STATE OF MINNESOTA

IN SUPREME COURT

C1-84-2137

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

The Supreme Court Jury Task Force filed a report with this Court recommending a mixture of best practices and rule changes for jury management and this Court requested the Advisory Committee on Rules of Criminal Procedure to file recommendations by September 30, 2003, in response to the Jury Task Force's recommendations to amend Minn. R. Crim. P. 26 and Minn. R. Gen. Prac. 814.

The Committee filed a report regarding the recommendations of the Jury Task Force on September 29, 2003.

Additionally, on September 29, 2003, the Committee filed a report proposing amendments to the Rules of Criminal Procedure relating to the standards for public defender eligibility.

IT IS HEREBY ORDERED that a hearing be held before this Court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on November 18, 2003 at 2 p.m., to consider the recommendations of the Supreme Court Advisory Committee on the Rules of Criminal Procedure to amend the rules. Copies of both reports and proposed amendments are annexed to this order.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 14 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, Minnesota 55155, on or before November 12, 2003, and

2. All persons desiring to make an oral presentation at the hearing shall file 14 copies of the material to be so presented with the Clerk of the Appellate Courts together with 14 copies

of a request to make an oral presentation. Such statements and requests shall be filed on or before November 12, 2003.

Dated: October 8, 2003

BY THE COURT:

Kathleen A. Blatz
Chief Justice

C1-84-2137
STATE OF MINNESOTA
IN SUPREME COURT

In Re:

Supreme Court Advisory Committee
On Rules of Criminal Procedure

REPORT AND PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE CONCERNING THE SUPREME COURT JURY TASK FORCE'S RECOMMENDATIONS

September 29, 2003

Hon. Robert Lynn, Chair

Caroline Bell Beckman, St. Paul
Leonardo Castro, Minneapolis
James D. Fleming, Mankato
Theodora Gaitas, Minneapolis
William Hennessy, Grand Marais
Candice Hojan, St. Paul
Kathryn M. Keena, Hastings
Thomas M. Kelly, Minneapolis
William F. Klumpp, Jr., St. Paul
Wayne A. Logan, St. Paul
John W. Lundquist, Minneapolis
Arthur Martinez, Minneapolis
Paul Scoggin, Minneapolis
Hon. Jon Stafsholt, Glenwood
Robert Stanich, St. Paul
Hon. Heather L. Sweetland, Duluth

Hon. Russell Anderson
Supreme Court Liaison

C. Paul Jones, Minneapolis
Counselor

Philip Marron, Minneapolis
Reporter

Kelly Mitchell, St. Paul
Staff Attorney

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

By Order of the Supreme Court dated January 28, 2003, the Advisory Committee on Rules of Criminal Procedure was directed to report to the Court by September 30, 2003, concerning certain recommendations made by the Supreme Court Jury Task Force in its Final Report of December 20, 2001. The Advisory Committee has met regularly to review those recommendations and now recommends that the Supreme Court adopt the proposed amendments to the Rules of Criminal Procedure that are submitted herewith. Additionally, the Advisory Committee offers the following comments concerning the various issues addressed to us by the Court.

JUROR PRIVACY

Recommendation #20 of the Jury Task Force Final Report proposes that the Rules of Criminal Procedure be amended to allow prospective jurors to answer questions on highly sensitive or personal matters at the bench, in chambers, or in a courtroom closed to observers. The Advisory Committee agrees with the Task Force that, to the extent possible, judges should accommodate jurors' legitimate privacy concerns during voir dire. However, in doing that, it is constitutionally necessary to balance those concerns against defendants' rights to a fair and public trial and the public's First Amendment right to have access to court proceedings. Before any part of voir dire can be closed or access to information restricted, a court must comply with the constitutionally required procedures and standards as set out by the United States Supreme Court in Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984). The Advisory Committee is proposing a new rule to govern this situation, Rule 26.02, subd. 4(4). This new rule will permit closing parts of voir dire, but only when the trial court orders such closure after finding

that it is necessary to do so to protect an overriding legitimate privacy interest of the prospective juror in not disclosing deeply personal matters to the public. Such an order may be issued only pursuant to the procedures set forth in the rule. That includes requirements that the request be made by the prospective juror, that an in camera hearing be held, that supporting findings of fact be made in writing or orally on the record, and that any closure be no broader than is necessary to protect the overriding privacy interests involved. The Advisory Committee believes that these procedures and standards contained in proposed Rule 26.02, subd. 4(4) are necessary before an order closing voir dire or any part of it can withstand constitutional scrutiny.

CONFIDENTIAL VOIR DIRE QUESTIONNAIRES

Recommendation #21 of the Jury Task Force Final Report proposes that Rule 26.02, subd. 2(2) of the Rules of Criminal Procedure be amended to provide that juror questionnaires not be maintained in the public record and that they be destroyed after they are no longer needed for trial or appeal. The reason for this is to protect the legitimate privacy interests of jurors and because prospective jurors are more likely to be forthcoming with candid answers if they are assured that their questionnaire answers will be confidential. The Advisory Committee agrees that these are important concerns, but as the Task Force recognized in its comments in the Final Report, any provisions made to safeguard jury privacy with regard to questionnaires must conform to the Supreme Court's dictates in Press-Enterprise v. Superior Court, 464 U.S. 501 (1984) as discussed above. Several courts have also recognized and held that the Press-Enterprise dictates apply to voir dire questionnaires as well as oral questioning. See Lesher Communications, Inc. v. Superior Court, 224 Cal. App. 3d 774, 274 Cal. Rptr. 154 (1990); Newsday, Inc. v. Goodman, 159 A.D. 2d 667, 552 N.Y.S. 2d 965 (1990). The Task Force proposal to seal all questionnaires of selected jurors and destroy them upon completion of the

proceedings, including any appeal, constitutes a blanket closure of the written voir dire that does not satisfy the case-specific constitutional requirements of Press-Enterprise. Most, if not all of the information obtained on a standard jury questionnaire is mundane and not the type of sensitive, highly personal information that would be necessary to constitutionally justify restricting access to it. Consequently, any general promise to prospective jurors that their jury questionnaire answers will be confidential is inappropriate. See Bellas v. Superior Court of Almeda County, 85 Cal. App. 4th 636, 102 Cal. Rptr. 2d 380 (2000) in which the court stated that "[n]o comprehensive offer of protection from public disclosure of information communicated on juror questionnaires is legally effectual where public access is mandated by the First Amendment." Additionally, the premature destruction of the questionnaires could present appellate problems if a defendant raises issues concerning the jury in a later post-conviction proceeding. If sensitive information is collected by jury questionnaires it would be necessary to employ a procedure similar to that proposed in Rule 26.02, subd. 4(4) concerning oral voir dire, before access to that sensitive information could be restricted by the court. Rather than do that, however, the Advisory Committee decided it would be more efficient and less troublesome to simply handle any such issues under the oral voir dire closure provisions of proposed Rule 26.02, subd. 4(4).

The amendment of Rule 26.02, subd. 2(3), concerning jury questionnaires, proposed by the Advisory Committee, will permit questions that may elicit sensitive information to be added to the Jury Questionnaire set forth in Form 50. If that is done, the preamble to the questionnaire must advise the potential jurors that if they object to answering any particular question because the answer will be sensitive or embarrassing to them, then they may request an opportunity to address the court to ask that the answers by given orally and not disclosed to the public. If a

potential juror makes such a request, the court will then handle the matter orally under Rule 26.02, subd. 4(4) and that rule will govern the issue and assure that any closure satisfies the constitutional requirements. By this method, there should not be any information in the written questionnaire answers that is so sensitive and deeply personal that it would qualify for sealing or restricting access to it. Likewise, there should be no adequate reason for destruction of those written records earlier than would ordinarily occur.

ANONYMOUS JURORS

Recommendation #22 of the Jury Task Force Final Report proposes that "anonymous" juries be used sparingly when justified by concerns for jury tampering or safety. Rule 26.02, subd. 2 already provides a procedure for maintaining the anonymity of prospective jurors in accordance with the standards and procedures required by the court in State v. Bowles, 530 N.W.2d 521 (Minn. 1995).

However, that rule does not expressly address anonymity after jury selection or the recommendation of the Task Force that numbers may be used in certain circumstances to identify jurors. Therefore, the Advisory Committee is proposing that the anonymous juror provisions of Rule 26.02, subd. 2 be amended to permit juror anonymity to extend through trial and even later for so long as such protection is necessary. Additionally, the proposed rule amendment expressly recognizes that the court may identify jurors and prospective jurors by number or by other method that protects their identity. The comment concerning the proposed rule amendment also states that the court may prohibit pictures on sketches in the courtroom to protect juror anonymity.

JURY SEQUESTRATION

Recommendation #32 of the Jury Task Force Final Report proposes that Rule 26.03, subd. 5 be amended so that jury sequestration during deliberations be left solely to the sound discretion of the trial judge. Originally, this rule required the defendant to consent to any separation of the jury during deliberations. After previously reviewing this rule, the Advisory Committee in its Report to the Supreme Court dated August 9, 2002, proposed that the rule be amended to treat both parties equally and require the prosecution, as well as the defendant, to consent to any separation of the jury during deliberations. This proposed amendment was adopted by the Supreme Court effective February 1, 2003. Pursuant to the Supreme Court's order of January 28, 2003, and in light of the Task Force's recommendation, the Advisory Committee again thoroughly considered the sequestration provisions in Rule 26.03, subd. 5. It appeared to the committee that, in current practice, jury sequestration during deliberations is rarely ordered. Although defendants, and now the prosecution, may require jury sequestration during deliberation, that power is not being abused and the current procedure is working well. Therefore, the Advisory Committee still supports its previous proposed amendment of Rule 26.03, subd. 5 which was adopted by the Supreme Court and recommends that no further change be made in the rule.

QUESTIONS BY JURORS

Recommendation #31 of the Jury Task Force Final Report proposes that the rules be amended to permit jurors to submit questions to witnesses in the discretion of the court. In State v. Costello, 646 N.W.2d 204 (Minn. 2002), the Supreme Court prohibited that practice in criminal cases and subsequently the Supreme Court denied recommendation #31. Consequently, no revision of the Rules of Criminal Procedure is necessary in light of the Court's actions on this

issue. Nevertheless, the Advisory Committee is proposing that Rule 26.03, subd. 15 and the comment on that rule be amended to expressly include the prohibition against such questions and to reference the Costello decision.

MINNESOTA GENERAL RULE OF PRACTICE 814

Recommendation #8 of the Jury Task Force Final Report proposes that Rule 814 of the General Rules of Practice for District Courts be amended to require the destruction of all juror records and lists, including juror qualification questionnaires, promptly after they are no longer needed for trial or appeal, unless otherwise ordered by the court. The Supreme Court order of January 28, 2003, directed this committee to report back to the court concerning this recommendation. The Advisory Committee has reviewed the Task Force recommendation concerning Rule 814 and we are concerned that the proposed changes to the rule, as well as the existing language of the rule, do not meet constitutional requirements for destruction or suppression of this otherwise public information. The Advisory Committee is concerned that the destruction of all juror questionnaires and related information is actually an after-the-fact blanket closure of voir dire that is not permissible under Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984). Additionally, the destruction of these materials when no longer needed for trial or appeal fails to recognize that a defendant may petition for postconviction relief at any time or habeas corpus relief for as long as he or she is incarcerated. In light of these concerns, the Advisory Committee therefore proposes the following amendment of Rule 814 for further consideration:

RULE 814. RECORDS

(a). the names of qualified prospective jurors drawn and the contents of juror qualification questionnaires completed by those prospective jurors must be made available to the public upon specific request to the court, supported by affidavit setting forth the reasons for the request, unless the court determines in any instance that access to

any such information in a criminal case should be restricted pursuant to Minn. R. Crim. P. 26.02, subd. 2(2) ~~in the interest of justice this information should be kept confidential or its use limited in whole or in part~~.

(b). the contents of juror qualification questionnaires must be made available to lawyers upon request in advance of voir dire. The court in a criminal case may restrict access to names, telephone numbers, addresses and other identifying information of the prospective jurors as permitted by Minn. R. Crim. P. 26.02, subd. 2(2).

(c). The jury commissioner shall make sure that all records and lists, including any juror qualification questionnaires, are preserved for the length of time ordered by the court except that in criminal cases such records and lists shall be preserved for at least ten years after judgment is entered. ~~The contents of any records or lists not made public shall not be disclosed until one year has elapsed since preparation of the list and all persons selected to serve have been discharged, unless a motion is brought under Rule 813.~~

At this time, the Advisory Committee is not proposing that the Supreme Court adopt these amendments to Rule 814. Rather, the Advisory Committee recommends that this proposal and recommendation #8 from the Jury Task Force Final Report be referred to the Minnesota Supreme Court Advisory Committee on General Rules of Practice. We feel this is appropriate because the proposed revisions relate to the General Rules of Practice and also because they affect civil proceedings and not just criminal proceedings.

Dated: 09/29/03

Respectfully submitted,

/s/
Judge Robert Lynn, Chair
Supreme Court Advisory Committee
on Rules of Criminal Procedure

PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

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

1. Rule 26.02, subd. 2. Juror Information.

Amend Rule 26.02, subd. 2 as follows:

Subd. 2. Juror Information.

(1). List of Prospective Jurors. Upon request the ~~clerk of court~~ court administrator shall furnish the parties with a list of the names and addresses of the persons on the jury panel and such other information as the ~~clerk of court~~ court administrator has obtained from the prospective jurors, unless otherwise ordered by the trial court after a hearing in accordance with this rule.

(2) Anonymous Jurors. Upon the motion of a party that there is a special need to restrict the parties' access to names, ~~and~~ addresses, telephone numbers, and other identifying information of prospective and selected jurors, the court shall hold a hearing on the motion. The court may order that the parties' and the public's access to this information about the prospective and selected jurors be restricted only if it determines that, in the individual case there is a strong reason to believe that the jury needs protection from external threats to its members' safety or impartiality. The court order may restrict access to such information during jury selection, trial and later for so long as such protection is necessary. Jurors and prospective jurors may be identified by number or by other method that protects their identity. If the court restricts access to this information, the court must also take reasonable precautions to minimize any possible prejudicial effect the restriction on access to this information might have on the defendant or on the state.

The court shall make clear and detailed findings of fact in writing or on the record in open court supporting its determination that the restriction on access to information about the prospective and selected jurors is necessary for their ~~the jurors'~~ safety or impartiality.

~~(2)~~ (3) Jury Questionnaire. As a supplement to oral voir dire, a sworn jury questionnaire designed for use in criminal cases may be used to obtain information helpful to the parties and the court in jury selection before the jurors are called into court for examination. The court may on its own initiative or on request of counsel include in the questionnaire additional questions that may elicit sensitive information. If sensitive questions are included, the prospective jurors shall be advised that instead of answering

any particular sensitive questions in writing they may request an opportunity to address the court, in camera with counsel and defendant present, concerning their desire that their answers to any particular sensitive questions not be public. When such a request is made by a prospective juror, the court shall proceed under Rule 26.02, subd. 4(4) and decide whether the particular sensitive questions may be answered during oral voir dire with the public excluded. Court personnel may hand out the questionnaire to the prospective jurors and collect them when completed. The court shall make the completed questionnaires available to counsel.

2. Rule 26.02, subd. 4(1) Purpose—By Whom Made.

Amend part (1) of rule 26.02, subd. 4 concerning voir dire examination as follows:

(1) Purpose—By Whom Made. A voir dire examination shall be conducted for the purpose of discovering bases for challenge for cause and for the purpose of gaining knowledge to enable an informed exercise of peremptory challenges, and shall be open to the public except upon order of the court as provided by Rule 26.02, subd. 4(4). The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge shall then put to the prospective juror or jurors any questions which the judge thinks necessary touching their qualifications to serve as jurors in the case on trial and may give such preliminary instructions as are set forth in Rule 26.03, subd. 4. Before exercising challenges, either party may make a reasonable inquiry of a prospective juror or jurors in reference to their qualifications to sit as jurors in the case. A verbatim record of the voir dire examination shall be made at the request of either party.

3. Rule 26.02, subd. 4. Voir Dire Examination.

Amend Rule 26.02, subd. 4 by adding a new part (4) at the end as follows:

(4) Exclusion of the Public from Voir Dire. In those rare cases where it is necessary, the following rules shall govern the issuance of any court orders excluding the public from any part of the voir dire or restricting access to such orders or to transcripts of any parts of the voir dire closed to the public.

(a). Advisory. When it appears that prospective jurors during voir dire may be asked sensitive questions that could be embarrassing to them, the court may on its own initiative or on request of the defense or the prosecution, advise the prospective jurors that they may request an opportunity to address the court in camera, with counsel and defendant present, concerning their desire to exclude the public from voir dire when the sensitive questions are asked.

(b). In Camera Hearing. If a prospective juror requests an opportunity to address the court in camera concerning exclusion of the public from

voir dire during sensitive questioning, the court shall conduct an in camera hearing on that issue on the record with counsel and the defendant also present. The court shall consider at the hearing whether there are any reasonable alternatives to closing voir dire.

(c). Standards. In considering the request to exclude the public during voir dire, the court shall balance the juror's privacy interests, the defendant's right to a fair and public trial, and the public's interest in access to the courts. The court may order closure of voir dire only if it finds that there is a substantial likelihood that conducting the voir dire in open court would interfere with an overriding interest including the defendant's interest in a fair trial and the juror's legitimate privacy interests in not disclosing deeply personal matters to the public. Any closure of voir dire shall be no broader than is necessary to protect the overriding interests involved.

(d). Refusal to Close Voir Dire. If the court determines that there is no overriding interest to justify excluding the public from voir dire, the voir dire shall continue in open court on the record and upon request the in camera proceeding shall be transcribed and filed with the court administrator within a reasonable time.

(e). Closure of Voir Dire. If the court determines that overriding interests justify closure of any part of the voir dire, that part of the voir dire shall be conducted in camera on the record with counsel and the defendant present.

(f). Findings of Fact. No order excluding the public from any part of the voir dire shall issue without the court setting forth the reasons therefor either in writing or orally on the record. The findings shall indicate why the defendant's right to a fair trial and the jurors' interests in privacy would be threatened by an open voir dire and shall also include a review of alternatives to closure and a statement of why the court believes such alternatives are inadequate.

(g). Record. Whenever under this rule in camera proceedings are held on a juror's request for closure or the public is excluded from any part of the voir dire, a complete record of the proceedings shall be made. Upon request, the record shall be transcribed within a reasonable time and shall be filed with the court administrator. The transcript shall be available to the public, but only if such disclosure can be accomplished while safeguarding the overriding interests involved. The court may order that the transcript or any part of it be sealed, that the name of a juror be withheld, or parts of the transcript be excised if the court finds that it is necessary to do so to protect the overriding interests involved.

4. Rule 26.03, subd. 15. Evidence.

Amend Rule 26.03 subd. 15 as follows:

Subd. 15. Evidence. In all trials the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules. Jurors shall not be permitted to submit questions to any witness, directly or through the court or counsel. If either party offers into evidence a videotape or audiotape exhibit, that party may also provide to the court a transcript of the proposed exhibit which will be made a part of the record.

5. Comments on Rule 26.02, subd. 2(2).

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

> In the rare case, where there is a belief that dissemination of this information poses a threat to juror safety or impartiality, ~~the rule~~ Rule 26.02, subd. 2(2) (Anonymous Jurors) provides for a hearing upon a party's motion that the jurors' names, ~~and~~ addresses, telephone numbers, and other identifying information not be distributed. At the hearing, the moving party will have an opportunity to present evidence and argument that there is reason to believe that the jury needs protection from external threats to its members' safety and impartiality. Upon a finding that there is strong reason to believe that this condition exists, the court may enter an order that information regarding identity, including names, telephone numbers, and addresses of prospective jurors be withheld from the public, parties and counsel. See *State v. Bowles*, 530 N.W.2d 521, 530-1 (Minn. 1995); *State v. McKenzie*, 532 N.W.2d 210, 219 (Minn. 1995). The restrictions ordered by the court may extend through trial and beyond as necessary to protect the safety and impartiality interests involved. To protect the identity of jurors and prospective jurors the court may order that they be identified by number or other method and may prohibit pictures or sketches in the courtroom. These procedures and protections are in accord with recommendation 22 of the Minnesota Supreme Court Jury Task Force Final Report of December 20, 2001. The trial court's decision will be reviewed under an abuse of discretion standard.

6. Comments on Rule 26.02, subd. 2(3).

Amend the twenty-third through twenty-eighth paragraphs of the comments on Rule 26 as follows:

Rule 26.02, subd. 2~~(2)~~ (3) (Jury Questionnaire).

The use of a written jury questionnaire has proved to be an extremely

useful tool in obtaining information from prospective jurors in criminal cases. While its use has been primarily reserved for serious felony cases, experience has established that expanded use of this tool will increase the amount of important information provided by prospective jurors and also make for a more efficient jury selection process. This rule approves of the use of a written questionnaire on a wider scale and provides the procedure for its use. The written questionnaire provided in the Criminal Forms following these rules, includes generally non-sensitive questions relevant to jury selection in any criminal case. See Form 50 for the Jury Questionnaire. Additionally the court on its own initiative or on request of counsel may submit to the prospective jurors as part of the questionnaire other written questions that may elicit sensitive information that might be helpful based on the particular case to be tried.

Once the panel of prospective jurors for a particular case has been determined, the judge or court personnel will instruct the panel on the use of the questionnaire. The preamble at the beginning of the Jury Questionnaire (Form 50) provides the basic information to the prospective jurors including their right to ask the court to permit them to answer any sensitive questions orally and privately. Upon completion of the questionnaire, the court shall make the questionnaire available to counsel for use in the jury selection process. The questionnaire may be sworn to either when signed or when the prospective juror appears in court at the time of the voir dire examination. Because of the information contained in the questionnaire, counsel will not need to expend court time on this information, but can move directly to follow-up questions on particular information already available in the questionnaire. However, the written questionnaire is intended only to supplement and not to substitute for the oral voir dire examination provided for by Rule 26.02, subd. 4.

The use and retention of jury questionnaires have been subject to a variety of practices. This rule provides that the questionnaire is a part of the jury selection process and part of the record for appeal and reflects current law. As such, the questionnaires should be preserved as part of the court record in the case. See Rule 814 of the General Rules of Practice for the District Courts as to the length of time such records must be retained. Additionally, see Rule 26.02, subd. 2(2) as to restricting public access to the names, addresses, telephone numbers, and other identifying information concerning jurors and prospective jurors when the court determines that an anonymous jury is necessary.

It is recognized that the idea of the privacy of the questionnaire adds to the candor and honesty of the responses of the prospective jurors. However, in light of other applicable laws and the fact that the questionnaire is part of the record in the case, prospective jurors cannot be told that the questionnaire is confidential or will be destroyed at the conclusion of the case. Rather, the jurors can be told, as reflected in the preamble to the Jury Questionnaire (Form 50), that they can ask the court to permit them to answer sensitive questions orally and privately under Rule 26.02, subd. 4(4). This procedure should minimize the sensitive or embarrassing information in the written questionnaires and consequently the need for sealing or destroying them.

In addition to being part of the record in the case, jury selection is a part of the criminal trial which is presumed to be open to the public. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) (*Press-Enterprise I*). The use of a jury questionnaire as part of jury selection is also a part of the open proceeding and therefore the public and the ~~press~~ media have a right of access to that information in the usual case. See e.g., *Lesher Communications, Inc. v. Superior Court of Contra Costa County*, 224 Cal. App. 3d 774 (1990).

7. Comments on Rule 26.02, subd. 4(4).

Amend the comments on Rule 26 by adding the following new paragraph after the existing twenty-eighth paragraph of the comments:

Rule 26.02, subd. 4(4) (Exclusion of the Public from Voir Dire) provides the procedure and standards for excluding the public from voir dire or restricting access to related orders or transcripts when prospective jurors are questioned on sensitive or embarrassing matters. The Minnesota Supreme Court Jury Task Force in its Final Report of December 20, 2001 in recommendation 20 proposed that the Rules of Criminal Procedure be amended to safeguard the privacy interests of prospective jurors during voir dire when the interrogation focuses on highly sensitive or personal matters. Rule 26.02, subd. 4(4) does that, but subject to the dictates of *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) which requires balancing a prospective juror's privacy interest against the defendant's right to a fair and public trial and the First Amendment right of the public to have access to court proceedings. Under that case only a compelling interest would justify closing voir dire to the public and any restrictions on access must be narrowly tailored to serve that interest. Closure of voir dire must be rare and should be ordered only when the interrogation touches on deeply personal matters that the prospective juror has legitimate reasons for keeping out of the public domain. Under the rule and in accord with *Press-Enterprise*, the request to close voir dire must be initiated by the prospective juror. However, the court must advise the prospective jurors of the right to make that request when it appears that sensitive questions may be asked during voir dire. Any determination by the court to close any part of the voir dire must be supported by findings either in writing or orally on the record. The court may withhold names, restrict access to orders or transcripts, and excise transcripts as may be necessary to safeguard the overriding privacy interests involved.

8. Comments on Rule 26.03, subd. 15.

Amend the sixth-fourth paragraph of the comments on Rule 26 concerning Rule 26.03, subd. 15 as follows:

Rule 26.03, subd. 15 (Evidence) leaves to the Minnesota Rules of Evidence the issues of the admissibility of evidence and the competency of witnesses except as otherwise provided in these rules. As to the use of a deposition at a criminal trial, Rule 21.06 controls rather than the Minnesota Rules of Evidence if there is any conflict between them. See Rule 802 and the comments to Rule 804 in the Minnesota Rules of Evidence. The prohibition in Rule 26.03, subd. 15 against jurors submitting questions to witnesses is taken from *State v. Costello*, 646 N.W.2d 204 (Minn. 2002).

9. Form 50. Jury Questionnaire.

Amend the preamble to Form 50 as follows:

> The use of this Questionnaire is to assist lawyers and the court in the selection of a fair, impartial and neutral jury.
>
> Your answers to the questions contained in the Questionnaire, like your answers to questions in open court during jury selection proceedings, are part of the public record in this case.
>
> DO NOT DISCUSS YOUR ANSWERS WITH ANY OF THE OTHER PROSPECTIVE JURORS.
>
> (If additional questions are asked that may elicit sensitive information, the following language should be included: If you object to answering any particular questions in writing because the answers will be sensitive or embarrassing to you, you may request an opportunity to address the court to ask that such answers be given orally and not disclosed to the public.)

C1-84-2137
STATE OF MINNESOTA
IN SUPREME COURT

In Re:

Supreme Court Advisory Committee
On Rules of Criminal Procedure

REPORT AND PROPOSED AMENDMENTS TO RULE 5.02 OF THE RULES OF CRIMINAL PROCEDURE CONCERNING APPOINTMENT OF THE PUBLIC DEFENDER

September 29, 2003

Hon. Robert Lynn, Chair

Caroline Bell Beckman, St. Paul
Leonardo Castro, Minneapolis
James D. Fleming, Mankato
Theodora Gaitas, Minneapolis
William Hennessy, Grand Marais
Candice Hojan, St. Paul
Kathryn M. Keena, Hastings
Thomas M. Kelly, Minneapolis
William F. Klumpp, Jr., St. Paul
Wayne A. Logan, St. Paul
John W. Lundquist, Minneapolis
Arthur Martinez, Minneapolis
Paul Scoggin, Minneapolis
Hon. Jon Stafsholt, Glenwood
Robert Stanich, St. Paul
Hon. Heather L. Sweetland, Duluth

Hon. Russell Anderson
Supreme Court Liaison

C. Paul Jones, Minneapolis
Counselor

Philip Marron, Minneapolis
Reporter

Kelly Mitchell, St. Paul
Staff Attorney

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

The Supreme Court Advisory Committee on Rules of Criminal Procedure has reviewed the public defender eligibility standards of Rule 5.02 in light of the current serious funding problems of the public defender system. This review was also prompted by recent caselaw and legislation related to Rule 5.02. In the case of In Re Stuart, 646 N.W.2d 520 (Minn. 2002), the Supreme Court considered what constitutes a "liquid asset" under Rule 5.02 for purposes of appointing counsel. Additionally, the legislature recently amended various provisions in Ch. 611 of the Minnesota Statutes effective

July 1, 2003, concerning provision of attorney and other defense services to indigents. Minn. Stat. §611.27 (Supp. 2003). Because of the urgency of this matter, the Advisory Committee believes it should be considered without delay.

The Advisory Committee on Rules of Criminal Procedure recommends that the Supreme Court adopt the Proposed Amendments to Rule 5.02 of the Rules of Criminal Procedure submitted herewith. These proposed amendments incorporate the holding of In Re Stuart, 646 N.W.2d 520 (Minn. 2002) and the standards set forth in Minn. Stat. §611.27 (Supp. 2003). The Advisory Committee at this time is not recommending any amendment of forms 47 (Application for Public Defender) and 48 (Order on Application for Public Defender) because of pending litigation concerning the constitutionality of public defender co-payments. The Advisory Committee will report to the court concerning those forms at a later date.

Dated: 9/29/03

Respectfully submitted,

/s/
Judge Robert Lynn, Chair
Supreme Court Advisory Committee
on Rules of Criminal Procedure

PROPOSED AMENDMENTS TO RULE 5.02 OF THE RULES OF CRIMINAL PROCEDURE

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

1. Rule 5.02. Appointment of Public Defender.

Amend Rule 5.02 as follows:

Rule 5.02. Appointment of Public Defender

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

(1) Notice of Right to Counsel. If a defendant charged with a felony, gross misdemeanor, or misdemeanor punishable by incarceration appears without counsel, the court shall advise the defendant of the right to counsel and the appointment of the district public defender if the defendant has been determined to be ~~is~~ financially unable to afford counsel. The court shall also advise the defendant of the right to request counsel at any stage of the proceedings.

(2) Appointment of the Public Defender. Upon the request of a defendant charged with a felony, gross misdemeanor, ~~or~~ misdemeanor punishable by incarceration, extradition proceeding under section 629, or probation revocation proceeding, who is not represented by counsel and is financially unable to afford counsel, the judge or judicial officer shall appoint the district public defender for the defendant. The court shall not appoint a district public defender to a defendant who is financially able to retain private counsel, but refuses to do so. ~~In all other cases, the court may appoint an attorney for a defendant financially unable to afford counsel when requested by the defendant or interested counsel or when such appointment appears advisable to the court in the interests of justice to the parties.~~

(3) Waiver of Counsel, Misdemeanor. If a defendant appearing without counsel charged with a misdemeanor punishable upon conviction by incarceration does not request counsel and wishes to represent himself or herself, the defendant shall waive counsel in writing or on the record. The court shall not accept the waiver unless the court is satisfied that it is voluntary and has been made by the defendant with full knowledge and understanding of the defendant's rights. The court may appoint the public defender for the limited purpose of advising and consulting with the defendant as to the waiver.

(4) Waiver of Counsel, Felony, Gross Misdemeanor. If a defendant appearing without counsel charged with a felony or gross misdemeanor does not request counsel and wishes to represent himself or herself, the court shall ensure that a voluntary and intelligent written waiver of the right to counsel is entered in the record. If the defendant refuses to sign the written waiver form, the waiver shall be made orally on the record. Prior to accepting any waiver, the trial court shall advise the defendant of the following: the nature of the charges, the statutory offenses included within the charges, the range of allowable punishments, that there may be defenses, that there may be mitigating circumstances, and all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel. The court may appoint the district public defender for the limited purpose of advising and consulting with the defendant as to the waiver.

Subd. 2. Appointment of Advisory Counsel. The court may appoint "advisory counsel" to assist the accused who voluntarily and intelligently waives the right to counsel.

(1) If the court appoints advisory counsel because of its concerns about fairness of the process, the court shall so state on the record. The court shall, on the record, then advise the defendant and counsel so appointed that the defendant retains the right to decide when and how the defendant chooses to make use of advisory counsel and that the decision on what type of role advisory counsel is permitted may affect a later request to allow advisory counsel to assume full representation of the accused.

(2) If the court appoints advisory counsel due to its concerns about delays in completing the trial because of the potential disruption by the defendant or because of the complexity or length of the trial, the court shall so state on the record. The court shall on the record then advise the defendant and counsel so appointed that advisory counsel will assume full representation of the accused if (a) the defendant becomes so disruptive during the proceedings that such conduct is determined to constitute a waiver of the right of self representation or (b) the defendant requests advisory counsel to take over representation during the proceeding.

Advisory counsel must be present in the courtroom during all proceedings in the case and must be served with all documents which must be served upon an attorney of record.

Subd. 3. Standards for District Public Defense Eligibility. A defendant is financially unable to obtain counsel if:

(1) The defendant, or any dependent of the defendant who resides in the same household as the defendant, receives means-tested governmental benefits; or

(2) The defendant, through any combination of liquid assets and current income, would be unable to pay the reasonable costs charged by private counsel in that judicial district for a defense of ~~a case of the nature at issue~~ the same matter.~~; or~~

~~(3) The defendant can demonstrate that due to insufficient funds or other assets: two members of a defense attorney referral list maintained by the court have refused to defend the case or, if no referral list is maintained, that two private attorneys in that judicial district have refused to defend the case.~~

Subd. 4. Financial Inquiry. An inquiry to determine financial eligibility of a defendant for the appointment of the district public defender shall be made whenever possible prior to the court appearance and by such persons as the court may direct. This inquiry may be combined with the pre-release investigation provided for in Rule 6.02, subd. 3. In no case shall the district public defender be required to perform this inquiry or investigate the defendant's assets or eligibility. The court has a duty to conduct a financial inquiry. The inquiry must include the following:

(1) the liquidity of real estate assets, including homestead;

(2) any assets that can be readily converted to cash or used to secure a debt;

(3) the value of all property transfers occurring on or after the date of the alleged offense; and

(4) the determination of whether transfer of an asset is voidable as a fraudulent conveyance.

The burden is on the accused to show that he or she is financially unable to afford counsel. Defendants who fail to provide the information necessary to determine eligibility shall be deemed ineligible.

Subd. 5. Partial Eligibility and Reimbursement. The ability to pay part of the cost of adequate representation at any time while the charges are pending against a defendant shall not preclude the appointment of the public defender for the defendant. The court , if after previously finding that the defendant is eligible for public defender services, determines that the defendant now has the ability to pay part of the costs, may require a defendant, to the extent able, to compensate the governmental unit charged with paying the expense of the appointed public defender.

2. Comments on Rule 5.02.

Amend the tenth paragraph of the comments on Rule 5 as follows:

~~This rule also allows the court to appoint counsel for a defendant charged with an offense which is not punishable by incarceration and who is financially unable to afford counsel upon the request of the defendant or interested counsel or upon the court's initiative when in the interests of justice to the parties. The United States Supreme Court in *Argersinger v. Hamlin*, 405 U.S. 348 (1972) did not decide that counsel was not required whenever incarceration was not authorized. Considerations other than the possibility of incarceration may make the case sufficiently serious to warrant the appointment of the public defender and this rule provides for that possibility.~~

3. Comments on Rule 5.02.

Amend the seventeenth paragraph of the comments on Rule 5 as follows:

These general reasons for the appointment of ~~the public defender~~ counsel to the pro se defendant suggest a natural expectation of the level of readiness of advisory counsel. If the court appoints advisory counsel as a safeguard to the fairness of the proceeding, it would not be expected that counsel would be asked to take over the representation of the defendant during the trial and counsel should not be expected and need not be prepared to take over representation should this be requested or become necessary. If this unexpected event occurred and a short recess of the proceeding were sufficient to allow counsel to take over representation, the court could enter that order. If the circumstances constituted a manifest injustice to continue with the trial, a mistrial could be granted and a date for a new trial, allowing counsel time to prepare, could be set. The court could also deny the request to allow counsel to take over representation if the circumstances would not make this feasible or practical.

4. Comments on Rule 5.02.

Amend the twenty-third paragraph of the comments on Rule 5 as follows:

Rule 5.02, subd. 3 prescribes the standard to be applied by the court in determining whether a defendant is financially eligible for the appointment of the

public defender. This standard is based upon the standards adopted by the Minnesota ~~State Board of Public Defense on January 30, 1993~~ Legislature effective July 1, 2003 in Minn. Stat. §611.27 (Supp. 2003) except that the statute expressly prohibits the appointment of the public defender as advisory counsel. This rule also recognizes the limited resources of district public defenders.

5. Comments on Rule 5.02

Amend the twenty-sixth and twenty-seventh paragraphs of the comments on Rule 5 as follows:

~~Under part (3), the defendant is eligible for public defender representation if they are able to demonstrate that they have attempted to obtain private defense counsel and have been unsuccessful due to their financial circumstances.~~ It is strongly recommended that the district court maintain a list of attorneys who wish to have cases referred to them and who are willing to try to make financial arrangements with defendants to permit them to accept representation. A number of organizations, including the Hennepin and Ramsey County Bar Associations and the Minnesota Association of Criminal Defense Lawyers, maintain lists of private attorneys who will accept criminal defense cases at a fee rate which will be determined after consideration of the defendant's ability to pay. ~~The defendant may demonstrate eligibility for the public defender by being turned down by two attorneys from the court's referral list due to the defendant's financial circumstances. If no referral list is maintained by the court, the defendant may also prove eligibility by demonstrating that they have contacted two attorneys in the judicial district and that both have refused representation due to the defendant's financial circumstances.~~ The existence of such a referral list may not, however, be a basis for failing to appoint counsel for a defendant who is financially eligible for public defender representation under Parts (1) or (2) of this rule.

To assist the court in deciding whether to appoint the public defender, Rule 5.02, subd. 4 provides that whenever possible a financial inquiry should be conducted before the defendant's appearance in court. Such an inquiry may be combined with the pre-release investigation provided for in Rule 6.02, subd. 3. The rule also emphasizes the court's obligation to jealously guard the resources of district public defense and outlines the extent to which the court must go to determine district public defense eligibility in accordance with *In Re Stuart,* 646 N.W.2d 520 (Minn. 2002). In order to avoid the creation of conflicts of interest and to focus limited public defender resources on client representation, the public defender shall not be permitted or required to participate in determining whether particular defendants are eligible for public defender representation.

STATE OF MINNESOTA

IN SUPREME COURT

C1-84-2137

HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE
RULES OF CRIMINAL PROCEDURE

WRITTEN COMMENTS BY
THE HONORABLE KATHLEEN GEARIN, SECOND JUDICIAL DISTRICT,
THE HONORABLE DANIEL MABLEY, FOURTH JUDICIAL DISTRICT, AND
THE HONORABLE WILLIAM WALKER, SEVENTH JUDICIAL DISTRICT
CHAIRS OF THE SUPREME COURT JURY TASK FORCE

TO: THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT

Thank you for the opportunity to comment on the proposed change to the Rules of Criminal Procedure concerning the Jury Task Force Recommendations. As you know, the Jury Task Force met from April 2000 through December 2001 to discuss and make recommendations related to juror utilization and treatment. The Criminal Rules Committee considered our recommended changes to the Rules of Criminal Procedure and came to a different result concerning juror privacy, confidentiality of voir dire questionnaires and jury sequestration issues. The Task Force chairs are submitting these comments to reiterate the position of the Jury Task Force in those areas.

I. JUROR PRIVACY

The Criminal Rules Committee cites Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) ("Press-Enterprise Co.") as the reason why it cannot accept the Jury Task Force Recommendation #20. The Jury Task Force closely analyzed the Press-Enterprise Co. case in making its recommendation about juror privacy during voir dire. The Task Force's suggested rule change stated:

> (a) Court's Discretion. In the discretion of the court the examination of each juror may take place outside of the presence of other chosen and prospective jurors and observers. The court may also take answers to individual voir dire questions touching on sensitive or private issues at the bench or otherwise outside the presence of the venire and observers. When the court or counsel ask voir dire questions touching on sensitive or private issues, the court should inform prospective jurors that they may elect to answer the questions in private.

This language alerts judges that on a case-by-case basis they can give jurors the choice to answer sensitive questions at the bench or in chambers. Even after reading the Criminal Rules Committee's report and proposed rule change, the Task Force believes its proposed rule meets the standard set out in the Press-Enterprise Co. case. The procedures proposed by the Criminal Rules Committee are overly detailed and assume that judges cannot follow the dictates of the Press-Enterprise Co. case without step-by-step instructions. The Task Force's research turned up no other state that has created a procedural rule or statute similar to the one proposed by the Criminal Rules Committee. By contrast, the Task Force's proposed rule change, with a reference to the Press-Enterprise Co. case in the comment to the rule, provides the necessary guidance to judges on this issue.

II. CONFIDENTIAL VOIR DIRE QUESTIONNAIRES

Recommendation #21 of the Jury Task Force Report has two parts. First is a recommendation that voir dire questionnaires not be maintained on the public record. Second is a recommendation that they be destroyed after they are no longer needed for trial or appeal. Specifically, the Task Force recommended the following amendment to Rule 26.02, subd. 2(2) of the Rules of Criminal Procedure:

> (2) *Jury Questionnaire.* As a supplement to oral voir dire, a sworn jury questionnaire designed for use in criminal cases may be used to obtain information helpful to the parties and the court in jury selection before the jurors are called into court for examination. Court personnel may hand out the questionnaire to the prospective jurors and collect them when completed. The court shall make the completed questionnaires available to counsel. If copies of the questionnaires are made for counsel, the copies shall be returned to the court at the conclusion of jury selection and destroyed. The originals and copies of questionnaires completed by jurors not selected for service on the panel for a particular case shall be destroyed immediately following jury selection, unless either party requests that the questionnaire of a particular juror be preserved because of possible appellate issues. Questionnaires completed by jurors who are selected to serve as jurors in a particular case shall be preserved under seal as a part of the court record and shall not be disclosed except by order of the court based upon good cause shown for such disclosure. Upon return of a "not guilty" verdict, or at the conclusion of all appellate proceedings or the expiration of time for appeal in cases in which a verdict of "guilty" is returned, the original questionnaires retained under seal shall be destroyed.

The Task Force further recommended that the second sentence of the preamble to "Form 50. Juror Questionnaire" be stricken and that the following sentence be substituted:

> The completed Questionnaire is confidential and will be shared only with counsel and the parties solely for the purpose of jury selection. At the

conclusion of jury selection, all copies of the Questionnaire will be destroyed, and your original Questionnaire will be retained by the court "under seal" -- that is, no one will be permitted to have access to it without a court order based upon a showing of good cause. The Questionnaire will be destroyed at the conclusion of all proceedings in the case.

Responding to the Criminal Rules Committee's reasoning for rejecting this proposal, the Task Force recognizes that some jurisdictions have applied Press-Enterprise Co. to voir dire questionnaires, see, e.g., Lesher Communications, Inc. v. Superior Court of Contra Costa County, 224 Cal. App. 3d 774 (1990), but many other jurisdictions have confidential voir dire questionnaires. Court rules from Arizona, Idaho, Missouri and New York specifically provide that jury questionnaires are confidential and, other than being provided to the parties for jury selection preparation, shall not be disclosed to anyone except pursuant to court order. See Ariz. St. S. Ct. R. 123; Idaho R. Civ. P. 47; Idaho R. Crim. P. 23.1; Mo. R. 18 Cir. 52.1; N.Y. Uniform R. Jury Sys. § 128.14.

Citizens attending the focus groups expressed many concerns about privacy issues. Many former jurors expressed to the Jury Task Force their dismay at learning that the current rules presently provide that voir dire questionnaires are a part of the public record. The Jury Task Force believes that protecting the privacy of answers to questions will encourage jurors to be more open in their answers. Recommendation #21 of the Jury Task Force Report seeks to improve jurors' confidence in the jury selection process and does not violate Press-Enterprise Co. or any other case law applicable in Minnesota.

III. JURY SEQUESTRATION

This issue was thoroughly discussed by the Jury Task Force. The Task Force recommended that sequestration be left to the sound discretion of the trial judge. The Criminal Rules Committee reviewed this recommendation and went exactly in the opposite direction. The Criminal Rules Committee recommended an expansion of the rule by giving prosecutors, as well as defense attorneys, the ability to demand overnight sequestration. This expanded rule was adopted by the Supreme Court effective February 1, 2003. Minn. R. Crim. P. 26.03, subd. 5 (1).

The reasoning provided in the Jury Task Force Report still stands. From a policy perspective, the factors that should enter into the decision to sequester are: (1) the seriousness of the alleged offense; (2) the length and complexity of the trial; and (3) the likelihood that the jurors may be exposed to improper outside influences or information. The consideration and resolution of these factors are particularly well suited to a determination by the trial judge, after input from opposing lawyers.

The Task Force did not examine other state laws and court rules when making this recommendation, but it is interesting to note that only Minnesota and Texas allow the attorneys to decide whether jurors should be sequestered during deliberations. See Tex. Code Crim. Proc. § 35.23 (2001). The Task Force believes, and the majority of states agree, that having the

attorneys make the decision about overnight sequestration is bad policy, even if "the power is not being abused", as the Criminal Rules Committee's report states.

Because of the hardships created for sequestered jurors and the factors that go into the decision to sequester during deliberations, that decision should be the trial judge's alone. The Task Force hopes the Supreme Court will take this opportunity to amend Rule 26.03, subd. 5(1) of the Rules of Criminal Procedure and remove the phrase "with the consent of the defendant and the prosecution."

Serving on the Jury Task Force was a positive experience for each of the Task Force chairs. In the time since the Task Force Report, the budget crisis has meant that we have had to retreat on some important juror treatment issues, such as reducing the juror per diem from $30 to $20. The creation of the new jury orientation video is the only Jury Task Force recommendation that has been fully implemented to date. The proposed changes to the Rules of Criminal Procedure outlined above do not cost extra money. In fact, allowing sequestration to be at the judge's discretion will be more likely to result in cost savings. The Task Force hopes that these recommendations and others, all of which came out of focus groups with jurors, consultation with national jury experts and many hours of work by committee members, will be implemented by the Supreme Court.

Minnesota Conference of Chief Judges
130 Minnesota Judicial Center
St. Paul, Minnesota 55155

November 12, 2003

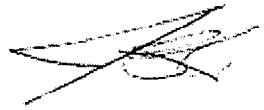
Mr. Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, Minnesota 55155

Dear Mr. Grittner:

Attached please find 14 copies of the comment on behalf of the Conference of Chief Judges regarding the Supreme Court Advisory Committee on Rules of Criminal Procedure's Report and Proposed Amendments to the Rules of Criminal Procedure Concerning the Supreme Court Jury Task Force's Recommendations, filed with the court on September 29, 2003.

By this letter, I also respectfully request that a member of the Conference of Chief Judges be given the opportunity to make an oral presentation at the public hearing scheduled for November 18, 2003. I will provide the name of that individual by the end of this week.

Sincerely,



Hon. J. Thomas Mott
Chair, Conference of Chief Judges

Att.

STATE OF MINNESOTA

IN SUPREME COURT

C1-84-2137

HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

WRITTEN COMMENTS FROM THE CONFERENCE OF CHIEF JUDGES

TO: THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT

The Conference of Chief Judges ("CCJ") reviewed the proposed amendments to the Rules of Criminal Procedure at its October 17, 2003 meeting. The judges disagreed with the proposed rules regarding juror privacy, confidentiality of voir dire questionnaires, sequestration and records retention. The CCJ is submitting comments to articulate its position and provide alternatives to the proposed rules.

I. JUROR PRIVACY

It is the position of the CCJ that constitutional case law requires a court to balance the often-conflicting demands of different constitutional rights when deciding to limit public access to voir dire. The seminal case on this issue, Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (hereinafter "Press Enterprise I"), provides standards for courts to use before closing voir dire to the public. In Press-Enterprise I, the Supreme Court held that the presumption of openness of voir dire may be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Id. at 510. Some of these "overriding interests" include the prospective and selected jurors' right to privacy and the defendant's right to an impartial jury. The proposed amendments by the Jury Task Force and the Supreme Court Advisory Committee on Rules of Criminal Procedure focus on one "overriding interest" (juror privacy), while the CCJ proposal recognizes that other rights also may require protection during voir dire. In order to balance all of these rights with the presumption of an open voir dire, the CCJ proposes its amendments to the criminal rules concerning voir dire.

Although the Jury Task Force and the Supreme Court Advisory Committee on Rules of Criminal Procedure both recognize Press-Enterprise I as the source of the standard to use in deciding whether to close voir dire, neither mentioned that the Press-Enterprise I standard is already a part of the Minnesota Rules of Criminal Procedure. Minn. R. Crim. P. 25 governs when prejudicial publicity may adversely affect pretrial proceedings.

Subdivision 1 provides procedures for a trial court to follow when deciding whether to close pretrial hearings to the public and press. These procedures consist of the standards set out by the Supreme Court in Press-Enterprise I. See Minn. R. Crim. P. 25.01, cmt. (citing Press-Enterprise I as the source of standards for "sufficiency of the alleged overriding interest to justify closure of the hearing" in voir dire). Because Press-Enterprise I dealt explicitly with standards for closure of voir dire, the standards drawn from Press-Enterprise I and implemented in Minn. R. Crim. P. 25 should also be implemented in any amendments to the rules concerning closure of voir dire. For this reason, the CCJ offers the following amendments to the criminal rules concerning voir dire that follow the Press-Enterprise I standard as already established in the criminal rules.

1. Rule 26.02, subd. 4(1) Purpose—By Whom Made.

Amend part (1) of rule 26.02, subd. 4 concerning voir dire examination as follows:

(1) *Purpose—By Whom Made.* A voir dire examination shall be conducted for the purpose of discovering bases for challenge for cause and for the purpose of gaining knowledge to enable an informed exercise of peremptory challenges, and shall be open to the public except upon order of the court as provided by Rule 26.02, subd. 2. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge shall then put to the prospective juror or jurors any questions which the judge thinks necessary touching their qualifications to serve as jurors in the case on trial and may give such preliminary instructions as are set forth in Rule 26.03, subd. 4. Before exercising challenges, either party may make a reasonable inquiry of a prospective juror or jurors in reference to their qualifications to sit as jurors in the case. A verbatim record of the voir dire examination shall be made at the request of either party.

2. Rule 26.02, subd. 4 (2) (a) Court's Discretion.

Amend part (a) of Rule 26.02, subd. 4 (2) concerning court discretion as follows:

(a) ~~Court's Discretion~~ Grounds for Closure of Voir Dire. All voir dire shall be open to the public. However, ~~I~~in the discretion of the court, or upon motion of the defendant or the prosecuting attorney, the examination of each juror may take place outside of the presence of other ~~chosen and~~ prospective and selected jurors and observers on the ground that an open voir dire may interfere with an overriding interest, including interference with a prospective or selected juror's privacy or the defendant's right to an impartial jury. When it appears that prospective jurors may be asked sensitive questions that may cause them embarrassment, the court shall inform prospective jurors that they may

request an opportunity to present such concerns to the court in camera, with counsel present. The closure of voir dire shall not be granted unless the court makes findings that there is a likelihood of such interference. In deciding on the motion, the court shall consider reasonable alternatives to closing voir dire, and the closure shall be no broader than is necessary to protect the overriding interest involved.

If the proposed rule amendments above were adopted, the Comment to Rule 26 would also need to be revised to reflect the explicit incorporation of the Press-Enterprise I standards.

II. CONFIDENTIAL VOIR DIRE QUESTIONNAIRES

Voir dire questionnaires are an important tool in the jury selection process. As noted in the Jury Task Force Report Recommendation #21, current practice varies widely regarding what to do with these questionnaires after voir dire is completed. Although the comment to Rule 26.02, subd 2(2) states that "jurors cannot be told that the questionnaire is confidential," there is no law cited for this proposition. It is true that some jurisdictions have applied Press-Enterprise I to voir dire questionnaires, see, e.g., Lesher Communications, Inc. v. Superior Court of Contra Costa County, 224 Cal. App. 3d 774 (1990), but none of these jurisdictions have any bearing on Minnesota law. In fact, many court rules specifically provide that jury questionnaires are confidential and, other than being provided to the parties for jury selection preparation, shall not be disclosed to anyone except pursuant to court order. See Idaho R. Civ. P. 47; Idaho R. Crim. P. 23.1; Ariz. St. S. Ct. R. 123; Mo. R. 18 Cir. 52.1; N.Y. Uniform R. Jury Sys. § 128.14.

These questionnaires should be confidential and should be retained as part of the court record for the period of direct appeal. Confidentiality encourages prospective juror candor, which helps to protect the defendant's right to an impartial jury. Confidentiality also protects prospective and selected jurors' right to privacy. For these reasons, the CCJ recommends that Rule 26.02, subd. 2(2) be amended to state:

> (2) Jury Questionnaire. As a supplement to oral voir dire, a sworn jury questionnaire designed for use in criminal cases may be used to obtain information helpful to the parties and the court in jury selection before the jurors are called into the court for examination. Court personnel may hand out the questionnaire to the prospective jurors and collect them when completed. In order to provide for open, complete and candid responses to the questionnaire, information provided on these questionnaires shall be confidential and shall not be disclosed without court order. For the limited purposes of trial preparation, ~~T~~the court shall make completed questionnaires available to counsel.

If this confidentiality policy were adopted, the Comment to this rule would have to be modified, as well as the heading to Rules of Criminal Procedure Form 50. The CCJ also recommends that the court's records retention policy be amended to require the retention

for two years of the voir dire questionnaires for those jurors who were questioned during jury selection.

The constitutional importance of this issue should not be underestimated. Jurors need to be able to give candid responses on these questionnaires in order to ensure a fair trial. The Criminal Rules Committee is relying on a few cases from distant jurisdictions for the proposition that voir dire questionnaires cannot be confidential. The CCJ urges the Supreme Court to adopt a rule similar to rules in practice in many other states, providing that voir dire questionnaires are confidential unless opened by order of the court.

III. JURY SEQUESTRATION

The CCJ feels strongly that the decision to sequester jurors should be at the discretion of the trial judge. Judges are in the best position to weigh the various factors in each case and decide whether sequestration is necessary. As stated by the New Hampshire Supreme Court, "sequestration is an extreme measure, one of the most burdensome tools of the many available to assure a fair trial." State v. Smart, 622 A.2d 1197, 1209-10 (N.H. 1993). The decision whether or not to sequester should be left to the judge and should not require the consent of either the defense or prosecuting attorney. Most importantly, the criminal rules should not require the consent of the parties before permitting the jury to separate overnight during deliberations in criminal cases.

The majority of states and the federal government give discretion to the trial court to decide whether a jury will be sequestered during trial and deliberations, and the judge may act to sequester or to separate the jury even over the defendant's objection. See Marcy Strauss, Sequestration, Am. J. Crim. L. 63, 72 (1996). A number of other states have mandatory sequestration for certain serious felonies, most often in capital cases, but allow the trial judge discretion in all other case types. Id. at 74. Texas is the only state other than Minnesota that requires the consent of the parties before permitting the jury to separate overnight during deliberations in criminal cases. Tex. Code Crim. Proc. § 35.23 (2001)[1].

In addition, the current rule has conflicting provisions. Rule 26.03, subd. 5 (2) provides that either party may move for sequestration, and then provides a standard for judges to use when deciding on this motion. Rule 26.03, subd. 5 (1) authorizes judicial discretion to allow the jury to separate overnight during deliberations, but only upon the consent of both parties. When sections (1) and (2) are read together, one can imagine the following scenario: an attorney moves for sequestration under Rule 26.03, subd. 5 (2) and the court denies the motion, finding that sequestration is not required. Yet the court can still be required to sequester the jury overnight despite this finding, if the same attorney refuses to provide consent for the jurors to separate as provided in Rule 26.03, subd. 5(1). Why require a judge to apply a standard in deciding sequestration motions when the

[1] Texas makes an exception for misdemeanor cases, where the decision to sequester is left to the trial judge. The Minnesota rule does not have a misdemeanor exception and requires the consent of the attorneys in every criminal case.

attorneys can get overnight sequestration without meeting any standard at all? The language provided in Rule 26.03, subd. 5(2) describes the appropriate standard. In order to insure that sequestration is ordered only in cases where there is "such notoriety or the issues are of such a nature that, in the absence of sequestration, highly prejudicial matters are likely to come to the attention of the jurors," the judge alone should weigh these factors and make a determination.

The Criminal Rules Committee's submission to this court states that "[a]lthough defendants, and now the prosecution, may require jury sequestration during deliberation, that power is not being abused and the current procedure is working well." The CCJ response to that statement is that, although Minnesota may not currently have a sequestration epidemic, it is bad policy to allow attorneys to demand overnight sequestration of jurors in any criminal case. The majority of other states and the federal government recognize that the trial judge is in the best position to determine whether sequestration is required. Because this rule is currently before the Supreme Court, the CCJ asks the court to take this opportunity to change bad policy and follow the practice of the majority of states by resolving the conflicting provisions in the existing rules.

IV. CHANGES TO RULE 814

Although the Criminal Rules Committee is not recommending the adoption of their proposed change to Rule 814 of the General Rules of Practice before referral to the General Rules Committee, the CCJ would like to make its position clear on this issue. The CCJ supports the position that the juror qualification questionnaire, as well as the voir dire questionnaire discussed above, should be retained for two years for both criminal and civil cases. The ten year rule proposed by the Criminal Rules Committee for juror questionnaires (apparently including both the juror qualification questionnaires and the voir dire questionnaires) is untenable and shows no understanding of either the storage space limitations in local courts or the and practical concerns with having a differing standard between criminal and civil cases.

Rule 814 of the General Rules of Practice currently provides that juror qualification questionnaires are confidential, except for lawyers requesting the questionnaire in advance of voir dire. This is a good policy and there is no reason to change it. The juror qualification questionnaires serve the administrative function of providing information about whether prospective jurors meet the requirements to serve under Rule 808 of the General Rules of Practice. They contain a prospective juror's name, address, phone number and, in some counties, social security number. Rule 814 should be left unchanged in its protection of juror privacy as to qualification questionnaires.

V. NEED FOR IMPROVED PROCESS WITH RULES COMMITTEES

When the CCJ discussed these proposed rule changes at its October 17, 2003 meeting, there was a consensus that the CCJ did not have adequate time to appropriately review and respond to the Criminal Rules Committee's recommendations. The CCJ is

increasingly concerned with the lack of consultation and the short time frames it is given to respond to proposed rules and rules changes. The Supreme Court should consider instituting a process that better deals with the conflict between the fiscal impacts of the Rules and the CCJ's responsibility to administer the trial court budget. Currently, some rules committees solicit CCJ and public input before the final report is sent to the Supreme Court, but the Criminal Rules Committee does not. All rules committees should provide the CCJ with substantially more than the one-month notice given before the Supreme Court hearing in this case.

STATE OF MINNESOTA

IN SUPREME COURT

C1-84-2137

HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE
RULES OF CRIMINAL PROCEDURE

WRITTEN COMMENTS BY THE COURT EXECUTIVE TEAM (CET)
AND JURY MANAGEMENT RESOURCE TEAM (JMRT)

TO: THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT

Thank you for the opportunity to comment on the proposed change to the Rules of Criminal Procedure concerning the Jury Task Force Recommendations. For the juror privacy and voir dire questionnaire issues, the CET and the JMRT (hereinafter "CET") support the submission from the Conference of Chief Judges and do not feel it is necessary to comment separately. For the jury sequestration and records retention issues, the CET is providing additional comments to focus on the administrative implications of approving these rules and the impact on jurors. Additionally, the CET is requesting that there be court administration representation on the Criminal Rules Committee.

I. JURY SEQUESTRATION

The CET favors sequestration being at the sole discretion of the trial judge. Sequestration is consistently one of the biggest concerns of prospective jurors. Dealing with both the hypothetical fears and the practical problems for jurors regarding sequestration takes up administrative staff time. Sequestered jurors are startled to find out at the end of trial that they will be spending that night in a hotel room with a stranger. Some jurors require medication, so family members drive an hour or more to the courthouse to bring them what they need. Other jurors have children that need to be picked up from daycare, or pets that need to be fed. There are certainly times when sequestration is required to provide a fair trial, but because of the impact on jurors this decision should be left to the sound discretion of the trial judge.

Under the current system created by Rule 26.03, subd. 5, neither the judge nor court staff know until the end of trial whether jurors will be sequestered overnight. This makes it very difficult for court staff to plan ahead for hotel rooms, transportation, and other arrangements. If the rule were changed to provide for sequestration only at the discretion of the judge, it is much more likely that the judge would know a day or more before deliberations whether the jury will be sequestered. This would allow for better planning on the part of court staff.

The current jury information system does not track the total number of sequestrations statewide, but data does exist on some of the costs associated with sequestration. These figures include expenditures on meals, hotels, and transportation associated with jury sequestration during deliberations. They do not include the cost to sheriff's departments of supervising the jurors or the court staff costs for arranging juror accommodations.

District	2002[1] Cost
First	$18,540
Second	$35,709
Third	$12,780
Fourth	$67,735
Fifth	$3,094
Sixth	$7,363
Seventh	$6,285
Eighth	$3,292
Ninth	$5,170
Tenth	$10,461
TOTAL	**$170,429**

Although these costs do not represent a large portion of the $4 million jury budget, there would be cost savings associated with limiting overnight sequestration to the judge's discretion. Cost is not the most important reason for changing the sequestration rule, but should be considered as one factor.

Currently only Minnesota and Texas allow the attorneys to decide whether jurors should be sequestered overnight. See Tex. Code Crim. Proc. § 35.23 (2001). Even though the Criminal Rules Committee is correct that jury sequestration during deliberations is not often demanded, the question is not whether the decision making power is being abused but whether attorneys are the proper decision makers concerning sequestration. In the CET's view, the policy followed by the majority of states is the correct one: Judges are in the best position to weigh the factors, apply a consistent standard, and make a finding about the need for sequestration. See Marcy Strauss, Sequestration, Am. J. Crim. L. 63, 72 (1996).

Because of the hardship for jurors, the difficulties of planning for administrators, and the fact that judges are in the best position to make decisions about the need for sequestration, the CET asks the Supreme Court to delete the phrase "with the consent of the defendant and the prosecution" from Rule 26.03, subd. 5(1) of the Rules of Criminal Procedure.

[1] Some districts provided cost information for the fiscal year, while others used a calendar year, but all amounts cover a 12-month period.

II. RECORDS RETENTION

In the juror selection process, two documents contain information about potential jurors: the juror qualification questionnaire and the voir dire questionnaire (also called the sworn jury questionnaire in Rule 26.02, subd. 2(2) of the Rules of Criminal Procedure). The juror qualification questionnaire (the form potential jurors complete to determine if they are qualified to serve as jurors as defined by Rule 808 of the General Rules of Practice) contains basic identification information about potential jurors, including date of birth, telephone number, home address and, in some counties, social security numbers. The voir dire questionnaire is a form used to expedite the voir dire process and is defined in Rule 26.02, subd. 2(2) of the Rules of Criminal Procedure.

Recommendation #8 of the Jury Task Force Final Report only asked for changes to Rule 814 of the General Rules of Practice regarding *juror qualification questionnaires*; it did not relate to voir dire questionnaires. The qualification questionnaire serves a purely administrative function. Court staff use this questionnaire to determine who is eligible to be a prospective juror. Minn. R. Gen. P. 807, 808. Thus, it should not be subject to the dictates of the Press-Enterprise Co. case and its progeny relating to closure of voir dire proceedings. See Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984). A small number of jurisdictions have applied the Press-Enterprise Co. standard to voir dire questionnaires, see, e.g., Lesher Communications, Inc. v. Superior Court of Contra Costa County, 224 Cal. App. 3d 774 (1990), but no case has ever extended its protection to juror qualification questionnaires. The Criminal Rules Committee was likely confusing the two questionnaires when it stated, "The Advisory Committee is concerned that the destruction of all juror questionnaires and related information is actually an after-the-fact blanket closure of voir dire. . . ." The qualification questionnaires have nothing to do with voir dire, and therefore the Jury Task Force's recommended changes to Rule 814 of the General Rules of Practice are permissible and should be adopted by the General Rules Committee and this Court.

Even if the Court should decide that some amendment of Rule 814 is necessary under Press-Enterprise Co., the Criminal Rules Committee' proposed changes are unworkable in practice. The juror qualification questionnaires are not connected to any particular case. They are kept for two years under the current records retention policy. There would be no practical way for court administrators to separate out the questionnaires of jurors who served on criminal cases, from those who served on civil cases, from those who were never assigned to a case at all. The proposed amendments state that qualification questionnaires for jurors who served on criminal cases should be kept for ten years, much longer than the current two-year requirement. Court administrators around the state receive over 75,000 juror qualification questionnaires per year. Because of the inability to separate out questionnaires of jurors in criminal cases, the proposed rule would require all questionnaires to be kept for ten years, which raises significant storage space concerns and other practical problems.

In the CET's view, the juror qualification questionnaire should not be subject to the processes outlined in the Press-Enterprise Co. case. Therefore, the amendments suggested by the Jury Task Force should be considered in order to increase juror privacy concerning a purely administrative document that includes sensitive information.

III. CRIMINAL RULES COMMITTEE REPRESENTATION

The Court Executive Team strongly favors having court administration representation on every court rules committee. The Criminal Rules Committee does not currently include any court administrators. The CET believes that without a representative to provide a court administration perspective, the committee is more likely to propose rules that may unduly burden court staff and have an impact on the court budget that has not been fully considered. Therefore the CET asks that the Supreme Court consider appointing a court administration representative to this committee.