(14)

STATE OF MINNESOTA

IN SUPREME COURT

#45517

IN RE HEARING ON AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

O R D E R

WHEREAS the Advisory Committee on the Rules of Criminal Procedure has recommended to the Supreme Court amendments or additions to Rules 25, 33.04, 9.03, subd. 9, and 26.02, subd. 4, and the comment to Rule 2.01 of the Rules of Criminal Procedure; and

WHEREAS the Criminal Law Section of the Minnesota State Bar Association has petitioned the court for an amendment to Rule 6, Pretrial Release, of the Rules of Criminal Procedure;

NOW, THEREFORE, IT IS ORDERED that a hearing on the proposed additions and amendments to the Rules of Criminal Procedure or comments thereto which are incorporated in this order as Appendix A shall be held in the Supreme Court Chambers at 9:30 a.m. on Thursday, November 2, 1978.

IT IS FURTHER ORDERED that true and correct copies of the proposed amendments or additions to the rules be made available upon request to persons who have registered their names with the Clerk of the Supreme Court for the purpose of receiving such copies and who have paid a fee of $2.40 to defray the expense of providing the copies.

IT IS FURTHER ORDERED that advance notice of the hearing be given by the publication of this order once in the Supreme Court edition of Finance & Commerce and the St. Paul Legal Ledger.

IT IS FURTHER ORDERED that interested persons show cause, if any they have, why the proposed amendments or additions to the rules should not be adopted. All persons desiring to be heard shall file briefs or petitions setting forth their objections, and shall also notify the Clerk of the Supreme Court, in writing, on or before October 20, 1978, of their desire to be heard on the matter.

Dated: August 2, 1978

BY THE COURT

SUPREME COURT
FILED
AUG 4 1978
JOHN McCARTHY
CLERK

George M. Scott

George M. Scott, Associate Justice
Supreme Court of the State of Minnesota

APPENDIX A

REPORT TO MINNESOTA SUPREME COURT BY SUPREME COURT ADVISORY COMMITTEE RULES OF CRIMINAL PROCEDURE

GENERAL COMMENT

In proposing the following recommendations, the Advisory Committee was guided by these considerations:

It is the view of the Committee that in a democratic society such as ours, it is essential that the public be informed about the functioning of our courts, particularly in criminal cases, just as it is entitled to be informed about other public institutions. It is only then that the public will retain its confidence in our judicial system.

There are, however, limited and exceptional situations where immediate dissemination of information about particular judicial procedures would clearly defeat the purposes of those proceedings. Temporary postponement of public access to such information then becomes necessary if the courts are to carry out their legitimate functions. Even then, if the situation permits, prior notice and hearing should be provided to avoid unwarranted and unnecessary suspension orders.

Proposed Rule 25.03 and the proposed amendment to Rule 33.04 implement these principles.

Proposed amended Rule 33.04 covers situations where prior notice and hearing can defeat the purpose of the proceeding. The filing and particularly the publication of documents incident to the issuance and execution of an arrest or search warrant can alert, and cause the disappearance of, the person sought to be arrested or of the evidence sought to be seized. There is ample precedent for the amendment in the secrecy imposed on grand jury action until the arrest of a person charged, (Rule 18.08) and in Minn. Stat., Sec. 626A, subd. 9, making it a criminal offense to prematurely disseminate information about the issuance of a warrant authorizing the interception of wire or other communications.

Proposed Rule 25.03 covers all other situations and requires notice and opportunity to be heard on the need for any restriction on access to public records of criminal proceedings. This conforms to the guidelines stated in Northwest Publications, Inc. v. Honorable Donald E. Anderson, et al. The standard required to be met is high, "a clear and present danger of substantially interfering with the fair and impartial administration of justice." To assure compliance with the standard, written findings of fact must be made and reasons given for the order, and appellate review is provided.

RECOMMENDATIONS

1. That Rule 25 entitled Special Rules Governing Prejudicial Publicity, be amended by adding the following:

Rule 25.03 Restrictive Orders

The following rule shall govern the issuance of any court order restricting public access to public records relating to a criminal proceeding:

Subd. 1. Motion and Notice

(a) A restrictive order may be issued only upon written motion and after notice and hearing.

(b) Notice of the hearing shall be given in the time and manner and to such interested persons, including the news media, as the court may direct.

Subd. 2. Hearing

(a) At the hearing, the moving party shall have the burden of establishing a factual basis for the issuance of the order under the conditions specified in subd. 3.

(b) The public and news media shall have a right to be represented at the hearing and to present evidence and arguments in support of or in opposition to the motion.

(c) A verbatim record shall be made of the hearing.

Subd. 3. Grounds for Restrictive Order

The court may issue a restrictive order under this rule only if the court concludes on the basis of the evidence presented at the hearing that:

(a) Access to such public records will present a clear and present danger of substantially interfering with the fair and impartial administration of justice.

(b) All alternatives to the restrictive order are inadequate.

Subd. 4. Findings of Fact

The court shall make written findings of the facts and statement of the reasons supporting the conclusions upon which an order granting or denying the motion is based.

Subd. 5. Appellate Review

(a) Anyone represented at the hearing or aggrieved by an order granting or denying a restrictive order may petition the Supreme Court for review, which shall be the exclusive method for obtaining review.

(b) The Supreme Court shall determine upon the hearing record whether the moving party sustained the burden of justifying the restrictive order under the conditions specified in subd. 3 of this rule, and the Supreme Court may reverse, affirm, or modify the order issued.

Comment to Rule 25.03: It is anticipated that this rule will be utilized only "in exceptional cases" involving serious crimes. See Northwest Publications, Inc. v. Anderson, 259 N.W.2d 254, 257, and note 7 (Minn. 1977).

Comment to Rule 25.03, subd. 3(b): Possible alternatives to a restrictive order are the following:

A continuance or change of venue under Rule 25.02; sequestration of jurors on voir dire under Rule 26.02, subd. 4(2)(b); regulation of use of the courtroom under Rule 26.03, subd. 3; sequestration of jury under Rule 26.03, subd. 5(1); exclusion of the public from hearings or arguments outside the presence of the jury under Rule 26.03, subd. 6; cautioning or ordering parties, witnesses, jurors, and judicial employees and sequestration of witnesses under Rule 26.03, subd. 7; admonitions to jurors about exposure to prejudicial material under Rule 26.03, subd. 9.

2. That Rule 33.04 be amended to read as follows:

Rule 33.04 Filing

(a) Except as provided in Rule 9.03, subd. 9, papers required to be served shall be filed with the court. Papers shall be filed as provided in civil actions.

(b) A complaint, application, or affidavit requesting a warrant directing the arrest of a person or authorizing a search and seizure may contain a request by the prosecuting attorney that the complaint, application or affidavit, any supporting evidence or information, and any order granting the request, not be filed.

(c) An order shall be issued granting the request in whole or in part, if the judge finds from affidavits, sworn testimony or evidence that there are reasonable grounds to believe that such filing will lead to any person to be arrested fleeing or secreting himself or otherwise preventing the execution of the warrant or causing the items to be seized to be removed, destroyed or otherwise prevented from being seized.

(d) The order shall further direct that upon the execution of and return of the warrant, the filing required by subd. (a) shall forthwith be complied with. Until such filing, the documents and materials ordered withheld from filing shall be

retained by the judge or the judge's designee.

Comment to Amended Rule 33.04: The Rule as amended contains several safeguards against unwarranted orders which withhold the filing of documents referred to in the Rule. The prosecuting attorney, a responsible public official, must request the order; the request must be supported by adequate evidence showing the need for the order; the need must be found by a judge to exist; and, finally, when the arrest or search warrant has been executed, the documents must be filed immediately, and thereupon become available to the public.

Supporting precedents for this Rule are: Grand jury secrecy about indictment issued; (Rule 18.08), Minn. Stat., Sec. 626A.06, subd. 9, prohibiting disclosures of applications for and granting of warrants for interception of communications.

3. That the following comment be added to the comments to Rule 2.01:

Because the documents supporting the statement of probable cause frequently contain irrelevant material, material that is injurious to innocent third persons, and material prejudicial to defendant's right to a fair trial, it is the recommended practice that a statement be drafted containing the facts establishing probable cause, in or with the complaint, and that irrelevant material, material injurious to innocent third persons and material prejudicial to defendant's right to a fair trial be omitted therefrom.

4. That Rule 9.03, subd. 9, be amended to read as follows:

Subd. 9. Filing

Unless the court orders otherwise for the purpose of a hearing or trial, discovery disclosures made pursuant to Rule 9 shall not be filed under the provisions of Rule 33.04.

The party making the disclosures shall prepare an itemized descriptive list identifying the disclosures without disclosing their contents and shall file the list as provided by Rule 33.04.

5. That Rule 26.02, subd. 4, (1) be amended to read as follows:

Subd. 4. Voir Dire Examination

(1) Purpose - By Whom Made. A voir dire examination shall be conducted for the purpose of discovering bases for challenge for cause and for the purpose of gaining knowledge to enable an informed exercise of peremptory challenges, and shall be open to the public.

(The underlined portion is added. The remainder is unchanged.)

Respectfully submitted,

SUPREME COURT ADVISORY COMMITTEE
RULES OF CRIMINAL PROCEDURE

By Frank Claybourne
Frank Claybourne, Chairman

June 20, 1978.

The Criminal Law Section of the Minnesota State Bar Association requests consideration of the following amendment to Rule 6, Pretrial Release, of the Rules of Criminal Procedure.

Rule 6.02, subd. 1 would be amended by adding a new subparagraph (d) to read:

> "(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, 100 percent of the sum deposited."

The comment to Rule 6.02, subd. 1 is amended to read:

"These conditions are taken from 18 U.S.C. § 3146 and ABA Standards, Pre-Trial Release, 5.2, 5.3 (Approved Draft, 1968).~~,-except-that-they-do-not-include-a-condition permitting-a-cash-deposit-of-10-percent-of-the-amount-set as-money-bail.--The-Advisory-Committee-was-of-the-opinion that-with-only-10-percent-required-to-be-deposited-by-the defendant,-the-amount-of-the-money-bail-set-did-not-truly represent-the-actual-bail,-but-that-bail-in-an-amount equal-to-the-10-percent-figure-would-be-more-realistic.~~ Once the appropriate amount of bail is set, then and only then is the applicability of a 10 percent deposit considered as one alternative method of providing for the bail recommended to be set. In selected, appropriate cases, where all the circumstances indicate that some bail is desirable but appearance in court is likely, the court has the option of accepting 10 percent of the bail in cash rather than having 10 percent paid to a private bondsman."

(76)

COUNTY ATTORNEYS COUNCIL

40 NORTH MILTON STREET, SUITE 106 • SAINT PAUL, MINNESOTA 55104 • TELEPHONE 612/296-6972

October 20, 1978

Mr. John McCarthy
Clerk of the Supreme Court
Capitol Building
Room 230
St. Paul, Minnesota 55155

Dear Mr. McCarthy:

called and notified O.K.

The County Attorneys Council requests permission to appear at the Supreme Court hearing on Thursday, November 2, 1978 with regard to the proposed amendments to the Rules of Criminal Procedure. William Randall, Ramsey County Attorney would appear as the spokesman for the Council.

The purpose of the appearance would be to comment briefly on the proposed rules and generally urge their adoption.

Respectfully,

Stephen J. Askew
Executive Director
County Attorneys Council

cc: William Randall

THE MINNEAPOLIS STAR
Evening

MINNEAPOLIS TRIBUNE
Morning and Sunday

MARY JOAN BERG
ATTORNEY

Minneapolis, Minnesota 55488

October 17, 1978

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

Re: Hearing on Amendments
To Rules of Criminal Procedure

Dear Mr. McCarthy:

Pursuant to the order of the Minnesota Supreme Court dated August 2, 1978, concerning the above-referenced matter, please be advised that the Minneapolis Star and Tribune Company wishes to be heard in support of the proposed amendments when the Court conducts its hearing November 2, 1978.

If you have any questions, please call me at 372-4111.

Very truly yours,

Mary Joan Berg

Mary Joan Berg

MJB/dmi

cc: Donald R. Dwight

(77)

STATE OF MINNESOTA

IN SUPREME COURT

IN RE: HEARING ON AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

MEMORANDUM TO SHOW CAUSE WHY PROPOSED AMENDMENTS TO RULE 33.04 SHOULD NOT BE ADOPTED

STATE OF MINNESOTA

WARREN SPANNAUS
Attorney General
State of Minnesota

THOMAS L. FABEL
Deputy Attorney General

820 American Center Building
Saint Paul, Minnesota 55101
Telephone: (612) 296-7575

STATE OF MINNESOTA

IN SUPREME COURT

IN RE: HEARING ON AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

MEMORANDUM TO SHOW CAUSE WHY PROPOSED AMENDMENTS TO RULE 33.04 SHOULD NOT BE ADOPTED

INTRODUCTION

The Office of the Attorney General supports the efforts of this Court and its Committee on the Rules of Criminal Procedure to resolve the recurrent conflicts between the interests of openness and the interests of confidentiality in criminal proceedings. Moreover, we concur with the philosophy of the proposed amendments which weights heavily the interests of openness and gives sway to the interests of confidentiality only in extreme and highly meritorious circumstances.

Our sole objection to the proposed amendments concerns the treatment of affidavits used as applications for search warrants. The proposed amendments to Rule 33.04 fail to distinguish these documents from complaints, probable cause statements supporting complaints, search warrants, arrest warrants and related documents. In failing to make this distinction the proposed amendments have overlooked current law and compelling policy concerns which require different treatment for search warrant applications.

This memorandum will first examine the nature of search warrant applications and current law governing their filing. We will then discuss the policies supporting the current law and opposing the proposed amendments. Finally, we will suggest modifications to the proposed amendments preserving an increased emphasis upon openness while avoiding the great injuries to public and private interests threatened by the current proposals.

WHAT ARE SEARCH WARRANT APPLICATIONS?

This discussion must begin with a brief reflection upon the nature of search warrant applications and their role in the criminal justice system. A search warrant application, of course, is an affidavit presented to an authorized judicial officer, seeking authority to conduct a search and seizure. The affidavit is submitted by a person appearing before the judicial officer, and it must set forth "facts tending to establish the grounds of the application, or probable cause for believing that they exist." Minn. Stat. § 626.10 (1976). If the warrant application satisfies statutory and constitutional requirements, a warrant may be issued upon any of the grounds itemized in Minn. Stat. § 626.07 (1976), which essentially provides that property may be subject to search and seizure if it is contraband or if it constitutes or could lead to the fruits of a crime, the instrumentalities of a crime, or the evidence of a crime.

It is critical to observe at this point that a search warrant application is by its very nature speculative. It speculates, albeit with probable cause, that a crime may have occurred or be in the offing; that certain persons, usually identified, may have engaged in unlawful conduct or may be planning to do so; and/or that certain evidence or information pertaining to past or future crimes may exist in an identified location. Unlike a probable cause affidavit which accompanies a complaint or an arrest warrant, a search warrant application does not reflect the culmination of an investigation. Also unlike a complaint or arrest warrant affidavit, a search warrant application does not reflect a prosecutorial conclusion that a crime has indeed been committed and that the named individual has committed the alleged offense.

Because search warrant applications are necessarily speculative, and because they are closely scrutinized and often attacked if charges are ultimately filed, every incentive exists to jam them with a requisite showing of probable cause. This showing, of course, should include a detailed statement of possible misconduct, a detailed recitation of information sources, and often a delineation of facts supporting the credibility of the

information sources. In short, the application can and often does contain every important item of information in the investigative file. In retrospect it is always better to set forth too much rather than too little. Needless to say, such information often includes items which ultimately prove to be nothing but investigative suspicions resulting in no charges whatsoever.

Police officers should neither be blamed nor discouraged from overloading their search warrant applications. They, after all, are not lawyers, and they often lack the assistance of lawyers in seeking a search warrant. The affidavit requirement is designed to place facts before a neutral magistrate before authority can be granted to engage in an intrusive investigative tactic, namely, the search and seizure. This process is not harmed by the inclusion of extensive and extraneous facts in the warrant application. Conversely, the process can be harmed, often fatally, if the police become too selective or too conclusionary in the facts presented.

These unique characteristics of search warrant applications have led to different current filing requirements than those which apply to search warrants, documents reflecting the execution of search warrants, complaints, arrest warrants and accompanying affidavits, and related documentation. As will be seen, strong policy considerations favor this differential treatment.

THE CURRENT LAW ON FILING

Statutory provisions pertaining to search warrant applications very clearly treat them as documents separate from search warrants themselves, and equally clearly contemplate different filing requirements. A search warrant is defined by Minn. Stat. § 626.05 subd. 1 (1976) as a court order directing a peace officer to conduct a search and seizure as authorized by law. The warrant must contain the names of any persons presenting affidavits supporting issuance of the warrant. Minn. Stat. § 626.12 (1976). The warrant application, on the other hand, is referred to as a written affidavit presented and subscribed before the judicial officer prior to issuance of a warrant. Minn. Stat. §§ 626.08 - 628.10 (1976).

The statutes require that a warrant must be served upon a person or otherwise left at the location to be searched, together with a receipt itemizing any seized property. Minn. Stat. § 626.16 (1976). Statutes further require that the warrant be executed within ten days of issuance, and that following its execution, the warrant together with an inventory of seized property must be returned "forthwith" to the issuing judge. Minn. Stat. §§ 626.15 and 626.17 (1976).

The statutes make absolutely no reference to the service of the search warrant application upon a person or location or to the subsequent return of the search warrant application to the issuing judge. That silence, coupled with the other statutory provisions, makes clear that the following procedure is within legislative contemplation:

1. A person presents an application to a judicial officer;

2. The judicial officer, if he finds probable cause, issues a search warrant and gives that document together with the supporting affidavit to the applicant;

3. The warrant is then executed within ten days by a peace officer who serves or deposits a copy of the warrant and a property receipt at the location of the search;

4. The original search warrant and an itemized inventory is then forthwith returned to the issuing judge (or simply filed with the clerk);

5. The judge or clerk files the original warrant and inventory pursuant to Rule 33.04, since those are documents which were required to be served; and

6. The search warrant application may or may not be returned to the issuing judge and filed, depending upon surrounding circumstances.

As a point of fact, the above procedure accurately reflects the general practice in this State.

Under current law, when the search warrant application is not returned to the issuing magistrate, it nevertheless becomes disclosed if charges are subsequently filed. At that time the defendant would be notified of the existence of the application when the prosecution serves and files its Rule 7.01 notice, and the document itself would subsequently be subject to discovery

pursuant to Rule 9.01 subd. 1(3) and filing pursuant to Rule 9.03 subd. 9. In this situation the search warrant application would become a public document when the investigation has concluded and when the ultimate targets of the search warrant have an opportunity to rebut the allegations contained therein.

EFFECT OF THE PROPOSED AMENDMENTS

The proposed amendments to Rule 33.04 do not appear to recognize the difference in nature and the difference accorded by law to search warrant applications. Subsections (b) and (c) appear very clearly to contemplate that search warrant applications shall be subject to the same procedure for exclusion from mandatory filing as complaints, arrest warrant applications, and related documents. Nevertheless, the mandatory filing provisions themselves (contained in subsections (a) and (d)) are limited to "papers required to be served." As demonstrated above, however, there is absolutely no requirement in law that search warrant applications be served upon anyone.

We are left to speculate as to whether the Advisory Committee inadvertently assumed that search warrant applications must be served, or whether the Committee inadvertently included reference to such applications in the recommended procedures for exclusion from mandatory filing. The former inadvertency seems the more likely, since subsections (b) and (c) are very explicit in their references to search warrant applications. Thus, it appears that the proposed amendments would create a mandatory immediate filing requirement for search warrant applications where none has existed in the past.

Before turning to the arguments against the creation of this requirement, another erroneous assumption in the proposed amendments should be noted. Subsection (d) provides that even where exclusion from mandatory filing has been granted, the filing still must occur immediately following the execution and return of the warrant. As this applies to search warrants, the apparent assumption is that absent an exclusion granted pursuant to

subsection (c), the search warrant and the application would be filed immediately upon the issuance of the warrant. This assumption flies directly in the face of Minn. Stat. §§ 626.15 and 626.17, both of which contemplate that the search warrant goes to the peace officer at the time of issuance and is later returned to the issuing magistrate after execution, which must occur within ten days. The return date would be the first possible date for filing. Hence, the immediate filing assumption in the proposed amendments is wholly contrary to law, and the exclusion procedure set forth in subsections (b) and (c) is meaningless with respect to search warrants, assuming that the statutes are not being voided.

Our primary objection to the proposed amendments, however, is the apparent creation of a mandatory filing requirement for search warrant applications, and to that we now turn our attention.

ARGUMENT: A MANDATORY FILING REQUIREMENT FOR SEARCH WARRANT APPLICATIONS WOULD CAUSE IRREPARABLE HARM TO INNOCENT PERSONS.

The fact that search warrant applications are often replete with unsubstantiated speculation as to possible misconduct has already been discussed. As noted, an application may be a recitation of every material item in the investigative file, regardless of ultimate relevancy or veracity. It does no good to criticize this fact; every natural and necessary force makes it inevitable. There is no penalty for overinclusion in a warrant application, while there is every penalty for underinclusion.

What, then, of the innocent individual who is the subject of these published speculations and rumors, when no charges are ultimately forthcoming? Under a mandatory filing requirement, the person would be exposed to public discussion of the speculations and possible public villification, but he would be without an opportunity to rebut the charges in a judicial setting.

The resultant situation is identical to the evil of certain grand jury reports which this Court has denounced. In In re Grand Jury of Wabasha County, etc. 309 Minn. 148, 151-152, 244

N.W.2d 253, 255 (1976), the Court adopted the following rationale for prohibiting the issuance of grand jury reports which criticize the conduct of identified individuals:

> To permit the release of such a report would in effect reinstate the presentment in a form likely to inflict great damage on a named individual's reputation despite the fact that insufficient evidence was available to support formal charges. As was stated in People v. McCabe, 148 Misc. 330, 333, 266 N.Y.S. 363, 367 (1933):
>
> > "A presentment is a foul blow. It wins the importance of a judicial document, yet it lacks its principal attributes--the right to answer and to appeal. It accuses but furnishes no forum for a denial. No one knows upon what evidence the findings are based. An indictment may be challenged--even defeated. The presentment is immune. It is like the 'hit and run' motorist. Before application can be made to suppress it, it is the subject of public gossip. The damage is done. The injury it may unjustly inflict may never be healed."

Just recently the Wabasha County holding was extended to grand jury reports criticizing unidentified individuals if the identity might be inferred from surrounding circumstances.

> Because its subjects are identifiable, this report creates the same danger which we sought to avoid in Wabasha County--the infliction of great damage to the reputations of individuals who are granted no appropriate forum in which to clear themselves. The judicial imprimatur under which a grand jury operates gives to its pronouncements a ring of proven truth which they may not deserve. A formal indictment, supported by probable cause, is followed by a public trial during which a whole range of constitutional provisions insure a fair hearing for the accused. An informal report, on the other hand, drafted after a secret investigation and based upon an uncertain standard of proof, may be remembered, long after equally informal denials or objections forthcoming from its targets are forgotten. And the report's readers may understandably but incorrectly assume that at least the rudiments of due process--notice and opportunity to be heard--were afforded the accused.

In re Grand Jury of Hennepin County Impaneled on November 24, 1975, ___ Minn. ___, ___ N.W.2d ___ (filed October 13, 1978) (slip opinion at 3-4). It is difficult to understand why the disclosure of grand jury reports of this variety would violate public policy, while the disclosure of a search warrant application with a similar effect would not.

The very obvious and valid privacy interest which is at stake here has also been recognized by our state legislature. As stated, search warrant applications simply recite information from active investigative files. So long as such information

remains within police files, it is classified as "confidential" under the Minnesota Data Privacy Act, Minn. Stat. §§ 15.162, et. seq. (Supp. 1977), and as such is available to no outside person including the subject himself. Minn. Stat. § 15.162 subd. 2a (Supp. 1977). A mandatory filing requirement for search warrant applications, however, would cause such information to become public simply because it is presented to a judicial officer in an attempt to further the investigation. This consequence has no logical foundation, and it is surely contrary to the policy embraced by the Data Privacy Act.

The conclusion is inescapable. Severe and unwarranted injury to individuals is certain to result from a mandatory filing requirement for search warrant applications.

ARGUMENT: A MANDATORY FILING REQUIREMENT FOR SEARCH WARRANT APPLICATIONS WOULD FATALLY UNDERMINE ONGOING CRIMINAL INVESTIGATIONS.

A second and equally weighty objection to the creation of a mandatory filing requirement for search warrant applications is that such procedure would inevitably injure some ongoing investigations. It is unquestionably true that many--perhaps most--search warrants are obtained and executed almost simultaneously with the conclusion of an investigation and the filing of charges. In such situations public disclosure of the search warrant application would be unlikely to frustrate legitimate police work. In other situations, however, a search warrant may be obtained and executed long before the conclusion of the investigation or the filing of charges. Here, the disclosure of the warrant application could cause an aborted conclusion to the investigation.

Situations of the threatened variety would most often involve large-scale, complex investigations where the subject of the investigation is likely to be sophisticated white collar crime or other forms of organized criminal activity. The premature release of investigative findings in such cases could lead to any number of retaliatory or evasive efforts which could poison the investigation. Identified information sources could be silenced

or otherwise persuaded to forego further cooperation with investigators; documents or other items of evidence could be destroyed or falsified in anticipation of the next investigative step; false explanations of complex transactions could be agreed upon by insiders prior to official confrontation.

The need for confidentiality of investigative information prior to the issuance of charges has been recognized by many courts. The sentiments supporting this policy were well articulated by the Washington Supreme Court in Ashley v. Washington State Public Disclosure Commission, 560 P.2d 1156, 1159 (Wash. 1977):

> The rationale for exempting such material from unwinnowed public view is clear. Wholesale release of material in investigative files would eviscerate an on-going investigation. Human sources of information must be assured of anonymity, or they will dry up. Premature release of information may jeopardize the remainder of an inquiry, or related inquiries. Preliminary conclusions or accusations should not be revealed inasmuch as they may later be superseded, or even totally contradicted.

See also Bougas v. Chief of Police of Lexington, 354 N.E.2d 872 (Mass. 1976); Young v. Town of Huntington, 388 N.Y.S.2d 978 (1976); Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977); City of Tampa v. Harold, 352 So.2d 944 (Fla. 1977); Cook v. Craig, 127 Cal. Rptr. 712, 55 C.A.3d 773 (1976); Denver Pub. Co. v. Dreyfus, 520 P.2d 104 (Col. 1974); Atchison, T. & S. F. Ry. Co. v. Kansas Civil Rights Commission, 217 Kan. 15, 535 P.2d 917 (1974); Jensen v. Schiffman, 24 Or. App. 11, 544 P.2d 1048 (1976).

While these decisions pertain to investigative files, the policy is equally applicable to many search warrant applications. Where such applications are made during the course of an ongoing investigation, a public disclosure would have the same effect as the disclosure of the entire police file.

It might be argued by proponents of a mandatory filing requirement for search warrant applications that selective nonfiling may lead to an intentional abuse of the search warrant process. Another concern may be that the subjects of search warrants may never discover the reason for the police intrusion if charges are not forthcoming.

Both fears have little merit. With respect to potential abuse, it must be remembered that a judicial officer always stands between the police and the door in a search warrant situation. Moreover, the malicious procurement of a search warrant is itself a crime. Minn. Stat. § 626.22 (1976). Thus, regardless of whether applications are filed, strong protections exist to prevent abuse.

With respect to the ability of a search warrant subject to discover the basis for the warrant, Minn. Stat. § 626.21 (1976) provides a judicial remedy. That section authorizes any person aggrieved by an illegal search to move the appropriate court for the return of seized property. Certainly in the context of such a proceeding the warrant application would eventually be discoverable, regardless of the issuance of criminal charges.

Again, the conclusion stands untarnished. A mandatory immediate filing requirement for search warrant applications would be injurious to legitimate privacy interests and to legitimate public welfare interests; and such a requirement would not substantially promote any legitimate interest whatsoever.

RECOMMENDATIONS

Based upon the above discussion it is recommended that the proposed amendments to Rule 33.04 be altered to allow for selective nonfiling of search warrant applications where (1) the filing could result in unfair public allegations directed against innocent individuals; or (2) the filing could severely undermine an ongoing investigation.

The achievement of these ends could be accomplished in several different manners, any of which could be quite acceptable.

The most obvious and simplest means of achieving an acceptable result would be to simply restore existing law (as discussed <u>infra</u> at pp. 3-5) by striking all reference to search warrant applications from the proposed amendments. This proposal in the form of an engrossment is attached as Exhibit 1. Corresponding comments to the rule would, of course, also need modification.

A second possibility would be to modify the existing proposal to incorporate as additional grounds for the nonfiling of search warrant applications those concerns identified in this memorandum, namely, a substantial threat that filing could result in injury to innocent individuals or in the undermining of an ongoing investigation. This modification would have the virtue of involving a judicial officer in any decision against immediate filing, and as such would be a change from existing law and practice. An engrossment of this proposal is attached as Exhibit 2. Once again, corresponding comments to the rule would require parallel modification.

Variations upon the above themes are endless, suggesting that this entire issue requires substantial re-evaluation by the Advisory Committee. While the task is complex, a result is no doubt feasible which would promote the worthy ideals of openness while protecting the competing but nonetheless legitimate public and private concerns identified herein. We urge the Court to resubmit this issue to the Advisory Committee for their renewed efforts.

Dated: October 20, 1978

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota

By _____
THOMAS L. FABEL
Deputy Attorney General

820 American Center Building
St. Paul, Minnesota 55101
Telephone: (612) 296-7575

The position set forth in this memorandum is concurred with and joined in by the Minnesota County Attorneys Council.

RAPHAEL MILLER
Sibley County Attorney
President

_____
JOHN O. SONSTENG
Dakota County Attorney
President-Elect

2. That Rule 33.04 be amended to read as follows:

Rule 33.04 Filing

(a) Except as provided in Rule 9.03, subd. 9, papers required to be served shall be filed with the court. Papers shall be filed as provided in civil actions.

(b) A complaint, application, or affidavit requesting a warrant directing the arrest of a person ~~or authorizing a search and seizure~~ may contain a request by the prosecuting attorney that the complaint, application or affidavit, any supporting evidence or information, and any order granting the request, not be filed.

(c) An order shall be issued granting the request in whole or in part, if the judge finds from affidavits, sworn testimony or evidence that there are reasonable grounds to believe that such filing will lead to any person to be arrested fleeing or secreting himself or otherwise preventing the execution of the warrant. ~~or causing the items to be seized to be removed, destroyed or otherwise prevented from being seized.~~

(d) The order shall further direct that upon the execution of and return of the warrant, the filing required by subd. (a) shall forthwith be complied with. Until such filing, the documents and materials ordered withheld from filing shall be retained by the judge or the judge's designee.

EXHIBIT 1

2. That Rule 33.04 be amended to read as follows:

Rule 33.04 Filing

(a) Except as provided in Rule 9.03, subd. 9, papers required to be served shall be filed with the court. Papers shall be filed as provided in civil actions.

(b) A complaint, application, or affidavit requesting a warrant directing the arrest of a person or authorizing a search and seizure may contain a request by the prosecuting attorney that the complaint, application or affidavit, any supporting evidence or information, and any order granting the request, not be filed.

(c) An order shall be issued granting the request in whole or in part, if the judge finds from affidavits, sworn testimony or evidence that there are reasonable grounds to believe that: (1) in the case of complaint or arrest documents, such filing will lead to any person to be arrested fleeing or secreting himself or otherwise preventing the execution of the warrant; or (2) in the case of a search warrant application or affidavit, such filing will lead to causing the items to be seized to be removed, destroyed or otherwise prevented from being seized, or will create a substantial risk of injuring an innocent person or severely hampering an ongoing investigation.

(d) The order shall further direct that upon the execution of and return of ~~the~~ an arrest warrant, the filing required by subd. (a) shall forthwith be complied with; and in the case of a search warrant, the application or affidavit in application thereof shall be filed forthwith following the commencement of any criminal proceeding utilizing evidence obtained in or as a result of the search, or at any other such time as directed by the judge. Until such filing, the documents and materials ordered withheld from filing shall be retained by the judge or the judge's designee.

EXHIBIT 2

C. 59

#45517

PREPARED REMARKS

Before the Minnesota Supreme Court

Concerning Amendments to Rules of Criminal Procedure

November 2, 1978

By Charles W. Bailey, Editor of the Minneapolis Tribune

My name is Charles W. Bailey and I am editor of the Minneapolis Tribune. I appear here today in behalf of The Minneapolis Star, as well.

When the Advisory Committee on the Rules of Criminal Procedure held a hearing several months ago on this topic, an editor from The Star appeared on behalf of his paper and the Tribune. He took the position that the rules should simply prohibit closing public records.

We felt then, and still feel, that there is no evidence that the existence of public records has ever deprived a defendant of his constitutional right to an impartial jury. We recognize, however, that the question is debatable, and that the revisions before you today recognize this debate.

We support these proposed changes because they permit the debate to continue within the context of some important principles. The rules recognize the threat posed to a democratic society when government records are closed to the public. They recognize that all affected

parties should have an opportunity to present their arguments in a court hearing. They recognize that the burden of proof should fall to those seeking the unusual step of closing public records. They recognize the need to bring facts to the debate, not mere conjecture and supposition. And they acknowledge the many other less harmful remedies available to guarantee a constitutional trial. These principles have been included in decisions of this court, and we think it is important and gratifying that they are included in the revisions before you today.

Some journalists have expressed concern about one detail of the proposal--a change in Rule 33.04 that would allow the closing of search and arrest warrants for a limited period of time. We do not doubt the need to prevent the escape of suspects and the destruction of evidence. We hope no officials will abuse this provision, although we have learned from sad experience to be wary of any ambiguity.

Accordingly, we urge this Court to provide that if a restrictive order is entered pursuant to this rule, it should be no broader than absolutely necessary to prevent a suspect from fleeing or to prevent evidence from being hidden or destroyed.

And we assume that words such as "forthwith" and the other provisions of the revised rule mean that the temporarily closed records must be re-opened promptly and without delay on the seizure of the suspect or completion of the search. (We believe "immediately" would be a better word, particularly as provided in the advisory committee's comment to Rule 33.04, in which it interprets "forthwith" to mean

"immediately.")

This is a single concern in our generally favorable reaction to the proposed rules. There are many complexities in the relationship of the First and Sixth Amendments, and we no doubt will be in court one day debating whether there ever is a link between closing public records and assuring a fair trial. But the proposed rules provide a proper forum for the debate, and proper ground rules. We are pleased that, in these rules, Minnesota once again is setting a standard for careful, enlightened progress. We appreciate the thoughtful work of the advisory committee.

(79)

STATE OF MINNESOTA
DISTRICT COURT
SECOND DISTRICT

JOSEPH P. SUMMERS
JUDGE

November 1, 1978

TO THE HONORABLE MEMBERS OF THE SUPREME COURT:

While the ten-percent bail deposit rule is billed as an "option", its adoption by your honorable body would constitute an endorsement of the principle. Since I believe the principle of the ten-percent bail deposit is unsound, I urge you not to adopt the rule.

The concept is unsound because:

(1) It is part of a movement to eliminate bail bonding. In proper cases, I believe bail bonding and bondsmen perform a useful service and should not be eliminated.

(2) Bail deposits encourage "juice men", who lend money at illegal interest rates to enable defendants to post cash deposits.

(3) Bail deposits are a fraud on the public. Few are more judgment proof than a bail-jumper. Few personal recognizance bonds would ever be recovered from defaulters.

(4) The ten-percent deposit will escalate the bail figures routinely used by the courts by a factor of ten. This will force judges who want to impose honest bail into the position of using this "funny money" approach to bail or look like they are soft on crime compared with their brethren.

I urge your honorable body to decline to adopt the ten-percent deposit rule.

Thank you for your consideration.

Respectfully,

Joseph P. Summers

JOSEPH P. SUMMERS

Court House, Saint Paul, Minnesota 55102

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(80)

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November 1, 1978

The Honorable George C. Scott
Justice of the Supreme Court
State Capitol Building
St. Paul, Minnesota

In Re: Rules of Criminal Procedure

Dear Justice Scott:

I am writing to you in my individual capacity as an attorney licensed to practice law in the State of Minnesota and not in my capacity as a member of the Supreme Court Advisory Committee on Rules of Criminal Procedure. Obviously, my experience on the Committee must come in to play in the comments I wish to make with respect to one of the proposals to the Court.

The specific provision which I wish to address you and the Court relates to the proposal to amend Rule 6.02, subd. 1, by changing sub-paragraph (d) so as to permit the 10 percent deposit for an appearance bond.

My recollection of the deliberations of the Committee are that the Committee has considered this proposal on more than one occasion and has consistently rejected the proposal. I believe it is also significant that the representatives of the various segments of the Committee, i.e. the District Court Judges, Municipal Court Judges, prosecutors, defense attorneys and academic representatives have all voiced their objection to this proposal.

It has often been said that the purpose in drawing new rules of criminal procedure was to provide a better system of criminal justice in Minnesota. It seems to me that one of the thoughts that must be borne in mind in attempting to arrive at such a goal is to utilize the court system and its adjuncts in such a way as to not impose greater burdens upon the system and the monies available to operate that system unless it can be demonstrated that the additional burden increases the efficiency and the ultimate goal of promoting criminal justice for all segments of society. The 10 percent deposit system in my view adds an additional burden by causing our courts to become bill collectors and bookkeepers. We obviously would have to interview every defendant who participates in the cash bail system and to have their references scrutinized to minimize their failure to appear. A significant number of clerical and administrative staff would thereby be diverted from duties presently imposed upon them or additional suportive clerical and administrative staff would have to be hired. In the present system

the commercial bail bondsman performs those duties and, in fact, also performs the function of the sheriff's office, i.e. locating the defendant who failed to appear thereby saving the County additional costs. It is hard to believe that money judgments against those defendants who failed to appear would ever be collectable inasmuch as the system does not require security.

As you know, our lawfirm has, over the years, represented many members of the minority community. I recall at the hearings held on this subject at the last legislative session that the argument was made that this system would be of benefit to those members of the community. It has been my experience that in representing this segment of the community that this suggestion is not based on fact but rather conjecture. In fact, I would make the suggestion that those members of the community would probably wind up remaining in jail for longer periods of time than under the present system where commercial bail bondsmen have extended credit to the defendant in lieu of cash in order that they might be released on bail.

It is my earnest belief that the purpose behind the proposal is to eliminate commercial bail bondsmen. As a former assistant county attorney and a private practitioner, I am not aware that there exists in the State a commercial bail bondsman who has abused the system. In fact, the bondsmen have over the years demonstrated their willingness to cooperate with the Courts and to assist the Courts in the attendance of all defendants released on bond.

Very truly yours,

Henry H. Feikema

HHF:nm

(61)

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ROBERT B. LEE*

*ADMITTED IN DISTRICT OF COLUMBIA

October 31, 1978

Minnesota Supreme Court
State Capitol
St. Paul, MN 55155

Honorable Justices of the Supreme Court:

We are writing to oppose the petition of the Criminal Law Committee to amend Rule 6.02 of the Rules of Criminal Procedure, and to ask that these remarks be made a part of the record of the public hearing thereon scheduled for November 2, 1978.

During the 1978 legislative session, a bill was heard that reaffirmed the power of the judiciary under existing Rule 6.02 to require that a cash deposit of 10% of the amount of any bail set be paid into court as a condition of release (S.F. 97, H.F. 1021). The bill was heard before both the Senate Judiciary Committee and the House Criminal Justice Committee. Due to considerable opposition from a number of witnesses (see attached list), the Senate Judiciary Committee took no action, and the House Criminal Justice Committee laid the bill over for interim study. The chief proponent for the bill was the Criminal Law Section represented by Ellis Olkon, Esquire.

Subsequent to the adjournment of the legislature, the Criminal Law Committee of the Minnesota State Bar Association recommended that the Association support similar legislation in the 1979 legislative session. Following a full discussion of the issue at the May 20th Board of Governors' Meeting, the Board of Governors recommended to the convention that it not adopt the Criminal Law Committee report. The convention, however, did adopt the Committee's recommendation.

We would like to briefly summarize the arguments presented by those testifying against the bill when it was heard during the last legislative session and by those who opposed the move before the Board of Governors' convention.

1. The power to impose so-called "10% bail" is already provided in the Rules of Criminal Procedure as one option available at the discretion of the court. The proponents stated that the purpose of the bill was to force the use of the option in the majority of instances in which bail is imposed.

2. The Senate author asserted that the purpose of the bill is to eliminate some of the abuses and the injustices in the present bail bonding system in Minnesota. He offered no proof of any such abuses, nor did any witness who testified in favor of the bill. The MPIRG Report, often referred to throughout the hearings, also only spoke of the present system as being "prone to abuse". The facts do not support any such conclusion; rather, the testimony received from several members of the Judiciary, the State Public Defender, County Attorney's Offices, members of the Bar, and representatives of the minority community clearly refuted this statement.

   The proponents made it clear that their purpose is eventually to abolish commercial bail bonds in Minnesota. The overwhelming consensus of all those testifying and those prepared to testify against the bill was that bail bondsmen serve a useful purpose and that no legislation is required. Absent proof to the contrary, it appears that the requirement of commercial bonds should remain within the discretion of the court.

3. The argument also was made that the bill would greatly benefit minority people (particularly Native Americans) and the poor, in that 90% of the amount deposited as bail would be returned to the defendant upon final disposition of his/her case. Those opposing the bill emphasized that the bill would not aid these persons because poor people usually do not have the 10% deposit to begin with. In most instances, then, the defendant has to borrow the money from an outside source. It was pointed out that bail bondsmen in Minnesota will extend credit in some cases so the defendant can be released from jail without any cash changing hands, on the defense lawyer's promise to the bondsmen. Testimony by leaders in the Native American community was further prepared to refute the contention that such legislation would aid Native Americans; it had been their experience in other states with such a system that Native Americans in fact were incarcerated more often and for longer periods of time.

   It should also be emphasized that the proposed system requires a cash deposit to be made to the court, while bondsmen often will take other forms of collateral because many people have equity and credit in other forms than cash; a 10% bail bond system may actually result in more incarcerations.

It was also emphasized during the hearings that such legislation could result in the setting of inflated bail levels to minimize the loss to the county if the defendant jumped bail. There is some evidence that bail levels were greatly increased in other jurisdictions following adoption of such legislation.

4. A third area of concern is the anticipated high administrative cost in establishing such a system. It is clear from all the testimony at the legislative hearings that such a system has proven to be expensive elsewhere. Some of the costs involved are: (1) It is imperative to interview every defendant who participates in the 10% cash bail system and to have his/her references scrutinized to minimize the failure-to-appear rate. A significant number of interviewers and support clerical and administrative staff would thus be needed in the Department of Court Services of each county; (2) It has been further suggested that a viable apprehension system is necessary for those defendants who jump bail and forfeit not only their bail deposit, but who are liable for the remainder of the initial bail. More deputies and support staff would thus be needed in the sheriff's department of each county; (3) Also to be considered is the possible adverse financial impact on the county from lost revenues through bail forfeitures, because the county is taking the place of the commercial bail bondsmen as surety for 90% of the nondeposited bail. The problem is aggravated further because law enforcement agencies may not be as zealous in pursuing bail jumpers as private surety. In any case, most judgments against such defendants are not collectible.

It thus appears that a total cash bail system would necessitate a substantial increase in costs and staffing to the counties and the state. The rule proposed to the Court is silent on this point.

It should be emphasized that bail is no longer used as much in Minnesota as in the past. The metropolitan municipal courts have generally eliminated the use of bail, using instead "NBR" (no bail required). At the District Court level, bail is but one tool available to the courts, along with NBR, conditional releases, and combinations of the three.

Further research is necessary to calculate the cost to counties for such a system, the impact on minorities and the poor, and the extent to which bonded bail is a less-than-appropriate tool in our judiciary system. It appears that the chief impact of cash bail would be elimination of the commercial bondsmen; proponents of the suggested rule specifically so stated during the legislative hearings. Thus, there should be a burden of

proof on the proponents to demonstrate empirically and cogently the need for change, the denial of rights to the indigent, and any improper practices by commercial bondsmen that would warrant the new system.

We urge you to vote against the proposed rule.

Sincerely,

William F. Brooks, Jr.
Legislative Counsel for Goldberg
Bonding Company

WFB:cjh

PERSONS TESTIFYING AGAINST 1978 BAIL BOND LEGISLATION:

Judge Joseph Summers - (Ramsey County Municipal Court)
Judge Neil Riley - (Hennepin County Municipal Court)
John Ryan - (Hennepin County Department of Court Services)
C. Paul Jones - (State Public Defender)

Judge Sidney Abrahamson - (Ramsey County District Court)
Representative James Rice
Eddie Benton - (Director, Red School House - Native American Community Leader)

At this point, testimony was cut off because of the motion to lay the bill over for interim study. Following is a list of additional persons who had requested time to testify in opposition to the bill.

Ralph Ware - (Native American Community Leader)
Ken Webster - (Native American Community Leader)
Doug Hall - (Director, Legal Rights Center)
Ed Anderson - (Hennepin County Attorneys' Office)
Del Gorecki - (Ramsey County Attorneys' Office)
Bob Kelly - (Washington County Attorneys' Office)
Brian Miller - (Minnesota Trial Lawyers Assn.)
Bill Lubov - (Private Attorney)
Mark Peterson - (Private Attorney)
Art Reynolds - (Hennepin County Attorneys' Office Intern)
Judge Peter Lindberg - (Hennepin County Municipal Court)

(83)

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November 17, 1978

Minnesota Supreme Court
State Capitol
St. Paul, MN 55155

45517

To the Honorable Justices of the Minnesota Supreme Court:

On November 2, 1978, I requested an opportunity to respond if necessary to letters of the Hon. Joseph P. Summers and William Brooks, the chief lobbyist for Goldberg Bonding Company. I received today letters that were submitted to your Court prior to hearing. I am told by the law clerk for Chief Justice Sheran that I must respond immediately. I am submitting the following response.

I will attempt not to repeat any points fully argued at the November 2, 1978, hearing or in the ten-page Petition submitted by the Criminal Law Section of the Minnesota State Bar Association by Theodore J. Collins, James Manahan and myself as the three immediate past chairmen of this organization. It should again be reiterated that our organization includes dozens of prominent members of our judiciary, public defenders, private practicing defense attorneys and countless prosecutors. In 1977 and 1978 when the Criminal Law Section took its positions, which were ratified by the General Assembly of the State Bar Association Convention, we had close to 300 members. Mr. Brooks names several witnesses who have testified at legislative hearings in 1978, and also names other potential witnesses. I will not name the 300 members of the Criminal Law Section, nor do I have available the names of each and every delegate who voted in support of the Criminal Law Section recommendation at the June 1977 and June 1978 conventions. I will name, however, witnesses who have appeared before the Legislature in 1973 and again in 1978 on behalf of this recommendation for legislation at the conclusion of this response.

I would also like to point out that individuals such as Doug Hall and others named by Mr. Brooks would in all likelihood, if properly questioned by this office or an investigator, would deny being opposed to the recommendation before the Minnesota Supreme Court.

The witnesses that testified in 1978 before the Minnesota Legislature generally looked upon the Criminal Law Section and the Minnesota State Bar Association proposal as mandatory legislation. Only Judge Summers fully comprehended that the ten-percent bail deposit is merely an option available at the sound discretion of our present judiciary. Most of the other witnesses looked upon this recommendation as mandatory legislation which would force judges to use a ten-percent bail deposit in lieu of bail. This is not the situation in the federal system since 1966, nor is it the situation in all of the other jurisdictions that have adopted this position. It is rather unfortunate that Mr. Brooks has not provided the Court with actual transcripts of the testimony of the various witnesses listed on the final page of his letter and petition to this Honorable Court. It is rather unfortunate that Mr. Brooks did not list the names and positions of various other witnesses that testified in favor of the legislation who were not called by the Criminal Law Section or by the professional bail bondsmen. For example, Ken Roberts of Hennepin County Court Services testified in favor of the bill. His testimony was diametrically opposed to John Ryan's, of the very same department. The foremost expert on pretrial screening and pretrial release in the United States and the former head of Hennepin County Court Services Pretrial Release Department, Richard Scherman, has on numerous occasions been quoted in various periodicals as being in favor of the ten-percent deposit provision. Mr. C. Paul Jones testified against the recommendation, but indicated in the strongest of terms that the ten-percent deposit provision is now available to all judges in Minnesota by virtue of the present Rules of Criminal Procedure. Senator Jack Davies asked Mr. Jones why there were so many people lobbying against this recommendation if it is something you can do already. I believe this Honorable Court knows what the obvious answer might be.

It should be noted that at its most recent convention the Minnesota State Bar Association heard arguments pro and con on the recommendation of the Criminal Law Section. The only person who spoke on behalf of the Criminal Law Section's recommendation was County Commissioner Nancy Olkon. Mr. Brooks was present at this convention, and for his own reasons did not see fit to testify against the recommendation. In any event, the convention once again adopted the Section's recommendation that the Minnesota Legislature adopt a provision as a permissive alternative to mandatory surety bond.

In specific response to the Hon. Judge Joseph Summers, it should be noted that his position, as outlined in his letter of November 1, 1978, is based on speculation and not sound evidence. Judge

Summers is correct when he states that it is "part of a movement to eliminate bail bonding". Judge Summers is apparently fully aware of the ABA proposals of 1964 and again of 1978 which will be submitted to the House of Delegates in February, 1979. However, this is not the position of the Criminal Law Section of the Minnesota State Bar Association. We have never advocated the elimination of the bail bondsman, nor do we at the present time. The abuses referred to are part of an MPIRG report submitted to many of the judges in the metropolitan area. This report was prepared and submitted by that organization, and not the Criminal Law Section of the Minnesota State Bar Association.

The Minnesota State Bar Association and many of its members firmly believe that a bail bondsman can and does perform a useful service. The Criminal Law Section would challenge Judge Summers to produce any evidence of "juicemen" who lend money at illegal interest rates to enable defendants to post cash deposits. For twelve years the system has been in existence in Minnesota on the federal level. There is very little else to respond to in the letter of the Hon. Joseph Summers.

Mr. William Brooks does raise several points which should be responded to specifically. Point number 1 is contrary to the testimony of Ted Collins or Ellis Olkon before the Minnesota Supreme Court. I am not aware of any express purpose to force this particular option on the intelligent judges in this particular State. Again, this is designed to be a permissive rule which would be utilized in only appropriate situations.

After reviewing Mr. Brooks' four pages of arguments, it appears that much of it has been directed to the Minnesota Legislature and some of the arguments presented there. Most of it is immaterial as it relates to this particular proceeding. It is clear that the Criminal Law Section or the Minnesota Bar Association cannot force Minnesota judges to abolish bail bondsmen. It is unfortunate that on page 3, number 4, Mr. Brooks states that a ten-percent deposit provision would have high administrative costs and has been expensive elsewhere. I am not aware of that testimony. In any event, I would challenge Mr. Brooks to let this Court know where it has been expensive, how it would differ from the federal system, and how it would be any more expensive from an administrative standpoint from the present system. Clerks must each and every day file surety bonds or NBR releases, or whatever conditional release that a court imposes. The ten-percent cash bail alternative, used sparingly, would not create any

additional burden or any additional expense. It is rather unfortunate that Mr. Brooks also states "that the metropolitan municipal courts have generally eliminated the use of bail, using instead 'NBR' (no bail required)." This is at best an outright distortion of what is the present situation in much of the metropolitan area. A cursory examination of the bail logs in the Hennepin County court system today revealed that thousands of men and women posted $100 and $200 bails on a multitude of municipal offenses in 1977 and 1978. I would challenge Mr. Brooks to substantiate this irresponsible conclusion.

Mr. Brooks also fails to indicate that many individuals are forced to post bail before they ever appear in court on both misdemeanor and felony matters. As a matter of fact, the overwhelming majority of criminal defendants are given a felony complaint, usually during the course of the afternoon or evening, with a recommended bail by the county attorney. In Minneapolis and St. Paul they can get out on that recommendation and only that recommendation. If they do not post a surety bond, their alternative is to wait until morning and then consider either no bail or conditional release or any other type of combination.

Finally, the issue before the Court is not the improper practices by the commercial bail bondsman. That particular issue can be before the Court at another time and another place. The only issue is whether this Court should clarify Rule 6 and clearly and unequivocally state what the alternatives are that are available to the lower court judges in the State of Minnesota. Any potential misunderstandings can be clearly clarified by the usual comments that follow all of the other rules.

Respectfully,

Ellis Olkon

Ellis Olkon
Chairman, Minnesota State Bar
Association, Criminal Law Section
1974-1977

11-20 -- Copy given to each Justice
W. T.

EO:dj
cc: Hon. Joseph P. Summers
William F. Brooks, Jr.

Persons favoring and testifying on behalf of a 1973 and 1978 bail bond legislation, together with some of its legislative authors, include:

Rep. John Arlandson

Rep. John Bell

Theodore Collins

Sen. Jack Davies

Sen. Neil Dietrich

Sen Hubert Humphrey III

Dan Kloss, former St. Paul City Attorney and presently Assistant Ramsey County Public Defender

Sen. William Luther

Rep. Don Moe

Rep. Ken Nelson

Rep. Fred Norton

Allen Oleisky, Hennepin County District Court Judge

Ellis Olkon

Commissioner Nancy K. Olkon

Rep. Richard Parish

Ken Roberts, Hennepin County Department of Court Services

Richard Scherman

Sen. Allen Spear

Sen. Bob Tenneson

J. Peter Thompson, then Federal Public Defender

Jack Wylde

(84)

STATE OF MINNESOTA
DISTRICT COURT
SECOND DISTRICT

JOSEPH P. SUMMERS
JUDGE

November 27, 1978

Minnesota Supreme Court
State Capitol
St. Paul, MN. 55155

45517

To the Honorable Justices of the Minnesota Supreme Court:

Despite the fervor of Mr. Olkon's arguments in his letter of November 17, 1978, I remain persuaded that Minnesota's bail practice would be hurt, not helped, by implementation of the ten per cent deposit rule. The camel's nose should remain outside the tent.

It is not often that I appear in your proceedings in a negative posture. To the contrary, I have been rather more willing than most to actively support reform of the trial courts and their rules.

However, I feel strongly that widespread implementation of a ten per cent bail deposit rule will, in the practical order of things, leave minorities and poor people worse off than they are now, and I would urge its defeat.

Respectfully,

Joseph P. Summers

JOSEPH P. SUMMERS

JPS:hk

11-28 -- copy to each Justice

Court House, Saint Paul, Minnesota 55102

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(85)

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ROBERT B. LEE*

*ADMITTED IN DISTRICT OF COLUMBIA

November 22, 1978

Minnesota Supreme Court
State Capitol
St. Paul, MN 55155

45517

To the Honorable Justices of the Minnesota Supreme Court:

This is to inform you that I am in receipt of a letter addressed to the Court by Ellis Olkon, dated November 17, 1978, regarding the proposed change in the criminal rules in respect to bail bonds. I will not respond to the specific arguments made in the text of Mr. Olkon's letter, since the materials we submitted to the Court and the witnesses who testified against the proposed rule have fully informed you of the relevant points.

I would be glad to answer any further questions you may have regarding this matter.

Respectfully,

William F. Brooks

William F. Brooks, Jr.

WFB:cjh