

STATE OF MINNESOTA

IN SUPREME COURT

C1-84-2137

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

IT IS HEREBY ORDERED that a hearing be held before this Court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on October 29, 2002 at 3:30 p.m., to consider the recommendations of the Supreme Court Advisory Committee on the Rules of Criminal Procedure to amend the rules. A copy of the committee's report and proposed amendments is annexed to this order.

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 14 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before October 15, 2002, and
2. All persons desiring to make an oral presentation at the hearing shall file 14 copies of the material to be so presented with the Clerk of the Appellate Courts together with 14 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before October 15, 2002.

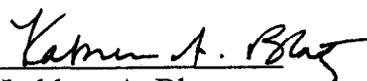
Dated: August 28, 2002

BY THE COURT:

OFFICE OF  
APPELLATE COURTS

AUG 29 2002

FILED

  
Kathleen A. Blatz  
Chief Justice

**C1-84-2137**  
**STATE OF MINNESOTA**  
**IN SUPREME COURT**

**In Re:**

**Supreme Court Advisory Committee**  
**On Rules of Criminal Procedure**

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

**August 9, 2002**

**Hon. Robert Lynn, Chair**

Leonardo Castro, Minneapolis Minneapolis	Thomas Kelly,
Martin Costello, Saint Paul Paul	William Klumpp, Saint
Fred Fink, Saint Paul Minneapolis	John W. Lundquist,
Theodora Gaitas, Minneapolis Minneapolis	Arthur Martinez,
Susan Gretz, Saint Paul Winona	Candace Rasmussen,
Bill Hennessy, Grand Marais Stillwater	Hon. Gary Schurrer,
Candice Hojan, Minneapolis	Paul Scoggin, Minneapolis
C. Paul Jones, Minneapolis Glenwood	Hon. Jon Stafsholt,

Hon. Russell Anderson  
Supreme Court Liaison

Philip Marron, Minneapolis

Reporter

Kelly Mitchell, Saint Paul  
Staff Attorney

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

Pursuant to the Order of the Supreme Court dated August 21, 1998 adopting previous amendments to the Rules of Criminal Procedure, The Advisory Committee has met regularly and continued to monitor the rules and to hear and accept comments concerning them. The Committee has reviewed those matters referred to it by the Supreme Court as well as any comments or suggestions received from the bench and bar and other judicial committees and task forces. Based on this review the Supreme Court Advisory Committee on Rules of Criminal Procedure recommends that the Supreme Court adopt the Proposed Amendments to the Minnesota Rules of Criminal Procedure submitted herewith. A brief summary of those rule amendments follows:

**DWI STATUTORY UPDATE**

Because of statutory changes reorganizing the driving while impaired laws, it is necessary to revise the rules that refer to those statutes. Consequently, the Committee has proposed amending the definition of “designated gross misdemeanor” in Rule 1.04 to replace the previous statutory references with their current counterparts in the new driving while impaired chapter, Minn. Stat. Ch. 169A.

**BAIL BY SURETIES**

In State v. Brooks, 604 N.W.2d 345 (Minn. 2000) the Court determined that a cash only bail requirement violates Article I, §7 of the Minnesota Constitution. The

Committee therefore has proposed that Rule 6.02, subd. 1 be amended to expressly state that bail may be satisfied either by posting cash or by sufficient sureties.

### **COPIES OF DISCOVERY DOCUMENTS**

Rule 7.03 currently provides that in misdemeanor cases the defendant may “inspect” police investigatory reports, but it says nothing about copying those reports. With the technology readily available today to reproduce copies, the Committee believes it is appropriate to amend Rule 7.03 to give the defendant the right to copies of these reports in misdemeanor cases as is already provided under Rule 9 for felony and gross misdemeanor cases. Additionally, the Committee has proposed amending Rule 7.03 and Rule 9.03 to expressly permit such copying to be done by the various methods that exist now and that may be developed in the future. This would include e-mail and facsimile transmission where available to both parties.

### **DISCLOSURE OF DEFENDANT’S STATEMENTS**

The Committee recommends amending Rule 9.02, subd. 1(3) concerning production of defense witness statements to clarify that the rule does not require the disclosure of statements made by the defendant to defense counsel that are protected by the attorney-client privilege or by the state or federal constitution.

### **GUILTY PLEA QUESTIONS AND PETITIONS**

The Committee has proposed several revisions in the guilty plea petition in Appendix A to Rule 15 to make the petition easier to accurately translate and also to assure that defendants are advised of mandatory periods of conditional release in those cases where they may apply. Also, the Committee has proposed amending Rule 15.01 to

require that defendants upon pleading guilty be questioned as to any mandatory conditional release period that may apply.

### **GRAND JURY SUPPORT PERSON**

Rule 18.04 currently permits the witnesses, interpreters, court reporters, and the attorney for the state to be present during grand jury proceedings. The Committee has proposed amending that rule and related rules to also permit a support person, such as a parent or guardian, to be present with a minor testifying before a grand jury. To assure that this does not unduly effect the process, the proposed amendment further provides that a court order based upon a particularized showing of need is necessary. The Court must determine whether the proposed supportive person is appropriate, including whether that person may become a witness or may exert undue influence on the child witness. The support person shall not influence the minor's testimony and shall not be permitted to participate in the grand jury proceedings.

### **VENUE RULE UPDATE**

Rule 24.02 sets forth the exceptions to the general venue rule that a case shall be tried in the county where the offense was committed. Rule 24.02 has not been revised for a number of years and consequently no longer contains all of the exceptions to the general venue rule required as a result of statutory changes since this rule was originally promulgated. The Committee has therefore proposed a number of amendments to Rule 24.02 to update it to accommodate those statutory changes.

### **JURY DELIBERATIONS**

Rule 26.03, subd. 5 permits separation of the jury overnight during deliberations, but only if the defendant consents. The Committee believes that the prosecution should

be treated the same as the defendant on that matter and has therefore proposed amending Rule 26.03, subd. 5 accordingly.

### **APPEAL PROVISIONS**

The Committee has proposed a number of amendments concerning appellate procedure in Rules 27, 28 and 29. Most of these proposed amendments fill in procedural gaps that exist in the rules. These proposed appellate amendments include the following:

1. Amend Rule 27.04, subd. 3 to provide a 30-day time limit to file appellant's brief after delivery of the transcript on a probation revocation appeal;
  
2. Amend Rule 28.02, subd. 2 to permit the defendant to appeal from an order denying a motion to dismiss a complaint following a mistrial where the issue is whether the retrial would violate double jeopardy;
  
3. Amend Rule 28.02, subd. 4 to permit a defendant to join a misdemeanor appeal with a felony or gross misdemeanor appeal when the misdemeanor was joined with the felony or gross misdemeanor for prosecution in the trial court;
  
4. Amend Rules 28.02, subd. 4, 29.03, subd. 4, and 29.04, subd. 11 to provide a procedure for remanding a case for post-conviction proceedings after the defendant has already filed for a direct appeal;

5. Amend Rule 28.02, subd. 5, in accord with State v. Pederson, 600 N.W.2d 451 (Minn. 1999), to establish the procedure for an indigent defendant represented by private counsel to obtain a free transcript from the State Public Defender;
6. Amend Rules 28.04, subd. 1, 29.02, subd. 1 and 29.06 to permit the prosecution to appeal from an order for a new trial following a verdict or judgment of guilty where the order is based exclusively upon a question of law and not in the interests of justice;
7. Amend Rule 28.04, subd. 2 to provide that the prosecution on a pretrial appeal shall file its brief within 15 days after filing the notice of appeal in those cases where the prosecution does not request a transcript or the transcript is delivered before the notice of appeal is filed;
8. Amend Rule 28.05, subd. 1 to require a prosecutor filing a sentence appeal to serve their brief on the State Public Defender in all such cases;  
and
9. Amend Rule 28.05, subd. 1 to permit an appellant on a sentencing appeal to serve and file a reply brief within 5 days after service of the respondent's brief.

### **LEGAL HOLIDAY DEFINITION**

The definition of “legal holiday” in Rule 34.01 is no longer in accord with the statutory definition of that term. The Committee therefore has proposed that the Rule be amended to simply refer to the definition of that term as set forth in Minn. Stat. §645.44.

### **TRIAL JUDGE INVOLVEMENT IN APPEAL**

In State v. Pero, 590 N.W. 2d 319 (Minn. 1999), both the defendant and the prosecution joined together on the appeal in objecting to the trial court judge’s rejection of the tendered guilty plea and subsequent refusal of that judge to recuse himself from the case. The trial court judge formally filed a pro se brief and was personally represented by counsel on the appeal. As requested in the special concurring opinion in that case, this Committee reviewed the issue of a trial court judge’s participation in an appeal. The Committee believes that no amendment of the Rules of Criminal Procedure is necessary to address this issue. Rather, if any rule change is necessary in the future, it should be in the Rules of Civil Appellate Procedure governing extraordinary writs.

### **ELECTRONIC FILING**

The Committee is aware that the new Minnesota Court Information System (MNCIS) being developed for the State of Minnesota will include electronic filing (E-Filing) and that this will require some amendment to the Rules of Criminal Procedure. The Committee has been monitoring this project and when necessary will be prepared to propose to the Court the amendments to the rules needed to implement electronic filing.

### **JURY TASK FORCE RECOMMENDATIONS**

On December 28, 2001, the Minnesota Supreme Court Jury Task Force submitted its Final Report to the Court. As requested by the Court, this Committee reviewed that

report and its recommendations in detail and submitted extensive comments to the Court. The Jury Task Force's recommendations are pending before the Court following the public hearing held on June 26, 2002. As stated at the public hearing, this Committee asks that any Jury Task Force recommendations for amendments to the Rules of Criminal Procedure be referred to this Committee for further review. The Supreme Court Advisory Committee on Rules of Criminal Procedure is prepared to conduct that review and to report back to the Court on any such recommendations as well as other matters concerning the rules that may be referred to us or come to our attention.

Dated: \_\_\_\_\_

Respectfully Submitted,

\_\_\_\_\_

Judge Robert Lynn, Chair  
Supreme Court 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. Rule 1.04. Definitions.

Amend part (b) of Rule 1.04 as follows:

**(b) Designated Gross Misdemeanors.** As used in these rules, the term “designated gross misdemeanors” refers to gross misdemeanors ~~or enhanced gross misdemeanors~~ charged or punishable under Minn. Stat. ~~§169.121, Minn. Stat. §169.1211, Minn. Stat. §169.129~~ 169A.20, Minn. Stat. §169A.25, Minn. Stat. §169A.26 or Minn. Stat. §171.24.

2. Comments on Rule 1.04.

Amend the last paragraph of the comments on Rule 1 as follows:

Rule 1.04 (a) clarifies that any duties, functions or responsibilities set forth in the rules for clerks or deputy clerks also apply to court administrators and deputy court administrators. This is in accord with Minn. Stat. §485.01 (1997). Under Rule 4.02, subd. 5(3) it is possible to commence a prosecution by ~~tab~~ charge for certain designated gross misdemeanors ~~including specified enhanced gross misdemeanors~~. See Rule 4.02, subd. 5(3) and the comments to that rule for the limitations on such prosecutions. That term is also used in various other places throughout the rules and Rule 1.04 (b) specifies the offenses which are considered to be “designated gross misdemeanors”. Minn. Stat. ~~§169.121 (1997), Minn. Stat. §169.1211 (1997), and Minn. Stat. §169.129 (1997)~~ relate ~~169A.20~~ relates to driving, operating, or physical control of a motor vehicle while under the influence of alcohol or a controlled or hazardous substance or refusing to submit to a chemical test and Minn. Stat. §171.24 (1997) relates to driving after cancellation. Minn. Stat. §169A.25 (second-degree driving while impaired) and Minn. Stat. §169A.26 (third-degree driving while impaired) establish the circumstances under which violations of Minn. Stat. §169A.20 constitute a gross misdemeanor. Minn. Stat. §609.02, subd. 2a (1997) defines “enhanced gross misdemeanor” as a “crime for which a sentence of not more than two years imprisonment in a correctional facility or a fine of not more than \$3,000, or both, may be imposed.”

3. Comments on Rule 4, subd. 5(3).

Amend the first five sentences of the eighth paragraph of the comments on Rule 4 as follows:

Rule 4.02, subd. 5(3) permits the use of a tab charge to initiate a prosecution for a designated gross misdemeanor charged under Minn. Stat. §171.24, Minn. Stat. §~~169.121~~169A.20, Minn. Stat. §~~169.121~~169A.25 or Minn. Stat. §~~169.129~~169A.26. Rule 1.04 (b) defines designated gross misdemeanor. The provisions concerning tab charges were extended to gross misdemeanor ~~and enhanced gross misdemeanor~~ driving while ~~intoxicated~~ impaired proceedings because of concern that such proceedings will not otherwise be prosecuted and completed promptly. When the rules were originally promulgated, there were few gross misdemeanor prosecutions. Due primarily to Minn. Stat. §§169.121 and 169.129 and their successor statutes Minn. Stat. §§169A.20, 169A.25, and 169A.26, the number of gross misdemeanor prosecutions has increased tremendously.

4. Comments on Rule 4.02, subd. 5(3).

Amend the second sentence of the eighteenth paragraph of the comments on Rule 4 as follows:

For gross misdemeanors prosecuted ~~under Minn. Stat. §169.121 or Minn. Stat. §169.129~~ as “designated gross misdemeanors” as defined by Rule 1.04(b) and for misdemeanors, Rule 4.02, subd. 5(3) requires only that a tab charge be entered on the records at the time of a defendant’s appearance in Court within the “36 hour rule”.

5. Rule 6.02, subd. 1. Conditions of Release.

Amend the third paragraph of Rule 6.02, subd. 1 as follows:

In any event, the court shall also fix the amount of money bail without other conditions upon which the defendant may obtain release either by posting cash or by sufficient sureties.

6. Comments on Rule 6.02, subd. 1.

Amend the twenty-first paragraph of the comments on Rule 6 by adding the following sentences at the end of that paragraph:

It would violate this constitutional provision for the court to require that the monetary bail could be satisfied only by a cash deposit. The defendant must also be given the option of satisfying the monetary bail by sufficient sureties. State v. Brooks, 604 N.W.2d 345 (Minn. 2000).

7. Rule 7.03. Completion of Discovery.

Amend Rule 7.03 as follows:

**Rule 7.03. Completion of Discovery**

Before the date set for the Omnibus Hearing, in felonies and gross misdemeanor cases, the prosecution and defendant shall complete the discovery that is required by Rule 9.01 and Rule 9.02 to be made without the necessity of an order of court.

In misdemeanor cases, without order of the court the prosecuting attorney on request of the defendant or defense counsel shall, prior to arraignment or at any time before trial, permit the defendant or defense counsel to inspect the police investigatory reports. Upon request, the defendant or defense counsel also shall be entitled to receive a reproduction of the police investigatory reports after the arraignment. This obligation to provide a reproduction of the police investigatory reports may be satisfied by any method that provides to the defendant or defense counsel an exact reproduction of such reports, including e-mail, facsimile transmission, or similar method if that method is available to both parties. A reasonable charge may be made to cover the actual costs of reproduction unless the defendant is represented by the public defender or an attorney working for a public defense corporation under Minn. Stat. §611.216 or is determined by the court to be financially unable to obtain counsel pursuant to Rule 5.02. Any other discovery shall be by consent of the parties or by motion to the court.

8. Comments on Rule 7.03.

Amend the next to last paragraph of the comments on Rule 7 as follows:

Rule 7.03, in misdemeanor cases, requires the prosecutor upon request of the defendant or defense counsel at any time before trial to permit inspection of the police investigatory reports in the case. Additionally, upon request of the defendant or defense counsel, the prosecutor is obligated to provide a reproduction of the police investigatory reports to defendant or defense counsel after the arraignment. This obligation of the prosecutor to provide a reproduction of such reports may be satisfied not just by photocopying, but by other existing or future methods that permit transmission of an exact reproduction to the defendant or defense counsel. This would include e-mail or facsimile transmission if the defendant or defense counsel has the equipment necessary to receive such transmissions. The provision of the rule permitting free copies to public defenders and attorneys working for public defense corporation under Minn. Stat. §611.216 is in accord with Minn. Stat. §611.271. Under this rule the prosecutor should reveal not only the reports physically in the prosecutor's possession, but also those concerning the case which are yet in the possession of the police. This disclosure of investigatory reports is already the practice of many prosecutors and in most misdemeanor cases should be sufficient discovery. This type of discovery is particularly important in misdemeanor cases where prosecution can be initiated upon a tab charge (Rule 4.02, subd. 5(3)) without a complaint or indictment. A defendant, of course, may request a complaint under Rule 4.02, subd. 5(3) to be better informed of the charges, but it is expected that complaints will seldom be requested when the investigatory reports are disclosed to the defendant.

9. Comments on Rule 7.03.

Amend the last paragraph of the comments on Rule 7 as follows:

In those rare cases where additional discovery is considered necessary by either party, it shall be by consent of the parties or by motion to the court. In such cases it is expected that the parties and the court will be guided by the extensive discovery provisions of these rules. Rule 9 provides guidelines for deciding any such motions, but they are not mandatory and the decision is within the discretion of the trial judge. State v. Davis, 592 N.W.2d 457 (Minn. 1999).

10. Rule 9.02, subd. 1(3). Notice of Defense and Defense Witnesses and Criminal Record.

Amend part (b) of Rule 9.02, subd. 1(3) as follows:

(b) Statements of Defense and Prosecution Witnesses. The defendant shall permit the prosecuting attorney to inspect and reproduce any relevant written or recorded statements of the persons whom the defendant intends to call as witnesses at the trial and also statements of prosecution witnesses obtained by the defendant, defense counsel, or persons participating in the defense, and which are within the possession or control of the defendant and shall permit the prosecuting attorney to inspect and reproduce any written summaries within the defendant's knowledge of the substance of any oral statements made by such witnesses to defense counsel or obtained by the defendant at the direction of defense counsel. This provision does not require disclosure of statements made by the defendant to defense counsel or agents of defense counsel that are protected by the attorney – client privilege or by state or federal constitutional guarantees.

11. Rule 9.03. Regulation of Discovery.

Amend Rule 9.03 by adding a new subdivision 10 as follows:

**Subd. 10. Reproduction.** Whenever a party has an obligation to permit reproduction of a report, statement, document or other tangible thing, discoverable under this rule, that obligation may be satisfied by any method that provides to the other party an exact reproduction of that item, including e-mail, facsimile transmission or similar method if that method is available to both parties. A reasonable charge may be made to cover the actual costs of reproduction, except that no charge may be assessed to a defendant represented by the public defender or by an attorney working for a public defense corporation under Minn. Stat. §611.216 or to a defendant determined by the court to be financially unable to obtain counsel pursuant to Rule 5.02.

12. Comments on Rule 9.02, subd. 1(3).

Amend the thirtieth paragraph of the comments on Rule 9 as follows:

Rule 9.02, subd. 1(3) (b) for disclosure of the statements of defense trial witnesses also follows the parallel prosecution disclosure Rule 9.01, subd. 1(1)(a). Rule 9.02, subd. 1(3)(b), which requires the defense to disclose statements of defense and prosecution witnesses does not require the disclosure of a defendant's statements made to defense counsel or agents of defense counsel where such information is protected by state and federal constitutional guarantees or the attorney-client privilege. See Minn. Stat. §595.02, subd. 1(b).

13. Comments on Rule 9.03.

Amend the comments on Rule 9 by adding a new final paragraph as follows:

Under Rule 9.03, subd. 10 the obligation of the defendant or the prosecutor to permit reproduction of items discoverable under Rule 9 may be satisfied not just by photocopying, but by any other existing or future technology that permits transmission of an exact reproduction of the item. This would include e-mail or facsimile transmission if the other party has the equipment necessary to receive such transmissions. The provision in this rule permitting free copies to public defenders and attorneys working for public defense corporations under Minn. Stat. §611.216 is in accord with Minn. Stat. §611.271.

14. Rule 15.01. Acceptance of Plea; Questioning Defendant; Felony and Gross Misdemeanor Cases.

Amend number 10 of Rule 15.01 as follows:

10. Whether defense counsel has told the defendant and the defendant understands:

- a. That the maximum penalty that the court could impose for the crime charged (taking into consideration any prior conviction or convictions) is imprisonment for \_\_\_\_\_ years.
- b. That if a minimum sentence is required by statute the court may impose a sentence of imprisonment of not less than \_\_\_\_\_ months for the crime charged.
- c. That for felony driving while impaired offenses and most sex offenses, a mandatory period of conditional release will be imposed to follow any executed prison sentence, and violating the terms of that conditional release may increase the time the defendant serves in prison.
- d. That if the defendant is not a citizen of the United States, a plea of guilty to the crime charged may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.

15. Appendix A to Rule 15.

Amend number 4 of Appendix A to Rule 15 as follows:

4. Specifically, I understand that I have been charged with the crime of \_\_\_\_\_ committed on or about (month) (day) (year) in \_\_\_\_\_ County, Minnesota, ~~(and that the crime I am talking about is \_\_\_\_\_ which is a lesser degree or lesser included offense of the crime charged).~~

16. Appendix A to Rule 15.

Amend number 19 of Appendix A to Rule 15 as follows:

19. I have been told by my attorney and I understand:

- a. That a person who has prior convictions or a prior conviction can be given a longer prison term because of this.
- b. That the maximum penalty that the court could impose for this crime (taking into consideration any prior conviction or convictions) is imprisonment for \_\_\_\_\_ years. That if a minimum sentence is required by statute the court may impose a sentence of imprisonment of not less than \_\_\_\_\_ months for this crime.
- c. That for felony driving while impaired offenses and most sex offenses, a mandatory period of conditional release will follow any executed prison sentence that is imposed. Violating the terms of this conditional

release may increase the time I serve in prison. In this case, the period of conditional release is \_\_\_\_\_ years.

- d. That a person who participates in a crime by intentionally aiding, advising, counseling and conspiring with another person or persons to commit a crime is just as guilty of that crime as the person or persons who are present and participating in the crime when it is actually committed.
- ~~e.~~ That my present probation or parole could be revoked because of the plea of guilty to this crime.
- e. ~~That if I am not 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.~~

17. Appendix A to Rule 15.

Amend number 21 of Appendix A to Rule 15 as follows:

- 21. That except for the agreement between my attorney and the prosecuting attorney:
  - a. No one – including my attorney, any ~~policeman-police officer~~, prosecutor, judge, or any other person – has made any promises to me, to any member of my family, to any of my friends or other persons, in order to obtain a plea of guilty from me.
  - b. No one – including my attorney, any ~~policeman-police officer~~, prosecutor or judge, or any other person – has threatened me or any member of my family or my friends or other persons, in order to obtain a plea of guilty from me.

18. Appendix A to Rule 15.

Amend number 22a of Appendix A to Rule 15 as follows:

- a. I would then stand trial on the original charge (charges) ~~against me, namely \_\_\_\_\_ (which would include any charges that were dismissed as a result of the plea agreement entered into by my attorney and the prosecuting attorney).~~

19. Appendix A to Rule 15.

Amend number 27 of Appendix A as follows:

- 27. My attorney has told me and I understand that if I am not a citizen of the United States this plea of guilty may result in deportation, exclusion from admission to the United States of America or denial of citizenship
- 28. That in view of all above facts and considerations I wish to enter a plea of guilty.

20. Comments on Rule 17.06, subd. 4(3).

Amend the comments on Rule 17 by adding the following sentence at the end of the second paragraph from the end of the existing comments.

This filing requirement for a new or amended complaint is not satisfied until the complaint is signed by the judge or other appropriate issuing officer and then filed with the court administrator.

21. Rule 18.04. Who May Be Present.

Amend Rule 18.04 as follows:

**Rule 18.04. Who May Be Present**

Attorneys for the State, the witness under examination, qualified interpreters for witnesses handicapped in communication or for jurors with a sensory disability, and for the purpose of recording the evidence, a reporter or operator of a recording instrument may be present while the grand jury is in session, but no person other than the jurors and any qualified interpreters for any jurors with a sensory disability may be present while the grand jury is deliberating or voting. Upon order of court and a showing of necessity for the purpose of security, a designated peace officer may be present while a specified witness is testifying. If a witness before the grand jury so requests and has effectively waived immunity from self-incrimination or has been granted use of immunity, the attorney for the witness may be present while the witness is testifying, provided the attorney is then and there available for that purpose or the attorney's presence can be secured without unreasonable delay in the grand jury proceedings. The attorney shall not be permitted to participate in the grand jury proceedings except to advise and consult with the witness while the witness is testifying.

Pursuant to an order of the court based upon a particularized showing of need, a witness under the age of 18 may be accompanied by a parent, guardian or other supportive person while that child witness is testifying before the grand jury. The parent, guardian or other supportive person shall not be permitted to participate in the grand jury proceedings and shall not be permitted to influence the content of the witness's testimony. In choosing the parent, guardian or other supportive person the court shall determine whether the parent, guardian or other supportive person is appropriate, including whether he or she may become a witness to the matter or may exert undue influence over the child witness. The court shall instruct the parent, guardian or other supportive person on their proper role in the grand jury proceedings.

22. Rule 18.08. Secrecy of Proceedings.

Amend Rule 18.08 as follows:

**Rule 18.08. Secrecy of Proceedings**

Every grand juror and every qualified interpreter for a grand juror with a sensory disability present during deliberations or voting shall keep secret whatever that juror or any other juror has said during deliberations and how that juror or any other juror has voted. Disclosure of matters occurring before the grand jury, other than its deliberations and the vote of any juror, may be made to the prosecuting attorney for use in the performance of the prosecuting attorney's duties, and to the defendant or defense counsel pursuant to Rule 18.05 of this rule governing the record of the grand jury proceedings. Otherwise, no juror, attorney, interpreter, stenographer, reporter, operator of a recording device, typist who transcribes recorded testimony, clerk of court, law enforcement

officer, parent, guardian or other supportive person who attended the grand jury in accordance with Rule 18.04 while a child testified, or court attache may disclose matters occurring before the grand jury except when directed by the court preliminary to or in connection with a judicial proceeding. Unless the court directs otherwise, no person shall disclose the finding of an indictment until the defendant is in custody or appears before the court except when necessary for the issuance and execution of a summons or warrant, provided, however, disclosure may be made by the prosecuting attorney by notice to the defendant or defense counsel of the indictment and the time of defendant's appearance in the district court, if in the discretion of the prosecuting attorney such notice is sufficient to insure defendant's appearance.

23. Rule 24.02, subd. 10. Fair Campaign Practices.

Amend Rule 24.02, subd. 10 as follows:

**Subd. 10. Fair Campaign Practices.** Violations of Minn. Stat. ~~§210A.34 (1975)~~ 211B.15 (2000) prohibiting corporate contributions to political campaigns may be prosecuted and tried in the county where such payment or contribution is made or services rendered or in any county wherein such money has been paid or distributed.

24. Rule 24.02, subd. 11. Series of Offenses Aggregated.

Amend Rule 24.02, subd. 11 as follows:

**Subd. 11. Series of Offenses Aggregated.** When a series of offenses are aggregated pursuant to Minn. Stat. ~~§609.52, subd. 3(7) (1988)~~ 609.52, subd. 3(5) (2000) and the offenses have been committed in more than one county, the case may be presented and tried in any one of the counties in which one or more of the offenses was committed.

25. Rule 24.02, subd. 12. Non-Support of Spouse or Child.

Amend Rule 24.02, subd. 12 as follows:

**Subd. 12. Non-Support of Spouse or Child.** Violations of Minn. Stat. ~~§609.375 (1988)~~ (2001) for non-support of spouse or child may be prosecuted and tried in the county where the defendant, spouse or child ~~or both~~ reside.

26. Rule 24.02. Venue in Special Cases.

Amend Rule 24.02 by adding new subdivisions 13, 14, 15, 16, 17, and 18 as follows:

**Subd. 13. Refusal to Submit to Chemical Test Crime.** Violations of Minn. Stat. §169A.20, subd. 2 for refusal to submit to a chemical test may be prosecuted either in the jurisdiction where the arresting officer observed the defendant driving, operating, or in the control of the motor vehicle or in the jurisdiction where the refusal occurred.

**Subd. 14. Contributing to Need for Protection or Services for a Child.** Violations of Minn. Stat. §260C.425 for

contributing to need for protection or services for a child, may be prosecuted and tried in the county where the child is found or resides or where the alleged act of contributing occurred.

**Subd. 15. Criminal Tax Penalties.** If two or more violations of Minn. Stat. §289A.63 are committed by the same person in more than one county, the person may be prosecuted and tried in any county in which one of the violations was committed.

**Subd. 16. Municipalities in More than One County.** The place of prosecution and trial for offenses subject to prosecution under the provisions of Minn. Stat. Ch. 487 which occur in a municipality located in more than one judicial district or in more than one county within a judicial district shall be determined pursuant to Minn. Stat. §487.21, subd. 4 and any successor statutes. The place of prosecution and trial for misdemeanor and gross misdemeanor offenses which occur in the city of St. Anthony shall be determined pursuant to Minn. Stat. §488A.01, subd. 6 and any successor statutes.

**Subd. 17. Depriving Another of Custodial or Parental Rights.** Violations of Minn. Stat. §609.26 for depriving another of custodial or parental rights may be prosecuted and tried either in the county in which the child was taken, concealed or detained or in the county of lawful residence of the child.

**Subd. 18. Child Abuse.** A criminal action arising out of an incident of alleged child abuse may be prosecuted and tried either in the county where the alleged abuse occurred or the county where the child is found.

27. Comments on Rule 24.02, subd. 10, 11, and 12.

Amend the comments on Rule 24.02, subd. 10, 11, and 12 as follows:

Rule 24.02, subd. 10 (Fair Campaign Practices) from Minn. Stat. §§ ~~210A.34, 210A.36 (1975)~~ §211B.15 (2000);

Rule 24.02, subd. 11 (Series of Offenses Aggregated) from Minn. Stat. §609.52, subd. 3 ~~(7) (1988)~~ (5) (2000), as amended;

Rule 24.02, subd. 12 (Non-Support of Spouse or Child) from Minn. Stat. §609.375 ~~(1988)~~ (2000);

28. Comments on Rule 24.02, subds. 13, 14, 15, 16, 17, and 18.

Amend the comments to Rule 24.02 by adding the following language after the existing paragraph of the comments concerning that rule:

Rule 24.02, subd. 13 (Refusal to Submit to a Chemical Test Crime) from Minn. Stat. §169A.43, subd. 3 (2000);

Rule 24.02, subd. 14 (Contributing to Need for Protection or Services for a Child) from Minn. Stat. §260C.425, subd. 2 (2000);

Rule 24.02, subd. 15 (Criminal Tax Penalties) from Minn. Stat. §289A.63, subd. 11 (2000);

Rule 24.02, subd. 16 (Municipalities in More than One County) from Minn. Stat. §487.21, subd. 4 (2000) and Minn. Stat. §488A.01, subd. 6 (2001);

Rule 24.02, subd. 17 (Depriving Another of Custodial or Parental Rights) from Minn. Stat. §609.26, subd. 3 (2000); and

Rule 24.02, subd. 18 (Child Abuse) from Minn. Stat. §627.15 (2000).

29. Rule 26.03, subd. 5. Sequestration of the Jury.

Amend part (1) of Rule 26.03, subd. 5 as follows:

*(1) In the Discretion of the Court.* During the period from the time the jurors are sworn until they retire for deliberation upon their verdict, the court, in its discretion, may either permit them and any alternate jurors to separate during recesses and adjournments or direct that they be continuously kept together during such period under the supervision of proper officers. With the consent of the defendant and the prosecution the court, in its discretion, may allow the jurors to separate over night during deliberation. The officers shall not speak to or communicate with any juror concerning any subject connected with the trial nor permit any other person to do so, and shall return the jury to the courtroom at the next designated trial session.

30. Comments on Rule 26.02, subd. 4(1).

Amend the thirtieth paragraph of the comments on Rule 26 as follows:

Rule 26.02, subd. 4(1) (Purpose of Voir Dire Examination ---By

Whom Made). The provision of this rule governing the purpose for which voir dire examination shall be conducted and the provision for initiation of the examination by the judge is taken from ABA Standards, Trial by Jury, 2.4 (Approved Draft, 1968). The last sentence of the rule permitting the parties to interrogate the jurors before exercising challenges continues the similar provision of Minn. Stat. §631.26 (1971) with the limitation that the inquiry shall be “reasonable”. The court has the right and the duty to assure that the inquiries by the parties during the voir dire examination are “reasonable”. The court may therefore restrict or prohibit questions that are repetitious, irrelevant, or otherwise improper. See State v. Bauer, 189 Minn. 280, 249 N.W. 40 (1933) and State v. Greer, 635 N.W. 2d 82 (Minn. 2001) (holding no error in district court’s restrictions on voir dire). However, the Minnesota Supreme Court’s Task Force on Racial Bias in the Judicial System recommends in its Final Report, dated May 1993, that during voir dire lawyers should be given ample opportunity to inquire of jurors as to racial bias.

31. Comments on Rule 26.03, subd. 5 (1).

Amend the fifty-first paragraph of the comments on Rule 26 as follows:

Rule 26.03, subd. 5(1) (Sequestration of Jury in Discretion of Court) permits sequestration of the jury in the discretion of the court from the time the jury is sworn until deliberation begins.

32. Rule 27.04, subd. 3. Revocation Hearing.

Amend part (5) of Rule 27.04, subd. 3 as follows:

(5) The probationer or the prosecution may appeal from the court’s decision. The appeal shall proceed according to the procedure provided for appeal from a sentence by Rule 28.05, except that if appellant files a notice of appeal and order for transcript within 90 days of the revocation hearing, appellant’s brief shall be due within 30 days of the delivery of the transcript. Preparation of the transcript shall be governed by the Minnesota Rules of Civil Procedure. All other procedures are governed by Rule 28.05.

33. Rule 28.02, subd. 2. Appeal as of Right.

Amend Part (2) of Rule 28.02, subd. 2 as follows:

(2) *Orders.* A defendant may not appeal until final judgment adverse to the defendant has been entered by the trial court except that a defendant may appeal from an order refusing or imposing

conditions of release or in felony and gross misdemeanor cases from:

1. an order granting a new trial when the defendant claims that the trial court should have entered a final judgment in the defendant's favor; ~~or~~
  2. an order, not on the defendant's motion, finding the defendant incompetent to stand trial; or
  3. an order denying a motion to dismiss a complaint following a mistrial where the issue is whether retrial would violate double jeopardy.
34. Rule 28.02, subd. 4. Procedure for Appeals Other than Sentencing Appeals.

Amend part (3) of Rule 28.02, subd. 4 as follows:

*(3) Time for Taking an Appeal.* An appeal by a defendant shall be taken within 90 days after final judgment or entry of the order appealed from in felony and gross misdemeanor cases ~~and.~~ Upon the felony or gross misdemeanor appeal, other charges which were joined for prosecution with the felony or gross misdemeanor may be included. An appeal by a defendant shall be taken within 10 days after final judgment or entry of the order appealed from in misdemeanor cases, ~~except that an.~~ An appeal from an order denying a petition for post-conviction relief shall be taken within 60 days after entry of the order. A notice of appeal filed after the announcement of a decision or order, but before sentencing or entry of judgment or order shall be treated as filed after such entry or sentencing and on the day thereof. If a timely motion to vacate the judgment, for judgment of acquittal, or for a new trial has been made, the time for an appeal from a final judgment does not begin to run until the entry of an order denying the motion, and the order denying the motion may be reviewed upon the appeal from the judgment.

A judgment or order is entered within the meaning of these appellate rules when it is entered upon the record of the clerk of the trial court.

For good cause the trial court or a judge of the Court of Appeals may, before or after the time for appeal has expired, with or without motion and notice, extend the time for filing a notice of

appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed herein for appeal.

35. Rule 28.02, subd. 4. Procedure for Appeals Other than Sentencing Appeals.

Amend Rule 28.02, subd. 4 by adding a new part (4) as follows:

(4) Dismissal for Postconviction Proceedings. a) Dismissal. If, after filing a notice of appeal, a defendant determines that a petition for postconviction relief is appropriate, the defendant may file a motion to dismiss the appeal for postconviction proceedings.

b) No Waiver. Dismissal of the appeal pursuant to this rule does not result in waiver of any issues raised on the initial direct appeal, and the issues that may be raised in a later appeal from the postconviction order are not limited.

c) Standard of Review. The appellate court shall apply the standard of review applicable to direct appeals to all issues not raised in the petition for postconviction relief.

36. Rule 28.02, subd. 5. Proceeding in Forma Pauperis.

Amend Rule 28.02, subd. 5 as follows:

**Subd. 5. Proceedings in Forma Pauperis.** Proceedings on appeal or postconviction in forma pauperis shall be as follows:

(1) An indigent defendant wanting to appeal or to obtain postconviction relief shall make application therefor to the office of the State Public Defender.

(2) The office of the State Public Defender shall promptly send to such applicant a financial inquiry form, preliminary questionnaire form and such other forms as deemed appropriate.

(3) The applicant shall, if the applicant wants to pursue the application, completely fill out these forms, sign each of these forms, and have his or her signature notarized on each of these forms if indicated.

(4) The applicant shall then return these completed documents to the office of the State Public Defender for further processing.

(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 provide representation regarding a judicial review or an evaluation of the merits of a judicial review of the case in a felony case and may so represent the applicant in misdemeanor or gross misdemeanor cases. Upon the administrative determination by the State Public Defender's office that the office will represent an applicant for such a review or evaluation, 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.

(6) All requests for transcripts necessary for judicial review or efforts to have cases reviewed in which the defendant is not represented by an attorney shall be referred by the court receiving the same to the office of the State Public Defender for processing as in paragraphs (2) through (5) above.

(7) Requests for transcripts made by indigent defendants who are represented by private counsel shall be submitted to the State Public Defender and processed in the following manner:

a. The State Public Defender shall determine financial eligibility of the applicant as in paragraphs (2) through (5) above.

b. If the defendant is financially eligible, he or she may request the State Public Defender to order all parts of the trial transcript necessary for effective appellate review. The State Public Defender shall order and pay for all parts of the transcript that are necessary for effective appellate review.

c. If a dispute arises concerning what parts of the

trial transcript are necessary for effective appellate review, a motion for resolution of the matter may be made by the defendant or by the State Public Defender in the appropriate court.

d. The State Public Defender shall provide the transcript to the attorney for the indigent defendant for the purposes of perfecting the direct appeal. The attorney shall sign a receipt for the transcript agreeing to return it to the State Public Defender when the appeal process is complete.

(8) All clerks of court shall furnish the office of the State Public Defender copies of any documents in their possession, without the prior payment of the fees therefor and shall bill the office of the State Public Defender for these copies after they have been furnished to the State Public Defender's office.

~~(8)-(9)~~ All fees, other than for furnishing copies of documents, including appeal fees, hearing fees or filing fees, ordinarily charged by the clerks of court shall automatically be waived in cases in which the State Public Defender's office, or other public defender's office, represents the defendant in question. Such fees shall also be waived by the court upon a sufficient showing by any other attorney that the defendant is unable to pay the fees required.

~~(9)-(10)~~ Unless otherwise specifically provided by Supreme Court order, the State Public Defender's office shall be appointed to represent all eligible indigent defendants in all appeal or postconviction cases as provided above, regardless of which county in the state is the county in which the defendant was accused.

~~(10)-(11)~~ In appeal cases and postconviction cases, the cost of transcripts and other necessary expenses shall be borne by the State of Minnesota from funds available to the State Public Defender's office, regardless of which county in the state is the county in which the defendant was accused, if approved by the State Public Defender.

~~(11)-(12)~~ When a defendant is represented on appeal by the State Public Defender's office, the provision of Rule

110.02, subd. 2 of the Minnesota Rules of Civil Appellate Procedure concerning the certificate as to transcript shall not apply. Rather, in such cases, the State Public Defender upon ordering the transcript shall mail a copy of the written request for transcript to the clerk of the trial court, the clerk of the appellate courts, and the prosecuting attorney. The reporter shall promptly acknowledge receipt of said order and his acceptance of it, in writing, with copies to the clerk of the trial court, the clerk of the appellate courts, the State Public Defender, and the prosecuting attorney and in so doing shall state the estimated number of pages of the transcript and the estimated completion date not to exceed 60 days. Upon delivery of the transcript, the reporter shall file with the clerk of the appellate courts a certificate evidencing the date of delivery.

~~(12)~~(13) A defendant may proceed pro se on appeal only after the State Public Defender has first had the opportunity to file a brief on behalf of the defendant. The State Public Defender at the time of filing and serving the brief shall also provide a copy of the brief to the defendant. If the defendant then chooses to proceed pro se on appeal or to file a supplementary brief, the defendant shall so notify the State Public Defender.

~~(13)~~(14) Upon receiving notice pursuant to paragraph ~~(12)~~ (13) that the defendant has chosen to proceed pro se on appeal or to file a supplementary brief, the State Public Defender's office shall confer with the defendant about the reasons for choosing to do so and advise the defendant concerning the consequences and ramifications of that choice.

~~(14)~~(15) In order to proceed pro se on appeal following consultation, the defendant shall sign and return to the State Public Defender's office a detailed waiver of counsel as provided by that office for the particular case.

~~(15)~~(16) If the State Public Defender's office believes, after consultation, that the defendant may not be competent to waive counsel it shall assist the defendant in seeking an order from the district court determining the competency or incompetency of the defendant.

~~(16)~~(17) The brief filed by the State Public Defender on behalf of the defendant shall be considered by

the court. A defendant, whether or not choosing to proceed pro se, may also file with the court a supplemental brief. The supplemental brief shall be filed within 30 days after the initial brief is filed by the State Public Defender.

~~(17)~~(18) If a defendant requests a copy of the transcript, the State Public Defender's office shall confer with the defendant concerning the need for the transcript. If the defendant still requests a copy of the transcript it shall be provided to the defendant temporarily.

~~(18)~~(19) Upon receiving the transcript, the defendant must sign a receipt for it including an agreement not to make the transcript available to other persons and to return the transcript to the State Public Defender's office upon expiration of the time to file any supplementary brief.

~~(19)~~(20) The transcript remains the property of the State Public Defender's office and must be returned to that office upon expiration of the time to file any supplemental brief. Upon return of the transcript to the State Public Defender's office, that office shall provide the defendant with a copy of a signed receipt for it. The original of the receipt shall be filed promptly with the clerk of the appellate courts and until it is filed the defendant's supplemental brief will not be accepted for filing.

37. Rule 28.04, subd. 1. Right of Appeal.

Amend Rule 28.04, subd. 1 as follows:

**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 Minn. Stat. §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 Minn. Stat. Ch. 590; and

(4) 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) 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) 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.

38. Rule 28.04, subd. 2. Procedure Upon Appeal of Pretrial Order.

Amend part (3) of Rule 28.04, subd. 2 as follows:

*(3) Briefs.* Within fifteen (15) days of delivery of the transcripts, or within fifteen (15) 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 8 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.

39. Rule 28.04, subd. 7. Procedure Upon Appeal From Judgment of Acquittal or Vacation of Judgment After a Jury Verdict of Guilty.

Amend Rule 28.04, subd. 7 as follows:

**Subd. 7. 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 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 ten (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's 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 10 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.

40. Rule 28.05, subd. 1. Procedure.

Amend part (1) of Rule 28.05, subd. 1 as follows:

*(1) Notice of Appeal and Briefs.* Any party appealing a sentence shall file with the clerk of the appellate courts, within 90 days after judgment and sentencing, (a) a notice of appeal, (b) 9 copies of an informal letter brief setting forth the arguments concerning the illegality or inappropriateness of the sentence, (c) an affidavit of service of the notice upon opposing counsel, the attorney general, and the clerk of the trial court in which the sentence was imposed or stayed, and (d) an affidavit of service of the brief upon opposing counsel, ~~and upon the attorney general,~~ and in the case of prosecution appeals, the State Public Defender. A defendant appealing the sentence and the judgment of conviction has the option of combining the two appeals into a single appeal; when this option is selected the procedures established by Rule 28.02 of these rules shall continue to apply. The clerk of the appellate courts shall not accept a notice of appeal from sentence unless accompanied by the requisite briefs and affidavit of service.

41. Rule 28.05, subd. 1. Procedure.

Amend part (4) of Rule 28.05, subd. 1 as follows:

*(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. 6 concerning stays, Rule 28.02, subd. 7 concerning the release of the defendant on appeal, and Rule 28.02, subd. 13 concerning oral argument shall apply to sentence appeals under this rule. The appellant may serve and file a reply brief within 5 days after service of the respondent's brief.

42. Comments on Rule 28.02, subd. 2(2).

Amend the fifth paragraph of the comments on Rule 28 as follows:

The provisions in Rule 28.02, subd. 2(2) concerning a defendant's right to appeal from an order refusing or imposing conditions of release is taken from Fed.R.App.P. 9(a) and 18 U.S.C. § 3147(b). The remaining provisions of Rule 28.02, subd. 2(1) and (2) are taken substantially from ABA Standards, Criminal Appeals, 21-1.3 (Approved Draft, 1979). Subd. 2(2) 3 provides defendants with the ability to appeal an order denying a double jeopardy based motion for dismissal after a first trial has ended by mistrial. This provision avoids forcing a

defendant to stand trial for a second time for the same offense, one of the principle concerns of double jeopardy protection, State v. McDonald, 298 Minn. 449, 452, 215 N.W.2d 607, 609 (1974), without first permitting appellate review of the double jeopardy issue. Rule 28.02, subd. 2(3) giving a defendant the right to appeal any sentence imposed or stayed in a felony case is based on Minn. Stat. §244.11 (1982). Under Rule 28.04, subd. 1(2) the prosecuting attorney also has a right to appeal from a sentence imposed or stayed. Under Rule 27.04, subd. 3(5) either the defendant or the prosecuting attorney may also appeal from the court's decision in a probation revocation proceeding. A defendant cannot as a matter of right appeal from a stay of adjudication entered pursuant to Minn. Stat. §152.18, subd. 1, which statute requires the consent of the defendant. However, a defendant may seek discretionary appeal from such a stay under Rule 28.02, subd. 3. State v. Vershelde, 595 N.W.2d 192 (Minn. 1999).

43. Comments on Rule 28.02, subd. 4(4).

Amend the comments on Rule 28 by adding the following paragraph after the existing eighth paragraph of the comments:

Rule 28.02, subd. 4(4) establishes a procedure by which a defendant who has initiated a direct appeal may nonetheless pursue postconviction relief. Certain types of claims are better suited to the taking of testimony and factfinding possible in the district court, and defendants are encouraged to bring such claims, such as ineffective assistance of counsel where explanation of the attorney's decision is necessary, through post conviction proceedings rather than through direct appeal. See Black v. State, 560 N.W.2d 83, 85 n.1 (Minn. 1997). Dismissal of the direct appeal under the rule for these purposes, standing alone, should not be construed as a procedural default by the defendant, or to indicate failure to exhaust available state remedies. See 28 U.S.C.A. §2254(b) (requiring a state prisoner seeking habeas corpus relief in federal court to exhaust available state remedies); Wainwright v. Sykes, 433 U.S. 72 (1977) (holding procedural default may bar federal court review on habeas petition).

44. Comments on Rule 28.02, subd. 5.

Amend the tenth paragraph of the comments on Rule 28 as follows:

Rule 28.02, subd. 5 also sets forth the method for temporarily making transcripts available to defendants seeking to proceed pro se or to file a supplemental brief on appeal. As to the right of a defendant to proceed pro se on appeal and to obtain a transcript for that purpose see State v. Seifert, 423 N.W.2d 368 (Minn. 1988). The procedure established by the rule contains elements of both the majority and dissenting opinions in that case. The rule allows a defendant to proceed pro se on appeal and to obtain a copy of any necessary

transcript, but only after the State Public Defender has first had an opportunity to file a brief on behalf of the defendant and provided a copy of that brief to the defendant. This procedure satisfies the right of a defendant to proceed pro se while also assuring that any valid legal arguments will be brought to the attention of the appellate court by competent legal counsel. The State Public Defender's office will confer with the defendant and advise the defendant of the dangers and consequences of proceeding without legal counsel. If the defendant chooses to proceed, the State Public Defender's office will obtain a waiver of counsel from the defendant. If there is doubt as to the defendant's competency to waive counsel, the State Public Defender's office will assist in seeking an order from the district court determining the defendant's competency or incompetency. Upon receiving the transcript, the defendant must sign a receipt acknowledging the obligation to return the transcript to the State Public Defender's office when the time to file the supplementary brief expires. The transcript remains the property of the State Public Defender's office and any supplementary brief will not be accepted by the appellate court until the State Public Defender files a receipt with the appellate court indicating that the transcript has been returned. The recommended forms appended to the rules contain forms for waiver of counsel, request for determination of competency, and receipts of transcript by and from the defendant that satisfy the requirements of these rules. Part (7) sets forth the procedure through which an indigent person represented on appeal by private counsel obtains a transcript at public expense. It reflects the ruling and procedure set out in *State v. Pederson*, 600 N.W.2d 451 (Minn. 1999). Part (7) (c) addresses the method of resolving disputes between the State Public Defender and the private attorney about what parts of the transcript should be ordered. The "appropriate" court for resolving disputes is the appellate court in which the appeal is filed. In the event an evidentiary hearing or extensive fact finding is required to resolve the dispute, the appellate court may order the issue be resolved by the district court in which the case was originally filed. In any case in which the entire transcript is not ordered, the procedure set forth in Rule 28.02, subd. 9 must be followed to permit the respondent to order additional parts of the transcript. Under part (10) of Rule 28.02, subd. 5, the State Public Defender is not obligated to pay for transcripts or other expenses for a misdemeanor appeal if that office has not agreed under part (5) of that rule to represent the defendant in such a case.

45. Comments on Rule 28.04.

Amend the twentieth paragraph of the comments on 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). 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 773 (Minn 1997), *aff'g*

569 N.W.2d 205 (Minn. 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 5 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 5-day time limit begins to run. In State v. Hugger, 640 N.W.2d 619 (Minn. 2002) the court held that in computing the 5-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 3 days for service by mail is added pursuant to Rule 34.04.

46. Rule 29.02, subd. 1. Appeals in First Degree Murder Cases.

Amend Rule 29.02, subd. 1 as follows:

**Subd. 1. Appeals in First Degree Murder Cases.** A defendant may appeal as of right from the district court to the Supreme Court from a final judgment of conviction of murder in the first degree. Either the defendant or prosecuting attorney may appeal as of right from the district court to the Supreme Court, in a first degree murder case, from an adverse final order upon a petition for postconviction relief under Minn. Stat. Ch. 590. The prosecuting attorney may appeal as of right from the district court to the Supreme Court, in a first degree murder case, from either a judgment of acquittal after a jury verdict of guilty of first degree murder or an order vacating judgment and dismissing the case after a jury verdict of guilty of first degree murder, or from an order granting a new trial under Rule 26.04, subd. 1, after a verdict or judgment of guilty of first degree murder, 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, except that an order for a new trial is not appealable if it is based on the interests of justice. Upon the appeal other charges which were joined for prosecution with the first degree murder charge may be included. Except as otherwise provided in Rule 118 of the Rules of Civil Appellate Procedure for accelerated review by the Supreme Court of cases pending in the Court of Appeals, there shall be no other direct appeals from the district court to the Supreme Court.

47. Rule 29.03, subd. 4. Other Procedures.

Amend Rule 29.03, subd. 4 as follows:

**Subd. 4. Other Procedures.** The provisions of Rule 28.02, subd. 4(4),

concerning dismissal for postconviction proceedings, Rule 28.02, subd. 5, concerning proceedings in forma pauperis, Rule 28.02, subd. 6, concerning stays, Rule 28.02, subd. 7, concerning release of defendant, Rule 28.02, subd. 9, concerning the transcript of proceedings and transmission of the transcript and record, Rule 28.02, subd. 10, concerning briefs, Rule 28.02, subd. 11, concerning the scope of review, Rule 28.02, subd. 12, concerning action on appeal, and Rule 29.04, subd. 9, concerning oral argument shall apply to appeals in first degree murder cases under this rule.

48. Rule 29.04, subd. 11. Other Procedures.

Amend Rule 29.04, subd. 11 as follows:

**Subd. 11. Other Procedures.** The provisions of Rule 28.02, subd. 4(4), concerning dismissal for postconviction proceedings, Rule 28.02, subd. 5, concerning proceedings in forma pauperis, Rule 28.02, subd. 6, concerning stays, Rule 28.02, subd. 7, concerning release of defendant, Rule 28.02, subd. 8, concerning record on appeal, Rule 28.02, subd. 11, concerning the scope of review, and Rules 28.02, subd. 12 and 28.05, subd. 2, concerning action on appeal shall apply to appeals to the Supreme Court from the Court of Appeals.

49. Rule 29.06. Procedure for Appeals by the Prosecuting Attorney from a Judgment of Acquittal or Vacation of Judgment after a Jury Verdict of Guilty.

Amend Rule 29.06 as follows:

**Rule 29.06. Procedure for Appeals by the Prosecuting Attorney from a Judgment of Acquittal or Vacation of Judgment after a Jury Verdict of Guilty, or from an Order Granting a New Trial**

Upon an appeal to the Supreme Court 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 from an order granting a new trial, in a first degree murder case, the provisions of Rule 28.04, subd. 7 shall apply.

50. Rule 34.01. Computation.

Amend Rule 34.01 as follows:

**Rule 34.01. Computation**

Except as provided by Rules 3.02, subd. 2(2), 4.02, subd. 5(1), 4.02, subd. 5(3), and 4.03, time shall be computed as follows:

The day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a

Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When a period of time prescribed or allowed is seven days or less, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" includes any holiday defined or designated by statute ~~New Year's Day, Washington's Birthday (President's Birthday), Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, Christmas Day,~~ and any other day appointed as a holiday by the President or the Congress of the United States or by the State.

51. Comment on Rule 34.01.

Amend the first paragraph of the comments on Rule 34 as follows:

Rule 34.01 (Computation) adopts Minn. R. Civ. P. 6.01 except that it ~~specifies the legal holidays provided for by Minn. Stat. §645.44, subd. 5 (1971) and~~ excludes Saturdays, Sundays, and legal holidays from computation when the period of time allowed is "seven days or less" rather than "less than seven days". Minn. Stat. §645.44, subd. 5 sets forth the legal holidays for the State of Minnesota.

OFFICE OF  
APPELLATE COURTS

OCT 15 2002

**FILED**

**C1-84-2137  
STATE OF MINNESOTA  
IN SUPREME COURT**

**In Re:**

**Supreme Court Advisory Committee  
On Rules of Criminal Procedure**

**REQUEST TO MAKE ORAL PRESENTATION**

I hereby respectfully request the opportunity to make an oral presentation regarding the attached Objection to Proposed Amendment to Rule of Criminal Procedure 28.02, Subd. 4 at the hearing scheduled for October 29, 2002.

Respectfully submitted,



**THOMAS R. RAGATZ  
Assistant Attorney General**

(651) 296-6598

AG: #743196-v1

**C1-84-2137**  
**STATE OF MINNESOTA**  
**IN SUPREME COURT**

**In Re:**

**Supreme Court Advisory Committee**  
**On Rules of Criminal Procedure**

**OBJECTION TO PROPOSED AMENDMENT TO RULE OF CRIMINAL PROCEDURE**  
**28.02, SUBD. 4**

The Minnesota Attorney General's Office, the Minnesota County Attorneys Association, the Minnesota Center for Crime Victim Services, and the Minnesota General Crime Victim Coalition, object to the proposed amendment to Minn. R. Crim. P. 28.02, subd. 4, Procedure for Appeals Other than Sentencing Appeals. The proposed amendment adds a new part (4) as follows:

- (4) *Dismissal for Postconviction Proceedings.* a) Dismissal. If, after filing a notice of appeal, a defendant determines that a petition for postconviction relief is appropriate, the defendant may file a motion to dismiss the appeal for postconviction proceedings.
- b) No Waiver. Dismissal of the appeal pursuant to this rule does not result in waiver of any issues raised on the initial direct appeal, and the issues that may be raised in a later appeal from the postconviction order are not limited.
- c) Standard of Review. The appellate court shall apply the standard of review applicable to direct appeals to all issues not raised in the petition for postconviction relief.

The problem with this amendment is that dismissal of a direct appeal, to allow for filing of a postconviction petition, divests the appellate court of jurisdiction over the appellant, and this proposed amendment creates no time limit or other incentive for the appellant to file a postconviction petition in a timely fashion. This leaves victims with no idea when state appellate proceedings will conclude, and does not serve the criminal justice system's interest in timely resolution of attacks on convictions.

As a concrete example, Donald Blom filed a direct appeal from his conviction for the first-degree murder of Katie Poirer but then moved the court to stay the direct appeal to allow him to pursue postconviction relief. The Minnesota Supreme Court stayed the appeal. Approximately ten months later, when Blom still had not filed a petition for postconviction relief, the Court ordered him to do so within 21 days, stating that if he did not it would lift the stay of appeal and require him to file his brief within 60 days. See February 13, 2002, order, *State v. Blom*, C2-00-1994. The Minnesota Supreme Court filed a similar order in *State v. Michael Jon Staunton*, C4-01-7730 (order of December 6, 2001).

Had the Minnesota Supreme Court followed the procedures set out in the proposed amendment to Rule 28.02, it would not have had any jurisdiction to order Blom to make a timely filing of a petition for postconviction relief.

In certain cases, it may be in a defendant's interest to delay filing a postconviction petition for many months, in the hope that the passage of time will make it harder for the state to retry the case, if necessary, as witnesses become unavailable or their memories fade. An example of a delay that created a possible tactical advantage is found in *State v. Nelson*, C5-98-2278, where a defendant claiming ineffective assistance of counsel waited to file his postconviction petition until after the retirement of the trial judge who presided over the plea negotiation at issue.

In order to prevent appellants from obtaining dismissal of a direct appeal and then failing to file a petition for postconviction relief in a timely fashion, we propose two alternatives:

1) In the proposed amendment to Rule 28.02, subd. 4, change the word "dismissal" to "stay." We are aware that the Court of Appeals would prefer to dismiss direct appeals, rather than staying them, for record keeping reasons; therefore, in the alternative we propose:

2) Section c) of new part (4) be amended to include the following language,

c) Standard of Review. The appellate court shall apply the standard of review applicable to direct appeals to all issues not raised in the petition for postconviction relief, *provided the petition for postconviction relief is filed within 90 days of the dismissal of the direct appeal, or a motion for an extension of time within which to file the petition for postconviction relief is filed with the postconviction court within this 90 days and is granted by the postconviction court.*

Proposal no. 2 would give appellants a strong incentive to file a postconviction petition within the required 90 days, in order to avoid facing the stricter postconviction standard of review on all their appellate issues, while providing for additional time if an appellant has a good-faith basis for not being able to file a postconviction petition within the required 90 days.

Either of these two proposals will balance the rights of defendants, the rights of victims, and the interest of the criminal justice system in resolving cases in a timely fashion. The current proposal does not.

Respectfully submitted,



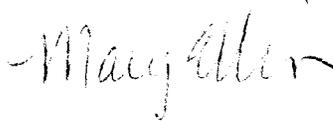
THOMAS R. RAGATZ  
Assistant Attorney General

(651) 296-6598



John Kingrey,  
Executive Director,  
Minnesota County Attorneys Association

(651) 641-1600



Mary Ellison,  
Executive Director,  
Minnesota Center for Crime Victim Services

(651) 297-7883



Lucy Banks,  
Executive Director,  
Minnesota General Crime Victim Coalition

(952) 941-2515