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October 19, 2023

N.H. Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301

Via email only: rulescomment@courts.state.nh.us

Re: Proposed amendments to the New Hampshire Rules of Criminal Procedure and Family Division Rules Rule 3.13.

Dear Chairperson Donovan and Supreme Court Advisory Committee on Rules,

I wish to comment on the proposals to amend Rules 1-19 of the New Hampshire Rules of Criminal Procedure and the addition of Family Division Rules Rule 3.13. Overall, 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.

Similarly, many of the 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.

Please do not make the embarrassing recommendation to the New Hampshire Supreme Court to change grammatically correct rules into grammatically incorrect rules.

With reference to specific rules:

Rule 3(c)(page 9) ends with the sentence: "if the person is detained in lieu of bail, an affidavit or statement signed under oath, if filed electronically that complies with Gerstein v. Pugh, 420 U.S. 103 (1975) must be filed."

I believe that this is confusing. I believe that the commas are in the wrong place and it should actually read: "if the person is detained in lieu of bail, an affidavit**,** or statement signed under oath if filed electronically**,** that complies with Gerstein v. Pugh, 420 U.S. 103 (1975) must be filed."

I believe that an even better re-write would be: "if the person is detained in lieu of bail an affidavit that complies with Gerstein v. Pugh, 420 U.S. 103 (1975) must be filed." I would get rid of the phrase "or statement signed under oath" because I personally do not know of any difference is between an affidavit and a statement signed under oath.

Rule 3(d)(page 9) says: "In any other case in which an arrest warrant would be lawful, upon the request of the State [sic], the person authorized by law to issue an arrest warrant may issue a summons."

I believe this contradicts RSA 592-A:14 which reads: "592-A:14 Summons for Defendant. – Upon complaint for an offense of which a district or municipal court has final jurisdiction, the justice to whom the complaint is made, if he shall deem an arrest unnecessary, may issue a summons requiring the party to appear at a certain time and place to answer to the complaint." I don't believe a justice can issue a summons in lieu of an arrest warrant on a felony level case, which is something the rule seems to authorize.

I also don't understand the statement "in any other case in which an arrest warrant would be lawful…" I believe this is surplusage and should be eliminated. Is there a case in which an arrest warrant is unlawful? I do not believe there is any type of case in which the police could not lawfully obtain an arrest warrant.

Rule 4(a)(1)(page 10) This rule sets forth a timeframe in which the complaint must be filed *prior to* arraignment. 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.

This rule also begs the question- what if it is not complied with? I do not want to see judges believe that they have the authority to dismiss criminal charges or discharge bail if a complaint is not received by the court 14 days prior to arraignment. If this timeframe remains in the rule, I would add the sentence "no case may be dismissed and no bail may be discharged for failure to comply with this rule."

Rule 4(a)(2)(page 10) Similar to above, this rule creates a new timeframe for the filing of a complaint when a defendant is detained prior to arraignment.

I do not believe that a 1 hour timeframe is workable or realistic in circuit court when these 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. The 6th Circuit, District Division, Concord Court now holds video arraignments at 10am, which would require the complaints to be filed by 9am. This is virtually impossible in my opinion.

Again, this also begs the question- or what? 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 filed 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?

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 on 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 and presumable 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 that these timeframes are aspirational and that no case shall be dismissed based on non-compliance with the rule based timeframes.

Rule 4(a)(3)and(4)(page 10) These rules reference timeframes for filing complaints in plea by mail cases. Again, these timeframes never made any sense to me. How can a court dismiss a complaint if there is no

complaint filed? Again, if it is the filing of a complaint which initiates a criminal prosecution, then the court lacks jurisdiction to dismiss a case until *after* the complaint is filed. I believe that the only action the court could take would be to discharge the bail, although there is no bail set in "plea by mail" cases since it is a summons.

Rule 4(g)(1) and 4(g)(2)(page 12) This rule adds language regarding the "Notice of Intent to Seek Class A Misdemeanor Penalties" form, specifically "with proof that a copy was provided to the Defendant [sic] by the State [sic]."

The form itself has a certificate of service on it, which is something that I believe has always been problematic. However, this rule now goes a step further, by actually having "proof that a copy was provided."

This becomes very problematic. For example, many people who are arrested do not have fixed mailing addresses, or their mailing address is not known to the prosecution. What constitutes "proof that a copy was provided to the Defendant [sic] by the State [sic]"? Is simply mailing it to the last known address sufficient?

This is additionally complicated by the fact that the defendant may be represented by counsel between the time of the arrest and the time of arraignment, something the state may not be aware of.

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.

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)(page 14) This rule requires bail commissioners to provide defendants with information and applications related to the appointment of counsel.

I have always had concerns about 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 police, who decides to prosecute a crime. The police make arrests and the prosecutor initiates prosecutions. The problem with having a bail commissioner explain the right to counsel is that this occurs prior to a prosecutor's involvement in the case. What the police believe the charges may be, and the offense level of those charges, may not be accurate.

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)(page 14) 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 terrible situation that they were told that they no longer qualified for counsel and the attorney which had been appointed was required to withdraw.

We are all aware of the high caseloads at the Public Defender's Office, and it was also my experience that the Public Defenders were (intelligently) reluctant to allocate resources into a case which might ultimately be filed as a class B misdemeanor or violation.

Rule 6(a)(2)(page 18) This rule addresses scheduling and says you get a PC hearing within 10 days if held and within 30 days if released "excluding weekends and holidays."

I interpret this to mean that if I am arrested on Friday, September 1, 2023 and I am held in custody, my PC hearing must occur by Monday, September 18, 2023. This is because:

i. September 1, 2023 (Friday) day of arrest, does not count
ii. September 2, 2023 (Saturday) weekend, excluded.
iii. September 3, 2023 (Sunday) weekend, excluded.
iv. September 4, 2023 (Monday) Labor Day, holiday, excluded.
v. September 5, 2023 (Tuesday) Day 1 of the 10 days.
vi. September 6, 2023 (Wednesday) Day 2 of the 10 days.
vii. September 7, 2023 (Thursday) Day 3 of the 10 days.
viii. September 8, 2023 (Friday) Day 4 of the 10 days.
ix. September 9, 2023 (Saturday) weekend, excluded.
x. September 10, 2023 (Sunday) weekend, excluded.
xi. September 11, 2023 (Monday) Day 5 of the 10 days.
xii. September 12, 2023 (Tuesday) Day 6 of the 10 days.
xiii. September 13, 2023 (Wednesday) Day 7 of the 10 days.
xiv. September 14, 2023 (Thursday) Day 8 of the 10 days.

xv. September 15, 2023 (Friday) Day 9 of the 10 days.
xvi. September 16, 2023 (Saturday) weekend, excluded.
xvii. September 17, 2023 (Sunday) weekend, excluded.
xviii. September 18, 2023 (Monday) Day 10.

This would be opposed to "within 10 days" of Friday September 1, 2023 being Monday, September 11, 2023.

Thirty days from September 1, 2023, excluding weekends and holidays, would be October 17, 2023 (there are 9 weekend days and 1 holiday in Sept and 6 weekend days and 1 holiday in October between those dates). This would be opposed to 30 days from September 1, 2023 being Monday, October 2, 2023.

Unless you actually want to *exclude* weekends and holidays from the computation, as opposed to when the 10th day falls on a weekend or holiday, I would note that in my opinion the phrase "excluding weekends and holidays" does not need to be included.

Circuit Court- District Division Rule 1.1A already addresses the computation of time and states: "(1) In computing any period of time prescribed or allowed by these rules, by order of court, or by applicable law, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, or a legal holiday as specified in RSA ch. 288, as amended"

Therefore if you wanted the hearing within 10 days or within 30 days *unless* the 10th day or the 30th day was a weekend or holiday the phrase "within 10 days" would be adequate in light of the above rule.

Rule 7(c)(page 21). This rule requires indictments to contain certain words and 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 case number and charge ID or the words 'direct indictment'" infringes upon the grand jury (which is the body issuing the indictment).

Again, it also begs the question- or what? Is the superior court going to dismiss an indictment for failure to specify the circuit court charge ID number on it?

Rule 12(a)(1)(page 29) This rule addresses discovery in circuit court. However, the way the circuit court discovery portion is written it allows ALL defendants in circuit court (which would include those charged with felonies) discovery upon request.

I believe that this exceeds the statutory authority of the circuit court which can only arraign and hold preliminary examinations in felony level offenses (RSA 490-F:3-a). It is internally inconsistent because it refers to 10 days prior to "trial" in circuit court as a timeframe, but the circuit court does not have jurisdiction to have trials over all criminal defendants before the circuit court (felony charges). It also contradicts the superior court discovery rules under 12(b) in that discovery must be provided within 10 calendar days of arraignment in superior court, which only occurs after indictment.

In the old (pre-felonies first) system, individuals charged with felony level offenses were not entitled to discovery in circuit court.

This makes practical sense, since all of the discovery should come from the respective county attorney's office to ensure that the defendant has the same full discovery as the prosecutor. In addition, it avoids the potential for discovery motions and discovery litigation to take place in circuit court.

This rule should retain and amend the current language "Upon request, in misdemeanor and violation-level cases **[which are not accompanied by a felony]**, the prosecuting attorney shall furnish the defendant with the following…"

I also wish to comment of proposed **Family Division Rules Rule 3.13**. The rule simply indicates: "All pleadings and other submissions to the court in delinquency matters shall be entitled, "In the interest of _____, a minor."

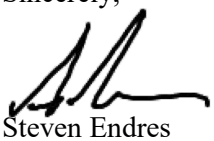
While I appreciate the guidance this rule provides, I actually think it needs to be more clear. I have seen juvenile pleading which utilize the juvenile's full name, the juvenile's fist name and last initial, or simply the juvenile's initials. I am not sure which is correct, and this rule does not clarify that. Each of the following would comply with the rule:

In the interest of John Smith, a minor
In the interest of John S., a minor
In the interest of J.S., a minor

I have always presumed that since juvenile cases were sealed that I could caption a pleading with the juvenile's full name. If this is the case, I would propose adding that clarification to the rule:

"All pleadings and other submissions to the court in delinquency matters shall be entitled, "In the interest of [first name, last name], a minor."

Sincerely,



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