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November 24, 2021

TO: New Hampshire Supreme Court Advisory Committee on Rules

FROM: Paul A. Halvorsen, Merrimack County Attorney

SUBJECT: Submissions for Committee Consideration (Proposed Changes to Rule 12)

Earlier this year I submitted two letters to the Supreme Court with my comments concerning proposed changes to Rule 12. With the Supreme Court referring those proposed changes back to this Committee I updated the two letters I submitted to the Supreme Court and resubmitted them for Committee consideration in connection with the upcoming December 10, 2021, public hearing.

In order to minimize documents going to the Committee I am submitting this memorandum to Ms. Platt, the Committee Secretary, indicating that I am comfortable with providing my two updated letters to the Committee with this memo as a cover to each to maintain the record of all correspondence.

Thank you

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November 24, 2021

New Hampshire Supreme Court Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301

Via email: rulescomment@courts.state.nh.us

Re: Proposed change to N.H. Rule of Criminal Procedure 12 — Discovery of Defendant's Criminal Record (referenced as 2020-006 for a December 10, 2021, public hearing)

Dear Advisory Committee Members,

For the reasons set forth in this letter, I wish to express my opposition to the proposed amendment of the New Hampshire Rules of Criminal Procedure Rule 12; specifically the amendment which would require the State to provide a defendant's criminal record prior to arraignment and would prohibit the State from referencing the record if it was not provided within the parameters set out by the proposed Rule. I believe this proposed rule is overly broad and therefore subject to various interpretations, is difficult to comply with, and unnecessarily limits the amount of relevant information at the judge's disposal. Let me begin my comments by describing the process and some background so that this proposed rule is in context.

The vast majority of people who are arrested are released on personal recognizance bail by a bail commissioner or on a hand summons by the police. Those individuals are generally arraigned as court schedules allow. It is uncommon for the State to attempt to amend bail at those arraignments. The proposed rule would minimally affect those cases.

In a small number of cases a person is held either as required by statute or based on the bail parameters set by the bail commissioner. These tend to be the more serious cases, either felonies or misdemeanors, where the arrested person presents a clear danger to the community or unreasonable risk of flight. When a person is arrested and detained by a bail commissioner, they

must be brought before the court "without unreasonable delay." RSA 594:20-a. The statute goes further to require "All persons shall appear no later than 24 hours after arrest, or no later than 36 hours after arrest if arrested between 8:00 a.m. and 1:00 p.m. and the person's attorney is unable to attend an arraignment on the same day [...] "

In Merrimack County, arraignments on detained individuals are via video with the House of Corrections. The "video arraignments" were not triggered by COVID-19, these hearings have been occurring by video between the Circuit Courts and the House of Corrections for around 20 years. See Larose v. Superintendent, Hillsborough County Correction Admin., 142 N.H. 364, (1997) [finding video arraignments did not violate due process], see also Circuit Court Administrative Order 2011-16 [creating a presumption of arraignment by video for incarcerated defendants]. Once the Felonies First program was implemented the Superior Court also began video arraignments for detained defendants.

Each Court has a designated timeslot with the respective House of Corrections to do their video arraignments. For example, Franklin Circuit Court is scheduled for 10am, Concord Circuit Court at 11am, Superior Court at 1pm, and so on. The judge appears in court, the prosecutor may be in court or may appear by video and the defendant remains at the House of Corrections. A defense attorney, if retained or already appointed based on a defendant's request, may appear at court, via video from counsel's office or via video from the House of Corrections.

At a video arraignment the defendant may request an attorney for the first time. Of course, it is impossible to instantly provide a defendant with an attorney at the video arraignment, so following Koleta Nygn & a. v. Manchester District Court, Case No. 2011-0464 (Decided April 18, 2012) the Supreme Court's Advisory Committee of Rules addressed the issue of court appointed counsel at bail hearings initially through interim District Court Rules. See N.H. Supreme Court Order Adopting Temporary Amendments to Court Rules dated February 20, 2014. These rules were eventually subsumed by the Rules of Criminal Procedure, and the process of initial arraignments and counsel is addressed in Rule 5.

Should a defendant apply for an attorney prior to the video arraignment, the court may appoint an attorney; however, the State (prosecution) may not be notified of this appointment. If a defendant privately hires an attorney, that attorney may simply show up at the video arraignment with no prior notice to the prosecution. Additionally, if there is a defense attorney, the defense attorney may appear either in court or by video from their office or from the House of Corrections. The resulting reality is that the prosecutor may not know if a defendant is represented until the video arraignment begins or where defense counsel may be during, or indeed before, a scheduled arraignment hearing.

Prior to any scheduled arraignment the prosecutor must prepare. This includes receiving and reviewing reports and other documents from the arresting agency, preparing and reviewing complaints and then filing complaints along with the supporting affidavit. The prosecutor must also formulate an appropriate bail argument based on information received from several sources including, but not limited to, victims, police officers and quite possibly prosecutors from other jurisdictions where a defendant may have additional (pending) cases. All of these prosecution activities usually occur during a time when the regularly scheduled morning court docket is in

progress and thereby means that the prosecutor may often need to accomplish this work while in court as opposed to while being in their office. The prosecutor, while in court, is not likely to have immediate access to a fax machine[1] and may not have immediate access to a document scanner, computer[2] or even a telephone.

At the arraignment in there is often a contested bail hearing. The Judge will have read the Gerstein Affidavit; however, the judge must now make a choice about whether to release or detain the defendant. A bail decision, especially one depriving a person of their liberty, is one of the most difficult decisions a judge must make. In some cases this decision may literally have life and death consequences for a defendant or a victim. Indeed, members of the Advisory Committee may remember a case from 1998 where a defendant was released on bail where relevant facts were apparently not known to all parties and the result was a domestic violence related murder/suicide.

Understanding the process and background I will move to some of my more specific concerns.

Overly Broad and Subject to Various (and Inconsistent) Interpretations

The proposed rule does not define terms and leaves overly broad room for interpretation. For example, the proposed Rule says: "In any criminal proceeding in which the State intends to rely upon a defendant's criminal record, the State shall provide to either defense counsel or to a *pro se* defendant [...]." We must then ask a threshold question: "What constitutes a 'defendant's criminal record?'" Are we simply talking about the NCIC printout? A prosecutor may be personally aware that a defendant was convicted of other offenses, can the prosecutor mention those convictions or is that part of the defendant's "criminal record?" If referencing prior convictions based on personal knowledge, what would a prosecutor need to provide to defense counsel? Must a copy of the conviction from the Court be provided? Additionally, multiple failures to appear do not appear on criminal records, but a prosecutor may have participated in prior cases where a defendant had failed to appear. Is that part of the "criminal record?" Can a prosecutor mention other open cases known to the prosecutor or are those part of the "criminal record," too?

Compliance with the Proposed Rule is, at best, Difficult

My concerns about difficulties of compliance include but are not limited to:

- Knowledge of Representation: How will the State know if a defendant is represented by appointed or retained counsel or will be acting *pro se*? Prior to an initial hearing a prosecutor is typically unable to speak to a defendant who is detained at a House of Corrections. It is also true that defense counsel seldom file appearances prior to most

[1] Criminal records, as protected materials, must be transmitted by the most reliably secure method available. A stand-alone facsimile machine used on a telephone line is a secure method as it is point-to-point and does not pass through intermediate devices.

[2] Should a prosecutor have access to a computer (or other devices such as a telephone) while in court the access to a secure network or scanner is not assured. Device use may be further limited by the courts or by court activity.

arraignments. A criminal record is a private document, so simply sending it to the Public Defender with the hope that they represent the person is not a solution.

- What Constitutes an Opportunity to Review a Record: The proposed Rule indicates that a record concerning a defendant must be sent "prior to any hearing such that defense counsel will be given an opportunity to review said records with the defendant … ." How much time constitutes an "opportunity to review" a record? Is one hour enough? How about 30 minutes? Is 15 minutes overly short to constitute an "opportunity to review?" It is important to remember that in the vast majority of these cases, the defendant is at the jail and their counsel is very likely already busy with a morning docket. Assuming that counsel for the State is aware of an assigned/appointed counsel simply sending a record to a defense counsel's office may not get it into defense counsel's hands. What constitutes adequate presentation to defense counsel? If electronic (i.e. facsimile) transmission to a defense counsel's office constitutes notice what time is used to start the clock ticking to measure an opportunity to review the document with defense counsel's client? If defense counsel is unable to review the record with their client because of defense counsel's schedule, but the State has provided it in a timely manner, will the State be able to utilize the record? For *pro se* individuals how are records sent to them when they are being held at the House of Corrections?

I believe that these areas of concern are just the visible top of the compliance difficulties iceberg. The number of involved parties, the number of delivery options mean that the permutations involving compliance difficulties are many and are so varied that the production of an easily workable rule is clearly elusive.

The Proposed Rule Deprives the Court of Relevant Information

The proposed Rule instructs: "If the State fails to provide said copies as described herein, the State **shall be prohibited** from referencing any such records…" (emphasis in **bold** added). In reality, the impact of the proposed rule is to limit the amount of relevant information the Judge has when making the very important decision regarding bail. This could potentially result in individuals who present a danger to the community being released, not because there was something we were not aware of, but because there was something the judge was prohibited by rule from knowing. Ironically, should this proposed rule be adopted, the judicial system will be in a position where a bail commissioners had access to more complete, relevant and appropriate information than will the judges.

It is worth noting that language very similar to this proposed rule appeared as a July 14, 2020 Superior Court Administrative Order (2020-006). The administrative order states that it would be "fundamentally unfair" to allow the State to cite potentially substantive documents at arraignment or bail hearings which the defense does not have access to. However, this overlooks the following facts: (1) the defendant, having been present for the events that constitute his existing record, is absolutely aware of that record, (2) at the time of a hearing addressed by the proposed rule the State has police reports, witness statements, and sometimes even photographs or video to which a defendant does not have access, and (3) the defense often has access to

information regarding the defendant's ties to the community, family situation, and information to which the State has no access. These structural limitations are why there are several statutory and procedural safeguards already in place allowing for subsequent hearings, reconsideration, and appeals.

Additionally, shortly after Superior Court Administrative Order 2020-006 was signed, the New Hampshire Legislature amended RSA 597:2 III to say, in relevant part: [3]

> "III. When considering whether to release or detain a person, the court shall consider the following issues:
>
> (a) Safety of the public or the defendant. If a person is charged with any criminal offense, an offense listed in RSA 173-B:1, I, or a violation of a protective order under RSA 458:16, III, or after arraignment, is charged with a violation of a protective order issued under RSA 173-B, the court may order preventive detention without bail, or, in the alternative, may order restrictive conditions including but not limited to electronic monitoring and supervision, only if the court determines by clear and convincing evidence that release will endanger the safety of that person or the public. In determining whether release will endanger the safety of that person or the public, the court may consider all relevant factors presented pursuant to paragraph IV."

Paragraph IV of that statute was also amended to read:

> "IV (a) Evidence in support of preventive detention shall be made by offer of proof at the initial appearance before the court. At that time, the defendant may request a subsequent bail hearing where live testimony is presented to the court.
>
> (b) At any subsequent hearing, such testimony may be presented via video conferencing, unless the court determines that witness testimony in court is necessary. A request by the defendant for in-court testimony shall be made by oral motion at the initial hearing or by written motion prior to any subsequent hearing. Any order granting the defendant's request shall be distributed to the parties at least 48 hours prior to any subsequent hearing.
>
> (c) There shall be a rebuttable presumption that an alleged victim of the crime shall not be required to testify at the bail hearing. Nothing in this section shall preclude an alleged victim from voluntarily testifying at such hearing. The state may present evidence of statements made in the course of an investigation through a law enforcement officer."

[3] Emphasis in underlined text shown in quoted text from paragraphs III and IV (including subsections) was added.

Clearly, the legislature recognized that there should be no limitation to the relevant information provided to the judge prior to making the important decision about bail. This legislative action effectively (and clearly) nullified the Court's Administrative Order. This legislative action stands for the proposition that when a judge is making a decision about whether or not to hold or release a potentially dangerous individual they should have all the relevant facts. When reading the proposed rule there is a clear appearance that the proposed rule attempts to reinstate the Administrative Order over the actions of the elected Legislature. As the proposed rule has the effect of restricting or limiting or overturning legislative actions the proposed rule may implicate an issue of separation of powers.

My serious concerns about limiting information at bail hearings, as suggested by the proposed rule, is bolstered by a tragic event in NH that is known to many in the legal community. Unfortunately, there was a well-known incident in 1998 in which a District Court's bail order was amended in Superior Court which resulted in a dangerous man, Mr. James Golightly, being released. Shortly after being released, Mr. Golightly murdered his former girlfriend, Ms. Traci Winship, and then killed himself. The decision to agree to release Mr. Golightly was made by an individual who apparently did not have all the relevant facts and, it appears, the judge reducing bail also did not have all the relevant facts on which to base the Court's decision. Following this tragedy the New Hampshire Legislature amended RSA 597:6-e via HB216 (1999) and SB382 (2000) to require that when a bail decision is appealed to a Superior Court judge, the moving party must provide that judge with all of the information the District Court judge had when making the bail decision.[4] The premise is simple: a judge making a decision should have all the relevant information available.[5]

During the discussion and testimony on HB216 (1999) individuals in opposition to that bill indicated that the bill was not necessary, because "most judges want to see records prior to proceedings, already." When asked "How do we assure the judge will look at them?" the suggestion was "You could require the prosecutor to supply the court with the person's records." See Testimony of Andy Schulman available at RELATIVE TO RELEASE CONDITIONS PENDING TRIAL FOR DEFENDANTS IN DOMESTIC VIOLENCE, STALKING, OR PROTECTIVE ORDER VIOLATION CASES, HB216, 1999 SESSION (N.H. 1999)

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[4] RSA 596:6-e is clear. It says, in relevant parts, that while the issue of a bail review/appeal "shall be determined promptly" no action can be taken on a review/appeal "until the moving party has provided to the superior court certified copies of the complaint, affidavit, warrant, bail slip, and any other court orders relative to each charge for which a release or detention order was issued by a justice, or a bail commissioner." Emphasis in underlined text added.

[5] A report issued by The National Institute of Justice [NIJ], in discussing issues involving domestic violence, instructs: "Judges should understand that if an abuser has a prior record for **any** crime, he is a high-risk domesticviolence offender, not a low-risk "first" offender. Judges should demand access to prior criminal and abuse histories before fashioning civil orders, making pretrial release decisions, or sentencing abusers." Extracted from Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges" at page 23 available at Practical Implications of Current Domestic Violence Research (ojp.gov) (emphasis in **bold text** in the original, emphasis in underlined text added.) The NIL report also instructs: "For judges to make safe decisions about bail, sentencing or fashioning civil orders, they must insist on appropriate information about abusers" prior activities, including those associated with increased risk for lethality." *Id* at page 28, emphasis in underlined text added.

HTTP://GENCOURT.STATE.NH.US/SOFS_ARCHIVES/1999/HOUSE/HB216H.PDF (JANUARY 27, 1999 HEARING, REMARKS OF ANDY SCHULMAN, PAGE 12, PARAGRAPH 2). Ironically, with the proposed rule now before the Advisory Committee on Rules, it appears that we are moving away from the common sense and best practice suggestion requiring that records be provided to the judges in favor of prohibiting those same records from being provided.

If we limit or put prerequisite requirements upon the State's use of a criminal history at a bail hearing, where does it end? Would we also limit the State's ability to present the victim's input to the court unless it is provided to the defendant in advance? Would we prevent the State from referring to information from the police that is not contained in the Gerstein Affidavit unless that information is documented and provided to the defense? Would we prevent the State from presenting relevant and informative photographs at bail hearings unless they have been provided? The bigger question is whether or not we will similarly limit the information a defendant is allowed to present with regard to their ties to the community, medical issues, personal obligations, employment, and so on, unless that information is documented and provided to the prosecutor in advance?

In closing I want to make it clear that I recognize the position many defense attorneys may find themselves in during a bail hearing where they are faced with addressing a defendant's record. However, the remedy should not be to keep important, relevant and probative information on the issue of bail away from a judge. The remedy should be that the defense attorney can come back and have a subsequent bail hearing once they have had time to further review and vet information presented at the initial hearing. Indeed, in Circuit Court this remedy already exists in RSA 597:2(X), which grants a hearing on a "motion to reconsider" bail for detained individuals within 36 hours; and in RSA 597:6-e which allows for an additional "prompt" hearing at the defendant's request. This remedy exists in Superior Court as well through a motion to reconsider or an appeal to the New Hampshire Supreme Court pursuant to RSA 597:6-e.[6]

I don't believe anyone wants to limit the amount of relevant information judges receive. No one I know wants to impair a judge's ability to make the right decision regarding releasing or detaining a defendant. No one wants to put at risk a victim of domestic violence or a victim of a non-DV offense through the release of a dangerous person. Unfortunately, this proposed rule may do those very things.

PH 11/24/21

Paul Halvorsen
Merrimack County Attorney

[6] Please reference my supplemental letter, also dated November 24, 2021, for detailed summary of the bail review and appeal options available to a defendant.

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November 24, 2021

New Hampshire Supreme Court
1 Charles Doe Drive
Concord, NH 03301

Via email: rulescomment@courts.state.nh.us

Ref: Proposed change to N.H. Rule of Criminal Procedure 12 — Discovery of Defendant's Criminal Record (referenced as 2020-006 for a December 10, 2021, public hearing)

Dear Advisory Committee Members:

This letter supplements my separate submitted letter also dated November 24, 2021.

This letter specifically addresses part of Attorney Rothstein's June 30, 2020, letter to the Advisory Committee on Rules suggesting the proposed change to Rule 12. A copy of Attorney Rothstein's letter is at Attachment #1.

Please allow me call your attention to the last line on page 1 of Attorney Rothstein's letter. For ease of reference that portion is highlighted within Attachment #1. That line, referring to bail orders, alleges that "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." Rothstein letter at page 1 para 4. I do not believe that Attorney Rothstein's comment reflects the current state of the bail process which, in both Circuit and Superior Courts, allows many opportunities to review, modify and appeal bail. It is worthy to note that there have been several recent legislative

changes to bail related statutes in the last several years impacting, clarifying and expanding protections afforded an arrestee (defendant). Please let me summarize the many protections currently afforded an arrestee:

- In Circuit Court cases:
  - Bail in most cases is initially set by a Bail Commissioner (unless such services are declined by the arrestee).
  - If an arrestee declines the services of a Bail Commissioner or is held (detained) then the arrestee must be brought before a Circuit Court Judge under strict statutory time limits outlined in RSA 594:20-a (i.e. "…no later than 24 hours after arrest … [Saturday, Sundays and holidays excepted])".
  - If, after appearing before a judge, an arrestee remains detained and was not represented at the initial appearance Rule 5(e) of the Rules of Criminal Procedure mandates "A bail hearing, at which the defendant's counsel is present, **shall** be held within 24 hours of a written or oral request for same made by the defendant's counsel, weekends and holidays excluded." Bolded emphasis in quote added.
  - If an individual is detained based on an offer of proof 597:2 IV (a) directs that the arrestee "may request a subsequent bail hearing where live testimony is presented to the court." The request for in-court testimony may be "made by oral motion" or "by written motion" in accordance with 597:2 IV (b).
  - An arrestee who remains detained by a Court has, under RSA 597:2 X (a), "the right to" a hearing in Circuit Court within 36 hours of filing a Motion to Reconsider.
  - Bail may also be appealed to the Superior Court in accordance with 597:6-e II and requires a decision "within 36 hours of the filing of the appeal" under 597:2 X (b).
  - Additional reviews of bail orders are available under Rule 43 of the New Hampshire Rules of Criminal Procedure which allows for Motions for Reconsideration at any time in any proceeding when an arrestee can present "points of law or fact that the court has overlooked or misapprehended."
  - Under 597:6-e III an arrestee "may appeal to the supreme court from a court's release or detention order, or from a decision denying revocation or amendment of such an order" and "[T]he appeal shall be determined promptly."

- In Superior Court cases:

    - Bail in most cases is initially set by a Bail Commissioner (unless such services are declined by the arrestee).

    - If an arrestee declines the services of a Bail Commissioner or is held (detained) then the arrestee is brought before a Superior Court for a "Felonies First" arraignment. An arrestee is typically represented by counsel at this hearing. Rule 4 of the New Hampshire Rules of Criminal Procedure mandates that a detained individual must have an arraignment "scheduled within 24 hours, excluding weekends and holidays unless the person was arrested between 8:00 a.m. and 1:00 p.m. and the person's attorney is not available in which case the arraignment shall take place within 36 hours of arrest, Saturdays, Sundays and holidays excluded." Bail is addressed at this arraignment.

    - If an individual is detained based on an offer of proof 597:2 IV (a) directs that the arrestee "may request a subsequent bail hearing where live testimony is presented to the court." The request for in-court testimony may be "made by oral motion" or "by written motion" in accordance with 597:2 IV (b).

    - Additional reviews of bail orders are available under Rule 43 of the New Hampshire Rules of Criminal Procedure which allows for Motions for Reconsideration at any time in any proceeding when an arrestee can present "points of law or fact that the court has overlooked or misapprehended."

    - Under 597:6-e III an arrestee "may appeal to the supreme court from a court's release or detention order, or from a decision denying revocation or amendment of such an order" and "[T]he appeal shall be determined promptly."

I hope this letter clarifies the many opportunities available to an individual to have bail reviewed, modified and appealed. These many protections, put in place by our legislature and courts through statutes and rules, protect a defendant's due process rights on many levels and eliminates any need for this proposed Rule.

Thank you for your attention on this matter.

11/24/21

Paul Halvorsen
Merrimack County Attorney

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June 30, 2020

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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