

March 24, 2017

20170045

Penny Miller  
Clerk of the Supreme Court  
600 E. Boulevard Ave.  
Bismarck, ND 58505-0530

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT  
MARCH 24, 2017  
STATE OF NORTH DAKOTA

RE: Supreme Court No. 20170045  
Public Comment  
Proposed Amendments to N.D.R.Crim.P., N.D.R.Juv.P., N.D.R.Ct., and  
N.D.Sup.Ct.Admin.R.

Dear Clerk:

On February 6, 2017, the Joint Procedure Committee petitioned the Supreme Court for amendments to existing procedural rules in response to the passage of the Marsy's Law constitutional amendment, now codified at N.D. Const. Art. I, S. 25.

The proposed change to N. D. R. Crim. P. 15 would allow a victim to refuse a deposition, a right guaranteed under N. D. Const. Art. 1, S. 25(f). However, N. D. Const. Art. 1, S. 25(f) also declares that nothing will be done to violate the rights of the accused under the Sixth Amendment of the United States Constitution as a result of the refusal of a deposition or any other event mentioned in subpart (f).

A full reading of N. D. Const. Art. 1, S. 25(f) expressly states that a criminal defendant's Sixth Amendment United States Constitution rights are superior to a victim's decision to refuse a deposition. This should be included in the proposed change to Rule 15; without it, the proposed change would run afoul of our state constitution.

I therefore offer that the proposed Rule 15(a)(5) instead read as follows, which would comply with the new constitutional amendment:

(5) a victim may refuse to participate in a deposition requested by the defendant or the defendant's attorney, unless the court determines after a hearing upon a defendant's motion that the criminal defendant's rights under the Sixth Amendment United States Constitution are abrogated by the refusal.

I can only assume that the burden would be on a criminal defendant to show that his rights would be violated, and he or she would need to bring a pre-trial motion to trigger this balancing test. Therefore, a modification would also be necessary for N. D. R. Crim. P. 12(b)(3), as the current Rule 12(b)(3) only includes motions under N. D. R. Crim. P. 14, N. D. R. Crim. P 16, suppression of evidence, and for other assertions involving defects in the prosecution of a case.

Therefore, the following should be proposed as amendment to Rule 12(b)(3), as subparts (D), (E) and a new subpart (F) to that section:

- (D) severance of charges or defendants under Rule 14; ~~and~~
- (E) discovery under Rule 16; and
- (F) a motion to compel attendance at a deposition under N. D. R. Crim. P. 15(a)(5).

Such a change is necessary to authorize the timing and filing of this kind of motion.

These would resolve the differences between the proposed changes and N. D. Const. Art. 1, S. 25(f).

Thank you for your consideration.

Sincerely,



Andrew J. Schultz

Attorney at Law

Worthington & Schultz, P.C.

P.O. Box 2087

Minot, ND 58702-2087

Ph. (701) 852-5513

worthington@srt.com