2011 HOUSE JUDICIARY

HB 1192

2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1192
January 18, 2011
12986

☐ Conference Committee

Committee Clerk Signature

Minutes:

Chairman DeKrey: We will open the hearing on HB 1192.

Rep. Stacey Dahl: Sponsor, support, explained bill. Some basic background on what it is seeking to accomplish. This is just a clarification of when a criminal action legally begins. There's been some confusion. When you look at the language that's been overstruck in the bill, it talks about when an information or indictment is to be presented, there was some confusion. This just clarifies that prosecution is commenced when a complaint, summons or information is filed, or when a grand jury indictment is returned. Additionally, section 2 of the bill is repealing several sections of the century code. Those are duplicated and present in the court rules, so those statutes are now found in the court rules, so they are duplicates at this point. The statutes are actually outdated because they reference county courts.

Chairman DeKrey: You don't see any problem on the floor, when we're repealing sections of the century code and telling them it is now A rule over at the Supreme Court.

Rep. Dahl: There will be people who will wonder what we're repealing, but I did go and look at those sections yesterday and they do reference county courts, and because they are already provided in court rule, we're not deleting a process anywhere.

Chairman DeKrey: Thank you. Further testimony in support.

Aaron Birst, National Association of Counties: Support (see attachment 1).

Rep. Koppelman: You referenced judicial rules or court rules and legislative rules. Are we dealing with rules here from the legislative perspective or statutes.

Aaron Birst: Legislative statutes are what we're suggesting to be repealed in light of court rules being in existence.

Rep. Koppelman: So you're implying that the court is adopting rules then that are contrary to, or at least in some way, different from state law.

Aaron Birst: Correct.

Rep. Koppelman: The question I would ask is if the laws are antiquated, why wouldn't the court come in and tell us that it doesn't work in our system today; rather than adopting rules that would be contrary. The second question would be, is this strictly procedural or are we actually dealing with something substantive.

Aaron Birst: Again, the Supreme Court has actually stepped in and said the legislative statutes are no longer applicable in this particular area because of our court rules. So the Supreme Court has already basically indicated that there are questionable cross-language sections that don't really match up. I cited that case, that's the State v. Norland, 2005 ND 189, where that was litigated. The defendant was claiming that the statute of limitations had run, because the Information wasn't filed yet, and cited the state's statutes and the Supreme Court said, the state's statutes, although on their face seems to say that, it's no longer applicable because when we unified, we no longer have the same rules. It has caused litigation. If the legislature wanted to codify the rules that would be fine, too. I wouldn't have a problem with that. The only question becomes what is easier to access when there are some changes that need to be done. Quite frankly, having to wait every two years to try and change the statutory framework is much more difficult than the court rules. Don't get me wrong, court rules are not easy to change either. There's a process that you have to go through, a comment period, etc. It's still an undertaking, but that's what's caused us some lag time.

Rep. Koppelman: I understand, why under separation of powers, the court guards its authority jealously to decide procedural issues and how they flow through the court. That appears to be what we're talking about here. But most of us in this branch of government get a little nervous, especially when we hear about the court drafted the rules and said the law doesn't apply anymore.

Rep. Klemin: This is a technical matter. The head note is when action is commenced, but the text says when the prosecution is commenced, so maybe the word action should be prosecution on line 8. I recognize that we have another old statute that says the head note is not part of the law, but still I think they ought to be consistent. What do you think.

Aaron Birst: I agree. That is the old language that we just cut and pasted out of there. Quite frankly, when you pull the century code and you look at when this was enacted, it is statehood, and hasn't seen any action since 1940, and one of the statutes is 1970. Those terms should all be cleaned up and if you found that appropriate, I would agree to that.

Rep. Klemin: I guess to go back to what Rep. Koppelman was talking about, I don't remember exactly where it is located, but it may be in the constitution that says that the Supreme Court has the power to make rules relating to the procedures in the courts and that's what they have been doing on civil and criminal procedures and basically, we used to have the rules of civil procedure in the statute and they aren't there anymore, so this is nothing new.

Aaron Birst: If you pull the statute in the 29 code, you will see numerous places where it says repealed based on Supreme Court rules. If I thought this was substantive, I would certainly say that the legislature has a role in setting up the substantive process of criminal prosecution, this is more of a procedural process, when you file, how you file in front of the court.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition. We will close the hearing.

Rep. Klemin: I move that we amend line 8, on HB 1192, to remove the word "action" and insert the word "prosecution".

Rep. Kretschmar: Seconded.

Chairman DeKrey: Discussion. Voice vote, motion carried. We now have the bill before us as amended. What are the committee's wishes.

Rep. Klemin: I move a Do Pass as amended.

Rep. Delmore: Seconded.

14 YES 0 NO 0 ABSENT DO PASS AS AMENDED CARRIER: Rep. Klemin

11.0485.01001
Title.02000

Adopted by the Judiciary Committee

January 19, 2011

1/19/11

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1192

Page 1, line 8, overstrike "**action**" and insert immediately thereafter "**prosecution**"

Renumber accordingly

Date: 1/18/11
Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1192

House JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 11.0485.01001 .02000

Action Taken: ☑ Do Pass ☐ Do Not Pass ☑ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep. Klemin Seconded By Rep. Delmore

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Guggisberg	✓	
Rep. Beadle	✓		Rep. Hogan	✓	
Rep. Boehning	✓		Rep. Onstad	✓	
Rep. Brabandt	✓				
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				
Rep. Maragos	✓				
Rep. Steiner	✓				

Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep. Klemin

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1192: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1192 was placed on the Sixth order on the calendar.

Page 1, line 8, overstrike "**action**" and insert immediately thereafter "**prosecution**"

Renumber accordingly

2011 SENATE JUDICIARY

HB 1192

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

HB1192
3/8/11
Job #15101

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Relating to criminal procedure and the methods of prosecution

Minutes: There is attached written testimony

Senator Nething – Chairman

Representative Dahl – Introduces the bill.

Cherie Clark – Cass County Assistant State's Attorney – See written testimony.

Senator Nething – Asks if because of the unified court system the current law is outdated.

Clark – Explains they would do a complaint in magistrate court in felony cases and only after the preliminary hearing was the information then presented in district court.

Senator Nething – Responds, now we're going to say that the prosecution is commenced under a uniform complaint and summons or it can be a complaint signed by an officer or an information is filed or when a grand jury indictment is returned. There are 4 ways under this proposal to begin the action.

Clark – Said yes, it has already been done in practice throughout the state since 1994 in all four of those ways.

Senator Nething – Asks what the information is.

Clark – Replies the information consists of a prosecutor will get the police reports from law enforcement, they are reviewed, then they draft up the information based on the charges. They then contact law enforcement and they sign a signed affidavit of probable cause sworn to by a notary public. She says the rules as well as the Supreme Court have said the complaint is the same as information for all legal purposes.

Senator Nething – Said he is trying to tie down a date when the ND rules, that currently govern, took place.

Clark – Says in 1994 the unification of the court system took place, since then they have used information in lieu of the complaint.

Senator Sitte – Said she likes the current law that it is clear for the average person.

Clark – Explains that this isn't eliminating anything that is now done in practice.

Senator Olafson – Asks for more explanation on the John Doe warrant process, the way he understands it keeps the clock running on the statute of limitations.

Clark – Responds that is correct. She speaks of the DNA sequence.

Senator Sorvaag – Asks about the court rules.

Clark – Explains the court rules.

Senator Sitte – Asks if this rule changes the statute of limitations.

Clark – Says technically the statute won't stop until the information is presented.

Opposition – 0

Closet the hearing

Senator Olafson moves a do pass
Senator Sorvaag seconds

Roll call vote – 5 yes, 0 no, 1 absent

Senator Olafson will carry

Date: 3/8/11
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1192

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Olafson Seconded By Senator Sorvaag

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman	X		Carolyn Nelson	X	
Curtis Olafson – V. Chairman	X				
Stanley Lyson	X				
Margaret Sitte	X				
Ronald Sorvaag	X				

Total (Yes) 5 No 0

Absent 1

Floor Assignment Senator Olafson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1192, as engrossed: Judiciary Committee (Sen. Nething, Chairman) recommends **DO PASS** (5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed HB 1192 was placed on the Fourteenth order on the calendar.

2011 TESTIMONY

HB 1192

Testimony to the
HOUSE JUDICIARY
Prepared January 18, 2011 by the North Dakota Association of Counties
Aaron Birst, Legal Counsel

CONCERNING HOUSE BILL 1192

Chairman DeKrey and members of the committee, the North Dakota Association of Counties is here today to support HB 1192 which an attempt to harmonize Century Code Criminal Procedure with the Supreme Courts' Criminal Procedure Rules.

The current century code procedures regarding how to initiate a prosecution have been on the books since statehood and have last been updated in the 1940's and 1970's. Since that time however, significant changes to the way our court system operates have been put in place. The most significant one that impacted the statutes contained in this bill is the Unification of the Court system in 1995. This change eliminated the county court system which had separate procedures since they did not have the jurisdiction to hear felony cases.

This antiquated language that is found in the Century Code has lead to a number of Supreme Court appeals to determine the proper procedure. One of the latest cases happened in 2005. In State v. Noorlun, 2005 ND 189, The North Dakota Supreme Court recognized these changes and stated, "[t]he underlying rationale of Dimmler and Hersch was that a felony complaint filed in a county court without jurisdiction to hear, try, and determine the action was insufficient to commence the action under N.D.C.C. § 29-04-05. However, the applicable law has changed since Dimmler and Hersch were decided, with the abolishment of county courts, effective January 1, 1995."

I have also attached to my testimony copies of the current law this bill seeks to repeal along with copies of the Court Rules on Criminal Procedure. As you can see, the requested repealed statutes are already addressed in the Court Rules. Currently, having two sets of rules in place creates only inefficiencies and confusion in the criminal process. A personal example of inefficiencies can be found when I was practicing in Cass County. In order to comply with all the rules, a "complaint" would be drafted against an individual and filed with the court. After the preliminary hearing, a "information" would be resubmitted to the court and the defendant. This "information" would be the exact same piece of paper but just re-titled. This created two sets of paperwork for the State's Attorney, the Court and the defendant but yet provided no more information to the system. My understanding is in many of the larger jurisdictions they have since stopped this practice but none-the-less the statutes still appear on the books.

By passing this bill the legislature is acknowledging the changes in the court system and allowing the Supreme Court to rely on its rules for the criminal justice system.

For the following reasons I ask that you support House Bill 1192. Thanks you.

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LEXSTAT NDCC 29-09-02

NORTH DAKOTA CENTURY CODE

*** THIS DOCUMENT IS CURRENT THROUGH THE 2009 LEGISLATIVE SESSION ***
*** AND INITIATED MEASURES APPROVED AT THE NOVEMBER 2, 2010 ELECTION ***
*** STATE COURT ANNOTATIONS CURRENT THROUGH AUGUST 30, 2010 ***
*** FEDERAL COURT ANNOTATIONS THROUGH DECEMBER 1, 2010 ***

TITLE 29 Judicial Procedure, Criminal
CHAPTER 29-09 Methods of Prosecution

Go to the North Dakota Code Archive Directory

N.D. Cent. Code, § 29-09-02 (2010)

29-09-02. Prosecution on information -- In what cases.

During each term of the district court held in and for any county in this state at which a grand jury has not been summoned and impaneled, the state's attorney of the county, or any other person appointed by the court, as provided by law, to prosecute a criminal action, shall file an information as the circumstances may require against any person accused of having committed a crime or public offense within such county, or one triable therein:

1. When such person has had a preliminary examination before a magistrate for such crime or public offense and, from the evidence taken thereat, the magistrate has ordered that such person be held to answer to the offense charged or some other crime or public offense disclosed by the evidence;

2. When the crime or public offense is committed during the term of the district court in and for the county in which the offense is committed or triable;

3. When a person accused of a crime or public offense is arrested and waives, in writing, or if before a magistrate, orally, a preliminary examination therefor, but the fact that a preliminary examination was neither had nor waived does not invalidate an information unless the defendant objects to such information because of such fact before entering the defendant's plea;

4. When a person accused of a misdemeanor or infraction, not within the jurisdiction of the magistrate to try and punish, has been arrested and admitted to bail at a place other than the county in which said offense is triable; and

5. At any time when the person accused of a crime or public offense is a fugitive from justice and such information may be needed by the governor of this state to demand such person from the executive authority of any other state or territory within the United States, or to aid the proper executive authority of the United States to demand such person of any foreign government.

HISTORY: S.L. 1890, ch. 71, § 1; R.C. 1895, § 7982; R.C. 1899, § 7982; R.C. 1905, § 9791; S.L. 1911, ch. 153, § 1; C.L. 1913, § 10628; R.C. 1943, § 29-0902; S.L. 1975, ch. 106, § 329.

NOTES: Cross-References.

Indictment and information, see N.D. R.Crim.P., Rule 7.

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NORTH DAKOTA CENTURY CODE

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TITLE 29 Judicial Procedure, Criminal
CHAPTER 29-09 Methods of Prosecution

Go to the North Dakota Code Archive Directory

N.D. Cent. Code, § 29-09-06 (2010)

29-09-06. State's attorney shall inquire into charges.

If, at a preliminary examination, a defendant is held to answer, the state's attorney or other person appointed to prosecute shall make full examination and inquiry into the facts and circumstances touching any crime or public offense alleged to have been committed, except as is otherwise provided in section 29-09-07, and triable in said county, and shall file an information charging the commission of a crime according to the facts ascertained on such examination and inquiry and from the written testimony taken before the magistrate, whether it is the offense charged in the complaint upon which the examination was had or some other offense.

HISTORY: S.L. 1890, ch. 71, § 7; R.C. 1895, § 7983; R.C. 1899, § 7983; R.C. 1905, § 9792; C.L. 1913, § 10629; R.C. 1943, § 29-0906.

NOTES: Cross-References.

Indictment and information, see N.D. R.Crim.P., Rule 7.

Contents of Information. Information May Charge Second Offense. State's Attorney Acts in Judicial Capacity.

Contents of Information.

The state's attorney may file an information for any offense covered by the allegations in the complaint, or growing out of the transaction therein set forth, or necessarily connected therewith. State v. Rozum, 8 N.D. 548, 80 N.W. 477 (1899), distinguished, State v. Dahms, 29 N.D. 51, 149 N.W. 965 (1914) and State v. Winbauer, 21 N.D. 161, 129 N.W. 97 (1910); State v. Fordham, 13 N.D. 494, 101 N.W. 888 (1904), distinguished, State v. Thompson, 68 N.D. 98, 277 N.W. 1 (1938); State v. Wisnewski, 13 N.D. 649, 102 N.W. 883 (1905).

Information May Charge Second Offense.

An information charging a named offense as a second offense may be filed in the district court, where the accused was held by justice court to answer in district court on a complaint not mentioning the crime as a second offense. State v. O'Neal, 19 N.D. 426, 124 N.W. 68 (1909); State v. Kaczor, 55 N.D. 511, 214 N.W. 800 (1927).

State's Attorney Acts in Judicial Capacity.

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LEXSTAT N.D. CENT. CODE, § 29-09-07

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TITLE 29 Judicial Procedure, Criminal
CHAPTER 29-09 Methods of Prosecution

Go to the North Dakota Code Archive Directory

N.D. Cent. Code, § 29-09-07 (2010)

29-09-07. Procedure when no information filed.

If the state's attorney, or other person appointed to prosecute in any case mentioned in section 29-09-06, determines that an information ought not to be filed, the person shall present to the court a statement in writing setting forth the person's reasons in fact and in law for not filing an information. Such statement must be filed at and during the term of the court to which the accused is held to appear for trial. The court thereupon shall examine such statement, together with the evidence filed in the case, and if, upon such examination, the court is not satisfied with such statement, the state's attorney, or other person appointed to prosecute, must be directed and required by the court to file the proper information and bring the case to trial. If the court does not require that an information be filed and the defendant is not held or wanted to answer for any other crime or public offense, the defendant must be discharged and the defendant's bail exonerated or money deposited refunded to the defendant.

HISTORY: S.L. 1890, ch. 71, § 7; R.C. 1895, § 7984; R.C. 1899, § 7984; R.C. 1905, § 9793; C.L. 1913, § 10630; R.C. 1943, § 29-0907.

NOTES:

Depleting Salary of State's Attorney.

Depleting Salary of State's Attorney.

Where trial court overruled reasons for not prosecuting which were filed by a state's attorney and appointed an attorney to prosecute the case, the district court did not have the power to enter an order depleting the official salary of the state's attorney. State ex rel. Clyde v. Lauder, 11 N.D. 136, 90 N.W. 564 (1902), distinguished, State ex rel. Ilvedson v. District Court ex rel. Ward County, 70 N.D. 17, 291 N.W. 620 (1940).

North Dakota Rules of Criminal Procedure
II. PRELIMINARY PROCEEDINGS.

N.D.R. Crim. P. Rule 3 (2010)

Review Court Orders which may amend this Rule.

Rule 3. The complaint.

(a) General.

The complaint is a written statement of the essential facts constituting the elements of the offense charged and is the initial charging document for all criminal offenses. The complaint must be sworn to and subscribed before an officer authorized by law to administer oaths within this state and be presented to a magistrate

(b) Magistrate review.

The magistrate may examine on oath the complainant and other witnesses and receive any affidavit filed with the complaint. If the magistrate examines the complainant or other witnesses on oath, the magistrate shall cause their statements to be reduced to writing and subscribed by the persons making them or to be recorded.

(c) Amendment.

The magistrate may permit a complaint to be amended at any time before a finding or verdict if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

NOTES:

EXPLANATORY NOTE

Rule 3 was amended, effective January 1, 1995; March 1, 1996; March 1, 2006; March 1, 2007.

Subdivision (a) was amended, effective January 1, 1995, to allow a complaint to be subscribed and sworn to outside the presence of a magistrate. An effect of this amendment is to allow facsimile transmission of the complaint. For a listing of officers authorized to administer oaths, see N.D.C.C. § 44-05-01. The amendment does not preclude a magistrate from examining a complainant or other witnesses under oath when making the probable cause determination.

Subdivision (a) was amended, effective March 1, 1996, to clarify that the complaint is the initial document for charging a person with a misdemeanor or felony.

Subdivision (a) was amended, effective March 1, 2007, to specify that the complaint must contain a statement of the facts that establish the elements of the offense charged.

NORTH DAKOTA CENTURY CODE COURT RULES ANNOTATED

*** AMENDMENTS TO RULES CURRENT THROUGH AMENDMENTS RECEIVED THROUGH ***
*** OCTOBER 14, 2010 ***
*** STATE COURT ANNOTATIONS CURRENT THROUGH AUGUST 30, 2010 ***
*** AND FEDERAL COURT CURRENT THROUGH DECEMBER 1, 2010 ***

North Dakota Rules of Criminal Procedure
II. PRELIMINARY PROCEEDINGS.

N.D.R. Crim. P. Rule 5 (2010)

Review Court Orders which may amend this Rule.

Rule 5. Initial appearance before the magistrate.

(a) General.

(1) Appearance upon an arrest.

An officer or other person making an arrest must take the arrested person without unnecessary delay before the nearest available magistrate.

(2) Arrest Without a Warrant.

If an arrest is made without a warrant, the magistrate must promptly determine whether probable cause exists under Rule 4(a). If probable cause exists to believe that the arrested person has committed a criminal offense, a complaint must be filed in the county where the offense was allegedly committed. A copy of the complaint must be given within a reasonable time to the arrested person and to any magistrate before whom the arrested person is brought, if other than the magistrate with whom the complaint is filed.

(b) Statement by the magistrate at the initial appearance.

(1) In all cases.

The magistrate must inform the defendant of the following:

(A) the charge against the defendant and any accompanying affidavit;

(B) the defendant's right to remain silent; that any statement made by the defendant may later be used against the defendant;

(C) the defendant's right to the assistance of counsel before making any statement or answering any questions;

(D) the defendant's right to be represented by counsel at each and every stage of the proceedings;

(E) if the offense charged is one for which counsel is required, the defendant's right to have legal services provided at public expense to the extent that the defendant is unable to pay for the defendant's own defense without undue hardship; and

(F) the defendant's right to be admitted to bail under Rule 46.

(2) Felonies.

If the defendant is charged with a felony, the magistrate must inform the defendant also of the defendant's right to a preliminary examination and the defendant's right to the assistance of counsel at the preliminary examination.

(3) Misdemeanors.

If the defendant is charged with a misdemeanor, the magistrate must inform the defendant also of the defendant's right to trial by jury in all cases as provided by law and of the defendant's right to appear and defend in person or by counsel.

(c) Right to preliminary examination.

(1) Waiver.

(A) If the offense charged is a felony, the defendant has the right to a preliminary examination. The defendant may waive the right to preliminary examination at the initial appearance if assisted by counsel.

(B) If the defendant is assisted by counsel and waives preliminary examination and the magistrate is a judge of the district court, the defendant may be permitted to plead to the offense charged in the complaint at the initial appearance.

(C) If the defendant waives preliminary examination and does not plead at the initial appearance, an arraignment must be scheduled.

(D) The magistrate must admit the defendant to bail under the provisions of Rule 46.

(2) Non-waiver.

If the defendant does not waive preliminary examination, the defendant may not be called upon to plead to a felony offense at the initial appearance. A magistrate of the county in which the offense was allegedly committed must conduct the preliminary examination. The magistrate must admit the defendant to bail under the provisions of Rule 46.

(d) Interactive television.

Interactive television may be used to conduct an appearance under this rule as permitted by N.D. Sup. Ct. Admin. R 52.

(e) Uniform Complaint and Summons.

Notwithstanding Rule 5(a), a uniform complaint and summons may be used in lieu of a complaint and appearance before a magistrate, whether an arrest is made or not, for an offense that occurs in an officer's presence or for a motor vehicle or game and fish offense. When a uniform complaint and summons is issued for a felony offense, the prosecuting attorney must also subsequently file a complaint that complies with Rule 5(a). An individual held in custody must be brought before a magistrate for an initial appearance without unnecessary delay.

NOTES:

EXPLANATORY NOTE

Rule 5 was amended effective March 1, 1990; January 1, 1995; March 1, 2006; June 1, 2006; March 1, 2010.

Rule 5 is derived from Fed.R.Crim.P. 5. Rule 5 is designed to advise the defendant of the charge against the defendant and to inform the defendant of the defendant's rights. This procedure differs from arraignment under Rule 10 in that the defendant is not called upon to plead.

Subdivision (a) provides that an arrested person must be taken before the magistrate "without unnecessary delay." Unnecessary delay in bringing a person before a magistrate is one factor in the totality of circumstances to be considered in determining whether incriminating evidence obtained from the accused was given voluntarily.

Subdivision (a) was amended, effective January 1, 1995, to clarify that a "prompt" judicial determination of probable cause is required in warrantless arrest cases.

Subdivision (b) is designed to carry into effect the holding of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966). Because the Miranda rule is constitutionally based, it applies to all officers

1 of 1 DOCUMENT

NORTH DAKOTA CENTURY CODE COURT RULES ANNOTATED

*** AMENDMENTS TO RULES CURRENT THROUGH AMENDMENTS RECEIVED THROUGH ***
*** OCTOBER 14, 2010 ***
*** STATE COURT ANNOTATIONS CURRENT THROUGH AUGUST 30, 2010 ***
*** AND FEDERAL COURT CURRENT THROUGH DECEMBER 1, 2010 ***

North Dakota Rules of Criminal Procedure
III. INDICTMENT AND INFORMATION.

N.D.R. Crim. P. Rule 7 (2010)

Review Court Orders which may amend this Rule.

Rule 7. The indictment and the information.

(a) When used.

(1) Felony.

All felony prosecutions in the district court must be by indictment after grand jury inquiry or information after preliminary examination.

(2) Misdemeanor.

All misdemeanor and other prosecutions in the district court, including appeals, must be by indictment, information, or complaint.

(b) Waiver of indictment.

[Intentionally omitted.]

(c) Nature and contents.

(1) In general.

The indictment or the information must name or otherwise identify the defendant, and must be a plain, concise, and definite written statement of the essential facts constituting the elements of the offense charged. It must be signed by the prosecuting attorney. All prosecutions except appeals from municipal courts must be carried on in the name and by the authority of the State of North Dakota and must conclude "against the peace and dignity of the State of North Dakota." Except as required by this rule, the indictment or information need not contain a formal commencement, a formal conclusion, or any other matter not necessary to the statement. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specific means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law which the defendant is alleged to have violated.

(2) Citation error.

Unless the defendant was prejudicially misled, neither an error in the citation nor its omission is a ground to dismiss the indictment or information or to reverse a conviction.

(d) Surplusage.

On motion of either party or on its own motion, the court may strike surplusage from the information or indictment.

(e) Amending an information.

Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.

(f) Bill of particulars.

The court may direct the filing of a bill of particulars. The defendant may move for a bill of particulars before arraignment or within one day after arraignment or at a later time if the court permits. The motion must be in writing and must specify the particulars sought by the defendant. A bill of particulars must be granted if the court finds it necessary to protect the defendant against a second prosecution for the same offense or to enable the defendant to adequately prepare for trial. A bill of particulars may be amended at any time subject to such conditions as justice requires.

(g) Names of witnesses to be endorsed on indictment or information.

When an indictment or information is filed, the names of all the witnesses on whose evidence the indictment or information was based must be endorsed on it before it is presented. The prosecuting attorney, at a time the court prescribes by rule or otherwise, must endorse on the indictment or information the names of other witnesses the prosecuting attorney proposes to call. A failure to endorse those names does not affect the validity or sufficiency of the indictment or information, but the court in which the indictment or information was filed must direct the names of those witnesses to be endorsed on application of the defendant. The court may not allow a continuance because of the failure to endorse any of those names unless the application was made at the earliest opportunity and then only if a continuance is necessary in the interests of justice.

NOTES:

EXPLANATORY NOTE

Rule 7 was amended effective March 1, 1990; January 1, 1995; March 1, 1996; March 1, 2006; March 1, 2007.

Rule 7 is an adaptation of Fed.R.Crim.P. 7 and controls all indictments and informations. Although North Dakota provides that a defendant may be prosecuted by indictment or information, indictments are seldom used.

Subdivision (a) was amended, effective January 1, 1995, in response to county court elimination. The amendment allows misdemeanors to be charged by complaint in district court, and for the inclusion of misdemeanor charges with felony charges in an indictment or information.

Subdivision (a) was amended, effective March 1, 1996, to clarify that even though a felony is initially charged by complaint, the subsequent prosecution must be by indictment or information.

Subdivision (b) entitled "Waiver of Indictment" is retained in title and number only to conform with the outline and form of Fed.R.Crim.P. 7. Article I, Section 10 of the North Dakota Constitution provides that an individual must be prosecuted by indictment in cases of felony unless otherwise provided by the legislature, but in all cases either by information or indictment. Since the legislature has provided the state with an alternative to a prosecution by indictment in N.D.C.C. § 29-09-02, it follows that under the state constitution, there is no right in the accused to demand prosecution by indictment.

The language of subdivision (c), "must be carried on in the name * * * of the State of North Dakota," does not mandate a change in the style of prosecution before municipal courts. The purpose of the indictment or information is to inform the defendant of the precise offense of which the defendant is accused so that the defendant may prepare the defendant's defense and further that a judgment will safeguard the defendant from subsequent prosecution for the same offense. The language employed in subdivision (c) is intended to provide the defendant with the Sixth Amendment protection to "be informed of the nature and the cause of the accusation * * * ." With this view in mind, subdivision (c) is established for the benefit of the defendant and is intended simply to provide a means by which the defendant can be properly informed of the proceedings without jeopardy to the prosecution.

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1192

TESTIMONY TO THE SENATE JUDICIARY COMMITTEE

Prepared by Cherie Clark Cass County Assistant State's Attorney

March 8, 2011

Testimony on HB 1192

Chairman Nething and members of the Senate Judiciary, I am here today to offer support for HB 1192. HB 1192 is an attempt to harmonize existing court rules with outdated legislative statutes regarding the criminal justice process.

The North Dakota Supreme Court through the North Dakota Rules of Criminal Procedure has already created rules governing the criminal justice system. The specific statutes that HB 1192 seeks to repeal are currently covered in ND Rules of Crim. Pro. 3, 5 and 7.

The current legislative statutes (which have been in existence since statehood and were last updated between the 1940's and 1970's) are no longer applicable since many of their underlying reasons for being created are no longer in existence. This is because when the courts unified in 1995 there were no longer county courts. However, with the current law on the books our Supreme Court has had to distinguish between the rules and the statutes. In State v. Noorlun, 2005 ND 189, our Supreme Court indicated, "The underlying rationale of Dimmler and Hersch was that a felony complaint filed in a county court without jurisdiction to hear, try, and determine the action was insufficient to commence the action under N.D.C.C. § 29-04-05. However, the applicable law has changed since *Dimmler* and *Hersch* were decided, with the abolishment of county courts, effective January 1, 1995."

Additionally, HB 1192 does request a clarification to NDCC 29-04-05 which provides when a criminal action is legally begun. This is significant since when an action begins directly relates to when the statute of limitations for prosecution of a crime runs out. For example, under current law the action is commenced when the "information" is "presented." However, under the current dual legislative and court rules structure, when the information is technically "filed" is unclear.

This clarification and update to North Dakota Statutes would make navigating the rules clearer and more consistent with current trial court practice.

Thank you.