STATE OF MINNESOTA
IN SUPREME COURT
A-5

IN RE PROPOSED AMENDMENTS TO MINNESOTA RULES OF CRIMINAL PROCEDURE

ORDER

IT IS HEREBY ORDERED that a hearing be had before this Court in the courtroom of the Minnesota Supreme Court, State Capitol, on Friday, February 11, 1983, at 9:00 o'clock a.m., before adoption of the Amendments to the Minnesota Rules of Criminal Procedure. At that time, the court will hear proponents or opponents of the proposed Amendments to the Minnesota Rules of Criminal Procedure.

IT IS FURTHER ORDERED that advance notice of the hearing be given by the publication of this order once in the Supreme Court editions of FINANCE AND COMMERCE, ST. PAUL LEDGER, and BENCH AND BAR.

IT IS FURTHER ORDERED that the proposed Amendments be published in the NORTHWESTERN REPORTER advance sheets.

IT IS FURTHER ORDERED that all citizens, including members of bench and bar, desiring to be heard shall file briefs or petitions setting forth their positions and shall notify the Clerk of Supreme Court, in writing, on or before February 1, 1983, of their desire to be heard on the proposed rules. Ten copies of each brief, petition, or letter should be supplied to the Clerk.

Dated: November 18, 1982

BY THE COURT:

Chief Justice

SUPREME COURT
FILED
NOV 18 1982

JOHN McCARTHY
CLERK

(63)

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MARK W. PETERSON

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FEBRUARY
SECOND
1 9 8 3

John C. McCarthy, Clerk
Minnesota Supreme Court
230 State Capitol
St. Paul, Minnesota 55155

A-5

RE: Minnesota Rules of Criminal Procedure

Dear Mr. McCarthy:

On behalf of the Minnesota Trial Lawyers Association, I am submitting this letter for the Court's consideration at the time of the hearing on the proposed changes to the Minnesota Rules of Criminal Procedure on February 11, 1983.

On January 15, 1983, the Board of Governors of the Minnesota Trial Lawyers Association unanimously adopted the following resolution:

> It is hereby resolved that we oppose any change in the present order of final argument in criminal cases, as contemplated by proposed Rule 26.03, subd. 11.

The reasons for this resolution are as follows.

1. The proposed change is contrary to the traditional rule in all cases that the party with the burden of proof argues first. To establish a contrary practice makes neither practical nor forensic sense.

2. The proposal for prosecution surrebuttal is also nonsensical, for several reasons. First, a "clearly improper" defense rebuttal should be objected to at the time and appropriate action, if necessary, taken by the trial court. Not only is this accepted practice but also the only effective way of dealing with such arguments before the jury.

Second, although perhaps sounding in clarity, "clearly improper" is obviously such a pervasive standard that the proposed Rule would result in trial courts, exercising their vast discretion, allowing four arguments in virtually every case. This result would clearly decrease the efficiency of the courts.

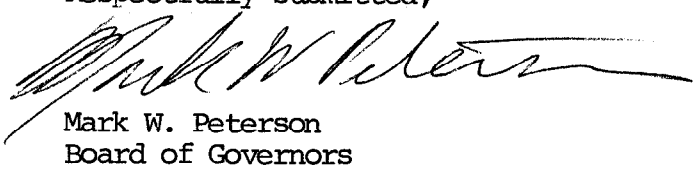
This latter result would also increase the workload of the new appellate court and the Supreme Court. Any reasonably competent appellate lawyer will raise the "improper surrebuttal" issue in every case, resulting in increased expenditure of appellate resources in reviewing cases.

3. For the most part, the Rules themselves and changes since 1975 have benefitted the prosecution. Although we realize that a number of prosecutors, individually and collectively, also oppose the proposed Rule, it is apparently another proposal which would benefit the prosecution and put the defense at a further disadvantage.

4. Besides giving further advantage to the prosecution, the only conceivable reason for changing the present well-established, simply administered and uncomplicated Rule is for the sake of change. We are aware of no evidence that the present order of argument has prevented prosecutors from obtaining convictions where conviction would be just, and it is therefore clear that the efficient administration of criminal justice would not be advanced by any change.

Since we therefore perceive no legitimate purpose to be furthered by a change in the present Rule, we respectfully submit that the proposed change should not be adopted.

Respectfully submitted,



Mark W. Peterson
Board of Governors
Minnesota Trial Lawyers Association

MWP/gfy

1-19-83 -- Called for 10 copies

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BRUCE H. HANLEY
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TELEPHONE
(612) 338-6990

January 18, 1983

Mr. John C. McCarthy
Clerk of Supreme Court
Room 230
State Capitol
St. Paul, Minnesota 55155

Re: Proposed Changes in Rules of Criminal Procedure

Dear Mr. McCarthy:

I understand that the Supreme Court is considering a change in the Rules of Criminal Procedure whereby the order of closing arguments in a criminal case would be altered. I am not even sure what the proposed change would be, although I presume that it would be a change to allow rebuttal argument for the State after defense has argued, similar to the procedure in Federal Court. I request that this letter be forwarded to the Criminal Rules Committee before February 1, 1983.

I would like to go on record as opposing any change in the proposed order of final argument, or the addition of rebuttal for the State.

I am a lawyer in private practice, practicing primarily in the areas of criminal defense. I see no reason to change the order of final argument in a criminal case, since the present order has been in effect for a substantial period of time. The number of criminal cases that are decided on oral argument are minimal, yet the State wishes to add another weapon to its arsenal.

When the Rules of Criminal Procedure were placed in effect and subsequent amendments were added, the emphasis has primarily favored the prosecution. The defense Bar has not been as organized as the County Attorneys and City Attorneys across the State, therefore, the Rules of Criminal Procedure have not maintained the position of neutrality and equity that should prevail.

My experience in Federal Court (although it is somewhat limited), and I expect the experience of other defense lawyers in Federal Court, indicates that rebuttal by the prosecution oftentimes turns into an attack of the defense closing argument. The jurors should be able to analyze each closing argument for him or herself without the necessity of having a prosecutor criticize the words spoken by the defense. Criticism of the closing argument takes away the idea of a fair, and impartial trial, and takes away from the pursuit of justice. Personalities become injected into the case to too great a degree,and the value of the closing argument is destroyed.

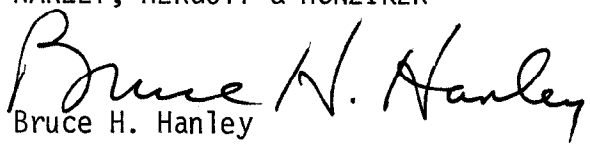
Consequently, I would respectfully urge the Court to maintain the present order of closing argument and impose no changes relative to closing argument in State Courts at this time or any time in the future. We do not have to blindly follow other States who are eager to emasculate the fundamental purpose and necessity for the criminal jury trial.

Although I am a member of the Minnesota Trial Lawyers Association-Criminal Law Committee; Minnesota State Bar Association-Criminal Law Section; Hennepin County Bar Association-Criminal Law Committee, and the National Association of Criminal Lawyers, I am writing this letter as an individual lawyer in the State of Minnesota.

Thank you very much for your attention to this matter.

Very truly yours,

HANLEY, HERGOTT & HUNZIKER



Bruce H. Hanley

BHH/vlc

1-24-83 -- called for 9 more

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MICHAEL T. OBERLE

OF COUNSEL
JOSEPH T. BURKARD
SANDRA L. NEREN

January 21, 1983

SUPREME COURT
FILED
JAN 24 1983
JOHN McCARTHY
CLERK

Mr. John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

A-5

Dear Mr. McCarthy:

It is my understanding that in February there are going to be hearings on a proposed rule which would change the order of closing arguments. I strongly oppose any such change. In the eight years that I have been practicing, I have seen many changes in the rules which have eroded the previous rights of the accused. Changing the order of closing arguments is the most dramatic to date. It would effectively confuse any jury as to who has the burden of proof.

Very truly yours,

James H. Ranum

JHR/cf

1-24-83 – Called for 9 more

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SUPREME COURT
FILED
JAN 24 1983
JOHN McCARTHY
CLERK

January 21, 1983

John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

RE: Amendment to Rules of Criminal Procedure - Order of Oral Argument

A-5

Dear Sir:

It has come to my attention that proposal has been made to change the order of oral argument at the criminal trial level in the District Courts of the State of Minnesota. I want to express my strong disapproval of this change and its' implications for the trial of criminal cases in Minnesota. As an active criminal defense attorney I have often seen the immense power that the State can apply to any criminal prosecution. Under the current structuring of the rules the State has virtually all of the power in any criminal case. In recent years the changes in the rules, including those related to peremptory challenges and discovery have strongly benefited the prosecution and created a situation where even handed treatment of criminal defendants in this state is seriously in doubt. To change the order of final argument is merely one additional nail in the coffin of even handed treatment of criminal defendants.

I understand that the argument being made by the advocates of this change is that all the other states in the union do it so we should do it too. That has never been the tradition in the State of Minnesota and certainly should not become it. We have long jealously guarded our independent attitude toward our own rules and procedures and to go along with such an argument merely because prosecutors are not happy that this state is different from every other or that they don't think that enough convictions are being obtained is not an adequate reason to make such a change. I strongly urge the Court not to make such a change.

I understand that oral presentations are being made on February 11th. I would like an opportunity to speak on that day.

I understand that scheduling is for all day and I would appreciate an opportunity to speak in the afternoon, as I know I am supposed to be in Court in the morning at Minneapolis. If this is possible, please feel free to contact me.

Sincerely,

Charles W. Faulkner

CWF: ljr

1-24-83.. Called for 9 more

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JAMES H. MANAHAN
WILLIAM S. PARTRIDGE
DORIS C. McKINNIS

January 20, 1983

The Honorable John McCarthy
Clerk of Supreme Court
STATE CAPITOL
St. Paul, Minnesota 55155

Re: Proposed Change in Order of Oral Argument

A-5

Dear Mr. McCarthy:

I write with regard to the above-referenced proposal as it relates to the practice of criminal law in Minnesota.

I have been practicing law for over a decade, and presently expend approximately 60% of my effort in the area of criminal defense. In the last several years, I have represented clients in more than 80% of the states, and thus am familiar with a wide range of practice procedures.

In my opinion, a change in the order of oral argument allowing the prosecutor a "rebuttal" will be detrimental to the functioning of "fair trials" here in Minnesota. Obviously, the impact of a change in the order of oral argument would be felt primarily in jury cases. Research by the National Jury Project (in cooperation with the American Bar Association and the National Association of Criminal Defense Lawyers) indicates that jurors, notwithstanding instructions and voir dire statements to the contrary, do not afford defendants the "presumption of innocence" which is to stay with them unless and until the offense is proven beyond a reasonable doubt. Rather, as many as 75% of jurors are believed to have already formed their opinion as to the defendant's guilt merely because that individual was brought into the system for trial.

Many prosecutors argue their need for rebuttal argument on the basis that the prosecutor has the "burden of proof," and thus should be given the last word to the jury. The practical realities of a trial, however, suggest that in fact the pragmatic

burden of proof lays with the defendant, notwithstanding the laudable philosophies and jury instructions to the contrary.

Unfortunately, defense counsel do not have the super structure of the prosecutors here in Minnesota nor do we have paid lobbyists to work with the Court or Legislature on this issue. I would like to present testimony on February 11th; however, I may be in trial before the Honorable Robert Renner on that hearing date. Thus, I would appreciate your "registering" this letter as my firm opposition to any change in the order of oral argument.

Thank you for your consideration of these views.

Very truly yours,

Marc G. Kurzman

MGK/jl

1-24-83-- Called for 9 more

DOYLE AND MICHALES
LAWYERS
2124 DUPONT AVE. SOUTH • MINNEAPOLIS, MN 55405 • 612/870-8993

STEPHEN PATRICK DOYLE
MARILYN MICHALES

January 21, 1983

SUPREME COURT
FILED
JAN 24 1983
JOHN McCARTHY
CLERK

Mr. John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

RE: Proposed Change in Criminal Rules of Procedure

Dear Mr. McCarthy:

A-5

As a former assistant Dakota County attorney and now as a private lawyer who has done criminal defense work (felonies and misdemeanors), I wish to have my position noted. I am in opposition to any change in the Criminal Rules of Procedure which would allow the state to argue last. First, it is unnecessary and would serve no useful or significant purpose in the administration of justice. Second, the present order of argument, I believe, provides the proper balance between the state and defense--in light of the resources available to the prosecution. Third, the present order is consistent with a presumption of innocence and allowing the state to argue last would clearly allow greater weight to be given to the state's case.

I am available and would be willing to share my thoughts and perspectives at the upcoming hearing if necessary.

Sincerely,

DOYLE AND MICHALES

Marilyn Michales

MM/sjh

1-24-83 -- Called for 9 more

UNIVERSITY OF MINNESOTA
TWIN CITIES

Law School
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Minneapolis, Minnesota 55455
(612) 373-2717
373-9980

January 21, 1983

A-5

Criminal Rules Committee
Minnesota Supreme Court
C/O Clerk of Supreme Court
State Capitol
Saint Paul, Minnesota 55155

RE: Proposed Change in Order of Final Argument on Criminal Cases

Dear Mr. McCarthy:

I am writing to the Criminal Rules Committee to recommend that the existing order of final argument in criminal cases not be changed.

Our present order of final arguments has worked well for many years. Few cases are won or lost because of final argument. If the last thing the jury heard was final argument it would be much more outcome determinative. However, lengthy jury instructions follow final arguments and jurors concentrate closely on those.

When a defendant or his attorney has the last opportunity to argue to the jury, the defendant has a greater sense that the adjudicative process is fair and they are more likely to accept the outcome.

Sincerely,

Stephen M. Simon
Clinical Instructor
University of Minnesota Law School

SMS
mlr

1-24-83--Called for 9 more

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MARK REINHARDT
RICHARD L. JASPERSON
THOMAS W. KRAUEL
WILLIAM CROWDER
TIMOTHY J. LEER

CASE COORDINATOR
SHARON A. ERICKSON

LAW CLERK
SUSAN BEDOR

January 21, 1983

John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

A-5

Dear Mr. McCarthy:

I am very concerned about the proposed change in the order of oral argument in Minnesota criminal cases. The rules of criminal procedure in our state have whittled away, bit by bit, many of the protections which Minnesota defendants previously had. I think this has come about due to the fact that the prosecutors have been far more effective in lobbying than the individual defense attorneys; of course this would obviously be so because the defense bar is much looser knit than the staffs of the county attorneys' offices.

I can see no reason for changing this rule other than to once again deprive the defendant of another possible protection. The fact that other states have rules different from ours does not impress me; I live in Minnesota because it was Minnesota not another state.

Very truly yours,

Mark Reinhardt

MR:kas

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PETER B. WOLD
DAVID M. JACOBS

BRANCH OFFICE:
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ROBBINSDALE, MINNESOTA 55422

January 21, 1983

Mr. John C. McCarthy
Clerk of Supreme Court
Room 230, State Capitol
St. Paul, MN 55155

A-5

RE: Proposed Changes in Rules of Criminal Procedure

Dear Mr. McCarthy:

It has been brought to my attention by several of my fellow criminal defense practitioners that the Supreme Court is considering altering the Rules of Criminal Procedure regarding closing arguments in criminal cases. The rumors suggest that the proposed changes would bring the State Courts into alignment with the Federal Courts allowing a rebuttal argument for the State after the defendant's summation. I strongly oppose any change in the present procedures for final arguments. I request that you forward this letter to the Criminal Rules Committee before February 1, 1983.

Presently, both the State and the defendant are allowed to fully argue the admitted evidence and the reasonable conclusions of such evidence. This procedure allows the jury to hear how both sides feel the evidence supports the verdict they desire. To allow the State a rebuttal argument would not only add weight to the State's position by repetition of their argument, but the procedure allowing the State two opportunities to argue its facts could imply that the State's position merits more serious consideration. The imperical studies I have seen suggest that very few criminal cases are determined by the final arguments of counsel. I strongly feel that changes in the Rules of Criminal Procedure as proposed by prosecuting attorneys in this State would increase the number of cases that were decided on the final argument of counsel. Likely, the prosecutor would use his rebuttal argument to criticize the inferences the defense counsel would suggest from the evidence. Not only would that procedure be unfair to the defendant, but it would also invade the province of the jury. We must assume that a jury can listen to different positions and review them critically, after they have seen the evidence.

The Rules of Criminal Procedure were conceived, in part, to ensure a fair and just trial. To this point, the Rules regarding final argument have ensured that type of trial. I respectfully urge that you agree with that position, and determine that the present Rules regarding closing arguments shall remain the same.

Thank you very much for your time and consideration.

Sincerely,

WOLD & JACOBS

Peter B. Wold

PBW:mfk

1-24-83 -- Called for 9 more

LAW OFFICES OF
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612-338-0066

January 21, 1983

Mr. John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, MN 55155

Re: Order of Closing Argument

Dear Mr. McCarthy:

Please consider this letter as evidence of my strong opposition to any proposed change threatening the present order of final oral argument in criminal cases.

Any effort to transfer the opportunity for the last word to the prosecutor can only be viewed as a further attempt to bolster the power a prosecutor has in a criminal case, to the detriment of an individual's defense. The present system has worked very well for many years, and there is no compelling reason to change.

Yours very truly,

LAW OFFICES OF
THOMAS H. SHIAH, LTD.

By
Thomas H. Shiah

THS:rsc

State of Minnesota
in Supreme Court

In re Proposed Amendments to
Minnesota Rules of Criminal Procedure

A-5

Petition of Judge C. Wm. Sykora

The order of the Supreme Court dated November 18, 1982, relative to the above entitled matter, provides for a hearing on February 11, 1983, at which the proponents or opponents of the Proposed Amendments will be heard.

Your petitioner requests to be heard, not to comment upon the issues presented by the amendments but, rather, upon issues the proposed amendments do not address.

The adoption of the Rules of Criminal Procedure was a tremendous step forward in improving our system of criminal justice, however the rules failed to find a solution to a problem which has plagued the courts for many years. Namely, does the minor penalty, the volume and the costs involved in prosecuting "petty offenses" justify a variation from the procedure in prosecuting "serious offenses" and, if so, to what degree? (See Baldwin v. New York, (1970), 399 U.S. 661).

The procedure set forth by the rules for handling "petty offenses" has congested the municipal court calendars, caused unwarranted expense to the government and permitted petty offenders to thwart the justice system.

The following suggestions are offered as possible and partial solutions to the problem:

1. Peremptory Challenges - M.S.A. 593.01 defines a petty jury as a jury of six except when the offense charged is a gross misdemeanor or a felony, then as a jury of 12. Rule 26.02, Subd. 6 allows a defendant five peremptory challenges and the state three regardless of whether he is charged with a "serious" or "petty" offense. Why should a "petty" offender, percentage-wise, be entitled to more such challenges than a felony?

2. Written Complaints - Rule 4.02, Subd. 5(3) grants to a defendant whether charged with a "serious offense" or a

"petty offense", including a non-criminal offense (See M.S.A. 609.02), the right to a written complaint. Rule 1.02 does provide that the rules shall be construed to eliminate unjustifiable expense and delay. However, many lawyers believe this right to be absolute even to the extent of instructing a client, when they have a conflict and cannot appear, to appear without counsel and request a written complaint and thus obtain a delay. Delay and expense would be avoided if the judge was granted the right to approve or disapprove the request.

3. Bench Warrants - Neither the rules nor the statutes distinguish between "Warrants" and "Bench Warrants". Historically warrants issued upon probable cause to believe the defendant to be in contempt of court, pursuant to Chapter 588 of the statutes, have been called "Bench Warrants". Those warrants issued following defendant's failure to respond to a complaint as "Warrants". M.S.A. 588.20 provides that every person who willfully disobeys the lawful process of the court is guilty of a misdemeanor.

Contrary to the authorization of M.S.A. 480.059, Rule 3.03, Subd. 3 amended M.S.A. 629.31 by prohibiting the "night capping" of a warrant unless the offense is punishable by incarceration.

This rule has been construed by most authorities to apply to "Bench Warrants" as well as "Warrants". Since contempt is punishable by imprisonment, it would seem that the rules authorize the night capping of "Bench Warrants". A clarification is certainly desirable. It is suggested Rule 22.05 be amended to read: "Failure to obey a subpoena or respond to a citation issued in lieu of an arrest without adequate excuse is a contempt of court."

4. Reduction of Misdemeanor Charges to Petty Misdemeanor - Rule 23.02 delegates a legislative function to the judiciary and Rule 23.04 a legislative function to the prosecutor, thus are unconstitutional.

These rules cause confusion because the executive branch is controlled by the law and the judicial by the rules. For example, a prosecutor certifies a misdemeanor traffic offense

as a petty misdemeanor. The Driver's License Bureau records the same as a misdemeanor and the court records it as a non-crime. The solution requires legislation.

The foregoing point out major problems. Other problems exist.

Respectively submitted,

C. William Sykora

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TELEPHONE 612-333-8225

January 25, 1983

John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Re: Proposed Amendment to Rule Regarding Final Argument

A-5

Dear Mr. McCarthy:

I wish to advise you that I vigorously oppose the proposed Rule to change the order of oral argument in criminal trials. I know of no reason to change this Rule.

After all, the accused is innocent until proven guilty. Therefore, he should have the last word in order to defend himself and to answer any accusations made by the prosecution in its final argument.

Most changes that have been made recently in the Rules of Criminal Procedure have been to the benefit of the prosecution, especially those with regard to discovery.

Therefore, I would urge that the Rule not be changed.

Sincerely,

Roger C. Clarke

Roger C. Clarke

RCC/cs

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(612) 920-8444

January 25, 1983

John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, MN 55155

Re: Amendment with respect to the order of oral argument

A-5

Dear Mr. McCarthy:

This letter is written in opposition to the proposed change in the Rules relative to the order of oral argument. This change should not be made in the opinion of the undersigned.

Very truly yours,

THIEL, SORENSON, THIEL AND CAMPBELL

by Alan C. Thiel

cas

1-25 - called for 10 more copies

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RESIDENCE 331-2727
AREA CODE 612

January 25, 1983

John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Re: Proposed Amendment to Rule Regarding Final Argument

Dear Mr. McCarthy:

A-5

I wish to advise you that I vigorously oppose the proposed Rule to change the order of oral argument in criminal trials. I know of no reason to change this Rule.

After all, the accused is innocent until proven guilty. Therefore, he should have the last word in order to defend himself and to answer any accusations made by the prosecution in its final argument.

Most changes that have been made recently in the Rules of Criminal Procedure have been to the benefit of the prosecution, especially those with regard to discovery.

Therefore, I would urge that the Rule not be changed.

Yours truly,

Syrus S. Kouri

Syrus S. Kouri

SSK/cs

OFFICE OF
JAMES H. MARTIN
STEVENS COUNTY ATTORNEY

ASSISTANT COUNTY ATTORNEY
Lowell H. Nelson

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Morris, Minnesota 56267
Phone: (612) 589-1950

"Justice is the constant desire and effort to render to every man his due"...
Justinian

January 26, 1983

The Honorable Justices of the
Minnesota Supreme Court
State Capitol Building
St. Paul, Minnesota 55155

A-5

RE: Proposed Amendments to Minnesota Rules of Criminal Procedure

Dear Justices of the Supreme Court:

We of The Stevens County Attorney's Office are writing to offer our impressions of certain of the proposed amendments to the Minnesota Rules of Criminal Procedure. Our collective impressions are buttressed by the experience County Attorney, James H. Martin, has had for 14 years as prosecuting attorney.

We are particularly concerned with two of the proposed amendments. First, we take issue with the proposal #47, which proposes an amendment to number 19b of Appendix A to Rule 15 (Petition to Plead Guilty). This attempt to inform the defendant about the operation of the Minnesota Sentencing Guidelines seems to be inherently confusing. The amendment is not clear whether it refers to the statutory maximum or to the maximum under the guidelines. If it means that, even under the guidelines, the statutory maximum could still be imposed, then this reference to the guidelines imparts no new information and should not be added. If, however, the reference is to the maximum sentence under the guidelines, this amendment could seriously interfere with the discretion of a trial judge to depart from the guidelines after a plea of guilty. It would seem that, whether or not a negotiated plea included a negotiated sentence, an upward departure from the guidelines because of aggravating circumstances would be forestalled. This would amount to amending the Sentencing Guidelines to provide that upward departures could be made only after trial, and not after pleas of guilty. Such an amendment should not be made by a change in an appendix to a rule; the guidelines themselves should be amended, if such is the intention of the Court.

In conclusion, the Appendix A to Rule 15 as presently constituted is preferable to the proposed amendment.

The bulk of our dissatisfaction, however, lies with proposal #76, amending Rule 26.03, Subd. 11, on Order of Jury Trial. It proposes that defendant may argue first, then the prosecution, and then

defendant may have rebuttal, with surrebuttal allowed where rebuttal is "clearly improper". Our view is that the entire proposal is not warranted.

If such a rule were adopted, defense strategy would obviously be as follows: first, defendant would argue such general considerations as reasonabledoubt, credibility of witnesses, and good character of the defendant. Then, the prosecution would present its final argument on the merits. Finally, defendant would present arguments related to the actual evidence, having carefully avoided such things in his first argument. The obvious result is to give defendant two complete arguments to the prosecution's one argument, while giving defendant both the first and last argument.

The inequity of such a situation would be obvious even where proof by only a preponderance of the evidence were required. The rest of the trial is carefully balanced, with each adversary having an equal chance to examine jurors, question witnesses, and present a case in chief. To award an extra final argument to one party could conceivably be fair if the argument were awarded to the party with the burden of persuasion, although it is wholly inconsistent with the philosophy behind all other trial procedure. This rule, however, would not only be inconsistent with that philosophy, but would award the extra argument to a party <u>without</u> the burden of persuasion, and would leave the party with the burden of proof <u>beyond a reasonable doubt</u> with one argument less, offered neither first nor last.

Our dissatisfaction is compounded by the fact that this immense disadvantage is placed on the prosecution without adding any counter-balancing needed benefit to defendants. Our state is already one of the very few states, if not the only state, to allow defendant last say in final argument. Any rebuttal can be made under present rules. Liberal discovery rules (which heavily favor defendants) prevent any unfair surprise. The proposed rule change does not help defendants in any substantive way, and the only procedural difference is to give a gratuitous extra argument to defendant. In a system where the prosecution's burden of persuasion is already that of proof beyond a reasonable doubt, this rule change can only convert a fair trial into an unfair trial where the prosecution's burden becomes impossible to carry.

Mr. James H. Martin has 14 years of experience in criminal prosecution, and an equal number of years' experience in criminal defense. That experience is the primary basis for our collective opinion that the present order of trial works well, is fair to both sides, and should not be altered.

We therefore urge that the proposal #47, amending Appendix A to Rule 15, and proposals #76 and #82, amending the rule and comments

on order of trial to change final argument procedure, should not be adopted.

Very truly yours,

James H. Martin
Stevens County Attorney

Lowell H. Nelson
Assistant Stevens County Attorney

Kenneth L. Hamrum
Assistant Stevens County Attorney

6304 Mildred Avenue South
Minneapolis, Minnesota 55435
January 28, 1983

A-5

John McCarthy
Clerk of the Supreme Court
St. Paul, Minnesota 55155

Re: Proposed rule change to reverse order of final argument in criminal cases

Dear Mr. McCarthy:

I am an Assistant Public Defender in Hennepin County. I'm concerned about the proposed change in the order of final argument in criminal cases. Specifically, I question why the change in order of final argument is being proposed in the first place. The only reason I can think of is that prosecutors believe the defense has an unfair advantage in going last and therefore they desire to change the rules so they can now have the benefit of the same "unfair" advantage. Prosecutors apparently assume that the switching of final argument will then result in a higher percentage of convictions, and eliminate the majority of those erroneous acquittals because the defense attorney wasn't allowed to beguile the jury without the opportunity for the prosecution to comment upon the defense attorney's argument.

I strongly disagree with the reasons given or implied by the proponents for the change. The fact that the rest of the jurisdiction have the defense go first does not make it a better rule, nor does it justify change for that reason alone. I believe the prosecution going first is the more natural way of proceeding, if it is remembered that the prosecution has the burden of proof. In giving his argument first, the prosecutor is concerned with pointing out to the jury how the evidence has proven the elements of the charge beyond a reasonable doubt. The defense then has the opportunity to point out to the jury why all the evidence or the lack of credibility of the witnesses is insufficient to sustain a guilty verdict. In essence the defense attorney is asking the jury to be critical of the State's case and requests the jury to preserve the status quo and find the defendant not guilty.

To reverse the order of argument as proposed and encourage prosecutors to be less concerned with arguing why the jury should convict because of the evidence, but instead become critics of the defense attorney's criticisms. The defense attorney then in rebuttal would apparently be allowed to then criticize the prosecutor's criticisms of the defense attorney's initial criticisms of the State's case.

Prosecutors should be concerned with why they have proven their case, not with the defense attorney's comments. If the prosecutor has a good enough

case that the jury should "buy" it in the first place, the case should hold up in spite of the defense attorney's arguments. If if cannot, there should be an acquittal.

What prosecutors seem to forget is that there are some advantages in arguing first. The jury is sometimes more attentive and pursuedable, and they can be told by the prosecutor that no case is ever perfect, and be told that the defense attorney will probably point out the imperfections in the State's case but the minor imperfections in the State's case does not necessarily mean that the case is not proven beyond a reasonable doubt.

I have practiced almost six years as a defense attorney and have also been a prosecutor for eight months with the Hennepin County Attorney's Office on the exchange program. I can see no compelling reason at this time to change the order of final argument in criminal cases from what I feel is the natural order of proceedings. I trust these comments will be passed on to the appropriate rules committee.

Respectfully,

Gary S. McGlennen
Assistant Public Defender

GSM:kj

Carol A. Collins
5041 First Avenue South
Minneapolis, Minnesota 55419

Mr. John McCarthy
Clerk of the Supreme Court
Room 230 State Capitol
St. Paul, Minnesota 55155

Re: Order of Final Argument

A-5

Dear Mr. McCarthy:

I wish to express my strong opinion that the order of final argument should remain as it has been for many, many years. I have heard no convincing argument why the order should be changed to let the prosecution be allowed to argue last. In the interests of justice and fairness, I feel it is very appropriate to have the defense argue last after all the evidence has been received. It is very hard for a defendant to counteract the impression that because he is on trial, he is guilty. Allowing him to be heard last, after the prosecution has made all his arguments, gives him an opportunity to confront all the evidence and arguments against him and is certainly consistent with maintaining the presumption of innocence and a fair trial.

Thank you for your consideration.

Sincerely,

Carol A. Collins

Carol A. Collins
Attorney at Law

CAC/lms

Office of the Public Defender
C-2200 Government Center
Minneapolis, Minnesota 55487

January 26, 1983

Mr. John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

A-5

Dear Sir:

I am writing to voice my concern over the proposed change in the order of closing argument in criminal cases. Although I am presently a member of the defense bar, I have worked as prosecutor and as a defense lawyer in both misdemeanor and felony courts. I have never felt that the present order was a detriment to prosecution. I do strongly feel that the present order is the correct one. The State has the burden of proving guilt, and thus must first present its case. The defendant has an opportunity to answer those charges if the State can meet its burden. So it should seem, logically, that this should also be the order of closing argument. To reverse the order, allowing the State to argue last, hints of a shift in the burden of proof, allowing the State's charges and argument to remain unanswered before the jury.

I realize that Minnesota stands alone in its present rule. However, that does not mean that this long-standing tradition is incorrect. To the contrary, I feel the present rule speaks well of Minnesota's concern for the rights of those accused of crimes, and for Minnesota's commitment to fairness in its criminal process.

I urge the court to leave this rule as it now stands.

Very truly yours,

Warren R. Sagstuen
Assistant Public Defender

WRS/lms

FRANCES B. MOORE
ATTORNEY AT LAW
7064 VICTORIA ROAD
WOODBURY, MINNESOTA 55119
612-739-7668

January 27, 1983

Mr. John McCarthy
Clerk of Supreme Court
Room 230, State Capitol
St. Paul, Minnesota 55155

A-5

Dear Mr. McCarthy:

I am writing in opposition to the proposed amendment to the Rules of Criminal Procedure which would reverse the order of closing arguments. It seems as if every change in the Rules has been drafted with the intent, or at least the effect, of making it easier for the State to get a conviction. How much easier should we as lawyers and members of a free democratic society let it get? Defendants continue to need reasonable procedural protections; easy convictions can result in erroneous convictions.

There would appear to be no legitimate reason for the change. The rule as is has worked in Minnesota for a long time and to change it would be to merely make life easier for prosecutors.

Sincerely,

Frances B. Moore

Frances B. Moore
Attorney at Law

FBM:sb

Mitchell Swaden
2234 Highland Parkway
St. Paul, MN 55116

January 27, 1983

John McCarthy
Clerk of Supreme Court
Room 230 State Capitol
St. Paul, MN 55155

A-5

Dear Sir:

This letter is in regards to the proposed change of Rule 26.03, subdivison 11, Minnesota Rules of Criminal Procedure changing the order of closing arguments in criminal prosecutions. As a relatively new member of the Minnesota Bar and the Hennepin County Public Defender's Office I would strongly oppose this change.

As I'm sure everyone would agree, the aim of the Criminal Justice System is to provide a fair and just trial for everyone accused of a criminal offense. At a time when our country is experiencing overcrowding of our prisons and jails causing at the very least uncomfortable and unsanitary conditions and at the most degrading, inhuman, and violent situations, I have not heard experts in the field of Criminal Justice nor the public express an opinion that too many people accused of a crime are not being prosecuted and convicted. It would seem to me, that the only purpose for this change would be to make it easier for the State to obtain a conviction. I ask you members of the Supreme Court, where is the basis for this change. Am I to believe that the State with all its resources which it brings to bear upon a criminal defendant needs one more piece of ammunition in its arsenal.

This change if adopted will be seen as one more attempt to limit a defendant's right to a fair trial. Because there is not a basis in law for this change nor is there evidence of a high number of unwarranted acquittals, allowing this change will only broaden the specter of an innocent person being convicted of a crime.

Sincerely,

Mitchell Swaden

Mitchell Swaden
Assistant Hennepin County
Public Defender

MS:sh

LaJune Thomas Lange
Attorney at Law
1316 Douglas Avenue South
Minneapolis, Minnesota 55403
(612) 377-9171

January 26, 1983

A-5

Mr. John McCarthy
Clerk of Supreme Court
State Capitol Room 230
St. Paul, MN 55155

Dear Mr. McCarthy:

I am writing to express my concern regarding the proposal to change the order of final argument. The order of argument should not be changed. The defense should continue to be able to argue last.

As a trial lawyer in Hennepin County I recognize the power vested in the Office of the County Attorney to charge cases and to request further investigation by police agencies prior to the insurance of a complaint. The result is obvious, that only a fraction of the cases charged ever go to trial. The majority are concluded with a plea of guilty. The advantages of the County Attorney determination of what to charge and when to initiate formal proceedings clearly bolsters the position of the prosecution at every stage of the proceeding and especially at the trial.

The only basis for changing the order of final argument appears to be the intense lobbying efforts of the prosecutors.

I urge you to retain the dignity and fairness that has traditionally been attached to a criminal trial and let the defendant who faces penalties as great as lifetime incarceration have the opportunity through his attorney to give the final summation. The proposed rebuttal procedure would turn each trial into a debate and also make more grounds for appeal on the basis of whether or not rebuttal was granted or proper.

Minnesota should not be dictated to by other courts - let the rule stand unchanged.

Very truly yours,

LaJune T. Lange

LaJune T. Lange
Assistant Public Defender

LTL:msp

cc: William Kennedy
Jack Nordby

LANE AYRES
ATTORNEY AT LAW
2140 Dayton Avenue
St. Paul, Minnesota 55104
Telephone 348-7530

January 27, 1983

Mr. John McCarthy
Clerk of Supreme Court
Room 230 State Capitol
St. Paul, Minnesota 55155

Re: Closing Argument Rule

A-5

Dear Justices:

This is to inform you that I am strongly opposed to any change in the present rules regarding the order of final argument.

As a practicing criminal defense attorney I am well aware that the state County Attorney's Association has a strong organization that is pushing this change. I would urge the Court not to succumb to this political pressure. There is no specific need to change a rule that has worked for many years. The fact that prosecutors and other law enforcement officials believe it would make it easier to obtain convictions should not be grounds to even consider the change.

Sincerely,

Lane Ayres

Lane Ayres
Attorney at Law

LA/lms

Minnesota House of Representatives

January 27, 1983

Mr. John C. McCarthy
Clerk of Minnesota Supreme Court
230 State Capitol
St. Paul, MN 55155

SUPREME COURT
FILED
JAN 31 1983
JOHN McCARTHY
CLERK

Re: Proposed Amendments to Minnesota Rules of Criminal Procedure

A -5

Dear Mr. McCarthy:

I am writing to ask you to convey to the members of the Minnesota Supreme Court this written statement of position relative to the proposed change of Rule 26.03, Subd. 11, which is Item 76 in the proposed amendments to the Minnesota Rules of Criminal Procedure set for hearing before the Minnesota Supreme Court on February 11, 1983. Please be advised that I hereby request an opportunity to be orally heard on this matter. My oral statement will be brief and will contain references to the matters stated herein below.

Specifically, it is my understanding that the proposed change alters the order of argument at the conclusion of the evidence in criminal trials and enables the prosecution to argue after the principal argument has been made by defense counsel and only offers defense counsel a limited rebuttal as described in the proposed rule change.

I have personally handled a number of criminal cases in general practice before the courts of the State of Minnesota since my admission to the bar in 1955 and prior to my partial retirement from practice in 1976. I have had sufficient experience in the trial of criminal cases to be deeply persuaded that the privilege or right of final argument is just about the only significant procedural tactic left to the defense in support of the presumption of innocence in the course of trial. I believe the proposed change of rule will in practice almost completely destroy the possible benefit that defense counsel presently and traditionally

has had in the ability to argue last. When a defendant is brought into court for a criminal trial with handcuffs that a deputy sheriff then unlocks, when the deputy with a gun on his hip sits next to or near the defendant, when the court and jury are functioning in criminal cases in many small particulars, to say that the defendant has the presumption of innocence is to indulge a great deal of fiction and requires a juror to stretch his mind quite a ways. The final argument capability appears to me to be just about the only practical method available to the defense to counter all of the implied guilt that a defendant in custody has surrounding him during all of the preliminary and actual trial procedures and proceedings.

In addition, I would like to comment that the second sentence of the new Section"i" proposed in the change of rules seems to be vague and could be used by either the prosecution or the defense under varying interpretations by the trial bench; if I were attempting to argue in summation under the application for the proposed new Rule "i",I would outline all of the potential issues in the trial with only a brief summary and suggest to the jury that I did not know what the prosecution's argument on those issues would be,but that I would have an opportunity to respond in rebuttal after the prosecution argued the particular issues that had been outlined. I would then in effect have two arguments on all possible issues, particularly if the prosecution discussed the issues outlined in the first argument by the defense. I doubt if this is intended by the persons who drafted the proposed change and I believe it will cause confusion to the trial courts if it is interpreted as I outlined.

In summary, I believe the adoption of the change of this rule is unwise and unfair and probably unconstitutional under the applicable provisions of the Minnesota and United States Constitutions. It strikes at the heart of the presumption of innocence and I strongly urge that the court reject this particular proposed rule change.

Very truly yours,

David T. Bishop

David T. Bishop
Attorney-at-law
Member of the Minnesota
House of Representatives

DTB:mm

William Popalisky
5113 - 43rd Avenue South
Minneapolis, MN 55417

January 31, 1983

John McCarthy
Clerk of Supreme Court
Room 230 State Capitol
St. Paul, MN 55155

A-5

Dear Mr. McCarthy:

I am a young attorney with the Hennepin County Public Defender's Office. I've had an opportunity to review the proposed changes to the Minnesota Rules of Criminal Procedure. I'm writing you about the proposed change that disturbs me most - the reversal of the order final argument.

Our system is based on the concept that an accused is innocent until proven guilty. It is designed with that presumption, because some of the persons who find themselves accused are indeed innocent. The right to argue last is an invaluable bullwork for a system that is designed to protect the innocent. It has served long and well in Minnesota and should not be abandoned.

Sincerely yours,

William M. Popaliksy
Assistant Hennepin County
Public Defender

WMP:sh

3445 Girard Avenue South
Minneapolis, Minnesota 55408
January 31, 1983

Mr. John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Dear Mr. McCarthy:

As a lawyer involved in criminal defense work, I wish to note my objection to the proposal to amend M.R.Cr.P. 26.03, subd. 11, to reverse the order of final argument in criminal cases.

I haven't as yet heard any arguments to the effect that the present rule impermissibly prejudices prosecutors in the presentation of their cases. Indeed, the very length of time for which the present rule has been in effect is itself evidence that it works fairly. Why fix something that works?

Sincerely,

Richard G. Carlson
Attorney-at-Law

RGC:kj

ZIMMERMAN & BIX, LTD.
ATTORNEYS AT LAW
2020 DAIN TOWER
MINNEAPOLIS, MINNESOTA 55402

TELEPHONE (612) 333-8225

MANLY A. ZIMMERMAN
MILTON H. BIX

January 25, 1983

A-5

John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Re: Proposed Amendment to Rule Regarding Final Argument

Dear Mr. McCarthy:

I wish to advise you that I vigorously oppose the proposed Rule to change the order of oral argument in criminal trials. I know of no reason to change this Rule.

After all, the accused is innocent until proven guilty. Therefore, he should have the last word in order to defend himself and to answer any accusations made by the prosecution in its final argument.

Most changes that have been made recently in the Rules of Criminal Procedure have been to the benefit of the prosecution, especially those with regard to discovery.

Therefore, I would urge that the Rule not be changed.

Yours very truly,

ZIMMERMAN & BIX, LTD.

Milton H. Bix

MHB/cs

1-27-83 -- call for additional copies

ERROL K. KANTOR
ATTORNEY AT LAW
LAW CENTER BUILDING
1625 PARK AVENUE
MINNEAPOLIS, MINNESOTA 55404-1694

OFFICE 612/332-8611, RES. 866-5400

January 26, 1983

Mr. John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Re: Change in the Order of Oral Argument A-5

Dear John:

It is my understanding that an amendment to the Rules to change the order of oral argument in criminal matters has been proposed and the hearing will be held on February, 1983 concerning that. At this time I would like to express my strong opposition to that change as a defense lawyer.

As you know, all the changes in the criminal prosecution area have been to favor the prosecution and we as defense lawyers have really not had any changes to the benefit of our clients. This change again would only help the prosecutors and would be an added burden on defendants. I am strongly opposed to that and hope that this letter expresses my opposition as such.

Thank you.

Sincerely,

Errol K. Kantor

Errol K. Kantor

EKK/dm
1933A

MICHAEL F. CROMETT
ATTORNEY AT LAW
608 COMMERCE BUILDING
FOURTH AT WABASHA
SAINT PAUL, MINNESOTA 55101
612-224-3821

January 26, 1983

A-5

John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Re: Proposed amendment to the Order of oral argument

Dear Mr. McCarthy:

As an attorney who has spent the majority of his career practicing criminal law as a defense attorney, both at trial and on appeal, I wish to voice my strenuous objection to the proposed change in the Order of final argument. I feel very strongly that there is no reasonable justification for the proposed change, and that the offered "reasons" for the proposal are merely a subterfuge for strengthening the prosecution's already heavy advantage at trial.

The Rules of Criminal Procedure codified the existing order of closing argument, and that which had been in effect since 1923. The Rules have been in effect for nearly eight years and the order of final argument for many, many more years. What has happened in that time which necessitates a change in this area? What makes the proposed change fit within the purposes of the Rules, which are "just and speedy determination of criminal proceedings" and "to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay"? M.R. Cr. P. 1.02. The answer is nothing. Nothing warrants a change in this area.

To note, as the proponents of the change do, that Minnesota is the only state to provide for this particular order of argument may be correct, but this fact is hardly a persuasive reason for change. Minnesota has always decided issues like this on the issues' own merit, rather than blindly following other states. The advances made by our state, in criminal law, which lead the way rather than follow, are particularly noteworthy in this respect.

Statements regarding order of argument in civil cases are inapposite here. Here we are talking, not about monetary matters between similarly situated individuals, but about individual liberty in the face of proposed government restriction. Here we are talking about the presumption of innocence of the individual in the face of the government accusation. "Traditional notions of fairness" warrant awarding the individual defendant a last word to the jury in this context.

The state is not, as it would have you believe, defenseless against improper argument by defense counsel during closing argument. Nor are defense counsel particularly prone to improper arguments. As the prosecutors should be aware, objections to improper argument and chastisement from the court are usually sufficient to keep comment within the proper scope. Giving the state final argument will not do anything to change this. It would merely give the prosecution an advantage to the numerous advantages they already possess.

In light of these unpersuasive, old arguments it can be seen that there is no need for a change in the order of final argument. Rather, the same order is mandated - in fairness to the individual defendant and our notions of fundamental fairness. Prosecutors should know by now that they are not out to win their cases but to seek justice: the state wins whenever justice is done. The proposed change, at the risk of convicting innocent men, merely seeks to make it easier to convict by allowing the state the final word. One wonders whether they should convict when the state's case rests on who has the last word rather than on the facts.

Thank you for considering these sincere comments and concerns regarding the proposed change to Rule 26.03 subd. 11 h. and i.

Sincerely,

Michael F. Cromett

MICHAEL F. CROMETT
Attorney at Law

MFC:bmc

DAVID KNUTSON
Attorney at Law
3306-64th Avenue North
Brooklyn Center, Minnesota 55429

January 25, 1983

A-5

Mr. John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Re: Proposed Rules, Final Argument Criminal Case

Dear Sir:

I am writing in response to the proposed amendments to the Rules of Criminal Procedure and requesting an opportunity to be heard at the hearing.

Specifically, I am most concerned with and vehemently opposed to the proposed change in final argument. I have been an attorney since 1973 and have practiced criminal law exclusively. I am firmly convinced that it is very difficult to obtain a fair trial for a criminal defendant. Many of my clients are minority individuals which exacerbates the difficulty of receiving a fair trial. The jury surveys that have been performed show that jurors do not follow the court's instructions nor do they presume that a defendant is innocent. Such studies have been born out by my own experience as well as the interviews conducted by the jury in the recently completed federal criminal trial of Norman Perl. Altering the final argument would only serve to make trials less fair.

Additionally, this proposal has been introduced by the prosecutors in the last five legislative sessions. In each session, the bill has been defeated. There appears to be no justification for the court to do judicially what the prosecutors have been unable to accomplish legislatively.

Finally, I have seen no reasons advanced for the change. Prosecutors favor it because they believe it will make their job easier. I cannot imagine why the Court would favor such a change.

Sincerely,

David Knutson

David Knutson
Attorney at Law

DK/vh

called for 10 copies

MARILYN B. KNUDSEN

ATTORNEY AT LAW
SUITE 608 COMMERCE BUILDING
(4TH AT WABASHA)
SAINT PAUL, MINNESOTA 55101

TELEPHONE 612/224-3821

January 25, 1983

John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Re: Amendment of the Order of Oral Argument in Criminal Cases

Dear Mr. McCarthy:

A-5

I am writing to object to the amendment of the Order of Oral Argument in Criminal Cases. I have had the opportunity to use the last closing argument, both as a prosecutor in Massachusettes and as a defense attorney here in Minnesota. I recognize that the position of having the last word, or at least the last word before the Judge has the final word, is a great advantage.

It is an advantage, moreover, that should remain with the defense. As the amendments have been made to the rules of criminal procedure, they predominately seem to favor prosecutors. In addition, the United States Supreme Court has seen fit recently to erode many of the protections that have been provided to defendants. Another one of my roles currently is to teach criminal procedure to perspective police officers in the Community College system. From that prospective, I have an opportunity not only to discuss the rules, but to look at them philosophically. It seems very important, especially in these times of stressing law and order, that we remember that the rules are designed to protect the innocent. It is fundamental to our system that any advantage which will prevent an innocent person from going to prison, should be afforded the defendant.

It is essential that we not only speak the words, but also provide the system wherein the defendant is considered innocent until proven guilty. One aspect which has been provided in Minnesota to facilitate such a system, is the final defense argument. It is invaluable to the innocent defendant to have that right afforded him.

Lest people be able to say that the final argument is of no importance, I would like to stress my own personal experience. At one time, prior to doing much criminal work, I would have agreed that the final argument was often times mere verbiage. However it has been my experience to do a

number of criminal trials recently, and I now know from experience that the final argument is important. I have observed it in the eyes of the juror as either the prosecutor or I was speaking and I have also observed it from speaking to jurors afterwards.

I will not be able to be present on February 11th to speak to the Court, since my duties as an Assistant Public Defender require me to be doing arraignments that day. However I respectfully hope that the Court will take into consideration the thoughts expressed in this letter.

Sincerely,

Marilyn B. Knudsen

MARILYN B. KNUDSEN
Attorney at Law

MBK:bmc

HENNEPIN

OFFICE OF THE PUBLIC DEFENDER
C2200 Government Center
Minneapolis, Minnesota 55487
(612) 348-7530

William R. Kennedy, Chief Public Defender

January 25, 1983

SUPREME COURT
FILED
JAN 31 1983
JOHN McCARTHY
CLERK

A-5

Mr. John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Dear Mr. McCarthy:

I am writing you concerning the proposed amendments to the Minnesota Rules of Criminal Procedure. Specifically, I want to address proposals numbered 76 and 82, which would change Rule 26.03, subd. 11(h) and (i), as regards order of final argument.

Such a proposal does little to further a "just, speedy determination of criminal proceedings." Rule 1.02, Minnesota Rules of Criminal Procedure. What it does, however, is facilitate convictions for the prosecutor by dramatically tipping the scales of the criminal justice system in favor of the government. It presupposes that somehow criminal trials in the state are more "fair" to the accused. It is extremely doubtful that there exists any documentation to support such a position.

What makes the proposal even more disturbing is the fact that the legislature has defeated similar proposals over the past several sessions. How can the Court change by rule what the legislature has refused to do by statute?

If the Rules of Criminal Procedure exist to ensure convictions, then the proposed change constitutes a significant benefit. If they exist, however, to provide fair procedures for both the state and the individual, it is counterproductive to the criminal justice system in Minnesota.

I oppose the change of the order of oral argument and can see no legitimate reason for its inclusion in the proposed amendments.

Respectfully,

Daniel E. O'Brien

Daniel E. O'Brien
Assistant Public Defender

DEO/vh
enc.

OFFICE OF THE PUBLIC DEFENDER
C2200 Government Center
Minneapolis, Minnesota 55487
(612) 348-7530

William R. Kennedy, Chief Public Defender

January 24, 1983

Honorable John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, MN 55155

Re: Amendments to the Rules of Criminal Procedure

A-S

Dear Mr. McCarthy:

I must state my opposition to the proposed changes in Order of Final Argument. Minnesota's Order of Final Argument has been established by statute since the 19th century, and I do not feel there has been any evidence showing that it is unfair or is not working properly. I might add, since I have started practicing law, the County Attorney's Council has repeatedly introduced bills into the legislature to change the order of final argument, and in each instance, the bills were defeated. Moreover, there have also been attempts to amend the Rules of Criminal Procedure and these attempts have been voted down by the Minnesota Supreme Court.

It is my opinion that there is currently no demonstrable need for a change and there has not been over the years, and therefore, this rule should not be altered. I would be happy to speak to the Court on February 11, if you wish to make arrangements in that regard.

Sincerely,

David P. Murrin
Assistant Public Defender

-vm

1-24-83.. called for 9 more

HENNEPIN

OFFICE OF THE PUBLIC DEFENDER
C2200 Government Center
Minneapolis, Minnesota 55487
(612) 348-7530

William R. Kennedy, Chief Public Defender

January 21, 1983

SUPREME COURT
FILED
JAN 24 1983
JOHN McCARTHY
CLERK

Mr. John McCarthy
Clerk of the Supreme Court
State Capitol
St. Paul, MN 55155

Re: Order of Closing Argument

A-5

Dear Mr. McCarthy:

I am sorry to see that the supposed "issue" of closing argument is blooming again, like a hardy perennial.

Apparently the prosecutors' organizations feel a need to test their strength periodically by proposing to reverse the order of final argument. Certainly it would be hard to point to any substantive reason for the proposal.

As one defense lawyer, I do not have the benefit of the kind of organized leverage that prosecutors can bring to bear on this sort of point. Nevertheless, speaking as an individual member of the practicing bar, I continue to hope that the Court will preserve the existing order of argument. The present system seems to have worked well since its inception, and there is simply no sound reason to make a change at this time.

Sincerely,

John M. Stuart
Attorney at Law

-vm

HENNEPIN

OFFICE OF THE PUBLIC DEFENDER
C2200 Government Center
Minneapolis, Minnesota 55487
(612) 348-7530

William R. Kennedy, Chief Public Defender

January 24, 1983

A-5

Honorable John McCarthy
Clerk of the Supreme Court
State Capitol
St. Paul, MN 55155

Re: Order of Closing Argument in Criminal Cases

Dear Mr. McCarthy:

For five-and-a-half years I was a county attorney, prosecuting felony cases. I felt very comfortable, during that period, with the order of argument wherein the prosecutor proceeds first and the defense attorney proceeds last. No defense attorney snatched a victory away from me just because he had the opportunity to argue last.

Now, after being a defense attorney for several years, and with reflection upon my experience as a prosecutor, I feel very strongly that the present order of argument is appropriate for the continued impartial, fair administration of justice.

In all phases of the trial, with the exception of jury selection, the prosecutor, who has the burden of proof beyond a reasonable doubt, is obliged to proceed first, and the defendant, who has no burden of proof, and who is presumed innocent, is allowed to proceed last and raise issues of a reasonable doubt. It is logical and fair that the prosecutor who has the burden of proof and is making the accusation against the defendant, should proceed first in the final argument. If the prosecutor's evidence is sufficient and his argument sound, the trier of fact, be it a jury or a judge, will not be swayed by rhetoric of a defense attorney in final argument, but only by reasoned and well-thought-out presentation. However, neither the prosecutor nor the defense attorney have the final word in a criminal trial, because it is the judge who instructs on the law, and if necessary, restores an unemotional aura to the jury's deliberation.

A trial should not be structured in order to allow a prosecutor to secure a conviction, but rather to allow the fair and impartial administration of justice and give the jury an opportunity to render a fair and true verdict.

I view this proposed rule of reversing the order of final argument as an attempt to change a long-settled practice. I can envision that if the order of final argument is changed this time, there will be repeated attempts to change it in the future. I see no demonstrated need or rationale to change the order of final argument.

Sincerely,

Rick E. Mattox
Assistant Public Defender

-vm

HENNEPIN

OFFICE OF THE PUBLIC DEFENDER
C2200 Government Center
Minneapolis, Minnesota 55487
(612) 348-7530

William R. Kennedy, Chief Public Defender

January 24, 1983

Honorable John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

A-5

Dear Mr. McCarthy:

I am enclosing a letter to Chief Justice Amdahl regarding the proposed amendments to the Minnesota Rules of Criminal Procedure.

I would like to be heard on this issue on February 11, 1983.

I have also enclosed copies of letters written by two other attorneys pertaining to this proposed amendment.

Very truly yours,

E. George Widseth
Assistant Public Defender

EGW/vh
enc.

OFFICE OF THE PUBLIC DEFENDER
C2200 Government Center
Minneapolis, Minnesota 55487
(612) 348-7530

William R. Kennedy, Chief Public Defender

January 24, 1983

Chief Justice Douglas Amdahl
Minnesota Supreme Court
State Capitol
St. Paul, Minnesota 55155

A-3

Dear Chief Justice Amdahl:

I am writing regarding the change in the order of closing argument suggested in the proposed amendments to the Minnesota Rules of Criminal Procedure. It probably goes without saying that I, as an Assistant Public Defender, am opposed to such a change.

It seems to me that when a revision like this is proposed, we must first look to the basic purpose for these procedures and then decide whether the change would further that purpose. What is the supposed purpose for the Minnesota Rules of Criminal Procedure?

> Rule 1.02. Purpose and Construction.
>
> These rules are intended to provide for the just, speedy determination of criminal proceedings. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

Thus, the question is, "How does the proposed change in order of closing arguments further the spirit of Rule 1.02?" The answer is, "It does not." This change would not simplify, nor would it eliminate any delay in, criminal trials. Can anyone argue, then, that this would make a trial more "just," more "fair"?

It is said that trials should be "fair" both to the defendant and to the State. Can anyone argue that trials in Minnesota are not presently "fair" to both parties? Does someone have reason to believe that too many criminals are being acquitted in Minnesota?

Isn't that the only purpose for changing the order of closing argument--to obtain more convictions? If you agree that getting convictions is, in fact, the purpose for the change, I would concur that it will help. But, if you

are really seeking "justice" and "fairness," you will rebuff this proposal.

All of us must constantly be aware of, and try to minimize the specter that, if allowed, will haunt us always. Justice Scott even mentioned this specter in "An Overview of the Minnesota Rules of Criminal Procedure." He quoted the expression, "The Ghost of the Innocent Man Convicted." We only need fear this specter or ghost when we stop thinking about "justice" and "fairness" and start worrying about convictions.

Yours very truly,

E. George Widseth
Assistant Public Defender

EGW/vh

1-25-82 -- called for more copies

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January 24, 1983

Mr. John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Re: Amendment of Criminal Rules - Closing Argument

A-5

Dear Mr. McCarthy:

If time permits at the hearing on February 11th, and if I am not in trial at the time, I would like an opportunity to speak with regard to the proposed amendment of the Rules of Criminal Procedure.

I recall that the county attorneys made a diligent effort at the time the Rules of Criminal Procedure were passed to try and wrestle the final argument from the defense. It seemed to me that the matter was fully presented, argued and properly decided by the Supreme Court at that time. I can see no reason why a different decision should be made this time, nor can I see a reason for rehashing the topic.

It seems to me that the order of argument has worked well and fairly down through the years here in Minnesota, that it is consistent with the cornerstones of our criminal justice system of the presumption of innocence and burden of proof, and is a vital ingredient in affording defendants a fair trial in our state.

The only precedent I have heard advanced in support of changing the order of argument is that numerous other states have a different order of argument. Were this a valid basis for changing our well-established procedures, we would be constantly changing our rules of evidence, rules of criminal and civil procedure and every other conceivable area of practice. Unless there exists some compelling constitutional or legal reason to make such a change, I see it as unnecessary and illadvised.

Please let me know if I can have the opportunity to elaborate on these views.

Very truly yours,

Peter J. Thompson

PJT:cb

cc: Jack Nordby, Esq.
George Widseth, Esq.

1-25-82 -- called for more copies

LYNN S. CASTNER
ATTORNEY AT LAW
SUITE 812
MIDLAND BANK BUILDING
MINNEAPOLIS, MINNESOTA 55401

(612) 339-0080

January 24, 1983

The Honorable Justices of the
Minnesota Supreme Court
Attention: John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Re: Proposed change of order of oral argument in criminal cases

A-5

Dear Justices:

I write this letter to register my opposition to any change in the order of oral argument in criminal cases.

I have been practicing law since 1963. My resume is attached.

I was admitted to practice to the Supreme Court of the United States in 1967, the U.S. Court of Appeals for the Eighth Circuit in 1968, the U.S. District Court for the District of Minnesota in 1964, and in all of Minnesota Courts since 1963.

I was active as a staff and board member of the Minnesota Civil Liberties Union from 1963 until 1981.

In my practice I have a substantial criminal defense and civil practice.

Any amendment in the order of closing argument in criminal cases would be contrary to the orderly administration of justice, and be a substantial threat to the rights of individual defendants.

In my own judgment, such a change threatens the concept of due process of law as guaranteed by the Fourteenth Amendment to the U.S. Constitution, but I am aware that is not the prevailing rule of the land and there are a number of states which have been allowed to set rules allowing the state to close oral argument.

There simply has been no argument in favor of the orderly administration of justice advance that is persuasive for the Court to change closing arguments, except to make it easier for prosecutors to obtain convictions.

The state of administration of criminal justice in Minnesota is not such that the Court should reach for a change of a longstanding rule in practice for the simple reason of making criminal convictions easier.

The reasons in favor of maintaining the practice are substantial. Minnesota in many respects is unique in its continuous respect of the constitutional rights and liberties of individuals.

In my own practice with the Civil Liberties Union and in my private practice which has often involved the defense of constitutionally protected liberties, I have been particularly aware of the Minnesota Supreme Court having a tradition and history of jealously guarding these individual liberties.

For example, the Minnesota Supreme Court, before the federal constitution required it, recognized the rights of individual defendants in requiring a judicial officer to make a finding of probable cause in misdemeanor cases State v. Paulick, (citation omitted). Also, in 1967, upon the heals of the federal Gideon case which found that a felony criminal defendant had the right to legal counsel as a matter of federal constitutional law, and well before the U.S. Supreme Court extended this protection to misdemeanants under the federal constitution, this Court in 1967 made a finding that individual criminal defendants charged with misdemeanors should be accorded the right of legal counsel. Indeed, following the impact of that ruling, the then Chief Justice Robert Sharon recognized the gap between ruling and practice, and recognized that the government was simply not able immediately to provide legal counsel for all of those charged, and this Court through his good offices called upon the bar to volunteer their services statewide to set up a volunteer network to guarantee these individual rights to defendants until the legislature and the state government caught up with the law and provided the required governmental services.

It is this respected tradition of this Court and this State in protecting the individual rights and liberties of individuals, that should persuade the Court to not join those other states which have chosen to tinker with the time honored tradition and practice of allowing the defendant's counsel to be heard last in closing arguments in criminal cases.

Respectfully submitted,

Lynn S. Castner
Attorney at Law

LSC:gs

Enclosure

P.S. I plan to attend the hearing and will be available to be heard if the Court will entertain remarks of individuals attending the hearing.

LYNN S. CASTNER
ATTORNEY AT LAW
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MINNEAPOLIS, MINNESOTA 55401

(612) 339-0080

RESUME OF LYNN S. CASTNER

Academic:

Bachelor of Arts Degree, Political Science and International Relations, University of Minnesota, 1960. Juris Doctor Degree, University of Minnesota Law School, 1963.

Professional:

Admitted to practice:

Supreme Court of the United States of America, 1967.

United States Court of Appeals for the Eighth Circuit, 1968.

United States District Court for the District of Minnesota, 1964.

Supreme Court for the State of Minnesota and all lower Minnesota Courts, 1963.

Private practice of law: 1963 - 1964; 1970 - present.

Faculty, William Mitchell College of Law, Civil Rights Survey, 1976 - 1981.

Executive Director and Legal Counsel, Minnesota Civil Liberties Union, 1964 - 1970.

Assistant Director, Governor's Human Rights Commission, 1963.

Research Director, St. Paul Fair Employment Practices Commission, 1961 - 1962.

Community Service:

Minnesota State and Hennepin County Bar Association, 1963 - present.

Hennepin County Bar Association Criminal Law Committee, 1973 - present.

Minnesota State Bar Association Real Property Law Section, 1977 - present.

Minnesota State Bar Association Criminal Law Subcommittee on Development and Drafting of Jury Instruction Guides for Misdemeanor Cases, 1974 - 1975.

Hennepin County Bar Association Committee on Individual Rights and Responsibilities, 1974 - present. Chairperson, 1981 - present.

American Civil Liberties Union National Board of Directors, 1973 - 1981.

President, Minnesota Civil Liberties Union, 1974 - 1980.

Minnesota Civil Liberties Union State Board of Directors, 1970 - 1981.

Governor's Commission on Law Enforcement and Administration of Justice, 1964 - 1965.

Minnesota Council of Civil and Human Rights, 1962 - 1965, the state-wide supporting organization for anti-discrimination legislation, which was enacted, creating the State Department of Human Rights.

KENNETH A. MITCHELL
ATTORNEY AT LAW
1625 PARK AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55404-1694

612 / 332-8611

January 24, 1983

SUPREME COURT
FILED
JAN 25 1983
JOHN McCARTHY
CLERK

A-5

John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Re: Rules of Criminal Procedure (Order of Closing Argument)
Hearing February 11, 1983

TO THE SUPREME COURT AND ITS HONORED MEMBERS:

In view of the fact that the proposed rule change touches so deeply upon the respected traditions of the law, I am sure that this Court will give any change the most serious and deliberate consideration.

I stand with the existing order of closing, wherein the prosecution goes first and the defense follows, not simply because I have done more defense work than prosecution, but because of the very logic by which the initial rule appears to have evolved.

So lets examine the structure.

First, compelling the defendant to argue first after the close of evidence, is a not so subtle way of imposing upon the defendant a burden or duty to explain why they should not be convicted. It runs against the grain so far as the presumption of innocence is concerned, and has severe unconstitutional underpinnings.

Its very similar to the police officer, going into a person's home and demanding to know what he was doing at 8:00 o'clock that evening, and then based upon the accused's silence arresting that person and hauling them off to jail.

It does not test the validity of the state's case against the defendant, but it does test the ability of the defendant to provide an alibi, and so creates the rather horrendous circumstance in which the individual who cannot and does not have an alibi is compelled by the law to stand there mute, exposed, and condemned by his own silence.

It would be redundant of me to inform the members of this court that the basic underpinnings of Anglo-American jurisprudence, which goes back hundreds of years to before the American Constitution was even written, that the burden of proving a crime is never upon the defendant, and placing the defendant in this order or argument

creates an invalid and embarrassing circumstance that the mere right of rebuttal may not dispose of, particularly when the right of the rebuttal is limited.

REBUTTAL

It takes very little thought, or analysis, to understand why the proposed rules limit rebuttal to five minutes. This is true because without the limit, all the defendant would have to do is pass on his initial argument and reserve the right for rebuttal at which time he would then have proper opportunity to comment upon the state's case as they presented it and as they tried it.

This, of course, is exactly what we have at the present time, where the prosecution argues first and the defendant argues second, because that is exactly what the defense is, what the word means, in every technical, legal and common place use of the word.

Now when a lawyer is required to defend against criminal charges, that is exactly what he does. The very act of defense then cannot generally or usually take place until such time as the shape of the charges are known, the evidence is introduced, and the prosecution's interpretation of those charges and evidence has been submitted. The very logic of Socratic thought dictates that flow of events.

But there is additional difficulty, which as a debater knows can happen so far as rebuttals are concerned, that debates do not necessarily go based upon its merits, but sometimes unfortunately upon who is the most clever of the individuals in a minor rebuttal point. In other words, it may be fine for a high school or college debate team, to take an affirmative, negative, sur-rebuttal because it is simply an exercise in mental gymnastics, but when we are talking about something as serious as incarcerating an individual in prison for the rest of his life, or any other major felony, then the jury should not be permitted the luxury of directing all of its focus on one minor issue in such a manner as to destroy the validity of either the prosecutor or the defendant's entire case.

I am, therefore, of the considered opinion that any form of rebuttal is extremely dangerous, more so if limited as to time and that any rebuttal requiring a sur-rebuttal on discretion of the court is absolutely going to produce the very condition that the public sometimes thinks exists in the courtroom already, that a lawsuit is a matter of gamesmanship, and that justice can be defeated based primarily upon the glibness or quick wittedness of counsel.

The system at the present time does not lend itself to any sincere criticism on that basis, or on those points. In fact, it

is quite apparent that a present request for a rule change of criminal rules does not have much wide spread support among the bar, the public or the press, or the legislature or anyone else, and so therefore, unless the prosecution can show or exhibit where injustice occurred as the result of the order of argument, that the motive for change arises only out of their singular frustration at having to be compelled to sit and listen to the bareness of their case exposed once it has been submitted.

CONCLUSIONS

Personal experience tells me, that in spite of all of the false hoopla of the common genre, or the deliberately misconceived concepts of criminal justice in this country, the guilty get convicted of their crimes and the statistical data available in the State of Minnesota bears that out overwhelmingly.

Conversely, while I sit here sifting mentally through 18 years of experience, some of it criminal, some of it civil, both trial and otherwise, I can think of very, very few cases where I suspect the guilty have not been convicted, and in those few cases, it is hard for me to believe that the jury's verdict was even that greatly influenced by the closing arguments as opposed to the balance of the trial.

So why then change? Certainly if the prosecutors think the rules should be changed, it is because they must be able to lay claim to a larger number of convictions. If this is the prosecutor's argument, then what they are doing is paying false homage to the defense attorney's closing summation as an element as any legal proceeding. What they are saying is, cases have been lost because of the defense attorney's final argument, and order of argument.

While such an analysis, from a defense attorney's point of view, is highly complimentary; experience tells me it is just as highly unrealistic and the members of the court, with trial experience, are certainly aware that this populistic viewpoint of attorneys being able to wash away the evidence with some closing brilliance occurs mostly in the theatre, and rarely if ever in the courtroom.

There are a lot of old saws in the practice of law, all of them subject to some qualifications, but there are several that have a high degree of validity.

First, there is the old saying amongst lawyers that "lawsuits are not won or lost in the courtroom, but before they get there", and there is a second that goes with it "that the most important part of trying any lawsuit is selecting the jury." Allowing for the moment, that there are a half dozen old saws that fit into this picture, they still fit the general prescription of one old lawyer

who complained "don't tell me what the other lawyer said, what was the evidence, what was the evidence, what was the evidence."

In this respect, since the prosecutor has the constitutional duty to prove a case, and the burden of proof so far as going forward with that case is concerned, and no compelling reason to change the order of trial events that would improve justice or obtain additional convictions, if that were to be considered an improvement in justice, then the only reason I can see for the prosecutor's really needing a change in the order of argument is to relieve their personal frustrations.

Hardly reason enough.

To induce limited rebuttal and discretionary re-rebuttal would in turn produce no visible benefit to the public, and cause rancorous feelings on the part of some attorneys which could very easily spark open hositlity and divisiveness amongst the bench and the bar.

Respectively yours,

Kenneth A. Mitchell

KAM/bk

STATE OF MINNESOTA
DISTRICT COURT

CHARLES W. KENNEDY, JUDGE

WADENA, MINN. 56482

January 31, 1983

Mr. John McCarthy
Clerk of Supreme Court
230 State Capitol
St. Paul, MN. 55155

Re: Proposed Amendments to Minnesota Rules of Criminal Procedure

Dear Mr. McCarthy:

Enclosed, for filing, original and ten copies of brief relating to proposed amendment of Rule 26.03, Subd. 11. No request is made for leave to appear for oral argument.

Yours very truly,

Charles W. Kennedy

STATE OF MINNESOTA

IN SUPREME COURT

IN RE PROPOSED AMENDMENTS TO

MINNESOTA RULES OF CRIMINAL PROCEDURE

BRIEF OPPOSING PROPOSED AMENDMENT TO RULE 26.03, SUBD. 11. ORDER OF JURY TRIAL

Charles W. Kennedy
Judge of District Court
Box 8
Wadena, MN. 56482
Phone 218 631 3048

ARGUMENT

Rule 26.03, Subd. 11 now provides in part:

> "h. At the conclusion of the evidence, the prosecution may make a closing argument to the jury.
>
> i. The defendant may then make a closing argument to the jury."

The Supreme Court Advisory Committee on the Rules of Criminal Procedure recommends the following amendment to that Rule:

> "h. At the conclusion of the evidence, the defendant may make a closing argument to the jury.
>
> i. The prosecution may then make a closing argument to the jury. The defendant shall then be permitted time to reply in rebuttal and shall raise in rebuttal no new issues of law or fact which were not presented in one or both of the prior arguments. Only if the court determines that the defendant's rebuttal was clearly improper shall the prosecution be entitled to reply in surrebuttal."

The Court is respectfully urged to deny the proposed amendment.

The present procedure is just, simple, and time-tested. Need for change has not been shown.

The Rules "are intended to provide for the just, speedy determination of criminal proceedings." Rule 1.02. It seems more just that the accused have the advantage of the last argument - that is, full argument, not a limited rebuttal. See, 42 Minn. L. R. 549, 558. A prosecutor has, "by virtue of his office * * * a great influence with juries * * * ." State v Clark, 1911, 114 Minn. 342,

344, 131 N. W. 369; 5B Dunnell's Minn. Dig. 3d Ed. 2d Series, Sec. 11.06. The state does not need the further advantage the proposed amendment would supply.

The existing procedure is simple. The Rules seek to "secure simplicity in procedure * * * ." Rule 1.02. The proposed amendment introduces the complexities of determining what is "rebuttal", what are "new issues", what "time" will be allowed for defendant's rebuttal, what is "clearly improper". There will be varying interpretations and increased in-trial and post-trial disputation.

The present order of final argument seems to have been the law in Minnesota since at least 1875. Laws 1875, c. 41, Sec. 1; Statutes of Minnesota 1878, Chapter 114, Sec. 12. So far as the writer has been able to learn there is no sound evidence to the effect that the quality of Minnesota criminal justice has been impaired because the accused has had the last argument.

Respectfully submitted

Charles W. Kennedy
Judge of District Court
Box 8
Wadena, MN. 56482

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1-20-83 -- called for 10 more copies

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MANLY A. ZIMMERMAN
MILTON H. BIX

January 25, 1983

A-5

John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Re: Proposed Amendment to Rule Regarding Final Argument

Dear Mr. McCarthy:

I wish to advise you that I vigorously oppose the proposed Rule to change the order of oral argument in criminal trials. I know of no reason to change this Rule.

After all, the accused is innocent until proven guilty. Therefore, he should have the last word in order to defend himself and to answer any accusations made by the prosecution in its final argument.

Most changes that have been made recently in the Rules of Criminal Procedure have been to the benefit of the prosecution, especially those with regard to discovery.

Therefore, I would urge that the Rule not be changed.

Sincerely,

ZIMMERMAN & BIX, LTD.

Manly A. Zimmerman

MAZ/cs

OFFICE OF THE SHERBURNE COUNTY ATTORNEY

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John E. MacGibbon
Assistant County Attorney:
Robert B. Danforth

Law Enforcement Center Office
13880 Highway 10
Elk River, Minnesota 55330
(612) 441-5728

Assistant County Attorney:
Thomas N. Price
Assistant County Attorney:
Richard D. Clough
Investigator:
Donald L. Anderson

February 1, 1983

Mr. John C. McCarthy
Clerk of Supreme Court
230 State Capitol Building
St. Paul, Minnesota 55155

A-5

In Re Proposed Amendments to Minnesota
Rules of Criminal Procedure

Dear Mr. McCarthy:

Enclosed herewith is my brief opposing certain proposed amendments to the Rules of Criminal Procedure. I would also request the opportunity to be heard at he hearing on February 11, 1983.

Very truly yours,

John E. Mac Gibbon

JEM:lc

Enclosures

STATE OF MINNESOTA
IN SUPREME COURT
A-5

IN RE PROPOSED AMENDMENTS TO MINNESOTA

RULES OF CRIMINAL PROCEDURE

BRIEF OF THE SHERBURNE COUNTY ATTORNEY IN OPPOSITION TO CERTAIN PROPOSED AMENDMENTS

This brief is respectfully submitted by the undersigned as the Sherburne County Attorney and the sole member of the Advisory Committee remaining an active prosecutor. It is the intention of the brief to deal primarily with the proposed amendment to Rule 18.05 and incidentally with certain other proposed amendments.

AMENDMENT TO RULE 18.05

The report of the Advisory Committee proposes an amendment to Rule 18.05, Subdivision 1, that would require the verbatim record of proceedings heretofore restricted to evidence taken before a grand jury and all statements made and occuring while a witness is before a grand jury to include all statements and evidence except the deliberations and voting of the grand jury. Historically, this subject was governed by the provisions of Section 628.57 of the Minnesota Statutes. This statute prohibited the

minutes of the proceedings of the grand jury from including votes of the individual members or the evidence given before the grand jury.

Except for the additions to the reasons for setting aside an indictment contained in Section 630.18, M.S.A., Rule 18 of the Rules of Criminal Procedure has governed matters relating to grand juries since July 1, 1975. Rule 18 was a result of approximately four years of debate and consideration by the Advisory Committee and was adopted in the context of the adoption of other rules, which, taken together with the contents of Rule 18, was deemed by the Advisory Committee to strike a balance that considered the needs of the prosecution and the safeguard of the procedural and constitutional rights of the defendant. This significant amendment to the then existing law, with respect to grand juries, included,

(a) The allowance of the presence of an attorney for a witness testifying after waiver of his immunity (Rule 18.04 RCP)

(b) The requirement of a verbatim record of evidence taken before a grand jury and all statements made and events occurring while a witness is before a grand jury (Rule 18.05, Subdivision 1 RCP)

(c) The right of the defendant to a transcript of the proceedings (Rule 18.05, Subdivision 2 RCP)

(d) The ability of the defendant to challenge the indictment for lack of probable cause to support the indictment (Rule 18.06, Subdivision 2 and Rule 17.06, Subdivision 2 RCP)

The foregoing indicate that with the adoption of the Rules in 1975 major changes were made, both in grand jury practices and procedure. The record of appellate decisions would permit the conclusion that the present draft of Rule 18 is working well and has not been the subject of any pattern

of abuse by prosecuting attorneys. In opposing the proposed amendments, this writer advances both substantive and procedural considerations.

Substantive considerations.

1. There is no reason demonstrated by the propenents of the change as to what purpose the extension of the verbatim record would serve. It would be irrelevant to the review to determine probable cause and any effect it might have upon the weight to be given the testimony of any witness would serve no purpose at a probable cause hearing.

2. All of the evidence taken and all statements made and events occuring while a witness is before a grand jury, are available to the Court reviewing the indictment under the present draft of the Rules.

3. A most important reason to reject the proposed amendment would be its impact of the right of a grand juror to question the foreman, his fellow grand jurors or the prosecuting attorney if he is confused on any matter or issue before the grand jury. Many jurors, knowing a permanent record of his or her ignorance or naivete will be made if a question is raised, forego the opportunity to seek clarification. This stifling effect could seriously impede the usefulness of a grand jury and permit less inhibited jurors to prevail over those who are more sensitive thereby permitting a result which would not necessarily reflect the thinking of the majority of the members of the grand jury. Reluctance on the part of some jurors now exists under the Rules for reasons enunciated, but not enough to create an imbalance between the prosecution and the defense.

4. The use of the grand jury is not an experience that comes the way of many lawyers. The argument that the secrecy of the grand jury fosters

its abuse by prosecuting attorneys belongs on the same shelf of obsolete notions and myths as does the idea that a guilty man should be denied an opportunity for a defense. Certain criminal matters are required by statute to be brought before grand juries, such as the violation of the Fair Campaign Practices Act. Other matters are more apt to be brought before the grand jury at the instance of the prosecuting attorney. The assumption that the prosecuting attorney seeks an indictment in every case brought before the grand jury is a fallacy. No competent prosecuting attorney desires an indictment where the innocence of the defendant will be vindicated by an acquittal. Certain cases have that particular quality which so incenses a layman grand juror that he or she is prone to vote for an indictment notwithstanding legal technicalities and practical consideration confronting the prosecution. Under the present rules, the prosecutor is free to engage in a dialogue with the members of the grand jury to enlighten them on the consequences of an indictment and the difficulties that he, as a prosecutor, would face if an indictment is rendered and the heavy consequences to an indicted defendant notwithstanding an ultimate acquittal. These are matters that prosecutors now address when presenting cases to a grand jury. To suggest that a permanent verbatim record must be made of every remark of a prosecutor to a grand jury and every question from a grand juror to the prosecutor would have two significant and, I believe, decisive ramifications: (a) The prosecutor would now measure his words and be less candid with the grand jury because of the ultimate availability of his remarks through leakage or surreptitious use of grand jury transcripts and (b) indictments would be rendered where indictments should not be rendered.

This writer, in no way, urges that the proponents of the amendment seek indictments for the sole purpose of the opportunity to dismiss the indictments.

In the event of a trial on an indictment rendered where the prosecutor has candidly expressed the weaknesses of the position of the case to the grand jury, the defendant would have the opportunity, by using the transcript, to render any resemblance to a trial, a mockery.

5. Section 628.60 of the Minnesota Statutes provides that a member of a grand jury shall know or have reason to believe that a public offense has been committed, he shall declare the same to his fellow jurors, who shall thereupon investigate the same. Notwithstanding the literal interpretation of this statute, this statute could have serious consequences if pursued without the guidance of a prosecuting attorney. Where a grand jury has picked up on such a matter not presented to it by the prosecutor and is unconcerned with the record it is making, it could cause catastrophic consequences by promiscuiously indicting persons who have not actually violated the law. In situations of this kind, a prosecutor must feel free to address the grand jury as directly and candidly as he can in order to protect persons or reputations from the effect of an unwarranted indictment. No verdict of acquittal has ever expunged from the record, in Court or out of Court, the lasting trauma of an indictment. If the grand jury is to continue as a useful body in the criminal justice system, the prosecuting attorney must have the right, without restriction and without concern for political consequences, to confront the grand jury and assist the grand jury in regaining its stability and proceedings in a lawful manner.

Procedural considerations. This writer certainly does not question the authority of the Court or the propriety of the Court adopting

rules without consideration by any committee before such adoption or promulgation. The reasons gravitating against such adoption or promulgation are of a practical nature. In the last analysis, the workability of any rule depends to a large extent upon its support and adherence by the practicing lawyer.

1. The proposed amendment was not contained in the working draft of proposed amendments, which draft was designed to include all matters considered for recommendation to the Court prior to the Advisory Committee meeting in September, 1981. Nor was it included in a working draft of proposed amendments drawn subsequent to the September, 1981, meeting of the Advisory Committee for use in the December, 1981, and January, 1982, meetings. Emphasis upon the September, 1981, Advisory Committee meeting is made because this meeting, covering a period of approximately three days, was designed to give the full committee the opportunity to review and debate the recommendations of the drafting subcommittee presented at such meeting.

2. No agenda was provided for the January 16, 1982, meeting containing the proposed amendment to Rule 18.05, Subdivision 1, whereas other agenda items were circulated prior to the meeting. This amendment was adopted within the few minutes following the convening of the January 16, 1982, meeting at 9:00 a.m. in Minneapolis, at a time when no prosecutor was in attendance upon the meeting. It is significant that at least two members representing the prosecution were later in attendance at this meeting. No discussion of this item occurred after their arrival.

3. The policy of the Advisory Committee to give advance notice and full opportunity for debate and imput by both the defense and the prosecution in all sensitive matters addressed by the Committee was not observed in this instance.

4. The amendment apparently addresses the subject matter of the decision in State v. Hejl, 315 NW2d 592, notwithstanding the fact that this decision was not rendered until February 4, 1982. There was no meeting of the Advisory Committee subsequent to January 16, 1982. The comments accompanying the amendment to Rule 18.05, Subdivision 1, make specific reference to the Hejl case.

This writer would respectfully urge the Court to remand the proposed amendment to the Advisory Committee for further proceedings consistent to its long-term policy of giving ample opportunity for input and debate by both defense and prosecution.

RULE 26.03, SUBDIVISION 11, h & i

This amendment does not accurately reflect the action of the Advisory Committee. The action taken by the Advisory Committee was to resubmit the original proposal of the Advisory Committee. The relevant part of the orginal proposal is as follows:

> "In the discretion of the Court, the prosecutor may be permitted to reply in rebuttal to the rebuttal argument of the defendant, provided the defendant's rebuttal was improper."

The proposed amendment contains the following language:

> "Only if the Court determines that the defendant's rebuttal was clearly improper shall the prosecution be entitled to reply in surrebuttal."

I would respectfully urge the Court to either conform the proposed amendment to the Advisory Committee action or remand it to the Advisory Committee for further consideration.

RULE 18

The proposed amendment to Rule 18 does not address the impact of Chapter 233, Section 40 of the Laws of 1979 amending Section 630.18 of the

Minnesota Statutes. This statute lists reasons for dismissal of an indictment. Heretofore, Rule 18 had been regarded as all encompassing in this respect. I would respectfully request the Court to remand this to the Committee for consideration of the impact of the statute on the Rules of Criminal Procedure.

RULE 15.07

This rule deals with the issue of accepting pleas to lesser included offenses and offenses of a lesser degree without the consent of the prosecuting attorney. The purpose of the amendment is to reflect the decision of the Minnesota Supreme Court, State v. Carriere, 290 NW2d 618 (Minn. 1980). The proposed amendment includes a reason not contained in the Carriere decision.

> ". . . or that it would be a manifest injustice not to accept the plea."

I would respectfully urge the Court to delete the addition so that the Rules conform to the Carriere decision.

Respectfully submitted,

John E. Mac Gibbon
Sherburne County Attorney
321 Lowell Avenue
Elk River, Minnesota 55330
Telephone: (612) 441-1383

1-20-83--Called for 9 copies

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January 19, 1983

SUPREME COURT
FILED
JAN 20 1983
JOHN McCARTHY
CLERK

Mr. John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, MN 55155

Re: Letter of January 13, 1983

Dear Mr. McCarthy:

It is my understanding that there is currently an amendment before the Supreme Court proposing to change in the order of closing arguments in criminal cases. I wish to express my strong disapproval of any change in either the civil or the criminal order of closing arguments. Since I do not know whether the amendment includes any civil changes I will only address the proposed change in the order of criminal arguments. Because of the huge amount of resources which the prosecution has at its disposal the defendant, for the most part, has only two weapons to equalize his position. Those two weapons are reasonable doubt and the order of the closing argument. Reasonable doubt is an extremely difficult concept only through final closing argument can a defense attorney make sure that the jury understands what reasonable doubt is all about and understand the case as a whole. I cannot emphasize enough the fact that final closing argument for a defendant insures that no misconceptions will occur due to the prosecution's case. It is not enough for the defense attorney to make an objection to prosecutor's argument and have the case reversed later in the Supreme Court. By the time the case is heard in the Supreme Court the defendant has usually served much, if not all, of his prison term. If a prosecutor makes an improper remark in his closing argument, the defense attorney can, currently, alleviate the problem in his own closing argument. The Minnesota Supreme Court has time and time again indicated that the defense attorneys objection and later remarks in his own closing argument negated the problems involved in the prosecutor's improper remarks. Without the defense attorney's ability to do so, the entire matter will rest with further instructions by the Court and reversal by the Supreme Court. The Judge usually hesitates to instruct the jury regarding a number of different matters because of the undue influence that he has with the jury and undue emphasis which they will place upon anything which comments upon. This makes the Judge only partially effective in warding off prosecutorial misconduct which can improperly skew jurys' minds.

Again, the Supreme Court can reverse a matter however that would only be done after the defendant has served a great deal of his term in prison. The only way to effectively preserve the defendant's rights is by final closing arguments.

If the prosecution is denied a conviction because of the current order of closing arguments it merely attests to the fact that there was a reasonable doubt in the jurys' mind. If the individual was, in fact, guilty then the state has denied the ability to further punish that individual. This does not mean that the individual has not been punished. Many times the punishment exacted by the court is far less than the punishment the individual has already received in going through a trial, paying for an attorney, and all of the concomitent emotional, psychological problems and tensions which accompany criminal charges. However, if the order of closing arguments are reversed and the defendant is convicted, who is not in fact guilty, then the society has ruined an individual's life. The entire society, at that point, has suffered. If order of clsoing argument is the straw which convicts the individual then a reasonable doubt in fact existed and the jury did not follow that reasonable doubt. The possible wrong suffered by society in letting a guilty individual off versus the wrong suffered by the individual and society upon the conviction of an innocent person are so disparate that the court cannot change its rule and allow an injustice to occur.

Thus, not only would the Supreme Court be swamped with prosecutorial misconduct problems, which could not be rectified or alleviated in the lower courts, but individuals may be deprived of their Constitutional rights and falsely convicted. For all of these reasons I adamantly oppose any changes in the order of closing arguments. If it will help defeat this matter I would be willing to speak at any hearing. Thank you for your anticipated cooperation. It is my hope that this letter will be made known to the individual Justices prior to any decision making process. Again, thank you.

Yours very truly,

Alan D. Margoles

ADM:bs

STATE OF MINNESOTA

IN SUPREME COURT

IN RE: Proposed Amendments to Minnesota Rules of Criminal Procedure

REQUEST TO BE HEARD

A-5

TO: Clerk of the Supreme Court of the State of Minnesota

Please take notice that Assistant Washington County Attorney Wm. F. Klumpp, Jr. desires to be heard on the proposed amendments to the Minnesota Rules of Criminal Procedure at the hearing in the courtroom of the Minnesota Supreme Court, State Capitol, on Friday, February 11, 1983, at 9:00 a.m. Ten copies of a letter setting forth the position of the Washington County Attorney's Office will be filed with the Clerk of the Supreme Court.

Dated: January 28, 1982.

Respectfully submitted,

ROBERT W. KELLY, COUNTY ATTORNEY
WASHINGTON COUNTY, MINNESOTA

Wm. F. Klumpp, Jr.
Assistant County Attorney
Washington County Courthouse
Stillwater, Minnesota 55082

SUPREME COURT
FILED
JAN 31 1983

JOHN McCARTHY
CLERK

WASHINGTON COUNTY

OFFICE OF THE COUNTY ATTORNEY

COURT HOUSE
14900 61ST STREET NORTH • STILLWATER, MINNESOTA 55082
612/439-3220, Ext. 445

Robert W. Kelly
County Attorney
CRIMINAL DIVISION
Wm. F. Klumpp, Jr. Chief
Robert J. Molstad
M. Jo Madigan
Rebecca H. Frederick
CIVIL DIVISION
Douglas G. Swenson, Chief
Margaret Westin Perry
Francis D. Collins

January 28, 1983

Members of the Minnesota Supreme Court
State Capitol
St. Paul, MN 55101

RE: Proposed Amendments to Minnesota Rules of Criminal Procedure

Dear Justices of the Supreme Court:

This letter will set forth the position of the Washington County Attorney's Office in regard to the proposed amendments to the Minnesota Rules of Criminal Procedure. In order to correlate these comments with the proposed amendments as they appeared in the December 14, 1982, advanced sheets of the Northwestern Reporter I will refer to the numbered paragraphs of the proposed amendments along with the title as it appears in the advanced sheets.

Paragraph number 8, Rule 4.02, Subd. 5(2)

This amendment seems to eliminate the possibility of extensions of the 36 hour rule. This rule presently is somewhat difficult for law enforcement agencies in semi-rural and rural counties to comply with due to the distances that must be covered by the police officers. Presently a judge may grant an extension of the 36 hour rule for good cause shown.

Elimination of the possibility of an extension will have several harmful affects. Obviously, a dangerous individual may be set loose in the community if an investigation is not completed within the 36 hours. This individual can then flee the jurisdiction, destroy or conceal evidence, or intimidate witnesses.

In order to prevent this possibility prosecutors will be forced to issue complaints before an investigation is complete. Consequently some individuals will be charged in situations where the person might not be charged at all once the investigation was completed. For the individual who posts a surety bond and then has his case dismissed he will lose whatever money he has had to put up with the bondsman.

2 - 1 -- copy to each Justice

Paragraph number 21, Rule 9.01, Subd. 1(5)

This office has no particular objection to informing defense counsel of the criminal record of any witness within the computerized criminal information system. However, in order to get this information out of the computerized records keeping system the defense attorney must inform the prosecutor of the witness' full name, date of birth, and the jurisdictions in which the witness has lived for the past ten years. The greatest difficulty in most cases is getting the defense attorney to disclose the names of the witnesses he may call at trial prior to the actual day of trial. Frequently, defense attorneys will not disclose an address and the name will not be a full name but rather a nickname giving no clue as to the correct name of the witness. It is also impossible to accurately determine convictions from outside the State of Minnesota unless the prosecutor is informed of the other states in which the witness has lived for the past ten years. This will allow the prosecutor to teletype the criminal information system in those jurisdictions to get the appropriate information.

Paragraph number 23, Rule 9.02, Subd. 1

The proposed amendment should state that the notice of the entrapment defense shall include a "detailed" statement of the facts forming the basis for the defense. This would bring the proposed amendment into compliance with the language in State v. Grilli, 230 N.W.2d 445 (Minn. 1975).

I would also suggest that Rule 9.02, Subd. 1(3)(d) be amended so as to require defense counsel to ask the defendant about his prior convictions and then disclose any convictions revealed by the defendant. Since the adoption of the Minnesota Sentencing Guidelines, I have found many defense attorneys who refuse to ask their client about prior convictions. The theory being that the defense attorney is under no obligation to disclose the prior record of the defendant unless he is aware of it. This results in inaccurate criminal history scores being compiled by the individuals doing the Sentencing Guidelines Worksheets.

Paragraph number 24, Rule 9.01 , Subd. 1

This proposed amendment to the comments seems to imply that there will be no sanction for intentional or unintentional abuses of the discovery process by defense counsel. Although as a practical matter there are few sanctions

employed by the trial courts, this court did provide for such sanctions in State v. Lindsey, 284 N.W.2d 368 (Minn. 1979). If such a comment is adopted additional language should be added indicating that one of the sanctions for the failure to disclose a witness will be exclusion of the witness at trial. Additionally, the language used in the proposed amendment is offensive to prosecutors. I believe that if you would check with trial judges around the state you would find that abuses of the discovery process are most frequently perpetrated by defense attorneys and such abuses are often done to gain a tactical advantage over the prosecutor who is complying with the disclosure requirements.

Paragraph number 25, Rule 9.01, Subd. 1(5)

Certainly having a pre-trial hearing to determine the admissibility of prior convictions for impeachment purposes is desireable. However, I would suggest that such a hearing deal with not only the defendant and defense witnesses but also any prosecution witnesses who have prior convictions. This will allow the court to make the proper determination under evidentiary Rule 609 as to whether or not the probative value of admitting the prior conviction outweighs its prejudicial affect. An additional problem is created when defense attorneys fail to disclose defense witnesses prior to the start of the trial.

Paragraph number 32, Rule 11.04

The so-called Spreigl hearing is perhaps best held during the trial. This way the Spreigl witnesses do not have to come to court on two separate occasions. In those cases where the court feels that the prosecution's case is sufficiently strong it could rule on that issue without having to take any testimony nor inconveniencing any of the witnesses.

Paragraph number 44, Rule 15.01

In view of the adoption of the Minnesota Sentencing Guidelines I would recommend that during the Rule 15 inquiry in felony cases the defendant be asked about his prior record. This will assist the attorneys and the individual preparing the Sentencing Guidelines Worksheet in determining the defendant's appropriate criminal history score. Additionally, a defendant who intentionally conceals or falsifies his criminal history would be subject to prosecution for perjury. Because of the difficulty in obtaining juvenile records there should also be an inquiry as to the defendant's juvenile criminal history if he is under 21 at the time of the commission of the offense to which he is pleading guilty.

The amendment proposed by the Committee may confuse defendants. Constitutionally it would seem sufficient to inform the defendant of the maximum penalty without going into any explaination as to how the Sentencing Guidelines operate in regard to the particular crime to which the defendant has pleaded guilty. Informing the defendant of any minimum sentence also seems to be constitutionally unnecessary.

Paragraph number 45, Rule 15.07

The proposed amendment improperly states the rule in State v. Carriere, 290 N.W.2d 618 (Minn. 1980). The words "or that it would be a manifest unjustice not to accept the plea" should be stricken as violative of the separation of powers. In addition the prosecution must only demonstrate a "reasonable likelihood the State can withstand a motion to dismiss the charge at the close of the State's case in chief."

Paragraph number 59, Rule 18.05

In view of the bases for challening a grand jury indictment this amendment would seem unnecessary. In addition I do not understand the justification for requiring all the proceedings to be transcribed. The Rules of Criminal Procedure and case law are quite clear that as long as there is sufficient evidence otherwise admissible at trial to support the indictment it will be not dismissed. This amendment would also seem to encourage unnecessary litigation over the sufficiency of an indictment.

Paragraph number 67, Rule 20.01, Subd. 5

This office would recommend that no change be made in the present rule. This same comment would apply to the proposed amendment to Rule 20.02, Subd. 8(4).

Paragraph number 76, Rule 26.03, Subd. 11

The proposed amendment runs contrary to the practice in every jurisdiction and is completely untenable to prosecutors. This office would recommend that Minnesota adopt the same rule that every other jurisdiction follows in regard to closing statements. This would allow the prosecution to go first followed by the defense. The prosecutor could then present a closing statement in rebuttal to the defense attorney's closing.

One of the primary reasons to allow rebuttal by prosecutors is to provide some sanction against abuses by defense counsel. Trial courts are extremely reluctant to grant a mistrial based on a defense attorney's closing statement regardless of how improper. Additionally trial courts are reluctant

to give a corrective instruction due to an improper comment by defense counsel out of fear infringing upon a defendant's constitutional rights. On the other hand the sanctions against prosecutorial abuse have proven to be effective and trial courts are very willing to apply them.

Paragraph number 77, Rule 26.03, Subd. 15

This office would suggest that some allowance be made for those witnesses who are unable to commute verbally.

Paragraph number 86, Rule 27.03

It would be appropriate to set some time period for the trial court to file the departure report. Because the prosecutor has only 90 days in which to bring a sentencing appeal the sentencing court may frustrate this right by failing to file the departure report within that 90 days. Such a delay will not prejudice the defendant because this court has allowed sentencing guidelines issues to be raised in post conviction petitions. However, the prosecution has no such correlative procedure. Ten days from the date of the sentencing would seem to be sufficient time for the court to file the written reasons for departure.

Paragraph number 87, Rule 27.04

This amendment should allow for the introduction of reliable hearsay or the introduction of affidavits in probation revocation proceedings. It does not seem particularly unfair to allow prosecutors to use the testimony of a defendant from a probation revocation hearing if one views a trial as a search for the truth. If the defendant wishes to avoid having his statements used against him in another criminal proceeding, he should simply invoke his right under the fifth amendment to remain silent.

Paragraph number 91, Rule 29.04

This office would suggest that a notice of appeal and briefs from a sentencing appeal should be filed within 90 days of the sentencing or within 90 days of the date of the filing of the departure report, whichever is later. This would avoid any problems caused by the trial court delaying in the filing of the written reasons for departure.

Thank you for taking into account these recommendations in adopting any amendments to the Rules of Criminal Procedure.

Very truly yours,

ROBERT W. KELLY, COUNTY ATTORNEY
WASHINGTON COUNTY, MINNESOTA

Wm. F. Klumpp, Jr.
Assistant County Attorney

WFK/nmp

2-1-82 -- Called for additional copies

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DONALD L. LARSON
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TELEPHONE
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Jan. 28, 1983

John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, MN 55155

A-5

Re: Change to the order of closing argument in criminal matters.

Dear Mr. McCarthy:

Please record my opinion that the order of closing arguments in a criminal matter should not be changed from its present traditional sequence of letting the defendant have the last word.

One should always be wary of changes, and attempt to determine the motivation for them. It should be recognized that defending attorneys are not as organized, nor do they have the resources at hand that the prosecuting attorneys have. To indiscriminately make changes in matters affecting the rights of those accused, should not be treated lightly. There obviously was good reason for the rule to be put into effect in the first place, for it would have been quite easy to keep the order the same as that in civil matters.

Sincerely

Donald L. Larson

Called for 10 copies

JON R. DUCKSTAD
ATTORNEY AT LAW
838 MINNESOTA BUILDING
SAINT PAUL, MINNESOTA 55101

TELEPHONE: (612) 227-3236

January 31, 1983

Mr. John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

RE: Order of Closing Argument

A-5

The Honorable John McCarthy:

In connection with the pending "Amendment of the Order of Oral Argument", I respectfully request:

(1) An opportunity to make an oral presentation, or in the alternative,

(2) Submit this letter to the Minnesota Supreme Court as written objection to any Amendment of the Order of Oral Argument in criminal cases in Minnesota.

Thank you!

Very truly yours,

Jon Duckstad

Jon R. Duckstad

JRD/mml

A-5

RAMSEY COUNTY

COMMUNITY CORRECTIONS DEPARTMENT

ADULT PROBATION AND PAROLE DIVISION

Memorandum

TO: Clerk of Supreme Court DATE: February 1, 1983

FROM: Robert A. Hanson, Ramsey County Adult Probation and Parole Division Director
Robert L. Steiner, Supervisor, District Court Investigative Unit

RE: Request to be heard on the proposed amendments to Minn. Rules of Criminal Procedure

As required by the procedures outlined in the draft of the new rules of Criminal Proceedure, we are requesting to be heard on this matter at the Feb. 11th hearing. The areas we would like to comment on are:

Rule 15.01

If the Court orders a guideline worksheet to be prepared at the pre-plea stage a number of difficulties will ensue. The first of these is that because the plea bargain is not known, the probation officer will not know on what offense(s) the worksheets should be based. When considering the "Hernandez" effect, many combinations of the worksheet could be required on multiple current convictions. The suggestion of our office would be that if the Court feels such an early stage worksheet is needed, it should be limited to determining the Criminal History Score. From this basis attorneys could intelligently discuss the case and much unnecessary work could be avoided in the probation office where staff is already limited.

From the text of the materials we have seen it appears that the early worksheet involves an expedited worksheet from the probation office. There may be serious problems in obtaining accurate and comlete criminal history scores if insufficient time is available to do a good records search. Current practice is that defense attorneys ask their clients for this information. The probation office would need access to the defendant at an early stage to begin our process. Our experience in Ramsey County with obtaining FBI rapsheets is that they require from 30 to 60 days to obtain. If the material is in the County Attorney file there is a considerably lessened problem. Items such as decay factors, dates of various periods of time served in custody, reasons for those days served in custody, etc. all require time for a good worksheet to be completed.

Such a process will be more difficult for our office in that a double scheduling of cases will be necessary. The first is needed to do the early worksheet (only the Criminal History Score we hope) and the second is necessary to complete the PSI.

A considerable concern is that once worksheets are completed and all parties know the guideline grid, there will be a real temptation to sentence without Pre-Sentence investigations. This is not a concern based on self

2-11 -- copy to each Justice

CC292

interest because our office conducts PSI's. If direct sentencings occur with any significant frequency, there will be little or no realistic chance of aggravating or mitigating circumstances being considered. Neither will there be accurately verified amounts of restitution nor an opportunity for the victim of a crime to address the Judge through the PSI. It is further true that there will be no information of any value going to the Workhouse, the prisons, any treatment programs that may be appropriate, or the field probation officer or parole officer. Should such a practice come into place we will have lost a major source of information to the parties mentioned above and we will have caused almost all individualized information to be unavailable to the Judges when a person is being sentenced. The effect this may have on the quality of justice at sentencings I will leave up to the reader to judge.

In addition to the concern surrounding availability of PSIs for the judge there seems to be a danger that too much concentration in the area before sentencing causes issues of guilt and innocence to be forgotten or at least put behind the more "practical" questions. Questions like "what square on the grid does a case fall on?" Is it above or below the line? Issues of guilt and innocence seem to get sidetracked in an apparant search for the best possible or most workable sentencing arrangement for the defendant.

RULE 27.03

On the whole, these changes make sense and actually improve the previous process. They also lend greater clarity to distribution procedures surrounding the Pre-Sentence Investigation and the Sentencing Guideline Worksheet. We do have some concerns though.

Subdivision 4, (E)(4) could cause a problem. With thousands of cases under supervision and from five to ten conditions per case, there are many judicial hearings that could be involved. This could border on the unmanageable if probation officers were required to inform probationers that they could return to court for clarification when a condition is disputed. Cases involving repayment schedules on victim restitution would in themselves account for a large potential pool of such requests. It is doubtful that the Court has the available time this could require and it could, unless controlled by some detailed guidelines, really tie the hands of probation officers. If every time (or even many times) a probation officer requires compliance with a condition of probation, the person balks and wants a hearing, the effectiveness of probation would be severely and adversely affected. If the intent is a desireable one, the language may be unworkable. This may be an example of fixing something that is not broken. If a probationer today wants a review of conditions or of a special condition it is unknown in my experience that such a clarification would not be made. This might be by the agent calling the Judge or by the person's attorney going to the Judge, but the matter does get cleared up. The concern here is that if the next logical step (a procedure for such reviews and probation officers being required to notify probationers of the procedure whenever a dispute occurs) is implemented, everyone involved could be overwhelmed by these requests for hearings.

27.02 Pre Sentence Investigations

We note that the only reference to pre sentence investigations under that heading is regarding the misdemeanor PSI. It would seem more desireable to have material relating to gross misdemeanor and especially, felony PSI

references under the Pre-Sentence Investigation heading. One could otherwise misinterpret that ommission as an implication that pre-sentences in the felony area are not needed.

27.03,sub.4(E)

This paragraph would appear to limit the Randolph decision. Would it not more accurately read..."Rule 27.03, subd. 4(E) is designed to avoid any due process notice problems if probation is revoked and sentence executed. Since a defendant has a right to refuse probation when the conditions of the probation are more onerous than a prison sentence, and if it cannot be demonstrated that society's interests suffer by vacating the probation sentence, State v. Randolph 316 N.W. 2d 508 (Minn. 1982), he may will elect not to accept probation if he believes that he may fail to satisfy the conditions of probation, and may not receive credit for time spent in custody as part of probation against his eventual sentence.

27.04 Subd. 2 (1) E

I was not aware that a probationer could appeal from the determination of the court following the revocation hearing. Is this a new right? Does it not complicate an already sound process? There has already been one finding of guilt or admission of culpability. The probationer goes through a very clear and justified due process for the revocation hearing. Does it not just bog down the courts and complicate the legal system even further if we are to add yet another appeal process to these cases? It certainly makes the already difficult process of enforcing probation conditions that much more difficult and has the potential for reducing further the time span between the occurence of the violation and the consequence of the violation. Such delays surely lessen the impact that probation has on the individual, just as undue delay between crime and punishment diminishes the impact of the entire criminal justice system. When coupled with other rule changes discussed below, the process could become a morass of complicated procedural rules which diminish the effect of probation. I would rather see a rule which simply states that no violation report will be filed when a new crime has been committed unless the probationer has been convicted of that crime. I do not agree that this should be the case but it is simpler and clearer if this were so than the immunity rule, coupled with the consent to continuances rule, overlaid with the right to appeal.

Subd.4, Immunity

The rational for granting immunity in revocation cases is not clear to this reader. If it is intended to make it impractical for probation offices to file revocation reports on new offenses before there is a conviction on the new crime, then why not state that as the rule and omit the large blanket of immunity. In cases where the probation violation is filed on the basis of a new offense alone, the probationer could refuse to allow the judge to continue his/her violation hearing until after a trial on the new charge(s). The same defendant could also appeal (sub 2, sec.1, E) the revocation on the basis he was not convicted of a crime but was revoked because of the arrest.

In cases where a probationer is nearing the end of his/her original supervision time current practice would allow the filing of the violation report and if later convicted, the original stay of sentence could be revoked. Under these rules this would not be possible because the defendant

would have to be heard within seven days, absent his consent for a continuance.

27.04 subd. 4

This language conflicts with sentencing guideline Jail Credit wording. The guideline manual states that "Time spent in confinement as a condition of a stayed sentence when the stay is later revoked and the offender committed to the custody of the Commissioner of Corrections shall not be included in the above record, however, and shall not be deducted from the sentence imposed."

Time of Revocation Hearings

When a probationer is in custody the hearing is to be in seven days. Are these working days or calendar days? Either is workable but the language should be clarified.

General Comments

Overall, these rule changes are good and the Ramsey County Probation Office supports most of them. The concerns listed above are possible exceptions to this support. We hope there is time for discussion and input from probation officers. We note that in our case, we received a copy of these proposed changes on 1-31-83, late in the afternoon. The instructions require a written commentary by 2-1-83. Other probation offices contacted, including Hennepin County, were also unaware of these pending rule changes. The time limitations of this and other probation office responses cause me to be concerned that the probation office responses may not be as well detailed and thought out as we would like, and in many instances, they may not be existant.

ccJack Young

A-5

TO: Minnesota Supreme Court

FROM: Sherry A. Bakken,
Assistant Ramsey County Attorney

DATE: February 1, 1983

RE: **Proposed Amendment #22, Rule 9.02, Subd. 1(3)(c) Modifying Alibi Disclosure.**

The fallacy behind the rules of "reciprocal" disclosure in criminal trials, arises from the fact that only one party, the prosecution, abides by them. The theory and the reality of disclosure are 180° apart.

Standard defense practice is to disclose names of potential witnesses, with inadequate addresses on the morning of trial or one day before. No statements or written summaries of oral interviews are provided since defense investigators function by word-of-mouth rather than disclosable documentation.

If a prosecutor is able to find a detective with the time to track down these witnesses during the course of the trial and gain any information from them, the proposed rule would require the State to disclose such "impeachment" information. Once such disclosure is made, however, the defense will modify its tactics--changing who they will call or what they will say to subvert the potential impeachment which would expose the contrived or perjurious character of their defense to the jury.

Traditionally, there has not been a requirement to disclose rebuttal witnesses or information. This makes logical sense because the State cannot know in advance which witnesses will

2-2-83 Copy to each Justice

actually be called by the defense or to what they will testify. Since they are defense witnesses, that party has the best opportunity to know in advance what they will say. It is ludicrous to put a burden on the State to inform the defense of what their own witnesses know. When defense investigators contact State witnesses prior to trial, they never supply information as to those conversations, but they then do use the conversations to impeach. The State must at least be allowed an equal ability to impeach defense witnesses.

A trial is meant to be a search for truth. The proposed rule on disclosure of rebuttal alibi witnesses is antithetical to this goal. Once the defense is informed that the State can effectively impeach/rebut the claimed alibi, the defense will alter the presentation or substance of their defense so that the jury never becomes aware of the original fabrication.

A recent case in point involved the trial of Timothy Eling, who shot Officer Richard Walton in the course of an attempted aggravated robbery. The case was indicted as First Degree Murder, November 18, 1982, and set for trial on January 10, 1983. Following written demands for disclosure, the State personally contacted the defense attorney in Mid-December, again requesting disclosure of defenses, witnesses, and statements, as none had been received. The defense claimed inability to comply with disclosure until January 3rd--seven days before trial. Therefore, the State brought a motion to compel disclosure and the Court ordered the defense to comply by December 20th. On that date the State received a list of 13 names with addreses of "Mpls/St.Paul", a

checked-off defense of "Alibi" with defendant's home address, and no witnesses designated as alibi witnesses.

The State again made a written demand for complete addresses, statements, dates of birth or convictions of witnesses, and designation of Alibi witnesses. On December 30th, the defense supplied some addresses, a designation of two alibi witnesses (two more were added January 7th) and no conviction or date of birth data.

The State disclosed hundreds of police reports, all photographs, documents, witnesses names, addresses, and evidence as soon as received, including typed transcripts of taped statements of key witnesses. The defense provided no written or oral summaries of witness' knowledge prior to trial. During the first days of proceedings, the defense served two single sheet "summaries" which comprised the entire defense disclosure of witness' statements in the case. (See attachment A)

During trial police were advised that defendant's sixteen year old daughter, who had been disclosed as an alibi witness, sought placement in a shelter home because of "problems" at home. Upon interviewing persons at the shelter, police learned that the daughter was being told by defendant and relatives to say he was home Sunday night of the shooting having dinner and playing monopoly. She could not remember any such facts and was disturbed at having to lie in trial to help her father.

Police reports summarizing this information and listing persons at the shelter who would be rebuttal/impeachment witnesses were disclosed when received--just prior to the defense opening

(A)

Investigative Report January 13, 1983

Timothy Eling
Murder

In reference to the above mentioned case, this investigator spoke with Mrs. Pat Hurd, 993 Maryland, St. Paul. Pat is Eileen Kealys aunt.

Pat stated that what she knows is that on Sunday Tim and Eileen were at the house for supper. She stated that they had supper at 7:00 P.M. and they satyed until 7:30-8:00 P.M. Pat stated that she can not remember if Eileen went with him when he left.

She also stated that she and Tim, Eileen, and their daughter Karen went to Pine City to visit Bob Fitzgerald. At no time on Monday or Tuesday did it appear that there was anything wrong with Tims leg, nor did he mention anything about his leg being sore.

Pat stated that she would be willing to tell what she knows about the case.

Arthur G. Temple
Investigator

statement. As a result, the daughter's name was never mentioned in opening and she was not called to testify in support of the false alibi which was instead established solely through her grandmother and great-aunt.

At the same time, the State disclosed a report of a police interview during trial with a defense witness, Mr. Warneke, in which he indicated he did not recall the specifics of an alibi-related incident until the defense person called--prompting him with facts and seeming to "put words in my mouth". After receiving the report, the defense opening statement characterized the witness as a man with a hazy memory who couldn't recall much of this incident until reminded of it by their call. Again, because of the disclosure of potentially impeaching rebuttal material, the defense adjusted its tactics, thereby, preventing the jury from learning about their chicanery.

Judge Hyam Segell who presided at this trial is well aware of the facts of this case. He can also speak to the defense abuse of the truth-seeking function which results from compelling disclosure of impeachment/rebuttal information ahead of time.

The proposed rule promotes defendant's dishonesty. A jury which is deprived of the facts establishing defendant's subornation of falsehoods by rebuttal impeachment can never know or find the truth.

Sherry A. Bokker

OFFICE OF THE COUNTY ATTORNEY
RAMSEY COUNTY
200 LOWRY SQUARE
ST. PAUL, MINNESOTA 55102

TOM FOLEY
COUNTY ATTORNEY

TELEPHONE
(612) 298-4421

February 1, 1983

Mr. John McCarthy
Clerk of Supreme Court
230 State Capitol
St. Paul, Minnesota 55155

RE: In Re Proposed Amendments to Minnesota Rules of Criminal Procedure

Dear Mr. McCarthy:

The undersigned desires to be heard in regard to the above referenced amendments on February 11, 1983 and will promptly submit a brief setting forth the position of the office.

Respectfully submitted,

TOM FOLEY
Ramsey County Attorney

Steven C. DeCoster /cac

STEVEN C. DeCOSTER
Assistant County Attorney

SCD/cac

2-1-- Copy to each Justice

OFFICE OF THE COUNTY ATTORNEY
RAMSEY COUNTY
200 LOWRY SQUARE
ST. PAUL, MINNESOTA 55102

TOM FOLEY
COUNTY ATTORNEY

TELEPHONE
(612) 298-4421

TO: SUPREME COURT OF THE STATE OF MINNESOTA

FROM: Del Gorecki, Assistant Ramsey County Attorney

DATE: February 1, 1983

RE: PROPOSED AMENDMENTS TO MINNESOTA RULES OF CRIMINAL PROCEDURE

I have been a prosecutor in the office of the Ramsey County Attorney since March 2, 1970, and have served as the chief of the Criminal Division for the past two and one-half years. Please allow me to take this opportunity to address only some of the proposed changes to the Rules of Criminal Procedure which go beyond mere housekeeping and again demonstrate the pro-defendant and pro-defense counsel orientation of the Rules Committee.

The first complaint I have is based upon paragraphs 7 through 10 and paragraphs 97 and 98 of the proposed amendments. Rule 32.02 currently allows a court approved extension of the 36 hours between arrest and first appearance in court specified in Rules 3.02, Subd. 2, and 4.02, Subd. 5. The proposal here is to eliminate any and all of such court approved extensions regardless of merit. The procedure in Ramsey County has been for Rule 34.02 to be used with

2-1-- Copy to each Justice

court approval if time and resources simply did not permit the police or the crime lab to adequately investigate a case in 36 hours, the case was a serious felony with defendant flight potential, and it appeared the case inadequacies could be remedied within an extra day. The procedures for obtaining an extension to the 36-hour rule have been used very sparingly, and in every instance with the approval of the court and with a signed court order allowing for the extension granted. The facts of life are that the most serious cases with the greatest potential for defendant flight are sometimes impossible to investigate in a 36-hour period. When that is the case, it seems only reasonable that a court-approved extension be obtained to extend that period for an additional court-approved period of time. The alternative of releasing the defendant on the streets in the type of case where this added time is needed simply doesn't make any sense and is not in the public interest. This is particularly true when the constitutional rule on the issue simply requires that a defendant be brought before the magistrate without unreasonable delay and lets a court determine if there has been unreasonable delay. All we ask is to let the court determine if the extension that has been obtained has been reasonable or unreasonable, and to allow the use of Rule 34.02 to remain as it is with court control over any complaints from the defense. The arbitrary elimination of the 36-hour extension provision should be rejected by the Supreme Court.

2. Another area of concern is the added disclosure responsibilities imposed on the prosecutor by the proposed amendments to Rule 9 contained in paragraphs 21 and 22. The practical problem in providing defense counsel with the record of a defense witness is that we do not know who the defense witnesses are going to be until trial in many cases, until the Friday before the Monday set for trial in most cases, and rarely in sufficient time to develop a thorough records check on potential defense witnesses. We will only have this information if we happen to guess right during our trial preparation and anticipate what witnesses the defense may choose to call. After not providing the prosecution with proper disclosure of their defense witnesses, the defense will now profit by this failure to disclose by obtaining the prosecutor's trial preparation efforts. And if the name of a potential defense witness was not anticipated by the prosecution, that defense witness will be able to testify without proper impeachment and defense counsel will know it.

The same practical problem arises with respect to the paragraph 22 imposition on the prosecutor to inform defense counsel of the names and addresses of the witnesses the prosecution intends to call at trial to rebut defense counsel's alibi witnesses. Again, most of the time we don't know who the alibi witnesses are until the trial day or the Friday before the trial day of Monday, so we are normally developing the rebuttal witnesses to the alibi

witnesses during the course of the trial. Should we happen to try to anticipate the alibi witnesses defense might call, these efforts will also inure to the benefit of the defense counsel who has failed to properly disclose his alibi witnesses to the prosecution. Then, it is either too late for the prosecutor to develop a rebuttal to the defense alibi witnesses, or the defense gets to profit by the prosecutor's anticipated rebuttal efforts and gets to change the alibi in response to thereto. These unfortunate defense tactics happen to be routine and something we have learned to live with as prosecutors.

If what I have said here sounds like I am critical of the manner in which defense counsel have satisfied their responsibilities to disclose pursuant to the Rules of Criminal Procedure, it is because that has been a predictable fact of life since July 1, 1975. There is no mutual discovery or mutual disclosure under the Rules of Criminal Procedure, and anyone who thought the Rules of Criminal Procedure would develop such mutuality simply does not have a grasp of how the system works. There are a great many sanctions against the prosecutor for failing to disclose in accordance with the rules, but there are no such avenues of recourse against a failure to disclose by the defense. It is no answer to the problem to suggest that the recourse against defense counsel is to grant a continuance to the prosecutor or grant a mistrial. Those alternatives are of no benefit

whatsoever to the prosecutor, and anyone who has had to deal with the logistics of trial preparation as a prosecutor is perfectly aware of that. My suggestion is to refrain from imposing more impractical and unilateral disclosure responsibilities on the prosecution and to let Rule 9 remain the way it is. It's bad enough now.

Paragraph 76 of the proposed amendments changes the order of trial set forth in Rule 26.03, Subd. 11. The proposed change here places the order of arguments as: (1) the defense; (2) the prosecutor; (3) rebuttal by the defense to the prosecutor, and (4) rebuttal by the prosecution to the defense only if the court determines that the defendant's rebuttal is clearly improper. There were only two positions that the committee could take to make the prosecution's argument situation worse than it presently is in the state of Minnesota. The first was to eliminate argument by the prosecution completely, and the second was to do what it did in this instance. Unfortunately, the committee chose the worst of the two alternatives. The final argument posture of the prosecution is certainly bad enough the way it is without further efforts to make it worse. It is one thing to be uniquely handicapped as we are here in Minnesota with our current argument procedure, but it is quite another to be even further handicapped by the unique absurdity that is recommnded here. If the final argument lot of the prosecutor cannot be improved, and the proposed amendments to

Rule 26 are certainly symbolic of that, then let the prosecution suffer with its current miseries without making matters worse.

4. Paragraphs 59 and 60 cover a proposed change to Rule 18.05 which will require everything that occurs at a grand jury session to be placed on record. First of all, that proposed change does not incorporate the present law except for one jurisdiction in the state of Minnesota. Why that single decision making it optional for judicial districts to establish their own rules should suddenly become the law of the state and be imposed on everyone is a little unclear. We do not have a problem here in Ramsey County and never have with our approach to the grand jury situation under Rule 18.05. If only one jurisdiction has a problem that purports to need curing, why are we going through the administrative process of creating additional rules and expense for the taxpayer in dealing with an issue that is not a problem throughout most of the state and is not the law of the state of Minnesota?

5. Paragraphs 85 and 86 cover sentencing procedures and the use of the presentence investigation. At the middle of page 27 it is indicated that any evidence derived from the presentence investigation may not be used against a defendant in any subsequent proceedings or on retrial except for the review of the sentence. It seems only logical and practical that the professional results of the presentence investigation process should represent valid and useable evidence in commitment proceedings that follow many

sentencings covering defendants who are mentally ill, mentally ill and dangerous, and psychopathic personalities. The proposed rules here do not provide for the very valid use of that presentence investigation information and evidence in proceedings involving those very important determinations.

6. Paragraph 87 of the proposed Rules of Criminal Procedure create a new section to Rule 27 covering probation revocation proceedings. I believe the judicial districts in the state of Minnesota have currently set up their own probation revocation procedures based on the logistics of their own respective situations. Ramsey County certainly has no problems in the area of probation revocation proceedings and has respected the constitutional rights of a defendant in the process of setting up its own probation revocation procedures. Ramsey County procedures may not work in many of the other counties because of the logistical distinctions between Ramsey and the other counties. If the constitutional rights of the defendant as established by case law are being respected here, why are we again establishing an elaborate set of all-encompassing rules in the interest of so-called uniformity when the logistics of each county are not equally uniform? Moreover, the procedures advanced by the Rules Committee to amend Rule 27 are extremely cumbersome and are designed primarily to create procedural problems for the prosecution, the judiciary, and the various departments of

court services. We simply don't need more bureaucracy in the criminal justice system.

I will close by stating that I am extremely concerned with the tenor and direction of the rules changes being proposed here. They are uniformly anti-prosecution and pro-defense to the point where the annotations have become a forum for anti-prosecution commentary and a handbook for how the defense should handle various issues. That is not a professional approach to the rule-making process. By the nature of the proposed rules changes and the commentaries and allegations that accompany them, it is apparent that the Rules Committee has complete disdain for the prosecutor and has no interest whatsoever in imposing truth oriented responsibilities upon the defense and the criminal justice system as a whole. The legislature should be apprised of this and asked to respond to the apparent inequities being imposed upon the prosecution in this state.

Del Gorecki

LAW OFFICES OF

PETERSON & SCHMITZ

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MELVIN J. PETERSON, JR.
BUS.: (612) 424-6442
RES.: (512) 424-3373

DAVID F. SCHMITZ
BUS.: (612) 424-6403
RES.: (612) 379-3217

January 31,1983

John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Re; Order of Closing Argument

Dear Mr. McCarthy,

As an attorney I feel that any proposed change on the order of closing argument would impair the ability of the accused to properly defend themselves. An accused often times has an insurmountable burden to overcome because he has to balance the resources he can use; the cost of expert witnesses, investigators and legal expenses while the state on the otherhand has these resouses readily available.

Melvin J Peterson Jr.
Attorney at Law
133 1st. Av.N.W.
Osseo, Minn. 55369

David Schmitz
Attorney at Law
133 1st. Av.N.W.
Osseo Minn. 55369

OFFICE OF THE PUBLIC DEFENDER
C2200 Government Center
Minneapolis, Minnesota 55487
(612) 348-7530

William R. Kennedy, Chief Public Defender

January 31, 1983

Mr. John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, MN 55155

Dear Mr. McCarthy:

Time permitting, I would like to be heard on February 11, 1983, in opposition to some of the proposed changes in the Rules of Criminal Procedure.

Specifically, I am concerned about two proposals.

1) Closing Argument. I am unable to find any sound justification for this change. Merely because other states do it, Minnesota prosecutors seem to want it, or that efforts to change in our Legislature have failed, don't appear, at least to me, to be sound reason for change.

2) Voir Dire. The proposed change in the Commentary language, without further explanation, seemsdirected towards unduly restricting voir dire. This is a particularly sensitive issue in Hennepin County.

If you need additional information, please let me know.

Very truly yours,

William R Kennedy
William R. Kennedy
Chief Public Defender

-vm

2724 Garfield Avenue South
Minneapolis, Minnesota 55408

January 31, 1983

Mr. John McCarthy
Clerk of the Supreme Court
State Capitol
St. Paul, Minnesota 55155

RE: PROPOSED CHANGE OF ORDER IN CLOSING ARGUMENTS

Dear Mr. McCarthy:

I am writing in regard to the proposed change of Minnesota Rules of Criminal Procedure 26.03, Subd. 11, Order of Closing Arguments. I am an Assistant Hennepin County Public Defender.

The current rule should remain as it is. The present order has worked well for years in this state and there is no reason to change it. I understand that our state's position is a minority one but that is not grounds for altering the present order of final argument.

The people I represent are poor and unpopular. Popular opinion surveys show that over two-thirds of the people questioned feel that if the government brings someone to trial that person is probably guilty of some crime. In State vs. Dolliver, 150 Minn. 155, 159 (1921), the Court recognized this problem when it observed, "a man accused of the crime for which defendant was indicted [criminal sexual conduct] is as good as convicted in the minds of many men even before he is tried." To counter this a defendant has the presumption of innocence and the state must prove him or her guilty beyond a reasonable doubt. It is logical and very workable that the prosecution go first in their final argument as they do in the opening statements and in the presentation of evidence.

By the time final arguments occur, all the evidence has been heard so the prosecutor knows what the defense will argue. He or she should be able to make a closing argument that withstands defense scrutiny, if the case is to be proved beyond a reasonable doubt.

Adoption of the proposed rule will erode the presumption of innocence and the burden of proof. There is no valid reason to alter the order and I vigorously urge the Court to retain the present order. I wish to be heard on this proposed rule change on February 11, 1983.

Sincerely,

Philip D. Bush
Assistant Public Defender

PDB:sb

NATIONAL LAWYERS GUILD

TWIN CITIES CHAPTER

P. O. BOX ~~XXXX~~ 8318
~~XXXXXXXXXXXXXXXX~~ Lake Street Station
MINNNEAPOLIS, MINNESOTA ~~XXXXX~~ 55408

January 31, 1983

SUPREME COURT
FILED
FEB 1 1983
JOHN McCARTHY
CLERK

Mr. John McCarthy
Clerk of the Supreme Court
State Capitol
St. Paul, Minnesota 55155

RE: ORDER OF CLOSING ARGUMENT

Dear Mr. McCarthy:

On behalf of the Twin Cities Chapter of the National Lawyers Guild, we are writing to express our opposition to the proposed change in the order of final argument in criminal trials. We believe that Minnesota Rules of Criminal Procedure 26.03, Subd. 11 should remain as it currently reads.

In 1977, there was a proposal to change the order of order of final argument which the Court did not adopt. We testified against the proposed change and nothing has happened since then to warrant a change. We can do no more than repeat our prior testimony.

"We vigorously object to the change in the order of final argument, Rule 26.03, Subd. 11. The original Rule continued this state's exemplary, albeit, minority, view on the matter. Now, this is all to be changed on the unproven hypothesis that it leads to more jury acquittals. There is absolutely no evidence of this. Even if there was, the fact that approximately 90-95% of criminal cases do not go to trial means that the number of instances of this happening would be small indeed. This is a small price to pay for the increased appearance of fairness which the prior practice provided. Even if there was evidence that arguing last was of some benefit to the defendant, we believe that, if it makes our proceedings more fair, then that benefit should go to the defendant, the person who is presumed innocent, against the power of the state. If that is the result, then we are proud to be a part of a minority view among the states. It is common knowledge that, regardless of voir dire and juror oaths forsaking any predisposed view at the beginning of trial, criminal defendants are regarded by juries as at least possibly guilty. This is reaffirmed by the high rates of jury convictions. In a system in which the state must prove the defendant's guilt beyond a reasonable doubt, the defendant should not be required to overcome whatever potential prejudice exists in an emotional final argument in which the state argues last. Moreover, logic dictates that the order of final argument be the same as at trial, in which the state has the burden of presenting the case, followed by the defense. As long as it is conceded that the state has the burden of proving

guilt beyond a reasonably doubt, then, the order of final argument should be the same as the order of proof at trial. In light of the change in the jury trial waiver provision, this amendment takes on added significance. We urge that it not be adopted."

The Steering Committee
Twin Cities Chapter
National Lawyers Guild

NLG:sb

3508 - 3rd Avenue South
Minneapolis, Minnesota 55408
January 31, 1983

A-5

Mr. Chief Justice Douglas K. Amdahl
Minnesota Supreme Court
State Capitol
St. Paul, Minnesota 55155

RE: PROPOSED 1983 AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

Dear Mr. Chief Justice Amdahl and Members of the Court:

I am an Assistant Hennepin County Public Defender, and have been engaged in full-time practice of criminal defense for about four and one-half years. During that time, I have represented about 175 people charged with felonies as well as several hundred misdemeanor and juvenile delinquency defendants. I am writing to offer my comments on two of the proposed changes in the Rules.

Item #87, of the Court's November 18, 1982 order, adds a new rule dealing with probation revocation procedures. This is an area of Minnesota criminal procedure which, in my view, will benefit from adoption of the proposed rule. Currently, there is little authority, either by rule or case law, to govern these proceedings, the Court's decisions in Pearson vs. State, 308 Minn. 287, 241 N.W.2d 490 (1976) and State vs. Austin, 295 N.W. 2d 246 (Minn., 1980), providing nearly all the governing authority in this state. Revocations occur often enough that some standard procedures will be helpful. Especially welcome are the provisions for summons, appearance, and bail, together with the immunity procedure which is an issue addressed in several other jurisdictions, and of sometimes crucial import to a violation hearing, but never decided in this state.

I am quite troubled by Item #76, of the Court's November 18, 1982 order, concerning the order of closing argument, and so I urge the Court not to make this proposed change in our rules. At present, Rule 26.03, Subd. 11 reflects the order of argument specified by Minn. Stat. 631.07 (1974), which has been the procedural rule in this state for some time.

The proposed change is nearly identical with that initially proposed by the advisory committee in 1975. What was said then is equally applicable now. Objections as to the proper scope of rebuttal and surrebuttal, and arguments over what are "new issues" and what is "clearly improper" will introduce interruptions into the orderly procedure which now exists with regard to final arguments and instructions to the jury. This proposed language was not adopted by the Court in 1975, nor was the Court's proposal that the state have the first closing argument as well as a five-minute rebuttal after the defense closing. Nothing has happened in the time since then which justifies making a change which the Court declined to do in 1975. Nor, for that matter, has anything occurred which indicates that this Court was wrong in declining to reverse the order of argument when it considered the 1977 amendments.

A - 5

STATE OF MINNESOTA

IN SUPREME COURT

IN RE: Proposed Amendments to Minnesota Rules of Criminal Procedure

REQUEST TO BE HEARD

TO: Clerk of the Supreme Court of the State of Minnesota

Please take notice that David W. Larson, Executive Director, Minnesota County Attorneys Association, desires to be heard on the proposed amendments to the Minnesota Rules of Criminal Procedure at the hearing in the courtroom of the Minnesota Supreme Court, State Capitol, on Friday, February 11, 1983, at 9:00 a.m. Since Mr. Larson will be introducing and outlining the presentations of other prosecutors, the Court may wish to schedule his presentation relatively early. Ten copies of a letter setting forth the position of the Minnesota County Attorneys Association will be filed with the Clerk of the Supreme Court.

Dated: February 1, 1983

Respectfully submitted,

David W. Larson
Executive Director
Minnesota County Attorneys Association
40 North Milton, Suite 100
Saint Paul, Minnesota 55104

Office of
ANOKA COUNTY ATTORNEY

ROBERT M.A. JOHNSON

Courthouse - Anoka, Minnesota 55303 *612-421-4760*

February 8, 1983

Mr. Wayne O. Tschimperle
Clerk, Minnesota Supreme Court
State Capitol
St. Paul, MN 55155

RE: PROPOSED AMENDMENTS TO RULES OF CRIMINAL PROCEDURE

Dear Mr. Tschimperle:

Enclosed are the original and nine copies of my comments relating to certain portions of the proposed Rules of Criminal Procedure.

I hereby request permission to speak to the Court at the public hearing on these proposed rules, which I understand is scheduled for Friday, February 11, 1983, at 9:00 a.m.

Thank you for your cooperation.

Very truly yours,

Stephen L. Muehlberg
Assistant County Attorney

SLM/cs
Encls.

2-8-- copy to each Justice

STATE OF MINNESOTA
IN SUPREME COURT

In Re The Proposed Amendments to)
the Rules of Criminal Procedure)

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

Stephen L. Muehlberg, on behalf of Anoka County, Minnesota and the Minnesota County Attorneys Association respectfully requests that the Court consider the remarks contained herein in its deliberations over the proposed amendments to the Minnesota Rules of Criminal Procedure.

I. Rule 26.03, Subdivision 11. Order of Jury Trial.

We respectfully oppose this proposal, which really relates only to the order of final argument in a jury trial. This proposal is so revolutionary that it could completely change the state of the caselaw concerning what constitutes proper final argument. As the proposed rule is written, it would undoubtedly breed a generation of appellate cases raising issues such as what is proper rebuttal, or when surrebuttal would be allowed. The burden on trial courts would be even more severe.

Final argument in every trial would be clouded by State's objections as to the scope of defense rebuttal, and defense motions to forbid or limit surrebuttal by the prosecution. It is a safe prediction that trial courts would be assaulted by such motions, on discretionary issues of which no guidance is given in the proposed rule. None of these questions goes to the true purpose of

a trial, which is to decide the truth. The function of reaching a correct verdict is already well served under the present rule. The proposal would undoubtedly generate a host of issues to be decided by trial courts (and ultimately by appellate courts), none of which would materially improve the factfinding process. The increased burden on all judges is as unnecessary as it is wasteful.

The Criminal Law Section of the Minnesota State Bar Association has gone on record opposing this proposal. The proposal is opposed by both the criminal prosecution and defense bar.

For all of these reasons, the proposed amendment to Rule 26.03, Subdivision 11, should not be implemented.

II. Rule 26.03, Subdivision 19. Jury Deliberations and Verdict.

This amendment would permit a partial verdict. It follows the opinion of this Court in State v. Olkon, 299 N.W. 2d 89 (1980), which authorized such a verdict. It is noted that the proposed rule's language is permissive, rather than mandatory. That seems reasonable. It should be left to the trial court to decide when the jury has deliberated long enough, on a case by case basis.

It is assumed that counts on which the jury did not find a verdict would be considered mistried. See Rule 26.03, Subdivision 19(4). This could create prior jeopardy problems unless the counts joined for trial involve different victims, different behavioral incidents, or burglary.

We do note some concern that the proposed rule does not appear to consider the effects of the double jeopardy clause or of M.S. 609.035 (common course of conduct). These issues were not raised, nor were they addressed, in State v. Olkon.

In the event of a conviction on some counts, but mistrial on others, the State may elect to retry the remaining counts. Would this second trial be barred by the double jeopardy clause or by M.S. 609.035? An example of the problem would be a case where a defendant is charged with both Kidnapping and Murder in the First Degree upon the same victim. Would a conviction of Kidnapping bar retrial after a mistrial on the murder count? A literal reading of M.S. 609.035 would seem to answer this question in the affirmative, forbidding retrial. Yet such a result is surely contrary to public policy.

On the other hand, it appears that an acquittal on one count may completely bar further prosecution of other counts during the same course of conduct. See, e.g. Ashe v. Swenson, 397 U.S. 436 (1970) and M.S. 609.035. Such a result would likewise be undesirable.

To allow the trial court discretion in accepting a partial verdict may obviate these questions, but only if the court is able to determine the issues with knowledge of the jury's actions. The proposed rule should permit the trial court access to the results of the jury's deliberations before having to finally decide what action to take.

What is of additional concern is that the proposal could tend to unduly encourage compromise verdicts. This could happen where a jury reaches a verdict on one count in a relatively short period of time and that count is of minimal importance compared to the other counts. Where the Court accepts that verdict without requiring a full and complete deliberation on all counts submitted, the case may well have been improperly or inadequately considered by the jury. The comments to the proposed rule should reflect this

potential concern.

III. Rule 27.03. Sentencing Proceedings.

We have no objection to the proposed amendments to this Rule and to the Comments thereto.

Respectfully submitted,

ROBERT M.A. JOHNSON
Anoka County Attorney

By _____
Stephen L. Muehlberg
Assistant County Attorney
Anoka County Courthouse
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A-5

LEO M. DALY
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OF COUNSEL
DUDLEY AND SMITH

February 2, 1983

Mr. John McCarthy
Clerk of the Supreme Court
State Capitol
Saint Paul, Minnesota 55155

Re: Proposed Order of Closing Argument

Dear Mr. McCarthy:

This letter is simply to express my deep concern over the proposed changes in the Criminal Rule regarding the order of closing argument. I am strongly opposed to any such change which would allow prosecutors to argue last.

As I am sure you are aware, any criminal case is generally controlled by the prosecution. The defense only can respond to what is put before them by the prosecution and is always in a weaker position than the prosecution because of the necessity to respond rather than take control of any litigation.

I think it would be extremely unfair to change this order in a State which has always guaranteed defendants a right to argue last. The prosecution has the entire machinery of the State on its side whereas the defense bar has only the defending lawyer to uphold the rights of the client.

I would appreciate your considering this letter and forwarding it onto the appropriate parties who are considering this change.

Yours sincerely,

Leo M. Daly

LMD:kuob

2-11 -- Copy to each Justice

NICHOLS, KRUGER, STARKS & CARRUTHERS
ATTORNEYS AND COUNSELORS AT LAW

DONALD H. NICHOLS
RICHARD J. KRUGER
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A-5

February 1, 1983

Mr. John McCarthy
Supreme Court
State Capitol
St. Paul, Minnesota 55155

Re: Proposed Rule Change on Minnesota Rules of Criminal Procedure -- Order of Final Argument; Hearing to be Held on February 11, 1983.

Dear Sir/Madam:

I am the secretary of the State Bar Association Criminal Law Section and a criminal law practitioner. This letter is written in my individual capacity and not on behalf of the section. I am writing to express my opposition to the proposed changes in the order of final argument. The rule permitting the defense to argue last has been in effect for a significant period of time. The only persuasive argument to change the rule is to allow the prosecution a greater advantage in the trial of criminal cases in Minnesota.

While we always talk about the presumption of innocence, many persons actually operate with a presumption of guilt. By taking away the right of the defense attorney to argue last, you are in effect giving the prosecutor the right to argue last. If his or her evidence actually meets the standard of proof beyond a reasonable doubt, the strategic advantage of arguing last should not be critical. If the strategic advantage of the "last word" is so critical to the prosecutor, then his or her proof would not seem to measure up to the standard of "beyond a reasonable doubt." Melvin Belli was speaking recently in a public forum, and was quoted as saying that he would rather

4-8-- Copy to each Justice

see 20 guilty persons acquitted than one innocent person convicted. If that is the standard by which we all operate, and I hope that it is, then strategic advantages should not be the critical difference in obtaining a conviction; the proof should simply and plainly be strong enough to carry the day. I oppose changing the rule.

Sincerely,

NICHOLS, KRUGER,
STARKS & CARRUTHERS

James H Kaster

James H. Kaster

ljr

STATE OF MINNESOTA

IN SUPREME COURT

In Re Proposed Amendments of

Minnesota Rules of Criminal Procedure

BRIEF OF RAMSEY COUNTY ATTORNEY

TOM FOLEY
Ramsey County Attorney

By: STEVEN C. DeCOSTER
JEANNE SCHLEH
DELROY GORECKI
HARRY D. McPEAK
KIM E. BINGHAM
Assistant County Attorneys
200 Lowry Square
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2-4 -- copy to each Justice

I. INTRODUCTION

The undersigned asks that the Proposed Amendments to the Criminal Rules, which are flawed in many important ways, be resubmitted to the Rules Committee for reconsideration and that prior thereto the Committee be reconstituted and amplified to more fairly represent the prosecutors of the State in its membership. Only one of the three original prosecution members still functions in that capacity and the need for balanced representation is evident. So far as the undersigned is aware, there was no hearing or opportunity to present recommendations to the Rules Committee or notice concerning the amendments far-reaching implications until they were published in the Northwestern Reports as an accomplished fact.

Specific recommendations follow respecting individual rules changes recommended by the Committee. In addition, some general prefacatory remarks are appropriate striking themes running through the document as a whole.

First and foremost, a perceptible anti-prosecutorial bent runs through the provisions wherever they are not ministerial and concern matters of substance.

Second, the bias is in the favor of creating new procedures which are state-wide in application. Some procedures, because of legitimate regional differences (e.g. big city vs. rural area) should, and now are being handled expeditiously and fairly under local ophons. However, pre-trial hearings in the proposed Amendments are routinely decreed whether or not the defense genuinely questions the methods used or actions taken. In such instances, so long as the State gives adequate notice, it should

be left to the defense, only where appropriate, affirmatively to question (as by motion to suppress) what has taken place. There is no need for adding additional procedures to already cumbersome trials save where needed.

Third, in numerous instances, the proposed amendments, especially to the Comments, purport to define what this Court's cases have held and to incorporate these holdings into the Rules. By permitting such commentary in the Rules, the precedent is set that eventially will lead to official annotation of case law that will supersede the case law itself.

Many times these comments misstate the thrust or significance of the opinion cited, and even when they do not, it adds little to put into Rule what this Court has already decided. We have no objection to referring to and citing this Court's decisions, only to attempts, slanted and otherwise, definitively to restate or summarize their holdings. Even the most careful summary of the holding of a case inadequately states what the case stands for in its entirety.

Finally, some amendments make very material changes - as in the order of final argument - without broadly canvassing the opinion of the Bench and the Criminal Bar. Others include ambiguous references to broadly worded definitions of "immunity" granted under questionable circumstances. Again, such provisions should be adopted only after the broadest and most searching consideration of their potential applications.

Beyond these introductory generalizations, the undersigned calls into question the following specific amendments.

II. DISCUSSION OF PROPOSED AMENDMENTS TO RULES OF CRIMINAL PROEDURE AND COMMENTS THERETO.

A. The charging function

1. Thirty-six hour rule

References:

Paragraphs of Amendments:

10, 97, 98.

Rules and Comments amended:

Comments on Rule 4.02, Subd. 5(1)

Rule 34.02

Discussion: This proposal contains two separate aspects that are not clearly distinguished. First it proposes elimination of the power in the District Court under Rule 34.02 to enlarge, for cause shown, the 36-hour period for bringing the arrested before the Court. Second, it attempts to codify Supreme Court cases on "unnecessary" delays in bringing the accused before the Court.

Those cases, State v. Wiberg, 296 N.W.2d 388 (Minn. 1980) and Meyer v. State, 316 N.W.2d 545 (Minn. 1982) do not involve delays beyond the 36-hour rule and do not hold suppressible any evidence derived within the 36-hour-period. The holdings speak for themselves and nothing is served by attempting to restate the rules they contain.

More important, nothing in either of them has anything to do with the power to extend the 36-hour-rule. Rule 34.02 currently allows

prosecutors to obtain a court-approved extension to the thirty-six hours between arrest and appearance in court specified in Rules 3.02, Subdivision 2, and 4.02, Subdivision 5(1) under extraordinary circumstances. The procedure in Ramsey County has been for Rule 34.02 to be used with court approval, only if time and resources simply do not permit the police or the crime lab to assemble a case in thirty-six hours. The procedures for obtaining an extension to the thirty-six hour rule have been used very sparingly, and in every instance the use has been with approval of the court.

The 36-hour rule works efficiently and properly in most felony cases to keep pre-arraignment custody of defendants to a minimum, yet allow a reasonable time for the police investigation to be completed and the prosecutor to review the case for charging. Police and prosecutors work diligently to complete their work within this time frame. There remain, however, as envisioned by the drafters of the present comment, occasional circumstances in which an additional reasonable amount of time is needed to complete this work. In these few cases, which

usually are extremely serious or complex, suspects may flee, crucial evidence may disappear, and witnesses may alter their stories or disappear if the suspect is released prematurely.

There is a considerable gap between probable cause for arrest and that degree of prosecutorial merit that warrants presenting the case to a jury for finding whether proof of guilt beyond a reasonable doubt exists. Ordinary self-interest dictates that the accused be interviewed by police promptly after his arrest. Cases where more than 36-hours is needed typically will involve those where evidence derived from sources other than the accused must be collected and analyzed. There will therefore not likely be evidence derived from the accused to consider for suppression because of any delay.

Disallowing extension to the 36-hour rule might lead to filing charges in close cases where later investigation would reveal lack of prosecutorial merit.

Recommendation: We ask that (1) cases like Wiberg and Meyer stand on their own, without codification and summarization in the Comments on Rules and (2) that the Court's power to extend the thirty-six hour rule to retained.

A.-2. Record of Grand Jury Proceedings

References: Paragraphs of Amendments:

59, 60

Rules and Comments amended:

Rule 18.05, Subd. 1, and

Comment thereto.

Discussion: A verbatim record would, under the amended rule, be made of everything that occurs during Grand Jury proceedings except discussion and voting among the jurors.

Already, all the evidence considered is subject to verbatim record so that the indictee can make appropriate motions challenging the factual basis for his indictment.

The rule as proposed takes the present practice in one Judicial District, considered in State v. Hejl, 315 N.W.2d 592, 593 (Minn. 1982), and applies it statewide. The rule was permitted in that District as "not in conflict with rules promulgated by this court."

Absent the perception of a problem needing remedying, it is unclear why the rule is being so extended.

The rule isn't really objectionable to the prosecution, but the Court and defense counsel should understand that its principal effect may be to inhibit prosecutors, particularly in cases

where the prosecution is statutorily required to present facts to the Grand Jury, from discouraging the return of indictments for cases without prosecutorial merit, even ones that are frivolous. Thus the principal effect of the new rule may be indictment of individuals who should not be.

Recommendation: The proposed amendment should be deleted.

B. Pre-trial Discovery

1. Criminal Record of Defense Witnesses

References: Paragraphs of Amendments:

21, 25

Rules and Comments amended:

Rule 9.01, Subd. 1(5) and

Comment thereto

Discussion: Two procedural changes are contained in these amendments: one deals with pre-trial discovery of convictions of defense witnesses, a matter not considered in State v. Wenberg, 289 N.W.2d 503 (Minn. 1980). The other deals with requiring hearing out of the jury's presence on the use of specific convictions to impeach an issue Wenberg does decide.

Again, the holding in Wenberg is not clearly stated and misidentifying its holding is of little help. It may be referred to and its reasoning stand for itself.

Pre-trial prosecutorial discovery of convictions isn't possible unless there is defense disclosure of the identities of potential defense witnesses long enough before trial to allow proper checking of records. A one week period would constitute fair notice and should be written into the proposed rule. The current rule is that the State provide whatever criminal history information it is able to obtain on the defendant to defense counsel and that is reasonable inasmuch as the prosecution knows who the defendant is in plenty of time to get the record. The practical problem in providing defense counsel with the record of a defense witness is that the State does not know who the defense witnesses are going to be until trial in many cases, until the Friday before the Monday set for trial in most cases, and rarely in sufficient time to develop a thorough records check on the witnesses disclosed by defense counsel.

There should be no continuing duty of disclosure of criminal records of defense witnesses to, and during, trial. It's unfair, and inappropriate to place the responsibility on the prosecution to perform these functions for belatedly disclosed defense witnesses (one can imagine a list of 50 being served the night before

trial all of whose records must be checked and accurately disclosed immediately).

Moreover, hearing the matter of admissibility before trial is unrealistic in jurisdictions where the Omnibus Hearing is concluded well before that time. The issue is anyways best disposed of in chambers at the start of the defense's case, unless prompt and full defense discovery well before trial has been made.

Recommendation: The proposal should be amended as suggested above.

B.-2. Discovery of Rebuttal Witnesses to Alibi Defense

References: Paragraphs of Amendments:

22

Rules and Comments amended:

Rule 9.02, Subd. 1(3)(c)

Discussion: This provision is subject to multiple objections. Again, often the prosecution doesn't know the names of the defenses' alibi witnesses until the day of trial or late on the Friday before the Monday trial date.

Even more important, the identity of rebuttal witnesses cannot be decided simply from the names of the alibi witnesses without statements or summaries of what their testimony will be.

Worst of all, the defense would in advance of trial learn what witnesses in rebuttal could say to disprove the alibi; then the defense could abandon the alibi and turn to another defense, even another unrelated or inconsistent alibi, and yet the State would be unable to inform the trier of fact of the change of position.

Recommendation: This provision should be reconsidered. If retained, it should provide, as a condition to disclosure of prosecution alibi witnesses that the summary or narrative of alibi witnesses testimony be first provided to the State well before trial and that the summary so disclosed be admissible for impeachment where the defense embarks on another and inconsistent defense.

B.-3 Intentional Abuses of the Discovery Process by the Prosecutor

References:

Paragraphs of Amendment:

24

Rules and Comments amended:

Comment on Rule 9.01, Subd. 1.

Discussion: There is no place in the Criminal Rules for an admonition to the prosecution but not to the defense concerning intentional default of duty.

The present rule is sufficient to create an obligation on the prosecution to disclose information without an additional comment to cover

the point. If the prosecution fails to abide by the rules, case law should determine in each instance whether that has occurred and, if so, what should be the consequence. One of a mind intentionally to disobey is not deterred by a rule such as this. Moreover, defense counsel is susceptible to disobedience of the rules regarding disclosure of information and yet the Comment fails to refer to, or condemn, this conduct.

Recommendation: The comment should be deleted.

C. Pre-trial Hearings

1. Rule 20 Amendments

References:

Paragraphs of Amendments:

67, 68, 70, 72

Rule and Comments amended:

Rule 20.01, Subd. 5;

Rule 20.02, Subd. 8(4) and

Comment on Rule 20.01, Subd. 4(2)(a) and (b)

20.01, Subd. 5; 20.02, Subd. 8(4)

Discussion: In a number of cases persons committed pursuant to" Rule 20" petitions are committed as mentally ill, chemicaly dependent or mentally retarded. In these cases there is no review required or permitted of a decision regarding the provisional or absolute discharge of such an individual. Consequently, the "right" to participate in hearings guaranteed in amendments

67 and 68 is illusory, a sham.

Recommendation: The Rule and Comments should remain in their current form.

C.-1-a. Rule 20 Amendments

References: Paragraphs of Amendments:

69

Rules and Comments amended:

Comment on Rule 20.01, Subd. 2(1)

Discussion: This is a technical amendment to conform to the Rules to the provision of the Minnesota Commitment Act of 1982.

Recommendation: No objection.

C.-1-b. Rule 20 Amendments

References: Paragraphs of Amendments:

71

Rules and Comments amended:

Rule 20.01 Subd. 4(2)(c) and

Comments on Rule 20.01, Subd. 4(2)(c)

Discussion: The current Rules and Comments and the proposed Comment are confusing and appear to be inconsistent with the provisions of Minn. Stat. §253B.23 (1982) and Minn. Stat. Ch. 487 (1982) regarding the right of appeal from a commitment order.

Recommendation: Rule 20.01, Subd. 4(2)(4) should be amended to read: "Either party shall have the

right to appeal in accordance with the provisions of Minn. Stat. Ch. 253B (1982)"

C.-2. Consolidated First Appearance

References: Paragraphs of Amendments:

12, 13, 14, 15

Rules and Comments amended:

Numerous Technical Amendments

Discussion: The rule changes seem well calculated for efficiency.

Recommendation: Since no right of the defendant is colorably involved, it is suggested that the procedures be allowed simply as a matter of effective court administration, thereby obviating the need for defense "request" or "waiver" to permit their implementation.

C.-3. Pre-trial hearings on Probable Cause, Spriegl Crimes, Dual Representation, Entrapment and Other Issues

References: Paragraphs of Amendments:

25, 26, 27, 31, 32, 36, 38

Rules and Comments amended:

Rules 9.01, Subd. 1(5);

9.02, Subd. 1(3)(e);

11.03 and 11.04; 12.03

Discussion: These provisions should be discussed together because they are flawed in the following recurring ways.

1. Misstatement or Incomplete Citation of Case Law.

All of the amended Rules and Comments involve an attempt to codify into rule holdings in various of this Court's decisions, with greater or lesser degrees of accuracy. The Court's decisions stand for themselves and don't need interpretation or elaboration in the Criminal rules. Citation of relevant cases is sufficient.

Examples abound. The Comment states, citing State v. Billstrom, 276 Minn. 174, 149 N.W. 2d 281 (1967) that Spriegl collateral crime evidence "is admissible only if the prosecution case is otherwise weak." Billstrom applied only to those crimes offered to prove "identity". Moreover, current case law no longer refers to this test. All recent decisions of this Court, even those citing Billstrom, refer to a three-fold test of admissibility; (1) that the proof be clear and convincing; (2) that the evidence be relevant; and (3) that the evidence's probative value outweigh the danger of unfair prejudice. Rules of Evidence, Rules 401, 403, 404(b) and, e.g., State

v. Volstad, 287 N.W.2d 660 (Minn. 1980); State v. Bolts, 288 N.W.2d 718 (Minn. 1980); State v. Moyer, 298 N.W.2d 768 (Minn. 1980); State v. Makela, 309 N.W.2d 295 (Minn. 1981); State v. Walker, 310 N.W.2d 89 (Minn. 1981). The necessity to use the evidence may well be subsumed under the requirement that probative weight exceed prejudice, but that is no reason to reinstate the discarded test that the State's case be "weak".

(To put the State in the position of being required to prove before the admission of Spreigl evidence that its case is weak and to put the defense in the position of arguing that it is strong and therefore the Spriegl evidence is unnecessary, is incongruous. It also puts the State in the position of being required to make arguments the defense may later very well include in its own final argument to the jury.)

The holding in the case of State v. Florence, 239 N.W.2d 892, 900 (Minn. 1976) is incorrectly stated. See paragraph 31. That decision permits the defense to offer "witnesses subject to cross-examination who give testimony which, if believed, would establish the defendant's innocence", not, as the Comment provides, to call "any witness to testify for purposes of showing an absence of probable cause."

If the State has shown probable cause, the idea of showing "an absence of probable cause" has no real meaning assuming State's witnesses are believed for purpose of deciding the motion.

The holding in State v. Mack, 292 N.W.2d 764 (Minn. 1980) para. 32, states too broadly conditions under which testimony of a previously hypnotized witness must be excluded.

Standards for admission of prior convictions are contained in Rule 609 of the Minnesota Rules of Evidence, as para. 32 states, but the proposed Comment goes on to refer to State v. Jones, 271 N.W.2d 534 (Minn. 1978), a case decided for the defendant, without mentioning all the later cases more broadly defining admissibility. See e.g. State v. Brouillette, 286 N.W.2d 702, 707-708 (Minn. 1979) Either cite all of the cases or none of them.

2. Inadequate Allowance for Local Options to Meet Local Needs.

Some counties don't use the rules announced in State v. Florence. Some counties conclude their Omnibus Hearings well before trial and some hearings, like Spriegl, are not expeditiously or fairly scheduled at that time. This is especially true because in some districts live witnesses are required to demonstrate whether the proof is

"clear and convincing" while in other districts only an offer of proof is made or statements submitted. Others of required pre-trial hearings simply can't be had months before trial.

3. Pre-trial hearings are routinely required whether needed or not.

For example, with issues related to impeachment by past convictions of the defendant, the defense should move to exclude, based on information received by discovery, and where there is no real dispute, hearing needn't routinely be held.

Where convictions relate to dishonesty or false statement, there is no discretion on whether or not to receive them and thus no issue to decide. Why must the matter now be set for pre-trial Omnibus hearing in every case?

Conversely (paras. 55 and 56) where two defendants choose joint representation, the procedures set out in State v. Olsen, 258 N.W.2d 898 (Minn. 1977) must be scrupulously observed in every case as Olsen holds. There the need for pre-trial decision in each and every instance of dual representation is apparent. It is required, however, by the holding in Olsen which is already comprehensive and explicit.

Recommendation: It is submitted that none of these rule amendments are required and some are downright mischievous. The conduct of pre-trial hearings at present under this Court's decisions expeditiously protect the rights of the accused while allowing for local differences to solve local problems.

Rehashing the holdings in this Court's cases is not helpful.

D. Guilty Pleas

1. Plea to Lesser Offense

References: Paragraphs of Amendments:

45, 52

Rules and Comments amended:

Rule 15.07 and

Comment on Rule 15.07

Discussion: In State v. Carriere, 290 N.W.2d 618, 620 (Minn. 1980), this Court held that a plea of guilty to a lesser included offense could not be accepted over the State's objection where the prosecution, by offer of proof, demonstrates "to the trial court that there is a reasonable likelihood the State can withstand a motion to dismiss the charge at the close of the State's case-in-chief." For purposes of review, Carriere held that the Court must make "a detailed statement of the reasons for its ruling on the motion." This interpretation was made to avoid

constitutional problems under the separation of powers provision.

The rule proposed, however, goes far beyond Carriere to allow acceptance of the plea provided the court is satisfied following hearing that the prosecution cannot introduce evidence sufficient to justify the submission of the offense to the jury "or that it would be a manifest injustice not to accept the plea." The case does not support this last exception. It is a vague standard, essentially unreviewable by State's appeal, thereby jeopardizing the very constitutional separation of powers considerations the case was intended to protect.

Recommendation: This amendment is not needed, except to point out that: "The power of the Court to accept a guilty plea to a lesser included offense is limited by State v. Carriere, 290 N.W.2d 618 (Minn. 1980)."

D.-2. Pre-plea Worksheet

References:

Paragraphs of Amendments:

49

Rules and Comments amended:

Comment to Rule 15.01

Discussion: The committee states its preference that before entry of a guilty plea, a sentencing guidelines worksheet be prepared so the court and counsel

will be aware of the effect of the guidelines at the time the guilty plea is entered. This is not a simple thing to do in most cases, nor can the result of such a pre-plea worksheet be guaranteed to be correct. Many defendants are involved in multiple crimes charged in different counties and the criminal history may depend on which charge is disposed of first. A worksheet may be correct when completed but obsolete weeks or even days later.

By requiring the worksheet be done before the plea, we set ourselves up for instances in which a defendant later wishes to withdraw his plea of guilty on the grounds that he was incorrectly apprised of his sentencing guidelines situation. Yet what his criminal history is and what other charges he is facing elsewhere is uniquely within the knowledge of a defendant,and any error in communicating this should fall on the defendant not on the prosecutor. As a practical matter, where the defendant's history is known in advance, it is always considered by defendant, his counsel, and the prosecutor before the plea is entered. Nothing further is gained by requiring a worksheet, especially since the worksheet would be completed by the Probation Department, an additional burden on that department at a time

when it is not rightfully involved in the case.

Recommendation: This proposed amendment to the Comment should be deleted.

E. Final Argument

1. Order of Argument

References: Paragraphs of Amendments:

76

Rules and Comments amended:

Rule 26.03, Subd. 11

Discussion: The proposed order of argument places the defense first followed by the prosecution and rebuttal then by the defense, with surrebuttal by the prosecution only where "the court determines that the defendant's rebuttal was clearly improper." (Emphasis added)

We are unaware of any jurisdiction in which argument is structured as in the proposed rule, nor is any explanation offered either of its source or its purpose. The effect will be to give the defense two arguments that will surround that of the prosecution and wholly negate its effect - the worse of both worlds.

Indeed the defense's rebuttal's only limitation is that it raise "no new issues which were not presented in one or both of the prior arguments" Thus, the defense could include, repeat and reemphasize all its initial arguments

now tailored to undercut whatever the State had said.

Finally and illustrative of the anti-prosecution tenor of the proposal as a whole, surrebuttal is allowed the State not when the defense rebuttal is found to be "improper" but only when it is "clearly improper." Since the rebuttal can include almost anything, one wonders when or how it could be found "clearly improper."

It is one thing to be uniquely handicapped as is the prosecution now in Minnesota in the order of argument but to propose the only rule that makes things worse - excepting possibly allowing the State no argument at all - is gratuitously unfair in the extreme.

Recommendation: This rule should be resubmitted to the Committee, reconstituted to include fair representation of the prosecution, for reconsideration.

The alternative proposed is "clearly improper".

F. Verdict

1. Partial Verdict

References: Paragraphs of Amendments:

79

Rules and Comments amended:

Rule 26.03, Subd. 19

Discussion: Relying on State v. Olkon, 299 N.W.2d 89 (Minn. 1980), the proposed rule permits the Court to "accept a partial verdict when the jury has agreed on a verdict of conviction on less than all the charges submitted, but is unable to agree on the remainder." Though this rule is appropriate when separate and distinct charges tried together are involved it is not when the jury agrees on a guilty verdict to a lesser included offense or offenses submitted but is divided as to the crime or crimes charged. There, the prosecution should be able to insist on continued deliberation or, in the Court's discretion, declaration of a mistrial and re-trial on the offenses charged.

Recommendation: The rule should be clarified so that it does not apply to partial guilty verdicts respecting lesser included offenses.

G. Sentences

1. Sentencing Hearings - Immunity

References:

Paragraphs of Amendments:

86, 89

Rules and Comments amended:

Rule 27/03 and

Comment thereto

Discussion: The rule as amended adapts sentencing procedures to the guidelines now implemented. We are not opposed to the procedures, per se, only

suggesting that Subd. 4(E) dealing with stayed sentences contains some potential problems. When imposing terms and conditions of probation it is arguably unwise to state in advance which terms of probation - apart from illegal conduct - will lead to revocation and which will not. Moreover, once the terms of probation are stated in writing, it is questionable whether the additional recourse to the trial court for "clarification" outweighs in usefulness the additional potential burden to the Court it might create.

Of much greater significance, we question the provision which first allows a mental and physical examination of the defendant as part of any presentence investigation and that then goes on to provide: "Any evidence derived from the examination may not be used against the defendant in any subsequent proceedings or on retrial except for the review of the sentence." (Emphasis added)

This broad-brush immunity provision is objectionable or very objectionable - depending on its interpretation.

For example, a defendant's revelations in a pre-sentence psychiatric exam may be used by him in an effort to receive treatment rather than imprisonment. He speaks not under that type of testimonial compulsion that is the key to immunity

but voluntarily and for self-serving reasons.

As a result information is learned about the defendant not available from any other source that may indicate he is a danger and in need of involuntary hospitalization. This Court's opinion in State v. Partlow, 321 N.W.2d 886 (Minn. 1982) specifically suggests commitment as a psychopathic personality be considered in the case of a defendant whose pattern of danger to children because of his sexual proclivities is revealed in his pre-sentence psychiatic report. This immunity provision should be amended to allow this contemplated derivative use.

More broadly, there are other situations in which data from such examinations should properly be usable in "subsequent proceedings" even criminal ones. For example, the accused might admit other crimes and a case with prosecutorial merit be thereafter assembled from evidence unrelated to his admission, save only that his admission caused him to be made a suspect. Immunity should not apply to this derivative use. Too, the crime admitted might be appropriate for Spriegl use in a later prosecution. What does "derived" mean under these circumstances?

Immunity ordinarily derives from a judicial decision sought, or at least acquiesced in, by the

prosecution. Here, the defendant can potentially give himself an immunity bath through wide ranging admissions made to a doctor or other pre-sentence examiner who is interested only in evaluation and diagnosis. It is noteworthy that this broad and unprecedented grant of immunity isn't discussed in the Comment on the Rule. See para. 89.

Recommendation: Careful reconsideration should be made of when and under what circumstance the accused should be immunized for matters "derived" from pre-sentence evaluations.

H. Probation Revocation

1. Procedures for Revocation

References:

Paragraphs of Amendments:

87, 90

Rules and Comments amended:

Rule 27.04 and

Comment thereon

Discussion: This seciton creates new procedures governing probation revocation hearings. We understand the judicial districts of the State have currently established their own procedures based on the logistics of their respective situations. Ramsey County has had no problem with its particular procedure and the constitutional rights of probationers have been protected, but it is questionable whether the same procedures could be

expeditiously applied in rural counties with other logistical imperatives.

The Constitution and case law should control and a new set of rules should not be imposed simply for uniformity unless a problem is found to exist presently.

This provision contains an even broader grant of immunity than that respecting pre-sentence examinations:

> "Subd. 4. Immunity.
>
> "Testimony or information given by a probationer at a revocation hearing, or any information derived from such testimony of information shall not be admissible against the probationer in any judicial proceeding against the probationer other than a prosecution for perjury or impeachment of his testimony under oath."

Admittedly, there is here judicial supervision because only "testimony or information given at a hearing" is involved, but the "derivative" information provision is broader and more explicit.

Another fault is that immunity is afforded not just for information the probationer is compelled to reveal under questioning by the State or the Court but for information elicited by his own counsel - even that which he volunteers.

The Comment refers to the fact that the ABA Standard at 18-7.5(f) and Minn. Stat. §609.09 support this grant of immunity. This is not so,

with respect to the statute, where only testimony elicited under testimonial compulsion is subject to immunity. The ABA standard limits immunity to information bearing "on a charge of violation of a condition of probation;" therefore the immunity would only obtain on matters with which he had been specifically charged as probation violations - and unintended immunity, for example, on a far more serious charge he chooses to admit would not be afforded.

Careful rconsideration should be made of a provision of immunization, where the one immunized chooses what he will say and there need be no shred of actual or substantial judicial compulsion. Constitutional and decisional filling out of appropriate perimeters of immunization is preferable to rule making unless the most careful consideration of potential implications of the rule is made.

Recommendation: Immunity should be afforded only for compelled testimony bearing on the charge of violation of probation and information derived therefrom.

I. Criminal Appeals

1. Appellate Procedures

References: Paragraphs of Amendments:

91, 92, 93

Rules and Comments amended:

Rule 29.04, 29.03, Subds. 1 and 2;

Comment on Rule 29.04

Discussion: The provisions for appeals of sentence derive from this Court's standing order of February 28, 1980. We suggest modification of the provision allowing 90 days to the appellant but only 10 days to the respondent for filing of briefs. As with State's appeals where the State must file in 15 days or have its appeal dismissed, these periods are just too short. The need to respond often comes out of the blue into an already full schedule, and, furthermore, other personnel that the attorney often does not control must be relied upon to engineer the completion, duplication and binding of the finished product.

Also, in para. 92, requirement of the prosecutor's statement that suppressed evidence critically impact the trial should either be deleted or the prosecutor's statement accepted as true. The question is difficult to answer prior to trial and the more so by the Court which can't be familiar with the strength and texture of the prosecution case.

Recommendation: These rules will - as well- require reconsideration to harmonize with rules enacted to implement the new Intermediate Appellate Court.

III. CONCLUSION

We ask that the proposed amendments be thoughtfully reconsidered in light of the general and specific objections discussed above.

Respectfully submitted,

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Ramsey County Attorney

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Dated: February 4, 1983

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February 3, 1983

A-5

Mr. John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

RE: Order of Final Argument in Criminal Cases

Dear Mr. McCarthy:

The proposed change in the order of final argument should be rejected.

The Minnesota tradition is worthy of respect, notwithstanding the slick organization and pressure lobby of the prosecutors. The only reason for the rule change is that the prosecutors believe it causes them to lose cases. If that is the case, then the rule is effective in keeping the burden of proof where it belongs.

Sincerely yours,

Michael F. Fetsch

Michael F. Fetsch

MFF/mml

cc: E. G. Widseth

2-4-83 Called for 10 copies

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PLEASE REPLY TO:
Minneapolis OFFICE

February 3, 1983

Mr. John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

RE: Order of Closing Argument

A-5

Dear Mr. McCarthy:

I oppose the proposed amendement to change the order of oral argument in criminal cases.

Sincerely,

EGGE, BURTON, CAVERT & WEXLER

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January 31, 1983

Mr. John C. McCarthy
Clerk of the Supreme Court
Room 230
State Capitol
St. Paul, Minnesota 55155

Re: Proposed Changes in Rules of Criminal Procedure

Dear Mr. McCarthy:

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The Criminal Law Section of the Minnesota State Bar Association met on January 22, 1983 to discuss several of the proposed changes in the Rules of Criminal Procedure. Mr. William Mauzy presented several of the proposed changes, and explained them to the Section. Additionally, we had an opportunity to review copies of the proposed changes. Pursuant to discussion and motion, the Section took the following positions on several of the proposed changes:

1. The Section moved to approve the deletion of the following language in the comment on Rule 4.02, Subd. 5(1):

   "In exceptional cases, however, the prosecuting attorney shall not be precluded by this section from seeking relief pursuant to Rule 34.02."

   Moreover, the Section concurs with the addition of the language in that same paragraph referring to State v. Wiberg, 296 N.W. 2d 388 (Minn. 1980) (attached is a copy of the proposed changes to the comments on Rule 4.02, Subd. 5(1).

2. The Section moved to approve the changes to Rule 9.01, Subd. 1(5) requiring the State to inform defense counsel of the records of prior convictions of the defendant and any of the defense witnesses disclosed under Rule 9.02, Subd. 1(3)(a) that are known to the prosecuting attorney provided defense counsel informs the prosecuting attorney of any such records known to the defendant.

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The Section moved to approve the amendment to Rule 9.02, Subd. 1(3)(c) by adding the following sentence at the end:

"As soon as practicable, the prosecuting attorney shall then inform the defendant of the names and addresses of the witnesses the prosecuting attorney intends to call at the trial to rebut the testimony of any of the defendant's alibi witnesses."

The Section moved to approve the amendment to Rule 9.02, Subd. 1(3) by adding a new provision (e) to read as follows:

"(e) Entrapment. If the defendant gives notice of intention to rely on the defense of entrapment, he shall include in the notice a statement of the facts forming the basis for the defense, and whether he elects to have the defense submitted to the court or to the jury.

The entrapment defense may not be submitted to the court unless the defendant waives jury trial upon that issue as provided by Rule 26.01, Subd. 1(2)."

The copy of the proposed changes that I used to prepare this letter did not contain a portion of the next sentence referring to Rule 9.01, Subd. 1(3)(e). The copy that the Section reviewed, however, did, to my knowledge, contain the entire statement. The statement dealt with the State's requirement to notify the defendant in writing of any additional offenses or criminal conduct of the defendant upon which the prosecution intends to rely in refuting the defense of entrapment. Moreover, the following language included in the amendment was approved by the Section:

"If the entrapment defense is submitted to the Court, the hearing thereon shall be included in the Omnibus hearing under Rule 11 or in the evidentiary hearing provided for by Rule 12. The Court shall make findings of fact, and conclusions of law on the record supporting its decision."

A copy of the proposed Rule changes reviewed by the Criminal Law Section of the State Bar Association has been attached hereto and incorporated herein by reference.

The Section approved the amendments to the comments of Rule 9.01, Subd. 1, paragraph 4; the comments on Rule 9.01, Subd. 1(5) after paragraph 14; Rule 9.02, Subd. 1(3)(e) adding a comment after the comment on Rule 9.02, Subd. 1(3)(d).

3. The Section moved to approve the amendments to Rule 20 removing the District Court Trial Judge's jurisdiction over a defendant found not-guilty by reason of mental illness.

4. The Section moved to oppose the proposed change in the order of final argument pursuant to proposed amendments to Rule 26.03, Subd. 11(h) and (i).

5. The Section moved to support the proposed amendment to Rule 15.07 relative to incorporating case law (State v. Carriere, 290 N.W. 2d 618 (Minn. 1980)) into the Rule.

6. The Section moved to approve the amendments to Rule 18.05 Subd. 1 relative to the recording of all statements made and events occurring before the Grand Jury except during deliberations and voting of the Grand Jury.

The Minnesota State Bar Association, Criminal Law Section, requests the opportunity to be heard on the issues of the proposed Rule changes at the hearing scheduled for February 11, 1983 at 9:00 A.M. in the Minnesota Supreme Court. I, as Vice Chairman of the Committee, have been designated by the Chairman, Richard Trachy, to present the position of the Minnesota State Bar Association, Criminal Law Section. We have 226 members in our Section, consisting of Judges, defense lawyers, prosecutors, and educators in its membership. Consequently, we respectfully request the opportunity to be heard in hearings held to discuss these matters.

Thank you very much for your attention to these matters.

Very truly yours,

HANLEY, HERGOTT & HUNZIKER

Bruce H. Hanley

Bruce H. Hanley

BHH/vlc
Encls.
cc. Richard Trachy
Assistant Anoka County Attorney
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10. Comments on Rule 4.02, Subd. 5(1)

To conform to the proposed amendment of Rule 34.02 and to explain recent case law concerning the 36-hour rule, amend the sixth paragraph of the comments to read as follows:

"Rule 4.02, subd. 5(1) prescribing the time within which a person arrested without a warrant shall be first brought before the court recognizes that additional time is needed to determine whether to continue the prosecution and to draw the complaint. So there is no requirement that the defendant be brought promptly before the appropriate court after his arrest if the court is in session, but it is necessary under Rule 4.02, subd. 5(1) that the defendant be brought before such court without 'unnecessary delay'. (Compare Rule 3.02, subd. 2.) The 36-hour period does not include the day of arrest, Sundays, or legal holidays. Otherwise the intent of Rule 4.02, subd. 5(1) and Rule 3.02, subd. 2 is the same, namely, that the 36-hour period is not an automatic holding period and that the defendant shall be brought before the court at the earliest possible time within the period. ~~In exceptional cases, however, the prosecuting attorney shall not be precluded by this section from seeking relief pursuant to Rule 34.02.~~ The effect of failure to comply with Rules 4.02, subd. 5(1) and 3.02, subd. 2 on the admission of confessions or other evidence or on the jurisdiction of the court is left to case-by-case development. In State v. Wiberg, 296 N.W.2d 388 (Minn. 1980) the Supreme Court held that violation of the time limits set forth in Rule 4.02, subd. 5(1) does not require the automatic exclusion of statements made which have a reasonable relationship to the violation. Rather, the admissibility of the statements depends on such factors as the reliability of the evidence, the length of the delay, whether the delay was intentional, and whether the delay compounded the effects of other police misconduct. In Wiberg the Supreme Court found a violation of Rule 4.02, subd. 5(1) even though 36-hours had not yet elapsed exclusive of the day of arrest. The court noted that such unexplained delays as occurred in Wiberg should weigh heavily in the trial court's determination of whether to exclude any statements. For the application of this same suppression test to identification evidence see Meyer v. State, 316 N.W.2d 545 (Minn. 1982)."

21. Rule 9.01, Subd. 1(5) Criminal Record of Defendant.

In State v. Wenberg, 289 N.W.2d 503 (Minn. 1980) the Supreme Court held that before a witness with prior felony convictions takes the stand, the trial court should determine whether those prior convictions may be used to impeach the witness. In order to determine whether such an issue exists, the prosecution should be required to notify the defendant of the criminal record of proposed defense witnesses as well as the criminal record of the defendant himself. To accomplish this amend Rule 9.01, subd. 1(5) to read as follows:

> "(5) Criminal Record of Defendant and Defense Witnesses. The prosecuting attorney shall inform defense counsel of the records of prior convictions of the defendant and of any defense witnesses disclosed under Rule 9.02, subd. 1(3)(a) that ~~is~~ are known to the prosecuting attorney provided the defense counsel informs the prosecuting attorney of ~~the~~ any such records ~~of defendant's prior convictions~~ known to the defendant."

22. Rule 9.02, Subd. 1(3)(c) Alibi.

This rule requires defense counsel to disclose to the prosecuting attorney the names of any alibi witnesses. Under Rule 9.03, subd. 2 which requires a continuing duty to disclose, the prosecuting attorney should be required to inform defense counsel of any rebuttal witnesses to the alibi defense. However, to assure that this obligation is understood, amend Rule 9.02, subd. 1(3)(c) by adding the following sentence at the end:

> "As soon as practicable, the prosecuting attorney shall then inform the defendant of the names and addresses of the witnesses the prosecuting attorney intends to call at the trial to rebut the testimony of any of the defendant's alibi witnesses."

23. Rule 9.02, Subd. 1. Information Subject to Discovery Without Order of Court.

Subsequent to the adoption of the rules in 1975 the Supreme Court in State v. Grilli, 304 Minn. 80, 230 N.W.2d 445 (1975) established procedural and substantive standards governing the entrapment defense. To include those procedural standards in the rules, amend Rule 9.01, subd. 1(3) by adding a new provision (e) to read as follows:

> "(e) Entrapment. If the defendant gives notice of intention to rely on the defense of entrapment, he shall include in the notice a statement of the facts forming the basis for the defense, and whether he elects to have the defense submitted to the court or to the jury.
>
> "The entrapment defense may not be submitted to the court unless the defendant waives jury trial upon that issue as provided by Rule 26.01, subd. 1(2).

when notice of the defense of entrapment is given, the prosecuting attorney shall notify the defendant in writing of any additional offenses or criminal conduct of the defendant upon which the prosecution intends to rely in refuting the defense.

"If the entrapment defense is submitted to the court, the hearing thereon shall be included in the Omnibus Hearing under Rule 11 or in the evidentiary hearing provided for by Rule 12. The court shall make findings of fact and conclusions of law on the record supporting its decision."

24. Comments on Rule 9.01, Subd. 1

To explain recent case law concerning violation of the prosecution's duty to disclose under Rule 9.01, subd. 1, amend the fourth paragraph of the comments by adding the following language at the end of that paragraph:

"Intentional abuses of the discovery process by the prosecution will not be tolerated and will result in reversal of the judgment of conviction when the facts warrant that. State v. Smith, 313 N.W.2d 429 (Minn. 1981), State v. Zeimet, 310 N.W.2d 552 (Minn. 1981). Additionally even negligent failures by the prosecution to disclose under the rules will require a new trial for a convicted defendant when prejudice is shown even though there is otherwise sufficient evidence on the record to support the conviction. State v. Schwantes, 314 N.W.2d 243 (Minn. 1982), State v. Hall, 315 N.W.2d 223 (Minn. 1982)."

25. Comments on Rule 9.01, Subd. 1(5)

To explain the proposed amendment of Rule 9.01, subd. 1(5) and the case of State v. Wenberg, 289 N.W.2d 503 (Minn. 1980) add the following paragraph after the fourteenth paragraph of the comments:

"Rule 9.01, subd. 1(5) also provides for the reciprocal discovery of the criminal records of any defense witness disclosed to the prosecution under Rule 9.02, subd. 1(3)(a). Under Rule 9.03, subd. 2 there is a continuing duty to disclose such information up through the time of trial. If the prosecutor intends to impeach the defendant or any defense witnesses with evidence of prior convictions the prosecutor is required by State v. Wenberg, 289 N.W.2d 503 (Minn. 1980) to request a pretrial hearing on the admissibility of such evidence under the Rules of Evidence. The pretrial hearing may be made a part of the Omnibus Hearing under Rule 11 or the pretrial conference under Rule 12. See Rule 609 of the Minnesota Rules of Evidence for the standards governing the use of criminal convictions to impeach a witness."

additional offenses or criminal conduct of the defendant upon which the prosecution intends to rely in refuting the defense.

"If the entrapment defense is submitted to the court, the hearing thereon shall be included in the Omnibus Hearing under Rule 11 or in the evidentiary hearing provided for by Rule 12. The court shall make findings of fact and conclusions of law on the record supporting its decision."

24. Comments on Rule 9.01, Subd. 1

To explain recent case law concerning violation of the prosecution's duty to disclose under Rule 9.01, subd. 1, amend the fourth paragraph of the comments by adding the following language at the end of that paragraph:

"Intentional abuses of the discovery process by the prosecution will not be tolerated and will result in reversal of the judgment of conviction when the facts warrant that. State v. Smith, 313 N.W.2d 429 (Minn. 1981), State v. Zeimet, 310 N.W.2d 552 (Minn. 1981). Additionally even negligent failures by the prosecution to disclose under the rules will require a new trial for a convicted defendant when prejudice is shown even though there is otherwise sufficient evidence on the record to support the conviction. State v. Schwantes, 314 N.W.2d 243 (Minn. 1982), State v. Hall, 315 N.W.2d 223 (Minn. 1982)."

25. Comments on Rule 9.01, Subd. 1(5)

To explain the proposed amendment of Rule 9.01, subd. 1(5) and the case of State v. Wenberg, 289 N.W.2d 503 (Minn. 1980) add the following paragraph after the fourteenth paragraph of the comments:

"Rule 9.01, subd. 1(5) also provides for the reciprocal discovery of the criminal records of any defense witness disclosed to the prosecution under Rule 9.02, subd. 1(3)(a). Under Rule 9.03, subd. 2 there is a continuing duty to disclose such information up through the time of trial. If the prosecutor intends to impeach the defendant or any defense witnesses with evidence of prior convictions the prosecutor is required by State v. Wenberg, 289 N.W.2d 503 (Minn. 1980) to request a pretrial hearing on the admissibility of such evidence under the Rules of Evidence. The pretrial hearing may be made a part of the Omnibus Hearing under Rule 11 or the pretrial conference under Rule 12. See Rule 609 of the Minnesota Rules of Evidence for the standards governing the use of criminal convictions to impeach a witness."

To explain the entrapment defense requirements of State v. Grilli, 304 Minn. 80, 230 N.W.2d 445 (1975) and the proposed amendment adding Rule 9.02, subd. 1(3)(e) amend the comments by adding the following paragraphs after the present comment on Rule 9.02, subd. 1(3)(d):

"The procedures set forth in Rule 9.02, subd. 1(3)(e) for asserting the entrapment defense are taken from State v. Grilli, 304 Minn. 80, 230 N.W.2d 445 (1975). That case further requires that upon submission of the defense to court or jury, the defendant has the burden of proving by a fair preponderance of the evidence that he was induced by government agents to commit the crime charged, whereupon the burden rests on the state to prove beyond a reasonable doubt that defendant was predisposed to commit the offense.

"If the defendant asserts the defense of violation of due process with the entrapment defense or separately, the defense shall be heard and determined by the court. The concept of fundamental fairness inherent in the due process requirement will prevent conviction of even a predisposed defendant if the conduct of the government in participating in or inducing the commission of the crime is outrageous. As to this due process defense see Hampton v. United States, 425 U.S. 484 (1976), State v. Ford, 276 N.W.2d 178 (Minn. 1979) and State v. Morris, 272 N.W.2d 35 (Minn. 1978)."

45. Rule 15.07. Plea to Lesser Offenses

In State v. Carriere, 290 N.W.2d 618 (Minn. 1980), the Supreme Court construed Rule 15.07 as permitting the trial court to accept a plea to a lesser included offense over the objection of the prosecutor only if there is inadequate admissible evidence to support the offense charged. By this construction the court avoided the prosecution's arguments that the rule violated the constitutional restrictions on separation of powers. To conform to this case law restriction, amend the rule to read as follows:

"Rule 15.07. Plea to Lesser Offenses

"With the consent of the prosecuting attorney and the approval of the court, the defendant shall be permitted to enter a plea of guilty to a lesser included offense or to an offense of lesser degree. Upon motion of the defendant and hearing thereon the court may accept a plea of guilty to a lesser included offense or to an offense of lesser degree, provided the court is satisfied following hearing that the prosecution cannot introduce evidence sufficient to justify the submission of the offense charged to the jury or that it would be a manifest injustice not to accept the plea. In either event, the plea may be entered without amendment of the indictment, complaint or tab charge."

52. Comments on Rule 15.07

To conform the comments to the proposed amendment to Rule 15.07 which restricts the power of the court to accept a plea to a lesser offense over the prosecutor's objection, amend the fourth paragraph from the end of the comments to read as follows:

"The rule also authorizes the court on defendant's motion and following a hearing thereon to permit the defendant to plead to a lesser offense without the consent of the prosecuting attorney. In accordance with State v. Carriere, 290 N.W.2d 618 (Minn. 1980), such a plea is permitted only if the court is satisfied, following hearing that the prosecution could not present sufficient admissible evidence to justify submission of the offense charged to the jury. Under State v. Carriere, supra, the showing required of the prosecution in order to withstand the defendant's motion would be in the nature of an offer of proof. Further, the hearing must be in open court and the court's order must include a detailed statement of the reasons for its ruling on the motion. Rule 15.07 also permits a plea to a lesser offense over the prosecutor's objection to prevent a manifest injustice. ~~In either case,~~ Rule 15.07 does not require ~~a record of the reasons for permitting the plea (Compare Minn. Stat. §630.30 (1971).), and the~~ that the indictment or complaint ~~need not~~ be amended. (See State v. Oksanen, 276 Minn. 103, 149 N.W.2d 27 (1967).)"

59. Rule 18.05. Record of Proceedings

Amend subdivision 1 of this rule to read as follows:

"Subd. 1. Verbatim Record. A verbatim record shall be made by a reporter or recording instrument of the evidence taken before the grand jury and of all statements made and events occurring ~~while a witness is~~ before the grand jury except during deliberations and voting of the grand jury. The record shall not be disclosed except to the court or prosecuting attorney or unless the court, upon motion by the defendant for good cause shown, or upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury, orders disclosure of the record or designated portions thereof to the defendant or his attorneys."

60. Comment on Rule 18.05

To explain the proposed amendment of Rule 18.05, amend the paragraph of the comments concerning that rule to read as follows:

"Rule 18.05, subd. 1, providing for a verbatim record of ~~the evidence taken~~ all statements made and events occurring before the grand jury except during deliberations and voting, supersedes that portion of Minn. Stat. §628.57 (1971) which provides that the minutes of the evidence taken before the grand jury shall not be preserved. (Minn. Stat. §§628.64, 628.65, 628.66 (1971) are not affected.) This rule as amended is similar to the special rule of practice for the First Judicial District which was upheld by the Supreme Court in State v. Hejl, 315 N.W.2d 592 (Minn. 1982) as being consistent with the original language of Rule 18.05. The purpose of Rule 18.05 as amended is to assure that everything said or occurring before the grand jury will be recorded except for during deliberations and voting. This would include any statements made by the prosecuting attorney to the grand jury whether or not any witnesses were present. Of course, under Rule 18.04 during deliberations and voting only grand jury members may be present."

76. Rule 26.03, Subd. 11. Order of Jury Trial.

Amend parts "h" and "i" of this rule governing the order of final argument to read as follows:

"h. At the conclusion of the evidence, the ~~prosecution~~ defendant may make a closing argument to the jury.

"i. The ~~defendant~~ prosecution may then make a closing argument to the jury. The defendant shall then be permitted time to reply in rebuttal and shall raise in rebuttal no new issues of law or fact which were not presented in one or both of the prior arguments. Only if the court determines that the defendant's rebuttal was clearly improper shall the prosecution be entitled to reply in surrebuttal."

82. Comments on Rule 26.03, Subd. 11

To conform to the proposed amendment of sections (h) and (i) governing the order of final argument in Rule 26.03, subd. 11, amend the paragraph of the comments concerning that rule to read as follows:

"Rule 26.03, subd. 11 (Order of Jury Trial) substantially continues the order of trial under existing practice. (See Minn. Stat. §546.11 (1971).) The order of closing argument, under sections 'h' and 'i' of this rule ~~continues to be the same as under existing~~ differs from that provided by Minn. Stat. §631.07 (1971) ~~with~~ under which the prosecution ~~proceeding~~ proceeded first and then the defendant."

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STATE OF MINNESOTA

IN SUPREME COURT

In Re Proposed Amendments to Minnesota Rules of Criminal Procedure

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MEMORANDUM OF THE OFFICE OF THE MINNESOTA ATTORNEY GENERAL CONCERNING PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF CRIMINAL PROCEDURE

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STATE OF MINNESOTA

IN SUPREME COURT

In Re Proposed Amendments to Minnesota Rules of Criminal Procedure

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MEMORANDUM OF THE OFFICE OF THE MINNESOTA ATTORNEY GENERAL CONCERNING PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF CRIMINAL PROCEDURE

INTRODUCTION

Since their inception in 1975, the Rules of Criminal Procedure have served well the orderly and efficient administration of criminal justice in the State of Minnesota. They have been implemented, amended and studied with the two-fold purpose of improving the administration of the criminal justice system while simultaneously preserving the rights of the accused and protecting innocent members of society from those who would prey upon them. Over the years, several amendments to the rules have been considered by this Court and have been the subject of thorough and careful consideration. Many of the changes have been adopted, many have not. An equally careful and complete review of these newly proposed amendments compels the conclusion that they should be treated in a similar manner. Many of the proposals will further help the administration of a fair and efficient system of criminal justice. Unfortunately, several of the proposed amendments would make our

judicial system less efficient and less able to maintain that delicate balance between the rights of the accused and the rights of the citizens of our society to live free of the fear of crime and its awful consequences. It is to those proposed amendments that this memorandum is addressed.

The proposed amendments consist of two primary components. First, there is the proposal to amend the substantive text of the rules themselves. Second, there is the proposal to amend the text of the official comments to many of these rules. As one reviews the text of the proposed amendments and the text of the commments, it is often difficult to juxtapose the two because of the way they have been presented in the published materials. Therefore, to the extent possible, this memorandum is an attempt to combine the discussion of any proposed rule change with any proposed modification of the official comments. The published material sets forth a total of 98 changes, deletions, and additions of rule text or official comments. This office is concerned with, or has objection to, several areas of the proposed changes. To facilitate review of these concerns and objections we have set forth in this memorandum the number or numbers of the proposed change, the rule number, and a topic description for each area. The memorandum generally follows the numerical order of the proposed changes and it should therefore not be assumed that our strongest objections are to the matters first discussed herein.

ANALYSIS, COMMENTS AND RECOMMENDATIONS

I. Numbers 10 and 97; Comment to Rule 4.02, Subd. 5(1) and Rule 34.02; Time and the 36 Hour Rule.

The thrust of proposed amendments 10 and 97 is to deny the trial court any discretion at all, no matter how valid the reason, to extend the time requirements of the so-called "36 hour rule." The Advisory Committee apparently feels these amendments are necessary to prevent abuse of the 36 hour rule. This Office has no evidence, empirical or otherwise, that there is a problem in this area or that the 36 hour rule is being circumvented. Furthermore, this Court has already adopted a sanction in the form of the exclusionary rule's application in appropriate cases which the 36 hour rule has been violated. See, Meyer v. State, 316 N.W.2d 545 (Minn. 1982); State v. Wiberg, 296 N.W.2d 388 (Minn. 1980).

The present rule provides a means, in those rare situations where it is needed, to enlarge the time limitations of the 36 hour rule. Decisions of this Court already provide sanctions for abuse of the rule. The "escape valve" currently provided by Rule 34.02 is reasonable and necessary. Proposed amendments 10 and 97 should not be accepted.

II. Numbers 21 and 25; Rule 9.01, subd. 1(5) and Comments; Criminal Record of Defense Witnesses.

The proposed amendments to the rules and comments presented in proposal numbers 21 and 25 are neither fair nor justified by the prior decisions of this Court. The amendment to Minn. R. Crim. P. 9.01, subd. 1(5), would require the prosecution to disclose the criminal record of all defense witnesses whose identities and prior record are disclosed by the defense. The comment, citing, State v. Wenberg, 289 N.W.2d 503 (Minn. 1980), states that if the prosecution seeks to impeach a defense witness with a prior conviction it must seek a pretrial hearing to obtain a ruling on the admissibility of such information at trial.

This Office has several objections to these amendments. We do not believe that State v. Wenberg, supra, has such an expansive holding. In Wenberg the prosecutor asked two defense witnesses if they had a criminal record, which each denied. On appeal, the defendant argued that this questioning was prejudicial error, while the State contended the prosecutor always has the right to ask such a question. The Court rejected the State's argument and held that if the prosecutor asked that question he must have evidence available to refute a denial. The Court then went on, in dicta, to suggest that a hearing should be held outside the presence of the jury to determine what prior convictions could be used to impeach a defendant or a defense witness.

The procedure recommended in the Wenberg dicta and in the proposed comment is unfair in that it applies only to impeachment of defense witnesses. Impeachment of witnesses by prior convictions is governed by Minnesota Rule of Evidence 609. That rule makes no distinction between defense and prosecution witnesses. Therefore, if this pretrial determination of impeachment evidence is to become a standard procedure, it should be applied equally to defense and prosecution witnesses.

This Office also objects that the proposed amendments mandate that the prosecution disclose to the defense what it knows of the criminal record of the defense's own witnesses. Again, the rule is unilateral in that it imposes no similar obligation on the defendant. Furthermore, the rule, as proposed, essentially requires the prosecution to do the defendant's investigating for him. A defense witness is much more likely to be cooperative and friendly with the defendant than with law enforcement officers. The defense is clearly in a much better position to gather this information than is the prosecution and therefore, in most cases, the disclosure by the prosecution will simply be superfluous, since the defense will already have the information.

The proposed rule change is unnecessary and, as written, both the rule and comment are one-sided, totally defense-oriented and unfair. It is recommended that proposed amendments 21 and 25 be rejected, or, in the alternative, modified to place the same burden upon the defense that is placed upon the prosecution.

III. Number 22; Rule 9.02, subd. 1(3)(c); Alibi Rebuttal Witnesses.

Proposed amendment 22 would expressly require the prosecution to disclose the names and addresses of witnesses which will be called to rebut the defendant's alibi witnesses. This Office objects to this amendment as being redundant and unnecessary. It is the position of the Supreme Court Advisory Committee that Rule 9.03, subd. 2 already requires this disclosure. See, Proposed Court Rules, page 10. If that is true, which this Office does not concede, then the amendment is unnecessary. If Rule 9.03, subd. 2 does not require such a disclosure, then this amendment constitutes a change from current law. Nothing in the proposed amendment, comments, nor prior decisions of this Court, explain or justify such a change. It is recommended that proposed amendment 22 be rejected as either unnecessary or as an unjustified change of existing law and practice.

IV. Numbers 23 and 25; Rule 9.01, subd. 1(3)(e) and Comments; Entrapment.

These two proposed amendments seek to put into rule form the holdings of this Court in State v. Grilli, 304 Minn. 80, 230 N.W.2d 445 (1975) and State v. Ford, 276 N.W.2d 178 (Minn. 1979) as those decisions relate to the defense of entrapment and the defense of "due process" and "fundamental fairness." The objection which this Office has to the proposed amendment lies with the third paragraph of the new rule which states:

> "When notice of the defense of entrapment is given, the prosecuting attorney shall notify the defendant in writing of any additional offenses or criminal conduct of the defendant upon which the prosecution intends to rely in refuting the defense."

Our objection to this clause is two-fold. First, the imposition of this disclosure requirement upon the prosecution is not justified under the holding of any decision of this Court nor any decision of the United States Supreme Court, which has also adopted the "subjective" or "predisposition" standard for the defense of entrapment. See, Hampton v. United States, 425 U.S. 484 (1976). Besides adding a burden to the prosecution which this Court has thus far refused to do, the disclosure requirement is unrealistic in light of the course of events of most cases in which the defense of entrapment is raised. Our experience indicates that in almost every claim of entrapment a crucial question involves the interaction between the defendant and the person or persons alleged to have induced the defendant to commit the crime. Typically, the prosecution has little or no idea of what the defendant will claim in that regard until the defense case has been presented. It is only at that point that the prosecution can intelligently determine what evidence it may utilize to prove pre-disposition to commit the offense. To require the prosecution to make this decision and then reduce it to writing would, in many cases, simply be a waste of effort unless the defendant were also required to disclose prior to trial, in detail, the basis of his or her claim of entrapment. Nowhere is such a disclosure required by the proposed amendment.

The second objection this Office has to paragraph 3 is a concern that it impliedly limits the scope and nature of evidence which the prosecution may use to prove the defendant's criminal predisposition. The amendment requires the prosecution to give written notice of "additional offenses or criminal conduct." It is unclear from the language of the amendment what this encompasses. In State v. Grilli, supra, this Court held predisposition could be proven by evidence of (a) defendant's active solicitation to commit the crime, or (b) prior criminal convictions, or (c) prior criminal activity not resulting in conviction, or (d) defendant's criminal reputation, or by any other adequate means the challenged conduct of the state's officers is mitigated or excused. Such evidence can include the fact that the defendant has a reputation as a criminal. State v. Yaedke, 308 Minn. 345, 242 N.W.2d 601 (1976). The defendant's bragging about unspecified criminal activity is similarly relevant and admissible. Masciale v. United States, 356 U.S. 386 (1958); Sorrells v. Unites States, 287 U.S. 435 (1932). Neither reputation nor bragging may be "additional offenses or criminal conduct," but such evidence is admissible to prove pre-disposition. This Office is concerned that by the proposed language of this amendment the trial court may wrongly believe this Court has limited its holding in State v. Grilli, supra, and has concluded that only evidence of specific criminal deeds is admissible on the issue of pre-disposition. It must be made absolutely clear that such a result is not intended and that

clarification can best be done by deletion of the offending paragraph.

Because the provisions of paragraph 3 of the proposed amendment are highly impractical and readily subject to misinterpretation they should be deleted from the proposed amendment.

V. Number 24; Comment to Rule 9.01, subd. 1; Prosecution Discovery Abuse.

Proposed amendment 24 consists of the addition of a comment concerning discovery abuses by the prosecution. While the comment accurately states the case law of the decisions of this Court, this Office believes that such a unilateral "calling to task" is plainly offensive to the integrity of those who act as prosecutors for the State of Minnesota. As prosecutors, we are all well aware of our ethical and professional obligations concerning discovery. Even in those cases where convictions have been reversed because of discovery-related issues, this Court has found that the failure to provide proper discovery has been unintentional. State v. Hall, 315 N.W.2d 223 (Minn. 1982); State v. Schwantes, 314 N.W.2d 243 (Minn. 1982). The implication of this comment is that it is needed to "scare" prosecutors into fulfilling their discovery obligations. This simply is not the case. Prosecutors are no less diligent than defense counsel in meeting discovery obligations, and yet this comment makes no mention of discovery abuses by defense counsel. This comment should be rejected. It is unnecessary and patently offensive to the integrity of the prosecutors of this State and to our judicial system.

VI. Numbers 32 and 38; Comments to Rule 11.04 and Comments to Rule 12.03; Other Crimes Evidence.

This Office has two concerns with the proposed amendments to the comments found in paragraphs 32 and 38.

The first of those concerns is that State v. Wenberg, 289 N.W.2d 503 (Minn. 1980) is improperly cited as authority for portions of the comments concerning impeachment of defense witnesses by prior convictions. Our concerns in that regard are more fully set forth in Argument II, below:

The second concern of this Office is that the proposed amendments incorrectly construe the holding of State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967). As proposed, the comment states that Billstrom stands for the general proposition that evidence of other crimes committed by the defendant is admissible if the prosecution's case is otherwise weak. A careful reading of the Billstrom decision reveals that its holding is much more limited than that statement. Billstrom dealt only with the issue of identification of the defendant as the perpetrator of the crime. That case did not deal with any other areas in which other-crimes evidence might be admissible, such as proof of motive, opportunity, intent, preparation, plan, knowledge or lack of mistake or accident. Minn. R. Evid. 404(b). It is the recommendation of this Office that the proposed amendments to these comments either be rejected or modified to correctly reflect the holding of in State v. Billstrom, supra.

VII. Numbers 44 and 47; Rule 15.01; Appendix A to Rule 15; Guilty Plea Maximum and Minimum Sentence.

This Office's concern with proposed amendments 44 and 47 are the result of this Court's decision in State v. Olson, 325 N.W.2d 13 (Minn. 1982). In that decision the Court held that a trial court need not sentence a defendant under Minn. Stat. § 609.11 (1982), the mandatory minimum sentencing statute, if the trial court found the facts of the case so warranted. The proposed amendment states in relevant part:

> "b. That if a minimum sentence is required by statute the court must impose a sentence of imprisonment of not less than _____ years for the crime with which he is charged."

(Emphasis added.) Because of the Court's decision in State v. Olson, supra, the word "must" should be changed to "may," and this Office recommends that the same be done. Similarly, in proposed amendment 47, the word "must" should be changed to "may."

VIII. Numbers 45 and 52; Rule 15.07 and Comments; Plea to Lesser Offense.

Proposed amendments 45 and 52 address the acceptance by the Court of a plea of guilty to a lesser offense over objection of the prosecution. This office objects to the proposed amendments and contends the amendments inaccurately state the relevant case law and controlling decision of this Court.

The controlling decision, as acknowledged in the proposed amendments, is State v. Carriere, 290 N.W.2d 618 (Minn. 1980). Painstaking review of that decision demonstrates it simply does not sweep as broadly as these proposed amendments purport it does.

Specifically, the proposed amendments permit a court to accept a guilty plea to a lesser offense over the prosecution's objection to prevent "manifest injustice." This is not the holding of Carriere. Nothing in that decision speaks to the prevention of "manifest injustice." Rather, the holding of that case is: "If the trial court is convinced that at trial the prosecutor can introduce evidence reasonably capable of supporting the offense charged, it should refuse to accept the tendered guilty plea." Id. at N.W.2d 621. This is a far cry from acceptance of the plea to prevent "manifest injustice."

It is the recommendation of this Office that proposed amendments 45 and 52 be modified to delete the reference to "manifest injustice" and to more correctly reflect the holding of this Court in State v. Carriere, supra.

IX. Number 49; Comment to Rule 15.01; Pre-Plea Worksheet.

This proposed amendment to the Comments to Rule 15.01 would put this Court on record as stating "it is almost always desirable for the court to order a pre-plea sentencing guidelines worksheet to be prepared . . ." This Office has two concerns with such a statement. First, we are concerned about the accuracy of any such worksheet. In many cases, particularly where the defendant may have an out-of-state criminal record, a relevant juvenile record or a record of misdemeanor and gross misdemeanor convictions, the only way to learn of this fact and thereby obtain an accurate criminal history score is with the full cooperation of the defendant. In

many cases a defendant will be reluctant, or even unwilling, to provide this help prior to acceptance of the negotiated plea of guilty to the Court. Therefore, such a pre-plea worksheet will be of questionable accuracy and after entry of the guilty plea a second worksheet will have to be completed anyway.

This situation leads to our second concern with this comment. The practical effect of this comment is to require the preparation of two worksheets by the Department of Corrections staff. This Office is concerned about the economic implications and departmental staff burdens that this comment could generate. It is our recommendation that this comment not be adopted at least until the full impact upon the Department of Corrections is more fully studied.

X. Numbers 67, 68 and 72; Rule 20.01, Subd. 5, Rule 20.02, Subd. 8(4), Comment on Rule 20.02, Subd. 8(4); Mental Illness Commitments and Discharges.

This Office recommends that these three proposed amendments not be adopted. We believe that the public is better protected by the existing rules and procedure. Our position and reasoning is similar to that of the Ramsey County Attorney's Office and the Court is referred to their Memorandum concerning this matter.

XI. Numbers 76 and 82; Rule 26.03, Subd. 11 and Comments; Order of Final Argument.

Proposed amendments 76 and 82 concern modification of the order of final argument. Minnesota law is already unique in that it requires the prosection to present its argument before the defense does so and does not give the prosecution the opportunity for a rebuttal. The proposed amendment would allow the defense to argue first and then give it a chance for rebuttal. Such a procedure is objectionable.

Research by this office has failed to find a single jurisdiction which follows the procedure of the proposed amendment. Such a lack of precedent is certainly understandable. The burden of both proof and persuasion in a criminal trial are almost always on the prosecution. For many years it has generally been agreed that in an adversarial situation, fairness requires that the party with the burden of proof be given the primary opportunity to argue the merits of the facts and proposition to the decision-making body. This is true whether the proceedings take place in the courtroom or in another forum of debate. Fundamental fairness requires that the party with the burden of proof be given this opportunity. The proposed amendment is directly contrary to this procedure. It gives the defense the advantage of first speaking to the jury and yet it continues the present advantage the defense has in being able to respond to and tailor its final argument to meet the prosecution's presentation.

The proposed amendments are totally contrary to the recognized procedure of any jurisdiction, are unjustified and do not further the fair administration of justice in this State. Proposed amendments 76 and 82 should not be adopted.

XII. Numbers 86 and 90; Rule 27.04 and Comments; Probation Revocation Proceedings.

Proposed amendments 87 and 90 concern the adoption of a rule which would govern probation revocation proceedings. While this Office generally supports the adoption of such a rule, we object to subd. 4 of the new rule, which provides:

> "Testimony or information given by a probationer at a revocation hearing, or any information shall not be admissible against the probationer other than a prosecution for perjury or impeachment of his testimony under oath."

There is absolutely no justification for this aspect of the rule. Proposed amendment 90, which is the relevant comment to the proposed rule change, states in relevant part: "The use immunity provided by Rule 27.04, subd. 4 is similar to that provided in ABA Standards, Sentencing Alternatives and Procedures, 18-7.5(f) and Minn. Stat. § 609.09 (1981) except that under the rule the defendant's statements from the revocation hearing may also be used to impeach his testimony under oath later." It is inaccurate to state this provision is similar to Minn. Stat. § 609.09 (1981). That statute in no way offers the blanket of immunity provided by the proposed rule. Under Minn. Stat. § 609.09 (1981) use immunity of compelled testimony is granted only on a case-by-case basis and then only upon request of the prosecution and after the trial court

has determined that such testimony is not likely to subject the defendant to further prosecution. The proposed amendment goes far beyond that statute. The amendment gives neither the prosecution nor the Court any discretion to grant or deny immunity. It is therefore inaccurate to state that the proposed rule is similar to Minn. Stat. § 609.09 (1981) and that reference in proposed amendment 90 should be deleted.

The granting of use immunity for testimony by the probationer at a revocation hearing is legally unjustified. Immunity is granted a witness once that witness has invoked his right to silence under the fifth amendment. This situation arises when a witness is under subpoena or court order to testify and must choose between testifying and incriminating himself or invoking his right to silence. Probation revocation proceedings do not have this system of compelled testimony. Nothing in the statutes, the rules of procedure or decisions of this Court require that a probationer testify at a probation revocation proceeding. The decision of whether or not to testify rests totally with the probationer after consultation with his attorney. In that regard, a probationer is in no different a position than a defendant in a criminal trial, and the law does not grant immunity to a defendant who elects to testify at trial. There is no valid reason to treat a probationer any differently than one who is accused of a crime and thus there is no basis for this provision of the proposed amendment. We recommend that subd. 4 be deleted from the proposed rule.

XIII. Rule 9.01 Disclosure by Defendant.

One area of concern not addressed by the Committee is disclosure by defendants of statements in their possession made by prosecution witnesses. This problem may arise in interfamilial sexual abuse cases where victims or other family members may give statements, or even offer momentary retractions, to defense agents without the prosecutor having knowledge of the same.

It can be argued that the State already has an obligation to provide statements of defense witnesses under Brady v. Maryland, 373 U.S. 83 (1963) and State v. Schwantes, 314 U.S. 243 (Minn. 1982). Reciprocal discovery obligations would support a defendant having a similar obligation. This Court has cited with approval the concept that the ends of justice are best served by a liberal discovery system which reduces the possibility of suprise at trial. By requiring defendants to produce copies of witnesses' statements that either side has noted for trial, the concept of reciprocal discovery is enhanced and the ends of justice are served. We urge that Rule 9.02 be amended to require disclosure by defendants of statements made by any witness noted for trial.

CONCLUSION

While many of the proposed changes in these rules and comments would further the effective and fair administration of justice, the rules and comments discussed herein are objectionable and should be either rejected or modified in the manner set forth in this memorandum.

Respectfully submitted,

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A-5

STATE OF MINNESOTA

IN SUPREME COURT

IN RE: Proposed Amendments to Minnesota Rules of Criminal Procedure

REQUEST TO BE HEARD

TO: Clerk of the Supreme Court of the State of Minnesota

Please take notice that Crow Wing County Attorney Stephen Rathke desires to be heard on the proposed amendments to the Minnesota Rules of Criminal Procedure at the hearing in the courtroom of the Minnesota Supreme Court, State Capitol, on Friday, February 11, 1983, at 9:00 a.m. Ten copies of a letter setting forth the position of the Crow Wing County Attorney's Office will be filed with the Clerk of the Supreme Court.

Dated: February 1, 1983

Respectfully submitted,

Stephen Rathke

Stephen Rathke
Crow Wing County Attorney
Post Office Box 411
Brainder, Minnesota 56401

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SUPREME COURT
FILED
FEB 8 1983
JOHN McCARTHY
CLERK

STATE OF MINNESOTA

IN SUPREME COURT

In Re Proposed Amendments to Minnesota Rules of Criminal Procedure

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MEMORANDUM OF THE CROW WING COUNTY ATTORNEY, FOR THE MINNESOTA COUNTY ATTORNEYS ASSOCIATION, PROPOSING AN AMENDMENT TO THE ORDER OF FINAL ARGUMENT IN CRIMINAL MATTERS

STEPHEN RATHKE
Crow Wing County Attorney

2-8-- copy to each Justice

STATE OF MINNESOTA

IN SUPREME COURT

In Re Proposed Amendments to Minnesota Rules of Criminal Procedure

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SUMMARY OF THE PROPOSAL OF THE COUNTY ATTORNEYS ASSOCIATION

Presently, Minnesota Rules of Criminal Procedure, Rule 26.03, Subdivisions (h) and (i), dictate that in Minnesota criminal cases the order of final argument proceeds with the prosecution arguing first, followed by the defense. Minnesota is the only American jurisdiction with this order of argument.

The proposed criminal rules would require the defense to go first, shouldering the burden of explaining the elements of the offense and the applicable law. The state would follow, to reply to the defense's explanation of the state's evidence. The defense would be permitted a rebuttal.

Perhaps the only attraction of this proposal is that Minnesota would not lose its national reputation of having a unique order of final argument in criminal cases.

The Minnesota County Attorneys Association proposes instead that we join the rest of the nation.

PROPOSAL

That the Minnesota Rules of Criminal Procedure, Rule 26.03, Subd. 11(h), be amended as follows (Subd. 11(i) would be deleted):

> At the conclusion of the evidence the prosecution may make a closing argument to the jury. The defense may then reply. The prosecution shall be permitted a short reply in rebuttal, raising no new issues of law or fact.

ORDER OF FINAL ARGUMENTS IN MINNESOTA: A PROPOSAL FOR CHANGE

by

Stephen C. Rathke*

As its critics are quick to point out, the order of final argument in Minnesota is unique. Only in Minnesota does the prosecution argue first without opportunity for rebuttal.[1] Opponents, mainly prosecutors, attempted to change the order or provide for rebuttal argument when the rules of criminal procedure were first discussed.[2] The Supreme Court referred the issue back to the rules committee for further study.[3] Prosecutors continued to press the issue.[4] The rules committee has recently proposed that the defense argue first with opportunity for rebuttal. The prosecution could, with leave of court, respond to the rebuttal.[5]

Minnesota should follow the procedure used in most jurisdictions, retaining the present order but permitting the prosecutor a limited rebuttal. Most prosecutors recognize the advantage gained by first argument. A rebuttal argument would enhance the truth-seeking role of the trial and deter the defense attorney from improper comment. The trial court could give a cautionary instruction to diminish the advantage given the prosecutor by this suggested order.

The Prosecution Should Have First Argument

Whichever side argues first has a decided advantage. The side of an issue having the advantage of first position in the order of presentation is more effective in changing opinion than the side presented last, all other factors being equal. The side bearing the burden of proof should have this advantage. The rules committee's proposal permitting the defense to argue first should be rejected as both illogical and unfair.

Citing a member of authoritative psychological studies, Professor Lawson argues the validity of the "law of primary in persuasion."[6] In experimental studies, several arguments were given to two groups. Half heard the arguments in an affirmative-negative order; half in reverse order. The communication received first by the audience was more effective in changing opinion than the communication received second. This phenomenon is illustrated in the following two graphs:[7]

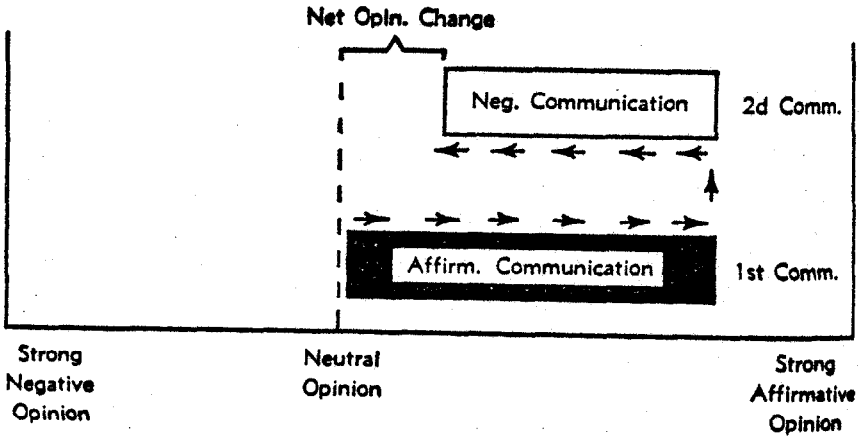

Figure 1: Arguments presented affirmative-negative

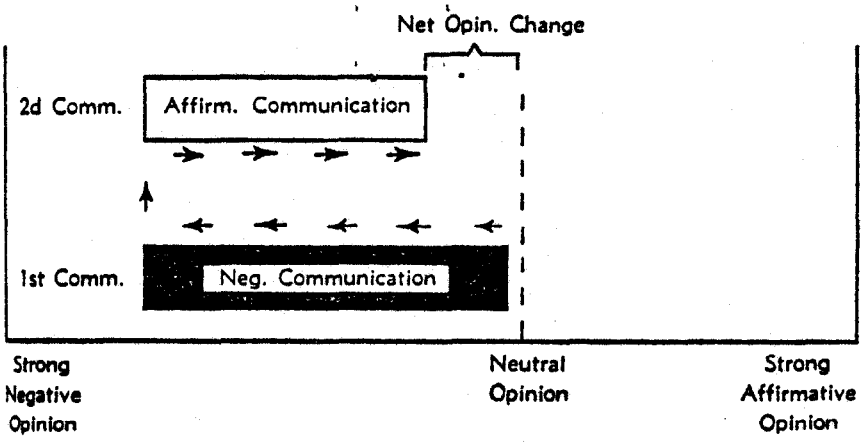

Figure 2: Arguments presented negative-affirmative.

Without regard to the nature of the first communication, the second communication did not succeed in shifting audience opinion back to its original opinion.

Lawson cites three psychological processes which account for the "law of primacy."[8] All three of these processes are relevant to the order of final argument.

As any experienced trial attorney knows, the jury is more alert and attentive during the first argument. The jury has listened to the attorneys question the witnesses for at least hours and usually days. Now comes the time that the attorneys shed the question-answer format and tell the jury what it all means. In order to give the judge time to prepare instructions, the final arguments frequently follow a "break in the action," such as an overnight recess. Thus, the attorney giving the first argument faces a jury at its most attentive state. The argument itself is a novel stimulus, leading to a high level of alertness and assures maximum learning of the content of that communication. The second argument generally covers the same ground and, therefore, jury attentiveness diminishes. After the prosecutor has spoken to the jury for forty-five minutes it takes more than a coffee break to recapture the jury's attention.

The second process relates to comprehension. Here again the first argument has the advantage. The initial communication sets the frame of

reference within which the second communication is construed. In the trial context, the prosecutor defines the issues. Assuming that he or she issufficiently astute to identify the correct issues, the defense attorney must agree, thus enhancing the prosecutor's credibility. A common defense tactic is to accuse the prosecutor of missing the crucial issue. The defense, however, is at a disadvantage since it must destroy the prosecutor's frame of reference before building a new one for the jury.

The third process relates to the acceptance of the argument. In a criminal trial the jury experiences interferring expectations of wrongness. The very fact that a fellow citizen is on trial engenders caution. This caution is enhanced by the repeated instructions concerning the presumption of innocence and the requirement of proof beyond a reasonable doubt. If the defense is afforded the first argument, the jury's motivation to reject the position of the prosecution is reinforced. A second acceptance factor relates to the concept of commitment and self-consistency. This factor is especially important where the listener has an opportunity to discuss the issue after the first argument. The listener forms an opinion and has a tendancy to maintain it. In the criminal trial the formulation of an opinion and its resulting commitment is idealy private. Nevertheless, this private commitment of the juror and his or her internal need for consistency may provide some advantage for the side having the first argument.

It is only logical that the prosecution have the advantage of first argument. The trial occurs because the prosecutor has filed the charge. The defense cannot counter sue. The prosecutor has virtually unlimited discretion to dismiss the case. Since the prosecutor is responsible for the trial, the government has a duty to state why it has charged the defendant.

The trial is much like an athletic contest. Each team has the periodic opportunity to score points. The defensive team attempts to prevent the score. Defensive strategy is defined by the offense. If the defense is effective, the offense may change its strategy, which may then lead to a different defense position.

In the criminal trial, the government is always the offensive player. Each crime is defined by its essential elements. The government scores as it proves each essential element. If at the conclusion if either the state's case or the entire testimony and element has gone unchecked, both the change and the jury as dismissed. If all essential elements are present in the testimony, the jury is told to decide the case. At that point, the jury is forcefully informed of the requirement of proof beyond a reasonable doubt. This concept is essentially subjective. The jurors might reach agreement on the existence and interpretation of the testimony. Nevertheless, one juror may find a reasonable doubt which remains undetected by the other eleven. The conclusions of all twelve jurors may be equally valid. Some people are simply more prone to find doubt than others.

It would be clearly improper for a witness to testify that his or her observations or conclusion is certain beyond a reasonable doubt.[9] Instead, the prosecutor must make that argument. A defense attorney cannot effectively argue the absence of proof beyond a reasonable doubt until the prosecutor has tied the evidence together and argued the inferences and conclusions that establish guilt. Because the state must score its points beyond a reasonable doubt, it must have the opportunity to argue first. Appellate decisions which have addressed this issue have conceded the advantage of first argument and upheld this advantage to the state because of the burden of proof beyond a

reasonable doubt.[10] Permitting the prosecutor to argue first is a "forensic tradition to be found in parliamentary and debating procedure throughout Anglo-Saxon history."[11]

Reversing the order of final argument as suggested by the proposed rule would cause great disruption amongst the profession. Such a drastic change in criminal procedure should not occur without a compelling advantage. None exists.

The Prosecution Should Be Permitted Rebuttal Argument

Minnesota stands alone as the only jurisdiction to allow the defense the right to deliver the final closing argument.[12] Seven states currently allow the defense to argue first and the prosecution to argue last. Thirty-seven states as well as all federal courts allow the prosecution to make the first argument with an absolute right to a short final rebuttal. Five states have a flexible procedure which allows for the state to argue first and last unless the defendant puts in evidence by his testimony, or otherwise assumes some burden as in an insanity defense. The present procedure under Rule 26.03, Subd. 11 (h) (i) of the Rules of Criminal Procedure should be amended to permit the prosecution to make the first argument with an absolute right to a short rebuttal following the defense's closing argument. This change would conform Minnesota's procedure to that of thirty-seven states, as well as the federal courts.

The order of final argument in a criminal trial was originally adopted in 1875, giving the defense the final word to the jury.[13] As early as 1927, the Minnesota Crime Commission, comprised of Minnesota judges, lawyers,

politicians, and citizens, recommended that the statute be amended to give the prosecution a reply or rebuttal argument following the defense's final argument. The Commission stated:

> ...the present practice [of allowing the defense the final word to the jury] is peculiar to Minnesota. In all other states, the final word of counsel to the jury is given to the prosecution. That rule is based upon the logic of the situation. The party having the burden of proof is regularly accorded the final argument. It is submitted that this rule is particularly apt in criminal cases, where, as already said, the greatest burden of proof known to the law.[14]

The prosecution must prove a defendant guilty beyond a reasonable doubt. This burden should not be unnecessarily increased by not allowing the prosecution the final word to the jury. Professor Orfield has criticized Minnesota procedure:

> In every state but Minnesota the final word of counsel to the jury is given to the prosecution. This rule is based on the logic of the situation. The party having the burden of proof is granted the final argument. Particularly should this be true in criminal cases in which the state must prove its case beyond a reasonable doubt.[15]

A rule permitting rebuttal argument should be drafted to minimize its effect. Rebuttal should only include issues raised by defense argument which were not reasonably anticipated by the prosecutor in the first argument. A prosecutor should not use rebuttal as an ambush tactic.[16] A wise prosecutor would use rebuttal sparingly so as not to alienate the jury.

The greatest advantage of permitting rebuttal argument is its discouragement of improper defense argument. The prosecutor has a number of effective incentives to avoid improper or inappropriate argument. The prosecutor refrains from silly, inappropriate or easily-answered arguments because he or she knows that they will not only be answered but also labeled as silly or inappropriate. Court intervention can be disasterous to a

prosecutor vying for the jury's respect and confidence. A prosecutor who argues improperly risks reversal if the argument is effective.[17] Even if the conviction is upheld, the Supreme Court may take the opportunity to publicly rebuke the prosecutor for a lack of ethics, intelligence or common sense.[18] The offending prosecutor also exposes himself to censure from the Lawyers Board of Professional Responsibility.[19]

These incentives to avoid improper argument do not effectively apply to the defense attorney. The prosecutor has no opportunity to respond to a silly or easily-answered defense appeal. Judges are reluctant to chastise a defense attorney in front of the jury since it is the client who may suffer. If an improper defense argument proves persuasive, the state cannot appeal the acquittal.

The most common improprieties by defense attorneys relate to misstatements of the evidence, personal opinions and appeals to sympathy. As the Minnesota Crime Commissioners Report of 1927 points out, rebuttal argument is the only effective remedy:

> Under the present procedure if a fallacious argument be made by the defendant's attorney, an unwarranted appeal to sympathy, a misstatement of the evidence, no answer by the state is possible. Should defendant's attorney say what would be ground for relevant if uttered by the county attorney, not only is it unanswered, but, if an acquittal results, no reversal is possible to correct the error, because a verdict of not guilty is final.[20]

Conclusion

The party arguing first has an advantage. Providing the prosecution with rebuttal furthers that advantage. Nevertheless, Minnesota should follow that procedure. In view of the government's burden of proving guilt beyond a reasonable doubt, the right of first argument is both fair and logical. A brief rebuttal would enhance the truth-seeking function of the trial by

discouraging improper defense argument. The advantage occurring to the state can be partially avoided by a judge's cautionary instruction. The jury should be told that the prosecution has a natural advantage to arguing both first and last. The jury should be told to guard against that and to give equal attention to the arguments of each party.

FOOTNOTES

[1] Minn. Stat. 631.07; Minn. R. Crim. Prac. 26.03, Subd. 11.

[2] The Supreme Court's Committee on Rules of Criminal Procedure proposed that the defense argue both first and last. This proposal created great controversy and was eventually rejected. See H. McCarr, Criminal Law and Procedure, 942, at 177-78 (1976).

[3] Order of the Supreme Court filed March 31, 1977.

[4] A number of bills have been introduced in the legislature at the insistance of the Minnesota County Attorney's Association. See, e.g., S.F. 780 (1981).

[5] Proposed Amendments to Minnesota Rules of Criminal Procedure, No. 76 and 82 (Nov. 1982).

[6] Lawson, Order of Presentation as a Factor in Jury Persuasion, 56 Ky. L.J. 523 (1968).

[7] Id. at 524-25.

[8] Id. at 528-37.

[9] The rules of evidence permit opinions on ultimate issues but the question cannot be posed in the context of reasonable doubt. Minn. R. Evid. 704.

[10] See, e.g., United States v. 2353.28 Acres of Land, 414 F.2d 965 (5th Cir. 1969); United States ex rel. Parsons v. Adams, 336 F. Supp. 340 (Conn. 1971).

[11] 6 Am. Jur. Trials 882 (1967). See also 3 Wharton's Criminal Procedure, §521, at 441-42 (12th ed. 1975).

[12] See Appendix for a complete list of all states.

[13] Minn. Laws 1975, ch. 41.

[14] Minnesota Crime Commission Report 34 (1927).

[15] Orfield, Criminal Procedure for Arrest to Appeal 447 (1947). See Appendix.

[16] See Crump, The Function and Limits of Prosecution Jury Arguments 28 SW. L.J. 505, 533-35 (1974).

[17] See, e.g., State v. Shupe, 293 Minn. 395, 196 N.W. 2d 127 (1972); State v. Wangberg, 272 Minn. 204, 136 N.W.2d 853 (1956); State v. Cole, 240 Minn. 52, 59 N.W.2d 919 (1953).

[18] See, e.g., State v. Clerk, 296 N.W.2d 372 (Minn. 1980); State v. Flom, 285 N.W.2d 47 (Minn. 1979); State v. Hill, 256 N.W.2d 279 (Minn. 1977); State v. Miles, 255 N.W.2d 48 (Minn. 1977); State v. Taylor, 305 Minn. 558, 234 N.W.2d 586 (1975); State v. Prettyman, 293 Minn. 493, 198 N.W.2d 156 (1972).

[19] See Cole of Professional Responsibility DR 7-102 (A)(2)(5); DR 7-106 (C)(1)(3)(4).

[20] Minnesota Crime Commission Report 34 (1927).

APPENDIX

JURISDICTION	ORDER	AUTHORITY
United States	P-D-P*	Fed. R. Crim. Proc. 29.1, effective 1974
Alabama	P-D-P	Ala. R. Cir. and Inferior Cts., R 19
Alaska	P-D-P	Alaska R. Crim. Proc. 27(a)(4)
Arizona	P-D-P	Arizona R. Crim. Proc. 19.1(a)(7)
Arkansas	P-D-P	Ark. Stat. Ann. 43-2132
California	P-D-P	Cal. Pen. Code 1093(5)
Colorado	P-D-P	matter of custom
Connecticut	P-D-P	Conn. Gen. Stat. 54-88
Delaware	P-D-P	matter of custom
Florida*	P-D-P unless def. has no evid. D-P-D	Florida R. Crim. Proc. 3.250
Georgia	P-D-P unless def. has no evid. D-P-D	Geo. Code Ann. §17-8-71
Hawaii	D-P	Haw. Rev. Stat. §806-62
Idaho	P-D-P	Idaho Code §19-2101(5)
Illinois	P-D-P unless def. has no evid. D-P-D	Ill. Pro. Act 217
Indiana	P-D-P	Ind. R. Crim. Proc. §35-1
Iowa	P-D-P*	Iowa R. Crim. Proc. 18.1(b)
Kansas	P-D-P	Kan. Stat. Ann. §22-3414

Kentucky	D-P	Ky. R. Crim. Proc. §9.42(f)
Louisiana	P-D-P*	La. Code Crim. Proc. Art 765 (6)
Maine	P-D-P	Me. R. Crim. Proc. 30(a)
Maryland	P-D-P	matter of custom
Massachusetts	D-P	Mass. R. Crim. P. §24 (a)(1)
Michigan	P-D-P	Mich. Ct. Rule 37
Minnesota	P-D	Minn. Stat. 631.07
Mississippi	P-D-P	matter of custom
Missouri	P-D-P	Mo. R. Crim. P. §26.02(7)
Montana	P-D-P	Mont. Code Ann. §46-16-401
Nebraska	P-D-P	Neb. Rev. Stat. §29-2016
Nevada	P-D-P	Nev. Rev. Stat. §175.141(5)
New Hampshire	D-P	matter of custom
New Jersey	P-D-P	matter of custom
New Mexico	P-D-P*	N. Mex. R. Crim. P. 40
New York	D-P	N.Y. Crim. Proc. Law §260.30
North Carolina	P-D-P unless def. has no evid. D-P-D	N.C. App. I; Gen. R. Pro Sup 10
North Dakota	P-D-P	N.D. Cent. Code §29-21-01(5)
Ohio	P-D-P	Ohio Rev. Code Ann. §2945.10(F)
Oklahoma	P-D-P	Okla. Stat. Ann. tit. 22, §831(6)
Oregon	P-D-P	Ore. Rev. Stat §17.210(5)
Pennsylvania	D-P	Pa. R. Crim. P. 1116
Rhode Island	D-P	matter of custom

South Carolina	P-D-P unless def. has no evid. D-P-D	S.C. Cir. Ct. R. 58
South Dakota	P-D-P	S.D. Code Laws §23A-24-2(6)
Tennessee	P-D-P	Tenn. R. Crim. P. 29.1
Texas	P-D-P	Tex. Code Crim. P. Art. 36.07-08
Utah	P-D-P*	Utah Code Ann. §77-35-17(7)
Vermont	P-D-P*	Vt. R. Crim. P. 29.1
Virginia	P-D-P	matter of custom
West Virginia	P-D-P	matter of custom
Wisconsin	P-D-P	Wis. Stat. Ann. §972.10(6)
Wyoming	P-D-P	Wyo. Stat. Ann. §7-11-201(a)(vii)

*specifies limited rebuttal

2-7-83 called for copies

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KATIE McCLELLAN

January 28, 1983

Mr. John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, MN 55155

A-5

Dear Mr. McCarthy:

It is my understanding that the Supreme Court is considering changing the order of final argument in criminal cases. As an attorney practicing extensively in the criminal courts, I must indicate my opposition to this proposal.

I am unaware of any showing of injustice based upon the current order of final argument. Absent that showing, it would seem inappropriate to change a system which has been in effect for more than a century.

I am hopeful that the Court will consider these thoughts at your hearing on February 11, 1983.

Very truly yours,

David G. Kuduk/ksm

David G. Kuduk

DGK/ksm

2-4-83 Called for 10 copies

TIMOTHY W. J. DUNN
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TELEPHONE 297-8484

January 27, 1983

Mr. John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, MN 55155

Re: Proposed Amendment of Order of Oral Argument

Dear Mr. McCarthy:

A-5

This letter is to speak in opposition to the proposed amendment of the Order of Oral Argument that has been suggested to the Court.

In Minnesota there has been a long standing history and precedence of Order of Oral Argument not only in criminal litigation but in civil litigation. Now, the well organized prosecutorial lobby has brought before the Court an argument that order and criminal matters ought to be reversed and the prosecution to argue last. I think to date it is well evidenced that the prosecutorial lobby has been able to procure changes in the rules to date to benefit the prosecution. The defense bar obviously has not been successful nor organized to either effectively lobby or to obtain changes that are beneficial to the defense.

I would suspect that an argument may be made that the criminal and civil trial arguments ought to be the same and thus with the change of criminal order of argument the civil order of argument ought to be changed. However, I would be assured that the strong and organized plaintiff's lobby (i.e. The Trial Lawyers Association, etc.) would strongly object on basically the same grounds as I object today to such request.

Very truly yours,

Timothy W. J. Dunn

TWJD:mg

1-24-83 called for 9 more

Fred A. Reiter

LAW OFFICES
LAKE CALHOUN PROFESSIONAL BUILDING
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MINNEAPOLIS, MINNESOTA 55408
1-612-827-4679

January 21, 1983

A-5

John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Dear Sir:

I am writing to you at this time since it has come to my attention that there is a movement afoot, apparently fueled by the prosecutors' lobby, to change the order of final argument in criminal cases.

Very simply, I believe this would be a tragic mistake. I believe it would have the direct effect of reducing freedom in this state; I believe that it would reduce the power and initiative of the individual in direct proportion to the corresponding increase that would be conferred on organized government and those who make their living representing organized government.

It should be remembered that organized government, in its various forms, is not the country and is not the people, but is only the servant of the people and a means through which each individual human being in this country can better spend his three score years and ten in pursuit of life, liberty and happiness.

Government is already too large and the weapons in its arsenal already too numerous and too powerful.

I remember it wasn't too many years ago when my father, a small businessman and a self-made man, told me that "the individual in this country is a vanishing breed."

This change will simply drive another nail into the coffin of individualism, a concept we once worshipped in this country, a concept which we once believed was the fountainhead for all the other good things with which our country was blessed.

If you change the rule that has been of long standing in the state and which I believe has served well during its tenure, to provide that the prosecutor will now be given the last opportunity to address the jury, then you are drastically shifting the balance of fairness in criminal trials. You are, very simply, making it easier to convict.

This means that by necessity more innocent people will be convicted.

I shudder to think that the "fear merchants" have led us to such a point in the history of our civilization that we are now more concerned with convicting the guilty than in exonerating the innocent.

The very least we owe our citizens is a truly fair trial, and I would contend that a society that does not offer this to all of its citizens is no longer a civilized society.

It has been said that the true measure of any society is the extent to which it can protect even the weakest and the poorest members from unfair deprivation of their rights. This is a measure which should be applied now and the view that should be taken is the long view, the view that will be best not only for us but for our children and for our children's children.

Statistics support the conclusion that an extremely high percentage of people charged with crime are eventually convicted of crime. This would seem to indicate that a great number of guilty are being convicted under the present rules. Therefore, I don't believe there is any demonstrated need for this change.

Furthermore, I don't believe that there are any truly scientific studies or statistics which would support the argument that such a change would in any way decrease the crime rate. I rather doubt that anyone considering a criminal act stops to check the Minnesota Rules of Criminal Procedure before deciding whether or not to commit a crime.

In closing, it seems to me that over the past five years most of the changes made in the area of criminal law by judges, legislatures and Congress have made it easier to convict. Perhaps some of those changes were necessary, and only time will tell for sure. However, I think that this trend has gone far enough, and we ought to call a moratorium on changes to see what effect they have on a long term basis before plunging ahead when we don't know for sure what negative consequences may ensue.

I don't believe this proposed change in the order of closing argument is going to improve the administration of criminal justice. It will only add to the already awesome power of the state and take away the freedom of the individual citizen. I see no justification for such a step.

In addition, I would appreciate being notified of the date, time and place of the hearing on this matter so that I can be personally present and make a brief statement regarding it.

Thank you for giving me an opportunity to express my feelings regarding this important matter.

Very truly yours,

Fred A. Reiter

Fred A. Reiter
Attorney at Law

FAR:aje

THOMAS L. JOHNSON
COUNTY ATTORNEY

(612) 348-3091

OFFICE OF THE HENNEPIN COUNTY ATTORNEY
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MINNEAPOLIS, MINNESOTA 55487

February 1, 1983

Mr. John McCarthy
Clerk, Minnesota Supreme Court
230 State Capital
St. Paul, Minnesota, 55155

In Re Proposed Amendments to
Minnesota Rules of Criminal
Procedure

Dear Mr. McCarthy:

Enclosed please find thirteen (13) Comments and Proposals regarding the proposed amendments to the Minnesota Rules of Criminal Procedure. These comments and proposals reflect concerns and ideas from within the Hennepin County Attorney's Office.

In addition, the following individuals desire to be heard on February 11, 1983, before the Supreme Court regarding the various amendments under consideration. These persons are Mr. Walt Bachman, Esq., Mr. John Brink, Esq., Mr. Peter Fransway, Esq., and Mr. Rob Lynn, Esq.

Very truly yours,

THOMAS L. JOHNSON
HENNEPIN COUNTY ATTORNEY

John D. Tierney

John D. Tierney
Principal Attorney
Criminal Division

JDT/cl

Encls.

2-1-- copy to each justice

COMMENTS AND PROPOSALS

PARAGRAPHS 10 and 97

RULE 4.02 SUBD. 5(1)

RULE 34.02 ENLARGEMENT

A. The current Minnesota Rules of Criminal Procedure provide that:

Rule 4.02

Subd. 5. Appearance Before Judge or Judicial Officer

(1) Before Whom and When. If an arrested person is not released pursuant to this rule or Rule 6, he shall be brought before the nearest available judge of the county court of the county where the alleged offense occurred or judicial officer of such court or judge of a municipal court in such county. He shall be brought before such judge or judicial officer without unnecessary delay, and in any event, not more than 36 hours after the arrest, exclusive of the day of arrest, Sundays, and legal holidays, or as soon thereafter as such judge or judicial officer is available. Provided, however, in misdemeanor cases, if the defendant is not brought before a judge or judicial officer within the 36-hour limit, he shall be released upon citation as provided in Rule 6.01, subd. 1.

Comments - Rule 4.02, Subd. 5(1)

Rule 4.02, subd. 5(1) prescribing the time within which a person arrested without a warrant shall be first brought before the court recognizes that additional time is needed to determine whether to continue the prosecution and to draw the complaint. So there is no requirement that the defendant be brought promptly before the appropriate court after his arrest if the court is in session, but it is necessary under Rule 4.02, subd. 5(1) that the defendant be brought before such court without "unnecessary delay". (Compare Rule 3.02, subd. 2.) The 36-hour period does not include the day of arrest, Sundays, or legal holidays. Otherwise the intent of Rule 4.02, subd. 5(1) and Rule 3.02, subd. 2 is the same, namely, that the 36-hour period is not an automatic holding period and that the defendant shall be brought before the court at the earliest possible time within the period. In exceptional cases, however, the prosecuting attorney shall not precluded by this section from seeking relief pursuant to Rule 34.02. The effect of failure to comply with Rules 4.02, subd. 5(1) and 3.02, subd. 2 on the admission of confession or other evidence or on the jurisdiction of the court is left to case-by-case development.

Rule 34.02 Enlargement

When an act is required or allwed to be done at or within a specified

time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 26.03, subd. 17(3); 26.04, subd. 1(3); or 26.04, subd. 2, or except as provided by Rules 29.02, subd.5(3), 29.02, subd. 6(4), and 28.05, subd. 1, the time for taking an appeal.

(Amended March 31, 1977, effective July 1, 1977.)

Comments Rule 34.02 Enlargement

Rule 34.02 (Enlargement) is taken from F.R. Crim. P. 45(b) and Minn.R.Civ.P. 6.02. It permits an extension of time except for motions for judgment of acquittal (Rule 26.03, subd. 17(3), for new trial (Rule 26.04, subd. 1(3), or to vacate judgment (Rule 26.04, subd. 2). Extension of time for taking an appeal may not be enlarged except as provided by Rule 29.02, subd. 5(3), Rule 29.02, subd. 6(4), and Rule 28.05, subd. 1.

B. The proposed amendments to the Minnesota Rules of Criminal Procedure provide that:

10. Comments on Rule 4.02, Subd. 5(1)

To conform to the proposed amendment of Rule 34.02 and to explain recent case law concerning the 36-hour rule, amend the sixth paragraph of the comments to read as follows:

"Rule 4.02, subd. 5(1) prescribing the time within which a person arrested without a warrant shall be first brought before the court recognizes that additional time is needed to determine whether to continue the prosecution and to draw the complaint. So there is no requirement that the defendant be brought promptly before the appropriate court after his arrest if the court is in session, but it is necessary under Rule 4.02, subd. 5(1) that the defendant be brought before such court without 'unnecessary delay'. (Compare Rule 3.02, subd. 2.) The 36-hour period does not include the day of arrest, Sundays, or legal holidays. Otherwise the intent of Rule 4.02, subd. 5(1) and Rule 3.02, subd. 2 is the same, namely, that the 36-hour period is not an automatic holding period and that the defendant shall be brought before the court at the earliest possible time within the period. ~~In exceptional cases, however, the prosecuting attorney shall not be precluded by this section from seeking relief pursuant to Rule 34.02.~~ The effect of failure to comply with Rules 4.02, subd. 5(1) and 3.02, subd. 2 on the admission of confessions or other evidence or on the jurisdiction of the court is left to case-by-case development. In State v. Wiberg, 296 N.W.2d 388 (Minn. 1980) the Supreme Court held that violation of the time limits set forth in Rule 4.02, subd. 5(1) does not require the automatic exclusion of statements made which have a reasonable relationship to the violation. Rather, the admissibility of the statements depends on such factors as the reliability of the evidence, the length of the delay, whether the delay was intentional, and whether the delay compounded the effects of other police misconduct. In Wiberg the Supreme Court found a violation of Rule 4.02, subd. 5(1) even though 36-hours had not yet elapsed exclusive of the day of arrest. The court noted that such unexplained delays as occurred in Wiberg should weigh heavily in the trial court's determination of whether to exclude any statements. For the application of this same suppression test to identification evidence see Meyer v. State, 316 N.W.2d 545 (Minn. 1982)."

97. Rule 34.02. Enlargement

The Advisory Committee was concerned that Rule 34.02 is being improperly used to extend the 36 hour time limits between arrest and appearance in court as provided by Rule 3.02, subd. 2(2) (as renumbered) and Rule 4.02, subd. 5(1). To prevent this, amend the rule to read as follows:

> "When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 3.02, subd. 2(2); 4.02, subd. 5(1); 26.03, subd. 17(3); 26.04, subd. 1(3); or 26.04, subd. 2, or except as provided by Rules 29.02, subd. 5(3), 29.02, subd. 6(4), and 28.05, subd. 1, the time for taking an appeal."

C. Rule 34.02 currently allows for an extension of the 36-hour time period by the Court, "for cause shown." This rule is an absolute necessity in certain cases. The 36-hour limit is workable for most situations, but it is not a great deal of time. It must be recognized that police investigators are supposed to work only eight hours a day, although it is quite common for them to work long beyond that, simply to comply with the 36-hour rule. In all but the rarest cases, the officers complete their work and present it to the County Attorney, or release the suspect pending a complaint.

Where the officer cannot complete the investigation in that time period, and where the officer feels release of the suspect pending the complaint is inappropriate, the officer can request the County Attorney to obtain an enlargement order. Often the County Attorney will refuse, and the suspect is released pending complaint.

Where both the officer and the County Attorney feel an extension of time is necessary; e.g., where the crime is serious, where the delay is unavoidable, and where the suspect poses a threat to witnesses or the public, or where the suspect is likely to flee, the County Attorney must make a formal request of the District Court Judge. This is done by a written request signed by the County Attorney laying out the reasons for the delay, and the request usually asks for

an additional 24 hours within which to issue a complaint. Again, the District Court Judge may refuse to sign such an order if it is felt not to be necessary.

The entire process is designed for those serious cases where 36 hours is simply not enough time to complete the investigation, and where release of the suspect is dangerous or otherwise inappropriate. The rule contemplates several levels of review, including the independent judgment of the District Court Judge.

The Honorable Judge Harold Kalina, Chief Judge of the Hennepin County District Court, informs me that in his experience, enlargement requests are very rare. He states that he reviews each order to make sure that they are necessary. Judge Kalina also states that he has not seen, nor heard of, any abuses of this procedure.

The statistics in Hennepin County bear out the fact that an enlargement of time is rarely used. In 1982 over 5,000 cases were reviewed by the Criminal Division of the Hennepin County Attorney's Office. Three thousand three hundred and ninety cases were charged involving felony and gross misdemeanor defendants. According to the Hennepin County Clerk of District Court, no more than 20 such enlargement orders were granted in 1982.

The existing rule also provides some protection for arrested suspects. Occasionally, the further investigation clears the suspect, or at least makes the County Attorney decide not to issue a complaint. This occurred four times in Hennepin County in 1982. Although these four individuals spent an additional day in jail, had a hasty charging decision been made on probable cause without opportunity for additional investigation these persons may have been charged and thereby spent more time in jail and incurred the costs of attorneys' fees and bond.

In summary, the existing procedure is necessary in certain cases. The rule is being used as was intended, that is, only for serious and complex crimes where release of the suspect pending a complaint poses a danger to witnesses or the public at large, or where it can be documented that the suspect is likely to flee.

The committee, in its comments, cites the case of St. v. Wiberg, 296 N.W.2d 388, (Minn. 1980), as a case requiring review of this rule. The cite is inappropriate since in Wiberg the issue as to the admissibility of a confession arose even though the 36-hour period had not yet expired. Nothing in this rule, as it exists currently, prevents a defendant from raising issues as to the admissibility of evidence either during or after the expiration of the 36-hour time period.

The present rule providing for enlargement of the 36-hour time period should be maintained, and the proposed amendments, paragraphs 10 and 97 of the report of the Supreme Court Advisory Committee on the Rules of Criminal Procedure should be rejected by this Court.

COMMENTS AND PROPOSALS

PARAGRAPH 24

COMMENTS TO RULE 9.01, SUBD. 1

A. Restatement of the Comments are not being made as the proposed change is in addition to existing comments.

B. The proposed comment change to Rule 9.01, Subd. 1 is:

Comments on Rule 9.01, Subd. 1

To explain recent case law concerning violation of the prosecution's duty to disclose under Rule 9.01, subd. 1, amend the fourth paragraph of the comments by adding the following language at the end of that paragraph:

"Intentional abuses of the discovery process by the prosecution will not be tolerated and will result in reversal of the judgment of conviction when the facts warrant that. State v. Smith, 313 N.W.2d 429 (Minn. 1981), State v. Zeimet, 310 N.W.2d 552 (Minn. 1981). Additionally even negligent failures by the prosecution to disclose under the rules will require a new trial for a convicted defendant when prejudice is shown even though there is otherwise sufficient evidence on the record to support the conviction, State v. Schwantes, 314 N.W.2d 243 (Minn. 1982), State v. Hall, 315 N.W.2d 223 (Minn. 1982)."

C. As drafted, the proposed comment to Rule 9.01, Subd. 1, may imply that prosecutors attempt to circumvent rules of discovery. The vast majority of prosecutors consciously endeavor to comply with the Rules of Discovery. While four cases are cited in the comment reflecting the Supreme Court's interpretation of the Rules of Criminal Procedure the reality of intentional or negligent abuse by defense counsel will never become an appellate issue.

Pretrial discovery for the prosecution has been an empty promise by and large from our experience. Requests for disclosure by prosecutors are typically met with such responses as defense counsel doesn't know who will be called as witnesses, no written statements of the witnesses have been taken, or the defense witnesses have not been located. Many defense lawyers freely concede they do not take written statements or make notes of conversations with defense witnesses so as better to avoid having to turn over the information to the prosecutor.

Unlike the prosecution, the defense has opportunities from the beginning to the end of the criminal action to gain information about the prosecution's case. Search warrant affidavits, statements of probable cause in complaints, and grand jury transcripts are all sources of information regarding the

State's case and what witnesses the State will need to call to establish the elements of the offense. Moreover, after successful completion of the prosecution, appellate counsel has access to the prosecution file and again has an opportunity to see if the prosecution has complied fully with the Rules of Discovery. Even in a situation where an unethical prosecutor is trying to conceal evidence, these sources of information at least provide avenues for defense counsel to explore in an attempt to assure that disclosure has been complete.

However, the prosecution has no such leads to pursue. At best a notice of defense may provide the information that the defense may intend to call some witnesses, but no clues as to their identities. Therefore, the only way for the prosecution to determine whether a defense witness has given a discoverable statement is to ask the witness when he testifies whether he gave a statement or whether anyone took substantially verbatim notes of any interviews with him. Although this sometimes reveals violations of the rules and results in the disclosure of the material, the lateness of the disclosure prevents effective use of any material obtained.

Judicial intervention in the discovery process has not been a solution. No practical method of detecting the failure to comply exists because most judges refuse to inspect defense counsel's files to determine whether there has been compliance.

Thus, the prosecution is left without an adequate method of determining whether all discoverable material has been turned over.

Additionally, even if discoverable material is found to have been concealed by the defense, many judges seem reluctant to impose sanctions on noncomplying defense counsel, even in cases of deliberate violation. Perhaps because of the relative novelty of the availability of disclosure to the prosecution, santions are rarely imposed on defense counsel who fail to comply with the rules. Additionally, the remedy of excluding the evidence not disclosed, see State v. Chamberlain, (Writ of Mandamus filed 10-16-75) is extremely rarely applied.

So, the prosecution does not have an adequate method of determing whether all discoverable material has been turned over and even when discoverable material is found to have been concealed, defense counsel are virtually never disciplined, and exclusion of the concealed evidence is almost unheard of.

The rules regarding disclosure are adequate, with the exception of not providing a remedy for the prosecution in cases of nondisclosure or tardy disclosure. The rules should either be amended to provide sanctions for nondisclosure, or a strong message in the comments communicated to the District Bench that it will have support in the Supreme Court to fashion remedies for nondisclosure by defense counsel.

COMMENTS AND PROPOSALS

PARAGRAPHS 21 and 25

RULE 9.01 SUBD 1(5)

A. Current Rule 9.01 Subd. 1(5)

Rule 9.01. Disclosure by Prosecution

Subd. 1. Disclosure by Prosecution Without Order of Court. Without order of court, the prosecuting attorney on request of defense counsel shall, before the date set for Omnibus Hearing provided for by Rule 11, make the following disclosures:

* * *

(5) Criminal Record of Defendant. The prosecuting attorney shall inform defense counsel of the record of prior convictions of the defendant that is known to the prosecuting attorney provided the defense counsel informs the prosecuting attorney of the record of defendant's prior convictions known to the defendant.

B. Proposed Rule 9.01 Subd. 1(5)

Rule 9.01, Subd. 1(5) Criminal Record of Defendant.

In State v. Wenberg, 289 N.W.2d 503 (Minn. 1980) the Supreme Court held that before a witness with prior felony convictions takes the stand, the trial court should determine whether those prior convictions may be used to impeach the witness. In order to determine whether such an issue exists, the prosecution should be required to notify the defendant of the criminal record of proposed defense witnesses as well as the criminal record of the defendant himself. To accomplish this amend Rule 9.01, subd. 1(5) to read as follows:

"(5) Criminal Record of Defendant and Defense Witnesses. The prosecuting attorney shall inform defense counsel of the records of prior convictions of the defendant and of any witnesses disclosed under Rule 9.02, subd. 1(3)(a) that ~~is~~ are known to the prosecuting attorney provided the defense counsel informs the prosecuting attorney of ~~the~~ any such records of ~~defendant's prior convictions~~ known to the defendant."

Comments on Rule 9.01, Subd. 1(5)

To explain the proposed amendment of Rule 9.01, subd, 1(5) and the case of State v. Wenberg, 289 N.W.2d 503 (Minn. 1980) add the following paragraph after the fourteenth paragraph of the comments:

"Rule 9.01, subd. 1(5) also provides for the reciprocal discovery of the criminal records of any defense witness disclosed to the prosecution under Rule 9.02, subd. 1(3)(a). Under Rule 9.03, subd. 2 there is a continuing duty to disclose such information up through the time of trial. If the prosecutor intends to impeach the defendant or any defense witnesses with evidence of prior convictions the prosecutor is required by State v. Wenberg, 289 N.W.2d 503 (Minn. 1980) to request a pretrial hearing on the admissibility of such evidence under the Rules of Evidence. The pretrial hearing may be made a part of the Omnibus Hearing under Rule 11 or the pretrial conference under Rule 12. See Rule 609 of the Minnesota Rules of Evidence for the standards governing the use of criminal convictions to impeach a witness."

C. - (CONTINUED ON NEXT PAGE)

C. The proposed amendment should be changed by adding the words "and defense counsel" after "defendant" in the last line and before the period so that it reads as follows:

> "(5) Criminal Record of Defendant and Defense Witnesses. The prosecuting attorney shall inform defense counsel of the records of prior convictions of the defendant and of any defense witnesses disclosed under Rule 9.02, subd. 1(3)(a) that ~~is~~ are known to the prosecuting attorney provided the defense counsel informs the prosecuting attorney of ~~the~~ any such records ~~of defendant's prior convictions~~ known to the defendant and defense counsel."

Amend Rule 9.02, subd. 1(3)(a) so that it reads as follows:

> "(a) Notice of Defense. The defendant shall inform the prosecuting attorney in writing of any defense, other than that of not guilty, on which the defendant intends to rely at the trial, including but not limited to the defense of self-defense, entrapment, mental illness or deficiency, duress, alibi, double jeopardy, statute of limitations, collateral estoppel, defense under Minn. Stat. § 609.035, or intoxication. The defendant shall supply the prosecuting attorney with the names and addresses of persons whom the defendant intends to call as witnesses at the trial together with their prior record of convictions, if any, within his actual knowledge.
>
> If the defendant gives notice that he intends to rely on the defense of mental illness or mental deficiency he shall also notify the prosecuting attorney whether he also intends to rely on the defense of not guilty."

The amendment as proposed by the Advisory Committee would obligate the prosecutor to disclose the defense witnesses' records as well as the defendant's and state's witnesses' records as is currently required. Despite this additional obligation no corresponding obligation is made on defense counsel to disclose criminal records of witnesses he intends to call. Fundamental fairness requires that except as the defendant's constitutional rights otherwise prohibit, defense counsel should be under the same obligation as the prosecutor

to disclose the criminal history of his witnesses. The change in the proposed amendment to Rule 9.01, subd. 1(5) and the new proposal to amend Rule 9.02, subd. 1(3)(a) would impose upon defense counsel the same obligation as is presently imposed upon the prosecution. The language in the proposal to amend Rule 9.02, subd. 1(3)(a) is from Rule 9.01, subd. 1(1)(a), the parallel obligation of the prosecutor.

This comment and the comment to Rule 9.02, subd. 1(3)(a) should both be amended by adding the statement:

> "Defense counsel is under the same continuing duty as the prosecutor to disclose the criminal history of all witnesses he intends to call at trial."

COMMENTS AND PROPOSALS

NO PARAGRAPH CITED

RULE 9.02, SUBD 1(3)(b)

A. The current rule is:

Rule 9.02. Disclosure by Defendant

Subd. 1. Information Subject to Discovery Without Order of Court. Without order of court, the defendant on request of the prosecuting attorney shall, before the date set for the Omnibus Hearing provided for by Rule 11, make the following disclosures:

(3) *Notice of Defense and Defense Witnesses and Criminal Record.*

(b) Statements of Defense Witnesses. The defendant shall permit the prosecuting attorney to inspect and reproduce any relevant written or recorded statements of the persons whom the defendant intends to call as witnesses at the trial and which are within the possession or control of the defendant and shall permit the prosecuting attorney to inspect and reproduce any written summaries within his knowledge of the substance of any oral statements made by such witnesses to defense counsel or obtained by the defendant at the direction of his counsel.

B. This rule was not considered by the committee proposed amendments to the Rules of Criminal Procedure.

C. We propose the following amendment: (SEE NEXT PAGE)

COMMENTS AND PROPOSALS

PARAGRAPH 22

RULE 9.02, SUBD. 1(3)(c)

A. The current Rule is:

Rule 9.02. Disclosure by Defendant

Subd. 1. Information Subject to Discovery Without Order of Court. Without order of court, the defendant on request of the prosecuting attorney shall, before the date set for the Omnibus Hearing provided for by Rule 11, make the following disclosures:

(3) *Notice of Defense and Defense Witnesses and Criminal Record.*

(c) Alibi. If the defendant intends to offer evidence of an alibi, the defendant shall also inform the prosecuting attorney of the specific place or places where the defendant contends he was when the alleged offense occurred and shall inform the prosecuting attorney of the names and addresses of the witnesses he intends to call at the trial in support of the alibi.

B. Proposed rule is to add -

22. Rule 9.02, Subd. 1(3)(c) Alibi.

This rule requires defense counsel to disclose to the prosecuting attorney the names of any alibi witnesses. Under Rule 9.03, subd. 2 which requires a continuing duty to disclose, the prosecuting attorney should be required to inform defense counsel of any rebuttal witnesses to the alibi defense. However, to assure that this obligation is understood, amend Rule 9.02, subd. 1(3)(c) by adding the following sentence at the end:

"As soon as practicable, the prosecuting attorney shall then inform the defendant of the names and addresses of the witnesses the prosecuting attorney intends to call at the trial to rebut the testimony of any of the defendant's alibi witnesses."

AMENDMENT TO RULE 9.02, Subd. 1(3) (b)

(b) Statements of Defense and Prosecution Witnesses. The defendant shall permit the prosecuting attorney to inspect and reproduce any relevant written or recorded statements of the persons whom the defendant intends to call as witnesses at the trial and also statements of prosecution witness obtained by the defendant, defense counsel, or persons participating in the defense, and which are within the possession or control of the defendant and shall permit the prosecuting attorney to inspect and reproduce any written summaries within his knowledge of the substance of any oral statements made by such witnesses to defense counsel or obtained by the defendant at the direction of his counsel.

COMMENT

In State v. Stutelberg _____ N.W.2d ____ (Minn., filed Jan. 21, 1983), the Court said that the prosecution had the duty of disclosing prior to trial a statement made by a defense witness to the police. This proposed amendment imposes upon the defense the same obligation imposed upon the prosecution in Stutelberg. Except in those instances where the defendant's Constitutional rights require otherwise, information through discovery should be equally available to both the prosecution and the defense.

C. The existing Rules of Criminal Procedure conrrectly make no specific reference to Rebuttal witnesses. The practicalities of rebutting opposing evidence are often not available until the midst of trial. Should statements, in fact be taken, such would be available to opposing counsel prior to the witnesses' testifying.

A fear among prosecutors to the proposed amendment is that the defense will "try on" defenses until they find one that fits.

The prosecution case and evidence are limited in scope by the charge and the elements of the crime, therefore the State cannot alter its theory of the case based on disclosure by the defense, except within the narrow circumstances under which amendments of complaints and indictments are permitted.

The defense is not so restrained, and the proposed amendment permits the defense to give notice of defense, obtain the names of the State's rebuttal witnesses, and then abandon the defense for another as soon as defense counsel learns that the State can rebut his alibi defense. No limit to the number or variety of such experiments exists, and the State is powerless to demonstrate to the jury that the defense they hear may be the second, third, or fourth set of alibi witnesses tested by the defense by having checked to see if the prosecution could rebut their testimony.

We oppose this amendment.

COMMENTS AND PROPOSALS

PARAGRAPH - NOT ADDRESSED IN
PROPOSED AMENDMENTS TO RULES
OF CRIMINAL PROCEDURE

RULE 9.02 SUBD. 1(3)(d)

A. Current Rule 9.02 Subd. 1(3)(d)

Rule 9.02. Disclosure by Defendant

Subd. 1. Information Subject to Discovery Without Order of Court. Without order of court, the defendant on request of the prosecuting attorney shall, before the date set for the Omnibus Hearing provided for by Rule 11, make the following disclosures:

* * *

(3) Notice of Defense and Defense Witnesses and Criminal Record.

* * *

(d) Criminal Record. Defense counsel shall inform the prosecuting attorney of any prior convictions of the defendant provided the prosecuting attorney informs defense counsel of the record of prior convictions known to the prosecuting attorneys.

B. No recommendation was made regarding this rule by the committee submitting the proposed amendments to Minnesota Rules of Criminal Procedure.

C. Amendment to Rule 9.02, Subd. 1 (3) (d)

(d) Criminal Record. Defense counsel shall inform the prosecuting attorney of any prior convictions of the defendant provided the prosecuting attorney informs defense counsel of the record of prior convictions known to the prosecuting attorneys. The prosecuting attorney may serve upon defense counsel a written request for the admission of the truth of specific prior convictions of the defendant. Copies of documents showing the defendant's prior convictions shall be served at the time of the request. Within 20 days after service of the request defense counsel shall serve an answer which either admits or denies each conviction. The written answer shall be signed by the defendant and defense counsel. Any conviction admitted under this rule is conclusively established for the purpose of both Minn. R. Evid. 609 and sentencing under the Sentencing Guidelines. If the defendant fails to admit a specific prior conviction and the prosecuting attorney thereafter proves the truth of such conviction, he may apply to the court for an order requiring the defendant to pay the reasonable costs incurred in making such proof.

COMMENT

Defense counsel is already required under Rule 9.02, Subd. 1 (3) (d) to disclose the defendant's record. This proposed amendment merely provides a mechanism for enforcing the disclosure and for conserving limited governmental resources. No one knows a defendant's criminal record as well as the defendant. Even with the growing sophistication of criminal justice records systems, it is difficult to discover a defendant's record and obtain certified copies of judgements of conviction. This is particularly true in jurisdictions outside the State of Minnesota. A defendant should not be given a benefit he or she is not entitled to merely because of the ackwardness of governmental machinery in some foreign jurisdictions. The proposed amendment protects the defendant as well as the prosecuting authority. The prosecuting authority is not allowed to go on "fishing expeditions" but must have some documentation to support the request for the admission. If the defendant admits the conviction, the prosecuting attorney may use it for impeachment under Minn. R. Evid. 609, if the court allows. Also if admitted, the prior conviction may be used by the court in determining the defendant's criminal history under the Sentencing Guidelines. If objected to, the defendant may be subject to paying the prosecuting attorney's costs if the prosecuting attorney subsequently proves the conviction. The proposed amendment is based on Minn. R. Civ. P. 36.01, 36.02, and 37.03.

COMMENTS AND PROPOSALS

NEW PROPOSED SECTION

RULE 9.02, SUBD. 5

A. No current rule presently exists.

B. No committee proposal addressing sanctions.

C. We propose the adoption of the following rule designated as 9.02, Subd. 5.

Sanctions

Rule 9.02 should be amended by adding Subd. 5.

Subd. 5. Failure to Disclose. Failure by defense counsel to make timely disclosure under Rule 9.02, subd. 1 or subd. 2 renders the evidence which is the subject matter of the undisclosed material inadmissible for any purpose.

The comment to Rule 9.02 should be amended by adding the following paragraph at the end:

Rule 9.02, Subd. 5 provides the sanction for failure of the defense counsel to disclose discoverable material. The sanction not only renders the undisclosed material inadmissible, but also any evidence on the subject matter of the undisclosed material. This Rule follows State v. Chamberlain (Writ of Mandamus filed 10/16/75) in which the Supreme Court affirmed exclusion of alibi testimony for failure to disclose the names of alibi witnesses.

COMMENTS AND PROPOSALS

PARAGRAPHS 45 and 52

RULE 15.07

A. The current Minnesota Rules of Criminal Procedure provide that:

> With the consent of the prosecuting attorney and the approval of the court, the defendant shall be permitted to enter a plea of guilty to a lesser included offense or to an offense of lesser degree. Upon motion of the defendant the court may accept a plea of guilty to a lesser included offense or to an offense of lesser degree. In either event, the plea may be entered without amendment of the indictment, complaint or tab charge.

The Minnesota Supreme Court recently held that:

> [I]n order to successfully oppose a defendant's motion to plead guilty to a lesser included offense or an offense of lesser degree, the prosecutor must demonstrate to the trial court that there is a reasonable likelihood the State can withstand a motion to dismiss the charges at the close of the State's case in chief . . . If the trial court is convinced that at trial the prosecutor can introduce evidence reasonably capable of supporting the offense charged, it should refuse to accept the tendered guilty plea.

State v. Carriere, 290 N.W.2d 618, 620 (Minn. 1980) The Court further noted that the "showing required of the prosecutor is intended to be in the nature of an offer of proof regarding the evidence he expects to introduce at trial." Id. at 620.

B. The proposed amendments to the Minnesota Rules of Criminal Procedure provide that:

> Upon motion of the defendant and hearing thereon the court may accept a plea of guilty to a lesser included offense or to an offense of lesser degree, provided the court is satisfied following hearing that the prosecution cannot introduce evidence sufficient to justify the submission of the offense charged to the jury or that it would be a manifest injustice not to accept the plea.

The proposed amendment deviates from the holding of the Carriere case. First, whereas the Carriere case merely requires that a prosecutor demonstrate that there is a reasonable likelihood that the State can withstand a motion to dismiss, the proposed amendment seems to require that the prosecutor show that he/she can withstand a motion to dismiss. Second, unlike the holding in Carriere, the proposed amendment permits a trial court to accept a plea of guilty to a lesser included offense over the objections of the prosecution if "it would be a manifest injustice not to accept the plea."

C. Advantages of the Current Law

1. The current law which substantially limits judicial power to accept guilty pleas over the objection of a prosecutor serves to help preserve the separation of powers by eliminating "the danger of judicial intrusion into an area reserved for prosecutorial discretion." State v. Carriere, 290 N.W.2d at 620.

2. Under the current law, a prosecutor has appropriate control over the outcome of his/her case, which is the prosecutor's responsibility.

3. Under the current law, if a judge is concerned about manifest injustice, such concern can be reflected in sentencing rather than in reducing the charged offense.

Proposed Amendment

1. The standard of "manifest injustice" is vague. If a judge interprets the standard broadly, the judge may assume a substantial amount of discretion in deciding whether to accept a guilty plea over a prosecutor's objections.

2. By expanding a judge's power to accept guilty pleas over the objection of the prosecution, the proposed amendment would damage the separation of powers by permitting judicial intrusion into prosecutorial powers. State v. Carriere, 290 N.W2d at 620; State Carlson, 555 P.2d 269, 272 (Alaska 1976.)

3. Any involvement by a judge in plea negotiations would detract from the judge's neutrality and would present a substantial danger of unintentional coercion of defendants who might likely view with concern the judge's participation as a state agent in the negotiating process. State v. Carlson, 555 P.2d at 272; People v. Osin, 13 Cal. 3d 937, 120 Cal. Rptr. 65 533 P.2d 193 (1975.)

Proposals

1. Eliminate the provision in the proposed rules which allows a judge

to accept a guilty plea over prosecutor's objections if the judge acts to prevent manifest injustice.

2. Rewrite the proposed rule so that the standard in the rule is consistent with the "reasonable likelihood" standard in the Carriere case.

3. Indicate in the proposed rule that the prosecutor's offer of proof is to be made after the evidentiary hearing. Such requirement would make the rule consistent with State v. Carriere, 290 N.W.2d at n. 4.

COMMENTS AND PROPOSALS

PARAGRAPH 59 & 60

RULE 18.05, SUBD. 1

A. The current Rule is 18.05, Subd. 1

Rule 18.05. Record of Proceedings

Subd. 1. Verbatim Record. A verbatim record shall be made by a reporter or recording instrument of the evidence taken before the grand jury and of all statements made and events occurring while a witness is before the grand jury. The record shall not be disclosed except to the court or prosecuting attorney or unless the court, upon motion by the defendant for good cause shown, or upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury, orders disclosure of the record or designated portions thereof to the defendant or his attorneys.

B. The Proposed Rule of Rule 18.05, Subd. 1 is:

Rule 18.05. Record of Proceedings

Amend subdivision 1 of this rule to read as follows:

"Subd. 1. Verbatim Record. A verbatim record shall be made by a reporter or recording instrument of the evidence taken before the grand jury and of all statements made and events occurring ~~while a witness is~~ before the grand jury except during deliberations and voting of the grand jury. The record shall not be disclosed except to the court or prosecuting attorney or unless the court, upon motion by the defendant for good cause shown, or upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury, orders disclosure of the record or designated portions thereof to the defendant or his attorneys."

60. Comment on Rule 18.05

To explain the proposed amendment of Rule 18.05, amend the paragraph of the comments concerning that rule to read as follows:

"Rule 18.05, subd. 1, providing for a verbatim record of ~~the evidence taken~~ all statements made and events occurring before the grand jury except during deliberations and voting, supersedes that portion of Minn. Stat. §628.57 (1971) which provides that the minutes of the evidence taken before the grand jury shall not be preserved. (Minn. Stat. §§628.64, 628.65, 628.66 (1971) are not affected.) This rule as amended is similar to the special rule of practice for the First Judicial District which was upheld by the Supreme Court in State v. Hejl, 315 N.W.2d 592 (Minn. 1982) as being consistent with the original language of Rule 18.05. The purpose of Rule 18.05 as amended is to assure that everything said or occurring before the grand jury will be recorded except for during deliberations and voting. This would include any statements made by the prosecuting attorney to the grand jury whether or not any witnesses were present. Of course, under Rule 18.04 during deliberations and voting only grand jury members may be present."

C. The proposed amendment to Rule 18.05 would require that all communications between the county attorney and the grand jury be recorded. Under the existing rule, all testimony or other statements made in the presence of a witness are recorded, but the legal advice given to the grand jury by the county attorney is not recorded.

This proposed rule will, under current Minnesota practice, discourage use of the grand jury and will tend to cause more indictments in those cases presented to grand juries. If the rule is intended to furnish an indicted defendant with all legal advice furnished that may have affected the decision to indict, it fails to recognize the realities inherent in providing legal advice to a continuing grand jury.

The existing rule allows a prosecutor to be frank and candid in presenting both the legal strengths and weaknesses of a case under consideration by the grand jury. Total candor is encouraged by the present rule that assures that legal advise, as distinguished from evidence, will not be discoverable. Where the law pertaining to a case is not clearly settled, the recording of prosecutorial advice is likely to discourage the giving of advice that would resolve legal issues in favor of the suspect.

In jurisdictions where serious criminal charges can only be brought by grand jury indictment, there may be need to record the prosecutor's legal advice to prevent the grand jury from becoming a "rubber stamp" to charge cases. No such need exists here. In Minnesota, approximately 99% of all felony cases are charged by complaint, rather than by grand jury indictment. Under Hennepin County practice, approximately 75% of homicide cases considered by the grand jury do not lead to an indictment for first degree murder. In the vast majority of cases now presented to a grand jury in Minnesota, the prosecutor has the option of issuing a criminal complaint without grand jury presentation. The proposed rule, therefore, is likely to disfavor grand jury consideration of criminal cases, a result that is not in the best interests of the criminal justice system.

Adequate grounds now exist for dismissal of any grand jury indictment that is unwarranted. See Rule 17, Rules of Criminal Procedure. Recording of legal advice given the grand jury is not necessary to permit the court to review the evidence which led to indictment.

A practical problem in applying the proposed rule flows from the fact that grand juries hear many cases during one term of service. A typical Hennepin County Grand Jury will consider evidence regarding 15 different cases, most of them homicides. Advice given to one grand jury on the homicide laws is interwoven within numerous different presentations. Clearly, one indicted defendant has no right to invade the transcript of another suspect's grand jury investigation. Nor is it practical to expect the prosecutor to make a self-contained, largely redundant, exposition of the relevant laws for each case. The present Criminal Rules, by permitting discovery of testimony while precluding discovery of legal advice, strikes a logical and fair balance.

COMMENTS AND PROPOSALS

PARAGRAPH 68

RULE 20.02 SUBD. 8(4)

A. The current Rule is 20.02, Subd. 8 (4):

> (4) *Continuing Supervision.* In felony and gross misdemeanor cases only, the trial court shall be notified of any proposed termination of the civil commitment, and the court, after notice to the parties, shall hold a hearing thereon. If the court determines that the defendant is mentally ill or deficient and dangerous to the public, the defendant shall not be discharged from civil commitment. Otherwise, the civil commitment shall be terminated and the defendant discharged therefrom.
>
> **(Amended March 31, 1977, effective July 1, 1977.)**

B. The Proposed Rule of Rule 20.02, Subd. 8(4) is:

68. Rule 20.02, Subd. 8(4) Continuing Supervision.

Amend this rule to read as follows:

"(4) Continuing Supervision. In felony and gross misdemeanor cases only, the trial court and the prosecuting attorney shall be notified of any proposed institutional transfer, partial hospitalization status, and any proposed termination, discharge, or provisional discharge of the civil commitment~~, and the court, after notice to the parties, shall hold a hearing thereon. If the court determines that the defendant is mentally ill or deficient and dangerous to the public, the defendant shall not be discharged from civil commitment. Otherwise, the civil commitment shall be terminated and the defendant discharged therefrom.~~ The prosecuting attorney shall have the right to participate as a party in any proceedings concerning such proposed changes in the defendant's civil commitment or status."

C. Since this section of the Rules of Criminal Procedure deals with the issue of discharge from a facility after a finding of Not Guilty by Reason of Mental Illness, we propose to retain jurisdiction in the court prior to final discharge.

The reasons for retaining court jurisdiction include the following:

1. The court has a more direct connection to the public than either a review board or medical officer.

2. Most individuals coming within this category, and all those persons found mentally ill and dangerous have committed the more serious crimes or violent acts.

3. The court will have more specific information regarding the facts and circumstances of the criminal and psychiatric information and can weigh all the information both past and current.

4. Those persons who would not be found dangerous along with being mentally ill can be released by the medical staff as their case is not presented to the special review board.

COMMENTS AND PROPOSALS

PARAGRAPHS 76 and 82

RULE 26.03 SUBD. 11 (h) (i)

A. Under the current rule, the prosecution argues first and the defense last.

The principal difficulty with the current rule is that the party with the burden of proof -- the State -- argues first, rather than last. It is generally agreed that the party arguing last has two advantages: the opportunity to counter the arguments of the party going first, and to have the last word, so to speak.

In all other jurisdictions (except Florida which is a hybrid), the State argues last, and has the opportuntity for rebuttal. In Minnesota, in civil trials, the plaintiff argues last. This is based in large measure on the premise that the party with the burden should go last.

Under the current system, the prosecution has to anticipate defense argument and attempt to counter it. In addition, because of the wider latitude given the defense in argument, the prosecution suffers the dilemma of perhaps reaching too far, inviting objection or error or being less than an effective advocate due to caution.

B. The amendment provides that the defense goes first, the prosecution next, and the defense gets rebuttal. In cases of clearly improper defense argument, the prosecution gets surrebuttal.

C. The objections to this amendment are several.

Rather than remedy the inequity of the current rule, it exacerbates it. The defense gets two chances to argue, and the State, which has the burden of proof, does not get to go last or to have rebuttal.

Furthermore, in every case there is apt to be confusion and lengthy delays while counsel and the court decide whether the defense made clear distinctions in its rebuttal by introducing no new issues of law or fact or used improper argument allowing the prosecution surrebuttal.

Finally, there is no logic to the amendment, it creates more inequity, and solves none of the problems caused by the current rule.

We propose if any change is possible the defense argue first and the State argue last. This is consistent with our civil rules, with other jurisdictions, and with the basic premise that the party with the burden of proof should argue last.

COMMENTS AND PROPOSALS

PARAGRAPH 87

RULE 27.04

A. There is no present rule as to procedure for the revocation of probation.

B. [Refer to Paragraph 87, page 29 through page 31. Refer to comments Paragraph 90, page 34 to page 35] Special reference to Subd. 2(4):

> "(4) Time of Revocation Hearing. The court shall set a date for the revocation hearing to be held within a reasonable time before the court which granted probation. If the probationer is in custody as a result of the revocation proceedings, the revocation hearing shall be held within seven days. If the probationer has allegedly violated a condition of probation by commission of a crime, the court may, with the consent of the probationer, postpone the revocation hearing pending disposition of the criminal case whether or not the probationer is in custody.

C. The proposed rule's insistence on a final revocation hearing within seven days of a probationer's first appearance when he is in custody has substantial practical problems.

1. The defendant under the proposed rule is the only one who can secure a continuance.

2. The flow of information to a prosecutor's office, since the charge originates with the court, may allow for less than seven days before hearing.

3. It may not be possible to properly prepare within that time period.

4. It may not be possible to subpoena witnesses within that time period.

5. Discovery may not realistically be accomplished within that time period.

6. Evidence, in a new criminal charge, may be in the process of scientific analysis with the results unavailable.

7. Assuming the proposed procedures do not raise issues of res judicata or due process of law claims, there is a practical impact of granting "use immunity" if the revocation is for

> a new pending criminal charge. The concern is not as much one regarding the accused's actual statements as it is the "derivative use." With a new pending criminal charge, on-going investigaton may be taking place. It may be difficult if not impossible to combat the claim the desired evidence in the new charge was derived from testimony and did not originate from an independent source.

There are perhaps two ways of resolving these problems. First, the proposed rule should abandon the seven-day requirement when the probationer is in custody and the alleged violation is the commission of a new felony. In accordance with Morrissey, a preliminary hearing should be promptly held to determine probable cause. A final hearing then can be set under the "reasonableness" standard of Morrissey, which indicates that sixty days is not unreasonable. The State can then insure that, if necessary, the underlying crime is tried prior to the hearing.

A second alternative is to abandon the entire conflict as to the timing of the revocation hearing when the subject is a new felony by requiring that, when the violation is the commission of a felony, the final revocation hearing not be held until after the disposition of the felony. This alternative would also require a preliminary hearing to determine probable cause, pursuant to Morrissey. Because the proposed rule provides for a right to bail, however, this procedure would probably meet constitutional guidelines even if the probationer remained in custody pending the final revocation hearing.

Under these alternatives, a subsequent revocation hearing would avoid duplication, time and expense. If the probationer was convicted at trial, the fact-finding process on the violation would be very simple. Moreover, a subsequent revocation hearing is more just to the probationer. If the probationer is acquitted at trial or if the charge is dismissed, the court is then able to consider those facts in determining whether to continue with the warrant or summons or whether to revoke probation. If the probationer is

convicted at trial, it is as a result of a higher standard of proof. Under the current proposal, a probationer could be revoked for committing a new felony of which he was later acquitted or was dismissed. This is a harsh result to the probationer, although constitutional, and does not generally coincide with current practice in Hennepin County.