

AUG 01 2011

FILED

**REPORT AND PROPOSED AMENDMENTS TO THE
MINNESOTA RULES OF CRIMINAL PROCEDURE**

**MINNESOTA SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CRIMINAL PROCEDURE**

ADM10-8049
(Formerly CX-84-2137)

August 1, 2011

Hon. Mark Wernick, Chair

Helen Brosnahan
Frederic Bruno
Ben Butler
Scott Christenson
Brad Delapena
Matthew Frank
Prof. Richard Frase
Katrina Joseph

Michael Junge
Daniel Lew
Heidi Schultz
Thomas Sieben
Hon. Jeffrey Thompson
Hon. Robert Tiffany
Paul Young

Hon. Paul H. Anderson
Supreme Court Liaison

Karen Kampa Jaszewski
Staff Attorney

I. INTRODUCTION

As directed by a March 14, 2011, letter from the Supreme Court to the Chair of the Advisory Committee on Rules of Criminal Procedure, the Committee met to work on the two matters referred to it by the Court, namely:

- 1) Consider amending Minn. R. Crim. P. 23.04 to permit the prosecutor to certify a misdemeanor offense as a petty misdemeanor offense without the defendant's consent; and
- 2) Consider amendments to the Rules of Criminal Procedure that would procedurally treat gross misdemeanors like misdemeanors.

The following report summarizes the issues considered by the committee and the Committee's recommended changes to the Rules of Criminal Procedure. The report narrative is organized by topic and the proposed amendments are organized by rule number.

II. RULE 23.04

A. Preliminary Discussion

The Committee discussed the Supreme Court's request to amend the rules to remove a defendant's right of consent before a misdemeanor can be certified as a petty misdemeanor. One proposal was to amend the rule so that the defendant's consent is not required before application for or appointment of a public defender, but is required after either event. This proposal was patterned after HF 988, which sought to limit public defender appointments in petty misdemeanor cases. Committee members noted that any change to the rules regarding consent should make no distinction between public defender clients versus private attorney clients. Any rule change referring to application for or appointment of the public defender as the cut-off for consent would effectively create "two lines" at the courthouse where those not applying for public defenders would be treated differently. Further, as a practical matter, members also noted that in many jurisdictions, prosecutors generally do not see a case before the pretrial, thus a rule that focuses on the first appearance process would be unworkable. Therefore, the Committee agreed that any rule change should not be linked to the appointment of a public defender.

The Committee also discussed the idea that treating misdemeanors as petty misdemeanors would in many cases be detrimental to defendants who could suffer collateral consequences as a result of a conviction. This concern raised the question of whether it is fundamentally unfair to permit certification of offenses over the defendant's objection, thereby taking away the defendant's right to trial by jury (and perhaps the right to court-appointed counsel), when the collateral consequences of a conviction may be the same as they would have been for a misdemeanor conviction of the same offense.

Several committee members noted that cases often resolve much quicker when there are two competent attorneys involved. Thus removing an indigent defendant's right to a public defender may actually result in less efficient handling of cases. It was also noted that because of the serious effect of collateral consequences maybe every indigent defendant charged with a petty misdemeanor should have a right to a public defender. Offers to certify cases as petty misdemeanors, a "non-criminal" offense, are appealing to pro se defendants; but, pro se defendants often do not understand the collateral consequences of a conviction and frequently find themselves in the position of attempting to withdraw an ill-advised guilty plea in order to obtain housing and/or employment.

The Committee also discussed the idea of amending Rule 24.05 to provide that the public defender should be discharged if the prosecutor certifies the offense as a petty misdemeanor. Members were opposed to this change because it empowers the prosecutor to eliminate opposing counsel from a case.

Several members questioned whether this criminal rules amendment process should be used to do patchwork reform on an ailing justice system solely because the Legislature was failing to adequately fund the criminal justice system. In response, it was noted that this proposed revision enjoys support among many public defenders, prosecutors and Judicial Council members.

In light of the difficulty in agreeing on an approach, committee members questioned whether they were engaged in this process because it was the right thing to do or because it was purported to save money. The Committee agreed that if it does not believe this is a positive change, then there should at least be solid data to support that such a change would save money, but no such data has been provided. Several members noted the Supreme Court's request to review this issue is essentially supported by anecdotal evidence, which evidence does not appear to support the assertion that such a rule change would result in significant savings.

The Committee also noted that the expansion of the Statewide Payables List has already taken care of many of the issues that existed with low-level misdemeanors prior to that expansion. Far fewer cases are even making it to the district courts and those that do are typically those that should be treated as misdemeanors. As for those low-level misdemeanors that do make it to court, defendants typically consent to certification when such an offer is made.

Nonetheless, because the Committee concluded that it could not definitively say that a change in the rules would not provide some savings, the Committee agreed to continue to work to find a workable proposal to present to the Supreme Court. But members agreed to proceed after being cautioned against changing the rules solely to save money, if the change did not also improve the justice system. Additionally, as one

member cautioned, as these forces are being brought to bear on the system, it is rendering jury trials almost extinct, which eliminates a very valuable public education and participation experience.

B. Proposed Changes to Rule 23

1. Defendant's Consent to Certify Misdemeanors as Petty Misdemeanors

Following the foregoing preliminary discussion, the Committee discussed how best to amend Rule 23 to allow prosecutors to certify misdemeanors as petty misdemeanors without requiring the defendant's consent. Members noted that with jury trial calendaring as far out as one and one-half years in some courts, a rule change limiting the defendant's consent requirement would help and should be considered. This change should enable more cases to get resolved earlier in the process, especially for those defendants who may simply be delaying the inevitable. There was little, if any, support for eliminating the defendant's consent requirement entirely or limiting the consent requirement to only those offenses identified in Minn. Stat. § 609.131, subd. 2.

One proposal was to require the defendant's consent only for offenses involving moral turpitude, which is the standard used in Rule 23.05 to determine when a defendant charged with an offense that has been certified as a petty misdemeanor is entitled to representation by the public defender. It was also suggested there are other ways to improve efficiency that do not require amending the rule. For example, it was suggested that requiring prosecutors to appear at arraignment calendars would increase the opportunity to resolve more cases early in the process. Other options presented for consideration were: 1) leave the rule as it is; or, 2) use an interests-of-justice standard instead of a moral turpitude standard.

A question was raised as to whether amending the rule comports with Minn. Stat. § 609.131. Members noted that under current case law, the Rules of Criminal Procedure govern on the matters of procedure in the event there is conflict with a statute.

The Committee was agreed that the primary issue to be addressed would be which standard (moral turpitude or interests of justice) should apply to determine when and if consent of the defendant is required when a prosecutor seeks to certify a misdemeanor as a petty misdemeanor. While the moral turpitude standard already appears elsewhere in Rule 23, the Committee concluded the term is not well defined and therefore would be difficult to apply in practice. The interests-of-justice standard is also used elsewhere in the rules and did appear to provide the flexibility needed for district courts to determine when a given case presents circumstances that would warrant requiring a defendant's consent before certification would be approved by the court. Interests-of-justice factors in this context include whether the offense involves moral turpitude or is otherwise more

suitable for a jury's judgment and whether a defendant would suffer serious collateral consequences as a result of a conviction.

Recommendation. The Committee recommends amending Rule 23.04 to require the defendant's consent to certification only when consent is required by statute or the court determines the interests of justice require consent.

2. Right to Counsel in Misdemeanor Cases Certified as Petty Misdemeanors

The Committee next discussed whether Rule 23 should be further amended to address whether a public defender who has already been appointed to represent a defendant should be discharged when the offense is certified as a petty misdemeanor. Currently there is a conflict between Rule 23.05 and Minn. Stat. § 609.131. Rule 23.05 states that a defendant charged with a misdemeanor certified as a petty misdemeanor cannot qualify for court appointed counsel unless the offense involves moral turpitude. But section 609.131 states that in all cases where misdemeanors are certified as petty misdemeanors the defendant is still entitled to representation by the public defender if eligible.

Members noted that it was not clear whether the right to counsel on offenses certified as petty misdemeanors was a procedural issue for the Supreme Court to address by rule or a substantive issue for the Legislature to address by statute. At this point, a question was raised whether the issue of withdrawal of counsel is separate from the issues presented in Rule 23 and therefore, at least arguably outside the scope of the matters referred by the Supreme Court.

While the Committee had some interest in addressing the right to court-appointed counsel issue raised by these cases, the Committee ultimately agreed not to recommend any further change to Rule 23.05 and to leave it to district courts to decide on a case-by-case basis how to reconcile the interrelationship between the rules and the statute and then apply the withdrawal-of-counsel standards as appropriate.

Recommendation. The Committee recommends no change to Rule 23.05.

III. GROSS MISDEMEANOR PROCEDURES

A. Preliminary Discussion

The Committee next discussed the Supreme Court's request that it address procedural impediments to treating gross misdemeanors like misdemeanors rather than felonies. The argument for treating gross misdemeanors like misdemeanors rather than felonies throughout the rules is that if the rules were written today gross misdemeanors would most likely be paired with misdemeanors rather than felonies. The primary

premise underlying this argument is that when the Rules of Criminal Procedure were originally promulgated gross misdemeanors were paired with felonies because misdemeanors were under the jurisdiction of county courts while gross misdemeanors and felonies were under the jurisdiction of district courts. Now that there are only general jurisdiction courts, the argument is that the reason for pairing gross misdemeanors with felonies no longer exists.

Several committee members noted that while there is support for procedurally treating gross misdemeanors like misdemeanors, there are some gross misdemeanors that have been identified by the Legislature in statutes as being particularly significant offenses. This specific identification by statute may indicate that the procedural rules applicable to these identified gross misdemeanor offenses should not be the same as misdemeanors. Some examples include gross misdemeanor DWI and gross misdemeanor domestic assault, both of which are defined as repeat or more egregious behavior than a misdemeanor violation and should be handled accordingly. For such offenses, the potential for incarceration of up to 365 days is much closer to 366 days (a felony sentence) than it is to 90 days (a misdemeanor sentence). In addition, in many judicial districts, gross misdemeanors continue to be calendared with felonies, rather than with misdemeanors. Committee members noted that the impact of rule changes on those districts must be considered.

For these reasons, the Committee agreed not to support grouping all gross misdemeanors with misdemeanors. Nor did the Committee agree to support grouping all gross misdemeanors with felonies. Rather, the Committee agreed that the real question was not whether all gross misdemeanor offenses should be treated like felonies or like misdemeanors, but how to select those misdemeanor procedural rules which should apply to gross misdemeanor offenses, consistent with public safety and the more serious consequences to a defendant associated with a gross misdemeanor conviction. Thus the Committee determined that the best approach is a flexible approach that will allow a district court to place each gross misdemeanor offense on the appropriate procedural track, rather than a rigid approach that forces either one track or the other.

With the foregoing flexible approach in mind, the Committee reviewed every rule and agreed to recommendations that would allow pairing gross misdemeanor procedures with misdemeanor procedures when consistent with public safety and the rights of defendants.

B. Proposed Rules Changes Regarding Gross Misdemeanors

1. ITV Rules

The first rule changes considered were those governing the use of ITV, which rules were adopted based on the recommendations of the ITV Task Force. The ITV Task

Force report acknowledges “the current reality is that gross misdemeanors are aggravated misdemeanor type behavior” rather than “less impactful felony behaviors.” Thus the report recommended pairing gross misdemeanors with misdemeanors in the ITV rules where appropriate. But, the Task Force did identify some procedures where gross misdemeanors should be paired with felonies. Specifically, in Rule 1.05, subd. 7(1)(a) and (b), the ITV Task Force concluded that it was important to ensure that the defendant and the defendant’s attorney were present at the same terminal site for:

- (a) felony or gross misdemeanor plea proceedings when the defendant is entering a guilty plea or
- (b) felony or gross misdemeanor sentencing proceedings.

In promulgating the ITV rules, the Supreme Court agreed with the ITV Task Force. In light of the work done by the Task Force and the well reasoned approach taken by that group, the Committee agreed it was unnecessary and unwise to reconsider the ITV rules.

Recommendation. The Committee recommends no change to Rule 1.05, subd. 7.

2. Charging Rules

The Committee also agreed that the rules governing how offenses are charged need not be changed at this point. While there may be some benefit to reconsidering the use of tab charges in designated gross misdemeanors, *see* Rule 1.04(b), the Committee determined that because gross misdemeanors may be charged by citation (Rule 6.01, subd. 2) or complaint, there is enough flexibility already built into the rules and there is no need to recommend any changes to the charging rules as part of this process.

Recommendation. The Committee recommends that no changes be made to Rules 4.02, subd. 5; 5.03(h); 15.08; 17.01, subd. 2; or 17.06, subd. 4(3).

3. Pretrial Proceedings

The Committee discussed whether gross misdemeanors should be paired with misdemeanors in certain pretrial procedure rules. Members noted that if gross misdemeanors were paired with misdemeanors at this stage of the proceedings it would result in many more cases being subject to the 10-day speedy trial rule for in custody defendants. *See* Rule 6.06. Unlike the 60-day speedy trial rule, the 10-day rule requires that a defendant be released from custody if the trial does not begin within 10 days of the speedy trial demand. Gross misdemeanor cases are more likely to involve in custody defendants than are misdemeanor cases. Because a gross misdemeanor defendant is facing up to one year in jail, a 60-day speedy trial requirement is not inappropriate as compared with a misdemeanor defendant who is facing up to 90 days. The Committee

determined that a 10-day speedy-trial limitation would also be unworkable for gross misdemeanor DWI cases, which are frequently dependent on the laboratory results of urine or blood tests that generally are not ready within 10 days. In light of the fact that district courts, prosecutors, and defense lawyers are already overburdened, and meeting the 10-day rule is already difficult, the Committee concluded that adding more cases that would require trial within 10 days is not likely to create the efficiencies sought by a general pairing of gross misdemeanors with misdemeanors.

On the other hand, some Committee members noted that subjecting certain gross misdemeanors to the 10-day trial rule and the more streamlined misdemeanor pretrial process could have a positive effect. Currently it appears there is aggressive charging and bail settings for many of these gross misdemeanor cases, but then the proceedings slow down as the case makes its way to trial. Eliminating the need for Rule 5 and Rule 8 appearances and trying these cases more quickly could provide more swift justice.

The practical obstacles to compliance by courts, prosecutors, and defense lawyers with a 10-day speedy trial rule ultimately proved too significant for the Committee to support wholesale pairing of gross misdemeanors with misdemeanors at the pretrial stage. The Committee agreed to leave the references to gross misdemeanors in Rule 5 mostly intact, subject to a few exceptions, noted below.

Recommendation. The Committee recommends no change to Rules 5.05 and 5.06. The Committee also recommends that Rule 6.06, the 10-day rule, should remain unchanged.

4. Rule 8 Processes

Finally, the Committee discussed whether to remove gross misdemeanors from any of the Rule 8 processes. The Committee opposed allowing defendants charged with gross misdemeanors to enter a not guilty plea any earlier than the Rule 8 second appearance because entering the plea triggers the speedy trial timeline. The reasons noted were the same as in the 10-day rule discussion, e.g., concerns about whether blood and urine test results would be ready. It was again noted that defendants are more likely to be in custody in gross misdemeanor cases, which offenses are often enhanced and more serious offenses than misdemeanors. Further, because Rule 5.05 already allows the combining of the Rule 5 and Rule 8 appearances, the Committee concluded there is no efficiency to be gained by eliminating gross misdemeanors from Rule 8. Because the needed flexibility already exists in the rules as written, the Committee agreed that no changes to Rule 8 should be made.

Recommendation. The Committee recommends that no changes be made to Rule 8. Further, in light of the Committee's recommendation that gross misdemeanors should not be decoupled from felonies in Rules 5 and 8, the Committee also recommends no

changes to Rules 10 or 11 because these rules relate to the timing of pretrial motions and the Omnibus Hearing; the Committee also recommends that no changes be made to Rule 12, which should only apply to misdemeanor cases, or to Rule 14.03(b).

5. Waiver of Counsel

The Committee discussed Rule 5.04, subd. 1, and agreed that waiver of counsel is an area where pairing gross misdemeanors with misdemeanors makes sense. Committee members agreed that a change to this rule could create efficiencies and would not diminish the waiver process because even in misdemeanor cases, under Rule 5.04, subd. 1(3), the court “must not accept the waiver unless the court is satisfied that it is voluntary and has been made by the defendant with full knowledge and understanding of the defendant’s rights.”

Recommendation. The Committee recommends combining gross misdemeanors with misdemeanors in Rule 5.04, subd. 1(3), and removing the reference to gross misdemeanors from Rule 5.04, subd. 1(4).

6. Discovery

The Committee discussed whether any changes should be made to Rules 7 and 9 as they relate to disclosure requirements. Several committee members suggested that if any change were to be made, it should be consistent with the more robust disclosure requirements in Rule 9 that apply to felony and gross misdemeanor cases. There was no support for applying Rule 9’s less stringent misdemeanor disclosure requirements to gross misdemeanors. Ultimately, because the notice requirements in Rule 7 are triggered by the pretrial rules, which the Committee had already determined should remain mostly intact, changes to Rule 7 were determined to be unnecessary.

Recommendation. The Committee recommends that no changes be made to Rules 7 and 9.

7. Guilty Plea Procedures

The Committee discussed whether to pair gross misdemeanors with misdemeanors in the rules governing guilty plea procedures. The Committee had previously proposed to the Supreme Court in its 2010 Final Report that Rule 15 should be amended to allow guilty pleas by mail in gross misdemeanor cases. Thus the Committee was already in agreement with treating gross misdemeanors more like misdemeanors in the guilty plea process. Consistent with its earlier recommendation the Committee reiterated its recommendation that Rule 15.03 be amended to allow guilty pleas by mail in gross misdemeanor cases. In order to fully support such a change, the Committee also recommends amending Rule 14.02, subs. 1 and 2, to eliminate the requirement that a

defendant charged with a gross misdemeanor must be present to enter a guilty plea, and amending Rule 15.09 to allow the filing of a plea petition in lieu of the requirement that a verbatim record of the proceedings be made in gross misdemeanor cases.

The Committee then reviewed Rules 15.01 and 15.02 to determine whether gross misdemeanors could be paired with misdemeanors rather than felonies. Committee members noted that many misdemeanors are serious, enhanceable offenses and that the Rule 15.02 process is used for those offenses. The Committee noted that Rule 15.02 currently requires a thorough review of the rights a defendant is waiving when pleading guilty and that this process is more than adequate for gross misdemeanor guilty pleas. Further, Rule 15.01, subd. 2, applies only to felonies. Thus the Committee agreed that gross misdemeanors should be covered by the guilty plea procedures in Rule 15.02 rather than Rule 15.01. To fully support that change, the Committee also recommends updating the Misdemeanor Petition to Enter Plea of Guilty (Appendix B) to include gross misdemeanors. The Committee also recommends amending Rule 5.03(i); Rule 5.07, subd. 1; and the comments to Rule 5, to replace the reference to Rule 15.01 with a reference to Rule 15.02.

Recommendation. The Committee recommends amending Rule 5.03(i); Rule 5.07, subd. 1; the comments to Rule 5; Rule 14.02, subds. 1 and 2; Rule 15.01; Rule 15.02; Rule 15.03; Rule 15.09; and Appendix B to Rule 15 to combine gross misdemeanors with misdemeanors in the guilty plea procedures.

8. Trial and Appeal

The Committee next discussed the requirement in Rule 26.01, subd. 2(b), that the district court make written findings for gross misdemeanors tried to the court. The Committee agreed on a preliminary basis that any change made to Rule 26.01 depends on whether changes are recommended in the rules governing time to appeal. The Committee agreed that if the time to appeal remains at 90 days as provided in Rule 28.02, subd. 4(3)(a), then the written findings requirement should remain as is to ensure that the district court reduces its findings to writing in a timely manner thus preserving the record for appeal. On the other hand the Committee agreed that if the time to appeal was reduced to match the misdemeanor timeline of 10 days under Rule 28.02, subd. 4(3)(b), then the timeline for written findings could be changed to require written findings only if the case was appealed, as provided for misdemeanors in Rule 26.01, subd. 2(c).

i. Time to Appeal. The Committee then discussed Rule 28.02, subd. 4(3), which governs the time to appeal and several members expressed concern with reducing the time to appeal a gross misdemeanor. The reason cited was that the appeal process for gross misdemeanors is more like felonies than misdemeanors. Under Minn. Stat. § 611.14(2) defendants appealing a gross misdemeanor or felony conviction are entitled to public defender representation. Further, the cases to be appealed often do not get

referred to the State Public Defender's Office Appellate Division within the timeframe allowed for a misdemeanor appeal. Thus the Committee agreed that to avoid affecting the constitutional and statutory rights of defendants to appeal and be represented by the public defender's office in gross misdemeanor cases, the time to appeal a gross misdemeanor should remain unchanged.

Recommendation. The Committee recommends no change to the time to appeal a gross misdemeanor in Rule 28.02, subd. 4(3)(a). In light of this recommendation, the Committee also recommends that the written findings requirement in Rule 26.01, subd. 2(b), remain unchanged.

ii. Right to Appeal Orders. The Committee also reviewed Rule 28.02, subd. 2(2)(b), and considered whether the right to appeal from certain orders in gross misdemeanor cases should be changed. At the outset, members noted that these types of appeals do not occur very frequently in gross misdemeanor cases so there may be no problem to address. And while it could be argued that eliminating some or all of the options to appeal certain orders could reduce costs, an appeal is generally less costly than a retrial pursuant to the orders listed in subdivision 2(2)b.1 and b.3. Further, with respect to subdivision 2(2)b.3, if it were later to be determined that the retrial did constitute double jeopardy, the injury has already occurred when it could have been avoided by an interlocutory appeal. Because the injury is being placed on trial a second time, it is preferable that such orders for retrial be appealed and that retrials be avoided when possible. In sum, the Committee agreed there is a low frequency of these appeals, it is likely that little or no benefit would result from a rule change, and possible harm could result from a rule change.

Recommendation. The Committee recommends no change to Rule 28.02, subd. 2(2)(b).

iii. Personal Presence. The Committee next addressed the personal presence requirements of Rule 26.03, subd. 1. Because the Committee already agreed to recommend changes to Rules 14.02 and 15.03, which address the defendant's presence at the guilty plea stage, the Committee agreed that Rule 26.03 should be changed to be consistent with these recommendations. The Committee then discussed whether the better approach was to pair gross misdemeanors with misdemeanors in Rule 26.03, subd. 1(3)(3), or whether gross misdemeanors should be paired with felonies in Rule 26.03, subd. 1(3)(2), which would require adding an exception allowing the district court to waive the defendant's personal presence for guilty plea and sentencing. The felony rule, subd. 1(3)(2), prohibits the court from excusing the defendant's presence at certain stages; and the misdemeanor rule, subd. 1(3)(3), provides that if the defendant consents, "the court must excuse the defendant from appearing for arraignment or plea." Upon review of these two options, the Committee agreed that the rigid approach in the felony and misdemeanor rules would not work well for gross misdemeanors.

In keeping with the goal of providing flexibility in the rules to allow district courts to place gross misdemeanors on the appropriate place on the continuum in deciding whether to pair gross misdemeanors with either felonies or misdemeanors, the Committee agreed that gross misdemeanors should be addressed separately from both in Rule 26.03, subd. 1(3). The Committee concluded that district courts should be given the discretion to waive a defendant's personal appearance at arraignment or plea in gross misdemeanor cases (unlike felony cases), but should not be required to do so (unlike misdemeanor cases). With respect to trial, the Committee concluded that gross misdemeanors should be paired with felonies (court has no discretion to allow waiver of presence at trial). With respect to sentencing, the Committee concluded that gross misdemeanors should be paired with misdemeanors (court has discretion to allow waiver of presence at sentencing).

Victims' Rights. The Committee addressed the issue of victims' rights to ensure that the changes being recommended would not inadvertently have an impact upon any of the rights afforded to victims under chapter 611A. Some members expressed concern that if defendants in gross misdemeanor cases were allowed to waive their appearance at arraignment, plea and sentencing, this absence would prevent victims from giving the input they are entitled to provide to the district court on issues of pretrial release and sentence. But other members noted that these issues already exist in many misdemeanor cases, such as domestic assault. Further, the Committee assumed that the substantive rights of the victims would trump any request to waive personal appearance, and that district courts would require defendants to appear when necessary in order to afford a proper hearing to victims who have expressed a desire to be heard.

Recommendation. The Committee recommends amending Rule 26.03, subd. 1(3), to add a new subparagraph 3, providing that in "gross misdemeanor cases, the court may, on the defendant's motion, excuse the defendant's presence except at trial." The Committee also recommends that the remaining subparagraphs of the rule be renumbered.

iv. Presentence Investigation Reports (PSIs). The next question discussed was whether Rule 27.02, which allows oral presentence reports in misdemeanor cases, should be extended to apply to gross misdemeanor cases. Several committee members noted that a written report is preferable, especially when the defendant has prior convictions, which typically means there will be more issues addressed in the report. It was also noted that presentence investigations are not required in gross misdemeanor cases under Minn. Stat. § 609.115. The Committee agreed that adding gross misdemeanors to Rule 27.02 and allowing oral reports at the district court's discretion is consistent with the statute.

Recommendation. The Committee recommends amending Rule 27.02 to permit district courts to allow oral presentence reports in gross misdemeanor cases.

v. Sentencing Order. The Committee considered whether to remove the Rule 27.03, subd. 7, requirement that a sentencing order be prepared in gross misdemeanor cases. Several members recalled that the sentencing order was intended to fill the gap left when the rules changed to no longer require mandatory transcripts in gross misdemeanor and felony cases. Some members also noted that when a defendant has as much as a year of incarceration hanging over his head, it is important that the terms of the sentence be in writing. Rule 27.03, subd. 4(E)(4) already requires that conditions of probation be in writing.

Recommendation. The Committee recommends that the Rule 27.03, subd. 7, requirement of a written sentencing order in gross misdemeanor cases remain in place.

vi. Other Recommendations. The Committee agreed to leave Rule 6.05 unchanged as it was agreed it is good practice to review detention in both felony and gross misdemeanor cases in order to eliminate unnecessary detention. The Committee reviewed Rule 20 but agreed that because the rule already addresses felonies, gross misdemeanors, and misdemeanors separately and appropriately, there should be no changes made to that rule. Finally, the Committee reviewed Rule 30.01 and considered whether the reference to gross misdemeanors should be removed. It was noted that because the rules were amended to eliminate mandatory transcripts in felony and gross misdemeanor cases, it is possible that this rule too should have been amended to eliminate the requirement that a transcript be filed when a felony or gross misdemeanor charge is dismissed. Also, members agreed that if a gross misdemeanor is dismissed on the record, there is no need for a transcript in every case. Accordingly, the Committee recommends amending Rule 30.01 to remove the reference to gross misdemeanors.

Recommendation. The Committee recommends that Rule 6.05 and Rule 20 remain unchanged; the Committee also recommends that Rule 30.01 be amended to remove the reference to gross misdemeanors.

IV. OTHER ISSUES

In reviewing the Appendix of Forms to determine if any form changes should be recommended, the Committee noted that Appendix Form 4, Citation for Misdemeanor or Petty Misdemeanor, and Form 5, Citation for Felony or Gross Misdemeanor, should be deleted in light of the Supreme Court's January 13, 2011, Order promulgating amendments to the Rules of Criminal Procedure which changes will take effect on January 1, 2012. In its Order the Supreme Court mandated the use of a Statewide Uniform Citation. Additionally, the Committee recommends that Form 26 be deleted because the Minnesota Judicial Branch maintains a much more up-to-date subpoena form

on its website. The Judicial Branch subpoena form is in the process of being updated to conform to the recently promulgated rule change allowing attorney-issued subpoenas. The deletion of the out-of-date subpoena form in the rules Appendix is recommended by the Committee.

Recommendation. The Committee recommends that Form 4, Form 5, and Form 26 be deleted.

V. SUMMARY

The Committee is mindful that the changes recommended in this Report may not be the wholesale change to the Rules of Criminal Procedure sought by certain groups and/or individuals. But after considerable study and deliberation, there was not widespread support on the Committee for such wholesale change based on the reasons more specifically set out in this report. Moreover, HF 988, which sought to limit public defender appointments in petty misdemeanor cases and would have affected the application of Rule 23.04, was vetoed by the Governor. Further, the Committee believes that there are other changes that could also be considered to increase system efficiency. Such changes include reconsideration of the concepts of venue to allow more efficient resolution of cases in jurisdictions other than the jurisdiction of venue when appropriate. Additionally, requiring all parties to appear at first appearance would make those appearances more meaningful and provide more opportunity for the early resolution of cases. The Committee agrees that the viability of such additional changes should be explored.

In sum, the Committee believes that the changes recommended in this Report will result in some efficiencies and cost savings, while accommodating all competing concerns and if its recommendations are adopted by the Supreme Court that the overall result will be a positive change. Accordingly, the Committee respectfully submits this report to the Supreme Court and asks the Court to consider and adopt the recommended changes to the Rules of Criminal Procedure.

Respectfully Submitted,

ADVISORY COMMITTEE ON
RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

The Supreme Court Advisory Committee on Rules of Criminal Procedure recommends that the following amendments be made in the Minnesota Rules of Criminal Procedure. In the proposed amendments, except as otherwise indicated, deletions are indicated by a line drawn through the words and additions by a line drawn under the words.

1. Amend Rule 1.05, subd. 2, as follows:

Subd. 2. Appearance; How Made. Appearances in proceedings governed by the Minnesota Rules of Criminal Procedure must be made in person except as authorized to be made by ITV in this rule, by written petition in Rules 14.02, subd. 2 and 15.03, subd. 2, and by phone in Rule 26.03, subd. ~~4(3)~~41(3)5.

2. Amend Rule 5.03, clause (i), as follows:

Rule 5.03 Statement of Rights

The court must advise the defendant of the following:

- (a) The right to remain silent and not submit to interrogation;
- (b) Anything the defendant says may be used against the defendant in this or any subsequent proceeding;
- (c) The right to counsel in all proceedings, including police line-ups and interrogations;
- (d) If the defendant appears without counsel and is financially unable to obtain counsel, counsel will be appointed if the defendant has been charged with an offense punishable by incarceration;
- (e) The right to communicate with defense counsel, and that a continuance will be granted if necessary to permit this;
- (f) The right to a jury trial or a trial to the court;
- (g) If the offense is a misdemeanor, the defendant may plead guilty or not guilty, or demand a complaint before entering a plea;
- (h) If the offense is a designated gross misdemeanor as defined in Rule 1.04(b) and a complaint has not yet been 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;

(i) If the offense is a gross misdemeanor and the defendant has had an opportunity to consult with an attorney, the defendant may plead guilty in accordance with Rule ~~15.01~~15.02.

The court may advise a number of defendants at once of these rights, but each defendant must be asked individually at arraignment whether the defendant heard and understood the rights as explained earlier.

3. Amend Rule 5.04, subd. 1, as follows:

Subd. 1. Notice of Right to Counsel; Appointment of the District Public Defender; Waiver of Counsel.

(1) Notice of Right to Counsel. If a defendant charged with a felony, gross misdemeanor, or misdemeanor punishable by incarceration appears without counsel, the court must advise the defendant of the right to counsel, and that the court will appoint the district public defender if the defendant has been determined to be financially unable to obtain counsel.

The court must also advise the defendant that the defendant has the right to request counsel at any stage of the proceedings.

(2) Appointment of the Public Defender. The court must appoint the district public defender on request of a defendant who is:

(a) charged with a felony, gross misdemeanor, or misdemeanor punishable by incarceration, or subject to an extradition proceeding or probation revocation proceeding;

(b) not represented by counsel; and

(c) financially unable to obtain counsel.

The court must not appoint a district public defender if the defendant is financially able to retain private counsel but refuses to do so.

(3) Waiver of Counsel, Misdemeanor or Gross Misdemeanor. Defendants charged with a misdemeanor or gross misdemeanor punishable by incarceration who appear without counsel, do not request counsel, and wish to represent themselves, must waive counsel in writing or on the record. The court must not accept the waiver unless the court is satisfied that it is voluntary and has been made by the defendant with full knowledge and understanding of the defendant's rights. The court may appoint the district public defender for the limited purpose

of advising and consulting with the defendant about the waiver.

(4) Waiver of Counsel, Felony, ~~Gross Misdemeanor~~. The court must ensure that defendants charged with a felony ~~or gross misdemeanor~~ who appear without counsel, do not request counsel, and wish to represent themselves, enter on the record a voluntary and intelligent written waiver of the right to counsel. If the defendant refuses to sign the written waiver form, the waiver must be made on the record. Before accepting the waiver, the court must advise the defendant of the following:

- (a) nature of the charges;
- (b) all offenses included within the charges;
- (c) range of allowable punishments;
- (d) there may be defenses;
- (e) mitigating circumstances may exist; and
- (f) all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel.

The court may appoint the district public defender for the limited purpose of advising and consulting with the defendant as to the waiver.

4. Amend Rule 5.07, subd. 1, as follows:

Subd. 1. Entry of Guilty Plea in Gross Misdemeanor Cases.

The defendant may plead guilty to a gross misdemeanor charge in accordance with Rule ~~4.04~~15.02 if the defendant has counsel, or has had the opportunity to consult with counsel before pleading guilty. If the defendant does not plead guilty, entry of a plea must await the Rule 8 or Omnibus Hearing. A corporation must appear by counsel or by an authorized officer.

5. Amend the Comments to Rule 5, paragraph 4, as follows:

Under Rules 5.03(i) and 5.07, 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 ~~4.04~~15.02. 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, a complaint must be filed before the court accepts the guilty plea. See Rule 4.02, subd. 5(3), and the comments to that rule. See also Rule 5.04, subd. ~~1(4)~~1(3), concerning waiver of the right to counsel. Rule 5.03(i) 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 11.08, a not-guilty plea in felony and gross misdemeanor cases is not entered until the Omnibus Hearing or later.

6. Amend Rule 14.02, subds. 1 and 2, as follows:

Subd. 1. ~~Felony and Gross Misdemeanor Charges.~~ A plea in cases involving felony ~~or gross misdemeanor~~ charges must be made by an individual defendant in person on the record.

Subd. 2. Gross Misdemeanor and Misdemeanor Charges. A plea in cases involving misdemeanor or gross misdemeanor charges may be made by an individual defendant either in person on the record, by ITV, or by petition to plead guilty under Rule 15.03, subd. 2. The plea may be entered by counsel or by ITV if the court is satisfied that the defendant has knowingly and voluntarily waived the right to be present.

7. Amend the Comments to Rule 14, paragraph 4, as follows:

In misdemeanor and gross misdemeanor cases, by Rule 14.02, subd. 2, before accepting such a plea through counsel, the court should determine whether counsel has advised the defendant of the rights and information contained in Rule 15.02. See also Rule 26.03, subd. 1(3) (defendant's presence at trial and sentencing) and Rule 27.03, subd. 2 (defendant's presence at sentencing).

8. Amend the Title of Rule 15.01 as follows:

Rule 15.01 ~~Felony and Gross Misdemeanor~~ Cases

9. Amend the Title of Rule 15.02 as follows:

Rule 15.02 Gross Misdemeanor and Misdemeanor Cases

10. Amend Rule 15.02, subd. 1, as follows:

Subd. 1. Guilty Plea. Before the court accepts a plea of guilty to any misdemeanor or gross misdemeanor offense punishable upon conviction by incarceration, the plea agreement must be explained in open court. The defendant must then be questioned by the court or counsel as to whether the defendant:

1. Understands that the crime charged is (name the offense) committed on or about (Month) (Day) (Year) in _____ County, Minnesota, and that the defendant is pleading guilty to the crime of (name of offense) committed on or about (Month) (Day) (Year) in _____ County, Minnesota.

2. Understands that the maximum possible sentence is 90 days imprisonment for a misdemeanor and 1 year imprisonment for a gross misdemeanor, and a fine in the amount allowed by applicable law. (Under the applicable law, if the maximum sentence is less, it should be so stated.)

3. Understands that, if the defendant is not a citizen of the United States, a guilty plea may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.

4. Understands there is a right to the assistance of counsel at every stage of the proceedings and that defense counsel will be appointed for a defendant unable to afford counsel.

5. Understands and waives the right to:

(a) trial by the court or a jury and that a finding of guilty is not possible in a jury trial unless all jurors agree;

(b) confront and cross-examine all prosecution witnesses;

(c) subpoena and present defense witnesses;

(d) testify or remain silent at trial or at any other time;

(e) be presumed innocent and that the prosecutor must prove the case beyond a reasonable doubt; and

(f) a pretrial hearing to contest the admissibility at trial of any confessions or admissions or of any evidence obtained from a search and seizure.

6. Understands the nature of the offense or offenses charged.

7. Believes that what the defendant did constitutes the offense to which the defendant is pleading guilty.

11. Amend Rule 15.03 as follows:

Rule 15.03 Alternative Methods in Misdemeanor and Gross Misdemeanor Cases

Subd. 1. Group Warnings. The judge may advise a number of defendants at once as to ~~the~~ their constitutional rights as specified in Rule 15.02, subd. 1, questions 2 through 5 above, and as to the consequences of a plea.

The court must first determine whether any defendant is disabled in communication. If so, the court must provide the services of a qualified interpreter to that defendant and should provide the warnings contemplated by this

rule to that defendant individually. The judge's statement in a group warning must be recorded and each defendant when called before the court must be asked whether the defendant heard and understood the statement. The defendant must then be questioned on the record as to the remaining matters specified in Rule 15.02.

Subd. 2. Petition to Plead Guilty. As an alternative to the defendant personally appearing in court, the defendant or defense counsel may file with the court a petition to plead guilty. The petition must be signed by the defendant indicating that the defendant is pleading guilty to the specified misdemeanor or gross misdemeanor offense with the understanding and knowledge required of defendants personally entering a guilty plea under Rule 15.02.

12. Amend Rule 15.09 as follows:

Rule 15.09 Record of Proceedings

Whenever a guilty plea to an offense punishable by incarceration is entered and accepted by the court, a verbatim record of the proceedings must be made, or in the case of misdemeanors or gross misdemeanors, a petition to enter a plea of guilty must be filed with the court. If a written petition to enter a guilty plea is submitted to the court, it must be in the form as set forth in the Appendices to this rule. Any person may, at their expense, order a transcript of the verbatim record made in accordance with this rule. When requested, the transcript must be completed within 30 days of the date the transcript was requested in writing and satisfactory financial arrangements were made for the transcription.

13. Amend the Comments to Rule 15, paragraph 7, as follows:

Under Rule 15.03, subd. 2, a "Misdemeanor/Gross Misdemeanor Petition to Enter Plea of Guilty" as provided for in the Appendix B to Rule 15, may be completed and filed with the court. This petition in written form contains in substance the information and questions required by Rule 15.02, subd. 1, questions 2-5. When properly completed, the petition may be filed by either the defendant or defense counsel. It is not necessary for the defendant to personally appear in court when the petition is presented to the court. If the court is satisfied that the plea is being knowingly and voluntarily entered according to the standards of Rule 15.02, subd. 1 it will dispose of the plea in the same manner as if the defendant entered the plea in person.

14. Amend Rule 23.04 as follows:

Rule 23.04 Certification as a Petty Misdemeanor in a Particular Case

Before trial, upon approval of the court, the prosecutor may certify the offense as a petty misdemeanor if the prosecutor does not seek incarceration and seeks a fine at or below the statutory maximum for a petty misdemeanor. Certification takes effect only ~~on approval of the court and~~ upon consent of the defendant if the offense is identified in statute as requiring the defendant's consent, or if the court determines in the interests of justice that the defendant's consent is required.

15. Amend Rule 26.03, subd. 1, clause (3), as follows:

(3) Presence Not Required.

1. Corporations. A corporation may appear by counsel.

2. ~~Felony and Gross Misdemeanors.~~ In ~~felony and gross misdemeanor~~ cases, the court may, on the defendant's motion, excuse the defendant's presence except at arraignment, plea, trial, and sentencing.

3. Gross Misdemeanors. In gross misdemeanor cases, the court may, on the defendant's motion, excuse the defendant's presence except at trial.

3.4. Misdemeanors. In misdemeanor cases, if the defendant consents either in writing or on the record, the court must excuse the defendant from appearing for arraignment or plea, and the court may excuse the defendant from appearing at trial or sentencing.

4.5. ITV or Telephone. If a defendant consents, the court may allow the parties, lawyers, or the court to appear using ITV or telephone in any proceeding where the defendant could waive appearance under these rules.

16. Amend Rule 27.02 as follows:

Rule 27.02 Presentence Investigation in Misdemeanor and Gross Misdemeanor Cases

The court may permit that an~~An~~ oral presentence report ~~may~~ be given in misdemeanor and gross misdemeanor cases. If an oral report is given, the parties must be permitted to hear it.

17. Amend Rule 30.01 as follows:

Rule 30.01 By Prosecutor

The prosecutor may dismiss a complaint or tab charge without the court's approval, and may dismiss an indictment with the court's approval. The prosecutor must state the reasons for the dismissal in writing or on the record. In ~~felony and gross misdemeanor~~ cases, if the dismissal is on the record, it must be transcribed and filed.

18. Delete the following Criminal Forms:

Form 4 Citation for Misdemeanor or Petty Misdemeanor
Form 5 Citation for Felony or Gross Misdemeanor
Form 26 District Court Subpoena--Subpoena Duces Tecum

19. Amend Appendix B to Rule 15 as follows:

APPENDIX B TO MINN. R. CRIM. P. 15

STATE OF MINNESOTA
COUNTY OF _____

IN DISTRICT COURT
_____ JUDICIAL DISTRICT

Plaintiff,

MISDEMEANOR
/GROSS MISDEMEANOR
PETITION TO
ENTER PLEA OF GUILTY

vs.

Defendant

District Court File No.

TO: THE ABOVE NAMED COURT

I wish to enter a plea of guilty in the above-entitled case and I hereby state to the Court the following:

1. I am the Defendant in this case, my full name is _____ and my date of birth is _____.
2. I am charged with (name of offense) in violation of (statute or ordinance).
3. I hereby plead guilty to the offense of (name of offense) in violation of (statute or ordinance).
4. I am pleading guilty because on (date) in the City of _____, County of _____, and State of Minnesota I committed the following acts: (state sufficient facts to establish a factual basis for all elements of the offense to which the defendant is pleading guilty).
5. I understand that the maximum possible sentence for ~~the~~any misdemeanor offense to which I am pleading guilty is 90 days imprisonment or a fine of (amount) or both, and that the maximum possible sentence for any gross misdemeanor offense to which I am pleading guilty is 1 year imprisonment or a fine of (amount) or both. Further, I understand that if I am not a citizen of the United States, my plea of guilty to this crime may result in deportation, exclusion from admission to the United States or denial of naturalization as a United States citizen.

6. RIGHT TO AN ATTORNEY. I understand that I have the right to be represented by an attorney and that an attorney will be appointed to represent me without cost to me if I cannot afford to pay for an attorney.

7. I have fully discussed the charge(s), my constitutional rights, and this petition with my attorney, (name of attorney).

OR

7a. WAIVER OF ATTORNEY. I give up my right to be represented by an attorney and any right I might have to request that an attorney be appointed to represent me.

8. I understand that I also have the following constitutional rights which I knowingly and voluntarily give up:

a. The right to a trial to the court or to a jury in which I am presumed innocent until proven guilty beyond a reasonable doubt and in which all jurors in a jury trial must agree I am guilty before the jury could find me guilty.

b. The right to confront and cross-examine all witnesses against me.

c. The right to remain silent or to testify for myself.

d. The right to subpoena and present witnesses to testify for me in my defense.

e. The right to a pretrial hearing to contest the admissibility at trial of any confessions or admissions or of any evidence obtained from a search and seizure.

9. I am entering my plea of guilty freely and voluntarily and without any promises except as indicated in number 10 below.

10. I am entering my plea of guilty based on the following plea agreement with the prosecutor: (if none so state).

11. I understand that if the court does not approve this agreement I have the right to withdraw my plea of guilty and have a trial.

12. I understand that if this plea of guilty is accepted I have the right to be present at the time of sentencing and to speak and to present evidence on my behalf.

13. I hereby request to be present at the time of sentencing.

OR

13a. I hereby knowingly and voluntarily give up my right to be present upon (entry of my plea and) sentencing and request that the court sentence me in my absence, but according to any plea agreement that might be contained in this petition.

Dated this ____ day of _____, ____.

Signature of Defendant

Printed name of Defendant

I, (name of attorney) state that I am the attorney for the defendant in the above-entitled criminal action; that I personally explained the contents of the above petition to the defendant; and that I personally observed the defendant date and sign the above petition.

Dated this ____ day of _____, ____.

Attorney for Defendant

PETITION AND PLEA OF GUILTY ACCEPTED BY

Judge of District Court

Date