STATE OF MINNESOTA

IN SUPREME COURT

C1-84-2137

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

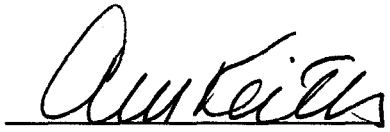
IT IS HEREBY ORDERED that a hearing be had before this Court in the State Capitol Courtroom of the Minnesota Supreme Court on April 19, 1994 at 9:00 a.m. to consider the recommendations of the Supreme Court Advisory Committee on Rules of Criminal Procedure to amend the Minnesota Rules of Criminal Procedure. The proposed amendments are annexed to this order.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 245 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before April 14, 1994 and
2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before April 14, 1994.

Dated: February 28, 1994

BY THE COURT:



A.M. Keith
Chief Justice

MICHAEL O. FREEMAN
COUNTY ATTORNEY

(612) 348-5550
T.D.D. (612) 348-6015

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

April 13, 1994

Frederick Grittner
Clerk of Appellate Courts
245 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Dear Mr. Grittner:

Enclosed for filing are 12 copies and the original of the comments of the Hennepin County Attorney concerning the proposed amendments to the Rules of Criminal Procedure. Also enclosed is a request to make oral statements on April 19, 1994.

Sincerely,

MICHAEL O. FREEMAN
Hennepin County Attorney

Paul R. Scoggin
Assistant County Attorney

PRS:ks
Enc.

STATE OF MINNESOTA

IN SUPREME COURT

REQUEST FOR
ORAL STATEMENTS

* * *

TO: THE MINNESOTA SUPREME COURT AND MR. FREDERICK GRITTNER, CLERK OF APPELLATE COURTS.

The Hennepin County Attorney's Office requests leave of the Court to make oral statements concerning proposed amendments to the Rules of Criminal Procedure on April 19, 1994.

Respectfully submitted,

MICHAEL O. FREEMAN
Hennepin County Attorney

Paul R. Scoggin
Assistant County Attorney
Atty. Reg. No. 161445
C-2000 Government Center
Minneapolis, MN 55487
(612) 348-5161

Dated: April 13, 1994

STATE OF MINNESOTA

IN SUPREME COURT

COMMENTS OF THE HENNEPIN COUNTY ATTORNEY ON THE PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

TO: THE MINNESOTA SUPREME COURT.

The Hennepin County Attorney, Michael O. Freeman, respectfully submits the following written comments concerning the report by the Advisory Committee on the Rules of Criminal Procedure.

1. **INTERPRETERS SHOULD BE ALLOWED TO ASSIST HEARING-IMPAIRED GRAND JURORS DURING DELIBERATIONS.**

Beginning in Rule 5 (page 9) the committee recommends implementation of a series of procedures to ensure that a defendant or witness is able to fairly participate in judicial proceedings despite a "handicap in communication" or "because of difficulty in speaking or comprehending the English language." Our experience as trial lawyers and participation in the Racial Bias Task Force confirms that these changes are badly needed. They are essential to ensuring the integrity of the judicial process.

The Advisory Committee, however, did not recommend the use of interpreters during grand jury deliberations. There is a strong probability that failing to make such a provision is in

violation of the Americans with Disabilities Act, the United States Constitution and both the Minnesota Constitution and Statutes.

Both the Minnesota Rules of Criminal Procedure and the corresponding state statute impose a secrecy requirement on grand jury proceedings. Minn. R. Crim. P. 18.04 specifies who may be present during grand jury proceedings:

> Attorneys for the State, the witness under examination, interpreters when needed, and for the purpose of recording the evidence, a reporter or operator of a recording instrument may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting. (emphasis added).

Minn. Stat. §628.63 codifies the provisions of Rule 18.04 and reads, in relevant part:

> The persons specified in Rule 18.04 of the rules of criminal procedure may, subject to the conditions specified in that rule, be present before the grand jury when it is in session, but no other person other than the jurors may be present while the grand jury is deliberating or voting.

While interpreters may be present for testimonial phase of grand jury proceedings, under both the rule and statute, only grand jurors may be present while the grand jury is deliberating or voting. Thus, the plain language of the rule and statute would appear to bar the presence of a sign language interpreter during grand jury deliberations. See Cooligan v. Celli, 492 N.Y.S.2d 287, 288 (A.D.4 Dept. 1985)(statute which permits only grand jurors to be present in grand jury room during deliberations could not be interpreted to provide an exception

for a sign language interpreter so that deaf woman could serve on grand jury).

The presence of an unauthorized person during grand jury deliberations constitutes grounds for the dismissal of an indictment. See Minn. Stat. §630.18 (3); State v. Dwire, 381 N.W.2d 871 (Minn. Ct. App. 1986)(presence of the prosecution team paralegal was grounds for dismissal of an indictment); State v. Slocum, 111 Minn. 328, 126 N.W. 1096 (1910)(quashing indictment justified where attorney, other than prosecutor, was present during grand jury proceedings).

In addition to jeopardizing indictments, Minn. Stat. §628.68, the secrecy requirement, makes it a misdemeanor for any "...judge, grand juror, county attorney, clerk, or other officer, who, except in the due discharge of his official duty, shall disclose, before an accused person shall be in custody, the fact that an indictment found or ordered against him...."

If an interpreter is allowed to be present during grand jury deliberations, the interpreter will learn the content of a "secret" indictment, putting either the District Court Administrator or prosecutor at risk of prosecution themselves.

Exclusion of a prospective juror, however, may violate Federal constitutional and statutory mandates. In McCollum v. Georgia, ____ U.S. ____, 112 S.Ct. 2348 (1992), the United States Supreme Court clarified the independent right of jurors to serve without regard to race. While the implications of McCollum on discrimination against the hearing-impaired are not yet fully

developed, it seems clear that the ban on the use of interpreters during deliberations must survive some level of heightened scrutiny. To the degree that potential grand jurors belong to a protected class by virtue of Constitutional analysis or by statute (such as the Americans with Disabilities Act or Minnesota Human Rights Act), the jurors are protected from discrimination individually, not as a derivation of the defendant's rights. While the need to protect grand jury secrecy is compelling, the use of qualified interpreters who are sworn to secrecy will protect the state's interests without discriminating against the hearing-impaired. Protecting the right of a hearing-impaired grand juror to participate in jury deliberations is a logical extension of the McCollum case.

In 1990, Congress passed the Americans with Disabilities Act ("ADA"). See 42 U.S.C. §12101 et seq. The stated purpose of the Act is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12101(b)(1). Under the ADA, no qualified individual with a disability shall, by reason of a disability, be excluded from participation in the services, programs, or activities of a public entity or be subjected to discrimination by such entity. 42 U.S.C. §12132. The term "public entity" includes state and local governments and "any department, agency, special purpose district, or other instrumentality of a State or States or local governments." 42 U.S.C. §12131(1).

A public entity has an affirmative duty under the ADA to provide appropriate auxiliary aids and services where necessary to afford a disabled person an equal opportunity to participate in a government service, program, or activity. 28 C.F.R. §35.160(b)(1). For a hearing-impaired person, appropriate auxiliary aids includes qualified interpreters. 28 C.F.R. §35.104(1).

A court's jury system falls within the parameters of the ADA. Galloway v. Superior Court of District of Columbia, 816 F.Supp. 12, 18 (Dist.D.C. 1993). As a consequence, this state has the affirmative duty under the ADA to make reasonable accommodations to enable a prospective juror to serve on the grand jury. A reasonable accommodation includes the presence of a qualified interpreter to assist a hearing-impaired juror during grand jury deliberations. While the ADA does not explicitly define a "reasonable accommodation" in this context, it is clear that to categorically exclude - by rule or statute - a hearing-impaired person from grand jury service, without making some reasonable accommodation for the juror's disability, would violate the ADA.

Additionally, exclusion of the prospective juror may violate a state law that prohibits discrimination against persons with disabilities. The Minnesota Human Rights Act (MHRA), like the ADA, makes it an unfair discriminatory practice to deny a disabled person "access to, admission to, full utilization of, or benefit from any public service." Minn. Stat. §363.03, subd.

4(1). The MHRA, again like the ADA, imposes an affirmative duty on public entities to ensure physical and program access, which includes provision of auxiliary services. Id.; Minn. Stat. §363.01, subd. 31(1). A public entity is exempted from this requirement only upon a showing of undue hardship. Id.

Ultimately, state court administrators, county attorneys and district court judges are placed between a rock and a hard place in attempting to accommodate McCollum, the ADA, the MHRA and Rule 18.04 in its present form. Unfortunately, the recommendations of the Rules Committee fail to cure this dilemma.

We respectfully ask the Court not only to adopt the changes to Rule 5 proposed by the Rules Committee, but to allow qualified interpreters to be present during grand jury deliberations. Such a rule change, coupled with the requirement that qualified interpreters take an oath not to interfere in deliberations and to keep juror secrecy, will adequately preserve jury integrity and make reasonable accommodations required by both State and Federal law.

2. THE EXPANDED APPELLATE RIGHTS FOUND IN RULE 28.04, SUBD. 1 SHOULD INCLUDE AN ORDER FOR A NEW TRIAL AFTER A JURY FINDING OF GUILTY.

The Advisory Committee expands the state's right to appeal in Rule 28.04 (page 26 et seq). This is a good change. It is a recognition that the integrity of a jury verdict is of compelling importance to crime victims, the state and society in general.

This change, however, does not include appeals by the state of orders for a new trial after a verdict of guilty. In failing to do so, we believe the rules cling to the now discarded notion that state's appeals after trial would violate double jeopardy.

The federal appeals statute for prosecutors is quite broad and basically permits all appeals, except those barred by the double jeopardy clause. See 18 U.S.C. § 3731 (1970). In 1978, when the Minnesota Criminal Procedure Rules were adopted, the prevailing legal thinking was that prosecutors could not seek any appeal after trial commenced because it would violate the double jeopardy clause. Thanks to the wide expansion of the federal statute permitting prosecution appeals in federal criminal cases, a series of decisions were made by the United States Supreme Court which made clear that double jeopardy permitted the prosecution to appeal any ruling entered after a trier of fact had made a finding of guilt. See United States v. Scott, 437 U.S. 83, rehg. denied, 439 U.S. 883 (1978)(first case in which U.S. Supreme Court permitted a prosecution appeal of a post trial order setting aside a guilty verdict). Additionally, the U.S. Supreme Court has indicated that double jeopardy also does not bar appeals by prosecutors from orders terminating a trial before a verdict has been reached. See e.g., Sanabria v. United States, 437 U.S. 54, 64 (1978); Serfass v. United States, 420 U.S. 377, 394 (1978).

Unless the rule is expanded to include the granting of new trial motions, judges will not be subject to review of orders granting new trials and will, effectively, have unbridled discretion to grant such motions whereas their denials of such motions are subject to review. There seems to be no logical reason to permit prosecutors to appeal a judgment of acquittal following a jury verdict of guilt and deny prosecutors the right to appeal an order granting a new trial.

From a victim's perspective, the prospect of being forced to testify all over again is nearly as bad as an acquittal. In many cases, such as child abuse, the second trial may never happen. At a minimum, the decision to grant a new trial should be subject to appellate review before the victim is traumatized a second time.

3. THE PROPOSED AMENDMENTS TO RULE 3 SHOULD INCLUDE A CATCHALL PROVISION TO PROTECT OTHER LEGITIMATE LAW ENFORCEMENT INTERESTS.

The Advisory Committee recommends switching from a presumptive warrant system to a presumptive summons system upon filing a criminal complaint (page 4). The Hennepin County Attorney supports this concept and believes it largely codifies existing practice in Hennepin County.

Nevertheless, there are other legitimate reasons to issue an arrest warrant other than likelihood of reappearance or the prevention of imminent bodily harm. Often, the use of a warrant will preserve the integrity of the judicial system. Use of a warrant provides a district court judge with the opportunity

to fashion conditions of release that prevent harassment of witnesses, destruction of evidence or intimidation of the victim. Use of a warrant and bail allows a district court judge to impose conditions of release that protect both the state's case and the victim beyond threats of imminent bodily harm.

As such, the Hennepin County Attorney's Office requests this court insert "or for other good reasons" at the end of the new language proposed for Rule 3.01.

Respectfully submitted,

MICHAEL O. FREEMAN
Hennepin County Attorney

Paul R. Scoggin
Assistant County Attorney
Atty. Reg. No. 161445
C-2000 Government Center
Minneapolis, MN 55487
(612) 348-5161

Dated: April 13, 1994

HENNEPIN COUNTY PROBATION AND PAROLE OFFICERS

LOCAL 552

BOX 15686
MINNEAPOLIS, MINNESOTA 55415

4/14

April 14, 1994

OFFICE OF
APPELLATE COURTS

APR 14 1994

FILED

Mr. Frederick Grittner
Clerk of the Appellate Courts
245 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Dear Mr. Grittner:

I would appreciate the opportunity to make a brief oral presentation at the Hearing on April 19, 1994, on the issues identified in the attached letter regarding the Proposed Amendments to the Rules of Criminal Procedure.

I do intend to attend the Hearing.

Sincerely,

Catherine Wagner

Catherine Wagner, President
Local 552, Hennepin County Parole and
Probation Officers
348-4161

HENNEPIN COUNTY PROBATION AND PAROLE OFFICERS

LOCAL 552

BOX 15686
MINNEAPOLIS, MINNESOTA 55415

April 14, 1994

The Honorable Supreme Court
State of Minnesota
245 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Honorable Justices of the Supreme Court:

On behalf of the membership of AFSCME Local 552, Parole and Probation Officers of Hennepin County, I have been authorized by action of the Executive Board to convey to you our concerns regarding a proposed amendment to the comments on Rule 27 of the Minnesota Rules of Criminal Procedure.

The proposed change reads as follows: "The Advisory Committee strongly commends the practice, now in effect in some counties, of preparing the Sentencing Guidelines Worksheet prior to the Omnibus Hearing. This may be done in connection with a pre-release investigation under Rule 6.02, 3 and may later be included with any presentence investigation report required under Rule 27.03, Subd. 1."

One of our primary concerns is that accurate criminal history information is not consistently and reliably available by the time of the Omnibus Hearing. Although FBI and BCA inquiries are routinely initiated at the time of a bail evaluation, those agencies are not always able to respond in a timely fashion. Further, many individual states, and particularly local jurisdictions, must be queried by letter, fax, or telephone in order to obtain criminal history information. Many times, it is only through a lengthy interview with the defendant and/or collateral contacts that the investigating officer learns of additional jurisdictions that should be researched for possible criminal court contacts. Defendants with "prior experience" in the Court systems particularly are not noted for being forthcoming or candid in revealing such information. If a defendant is ultimately sentenced on an incorrect Guidelines worksheet, the error cannot be corrected in favor of the State.

If the practice of pre-Omnibus Guidelines worksheets is adopted, the probation officer would be expected to prepare a worksheet to account for all eventualities. This can be a complicated exercise in cases of multiple offenses, files and/or victims. Without a plea or finding on a specific offense or offenses, the time spent calculating the various options can be significant and yet meaningless in terms of producing a document of value to the Court. All parts of the criminal justice system are already seriously overburdened by rapidly escalating caseloads and it would seem more expeditious to expend our limited resources on a viable product rather than a series of conjectures.

It is increasingly becoming common practice in our jurisdiction to prepare pre-plea investigations as well as a pre-plea Sentencing Guidelines Worksheet. We then find ourselves in the position of assuming guilt prior to adjudication and making written reports to the Court "concerning the defendant's individual characteristics, circumstances, needs, potentialities, criminal record and social history, the circumstances of the offense and the harm caused by it to others and to the community (M.S. 1993, 609.115)". The pre-plea investigations are then used as tools by counsel in the plea negotiation process and the presentence investigation is waived. In the absence of a plea to a specific offense and/or behavior and an acknowlegment of personal responsibility by the defendant, it is extremely difficult to identify appropriate sanctions for the behavior, assess the defendant's risk to public safety or identify conditions of probation intended to remediate criminal and/or other self-destructive behaviors.

For these reasons, we would ask that you not adopt the proposed amendment.

Thank you for your consideration.

Respectfully submitted,

Catherine Wagner

Catherine Wagner, President
FOR THE MEMBERSHIP
LOCAL 552

f-14

THE MINNESOTA

COUNTY ATTORNEYS

ASSOCIATION

40 North Milton Street
Suite 200
St. Paul, Minnesota 55104
612/227-7493
FAX
612/227-0405

April 14, 1994

OFFICE OF
APPELLATE COURTS

APR 14 1994

FILED

Frederick Grittner
Clerk of the Appellate Courts
245 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Dear Mr. Grittner:

Enclosed please find 12 copies of a written statement from the Minnesota County Attorneys Association. This statement relates to the Proposed Amendments to the Rules of Criminal Procedure as published in the March 11, 1994 edition of Finance & Commerce.

We do not wish to make an oral presentation at the April 19th hearing.

Sincerely,

William Jeronimus
Staff Attorney

THE MINNESOTA

COUNTY ATTORNEYS

ASSOCIATION

40 North Milton Street
Suite 200
St. Paul, Minnesota 55104

612/227-7493

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April 14, 1994

HONORABLE JUSTICES OF THE
MINNESOTA SUPREME COURT
245 JUDICIAL CENTER
25 CONSTITUTION AVE
ST PAUL MN 55155

Re: Comments Concerning Proposed Amendments to Rules of Criminal Procedure

Dear Justices:

The Minnesota County Attorneys Association (MCAA) would like to take this opportunity to comment upon the proposed changes to the rules of Criminal Procedure as authorized by court order C1-84-2137, dated February 28, 1994. Before offering our comments, the MCAA would like to acknowledge the effort made by the Supreme Court Advisory Committee on Rules of Criminal Procedure in preparing its recommendations and to indicate that we support many of the proposed changes. The MCAA and individual county attorneys are supportive of the ongoing need to review and revise the Rules of Criminal Procedure when necessary. As you know, we have also supported the court's need for additional staff and judges because we clearly recognize the increased demands placed upon all parts of the criminal justice system from rising caseloads in recent years. However, we are concerned that several of the proposed changes to the Minnesota Rules of Criminal Procedure appear to be unnecessary. While these concerns may have been presented by the prosecutors selected by the Court to serve on the Advisory Committee, this letter represents the position of the MCAA. We believe that some of these changes will cause significant additional demands on an already overburdened criminal justice system and will not help solve the overall problems that we share. I will address herein first those recommended rule changes that we have concerns about and secondly, highlight a number of recommended changes which we support.

AREAS OF CONCERN

1. The MCAA does not believe it is necessary that all complaints in gross misdemeanor and felony matters be supported by probable cause statements rather than attached reports of law enforcement officers (Rule 2.01). This change would result in significant increased demands upon those prosecutors who routinely and with court approval attach police reports to criminal complaints. While in some jurisdictions this practice does not occur, this by itself is not a sufficient reason to change the process everywhere. Individual judges throughout the State's judicial districts should be allowed to evaluate their workload and determine if attaching police reports to complaints creates any undue demand upon their judicial time limitations. Such judges can refuse to accept lengthy police reports and ask the prosecutor to do a narrative complaint in a given case <u>if necessary</u>. As we have acknowledged the increased demands that rising caseloads have upon the court, please do not overlook the increased demands that a rule change such as this will have on many county attorneys' offices throughout the State. Please understand that many rural and part-time city and county prosecutors are working as long and as hard as they can. City councils and county boards will not understand the increased demands made by this change. The consequence of this rule change would mean that prosecutors will not have the resources to charge all matters in a timely manner. Accused persons will therefore be released without bail pending charges, justice will be delayed, and the alleged offender will be at liberty without any controls. We respectfully request that this rule change not be adopted.

2. Similarly, we do not believe that the proposed modification requiring the filing of a formal complaint in reference to gross misdemeanor traffic violations within 48 hours of the defendant's appearance on the tab charge if the defendant is in custody or within 10 days of the defendant's appearance if the defendant is not custody (Rule 4.02, Subd. 5(3)) is needed. There is no data of which we are aware that indicates that the rights of persons accused of gross misdemeanor traffic violations are being abused or violated under current procedure. Requiring that formal complaints be issued in all such cases will drastically increase the workload for law enforcement officials and prosecutors throughout the State. It is important to keep in mind that these offenses are, after all, traffic violations where there will seldom be prosecutorial review involved at all. The typical defendant in these cases is currently represented by counsel and should there be an issue that a written complaint will help solve, such a complaint can be requested. The occasional filing of an inappropriate tab charge does not justify a recommendation that prosecutors be required to issue formal complaints in all such cases. This is an unnecessary response to a problem that rarely occurs, and this problem, if it exists, can

easily be dealt with by a request for prosecutorial review of a specific case or a formal motion to require that a complaint be filed in a specific case. Again, we do not believe this rule is justified, and we respectfully request the Court to bear in mind the significant increased costs it will create on an already overburdened system.

3. We are also opposed to the proposed change to Rule 3.01 which will mandate the issuance of a summons rather than a warrant unless it appears that there is a substantial likelihood that the defendant will fail to respond to a summons, or the defendant's whereabouts is not reasonably discoverable, or the arrest of the defendant is necessary to prevent imminent bodily harm to the defendant or another. Again, we are not aware of any broad scale abuse of discretion that is occurring under current practice in reference to the issuance of warrants in criminal cases. This change is far too broad in that it eliminates all discretion for a prosecutor and law enforcement officials to determine that an arrest of a person is appropriate in a given situation. There is nothing inappropriate about making the decision to arrest a person charged with a felony offense if prosecution and law enforcement deem this to be necessary. If adopted, we are concerned that this language would lead to more litigation and unnecessary demands upon both courts and prosecutors. Under the proposed rule, some type of formal showing would need to be made to the trial court that there is a "substantial likelihood" that the defendant will fail to respond to the summons or that the defendant's whereabouts is not "reasonably discoverable" or that the arrest of the defendant is "necessary to prevent imminent bodily harm to defendant or another". This will require the preparation of additional facts for judicial review not currently required. Of even greater concern is how a prosecutor will be able to come up with those facts. These standards are highly subjective and will be very difficult, if not impossible, to document. Also, a judicial determination to issue a warrant upon making one of these subjective findings could easily be subject to future challenge on appeal. The defense could also challenge the admissibility of any evidence lawfully seized as incident to the arrest or any statements volunteered by the defendant during the arrest on the basis that there was never a "substantial likelihood that the defendant would fail to appear on a summons", etc, and thereby a warrant should never have been issued in the first place. These are unnecessary procedures for an already overburdened system. While this proposal is supported in the proposed comments by reference to the report of the task force on racial bias, the changes extend much further than are supported in the comments. The argument that the lack of permanent residence among the economically disadvantaged leads to the issuance of warrants is unrelated to the change requiring the demonstration that there be a "substantial likelihood of imminent bodily harm" or "substantial likelihood that the defendant will not appear"

before a warrant could be used. You should keep in mind that the Legislature is currently entertaining a constitutional amendment to allow detention without bail in cases where public safety is involved. The requirement to show a likelihood of imminent harm before a warrant can issue ignores the reasonable public expectation that some offenses should lead to arrest, regardless of the likelihood that the accused will reoffend. A person accused of murder may well be unlikely to commit a new offense, but few, if any, would suggest that such an accused simply be sent a summons. We respectfully request that this rule not be modified.

4. While we generally support the notion that guidelines are needed for search warrants based upon oral testimony (Rule 36), the proposal seems unduly complicated. The requirement that there be both a record of the proceedings and also a written copy maintained by the judge seems duplicative. We would suggest that the rule be simplified to require: (1) that the oral probable cause information be recorded, as is permitted now in reference to materials supplementary to the application for a search warrant; (2) that the court authorize the search and direct the officer to prepare a standard written search warrant; (3) that the warrants prepared specifically note that it was authorized orally by the judge at a specific time and place; and (4) that a tape recording be made of this entire transaction. Such a proceeding would eliminate the need for the judge to maintain a separate copy of the warrant. It is also important to keep in mind that in many cases warrants contain lengthy lists of materials to be searched for and we believe this rule as currently worded would create unnecessary burdens upon the system.

5. Finally, the Advisory Committee recommends many changes to accommodate the needs of those handicapped in communication and the MCAA generally supports these recommendations. However, the shortage of qualified individuals to function as interpreters and the lack of standards by which to evaluate qualifications suggests that the court may wish to study this issue further before promulgating these rule changes. If adopted at this time, we would specifically recommend that the proposed revision to Rule 18.04, allowing the presence of an interpreter in grand jury proceedings, be clarified to also include jurors and prosecutors who may be also handicapped in communication and need assistance.

COMMENTS IN SUPPORT OF PROPOSALS

1. The MCAA agrees that the use of citations in situations involving failure to appear (Rule 6.01) is appropriate and would decrease the workload for all participants in the system.

2. The MCAA also supports the ability of law enforcement officers to swear to the authenticity of the facts of a complaint

before the clerk or a notary public will offer greater flexibility and should permit the more effective use of law enforcement time.

3. We also believe that those changes to Rule 22.03 allowing service by mail of subpoenas approves practice in use in many areas and is also a good idea.

4. The proposed change to Rule 28 to permit the State to appeal after a finding overturning a jury conviction is also appropriate and will increase public confidence in those rare cases.

Thank you for the opportunity to comment on the proposed changes to the Rules of Criminal Procedure.

Very truly yours,

James C. Backstrom

JAMES C. BACKSTROM
PRESIDENT

JCB/sw

admin/mcaa/rules

OFFICE OF THE CITY ATTORNEY
Timothy E. Marx, City Attorney

4/14

CITY OF SAINT PAUL
Norm Coleman, Mayor

Criminal Division
500 City Hall
15 West Kellogg Blvd.
Saint Paul, Minnesota 55102

Telephone: 612 266-8740
Facsimile: 612 298-5532

April 14, 1994

Mr. Frederick Grittner
Clerk of the Appellate Courts
245 Judicial Center
25 Constitution Avenue
Saint Paul, MN 55155

RE: Hearing to Consider Proposed Amendments to the Rules of Criminal Procedure

Dear Mr. Grittner:

Enclosed for filing please find an original and eleven copies of the Saint Paul City Attorney's Office statement regarding the impact of the proposed rule changes on our office, as well as an original and eleven copies of a Request for an Oral Presentation.

Sincerely,

Virginia D Palmer

Virginia D. Palmer
Deputy City Attorney
Criminal Division

VDP/gp

STATE OF MINNESOTA
IN SUPREME COURT
C1-84-2137

In the Matter of the Hearing to Consider Proposed Amendments to the Rules of Criminal Procedure

Request for an Oral Presentation

To: The Honorable A.M. Keith, Chief Justice and the Justices of the Minnesota Supreme Court

The undersigned attorneys respectfully request an opportunity to make an oral presentation at the hearing on April 19, 1994 regarding the effect of the Proposed Amendments to the Rules of Criminal Procedure on the Saint Paul City Attorney's Office.

Respectfully submitted,

Timothy E. Marx
Saint Paul City Attorney
Attorney License #151683
400 City Hall-Courthouse
Saint Paul, MN 55102
(612 266-8710

Virginia D. Palmer
Deputy City Attorney
Criminal Division
Attorney License #128995
500 City Hall-Courthouse
Saint Paul, MN 55102
(612)266-8740

STATE OF MINNESOTA
IN SUPREME COURT
C1-84-2137

In the Matter of the Hearing to
Consider Proposed Amendments to
the Rules of Criminal Procedure

To: The Honorable A.M. Keith, Chief Justice, and the Associate Justices of the Minnesota Supreme Court

Our office has had an opportunity to review the proposed changes to the Rules of Criminal Procedure, and we have specific concerns about the impact on our office of the changes to Rule 2.01, 3.01 and 4.02, subd.5(3).

First, we would like to indicate our support for the idea of requiring probable cause statements on complaints. In concept, this is a good idea, which will force better, more thorough review of the complaints being issued. That having been said, there are significant implications to our office if the implementation of these Rules does occur in August of 1994.

The proposed changes to the rules will require probable cause statements which we are currently not typing on our complaints, and as a result, will require additional clerical time. Our office has two criminal clerical typing positions, but each of those positions is only half-time as a typist for misdemeanor and gross misdemeanor complaints. Our office processed over 2,000 gross misdemeanor charges, and 17,000 misdemeanor charges in 1993. In talking to other prosecutorial offices, we have learned that it <u>is</u> more time-consuming to issue the probable cause statements, and that we will realistically need an additional two clerical positions.

Our office has already finished the budget process for 1994 and was unsuccessful in attempting to replace a retiring clerical position in our office. As a result, we have already had to shift job responsibilities and priorities. There is no realistic way that we can absorb the extra workload this change in the Rules will cause us without the impact being felt. The effect on our prosecutions, at least until we are adequately staffed with clerical help, or have an opportunity to computerize more of the work, will result in <u>a delay in proceedings being brought to court.</u>

Because the probable cause statements will take additional time, people who are arrested will be likelier to be released and

complaints prepared at a later date. This is often confusing and frustrating for defendants, who are unfamiliar with court procedures, and believe that they are being released and cleared of charges but later get complaints or summonses in the mail. Victims of crimes do not understand why people are not being charged when an arrest or a report is made, or why it is taking so long to begin the process. Although the rules do provide for time to prepare a complaint after a defendant has been released, the increase in workload will mean that we have to stretch those timelines to the utmost. One of the stated purposes of the Rules change is because it is "more difficult an time consuming for the court, and hinders a more prompt resolution of the criminal proceedings" when complaints are prepared with attached reports rather than probable cause statements. Unless we are given adequate time to prepare for this significant change in our procedures, it will have the unwanted effect of actually slowing cases from getting into the system.

In cases which we are going to charge where no arrest was made at the time of the incident, delays are likely to be even longer. Clearly there will be less priority for cases when someone is not in custody or released from custody with a deadline to prepare a complaint. This will extend the time before charges are filed and cases will be older when they are finally filed. As a result, victims become frustrated and angry with the system, prosecution becomes harder, as few cases ever get better with age, and it may be a disadvantage to defendants who want their cases resolved quickly, but are waiting for charges to be filed.

Because our 1994 budget is set, and we cannot possibly add the necessary staff to prepare the complaints as required, we will be forced to simply do the best we can with limited resources. The delays in bringing proceedings to court will not further the stated goals of the proposed changes to the Rules, and we respectfully request, in light of the above, that implementation of the changes requiring a probable cause statement on the face of complaints be deferred until 1995.

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April 14, 1994

Frederick Grittner
Clerk of the Appellate Courts
245 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Dear Mr. Grittner,

Enclosed are twelve copies of my letter to the Minnesota Supreme Court regarding a recommendation made by the Supreme Court Advisory Committee on Rules of Criminal Procedure. This letter represents my written statement to the Supreme Court and I do not wish to make an oral presentation at the hearing.

Sincerely,

Debra L. Dailey

Debra L. Dailey
Director

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April 14, 1994

Minnesota Supreme Court
Minnesota Judicial Center
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St. Paul, MN 55155

Dear Supreme Court Justices,

I appreciate the opportunity to express my concerns regarding the recommendation of the Supreme Court Advisory Committee on Rules of Criminal Procedure to amend the comments on Rule 27 by adding the following new paragraph:

> "The Advisory Committee strongly commends the practice, now in effect in some counties, of preparing the Sentencing Guidelines Worksheet prior to the Omnibus Hearing. This may be done in connection with a pre-release investigation under Rule 6.02, subd. 3 and may later be included with any presentence investigation report required under Rule 27.03, subd. 1."

There is a practical need for criminal justice practitioners to be informed as to the application of the sentencing guidelines for a defendant before the guilty plea to facilitate the plea negotiating process. Consequently, probation officers in some counties are asked to complete a sentencing guidelines worksheet prior to the guilty plea. Probation officers may be asked to complete several versions of the sentencing guidelines worksheet to demonstrate each possible plea option. While the information provided by these pre-plea sentencing worksheets are valuable to the plea negotiating process, the use of the Sentencing Guidelines Worksheet as the vehicle for this information raises several major issues.

The purpose of the Sentencing Guidelines Worksheet is to provide the sentencing court with the presumptive sentence under the sentencing guidelines. The presumptive sentence is based on the conviction offense(s) and therefore the sentencing worksheet cannot be officially completed until after guilt has been determined. Probation officers are in a unique position to complete the sentencing worksheet because they conduct the pre-sentence investigation and therefore already gather most of the information that is necessary to determine the application of the sentencing guidelines. This investigative work is typically done after the guilty plea. The current Rules of Criminal Procedure were written to support this process. Current Minnesota Law also mandates that the Sentencing Guidelines Worksheet be completed "when a defendant has been convicted of a felony, and before sentencing . . ." (Minn. Stat. 609.115, subd. 1).

The Sentencing Guidelines Worksheet is an official document that accurately reflects the appropriate application of the sentencing guidelines. We review each sentencing worksheet to determine if there are any errors. If there are errors we contact the probation officer for clarification and correction before the sentencing of the offender. The information on the worksheet is eventually merged with sentencing information from the State Judicial Information System (SJIS) and we determine which cases are sentencing departures. All of this information becomes a part of our monitoring system that we maintain as mandated by the Legislature.

Pre-plea sentencing worksheets create the following problems:

1) It is not necessarily clear whether the sentencing worksheet we receive is a pre-plea or an official sentencing worksheet and therefore we may not have accurate information regarding the offender's conviction offense and criminal history score and the appropriate application of the sentencing guidelines. Also, when multiple versions of the pre-plea sentencing worksheet are generated for the same offender, the problem of recognizing which is the official sentencing worksheet is even more problematic.

2) Erroneous requests for departure reports result when we have pre-plea sentencing worksheets rather than the official sentencing worksheet.

3) The official sentencing worksheet is part of the court record. These sentencing worksheets are often referenced at future points in time to provide background information when the offender commits a new crime. Pre-plea sentencing worksheets, if used in the future as a reference, can create confusion because they may not reflect the actual conviction offenses.

4) We understand that sometimes probation officers do not discover all information necessary to determine the presumptive sentence until they conduct the pre-sentence investigation (e.g. criminal record). We also understand that probation officers are sometimes asked to leave such information off of the official sentencing worksheet. It is not appropriate to exclude such information from the calculation of the presumptive sentence simply because a plea agreement was based on incomplete information. This interferes with the integrity of the sentencing guidelines system.

5) When probation officers are asked to complete pre-plea sentencing worksheets they must make various assumptions regarding the intentions of the prosecutor or defense attorney. If the attorneys do not supply the probation officers with the assumptions that should be made regarding the precise statutory provision of the potential conviction offense(s), the assumptions made by the probation officer can result in misleading information.

Because of the problems noted above, I believe that the language recommended by the Advisory Committee should not be added to the comments of Rule 27 of the Rules of Criminal Procedure. The Sentencing Guidelines Worksheet is an official document that serves the purpose of accurately communicating the presumptive sentence under the sentencing guidelines to the sentencing court based on the offense(s) of the conviction. I understand the value, however, of providing information on the specific application of the sentencing guidelines to the different plea negotiation options. I am sure there are ways to provide this information apart from the Sentencing Guidelines Worksheet to avoid the confusion and problems noted above. I would be happy to work with those who might be interested in developing other methods of providing the necessary pre-plea information.

Thank you for your consideration of my comments.

Sincerely,

Debra L. Dailey

Debra L. Dailey
Director

COMMUNITY CORRECTIONS DEPARTMENT

COUNTY OF RAMSEY

ADULT COURTS DIVISION

ROBERT A. HANSON
Division Director

GEORGE COURCHANE
Assistant Director

April 6, 1994

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Mr. Frederick Grittner
Clerk of the Appellate Courts
245 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Dear Mr. Grittner,

I would appreciate the opportunity to offer a brief oral presentation on April 19, 1994 in support of the attached written comments regarding the Proposed Amendments to the Rules of Criminal Procedure.

I do plan to attend this hearing.

Thank you for your time and attention.

Sincerely,

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St. Paul, MN 55104

COMMUNITY CORRECTIONS DEPARTMENT

COUNTY OF RAMSEY

ADULT COURTS DIVISION

ROBERT A. HANSON
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April 6, 1994

The Honorable Supreme Court
State of Minnesota
245 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Honorable Justices of the Supreme Court,

As officers of the Court, we write to apprise you of our serious concerns regarding a proposed amendment to the comments on Rule 27 of the Minnesota Rules of Criminal Procedure. We encourage you, at minimum, to delete this proposed change:

"The Advisory Commmittee strongly commends the practice, now in effect in some counties, of preparing the Sentencing Guidelines Worksheet prior to the Omnibus Hearing. This may be done in connection with a pre-release investigation under Rule 6.02, 3 and may later be included with any presentence investigation report required under Rule 27.03, Subd. 1."

At best, we would encourage you to actively discourage this practice as detrimental to the perception, if not the reality, of the Courts and the criminal justice system.

Briefly, our concerns with and objections to the practice of pre-plea Minnesota Sentencing Guidelines Worksheet preparation and/or investigations are:

1. Their emphasis is on the negotiated sentence outcome, not on the offender's guilt or innocence. They encourage negotiated sentencing decisions early in the process, before the determination of guilt, and without due or careful regard to offender capabilities and/or needs, supervising agency capabilitites, resource availability, victim impact, or public safety.

2. They disproportionally benefit offenders with criminal histories (the greater the history, the greater the benefit), as opposed to first time offenders.

3. They are less accurate than Minnesota Sentencing Guidelines Worksheets prepared as part of presentence investigations.

4. They tend to reduce respect for the Judiciary and Corrections systems in general, among victims, Corrections professionals, and the general public.

5. They are wasteful of scarce Corrections resources and already overburdened Court Services departments.

The Honorable Judge Foley, writing in a concurring opinion for the Court of Appeals on Miles vs. Minnesota C1-93-1285 (3/4/94) noted: "I write separately to remind Trial Judges that they are not to participate in plea negotiations." He further wrote: "Accordingly, a Judge should not promise a particular sentencing in advance." It seems that the current practice of pre-plea M.S.G. Worksheet preparation -- at Judicial request and/or insistence -- gives the appearance that Courts are not only promising precise sentences before plea -- but also are actually involved in the process of determining to which charge, or version of that charge, a defendant ought to plead given a particular criminal history score.

We do understand that the speedy processing of criminal cases is important to all involved: the Courts, the victims, the defendants, the Criminal Justice System in general, and the community. However, we are concerned, in an era of increasing emphasis on speed, that equity and justice in the process are being compromised. Where pre-plea Guidelines Worksheet preparation and investigations are practiced, the practice has been instituted at the strong insistence of that local Judiciary. Further, pressure for this practice is spreading. From our observations, whether intended or not, the practice results in the sentence and conditions of probation being agreed on by the defense, prosecution, and Judge, prior to a plea of guilty. Indeed, the sentencing package is the focus of and reason for the plea.

We are realistic. Criminal case resolution through plea agreements is a necessary piece of our system. However, the appearance of intense Judicial involvement in shaping the terms of the agreement and the future promise of sentence seems contrary to the notion of an impartial Judiciary weighing the merits of an agreement shaped by prosecution and defense, and imposing sentence following a reasoned appraisal of the defendant, the offense, victim impact, and the prospects for community adjustment.

Our experience in these events suggests that victims and the general public (as well as Corrections professionals) seriously question the propriety, fairness, and justice -- more so than usual -- in these instances. Individual defendants appreciation for their criminal behavior is lessened in this environment in which the clear message is admit something, anything, quickly, and we will gaurantee that you will be minimally inconvenienced. The Courts and the Criminal Justice System rely on community support and beliefs that we are fair and reasonable for our ultimate success. To foster the perception that this is not true is contrary to good practice.

A serious difficulty with the concept of pre-plea M.S.G. preparation is the compilation of an accurate criminal history. The compilation of an accurate and complete criminal history for an offender is a complex, time consuming task. Given the lack of any accurate, central depository of criminal history information, computerized data bases such as NCIC or BCA computer records represent merely places to begin a criminal record search. By far, the most fruitful starting place for a criminal history search is a personal interview with an individual defendant, and later his or her family. It is not that defendants readily volunteer prior offenses, but rather information obtained in a detailed social history leads to a more directed search of local jurisdictions in which the defendant has lived, traveled, and/or worked. Even a simple case, such as a 19-year-old defendant who was born and raised in the Metropolitan area, requires a significant effort to accurately search potential repositories of criminal history information. This search would include, but not be limited to: BCA, NCIC, Ramsey, Hennepin, Washington, Dakota, and Anoka District and Municipal Court Branches, Sheriff's Departments, and local police agencies. This search would also necessitate contacting Juvenile Courts in whatever Counties/Judicial District the defendant had resided as a juvenile. More often than we would like to admit, we are dependant on the kindness, time, and diligence of already overworked Court Clerks and police clerks for accurate criminal history information. Quite frankly, the current computer records do not possess sufficient data, even at their best, to accurately meet the requirements for inclusion on a Minnesota Sentencing Guidelines Worksheet. Speed produces inaccuracies. Lack of full access to a defendant for a thorough social history impedes or prohibits a thorough search. First time offenders, those with no criminal history, do not benefit to the same extent as offenders with known criminal histories from pre-plea negotiations. Repeat offenders who are active in a particular Judicial District, truly should not require pre-plea M.S.G. preparation. Their previous M.S.G. Worksheets are in the District Court, prosecutor, and last defense attorney's files. Offenders with criminal histories not previously well documented in a local district may well, as a result of a speedy pre-plea criminal history investigation, escape detection of some or all their criminal history, thereby benefiting more by this practice.

As Chief Justice Keith noted to me in his letter of 3/11/94, the Criminal Justice System and the Court System have been overwhelmed in recent years. This is equally true for probation departments. We are not aware of any probation department in the Metropolitan area which has the resources to commit to pre-plea M.S.G. Worksheets, without significantly reducing its effort in other important areas. As opposed to presentence investigations, the pre-plea preparation of M.S.G. Worksheets covers offenses to which the offender has not been found guilty or pled guilty; may or may not actually be charged; and require greater amounts of time and energy to prepare accurately. Further, due to the short time lines for pre-plea criminal history checks, they do not possess sufficient accuracy to remove the need for subsequent work.

We strongly encourage you to delete the proposed amendment. We truly believe it is bad for our Criminal Justice System to do pre-plea criminal history investigations and M.S.G. Worksheet preparation, let alone encourage it. Even though the practice may enable swift processing of cases, it neither encourages nor produces any outcome resembling justice.

We thank you for your time and attention.

Sincerely,

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M E M O

TO: Minnesota Supreme Court

FROM: Honorable Warren E. Litynski, Judge of District Court
Fifth Judicial District

DATE: April 8, 1994

RE: Proposed Amendments to the Rules of Criminal Procedure.

Honorable Members of the Supreme Court:

I have a few observations regarding the proposed amendments to the Rules of Criminal Procedure. All references to page and numbers will be as found in the March 11, 1994, edition of Finance and Commerce.

1. Page 39. Rule 2.01 refers to the "Clerk or Deputy Clerk of Court". This should be changed to the "Court Administrator".

2. Page 39. #5. Comments on Rule 1.02. Since #3 contains comments on Rule 1.02, and #5 follows Rule 2.01, I assume #5 should properly refer to Rule 2.01 rather than 1.02.

3. Page 39. Rule 2.01. When law enforcement issues a traffic citation, that acts as a tab charge, occasionally on a petty misdemeanor traffic offense a person will request a formal complaint. Some judges take the position that a person cannot demand a formal complaint for a petty misdemeanor traffic citation. I believe Rule 2.01 provides otherwise. I request that the comments to Rule 2.01 make it clear that a person charged with a petty misdemeanor traffic offense by tab charge may demand a formal complaint.

4. Page 40. #12. Rule 4.02, Subd. 5(3). This permits tab charges for gross misdemeanors under M.S. 169.121 or 169.129. If a defendant does not plead guilty to the tab charge within 10 days, a complaint must be issued. On page 43, #28, Rule 11.06 states that a defendant may plead to the Complaint. It strikes the "tab charge" language. Presumably, this is because it is assumed that the omnibus hearing will never be held within 10 days after arraignment. In Nicollet County, we usually hold a combined Rule 5/8 hearing on a Monday, and the omnibus hearing is scheduled for the following Monday. This means, according to Rule 4.02, if the gross misdemeanor was tab charged, the defendant could plead guilty

to the tab charge without the necessity of a formal complaint being filed. Rule 11.06, in that case, would be inconsistent with Rule 4.02. I suggest a modification of the Rule 11.06 language. I then also refer you to Page 42, #26. Comments on Rule 8. The last sentence says, "therefore, if the separate Rule 8 appearance occurs later than those time limits, as will usually be the case, . . ." In Nicollet County that is never the case. Where there is a separate Rule 5 hearing, the Rule 8 hearing is held between four and seven days later. I suggest that you omit the language "as will usually be the case" from the comment to Rule 8.

5. Page 40. #12. Rule 4.02, Subd. 5(3) permits tab charges for gross misdemeanor offenses under 169.121 and 169.129. The preamble entitled "gross misdemeanor procedure" (Page 38) states that the committee considered expanding the use of tab charges for other gross misdemeanors but rejected same. There are a number of other traffic matters in the gross misdemeanor category; some school bus violations, some driving after cancellations, and some leaving the scene of an accident. I suggest it is appropriate to commence all of those by tab charge. It is significant that the committee gives no reasons for rejecting the expansion, other than to say that "it is best" that this not be expanded. The committee should at least give definitive reasons for not recommending an expansion to tab charges for other gross misdemeanor traffic offenses.

6. Page 40. #12. Rule 4.02, Subd. 5(3) requires the filing and serving of a complaint for a gross misdemeanor which has been tab charged under 169.121 or 169.129 within 10 days of defendant's appearance where the defendant is not in custody. In misdemeanor cases where a person is tab charged, the State has 30 days in which to file a complaint after demand. I recommend making these time limits consistent; i.e., 10 days or 30 days without distinguishing between misdemeanors and gross misdemeanors. I believe the difference in time limits will be confusing and may lead to unwarranted dismissals of charges.

7. Page 41. Rule 5.01. Statement to the Defendant. Under (b) of this Rule there is a reference to "handicapped in communication". This is defined as "difficulty in speaking or comprehending the English language". Occasionally I see people from America who cannot read or write English and some who are deficient in communication skills. While this rule and others seem to indicate

that the people I just described are not entitled to special assistance, the rules are not quite clear. Does this mean that if a person cannot read we must furnish someone to read to the person? And, if so, where do we obtain this person?

Respectfully submitted,

Warren E. Litynski
Judge of District Court

HENNEPIN

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William R. Kennedy, Chief Public Defender

April 14, 1994

Mr. Frederick K. Grittner
Clerk of Supreme Court
245 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

Re: In Re 1994 Proposed Amendments To The Minnesota Rules of Criminal Procedure
Supreme Court File No. C1-84-2137

Dear Mr. Grittner:

Please find enclosed for filing the Statement of the Hennepin County Public Defender in the above-entitled matter.

Sincerely,

Peter W. Gorman
Attorney License No. 3633X
Assistant Public Defender
(612) 348-6618

PWG/vh
enc.

C1-84-2137

STATE OF MINNESOTA

IN SUPREME COURT

In re 1994 Proposed Amendments To The Minnesota Rules Of Criminal Procedure

STATEMENT OF THE HENNEPIN COUNTY PUBLIC DEFENDER

TO: THE MINNESOTA SUPREME COURT

The Hennepin County Public Defender believes that generally, the 1994 proposed amendments to the Rules of Criminal Procedure are well-considered. We are especially pleased with the proposed amendments to Rules 3 and 6 and their official comments and urge the Court to adopt them. We make this submission to the Court because we believe that two of the proposed amendments require further consideration.

1) We are very concerned about proposed amendments #4 and #5, which amend Rule 2.01 and its official comment.[1] We believe that the Court should reject them.

Proposed amendment #4 to Rule 2.01 is nearly impossible to understand without referring also to proposed amendment #5, to Rule 2.01's official comment (which is listed mistakenly in Finance & Commerce as 1.02). Reading the two together, we glean the following: a) petty misdemeanor

1. In this memorandum, we refer to the proposed amendment numbers as they were printed in Finance & Commerce, March 11, 1994, at 37-49.

probable cause determinations and complaints may be made and issued by court clerks as well as by judges or judicial officers; b) felony and gross misdemeanor complaints and probable cause statements may be sworn to before court clerks as well as before judges or judicial officers; c) affidavits and supplemental testimony supporting probable cause in felony and gross misdemeanor cases may only be sworn to or taken before a judge or judicial officer; and d) probable cause determinations in felony and gross misdemeanor complaints may only be made by judges or judicial officers based upon the documents submitted by the complaining witnesses to the court clerks.

At a minimum, we believe that proposed amendment #4 should be re-written so that it can be understood without reference to the official comment. This Court has often indicated, when promulgating court rules, that it does not formally adopt official comments. *See, e.g.,* Minnesota Rules of Court: State and Federal 96, 322 (West 1994).

Second, we do not believe that this amendment will save time for law-enforcement complaining witnesses, which apparently is the goal of the proposed amendments. *See* Finance & Commerce, March 11, 1994, at 38. Anyone who practices in the fourth judicial district can attest to the amount of time required, at certain times of each day, to obtain assistance from the clerk's office. In a building housing more than fifty judges, it is hard to imagine that this amendment will save *anyone* any time, particularly given

the fact that the documents sworn to before a court clerk in cases other than petty misdemeanors must then be brought to a judge for probable cause determinations. Moreover, a law-enforcement complaining witness who must supplement a complaint with affidavits or testimony will still have to appear before a judge, meaning that the above-noted objective of the amendment will not be served.

We understand that inconvenience to law-enforcement officers is a problem of the criminal court system worthy of this Court's attention. In extreme situations, it might justify adoption of procedures in some areas that would not be justifiable in other areas. We concede that a law-enforcement officer in the third, fifth, sixth, seventh, eighth and ninth judicial districts might have to travel a considerable distance in order to swear to a criminal complaint before a judge. However, we believe that it does not justify a change in Rule 2.01 which would apply statewide.

Third, we believe that delegation to court clerks of a probable cause determination, albeit only in petty misdemeanor prosecutions, violates at least the Minnesota Constitution. This Court held in State v. Paulick, 277 Minn. 140, 151 N.W.2d 591 (1967) that, under both the federal and Minnesota Constitutions, a court clerk could not, under Minn. Stat. § 488A.10, subds. 3 and 7 (1965), initiate an ordinance-violation prosecution for what it termed a "petty matter."

Although the Court did not specify in State v. Paulick whether the careless driving at issue was a misdemeanor or a petty misdemeanor under the village ordinance, its decision did not rest upon any such distinction.[2]

We recognize that the United States Supreme Court has held that, under the *federal* constitution, court clerks may issue warrants for municipal ordinance violations if the clerks are neutral and capable of determining whether probable cause exists. Shadwick v. City of Tampa, 407 U.S. 345, 350-51 (1972). However, this Court in its Paulick decision rejected, as a matter of at least *state* constitutional law, the federal court's rationale rendered four years later in Shadwick. *Compare*, State v. Paulick, 277 Minn. at 150, 151 N.W.2d at 598 *with* Shadwick v. City of Tampa, 407 U.S. at 348-51. State v. Paulick, though ignored by the original committee which drafted the rules in 1975 and ignored since, has never been overruled. To the extent that State v. Paulick governs the initiation of petty misdemeanor prosecutions, it conflicts with the proposed amendments to Rule 2.01.

If the Court feels that our constitutional objection to the amendment to Rule 2.01 is not well-taken, we still believe that possible inconvenience to law-enforcement

2. Our research in fact suggests that the petty misdemeanor, as an offense carrying only a fine, may not have existed at the time State v. Paulick was decided. *See* 12A Minn. Stat. Ann. 362-65 (West 1986)(Minn. Stats. § 169.89-§ 169.891 and history); 40 Minn. Stat. Ann. 17-21 (West 1987)(Minn. Stat. § 609.02, subd. 4a and history).

officers does not justify the use of court clerks in some areas. This is particularly true in the fourth judicial district where 54 judges are housed in downtown Minneapolis, in the second judicial district, where 24 judges have offices in downtown St. Paul, or in the first and tenth judicial districts, which have, respectively, 27 and 32 judges assigned to relatively compact geographic areas. There is no reason why law-enforcement officers should be unduly detained while seeking a judge in these judicial districts. The proposed amendment to Rule 2.01 would perhaps be more justifiable if adopted as a local rule in the third, fifth, sixth, seventh, eighth and ninth judicial districts.

2) We believe that amendment #76, the proposed new rule 36, is faithful to this Court's decisions in State, City of Minneapolis v. Cook, 498 N.W.2d 17 (Minn. 1993), State v. Lindsey, 473 N.W.2d 857 (Minn. 1991) and State v. Andries, 297 N.W.2d 124 (Minn. 1980). We agree with the committee's conclusion, noted in proposed Rule 36.02, that the primary inquiry in a telephonic search warrant proceeding is the reasonableness of dispensing with the traditional procedure. This theme runs through each of this Court's three decisions on the issue, and appears to be the principal issue in at least State v. Andries if not also in State v. Lindsey.

That being the case, we do not believe that adoption of proposed Rule 36 is necessary in the metropolitan judicial districts: first, second, fourth and tenth. While there may

be rare cases in which an exigency exists in those judicial districts, this Court's decisions in State, City of Minneapolis v. Cook, State v. Lindsey and State v. Andries would control, unless overruled, in the absence of proposed Rule 36.[3] Given the number of judges noted on page 5 in those four judicial districts, and given the fact that law-enforcement officers know how to reach those judges after hours[4], we believe that the Rule 36.02 "necessity" threshold could not and should not be met in the metropolitan judicial districts. Proposed Rule 36 would be best left for adoption as a local rule in the third, fifth, sixth, seventh, eighth and ninth judicial districts.

Respectfully submitted,

OFFICE OF THE HENNEPIN COUNTY PUBLIC DEFENDER

WILLIAM R. KENNEDY-CHIEF PUBLIC DEFENDER

By _____

Peter W. Gorman, Lic. 3633X
Assistant Public Defender
317 2nd Ave. S.-Suite 200
Minneapolis, MN 55401
Tel.: (612) 348-6618

Dated: this 13th day of April, 1994.

---

3. Two of the six justices in State v. Lindsey questioned the threshold exigency of the telephonic procedure in that case. State v. Lindsey, 473 N.W.2d at 865 (Wahl, J., dissenting), *id.* at 866 (Tomljanovich, J., dissenting).

4. As evidenced in State, City of Minneapolis v. Cook.