

STATE OF MAINE
SUPREME JUDICIAL COURT
AMENDMENTS TO
MAINE RULES OF CRIMINAL PROCEDURE

2012 Me. Rules 02

Effective: January 1, 2012

All the justices concurring therein, the following amendments to the Maine Rules of Criminal Procedure are adopted to be effective on the date indicated above. The specific rules amendments are stated below. To aid in understanding the amendments, an Advisory Note appears after the text of each amendment. The Advisory Note states the reason for recommending each amendment, but is not part of the amendment adopted by the Court.

1. Rule 11(h) of the Maine Rules of Criminal Procedure is amended to read as follows:

(h) Potential Adverse Immigration Consequences to Noncitizens of the a Plea to Any Crime. Before accepting a plea of guilty or nolo contendere for any crime, the court shall inquire whether the defendant was born in the is a United States citizen. If, based on the defendant's answer, it appears that the defendant is not a United States citizen, the court shall ascertain from defense counsel whether the defendant has been notified that there may be immigration consequences of the plea. advised of the risk under federal law of adverse immigration consequences, including deportation, as a result of the plea. If no such notification advice has been made provided, or if the defendant is unrepresented, the court shall notify the defendant that there may be immigration consequences of the plea the plea can create a risk of adverse immigration consequences, including deportation, and may continue the proceeding in order for counsel to provide the required advice, or, in the case of an unrepresented defendant, for investigation and consideration of the consequences by the defendant. The court is not required or expected to inform the defendant of the nature of any adverse immigration consequences.

Advisory Note – November 2011

Rule 11(h), is modified in light of *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010), holding that in the context of a plea by a noncitizen, to meet the Sixth Amendment’s effective-assistance-of-counsel guarantee, defense counsel must advise the noncitizen client regarding the risk of deportation. More specifically, when it is “clear” under federal immigration law that the consequence of a particular plea is deportation, defense counsel must advise the noncitizen client of that fact. *Id.* at 1483. When, instead, the deportation consequences of a particular plea are “unclear or uncertain” under federal immigration law, defense counsel’s obligation is satisfied by informing the noncitizen client that the plea “may carry a risk of adverse immigration consequences.” *Id.* Despite these modifications to the subdivision, the court itself has no obligation to inform the noncitizen about or predict the nature of any possible immigration consequences of the plea. *See* Advisory Note – 2009 to M.R. Crim. P. 11(h).

2. Rule 16(b)(1) of the Maine Rules of Criminal Procedure is amended to read as follows:

1. *Duty of the Attorney for the State.* Upon the defendant’s written request, the attorney for the state, except as provided in subdivision (3), shall allow access at any reasonable time to those matters specified in subdivision (2) which are within the attorney for the state’s possession or control. The attorney for the state’s obligation extends to matters within the possession or control of any member of the attorney for the state’s staff and of any official or employee of this state or any political subdivision thereof who regularly reports or with reference to the particular case has reported to the attorney for the state’s office. In affording this access, except as otherwise limited by 15 M.R.S. § 1121 relative to sexually explicit material, the attorney for the state shall allow the defendant at any reasonable time and in any reasonable manner to inspect, photograph, copy, or have reasonable tests made.

Advisory Note – November 2011

The amendment modifies paragraph (1) of subdivision (b) of Rule 16 by providing notice of the existence of the new statutorily-imposed limitations on the attorney for the state regarding a defendant’s access to sexually explicit material in any criminal proceeding pursuant to 15 M.R.S. § 1121, enacted by P.L. 2011, ch. 39, § 1, effective September 28, 2011. “Sexually explicit material” is defined in 15

M.R.S. § 1121(1) to mean “the property or material described in Title 17-A, chapter 12.”

3. Rule 16A(c)(2)(A), of the Maine Rules of Criminal Procedure is amended to read as follows:

- (A) Upon motion and notice the court may order a defendant to:
 - (i) Appear in a line-up;
 - (ii) Speak for identification by witnesses to a crime;
 - (iii) Be fingerprinted, palmprinted, or footprinted;
 - (iv) Pose for photographs;
 - (v) Try on articles of clothing;
 - (vi) Permit the taking of specimens of material under the defendant’s fingernails;
 - (vii) Permit the taking of samples of the defendant’s biological materials, including but not limited to, blood, hair, saliva, fingernail clippings and materials obtainable by swab, ~~and other material of the defendant’s body which involve no unreasonable intrusion thereof;~~
 - (viii) Provide specimens of the defendant’s handwriting; and
 - (ix) Submit to a reasonable physical or medical inspection of the defendant’s body.

Advisory Note – November 2011

The amendment to subparagraph (A)(vii), in combination with current subparagraph (A)(vi), are intended to mirror the category of “biological materials” described in new subdivision (k)(4) of Criminal Rule 41. See also Advisory Note – November 2011 to M.R. Crim. P. 41(k).

4. Rule 36B(a) and (b) of the Maine Rules of Criminal Procedure are amended to read as follows:

(a) Appeal to the Superior Court. An appeal may be taken by a juvenile or a juvenile's parents, guardian, or legal custodian as provided in 15 M.R.S. § 3402(1) and (2), from an adjudication, an order of disposition or modification thereof, a detention order, or refusal to modify a detention order, and, subject to the limitations stated in 15 M.R.S. § 3311-D, from a finding of failure to comply with a deferred disposition order, to the Superior Court in the county in which the juvenile crime was committed. An appeal may be taken by the State, pursuant to 15 M.R.S. § 3402(3), from the failure of a juvenile court to order a bind-over.

An appeal is taken by filing a notice of appeal with the clerk of the District Court. The notice of appeal shall conform to the appropriate form number JV-012 prepared by the Judicial Branch Forms Committee. The appellant shall file with the notice of appeal an order for those portions of the transcript the appellant intends to include in the record on appeal utilizing the appropriate Judicial Branch form number CR-165. The clerk of the District Court shall transmit date-stamped copies of the notice of appeal and transcript order to the Electronic Recording Division of the District Court, the clerk of the Superior Court, and the appellee. The clerk of the District Court shall also transmit a copy of the docket entries to the clerk of the Superior Court. If the appellant orders less than the entire transcript of proceedings, the appellee shall have 7 days in which to order additional portions of the transcript utilizing the appropriate Judicial Branch form number CR-165.

(b) Scope of Review. Review by the Superior Court shall be for error of law or abuse of discretion, as determined from the record on appeal; provided however, that pursuant to 15 M.R.S. § 3311-D, a juvenile determined to have inexcusably failed to comply with a court-imposed deferred disposition requirement may not appeal as of right and may have the merits of the appeal considered by the Superior Court only after the Superior Court has made a preliminary determination that (1) the appeal presents a significant issue of fact or law, or (2) consideration of the merits of the appeal would serve the interests of justice.

The Superior Court may affirm, reverse, or modify any order of the juvenile court, may enter a new order of disposition, or may remand for further proceedings in the juvenile court.

Pending appeal of an adjudication or an order of disposition, the Superior Court may order a stay of execution and release pending appeal.

Advisory Note – November 2011

The Legislature enacted P.L. 2011, ch. 384, effective September 28, 2011 adopting several amendments to the juvenile code, particularly to 15 M.R.S. §§ 3311-A, 3311-B, and 3311-C, to authorize deferred dispositions in juvenile cases, basically employing the same practices as are currently applied to deferred dispositions in adult criminal cases. Pursuant to 15 M.R.S. § 3311-D, a juvenile is given the capacity to appeal to the Superior Court from a finding of a failure to comply with a deferred dispositional requirement and imposition of a dispositional alternative. As with appeals from findings of failure to comply with deferred disposition requirements in adult criminal cases, *see* M.R. App. P. 19, section 3311-D provides that this appeal to the Superior Court is “not as of right.”

The amendments to Rule 36B(a) and (b) are designed to integrate the discretionary appeal provision of the new law into the appellate review process of the Superior Court. Subdivision (b) contains two factors that the reviewing court must consider in deciding whether to reach the merits of the appeal: that the appeal presents a significant issue of fact or law, and that consideration on the merits would serve the interests of justice.

Finally, the words “pursuant to 15 M.R.S. § 3402(3)” have been added to Rule 36B(a) to identify the statutory basis for the right of the State to appeal from the failure of the juvenile court to order a bind-over.

5. Rule 41(g) of the Maine Rules of Criminal Procedure is amended to read as follows:

(g) **Scope and Definition.** This rule does not modify any act inconsistent with it, regulating search, seizure and the issuance and execution of search warrants and under circumstances for which special provision is made. ~~The term “property” is used in this rule to include documents, books, papers and any other tangible objects.~~

Advisory Note – November 2011

The amendment deletes the definition of the “property” that is subject to search and seizure, which dates from the original promulgation of the Criminal Rules in 1965. See Glassman, *Maine Practice: Rules of Criminal Procedure Annotated*, Rule 41(g) at 356 (1967). This definition is hopelessly outdated. It defines “property” to “include documents, books, papers and any other tangible objects.” As early as 1982, the Law Court recognized that this definition was outdated, observing in *State v. Taylor*, 438 A.2d 1279, 1281 (Me. 1982):

It is true that Rule 41(e) speaks of illegally seized “property” to be returned to the person aggrieved by the unlawful search and seizure unless otherwise subject to lawful detention. We do realize that the blood or breath samples underlying the results of their chemical analysis may not have been contemplated by the drafters of our criminal rules as returnable property within the meaning of the term “property” as defined in Rule 41(g) “to include documents, books, papers and any other tangible objects.” Nevertheless, we hold that such evidence is subject to the provisions of Rule 41(e).

When Rule 41A was added, effective February 1, 1983, the Advisory Committee Note stated that the intent was “to provide a clear basis for a motion to suppress any evidence which was arguably illegally obtained.” 2 Cluchey & Seitzinger, *Maine Criminal Practice* § 41 at VIII-54 (Gardiner ed. 1995). But the addition left undisturbed the definition of “property” in Rule 41(g), simply noting that “that term has been expansively construed.” *Id.* A new expansive definition of “property” is now found in M.R. Crim. P. 41(k). See also Advisory Note – November 2011 to M.R. Crim. P. 41(k).

6. Rule 41(k), of the Maine Rules of Criminal Procedure is adopted as follows:

(k) **Definition of Property.** The term “property” is used in this rule and in Rules 41A and 41B to include, but not be limited to, the following:

- (1) Documents, books, papers and any other tangible objects;
- (2) Electronically stored information;
- (3) Information derived from a tracking device;
- (4) Biological materials, including hair, blood, saliva, fingernail clippings or scrapings and materials obtainable by swab;
- (5) Fingerprints, palmprints and footprints; and
- (6) Photographs, videos or any other digital image of any person or object.

Advisory Note – November 2011

New subdivision (k) defining “property” replaces the definition of “property” formerly contained in subdivision (g). See Advisory Note – November 2011 to M.R. Crim. P. 41(g). The new definition attempts to capture the expansive definition of “property” that has developed over decades of experience. Beyond the concept of “tangible objects,” “property” now encompasses electronically stored information, biological materials and the other categories listed in Rule 41(k). See also Advisory Note – November 2011 to M.R. Crim. P. 41A(a)(1) and 41B.

7. Rule 41A, subdivision (a), of the Maine Rules of Criminal Procedure is amended to read as follows:

(a) Grounds of Motion. A defendant may move to suppress as evidence any of the following, on the ground that it was illegally obtained:

- (1) ~~physical objects;~~ property;
- (2) statements of the defendant;
- (3) test results;
- (4) out-of-court or in-court eyewitness identifications of the defendant.

Advisory Note – November 2011

The amendment replaces the category of “physical objects” with the category “property.” The former, like its synonym “tangible objects,” is too narrow and is replaced by the newly expanded term “property,” now defined in M.R. Crim. P. 41(k). See also Advisory Note – November 2011 to M.R. Crim. P. 41(g) and 41(k).

8. Rule 41B of the Maine Rules of Criminal Procedure is adopted as follows:

**RULE 41B. SPECIAL PROVISIONS FOR SEARCHES
AND SEIZURES OF CERTAIN KINDS OF PROPERTY**

(a) Electronically Stored Information.

(1) **Contents of Warrant.** A warrant seeking electronically stored information may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The warrant may authorize the retention by the property owner of an electronic copy of such information necessary to avoid or mitigate business interruption or other disruptive consequences.

(2) **Execution of Warrant.** The time for executing the warrant in Rule 41(d) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

(3) **Inventory.** The inventory may be limited to describing the physical storage media that were seized or copied.

(b) Information derived from a tracking device.

(1) **Definition of Tracking Device.** The term “tracking device” is used in this rule and in Rule 41 to mean an electronic or mechanical device which permits the tracking of the movement of a person or object.

(2) **Contents of Warrant.** A warrant for a tracking device must identify the person or property to be tracked and the District Court to which it must be returned. It must command the officer to complete any installation authorized by the warrant within a specified time and specify a reasonable length of time that the device may be used.

(3) **Execution and Return of Warrant.** Notwithstanding Rule 41(d), within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it pursuant to Rule 41(f). The time for executing the warrant in this paragraph refers to the use of the tracking device and not to any later data extraction and review. The officer must enter on the warrant the date and time the device was installed and the period during which it was used.

(4) **Service of Warrant.** Within 10 calendar days after the use of the tracking device has ended, the officer executing it must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by (A) delivering a copy to the person who, or whose property, was tracked; (B) leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location; or (C) mailing a copy to the person's last known address. The time may be extended by the court for good cause shown.

Advisory Note – November 2011

The provisions for search warrants in Rule 41 were originally drafted with “tangible objects” (former Rule 41(g)) in mind. See Advisory Note – November 2011 to M.R. Crim. P. 41(g). Once additional categories of “property” are specified in Rule 41(k), *See* Advisory Note – November 2011 to M.R. Crim. P. 41(k), it becomes important to recognize that each of these additional categories may necessitate special search warrant provisions. Rather than shoehorn these provisions into Rule 41, as Federal Rule 41 has done, it is new Rule 41B that contains these provisions.

Initially, special warrant provisions are now adopted for warrants for electronically stored information and for installation of a tracking device. Rule

41B is expandable to include special warrant provisions for additional categories of “property” as the need for them arises.

Subdivision (a) contains special warrant provisions for electronically stored information. It is modeled on Federal Rule 41(e)(2)(B). The term “electronically stored information” was not defined in the federal rule because its meaning is generally understood from the civil discovery context. The Advisory Committee Notes to the 2006 amendment to Federal Civil Rule 34 stated:

...[T]he growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic.... Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper. Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents.

....Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to “electronically stored information” should be understood to invoke this expansive approach....

Maine Civil Rule 34 has followed this approach. See Advisory Committee Note – July 2008 to M.R. Civ. P. 34. Subdivision (a)(2) complies with the Law Court’s definition of the time when such a warrant is executed. See *State v. Nadeau*, 2010 ME 71, ¶¶ 46-48, 1 A.3d 445.

Subdivision (b) contains special warrant provisions for installation of tracking devices. It is modeled on Federal Rule 41(e)(2)(C) and (f)(2). The definition of “tracking device” in subdivision (b)(1) is taken from 18 U.S.C. § 3117(b). Unlike the federal rule, subdivision (b)(2) does not attempt to set an initial time limit and extension limits, but leaves the matter to case-by-case judicial discretion. Whether such a warrant is constitutionally required is an issue presently before the United States Supreme Court. *United States v. Jones*, No. 10-

1259, U.S., (argued November 8, 2011). Having a warrant provision in place is a safe course in case a warrant is held constitutionally required. It is also good public policy in any event.

9. These amendments shall be effective January 1, 2012.

Dated: December 13, 2011

FOR THE COURT¹

/S/

LEIGH I. SAUFLEY

Chief Justice

DONALD G. ALEXANDER

JON D. LEVY

WARREN M. SILVER

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Associate Justices

¹ This Rules Amendment Order is approved after conference of the Court, all Justices concurring therein.