STATE OF MINNESOTA

IN SUPREME COURT

C1-84-2137

OFFICE OF
APPELLATE COURTS

DEC 2 9 2006

FILED

ORDER PROMULGATING AMENDMENTS TO THE MINNESOTA RULES OF CRIMINAL PROCEDURE

In its report dated September 28, 2006, the Supreme Court Advisory Committee on the Rules of Criminal Procedure recommended certain amendments to the Minnesota Rules of Criminal Procedure.

By order dated October 6, 2006, this Court established a December 4, 2006, deadline for submitting written comments on the proposed amendments and on December 12, 2006, held a hearing on the proposed amendments.

The Supreme Court has reviewed the proposed amendments and submitted comments and is fully advised in the premises.

IT IS ORDERED that:

1. The attached amendments to the Minnesota Rules of Criminal Procedure are prescribed and promulgated for the regulation and procedure of criminal matters in the courts of the State of Minnesota.

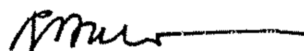
2. The attached amendments shall govern all criminal actions commenced or arrests made on or after April 1, 2007.

3. The inclusion of Advisory Committee comments is made for convenience and does not reflect court approval of the comments.

4. The Advisory Committee shall continue to serve and monitor said rules and amendments and to hear and accept comments for further changes, to be submitted to the court from time to time.

DATED: December 29, 2006

BY THE COURT:



Russell A. Anderson
Chief Justice

AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

Note to publishers: Deletions are indicated by a line drawn through the words; additions are underlined. New text that should be underlined in the final publication is indicated by a double underline.

1. Rule 5. Procedure on First Appearance.

Amend Rule 5.01 as follows:

Rule 5.01. Statement to the Defendant

A defendant arrested with or without a warrant or served with a summons or citation appearing initially before a judge or judicial officer shall be advised of the nature of the charge. The court shall first determine whether the defendant is handicapped in communication. A defendant is handicapped in communication if, (a) because of either a hearing, speech, or other communications disorder, or (b) because of difficulty in speaking or comprehending the English language, the defendant cannot fully understand the proceedings or any charges made against the defendant or is incapable of presenting or assisting in the presentation of a defense. If a defendant is handicapped in communication, the judge or judicial officer shall appoint a qualified interpreter to assist the defendant throughout the proceedings. The proceedings at which a qualified interpreter is required are all those covered by these rules which are attended by the defendant. A defendant who has not previously received a copy of the complaint, if any, and supporting affidavits and the transcription of any supplementary testimony, shall be provided with copies thereof. Upon motion of the prosecuting attorney, the court shall require that the defendant be booked, photographed, and fingerprinted. In felony cases ~~of felonies and gross misdemeanors~~, the defendant shall not be called upon to plead.

The judge, judicial officer, or other duly authorized personnel shall advise the defendant substantially as follows:

(a) That the defendant is not required to say anything or submit to interrogation and that anything the defendant says may be used against the defendant in this or any subsequent proceedings;

(b) That the defendant has a right to counsel in all subsequent proceedings, including police line-ups and interrogations, and if the defendant appears without counsel and is financially unable to afford counsel, that counsel will forthwith be appointed without cost to the defendant charged with an offense punishable upon conviction by incarceration;

(c) That the defendant has a right to communicate with defense counsel and that a continuance will be granted if necessary to enable defendant to obtain or speak to counsel;

(d) That the defendant has a right to a jury trial or a trial to the court;

(e) That if the offense is a misdemeanor, the defendant may either plead guilty or not guilty, or demand a complaint prior to entering a plea;

(f) That if the offense is a designated gross misdemeanor as defined in Rule 1.04(b) and a complaint has not yet been made and filed, a complaint must be issued within 10 days if the defendant is not in custody or within 48 hours if the defendant is in custody.

(g) That if the offense is a gross misdemeanor and the defendant has had an opportunity to consult with an attorney, the defendant may enter a plea of guilty in accordance with Rule 15.01.

The judge, judicial officer, or other duly authorized personnel may advise a number of defendants at once of these rights, but each defendant shall be asked individually before arraignment whether the defendant heard and understood these rights as explained earlier.

2. Comments to Rule 5.

Amend the comments to Rule 5 by adding a new paragraph after the existing sixth paragraph as follows:

Pursuant to Rule 5.01(g), a defendant may plead guilty to a gross misdemeanor at the first appearance under Rule 5 in accordance with the guilty plea provisions of Rule 15.01. If that is done, the defendant must first have the opportunity to consult with an attorney. If the guilty plea is to a designated gross misdemeanor prosecuted by tab charge, it is necessary that a complaint be made, served, and filed before the court accepts the guilty plea. See Rule 4.02, subd. 5(3), and the comments to that rule. See also Rule 5.02, subd. 1(4), concerning waiver of the right to counsel. Rule 5.01(g) does not permit a defendant to enter a plea of not guilty to a gross misdemeanor at the first appearance under Rule 5. Rather, in accordance with Rules 8.01 and 11.10, a not guilty plea in felony and gross misdemeanor cases is not entered until the Omnibus Hearing or later.

3. Rule 11. Omnibus Hearing in Felony and Gross Misdemeanor Cases.

Amend the introductory language at the beginning of Rule 11 as follows:

If the defendant does not plead guilty in a felony case at the initial appearance under Rule 8 or, in a gross misdemeanor case at the first appearance under Rule 5 or at the initial appearance under Rule 8, ~~before the district court following a complaint or, for a designated gross misdemeanor as defined by Rule 1.04(b), following a tab charge,~~ a hearing shall be held as follows:

4. Comments to Rule 11.

Amend the first paragraph of the comments to Rule 11 as follows:

If, following the filing of a complaint, a defendant does not plead guilty at the initial appearance before the district court under Rule 8 for felonies and gross misdemeanors, or at the first appearance under Rule 5 for gross misdemeanors, or if the defendant does not plead guilty at the arraignment under Rule 19.04, subd. 4, following an indictment, the Omnibus Hearing provided by Rule 11 shall be held. The initial appearance may be continued, and if the defendant does not then plead guilty, the Omnibus Hearing shall be held as provided by the rule.

Amend the fourth paragraph of the comments to Rule 11 as follows:

If, following the filing of a complaint, the defendant does not plead guilty upon the first appearance in the district court under Rule 5 for gross misdemeanors or upon the initial appearance in the district court under Rule 8 for felonies and gross misdemeanors ~~following a complaint or, where permitted, a tab charge~~ or upon arraignment in the district court under Rule 19.04, subd. ~~5~~ 4, following an indictment, the Omnibus Hearing (~~See~~see ABA Standards, Discovery and Procedure Before Trial, 1.1, 5.1-5.3 (Approved Draft, 1970)) shall be held as provided by Rule 11 not later than twenty-eight (28) days after the initial appearance or seven days after the indictment arraignment, unless the period is extended for good cause related to the particular case (Rules 8.04; 19.04, subd. ~~5~~4).

5. Rule 20. Proceedings for Mentally Ill or Mentally Deficient.

Amend Rule 20.01, subd. 6, as follows:

Subd. 6. Dismissal of Criminal Proceedings.

(1) *Felonies.* Except when the defendant is charged with murder, the criminal proceedings shall be dismissed upon the expiration of three years from the date of the finding of the defendant's incompetency to proceed unless the prosecuting attorney, before the expiration of the three-year period, files a written notice of intention to prosecute the defendant when the defendant has been restored to competency.

(2) *Gross Misdemeanors.* The criminal proceedings shall be dismissed 30 days after the date of the finding of the defendant's incompetency to proceed unless by that date the prosecuting attorney files a written notice of intention to prosecute the defendant when the defendant has been restored to competency. If such a notice has been filed, the criminal proceedings shall be dismissed when the defendant would be entitled under these rules to custody credit of at least one year if convicted in the criminal proceedings.

6. Comments to Rule 20.

Amend the thirteenth paragraph of the comments to Rule 20 as follows:

If the charge is a felony or gross misdemeanor and the defendant is found to be incompetent, the criminal proceedings shall continue to be suspended (Rule 20.01, subd. 4(2)), and the court shall follow the procedure established by Rules 20.01, subd. 4(2), to 20.01, subd. 6. For gross misdemeanors, the criminal proceedings must be dismissed by the court 30 days after the finding of incompetency unless the prosecuting attorney has filed with the court by that time a written notice of intention to prosecute the defendant on the gross misdemeanor when the defendant is restored to competency. Additionally, even if such a notice is filed, the proceedings must be dismissed later if the defendant becomes entitled to at least one year of custody credit if the defendant were to be convicted of the gross misdemeanor offense. This would include custody credit for time confined in a jail or correctional facility and also for time confined in a hospital or other facility under this rule (see subdivision 9 of this rule).

7. Rule 26.01. Trial.

Amend Rule 26.01, subd. 3, and add a new subdivision 4 as follows:

Subd. 3. Trial on Stipulated Facts. By agreement of the defendant and the prosecuting attorney, a determination of defendant's guilt, or the existence of facts to support an aggravated sentence, or both, may be submitted to and tried by the court based on stipulated facts. Before proceeding in this manner, the defendant shall acknowledge and waive the rights to testify at trial, to have the prosecution witnesses testify in open court in the defendant's presence, to question those prosecution witnesses, and to require any favorable witnesses to testify for the defense in court. The agreement and the waiver shall be in writing or orally on the record. If this procedure is utilized for determination of defendant's guilt and the existence of facts to support an aggravated sentence, there shall be a separate waiver as to each issue. Upon submission of the case on stipulated facts, the court shall proceed as on any other trial to the court pursuant to subdivision 2 of this rule. If the defendant is found guilty based on the stipulated facts, the defendant may appeal from the judgment of conviction and raise issues on appeal the same as from any trial to the court.

Subd. 4. Stipulation to Prosecution's Case to Obtain Review of a Pretrial Ruling. When the parties agree that the court's ruling on a specified pretrial issue is dispositive of the case, or that the ruling otherwise makes a contested trial unnecessary, the following procedure shall be used to preserve the issue for appellate review. The defendant shall maintain the plea of not guilty. The defendant and the prosecuting attorney shall acknowledge that the pretrial issue is dispositive, or that a trial will otherwise be unnecessary if the defendant prevails on appeal. The defendant, after an

opportunity to consult with counsel, shall waive the right to a jury trial under Rule 26.01, subdivision 1(2)(a), and shall also waive the rights specified in Rule 26.01, subdivision 3. The defendant shall stipulate to the prosecution's evidence in a trial to the court, and acknowledge that the court will consider the prosecution's evidence and may find the defendant guilty based on that evidence. The defendant shall also acknowledge that appellate review will be of the pretrial issue, but not of the defendant's guilt, or of other issues that could arise at a contested trial. The defendant and the prosecuting attorney must make the foregoing acknowledgments personally, in writing or orally on the record. The court after consideration of the stipulated evidence shall make an appropriate finding, and if that finding is guilty, the court shall also make findings of fact, orally on the record or in writing, as to each element of the offense(s).

8. Comments to Rule 26.

Amend the sixteenth paragraph of the comments to Rule 26 as follows:

Rule 26.01, subd. 2 (Trial Without a Jury), requiring special findings in a case tried to the court is taken from F.R.Crim.P. 23(c), and in addition prescribes time limits for general findings and for special findings. Rule 14.01 prescribes the pleas referred to in the rule. The consequences of an omission of a finding on an essential fact comes from Minn.R.Civ.P. 49(a). The provision in Rule 26.01, subd. 3 (Trial on Stipulated Facts), for submitting the case to the court for decision on stipulated facts is in accord with ABA Standards for Criminal Justice 21-1.3(c) (1985). In addition to determining guilt, the trial on stipulated facts provisions of subdivision 3 could be used for determining whether aggravated facts exist to support an upward sentencing departure under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). The rules do not permit conditional pleas of guilty whereby the defendant reserves the right to appeal the denial of a motion to suppress evidence or other pretrial order. State v. Lothenbach, 296 N.W.2d 854 (Minn. 1980). Rule 26.01, subd. 4 (Stipulation to Prosecution's Case to Obtain Review of a Pretrial Ruling), implements the procedure authorized by State v. Lothenbach, 296 N.W.2d 854 (Minn. 1980). The rule supersedes the case as to the procedure for stipulating to the prosecution's case to obtain review of a pretrial ruling. The rule also distinguishes the Lothenbach-type procedure it implements from Rule 26.01, subd. 3 (Trial on Stipulated Facts). The latter rule should be used if there is no pretrial ruling dispositive of the case, and if the defendant wishes to have the full scope of appellate review, including a challenge to the sufficiency of the evidence. See State v. Busse, 644 N.W.2d 79, 89 (Minn. 2002). The phrase in the first sentence of Rule 26.01, subd. 4 –"or that the ruling otherwise makes a contested trial unnecessary" – recognizes that a pretrial ruling will not always be dispositive of the entire case, but that a successful appeal of the pretrial issue could nonetheless make a trial unnecessary, such as in a DWI case where the only issue is the validity of qualified prior impaired driving incidents as a charge enhancement. See, e.g., State v. Sandmoen, 390 N.W.2d 419 (Minn. App. 1986). The parties could agree that if the defendant prevailed on appeal, the defendant would still have a conviction for an unenhanced DWI offense. Where a conviction for some offense is supportable regardless of the outcome of the appeal, but a contested trial

would serve no purpose, the rule could be used. ~~*However, by agreement of the parties, the issues may be preserved by submitting the case on stipulated facts as authorized by Rule 26.01, subd. 3.*~~

9. Rule 28.04. Appeals to Court of Appeals.

Amend Rule 28.04 as follows:

Rule 28.04. Appeal by Prosecuting Attorney

Subd. 1. Right of Appeal. The prosecuting attorney may appeal as of right to the Court of Appeals:

(1) in any case, from any pretrial order of the trial court, including probable cause dismissal orders based on questions of law. However, an order is not appealable (a) if it is based solely on a factual determination dismissing a complaint for lack of probable cause to believe the defendant has committed an offense or (b) if it is an order dismissing a complaint pursuant to Minnesota Statutes, section 631.21; and

(2) in felony cases from any sentence imposed or stayed by the trial court; and

(3) in any case, from an order granting postconviction relief under Minnesota Statutes chapter 590; and

(4) in any case, from an order staying adjudication of an offense for which the defendant pleaded guilty or was found guilty at a trial. An order for a stay of adjudication to which the prosecuting attorney did not object is not appealable; and

~~(4)~~ (5) in any case, from a judgment of acquittal by the trial court entered after the jury returns a verdict of guilty under Rule 26.03, subd. 17(2) or (3); and

~~(5)~~ (6) in any case, from an order of the trial court vacating judgment and dismissing the case made after the jury returns a verdict of guilty under Rule 26.04, subd. 2; and

~~(6)~~ (7) in any case, from an order for a new trial granted under Rule 26.04, subd. 1, after a verdict or judgment of guilty, if the trial court expressly states therein, or in a memorandum attached thereto, that the order is based exclusively upon a question of law which in the opinion of the trial court is so important or doubtful as to require a decision by the appellate courts. However, an order for a new trial is not appealable if it is based on the interests of justice.

Subd. 2. Procedure Upon Appeal of Pretrial Order. The procedure upon appeal of a pretrial order by the prosecuting attorney shall be as follows:

(1) *Stay*. Upon oral notice that the prosecuting attorney intends to appeal a pretrial order which shall also include a statement for the record as to how the trial court's alleged error, unless reversed, will have a critical impact on the outcome of the trial, the trial court shall order a stay of proceeding of five (5) days to allow time to perfect the appeal.

(2) *Notice of Appeal*. The prosecuting attorney shall file with the clerk of the appellate courts a notice of appeal, a statement of the case as provided for by Rule 133.03 of the Minnesota Rules of Civil Appellate Procedure, which shall also include a summary

statement by the prosecutor as to how the trial court's alleged error, unless reversed, will have a critical impact on the outcome of the trial, and a copy of the written request to the court reporter for such transcript of the proceedings as appellant deems necessary. The notice of appeal, the statement of the case, and request for transcript shall have attached at the time of filing proof of service on the defendant or defense counsel, the State Public Defender, the attorney general for the State of Minnesota, and the ~~clerk~~ court administrator of the trial court in which the pretrial order is entered. Failure to serve or file the statement of the case, to request the transcript, to file a copy of such request, or to file proof of service does not deprive the Court of Appeals of jurisdiction over the prosecuting attorney's appeal, but it is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the appeal. The contents of the notice of appeal shall be as set forth in Rule 28.02, subd. 4(2).

(3) *Briefs*. Within fifteen days of delivery of the transcripts, or within fifteen days of the filing of the notice of appeal if the transcript was delivered prior to the filing of the notice of appeal or if the appellant has not requested any transcript under Rule 28.04, subd. 2(2), appellant shall file the appellant's brief with the clerk of the appellate courts together with proof of service upon the respondent. Within eight days of service of appellant's brief upon respondent, the respondent shall file the respondent's brief with said clerk together with proof of service upon the appellant. In all other respects the Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern the form and filing of briefs and appendices except that the appellant's brief shall contain a statement of the procedural history.

(4) *Dismissal by Attorney General*. In appeals by the prosecuting attorney, the attorney general may, within twenty days after entry of the order staying proceedings, dismiss the appeal and shall within three days thereafter give notice thereof to the judge of the lower court and file with the clerk of the appellate courts notice of such dismissal. The lower court shall then proceed as if no appeal had been taken.

(5) *Oral Argument and Consideration*. The provisions of Rule 28.02, subd. 13, concerning oral argument shall apply to appeals by the prosecuting attorney provided that the date of oral argument or submission of the case to the court without oral argument shall not be more than three months after all briefs have been filed. The Court of Appeals shall not hear or accept as submitted any such appeals more than three months after all briefs have been filed and in such cases the lower court shall then proceed as if no appeal had been taken.

(6) *Attorney Fees*. Reasonable attorney fees and costs incurred shall be allowed to the defendant on such appeal which shall be paid by the governmental unit responsible for the prosecution involved.

(7) *Joinder*. The prosecuting attorney may appeal from one or several of the orders under this rule joined in a single appeal.

(8) *Time for Appeal*. The prosecuting attorney may not appeal under this rule until after the Omnibus Hearing has been held under Rule 11, or the evidentiary hearing and pretrial conference, if any, have been held under Rule 12, and all issues raised therein have been determined by the trial court. The appeal then shall be taken within five days after the defense, or the ~~clerk of~~ court administrator pursuant to Rule 33.03, subsequently serves notice of entry of the order appealed from upon the prosecuting attorney or within five days after the prosecuting attorney is notified in court on the record of such order,

whichever occurs first. All pretrial orders entered and noticed to the prosecuting attorney prior to the trial court's final determination of all issues raised in the Omnibus Hearing under Rule 11, or the evidentiary hearing and pretrial conference under Rule 12, may be included in this appeal. An appeal by the prosecuting attorney under this rule bars any further appeal by the prosecuting attorney from any existing orders not included in the appeal. No appeal of a pretrial order by the prosecuting attorney shall be taken after jeopardy has attached.

An appeal under this rule does not deprive the trial court of jurisdiction over pending matters not included in the appeal.

Subd. 3. Cross-Appeal by Defendant. Upon appeal by the prosecuting attorney, the defendant may obtain review of any pretrial or postconviction order which will adversely affect the defendant, by filing a notice of cross-appeal with the clerk of the appellate courts, together with proof of service on the prosecuting attorney, within 10 days after service of notice of the appeal by the prosecuting attorney, provided that in postconviction cases the notice of cross-appeal may be filed within 60 days after the entry of the order granting or denying postconviction relief, if that is later. Failure to serve the notice does not deprive the Court of Appeals of jurisdiction over defendant's cross-appeal, but is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the cross-appeal.

Subd. 4. Conditions of Release. Upon appeal by the prosecuting attorney of a pretrial order, the conditions for defendant's release pending the appeal shall be governed by Rule 6.02, subds. 1 and ~~subd.~~ 2. The court shall also consider that the defendant, if not released, may be confined for a longer time pending the appeal than would be possible under the potential sentence for the offense charged.

Subd. 5. Proceedings in Forma Pauperis. An indigent defendant wishing the services of an attorney in an appeal taken by the prosecuting attorney under this rule shall proceed under Rule 28.02, subd. 5.

Subd. 6. Procedure Upon Appeal of Postconviction Order.

(1) *Service and Filing*. An appeal shall be taken by filing a notice of appeal with the clerk of the appellate courts, together with proof of service on the opposing counsel, the ~~clerk~~ court administrator of the trial court in which the order appealed from is entered, and, when the appellant is not the attorney general, also the attorney general for the State of Minnesota. No fees or bond for costs shall be required for the appeal. Unless otherwise ordered by the appellate court, a certified copy of the order appealed from or a statement of the case as provided for by Rule 133.03 of the Minnesota Rules of Civil Appellate Procedure need not be filed. Failure of the prosecuting attorney to take any other step than timely filing the notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the appeal.

(2) *Time for Taking an Appeal*. An appeal by the prosecuting attorney of an order granting postconviction relief shall be taken within 60 days after entry of the order.

(3) *Other Procedures*. The provisions of Rule 28.02, subd. 4(2), concerning the contents of the notice of appeal, Rule 28.02, subd. 8, concerning the record on appeal, Rule 28.02, subd. 9, concerning transcript of the proceedings and transmission of the transcript on record, Rule 28.02, subd. 10, concerning briefs, Rule 28.02, subd. 13, concerning oral argument, Rule 28.04, subd. 2(4), concerning dismissal by the attorney general, and Rule 28.04, subd. 2(6), concerning attorney fees, shall apply to appeals by the prosecuting attorney of an order granting postconviction relief.

Subd. 7. Procedure Upon Appeal From Order Staying Adjudication.

(1) *Service and Filing*. An appeal from an order staying adjudication shall be taken by filing a notice of appeal with the clerk of the appellate courts together with proof of service on opposing counsel, the court administrator of the trial court in which the order is entered, the State Public Defender, and when the appellant is not the attorney general, the attorney general of the State of Minnesota. The notice shall be accompanied by a copy of a written request to the court reporter for such transcript of the proceedings as appellant deems necessary. No fees or bond for costs shall be required for the appeal. Unless otherwise ordered by the appellate court, a certified copy of the order appealed from or a statement of the case as provided for by Rule 133.03 of the Minnesota Rules of Civil Appellate Procedure need not be filed. Failure of the prosecuting attorney to take any other step than timely filing the notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the appeal.

(2) *Time for Taking an Appeal*. An appeal by the prosecuting attorney from an order staying adjudication shall be taken within 10 days after entry of the order.

(3) *Briefs*. Within 15 days after delivery of the transcript, or within 15 days after the filing of the notice of appeal if the transcript was delivered prior to filing of the notice of appeal or if the appellant has not requested a transcript, the appellant shall file the appellant's brief with the clerk of the appellate courts together with proof of service upon the respondent. The brief shall be identified as a stay of adjudication brief. Within eight days after service of the appellant's brief, the respondent shall file the respondent's brief with the clerk together with proof of service upon the appellant. In all other respects, the Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern the form and filing of briefs and appendices except that the appellant's brief shall contain a statement of the procedural history.

(4) *Other Procedures*. The provisions of Rule 28.02, subd. 4(2), concerning the contents of the notice of appeal, Rule 28.02, subd. 5, concerning proceedings in forma pauperis, Rule 28.02, subd. 7, concerning release of the defendant pending appeal, Rule 28.02, subd. 8, concerning the record on appeal, and Rule 28.02, subd. 13, concerning

oral argument, shall apply to appeals by the prosecuting attorney from an order staying adjudication.

Subd. ~~7~~ 8. Procedure Upon Appeal From Judgment of Acquittal or Vacation of Judgment After a Jury Verdict of Guilty, or From an Order Granting a New Trial.

(1) *Service and Filing*. An appeal shall be taken by filing a notice of appeal with the clerk of the appellate courts together with proof of service on the opposing counsel, the ~~clerk~~ court administrator of the trial court in which the judgment or order appealed from is entered, and when the appellant is not the attorney general, also the attorney general for the State of Minnesota. No fees or bond for costs shall be required for the appeal. Unless otherwise ordered by the appellate court, a certified copy of the judgment or order appealed from or a statement of the case as provided for by Rule 133.03 of the Minnesota Rules of Civil Appellate Procedure need not be filed. Failure of the prosecuting attorney to take any other step than timely filing the notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the appeal.

(2) *Time for Taking an Appeal*. An appeal by the prosecuting attorney from either a judgment of acquittal after a jury verdict of guilty, or an order vacating judgment and dismissing the case after a jury verdict of guilty, or an order granting a new trial, shall be taken within 10 days after entry of the judgment or order.

(3) *Stay and Conditions of Release*. Upon oral notice that the prosecuting attorney intends to appeal from a judgment of acquittal after a jury verdict of guilty or from an order vacating judgment and dismissing the case after a jury verdict of guilty, or from an order granting a new trial, the trial court shall order a stay of execution of the judgment or order of 10 days to allow time to perfect the appeal. The trial court shall also determine the conditions for defendant's release pending the appeal, which conditions shall be governed by Rule 6.02, subds. 1 and 2.

(4) *Other Procedures*. The provisions of Rule 28.02, subd. 4(2), concerning the contents of the notice of appeal, Rule 28.02, subd. 8, concerning the record on appeal, Rule 28.02, subd. 9, concerning transcript of the proceedings and transmission of the transcript and record, Rule 28.02, subd. 10, concerning briefs, Rule 28.02, subd. 13, concerning oral argument, Rule 28.04, subd. 2(4), concerning dismissal by the attorney general, and Rule 28.04, subd. 2(6), concerning attorney fees, shall apply to appeals by the prosecuting attorney from either a judgment of acquittal after a jury verdict of guilty or an order vacating judgment and dismissing the case after a jury verdict of guilty, or an order granting a new trial.

(5) *Cross-Appeals*. Upon appeal by the prosecuting attorney under this subdivision, the defendant may obtain review of any pretrial and trial orders and issues, by filing a notice of cross-appeal with the clerk of the appellate courts, together with proof of service on the prosecuting attorney, within 30 days of the prosecutor filing

notice of appeal or within ten days after delivery of the transcript by the reporter, whichever is later. If this election is made and the jury's verdict is ultimately reinstated, the defendant may not file a second appeal from the entry of judgment of conviction unless it is limited to issues, such as sentencing, that could not have been raised in the cross-appeal. The defendant may also elect to respond to the issues raised in the prosecutor's appeal and reserve appeal of any other issues until such time as the jury's verdict of guilty is reinstated. If reinstatement occurs, the defendant may appeal from the judgment using the procedures set forth in Rule 28.02, subd. 2.

10. Comments to Rule 28.

Amend the twenty-first paragraph of the comments to Rule 28 as follows:

To the extent that an order granting a defendant a new trial also suppresses evidence, it will be viewed as a pretrial order concerning the retrial, and the prosecuting attorney may appeal the suppression part of the order under Rule 28.04, subd. 1(1). State v. Brown, 317 N.W.2d 714 (Minn. 1982). In response to State v. Lee, 706 N.W.2d 491 (Minn. 2005), Rule 28.04, subd. 1(4), was revised to expressly permit a prosecuting attorney to appeal a stay of adjudication ordered by the district court over the objection of the prosecuting attorney. Prior to that revision, such appeals were permitted by construing the appeal in misdemeanor and gross misdemeanor cases as an appeal from a pretrial order under part (1) and in felony cases as an appeal from a sentence under part (2). See State v. Hoelzel, 639 N.W.2d 605 (Minn. 2002); State v. Verschelde, 595 N.W.2d 192 (Minn. 1999); State v. Thoma, 571 N.W.2d 773 (Minn. 1997), aff'g 569 N.W.2d 205 (Minn. App. 1997); and State v. Wright, 699 N.W.2d 782 (Minn. App. 2005). ~~*Additionally, a stay of adjudication is considered to be a pretrial order that may be appealed by the prosecuting attorney. State v. Thoma, 571 N.W.2d (Minn. 1997), aff'g 569 N.W.2d 205 (Minn. Ct. App. 1997).*~~ *A good faith timely motion by the prosecuting attorney for clarification or rehearing of an appealable order extends the time to appeal from that order. State v. Wollan, 303 N.W.2d 253 (Minn. 1981). Originally under Rules 28.04, subd. 2(2) and (8), the prosecuting attorney had five days from entry of an appealable pretrial order to perfect the appeal. It was possible for this short time limit to expire before the prosecuting attorney received actual notice of the order sought to be appealed. These rules as revised eliminate this unfairness and assure that notice of the pretrial order will be served on or given to the prosecuting attorney before the five-day time limit begins to run. In State v. Hugger, 640 N.W.2d 619 (Minn. 2002), the court held that in computing the five-day time period within which an appeal must be taken under Rule 28.04, subd. 2(8), intermediate Saturdays, Sundays, and legal holidays shall be excluded pursuant to Rule 34.01 before the additional three days for service by mail is added pursuant to Rule 34.04.*