THE STATE OF NEW HAMPSHIRE
SUPREME COURT
ADVISORY COMMITTEE ON RULES

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Lorrie Platt, Secretary

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Supplement to Agenda for June 3, 2022 Meeting

4. ITEMS STILL PENDING BEFORE THE COMMITTEE

(b) 2020-006 New Hampshire Rule of Criminal Procedure 12(a)(1)-Discovery; State's Obligation to Provide Copies to Defendant of his/her Criminal Record

Submission received on June 1, 2022 from Merrimack County Attorney's Office

5. NEW BUSINESS

(c) 2022-007 Rule of Criminal Procedure 11(c) – May 30, 2022 proposed amendment submitted by Attorney David Peck

See Appendix I

(d) 2022-008 Rule of Criminal Procedure 19 - May 31, 2022 proposed amendment submitted by Attorney Abigail Albee

See Appendix J

APPENDIX I 2022-007

To: Secretary, Advisory Rules Committee
From: David Peck
Re: Suggestion to Amend N.H. Crim. R. 11(c)
Date: May 30, 2022

In 1981, the New Hampshire Supreme Court held that conditional guilty pleas are not permitted in New Hampshire, thereby joining a minority of jurisdictions. State v. Parkhurst, 121 N.H. 821 (1981). A conditional guilty plea generally is a plea by a defendant of guilty that specifically reserves the right to appeal a particular ruling — often, a ruling denying a motion to suppress. If the defendant prevails on the appeal, then the defendant is permitted to withdraw his guilty plea.

Conditional guilty pleas are now permitted either by statute, court rule, or case law in approximately 30 jurisdictions, including federal courts. Glenn v. Commonwealth, 635 S.E. 2d 697 (Va. Ct. App. 2006); Commonwealth v. Gomez, 104 N.E.3d 636, 640-42 (Mass. 2018). In addition, the ABA Standards for Criminal Justice, Standard 21-1.3 provides: "Where the only contested issues in a prosecution can be raised and determined by decisions on pretrial motions, such as motions to suppress evidence, motions to exclude confessions, and motions challenging the sufficiency of the charging papers to state an offense, a procedure should be established to permit entry of a final judgment of conviction, on the basis of a guilty plea or a stipulation of the facts necessary for conviction, without foreclosing subsequent appeals on the contested issues."

Most jurisdictions require the consent of the court and/or the prosecutor to a conditional guilty plea, and require the defendant to specify the pretrial motion from which he seeks to appeal. Gomez, 104 N.E.3d at 641-42; see, e.g., Me. R. Crim. P. 11(a(2) ("With the approval of the court and the consent of the attorney for the State,

a defendant may enter a conditional plea of guilty or nolo contendere. A conditional plea shall be in writing. It shall specifically state any pretrial motion and the ruling thereon to be preserved for appellate review. If the court approves and the attorney for the State consents to entry of the conditional plea of guilty or nolo contendere, the parties shall file a written certification that the record is adequate for appellate review and that the case is not appropriate for application of the harmless error doctrine. Appellate review of any specified ruling shall not be barred by the entry of the conditional plea. If the defendant prevails on appeal, the defendant shall be allowed to withdraw the plea.").

A result of not allowing conditional guilty pleas is that a defendant must typically proceed to trial in order to preserve his appellate rights, even if the defendant desires only to appeal from a particular pretrial ruling, such as a motion to suppress. As the United States Supreme Court has recognized, this is a "completely unnecessary waste of time and energy." Lefkowitz v. Newsome, 420 U.S. 283, 292 (1975). Parkhurst is an example — although the defendant and the State in that case agreed to a plea of guilty for the charge of burglary, reserving only the right to appeal the trial court's ruling on a motion to suppress, the New Hampshire Supreme Court refused to allow the appeal. Rather, the court remanded the case, requiring the defendant to "either withdraw his plea and proceed to trial, or waive his right to appellate review of the motion to suppress and be resentenced." Parkhurst, 121 N.H. at ___.

The reason Parkhurst gives for rejecting conditional guilty pleas is the fear that the practice will undermine the public's confidence in the integrity of the criminal justice system. The court stated that it cannot endorse the use of a conditional guilty plea to test the government's ability to prove what has already been

admitted. As noted above, the majority of jurisdictions, including the federal courts, all permit conditional guilty pleas. Nothing indicates that confidence in the integrity of the criminal justice system has been eroded as a result. Moreover, despite Parkhurst, the New Hampshire Supreme Court has on occasion permitted a conditional guilty plea appeal to go forward. In State v. Nelson, 161 N.H. 58 (2010), the trial court denied the defendant's motion to dismiss for failure to comply with time limits in the Interstate Agreement on Detainers. The supreme court recited that the defendant thereafter "pled guilty, but reserved the right to appeal the denial of his motion to dismiss." Without any explanation, however, the court accepted the appeal and decided it on the merits.[1]

My suggestion is to join the majority of jurisdictions that permit conditional guilty pleas. Adoption of a court rule is an appropriate means for doing so. As the New Hampshire Supreme Court has explained, "the adoption of a new rule of criminal procedure should ordinarily be accomplished through rulemaking." State v. Locke, 166 N.H. 344 (2014); see State v. Ramos, 149 N.H. 118 (2003) (Dalianis, J., dissenting).

Rule 11(c) of the N.H. Criminal Rules provides:

> (c) Negotiated Pleas – Circuit Court-District Division and Superior Courts
>
> (1) Permissibility. If the court accepts a plea agreement, the sentence imposed by the court shall not violate the terms of the agreement.

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[1] As a practical matter, if Parkhurst is to be enforced, courts must do so sua sponte. Conditional guilty pleas will usually, if not always, be the result of a plea agreement. Thus, it is unlikely that any party will object to an appeal taken pursuant to a plea agreement that specifically permits the appeal.

(2) Court's Rejection of Negotiated Plea. If the court rejects a plea agreement, the court shall so advise the parties, and the defendant shall be afforded the opportunity to withdraw the plea of guilty or nolo contendere.

(3) Sentence Review. See Rule 29(k)(14)(c).

My recommendation is to adopt a new paragraph under section 11(c) addressing negotiated conditional guilty pleas. A possibility, based largely upon Massachusetts Criminal Procedure Rule 12(b)(6), would be to add the following new subsection:

(1-a) Conditional Pleas. As part of a plea agreement, the defendant may tender a plea of guilty while reserving the right to appeal any ruling or rulings that would, if reversed, render the State's case not viable on one or more charges. The written agreement must specify the ruling or rulings that may be appealed, and must state that reversal of the ruling or rulings would render the State's case not viable on one or more specified charges. If the defendant prevails in whole or in part on appeal, the defendant may withdraw the guilty plea. If the defendant withdraws the guilty plea, the judge shall dismiss the complaint or indictment on those charges, unless the State shows good cause to do otherwise. The appeal shall be governed by Supreme Court Rules, provided that a notice of appeal is filed within thirty days of the acceptance of the plea.

Pursuant to Supreme Court Rule 51, I note that I do not believe that exceptional circumstances justify expedited consideration of this suggestion. I do not wish to be heard by the Committee. My address is 36 NE Village Road, Concord, NH 03301 (skipwd@comcast.net).

APPENDIX J

2022-008

Lorrie:
Below is a proposed change/addition to the language of Criminal R.19. The current language is in black and the proposed language is in RED. Would it be possible to put this up for discussion by the Rules Committee (either on Friday or the next meeting)?
Thank you,
Abby

N.H. Rule of Criminal Procedure 19

Transfer of Cases
When any party files a motion in any superior court or circuit court-district division requesting the transfer of a case, or of a proceeding therein, there pending to another court, the presiding judge may, after giving notice and an opportunity for a hearing to all parties, order such transfer. Cases and/or proceedings shall not be transferred between Circuit Court and Superior Court – regardless of court order or agreement of the parties.

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June 1, 2022

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

Via hand delivery to the Committee at 1 Charles Doe Drive

Reference: 2020-006 – Proposed change to N.H. Rule of Criminal Procedure 12 — Discovery of Defendant's Criminal Record

Dear Advisory Committee Members,

I recently read with interest the March 4, 2022, Memorandum from the Subcommittee on Amendment to Criminal Rules of Procedure 12(a)(1) [referenced hereafter as "Memo" and "Subcommittee"]. Within that Memorandum the Subcommittee proposed two possible rules concerning 2020-006 and recommended the Advisory Committee [the Committee] adopt one of those two rules. For all the reasons stated in my prior correspondence (copies attached for ease of reference), as well as in my prior testimony before the Committee, I am opposed to the adoption of either of the two proposals put forward by the Subcommittee. I do, however, support a third option that was not recommended by the Subcommittee: Recommend/adopt no new rule. Should the Committee discount the "adopt no new rule" option, it is my position that any rule that is adopted by the Committee must allow the use of criminal records in order to fully inform a judge of relevant facts necessary to make an informed and intelligent decision on the issue of bail. Please allow me to comment on the Subcommittee's Memorandum.

The Committee Discussion:

The Memo, in part, summarizes the Committee's December 10, 2021, discussion. The Committee identified several difficulties with the proposal. I'll comment on these major Committee observations individually and also address the Committee's discussion concerning additional (subsequent) bail hearings.

- Committee Observation 1: "*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.*" Memo at page 2. This is the most important concern facing the full Committee and the Committee is spot-on in making this a primary concern when electing what course of action to pursue. Victims of crime, especially victims of domestic violence and sexual assault, expect a judge to make a fully informed decision using the best and fullest information available at the time of the court's hearing. For a judge to not have relevant information would make it impossible for the Court to evaluate factors that impact the safety of the victim, the safety of the community and the safety of the defendant. Consider, for example, a judge who is not told that a defendant before the Court has one or more prior convictions for assaulting the same victim. Or the judge who is not told that the defendant has a conviction for bail jumping or escape or failure to register as a sexual offender. Or the judge who is not told that the defendant has outstanding arrest warrants. Decisions on bail made without that type of information are decisions made in a vacuum. These examples are not hyperbole – any practitioner or judge can attest to having seen these very examples.

- Committee Observation 2: "*[P]rosecutors may not have access to the information prior to arraignment, making it hard to comply with the proposed amendment.*" Memo at page 2. Frankly, this statement within the Memo stands on its own. Prosecutors cannot comply with a rule when the conditions (and the materials) necessary for compliance may not be under their immediate control. By way of example: In my over two decades of criminal prosecution, of which almost 18 were spent in one of the busiest courts in the State, I can say that it is common, in Circuit Court, for a prosecutor to be handed, for the first time, a file for an arraignment while in court conducting other hearings.

- The Committee's discussion concerning additional bail hearings is also important. Memo at page 2-3. I addressed a defendant's opportunities for bail hearings in my supplemental correspondence of November 24, 2021. I also believe I touched on that issue during my oral testimony before the Committee. In my November 24th supplemental letter I cover, in detail, the many options available to a defendant in both Circuit and Superior Courts to address the issue of bail. Given the many options available to a defendant[1] additional bail hearings need not be addressed further within an additional Rule of Criminal Procedure.

[1] My November 24, 2021, letter outlines options available to a defendant in more detail than I do here. I urge readers to review that letter for such content. In summary, available options for hearings include but are not limited to those allowed by RSA 597:2(IV)(a) [live testimony in subsequent hearing if detained]; 597:6-e(III) [appeal to the Supreme Court shall be determined promptly]; 594:20-a [hearing before a judge]; R. Crim. Pro., R. 5(e) [hearing with counsel within 24-hours of request if no counsel at initial hearing] and 597:2(X)(a) [hearing on Motion to Reconsider within 36-hours].

The Subcommittee Discussion ("Current Position and Proposal"):

- Subcommittee Comment 1: "*[I]n attempting to craft a rule that would also apply to the district division, several difficulties were encountered.*" Memo at page 3. The Subcommittee's Memo discusses a number of topic areas that are problematic.[2] Prior correspondence with the Committee addressed these concerns and more. These are not minor considerations. Setting aside the legal and logistical difficulties, in some instances the safety of a defendant may be in jeopardy. Should another detainee or resident observe a prior conviction history involving, for example, a child victim, the defendant who is held pre-arraignment may be targeted for assault by other detainees or residents. This is a real risk to the physical safety of that defendant/detainee.

- Subcommittee Comment 2: "*The subcommittee has struggle with two issues in working to propose a new rule in this regard [confidentiality of records and exclusion of use as a remedy for violating the rule].*" Memo at page 4. The overall confidentiality issue is a real concern. I commented earlier on some of the factors involving confidentiality. Following the laws and rules surrounding the transmission of records is difficult at best and should those governing federal and/or state laws, regulations or rules change any New Hampshire rule adopted as part of this Committee's recommendation may be impacted. The issue of exclusion is, frankly, the heart of the matter and the one that is paramount. As I stated earlier in this letter:

  > "Victims of crime, especially victims of domestic violence and sexual assault, expect a judge to make a fully informed decision using the best and fullest information available at the time of the court's hearing. For a judge to not have relevant information would make it impossible for the Court to evaluate factors that impact the safety of the victim, the safety of the defendant and the safety of the community."

  A defendant's criminal record is, undoubtedly, an important consideration in a judge's decision making concerning bail. Any public policy, such as a rule as that before this Committee, that would exclude the use of a criminal record negates the public policy that victims and communities be protected.

- Subcommittee recommendation: "*The subcommittee requests that the full Committee vote and determine which of the proposed rules should move forward.*" Memo at page 6. I mentioned earlier that the Subcommittee did not address a relevant third option that no new rule be recommended or adopted. I understand that this Committee needs to take some action on 2020-006. Weighing all options should be the default starting point for the full Committee to then be followed by open discussion and voting on all possible

[2] The problematic areas include, but are certainly not limited to: Incarcerated defendants appear for arraignment by video from detention facilities; incarcerated defendants, having not been arraigned, do not have court appointed counsel; legal consideration exist concerning the propriety of using certain modes of transmission to get a defendant's criminal record to an incarcerated defendant and logistical concerns exist within law enforcement on how a criminal record (if transmitted by authorized methods) can be disseminated to a defendant.

options. However, in looking at only the two proposals put forward by the Subcommittee, several things are clear. First, it appears that the Subcommittee could not reconcile the difficulties of complying with federal and state laws concerning handling, transmission and dissemination of criminal records. Memo at page 3. Second, the Subcommittee admits that they "struggled" in working to propose a new rule. Memo at page 4. Since the Subcommittee "struggled" in structuring a rule the obvious follow-on concern is how the many courts throughout New Hampshire interpret and apply whatever new rule the Committee might recommend. I dare say consistency may most likely suffer and similarly situated defendants throughout New Hampshire may have their arraignment/initial bail hearing resolved in different manners. Third, the Subcommittee could not agree on any recommendation concerning exclusion (prohibiting the use of a criminal record by the State). Memo at page 4-5. The Subcommittee appears to see the gravity of excluding a defendant's criminal record from consideration by a judge when they say the issue of exclusion is of a "substantial nature." This position and comment, standing alone, is enough to preclude any sort of exclusionary provision should the Committee recommend/adopt a proposed rule.

Closing Comment and Recommendations:

My position is, and my recommendation to the Committee continues to be, that the Committee not recommend/adopt any new rule. The Committee will remember that during the processing of 2020-006 the opposition to the proposal, at several points in the process, was legion. Indeed, at the December 10, 2021, public hearing I do not recall any individual appearing to speak in support of the proposal.

Should the Committee reach a different conclusion and wish to put forward a recommended rule it is vitally important that exclusion of a defendant's criminal record not be mandated within the rule – to mandate such an action would clearly deprive a judge of the information necessary to make an informed ruling on the issue of bail and would also impact safety considerations toward victims, safety considerations toward the community and safety considerations toward a defendant.

PAH 6/1

Paul A. Halvorsen
Merrimack County Attorney

Attachments:

- Letter dated November 24, 2021 – 7 pages (general comments in opposition to 2020-006)
- Letter dated November 24, 2021 – 3 pages (supplemental comments on bail hearings)
- Letter dated December 9, 2021 – 2 pages (comments addressing Federal Probation and Pretrial Service Office preparation of reports used at Federal arraignments and the mandatory 3 – 5 day extensions available to the government and defense in federal cases)
- Letter dated December 9, 2021 – 2 pages (unanimous opposition by all New Hampshire County Attorneys

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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.

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.

Paul Halvorsen
Merrimack County Attorney

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December 9, 2021

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

Hand delivered at the Committee Hearing on December 10, 2021

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:

As I was again reviewing documents for the upcoming December 10th Committee hearing I noticed an additional issue that I believe this Committee should review. This letter followed and also supplements my prior letters to the Committee.

My letter today specifically addresses that part of Attorney Rothstein's June 30, 2020, letter at page 2, paragraph 3. That section of Attorney Rothstein's letter puts forward an abbreviated summary of the process used in federal court and cites to the United States District Court, District of New Hampshire, Local Rules at Section XII, Criminal Rules, Local Rule 16.1. There are, however, additional considerations this Committee should review when evaluating the position put forward in the attached letter from Attorney Rothstein. These additional considerations include, but are not limited to, the following:

- The robust assets available to federal authorities to prepare for an initial appearance of a defendant are not available to New Hampshire State, County or local agencies. Local Federal Rule 16.1(a) mandates that the United States Probation and Pretrial Service Office assemble documents for the government attorney. I do not believe comparative assets are available within New Hampshire to provide equal administrative support to our State, County or local prosecutors (including police prosecutors) in a manner that would be responsive to Circuit and Superior Court scheduling of initial appearances for detained individuals. Such extensive administrative support within the State structure would clearly be required with the proposed change to Rule 12 to come close to making an apples-to-apples comparison between federal and state process.

- 18 USC 3142, which addresses the release or detention of a defendant pending trial, allows the government a three day continuance to gather information relevant to a defendant's first appearance. See 18 USC 3142 (f) (2) (...a continuance on motion of the attorney for the Government may not exceed three days...). That same statute also allows defense counsel a continuance of no more than five days. See 18 USC 3142 (f) (2) (a continuance on motion of such person [the defendant] may not exceed five days). During either timeframe Saturdays, Sundays and holidays are not counted and a defendant remains detained. See 18 USC 3142 (f) (2) ([d]uring a continuance, such person shall be detained ...). Process for detained individuals within our State does not allow for such delays to an initial appearance before a judge; additionally, I refer you to my November 24, 2021, supplemental letter to this committee concerning the current scheduling structure within New Hampshire.

For the reasons I outline in this letter, as well as for those reasons I outline in my two prior letters, I urge the Committee to not recommend the proposed change to Rule 12.

Thank you for your attention on this matter.

Paul Halvorsen
Merrimack County Attorney

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Hand delivered at the Committee Hearing on December 10, 2021

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:

We, the below listed County Attorneys, urge that the proposed change to N.H. Rule of Criminal Procedure 12 not be approved. We have been corresponding with Attorney Halvorsen on this issue and he has our permission to add our names to this letter.

We have reviewed, individually, the many letters sent in opposition to the proposed change to Rule 12. Those many letters outline the legion of reasons why the proposed change fails and we need not repeat those comments and analysis here. However, we do point out the following major considerations that highlight why the proposed change to Rule 12 must not be adopted:

- The proposed change fails to protect victims of crime, especially those victims of domestic violence, by potentially shielding a defendant's criminal record from judicial review.

- The proposed change, on its face, and especially when dealing with defendants charged with a domestic violence offense, appears to violate NH RSA 21-M:8-k II (a) and (c) by failing to have "respect for the victim's safety" and by failing to allow a bail process that advances a victims right to be "reasonably protected from the accused."[1]

- The proposed change fails to ensure that all relevant history is available to a judge in order to set appropriate bail or order preventative detention. NH RSA 597-2 anticipates that all "relevant factors" will be submitted to a court when a court is "considering whether to release or detain a person" and mandates that a court "shall consider" the issue of "relevant factors."[2]

For these reasons, and in consideration of the other correspondence received by the Committee, we urge the Committee to not recommend the proposed change to Rule 12.

Thank you for your attention on this matter.

Paul Halvorsen
Merrimack County Attorney
(Signing for all)

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Carroll County Attorney

John Coughlin
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Thomas P. Velardi
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Patricia G. Conway
Rockingham County Attorney

Chris McLaughlin
Cheshire County Attorney

Marc Hathaway
Sullivan County Attorney

Marcie Hornick
Grafton County Attorney

Andrew Livernois
Belknap County Attorney

John McCormick
Coos County Attorney

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[1] NH RSA 21-M:8-k II (a) mandates that a victim of crime be afforded "The right to be treated with fairness and respect for the victim's safety, dignity, and privacy throughout the criminal justice process. NH RSA 21-M:8-k II (c) mandates that a victim of crime be "reasonably protected from the accused throughout the criminal justice process."

[2] See NH RSA 597-2 III, generally.