#2016-014

New Hampshire Appellate Defender Program

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December 5, 2016

Carolyn Koegler, Clerk
Advisory Committee on Rules
c/o New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

RE: Proposed Rule relating to procedure for *in camera* review of confidential records

To Whom it may concern:

I write to propose an amendment to the Rules of Criminal Procedure relating to the procedure used by trial courts when conducting the *in camera* review of confidential records. I also propose a corollary rule for the Supreme Court's appellate review of rulings on such matters.

Enclosed with this letter is a memorandum setting forth the proposed rules, with an explanation of the reasoning motivating the proposals. Please let me know if I can provide any further information of use to the Rules Committee.

Sincerely,

Christopher M. Johnson
Chief Appellate Defender

CC: Attorney General's Office

To: New Hampshire Supreme Court Rules Committee
From: Christopher M. Johnson
Date: December 2, 2016

In order to explain the motivation and analysis supporting the proposed rule, this memorandum first describes the current state of the law with respect to the procedure for trial court and appellate *in camera* review of confidential records. The memorandum then sets forth a proposed rule for trial court *in camera* review, and one for Supreme Court appellate review. Finally, the memorandum describes some of the considerations that motivated various features of the proposed rules.

I. The Current System for *in camera* review of confidential records

A. Trial Court

The possibility of *in camera* review of confidential records tends to arise in criminal cases when a party, usually the defense, believes that exculpatory evidence may exist in confidential or legally-privileged records. A variety of institutions – therapists, medical institutions, schools, and the like – may hold confidential or privileged records that document information about a person who will be a witness in a criminal case. In considering whether to allow access to the records, and whether ultimately to make their contents available for use at trial, a court must balance two competing considerations: the privilege-holder's interest in the privacy of her confidential communications, and the defendant's interest in a fair trial and the opportunity to present a full defense. See State v. Taylor, 139 N.H. 96, 98 (1994) (articulating those interests).

At present, trial courts balance those interests via a two-phase process. First, the party seeking *in camera* review and, ultimately, availability for use at trial, must make the requisite showing to trigger the trial court's obligation to obtain the records in question and undertake an *in camera* review of them. In keeping with the fact that disclosure of privileged information only to the judge involves a "minimal" intrusion, and given also the reality that a party cannot be expected to prove precisely what will be in records before the party has been able to see them, the standard for triggering *in camera* review is not unduly high. State v. Graham, 142 N.H. 357, 363 (1997). Specifically, that standard calls upon the court to determine only whether the defense has demonstrated a reasonable probability that the records in question contain information that is "relevant and material" to the defense. State v. Gagne, 136 N.H. 101, 105 (1992). If the defense makes the requisite showing of a reasonable probability, the court obtains and reviews the records *in camera* and the analysis proceeds to the second phase.

In that second phase, the court must decide whether to allow the use at trial of any information or documents contained in the record it reviews *in camera*. Under the prevalent interpretation of present doctrine, the court must make that decision *in camera*, without the benefit of the informed arguments of counsel. See Petition of State (State v. MacDonald), 162 N.H. 64 (2011) (holding that court erred in seeking to involve trial counsel in analysis of admissibility of records reviewed *in camera*). Counsel can supply the court with pleadings generally describing the kind of information that, if present in the records, would be useful at trial, but counsel cannot see the records themselves unless and until the court finds that the records contain information meeting the standard for availability for use at trial. Thus, counsel cannot make arguments tailored to the specific contents of the records the court reviews *in camera*. Under the current standard, records can be made available for use at trial only if they contain information that is "essential and reasonably necessary" to the defense. Gagne, 136 N.H. at 104-05.

B. Supreme Court

The parties can challenge, in the Supreme Court, adverse rulings made by the trial court at either the "triggering" phase or the "availability for use at trial" phase. An adverse ruling made at the triggering phase involves no complexities pertinent to the rule here, as the implication of such an adverse ruling is that the trial court should have conducted an *in camera* review of specified records, and erroneously refused to do so. In that circumstance, the trial court has not actually gathered or reviewed any confidential records. The Supreme Court therefore will not have confidential records to review.

Adverse rulings made in the "availability for use" phase of the analysis, though, present complexities because they involve appellate review of a decision made *in camera* in the trial court. Grounds for an appeal potentially exist in any case in which, after reviewing records *in camera*, the trial court decides to disclose something less than all the records reviewed. With regard to any records withheld from disclosure after *in camera* review, there is the possibility that the trial court erred – that is, there is the possibility that some information in the undisclosed documents is in fact "essential and reasonably necessary" to the defense. As a matter of appellate procedure, under current doctrine, appellate counsel stands in the same position as trial counsel stood in the trial court; counsel has no access to the documents found by the trial court not to be "essential and reasonably necessary" to the defense. See State v. Hilton, 144 N.H. 470, 476 (1999) (noting that courts are capable, without assistance of counsel, of determining whether confidential records contain information relevant and material to defense).

As a result, the Supreme Court is left to review the undisclosed records *in camera*, without the benefit of an analysis in an appellate brief as to why any particular item of information in the records should have been found to be essential and reasonably necessary to the defense.

II. The Proposed Rules for *in camera* review of confidential records

A. Trial Court

At present, judicial decisions structure and describe the procedures associated with the review of confidential records and the analysis of their availability for use at trial. Therefore, in the absence of a current court rule to amend, the proposed trial court procedure takes the form of a new rule to be placed in Section VIII ("Rules Applicable in All Criminal Proceedings) of the Rules of Criminal Procedure.

Rule 54. Procedure for Review and Evaluation of the Admissibility of Information Contained in Confidential Records

(a) Triggering *in camera* review of confidential records.

(1) A party seeking to discover evidence contained in privileged or confidential records shall bear the burden of showing a reasonable probability that the confidential or privileged records contain information that is relevant to the case.

(2) Upon finding that a party has made the requisite showing, the court shall order the custodian or possessor of the records in question to produce them to the court for an *in camera* review.

(b) Procedure for initial *in camera* review of confidential records.

(1) Upon receiving records ordered produced under paragraph (a), the court shall review the records in order to determine whether, in fact, they contain any information relevant to the case.

(2) The parties may provide the court with memoranda describing the kinds of information that would be relevant to the case. However, in conducting its review of the records for relevant information, the court shall maintain the confidentiality of the records, and not disclose them to the parties or their counsel. Nothing in this paragraph shall prevent the court from enlisting the assistance of court staff in the review of the records.

(3) To the extent that the court finds that the records, or parts of the records, contain information that is not relevant to the case, the court shall, without revealing the content of the non-relevant information in the records, notify the parties of that finding. In order to preserve such

records for potential appellate review, the court shall maintain a copy of the non-relevant records under seal, not subject to review by the public, the parties, or counsel.

(4) If the court finds that the records, or parts of the records, contain information that is relevant to the case, the court shall disclose that relevant information to counsel for the parties, subject to an appropriate protective order shielding the records from further disclosure.

(c) Determination regarding the availability for use at trial of information contained in privileged or confidential records.

(1) After disclosing to counsel for the parties the information found to be relevant to the case, the court shall permit counsel to be heard on the question of whether the disclosed content of the records shall be available for use at trial.

(2) Counsel for a party seeking to have information in the records made available for use at trial shall bear the burden of showing that such information is reasonably necessary to that party's case at trial.

(3) To the extent that the court finds that the disclosed records, or parts thereof, are not reasonably necessary to any party's case, the court shall order that such information will not available for use at trial. In order to enable appellate review of that decision, the court shall maintain a copy of such records in the file under seal, not subject to review by the public. Such records shall not be commingled with any records maintained under seal in accordance with paragraph (b)(3).

(4) To the extent that the court finds that the records, or parts of the records, contain information that is reasonably necessary to a party's case at trial, the court shall direct that such information shall, subject to the Rules of Evidence, be available for use at trial.

(d) Alternative procedure in certain cases.

(1) In all cases, the court shall follow the procedure defined in paragraphs (a) and (b)(1) – (3) of this rule. However, in either of the circumstances described in paragraph (d)(2) of this rule, the court shall employ the alternative process described in paragraph (d)(3) in place of the process defined in paragraphs (b)(4) and (c).

(2) The court shall employ the alternative procedure in any case in which either:

(i) the defendant has chosen self-representation in lieu of representation by counsel; or

(ii) although represented by counsel, the defendant declines to waive the right to insist that counsel reveal or otherwise share with the defendant access to the confidential records prior to a finding by the court that those records shall be available for use at trial.

(3) When using the alternative procedure, the court shall examine the records *in camera*. A party may provide the court with memoranda describing the kinds of information that would be reasonably necessary to the party's case. However, in conducting its review of the records, the court shall maintain the confidentiality of the records, and shall not disclose them to the parties or their counsel. Nothing in this paragraph shall prevent the court from enlisting the assistance of court staff in the review of the records. Upon making a finding that the records, or parts thereof, are reasonably necessary to a party's case at trial, the court shall disclose such records to counsel. With respect to records the court reviews but finds not to be reasonably necessary to a party's case a trial, the court shall maintain a copy of those records under seal, not subject to review by counsel, the parties, or the public. Records maintained under seal because found not to be subject to disclosure under this rule shall not be commingled with records maintained under seal in accordance with the process defined in paragraph (b)(3).

B. Supreme Court

Rule 12 of the Supreme Court Rules describes some procedures relating to the confidentiality of records in the Supreme Court. That rule, though, focuses in the main on questions of the designation of records as confidential, and on procedures for considering whether to grant public access to such records. It does not address in detail how the Court will involve the parties on appeal in a challenge to a trial court ruling refusing to disclose, or to release for use at trial, records kept under seal in the trial court. For that reason, the proposal here drafts a new rule, rather than suggesting any amendment to Rule 12. The proposal envisions that Rule 12 will continue in force unchanged, and that the proposed rule – here provisionally numbered Rule 12-A, would address procedures not covered by Rule 12.

Rule 12-A: Procedure in Appeals Alleging Error in connection with *in camera* review of Privileged Records.

(1) In all cases in which relief is sought in the Supreme Court on the ground that the trial court erred in failing to disclose information contained in confidential records reviewed *in camera* by the trial court and held under seal pursuant to Rule 54(b)(3) of the Rules of Criminal Procedure, the trial court shall transfer to the Supreme Court such records held under seal. Such records shall be held under seal in the Supreme Court, not subject to examination by the parties, counsel, or the public. Nothing in this paragraph shall prevent the Court from enlisting the assistance of court staff in the review of the records.

(2) In all cases in which relief is sought in the Supreme Court on the ground that the trial court erred in failing to make available for use at trial information contained in confidential records reviewed *in camera* by the court and held under seal pursuant to Rule 54(c)(3) of the Rules of Criminal Procedure, the trial court shall transfer to the Supreme Court such records held under seal. Such records shall be held under seal in the Supreme Court, not subject to examination by the parties or the public. However, to the extent that trial counsel had access to the records for the purpose of arguing their availability for use at trial, appellate counsel shall likewise have access for the purpose of discussing the content of the sealed information in the briefs on appeal. Briefs containing references to materials held under seal in the Supreme Court shall likewise be filed under seal. Nothing in this paragraph shall prevent the Court from enlisting the assistance of court staff in its review of the records.

(3) If a party is proceeding *pro se* on appeal, or if a represented party declines to consent to the procedure described in paragraph (2) with respect to documents sealed under Rule 54(c)(3), the sealed record shall not be made available to counsel, and shall instead be reviewed by the Court *in camera* in accordance with the procedure described in paragraph (1).

III. Explanations in support of the proposed rule.

A. Trial Court

The proposed rule makes only one change to the first phase – the "triggering" phase – of the process. Specifically, the proposed rule would rephrase the standard for triggering *in camera* review from the present "relevant and material," to "relevant." Standards that use more than one term, at least where the terms are not understood in the legal sense to be synonyms, imply a multi-prong analysis. Here, thus, the current law's "relevant and material" standard seems to indicate that, to trigger *in camera* review, the defense must show the requisite likelihood that the documents contain information that is both relevant and material. The difficulty is that the category of "material" information is, as far as I can tell, a wholly included subset within the category of "relevant" information. That is, all information that is "material" is necessarily also "relevant," but not all "relevant" information is "material." If this analysis of the concepts of "relevance" and "materiality" is correct, it therefore makes sense to make the triggering standard either "relevance," or "materiality," depending on how demanding one thinks the standard should be to trigger the right to have the court conduct *in camera* review.

For a couple of reasons, the proposal prefers "relevance" to "materiality" for use as the standard at this phase of the process. First, the concept of "materiality" involves an assessment of the importance of the information in the case, relative to other information in the case. At the pre-trial stage, though, the trial court will often not have a great deal of information about the contents of discovery, the parties' anticipated factual theories, etc. At that early stage of the case, trial courts therefore seem better equipped to apply a standard of "relevance" than a standard of "materiality." Second, the standard of relevance seems more fair, given the procedural context. As the Supreme Court has noted, "[i]n determining whether an *in camera* review is warranted, . . . trial courts cannot realistically expect defendants to articulate the precise nature of the confidential records without having prior access to them." Gagne, 136 N.H. at 105. Thus, "[t]his threshold showing is not unduly high." State v. Guay, 162 N.H. 375, 384 (2011) (citation and quotation marks omitted). The concept of "relevance" seems better suited than the concept of "materiality" to reflect a standard the Court has defined in terms of its contrast with "bare conjecture." See id. ("At a minimum, a defendant must present some specific concern, based on more than bare conjecture, that, in reasonable probability, will be explained by the information sought.") Thus, the initial phase of *in camera* review should be triggered if the defense can show a reasonable basis for believing that the confidential records contain some relevant information about the alleged crime or an anticipated defense.

For similar reasons, the proposed rule includes a clarification of the "essential and reasonably necessary" standard, employed in the "availability-for-use-at-trial"

phase of the analysis. See Guay, 162 N.H. at 385-87 (2011) (Lynn, J., concurring) (noting lack of clarity in that standard). In that opinion, Justice Lynn noted that "while all information that is 'essential' to the defense is also 'reasonably necessary' to the defense, the converse is not true: there may be some information that is '*reasonably* necessary' to the defense that falls short of being '*essential*' to the defense." Id. at 387. Given the choice between the two standards, the proposed rule opts for "reasonably necessary." In part, this reflects the difficulty of applying the higher standard of "essential" in the pre-trial context. In part, the choice reflects the view that the judicial branch ought prioritize the goal of ensuring that trials are fair, and that if the defense can show that certain information is "reasonably necessary" to the defense, that information ought be available for use at trial.

The principal change contained in the proposal involves the division of the *in camera* review stage of the process into an initial phase, conducted by the judge alone, and a second phase, in which counsel is also involved. Under present practice, as noted above, once the triggering showing is made, the court reviews the records largely without the input and assistance of the lawyers. That process survives in the proposed rule only as the alternative procedure. The idea behind the proposal is that, except in cases in which the alternative procedure must be retained, the quality of the court's *in camera* review will be improved if counsel can participate. In effect, the proposal seeks to bring to bear the systemic advantages of adversary process to the important task of determining whether information documented in confidential records should be available for use at trial. A need for counsel's informed participation arises especially because *in camera* review must happen before trial, at a time when trial counsel will be much better able than the court to recognize what kind of information could prove reasonably necessary to the presentation of a party's case.

The proposed rule provides for the retention of the current system in cases in which counsel is not able to participate in an *in camera* review, either because there is no counsel (in the case of a *pro se* defendant) or because a represented defendant declines allow counsel to participate in a review of documents that the defendant will not also be allowed to see. The concern motivating the idea of barring the defendant personally from seeing confidential records is that a greater incursion on the patient's privacy occurs when the person accused of a crime is able to see the records, than when only the lawyer for that person can see the records. If that concern seems not very weighty, the proposal could be amended by deleting paragraph (d). One might feel some concern in adopting paragraph (d), in that it imposes a procedural cost on a defendant's choice to self-represent. However, the Court has upheld the current process, retained in the rule as the alternative procedure. Thus, self-represented defendants under the proposal will be no worse off than they are under present practice. They would occupy a position that is worse only in a relative sense, in that represented defendants who choose to allow it will be able, via their counsel, to participate in the *in camera* review subject to a stringent protective order.

B. Supreme Court

This proposed rule essentially tracks the provisions of the proposed Rule of Criminal Procedure, modified only for the appellate context. The idea is that, to the extent possible and consistent with reproducing on appeal the degree of confidentiality observed in the trial court, the Supreme Court's analysis of appellate claims of error of this sort will be better served by the participation of counsel.

Paragraph (1) of the proposed Supreme Court rule seeks only to confirm present practice and codifies the principle of Hilton, under which appellate counsel shall have no access to records if trial counsel had no access to those records. The paragraph modifies current law and practice only in that it restricts this procedure to records sealed under proposed Criminal Procedure Rule 54(b)(3). That rule provides for the sealing, after the initial, court-only *in camera* review, of such records as the trial court found to contain nothing relevant to the case.

Paragraph (2) of the proposed rule provides for an appellate procedure with regard to the records sealed under proposed Criminal Procedure Rule 54(c)(3). That rule provides for the sealing, after an *in camera* review process in which counsel participated, of such records as the trial court found to contain nothing that is reasonably necessary to the defense at trial. The proposed rule preserves the principle that appellate counsel shall have access, for the purpose of preparing a brief, to the same extent as trial counsel had access, in arguing that the documents should be made available for use at trial.

Paragraph (3) proposes a mechanism in the appellate context analogous to the alternative procedure described in proposed Criminal Procedure Rule 54(d). There may be less need for the procedure on appeal, insofar as, unlike criminal defendants in the trial court who have a constitutional right of self-representation under Faretta v. California, 422 U.S. 806 (1975), there is no analogous constitutional right to self-representation on appeal. Martinez v. Court of Appeal of California, 528 U.S. 152 (2000). Nevertheless, there may still be occasions when criminal defendants self-represent on appeal, as when they are ineligible for the appointment of counsel and cannot, or choose not to, retain counsel. Also, the alternative appellate procedure would retain current practice in cases in which a represented client felt it inappropriate for the lawyer to see documents that that client would not be allowed to see.