STATE OF MINNESOTA

IN SUPREME COURT

C1-84-2137

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF CRIMINAL PROCEDURE

IT IS HEREBY ORDERED that a hearing be had before this Court in the courtroom of the Minnesota Supreme Court, State Capitol, on November 2, 1989, at 2:00 p.m., to consider the adoption of the Proposed Amendments to the Minnesota Rules of Criminal Procedure.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 230 State Capitol, St. Paul, Minnesota 55155, on or before October 24, 1989, and

2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before October 24, 1989, and

3. All persons wishing to obtain copies of the Proposed Amendments to the Minnesota Rules of Criminal Procedure shall write to the Clerk of the Appellate Courts. Copies will be available on and after September 1, 1989.

Dated: August 29, 1989

BY THE COURT

Peter S. Popovich

Peter S. Popovich, Chief Justice

SUPREME COURT ADVISORY COMMITTEE
RULES OF CRIMINAL PROCEDURE
2800 MINNESOTA WORLD TRADE CENTER
SAINT PAUL, MINNESOTA 55101
TELEPHONE (612) 291-9333

October 30, 1989

Chief Justice Peter S. Popovich
Minnesota Supreme Court
230 State Capitol
St. Paul, MN 55155

Dear Chief Justice Popovich:

On behalf of the Supreme Court Advisory Committee on Rules of Criminal Procedure, I deliver to you herewith copies of a Supplementary Report to the Minnesota Supreme Court from the Advisory Committee.

Respectfully submitted,

Frank Claybourne

Frank Claybourne, Chairman
Supreme Court Advisory
Committee on Rules of
Criminal Procedure

FC:dj102
Enclosure
c: Members of the Supreme Court
Advisory Committee on Rules
of Criminal Procedure

SUPPLEMENTARY
REPORT TO THE MINNESOTA SUPREME COURT
FROM
THE SUPREME COURT ADVISORY COMMITTEE ON
RULES OF CRIMINAL PROCEDURE

On September 1, 1989, the Advisory Committee submitted its report to the Minnesota Supreme Court along with Proposed Amendments to the Minnesota Rules of Criminal Procedure. Since that time, the Committee has again reviewed the report and decided that it would be appropriate to further comment on the Committee's consideration of the Uniform Rules of Criminal Procedure (1987) which do not implement the American Bar Association Standards for Criminal Justice (1985).

With some exceptions, the Committee considered but decided not to recommend adoption of those Uniform Rules which do not also implement the American Bar Association Standards. The Committee was advised by the draftsman of the Uniform Rules that generally the Uniform Rules not recommended are consistent with present Minnesota Rules. However, the Committee withheld recommendation believing that the respective Rules differ sufficiently in terminology so that members of the bench and bar would believe, with attendant uncertainty and possible litigation, that substantial changes were being made. Following the Court's action on the present recommendations, the Court is not foreclosed, at some future time, from giving the Uniform Rules further consideration if it so desires.

Dated: October 30, 1989

Respectfully submitted,

Frank Claybourne

Frank Claybourne, Chairman
Supreme Court Advisory Committee
on Rules of Criminal Procedure

SPEAKERS

CRIMINAL RULES HEARING

NOVEMBER 2

1.	Frank Claybourne	Chair, Criminal Rules Committee	**10 minutes**
2.	Hon. Henry McCarr	Judge, Fourth Judicial District Member, Criminal Rules Committee	**5 minutes**
3 .	Hon. George Petersen	Assistant Chief Judge, Second Judicial District	**5 minutes**
4.	Steven Pihlaja	Attorney and Chair, Criminal Law Section, Minnesota State Bar Association	**5 minutes**
5.	William Kennedy David P. Murrin David Knutson	Chief Public Defender Hennepin County Senior Attorney Hennepin Co. Public Defender's Office First Assistant Public Defender Hennepin County	**10 minutes**
6.	Tom Johnson	Hennepin County Attorney	**5 minutes**
7.	Lynn Castner	Criminal Defense Attorney	**5 minutes**
8.	Stephen Rathke	Crow Wing County Attorney Minnesota County Attorneys Association	**5 minutes**
9.	Mitchell L. Rothman	Deputy Minneapolis City Attorney Criminal Division	**5 minutes**
10.	Lucinda Botzek	Attorney and Spokesperson St. Paul Police Department	**5 minutes**
11.	Lawrence Hammerling	Deputy State Public Defender	**5 minutes**
12.	Steven DeCoster	Assistant Ramsey County Attorney	**5 minutes**
13.	Wm. F. Klumpp, Jr.	Assistant Attorney General Criminal Division	**5 minutes**
14.	Mark Rubin	Assistant St. Louis County Attorney	**5 minutes**
15.	David Dobrotka	Deputy Chief of Investigation Minneapolis Police Department	**5 minutes**

MINNESOTA COURT REPORTERS ASSOCIATION

November 1, 1989

Clerk of the Appellate Courts
230 State Capitol
Saint Paul, MN 55155

Re: Opposition to Proposed Amendment
Minnesota Rules of Criminal Procedure
Rule 11.06
~~C8-84-1650~~ C1-84-2137

Dear Gentleperson:

The Minnesota Court Reporters Association is taking a position in opposition to the proposed Rule 11.06.

We feel that by making the Rasmussen Hearing a part of the Onmibus hearing, rather than taking place immediately pre-trial, there would be a greatly increased demand for transcript because the judge hearing the Rasmussen would not be the trial judge. Attorneys wishing the trial judge to be apprised of testimony and rulings made at Rasmussen, both prosecution and defense, would be required to order transcript, which would have to be produced within the strict time constraints imposed by Rule 11.

MCRA is aware of the budgetary problems and complaints made by the state Public Defender's Office, as well as counties, in trying to keep up with their growing transcript bills. Rule 11 would only exacerbate these problems.

In addition, court reporters, already under strict deadlines for appeal and mandatory plea and sentencing transcripts, would be hard pressed to produce yet more transcripts generated by Rule 11.

Very truly yours,

Jane M. Bowman

Jane M. Bowman
President MCRA

PRESIDENT
JANE M. BOWMAN
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St. Paul, MN 55102
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PRESIDENT-ELECT
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RES. (612) 884-0808

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FAX Number (612) 929-1318

MINNESOTA COURT REPORTERS ASSOCIATION

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November 1, 1989

Clerk of the Appellate Courts
230 State Capitol
Saint Paul, MN 55155

RE: Opposition to Proposed Amendment
Minnesota Rules of Criminal Procedure
Rule 28.02, Subd. 9

Dear Gentleperson:

The Minnesota Court Reporters Association is opposed to the proposed Rule 28.02, Subd. 9.

We would suggest that an alternative to the court reporter producing transcript from taped exhibits used in trial, that the party offering the same be charged with the responsibility of offering that transcription along with the exhibit at trial.

While video tapes would not pose the largest problem, they do present an inconvenience, largely because they are not reported during the ordinary course of trial. This would mean that a reporter would have to interrupt the transcription process to watch the video on equipment that is not supplied by the court system. We believe this would be a time, energy and monetary drain to the courts.

The biggest problem we see as a result of this rule is in regard to phone taps, body taps, any recordings by a regulatory office, or home-grown recordings. In this situation, the reporter is unable to make voice identification or ask the speaker for clarification. A poor recording played once or twice for a jury, is what they heard and what the reporter heard. We would be placed in the position of replaying a tape numerous times until a presentable transcript resulted. We would be placed in the position of making decisions about content, which are beyond the province of a court reporter, and, in many cases, not what the jury heard at all. A transcript submitted with a taped exhibit would alleviate potential problems and be the best solution.

Very truly yours,

Jane M. Bowman

OFFICE OF DAKOTA COUNTY ATTORNEY
JAMES C. BACKSTROM
COUNTY ATTORNEY

Dakota County Government Center
1560 West Highway 55
Hastings, Minnesota 55033

Telephone
438-4438
Charles A. Diemer, First Assistant

November 1, 1989

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

RE: Proposed Amendments to the Minnesota Rules of Criminal Procedure
C1-84-2133

Dear Justices:

My office has recently had the opportunity to review the "Proposed Amendments to the Minnesota Rules of Criminal Procedure" recommended the Advisory Committee you appointed. It appears the reasons behind the changes are to create a more uniform, efficient, and fair system for the resolution of criminal cases throughout the State. The Dakota County Attorney's Office firmly believes prompt disposition of criminal cases is in the best interests of everyone. However, I believe many of the changes are unnecessary and will result in significant expense to those who participate directly in the system and the citizens of the State of Minnesota as a whole. Some of my major concerns are as follows:

GUILTY PLEA - MISDEMEANORS

It is my understanding that a proposed amendment to Rule 5.04, Subdivision 2 would allow the court in another jurisdiction to accept a misdemeanor plea committed outside its jurisdiction. A

prosecutor should always be given the opportunity to have inputinto the plea and sentencing process. This is especially true in the areas of fifth degree assault or domestic abuse. We would suggest that the rules be amended to merely allow such a procedure if all parties consent.

OMNIBUS HEARING

My understanding of the amendments to Rule 11.07 and related others would prohibit continuances of Omnibus Hearings past fourteen days "except for good cause related to a particular case" and in no event longer than thirty days. It is further understood that all issues must be decided in writing or orally within the thirty day time period. The comment section to Rule 11.07 would be amended to read "as a general rule of practice" the court should not "bifurcate the omnibus hearing or delay the hearing, or any part of it until the day of trial. To do so, violates the purpose of these rules." Problems exist in that "good cause" is not clearly defined. If the rule is strictly applied by the court system, the net effect would be for all attorneys to be prepared on all issues within fourteen to thirty days after the filing of the complaint. I can only assume the Committee's hope is that by forcing resolution of all issues within thirty days, parties may be more inclined to settle matters which would negate the necessity of trial dates being set. However, I believe the amendment ignores the reality of the

situation in that it would force both sides to attempt a settlement in the case where full discovery has not been completed, defense attorneys have not completed their investigations, and prosecuting attorneys have not had the opportunity to comply with victim notification requirements. Important decisions on criminal matters can only be made when both parties and the court have had the opportunity to collect the necessary data in support of their position. I recently surveyed the Assistant County Attorneys in the Criminal Division of my office who indicated that the number of Omnibus Hearings require witness testimony, would be significantly greater under this proposed rule because neither side is ready to negotiate the case. Substantial increases in the number of contested Omnibus Hearings will result in witness notification problems and requiring many more court appearances by law enforcement officers and other witnesses. This proposal will result in the need for two more prosecutors in my office. Unfortunately, the legislature has limited county spending in the last session, so even if the County Board was willing to spend the money, Dakota County is already at its levy limit. While we agree with the general idea of avoiding delay in the criminal process, this proposed rule change is not the way to accomplish it. In fact, it will have just the opposite effect from what is intended, a bottleneck will occur at the Omnibus Hearing stage. We suggest

no change.

DISCOVERY

I note, with great concern, the amendments to Rule 9.01 which would call for the prosecution to disclose and produce any relevant written or recorded statements "which relate to the case" and shall provide defense counsel with the substance of any oral statements "which relate to the case." The definition of "relate to the case" is confusing and ambiguous, and may include such things as witness scheduling, witness fees, telephone calls received not only by attorneys, but by support staff, calls of concerns from neighbors, pretrial preparation of witnesses by prosecuting attorneys, "crank calls," and human services division information which may be protected by data privacy concerns. This rule would require substantial increases in the amount of time devoted to discovery requests and required notices to defense counsel. Time which we simply do not have staff resources to handle. I believe the current language in the rule is more than adequate to provide proper discovery on the part of the defendant and should not be amended. Current discovery rules are more liberal than the federal rules and certainly provide for fair trials.

The proposed amendment to Rule 9.01, Subdivision 1(3) which requires the prosecution to supply reports on perspective jurors

which again "relate to the case" is also completely inappropriate. It is unclear from the discovery rule that this is limited in any form. It may require us to conduct criminal record checks on all potential jurors, as well as any other information on a juror, which may be in the possession of a government agency. Both the prosecutor and defense should be free to gather their own intelligence information on prospective jurors if they choose to do so without being obligated to show this information with the other side. This is in essence work product of the county attorney which should never be discoverable. This change should also be eliminated.

The proposed amendment to Rule 9.01, Subdivision 1(4) requires notification to defense counsel of any scientific tests or experiments which may preclude any further tests or experiments being conducted and allow the defendant reasonable opportunity to have a qualified expert observe the tests or experiment. Because any examination or tests would have the potential of precluding any further tests or experiments, (i.e. contamination of the sample) the amendment may require notification to any potential defendant. Naturally, some notification would "tip off" a suspect who has not been charged. This is further complicated by the fact that current Minnesota Bureau of Criminal Apprehension tests on drugs takes six to eight weeks. At a minimum, the

amendment should require notification only after the matter has been charged by formal complaint. This proposal needs significantly more study and refinement.

Proposed amendments to Rule 9.01, Subdivision 2 (2) and Rule 9.04 have the potential affect of requiring victims/witnesses to undergo physical examinations, mental examinations, participate in additional line-ups based on such ambiguous terms as "for good cause shown" or "necessary in the interests of justice or a fair trial." It has been my experience that victims/witnesses already consider the criminal justice system impersonal, bureaucratic, and uncaring. These proposed amendments can only serve to increase those feelings. The amendments to the rule make it unclear as to who is to provide the facilities and incur the expense for these examinations and procedures. This is especially of great concern in situations where the victim/witness may be indigent. Dakota County, as I'm sure is the case in most counties, has no available funds for expenses such as these. This rule could place great burdens upon victims and witnesses of crimes and is unnecessary to insure a fair trial of a criminal defendant.

COMPETENCY TO PROCEED

Rule 20.01, Subdivision 1 regarding competency to proceed is proposed to be amended to create a new standard for determination

of competency, - "lacks sufficient ability to consult with a reasonable degree of understanding with defense counsel." By creating a new standard of competency based on communication and understanding, without requiring mental illness a defendant may be prohibited from standing trial, thus circumventing future commitment procedures and psychological examinations. Amendments which would allow for the prosecution to examine defense counsel as a witness regarding communications will be ineffective as there is no way to effectively cross-examine without getting into the protected attorney/client matters. This rule is unnecessary, and further complicates this issue. The present rule should be retained.

PRETRIAL DIVERSION

Rule 27.05 creates a new rule which in effect allows the prosecutor and defendant, with the court's approval, to agree that a matter be continued for eventual dismissal. A concern exists on what would happen if during the period of continuance a defendant violated one of the rules and the matter would be reset for trial. It is unclear whether or not the defendant's statements or plea under such an agreement would be admissible in a later trial as it may conflict with Rule 4.10 of the Minnesota Rules of Evidence. The rule should state clearly that a judge can hold a guilty plea with the consent of both parties and if the conditions are not met, then the plea can be accepted and the

defendant sentenced. I am also concerned about the fairness for a victim/witness to be called as a witness 2, 5, 10, or 20 years after an incident should the defendant violate one of the conditions. Furthermore, a delay would cause evidentiary problems at trial.

CONCLUSION

The above briefly outlines some of the major concerns we have with amendments proposed by your Advisory Committee. We believe that several of the amendments will have the result of creating an even more impersonal and bureaucratic system. This is especially true in the metropolitan communities which are required to prosecute a large amount of criminal matters. It is my understanding that hearings will be held on the rules in the near future and I would request the opportunity to have a representative from my office speak before you. I do realize that several requests have been made to speak at the public hearings. Therefore, if this cannot be done, I hope you will take our comments into consideration.

Thank you for your time and efforts in these matters.

Sincerly,

James C. Backstrom

JAMES C. BACKSTRON
DAKOTA COUNTY ATTORNEY and

PHILLIP D. PROKOPOWICZ
ASSISTANT COUNTY ATTORNEY

ROBERT R. BENSON
FILLMORE COUNTY ATTORNEY

Box 257
PRESTON, MINNESOTA 55965

Telephone No.
507-765-3862

November 17, 1989

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

In re: Proposed Amendments to the Minnesota Rules of Criminal Procedure C1-84-2137

Dear Justices:

This office has had the opportunity to review the proposed Amendments to the Minnesota Rules of Criminal Procedure recommended by the Advisory Committee. In reviewing these, I have also had the opportunity to review comments to these proposed Rules by several other offices. In particular, I closely reviewed the comments and proposals which were submitted to you by James C. Backstrom, Dakota County Attorney.

Mr. Backstrom has raised very appropriate concerns on some of the proposed Rule changes. It is my belief that some of the proposed changes will cause as much consternation, if not more, in small rural County Attorney's offices, as they will in major metropolitan communities. I would at this time like to express my support for the comments given by Mr. Backstrom and urge the Court to follow the recommendations given by him.

Respectfully submitted,

Robert R. Benson
Fillmore County Attorney

RRB/dj

cc: James C. Backstrom

THE MINNESOTA

COUNTY ATTORNEYS

ASSOCIATION

40 North Milton Street
Suite 200
St. Paul, Minnesota 55104
612/227-7493

October 16, 1989

Clerk of Appellate Courts
230 State Capitol
St. Paul, MN 55155

Dear Clerk of Appellate Court:

The Minnesota County Attorneys Associaition respectfully requests that Mr. Stephen Rathke, Crow Wing County Attorney, be allowed to present oral testimony on the changes to the Minnesota Rules of Criminal Procedure in the hearing scheduled for November 2, 1989. Mr. Rathke will be speaking on behalf of the Minnesota County Attorneys Association.

Thank you for your consideration in this matter.

Sincerely,

William Jeronimus
Staff Attorney

GEORGE LATIMER
MAYOR

CITY OF SAINT PAUL
DEPARTMENT OF POLICE

Wm. W. McCutcheon, Chief of Police
100 East Eleventh Street
Saint Paul, Minnesota 55101
612-291-1111

October 23, 1989

Fred Grittner
Clerk of Appellate Courts
230 State Capitol
St. Paul, MN 55155

Dear Mr. Grittner:

On behalf of the Police Department of the City of St. Paul, the undersigned Deputy Chief John C. Nord, requests permission for the department's spokesperson, Lucinda Botzek, Esq., to make an oral presentation at the hearing held by the Minnesota Supreme Court on November 2, 1989 to consider proposed amendments to the Minnesota Rules of Criminal Procedure.

The Department opposes the amendment restricting the continuation and bifurcation of Omnibus Hearings, as practiced in Ramsey County District Court since the Rules were first implemented, on grounds the changes will substantially and unnecessarily consume the Department's scarce human and financial resources.

Ms. Botzek will discuss the fact that requiring a Rasmussen Hearing prior to the date of trial will necessitate two widely separated appearances usually by more than one officer for each case charged. The cost in overtime and manpower will have serious impact on the Department's budget and availability of manpower to handle normal police operations and require either the payment of overtime or the hiring of additional staff.

Thank you for your consideration of this request.

Sincerely,

John C Nord

John C. Nord
Deputy Chief
Detective Division

JCN:ras

cc: County Attny

MINNEAPOLIS POLICE DEPARTMENT
ROOM 130, CITY HALL
MINNEAPOLIS, MINNESOTA 55415

JOHN T. LAUX
CHIEF OF POLICE

(612) 348-2853

minneapolis
city of lakes

October 26, 1989

Mr. Frederick Grittner, Director
CONTINUING EDUCATION FOR STATE COURT PERSONNEL
230 State Capitol
St. Paul, Minnesota 55155

C1-84-2137

Dear Mr. Grittner,

This letter is in reference to the Proposed Amendments to the Minnesota Rules of Criminal Procedure and the Public Hearing on November 2, 1989.

I request an opportunity to be heard at that Public Hearing as a representative of the Minneapolis Police Department to discuss the potential impact of some of the Proposed Amendments.

SINCERELY,

DAVID A. DOBROTKA
DEPUTY CHIEF OF INVESTIGATION

DAD:mls

cc: CHIEF JOHN T. LAUX

Thank you for the opportunity to address the Minnesota State Supreme Court and discuss the potential impact of some of the proposed amendments to the Minnesota Rules of Criminal Procedure on the Minneapolis Police Department. Specifically, there are two that seem to have either a direct or indirect impact on the MPD. They are:

1. Rule 8.04, wherein part (c) would be amended to require an Omnibus Hearing within 14 days after the defendant's initial appearance; and

2. Rule 9.01. Subd. 2 (1), that would require the prosecuting attorney to "assist the defendant in seeking access to specified matters relating to the case which are within the control of an official or employee of any governmental agency, but which are not within the control of the prosecuting attorney."

* *

(1) Of these two the first could have the most significant impact on the Minneapolis Police Department and ultimately the citizens of the City. This rule, if enacted, could indirectly cost the taxpayers nearly $1,000,000 by consuming the time of 18 full time police officers who would be required to attend almost 3,500 Omnibus hearings not currently scheduled. (Assumptions based on 1988: 3,572 felony and gross misdemeanor cases charged [approximately 250 omnibus hearings were conducted] that would require a hearing; approximately 2.5 officers attending each hearing totalling 8,930 officers for 4 hours each; 35,720 total hours at approximately $26.00 per hour with a total cost of $928,720.00.) This potential loss to the taxpayer only reflects costs to the MPD and doesn't include the additional costs to the City Attorney, County Attorney or Courts.

Justice George M. Scott, in his overview of the Minnesota Rules of Criminal Procedure, Section V., wrote in 1975:

> The public is involved as citizens, whether witnesses or victims, in numerous hearings. The statement of a busy business man who was robbed, after a second hearing, "Now that you have tried me, when are you going to try the guy who robbed me?" is not too far from realistic under our present procedure. Nor does the citizen understand the tying of police officers who are badly needed on the street to court hearings on the same case time and time again. All of this demands action and new rules of criminal procedure.

Justice Scott went on to write that "these rules are intended to provide for the just, speedy determination of criminal proceedings." I submit this proposed rule change creates, in effect, a hearing that is separate in time from the trial and will require separate subpoenas and appearances by witnesses, thus creating an additional burden on them. It will probably not improve the timeliness of criminal proceedings but could actually slow the process due to an increased burden on an already overburdened Criminal Justice System.

The ultimate and unfortunate impact on the citizens of the City of Minneapolis may be a significant reduction in the uniformed presence of patrol officers, less time to devote to case investigation with fewer cases being investigated, and fewer cases resolved and perpetrators charged. In short, this proposed rule change may ultimately conflict with the intent of the Rules of Criminal Procedure when first promulgated in 1975.

It appears the intent of this proposed amendment is to improve the timeliness of the criminal trial process. I agree with this goal but must urge the Court to consider other alternatives that will not so severely limit our ability to provide crucial police services to the citizens of the City of Minneapolis. If this is the only rule the Court will consider, then may we suggest that the rule be adopted on a trial basis to better evaluate its impact and provide an opportunity for modification or rejection if the impact occurs as anticipated.

(2) This places a burden and responsiblity on prosecutors to assist the defense in securing information from other agencies that are fully independent in their decision making authority. It may also put the prosecutors in the position of trying to coerce people with whom they have a working relationship or else subject them to accusations of a lack of diligent good faith in getting information that the defense can now obtain through other means. We, or other City Departments, may feel legally justified in attempting to prevent disclosure of certain matters and expect our City Attorney's office to represent our position. Could this rule create a conflict of interest for prosecutors?

STATE OF MINNESOTA

DISTRICT COURT, SECOND JUDICIAL DISTRICT

JOANNE M. SMITH
CHIEF JUDGE

October 24, 1989

Mr. Fred Grittner
Clerk of the Appellate Courts
Minnesota Supreme Court
230 State Capitol
St. Paul, MN 55155

RE: Proposed Amendments to the Minnesota Rules of Criminal Procedure

Dear Mr. Grittner:

On August 4, 1989, I appeared before the Advisory Committee and addressed the concerns of the Second Judicial District concerning some of the proposed changes in the Rules of Criminal Procedure. My schedule will not permit me to be present at the hearing before the Supreme Court, therefore, I am submitting this written statement for your consideration.

Judge George O. Petersen, Assistant Chief Judge of the Second Judicial District, is also submitting a written statement and is available to address the Court on the issues that concern our Bench. I hope that the hearing schedule will permit him to present testimony on our behalf.

Should you require any additional information from me, please do not hesitate to contact me.

Very truly yours,

Joanne M. Smith

Joanne M. Smith
Chief Judge
Second Judicial District

Enclosure
jh

Court House, Saint Paul, Minnesota 55102 (612) 298-4002

STATE OF MINNESOTA
IN SUPREME COURT
C1-84-2137

- - - - - - - - - - - - - -

RE: Proposed Amendments
to the Minnesota Rules of
Criminal Procedure

STATEMENT PRESENTED BY
SECOND JUDICIAL DISTRICT

- - - - - - - - - - - - - -

The Judges of the Second Judicial District have reviewed the "Report to the Minnesota Supreme Court" from the Supreme Court Advisory Committee on Rules of Criminal Procedure, submitted on September 1, 1989. We extend our respect and appreciation for the work of the Committee and their consideration of the numerous matters reviewed.

After careful consideration of the Committee's recommendations, the Judges of the Second Judicial District have two concerns and, therefore, wish to express their opposition to two recommendations. Those recommendations concern Rule 11.07 which would limit bifurcation of the omnibus hearings and Rule 23.04 which by its comment intends that a defendant consent before a misdemeanor may be certified as a petty misdemeanor. I would like to limit my remarks to these matters on behalf of the Second Judicial District.

1. Bifurcation of Omnibus Hearings

The Advisory Committee is recommending amendments to restrict

the bifurcation and continuance of omnibus hearings. The intent of the recommendation appears to be to encourage the earlier settlement of cases so that fewer guilty pleas are negotiated and entered on the day of trial. Advisory Committee members have expressed concern about private citizens, law enforcement officers, court personnel and counsel having to appear for trial on cases that then settle when those cases could have been settled earlier. While we understand and share the Committee's concern about the large number of guilty pleas made on the day of trial, we disagree that limiting the bifurcation of omnibus hearings is the sole remedy to alleviate this.

Our proposal is to delay the implementation of this rule one year so that we can examine and implement other alternatives that will address the concerns that the Advisory Committee raises.

The Second Judicial District's Criminal Calendar Committee is presently meeting with representative of other criminal justice agencies in Ramsey County. The delays in the criminal caseflow system are being analyzed and solutions are being proposed to handle the increasing number of criminal cases. The Committee is diligently working to reduce delay on the criminal calendars and make the most effective use of judges, prosecutors, public defenders, law enforcement officers, witnesses and others without adversely affecting any one office or group. If the Second District is given a sufficient amount of time to study the problems unique to a metropolitan court, we are confident that we

can develop solutions that will encourage the earlier disposition of cases, reduce delay and reduce the number of cases resolved on the day of trial. We can point to recent success in the area of civil litigation.

The Second Judicial District is able to draw upon our experiences with our Civil Differentiated Case Management (DCM) program. In many respects, the former civil and the present criminal systems are alike in that there was no fallout of cases in the early stages of the old civil system. Most dispositions occurred on the trial date. Simpler matters requiring little trial preparation waited for trial dates as long as complex cases requiring extensive discovery. The Ramsey civil system now differentiates the complexity of cases and assigns each case to one of three case processing tracks. The differentiation of case types and the creation of several pretrial events has facilitated the reduction of the civil backlog pending in Ramsey County by more than 50 percent. At the same time, we have been able to significantly reduce the average age of the cases pending for trial and achieve greater trial date certainty. We anticipate that similar results can be obtained in the criminal system, but we need the time to fully analyze, develop and implement this system.

Ramsey County is presently participating in the Bureau of Justice Assistance Differentiated Case Management Program. Judge J. Thomas Mott, Chairman of the Criminal Calendar Committee, and

court administrative staff are attending a conference in Washington, D.C. the week of October 30, 1989, to specifically discuss the implementation of DCM in criminal systems. We are confident that we will be able to draw upon DCM programs implemented in other model sites around the country and tailor a DCM program to the needs of Ramsey County. At a minimum, we anticipate the greater screening of cases upon the filing of the complaint and the greater use of pretrials, including plea negotiations, in felony and gross misdemeanor matters. The scheduling of the omnibus hearing will definitely be analyzed by the Criminal Calendar Committee, but we are not prepared at this point to fully endorse the concept that all matters should be considered within 30 days.

Another committee of our bench is presently studying sentencing procedures and practices in Ramsey County. It should be noted that the State Justice Information System (SJIS) counts the time between a guilty plea or verdict to the sentencing in the calculation of the age of the case. In many instances, Ramsey County has recently been experiencing delays between the plea and the actual sentencing. The judges are studying ways to reduce this interval and are closely working with the Ramsey County Department of Corrections to simplify required presentence investigation procedures and forms to reduce the sentencing delay. At the same time, we are looking at local sentencing guidelines to ensure consistency among our judges and to reduce the tendency to

"judge shop" which may lead to delays in a guilty plea being entered.

2. Certification of Misdemeanors as Petty Misdemeanors

The Judges of the Second Judicial District also respectfully oppose the proposed comment to Rule 23.04 which would indicate that the consent of the defendant is required in order to allow the reduction of a misdemeanor to a petty misdemeanor. Minnesota Statute 609.131 was intended to allow the certification without consent. The Advisory Committee is rejecting any change in Rule 23.04 to coordinate with the statute and feels that the rule takes precedence over the statute.

We wish to call to the Court's attention the impact that this might have on cases of mass arrests arising out of protests or other civil disobedience. In many cases, the offenses are not serious in the sense that no damage to property or injury to persons results. Many of these cases evolve out of peaceful protests that end in arrests for trespassing when the defendants refuse to leave the premises. Our Bench feels that many of these cases are best handled as matters that should not congest other court calendars that are needed to deal with serious criminal cases. Consequently, the certification of misdemeanor charges to petty misdemeanor status saves not only judicial time but jury trial time and limited jury resources. Consequently, we urge that the proposed comment to Rule 23.04 not be approved and that defendants' consent not be made a prerequisite to petty

misdemeanor certification. The statute addresses the right to counsel and restricts certification in some areas. The Rule preserves the requirement of court approval for appropriate cases.

Our Court has experienced a number of mass arrest situations in the past year. We feel strongly that we need flexibility to be able to approve the reduction of some of these cases to petty misdemeanors over the objection of defendants, in order to avoid congestion that requires us to redirect limited resources to handle these matters as full-blown criminal cases. For many, of course, the over-riding issue or concern is the generation of public awareness or support for a cause by using jury trials and their attendant publicity as the vehicle. Certainly not all these cases should be classified as criminal. We simply urge that the persons charged not be given absolute control over their classification.

In closing, we feel that the combined efforts of the Criminal Calendar Committee and the Judges' Corrections Committee in the Second Judicial District will lead to new approaches to solving our local problems. We ask the Court to consider delaying the implementation of proposed amendment to Rule 11.07 which would limit the trial court's authority to bifurcate the omnibus hearing so we can fully develop other alternatives that we feel will accomplish the same goals sought by the Advisory Committee. We also ask that you consider the impact that requiring consent to reduce a misdemeanor to a petty misdemeanor has on court calendars

that are already congested with more serious matters. While we do not intend to suggest that these misdemeanor cases are non-important, we do feel that cases involving violence to persons take a greater priority.

The Judges of the Second Judicial District thank you for allowing us to provide this statement in response to the proposed amendment to court rules. If you desire any additional information or have any questions, we would be happy to respond accordingly at the hearing or as requested.

STATE OF MINNESOTA
OFFICE OF THE STATE PUBLIC DEFENDER

Minnesota State Public Defender
C.
Paul
Jones

Attorneys:
Lawrence Hammerling
Deputy State Public Defender
Mark F. Anderson
Susan K. Maki
Marie L. Wolf
Cathryn Middlebrook
Scott Swanson
Susan L. P. Hauge

October 23, 1989

In Cooperation with L.A.M.P.
(Legal Assistance to Minnesota
Prisoners) in Civil Legal Matters
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Philip Marron, *Co-Director*

In Cooperation with L.A.P.
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Margaret Van Demark
Rick Gallo

Mr. Frederick Grittner
Supreme Court Administrator
Capitol Building
75 Constitution Ave.
St. Paul, MN 55155

Re: Proposed amendments to the Rules of Criminal Procedure.

Dear Mr. Grittner:

Enclosed are suggested changes and comments concerning the proposed Rules of Criminal Procedure submitted to the Court by the Rules Committee. I would like the opportunity to make whatever oral presentation is appropriate regarding these suggested changes.

As a preface to these suggested changes, I wish to note that I speak on behalf of myself and virtually the entire appellate staff of the State Public Defender's office. We represent the vast majority of clients to whom the suggested changes have application.

The changes we propose are based on our collective experience. I wish to emphasize that our suggested changes are to a large extent a direct reflection of our current office practice for dealing with inmate requests to handle their cases pro se. Our experience has been that our practice works very well.

Because of this, we strongly oppose the changes in our present practice which are required by the Rules Committee's proposed amendments to Rule 28. In our opinion, the Rules Committee's proposed amendments would diminish our client's rights and increase tensions between ourselves and our clients.

Thank you for your attention to this matter.

Sincerely,

Lawrence Hammerling
Deputy State Public Defender
LH:saf
cc: C. Paul Jones

PROPOSED ALTERNATIVES TO RULES OF CRIMINAL PROCEDURE

These proposed rules are offered as an alternative and, in some cases, a supplement to the proposed Rules of Criminal Procedure contained in the September 15, 1989, edition of Finance & Commerce. They are presented using the same numbering format used therein. An explanation for the proposed change follows each section.

292. Rule 28.02, Subd. 5. Proceedings in Forma Pauperis

* * * *

(5) The State Public Defender's office shall determine if the applicant is financially and otherwise eligible for representation. If the applicant is so eligible, then the State Public Defender shall evaluate the applicant's case and advise the applicant about the merits of the applicant's case and the legal procedures available to address issues in the applicant's case. The State Public Defender's office shall provide representation to eligible applicants in direct appeals of felony convictions and may provide representation to eligible applicants in direct appeals of gross misdemeanor and misdemeanor convictions. The State Public Defender's office shall provide representation to eligible applicants in post conviction cases involving convictions for which there has not already been a direct appeal and may provide representation in all other post conviction cases. Upon the administrative determination by the State Public Defender's office that the office will represent an applicant, the State Public Defender is automatically appointed for that purpose without order of the court. The State Public Defender's office shall notify the applicant of its decision on representation and advise the applicant of any problem relative to the applicant's qualifications to obtain the services of the State Public Defender's office. Any applicant who contests a decision of the State Public Defender's office that the applicant is ineligible for representation may apply to the Minnesota Supreme Court for relief.

Explanation. This Rule clarifies when the State Public Defender's office is obligated to provide representation and when it is not so obligated. The rule clarifies that in first appeals as of right, or in post-conviction cases in which there has not been a direct appeal, representation is required upon the request of an eligible applicant. In cases in which there has already been an appeal, the State Public Defender will have discretion to refuse representation. This, in effect, is permitted by the current Rule and is a matter of office policy. The Rule with suggested changes makes this proposition significantly more clear.

* * * *

(12) strike it as surplusage - all districts in MN now have district public defenders. Note that there are 2 (12)s. This is the first one.

* * * *

(12) A defendant may proceed pro se on appeal at any point in the appellate process if the defendant elects to do so as set forth in these rules. A pro se defendant shall be bound by the same legal and procedural requirements as an attorney. In the case of any pro se appeal by a defendant who is eligible for representation by the State Public Defender's office, the court may order the State Public Defender's office to review the record and prepare an Amicus brief or the State Public Defender's office may request Amicus status on its own motion.

Explanation. This suggested change reflects current practice by the State Public Defender's office which has proved very successful. The changes proposed by the Rules Committee take a step backward by, in effect, denying indigents the right to proceed pro se. The reality is that some inmates do not want a brief filed for them by a state agency. Their wishes, even if ill-advised, should be honored by permitting them to proceed pro se if they wish to do so and if they can fulfill the procedural burdens of the applicable rules.

(13) A defendant who wishes to proceed pro se on appeal or in a post conviction case involving a conviction from which no direct appeal has been taken shall so notify the State Public Defender's office in writing. Upon receiving such notice, the State Public Defender's office shall confer with the defendant about the reasons for choosing to do so and advise the defendant about the ramifications of that choice.

(14) A defendant who, after consulting with the State Public Defender's office, wishes to proceed pro se must sign and return to the State Public Defender's office a detailed waiver of counsel which shall be provided to the defendant by that office, and the waiver shall be filed with the court by the State Public Defender's office.

Explanation. This also reflects current practice. This process has worked well.

(15) If the State Public Defender's office believes, after consultation with the defendant, that the defendant may not be competent to waive counsel, the State Public Defender's office shall make a motion in the district court in which the conviction at issue was obtained for a determination of competency to waive counsel. Copies of the motion papers shall be served upon the defendant, the county attorney, and the state attorney general.

If the district court determines that the defendant is not competent to waive counsel, it may order that the State Public Defender represent the defendant in the appeal or post conviction action or make another appropriate disposition.

Explanation. This suggested change is far better than that proposed by the Rules Committee. The latter requires the State Public Defender's office to file a request for a competency determination on the defendant's behalf. This not only forces representation by the State Public Defender upon the defendant, it also places the defendant in the position of having his counsel question his mental competency on his behalf. The suggested change permits the State Public Defender to submit this issue to a court in its own name, not that of the client. The court is given ample discretion to craft a remedy to protect the interests of the defendant.

(16) In direct appeal cases in which the defendant elects to proceed pro se, the State Public Defender shall file the notice of appeal, order all necessary records and transcripts and file the order of transcript. In post conviction actions involving convictions from which no direct appeal has been taken in which the defendant elects to proceed pro se, the State Public Defender's office shall order the necessary records and transcripts. All records and transcripts remain the property of the State Public Defender's office and shall be returned to that office following the conclusion of the state appellate process. Upon receipt by the State Public Defender's office of the records and transcripts, they shall be loaned to the defendant and the defendant shall sign a receipt requiring that all such materials be returned to the State Public Defender's office within 15 days of the filing of the state's brief. An appellate court shall not consider a pro se appeal to be submitted until the State Public Defender's office has filed with the court a signed receipt indicating the return to that office of all loaned transcripts.

Explanation. This procedure establishes a mechanism by which the pro se defendant can be provided with the materials necessary to pursue his/her case. It also provides a means by which state property can be preserved while, at the same time, granting the defendant access to transcripts and file materials to prepare pro se filings. This reflects present practice that has been completely successful.

(17) Following the filing of an appellate brief by the State Public Defender's office, the defendant for whom the brief is filed may elect to file a pro se supplemental brief. The defendant electing to do so shall inform the State Public Defender's office.

Explanation. Filing pro se supplemental briefs is already a practice of the State Public Defender's office. It is an extremely successful practice and permits defendants to provide their own arguments about issues or raise issues other than those raised by counsel.

(18) To facilitate preparation of a pro se supplemental brief, the State Public Defender's office may loan the defendant all or any of the records and transcripts concerning the case that are in its possession under such conditions as it deems appropriate in light of its legal responsibilities as counsel for the defendant. If transcripts are loaned to the defendant for preparation of a pro se supplemental brief, the defendant must sign a receipt for them and agree to return the transcript to the State Public Defender's office upon completion of the supplemental brief. The court shall not accept the pro se supplemental brief for filing until the State Public Defender's office has filed with the court a signed receipt indicating the return of the transcripts to that office.

(19) The State Public Defender's office shall be responsible for duplicating, binding, serving and filing pro se supplemental briefs and may require the defendant to submit the pro se supplemental brief to that office sufficiently in advance of the filing deadline to enable it to reasonably carry out these responsibilities. A pro se supplemental brief shall be filed within 30 days of the date the State Public Defender's office has filed its brief on the defendant's behalf. The state shall be permitted to file a response to the pro se supplemental brief within 15 days of the date the pro se supplemental brief is filed or at the time its response to the State Public Defender's brief is due, whichever is later. A defendant may file a pro se supplemental reply brief subject to the same requirements set forth above, but must file it within 15 days of the filing of the respondent's brief or within 15 days of the filing of the state's response to a pro se supplemental brief, whichever is later.

Explanation. This provision clarifies who has responsibility to prepare and serve pro se supplemental filings. It also sets out a procedure to protect the state's interests in cases by permitting them a time certain within which they can respond to pro se supplemental filings.

THOMAS L. JOHNSON
COUNTY ATTORNEY

(612) 348-5550

OFFICE OF THE HENNEPIN COUNTY ATTORNEY
2000 GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487

October, 5, 1989

Mr. Fred Grittner
Clerk, Minnesota Supreme Court
230 State Capitol
St. Paul, Minnesota 55155

Re: Proposed Amendments to the Minnesota Rules of Criminal Procedure

Dear Mr. Grittner:

We have reviewed the proposed amendments to the Minnesota Rules of Criminal Procedure. Our understanding is that a public hearing will be held on November 2, 1989. We request permission to speak to the court regarding the proposed changes.

Thank you for your assistance.

Sincerely,

THOMAS L. JOHNSON
Hennepin County Attorney

JUDY A. JOHNSTON
Assistant County Attorney

JAJ:ems

sent

T.D.D. (612) 348-6015

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OFFICE OF THE COUNTY ATTORNEY
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SUITE 400
350 ST. PETER STREET
ST. PAUL, MINNESOTA 55102

TOM FOLEY
COUNTY ATTORNEY

TELEPHONE (612) 298-4421
FAX 298-5316

October 24, 1989

Fred Grittner
Clerk of Appellate Courts
230 State Capitol
St. Paul, Minnesota 55155

Dear Mr. Grittner:

On behalf of the Ramsey County Attorney, the undersigned, Assistant County Attorney Steven C. DeCoster, requests permission to make an oral presentation at the hearing held by the Minnesota Supreme Court on November 2, 1989 to consider proposed amendments to the Minnesota Rules of Criminal Procedure.

The Ramsey County Attorney opposes the amendment restricting the continuation and bifurcation of Omnibus Hearings, as practised in Ramsey County District Court since the Rules were first implemented, on grounds the changes will substantially and unnecessarily consume the Court System's scarce human and financial resources when other means of accelerating case disposition that do not have this adverse effect are still to be tried. The principle of allowing different procedural rules based on the differing situations in small and large counties simply makes good sense.

In addition, the Ramsey County Attorney opposes changes in the rule respecting pre-trial discovery on grounds the present rule correctly sets the line, making available to the defense evidence the State intends to use at trial and any evidence favorable to the defense. Proposed rule changes introduce uncertainty - requiring disclosure of anything, after the fact, deemed to "relate to the case" - while not fostering the legitimate right to discovery of the defense.

Thank you for your consideration of this request.

Respectfully submitted,

Steven C. DeCoster

Steven C. DeCoster
Assistant Ramsey County Attorney

/cd

PIHLAJA & STROMME
ATTORNEYS AT LAW
SUITE 726, NORWEST MIDLAND BUILDING
401-2nd AVENUE SOUTH
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STEVEN A. PIHLAJA
LORRAINE G. STROMME

TELEPHONE
(612) 338-1015

September 25, 1989

Clerk of Court
Minnesota Supreme Court
230 State Capitol Building
St. Paul, Minnesota 55155

Re: Request to Speak at hearing on November 2, 1989 regarding proposed amendments to the Minnesota Rules of Criminal Procedure C1-84-2137

Dear Sir or Madam:

I am the elected chairperson of the Criminal Law Section of the Minnesota State Bar Association. It is my understanding that a hearing will take place on November 2, 1989, regarding proposed amendments to the Minnesota Rules of Criminal Procedure.

Pursuant to a resolution adopted at the Criminal Law Section meeting on September 23, 1989, I am requesting that I, or another designated individual, be allowed an opportunity to testify at the November 2nd hearing.

The Criminal Law Section membership is made up of both prosecution and defense lawyers, and I feel that our input will be of value in this matter.

Thank you for your consideration.

Sincerely,

PIHLAJA & STROMME

Steven A. Pihlaja

SP:aj

SEVERSON, WILCOX & SHELDON, P.A.

A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

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OF COUNSEL:
JOHN E. VUKELICH

December 13, 1989

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

Re: Proposed Amendments to the Minnesota Rules
of Criminal Procedure C1-84-2137

Dear Justices:

We write as City Attorneys for the City of Apple Valley. Our office has recently had the opportunity to review the "Proposed Amendments to the Minnesota Rules of Criminal Procedure" recommended by the Advisory Committee which were appointed by the Supreme Court. We have also had the opportunity to review the letter sent to you by James C. Backstrom, Dakota County Attorney, dated November 1, 1989, a copy of which is attached for your convenience.

Rather than dwelling on matters that have already been stated, the City of Apple Valley shares the concerns addressed by County Attorney Backstrom and ask you to consider the letter of Mr. Backstrom as being fully supported by the City.

Thank you for your consideration in addressing these concerns.

Very truly yours,

SEVERSON, WILCOX & SHELDON, P.A.

Michael E. Molenda
Apple Valley City Prosecutor

MEM:dms

cc: James F. Sheldon, Apple Valley City Attorney
Lloyd F. Rivers, Chief of the Apple
Valley Police Department
Tom Melena, Apple Valley City Administrator
James C. Backstrom, County Attorney

OFFICE OF DAKOTA COUNTY ATTORNEY
JAMES C. BACKSTROM
COUNTY ATTORNEY

Dakota County Government Center
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Hastings, Minnesota 55033

Telephone
(612) 438-4438
Charles A. Diemer, First Assistant

November 1, 1989

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

RE: Proposed Amendments to the Minnesota Rules of Criminal Procedure
C1-84-2133

Dear Justices:

My office has recently had the opportunity to review the "Proposed Amendments to the Minnesota Rules of Criminal Procedure" recommended the Advisory Committee you appointed. It appears the reasons behind the changes are to create a more uniform, efficient, and fair system for the resolution of criminal cases throughout the State. The Dakota County Attorney's Office firmly believes prompt disposition of criminal cases is in the best interests of everyone. However, I believe many of the changes are unnecessary and will result in significant expense to those who participate directly in the system and the citizens of the State of Minnesota as a whole. Some of my major concerns are as follows:

GUILTY PLEA - MISDEMEANORS

It is my understanding that a proposed amendment to Rule 5.04, Subdivision 2 would allow the court in another jurisdiction to accept a misdemeanor plea committed outside its jurisdiction. A

prosecutor should always be given the opportunity to have inputinto the plea and sentencing process. This is especially true in the areas of fifth degree assault or domestic abuse. We would suggest that the rules be amended to merely allow such a procedure if all parties consent.

OMNIBUS HEARING

My understanding of the amendments to Rule 11.07 and related others would prohibit continuances of Omnibus Hearings past fourteen days "except for good cause related to a particular case" and in no event longer than thirty days. It is further understood that all issues must be decided in writing or orally within the thirty day time period. The comment section to Rule 11.07 would be amended to read "as a general rule of practice" the court should not "bifurcate the omnibus hearing or delay the hearing, or any part of it until the day of trial. To do so, violates the purpose of these rules." Problems exist in that "good cause" is not clearly defined. If the rule is strictly applied by the court system, the net effect would be for all attorneys to be prepared on all issues within fourteen to thirty days after the filing of the complaint. I can only assume the Committee's hope is that by forcing resolution of all issues within thirty days, parties may be more inclined to settle matters which would negate the necessity of trial dates being set. However, I believe the amendment ignores the reality of the

situation in that it would force both sides to attempt a settlement in the case where full discovery has not been completed, defense attorneys have not completed their investigations, and prosecuting attorneys have not had the opportunity to comply with victim notification requirements. Important decisions on criminal matters can only be made when both parties and the court have had the opportunity to collect the necessary data in support of their position. I recently surveyed the Assistant County Attorneys in the Criminal Division of my office who indicated that the number of Omnibus Hearings require witness testimony, would be significantly greater under this proposed rule because neither side is ready to negotiate the case. Substantial increases in the number of contested Omnibus Hearings will result in witness notification problems and requiring many more court appearances by law enforcement officers and other witnesses. This proposal will result in the need for two more prosecutors in my office. Unfortunately, the legislature has limited county spending in the last session, so even if the County Board was willing to spend the money, Dakota County is already at its levy limit. While we agree with the general idea of avoiding delay in the criminal process, this proposed rule change is not the way to accomplish it. In fact, it will have just the opposite effect from what is intended, a bottleneck will occur at the Omnibus Hearing stage. We suggest

no change.

DISCOVERY

I note, with great concern, the amendments to Rule 9.01 which would call for the prosecution to disclose and produce any relevant written or recorded statements "which relate to the case" and shall provide defense counsel with the substance of any oral statements "which relate to the case." The definition of "relate to the case" is confusing and ambiguous, and may include such things as witness scheduling, witness fees, telephone calls received not only by attorneys, but by support staff, calls of concerns from neighbors, pretrial preparation of witnesses by prosecuting attorneys, "crank calls," and human services division information which may be protected by data privacy concerns. This rule would require substantial increases in the amount of time devoted to discovery requests and required notices to defense counsel. Time which we simply do not have staff resources to handle. I believe the current language in the rule is more than adequate to provide proper discovery on the part of the defendant and should not be amended. Current discovery rules are more liberal than the federal rules and certainly provide for fair trials.

The proposed amendment to Rule 9.01, Subdivision 1(3) which requires the prosecution to supply reports on perspective jurors

which again "relate to the case" is also completely inappropriate. It is unclear from the discovery rule that this is limited in any form. It may require us to conduct criminal record checks on all potential jurors, as well as any other information on a juror, which may be in the possession of a government agency. Both the prosecutor and defense should be free to gather their own intelligence information on prospective jurors if they choose to do so without being obligated to show this information with the other side. This is in essence work product of the county attorney which should never be discoverable. This change should also be eliminated.

The proposed amendment to Rule 9.01, Subdivision 1(4) requires notification to defense counsel of any scientific tests or experiments which may preclude any further tests or experiments being conducted and allow the defendant reasonable opportunity to have a qualified expert observe the tests or experiment. Because any examination or tests would have the potential of precluding any further tests or experiments, (i.e. contamination of the sample) the amendment may require notification to any potential defendant. Naturally, some notification would "tip off" a suspect who has not been charged. This is further complicated by the fact that current Minnesota Bureau of Criminal Apprehension tests on drugs takes six to eight weeks. At a minimum, the

amendment should require notification only after the matter has been charged by formal complaint. This proposal needs significantly more study and refinement.

Proposed amendments to Rule 9.01, Subdivision 2 (2) and Rule 9.04 have the potential affect of requiring victims/witnesses to undergo physical examinations, mental examinations, participate in additional line-ups based on such ambiguous terms as "for good cause shown" or "necessary in the interests of justice or a fair trial." It has been my experience that victims/witnesses already consider the criminal justice system impersonal, bureaucratic, and uncaring. These proposed amendments can only serve to increase those feelings. The amendments to the rule make it unclear as to who is to provide the facilities and incur the expense for these examinations and procedures. This is especially of great concern in situations where the victim/witness may be indigent. Dakota County, as I'm sure is the case in most counties, has no available funds for expenses such as these. This rule could place great burdens upon victims and witnesses of crimes and is unnecessary to insure a fair trial of a criminal defendant.

COMPETENCY TO PROCEED

Rule 20.01, Subdivision 1 regarding competency to proceed is proposed to be amended to create a new standard for determination

of competency, - "lacks sufficient ability to consult with a reasonable degree of understanding with defense counsel." By creating a new standard of competency based on communication and understanding, without requiring mental illness a defendant may be prohibited from standing trial, thus circumventing future commitment procedures and psychological examinations. Amendments which would allow for the prosecution to examine defense counsel as a witness regarding communications will be ineffective as there is no way to effectively cross-examine without getting into the protected attorney/client matters. This rule is unnecessary, and further complicates this issue. The present rule should be retained.

PRETRIAL DIVERSION

Rule 27.05 creates a new rule which in effect allows the prosecutor and defendant, with the court's approval, to agree that a matter be continued for eventual dismissal. A concern exists on what would happen if during the period of continuance a defendant violated one of the rules and the matter would be reset for trial. It is unclear whether or not the defendant's statements or plea under such an agreement would be admissible in a later trial as it may conflict with Rule 4.10 of the Minnesota Rules of Evidence. The rule should state clearly that a judge can hold a guilty plea with the consent of both parties and if the conditions are not met, then the plea can be accepted and the

defendant sentenced. I am also concerned about the fairness for a victim/witness to be called as a witness 2, 5, 10, or 20 years after an incident should the defendant violate one of the conditions. Furthermore, a delay would cause evidentiary problems at trial.

CONCLUSION

The above briefly outlines some of the major concerns we have with amendments proposed by your Advisory Committee. We believe that several of the amendments will have the result of creating an even more impersonal and bureaucratic system. This is especially true in the metropolitan communities which are required to prosecute a large amount of criminal matters. It is my understanding that hearings will be held on the rules in the near future and I would request the opportunity to have a representative from my office speak before you. I do realize that several requests have been made to speak at the public hearings. Therefore, if this cannot be done, I hope you will take our comments into consideration.

Thank you for your time and efforts in these matters.

Sincerly,

James C. Backstrom

JAMES C. BACKSTRON
DAKOTA COUNTY ATTORNEY and

PHILLIP D. PROKOPOWICZ
ASSISTANT COUNTY ATTORNEY

STATE OF MINNESOTA
IN SUPREME COURT

IN RE PROPOSED AMENDMENTS
TO THE MINNESOTA RULES OF
CRIMINAL PROCEDURE.

COMMENTS FROM THE MINNESOTA COUNTY ATTORNEYS ASSOCIATION

The Minnesota County Attorneys Association is a state-wide organization of county attorneys and assistant county attorneys. This paper presents the position of the association with respect to the proposed amendments to the rules of criminal procedure and highlights those portions which cause particular concern.

DISCOVERY OBLIGATIONS. The proposed amendments will place unnecessary burdens upon the prosecution. Vague, nebulous obligations will invite delay. The focus of the trial will move from courtroom to chambers with the principle fact-finding revolving around the issue of whether the prosecutor fulfilled the discovery obligations. The Court's effort to speed up the process will suffer.

The requirement that the state identify all persons "having information relating to the case" and assist the defense "in seeking access" relating to matters possessed by "an official or employee of any governmental agency" expands the duties of the prosecutor beyond reasonably definable limitations. As a practical matter, the prosecutor receives all information in the form of written reports and statements from law enforcement. Normally, all such written statements and reports are provided to the defense. This "open file" obligation is clear and definable and has not been the subject of abuse. The proposed rule muddies the state's obligation, thereby inviting pointless motions and arguments. No reason

has been advanced for the change.

Under this proposal, the defendant may demand that the prosecutor produce public records which are equally accessible to defense counsel. It is not clear how the prosecutor would have more of an ability to find these documents than the defense, but the end result could be a series of unnecessary motions.

Many prosecutions involve a long investigation, culminating in charges against a particular defendant based on information gathered from many sources. In many prosecutions, and especially in the drug prosecution area, many of these sources of information do **not** form the probable cause basis for the charge. The necessary network of informants in these cases could be jeopardized by a requirement that the state identify "all persons having information in relation to the case." The same holds true for sexual abuse prosecutions and initial reporters.

The proposed discovery of "reports on prospective jurors" invites similar speculation concerning its meaning. In a domestic assault trial, is a whispered conversation from an officer to the prosecutor, that officers were called to the home of juror number three last year on a complaint of his wife, a "report" which must be disclosed? If so, the proposal is a blatant attempt to require the prosecutor to assist defense counsel in selecting the jury. The defense has additional peremptory strikes to compensate for any possible deficiency of information on prospective jurors. The proposed rules provide a work product exception for the defendant but not the state (para. 81). Thus, subjective opinions relating to prospective jurors which are provided by law enforcement officers, other prosecutors or, arguably, anyone whom the prosecutor knows, become discoverable. What prosecutorial abuse has occurred which this unprecedented proposal seeks to correct?

The proposal relating to laboratory tests is entirely unwarranted. No evidence exists to suggest that lab personnel have violated the standards of their profession.

Often police or lab personnel are called to a crime scene immediately after a suspect has been arrested. The proposal, read literally, would delay a blood splatter analysis until a defense expert would be present at the scene. The funeral of a murder victim would be put on hold until a defense expert would be available at the autopsy where tests are conducted to determine the path of a projectile or muzzle to target distance.

TIMELINESS OF THE OMNIBUS HEARING. The proposed amendments require an omnibus hearing within fourteen days of the initial Rule 8 hearing and limits extensions (para. 63, 65, 98). For most counties, compliance should not be difficult. When this amendment is coupled with the prohibition of bifurcated hearings, however, intolerable scheduling problems could occur in Hennepin and Ramsey counties.

The association suggests that the court permit bifurcated hearings to continue until there is some indication that this change can be implemented, considering present criminal justice system limitations. In no event should the failure to meet these deadlines which is not attributable to the prosecution prejudice the state's case or jeopardize the public safety.

CONCLUSION. The proposed amendments include many beneficial provisions. Prosecutors favor rules which expedite the criminal process. The Court must, however, recognize that rigid time constraints that do not take into substantial consideration existing resources cannot be implemented. Moreover, some of the proposed discovery obligations will cause needless pretrial litigation and delay.

Stephen Rathke,
Chair, Criminal Law Committee
Minnesota County Attorneys Association

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
ST. PAUL 55155

HUBERT H. HUMPHREY, III
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October 24, 1989

Mr. Frederick Grittner
Clerk of Appellate Courts
230 State Capitol
St. Paul, Minnesota 55155

Re: In re Proposed Amendments To The
Minnesota Rules of Criminal Procedure
Court File No. C1-84-2133

Dear Mr. Grittner:

I would like to have my name added to the list of those requesting time for an oral presentation to the Supreme Court at its hearing on the Proposed Amendments to the Minnesota Rules of Criminal Procedure, scheduled for November 2, 1989. I will be speaking on behalf of the Minnesota Attorney General's Office.

Very truly yours,

Wm. F. Klumpp Jr.

WM. F. KLUMPP, JR.
Assistant Attorney General

Criminal Division
Telephone: (612) 296-7578

WFK:njr

C1-84-2133

STATE OF MINNESOTA

IN SUPREME COURT

IN RE PROPOSED AMENDMENTS
TO THE MINNESOTA RULES OF CRIMINAL PROCEDURE

WRITTEN STATEMENT BY
THE MINNESOTA ATTORNEY GENERAL

TO: THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT.

Attorney General Hubert H. Humphrey, III, would like to express his gratitude to this Court for the opportunity to present his views through a representative on the Proposed Amendments to the Minnesota Rules of Criminal Procedure. The Proposed Amendments to the Rules that provide for language changes to remove any gender references are to be applauded and are overdue. The efforts of the Advisory Committee will have been worthwhile if only those changes making the criminal rules gender neutral are adopted. These changes are truly significant and will make the criminal process more "just" for female litigants, witnesses, and attorneys.

The Minnesota Rules of Criminal Procedure were 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." Rule 1.02, Minn. R. Crim. P.

The last amendments to these rules were effective on August 1, 1987. Since that time, the Supreme Court Advisory Committee has met numerous times. In August, 1988, the Supreme Court requested the Advisory Committee to consider the Uniform Rules of Criminal Procedure (1987). At various times, the Supreme Court has apparently requested the Committee to consider certain subjects. "For over a year the Committee has met almost monthly in day-long meetings to consider possible amendments to the Rules. (Report to the Minnesota Supreme Court from the Supreme Court Advisory Committee on Rules of Criminal Procedure, p. 1, hereinafter referred to as the Report). However, these meetings have been closed to the public and closed to members of the bar.

Written and oral comments were solicited for the Advisory Committee with two weeks notice to review the proposed changes. We are always encouraged by the willingness of this Court to provide a forum for discussion. Likewise, we appreciate the changes made after the initial hearing. However, it would be better practice to require meetings of the Supreme Court Advisory Committee to be published and open to the public, or at least licensed attorneys. With such an opportunity for interaction and dialogue between the Committee and those affected by the Rules this Court could truly secure the simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay envisioned by the Rules.

The Report (p. 1) states that the major source of potential amendments considered by the Committee were the Uniform Rules of Criminal Procedure (1987) "which incorporated and effectuate the American Bar Association Standards for Criminal Justice (1985)." However, it is often very difficult to determine how the Uniform Rule was derived from the American Bar Association Standard. It is equally difficult to understand how some of the proposed changes will effectuate the underlying purpose of the ABA standards.

It is not always best to adopt "uniform" rules. Every jurisdiction has different criminal statutes and different rules. The Committee in its report at p. 2 has determined that, with only a few exceptions, Minnesota's rules, with the proposed amendments, will either be in substantial compliance or exceed the ABA standards and the uniform rules. The Report states at p. 3 that where the Minnesota rules will differ, the Committee has determined that the Minnesota rules are superior. Many of the proposed changes are unnecessary and will lead to additional confusion, significant delay and cost, and embarrassment and fear to victims and witnesses. Several of the proposed changes will place additional unfair and expensive burdens on the prosecution, while requiring very little, if anything, in reciprocity from the defense.

The fact that "uniform rules" have been promulgated by the National Conference of Commissioners on Uniform State Laws, does not mean that Minnesota should necessarily adopt all of the rules

or any particular rule. The Rules and Comments to the Rules should be revised only if there is a resulting benefit to the fair administration of justice. The Rules must be changed or clarified to incorporate statutory changes or judicial decisions. They should also be reviewed to provide for the realities of day-to-day practice.

If the Advisory Committee was truly intent on making the Minnesota Rules more uniform with those adopted by other states, why isn't there a proposal regarding the order of final argument? To provide for uniformity the Advisory Committee should have recommended an amendment to provide for more unrestricted rebuttal argument by the prosecution, as is the case in the majority of jurisdictions.

PROPOSED AMENDMENTS TO RULE 9.01

Throughout Rule 9.01, it is proposed to require additional disclosures by the prosecution "which relate to the case" or which pertain to "information relating to the case." The language of the proposed rule changes is too vague and too expansive. These proposed changes do not necessarily follow the standards from which they are derived. According to the comments the uniform rule was intended to create a breadth similar to that created in the civil discovery area by Fed. R. Civ. P. 26(b)(1). This intention is not reflected in the related ABA standards. It seems puzzling that the Advisory Committee seeks to incorporate the federal civil rules of

pretrial discovery while ignoring the much more restrictive discovery requirements from the federal criminal rules.

The comments to Rule 9.01, subd. 1, as set forth in the Report, p. 45, paras. 75 and 76 make it clear that the prosecution is being required to go far beyond that contemplated by the current rules. The "relating to the case" standard is so vague that it gives no guidance to prosecutors or trial judges. It will only encourage endless pretrial and post conviction litigation without any benefit to the fairness of the process. Presently, upon request, prosecutors must disclose exculpatory evidence, witnesses intended to be called, relevant written or recorded statements of witnesses, and statements of the defendant and accomplices.

"Relevance" is understood by the trial bar and is defined in Rule 401, Minn. R. Evid. Likewise, exculpatory evidence is generally understood. One only needs to look at the number of appellate decision s pertaining to defense "fishing expeditions" into the past history of sexual assault victims and their families to see no such general agreement will result with a "relate to the case" standard. This change will serve only to further discourage those who already feel disenfranchised from the criminal justice system, and victimized by it.

Perhaps it needs to be recognized that we have an adversary system notwithstanding the special obligations of prosecutors. Is there really any likelihood prosecutors and defense attorneys will agree on what "relates to the case?" Does

this standard overlook the practical reality that human beings who are adversaries work in the system?

Equally troubling is the fact that defense counsel is not required to disclose reciprocal information which relates to the case. The current comments to Rule 9.01, subd. 1 cite four Minnesota Supreme Court decisions that set out and discuss the prosecution's duty to disclose under the rules. In State v. Schwantes, 314 N.W.2d 243 (Minn. 1982), the Minnesota Supreme Court pointed out that the purpose of this discovery rule is "to give the defendant and prosecution as complete discovery as is possible under constitutional limitations." Id. at 245. The Schwantes court further stated:

> The United States Supreme Court has in recent years described the expansion of criminal discovery devices as a "salutary development. The proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial," underlies the reciprocal discovery procedures and requirements set out in Rule 9 of the Minnesota Rules of Criminal Procedure (additional citations omitted). Id. at 245.

Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893 (1970), upheld a notice of-alibi provision when there were reciprocal disclosure obligations placed on the prosecution. Williams pointed out that "the adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." Id. at 82. Under the majority opinion in Williams there appears to be

no constitutional obstacle to requiring the defense to disclose similar evidence that "relates to the case." If this new standard of discovery is adopted, it ought to be a reciprocal obligation on the part of the prosecution and defense, subject to constitutional limitation.

The decisions of this Court do not reflect the existence of an ongoing problem of intentional nondisclosure by the prosecution. In all but the more complex cases the prosecutor's disclosure is generally complete by the omnibus hearing. The defense rarely discloses anything before the omnibus hearing and frequently only discloses defense witnesses a week or so prior to trial. Many defense attorneys as a practice never take notes of witness interviews. This precludes disclosure of factual information. Late disclosure of the witnesses' identities may preclude the possibility of an interview by the prosecutor or prosecution agents. Is this the practice envisioned by the criminal rules?

Rule 9.02 should be amended to require consultation between the defendant and counsel prior to the omnibus hearing in order to ascertain whether any witnesses may be called by the defense and to determine their identities. The comments to Rule 9.02 should be amended to reflect that the disclosure of the defendant's prior criminal record by the defense is not violation of the privilege against self-incrimination.

PROPOSED AMENDMENTS TO RULE 9.01, SUBD. 1(1)(d) AND SUBD. 1(2)

The proposed amendment requiring the disclosure of the names and addresses of persons having information relating to the case may endanger the lives of citizen informants and will certainly invite protracted litigation at the trial and appellate levels. Presently citizen informants who cause an investigation to be initiated or who provide leads as to the identity of suspects do not have to be disclosed or have their existence disclosed except in rare circumstances. Even though Rule 9.01, subd. 3(2) will hopefully prevent the disclosure of the citizen informant's identity, it does require the disclosure of the existence of such an individual. Once the existence of such a citizen informant is known to certain defendants, intimidation and violence will certainly follow. Recently memoranda has seen the successful intimidation of witnesses and threats directed toward the judiciary. This proposed change will only increase the likelihood of such threats or violence with no corresponding increase in the fairness of the administration of justice.

This proposed change is also subject to criticism because of the vagueness of the standard. Furthermore, it seemingly requires the disclosure of the identity of individuals who may not be known to the prosecutor or police. For example, what if a crime occurs in a crowded area and many potential witnesses flee before the arrival of police and refuse to later contact the police? If adopted, this requirement must be qualified by

language indicating the identities of these people must be known to the prosecutor.

The proposed amendment to Rule 9.01, subd. 1(2) is subject to the same criticism with regard to the vagueness of the standard. Furthermore, how can the prosecutor disclose those "oral statements which relate to the case" unless the declarant and the existence of the oral statement is known to the prosecutor? As a practical matter, this change requires the prosecutor to "write a book" following each witness interview. Curiously, if the change will enhance the administration of justice, why isn't Rule 9.02, subd. 1(3)(b) being amended to require the same degree of disclosure from defense counsel?

PROPOSED AMENDMENTS TO RULE 9.01, SUBD. 1(4)

This proposed amendment is substantially different from the amendment originally proposed by the Committee. There was extensive comment at the public hearing of August 4, 1989, and I commend the Commission for reconsidering the original proposal. However, further clarification is necessary. First, the rule should specify it applies only to those defendants who have been formally charged by complaint or indictment. Second, the proposed rule exempts "chapter 169 offenses." This change apparently was brought about because of the concern that, despite statues and caselaw to the contrary, a defendant might have a right to require an expert to be present to observe the operation of the intoxilyzer since the breath sample will be "destroyed" during the

testing process. A similar concern, however, arises during the investigation of criminal vehicular operation in violation of Minn. Stat. § 609.21. Likewise, the intoxilyzer may also be used to determine the alcohol concentration of individuals being investigated or arrested for other chapter 609 offenses when intoxication may be a defense. The rule should also make some provision for maintaining the integrity of the chain of custody and insuring that the item is not altered by an unscrupulous expert.

PROPOSED AMENDMENTS TO RULE 9.01, SUBD. 2 PROVIDING FOR DISCRETIONARY DISCLOSURE

None of these proposed changes require notice to the prosecutor. At a minimum simple fairness requires such notice. The proposed amendment requiring that prosecutors assist defense counsel in accessing other governmental information outside the control of the prosecutor is unnecessary because of the Government Data Practices Act. Defense counsel should be as capable as the prosecuting attorney of interpreting these statutes. This requirement also places an unfair burden on prosecutors who already have inadequate resources to prepare their own cases. Public defenders offices are funded on a statewide basis whereas prosecutors are funded locally. Recent legislation requires the Attorney General to charge for legal services rendered to local units of government.

Requiring the prosecuting attorney to provide for a lineup assumes that the prosecutor can order law enforcement agencies to perform such investigative functions. This is not the case in Minnesota. Furthermore, a prosecutor cannot set up a lineup or photographic display without law enforcement assistance. This proposed change ignores the realities of Minnesota practice.

PROPOSED AMENDMENT TO ADD RULE 9.04 PROVIDING FOR PHYSICAL OR MENTAL EXAMINATION OF PERSPECTIVE WITNESSES

The proposed rule recognizes the right as set forth in caselaw to seek examination of a prospective witness on such matters as eyesight, hearing or mental condition in limited circumstances. However, the proposed rule should be further amended in two respects. First, it should be made clear that any existing medical or psychological reports should be reviewed in camera by the Court before determining whether additional examinations are necessary. Secondly, and more importantly, if such an examination is ordered by the Court, the report should go initially only to the Court and the individual examined. The Court should then review the report in camera and decide whether any or all of the material should be further disclosed to counsel for the parties. This will help to prevent abuses of the rule and will serve to protect the privacy interests of witnesses.

PROPOSED AMENDMENTS TO RULE 20.01, SUBD. 1

The proposed amendments to Rule 20.1 require that a defendant may not waive his right to counsel without first consulting with counsel. The proposed change appears to follow recent appellate decisions; however, it does not address the procedure to be followed when the defendant refuses to talk with an attorney and demands to go forward pro se consistent with the defendant's right under Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975). The proposed amendment seems to require such a consultation.

The proposed rule requires that the defendant must understand the range of "applicable" punishments rather than the range of "allowable" punishments as suggested in Von Moltke v. Gillies, 332 U.S. 708, 724, 68 S. Ct. 323 (1948). To what extent must the pro se defendant fully understand the Minnesota Sentencing Guidelines? The appellate courts have consistently held that a misunderstanding of the guidelines will not result in an automatic withdrawal of a guilty plea. The proposed rule should be amended to read "allowable" punishment so that the trial court only need inform the defendant of the maximum sentence, any minimum sentence, any mandatory sentence and the possibility of multiple or consecutive sentences.

PROPOSED AMENDMENT TO RULE 20.02, SUBD. 6 -- ELIMINATION OF THE BIFURCATED TRIAL AT THE DEFENDANT'S OPTION

These amendments are a change from the present procedure utilized in Minnesota. See also State v. Hoffman, 328 N.W.2d 709 (Minn. 1982). These changes are not based upon a legislative amendment or an appellate decision. The advantage of the bifurcated trial is that the jury is able to concentrate on one issue at a time. Likewise the bifurcated trial serves to prevent the jury from becoming confused by the different burdens and standards of proof. The effect of this proposed amendment might well be the introduction of diminished capacity as a defense. This move should be resisted. The bifurcated trial has worked well and should be retained.

The rules do need to be clarified to provide a procedure to be followed regarding alternate jurors during a bifurcated trial, particularly, when an alternate in the mental illness phase did not actually deliberate in the "crime" phase. If an alternate will be deliberating in the second phase, there should be a jury instruction to the effect that the jury is bound by the finding in the earlier phase.

Perhaps the time has come to amend Rule 20.02, subd. 8, to provide for the mental illness commitment process to be initiated any time the evidence as presented by both parties indicates the defendant is mentally ill. A dual commitment can be ordered when the defendant receives an executed prison sentence and is also commitable as mentally ill. The same judge should

preside over both the criminal case and civil mental illness commitment hearing. Rule 20.01, subd. 4 should be so amended as well to provide that the same judge should preside at the competency hearing and commitment hearing if there is a finding of incompetency. With the unification of the court system there appears to be no overriding reason to have a second judge start from scratch at the commitment proceeding.

RULE 23.04 --DESIGNATION AS A PETTY MISDEMEANOR IN A PARTICULAR CASE

As set forth in the proposed comments, the legislature amended Minn. Stat. § 609.131 in 1987 to provide that the defendant's consent to the certification is not required. Despite that, the Advisory Committee is recommending that the court reject any change in the Rule. On matters of procedure, the Rules of Criminal Procedure take precedence over statutes to the extent there is any inconsistency. That does not, however, mean that an act of the legislature should be totally ignored. There are many sound reasons for allowing the prosecution to certify the matter as a petty misdemeanor without consent of the defendant. The prosecution is in a better position to determine that the interests of justice are better served by such a certification. This is in keeping with the separation of powers. The proposed amendments to the comments do not justify or explain the reason to ignore the legislative action. The secret meetings of the

Advisory Committee also provide no guidance. The public policy behind the legislative change should be carried out by this Court.

RULE 27.05 -- PRETRIAL DIVERSION

The Advisory Committee has proposed a Rule 27.05 be adopted to formalize the procedure for pretrial diversion. However, there are problems with the Rule as proposed.

First, proposed Rule 27.05, subd. 4 provides that the agreement may be terminated "as if there had been no agreement" merely upon the defendant filing a notice that the agreement is terminated. This places the defendant at a terrific advantage. For example, if witnesses became unavailable, should the defendant be allowed to terminate the agreement and then demand a speedy trial? Victims and society want and deserve finality in the criminal justice system. This provision provides for certainty only if the defendant does not have a change of mind. Yet, in order to terminate the diversion and resume a prosecution the State must prove a material violation of the agreement or, within six months of the agreement, establish that defendant or defense counsel misrepresented material facts.

Second, the court has a right to accelerate the time frame of the diversion agreement. This appears to violate the separation of powers, since it takes the matter entirely outside the control of the charging authority. Furthermore, proposed Rule 27.05, subds. 8 and 9 do not require notice to the prosecution.

the supplemental or pro se brief is received. Alternatively, if a pro se or supplemental brief is filed, the respondent should have the same amount of time to respond to the pro se brief as available to respond to the lawyer's brief.

RULE 28.02, SUBD. 9 -- TRANSCRIPT OF PROCEEDINGS AND TRANSMISSION OF THE TRANSCRIPT AND RECORD

These amendments provide for any videotape or audiotape exhibits admitted at trial or hearing, if not previously transcribed, to be transcribed at the request of either appellant or the respondent and that the transcript of any such exhibit then shall be included as part of the record. However, there is no method by which the parties can review the transcript for accuracy. Nor does the rule establish who will bear the cost of transcription.

A tape is admitted for the purpose of allowing the jury to hear various sounds or to observe the demeanor of an individual or to merely get a better understanding of the layout of the scene of a crime. There are many times when a video or audio tape is not just a series of questions and answers that are easily transcribed. The transcriber will be placed in a difficult, if not impossible, position.

If the appellate process is to function properly, the appellate court must examine the record from the trial court. Appellate courts do not see the demeanor of the witnesses. When recordings are part of the record, the appellate court should see

and hear these exhibits. The transcript should not become a substitute for the actual recording. This proposed change may well be a step backward from the modern technology available at the trial court level if the appellate courts rely on the transcripts rather than the actual recordings.

CONCLUSION

Many of the proposed rule changes will bring more delay and inequity into the system. The Advisory Committee has demonstrated no necessity for many of the significant changes and the advantage to the fair administration of justice is absent. However, the changes making the criminal rules gender neutral are long overdue and should be adopted.

Dated: October 24, 1989

Respectfully submitted,

HUBERT H. HUMPHREY, III
Minnesota Attorney General

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DISTRICT COURT
SECOND JUDICIAL DISTRICT

GEORGE O. PETERSEN
JUDGE

October 24, 1989

Mr. Fred Grittner
Clerk of the Appellate Courts
Minnesota Supreme Court
230 State Capitol
St. Paul, MN 55155

Dear Mr. Grittner:

The Judges of the Second Judicial District are submitting the enclosed statement regarding proposed amendments to the Minnesota Rules of Criminal Procedure. We would also like to request the opportunity to address the Minnesota Supreme Court at the hearing on November 2, 1989. Two of the proposed changes are of special concern.

First, we are opposed to limiting the bifurcation of the omnibus hearing, and we are asking that this recommendation be delayed one year so that we can pursue alternatives.

Second, we are concerned about the comment that the defendant's consent must be given in order to certify a misdemeanor as a petty misdemeanor. For reasons set forth in the enclosed statement, we oppose the consent requirement.

Please contact me if it is not possible to appear before the Court to address these matters. Also, if a list in order of appearance is prepared of those wishing to testify, please send me a copy of that if time permits.

Respectfully,

George O. Petersen
Assistant Chief Judge

1151 Courthouse
15 W. Kellogg Blvd.
Saint Paul, Minnesota 55102

612-298-4539

STATE OF MINNESOTA

IN SUPREME COURT

C1-84-2137

Re: Proposed Amendments to the Minnesota Rules of Criminal Procedure

Public Hearing November 2, 1989

Chief Justice Peter S. Popovich and Honorable Justices of the Minnesota Supreme Court, the Trial Court Judges of the Second Judicial District respectfully call to your attention the proposed amendment to Rule 11.07 of the Minnesota Rules of Criminal Procedure. As you know, that amendment would limit the authority of the trial courts to bifurcate Omnibus Hearings. We respectfully urge that you delay implementation of such a limitation for a period of one year to allow development of alternative proposals that would accomplish the same results as those which motivate the proposed amendment.

The Judges of the Second Judicial District share the concern that all litigation be processed without unnecessary delay. Civil cases of all types and charges of violations of criminal and traffic laws in all degrees should be heard on a timely basis and concluded within a reasonable time after their initiation.

We do not, at the present time, have the judicial resources in the Second Judicial District to conduct all of the additional hearings that the proposed amendment will precipitate if Rule 11.07 is changed with an immediate effective date. We respectfully request that a one-year period of time be allowed for our development and implementation of alternative calendaring and case assignment

procedures. We currently have calendar committees in place and actively addressing the prompt disposition of all matters on our calenders including civil, criminal and special court (juvenile, family and probate) cases.

You are also, of course, familiar with efforts made in the Second Judicial District during the past two years to reduce case processing delay in civil matters by use of the Differentiated Case Management concept. The DCM project was implemented by amendment to our local rules and was intended to expedite the trial and disposition of all civil cases by case classification into "simple, standard or complex" cases and then by assigning them to a series of both administrative and judicial processes and hearings designed to provide better information and earlier opportunities for resolution of these disputes. We believe we can demonstrate already the success we have been able to achieve in reducing delay in our civil calendars. Attached and marked as Exhibit A, and made a part of this submission is a compilation of statistics that will briefly describe the progress we have made in expediting the resolution of civil litigation in our District during the time period described.

We respectfully request an opportunity to demonstrate a similar ability to reduce delay and earlier conclude criminal cases by means other than the method prescribed in the proposed amendment to Rule 11.07.

Prior to a further discussion about criminal-case-related statistics and recent changes in those statistics that we are experiencing on a local level, a brief word should be said about the measurement of "case processing times in criminal cases."

Presently, criminal case timing is measured from First Appearance to Disposition. In other words, a criminal case is not seen as "disposed of" until sentencing. We are all familiar with the requirement of pre-sentence investigations in certain cases and the desirability of pre-sentence investigations in many other types of cases before sentencing is concluded. So, while a case may be concluded in terms of a plea and thus removed from the trial calendar, the clock continues to run for purpose of "case processing" until such time as the pre-sentence investigations are completed and sentencings are concluded. It is important to know that local corrections departments are limited in terms of the personnel available to complete pre-sentence investigations and reports to the Court. Corrections personnel are charged with the responsibility of supervising probationers and parolees under circumstances where caseloads are already overly burdensome. Pre-sentence investigations and reports cannot be speeded up by simply reassigning existing personnel. At the present time, our judges are being asked to allow at least six weeks for the usual pre-sentence investigation and report to be completed. In some minor cases or in some "single-issue" cases a sentencing date may be scheduled sooner than six weeks after the plea or conviction, but those are the exceptional matters.

So, while we share the concern reflected by increased case processing times in criminal matters, we must remember that those times include sentencings which can only follow after pre-sentence investigations and reports which provide judges with essential sentencing information.

Local statistics that impact case-processing times for

criminal matters include the rates at which the filing of certain criminal charges have increased.

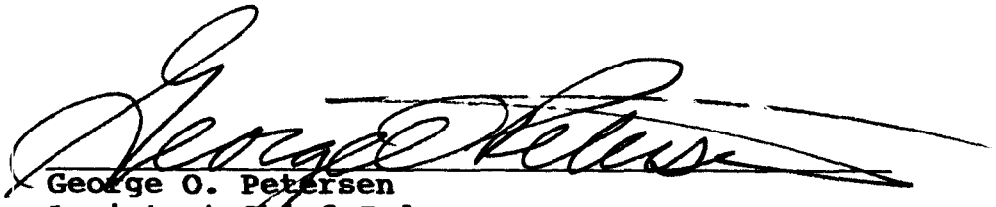
In one area, we have seen a decrease in criminal complaints from 1985 to 1988; Crimes Against Property cases were down 10.8 percent. Otherwise, criminal filings have increased; complaints alleging Crimes Against Persons, Controlled Substances Crimes and Fugitives from Justice have all increased by 24.8 percent, 116.8 percent, 61.1 percent respectively. These figures are available from the report published earlier this year by a committee appointed to study jail overcrowding in Ramsey County. Attached as Exhibit B is a one-page summary of statistics that reflect the impact that these increased criminal filings have had on local detention. As you know, increased detention results in an increase in the number of court hearings and consequently in an increase in the number of judicial personnel hours required to preside over those hearings.

Attached as "Exhibit C" is a further demonstration of our current case-processing capabilities in the Second Judicial District. While we have been able to increase the number of cases processed, the rate at which we have been processing those cases has not been as desirable because of the increase in the number of criminal case filings.

The Judges of the Second Judicial District and the staff of the Judicial District Administrator are working closely together to improve case processing in both the civil and criminal areas. We simply but respectfully request that you allow us a time period within which to implement alternative means by which to continue improvements which we have already been able to demonstrate in

part. We ask that the proposed amendment to Rule 11.07 not be adopted at this time and that a one-year period of time be provided to propose a different solution. We are experimenting with greater use of pretrials, we have been expanding the use of joint disposition conferences and we have done some "fast-tracking" in criminal case calendaring. We believe with some additional time and experimentation that we can accomplish the result desired by those who are proposing the amendment to Rule 11.07. Until more judicial personnel are available or new and innovative systems of case classification, assignment, calendaring and pretrial conferences can be implemented, we believe it will be almost impossible to comply with the time lines proposed in the amendment to Rule 11.07.

Respectfully submitted,



George O. Petersen
Assistant Chief Judge
Ramsey County District Court

EXHIBIT A

Differentiated Case Management Statistics

- Under the pre-DCM system, 33% of the cases were still pending 18 months after the Note of Issue was filed; after only 12 months of the DCM system, only 8% of the cases had not reached final disposition.

- At the beginning of the DCM system, the average case processing time was 16 months from the filing of a Jury Note of Issue and 11 months from the filing of a Court Note of Issue. Under the DCM system, the average case processing time is 6 months for cases on the expedited track and 10 months for cases on the standard track.

- The median age of cases pending is 152 days on the expedited track, 216 days on the standard track, and 309 days on the complex track.

- Number of cases pending reduced from 5,501 to 1,891 in first year of DCM program.

- Number of cases pending over 180 days from the filing of the Note of Issue reduced 58.6% in one year.

- Courtwide, the number of jury trials held increased from 96 trials in 1987 to 236 trials in 1988.

- Courtwide, the number of court trials increased from 291 trials in 1987 to 391 trials in 1988.

- Number of cases continued on trial date because no judge available reduced by 60%.

EXHIBIT B

Offense	1985	1988	% Increase in Bookings	% Increase in People Staying 3+ days
Felonies	4,367	5,529	27%	
	1,260	1,645		31%
Misdemeanors	11,515	12,414	8%	
	387	780		102%
Aggravated Assault	150	287	91%	
	11	67		235%
Aggravated DWI	602	592	-2%	
	98	146		49%
Misdemeanor Domestic Assault	606	1,132	87%	
	42	158		276%
Possession of Controlled Substance	346	678	96%	
	61	115		87%
Commercial Sex/ Prostitution	88	487	453%	
	11	52		373%

EXHIBIT C

Criminal Caseload Statistics*

From 1988 to 1989:

- o Felonies increased 14%
- o Gross misdemeanors increased 21%
- o Overall, criminal case filings increased 17%
- o Dispositions increased 3%
- o Clearance rate dropped from 90% to 79% because of increased filings
- o The average delay from guilty plea or verdict to sentencing is 45 days.

*SJIS statistics, 1989 figures include twelve months ending August 31, 1989.

COMMENTS OF THE HONORABLE
HENRY W. McCARR, JUDGE
HENNEPIN COUNTY DISTRICT COURT

MEMBER, SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CRIMINAL PROCEDURE

TO THE MINNESOTA SUPREME COURT
NOVEMBER 2, 1989

Rule 11.07, The Omnibus Hearing

The purpose of the Rules of Criminal Procedure is to provide a common set of rules for all our state courts. One of the rules, Rule 11, provides for an Omnibus Hearing in felony and gross misdemeanor cases. The hearing has three phases: (1) a hearing on evidentiary issues, (2) a hearing on pretrial motions, and (3) a hearing on other pretrial issues initiated by the Court. As the Advisory Committee's comment to Rule 11 puts it:

> "The purpose of the Omnibus Hearing is to avoid a multiplicity of court appearances and hearings upon these issues with a duplication of evidence and to combine all of the issues that can be disposed of without trial into one appearance and hearing."

This salutary goal was compromised to permit the Second and Fourth Judicial Districts, Ramsey and Hennepin Counties, to bifurcate the Omnibus Hearing. In practice this means that the Probable Cause determination is made first, with the hearing of pretrial motions and evidentiary issues postponed to the time of trial. The proposed amendment of Rule 11.07 would disallow this continuance of the latter determinations to the trial date by providing that the Omnibus Hearing could not be continued "beyond

30 days after the defendant's appearance under Rule 8" and by further providing that all issues presented at the Omnibus Hearing must be determined "within 30 days after the defendant's initial appearance under Rule 8, unless a later determination is required for good cause* * *"

This proposal has met a barrage of criticism from the criminal Bar and the Bench in both the Second and Fourth Districts. However, the proposed modification of Rule 11.07 is rooted in this observation contained in the Committee's report to this Court:

> "The Committee is very concerned about the delays caused in some districts by the large numbers of guilty pleas occurring on the day of trial. When that happens, judicial scheduling becomes difficult and the public interest suffers. Private citizens, law enforcement officers, court personnel, and counsel should not have to appear for trial on a case that then settles when that case could have been settled earlier. The recommended amendments restricting the continuation and bifurcation of the Omnibus Hearing are intended to encourage the earlier settlement of cases so that this waste of resources and the emotional strain on private citizen witnesses can be minimized. A necessary part of this effort would be to have mandatory plea discussions as part of the Omnibus Hearing at a time substantially before the trial. This could be done by the trial court under present law."

We are happy to report that both the Second and Fourth Judicial District Courts have initiated procedures, policies, and programs to meet this goal of early settlement of criminal

cases. In its written report to this Court, the judges of the Second Judicial District have asked for a delay of one year in the implementation of Rule 11.07 so that, in the words of the Second Judicial District Judges, "we can examine and implement other alternatives that will address the concerns that the Advisory Committee raises." The Second District's report goes on to explain:

> "The Second Judicial District's Criminal Calendar Committee is presently meeting with representatives of other criminal justice agencies in Ramsey County. The delays in the criminal caseflow system are being analyzed and solutions are being proposed to handle the increasing number of criminal cases. The Committee is diligently working to reduce delay on the criminal calendars and make the most effective use of judges, prosecutors, public defenders, law enforcement officers, witnesses and others without adversely affecting any one office or group. If the Second District is given a sufficient amount of time to study the problems unique to a metropolitan court, we are confident that we can develop solutions that will encourage the earlier disposition of cases, reduce delay and reduce the number of cases resolved on the day of trial."

Likewise, in the Fourth Judicial District there have been encouraging strides to stem the flow of guilty pleas deferred to the day of trial, thereby unnecessarily tying up large segments of the criminal justice system.

In January 1988 the judges of the Fourth Judicial District added pretrial calendars to improve case management of

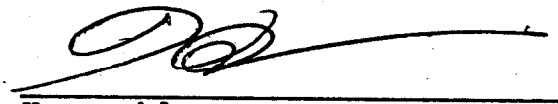
criminal cases. These calendars provide an institutionalized time for settlement conferences to promote settlement of a case prior to trial. Approximately 15-20 felony and 40-50 misdemeanors are set for settlement each day. Settlement rates have been very successful. All judges who are on general assignment participate in the pretrial settlement. The county attorney who intends to try the case is required to appear at the settlement conference. In the event the parties cannot reach agreement, they are sent to the assigning judge for selection of a trial date. The assigning judge in effect acts as a backup to insure good faith efforts are made by the parties to minimize last minute trial date settlements. A by-product of this program is to minimize sentencing disparity or settlement approaches by the judges on general assignment. For the first half of 1989, one to two cases per day were set for trial out of the 15-18 felony settlement conferences.

A proposed program which combines the felony probable cause and recently established pretrial hearings into one court appearance at the time of the probable cause hearing is expected to assist in speedier resolution of criminal cases. An early "meaningful" appearance will improve overall case management. By combining the pretrial and probable cause hearing, the Fourth District Bench believes that it can comply with the spirit of the proposed rule revision and, at the same time, minimize the overall economic cost of full blown contested Omnibus Hearings. Finally, the reforms initiated in the Fourth District have resulted in a reduction of the judges needed for criminal assignment, with many more cases set for trial actually going to trial rather than simply pleading guilty on the trial date.

Committee Recommendation

Based on this encouraging evidence of progress in solving the very problems the modifications to Rule 11.07 were proposed to remedy, we of the Advisory Committee respectfully recommend that the Court defer implementation of the proposed amendment of Rule 11.07 for a period of one year to permit the Second and Fourth Districts to demonstrate the effectiveness of their alternative proposals.

Respectfully submitted for the Supreme Court Advisory Committee on Rules of Criminal Procedure;



Honorable Henry W. McCarr
District Court Judge and Member
of the Supreme Court Advisory
Committee on Rules of Criminal
Procedure

C1-84-2137

To the Minnesota Supreme Court:

The Minnesota Commissioners on Uniform State Laws respectfully submit the following comments on the Report to the Court of the Court's Committee on Rules of Criminal Procedure.

Heretofore, the Commissioners submitted to the Court the Uniform Rules of Criminal Procedure for its consideration and adoption. The published pamphlet containing these Rules and the ABA Standards which the Rules implement are submitted with this report. The Court referred these Rules to the above Minnesota Committee for its consideration and recommendation.

The Minnesota Commission on Uniform State Laws consists of the following members who were appointed pursuant to Minnesota law by the chief justice, the governor, and the attorney general:

Mr. Michael Sullivan, practicing attorney, whose term as president of the National Conference of Commissioners on Uniform State Laws to which he was elected by the Conference has just expired;

Mr. Harry Walsh, Minnesota Revisor of Statutes;

Dean Robert Stein, dean of the University of Minnesota Law School;

Mr Robert Tennessen, practicing attorney and recently appointed as commissioner;

Prof. Jack Davies, of the William College of Law;

Prof. Maynard E. Pirsig, of the William College of Law.
The last two are life members, so designated by the Conference after 20 years of service as commissioner.

Every state has similar commissioners.

The duties of the commissioners are to attend the annual meetings of the Conference at which various proposed Uniform Acts and Rules are considered; to participate in the preparation of proposed Uniform Rules by committees to which they have been appointed; to report to their respective states those Acts and Rules which the Conference has adopted; and to promote their adoption by their states.

It is in the performance of those duties that this report is made to the court.

The National Conference of Commissioners on Uniform State Laws had first adopted Uniform Rules on criminal procedure in 1952. This was superseded by a revision in 1974, drafted by a committee headed by Professor Pirsig and assisted by three reporters, Professors Jerrold Israel of the University of Michigan Law school, Yale Kamasar of the same law school, and Wayne LaFave of the University of Illinois. These reporters are among the top authorities in the field of criminal procedure.

The committee of the Conference which drafted the present Uniform Rules of Criminal Procedure was first appointed by the Conference in 1983. It was appointed to bring the Uniform Rules into conformity with the new ABA Standards on Criminal Justice. The committee was chaired by Justice Jay Rabinowitz of the Alaska Supreme Court. Other members of the committee included a a justice of the Supreme Court of Wisconsin; a law professor from North Carolina; a trial judge from Illinois with wide experience in the trial of criminal cases; a retired Supreme Court justice from Indiana; a prosecuting attorney from Colorado; a law professor from the University of Pennsylvania; and a former member of the Missouri legislature and presently head of that state's parole board.

Professor Kenneth Kirwin of the William Mitchell College of Law served as reporter for both the 1974 version and for the present one. In that capacity, he prepared and submitted drafts of proposed rules for consideration by the committees.

The court will note that the recommendations of the Minnesota Committee on Rules of Criminal Procedure deal with many matters with which the Uniform Rules are not concerned. They include, for example, the following:

(1) Changes to gender neutral language;

(2) Other stylistic changes;

(3) Changes made in the light of judicial decisions of the court on issues not dealt with by the Uniform Rules.

(4) Rules relating to appeals. See, e.g., recommended Rules 28.02, p. 144, and 29.03, p. 158 of the report;

(5) Appendix A and B to Rule 15.

As to these the Commissioners have no comment favorable

or unfavorable since these matters are not within their responsibilities.

The report to the court by the Minnesota Committee in its various comments sets out the Uniform Rules which the committee is recommending in whole or in part. These are:

P. 45 - Rule 9.01 subd. 1. "The general 'open policy' established by the rule is based on Unif. R. Crim. P. 421(a) (1987)".

P. 44 - "Rule 9.01 Subd. 1(1)(d) - "is taken from Unif. R. Crim. P. 421(a) (1987). Additionally, the other specific items required to be disclosed by Unif. U. Crim. P. 421(a) (1987) are included in Rule 9.01, subd.1."

P. 45 - Rule 9.01, Subd. 1(2) - "As revised it is in accord with Unif. R. Crim. P. 421(a) . . . ."

P. 45 - Rule 9.01, Subd. 1. - "It has been broadened based on Unif. R. Crim. P. 421(a) (1987) . . . ."

P. 46 - Rule 9.01, Subd. 1(4) - "is taken from Unif. R. Crim. P. 421(a) (1987)."

P. 46 - Rule 9.01, Subd. 2 - "is similar to Unif. R. Crim. P. 435 (1987), except that under Rule 9.01, subd. 2 a court order is required upon a showing of good cause. . . . The second part of this rule. . . is based on Unif. R. Crim. P. 435 . . . ."

P. 50 - Rule 9.04 - "The rule is based on Unif. R. Crim. P. 433 (1987), but the standard for ordering the examination differs."

P. 51 - Rule 9.04 - "The requirement for specifying the time, place, manner, conditions and scope of the examination is taken from Unif. R. Crim. P. 433(b) and Fed. R. Civ. P. 35(a). The right to obtain a copy of any report made is taken from Unif. R. Crim. P. 433(c) (1987) and Fed. R. Civ. P. 35(b)(1) except that the report is to be provided automatically to the court, counsel and the person examined and provision is made for confidentiality of the report."

P. 79 - Rule 15.10 - "is based on Unif. R. Crim. P. 444(e) 1987). It is similar to Rule 5.05, subd. 2, which previously authorized such pleas in misdemeanor cases, but is broader in that such pleas are permitted after a verdict of finding of guilty as well as after a guilty plea."

P. 83 - Rule 17.03 Subd. 3. - Part (1) "is taken from Unif. R. Crim. P. 472(a)"; Part (2) "is taken from Unif. R.

Crim. P. 472 (b)(1) (1987). . ."; Part (3) is taken from Unif. R. Crim. P. 472(b)(2)(ii) (1987).

P. 94 - Rule 20.01 - This and succeeding provisions deal with the competency of an accused to stand trial. The American Bar Association has prepared and promulgated Standards on this subject which has brought a systematic approach to this subject where chaos prevailed before. The Uniform Rules implement these Standards.

The Minnesota Committee's report has taken a substantial portion of the relevant Uniform Rules and integrated them into the current Minnesota Rules. In its comment on page 105 it lists the following Uniform Rules:

Additional "elements as set forth in Unif. R. Crim. P. 463(b) (1987);
"The requirement for counsel. . . is from Unif. R. Crim. P. 464(c) (1987);
Waiver of counsel "is from Unif. R. Crim. P. 711(a) and (d)".

P. 106 - Rule 20.01, subd.2 - duty to raise issue of defendant's competence "is in accord with Unif. R. Crim. P. 464a (1987);
Duty of defense counsel not to divulge confidential communication "is from Unif. R. Crim. P. 464(b) (1987)

P. 106 - Rule 20.01, subd. 2(3) and (4) - preference for outpatient examination "is derived from Unif. R. Crim. P. 464(f)

On page 107, the comment observes, "As revised the rules are in substantial compliance with the Uniform Rules of Criminal Procedure (1987)." Specific references are made to Uniform Rules 464(f), 464(e)(6) and 464(f).

P. 111 - Rule 20.02, Subd. 6. - "This right of the defendant to elect either a bifurcated or a unitary trial is in accord with Unif. R. Crim. P. 474 and ABA Standards . . "

P. 133 - Rule 26.03, Subd.13 - "Part (3) of the rule is based on Unif. R. Crim. P. 741(c) (1987). . . . Part (5) of the rule concerning recusal is based on Unif. R. Crim. P. 741(b) (1987)."

P. 134 - Rule 26.03, Subd. 19(7) - is taken from Unif. R. Crim P. 535(e) (1987) and from State v. Olkon. . . ."

P. 142 - Rule 27.05 - "is based on Unif. R. Crim. P. 442 (1987)".

The Minnesota commissioners welcome the Minnesota committee's recommendation that the Uniform Rules above listed be adopted. The commissioners recognize, however, that the bulk of the Uniform Rules have not been included. The focus of the report is on the existing rules as they may be needed to be changed to conform to the new ABA Standards. The changes that are recommended come from a variety of sources, including the ABA Standards and to the extent that the present Minnesota rules do not appear to already conform, use, to a degree, the Uniform Rules that implement the Standards.

The report does not reject on their merits the Uniform Rules not recommended. It states that, although these Rules are substantially similar to existing Minnesota rules, the legal profession would, nevertheless, regard the adoption of those rules as changes in substance and lead to uncertainty and litigation.

In the opinion of the Minnesota commissioners, the adoption by the court of the Minnesota committee's report will leave the court free to later take up consideration of the Uniform Rules not adopted. The adoption of the report may well make the remaining Uniform Rules more acceptable to the profession, assuming that it is presently not so disposed.

On p. 3 of its report to the court, the Minnesota committee recommends that four of the ABA Standards and the implementing Uniform Rules not be adopted. It is the position of the Minnesota commissioners that this recommendation not be followed. These Standards, and the reasons given for them by the ABA Section on Criminal Justice Standards were pursuasive to the committee on Uniform Rules of Criminal Procedure when it recommended adoption of the implementing Uniform Rules. It is not evident from the report of the Minnesota committee why the present Minnesota Rules are deemed to be superior.

The Minnesota commissioners also recommend that the provisions running through the Minnesota committee's report [See, e.g., Rule 4.02, subd. 5(3) at page 8 and and comment, p. 11.] which would extend the use of tab charges to gross misdemeanors involving drunken driving, not be adopted. The Uniform Rules take the position that when conviction may result in involuntary confinement, the accused should be fully informed of the charge at the earliest time and this should not depend on the request of the accused. A tab charge does not adequately serve that function. See Comments to Uniform Rules of Criminal Procedure, Rule 111; Rule 221(d); and Rule 231(b).

If, as stated in the committee's report, there are not sufficient personnel in some prosecution offices under present conditions to prepare required complaints, that should be met by providing increased personnel rather than by reducing desirable safeguards against possible conviction and confinement of accused persons who are innocent. It should be said that the position of the Uniform Rules on this subject was brought to the attention of the Minnesota committee during its deliberations.

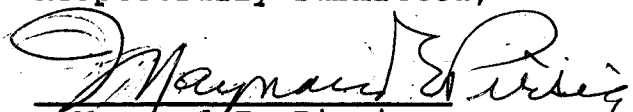
The point is sometimes made that criminal prosecutions are local in character and do not cross state lines and hence uniformity is not important. This fails to recognize that differences in procedures can result in consequences to both the prosecution and the accused. For example, differences in the right of discovery may result in conviction in one state and acquittal or even non-prosecution in the other. Differences in pretrial procedures such as release pending trial, the extent to which the accused is advised of his rights, etc. may lead to confinement in one state and not in the other.

Such arbitrary procedural differences between states, on which the loss of liberty may turn, does not make for respect for the law or for our judicial institutions.

To this may be added, that in the area of criminal procedure, there is now, for the first time, a model act for states to follow that represents the best modern thought and effort of two respected national organizations, the American Bar Association and the National Conference of Commissioners on Uniform State Laws.

Whether and when the Uniform Rules of Criminal Procedure should be adopted are decisions for the court to make. It has the authority to prescribe what the procedure in criminal cases should be. The commissioners present the Uniform Rules in that spirit.

Respectfully submitted,



Maynard E. Pirsig
On behalf of the Minnesota Commissioners on Uniform State Laws.

OFFICE OF THE CITY ATTORNEY
A-1700 HENNEPIN COUNTY GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487-0170

(612) 348-2010

minneapolis
city of lakes

October 20, 1989

OFFICE OF
APPELLATE COURTS
OCT 23 1989
FILED

Frederick Grittner
Clerk of the Appellate Courts
230 State Capitol
St. Paul, MN 55155

Dear Mr. Grittner:

I hereby request to make an oral presentation at the hearing on proposed amendments to the Rules of Criminal Procedure that the Supreme Court will hold on November 2. Enclosed are twelve copies of this request and the written material that I will present.

Sincerely,

M L Rothman

Mitchell Lewis Rothman
Deputy, Criminal Division

Enc.
MLR/hhp

Comments on Proposed Amendments of

Rules of Criminal Procedure

The comments below are presented on behalf of the Minneapolis City Attorney's Office. In 1988, this office prosecuted more than 40,000 persons on petty misdemeanor, misdemeanor, and gross misdemeanor charges that ranged from minor ordinance violations to driving under the influence. Several of the proposed amendments to the Rules of Criminal Procedure will adversely impact the efficient operation of the City Attorney's Office and, more generally, the effective administration of criminal justice in Hennepin County. In each of the following instances, I have organized my comments in terms of specific Advisory Committee recommendations.

1. Amendment of Rule 9.01

Two of the changes suggested in this proposal would impose unrealistic, perhaps impossible, disclosure requirements on the prosecution in gross misdemeanor cases.

a) As written, paragraph (1)(d) of subdivision 1 of this Rule would require the prosecution to disclose to defense counsel "the names and addresses of persons having information relating to the case." This is unreasonable. The proposal should require disclosure of the names and addresses of persons known to the prosecution who have such information.

b) By amending Rule 9.01, subdivision 2, the proposal would allow discovery, on court order, of matters not within the control

of the prosecuting attorney. The suggested amendment does not specify the court's role or what is required of the prosecutor in such circumstances. It seems to assume that the prosecutor exercises some degree of control over outside governmental agencies, even those in other jurisdictions, and thus that the prosecutor's "diligent good faith efforts" will not be futile. Moreover, the proposed amendment does not allow for in camera review of materials not ordinarily available to the general public.

The recommended change should not be adopted. At most, the Rule should allow the court for good cause shown to authorize the defendant to seek discovery from other government agencies through counsel representing such agencies. The Rule should include an exception for nondiscoverable material covered by subdivision 3 and a requirement that notice be given to the prosecution of the results of the defendant's discovery efforts.

2. Timing of the Omnibus Hearing (Amendment of Rules 8.04 and 11.07 and associated changes)

The proposals concerning the timing of the omnibus hearing under Rule 11 will require the reallocation of scarce government resources, increase costs, and yet do little to speed resolution of gross misdemeanor and felony cases. In addition, if put into effect, the proposed changes will make it more difficult for the police to ensure the safety and well-being of Minnesota's citizens.

Omnibus hearings are now held on the scheduled day of trial in Hennepin County. This practice ensures that police officers,

victims, and other witnesses need only appear once during the course of a prosecution. It also fosters judicial economy, as the judge assigned to the trial of a matter is the judge who makes decisions about the admissibility of evidence at trial. See State v. Clark, 442 N.W. 2d 832, 834 (Minn.App. 1989) (trial judge may reconsider a different judge's omnibus order only under "extraordinary circumstances").

Requiring that the omnibus hearing be held prior to the scheduled day of trial will require the expenditure of additional resources on the processing of gross misdemeanor and felony cases by prosecuting authorities, public defender's offices, and the courts. It will also drastically increase the direct and indirect costs associated with witness appearances. The Minneapolis Police Department has estimated conservatively that these amendments will cost it $850,000-1,000,000 in the next year. The Department is concerned, too, that diverting officers from street patrol and investigative duties will harm the community it serves. Justice Scott's observation in his 1975 overview of the Rules of Criminal Procedure is still directly on point: "Nor does the citizen understand the tying of police officers who are badly needed on the street to court hearings on the same case time and time again." G. Scott, An Overview of the Minnesota Rules of Criminal Procedure, Minnesota Rules of Court, 96, 98 (West, 1989). It is ironic that Justice Scott's lament will be as true under the revised Rules as it was before the Rules of Procedure were enacted.

If the suggested changes are adopted, the Minneapolis Police Department and police departments around the state will be forced to devote less time and energy to their basic responsibilities: detection, investigation, and apprehension. Victims and other civilian witnesses, required to make two separate court appearances, will be greatly inconvenienced and more likely to conclude that cooperation with prosecuting authorities is simply not worthwhile. In both respects, the citizens of Minnesota will be the real losers.

Other problems will result if the proposed changes go into effect. It is by no means clear that all the evidence needed to resolve the many issues that may be raised in an omnibus hearing will be available within the time period provided by the amendments. It will also be more difficult for prosecutors' offices to establish vertical representation, i.e., have the same attorney handle different proceedings within a single prosecution. This will hamper effective prosecution and make it more difficult to communicate with victims and win their confidence and cooperation.

It is uncertain that the proposed changes to Rule 11 would allow cases to be resolved more quickly. Defendants plead guilty when it is clear that the "day of reckoning" has arrived and that their fate can be delayed no longer. Moving up the omnibus hearing is <u>not</u> the answer to jail or court congestion; many pleas will continue to be postponed until the day of trial, when it is clear to all concerned that the prosecution's witnesses are ready,

willing, and able to proceed. Given the significant costs that will be associated with the proposed changes, the Court, if it decides to go forward at all, should institute these amendments on a trial basis, to determine just how many cases will be resolved more quickly as the result of earlier omnibus hearings. Only then will it be able to weigh accurately the cost effectiveness of this series of proposals.

3. Amendment of Comments on Rule 23

The Advisory Committee would add a new paragraph to the Comment on Rule 23.04, which concerns the certification of misdemeanors as petty misdemeanors. The new paragraph states that Rule 23.04 takes precedence over Minn Stat. 609.131, enacted by the Legislature in 1987 to allow certification by the prosecutor over the defendant's objection if the court so approves. In terms of law and policy, this proposal is unsound.

Minn. Stat. 480.059, subd. 8, reserves the right of the Legislature "to enact, modify, or repeal any statute or modify or repeal any rule of the supreme court." When, as here, the Legislature enacts a provision that is clearly intended to modify an existing rule of criminal procedure, one must conclude that the statute, not the older rule, controls. State v. Keith is not sufficient authority to the contrary, given its relatively superficial treatment of the basic issue.

The Court should be aware that Minn. Stat. 609.131 was one element of a legislative package that gave municipal prosecutors

much broader authority in the gross misdemeanor area; the ability to certify misdemeanor charges as petty misdemeanors with court approval was seen as a necessary adjunct to increased responsibility for more serious cases and as a prerequisite to the fair, speedy resolution of all criminal charges prosecuted by Minnesota's municipalities. Moreover, it is clear from the text of section 609.131 that the Legislature recognized that the statute granted broader authority to courts and prosecutors than the Rule and, in light of this, made appropriate safeguards available.

Under section 609.131, the defendant retains the right to appointed counsel; Rule 23.04 provides for appointed counsel only when the charge involves "moral turpitude." That a case may be certified under the statute without the defendant's approval is balanced by the fact that the accused in such cases continues to enjoy the assistance of appointed counsel. The two sources of authority to certify thus coexist quite comfortably. There is no reason for the Court to disturb the status quo by adding the proposed Comment.

As a policy matter, the court and the prosecuting authority, not the defendant, should decide how to allocate the increasingly scarce jury trial resources available at the misdemeanor level. If the judge and the prosecutor concur that a matter should be treated as noncriminal, that determination should be final. The defendant has no right to be tried as a misdemeanant, rather than as a petty offender.

4. Addition of Rule 27.05

This proposal contemplates addition of Rule 27.05, governing pretrial diversion. Neither the Rule nor proposed comments thereto define "pretrial diversion." This is important, as there is some question that subdivision 1(1) of the proposed Rule, which focuses on the mere suspension of prosecution, actually deals with pretrial diversion. Diversion is generally thought to involve the channeling of defendants into counseling, treatment, or educational programs provided by government or private agencies outside the criminal justice system. National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections 73 (1973), cited in R. Frase, P. Haugen, and M. Costello, Minnesota Misdemeanors and Moving Traffic Violations 61 (Issue 13, February 1989); National District Attorneys Association, National Prosecution Standards, Commentary on Standard 11.8 (1977); Note, Pretrial Diversion From the Criminal Process, 83 Yale L.J. 827, 827 (1974). It is unclear, for example, that the Legislature intended for the victim notification provisions of Minn. Stat. 611A.031 to apply when the prosecutor decides that charges should simply be continued for a period of time without a plea.

Pretrial diversion, whether involving treatment of some kind or the suspension of prosecution without more, traditionally has been viewed as a prerogative of the executive branch; the prosecutor, not the court, has the authority to decide whether to

go forward with a case. In this regard, the proposed rule invites unwarranted judicial involvement in a purely executive function.

October 23, 1989

Mitchell Lewis Rothman

Mitchell Lewis Rothman
Deputy City Attorney
Minneapolis

HENNEPIN

OFFICE OF THE PUBLIC DEFENDER
C2200 Government Center
Minneapolis, Minnesota 55487-0520
(612) 348-7530

William R. Kennedy, Chief Public Defender

September 22, 1989

Mr. Frederick Grittner
Clerk of the Appellate Courts
230 State Capitol
St. Paul, MN 55155

Re: Hearing on Proposed Rules of Criminal Procedure

C1-84-2137

Dear Mr. Grittner:

I would like the opportunity to appear and make an oral presentation to the Supreme Court on November 2, 1989, regarding the proposed Rules of Criminal Procedure.

Sincerely,

David Knutson
First Assistant Public Defender

DK:kbt

HENNEPIN

OFFICE OF THE PUBLIC DEFENDER
C2200 Government Center
Minneapolis, Minnesota 55487-0520
(612) 348-7530

William R. Kennedy, Chief Public Defender

September 22, 1989

Mr. Frederick Grittner
Clerk of the Appellate Courts
230 State Capitol
St. Paul, MN 55155

Re: Hearing on Proposed Rules of Criminal Procedure
C1-84-2137

Dear Mr. Grittner:

I am writing to request an opportunity to appear before the Minnesota Supreme Court on November 2, 1989, to speak regarding the proposed Rules of Criminal Procedure. In the past I have been accorded the courtesy of speaking last. I am most appreciative of that consideration. Again, I would like the opportunity to speak last.

Sincerely,

Bill Kennedy

William R. Kennedy
Chief Public Defender

WRK:kbt

OFFICE OF THE PUBLIC DEFENDER
C2200 Government Center
Minneapolis, Minnesota 55487-0520
(612) 348-7530

William R. Kennedy, Chief Public Defender

September 22, 1989

Minnesota Supreme Court
Wayne Tschimperle, Clerk of Court
230 State Capital Building
St. Paul, MN 55155

RE: Proposed Amendments to the Rules of Criminal Procedure
C1-84-2137

Dear Sirs:

I would appreciated being noted as a speaker at the November 2 hearing concerning the Amendments to the Rules of Criminal Procedure. I would appreciate being allotted some time for my comments and suggestions.

Sincerely,

David P. Murrin
Senior Attorney
Hennepin County Public Defender's Office

LYNN S. CASTNER
ATTORNEY AT LAW
SUITE 726, NORWEST MIDLAND BUILDING
401 SECOND AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55401

(612) 339-0080

September 22, 1989

Minnesota Supreme Court
230 State Capitol Building
St. Paul, MN. 55155

Re: REQUEST TO SPEAK AT HEARING NOVEMBER 2, 1989
ON PROPOSED RULE CHANGES, MINNESOTA RULES OF
CRIMINAL PROCEDURE. C1-84-2137

I am attorney practicing since 1963. A very substantial portion of my practice in the past twenty six years has been in criminal law, in Hennepin County and in many other Minnesota counties -- both in the metropolitan area and outstate.

I am a sole practitioner, as are many privately retained lawyers practicing criminal defense.

In the discussion of changes of the rules I have identified a number of concerns of the trial courts, prosecutors and public defenders, in metropolitan and outstate counties, but I believe that I have concerns about proposed rules changes, from the perspective of a sole practictioner in criminal law practice, which I would like to address.

I respectfully request a few minutes to be heard.

Please notify me if I am granted some time.

Thank you.

Respectfully,

Lynn S. Castner,
Attorney at Law
Attorney license 15763