Olmsted County Court

CIVIL-CRIMINAL DIVISION
Room 205, Rochester City Hall
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JUDGES
THOMAS J. SCANLAN
GERARD W. RING
ROBERT NESETH

JOHN N. RICE
CLERK OF COUNTY COURT

ANGIE CHAFOS
CHIEF DEPUTY CLERK

January 24, 1975

Supreme Court of Minnesota
St Paul
Minnesota 55101

Re Misdemeanor Rules of Criminal Procedure 45517
Rule 27.03, Subdivision 9

Gentlemen

I will not be able to attend the hearing before the Court scheduled for January 31, 1975. I would, however, like to register a strong objection to the language of proposed Rule 27.03, Subdivision 9. The last sentence of that rule would seem by implication to deny a Court the right to modify a sentence involving payment of fines or jail after that sentence was pronounced. This, I believe, would be unduly restrictive to the Court and, also, in many cases, would work a hardship upon defendants who appear in Court.

At the present time it is quite common for our Court to permit installment payments of fines. From time to time a person who is making weekly or monthly payments comes back to Court and indicates that there has been a substantial change in circumstances since the fine was imposed. For example, a man who was employed gets laid off or injured and for some period of time is unable to pay the fine. The Court should have the option of reducing the fine or extending the time for payment. A literal interpretation of the proposed rule might mean that once the installment payment schedule was set, the Court could not even modify the dates of those payments.

An even more serious problem is present in the case of jail terms imposed at the time of sentencing. At the present time we have a program in our county jail under the supervision of the Department of Court Services. I have a standing rule that any person sentenced to jail for a period in excess of fifteen days shall be immediately interviewed and a post-sentence report filed by the Department. Based upon that report, a sentence may be modified or suspended upon certain conditions. It is our experience that relatively short sentences seem to be the most effective. However, particularly in the case of first offenders who may believe that the courts really do not look seriously on their misconduct, the imposition of a ninety day sentence which is thereafter reduced is very effective. I am of the impression that this sort of "shock probation" is widely used throughout this state. I am also of the impression that the courts of some other states have construed language similar to that of the proposed rule to mean that a court may not modify a jail sentence once imposed.

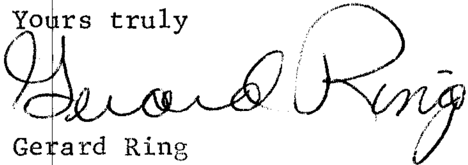
I recognize that by properly qualifying the sentence as imposed, I could perhaps reserve to the Court Services the right to release a defendant early. It is also true that at the present time it is generally the practice of this Court to impose a jail sentence and add the phrase "unless released prior thereto by the Department of Court Services". Quite possibly, that sort of language would avoid the problem created by Subdivision 9. I do not believe, however, that the rules should be so restrictive. If I neglected to add the language, the defendant would then be required to serve the full ninety days without possibility of later modification.

I believe it would also be advisable to clear up the question which presently exists as to who has the authority to modify sentences. Accordingly, I would propose that proposed Rule 27.03, Subdivision 9 be amended and that a Subdivision 10 be added as follows.

> Subdivision 9 Correction or Reduction of Sentence. The court at any time may correct a sentence not authorized by law.
>
> Subdivision 10 Modification of Sentence. The Court may at any time modify a sentence during either a stay of imposition or execution of sentence except that the court may not increase the period of confinement. The court may modify a sentence imposing a fine, jail or workhouse term at any time prior to its completion, except that the fine or period of confinement may not be increased. Except as otherwise provided in these rules, any such modification shall be done by the judge

who imposed such sentence. If such judge is unavailable, the Chief Judge of the district shall appoint a judge to act for the sentencing judge. In a single-judge district, the acting judge shall have such authority.

Yours truly



Gerard Ring
Judge of Dodge-Olmsted County Court

45517

STATE OF MINNESOTA

IN SUPREME COURT

IN RE PROPOSED RULES OF
CRIMINAL PROCEDURE

BRIEF OF JOSEPH P. SUMMERS
JUDGE OF COUNTY MUNICIPAL COURT
RAMSEY COUNTY

1339 Court House
Saint Paul, Minnesota 55102

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C. Rule 4.02, Subd. 5 (1), to permit initial appearance on felony and gross misdemeanor matters in district, rather than county court, where the two courts concur. 5

D. Rule 4.02, Subd. 5 (3), to eliminate the requirement of a written complaint where there is a tab charge in misdemeanor and traffic cases, except where (a) the arresting party did not witness the offense or (b) the court requires a written complaint, and to eliminate the requirement that the complaint be filed within 36 hours, except where the defendant is in custody. 7

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INTRODUCTION

I am concerned that the long-term effect of the adoption of a code of rules of criminal procedure will be to freeze the present state of the art into permanency. The great advances in Constitutional and criminal law have come from court decisions, not codifiers. It has been the experience of history from the Corpus Juris Civilis through the Code Napoleon that codes start out as advances and end up as hindrances.

It appears, however, that a Code will be adopted. It should not be the present document, unless substantial amendments are made. The attached amendments are not exhaustive, and represent only my own views as to technical changes which would make the Rules more workable.

The proposed Misdemeanor Rules were inserted into the document before the Court almost as an afterthought. They were never circulated by the Committee for comment. The January 31 hearing before your Court is the first opportunity for criticism and review of the rules by affected persons.

No judge of either the Hennepin or Ramsey County Municipal Courts is a member of the Advisory Committee. Since our benches had input neither through membership on the Committee nor the opportunity to be heard, the Misdemeanor Rules do not reflect the substantial experience of our benches in handling large number of misdemeanor cases.

It is respectfully suggested that the Rules be referred back to the Committee with instructions that the Committee provide an opportunity for affected individuals to be heard, and that the Committee consider adopting the attached amendments.

PROPOSED AMENDMENT TO RULE 2.01

...Except as provided in Rules 11.06 and 15.08, the facts establishing probable cause to believe that an offense has been committed and that the defendant committed it shall be set forth separately in writing in or with the complaint, or in supporting affidavits, and may be supplemented by sworn testimony of witnesses taken before the issuing officer. If such testimony is taken, a note so stating shall be made on the face of the complaint by the issuing officer. The testimony shall be recorded by a reporter or recording instrument. ~~and-shall-be-transcribed-and-filed.~~ A free transcript of such testimony shall be provided on request to the defendant or his counsel.

COMMENT

The proposed rule would require that the court reporter transcribe and file every probable cause hearing at which testimony was taken beyond the facts set forth in or attached to the complaint.

The proposal will be counterproductive. It will tempt judges either to eliminate such examinations and rely exclusively upon the summary statements contained in the complaint, or to conduct "off the record" interrogations of complainants, simply to reduce the typing burden on their reporters.

If it were required that a free transcript of the probable cause hearing be provided to the defendant or his lawyer if either of them requests, the burden of transcription would be materially reduced while the defendant's right to be apprised of the facts which support the complaint against him would be preserved.

PROPOSED AMENDMENTS TO RULE 3.03

3.03, Subd. 1. The warrant shall be executed by an officer authorized by law. The summons may be served by any officer authorized to serve a warrant, and if served by ~~certified~~ mail, it may also be served by the clerk of the court of which the issuing officer is judge or judicial officer.

Subd. 3. The warrant shall be executed by the arrest of the defendant. If the offense charged is a misdemeanor the defendant shall not be arrested on Sunday, or on a legal holiday, or between the hours of 9:00 o'clock p.m. and ~~9:00~~ 6:00 o'clock a.m. on any other day ~~unless the offense is punishable by incarceration and then only~~ except by direction of the issuing officer, endorsed on the warrant when exigent circumstances exist. The officer need not have the warrant in his possession at the time of the arrest, but shall inform the defendant of the existence of the warrant and of the charge against him.

The summons shall be served on an individual defendant by delivering a copy to him personally or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it by ~~certified~~ first class mail to the defendant's last known address. A summons directed to a corporation shall be issued and served in the manner prescribed by law for service of summons on corporations in civil actions or by ~~certified~~ first class mail addressed to the corporation at its principal place of business or to an agent designated by the corporation to receive service of process.

COMMENT

1. Eliminate certified mail. The idea behind the summons concept is to reduce the number of arrest warrants issued. Mailed notice, therefore, should use that form of mail most likely to be received and read.

The postman who does not find the addressee of certified mail at home leaves a card requesting the addressee to pick up the item at the post office.

The urban poor know certified mail means trouble and tend not to pick it up. In addition, of course, many have no cars, and it is unlikely that anyone would take a special bus trip just to pick up a certified letter. Thus the use of certified mail will result in more, rather than fewer warrants.

2. Permit nightcapping of petty misdemeanor warrants. It is impossible to find a certain class of urban defendant during the daytime. Why should these "night people" be permitted to flout the law?

3. Permit non-nightcapped warrants to be served after 6:00 A.M. At present, we must give the police a full nightcap in order to authorize them to pick up a defendant who goes to work before 9:00 A.M., unless we want him arrested at work. Advancing the service hour from 9:00 A.M. to 6:00 A.M. would result in fewer requests for nightcap and fewer arrests at work.

PROPOSED AMENDMENT TO RULE 4.02, Subd. 5 (1)

(1) Before Whom and When.

If an arrested person is not released purusant to this rule or Rule 6, he shall be brought before the nearest available judge of the county court of the county where the alleged offense occurred or judicial officer of such court or judge of a municipal court in such county. He shall be brought before such judge or judicial officer without unnecessary delay, and in any event, not more than 36 hours after the arrest, exclusive of Sundays and legal holidays, or as soon thereafter as such judge or judicial officer is available. Provided, however, in misdemeanor cases, if the defendant is not brought before a judge or judicial officer within the 36-hour limit, he shall be released upon citation as provided in Rule 6.01, subd. 2.

By agreement between the district court and county court, all appearances by persons accused of felonies and gross misdemeanors, including first appearances, may be in the district court instead of the county court.

COMMENT

The only policy reasons to require the first appearance of a felony or gross misdemeanor defendant to be in the county court are (1) to set the date for the preliminary hearing, if demanded; or (2) because the district court may not be in session when the defendant is to appear.

With the substitution of the omnibus hearing for the preliminary hearing, reason (1) does not apply in those courts where the district court will handle the omnibus. Reason (2) has never applied in Hennepin and Ramsey Counties, where the district court holds daily sessions for the arraignment of criminal defendants.

Therefore the Rules should permit the district and county courts of these counties to agree that all appearances by felony and misdemeanor defendants be in the district court.

Such a procedure would have the following advantages:

(1) It would eliminate the initial county court appearance, thus reducing the amount of delay between arrest and trial;

(2) It would reduce the likelihood of mistake by reducing the number of court records required;

(3) It would halve the number of appearances which must be made by defense attorneys prior to trial;

(4) It would enable the district judges to have full control over the conditions of release or bail of felony or gross misdemeanor defendants, rather than being bound in fact by county court determinations with which they may not agree.

Since the proposed amendment is permissive, not mandatory, there should be no opposition to its adoption.

PROPOSED AMENDMENT TO RULE 4.02, SUBD. 5(3)

4.02, Subd. 5 (3). Complaint or tab charge; Misdemeanors.

If there is no complaint made and filed by the time of the defendant's first appearance in court as required by this rule for a misdemeanor charge, the clerk shall enter upon the records a brief statement of the offense charged, including a citation of the statute, rule, regulation, ordinance or other provision of law which the defendant is alleged to have violated. This brief statement shall be the complaint. ~~However, if the judge orders, or if requested by the person charged or his attorney, a formal complaint shall be made and filed.~~ A formal complaint shall be ordered if it shall appear that the person who arrested or cited the defendant did not witness the offense charged, and in other cases in the discretion of the judge. If the defendant is in custody, and no valid complaint has been made and filed within 36 hours after the ~~demand~~ order therefor, exclusive of Sundays and legal holidays, the defendant shall be discharged, the proposed complaint, if any, and any supporting papers shall not be filed, and no record shall be made of the proceedings. A complaint is valid when it (1) complies with the requirements of Rule 2, and (2) the judge has determined from the complaint and any supporting affidavits or supplemental sworn testimony that there is probable cause to believe that an offense has been committed. Upon the filing of a valid complaint, the defendant shall be arraigned. When a charge has been dismissed for failure to file a valid complaint and a valid complaint is thereafter filed, a warrant shall not be issued on that complaint unless a summons has been issued first and either could not be served or, if served, the defendant failed to appear in response thereto.

COMMENT

1. The "written complaint" requirement. This rule by its terms requires that a sworn, written complaint issue upon request in any tab charge, and, impliedly, on every misdemeanor traffic ticket.

This is the current law in every county court except Ramsey. It should be changed. The written complaint requirement merely imposes a lot of busy work on prosecutors and judges, increases the number of court appearances, and does not serve any valid public purpose.

The statement in the Comment to this rule that "It is anticipated that complaints will be requested by defendants in only a small percentage of misdemeanor cases because discovery is permitted under Rule 7.03" is simply naive. In Hennepin County, which is now subject to the proposed rule, "demanding a written complaint" is a routine first step for almost all defendants who are represented by counsel.

Thus every day a bored prosecutor or policeman brings a sheaf of complaints before an equally bored judged, swears routinely to all of them, and due process goes on.

With the "open file" policy dictated by Rule 7.03 in misdemeanor cases, there is simply no reason for mandatory written complaints except where the arresting or citing officer did not witness the offense or in those circumstances where the arraignment judge, in his sound discretion, determines that the circumstances call for it. This is the present--and better--practice in Ramsey County.

2. The 36-hour rule. If the defendant is not in custody, there is no earthly reason why the complaint should have to be produced in 36 hours. The statement in the Comment that "The 36-hour limit, of course, can be waived by a defendant" is not supported by the Rule. In any event, I do not believe defense attorneys will freely waive a provision which might get their clients off scot-free.

PROPOSED AMENDMENT TO RULE 6.03

6.03, Subd. 1. Upon ~~an-application-of-the-prosecuting-attorney alleging-that~~ the violation by a defendant ~~has-violated~~ of the conditions of his release, ~~the-judge,-judicial-officer,-or-court-that-released the-defendant~~ the judge or judicial officer of the court in which the matter is pending may issue a warrant directing that the defendant be arrested and taken forthwith before ~~such-judge,-judicial-officer, or~~ the court. A summons directing the defendant to appear before ~~such-judge,-judicial-officer,-or~~ the court at a specified time shall be issued instead of a warrant unless it reasonably appears that there is a substantial likelihood that the defendant will fail to respond to a summons, or when the whereabouts of the defendant is unknown~~.~~, the defendant fails to make a required court appearance, or the public safety requires that a warrant issue immediately.

COMMENT

The amendments to lines 3 and 7 are to eliminate surplusage and make it clear that a warrant is returnable before any judge of the court, rather than solely before the issuing judge.

The amendment to line 4 is to preserve the court's power to compel the appearance of persons before it regardless of whether the prosecutor requests that a warrant be issued. Prosecutors tend to be lax in policing violations of conditional releases, and a defendant ought not be able to remain in violation merely because the prosecutor does nothing about it.

The additional language at the end of Subd. 1 is to make it clear that we do not have to resort to a summons before issuing a warrant if the nature of the defendant's violation is a failure to appear as ordered. A direction to appear is an order of court, a failure to appear is a direct violation of that order. I do not think we ought to have to send the defendant an engraved invitation before taking stronger means to insure his presence. The "public safety" amendment is designed to cover situations where the condition

of release was imposed to protect an innocent party.
If the defendant, for instance, threatens a complaining witness, we should not have to use a summons first merely because his whereabouts are known and it is likely that he would respond to a summons.

PROPOSED AMENDMENT TO RULE 6.05

6.05 Supervision of Detention. The trial court shall exercise supervision over the detention of defendants within the court's jurisdiction for the purpose of eliminating all unnecessary detention. The officer in charge of a detention facility shall make ~~bi-weekly~~ written reports to the prosecuting attorney and to the court having jurisdiction over the prisoners listing each defendant who ~~has-been-held-in-custody-for-a-period-in-excess-of ten-days~~ is in custody pending criminal charges, arraignment, trial, sentence, or revocation of probation. Reports shall be made as frequently as the court shall direct, but at least twice each week. Reports to the county court shall include prisoners held for other counties, states or the United States.

COMMENT

The proposed rule is barbaric. We require daily reports of everyone who is held for our court, and they are screened every morning by a judge. The rule would only permit us to require such reports twice a week, and then only of defendants who have been in custody for over ten days.

The clarifying language referring to prisoners held for other counties is essential in view of the vagueness of the phrase "court having jurisdiction over the prisoners," which can be taken to mean only those courts in which the charges are pending.

One matter which is not dealt with in the rule is the problem of Federal prisoners held in local detention facilities. While it rarely happens, a Federal prisoner will occasionally be "forgotten" in a local jail. If his name were required to be on the detention list, the odds are that at some point an arraignment judge would check with the local Federal authorities to see what they intend to do with him.

PROPOSED AMENDMENT TO RULE 7.03

7.03. Before the date set for the Omnibus Hearing, in felonies and gross misdemeanor cases, the prosecution and ~~defendant~~ defense shall complete the discovery that is required by Rules 9.01, subd. 1 and 2 to be made without the necessity of an order of court.

In misdemeanor cases, without order of court the prosecuting attorney on request of the defendant or his attorney shall, prior to arraignment or at any time before trial, permit the defendant or his attorney to inspect and reproduce the police investigatory reports. Any other discovery shall be by consent of the parties or by ~~motion-to-the~~ order of court. For good cause shown, the court may limit or forbid the reproduction or dissemination of the police investigative reports.

COMMENT

The correction in line 2 is merely to correct an error in parallelism.

The substantive change is to permit the court to limit or forbid the reproduction or dissemination (but not the inspection) of police reports. The change is suggested so that the court could prohibit the dissemination of scandalous material about innocent parties, upon a proper showing. Consider, for instance, the mass disorderly house arrest. Shouldn't there be some protection against the screwball *pro se* defendant who, for his own purposes, wishes to Xerox hundreds of copies of these raw police reports and spread them all over town?

PROPOSED AMENDMENTS TO RULE 23

Rule 23.04 provides that the prosecution and defense may, without consent of the court, agree that <u>any</u> misdemeanor is to be treated as a petty misdemeanor, thereby depriving the court of jurisdiction to impose a fine in excess of $100, or a workhouse sentence.

Rule 23.05 provides that, in cases where the charge has been so reduced by the prosecution and defense, the defendant is not entitled to a jury trial if the offense involves "moral turpitude".

23.04 and 23.05 should be expunged in their entirety. It is a legislative, not a judicial, function to decide in the first instance what shall be the punishment for crime. To give prosecutors and defense attorneys the absolute right to reduce any misdemeanor charge to a petty misdemeanor is a violation of legislative prerogative and an open invitation to improper collusion, particularly where the court has no voice in the decision.

For example, driving while under the influence now requires a mandatory jail sentence upon a second conviction within three years. Under the proposed rule, the prosecution and defense could reduce the charge to a petty misdemeanor and compel the court to administer only a maximum $100 fine.

I also fail to see the reason why reduction of the offense to petty misdemeanor status should operate to deprive the defendant of a jury trial if the offense also involves moral turpitude, but not to deprive him of a jury trial if the offense does not involve moral turpitude.

PROPOSED AMENDMENT TO RULE 27.03, Subd. 6

Subd. 6. Record. A verbatim record of the sentencing proceedings shall be made. ~~and transcribed.~~ In felony or gross misdemeanor cases, the record shall be transcribed and filed.

COMMENT

The rule as it stands would require the transcription of each and every sentencing. In 1974 there were approximately 11,500 sentencings in our court, generally on traffic matters. There are policy reasons why the sentencing proceeding ought to be transcribed where the sentence might be long and the proceeding important in a post-conviction remedy case. These policy considerations do not apply in the sentencing on a dog ordinance violation or a tag for improper left turn. It would be ridiculous to require that all these sentencings be transcribed and filed. The provision indicates once again how out of touch the framers of these rules were with conditions in busy urban courts.

So long as a verbatim record of these petty sentencings is kept, it is available for transcription in that one case out of a million where it might become relevant.

1-2-75
copy to Scott, J

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AREA CODE 612
TELEPHONE 333-5555
RES. 920-4665

December 30, 1974

Clerk of the Minnesota Supreme Court
Supreme Court of Minnesota
State Capitol
St. Paul, Minnesota 55101

Re: Petition In Re Proposed Rules of Criminal Procedure

Attention: John McCarthy

Dear Mr. McCarthy:

I am enclosing an original and a copy of a Petition In Re Proposed Rules of Criminal Procedure, which concerns itself with Rule 6 of those Rules.

I am requesting oral argument, and would request 30 minutes for such purpose.

This Petition is being submitted pursuant to an Order dated November 19, 1974, by Chief Justice Robert Sheran, and pursuant to discussion with Justice George Scott concerning the form of the Petition. The normal number of briefs and size of brief or petition have been waived by Justice George Scott.

It should be noted there are two issues in this Petition. The issue concerning itself with the 10 percent bail deposit provision is the position taken by the Criminal Law Committee of the State Bar Association in 1972 and 1973. My appearance will be on behalf of that Committee as its chairman. The issue that concerns itself with mandatory and permissive release is an issue which the Hennepin County Bar Association's Individual Rights and Responsibilities Committee and the Governing Council of that Bar Association have taken. My appearance on behalf of that issue will be as vice-chairman of said Committee.

Respectfully yours,

Ellis Olkon

EO:dj
cc: Justice George Scott
Enclosures

PETITION FOR REVISION OF RULE 6---PRETRIAL RELEASE

Minnesota Proposed Rules of Criminal Procedure

I.

Revision of Sec. 6.02, Subd. 1--Release by Judge, Judicial Officer or Court, Conditions of Release.

ISSUE

THIS SUBDIVISION, CONDITIONS OF RELEASE, SHOULD BE REVISED TO INCLUDE AFTER (c) A PROVISION FOR DEPOSIT OF 10 PERCENT OF THE AMOUNT OF BAIL AS AN ALTERNATIVE AVAILABLE TO THE COURT. THE NEW SUBPARAGRAPH "d" IS TO READ AS FOLLOWS:

(d) Require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 percent of the amount of the bond. When the conditions of the bond have been performed and the accused discharged from all obligations in the cause, the Clerk of Court shall return to him, unless the Court orders otherwise, 90 percent of the sum deposited and retain as bail bond costs 10 percent of the amount deposited.

II.

Revision of Sec. 6.01--Release on a Citation by Law Enforcement Officer Acting Without a Warrant.

ISSUE

THIS SECTION SHOULD BE REVISED TO MAKE THE ISSUANCE OF A CITATION BY STATION HOUSE POLICE MANDATORY FOR GROSS MISDEMEANORS AND FELONIES AS WELL AS MISDEMEANORS.

PROCEDURAL HISTORY

It was argued at the Minnesota State Bar Convention in June of 1972 and several times before the Minnesota House and Senate in 1973 that legislation was necessary in the area of pretrial release. H.F.373 passed the House, and S.F.348, a companion bill, died in the Senate because of the argument that stronger reforms in the area of pretrial release will be adopted by the Minnesota Supreme Court. Both H.F.373 and S.F.348 contained a provision for a 10 percent deposit and other A.B.A. Standards Relating to Pretrial Release.

INTRODUCTION

Accused persons whose guilt or innocence has not yet been adjudicated constitute a distinct class of individuals. Though presumed innocent, they may be subjected to those restrictions necessary to ensure their appearance at all judicial proceedings. These restrictions, or their absence, define their pretrial status in Rule 6 of the Proposed Rules of Criminal Procedure.

The Advisory Committee quotes liberally from the A.B.A. Standards Relating to Pretrial Release in its Comments. However, in certain respects the spirit of the A.B.A. Standards is violated by the Proposed Rules. With regard to the essential posture of the A.B.A. Standards on the role of money bail in pretrial release, it must be noted that money bail is to be regarded as a last resort only. "<u>It should be presumed that the defendant is entitled to be released on order to appear or his own recognizance</u>. The presumption may be overcome by a finding that there is substantial risk of non-appearance, or a need for conditions..." (A.B.A. Standards, Pretrial Release 5.1. Emphasis supplied.) "Money bail should be set only when it is found that no other conditions on release will reasonably assure the defendant's appearance in court..." <u>The sole purpose of money bail is to assure the defendant's appearance</u>. Money bail should not be set to punish or frighten the defendant, to placate public opinion, or to prevent anticipated criminal conduct." (Id. 5.3 (a), (b).) The A.B.A. Standards also recommend total elimination of the professional bail bondsman. See A.B.A. Standards, Pretrial 5.4 and National Advisory Committee on Criminal Justice Standards and Goals, Litigated Case, Chapter 4, 1973.

The considerations for disfavor of money bail in pretrial release relate primarily to the invidious and inevitable discrimination against the poor. "The bail system as it now generally exists is unsatisfactory from either the public's or the defendant's point of view. Its very nature requires the practically impossible task of translating risk of flight into dollars and cents and even its basic premise--that risk of financial loss is necessary to prevent defendants from fleeing prosecution--is itself of doubtful validity." (A.B.A. Standards at 215.) In addition, failure to release before trial is economically wasteful and expensive both of monetary and human resources. "The consequences of pretrial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants.... Moreover, there is strong evidence that a defendant's failure to secure pretrial release has an adverse effect on the outcome of his case." (Id. 216-217.)

By the failure of the Proposed Rules to include a 10 percent bail deposit provision, the Advisory Committee has omitted a crucial element of the total plan for essential reform of the present system. In addition, by unnecessarily narrowing the scope of issuance of citations in lieu of arrest and detention, the Committee does violence to the presumption that the defendant is to be released without bail unless it is shown that there is reason to believe his release should be conditional.

ARGUMENT

I.

TEN PERCENT DEPOSIT PROVISION

"Ten percent bail" is another alternative to the traditional monetary bail system. Instead of paying as much as a 10 percent non-refundable premium to a professional bondsman, the accused executes a bond for the amount set by the court and deposits 10 percent of the amount with the clerk of court. Since 1963, 35 states have enacted bail reform legislation. Many of these jurisdictions have authorized the use of the 10 percent deposit provision. The 10 percent deposit provision is also included in the 1966 Federal Bail Reform Act.

The 10 percent deposit provision instills confidence in the system. Upon compliance with the conditions of his bond, the accused is refunded all or a very high proportion of the cash

deposit. This procedure thus eliminates the bondsman for good risk defendants, and substantially reduces the cost to the defendant who appears in court.

In Philadelphia during the first 9½ months of the Ten Percent Cash Bail Program (Feb. 23, 1972 to October 31, 1972), 89.5 percent of defendants who made bail took advantage of the program. Appearance rates have been shown to be at least as good for those who post the 10 percent bond as for those who post a surety bond. During 1964, in the First District of the Municipal Court Division of the Circuit Court of Cook County, bondsmen wrote 35,571 bonds, 11.4 percent of which were forfeited; 27,956 bonds were posted under the 10 percent program, only 7.7 of which were forfeited. During 1969, in the same district, 84,202 bonds were posted under the 10 percent program, 11.7 percent of which were forfeited. See 83 Yale Law Journal 153, A Proposal for Pretrial Release, 1973.

The Advisory Committee advances as its reasoning for the exclusion of the 10 percent bail deposit provision that, if only 10 percent were to be deposited, "...the amount of the money set did not truly represent the actual bail, but that bail in an amount equal to the 10 percent figure would be more realistic." Minnesota Proposed Rules and Comments, at 28. This reasoning is erroneous for the following reasons:

> Statistics from the federal system and all jurisdictions with the 10 percent deposit provision show a high degree of success.
>
> The entire purpose of the bail requirement is to assure the appearance of the defendant in court, not to provide a source of income for the State. If we accept that premise it becomes apparent that the rules regulating bail which should be adopted are those which are most likely to result in the re-appearance of the defendant. The most crucial factor in determining the likelihood of re-appearance is the defendant's state of mind.
>
> Obviously, in a case where the defendant deposits 10 percent of the bail with the knowledge that it will be returned, and with the knowledge that the full amount is owing if he defaults, there exists a strong incentive to return for the subsequent appearances in court. Conversely, if the 10 percent is paid to a bondsman as a premium,

the defendant has now spent his money and has no hope of its return. If he fails to appear, the court looks to the bondsman, not the defendant for the remainder. (In practice the bondsman, who in Minnesota is not regulated by any rules or statutes, seldom pays the balance due. This is discretionary with each and every judge.) Any further payment by the defendant would be only whatever the bondsman, as a private citizen, would be able to collect from him or his co-signer.

By the use of 10 percent provision, the defendant is clearly conscious that the bail relationship is a relationship between himself and the court, and it remains so throughout the course of the criminal case. However, where a bail bondsman is involved, the relationship becomes one between defendant and the bail bondsman; the court, at least in the defendant's mind, has been removed as a party concerned with bail.

II.

PROPOSAL--AMEND 6.01 Subd. 1(2) and Subd. 2--MANDATORY AND PERMISSIVE.

A further purpose of this petition is to change the language of Rule 6, Subd. 2 "Permissive Authority to Issue Citations for Gross Misdemeanors and Felonies" to "Mandatory Authority, etc."

Subd. 1 provides for mandatory issuance of citations for misdemeanors by arresting officers and for misdemeanors, gross misdemeanors and felonies when ordered by prosecuting attorney or judge. By the terms of Subd. 2, a station house officer in charge has authority to issue citations for gross misdemeanors and felonies unless certain enumerated conditions occur. This authority is described as "permissive." However, the authority granted to arresting officers by Subd. 1 is mandatory under exactly the same conditions.

It is proposed that Rule 6.01, Subd. 1(2) be deleted in its entirety. Further, that 6.01, Subd. 2 be changed from permissive authority to mandatory authority, and that all language conform with 6.01, Subd. 1 (1)(b).

There is no reason why the term "permissive" is used in one case and "mandatory" in another where the exceptions are exactly the same. The same policy reasons for the preference for citations over detention exist in both cases. It cannot be denied that defendants charged with felonies are unlikely to be sentenced to a correctional institution if convicted. In 1973, 137,000 serious crimes were reported in Minnesota. This led to 85,000 arrests. Many of the 85,000 individuals were required to post bail. The records show that there were 25,000 convictions in Minnesota for felonies, but only 1,500 persons were sent to correctional institutions. See Minneapolis Star, Many Convicted Are Not Imprisoned, December 21, 1974.

It is clear that arrest and detention are probably unnecessary in a vast majority of cases. It is also clear that the posting of a surety bond is also unnecessary in a vast majority of cases.

In Hennepin and Ramsey Counties and in several of the states where pretrial release reforms have been enacted, it can be determined with reasonable certainty who should be released without cash bail or surety bond. (See attached exhibit A.)

The presently existing Hennepin County Pretrial Services Program has been formally organized under a Crime Commission grant since 1972. It is known nationally for its comprehensive services and is used as a model both in Minnesota and throughout the nation. The regard in which this program is held by the Minnesota Supreme Court is reflected in dicta in the recent case of State v. Winston, ___Minn.____, 219 N.W. 2d 617 (1974), wherein the Court ruled that information given to probation officers to determine bail was inadmissible at trial, although not prejudicial error. The Court noted, however, that "...we are constrained to observe that the practice followed in this case of calling the probation officer to testify regarding information given to him at the time he was conducting his interview for the sole purpose of arranging bail seriously jeopardizes a very noteworthy and outstanding program presently being operated in Hennepin County. We need not detail the specifics of this program except to state that the court rates it as most commendable and severely admonishes any infringements which would limit its use." (Id. at 619, emphasis supplied.)

Unless this rule is revised, a serious probability of the very type of infringement upon this program the court speaks of threatens. Infringement can be eliminated only by consistent language in the Proposed Rules, and a deletion of Rule 6.01, Subd. 1(2). This deletion would create consistency with Rule 4.02, Subd. 5(1), and would in essence create uniformity. The court's function need not commence until the arraignment. Prior to arraignment, release can take place pursuant to the Rules.

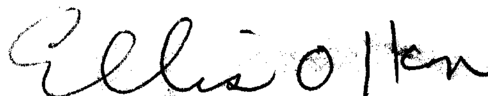
The Verifiable Release Criteria as used in Hennepin and Ramsey County are attached to this Petition. I would suggest that this be made part of the Rules and attached to the Commentary as a proposed Form.

CONCLUSION

Many of the Rules that are being promulgated by this Court have, in the pretrial release area, been in existence in Hennepin County for several years. The attached statistical data obtained from Hennepin County Court Services indicates the number of interviews for misdemeanors and felonies, and the number of bench warrants (BW) for each category from 1971 to 1974. It should be noted that a responsible organization such as Hennepin County Court Services will not release prior to a court appearance dangerous offenders, but only excellent risks who have good roots in the community, have gainful employment, and probably committed an offense against property; and will, in all likelihood, receive probation or a dismissal in the final analysis.

The 10 percent deposit provision should be used as only a final alternative where release without bail is not possible. Under the proposals in this Petition, the bail bondsmen continue to exist for high risk, repeated, and violent offenders.

Respectfully submitted,



Ellis Olkon
2226 IDS Center
Minneapolis, Minnesota 55402
Telephone: 333-5555

20

No.: ______________________
Name: ______________________

II. VERIFIABLE RELEASE CRITERIA:

Int.	Ver.	PRIOR RECORD
2	2	No Convictions
1	1	One Misdemeanor Conviction
0	0	Two Misdemeanor Convictions or one Felony Conviction
-1	-1	3 or More Misdemeanor Convictions or 2 or More Felony Convictions
Int.	**Ver.**	**HEAVILY WEIGHTED OFFENSES**
-3	-3	Present Charge of Narcotic Offense, homicide and crimes against the person. (Including sex crimes and all attempts.)
Int.	**Ver.**	**FAMILY TIES**
2	2	Lives with family <u>and</u> has weekly contact with other family members.
1	1	Lives with non-family person
0	0	Lives alone
Int.	**Ver.**	**EMPLOYMENT**
3	3	Present local job one year or more
2	2	Present job 6 months
1	1	New job or Rec. unemployment compensation, welfare, or supported by family or savings
0	0	Unemployed
Int.	**Ver.**	**RESIDENCE IN AREA (CONTINUOUS)**
3	3	Present residence 1 year or more
2	2	Present residence 6 months OR present and prior 1 year.
1	1	Present residence 3 months OR present and prior 6 months.
0	0	Non-resident or transient (less than 3 months)
Int.	**Ver.**	**TIME IN AREA**
1	1	Ten years or more (Continuous)
Int.	**Ver.**	**DISCRETION**
1	1	Pregnancy, old age, poor health or student
-2	-2	Threat to himself or others (suicidal or homicidal)
-2	-2	Prior bail jumper or escapee
-3	-3	Dangerous weapon used in present offense, narcotic problem

If a defendant does not score a +5 on interview, verification need not be attempted, and recommendation should be negative.

To be recommended for release defendant needs:
1. A local address where he can be reached AND
2. A total of five verified points from the above categories.

Int.	Ver.	
		TOTAL POINTS

III. EVALUATION STATEMENT OF INVESTIGATOR:

Exhibit A

IV. RECOMMENDATION:

( ) Recommended for release
( ) Not recommended for release
( ) Recommended for bail reduction from ______________ to ______________
( ) Psychiatric evaluation recommended prior to release consideration
( ) Preventive detention recommended.

Date of Recommendation ______________ Signed ______________________
Investigator

1973 - 1974 Statistical Volume

Hennepin County

Misdemeanors

Race	Interviews	Percent
Caucasian	8,310	77%
Negro	1,415	13%
Indian	1,078	10%
Totals	10,803	100%

Felonies

Race	Interviews	Percent	Total
Caucasian	1,322	71%	9,632
Negro	389	21%	1,804
Indian	143	8%	1,221
Totals	1,854	100%	12,657

The following will be statistical data gathered over a three-year basis indicating total defendants interviewed in relation to their release on OR indicating the bench warrant factor.

1971 - 1972

Misdemeanants interviewed -	7,573	Misdemeanants released -	3,840	Average -	50%
Felons interviewed -	1,620	Felons released -	555	Average -	34%
Total -	9,193				

Felonies BW - 13
Misdemeanors BW - 44

1972 -1973

Misdemeanants interviewed -	10,029	Misdemeanants released -	5,312	Average -	53%
Felons interviewed -	1,883	Felons released -	660	Average -	35%
Total -	11,912				

Felonies BW - 16
Misdemeanors BW - 51

1973 - 1974

Misdemeanants interviewed -	10,803	Misdemeanants released -	6,179	Average -	57%
Felons interviewed -	1,854	Felons released -	645	Average -	35%
Total -	12,657				

Felonies BW - 14
Misdemeanors BW - 67

OLKON & OLKON, P.A.
ATTORNEYS AND COUNSELORS
2226 IDS CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MINNESOTA 55402

ELLIS OLKON
NANCY K. OLKON

AREA CODE 612
TELEPHONE 338-5555
RES. 920-4665

January 30, 1975

Clerk of the Minnesota Supreme Court
Supreme Court of Minnesota
State Capitol
St. Paul, MN 55101

Re: Petition In Re Proposed Rules of Criminal Procedure

Attention: John McCarthy

Dear Mr. McCarthy:

On December 30, 1974, this office submitted an original and copy of a Petition In Re Proposed Rules of Criminal Procedure, which concerns itself with Rule 6 of those Rules.

I am at this time submitting photocopies of the relevant Sections of the Uniform Rules of Criminal Procedure, which just recently was published and recently approved.

In the area of pretrial release, the Proposed Rules would allow most defendants to remain free pending trial. The following is a quotation from 16 Criminal Law Reporter 2304, January 8, 1975:

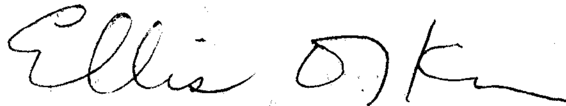
> "Pretrial arrest and detention would be required only where necessary. Police officers would be required to issue 'citations' similar to traffic tickets instead of formal arrest for most defendants. In this way a defendant who was acquitted would not be burdened with an arrest record. However, if a defendant failed to appear for trial, a warrant could be issued for his arrest.
>
> Under this procedure, police officers would be authorized to formally arrest for violent crimes; for purposes of stopping an ongoing crime; where there is grounds for a reasonable belief that the defendant would not respond to a citation; or for purposes of protecting or aiding the defendant. A suspect who is arrested must

be given a prompt hearing on the justification for the arrest and to determine whether pretrial release is appropriate and what form this release should take. Bail is regarded as a last resort among the various forms of release. A provision that bail be posted only by 'uncompensated sureties' would eliminate commercial bondsmen.
The rules also call for the establishment of a release agency to provide judges with the facts needed in making releases. This agency would supervise and coordinate the release program."

Please also find letters dated July 30, 1974, and August 9, 1974, from Ray Chisholm Bonding Service, carbon copies of which were sent to Mr. Richard E. Klein, your court administrator.

I am also enclosing an Affidavit from Robert Nathaniel Childs, who was charged with a crime of violence and whose case was recently continued for one year by a Hennepin County District Court Judge for purposes of dismissal.

Respectfully submitted,



Ellis Olkon

EO:dj

Enclosures

335-8454

RAY CHISHOLM BONDING SERVICE
820 Midland Bank Building
Minneapolis, Minn. 55401

July 30, 1974

THE HONORABLE JUDGE DONALD S. BURRIS
CHIEF JUDGE - HENNEPIN COUNTY MUNICIPAL COURT
Hennepin County Court House - Room 417A
Minneapolis, Minnesota

Dear Judge Burris:

The action of the Bench after full review and consideration of all information regarding my criticism of some bail bond rules established in Hennepin County, especially that of Rule #35 as modified on January 30th, 1974, disappoints me. I could live with Rule #35 as amended if, after the defendants were brought into jail a representative from Court Services could make an evaluation and release the defendant without a bond, or lower the recommended amount if the defendant qualified.

Rule #35 as it exists today is a travesty on justice and leaves the defendant at the mercy of the bondsman. The fact is that the Court, in its present stand on Rule #35, is compelling the defendant to pay a bondsman in many instances for an excessively high bond and that, in my opinion, is wrong. I, nor any of my associates, will write a bond on a defendant charged with a felony until the defendant has been brought before a judge, or if Rule #35 is changed, until a representative of Court Services has had a chance to make an evaluation.

Has the Court made a survey to determine what percentage of bonds are lowered below that of the suggested bail recommended once Court Services has been given the chance to review the case? From my observation and experience, where I recommend the defendant to seek a bond reduction whether before or after the initial arraignment, which I do with all defendants that seek my service, I'd say that well over 50% of the bonds are lowered. Most defendants are sick or disturbed people and need all the help and common sense guidance that they can get.

Rule #35, as it stands today, encourages corruptive action on the part of the bondsmen and the Court is aiding and abetting that enterprise as long as its present position on Rule #35 as amended remains in effect. In the past sixty days I have had a call from only three defendants seeking a bond before they appeared before a judge. Each had been approached by Mr. Goldberg before they

(cont.)

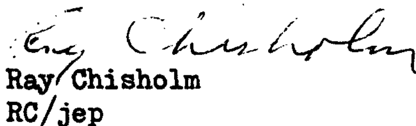
contacted Chisholm Bonding. I turned them down with the admonishment that they wait to see if they could get their bonds lowered when they appeared in Court. One of them didn't wait and recalled Mr. Goldberg and bailed out. I can't argue with that -- the man wanted out right now.

It's hard telling how many defendants bond out before they appear in Court. To give you a rough idea of the volume of bonds written in Hennepin County Municipal Court, Division I, I examined the bond book for the period of January 1, 1974, through July 2, 1974, pages 238 through 266 and found that on felony bonds of $1000.00 and over Mr. Goldberg had written 214 bonds, and Chisholm 63 bonds -- a ratio of more than 3 to 1. We did much better in the number of misdemeanor bonds written - 294 for Goldberg Bonding and 189 for Chisholm Bonding - a ratio of 2 to 1.6. Why should Mr. Goldberg get a substantially higher ratio of felony bonds written over misdemeanor bonds?

I think the Court is one hundred percent wrong and is acting in a capacity, knowingly or unknowingly, to help Mr. Goldberg write uncalled for higher premium felony bonds. If I am wrong let Mr. Goldberg sue me for slander, defamation of character, or whatever. I think it is a crying shame that the Court would condone his action by its refusal to amend Rule #35 and ask that some immediate action to taken to correct this situation.

Lest I sound naive, I'm not asking that the bonding system be abandoned. The bail bond system, when used properly, can save Minnesota taxpayers hundreds of thousands of dollars annually but it must be set up with that idea in mind -- not to make an individual bondsman a wealthy man. I've said it before and I repeat, the area must be open to anyone who qualifies to write bonds and can get an acceptable insurance company to represent him. However, the way the system is set up today in the Hennepin County Municipal Court it obviates the possibility of any new bondsman starting and has practically driven out of business Mr. Goldberg's only competitor. If that is what you want you'll get it -- but not without protest.

Respectfully,



Ray Chisholm
RC/jep

cc: The Honorable Judge O. Harold Odland
JUDGE OF MUNICIPAL COURT
Hennepin County Court House
Minneapolis, Minnesota

cc: Mr. Richard E. Klein
Court Administrator
THE SUPREME COURT OF MINNESOTA
St. Paul, Minnesota

335-8454

RAY CHISHOLM BONDING SERVICE

820 Midland Bank Building
Minneapolis, Minn. 55401

August 9, 1974

THE HONORABLE JUDGE JAMES D. ROGERS
Judge of Municipal Court
Hennepin County Court House
Minneapolis, Minnesota

Dear Judge Rogers:

Your letter to Judge Kenneth Gill of July 30th, 1974, regarding his deportment in reinstating the Albert Tatum bond is uncalled for. The Petition and Affidavit was sent to the Clerk of Court in Crystal. If I made a mistake it was in not sending the City Attorney in Crystal a copy. This will be done on all petitions for bond reinstatement from this date forward. The petition was adequate but if you need additional information I relate the following:

Mr. Tatum had no intention of missing his court date. He was detained in Kansas City and the Clerk of Court was called in advance and notified of this fact. A new date could have been set at that time but he didn't know just when he would be back and I can understand why a bench warrant and bond forfeiture were ordered. As soon as Mr. Tatum returned to Minneapolis he came to my office and I advised him that a warrant had been issued and I showed him the notice of forfeiture. I called the Warrant Division to advise them that Mr. Tatum was in my office and arrangements were made for him to go out to Crystal and get a new court date set. In my mind the only fair thing to do was to reinstate the bond and not further punish Mr. Tatum who showed due respect.

There are several points that I want to bring to your attention. <u>First</u>, I appreciate Judge Gill's tolerant view regarding the bondsmen and their problems. I'm sure he treats all bondsmen in the same manner. Any individual bondsman could be driven out of business if the courts refuse to be lenient.

<u>Second</u>, I question the legality and/or propriety of substituting the bondsman's paid forfeiture as cash deposited in lieu of bonds until such time as the state can put an absolute claim on the money. I am not contesting the legality of the action as it could lead to a protracted fight and I haven't got the money to hire an attorney to fight my battles. Then, too, try to find an attorney to expend the extra effort to fight City Hall.

<u>Third</u>, I'm led to believe by your action that you would like to see me out of this business and are doing everything possible to attain that result. As

(cont.)

early as 1967 you accused me of being in business with Myron Broms. It took the word of Attorney Don Morgan to convince you that that wasn't true. On several occasions you have refused bond reinstatements where there was no legitimate excuse to deny the forfeitures. As an example -- the Laurice Anderson case. I had her back the day after I received the notice of forfeiture. However, my plea for reinstatement was denied with your verbal comment, "anybody who bails out one of Timmy's girls can pay the forfeiture". Later you accused me of being in business with John Mancino. That's a story you know.

I'm asking, do you treat Mr. Goldberg in like fashion? How many bonds have you denied Mr. Goldberg, and have you asked that a portion of each of his bonds be assessed for court costs? I'm just asking the question and I'd like to know the answer. One of these days I am going to ask that you bring your case against me before the State Committee on Judicial Standards.

Respectfully,

Ray Chisholm
RC/jep

cc: Mr. Richard E. Klein
Secretary
STATE COMMITTEE ON JUDICIAL STANDARDS
State Capitol
St. Paul, Minnesota

STATE OF MINNESOTA | DISTRICT COURT
COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs. **AFFIDAVIT**

Robert Nathaniel Childs,

Defendant.

COUNTY OF HENNEPIN)
) ss.
STATE OF MINNESOTA)

Robert Nathaniel Childs, being duly sworn, states as follows:

1. That on or about October 16, 1974, at approximately 7:30 p.m., he was accused by employees of Sears to have taken a one or two dollar socket. Affiant offered to pay for socket, and said offer was refused.

2. Affiant was sprayed by mace, which caused Affiant to take out a small, 1½ inch pocketknife and jab one Brian Olson in the leg with said knife.

3. The chase continued and as a result, Leon Van Heel was also jabbed with the pocketknife in his right hand.

4. Affiant was well-known in the community and was identified shortly thereafter and apprehended.

5. Affiant was served with a Criminal Complaint on Friday afternoon. The Complaint recommended bail in the amount of $10,000. Affiant was told by Bud Goldberg that for a fee of $1,000 he could bail out then. Affiant preferred to wait to his arraignment the following morning.

6. Hennepin County Court Services conducted an investigation, and recommended no bail required. County Attorney

Stuart Mogelson took no position on the no bail required recommendation, and stated that his office recommended $10,000.

7. After lengthy arguments by Attorney Ellis Olkon, the Court, by way of Judge Dehlia Pierce, reduced bail to $5,000 and denied release without bail. The denial was based upon not having any assurances that the conduct in question would never take place again.

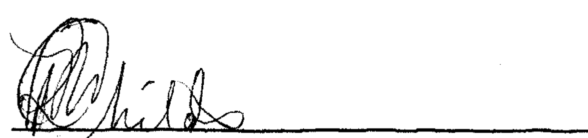
8. Affiant owns his own home in Crystal, Minnesota, and is a supervisor at the Minnesota Mining and Manufacturing Company, is married and has three children, ranging in ages of five to fourteen, and has never been convicted of a crime. Affiant is 38 years old and is presently not suffering from any disability.

9. Affiant advised his attorney, Ellis Olkon, that he wished to remain in jail until Monday if he could be released without bail on that day, rather than pay a $500 premium to a bail bondsman.

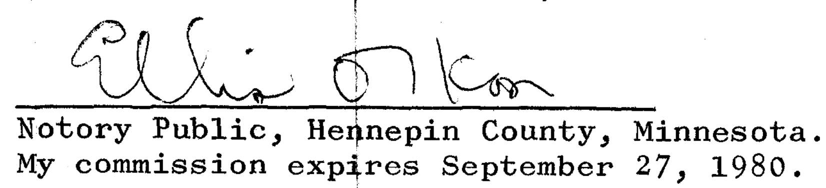
10. Affiant was approached in his jail cell on Saturday afternoon and again on Sunday by Bud Goldberg and was told that it was better for him to get out now because it is difficult to get one judge to reverse another judge, and that his bail would remain at $5,000.

11. Affiant avoided temptation and waited for his court appearance on Monday, October 21, 1974, and was released without bail.

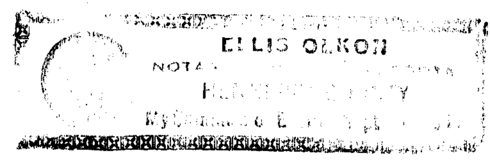
Further Affiant saith not.



Subscribed and sworn to before
me this 21st day of October, 1974.



Notory Public, Hennepin County, Minnesota.
My commission expires September 27, 1980.



STATE OF MINNESOTA

IN SUPREME COURT

IN RE PROPOSED RULES OF CRIMINAL PROCEDURE	)	STATEMENT OF THE NATIONAL LAWYERS GUILD

Pursuant to the order of the Minnesota Supreme Court dated November 19, 1974, the National Lawyers Guild, Twin Cities Chapter, as represented by Jerod H. Peterson and Kenneth E. Tilsen, submits the following statement setting forth its position with respect to the Minnesota Proposed Rules of Criminal Procedure.

Dated this 31st day of January, 1975

INTRODUCTION

The National Lawyers Guild is an association of lawyers, law students and legal workers dedicated to the need for basic change in the structure of our political and economic system. Since its founding convention in 1937, our organization has sought to protect and extend the civil rights and liberties of the people, on the assumption that human rights are more precious than property interests. The systematic racism and sexism of our society are evils which we actively seek to eliminate.

Throughout its history, our organization and its members have been continuously involved in the representation of poor and minority defendants. Our membership has also been involved in most of the political trials of the last three decades. For example, Guild members are currently involved in the continuing trials arising out of the Wounded Knee occupation and the Attica Rebellion.

Recognizing the fact that various individuals and groups will offer wide-ranging criticism of the rules, we have limited our comments to two rules about which we can make a unique contribution based on our particular experience.

We urge this Court to carefully weigh the social and political implications of the Proposed Rules we have singled out for criticism, and amend them accordingly.

I

THE MINNESOTA SUPREME COURT SHOULD LIMIT THE CONTENT OF PROSECUTION DISCOVERY TO INFORMATION WHICH CANNOT POSSIBLY HAVE A TENDANCY TO INCRIMINATE THE WITNESS AND WHICH CANNOT CONCEIVABLY LIGHTEN THE PROSECUTION'S BURDEN OF PROVING ITS CASE IN CHIEF.

Section 9.02 Subd. 1 of the Minnesota Proposed Rules of Criminal Procedure (hereinafter "Proposed Rules") sets out, inter alia, the following requirements for disclosure by the defendant to the prosecution. Without order of the court and before the date set for the Omnibus Hearing the defendant shall provide the prosecution with all documents and tangible objects, reports of examinations and tests, and notice of defense and defense witnesses and criminal record. The last category includes notice of any affirmative defense, statements, names and addresses of defense witnesses, and notice of alibi with names and addresses of alibi witnesses. The primary limitation on all of the above information is that at the time of submission, the defendant intend to use the information at trial.

The Comment immediately following Section 9 states that the derivation of the enumerated subsections is from Jones v. Superior Court of Nevada County, 58 Cal.2d 56, 22 Cal. Rptr. 879, 372 P.2d 919 (1962), Williams v. Florida, 399 U.S. 78 (1970), ABA Standards, Discovery and Procedure Before Trial, 3.2 (Approved Draft, 1970), and the Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure (1970). Proposed Rules, p. 46. Rule 9 is "intended to give the defendant and prosecution as complete discovery as is possible under constitutional limitations." Proposed Rules, p. 43.

The primary constitutional underpinning of prosecution discovery of the defense' case comes from Williams v. Florida, supra. In that decision, Mr. Justice White, writing for the majority, held that a Florida notice-of-alibi statute which required a criminal defendant to reveal to the prosecution before trial the nature of any alibi defense he intended to raise as well as the names and addresses of witnesses he intended to rely upon in support thereof, did not violate fifth and fourteenth amendment strictures against self-incrimination. Even though the information sought by the prosecution was testimonial and did in fact prove to be incriminating to the petitioner, Justice White's opinion

held that the compulsion required to make the discovery unconstitutional under the fifth amendment was not present:

> Nothing in such a rule requires the defendant to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice. That choice must be made, but the pressures that bear on his pretrial decision are of the same nature as those that would induce him to call alibi witnesses at the trial; the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts. Response to that kind of pressure by offering evidence or testimony is not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments.
>
> . . . At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. 399 U.S., at 84-85.

More recently, an extensive dictum in Wardius v. Oregon, 412 U.S. 470, expansively invited the states to experiment in the field of criminal discovery, so long as discovery privileges were reciprocal:

> Notice-of-alibi rules, now in use in a large and growing number of the states,[fn] are based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial. See, e.g., Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash U LQ 279; American Bar Association Project on Standards for Criminal Justice, Relating to Discovery and Procedure Before Trial 23-43 (Approved Draft 1970); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale LJ 1149 (1960). The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system. As we recognized in Williams, nothing in the Due Process Clause precludes States from experimenting with systems of broad discovery designed to achieve these goals. "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." 399 U.S. at 82 (footnote omitted).
>
> 412 U.S., at 473-474.

The discovery provisions in the Proposed Rules provide just such an experiment, enlarging the materials demanded from defendants to a degree far exceeding that of the notice-of-alibi rules considered by the Supreme Court. Under the Proposed Rules, the defendant must surrender to the prosecutor not only the names and addresses of witnesses whom he intends

to call in support of a defense of alibi, but also the names and addresses of any witnesses he intends to call as well as copies of their statements; the defendant must surrender to the prosecutor not only scientific tests and data relevant to evidence he intends to introduce in support of an affirmative defense, as was the case in Jones v. Superior Court, supra, but also those tests and scientific data relevant to any testimony he intends to introduce at trial. The defendant's notice of affirmative defense is not limited to that of alibi, but to any affirmative defense he intends to present.

The Rules as proposed constitute a breakdown in the textual command of the Fifth Amendment that an accused "shall(not) be compelled in any criminal case to be a witness against himself." As Mr. Justice Black stated in his dissent to the Williams majority, "If the words are to be given their plain and obvious meaning, that provision, in my opinion, states that a criminal defendant cannot be required to give evidence, testimony or any other assistance to the State to aid it in convicting him of crime." 399 U.S., at 111 (dissent). In essence, Justice Black stated that it is the historical right of a criminal defendant to stand mute until the State, with its awesome police powers, has by its own investigation independent of aid from the defendant, proven its case against him. The Williams majority was not merely altering the timing of the defense case by forcing pretrial disclosures, but striking at the heart of a human right which the framers of the Constitution had fully intended would make heavier the burden of the State in proving its case. These framers did not write in a vacuum - - they had fresh in their minds the memory of both the Star Chamber and an oppressive state which had subjugated the human rights of the colonists to the expediency of the colonizers. If the "timing" of the presentation of the defense were somehow more important than the absolute right of the defendant to stand mute, then Justice Black could perceive no end to a rationalization of expediency at the expense of violation of the Fifth Amendment.

Two state courts have found the reasoning of Justice Black to be persuasive, although to differing degrees. One court, the Alaska Supreme

Court, held that notwithstanding the Williams court's decision about federal constitutional rights, their construction of the Alaska self-incrimination prohibition, based upon their own interpretation of their civilization, did not allow for certain forms of prosecutorial discovery. The discovery in question in the Alaska case was precisely that contemplated in Proposed Rule 9.02, Subd. 1(3)(a) and (b).

The other court, the California Supreme Court, provides an even more interesting contrast. The Williams court as well as the Proposed Rules Comment section cite a California Supreme Court case, Jones v. Superior Court, supra, in support of the contention that state courts were showing a trend toward allowing notice-of-alibi and alibi witness requirements. See Williams, 399 at 83. Mr. Justice Black's dissent, in fact, condemned the Jones case for its "dangerous implications" regarding unlimited prosecution discovery. 399 U.S., at 114-115. Immediately prior to the Williams decision, the California Supreme Court issued its decision in Prudhomme v. Superior Court, 2 Cal.3d 320, 85 Cal. Rptr. 129 (1970), which put restrictions on prosecution discovery which have relevance to the Proposed Rules. The California Supreme Court stated in Prudhomme that before defense information could be given the prosecution, the trial court must determine first, that the evidence "cannot possibly have a tendancy to incriminate the witness," and second, that the evidence not "conceivably...lighten the prosecution's burden of proving its case in chief." 2 Cal.3d, at 326, 85 Cal. Rptr., at 133. Prudhomme emphasized that these requirements were designed to avoid the type of fact situation which will arise again and again under the Proposed Rules:

> For example, if a defendant in a murder case intended to call witness A to testify that defendant killed in self-defense, pre-trial disclosure of that information could provide the prosecution with its sole eyewitness to defendant's homicide. Similarly, consider the effect of disclosing the name or expected testimony of a witness B, whom the defendant intends to call only as a "last resort" to testify that defendant only committed a lesser-included offense. It requires no great effort or imagination to conceive of a variety of situations wherein the disclosure of the expected testimony of defense witnesses, or even their names and addresses, could easily provide an essential link in a chain of evidence underlying the prosecution's case in chief. 2 Cal.3d at 328.

See also State v. Gardiner, 88 Minn. 130 (1902).

Although some commentators had feared that Prudhomme would eventually be modified in light of Williams, Lapides, "Cross-Currents in Prosecutorial Discovery: A Defense Counsel's Viewpoint," 7 University of San Francisco L.R. 217, on November 22, 1974, the California Supreme Court strengthened its Prudhomme opinion, limited Jones "virtually to its facts," and indicated strongly that even a notice-of-alibi statute might be declared invalid under California's constitution. Reynolds v. Superior Court of Los Angeles County, 117 Cal. Rptr. 437. It is significant that California, whose Jones case was cited both by Williams and by the Comment to the Proposed Rules, and who has had the opportunity to engage in Wardius' "experimenting" regarding broad criminal discovery for the past eight years, has now made an abrupt turnabout and created rules far more limited than those of Williams or the Minnesota proposals now before this Court.

It is our contention that the two-pronged test of Prudhomme be incorporated into Proposed Rule 9.02 in order to maximize reciprocal discovery while at the same time safeguarding the traditional parameters of the right against self-incrimination. The California rule, which has taken seriously the objections raised by Mr. Justice Black, is the better rule.

II
THE SILENCING OF DEFENDANTS AND DEFENSE COUNSEL PROVIDED FOR IN PROPOSED RULE 26.03 SUBDIVISION 7 VIOLATES THE RIGHT TO FREE SPEECH AND FAIR TRIAL

Proposed Rule 26.03 Subdivision 7, which allows a trial court to order the silence of defendants and defense counsel during criminal trials, violates the constitutionally protected rights of free speech and fair trial. An order silencing the defense is especially damaging to fundamental rights in political trials, where the prosecution is politically motivated and large segments of the community have inportant interests in the issues and the outcome of the case.

The Rule has the purpose of preventing prejudicial publicity before or during a criminal trial. It provides as follows at page 147 (Green Volume):

> Subd. 7 Cautioning Parties, Witnesses, Jurors and Judicial Employees; Insulating Witnesses. Whenever appropriate, the court shall order attorneys, parties, witnesses, jurors, and employees and officers of the court not to make extra-judicial statements relating to the case or the issues in the case for dissemination by any means of public communication during the course of the trial.

According to the Comment, at page 161, the rule is based on ABA Standards, Fair Trial and Free Press, 3.5(c) (Approved Draft, 1968) which has similiar language. One difference between the Proposed Rule and the ABA Standards which this Court should carefully note is that the Proposed Rule adds "attorneys" to the list of trial participants subject to silence orders. Apparently it was the position of the ABA that prior restraints on counsel were inappropriate.

Silence orders provided for in the ABA Standards were designed to minimize prejudicial publicity resulting from serious offenses, usually homicides, about which a fearful public demands action, and an overzealous press publicizes whatever evidence or rumors it can find. In fact, the legal basis for silence orders is found in the dicta of Sheppard v Maxwell 384 US 333, 86 S.Ct. 1507, 16 L.Ed2d 600 (1966), a sensational murder trial conducted in a carnival atmosphere. Under the extreme facts of that case, the Court held that the prejudicial publicity had deprived the defendant of a fair trial. The Court went on to suggest the use of silence orders as one way of curbing prejudicial publicity, along with sequestration of the jury, continuance until the publicity abates, change of venue, and warnings to the press.

While sensational murder trials like Sheppard certainly justify a limitation on the police and prosecution as to what information they may release, the fear that prejudicial publicity will deprive the defendant of a fair trial does not justify silencing the defense, which will seldom if ever try to prejudice its own case. Especially in political trials*, a silence order aimed at the defense will do little to control prejudicial publicity while seriously violating the defendant's right to free expression and a fair trial.

1. The Rule Providing for the Silencing of Defendants and Defense Counsel Violates First Amendment Rights Because It Is a Prior Restraint of Speech.

Under our Constitution, prior restraints of speech are heavily disfavored because they suppress the precise freedom which the First Amendment sought to protect against abridgement. Near v Minnesota 283 US 697, 51 S.Ct. 625, 75 L.Ed2d 1357 (1930) The Supreme Court has repeatedly stated that any prior restraint on expression comes before the Court with a "heavy presumption" against its constitutional validity. Bantam Books v Sullivan 372 US 58, 83 S.Ct. 631, 9 L.Ed2d 584 (1963); Freedman v State of Maryland 380 US 51, 85 S.Ct.734, 13 L.Ed2d 649 (1965); Carroll v President and Commissioners of Princess Anne 393 US 175, 89 S.Ct. 347, 21 L.Ed2d 325 (1968); Organization for a Better Austin v Keefe 402 US 415, 91 S.Ct. 1575, 29 L.Ed2d 1 (1971); New York Times Co. v United States 403 US 713, 91 S.Ct. 2140, 29 L.Ed2d 822 (1971)

Because an order prohibiting the out of court statements of defendants and defense counsel constitutes a prior restraint of expression, there is a heavy presumption to be met in justifying its use.

The only possible justification for silencing the defense would be that extra-judicial statements of the defendants or defense counsel would prejudice the defendant's right to a fair trial. Because the defendants or their counsel are unlikely to ever do so, the presumption of invalidity can never be overcome.

*Although most local experience with political trials has been in the federal court (U.S.v Dennis Banks and Russel Means, the Selective Service prosecutions), there has been substantial activity in the courts of the state of Minnesota. See for example, State v Miller 280 Minn 566, 159 NW2d 895 (1969); State v Johnson 282 Minn 153, 163 NW2d 750 (1968); State v Hodgson 295 Minn 294, 204 NW2d 199 (1973). Among cases tried in Municipal Courts were those arising out
(continued on next page)

On the other hand, defendants and defense counsel have an important role to play in the public debate surrounding a political trial. Where a prosecution is politically motivated, it is crucial that defendants and their counsel, whose knowledge of the issues and interest in the outcome is so great, be able to join in the debate.

2. The Rule Providing for the Silencing of Defendants and Defense Counsel Violates First Amendment Rights Because It Fails to Provide Any Standards As To When a Silence Order Would Be Proper.

Even assuming arguendo that prior restrainst against extra-judicial statements of defendants and defense counsel are not absolutely invalid, a rule which failed to articulate standards as to when such a prior restraint might be valid is constitutionally deficient.

Various cases have struck down judicial orders silencing defendants and defense counsel because they lacked standards and were therefore overbroad. The court of In Re Oliver 452 F.2d 111 (7th Cir.,1971) held that a court rule, upon which an order silencing an attorney was based, was violative of the First Amendment because it did not set standards limiting its application. That case followed Chase v Robson 435 F.2d 1059 (7th Cir.,1970) which reversed an order silencing fifteen defendants and their three attorneys, all of whom were involved in a trial for interference with the Selective Service System. In addition to finding the order to be unconstitutionally overbroad, the court also stated, 435 F.2d at 1061:

> "We hold that before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is a 'serious and imminent threat to the administration of justice.'

The standard called for in Chase is consistent with a strong line of cases which established the principle that the contempt power could be used against out of court publications and statements only under the rule of the clear and

(Footnote continued from preceding page) of numerous incidents, including the University demonstrations in May, 1972, the Red Barn incident, the Morrill Hall sit-in, etc. It should also be noted that the Angela Davis trial and the current Attica trials are state court cases.

present danger standard. Bridges v California 314 US 252, 62 S.Ct. 190, 86 L.Ed 192 (1941); Pennekanp v Florida 328 US 331, 66 S.Ct. 1029, 90 L.Ed2d 1295 (1946); Craig v Harney 331 US 367, 67 S.Ct. 1249, 91 L.Ed 1546 (1947); Wood v Georgia 370 US 375, 82 S.Ct. 1364, 8 L.Ed2d 569 (1962).

A rule providing for the silencing of defendants and attorneys will be unconstitutionally overbroad unless it clearly prohibits only speech which constitutes an imminent threat to the administration of justice. Because the Proposed Rule allows the use of a silence order "whenever appropriate," it is facially unconstitutional.

3. The Rule Providing for the Silencing of Defendants and Defense Counsel Violates the Defendant's Right to a Fair Trial.

Political trials raise very special fair trial problems for defendants, especially when the indictment contains the familiar "conspiracy" count. It is our experience that these trials are one-sided contests, with the defendants struggling to raise funds and assemble a defense team in the face of the government's superior legal and investigative resources. In many cases, it is simply a matter of survival that defendants be able to speak publicly in order to raise funds and attract volunteer assistance. In addition, there is the problem that a widely publicized indictment carries with it a wide spread feeling among the public that the defendant is guilty. In order to balance this public opinion, the defendants need to be able to justify their acts and cast some light on the government's motivations for the prosecutions. A silence order therefore violates the political defendant's right to a fair trial.

4. Conclusion

Proposed Rule 26.03 Subd. 7 as now written is unconstitutional. Because defendants and defense counsel will seldom be sources of publicity which prejudices the trial, silencing them would not solve the problems of prejudicial publicity in any case.

On the other hand, statements by the police and prosecution, who have no

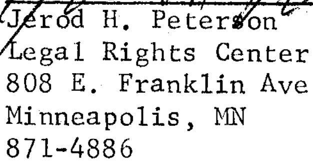
comparable interest in free expression on the subject of the trial, are the prime source of prejudicial publicity. Consequently, the First Amendment considerations will change when applied to the police and prosecution.

We petition the Court to amend this rule to specifically except defendants and defense counsel. The power to punish obstructions of justice after the fact through the contempt power will be sufficient deterrence of defense-caused abuses.

RESPECTFULLY SUBMITTED,

NATIONAL LAWYERS GUILD

TWIN CITIES CHAPTER



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St. Paul, MN
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COUNTY BOARD

File No. ________

Resolution No. 75-066

BOARD OF RAMSEY COUNTY COMMISSIONERS

STATE OF MINNESOTA

January 27 19 75

The attention of William Randall, County Attorney;
William Falvey, Public Defender; All Members of Supreme Court;
Harry Gregg, Assistant County Attorney;

is respectfully called to the following Resolution of the Board of County Commissioners of Ramsey County, Minnesota, adopted at the meeting held on January 27, 1975

By Commissioner Orth

WHEREAS, The Ramsey County Board of Commissioners is advised that the Supreme Court of Minnesota is considering new rules of criminal procedure. The effective date of the new rules is to be July 1, 1975, and

WHEREAS, The Board is advised that because of time constraints required by the proposed rules for Court Activities the Ramsey County Public Defender and the Ramsey County Attorney will each have to augment their staff. Should the rules be modified to eliminate time and other constraints by amendment calling for action in the Courts of these called for procedures "as soon as possible", fewer additions to staff would be needed to comply fully with the rules and their intended purpose of assuring speedy trial, Now, Therefore Be It

RESOLVED That the Ramsey County Board of Commissioners request the Minnesota Supreme Court to modify the rules so that the intended purpose and benefits can be achieved without adding additional costs which otherwise will have to be met by additional taxes on property in Ramsey County, and Be It Further

RESOLVED That the Ramsey County Attorney is requested to present this Resolution to the Minnesota Supreme Court at its hearing on the proposed rules scheduled for January 31, 1975.

EUGENE F. MACAULAY County Administrator

By Executive Secretary

Form ADM 201

IN THE SUPREME COURT

In re Proposed Rules of Criminal Procedures	PETITION FOR LEAVE TO APPEAR IN OPPOSITION TO A PROPOSED RULE OF CRIMINAL PROCEDURE

TO: The Honorable Justices of the Supreme Court of the State of Minnesota.

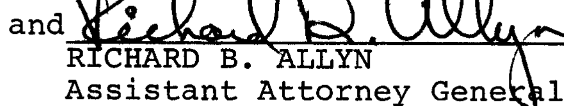
PLEASE TAKE NOTICE that the Office of the Attorney General of the State of Minnesota hereby petitions the Court for leave to appear in the Supreme Court on Friday, January 31, 1975, at 2:00 p.m., for the purpose of expressing its opposition to Proposed Rules of Criminal Procedure 26.03, subd. 11(h) and (i). Said opposition is summarized in the Memorandum in Opposition to a Proposed Rule of Criminal Procedure attached hereto and submitted in support of the Petition.

Dated: January 28, 1975.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota

By ______________________
PETER W. SIPKINS
Solicitor General



and ______________________
RICHARD B. ALLYN
Assistant Attorney General

160 State Office Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-2961

IN THE SUPREME COURT

In re Proposed Rules of Criminal Procedures

MEMORANDUM OF THE OFFICE OF THE ATTORNEY GENERAL IN OPPOSITION TO A PROPOSED RULE OF CRIMINAL PROCEDURE

PRELIMINARY STATEMENT

Petitioner, the Attorney General's Office of the State of Minnesota, has carefully reviewed and analyzed the Minnesota Proposed Rules of Criminal Procedure. In most instances, we find them to be fair to prosecutor and defendant alike. However, we find one rule as proposed to be unjust and unduly slanted, and we feel compelled to set forth herein our opposition thereto.

Minnesota Proposed Rules of Criminal Procedure 26.03, subds. 11(h) and (i), would establish an order of closing arguments to a jury that is both unfair and without precedent. Under that proposed rule, the defendant's counsel may make both the opening and concluding final arguments. The prosecution would be permitted one argument, sandwiched between defendant's, and an opportunity for a rebuttal argument only if the defendant's concluding argument is "improper."

As the law presently exists, Minn. Stat. § 631.07 (1971) provides that the prosecution may make one final argument after which the defendant's counsel may present his summation.[1/] We believe that the present procedure is inequitable and uncommon. The order of closing arguments under the proposed rules would place an even more drastic and unwarranted handicap on prosecutors.

1/ Minn. Stat. § 631.07 provides as follows:

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

ARGUMENT

Only four other states follow the procedure currently used in Minnesota pursuant to Minn. Stat. § 631.07 (1971),[2/] and no state has adopted a rule similar to that proposed here which would give the defendant such a significant advantage in the order of closing arguments. Eight states currently have procedures whereby the defense argues first and the prosecutor last.[3/] Thirty-four states and the United States District Court for the District of Minnesota follow an intermediate approach which allows the defendant to make his final argument after the prosecution but permits the prosecution a short time for rebuttal.[4/]

2/ Illinois, Ill. Rev. Stat. § 110A-277 (1967); Michigan, Mich. Ct. Rules, R. 37; Montana, Rev. Code of Mont. § 95-1910; Oklahoma, 22 Okla. Stat. § 1164. (It should be noted that in the past there have been attempts to conform the Minnesota procedure to that followed by the majority of states. See, Minnesota Crime Commission Report 34 (1927) and Report of the Minnesota Crime Commission 47 (1934).)

3/ Hawaii, Haw. Rev. Stat. § 711-62; Kentucky, Ky. Rev. Stat. § 9.42(6); Massachusetts (as a matter of custom); New Hampshire (as a matter of custom); New Jersey (as a matter of custom); New York, McKinney's Laws of New York § 260.30; Pennsylvania, Pa. R. Cr. Pro. 1974, 1116(b); Rhode Island (as a matter of custom).

4/ Alabama, R. Cir. and Inferior Cts., R. 19; Alaska (as a matter of custom); Arizona, R. Cr. Pro. 19.1(a)(7); Arkansas, Ark. Stat. § 43-2132; California, West's Ann. Code - Code of Civ. Pro. § 607; Colorado (as a matter of custom); Connecticut, Conn. Gen'l. Stat. § 54-88; Delaware (as a matter of custom); Georgia, Code of Geo. 1972 § 27-2201; Idaho, Idaho Code § 19-2101(5); Indiana, Burn's Ind. Stat. Ann. § 9-1805; Iowa, Iowa Code § 780.6; Kansas, Kan. Stat. § 22-3414; Louisiana, La. Code of Cr. Law and Pro., Art. 380; Maine, Maine R. Cr. Pro. 30(a); Maryland (as a matter of custom); Mississippi (as a matter of custom); Missouri, Mo. Rev. Stat. § 546.070(5); Nebraska, Rev. Stats. of Neb. § 25-1107; Nevada, Nev. Rev. Stat. § 175.141; New Mexico, N.M. Stats. 1953 § 21-8-18; North Carolina (as a matter of custom); North Dakota, N.D. Cent. Code § 29-21-01; Ohio, Baldwin's Ohio Rev. Code Ann. § 2945.10; Oregon, Ore. Rev. Stat. § 17.210(5); South Dakota, S.D. Comp. Laws 1967 § 23-42-6; Tennessee (as a matter of custom); Utah, Utah Code Ann. § 77-31-1; Vermont, Vt. R. Cr. Pro. 29.1; Virginia (as a matter of custom); Washington, Wash. Super. Ct. Cr. R. 6.15(d); West Virginia, (as a matter of custom); Wisconsin, West's Wisc. Stat. Ann. § 972.10; Wyoming, Wyo. Stat. § 7-228; United States, Local R. Dist. Minn. 6D.

Since The Prosecution Has The Ultimate Burden of Proof, It Should Be Given The Advantage Of Making The Final Closing Argument.

It is undisputed that the order of closing arguments often has a significant impact on the determinations of juries in criminal cases.[5/] The authorities are divided on the issue of whether it is more advantageous to make the first or the last argument to the jury.[6/] Some studies have indicated that in the more complex cases, the best position is last, while it is more advantageous to make the first closing argument in cases with few and simple issues.[7/] In any event, the proposed Minnesota rule would satisfy both Pangloss and criminal defendants by giving them the "best of all possible worlds."

This overbalance in a defendant's favor is contrary to reason and to the procedure followed in most other jurisdictions. In a criminal case the defendant is presumed innocent, and the prosecution has the heavy burden of proving guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). Thus, it is the general rule in most jurisdictions that the party who must carry the burden of persuasion has the right to open and close final arguments.[8/] Even noted defense attorney Henry Rothblatt has stated:

> Under our system of law, he [the prosecutor] has the last say. That is because the law, in its wisdom, says that the prosecutor has a heavy burden to carry; he must prove beyond a reasonable doubt that this accused, who is presumed innocent, is in fact guilty.

Rothblatt, Summation in Criminal Cases, 37 Tenn. L. Rev. 728, 732 (1970).

5/ Rothblatt, Summation in Criminal Cases, 37 Tenn. L. Rev. 728 (1970); 6 Am. Jur. Trials 876 § 2 (1967).

6/ R. Lawson, Order of Presentation as a Factor in Jury Persuasion, 56 Ky. L. J. 523 (1968); and L. Orfield, Criminal Procedure From Arrest to Appeal, N. Y. University Press, 1947.

7/ W. Costopoulos, Persuasion in the Courtroom, 10 Duquesne L. Rev. 384 (1972).

8/ See, Am. Jur. Trials 876 § 8 (1967), where it is noted that the opportunity to speak last in closing arguments is one of the most important tactical advantages the prosecution enjoys.

At a time when Minnesota was the only state to follow its present procedure, Professor Lester Orfield wrote:

> In every state but Minnesota the final word of counsel to the jury is given to the prosecution. This rule is based on the logic of the situation. The party having the burden of proof is granted the final argument. Particularly should this be true in criminal cases in which the state must prove its case beyond a reasonable doubt.

Orfield, Criminal Procedure from Arrest to Appeal, N. Y. University Press, 1947.

Comparison should be made to civil cases. There the plaintiff generally is given the right to open and close final arguments on the theory that this right should be extended to the party who has the ultimate burden of proof. Minneapolis-St. Paul Sanitary District v. Fitzpatrick, 201 Minn. 442, 277 N.W. 394 (1937). This procedure is said to be based upon "traditional notions of fairness." United States v. 2,353.28 Acres of Land, etc., State of Florida, 414 F.2d 965, 972 (5th Cir. 1969).

While a defendant in a criminal case generally has far more at stake than a defendant in a civil case, there are no indications that criminal defendants need more protections during the course of trials than those already guaranteed in Minnesota.

This Court has previously taken note of this state's "unique procedure in criminal trials." State v. Mitchell, 268 Minn. 513, 517-18, 130 N.W.2d 128 (1967). There is no evidence of any injustice or inequity which requires the adoption of a rule that is even more stringent than the rule already in use.

We do not suggest, of course, that the prosecution should be given all advantages to the disadvantage of the defendant. However, we believe that since nearly every burden of proof is presently (and correctly) placed on the prosecution, its burden should not be unnecessarily increased by the adoption of proposed Rule 26.03, subds. 11(h) and (i). We submit that the present procedure under Minn. Stat.

§ 631.07 (1971) should be changed to permit the prosecution to make the first and final arguments or, at the very least, the final closing argument. Such a rule would align Minnesota with the majority of other jurisdictions and would be founded upon fairness and logic.

Moreover, The Proposed Rule To Which The Attorney General Objects Is Impractical and Unworkable.

Proposed Rule 26.03, subds. 11(h) and (i) suggests that the prosecution may rebut a final defense argument if such argument is "improper." This facet of the proposed rule would likely be ignored by the judiciary since it is in fact unworkable.

Improper argument during a summation is one of the more frequently raised issues on appeals of criminal cases.[9/] Of course, these appeals can only be brought by defendants. Under the proposed rules, defendants are going to have yet another avenue of attack upon a state conviction. The state, however, will continue to have no recourse from potentially incorrect trial court determinations.

Additionally, the proposal invites disputes in front of the jury and a disruption of an orderly trial process. A prosecutor who believes that statements by defense counsel in closing argument are improper will be forced to engage in an immediate debate as to whether the prosecutor is thereby entitled to make a rebuttal. Even if trial judges were to permit such disruptions, it seems unlikely that they will find defense arguments to be improper in many instances.

The net effect of allowing the "privilege" of rebuttal to prosecutors would be a procedure that would be counterproductive of smooth and orderly trial procedures. In time, the privilege would be extended only infrequently.

9/ See, e.g., State v. Olek, 288 Minn. 235, 179 N.W.2d 320 (1970); State v. Hanson, 286 Minn. 317, 176 N.W.2d 607 (1970); State v. Cook, 212 Minn. 495, 4 N.W.2d 323 (1942).

CONCLUSION

Proposed Rule 26.03, subds. 11(h) and (i) would place an unfair and unnecessary extra burden on prosecutors at a critical stage of trial. The *apparent* opportunity for rebuttal by the prosecution would be impractical and seldom permitted. We suggest that rather than making the present Minnesota rule more severe than it is already, the procedure should be made more equitable by allowing the prosecution to make either opening and final closing arguments or to make the first argument with an absolute right to make a short rebuttal. This change would place Minnesota in the mainstream of the procedures used in most other jurisdictions and would be more in accordance with the rules on burdens of proof.

Dated: January 28, 1975.

Respectfully submitted,

WARREN SPANNAUS
Attorney General

By
PETER W. SIPKINS
Solicitor General

and
RICHARD B. ALLYN
Assistant Attorney General

160 State Office Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-2961

45517

IN THE SUPREME COURT

STATE OF MINNESOTA

IN RE PROPOSED RULES)
)
OF CRIMINAL PROCEDURE)

PETITION

Pursuant to the order of this honorable Court in the above captioned matter, dated November 19, 1974, the undersigned submits the attached petition setting forth our position on said rules.

Your Petitioner prays that this document shall constitute notice to the Clerk of the Supreme Court that your Petitioner or his designee desires to be heard at the final hearing on the Proposed Rules of Criminal Procedure on Friday, January 31, 1975 at 9:30 o'clock A.M.

Respectfully submitted,

WALTER J. DUFFY, JR.
City Attorney
325M, City Hall
Minneapolis, Minnesota
348-2022

Dated: January 20, 1975

Mr. Duffy:

Either yourself or your designee may present your views on 1-31-75. About a dozen others have indicated that they will also make oral presentations.

John McCarthy, Clerk

The office of the Minneapolis City Attorney prosecutes the largest volume of misdemeanor cases in this state. Due to this unique position, our staff has made as extensive a study as possible of the Proposed Rules of Criminal Procedure as they affect the practice of misdemeanor law. We have done so under what we feel are severe time limitations since we were unaware of their very existence prior to our recent receipt of the "green-bound" Rules volume.

We have found that they make changes which profoundly affect misdemeanor practice and that in many cases they do so in a seemingly unnecessary and adverse fashion to both the State and the accused. We have cause to wonder at their rushed promulgation when we know that they will seriously influence 90% or more of all persons ever charged with a public offense.

While our support for a uniform system and codification of court rules remains steadfast, it is necessary to point out that Rule 1.02 states as follows:

> "These rules are intended to provide for the just, speedy determination of criminal proceedings. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustified expense and delay."

Our office has attempted, in the time allotted, to review these rules giving full mind to the above quoted directives. It has been our basic policy to attempt to limit our consideration to areas where we feel the current rules do not fulfill the objectives of Rule 1.02.

We do not claim infallibility or ask that our suggestions

be carried out *in toto*. We recognize that the views expressed by the distinguished committee appointed by this Court are, in many instances, the scholarly result of long and careful deliberation.

Nevertheless, we urge this Court to allow time for committee hearings or meetings on the misdemeanor rules similar to those that took place on the felony rules. We would make every effort possible to meet with and cooperate with the Advisory Committee in the formulation of more workable procedures. We feel that the category of crimes classified as misdemeanors is deserving of as much consideration as gross misdemeanors and felonies in view of the fact that about 25,000 defendants were charged with misdemeanors in Minneapolis, alone, in 1972.

The City of Minneapolis has attempted to keep its comments concise so that this Court may not be burdened with an excess of useless verbiage. The fact that we have been brief will not, we trust, obscure the sincerity with which seven attorneys with approximately thirty years of combined time in misdemeanor practice have labored to present this Court with the benefit of our practical experience.

The Minneapolis City Attorney's office has tried to be fair and impartial in its recommendations to this Court both on behalf of the City of Minneapolis and on behalf of those charged with misdemeanor violations. It is our hope that the Minnesota Supreme Court will respond to our recomme dations and suggestions with this in mind.

RULE 1. SCOPE, APPLICATION, GENERAL PURPOSE AND CONSTRUCTION

RULE 1.01. Scope and Application. The scope and application should be clarified to indicate that the rules cover petty misdemeanors, if the rules are to be extended to petty misdemeanors at this time.

RULE 2. COMPLAINT

RULE 2.02. Approval of Prosecuting Attorney. Requiring the written endorsement of the prosecuting attorney as a condition to issuance of a written complaint is a good general policy; however, such endorsement should not be required on a complaint charging a misdemeanor punishable by fine only, where the charged party has ignored a citation issued on the same charge. The volume of such complaints in urban counties would make such endorsement an unnecessary burden.

Rule 15.07, however, allowing the Court to accept pleas to a lesser included offense on the motion of the defendant effectively undermines the role of the prosecutor as the initiator of criminal charges, or as the reviewer of police charges.

RULE 3. WARRANT OR SUMMONS UPON COMPLAINT

RULE 3.02, Subd. 1. Warrant. This subdivision must be clarified as it is directly contradicted by the comments to Rule 3, page 9, line 12. The text indicates that the issuing officer may set and endorse the amount of bail, while the cited comment states that the issuing officer must so endorse the amount of bail. The textual material of the rule is preferable as there seems no utility in requiring the officer to set bail.

RULE 3.03. Execution or Service of Warrant or Summons; Certification. Warrants should be nightcapped if they issue on a charge upon which a signed citation, issued in accordance with Rule 6.01, Subds 1, 3, has been ignored. The accused in these cases has demonstrated unwillingness to submit voluntarily to process and respond to a "daytime" order. The A.B.A. Standards, Pretrial Release, §1.3 (1968), take a more stringent attitude and suggest that the willful failure to appear be made a crime and that failure to appear establish a prima facie case.

It is unfortunate to require exigent circumstances to allow nightcapping. In practice it would seem that custodial arrest of an accused during the night time hours would be less of a dislocation to his daily life than taking him into custody during the daytime when there is increased likelihood of interference with his employment. Once that appearance has been assured by either bail or release conditions in accordance with Rule 6, a day suitable to the defendant's work schedule can be selected for his appearance.

RULE 4. PROCEDURE UPON ARREST UNDER WARRANT FOLLOWING A COMPLAINT OR WITHOUT A WARRANT.

RULE 4.02, Subd. 2. Citation. This rule should be clarified to reflect that a court's order to issue a "citation only" be made on a case by case basis, to preclude the ordering of a "citation only" policy for a whole class of misdemeanor offenses punishable by incarceration.

RULE 4.02, Subd. 5. Appearance before Judge or Judicial Officer. A demand for a written complaint should be subject to the discretion of the presiding judge at first appearance. It

should also be available with the consent of the opposing counsel. Since Rule 7.03 makes the prosecutor's files open to the defense, and since the defendant's right to object to the court's jurisdiction over his person is not lost by his entry of a plea, the importance of a written complaint to a defendant is reduced considerably. In the alternative, we would not object to maintaining the present system where complaints are mandatory under Minn. Stats. §488 A10, Subd. 3, and making discovery subject to existing case law.

The unbridled right to demand a written complaint, when taken together with Rule 17.06, Subd. 4(3), which provides for dismissal "with prejudice" of a charge where the State fails to issue a formal complaint following a demand by a defendant, will lead to a great increase in complaint demands and thus multiply administrative costs. A defense attorney who did not take this calculated gamble for a dismissal with prejudice would be doing a disservice to his client; in fact, not to do so might be alleged on appeal as showing incompetence of counsel.

The 36 hour time limit for issuance of a complaint is too short to allow notice to witnesses (and possible rescheduling of their plans) to assure their appearance for the drafting of a formal complaint.

A period of time to be set by the court, but not less than 14 days, should be allowed for issuance of a formal complaint following a demand. This would avoid the confusing 36 hour plus 7 day, plus 7 day time periods allowed by Rule 4.02, Subd. 5(3), and Rule 17.06, Subd. 4(3), <u>Dismissal for Curable Defect</u>.

Unwarranted detentions while awaiting complaints can be avoided by recourse to procedures set out in Rules 4, 5, and 6, when the court orders a complaint.

RULE 5. PROCEDURE ON FIRST APPEARANCE

Note 12 on Page 21 provides that in misdemeanor cases the trial is "to be held within 30 days from the date of demand or within 10 days of demand if the defendant is in custody (Rule 6)." Because there is no basis for this requirement in Rule 6 or elsewhere in the proposed rules, this note should be deleted. (See also our comment to Rule 30.02).

RULE 5.01 (e), should not provide an explicit offer of a written complaint for the reasons cited in this petitioner's comments to Rule 4.02, Subd. 5(3).

RULE 5.02, Subd. 2, Misdemeanors, provides that counsel may be appointed although the offense charged carries no penalty of incarceration. This standard is inconsistent with Rule 23.05, Subd. 2, which limits appointed counsel in petty misdemeanor cases to offenses involving moral turpitude. It would seem more fair to allow appointed counsel in the court's discretion in petty misdemeanor cases involving moral turpitude, or in cases where substantial questions of constitutional law exist.

RULE 6. PRE-TRIAL RELEASE

Rule 6.01, Subd. (1)(a). By Arresting Officers. This provision appears to bar custodial arrests in petty misdemeanor offenses. While a policy favoring issuance of citations appears to represent an enlightened approach where petty offenses are involved, the standards found in the comments to Subd. 1(1)(a) and (b) of Rule 6.01 are unnecessarily more restrictive than the guidelines suggested in the A.B.A. Standards, Pre-trial

Release, §2.2 (1968). Our rules neither provide for arrest if the accused fails to satisfactorily identify himself, nor where the accused refuses to sign the citation.

Additionally, the Advisory Committee has in this subdivision seemingly changed Minn. Stat. §629.34, which currently allows arrest by a peace officer for a public offense committed in his presence. Such a change exceeds the legislative restrictions placed upon the Advisory Committee by Chapter 390, Minnesota Session Laws of 1974, which provides as follows:

> "Notwithstanding any rule, however, the following statutes remain in full force and effect:***** (f) Statutes which relate to extradition, detainers, and <u>arrest</u> , found in Minnesota Statutes, Sections 629.01 to 629.404." (Emphasis supplied).

All custodial arrests for petty misdemeanors should not be barred as this would enable out-of-state residents to ignore the only enforcement tool of petty misdemeanor violations, that is, the citation, with impunity.

RULE 7. NOTICE BY PROSECUTING ATTORNEY OF EVIDENCE AND IDENTIFICATION PROCEDURES; COMPLETION OF DISCOVERY

RULES 7.01 and 7.02: <u>Notice of Evidence and Identification Procedures and Notice of Additional Offense</u>. Notices which are the equivalent of present Wade and Spriegl notices should be allowed to be served within 15 days following pre-trial conferences, for the reason that a great majority of cases will be negotiated to a plea of guilty at the time of pre-trial; the prosecuting attorney should not be required to prepare every file with such notices before the expiration of a reasonable time after that negotiating session.

The proposed discovery system outlined by Rule 7.03 should serve to notify the defendant of possible defenses which will influence his decisions at the time of the pre-trial conference. We further submit that the existence of provisions for discovery obviate the present need for a complex system of pre-trial notices.

RULE 9. DISCOVERY IN FELONY AND GROSS MISDEMEANOR CASES.

Clarification is needed as to what parts of Rule 9, if any, apply to misdemeanor and petty misdemeanor offenses. By its title, Rule 9 should have no application to those classes of offenses, however, the notes on Page 47 (third full paragraph) indicate that Rule 9.02, Subd. 2, "Discovery Upon Order of Court", does apply to misdemeanor cases.

In the case of misdemeanors punishable by fine only, it would appear that the streamlined procedure of Rule 7.03 would be all the more desirable, rather than the lengthy avenues of discovery set out in Rule 9. (See A.B.A. Standards: "Discovery and Procedure Before Trial", 1.5 (1970)).

RULE 10. PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

RULE 10.04. Service of Motions; Hearing Date. This rule provides only a three-day minimum period for a motion by defendant; a minimum of 10 days would allow adequate time for the prosecution to obtain information from those having knowledge of the facts involved in the charge and to research legal issues

raised. Further, notice should be filed with the appropriate court clerks within the same time period. The rules do not appear to provide for such filings, as currently written.

RULE 12. PRETRIAL CONFERENCE AND EVIDENTIARY HEARING IN MISDEMEANOR CASES.

RULE 12.04. Hearing on Evidentiary Issues. This rule should provide that all testimony in support of motions at pre-trial conferences shall be by affidavit only, rather than by oral testimony. If the defendant alone produced witnesses at the pre-trial conference, he would be at a distinct advantage over the State. If oral testimony was to be allowed, the State would be compelled to require attendance of witnesses at each pre-trial conference for which motions were noted. The taking of testimony and cross-examination at the time of pre-trial defeats the purpose of streamlining the judicial process and, on the contrary, would lengthen it considerably. Any hearing requiring oral evidence should be held prior to trial as suggested in Rule 12.07, with sufficient time allowed for each side to notify and assure the presence of those would give such oral testimony.

RULE 12.08. Record. A verbatim record of the pre-trial conference is both unnecessary and expensive. It is incumbent that the rules distinguish between the need for a reporter at pre-trial hearings as opposed to pre-trial conferences. A recording of any tendered plea negotiations and their conditions can be made by the judge hearing "pre-trials."

RULE 15. PROCEDURE UPON PLEA OF GUILTY; PLEA AGREEMENTS; PLEA WITHDRAWAL; PLEA TO LESSER OFFENSE

RULE 15.07. Plea to Lesser Offenses. This rule provides that, "Upon motion of the defendant the court may accept a plea of guilty to a lesser included offense or to an offense of lesser degree",

without consent of the prosecutor. The court should not be allowed to take a plea of guilty to a lesser charge without the consent of the prosecuting attorney, since to do so confuses the power of the judiciary with that of the executive branch of government. It has traditionally been the prosecuting attorney's role to oversee and review charges placed by the police, and then to determine what, if any, charges should finally be brought. (See Proposed Rules Rule 2.02; A.B.A. Standards, "Prosecution Function 3.4" [approved draft, 1968] and ALI Model Code of Pre-Arraignment Procedures, §6.02 [T.D. #1, 1966]).

We have been unable to find anywhere in the A.B.A. Standards Relating to the Administration of Criminal Justice a provision which suggests that the court, of its own initiative, should have the right to accept guilty pleas solely on the motion of the defendant. In fact, A.B.A. Standards, "The Functions of Trial Judge", §4.1 (1972) and its comment, as well as A.B.A. Standards, "Pleas of Guilty", §3.3 (1969) state that the trial judge should not be involved in plea discussions.

RULE 15.08. Plea to Different Offense. This provision allows a guilty plea to a different offense. As to that new charge, the defendant may be charged by complaint or tab charged as provided in Rule 4.02, Subd. 5(2), if the different offense is a misdemeanor. The reference to Rule 4 should include reference to Rule 4.02, Subd. 5(3), as that is the subsection which deals with tab charges. Further, the procedure of using a tab charge should be allowed in the case where the new offense charged is a petty misdemeanor.

RULE 17. INDICTMENT, COMPLAINT AND TAB CHARGE

RULE 17.06, Subd. 4(3). Dismissal for Curable Defect. This

rule provides a "two step extension procedure", (7 days, thence 7 days) available to the State, if it desires to "re-issue" a complaint dismissed as untimely or for a curable defect. Failure by the State to take appropriate action during either of these time periods will result in the charges being "dismissed with prejudice." This situation will lead to numerous demands for written complaints in the hope that any one of a myriad number of contingencies might prevent the State from obtaining the complaint within the prescribed period. Minn. Stat. §609.035, as construed, as well as the 5th Amendment to the United States Constitution and Art. I, Section 7 of the Minnesota Constitution, should remain the determining bases of when merger, collateral estoppel or jeopardy attach.

Clarification is needed as to the notes on Page 90 which provide that upon dismissal of a complaint by reason of untimely filing or a curable defect, "the prosecuting attorney may, within two days after notice of entry of order dismissing, move to continue for not more than 24 hours for the filing of a new complaint." (Emphasis supplied). There seems to be no basis for these notes anywhere in the textual material.

RULE 21. DEPOSITIONS

RULE 21.09. Deposition in Misdemeanor Cases. This rule allows depositions in connection with petty misdemeanor charges. Given the limited nature of sentence exposure in such cases, the attendant costs and time-consuming procedures involved with depositions seems unjustified.

RULE 23. PETTY MISDEMEANORS AND VIOLATION BUREAUS

RULE 23.02. Designation as Petty Misdemeanor by Sentence Imposed. This particular section states that any charge shall be deemed a petty misdemeanor if the sentence imposed following conviction is limited to a fine of less than $100.00. This will potentially cause considerable administrative expense. If a defendant is convicted of a misdemeanor traffic violation such as careless driving, but is sentenced to a fine only of $75.00, how is the Department of Public Safety to treat such a conviction for purposes of evaluating that person's driving privileges? What effect would a petty misdemeanor driving while intoxicated conviction have on a person's record?

RULE 23.03, Subd. 3. Written Plea of Guilty. This rule requires that any fine payment to a violations bureau be accompanied by a signed admission of guilt. Given the volume of petty misdmeanor charges and the fact that only fines are involved, it seems that this provision is not justified. This is especially true since petty misdemeanors are not crimes.

No provision is made for a situation where payment without signature is made by mail. The costs of returning payments not accompanied by such a signed admission would be considerable; ergo, what sanctions are-or should be-applicable. In addition, due to the mobile nature of today's society, many of the returned citations (if a return is to be the procedure) would not reach the person who made the attempt to pay his fine. Such a person would then have a summons or warrant outstanding for his arrest even though he had paid his fine. It would seem that the act of paying the scheduled fine would be an adequate admission of guilt where a petty misdemeanor is involved.

RULE 23.04. Designation as a Petty Misdemeanor in a Particular Case. This rule requires consent of the defendant before a prosecuting attorney may certify a misdemeanor charge as a petty misdemeanor. There is no justification set out in the rules or notes for allowing the defendant to dictate the charges against himself. Certification of the offense as a petty misdemeanor should be allowed up to 15 days after the pre-trial or, if no pre-trial is held, up to two weeks of the trial date.

RULE 23.05. Procedure in Petty Misdemeanor Cases. This rule provides that there is no right to a jury trial for a certified petty misdemeanor which involves moral turpitude. The logical inference is that there is a right to a jury trial if the certified petty misdemeanor does not involve moral turpitude. This conflicts with Rule 26.01, Subd. 1(1)(b), and comments thereto, (Page 56; third paragraph) which provide that offenses not punishable by incarceration will be tried to the Court.

Rule 23 should provide guidance as to what sanction is contemplated if one convicted of a petty misdemeanor willfully refuses to pay an imposed fine.

RULE 26. TRIAL

RULE 26.01, Subd. 1(a). Offenses Punishable by Incarceration. This rule, providing a jury trial in the first instance will dramatically increase the jury calendar in Hennepin and Ramsey Counties, and should not be implemented in those counties. A zealous defender will normally demand a jury trial as the chances for acquittal obviously increase if the State must persuade six or twelve people of the accused's guilt rather than one trial judge. The laudable policy of promoting jury trials will result

in the frustration of an equally important right-that of a speedy trial. Pressure will be exerted upon prosecuting attorneys to certify misdemeanors as petty offenses simply to prevent a jury calendar backlog. (See also City of St. Paul v. Hitzmann, 295 Minn. 301, 204 N.W. 2d 417 (1973).

RULE 26.02, Subd. 5 (1), 9. Grounds. This rule is unclear. Does this allow a challenge for cause against a juror who has already served on a jury hearing an offense charged under the same statute or ordinance, or is this ground directed at excluding jurors who have sat on a jury hearing a matter which arose at the same time or is connected factually?

RULE 26.03, Subd. 17 (2). Reservation of Decision on Motion. This rule should not allow the Court to reserve ruling on a motion for judgement of acquittal. To allow granting this motion after a verdict is returned is to allow jury deliberations which may become a meaningless act. The Court should not be influenced by the findings of a jury in ruling on such a motion. The standard for granting such a motion is inappropriate. Rather than "if the evidence is insufficient to sustain a conviction of such an offense or offenses," the standard should be a more definitive one and not allow the Court to substitute its own opinion for that of the jury when any fact question remains. At a minimum, the rule should require specific findings by the ruling judge if such a motion is granted.

RULE 27. SENTENCE AND JUDGMENT

RULE 27.03, Subd. 9. Correction or Reduction of Sentence. This rule should require a Court to state on the record the new factors which led it to modify a previously imposed

sentence. This is strongly suggested by A.B.A. Standards, "Sentencing Alternatives and Procedures", §6.1 (1968). The comments accompanying Rule 27 should refer to the A.B.A. Standards for clarification.

RULE 28. TRIAL DE NOVO AND APPEALS TO DISTRICT COURT

This rule permits appeals from Municipal to District Court on the record from petty misdemeanors and misdemeanors when the initial hearing has been before a judge learned in the law. (Rule 28.01). Rule 28.03 also allows discretionary interlocutory appeals to District Court. Further, the scope of review set out in Subd. 12 of Rule 29.02 is broad in range and encourages the appellate court to review the record as "the interests of justice may require."

It would seem logical that appeals to the District Court would proliferate under the above rules causing an increased workload on the District Court. This would be especially true since the rules do not specifically prohibit appeals from Municipal Court sentences. (However, see also, comment to Rule 29.02, Subd. 12).

A far more equitable distribution of appellate responsibilities would take place if appeals to District Court were limited to cases punishable or punished as a petty misdemeanor. This would take account of the fact that they are not a crime, (Rule 23.06). Appeals from the District Court to the Supreme Court could be discretionary. (Rule 29.02, Subd. 6(1)). In fact, appeals from petty misdemeanors could be made completely discretionary without running afoul of the A.B.A. Standards,

"Criminal Appeals", §1.1(a) (1970) which stresses the need for appeal for every criminal conviction. (Emphasis added).

Appeals in misdemeanor cases punishable by fines over $100 or by jail sentences, whether executed or not, would be appealable in the same manner as felonies and gross misdemeanors. This would take recognition of the fact that Municipal Court judges are learned in the law by not subjecting each and every decision to intermediate appellate appeal.

RULE 28.01, Subd. 2. Right to Appeal on the Record. This rule should be clarified as to whether a conviction of a petty misdemeanor is appealable to the District Court. (See definition of "misdemeanor" Rule 1.01, which standing alone, does not include petty misdemeanors).

RULE 28.07, Subd. 1. Record on Appeal and Scope of Review. This rule, to be logical, must refer to Rule 29.02, Subd. 10 and 12, (or this may be a mere scrivner's error).

Appeal should not be allowed where conviction is of a misdemeanor punishable by fine only. Since the rules specifically provide that a petty misdemeanor is not a crime, this position is not inconsistent with A.B.A. Standards, Criminal Appeals 1.1, "The necessity of appellate review of convictions in criminal cases."

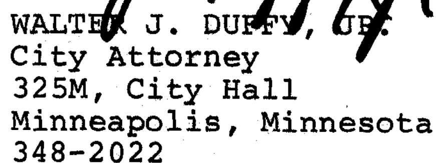
RULE 28.07, Subd. 4. Action of District Appellate Court. This rule should not grant the District Court authority to direct that the appealed conviction be reduced to a lesser

charge. We have been unable to find in the A.B.A. Standards relative to appellate review of sentences or criminal appeals such a grant of appellate authority. The function of an appellate Court is to review for error, affirm, reverse, or remand for further action by the lower court. It seems inconsistent with the role of a detached court, dealing only with transcripts, to introduce new charges at the appeal level. The appellant is denied an adversary hearing on the newly introduced charge. Since he may have raised other distinct defenses and objections to this lesser charge during the trial, he should not suddenly be confronted with a conviction for which he might have offered a defense.

RULE 30.02. By Court. Existing standards for dismissal for want of a speedy trial should be specifically included in misdemeanor cases. If the delay is not demonstrably prejudicial to the defendant or if the defendant has not requested that this matter be brought on for trial a Court should not be entitled to dismiss for "Unnecessary Delay" (See considerations weighed in State v. Borough, 287 Minn. 482, 178 N.W. 2d 897 (1970).

It is hoped that the attached comments are received in the spirit in which they are proferred, not in a negative vein, but in the hope of contributing to a comprehensive codification of criminal procedure in this State. We realize that the numerous and wide ranging observations contained herein should be considered by a working committee with whom a two way discussion could be productive. It is respectfully submitted that there has been no opportunity for such an exchange. We reiterate then, the request that these rules receive a hearing as a complete set of rules before the drafting committee and that the committee itself include a full-time urban municipal prosecutor.

Respectfully submitted,



WALTER J. DUFFY, JR.
City Attorney
325M, City Hall
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348-2022

Dated: January 20, 1975

45.5.17

IN THE SUPREME COURT

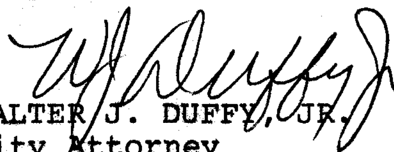
STATE OF MINNESOTA

IN RE PROPOSED RULES)
)
OF CRIMINAL PROCEDURE)

SUPPLEMENTAL PETITION

Pursuant to leave of this Court granted January 31, 1975, your petitioner submits the attached comments as addenda to the five minute oral presentation delivered by Larry L. Warren on my behalf.

Respectfully submitted,



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348-2022

Dated: February 3, 1975

IN THE SUPREME COURT

STATE OF MINNESOTA

IN RE PROPOSED RULES)
OF CRIMINAL PROCEDURE) SUPPLEMENTAL PETITION

Comes now Walter J. Duffy, Jr., and petitions the court to consider the following additional consideration in connection with the Minnesota Proposed Rules of Criminal Procedure:

RULE 6.01 prohibits custodial arrest by a police officer where the public offense committed in his presence is a petty misdemeanor. What should be the course of a peace officer confronted by a citizen who refuses to ID himself or has no ID? What does the officer do if the accused refuses to sign a promise to appear? The policy of tagging in lieu of arrest is a good one, but the decision as to whether or not to book a suspect should be left with the discretion of the peace officer involved.

RULE 23.03, Subd. 3 requires that each fine payment to a violations bureau be accompanied by a signed admission of guilt. Given the propensity for human error and failure to follow instructions and the enormous volume of citations issued in Minneapolis alone, a colossal administrative bottleneck will occur when unsigned citations come in the mail with each payment of tags issued.

The payment accompanying the citation should be regarded as a sufficient admission of guilt.

RULE 23.04 clearly allows the prosecuting attorney to invade the province of the legislative branch. The legislature must remain the determiner as to classification of criminal conduct. An example is that of a charge of possession of a

small amount of marijuana. The legislature recently had before it a proposal to make such conduct a petty misdemeanor. This was specifically rejected by the legislative branch of our government as that bill was not reported out of committee. As a compromise, the legislative branch made that conduct a misdemeanor.

Now, however, each prosecutor may at his pleasure give full force and effect to the rejected bill and denominate the possession of a small amount of marijuana a petty misdemeanor.

RULE 26.01, Subd. 1 (a) giving an accused a right to jury trial at first instance in every case wherein he is exposed to the possibility of incarceration will dramatically increase the jury calendar. It is indeed rare for a defendant to waive his right to a jury trial when entitled to one. The current practice in Hennepin County Municipal Court results in approximately 45 cases being set for criminal court trial weekly. These cases in turn generate approximately one appeal to Hennepin County District Court every week. It seems, then, that allowing a court trial only in Municipal Court allows reasonable disposition of misdemeanor cases and a manageable number of misdemeanor District Court jury cases, maintaining a jury trial right.

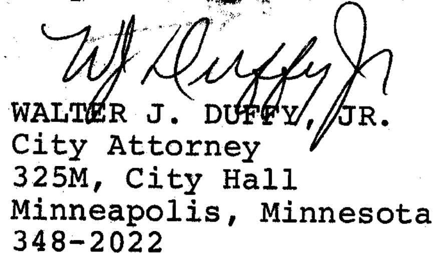
Under new policies, it is not difficult to anticipate 45 jury cases being set weekly or many times that number in Municipal Court under the new rules. This situtation is out of the question without a tripling of the staff for the bench and prosecutor's office, to say nothing of administrative burden for the Hennepin County Court Administrator and the realities of courtroom space.

The argument will undoubtedly be made that in practice, the prosecuting attorney will be squeezed into certifying the bulk of misdemeanor cases as petty misdemeanors. Is this a proper device to "move the calendar along?" We think not. The present

practice of allowing a jury trial in ordinance misdemeanor prosecution only on De Novo trial in District Court should be maintained.

In sum, we ask that the rules be referred to the Advisory Committee to meet with interested parties and discuss their observations and objections. This opportunity has not been afforded those practicing in the misdemeanor area.

Respectfully submitted,



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