Technical Notes
And Briefing Papers

Publication 31
June 1980

Pretrial Motions in Criminal Cases

Minnesota County Attorneys Council
40 North Milton Street
St. Paul, Minnesota 55104

Technical Notes
And Briefing Papers

Pretrial Motions in Criminal Cases

by
John E. DeSanto
Assistant St. Louis County Attorney

Minnesota County Attorneys Council
40 North Milton Street
St. Paul, Minnesota 55104

PRETRIAL MOTIONS IN CRIMINAL CASES

TABLE OF CONTENTS

INTRODUCTION

Pretrial motions in criminal cases for prosecutors is perhaps most often a matter of responding to and/or opposing requests from criminal defendants and their attorneys. Often, the defense will make a pretrial motion for something simply to confuse the prosecution. Often, the defense motion will be a request for something to which the defendant is clearly not entitled, unsupported by any case law or precedent whatsoever.

All too often, the Court to whom a pretrial defense motion is made will grant the motion simply because the prosecutor is confused, the Court is reluctant to say no to the defendant and thereby create another issue on appeal, and/or the prosecutor has failed to adequately research and prepare his response to the pretrial motion.

Whether the prosecutor is the moving party or the responding party at the time of pretrial motions in criminal cases, he must have done his homework so that he can back up his claim for requested relief or for denial of the defendant's request. Without the necessary preparation, research and hopefully a memorandum to support his position, the prosecutor is unlikely to get his motion granted or to convince the Court that the defendant's motion should not be granted.

As with everything involved in the practice of law, there are certain rules and regulations governing pretrial motions in criminal cases -- where else but in the Minnesota Rules of Criminal Procedure. Rule 32

of the Minnesota Rules of Criminal Procedure entitled "Motions" states:

> "An application to the Court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the Court or these Rules permit it to be made orally. The motion shall state the grounds upon which it is made and shall set forth the relief or order sought and may be supported by affidavit."

Rules 10, 11, and 12 of the Minnesota Rules of Criminal Procedure deal specifically with pretrial motions in criminal cases. Rule 10.04, Subd. 1, states that:

> "In felony and gross misdemeanor cases, motions shall be made in writing and served upon opposing counsel not later than three (3) days before the Omnibus Hearing unless the Court for good cause shown permits the motion to be made and served at a later time.
>
> In misdemeanor cases..., motions shall be made in writing and along with any supporting affidavits shall be served upon opposing counsel at least three (3) days before they are to be heard and no more than thirty (30) days after the arraignment unless the Court for good cause shown permits the motion to be made and served at a later time."

As Rules 10, 11, and 12 of the Minnesota Rules of Criminal Procedure indicate, all pretrial motions in felony and gross misdemeanor cases should generally be heard at the Omnibus Hearing and all pretrial motions in misdemeanor cases should generally be heard at a pretrial conference or immediately before trial.

In addition, Rule 34.03 states:

> "A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing unless a different period is fixed by rule or order of Court. For cause shown such an order may be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served not less than one (1) day before the hearing unless the Court permits them to be served at a later time."

It is very important to know when, where, and how the Rules of Criminal Procedure require pretrial motions to be made. Failure to know and abide by these rules and regulations can prevent the prosecutor from obtaining an order or relief to which he is entitled just as the prosecutor can prevent the granting of an otherwise worthy motion by the defense simply because the defense motion was not in writing and/or served with enough notice upon the prosecution. The prosecutor should always require defense motions to be served upon him as required by the Rules if for no other reason than to allow himself time to prepare and research his response to them.

Hopefully, the following article will familiarize the Minnesota prosecutor with the broad scope of relief and orders available to him through pretrial motions. In addition, it is hoped that this article will serve as a guide for Minnesota prosecutors responding to the myriad pretrial motions made by criminal defense attorneys. Imagination is often a necessary and important ingredient in making and responding to pretrial

motions in criminal cases. Sample forms for some of the motions referred to will be included in the Appendix to this article.

I. MOTION FOR EXTENSION/ENLARGEMENT OF TIME TO FILE COMPLAINT AGAINST DEFENDANT ARRESTED WITHOUT A WARRANT.

Of course, Rule 4.02, Subd. 5, of the Minnesota Rules of Criminal Procedure requires that a criminal defendant arrested without a warrant be brought before a County Court Judge or judicial officer "not more than thirty-six (36) hours after the arrest, exclusive of the day of arrest, Sundays, and legal holidays, or as soon thereafter as such judge or judicial officer is available." This means that a complaint charging the defendant must be presented to the judge or judicial officer within this thirty-six (36) hour period.

Sometimes it is impossible for the law enforcement officers investigating a crime to gather the evidence necessary for the prosecutor to make his charging decision within this thirty-six (36) hour period. For instance, additional time may be needed to obtain medical reports concerning a crime victim's condition (e.g. death, great bodily harm, substantial bodily harm, or only bodily harm). Because of the complexity and time consuming nature of a particular investigation, the law enforcement authorities sometimes need additional time to prepare their reports and to submit them to the prosecutor for his review. At the same time, the serious nature of the offense and the fact that the suspect may be a

non-resident of the area may necessitate applying for an extension of time to file the complaint against the defendant and get him before the Court, rather than releasing the defendant from custody.

Such an application for an extension of the "thirty-six (36) rule" should be made in the form of a written motion or petition to the County Court pursuant to Rule 34.02 of the Minnesota Rules of Criminal Procedure. This motion will generally be an ex parte motion by the prosecution since, at this stage of the criminal proceedings, the defendant is usually not represented by counsel. The reason that this motion or petition should be in writing is so that the Court file will reflect the grounds for it and the written order granting the extension, should the extension be questioned later during the proceedings. An example of such a prosecution petition and Court order can be found in the Appendix.

II. MOTIONS REGARDING BAIL OR SUPERVISED RELEASE.

In St. Louis County, the County Court Judge before whom the criminal defendant first appears on a complaint generally determines the amount of bail imposed upon the defendant or whether the defendant will be released on supervised released without a motion from either the prosecutor or a defense attorney. However, defendants sometimes do make their first appearance in County Court with an attorney who will most often address the issue of bail. When aware of this, the prosecutor should be prepared to respond to such bail motions. In felony and gross misdemeanor

cases, such bail motions will generally be made by defense attorneys at the initial appearance in District Court.

Prior to the initial appearance of the defendant in District Court in felony and gross misdemeanor cases, the prosecutor should attempt to familiarize himself with the defendant's background. For instance, the prosecutor should attempt to learn the defendant's prior criminal record, address and living arrangements, employment status, past employment record, and marital status. Such information is most important when responding to defense motions to reduce bail or to place the defendant on supervised release in lieu of bail. With knowledge of the defendant's background, the prosecutor can make an intelligent decision as to whether or not to oppose defense counsel's bail motions. Otherwise, the Court will generally have to rely on the defendant's representations to his attorney, alone, and such representations are sometimes untrue.

Rule 6.03 of the Minnesota Rules of Criminal Procedure permits the prosecution to apply for a warrant for a defendant's arrest upon violation of any conditions of pretrial supervised release:

> "Upon an applicaltion of the prosecuting attorney alleging that a defendant has violated the conditions of his release, the judge, judicial officer, or Court that released the defendant may issue a warrant directing that the defendant be arrested and taken forthwith before such judge, judicial officer, or Court."

III. MOTIONS INVOLVING AMENDMENT OF DEFECTIVE WARRANTS, SUMMONS, AND COMPLAINTS.

Under Rule 3.04, Subd. 1, of the Minnesota Rules of Criminal Procedure, the prosecutor may make a motion to amend a defective warrant or summons.

Rule 3.04, Subd. 2, provides for a prosecution motion for a continuance of the proceedings in order to file a new complaint because: (1) the original complaint does not properly name or describe the defendant or the offense with which he is charged, or (2) based on the evidence presented at the pretrial proceedings, it appears that there is probable cause to believe that the defendant committed a different offense from that charged in the original complaint.

The Minnesota Rules of Criminal Procedure also permit prosecution motions to amend misdemeanor complaints at the pretrial conference and to amend felony and gross misdemeanor complaints or indictments at any time before verdict, if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced. See Rules 12.05 and 17.05. See also State v. Doeden, _____ Minn. _____, 245 N.W.2d 233 (1976).

As an example, in a prosecution for receiving, possessing, or concealing stolen property, it may be learned immediately before trial, or even during the presentation of evidence at trial, that the defendant did not know the property in question was stolen on the specific date of the offense

alleged in the complaint. However, the evidence clearly indicates that the defendant did know that the goods in question were stolen while he concealed them on a later date prior to issuance of the complaint or indictment. Because the precise time or date of this offense is not an essential element of receiving stolen property and an amendment of the complaint to the more accurate date does not change the offense and does not prejudice the substantial rights of the defendant, the prosecutor's motion to so amend the complaint may be permitted by the Court. See State v. Fraser, 277 Minn. 421, 152 N.W.2d 731 (1967), where the Minnesota Supreme Court upheld the general statutory and common-law rule that it is not necessary to prove the commission of a crime on the precise day, or even year, stated in the complaint or indictment except where the time is a material ingredient of the offense, as where the act done is unlawful only during certain seasons, on certain days, or at certain hours of the day.

However, the Court may not permit a pretrial motion to amend a complaint charging criminal sexual conduct in the third degree immediately before trial where the complaint alleges "force or coercion" mistakenly instead of an "under age" victim between 13 and 16 years old with the defendant being more than 24 months older, because although such an amendment does not add or change the offense charged it does prejudice the substantial rights of the defendant in that his attorney's defense to the charge must be completely different. See State v. Carter, _____ Minn. _____,

_____ N.W.2d _____ (October 19, 1979), Footnote #1.

IV. MOTION/DEMAND FOR SPEEDY TRIAL WITHIN SIXTY (60) DAYS.

Rules 6.06 and 11.10 of the Minnesota Rules of Criminal Procedure permit a motion or demand for speedy trial by either the prosecutor or the defense in a criminal case. This motion or demand may be made in writing or orally on the record. This motion or demand can be made at the time of the defendant's not guilty plea and when it is made, the trial must be commenced within sixty (60) days of the demand unless good cause is shown by the prosecution or the defense why defendant should not be brought to trial within that period. Defendants charged with misdemeanors, who are in custody, must be tried within ten (10) days of this motion or demand or be released from custody pending trial. Rule 6.06.

The Sixth Amendment right to a speedy trial is, of course, a right given to criminal defendants. However, as a general rule, it is the defendant who does not want a speedy trial because the defendant often benefits from a lengthy delay of his trial. The longer the time between the date of the offense and trial the more likely the prosecution witnesses are to forget the facts or to be unavailable to testify. Rules 6.06 and 11.10 remedy this situation by giving the prosecution an opportunity to demand a speedy trial. In addition, the absence of such a motion or demand by the defendant provides a factor that may be taken into account in determining whether the defendant has been unconstitutionally denied a speedy trial.

See Baker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Forms 1.17 and 2.13 following the Minnesota Rules of Criminal Procedure are samples of this type of pretrial demand.

V. MOTIONS RELATING TO DISMISSAL OF CHARGES.

Rule 30.01 of the Minnesota Rules of Criminal Procedure provides for pretrial motions or petitions by the prosecuting attorney to dismiss charges in criminal cases. Such dismissals may be made in writing or orally on the record, with the prosecuting attorney stating the reasons for them.

Dismissals of complaints or tab charges do not require leave or permission of the Court. However, dismissal of an indictment does require leave or permission of the Court. See State v. Aubol, _____ Minn. _____, 244 N.W.2d 636 (1976), where the Minnesota Supreme Court held that the trial Court was required to grant leave to this prosecutor to dismiss a first degree murder indictment where this prosecutor provided the trial Court with a factual basis for the dismissal and the trial Court was satisfied that this prosecutor had not abused his broad prosecutorial discretion.

Forms 1.35 and 2.33 following the Minnesota Rules of Criminal Procedure are examples of dismissals pursuant to Rule 30.01.

VI. MOTIONS RELATING TO DISCOVERY.

Rule 9 of the Minnesota Rules of Criminal Procedure sets out the rules and regulations governing discovery in felony and gross misdemeanor

cases. Rules 9.01, Subd. 1 and 9.02, Subd. 1 mandate discovery by the prosecution and defense, respectively, upon request of opposing counsel and without motions from either party or Order of the Court.

Among the material which the prosecutor must disclose to defense counsel upon request, but without a defense motion and Order of the Court, is exculpatory information tending to negate or reduce the guilt of the defendant. See Rule 9.01, Subd. 1(6), and Brady v. Maryland, 373 U.S. 83 (1963); U.S. v. Agurs, 427 U.S. 97 (1976). The disclosure of such information by the prosecutor is constitutionally and ethically required. Nevertheless, defense attorneys often make formal written pretrial motions pursuant to Rule 9.01, Subd. 1(6), for disclosure of "exculpatory information". These unnecessary defense motions are made with the intention of obtaining much more than "exculpatory information". Such motions may include demands for such things as prior juvenile delinquency adjudications of potential State's witnesses, prior "misconducts" of potential State's witnesses, promises made to prospective State's witnesses in return for testimony, and "any and all information which may be beneficial to the defense". The defense attorney making such motions often knows he is not entitled to such things, but by including them in Rule 9.01, Subd. 1(6) motions for "exculpatory information", he is more likely to get a timid prosecutor and/or judge to agree to give them to him.

Impeaching information is by no means the same thing as exculpatory information. In addition, Rule 9.01, Subd. 1(6), and Brady v.

Maryland "does not require the [prosecution] to disclose the myriad immaterial statements and names and addresses which any extended investigation is bound to produce." U.S. v. Jordan, 399 F.2d 610, 615 (2nd Cir. 1968). Moreover, the Court in U.S. ex rel Thompson v. Dye, 211 F.2d 763, 769 (3rd Cir. 1955), stated that "it seems likely that many situations will arise in which a prosecutor can fairly keep to himself his knowledge of available testimony which he views as mistaken or false."

Rules 9.01, Subd. 2 and 9.02, Subd. 2 do provide for pretrial motions by the defense and prosecution, respectively, to obtain discovery from opposing counsel which is not automatically required without Court Order. Such a defense motion under Rule 9.01, Subd. 2, requires "a showing" by the defense that the information sought "may relate to the guilt or innocence of the defendant or negate the guilt or reduce the culpability of the defendant as to the offense charged." Rule 9.01, Subd. 2.

Pursuant to Rule 9.02, Subd. 2, the prosecuting attorney can make a motion "at any time before trial...when the defendant is admitted to bail or otherwise released, or at the Omnibus Hearing" to have the trial Court order the defendant to do such things as appear in a lineup, speak for identification by witnesses or for the purpose of taking voice prints, be fingerprinted, permit measurements of his body to be taken, pose for photographs (not involving reinactment of a scene), provide specimens of his handwriting, submit to reasonable physical or medical inspection of his

body, or permit the taking of samples of his blood, hair, saliva, urine, and other materials of his body.

Such a 9.02, Subd. 2, motion for discovery can include a motion requiring the defendant to shave a beard before appearing in a lineup. See U.S. v. O'Neal, 349 Fed.Supp. 572 (1972). Based on this authority, Roger Caldwell was required to shave a beard he had grown following his arrest prior to appearing in a lineup conducted before his trial.

Note that Rule 9.02, Subd. 2(5) states that "the discovery procedures provided for by this rule do not exclude other lawful methods available for obtaining the evidence discoverable under the rule." During the time between Roger Caldwell's arrest and trial for the murders of Elisabeth Congdon and Velma Pietila in Duluth, Minnesota, the prosecution obtained several search warrants authorizing the taking of blood, hair, and saliva samples from Roger Caldwell who was being held in the St. Louis County Jail. Search warrants, of course, are applied for and executed in an ex parte fashion. During the pretrial proceedings, the defense argued that a search warrant was an improper method for obtaining these samples because Rule 9.02, Subd. 2, required that they be taken "upon motion of the prosecuting attorney with notice to defense counsel." This prosecutor argued successfully that the language of Rule 9.02, Subd. 2(5), permitted the use of "other lawful methods" such as search warrants for obtaining these samples. Besides, it was pointed out to the Court that

the language of Rule 9.02, Subd. 2(1), indicates that this pretrial motion procedure be used "either when the defendant is admitted to bail or otherwise released" and Roger Caldwell was in jail at the time. The reasoning behind requiring the pretrial motion procedure of Rule 9.02, Subd. 2, for obtaining the discovery in question from defendants on bail or released pending trial is quite obviously the prevention of interupting the defendant's pretrial freedom with these discovery procedures without notice to defense counsel and a showing that these procedures are a necessary aid in determining whether the defendant committed the offense charged. [A copy of the Rule 9.02, Subd. 2(1) motion and addendum/reply made in State v. Roger Caldwell can be found in the Appendix.]

Pursuant to Rule 9.03, Subd. 5, the prosecutor or defense attorney can make a motion to have the trial Court restrict or defer discovery. Such a motion for a "protective order" may be granted by the trial Court "upon a showing of cause". For example, the prosecutor may wish to make such a motion before trial during a rape prosecution to defer or restrict disclosure of the rape victim's address to the defense upon a showing that the disclosure of the address would subject the victim to a reasonable likelihood of intimidation, harassment or harm by the defendant before her testimony in Court.

A related ex parte procedure is provided for in Rule 9.01, Subd. 3(2). This rule of criminal procedure permits the prosecuting attorney to file a written certificate with the trial Court so that discovery otherwise

required by Rule 9.01, Subd. 1(1), (2) (basically trial witnesses' names, addresses, and statements) need not be disclosed to the defense. This certificate must show that to disclose such information "may subject such witnesses or persons or others to physical harm or coercion". The non-disclosure permitted in this rule does not extend beyond the time when the witnesses are sworn to testify at the trial, thus continuing in Minnesota the application of the Jencks rule [353 U.S. 657 (1957)]. See State v. Thompson, 273 Minn. 1, 139 N.W.2d 490, 508-512 (1966); State v. Grunau, 273 Minn. 315, 141 N.W.2d 815, 823 (1966). This rule does not prohibit discovery of a defendant's own statement.

Pursuant to Rule 9.03, Subd. 6, with notice to the adverse party, either the prosecution or defense can make a motion to the trial Court for an in camera hearing to deny or regulate discovery. This rule provides for preserving the confidentiality of material at such times as the trial Court is called upon to decide whether to require its disclosure. In issuing protective orders under Rule 9.03, Subd. 5, or in otherwise deciding that certain material is not subject to disclosure, the trial Court must sometimes have an opportunity to examine in private the particular material as well as the reasons for non-disclosure because sometimes it would defeat the purpose of the protective order if the moving party were required to make its showing in open Court. This rule does not supplant or modify the disclosure requirements themselves. It simply provides a device for determining whether there should be disclosure in doubtful cases.

Rule 9.03, Subd. 7, permits the prosecutor to excise non-discoverable material from documents which contain both discoverable and non-discoverable information without a pretrial motion to do so. However, this rule clearly contemplates that in difficult cases counsel wishing to make such an excision of non-discoverable material will seek a decision by the trial Court by making a pretrial motion for a Court Order to excise, seal, and preserve such non-discoverable information. In Sells v. U.S., 262 F.2d 815 (10th Cir. 1958), cert. denied, 360 U.S. 913 (1959), the appellate Court approved the trial Court's excision of materials which did not relate to any issue presented in the trial and further observed at 262 F.2d 824:

> "Without the excisions, there was the danger of harm to individuals who were not on trial, who did not appear as witnesses, and who were in no way connected with the offense charged against Sells [the defendant]. The excisions properly and reasonably protected such individuals and in no way prejudiced the defendant."

As another example, the prosecutor may wish to make a motion to excise the alibi statements made by a defendant's co-defendant spouse from a police report which contains otherwise discoverable material. Where the defendant has exercised his marital privilege preventing his co-defendant spouse from being called as a witness and where the defendant has not given the name of his co-defendant spouse as an alibi witness who he intends to call at trial, the alibi statements of co-defendant spouse are not discoverable. In such a case, the prosecutor may understandably wish to conceal these alibi state-

ments of the co-defendant spouse from the defendant in order to hinder the establisnment of a false alibi.

Rule 9.03, Subd. 8, provides for motions for sanctions by the trial Court for failure to comply with the criminal rules of discovery. The due process clause and the criminal rules of discovery clearly contemplate "the balance of forces between the accused and his accuser" so that discovery in criminal cases, insofar as possible, must be a "two way street". Wardius v. Oregon, 412 U.S. 470, 474 (1973). Nevertheless, I am sure that prosecutors throughout Minnesota and the country will agree that to date discovery in criminal cases has not been a "two way street".

Since the Minnesota Rules of Criminal Procedure came into effect on July 1, 1975, the Minnesota Supreme Court has twice taken the opportunity to put "teeth" into a Rule 9.03, Subd. 8, motion for sanctions against the defense for failure to comply with criminal discovery rules. On October 16, 1975, the Minnesota Supreme Court issued a writ of mandamus in State v. George Gerald Chamberlain commanding the trial Court in Hennepin County to prevent the defense from calling alibi witnesses at trial where the defense had deliberately and intentionally failed to disclose the names of these alibi witnesses upon demand from the prosecution. A copy of this writ of mandamus can be found in the Appendix to this article. Minnesota prosecutors should not hesitate to show this writ of mandamus to the trial Court when making motions for sanctions upon the defense for failure to comply with discovery rules. The trial Court will generally be very reluctant to impose

such a sanction as prohibiting the introduction of evidence not disclosed by the defense, unless the Court is aware that the Minnesota Supreme Court will back up such action against willful violations of the discovery rules.

More recently, the Minnesota Supreme Court in State v. Lindsey, 284 N.W.2d 368 (1979), upheld a second degree murder conviction and the Ramsey County trial Court's order preventing defense attorney, Doug Thomson, from calling the defendant's father as a witness and striking part of the defendant's mother's testimony because these witnesses were not disclosed by the defense to the prosecution despite two separate demands by the State pursuant to Rule 9.02, Subd. 1(3), of the Minnesota Rules of Criminal Procedure. In Lindsey, the Supreme Court stated:

> "Pretrial discovery rules fulfill an essential role in the criminal justice system. ...But, of course, for discovery to achieve its intended purposes the rules must be complied with, and this requires that adequate sanctions exist for their enforcement. ...Consistent with this, the [U.S.] Supreme Court has moved to insure that the consequence of failing to comply with a discovery obligation is meaningful. Thus, in United States v. Nobles, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), the Court upheld against constitutional challenge preclusion of defense evidence as a sanction for non-compliance with a discovery order. In Nobles, the Court reasoned that: '...The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; ...' 422 U.S. 241, 95 S.Ct. 2171, 45 L.Ed.2d 155." 284 N.W.2d 372-373.

In Lindsey, the Court also declares as inadequate the two most

commonly given reasons of defense attorneys for failing to disclose the names of defense witnesses in accordance with the discovery rules: that they (defense counsel) did not intend to call such witnesses until after they had heard the State's case at trial and that, besides, the names of these defense witnesses were included somewhere in the various police reports in the possession of the prosecution. With regard to this first excuse, the Minnesota Supreme Court stated at 284 N.W.2d 373: "Such an interpretation of the discovery obligation would render Rule 9.02, Subd. 1(3), meaningless; in every case, counsel could claim that the final decision to call any given witness was made only after the State had presented its evidence." In regard to the second excuse, the Supreme Court stated at 284 N.W.2d 373-374: "Although it is true that the various police reports prepared in connection with its investigation of the shooting contained the names and addresses of defendant's parents, the prosecutor had not taken steps to independently investigate what they might testify to because he had not been put on notice that they might be called at trial."

The exclusion of defense evidence as a sanction for failure to comply with the discovery rules is drastic, and clearly the Courts indicate that such a sanction should be used only as a last resort when a continuance is not a feasible alternative. However, the Minnesota prosecutor should be aware that the Minnesota Supreme Court condones such a sanction even when the defendant is on trial for such a serious charge as second degree murder.

The Minnesota prosecutor should not hesitate to seek such a sanction against the defense with the appropriate pretrial motion in order that discovery in criminal cases might someday truly become a "two way street". Short of asking for such a sanction, the prosecutor should always make a motion for a long enough continuance of trial proceedings to give the prosecution ample opportunity to completely investigate the background and statements of the newly discovered defense witness(es).

In cases where the criminal defendant is charged with a crime by Grand Jury indictment, Rule 18.05, Subd. 2, permits a defense motion for disclosure of specific pieces of testimony presented to the Grand Jury. This pretrial defense motion, of course, supplements the discovery rules of Rule 9.01, Subd. 1, by permitting the defendant to obtain a transcript of the testimony of Grand Jury witnesses, subject to protective orders under Rule 9.03, Subd. 5.

It is important for the prosecutor to note that the defense is only entitled to a transcript of: (1) Grand Jury testimony of the defendant in the case against the defendant; (2) Grand Jury testimony of witnesses whom the prosecution intends to call at the defendant's trial; and (3) testimony of any witness before the Grand Jury in the case against the defendant, provided that at the hearing on the motion, defense counsel makes an offer of proof showing that he expects to call the witness at the trial and that this witness will give relevant testimony favorable to the defendant. Where the prosecutor

is uncertain about whether or not he will call a particular Grand Jury witness at trial, the transcript of the Grand Jury testimony of such a witness may technically be kept from the defense prior to trial. However, the prosecutor may wish to permit discovery of such testimony pursuant to a pretrial Rule 18.05, Subd. 2, motion in order to avoid a delay in the trial proceedings (so that this discovery can be made) when the prosecutor decides that he must call this Grand Jury witness, after all. Moreover, Rule 18.05, Subd. 2, does not preclude the trial Court from ordering that the defendant be supplied with such a transcript during the trial, upon a showing of good cause.

Another pretrial defense motion relating to discovery which the prosecutor may confront is a motion pursuant to Rule 9.01, Subd. 1(4), requesting disclosure of all notes and memoranda in the files of crime laboratory analysts whom the prosecution intends to call at trial. Although, this rule clearly entitles the defense to discovery of reports and results of scientific tests and examinations, the defense should be precluded from obtaining such lab notes on the grounds that they are non-discoverable "work product" "of the prosecuting attorney or members of his staff or officials or official agencies participating in the prosecution". See Rule 9.01, Subd. 3(1). See also People v. Hester, 39 Ill.2d 489, 237 N.E.2d 466 (1968), cert. dism. 397 U.S. 660; People v. Kanady, 49 Ill.2d 416, 275 N.E.2d 356 (1971); State v. Grunau, 273 Minn. 315, 141 N.W.2d 815 (1966); and U.S. v.

Nobles, 422 U.S. 225 (1975). Such a pretrial defense motion for disclosure of BCA and FBI laboratory analysts' notes and memoranda was made by the defense during the Roger Caldwell prosecution; based on the authorities cited above this motion was successfully resisted.

Several other unsuccessful pretrial defense motions relating to discovery made during the Roger Caldwell prosecution included a Rule 9.01, Subd. 1(1)(a), motion for disclosure of the order in which the prosecution intended to call its witnesses and a Rule 9.01, Subd. 1(1), motion for disclosure of the prosecution's potential rebuttal witnesses. In a lengthy prosecution like the Caldwell case where over one hundred prosecution witnesses were called to testify, disclosure of the witness order is a disclosure of the prosecutor's trial strategy which necessarily involves his theories and conclusions. In such a prosecution, the motion for disclosure of witness order should be opposed as non-discoverable "work product" under Rule 9.01, Subd. 3(1)(a). A pretrial defense motion for disclosure of potential rebuttal witnesses should also be resisted as not required by the discovery rules absent a showing by the defendant under Rule 9.01, Subd. 2, that "the information may relate to the guilt or the innocence of the defendant or negate the guilt or reduce the culpability of the defendant as to the offense charged". See also State v. Amos, 262 N.W.2d 435 (1978), where the Minnesota Supreme Court tangentially addressed this issue. In Amos, the defendant contended on appeal that the notice of alibi rule [Rule 9.02, Subd. 1(3)(c)]

was unconstitutional because "it does not require the prosecutor to give defendant notice of which of the State's witnesses the State intends to call to rebut the alibi testimony, whereas defendant is required to specify which defense witnesses might be called to present alibi testimony". 262 N.W.2d 437. The Minnesota Supreme Court did not decide this issue because defense counsel had neither raised the issue at trial nor showed any adverse effect on the defendant. However, the Minnesota Supreme Court did not state that defendant was inaccurate in his interpretation that the prosecutor need not disclose alibi rebuttal witnesses. Plainly and simply, the Minnesota Rules of Criminal Procedure governing discovery do not require prosecutorial disclosure of rebuttal witnesses and testimony because of the inherent nature of rebuttal testimony.

Another pretrial defense motion relating to discovery is the motion for production of the prosecution's dossier on prospective jurors. During the Roger Caldwell prosecution, defense attorney, Douglas Thomson, made such a motion pursuant to Rule 1.02 of the Minnesota Rules of Criminal Procedure. Most Courts consider the prosecutor's jury book as work product and not discoverable. See Rule 9.02, Subd. 3; 86 ALR3d 571; People v. Quicke, 71 Cal.2d 502, 78 Cal.Rptr. 683, 455 P.2d 787 (1969); People v. Stinson, 58 Mich.App. 243, 227 N.W.2d 303 (1975). Nevertheless, some Courts have sanctioned discovery of prosecution information regarding prospective jurors. See People v. Aldridge, 47 Mich.App. 639, 209 N.W.2d 796 (1973).

The prosecutor may confront a pretrial defense motion for a production of a pre-sentence investigation report about a prospective State's witness. In U.S. v. Evans, 454 F.2d 813 (8th Cir. 1972), the Court refused to recognize the right of an accused to obtain a pre-sentence report concerning another person on the basis that the other person may be a witness against the accused. It was held that such a right would adversely effect the Court's ability to obtain data from independent sources on a confidential basis, especially where the person who is the subject of the report has not consented to its being given to another person for the other person's use in a public trial.

Finally, pretrial defense motions to discover information about and/or the identity of police informants are common. Generally, such motions can be successfully opposed. It is clear that when an informant is a mere transmitter of information and not an active participant so as to be a competent witness to the crime charged, the informant's name need not be disclosed. State v. Purdy, 278 Minn. 133, 153 N.W.2d 254 (1967); State v. DeSchoatz, 280 Minn. 3, 157 N.W.2d 517 (1968); State v. Weber, 221 N.W.2d 146 (1974); State v. Villalon, 234 N.W.2d 189 (1975).

VII. MOTION FOR JOINT TRIAL OF TWO OR MORE CRIMINAL DEFENDANTS.

In the State of Minnesota, two or more criminal defendants jointly charged with a felony or gross misdemeanor are entitled to separate trials. However, Rule 17.03, Subd. 2(1), permits a pretrial motion by the prosecution

for a joint trial of such defendants on the ground that a joint trial is essential to "the interests of justice and not solely related to economy of time or expense". Defendants jointly charged with a misdemeanor may be tried jointly or separately, in the discretion of the trial Court. Rule 17.03, Subd. 2(2).

In Minnesota and most State Courts, motions for joint trial of criminal defendants are seldom granted. Conversely, defense motions to sever trials of co-defendants pursuant to Rule 17.03, Subd. 3, are virtually automatic in State trial Courts.

Nevertheless, in State v. Gengler, 294 Minn. 503, 200 N.W.2d 187 (1972), the Minnesota Supreme Court upheld the trial Court order requiring a joint trial of three defendants for the crime of sexual intercourse with a child under fourteen years of age. In Gengler, the Court stated that it was clearly in the interests of justice "that the victims be spared the ordeal of testifying on three separate occasions to the terrifying and revolting details of these offenses" by members of a motorcycle gang.

Also, in State v. Swenson, 301 Minn. 199, 221 N.W.2d 706 (1974), the Court permitted a joint trial upon the prosecution's showing that the four victims of an aggravated robbery were all between the ages of 63 and 73; one victim was nearly blind; two of the victims had experienced coronary attacks; one victim suffered from an artery ailment; and one victim lived some distance away in the eastern part of Wisconsin.

The Minnesota prosecutor should also be aware of the recent United States Supreme Court decision in Parker v. Randolf, 99 S.Ct. 2132,

25 Cr.L. 3096 (May 29, 1979), which held that Bruton v. U.S., 391 U.S. 123 (1968), does not require reversal of a murder conviction of a defendant tried jointly with a co-defendant when the confessions of both defendants, admitted at trial, were "interlocking". See also State v. Robinson, 261 Minn. 477, 136 N.W.2d 401 (1965), which held that defendant, jointly tried with another for theft, was not denied due process where both defendants testified at trial and each exonerated the other, even though only Robinson's co-defendant had a prior felony record.

In the federal courts, joinder of co-defendants' cases for trial is virtually automatic. Conversely, motions to sever are seldom granted. See U.S. v. Sidman, 470 F.2d 1158 (9th Cir. 1972), cert. denied 409 U.S. 1127 (1973): Sidman was indicted on three separate counts of armed robbery; Counts II and III named two accomplices, Carroll and Clifford, respectively; the trial on Count II was a multiple jury joint trial in which two juries were impaneled to try Sidman and Clifford simultaneously; when evidence inadmissible against one defendant, but admissible against the other, was to be presented, the jury for the former defendant would retire from the courtroom and the remaining jury would listen to the evidence.

VIII. MOTION TO CONSOLIDATE TRIAL OF CHARGES IN TWO OR MORE INDICTMENTS, COMPLAINTS, OR TAB CHARGES.

Pursuant to Rule 17.03, Subd. 4, the prosecution may make a pre-trial motion for a single trial of charges in two or more indictments, complaints, or tab charges. Such a motion will be granted if the offenses and the

defendants, if there is more than one, could have been joined in a single indictment, complaint, or tab charge but for some reason were not. The trial Court may order such consolidation on its own motion also. Such consolidation of charges for trial may be granted on motion of the defendant, even if the offenses and the defendants, if there be more than one, could not have been joined in a single indictment, complaint, or tab charge.

IX. MOTION TO STRIKE SURPLUSAGE FROM INDICTMENT, COMPLAINT, OR TAB CHARGE.

Rule 17.04 permits a pretrial motion to strike surplus language from the indictment, complaint, or tab charge. The prosecutor may wish to make such a motion when the "description" of the criminal charge in the complaint contains such unnecessary language as "willfully, wrongfully, unlawfully, or feloniously...contrary to the peace and dignity of the State of Minnesota". While such words of art have a long history of usage in criminal indictments and complaints, they sometimes overburden the prosecutor at trial. A jury just might require the prosecutor to prove each and every one of these words of art beyond a reasonable doubt before returning a guilty verdict. Of course, only the essential elements of the charge itself need be proven beyond a reasonable doubt. Therefore, such surplus language should be stricken from the portion of the indictment, complaint, or tab charge which will be read by the Court to a jury at time of trial.

X. MOTIONS ATTACKING INDICTMENT, COMPLAINT, OR TAB CHARGE.

Under Rule 17.06, Subd. 2(1), motions to dismiss an indictment may be based on such grounds as: (1) the evidence admissible before the Grand Jury was not sufficient to establish the offense charged or any lesser or other included offense or any offense of a lesser degree; (2) the Grand Jury was illegally constituted; (3) the Grand Jury proceedings were conducted before fewer than sixteen Grand Jurors; (4) fewer than twelve Grand Jurors concurred in the finding of the indictment; (5) the indictment was not found or returned as required by law; or (6) an unauthorized person was in the Grand Jury room during the presentation of evidence upon the charge contained in the indictment or during the deliberations or voting of the Grand Jury upon the charge. See also Rule 18.02. These grounds are not exclusive.

A motion for dismissal of an indictment for lack of admissible evidence showing probable cause is available because of the requirement of Rule 18.05, Subd. 1, that a record be made of the evidence taken before the Grand Jury. See also the provisions of Rule 18.05, Subds. 1 and 2, for the conditions in which the record may be disclosed to the defendant.

Recently, a homicide prosecution in St. Louis County involved a pretrial defense motion for dismissal of a first degree murder indictment on the ground that an unauthorized person was in the Grand Jury room during the presentation of evidence upon the charge, pursuant to Rule 17.06, Subd. 2(1)(f). A co-defendant of the indicted defendant who had been already tried and acquitted of the murder charge (but convicted of a burglary charge) was subpoenaed to the Grand Jury room and questioned concerning an admission

to the murder made by the defendant. This co-defendant refused to enter the Grand Jury room without his Court appointed attorney present with him. The attorney was permitted to enter the Grand Jury room even though the witness did not first waive his immunity from self-incrimination as required by Rule 18.04. The motion for dismissal of the indictment was denied and this writer believes that on appeal of the subsequent first degree murder conviction that this issue will be resolved in favor of the trial Court ruling and the prosecution. State v. William Helenbolt.

Under Rule 17.06, Subd. 2(2), a motion to dismiss an indictment, complaint, or tab charge may be based on such grounds as: (1) the indictment, complaint, or tab charge does not substantially comply with the requirements prescribed by law to the prejudice of the substantial rights of the defendant; (2) the Court lacks jurisdiction of the offense charged; (3) the law defining the offense charged is unconstitutional or otherwise invalid; (4) the facts stated in the indictment or complaint do not constitute an offense; (5) the prosecution is barred by the statute of limitations (Minn. Stat. §628.26: three years for all crimes except bribery of public officers or employees which has a six year limitation and murder which has no limitation); (6) the defendant has been denied a speedy trial; (7) there exists some other jurisdictional or legal impediment to prosecution or conviction of the defendant for the offense charged; or (8) double jeopardy, collateral estoppel, or that the prosecution is barred by Minn. Stat. §609.035. These grounds also are not exclusive.

It should be noted that Rule 17.06, Subd. 3, provides that a motion to dismiss an indictment or complaint in felony and gross misdemeanor cases must be served upon the prosecution not later than three (3) days before the Omnibus Hearing unless the time is extended for good cause. See Rule 10.04, Subd. 1. In misdemeanor cases, such a motion to dismiss a complaint or tab charge must be served upon the prosecution at least three (3) days before the trial if no pretrial conference is held and no more than thirty (30) days after the arraignment unless this time is extended for good cause. See Rule 10.04, Subd. 1. The only exceptions to these time limits on motions attacking an indictment, complaint, or tab charge are that a motion to dismiss on the ground that the Court lacks jurisdiction of the offense or on the ground that the indictment, complaint, or tab charge fails to charge an offense may be made at any time during the pendency of the proceedings.

Rule 17.06, Subd. 4(1), provides that if a defendant's motion to dismiss is denied in a misdemeanor case he may continue to raise the issue involved in the motion on direct appeal if he is convicted following a trial. The denial of a motion to dismiss based upon a challenge to the personal jurisdiction of the Court could, therefore, be raised on direct appeal of a misdemeanor judgment of conviction. This reverses prior Minnesota case law, which permitted review in such cases only by writ of prohibition. See State v. Stark, 288 Minn. 286, 179 N.W.2d 597 (1970). Permitting the issue of personal jursidiction to be raised on direct appeal avoids the inconvenience

and delay which would often result from continuing the trial to allow the defendant to seek a writ of prohibition.

In order that the basis of a dismissal for a defect in the institution of the prosecution or in the indictment or complaint may be apparent, Rule 17.06, Subd. 4(2), requires the Court to specify the grounds for granting the motion.

Under Rule 17.06, Subd. 4(3), if the dismissal is for failure to file a timely complaint as required by 4.02, Subd. 5(3), for misdemeanor cases or for a defect which could be cured by a new complaint, the prosecutor may, within seven (7) days after notice of entry of the order dismissing the case, move to continue the case for the purpose of filing a new complaint. Upon such a motion, the Court shall continue the case for no more than seven (7) days pending the filing of a new complaint, or amending of the complaint or indictment or for sixty (60) days pending the filing of a new indictment. During the time for such a motion, and during any continuance, dismissal of the charge is stayed, but in a misdemeanor case, the defendant may not be kept in custody based on that charge. If the defendant cannot post bail in a misdemeanor case, he must be released subject to such non-monetary conditions as the Court deems appropriate under Rule 6.02, Subd. 1. If no motion is made or if no new or amended complaint or indictment is filed within the times allowed, the defendant must be discharged and any further prosecution is barred unless the prosecution has appealed or unless the defendant is charged with murder and the Court has

granted a motion to dismiss on the ground of the insufficiency of the evidence before the Grand Jury. In misdemeanor cases dismissed for failure to file a timely complaint under Rule 4.02, Subd. 5(3), further prosecution shall not be barred unless additionally a judge or judicial officer of the County Court has so ordered.

XI. MOTIONS RELATING TO COMPETENCY OF CRIMINAL DEFENDANTS AND DISCOVERY IN INSANITY CASES.

A detailed discussion of Rule 20 proceedings for mentally ill or mentally deficient defendants is beyond the intended scope of this article. However, I do hope to familiarize the Minnesota prosecutor with the general scope of relief and orders available through pretrial Rule 20 motions.

Pursuant to Rule 20.01, Subd. 2, either the prosecutor or defense attorney can make a motion to suspend criminal proceedings in order to determine whether a criminal defendant is capable of understanding the proceedings in Court and able to participate in his defense. The court may also seek to determine the defendant's competency to proceed on its own motion.

Once such a motion to determine the defendant's competency to proceed has been made, Rule 20.01, Subd. 2(2), provides that in felony and gross misdemeanor cases upon motion, before proceeding further, the District Court shall determine whether the complaint sufficiently states probable cause on its face. If the Court determines that probable cause is

not sufficiently stated, the case shall be dismissed. If it determines that probable cause is sufficiently stated, the criminal proceedings are suspended pending determination of the defendant's competency to proceed.

In general, if the defendant is found to be competent, the criminal proceedings are resumed; if the defendant is found to be incompetent, misdemeanor charges shall be dismissed and felony and gross misdemeanor proceedings shall be suspended. At any time, on motion of the interested parties or on the Court's own motion, a hearing shall be held to determine the defendant's competency, and if he is found to be competent, the criminal proceedings shall be resumed. There is no limitation on the time or number of these hearings. See Rule 20.01, Subd. 5.

During the period of the defendant's incompetency, Rule 20.01, Subd. 7, permits the defense attorney to make any legal objection or defense to the prosecution which can be determined without the presence of the defendant. This could include motions to dismiss the indictment or complaint under Rules 17.06 and 18.02, Subd. 2.

Assuming the defendant is ruled competent to proceed, if the defense notifies the prosecution under Rule 9.02, Subd. 1(3)(a), of its intention to rely on the defense of mental illness or mental deficiency, on motion of the prosecuting attorney and notice to defense counsel, the trial Court may order the defense to furnish to the Court or prosecution copies of all medical reports and hospital and medical records concerning the defendant's mental condition. See Rule 20.03, Subd. 1. In response to such

a discovery motion, the defense may turn over the copies of the reports and records to the Court instead of to the prosecuting attorney. If the defense does this, the trial Court must examine these reports and records to determine their relevancy to the defense of mental illness or mental deficiency. If the Court determines they are relevant, they must be given to the prosecuting attorney. Otherwise, these reports and records shall be returned to the defendant. If the defense is unable to comply with the order of the Court for such disclosure, either because it does not have access to the reports or records, or for any other reason, a subpoena duces tecum may be issued by the Court for their production as provided for in Rule 22.02. It is important to note that the granting of a Rule 20.03, Subd. 1 motion for disclosure entitles the prosecution to reports and records that were made both before and after the defense of mental illness or mental deficiency was asserted.

XII. MOTION FOR TAKING DEPOSITION OF TESTIMONY OF A PROSPECTIVE WITNESS.

Under Rule 21.01, either the prosecution or defense can make a pretrial motion for taking the oral deposition of a prospective hearing or trial witness of either party upon a showing of reasonable probability that the witness will be unavailable at the hearing or trial because of any of the following conditions specified in Rule 21.06, Subd. 1: death; physical or mental illness or infirmity; or inability of the moving party to procure the attendance of the witness by subpoena, order of the Court, or other reasonable

means. Prior to enactment of the Minnesota Rules of Criminal Procedure on July 1, 1975, Minnesota law contained no provision for depositions to be taken on behalf of the prosecution in criminal cases. Only the taking of depositions of witnesses on behalf of the defendant was permitted by Minn. Stat. §611.08.

The Court may order the taking of such a deposition at any time after the filing of a complaint or indictment, upon motion of the party seeking to take the deposition and notice to every other party of the time and place for taking the deposition. The deposition may be taken before any person authorized to administer oaths. The notice of the taking of the deposition must: (1) be served personally on all defendants involved in the criminal case; (2) inform all defendants that they are required by order of the Court to personally attend the taking of the deposition; and (3) state the name and address of each person to be examined. See Rule 21.02. If the Court grants the order for taking of the deposition, the order shall direct that all defendants to the action be present at the taking of the deposition.

Upon a showing of the "unavailability" of the witness to be deposed as defined in Rule 21.06, Subd. 1, and a granting of the motion for such a deposition, the deposition may be used as substantive evidence at the hearing or trial for which it was taken. See Rule 21.06, Subd. 1. The deposition may also be used as substantive evidence if the witness gives inconsistent testimony at the trial or hearing or if the witness persists at the trial or hearing in refusing to testify despite an order of the Court to do so. See Rule 21.06, Subd. 2.

Rule 21.04, Subd. 2, requires that the witness to be deposed be put under oath and that a verbatim record of his testimony be made. The testimony must be taken stenographically unless the Court directs otherwise.

During the Roger Caldwell prosecution, it was necessary for this prosecutor to make a Rule 21 motion for deposition of Thomas Congdon. Thomas Congdon was a very important State's witness who lives in Denver, Colorado but who had suffered a heart attack on March 31, 1978, just a week before the commencement of the Roger Caldwell trial in Brainerd, Minnesota. Because of this heart attack, physicians indicated that Mr. Congdon would not be able to travel from Denver, Colorado to Brainerd, Minnesota to testify at the trial. Upon a showing of this "unavailability" of Thomas Congdon, the trial Court granted the prosecution motion for the taking of the deposition of Thomas Congdon in Denver, Colorado. (A copy of this motion, notice of taking deposition, and order can be found in the Appendix.)

During the Memorial Day Holiday recess in the middle of the Roger Caldwell trial, counsel and defendant, Roger Caldwell (with a deputy sheriff), flew to Denver, Colorado to take Tom Congdon's deposition. This deposition was not only stenographically transcribed, but was also video taped in color. The video taped deposition of Thomas Congdon's testimony was later played to the jury in Brainerd (minus objections of counsel and testimony to which objections had been sustained by the Court, which had been electronically deleted after a review of the video tape by the trial judge) at the close of the State's case. I believe that this was a very important piece

of evidence contributing to the conviction of Roger Caldwell.

When the prosecutor finds it necessary to request a deposition of a witness who will be unavailable at trial, I suggest that he should usually attempt to have the deposition video taped. If the testimony in question is important enough to need a deposition, it is in your best interest to have the testimony presented as favorably as possible. The stale and boring reading of questions and answers in a written deposition can only diminish the receptiveness of the jury to this testimony. If the jury is able to see and hear the witness just as if he were present in the courtroom, this can only enhance their receptivness to this testimony. Conversely, if the person to be deposed is a defense witness or a necessary but potentially harmful State's witness, a video taped deposition should not be encouraged by the prosecutor.

XIII. MOTIONS FOR A CHANGE OF VENUE AND RELATED MOTIONS.

Rules 24.03 and 25.02 of the Minnesota Rules of Criminal Procedure permit a pretrial motion for a change of venue by either prosecutor or the defense in criminal cases based on any of the following grounds: (1) that a fair and impartial trial cannot be had in the county in which the case is pending; (2) for the convenience of the parties and witnesses; (3) in the interests of justice; or (4) that the dissemination of potentially prejudicial pretrial publicity has created a reasonable likelihood that a fair trial cannot be had in the county where the case is pending. Rule 24.03, Subd. 3 provides that in felony and gross misdemeanor cases, motions for change of

venue based on any of the first three grounds listed above must be made and served upon opposing counsel not later than three (3) days before the Omnibus Hearing unless the time is extended for good cause. See Rule 10.04, Subd. 1. In misdemeanor cases, such motions must be made and served upon opposing counsel at least three (3) days before trial if no pretrial conference is held and no more than thirty (30) days after the arraignment unless this time is extended for good cause. See Rule 10.04, Subd. 1. Motions for change of venue based on prejudicial pretrial publicity must be made before the jury is sworn unless such a motion is made after voir dire has been completed or the motion is being made to reconsider a prior denial of change of venue. See Rule 25.02, Subd. 4.

With the continuous expansion of First Amendment rights by the appellate courts, the prosecutor can expect to see more and more change of venue motions by criminal defendants based on prejudicial pretrial publicity. As cameras and media become more and more prevalent in the courtroom, perhaps the prosecutor, himself, is more likely to seek a change of venue on the ground that prejudicial pretrial publicity has created a reasonable likelihood that the State cannot obtain a fair trial in the county where the case is pending! Whoever the moving party is, it must be emphasized that the burden in change of venue motions is on that moving party to show that there is a reasonable likelihood that the moving party cannot obtain a fair and impartial trial without a change of venue. See Rule 25.02, Subd. 3.

As the recent Minnesota prosecutions of Roger and Marjorie Caldwell and Bruce Webber and Donald Howard have indicated, there is definitely a trend in highly publicized criminal cases for defendants to assert their right to specify the county of transfer in their change of venue motions. Defense attorneys rationalize this right to specify the county of transfer on the so-called constitutional doctrines of "unconstitutional conditions" and "waiver". Under the "doctrine of unconstitutional conditions", it is argued that if the defendant must seek a change of venue without the right to specify the transferee county, he runs the risk of being sent to a less favorable county, thus chilling the exercise of his right to seek a change of venue. Under the "doctrine of waiver", it is argued that the motion for change of venue is the defendant's waiver of his constitutional right to have his trial in the county where the crime was committed; for this to be a knowing and intelligent waiver of this constitutional right, the defendant cannot be uncertain of the place to which the trial will be transferred if his change of venue motion is granted. See 26 Stanford Law Review 131 (1973).

This so-called right of the defendant to specify the county of transfer is purely theoretical. Defense motions asserting this right in terms like "the defendant stands the best chance of securing a fair trial in a large metropolitan area" are really statements that the defendant stands the best chance of acquittal in such areas. Clearly, there is no Minnesota case law

providing a precedent for such a right to specify the county of transfer; the Minnesota prosecutor should resist the assertion of this right. See the recent Minnesota Supreme Court decision in State v. Webber, _____ Minn. _____, _____ N.W.2d _____ (April 11, 1980), which upheld the trial Court's moving of Bruce Webber's trial to Mower County rather than to Hennepin County as requested by the defendant in his change of venue motion. See also State v. Thompson, 266 Minn. 385, 123 N.W.2d 378 (1963); State v. Hogan, 297 Minn. 430, 212 N.W.2d 664 (1973); State v. Beier, _____ Minn. _____, 263 N.W.2d 622 (1978); State v. Swain, _____ Minn. _____, 269 N.W.2d 707 (1978); State v. Gilbert, _____ Minn. _____, 268 N.W.2d 576 (1978); and State v. Hull, _____ Minn. _____, 269 N.W.2d 905 (1978).

Rule 25.02 also provides for a pretrial motion for a continuance of the trial by either the prosecutor or defense adversely affected by prejudicial pretrial publicity. This alternative to a change of venue motion is less likely to be granted. Generally, a motion for a continuance should be resisted by the prosecutor, anyway, since delay of the trial usually inures to the benefit of the defendant. Besides, a continuance of the trial in a highly publicized criminal case is not likely to alleviate the problem of the dissemination of potentially prejudicial material creating a reasonable likelihood that a fair trial cannot be had. Once the period of continuance is over and the trial is about to begin again, the potentially prejudicial publicity will be present again.

Pursuant to Rule 25.01, the defense in a criminal case may make a pretrial motion to have all or part of any pretrial hearing closed to the public. This pretrial motion to exclude the public is not available to the prosecution. However, with the consent of the defendant, the Court may make such an exclusion order on its own motion or at the suggestion of the prosecution. The motion to exclude the public from pretrial hearings under this rule may not be granted unless the Court determines that there is a substantial likelihood of interference with the defendant's right to a fair trial by an impartial jury by reason of the dissemination of evidence or argument adduced at the hearing. With the continuous expansion of the "public right to know" under the First Amendment by the appellate courts, it is becoming less and less likely that such motions to exclude the public from pretrial hearings under this rule will be granted. Moreover, an agreement by the news media not to publicize these matters until after completion of the trial will likely preclude granting of such a motion. However, as the comments to this rule state, "this rule does not interfere with the power of the Court in any pretrial hearing to caution those present that dissemination of certain information by means of public communication may jeopardize the right to a fair trial by an impartial jury". The prosecutor should emphasize that the State has the same right to a fair trial by an impartial jury as the defendant in criminal cases. See also Rule 26.03, Subd. 6 which provides for an identical exclusion motion during trial.

As a result of the Roger Caldwell and Donald Howard prosecutions, Rule 25.03 was added by the Minnesota Supreme Court to the Minnesota Rules of Criminal Procedure on November 13, 1978, and became effective on January 1, 1979. See Northwest Publications, Inc. v. Anderson, _____ Minn. _____, 259 N.W.2d 254 (1977). Rule 25.03 provides for pretrial motions by either the prosecution or the defense to restrict public access to public records relating to criminal proceedings. Such motions restricting the news media from viewing and publicizing such things as criminal complaints or search warrants are now very unlikely to be granted.

Rule 25.03, Subd. 3, provides that such a pretrial motion for restrictive orders will not be granted un ess there is a "clear and present danger of substantially interfering with the fair and impartial administration of justice" and "all alternatives to the restrictive order are inadequate". The burden is upon the moving party to establish these two grounds at a hearing at which the public and news media have a right to be represented by counsel. Such a Rule 25.03 motion was unsuccessfully made by Marjorie Caldwell at the beginning of the criminal proceedings against her. This motion was denied by the trial Court and the Minnesota Supreme Court. See also the related new Rule 33.04 which was likewise added to the Minnesota Rules of Criminal Procedure on November 13, 1978 and became effective on January 1, 1979. This rule requires public filing of search warrant applications, affidavits, and inventories and criminal complaints with probable cause statements except in very limited cases.

Finally, where the prosecutor is faced with the inevitable granting of a change of venue motion because of prejudicial pretrial publicity in his county, he might make a pretrial motion for obtaining a jury from another county not subjected to the publicity in question. Such motions are rare and have no precedent in the State of Minnesota. However, it has been held that the fact that a non-resident of the county sits on a jury violates no constitutional rights. Baxter v. Commonwealth, 292 Ky. 204, 166 S.W.2d 24 (1942). Furthermore, some state statutes authorize the summoning of jurors from a county other than that in which the offense was committed where a jury free of bias cannot be obtained in the latter county. The motion for a jury from another county should precede a motion for a change of venue. Looney v. Commonwealth, 115 Va. 921, 78 S.E. 625 (1913). This motion generally is addressed to the discretion of the trial Court. Before such a motion is likely to be granted, the trial judge may be required to make a fair effort in good faith to secure a jury free of bias in the county wherein the prosecution is pending. Bennett v. Commonwealth, 309 S.W.2d 183 (Ky. 1958).

XIV. RULE 26 PRETRIAL MOTIONS.

Rule 26 of the Minnesota Rules of Criminal Procedure prescribes the procedure to be followed at trial of criminal cases in Minnesota. Many of the rules in Rule 26 provide a basis for pretrial motions by the prosecutor and the defense. Some of these "Rule 26 pretrial motions" will be alluded to in the following paragraphs. As you will see, some of these motions may

actually be made during trial instead of before trial.

Rule 26.02, Subd. 3, provides that either the prosecution or defense may make a pretrial motion challenging the jury panel "on the ground that there has been a material departure from the requirements of law governing the selection, drawing, or summoning of the jurors". This pretrial motion or challenge must: (1) be made in writing; (2) specify the facts constituting the grounds of the challenge; and (3) be made before the jury is sworn. Such a motion was unsuccessfully made by the defense in both the Roger and Marjorie Caldwell prosecutions. (See Appendix for copies of two Rule 26.02, Subd. 3, challenges to the jury panel made by defense attorney Douglas Thomson in behalf of Roger Caldwell; two accompanying defense motions to stay the proceedings and quash the indictment on the ground of "substantial failure to comply with Minn. Stat. §593.31-§593.50 in selecting the trial jury"; and this prosecutor's memorandum in opposition to one of the Rule 26.02, Subd. 3, challenges.)

Pursuant to Rule 26.02, Subd. 4, either the prosecutor or defense attorney may make a pretrial motion to conduct the voir dire examination of jurors in accordance with any one of three methods. It should be noted that effective January 1, 1979, Rule 26.02, Subd. 4(1), was amended by the Minnesota Supreme Court making it mandatory for voir dire examination of jurors to be open to the public. This rule change was also a result of the Roger Caldwell prosecution. In Brainerd, the trial Court granted defendant's

pretrial motion to exclude the public from voir dire examination of prospective jurors. This order was immediately appealed to the Minnesota Supreme Court which reversed it, consistent with the principles set forth in Northwest Publications, Inc. v. Anderson, supra.

Rule 26.02, Subd. 6, provides that the prosecution and defense in criminal cases are entitled to a certain number of peremptory challenges of prospective jurors. In the unusual case where a joint trial of two co-defendants is granted, the prosecutor may wish to make a pretrial motion under this rule for additional peremptory challenges on the ground that the defense "team" has doubled its number of peremptory challenges by virtue of the joint trial.

Under Rule 26.03, Subd. 2(c), in the unusual case, the prosecutor may find it necessary to make a motion to the trial Court to have the defendant restrained (i.e. shackled or handcuffed) as he sits in Court during his trial. Such a motion should be considered only as a last resort and under extreme conditions if reversible error is to be avoided. In most cases, it is unlikely that such a motion will be granted. However, see State v. Stewart, _____ Minn. _____, 276 N.W.2d 51 (1979), where the Minnesota Supreme Court held that the shackling of the defendant during his first degree murder trial did not violate the defendant's constitutional right to a fair trial because such restraint was "eminently necessary and reasonable under the circumstances" which included the fact that the defendant had threatened to kill the prosecutor.

Under Rule 26.03, Subd. 3, the prosecutor or defense attorney may wish to make a pretrial motion to have the Court restrict or prohibit photography, sketching or news broadcasts (i.e. general media access) in the area of the courtroom during trial. This prosecutor found such relief necessary during both Caldwell trials. Such restrictions on the media were actually made by the trial Court on its own motion in Brainerd and Hastings.

Motions to restrict media coverage must be reasonably related to preserving the Court's dignity, the orderly administration of justice, and the defendant's right to privacy. Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965). The Court in In Re Mack, 386 Pa. 251, 126 A.2d 679 (1956), held that restrictions on the news media may extend to corridors of the court house, to a specified distance beyond the court house, to the jail, and to the process of transporting the defendant from jail to the courtroom. The Court in U.S. v. CBS, 497 F.2d 102 (5th Cir. 1974), denied a trial Court order prohibiting courtroom sketches by media personnel absent a showing that such sketching was obtrusive.

Either the prosecution or defense may make a motion for sequestration of the jury at the beginning of trial or at any time during the course of the trial pursuant to Rule 26.03, Subd. 5(2). Such a motion must be granted if the trial Court determines "that the case is of such notoriety or the issues are of such a nature that, in the absence of sequestration, highly prejudicial matters are likely to come to the attention of the jurors". This

rule provides that "whenever sequestration is ordered, the Court in advising the jury of the decision shall not disclose which party requested sequestration". During the Roger Caldwell prosecution, defense attorney, Douglas Thomson, made this motion before the trial and at the beginning of every day of the trial in Brainerd. Each day's motion to sequester was accompanied by reams of newspaper articles from the daily Twin Cities, Brainerd, and Duluth newspapers.

Pursuant to Rule 26.03, Subd. 7, the prosecutor or defense attorney may wish to make a pretrial motion for a Court order precluding attorneys, parties, witnesses, jurors, and employees and officers of the Court from making any extra judicial statements relating to the case or the issues in the case for dissemination by any means of public communication during the course of a trial. Such a "gag order" was made by the trial Court during both Caldwell prosecutions.

Rule 26.03, Subd. 7, also provides for a motion to sequester or exclude witnesses from the courtroom prior to their testimony at trial. The granting of such a motion is discretionary with the trial Court. It depends on the nature of the case whether such an order is advantageous or disadvantageous to the prosecution. Certainly, if the prosecutor would not like State's witnesses sequestered during the trial, he should not make such a motion for sequestration of defense witnesses. A related defense motion often confronted by the prosecutor prior to trial is the motion to exclude the prosecution's chief investigating officer from the courtroom and/or the counsel

table during an entire trial. Perhaps, such a defense motion is more common in federal practice since federal prosecutors often make greater use of such chief investigating officers during trial. A motion of this nature is an attempt by the defense attorney to prevent non-testimonial conduct which may enhance the chief investigating officer's credibility when he testifies before the jury. Sequestration has been denied where there were no convenient quarters for the witnesses, where any inconsistencies in testimony would be otherwise apparent, where the witnesses could use an available preliminary hearing transcript to harmonize their testimony, and where a witness' presence is necessary to enable identification. State v. Jordan, 272 Minn. 84, 136 N.W.2d 601 (1965).

Pursuant to Rule 26.03, Subd. 8, the prosecutor or defense attorney may wish to make a motion to have the trial Court admonish jurors not to read, listen to, or watch reports about a case appearing in the news media during a trial. Such a pretrial motion was granted by the trial Court in both Caldwell prosecutions. An admonition was given almost daily by both trial judges.

Finally, Rule 26.03, Subd. 10, permits a motion for a view of the crime scene by the jury on the ground that such a viewing will be helpful to the jury in determining any material factual issue. The granting of such a motion is discretionary with the trial Court. State v. Ewing, 250 Minn. 436, 94 N.W.2d 904 (1957); Chute v. State, 19 Minn. 291 (1872). If the motion for

a view is granted, the jury is taken together to the place to be viewed under the supervision of a Court officer sometime before closing arguments by counsel. Whether or not a view is beneficial or disadvantageous to the prosecution depends on the case. Such a motion for a view should be resisted where it would serve no useful purpose to the prosecution. During the trial in State v. Malzac, _____ Minn. _____, 244 N.W.2d 258 (1976), the prosecution requested such a view by the jury and it was granted. In Malzac, the jury viewed the automobile in which the defendant had murdered his girlfriend. It was important for the prosecutor to have the jury view the automobile so that they could see that the defendant's claim of an accidental shooting was impossible within the limited confines of the car, given the expert testimony that the muzzle of the gun was three to four feet away from the victim when she was hit and the locations of blood in the car.

XV. STANDAND DEFENSE MOTIONS FOR SUPPRESSION OF EVIDENCE.

At the defendant's initial appearance in District Court on felonies and gross misdemeanors, in most cases the prosecutor routinely notifies the defendant of any evidence against the defendant obtained as a result of search and seizure; any confessions, admissions, or statements in the nature of confessions made by the defendant; any evidence against the defendant discovered as a result of confessions, admissions, or statements in the nature of confessions made by the defendant; and/or any identification procedures, including lineups, other observations of the defendant, and the exhibition of photographs of the defendant or any other person which the prosecution

intends to use at trial. In misdemeanor cases, this notice of such evidence is routinely given by the prosecutor either in writing or orally on the record in Court on or before the date set for the defendant's pretrial conference or seven (7) days before trial if no pretrial conference is to be held. See Rule 7.01. Such Rule 7 notices are routinely followed by standard defense motions for suppression of such evidence.

The litigation of search and seizure issues, Miranda issues, and identification procedure issues are then held at the Omnibus Hearing in felony and gross misdemeanor cases and at a pretrial Rasmussen hearing in misdemeanor cases. It is not within the intended scope of this article to discuss in any detail these suppression motions and the issues they raise. Of course, the prosecutor's response to such suppression motions will vary depending on the particular facts of each case. Certainly, however, response to these pretrial motions will generally necessitate considerable preparation, research, and a memorandum of law in support of the prosecutor's position.

Rule 7.02 also provides for pretrial notice by the prosecuting attorney to the defendant of any additional offenses committed by the defendant, the evidence of which the prosecution may wish to offer at trial, in a "Spreigl notice". In cases of felonies and gross misdemeanors, this notice must be given at the Omnibus Hearing or as soon thereafter as the offenses become known to the prosecuting attorney. In misdemeanor cases,

the notice shall be given at or before the pretrial conference if held or as soon thereafter as the offense becomes known to the prosecuting attorney. If no pretrial conference is held, then the Spreigl notice must be given at least seven (7) days before trial of the misdemeanor charge or as soon thereafter as known to the prosecuting attorney. Defense counsel will routinely make pretrial motions for suppression of Spreigl evidence also. Again, the prosecutor's response to these suppression motions will necessitate preparation, research, and often a memorandum of law in support of the prosecution position.

XVI. MOTIONS IN LIMINE.

There are no procedural rules governing motions in limine. Such motions refer to pretrial requests of both prosecutors and defense attorneys to limit the introduction of certain evidence, anticipated questioning by opposing counsel at trial, and/or anticipated argument of opposing counsel at trial. Such motions may often be based on Rule 403 of the Minnesota Rules of Evidence which provides that:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Examples of motions in limine include a pretrial motion to preclude defense counsel from engaging in improper questioning of a rape victim about prior sexual activity pursuant to Minn. Stat. §609.347; a pretrial

motion to preclude defense counsel from asking cross-examination questions asking for hearsay only to get an objection from the prosecutor in order to make it look like the prosecutor is hiding something; and a pretrial motion to preclude defense counsel from commenting on the failure of the prosecution to call certain witnesses during opening statement or final argument. See State v. Thomas, _____ Minn. _____, 232 N.W.2d 766 (1975). A related pretrial motion may include a prosecutor's request to ask leading questions of (cross-examine) adverse prosecution witnesses per Rule 611(c) of the Minnesota Rules of Evidence.

A common defense motion in limine which the prosecutor of a homicide case may confront is a motion to preclude the prosecution from introducing photographic evidence of the homicide victim or scene on the ground that the defense is stipulating to the fact that the victim was intentionally murdered with premeditation. Such a motion and stipulation can and should be successfully resisted by the prosecutor. The prosecutor should point out that the defendant's "not guilty" plea to the murder puts in issue each and every essential element of the crime charged, so that it is incumbent on the State to introduce the best evidence within its power to controvert the not guilty plea and prove the defendant's guilt. See King v. State, 108 Neb. 428, 187 N.W.2d 934, 938 (1922); Leland v. Oregon, 343 U.S. 790 (1952); State v. DeZeler, 230 Minn. 39, 41 N.W.2d 313 (1950); State v. Steeves, 279 Minn. 298, 157 N.W.2d 67 (1968); State v. Tinklenberg, 292 Minn. 271, 194 N.W.2d 590 (1972);

State v. Martin, 261 N.W.2d 341 (1977). The prosecutor should also remind the Court that Minn. Stat. §634.051 provides:

> "No person shall be convicted of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of killing by the defendant, as alleged, are established as independent facts, the former by direct proof, and the latter beyond a reasonable doubt."

The motion in limine procedure easily lends itself to advance submission of questionable evidence for approval by the trial Court in order that the moving party may avoid commission of reversible error. This procedure may help the prosecutor prepare a judge to rule in his favor in the courtroom or discourage a pro se defendant or defense counsel from offering evidence to which the prosecutor does not want to object in front of the jury. The prosecutor should keep in mind that motions in limine are often made by defense attorneys with the same intentions in mind. Defense attorneys often make groundless pretrial motions in limine simply to frighten timid prosecutors, prevent prejudicial evidence from being heard by the jury, and/or buttress arguments on appeal regarding prejudice.

XVII. UNCONVENTIONAL DEFENSE MOTIONS WHICH GENERALLY SHOULD AND CAN BE SUCCESSFULLY RESISTED.

Finally, the Minnesota prosecutor should be aware of and constantly vigilant for pretrial defense motions which, plainly and simply, should not be granted. Many pretrial motions are made by the defense attorney knowing that there is no basis for the granting of the relief or order

requested. Defense attorneys continue to make such unconventional motions for the sole purpose of establishing precedent which can be cited when the timid prosecutor does not oppose them or the timid judge decides to grant them.

For example, a pretrial defense motion for a bill of particulars is completely out of order. Rule 17.02, Subd. 4, abolishes the bill of particulars. A pretrial defense motion for a psychiatric examination of State's witnesses is often confronted by the prosecutor, especially in criminal sexual conduct prosecutions. The granting of such motions are completely within the discretion of the trial Court. State v. Whelan, 291 Minn. 83, 189 N.W.2d 170 (1971); State v. Shotley, 305 Minn. 384, 233 N.W.2d 755 (1975); State v. Lasley, 306 Minn. 224, 236 N.W.2d 604 (1975); State v. Bird, _____ Minn. _____, _____ N.W.2d _____ (April 11, 1980). Such motions for psychiatric examinations should and can generally be successfully resisted.

A pretrial motion for a Court order permitting defense counsel to direct lineup procedures involving a criminal defendant or for a Court order directing a "blank" lineup may be confronted by the prosecutor. A "blank" lineup is one in which the defendant/suspect does not appear. Such unconventional pretrial defense motions generally should and can be successfully opposed. Although there is no statutory or case law in Minnesota addressing this issue, the general rule is that lineup procedures are recognized as a matter of internal law enforcement agency policy not to be

governed by the Courts. In addition, it is well recognized that a suspect or criminal defendant can be compelled to take part in a lineup without violation of any constitutional rights and the Sixth Amendment right to counsel applies only to lineups conducted after a suspect has been charged with a crime. Furthermore, the prosecution is under no constitutional duty to furnish to the defense the names and addresses of lineup witnesses.

Nevertheless, it perhaps is advisable for the prosecutor to encourage departmental lineup policies which themselves encourage at least the presence of a defense attorney at all lineups. The purposes of having defense counsel at lineups are to minimize the likelihood of misidentifications by eliminating or reducing suggestiveness and to enable counsel to make informed challenges to subsequent identification testimony through motions to suppress and cross-examination of lineup witnesses. It is likely that the prosecution will be required to respond to fewer motions to suppress identification testimony if the defendant's attorney has been allowed a role in staging the lineup. As stated in U.S. v. Eley, 286 A.2d 239, 240 (D.C. Ct. App. 1972), "...suggestions of defense counsel may be followed and lineup contests averted". Also, even if a motion to suppress is made, judges may be reluctant to suppress eye witness identification testimony because of an allegedly suggestive lineup, if the defense attorney had been given the opportunity to take part in the actual preparation of the lineup.

On the other hand, pretrial defense motions to permit defense

attorneys to direct lineup procedures are clearly out of order. Moreover, once the lineup actually begins, the defense attorney should be restricted to functioning merely as an observer and should not be permitted to converse with any of the lineup participants or witnesses.

Defense attorneys sometimes like to make pretrial motions for Court orders requiring State's witnesses to make themselves available for interviews by the defense. See 90 ALR3d 652. Such motions also generally should and can be successfully resisted. Plainly and simply, a prospective witness need not make himself available to either the prosecution or the defense in the absence of a subpoena or Court order. Nevertheless, it is sometimes advisable for the prosecutor not to resist such a motion. Encouraging State's witnesses to make themselves available for interview by the defense prior to trial prevents the defense attorney from establishing bias of the witnesses at trial with a favorite cross-examination question: "You refused to talk with the defense prior to taking the witness stand, didn't you Mr. Jones?"

Finally, the innovative defense attorney may someday come up with a pretrial motion for a Court order directing that a "defense bailiff" be appointed and deputized to help the government bailiff watch and take care of the jury during a trial. A "defense bailiff" would be a friend of defense counsel, perhaps a clerk working in defense counsel's office or an investigator hired by defense counsel. Again, there is no basis for the

granting of such a motion whatsoever. It should and can be successfully resisted by the prosecutor. Once such a motion is granted by a trial Court, it serves as precedent and will open the door for many more like motions by defense attorneys in the future. Such a motion was unsuccessfully made by Ron Meshbesher prior to the second Piper kidnapping trial.

CONCLUSION

Making and responding to pretrial motions in criminal cases can be fun for the prosecutor. Perhaps, pretrial motion work rewards the virtues of imaginativeness and innovativeness more than any other area of criminal trial practice. However, as with everything involved in the practice of law, no rewards are reaped without hard work and preparation. Pretrial motion practice is, itself, a big part of the necessary preparation for successful trial practice. Unless the prosecutor vigorously seeks the granting of his pretrial motions and the denial of unwarranted pretrial defense motions, the outcome of the trial which follows may not serve the interests of justice.

STATE OF MINNESOTA

COUNTY OF ST. LOUIS

COUNTY COURT
SOUTHERN DISTRICT, DULUTH
CIVIL-CRIMINAL DIVISION

State of Minnesota,

Plaintiff,

vs.

Roger Sipe Caldwell,

Defendant.

PROSECUTION PETITION
FOR TIME EXTENSION
PURSUANT TO RULE 34.02

On June 27, 1977, the dead bodies of Miss Elisabeth Congdon and her nurse, Velma Pietila, were found inside the Congdon mansion located at 3300 London Road in Duluth, Minnesota. The finding of these bodies initiated an intensive, multi-state, multi-law enforcement agency search for the person or persons responsible for the two homicides. The Duluth Police Department, with the cooperation of other law enforcement agencies in the State of Minnesota and throughout the country, has accumulated substantial evidence indicating that defendant, Roger Sipe Caldwell, is responsible for the deaths of Miss Elisabeth Congdon and Mrs. Velma Pietila. However, the necessity of dispatching chief investigating officers to Minneapolis and Golden, Colorado has made the preparation of reports indicating the evidence accumulated against the defendant impossible. These reports are necessary to the prosecution in the preparation of an accurate probable

cause statement in a complaint charging the defendant with these homicides.

Based on the evidence thus far accumulated, the above-named defendant was placed under arrest by police officers for the homicides of Miss Congdon and Mrs. Pietila at a hospital in St. Louis Park, Minnesota shortly after midnight during the early morning hours of Wednesday, July 6, 1977. The defendant was hospitalized at the Methodist Hospital in St. Louis Park, Minnesota, on the morning of Tuesday, July 5, 1977, and was discharged from said hospital on the morning of Thursday, July 7, 1977. The defendant is now in the custody of the Hennepin County Sheriff at the Hennepin County Jail at Minneapolis, Minnesota.

Duluth Police Officers intend to transport the defendant from the Hennepin County Jail to the St. Louis County Jail in Duluth, Minnesota, on Friday, July 8, 1977. Because of the absence of police reports, defendant's hospitalization, and the distance between Minneapolis and Duluth, it is virtually impossible to have the defendant arraigned on a complaint before a Judge or Judicial Officer of the St. Louis County Court by noon on Friday, July 8, 1977, as dictated by the Minnesota Rules of Criminal Procedure.

Defendant is not a resident of Minnesota, but a resident of Golden, Colorado.

WHEREFORE, the undersigned Assistant St. Louis County Attorney petitions this Court for a 48-hour extension of time to prepare appropriate formal complaints against the above-named defendant pursuant to Rule 34.02

of the Minnesota Rules of Criminal Procedure for the following reasons:

1. To permit the St. Louis County Attorney's Office to obtain a complete and accurate statement of facts regarding evidence presently accumulated against defendant, said facts being necessary in the preparation of a formal complaint against the defendant, charging him with the homicides of Miss Elisabeth Congdon and Mrs. Velma Pietila.

2. To assure defendant's continued custody and presence in the State of Minnesota, prior to the filing of formal charges against him in a complaint.

3. The protection and safety of the community.

4. The defendant is not unduly prejudiced by the extension of time to prepare formal written complaints against him.

Dated this 7th day of July, 1977.

KEITH M. BROWNELL
St. Louis County Attorney

By: /s/ John E. DeSanto
JOHN E. DeSANTO
Assistant County Attorney

STATE OF MINNESOTA

COUNTY OF ST. LOUIS

COUNTY COURT
SOUTHERN DISTRICT, DULUTH
CIVIL-CRIMINAL DIVISION

State of Minnesota,

Plaintiff,

vs.

ORDER

Roger Sipe Caldwell,

Defendant.

On Petition of the Plaintiff, by its attorneys:

IT IS HEREBY ORDERED, the prosecution be granted an additional 48 hours to prepare a formal complaint against defendant, Roger Sipe Caldwell, in connection with the homicides of Mrs. Velma Pietila and Miss Elisabeth Congdon and that pursuant to Rule 34.02 and Rule 4.02, Subdivision 5, the aforementioned defendant must appear before a Judge of this Court before noon on Sunday, July 10, 1977.

Dated this 7th day of July, 1977.

BY THE COURT

/s/ David S. Bouschor
JUDGE OF COUNTY COURT

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF ST. LOUIS | SIXTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Roger Sipe Caldwell,

Defendant.

MOTION AND NOTICE BY PROSECUTING ATTORNEY FOR DISCOVERY BY ORDER OF THE COURT PURSUANT TO RULE 9.02, Subd. 2(1)

Pursuant to Rule 9.02, Subd. 2(1), Minnesota Rules of Criminal Procedure, the State informs the Court that the following discovery procedures will be of material aid in determining whether the Defendant in the above-entitled matter committed the offenses charged, and moves this Court to order the Defendant to:

(1) Shave any mustache, beard and other facial hair, except sideburns, grown by Defendant since his incarceration at the St. Louis County Jail on July 3, 1977;

(2) Appear in a line-up clean shaven, except for sideburns;

(3) Permit measurements of his arms and biceps;

(4) Provide specimens of his handwriting.

The discovery procedures above will be of material aid in determining whether the Defendant committed the offenses charged in this case for the following reasons:

On June 27, 1977, the bodies of Miss Elisabeth Congdon and her nurse, Mrs. Velma Pietila, were found at approximately 7:00 a.m. at the Congdon home located at 3300 London Road in Duluth, Minnesota. On August 5, 1977, the Defendant was charged by a St. Louis County Grand Jury with two counts of Murder in the First Degree in connection with this double homicide.

The Ford automobile which Mrs. Pietila had driven to the Congdon home on the evening of Sunday, June 26, 1977, was found missing from the Congdon home after the bodies of Miss Congdon and Mrs. Pietila were found. At approximately 11:30 a.m. on June 27, 1977, the missing Pietila vehicle was found at the Minneapolis - St. Paul International Air Port in Minneapolis, Minnesota. The Duluth Police investigation of the Congdon and

Pietila homicides has also linked the Defendant to a purchase of a suede "carry-all" bag at the Minneapolis - St. Paul International Air Port at approximately 6:40 a.m. on June 27, 1977.

Due to the above-stated facts it is presently believed that the killer of Mrs. Pietila and Miss Congdon did not arrive at the Congdon home by a privately owned or rented motor vehicle. A part-time Duluth cab driver has told Duluth Police that he picked up a male individual in the vicinity of 4th Avenue West and 1st Street between 11:30 p.m. and 12:00 midnight on June 26, 1977. This male passenger, whose general description corresponds to the Defendant, was taken by the cab driver to the vicinity of 38th Avenue East and London Road, approximately five blocks from the Congdon home. In conversation during the cab ride to his destination, this male passenger asked the cab driver why the cabs aren't behind the Greyhound Bus Depot anymore. From this statement the cab driver assumed that this passenger had come into Duluth by bus.

Duluth Police investigation reveals that the Greyhound bus originating in Chicago, Illinois, arrived in Duluth at approximately 11:05 p.m. on June 26, 1977. The driver of this Greyhound bus who drove the bus from Stevens Point, Wisconsin, to Duluth, Minnesota, and the aforementioned cab driver will be available at 2:00 p.m. on Wednesday, August 17, 1977, at the St. Louis County Jail to view a line-up including the Defendant.

At the time of the Defendant's arrest and incarceration on July 8, 1977, he did not have a beard or mustache or other facial hair, except sideburns. The description of the male individual purchasing the "carry-all" bag at the Minneapolis - St. Paul International Air Port on the morning of June 27, 1977, by Host Shop personnel did not include facial hair such as a mustache or beard. All indications from police investigation are that the Defendant did not have a beard, mustache or other facial hair other than sideburns. However, on August 9, 1977, at the time of the Defendant's initial appearance on the indictment in District Court it was obvious from observing the Defendant that he is starting to grow a mustache and beard. To permit the Defendant to appear in the August 17, 1977, line-up with this newly grown

beard and or mustache would substantially and unduly impair the validity of this discovery procedure.

Sixteen-year-old Richard LeRoy, son of Marjorie Caldwell, who is the wife of the Defendant, has given Duluth Police officers a written statement that he found a note on his bed in his room in Golden, Colorado, when he returned home on the evening of Friday, June 24, 1977. This note was signed, "Love Mom and Dad" and stated that Marjorie and the Defendant were going to be gone looking at real estate on Saturday, June 25, and Sunday, June 26, 1977. This note has been turned over to Ms. Pat Rutz, a handwriting expert for the District Attorney's Office in Golden, Colorado. Handwriting specimens from the Defendant are sought in this motion for the purpose of submitting them to Ms. Rutz for comparison with the handwritten note left for 16-year-old Richard LeRoy and comparison with any other writings which have been or may subsequently be secured in this investigation.

Duluth Police officers believe the entry point to the Congdon home used by the killer of Mrs. Pietila and Miss Congdon was a broken basement window on the south side of the Congdon home. This window had a pane of glass with a hole broken in it, giving access to the two types of locks securing the window. One of the locks in the middle of the window between the lower and upper sash is immediately accessible from the broken hole. The second "lock" on the northwest side of this window frame is approximately nineteen inches from the broken hole. Measurements of the Defendant's arms and biceps are sought in this motion for the purpose of seeing whether they could fit into the broken hole in the suspected entry window for purposes of reaching the locking mechanism on the northwest side of the window frame.

The above facts constitute the basis for the State's motion that the Defendant be ordered to appear at the St. Louis County Jail at 2:00 p.m. on Wednesday, August 17, 1977, to submit to the aforementioned discovery procedures.

Dated this 16th day of August, 1977.

KEITH M. BROWNELL
St. Louis County Attorney

BY: _____
JOHN E. DeSANTO
ASSISTANT COUNTY ATTORNEY

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF ST. LOUIS — SIXTH JUDICIAL DISTRICT

****

State of Minnesota,

Plaintiff,

vs.

Roger Sipe Caldwell,

Defendant.

PLAINTIFF'S REPLY TO DEFENDANT'S ANSWER TO MOTION FOR DISCOVERY UPON ORDER OF COURT

****

Plaintiff, by and through the undersigned Assistant County Attorney, relies on the facts given in Plaintiff's original Motion and Notice for Discovery by Court Order pursuant to Rule 9.02, Subdivision 2(1), except for the following additions:

1. The cab driver in question has generally described the male passenger he picked up between 11:30 and midnight on June 26, 1977 as a man in his 60's, 5'9" tall and wearing a suit and grey, long coat. The defendant is listed on the St. Louis County Jail booking card as being 5'10" tall. Moreover, at approximately 2:00 p.m. on July 5, 1977, at the Duluth Police Department, this cab driver viewed four photographs of male individuals, including the defendant, Roger Sipe Caldwell. At that time, he picked the photograph of the defendant as looking most like the male passenger he drove to the vicinity of 38th Avenue East and London Road around midnight on June 26, 1977.

2. Pursuant to U.S. v. O'Neal, 349 Fed. Supp. 572 (1972) (See attached two-page opinion), which takes into account the holdings in U.S. v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967), U.S. v. Hammond, 419 F. 2d, 166 (1969), Smith v. U.S., 83 U.S. App. D.C. 80, 187 F.2d 192 (1950), and Holt v. U.S., 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910), it is clear that this Court has the authority to require a defendant to change or alter his physical appearance for a line-up.

3. Given the proper motion, notice and showing pursuant to Rule 9.02, Subdivision 2(1), defendant's answer that the evidence

sought in this motion has little, if any, probative value and/or is cumulative with earlier obtained evidence is not sufficient or proper basis to deny plaintiff's Motion for Discovery.

THEREFORE, Plaintiff, by and through the undersigned Assistant County Attorney, again moves that the defendant be ordered to appear at the St. Louis County Jail to submit to the aforementioned discovery procedures without any further undue prolonged delay which would further prejudice the State in obtaining this necessary evidence.

Dated this 31st day of August, 1977.

KEITH M. BROWNELL
St. Louis County Attorney

By: _____
JOHN E. DeSANTO
Assistant County Attorney

UNITED STATES of America, Plaintiff,

v.

Willie B. O'NEAL, Defendant.

No. CR72-684.

United States District Court, N. D. Ohio, E. D.

Oct. 26, 1972.

Proceeding on prosecution's motion for order requiring defendant to be clean shaven when appearing in lineup. The District Court, Ben C. Green, J., held that requiring defendant who had a beard to be clean shaven when appearing in identification lineup would not violate his Fifth Amendment rights.

Motion granted.

Criminal Law ⇐393(1)

Requiring defendant who had a beard to be clean shaven when appearing in identification lineup would not violate his Fifth Amendment rights. U.S.C.A. Const. Amend. 5.

Edward S. Molnar, Asst. U. S. Atty., Cleveland, Ohio, for plaintiff.

Clarence D. Rogers, Jr., Cleveland, Ohio, for defendant.

MEMORANDUM

BEN C. GREEN, District Judge:

The prosecution has moved for an order "requiring the defendant [Willie B. O'Neal] to be clean-shaven when appearing in an identification lineup". At the present time the defendant, who is in custody having been unable to make bond, has a beard. Such an order is resisted by the defendant on the basis that it would be violative of his Fifth Amendment rights.

The Government's request is predicated upon the following state of facts, asserted in an affidavit by the Assistant United States Attorney:

> On September 12, 1972, two males, one black, the other white, entered the Lake County National Bank, Mentor, Ohio, posing as Brinks, Inc. guards and stole $315,000. The description of one individual by on-the-scene witnesses matches the description of the defendant, Willie B. O'Neal. In addition, this individual was described as clean-shaven.
>
> Investigation has determined that prior to the incident in question defendant did have a beard and goatee. However, on September 25, 1972, a witness testified before a Federal Grand Jury in this District, that the defendant shaved off his beard and goatee some three to four days prior to the date in question.

There do not appear to be any reported decisions within the Federal courts on the precise factual situation presented herein. However, there are rulings which do bear on the general question of whether a defendant's constitutional rights protect him for a required change in physical appearance.

In Smith v. United States, 88 U.S. App.D.C. 80, 187 F.2d 192 (1950), the claim was advanced that the defendant's privilege against self-incrimination had been violated by his hair having been dyed black prior to his being presented to witnesses for purposes of identification. The Court rejected that argument, relying, in part, upon the language of the United States Supreme Court in Holt v. United States, 218 U.S. 245, 252, 31 S.Ct. 2, 6, 54 L.Ed. 1021 (1910) that, "But the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."

The Fourth Circuit Court of Appeals had before it in United States v. Hammond, 419 F.2d 166 (1969), a conviction

on a charge of criminal contempt arising from the defendant's refusal to appear in a lineup. The Court held:

> On appeal, Hammond contends that the order requiring him to appear in a lineup wearing a [false] goatee violated his constitutional rights in that he would be denied due process of law and his privilege against self-incrimination; that the order was thus invalid and incapable of supporting his conviction for criminal contempt. We find this contention to be without merit.
>
> id., p. 168.

In reaching the conclusion in *Hammond* that the proposed lineup did not violate any constitutional rights, the court looked to the decision in United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). In the *Wade* case, the Supreme Court found no violation of constitutional rights in a lineup in which all the participants were required to wear strips of tape on their faces in a manner corresponding to the described appearance of the persons who had committed the offense in question.

The Sixth Circuit Court of Appeals has recently had occasion to review the general question of the scope of the Fifth Amendment privilege against self-incrimination. United States v. Blank, 459 F.2d 383 (1972). The opinion in the *Blank* case makes it quite clear that the construction placed upon the leading Supreme Court decisions by the Court of Appeals stands for the proposition that the privilege against self-incrimination is limited to evidence of a testimonial or communicative nature.

Based upon the decision in United States v. Blank, supra, and taking into account the holdings in the *Wade*, *Hammond*, and *Smith* cases, this Court has concluded that the order which the Government seeks would not violate any of the defendant's constitutional rights. It is the Court's opinion that requiring the defendant to shave for the purposes of the lineup is consistent with the philosophy expressed by the Supreme Court in Holt v. United States, supra, that, as a part of a criminal proceeding, a defendant may be required to alter his physical appearance without infringing upon any constitutional guarantees.

The Government's motion will be granted.

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Petitioner,

46282 vs.

George Gerald Chamberlain,

Respondent.

The above-entitled matter came on for hearing before a panel of this court on October 14, 1975, at 9:15 a. m., upon the application of plaintiff-petitioner for a writ of mandamus. Appearing on behalf of the state were Vernon Bergstrom and David W. Larson, Assistant Hennepin County Attorneys, and the defendant appeared through his attorney, Mark W. Peterson.

It having been made to appear that the refusal to disclose the names of the alibi witnesses seasonably upon demand was deliberate and intentional and with the knowledge and consent of the defendant and was without legal justification, it is the opinion of this court (Sheran, Peterson, Kelly, Todd, MacLaughlin, Yetka, and Scott) that the writ should issue. Otis, J., took no part. Rogosheske, J., is not persuaded that the relief requested should be granted.

Let the Writ issue.

10-16-75

BY THE COURT

Chief Justice

WRIT OF MANDAMUS

The State of Minnesota to the Honorable Andrew Danielson, Judge of District Court, County of Hennepin, Fourth Judicial District:

WHEREAS, upon a consideration of the petition of the State of Minnesota and the answer of the Respondent, this court

has determined that the State is entitled to the relief requested in said petition,

NOW THEREFORE, we do command and direct that you immediately upon receipt of a copy of this writ vacate and set aside your order of October 10, 1975, and that you grant to the State the relief requested in the State's motion of October 10, 1975.

WITNESS, The Honorable Robert J. Sheran, Chief Justice of the Supreme Court aforesaid, and the seal of said court this 16th day of October, 1975.

John McCarthy
Clerk of Minnesota Supreme Court

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF ST. LOUIS — SIXTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

MOTION AND NOTICE OF TAKING DEPOSITION

Roger Sipe Caldwell,

Defendant.

TO: The above named Defendant, Douglas W. Thomson, Defendant's attorney, and this Court:

Pursuant to Rule 21, Minnesota Rules of Criminal Procedure, the State of Minnesota, by the undersigned Assistant County Attorney, hereby moves for and gives notice of the taking of the deposition of Thomas Congdon of 4150 East Quincy Avenue, Denver, Colorado by oral examination before any designated person authorized to administer oaths at a future time and place to be determined by this Court.

Plaintiff, by the undersigned Assistant County Attorney, moves for the taking of said deposition in the presence of Defendant and defense counsel on the grounds that said Thomas Congdon is an essential and material State's witness at the trial of the above entitled matter, and by reason of a heart attack suffered on or about Friday, March 31, 1978 in Denver, Colorado, said material witness will be unable to come from Colorado to Minnesota to testify at the trial of the above entitled matter.

Dated this 10th day of April, 1978.

KEITH M. BROWNELL
St. Louis County Attorney

By: John E DeSanto
JOHN E. DeSANTO
ASSISTANT COUNTY ATTORNEY
501 Court House
Duluth, Minnesota 55802
Telephone: 218-723-3501
ATTORNEY FOR PLAINTIFF

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF ST. LOUIS — SIXTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

-vs

ORDER

Roger Sipe Caldwell,

Defendant.

On motion and notice of Plaintiff by it's attorney,

IT IS ORDERED, that the deposition of Thomas Congdon by oral examination will be taken before a designated person qualified and authorized to administer oaths and to take and transcribe a verbatim record of said Thomas Congdon's testimony at

on the ____ day of _____, 1978 at _____, and the presence of Defendant and his counsel shall be required at the taking of the deposition.

Dated this _____ day of _____, 1978.

BY THE COURT:

_____

JACK J. LITMAN,
Judge of District Coure

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF CROW WING — NINTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Roger Sipe Caldwell,

Defendant.

****

CHALLENGE TO JURY PANEL

The defendant, ROGER SIPE CALDWELL, by and through his attorney, DOUGLAS W. THOMSON, hereby challenges the jury panel pursuant to Rule 26.02 Subdivision 3 of the Minnesota Rules of Criminal Procedure, on the ground that there has been a material departure from the requirements of law governing the selection, drawing and summoning of the jurors.

The acts constituting the grounds of the challenge are as follows:

1) That the persons selected for jury service were not selected from the broadest feasible cross section of the area served by the court as required by Minnesota Statutes Section 593.31 and the Sixth Amendment to the Constitution of the United States.

2) The juror selection plan does not designate for Crow Wing County the lists of names, if any, which shall be used to supplement the voter registration list as sources for prospective juror names as required by Minnesota Statutes Section 593.36, Subdivision 3.

3) No written plan for the random selection of random petit jurors has been devised and placed into operation for Crow Wing County as required by Minnesota Statutes Section 593.36.

4) There has been a substantial failure to comply with Section 593.31 - 593.50 of the Minnesota Statutes in selecting the petit jury.

This challenge is based upon the indictment, the files, records and proceedings herein, such evidence, testimony and other matters as may be presented to the court at the time of the hearing of said challenge.

Respectfully submitted,

THOMSON & NORDBY

By-/s/ Douglas W. Thomson
DOUGLAS W. THOMSON

Attorney for Defendant
Suite 1530 - 55 East Fifth Street
St. Paul, Minnesota 55101
(612) 227-0856

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF CROW WING NINTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Roger Sipe Caldwell,

Defendant.

****

MOTION TO STAY THE PROCEEDINGS AND TO QUASH THE INDICTMENT

The defendant, ROGER SIPE CALDWELL, by and through his attorney, DOUGLAS W. THOMSON, hereby moves the court, pursuant to Minnesota Statutes Section 593.46 Subdivision 1 to stay the proceedings and to quash the indictment on the ground of substantial failure to comply with Sections 593.31 - 593.50 of the Minnesota Statutes in selecting the petit jury.

This motion is based upon the indictment, the files, records and proceedings herein, a sworn statement of facts pursuant to Minnesota Statutes Section 593.46 Subdivision 2, and such evidence, testimony and other matters as may be presented to the court at the time of the hearing of said motion.

Respectfully submitted,

THOMSON & NORDBY

By -/s/ Douglas W. Thomson
DOUGLAS W. THOMSON
Attorney for Defendant
Suite 1530 - 55 East Fifth Stree
St. Paul, Minnesota 55101
(612) 227-0856

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF CROW WING — NINTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Roger Sipe Caldwell,

Defendant.

****

SWORN STATEMENT OF FACTS
PURSUANT TO MINNESOTA STATUTES
SECTION 593.46 SUBDIVISION 2

STATE OF MINNESOTA
ss.
COUNTY OF RAMSEY

DOUGLAS W. THOMSON, being duly sworn on oath states as follows:

1) He is the attorney of record for the defendant herein.

2) That this sworn statement of facts is made in support of defendant's motion to stay the proceedings and to quash the indictment.

3) Affiant obtained, through the Crow Wing County Clerk of Court, at approximately 5 O'Clock P.M. on Friday, April 7th, 1978, a document entitled "In the Matter of the Uniform Jury Selection and Usage in the Courts of the Ninth Judicial District". Affiant has read the above document and compared it with the provisions of Sections 593.31 - 593.42 of the Minnesota Statutes and finds that there is substantial failure to comply with Sections 593.31 - 593.42 in that:

a) No written plan for the random selection of grand and petit jurors has been adopted for Crow Wing County as required by Minnesota Statutes Section 593.36.

b) There is no specification of detailed procedures to be followed by the jury commissioner of Crow Wing County in randomly selecting names from the sources designated in accordance with Subdivision 3 of Section 593.36 and in all other random selections of names of prospective jurors from any other list or lists as required by Minnesota Statutes Section 593.36 Subdivision 3.

c) There is no compliance with the provisions of Minnesota Statutes Section 593.36 Subdivision 3.

d) There is no statement that a master list is to be used by the jury commissioner as required by Minnesota Statutes Section 593.36 Subdivision 4.

e) There is no specific designation of source lists as required by Minnesota Statutes Section 593.37.

f) The master list does not comply with the requirements of Minnesota Statutes Section 593.38 in that there is no provision of the establishment of a secondary list.

g) The qualification questionnaire does not solicit the information set forth in Minnesota Statutes Section 593.40 Subdivision 2.

h) Other failures to comply with Section 593.31 - 593.42 will be developed through testimony of the jury commissioner at the time of the hearing of said motion.

Further affiant sayeth not.

/s/Douglas W. Thomson
DOUGLAS W. THOMSON

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF CROW WING — NINTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Roger Sipe Caldwell,

Defendant.

****

CHALLENGE TO JURY PANEL

The defendant, ROGER SIPE CALDWELL, by and through his attorney, DOUGLAS W. THOMSON, hereby challenges the jury panel pursuant to Rule 26.02 Subdivision 3 of the Minnesota Rules of Criminal Procedure, on the ground that there has been a material departure from the requirements of law governing the selection, drawing and summoning of the jurors.

The acts constituting the grounds of the challenge are as follows:

That the Jury Commissioner for Crow Wing County did not rigorously adhere to the conditions sufficient to constitute grounds for excusing from jury service, in excusing a substantial number of jurors from the jury panel, in violation of Minnesota Statutes Section 593.45.

This challenge is based on the indictment, the files, records and proceedings herein, such evidence, testimony and other matters as may be presented to the court at the time of the hearing of said challenge.

Dated: May 1, 1978.

Respectfully submitted,

THOMSON & NORDBY

By - /s/ Douglas W. Thomson
DOUGLAS W. THOMSON

Attorney for Defendant
Suite 1530 - 55 East Fifth Street
Saint Paul, Minnesota 55101
(612) 227-0856

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF CROW WING — NINTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Roger Sipe Caldwell,

Defendant.

****

MOTION TO STAY THE PROCEEDINGS AND TO QUASH THE INDICTMENT

The defendant, ROGER SIPE CALDWELL, by and through his attorney, DOUGLAS W. THOMSON, hereby moves the court, pursuant to Minnesota Statutes Section 593.46 Subdivision 1, to stay the proceedings and to quash the indictment on the ground of substantial failure to comply with Section 593.45 of the Minnesota Statutes in selecting the petit jury.

This motion is based upon the indictment, the files, records and proceedings herein, a sworn statement of facts pursuant to Minnesota Statutes Section 593.46 Subdivision 2, and such evidence, testimony and other matters as may be presented to the court at the time of the hearing of said motion.

Dated: May 1, 1978.

Respectfully submitted,

THOMSON & NORDBY

By Douglas W. Thomson

DOUGLAS W. THOMSON

Attorney for Defendant
Suite 1330 - 55 East Fifth Stree
St. Paul, Minnesota 55101
(612) 227-[illegible]

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF CROW WING — NINTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Roger Sipe Caldwell,

Defendant.

****

SWORN STATEMENT OF FACTS
PURSUANT TO MINNESOTA STATUTES
SECTION 593.46 SUBDIVISION 2

STATE OF MINNESOTA
ss.
COUNTY OF AITKIN

DOUGLAS W. THOMSON, being duly sworn on oath states as follows:

1) He is the attorney of record for the defendant herein.

2) That this sworn statement of facts is made in support of defendant's motion to stay the proceedings and to quash the indictment.

3) That affiant was before the Honorable Jack J. Litman, Judge of the District Court, today in chambers. John DeSanto, Assistant St. Louis County Attorney, the defendant, Roger Sipe Caldwell and Marge Williams, Clerk of the Crow Wing County District Court and Jury Commissioner were also present. Marge Williams advised Judge Litman, inter alia, that only 59 jurors are presently available for service out of the original 400 that were certified by her as having been selected at random on December 15, 1977.

It would appear that of the original 400 jurors, 45 were called to serve as jurors for the regular term of court for Crow Wing County; that 89 were previously summoned for the instant case and that 59 remain to be called for the instant

case. Thus, it is evident that only 163 jurors out of the original 400 have been available for jury service and the other 237 jurors have been excused.

It would appear to affiant that the Jury Commissioner did not rigorously adhere to the conditions for excusing jurors from jury service as required by Minnesota Statutes Section 593.45.

As further evidence of affiant's contention, affiant will submit to the court the appropriate records required to be maintained, pursuant to Minnesota Statutes Section 593.45 Subdivision 1 and the testimony of the Jury Commissioner.

Further affiant sayeth not.

/s/ Douglas W. Thomson

DOUGLAS W. THOMSON

STATE OF MINNESOTA — IN DISTRICT COURT

COUNTY OF ST. LOUIS — SIXTH JUDICIAL DISTRICT

* *

State of Minnesota, — Plaintiff,

-vs-

Roger Sipe Caldwell, — Defendant.

* *

MEMORANDUM IN OPPOSITION TO DEFENDANT'S

CHALLENGE OF THE JURY PANEL

* *

The Crow Wing County District Clerk has drawn 100 names for prospective jurors on the above matter. The defendant has challenged this panel of prospective jurors. The Clerk selected the prospective jurors in accordance with Minnesota Statutes and the rules and policies of the Tenth Judicial District. Therefore, defendant's motion should be denied.

The method of selecting prospective jurors was revised by Chapter 286, enacted by the Legislature in 1977. The Legislature provided for a uniform selection and service procedure which is now codified in Minn. Stat. Chapter 593. The first step involves the selection of a source list. Minn. Stat. 593.37 provides that, "The voter registration list for the judicial district shall serve as the source list but may be supplemented with names from other lists of persons resident therein, such as lists of utility customers, property and income tax payers, motor vehicle registrations, and drivers licenses, and welfare recipients, which may be specified in the County Jurors Selection Plan. The Court may include in its Juror Selection Plan supplementary lists whenever it is deemed feasible and necessary in order to foster the policy and protect the rights secured by (the act)." Minn. Stat. 593.38 mandates

the Jury Commissioner in each county, under the direction of the Chief Judge of that County, to devise and place into operation a written plan for the random selection of grand and petit jurors.

In December, 1977, shortly after the above act had gone into effect, all of the Clerks of Court for the 17 counties comprising the Ninth Judicial District met to formulate a random plan. The plan adopted by the Clerks is attached to this memorandum. This plan went into effect immediately and has been used to this date. All of the six District Judges of the Ninth Judicial District are aware of the plan and have acquiesced and approved of this plan.

Paragraph one of the plan provides that, "The voter registration list of each county shall be the primary source list from which jurors names shall be selected for service on the Grand and Petit Juries. If the voters registration list represents 40% or more of the total population of the county, it shall be considered an adequate source for random selection of jurors." The population of Crow Wing County is 39,700 people. As of October, 1976, the County had 19,407 registered voters. Thus, 48.8 % of the population of Crow Wing County is registered to vote. According to the 1970 census, 35.5% of the population of Crow Wing County is under 18 and not eligible to vote. When the percentage of the population registered to vote is added to the population under 18, 86.1% of the total county population is accounted for.

After determining that the percentage of residents registered to vote provided an adequate source for the random selection of jurors, the Clerk proceeded to draw 400 names. Until this trial was moved to Brainerd, 65 names had been taken from the master list of 400 for service on Petit Juries. At the trial court's direction, the Clerk drew 100 additional names for the panel in the above matter. None of the 100 have been drawn for jury duty before this case.

There are no Minnesota cases which demonstrate when the voters registration list is an inadequate source list. The 17 Clerks of the Ninth Judicial District, with the acquiescence of the District Court, have developed a policy that where 40% of the population is registered to vote, the voters registration list is adequate. This policy of the Ninth Judicial District is now in operation throughout the District and has been utilized for each and every trial held since the first of the year. When a trial from another district is moved into the Ninth Judicial District, it seems only appropriate that the standard policy of the Ninth Judicial District should govern the selection of jurors. If this Court were to deviate from that policy, an undue burden would be placed upon the host County of Crow Wing which would discourage it and other counties from accepting change of venue cases.

Since this jury has been chosen in accordance with the uniform policy of the Ninth Judicial District, defendant's motion challenging the panel should be denied.

Dated this 10th day of April, 1978.

KEITH BROWNELL
ST. LOUIS COUNTY ATTORNEY

By_____
John DeSanto
Assistant St. Louis County Attorney
Court House
Duluth, MN
(218) 723-3501

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF ST. LOUIS SIXTH JUDICIAL DISTRICT

* *

State of Minnesota, Plaintiff

-vs-

Roger Sipe Caldwell, Defendant.

* *

AFFIDAVIT

* *

STATE OF MINNESOTA)
(SS
COUNTY OF CROW WING)

Marge Williams, being first dul[illegible] sworn on oath, deposes and says:

1. Affiant is the Clerk of the Crow Wing County District Court and has held that position at all times pertinent to this matter.

2. That one of Affiant's duties as Clerk of the Crow Wing County District Court is to act as Jury Commissioner.

3. In her function as Jury Commissioner, affiant drew a jury panel of 400 names in January of 1978. These names were drawn from those persons in Crow Wing County registered as voters as of October 27, 1976.

4. Affiant is informed by the Crow Wing County Auditor's Office that as of October 27, 1976, Crow Wing County had 19,407 registered voters. Affiant is further informed that, according to the State Demographer, Crow Wing County has a population of 39,700 people as of July 1, 1976. According to these figures, 48.8% of the population of Crow Wing County is registered to vote as of October 27, 1976.

5. It is the policy and rule in the Ninth Judicial District that the source list for jury selection be taken from the list of registered voters if more than 40% of the residents of the county are registered voters. The 17 Jury Commissioners of the Ninth Judicial District by virtue of their Memorandum dated December 2nd, 1977, established the policy that if 40% of the population was registered to vote that the list of registered voters "shall be considered an adequate source". Therefore, affiant selected the master list in accordance with the rules and procedures of the Ninth Judicial District.

6. In January of 1978, Affiant selected 45 names from the master list of 400 to serve on the Petty Jury for the February, 1978, term of court in Crow Wing County. In March of 1978, Affiant selected 20 more names from this master list to supplement the original 45 drawn.

7. On March 31, 1978, Affiant drew 100 ~~additional~~ names after receiving instructions to do so by the Honorable Jack Litman, Judge of District Court. Affiant then summoned those 100 individuals for jury duty on the above entitled case for April 10, 1978.

8. In addition, Affiant selected 100 additional names in the event that the 100 names referred to above were insufficient.

Further affiant sayeth not.

Margo Williams

Subscribed and Sworn to
Before me this
day of April, 1978.

STEPHEN C. RATHKE
Notary Public, Crow Wing County, Minn
My Commission Expires Mar. 12, 19[illegible].