OFFICE OF
WALLACE C. SIEH
County Attorney
MOWER COUNTY, MINNESOTA
COURT HOUSE
AUSTIN, MINN. 55912
507-437-4192

December 19, 1974

Mr. John C. McCarthy
Clerk of Supreme Court
230 State Capitol
St. Paul, Minnesota, 55101

Dear Mr. McCarthy: Re: Proposed Rules of Criminal Procedure

I enclose Petition in Opposition with Proof of Service.

I will be present at the Courtroom in the State Capitol at 9:30 A.M. January 31, 1975 and wait to be heard.

Sincerely,

Wallace C. Sieh

WALLACE C. SIEH
County Attorney

WCS/mj

Encs. (2)

12-23 copy to
C. Johnson
W.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA

SS

COUNTY OF MOWER

Marcia Johnson
[redacted], being first duly sworn on oath, deposes and says that on the 19th day of December, 19 74, the attached PETITION IN OPPOSITION was duly served on the persons and attorneys hereinafter named by placing a true and correct copy thereof in a sealed envelope, postage prepaid, and by deposit of same in the United States mail at Austin, Minnesota, properly addressed to the following at the addresses specified.

Mr. Frank Claybourne
Chairman
Advisory Committee on Rules of Criminal Procedure
1500 First National Bank Building
St. Paul, Minnesota, 55101

Marcia Johnson

Subscribed and sworn to before me this 19th day of December, 19 74.

Wallace C. Sieh

WALLACE C. SIEH, Notary Public
Mower County, Minnesota
My Commission Expires: February 26, 1981

STATE OF MINNESOTA

IN SUPREME COURT

IN RE PROPOSED RULES OF CRIMINAL PROCEDURE
45507

Petition in Opposition to 7 day and other time limits

Your Petitioner represents:

That he is now and has been the County Attorney for Mower County since about January 1, 1947.

That he opposes the 7 day limit on the following rules:

5.03 Requiring appearance in District Court 7 days after County Court.
8.04 Requiring omnibus hearing 7 days after initial appearance in District Court.

and other 3 and 4 day time limits in the rules
For these reasons:

1. The District Judge or County Attorney or Defense Attorney may not be readily available within 7 days.

2. Much wasted effort will be spent in either arranging for the 7 day appearance or hearing or getting an extension.

3. There is no good reason for the haste in any event. In most cases defendant will be on bail or otherwise released.

4. While reasonable speed is good. Speed for speeds sake is not good.
A. Proper consideration of most offenses requires a cooling off period whereby prosecutor, complainant, defense counsel, defendant, can take a second look at the situation. Often times this is to the defendants advantage because most of the time the offense doesn't seem quite as bad after a cooling off period.

B. The prosecution and defense often need more time than 7 days to prepare for omnibus hearing.

5. As is well known, legal procedures and especially court appearances cannot be set down on a clock basis.

6. Making these limits 20 instead of 7 days and directory and not mandatory or jurisdictional will avoid abortive proceedings; a provision may be made for prosecution or defense to get a court order speeding up proceedings if they are not done within a prescribed time.

ARGUMENT

The purpose of a criminal procedure to determine the guilt or innocence of defendant and/if guilty impose sentence. The Mapp v. Ohio decision imposed heavy burdens on prosecution and defense counsel to accomplish a purpose of conforming to constitutional principals. Now the time limits on these rules will impose great additional burdens on prosecution and defense for no real purpose or object. The time limits have absolutely nothing to do with the question of whether defendant is guilty or innocent. In fact if adopted will create such procedural problems that defendants guilt or innocence will go even farther into the background.

CONCLUSION

The 7 day and other time limitations are needless, impractical if not impossible of performance and will result in effort and expense that could better go to the merits of the prosecution and will result in aborting some prosecutions.

Wherefore Petitioner requests that the proposed rules be suitably altered with respect to the 7 day and other time limitations and petitioner requests to be heard on same.

Dated December 19, 1974

WALLACE C. SIEH, COUNTY ATTORNEY
Courthouse
Austin, Minnesota
Telephone (507) 437-4192

WEGNER, WEGNER & AMERMAN
ATTORNEYS AT LAW
2308 CENTRAL AVENUE, N. E.
MINNEAPOLIS, MINNESOTA 55418
789-8805

CARL O. WEGNER
JAMES L. WEGNER
DERCK AMERMAN

January 16, 1975

Justice George M. Scott
Supreme Court of Minnesota
State Capitol
St. Paul, Minnesota

Re: Proposed Rules of Criminal Procedure, File No. 45517

Dear Justice Scott:

Thank you for your letter of January 13, 1975 pointing out the 1974 amendments to Minn. St. 1971, Section 480.059 which I was not aware of.

In light of that new statute, it appears that there is no basis for my Petition, other than my personal liking for the old order of argument, I therefore withdraw the same.

Yours very truly,

Derck Amerman

DA:kjr
cc: Mr. John McCarthy
Clerk of the Supreme Court of Minnesota
State Capitol
St. Paul, Minn.

COPY

Copies Distributed
1-3-75

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CARL O. WEGNER
JAMES L. WEGNER
DERCK AMERMAN

January 2, 1975

Mr. John McCarthy
Clerk of the Supreme Court of Minnesota
State Capitol
St. Paul, Minnesota

Re: In Re Proposed Rules of Criminal Procedure; File No. 45517

Dear Mr. McCarthy:

I am enclosing herewith original and eleven copies of Petition in the above matter. Pursuant to Order dated November 19, 1974, I hereby submit a request to be heard on this matter on January 31, 1975.

Yours very truly,

Derck Amerman

DA:kjr
Enc.

STATE OF MINNESOTA

IN SUPREME COURT

45517

IN RE PROPOSED RULES OF

CRIMINAL PROCEDURE

PETITION

The undersigned Petitioner, an Attorney at Law, in the State of Minnesota, hereby moves the Supreme Court of the State of Minnesota to delete from Rule 26.03 of the Minnesota Proposed Rules of Criminal Procedure, Subdivision 11 (h) and (i) and to substitute the following:

h. At the conclusion of the evidence, the prosecution shall commence and the defendant conclude the closing argument to the jury.

The above proposed paragraphs of the Minnesota Proposed Rules of Criminal Procedure radically alter the order of argument in criminal cases in Minnesota. That portion of the Rule is in direct contradiction to Minnesota Statutes Annotated Section 631.07, which is quoted below for reference purposes. The change in the Rule will not only be a change in tradition in Minnesota (the statute was enacted in 1875) but would force upon the Supreme Court of Minnesota a legislative function, to-wit: the amendment or modification of an existing statute. This is specifically prohibited in the enabling act made effective May 12, 1971, Minnesota Statutes Annotated 481.059.

631.07 Order of argument

When the evidence shall be concluded upon the trial of any indictment, unless the cause shall be submitted on either or both sides without argument, the plaintiff shall commence and the defendant conclude the argument to the jury.

Respectfully submitted,

Derck Amerman
2308 Central Avenue N.E.
Minneapolis, Minnesota 55418
789-8805

Dated: January 2, 1975.

CITY OF SAINT PAUL
MUNICIPAL COURT

JOSEPH P. SUMMERS
JUDGE

January 2, 1975

Mr. John McCarthy
Clerk, Minnesota Supreme Court
St. Paul, Minnesota

45517

Dear Mr. McCarthy:

Pursuant to the order of the court dated November 19, 1974, I hereby request the opportunity to be heard, orally, before the court, at its hearing Friday, January 31, 1975, regarding the proposed Rules of Criminal Procedure.

Pursuant to the court's order, I shall file a written brief on or before January 20, 1975.

Sincerely,

Joseph P. Summers

JOSEPH P. SUMMERS

JPS:hk

1-3-75

Judge Summers:

We have filed the original of your letter. Your request is granted. At this point, there are only 3 others who have indicated a desire to be heard. Can you kindly file 12 copies of your brief with this office.

John McCarthy

John McCarthy, Clerk

Court House, Saint Paul, Minnesota 55102

612 298-4759

JOHN REMINGTON GRAHAM
COUNSELOR AT LAW
212 WEST FRANKLIN AVENUE
MINNEAPOLIS, MINNESOTA 55404

TELEPHONE 332-6685
AREA CODE 612

January 14, 1975

45517
45298

Mr. John McCarthy, Clerk
Minnesota Supreme Court
State Capitol Building
St. Paul, Minnesota

Dear Sir:

This will acknowledge notice of hearings to be held on the 31st of this month relative to the new criminal rules (Case No. 45517), and compulsory legal education (Case No. 45298), in which members of the bar are entitled to participate.

I hereby request recognition in oral argument in the morning on the new criminal rules. A formal brief will be filed, a copy to each Justice and to yourself, will be filed on or before the 20th of this month.

I also request recognition in oral argument in the afternoon on compulsory legal education. I have already filed a counter-petition and memorandum. A supplemental memorandum will be filed on or before the 24th of this month.

Thanking you for your attention, I remain

Respectfully yours,

John Remington Graham

January 16, 1975

Mr. Graham:

We have filed this letter and have added your name to the list of those who will appear in these matters.

John McCarthy
John McCarthy

STATE OF MINNESOTA
IN SUPREME COURT
No. 45517

Appearance of
John Remington Graham:

ADVISORY MEMORANDUM

In re Proposed Rules
of Criminal Procedure

MAY IT PLEASE THE COURT

1. The adoption of a comprehensive set of Minnesota Rules of Criminal Procedure is a laudable project. Yet, the matter should be approached with considerable caution. The main deficiency in our present system is that it consists of a patchwork of statutes, custom, and case law, which is not officially integrated. Even so, this disadvantage is fairly insignificant, because the state bench and bar have been favored with excellent, scholarly, and systematic treatises by Mssrs. Jones and McCarr. Moreover, the piecemeal character of our current procedure is really a reflection of careful development over a long period of time, in consequence of which what we now have, though imperfect, is generally established, understandable, fair, and workable. Why then should we be so anxious to adopt a new set of rules, so vastly complex and innovative as proposed by the Advisory Committee? It is an old adage that haste makes waste. What exists has borne the test of experience. The proposal before the Court is actually a complicated compromise of various points of view, often resulting in sweeping changes of questionable constitutionality and practicality, as well as radical departures from traditional notions of the common law, such as the abolition of preliminary hearings and informations, reciprocal pre-trial discovery, reversed order of final arguments at trial, etc.

This writer would have preferred either an attempted codification of present procedure subject to a few ameliorative changes; or else, if extensive modernization be deemed desirable, adoption of the federal rules, which are a sound and simple blend of the old and the new, with various modifications adapted to our court structure. No urgency requires immediate adoption. Further study is needed, but if this Court be disposed to adopt the proposed rules, substantially as suggested, certain alterations are urged. Unfortunately, this writer has had insufficient time to formulate comprehensive counter-proposals, but it is hoped that the following commentary will be useful.

2. Proposed Rule 2.02, as it stands, invariably requires the approval of a prosecutor before a complaint can issue, unless the prosecutor be unavailable and process must issue at once. Suppose, however, that a just complaint is made, but the prosecutor fails to act? Some remedy should certainly be available to prevent abuse of discretion not to prosecute, particularly in matters of political corruption. Under present procedures, such a situation may be remedied by direct application to and complaint before a magistrate, Minnesota Statutes, Sections 487.25 Subd. 3 and 633.03; by grand jury indictment or presentment, Minnesota Statutes 628.01 et seq.; and, in the limited case of an unfair campaign practice, appointment of a special prosecutor, or possibly writ of quo warranto, Minnesota Statutes, Section 211.33. The Committee Comment appears to affirm that any complaint not endorsed by a prosecutor and not requiring immediate issuance, no matter how proper, would be invalid under Proposed Rule 2.02. Reliance on grand jury procedures would often be inadequate. The provision for unfair campaign practices is too strong for universal application. It is suggested, therefore, that an additional proviso be added to Proposed Rule 2.02, to wit: that if a magistrate find that a private complaint, in which accusation by indictment or presentment be unnecessary, be proper, just, and based on probable cause; and that refusal of prosecutorial endorsement amount to abuse of discretion, then the complaint shall be valid, and process by warrant or summons may issue, and if abuse of prosecutorial discretion be egregious, a private counsel may be retained by the complainant, or be appointed if he be indigent, to act as prosecutor pro hac vice. This would defer to the spirit of the ABA Standards requiring primary prosecutorial responsibility in the commencement of criminal proceedings, and it would stiffen present requirements for private institution thereof; yet, it would provide a remedy for prosecutorial abuse of discretion be it mere error of judgment or political corruption.

3. There are serious constitutional deficiencies in Proposed Rule 17.02 Subd. 3. The fundamental guarantee of informative accusation includes an assured degree of clarity. The essentials of form in common law pleading must characterize a complaint, information, or indictment. Minnesota Constitution of 1974, Article I, Section 6; United States Constitution, Amendments VI and XIV; Twining v. New Jersey, 211

U.S. 78 at 100-101 (1908); Russell v. United States, 369 U.S. 749 (1962); United States v. Carll, 105 U.S. 611 (1881); United States v. Simmons, 96 U.S. 360 (1887); United States v. Cruikshank, 92 U.S. 542 (1875); Bins v. United States, 331 F. 2d 390 (5 Cir. 1964); Bratton v. United States, 73 F. 2d 795 (10 Cir. 1934); Creel v. United States, 21 F. 2d 690 (8 Cir. 1927). This, of course, means that criminal accusations must be free from duplicity, ambiguity, argumentation, prolixity, legal conclusion, etc. In other words, a criminal accusation must be a direct, specific statement of ultimate fact; when multiple crimes are charged, the facts constituting each offense must be distinctly alleged in a separate count.

Proposed Rule 17.02 Subd. 3 is problematical in that it permits several degrees of the same offense, each of which is a separate crime, to be charged in a single count. It also permits a count charging an offense to include implicitly lesser included offenses. In both of these particulars, the proposed rules permit duplicity of accusation, which is unconstitutional. Moreover, the proposed rule is unduly prolix. This can be remedied by displacing everything after the first two sentences in the proposed rule, with the following language: "Each count must charge only one offense. Allegations made in one count may be incorporated by reference in another count. Each offense, each degree of each offense, each lesser included offense, and each alternative means of committing the same offense, must be charged in a separate count." This would simplify and clarify the rule, as well as eliminate constitutional problems, and make pleas of double jeopardy in subsequent proceedings much easier to determine. The adoption of this suggestion would require modification of Proposed Rule 15.07 so as to permit amendments, as and if necessary, when guilty pleas are entered to lesser included offenses, or lesser degrees of the same offense.

4. Proposed Rule 14.01 should permit a plea of nolo contendere with the consent of the court. However metaphysical the distinction between this and a guilty plea, the public interest is sometimes best served by a plea of nolo contendere to accommodate intangible factors such as were involved in the circumstances surrounding the resignation of Mr. Agnew as Vice President of the United States. To prevent abuse, a proviso might be inserted prohibiting corporations and corporate

officers or directors from entering pleas of nolo contendere.

5. Proposed Rule 9 is most controversial because in tenor and spirit, insofar as reciprocal discovery is required, it violates the fundamental constitutional guarantee against self-incrimination. This writer relies on the arguments of his colleagues whom he knows will object to this proposal on the same or similar grounds. To draw meaningless distinctions between "real" and "testimonial" evidence, and to engage in other strained fancies of pseudo-reasoning needed to sustain this rule, can only undermine the Constitution as the bastion of liberty. The abuses which the proposal seeks to remedy can better be dealt with by adoption of Rules 15 and 16, F. R. Crim. P., in substance. As a further element of compromise, it might not be objectionable to incorporate, and thus retain, the language of Section 630.14 of Minnesota Statutes.

6. Proposed Rule 26.03 Subd. 11 (h) and (i) is fundamentally wrong. The burden of proof is on the prosecution, not the defense. The defense has nothing to say until the prosecution has spoken. A requirement that the defense must first speak in final argument is inconsistent with tradition and the fundamental idea of the presumed innocence of the accused. No objection is made to the suggested feature of rebuttal and surrebuttal, but reversed order of final argument is plainly unconstitutional. The want of precedent on this question is due to the shocking irregularity of the proposal, which should be stricken and replaced with the usual requirement that the prosecution make the first argument in final summation.

7. Finally, if the Court see fit to adopt these rules, with or without alterations, at very least a provision should be inserted to read substantially as follows: "The adoption of these rules shall not be construed to preclude objections in criminal proceedings to the constitutionality or statutory authorization hereof in whole or part, either prima facie or as applied." Without such a provision, express or implied, we would not be able to benefit from experience, and federal litigation would be invited.

Respectfully submitted,

JOHN REMINGTON GRAHAM
Counselor at Law
212 West Franklin Avenue
Minneapolis, Minnesota 55404
Telephone 871-8885

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JOHN E. DRAWZ
JOHN B. DEAN
DAVID J. KENNEDY
WARREN R. SAGSTUEN
GLENN E. PURDUE
WILLIAM E. FLYNN

January 17, 1975

Mr. John McCartny, Clerk
Minnesota Supreme Court
State Capitol Building
Saint Paul, Minnesota 55155

RE: Proposed Rules of Criminal Procedure

Dear Sir:

Enclosed for filing please find our brief in opposition to the proposed rules relating to misdemeanors. The brief is filed on behalf of the prosecuting attorneys for the Cities of Brooklyn Park, Crystal, Lauderdale, Plymouth and Richfield.

We request that the following be allowed to address the Court at the December 31, 1975, hearing:

Glenn E. Purdue
Warren R. Sagstuen
John B. Dean

Respectfully yours,

Glenn E. Purdue

GEP:jdb
Enclosure

Mr. Purdue: 1-20-75

Your request to address the court is granted. At this time, 6 others have been granted permission to address the court on these rules.

John McCarthy (296-2581)

STATE OF MINNESOTA

IN SUPREME COURT

IN RE PROPOSED RULES OF CRIMINAL PROCEDURES 45517	BRIEF REQUESTING FURTHER STUDY OF MISDEMEANOR RULES

The undersigned attorneys represent the Cities of Brooklyn Park, Crystal, Lauderdale, Plymouth and Richfield in the prosecution of misdemeanors, pursuant to the authority vested in municipal attorneys in Minn. Stat. 488A.10, Subd. 11 (1971). After review and study of the Proposed Rules as they relate to misdemeanor matters, we recommend the Court appoint a panel of persons including individuals experienced in misdemeanor prosecution and in law enforcement together with Municipal Court judges and clerks to review and revise the proposed rules relating to misdemeanors to the end that the goals expressed in Rule 1.02 might be fully accomplished.

While several of the proposed changes would serve to enhance and modernize criminal procedure in the State, it is our belief that several of the proposals will actually cause unnecessary delay, unjustifiable expense, and unreasonable and unnecessary complexity and inflexibility in the processing of misdemeanor cases. A complete review of the Proposed Rules will not be made herein; rather, several examples of rules which especially trouble us as misdemeanor prosecutors will be cited as examples of the need for further study and review.

Fule 4.02, subd. 5(3), which is apparently erroneously referred to as subd. 5(2) throughout the Comments, imposes time constraints in the issuance of formal complaints following requests therefor at the

first appearance. It is a rule for which no reason exists, and one which will greatly increase the time and expense required to prosecute cases. Except where the defendant is in custody, which is rare in misdemeanor cases, the Comment provides no reason for the 36-hour period, or for any definite period, and merely states that this period ". . . gives the prosecutor in most misdemeanor cases as much time . . . as . . . in most felony cases." P. 15. The proposal bespeaks a lack of knowledge of the practical factors involved in misdemeanor practice where the defendant is given an early arraignment rather than held in jail until the case is prepared. In Hennepin County, the normal period between demand and issuance of a formal complaint is 14 days. Further, the proposal rectifies no known deficiency in the current procedure and supposes the Bench is unable to control any rare indefensible delays which may occur in the preparation of formal complaints after a request therefor.

Since most arraignments are held in the morning hours, the 36-hour period ends in reality with the close of business the following day and in the case of demands on Friday, the period effectively ends actually seven and one-half hours later. A typical sequence of events in such a case under current practice could be as follows. The defendant requests a formal complaint at a morning arraignment. The prosecutor notes the request and remains in court during the remainder of the arraignment session and through probation reports and sentencing. He returns to his office later in the day and directs an assistant to gather arrest reports from the arresting agency, which may be the county sheriff, municipal police, the state patrol, or some other agency or private citizen. These requests may be made by telephone or letter the same day, or later if impossible that day. The arresting

agency forwards information by mail, often in batches to effect economies. Most misdemeanor complaint requests involve the offense of driving under the influence, and the results of chemical tests may not be available for several days. The assistant receives the reports by mail and reviews them for sufficiency. If they are insufficient to allow a full review of the situation, for more than a review of probable cause is required, the arresting officer or complainant witness must be personally contacted. Since officers work varying shifts, contact may not be made immediately, short of declaring an emergency. Where people other than police are involved, other delays may be anticipated. After receiving further information, the complaint is drafted, typed, reviewed, and mailed to the complainant witness. Under the current practice an officer may be able to arrange his appearance before a judge for the signing of two or more complaints at one time. We must emphasize that there is nothing unusual about this sequence of events. It represents the normal pattern which repeats many times a week. To say this procedure may be accomplished in the usual case within 36 hours, without unnecessary expense, is to totally ignore reality. The drafters of the Comment state that they suppose requests for complaints will be few, in view of the discovery rule. They also acknowledge most prosecutors have an open file policy now. However, they encourage requests for complaints when they state "A defendant, of course, may request a complaint under rule 4.02, subd. 5(2) [sic] to be better informed of the charges against him, . . ." P.33. What defense attorney would rather not be "better informed"? In one recent arraignment session, approximately 12% of the defendants requested complaints, in spite of an open file policy by the prosecutor.

It is well-known that the prosecutor of misdemeanor offenses differs greatly from the prosecution of more serious offenses due to factors such as the volume of cases, the differences in consequences of conviction to the defendant, the structure of courts, and other factors. These differences cannot be ignored, and, while the Committee apparently recognizes the same rules should not be made applicable to both types of cases, Rule 4.02, subd. 5(3) is an example of an unreasonable effort to force misdemeanor procedure to too closely resemble felony procedure. If any rule is to be imposed on misdemeanor situations, it should deal only with situations where the defendant is held in custody after his first appearance.

A second example of a proposal requiring further study is Rule 7.03, relating to the discovery of police investigatory reports. Such reports occasionally contain information which should not be disclosed. For instance, confidential sources may be mentioned or methods of investigation not generally known about may have been used. In domestic cases, neither party may be benefited by knowing all the information given to or known to police. The rule does not mention juvenile practice. For example, what if an accomplice is a juvenile? The end result may be that police will be forced to "launder" reports and keep some information elsewhere. This will appear to be an attempt to conceal information from the defendant, and motions, arguments, and continuances will result. On the other hand, there is no misdemeanor counterpart to Rule 9.02 requiring voluntary disclosures by defendants. Further review is imperative, with a view toward the development of a rule which will allow proper discovery and yet provide some flexibility.

Rule 15.07 authorizes the court to accept a plea to a lesser offense without the approval of the prosecuting

attorney. This rule violates a basic separation of the functions of judge and prosecutor essential to a system which protects both the rights of the public and the defendant. Prosecuting attorneys may not always have a full view of the needs of the public for carrying a case forward, and judges may not have facts available to the prosecutor which would militate against dismissal or amendment of a charge. More important, the proposal may well violate the separation of powers mandated by Article Three of our Constitution by removing from the legislative and executive branch the power to make and enforce the laws. In short, the present rules and statutes should not be changed without further consideration.

In many cases, the Comments differ markedly with the Rules. References to Rules in the Comments are often misnumbered or the Rule cited is non-existent. The Comment to Rule 4 provides that where a tab charge has been dismissed for failure to file a valid complaint within 36 hours, the prosecutor must file a valid complaint within 14 days after dismissal or all further prosecution is barred, citing Rule 17.06, subd. 4(3). P.15. A review of the cited rule deals with the curing of defects in indictments and complaints. Indeed, even a citation to a 14-day rule is an error, and is apparently inconsistent with the Comment on page 90 which specifies the prosecutor has but two days to move for a continuance. The Comment to Rule 5 states that trial in a misdemeanor be held on a misdemeanor charge within 30 days of demand or within ten days if the defendant is in custody, citing Rule 6. Rule 6 contains no provision which could even remotely support such a comment. There are so many similar errors throughout the Comments that one is forced to speculate whether the comments were intended to apply to some predecessor draft of the rules.

Several rules appear to be inconsistent. Rule 3.02, subd. 1 provides that the judicial officer issuing a warrant may set conditions for release of the defendant by so endorsing the warrant. Yet Rule 6.02 provides that the conditions of release shall be determined by the procedure therein. Rules 15.04, subd. 2(2) and 15.07 may be thought in conflict as to whether the court is required to accept a plea negotiation proposed by prosecutor and defense attorney. There are apparent conflicts between other rules.

This brief is not intended to be critical of the Advisory Committee. Indeed there are many Rules and Comments which appear well-considered and which serve a needed clarification and modification of our present procedure. The work of the Committee as applicable to felonies and gross misdemeanors should not, however, be marred by the adoption of the currently proposed misdemeanor rules.

While we are not unmindful of the important and valuable efforts of the Advisory Committee in the preparation of these proposed rules, we are, as misdemeanor prosecutors, deeply concerned with many aspects of the treatment given to misdemeanors. We fear that the rules relating to misdemeanors suffer from a lack of overall experience concerning the misdemeanor regions of the criminal justice system and are the product of a hurry-up effort to finish the project. We have personally heard from police officials and members of the municipal bench who are disturbed that no input was sought from their ranks and that the proposed rules do not reflect the product of their experience. We share those views and ask that

the Court refer the misdemeanor rules for further consideration and input from those involved in misedemeanor practice.

Respectfully submitted,

LeFEVERE, LEFLER, HAMILTON AND PEARSON
Attorneys at Law
1100 First National Bank Building
Minneapolis, Minnesota 55402
Telephone (612) 333-0543

By _____
Glenn E. Purdue

_____
Warren R. Sagstuen

_____
John B. Dean

Dated: January 17, 1975

LAW OFFICES
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WILLIAM J. FLEMING

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TELEPHONE 612/421-1737

January 17, 1975

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

Re: Hearing on Proposed Rules of Criminal Procedure

Dear Sir:

Enclosed is the original and 19 copies of the Petition of the Hennepin County Municipal Prosecutors Association in the above captioned matter.

The undersigned requests time to present oral arguments at the hearing on January 31, 1975, in line with the contents of this Petition.

Thank you for your attention.

Sincerely,

SCHIEFFER, HADLEY, BAKKE & JENSEN

Richard J. Schieffer

Richard J. Schieffer
RJS:rmg
Encls.

1-20-75

Mr. Schieffer:

We have filed and distributed the petition. Your request to appear has been granted. At this time, about a half a dozen others have indicated that they will also present oral arguments.

John McCarthy

John McCarthy, Clerk

STATE OF MINNESOTA

IN SUPREME COURT

* * * * * * * * * * * * * * * * * * * *

In the Matter of the Adoption of
Proposed Rules of Criminal Procedure

PETITION

* * * * * * * * * * * * * * * * * * * *

TO THE JUDGES OF THE SUPREME COURT:

I.

The Hennepin County Municipal Prosecutors Association petitions the Court as follows:

1. That the time for filing of Briefs offering comment on the Proposed Rules (January 20, 1975) be extended for 30 days and that the hearing thereon scheduled for January 31, 1975 be adjourned and re-opened for additional comment on or about March 1, 1975.

2. That at such time consideration be given to the adoption of separate rules of criminal procedure applicable to the handling of misdemeanor and petty misdemeanor matters in Municipal and County Courts.

II.

Until recently, members of this Association and others have believed that separate Rules would be proposed to handle criminal and traffic matters in the Municipal and County Courts. The Advisory Committee caused drafts, comments, and refinements of Misdemeanor Rules to be prepared. Early drafts of the Proposed Rules of Criminal Procedure limited their scope to felonies and gross misdemeanors. Procedural needs of the high volume of brief hearings required in petty criminal and traffic courts create a practical and logical distinction between felony and misdemeanor practice. Further time is needed for

study of the application of the Proposed Rules to misdemeanor cases.

III.

Cursory examination of the application of the Proposed Rules to misdemeanor practice indicate a need for changes in operating procedures of many Police Departments and, in particular, the Minnesota Highway Patrol; for increased clerical, record keeping and duplicating services in many Police Departments; for additional man hours devoted to immediate investigation of petty matters by police personnel; for additional hours devoted to the delivery of documents to the office of the prosecutor and to the Courts; for substantial increases in budgeted amounts for prosecution services due to appearances at arraignments and additional hearings, anticipated increase in the number of jury trials, evidentiary hearings, motions, and the preparation for such hearings. The value obtained from these additional activities is not immediately apparent.

IV.

These and other ramifications of the application of the Proposed Rules to misdemeanor practice have been submitted by other members of this Association on behalf of the cities which they represent, Minneapolis, Richfield, Plymouth, Brooklyn Center, Medina, Maple Plain, Corcoran, and others unknown to the undersigned. While these above mentioned memoranda are endorsed by this Association, they are not exhaustive and further time for study and consideration by this Association and others is urgently requested.

V.

This Petition is offered, not in the spirit of resistance to change, or without gratitude for the many hours spent in preparation of the Proposed Rules by the Advisory Committee. Rather, the additional time

is requested to the end that a set of Rules may be formulated which is understandable to the many ordinary citizens appearing before the misdemeanor courts; which is a response to the actual procedural problems which do now or might someday exist; and which will lead to a fair trial of the issues or plea to a proper charge, rather than an aborting of criminal process based upon procedural defects.

Respectfully submitted,

Hennepin County Municipal Prosecutors Ass'n.

By: Richard J. Schieffer

Richard J. Schieffer, Vice-Chairman

January 17, 1975
r

CITY OF SAINT PAUL

OFFICE OF THE CITY ATTORNEY

PIERRE N. REGNIER

January 17, 1975

The Honorable Robert J. Sheran
Chief Justice
Minnesota Supreme Court
State Capitol
Saint Paul, Minnesota 55155

Dear Mr. Chief Justice:

We enclose herein our Petition and Brief on the new rules for the consideration of the Court.

We further respectfully request an opportunity to be heard orally on January 31, 1975 at such time as the Court might permit. Our oral presentation will be brief.

Very truly yours,

Pierre N. Regnier

PIERRE N. REGNIER
City Attorney

Philip B. Byrne

PHILIP B. BYRNE
Deputy City Attorney

1-21-75

Messrs. Regnier and Byrne:
We have filed and distributed your petition and brief. Since 8 or 9 others have filed notices of intention to appear, and since the court has another hearing at 2:00 p. m., I am sure no one will object to a brief presentation. Court convenes at 9:30.

John McCarthy

John McCarthy, Clerk

City Hall, Saint Paul, Minnesota 55102

612 298-5121

STATE OF MINNESOTA

IN SUPREME COURT

IN RE PROPOSED RULES OF
CRIMINAL PROCEDURE

45517

PETITION AND BRIEF IN OPPOSITION TO PROPOSED RULES

OFFICE OF THE CITY ATTORNEY
CITY OF SAINT PAUL

PIERRE N. REGNIER
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I. INTRODUCTORY REMARKS

This Brief is respectfully submitted to the Court on behalf of the Office of the City Attorney of Saint Paul, with the special concurrence of those who have signed the Brief and Petition below.

The City of Saint Paul has exclusive jurisdiction to prosecute misdemeanor and petty misdemeanor offenses committed within the city limits. It currently employs seven prosecuting attorneys, a chief prosecuting attorney, and three secretarial clerical employees in its Criminal Division. Prosecuting attorneys appear daily in municipal court matters, including criminal arraignments, traffic arraignments, special term hearings, traffic trials and criminal trials to the court, and jury trials. The chief prosecuting attorney administers the Criminal Division, and tries all de novo jury trials in the District Court.

The City prosecutes a wide variety of misdemeanor criminal and traffic offenses including all state cases involving failure to file Minnesota income tax returns. During 1972 and 1973, the Saint Paul Municipal Court disposed of 19,619 and 18,842 criminal and traffic cases respectively (exclusive of preliminary hearings). See Exhibit A, attached. During the first six months of 1974, 10,595 cases were disposed of. Of these matters, 1,571 went to court or jury trial in 1972, 1,726 in 1973, and 733 in the first half of 1974. All of these cases were within the City's jurisdiction to prosecute. The vast majority of such cases are, at present, "tab charged" by the

prosecutor in arraignment court under Minnesota Statutes Section 488A.27, Subd. 4, or charged by means of the Uniform Traffic Tag (issued by the officer who witnessed the offense, but without a probable cause hearing).

The Office of the City Attorney of Saint Paul, as a matter of policy, and its attorneys as officers of the various courts in which they practice, seek to assist this Court on a continuing basis to maintain a fair and effective system of criminal justice. This is demonstrated in part by our vigorous efforts in appellate advocacy before this Court and by our voluntary discovery policy in criminal matters. (Defense attorneys are permitted to examine all police reports or other records or evidence in our files). In all matters, our objective is not primarily to win or to convict, but to achieve justice. It is in this spirit, a spirit of constructive criticism, that we make our comments on these proposals.

These comments are addressed only to the Proposed Rules (hereafter, Rules) as they affect the procedures for handling misdemeanor or petty misdemeanor offenses. There are many useful concepts in the Rules, and we refer to them and support them. On the whole, however, it is obvious that insufficient thought and work have thus far gone into the misdemeanor Rules. Previous Rules drafts have dealt with felonies and gross misdemeanors, and there has been widespread discussion and review as to those. But this is the first time Rules as to misdemeanors have been circulated to the Bar. Even such elementary mistakes as conflict between the text of the Rules and the supporting Comments have not been eliminated. These will be referred to below.

The Rules as applied to misdemeanors simply do not achieve the praiseworthy goals set forth in Rule 1.02. On the contrary, they would result in additional expense and delay, unfairness to the prosecuting authority and its witnesses, and to the public, and more complex procedures than now exist.

II. MAJOR OPPOSITION

There are two major changes proposed by the Rules in misdemeanor procedures which which we believe will result in serious, major inefficiencies, unnecessary expense, and delays for both the Municipal Court and the City. Substantial additional staff would be required. These changes are the new sworn complaint procedures and the elimination of the two-tier or de novo system for trying ordinance violations, requiring a jury trial for all such matters in Municipal Court.

A. First, the new written complaint procedures as applied to misdemeanors will require a substantial increase in the professional and secretarial staff of the prosecutor, and probably would require additional court reporters and judicial and secretarial time. These procedures are by far the most severe in the Rules in creating hardship and inefficiency for the prosecution without promoting fairness and justice for the defendant. There will be further burdens placed on witnesses and complainants.

Rule 4.02, Subd. 5(3) requires a formal complaint where ordered by the Judge or requested by the defense. The Comment

(Page 15) indicates a belief that few defendants will make such a request because of the additional appearance and available discovery. This is totally unrealistic. It would become absolutely essential for the defense to request a formal complaint, and in every case. Where the practical burden on the prosecution of preparing a complaint under the Rules is great and where, therefore, the chance that a case will be lost "in the cracks" is great (or where the legal grounds for attack are increased by the complexities involved or questions raised), we believe nearly all defense attorneys will, as a matter of course, demand a written, sworn complaint. A competent attorney should and will insists on full procedural protections for the defendant where there is no real hardship or cost to him. The written complaint will not be waived in favor of discovery, since full discovery will also be available under Rules 7.03 and 21.09.

Let us assume counsel waives a complaint and examines the files of the prosecutor. He will, in addition to having heard the oral charge, know the contents of the police reports and witnesses' statements. On the other hand, should he request a written complaint, he will have all of the above available to him as well as a complaint in writing and sworn testimony in either affidavit or transcript form. Such sworn materials are essential for trial impeachment. In addition, he has the possibility that witnesses will be unavailable for probable cause purposes, whether to testify or sign affidavits, and thus, the case will be dismissed either "temporarily" at the end of thirty-six (36) hours, R. 4.02, Subd. 5(3); or permanently at the end of fourteen (14) days, Rule 17.06, Subd. 4(3). It is

not altogether clear how long after a charge is dismissed for failure to file a written complaint the prosecution has to bring a complaint on probable cause. The Comment at Page 15 indicates the prosecution has fourteen days. Rule 17.06, Subd. 4(3) apparently intends that the prosecution shall move within seven (7) days for an order extending the defendant's bail and release conditions for a "specified reasonable time" in which to file a new complaint. (This is difficult to reconcile with the Comment at Page 90 which indicates in the third paragraph that the State has only two (2) days in which to make such a motion). A specified reasonable time is by the Rule defined as not to exceed seven (7) days. Therefore, if the prosecution waits to the seventh day to file its motion, and if the Court grants a full seven (7) days additional, then the prosecution will have fourteen (14) days. As a practical matter, however, since the prosecutor will almost certainly have to make his motion at the time of dismissal (or create more paper work), he will have only seven days as a maximum to re-charge.

Also, Rule 4.02, Subd. 5(3), requires that where a charge is dismissed for failure to file a valid complaint, a warrant shall not be issued until after a summons has been attempted. But in a case where a charge is dismissed and the prosecutor makes his oral motion under Rule 17.06, Subd. 4(3), there should be enough flexibility for the Court to set a return date for arraignment on a valid complaint and issue a warrant directly if the defendant does not appear on that date.

All of the above timing is a prosecutor's nightmare, having very little to do with fairness to the defendant in terms of notice and preparation of his defense.

Then, too, the possibility of error in a written complaint proceeding is worthwhile to the defense. For example, nowhere do the Rules spell out (1) how much, or (2) what kind of evidence is necessary to establish probable cause in misdemeanor cases. It is not clear whether the requirements applicable to a grand jury indictment are also applicable to a misdemeanor complaint. Both must be based upon a finding of probable cause (R. 18.06, Subd. 2; R. 4.02, Subd. 5(3); R. 2.01). In addition, certain felonies may also be brought on complaint (R. 17.01; R. 4.02, Subd. 5(2)), which must similarly be based on a finding of probable cause for which no standards are specified, unless grand jury standards are used. It would, therefore, appear to be the intent of the Rules that the use of hearsay evidence to establish probable cause for sworn misdemeanor complaints would be severely limited by Rule 18.06.

This means that the lay witnesses, civilians and complainants able to give first hand testimony must be brought in to execute affidavits, or to give oral supplemental testimony in misdemeanor cases within thirty-six (36) hours. If they are not available, or if judges are not available in chambers, or if prosecutors are not available to prepare affidavits, such cases will simply be dismissed. With these possibilities, few defense attorneys can afford to pass up a demand for formal written complaints. At the present time, there are simply not enough prosecutors, judges or court reporters to handle the work. The Rules should permit the

use of reliable hearsay evidence to establish probable cause in misdemeanor matters.

Given a formal complaint procedure in every case, the prosecutorial burden -- at least in large urban areas where there is a high volume of misdemeanor cases -- will be staggering. We are here talking as well of all misdemeanor traffic charges -- those made a misdemeanor by their terms and by operation of Minnesota Statutes Section 169.89. On any given day, in both criminal arraignment court and traffic arraignment court, there will be scores of defendants represented by counsel who will demand a formal complaint. It involves no exaggeration to predict hundreds of additional probable cause hearings each month.

In addition, it is not at all clear what the proposed complaint procedure requires by way of affidavits, sworn testimony and allegations in the complaint. Rule 2.01 requires that the facts which establish probable cause be set forth in writing (1) in or with the complaint, or in supporting affidavits, and (2) the facts may be supplemented by sworn testimony. The implication from this wording is clearly that probable cause may <u>not</u> be based solely on sworn testimony. Rule 4.02, Subd. 5(3), however, seems to suggest that supplemental sworn testimony might totally supplant sworn affidavits. In any event, this must be clarified and it would be our position that any combination of written complaint, affidavit or oral testimony, together or singly, should be permitted to establish probable cause. At present, the City, in those cases in which complaints must now be issued on probable cause, always uses sworn testimony. To require additional written materials would involve substantially

more secretarial and clerical effort, additional prosecuting attorney time, and more time spent by the civilian witnesses or complainants.

Of course, if the City is permitted under the Rules or any revision thereof to go solely on sworn testimony, the present Rules 2.01 and 5.01 require the reporter to transcribe and file the testimony and, further, require that it shall be provided to the defendant at his initial appearance. The Comment to Rule 5 (Page 19) states that the transcript must be provided "as soon as it is available". This timetable is not spelled out in the Rule itself, and should be. With the number of cases going to probable cause hearings, and with the number which we would like to handle by oral testimony, it is readily apparent that the court reporters available would be overwhelmed by the load, particularly if hearsay is not allowed. The likely response of the judges of Municipal Court would be to refuse to sign or entertain any formal complaint unless supported entirely by affidavit.

Thus, it is evident that at present levels of staffing, neither the Municipal Court nor prosecuting authority in Saint Paul will be able to function under the new Rules regarding written complaints. Of course, with substantial increases in staff, and disregarding the added burdens on lay witnesses, compliance could be had. But it is difficult to see where any significant gains in the fairness of the system for the defendant have been achieved in the misdemeanor area by this expense. This is not the time to increase the burdens of victims of crime or lay witnesses for speculative advantages to defendants.

We believe that with full discovery under proposed Rule 7.03 of the prosecutor's file (which we now allow in St. Paul as a matter of routine practice), there is no need for formal sworn complaints. If there is a need for a complaint in writing, this could be done by written complaint on a case by case basis as is now done.

B. The second major change, as we view it, proposed by the new Rules is the abolition of the "two-tier" system for the trial of ordinance charges under which there would be the right to a jury trial in all ordinance charges in Municipal Court. We strongly urge the Rules be amended to retain the existing system.

At present, a defendant, if charged with an ordinance violation, is entitled to a jury trial in District Court only if he is convicted in Municipal Court. This trial is de novo and as a matter of right, and may be had either after a trial or a plea of guilty. The large majority of ordinance charges are resolved without a jury trial.

There are no statistics available as to precisely the number of misdemeanors charged in St. Paul annually. However, using rough estimates, somewhat less than one percent (1%) of criminal ordinance charges are appealed to District Court[1].

We believe that the present system offers a fair, constitutional balance between the need for speedy and efficient settlement of the more minor type of criminal cases and the right to have one's guilt determined by a jury. This Court

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[1]The Clerk of Court tabulates criminal cases under traffic violations and other violations. Since traffic charges are either statutory misdemeanors (with the right to a jury trial in Municipal Court) or petty misdemeanors (with no jury trial in any court), the "other violations" category will principally be subject to the de novo jury system. In 1972, 1973 and 1974, there were 42, 38 and 45 such de novo appeals calendared for jury trial (out of roughly 4,600 to 4,800 total matters disposed of), or roughly less than 1% of all ordinance cases charged. See Exhibit A.

recognized that fact in City of St. Paul v. Hitzman, 295 Minn. 301, 204 N.W.2d 417 (1973). The proposed Rule will cause congestion of the court calendar and excessive delays in bringing matters on for trial. We need not detail all of the many undesirable aspects of delays in the criminal calendar. A fair determination of fact issues, whether by the Court or jury, is certainly hindered by delay. The relevance of the sentence imposed and its effectiveness in punishment, deterrence and rehabilitation is lessened by delay. Expansion of the jury calendar will also increase the delays in court trial assignments since it is assumed the Court would apportion any delays among other matters appearing on the calendar. (The Comment at Page 21, Number 12, indicates that trial is to be held either within thirty days or ten days, and refers to Rule 6. We are unable to find this provision in Rule 6 or any other Rule. This oversight should be clarified. If there is such a requirement, it will clearly have a major impact on the misdemeanor criminal justice system).

It is apparent, in connection with this matter of requiring jury trials, that the drafters of the Rules did not consult with anyone in a major city's municipal court system. A glaring example of this is the provision in Rule 26.01, Subd. 1(3), which permits a defendant to withdraw his waiver of jury trial at any time prior to commencement of trial. This approves and permits a defendant to waive his jury trial at arraignment and then come up to the date of the court trial, determine whether the prosecution has its witnesses available, and if so, withdraw his jury waiver and ask for a jury trial. In almost every case this would result

in a delay to another date and great harassment to the court system and prosecution. This could be solved with the addition of more judges and prosecutors, but this provision hardly seems anything more than a ploy for the benefit of defense counsel. This is also another hardship on civilian witnesses who might be involved in the matter.

The provision by which certain misdemeanors are to be designated by the prosecutor as petty misdemeanors under Rule 23.04 simply will not help to reduce the expected increase in jury trial settings. First of all, it requires the consent of the defendant. Any waiver or consent given by the defendant without first an opportunity to consult counsel would be open to attack. This would particularly be true where even though no incarceration was possible, a conviction might involve the loss of a valuable license (e.g., driver's license, business license, liquor license) or might involve a relatively high fine, or where the conduct or crime involved is commonly understood by the community to be criminal. As one example, given the language of Minnesota Statutes Section 169.89, where certain offenses are required to be charged as misdemeanors, it would probably be the position of the licensing authority that designation would have no effect on their decisions to suspend, revoke or cancel after a given offense.

It seems unlikely that an attorney would consent on behalf of his client to designation in cases where no jail time is normally given and where important collateral consequences will result from a conviction such as listed above, involving valuable licenses, community shame, and the like.

In the case where a defendant is without counsel and consents to designation, whether at arraignment or later, his waiver of counsel may be withdrawn at any time. Rule 5.02, Subd. 2, makes the appointment of counsel discretionary in petty misdemeanors, whether by original or later designation, but once appointed, it would seem that the defendant could on advice of counsel withdraw his consent to designation as a petty misdemeanor and request a jury trial. This would, of course, cause extra delays in the jury calendar. As noted above, a jury trial waiver may be withdrawn at any time.

There are additional problems with the provision in Rule 23.04 for designation. There is no language dealing with a simple declaration by the judge that in a given case he will not impose incarceration, in effect creating a petty misdemeanor, without either the consent of the prosecutor or the defendant. It might fairly be anticipated that "unreasonable" refusals to designate or to consent thereto would be met by such judicial action. Second, this power substantially invades the sentencing discretion of judges and is, in effect, a way to bind the judges' hands by sentence plea bargaining. It seems unlikely, although this may be speculation, that designation as a petty misdemeanor would take place at all except in the context of plea bargaining, particularly where the congestion of the calendar makes it appear it is in the best interests of the prosecution to designate.

Finally, if the Court does determine to retain the de novo jury trial for ordinance cases, then the standards governing sentencing in Rule 28.06, Subd. 2, need revision. In the present de novo system, and under the new Rules were it to be kept, a defendant may simply plead guilty and appeal.

Sentence is imposed or may be imposed without sworn testimony and, customarily, a factual basis is supplied from the police reports. Also, a court trial may be had in which the defendant, knowing he will appeal, stays off the stand and does not testify (in effect treating the court trial as a preliminary hearing). In each of these cases, under Rule 28.06, the District Court judge could not impose a more severe sentence even though, after hearing at a de novo jury trial all the witnesses and the defendant, he determined that it was needed. It would also be impossible for the District Court in most cases to determine whether the lower Court knew or did not know of the defendant's conduct now apparent in District Court without calling in the lower Court judge to review the proceedings de novo.

We would strongly urge the Court to return to the sentencing standards laid down recently in State v. Ernest Johnson, Minn. , 216 N.W.2d 904 (1974). These standards permit the Court to sentence de novo, taking into account all relevant sentencing considerations, but prohibit any sentence which is vindictive or intended to punish the defendant for exercising his right to a jury trial. This would permit consideration of such factors as the defendant's testimony, his demeanor, his contrition or lack of it, his past record, rehabilitation and sentencing possibilities, none of which would fit the "identifiable conduct not known to the county court" test in Rule 28.06.

III. OTHER PROVISIONS OPPOSED

There are four proposed changes we feel need revision

or clarification which lack the impact of the complaint procedures and jury trial Rules discussed, but which are significant enough in our judgment to warrant discussion. These are the provisions governing appointment of counsel; discovery; evidentiary or Rasmussen-type hearing; and appealable orders.

A. Rule 5.02, Subd. 2, provides for the appointment, in cases of financial inability, of counsel, as well as for waiver by the defendant either in writing or on the record. It is not totally clear whether this waiver can be withdrawn by the defendant and, if so, whether other decisions made by the defendant when without counsel can similarly be revoked, such as consent to designation as a petty misdemeanor, waiver of jury trial, waiver of pretrial motions including suppression, waiver of pretrial conference. It would appear that the Rule contemplates that a waiver of counsel can be withdrawn. If this is so (and clarification is in order), a better procedure would be simply to refuse to accept any waiver of counsel until after the defendant has been afforded an opportunity to consult counsel, so that any waiver will have been made on that basis. After that is done, in the unlikely event waiver is still desired, it should be binding on the defendant. If it is not and the Court permits withdrawal of a waiver, at the very least, all action and inaction by the defendant, whether in taking affirmative steps or neglecting to do any such things in a timely fashion, should be binding.

B. Second, Rule 7.03 and Rule 21.09 provide for discovery in misdemeanor cases. Rule 7.03 deals with inspection of police investigatory reports. We see two problems with the

current wording of this proposal. First, the time when discovery is to be made needs clarification. It states that inspection may be made "prior to arraignment or at any time before trial" without specifying in whose hands the exact timing is controlled. "Prior to arraignment" should not include the time prior to the actual charging of an offense or time when the offense is being investigated. Second, the use of reproduction of such reports is a very serious problem, particularly where the defendant can obtain them independent of counsel. Such reports should be written for the purpose of aiding in investigations of crime, for refreshing recollections of officers, and for assisting prosecutors in case preparation. They should not be written with an eye toward eventual public dissemination or toward possession by the defendant or those to whom he gives them. It would be easy to predict that such reports would be much more brief and useless for their principal purposes. Such reports would also be useless for discovery.

We strongly urge the Court modify this provision to provide inspection only, or if reproduction is a necessity in the Court's view, that the defense attorney be required to certify that he will maintain the reports in his possession only and use them solely to assist in the defense of his case. These reports contain the names of witnesses who might be harassed if their names and addresses were circulated. The lack of restriction in the Rule on use of such reports also brings near the likelihood of a breach of the Code of Professional Responsibility, DR 7-107, which limits disclosures by prosecuting authorities in criminal cases.

C. Third, Rule 12.04, Subd. 3, provides that an evidentiary hearing (including suppression questions) is to be held in court trials either separately or as part of the trial "in the discretion of the Court". We would urge this be modified to read that the hearing should be held as part of the court trial unless otherwise requested by the prosecutor. This change would permit the prosecution to preserve its appeal rights in those cases where such a procedure would be likely. If the hearing is held as part of the trial, the defendant would necessarily have been put in jeopardy and, thus, no appeal would be permissible. Minnesota Statutes Section 632.11.

D. Lastly, Rule 28.08, Subd. 2 and Rule 29.03, Subd. 1, provide for appeal by the prosecuting authority of certain pretrial orders, not including dismissals for want of probable cause or dismissals under Minnesota Statutes Section 631.21. The Comment (Page 192) indicates these exceptions represent situations where no right of appeal is needed because the case may be reinstated by other means, presumably by proceeding to obtain on adequate probable cause a formal written complaint. There have been dismissals purporting to be pursuant to Minnesota Statutes Section 631.21 in which the judge has directed that no complaint be re-issued, or that if a complaint be re-issued, it should be brought before the same judge for probable cause. In this situation under the Rules, the prosecuting authority could be without an appellate review. This could be handled by simply striking the exception, since the prosecuting authority in almost every case would attempt, if possible, to re-issue the complaint short of appeal.

IV. PROVISIONS SUPPORTED

We do support a number of general and specific matters proposed as part of the Rules as these relate to misdemeanors and will touch on them briefly.

These encompass inclusion of misdemeanors within the scope of the Rules, or the notion of a specific codification of rules for misdemeanors; the use of a summons in lieu of warrants; the use of citations in misdemeanor cases; specification of methods of voir dire in jury cases; and the permission of rebuttal closing argument in criminal cases.

A. First, we support wholeheartedly efforts to promulgate a code of procedural or procedural-substantive provisions to govern misdemeanor crimes which will be uniform throughout the State. Without such rules, procedures would be covered by locally adopted rule or by reference to District Court (felony) rules where applicable. It must be obvious from the proposed rules here that the needs and problems in misdemeanor cases are not readily solved by rules designed for felonies. In this connection, Rule 1.01 should be amended to include petty misdemeanors within the scope of the Rules.

B. The second two matters which we feel will improve existing procedures are the preference for summons in lieu of warrants and the preference for issuance of citations rather than arrests (which will require the establishment of a "violations bureau" analogous to the existing traffic violations bureaus).

In each case, the officer making the decision to issue a summons or a citation, and this could be variously the Court, a clerk of Court, a police officer, or prosecuting authority, is required to use his discretionary judgment based on a number

of both tangible and intangible factors. See Comments, Page 8, Pages 26-27. In partial recognition of this discretion, failure to issue a summons or citation when in retrospect or on review the defendant should not have been arrested, is not a jurisdictional defect. This Comment should really be expressed in the text of the Rules. So many consequences could flow from a finding of an invalid arrest by way of written complaint procedures, new motions to dismiss on recharging, suppression of statements and admissions and physical evidence, that it would be in the interests of efficiency to foreclose this question in the Rules. In addition, if any arrests are held invalid under these Rules, it will have the effect of forcing officers to issue citations in cases where this really should not be done, with possible serious consequences to crime victims or the general public.

Rule 6.01, Subd. 1, does not define "law enforcement officer" but, presumably, is intended to have a different denotation than "peace officer" in Chapter 629 of the Minnesota Statutes. Even so, the terminology should be clarified so that all persons charged with the enforcement of housing, building and health codes, for example, could also issue citations.

Second, it would seem that the requirement of certified mail in Rule 3.03, Subd. 1 and Subd. 3 is superfluous. In the event the defendant does not appear at the summoned time and place, a warrant will be issued, no matter how service was attempted. Even were the Rule to require a "return receipt requested", it is probably an open question whether regular or certified mail is more likely to reach the defendant.

Certified mail with a return receipt is most useful only for proof of delivery. Therefore, given the costs involved, the Rule should permit service by regular mail to encourage the use of summons.

In addition, there is another point needing clarification. Rule 4.02, Subd. 3, requires that the prosecuting attorney be notified of an arrest "as soon as possible" after the arrest so that he might order the defendant released from custody. Apart from the fact that there is no indication of what factors are to be involved in making this decision as are spelled out in Rule 6.01, it would seem that the prosecuting attorney must be available for telephone calls at all hours of night or day on every single misdemeanor arrest, including driving under the influence, assaults, or crimes where there is danger of further crimes such as domestic fights and the like. This would certainly be an unnecessary hardship and administrative burden in a large city such as Saint Paul. We would suggest that in view of the fact that the defendant must be in court within thirty-six (36) hours, Rule 4.02, Subd. 5, that notice to the prosecuting attorney be stricken. This will, of course, mean a Saturday and Sunday assignment court, and will cause manpower needs for both the prosecuting authority, the court system and the defense bar.

C. Lastly, in endorsing jury selection procedures under Rule 26.02 and trial procedures under Rule 26.03, we particularly support the use of preliminary jury instructions under Rule 26.03, Subd. 4 and rebuttal closing argument under Subd. 11. It would be far preferable to both the present system and the proposed rules to have the federal order of

argument, prosecution, defense, and prosecution rebuttal. The proposal in Subd. 11 goes a long way, however, to removing the unfairness of the present system. The limitation on prosecution rebuttal should be deleted so that both sides may make limited but pertinent rebuttal.

We would also suggest the Rules provide for the submission of the judge's instructions to the jury in writing as well as orally. Most, if not all, judges use a great many standard instructions capable of reproduction in advance. It is a relatively simple matter to use multiple carbon sets to type the few specialized instructions which might be required in any given case. It would also be possible to reproduce in advance many specialized instructions, keeping them available in the clerk's office.

It is likely that few attorneys and judges would be able to recall, were they asked to do so, word for word the instructions given in a criminal case, yet all would agree that nearly every sentence in the instructions is essential. Written instructions, taken into the jury room for use in deliberations, would be of substantial benefit to fairness and justice.

V. PLEA BARGAINING

We add a brief note on the ratification of plea bargaining contained in Rule 15.04, believing that plea bargaining is a practical compromise of the purposes of the criminal justice system, a necessary evil at best. Justice is more certainly done, the public is better informed, the victims of crime assured that the perpetrator is dealt with, and the defendant

better represented by a public trial, whether to the Court or to the jury. Plea bargaining is a haven for counsel unskilled or reluctant to engage in trial defense, a device to camouflage weak prosecution evidence or uncertain witnesses, and a denial of the right of the public and the victim to know that justice is working.

It seems impossible to attempt a fair exploration in practice of the workability of a system without plea bargaining. Nonetheless, until it is clear that no such exploration is possible, we strongly urge the Court to withhold its unqualified approval of plea bargaining.

We further urge that the trial court judge not be required as a matter of duty to accept a plea bargain, even under the standards set forth in Rule 15.04, Subd. 2(2). It would be far preferable to insure his sentencing discretion.

In connection with plea bargaining and the entry of pleas in Rule 15, three changes should be made. Rule 15.05 provides for the withdrawal of pleas, but does not cover the common situation in misdemeanors where one or more charges have been dismissed in consideration of a plea to one or more matters. Where the plea is withdrawn, the charges dismissed should be reinstated automatically without the necessity of going through probable cause hearings or other formal procedures. This should be clarified in the Rule. Second, there will be cases in which a plea is withdrawn, when under Rule 15.06 the plea discussions, plea agreement and plea will be inadmissible in a later hearing or trial against the defendant. This should not apply to statements or testimony of the defendant made for the purpose of establishing a factual basis for the plea, nor to any inquiry made pursuant to Rule 15.01 or Rule

15.02, which is not relative to plea discussions or agreements.

Finally, the pro se defendant is on the face of Rule 15.04, Subd. 1, foreclosed from plea bargaining. While there may be good reasons for prohibiting all plea bargaining with pro se defendants, it would appear to be more fair to permit it under suitable restrictions.

VI. PETITION

In conclusion, we the undersigned respectfully request that this Court return the Rules to committee for further study and deliberation, either totally or only as they relate to misdemeanors.

To restate, although there is much that is good in the Proposed Rules and many of the concepts embodied therein must be retained, on balance, the effect of their adoption will be harmful. They will permit unreasonable delay and result in more expensive prosecution. They provide a wide array of traps and surprises for the prosecution and an arsenal of procedural gambits for the defense, bearing little relation to ultimately fair, factual determinations or just sentencing.

Submitted this 20th day of January, 1975.

Pierre N. Regnier

PIERRE N. REGNIER
City Attorney

Philip B. Byrne

PHILIP B. BYRNE
Deputy City Attorney

FRANK E. VILLAUME III
Assistant City Attorney

THOMAS R. HUGHES
Assistant City Attorney

JOHN C. MC LAUGHLIN
Assistant City Attorney

BERYL A. NORD
Assistant City Attorney

WILLIAM M. KRONSCHNABEL
Legal Intern - Senior Practice Rule

JAMES E. FINLEY
Assistant City Attorney

ARTHUR M. NELSON
Assistant City Attorney

PAUL F. MC CLOSKEY, JR.
Assistant City Attorney

YEARLY STATISTICAL REPORT -- ST. PAUL MUNICIPAL COURT

EXHIBIT A

YEAR ENDING December 31, 1973.

CALENDAR YEAR 1973

SIX FULL TIME JUDGES PRESIDING

NOTE: FIGURES IN PARENS ( ) REPRESENT THE 1972 FIGURE FOR THE PURPOSES OF COMPARISON.

	CRIMINAL		CIVIL		CONCILIATION
	TRAFFIC	OTHER VIOLATIONS	COURT	JURY	COURT
1. Cases Pending at Beginning of year	(865) 810	(271) 381	(163) 157	(745) 446	(542) 543
2. New Cases Added During year	(15,020) 15,282	(4,734) 4,638	(548) 527	(502) 439	(5,968) 6,190
3. Sum of Lines 1 and 2	(16,332) 16,092	(5,005) 5,019	(711) 684	(1,247) 885	(6,510) 6,733
4. Cases Disposed Of By "Guilty Plea"	(10,430) 9,120	(2,094) 1,924	XXXX	XXXX	XXXXX
5. Cases Disposed Of By Preliminary Hearing (Dismissal or Bound Over)	XXXXXXXX	(527) 527	XXXX	XXXX	XXXXX
6. Cases Disposed Of By Court Trial	(910) 1,111	(599) 552	(167) 109	XXXX	(1,924) 1,779
7. Cases Disposed Of By Jury Trial	(50) 53	(12) 10	XXXX	(69) 25	XXXXX
8. Cases Dismissed, Settled, Stricken, or Default Judgment	(4,132) 4,475	(1,392) 1,597	(387) 384	(732) 350	(4,043) 4,388
9. Total Cases Disposed Of During year (Sum of Lines 4 through 8)	(15,522) 14,759	(4,624) 4,610	(554) 493	(801) 375	(5,967) 6,167
10. Cases Pending At End of year (Line 3 minus Line 9)	(810) 1,333	(381) 409	(157) 191	(446) 510	(543) 566

The foregoing is a true and accurate report of the State of the Civil, Criminal, and Conciliation Dockets of the St. Paul Municipal Court, for the year ending December 31, 1973.

R. E. BUSHINSKI, Clerk of Court

R E Bushinski

MONTHLY STATISTICAL REPORT -- ST. PAUL MUNICIPAL COURT

PERIOD OF: January - June 1974 . (First Six Months)

SIX FULL TIME JUDGES PRESIDING

January thru June, 1974 (1st six months)

	CRIMINAL		CIVIL		CONCILIATION
	TRAFFIC	OTHER VIOLATIONS	COURT	JURY	COURT
1. Cases Pending at Beginning of Period	1,333	409	191	510	566
2. New Cases Added During Period	7,846	2,394	276	220	3,432
3. Sum of Lines 1 and 2	9,179	2,803	467	730	3,998
4. Cases Disposed Of By "Guilty Plea"	4,889	1,045	XXXX	XXXX	XXXXX
5. Cases Disposed Of By Preliminary Hearing (Dismissal or Bound Over)	0	259	XXXX	XXXX	XXXXX
6. Cases Disposed Of By Court Trial	450	230	82	XXXX	964
7. Cases Disposed Of By Jury Trial	49	4	XXXX	18	XXXXX
8. Cases Dismissed, Settled, Stricken, or Default Judgment	2,791	878	225	271	2,286
9. Total Cases Disposed Of During Period(Sum of Lines 4 through 8)	8,179	2,416	307	289	3,250
10. Cases Pending At End of Period (Line 3 minus Line 9)	1,000	387	160	441	748

The foregoing is a true and accurate report of the State of the Civil, Criminal, and Conciliation Dockets of the St. Paul Municipal Court, for the Period of: January - June 1974 .

R. E. BUSHINSKI, Court Administrator

R E Bushinski

RECAP OF: MONTHLY STATISTICAL REPORT -- ST. PAUL MUNICIPAL COURT

PERIOD OF: JAN. thru JUNE, 1973 . (First Six Months)

SIX FULL TIME JUDGES PRESIDING

Jan. thru June, 1973 (1st Six months)

	CRIMINAL		CIVIL		CONCILIATION COURT
	TRAFFIC	OTHER VIOLATIONS	COURT	JURY	
1. Cases Pending at Beginning of Period	810	381	157	446	543
2. New Cases Added During Period	7,735	2,257	270	236	3,119
3. Sum of Lines 1 and 2	8,545	2,638	427	682	3,662
4. Cases Disposed Of By "Guilty Plea"	4,844	937	XXXX	XXXX	XXXXX
5. Cases Disposed Of By Preliminary Hearing (Dismissal or Bound Over)	0"	245	XXXX	XXXX	XXXXX
6. Cases Disposed Of By Court Trial	584	302	34	XXXX	909
7. Cases Disposed Of By Jury Trial	33	5	XXXX	15	XXXXX
8. Cases Dismissed, Settled, Stricken, or Default Judgment	2,402	775	133	164	2,298
9. Total Cases Disposed Of During Period (Sum of Lines 4 through 8)	7,863	2,264	167	179	3,207
10. Cases Pending At End of Period (Line 3 minus Line 9)	682	374	260	503	455

The foregoing is a true and accurate report of the State of the Civil, Criminal, and Conciliation Dockets of the St. Paul Municipal Court, for the Period of: JAN. thru JUNE, 1973 .

R. E. BUSHINSKI, Court Administrator

R. E. Bushinski

February 19, 1975

Minnesota Supreme Court
State Capitol
Aurora and Park Avenues
St. Paul, Minnesota 55155

Dear Justices:

The Ramsey County Chiefs of Police Association, at its meeting on February 14, 1975, took the following action relating to the Petty Misdemeanor Law:

> It was moved and seconded that the Ramsey County Chiefs of Police Association request the Supreme Court to delay implementation of the new rules of criminal procedure until such time as some in-put is received from the Chiefs of Police Association re suggested corrections, or changes, and the rules are amended accordingly. Motion carried.

If you have any questions concerning this action, please call me, 633-6711.

Yours truly,

Patrick J. Sexton

Patrick J. Sexton, Secretary
Ramsey County Chiefs of Police Association
1450 West Highway 96
Arden Hills, Minnesota 55112

PJS/dz

HIGHWAY PATROL DIVISION
110 HIGHWAY BUILDING

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY
SAINT PAUL 55155

February 7, 1975

2000-09-027

Clerk of the Minnesota Supreme Court
State Capitol
St. Paul, MN 55155

Dear Sir:

We have reviewed the Minnesota Proposed Rules of Criminal Procedure and desire to comment on Rule 3.03, Subd. 3 and Rule 6.01, Subd. 1 (1)(a) and (b).

Rule 6.01, Subd. 1 (1)(a) and (b) as proposed requires the release of a person accused of a petty misdemeanor if the accused agrees to sign a citation. We would urge that Rule 6.01 be modified to provide that mandatory release upon signature for a petty misdemeanor offense is not required where the arresting officer has reason to believe the accused may leave the state. This situation is presently covered by MS 169.91, Subd. 1 (6).

While most traffic offenses are petty misdemeanors unless committed in a manner to endanger or be likely to endanger persons or property and are therefore "minor" offenses, traffic safety is nevertheless influenced by administration of the law and there must be reasonable assurance that administration of the law will be secured.

Our area of concern here is that under the proposed rule a non-resident cited for a petty misdemeanor traffic offense while passing through Minnesota would have to be released upon his written promise to appear. While some of these persons would honor their committment and appear, others would completely disregard the matter upon leaving the state. Issuing warrants in such cases is largely a waste of effort.

We believe enlarging the rule to permit a police officer to exercise judgment in this area would promote effective and uniform traffic law enforcement by precluding the situation where a police officer charged a traffic offense as "endangering" merely to proceed with the posting of bail or

the opposite situation where a police officer, knowing that he could not require the posting of bail, would simply permit the offender to proceed without enforcement action. Additionally, if the court rules permit the closing of a petty misdemeanor case upon forfeiture of bail as contemplated by MS 169.95 and 171.01, Subd. 13, there would be no need to employ the summons and warrant procedures in the typical case of this type since bail forfeiture would conclude the matter.

With respect to Rule 3.03, Subd. 3, we request that warrants for petty misdemeanors not be arbitrarily excluded from the nightcap procedure. We feel adequate safeguards would exist where a judicial officer must pass on the inclusion of a nightcap on a petty misdemeanor warrant. There are many instances where the accused in a warrant situation is locatable only at night or on Sundays or holidays. Where a person has not honored his written promise to appear or contacted the court to make other arrangements, we feel the rule should permit the accused to be arrested with a properly endorsed warrant at an hour when such arrest can be accomplished.

We appreciate any consideration which can be given our request and would be pleased to furnish additional information if such is desired.

Sincerely,

James C. Crawford

Colonel James C. Crawford
Chief
Minnesota State Patrol

JCC/js

45517

OFFICE OF THE ATTORNEY GENERAL

State of Minnesota

ST. PAUL 55155

WARREN SPANNAUS
ATTORNEY GENERAL

February 3, 1975

The Honorable Fallon Kelly
Justice of the Minnesota Supreme Court
State Capitol
St. Paul, Minnesota 55155

Dear Justice Kelly:

Thank you for permitting a member of my staff to appear in opposition to Proposed Rule of Criminal Procedure 26.03, subd. 11(h) and (i). I have just been informed that those desiring to reply to the Advisory Committee's rebuttal must do so forthwith as you are starting your deliberations today. Please consider this letter as such reply.

It is the spokesman for the Advisory Committee's point that the order of closing argument is a matter upon which reasonable people will always disagree. Therefore, its reasoning goes, the court should adopt the committee's recommendation, because it is at least as good as any other.

With all due respect we take great issue with both the approach and the result. As you are aware, the existing statutory provision permits the state to argue first and defendant last. Minn. Stat. 631.07 (1974). We agree that some people feel the first argument is most advantageous, while many others prefer the last. This is the disagreement to which the Advisory Committee really refers. However, no one to my knowledge would disagree that the Proposed Rule to which we object gives to defendants both possible advantages -- first and last argument. In my judgment, given the fact and weight of the burden of proof which the state already must meet in every criminal prosecution, this proposal will impose a new and unnecessary impediment to obtaining a just result. Now is not the time to make it more difficult to obtain a conviction in a proper case.

Our view is that the party carrying the burden of proof should be permitted to argue last. As pointed out in the attached memorandum, this is the practice in the overwhelming number of

state and federal jurisdictions. I can see no sound reason for Minnesota to be different on this score. Nor do I feel that it has been demonstrated that the Proposed Rule is an improvement over the existing practice.

We would acknowledge that the Proposed Rule here in question does provide for a state's "rebuttal" if a defendant's argument is "improper." We are concerned that given the total lack of case law definition as to what is "improper" for a defense counsel, and given the natural reluctance of trial judges to grant a rebuttal from which a reversible appeal may lie, this right of surrebuttal will be rarely if ever permitted. In any event, it does not provide sufficient balance to the order of closing argument.

We urge that the state be permitted to argue last, or at a minimum, the present statutory scheme be retained. Thank you for your consideration of our concerns.

Very truly yours,

Warren Spannaus

WARREN SPANNAUS
Attorney General

Attach.

WS:dms

February 26, 1975

The Honorable Robert J. Sheran
Chief Justice
Minnesota Supreme Court
230 State Capitol
St. Paul, Minnesota 55155

Dear Chief Justice Sheran:

Last Saturday morning the Advisory Committee on the Proposed Rules of Criminal Procedure graciously permitted a member of my staff to appear and present my views concerning the order of closing argument. He again reiterated my belief that the published Proposed Rule 26.03 subd. 11(h)-(i) places too great an additional burden on the side which carries the burden of proof in criminal cases.

He reported to me that a modified proposal was before the Committee which had been recommended by one or more members of the Supreme Court. The proposal is apparently a modification of the majority rule which is followed by the Federal courts and 34 states. While we have called for adoption of the majority rule, i.e., Prosecutor - defendant - Prosecutor (without limitation), it is the consensus of my staff and I that the modified proposed order of closing argument, i.e., Prosecutor - defendant - Prosecutor (limited rebuttal only), is a marked improvement over our present statutory scheme and certainly vastly more acceptable than the Proposed Rule contained in the Advisory Committee's published recommendations.

I am therefore withdrawing my request that the Court adopt the majority rule from other jurisdictions; I respectfully urge you to favorably consider the new proposal referred to above. Thank you for your considered attention.

Very truly yours,

WARREN SPANNAUS
Attorney General

WS:dms

bcc: Justice George M. Scott