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Penny Miller
Clerk, N.D. Supreme Court
State Capitol Grounds
Bismarck, ND 58505

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STATE OF NORTH DAKOTA

Re: Proposed Amendments, Hearing Scheduled October 20th, 1998

Dear Ms. Miller:

I wish to comment on proposed Rule 32, Sentence and Judgment, of the North Dakota Rules of Criminal Procedures. I refer the Court to Page 62, beginning at Line 102 which is labeled Subsection (A). The sentence reads, "The pre sentence investigation report and any addendum to the report are confidential and may not be read or copied by the public or the parties unless permitted by the Court in its discretion."

Where I agree that the pre sentence investigation report and any addendum report should be confidential and not read by the public unless permitted by the Court in its discretion, I do not agree that the pre sentence investigation report should be confidential and not read by the Defendant. The pre sentence investigation report should be made available to the Defendant. Items in any addendum should be confidential and not read by the Defendant unless permitted by the Court in its discretion.

This takes me to Page 61, specifically Lines 68 through 79, labeled Subsection (B). First, I agree that Subsections (B)(i) and (ii) should be matters for an addendum. I disagree, however, that Subsections (B) (iii) and (iv) should be in an addendum. Items (iii) and (iv) should be in the pre sentence investigation report itself. I believe that this is the way it is presently handled.

Second, I wish to also comment on Rule 6.10, Courtroom Oaths, found at Page 122. I request that the Court not adopt Rule 6.10. Attached hereto is a copy of a letter to the Editor by a Mr. Wayne Hervey, Bismarck. As I do not agree with his personal attack upon Judge Hagerty, I do agree with his reasons for the Court not adopting Rule 6.10. I agree that this is not a promulgation of rules of procedure. I agree with Mr. Hervey's reference to the North Dakota Constitution, federal system, and also to the quote by Prof. Roscoe Pound. Although I agree with Judge Hagerty's efforts to simplify our legal language and to make the process more

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amenable to lay persons, I do not agree with this effort to change the courtroom oaths by the Joint Procedure Committee. I believe that this matter should be left with the legislature, in conjunction with their interpretation of the North Dakota Constitution. If the legislature should act in an unconstitutional manner in this regard, then it is at that time that the courts should be involved. Not before then.

Thank you for your consideration of this letter.

Sincerely yours,



Michael R. Hoffman

MRH/mmk

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STATE OF NORTH DAKOTA

YOUR VIEWS

Juries, not judges, are supreme

WAYNE HERVEY, *Bismarck*

Judge Gail Hagerty has repented of her proposal to remove "so help me, God" from North Dakota courtrooms. Still remaining in the dumbed-down oaths proposed by Hagerty, however, is a requirement that jurors follow the instructions given by the judge.

This requirement is not in the current oaths written by the North Dakota Legislature. Before the Supreme Court presumes, under the pretext of promulgating rules of procedure, to change the legislative mandate for operation of the justice system, it should have a sound procedural reason for doing so.

In this case, the proposed change to require jurors to obey the judge is contrary not only to the North Dakota Constitution but to established case law on the authority of jurors. Furthermore, the very foundation of our jury system is based upon the willingness of jurors to defy the court and arrive at their own conclusions on a matter, regardless of what the judge says or thinks.

This is a matter of American history, but not a history that Gail Hagerty has learned. It is the jury that is supreme in the courtroom, not the judge.

Article 1, Section 4, of the North Dakota Constitution says that "... the jury shall have the right to determine the law and the facts under the direction of the court ..." The "direction of the court" is just that: direction. Hagerty's dumbed-down oaths require the jurors to "promise ... to follow the instructions given to you."

This is unconstitutional. We have come a long way when the North Dakota Supreme Court, through one of its committees — made up 100 percent of lawyers and judges, who are also lawyers — now creates in the back room a "rule of procedure," which contradicts the state constitution. Such is the arrogance of a bench and bar that for too long have operated without any scrutiny or discipline by the people themselves.

Gail Hagerty, through her oath-revising, would destroy the hallowed institution of jury nullification. The federal courts have determined that jury-nullification instructions may

not be given by judges, but neither may courts instruct juries that they may not nullify. This is a power inherent in the plenary authority of juries, and may neither be enhanced nor diminished by judges. (United States vs. Moylan, 417 F.2d 1002, 4th Cir. 1969.)

Hagerty, it seems clear, desires to remove the power of the jury from the courtroom, leaving the judge as sole authority. This is not a procedural question, but one going to the very substance of justice. Prof. Roscoe Pound, dean of the Harvard Law School 1916-1936, stated: "Jury lawlessness is the great corrective of the law in its actual administration."

It is time for the citizens of North Dakota to resist this new power grab by the "just us" judicial system, and insist legislative matters going to the very heart of the meaning of justice in our courts be reserved to the people, as required by the constitution.

A lawyers' committee has no power to amend the constitution to make little courtroom gods of judges.

(This letter is signed by six other "concerned citizens of North Dakota." — Editor)

God and justice

SOPHIA PREZLER, *Bismarck*

Two Oct. 9 letters — one by The Rev. Steve Wisthoff, the other by Gerald Glaser, a former district judge — expressed support for changes to our traditional courtroom oaths.

The heart of the issue is the sovereignty of our nation and preservation of our oaths, under God, in public life. Each of these men spoke according to the letter of the law — one in conformance to Scripture, the other in compliance with judicial law. Yet, it seems, these professional men were bombarding the very truths they should have been defending.

It's interesting that, even though Wisthoff quotes Scripture, his interpretation keeps the Word from becoming light and salt for the preservation of our nation.

Glaser says that the vast majority of people, the world over, have never heard of the Ten Commandments, or do not know they exist as the direct Word of God. I question the validity

of that statement, but even if it were true, people would be without excuse, because of the abundance of missionaries, Christian radio, TV and the other vast Christian media, the world over.

None of our mere human reasoning can change that, from the dawn of history — and it will continue to the end of time — nations have risen to their greatest potential when they have allowed God, the Bible and the Ten Commandments to be the cornerstone of government. America has been the greatest beneficiary of these blessings.

Nations have and will produce their own demise when they refuse constitutional governance.

God and justice are twins. In the oath, we bind and bond our nation under God. What a safe, secure provision!

God has seniority

CLETUS J. SCHMIDT, *Bismarck*

As clerk of the District Court for Morton County (1947-1961), I conducted a study of the oaths administered in state courts, and found that the verbiage for most oaths and for making an affirmation is provided for in the North Dakota Century Code or the Rules of Civil Procedure. In 1961, the Knight Printing Co., Fargo, printed a booklet of district court oaths, citing the statutory authority of applicable oaths.

As deputy clerk, then clerk, of the United States District Court (1962-1984), I researched the United States Code and Federal Rules of Civil and Criminal Procedure as to district court oaths and affirmations. Some of these oaths are based on federal law. In 1976, the Federal Judicial Center printed a booklet that compiled the oaths used in federal courts. Many of these oaths are substantially the same as those used in state courts.

I have been retired for 13 years now, and reference to God in the court oaths must still be in the North Dakota Century Code, and I can't imagine the Legislature striking God out of the court.