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December 19, 2023

N.H. Supreme Court
1 Charles Doe Drive
Concord, NH 03301

Via e-filing

Ref: R-2023-0008, Proposals to the Rules of Criminal Procedure Rules 1-19

Chief Justice MacDonald and Justices:

Thank you for considering my attached comments concerning the proposed changes to Rules 1 through 19 of the New Hampshire Rules of Criminal Procedure.

The proposed rules have, in my opinion, a substantial risk of prompting increased litigation, may negatively impact court operation and docket management at both the Circuit Court and Superior Court levels and, in some instances, appear to run afoul of jurisdictional limits imposed by statutes. I appreciate your collective scrutiny on these proposals as you conduct your review and analysis.

Please feel free to contact me with any questions.

12/19

Paul Halvorsen
Merrimack County Attorney

Attachment: Input on proposed changes to New Hampshire Rules of Criminal Procedure 1-19

Attachment 1

December 19, 2023 Letter from Merrimack County Attorney Halvorsen
Re: R-2023-0008, Proposed Changes to New Hampshire Rules of Criminal Procedure 1-19

Rule 4(a)(2)

General Recommendation: Change the wording of the proposed Rule 4(a)(2) to identify a "best practice" rather than mandate a complaint be filed "no later than one (1) hour prior to the arraignment" for a detained individual.

Specific Suggestions:

- At Rule 4(a)(2) change the current one and only sentence in the paragraph to read: "***If a defendant is detained pending arraignment, it shall be best practice to file any complaint with the court no later than one (1) hour prior to the scheduled arraignment.***"

- At Rule 4(a)(2) add a subsequent and final sentence to the paragraph the Court ultimately wishes to adopt saying: "***The inability to meet the provisions of this rule shall not constitute a basis for dismissal of any filed complaint or discharge of any otherwise existing bail order.***"

- Add a sentence in the rule, at an appropriate location to be determined by the Court and in wording to be determined, that prohibits local courts from increasing the timeframes specified in the court rule.

Discussion: Proposed Rule 4(a)(2) does not contain guidance for a court as to what remedy or remedies should exist if the State does not meet the specified 1-hour time limit established by the Rule. A lack of guidance on any remedy does not ensure statewide court-to-court consistency in application of the Rule. Additionally, at least one local court served by my office has already indicated a proposed local requirement that materials "must" be submitted "no later than 90 minutes prior to the arraignment" in order, I believe, to allow adequate internal processing time while taking into account other court obligations and staff tasking (quotes are from a court handout sheet). The local court requirement, as put forward, appears to contradict the materials presented in a webinar conducted on the afternoon of December 18th where court representatives commented that the rule is "one hour." The three specific suggestions above act in unison to meet the goals established in Rule 1 – specifically "simplicity in procedure" and "fairness in administration."

Additionally:

- The proposed rule addressing detained defendants and requiring filing of a complaint "no later than one (1) hour prior to the arraignment" should be the statewide goal with an understanding and allowance that sometimes circumstances may exist where the goal of filing one hour before arraignment cannot be met.

- The proposed rule addressing detained defendants and requiring filing of a complaint "no later than one (1) hour prior to the arraignment" does not allow for the complicated and difficult process associated with serious felonies. I am confident that State prosecutors certainly will endeavor to meet established time limits. However, in serious felony cases, writing materials consisting of complaints, affidavits and associated documents may run up against or fall within the 1-hour established by the proposed rule.

- The proposed rule may also be unworkable in other situations:

    - The filing of complaints when a defendant is detained involves at least four agencies including: 1) The arresting agency, 2) the holding location where an individual is detained, 3) the State (prosecutor) and 4) the Court. Difficulties within each agency in meeting specific time limits can occur in many forms including, but certainly not limited to, (in no particular order):

        - In the event courts schedule early arraignments, the ability of a police department to process a defendant and their complaint(s) could be extremely time limited. Smaller departments with few officers (i.e. a town with only three officers) would be particularly impacted. Add in an arrest that occurs after 2:00 a.m. or 3:00 a.m. and the impact is compounded. Add a 50-minute drive to the County holding facility or an individual who must be medically cleared at a hospital before transport to a holding facility and the issue is compounded even further.[1] Remember, too, that accurate complaints and comprehensive affidavits must also be completed.

[1] For example: The Newbury Police Department, a department located in Merrimack County, typically has one officer available per shift and is serviced by the 5th Circuit Court in Newport, which is located in Sullivan County. Google Maps indicates a good weather drive time of just under an hour from the Newbury Police Department to the Merrimack County Jail which is located in Boscawen. Inclement weather and/or a required stop at Concord Hospital to medically clear a defendant would dramatically increase travel time and therefore dramatically reduce an arresting officer's time available for completing reports, affidavits and complaints.

- Any involved prosecutor may already be subject to being in court on other matters such as trials, motion hearings and other arraignments. When a prosecutor receives a complaint while in court, that case package must be read and reviewed before filing. In my 17+ years of courtroom experience prosecuting in the criminal courts, I can say that such circumstances happened almost daily and across several police agencies.

- If, due to a scheduling conflict, a court needs to reschedule an arraignment on a detained individual to an earlier time than originally scheduled, the last minute change may, dare I say usually will, result in an inability to meet the "one (1) hour prior to arraignment" standard in proposed Rule 4(a)(2).

- In circumstances where a police department has multiple arrests, it is reasonable to assume that the practical ability to meet the proposed time expectation outlined in proposed Rule 4(a)(2) will be compromised. There are just so many hours in a day and just so many officers available in a shift. This is especially true in the smaller department throughout rural New Hampshire.

Rule 4(g)(1)

General Recommendation: Concurrent to action on this proposal, initiate the merging of two court forms into one.

General Recommendation: Add wording to the proposed rule change indicating that a defendant who waives an arraignment on a class A misdemeanor is deemed to have received notice of the State's intent to seek class A misdemeanor penalties when the State timely files timely notice with the Court.

General Recommendation: Allow notice of the State's intent to seek class A penalties to be accomplished concurrent with the court's notice of charges to a defendant in accordance with Rule 4(g)(2).

Specific Suggestions:

- Take concurrent action, in addition to acting on these rule proposals, to merge form NHJB-2618-D [Notice of Intent to Seek Class A Misdemeanor Penalties, revised 01/01/2020] with and into form NHJB-2962-D [State of New Hampshire Complaint, revised 10/02/2023].

- Delete "***with proof that a copy was provided to the Defendant by the State***" from proposed Rule 4(g)(1).

- Add language to the end of Rule 4(g)(1) indicating: "***A defendant who waives arraignment on a class A misdemeanor under Rule 4(c) where the State has timely filed notice with the Court to seek class A penalties shall be deemed to have received such notice.***" The rationale for this language is that the State should not be penalized for failing to notify a defendant of the State's intent to seek class A misdemeanor penalties when a defendant nullifies the State's opportunity to provide such notice "before or at" a defendant's arraignment. See additional comments in "discussion," below.

Discussion: The proposed rules require two court specified forms where one consolidated form, even if two pages in length, would better serve the intent of the court as well as meet legislative requirements. As forms are under the control of the courts, see RSA 490:26-d, the consolidation of two forms into one form can be accomplished unilaterally with no (or, at most, minimal) outside coordination.

- Proposed Rule 4(g)(1) mandates the use of form NHJB-2618-D [Notice of Intent to Seek Class A Misdemeanor Penalties]. This form is used in conjunction with and in addition to form NHJB-2962-D [State of New Hampshire Complaint].

- Use of two forms to accomplish notice is clearly duplicative. A criminal complaint already provides notice of the charge and level of offense. Incorporating, by consolidation, additional statutory notice materials into the basic complaint form would reduce paperwork. **Additionally, such consolidation of forms would allow the courts to meet their requirements under Rule 4(g)(2) [court to notify a defendant of "charges" and "possible penalties"] in a more efficient manner. Indeed, it also seems counterintuitive that one agency (the court) would provide notice of charges and penalties, as in proposed Rule 4(g)(2), and another agency (the prosecutor) must serve an additional form to a defendant giving identical notice, as in proposed Rule 4(g)(1).**

- The language in proposed Rule 4(g)(1) requiring the State to serve form NHJB-2618-D [Notice of Intent to Seek Class A Misdemeanor Penalties] to a defendant appears to unduly expand the public policy established by the legislature in RSA 625:9 IV(c)(2). This statute, 625:9 IV(c)(2), only requires that the "state files a notice of intent to seek class A misdemeanor penalties." It is well settled that the courts do not establish public policy. See Appeal of the State of New Hampshire (New Hampshire Public Employee Labor Relations Board), _____ N.H. _____ (2021-0248, opinion issued July 21, 2022) ["... **it is not the court's role to second-guess the legislature**. Matters of public policy are reserved for the legislature." (Emphasis in **bold** added)]. Deleting the wording "***with proof that a copy was provided to the Defendant by the State***" from proposed Rule 4(g)(1) removes any possible tension with the legislatively set public policy contained in RSA 625:9 IV(c)(2).

- Incorporation of the two forms into one would comply with RSA 625:9 IV(c)(2) [notice of intent required] and RSA 490:26-d [court forms are under the control of the courts].

Rule 6(a)(5), 6(a)(7) and 6(a)(8)

General Recommendation: Clearly identify that misdemeanor and violation marijuana charges must also transfer to Superior Court when they are associated with a bound over felony.

Specific Suggestion: At Rule 6(a)(5) and 6(a)(7) add in each section the words, including parenthesis, " ***(including misdemeanor and violation marijuana offenses)*** " after the words "… directly related misdemeanors and violations … ."

Specific Suggestion: At Rule 6(a)(8) add the words, including parenthesis, " ***(including misdemeanor and violation marijuana offenses)*** " after the words " … violation level charges … ."[2]

Discussion: Pursuant to two statutes that become effective on January 1, 2024, all misdemeanor and violation offenses must accompany a bound over felony. Several recent meetings in Circuit Courts that are covered by my office have indicated that Circuit Courts believe that marijuana cases that are directly related with a bound over felony will remain in the Circuit Court. However, this position does not comply with statutes that become effective on January 1, 2024.

- Effective January 1, 2024, RSA 592-B:1 will read, in relevant part:
  - "592-B:1 Jurisdiction. The superior court **shall have jurisdiction** over felony complaints **and misdemeanors and violation level charges that are directly related to those felonies**." (Emphasis in **bold text** added.)
- Also effective on January 1, 2024, RSA 592-A:4-a will read:
  - "592-A:4-a Binding Over by Justice. A justice of the circuit court district division may cause to be apprehended and committed to jail or bound over with sufficient sureties to the superior court all persons charged with offenses committed or triable in the county exceeding the justice's jurisdiction to try **and any directly related misdemeanor or violation level offenses**." (Emphasis in **bold text** added.)
- Circuit Courts, being established by statute and having limited jurisdiction by statute, have been divested, by statute, of jurisdiction on any violation or misdemeanor that is "directly related" to a bound over felony. The contents of RSA 592-A:4-a and RSA 592-B:1 do not include any exceptions for marijuana offenses. Our legislature could have carved out an exception for marijuana offenses; however, they did not. Our courts follow the well-settled basic rules of statutory interpretation that clearly instruct courts in New Hampshire to read the

[2] Drafters of the proposed rules were inconsistent in phrasing sections of proposed Rules 6(a)(5), 6(a)(7) and 6(a)(8). Accordingly, identical edits/additions were not possible.

words of a statute using the "plain and ordinary meaning" of the words used by the legislature and to interpret statutes using the legislative language "as written." Our courts are also instructed to "not consider what the legislature might have said or add language the legislature did not see fit to include."

- While the legislature did not specifically amend RSA 318-B:2-d, which addresses the issue of a plea by mail for certain marijuana offenses, the legislature none-the-less divested the Circuit Court of jurisdiction over marijuana offenses "directly related" to a felony that is bound over to the Superior Court. The ability to plea by mail to a Circuit Court remains in place for marijuana charges in cases where jurisdiction remains within the Circuit Court (i.e.: charges not associated with a bound over felony). Accordingly, there is no tension between the several statutes.

- Moving a marijuana offense to Superior Court with a bind over in a "directly related" felony also makes sense to ensure that a defendant does not inadvertently jeopardize his or her position or possible defenses in a bound over felony charge.

Rule 7(c)

General Recommendation: Rewrite the last line in proposed Rule 7(c) to better define marking requirements for indictments that do not address identical charges filed and pending in Circuit Court.

General Recommendation: No matter the final wording included in Rule 7, specify exactly where and how the anticipated information that cross references the Circuit Court case and charge number is entered. When adding this proposed cross referencing information there exists a very real possibility, indeed a high probability, that a prior judicial finding of probable cause is revealed to a grand jury when an indictment is presented.

Specific Suggestions:

- Reword the last sentence in proposed Rule 7(c) to read as follows: "**An Indictment must indicate either the corresponding Circuit Court case number and charge ID or, if no identical offense exists within a pending Circuit Court case, the words 'Direct Indictment'.**"

- I have no specific suggestion as to where and how to include the cross referencing information on an indictment. However, this Court should write and include specific directions to avoid placing an indication of a prior judicial finding of probable cause in front of a grand jury.

Discussion: While frankly I believe that this proposed wording, re: cross referencing, need not be included for several reasons (i.e. possible follow-on litigation as to what constitutes a sufficient indictment or causing prejudice to a grand jury which is supposed to be unbiased) I understand the desire to implement a management tool to avoid duplication between courts. However, the proposed rule uses the terms "case" and "charge ID" almost interchangeably and that usage will lead to confusion rather than the clarification the rule seeks. I believe the use of the wording in my specific suggestion can allow Superior Court indictments to be matched to a specific Circuit Court case and charge ID number while also allowing indictments on offenses which are **not** pending in an already existing Circuit Court case to be clearly identified as such.

I will defer to the Court on the issues of how inclusion and placement of cross referencing comments impacts the issue of a sufficient indictment or probable prejudice to a grand jury.

Rule 18(a)

General Recommendation: Add text to Rule 18(a) to establish a judicial district (circuit) rule parallel to the rule that applies to prosecution of an offense in the Superior Courts.

Specific Suggestion:

- Change and add text as follows.
    - Change the following text in Rule 18(a): Change "***judicial district***" to "***judicial circuit***."
    - Add the following text to Rule 18(a): "***If part of an offense is committed in one judicial circuit, and part in another, the offense may be prosecuted in either judicial circuit.***"

Discussion: The language of this rule should adopt the term "circuit" to parallel the current structure of the Circuit Courts. Additionally, the ability to prosecute offenses where part of an offense is committed in one circuit and part is committed in another circuit should be made clear in this rule and in doing so the judicial circuit rule should parallel that of the Superior Court rule.

Rule 19(3)

General Recommendation: Establish a remand process from Superior Court to Circuit Court (District Division) for misdemeanor and violation charges that were associated with a felony when the State is unable to proceed on the felony(ies) contained within a bind over.

Specific Suggestion:

- Add language to Rule 19 by adding a paragraph 4 saying: "***When a felony having any directly related misdemeanors and/or violations is bound over to Superior Court and the State is unable to proceed on all bound over felonies in that case, the Superior Court shall remand the misdemeanors and/or violations along with a transfer of bail conditions to the originating Circuit Court.***"

Discussion: The appropriateness of this suggestion can be illustrated by an example. A civilian witness calls 911 to report a vehicle is being operated in an erratic manner. That vehicle is stopped minutes later for a yellow line violation level offense. The motor vehicle stop results in a DWI arrest which ultimately results in a blood draw. Additionally, a felony drug charge results from the event. All charges are bound over to the Superior Court under proposed Rule 6 and RSA 592-A:4-a.[3] Later litigation in the Superior Court results in a motion to suppress the felony level drugs being granted and therefore the State is unable to proceed on the sole felony. The misdemeanor and violation level offenses are unaffected by the suppression litigation. RSA 592-A:1 does not allow the Superior Court to dismiss the remaining misdemeanor and violation charges[4] and proposed Rule 19 prohibits a transfer of the remaining DWI and yellow line offenses to the Circuit Court.[5] In the end you have, in Superior Court, a several hour trial on one class B misdemeanor DWI and one violation yellow line offense where the State's case-in-chief involves at least one civilian witness, the arresting officer, a phlebotomist, the evidence technician and laboratory analyst. This scenario is not unreasonable and is repeatable in several permutations across charges available in the criminal and motor vehicle codes. It is an unreasonable end result to expend limited Superior Court assets of time and resources on issues better resolved in a Circuit Court. Additionally, in my example, other than conducting a trial in the Superior Court it appears that the only remaining option to return the case to the Circuit Court, based on statutes and proposed rules, is for the State to enter a *nolle prosequi* on the charges remaining in the Superior Court and then recharge the defendant in Circuit Court on the lower level offenses. This

[3] The proposed Rule 6 requires the Circuit Court to bind over "any directly related misdemeanors and violations to the Superior Court" with the bound over felony charge(s). This portion of the Rule duplicates RSA 592-A:4-a.
[4] RSA 592-A:1 prohibits a Superior Court from dismissing charges which began in Circuit Court.
[5] Proposed Rule 19(3) prohibits any transfer of cases from the Superior Courts to the Circuit Courts unless otherwise allowed by a statute or rule. The writer of this letter is not aware of any statute prohibiting a transfer of misdemeanors or violations back to the Circuit Court where the issue originated.

will ultimately require an additional arraignment of the same defendant in Circuit Court. Frankly, that process drags out the issue even longer and is certainly not appropriate from the viewpoint of both a defendant (who begins the adversarial process anew) and the court (which now must use limited docket time to re-arraign an individual). The lack of a remand process in these types of events seems unreasonable.

Miscellaneous Rule Issues:

- Many proposed rule changes appear to be adjustments which are not related to those rules necessary to returning initial felony proceedings to the Circuit Court. Some examples include changes involving capitalization of various terms and updates to the use of pronouns. While some of these changes are or may be appropriate, to execute those changes within only 19 of the 53 rules within the Rules of Criminal Procedure only manages to update just over 1/3 of the rules and create an internal inconsistency where none existed prior.

    - **Specific Suggestion:** Changes along the lines of those outlined above should not be executed in part with pending changes. Such changes would be better addressed in a later comprehensive update to the rules. Such an approach will permit all these types of updates to be executed at once and thereby maintain internal consistency.

- Several attorneys I spoke with have mentioned that they identified conflict or misalignment with other govern directives (i.e. other statutes). Some issues that were mentioned I, too, identified and included in this letter. I will defer to submissions from others as well as the Committee's review concerning issues I may have overlooked or deemed covered in other possible submissions.