NASHUA POLICE DEPARTMENT

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New Hampshire Supreme Court Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301
rulescomment@courts.state.nh.us

Re: N.H. Rule of Criminal Procedure 12 – Discovery of Defendant's Criminal Record

Dear Advisory Committee Members,

We write in joint opposition as the Nashua, Hollis, and Hudson Police Departments to the proposed rule change to N.H. Rule of Criminal Procedure 12 regarding Discovery of Defendant's Criminal Record.

While we do not object to providing a defendant with his or her criminal record as soon as we can, we are concerned that this proposed rule would adversely impact victims' safety. There are several practical concerns that would make it difficult or impossible for prosecutors in the Nashua District Court to comply with this proposed rule change if it were enacted. The primary concerns are with video arraignments and 36-hour bail hearings pursuant to RSA 597:2, X (a). A defendant's criminal record is a vital piece of the puzzle for the judge to consider when making a determination on bail, particularly in light of ensuring the safety of the defendant, the victim, and the community.

Defendants who are arrested overnight or on weekends, and either held preventatively or held on cash bail that they are unable to post by the bail commissioner, or who refuse the services of the bail commissioner, are transported to the Hillsborough County House of Corrections ("Valley Street Jail") to await a video arraignment the next court day. When these defendants appear in front of the Nashua District Court judge for their 10:00am video arraignment, the vast majority of the time they are unrepresented. The prosecutor who reviews the file before the arraignment makes the determination of what the State will request for bail. The proposed rule would require the State to provide the defendant with his or her criminal record if it plans to ask for preventative detention, high cash bail, or restrictive bail conditions.

Realistically, it is not possible for the State to get the defendant his or her criminal record before the video arraignment. For one, there are federal regulations regarding dissemination of criminal records. Pursuant to the FBI's Criminal Justice Information Services ("CJIS") compliance, if Valley Street Jail were able to accommodate a system where we fax over the criminal record in the morning, we would need to know who will pick up the record off the fax machine and ensure that it is handed to the defendant. The State has significant concerns about providing a defendant in an unknown mental state and at an unknown level of intoxication with a document that lists their social security number, FBI number, address, and criminal history – particularly because the record would need to be sent before the prosecutor has an opportunity to view the defendant on video to get an idea of their current demeanor.

The defendant knows his or her criminal record. If the defendant has an attorney for a bail hearing, they would have spoken about the defendant's criminal record. The issue is the State's capacity to provide a criminal record at the last minute. The proposed rule puts all of the onus on the State and none on the defendant or the defense attorney. Again, CJIS compliance prohibits us from e-mailing criminal records so it takes advanced notice to be able to send a record as discovery. The State would have to ensure that the defendant and/or defense attorney have the record with enough time to review it before the hearing. The proposed rule does not say anything about 3:30pm bail hearing requests that are put on for the next morning or situations where the defense attorney does not reach out to the prosecutor before the hearing.

This has particularly become an issue with the COVID-19 pandemic. In the past, we were in the courtroom with the defense attorney. If they had any questions about the defendant's criminal record, we could show them our file. But when hearings are conducted telephonically, it is not possible to share the document in the moment. It is particularly difficult because the prosecutor does not always know when the defense attorney plans to appear telephonically or in-person. Again, this puts all of the obligation on the State even though it is the defense attorney requesting the bail hearing on the defendant's behalf and then participating in the hearing by phone.

The Nashua District Court conducted a stakeholders meeting where judges, prosecutors, and defense attorneys met and were able to figure out a workable solution to the issue of providing defendant's criminal record before bail hearings. The compromise was that the defense attorney needs to request discovery early enough in the day so that the State can either fax it to them or have a hard copy available to be picked up before the bail hearing in the morning. Again, the problem is not with providing the criminal record. It is with having reasonable notice before the hearing so that the State can accommodate the discovery request.

The proposed rule could negatively impact victim safety because the State would potentially be prevented from introducing the defendant's record and therefore the judge would not have that information when deciding appropriate bail. This is particularly concerning in cases involving domestic violence. One common instance is a defendant who is arrested for Stalking and Breach of Bail for violating a Criminal Bail Protective Order where the alleged conduct is a text message

or phone call. On its face, it might be difficult to see why the State might ask for the defendant to be held in preventative detention. However, the defendant's criminal record puts it into context when there is a history of domestic violence arrests and convictions for the judge to understand why the defendant who has demonstrated an inability to comply with the court's orders is a danger to the victim.

RSA 597:2, III(a) provides that the court may consider "all relevant factors" in determining whether releasing a defendant would endanger that person or the public. In contrast, the proposed rule seeks to limit the information available to the judge on the basis of a procedural discovery violation. The proper remedy would be to continue the bail hearing to give the defense attorney an opportunity to obtain and review discovery before requesting a further a bail hearing. *See State v. Stickney*, 148 N.H. 232 (2002).

Ultimately, there are very few cases in district court where the prosecutor will request preventative detention. At the end of the day, this proposed rule weighs withholding information that the defendant already knows against the safety of a victim. The only person involved with the hearing who does not know the defendant's record is the judge. In those select situations, the judge should have all of the information available to make an appropriate determination about whether that defendant is a danger to himself or herself, or to a victim, or to the community.

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