

January 29, 2024

Honorable Patrick E. Donovan, Chair
Advisory Committee on Rules
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

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

Dear Justice Donovan and Advisory Committee on Rules,

As you are aware, there was a proposal to amend Rule 12 of the Rules of Criminal Procedure before the Advisory Committee on Rules docketed as 2020-006. The proposed amendment would have required the prosecution to provide a copy of the defendant's criminal record prior to the initial arraignment. If the prosecution failed to do so, the prosecution would not be allowed to refer to the defendant's criminal history during the bail argument. This amendment was proposed on or about June 30, 2020 by Attorney Rothstein.

Shortly after Attorney Rothstein's proposed amendment, Superior Court Chief Justice Nadeau issued Superior Court Administrative Order 2020-06 on July 14, 2020, essentially implementing Attorney Rothstein's proposed amendment as a Superior Court Administrative Order.

On July 17, 2020 Governor Sununu signed HB 1645 into law, effective upon passage, which amended the bail statute, RSA 597:2, to indicate that in determining bail, "the court may consider all relevant factors..." This amended statute appears to supersede Superior Court Administrative Order 2020-06 by allowing the court to unconditionally consider "all relevant factors" such as the defendant's prior record, even if the record was not previously provided to the defense.

The Advisory Committee on Rules initially recommended that the Supreme Court adopt the amendment; however, the Supreme Court referred the matter back to the Advisory Committee in light of public comments received by the Court.

The Advisory Committee on Rules then received many letters in opposition to the proposed amendment to Rule 12. Those letters were from various prosecutors throughout the State as well as the New Hampshire Coalition Against Domestic and Sexual Violence and the New Hampshire Police Association. In addition, there was a public hearing in which a number of individuals spoke against the proposed amendment.

The Advisory Committee on Rules formed a subcommittee and there were three reports from the subcommittee making various recommendations. It is my recollection that the subcommittee failed to form a consensus. Ultimately, the Advisory Committee on Rules recommended a version of the proposed amendment to Rule 12 to the New Hampshire Supreme Court in its August 1, 2022 report to the Court.

The New Hampshire Supreme Court docketed the proposed amendment as R-2022-0003 and sought further public comments about the proposed amendment. After receiving and considering additional public comments, the Supreme Court declined to amend the New Hampshire Rules of Criminal Procedure Rule 12.

On January 2, 2024 Circuit Court Administrative Judge King issued administrative order 2024-02 (attached). Essentially, this administrative order implements a requirement that the prosecution provide the defense with a copy of the defendant's criminal record prior to the initial bail hearing, and says: "If the State fails to provide said copies, the State shall be prohibited from referencing any such records at the arraignment or bail hearing, except for good cause shown."

This is nearly identical to the language which was initially proposed as an amendment to Rule 12, subject to multiple public hearings, and ultimately rejected by the New Hampshire Supreme Court. On January 29, 2024 I had the opportunity to meet with Judge King, who indicated that he was aware of the proposed amendment to Rule 12 and the controversy surrounding that amendment. Judge King also indicated that he skimmed the paperwork in the Advisory Committee's Docket 2020-006 prior to issuing Circuit Court Administrative Order 2024-02.

I do not believe that the Circuit Court Administrative Judge should be able to unilaterally, and without being subject to any type of appeal, essentially implement a change to the Rules of Criminal Procedure, *especially one which has been previously considered and rejected*. The Rules of Criminal Procedure are properly written by the Chief Judge of the Supreme Court with a concurrence of a majority of supreme court justices pursuant to Part II, Article 73-a of the New Hampshire Constitution. Furthermore, there is a rulemaking process outlined in Supreme Court Rule 51.

Supreme Court Rule 51 makes it clear that the rulemaking process is designed to ensure: the adoption and amendment of rules occurs in an orderly, transparent and uniform manner; that the public, the bench and the bar receive notice and an opportunity to comment on proposed rule suggestions; and so that the rules are clear, definite in application and consistent with each other. Allowing an amendment or augmentation to the Rules of Criminal Procedure by administrative order completely undermines the sound reasoning for the rulemaking process articulated in Rule 51(1).

In my opinion, the proper process in Rule 51 was followed in 2020-006 and R-2022-0003. That process has been subverted by Circuit Court Administrative Order 2024-02.

Therefore, to both rectify the current problem and to prevent this from occurring in the future, I respectfully propose an amendment to New Hampshire Supreme Court Rule 54(4), subsection (c) as follows:

"Without limiting the foregoing, the responsibilities of the administrative judge (or, upon the unavailability of the administrative judge of the circuit court, the deputy administrative judge) include the following...

(c) Issuing superior court or circuit court administrative orders as may be required from time to time to carry out the responsibilities of the office; **[provided**

however, that any administrative order which supplements, modifies, or augments existing court rules shall be issued only on an emergency temporary basis while the proposed rule or amendment is subject to the Rule-Making Procedures in Supreme Court Rule 51. Upon Final Action by the Supreme Court in the Rule-Making Procedure all emergency temporary administrative orders concerning the proposed rule or amendment shall be void. All current administrative orders which supplement, modify, or augment existing court rules shall be void.]”

We do not know why the Supreme Court declined to adopt the proposed amendment to Rule 12, but some of the objections to the amendment expressed concerns for victim safety. Since the failure to adopt the proposed amendment may have been grounded in a concern for victim safety, and Circuit Court Administrative Order 2024-02 has implemented the same process which was specifically *not* adopted by the New Hampshire Supreme Court, I believe my proposed amendment to Supreme Court Rule 54 justifies expedited consideration.

To the extent the Advisory Committee wishes for further information, I would respectfully request a hearing on this proposal.

Sincerely,



Steven Endres
NH Bar # 14894

Cc: Circuit Court Administrative Judge David D. King
(via email: dking@courts.state.nh.us)

Superior Court Chief Justice Mark E. Howard
(via email: mhoward@courts.state.nh.us)

**State of New Hampshire
Circuit Court
Administrative Order 2024 – 02**

Discovery of Criminal Record Prior to Arraignment

Pursuant to the Due Process Clauses of the Federal and New Hampshire Constitutions and the Court's inherent authority to govern discovery in criminal cases, the Court issues the following order relative to discovery of criminal records in all New Hampshire Circuit Courts prior to arraignments and bail hearings. This order is intended to be viewed in conjunction with Superior Court Administrative Order 2020-06 as felony arraignments and bail hearings will be heard in the first instance Circuit Court beginning on January 2, 2024.

1. At arraignments and bail hearings the State routinely cites to record checks of defendants' criminal histories, including National Crime Information Center (NCIC) and New Hampshire Department of Safety maintained records. The Court may place weight on these records in making bail decisions. These records are accessible to the State but not to criminal defendants or their counsel.
2. Because it would be fundamentally unfair to permit the State to cite to documents at arraignment or bail hearings to which the defense does not have ready access, this Court hereby orders that in any criminal case where the State intends to cite to a defendant's criminal record at an arraignment or bail hearing, the State shall provide to the defense copies of any and all such records in the State's possession prior to any such hearing. The State may provide the records by fax, secured email, or similar means to assure the confidentiality of such records.
3. If the State fails to provide said copies, the State shall be prohibited from referencing any such records at the arraignment or bail hearing, except for good cause shown. In any event, defense counsel shall be given the opportunity to review said records with the defendant before the arraignment or bail hearing. If the defendant does not have counsel, they shall be given the opportunity to review said records before the arraignment or bail hearing. If the State does not intend to cite to the defendant's criminal record during the arraignment or bail hearing, then the Rules of Criminal Procedure 12(a) shall govern the timing of disclosure.
4. This order is effective on this date and shall remain in effect until rescinded or modified.

Dated: January 2, 2024



David D. King Administrative Judge
New Hampshire Circuit Court