SUPREME COURT ADVISORY COMMITTEE
RULES OF CRIMINAL PROCEDURE

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July 27, 1999

Chief Justice Kathleen Blatz
Minnesota Supreme Court
25 Constitution Avenue
St. Paul, MN 55155-6102

Justice Russell Anderson
Minnesota Supreme Court
25 Constitution Avenue
St. Paul, MN 55155-6102

Dear Chief Justice Blatz and Justice Anderson:

On behalf of the Supreme Court Advisory Committee on Rules of Criminal Procedure, I deliver to you herewith the original and ten copies of a Report to the Minnesota Supreme Court from the Committee together with attached proposed Amendments to the Minnesota Rules of Criminal Procedure concerning solely the issue of final argument in Criminal Proceedings.

Respectfully yours,

Joanne M. Smith
Chair

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,

Joanne M. Smith

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 (1971).) 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 (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).

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

PAUL R. KEMPAINEN
Member, Criminal Rules Advisory Committee

Kathryn Quaintance

KATHRYN QUAINTANCE
Member, Criminal Rules Advisory Committee

Fred Fink by Kathryn Quaintance

FRED FINK
Member, Criminal Rules Advisory Committee

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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).

C1-84-2137

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

SUPREME COURT ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

The undersigned members of the Advisory Committee on Rules of Criminal Procedure supplement the previous reports on order of closing argument submitted to this Court on July 27, 1999 and August 12, 1999.

We wish the court to know that it is and always has been our strongly held personal belief that the Court should not change Rule 26.03 to allow automatic prosecution rebuttal.

In the effort to reach a consensus during numerous meetings where this issue was discussed, several members of this committee who held strong beliefs that the Court should not change Rule 26.03 to allow prosecutor rebuttal set aside their individual feelings on this issue in attempting to reach a consensus as outlined in the July 27, 1999 report.

In light of the August 12, 1999 "minority report" we feel it necessary to express to the Court the additional view that the rule should not be changed.

The current order of final argument, in place since 1875, well serves justice. Minnesota's Rules of Criminal Procedure, Rule 26.03 sets a fine example which the rest of the nation would be wise to follow. The statistics gathered through Legislative study reinforce the appropriateness of the current Rule 26.03. When the research shows that

prosecutors only ask for rebuttal in two percent of trials, and trial courts have the power to grant the request in an appropriate case, a wholesale rule change to dramatically change trial procedure is simply not warranted. The current rule appropriately protects the values underlying the presumption of innocence. The rights of our citizens merit the continued protection of the 124 year old procedure in place at this time.

CONCLUSION

For all the above reasons, we the undersigned members of your committee submit this supplemental report and urge the Court to reject any suggested change to Rule 26.03.

Dated: 10·16·99

Respectfully submitted,

Lisa D. Dejoras

William E. McGee

Candace Rasmussen