STATE OF MINNESOTA

IN THE SUPREME COURT

45517

O R D E R

IT IS HEREBY ORDERED, that a hearing be held before this Court in the Supreme Court, State Capitol Building, Saint Paul, Minnesota, on Thursday, February 17, 1977 at 9:30 a.m. on the proposed amendments to the Rules of Criminal Procedure recommended by the Advisory Committee on Rules of Criminal Procedure.

IT IS FURTHER ORDERED, that true and correct copies of the Amendments to the Rules of Criminal Procedure be made available upon request to persons who have registered their names with the clerk of this Court for the purpose of receiving such copies and who have paid $6.90 which is the specified fee to defray the expense of providing the copies.

IT IS FURTHER ORDERED, that advance notice of the hearing be given by publication of this Order once in the Supreme Court Edition of FINANCE AND COMMERCE and once in THE ST. PAUL LEGAL LEDGER.

IT IS FURTHER ORDERED, that interested persons show cause, if any they have, why the proposed amendments should or should not be adopted. All persons desiring to be heard shall file briefs or petitions setting forth their views and shall also notify the Clerk of the Supreme Court in writing on or before February 10, 1977.

DATED: December 20, 1976.

BY THE COURT:

Robert J. Sheran
Chief Justice

SUPREME COURT
FILED
DEC 21 1976
JOHN McCARTHY
CLERK

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

CARL O. WEGNER
JAMES L. WEGNER
DERCK AMERMAN

January 12, 1977

Supreme Court
State Capitol
St. Paul, Minnesota 55101

45517

Re: Criminal Rules of Procedure change proposal

Dear Sir:

I would like the court to register my opposition to any changes in the Criminal Rules of Procedure, which would change the order of final arguments from that which presently exists.

Thank you in advance for your anticipated cooperation in registering my negative response to the said proposed Criminal Rules change.

Yours very truly,

WEGNER, WEGNER, & AMERMAN

James L. Wegner

James L. Wegner

JLW:db

McCARTEN & TILLITT
LAWYERS
ALEXANDRIA BANK & TRUST BLDG.

612-763-3115

JOHN J. McCARTEN
RALPH S. TILLITT

PAUL V. McCARTEN, ASSOCIATE

P.O. BOX 188, 720 BROADWAY
ALEXANDRIA, MINN. 56308

January 14, 1977

Clerk of Court
Minnesota Supreme Court
State Capitol
Saint Paul, MN 55155

Dear Sir:

Re: Rule 26.03, Subd. 11 45517

Enclosed is a Memorandum directed to the Court specifying opposition to a proposed amendment to the Minnesota Rules of Criminal Procedure. The specific Rule addressed herein is Rule 26.03, Subd. 11.

Very truly yours,

McCARTEN & TILLITT

Paul V. McCarten

Paul V. McCarten

PVM/lmh

Enclosure

1-17 -- copy distributed to justices
W.T.

McCARTEN & TILLITT
LAWYERS
ALEXANDRIA, MINN.

STATE OF MINNESOTA

In Supreme Court

January 14, 1977

Re: Rule 26.03, Subd. 11

Memorandum

Gentlemen:

I am writing in regard to a proposed change in the Rules of Criminal Procedure, whereby the prosecuting attorney would have an opportunity to rebut the defense's closing argument at the conclusion of a criminal case. It is my understanding that this proposal has been made and is now being considered by the Court.

In that I now handle the bulk of criminal matters for this office, I have been directed to write the Court and express this firm's feelings towards that particular rule change. I will preface my remarks with a background of this office's experience in the area of criminal law. The senior member of this firm, John J. McCarten, was the Douglas County Attorney for 16 years, from 1951 through 1966. His partner, Ralph S. Tillitt, was the Assistant County Attorney for Douglas County from 1956 through 1966. Since that time, both Mr. McCarten and Mr. Tillitt have participated in the trials of numerous criminal cases for the defense.

Prior to joining the firm of McCarten & Tillitt in October of 1976, I was admitted to practice in Minnesota in September of 1974, and thereafter was the judicial law clerk for Judge Andrew W. Danielson in the Hennepin County District Court. In that Judge Danielson heard a predominance of criminal cases during my tenure as law clerk, I was exposed to the trial of numerous criminal cases. In my observation of those trials, I have formulated opinions of my own which I now find correlate directly with the inclinations held by my father, John J. McCarten, and his partner, Ralph S. Tillitt. Therefore, the suggestions expressed herein reflect the feelings of all members of this firm.

It is my understanding that the Court is presently considering a petition by one or more prosecuting attorneys regarding the change in the Rules of Criminal Procedure, Rule 26.03, Subd. 11, which would allow a prosecuting attorney 5 minutes of rebuttal to the defense counsel's closing argument. We feel strongly that the Court should reject this petition for the following reasons:

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LAWYERS
ALEXANDRIA, MINN.

First, it has been our experience that the present Rules of Criminal Procedure provide adequate opportunity for the State to present its case to a jury so as to give the jury sufficient opportunity to determine the guilt or innocence of an accused party. To provide an additional opportunity for the State to address the jury after the close of a criminal case as we know it today, would have the effect of further deteriorating the principle that a defendant is innocent until he has been proven guilty.

It has been our observation that even though the criminal justice system is based upon the theory of a defendant's innocence through the trial procedure, actually, a jury's view of an accused is more often than not, that a defendant is in fact guilty until he has been proven innocent. Though this observation may upon first blush appear radical, the reality of this premise is undeniable at the trial level.

To provide the prosecutor with additional rebuttal opportunity would be tantamount to adopting a view that the State is not given sufficient opportunity to present evidence during the case in chief, adequate to convince a jury as to the guilt of the accused. In that the jury is expected to base its conclusions upon evidence presented during the trial without regard to extraneous circumstances, a prosecutor's rebuttal would defeat that very principle.

Second, since historically Minnesota has provided the prosecutor with the initial opening statement and the defense with the final closing argument; unless the Court were to find that the present criminal trial procedure is patently ineffective in dealing with the application of criminal justice, a change is unwarranted. Despite particular inadequacies in the criminal justice system, it is difficult to deny that, in fact, the vast majority of criminal cases result in a just outcome. Therefore, to alter the present trial system with so radical a change as to allow a prosecutor a rebuttal opportunity at so sensitive a stage in the trial procedure, is dangerously unjustifiable.

Third, the argument of the petitioners suggests that criminal prosecutions fail due to the lack of opportunity for the prosecutor to rebut a defense attorney's closing argument. It must be realized that the majority of those lost cases, assuming a conviction would be the proper result, more often than not, fail to achieve convictin due to inadequate preparation or presentation by the prosecutor. Hence, awarding the prosecutor additional rebuttal opportunity, provides him with an unwarranted advantage in a system which already provides adequately for both parties to gain a just result.

Lastly, the function of the Court in the trial of a criminal

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LAWYERS
ALEXANDRIA, MINN.

case is or should be more active than the role played by the Court in the trial of a civil case. If the trial judge maintains the stricture of fairness during the course of a criminal trial, the closing arguments, under the present Rules, can as well be regulated by the judge's supervision in that delivery.

If petitioner complains that the defense's closing argument is unfair per se, the attack on that segment of the trial should be directed to application of rules regulating closing arguments, rather than providing the prosecutor an additional opportunity to counter the defense's closing argument. If petitioner claims that a defense closing argument is unfair in a particular case, he can ask for curative instructions or appeal or both, which is provided for under the present Rules.

Respectfully submitted,

McCARTEN & TILLITT

By Paul V. McCarten

Paul V. McCarten
720 Broadway
P. O. Box 188
Alexandria, Minnesota 56308

(48)

JAMES H. MANAHAN LAW OFFICE, CHARTERED
Suite 107, Madison East
P. O. Box 152
MANKATO, MINNESOTA 56001

Area Code 507
387-5661

February 7, 1977

45517

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

Dear John:

Would you please bring to the attention of the Supreme Court my opposition to the proposed amendment to Rule 26.01, sub. 1 (2) (a) of the Rules of Criminal Procedure. I do not wish to appear at the hearing, but would appreciate being permitted to present the following views:

The present rule provides that the defendant, with the approval of the Court, may waive jury trial. The proposed rule would permit the prosecuting attorney to veto this, even if both the defendant and the judge desire a court trial.

Jury trials were instituted as a device to protect the rights of defendants, and it is anomalous to talk about the prosecution having a right to a jury trial. This is particularly true under the proposed rule, where the prosecution can demand a jury trial even if the judge believes that justice would best be served by a court trial.

In State v. Kilburn, 231 N.W. 2d 61 (1975), the defendant's showing of predudicial publicity was insufficient to give him a right to waive a jury trial under Rule 26.01, sub. 1 (2) (b). Nonetheless, when there has been some prejudicial publicity, the defendant should have the right, and the judge must have the right, if requested by the defendant, to waive a jury rather than risk an unfair trial.

In State v. Vail (Supreme Court File No. 47427), defendant waived a jury trial because of the complexity of the factual issues involved. District Judge O. Russell Olson, after reviewing the applicable law, granted the defendant's request. A copy of his Order and Memorandum is attached hereto.

For these reasons, I request that the Court not amend Rule 26.01, sub. 1 (2) (a).

Yours very truly,

James H. Manahan

James H. Manahan

JHM:ck
Enclosure

2-8 - Copy to all justices
W.T.

(50)

DOUGLAS, JAYCOX, TRAWICK, MCMANUS & LIPPERT

Attorneys at Law

BRUCE C. DOUGLAS
JACK S. JAYCOX
LEON A. TRAWICK
THOMAS P. McMANUS
LEANDER G. LIPPERT

JAMES E. MOON
THOMAS I. HARA
STEVEN C. AHLGREN
J. I. MORELAND, JR.
MARY D. HELGERSON

247 THIRD AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55415

AREA CODE 612
TELEPHONE 339-4946

February 9, 1977

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

45517

Re: Proposed Amendment to Rules of Civil Procedure

To the Honorable Chief Justice and Associate Justices of the Minnesota Supreme Court:

I am writing with regard to proposed Amendment to Rule 26.03 Subdivision 11, "Order of Jury Trial." I am particularly concerned with what constitutes a substantial change from tradition in the criminal law area. If there were a specific reason for changing the order of final argument so as to permit the prosecution to have the "last word" to the jury, then I would have no objection to such change. To simply change the rule to comply with the majority of other jurisdictions is similarly not sufficient. It must be remembered first and foremost that our criminal process is accusatorial as opposed to inquisitorial, and that while we seek the truth in a criminal trial, we do so knowing full well that the State possesses awesome power and unlimited financial resources with which to effectuate the prosecution of accused individuals. While the State alone has the burden of proof and we ordinarily permit the party with such a burden to have the last word, we do so assuming the parties to be equal in terms of monetary resources and legal talent. This assumption cannot be made in the area of criminal prosecutions. Prosecutors regularly deal with the criminal law and become experts in very short order. We do not yet have certification of criminal law as a specialty, and therefore cannot simply assume parity of talent between counsel.

This Court's practical knowledge of the investigative resources possessed by the State and its political subdivisions must also strongly militate against viewing the criminal trial as an arena in which co-equals do battle.

In addition, this Court must separate theory from reality. Jurors must be protected from preexisting societal passions and prejudices associated with the criminal processes. Jurors know very well that a criminally accused would not be in the courtroom having his case tried before them unless there were already extant very strong evidence tending to indicate guilt. A criminally accused needs the advantage of arguing last, if for no other reason than to reinforce the presumption of innocence which the law affords him. He needs the opportunity to tell the jury that his accusors have not proven their case and exactly why and how they have not done so. To place in the hands of a trial judge the discretion to permit prosecution rebuttal will only invite appellate litigation on whether a defendant's rebuttal was proper or improper. There is simply no justification at this juncture for changing the traditional order of final argument in criminal cases, and there are strong justifications for retention of that traditional order. I urge you to reject the proposed Amendment in its entirety.

Very truly yours,

DOUGLAS, JAYCOX, TRAWICK, MCMANUS & LIPPERT

Bruce C. Douglas

BCD/aw

(51)

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2308 CENTRAL AVENUE, N. E.
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789-8805

CARL O. WEGNER
JAMES L. WEGNER
DERCK AMERMAN

February 7, 1977

Minnesota Supreme Court
State Capitol Building
St. Paul, Minnesota 55101

45517

RE: PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

Gentlemen:

Please be advised that I am opposed to the amendment of Paragraph Number 57 of said proposed amendments which is an amendment to Rule 26.03, Subd. 11 - Order of Jury Trial. That order of argument has been the same in Minnesota for over 100 years and everybody is comfortable with it. As you know, it also coincides and is uniform and consistent with the order of argument in civil cases. To allow people to reply for five minutes and pick away at each other, would seem to lower the dignity of the proceeding.

The Rule also has the affirmative therapeutic effect of the defendant having the last word before the judge's charge, for whatever benefit that may be. I am sure that if the change is made, it will be a source of dissatisfaction and grumbling among the prisoners at St. Cloud and Stillwater, as well as the basis for numerous appeals based on the defendants' feeling that had the old order of argument been in effect at the time of his or her trial, there may have been an acquittal.

Respectfully submitted,

Derck Amerman

DA:sh

(53)

LAW OFFICES

LEFEVERE, LEFLER, PEARSON, O'BRIEN & DRAWZ

1100 FIRST NATIONAL BANK BUILDING

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DAVID J. KENNEDY
GLENN E. PURDUE
DAVID J. BUTLER
JAMES D. LARSON
CHARLES L. LEFEVERE
HERBERT P. LEFLER III

February 10, 1977

Mr. John McCarthy
Clerk of Supreme Court
State Capitol Building
St. Paul, Minnesota 55155

RE: Proposed amendments to Rules of Criminal Procedure

Dear Mr. McCarthy:

I request to be heard at the February 17 hearing by the Court on the proposed amendments to the Rules of Criminal Procedure. My appearance would be as an officer of the Hennepin County Municipal Prosecutors Association, and I expect my presentation would be not longer than five minutes.

I am enclosing a Petition setting forth the view of the Hennepin County Municipal Prosecutors Association.

Very truly yours,

Glenn E. Purdue
Vice President, Hennepin County
Prosecutors Association

GEP:jdb
Enclosure
CC: Mr. R. J. Schieffer, President
Mr. F. C. Brown, Jr., Secretary

STATE OF MINNESOTA
IN THE SUPREME COURT

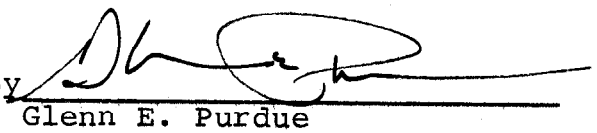
IN RE Adoption of Proposed Amendments
to the Rules of Criminal Procedure

PETITION OF
HENNEPIN COUNTY MUNICIPAL
PROSECUTORS ASSOCIATION

The Hennepin County Municipal Prosecutors Association does recommend that the Supreme Court approve those amendments to the Rules of Criminal Procedure as proposed by the Supreme Court Advisory Committee as relate to criminal procedure in misdemeanor cases. Many of the amendments will provide substantial flexibility for the courts and its officers and will protect and enhance the substantial rights of those accused. In some cases, the proposed amendments adopt procedures which are presently being followed in our courts and which have proven effective in enhancing the quality of justice in Hennepin County.

The Hennepin County Municipal Prosecutors Association does hereby petition the Supreme Court to approve and adopt the amendments.

HENNEPIN COUNTY MUNICIPAL
PROSECUTORS ASSOCIATION

By 
Glenn E. Purdue
Vice President

54

COUNTY ATTORNEYS COUNCIL

203 STATE CAPITOL CREDIT UNION BUILDING • 95 SHERBURNE AVENUE SAINT PAUL, MINNESOTA 55103 • TELEPHONE: 296-6972

February 9, 1977

John C. McCarthy
Clerk of Supreme Court
230 State Capitol
St. Paul, MN 55155

Dear Mr. McCarthy:

With regard to the February 17, 1977 hearing on proposed amendments to the Rules of Criminal Procedure, W. M. Gustafson, President of the Minnesota County Attorneys Council, desires to be heard on behalf of the County Attorneys Council. Mr. Gustafson intends to express the support in general of Minnesota County Attorneys for the adoption of the proposed amendments. For your information Mr. Gustafson's office address is as follows:

W. M. Gustafson
Nicollet County Attorney
P. O. Box 360
St. Peter, MN 56082
507/931-3430

Respectfully,

Stephen J. Askew
Executive Director

SJA/pjs

Office of the Public Defender
(612) 348-7530
C2200 Government Center
Minneapolis, Minnesota 55487

HENNEPIN COUNTY

William R. Kennedy
Chief Public Defender

February 9, 1977

Honorable John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Dear Sir:

Enclosed is a Petition requesting opportunity to be heard on February 17, 1977, regarding the Proposed Amendments to the Rules of Criminal Procedure.

Very truly yours,

John D. Tierney

John D. Tierney
Assistant Public Defender

JDT/vh

enc.

STATE OF MINNESOTA

IN SUPREME COURT

In The Matter Of An Open Hearing
On Proposed Amendments To The Rules
Of Criminal Procedure Recommended
By The Advisory Committee On Rules
Of Criminal Procedure

PETITION

TO: The Honorable Robert J. Sheran, Chief Justice of the Supreme Court, State of Minnesota.

Petitioner, a duly licensed attorney in the State of Minnesota, requests the opportunity to be heard on February 17, 1977, regarding the Proposed Amendments to the Rules of Criminal Procedure.

Of express concern are Rules 57 and 60, pertaining to the changing in the order of final argument, along with Rules, 16, 54 and 59, dealing with the right of the State to have a jury trial.

Respectfully submitted,

OFFICE OF THE HENNEPIN COUNTY PUBLIC DEFENDER
William R. Kennedy - Chief Public Defender

By John D. Tierney

John D. Tierney
Assistant Public Defender
Petitioner
C-2200 Government Center
Minneapolis, Minnesota 55487
Telephone: 348-7530

DATED: this 9th day of February, 1977.

(36)

RAMSEY COUNTY PUBLIC DEFENDERS OFFICE
605 Minnesota Building
St. Paul, Minnesota 55101
(612) 298-5797

WILLIAM E. FALVEY
Chief Public Defender

LOUIS E. TORINUS
1st Asst. Public Defender

February 10, 1977

Mr. John McCarthy, Clerk
Minnesota Supreme Court
St. Paul, Minnesota 55155

Re: Amendments to the Minnesota
Rules of Criminal Procedures

Dear Mr. McCarthy:

Enclosed you will find the original and nine copies of a Petition in connection with the proposed amendment to the Minnesota Rules of Criminal Procedure.

I would like the opportunity of being heard on February 17, 1977.

Very truly yours,

William E. Falvey

William E. Falvey
Chief Public Defender
Ramsey County

WEF/ml
Enc.

(56)

STATE OF MINNESOTA

IN THE SUPREME COURT

Petition of Ramsey
County Public Defender
In re: Amendments to
Minnesota Rules of
Criminal Procedure

PETITION

Petitioner, William E. Falvey, Ramsey County Public Defender, respectfully requests the Court to consider the following comments in connection with any amendments to the Minnesota Rules of Criminal Procedure:

1. Complaint. At the present time felony complaints that are filed against defendants merely recite the charge and have attached thereto copies of police reports. Often the police reports merely reflect what the officers have heard from some other essential witness. Your petitioner recommends that Rule 2 should be made more specific in requiring actual sworn statements of witnesses who have information relating to the essential element of the offense being charged. Under existing practice police reports often contain second and third hand, hearsay information upon which probable cause decisions are made. A court reviewing the complaint and attachments has no way of ascertaining the reliability of the hearsay information contained in those police reports. Sworn statements of witnesses would increase the reliability of information upon which a judge must act. Your petitioner is of the belief that actual sworn statements or affidavits from witnesses is even more essential if the Court adheres to its decision in State v. Florence, 239 NW2d 892 (1976) which has eliminated the adversary hearing on the issue of probable cause.

2. 36-Hour Rule. The proposed amendments to the Minnesota Rules of Criminal Procedure differentiate the time required to bring a defendant before a judge depending upon whether the individual is arrested with or without a warrant. The effect of the amendments would enlarge the amount of time to bring a defendant before the court when he or she has been arrested without a warrant. Such an amendment would serve only to encourage warrantless arrests and for this reason your petitioner is opposed to such an amendment.

3. Procedure on First Appearance. Your petitioner is of the belief that felonies and gross misdemeanors are of a serious enough nature that rights should be given individually to each defendant rather than defendants as a group. Accordingly, I would be opposed to the proposed amendment allowing group warnings to be given in felony and gross misdemeanor cases. Your petitioner would further be opposed to allowing the statement of rights to be given by someone other than a judge or judicial officer. The language "other duly authorized personnel" is too broad as it does not even exclude policemen and prosecutors as being the authorized individual who would advise the defendant of his rights.

4. Completion of Discovery. Under the existing practice in Ramsey County the time sequence contemplated by the Rules of Criminal Procedure simply is not working out. The Rules contemplated an Omnibus Hearing within fourteen (14) days after the defendants initial appearance in District Court. Once the Florence decision came down, Ramsey County went to a system of having one District Court appearance where a determination was made as to probable cause, arraignment of the defendant and the setting of a trial date. The second portion of the Omnibus Hearing, or the old Rasmussen portion, is then continued until immediately prior to trial. In effect, the Ramsey County District Court, contrary to the language in Florence, makes its determination of probable cause before the completion of discovery by the parties and before the Rasmussen issues are litigated. Florence, of course, suggests a reverse order, or that is, to decide the Rasmussen issues first and then proceed to the probable cause issue. Inasmuch as the time sequence contemplated by the Rules is not being followed, Rule 7 should be amended to provide for the necessary disclosures in some other manner. This is particularly problematical if the probable cause determination is to be based upon all of the disclosures made by the parties.

5. Omnibus Hearing. The original Omnibus Hearing contemplated by the Rules Advisory Committee included an adversary probable cause hearing. It is your petitioner's recommendation that the Supreme Court restore that portion of the Omnibus Hearing.

If it is not to be restored, Rule 11 should be completely redrafted. As things exist now, Rule 11 provides one way of proceeding, the Florence decision another, and in two of the major metropolitan areas of the state neither the Rule nor Florence are being observed. Additionally, your petitioner would be opposed to the proposed amendment to Rule 11.08 which would not require the presence of a court reporter at the so-called Omnibus Hearing. Recordings are no substitute for a court reporter. Experience has shown that it is extremely difficult and sometimes impossible to get a proper transcript from a recording. Attached hereto as Exhibit A is a memorandum of the Honorable Hyam Segell, Judge of District Court, Second Judicial District, concerning the inadequacies of recordings. This memorandum arose out of a dispute as to whether or not the Ramsey County Public Defender could have a court reporter present in Grand Jury proceedings.

6. Pleas of Guilty. Your petitioner is opposed to the proposed amendment of Rule 14 which would require that the Clerk of Court be notified in writing when a defendant wants to change a plea. This would result only in a proliferation of paper work which already has become overly burdensome by reason of the Rules. Phone calls should be more than adequate in this connection. Your petitioner would further recommend that Rule 15, dealing with questions to be asked a defendant upon a plea of guilty, be completely redrafted. The language in the proposed questions is entirely too difficult and cumbersome for a defendant to understand, and at least in this county, those questions outlined in Rule 15 are simply not used.

7. Order of Final Argument. Your petitioner would be opposed to changing of the order of final argument in a criminal case. No good reason has been advanced for this change save and except that most other jurisdictions do it differently. The prosecution in the trial of a criminal case have all the necessary resources with which to conduct their litigation. If, with all the resources the State has to prosecute a case is so close that it will turn on a final argument, a defendant should be given the opportunity of speaking last. Such a procedure seems only consistant with our traditional concepts of presumption of innocence and proof beyond reasonable doubt.

8. Separation of Misdemeanor Rules. Petitioner recommends that the Minnesota Rules of Criminal Procedure be amended in such a manner as to create separate sections for rules dealing with misdemeanors and rules dealing with felonies and gross misdemeanors. With the provisions being mixed as they are now, it is often times difficult to separate which rules apply to misdemeanors and which to felonies.

Respectfully submitted,

William E. Falvey

William E. Falvey
Chief Public Defender
Ramsey County

STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

State of Minnesota

vs.

Jerrold Dave Gray

ORDER

File No. 28574

This matter was heard by the undersigned on August 17, 1976, pursuant to a motion by the defendant for an order allowing a court reporter to be present at the hearing of the Grand Jury on Wednesday, August 18, 1976, for the purpose of taking and transcribing testimony of witnesses in connection with the case to be presented at that time involving said defendant. Defendant appeared by his attorney, William E. Falvey, and the State was represented by Thomas Poch, Assistant Ramsey County Attorney, and the Court, having been duly advised in the premises, now makes the following order:

IT IS ORDERED that a court reporter shall be allowed in the hearing before the Grand Jury on Wednesday, August 18, 1976, for the purpose of taking such testimony as may be presented involving the captioned defendant and shall be allowed to transcribe such testimony and furnish a copy of said transcript to William E. Falvey, Ramsey County Public Defender. Such reporter shall be furnished by the Public Defender.

IT IS FURTHER ORDERED that any court reporter so engaged by the Ramsey County Public Defender shall be instructed before entering upon

his duties that all proceedings heard by him before the Grand Jury must be kept secret and that he shall not impart or disclose to anyone any of the proceedings heard before him except by order of the Court.

Dated: August 17, 1976.

Judge of District Court

MEMORANDUM

In order to determine the likely quality of future tape recordings before the Grand Jury, the Court has listened to three tapes involving proceedings before the Grand Jury on July 28, 1976; each tape represented the testimony taken in connection with a particular defendant. It is to be noted first that the cassette tapes in each instance are of extremely low quality. The Court is familiar with them, since they are the standard cassette tapes furnished through the Purchasing Department of Ramsey County and are the least expensive tapes on the market. It is to be further noted that in listening to each of the tapes considerable extraneous noise is noted on them, thereby preventing any person who might transcribe them from accurately preparing such transcript. Tape recordings in general are usually unsatisfactory because of extraneous noises. They are particularly unsatisfactory when there are several microphones in the room, all of which are connected to the same recorder. If the person who is speaking lowers his voice, mumbles, or does any of the other things that are common to everyday speech, the clarity of the recording immediately falls off, and it is difficult to hear what that person is saying. This, of course, is evident in listening to the tapes in question. While the County may have a considerable investment in the equipment, it does not appear to this Court, at least, to be suitable for the purpose intended. Accordingly, the Public Defender should be allowed, at his own expense, to have a court reporter present at Grand Jury proceedings involving his clients. While the Court does not like to set a precedent in this regard because of the expense, it would seem that an order of this kind will be appropriate where requested, unless the recording equipment is improved.

HS

H. S., Judge.

(57)

William Mitchell Law Clinic
WILLIAM MITCHELL COLLEGE OF LAW • 875 SUMMIT AVENUE • ST. PAUL, MINNESOTA 55105 • 612-227-7591

February 10, 1977

45517

Minnesota Supreme Court
State Capitol
St. Paul, MN 55155

Members of the Court:

Enclosed are an original and nine (9) copies of a Petition Regarding The Minnesota Rules of Criminal Procedure and Their Proposed Amendment.

In the petition I have set forth certain comments and proposed changes.

I will be in court on Thursday, February 17, to be heard.

Respectfully,

Rosalie E. Wahl

Rosalie E. Wahl
Clinical Professor of Law

REW:ad

Encls: As stated above.

57

STATE OF MINNESOTA

IN SUPREME COURT

- -

PETITION REGARDING THE MINNESOTA RULES OF CRIMINAL PROCEDURE AND THEIR PROPOSED AMENDMENT

- -

TO THE SUPREME COURT:

Comes now the petitioner, Rosalie E. Wahl, who states:

1. That she is an attorney duly licensed to practice before this Court.

2. That she has served as a Special Assistant State Public Defender and that she is a Clinical Professor of Law at William Mitchell College of Law in St. Paul, Minnesota.

3. That in establishing and directing the criminal clinical program at William Mitchell College of Law for the past four years and in supervising certified student attorneys in their representation of indigent defendants, she has been closely involved in the arraignment and trial of misdemeanor cases in the Municipal Court of Ramsey County both before and after the adoption of the Minnesota Rules of Criminal Procedure, and has observed both the practice and effect of those rules.

4. That, on the basis of her knowledge and experience, she makes the following comments and suggestions regarding the Minnesota Rules of Criminal Procedure and their Proposed Amendment:

(a) Rule 4.02 subd. 5. Appearance Before Judge or Judicial Officer. (1) Before whom and when. (Proposed Amendment 4)

Because the proposed amendment to Rule 4.02 subd. 5(1), excluding the day of arrest from the 36-hour rule applying to warrantless arrests, would prolong the period of pre-appearance incarceration for those accused who can neither make bail nor meet pre-appearance release guidelines, and

Because the added delay would encourage law enforcement

officials to do the very thing which this Court recently and emphatically stated, in State v. Weeks, (decided January 27, 1977) they cannot do -- hold a person "for investigation,"

Retain Rule 4.02 subd. 5(1) as it was originally adopted, counting the 36 hours from the time of the arrest.

Failure to adopt this amendment would obviate the necessity of adopting proposed Amendment 7.

(b) Rule 10.04 subd. 1. Service. (Proposed Amendment 30)

Because the present rule requiring Rule 10 motions to be served upon opposing counsel at least three (3) days before they are to be heard provides adequate notice and is no detriment to the state, and

Because to add the requirement that such motions be served no more than thirty (30) days after the arraignment would add a burden to the public defender in light of the volume of cases processed and sequence of preparation,

Retain Rule 10.04 subd. 1, as it stands, without amendment.

(c) Rule 23.04. Designation as a Petty Misdemeanor in a Particular Case. (Petitioner's Requested Clarification)

Since the provision in the modification order in effect since July 1, 1975, providing that any alleged offense may be treated as a petty misdemeanor pursuant to Rule 23.04 when the prosecutor certifies as required and the court approves, has not been proposed as an amendment, it follows that Rule 23.04 as originally promulgated, requiring also the consent of the defendant for certification, shall be in effect.

(d) Rule 23.05. Procedure in Petty Misdemeanor Cases. Subd. 2. Right to Appointed Counsel. (Petitioner's Proposed Amendment)

Because a conviction for an offense involving moral turpitude would be as damaging to future career and employment prospects if that conviction is for a petty misdemeanor as it would be if it were for a misdemeanor, and

Because to put a defendant to an election between possible jail time and a fine would chill his right to counsel,

Amend Rule 23.05 subd. 2. Right to Appointed Counsel. to read as follows:

> "If a defendant is financially unable to afford counsel, the court ~~may~~ shall appoint counsel to represent him if he is charged with a misdemeanor which by operation of Rule 23.04 is to be treated as a petty misdemeanor and which also involves moral turpitude."

(e) Rule 23.06. Effect of Conviction. (Petitioner's Proposed Amendment)

Because, with the state courts' present record-keeping systems, it is difficult and often impossible to ascertain whether convictions in a prior record brought forward for impeachment or sentencing purposes are for misdemeanors or for misdemeanors, and

Because it would be improper to use petty misdemeanor convictions for those purposes, a petty misdemeanor being no crime;

Amend Rule 23.06 Effect of Conviction. to read as follows:

> "A petty misdemeanor shall not be considered a crime. All petty misdemeanor convictions shall be clearly designated as such and all records of petty misdemeanor convictions shall be maintained separately from criminal records."

(f) Rule 26.03 subd. 11. Order of Jury Trial Parts "h" and "i", Order of Final Argument. (Proposed Amendment 57)

Because in Minn. Stat. §631.07 (1971), superseded and continued by the Rules of Criminal Procedure, the legislature evinced the intent to grant procedural safeguards, even in the order of final argument, which would serve to protect the accused against a miscarriage of justice,

Because, further, the state possesses both the money and machinery for superior investigation, and

Because the order of final argument in Minnesota, alone among the states, "uniquely implements the philosophical core of American jurisprudence" (See, Order of Final Argument in Criminal Trials, Marilyn Vavra Kunkel and Gilberg Geis, March, 1958. 42 Minn. Law Review 549, 558);

Retain the order of final argument as set out in Rule 26.03 subd. 11, parts "h" and "i".

WHEREFORE, the Petitioner respectfully requests that the Court consider and adopt the above suggestions.

Dated: February 9, 1977.

Rosalie E. Wahl

ROSALIE E. WAHL
William Mitchell College of Law
875 Summit Avenue
St. Paul, MN 55105
227-7591

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

ROSALIE E. WAHL, being first duly sworn, on oath says that she is the petitioner named in the foregoing petition; that she has read said petition and knows the contents thereof; that the same is true of her knowledge except as to those matters therein stated on information and belief, and as to such matters she believes it to be true.

Rosalie E. Wahl
Rosalie E. Wahl

Subscribed and sworn to before me
this 10th day of February, 1977.

Alberta Dowlin

ALBERTA DOWLIN
RAMSEY COUNTY
NOTARY PUBLIC-MINNESOTA
MY COMMISSION EXPIRES SEPT. 14, 1982

(52)

IN THE SUPREME COURT

IN RE PROPOSED AMENDMENTS)
TO THE RULES OF CRIMINAL) PETITION
PROCEDURE)

Pursuant to the order of this honorable Court in the above captioned matter, dated December 20, 1976, the undersigned submits this petition setting forth the view of this office and further requests leave to be heard on Thursday, February 17, 1977 at 9:30 a.m. or as soon thereafter as counsel may be heard.

WALTER J. DUFFY, JR.
City Attorney
A1700 Hennepin County
Government Center
Minneapolis, Minnesota 55487

Dated: February 10, 1977

Change 9. Comments on Rule 4.02, Subd. 5(3).

This amendment, first adopted on July 1, 1975 establishes a procedure by which a defendant can obtain a dismissal with prejudice. It is the opinion of this office that, by providing such a remedy, the amendment thwarts the purpose of these rules, in that a defense attorney who would not otherwise demand a complaint may feel compelled to do so in the hopes of obtaining a disposition which he could not obtain by any other means. In effect, the rule alters the substantive law that jeopardy attaches when a jury is impaneled and sworn (State v. Sommers, 60 Minn. 90, 61 N.W. 907 (1890)) or when the first evidence is presented in a court trial (M.S. 632.11, Subd. 2(1)) by attaching the functional equivalent of jeopardy to a complaint demand. Since such an alteration may encourage complaint demands, the "speedy, just determination of criminal proceedings" sought to be promoted by these rules may be impeded.

Change 19. Comment on Rule 6.03, Subd. 3.

While the amendment to Rule 6.03, Subd. 3 clarifies the type of hearing required to impose the same or different conditions of release, we feel this rule and the relevant statutes are confusing as to when and under what circumstances bail can be forfeited for breaching the peace or breaching conditions of release. We ask that this be clarified.

We further feel that Rule 6.03, Subd. 1 should be amended to conform to Rule 6.03, Subd. 2 insofar as determining when a warrant rather than a summons should issue.

Change 22. Rule 7.02, Notice of Additional Offense.

A Spreigl notice, unlike a Rasmussen or Wade notification under Rule 7.01, requires a high degree of specificity. Because a high percentage of pending matters are settled at pre-trial conferences, it is unfortunate to require that the state pre-

pare 7.02 notices on all possibly affected files before the "winnowing" process of pre-trial. It would seem that it would be preferable to change the final date of 7.02 notices from the date of pre-trial to a date ten days following pre-trial.

Change 49. Rule 23.03, Subd. 3. Written Plea of Guilty.

The suggested amendment is progressive in that it simplifies required warnings for citation recipients. We would recommend a further streamlining: "A defendant shall be advised in writing before paying a fine to a violations bureau that such a payment constitutes a plea of guilty to the misdemeanor designated and that he understands that he has the right to a trial with all its safeguards. And further that should a citation recipient have any questions about this waiver, he should consult with an attorney." The suggested text provides sufficient information to one charged with a minor violation. The present warnings probably do little to enlighten the charged party, and much to confuse him.

Change 57. Rule 26.03, Subd. 11. Order of Jury Trial.

While it is the opinion of this office that any change in the present order of final argument would be a positive step, it is anticipated that the relatively complex rebuttal and surebuttal provisions proposed may create more problems than they would solve. This office would urge that the court adopt either a provision allowing the prosecution to speak first and grant a right of rebuttal as is done in Federal Court or to simply reverse the existing order of final argument and allow the prosecution to speak last.

Respectfully submitted,

WALTER J. DUFFY, JR.
City Attorney
A-1700 Government Center
Hennepin County
Minneapolis, Minnesota 55487

Dated: February 10, 1977

(59)

SUPREME COURT
FILED
FEB 10 1977
JOHN McCARTHY
CLERK

STATE OF MINNESOTA

IN SUPREME COURT

In re Proposed Amendments
to the Minnesota Rules of
Criminal Procedure

45517

PETITION FOR LEAVE TO APPEAR IN OPPOSITION TO A PROPOSED AMENDMENT OF A 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 Thursday, February 17, 1977 at 9:30 a.m., for the purpose of expressing its opposition to the proposed amendment of Rule 26.03 subds. 11(h) and (i). Said opposition is summarized in the memorandum in opposition to the proposed amendment to said rule attached hereto and submitted in support of this Petition.

Dated: February 9, 1977

WARREN SPANNAUS
Attorney General
State of Minnesota

By Thomas L. Fabel
THOMAS L. FABEL
Deputy Attorney General

and Joseph B. Marshall
JOSEPH B. MARSHALL
Special Assistant
Attorney General

122 Veterans Service Building
St. Paul, Minnesota 55155
Telephone: (612) 296-7575

STATE OF MINNESOTA

IN SUPREME COURT

In re Proposed Amendments
to the Minnesota Rules of
Criminal Procedure

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

PRELIMINARY STATEMENT

Petitioner, the Attorney General's Office of the State of Minnesota, has carefully reviewed and analyzed the proposed amendments to Rule 26.03 subd. 11, Minnesota Rules of Criminal Procedure. The proposed amendment is identical in form to the original proposal of 1974.[1/] Our opinion now, as then,[2/] is that the proposal does not adequately protect the interests of the people of this state, and therefore we must express our strenuous opposition to its adoption.

The proposed amendments to Rule 26.03 subds. 11(h) and (i) would establish an order for closing arguments to a jury that is unfair and without precedent. Under the proposed amendments, the defendant's counsel would routinely make both opening and concluding final arguments. The prosecution would be permitted one argument, sandwiched between

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1/ See, Rule 23.3.11(h) and (i), Minnesota Proposed Rules of Criminal Procedure as Approved by the Minnesota Supreme Court June 4, 1974.

2/ See, Memorandum of the Office of the Attorney General in Opposition to a Proposed Rule of Criminal Procedure, filed January 28, 1975.

defendant's, with an opportunity for a rebuttal argument only if the defendant's concluding argument is "improper."

The present rule did not alter the order of final arguments established under the superseded statute[3] due to the controversial nature of the proposed rule. The Advisory Committee on Rules of Criminal Procedure was instructed to debate the proposed rule further before any change would be made. But after nearly two years of study, the Advisory Committee has again recommended an amendment in the form of their original proposal. As stated in our opposition to the rule as originally proposed, we believe that it is inequitable, uncommon, and would place an even more prejudicial and unwarranted handicap upon prosecutors than currently exists.

ARGUMENT

In 1975 we pointed out that only four states followed the Minnesota order of closing arguments. Today, Minnesota stands alone as the only jurisdiction to follow an unalterable procedure whereby the defense has the right to deliver the final closing arguments.[4] Seven states currently have the fixed procedure whereby the defense argues first and the

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3/ Minn. Stat. § 631.07 (1974) provided:

> 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.

4/ 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).

prosecution argues last.[5] Thirty-six states[6] as well as all federal courts[7] follow a procedure whereby the prosecution argues first and last. Six states have a flexible procedure which allows for the state to argue first and last unless the defendant puts in evidence by his testimony, or otherwise assumes some burden as in an insanity defense.[8]

5/ Hawaii, Haw. Rev. Stat. § 806-62; Kentucky, Ky. R. Cr. Pro. § 9.42(6); Massachusetts (as a matter of custom); New Hampshire (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).

6/ 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, Cal. Penal Code § 1093; Colorado (as a matter of custom); Connecticut, Conn. Gen'l. Stat. § 54-88; Delaware (as a matter of custom); Idaho, Idaho Code § 19-2101(5); Indiana, Ind. R. Cr. Pro. § 35-1-35-1; Iowa, Ia. Code § 780.6; Kansas, Kan. Stat. § 22-3414(4); Louisiana, La. Code of Cr. Law and Pro., Art. 774; Maine, Maine R. Cr. Pro. 30(a); Maryland (as a matter of custom); Michigan, Mich. Ct. Rule 37; Mississippi (as a matter of custom); Missouri, Mo. Rev. Stat. § 546.070(5); Montana, Mont. Rev. Code § 95-1910(f); Nebraska, Rev. Stats. of Neb. § 29-2016(6); Nevada, Nev. Rev. Stat. § 175.141(5); New Jersey (as a matter of custom); New Mexico, N.M. R. Cr. Pro. 41-23-40; North Dakota, N.D. Cent. Code § 29-21-01(5); Ohio, Baldwin's Ohio Rev. Code § 2945.10(f); Oklahoma, Okla. Stats. § 831; Oregon, Ore. Rev. Stat. § 17.210(5); South Dakota, S.D. Comp. Laws § 23-42-6; Tennessee (as a matter of custom); Texas, Tex. Code Cr. Pro. 36.07; Utah, Utah Code § 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); Wyoming, Wyo. Stats. § 7-228.

7/ Rule 29.1, Federal Rules of Criminal Procedure.

8/ Florida, Fla. R. Cr. Pro. 3.250; Georgia, Code of Ga. § 1975; Illinois, Ill. Pro. Act. 217; North Carolina, Gen. Stats. of N.C. Appendix I, Gen. R. Pro. Sup. and Dist. Ct. 10; South Carolina, Cir. Ct. R. 58; Wisconsin, West's Wisc. Stats. § 972.10.

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.[9] The authorities are divided on the issue of whether it is more advantageous to make the first or the last argument to the jury.[10] 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.[11] In any event, the proposed amendments to the rule gives the advantages of both positions to criminal defendants and, thus, provides them with the best of all possible worlds.

This overbalance in a defendant's favor is contrary to the fundamental rule of fairness applied in nearly every other jurisdiction that the party who carries the burden of persuasion has the right to open and close final arguments. In a criminal case, of course, the defendant is presumed innocent, the prosecution has the heavy burden of proving guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). Hence, even noted defense attorney Henry Rothblatt finds merit in the majority rule on closing arguments in criminal cases:

> 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.

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

10/ 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.

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

Rothblatt, Summation in Criminal Cases, 37 Tenn. L. Rev. 728, 732 (1970). Likewise, 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.[12/]

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

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12/ See also, 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.

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 the proposed amendment to Rule 26.03 subds. 11(h) and (i). We submit that the present procedure under the rule 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 Amendment To Which The Attorney General Objects Is Impractical And Unworkable.

Proposed amendment to 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 amendment strikes us as unworkable and would likely be ignored by the judiciary.

Improper argument during a summation is one of the more frequently raised issues on appeals of criminal cases.[13/] 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 conviction whenever the state is allowed to rebut an improper argument. The state, however, will continue to have no recourse from potentially incorrect trial court determinations.

13/ 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).

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. The trial judge would then be required to make a quick decision in a most murky area of the law, with full knowledge that an error favoring the prosecution alone could result in reversal. In such a setting it is unlikely that the prosecution would often obtain an opportunity to rebut improper argument.

Thus, the net effect of the prosecution rebuttal provision in the proposed amendment is that it will be seldom allowed, and when allowed it will often be the subject of appeal. As a counterbalance, the unlikely potential for rebuttal is a poor exchange for a rule which guarantees the defendant two closing arguments. The interests of the people of this state could be better served by retention of the current rule, albeit defense-oriented.

CONCLUSION

The proposed amendment to 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: February 9, 1977

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota

By Thomas L. Fabel
THOMAS L. FABEL
Deputy Attorney General

and Joseph B. Marshall
JOSEPH B. MARSHALL
Special Assistant
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(52)

NATIONAL LAWYERS GUILD

TWIN CITIES CHAPTER

P. O. BOX 7193
POWDERHORN STATION
MINNNEAPOLIS, MINNESOTA 55407

February 9, 1977

John McCarthy
Clerk
Minnesota Supreme Court
State Capitol Building
St. Paul, MN 55101

45517

Re: Proposed Amendments to the Rules of Criminal Procedure

Dear Mr. McCarthy,

Our organization would like the opportunity to be heard at the hearing on the proposed amendments to the Rules of Criminal Procedure which is scheduled for February 17, 1977 at 9:30 A.M.

We will be in contact next week to check the details with you. In the meantime, you may contact me on this matter at 823-3454.

Thank you very much.

Very Truly Yours,

Greg Gaut

Greg Gaut

NOTE

Mr. Gaut will submit memorandum to Court prior to Hearing on February 17th.

Clerk's Office

(49)

611 Ridgewood Avenue, Apt.106
Minneapolis, Minnesota 55403
7 February 1977

Mr. John McCarthy
Minnesota Supreme Court
State Capitol
St.Paul, Minnesota 55155

Mr. McCarthy:

As instructed during our telephone conversation today, I do hereby request an opportunity to be heard by the Advisory Committee on the Rules of Criminal Procedure on the 17th of this month.

My comments will be quite brief, and will be accompanied by a short written submission.

Thank you.

Sincerely,

Peter W. Gorman
Hamline University School of Law

SUPREME COURT
FILED
FEB 9 1977
JOHN McCARTHY
CLERK

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Shermoen and Shermoen
Attorneys at Law
International Falls, Minnesota 56649

JEROME W. SHERMOEN
STEVEN M. SHERMOEN
406 FIFTH AVENUE
TELEPHONE 218 283-4494

February 7, 1977

Honorable Robert J. Sheran
Chief Justice
Minnesota Supreme Court
State Capitol Building
St. Paul, Minnesota

Re: Proposed Amendments to Rules of
Criminal Procedure

Dear Chief Justice:

I have reviewed the proposed amendments to the Rules of Criminal Procedure and would like to voice my opposition to several of them.

Proposed amendments 2, 3, 4 and 7 all pertain to the exclusion of the day of arrest in computing the 36 hour time limit for a defendant's initial appearance before the Court. Depending upon the time of a defendant's arrest, this change could increase by over 23 hours the period a person could be held in jail without appearing before a judge. Furthermore, it does away with the uniformity of treatment accorded under the current rule. If the 36 hour period has proven too short, it would seem preferable to increase the present period by a specific number of hours rather than introduce a factor which would lead to substantially different time limits for every defendant depending upon the time of their arrest.

Proposed amendments 54 and 59, giving the prosecution the right to a jury trial, are also objectionable. A defendant's right to trial by jury, being of Constitutional origin, should not be diminished by granting a similar privilege to the prosecution. If a defendant for some compelling reason has decided to waive this right, he should be allowed to do so without interference from the prosecution.

Finally, I would object to proposed amendments 57 and 60 which alter the order of final argument. The present system is easy to apply and has served the state well for many years. The proposal allowing for rebuttal and possibly re-rebuttal will likely add confusion and length to our trials for no compelling reasons. More importantly, this would further increase the overwhelming advantage currently enjoyed by the prosecution in our criminal system.

Statistics show that the vast majority of defendants that stand trial are convicted. Yet, the prosecutors of the state keep attempting to diminish the safeguards long felt necessary to insure that people accused of a crime receive a fair trial. Where is it all to end? I strongly urge that you Honor and the other justices reject the unnecessary and unfair amendments discussed above.

Respectfully,

SHERMOEN AND SHERMOEN

Steven M Shermoen

Steven M. Shermoen

SMS/cls

(61)

January 19, 1977

Minnesota Supreme Court
230 State Capitol Building
Saint Paul, Minnesota 55155

Re: Proposed Change in Order of Final Argument -
Rules of Criminal Procedure

I would like to take this opportunity to express my strong opposition to the proposed change in the order of final arguments in the Rules of Criminal Procedure.

As a part-time Public Defender for Ramsey County, I defend clients on a regular basis, and it is my belief the prosecution already has advantages not as readily available to the defense. The prosecution's witnesses usually include police officers who are experienced witnesses, while for many defense witnesses it is the first time in court. In addition to other advantages, the prosecution has access to the professional investigative forces of the police. Also, while the law provides that a person is innocent until proven guilty, as a practical matter many potential jurors believe that a defendant would not be in court if he were not guilty.

I believe maintaining the present order of the final arguments will safeguard the defendant's presumption of innocence.

Thank you for allowing me to express my opinion.

Respectfully,

Donna D. Geck

DONNA D. GECK
Attorney at Law
GECK AND GECK
614 Fourth Street
White Bear Lake, Minn. 55110

DDG:djm

(62)

RAMSEY COUNTY PUBLIC DEFENDERS OFFICE
605 Minnesota Building
St. Paul, Minnesota 55101
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WILLIAM E. FALVEY
Chief Public Defender

LOUIS E. TORINUS
1st Asst. Public Defender

January 10, 1977

Mr. Justice Scott

Mr. Chief Justice Sheran
Supreme Court of Minnesota
State Capitol Building
Saint Paul, Minnesota 55155

Dear Chief Justice Sheran:

In view of the upcoming hearing on the Minnesota Rules of Criminal Procedure, I would like to express my wish that the defendant continue to have the opportunity to be heard last in closing argument. I believe under the presumptions that a defendant is innocent until proven guilty and that proof of guilt must be beyond a reasonable doubt, that this procedure will be the best way to ensure the safeguard of a defendant's rights.

Thank you very much for your consideration.

Sincerely yours,

Carol A. Collins

Carol A. Collins
Law Clerk

CAC/ml

(43)

CITY OF SAINT PAUL
MUNICIPAL COURT

JOSEPH E. SALLAND
JUDGE

January 24, 1977

The Honorable George M. Scott
Associate Justice
Minnesota Supreme Court
State Capitol
St. Paul, Minnesota 55155

Re: Amendments to the Rules of Criminal Procedure

Dear Justice Scott:

I am enclosing with this letter a copy of an amendment that I am suggesting to the Rules of Criminal Procedure to rectify a daily recurring problem that I have as a trial judge to fill a tremendous void. Since the problem is two-sided, I have enclosed the rule and its alternative with my comments as to each.

I hope that this is not being sent to you too late for consideration in February 1977.

Thanking you, I remain,

Very truly yours,

Joseph E. Salland

JES:dr

Encl.

Court House, Saint Paul, Minnesota 55102

Area Code 612
298-5700

3.05 Bench Warrant

A trial court shall have the power to issue warrants, after the court has jurisdiction of a defendant, to carry out the court's orders, so as to compel attendance by the defendant or witness at hearings or trial and to compel conditions of disposition or sentence be carried out.

Comment

The Rules make no provision for the failures of the defendant after arrest or first appearance to compel appearance or to comply with a court order or sentence. The defendant may not appear at pre trial, trial or he may not carry out the terms of a sentence; i.e., not paying a petty misdemeanor fine, or restitution, where ordered, or reporting in to serve jail time. At times the court should have the power, by bench warrant, to compel a witness to appear for trial, or for a probable cause hearing or an omnibus hearing, if testimony is to be given.

In the alternative:

3.05 Bench Warrant

The court shall not have the power to issue warrants after it has acquired jurisdiction of a criminal matter nor shall it have the power to compel attendance at hearings or trial by the defendant or witnesses and no warrant shall issue based on the defendant's failure to comply with conditions of a sentence or for disposition.

Comment

There is literally nothing in the Rules that covers the subject matter and there is little, if no law. The courts have been issuing writs or bench warrants for years based on their inherent powers. The issue should be faced and one of these two amendments adopted.

(64)

WINTER, LUNDQUIST, SHERWOOD, ATHENS & PEDERSEN
ATTORNEYS AT LAW

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REFER CORRESPONDENCE AND CALLS TO OFFICE CHECKED ABOVE

January 14, 1977

Honorable Robert Sheran
Chief Justice
State Supreme Court
State Capitol Building
St. Paul, Minnesota 56101

Dear Chief Justice Sheran:

We understand that an effort has been made to have the court reconsider Rule 26.03, subd. 11 of the Rules of Criminal Procedure as said Rule deals with the order of argument.

As a trial judge advocate in the service, a prosecuting attorney for many years, and a defense counsel for more years than I like to remember, I am unalterably opposed to the change.

The present rule retains the prior statutory practice. M.S.A. Section 631.07 Justice has been ground out since statehood under our present practice, and I see no credible basis for any change. I concur with the view expressed by the defense bar that the order of argument in Minnesota is a "salutary rule of long standing". See Brief of Minnesota Public Defenders Association in Opposition to Adoption of the Rules, 1975, p. 20.

I have had occasion to try a number of cases in South Dakota which permits a party to reply in rebuttal after counsel have had an opportunity of making closing statements. This peculiar method, as suggested apparently by the advisory committee (see proposed Crim. R. 26.03, subd. 11 (h) and (i)) will create grave problems on the question of whether the defendant is raising in rebuttal issues of law or fact which were not presented in one or both of the prior arguments. The same problem will then arise when the prosecution is permitted to have five minutes to reply in rebuttal, if the defendant's rebuttal is improper.

Change may be advisable, but in this instance where juries start with the premise, as most of them do, that the defendant would not

be sitting at the table if he were not guilty, the change is inadvisable in my judgment.

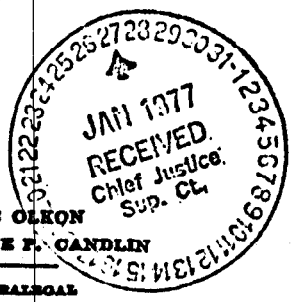
Respectfully yours,

WINTER, LUNDQUIST, SHERWOOD, ATHENS & PEDERSEN

Marvin E. Lundquist

cc: Justice James C. Otis
Justice C. Donald Peterson
Justice Walter F. Rogosheske
Justice Lawrence Yetka
Justice John J. Todd
Justice George M. Scott
Justice Harry H. MacLaughlin
Justice Fallon Kelly

(65)



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MINNEAPOLIS, INDIANA 55402

ELLIS OLKON
BRUCE F. CANDLIN

PARALEGAL
DEBORAH JUHL

TELEPHONE
(612) 333-5555

January 26, 1977

Justice Scott
What response would you suggest?
S

Chief Justice Robert J. Sheran
Minnesota Supreme Court
State Capitol
Saint Paul, MN 55101

Re: Hearing regarding Rules of Criminal Procedure

Dear Chief Justice Sheran:

The Criminal Law Section of the Minnesota State Bar Association has asked me as its chairman to write to you to request that the Supreme Court delay its hearing at least thirty days so as to allow interested members of the bench and bar adequate notice to appear before your Court.

Last Saturday it came to our attention that a hearing was scheduled for February 17, 1977. Only one member of our Section was even aware of this hearing. The Criminal Law Section has felt left out of all hearings and deliberations since its inception. I am confident that our membership, which consists of over 200 members of the bench and bar, would be willing to appear before your Court if given adequate notice.

In 1974 and again in either January or February of 1975, I petitioned your Court for a revision of Rule 6. I am again submitting this Petition with hopes that it can appear on your next scheduled hearing with the opportunity for again giving oral arguments on why this particular revision is necessary.

Respectfully yours,

Ellis Olkon

Ellis Olkon, Chairman
Criminal Law Section
Minnesota State Bar Association

EO:dj

Enclosure

exh. III

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. "It should be presumed that the defendant is entitled to be released on order to appear or his own recognizance. 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..." The sole purpose of money bail is to assure the defendant's appearance. 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

February 4, 1977

Mr. Ellis Olkon, Chairman
Criminal Law Section
Minnesota State Bar Association
2226 IDS Center
Minneapolis, MN 55402

Dear Mr. Olkon:

Thank you for your letter concerning the recommendations on amendments to the Rules of Criminal Procedure. Your communique has been distributed to the entire Court and to the Advisory Committee. Be assured that serious consideration will be given to your proposal.

I am attaching the report of the Advisory Committee to the Court. The suggested amendments and forms are contained in the January issue of Bench and Bar. With the extensive review already conducted and a Court hearing scheduled and published, we see no possibility of a postponement. You are all very familiar with the Rules by now and the amendments are mostly "housekeeping" and those that have been suggested before.

Sincerely yours,

George M. Scott

GMS/aw

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ELLIS OLKON
BRUCE P. CANDLIN

PARALEGAL
DEBORAH JUHL

TELEPHONE
(612) 333-5555

February 8, 1977

Justice George M. Scott
Minnesota Supreme Court
State Capitol
St. Paul, MN 55101

Dear Justice Scott:

I am in receipt of your letter dated February 4, 1977.

I understand that a postponement is not possible. However, could you please advise me as to whether the recommendations concerning the 10 percent deposit provision will necessitate oral arguments and whether my presence on February 17, 1977, is required. If at all possible, I would prefer to address the Court on the necessity of the amendments to Rule 6.

Sincerely,

Ellis Olkon

Ellis Olkon
Attorney at Law

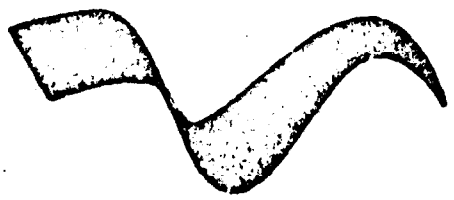
EO:dj

To the Court:

How do you answer a letter such as this?

J.S.M.

(L6)



City of Golden Valley

January 20, 1977

Ms Judy Rehack
Assistant Administrator
Minnesota Supreme Court
318 State Capitol
St. Paul, MN 55155

Dear Ms Rehack:

The Minnesota Environmental Health Association is requesting a change in the criminal procedures. The requested change would be to authorize state inspectors (Health, Agriculture, Pollution Control Agency and Labor and Industry) to issue criminal citations for violations of statutes and regulations. The authority would only extend to the issuance of citations and not to any other police power. The authority would be the same as is currently authorized by MSA 493 for County and City inspectors.

This authority is needed since violations of statutes and regulations must either be ignored, hearings held to revoke licenses or obtain a complaint and warrant through the County Attorney having jurisdiction. This range of options is not appropriate to situations such as the cook who is smoking a cigar while cooking or a restaurant with a filthy kitchen. The ability to envorce statutes and regulations is expedited when those who are regulated know that they can be "tagged"; even though the authority is not used. There is of course a reluctance to use the revocation or warrant procedure except in exceptionally bad cases.

Thank you.

Sincerely,

Thomas L. Heenan
Public Health Sanitarian

TLH/hd

(29)

GARY W. FLAKNE
COUNTY ATTORNEY

(612) 348-3091

OFFICE OF THE HENNEPIN COUNTY ATTORNEY
2000 GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487

February 9, 1977

Hon. John McCarthy, Clerk
MINNESOTA SUPREME COURT
230 State Capitol
St. Paul, Mn 55155

Dear Mr. McCarthy:

He will file 10 copies

Pursuant to the Court's Order dated December 20, 1976, the Hennepin County Attorney requests leave of this Court to file a document containing certain proposals concerning the new Rules of Criminal Procedure. We do not request to be heard personally in this matter at the hearing scheduled for Thursday, February 17th.

Respectfully submitted,

GARY W. FLAKNE
HENNEPIN COUNTY ATTORNEY

David W. Larson
Assistant County Attorney

mp

(69)

STATE OF MINNESOTA

IN SUPREME COURT

RE: RULES OF CRIMINAL PROCEDURE

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF MINNESOTA:

The undersigned, Assistant Hennepin County Attorney, respectfully requests this Court to consider the following change to the Rules of Criminal Procedure:

Rule 27.03, subd. 3, be amended to read: "Before pronouncing sentence, the court shall give the prosecutor and defense counsel an opportunity to make a statement with respect to any matter relevant to the question of sentence including sentencing recommendations." (Remainder omitted.)

This Court recently ruled in the case of State v. Thilmany, that prosecution may not make specific sentencing recommendations unless the Court grants permission to make those recommendations. Substantial reasons exist why such specific recommendations should be allowed to be made by the prosecutor. A letter detailing these reasons is attached.

Respectfully submitted,

David Larson

Edward Anderson
David Larson
Assistant Hennepin County Attorneys.

cc: Edward Anderson
cc: Steve Askew, Minn. County Attorney's Council.

COUNTY ATTORNEYS COUNCIL

203 STATE CAPITOL CREDIT UNION BUILDING • 95 SHERBURNE AVENUE SAINT PAUL, MINNESOTA 55103 • TELEPHONE: 296-69

July 27, 1976

Honorable Robert J. Sheran, Chief Justice
MINNESOTA STATE SUPREME COURT
230 State Capitol
St. Paul, Minnesota

RE: State v. Thilmany

Dear Chief Justice Sheran:

Currently pending in the Supreme Court is a Petition for Extraordinary Writ in the case of State v. Thilmany. At its meeting of July 15, 1976, the County Attorneys Council's Board of Governors discussed the issue raised by that case. The Board of Governors agreed that the problem faced by the Winona County Attorney is one of substantial interest to the County Attorneys of the state, and that, if possible, the Supreme Court should be made aware of the overriding policy considerations favoring the issuance of the Writ.

The issue presented is whether a County Attorney may make specific sentencing recommendations when there has been no plea negotiation.

There appear to be no Minnesota cases deciding that point. A.B.A. Standards on The Prosecution Function, §6.1(b), state that a prosecutor should not ordinarily make specific sentencing recommendations, but those Standards do not give the sentencing court the power to silence the County Attorney in the out of the ordinary case. The Winona County Attorney ably advances a strong argument that the Rules of Criminal Procedure permit the prosecutor to make specific sentencing recommendations. Apart from the legal merits of the Petition, significant policy reasons exist which suggest the Writ should issue.

From an informal poll of our membership, it appears that most County Attorneys, consistent with the A.B.A. Standard do not ordinarily make specific sentencing recommendations. It is unlikely that granting this Petition would change the practice of Minnesota prosecutors. But some cases exist which require the prosecution's recommendations be made to the Court.

In charging a defendant and preparing to go to trial, a County Attorney becomes familiar with a defendant's background; he sees psychological reports on the defendant's emotional make-up; he talks to both the defendant's friends and victims. A prosecutor will spend hours reconstructing the details of the crime, trying to understand the defendant's motive and purpose; whether the crime was caused by passion, was a "frolic", was induced by intoxication, or was a cold, premeditated act. In many of the cases charged, no one in the court system understands the defendant and the nature of his acts better than the prosecutor.

Over a period of time, the prosecutor builds a fund of experience which enables him to accurately assess individual cases. That depth of experience often permits him to evaluate sentencing dispositions better than a defense counsel, who may only occasionally represent criminal defendants. Yet if the Petition here is not granted, that defense counsel will be able to make his sentencing recommendations, which may be totally unrealistic, without even the possibility of rebuttal by the person knowing the most about a case. Certainly, the Court is not required to give any weight to prosecutor's recommendations. But it would seem that a Court should at least be required to hear the relevant input of all the parties having an interest in the disposition.

A prosecutor does have an interest in sentencing. The County Attorney is more than a legal technician who presents proof beyond a reasonable doubt that the defendant is guilty. He is also an elected representative of the people of the county. His clients have a right to expect him to exercise his best professional judgement to insure that their interest, the public safety, is protected. If a prosecutor is prevented from making specific sentencing recommendations, not only is the public deprived of the benefit of having a legal representative, but to the public, the sentencing proceedings lose their appearance of fairness.

Whether fortunately or unfortunately, in most communities in this state, sentencings are reported in the news media. For a newspaper to report that the Court heard a plea for leniency from the defendant and his attorney and then to report that the prosecutor said nothing, gives the appearance of unfairness. Public confidence in the basic fairness of the judicial system is critical to the continued functioning of the Courts. The public has a right to expect that their representative, the County Attorney, has some input into the sentencing decision.

Respectfully submitted,

Stephen J. Askew
Executive Director

cc: Mr. Julius Gernes,
Winona County Attorney
Mr. Steve Goldberg,
Attorney for Defendant
Mr. Richard Mark,
Attorney General's Office
Ms. Cindy Johnson, Court Commissioner's Office

(70)

LAW OFFICE OF
EKVALL & RASMUSSEN

BAGLEY, MINNESOTA 56621

AUREL L. EKVALL
EDWARD H. RASMUSSEN

ASSOCIATE
JAMES R. WILSON

TELEPHONE 694-6565
AREA CODE 218

February 15, 1977

The Supreme Court
State of Minnesota
Capitol Building
St. Paul, Minnesota 55103

45517

Re: Proposed Amendments to Rules
of Criminal Procedure

The Honorable Members of the Court:

As County Attorney of Clearwater County I would like to lend my support to the proposed change in order of final argument under Rule 26 whereby the Prosecution is last with a defense rebuttal and discretionary Prosecution rebuttal.

I believe we are the only state that now permits the defense the final argument. I believe that in fairmess to the people of the State of Minnesota and in furtherance of justice in the State of Minnesota that it is absolutely essential that the change in final argument under Rule 26 be accomplished as proposed.

Your full and due consideration of this requested change is appreciated.

Very truly yours,

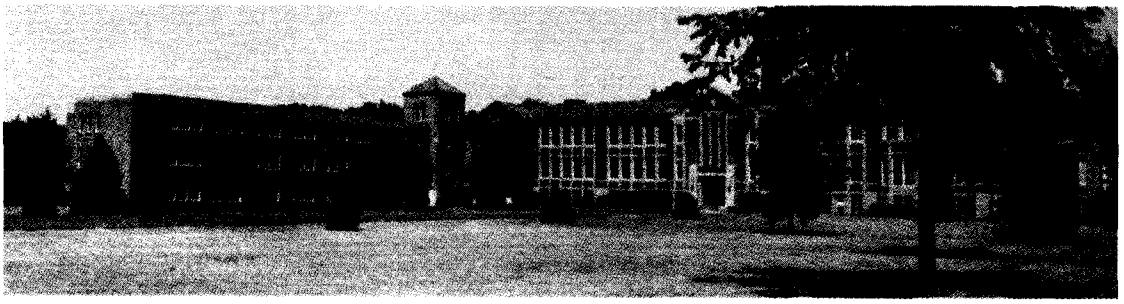
Aurel L. Ekvall

Aurel L. Ekvall
Clearwater County Attorney

ALE:js

(67)

WILLIAM MITCHELL
College of Law



875 SUMMIT AVENUE □ ST. PAUL, MINNESOTA 55105
TELEPHONE: (612) 227-9171

February 9, 1977

Mr. John McCarthy
Clerk of Supreme Court
State Capitol Building
St. Paul, MN 55155

Re: Proposed Amendments
to Rules of Criminal
Procedure

Dear John:

Enclosed please find my brief regarding Proposed Amendments to Rules of Criminal Procedure. I am not requesting to be heard orally at the February 17 hearing, but plan to be present in the event that the court for some reason would wish to call upon me.

Best wishes.

Sincerely,

Kenneth F. Kirwin

KFK:ag
Enclosure

(67)

STATE OF MINNESOTA
IN SUPREME COURT

PROPOSED AMENDMENTS TO)	BRIEF OF
)	
RULES OF CRIMINAL PROCEDURE)	KENNETH F. KIRWIN

I am opposed to Proposed Amendment number 54, which would amend Rule 26.01, subd. 1(2)(a) (waiver of trial by jury) by adding the words "Unless the prosecuting attorney objects."

My opposition is for the reasons expressed in the Comment to Rule 511(a) of the Uniform Rules of Criminal Procedure (1974) and in the Commentary to ABA Standards, Trial by Jury 1.2 (Approved Draft 1968) (the Standard itself is neutral on this). I would have preferred that the Minnesota Rules take the approach of Uniform Rule 511(a) in not allowing either the judge or the prosecutor to thwart the defendant's waiver. Allowing the prosecutor to do so is surely a step in the wrong direction. As set forth in the Commentary to ABA Standard 1.2:

> "[Jury] trial is solely for the protection of the accused. The public has no interest in the method of trial other than that every defendant who wants a jury trial should get one. * * *
>
> " * * * There is a risk that the prosecutor may withhold his consent in order to obtain tactical advantages over the defendant. For example, the prosecutor might insist on a jury trial because of public opinion against the defendant. * * *
>
> "Logical consistency requires that waiver of jury trial be accorded the same treatment as a plea of guilty. Waiver of a jury trial has far less damaging results than a plea of guilty, which waives any kind of trial. If a defendant who enters a voluntary, knowing and accurate plea can do so without the approval of * * * the prosecutor * * * then he should be able to waive trial by jury in the same fashion.
>
> " * * * Without any requirement of government consent a defendant may waive his right to counsel, his right to a speedy trial, his right to compulsory process, and his right to confront witnesses. Since consent is not required for waiver of the other rights, it should not be required for waiver of jury trial. * * *
>
> "[I]t is in the public interest to allow waiver of jury trial. A vast amount of time and money are spent on jury trials. The requirements of consent by the prosecutor * * * are added unnecessary obstacles to the faster and more efficient trial without a jury."

Respectfully submitted,

February 9, 1977

Kenneth F. Kirwin
William Mitchell College of Law
875 Summit Avenue
St. Paul, Minnesota 55105
Telephone 227-9171

(68)

received 2-15-77

Office of the Public Defender

(612) 348-7530

C2200 Government Center
Minneapolis, Minnesota 55487

HENNEPIN COUNTY

William R. Kennedy
Chief Public Defender

February 10, 1977

Honorable John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, Minnesota 55155

Re: Proposed Amendments to the Rules of Criminal Procedure for the State of Minnesota

Dear Mr. McCarthy:

I would ask that I be listed as one of the persons who would like to be heard on February 17, 1977 at 9:30 a.m., regarding the items numbered 4 and 7, which relate to Rule 4.02, Subdivision 5(1), and secondly, items 57 and 60, which relate to Rule 26.03, Subdivision 11.

notified by phone -- 15 minutes for Public Defender in total

Very truly yours,

Paul W. Lohmann
First Assistant Public Defender

PWL/vh

STATE OF MINNESOTA

IN SUPREME COURT

IN RE PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE	:	STATEMENT OF THE NATIONAL LAWYERS GUILD

Pursuant to the order of the Minnesota Supreme Court dated December 20, 1976, the National Lawyers Guild, Twin Cities Chapter, as represented by Peter W. Gorman, submits the following statement setting forth its position with respect to the Proposed Amendments to the Minnesota Rules of Criminal Procedure.

Dated, this 17th day of February, 1977.

INTRODUCTION

My name is Peter Gorman. I am a law student at Hamline University School of Law in St. Paul. I have been a student of, and a participant in, the criminal justice system for three years. I am presently employed in a capacity in which I deal exclusively with the defense of criminal cases. In addition, I am a student tutor in criminal procedure at school. While I do not speak for my school, classmates, or employer, I am here on behalf of the National Lawyers Guild.

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 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 interests. Our membership has been involved in most of the political trials of the last three decades. Guild members are currently involved in the continuing trials arising out of the Wounded Knee occupation, the Attica prison uprising, and various abuses of the Federal Grand Jury system in many parts of this country.

Recognizing the fact that various individuals and groups will offer wide-ranging criticism of certain of the amendments to the Rules, we have limited our comments to four of the amendments.

We urge this Court to carefully weigh the social and political implications of the Proposed Amendments, which we have singled out for criticism, and give careful consideration to revising them.

In general, we believe that the Rules are a commendable attempt to standardize the operation of the criminal justice system, at least that portion which chronologically precedes the corrections system. While the Rules do not cover the entire criminal justice process (the law of warrantless arrest and search is, for example, still found in the cases and Minn. St. Ch. 626 and 629), most of the process is contained in the Rules. In that respect, it is certainly a better system than that which exists in many of the other states.

We have been concerned about the impact of the criminal justice system upon the individual defendant. When a person is arrested and charged with a crime, he is faced with the frightening power of the state and its criminal justice system. When that happens, his view of the system is likely to be colored by his perception of whether or not he was fairly treated. He is not concerned with whether the system is well-ordered under its Rules and Statutes, or whether it is based on logical premises, or whether it is time-efficient. He is only concerned with whether he was fairly treated, when confronted by the state. This perception affects both him and the state, long after his contact with the system at the trial level has ended. For, if he believes that he was unfairly treated, he will be less likely to respond to rehabilitative treatment, and will be more likely to become a recidivist. We believe that this is important, for, in spite of the nationwide trend toward retributivist-determinate sentencing systems, we would hope that our system is more concerned with rehabilitation, and keeping people out of prison.

These considerations are even more important when the defendant is a member of an economically disadvantaged socio-economic group. In many cases, members of these groups literally have to fight a "system" all of their lives. Having been forced to do this, they are all the more likely to view a contact with the criminal justice system with something more than mere suspicion.

With this in mind, we wish to express our concern over several of the proposed Amendments to the Rules, and offer our hope that they will be modified.

1. The changes proposed in Rules 3.02 subd. 2(3), and 4.02 subd. 5(1), the so-called 36-hour rules, are certainly difficult to understand. While it would be our personal view that the Constitution places a higher value on personal liberty than systemic convenience, and that, therefore, a person should never be deprived of his liberty longer than 15 hours (5 p.m. to 8 a.m.) without notice of the charge, we understand that initial hearing cannot always be held that promptly. Thus, we recognize that the 36-hour rule is perhaps a necessary compromise of interests, as long as it is clear that this is the outermost limit, which can be approached only under unusual circumstances. This interpretation finds explicit support in the comment to Rule 3, paragraph 16. However, even were it not for the proposed change, we find troubling the report that a strong minority of the Rules committee favored a 72-hour rule in 1974, and especially so when this amendment is read with this fact in mind. Such an amount of time clearly exceeds the amount needed for systemic efficiency and intrudes unreasonably upon the defendant's personal interest in liberty, unless charged. The proposed change in Rule 3.02 approaches the position of the minority of the Rules committee, for, depending upon the time of arrest, the 36-hour rules could easily become the 60-hour rules.

The change in Rule 4.02, however, is of far greater concern to us. Whereas Rule 3.02 deals with procedures following an arrest under warrant, Rule 4.02 is concerned with warrantless arrests, which are the far greater number of arrests. Our enhanced concern lies in the fact that the change will mean a greater pre-arraignment delay following warrantless arrests than those following arrests under warrant. Not only is the day of arrest eliminated, but the Rule already eliminates Sundays and holidays. The fact that Saturdays are included is of no benefit to the Friday arrestee, who the police, for various reasons, are determined to hold. The Friday afternoon arrestee, on the several Monday-holiday weekends, will not have to be arraigned until Tuesday, as much as 92 hours after arrest. On normal weekends, the delay for the Friday afternoon arrestee could approach 68 hours.

What is hard to understand about the change in Rule 4.02 is that

the Rules will now give better protection to arrestees under warrant than warrantless arrestees. If there has to be a ranking here, it would seem that warrantless arrestees, not having had the benefit of a neutral magistrate, would be accorded the better treatment. Given the importance that the United States Supreme Court has always ascribed to the interruption in the arrest process by a neutral magistrate /~ Johnson v. United States, 333 U.S. 10 (1948); Beck v. Ohio, 379 U.S. 89 (1964) ~/, and given the fact that most arrests are warrantless, these changes are indeed hard to understand.

Furthermore, it should be pointed out that, as recently as 1975, the United States Supreme Court explicitly held that a determination of probable cause is an essential prerequisite to extended restraint on liberty following a warrantless arrest. Gerstein v. Pugh, 420 U.S. 103 (1975). It is submitted that 68 and 92 hours, although concededly maximums, are both extended restraints on liberty.

A further result of the warrant-warrantless distinction is that warrantless arrests will be encouraged, for they permit more time for pre-arraignment investigation. While this may, at first, seem logical, in the sense that in warranted arrests, the decision to charge has already been made, the end result will be more warrantless arrests, with more time for interrogation, and more time for confessions, often without benefit of counsel. This is not a logical leap, nor is it unfounded speculation. Given the language in Miranda v. Arizona, 384 U.S. 436 (1966) concerning waiver, and the results in Oregon v. Hass, 420 U.S. 714 (1975) and Michigan v. Mosely, 423 U.S. 96 (1976), regarding renewed attempts at questioning, there will be more uncounseled confessions during the pre-arraignment period. This is bad enough without providing for more time within which to do so. This result, while obviously contrary to several decades of Fifth and Sixth Amendment law, appears to us to be the only purpose behind the changes in the 36-hour rule, notwithstanding the above-described comment to Rule 3, and its counterpart in the comment to Rule 4, paragraph 6. In our judgment, the possible benefit to the defendant of more investigation time within which to decide whether or not

to continue the prosecution following a warrantless arrest (Rule 4, comment, paragraph 6), is outweighed by the danger that the additional time will be used to attempt to procure confessions, many uncounseled, in cases in which the continuance of the prosecution is a foregone conclusion. This is the only too obvious result of the Hass and Mosely cases.

It bears noting that the American Law Institute's Model Code of Pre-Arraignment Procedure, Article 130.2, expressly disapproves of delay in arraignment for the purpose of investigation.

The added delay is further aggravated by the fact that the only remedy at that point, habeas corpus, takes at least 48 more hours. This means that, in certain cases, the total pre-arraignment delay, if habeas is necessary, approaches one week, a period certainly not envisioned by the framers of the Fourth Amendment.

2.We are also concerned about the extent of the required defendant discovery, as regards affirmative defenses. While some of these comments address the present Rule 9 provisions, I am more specifically referring to the proposed addition to the comment to Rule 9.

Rule 9 reflects the view that, as regards discovery, the state and the defendant should be equal participants in an ordinary lawsuit. This is the prevailing view in civil litigation. However, this is not an ordinary lawsuit; it is, rather, an extraordinary proceeding involving unequal participants. The defendant is faced with the extraordinary power and resources of the state and the county attorney. Unlike parties in a civil proceeding, the defendant is rarely as well represented. Moreover, this inequality is shown in the fact that the state must prove guilt beyond a reasonable doubt. Such a burden does not exist in an ordinary civil lawsuit between equal participants. Furthermore, the defendant in a civil lawsuit, does not face loss of liberty. Last, the common law has always had a rule requiring strict construction of penal statutes in favor of the defendant. For these and other reasons, a criminal proceeding is not, nor should it be thought of, as an ordinary proceeding between equal participants. Therefore,

it could be argued, and with some force, in our judgment, that extensive discovery by the defendant should not be required in a criminal case.

Nevertheless, Rule 9 presently reflects the view of the United States Supreme Court, that notice of defense statutes are constitutional, Williams v. Florida, 399 U.S. 78 (1970), when reciprocal discovery is provided by the state. However, what Rule 9 does not contain, and what the Williams case implied, is reciprocal discovery in the form of notice of the state's intended response to the defense. Three years ago, the Court filled the gap in the Williams case by explicitly holding that notice of defense statutes are unconstitutional in the absence of reciprocal discovery by the defendant. Wardius v. Oregon, 412 U.S. 470 (1973). It is submitted that the failure of Rule 9 to include within reciprocal discovery some notice of the state's intended response to the defense, could fall within the Wardius rule. Since defenses are a vital part of many criminal cases, this results in an appearance of unfairness, in spite of the considerable discovery afforded the defendant by other provisions in Rule 9.

This problem is compounded by the expanded discovery of the alibi defense provided by Rule 9, and of the entrapment defense, under State v. Grilli, ___Minn. ___, 230 N.W.2d 445 (1975). This rule is now proposed for addition to the comment in Rule 9.

It may be conceded that extensive discovery of the alibi defense enhances fairness because the defense is so easily fabricated and supported by false testimony. But this concern is not applicable to the entrapment defense. This defense has been considerably emasculated by the United States Supreme Court decisions in U.S. v. Russell, 411 U.S. 423 (1973), and Hampton v. U.S., ___ U.S. ___, 96 S.Ct. 1646 (1976). It does not seem fair to further restrict the usefulness of this defense, at least without notice of the state's intended response.

Therefore, since we object to the expanded disclosure requirement in the Grilli case, we object to the inclusion of that language in the comment to Rule 9. We certainly hope that the example of the Grilli case and Rule 9.02 subd. 1(3)(c), regarding the alibi defense, is not to be extended to the other affirmative defenses. If this is to be the eventual result,

then, regardless of whether reciprocal discovery of the state's intended response is provided, the defendant will be required to incriminate himself in violation of the Fifth and Fourteenth Amendments to the United States Constitution. This is because the pleading of defenses involves, in many cases, an admission of guilt of either conduct or criminal conduct, followed by either a justification or other bar to liability. Furthermore, even if compelled self incrimination was not involved, it could be argued that extensive notice of defenses violates the procedural fairness requirement of the Fourteenth Amendment.

While there may be arguable justification for expanded discovery of the alibi defense, there seems little reason to likewise expand disclosure of the entrapment defense. The state should already know if there was conduct supporting a claim of entrapment. If there is, then, no justification for the additional disclosure, the only conclusion possible is that this is an attempt to, as some have said, "get a foot in the door" now, and later, open up the door to expanded disclosure of other Rule 9 defenses. This is, we believe, another unwarranted restriction of the rights of criminal defendants.

3. With regard to the change in Rule 26.01 subd. 1(2)(a), this change appears to eliminate the prior right under Minnesota law to waive a jury trial in all cases. The original Rule added the requirement of court approval, and, in that sense, approached the rule of Singer v. United States, 380 U.S. 24 (1965), that there is no automatic right to waive a jury trial.

We think that there are two problems with this change whose purpose, according to the proposed amendments, is to give the state a right to a jury trial. First, the Bill of Rights provisions in the United States and the state Constitutions regarding jury trials were not designed to confer a right on the state. Rather, they were explicitly intended to confer a right upon the criminal defendant in his contacts with the state. The Sixth Amendment reads, "In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury...." It has

never been thought that the right of jury trial existed in behalf of the state against an objecting defendant. As long as his waiver of this constitutional right meets the standard of Johnson v. Zerbst, 304 U.S. 458 (1938), the defendant should be allowed to do so.

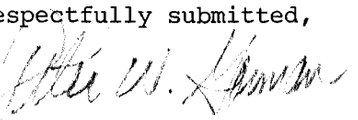
Of greater concern, however, is the interrelationship between the amended part (a) and part (b) of Rule 26.01 subd. 1(2). Pretrial publicity is a compelling reason why a defendant might wish to waive a jury trial. Another reason is the existence of gruesome evidence, or the fact that a crime is a particularly violent one, with the attendant possibilities of jury prejudice. All of these reasons address themselves to the danger that the jury will base its decision on materials other than the facts and evidence introduced at trial. However, the amended part (a) gives the state the right to object to jury trial waiver. The effect of this upon part (b), when pretrial publicity is involved, is unknown. Does it mean that the state can force a jury trial upon a defendant confronted with potentially prejudicial publicity? We don't know. The change in Rule 26.01 does not make this clear.

4. Lastly, we vigorously object to the change in the order of final argument, Rule 26.03 subd. 11. The original Rule continued this state's exemplary, albeit, minority, view on the matter. Now, this is all to be changed on the unproven hypothesis that it leads to more jury acquittals. There is absolutely no evidence of this. Even if there was, the fact that approximately 90-95% of criminal cases do not go to trial means that the number of instances of this happening would be small indeed. This is a small price to pay for the increased appearance of fairness which the prior practice provided. Even if there was evidence that arguing last was of some benefit to the defendant, we believe that, if it makes our proceedings more fair, then that benefit should go to the defendant, the person who is presumed innocent, against the power of the state. If that is the result, then we are proud to be a part of a minority view among the states. It is common knowledge that, regardless

of voir dire and juror oaths forsaking any predisposed view at the beginning of trial, criminal defendants are regarded by juries as at least possibly guilty. This is reaffirmed by the high rates of jury convictions. In a system in which the state must prove the defendant's guilt beyond a reasonable doubt, the defendant should not be required to overcome whatever potential prejudice exists in an emotional final argument in which the state argues last. Moreover, logic dictates that the order of final argument be the same as at trial, in which the state has the burden of presenting the case, followed by the defense. As long as it is conceded that the state has the burden of proving guilt beyond a reasonably doubt, then, the order of final argument should be the same as the order of proof at trial. In light of the change in the jury trial waiver provision, this amendment takes on added significance. We urge that it not be adopted.

The United States Supreme Court has, by and large, drastically swung the constitutional balance away from the rights of defendants. Their decisions have passed to the states the burden of providing more protection, based on state laws, procedures, and constitutions, to criminal defendants, than they deem required by the United States Constitution. Only by rejecting these four amendments can we begin to carry that burden.

Respectfully submitted,



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February 17th, 1977

Minnesota Supreme Court
Supreme Court Chambers
State Capitol Building
St. Paul, MN 55103

45517

RE: Proposed Amendment to the Rules of Criminal Procedure

Dear Sirs:

Please be advised that it is the position of the Hubbard County Attorney, his Assistant and the City Attorney of Park Rapids, Minnesota, that we are in general agreement to the proposed amendments to the Rules of Criminal Procedure as outlined in the recent issue of the Bench & Bar.

In particular, we wish to express our individed support for the proposed change of Rule 26 which modifies the order of final argument allowing the prosecutor the last argument to the jury with a defense rebuttal and a discretionary rebuttal thereafter by the prosecution. Such a change will clearly enable the jury to have a more clear and concise understanding of the facts of a particular case based upon the opportunity of both the defense and the prosecution to directly address themselves to points of issue which were raised by the opposing counsel. In so allowing, all of the points raised by counsel, whether raised by the prosecution or the defense, to be rebutted by the opposing counsel, the jury will be enabled to have a fuller understanding of all the important issues of a case. By so being enlightened, the jury will be that much more capable of rendering a verdict which is just.

We therefore respectfully request that the proposed change of Rule 26 and the other proposed changes in the Rules of Criminal Procedure be approved.

Sincerely yours,

Jay D. Mondry,
Hubbard County Attorney

David E. McGrane,
Assistant Hubbard County Attorney
Park Rapids City Attorney

JDM-DEM/ec