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 November 17, 1999 at 1:30 p.m., to consider the recommendations of the Supreme Court Advisory Committee on the Rules of Criminal Procedure to amend the rules. Copies of the committee's majority and minority reports are 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 12 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 November 10, 1999, and

2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the Clerk of the Appellate Courts together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before November 10, 1999.

Dated: September 27, 1999

BY THE COURT:

Kathleen A. Blatz
Chief Justice

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 10, 1998 promulgating the last amendments to the Rules of Criminal Procedure, the Advisory Committee has continued to monitor the rules and to consider other possible amendments. During the 1999 session, the Minnesota Legislature amended Minn. Stat. § 631.07 to give the prosecution in criminal cases an automatic right of rebuttal. This provision is contrary to current Rule 26.03, subd. 11 of the Rules of Criminal Procedure. The order of final argument is an issue that the committee has considered numerous times in the past. In light of the legislative action and at the request of various committee members, the committee reviewed this issue again. As a result of our further extensive discussion the committee is recommending that the court adopt the accompanying proposed amendments to the Rules of Criminal Procedure concerning the order of final argument in Rule 26.03, subd. 11 and the comments to that rule. In making this recommendation the committee attempted to reach a consensus. This is the usual approach taken by the committee and most recommendations made by the committee to this court are the result of a consensus judgment made after full discussion of the particular issues with a primary focus on what is best for the criminal justice system. On the issue of final argument consensus was not possible, but the proposed amendments submitted herewith had the support of a majority of the committee. Of the twelve members present, three members of the committee voted against the proposed amendment of Rule 26.03, subd. 11 because of the provision for surrebutal to the defendant in the discretion of the court. Instead of permitting such discretionary surrebutal, those three members proposed that the following language be added to the rule:

"At the conclusion of the prosecution rebuttal the Court shall allow the defense an opportunity, outside the presence of the jury, to make any objections it may have to the content or manner of the prosecution=s rebuttal based upon existing law, and to request curative instructions. The court shall, on the record, rule on all such objections and requests before submitting the case to the jury. This rule does not limit the right of any party under existing law to make appropriate objections and seek curative instructions at any other time during the closing argument process."

Additionally, three other committee members abstained from voting on the proposed amendments, not on the merits, but because the committee had been unable to reach consensus on the issue and they did not want to deviate from the committee's usual practice of deciding matters by consensus. However, those committee members would have voted for the proposed amendment had consensus been possible.

Because of the need to consider the final argument issue promptly, the committee at this time is submitting this report and the accompanying proposed amendments concerning only that issue. However, the committee will continue to meet and to consider any comments or proposals received from the bench and bar concerning possible future amendments to the Rules of Criminal Procedure.

Dated: July 27, 1999

Respectfully Submitted,

_____
Judge Joanne M. Smith, Chair
Supreme Court Advisory Committee on
Rules of Criminal Procedure

PROPOSED AMENDMENTS TO THE
RULES OF CRIMINAL PROCEDURE
- July 26, 1999 -

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 deletions are indicated by a line drawn through the words and additions by a line drawn under the words.

1. Rule 26.03, subd. 11. Order of Jury Trial.

Amend Rule 26.03, subd. ll as follows:

Subd. 11. Order of Jury Trial. The order of a jury trial shall be substantially as follows:

a. The jury shall be selected and sworn.
b. The court may deliver preliminary instructions to the jury.
c. The prosecuting attorney may make an opening statement to the jury, confining the statement to the facts the prosecuting attorney expects to prove.

d. The defendant may make an opening statement to the jury, or may make it immediately before offering evidence in defense. The statement shall be confined to a statement of the defense and the facts the defendant expects to prove in support thereof.
e. The prosecution shall offer evidence in support of the indictment, complaint or tab charge.
f. The defendant may offer evidence in defense.
g. The prosecution may offer evidence in rebuttal of the defense evidence, and the defendant may then offer evidence in rebuttal of the prosecution's rebuttal evidence. In the interests of justice, the court may permit either party to offer evidence upon the party's original case.
h. At the conclusion of the evidence, the prosecution may make a closing argument to the jury.
i. The defendant may then make a closing argument to the jury.
j. The prosecution may then make a rebuttal argument to the defense closing argument. The rebuttal must be limited to a direct response to those matters raised in the defendant's closing argument.
k. On the Motion of the ~~prosecution~~ defendant, the court may permit the ~~prosecution~~ defendant to reply in ~~rebuttal~~ surrebuttal if the court determines that the ~~defense~~ prosecution has made in its ~~closing~~ rebuttal argument a misstatement of law or fact or a statement that is inflammatory or prejudicial. The ~~rebuttal~~ surrebuttal must be limited to a direct response to the misstatement of law or fact or the inflammatory or prejudicial statement.
l. At the conclusion of the arguments the court shall allow the parties an opportunity, outside the presence of the jury and on the record, to make any objections they may have to the content or manner of the other party=s arguments based upon existing law and to request curative instructions. This rule does not limit the right of any party under existing law to make appropriate objections and to seek curative instructions at any other time during the closing argument process.

~~k~~ m. The court shall charge the jury.
~~l~~ n. The jury shall retire for deliberation and, if possible, render a verdict.

2. Comments on Rule 26.03, subd. 11.

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

Rule 26.03, subd. 11 (Order of Jury Trial) substantially continues the order of trial under existing practice. (See Minn. Stat. ' 546.11 (l971).) The order of closing argument, under sections "h", "i", ~~and~~ "j" ,"k" and "l" of this rule reflects a change. The prosecution argues first, then the defense. ~~The court may then permit the prosecution limited rebuttal, if the defense in its argument made a misstatement of law or fact or a statement that is inflammatory or prejudicial.~~ The prosecution is then automatically entitled to rebuttal argument. However, this argument must be true rebuttal and is limited to directly responding to matters raised in the defendant=s closing argument. Allowance of the rebuttal argument

to the prosecution should result in a more efficient and less confusing presentation to the jury. The prosecution will only need to address those defenses actually raised by the defendant rather than guessing, perhaps wrongly, about those defenses. In the event that the prosecution engages in improper rebuttal, paragraph "k" of the rule provides upon motion, for a limited right of rebuttal to the defendant to address misstatements of law or fact and any inflammatory or prejudicial statements. The court has the inherent power and duty to assure that any rebuttal or surrebuttal arguments stay within the limits of the rule and do not simply repeat matters from the earlier arguments or address matters not raised in the earlier arguments. It is the responsibility of the court to ensure that final argument to the jury is kept within proper bounds. ABA Standards for Criminal Justice, The Prosecution Function 3-5.8, and The Defense Function 4-7.8 (l985). If the argument is sufficiently improper, the trial judge should intervene even without objection from opposing counsel. State v. Salitros, 499 N.W.2d 815 (Minn. 1993); and State v. White, 295 Minn. 217, 203 N.W.2d 852 (l973).

MINORITY REPORT
TO THE MINNESOTA SUPREME COURT
ON ORDER OF CLOSING ARGUMENT

SUPREME COURT ADVISORY COMMITTEE ON
RULES OF CRIMINAL PROCEDURE

The undersigned three members of your Advisory Committee on Rules of Criminal Procedure respectfully dissent from the majority report on order of closing argument submitted to this Court on July 27, 1999. We disagree with that part of the majority's proposal allowing a defense surrebuttal after the prosecutor's rebuttal in closing argument. Instead, we respectfully recommend the attached proposed amendments to Rule and Comment 26.03, subd. 11, as the better alternative for this Court to adopt from the legal, practical, and public policy points of view.

First, however, we wish to express our strong agreement with that part of the majority's recommendation allowing prosecutor rebuttal. In this regard, our proposal for a new paragraph j to Rule 26.03, subd. 11, is exactly the same as that recommended by

the majority report. Both proposed amendments state that after the defense closing argument:

> j. The prosecution may then make a rebuttal argument to the defense closing argument. The rebuttal must be limited to a direct response to those matters raised in the defendant's closing arguments.

This is a highly desirable and long awaited improvement to Minnesota's criminal justice process. Not only does it bring our Rules of Criminal Procedure into alignment with every other state in the nation and the federal system, but it also conforms to recent action by our state legislature. Thus, potential conflicts in the law are avoided. More importantly, there are sound public policy reasons for allowing prosecutor rebuttal.

The right of prosecutors to respond in closing arguments significantly aids the truth finding process, and furthers the public interest in seeing that all the issues in a criminal trial are fairly and fully presented. Allowing the right of rebuttal reduces the likelihood of surprise in the trial process - a goal that underlies many of our rules of criminal procedure. Furthermore, such an improvement will update our Rules of Criminal Procedure to permit what is almost universally recognized, from high school debate teams to appellate arguments in this Court, as an essential tool of fair argument: The right of the party with the burden of persuasion to rebuttal.

Allowing prosecutor rebuttal would also contribute to more efficient trials and save judicial time. The State's initial closing would be much more focused on the affirmative merits of the prosecution's case, and would not have to spend time anticipating all possible defense arguments. Because the prosecution would have rebuttal, it could then respond to the defense arguments actually raised. If the defense raises nothing new or different at all, the prosecution would not need to address them in rebuttal, thus saving time and helping to focus the case.

In sum, the search for truth and justice would be best served by allowing prosecutors a rebuttal argument in criminal cases. We therefore join with the majority of

the Criminal Rules Committee in recommending the proposed amendment to paragraph j of Minn. R. Crim. P. 26.03, subd. 11.

Where we part with the majority, however, is on the question of allowing surrebuttal to the defendant in the discretion of the court (amended paragraph k of the majority's proposal). The undersigned respectfully submit that the better rule would allow only prosecutor rebuttal and no defense surrebuttal. Not only would defense surrebuttal once again put our state out of line with the rest of the nation, we also believe there is no practical or legal need for prolonging the closing argument process with defense surrebuttals.

As a practical matter, under both the majority and minority proposals, there can be no new or unforeseen arguments raised in the prosecutor's rebuttal which would require surrebuttal. This is because the proposed rule and comment expressly prohibit the prosecutor from raising new issues in the rebuttal. Therefore, at the end of rebuttal all issues raised will have already been fully addressed by both sides.

As a legal matter, no defense surrebuttal is necessary to correct potential prosecutor misconduct because this Court has already held that correcting any attorney's trial misconduct is the trial court's responsibility, not opposing counsel's. *State v. White*, 295 Minn. 217, 203 N.W.2d 852 (1973). In *White*, this Court rejected the argument by one party attempting to justify its trial conduct as a response to opposing counsel's "impermissible trial tactics." *Id*. at 223, 203 N.W.2d at 857. This Court said that both sides had "recourse to the court for appropriate admonition and rulings with regard to impermissible trial conduct. Trial courts, as we wrote in *State v. Boice*, 157 Minn. 374, 378, 196 N.W. 483, 484 (1923), 'have ample power to keep counsel on both sides within bounds'." *Id*. More recently the case of *State v. Salitros*, 499 N.W.2d 815, 817-18 (Minn. 1993), reiterated the principle that it is the trial court's responsibility to keep final arguments within proper bounds and to correct misconduct. Thus, the minority's proposed paragraph k in our attachment hereto is ample protection for the defense

because it expressly recognizes this procedure (objection and request for curative instructions) as the appropriate remedy to any prosecutor misconduct on rebuttal.

Finally, it should be noted that defense surrebuttal provisions similar to that in the majority report were proposed in both the house and senate during the last legislative session, and expressly voted down on the floors of both bodies. We respectfully submit that substantial conformity between Minnesota's Rules and statutes is a desirable public policy objective. So is the need to avoid public disrespect for our criminal justice process which might be engendered by having conflicting laws and rules on the same subject. The public, through their elected representatives, have clearly rejected the idea of defense surrebuttal in closing argument. We strongly recommend that this Court do so as well.

CONCLUSION

For all the above reasons we the undersigned minority members of your committee recommend rejection of the majority report, and that the attached minority proposal for a new Rule 26.03, subd. 11 be adopted by this Court in its place.

Dated: August 12, 1999

Respectfully submitted,

_____
PAUL R. KEMPAINEN
Member, Criminal Rules Advisory Committee

_____
KATHRYN QUAINTANCE
Member, Criminal Rules Advisory Committee

_____
FRED FINK
Member, Criminal Rules Advisory Committee

MINORITY REPORT'S
PROPOSED AMENDMENTS TO THE
RULES OF CRIMINAL PROCEDURE

The minority of 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 deletions are indicated by a line drawn through the words and additions by a line drawn under the words.

Amend Rule 26.03, subd. 11 as follows:

Subd. 11. Order of Jury Trial. The order of a jury trial shall be substantially as follows:

* * *

j. The prosecution may then make a rebuttal argument to the defense closing argument. The rebuttal must be limited to a direct response to those matters raised in the defendant's closing arguments.

k. At the conclusion of prosecution rebuttal the court shall allow the defense an opportunity, outside the presence of the jury, to make any objections it may have to the content or manner of the prosecution's rebuttal based upon existing law, and to request curative instructions. The court shall, on the record, rule on all such objections and requests before submitting the case to the jury. This rule does not limit the right of any party under existing law to make appropriate objections and seek curative instructions at any other time during the closing argument process.

l. The court shall charge the jury.

m. The jury shall retire for deliberation and, if possible, render a verdict.

Amend the comments on Rule 26.03, subd. 11 as follows:

Rule 26.03, subd. 11 (Order of Jury Trial) substantially continues the order of trial under existing practice. (See Minn. Stat. § 546.11 (1971).) The order of closing

argument under sections "h", "i" ~~and~~ "j" and "k" of this rule reflects a change. The prosecution argues first, then the defense~~. The court may then permit the prosecution limited rebuttal, if the defense in its argument made a misstatement of law or fact or a statement that is inflammatory or prejudicial~~. The prosecution is then automatically entitled to rebuttal argument. However, this argument must be true rebuttal and is limited to directly responding to matters raised in the defendant's closing argument. Allowance of the rebuttal argument by the prosecution should result in a more efficient and less confusing presentation to the jury. The prosecution will only need to address those defenses actually raised by the defendant rather than guessing, perhaps wrongly, about those defenses. In the event that the prosecution engages in improper rebuttal, paragraph "k" of the rule expressly recognizes the ability of defendant upon objection, to seek curative instructions from the court. The court has the inherent power and duty to assure that any rebuttal argument stay within the limits of the rule and does not simply repeat matters from the earlier arguments or address matters not raised in the earlier arguments. It is the responsibility of the court to ensure that all parties' final arguments to the jury are kept within proper bounds. ABA Standards for Criminal Justice, The Prosecution Function 3-5.8 and The Defendant Function 4-7.8 (1985). If the argument is sufficiently improper, the trial judge should intervene even without objection from opposing counsel. *State v. Salitros*, 499 N.W.2d 815 (Minn. 1993); and *State v. White*, 295 Minn. 217, 203 N.W.2d 852 (1973).

STATE OF MINNESOTA

IN SUPREME COURT

CI-84-2137

November 10, 1999

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul MN 55155

RE: THE HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

Dear Mr. Grittner:

The Court's requirement that copies of the materials to be orally presented at the November 17, 1999 hearing be filed by November 10, 1999 puzzles me. That requirement makes an oral presentation unnecessary.

Here, then, are the 12 copies of what I would say at the hearing on November 17, 1999.

Thank you.

Bill Kennedy

William R. Kennedy
#55220
MSB Center
1401 W. 76th St. Suite 400
Richfield, MN 55423

STATE OF MINNESOTA

IN SUPREME COURT

CI-84-2137

May it please the Court. My name is Bill Kennedy. I speak today as a citizen and a lawyer.

In his 1946 classic, "Politics and the English Language", George Orwell observed that "Political language is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind. . . ." He noted that, "In our time, political speech and writing are largely the defense of the indefensible. . . . . Defenseless villages are bomb[ed] . . . , the inhabitants driven out into the countryside, . . . cattle machine gunned, . . . huts set on fire with incendiary bullets: this is called *pacification*." (Emphasis in original).

Fifty odd years later, political language dominates our life: down-sizing hides massive firings, missiles masquerade as Peacemakers, and salesmen prowl used car lots disguised as Associates.

Political correctness is the umbrella under which political language thrives. Nothing is ever as it seems. A fear of offending the powerful, or a desire to avoid sensitive topics, or to disguise one's motives, conceals reality.

I will not do that.

Justice belongs to the People, as do our rivers, our lakes, our forests. Justice does not belong to judges or lawyers --- we are the Trustees in whose hands the

People have placed Justice for safe keeping: for its fair administration, for its **equal** application to all, ***without fear or favor.***

That's a lot of power the People have given us --- the power to arrest, to prosecute, to convict, to imprison. What do the People demand of us in return? This is our part of the bargain: Do equal justice fairly for all, ***without fear or favor***, zealously guard individual rights and liberties against attacks from whatever quarter, prevent "vigilante justice", banish politics in all its ugliness from the halls of justice.

When I think about it, that's a good bargain --- if the People keep their promise, and if we keep ours.

While blessed, or cursed, with Irish naivete, I am not a political novice. The difference between the statute and these proposals is meaningless. This scheme originated in the fog that surrounds the dark side of politics. The conversations that occurred in the corridors of power in this government had nothing to do with Separation of Powers, legislative authority, or judicial independence.

Unspoken publicly, but uttered privately you can hear in your mind's ear: The Court has no choice --- it has to do it; <u>the consequences are drastic if the Court doesn't do what we want!</u>

I ask myself: what consequences? The answer echoes throughout this chamber: salaries, pensions, appropriations, and jurisdiction. Sounds suspiciously like blackmail. You are commanded: Do it or else! Those who decry my use of the word "blackmail" believe there are secrets in life, law, or politics, and that this scheme is shrouded in a secrecy that can not be penetrated.

Several years ago, before any of you became Justices, this Court began a tortured journey down a twisting road that I believe the Irish sign posted; each sign points in a different direction, one on top of another, yet pointing down the same road. The signs in Ireland are often humorous. I hear no laughter from the People about our signs on the road to Justice. Discussion of those signs must wait for another day in another forum.

So, this is the reality you face --- adopt the proposals and be safe politically (is anyone ever safe politically), or take back your independence; refuse to adopt these proposals. Breathe new life into Separation of Powers. Whatever claims are made, inherent but concurrent judicial power does not exist. My mind boggles at the prospect.

The reasons given for adoption of these amendments hide the reality of what is happening. Calling a sow's ear a silk purse doesn't make it so. You know what a prosecutor's duties are; you know what a defense lawyer's duties are; you know what a trial judge's duties are. When political rhetoric is exposed for what it really is, the People know what our duties are, and know whether we are keeping our part of the bargain.

Three decades ago when baby sitters were scarce and I was desperate to find one, deep down in my gut I had to know one thing about that baby sitter: <u>are my kids safe in your hands?</u> When the answer was "yes" I called it trust! I have the same question today about babysitters and my grandchildren.

The People are uneasy about us. They ask: Is Justice safe in our hands? Is it? Justice must now only be done, it must be seen to be done.

I believe that if you adopt these amendments you forfeit forever any claim this Court has to independence, and Separation of Powers becomes of academic interest only.

When they write the history of Justice in our time, it may begin with the words, "Justice lay wounded." History is the Judgment of the People! How will they judge us? Will it be on how much power we have acquired, or how much influence we have (or think we have), or how much money we accumulated, or how may people we sent to jail, or how may cases we handled, or how efficient we were?

No! History will ask, and answer: Did you and I keep our bargain with the People --- ***without fear or favor.*** If we are found wanting, then the History that began, "Justice lay wounded," will end with, "Justice lay dying."

MDJA

MINNESOTA DISTRICT JUDGES ASSOCIATION

November 9, 1999

The Hon. Kathleen A. Blatz
Chief Justice
Minnesota Supreme Court
25 Constitution Avenue
St. Paul, Mn. 55155

Dear Justice Blatz:

I would like to make a short oral presentation at the hearing to consider proposed amendments to the Rules of Criminal Procedure on November 17, 1999.

Sincerely

Kathleen Gearin
Judge of District Court

PRESIDENT
Honorable Kathleen R. Gearin
Second Judicial District
1550 Ramsey County Courthouse
15 West Kellogg Boulevard
St. Paul, MN 55102
651/266-9178

PRESIDENT ELECT
Honorable Thomas M. Stringer
Seventh Judicial District
Otter Tail County Courthouse
PO Box 417
Fergus Falls, MN 56538-0417
218/739-2271

VICE-PRESIDENT
Honorable Timothy K. Connell
Fifth Judicial District
Rock County Courthouse
204 East Brown, PO Box 745
Luverne, MN 56156
507/283-5020

PAST PRESIDENT
Honorable Bruce R. Douglas
Tenth Judicial District
Wright County Government Center
10 Second Street NW, Room 201
Buffalo, MN 55313-1192
612/682-7539

TREASURER
Honorable James H. Clark, Jr.
Second Judicial District
1100 Ramsey County Courthouse
15 West Kellogg Boulevard
St. Paul, MN 55102
651/266-8207

❖ ❖ ❖

ADVISORY SERVICES DIRECTOR
Stephen E. Forestell
120 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155
Phone (651) 297-7582
Fax (651) 296-6609

ADMINISTRATIVE DIRECTOR
Carol M. Solberg
73 Spruce Street
Mahtomedi, MN 55115
Phone or Fax (651) 426-1746

November 9, 1999

Memo RE: Materials to be presented at the public hearing on proposed amendments to the Rules of Criminal Procedure.

From: Judge Kathleen Gearin, President,
Minnesota District Judge's Association

To: Honorable Justices of the Minnesota Supreme Court

The Minnesota District Judges Association members are concerned about the proposal of the Supreme Court Criminal Rules Advisory Committee to modify the Rules of Criminal Procedure. It is clear that the modifications were made in response to the legislature's amendment to **Minn. Stat.** § 631.07, giving prosecutors an automatic right to rebuttal. The order of final argument is a procedural matter that should be determined by the judicial branch of government. Changing a procedural rule because of a statutory mandate would violate the separation of powers doctrine that has kept our three branches of government strong and independent. It would establish a devastating and dangerous precedent.

MDJA takes no position at this time regarding the most appropriate order of final argument. Its members have different opinions regarding that issue. We do request that the Supreme Court reject any recommendations made as a result of the legislature's statutory change. To do otherwise would not only weaken the independence of the judiciary but also demean the dignity and independence of the legislature. Our system of government works when the three branches of government respect each other's constitutional authority. Allowing any branch of government to interfere in the procedural rules of another is wrong.

OFFICE OF THE RAMSEY COUNTY ATTORNEY
Susan Gaertner, County Attorney

50 West Kellogg Boulevard, Suite 315 • St. Paul, Minnesota 55102-1657
Telephone (651) 266-3222 • Fax (651) 266-3015

November 10, 1999

Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Dear Mr. Grittner:

I would like to request time to deliver an oral presentation at the hearing on November 17, 1999, regarding proposed amendments to Minnesota Rule of Criminal Procedure 26.03, Subd. 11.

My presentation will focus on the crime victim perspective regarding the order of closing argument. My written comments are enclosed.

My direct phone number is 651-266-3157, and my fax number is 651-266-3010.

Thank you for considering my request.

Sincerely,

Mary Biermaier

Mary Biermaier
Director
Victim/Witness Services Division

Enclosure

WRITTEN STATEMENT BY MARY BIERMAIER

SUBMITTED TO THE MINNESOTA SUPREME COURT

REGARDING PROPOSED AMENDMENTS
TO MINNESOTA RULE OF CRIMINAL PROCEDURE 26.03, SUBD. 11

Honorable Justices of the Minnesota Supreme Court,

Thank you for the opportunity to address you regarding the issue of final argument as it relates to victims and witnesses of crime. I have worked as the Director of the Victim/Witness Services Division in the Ramsey County Attorney's Office for more than 12 years. I supervise eight victim advocates who manage caseloads of approximately 80 felony-level criminal cases. My comments today reflect discussions with these staff members on the matter of final argument and conversations with other professionals in the victim services field.

Justice requires that crime victims be treated fairly in criminal cases. The reality is that the present lack of substantive rebuttal on the part of the state is not fair for victims. Too often, victims and witnesses are left shocked and in despair because prosecutors cannot respond to the attacks heard in closing argument. The reality is that even a guilty verdict can feel like a hollow victory for a victim when the defense attorney's last statement to the jury may contain false theories and unsubstantiated inferences about the victim.

I understand that it is the job of defense attorneys to zealously represent their clients, and that this may involve attacking the credibility of the victim or witness. That is justice. It can, however, be a bitter justice for the victim. Sexual assault victims, for example, may feel that their credibility, their chosen response to the assault, and their motivation for reporting the crime are all being questioned and criticized. It feels very personal to them, and it is frustrating that the prosecutor cannot respond sufficiently to these attacks.

It is very difficult for victim advocates to adequately brace victims for closing arguments. Yet victims must be ready for what lies ahead. We tell them, therefore, that the words of the defense attorney may be very difficult to hear, and that some statements may focus on them or their loved ones. We warn them that the defense attorney may actually point at them during his or her final presentation and attack their integrity. We advise them that in all likelihood the prosecutor will be unable to respond to whatever the defense attorney says. We caution them that the case could be adversely affected if they are unable to remain composed during the final argument. After hearing these cautionary statements, some victims make the difficult decision not to attend the closing argument. This may be a necessary decision, but it is one that disenfranchises victims from the criminal proceedings. This scenario is particularly unfortunate for those victims and their families who may have been sequestered during the trial. Closing arguments represent their only opportunity to hear a summation of the facts of the case. They may feel emotionally incapable, however, of incurring the sting of the defense attorney's closing remarks.

Again, defense attorneys are obligated to represent their clients' interests. True justice, however, depends on a search for the truth, which in turn depends on a jury's opportunity to hear all of the facts. To ensure justice, jurors in criminal trials need to hear all relevant information. When prosecutors are allowed to have the last word, jurors can deliberate with the assurance that they have heard a full and thorough airing of the facts. And victims can rest assured that the process has been fair.

Dated: November 10, 1999

Respectfully Submitted,

Mary Biermaier

Mary Biermaier, Director
Victim/Witness Services Division
Ramsey County Attorney's Office

STATE OF MINNESOTA
FOURTH JUDICIAL DISTRICT COURT

RICHARD S. SCHERER
JUDGE
HENNEPIN COUNTY GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487
(612) 348-3750
FAX (612) 348-2131

November 15, 1999

Clerk of Appellate Courts
Minnesota Supreme Court
125 Constitution Avenue
St. Paul, MN 55155

Dear Sir:

Enclosed are eight (8) copies of a letter addressed to the Justices of the Supreme Court on an issue I believe is scheduled for argument on November 17, 1999.

Please do what you can to provide a copy of this document to each Justice prior to the scheduled hearing.

Thank you for your help.

Very truly yours,

Judge Richard S. Scherer

STATE OF MINNESOTA
FOURTH JUDICIAL DISTRICT COURT

RICHARD S. SCHERER
JUDGE
HENNEPIN COUNTY GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487
(612) 348-3750
FAX (612) 348-2131

November 15, 1999

Justices of the Minnesota Supreme Court:

Re: Proposed Amendment to M. R. Crim. P.

I would like to share my thoughts on whether the Court should amend the Rules of Criminal Procedure to "rubber-stamp" the position taken by the legislature in the last year with regard to reversing the order of closing arguments.

In my view it matters little in the outcome of a trial who gives the first or the last closing argument. I have tremendous faith in the jury's ability to ultimately decide a case on the facts and the law.

Nonetheless, I feel very strongly that the Court should take a strong position against amending procedural rules at the behest of prosecutors and the legislature. Determining appropriate PROCEDURES for the conduct of trials should be exclusively the province of the court under the constitutionally guaranteed Separation of Powers.

Until and unless prosecuting authorities can effectuate the proposed change through recognized court procedures, efforts to effect that change through legislative action should be quickly ruled ineffective in order to protect the integrity and independence of the bench. I fear to rule otherwise will be to invite and encourage further undermining of the court's crucial role in our constitutional form of government.

I urge the court to consider that the body of case law relating to improper use of closing argument revolves around prosecutorial abuse, not defense abuse. The trial court, under existing rules, has the discretion to allow rebuttal by the State if it determines defense counsel has crossed the line of appropriate argument under the facts.

Given the protections afforded the State under existing rules, I urge the court to take a clear and firm position on the inappropriate interference with the court's function by the prosecutors and the legislature.

Judge Richard S. Scherer

STATE OF MINNESOTA
IN SUPREME COURT
C1-84-2137

In Re Proposed Amendments
to the Rules of
Criminal Procedure

Request to Make
Oral Presentation

Pursuant to the Court's Order of September 27, 1999, I request an opportunity to make an oral presentation at the hearing on November 17, 1999.

By _____
Ronald I. Meshbesher
Attorney #72229

STATE OF MINNESOTA
IN SUPREME COURT
C1-84-2137

In Re Proposed Amendments
to the Rules of
Criminal Procedure

Statement of
Ronald I. Meshbesher

I. INTRODUCTION

During the 1999 session, the Minnesota Legislature amended Minnesota Statutes § 631.07, after years of pressure from the state's prosecutors, to provide the prosecution in criminal cases with an automatic right to rebuttal. Section 631.07, as amended, directly conflicts with Minnesota Rule of Criminal Procedure 26.03, subdivision 11. In light of the recent legislation, and its conflict with the Rules of Criminal Procedure, the Supreme Court Advisory Committee on the Rules of Criminal Procedure decided to review the rule regarding order of final argument in criminal cases, an issue that has been considered numerous times in the past.

In a report to this Court, the Advisory Committee recommended that the Court adopt a proposed amendment to Rule 26.03, subdivision 11, giving prosecutors the final argument in criminal trials. The committee made this recommendation even though it failed to reach a consensus on this issue, as is the committee's usual approach for all recommendations. Subsequent to the committee's report proposing a change in the order of final argument in criminal trials, this Court ordered that a hearing be

held on November 17, 1999, to consider the Advisory Committee's recommendations, and that any written materials and requests to make oral presentations be filed with the Court no later than November 10, 1999.

In accordance with this Court's order, I hereby request an opportunity to make an oral presentation before this Court on this very important matter. Contained within this memorandum are the materials I will present before the Court.

II. ARGUMENT

This Court has the authority to "regulate the pleadings, practice, procedure, and forms thereof in criminal actions in all courts of this state, by rules promulgated by it from time to time. Minn. Stat. § 480.059, subd. 1 (1998). This authority, acknowledged by the legislature, is derived from this Court's inherent judicial powers. See State. v. Willis, 332 N.W.2d 180, 184 (Minn. 1983)("the judicial function constitutionally empowers the courts to make their own rules of procedure"). Simply put, determination of procedural matters is purely a judicial function, whereas the legislature determines matters of substantive law. State. v. Johnson, 514 N.W.2d 551, 554 (Minn. 1994). Under this separation of powers doctrine, "'[i]n matters of procedure rather than substance, the Rules of Criminal Procedure take precedence over statutes to the extent that there is any inconsistency.'" Id. (quoting State v. Cermak, 350 N.W.2d 328, 331 (Minn. 1984)).

Adoption of the proposed amendment to Rule of Criminal Procedure 26.03 would all but erase this Court's inherent authority

to regulate procedure. Since 1875, an individual charged with a criminal offense in the State of Minnesota has had the last word in final argument. I was on the original criminal rules committee which promulgated the first set of criminal procedure rules in this state's history, pursuant to the Supreme Court's inherent authority to establish rules of procedure. In arriving at what may be the finest rules of criminal procedure in the United States, the committee worked four years before submitting its recommendations to this Court. Compromises were made in order to obtain uniform support of the committee, which was composed of members of the prosecution and defense bar, as well as the judiciary. The rule which eliminated preliminary hearings and their cumbersome procedures was adopted in exchange for support to maintain the order of final argument. Many of the other rules were the result of give and take which produced rules that were efficient and fair to the prosecution and defense.

For many years, however, prosecutors have attempted to persuade this Court to grant the prosecution the last say. This Court, however, has consistently resisted their efforts and concluded that there was no need for change. Hence, prosecutors, using public opinion and political pressure, sought legislation reversing the order of final argument.

In 1987, this Court acquiesced to the legislature, accommodating an unconstitutional enactment giving the prosecutor in a criminal trial a five minute rebuttal if the defense lawyer misstated the law or evidence in the closing argument. This,

however, did not satiate the state's prosecutors. Rather, they continued to lobby in the legislature for change in the order of final argument. Now armed with such legislation, which certainly violates the separation of powers doctrine, they again seek amendment to Rule 26.03 by this Court. If this Court is to accede yet again to unconstitutional legislative enactment, the Court may as well transfer its authority to promulgate rules of procedure to the legislature permanently.

The real reason why prosecutors seek to change this longstanding rule and tradition is because, or so they claim, allowing the defendant the last word has resulted in an inordinate number of acquittals. However, Minnesota has one of the highest conviction rates of any state in the country. At the legislative subcommittee hearing in 1987, one of many times when legislation to change the order of final argument was proposed, Tom Johnson, then Hennepin County Attorney, candidly admitted that a change in final argument would not have an impact on the conviction rate in Minnesota.

The prosecutors' only motive for trying to alter the order of final argument in Minnesota cases is to obtain more convictions of defendants from juries who are not convinced beyond a reasonable doubt by the evidence. In other words, the prosecutors want more persons to go to prison whom they have not been able to prove guilty. No other conclusion logically follows, and it is disingenuous for anyone to suggest otherwise.

Juries must only convict upon application of proper jury instructions to properly admissible evidence and no one can dispute that proposition. However, the prosecutors' position implies that, in some cases, the decision turns not on the evidence but on defense counsel's argument. What is more, the argument presupposes that the mere fact the argument follows rather than precedes the prosecutor is decisive. If the change would not alter trial results, there simply is no point to it. It if would alter trial results, this means something other than evidence can convict.

Frankly, the prosecutors' position gives defense lawyers more credit than they deserve for their persuasive powers. More importantly, however, it is an egregious insult to our system of justice, to the judges who administer trials, to the legislature and Supreme Court which have established the long-standing practice and -- ironically -- to the prosecutors themselves, whose claim betrays their own collective lack of confidence in their ability to obtain convictions by legitimate means, i.e., by presentation of proof beyond a reasonable doubt.

Another chief concern surrounding this issue is the potential for even greater prosecutorial misconduct. Minnesota Appellate Court decisions are replete with prosecutorial misconduct occurring during final argument. These instances occurred, mind you, when the defendant had the last say at trial. Granting prosecutors the last word in final argument will only increase instances of prosecutorial misconduct, for prosecutors no longer need be

concerned with the defense attorney's response to their inappropriate remarks and argument.

The long standing rule giving a criminal defendant the last word in final argument may also be the primary reason why there have been so few innocent people convicted in Minnesota. This, however, is not true in many other jurisdictions. Recent media reports have uncovered an alarming number of cases where innocent defendants have been convicted--some of them having been sentenced to death. A recent report showed that 11 people in Illinois were convicted of major offenses of which their innocence was later established. States such as Florida and New York have had similar experiences. Thankfully, Minnesota has not had such an experience, but one cannot help but wonder whether this would be the case if criminal defendants were not entitled to the last word in final argument.

There is an insidious aspect to this debate, as well. It should not be unnoticed that over the years the prosecutors, while continuing unsuccessfully to beat this equine cadaver, have in fact been able to chip away at various provisions of the rules, eroding defendants' rights. They have, for example, managed to reduce the defendant's proportion of peremptory challenges, effectively eliminate a meaningful evidentiary preliminary hearing, and excluded sometimes crucial evidence in sex cases by amendments of rules and statutes. This does not at all take into account the judicial decisions in which they have prevailed over other rights; I shall not mention them, because those decisions at least resulted

from the adversary process, not the kind of heavy-weight lobbying in which the well-financed and organized prosecutorial bar can bring to bear on legislators and rule-makers. The defense bar unfortunately has no comparable resources, clout or organization.

The prosecution not only has more lobbying resources -- they have more resources **period**. By and large they already hold a great advantage over the defense in terms of man-and-woman power, support staff, experience and public sentiment, despite our lip-service to the presumption of innocence. As an article on the subject, Kunkel and Geis, "Order of Final Argument in Minnesota Criminal Trials," 42 Minn.L.Rev. 549, 553-554 (1958) observed, even a number of prosecutors who were surveyed admitted:

> that the prosecutor possesses a great many advantages such as unlimited funds for investigation and superior investigatory machinery plus cooperation with state and federal enforcement agencies. It was claimed that, "In order to balance the equities, it is perhaps right that the defense shall have the final argument.

Trial lawyers all know, defense lawyers and prosecutors alike, the truth of the matter as James Gould Cozzens put it eloquently in one of his great novels of the law, The Just and the Unjust (1942), pp. 57-58, referring to a jury trial:

> Justice for all was a principle they understood and believed in; but by 'all' they did not perhaps really mean persons low-down and no good. They meant that any accused person should be given a fair, open hearing, so that a man might explain, if he could, the appearances that seemed to be against him. If his reputation and presence were good, he was presumed to be innocent; if they were bad, he

> was presumed to be guilty. If the law presumed differently, the law presumed alone.

The unhappy truth is most lawyers defending criminal cases are at a great disadvantage in virtually every aspect. As Oscar Wilde observed in his inimitable way:

> [some lawyers] have been known to wrest from reluctant juries triumphant verdicts of acquittal for their clients, even when those clients, as often happens, were clearly and unmistakably innocent.

Wilde, The Decay of Lying.

What we do have on our side of this issue, however, is fairness in general, a grand tradition of fairness peculiar to our state, and the Minnesota Constitution, a unique document. I do not suggest the present rule needs the support of the state constitution, though I believe it can be found there. The point is rather that the prosecutors tediously repeat that only Minnesota has this rule.

Are they ashamed of this, embarrassed to be different from other states? And if so, why? We should rather be proud of it, particularly because, as I have suggested, if the rule has any effect on trial results it simply gives the benefit of the doubt in marginal cases to the presumptively innocent accused. And if anything is implicit in our accusatory system it is that benefits of the doubt go to the accused; the cards are quite deliberately stacked to prevent, rather than encourage, the conviction of the innocent.

Indeed, foreign legal scholars viewing the American system have harshly criticized the procedure in most of our jurisdictions where the prosecutor argues last, as noted by Kunkel and Geis:

> One continental writer, for instance, reports that the French believe that Americans "have no conception of fair play to the accused," but instead possess "the souls and minds of hangment" because we do not have a rule such as I'inculpe' a le dernier la parole (the accused is entitled to the last word). Other commentators have noted that the French procedure, allowing the defense to address the jury last, is an "absolutely essential" safeguard and that it possesses "great advantage for the accused." Another writer, commenting on German procedure, maintains that the prevalent European order of argument should be adopted in the United States, particularly since "every criminal lawyer will appreciate the tactical advantage of such a rule."

Id. at 549.

Interestingly, however, it is not even clear that there is an advantage, as those authors observed:

> The psychological evidence, however, is no more conclusive than are the opinions of the attorneys. Still, the sparse psychological research does tentatively point to a conclusion that was completely ignored by the attorneys; that the initial argument may be the more significant in determining the jury's decision. While there is a rather commonly held opinion among writers in the analogous field of debate that the last argument is stronger, experimental work in psychology -- apparently confined to a single major study by Frederick H. Lund -- indicates that the first argument might well be the more effective.

42 Minn.L.Rev. p. 556:

In this regard it is perhaps notable that in that survey thirty five percent of prosecutors favored the present rule (and 56% of

all respondents). Id. at 551. And this seems ironically consistent with the thinking of the court in an 1871 case -- decided, I emphasize, only **four years** before adoption of the Minnesota procedure in 1875, which found no error or prejudice in allowing the prosecutor the **first** summation at a time when it was discretionary with the court, the defense on appeal having claimed the right to argue first. State v. Beebe, 17 Minn. 241 (Gil. 218) (1871). The sequence of events suggests the rule was enacted in response to this decision, and for the preservation of the prosecutor's right to argue first, although this allowed the defense to be "advised of the line of argument of the prosecution." Id., Gil 227.

It is worth noting, too, as the article cited points out, repeated attempts to change the procedure have failed over the years and:

> Agitation for change of the statute is apparently not as strong as might be expected. This survey found that 56% of its respondents favored retention of the law, although only 35% of the county attorneys took this position. The percentage of favorable opinions among all bar members might well be greater than 56%.

42 Minn.L.Rev. at 558.

So all of this leaves us much in doubt not only as to why there should be a change, but even as to the effect. Has human psychology changed since that prosecutor in Waseca County in 1871 insisted on the first argument? And the very fact we do not know is among the most persuasive reasons for leaving the system alone,

giving individual liberties the benefit of the doubt. If there is any effect, any bias, we must assume this is an added degree of fairness; the alternative is an added degree of unfairness. And between these it should never be difficult for us to choose.

There is a refreshing and encouraging trend in the state courts toward reasserting their independence in protecting individual rights as the federal judiciary retreats from that somewhat paternalistic, but often crucial role. The Minnesota Supreme Court said this, for instance, in the early civil-war-created case of Davis v. Pierse, 7 Minn. 13, 14 (Gil. 4) (1862), which held unconstitutional a statute that suspended access to the courts to rebels:

> . . . although many patriotic citizens may regret for the moment, that the state and federal constitutions stand in the way of an enactment which might aid, however feebly, in restoring the supremacy of the Union, yet, in the end, all must regard as matter of pride and gratulation, that in this state, no one, not even the worst of felons, can be denied the right to simple justice.

Therefore the sorry fact that other jurisdictions do not have this rule is not a reason to change it; it is a strong enough reason in itself to retain it. There is no glory in falling, sheep-like, into line. On the contrary, we should cling proudly to this salutary example of our individualism, one of our small commitments to the cause of individual freedom.

But so much cogitating is superfluous. There simply is no good or valid rationale for changing the rule. The facts are irrefutable: The plea for change presupposes and is solely

designed to ensure that some citizens should be convicted, despite the lack of evidence, solely because the prosecutor argues last because the issue does not even arise unless the verdict is poised on that point. This is absurd, it is unworthy of the prosecutor's high calling, and its proponents should, I suggest, be ashamed to continue wasting judicial resources on the subject.

The prosecutor's position on this confirms that the old boast attributed to one of their number was not altogether in jest. On hearing a colleague being congratulated on achieving the conviction of a notorious thug for a crime he obviously committed, the fellow prosecutor said:

> Ah, the guy was guilty. Any dummy can convict the guilty. It's convicting the innocent that is a challenge.

And make no mistake, we are speaking of convicting the innocent, because "innocent" means not proved guilty by the evidence.

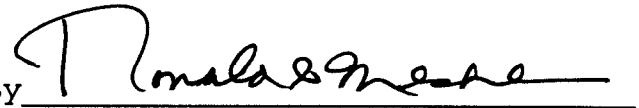
III. CONCLUSION

For the reasons stated herein, I respectfully request that this Court decline to adopt the proposed amendment to Minnesota Rule of Criminal Procedure 26.03, subdivision 11, which would give the prosecution in criminal cases the last word in final argument. I also respectfully request an opportunity to be heard at the Court's hearing on November 17, 1999.

Respectfully submitted,

MESHBESHER & SPENCE, LTD.

Dated: November 10, 1999

By 

Ronald I. Meshbesher, #72229
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OFFICE OF THE HENNEPIN COUNTY ATTORNEY

AMY KLOBUCHAR COUNTY ATTORNEY

November 9, 1999

Mr. Frederick Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

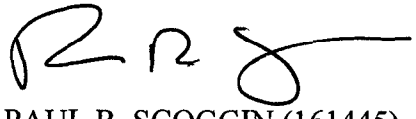
Re: Proposed Amendments to Minn. R. Crim. P. 26.03, Subd. 11
Appellate No. C1-84-2137

Dear Mr. Grittner:

Attached for filing are the written comments on the above-entitled matter along with a request to make an oral presentation on November 17, 1999.

Sincerely,

AMY KLOBUCHAR
Hennepin County Attorney



PAUL R. SCOGGIN (161445)
Assistant County Attorney
Telephone: (612) 348-5161
FAX: (612) 348-6028

PRS:ks
Enc.

OFFICE OF THE HENNEPIN COUNTY ATTORNEY
AMY KLOBUCHAR COUNTY ATTORNEY

December 1, 1999

Mr. Frederick Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155-6102

Re: Question Posed During the Public Comment Hearing on Proposed Amendments to
Minn. R. Crim. P. 26.03, Subd. 11
Appellate No. C1-84-2137

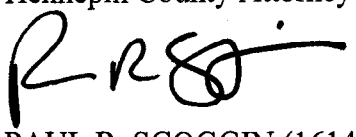
Dear Mr. Grittner:

During the public hearing on proposed changes to the closing argument rule, Justice Blatz asked me a question on how often the Hennepin County Attorney's Office uses the present rule. I promised to provide those numbers.

Attached is my best effort to do what I promised. I'm assuming filing this with you is the best way to respond. If I'm wrong, please let me know.

Sincerely,

AMY KLOBUCHAR
Hennepin County Attorney



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OFFICE OF THE HENNEPIN COUNTY ATTORNEY
AMY KLOBUCHAR COUNTY ATTORNEY

December 1, 1999

The Honorable Kathleen Blatz
Chief Justice of the Minnesota Supreme Court
25 Constitution Avenue
St. Paul, Minnesota 55155-6102

Re: Proposed Amendments to Minn. R. Crim. P. 26.03, subd. 11
Appellate No. C1-84-2137

Dear Chief Justice Blatz:

During the public comment hearing on proposed changes to the final argument rule you asked me how many times assistant Hennepin County attorneys had asked (and received) limited rebuttal under the present rule. I promised I would find out.

I put out an e-mail asking about rebuttal. I received responses from 15 lawyers (out of 29 that tried cases in the Fourth Judicial District last year). They asked for rebuttal 34 times. The motion was granted 15 times.

Six lawyers said they never ask, one said he always asks.

Sincerely,

AMY KLOBUCHAR
Hennepin County Attorney

PAUL R. SCOGGIN (161445)
Assistant County Attorney
Telephone: (612) 348-5161
FAX: (612) 348-6028

PRS:ks

LESLIE M. METZEN
CHIEF JUDGE

CHAMBERS 1119

DAKOTA COUNTY JUDICIAL CENTER
HIGHWAY 55
HASTINGS, MINNESOTA 55033

(651) 438-4325

STATE OF MINNESOTA
DISTRICT COURT, FIRST JUDICIAL DISTRICT

November 5, 1999

Mr. Fred Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Dear Mr. Grittner:

Enclosed you will find 12 copies of a request to make an oral presentation at the public hearing on proposed amendments to the Minnesota Rules of Criminal Procedure. Also enclosed are 12 copies of written materials I wish to submit on behalf of the Minnesota Conference of Chief Judges. I will contact your office sometime a few days before the hearing to get some idea of what time I will be called on to make my presentation.

Very truly yours,

Leslie M. Metzen

Enc.

LESLIE M. METZEN
CHIEF JUDGE

CHAMBERS 119

DAKOTA COUNTY JUDICIAL CENTER
HIGHWAY 55
HASTINGS, MINNESOTA 55033

(651) 438-4325

STATE OF MINNESOTA
DISTRICT COURT, FIRST JUDICIAL DISTRICT

REQUEST TO MAKE AN ORAL PRESENTATION AT THE PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF CRIMINAL PROCEDURE.

TO: HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT

This is a formal request to make an oral presentation at the public hearing on the proposed amendments to the Minnesota Rules of Criminal Procedure. The hearing is scheduled for Wednesday, November 17, 1999 at 1:30 p.m. I wish to make a presentation as a representative of the Minnesota Conference of Chief Judges.

Respectfully submitted,

Leslie M. Metzen

Leslie M. Metzen, Chair
Conference of Chief Judges

November 5, 1999

Memo re: Materials to be presented at the public hearing on proposed amendments to the Rules of Criminal Procedure.

From: Judge Leslie M. Metzen, Chair
Conference of Chief Judges

To: Honorable Justices of the Minnesota Supreme Court

The Conference of Chief Judges strongly objects to the proposed modification of Criminal Rule 26.03 Subd. 11, regarding the order of final argument. The Criminal Rules Committee proposes this change in response to the legislature's amendment to Minn. Stat. 631.07 giving prosecutors an automatic right of rebuttal. The Rules Committee has debated and discussed the issue of the order of final argument numerous times. The Committee was unable to reach consensus to propose a change in the rule. Indeed, this report contains a minority view and three additional members of the committee abstained from the vote on the proposed language. The Conference of Chief Judges believes it is improper for the Legislature to dictate court procedures and promulgate law which supersedes rules adopted by the Supreme Court.

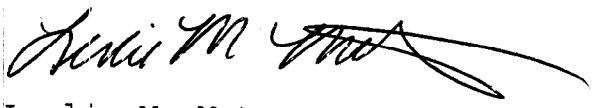
From a substantive standpoint, the judges of the Conference, who represent the trial court judges of each

judicial district, are somewhat divided. Most judges believe the rule as it currently exists is appropriate and needs no modification. A number of judges have expressed the view that who argues last makes little or no difference. A few judges believe the order of final argument should be reversed, giving prosecutors the last word.

We are united in our firm view that the business of procedural rulemaking lies with the Court. Based upon the separation of powers and co-equal status of our two branches of government, we are compelled to take this stand. The Court should have the sole authority to set the rules and procedures for its operation; just as the Legislature establishes its own rules and procedures to conduct its business. It is unfortunate that prosecutors, who are attorneys and therefor officers of the Court, have created this issue for us. They have historically participated as equal players on the Criminal Rules Committee. They were unsuccessful in getting their version of Rule 26.03 Subd. 11 proposed by the Rules Committee and so went to the Legislature with their request. We do not relish the conflict this creates for the legislative and judicial branches of our government, but this mandate by the Legislature is improper.

We respectfully request that the Supreme Court refuse to modify Rule 26.03 Subd. 11 as proposed and send a clear message that rules of court procedure are a judicial branch responsibility.

Respectfully submitted,



Leslie M. Metzen

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH
ATTORNEY GENERAL

102 STATE CAPITOL
ST. PAUL, MN 55155-1002
TELEPHONE: (651) 296-6196

November 10, 1999

Mr. Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Re: Hearing to Consider Proposed Amendments to the Rule of Criminal Procedure

Dear Mr. Grittner:

I am writing to request permission from the Court to make a brief oral presentation on behalf of the Minnesota Attorney General at the November 17, 1999 hearing on the order of final argument.

Attorney General Hatch supports the minority report of the Minnesota Supreme Court Advisory Committee on the Rules of Criminal Procedure supporting prosecutor rebuttal but opposing surrebuttal. Finally, our office supports the comments of the Minnesota County Attorneys Association on the proposed amendments to the Minnesota Rule of Criminal Procedure 26.03, Subd. 11.

Thank you for your consideration of this request. I will look forward to hearing from you.

Very truly yours,

John M. Stanoch
Chief Deputy Attorney General
651/296-2351

JMS/lmc

C1-84-2137

STATE OF MINNESOTA

IN SUPREME COURT

IN RE PROPOSED AMENDMENTS TO MINNESOTA
RULE OF CRIMINAL PROCEDURE 26.03, SUBD.11

REQUEST FOR ORAL PRESENTATION

TO: THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT.

The Minnesota County Attorneys Association requests the opportunity to make an oral presentation to this Court at the public hearing on Amendments to the rules of Criminal Procedure. The Minnesota County Attorneys Association's representatives will be Mr. Paul Scoggin, Assistant Hennepin County Attorney; Mr. Robert M. A. Johnson, Anoka County Attorney; and Mr. Douglas Ruth, Steele County Attorney.

The Minnesota County Attorneys Association's written comments are attached to this request.

DATED: November 9, 1999

Respectfully submitted,

MINNESOTA COUNTY ATTORNEYS
ASSOCIATION

William J. Jerommus (186053)
MCAA Acting Executive Director
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C1-84-2137

STATE OF MINNESOTA

IN SUPREME COURT

IN RE PROPOSED AMENDMENTS TO MINNESOTA
RULE OF CRIMINAL PROCEDURE 26.03, SUBD. 11

WRITTEN STATEMENT BY
THE MINNESOTA COUNTY ATTORNEYS ASSOCIATION

TO: THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT.

The Minnesota County Attorneys Association extends its gratitude to this Court for considering proposals to amend the order of closing argument. We recognize how contentious the issue has been over the years and thank the Court for its careful consideration of the arguments raised by both sides. On behalf of the county attorneys in the state of Minnesota, and their offices, the Minnesota County Attorneys Association respectfully asks this Court to amend Minn. R. Crim. P. 26.03, subd. 11, to allow for prosecutorial rebuttal in closing argument subject to objections and requests for curative instructions, but without a provision for surrebuttal.

The Minnesota County Attorneys Association believes that the other 49 states and the federal system give the prosecution the last word in closing arguments for very good reasons. First, fundamental fairness dictates the party bearing the burden of proof should be awarded the last word in closing argument. Second, rebuttal aids the trial process as a search for the truth by reducing the use of tactical surprise by the defense

bar and by reducing awkward attempts to anticipate defense arguments by prosecutors. Third, rebuttal promotes the appearance of justice for victims and witnesses by allowing the state to respond to credibility arguments raised by the defense. Finally, our 12 years of experience with the conditional rebuttal rule suggests that it doesn't work. The rebuttal for misconduct rule does not meet the prosecutor's need to respond to legitimate defense arguments. The rule is unwieldy, inconsistently applied, and can potentially backfire.

The Minnesota County Attorneys Association also asks this Court to adopt the recommendation of the first minority report of the Advisory Committee of the Rules of Criminal Procedure. A straight rebuttal system will return Minnesota to the mainstream of judicial practice in the United States and recognizes that the court, not the lawyers, is responsible for responding to attorney misconduct.

I. THE PROSECUTOR SHOULD HAVE THE LAST WORD IN CLOSING ARGUMENT

A. The Party With the Burden of Proof Should Have the Last Word in Closing Argument.

Every other jurisdiction in the United States, with very limited exceptions, awards the party with the burden of proof the right to the last word. Likewise, the rules or statutes governing procedure in the civil and appellate arenas in Minnesota award the last word to the party bearing the burden of proof. We believe that this almost universal rule is grounded in fundamental fairness.

Our constitution and rules guarantee the accused a considerable number of procedural advantages. Paramount among these is the state's obligation to prove a

violation of law beyond a reasonable doubt. While justice demands that the state be placed at this disadvantage, "traditional notions of fairness favor giving the privilege of opening and closing to the party that carries the burden of proof."[1] This idea extends far beyond the courtroom. Similar notions of fairness can be found in everything from typical high school debating rules to Robert's Rules of Order.[2] There is nothing peculiar to the criminal system in the state of Minnesota suggesting that this widely held logical quid pro quo shouldn't apply.

B. Rebuttal Will Aid the Search for the Truth.

The ultimate goal of a trial is the search for the truth bounded by the protections provided in the Minnesota and United States Constitutions. We believe prosecutorial rebuttal will aid the search for the truth in at least two ways. Rebuttal reduces the advantage of surprise in closing argument and avoids the awkward process of prosecutorial attempts to anticipate defense arguments.

The defense bar of this state is second to none. They're smart, vigorous advocates for their clients. We should be proud of the quality of representation the accused receive in this state. But good lawyers are good tacticians. Smart, vigorous advocates know that it is effective to "keep your powder dry" and save an argument

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[1] United States v. 2,353.28 Acres of Land, 414 F.2d 965, 972 (5th Cir. 1969); *see also* Ethos, Pathos and Legal Audience, 99 Dick. L. Rev. 85 (Fall 1994) (reviewing the traditional rules of rhetoric outlined by Cicero and Quintilin incorporated in modern rules of court).

[2] Robert's Rules of Order: Simplified and Applied, Art. VII, § 42 (Webster's New World/McMillan 1990 ed.)(also reproduced at http://www.arts.state.tx.us/library/roberts.htm)

until after the state is done. Under the present rule, a defense attorney knows that the prosecutor can only sit silently, unable to respond, if an issue is raised for the first time in closing argument.

This tactic is perfectly legitimate - it's good lawyering. Carefully done, it's very effective strategy. It is not, however, particularly helpful in determining the truth. The fundamental premise of the adversarial system holds that the truth of an argument cannot be established until it is tested in the crucible of criticism. The present rule fails this fundamental test. Arguments go unanswered and we believe the search for the truth suffers.

The search for the truth also benefits when prosecutors use closing argument to argue their own case and not to anticipate what the other side might say. Prosecutors with experience in other jurisdictions note that forced anticipation is the most frustrating element of Minnesota practice. Instead of a straightforward presentation of the case, they are forced to grasp at straws in an attempt to guess what opposing counsel might say.

This simply isn't fair. It makes a prosecutor's argument clumsy and in many cases longer than it needs to be. It dilutes the central points of a prosecutor's argument because that prosecutor must attempt to cover every possible potential attack. Occasionally, it leads prosecutors down the wrong road. Closing argument misconduct cases in which the prosecutor is accused of denigrating the role of the defense attorney almost always arise in the context of attempting to anticipate defense arguments.

We believe the rebuttal system aids the search for the truth by reducing anticipation and surprise. The prosecutor shouldn't be left guessing what the defense will argue. Defense arguments, once raised, need to be answered. The rebuttal amendment will allow the prosecutor to present a streamlined and focused argument and limit its response to those issues legitimately raised by the defense.

C. Rebuttal Enhances the Appearance of Fairness for Victims and Witnesses.

This Court once said "justice is a process, not simply a result."[3] Too many victims and witnesses have walked away from closing argument convinced that the process was not fair - even if the result was favorable to the state. We believe that giving the prosecutor the opportunity to respond to attacks on the victim's credibility or suggestions that the victim consented to the act will make the process appear more just and enhance public confidence in the system.

This is not to suggest that the defense bar always engages in misconduct in launching these attacks. To the contrary "defense counsel has no . . . obligation to ascertain or present the truth . . . if he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course."[4] These tactics are simply a part of a defense attorney's job.

But too often, victims and witnesses suffer through a closing only to learn that the state cannot respond. They are horrified to discover that these arguments - even if legitimate - will go unanswered before the jury deliberates. Many prosecutors have

[3] State v. Lefthand, 488 N.W.2d 799, 802 (Minn. 1992).
[4] United States v. Wade, 388 U.S. 218, 257-58 (1967).

spent long hours consoling witnesses and explaining that the rules simply don't allow the prosecutor to stand up after the defense attorney levels an accusation.

We think that there is a growing awareness that victims and witnesses have a legitimate stake in the criminal trial process. Allowing the state to respond is a legitimate and constitutional method to recognize these interests. The appearance of fairness to both the defendant and victim should be an important goal of the criminal justice process. Rebuttal will further this goal without compromising the accused's fundamental rights.

D. Conditional Rebuttal Doesn't Work.

In 1987, both the legislature and this Court reached a compromise attempting to limit rebuttal to those cases where the defense attorney engaged in misconduct. The Minnesota County Attorneys Association believes this compromise did not work for two reasons. First, the compromise failed because it missed the point. The need for rebuttal isn't driven by defense misconduct, it is required to meet the legitimate and effective arguments made by the defense. Second, the compromise didn't work because the remedy offered the prosecutor is too limited and sometimes misleads the jury.

Rebuttal for misconduct didn't come close to meeting legitimate prosecutorial needs. The most effective defense arguments don't rely on misconduct - they use forceful and well-timed arguments. Our request is based on the need to answer those legitimate arguments.

If an attorney resorts to misconduct, the adversary already has the option of objecting or asking for a curative instruction. Likewise, the offending attorney may

face an admonishment from the bench in front of the jury. A judge, however, cannot and should not comment on arguments that stay within the rules. Granting the prosecutor the last word allows the state to meet legitimate arguments and keeps the judges out of the fray.

The present rebuttal rule also does not work because, even on the rare occasions when a prosecutor is permitted rebuttal, it must be done within very narrow boundaries which can easily mislead a jury. If a defense attorney provokes rebuttal under the present rule, a judge will allow the prosecutor to respond only to those elements of the closing argument that are ruled to be unduly prejudicial, inflammatory, or misstatements of law or fact. If a defense attorney made several points in summation and the prosecutor responds only to a single instance of misconduct, a jury is easily left to assume that the prosecutor has no answer to the rest of defense counsel's argument. Otherwise, the prosecutor would have responded to all of the points. Rather than constitute a remedy for misconduct, the rebuttal argument may reinforce the defendant's remaining points.

II. THE FIRST MINORITY REPORT CREATES A PROCEDURE FOR FINAL ARGUMENT THAT IS SIMPLE AND RETURNS MINNESOTA TO THE JUDICIAL MAINSTREAM

The Minnesota County Attorneys Association believes the conditional surrebuttal proposal is unnecessarily confusing and will lead to inconsistent application across the judicial districts of this state. Instead, we ask this court to adopt the provisions of the first minority report. The pure rebuttal approach efficiently provides

both sides with certainty, will lead to judicial consistency in application, and recognizes that the job of policing attorney behavior belongs to the court, not the lawyers.

A. The First Minority Report Provides A Clear Process Easily Understood By The Parties.

We believe the criminal justice system works best when the rules create a clear and consistent process. Indeed, Minnesota Rule of Criminal Procedure 1.02 - the purpose and construction clause - provides that the rules "shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." These goals can be difficult to achieve in an adversarial system. Trials are often heated and decisions must be made in haste. The need for a simple clear script directing the process is self-evident.

The conditional surrebuttal proposal is neither simple nor certain. Our experience with the conditional rebuttal system created in 1987 as a compromise suggests there is no consensus among prosecutors, defense attorneys, and trial judges as to when rebuttal should be allowed. A prosecutor's definition of a "misstatement of law or fact or a statement that is inflammatory or prejudicial" differs from a defense attorney's. Likewise, we know trial judges haven't reached consensus on what constitutes an illegitimate argument.

For a trial judge, the proposed decision to grant surrebuttal and the present decision to grant rebuttal is very different. The former is reviewable, the latter is not. For a defense attorney this creates a number of tactical opportunities. Should the defense attorney request surrebuttal simply because the judge will feel obligated to grant the motion and avoid creating an appellate issue? Does a failure to request

surrebuttal waive prosecutorial misconduct claims on appeal? Should the defense attorney ask for surrebuttal knowing it will be denied but ensuring at least one appellate issue? Ultimately this leads to more gamesmanship in trial and more issues on appeal. But, because only the decision to deny surrebuttal is reviewable, we still will not know when surrebuttal is appropriate.

The context of the surrebuttal decision adds to the confusion. After 12 years of asking for rebuttal, we know that the moment after the curtain falls on closing argument is a poor time to ask for an encore. Most trial judges have little patience for bench conferences over what is a misstatement or prejudicial as the jury waits for instructions. The final argument process can be the most contentious phase of trial. We believe justice is best served by a simple, clear, and certain rule.

B. Surrebuttal Will Lead To Inconsistent Results Because The Parties And Courts Will Never Agree When It Is Appropriate, And No Other Jurisdiction Can Provide Precedent.

The uncertainty of the conditional surrebuttal proposal is compounded by the fact that no one else in the world uses such a system. Just as the players in the Minnesota system never reached consensus on conditional rebuttal amongst themselves, they cannot look to any other jurisdiction for guidance on conditional surrebuttal. We will replace one anomaly unique to Minnesota with another.

The closest cousin to the ping-pong model suggested in the conditional surrebuttal proposal is the direct examination/cross-examination/re-direct examination/re-cross examination process used with witnesses. While this may be justified when an unpredictable witness testifies to new issues, it is hardly an elegant model for closing arguments.

The first minority model, on the other hand, gives both the trial and appellate courts a wealth of precedent to guide development of the criminal argument process. Closest to home, trial judges are familiar with giving the party with the burden of proof the last word in civil proceedings. Likewise, the law of every other jurisdiction in the country provides a good reference point for dealing with criminal closing argument issues.

It follows that with neither precedent nor consensus the conditional surrebuttal system will lead to wildly inconsistent results. Again, our experience in the last 12 years is instructive. Occasionally, judges are open to rebuttal motions and are willing to entertain argument on allegations of misconduct. Most others, however, make it clear that the prosecutor shouldn't even bother to ask. This uncertainty at a critical point of the trial is inconsistent with the simple process envisioned in the purpose and construction clause of the Minnesota Rules of Criminal Procedure. We believe that the trial process is better served if the players act out a simple and certain script. The first minority report provides a consistent process on which lawyers and judges may depend.

C. Judges, Not Lawyers, Should Police Misconduct In The Courtroom.

The Minnesota County Attorneys Association respectfully suggests that both the 1987 conditional rebuttal rule and the proposed conditional surrebuttal system improperly blur the line between advocate and referee. Both rules award argument not because the opposition has made a legitimate point that merits response but because the other side has done something wrong. Such a process is without precedent in our system. Ordinarily lawyers make objections to the court and the court renders its

judgment. Likewise, lawyers move for curative instructions which, if given, are delivered by the court. Ultimately, the offending party may suffer admonishment from the bench, a mistrial delivered by the district court, or reversal delivered by the appellate courts. All of this, however, is the exercise of judicial authority.

The conditional surrebuttal proposal turns over this disciplining authority to the lawyer. Instead of a curative jury instruction or a sustained objection by the judge correcting the misconduct, the opponent delivers the message. We are concerned that the opportunity for surrebuttal will be used for tactical purposes. Rather than make objections or request curative instructions, lawyers may wait and demand the last word. If the motion is granted, the defense gets the last word; if the motion is denied, the attorney creates an appellate issue. At best this process is awkward and confusing; at worst, it usurps the proper role of the judiciary in controlling the proceedings.

Both the first minority and conditional surrebuttal proposal reports point to cases that acknowledge the authority of the court to sustain objections, give curative instructions and admonish the lawyers in front of the jury. These are all tools available to a judge in controlling the courtroom. The Minnesota County Attorneys Association respectfully suggests the cases cited by the reports go a step further. Not only does the court retain this authority; this court has repeatedly found the lawyers should not attempt to cloak themselves in judicial authority by delivering those admonishments themselves. Thus, attempts to justify statements in closing argument as legitimate attempts to police the improper comments by the opponents have been rejected.[5] We

[5] State v. Salitros, 499 N.W.2d 815 (Minn. 1993) ; State v. White, 203 N.W.2d 852 (Minn. 1973); State v. Boice, 196 N.W. 483 (Minn. 1923) .

believe the first minority report keeps the parties in their proper roles. Rather than asking the lawyers to remedy misconduct, the judge performs this task.

D. The Rebuttal System Is A Moderate Approach In The Context Of The Process Used In Many Other States.

The "true rebuttal" proposal in the first minority position puts Minnesota in the middle ground of closing argument procedures. The Minnesota County Attorneys Association acknowledges that the amended rule marks a significant change from present practice. The amendment does not, however, reflect a capitulation to prosecutorial interests. In comparison with many other states, "true rebuttal" is a significant restraint on the prosecution. Most states either have a defense first/state second system or give the state both first and last argument with no limit on the issues open to the state in its last argument. Only thirteen states and the United States District Courts limit the prosecutor to issues already raised.

This is no small limitation. One of the chief complaints lodged against the present system by prosecutors is the tactical use of surprise by defense attorneys. A true rebuttal system in which the state is limited in its response to those issues raised by the defense eliminates that risk.

The ultimate limitation on improper argument, of course, lies with this Court. While the defense bar operates in a largely unreviewable realm, the state does not. The defense bar of this state has not been shy in pressing claims of misconduct in argument on appeal. Likewise, this Court has not hesitated to express its displeasure (even to the point of reversal) if it finds such misconduct.

There is every reason to believe that the bench and bar will be equally zealous in policing a rebuttal system. As such, there is little need to layer an untested cumbersome conditional surrebuttal provision on top of the protections this system already provides.

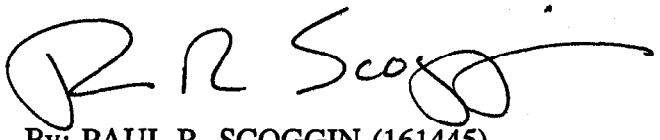
CONCLUSION

The Minnesota County Attorneys Association urges this Court to adopt the first minority report. A rebuttal system is easily understood by lawyers and will yield consistent results from the bench. Rebuttal allows the criminal justice participants to maintain their proper roles: lawyers as advocates, judges as arbitrators of attorney behavior. Rebuttal is consistent with mainstream practice in other states and the federal system. The true rebuttal limitation described in the first minority report comment is a significant limitation of prosecutorial practice and will not lead to increased prosecutorial misconduct. The Minnesota County Attorneys Association believes the reform of the closing argument rule will promote the search for truth at trial allowing both sides the opportunity to respond to the arguments of the other. We ask this Court to join every other jurisdiction in the country in awarding the last word to the party bearing the burden of proof.

DATED: November 9, 1999

Respectfully submitted,

MINNESOTA COUNTY ATTORNEYS ASSOCIATION



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November 10, 1999

Mr. Frederick K. Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Ctr.
25 Constitution Avenue
St. Paul, MN 55155

Re: *In re* 1999 Proposed Amendment to Minn. R. Crim. P. 26.03, Subd. 11
App. Ct. File No. C1-84-2137

Dear Mr. Grittner,

Enclosed are twelve copies of the Statement of: the Minnesota State Public Defender System, the Minnesota Public Defenders Association, the Minnesota Society for Criminal Justice, and the Minnesota Association of Criminal Defense Lawyers. We have submitted a combined statement rather than individual filings.

We request permission for two of our number, John M. Stuart and Mark S. Wernick, to address the Court for a total of 25 minutes.

Sincerely,

Peter W. Gorman
Assistant Public Defender
(612) 348-6618

C1-84-2137

STATE OF MINNESOTA

IN SUPREME COURT

In re 1999 Proposed Amendment To Minn. R. Crim. P. 26.03, Subd. 11	**STATEMENT OF THE MINNESOTA STATE PUBLIC DEFENDER SYSTEM, THE MINNESOTA PUBLIC DEFENDERS ASSOCIATION, THE MINNESOTA SOCIETY FOR CRIMINAL JUSTICE, AND THE MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

TO: THE SUPREME COURT OF THE STATE OF MINNESOTA

1. Introduction And Request To Appear

Pursuant to the Court's order of September 27, 1999, this statement is submitted to the Court on behalf of the Minnesota State Public Defender system and three organizations of criminal defense lawyers who practice before this Court and the other courts of the State of Minnesota. The organizations submitting this statement are: the Minnesota Association of Criminal Defense Lawyers, the Minnesota Public Defenders Association, and the Minnesota Society for Criminal Justice.

We appear before the Court to oppose the July 26, 1999 recommendation of the Court's Advisory Committee on the Rules of Criminal Procedure. We also oppose the August 12, 1999 minority report filed by three members of the Court's

Advisory Committee. We believe that the Court should not amend Rule 26.03, subd. 11, and should retain the rule as amended in 1987.

We request permission for two of our number, John M. Stuart and Mark S. Wernick, to address the Court, for a total of 25 minutes.

2. <u>This Court Has Final Authority Under The Minnesota Constitution To Promulgate Rules Of Criminal Trial Procedure, And Need Not Defer To The Legislature's Enactment Of Laws, 1999, Ch. 72.</u>

The Minnesota Supreme Court unquestionably possesses inherent, final authority to establish rules of criminal trial procedure. The foundation for this inherent power is the Minnesota Constitution, and the contours of this inherent power are set forth in this Court's decisions, beginning with the bar admission and discipline cases. The brief discussion which follows demonstrates that both the Minnesota Constitution and the Court's decisions provide the Court a complete defense against the current encroachment into the independence and authority of the judiciary.

A. The Minnesota Constitution

This Court is a co-equal partner with the governor and the legislature in the tripartite system of separated powers established in the Minnesota Constitution of 1857. Article III, § 1 of both the Democratic and the Republican Constitutions were identical (save for two capital letters):

> The powers of the [g/G]overnment shall be divided into three distinct Departments, the Legislative, Executive and Judicial; and no person or persons belonging to or constituting one of these [d/D]epartments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this Constitution.

1 Minn. Stat. Ann. 33, 72 (West 1946). No change was made to this article when the Minnesota Constitution was restructured in 1974. *See* 2 Minn. Stat. Ann. 7 (West 1976).

The dual 1857 Democratic and Republican Minnesota Constitutions also established the judicial branch of government with identical language appearing in Article VI, §§ 1-15.[1] *See* 1 Minn. Stat. Ann. 43-46 and 82-85 (West 1946).

These 1857 Minnesota Constitutions provided in Art. VI, § 14 that legal pleadings and proceedings were the province of the Legislature, *see* 1 Minn. Stat. Ann. 46, 85 (West 1946). In 1850, however, seven years earlier, this Court had established its own rules as a matter of inherent power. *See* Maynard E. Pirsig and Randall M. Tietjen, Court Procedure And The Separation Of Powers In Minnesota, 15 Wm. Mitchell L. Rev. 141, 148 & n.20 (1989)(*hereinafter,* Pirsig & Tietjen). The Legislature then ratified this Court's 1850 rules in 1853, but the statute which did so indicated that a

[1] The Republican Constitution lacks the word "vacant" in Art. VI, § 10.

court rule could not violate or abrogate a legal rule or statutory provision. Pirsig & Tietjen, *supra*, at 151.

For the most part, the presumption in favor of legislative control of pleadings and court procedure remained undisturbed for about seventy-five years. Pirsig & Tietjen, *supra*, at 153-56.

Three distinct developments appear to be largely responsible for the demise of that presumption in favor of legislative control. As a result of these developments, the Supreme Court's inherent authority over court rules and procedures came to be recognized and accepted.

First, between 1932 and 1937, Congress authorized the United States Supreme Court to establish rules of civil procedure, and the Court promulgated these late in 1937. Pirsig & Tietjen, *supra* at 155-56. This change on the federal level sparked an analogous development in Minnesota between 1936 and 1952.

Second, the Legislature authorized the Minnesota Supreme Court in 1947 to promulgate rules of civil procedure, and these were adopted beginning in 1952. The 1947 enabling act provided that a Court rule could modify or supersede an existing statute. However, it also contained two limitations similar to the 1853 statute: first, the rules could not abridge, enlarge or modify the substantive rights of any litigant; second, the Legislature retained the

right to modify or repeal a Court rule. Pirsig & Tietjen, *supra* at 157-64.

Third, the Minnesota Legislature passed, and the voters approved, a re-written Article VI of the Constitution covering the judiciary in 1956. *See* 2 Minn. Stat. Ann. 144-209 (West 1976) and *id.* at 16-26 (Supp. 1999). *The re-written Article VI did not contain the 1857 provision placing authority over court pleadings and procedure in the Legislature.* About a quarter-century after Article VI was re-written, the voters amended portions of it in order to establish the Minnesota Court of Appeals in 1982. *See* 2 Minn. Stat. Ann. 16, 18, 22, 23 (Supp. 1999). Pirsig & Tietjen, *supra*, 161-68.

These latter two developments were the product of a recognition, first seen on the federal level and later evident in Minnesota, that the Supreme Court was better able to write and oversee court procedure and rules. Judges were law-trained, unlike most legislators. Because of their training and their daily experience, judges were more familiar with court procedures than were non-lawyers.

This emerging view that Supreme Court rule-making was superior to Legislative rule-making began to appear in reports prepared by the legislatively-created Judicial Council, by the state bar association, and, later, by committees of the Legislature. Pirsig & Tietjen, *supra* at

159 n.58, 160 & n.63, 161 & n.68, 163, and 166 n.90.[2] The same sentiments appeared early in the 1970's in a report filed by the legislatively-created Constitutional Study Commission, and were repeated in 1987 by an influential member of the Senate. Pirsig & Tietjen, *supra* at 169 & n.104, 212 & n.262.

Since the Minnesota Supreme Court promulgated the rules of civil procedure in 1952, it has aggressively exercised its right to control court rules and procedures. The Court has repeatedly amended the civil rules. Pirsig & Tietjen, *supra* at 171.

This Court promulgated rules of appellate procedure in 1967, since amended several times, and rules for family court in 1986. No specific enabling act had been first passed by the Legislature to authorize either set of rules. Although an existing statute permitted this Court to prescribe and amend its own rules of practice, it did not authorize the supersedure of existing statutes, which the rules of appellate procedure did. In its order adopting the family-court rules, this Court specifically stated that it was acting under its inherent authority. Pirsig & Tietjen, *supra* at 171-72 and 175-76.

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[2] In fact, one of these reports specifically argued that Constitution, 1857, Art. VI, § 14 merely *enabled* the Legislature to control court rules and procedure, and did not delegate those tasks exclusively to the Legislature. Pirsig & Tietjen, *supra* at 160 n.63.

The Supreme Court promulgated rules of criminal procedure in 1975, rules of evidence in 1977, and rules of juvenile procedure in 1983. The rules of evidence were amended by the Court in 1990, and the rules of juvenile procedure were amended twice before being re-written in 1996. The rules of criminal procedure were amended in 1977, 1983, 1987, 1990, 1993, 1994 and 1998.

Each of these original sets of rules was promulgated after the Legislature passed an enabling act. All three enabling acts, criminal, evidence and juvenile, purported to limit the Court's authority, but the viability of those limits in the evidence and juvenile acts has not been addressed.

The criminal-rules act originally stated in 1971 that the criminal rules could not amend or modify a statute. This Court, by going well beyond the statute's limits, demonstrated its belief that it possessed inherent authority to disregard that limitation, Pirsig & Tietjen, *supra* at 173, which was deleted in 1974. *See* 27-28 Minn. Stat. Ann. 35 (West 1990). At that time, however, the Legislature nevertheless specified certain statutes which could not be disturbed. Minn. Stat. § 480.059, subd. 7 (1974, 1998).

In its criminal-rules statute, the Legislature also reserved the right to modify or repeal any rule. Minn. Stat.

§ 480.059, subd. 8 (1971, 1998).[3] This language also appeared in the 1947 legislation authorizing the rules of civil procedure. Pirsig & Tietjen, *supra* at 173 & n.120.

The Legislature, in its 1975 evidence-rules act, also specified statutes which could not be disturbed, and reserved the right to modify or repeal a rule. Minn. Stat. § 480.0591 (1974, 1998). Neither of these specific limitations appeared in the 1980 juvenile-rules legislation, however. Minn. Stat. § 480.0595 (1980, 1998).[4] Pirsig & Tietjen, *supra* at 174-75.

This Court's aggressive exercise, since 1952, of its inherent rule-making authority, particularly in those instances in which it did so without an enabling act, demonstrate that the Court does not doubt its role under the Constitution as one of three co-equal separated powers. Such a conclusion is even more compelling in light of the 1956 Constitutional amendment to Article VI which repealed the Legislature's control over court pleadings and procedures, as this Court observed in State v. Johnson, 514

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[3] Until Laws, 1999, ch. 72, we are aware of only two instances of the Legislature's exercise of this prerogative. Laws, 1997, ch. 96, §§ 1,2,10,11; Laws, 1997, ch. 239, art. 3, §§ 21-22.

[4] It may be that the Legislature thought a limiting clause unnecessary in the juvenile-rules act, since the act referred to the criminal-rules act which contained the limitations described.

N.W.2d 551, 553-54 (Minn. 1994).[5] The Court's decisions show its comfort with its status.

B. Minnesota Decisions

This Court's decisions establish three principles which derive from the separated-powers clause of Article III and the judiciary article, Article VI, of the Minnesota Constitution. First, the Court possesses inherent powers which flow from the people by way of the Constitution,[6] which allow it to execute its duties. Second, one branch of the government may not assume the duties of or encroach upon the duties of another branch. Third, in order to eliminate friction between co-equal branches of government, one branch will sometimes permit innocent encroachments into the authority of another branch, as when the judicial or legislative character of a particular act is uncertain. Although its earliest decisions were bar-admission and discipline cases, the Court's more recent decisions on the point address broader issues.

1) In its decision in *In re* Integration of the Bar, 216

[5] Nothing said here is affected by the events in 1987, when the Legislature attempted to regain control of some criminal procedures, because this Court, after enactment of amending legislation, considered and decided whether or not to adopt parallel amendments to the criminal rules. Pirsig & Tietjen, *supra* at 198-216.

[6] Sharood v. Hatfield, 296 Minn. 416, 424, 210 N.W.2d 275, 279 (1973).

Minn. 195, 12 N.W.2d 515 (1943), this Court said:

> The supreme court is thereby made the final authority and last resort in the protection of the human, political, and property rights guaranteed by the constitution, ...
>
> The fundamental functions of the court are the administration of justice and the protection of the rights guaranteed by the constitution.

Id. at 199, 12 N.W.2d at 518. In an earlier decision, the Court said:

> The judicial power of this court has its origin in the constitution; but when the court came into existence it came with inherent powers. Such power is the right to protect itself, to enable it to administer justice whether any previous form of remedy has been granted or not. This same power authorizes the making of rules of practice.

In re Greathouse, 189 Minn. 51, 55, 248 N.W. 735, 737. (1933).

More recently, applying these bar-supervision principles to a dispute about the salary of a clerk of court, this Court relied on Greathouse:

> Inherent judicial power governs that which is essential to the existence, dignity, and function of a court because it is a court. . . . Its source is the constitutional doctrine of separation of powers . . . . Its scope is the practical necessity of ensuring the free and full exercise of the court's vital function--the disposition of individual cases to deliver remedies for wrongs and justice freely and without purchase; completely and without denial; promptly and without delay, conformable to the laws.

> At bottom, inherent judicial power is grounded in judicial self-preservation. Obviously, the legislature could seriously hamper the court's power to hear and decide cases or even effectively abolish the court itself through its exercise of financial and regulatory authority. If the court has no means of protecting itself from unreasonable and intrusive assertions of such authority, the separation of powers becomes a myth.

In re Clerk of Lyon County Courts, 308 Minn. 172, 176-77, 241 N.W.2d 781, 784 (1976).

These cases establish beyond doubt that the Supreme Court possesses inherent powers to execute its constitutional duties as it see fit, regardless of whether those powers are specified in the constitution.

2) The Court's decisions have also plainly held that co-equal branches of government, under the separated-powers clause of Article III, must avoid encroaching upon the responsibilities of other branches. In one of its earliest decisions, this Court said that it is the duty of each branch of the government to abstain from and to oppose encroachments on the other branches. *In re* Application of the Senate, 10 Minn. 78, 80 (Gil. 56, 57) (1865), *quoted in*, Sharood v. Hatfield, 296 Minn. at 423, 210 N.W.2d at 279.

3) From time to time, this Court has suggested that, although not required to, it would defer to legislative enactments which might otherwise encroach upon its inherent authorities. Generally, the encroachments which this Court has indicated it would tolerate for the sake of harmony

between co-equal branches of the government are relatively minor.

For instance, this Court once said it would acquiesce in certain legislative acts, in the interest of harmony between the branches, as long as those acts did not usurp the Court's right to make the final decision. Sharood v. Hatfield, 296 Minn. at 424-25, 210 N.W.2d at 280. In *In re* Tracy, 197 Minn. 35, 46, 266 N.W. 88, 93 (1936), the Court said it would comply with the legislature whenever it would not mean ceasing to function as independent judges. See *also* Cowern v. Nelson, 207 Minn. 642, 647, 290 N.W. 795, 797 (1940).

The Court has also indicated its willingness to avoid friction when the nature of an act, judicial or legislative, is unclear. Sharood v. Hatfield, 296 Minn. at 423, 210 N.W.2d at 279. However, the Court said it would act in judicial self defense when it was forced to. *In re* Tracy, 197 Minn. at 44, 266 N.W. at 92.

In Clerk of Lyon County, this Court synthesized these principles, and, to the extent that the Court's synthesis applies to the present controversy over Rule 26.03, subd. 11, the Court said:

> (1) Inherent judicial power grows out of express and implied constitutional provisions mandating a separation of powers and a viable judicial branch of government. It comprehends all authority necessary to preserve and improve the fundamental judicial function of deciding cases.
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> . . .

> (3) Inherent judicial power may not be asserted unless constitutional provisions are followed and established and reasonable legislative-administrative procedures are first exhausted.
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> . . .
>
> (5) The test to be applied in these cases is whether the relief requested by the court . . . is necessary to the performance of the judicial function . . . . The test is not relative needs or judicial wants, but practical necessity in performing the judicial function.

In re Clerk of Lyon County, 308 Minn. at 180-81, 241 N.W.2d at 786.

Pirsig and Tietjen say that the Supreme Court could have applied these principles to rule-making disputes from the beginning. Article VI, § 14 of the 1857 Constitution did not preclude the Court from rule-making as a matter of inherent authority during the 99 years of its existence.

But, when that section disappeared from the 1956 re-write of Article VI, legislative control over pleadings and court rules was no longer either specific or presumed: rule-making became an implicit and necessary function and responsibility of the inherent judicial power conferred on this Court by the Constitution. Under this interpretation, the enabling acts were nothing more than minor intrusions which the Court tolerated, or prompts to act by the Legislature. Pirsig & Tietjen, *supra* at 180-81.

Since the legislature never had exclusive rule-making authority, and certainly didn't after 1956, it should not attempt to make procedural rules. If a rule conflicts with

an existing statute, the rule should control. If a statute is passed which is not controlled by a rule, the Court may, but does not have to, allow the statute to stand as a matter of comity. Pirsig and Tietjen, *supra* at 180-83.

This Court's decisions after Clerk of Lyon County show that Pirsig and Tietjen were correct when they wrote a decade ago. While many of the post-Lyon County cases concern the rules of criminal procedure, the Court has also decided the same issue in different areas of the law. The rule which emerges from these cases is that court procedures and rule-making are the province of this Court and no other body. Therefore, the Legislature was not free to enact Laws, 1999, ch. 72, in an effort to amend Rule 26.03, subd. 11.

State v. Wingo, 266 N.W.2d 508 (Minn. 1978), the first of these cases, involved the question of whether the rules of criminal procedure unconstitutionally changed the right of a prosecutor to appeal. This Court held that then-Rule 28 did not abridge a substantive right in violation of the criminal-rules enabling act. Addressing a theme which persists to this day, the Court said that a substantive provision is one which establishes which acts are crimes and what punishments are assessed for those crimes. Procedural provisions are those which regulate the steps by which the guilt or innocence of an accused is determined. State v. Wingo, 266 N.W.2d at 513.

The Court dismissed a different prosecution appeal in State v. Keith, 325 N.W.2d 641 (Minn. 1982) for noncompliance with then-Rule 29. It said that the rules of criminal procedure control over inconsistent statutes in matters of procedure. *Id.* at 642.

The Court applied the language from Sharood v. Hatfield in its decision in State v. Willis, 332 N.W.2d 180 (Minn. 1983). There, the issue was the constitutionality of a statute which permitted the jury to hear evidence that there had been no breath testing in a drunk-driving prosecution.

This Court said that the Legislature had the authority to establish certain kinds of evidentiary rules, even though the courts, generally, had the inherent authority to prescribe rules of evidence. The Court indicated that it should be restrained before invalidating a statute, particularly when the controversy involved the question of legislative function v. judicial function. Since the statute did not interfere with the judicial function of ascertaining facts and applying the law to those facts, the Court decided to enforce it as a matter of comity. The statute neither interfered with nor impaired a judicial function. State v. Willis, 332 N.W.2d at 184.

State v. Cermak, 350 N.W.2d 328 (Minn. 1984) involved a conflict between the notice-to-remove statute and a change-of-venue rule. As in State v. Keith, this Court held that the rule was procedural and controlled over the statute. State v. Cermak, 350 N.W.2d at 331.

State v. Johnson, 514 N.W.2d 551 (Minn. 1994) is the most important of this Court's separation-of-powers decisions on the criminal rules. In a prosecution for speeding, the Court considered whether Rule 23.04, which governs petty-misdemeanor procedure, controls over Minn. Stat. § 609.131, subd. 1, which had been enacted a dozen years after Rule 23 was promulgated.

The Court returned to the *State v. Wingo* substantive-procedure distinction, and defined substantive law as "law which creates, defines and regulates rights, . . ." in contrast to that part of the law which enforces those rights. State v. Johnson, 514 N.W.2d at 554, *citing*, Stern v. Dill, 442 N.W.2d 322, 324 (Minn. 1989). The Court also cited a foreign decision which suggested that if a statute did not create a new cause of action or deprive a person of a defense on the merits, it is procedural. State v. Johnson, 514 N.W.2d at 555.

State v. Johnson held that Rule 23 defined the steps by which an offense is treated as a petty misdemeanor, and did not create or modify a substantive offense. Thus, citing Wingo, this Court said that the statute and the rule were matters of procedural law and the rule thus controlled. State v. Johnson, 514 N.W.2d at 555.

In reaching this conclusion, the Court reiterated that its rule-making authority arose from its inherent judicial powers. State v. Johnson, 514 N.W.2d at 553. Although the Legislature reserved to itself the right to modify a court

rule, this Court stated that, since 1956, the Legislature had no rule-making authority notwithstanding the rules-enabling acts. State v. Johnson, 514 N.W.2d at 553-54, *citing*, Pirsig and Tietjen, *supra*. Nevertheless, the Court indicated that it would accord due respect to the co-equal legislative branch in resolving the distinction between judicial functions and legislative functions. State v. Johnson, 514 N.W.2d at 554. Determination of procedural matters is a judicial function. *Id.*

These separation-of-powers decisions, particularly those involving the rules of criminal procedure, show that the Court controls court procedure and rule-making, not the Legislature. But the Court has also reviewed its inherent authority in other areas of the law.

In these other areas, the Court has also asserted its inherent judicial authority to act outside of statutory authority. In doing so, it has undoubtedly recalled its statements in the early bar-supervision cases that the Court exists to administer justice and protect constitutional rights. *See, e.g.*, *In re* Integration of the Bar, 216 Minn. 195, 199, 12 N.W.2d 515, 518 (1943).

However, the Court has been careful, when it acts outside of statute, not to intrude upon the Constitutional authority imparted to the other, co-equal, branches of the government. For instance, in its early expungement decisions, the Court claimed an inherent right to order

expungement of criminal records if constitutional rights would be seriously infringed by retention of those records. *In re* R.L.F., 256 N.W.2d 803, 807-808 (Minn. 1977). It then assumed non-statutory authority to grant this relief even if constitutional rights were not seriously infringed. State v. C.A., 304 N.W.2d 353, 358 (Minn. 1981). However, in C.A., the Court also said that it must respect the equally-unique authority of the executive branch to retain criminal records, *id.* at 359, and reiterated that statement in *In re* Quinn, 517 N.W.2d 895, 897-98 (Minn. 1994). The Court of Appeals has followed suit. State v. T.M.B., 590 N.W.2d 809, 813 (Minn. Ct. App. 1999).

In another area, the Court provided non-statutory authority for a district judge to conclude a criminal prosecution without a conviction. State v. Krotzer, 548 N.W.2d 252 (Minn. 1996). Although this decision appeared well-grounded in this Court's separation-of-powers precedents, *see, id.* at 255 (*citing,* Clerk of Lyon County), the Court later stated that the *Krotzer* rule should be applied only when necessary to avoid injustices due to the prosecutor's abuse of charging discretion. State v. Foss, 556 N.W.2d 540, 541 (Minn. 1996).

These expungement and stay-of-adjudication decisions are perfectly consistent with the Court's separation-of-powers and criminal rule-making decisions. In each of these areas, the Court was attempting to insure that justice was

done in order to fulfill its duty under Article VI of the Constitution. However, the Court recognized that its inherent right to insure justice was limited when the rights of the co-equal executive branch of government were threatened. That is why the Courts placed limitations on non-statutory expungement of executive-branch criminal records in *In re* Quinn and in State v. T.M.B. Similarly, the Court in State v. Foss maintained its responsibility to do justice in supervising the criminal-charging function, but only when the executive abused its discretion.

By contrast, court procedures and court rules are *exclusively* a judicial function, at least since 1956, if not before. State v. Johnson, 514 N.W.2d at 553-54. The Court's rules do *not* abridge the rights of a co-equal branch of government, and thus, under the separated-powers scheme of the Minnesota Constitution, Rule 26.03, subd. 11 (1987) controls over Laws, 1999, ch. 72, although the latter was enacted later.

3. The Legislature's Enactment Of Laws, 1999, Ch. 72 Is A Political Attack On The Inherent Authority Of The Judiciary Which Is Plainly Unconstitutional.

As shown above, this Court could easily decide that Rule 26.03, subd. 11 (1987) controls over Laws, 1999, ch. 72, on separation-of-powers principles. However, the Court should uphold the primacy of its rule for this additional reason: the events in the spring of 1999 which resulted in

Laws, ch. 72 were essentially a political encroachment upon the judiciary and upon this Court's Advisory Committee which should be summarily repulsed. In the course of this political attack, the prosecutors have splintered this Court's Advisory Committee, which, until this year, had nearly always made consensus recommendations to this Court.[7]

This political attack was orchestrated in 1999 by criminal prosecutors through their lobbying organization, the attorney general, and local elected county attorneys. Since the promulgation of the rules in 1975, they have repeatedly sought a change in the order of closing arguments in 1977, 1983, 1987, 1997 and 1999.[8] Prior to the rules, they repeatedly sought a change in Minn. Stat. § 631.07, which dates to the last century. Pirsig & Tietjen, *supra* at 199-200. Judge McCarr notes that, between 1971 and 1975, while the rules were being prepared, no other proposed rule produced as much controversy. Henry W. McCarr, 8 Minnesota Practice: Criminal Law And Procedure, § 36.12 at 364 (2d Ed. 1990). Then, in 1987, 1997 and 1999 the prosecutors took their arguments for change to the Legislature, where they sought to compel a change in the rule by legislation. Pirsig & Tietjen, *supra* at 198-216.

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[7] Testimony of Retired Justice Esther M. Tomljanovich, Senate Crime Prevention Committee, Hearings on S.F. 198, Feb. 8, 1999.

[8] To illustrate the maxim that the more things change, the more they stay the same, the principal writer of this brief also briefed this same issue before this Court in 1977.

Numerous pieces of evidence support our position that the Legislature's 1999 enactment of ch. 72 is a political encroachment on the Minnesota judiciary, one which essentially says that judges can't be fair to prosecutors.

First, nothing more clearly demonstrates the nature of this attack than this March, 1999 statement on the floor of the Senate by an influential member of the Legislature: "justice is too important to leave to our courts."[9] That legislator was also the sponsor of the Legislature's 1997 closing-argument legislation, which amended Minn. Stat. § 631.07 (1996) and resulted in a study of rebuttal-argument practices. As a member of the House, that same legislator sponsored and then resurrected after its first defeat the legislation which amended Minn. Stat. § 631.07 (1986) to provide for prosecutor rebuttal in certain circumstances.

Second, the Legislature clearly knew that its enactment was constitutionally suspect. The Legislature heard in 1999 from Retired Justice Esther M. Tomljanovich to this effect.[10] At the same committee hearing at which Justice Tomljanovich spoke, a Senate sponsor of a competing bill to repeal Minn. Stat. § 631.07 argued that jurisdiction over court rules properly lay in the Court. The 1987 Legislature heard the same type of testimony from then-Justice George

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[9] Minneapolis Star Tribune, March 16, 1999, at B3, reporting on debate on S.F. 198, which was enacted as ch. 72.

[10] Senate Crime Prevention Committee, Hearings on S.F. 198, Feb. 8, 1999.

Scott. Pirsig & Tietjen, *supra* at 205 & n.241, 208 & n.248. In fact, among those legislators serving in both 1999 and 1987 are numbered the 1999 sponsor of ch. 72 and the Chair of the Senate Crime Prevention Committee, who sponsored the 1987 amendment. In addition to this, the separation-of-powers problem was commented upon at some length by then-Justice Lawrence R. Yetka at this Court's June 25, 1987 hearing. Pirsig & Tietjen, *supra* at 202 n.232, 207 n.245, 215 & n.269. Last, State v. Johnson, 514 N.W.2d 551 (Minn. 1994) had been decided after the 1987 legislation, and Pirsig and Tietjen's article, which plainly states that the Legislature has no rule-making authority, was published in 1989. Numerous copies of this article were provided to the 1999 Legislature.

Third, prosecutors openly admit that they ran an "end run" around this Court and sought the change by legislation when they could not obtain what they wanted from the Court and its Advisory Committee. Then-Hennepin County Attorney Tom Johnson admitted before the Legislature in 1987 that the prosecutors did not believe they would prevail in the Advisory Committee, and so did not even try.[11] And in 1999,

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[11] Pirsig & Tietjen, *supra* at 202-207 & nn.242, 245. Then, after the 1987 Legislature amended Minn. Stat. § 631.07 (1986), this Court scheduled a hearing on this and another amendment to the criminal rules proposed by the Advisory Committee. Without a formal proposed amendment to Rule 26.03, subd. 11 from its Advisory Committee, this Court added the closing argument rule to its June 25, 1987 agenda, heard argument, and changed the rule.

proponents of ch. 72 (S.F. 198) testified that the Advisory Committee would not make the changes they wanted.[12]

Fourth, the prosecution lobby has repeatedly taken a political, "all or nothing," approach to this issue, demanding that it have the first and last argument and no other procedure. Pirsig & Tietjen, *supra* at 207 & n.244. In 1987, the prosecutors rejected a proposed compromise calling for rebuttal and defense surrebuttal, and ended up with the limited rebuttal adopted that year. They objected in 1975 and in 1983 to a proposal for rebuttal and limited defense surrebuttal. Pirsig & Tietjen, *supra* at 200-202 & nn.224, 230. In 1999, they successfully urged a House Committee to defeat a rebuttal-surrebuttal alternative.[13] In fact, the prosecutors on the Advisory Committee in 1999 have filed a minority report objecting to the rebuttal-defense surrebuttal proposal of the Advisory Committee majority.

Fifth, in a claim that amply demonstrates the political nature of this encroachment upon the judiciary, prosecutors have argued this year that trial judges are unable or unwilling to control improper arguments by defense lawyers.[14] Such a claim, of course, overlooks the fact that

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[12] Senate Crime Prevention Committee, Hearings on S.F. 198, Feb. 8, 1999.

[13] House Crime Prevention Committee, Hearings on H.F. 197, Feb. 19, 1999.

[14] Minneapolis Star Tribune, March 3, 1999 at A17 ("Let Minnesota Prosecutors Get the Last Word"); *id.*, March 23, 1999 at A10

trial judges, throughout a criminal prosecution, are accorded wide management discretion. They have authority to impose sanctions such as preclusion of testimony; they may give curative instructions which inform the jury of improper behavior; in extreme instances, they are permitted to mistry the prosecution. The claim, of course, also ignores this Court's authority to discipline lawyers for professional misconduct. Thus, no change in the 1987 rule is necessary for this reason.

It is completely appropriate for the Legislature to entertain political arguments about crime. However, where there are court procedures to be determined, the deliberate and contemplative processes of this Court and its Advisory Committee (which contains a number of criminal prosecutors) are far better suited for this task (as Legislatively-commissioned reports and committees repeatedly said in the first half of this century, *see* 5-6, *supra*). The Committee studies issues at length and takes testimony from the public and those professionally interested in its work. This Court then accepts briefing and oral argument before passing on the Advisory Committee's work.

All members of the Advisory Committee are lawyers who are professionally familiar with criminal court processes. A relatively small percentage of the 201 members of the

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("Why Prosecutors Should Have the Final Word").

Legislature are lawyers, Pirsig & Tietjen, *supra* at 212 n.259.[15]

The Legislature, since it is the voice of those governed, is best suited for the large public-policy decisions which must be made to govern the four million people of a geographically large area. But it is poorly suited to spend its time micro-managing a single responsibility of another branch of government.

Legislative sessions are limited by law to 120 days. Minn. Const. art. IV, § 12. The legislative process simply does not allow contemplative consideration, by a largely-nonlawyer body, of issues properly committed to another branch of government. The agendas of legislative committee hearings are packed with many pieces of legislation, particularly near the end of the session, and short time limits must be imposed on each bill. Committees meet well into the night, far past the times when those most affected by legislation can easily or effectively testify. In 1987, the legislative amendment to Minn. Stat. § 631.07 (1986) was passed out of committee at 2:00 a.m. Pirsig & Tietjen, *supra* at 213-14.

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[15] The chair of the Senate Crime Prevention Committee, which considered this proposal in 1997 and 1999, and who sponsored the 1987 amendment is not a lawyer but a college professor. The 1997 and 1999 Senate sponsor is not a lawyer. As the chair of the House Judiciary Committee in 1987, that same legislator was the House sponsor. The 1997 and 1999 House sponsors are lawyers.

As opposed to the contemplative process of the Court and its Advisory Committee, the Legislature's short sessions, fast pace, and inconvenient committee meetings make it conducive to misleading, sometimes outright false, anecdotal statements which are difficult to respond to. This anecdotal evidence is, alas, often the second- or third-hand reports of someone not present, and sometimes has nothing whatever to do with whether the order of argument should be changed.

In 1999, for instance, northern-Minnesota legislators provided a letter from the family of a Two Harbors victim of a notorious murder. The letter claimed that, during the trial of one of the assailants, the defense lawyer fabricated stories about the murder victim in the closing argument. This letter was read in both House and Senate committees. The State Public Defender, who represented the convicted parties on appeal and possessed the trial transcript, was forced to appear and to prove that the claim was completely false by reading from the portion of the transcript in question.[16]

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[16] Senate Crime Prevention Committee, Hearings on S.F. 198, Feb. 10, 1999; House Crime Prevention Committee, Hearings on H.F. 197, Feb. 19, 1999. It is disappointing to learn from this legislative history that the State Public Defender was forced to answer this claim on two occasions, *nine days apart,* even though he had shown it to be false at the first hearing. At the House committee hearing, when the State Public Defender tried to tried a legislator's question about this, he was cut off.

This and other so-called victim's rights claims have been made in the Legislature under circumstances in which the claims could not be rebutted, even though quite false. Pirsig and Tietjen, *supra* at 213 & n.263, tell of a speech by a legislator in 1987 which blamed the order of argument for the lengths of prison terms and the percentage of murderers prosecuted.

Other questionable claims are sometimes made by prosecutors in their own testimony. Reports in 1997 stated that an elected county attorney told the committee that he had unsuccessfully sought rebuttal argument under the 1987 rule "dozens and dozens" of times. This is quite a questionable claim for an elected prosecutor, particularly since the rebuttal study ordered by the Legislature in 1997 reported that *all* the state's prosecutors in 1998 requested rebuttal only 23 times out of 1074 trials. A Ramsey County study at the same time reported five rebuttal requests in 212 trials.[17]

The Court must reject this type of political encroachment upon its co-equal status under the Minnesota Constitution. It should judicially defend itself, *In re* Tracy, 197 Minn. 35, 44, 266 N.W. 88, 92 (1936) by

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[17] This information appears in: the January 21, 1999 rebuttal study by Sue Dosal, State Court Administrator; in Minneapolis Star Tribune, Feb. 20, 1999 at B1 ("Criminal Prosecutors Want Last Word"); and in St. Paul Pioneer Press, March 15, 1999 at 8A ("Rights of Accused Merit Protection").

declaring, once and for all, this it alone possesses authority to make rules of court procedure.

4. Retention Of Minn. R. Crim. P. 26.03, Subd. 11 (1987) Is The Better Rule Of Law--There Is No Compelling Reason To Change It.

Unfortunately, this year's political attack by the prosecutors against this Court and Minnesota's lower judiciary has splintered this Court's Advisory Committee. The Advisory Committee is composed of a broad membership with wide experience in every facet of the criminal courts. As such, it is best able to harmonize competing interests when it proposes rules of procedure. The rules have always reflected this balancing of interests to seek fairness and justice. A change in a single rule to serve one set of interests disrupts the whole.

This year, the Advisory Committee was forced to meet and to *again* discuss this issue because of the prosecutors' very-political approach to, and success in, the Legislature. It is unlikely that the Advisory Committee's proposal would even have been made this year were it not for events beyond its control. For instance, the rebuttal study ordered by the 1997 Legislature was not even released until January 21, 1999, two days *after* ch. 72 (S.F. 198) had been introduced. Since the opportunity for prosecutor rebuttal was *the* issue when the Legislature in 1997 amended Minn. Stat. § 631.07, one would think that the rebuttal study would at least have

been considered and discussed before *yet another* legislative intervention, or referral to the Advisory Committee, was ripe.

For these reasons, and the reasons which follow, we believe that the Advisory Committee's proposal should be rejected and Rule 26.03, subd. 11, as last amended in 1987, should stand. We also believe that this Court should hold, once and for all, that it alone possesses inherent authority over court rules and procedures so that the time and resources of the judiciary, the legislative branch and the bar will not continue to be required on this issue every year or two.[18]

First, although both sides recognize the possibility of a tactical advantage to arguing last, it is also true that the order of final argument has no impact on the vast majority of prosecutions. As a practical matter, only a very small percentage of felony prosecutions go to trial, and only a few of them are actually close as to guilt or non-guilt.[19] There is simply no reason to change the rule for thousands of cases in order to affect the very few close cases. In those very few close cases which go to trial, it

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[18] Minneapolis Star Tribune, February 20, 1999 at B1 ("Criminal Prosecutors Want Last Word"). One member of the Senate showed her frustration with the repeated consideration of this issue by urging her colleagues to once and for all put the issue to rest. Senate Crime Prevention Committee, Hearings on S.F. 198, Feb. 24, 1999.

[19] Minneapolis Star Tribune, April 14, 1997 at A10 ("Closing Arguments")

is consistent with the policies promoted by the presumption of innocence and the proof-beyond rules to give the defendant the right to argue last.

To the extent that prosecutors claim that they should argue last because they have a difficult burden of proof, they may be incorrect. Social scientists tell us that jurors, regardless of instructions from the bench, assume regularity in criminal charging. National Jury Project, 1 Jurywork: Systematic Techniques, § 2.04 at 2-10 to 2-21 (2d Ed. 1997-98).[20] Some jurors hold opinions flatly inconsistent with instructions from the trial judge. *See* David E. Rovella, "Criminal Cases--Poll Elicits Fear Of Rogue Jury," National Law Journal, Nov. 2, 1998 at A-25. Since jurors assume charging regularity, they expect the defense to prove false accusation. Thus, one could argue that it is the defense which *actually* has the burden, albeit one inconsistent with the law, and should argue last for that reason.

Second, prosecutors say that they must argue last because they have no way of knowing what defenses will be raised and by what method.[21] But this ignores the

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[20] In this section of Jurywork, the authors report that 43% of eligible jurors interviewed in St. Louis County in 1979 said that a person brought to trial by the government was probably guilty of some crime.

[21] Minneapolis Star Tribune, March 3, 1999 at A17 ("Let Minnesota Prosecutors Get the Last Word in Criminal Trials").

requirements of Minn. R. Crim. P. 9.02. Since 1975, the defense has been required to notify the prosecutor of defenses, defense witnesses, and statements of defense witnesses. The only defense which need not be disclosed is the "not guilty" defense. In 1983, the Court amended Rule 9.02 to require the defense to give the prosecution statements taken from prosecution witnesses. If the defense fails to comply, the trial judge may preclude evidence or a line of questioning, or impose other sanctions, and this Court has disciplinary authority.

This "unknown defense" argument is truly a red herring. Prosecutors should *never* be surprised by a defense theory. Even if the defense calls no witnesses, the defense theory will be ascertainable from the defense *voir dire*, opening and cross-examination.

If some truly unforeseen development occurs at trial which supports a defense, the trial judge has the authority to grant a brief continuance, to allow rebuttal argument, or even to mis-try the case.

Because prosecutors should never be surprised at trial, they do not need to argue last for this reason. There is a difference between failing to anticipate a defense, and being unable to respond to it. In the case of a defense which is truly surprising and which first surfaces during the defense closing, the Advisory Committee is quite able to contemplatively propose a rule covering that situation.

Third, prosecutors cannot creditably claim that their conviction rates suffer because they are not permitted to argue last. They have never introduced one word of evidence to support this claim, not when they raised it in 1987, Pirsig & Tietjen, *supra* at 206 & n.242, not in 1997, not in 1999, never. If this type of evidence existed, one would think that the prosecutors would offer it.[22] In fact, crime rates have dramatically fallen in this decade, as many recent news items demonstrate.[23] But, even if crime rates were rising, that would not justify a change in the argument order, since the vast majority of convictions are obtained by pleas.

Fourth, prosecutors argue that Minnesota is the only state in which prosecutors do not argue last. But the truth does not lie in black and white. Some states have only two arguments, defense and prosecution; some states have discretionary rebuttal and surrebuttal. In some states, rebuttal depends upon whether the defense argues. Other states commit the issue to uncertain case law.

But even if the "49-1" claim is mostly true, nothing says that Minnesota should change its rules to conform to

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[22] St. Paul Pioneer Press, February 28, 1987 at 10A.

[23] St. Paul Pioneer Press, March 15, 1999 at 8A ("Rights of the Accused Merit Protection"). The claim of an influential of the Senate at a committee hearing that crime rates have risen dramatically was not supported, and could not be in 1999. Senate Crime Prevention Committee, Hearings on S.F. 198, Feb. 10, 1999.

everyone else. No state dispenses perfect justice--the United States Supreme Court receives appeals each year from every state. Justice Brandeis once referred to the state courts as laboratories for experimentation, and laboratories do not all do the same thing. New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932)(Brandeis, J., dissenting); *see also* Miranda v. Arizona, 384 U.S. 436, 490 (1966).

Many states have preliminary hearings, which Minnesota has not had since 1975. Some states permit depositions of police officers and other trial witnesses, which are almost never permitted in Minnesota. Some states do not provide the defense with police investigation and other investigative reports, but Minnesota has always had liberal discovery, even before Rule 9.01 was adopted in 1975. Minnesota defendants must disclose their witnesses, while those in other states do not. In Europe, according to the defense the last word is in many places regarded as an essential safeguard. Pirsig & Tietjen, *supra* at 199 n.217.

Fifth, prosecutors claim that they must commit argument misconduct because they can't anticipate what the defense will say. This is a simply outrageous claim. Any prosecutor who admits to deliberately committing argument misconduct should be disciplined by this Court. To expect this Court to reward them for admitted argument misconduct is indeed difficult to understand.

It is demonstrably false that prosecutors commit argument misconduct because they must anticipate defense

arguments. As a quick review of this Court's argument-misconduct decisions shows, prosecutors commit misconduct because they want to win more cases, and they know that misconduct will rarely lead to reversal or professional discipline. This Court had to warn the St. Louis County Attorney repeatedly about misconduct, State v. Merrill, 428 N.W.2d 361 (Minn. 1988), before it reversed a conviction in State v. Lefthand, 488 N.W.2d 799 (Minn. 1992).

But it was not until this decade that this Court and the Court of Appeals were forced to reverse convictions on appeal for argument and trial misconduct. And all these instances occurred under the 1987 rule. State v. Porter, 526 N.W.2d 359 (Minn. 1995); State v. Williams, 525 N.W.2d 538 (Minn. 1994); State v. Harris, 521 N.W.2d 348 (Minn. 1994); State v. Shannon, 514 N.W.2d 790 (Minn. 1994); State v. Van Wagner, 504 N.W.2d 746 (Minn. 1993); State v. Salitros, 499 N.W.2d 815 (Minn. 1993); State v. Kaiser, 486 N.W.2d 384 (Minn. 1992); State v. Peterson, 530 N.W.2d 843 (Minn. Ct. App. 1995); State v. Richardson, 514 N.W.2d 573 (Minn. Ct. App. 1994).

In a number of other cases, the Courts have held that the prosecutor's argument was improper, but was not reversible. State v. Buggs, 581 N.W.2d 329 (Minn. 1998)(prosecutor referred to L.P.R.B.); State v. Thompson, 578 N.W.2d 734 (Minn. 1998); State v. Ives, 568 N.W.2d 710 (Minn. 1997); State v. Ashby, 567 N.W.2d 21 (Minn. 1997); State v. Griese, 565 N.W.2d 419 (Minn. 1997)(prosecutor had

already had a conviction reversed for misconduct); State v. Coleman, 560 N.W.2d 717 (Minn. Ct. App. 1997).

Prosecutor misconduct is troubling because, even if trial judges sustain objections, jurors have trouble ignoring the misconduct. Jurors' inability to purge prejudicial material is, after all, the reason for trial procedures mandated by cases like Gray v. Maryland, 523 U.S. 185 (1998).

Sixth, prosecutors ask that they be given an unqualified first and last argument because the 1987 limited rebuttal argument promulgated by this Court after the Legislature amended Minn. Stat. § 631.07 (1986) has not worked. However, there is no proof of this. House File 1109 in 1997 resulted in a study of rebuttal arguments. Laws, 1997, ch. 239, art. 3, § 23. At that time, prosecutors argued that they had requested rebuttal dozens of times since 1987 without success. What prosecutors on this point are saying is that they really don't trust judges to properly apply the rebuttal rule, *i.e.*, another attack on the judiciary.[24]

However, the rebuttal study, which was released on January 21, 1999 (two days *after* Ch. 72 was introduced in the Senate), showed that, in 1998, prosecutors throughout

[24] St. Paul Pioneer Press, March 15, 1999 at 8A ("Prosecutors Deserve Right To Respond"); Minneapolis Star Tribune, March 3, 1999 at A17 ("Let Minnesota Prosecutors Get the Last Word in Criminal Trials").

the state asked for rebuttal less than two dozen times out of more than one thousand trials, and it was granted ten times out of the 23. A similar study in Ramsey County reported five requests in more than 200 trials.[25] This does not amount to proof that the 1987 procedure has not effectively addressed the problems claimed by the prosecutors; it shows they don't use what they sought and were granted.

Last, some prosecutors claim that this is crime-victims' reform, and they must argue last in order to respond to defense lawyers' unwarranted attacks upon crime victims during their closings. The "crime-victims" argument was used in 1987, too. Pirsig & Tietjen, *supra* at 205-209 & nn.239, 242, 249-52. To some extent, this claim is based upon rather questionable anecdotal claims. We have already discussed this type of misleading evidence offered to the 1999 Legislature concerning the Two Harbors murder victim.[26]

To an extent, however, there is nothing improper about challenging a prosecution trial witness, particularly in a case involving credibility, eyewitness identification or consent. That's what trials are for. Who is credible? Did a crime occur? That's what juries decide, and that's how lawyers try to convince juries. An irrelevant attack upon a murder victim would surely be interrupted by a trial court.

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[25] St. Paul Pioneer Press, March 15, 1999 at 8A ("Rights of Accused Merit Protection").

[26] *Supra* at 26 & n.16.

In any event, challenges to prosecution testimony should always be anticipated by prosecutors and are no reason to change the closing-argument rule. Protection of crime victims is not the issue.

In a related vein, prosecutors sometimes claim that certain defendants were acquitted only because the defense lawyer argued last. In 1997, for instance, prosecutors brought crime victims to the Legislature to testify that their assailants were acquitted solely because the defense had the last argument.[27]

This is worse than speculative nonsense, and no proof has ever been offered on this point. Any participant in the criminal courts knows that there are any number of reasons, legitimate and illegitimate, why juries acquit or partially acquit. Defense lawyers are not entitled to argue nullification or to get a nullification instruction. State v. Perkins, 353 N.W.2d 557, 561-62 (Minn. 1984). Any attempt to change argument procedure because of the possibility that a jury might acquit would also justify a wholesale change in all the rules of procedure for the same reason. The argument thus proves too much.

The arguments which were made this past Spring before the Legislature, particularly those which were also made in

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[27] Minneapolis Star Tribune, April 30, 1997 at B3 ("Senate Gives Prosecutors Last Word").

1987 when the prosecution lobby succeeded in its effort to amend Minn. Stat. § 631.07 and Rule 26.03, subd. 11, make two things apparent.

First, it is likely that, despite the quite obvious constitutional problems which are posed by their efforts, prosecutors will continue to seek from the Legislature what they can't, or think they can't, obtain from this Court and its Advisory Committee.[28]

Second, and of far greater concern, however, is the "slippery slope" this Court would begin descending if it allows the prosecutors to prevail this year by amending Rule 26.03, subd. 11 (1987) to conform to Laws, 1999, ch. 72. A dozen years ago, the Legislature amended Minn. Stat. § 631.07 (1986) and, even though no similar proposal had been made to its Advisory Committee, this Court amended its rule to conform. But that didn't satisfy the prosecutors. They came back to the Legislature in 1997 seeking more relief, and then came back again in 1999, before the rebuttal study ordered by the Legislature in 1997 was even released. When will this end?

In 1997, the Legislature purported to amend portions of Rules 27.03 and 28. In that same year, in addition to its

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[28] Minneapolis Star Tribune, February 20, 1999 at B1 ("Criminal Prosecutors Want Last Word"). In this same respect, Pirsig & Tietjen, *supra* at 202 n.232 quoted the June 25, 1987 hearing before this Court in which Stephen Cooper, then of the Neighborhood Justice Center, analogized this situation to a child playing one parent against the other in order to obtain permission to do something. *See also, id.* at 207 n.245 and 215 (June 25, 1987 comments of then-Justice Yetka).

amendment to Minn. Stat. § 631.07, the Legislature also passed a corresponding purported amendment to Rule 26.03, subd. 11. *See* 41 Minn. Stat. Ann. 247 (Supp. 1999). One of the authors of this memorandum is aware of an elected county attorney unhappy with Rule 9 who plans to seek legislative amendment to *that* rule in the next session.

If the Court, as a co-equal branch of our tripartite government, does not exercise its inherent Constitutional authority over court rules and procedures, it will only invite further bypasses of its Advisory Committee and further legislative intrusion.

5. Conclusion

For the reasons outlined in this memorandum, the Minnesota State Public Defender system, the Minnesota Public Defenders Association, the Minnesota Society for Criminal Justice, and the Minnesota Association of Criminal Defense Lawyers respectfully urge the Minnesota Supreme Court to retain Minn. R. Crim. P. 26.03, subd. 11 (1987) and to rule once and for all that it alone possesses inherent authority under the Minnesota Constitution over court procedures and rules.

Respectfully submitted,

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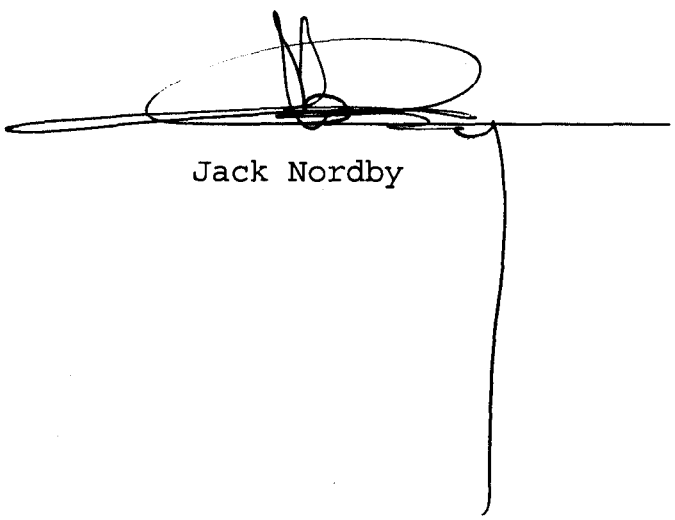
Dated: November 8, 1999

STATE OF MINNESOTA
IN SUPREME COURT
C1 - 84 - 2137

IN RE PROPOSED AMENDMENTS
TO THE RULES OF CRIMINAL PROCEDURE

Request to Make Oral Presentation.

Pursuant to the order of September 27, 1999, I request leave to make an oral presentation at the hearing on November 17, 1999.



Jack Nordby

STATE OF MINNESOTA

IN SUPREME COURT

C1 - 84 - 2137

IN RE PROPOSED AMENDMENTS
TO THE RULES OF CRIMINAL PROCEDURE.

STATEMENT OF JACK NORDBY

Prefatory Parable

A child once broke a window with his slingshot. This amused him, so he did it again, and again. His parents remonstrated, but nothing more, so he did it again, and then again, and again. Warnings were issued, ultimata, and mild punishments, all to no avail. Neighbors and others, whose windows and pets and children had been targets of the child's marksmanship, implored his parents to take action. But they, reasoning that boys (and girls) will be boys (and girls), were loath to do more than repeat their admonitions, and administer the occasional slap on the wrist or elsewhere. One day, after an especially appalling series of depredations, the child asked to speak to his parents. They assumed he had finally seen the light. "I want a bigger slingshot," he said.

Preface

The proposed rule change implicates concerns much broader and more important than whether the prosecution is permitted the latter final argument, or the defense is, as it traditionally has been in Minnesota.

There are, on the one hand, several compelling reasons why the present and long-standing practice should not be changed, particularly in the posture in which the question now arises. There is, on the other hand, no good reason for change.

I propose here to discuss three general areas of concern which militate decisively against alteration of this rule. In ascending order of importance they are:

First, the present rule was propounded by an Advisory Committee of very distinguished lawyers and judges, nearly all of whom were prosecutors or former prosecutors. No reason even modestly persuasive has been put forward to discard their careful work.

Second, abuse of final argument by prosecutors is a perennial, chronic, on-going problem, and increasing, despite repeated and harsh warnings from this Court. The issue arises with alarming frequency, has resulted in many reversals of major felony convictions, and the cases reveal a damning pattern of willful and grossly negligent misconduct by the very group that now seeks to change the rule to its advantage.

Third, and even more important, to acquiesce in the blatantly unconstitutional statute recently enacted, (at the behest of prosecutors who deliberately by-passed the proper rule-making procedure), would be for this Court to abdicate its crucial responsibility of preserving the Constitutional division of powers, and would gravely undermine its own moral and legal authority as the arbiter of the professionalism of the bar.

I. CHANGE OF THE RULE WOULD DISPARAGE THE ORIGINAL COMMITTEE AND THE COURT THAT ADOPTED THE RULES, AND SUBSEQUENT COMMITTEES AND COURTS THAT HAVE REJECTED CHANGE.

The Advisory Committee that formulated the Rules of Criminal Procedure was appointed in 1971, and spent four years drafting them. The Committee was distinguished, and comprised mostly active and former prosecutors: John E. MacGibbon, Sherburne County Attorney; Henry W. McCarr, Assistant Hennepin County Attorney; Judge Bruce Stone, Hennepin County District Judge and former Assistant Hennepin County Attorney; Ronald Meshbesher, defense lawyer and former Assistant Hennepin County Attorney; Henry Feikema, private lawyer and former State Solicitor General and Assistant County Attorney; Judge Charles Johnson, former County Attorney; Judge Donald Odden, former Assistant St.Louis County Attorney; C.Paul Jones, Public Defender and former Chief Assistant Hennepin County Attorney. The other members were Judge Charles Cashman, Judge Chester Rosengren, Frank Claybourne, and Professor David Graven, who may or may not have had prosecution experience.

The Coordinator was Supreme Court Justice George M. Scott, who had been for many years the Hennepin County Attorney. Professor Maynard Pirsig, distinguished teacher and former member of the Supreme Court, was Consultant. The Reporter was a former federal prosecutor.

This committee was, then, populated almost entirely by lawyers and judges who were or had been prosecutors and can in no sense whatever be described as hostile to the prosecution, or pro-defense, or pro-crime. The committee expended four years of intensive effort, so the rule was not casually propounded.

The members of the Supreme Court who approved and adopted the Rules were similarly distinguished and respected: Chief Justice Robert Sheran, and Justices James Otis, Walter Rogosheske, C. Donald Peterson, Fallon Kelly, John Todd, Harry MacLaughlin, Lawrence Yetka, and Justice Scott.

To change the rule now, in the absence of a showing of changed circumstances requiring or justifying the alteration, would inescapably be an affront to these dedicated people -- a clear determination that they were wrong.

Change of this rule has been suggested regularly over the years by prosecutors. Each time the Advisory Committee (and therefore this Court) has rejected the proposal. To the many members of these bodies, too, a change at this time, not founded upon any significant change in circumstances or persuasive new evidence, would display disrespect.

It is probably true, of course, that mere respect for tradition or the status quo is rarely a compelling justification, (as is change merely for the sake of change). But the case for revision surely requires at least:

A) Some specific showing that the existing practice is defective;

B) Some specific showing that the change is likely to improve the administration of justice; that it would do more good than harm;

C) Some specific showing that circumstances have changed since the establishment of the rule, in a way favoring revision;

4) Some specific showing that the proponents of change, in this instance the prosecutors of Minnesota, deserve to be respectfully heard -- that they have clean hands and clear consciences on the issue.

As we shall see, none of these showings can be made. The record and experience vividly demonstrate in every respect quite the opposite.

In the quarter century of its existence the Advisory Committee has always been independent and collegial, or appeared to be. It has been highly respected as fair and balanced, in the bar and among judges, because of this. This is of considerable importance. Now, however, for the first time in its history (so far as I can recall or determine) its recommendation is not unanimous; there is sharp dissention on the Committee itself. Its claim upon general respect in the bench and bar has accordingly been diminished. This is profoundly unfortunate. A committee once believed objective, contemplative, and as a group disinterested, now appears to be contentious, fragmented, political, and subject to manipulation by the legislature and the Court.

This attempted exercise of brute power by prosecutors applying to the legislature, in clear violation of the separation of powers, in order to bring pressure to bear on this Court, has also caused extreme bitterness in the bar, especially among defense lawyers. The widespread perception -- correct or not -- is that the court has prejudged the question and determined in advance to do what the prosecutors desire in order to avoid conflict with the legislature.

Thus has a relatively narrow and technical question -- the order of final argument -- by virtue of the way it has been handled by the prosecutors, the legislature and this Court, become a divisive and embittering controversy threatening seriously to undermine this Court's image and authority.

II. CHANGE OF THE RULE WOULD REWARD THE PERENNIAL, INTENTIONAL AND EXPENSIVE ABUSE OF ARGUMENT BY PROSECUTORS, IN DEFIANCE OF THE COURT'S REPEATED WARNINGS.

It is a telling irony, and one that must no longer go unnoticed, that for many years improper arguments by prosecutors have been a distressingly frequent source of error asserted and found on appeal, despite repeated and firm warnings from the reviewing courts. It is indeed possible that no other issue has been more frequently raised and no action more often condemned in criminal cases. Perhaps no single issue (and certainly none which could be so easily avoided by a little study and self-restraint) has resulted in more reversals of convictions in major felony cases.

Yet prosecutors, having consistently abused the practice, violated the governing rules, and effectively ignored their bedrock responsibility as ministers of justice, and having done so fragrantly in the face of repeated admonitions, now ask to be rewarded by a shift of procedure giving them a new advantage.

In a moment I shall review representative cases, in the most pertinent period, the last decade, the years immediately preceding

this request for amendment. But it is important to understand that this pattern of serious impropriety is not so recent a phenomenon, as I shall also show. The cases which I examine in some detail are chosen because they follow the first of several strong recent pronouncements by the Court designed (altogether ineffectively as the record reveals) to deter precisely such misconduct.

Final argument is not (or should not be) an improvised or spontaneous or careless practice. It comes at the very end of a trial, with ample time to prepare. Guidelines to proper argument are relatively simple, and they are well-known, or should be. That is to say, there is no excuse in most cases, and certainly none in the most egregious ones, for the transgressions; they are either premeditated or grossly negligent.

Because of the staggeringly large number of cases in which prosecutorial misconduct in final argument has been alleged (about two hundred and thirty-five, by my rough count), I have not had time before this submission to read and analyze them all. I am in the process of doing so, however, because it seems to me that publication of the results might have an educative and minatory effect in this very important area. After all, the fairness of the process in which persons are condemned and often sent to prison -- that is, the very integrity of the criminal justice system -- is at stake. This phenomenon represents a mostly submerged scandal of notable proportions -- submerged because the distressingly large number of cases, together with the arbitrary and disconnected manner in which the question arises in individual decisions,

discourages a plenary analysis. It is surely time the epidemic of malfeasance be exposed to the harsh light of day.

So far as my examination has gone, (coupled with twenty-seven years of experience as a criminal trial and appellate lawyer, and five as a judge), the data clearly support the following conclusions:

1) No other issue involving the conduct of counsel arises so frequently, jeopardizes so many convictions, undermines fairness so often, or consumes so many hours of the reviewing courts's time.

2) The violations are very often obvious; they very often repeat the specific errors that have been explicitly condemned by this Court.

3) It follows from this that prosecutors as a group are either:

> A) Ignorant of the pronouncements of this Court,and the ABA Standards, as well as the Rules of Professional Conduct, and thus grossly negligent; or
>
> B) Disdainful of them, and thus wilfully unprofessional. Given the sheer numbers of these cases, where the misconduct is apparent or previously forbidden or both, no other alternative suggests itself.

4) It also follows that this Court, (and to a lesser extent the Court of Appeals), has been woefully ineffective in its mission and duty of preserving, protecting and defending the fair

administration of criminal justice.

5) To reward prosecutors by altering the rule in their favor, in light of this damning record, would inevitably:

A) Encourage continued and indeed more frequent and aggravated violations; and

B) Further undermine the important authority of this Court to govern the conduct of lawyers.

6) Since some cases are affirmed because, despite improper prosecutors's arguments, defense counsel was found to have retaliated in its closing and partially mitigated the prejudice (a questionable rationale, and one that encourages misconduct by both sides), a revision of the order of argument will eliminate this safe-guard, leave the prosecutors's unprofessional words the last to reach the jurors's ears, and thus result in more frequent prejudice, reversals, and the attendant expense, delay, and anguish for victims, witnesses, and defendants. (This would not be avoided by a provision for defense rebuttal after impropriety; prosecutors claim their right to do this now has been dismally ineffective. Besides, it encourages rather than dissuades misconduct.)

7) Other violations (many of them, to the shame of the defense bar) are not reviewed because defense counsel failed to object. This is an insidious rationale and evasion for several reasons:

A) The misconduct is often obvious and in need of no notice from defense counsel;

B) Objecting to an improper argument tends often to underscore the impropriety and make it even more forceful;

C) Most important, the logic of this rationalization is: the prosecutor's violation of the defendant's rights is off-set by the incompetence of the defendant's lawyer; an injury to due process is healed by an injury to the right to effective counsel.

D) To mitigate a prosecutor's willful misconduct by a defense lawyer's failure to object has all the appeal of the argument that a rapist should be excused by his victim's failure to protest.

8) Sometimes convictions are affirmed because objections were sustained or curative instructions given. This, however, merely fosters a fiction and encourages misconduct, for lawyers know that jurors cannot and do not ignore what is stricken, even when ordered to do so; if anything such an instruction heightens the prejudice. We pretend otherwise, but as Justice Robert Jackson (the Nurenberg prosecutor incidentally) said in Krulewitch v. United States, it is a "naive assumption that prejudicial effects can be overcome by instructions to the jury," a proposition that "all practicing lawyers know to be unmitigated fiction."

As Judge John R. Brown of the federal Fifth Circuit Court of Appeals, a vivid jurist, put it in United States v. Stewart, 576 F.2d 50,56 (5th Cir. 1978), a case where the prosecutor had interjected improper material into a trial, "the Court's hopelessly

tardy attempt to unring the bell, to put the cat back in the bag, to deodorize the jury box of the skunk's presence, and to unsing the song," probably increased the prejudice.

This convenient fiction is about as efficacious, as another distinguished judge has said, as it is to tell a small child to sit in the corner and not think about a white elephant. It does not work.

9) The record indicates that trial judges have, in any case, been singularly inattentive to improper prosecutorial arguments, failing regularly to intervene sua sponte, despite this Court's encouragement to do so.

10) The harmless error doctrine is invoked to justify many other affirmances. But this, too, is often mere fiction, and encourages further misconduct, especially where the prosecutor believes his case is strong. Reviewing courts decide the evidence is strong, often "overwhelming," but they do not see or hear the witnesses, nor (I believe) do they often even read the full trial transcripts. They conclude the evidence is strong because the prosecutors tell them so. Appellate judges thus place themselves in the shoes, indeed in the minds, of jurors and, armed with summaries of selected evidence by advocates, weigh evidence, credibility, and the effect of improper remarks. This is an inexact and subversive science. The indiscriminate invocation of the harmless error rule (in this context; other applications of it are, of course, perfectly legitimate) merely emboldens unscrupulous prosecutors.

Moreover, this court sometimes says (inconsistently) the prosecutor's misconduct is more blameworthy where the evidence is very strong, because it is unnecessary. This, of course, suggests that unethical argument is more excusable (perhaps "necessary") when the evidence is weak (and the defendant more likely innocent).

(There is a saying among prosecutors -- amusing when said in jest; when not, not -- that any idiot can convict a guilty defendant; it is convicting the innocent that poses a challenge.)

11. The court has also of late taken to minimizing misconduct in argument with the amazing device of counting the improper references, then comparing these to the number of pages of argument; as if, say, two acts of misconduct in a one hour argument are per se less prejudicial than one in a two hour speech. This is simply not true, and the poorest possible approach. In its nature, improper argument injects prejudicial and almost always vivid ideas and thoughts and images into the minds of jurors, tainting the very atmosphere of the trial. This approach:

1) Invites prosecutors to extend arguments to build up the ratio of good pages to bad;

2) Effectively offers prosecutors leave to make a quota of misstatements;

3) Utterly misconceives the psychology of the jury trial process, in failing to perceive that a single innuendo can poison an otherwise entirely unexceptionable trial;

4) Ignores the relatively obvious truth that

> no amount of other evidence, argument, or cautionary instructions can erase or even neutralize an improper remark.

This is a false and dangerous fiction.

And: 12) Because the present rule quite explicitly allows the prosecution a remedy for improper defense argument (requested with telling rarity by prosecutors, and often granted when it is), the proposed solution is for a non-existent problem. (It is astonishing, to me at least, that the minority members of the committee should think no defense rebuttal would be necessary because instructions or other judicial measures will neutralize improprieties. These folks apparently have not tried criminal cases, or read this Court's decisions).

Perhaps the most remarkable aspect of this sorry spectacle is the cavalier and even contemptuous way in which lawyers have violated this Court's repeated, consistent, emphatic (and impotent) directives. Let us consider the documented experience of only the last decade or so, understanding that we begin in 1988, at a time when the question had already arisen about one hundred and sixty eight times, in reported decisions. (And, of course, appellate decisions do not reflect instances where improper arguments were made but not raised on appeal.)

My semi-diligent review of the cases in which prosecution misconduct in final argument was raised on appeal reveals the following astounding figures:

From 1893 to 1988 (105 years) there were 168 cases.

Of these, 101 arose in the 12 years between 1976 and 1988, the year this court issued the first of several recent admonitions.

From 1988 to the present there were at least 67, (only published decisions being included up to 1996 and not all unpublished opinions thereafter).

In other words, in the ten years since the warning in State v Merrill, there have been just as many such cases as there were in the 82 years from 1893 to 1975.

In the 22 years from 1976 to present there have been 168 cases -- almost 3 times as many as in the entire previous 82 years. I shall upon request provide a complete annotated list of these to the court as soon as I have completed it.

I suggest that no one, including any member of this Court, can properly appreciate the enormity of this problem, its persistence and distressing evolution, and fairly decide the question, without reading these cases, all of them, preferably in chronological order. This is a large task, but the issue is important enough to justify the observation that anything less would be an abdication of responsibility.

For present purposes, let us concentrate only on the last ten years or so. This is an appropriate sampling because: 1) it illustrates the recent and current situation; 2) it immediately follows another decade in which such misconduct was so rampant that this court was moved to issue a very strong warning to erring prosecutors; and 3) it reveals that those prosecutors disdainfully ignored this and several later warnings. It fairly illustrates, in

other words, the depth and breadth of the crisis.

The period under review began inauspiciously with State v. Parker, 417 N.W.2d 643 (Minn.1988) (Ramsey County), when the Court in effect encouraged misconduct by overturning a Court of Appeals reversal, where a prosecutor had improperly commented on the failure of the defense to call witnesses, because the evidence was "overwhelming."

But then in State v. Merrill, 428 N.W.2d 361, 372 (Minn. 1988) the court said this about a prosecutor's final argument, which it had just described in some detail:

> We agree that the comments of the prosecutor referred to above were unfortunate, inexplicable, and, even worse, totally unnecessary. The prosecution had overwhelming evidence of defendant's guilt. It did not have to stoop to such tactics to get a conviction. We feel compelled to say that this court has seen with increasing frequency tactics being used such as those exhibited in this case.... We have on occasion warned the prosecution in our opinions that it has used improper tactics. However, <u>these warnings appear to have been to no avail</u>. For example, at oral argument in this case, the prosecutor made a cynical statement to this court that, while it considered the tactics used here to be appropriate, even if the tactics had been inappropriate, the court should find the remarks non-prejudicial. We reiterate that we find the statements above cited deplorable.... [T]he use of those statements [was] even more regrettable--because they were unnecessary.
>
> We thus specifically warn St. Louis County <u>and prosecutors generally for the last time</u> that we will no longer tolerate the tactics used by the prosecution in closing arguments in this case. The prosecution can expect a reversal if such tactics are used again. (Emphasis added).

(The reference to the "increasing frequency" of such

misconduct perhaps alludes to the startling fact that in the four years 1984-1987 the issue arose a bewildering fifty-seven times, twenty-one times in 1985 alone).

Strong words. That was 1988. Since then what do we find? Was this taken to heart by prosecutors generally? Did they show their respect for this court? If not, did this court make good on its promise?

Looking now only at the few years since Merrill, let us see how effective the Court has been as an enforcer of these important principles; let us ask how much moral force, so to speak, these admonitions have had upon the very group who now petition to change for their benefit a rule that has been in place since the Criminal Rules were adopted, and indeed for very long before that. Quite apart from all other questions, that is, have Minnesota prosecutors individually and collectively demonstrated sufficient good faith in respecting this Court's words so that their prayer here should be deferentially received? Do they have clean hands, that is?

In 1989 there were apparently only three reported cases, (I have not had time to locate unpublished Court of Appeals decisions before 1995, and thereafter only partially), which seems to be an improvement; and I find only two in 1990, which appears to confirm at least a short-term attention span. That year, however, the court found it necessary to revoice its frustration.

In State v. Scruggs, 421 N.W.2d 707 (Minn.1988)(Hennepin County), an argument was found "troubling", and "improper", -- but harmless.

In State v. Tennin, 437 N.W.2d 82,89 (Minn.App.1989), the Court of Appeals affirmed despite misconduct, but said "we share the concern recently expressed by the Supreme Court in State v. Merrill .... regarding prosecutorial misconduct and recognize that a pattern of improper prosecutorial remarks may earmark future convictions for reversal."

In State v. Wilbur, 445 N.W.2d 582 (Minn.App.1989)(Hennepin County), the Court found a prosecutor's argument "improper", "impermissible", and "objectionable", but affirmed.

State v. Glaze, 452 N.W.2d 655, 662 (Minn.1990)(Hennepin County) was a first degree murder prosecution, nearly (but not quite) reversed because of a blatantly improper prosecution argument. This Court said:

> "In recent years, we have become increasingly concerned about prosecutorial misconduct in criminal trials." State v. Johnson, 441 N.W.2d 460, 462 (Minn.1989) (prosecutor's remarks to grand jury found prejudicial); see also State v. Merrill, 428 N.W.2d 361, 372-73 (Minn. 1988) (prosecutor's closing argument deemed "deplorable"). We consider some of the prosecutor's remarks to constitute unprofessional conduct unbecoming a prosecutor. Defense counsel did not object at trial to the remarks nor did he bring a mistrial motion on this basis or ask for curative instructions. Prosecutors are officers of the court, however, and we will not hesitate in a suitable case to grant relief in the form of a new trial. We also note that trial courts have a duty to intervene and caution the prosecutor, even in the absence of objection, in appropriate circumstances. (Emphasis added.)

In State v. DeWald, 463 N.W.2d 741, 745 (Minn.1990)(Hennepin County), the court also held an argument improper (but "harmless")

and said:

> Although we find no prejudice to the defendant in this instance, prosecutors would be well advised to heed our admonitions concerning this type of argument. (Emphasis added.)

Nevertheless in 1991 five reported cases emerged, in 1992 four, and in 1993 five again. This inspired another diatribe from the court, which incidentally referred to the very long-standing nature of the problem.

State v. Everett, 472 N.W.2d 864 (Minn.1991)(Hennepin County), held an argument "unartful," but not reversible. State v. Coley, 468 N.W.2d 552 (Minn. App.1991) found an argument improper, but harmless, as did State v. Bright, 471 N.W.2d 708 (Minn.App.1991)(Hennepin County).

In State v. Gerald, 486 N.W.2d 799 (Minn.App.1992)(Hennepin County), a prosecutor's argument, which "we in no way condone," was found "clearly ... inappropriate and improper," but not "unusually serious misconduct." (This probably unintentionally ironic qualifier reflects the peculiar phenomenon that misconduct has become so frequent this court has seen fit to define categories of seriousness and apply different standards of review to them. That the conduct was not "unusually" serious is damnation by faint praise indeed.)

In State v. Lee, 480 N.W.2d 668 (Minn. App. 1992)(Ramsey County), the Court of Appeals held a prosecutor's action (not in argument) "improper and highly prejudicial," and reversed. But this court reversed, 494 N.W.2d 475. The same thing occurred in

State V. Wermerskirchen, 483 N.W.2d 725 (Minn. App. 1992)(Hennepin County), reversed 497 N.W.2d 235. Thus does this court undermine the Court of Appeals's occasional efforts to control misconduct.

In State v. Walsh, 495 N.W.2d 602 (Minn. 1993), the prosecutor's argument was "unduly inflammatory," "improper," "out-of bounds" -- but the conviction was affirmed nevertheless. So, too, in State v. Jolley, 508 N.W.2d 770 (Minn. 1993)(Hennepin County), the court was "troubled" by a prosecutor's "misstatement of the law," which the trial judge should have but failed to correct; the conviction was affirmed. In State v. Bates, 507 N.W.2d 847 (Minn.App.1993), a prosecutor's conduct was "not so prejudicial as to deny ... a fair trial."

In State v. Goldenstein, 505 N.W.2d 332, 346 (Minn.App. 1993)(Hennepin County), a first degree criminal sex conviction was reversed. The court held the prosecutor commented on inadmissible evidence, invited prejudicial speculation not supported by evidence, and otherwise was "in error," and said:

> The supreme court has again recently addressed prosecutorial misconduct. The court stated that a prosecutor is governed by a unique set of rules which
>
> > follow directly from the prosecutor's inherently unique role in the criminal justice system, which mandates that the prosecutor not act as a zealous advocate for criminal punishment, but as the representative of the people in an effort to seek justice.

State v. Salitros, 499 N.W.2d 815 (Minn. 1993) includes a lengthy review of malfeasance in argument, and makes these points:

As long ago as 1933 we began admonishing trial courts and prosecutors not to state that constitutional rights such as the presumption of innocence are only for the benefit of the innocent and not to shield the guilty. State V. Bauer, 189 Minn. 280,284 249 N.W.40,42 (1933). Forty-three years later, in State v. Thomas, 307 Minn. 229,231,239 N.W.2d 455,457 (1976), we said that prosecutors had failed to heed what we said in Bauer ....

In this case the prosecutor resurrected the statement condemned in Bauer and Thomas, ...;

and:

In a number of cases we have cautioned prosecutors against generally belittling a particular defense in the abstract, as by saying,e.g.,"That's the sort of defense that defendants raise when nothing else will work." It is clearly improper for a prosecutor to suggest that the arguments of defense counsel are part of some sort of syndrome of standard arguments that one finds defense counsel making in "cases of this sort."

That, however, is precisely what the prosecutor did in this case;

and:

In State v. Montjoy, 366 N.W.2d 103,108-09 (Minn.1985), we criticized the .... argument by a prosecutor to the jury to think about "accountability".....

The prosecutor in this case made an argument similar to, almost identical to, the argument ....that was made in Montjoy:

and:

Over the years we have reversed a number of convictions on the basis of prosecutorial misconduct in closing argument even though defense counsel did not object to the statements. Generally, however, in those cases we have been able to say that the

> misconduct was prejudicial. However, we have also made it clear to prosecutors who persist in employing such tactics that we retain the option of reversing prophylactically.

The very next year, however, the number of cases rose dramatically to thirteen, the third largest number in history (again, it bears mentioning, excluding unpublished opinions). Let us review that shameful year.

In State v. Harris, 521 N.W.2d 348 (Minn.1994)(Hennepin County), the court reversed a murder conviction because of grossly improper prosecution questioning and argument and said:

> The prosecutor's persistence in violating the trial court's rulings had the effect of diverting the jury's attention from its primary task.... Questions by a prosecutor calculated to elicit or insinuate inadmissible and highly prejudicial character evidence and which are asked in the face of a clear trial court prohibition are not tolerable.
>
> We have made it clear that "[t]he state will not be permitted to deprive a defendant of a fair trial by means if insinuations and innuendos which plant in the minds of the jury a prejudicial belief in the existence of evidence which is otherwise inadmissible.'" ....Here, the prosecutor's single-minded determination to bring in a guilty verdict succeeded, but at the cost of undermining the value of the trial as a truth-determing process.
>
> ....
>
> The role of the prosecutor and trial court is not simply to convict the guilty, they are also responsible for providing a procedurally fair trial. Strong evidence of guilt does not -- cannot -- deprive a defendant of the right to a fair trial. "The prosecutor has as overriding obligation, shared by the court, to see the [sic] defendant receives a fair trial, however guilty he may be."... They [sic] did

not meet that obligation here.

In State v. Hawkins, 511 N.W.2d 9 (Minn. 1994)(Ramsey County) the court found an argument "improperly disparaged the role of defense counsel in general and of appellant's counsel in particular and improperly commented on appellant's failure to testify," then affirmed. It added:

> In general, this court grants relief for plain error only if the error is prejudicial, however, "we have made it clear that if prosecutors persist in making improper statements *** we will not hesitate, in an appropriate case," to grant a new trial. State v. Salitros, 499 N.W.2d 815,816 (Minn. 1993). While we decline to exercise our supervisory power in this case, we once again remind prosecutors that we may reverse a conviction on the grounds of prosecutorial misconduct even where the misconduct was harmless. (Emphasis added.)

In State v. McKenzie, 511 N.W.2d 17 (Minn. 1994)(Hennepin County), another murder case, the Court said "clearly, the prosecutor's remark was improper," but affirmed the conviction nevertheless.

State v. Post, 512 N.W.2d 99 (Minn. 1994) reversed a murder conviction and said:

> The above-quoted statement by the prosecutor, although not objected to, was improper. See State v. Salitros, 499 N.W.2d 815,819-20 (Minn.1993), where we awarded a new trial to a criminal defendant because the prosecutor's closing statement included a number of improper arguments, one of them similar to this argument. On retrial the prosecutor is cautioned against repeating such an argument.

State v. Shannon, 514 N.W.2d 790 (Minn. 1994)(Hennepin County), was yet another murder case, and the conviction was reversed:

> Applying the general rule that absent objection only plain error will be reviewed on appeal, the court of appeals denied relief. We have decided, however, that in this case the defendant should be granted a new trial. In all probability the improper, misleading and confusing argument of the experienced prosecutor, who knew or should have recognized its impropriety, created the confusion that the trial court declined to correct. (Emphasis added.)

This reference to an experienced prosecutor suggests that inexperience might excuse an "improper, misleading and confusing argument," but that would be both poor jurisprudence and poor pedagogy. All prosecutors are, after all, law school graduates, at least. They are ministers of justice, as this court has said. A federal court said, in United States v. Stewart, 576 F.2d 50, 56-57 (5th Cir. 1978), reversing a conviction for prosecutorial misconduct:

> We do not review here the untutored policeman in hot pursuit who commits an error of constitutional law. This is the Government, through its sophisticated, supposedly informed legal representatives.... the Government proceeded as though indifferent to established rules of almost constitutional origin ....
>
> The errors here were not of the constable on the beat. They were those of the office of United States Attorney, whose adversary contentions and approach dragged the Trial Judge into flagrant errors. If under these circumstances all can be washed out be a finding of "harmless error," prosecutors will be encouraged to urge the Judges should allow them to take indefensible paths, confident that we will forgive if not forget.

In State v. Starkey, 516 N.W. 2d 928 (Minn 1994)(Hennepin County), another murder conviction was affirmed, despite an "inappropriate" argument.

In State v. Stewart, 514 N.W.2d 559 (Minn. 1994), yet another murder case, the prosecutor's argument was held improper and "out of bounds" (he referred inter alia to the defendant's testimony as "crap," reflecting the high level of current professionalism in advocacy), but the conviction was affirmed.

State v. Washington, 521 N.W.2d 35 (Minn. 1994)(Dakota County) was still another murder conviction jeopardized by a prosecutor's final argument, which the court held included "improper reference to appellant's character" that diverted the jury from its proper duty; nevertheless it affirmed.

State v. James, 520 N.W.2d 399 (Minn. 1994)(Hennepin County) was another first degree murder case where the same prosecutor who had given a "clearly" improper summation in State v. McKenzie, above, did so again.

In State v. Williams, 525 N.W.2d 538 (Minn. 1994)(Ramsey County) a first degree drug conviction was reversed. This court in an "independent review of the record" concluded the prosecutor had:

> Improperly invited the jurors to speculate with respect to the motivation behind defendant's decision to try the case as she did. This argument is similar to the "That's the sort of defense that defendants raise when nothing else will work" argument declared improper in prior cases of this court. See e.g.,State v. Bettin 309 Minn. 578,579,244 N.W.2d 652,654 (1976), relied upon most recently in State v. Salitros, 499 N.W.2d 815, 818 (Minn.1993).... The prosecutor ... was not

> free to belittle the defense... or, as here, to suggest that the defendnat raised it because it was the only defense that "might work". Moreover, the prosecution was not free to urge the jurors to put themselves in the defendant's shoes and ask themselves if they ever had traveled and opened their luggage to "just magically find something in your bag that you hadn't put in there when you packed." It is improper for the prosecutor to urge the jurors to look at their own experiences as proof that the defendant's defense is not credible.

The court in State v. Bohlsen, 26 N.W.2d 49 (Minn. 1994), denied review of an unpublished decision, but took the unusual step (for such an order) of issuing this admonition:

> [W]e take this opportunity to caution prosecutors against making the kind of closing argument with respect to the presumption of innocence that the prosecutor made in this case. This argument was improper, as our decision in State v. Jensen, 308 Minn. 377, 242 N.W.2d 109 (1976), makes clear. See also State v. Thomas, 307 Minn. 229, 239 N.W.2d 455 (1976). As the dissenting judge in the court of appeals in this case stated, the argument -- which manages to assume the defendant's guilt while saying that the defendant is presumed innocent -- "mocks" the presumption of innocence.
>
> ....
>
> The error in this case was not prejudicial. However, as prosecutors know, in a number of recent cases we have reversed convictions on the basis of prosecutorial misconduct in closing argument notwithstanding the lack of prejudice. We have done so in the interests of justice and for prophylactic purposes. See,e.g. State v. Salitros, 499 N.W.2d 815 (Minn.1993). Prosecutors who use an argument such as this with respect to the presumption of innocence in the future will risk reversal in the interests of justice. (Emphasis added).

Note that the argument condemned here has been clearly and repeatedly condemned. The phrase "as prosecutors know" in the last

paragraph is (consciously or otherwise) ironic. So is the threat to reverse future convictions. Prosecutors -- large numbers of them anyway, including some very experienced ones -- obviously don't know; or, if they do, they don't care.

This annus miribilis of error came six years after Merrill, one year after Salitros -- with no relief in sight.

In 1995 there were seven reported opinions, including at least two which reveal that prosecutors were still not reading, or if they were, not heeding what the court said.

In State v. Thaggard, 527 N.W.2d 804, 812-13 (Minn. 1995)(Hennepin County), the court found that a prosecutor's argument was not so improper that it necessitated a new trial. Nevertheless, "in the interest of preventing further error in other cases," the court reviewed numerous aspects of the argument which it found "improper," and warned that if such conduct persists prosecutors "will risk reversal," concluding:

> As we have said before, a prosecutor is a "'minister of justice'" whose obligation is to enforce the rights of the public....
> We take very seriously our role of insuring that a criminal defendant, no matter the nature of the charge against him or her, receives a fair trial. We have made it clear on a number if recent occasions to prosecutors who persist in making improper arguments in closing argument that we will, in appropriate cases, exercise our power to reverse prophylactically or in the interests of justice. (Emphasis added).

These again are firm words, but they are, of course, hollow -- because similar dire predictions and admonitions have issued from the court for years without noticeable effect. One suspects indeed

that such words have become a source of scornful amusement.

In State v. Porter, 526 N.W.2d 359, 365 (Minn. 1995), reversing a serious criminal sexual conduct case, the court said:

> We conclude the prosecutor improperly: appealed to the passions and prejudices of the jury, argued the consequences of the jury's verdict, bolstered the credibility of the state's expert witness, distorted the state's burden of proof, and committed misconduct by alluding to Porter's failure to contradict certain testimony. This misconduct permeated the entire closing argument and appears to have been intended to play on the jurors emotions and fears. To the extent that the closing argument suggested to the jurors that they would be suckers if they acquitted Porter and there would be no sedation or salve to make them feel better, the misconduct struck at the heart of the jury system, juror independence. This is particularly disturbing because the prosecutor involved is a veteran of the courts with years of experience and knew or should have knows the impact this argument could have on the jury.
>
> ....
>
> It is unlikely the cautionary instruction given could undo the damage done by the misconduct. In addition, it is questionable whether the curative instruction hurt more than it helped, as it again focused the jury's attention of the inflammatory statements. Because the prosecutor engaged in serious misconduct which we cannot say with certainty was harmless beyond a reasonable doubt, we reverse Porter's conviction and remand for a new trial.
>
> We also choose to exercise our supervisory powers. In State v. Salitros, 499 N.W.2 815 (Minn 1993), we stated prosecution misconduct may result in a new trial where the interest of justice so requires. Normally, where we have already determined that the defendant is entitled to a new trial, we would not need to exercise our supervisory powers. However, because the misconduct here was directed at the very heart of the jury system, we must comment. To have a prosecutor suggest that jurors would be suckers for acquitting a

> defendant or that no salve or sedative would be able to make them feel good if they were to acquit a defendant, is intolerable. We say again--a prosecutor may not seek a conviction at any price. (Emphasis added)

It is worth emphasizing that here again the malefactor was a "veteran," not a neophyte who might offer inexperience as mitigation (if a tyro's ineptitude can ever excuse the pollution of justice).

In 1996 six opinions on the subject were released, in 1997 seven, and in 1998 six, including at least one with an almost wistful suggestion of the court's dawning awareness of its inability to deal with the problem.

In State v. Gaitan, 536 N.W.2d 11,17 (Minn. 1995), the court affirmed, partly because the defendant had failed to object to "most" of the alleged misconduct, but said:

> We have made it crystal clear in recent decisions that we are not going to tolerate misconduct by prosecutors in the prosecution of criminal defendants in this state. See,e.g.our recent decisions in State v. Porter, 526 N.W.2d 359 (Minn. 1995), State V. Williams, 525 N.W.2d 538 (Minn. 1994), and State v. Salitros, 499 N.W.2d 815 (Minn. 1993). (Emphasis added.)

In State v. Griese, 565 N.W.2d 419 (Minn 1997), a first degree murder conviction was jeopardized (but affirmed) by the improper argument of the same prosecutor whose misconduct had previously led to reversal in Salitros. The court said the allegations were "troubling" and:

> This court has repeatedly warned prosecutors that it is improper to disparage the defense in closing arguments or to suggest that a defense offered is some sort of standard

> defense offered by defendants "when nothing else will work." Williams, 525 N.W.2d at 548-49; State v. Salitros, 499 N.W.2d 652, 654 (1976).
>
> Similarly, in Salitros this court exercised its supervisory powers to act in the interests of justice in reversing a case prosecuted by the same prosecutor as in this case for making a similar argument even in the absence of evidence that the argument was prejudicial.
>
> We are troubled that a prosecutor once-reversed by this court would risk reversal a second time by offering even a brief--albeit less egregious -- reprise of the improper argument in a subsequent case. (Emphasis added.)

In State v. Thompson, 578 N.W.2d 734 (Minn. 1998) the state conceded on appeal that the prosecutor improperly: 1) Invited the jurors to put themselves in the victim's shoes; and 2) speculated in opening and closing improperly as to the events charged. In addition he referred improperly to the O.J. Simpson case. The court found this to be "misconduct," "improper," "pure speculation having no factual basis," "well beyond simply drawing inferences," "particularly inappropriate," and said in conclusion:

> As a final note, it is difficult to understand why a prosecutor would engage in clear misconduct as in present in this case, particularly when the evidence of guilt is so overwhelming that a simple review of the facts sustained by the evidence spins out a web of guilt more persuasive than anything that could be added through the prosecutor's inappropriate conduct. With the high risk of a new trial at stake, the gamble hardly seems worthwhile. (Emphasis added.)

This unfortunately implies that sometimes, in a weak case, such a "gamble" would be worthwhile. In weak cases the accused in more likely to be innocent, of course. It is a gamble only if a

lawyer assumes the case will not be mistried or reversed, and here the gamble was successful; no penalty resulted, and thus the practice is further encouraged. The court had made the same dubious point in Merrill, above.

So far in 1999 we find five decisions, including one where the court -- apparently giving up the effort to control the pestilence -- attempts to delegate the task to defense lawyers and judges.

In State v. Sanders, 598 N.W.2d 650, 656 (Minn. 1999), the court said: "we strongly encourage defense attorneys to object" to improper arguments, and "Importantly, an objection might deter the prosecutor from continuing an improper line of argument." Well, it might, and certainly lawyers should object to an adversary's misconduct. But meaningful deterrence will not occur until judges begin to impose unpleasant consequences.

Those cases are representative, but by no means exhaustive. In fact, only since Merrill, and even since Salitros, prosecutors's arguments have been condemned in a remarkable collection of cases.

Now the group responsible for this prodigious waste of judicial resources asks for a favor from the court it has defied. Indications are that the court may acquiesce and, in doing so, endorse the time-honored injunction that if you can't beat 'em you should join 'em.

The ignoble "gamble" referred to in several decisions is a promising one for prosecutors; they know the odds are very much in their favor, because:

1) If the defense does not object, as it woefully often does

not, the reviewing courts are likely to say the issue was waived.

2) If an objection is made and sustained, affirmance is likely to result because the courts will say (imaginatively) the error was cured.

3) If an objection is overruled, the reviewing courts will likely defer to the trial judge's ruling.

4) In any case an objection by its very nature tends to highlight the misstatement in the eyes of the jury, and prosecutors know this.

5) Reversals very, very rarely occur <u>despite</u> the routine warnings to the contrary.

In other words, the gamble will almost always pay off; the occasional reversal is simply part of the cost of doing business, and not a very dear cost. They obviously do not fear it at all.

Why the court should tolerate this sort of gambling with justice, much less encourage it, is a mystery.

(The statute was a gamble, too. The proponents are wagering that this court does not have the courage to strike it down. They believe it is a <u>safe</u> bet, because even if the separation of powers prevails, they have nothing to lose; they will be no worse off than they were before the effort -- or so they apparently believe.)

Like the court in United States v. Chiantese, 560 N.W.2d 1244, 1252-53 (5th Cir.1977), trying to put an end to on-going improper jury instructions, this Court should recognize that heretofore it has been "writing on water as it turns out." Here, as in <u>Chiantese</u>, "like the proverbial bad penny" the error keeps

recurring, and this Court might say, echoing the Chiantese court:

> Thus we have preached, ... but as with the boy who yelled wolf too often, our warnings have gone unheeded.... After all of this preaching and admonitions we conclude that this case should be the vehicle to bury the condemned, prejudicial charge once and for all. And the way to do it is to reverse the case without adding to the confusion, or worse, an invitation to trial judges to flirt with its use in the hope that we will find some extenuation in the use accompanied by some high sounding, but unheeded, pontifical platitudes that surely never again will it be implied.
>
> ....
>
> In the light of this history of wasted judicial resources and ineffective communication, a majority of the court en banc has determined that directory action of a supervisory nature must supplant the more normal adjudicatory process if we are to eliminate this chronic issue.

Of tangential interest are a number other recent cases:

In State v. Erickson, 589 N.W.2d 481 (Minn 1999), the court, in a case of first impression, the first time the issue arose before it, disciplined a prosecutor for conduct which had not violated either the rules or any previous directions from the court (multiple notices to remove a trial judge). It found "abuse" of a rule in conduct that did not violate the rule. Yet, when confronted with violations by other prosecutors of rules and admonitions concerning final arguments (numbering now in the hundreds), it continues either to tolerate the misconduct, rationalize it, minimize it, excuse it, only occasionally to grant relief, and never to impose discipline.

In State v. Miller, _ N.W.2d _ (Minn. 1999), the court found

a violation by a prosecutor of the ethical rule against communication with a person represented by counsel and imposed harsh sanctions, excluding evidence. It did not, however, impose discipline on the offending lawyers individually.

And in State v. Pilot, _ N.W.2d _ (Minn.1999), it approved a practice that had theretofore been long and repeatedly condemned -- asking one witness whether another was lying. The questions when asked by the prosecutor at trial clearly violated the rule in place at the time;nevertheless this court not only did not find error, but offered a limited license to ask such questions in the future (with no logical rationale and no useful guidance as to how this exception is to be applied, thus inviting what will surely be a deluge of abuses with the now built-in explanation that they were good faith applications of the Pilot decision). Justice Page rightly dissented.

In State v. Van Wagner, 504 N.W.2d 746,749-50 (Minn. 1993) a prosecutor (an experienced one) improperly and repeatedly elicited hearsay. This court said:

> Yet the prosecutor persisted by various tactics to get Soland's statement before the jurors. Everyone agrees this was improper conduct.
>
> The question before us is whether there should be a new trial....But even if the misconduct were harmless, we conclude we should reverse for prophylactic reasons.... The prosecutor is bound to seek that truth which is governed by the rules of evidence, a task we recognize is not always easy. At stake, nevertheless, is the integrity of the fact finding process itself, which we in the exercise of our supervisory powers must protect. For, As Queen Elizabeth put it centuries ago, the prosecutor is "not so much

> retained pro Domina Regia [For Our Lady the Queen] as pro Domina Veritate [For Our Lady Truth]."

In a footnote the court rejected the prosecutor's claim his methods and intentions were innocent:

> While there might be occasions when such a tactic could be employed, the prosecutor's overall questioning was too pointed, too persistent, to make that explanation plausible here. The prosecutor's subsequent ploy during final argument .... suggests the prosecutor's true motives in questioning the deputy.

In other words, the prosecutor not only deliberately tainted the trial, the court found his explanation was false -- i.e., that he lied to the reviewing courts. No disciplinary action was taken.

Although misconduct in argument is the most prevalent prosecutorial transgression, it is by no means the only one to arise with distressing recent frequency. A hardly less embarrassing roster of cases can be complied revealing:

1) Improper questioning of witnesses, and particularly defendants.

2) Violation of discovery rules, concerning both exculpatory evidence, and more generally.

3) Misconduct in questioning of prospective jurors on voir dire.

4) Improper opening statements.

5) Mishandling of grand juries.

6) Allusions to inadmissible evidence, sometimes even after it has been specifically suppressed by the trial judge.

7) Tardy amendments of complaints.

8) Gross overuse of evidence of other crimes, so-called Spreigl evidence. (This kind of volatile and misunderstood evidence probably accounts for more appeals than any other issue, except possibly final arguments.)

9) Misuse of prior convictions to impeach.

10) Testimony by prosecutors who are involved in the case.

11) Interference with access to witnesses and evidence.

12) Routine demands for unreasonable bail.

It seems to me worth suggesting that this court should consider a new approach to exerting control over trial lawyers -- prosecutors and defense lawyers alike, (and no reason suggests itself for excluding civil practitioners). The record makes clear that the courts's frequent admonitions have been unavailing, and are apparently being ignored cynically and even scornfully. This might change if the court would establish a policy under which, in appropriate cases:

1) Lawyers found to have committed misconduct would be identified by name and position. The present practice is, apparently, to avoid this assiduously;

2) The Director of the Office of Lawyers Professional Responsibility would be instructed to begin a disciplinary enquiry into conduct so identified in this court's opinions (and those of the Court of Appeals when review is denied);

3) Costs would be assessed on lawyers personally where willful or grossly negligent misconduct has led to otherwise unnecessary appeals or retrials; in the event of re-trial, the costs of it; in

the event misconduct is found, but "harmless," the costs of the appeal, at least;

4) Mandatory educational programs on the rudiments of proper argument would be instituted. (The record suggests that supervising prosecutors have done nothing to compel their employees's compliance with this Court's directives. The Court might enquire of them about this: what measures have they taken?)

Final argument is not rocket-science, it is not neuro-surgery, it is not calculus. It is not even difficult. The most prevalent errors are easily enumerated and can be easily avoided by moderately scrupulous professionals. Prosecutors could reduce this Court's workload appreciably simply be remembering they should not:

1) Comment on or allude to the defendant's failure to testify or produce evidence, or upon his silence otherwise.

2) Refer to inadmissible evidence.

3) Invoke concerns and fears beyond the proper issues in the case, or appeal to bias, sympathy, or fear.

4) Disparage the defendant, defense counsel or the defense theory improperly.

5) Vouch for (or against) the credibility of witnesses.

6) Inject other personal opinions about witness, defendants, or the merits of the case.

7) Refer to possible punishment.

8) Misstate the law.

9) Misstate the evidence.

10) Speculate, or invite the jury to do so, beyond reasonable

inferences from the evidence.

11) Shift the burden of proof, as is commonly done by referring to "uncontradicted" or "undisputed" evidence.

12) Invite jurors to put themselves in the shoes of the victim, or the defendant.

13) Refer to plea negotiations.

These few proscriptions are (or should be) easily learned, easily remembered, and easily obeyed. Instead they are ignored and violated with a frequency that suggests a deliberate and organized subversion of justice. The regular failure of defense lawyers to object suggests they, too, are ignorant of the rules and could benefit from some education. So, no doubt, could judges.

Even if the law schools are not teaching these things (as one is constrained to believe they are not), and even if these lawyers are not reading this court's opinions (as they obviously are not -- or else they are consciously disregarding them), the problem could be solved by an hour or two of teaching accompanied ideally by a short paper for future reference. That is, I suspect, what would occur if this court would finally demonstrate that it is serious about the problem.

The violations so often passed off as "harmless" are never truly harmless. They are merely a little less damaging than reversible errors, as an attempted crime is a little less serious than a completed one. (Some of the violations are indeed tantamount to crimes: criminal contempt.) The "harm" in these transgressions, of course, is that: 1) They infringe a litigant's

rights, to one degree or another; 2) They insult this Court and the Court of Appeals; 3) They create the risk and often the reality of expensive, time-consuming mistrials and reversals, with all the accompanying cost to victims and witnesses and taxpayers -- not to mention the renewed chance of acquittal of the "guilty"; 4) They self-destructively enhance the impression that the bar is unprofessional and out of control; 5) They thus tarnish the always fragile image of our system of justice in a litigious and litigation - disapproving society. In a word, they poison the waters of justice. This is not harmless.

It is effrontery for prosecutors to be making this effort at this time. It would be just, and in fact perhaps productive, for the Court to issue a well-considered statement refusing to change the rule, but indicating that if in, say, ten years, the prosecution bar can appear with a summary of all intervening appeals indicating that no further similar transgressions have occurred, or inconsiderably few, in other words that they have at long last heeded this Court's instructions, and if they can provide persuasive reasons for change, -- then, it may be, further consideration of the notion might be in order. There are, after all, not many prosecutors in Minnesota, and they are well-organized. It should be a simple matter for them to inform themselves and their colleagues of what is and is not proper in a summation and what the consequences of impropriety might be. Rather than acquitting and honoring them, at this point, the court should effectively place them on probation on the simple condition

that they remain law-abiding.

Meanwhile the spokesperson for the prosecution bar should be asked to respond to these questions:

1) How do you account for the deplorable frequency of clearly improper arguments?

2) What have you done to stem the tide of violations?

3) Why have so many prosecutors so often ignored our warnings?

4) Do you read this Court's opinions?

5) Do you know what proper and improper arguments are?

6) What assurance can you give that, after all these years of on-going violations, the misconduct will cease?

7) Do you, at last , apologize?

8) Did you in fact quite deliberately engineer passage of this statute in order to exert pressure on this Court to adopt a conforming rule, thus creating a constitutional confrontation?

9) Why did you by-pass the Rules Committee?

10) Do you believe the legislature has the power to regulate pleading and practice, or does the judiciary, as this court has so often made clear? (Do you, in other words, understand the separation of powers?)

11) What specific evils or defects in the present system would a rule change remedy?

Because I have said a good deal that is critical of prosecutors collectively, I want to add that misconduct of the sort under consideration has not occurred in my courtroom since I have been a judge, and happened rarely in the many cases I tried as a

lawyer. I have for the most part great respect for the prosecutors who have appeared before me, and the many who were my adversaries in earlier years. I have no doubt that honorable prosecutors deplore the discredit and embarrassment that their dishonorable colleagues have brought upon them as a group. Although I believe there has been a significant erosion (or perhaps redefinition) of professionalism in the trial bar over the years I have observed and worked in the law, tending toward a more confrontational, hurried, unscholarly approach to litigation, prosecutors do not seem to have been any more inclined to this than defense lawyers (or judges). In the perhaps futile hope of averting misunderstanding or mischaracterization of my position, I can say that although the present controversy involves misconduct by prosecutors (and arises only because of their effort to change this rule), my opinion toward erring defense lawyers (or judges) is no higher or more charitable. It seems to me desirable and likely to promote the good health of the profession and the administration of justice that questions such as this should be debated, openly, candidly, courageously, and forcefully, and that so long as the disputants attempt to be scrupulously accurate in representing the facts and reasonable in drawing inferences from them, no offense should be given or taken.

The present system is broken, corrupted, spinning apparently out of control. It has malfunctioned abjectly at every level: prosecutors have injected the error, over and over again; defense lawyers have often failed to react; trial judges have stood

passively by; this Court and the Court of Appeals have tried to do something about it, valiantly and persistently, but ineffectually. If old-fashioned professionalism is dead or moribund, as it surely seems to be, only this court has the legal power and the moral authority to resurrect it. It is time to renew the profession in this respect, to attempt to replace cynicism, opportunism and incompetence with their better opposites, to restore public confidence in an honorable but dishonored calling. It is past time. It is perhaps too late, though one clings devoutly to the hope it is not.

III. RESPECT FOR THE DIVISION OF POWERS OF GOVERNMENT (AND SELF-RESPECT OF THE COURTS) REQUIRES REJECTION OF THE PROPOSAL.

The most important reason to reject this proposed change is this: It represents not a principled reconsideration of a time-honored policy in light of altered circumstances, but an invitation to surrender to an arrogant act of manifestly unconstitutional legislation which resulted, in turn, from an orchestrated and arrogant effort of prosecutors to by-pass the proper rule-making process in which it had been unsuccessful in the past.

The cynical strategy is transparently obvious. Unable in repeated attempts to persuade the proper agency -- the Rules Committee -- to initiate a change in the rule, the prosecutors contrived to approach the legislature, a political body in which pro-prosecution and anti-crime measures are always popular. Though they surely must have known the statute they sponsored was a flagrant violation of the constitutional separation of powers, they

doubtless reasoned that with the statute in place they could use it as a lever (or club) against the Committee and the Court, putting these bodies in a position of having either 1) to acquiesce in an unconstitutional exercise and cleanse the constitutional taint by adopting a similar rule in the name of "comity," or 2) offend the legislature, which among other things determines judicial salaries, by rejecting the statute and the rule. This is Machiavellian politics and its best, or worst. The effort to influence the court by by-passing the gatekeeper deserves recognition as an ingenious stratagem. But that is all it deserves. (I urge the court to enquire of the spokesperson for the rule if this is not indeed the strategy.)

If this court fails to reject this effort, and to reject it firmly and in courageous terms, it will confirm what the prosecutors and the legislature apparently already believe: That is, the way to evade the Minnesota Constitution's allocation of powers to the judicial branch of government is to create by easy political appeal an unconstitutional statute, and with this in hand present it for approval to the Court, creating the public-relations dilemma just described. This has, after all, repeatedly happened before -- most notably in the engineering of statutes regulating evidence which this court later adopted as rules. Success by prosecutors in the present endeavor would no doubt encourage other groups to pursue the same course. In the end this Court will emerge not as the protector of the distinct departments of government it was mandated to be, but as the wielder of a rubber-

stamp, legitimizing unconstitutional legislation -- the diametrical opposite of its proper constitutional mission.

It is persuasively arguable that no function of this Court is more elementary and important than a proper understanding of the separation of powers, a clear comprehension of the Court's position in this system of carefully divided authority, and a courageous willingness to preserve the constitution and preserve within its sphere the duties and responsibilities allocated to each branch -- emphatically including its own. It must vigilantly guard against incursions of any one branch into the prerogatives of any other.

Here we have an invasion of the judicial sphere by the combined forces of the executive and the legislative. It is difficult to imagine a clearer confrontation, or a clearer invitation to the judicial branch to abdicate its authority and collaborate in the undoing of a constitutional desideratum. That the immediate underlying issue is not one of potential earth - shattering moment -- the order of final argument -- does not diminish but rather underscores the significance of the larger question: Does the separation of powers retain meaning and good health in the eyes and in the hands of the institution peculiarly responsible for its preservation? Or will it be degraded in a second-rate controversey?

The legislature originally controlled pleading and practice, (Minn.Const.Art.VI,§14,1857), but the constitutional provision so providing was repealed in 1957. Our Constitution now provides in Article III, §1: "The powers of government shall be divided into

three distinct departments;legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution."

The legislature has recognized that this Court must "prescribe, and from time to time may amend and modify, rules of practice," (Minn.Stat.§ 480.051,civil) including "The pleadings, practice,procedure, and the forms thereof in criminal actions in all courts....Such rules shall not abridge, enlarge, or modify the substantive rights of any person." Minn.Stat.§480.059 s.1. These rules supersede statutes conflicting with them, (Minn.Stat.§480.059,s.7), but the legislature attempted to reserve the right to "enact, modify, or repeal any statute or modify or repeal any rule of the supreme court adopted pursuant thereto." (Minn.Stat.§480.059,s.8). These statutes are, however, first, superfluous and, second, ineffective, for the authority to regulate practice has long been recognized as <u>inherently and exclusively judicial</u>:

> This court has the authority to "regulate the pleadings, practice, procedure and the forms thereof in criminal actions in all court of this state, by rules promulgated by it from time to time." Minn.Stat.§480.059,subd.1 (1992). This authority, acknowledged by the legislature, arises from the court's inherent judicial powers. State v. Willis, 332 N.W.2d 180,184 (Minn.1983). Notwithstanding this inherent power, the enabling legislation for the rules of Criminal Procedure purports to reserve to the legislature the right to "enact, modify, or repeal any statute or modify or repeal any rule of the supreme court adopted pursuant thereto." Minn.Stat.§ 480.059, subd.8. Commentators have recognized, however, as do we, that since the 1956

> amendment of the Judiciary Article of the Minnesota Constitution removed the constitutional requirement that pleadings and proceedings be under the direction of the legislative body, under the separation of powers doctrine the legislature "has no constitutional authority in their enabling acts or otherwise to reserve a right to modify or enact statutes that will govern over court rules [of procedure] already in place." State v. Johnson, 514 N.W.2d 551,553-54 (Minn.1994). (Emphasis added.)

The power was recognized long before the amendment of the judiciary article. See State v. Keith, 325, N.W.2d 651 (Minn.1982); State v. Cermak, 350 N.W.2d 328 (Minn.1984).

The Court added:

> Determination of procedural matters is a judicial function. The legislature, for its part, determines matters of substantive law and has carefully protected that prerogative by providing that the Rules of Criminal Procedure "shall not abridge, enlarge, or modify the substantive rights of any person." Minn.Stat.§ 480.059,subd.1. As a matter of substantive law, the legislature has "[t]he power to define the conduct which constitutes a criminal offense and to fix the punishment for such conduct ***." State v. Olson, 325 N.W.2d 13,17-18 (Minn.1982). Both branches agree that "[i]n matters of procedure rather than substance, the Rules of Criminal Procedure take precedence over statutes to the extent that there is any inconsistency."

This is consistent with the separation of powers doctrine and it makes practical sense as well, because courts are familiar with their procedures and the Constitutional commands under which they function. Unlike the legislature, courts are expert in procedural matters; and they are not so susceptible to passing cultural, political and emotional sentiments which often properly motivate legislative bodies. The courts are thus in all respects better qualified and positioned to regulate procedure and are bound by Constitutional duty to preserve this power against executive or

legislative trespass. This Court said as early as 1865:

> By the constitution, the power of the state government is divided into three distinct departments; legislative, executive, and judicial. The departments are independent of each other to the extent, at least, that neither can exercise any of the powers of the others not expressly provided for. Const. Art. 3, 1. This not only prevents an assumption by either department of a power not properly belonging to it, but also prohibits the imposition, by one, of any duty upon either of the others not within the scope of its jurisdiction; and it is the duty of each to abstain from and to oppose encroachments on either. Any departure from these important principles must be attended with evil. In the Matter of the Application of the Senate, 10 Minn. 56,57 (1865) (Emphasis added.)

The legislature, however, has continued to attempt to regulate procedure, sometimes explicitly purporting to override rules. This puts lawyers and courts in a dilemma at least until this court can address the statutes - often a very long time. See Laws 1997, c.96 §10: "Rules 27 and 28 of the Rules of Criminal Procedure are superseded to the extent they conflict with Minnesota Statutes, section 244.09 subdivision 5 or 244.11." MSA 244.09, subd 5 pertains to sentencing procedures and MSA 244.11 subd 1& 3 pertain to timetables for appeals. The same legislature also provided for custodial arrests for certain misdemeanor offenses notwithstanding Rule 6.01's provision for citation in lieu of arrest. Laws 1997, c. 239, art. 3,§9. And it has recently prescribed pre-sentence investigation procedures, and attempted to restrict stays of adjudication.

The legislature also attempts to regulate evidence; but this power, too, is inherently and exclusively judicial. It has

purported to govern admissibility of privileged communications, alcohol evidence in driving offenses, evidence of prior domestic abuse, abuse of children, genetic statistics, illegitimacy, crime victim reparations, judicial notice, forgery, confessions, blood tests, breath tests, and DNA evidence. These are unconstitutional per se.

(MSA 480.0591, subd 6; MSA 595.02 to 595.25; MSA 169.121; MSA 634.20; MSA 626.556, 634.20; MSA 480.0591, 634.26; MSA 257.62; MSA 609.344, 609.345; MSA 169,94; MSA 599,25; MSA 622A.65; MSA 599.01 et seq.; MSA 634.01, 634.02; MSA 634.03; MSA 634.15; MSA 634.16; MSA 634.25.)

This partial listing illustrates both that the legislature believes it can act outside its constitutional sphere, and that the courts are not sufficiently conscious of their place in the structure of separate powers to prevent it.

This court has forcefully asserted its authority from time to time. It said in In re Tracy, 197 Minn. 35, 47, 166 NW 88 (1936):

> There could be no more obvious attempt to say what judges should and should not consider as evidence in a controversial matter <u>the decision of which the constitution by the departmentalization of the powers of government has delegated exclusively to the courts</u>. (Emphasis added).

The courts may agree that a proposed rule by the legislature is desirable and adopt it independently, State v. Willis, 332 N.W. 2d 180 (Minn. 1983), but:

> at the same time court must determine what is judicial and what is legislative; and if it is a judicial function that the legislative act purports to exercise, <u>we must not hesitate to</u>

> preserve what is essentially a judicial function. Sharood v. Hatfield, 296 Minn. 416, 210 N.W. 2d 275, 279 (1973); see also State v. Olson, 482 N.W.2d 212 (Minn. 1992). (Emphasis added).

As the court said, in a different situation, in United States v. Dros, 260 F.Supp. 13,16 (S.D.N.Y.1966): "There are sharp limits to the sacrifies men must make upon the altar of comity."

As with rules of procedure, the courts are better equipped to fashion rules of evidence.

But if the separation of powers vests in the judiciary sole control of criminal practice, pleading, and evidence, it gives exclusive authority over substantive criminal law to the legislature; that is, the power to define crimes and set punishments.

> The legislature is vested with the power to declare and define rules of conduct and is therefore vested with a large measure of discretion. The discretion is bounded by constitutional restraints. State v. Reynolds, 243 Minn. 196, 203-04, 66 N.W.2d 886 (1954).

And just as the courts must courageously reject intrusion by the legislature into the judicial sphere, they must assiduously respect and protect the legislature's prerogative to create and punish crimes. Courts have a duty (often condemned when fulfilled) to keep the legislature within constitutional bounds, see Marbury v. Madison, 1 Cranch (505) 137 (1803), but they have no power over legislation beyond that; judges may not impose their own or others's preferences, philosophies, or even their sense of fairness and justice to alter substantive criminal legislation that is constitutional:

> The legislature is at liberty to ignore logic and perpetrate injustice as long as it does not transgress constitutional limits. State ex rel. Timo v. Juvenile Court, 188 Minn. 125, 128, 246 N.W. 544 (1993).

The continued vitality of the judiciary's power within its own province implies and depends upon its respect for and defense of the equally absolute powers of the other branches.

If this court does not scrupulously preserve the separation of powers the doctrine is doomed, for no other agency or institution can do so. To defer to the legislature, to acquiesce in the name of comity, particularly in circumstances such as the present where the invitation comes as a result of a cynical manipulative collaboration between the executive and the legislature, would be in effect to agree with that legislator who recently said, apropos the very proposal under scrutiny, that justice is too important to leave to the courts.

CONCLUSION

Prosecutors, who have so relentlessly violated the rules of final argument and this court's warnings, unable heretofore to persuade the Advisory Committee to change this rule in their favor, contrived to create a statute as leverage, and succeeded. They thus quite deliberately created an otherwise unnecessary Constitutional confrontation. They knew that the issue must reach this court, either on appeal or through the Committee. They calculated that the Court, seeing the dilemma, would be inclined to finesse the issue by pre-empting the statute with an essentially

similar rule. And here we are. It was another gamble, but another in which they estimated the odds were good, and from which they reckoned they had nothing to lose. They were not, apparently, deterred at all by the threat this posed to the separation of powers. It remains only to see whether the court will abet them in the mischief, or have the courage, unpopular through it will surely be with the executive and legislative branches, to do its Constitutional duty.

There is a time and place for compromise, negotiation, accommodation, diplomacy, finesse; there are indeed many occasions for these. By and large that is what politics is all about. But judicial husbandry of the Constitution is not politics, or should never be. Assaults on the document cannot be finessed. Constitutions are <u>adopted</u> by negotiations and compromise; once adopted, though, they must not be construed or evaded by those methods.

Trials -- and especially criminal trials, because of constitutional concerns -- are governed by a highly complex and formal network of procedural and evidentiary rules, the product of centuries of experience is Anglo-American law, all designed ultimately to assure that both parties receive a fair trial before an impartial factfinder. Faith in this process depends upon faith in the participants. If all are conscientiously professional we can be satisfied we achieve something approaching justice. The insidious evil of improper argument is that by a single phrase, even a single word, a lawyer can irreparably corrupt the entire

proceeding and undo even the most scrupulous adherence to all other proprieties throughout the trial. It screams like a billboard in the wilderness. Every violation of this sort creates either injustice or -- what is practically as bad -- the appearance of it. No error is more harmful or more prevalent. Yet no one in the system is taking it seriously.

In Mesarosh v. United States, 352 U.S. 1, 14 (1956), the United States Supreme Court, reversing a conviction because of the tainted testimony of a government witness, said the evidence

> has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and the Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Polluting having taken place here, the condition should be remedied at the earliest opportunity.
>
> > "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts.... Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted. Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 124. (Emphasis added.)

In another context, in Olander v. Sperry, 293 Minn. 162, 164, 197 N.W.2d 438,40 (Minn. 1972), this Court said that "judicial

patience should not be confused with judicial impotence." No; but patience too long indulged becomes impotence.

If there is such a thing as the most creditable and significant opinion ever issued by this Court, and I am inclined to believe there is, it is probably Davis v. Pierse, 7 Minn. 13 (Gilfillan 1)(1861). There, in the midst of the passions of the Civil War, and against the impassioned legislature and the public, the Court stoutly defended the Constitution, rejecting a statute that denied access to our courts to residents of the Confederacy. In a little-known opinion that should be mandatory reading for every law student, lawyer, and judge, Chief Justice Emmett wrote:

> The act was doubtless intended to be in aid of the general government, then and still engaged in efforts to put down a most gigantic and causeless rebellion. It was but natural, at such a time, that every patriotic citizen should feel that any one engaged in this traitorous attempt to dismember the republic, ought not still to enjoy privileges secured to him only by that government which he has renounced and is striving to subvert; and especially that he should not be permitted, by the aid of our courts, to take of the substance of the people of the loyal states, to be afterwards used by him in support of the rebellion. Hence the legislature was readily induced to pass an act, which, while it visited those who had already engaged in the rebellion with certain disabilities, might, by the powerful motive of self-interest, restrain others from following their bad example. Still, the very fact that the act was passed under such a state of excitement admonishes us of the necessity of carefully examining its several provisions, lest in our anxiety to punish the guilty authors and abettors of our national troubles, we do far greater injury to ourselves, by forgetting justice and disregarding the wholesome restraints of our fundamental law.
>
> If the state of government affairs were

always peaceful and quiet, and legislation never attended with undue excitement, many of the restrictions imposed by constitutional governments upon legislative power might be dispensed with as unnecessary; but it is precisely because emergencies will arise, which, for the time, seem to demand or justify a resort to radical and extreme measures, that these various inhibitions are declared in the fundamental law; and, as extraordinary acts of legislation are seldom resorted to, except when the public exigencies seem to demand them, it may truly be said that these provisions are inserted in constitutions for the very purpose of meeting this plea of necessity. Hence the greater the seeming necessity, or popular demand for such legislation, the greater the danger to be apprehended from yielding to it, and the more imperative the obligation on the part of the courts to square it rigorously by the constitution; as no act in conflict with that instrument can ever become a law, however just, abstactly considered, its provisions may be: or however great and immediate the apparent necessity for such an enactment.

....

The number of instances in which, of late years, statutes have been declared unconstitutional, is sometimes referred to as if the fact were to be regretted; but this proves nothing (unless the decisions are shown to be wrong), except, perhaps, that legislation is not so carefully conducted as formerly. It sometimes happens, we fear, that legislators resolve all doubts in favor of enactments which seem to be demanded by the occasion, or by the current of popular sentiment, relying upon the courts to apply remedy, if it should be found, on more careful examination, that the legislature had no authority to pass such a law. This fact serves to explain to some extent why questions touching the constitutionality of statutes are more frequent of late than in former years. But however often such questions are presented, it is the duty of the courts to meet and decide them; and let us hope that all encroachments upon the fundamental laws of the state and nation may ever be faithfully and successfully resisted.

This is so good that commentary is superfluous, except to say that the cause of the present controversy -- the order of argument -- is not so serious as that confronted in Davis. But the underlying Constitutional threat is as serious and as bad, or worse. For here we have a combined effort of the executive branch and the legislature to undermine the judiciary. This makes the peril to the separation of powers very grave indeed. (One wonders, incidentally, whether either the legislators who adopted the statute or the members of the Committee who recommended the rule were informed or aware of the petitioning prosecutors's shameful record of misconduct. One assumes not.)

And, in any case, as the United States Supreme Court said, in a related Constitutional context, in Boyd v. United States, 116 U.S.616, 635 (1886), striking down a statute:

> It may be that it is the obnoxious thing in the mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure.

The present situation, regrettable though it is that it should even arise, provides this Court with an excellent opportunity to re-examine not only one species of unprofessionalism, but to reflect upon the state of professionalism more generally, and to re-evaluate the Court's own role in preserving the honor of the bench and bar. Unlike an appeal, the Court need not confine itself here to the particulars of a single trial record; it can in this setting quite properly issue an advisory opinion. I hope it will

do so.

It is appropriate to close these remarks by voicing the obvious and deplorable irony of the situation which inspired them: The very people whose central reason for being is to prosecute those who have broken the laws of this state, have in pursuit of that estimable goal become in large numbers breakers of the law themselves. It takes no very deep knowledge of history to know what this phenomenon often presages. There should be, in the popular jargon of contemporary corrections, consequences for this.

Coda

Now, about that slingshot.