December 18, 2023

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

Re: R-2023-0008, In re December 13, 2023 Report of the Advisory Committee on Rules, Rules of Criminal Procedure 1-19.

Dear New Hampshire Supreme Court,

I am writing to express my concerns with the proposed amendments to the NH Rules of Criminal Procedure Rules 1-19. While I understand that some of the rules need to be amended because of the "felonies first rewind," many of the amendments go beyond what would be necessary to implement the "felonies first rewind."

Rule 1- The proposed amendment to Rule 1 would capitalize "Circuit Court- District Division" and "Superior Courts." Clearly, this amendment would not be required for the "felonies first rewind."

In fact, many of the proposed amendments to the Rules of Criminal Procedure address capitalization and pronouns. In English, proper nouns should be capitalized, otherwise words should be lowercase. For example, "superior court" should be lowercase unless referring to a specific superior court, such as the Merrimack County Superior Court. Similarly, designations such as "defendant" are only capitalized when they refer to a specific defendant.

While I only own the sixteenth edition (sixth printing 1998) of the Bluebook from when I was in law school, the Bluebook contains capitalization rules which reflect proper English. Bluebook Rule 8 addresses capitalization. "Only capitalize party designations such as 'Plaintiff,' 'Defendant,' 'Appellant,' and 'Appellee' when referring to parties in the matter that is the subject of your document…" Capitalize "court" "only when naming any court in full or when referring to the United States Supreme Court…"

The current capitalization within the Rules of Criminal Procedure is correct and complies with both the Bluebook and proper English. The proposed amendments which consistently capitalize the words "Defendant," "Circuit Court" and "Superior Court" change something which is currently correct in the rules into something which is incorrect.

Furthermore, there are 53 Rules of Criminal Procedure. There are no proposed amendments to Rules 20-53, which consistently follow the proper rules of English and refer to "defendant," "superior court" and "circuit court" in proper lowercase. The proposed amendments would create capitalization inconsistencies within the rules themselves.

Similarly, many of the proposed amendments address pronouns. "The defendant" is a singular noun. The proper pronouns for this singular noun are "he or she" or "his or her." "They" or "them" is a plural pronoun, and should not be used to refer to the singular defendant. For example: "the defendant must be provided a copy of his or her complaint" is proper English. The phrase "the defendant must be given a copy of their complaint," although perhaps acceptable vernacular, is improper English. When writing court rules, the rules should be written in proper English, not vernacular.

Again, many of the amendments which change the proper singular pronouns "his or her" to "their" make a statement which is grammatically correct and proper English into something which is wrong.

To the extent the Court wishes to undertake a major overhaul of the capitalization and pronouns contained within the Rules of Criminal Procedure, all of the rules, not only the first 19, should be examined. Additionally, such an overhaul should take place when time is not of the essence as it is with reference to the "felonies first rewind" rules which need to be in place by January 1, 2024.

Rule 3(a)- This rule contains a substantive change which contradicts current law. The proposed rule would allow a complaint filed by *a prosecutor* or a police officer in a violation level offense or class B misdemeanor to not require an oath. Again, this amendment is not mandated by the "felonies first rewind."

The problem is that RSA 592-A:7 addresses the "Jurisdiction and Procedure Generally" in circuit court. It reads: "I. (a) Criminal proceedings before a circuit court shall be begun by complaint, signed and under oath, addressed to such court, briefly setting forth, by name or description, the party accused and the offense charged, provided that a complaint filed by a police officer, as defined in RSA 106-L:2, I for a violation-level offense or a class B misdemeanor shall not require an oath. All complaints filed by a police officer shall include the officer's signature and printed name and notice that making a false statement on the complaint may result in criminal prosecution."

If the Court were to adopt the proposed amendment to Rule 3(a), a prosecutor could file a complaint in certain circumstances not accompanied by an oath in compliance with the rule; but under the statute, that same complaint would be defective since the statute only allows *police officers* to file a complaint without an oath.

Furthermore, since the circuit courts are a statutorily created court, we must adhere to the legislature's grants and limitations of jurisdiction. In my opinion, the circuit court would lack jurisdiction on a complaint filed in circuit court by a prosecutor without an oath, even though that complaint would be in compliance with the proposed amendment to Rule 3(a).

Rule 3(b), Rule 3(c), and Rule 3(d)- The proposed amendments to these rules are not necessarily related to the "felonies first rewind;" however, the proposed amendments serve to make the rules more accurate, readable, and reflect the recent legislative changes in RSA 594:14. Other than the improper capitalization, I would support these amendments.

Rule 4(a)(1)- This rule currently sets forth an artificial timeframe in which the complaint must be filed *prior to* arraignment. Although amending this rule would not be part of the "felonies first rewind," I believe that the wording of this rule should be changed.

I use the term "artificial" timeline because there is no constitutional or statutory mandate for the 14 day period contained in the rule. It appears to simply be for the convenience of the court.

It is the filing of the complaint which vests the circuit court with jurisdiction (See RSA 592-A:7). Since it is the filing of the complaint which initiates the case and vests jurisdiction, I do not believe that the court can have a rule that requires the executive branch to file a complaint a certain number of days *before* arraignment. Essentially the judicial branch is requiring the executive branch to do something before the judicial branch has any authority over the process. I think that the court can have a rule that requires arraignment to be held "no sooner that 14 days after the filing of a complaint," but I do not believe the judicial branch can dictate actions prior to them having a case.

I would recommend amending the rule to change the language to reference the timing of the arraignment (a judicially controlled function), not the filing of the complaint (an executive function) as outlined above. Specifically: "(1) If the defendant is not detained prior to arraignment, the ~~complaint~~ **[arriangment]** shall be ~~filed~~ **[held]** no ~~later~~ **[sooner]** than fourteen (14) days ~~prior to~~ **[after]** the ~~date of arraignment~~ **[filing of the complaint, unless a statute or an administrative order requires other specific scheduling timeframes for the arraignment.]**

Rule 4(a)(2)- This proposed rule adds in an artificial "one hour" timeframe in which a complaint must be filed prior to arraignment if the defendant is being detained. This proposed rule is not mandated by the "felonies first rewind" since there are currently arraignments occurring every day in New Hampshire for defendants who are detained pending arraignment.

It is important to keep in mind the point of view of the individuals who drafted the proposed amendments to these rules. Specifically, the proposed amendments were drafted by court administrators. In my opinion, several of the proposed rules are being added for the convenience of the court staff, not because they are constitutionally or statutorily mandated. This new "one hour" timeframe is an example of a proposed amendment for the convenience of court staff; I believe this is being proposed to give court staff time to enter the charges in the computer system and prepare for the arraignment.

Unfortunately, while adding a "one hour" timeframe will increase the court staff's ability to process the paperwork, it comes at a cost to the prosecutor who will now have the added burden of rushing to file this paperwork within the artificial timeframe.

One of my concerns with this proposed amendment is that it does not contain a remedy. In the absence of a stated remedy, I am concerned that court staff may refuse to accept paperwork or that judges may believe that they possess the power to dismiss charges or discharge bail when the

complaints are not filed at least one hour prior to arraignment. **I believe this is an enormous problem.**

First of all, I do not believe that a 1 hour timeframe is workable or realistic in circuit court when the "video arraignments" are often done in the morning. When I was an Assistant City Prosecutor in Concord, we had "video arraignments" at 11am every day. The process of drafting complaints, having them brought to the prosecutor, having the prosecutor review them (while handling the normal docket) and filing them before 10am would be difficult. Some circuit courts hold video arraignments at 10am, which would require the complaints to be filed by 9am. This is virtually impossible in my opinion.

Think about who is actually being detained prior to arraignment. Generally, these are people who are arrested and a bail commissioner has determined by clear and convincing evidence that releasing the person would endanger the safety of that person or the public. There are often victims in these cases.

Again, what if the rule is not complied with? I can personally recall a case in which 3 men violently gang raped a woman in Concord. They had no ties to NH and were arrested in VA and extradited back to NH on very high cash bail. They were video arraignments and we were having difficulty getting the complaints from the police department and filing the complaints with the court in a timely manner prior to the video arraignment. The judge threatened to dismiss the case or discharge the bail if the complaints were not immediately filed. Are we really going to let a violent felon out of jail because the prosecution was not able to file the complaint 60 minutes prior to the arraignment?

If the defendant is charged with murder, and the complaints are not filed 60 minutes ahead of the arraignment, are we really going to allow the judge to dismiss the complaints?

It also begs the question of what the consequences of a dismissal or discharge of bail would be. We know that in criminal cases "[t]he sanction of dismissal with prejudice is… reserved for extraordinary circumstances, and should not be wielded where a prosecutor, through nonfeasance, vexes the trial judge but has not actually prejudiced the defendant." State v. Cotell, 143 N.H. 275, 281 (1998). Presumably, any dismissal for failing to comply with rule based timeframes would be without prejudice. "Subject to constitutional and statute of limitations issues, a dismissal without prejudice 'does not preclude the state from filing charges—even the same ones—at a later time.'" State v. Salimullah, 172 N.H. 739 (2020)(internal citations omitted).

Therefore, the state could just re-file the complaints within the statute of limitations. If a person was arrested for a felony and held prior to arraignment, and the prosecutor was unable to file the complaint an hour before arraignment the court could dismiss the complaint or discharge the bail; but, the defendant could be immediately re-arrested at the house of corrections and presumably held again pending arraignment. Obviously, this makes no sense.

To the extent the court believes that it has the authority to order the executive branch to file the complaint at a certain time, it should be made clear what the penalty for non-compliance with the timeframe may be. I would like to see language added which makes it clear that: "**No**

case shall be dismissed and no bail discharged as a result of non-compliance with the timeframe set forth in this rule."

Public safety and victim's rights should not be compromised because a complaint is not filed in compliance with an artificial timeframe.

Rule 4(g)(1) and Rule 4(g)(2)- Rule 4(g)(1) adds language regarding the notice of intent to seek class A misdemeanor penalties, which would require the prosecutor to provide "proof that a copy was provided to the Defendant [sic] by the State [sic]." This new requirement is not needed for the implementation of the "felonies first rewind."

I am concerned about what constitutes "proof" that a copy of a form was provided to the defendant. Is the prosecutor's statement that the form was mailed to the defendant's last known address sufficient? How would a prosecutor provide this form to a defendant who is being detained and is scheduled for a video arraignment the day after arrest?

This is further complicated by the fact that the defendant may be represented by counsel between the time of arrest and the time of arraignment. The state may not be aware of this and would be sending paperwork to a represented party.

Frankly, it never made any sense to me that the state was required to provide the notice of intent to seek class A misdemeanor penalties to the defendant. The form is something which must be filed at or before arraignment- it is a notice to the court, not necessarily to the defendant.

What would make the most sense to me is to eliminate the state's obligation to provide the form in Rule 4(g)(1), and have the court give the notice to the defendant when the defendant is provided with the information required by Rule 4(g)(2). I've always found it odd that the court is responsible for informing the defendant of the charge against him or her, the maximum potential penalty, and that the defendant can request discovery; but for some reason the prosecution is obligated to tell the defendant that we are filing a notice with the court to actually seek class A misdemeanor penalties before the defendant is even notified of the charges against him or her.

The first sentence of Rule 4(g)(2) is proposed to be: "If the defendant is charged with a felony, misdemeanor, or violation…" However, none of these words are necessary because the person *must* be charged with either a felony, misdemeanor or violation in order to be a *defendant.* Therefore, I would eliminate this surplusage.

I would amend Rule 4(g)(2) to read: "(2) ~~If the defendant is charged with a~~ **[felony,]** ~~misdemeanor or violation,~~ **[T]**he court shall inform the defendant of the nature of the charges, the possible penalties, **[the privilege against self-incrimination,]** the right to retain counsel, **[and provide the defendant with a copy of the charging documents and the notice of intent to seek class A misdemeanor penalties if applicable.] [In felony and]** class A misdemeanor cases, the **[court shall also inform the defendant of the]** right to have an attorney appointed by the court pursuant to Rule 5 if the defendant is unable to afford an attorney."

Rule 5(a)- This rule requires bail commissioners to provide defendants with information and applications related to the appointment of counsel. All of the proposed amendments to rule 5 address capitalization, pronouns, and the names of forms. None of the proposed amendments would be necessary to implement the "felonies first rewind."

However, if we are generally amending the Rules of Criminal Procedure, I have always had concerns about rule 5 and bail commissioners telling people that they have the right to counsel.

The right to counsel attaches at the commencement of adversarial judicial proceedings. See State v. Kilgus, 128 N.H. 577 (1986). Until the state has filed the complaint, the state has not committed to prosecute and the right to counsel does not exist. See State v. Chaisson, 123 N.H. 17 (1983); State v. Jeleniewski, 147 N.H. 462 (2002).

This makes sense since it is the prosecutor, not the arresting officer, who decides to prosecute a crime. The arresting officer makes the arrest, and the prosecutor initiates prosecutions. Sometimes these are the same individual, but often they are not. The problem with having a bail commissioner explain the right to counsel is that this generally occurs prior to a prosecutor's involvement in the case. What the arresting officer believes the charges may be, and the offense level of those charges, may not be accurate. In fact, this is the exact reason why the "notice of intent to seek class A misdemeanor penalties" form referenced in rule 4 exists; the legislature wanted to save money by only appointing counsel on cases which were truly going to be pursued as class A misdemeanors, and wanted the prosecutors to put thought into that determination prior to arraignment. See Relative to Classification of Misdemeanor Offenses, SB201-FN, 2009 Session (N.H. 2009), https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/ (Mar. 17, 2009 hearing, Remarks of Judge Edwin Kelly).

Being "arrested for a class A misdemeanor and / or felony" does not give you the right to counsel. Being charged with a class A misdemeanor or felony does. However, this rule provides for the appointment of counsel upon arrest.

Rule 5(b)- Again, this rule addresses the appointment of counsel.

I believe that the complaint MUST BE FILED in circuit court in order to (1) begin the court's jurisdiction over the criminal proceeding, (2) for the right to counsel to attach, and (3) in order for the court to know what the charges are to see if the defendant has a right to court appointed counsel.

Appointing counsel prior to the filing of the complaint can be problematic. I have personally experienced individuals which have had the New Hampshire Public Defender appointed because they were *arrested* on what the police believed was a class A misdemeanor. However, the complaints were filed as either class B misdemeanors or violations, which created the situation that they were told that they no longer qualified for counsel and the attorney which had been appointed was required to withdraw.

Rule 5 should be amended to reflect the current state of the law: **Upon the filing of a class A misdemeanor or felony level charge the court shall provide the defendant with written notice that if he or she is unable to afford counsel, counsel will be appointed for arraignment, if requested, subject to the state's right of reimbursement for expenses related thereto.**

Rule 7(c)- This rule requires indictments to contain certain words and docket numbers. I do not believe this proposed amendment is required for the implementation of the "felonies first rewind." I say this because prior to the implementation of felonies first the indictments were never required to contain the corresponding docket numbers.

An indictment is sufficient under RSA 601:4 "if it sets forth the offense fully, plainly, substantially and formally, and it is not necessary to set forth therein the special statute, bylaw or ordinance on which it is founded." Further rules regarding indictments can be found in RSA 601:5-601:9. Requiring an indictment to include "either the corresponding Circuit Court [sic] case number and charge ID or the words 'direct indictment'" goes beyond statutory and common law mandates. I believe that a judicially imposed mandate to require docket numbers on the indictment infringes upon the independence of the grand jury (which is the body issuing the indictment).

Much like the artificial timeframes contained in rule 4, it also begs the question of remedies for non-compliance. Is the superior court going to dismiss an indictment issued by the grand jury for failure to specify the circuit court charge ID number on it?

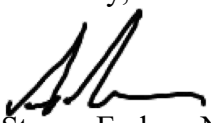
Conclusion

I certainly recognize that some of the Rules of Criminal Procedure must be amended in order to implement the "felonies first rewind." However, many of the proposed amendments are not necessary in order to implement the upcoming changes.

The amendments to rules 1-19 have been proposed by the administrative judges and court administrators. Several of the proposed rules would make the process more convenient or easier for the court and the court staff, but are not required by either the N.H. Constitution or statutes. For example, requiring the filing of complaints either 14 days or an hour before arraignment, requiring the state to provide proof that the notice of intent to seek class A misdemeanors form has been provided to the defendant, requiring bail commissioners to distribute paperwork to the defendant regarding the right to counsel, and requiring indictments to contain circuit court docket numbers all increase convenience to the court at the expense of the workload of others.

Furthermore, I remember the process in New Hampshire *before* felonies first was implemented. There were no required timeframes in which to file a complaint and there was no requirement that an indictment contain a docket number. The process ran smoothly without these requirements.

Sincerely,



Steven Endres, NH Bar #14894