New Hampshire Public Defender

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Loretta S. Platt
Secretary, Advisory Committee on Rules
New Hampshire Supreme Court
One Charles Doe Drive
Concord, N.H. 03301

Re: Proposed Amendment to Rule of Criminal Procedure 12

Dear Ms. Platt:

I am the Director of Litigation for the New Hampshire Public Defender. Part of my job is to keep abreast of obstacles our attorneys are facing in practice, and to attempt to find solutions. We have one such issue at present that, we submit, should be addressed by a rule change.

In felony cases, the defendant's first appearance is in Superior Court. In some of these cases, the State will seek to preventively detain the defendant, that is, ask the court to hold them without bail until their trial. In others, the State will ask for a higher amount of cash or corporate surety bail than the defendant can afford to post, which will result in their indefinite detention. The need for effective advocacy in such situations is acute.

In other cases, including class A misdemeanors brought in Circuit Court, the State similarly relies on the defendant's criminal record to argue for preventive detention or an amount of cash or corporate surety bail that the defendant cannot post. Moreover, at both court levels, the State will rely on the defendant's record to argue in favor of certain restrictive bail conditions, such as an order that they not have contact with an alleged victim or a witness.

The State has exclusive access to the defendant's criminal record. These records are maintained by the New Hampshire Department of Safety. They are also maintained in a national database called the NCIC. Before any bail hearing, the State will run a criminal record check. And, if the State determines preventive detention or high bail is appropriate, and the defendant has a record, it will use the record to advocate to the presiding judge that the defendant should be held in jail until trial. This results in the defendant losing their housing, benefits, job, and possibly, important rights with respect to children. Once the presiding judge issues a bail order, it is very difficult as a practical matter to gain further review of it or to reverse it.

The problem is not that the State relies on these records to advocate its position on bail. The problem is that our attorneys are not uniformly provided a copy of the client's record before the arraignment. In a survey of our managers, the practice with respect to this issue is different in nearly every county. In our largest county, Hillsborough, the practice differs in North as compared to South, despite the commonality in administration and, presumably, office policy.

The general rule is that, in all but one county, Rockingham, our attorneys do not routinely get a copy of their client's criminal records before an arraignment at which the State is requesting preventive detention or cash bail that the client will not be able to post, or is relying on the record to substantiate a restrictive bail condition. This renders our representation deficient. In two counties, the prosecutors provide a summary of the record. At first blush, this seems sufficient, but in one instance we know of, the summary turned out to be inaccurate, and the client was detained. Beyond that, a prosecutor and a defense attorney may have opposing interpretations of the information in a record report, or draw different inferences, meaning that the prosecutor has not provided all the information a defense attorney may deem relevant.

In our federal court, this is not an issue. Under Local Rule 16.1, "[p]rior to or during the course of the initial appearance, the United States Probation and Pretrial Service Office shall, to the extent in their possession, provide the government with two (2) copies of the defendant's criminal record report. Upon receipt, the government shall provide a copy of that report to counsel for the defendant, it being presumed that defense counsel has made a request for this information pursuant to Fed. R. Crim. P. 16(a)(1)(D)." Thus, federal counsel has their client's criminal record before arraignment.

Accordingly, we propose the following as an amendment to Rule of Criminal Procedure 12. Under our proposal, this would be entitled "Discovery of Criminal Record at Arraignment or Bail Hearing" and it would be Rule 12(a). Rule 12(b) would be "Circuit Court – District Division" and Rule 12(c) would be "Superior Court."

> Prior to arraignment or any bail hearing, in any felony or class A misdemeanor case in which the State relies on the defendant's criminal record to seek preventive detention, cash or corporate surety bail, or a restrictive bail condition, the State shall provide to the defense the defendant's current criminal record, to the extent reasonably available to the State, in either electronic or paper form.

I want to thank you in advance for considering this matter. Having done these arraignments, the field is not level where the prosecution can refer to a powerful document that the defense attorney and their client cannot see, study, and discuss in advance of the hearing.

As always, I welcome any questions the Committee may have.

Sincerely,

/s/ David M. Rothstein
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