949)
<https://scholar.smu.edu/smulr/vol3/iss4/3>

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WAIVER OF INDICTMENT IN FELONY CASES*

Charles S. Potts†

IT SHOULD be noted in the beginning that it is not here proposed to abolish the grand jury. Most, if not all, writers treating the subject agree that there are situations in which the inquisitorial powers of the grand jury are very useful. Especially is this true in cases involving criminal conspiracies and violations of law by one or more public officials, or "court-house rings." What is proposed and will here be discussed is the abrogation of the requirement, formerly found in most constitutions, state and Federal, that no crime of felony grade could be tried except upon indictment of a grand jury.

Bearing this limitation in mind we may point out that three or four hundred years ago this venerable institution, the Grand Jury, endeared itself to our English ancestors by serving as a check on the exercise of arbitrary power by kings and overlords.¹ Before the royal or baronial court could take jurisdiction of a case, this body of freemen, operating in secret, had to "present" the accused or find a "true bill" against him. In the same way the American colonists were protected in their lives and property against arbitrary actions by the king or by his royal governors.

It is not at all surprising, therefore, that when the American Revolution came, the fathers wrote into their state and national constitutions the provision that no person should be tried for a capital or otherwise infamous crime except upon presentment or indictment of a grand jury. But with the secure establishment of free governments in this country and in England a century and a half ago, the danger of arbitrary trials by subservient judges

*The author has been assisted in the preparation of this article by a grant from the Carnegie Foundation for the Advancement of Teaching.

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¹ *Criminal Justice in Cleveland (The Cleveland Crime Survey)*, p. 210-212 (1922).

steadily diminished, and men began to ask themselves whether the grand jury, after all, was as essential to liberty as it had been in earlier times. Many reached the conclusion that it was no longer necessary to provide a constitutional safeguard against despotic sovereigns and their servile ministers, and that the constitutional provision requiring indictment in all felony cases could safely be omitted from the constitutions of our newer states.² Not only so, but several of the older states joined the movement and without changing their constitutions, have provided by law that the defendant may waive the right to be indicted by the grand jury, and consent to be tried on an information filed by a prosecuting attorney.³

So general has this movement become that it can now be stated that Texas is the only state west of the Mississippi River that still *requires* an indictment by a grand jury before a felony can be tried. East of the River the following states do not *require* an indictment in all felony cases: Connecticut, Florida, Indiana, Michigan, New York, and Vermont. In addition nine states east of the River allow the defendant to insist on a grand jury indictment, or, in the alternative, permit him to waive indictment by the grand jury and be tried on an information, filed by the prosecuting attorney. These states are Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island and Virginia.

² Justin Miller, *Information or Indictment in Felony Cases*, 8 MINN. L. REV., 379-408 (1923-24). This article was reprinted in full with extensive notes, in 8 J. AMER. JUD. SOC., 104-120 (1924). [The author, then Professor of Law at the Univ. of Minn., later served as Dean of the Law School of the University of Southern California, then as Dean of the Law School of Duke University, and still later as Associate Justice of the Court of Appeals of the District of Columbia. He is now President of the Association of American Broadcasters, New York.] See also Dession, *From Indictment to Information—Implication of the Shift*, 42 YALE L. J. 162-193 (1932); and the Report of the Commission on L. Observance and Enforcement ("The Wickersham Commission") No. 4, pp. 124-126 (1931); Moley, *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 MICH. L. REV. 403 (1931); Moley, *The Use of the Information in Criminal Cases*, 17 A. B. A. J. 292 (1931).

³ ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 212-218 (1947); Johnson, *Waiver of Indictment in Texas*, 1 TEX. LAW AND LEGISLATION 22-23, and note 25, p. 27 (1947); FEDERAL RULES OF CRIM. PRO. (1946) Rules 7a and 7b.

1. THE AMERICAN LAW INSTITUTE STEPS OUT

In 1930, the American Law Institute gave impetus to the movement by providing in Section 113 of its Model Code that all offenses of whatever grade may be prosecuted either upon indictment or information.⁴ Section 114 of this Code relieved the judge of the necessity of impaneling a grand jury at each term of court. It reads as follows:

"Section 114. When grand jury to be summoned. No grand jury shall be summoned to attend at any court except upon the order of a judge thereof when in his opinion public interest so demands, except that a grand jury shall be summoned at least once a year in each county."⁵

2. MICHIGAN'S EXPERIMENT: THE ONE-MAN GRAND JURY

While the State of Michigan has not abolished the grand jury, it rarely calls one, but has developed a very interesting substitute for it. In 1917 the Legislature passed an act providing that whenever it was deemed necessary a single district judge or magistrate might sit as a "one-man grand jury," calling witnesses, taking testimony, and formulating charges to be tried before the jury, in lieu of an indictment. As at first drawn the statute permitted the judge who conducted the preliminary hearing to preside at the trial before the jury, but this objectionable feature was eliminated in 1947, and now a different judge must preside.

The Michigan statute providing for the so-called one-man jury reads as follows:

"Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such jus-

⁴ For State and Federal provisions relating to the instituting of Criminal proceedings, see AM. L. INSTITUTE'S CODE OF CRIMINAL PROCEDURE, Chap. 4, pp. 414-431.

⁵ For State and Federal provisions relating to Grand Juries, see AM. L. INSTITUTE'S CODE OF CRIM. PRO., pp. 431-434.

tice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of city ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of the law about which he may be questioned. . . .

"Any witness neglecting or refusing to appear in response to summons, or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exceeding sixty (60) days, or both in the discretion of the court: Provided, that if such witness after being so sentenced shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence."⁶

After the foregoing paragraphs were written, word comes that the Legislature has "nullified" Michigan's one-man grand jury law, by requiring that three judges act together hereafter in ordering and conducting preliminary examinations. As a result, one legislator is quoted as saying that,

"[t]he hundreds of minor inquiries that have so greatly aided the work of prosecutors will hereafter, in one-judge circuits, seldom be possible, and for greater inquiries, it will be difficult to assemble three judges from various circuits for an inquiry that may last for months. When such a grand jury is assembled, much will be lacking in efficiency, speed, economy and determination through diffusion of authority and responsibility and handicaps on initiative, and through inevitable conflicts of several personalities. . . .

⁶ Waite, *Michigan's "One-Man Grand Jury" Before the Supreme Court*, 31 J. AM. JUD. SOC. 184-186 (1948). The case there referred to, *In re Oliver*, 333 U. S. 257 (1948), does not question the right of the State of Michigan to confer inquisitorial powers on its judges and magistrates, but holds that such judge-grand jury cannot hold a witness guilty of contempt in failing or refusing to answer questions, without affording him a public hearing and the assistance of counsel.

For other articles dealing with the one-man grand jury see the following: March, *One Man Grand Jury*, 8 J. AM. JUD. SOC., 121 (1924); *Unprecedented Success in Criminal Courts*, 26 J. AM. JUD. SOC., 42-44 (1942); *Id.* at 79-80; Winters, *The Michigan One-Man Grand Jury*, 28 J. AM. JUD. SOC., 137 (1945); Gallagher, *The One-Man Grand Jury—a Reply*, 29 J. AM. JUD. SOC., 20 (1945).

"The attorney-general and prosecuting attorneys are to be barred from appointment to other office.

"Through an unintended blunder in drafting, the new law will require every justice of the peace to refer to a circuit judge every criminal complaint."⁷

In line with this criticism is the recent report of a special committee of the State Bar of Michigan which reads in part as follows:

"For 32 years the grand jury law has stood as a protecting shield between the law abiding people of Michigan and those who would commit any crime from murder to violation of public trust by graft, bribery and corruption. . . .

"The majority of the members of the Special Committee of the State Bar of Michigan believe that a grave mistake was made in enacting House Enrolled Bill No. 287. We believe it emasculates and destroys the protection of the grand jury law. When the people of Michigan fully realize that they have been stripped of this protection in the field of law enforcement, we believe that they will restore the one-man grand jury system."^{7a}

3. FEDERAL RULES OF CRIMINAL PROCEDURE

The federal courts are the latest recruits to this impressive array of jurisdictions that no longer *require* an indictment in the prosecution of ordinary felony cases. The new Federal Rules of Criminal Procedure that became effective on March 21, 1946, provide that a defendant in a felony case may waive indictment and be tried upon information filed by the United States Attorney, except in capital cases. The following is the language of Federal Rules 7(a) and 7(b).

"7 (a) *Use of Indictment or Information.* An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one

⁷ 33 J. AM. JUD. SOC., 58-59 (Aug. 1949).

^{7a} "Special Committee to Study and Report upon the One-Man Grand Jury Law," 28 MICHIGAN STATE BAR JOURNAL, 63 at 74 (1949). The report was signed by 11 out of 14 members of the committee. It provoked a bitter debate in the State Bar meeting, and the action of the Legislature was disapproved by a very narrow margin.

year or at hard labor shall be prosecuted by indictment, or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be without leave of court.

"7 (b) *Waiver of Indictment.* An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment."

In the notes to Rule 7(b) prepared under the direction of the Advisory Committee appointed by the Supreme Court, occurs the following pertinent statements:

1. "Opportunity to waive indictment and to consent to prosecution by information will be a substantial aid to defendants, especially those who, because of inability to give bail, are incarcerated pending action of the grand jury, but desire to plead guilty. This rule is particularly important in those districts in which considerable intervals occur between sessions of the grand jury. In many districts where the grand jury meets infrequently a defendant unable to give bail and desiring to plead guilty is compelled to spend many days, and sometimes many weeks, and even months, in jail before he can begin the service of his sentence, whatever it may be, awaiting the action of a grand jury. Homer Cummings, 29 A.B.A. Jour. 654-655; Vanderbilt, 29 A.B.A. Jour. 376, 377; Robinson, 27 Jour. of the Am Judicature Soc. 38, 45; Medalie, 4 Lawyers Guild R. (3) 1, 3. The rule contains safeguards against improvident waivers.

2. "On the constitutionality of this rule, see *United States v. Gill*, 55 F.(2d) 399 (D.N.M.), holding that the constitutional guaranty of indictment by grand jury may be waived by defendant. It has also been held that other constitutional guaranties may be waived by the defendant, e.g., *Patton v. United States*, 281 U.S. 276 (trial by jury); *Johnson v. Zerbst*, 304 U.S. 458, 465 (right of counsel); *Trono v. United States*, 199 U.S. 521, 534 (protection against double jeopardy); *United States v. Murdock*, 284 U.S. 141, 148 (privilege against self-incrimination); *Diaz v. United States*, 223 U. S. 442, 450 (right of confrontation).⁸

⁸ For comment while the proposal to adopt Rule 7b was still pending, see the following: *Wm. W. Barron*, Chief of Indictment Section, Criminal Division, Department of Justice: 2 Fed. Rules Dec., 211, 214 (1943); also 5 Fed. Rules Dec., 150-155, at 152

4. ENGLAND ABOLISHES THE GRAND JURY

If the grand jury has fared badly in America, it has fared much worse in England, the land of its birth. After a hundred years of debate, participated in by such outstanding men as Jeremy Bentham, Lord Denman, Lord Parmoor, Lord Salisbury and the three legal historians, Pollock, Maitland and Holdsworth, Parliament took the first step toward actual abolition of the grand jury by passing an act on April 2, 1917, the "Grand Jury Suspension Act."⁹ This act abolished the use of the grand jury for the duration of the war. It remained in full force and effect until abrogated by an order in council near the end of the year, 1921.

With the suspension of the Suspension Act the long debate in the press and Parliament was resumed, but it was quite clear that the end was near. In December, 1932, the Lord Chancellor, Viscount Sankey, appointed a committee to consider the business of the courts. In February, 1933, the committee brought in an interim report recommending the abolition of grand juries. Almost without debate the act was passed and went into effect September 1, 1933.¹⁰ The only exception it made was to permit grand juries to be held in the County of London and the County of Middlesex for consideration of treason and other high crimes against the government, and charges preferred against the governors of overseas dominions.

Section 2 of the Act allows private persons to file charges, which upon approval by officers of the court become indictments triable

(1946); *Judge Alexander Holtzoff*, 3 Fed. Rules Dec., 445-458, at 449 (1944); *Advisory Commission on Rules Criminal Procedure*, 4 Fed. Rules Dec., 405-445, at 410-412 (1946).

See also Annual Reports of Attorneys General: Reports for 1931, p. 3 and 1932, p. 6, by Attorney General Mitchell; Reports for 1933, p. 1, 1936, p. 2, 1937, p. 11, and 1938, p. 14, by Attorney General Cummings; Report 1939, 7 and 11 by Attorney General Murphy.

See also Report of Judicial Conference of Senior Circuit Judges, 1941, 13, recommending that "existing law or established procedure be so changed that a defendant may waive indictment and plead to an information filed by a United States Attorney in all except capital felonies," quoted in 4 Fed. Rules Dec., 411 (1946).

⁹ 7 Geo. 5, C. 4 (The Law Reports, 1917-18, p. 3).

¹⁰ 23 and 24 Geo. 5, C. 36; 26 Halsbury's Laws, 80. For an interesting discussion, see Elliff, *Notes on the Abolition of the English Grand Jury*, 29 J. CR. L. & CRIM., 3-22 (May-June, 1938).

by a jury in the ordinary way,¹¹ much as private persons in Texas may file complaints before a magistrate or prosecuting attorney.

It should be noted in passing that the grand jury has never been used on the continent of Europe, except in France from 1791 to 1808. Nor has it been used in the overseas colonies of the continental nations. Even in Canada, the following provinces do not have the grand jury: Alberta, British Columbia, Manitoba, Quebec,¹² and Saskatchewan.

5. OBJECTIONS TO REQUIRING INDICTMENT IN ALL FELONY CASES

What then are the defects of the present system of requiring indictment by a grand jury in all felony cases?

a. *Delay.* It is one of the chief causes for delay in criminal trials. If the grand jury is not in session when an offense is committed, the case must wait until the next term of court, unless the crime be one so shocking or so important as to warrant the District Judge, if the court is in session, in re-assembling the grand jury after it has been discharged for the term. This waiting for the next term of court may mean a delay of as much as six months, a period of time amply sufficient in any adequate system of criminal administration to cover all steps between the arrest of the offender and the final disposition of his case by an appellate court. In other words, in such a case we are only ready to begin investigating whether to prefer formal charges against him at a time when the accused should be at large after an acquittal, or on his way to the gallows or to the penitentiary if convicted.

b. *Injury to the State's case.* The delay while waiting for the grand jury often results in the returning of no "true bill," as a result of the disappearance of witnesses, the fading of memories, and in some cases no doubt by the improper influencing of witnesses by the accused or his friends. In most instances, two or three such delays are almost as good as an acquittal.

¹¹ See Sec. 1(4) and "Schedules" at end of act.

¹² Quebec abolished the grand jury in 1933, following the example of England, and of the four western provinces of Canada. Surveyor, *The Judicial System of Quebec*, 27 J. AM. JUD. SOC., 21 at 24 (1943).

c. *Many Escape Indictment.* The grand jury fails to indict many persons who should be indicted. A study made by the Illinois Association for Criminal Justice showed that "not a true bill" is returned in about 22 per cent of the cases bound over by the examining magistrate to await the action of the grand jury. The report compares the results reached in Chicago with those obtained in the neighboring city of Milwaukee, Wisconsin, where the grand jury is rarely used. In Chicago, of every 100 persons charged with felony a total of fifty-seven are eliminated for "want of prosecution" or other cause, or are discharged after the preliminary hearing, leaving only forty-three out of the hundred who are held to await the action of the grand jury. Of the forty-three persons bound over,¹³ nine are not "billed" by the grand jury,¹⁴ leaving only thirty-four to be docketed in the trial courts out of every 100 persons charged. In Milwaukee, on the other hand, out of each 100 persons charged only seventeen are eliminated by the preliminary processes. As none are eliminated by the grand jury (the grand jury being rarely called) and as informations are filed in all cases not eliminated in the preliminary proceedings, eighty-three out of each hundred originally charged are docketed in the trial courts as against only thirty-four out of each hundred in Chicago.

"But," some one may say, "possibly many of those tried in Milwaukee should have been eliminated by the grand jury." Possibly so, but the results of the trials on the merits do not seem to sustain such an objection, for the report states that "the final percentage of convictions is much larger than in Illinois." A little under 50% of those tried by the jury are convicted in Chicago, as against 76.94% in Milwaukee.¹⁵

Doubtless these figures account in large measure for Chicago's unenviable record of crime. The surveyors clearly placed an ap-

¹³ Illinois Crime Survey, Table A-4, p. 38 (1929).

¹⁴ *Id.*, Table A-5, p. 41. In 1949, R. A. Hall, Criminal District Judge of Dallas County, reported that 35 per cent of the cases considered by the Grand Jury were no-billed—a poorer record than that of Chicago's grand juries. *Dallas News*, April 2, § II, p. 6.

¹⁵ *Id.*, Table A-6, p. 43.

preciable share of the responsibility upon the constitutional requirement in Illinois that no felony can be tried except upon presentment of a grand jury.

The same conclusion was reached by the American Judicature Society, one of the greatest organizations of judges, prosecutors, lawyers, law teachers, and criminologists in the history of this country. This body recently stated that "in 999 out of ever 1,000 cases the grand jury can not possibly do anything to further the rights and interests of the State. If its action is anything more than a nullity, a mere waste of time and effort, it is certain to be prejudicial to the prosecution."

d. *Little Protection to the Accused.* If the grand jury is prejudicial to the prosecution, it is of little or no value as a protection to the legitimate rights of the accused. Its proceedings are secret, the accused can not be present to explain, to confront and cross-examine witnesses, or to introduce witnesses in his own behalf. It is a star chamber proceeding that by presenting formal charges can blacken a man's name in a way that acquittal before a trial jury can never entirely efface.

In the system herein proposed every person accused of a felony has an examining trial before a magistrate immediately after arrest; in this he can face his accusers, can have the help of counsel, can confront and cross-examine the witnesses against him, and can have compulsory process for securing witnesses in his behalf. If no sufficient showing is made against him, he is discharged at once without the stigma of having been indicted or tried. If a sufficient showing is made he is bound over for a public trial before judge and jury, but not to await the result of a star-chamber proceeding at which none of the immemorial rights enumerated above are granted to him.

To add an *ex parte* secret investigation before the grand jury, to the open hearing already had before the magistrate, is not to provide protection for the innocent person accused of crime, but is to furnish another loop hole for the guilty, to produce delays,

to clog the machinery of justice, and finally to escape the punishment they deserve.

e. *Burden on Witnesses.* The proceedings before the grand jury are largely a matter of rubber-stamping the opinion of the District Attorney, but they add materially to the burden of the state's witnesses. These witnesses are required to be present at the examining trial, unless it be waived; to tell the whole story a second time before the grand jury; to tell it once again in the trial before the jury and possibly a fourth time should the conviction be reversed on appeal. It all adds up to a wearisome, time-consuming burden that should be made as light on the citizen as is consistent with the proper administration of justice. Citizens shun service as a witness whenever possible. So much so that in day-time gang murders witnessed by hundreds of people, it has been found almost impossible to find any one who will admit that he knows anything about it.

f. *An Expensive Luxury.* The grand jury, except for its inquisitorial function in conspiracy cases, is an expensive luxury. Former District Attorney Banton of New York stated that in 4,000 cases out of 6,000 presented to the grand jury, that body's efforts were a complete waste of manpower and entirely unnecessary.

In 1924, the Committee on Criminal Jurisprudence presented to the Texas Bar Association an able report, prepared and read by the chairman of the committee, the Hon. Jed C. Adams of Dallas, an experienced lawyer and former District Attorney, advocating the abolition of the requirement that all felonies be tried upon presentment by a grand jury.¹⁶ The report contains figures compiled by the auditor of Dallas County showing that the grand jury of that day cost the county about \$20,000.00 per year, and the people of Texas an estimated total of half a million dollars per year. It is considerably larger than that at the present time. If this expenditure were necessary to protect the rights of the State or the

¹⁶ Report of the Committee on Criminal Law and Procedure, *Texas Law Rev., Bar Assn.* Number 1924, pp. 128-146, at p. 132. Auditor Charles A. Tosch of Dallas County gives the cost of the grand jury for Dallas County for the year 1948, at approximately \$25,000, or an increase since 1924 of a little more than 25 per cent.

rights of persons accused of crime, we should willingly bear the burden, but not when most of the money goes to perpetuate an out-worn institution of earlier ages.

6. WAIVING INDICTMENT IN TEXAS

Apparently there is no serious question that the legislature can constitutionally authorize a person accused of felony to waive indictment of a grand jury and be tried on an information filed by the prosecuting attorney. The language of the Constitution of Texas is substantially the same as that of the Fifth Amendment of the Federal Constitution,¹⁷ and as we have elsewhere pointed out the Supreme Court of the United States, through its rule making power, has recognized that an accused person may waive his right to be tried on an indictment, and can consent to be tried on an information filed by a prosecuting attorney. If the requirements of the Fifth Amendment can be satisfied by the making of a rule—Federal Rule 7(b) quoted above—it would seem to follow that the requirements of the Texas Constitution can equally be met by a statute permitting the defendant in a felony case to waive indictment and consent to trial on an information. If no constitutional change was necessary in the one case, none would be necessary in the other.

Such a result was reached in a Massachusetts case decided in 1943. It is true that Article 12 of the Massachusetts Constitution differs in verbiage from either the Federal or the Texas Constitu-

¹⁷ The Fifth Amendment on this point reads as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

Section 10 of Article 1 of the Constitution of Texas is as follows:

"No person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger."

tion, but the meaning and purpose are the same. The court in its opinion says:

“We are of the opinion that the provisions of Art. 12 of our Bill of Rights, which have been held to mean that a presentment by the grand jury is required where a person is accused of a felony, like the provisions for a jury trial, were intended to secure a benefit to the individual for his protection and security, and that the privilege therein asserted may be waived. . . . We find nothing in that document that declares or manifests an intention to deprive the individual of power to refuse to assert his constitutional right to a presentment by a grand jury.¹⁸

In this connection it may be well to call attention to the fact that both Federal and state courts have upheld the right of accused persons to waive many of the rights granted to them by constitutional and statutory provisions, including the right to trial by jury in felony cases;¹⁹ protection against self incrimination;²⁰ guaranty of a speedy trial;²¹ the right to be confronted by the witnesses against him;²² against double jeopardy;²³ and the right to be represented by counsel.²⁴ If all these rights granted or guaranteed to accused persons by constitutions and statutes may be waived by the accused, there would seem to be no reason to doubt that an accused person can be allowed to waive the right in felony cases to be tried upon indictment by a grand jury.

Indeed, it would seem that for almost a hundred years our statutes have authorized the waiver of indictment. Our original Code of Criminal Procedure, adopted in 1856, in Article 26, made

¹⁸ *DeGolyer v. Commonwealth*, 314 Mass. 626, 51 N. E. (2d) 251 (1943). See also *United States v. Gill* (Dist. Ct. N. Mex.), 55 F. (2d) 399 (1931).

¹⁹ *Patton v. U. S.*, 281 U. S. 276 (1930); *Tex. C. C. Pro. Art. 11*, as amended in 1931, 42nd Leg., p. 65, ch. 43, sec. 2; *McMillan v. State*, 122 T. Cr. R. 583, 57 S. W. (2d) 125 (1933).

²⁰ *Powers v. U. S.*, 223 U. S. 303 (1912).

²¹ *Daniels v. U. S.*, 17 F. (2d) 339 (1927).

²² *Diaz v. U. S.*, 223 U. S. 442 (1911).

²³ *Levin v. U. S.*, 5 F. (2d) 598 (1925).

²⁴ *Adams v. U. S. ex rel McCann*, 317 U. S. 269, 605 (1942); *McKee v. State*, 118 T. Cr. R. 497, 42 S. W. (2d) 77 (1931).

the following provision for the defendant to waive his rights in criminal cases.

“Art. 26. The defendant to a criminal prosecution for any offence may waive any right secured to him by law, except the right of trial by jury when he has pleaded not guilty.”

This provision has remained in the code from that day to this, and now appears as Article 11, the exception now being applicable to trial by jury in felony cases only. And even this exception was modified in 1931, by an act permitting the defendant in a felony case in which he proposes to plead guilty to waive trial by jury. This statute permitting trial by jury to be waived, is embodied in Article 12, and has been fully sustained by the Court of Criminal Appeals.²⁵

It is believed, therefore, that a simple statute in lieu of Article 11, allowing the defendant to waive indictment, and instructing the prosecuting attorneys and trial courts to accept such waiver by any defendant and to proceed to trial on the prosecutor's information, would be upheld as constitutional. Such a change would be of great benefit to incarcerated persons, and, by speeding up the work of the courts and reducing costs, would be beneficial to the public at large.

²⁵ *McMillan v. State*, 122 T. Cr. 583, 57 S. W. (2d) 125 (1933).

SOUTHWESTERN LAW JOURNAL

Published quarterly by Southern Methodist University Law Students.

Subscription price \$4.00 per year, \$1.00 per single copy.

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