# Salem Police Department

30th November 2021

New Hampshire Supreme Court Advisory on Rules
1 Charles Doe Drive
Concord, N.H. 03301

Sent via U.S. Mail, and via email to rulescomment@courts.state.nh.us

Re: Proposed change to N.H. Rule of Criminal Procedure 12
Discovery of Defendant's Criminal Record

Dear Advisory Committee Members,

Thank you for the opportunity to provide my objection and input on the proposed amendment of the New Hampshire Rules of Criminal Procedure, Rule 12. I specifically write concerning the amendment that would require the State to provide a defendant's criminal record prior to arraignment and prohibit the State from referring to the record if it was not provided within the proposed Rule's parameters.

I have seen comments and replies from other prosecutors, including Merrimack County Attorney Paul A. Halvorsen. I concur with his opposition, so I will not use this space to repeat or duplicate the viewpoints and reasoning he well-articulated. I do wish to speak to the practicality and actual impact of putting such a rule in place.

In the circuit courts, the proposed rule would seem to have the most significant impact on the arraignments of incarcerated defendants. These are individuals who were arrested and detained until the court's next sitting. In my experience, at this initial stage of the proceeding, the vast majority of these cases involve *pro se* litigants. At their first appearance, *pro se* defendants are given the option: conduct the arraignment without counsel or continue the hearing one weekday for the appointment and appearance of counsel.

My focus is on those instances where an incarcerated defendant requests the appointment of counsel. My experience is that, in almost every one of these instances, I have no advance notice about who is representing the defendant. It is the rule, not the exception, where counsel just appears at the arraignment – either in person, by phone or video. And that is when I first learn who is representing the defendant. I do not receive any advance notification from the Court. I am not contacted in advance by defense counsel. Instead, the defense lawyer just appears.

In light of this commonplace scenario, the Advisory Committee should proceed cautiously in legislating what information the State must provide to the defense prior to an arraignment. How can the State be compelled to provide information to defense counsel when the lawyer is often a mystery?



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Respectfully, it is my recommendation that you make no such rule on this matter. Like so much else that occurs within the courthouse, this issue should be left to the practitioners. It does not need legislating. In 100 of 100 cases, if a defense lawyer timely contacted me in advance of an arraignment and asked for their client's criminal record, I would provide it. But that takes someone from the defense identifying themselves and making a request.

At one point earlier this year, I conducted an in-custody arraignment where the defendant asked that his hearing be continued a day and that the Court appoint counsel to represent him. That same morning or afternoon, the Circuit Court appointed the public defender's office to represent the defendant. The next morning, a public defender appeared for the hearing. There was no prior contact by the public defender to my office, and I did not know who the defendant's lawyer was before the hearing started. As I made my bail request, the public defender objected when I started to recite the defendant's criminal record. In objecting, the public defender cited some order from a superior court judge in arguing that she was entitled to a copy of the defendant's criminal record before the arraignment. Where I did not provide the criminal record in advance, the defense argued, I should be blocked from providing the Court with that information. The Court overruled the objection, noting it was important for the Court to learn of the defendant's record before deciding bail.

Again, talking first on a practical level, how can one provide records to another without knowing who is the opposing counsel? And as I relayed to the Court, if the defense wanted the record, why didn't the defense counsel just reach out to ask me for it? No different than seeking additional discovery, if counsel wants something, just ask for it. And if the parties cannot resolve the issue, then it falls to the Court to act. Rulemaking on this specific issue is not required.

Aside from the issue of practicality, please allow me to address the real-world impact of imposing a sanction that a prosecutor cannot inform a court about a defendant's record if the record is not provided to the defense in advance.

Individuals who are dangerous and/or pose a flight risk are most often those defendants who are in custody at arraignment. It is bad public policy to restrict a judge from hearing relevant information before deciding bail. Literally, people's lives often hang in the balance.

As you are aware, the Supreme Court is presently reviewing the case involving a Hampton woman who, in October, was denied a domestic violence petition she sought against an ex-boyfriend. A month later, the man shot her as she left work. Imagine having such a defendant before the courts for a domestic violence-related offense and barring the prosecutor from talking about his criminal record. Why? This rule serves to do more harm than good and seeks to solve something that is not a problem.

Restricting the Court's receipt of relevant information for its consideration before it sets bail is a risky, dangerous business. It further exposes our citizens and communities to undue harm.

Thank you for your attention to this matter.

Sincerely,

Jason B. Grosky
Prosecuting Attorney
Salem Police Department

JBG/jbg