



SUPREME COURT OF VIRGINIA

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Supreme Court of Virginia Press Release

Media Contact: Patricia L. Harrington, Clerk

Release Date: March 2, 2018 CORRECTED VERSION¹

**THE SUPREME COURT OF VIRGINIA TO REVIEW
PROPOSED REVISIONS TO RULES 3A:11 AND 3A:12
RECEIVED FROM THE VIRGINIA STATE BAR
CRIMINAL DISCOVERY REFORM TASK FORCE**

RICHMOND - The Supreme Court of Virginia is considering proposed changes to Rules 3A:11 and 3A:12 regarding criminal discovery.

Comments on the proposed changes must be received by **June 1, 2018** and must be forwarded to:

Patricia L. Harrington, Clerk
Supreme Court of Virginia
100 North Ninth Street
5th Floor
Richmond, VA 23219

OR via email with the subject line "comment on Rules 3A:11 and 3A:12" to:

scvclerk@vacourts.gov

¹ The corrected version of the proposed changes to Rule 3A:11, sections (c)(2)(iv) and (v), changes erroneous references to "Counsel Only Material" to read "Restricted Dissemination Material." Rule 3A:12(k) redesignates sections (i) through (vii) as (i) through (viii).

Rule 3A:11. *Discovery and Inspection.*

(a) ~~Application of Rule.~~ General Provisions. —

(1) This Rule applies to any prosecution for a felony in a circuit court and to any misdemeanor brought on direct indictment.

(2) The Commonwealth's attorney's duty to provide exculpatory and/or impeachment evidence to an accused supersedes any protection or restriction on discovery provided pursuant to this Rule.

(3) A party may satisfy the requirement to permit the opposing party to inspect and copy or photograph a document, recorded statement or recorded confession by providing an actual duplicate, facsimile or copy of the document, recorded statement or recorded confession in question to the opposing party in compliance with the applicable time limits and redaction standards found elsewhere in this Rule.

(4) Any material or evidence disclosed or discovered pursuant to this Rule and filed with the clerk of court shall be placed under seal until it is either admitted as an exhibit at a trial or hearing or the court enters an order unsealing specified material or evidence.

(b) *Discovery by the Accused.* — (1) Upon written motion of an accused a court shall order the ~~Commonwealth's~~ Commonwealth's attorney to:

(1) Permit the accused to inspect and copy or photograph review any relevant reports prepared by law enforcement officers and made in connection with the particular case, the existence of which is known to the Commonwealth's attorney. Nothing in this rule requires that the Commonwealth provide the accused with copies of the relevant law enforcement reports, although it may do so in its discretion. The court's order providing for inspection and review of these reports shall be subject to the provisions of subsections c(1) and c(2) of this Rule.

(2) Permit the accused to inspect and copy or photograph any relevant:

(i) ~~written or recorded statements or confessions made by the accused, or copies thereof, or the substance of any oral statements or confessions,~~ written or recorded statements or confessions made by the accused, or copies thereof, or the substance of any oral statements or confessions, made by the

accused to any law enforcement officer, the existence of which is known to the Commonwealth's attorney for the Commonwealth, and,

(ii) written or recorded statements or confessions, or the substance of any oral statements or confessions, made by the accused to any person other than a law enforcement officer, that the Commonwealth intends to introduce into evidence against the accused at trial,

(iii) written or recorded statements, or the substance of any oral statements, made by a co-defendant or co-conspirator that the Commonwealth intends to introduce into evidence against the accused at trial, and

(iv) written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports, and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case, or copies thereof, that are known by the Commonwealth's attorney to be within the possession, custody, or control of the Commonwealth.

~~—(2) Upon written motion of an accused a court shall order the Commonwealth's attorney to~~
(3) Permit the accused to inspect and copy or photograph designated books, papers, documents, tangible objects, recordings, buildings or places, or copies or portions thereof, that are known by the Commonwealth's attorney to be within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This subparagraph does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except as provided in clause (ii) of subparagraph (b)(1) of this Rule.

(4) Notify the accused in writing of the Commonwealth's intent to introduce expert opinion testimony at trial or sentencing and to provide the accused with:

(i) any written report of the expert witness that describes the witness's opinions and the basis and reasons for those opinions, or, if there is no such report, a written summary of the proposed expert testimony that describes the witness's opinions and the basis and reasons for those opinions, and

(ii) the witness's qualifications and contact information.

Provision of a copy of a Virginia Department of Forensic Science Certificate of Analysis, signed by hand or by electronic means by the person performing the analysis or examination, shall satisfy the requirements of subsections (b)4(i) and (b)4(ii).

(5) Provide to the accused a list of the names and, if known, the addresses of all persons who are expected to testify on behalf of the Commonwealth at trial or sentencing. This provision is subject to subsection (c)(1) and to any protective order entered by the court pursuant to the subsection (g) of this Rule.

(6) This Rule does not authorize the discovery or inspection of the Commonwealth's attorney's work product to include internal reports, memoranda, correspondence, legal research or other internal documents made by the Commonwealth or its agents in preparation for trial.

(7) This Rule does not authorize the discovery of the names and/or personal identifying information of confidential informants whom the Commonwealth does not intend to call at trial and with regards to whose identity the Commonwealth asserts it holds a privilege.

(c) Redaction and Restricted Dissemination Material. —

(1) With regard to any material or evidence provided pursuant to this Rule, the Commonwealth may redact the residential address, telephone number, email address and place of employment of any witness or victim, or any member of a witness' or victim's family, who satisfies the conditions outlined in §19.2-11.2 of the Code of Virginia. The Commonwealth may redact the date of birth and Social Security Number of any person whose information is contained in material or evidence provided pursuant to this Rule.

If the Commonwealth redacts personal identifying information pursuant to this subsection, the accused may file a motion seeking disclosure of the redacted information. Should the court find good cause for disclosure, it may order the Commonwealth to provide the redacted information. In its discretion, the court ordering the provision of redacted personal identifying information may order that the information be identified as “Restricted Dissemination Material” pursuant to subsection (c)(2).

(2) If the Commonwealth satisfies the criteria outlined in this subsection, it may designate any evidence or material subject to disclosure pursuant to this Rule as “Restricted Dissemination Material” by prominently stamping or otherwise marking the designated evidence or material as “Restricted Dissemination Material.”

(i) The Commonwealth may designate any evidence or material subject to disclosure pursuant to this Rule as “Restricted Dissemination Material” if the accused’s attorney agrees to the designation.

(ii) In the absence of an agreement with the accused’s attorney, the Commonwealth may still designate any evidence or material as “Restricted Dissemination Material.” Should the Commonwealth designate material as “Restricted Dissemination Material” without the agreement of the accused’s attorney, the attorney for the Commonwealth shall certify in writing that, upon information and belief, the designation is reasonably necessary for one or more of the following reasons:

(a) the unauthorized disclosure of the designated material would result in cognizable danger to the safety or security of a witness or victim; or

(b) the unauthorized disclosure of the designated material would result in cognizable danger of a witness being intimidated or tampered with; or

(c) the unauthorized disclosure of the designated material may compromise an ongoing criminal investigation or confidential law enforcement technique; or

(d) the designated material relates to the statement of a child victim or witness who will be fourteen years of age or under at the time of trial.

(iii) Except as otherwise provided, “Restricted Dissemination Material” may only be disclosed to the accused’s attorney, the agents or employees of the accused’s attorney, or to any expert witness. The accused’s attorney may orally communicate the content of “Restricted Dissemination Material” to the accused or allow the accused to view the content of “Restricted Dissemination Material” but shall not provide the accused with copies of material so designated. “Restricted Dissemination Material” may not otherwise be reproduced, copied or disseminated in any way.

(iv) If the Commonwealth designates evidence or material as “Restricted Dissemination Material” pursuant to subsection (ii), the accused may at any time file a motion seeking to remove that designation from the subject evidence or material. Should the court find good cause to remove the designation, it may order that the subject evidence or material no longer be designated as “Restricted Dissemination Material.”

(v) Within 21 days of the entry of a final order by the trial court, or upon the termination of the representation of the accused, the accused’s attorney shall return to the court all originals and copies of any “Restricted Dissemination Material” disclosed pursuant to this Rule. The court shall maintain such returned “Restricted Dissemination Material” under seal. Any material sealed pursuant to this subsection shall remain available for inspection by counsel of record. For good cause shown, the court may enter an order allowing additional access to the sealed material as the court in its discretion deems appropriate.

(vi) In any case in which an accused is not represented by an attorney the Commonwealth may file a motion seeking to limit the scope of discovery pursuant to this Rule. For good cause shown, the court may order any limitation or restriction on the provision of discovery to an accused who is unrepresented by an attorney as the court in its discretion deems appropriate.

(d) *Discovery by the Commonwealth.* — If the court grants relief sought by the accused under ~~clause (ii) of subparagraph~~ subsection (b) (1) or under subparagraph

~~(b)(2)~~ of this Rule, it shall, ~~upon motion of the Commonwealth, condition its also~~ order ~~by requiring that~~ the accused to:

(1) ~~The accused shall~~ Permit the Commonwealth ~~within a reasonable time but not less than ten (10) days before trial or sentencing, as the case may be, to inspect, and~~ copy or photograph any written reports of autopsy examinations, ballistic tests, fingerprint, blood, urine and breath analyses, and other scientific tests that may be within the accused's possession, custody or control and ~~which~~that the defense intends to proffer or introduce into evidence at trial or sentencing.

(2) ~~The accused~~ Disclose whether ~~he~~the accused intends to introduce evidence to establish an alibi and, if so, ~~that the accused~~ disclose the place at which he claims to have been at the time of the commission of the alleged offense.

(3) If the accused intends to rely upon the defense of insanity ~~or feeble-mindedness, the accused shall~~ pursuant to Chapter 11 of Title §19.2, permit the Commonwealth to inspect, copy or photograph any written reports of physical or mental examination of the accused made in connection with the particular case, provided, however, that no statement made by the accused in the course of an examination provided for by this Rule shall be used by the Commonwealth in its case-in-chief, whether the examination shall be with or without the consent of the accused.

(4) Notify the Commonwealth in writing of the accused's intent to introduce expert opinion testimony at trial or sentencing and to provide the accused with:

(i) any written report of the expert witness that describes the witness's opinions and the basis and reasons for those opinions, or, if there is no such report, a written summary of the proposed expert testimony that describes the witness's opinions and the basis and reasons for those opinions, and

(ii) the witness's qualifications and contact information.

Provision of a copy of a Virginia Department of Forensic Science Certificate of Analysis, signed by hand or by electronic means by the person performing the analysis or examination, shall satisfy the requirements of subsections (d)4(i) and (d)4(ii).

(5) Provide to the Commonwealth a list of the names and, if known, the addresses of all persons known to the accused who are expected to testify on behalf of the accused at trial or sentencing. The accused's attorney may redact the personal identifying information of any witness if so authorized by a protective order entered by the court pursuant to subsection (g) of this Rule.

(e) Time of Motion. — A motion by the accused under this Rule must be made at least 10 calendar days before the day fixed for trial. The motion shall include all relief sought ~~under~~ pursuant to this Rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

~~—(e)(f)~~ (f) Time, Place and Manner of Discovery and Inspection. — An

The order granting relief under this Rule shall specify in writing the time, place and manner of making the discovery and inspection ~~permitted and~~ ordered. The court may prescribe such terms and conditions ~~as that~~ are in its discretion reasonable and just.

~~(f)(g)~~ (g) Protective Order. — =

(1) Upon a sufficient showing the motion of either party and for good cause, the court may at ~~any time~~ enter a protective order that with regards to the discovery or inspection be denied, restricted required by this Rule. The court may order any condition that it deems in its discretion necessary to the orderly adjudication of the case or deferred, to the fair administration of justice. These conditions may include, but are not limited to:

(i) A requirement that the parties not disclose the contents of any material or make such other order as evidence disclosed or discovered pursuant to this rule in any public forum, including any website;

(ii) A requirement that the parties not disclose the contents of any material or evidence disclosed or discovered pursuant to this rule to any third-party who is not an agent or employee of the parties or an expert witness; or

(iii) Authorization to either party to withhold the residential address, telephone number, email address or place of employment of any witness not covered by the terms of subsection (c)(1) of this Rule.

~~(iv) Authorize either party in appropriate. Upon motion by the Commonwealth the court may permit the Commonwealth to make such showing, in whole or in part, in the form circumstances to withhold from disclosure or place additional restrictions on dissemination of information otherwise discoverable but not exculpatory.~~

~~(2) Should either party believe in good faith that the terms of a written statement to be inspected by the court in camera. If the protective order entered by the court denies discovery or inspection following a showing in camera, the entire text of the Commonwealth's statement shall be sealed and preserved in the records of have been violated, such party may move the court to be made available to the appellate enforce the order and to impose any sanction the court in the event of an appeal by the accused. its discretion deems appropriate.~~

~~(g) (h) Continuing Duty to Disclose; Failure to Comply. — If, after disposition of a motion filed under this Rule, and before or during trial, counsel or a party discovers additional material previously requested or falling within the scope of an order previously entered, that is subject to discovery or inspection under this Rule, he the party shall promptly notify the other party or his their counsel or the court of the existence of the additional material. If at any time during the course dependency of the proceedings, case it is brought to the attention of the court that a party has failed to comply with this Rule or with an order issued pursuant to this Rule, the court shall order such party to permit the discovery or inspection of materials not previously disclosed, and may grant such other relief as it may in its discretion deem appropriate.~~

Rule 3A:12. Subpoena.—

(a) ~~—(a) For Attendance of Witnesses.~~ — A subpoena for the attendance of a witness to testify before a court not of record shall be issued by the judge, clerk, magistrate, ~~Commonwealth's Attorney~~ attorney for the Commonwealth or by the attorney for the defendant. A subpoena for the attendance of a witness to testify before a Circuit Court or a grand jury shall be issued by the clerk or

~~Commonwealth's Attorney~~attorney for the Commonwealth and, for the attendance of a witness to testify before a Circuit Court, by the attorney for the defendant as well. The subpoena shall (i) be directed to an appropriate officer or officers, (ii) name the witness to be summoned, (iii) state the name of the court and the title, if any, of the proceeding, (iv) command the officer to summon the witness to appear at the time and place specified in the subpoena for the purpose of giving testimony, and (v) state on whose application the subpoena was issued.

No subpoena or subpoena duces tecum shall be issued in any criminal case or proceeding, including any proceeding before any grand jury, which subpoena or subpoena duces tecum is (i) directed to a member of the bar of this Commonwealth or any other jurisdiction, and (ii) compels production or testimony concerning any present or former client of the member of the bar, unless the subpoena request has been approved in all specifics, in advance, by a judge of the Circuit Court wherein the subpoena is requested after reasonable notice to the attorney who is the subject of the proposed subpoena. The proceedings for approval may be conducted in camera, in the judge's discretion, and the judge may seal such proceedings. Such subpoena request shall be made by the ~~Commonwealth's attorney~~ for the Commonwealth for the jurisdiction involved, either on motion of the ~~Commonwealth's attorney~~ for the Commonwealth or upon request to the ~~Commonwealth's attorney~~ for the Commonwealth by the foreman of any grand jury. A defendant may also initiate such a subpoena request.

(b) *For Production of Documentary Evidence and of Objects Before a Circuit Court.* — Upon notice to the adverse party and on affidavit by the party applying for the subpoena that the requested writings or objects are material to the proceedings and are in the possession of a person not a party to the action, the judge or the clerk may issue a subpoena duces tecum for the production of writings or objects described in the subpoena. Such subpoena shall command either (1) that the person to whom it is addressed shall appear with the items described either before the court or the clerk or (2) that such person shall

deliver the items described to the clerk. The subpoena may direct that the writing or object be produced at a time before the trial or before the time when it is to be offered in evidence. The term "material" as used in this section does not require that the subpoenaed material be admissible at trial or that it be exculpatory.

Any subpoenaed writings and objects, regardless by whom requested, shall be available for examination and review by all parties and counsel. Subpoenaed writings or objects shall be received by the clerk and shall be placed under seal and shall not be open for examination and review except by the parties and counsel unless otherwise directed by the court. The clerk shall adopt procedures to ensure compliance with this paragraph. Until such time as the subpoenaed materials are admitted into evidence, the materials shall remain under seal, except as the court may otherwise deem appropriate.

Where subpoenaed writings and objects are of such nature or content that disclosure to other parties would be unduly prejudicial, the court, upon written motion and notice to all parties, may grant such relief as it deems appropriate, including ~~limiting disclosure, removal and copying.~~: (i) Quashing the subpoena in whole or in part; (ii) Prohibiting or limiting disclosure, removal and copying; (iii) Redacting confidential or immaterial information; (iv) Prohibiting or restricting further disclosure by parties to the litigation; and (v) Ordering return of all copies of the subpoenaed material upon completion of the litigation.

Such motions may be brought by a party to the litigation, by the entity or individual subpoenaed, or by the entity or individual who is the subject of the subpoenaed material.

If a subpoena requires the production of information that is stored in an electronic format, the person to whom it is addressed shall produce a tangible copy of the information. If a tangible copy cannot be reasonably produced, the subpoenaed person shall permit the parties to review the information on a

computer or by other electronic means during normal business hours, provided that the information can be accessed and isolated. If a tangible copy cannot reasonably be produced and the information is commingled with information other than that requested in the subpoena and cannot reasonably be isolated, the person to whom the subpoena is addressed may file a motion ~~for a protective order to quash~~ or a motion to quash for limitations on disclosure or other appropriate relief.

(c)—~~(e)~~ *Service and Return.* — — A subpoena may be executed anywhere in the State by an officer authorized by law to execute the subpoena in the place where it is executed. The officer executing a subpoena shall make return thereof to the court named in the subpoena.

(d)—~~(d)~~ *Contempt.* — — Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court to which the subpoena is returnable.

(e)—~~(e)~~ *Recognizance of a Witness.* — — If it appears that the testimony of a person is material in any criminal proceeding, a judicial officer may require him to give a recognizance for his appearance.

(f)—~~(f)~~ *Photocopying of Subpoenaed Documents.* — — Subject to the provisions of subsection (b), removal and photocopying of subpoenaed documents by any party or counsel shall be permitted. The court shall direct a procedure for removal, photocopying and return of such documents.

(g) *Undue Burden.* — Where subpoenaed material is so voluminous that its production would place an undue burden on the subpoenaed entity, the court may order that the subpoena duces tecum be satisfied by making the writings and documents reasonably available for inspection by the requesting party, subject to review by the court.

(h) *Freedom of Information Act* — In accordance with Virginia Code Section 2.2-3703.1, the provisions of the Freedom of Information Act ("FOIA") shall not govern a court's determinations with regard to the applicability of this Rule.

(i) *Subpoena Issued to a Party* — In a criminal proceeding, a subpoena duces tecum may not be used to obtain material from a party. Nor may a

subpoena duces tecum be used to obtain material from an agency or entity participating in, or charged with responsibility for, the investigation or prosecution of a criminal case such that the agency and its employees are deemed agents of the Commonwealth. A subpoenaed agency or entity claiming party status may seek to quash a subpoena on that basis and, if sustained, discovery shall be produced pursuant to Rule 3A:11. For purposes of this rule, the Department of Forensic Science and the Division of Laboratory Consolidated Services are not parties.

(j) *In Camera Review* — In determining whether a protective order should issue, or other relief be granted, a court may in its discretion review subpoenaed material in camera.

(k) *Ex parte proceedings* — (i) A court may not issue a witness subpoena on an ex parte basis. (ii) A court may not issue a subpoena duces tecum on an ex parte basis, except as follows: Where either the Commonwealth or the defendant seeks to have a subpoena duces tecum issued on an ex parte basis, the party seeking issuance of the ex parte subpoena must file an ex parte affidavit with the court which explains the basis for the request to have the subpoena issued ex parte. The affidavit shall be placed under seal. Should the court require additional information not within the affidavit, the court may conduct an ex parte hearing with the party requesting the subpoena duces tecum. Any such hearing shall be on the record and sealed until further order of the court. (iii) A court may only issue a subpoena duces tecum on an ex parte basis if it concludes that it is necessary to do so in the interest of justice. (iv) A court's decision with regard to the ex parte request for a subpoena duces tecum is not subject to appeal. (v) If a request for the issuance of a subpoena duces tecum is granted, the subpoena shall issue and the records returned under seal to be made available for examination and copying by the requesting party only. (vi) If a request for the issuance of a subpoena duces tecum is denied, the request shall remain under seal, and the requesting party may resubmit the subpoena duces tecum on a non-ex parte basis. (vii) Any motion to quash a subpoena duces tecum issued on an ex parte basis shall be made

on the public record and shall not be treated as an ex parte matter. (viii) In the event that the requesting party determines that records obtained pursuant to an ex parte subpoena duces tecum may be used at trial, the requesting party shall move no later than fourteen (14) days before trial to make available to the opposing party the entirety of the records produced pursuant to the ex parte subpoena duces tecum. If the requesting party fails to do this, the records may not be used by the requesting party at trial for any purpose.

(l) *Confidentiality Provisions of 19.2-11.2* — Where the confidentiality provisions of Virginia Code Section 19.2-11.2 apply, any material produced pursuant to a subpoena duces tecum shall be treated in accordance with the provisions of the statute.

(m) *Health Record Privacy*. — Any subpoena duces tecum seeking health records, or records concerning the provision of health services, as those terms are defined by Virginia Code Section 32.1-127.1:03, are subject to the procedures and requirements of Virginia Code Section 32.1-127.1:03(H), including the provisions for objecting to disclosure by a motion to quash.

(n) *Decision of the Court* — A court must state on the record, or in writing, its reasons for making a decision pursuant to this Rule.