

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

2013 Me. Rules 05

Effective: January 1, 2014

All of 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 amendments are stated below. To aid in understanding of the amendments, an Advisory Note appears after the text of each amendment. The Advisory Note states the reason for recommending the amendment, but the Advisory Note is not part of the amendment adopted by the Court.

1. Rule 17 of the Maine Rules of Criminal Procedure is amended to read as follows:

RULE 17. SUBPOENA FOR ATTENDANCE OF WITNESSES

.....

(c) For Production of Documentary Evidence and of Tangible Objects. A subpoena may also command the person to whom it is directed to produce at a reasonable time and place specified therein the books, papers, documents or other tangible objects designated therein. Notice of the service of the subpoena and a copy of it shall be provided to opposing counsel or, when applicable, a pro se defendant, contemporaneously with service. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable, oppressive, or in violation of constitutional rights. ~~The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.~~

Advisory Note – October 2013

Rule 17 is amended to resolve three problems that had developed in its operation. The first problem was uncertainty about where and when subpoenaed documents or other tangible objects pursuant to subdivision (c) were to be produced by a subpoenaed witness who is commanded to testify at a trial or hearing. Rule 17(c) formerly provided that the court “may direct” that the subpoenaed documents or other tangible objects “be provided before the court at a time prior to trial.” However, in practice this judicial action rarely happened. Instead, the subpoenaing party and the subpoenaed witness negotiated about the time and place of production, with no guidance from the rule. As now amended, subdivision (c) requires that the subpoena direct the subpoenaed person to produce the designated documentary evidence or other tangible objects “at a reasonable time and place specified therein.”

The second problem was uncertainty about what notice, if any, was to be provided to an adverse party at the time a subpoena issued. Rule 17(c) formerly provided no guidance. As now amended, subdivision (c) provides that “[n]otice of the service of the subpoena and a copy of it shall be provided to opposing counsel or, when applicable, a pro se defendant, contemporaneously with service.”

The third problem was presented when the subpoenaing party was solely interested in obtaining the subpoenaed documents or other tangible objects and had no interest in commanding the attendance of a witness at a trial or hearing. Although that situation was commonplace, it was a situation not contemplated by Rule 17, which only addresses document production in connection with witness attendance. As the amendment to the heading of Rule 17 makes clear, Rule 17 continues to deal exclusively with witness attendance and attendant document or other tangible object production. However, a new Rule 18 has been adopted that deals exclusively with a subpoenaing party whose interest is solely in obtaining documents or other tangible objects by subpoena without witness attendance. See Advisory Note – October 2013 to M.R. Crim. P. 18.

2. Rule 18 of the Maine Rules of Criminal Procedure is adopted to read as follows:

**RULE 18. SUBPOENA FOR PRODUCTION OF DOCUMENTARY
EVIDENCE OR TANGIBLE OBJECTS BY A NONPARTY**

(a) Subpoena to Produce Documentary Evidence or Tangible Objects. A party may serve a subpoena on a nonparty commanding the nonparty to produce documentary evidence or tangible objects at the time and place specified therein. The time specified shall be not less than 14 days, unless a shorter time is ordered by the court. The place specified shall not impose an undue burden or expense upon the nonparty. Documentary evidence includes, but is not limited to, electronically stored information, books, papers, photographs, and videos. A subpoena may be issued by the clerk under the seal of the court or by a member of the Maine Bar. A pro se defendant may be provided a subpoena completed by the clerk. A member of the Maine Bar may be provided a subpoena in blank. The text of subdivisions (d), (e), and (f) of this rule shall be contained in, or appended to, the subpoena.

(b) Service. A subpoena may be served by the sheriff, by the sheriff's deputy, by a constable, or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named. A defendant determined indigent by the court pursuant to Rule 44(b) is entitled to service within the State without payment of the cost. Such cost shall be paid by the Maine Commission on Indigent Legal Services. A request to the sheriff for service shall be accompanied by a certificate of counsel that the defendant has been determined indigent.

(c) Notice to Adverse Party. Unless otherwise provided by statute, notice of the service of the subpoena and a copy thereof shall be provided to opposing counsel or, when applicable, a pro se defendant contemporaneously with service.

(d) Motion to Quash or Modify Subpoena. A party or the subpoenaed nonparty or a person whose rights are potentially affected by the subpoena may move to quash or modify the subpoena.

The court may quash or modify the subpoena if compliance would be unreasonable, oppressive, or in violation of constitutional rights.

(e) Sanction for Noncompliance. If the subpoenaed person fails to obey the subpoena, the court shall order an appropriate sanction, which may include a warrant or order of arrest.

(f) Privileged or Protected Documentary Evidence. If a party or the party's attorney knows that a subpoena seeks the production of documentary evidence that may be protected from disclosure by a privilege, confidentiality protection, or privacy protection under federal law, Maine law, or the Maine Rules of Evidence, the party or the party's attorney shall file a motion in limine, pursuant to Rule 12, prior to serving the subpoena. The motion shall contain a statement of the basis for seeking production of the documentary evidence that may be privileged or protected and shall be accompanied by a copy of the yet unserved subpoena.

Upon receipt of the motion, the clerk shall set the matter for hearing and issue a notice of hearing. The notice shall state the date and time of the hearing and direct the party from whom the documentary evidence is sought to submit the documentary evidence subject to the subpoena for *in camera* review by the court or to adequately explain in writing any reasons for a failure to submit the documentary evidence for *in camera* review. Following the clerk's issuance of a notice, the party seeking production shall serve the subpoena, the motion, and the notice on the party from whom the documentary evidence is sought in accordance with this rule.

Upon receipt of the subpoena, the motion, and the notice, the party to whom the subpoena is directed shall either submit the documentary evidence subject to the subpoena for *in camera* review by the court or provide in writing reasons for the failure to submit the documentary evidence for *in camera* review before the date of the hearing. After the hearing, the court may issue any order necessary to protect any party's privileges, confidentiality protections, or privacy protections under federal law, Maine law, or the Maine Rules of Evidence. A party that may assert a privilege, confidentiality protection, or privacy protection may waive the right to a hearing and any applicable privileges or protections by notifying the court in writing that the party is waiving any applicable privileges or protections.

Advisory Note – October 2013

Rule 18 is adopted to deal with a subpoena for production of documentary evidence or other tangible objects by a nonparty without witness attendance. It draws on features of Rule 17 and Civil Rule 45. Rule 17 continues to deal

exclusively with a subpoena for witness attendance and attendant document or other tangible object production. See Advisory Note – October 2013 to M.R. Crim. P. 17(c). New Rule 18 provides for the standard features of the contents of subpoena, its service, notice to adverse party, motions therein, sanctions, and the special provisions for privileged or protected documentary evidence reproduced from Rule 17(d). Rule 18(c) also provides for notice of service of the subpoena and a copy thereof to the adverse party “[u]nless otherwise provided by statute.” The exception recognizes special circumstances such as that reflected in 9-B M.R.S. § 163 relative to customer’s bank records. It is anticipated that subdivision (d) of Rule 18 will be applied in accordance with the four factors approvingly listed in *State v. Watson*, 1999 ME 41, ¶ 6, 726 A.2d 214.

3. Rule 25-A of the Maine Rules of Criminal Procedure is designated as Rule 25A as follows:

~~RULE 25-A~~ 25A. SCHEDULING AND CONTINUANCES

Advisory Note – October 2013

The amendment omits the hyphen in the rule number to maintain consistency with the other rules.

4. Rule 41 of the Maine Rules of Criminal Procedure is amended to read as follows:

RULE 41. SEARCH AND SEIZURE

(a) Scope. This rule does not modify any special statutory provision regulating search, seizure, or the issuance and execution of search warrants.

~~(a)(b)~~ Authority to Issue a Search Warrant. A search warrant may be issued by a Superior Court justice, judge of the District Court judge, or justice of the peace as authorized by law.

~~(b)(c)~~ Grounds for Issuance of a Search Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a crime; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a crime; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

~~(c) **Issuance and Contents.** A warrant shall issue only on an affidavit sworn to before a judge of the District Court or justice of the peace which establishes the grounds for issuing the warrant. The affidavit shall specifically designate the person or place to be searched and the person or property to be searched for. Before ruling on a request for a warrant the judge or justice of the peace may hear evidence under oath or affirmation which shall be taken down by a court reporter or recording equipment that is capable of producing a record adequate for purposes of review.~~

~~If the judge or justice of the peace is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, the judge or justice of the peace shall issue a warrant designating the person or place to be searched and the person or property to be searched for.~~

~~The warrant shall be directed to any officer authorized to enforce or assist in enforcing any law of the State of Maine. It shall state the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search the person or place named for the person or property specified. It shall designate the court to which it shall be returned. A copy of the Search Warrant shall promptly be filed with the District Court designated in the warrant.~~

~~The warrant and affidavit materials shall be treated as impounded until the return is filed.~~

(d) **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.

(e) Requesting a Search Warrant

(1) *In General.* A search warrant request must be made in the presence of a Superior Court justice, District Court judge, or justice of the peace unless the justice, judge, or justice of the peace, upon request of the applicant, determines it reasonable under the circumstances to allow a search warrant request to be made outside the presence of the justice, judge, or justice of the peace.

(2) *Requesting a Search Warrant in the Presence of a Superior Court Justice, District Court Judge, or Justice of the Peace.* A search warrant request made in the presence of a Superior Court justice, District Court judge, or justice of the peace must be in the form of a written affidavit sworn to before the justice, judge, or justice of the peace. The affidavit must specifically designate the person or place to be searched or the tracking device to be installed and used, and the person or property to be searched for or tracked. Before ruling on the request, the justice, judge, or justice of the peace may hear evidence under oath or affirmation which shall be taken down by a court reporter or recording equipment, or recorded in a manner that is capable of producing a record adequate for purposes of review.

(3) *Requesting a Search Warrant Outside the Presence of a Superior Court Justice, District Court Judge, or Justice of the Peace.* A search warrant request to be made outside the presence of a Superior Court justice, District Court judge, or justice of the peace, if permitted by a justice, judge, or justice of the peace, shall be as provided by Rule 41C.

(f) Issuing a Search Warrant.

(1) *Duty of Superior Court Justice, District Court Judge, or Justice of the Peace.* If the Superior Court justice, District Court judge, or justice of the peace to whom the search warrant request is made concludes that there is probable cause to believe that the grounds for the application exist, the justice, judge, or justice of the peace shall issue a search warrant designating, except as otherwise provided in Rule 41B, the person or place to be searched, and the person or property to be searched for.

(2) *Contents of the Search Warrant.*

(A) *In General.* The search warrant shall be directed to any officer authorized to enforce or assist in enforcing any law of the State of Maine. It

shall state the names of the persons whose affidavits have been taken in support thereof. Except as otherwise provided in Rule 41B, it shall command the officer to search the person or place named for the person or property specified. It shall designate the court to which it shall be returned. A copy of the search warrant shall promptly be filed with the District Court designated in the warrant.

The warrant and affidavit materials shall be treated as impounded until the return is filed.

(B) *Nighttime Search Warrant.* The warrant shall direct that it be executed between the hours of 7 a.m. and 9 p.m., unless the Superior Court justice, District Court judge, or justice of the peace, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at another time.

(C) *Unannounced Execution of Search Warrant.* The warrant may direct that it be executed by an officer without providing notice of the officer's purpose and office if the Superior Court justice, District Court judge, or justice of the peace so directs by appropriate provision in the warrant. The justice, judge, or justice of the peace may so direct in the warrant upon a finding of reasonable cause shown that:

(i) the property sought may be quickly or easily altered, destroyed, concealed, removed, or disposed of if prior notice is given;

(ii) the escape of the person sought may be facilitated if prior notice is given;

(iii) the person sought, the person from whom or from whose premises the property is sought, or an occupant thereof, may use deadly or nondeadly force in resistance to the execution of the warrant, and dispensing with prior notice is more likely to ensure the safety of officers, occupants, or others; or

(iv) such facts and circumstances exist as would render reasonable the warrant's execution without notice.

~~(d)~~(g) Execution and Return with Inventory. The warrant may be executed and returned only within 10 days after its date. Upon the expiration of

the 10 days, the warrant must be returned to the District Court designated in the warrant. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken. If the person is not present, the officer shall leave the copy of the warrant and the receipt at the premises. The return shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property was taken, if the person is present, or in the presence of at least one credible person other than the applicant for the warrant. It shall be verified by the officer. Upon request the justice or judge sitting in the District Court designated in the warrant shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

~~(e) — **Motion for Return of Property.** A person aggrieved by an unlawful seizure, when no charge has been filed, may move the Superior Court in the county in which the property was seized for the return of the property on the ground that it was illegally seized.~~

~~A person aggrieved by an unlawful seizure related to a pending charge may move in the court that has jurisdiction of the charge, for the return of the property on the ground that it was illegally seized.~~

~~The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the court shall order that the property be restored unless otherwise subject to lawful detention. The motion may be joined with a motion to suppress evidence.~~

~~**(f)(h) Return of Papers to Clerk.** The justice or judge of the court sitting in the District Court to which a search warrant is returned shall attach to the warrant a copy of the return, inventory, and all other papers in connection ~~therewith~~ with the warrant and shall file them with the clerk of the District Court for the district and division in which the property was seized.~~

The justice or judge, upon motion or upon the justice's or judge's own motion, may for good cause order the clerk to impound some or all of the warrant materials until a specified date or event.

~~(g) **Scope.** 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.~~

~~(h) **Nighttime Search Warrant.** The warrant shall direct that it be executed between the hours of 7 a.m. and 9 p.m., unless the judge or justice of the peace, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at another time.~~

~~(i) **Unannounced Execution of Search Warrant.** The warrant may direct that it be executed by an officer without providing notice of the officer's purpose and office if the judge or justice of the peace so directs by appropriate provision in the warrant. The judge or justice of the peace may so direct in the warrant upon a finding of reasonable cause shown that:~~

~~(1) the property sought may be quickly or easily altered, destroyed, concealed, removed or disposed of if prior notice is given;~~

~~(2) the escape of the person sought may be facilitated if prior notice is given;~~

~~(3) the person sought, the person from whom or from whose premises the property is sought, or an occupant thereof, may use deadly or nondeadly force in resistance to the execution of the warrant, and dispensing with prior notice is more likely to ensure the safety of officers, occupants or others; or~~

~~(4) such facts and circumstances exist as would render reasonable the warrant's execution without notice.~~

~~(j)(i) **Attorney for State to File Notice with Clerk.** If a complaint, indictment, or information is filed subsequent to a search, the attorney for the state must file a notice with the clerk of the court of the district in which the search took place stating the venue of the case. The clerk will transfer the search warrant to the court having jurisdiction and venue over the criminal action instituted by the complaint, indictment, or information.~~

~~(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.~~

(j) Motion for Return of Property. A person aggrieved by an unlawful seizure, when no charge has been filed, may move the Superior Court in the county in which the property was seized for the return of the property on the ground that it was illegally seized.

A person aggrieved by an unlawful seizure related to a pending charge may move in the court that has jurisdiction of the charge for the return of the property on the ground that it was illegally seized.

The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the court shall order that the property be restored unless otherwise subject to lawful detention. The motion may be joined with a motion to suppress evidence.

Advisory Note – October 2013

The amendment makes a number of nonsubstantive changes to Rule 41, all designed to enhance readability and clarity. Specifically it:

(1) rearranges the order of three subdivisions within the rule – namely, subdivision (g) is redesignated subdivision (a) and its language is clarified; subdivision (k) is redesignated subdivision (d); and subdivision (e) is redesignated subdivision (j);

(2) redesignates current subdivision (a) as subdivision (b) and adds the words “a Search” to its heading after the word “Issue” and before the word “Warrant”;

(3) redesignates current subdivision (b) as subdivision (c) and adds the words “of a Search Warrant” in its heading after the word “Issuance”;

(4) breaks up former subdivision (c) into two new subdivisions designated (e) and (f);

(5) moves the special warrant provisions relating to a nighttime search and an unannounced search formerly found in subdivisions (h) and (i), respectively, into new subdivisions (f)(2)(B) and (f)(2)(C), respectively;

(6) redesignates current subdivision (d) as subdivision (g);

(7) redesignates current subdivision (f) as subdivision (h) and in its first sentence replaces the word “therewith” with the words “with the warrant”; and

(8) redesignates subdivision (j) as subdivision (i) and adds the words “with Clerk” in the heading after the word “Notice.”

In addition, the amendment to Rule 41 makes the following substantive changes.

First, subdivision (b) (formerly subdivision (a)) is amended to expressly provide that a search warrant may be issued by a “Superior Court justice” as well as by a District Court judge or justice of the peace “as authorized by law.” Although the term “District Court Judge” where appearing in the Maine Rules of Criminal Procedure definitionally includes, among others, a justice of the Superior Court sitting in the District Court by assignment, pursuant to Rule 57(d), the added reference in subdivision (b) is useful to the reader because justices of the Superior Court commonly sit in the District Court, and because there is no statutory basis for preventing Superior Court justices from granting warrant requests.

Second, a new subdivision (e) is added with the heading “Requesting a Search Warrant.” It consists of three numbered paragraphs. Numbered paragraph (1) of subdivision (e) has no counterpart in current subdivision (c). It draws a distinction for purposes of obtaining a search warrant between a warrant request made in the presence of the Superior Court justice, District Court judge, or justice of the peace and a warrant request made outside the presence of the justice, judge, or justice of the peace. It provides that an in-presence application is normally required but allows for an outside-of-presence application if, upon request of the

applicant, the justice, judge, or justice of the peace “determines it reasonable under the circumstances.”

Numbered paragraph (2) of subdivision (e) contains the in-presence request procedure. It carries over the substance of the first unnumbered paragraph of former subdivision (c), but with two additions. First, it adds a reference to a tracking device in the context of what an affidavit must specifically designate. Second, it provides for evidence to be taken down by a court reporter or recording equipment, *or* recorded in a manner that is capable of producing a record adequate for purposes of review. The added language would allow the justice, judge, or justice of the peace who, for example, may be hearing evidence at home, to create a record by writing it down. As was the case in former subdivision (c), unlike Rule 41(d)(2)(B) of the Federal Rules of Criminal Procedure, a justice, judge, or justice of the peace may not wholly dispense with a written affidavit.

Numbered paragraph (3) of subdivision (e) serves as a signpost identifying new Rule 41C as the rule containing the out-of-presence request procedure.

Third, a new subdivision (f) is added with the heading “Issuing a Search Warrant.” It consists of two numbered paragraphs. Numbered paragraph (1) of subdivision (f) carries over the substance of the second unnumbered paragraph of former subdivision (c) except that it leaves behind the former portion that required a judge or justice of the peace to issue a warrant if “satisfied that grounds for the application exist” as an apparent alternative to being satisfied “that there is probable cause to believe that they exist.” Paragraph (1) also adds “except as otherwise provided in Rule 41B” relative to what must be designated in the search warrant as to “the person or place to be searched, and the person or property to be searched for.”

Numbered paragraph (2) of subdivision (f) contains three subparagraphs. Subparagraph (A) carries over the substance of the third and fourth unnumbered paragraphs of former subdivision (c). It adds “[e]xcept as otherwise provided in Rule 41B” relative to what it commands the officer to do. Subparagraph (B) mirrors the substance of former subdivision (h). Subparagraph (C) mirrors the substance of former subdivision (i).

5. Rule 41C of the Maine Rules of Criminal Procedure is added to read as follows:

**RULE 41C. SEARCH WARRANT REQUEST MADE BY APPLICANT
OUTSIDE THE PRESENCE OF THE SUPERIOR COURT JUSTICE,
DISTRICT COURT JUDGE, OR JUSTICE OF THE PEACE**

(a) In General. A Superior Court justice, District Court judge, or justice of the peace may, upon request of the applicant, allow a search warrant request to be made outside the presence of the justice, judge, or justice of the peace if the justice, judge, or justice of the peace determines it to be a reasonable request under the circumstances.

(b) Procedures to be Applied. If the Superior Court justice, District Court judge, or justice of the peace allows the applicant to make the search warrant request outside the presence of the justice, judge, or justice of the peace, the following procedures apply:

(1) The request must be in the form of a written affidavit transmitted by reliable electronic means to the Superior Court justice, District Court judge, or justice of the peace. The contents of the affidavit must conform to Rule 41(e)(2). The applicant, by telephone or other reliable electronic means, must attest to its contents, and the justice, judge, or justice of the peace must acknowledge the attestation in writing on the affidavit. Before ruling on the request, the justice, judge, or justice of the peace may hear evidence under oath or affirmation by telephone or other reliable means which shall be taken down by a court reporter or recording equipment, or recorded in a manner that is capable of producing a record adequate for purposes of review.

(2) In addition to the written affidavit, the applicant shall prepare a proposed search warrant and transmit it by reliable electronic means to the Superior Court justice, District Court judge, or the justice of the peace. The contents of the warrant must conform to Rule 41(f)(2) or, when applicable, Rule 41B(a)(1) or 41B(b)(2). The transmission received by the justice, judge, or justice of the peace may serve as the original.

(3) If the Superior Court justice, District Court judge, or justice of the peace is satisfied that there is probable cause to believe that the grounds for the application exist, the justice, judge, or justice of the peace shall sign the proposed search warrant or a modified version, enter the date and time of issuance on the warrant, and transmit it by reliable electronic means to the applicant. A copy of the issued search warrant shall promptly be filed with the District Court designated in the warrant.

(c) Suppression Limited. Absent a finding of bad faith, evidence obtained from a warrant issued under this rule is not subject to suppression on the ground that issuing the warrant in this manner was unreasonable under the circumstances.

Advisory Note – October 2013

Rule 41C allows a search warrant request to be made outside the presence of a Superior Court justice, District Court judge, or justice of the peace if requested by the applicant and permitted by the justice, judge, or justice of the peace upon a determination that the request is reasonable under the circumstances. See also Advisory Note – October 2013 to M.R. Crim. P. 41(e). Rule 41C is added to provide the needed procedures for a permitted out-of-presence search warrant request.

Rule 41C has three subdivisions. Subdivision (a) is a restatement of the preconditions contained in Rule 41(e)(1) for pursuing a search warrant request outside the presence of the justice, judge, or justice of the peace. Subdivision (b) provides the procedures to be applied if the preconditions in subdivision (a) are satisfied. These procedures are to the extent feasible the same as the procedures applicable to an application request made in the presence of a justice, judge, or justice of the peace pursuant to Rule 41(f). The key difference in procedures as provided in Rule 41(f) and Rule 41C reflects the fact that, unlike in-person procedures, the written affidavit and warrant must be transmitted by reliable electronic means, as must any additional evidence to be taken remotely, and the finalized signed warrant to be returned to the applicant by the justice, judge, or justice of the peace. Subdivision (c) mirrors the substance of Rule 4.1(c) of the Federal Rules of Criminal Procedure and serves the same purpose.

6. Rule 66 of the Maine Rules of Criminal Procedure is deleted and replaced with the following:

RULE 66. PREREQUISITES TO AN ADJUDICATION ON THE MERITS

A petitioner must satisfy the following five statutory prerequisites to permit an adjudication on the merits by an assigned justice:

(a) Restraint or impediment under 15 M.R.S. § 2124;

(b) Prior exhaustion of remedies incidental to the proceedings in the trial court, or on appeal, or through administrative remedies as required by 15 M.R.S. § 2126;

(c) Absence of waiver of grounds for relief under 15 M.R.S. § 2128 except as exempted under 15 M.R.S. § 2128-A;

(d) Timely filing of the petition under 15 M.R.S. § 2128-B; and

(e) The stating of a ground upon which post-conviction relief can be granted under 15 M.R.S. § 2125.

Advisory Note – October 2013

Former Rule 66 has been deleted and replaced in order to make clear that to bring a petition permitting an adjudication on the merits by an assigned justice, the petitioner must satisfy the five statutory prerequisites of (a) restraint or impediment under 15 M.R.S. § 2124; (b) prior exhaustion of remedies incidental to the proceedings in the trial court or on appeal, or administrative remedies under 15 M.R.S. § 2126; (c) absence of waiver of one or more grounds for relief under 15 M.R.S. § 2128 except as exempted under 15 M.R.S. § 2128-A; (d) timely filing of the petition under 15 M.R.S. § 2128-B; and (e) the stating of one or more grounds upon which post-conviction relief can be granted under 15 M.R.S. § 2125. Title 15 M.R.S. § 2125, in addition to alluding to the other statutory prerequisites, contains its own prerequisite that the grounds for relief asserted in the petition relate to the criminal judgment being challenged as unlawful, the sentence being challenged as unlawful or unlawfully imposed, or the post-sentencing proceeding being challenged as illegal.

7. Subdivision (e) of Rule 67 of the Maine Rules of Criminal Procedure is amended to read as follows:

(e) Identification of Restraint or Impediment Prerequisites to an Adjudication on the Merits; Reasons for Relief and Facts in Support Thereof. The petition shall briefly ~~identify the incarceration, other restraint or impediment under 15 M.R.S. § 2124 which affects the petitioner~~ address the five statutory prerequisites to an adjudication on the merits identified in Rule 66. It shall briefly state each ~~reason~~ ground for relief and the essential facts in support of each ~~reason~~ ground. Argument, citation, and discussion of legal authorities shall be omitted from the petition, but may be filed in a separate document.

Advisory Note – October 2013

The amendment makes a number of changes to subdivision (e). Specifically it

(1) deletes and replaces in the subdivision’s heading the words “Identification of Restraint or Impediment” with the words “Prerequisites to an Adjudication on the Merits”;

(2) deletes from the second sentence the specific requirements that the petition briefly “identify the incarceration, other restraint or impediment under 15 M.R.S. § 2124” and replaces it with the broader requirement that the petition briefly “address the five statutory prerequisites to an adjudication on the merits identified in Rule 66,” one of which is restraint or impediment. See also Advisory Note – October 2013 to M.R. Crim. P. 66; and

(3) replaces in the third sentence the word “reason” where appearing with the word “ground” for purposes of clarity. The former term does not appear in the post-conviction review statute.

8. Rule 69-A of the Maine Rules of Criminal Procedure is designated as Rule 69A and amended to read as follows:

RULE ~~69-A~~ 69A. ASSIGNED JUDGE OR JUSTICE

.....

(d) “Assigned Justice” Includes an Assigned Judge. As used in this Part, the term “assigned justice” includes an assigned judge.

Advisory Note – October 2013

The amendment to Rule 69A omits the hyphen in the rule number to maintain consistency with the other rules and adds a new subdivision (d) that clarifies that the term “assigned justice” as used in Part X includes a District Court judge assigned to a post-conviction review proceeding.

9. Subdivision (b) of Rule 70 of the Maine Rules of Criminal Procedure is deleted and replaced with the following:

(b) Summary Dismissal or Stay of the Petition. The assigned justice shall enter an order for the summary dismissal of the petition in whole or in part, stating the reasons for the dismissal, if from the face of the petition and any exhibits attached to it, the petition affirmatively discloses

(1) No restraint or impediment under 15 M.R.S. § 2124;

(2) Waiver of grounds for relief under 15 M.R.S. § 2128 and discloses no exception under 15 M.R.S. § 2128-A;

(3) Failure to adhere to the filing deadline under 15 M.R.S. § 2128-B; if section 1, paragraph C is triggered, further discloses a failure to exercise due diligence; or

(4) No ground upon which post-conviction relief can be granted under 15 M.R.S. § 2125.

The assigned justice shall cause the petitioner to be notified of the dismissal and the reasons for it.

In the event that the face of the petition and any exhibits attached to it affirmatively disclose one or more unexhausted remedies incidental to the proceedings in the trial court or on appeal, or administrative remedies under 15 M.R.S. § 2126, the assigned justice shall, except as otherwise specifically provided in 15 M.R.S. § 2126 regarding an appeal from a judgment of conviction, a juvenile adjudication, or a judgment of not criminally responsible by reason of insanity, either enter an order for the summary dismissal of the petition or enter an order staying the post-conviction review proceeding pending exhaustion, depending upon which alternative the assigned justice determines to be most appropriate under the circumstances. The assigned justice shall cause the person to be notified of the dismissal or stay and of the duty to exhaust.

Advisory Note – October 2013

Former subdivision (b) has been deleted and replaced in order to rectify two major deficiencies. First, former subdivision (b) employed the phrase “a ground upon which post-conviction relief can be granted” to inferentially allude to the three unmentioned statutory prerequisites of exhaustion of remedies under 15 M.R.S. § 2126, absence of waiver of one or more grounds for relief under

15 M.R.S. § 2128, and timely filing of the petition under 15 M.R.S. § 2128-B. New subdivision (b) expressly addresses each of the five statutory prerequisites. Further, in the exhaustion context, new subdivision (b) expressly recognizes the authority of an assigned justice, except as otherwise specifically provided in 15 M.R.S. § 2126 regarding an appeal from a judgment of conviction, a juvenile adjudication, or a judgment of not criminally responsible by reason of insanity, to order a stay of the post-conviction review proceeding as an alternative to a summary dismissal if the assigned justice determines that to be most appropriate under the circumstances.

Second, former subdivision (b) failed to provide sufficient guidance to an assigned justice in determining when a summary dismissal was appropriate. New subdivision (b) replaces the phrase “if it plainly appears” modifying “the face of the petition and any exhibits annexed to it” with the modifying phrase “affirmatively disclose,” the latter providing a clearer standard. *Libby v. State*, 2007 ME 80, ¶ 1 n.2, 926 A.2d 724. Further, what is now required to be affirmatively disclosed is specifically identified as to each of the five statutory prerequisites. The special circumstance included in subdivision (3) regarding the failure to adhere to the filing deadline in the event 15 M.R.S. § 2128-B(1)(C) is triggered reflects the additional precondition for granting a summary dismissal of “a failure to exercise due diligence.” *Diep v. State*, 2000 ME 53, ¶ 6, 748 A.2d 974.

10. Subdivision (c) of Rule 70 of the Maine Rules of Criminal Procedure is amended to read as follows:

(c) Response; Amendment to Petition. If the petition is not summarily dismissed pursuant to subdivision (b), the respondent shall file a response as follows:

(1) If the petitioner has been represented by counsel at the time of the filing of the petition or the petitioner does not desire to retain counsel, or, if indigent, to have counsel assigned, the assigned justice shall order the respondent to file a response pursuant to Rule 71 within 20 days of the date the order is received.

(2) If the petitioner has not been represented by counsel at the time of the filing of the petition but expresses an intent to retain counsel forthwith or has made application to have counsel assigned pursuant to Rule 69, the assigned justice shall provide the nonindigent petitioner the opportunity to retain counsel or shall assign

counsel for the indigent petitioner. Within 45 days of the date counsel enters appearance or is assigned, counsel shall file either an amended petition or notice that no amended petition is to be filed. Additional time may be granted by the assigned justice for cause shown before or after the time has expired, with or without motion and notice. Following the filing of an amended petition or notice that no amended petition is to be filed, the clerk of the Superior Court shall mail a copy thereof to the respondent. Within 20 days of receipt of such copy, the respondent shall file a response pursuant to Rule 71.

(3) Following the filing of a response by respondent pursuant to paragraphs (1) and (2), a petition may be further amended only by leave of the assigned justice for good cause shown. If the assigned justice allows a petition to be amended after the filing of a response, the respondent may, except as the assigned justice might otherwise provide pursuant to Rule 72A(b)(3), file an additional response within 15 days of receipt of the amended petition.

Advisory Note – October 2013

Subdivision (c)(2) is amended to provide further guidance to an assigned justice in granting for cause shown additional time within which petitioner’s counsel can file either an amended petition or notice that an amended petition is to be filed. It expressly allows the granting of additional time “before or after the time has expired, with or without motion and notice.” See also Advisory Note – October 2013 to M.R. Crim. P. 70(c)(2).

Subdivision (c)(3) is amended to make clear that the discretion given the respondent as to whether to file an additional response if a petition is further amended may nonetheless become mandatory if the assigned justice orders that an additional response be filed pursuant to Rule 72A(b)(3).

11. Rule 71 of the Maine Rules of Criminal Procedure is deleted and replaced with the following:

RULE 71. RESPONSE

(a) When Required. The respondent is required to respond to the original or amended petition only when directed to do so pursuant to Rule 70(c), or as may be further ordered to do so by the assigned justice pursuant to subdivision (c) of this rule or Rule 72A(b)(3).

(b) Enlargement of Time to File. Notwithstanding the filing deadlines imposed pursuant to Rule 70(c), subdivision (c) of this rule or Rule 72A(b)(3), additional time may be granted by the assigned justice for cause shown, before or after the time has expired, with or without motion and notice.

(c) Contents of Response. Except as otherwise provided herein, the response must answer each of the grounds asserted in the petition. In addition, it must state whether any ground in the petition fails to satisfy one or more of the five statutory prerequisites to an adjudication on the merits identified in Rule 66. As to any such allegedly barred ground, the respondent may, in lieu of addressing its substantive merits in the response, move for its dismissal as part of the response. The assigned justice, upon review of the filed response, may order the respondent to supplement the filed response by addressing the merits of any allegedly barred ground and set the time within which the supplemental response is to be filed. Other than in the context of moving to dismiss a ground, the response shall not include argument, citation, and discussion of legal authorities, but they may be filed in a separate document.

(d) Materials Attached to or Filed With Response. Respondent must attach to the response or file with the response whatever further documents or other materials the respondent is relying upon in support of any allegation of a barred ground. Respondent is encouraged to also include whatever further documents or other materials the respondent believes may assist the assigned justice in adjudicating any non-barred ground on the merits.

Advisory Note – October 2013

Former Rule 71 has been deleted and replaced because it failed to provide adequate guidance to the respondent. New Rule 71 structurally contains four subdivisions, each addressing a separate aspect of response procedure.

New subdivision (a) explains under what circumstances a respondent is required to file a response to the original or any amended petition. It makes clear that a response is required only when the respondent is directed to do so pursuant to Rule 70(c), is ordered by the assigned justice to file a supplemental response under subdivision (c) of this rule, or is ordered by the assigned justice to respond to a further amendment of the petition following the filing of an initial response pursuant to Rule 72A(b)(3).

New subdivision (b) sets the conditions and timing for the respondent to seek an enlargement of time within which to file a response, supplemental response, or additional response. It expressly allows the assigned justice, upon a showing of cause, to grant additional time “before or after the time has expired, with or without motion or notice.” See also Advisory Note – October 2013 to M.R. Crim. P. 70(c)(2).

New subdivision (c) provides the content requirements for a response to the original or amended petition. The response must answer each of the grounds asserted except as to any ground that the respondent believes fails to satisfy one or more of the five statutory prerequisites to an adjudication on the merits identified in Rule 66. As to any such ground believed by the respondent to be so barred, the response must expressly allege which of the five statutory prerequisites to an adjudication on the merits bars the ground. Thereafter, respondent has a choice as to how next to proceed. Respondent may either move to dismiss the allegedly barred ground in the response without also addressing its substantive merits or, alternatively, move to dismiss *and* address the substantive merits. The latter is the best course unless the response and any accompanying exhibits affirmatively disclose that the ground is barred since the assigned justice, upon a review of the filed response, may order the respondent to supplement the respondent’s filed response by addressing the merits of the allegedly barred ground. Finally, the response must not include argument, citation, and discussion of legal authorities other than in the context of moving to dismiss a ground. However, such may be filed in a separate document accompanying the response.

New subdivision (d) describes what the respondent must or may attach to the response or file with it. In the context of an allegedly barred ground, the respondent must attach to the response or file with it whatever further documents or other materials the respondent is relying upon in support of the allegation. In the context of an answer to a ground, the respondent is encouraged to attach to the response or file with it the documents or other materials that the respondent believes may assist the assigned justice in adjudicating the ground on the merits.

12. Rule 71A of the Maine Rules of Criminal Procedure is adopted to read as follows:

**RULE 71A. FILING A RESPONSE SEEKING DISMISSAL; TIMELY
DISPOSITION BY ASSIGNED JUSTICE**

If the response filed by the respondent seeks a dismissal of the petition in whole or in part based upon a petitioner's alleged failure to satisfy one or more of the five statutory prerequisites to an adjudication on the merits identified in Rule 66, the assigned justice

(a) In the case of an alleged failure on the part of the petitioner to demonstrate exhaustion of remedies incidental to the proceeding in the trial court or on appeal, or administrative remedies, shall dispose of the dismissal request based upon the pleadings, any further amendment of the pleadings, and any other material of record. In the event the assigned justice determines that one or more pending or available unexhausted remedies exist, the assigned justice shall, except as otherwise specifically provided in 15 M.R.S. § 2126 regarding an appeal from a judgment of conviction, a juvenile adjudication, or a judgment of not criminally responsible by reason of insanity, either grant the respondent's dismissal request or stay the post-conviction review proceeding pending exhaustion, depending upon which alternative the assigned justice determines to be most appropriate under the circumstances.

(b) In the case of an alleged failure on the part of the petitioner to demonstrate one or more of the other statutory prerequisites, shall dispose of the dismissal request based upon the pleadings, any further amendment of the pleadings, and any other material of record unless the assigned justice determines that, as a matter of fairness to the petitioner, disposition should await an evidentiary hearing.

Advisory Note – October 2013

New Rule 71A addresses the timely disposition by an assigned justice of a response filed by a respondent seeking a dismissal of the petition in whole or in part based upon a petitioner's alleged failure to satisfy one or more of the five statutory prerequisites to an adjudication on the merits identified in Rule 66. *See also* Advisory Note – October 2013 to M.R. Crim. P. 66.

Paragraph (a) of Rule 71A addresses a respondent's dismissal request based on an alleged failure on the part of the petitioner to demonstrate a prior exhaustion of remedies incidental to the proceeding in the trial court or on appeal, or administrative remedies under 15 M.R.S. § 2126. The assigned justice is directed

to dispose of the dismissal request based on the pleadings, any further amendment of the pleadings, and any other material of record. Further, in the event the assigned justice determines that one or more pending or available unexhausted remedies exist, it expressly recognizes the authority of an assigned justice, except as otherwise specifically provided in 15 M.R.S. § 2126 regarding an appeal from a judgment of conviction, a juvenile adjudication, or a judgment of not criminally responsible by reason of insanity, to order a stay of the post-conviction review proceeding as an alternative to granting the respondent's dismissal request if the assigned justice determines that to be most appropriate under the circumstances.

Paragraph (b) of Rule 71A addresses a respondent's dismissal request based on an alleged failure on the part of the petitioner to demonstrate one or more of the other statutory prerequisites of restraint or impediment under 15 M.R.S. § 2124, absence of waiver of grounds for relief under 15 M.R.S. § 2128 and not exempted under 15 M.R.S. § 2128-A, timely filing of the petition under 15 M.R.S. § 2128-B, and a ground upon which post-conviction relief can be granted under 15 M.R.S. § 2125. It requires the assigned justice to dispose of the dismissal request based on the pleadings, any further amendment to the pleadings, and any other material of record, unless "the assigned justice determines that, as a matter of fairness to the petitioner, disposition should await an evidentiary hearing."

13. Rule 72 of the Maine Rules of Criminal Procedure is deleted and replaced with the following:

RULE 72. DISCOVERY

(a) In General. A party shall not be entitled to discovery in a proceeding for post-conviction review unless, and to the extent that, the assigned justice, upon motion and for good cause shown, grants leave for discovery. If leave for discovery is granted, the assigned justice shall specify the appropriate means of discovery, provided that depositions shall be ordered only pursuant to Rule 15.

(b) Discovery From Former Defense Counsel. If ineffective assistance of counsel is a ground of the petition and the respondent needs discovery from that defense counsel, the respondent may move for discovery, including an order requiring defense counsel to answer questions intended to allow the respondent to evaluate and respond to the petitioner's assertions of ineffective assistance. The motion shall state the nature of the disclosure sought and why it is needed. The motion shall be granted by the assigned justice for good cause shown. If leave for

discovery is granted, the assigned justice shall specify the means, scope, and timing of discovery to be employed.

Advisory Note – October 2013

Rule 72 has been structurally modified to accommodate two subdivisions. Subdivision (a), with the heading “In General,” contains the substance of Rule 72 before the structural change. Subdivision (b), with the heading “Discovery From Former Defense Counsel,” balances the interests of the petitioner and the respondent if ineffective assistance of counsel is a ground of the petition. The respondent may need timely discovery from former defense counsel in order to establish the needed facts relative to that counsel’s representation. The petitioner is entitled, according to ABA Formal Opinion 10-456 (July 14, 2010), to “court-supervised” disclosure from former defense counsel. Subdivision (b) regulates the means, scope, and timing of that disclosure.

14. These amendments to the Maine Rules of Criminal Procedure shall be effective January 1, 2014.

Dated: October 28, 2013

FOR THE COURT¹

/s/

LEIGH I. SAUFLEY

Chief Justice

DONALD G. ALEXANDER

JON D. LEVY

WARREN M. SILVER

ANDREW M. MEAD

ELLEN A. GORMAN

JOSEPH M. JABAR

Associate Justices

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