

MEMORANDUM

TO: N.H. Supreme Court Advisory Committee on Rules

FROM: Subcommittee on Amendment to Criminal Rules of Procedure 12(a)(1)

RE: Agenda Item 2020-006: New Hampshire Rule of Criminal Procedure 12 –
Discovery; State's Obligation to Provide Copies of Defendant's Criminal
Record

DATE: March 4, 2022

OVERVIEW

By letter dated June 30, 2020, Attorney David Rothstein of the New Hampshire Public Defender originally proposed an amendment to Rule 12(a) of the New Hampshire Rules of Criminal Procedure as follows:

Proposed Rule 12 (a) from Attorney Rothstein

(a) Discovery of Criminal Record Prior to Arraignment

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 copies of any and all such records in the State's possession prior to any such hearing such that defense counsel will be given the opportunity to review said records with the defendant, or a pro se defendant to do the same individually, prior to the hearing.

If the State fails to provide said copies as described herein, the State shall be prohibited from referencing any such records except for good cause shown. If the State does not intend to cite to a defendant's criminal record during the arraignment or bail hearing, New Hampshire Rule of Criminal Procedure 12(c)(1)(c) shall govern the timing of disclosure in superior court.

The State may provide the records by fax, secure e-mail, or similar means to assure the confidentiality of said records, or in any manner consistent with state and federal law.

Existing Rule 12 (a) would follow, re-lettered as (b), etc.¹

In summarizing the background and reasoning for this proposed rule change, Attorney Rothstein stated that attorneys at the New Hampshire Public Defender are not uniformly provided a copy of the client's criminal record before the arraignment. Having surveyed the attorneys in his office, he noted that the general rule in all but one county (Rockingham), his attorneys did not routinely get a copy of their client's criminal record before an arraignment at which the State is requesting preventative 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. He stated that this renders their representation deficient.

The Committee received responses from various prosecutorial and law enforcement agencies in response to the July 14, 2021 order seeking public comment on the proposed rule change. The Committee issued a second order on October 4, 2021, seeking further public comment on the proposed rule change.

The Committee held a public hearing on the proposed rule change at its December 10, 2021 meeting. During the Committee meeting that followed, Committee members expressed concern that the proposed amendment will deprive judges of information necessary to make informed bail decisions, even when such information is readily available. It was also noted that, in some counties, prosecutors may not have access to the information prior to arraignment, making it hard to comply with the proposed amendment. Judge Delker advised that, based upon his discussion with prosecutors and his fellow judges, this issue may affect counties differently, particularly at the circuit

¹ This proposed rule is very similar, if not identical, to the current New Hampshire Superior Court Administrative Rule regarding the State's obligation to produce a defendant's criminal record.

court level. He proposed an additional amendment allowing defendants to request additional bail hearings when the State has not complied with the rule, adding that such an amendment would incentivize compliance without compromising the defendant's due process rights. The Committee discussed whether Rule 12 already entitles defendants to request additional bail hearings, obviating the need for Judge Delker's proposal.

Upon motion made by Attorney Gill, and seconded by Judge Garner, the Committee unanimously voted to refer the issue back to the subcommittee, which would review the proposed amendment and suggest revisions for consideration at the next meeting.

THE SUBCOMMITTEE'S CURRENT POSITION AND PROPOSAL

The subcommittee recognizes to a large degree that the proposed rule, that would also be applicable in the district division, should in principle be consistent with the superior court administrative rule. Attorney Rothstein's proposal very much mirrors the current superior court administrative rule. However, in attempting to craft a rule that would also apply to the district division, several difficulties were encountered.

First, incarcerated defendants in the district division generally appear by video and are *pro se*. Various prosecutorial agencies and police departments, as well as the New Hampshire Attorney General's Office, have expressed that there exist legal prohibitions that do not allow for sending criminal records to a house of correction in a manner to be reviewed by an incarcerated *pro se* defendant appearing for a bail hearing in the district division by video. Various members of law enforcement who appeared at the last hearing also expressed logistical concerns about providing records to *pro se* defendants incarcerated and appearing before the circuit court for arraignment. As well,

law enforcement entities strongly objected to the exclusion of the record as a remedy for failing to provide it without showing good cause as to why the record was not produced.

The subcommittee has made extensive efforts to propose a rule, and it has worked through a variety of proposed rules. The subcommittee has struggled with two issues in working to propose a new rule in this regard. The first issue is regarding the confidential nature of criminal records, as well as the laws and regulations (both federal and state) that apply to the dissemination of those records. The second issue is whether exclusion of the record should be the remedy if the State fails to produce the record prior to a bail hearing without showing good cause for such failure.

The subcommittee has investigated language for a proposed rule that will allow for compliance with federal and state laws and regulations, and that is contained in the proposed rule(s) below. However, there is a debate in the subcommittee about whether exclusion of the record should be the remedy if the State fails to produce the record prior to a bail hearing without showing good cause for such failure. After much thoughtful discussion, the subcommittee cannot agree on this issue. Due to the substantial nature of the issue at hand, the subcommittee has agreed to submit this specific issue to the full Committee for review and determination.

With that in mind, below are two proposed rules that do and do not include “exclusion” as a remedy. The former (including exclusion as a remedy) would contain the bracketed text, and the latter (not including exclusion as a remedy) would not contain the bracketed text.

Sub-Committee’s Proposed Rule

(a) Circuit Court – District Division

(1) Disclosure of Defendant's Criminal Record at Initial Appearance or Bail Hearing

If the State intends to rely on the Defendant's criminal record at an initial appearance or any bail hearing, the prosecutor shall provide a copy of Defendant's criminal record to Defendant or, if Defendant is represented, to counsel for the Defendant, in advance of the initial appearance or bail hearing. The prosecutor shall exercise due diligence in complying with this disclosure obligation.

If the State[, for good cause,] is unable to provide a copy of the criminal record before the initial appearance or bail hearing, the Defendant or his counsel may elect to:

(A) Continue the initial appearance or bail hearing to the next available date after disclosure of the criminal record; or

(B) Proceed with the initial appearance or bail hearing subject to Defendant's right to a further bail hearing, upon request, after disclosure of the criminal record.

[If the State fails to provide said criminal record as described herein without showing good cause therefor, the State shall be prohibited from referencing any such record at the initial appearance or bail hearing.]

For purposes of this Rule, a "criminal record" is a written report of Defendant's criminal history generated by a governmental authority obligated to retain and produce such records.

["Good cause" under this Rule may include the State's inability to transmit the criminal record without violating state or federal law.]

Except for initial appearances and bail hearings, discovery of a Defendant's criminal record shall be governed by subsection (3)(D) of this Rule.

The subcommittee proposes renumbering existing subsection (1) to become (2) and (2) to become (3), and addition a subsection (D) to renumbered (3), to provide that at least fourteen days before trial, the State shall provide Defendant with **"(D) A copy of the Defendant's criminal record."**

The subcommittee requests that the full Committee vote and determine which version of the proposed rules should move forward.