Arraignment In Federal Criminal Procedure

Lester B. Orfield

Repository Citation
Lester B. Orfield, Arraignment In Federal Criminal Procedure, 20 La. L. Rev. (1959)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol20/iss1/13

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.
Rule 10 of the Federal Rules of Criminal Procedure, entitled "Arraignment," provides as follows:

"Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead."

I. HISTORY OF DRAFTING RULE 10.

The first draft of the Federal Rules of Criminal Procedure, dated September 8, 1941, contained no separate rule on arraignment. The second draft, dated January 12, 1942, contained an elaborate and lengthy Rule 50 entitled "Arraignment: Appearance and Plea by Counsel." A corporation could appear by counsel. As to all other defendants in cases not punishable by death the defendant if the court permitted could appear by counsel on arraignment to plead not guilty or to move to dismiss the accusation. But the defendant must have given bail or other security to appear for trial and filed a written appointment of his attorney. Rule 40 entitled "Counsel for Defendant" made provision for the court's informing the defendant at arraignment of his right to counsel and for assignment of counsel. Rule 9 on presence of defendant made it possible for the court to excuse defendant's presence at arraignment where the process issued was a summons.

Rule 51(a) of the third draft, dated March 4, 1942, much more nearly approached the final form of the rule. The first sentence provided that when "a written accusation has been filed against a person he shall be arraigned in open court by having the charge stated or read to him and by being called upon to plead thereto." The second sentence provided that the "defendant shall receive a copy of the written accusation if he makes a request for it prior to arraignment or if the court directs that a copy or copies be provided for him." The Reporter indicated that
the transcript was inconclusive as to whether it was the Committee's intention that the defendant must request the copy or whether it must be offered him without request. The provisions on presence of defendant at arraignment were transferred over to Rule 50 on presence of defendant. In the fourth draft, dated May 18, 1942, there was a separate rule on arraignment, Rule 14. The rule now used the language "indictment or information" instead of "written accusation." The first sentence now read: "A defendant is arraigned by having the indictment or information stated or read to him in open court and by having him called upon to plead thereto." A second sentence provided that the defendant might waive the statement or reading. The third sentence provided: "A copy or copies of the indictment or information shall be delivered to him upon his request or upon order of the court." Rule 13 on "Right to Counsel" stated that the defendant was entitled to counsel "at every stage of the proceeding," and for appointment at arraignment before pleading. Rule 12 on "Presence of Defendant" stated that the "defendant has the right to be present at the arraignment." The court with the defendant's consent could permit absence of the defendant at arraignment in cases punishable by fine or by imprisonment for not more than one year or both.

The fifth draft, dated June 1942, was again numbered 14. It omitted the sentence providing for waiver of stating or reading the indictment or information. It omitted the provision for delivery of a copy upon order of the court; delivery was only to be on request of the defendant. The Committee note indicated that the rule stated the present law on arraignment. It also referred to the statute calling for delivery of a copy of the indictment in treason and capital cases; and to the statute providing for delivery on defendant's request in other cases. Rule 13 on "Right to Counsel" no longer made specific reference to arraignment.

A draft, known as Preliminary Draft, dated May 1942, very close in resemblance to the fifth draft, was submitted to the Supreme Court for comment. The Supreme Court asked "by whom is the indictment or information to be 'stated'?" The court also asked: "Should there be a lapse of time between reading the indictment and plea, unless defendant announces he is ready to proceed, or he has received a copy of the indictment in advance of the trial? Should the rule not state that the court shall inform the defendant that he is entitled to a copy of the indictment, and
should the rule not state that the reading of the indictment may be waived by the defendant?"

The sixth draft, dated Winter 1942-1943, made several changes. It now received its present number 10. The first sentence provided: "A defendant is arraigned by reading to him the indictment or information or by stating to him the substance thereof and by calling on him to plead thereto." The second sentence provided: "The arraignment is conducted in open court." The third sentence provided: "A copy of the indictment or information shall be delivered to him at any time upon request made to the clerk." The language "at any time" and "made to the clerk" in the third sentence was new. The Reporter stated in a memorandum to the Committee that these changes were made because of the suggestion of the Supreme Court indicating the desirability of more specific provision for the defendant's getting a copy of the indictment in ample time to give him adequate opportunity to make use of it in preparation for arraignment and for trial. No request to the court for a copy is necessary. The Advisory Committee had decided before the suggestion of the Supreme Court that the more detailed provisions for arraignment suggested by the court should continue to be left in the discretion of the trial judge. Information has not come to the Committee that the present procedure on these points is in need of improvement.

The late Professor George H. Dession submitted an alternative Rule 10 under which there was to be a delivery to the defendant upon his request made at any time of the "names and addresses of all the witnesses or deponents on whose evidence the indictment or information was based." A failure to furnish such names and addresses shall not affect the validity of the indictment or information but the court shall, upon application of the defendant, direct that such names and addresses be furnished. Upon his request "the defendant shall be allowed a reasonable time, not less than one day, to plead to the indictment or information." Professor Dession pointed out that there is no federal statute providing for, nor does present practice sanction, the revelation of the names of witnesses or deponents to the defendant.1 Most states have enacted a requirement that the de-

---

1. Moore v. Aderhold, 108 F.2d 729 (10th Cir. 1939); Knight v. Hudspeth, 112 F.2d 137 (10th Cir. 1940), cert. denied, 311 U.S. 681 (1940); United States
fendant be furnished with such names. At least 20 states provide that the defendant be allowed a specified or reasonable time to answer the indictment or information if he requires it. The Advisory Committee did not adopt the alternative proposal of Professor Dession.

The First Preliminary Draft (seventh committee draft) dated May 1943 made a number of changes. Rule 11 entitled "Arraignment" provided: "Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or, if he consents, of stating to him the substance of the charge, and calling on him to plead thereto. He shall be advised that he is entitled to a copy of the indictment or information and if he requests it a copy shall be given to him before he is called upon to plead."

The following comments were made to the Advisory Committee on the Rule as it appeared in the First Preliminary Draft. W. E. Baker, District Judge for the Northern District of Virginia, would have the rule provide specifically that the United States Attorney supply the copy of the indictment or information. There would be delay if the copy was to be furnished by any other person such as the clerk. Edwin R. Holmes of the Court of Appeals of the Fifth Circuit would omit the provision that the defendant be advised of his right to a copy. Seth R. Thomas, of the Court of Appeals for the Eighth Circuit would omit the language requiring consent of the defendant to omission of the reading since the defendant is entitled to a copy of the indictment or information. A. Lee Wyman, District Judge for the District of South Dakota, would not allow omission of the reading of the indictment or information as the record may not show that the defendant was advised of the specific charge against him. This defect more than offsets the time saved. In his district he permitted waiver of reading only in misdemeanor cases where the defendant was represented by counsel. George Philip of the Committee for the District of South Dakota took the same view. Joseph T. Votava, United States Attorney for

3. See id. at § 207 and Annots. 637-38.
4. 2 Comments, Recommendations and Suggestions Received Concerning the Proposed Federal Rules of Criminal Procedure 85 (1943).
5. Id. at 86.
6. Id. at 87.
the District of Nebraska, would require a reading unless the defendant waived. Neil Burkinshaw of Washington, D.C., would not require consent of the defendant to omission of reading as reading would be extremely burdensome.\textsuperscript{7} In the District of Columbia reading is required only in capital cases. In other cases the clerk simply advises the defendant that he is charged with housebreaking, forgery, etc., and asks him how he wishes to plead. Furthermore reading is pointless, as the defendant is entitled to a copy. Robert M. Hitchcock of Dankirk, New York, took the same position. Frequently stating the substance of an indictment is far more understandable to a defendant than reading the entire indictment to him. Bert A. Riley of the Bar Committee for the Southern District of Florida would add the following provision: “Neither a failure to arraign nor an irregularity in the arraignment shall affect the validity of any proceedings in the cause if the defendant pleads to the indictment or information, or proceeds to trial without objecting to such failure or irregularity.” Judge Robert N. Wilkin of the Northern District of Ohio would have a copy of the accusation furnished the defendant without request by him in all cases.\textsuperscript{8} This would simplify and make the procedure more certain. It is easier and quicker to serve a copy than to advise the defendant that he is entitled to a copy. Thomas J. Morrissey, United States Attorney for the District of Colorado, thought that arraignment in juvenile cases should be in chambers.\textsuperscript{9} After the words “in open court” he would add “or in Chambers at the discretion of the court.” M. Neil Andrews, United States Attorney for the Northern District of Georgia, would require the defendant to plead in writing, thus avoiding numerous habeas corpus actions in which the applicant claims he did not intend to plead guilty. Joseph F. Deeb, United States Attorney for the Western District of Michigan, objected that the rule laid down a mandatory form of arraignment.\textsuperscript{10} In his district the practice for many years was that the court simply inquired of the defendant whether he understood the charges against him. If the court is not satisfied that the defendant understands, the court either directs the United States Attorney to make further explanation or the court itself explains the charge. In every case the defendant or his attorney

\textsuperscript{7} Id. at 88.
\textsuperscript{8} 2 id. at 382.
\textsuperscript{9} 2 id. at 383. Judge Lewis B. Schwellenbach of the Eastern District of Washington took the same view. 2 id. at 385.
\textsuperscript{10} 2 id. at 385.
has had a conference prior to arraignment with the United States Attorney and has had tendered him a copy of the indictment or information. The Judicial Conference for the Ninth Circuit adopted a resolution against requiring consent of the defendant to omission of the reading, and another resolution requiring that a copy of the indictment or information be supplied the defendant before he is called upon to plead. James E. Ruffin of the Criminal Division of the Department of Justice would amend the rule so as to require that a copy of the indictment, if requested, be given the defendant a reasonable time before he is called upon to plead.

The Second Preliminary Draft (eighth Committee draft), dated February 1944, was similar to the First Preliminary Draft except that it omitted the language "if he consents" in the first sentence. Thus the indictment or information could be stated in substance without obtaining his consent.

The following comments were made to the Advisory Committee on the Rule as it appeared in the Second Preliminary Draft. Judge Schoonmaker of the Western District of Pennsylvania pointed out that in his district there is a printing on the back of the indictment whereby the defendant waives arraignment and enters his plea. In practice it is always done that way. Attorneys do not wait around until a long indictment is read. This is time consuming. The attorneys know what it is all about. Judge Bascom Deaver of the Middle District of Georgia, T. Hoyt Davis, United States Attorney for that district, and the Bar Committee for that district thought that the rule should be clarified to make certain that arraignment can be waived. The federal judges in Ohio would amend the rule to provide that a copy of the indictment be served on the defendant five days before arraignment and that the defendant should not be arraigned earlier or before service unless he waives his right to such provision. Judges Tuttle and Picard of Michigan objected to this proposal. This would make the rule too detailed; logically it would also require a return of service. Thus delay would be promoted. A special committee of the Oregon State Bar and Judge A. Lee Wyman of the District of South Dakota thought a reading of the indictment should be required unless the defendant consented to omission of reading. S. H. Sibley of the Court

11. 3 id. at 39.
12. 3 id. at 40.
of Appeals for the Fifth Circuit thought that the second sentence on copy of the indictment unnecessary. In his circuit copies are always supplied on request. Advising of the right at arraignment might postpone many trivial cases because copies could not be at once furnished. Some of the division points in the districts are hundreds of miles apart, and the judges present only twice a year. There have been no complaints under the existing system. The Committee of the State Bar of California would join the rule in arraignment with the rule on appointment of counsel. Furthermore a copy of the accusation should be delivered before entry of plea; and the defendant should be advised at the time of delivery that he is entitled to a reasonable continuance before he enters his plea. The Special Committee of the Los Angeles Bar Association would substitute for the second sentence the following: "He shall be advised by the court of his constitutional rights. He shall be furnished a copy of the indictment or information before he is called upon to plead and shall be given, if he requests it, a reasonable time, but not less than 48 hours, within which to plead." The Committee would also add a new paragraph providing: "If the defendant enters a plea of not guilty, he shall be entitled to receive, at least 10 days before trial, a copy of the stenographic transcript of all testimony taken before the grand jury. He shall also be entitled to an inspection of all exhibits there produced."

The Report of the Advisory Committee (ninth committee draft), dated June 1944, was identical with the Second Preliminary Draft. The Supreme Court made no changes in the first sentence. But it rejected the second sentence which required a request for a copy of the indictment or information. Instead the Supreme Court language provided simply: "He shall be given a copy of the indictment or information before he is called upon to plead." This was a wise change. As the late Professor Des-sion stated: "It is refreshing to know that the picayune expense of making an extra carbon copy need no longer deter us from giving defendants the information they need."
II. FEDERAL PROCEDURE PRIOR TO RULE 10

Definition

The term "arraignment" appears in the cases as early as 1806. The federal statutes did not define the term. In 1896 the Supreme Court cited the definitions of Coke, Hale, Blackstone, and Chitty. A district court has stated: "The arraignment of the person accused of a public offense is nothing more or less than calling him to the bar of the court, and demanding of him, after explanation of the indictment, whether he pleads guilty or not guilty." In point of time the arraignment precedes the plea. The Supreme Court has stated: "There is no explicit provision in the laws of the United States describing what shall constitute an arraignment. But so far as it is expressed it has a definite meaning. ... It will be observed that the word 'arraignment' is used as comprehensively descriptive of what shall precede the plea." The court below had offered the following definition: "Strictly speaking, the defendant is arraigned by being called to the bar of the court to answer the accusation contained in the indictment, the arraignment consisting of three parts: (1) Calling the defendant by name and commanding him to hold up his hand, that his identification may be certain, (2) reading to him the indictment, and (3) taking his plea."

What Law Governs

Arraignment in federal criminal cases is not governed by state law. Circuit Judge Brewer so concluded, stating that "we

17. The various federal statutes of 1790, 1825, and 1835 are cited in Crain v. United States, 162 U.S. 625, 644 (1896).
19. United States v. McKnight, 112 Fed. 982, 983 (W.D. Ky. 1902). In perhaps the earliest case to attempt to define arraignment Circuit Justice Story stated after referring to the views of Blackstone and Hale: "When the prisoner is brought into court to answer the indictment, he is said to be brought in to be arraigned therein; for 'to arraign is nothing else but to call the person to the bar of the court, to answer the matter charged upon him by the indictment.'" United States v. Gibert, 25 Fed. Cas. 1287, 1304, Case No. 15,205 (C.C.D. Mass. 1834).
22. Circuit Justice Story held that even though by state law the final step in arraignment might be the question as to how the defendant will be tried, such a question was not necessary in federal criminal cases under the Constitution and laws of the United States. United States v. Gibert, 25 Fed. Cas. 1287, 1305, Case No. 15,204 (C.C.D. Mass. 1834).
have the federal statutes, and wherever there is a federal statute it controls irrespective of any state law or practice." A federal statute provided that no judgment should “be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.” The defendant could not insist on a new trial for error in arraignment as the federal statutes make the granting of new trials in civil cases a matter of discretion; hence the state law on new trials would not be applied.

Function and Purpose

Circuit Judge Brewer, later a member of the Supreme Court, stated the purposes of arraignment as follows: “It is laid down in the old books that three objects are to be subserved: (1) The identification of the defendant; (2) giving him information of the particular offense charged against him for which he is to be tried; and (3) to receive from him the plea which he makes to that charge.”

The purpose of an arraignment is to obtain from the defendant his answer, in other words, his plea - to the indictment. It would seem to follow that if the defendant voluntarily makes his plea without a formal demand upon him to know what it is, and the court accepts the plea as sufficient to form the issue and records the plea, the whole object of the arraignment has been accomplished. This is true for misdemeanor cases; the entering of a plea of not guilty necessarily presupposes an arraignment in fact or a waiver of it. Another court has stated: “The object of an arraignment is the identification of the accused and the framing of an issue upon which he may be tried.” The Supreme Court has stated that the object of arraignment is “to inform the accused of the charge against him and obtain an answer from him.” A court of appeal has said: “Arraignment, while not a perfunctory proceeding, is in actual practice as conducted in the District Court, primarily to facilitate the fixing of the docket.”

23. United States v. Molloy, 31 Fed. 19, 22 (E.D. Mo. 1887). Hence Missouri law would not be applied in the federal court sitting in Missouri.
24. This statute was also relied on by District Judge Thayer in the same case. Id. at 23-24.
25. Id. at 22. See Notes, 3 De Paul L. Rev. 105, 107 (1953); 31 Tulane L. Rev. 682 (1957).
Obsolete Steps in Arraignment

At common law the first step in arraignment consisted of calling the defendant to the bar by his name, and commanding him to hold up his hand. But it was held as early as 1828 that the defendant need not hold up his hand, if he admits himself to be the person indicted.\textsuperscript{30} But he may be compelled to go into the criminal box or dock in felony cases.\textsuperscript{31}

When upon arraignment the defendant pleads not guilty, it is not necessary that the clerk inquire how the defendant be tried.\textsuperscript{32} Trial by jury is the only mode of trial. Trial by battle has long been abolished; hence there is no need for the question.\textsuperscript{33}

Present Insanity

A defendant presently insane cannot plead at his arraignment.\textsuperscript{34} The common law applies, hence the mode of deciding this issue lies within the discretion of the court. He should not be arraigned when presently insane. Defendant’s counsel should object before arraignment; but a failure to object before arraignment does not bar objection after arraignment in bar of trial. Defendant may object orally, or may move for a continuance.

Postponement

If a defendant knows of no ground for bias or other challenges to the grand jury when brought up for arraignment, but wishes to reserve the privilege of examining further, he must apply to the court to postpone the arraignment until he has had adequate opportunity to press his inquiries.\textsuperscript{35} A statute required

\textsuperscript{32} United States v. Gibert, 25 Fed. Cas. 1287, 1303-06, Case No. 15,204 (C.C.D. Mass. 1834). Opinion was by Circuit Justice Story.
\textsuperscript{33} But in view of the modern provision for waiver of jury trial it has been suggested that the question be restored. Perkins, Cases on Criminal Law and Procedure 911 (1959). The early cases did not admit the possibility of waiver. United States v. Gibert, 25 Fed. Cas. 1287, 1306, Case No. 15,204 (C.C.D. Mass. 1834).
\textsuperscript{35} United States ex rel. McCann v. Thompson, 144 F.2d 604, 608, 156 A.L.R. 240 (2d Cir. 1944); Medley v. United States, 51 U.S. App. D.C. 85, 155 F.2d
the defendant before arraignment or during the next ten days to plead in abatement or to move to quash the indictment because of irregularity in drawing or impaneling the grand jury, or disqualification of a grand juror.\(^{36}\)

**Presence of Judge**

An arraignment by the United States Attorney in the absence of the judge would be void.\(^{37}\) By way of analogy it is arguable that counsel for defendant must be present unless his presence is intelligently waived.

**Presence of Defendant**

It may perhaps be implied from an early decision that there are some cases in which a defendant need not be present at his arraignment. One indicted for a misdemeanor, assault and battery of a seaman, may plead and defend by his attorney, without his own physical presence when no imprisonment must be inflicted and will not be inflicted, when the United States Attorney consents or unreasonably withholds his consent, when there is sufficient cause shown by affidavit to account for the absence of the defendant, and when the defendant has executed a special power of attorney permitting such defense.\(^{38}\)

In a subsequent case the Supreme Court stated broadly: "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has, at times and in the cases of misdemeanors, been somewhat relaxed, yet in felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial."\(^{39}\) The record must show presence. However, the case


\(^{37}\) Saylor v. Sanford, 99 F.2d 605, 606 (5th Cir. 1938).

\(^{38}\) United States v. Mayo, 26 Fed. Cas. 1230, Case No. 15,754 (C.C.D. Mass. 1853). The opinion was by Circuit Justice Curtis.

In Elick v. Territory of Washington, 1 Wash. T. 138 (1861), it was held that an attorney for an Indian defendant charged with murder could not plead guilty for the defendant unless the defendant is shown to be incapacitated. This case is cited favorably in State v. Walton, 50 Ore. 142, 150, 91 Pac. 490, 493 (1907).

\(^{39}\) Lewis v. United States, 146 U.S. 370, 372 (1892). As to how the defendant is brought before the court for arraignment Justice Field has stated: "When the indictment is found, or the information is filed, a warrant is issued for the arrest of the accused to be brought before the court, unless he is at the
on its facts involved absence at challenging of the jurors rather than absence at arraignment.

In a case coming up from the Philippine Islands the Supreme Court regarded presence of the defendant at his arraignment as indispensable in a felony case because the Philippine statutes expressly provided for it. In a state court case the Supreme Court indicated that presence in misdemeanor cases is not required by due process under the Fourteenth Amendment.

**Reading of Accusation**

The early practice was to read the indictment. Where a defendant demurs to an indictment and the demurrer is heard and overruled, and he is then required to plead to it without having it read to him, the reading not having been demanded by him, he cannot succeed on a motion in arrest of judgment. In this case the indictment was very voluminous, containing several hundred pages. The defendant had been called by the clerk, by direction of the court, and had appeared at the bar. The United States Attorney observed to the court that he supposed reading the indictment unnecessary and the court had replied: “Certainly not; let him plead.” The clerk then asked the defendant: “To this indictment, do you plead guilty or not guilty?” The defendant pleaded not guilty and did not then and there object that the indictment had not been read to him nor its substance stated to him. The substance of the indictment was stated later to the jury but it was not read to the jury. The Supreme Court has pointed out that information of the charge against him may be given to the accused without reading the indictment.

The defendant may waive the reading of the indictment. He did so in one case where the consolidated indictment covered 607 pages of the printed record and four days would have been re-

---

44. Johnson v. United States, 225 U.S. 405, 409 (1912). The lower court raised the issue whether reading may be waived in a capital case, but found it unnecessary to decide it. Johnson v. United States, 38 App. D.C. 347, 350 (1912).
required to read the indictment.\textsuperscript{45} Such waiver prevents the defendant from objecting that the whole indictment must be read at the trial.

\textit{Copy of Accusation}

In an ordinary criminal case the defendant was not entitled to a copy of the indictment to be furnished him at the expense of the government as no statute provided for it.\textsuperscript{46} It made no difference that the defendant applied for a copy. He was not entitled to a copy under the Sixth Amendment requiring that in all criminal cases the defendant shall "be informed of the nature and cause of the accusation." But the court could order that a copy be given the defendant upon his request at the expense of the government.\textsuperscript{47} In many cases the defendant does not desire a copy, or pleads guilty when the indictment is read to him. In such cases there is no propriety in forcing a copy on him at government expense. There is a right to a copy in capital cases only because a statute expressly provides for it. In a capital case the defendant is entitled to a copy at least two days before the trial when he seasonably claims such right.\textsuperscript{48} The error would not be cured by acquittal of the capital offense and conviction of a lesser offense charged in the same indictment. The duty to supply a copy in capital cases is mandatory.\textsuperscript{49}

Even in a capital case the defendant may waive his right to a copy of the indictment by failure to object until the end of the trial.\textsuperscript{50} The defendant ought to object before the jury is impaneled, or at least when the first witness is called for examination. Even if objection is timely possibly there is no reversible error when two substantially similar indictments are involved and one of them is served on the defendant; this would seem to be true where the only differences consist in the number and date on the indictments.

The statute eventually provided in 1927 as to ordinary criminal cases, not involving treason or a capital offense that "the

\textsuperscript{45} Gardes v. United States, 87 Fed. 172, 173 (5th Cir. 1898), cert. denied, 171 U.S. 689 (1898). In accord see Cornett v. United States, 7 F.2d 531 (8th Cir. 1925).


\textsuperscript{47} United States v. Van Duzee, 140 U.S. 169, 173 (1891).

\textsuperscript{48} Logan v. United States, 144 U.S. 263, 304 (1892). In case of treason the copy is to be delivered at least three days before trial.

\textsuperscript{49} Aldridge v. United States, 47 F.2d 407, 409 (D.C. Cir. 1931), reversed on other grounds, 283 U.S. 308 (1931).

\textsuperscript{50} Ibid.
clerk shall furnish each defendant upon his request, a copy of any information filed or indictment returned against him, the fees for said copy and the certificate thereto, at the rate provided for by law, to be taxed as costs.” 51 It was held that a defendant was not entitled to a continuance on the ground that he had not been furnished a copy of the indictment until four days prior to the date set for trial where the defendant had not requested the clerk to furnish him a copy. 52 The court pointed out that even in a capital case the defendant had a right to a copy of the indictment only two days before trial. Moreover the defendant in this case did have a copy from which had been deleted the names of the co-conspirators and the other defendants. These names could be filled in by examining the original indictment which was in the hands of the defendant four days before trial.

In an ordinary criminal case a failure to serve the defendant with a copy of the indictment does not go the jurisdiction of the sentencing court, hence habeas corpus does not lie. 53 This is particularly the case when there is no allegation of a request for a copy and a refusal thereof.

Record and Waiver: Due Process

An early decision laid down a liberal rule allowing waiver of arraignment. Where a defendant was not arraigned and made no plea before the trial, but was identified, knew exactly the offense charged, denied the charge, went to trial on the denial, and went on the witness stand and there denied the offense and was convicted, he was not entitled to a new trial for failure of the record to show arraignment and plea as there was no prejudicial error under the statute eliminating defects of form. 54 The state

52. Harper v. United States, 143 F.2d 795, 799 (8th Cir. 1944). In Cuckovich v. United States, 170 F.2d 89, 90 (6th Cir. 1948), the court failed to refer to this statute, stating broadly that there was no requirement that a defendant be furnished a copy.
53. Taylor v. Hudspeth, 113 F.2d 825, 826 (10th Cir. 1940). Treason or a capital offense was not involved.

The defendant may not move in arrest because he was arraigned under a certified copy of the indictment on remission of the case from the district court to the circuit court. United States v. McKee, 26 Fed. Cas. 1112, Case No. 15,687 (E.D. Mo. 1876).
rule of procedure as to arraignments did not apply to federal arraignments.

In a decision of the Supreme Court in 1896, with Justices Peckham, Brewer, and White dissenting, it was held that with respect to infamous crimes there must be an arraignment and plea; and that furthermore the record must show that these occurred. The record would not show an arraignment where it contained merely an order made at the beginning of the trial and as soon as the defendant appeared, reciting that the jury was selected, impaneled and sworn “to try the issue joined.” Nor was it shown by a statement in the bill of exceptions that the jury were “sworn and charged to try the issues joined.”

The defect of no formal arraignment was not cured by the statute providing that a trial should not be affected because of any defect or imperfection in matter of form not prejudicing the defendant. In capital and other infamous crimes an arraignment has always been regarded as a matter of substance. The court cited the views of Coke, Hale, Blackstone, and Chitty. It cited many state court decisions, but no federal court decisions. It cited Bishop and Wharton. Without referring to arraignment the court concluded that it is the prevailing rule that a plea to the indictment is necessary at least in cases of felony. The court referred to the federal statute on arraignment and plea as necessitating the making of a plea. The record must show affirmatively that it was demanded of the defendant to plead, or that he did so plead. The Constitution does not expressly provide for arraignment and plea. But due process of law requires that the defendant plead, or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can proceed; and the record must show this distinctly.

The dissenting judges thought that it was enough that in fact the defendant had been arraigned and pleaded. Error in the record is not presumed, but must be shown. The record implied-

---

55. Crain v. United States, 162 U.S. 625, 636 (1896). It was said in United States v. Auranst, 15 N.M. 292, 107 Pac. 1064 (1910), that this case overruled United States v. Molloy, 31 Fed. 19 (E.D. Mo. 1889). Oddly none of the opinions in the Grain case, not even the dissenting opinion, referred to the Molloy case.

The Grain case was thought to represent the view of most American courts at the time. See Notes, 21 Harv. L. Rev. 217 (1908); 6 Mich. L. Rev. 82 (1907), noting State v. Walton, 50 Ore. 142, 91 Pac. 490 (1907), which accepted the Grain case as correct for state court procedure. The Crain case was also followed in Dansby v. United States, 2 Ind. T. 456, 51 S.W. 1089 (1899); Beck v. United States, 145 Fed. 625 (2d Cir. 1906).
ly showed arraignment and plea. While the defendant made a motion in arrest of judgment, his motion did not raise the issue of want of arraignment. The defendant did not raise the issue when he was asked why sentence should not be pronounced on the verdict. Defendant's assignment of errors in connection with his writ of error did not raise it; and it was raised only in his brief before the Supreme Court. Even if there had been no arraignment in fact, the defendant went to trial without objection on his part; thus there was a waiver of arraignment. Defendant had not in fact been harmed by the procedure used. If the defendant wishes an arraignment, he should not ask for it for the first time on appellate review; he should ask for it before the trial commences. However, the dissenters do not base their dissent on the waiver, but rather on the fact that in their opinion the record impliedly did show that arraignment and plea had occurred. The statute that a trial should not be affected by imperfections of form should apply to this case.

Following this decision a court of appeals held that where the record was silent as to both arraignment and plea, arraignment could be waived, but not plea. In capital or other infamous crimes arraignment and plea were matters of substance to be shown by the record. A plea was necessary in both felony and misdemeanor cases, as without a plea there is no issue to be submitted to the jury.

Also following this decision of the Supreme Court a district court intimated that no formal arraignment should be required in misdemeanor cases. The holding was not a strong one, as the case involved a trial after a trial in which there had been an arraignment.

In a second case the Supreme Court adhered to its earlier decision and held that in capital and otherwise infamous crimes "both the arraignment and plea are a matter of substance, and must be affirmatively shown by the record." With respect to

56. Shelp v. United States, 81 Fed. 694, 701 (9th Cir. 1897). In Beck v. United States, 145 Fed. 625 (2d Cir. 1906) it was held that where a defendant was tried without having interposed a plea to any of the counts of the indictment except one, to which he pleaded not guilty, the issue made by such plea is the only one which can be tried.


the constitutional provision in the Sixth Amendment that the accused shall be informed of the nature and cause of the action against him the court pointed out that information of the charge may be given without reading the indictment. The record may allege arraignment without also alleging reading.

Finally in 1914 the Supreme Court in a state court case reversed its former holding as to the necessity of arraignment.\(^5\) The want of a formal arraignment to a second information of the same offense does not deprive the defendant of any substantial right, and where the course of the trial, otherwise fair, was not in any manner affected by his procedure, there is no denial of due process of law. The defendant had been arraigned as to the first information. He had not taken any specific objection before trial to the want of a formal arraignment, but objected during the trial itself to the introduction of any evidence. In effect the defendant had waived any right to an arraignment on the second information. The court pointed out that the historical reasons for a stricter rule had disappeared, as the defendant now has the right to counsel and to testify, and penalties are no longer severe.

Following this decision of the Supreme Court a number of lower court decisions were rendered finding a binding waiver.\(^6\) In one case an indictment was presented and four days later it was ordered that the defendant appear for arraignment five days after the order. A demurrer was filed and argued and overruled. The United States Attorney and counsel for the defendant then agreed on a trial date and that the defendant should plead on the trial date so as to save a trip. At the opening of the trial the indictment was read to the jury, and the clerk stated that the defendant had entered a plea of not guilty. The defendant proceeded to trial without objection that there had been no arraignment or plea. At the end of the trial the defendant moved in arrest of judgment and his motion was overruled. On appeal no error was found.\(^6\) The court of appeals referred to the stat-

5. Garland v. State of Washington, 232 U.S. 642, 645 (1914). The Note, 27 Harv. L. Rev. 760 (1914), points out that the weight of authority in the state courts was opposed because without an arraignment and plea there is no issue to try, or because no statute provides for waiver. But the decision was regarded as sound in principle. Today the weight of authority permits waiver. Note, 3 De Paul L. Rev. 105, 109 (1953). See also Note, 27 Mich. L. Rev. 703 (1929).

6. In one case it was pointed out that the Supreme Court ruling applied to federal cases as well as state, and that it applied even though the issue was raised in the trial court. Cornett v. United States, 7 F.2d 531, 532 (8th Cir. 1925).

61. Shidler v. United States, 257 Fed. 620, 624 (9th Cir. 1919). The court
ute on standing mute and to the last Supreme Court decision up-
holding waiver. It is too late to object to want of arraignment
after judgment. It cannot first be raised on a motion for new
trial.

In one case nine defendants were involved, six of whom had
been previously tried for what they claimed to be the same of-
fense. In the present proceeding all nine were arraigned and
pleaded not guilty. Later they were given leave to withdraw
their pleas and to demur to the indictment. The demurrers were
overruled and the trial commenced. Early in the trial counsel
called the court's attention to the fact that there were no pleas
as the pleas had been withdrawn and asked permission to plead.
Counsel for the other three defendants concurred in asking per-
mission to plead. The trial court did not distinguish the two sets
of defendants, and held as to all that their failure to plead after
demurrer was a waiver of their right to plead. On appeal it was
held that there be a reversal as to the set of six defendants.

They had not by inaction waived their right to plead; but had
offered to plead both the general issue (not guilty) and a special
plea in lieu of the action (double jeopardy). They had repeatedly
objected during the trial. They were deprived of their oppor-
tunity to defend under a proposed plea of double jeopardy. The
other three defendants objected too late. They objected only
when objection for the other six defendants was made. They
were not prejudiced as they had not previously been tried and
could not therefore plead double jeopardy.

Where the defendant, after the government had introduced
its evidence and rested, moved for a directed verdict on the
ground that he had not been formally arraigned and was then
told to plead and did plead not guilty, it has been held that a
waiver is conclusively presumed. A failure to arraign until
the close of the government's case is not ground for motion to
dismiss.

In general, where the defendant proceeds to trial without ob-
also cited State v. Klasner, 19 N.M. 474, 145 Pac. 679, Ann. Cas. 1917D 824
(1914).
62. Rossi v. United States, 278 Fed. 349, 353 (9th Cir. 1922).
63. Williams v. United States, 3 F.2d 933, 935 (9th Cir. 1925).
64. Rulovitch v. United States, 286 Fed. 315, 320 (3d Cir. 1923), cert. denied,
261 U.S. 622 (1923).
65. Cornett v. United States, 7 F.2d 531 (8th Cir. 1925).
There had been a demurrer before trial.
jection for lack of arraignment and failure to plead, there is a waiver; or at least the formal defect is not prejudicial so as to warrant reversal on appeal. In general, the federal cases do not distinguish between waiver of arraignment and waiver of plea, as do some states.

Where there is a recital in the order of the trial court of a plea of not guilty and where there is no express admission of a failure to arraign by the trial court or by the United States Attorney, there may be doubt whether the lack of arraignment may be established by affidavit. But even if it could be so established, the conviction would stand when the issue is not raised until after conviction.

Amendment and New Trial

Must the defendant be arraigned again when the grand jury has amended the indictment after the original arraignment? The answer under the early cases seems to be in the affirmative. Where, after mistrial, and before a new trial, amendments are made to purely formal parts of certain counts of an indictment, and the defendant is not rearraigned, even if the irregularity is material, it can affect only the counts so amended, and the error is cured by arrest of judgment on such counts. Moreover the defendant had filed a plea of former jeopardy in which he admitted that he had heard the amended indictment read. The amendment was merely of the caption of the indictment.

Following this case it was held that on a second or third trial for a misdemeanor when there was no arraignment this was not erroneous when there had been an arraignment at the first trial. The plea of not guilty entered at the first trial stood until the defendant showed a desire to change it. The case is not necessarily a precedent in felony cases as it is not clear that misdemeanor cases required an arraignment even at the first trial. Subsequently the Supreme Court held in a state court case that the want of a final arraignment on a second information for the

---

68. Note, 3 De Paul L. Rev. 105, 109-11 (1953). But see Shelp v. United States, 81 Fed. 694, 701 (9th Cir. 1897) decided under the earlier law.
69. Williams v. United States, 3 F.2d 933, 935 (6th Cir. 1925).
70. Gardes v. United States, 87 Fed. 172, 182-83 (5th Cir. 1898), cert. denied, 171 U.S. 689 (1898).
same offense was not a denial of due process and was waived by failing to object before trial. Following this decision of the Supreme Court a court of appeals held in a federal case that a failure to arraign a defendant again after amendment of an information was not ground for reversal. The original information charged unlawful possession of liquor and the maintenance of a nuisance in violation of the National Prohibition Law. The amendment added an additional count alleging sale. But the amendment added nothing substantially different and did not surprise the defendant. At the most the defendant could have asked for a continuance but failed to do so. However the court of appeals reversed the conviction for lack of evidence. Hence the holding is not a strong one.

Right to Counsel

In 1938 the Supreme Court took the position that failure to comply with the provision in the Sixth Amendment guaranteeing the right to counsel meant that the district court lost jurisdiction over the case. Following this decision, a court of appeals with one judge disagreeing was willing to concede arguendo that an arraignment was void when a defendant pleading not guilty was unable to obtain counsel and had not intelligently waived his right to counsel. But the court could proceed after the defendant obtained counsel, withdrew his plea of not guilty, and entered a plea of guilty. Habeas corpus would not lie. But Circuit Judge Sibley was not willing to concede even for the sake of argument “that a court cannot arraign one not represented by counsel without an express waiver of counsel.” Defendant had a right to counsel at arraignment only if he provided himself counsel, and at common law he did not even have the right to retain counsel.

Another court of appeals held a short time later that when a defendant is arraigned and forced to plead to an indictment

73. Muncy v. United States, 289 Fed. 780, 781 (4th Cir. 1923).
76. Until 1938 the right to counsel was generally understood as meaning merely the right of the defendant to be represented by counsel retained by him. Holtzoff, The Right of Counsel Under the Sixth Amendment, 20 N.Y.U.L.Q. Rev. 1, 7 (1944).
without counsel, there is no denial of due process and no right to habeas corpus where the defendant pleaded not guilty and was thereafter represented by an attorney on the trial.\textsuperscript{77} The defendant is not prejudiced when he pleads not guilty.

Even where without counsel the defendant pleads guilty and the court appoints counsel immediately after arraignment, and the defendant elected with advice of counsel to stand on his plea of guilty, which was subject to change, the constitutional rights of the defendant were not violated and he was not prejudiced.\textsuperscript{78} Habeas corpus would not lie. The Supreme Court laid down a similar rule in a state court case.\textsuperscript{79} As Professor Fellman points out: "It has been held that an accused is entitled to the assistance of a lawyer upon arraignment whether he pleads guilty or not, but the weight of opinion seems to be otherwise."\textsuperscript{80}

But one case has said that the right to counsel accrues as soon as the grand jury returns an indictment into court.\textsuperscript{81} And a leading case has said that there is a right even at the preliminary examination.\textsuperscript{82}

At his arraignment the district court should advise the defendant of his right to counsel and of his right, if indigent, to have counsel appointed for him.\textsuperscript{83} This is true even though the defendant pleads guilty.\textsuperscript{84} "The constitutional guarantee makes no distinction between the arraignment and other stages of crimin-
inal proceedings in respect of the application of the guarantee."\textsuperscript{85} The "right to the assistance of counsel exists at the time of arraignment as well as at the trial."\textsuperscript{86} On the whole the federal cases have been in conflict as to whether the defendant has been deprived of his constitutional rights if he was unadvised at the time of arraignment.\textsuperscript{87}

One court has pointed out that the time from arraignment up to trial is "the most critical period of the proceedings" as "investigation and preparation" are vitally important and the defendant should have counsel during that period.\textsuperscript{88}

\textit{Delay Between Arraignment and Trial}

What about delay between arraignment and trial? In a case coming up from the Philippine Islands, Justice Lamar in a dissenting opinion objected to a trial commencing eleven months after arraignment.\textsuperscript{89}

\textbf{III. RULE 10 AS INTERPRETED IN THE DECISIONS}

\textit{Definition}

Paraphrasing Rule 10 the Court of Appeals of the Eighth Circuit has said: "An arraignment consists of calling a defendant to the bar, reading the indictment to him or informing him of the charge against him, demanding of him whether he is guilty or not guilty, and entering his plea."\textsuperscript{90}

\textit{Function and Purpose}

Arraignment under Rule 10 "is intended to be a safeguard for due process — a pattern for a fair hearing."\textsuperscript{91}

\textsuperscript{85} Evans v. Rives, 126 F.2d 633, 641 (D.C. Cir. 1942).
\textsuperscript{86} Robinson v. Johnston, 50 F. Supp. 774, 778 (N.D. Calif. 1943). See also Michener v. Johnston, 141 F.2d 171, 174 (9th Cir. 1944).
\textsuperscript{87} Note, 42 COL. L. REV. 271, 276 (1942).
\textsuperscript{88} Price v. Johnston, 144 F.2d 260, 262 (9th Cir. 1944). In this case the defendant had counsel.
\textsuperscript{89} Diaz v. United States, 223 U.S. 442 (1912).
\textsuperscript{91} Merritt v. Hunter, 170 F.2d 739, 741 (10th Cir. 1948).
Due Process

In some cases a failure to follow Rule 10 may amount to want of due process. It is only when a failure to observe Rule 10 amounts to a denial of due process that the court is deprived of jurisdiction so that habeas corpus will lie. The mere fact that the plea of guilty was made by the defendant's counsel is not a denial of due process — when the defendant understood the charge against him and the nature and consequences of his plea. Due process does not require a literal compliance with Rule 10. It is enough that the defendant is clearly informed of and understandingly admits the offense charged. A motion to vacate sentence would not lie where defendant's attorney, appointed by the court on the day of arraignment, stated, while standing beside the defendant before the judge, that defendant wished to enter a plea of guilty, and defendant answered affirmatively the court's question as to whether the charges, heard by the defendant, were correct. The defendant had then effectively pleaded guilty in person, as well as by attorney. In this case the court had called for the F.B.I. agent for his report concerning investigations of the defendant, and the agent stated specifically what the defendant was charged with. When the agent finished, counsel for defendant stated that he had talked with the defendant and that he wished to plead guilty. Failure to supply the defendant with a copy of the information is not a denial of due process when the United States Attorney read and explained to the defendant each count of the information. There is no denial of due process because arraignment and impaneling of the jury takes place on the same day; the defendant has adequate time to prepare for trial where the indictment was on February 14, arrest and preliminary examination on February 22, arraignment and impaneling of the jury on March 18, and the trial commenced on March 20, and defendant did not move for a continuance when the case was called for trial. Arraignment before one judge and trial before another does not violate due process. Such procedure is neither unlawful nor unusual and is authorized by statute.

---

92. Ibid. See Note, 3 De Paul L. Rev. 105, 106 (1953).
93. Mayes v. United States, 177 F.2d 505, 506 (8th Cir. 1949).
94. Richardson v. United States, 217 F.2d 696, 698 (8th Cir. 1944).
95. Picciurro v. United States, 250 F.2d 585, 591 (8th Cir. 1958).
At about what time in a criminal proceeding in relation to earlier proceedings will the arraignment occur? In one case the arrest was on August 24, the indictment was delivered to the defendant on September 18, and arraignment occurred on September 21. In another case indictment was on February 14, arrest and preliminary examination on February 22, and arraignment and impaneling of the jury on March 18, and trial commenced on March 20. In another case arrest was on August 4, indictment on August 20, and arraignment on August 23. The arraignment will have been preceded by a grand jury indictment or an information filed by the United States Attorney as the arraignment consists of reading the accusation to the defendant or stating its substance to him. Usually the defendant will have been arrested and will have had or waived a preliminary examination. The preliminary examination will not be necessary when the first step is the filing of the grand jury indictment or an information. The arraignment occurs in open court before the district judge. It differs sharply from the preliminary examination which occurs shortly after arrest before the commissioner. Historically arraignment is very ancient, while preliminary examination arose in the nineteenth century. Yet many federal judges often refer to the preliminary examination or the bringing before the commissioner as "arraignment."

Under Federal Rule 12(b) (3) a motion to dismiss an indictment or information "shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter." However, one case erroneously refers to a statute requiring objection to be made before or within ten days after arraignment. This statute is now superseded by Rule 12(b) (3).

See Orfield, Criminal Procedure from Arrest to Appeal 266, n. 1 (1947).
101. Arraignment is the first step after indictment or information. Housel & Walser, Defending and Prosecuting Federal Criminal Cases 360, § 257 (2d ed. 1946). It takes place as soon after indictment or information as the presence of the defendant can be secured. Id. at 363, § 260.
103. Orfield, Criminal Procedure from Arrest to Appeal 275 (1947).
Reading of Accusation

The unsupported assertion by the defendant that the indictment was not read in open court and that there was no opportunity to know its terms furnishes no basis for an order vacating the sentence when the court records show that the defendant was arraigned and entered a plea of guilty.\(^{106}\) The records of the district court had been attached to and made a part of defendant’s motion to vacate the sentence.

Copy of Accusation

In an appellate decision two years after the Federal Rules of Criminal Procedure went into effect the court pointed out that the defendant is entitled under Rule 10 to a copy of the indictment or information.\(^{107}\) But in a robbery case involving a 25-year penalty arising before the adoption of Rule 10 there was no such rule. However it should be noted that in ordinary criminal cases since 1927 by statute the defendant had been entitled to a copy on request. The defendant waives his right to a copy when he makes no claim to a copy and does not complain of its omission until after sentence on a guilty plea.\(^{108}\) Even if he could claim error on a direct appeal, collateral attack does not lie under 28 U.S.C. § 2255. One case wrongly asserted that "there is no obligation on the part of the government to furnish copies of indictments to defendants in other than capital cases."\(^{109}\) However the defendant raised the objection on a motion to vacate under 28 U.S.C. § 2255; so he may be regarded as having waived his right by not asking for a copy seasonably.\(^{110}\) Failure to supply a copy of the information is not a want of due process where the defendant’s counsel in open court waived reading of the information; it is unlikely that a waiver would have occurred if a copy of the information had not been supplied; and the United States Attorney thereafter read and explained each count in the information.\(^{111}\)

In one case the court rather loosely held that showing a copy

---

110. Ray v. United States, 192 F.2d 658, 659 (5th Cir. 1951).
111. Richardson v. United States, 217 F.2d 696, 698 (8th Cir. 1954). This was a motion to vacate under 28 U.S.C. § 2255 (1952).
of the indictment to counsel for defendant was substantial and effective compliance with the provision in Rule 10 requiring that the defendant be given a copy of the indictment before he pleads. However, the matter was considered only on the hearing on the defendant's motion to vacate under 28 U.S.C. § 2255, and the motion to vacate itself did not raise the issue. Thus there was a waiver through delay. Judge Holtzoff has suggested that the lower federal courts adopt local rules prescribing the manner of delivery to the defendant and the manner of preserving the record of delivery. But he and Aaron Youngquist and Professor John B. Waite agreed that a failure to comply with the rule might well be regarded as a mere irregularity. The rule is silent as to translation where a copy is given to a foreigner who does not understand English.

**Waiver**

The defendant may waive arraignment. It has been held there is a good waiver where the defendant and his counsel appeared in court and counsel stated that he represented the defendant and was informed as to the nature of the charge, and that the defendant wished to waive formal arraignment and plead guilty. Rule 10 does not require the defendant to plead out of his own mouth. The defendant's failure to plead out of his own mouth does not deprive the court of jurisdiction. The Assistant United States Attorney had explained the charge on inquiry by the court. The defendant admitted that he understood the charge as explained by the Assistant United States Attorney. A court of appeals has applied the well-established rule that there is a waiver of arraignment and plea by going to trial.

**Record**

A record, reciting the defendant's arraignment in open court

---

113. 6 NEW YORK UNIVERSITY SCHOOL OF LAW INSTITUTE PROCEEDINGS 125 (1946).
114. Id. at 162.
115. Id. at 214.
116. Id. at 233.
117. Merritt v. Hunter, 170 F.2d 739, 741 (10th Cir. 1948).
118. Beatty v. United States, 263 F.2d 652, 654 (4th Cir. 1959). However, the facts showed an arraignment and plea.

In view of the modern rule permitting waiver of arraignment it no longer seems to be correct that "jeopardy does not attach where there is no arraignment and plea" as asserted by a writer in Note, 24 MINN. L. REV. 522, 527 (1940).
ARRAIGNMENT PROCEDURE

before trial and his plea of not guilty to the indictment, imparts
verity and cannot be contradicted by the defendant's unsup-
ported assertion that he did not know of the accusation before
trial. It is not a basis for reversal on appeal that arraignment
and plea do not appear in the stenographer's notes of the trial.
It is enough that the district judge has specifically found that
a plea of not guilty was duly entered by the defendant upon his
arraignment in open court, that such plea was entered by the
clerk on his original record and was referred to by the judge in
his charge to the jury. The court of appeals is bound by such
finding. The record shows a legal arraignment of the defendant
when it shows an arraignment, that the defendant was repres-
ented by, or had available, counsel at all times, and that the
defendant was fully aware of what was going on at all times,
and that he had had considerable experience in court pro-
cedure.
A motion to vacate sentence would not lie. Nor would
a motion to vacate lie on the unsupported assertion of the de-
fendant that the indictment was not read in open court and
that there was no opportunity to know its terms when the court
records show that the defendant was arraigned and entered a
plea of guilty.

Presence of Court Reporter

At the present time under statute an official court reporter
must be present at arraignment. But a motion to vacate sen-
tence would not lie for absence of a reporter where no court
reporter had been appointed for the court by the date of arraign-
ment in 1945 and appropriations for payment of salaries to court
reporters had not been financially enacted.

Time Relation to Trial

Following the arraignment the impaneling of the jury may
take place on the same day. The trial may commence shortly

120. Beaty v. United States, 203 F.2d 652, 663 (4th Cir. 1953).
121. Booth v. United States, 251 F.2d 296, 297 (9th Cir. 1958).
123. Previously, reliance was placed on the clerk's minutes often incomplete
    and inadequate. Holtzoff, The Right of Counsel Under the Sixth Amendment,
    1952).
after impaneling of the jury. If the defendant needs more time to prepare he should move for a continuance when the case is called for trial.

**Right to Counsel**

Rule 44 lays down a requirement that the court advise the defendant of his right to counsel at arraignment. The court is to so advise if "a defendant appears without counsel." He appears in court when he is arraigned. The defendant may waive his right to counsel at arraignment. In one federal case it was pointed out that the State of Michigan had adopted a rule of court expressly requiring the trial judge to advise the defendant of his right to counsel at arraignment.

Like the earlier cases the recent cases continue to hold that absence of counsel at arraignment when the defendant pleads not guilty is not a basis for release on habeas corpus. There is no constitutional requirement that the defendant be represented by counsel on arraignment where he pleads not guilty. Even when the defendant pleads guilty, the failure to appoint counsel is not prejudicial where counsel is appointed immediately thereafter and full opportunity is given to withdraw the plea, or take whatever steps are necessary or desirable without regard to what previously transpired. But as Professor Fellman pointed out "the better view is that one needs the advice of counsel on the crucial question of how to plead. Some judges have taken the position that how one pleads doesn't matter much because counsel are always free to change a plea later. However, once a plea of guilty has been entered, a very damaging admission has been made, and counsel may be understandably reluctant to try to undo the harm later by changing

---

126. For cases where such advice was given, see United States v. Christakos, 83 F. Supp. 521, 524-27 (N.D. Ala. 1949); Ray v. United States, 192 F.2d 658, 659 (5th Cir. 1951); United States v. Von der Heide, 169 F. Supp. 560, 562 (D.D.C. 1959).
128. See Von Moltke v. United States, 189 F.2d 56, 75, n. 4 (6th Cir. 1951).
129. Ruben v. Welch, 159 F.2d 403 (4th Cir. 1947), cert. denied, 331 U.S. 814 (1947); Setzer v. Welch, 159 F.2d 703, 704 (4th Cir. 1947); Holloway v. Welch, 160 F.2d 575 (4th Cir. 1947).
130. Council v. Clemmer, 177 F.2d 22, 23 (D.C. Cir. 1949), cert. denied, 338 U.S. 880 (1949). The court stated that a contrary rule "would literally open the doors of the penal institutions of the country." Id. at 24.
the plea. State courts are practically unanimous in agreeing
that the right to counsel accrues at arraignment.” 132

The Court of Appeals of the District of Columbia has stated:
“It has not been the custom in this jurisdiction to assign counsel
upon arraignment if the plea is not guilty, and we are not ad-
vised that it has been the custom in other jurisdictions.” 133

It would seem that at least in one case the Supreme Court
has laid down a stricter view with respect to the right to counsel
at arraignment. The court spoke very critically of the procedure
where on arraignment the trial judge assigned a young lawyer
for arraignment purposes only, who begrudgingly spent a few
moments with the defendant and recommended that she “stand
mute,” which she did, whereupon a plea of not guilty was en-
tered and she was thereupon remanded to custody. Counsel had
never seen the indictment. Later still without counsel of her
own choice and without counsel having been assigned to her as
the trial judge had promised, she changed her plea to guilty.
Justice Black stated: “Arraignment is too important a step in
a criminal proceeding to give such wholly inadequate represen-
tation to one charged with a crime,” and there should be no
“hollow compliance with the mandate of the Constitution at a
stage so important as arraignment.” 134 Such an appointment is
not a waiver of counsel. Possibly the case can be reconciled
with the views of the lower federal courts on the basis that the
defendant was not promptly supplied with counsel following the
arraignment, so that she made her subsequent guilty plea with-
out representation by counsel. 135 Counsel was only appointed at
a time when it was too late to move to withdraw the plea of
guilty under the old Rule II (4) of the Criminal Appeals Rules.
Under the present Rule 32 (d) of the Federal Criminal Rules
the defendant has more ample time to withdraw his plea.

133. Council v. Clemmer, 177 F.2d 22, 24 (D.C. Cir. 1949), cert. denied 338
U.S. 880 (1947).
of Counsel in Federal Courts to Defend Indigent Persons Accused of Crimes, 24
CALIF. B.J. 114, 117 (1949); Note, 22 TEMP. L.Q. 140, 141 (1948). On the
other hand the importance of arraignment is discounted in PUTTKAMMER, AD-
MINISTRATION OF CRIMINAL LAW 165 (1953).
135. Three dissenting members of the court pointed out that the procedure at
arraignment was not prejudicial as a plea of not guilty was entered when the de-
IV. Modern Reform Proposals

England

In England an indicted defendant must personally appear at the bar of the court in order to be arraigned, that is to say, called to a reckoning by hearing the indictment read, and to plead to it.\textsuperscript{136} If the trial is in the Queen's Bench Division and for misdemeanor, the defendant may, by leave of court, appear by attorney. Under the Indictments Act of 1915 it is the duty of the clerk of court to supply to the defendant, on request, a copy of the indictment free of charge.

A.L.I. Code of Criminal Procedure

Under Section 201 of the American Law Institute Code of Criminal Procedure\textsuperscript{137} the defendant may demand before pleading that the indictment or information be read to him. The Federal Rule gives the defendant no such right. The Code provides that the clerk state the charge or read the accusation. The Federal Rule is silent on who shall state or read the charge. Under Section 206 of the Code there is in effect a waiver of arraignment when the defendant pleads to the accusation or proceeds to trial without objection. Section 287 requires presence of the defendant in felony cases, and Section 288 in misdemeanor cases. Rule 43 of the Federal Rules of Criminal Procedure does not require presence in misdemeanor cases, although the defendant has a right to be present if he wishes. Section 203 of the Institute Code provides that before the defendant is arraigned on a felony charge “if he is without counsel the court shall, unless the defendant objects, assign him counsel to represent him in the cause.” Rule 44 of the Federal Rules does not specifically refer to arraignment, but impliedly does so. Section 193 of the Institute Code provides for the furnishing of a copy of the accusation, whether requested or not, at least twenty-four hours before the defendant is required to plead. But a failure to furnish the copy is not prejudicial error if the defendant pleads to the accusation.

Uniform Rules of Criminal Procedure

Arraignment is dealt with in Rule 23 of the Uniform Rules

\textsuperscript{137} For analysis of the American Law Institute Code, see Orfield, Criminal Procedure from Arrest to Appeal 273-77 (1947).
of Criminal Procedure adopted in 1952. Rule 23(a) provides: "Arraignment shall be conducted in open court and, unless waived by the defendant, shall consist of reading the indictment or information to the defendant or, if the defendant so requests, stating to him, the substance of the charge, and calling on him to plead thereto. The defendant shall be given a copy of the indictment or information at least [ ] days before he is called upon to plead. Defendants who are jointly charged may be arraigned separately or together in the discretion of the court." Rule 23(b) provides for assignment of counsel. Rule 23(c) provides that the record shall show compliance. With respect to prison offenses "the inquiries and remarks of the court and the responses thereto, if any, of the defendant, made to determine whether the defendant understands his right to be represented by counsel, the nature of the offense with which he is charged, and the punishment which may be imposed, shall be taken and transcribed and shall become a part of the record."

The drafters were impressed by the criticism of the Federal Rule, which does not require a reading, that there would be difficulties in determining whether there had been compliance with the rule. The defendant might contend that the substance of the accusation had not been actually stated. In many states statutes require reading. But since under the Federal Rules a copy of the accusation is given the defendant even without request it seems unrealistic to require a reading.

---