



New Hampshire Association of Criminal Defense Lawyers

VIA ELECTRONIC SUBMISSION

October 23, 2023

Hon. Timothy A. Gudas, Clerk
New Hampshire Supreme Court
1 Charles Doe Drive
Concord, NH 03301

RE: Amending Rules 1-19 of the New Hampshire Rules of Criminal Procedure

Dear Clerk Gudas:

On September 22, 2023, the Supreme Court requested comment regarding proposed amendments to the New Hampshire Rules of Criminal Procedure. In response, the New Hampshire Association of Criminal Defense Lawyers (“NHACDL”) submits the following remarks. NHACDL urges the Court to take this opportunity to amend Rule 12 (Discovery). The rule should be amended to clarify that the State is required to produce witness statements prior to trial in the Circuit Court. In addition, it should be amended to require the State to produce initial discovery in the Superior Court more expeditiously. As discussed below, requiring the State to produce discovery more quickly is in the interest of justice, promotes judicial economy, and will not result in any hardship to the State.

Circuit Court – District Division

At present, Rule 12(a) does not explicitly require the State to produce witness statements prior to trial in the Circuit Court. In practice, the State commonly provides these materials. Rule 12(b) concerning Superior Court practice explicitly states that witness statements are amongst the discovery materials that must be produced to the defense. *See* Rule 12(b)(1)(B). To promote consistency amongst the courts and codify existing practice, Rule 12(a)(2)(A) should be amended to include the production of witness statements.

Superior Court

As proposed, Rule 12(b)(1) sets different discovery deadlines depending on whether the case came to Superior Court from the Circuit Court or via direct indictment. If the case was born through direct indictment, the State is afforded forty-five (45) days to produce discovery. If the case originated in the Circuit Court, the State is afforded ten (10) days to produce discovery. There is no procedural reason for this disparity.

Under either procedural posture, the State should be obligated to immediately produce discovery to the defendant upon entry of a not guilty plea. To the extent that the rules committee feels there must be a deadline for production, NHACDL suggests a deadline of five (5) calendar days. In either procedural posture, the State should be required to produce discovery consistently and expeditiously.

Before bringing a case via direct indictment, the prosecutor's office receives discovery from the investigating agencies. The prosecutor uses that discovery to call witnesses and present evidence of the case to the grand jury. As a result, when a case is lodged via direct indictment, the State has discovery that it has read and worked with. The State should immediately produce this discovery upon entry of the Defendant's not guilty plea.

When a case originates in the Circuit Court, and is bound over to the Superior Court, the State has ninety days to return an indictment. *See* Rule 8(d)(1). In order to present the matter to the grand jury, the prosecuting agency must receive the discovery. Further, in the bound over period, the prosecuting agency has weeks – and often months – to gather additional discovery materials.

In either scenario, there is no practical reason why the State cannot provide discovery to the Defendant upon his plea of not guilty in the Superior Court. To the extent that the State has not received certain materials by that time, the State would simply be obligated to provide those materials as they are received. *See* Rule 12(b)(7) (parties are under a continuing obligation to supplement their discovery responses on a timely basis). The administrative burden placed on the State by this change would be *de minimis*. Many, if not all, counties manage discovery electronically. Providing discovery to the defense is as simple as creating a hyperlink.

The rules as presently proposed needlessly afford the State an opportunity to withhold discovery from the defense for up to forty-five (45) days. This delay impedes the Defendant's ability to prepare a defense, conduct investigation while events are fresh in the witnesses' minds and find and preserve exculpatory evidence. The advantage afforded the State by the current version of Rule 12 contradicts basic notions of fair play and due process. Further, the delay is simply unnecessary. It does nothing to promote any legitimate state interest and impedes truthful and accurate outcomes.

Requiring the State to produce discovery more quickly also promotes judicial economy. In many counties, dispositional conferences are scheduled in all felony cases approximately 45 to 60 days after entry of a not guilty plea. Early production of discovery would make those conferences more meaningful and reduce the number of continuances requested simply for the exchange of discovery.

We urge the committee to adopt the changes suggested above. Going forward, NHACDL would be happy to attend any stakeholder meetings related to drafting of the rules and also any discussions about procedural changes as the Courts transition away from felonies first.

Sincerely,

/s/Jeffrey D. Odland

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