SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 17

JULIUS A. WOLF, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 27, 1948.

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[fol. 1] **IN THE SUPREME COURT OF COLORADO**

No. 15666

JULIUS A. WOLF and A. H. MONTGOMERY, Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF COLORADO, Defendants in Error

Error to the District Court of the City and County of Denver

Honorable William A. Black, Judge

Abstract of Record

INFORMATION

On May 18, 1944, information was filed charging Julius A. Wolf and A. H. Montgomery with the crime of conspiracy to perform an abortion upon one, Mildred Cairo.

PLEA OF NOT GUILTY

On July 10, 1944, defendants Wolf and Montgomery entered a plea of not guilty.

[fol. 2] MOTION FOR SEVERANCE

On June 2, 1944, defendant Montgomery filed a Motion for Severance, omitting formal parts as follows:

> "At this day, comes the defendant A. H. Montgomery, by Henley A. Calvert, Esq., his attorney, and files herein his motion for severance which, omitting the formal parts and signature, is in words and figures as follows, to-wit:
>
> "Comes now A. H. Montgomery and respectfully moves this Honorable Court to sever the information herein and to grant this defendant a separate trial and for grounds for this Motion shows unto the Court:
>
> "1. That at the trial of this cause, there will be introduced evidence of matters that would be material and admissible as against this other defendant and would be inadmissible as against this defendant if

tried alone, and that such evidence, so admissible and material, as against the other defendant, does not relate to the reputation of such co-defendant.

"2. That to try this defendant jointly with the other defendant would greatly prejudice him in that such evidence affecting the other defendant but not affecting this defendant would be admissible, whereas if this [fol. 3] defendant is tried separately such evidence would not be admissible.

"This Motion is supported by the affidavit attached hereto."

Affidavit

"STATE OF COLORADO,
City and County of Denver, ss:

"A. H. Montgomery of lawful age, being first duly sworn according to law, deposes and says: That he is one of the above named defendants; That this defendant is informed and believes and so states the fact to be, that on the trial of this case evidence will be introduced by the State which would be admissible and material as against the co-defendant Julius A. Wolf and inadmissible as against this defendant if he were tried alone and separate from the other defendant, and that such evidence does not relate to the reputation of the other defendant.

"That a more particular statement of such evidence is, so this defendant is informed, substantially as follows:

"That after the arrest of this affiant and while he was in custody of Charles Foster, Sheriff of Arapahoe County, Colorado, at the time he arrested this affiant, stated to this affiant that Julius A. Wolf made incrimi- [fol. 4] natory statements involving himself and tending to show his complicity and participation in the offense alleged. That said statements were made by said co-defendant outside of the presence of this defendant and while said co-defendant was under arrest. That the evidence of such incriminatory statements would not be admissible and material as against this affiant, if tried separately, but would be as against said co-defendant.

"That this affiant is informed there will be other evidence which would be admissible as against his

co-defendant, and inadmissible as against him which does not relate to the reputation of the said codefendant, and this defendant cannot more definitely inform the Court as to the exact nature of said testimony.

"This affidavit is made in support of his Motion for a Severance as is required by Statute.

Signed—A. H. Montgomery.

Subscribed and sworn to before me this 12th day of May, 1944. My commission expires March 4, 1945. Richard Downing, Notary Public." (Seal)

[fol. 5] MOTION FOR SEVERANCE

On June 2, 1944, defendant Wolf filed a Motion for Severance, which is in substance the same as the Motion filed for Montgomery.

MOTION TO STRIKE MOTIONS FOR SEVERANCE

On June 10, 1944, District Attorney filed a Motion to strike Motions for Severance on the ground that said Motions are vague, indefinite and a sham.

July 10, 1944, Motion of District Attorney to strike Motions for Severance for the defendants is denied.

STATEMENT OF DISTRICT ATTORNEY IN RE MOTIONS FOR SEVERANCE

On argument for Motion for Severance, the District Attorney made the following statement:

"In addition to that, I may state to the Court at this time that the People are not aware of any witness that can come into this court and testify at the trial of this cause that either of these defendants, Julius A. Wolf or A. H. Montgomery, at any time made any incriminatory statement involving the other which would be admissible as against one of them but not admissible against the other.

"Now, when I make that statement I want the Court to take into consideration that I am speaking from the evidence as I know it at this time. I have examined into the witnesses in this case that I have had anything to do with, and especially the witnesses named in their [fol. 6] affidavits as to these statements that were made

by the other defendants, and no such statements were made and there will be no testimony offered from either Charles Foster or Louis Malach. The other only witness endorsed is Franklin Thayer, and there will be no testimony offered from Franklin Thayer of any such nature.

"If the Court please, with that statement, the general proposition of law, as to the last paragraph of the affidavit, 'That there will be other evidence, this affiant is informed, which would be admissible as against his co-defendant, and inadmissible as against him which does not relate to the reputation of said codefendant, and this affiant cannot more definitely advise the Court as to the exact nature of said testimony,' the People are not prepared at this time to say and cannot say that there is no such evidence. We have no idea of what they refer to, and in the Kolkman Case, as the Court has stated, while that statement is not sufficient ground for a severance, if the record should disclose at the trial evidence was produced which was inadmissible and was erroneous, and it appeared from the bill of exceptions, then, of course, the case would be reversed; because the defendants have no way of determining what the evidence would be of what would be offered; if they are not foreclosed. [fol. 7] That, of course, is a general proposition of law which should be followed in this case as in any other case. Neither the Court nor the People at this time can state that there is any such evidence that would be admitted. The only statement that can be made by the People is that in this case they are not going to endeavor to mislead the Court or try to introduce any evidence that is inadmissible."

"The Court: I am telling you what the ruling is. You are not telling the Court. The ruling is that you may introduce any evidence which existed prior to the commission of the conspiracy, but after their arrest if there have been any statements made by either of the defendants concerning each other, they will be barred, based upon your statement. For that reason, for motions for severance will be denied."

MOTION FOR ORDER TO RETURN BOOKS AND RECORDS

On October 4, 1944, the defendant Wolf filed his motion for an order to return the defendant's books and records, omitting the formal parts, the motion is as follows:

"Comes now the above-named defendant, Julius A. Wolf, and respectfully petitions the Court to require the State acting through the District Attorney to return to this defendant certain books and records which were wrongfully seized by the District Attorney [fol. 8] from the office and in possession of the defendant. A more particular description of said books and records being as follows:

One 1943 Day Book

One 1944 Day Book

Said books were a necessary record kept by this defendant in the carrying on of his profession as a doctor of medicine, and which were a record of the names and addresses of the patients of this defendant who had come to his office in his professional capacity for treatment and cure, and also were a record of the ailments or diseases for which said patients came for treatment and other privileged matters.

"That said books and records were taken out of the custody of this defendant while in his possession by officers of the District Attorney's office forcibly and wrongfully without the consent of this defendant, and without any warrant or order of Court describing any place to be searched or thing to be seized, and that said search and seizures constituted an unreasonable search and seizure in violation of Article 2, Section 7 of the Constitution of the State of Colorado."

Motion duly verified by defendant Wolf. (This motion was argued, but ruling was reserved until the time of the trial as appears from the Record, Folio 108.)

[fol. 9] **Statement of Trial Proceedings**

On December 4, 1944, case on for trial before a jury.

Mildred Cairo was sworn in as a witness and testified in substance as follows:

I was married to William Cairo on July 31, 1944. I was first married to him in 1938. I was divorced from him in October, 1943. I live at 749 Albion Street. I previously lived with my parents at 3858 Lafayette Street.

I saw Montgomery first at about 5 in the evening on April 3, 1944, at his home at 3106 West Ohio. I had called him on the 3rd at noon asking him if I could come out. He said yes, to be out about 5. So I went out. He let me in. I introduced myself and I told him I wanted an abortion. He asked me who sent me there. I gave him a fictitious name, so he told me it would cost quite a sum of money and they went according to months. But he asked me if I had been to a medical doctor. I said no. He said he wouldn't touch me until I had been examined by a medical doctor. He gave me Dr. Wolf's office in the Republic Building, and told me to be up there at noon Tuesday and he would arrange for Wolf to see me at noon Tuesday. So he asked me if my parents had known anything about this. I said no. He said, well, I would have to tell them because I would be in bed about a week. He didn't want them to get frightened if I should get sick and call in an outside doctor. He also stated that he lived outside of the City of Denver and he could perform an [fol. 10] abortion without complying with City laws.

At that time Montgomery made an appointment for me to see Wolf. He said that he was at 310 Republic Building, and that he lived at the Cosmopolitan Hotel. Montgomery told me that he never used instruments, he just used a drug.

I saw Dr. Wolf at his office. I walked in and I told him who I was. He says, yes, Montgomery called and told him I was coming. So he asked me how far pregnant I was. I says,

'Three months.' He says, 'Well, it will cost quite a sum of money.' He examined me. He gave me a vaginal examination. He says, yes, I was right; I was three months, and he said it would be $300.

Dr. Wolf wanted to know when I wanted it done. I told him as soon as possible. So he says he would arrange it. He told me to be at Dr. Montgomery's at 5 that same even-

ing and he would arrange everything with Montgomery. So I told him I would. He gave me his telephone number at the Cosmopolitan and his office phone number because, he says, I would need him within 24 hours after the abortion had been performed.

I went out to Dr. Montgomery's and he was waiting for me. He asked me how much money I had. I says I didn't have any. He told me that Wolf had told me to bring the [fol. 11] money out, which he hadn't. He says, well, he couldn't do a thing unless I had the money because he couldn't collect a thing on an illegal abortion after it had been done. So I told him I would have the money Thursday. He told me if I had the money Thursday to come out Thursday evening at 6.

I saw Dr. Montgomery on Thursday at 6. That was the time arranged between him and me. When I went in I told him I had the money. He took it. Then he gave me some pills. He said it would take about 20 minutes for the pills to take effect. He asked me if I had Dr. Wolf's telephone number, both where he was living and his office, and I said yes. He inserted a speculum and then inserted this drug and a syringe instrument and he packed me and told me to go right home go to bed; I would need Wolf within the next 24 hours.

Montgomery told me that if I ever sent anybody out to him to make sure who they were before I sent them. I asked him if I would have to pay the other doctor and he said no. I was at Dr. Montgomery's about 30 minutes. Then I went home and went to bed.

I saw Dr. Wolf Friday about 3 o'clock. I had been in bed all morning, I started getting pains, I had cramps and labor pains. My family called in Dr. Wolf. Dr. Wolf came to my home about 3 in the afternoon. He came in the bedroom and asked me how I felt. I said "Terrible." He said he had [fol. 12] arrived just in time. I miscarried and he helped me. He was pressing on my abdomen. He helped me as much as he could. Then he told me if I needed him again to call him.

I saw Dr. Wolf again on Saturday, the next day, at about 10 in the morning. He just stopped in and asked me how I was. I said, "Fine." He told me to come down to the office in about ten days for an examination.

I saw Dr. Wolf on April 21 at his office. He gave me

another examination and said I was all right. I asked him if I owed him any money. He said no.

Mr. Dickerson objects on behalf of Montgomery on the ground that if there was a conspiracy, then when the act was complete the conspiracy was complete.

Argument of counsel.

> "The Court: The objection will be overruled as to this question about the money, it having been discussed by both the defendants prior to the time of the alleged abortion being committed. It seems to be too harsh a rule just to say 'leave it in the air' when it is done in the furtherance of the conspiracy, and the object of the abortion, so far as the defendants are concerned, to obtain the money, the $300—certainly, the situation, so far as the Court sees it now, is that any statements made by either of the defendants concerning the money [fol. 13] would be admissible."

Exception saved.

Wolf asked me if I had paid Montgomery. I said I had. He said that he would make out with Montgomery. I was out at Montgomery's house three times.

When I was in Wolf's office on April 4, I gave him my name.

Witness is shown book marked Exhibit "A". This is one of the books that the defendant, by Motion duly filed, sought to have returned to him on the ground that seizure constituted a violation of his constitutional rights.

> "Q. Now, turning to a page in this book under date of Tuesday, April 4th, I will ask you to examine that and state whether or not your name appears there? A. Yes, sir. Q. How much of your name? A. It is "Mildred, 3858 Lafayette. Cherry 183—."

Mr. Dickerson objects because the book has not been introduced in evidence. Objection sustained.

OFFER OF EXHIBIT "A"

The District Attorney offers Exhibit "A" in evidence.

"Mr. Hornbein: We object, if your Honor please, to [fol. 14] offering the book in evidence. In the first place, we have not seen it. First they have to show us the book and have us look at it and then we can see whether it is objectionable or not. Then there will be another point raised, your Honor, in connection with the motion filed before the Court which the Court has still under consideration, being one of the books that was obtained in violation of the defendant's rights. Certainly, before he may offer it we have the right to look at it to see what it is and whether it is admissible.

"The Court: He has offered it now, and you gentlemen will have an opportunity to examine it."

Argument on objection.

After argument the Court ruled as follows:

"The Court: The Court feels that in view of objection being made to this evidence, you have a right to inquire into it the same as if it were a confession. For that reason the Court will hear the evidence pertaining to this book so that the record will show under what circumstances it was received.

"Mr. Anderson: If the Court please, we wish at this time to save our exceptions to your Honor's ruling that we are forced to go into this question of the admissibil- [fol. 15] ity of this evidence collaterally. I believe that this Court has erred in requiring that, and it being a tremendously vital part of this case, we would like at this time that your Honor enter an order recessing this trial until such time that we could submit that question to the Supreme Court and get a ruling upon it. We believe the Massantonio Case controls. We feel it of sufficient importance to do that.

"Mr. Dickerson: If your Honor please, it seems to me here and now is an effort to try to intimidate counsel and the Court—the question of submitting this to the Supreme Court, step by step by step by step. This question whether or not we have the right to show that they went out there and unlawfully, in violation not only of the law of searches and seizures but in violation of

the law that protects those patients who had come there, in violation of the rights of those people, laying sick and expecting visits on dates indicated, who could not have the benefit of their physician,—if this case is going to the Supreme Court, let us get the story in here and we will go to the Supreme Court, and the United States Supreme Court, indeed. This is that vital. But to start now to the Supreme Court, and recess, when the Supreme Court does not know what they did, we object to. Let us give them everything, and bring these [fol. 16] men here and cross-examine them and find out, and then let the Supreme Court pass on it.

"Mr. Anderson: Let me answer that, if your Honor please. The thing that we ask the Supreme Court to pass upon is not the question whether there is an unlawful or illegal search and seizure, but purely a question of the admissibility of the evidence. Counsel suggest that we proceed and take up certain matters later. But we are not unreasonable at this time. Counsel well knows if we proceed to a conclusion of this case at this time, with this type of evidence being excluded, the results of this trial may well be as he wishes it to be. We can appeal as a question of law, but the result of this trial will be forever settled. Therefore, at this time we ask your Honor that we be permitted to test that question.

Objection of District Attorney to going into the method of how the books were obtained, collaterally, was overruled.

The District Attorney then called Ray Humphreys as a witness in connection with the collateral inquiry as to how the books were obtained.

Ray Humphreys testified as follows:

I am Chief Investigator for the District Attorney's Office of Denver. On April 25, 1944, I had occasion to make an [fol. 17] investigation regarding the activities of a woman by the name of Gertrude Martin at the Cosmopolitan Hotel.

Objection was made by the defendant to the District Attorney's testimony concerning Gertrude Martin, but did not justify the search and seizure of the doctor's office.

Objection overruled.

Witness testified to a conversation with Gertrude Martin.

The gist of the conversation with Gertrude Martin at the

Cosmopolitan Hotel was that she had been aborted by Montgomery and had been to see Dr. Wolf before and after the abortion, or Dr. Wolf had been to see her after the abortion.

Conversation of Gertrude Martin caused defendants Wolf and Montgomery to be arrested.

> "Q. Will you please state just what procedure was adopted in doing that and when? A. On the 27th of April, 1944, I instructed Mr. Malach and Mr. Thayer and Mr. Rice, yourself, to arrest Dr. Wolf. At the same time another deputy was instructed to cooperate with the sheriff in arresting Dr. Montgomery. As Dr. Montgomery was in Arapahoe County, outside of your district."

Witness identifies People's Exhibit "A", book in question.

[fol. 18] I saw it the first time on the evening of the day that Dr. Wolf was arrested. The book has been in my office ever since. I was requested by Mr. Shere to turn it over and the District Attorney requested me not to do so.

Cross-examination:

I obtained the book from Mr. Malach. He obtained it by taking it from Dr. Wolf's office. He had no search warrant or order of Court. I did not permit Mr. Shere, Dr. Wolf's attorney, to look at the book.

Cross-examination.

By Mr. Dickerson:

I ordered Mr. Malach to go to the doctor's office and obtain the records. Another book was taken at the same time. These books were taken incident to the arrest.

I gave Mr. Malach only the orders that all of us give incident to an arrest, to take whatever records are available. I did not order them to take all records, only records that showed the name of Florence or Gertrude Martin.

> "Q. Did you instruct your deputy to go through all of the records in the doctor's office? A. I did not.
>
> "You did not? A. (Nods in the negative.)
>
> "A. How, then, would your deputy obtain the rec-
> [fol. 19] ords that you desired if he didn't go through

them all? A. My deputy is trained, Mr. Dickerson. I don't need to tell him such a foolish thing as to search a whole office.

"Q. I believe you did say that you requested him to obtain all books where the name of Miss Cairo appeared. A. Oh, no."

I did not order my deputy to take any books where the name of Miss Cairo appeared.

FRANKLIN THAYER, witness on behalf of the People.

I am a deputy district attorney. I went with Mr. Malach to the office of Dr. Wolf. I saw the book marked Exhibit "A." It was in Dr. Wolf's office on the table in the office room. I picked it up at that time at the direction of Mr. Humphreys. I brought it to the West Side Court.

Cross-examination.

By Mr. Hornbein:

The book was in the consultation room. I do not know whether or not it was a private room. It was where he had his patients. I don't suppose a doctor's consultation room is public. The book was on the table in the consultation room.

I picked it up, looked at it and looked through it. I saw it was a current book.

[fol. 20] It was my conclusion that the book contained the names of patients and I took that book and another book. I had no search warrant or court order. We searched Wolf first.

I remember I had instructions to pick up any day books, so far as my instructions were, they were not limited to the case of Gertrude Martin. If I had definite instructions to find out where the name of Gertrude was in the book, I would probably have done so. I looked through the book to see if there were daily entries.

Cross-examination of Franklin Thayer:

I have been in the district attorney's office since April 1, 1944. I was admitted to the bar in Indiana in 1923; to the

bar in Colorado in 1926. Mr. Rice went to the building with us.

> "Q. When you seized Exhibit A, were you acting on your own volition?
>
> "Mr. Dickerson: I want to call your Honor's attentention to the Kelley Case and also the case of Erl Ellis, lawyers who attempted to do something along this same line, if your Honor please, in that connection. That is the reason I make this inquiry. It connects up directly, if your Honor please, with these other cases on searches and seizures, where a lawyer interested in a case or in obtaining evidence, plants microphones [fol. 21] to get evidence, or he takes down a door and takes out an article and gets information, as in connection with these other constitutional citations, your Honor, and that is the purpose of knowing whether one of the lawyers in the case participated by way of order to an inferior officer, also a lawyer; whether there was an agreement between the two. That is the purpose. I want to call your Honor's attention to those cases as I propose to cite them at a later time. It is material, your Honor. That is not the same type of inquiry we have before the Court now. Your Honor was interested solely in determining the manner and means by which this evidence now comes before this Court.
>
> "The Court: Yes, the evidence in this case shows that the complaint was made to the District Attorney, concerning an abortion, and pursuant to that complaint or previous advice of it, an arrest was made. All I am concerned with is what he did."

I didn't say we went there for the purpose of arresting Dr. Wolf. I said we went there to arrest him under certain circumstances, and those circumstances transpired while we were in the building. At the time we arrested him we had instructions to pick up any evidence that might be pertinent to the case.

> [fol. 22] "Q. So, therefore, you went there to get all of the evidence concerning that subject matter that you could get, didn't you? A. No, I wouldn't say 'all of the evidence.'
>
> "Q. Were you going to leave some of the evidence there? A. Any evidence that we were permitted to

take and was pertinent to the case, we were to bring in.

"Q. By whose permission? Do you know? A. I beg pardon.

"Q. By whose permission do you mean, when you say 'any evidence that we were permitted to take.' Whose permission do you refer to? A. The law."

LOUIS MALACH.

My name is Louis Malach. I am investigator for the District Attorney's office. I am deputy sheriff. I went to Dr. Wolf's office to place him under arrest. We arrested him on the complaint of Miss Martin.

She made a complaint about Dr. Wolf and a man at 3106 West Ohio, I don't know the man's name.

At the time we went to Wolf's office we were looking for the record or any book containing the name of Gertrude Martin.

When I examined the book in the District Attorney's office [fol. 23] I found the name of "Martin." I made a further investigation of the book and found the name of Mildred Cairo. I found her name three times in Exhibit A. Her address and telephone number both appeared in Exhibit A. After finding the name of Mildred Cairo I had an occasion to see her and talk to her and I made an investigation as to whether Mildred Cairo had been aborted by either Wolf or Montgomery, and as a result of my investigation charges were filed against both doctors.

I did not have any warrant for the arrest of the defendant Wolf. We went there for the purpose of arresting him. We had information that felonies were committed there. Charges had not been filed. It was still in the process of investigation. We went there to arrest and investigate.

At the time of the arrest no information had been filed. Three of us went into Dr. Wolf's office. We went there to get records and to arrest Dr. Wolf.

Cross-examination of Mr. Malach:

When we went to Dr. Wolf's office we had no knowledge of Mildred Cairo. Never knew such a person existed. Went to Wolf's office to get his records and to arrest him. After we got to the District Attorney's office we looked through the record and looked up the names of the people in there. We found the name of Mildred Cairo. Then we contacted

[fol. 24] Mildred Cairo. We made an appointment to see her as a result of the knoweldge which we obtained from the book. Then she came to our office and she told us all about it. Then we looked up names of other patients in this book. I don't know how many other names we looked up, possibly ten. We looked at every name in the book. Some names had an address, and some names a telephone number. We didn't know what these people were suffering from. We knew they were patients. They were women. We went out and contacted these people and went to find out for what purpose they went to Dr. Wolf. We didn't contact all of them. We only contacted those where there were prices stated. We contacted these people and made them come to the District Attorney's office. We didn't know what was the matter with them until they came. The only information we had so far as Miss Cairo was concerned came from the book. The same with all other cases, except Miss Martin's.

We got about ten or twelve women in altogether. The information was filed against Dr. Wolf on the information that the District Attorney had from the books.

Redirect examination of Mr. Malach:

Mr. Rice. All of the women we talked to whose names were found in Exhibit "A" told us that they had been either [fol. 25] aborted by Montgomery or someone else who was connected with Wolf.

I was incorrect when I said everyone we talked to had been aborted. I meant only two, from whom we had statements. It was a small percentage that denied having any abortion. There were only two women that I know of. One didn't talk at all.

> "Q. Now, when these women came in, they came into your office and you asked them whether they had an abortion; is that how you approached them? A. No, we weren't quite that crude, no.
>
> "Q. You wouldn't do anything like that? A. Not that crude, Mr. Hornbein.
>
> "Q. Let's see how you proceeded. You said, 'Now, Mrs. So and So, you were in Dr. Wolf's office, weren't you?'"
>
> "A. That is about the substance of it.
>
> "Mr. Hornbein: I know, but I want to see what he

said for the purpose of showing that the District Attorney's office called in women they didn't know anything about; they did not ask them about the commission of a crime; they asked what was the matter with them. I say that is not the right of any man in these United States, from the President down, to call a man or a woman in who has been a patient of a doctor, and [fol. 26] under color of law interrogate them as to what they went to the doctor for. That is exactly what he has done."

Recross-examination of Mr. Malach.

By Mr. Dickerson:

One of these women told us that Dr. Wolf would take care of them after they had been aborted.

Deposition of Gertrude Martin is offered. The deposition is limited strictly to the collateral inquiry.

Argument on objection to the admission of the book, and in support of the motion to return the book.

"Mr. Hornbein: Very well. Of course, your Honor, we are not going to reargue what we argued yesterday. There would be no sense in that at all. We argued the straight proposition, the constitutional proposition, that here there was an unlawful seizure and violation of the State Constitution. We do not claim that the Fourth Amendment to the Federal Constitution on Searches and Seizures applies to this State, but we do maintain that the amendment is a provision of the State Constitution which is substantially the same as the Federal Statute.

"Our argument is principally based upon the propo- [fol. 27] sition that there is an inherent difference between contraband articles that are unlawful to have, and mere evidentiary articles. Our argument is based upon the proposition that this which the District Attorney has done is absolutely contrary to the basic constitutional rights; that there is no Constitution of Colorado guaranteeing immunity from unreasonable searches and seizures if they are permitted to do this. The situation now is much more aggravated than it was yesterday. They admit they went down there on a general search, went down there for the purpose of taking these records and arresting them. That is what Mr.

Malach just said. They admit they had no information whatever as to the cause now before the Court. They went there and got that book from a doctor's office, a private doctor, looked at the book and found the patients, and went and checked those patients up to see what they had been suffering from.

"I say to this Court, in all seriousness, that is a proposition I do not believe will stand."

DEFENDANT'S MOTION TO QUASH AND FOR A DIRECTED VERDICT

Motion to quash the information and the jury is instructed to return a verdict of not guilty, for the reason that it affirmatively appears from the testimony which has been adduced on this collateral investigation that the information [fol. 28] which was filed is based wholly and altogether upon testimony and evidence that was obtained from the defendant in violation of the constitution of this state which provides that no person shall be compelled to give testimony against himself, and for the further reason that this action is based wholly upon the evidence which was obtained in violation of the constitutional law against unreasonable searches and seizures, the Fourth and Fifth Amendments to the Constitution of the United States.

Objection by Mr. Dickerson on behalf of Dr. Montgomery to the admission of the evidence or statements against Montgomery.

Continued argument of Mr. Dickerson and Mr. Calvert.

"The Court: This is the first time, I believe, that this question has ever been put squarely up to a trial judge. The only time, as a rule, it has ever been put up was where an indictment was brought by a grand jury. Ordinarily, where an indictment is brought in, it is shown in the motions filed at the proper time, setting up the matters and things which would constitute requiring the defendant to give incriminating testimony about himself, and the motion, in that case, should be quashed. The question here is whether or not, under our Criminal Code, this motion should not have been filed before the plea was entered.

[fol. 29] "Mr. Hornbein: We couldn't possibly know it at that time. It was not known until today. We do not know what testimony the District Attorney has, and did not know, until it was presented. But we know

it now after they testified. They brought it out themselves. We did not know it. Otherwise, we would have filed such motion."

Further argument of counsel.

MOTION TO QUASH OVERRULED

Opinion of the Court. Court overruled motion to quash, because motion was not in writing and that the reasons were not specifically set forth.

Next question is as to the admission of Exhibit A.

MOTION TO RETURN BOOKS AND RECORDS DENIED

"The Court: I might say, gentlemen, in order to keep the record straight, that motion to return the books and records was filed on October 4th. The Court, as you recall, stated he would take it up during the trial. In order that the ruling may be entered, the Court will now deny that motion."

An exception noted.

"The Court: Also in regard to Exhibit A, I think the ruling will be that it is admissible. While it has been properly before the Court, I do not believe it has been before the jury. In other words, I am ruling it is ad-
[fol. 30] missible if properly connected up."

Mildred Cairo resumes the stand.

Exhibit A is offered in evidence and exceptions noted.

My name appears written in this book, "Mildred. 3858 Lafayette. Cherry 1831." My name appears on Friday, April 7. On April 7 I saw Dr. Wolf at my home. My name appears on Saturday, April 8. My name appears again on April 21 when I saw Dr. Wolf at his office.

Cross-examination of Mildred Cairo.

By Mr. Dickerson:

I did say that I would have an abortion because I wasn't married at the time. My ex-husband was responsible for the pregnancy.

I remember testifying about William Schafer and his being arrested and placed in jail. He brought me medicine,

pills that were supposed to produce an abortion. I used the pills that were purchased by my boy friend. I did not know Wolf or Montgomery at that time. I made plans to bring about an abortion with William Schafer. I never talked to my ex-husband about my condition, but he was responsible for my pregnant condition. He knew it and wanted me to remarry him at the time. William Schafer bought the pills. I don't know where the money came from. [fol. 31] At that time my husband was trying to effect a reconciliation. I discussed the matter with William Schafer, but not with my ex-husband.

William Schafer took me to the office of Dr. Montgomery. I was out there on three different occasions. I got his address and telephone number from William Schafer.

I didn't know when Schafer was in jail. I never saw him after he was in jail. I paid Dr. Montgomery $300 and I got the money from William Schafer. I still say that William Schafer was not responsible for my condition. My ex-husband did not know that I was having an abortion procured.

I got the $300 from Schafer at my home.

> "Q. All right. Do you remember making this statement? Do you remember this question being asked? 'Had you used any drugs on yourself at all? A. No, sir.' Do you remember that question and that answer?
>
> "Mr. Rice: What page is that on, Mr. Dickerson?
>
> "Mr. Dickerson: That is page 21 of my copy of the deposition, about half-way down on the page.
>
> "Q. Do you remember that? A. No. I thought I said I did. I don't remember.
>
> "Q. You don't remember saying that you didn't take any drugs? A. No, sir.
>
> [fol. 32] "But you don't deny that you did say so? A. Well, I don't remember.
>
> "Q. Well, do you remember after that making the admission that that statement was not correct? Do you remember that? A. (No response.)
>
> "Q. When you were asked, on page 25, 'How many times did you take the drugs? A. Oh, twice, I think. Q. What's that? A. 'Twice.' Do you remember that? A. Yes, I think I do."

I saw Dr. Montgomery three times. Why did you say in this deposition that you saw him twice when you saw

him three times? I don't know. You see it here, don't you (indicating)?

The $300 I got from William Schafer was a gift from him. I was under no obligation to pay it back to him. My ex-husband did not know about that, he knew I was pregnant. I never discussed the matter with my ex-husband. I never told him I was destroying the child. My ex-husband knew I had miscarried the night of April 7. He was over there. He got mad about it and went out. He guessed that I had miscarried.

> "Q. Well, you called on Bill Schafer to pay money for an illegal operation on the basis that he was responsible for your condition, didn't you. A. No, sir.
>
> "Q. You didn't do that? A. I didn't ask him for money.
>
> [fol. 33] "Q. So you say that you had had relations with him several months prior? A. Yes, sir.
>
> "Q. And that he knew he couldn't possibly be responsible for your condition? A. Yes, sir.
>
> "Q. But for some reason unknown to you, he -anteed $300 for the illegal operation? A. Yes, sir.
>
> "Q. Is that true, Mrs. Cairo? A. Yes, sir."

Dr. Montgomery never called Dr. Wolf in my presence.

Dr. Montgomery gave me Dr. Wolf's name and telephone number. I wrote it down. I know of no reason why in my deposition I said I had only been to see Dr. Montgomery twice. I am positive I was there three times.

I don't know what kind of a job Bill Schafer has. I believe that he was waiting to be called for the service. I don't know his financial standing. I had known him about a year and a half.

He worked for Wm. Ainsworth & Son, he was a balance maker.

I threw the box that contained the pills in the stove. The first person I told of my pregnancy was William Schafer. I don't remember when I told him.

[fol. 34] I used the fictitious name of "Mary Brown" or "Mary Smith" when I went to see Dr. Montgomery.

Cross-examination of Mildred Cairo.

By Mr. Hornbein:

I don't know who it was that called Dr. Wolf to my home. I was in bed suffering from severe and serious pain. Dr. Wolf never used any instruments or drugs.

Dr. Wolf came to my home on Friday afternoon because of an urgent call that I was suffering great pain. I remember giving my deposition, it was last summer. William Schafer was in Court. He heard my deposition.

He was the party just described who gave me the money. I don't know why his deposition was not taken. It wasn't taken when mine was taken. I never saw Schafer after that. He knew all about this. He bought the drugs. I don't know where Schafer is.

Redirect examination of Mildred Cairo:

My deposition was given on June 21 of this year. On direct examination I testified that I had seen Dr. Montgomery three times.

I first met Bill Schafer when I started to work at William Ainsworth & Son. I informed him that I was pregnant [fol. 35] sometime in February. I did not request him to marry me. After I took the pills, I did not have any reaction to them at all.

Recross-examination of Mildred Cairo.

By Mr. Dickerson:

Louis Malach recalled and testified as to the book and that the book has been in the custody of the District Attorney ever since.

Cross-examination of Louis Malach:

I went to the office of Dr. Wolf for the purpose of getting additional evidence. I glanced in the book in his office, saw the book contained the names of many patients. The room in which the book was was the one off to one side of the reception room.

Ben Goorman:

Ben Goorman testified that he was the Undersheriff of Arapahoe County and arrested Montgomery on April 27,

1944. He was taken to the County Jail at Littleton and the next morning turned over to Ray Humphreys and Louis Malach.

FRANKLIN THAYER.

Franklin Thayer testified for the people as follows:

[fol. 36] His testimony was the same in substance as Louis Malach.

Exhibit A was shown to the jury and specific notations referred to by the witness were shown to the jury.

MOTIONS FOR DIRECTED VERDICT

Motion for a directed verdict on behalf of defendant Wolf.

Motion for a directed verdict on behalf of defendant Montgomery.

Argument overruled and exceptions saved, and thereupon defendants offered and gave the following evidence.

DR. EUGENE S. AUER.

Dr. Eugene S. Auer, witness for the defendants, testified to the good character of the defendant Wolf. That he is a member of the Medical Society, Colorado State Medical Society.

DR. A. H. MONTGOMERY:

Dr. A. H. Montgomery is called as a witness on his own behalf and testified as follows:

My name is Andrew Harrison Montgomery. I am a chiropractor and druggist. I am licensed as a chiropractor. I am 55 years of age. I have lived in Colorado since 1929. I live at 3106 West Ohio. I have never been convicted of any crime. Witness shows the certificate that he is duly licensed in his profession.

[fol. 37] I do not know the prosecutrix, Mildred Cairo, I saw her the first time in June, 1944, at the time the deposition was taken. She was never in my home in Arapahoe County, I never treated her for anything.

Cross-examination of Dr. Montgomery:

Witness testifies that he has a full-time occupation, more or less, with pharmacy.

Went to school in Chicago, and came here and worked for the Moler System Colleges. I never practiced medicine as a medical doctor.

My office was at 1457 Glenarm Place, and I live at 3106 West Ohio. I did not know Mildred Cairo before June of 1944. I have only known Dr. Wolf since I was in jail. I believe I was introduced to Dr. Wolf at the Legion Hall. I may have seen him, but I never had any business dealings with him. I have never had any conversation with him about medicine or chiropractic. I never participated in any business with him, or treated with him as a physician. I know Bill Schafer. I know his Uncle, Shimm, a barber. I went out and talked to him once after the case was filed. I think I was trying to locate Bill Schafer.

The only way I knew Bill Schafer was here in the Court room.

Do you know his Uncle, Mr. Schimm, the barber? I met Mr. Shimm, once I believe. I don't know what relation he is to Shimm.

[fol. 38] I believe that when I talked to counsel he told me to get hold of Schafer and see who he was. That was before the deposition was taken. I don't know where I got that name, or whether it was after the deposition was taken.

Mr. Dickerson's objection overruled.

I went up to the ranch to see William Schafer. I went up there on the advice of counsel.

Did you ask him at that time if he would talk to Mildred Cairo and see if she would exercise her constitutional privilege and not testify when the deposition was taken.

A. I don't recall anything of the kind. I do not remember whether it was the Sunday before the deposition was taken.

I believe the name Schafer came from Mrs. Ione Hale. I believe that it was some of the counsel that told me to go out and hunt that man.

I saw Ione Hale twice.

I did not know William Schafer before the time I was arrested in connection with this case. I rather think he is related to Mr. and Mrs. Shimm. My home telephone number is Race 2214. My office telephone number is Keystone 0088. Mrs. Cairo never called me on the phone.

[fol. 39] IZETTA MONTGOMERY.

Izetta Montgomery, witness on behalf of the defendant, testified as follows:

I am the wife of the defendant, A. H. Montgomery.

I do not know Mildred Cairo, never saw her before I saw her here in court. She never came to my home and was never admitted by me.

Cross-examination:

Never saw Mildred Cairo before I saw her in Court. Dr. Montgomery has patients come to the home in the evening. I did not know Dr. Wolf until this case opened.

DR. JULIUS A. WOLF.

Dr. Wolf testified that he has lived in Denver forty-three years. Graduated from the University of Colorado, Medical School. Took my Bachelor of Arts at the University of Denver. I took special courses in gynecology, obstetrics, female disease at Bellevue Hospital, New York, postgraduate. I was an instructor at the old medical school at 13th and Welton. I specialized and treated women's diseases, obstetrics, surgery, pelvic and abdominal surgery. I belong to the Denver County Medical Society, the American Medical Association, the Colorado State Medical Society. [fol. 40] There never have been any charges brought against me for unprofessional conduct.

Mrs. Cairo came to my office on the 4th or fifth of April. I took her name, address, and telephone number. She wanted to be examined for pregnancy. I examined her and found from the size of the uterus that she was about three months' pregnant. I did not know anything about her. I told her the fee would be $5.00. I didn't use any instruments or any drugs.

The next time I saw Mildred Cairo was on April 7 at her home. I received a call, went there, and found her in labor. She was miscarrying. I put my hand on her abdomen. She was in terrible pain. I found on examination that the head was through the canal. I told her within a few minutes she would miscarry and the pains would stop. I made an examination and found the head of the fetus was coming down the canal, that was the situation. When the fetus is in that position, it is impossible to restore it.

A child cannot be alive at three months, that is impossible. After the fetus is dislodged from the uterus, and it is not expelled, a woman is liable to have blood poison and other complications. That is because the fetus would disintegrate and the poison would go through the system. She might develop peritonitis.

I was there that day and sat in the parlor and talked [fol. 41] to her boy friend, Bill Schafer. I stayed to see that everything went along all right and that she didn't have a hemorrhage.

I saw the girl the next morning at her home, she was in fine condition. Said that she felt fine. I took her temperature to see that there was no infection. I told her to come in in about a week or ten days and that I would give her my personal check up.

I received $15 for my services.

Witness is handed the book which showed the entry of a payment. He was paid by Bill Schafer. The entry in the book was an entry of $15, which was a house visit. You discussed this case with Montgomery before you were arrested. I never saw Montgomery until I was arrested. I never conspired with him. I never aided or assisted Montgomery or any other person in procuring an abortion. I never used any drugs or inserted any instruments.

Cross-examination of Dr. Wolf:

I am on the staff of the Beth Israel Hospital. It has been about a year and a half since I have been on the staff of any other hospital in Denver. I was on the associate staff at St. Anthony's. I have just one office, and my office is in the Republic Building. I live at the Cosmopolitan Hotel, and have lived there about fifteen months. I live there with my brother. I remember when I first saw Mildred Cairo and when I made the notation in the book.
[fol. 42] The first time I saw her was when she came for the pregnancy test. I made no written record of the case. Sometimes I do not make a record. I do not make a history record at all times. It depends on what they claim. If it is a simple thing, I don't make a record. When Mildred Cairo came to me she did not make any mention of an abortion. She didn't say that she wanted my services during pregnancy.

I asked her a few questions as to her symptoms, and whether she had been sick to her stomach. That was about

all the history that I took. I don't have any recollection of her general health. I would say that her condition was a normal three months' pregnancy.

According to my book, Exhibit A, the first time I saw Mildred Cairo was on April 4, and the next time was on Friday, April 7, and on April 7 I called at her home. (The Record shows October 7 which is a typographical error.)

My usual house-call charge varies, sometimes $3 and sometimes $5; Office calls usually $2, depending on the amount of time, and for ordinary manual examinations I charge two or three dollars.

I talked to Bill Schafer. He asked me how much he owed me. I said, "I have been here quite a little time and have done quite a little work, I'll just run over tomorrow and make it $15 all together."

[fol. 43] "Q. Did you make this notation at that time, '150'? That means $15. A. '15' and there is a dot. You see the period after the '15'. Do you see the period?

"Where is the other '0'? A. I don't know. Sometimes I mark them down and put a '5' without putting any '0's'. Then I put a little line under it '15' and a line.

"Q. Sometimes you wrote '$15' '150' and other times '15 00' is that right? A. No. Just put one '5' or '0' or '15' or——

"Q. In this '150' means $15. A. There should probably be another '0' there. That book has been out of my hands eight or nine months.

"Q. There is only one '0' after the '5'? A. Yes, $15 and a dot, and a dash, like that (indicating).

"Q. Where is the dash like that? A. Right there (indicating).

"Q. Way down here? A. Yes. We make that '150' the same as those dashes like when you make out a check, put a little dash underneath the '0'.

"Q. Do you usually write '$15' just '150'? A. I probably was busy that day and just made the one '0'.

"Q. That could not by any chance be half of $300? A. No, it could not. There is a period after the '5.'"

[fol. 44] I did not send Mildred Cairo to the hospital on April 7 because there was no reason for sending her to one.

I do not send ordinary cases of miscarriage to the hospital.

> "Q. What else? A. So I said, 'Well, let me examine you and see what is going on there.' I placed her on the bed. She also told me she was flowing. I forgot to mention that. She told me she was flowing and I says, 'Well, you probably are miscarrying then.' I placed her on the bed and put some newspapers under her to keep the bed from being soiled, and examined her and discovered the fetus was down in the bottom of the canal."

I did not question her as to how she got in that condition. I did not ask her what she had been doing, or whether she had tried to abort herself.

I understand that when you examine a perfectly normal woman and find that she is three months pregnant and normal in every respect, and two or three days later in a state of abortion, isn't that rather unusual?

It is rather unusual for a woman three months pregnant, a perfectly normal pregnancy, the pregnancy being normal, to abort just three days later. Such a situation does arouse suspicion.

[fol. 45] Did you make any inquiry as to what caused this abortion?

I may have asked her, but I do not remember what she said.

The case was filed shortly after I was brought to the District Attorney's office, and I have no recollection as to what I talked to Mildred Cairo about as to the cause of the abortion. I don't even believe I asked her because as I told you they tell all kinds of stories.

I did not report this still-birth to the State Board of Health as I am not required to do that. If there is a still-birth which means the baby breathes after five or six months then you have to report it. If they breathe you are supposed to report it.

I came back the next morning and examined her and she didn't have any infection. She said nothing about Montgomery at the time. I had met Montgomery once or twice, at several different clubs. We do not belong to the same professional societies. I never had anything to do with any chiropractor. I just knew one or two of them. I never sent

them any patients, and as far as I know never received any patients from them.

I saw Mildred Cairo again on the 21st. I made no additional charge. I don't believe that I had an additional conversation with her on the 21st, except that I asked her how she felt and she said fine.

[fol. 46] I kept the entries in the book. I make entries as people come in and I make these entries day by day.

On April 4, the only service I rendered Mildred Cairo was an examinaiton for pregnancy. Nothing was said about an abortion.

The occasion of taking her name, address and telephone number was so that I could send her a bill. You will find every one that has a name or number is also down twice. That is my personal record of my patients and my daily record, that is my record of all professional business. Nothing goes into this book except that which has to do with my business.

I had a speaking acquaintance with Dr. Montgomery. I never had any business with him, and I never sent him any patients, and he never sent me any that I know of. People's Exhibit C was marked for identification. I have seen that book before; it was my record for the year 1943.

This record in 1943 was kept in a similar way to the record of 1944.

I know where Dr. Montgomery lives, but I don't know his number. I might have seen it because I just happened to think that there was a maternity case about a year ago. I don't know whether I wrote it down or the girl in the office wrote it down, and said that Dr. Montgomery had sent this case up to me, and I had forgotten all about it. I said that I had never sent him a patient. I said that I didn't recall [fol. 47] whether he had ever sent any to me. I can't remember how many patients he sent me. I have no independent recollection of the name of the patient that he sent me that I delivered the baby. Would the name of the patient by any chance be Mrs. Allen? I don't remember a patient by the name of Allen. Witness is shown book. I wrote down the name of Mrs. Allen, but I have no recollection of that patient. Can you tell us what the word "Monty" means after that, in parentheses? To make a record of it, you wrote behind that name in parentheses "Monty". Dr. Montgomery may have sent Mrs. Allen in to see me. I

have no independent recollection at this time of any other patients by name that Dr. Montgomery sent me. I have no recollection of a patient by the name of Mrs. Bell.

Objection by counsel for defendant on the grounds that no doctor should be examined in regard to any communication with his patients.

Objection by Mr. Dickerson.

The Court: I understand the communications statute. You confine yourself to the examination on the acquaintance with Montgomery.

State offers in evidence Exhibit C.

Wolf's attention is called to an entry in the book showing the telephone number, RA 2214, 3106 W. Ohio, and the abbreviation "NT".

[fol. 48] Witness has no recollection of the meaning of that abbreviation. The telephone number RA 2214, and the address 3106 W. Ohio, is Dr. Montgomery's.

Witness's attention is called to an entry in Exhibit C being 3106 W. Ohio MG", also to an entry headed August 14, 1943, showing the name "McLaughlin". That is a patient's name and she was referred to me by Montgomery.

> "Q. Doctor, in your system of handling these names that you entered into your book where they are sent by someone else you put the party that sends them in parenthesis?
>
> "A. Usually, yes.
>
> "Q. That is your own private system of doing things, isn't it?
>
> "A. Yes, that's right.-

Witness's attention is directed to *a* entry date August 24, 1943. The handwriting is mine. 3106 W. Ohio is Montgomery's address. That was a woman from Wray, Colorado, I had forgotten that she had been sent to me originally. She has been in a dozen times since.

There is another entry under date of September 11, 1943, which is called to the witness's attention showing the address of 3106 W. Ohio.

[fol. 49] There is an entry by the name of Mrs. Allen on February 5, in parenthesis "Monte". It is possible that "Monte" means "Montgomery." I have patients by the name of Montgomery, too, as you notice. There are several hundred names, and I can't remember all of them.

"Mr. Dickerson: We object to it. It is objectionable as far as we are concerned, and it is not proper evidence against Montgomery.

"Mr. Anderson: Now, at this time, your Honor, we will offer specifically the page referred to as February 5th in Exhibit A; February 11th in Exhibit A, and March 17th in Exhibit A; and the page that has May 13, 1943, in Exhibit C; June 3rd in Exhibit C; August 14th in Exhibit C; August 24th in Exhibit C; September 11th in Exhibit C."

Defendants interpose the original objections.
Court overrules objection and defendants except thereto.
Exhibits are shown to the jury.

Redirect examination of Dr. Wolf:

The witness's attention is directed to the entry in the book of Friday, April 7, indicating the first entry "Mildred [fol. 50] Cairo." There is no reference to Montgomery, or any reference to any telephone number, or any street number.

"Q. The District Attorney asked you if it was usual and customary when somebody sent you a patient to put in parentheses the name of the man sending the patient. A. I told him yes.

"Q. And that was so? A. That's right.

"Q. On this entry of 'Cairo' on April 7th, there is no such entry of Montgomery? A. Yes, and not on any other."

The witness looks at the book under date of April 4 which is the first time the name Mildred Cairo appears.

The name, address, or telephone number of Montgomery is not on that entry.

The name of Mildred Cairo appears on the 8th. There is an "H" next to her name that indicates house visit.

The last entry was on April 21. The name of Mildred Cairo appears there, but not the name, or telephone number of Montgomery.

DR. EDWARD HARVEY:

Dr. Harvey, witness for the defendant, testifies to the good character of the defendant Wolf.
[fol. 51] Dr. Harvey also testified that it is not a practice to report miscarriages.

DR. HERMAN I. LAFF:

Dr. Herman I. Laff, witness for the defendant, testifies to the good character of the defendant Wolf.

> "Q. Do you know what his reputation is as a doctor in the medical profession?"

Question objected to by the State. Objection sustained. Exception by the defendants.

HARRY A. SULLIVAN:

Harry A. Sullivan testified to the good reputation of Dr. Wolf. His reputation is good.

EDWIN L. MCCULLOCH:

Edwin L. McCulloch, witness for the defendants, testified to the good reputation of Dr. A. H. Montgomery. He is a law-abiding citizen.

WILLIAM F. PRITTS:

William F. Pritts, witness for the defendants, testified to the good reputation, truth and veracity of Dr. A. H. Montgomery.

[fol. 52] SAM WILLIAM EMERSON and ROY P. WALLACE:

Witnesses for the defendants, testified to the good reputation of Dr. A. H. Montgomery.

Defendants rest.

RENEWAL OF MOTIONS FOR DIRECTED VERDICT

Defendants move for a directed verdict on the same grounds that it was made at the conclusion of the State's case.

Motion denied and exceptions saved.

INSTRUCTIONS REQUESTED BY DEFENDANTS

Instructions requested by the defendants, omitting the formal parts, are as follows:

No. 1

It appears from the evidence of the witness, Mildred Cairo that one William Schafer furnished her with the money to procure the alleged abortion, and that he accompanied her to the office or home of the defendant Montgomery.

Mr. William Schafer was a material witness in this case. If you believe from the evidence that he was available to the District Attorney, it was the duty of the District Attorney to call him as a witness, or to procure his deposition. And the failure of the District Attorney to do so justifies the inference that his testimony would not have been favorable to the State.

No. 2

The jury is instructed that the things which the defendant [fol. 53] Wolf actually did, namely, the examination of the prosecuting witness for pregnancy and attending her after an abortion had been committed, do not make him a co-conspirator with the defendant Montgomery, although he may have known at the time he examined the prosecuting witness that it was her purpose to procure an abortion, and although he may have known at the time he attended the prosecuting witness that she had committed an abortion.

No. 3

The jury is instructed that while it is not necessary that there be a formal agreement to constitute a conspiracy, yet it is necessary that there will be wilful, conscious, corrupt and active participation in carrying out and furthering a common criminal design. The mere fact that a defendant may have had knowledge that his alleged co-conspirator was

committing a crime and that a defendant acquiesced therein, is not sufficient to constitute a conspiracy.

No. 4

Where there is evidence that is material, available to and which can be produced by a party to any cause, and if such evidence is not produced, when available, an inference may be drawn that such evidence would be unfavorable to the party who fails to produce it.

[fol. 54] No. 5

If you believe from the evidence that Mildred Cairo was pregnant, and if you further believe that she suffered a miscarriage, and that such miscarriage was brought about by any drugs or poison or liquids administered to her by some one other than one of the defendants in this case, or if you believe that such miscarriage was brought about by any other act on the part of anyone other than one of the defendants in this case, or if from the evidence upon this question you have a reasonable doubt as defined in these instructions, then your verdict should be not guilty.

The Court refused to give each of said instructions, to which refusal of the Court to give the tendered instructions, defendants duly excepted.

Instructions Given by the Court

Thereupon the Court instructed the jury as follows:

No. 1

Statement of the issues made by the information, and the pleas of not-guilty.

No. 2

Stock instruction that information is a mere accusation.

No. 3

Statutory definition of a crime.

No. 4

Statutory definition of intent.

[fol. 55] No. 5

Instruction on presumption of innocence.

No. 6

Instruction on reasonable doubt.

No. 7

Burden of proof is on the People.

No. 8

Statutory definition of conspiracy.

No. 9

Statutory definition of an abortion.

No. 10

Instruction on venue.

No. 11

Instruction on conspiracy.

No. 12

The Court instructs the jury, as a matter of law, that all who take part in a conspiracy after it is formed, and while it is in execution, and who with knowledge of the facts concur in the plans originally formed, and aid in executing them, are fellow conspirators. They commit the offense when they become parties to the transaction, or further the original plan, with knowledge of the conspiracy.

[fol. 56] No. 13

The Court instructs the jury, as a matter of law, that to constitute the crime of conspiracy it is not necessary that the conspirators should succeed in their design; it is enough if the common design was formed, in manner and form as charged in the information. If the conspiracy charged in the information has been proven to the satisfaction of the jury, beyond a reasonable doubt, then the act of any one of the conspirators in furtherance of the common design, if proved, will be regarded as the act of the other.

No. 14

A common design and unlawful purpose by two or more persons is the essence of the charge of conspiracy, and this common design and unlawful purpose must be proved in order to warrant a conviction, either by direct evidence or by proof of such circumstances as naturally tend to prove it, and sufficient in themselves to satisfy the jury of the existence of such common design, beyond a reasonable doubt.

No. 15

The jury are instructed that one person cannot conspire by himself. In order to constitute a conspiracy, there must be active and conscious participation with a common design for the particular unlawful purpose alleged by at least two persons before the crime of conspiracy can be committed.

[fol. 57] No. 16

There can be no conspiracy without at least two persons participating therein. If after a consideration of all the evidence in this case there is a reasonable doubt as to the guilt of either of the defendants, it is your duty not only to acquit the defendant concerning whose guilt there is a reasonable doubt, but also to acquit the other defendant.

No. 17

The jury is instructed that it is not incumbent upon the State to prove the alleged conspiracy by direct evidence. It may be established by circumstantial evidence or by evidence both direct and circumstantial.

In proving the agreement or conspiracy it is not necessary to prove the language in which it was made. The conspiracy may be shown, as stated above, by evidence more or less circumstantial in its character. It may be shown by what is said and done by each of the parties in the furtherance of the common design, if any acts are done, or by what system or concert of action between them appears from their acts when viewed as a whole.

In determining whether or not the defendants entered into a conspiracy to commit an unlawful act, to-wit: a felony, which felony was procuring an abortion by wilfully, knowingly, unlawfully and feloniously administering and [fol. 58] causing to be administered and taken, poisons and

noxious and destructive substances and liquids, and using and causing to be used instruments in and upon the body of one Mildred Cairo, the said Mildred Cairo being then and there a woman with child, with the intent then and there to procure the miscarriage of the said Mildred Cairo, you will consider, so far as shown by the evidence, all that was said and done by the defendants, whether or not they acted in concert for the accomplishment of a common purpose, what that common purpose was, if the same was shown, and from these facts and all the facts and circumstances shown by the evidence you must determine, beyond a reasonable doubt, whether the defendants entered into an agreement or conspiracy amongst themselves to commit the crime charged in the information.

No. 18

The jury is instructed that although you believe from the evidence that one of the defendants committed an abortion on the witness Mildred Cairo, that is not sufficient in itself to convict the defendants of conspiracy, unless you further believe from all the evidence, beyond a reasonable doubt, that said abortion was committed in pursuance and in the furtherance of and as a part of a conspiracy as hereinbefore defined.

And if the evidence does not so convince you, you must acquit both defendants.

[fol. 59] No. 19

Instruction that if defendants unlawfully conspired and corroborated to perform an abortion upon Mildred Cairo, they were guilty of conspiracy, otherwise, they were not guilty.

No. 20

The Court instructs the jury that a duly licensed physician and surgeon may lawfully examine a patient for the purpose of ascertaining whether she is pregnant, and it is also lawful and right to attend her when in pain, when suffering from any cause whatsoever.

No. 21

Instruction on circumstantial evidence.

No. 22

Instruction on uncorroborated testimony must be corroborative.

No. 23

It is not necessary to prove that the offense was committed on the very date charged.

No. 24

Stock instruction on credibility of witnesses.

No. 25

Stock instruction on good character.

[fol. 60] No. 26

Stock instruction on punishment.

No. 27

General instruction that evidence stricken should not be considered, and arguments of counsel are not evidence.

EXCEPTIONS TO INSTRUCTIONS

The following exceptions were taken to the instructions.

The defendant Wolf desires to object to the giving of Instruction No. 12 on the ground that it is not applicable to the issues under the evidence. In this case the sole conspiracy is a conspiracy between the two defendants, and the evidence does not develop any unknown person. While such an instruction may be proper in the case of an existing conspiracy, it is not proper here because there could not be any conspiracy under the indictment in the evidence. And further, the defendant objects because the instruction unduly emphasizes the Prosecution's theory of the case, and the Court has already instructed the jury that no formal agreement is necessary to be shown in order to constitute a conspiracy. The last sentence of Instruction No. 12 is erroneous in that it makes one a conspirator who furthers the original plan with knowledge of the conspiracy. The law is that it is only an active, a conscious, a wilful and corrupt furtherance of the original plan which constitutes the conspiracy. It is the theory of the defendant Wolf that [fol. 61] what he did was lawful and within his rights as

a physician, and that he does not become a party to the conspiracy even if he knew that his services were to be utilized by others to accomplish a wrongful purpose.

Objection overruled.

Exception.

The defendant Dr. Montgomery objects to the giving of Instruction No. 12 for the following reasons: First, that this instruction does not in any way apply to the existing case; second, that it is misleading in that it includes within its terms accessories before the fact, accessories after the fact and, in effect, makes any person having anything to do with a conspiracy or an unlawful conspiracy a conspirator himself, which is not, in fact, the law. In other words, under the terms of this instruction it is particularly harmful where abortion is the subject-matter under consideration, or conspiracy to perform an abortion is the subject-matter under consideration. If this construction were true, then any physician or surgeon or chiropractor or professional man or person who attempted to aid or assist a woman who was being aborted, or who had been aborted, even though he did so to save her life, in carrying out the terms of the conspiracy and helping her with the delivery which had been already started, or in otherwise aiding or assisting her in this matter after the conspiracy was complete, would be a conspirator. And this is not the law.

[fol. 62] The especially erroneous part of the instruction is the last phrase, "or further the original plan, with knowledge of the conspiracy." That would preclude a regular physician or surgeon or a hospital from taking care of a woman who had been aborted, or in saving a life as the result of his services.

Objection overruled. The Court has covered the matter in a previous instruction.

Save an exception.

Exception.

Defendant objects to No. 13, particularly the last sentence thereof, for the reason that it should also state, in fairness to the defendants, that if the conspiracy in the information has not been proven beyond a reasonable doubt, then what one of the defendants did is not to be considered against the other defendant. And also that this instruction emphasizes the prosecution's theory in giving various and sundry definitions and conceptions of conspiracy.

We have to object to Instruction No. 13 as being erroneous, because it would cover the acts and doings of an alleged conspirator after the completion of the alleged co-conspirator, and in view of the fact we filed a motion for severance here, this instruction given would be harmful for the reason that it would include evidence which was previously objected to and was objected to during the trial, [fol. 63] and that it does cover acts of a person not admissible as to the other defendant where they were performed or said or done after the completion of the alleged conspiracy.

Objections overruled.

Exception.

We make the same objection to No. 14, that it unduly emphasizes the theory of the prosecution; that it is a restatement of the previous instruction with reference to conspiracy; that it is an incorrect statement of what a conspiracy is; that while the essence of a conspiracy may be a common design, and unlawful purpose must result from a definite, conscious, wilful co-operation between the alleged conspirators, which is not pointed out in this instruction. That under the evidence in this case the defendant Wolf did certain things, namely, examine the witness Cairo for pregnancy, and attended her, ministered to her when she was suffering; that under this instruction he and all others similarly situated, namely, physicians and surgeons, would be bound to forego a lawful activity merely because they might have known or even suspected that such activity was being utilized in the furtherance of an unlawful agreement.

Objection overruled.

Exception.

The defendant Dr. Montgomery objects to the giving of [fol. 64] Instruction No. 14 for the reason that it would contemplate any unlawful act not in itself an agreement, or not constituting a crime, and is therefore misleading; for the reason that it has no application and serves no purpose in this trial except to unduly point out and emphasize the State's theory and prejudice the defendant.

Objection overruled.

Exception.

We object to instruction No. 17 in its entirety for the reason that it is argumentative and has the nature of advocacy for the prosecution, specifically as to the first

paragraph, that is repetition of the statement made in instruction No. 14 to the effect that the conspiracy may be proved by direct or circumstantial evidence. The second paragraph of No. 14 is further repetitious of the same thought, and it descends into argument; the last paragraph of No. 17 is a further repetition of the same principle and is a comment on the evidence and invasion of the province of the jury in that it specifically points out to the jury the facts and circumstances that may be considered as tending to show the conspiracy, whereas, it completely ignores the facts and circumstances shown by the defendant which tend to prove the non-existence of a conspiracy. Further, that it authorizes and directs the jury to consider anything that was said or done by either of the defendants as against the other defendant regardless of whether or not said [fol. 65] defendants were acting in concert for the accomplishment of a common purpose, whereas the fundamental law is that the acts and statements of one defendant are only relevant against his co-defendant because of the existence of a concert and accomplishment of the common purpose; that a criminal agency or any agency can never be established by the declarations or conduct or statement of the agent until the criminal agency or partnership has been established.

Objection overruled.

Exception.

The defendant Dr. Montgomery objects to the giving of instruction No. 17 for the reasons that counsel already assigned, and for the further reasons that the argument purported to be given by this instruction in behalf of the prosecution is not warranted by the evidence; that it points out evidence or purported evidence which is not, in fact, in the case, or which has not, in fact, been admitted in the case, and applies it specifically to Mildred Cairo, and gives the jury to understand that Mildred Cairo was a woman with child, whereas, so far as the defendant Montgomery is concerned, he is not bound by such testimony and such a conclusion is not warranted in an instruction against the said Dr. Montgomery.

Objection overruled.

Exception.

[fol. 66] With Judge Calvert's suggestion, and I think it is a good one, there should be a general objection to this

instruction and the others dealing with conspiracy, that it is mere repetition and unduly emphasizes the State's theory of the case, and ignores the defendants' theory of the case.

Objection overruled.

Exception.

Save an exception.

Verdict

Verdict of the jury finding defendants guilty.

Exceptions to verdict.

Allowance of bail.

Order that defendant Wolf be allowed 20 days in which to file a motion for a new trial, bond fixed.

Formal entries of verdicts.

Motion for New Trial

Motion for a new trial by defendant, Julius A. Wolf, omitting the formal parts is as follows:

Comes now the defendant, Julius A. Wolf, and moves this Honorable Court for a new trial, and to set aside the verdict heretofore rendered, and as grounds for this Motion, shows unto the Court:

1. That the Court erred in overruling the Motion of the [fol. 67] defendant, Julius A. Wolf, to suppress as evidence certain books and records taken from the possession of the defendant, which records contained names of patients and the nature of their ailments, and other matters which were of a wholly private and confidential nature. Said books being Exhibits "A" and "C" in this case. For the reason that said books were taken without a search warrant or any other process of law, and in violation of the rights of this defendant under Article 2, Section 7 and Section 18 of the Constitution of the State of Colorado and the 4th Amendment of the Constitution of the United States.

2. The Court erred in overruling objections of the defendant, Julius A. Wolf to the introduction of said Exhibits "A" and "C" for the further reason that the admission in evidence of said Exhibits violated the statutes of the State of Colorado, which prohibit a doctor from testifying as to privileged communications received by him from his patients, which said statements were given to assist the

physician in his treatment and diagnosis and said Exhibits contained the ailments from which patients suffered and their introduction in evidence was, therefore, violative of the statute in such case made and provided.

3. The Court erred in overruling the objections of the defendant, Julius A. Wolf, to the introduction of said books and records, or either of them, on the ground that they were unlawfully obtained by the officers of the District [fol. 68] Attorney in violation of Article 2, Section 7, and Article 2, Section 18, of the Constitution of Colorado, and in violation of the 4th Amendment to the Constitution of the United States.

4. The Court erred in overruling the Motion of the defendant, Julius A. Wolf, made orally during the course of the trial to quash the information for the reason that it affirmatively appeared from the testimony of the State that the information was based wholly upon evidence which was obtained from the books and records of the defendants, which were unlawfully and wrongfully seized in violation of Article 2, Section 7, and Article 2, Section 18, of the Constitution of Colorado, and in violation of the 4th Amendment to the Constitution of the United States, whereby the defendant was compelled to give testimony against himself, which testimony was the sole basis of the information, all in violation of Article 2, Section 18, of the Constitution of Colorado.

5. The Court erred in overruling the Motion of the defendant, Julius A. Wolf, made at the conclusion of the State's case for a directed verdict of "not guilty" for the reason that the evidence affirmatively showed that the defendant did nothing except that which was lawful for him to do in accordance with the practice of his profession, and that the evidence was wholly insufficient to establish any conspiracy to which the defendant was a party, and the [fol. 69] Court further erred in overruling the Motion of the defendant, Julius A. Wolf, made at the conclusion of all the testimony for a directed verdict of "not guilty" for the same reason.

6. The Court erred in refusing to give defendants' tendered instruction No. 1, in which the Jury was advised that one William Schafer was a material witness, and that it

was the duty of the District Attorney to call him as a witness or procure his deposition if he was not available.

7. The Court erred in refusing to give defendants' tendered instruction No. 2 in which the Court was requested to charge that the things that the defendant did, do not make him a conspirator, and that the refusal to give said instruction was erroneous because it correctly stated the law, and the defendant was entitled to have his theory of the case presented to the Jury.

8. The Court erred in refusing to give defendants' tendered instruction No. 3, in which the Jury was sought to be instructed that it was necessary that there will be willful, conscious, corrupt and active participation to make one a conspirator, the necessary elements of active and corrupt participation were not stated.

9. The Court erred in refusing to give defendants' tendered instruction No. 4.

[fol. 70] 10. The Court erred in refusing to give defendants' tendered instruction No. 5.

11. The Court erred in giving instruction No. 12, for the reason that said instruction was not applicable to the issues involved in this case, in that there are only two persons to the alleged conspiracy, and that such instruction is only proper when it appears that a conspiracy has actually been formed, and that thereafter one enters into said conspiracy in furtherance thereof.

12. The Court erred in giving instruction No. 13 for the reason that it unduly emphasizes the theory of the State's case and ignores the defendant's theory.

13. The Court erred in giving instruction No. 14 for the reason that it is a repetition of matters already covered in the instructions and it unduly emphasizes the theory of the State's case and ignores the defendant's theory.

14. The Court erred in giving instruction No. 17, for the reason that it is a repetition of matters already covered in the instructions and it unduly emphasizes the theory of the State's case and is argumentative and is in the nature of advocacy, and the same is misleading and ambiguous.

15. The Court erred in denying defendant's Motion for a Severance in that the Court admitted testimony that was

[fol. 71] admissible as against the other defendant, but was not admissible against this defendant if tried alone and did not relate to the reputation of such co-defendant.

16. That to the refusal to give said tendered instructions, the defendant Julius A. Wolf, duly saved his exceptions and further saved his exceptions to the instructions herein challenged, to which his objections were overruled.

17. Further, the verdict of the Jury is against the law and the evidence, and the evidence is insufficient, to sustain any verdict or judgment save and except a verdict of "not guilty."

(Orig. Sgd.) Philip Hornbein, Donald M. Shere, Attorneys for Defendant, Julius A. Wolf, 620 Symes Building, Denver, Colorado.

MOTION FOR NEW TRIAL

Motion for New Trial filed by A. H. Montgomery, which is the same in substance as the Motion for New Trial filed by Julius A. Wolf.

DENIAL OF MOTIONS FOR NEW TRIAL

Separate exceptions of the defendant.

SENTENCE

Sentence of the Court that each of the defendants serve not less than one year nor more than 18 months.

Exception to sentence.

[fol. 72] COURT ORDERS

Stay of execution of 60 days and 60 days for a bill of exceptions is granted.

Formal entry of order denying Motion for New Trial.

Formal entry of sentence of Julius A. Wolf.

Formal entry of sentence of A. H. Montgomery.

Formal entry of order staying execution.

Additional time for stay of execution

Deposition of Gertrude Martin attached to the Record.

Additional time for preparation of Bill of Exceptions.

July 16, 1945, additional time for stay of execution.

Certificate of trial judge signed August 3, 1945.

Certificate of clerk signed and filed July 24, 1945.
Certificate of trial judge dated August 3, 1945.

ASSIGNMENTS OF ERROR OF JULIUS A. WOLF

Assignment of Error, omitting formal parts, is as follows:

Comes now Julius A. Wolf, the above-named plaintiff in error and respectfully represents to this Honorable Court [fol. 73] that at the trial and proceedings in the Court below there was manifest and material error to the prejudice of the plaintiff in error, a specification of said errors being as follows:

1. That the Court erred in overruling the Motion of the defendant, Julius A. Wolf, to suppress as evidence certain books and records taken from the possession of the defendant, which records contained names of patients and the nature of their ailments, and other matters which were of a wholly private and confidential nature. Said books being Exhibits A and C in this case. For the reason that said books were taken without a search warrant or any other process of law, and in violation of the rights of the defendant under Article 2, Section 7 and Section 18 of the Constitution of the State of Colorado and the 4th Amendment of the Constitution of the United States.

2. The Court erred in overruling the objections of the defendant, Julius A. Wolf, to the introduction of said Exhibits A and C for the further reason that the admission in evidence of said Exhibits violated the statutes of the State of Colorado, which prohibit a doctor from testifying as to privileged communications received by him from his patients, which said statements were given to assist the physician in his treatment and diagnosis and said Exhibits contained the ailments from which patients suffered and their introduction in evidence was, therefore, violative of the statute in such case made and provided.

3. The Court erred in overruling the objections of the defendant, Julius A. Wolf, to the introduction of said books [fol. 74] and records, or either of them, on the ground that they were unlawfully obtained by the officers of the District Attorney in violation of Article 2, Section 7, and Article 2, Section 18 of the Constitution of Colorado, and in violation of the 4th Amendment to the Constitution of the United States.

4. The Court erred in overruling the Motion of the defendant, Julius A. Wolf, made orally during the course of the trial to quash the information for the reason that it affirmatively appeared from the testimony of the State that the information was based wholly upon evidence which was obtained from the books and records of the defendant, which were unlawfully and wrongfully seized in violation of Article 2, Section 7, and Article 2, Section 18, of the Constitution of Colorado, and in violation of the 4th amendment to the Constitution of the United States, whereby the defendant was compelled to give testimony against himself, which testimony was the sole basis of the information, all in violation of article 2, Section 18 of the Constitution of Colorado.

5. The Court erred in overruling the Motion of the defendant, Julius A. Wolf, made at the conclusion of the State's case for a directed verdict of "not guilty" for the reason that the evidence affirmatively showed that the defendant did nothing except that which was lawful for him to do in accordance with the practice of his profession, and that the evidence was wholly insufficient to establish any conspiracy to which the defendant was a party, and the Court further erred in overruling the Motion of the defendant, Julius A. Wolf, made at the conclusion of all the testi- [fol. 75] mony for a directed verdict of "not guilty" for the same reason.

6. The Court erred in refusing to give defendants' tendered instruction No. 1, in which the Jury was advised that one William Schafer was a material witness, and that it was the duty of the District Attorney to call him as a witness or procure his deposition if he was not available.

7. The Court erred in refusing to give defendants' tendered instruction No. 2 in which the Court was requested to charge that the things that the defendant did, do not make him a conspirator, and that the refusal to give said instruction was erroneous because it correctly stated the law, and the defendant was entitled to have his theory of the case presented to the Jury.

8. The Court erred in refusing to give defendants' tendered instruction No. 3 in which the Jury was sought to be instructed that it was necessary that there be willful, conscious, corrupt and active participation to make one a

conspirator, the necessary elements of active and corrupt participation were not stated.

9. The Court erred in refusing to give defendants' tendered instruction No. 4.

10. The Court erred in refusing to give defendants' tendered instruction No. 5.

11. The Court erred in giving instruction No. 12 for the reason that said instruction was not applicable to the issues involved in this case, in that there are only two persons to the alleged conspiracy, and that such instruction is only [fol. 76] proper when it appears that a conspiracy has actually been formed, and that thereafter one enters into said conspiracy in furtherance thereof.

12. The Court erred in giving instruction No. 13, for the reason that it unduly emphasizes the theory of the State's case and ignores the defendant's theory.

13. The Court erred in giving instruction No. 14 for the reason that it is a repetition of matters already covered in the instructions and it unduly emphasizes the theory of the State's case and ignores the defendant's theory.

14. The Court erred in giving instruction No. 17 for the reason that it is a repetition of matters already covered in the instructions and it unduly emphasizes the theory of the State's case, and is argumentative and is in the nature of advocacy, the same is misleading and ambiguous.

15. The Court erred in denying defendant's Motion for a Severance in that the Court admitted testimony that was admissible as against the other defendant, but was not admissible against this defendant if tried alone and did not relate to the reputation of such co-defendant.

16. That to the refusal to give said tendered instructions, the defendant Julius A. Wolf, duly saved his exceptions and further saved his exceptions to the instructions herein challenged, to which his objections were overruled.

17. Further, the verdict of the Jury is against the law [fol. 77] and the evidence, and the evidence is insufficient to sustain any verdict or judgment save and except a verdict of "not guilty."

(Signed) Philip Hornbein, Donald M. Shere, Attorneys for Julius A. Wolf, Plaintiff in Error.

ASSIGNMENT OF ERROR OF A. H. MONTGOMERY

Assignment of Error, omitting the formal parts, is as follows:

Comes now A. H. Montgomery, the Plaintiff in Error, and respectfully represents to the Court that there were manifest grievous and prejudicial errors committed by the District Court of the City and County of Denver, and State of Colorado, in the proceedings, trial and judgment rendered and entered in the above entitled cause in the following particulars, to-wit:

1. The Court erred in overruling the objection of the defendant, A. H. Montgomery, to the admission of any testimony that occurred after the alleged illegal act for which the conspiracy was formed and completed, and for the further reason that at the overruling of the Motion for a Severance, the Court instructed the District Attorney that it would not permit introduction of any evidence that would be admissible against one defendant, but not admissible against the other if tried alone.

2. The Court erred in overruling the objection of the de-
[fol. 78] fendant, A. H. Montgomery, in permitting Exhibit "A" to be introduced in evidence for the same reason as stated in Paragraph 1.

3. The Court erred in overruling the Motion of the defendant, A. H. Montgomery, made orally during the course of the trial to quash the information for the reason that it affirmatively appeared from the testimony of the State that the information was based wholly upon evidence which was obtained from the books and records of the other defendant, which was unlawfully and wrongfully seized in violation of Article 2, Section 7, and Article 2, Section 18, of the Constitution of Colorado, and in violation of the 4th Amendment to the Constitution of the United States, whereby the other defendant was compelled to give testimony against himself, which testimony was the sole basis of the information, all in violation of Article 2, Section 18, of the Constitution of Colorado.

4. The Court erred in overruling the Motion of the defendant, A. H. Montgomery, made at the conclusion of the State's case for a directed verdict of "not guilty" for the reason that the evidence affirmatively showed that the de-

fendant did nothing except that which was lawful for him to do in accordance with the practice of his profession, and that the evidence was wholly insufficient to establish any conspiracy to which the defendant was a party, and the Court further erred in overruling the Motion of the defendant, A. H. Montgomery, made at the conclusion of all the testimony for a directed verdict of "not guilty" for the same reason.

[fol. 79] 5. The Court erred in refusing to give defendants' tendered instruction No. 1 in which the Jury was advised that one William Schafer was a material witness, and that it was the duty of the District Attorney to call him as a witness or procure his deposition if he was not available.

6. The Court erred in refusing to give defendants' tendered instruction No. 2 in which the Court was requested to charge that the things that the defendant did do not make him a conspirator, and that the refusal to give said instruction was erroneous because it correctly stated the law, and the defendant was entitled to have his theory of the case presented to the Jury.

7. The Court erred in refusing to give defendant's tendered instruction No. 3 in which the Jury was sought to be instructed that it was necessary that there be willful, conscious, corrupt and active participation to make one a conspirator, the necessary elements of active and corrupt participation were not stated.

8. The Court erred in refusing to give defendants' tendered instruction No. 4.

9. The Court erred in refusing to give defendants' tendered instruction No. 5.

10. The Court erred in giving instruction No. 12 for the reason that said instruction was not applicable to the issues involved in this case, in that there are only two persons to the alleged conspiracy, and that such instruction is only proper when it appears that a conspiracy has actually been formed, and that thereafter one enters into said conspiracy [fol. 80] in furtherance thereof.

11. The Court erred in giving instruction No. 13 for the reason that it unduly emphasizes the theory of the State's case and ignores the defendant's theory.

12. The Court erred in giving instruction No. 14 for the reason that it is a repetition of matters already covered in the instructions and it unduly emphasizes the theory of the State's case and ignores the defendants' theory.

13. The Court erred in giving instruction No. 17 for the reason that it is a repetition of matters already covered in the instructions and it unduly emphasizes the theory of the State's case and is argumentative and is in the nature of advocacy, and the same is misleading and ambiguous.

14. The Court erred in denying defendants' Motion for Severance in that the Court admitted testimony that was admissible as against the other defendant, but was not admissible against this defendant if tried alone and did not relate to the reputation of such co-defendant.

15. That to the refusal to give said tendered instructions, the defendant, A. H. Montgomery, duly saved his exceptions and further saved his exceptions to the instructions herein challenged, to which his objections were overruled.

[fols. 81-82] 16. The verdict of the Jury is against the law and the evidence, and the evidence is insufficient to sustain any verdict or judgment save and except a verdict of "not guilty."

(Signed) F. E. Dickerson, William F. Dwyer, Attorneys for Plaintiff in Error, A. H. Montgomery. Respectfully submitted, Philip Hornbein, Donald M. Shere, F. E. Dickerson, William F. Dwyer, Attorneys for Plaintiffs in Error, Symes Building, Denver, Colorado.

[fol. 83] IN SUPREME COURT OF COLORADO

MOTION FOR LEAVE TO FILE SUPPLEMENTAL ASSIGNMENT OF ERROR—Filed February 18, 1947

Comes now the plaintiff in error, Julius A. Wolf, defendant below, and moves this Honorable Court to grant a leave to file a supplemental assignment of error as follows:

1. That the Court erred in overruling the Motion of the defendant, Julius A. Wolf, to suppress as evidence certain books and records taken from the possession of the defend-

ant, which records contained names of patients and the nature of their ailments, and other matters which were of a wholly private and confidential nature. Said books being Exhibits A and C in this case. For the reason that said books and records were taken by the District Attorney of the City and County of Denver, a State Officer functioning under the authority of the State of Colorado, without a search warrant or any other process of law, and in violation of the rights of the defendant under the due-process clause of the Fourteenth Amendment of the Constitution of the United States, and the defendant specifically invokes the protection of the Fourteenth Amendment against said unlawful search and seizure.

Philip Hornbein, Donald M. Shere, Attorneys for Plaintiff in Error, Julius A. Wolf, 620 Symes Building, Denver, Colorado—TA. 5174.

IN SUPREME COURT OF COLORADO

ORDER DENYING MOTION FOR LEAVE TO FILE SUPPLEMENTAL ASSIGNMENT OF ERROR—February 27, 1947

Upon consideration of the motion of the plaintiffs in error, asking leave to file supplemental assignments of error herein, the Court being well advised, doth deny said motion.

[fol. 84] IN SUPREME COURT OF COLORADO

JUDGMENT—November 3, 1947

This cause having been brought to this Court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is no error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, affirmed,

and that it stand in full force and effect; and that this case be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

IN SUPREME COURT OF COLORADO

No. 15666

JULIUS A. WOLF and A. H. MONTGOMERY, Plaintiffs in Error,

v.

THE PEOPLE OF THE STATE OF COLORADO, Defendant in Error,

Error to the District Court of the City and County of Denver

Hon. William A. Black, Judge

En Banc. Judgment Affirmed

Mr. Philip Hornbein, Mr. Donald M. Shere, For Julius A. Wolf,

Mr. F. E. Dickerson, Mr. William F. Dwyer, For A. H. Montgomery, Attorneys for Plaintiffs in Error.

Hon. H. Lawrence Hinkley, Attorney General; Mr. Duke W. Dunbar, Deputy Attorney General; Mr. James S. Henderson, Assistant Attorney General, Attorneys for Defendant in Error.

OPINION

[fol. 85] MR. CHIEF JUSTICE BURKE Delivered the Opinion of the Court:

Plaintiffs in error, hereinafter referred to by name, were convicted of conspiracy to commit abortion and each was sentenced to the penitentiary for a term of one year to eighteen months. To review that judgment they prosecute this writ. They were represented below and here by separate counsel. Wolf assigns 17 errors and Montgomery 16. Generally they are duplications and separate consideration is unnecessary. Some require no examination and others

are so interrelated it is useless to take them up separately. Those deserving of notice may properly be thus classified and considered: 1—The seizure and introduction in evidence of Exhibits A and C; 2—The overruling of motions for severance; 3—The giving and refusal of certain instructions. Even these are so related that the disposition of one will leave little to be said as to the others. All motions and objections necessary to save the points were presented and overruled.

Wolf was a regularly admitted and practicing physician and surgeon whose professional activity consisted principally in the treatment of diseases of women, obstetrics, and pelvic and abdominal surgery. Montgomery was a duly licensed chiropractor. The particular offense charged concerned an abortion on one Mildred Cairo. Representatives of the district attorney's office, having no information concerning that offense, but possessed of definite information concerning a similar one committed on another woman and the connection of Wolf and Montgomery therewith, went to the office of Wolf without a warrant and took him into custody and there they took possession of said Exhibits which were his day books of 1933 and '34 up to the time of the arrest. They were records of patients who consulted him professionally. So far as Mildred Cairo was concerned they disclosed only her name, address and telephone number.

1—It is contended that the seizure and use of these Exhibits constituted reversible error. First, because it violated the fourth paragraph of Section 9, chapter 177, C. S. A. '35, which provides that the physician "shall not, without the consent of his patient, be examined as to any informa- [fol. 86] tion acquired in attending the patient which was necessary to enable him to prescribe or act for the patient; * * *." There are two answers to this contention. First, the information contained in the Exhibits was not "necessary to enable him to prescribe or act for the patient," and second, this act is solely for the protection of the patient, not the physician.

Hanlon vs. Woodhous, 113 Colo. 504, 508; 160 Pac. (2d) 998. 28 R. C. L. sec. 132, p. 542.

Mildred Cairo testified in this cause, was fully cognizant of all the proceedings and had every opportunity to object to any disclosures made concerning her. Since no intima-

tion to the contrary came from her lips throughout the trial her consent must be assumed for the purpose of this case.

The second objection is that the seizure and introduction of Exhibits A and C was in violation of Section 7, Article II of the constitution which forbids unreasonable search and seizure and forbids any such search and seizure without a warrant, and Section 18 of Article II, id., which provides "that no person shall be compelled to testify against himself in a criminal case. This identical contention was before this court over twenty years ago and decided to the contrary. The opinion was by the court en banc, one Justice not participating, all the others concurring.

Massantonio v. People, 77 Colo. 392; 236 Pac. 1019.

Numerous cases on both sides of the controversy were there cited. That decision has never been disturbed through the years, but has been frequently followed and reaffirmed.

Roberts v. People, 78 Colo. 555; 243 Pac. 544;
Bills v. People, 113 Colo. 326; 157 Pac. (2d) 139.

Among the decisions of sister states handed down since the disposition of the Massantonio case, and following it, might be mentioned.

State v. Dillon, 34 N. M. 366; 281 Pac. 474;
State v. Frye, 58 Ariz. 409; 120 Pac. (2d) 793;
People v. Onofrio, 65 Cal. App. (2d) 585; 151 Pac. (2d) 158.

[fol. 87] The question would thus seem to be definitely and finally disposed of in this jurisdiction under the rule of stare decises. We are not unconscious of the fact that that rule is frequently ignored, with the general approval of the courts, for certain definite and often valid reasons. Among these are doubtful decisions handed down by closely divided courts and recent decisions establishing rules not yet firmly embedded in the jurisprudence of the jurisdiction. No such reason can possibly exist here. The best reason, and the one perhaps most frequently invoked to justify a departure from the rule, is that the case under consideration by the court demonstrates that adherence thereto will either promote injustice or defeat justice. No such reason exists in the instant case for any present change in the rule. The result of any present revocation or modification would here defeat justice and promote injustice. The evidence over-

whelmingly supports the conclusion of the jury that these men were guilty; that this was not the only instance of their guilt but that they had been generally engaged in such forbidden practice. Their scheme appears to have been, and so the jury doubtless concluded, that persons familiar with their operations would steer prospective victims to Montgomery, who required that they first consult Wolf and get his opinion as to pregnancy, etc., and arrange for him to attend them after the operation. They then returned to Montgomery who did the actual work and turned the patient back to Wolf. One or the other fixed the fee and they divided it.

If a case ever comes before us which demonstrates that the rule in the Massantonio case has worked injustice, or prevented justice, it will be time enough to consider alteration or modification of that rule. Certainly these parties are in no position to contend that the law of Colorado which has stood for twenty years and been affirmed and reaffirmed by this tribunal and the decisions of sister states, should now be overturned or so modified that they may escape the toils in which their own felonious conduct has involved them.

It seems superfluous to add that nothing here or heretofore said by us and nothing contained in any of the numer-[fol. 88] ous decisions of other jurisdictions in support of the rule in the Massantonio case, justifies unlawful searches or seizures. In line with such jurisdictions we have condemned them in the strongest terms and pointed out the proper remedy.

2—In view of the foregoing, and the further fact that the Exhibits in question contain references to Montgomery and directly contradict the testimony of Wolf in relation to him, the motions for severances were properly overruled.

3—The Court's refusal to give tendered instruction No. 2 is fully answered by the foregoing.

Tendered instruction No. 1 and Wolf's tendered instruction No. 4 are based upon the failure of the People to call a certain witness. Since he was not endorsed on the information they were not misled and since the record discloses that they had all the essential knowledge concerning him which the People had, these instructions were properly refused.

Other assignments relating to instructions are so devoid of merit as to obviate the necessity for comment.

The judgment is affirmed.

Mr. Justice Hilliard dissents.

IN SUPREME COURT OF COLORADO

MOTION FOR EXTENSION OF TIME FOR FILING PETITION FOR REHEARING—Filed November 10, 1947

Comes now Julius A. Wolf, plaintiff in error, and respectfully moves this Honorable Court to grant an extension of time in which he may file his Petition for Rehearing, and as grounds therefor states:

1. That the questions involved are of importance and there is difficulty in getting prompt printing.

Wherefore, plaintiff in error requests that he be given [fols. 89-90] fifteen days additional time, that is, until December 2, 1947, within which to file said Petition.

Philip Hornbein, Donald M. Shere, Attorneys for Plaintiff in Error, 620 Symes Building, Denver 2, Colorado—TA. 5174.

IN SUPREME COURT OF COLORADO

ORDER EXTENDING TIME FOR FILING PETITION FOR REHEARING —November 14, 1947

Upon consideration of the motion of the plaintiff in error, Julius A. Wolf, it is this day ordered that the plaintiff in error have to and including December 2, 1947, in which to file petition for rehearing.

[fol. 91] IN SUPREME COURT OF COLORADO

[Title omitted]

PETITION FOR REHEARING

Comes now the above-named plaintiff in error, Julius A. Wolf, and moves this Honorable Court to grant a rehearing herein for the following reasons:

1. The Court misapprehended our contention with respect to the statutory privileges of physicians. We referred to this statute merely to show the aggravated character of the search and seizure in this case. See page 22 of our Opening Brief and page 15 of the Reply Brief. The point [fol. 92] that we attempted to make was that a search that is calculated to force a doctor's patients to disclose their personal affairs is an unreasonable search, and clearly, in determining whether the search was reasonable or unreasonable, it is proper to consider the nature and purpose of the search.

2. The Court in its opinion states:

> "The second objection is that the seizure and introduction of Exhibits A and C was in violation of Section 7, Article II of the constitution which forbids unreasonable search and seizure and forbids any such search and seizure without a warrant, and Section 18 of Article II, id. which provides 'that no person shall be compelled to testify against himself in a criminal case.'" (Page 3 of the opinion of the Court.)

3. We wish to direct the Court's attention to the Record from which it appears that the protection of the fourth and fifth amendments to the Constitution of the United States, which prohibit unreasonable search and seizure, and compulsory testimony in a criminal case, was specially invoked as against the evidence which was obtained from the search and seizure of the books of the defendant (Folios 243-244).

4. In the motion for a new trial which appears at folio 790, the protection of the fourth amendment of the Constitution of the United States was specially invoked three different times. (See paragraphs 1, 3 and 4 of the motion for a new trial, folios 790, 792 and 793.)

[fol. 93] 5. The protection of the Constitution of the United States was again invoked in the assignments of

error filed in this Court. (See page 73, Abstract of Record, Assignments #1, #3, and #4.)

6. That on February 18, 1947, prior to the oral argument of this case, the defendant filed with this Court, the following motion.

> "Comes now the plaintiff in error, Julius A. Wolf, defendant below, and moves this Honorable Court to grant a leave to file a supplemental assignment of error as follows:
>
> 1. That the Court erred in overruling the Motion of the defendant, Julius A. Wolf, to suppress as evidence certain books and records taken from the possession of the defendant, which records contained names of patients and the nature of their ailments, and other matters which were of a wholly private and confidential nature. Said books being Exhibits A and C in this case. For the reason that said books and records were taken by the District Attorney of the City and County of Denver, a State officer functioning under the authority of the State of Colorado, without a search warrant or any other process of law, and in violation of the rights of the defendant under the due-process clause of the Fourteenth Amendment of the Constitution of the United States, and the defendant specifically invokes the protection of the Fourteenth Amendment against said unlawful search and seizure."

[fol. 94] That thereafter the Attorney General of the State tendered written objections to the filing of such supplemental assignment of error on the ground that the matter referred to was already covered in the previous assignments.

After the oral argument and the submission of this cause to this Court, the Supreme Court of the United States rendered a decision which we believe has an important bearing on the constitutional question involved in this case. See *Harris v. United States,* decided May 5, 1947, reported in Advance Sheet 12, Volume 67, Supreme Court Reporter, page 1098.

Respectfully submitted, Philip Hornbein, Donald M. Shere, Attorneys for Plaintiff in Error, Julius A. Wolf, 620 Symes Building, Denver 2, Colorado—Ta. 5174.

[fol. 95] IN SUPREME COURT OF COLORADO

ORDER DENYING PETITION FOR REHEARING—December 8, 1947

The Court having considered the petition of the plaintiff in error for a rehearing in this cause, and now being well and fully advised in the premises, doth order that said petition be, and the same is hereby, denied.

IN SUPREME COURT OF COLORADO

ORDER STAYING EXECUTION—December 8, 1947

On consideration of the motion of the plaintiff in error, Julius A. Wolf, requesting a stay of execution pending application for a writ of certiorari, the objections of the Attorney General thereto, and the answer of Attorneys for said plaintiff in error to said objection; it is now ordered by the Chief Justice of the Supreme Court of the State of Colorado that the execution of the sentence herein against plaintiff in error be, and the same is hereby, stayed for a period of 60 days from this date upon the giving of a good and sufficient bond in the sum of Seventy-five Hundred Dollars, ($7,500.00) conditioned as by law provided and approved by the undersigned and to be substituted for any bond heretofore given, whereupon execution shall be stayed as prayed and no remittitur shall issue during said period of 60 days.

Done and signed this 11th day of December, 1947.

H. P. Burke, Chief Justice of the Supreme Court of the State of Colorado.

[fol. 96] Recognizance on appeal for $7,500.00 approved December 17, 1947, omitted in printing.

[fols. 97-98] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 99] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 26, 1948

The petition herein for a writ of certiorari to the Supreme Court of the State of Colorado is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.