

# Virginia's New Criminal Discovery Rules

**Live Webcast, Live Telephone, & Live on Site at Virginia CLE**

Thursday, January 30, 2020, 12:00 p.m. to 2:00 p.m.

**Virginia CLE**

# Virginia's New Criminal Discovery Rules



- Honorable Kimberely S. White<sup>th</sup>
  - 10<sup>th</sup> Judicial Circuit of Virginia / Halifax
- Honorable Charles H. Slemp, III
  - Commonwealth's Attorney / Wise Co.
- Michael HuYoung
  - Barnes & Diehl, PC / Richmond

# Virginia's New Criminal Discovery Rules



- “The Times They Are a-Changin’”

## Delayed Implementation until July 1, 2020

- ***Before we go further – full disclosure!!!***

In February of 2019, the Virginia Supreme Court announced a delay in the implementation of the changes to Rule 3A:11 & 3A:12.

- **New Rules will go into effect July 1, 2020!**

# What is “Discovery?”

- Discovery is “the act or process of finding or learning something that was previously unknown” and a process of “compulsory disclosure, at a party’s request, of information that relates to the litigation.”
  - *Black’s Law Dictionary.*
- “The theory of broad rights of discovery is that all parties will go to trial with as much knowledge as possible and that neither party should be able to keep secrets from the other (except for constitutional protection against self-incrimination.)”
  - Source: Law.com (<https://dictionary.law.com/Default.aspx?selected=530> )

# Why is “Discovery” important?

- 
- “The aim of trials is to find the truth. Uncovering the truth is the paramount goal of the adversary system. All the rules of decorum, ethics, and procedure are meant to aid the truth-finding process. Ambush, trickery, stealth, gamesmanship, one-upmanship, surprise have no legitimate role to play in a properly conducted trial. This is so whether the gamesman is the defendant or the Commonwealth.” Bennett v. Commonwealth, 236 Va. 448, 460-461 (1988).

# Constitutional right to discovery?

- “The Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.” Wardius v. Oregon, 412 U.S. 470, 474 (1973).
- “There is no general constitutional right to discovery in a criminal case. . . .” Juniper v. Commonwealth, 271 Va. 362, 394 (2006).
- Unless they contain exculpatory evidence, “[t]here is no general right to discovery of witness statements, reports or other memoranda possessed by the Commonwealth.” Claggett v. Commonwealth, 252 Va. 79 (1996).

# Constitutional right to discovery?

- “The granting or denying of discovery is a matter within the discretion of the trial court.” O’Brian v. Langley Sch., 256 Va. 547, 552 (1998).
- The Virginia Court of Appeals has previously held that a defendant has a right to crime scene inspection if he establishes that it is relevant and material. See Henshaw v. Commonwealth, 19 Va. App. 338, 346 (1994).

# Statutory rights?

- Rules of the Supreme Court of Virginia
- Criminal Discovery Rules
  - Rule 3A:11 (Discovery and Inspection)
  - Rule 3A:12 (Subpoenas)
  - Rule 7C:5 (General District Criminal & Traffic Discovery)
  - Rule 8:15 (Juvenile & Domestic Relations Discovery)
- Rules of Professional Responsibility  
Prosecutor Ethical Responsibilities
  - Rule 3.8
- Va Code Section 19.2-265.4 (failure to provide discovery)

# Statutory rights?

- Va. Code 19.2-270.5 (DNA analysis)
- Va Code 19.2-264.3:4 (experts in capital cases)

## Professional Guidelines: Rule 3.8

- “A lawyer engaged in a prosecutorial function shall . . .  
(c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense;  
(d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court . . .”

## Comment to Rule 3:8

- “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”

## Va. Code 19.2-265.4

### Failure to Provide Discovery

- “B. If at any time during the course of the proceedings it is brought to the attention of the court that the attorney for the Commonwealth has failed to comply with this section, the court may order the Commonwealth to permit the discovery or inspection, grant a continuance, or prohibit the Commonwealth from introducing evidence not disclosed, or the court may enter such other order as it deems just under the circumstances.”

## Brief review of CURRENT criminal discovery

- Before we address the changes to the discovery rules, we need to briefly address what the current rules provide.

CURRENT RULES: Rule 3A:11

- 3A:11 Applies to felonies in Circuit Court & Misdemeanors brought by indictment
- NOTE: In addition to statutorily mandated discovery, the Commonwealth's Attorney must provide exculpatory and impeachment evidence as required by case law.

## CURRENT RULES: Exculpatory Evidence.

- **Exculpatory evidence** is any evidence, material to guilt or punishment, that is favorable to the accused.
- 
- “The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.”
  - Brady v. Maryland, 373 U.S. 83 (1963)

## CURRENT RULES: Exculpatory Evidence.

- Evidence to show defendant is innocent
- Statements of other witnesses that exonerate the defendant, minimize his involvement, support his theory of the case, etc.
- Evidence to discredit or impeach Commonwealth witness
- Prior inconsistent statements or prior perjured testimony
- Relevant criminal records
- Eyewitnesses who fail to identify defendant in line-up
- Evidence to mitigate seriousness of offense or lessen punishment
- Evidence of bias

CURRENT RULES: Rule 3A:11 (b)

- Discovery by Accused -  
“Upon written motion of an accused a court shall order the Commonwealth’s attorney to permit the accused to inspect and copy or photograph . . . .”
-

## CURRENT RULES: Rule 3A:11 (b)

- Discovery by Accused -  
(1) (i) 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 attorney for the Commonwealth . . . .”
-

## CURRENT RULES: Rule 3A:11 (b)

- Discovery by Accused -  
(1) (ii) 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 to the Commonwealth attorney to be within the possession, custody or control of the Commonwealth.”
-

## CURRENT RULES: Rule 3A:11 (b)

- Discovery by Accused -  
(2) . . . designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are 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.”
-

CURRENT RULES: Rule 3A:11 (c)

- Discovery by the Commonwealth - If the court allows discovery by the accused under clause (ii) of subparagraph (b)(1) or (b)(2), the Commonwealth can file a motion seeking. . .

## CURRENT RULES: Rule 3A:11 (c)

- Discovery by Commonwealth -  
(1) . . . inspect, 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 the defense intends to proffer or introduce into evidence at trial or sentencing.”

CURRENT RULES: Rule 3A:11 (c)

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

## CURRENT RULES: Rule 3A:11 (c)

- Discovery by Commonwealth -  
(3) If the accused intends to assert a defense of insanity or feeblemindedness, the accused shall 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. . . .”

CURRENT RULES: Rule 3A:12 (Subpoenas)

- (a) Witness subpoenas.
- (b) For production of documentary evidence and objects before a circuit court.

- **“The Times They Are a-Changin’”**  
**Criticisms and approaches under the current system?**
  - *Strict compliance with rules too limiting?*
  - *“Open file policy”*
  - *Trial by ambush*

# Efforts for change

- Efforts have been ongoing since 2004
- Goal: to expand & reform Virginia's criminal discovery rules.
- Legislation
- Discovery reform task force of the Supreme Court
- Virginia Criminal Justice Conference

# Efforts for change

- Several forces combined to advance change:
  - The Virginia Association of Commonwealth's Attorneys
  - The defense bar
  - Legislators
  - The ACLU
  - Professors/Academics
  - The trial lawyers association
  - Court of Appeals judges and Supreme Court justices
  - Review of standards from other states

# Efforts for Change

- A number of groups including prosecutors and defense attorneys have convened committees to work out changes to the Rule.
- Prosecutors withdrew from one of the earliest committees due to an inability to reach any consensus.
- A subsequent committee convened by the Supreme Court requested changes in November 2014. By order dated December 2, 2015, the Supreme Court declined to adopt the changes.
- The Virginia State Bar convened a task force which also produced proposed changes. Those changes are incorporated in the proposed new rule.
- While the VSB task force was at work, Senator Stanley proposed legislation on discovery, which he only withdrew when promised that the Task Force was making progress.

# Discovery!

- Chief Justice Donald W. Lemons on Sept. 5, 2018:
  - “Criminal discovery reform is a complex matter, and while there is not 100 percent agreement on all issues, this proposal has significant support from the numerous stakeholders involved in the criminal discovery process.”

# Major considerations

- 1. **Distinguishing between discovery and exculpatory evidence.**

From the start, it is important to distinguish between statute/rule based discovery and constitutionally-mandated exculpatory evidence.

- ***Brady v. Maryland*** is a disclosure rule, not a discovery rule.

- ***Commonwealth v. Tuma***: “There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one.”

# Major considerations

- **2. Avoiding trial by ambush.**

- “The aim of trials is to find the truth. Uncovering the truth is the paramount goal of the adversary system. All the rules of decorum, ethics, and procedure are meant to aid the truth-finding process. Ambush, trickery, stealth, gamesmanship, one-upmanship, surprise have no legitimate role to play in a properly conducted trial. This is so whether the gamesmanship is a defendant or the Commonwealth.”

~ *Bennet v. Commonwealth*, 236 Va. 448, 460-461 (1988).

# Major considerations

- **3. Safeguarding personal information of victims and witnesses.**
- Prosecutors and law enforcement on the committee worried about how to provide enhanced discovery while also safeguarding personal information about victims and witnesses of crime.
- This problem has grown in significance over the past few years as the availability of personal digital devices have grown exponentially.

# Major considerations

- 4. **Minimizing costs, burdens, and delays.**
- **Even without any changes to Rule 3A:11, prosecutors are facing increasing discovery demands.**
- Modern technology and the use of it by law enforcement generates far greater discoverable information.

# Additional Considerations

- Limited resources for prosecutors and public defenders
- 
- Increased in body camera footage
- Criminal justice reform movements

# Several proposals considered?

- Proposal that routine discovery be triggered by the filing of written notice by the defendant rather than a motion seeking discovery. Discovery is usually routine and seldom needs court involvement.
- Police reports and formal written reports by investigators/law enforcement be turned over to defendants.
- Witness statements (more than just experts) be disclosed.
- Reciprocal discovery (more than just alibi), including witness lists
- Exclusion of attorney work product from discovery
- Proposal that makes clear the term “material” does not require items be admissible at trial or exculpatory for Subpoenas Duces Tecum

# The Supreme Court Speaks

- **“It is ordered that the Rules heretofore adopted and promulgated by this Court and now in effect be and they hereby are amended to become effective July 2, 2019, subject to any further orders of this Court.”**
- Chief Justice Lemons wrote to VACA president Roy Evans upon announcing the revised Rules, and stated in pertinent part,
  - “The Court recognizes the impact that these new rules will have on the workload of Virginia’s prosecutors; a workload that has already been significantly stretched by the snowballing advent on the discovery process of body worn cameras. It is our sincere hope that the General Assembly will give very serious consideration to addressing the costs associated with the implementation of these new rules.”

## Delayed Implementation

- ***Then it was delayed....***

In February of 2019, the Virginia Supreme Court announced a delay in the implementation of the changes to Rule 3A:11 & 3A:12.

- **July 1, 2020**

# Delay

- “While the Court continues to recognize that criminal discovery reform is overdue, it also recognizes that when separate branches of government work cooperatively, it benefits the citizens of the Commonwealth.”

~ Chief Justice Donald W. Lemons on January 29, 2019

## A note about early implementation?

- Some prosecutors are experimenting with early implementation of the new discovery rules by agreement with defense counsel in certain cases.

## Rule 3A:11

- ***Applicability:***

- “This rule applies to the prosecution of a felony in a circuit court and to any misdemeanor brought on direct indictment.”

- *No change from current rule*

# *New Rule: Subsection (a)*

General Provisions

Subsection (a)2 adds **exculpatory evidence** to the discovery Rule! This is new:

- “[D]uties of the Commonwealth’s attorney to provide exculpatory and/or impeachment evidence to an accused supersede any limitation or restriction on discovery provided pursuant to this Rule.”

# *New Rule: Subsection (a)*

## General Provisions

The new **exculpatory evidence and impeachment** provision is new to the discovery rules, but it isn't a new requirement!

- “[D]uties of the Commonwealth’s attorney to provide exculpatory and/or impeachment evidence to an accused supersede any limitation or restriction on discovery provided pursuant to this Rule.”

# RECAP - Current rule:

- **1. Discovery by the Accused**
- a) Written or recorded statements by the accused to anyone. “It is settled that the language of Rule 3A:11(b)(1)(i) requires the prosecutor to turn over written and recorded statements by the accused whether made to a law enforcement officer or not.” Smoot v. Commonwealth, 37 Va. App. 495, 500 (2002). And technically, this is regardless of whether the statement is inculpatory or exculpatory;
- b) Oral statements made to any law enforcement officer;
- c) Written scientific reports or written reports of the victim’s physical or mental examination made in connection with the case;'
- d) Inspection of tangible evidence in possession of Commonwealth, excluding reports.'

## RECAP - Current rule:

- **2. Reciprocal Discovery by Commonwealth**
- a) Copy of defense scientific reports.
- b) Notice of alibi, including place.
- c) If insanity defense, there must be a *full report* of the physical or mental examination of the accused which must be sent to the Commonwealth after notice of an insanity defense is given. *VA Code §19.2-169.5(D) & (E)*. However, the Commonwealth may not use any statements made by the accused in its case-in-chief.

## New to the rule.... But not new to the rules....

### Exculpatory evidence:

- Any evidence, material to guilt or punishment, that is favorable to the accused
- Brady v. Maryland, 373 U.S. 83 (1963)
  - “The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.

# Exculpatory evidence:

- **Tends to show the defendant is innocent**

A confederate's statement that he actually killed the victim is favorable to the defendant, regardless of whether the prosecution believes such statement is incredible. White v. Commonwealth, 13 Va. App. 284 (1991).

# Exculpatory evidence:

- **Tends to discredit or impeach Commonwealth witnesses**

Witness' criminal record and agreement to aid police are clearly exculpatory. Moreno v. Commonwealth, 10 Va. App. 408 (1990).

# Exculpatory evidence:

- **Statements that victim** may have been armed and may have been involved in other unrelated shootings are relevant impeachment evidence in a self-defense case and must be disclosed. Workman v. Commonwealth, 272 Va. 633 (2006).

# Exculpatory evidence

- **Tends to mitigate seriousness of offense or lessen punishment**

Defendant's undisclosed statements were mitigating and exculpatory as to punishment, even though not exculpatory as to guilt. Knight v. Commonwealth, 18 Va. App. 207 (1994)

# Exculpatory evidence:

- Prior inconsistent statements of Commonwealth witnesses
- Relevant criminal record for felonies or crimes of moral turpitude
- Deals with Commonwealth witnesses
- Eyewitnesses who fail to identify the defendant
- Statements of other witnesses who exonerate the defendant
- Evidence of bias by Commonwealth witness
- Impeachment evidence & prior inconsistent statements
- Perjured testimony

# Exculpatory evidence:

- NOTE: The rules and case law proscribe, not prescribe, certain behavior by prosecutors and law enforcement. A prosecutor can always choose to disclose more than is required by the rule and case law.
- Commentary to National Prosecution Standard 52.1:
- “The prosecutor who wishes to achieve the greatest benefit from the standards will treat the principles as a minimum standard and will seek to exceed them in every case where it is appropriate.”

# *New Rule: Subsection (a)*

## General Provisions

Now, constitutionally mandated disclosures are also codified in Subsection (a)2 as follows:

- “[D]uties of the Commonwealth’s attorney to provide exculpatory and/or impeachment evidence to an accused supersede any limitation or restriction on discovery provided pursuant to this Rule.”

# *New Rule: Subsection (a)*

General Provisions

- Subsection (a)3 permits inspection of evidence within the time limits and redaction standards set forth later in the rule.

*this is new!*

*More on this later....*

# *New Rule: Subsection (a)*

General Provisions

Subsection (a)4 provides that any discovery material filed with the court will be placed **under seal** at the time it is filed.

*this is new!*

*More on this later....*

# *New Rule: Subsection (b)*

Discovery by the Accused.

# RECAP - Current rule:

- **1. Discovery by the Accused**
- a) Written or recorded statements by the accused to anyone.
  - NOTE: “It is settled that the language of Rule 3A:11(b)(1)(i) requires the prosecutor to turn over written and recorded statements by the accused whether made to a law enforcement officer or not.” Smoot v. Commonwealth, 37 Va. App. 495, 500 (2002). And technically, this is regardless of whether the statement is inculpatory or exculpatory;
- b) Oral statements / confessions made to any law enforcement officer;
- c) Written scientific reports or written reports of the victim’s physical or mental examination made in connection with the case;'
- d) Inspection of tangible evidence in possession of Commonwealth, excluding reports.'

# *New Rule: Subsection (b)*

Discovery by the Accused

“Upon written motion of an accused a court shall order the Commonwealth’s attorney to: (1) Permit the accused to inspect and review any relevant reports prepared by law enforcement officers and made in connection with the particular case, including any written statements or written summaries of oral statements contained within such reports, that are known to the Commonwealth’s attorney to be in possession, custody, or control of the Commonwealth.”

# *New Rule: Subsection (b)*

**Let's break that down!** Discovery by the Accused

- **POLICE REPORTS!**

This is the first of the **KEY CHANGES** to the **Rule is in (b)(1)**, and may cause many prosecutor's offices to significantly alter the manner in which they provide discovery.

- In this subsection, the defense is entitled to inspect and review (but not copy).

**“RELEVANT REPORTS PREPARED BY LAW ENFORCEMENT OFFICERS. . . IN CONNECTION WITH THE PARTICULAR CASE.”**

# *New Rule: Subsection (b)*

Discovery by the Accused

**(b)(1):**

**“Nothing in this Rule requires the Commonwealth *provide the accused copies of* the relevant law enforcement reports, although it may do so in its discretion.”**

# *New Rule: Subsection (b)*

Discovery by the Accused

## **b(1)**

- **POLICE REPORTS!**  
“RELEVANT REPORTS PREPARED BY LAW ENFORCEMENT OFFICERS... IN CONNECTION WITH THE PARTICULAR CASE.”
- *Litigation questions for discussion of panel:*
  - Which reports are “relevant?” Who makes this call? What does it mean?

# *New Rule: Subsection (b)*

Discovery by the Accused

- **I. What are Relevant Reports?**

- Clearly, it covers an officer's incident report and any supplements, but
- Does it include emails sent to the prosecutor on a case? Phone calls?
- Notice, the Rule does NOT specify that the reports to which it refers be written reports.
- What, then, is considered attorney work product?

# *New Rule: Subsection (b)*

Discovery by the Accused

## • II. What are Relevant Reports?

- *Notice (b)6*: “The Rule does not authorize discovery or inspection of the Commonwealth’s “**work product** . . . internal reports, witness statements, memoranda, correspondence, legal research or other internal documents prepared by the office of the Commonwealth’s Attorney or its agents in anticipation of trial.”

# *New Rule: Subsection (b)*

Discovery by the Accused

**(b) (6) This Rule does not authorize the discovery or inspection of the work product of the Commonwealth's attorney, including internal reports, witness statements, memoranda, correspondence, legal research or other internal documents prepared by the office of the Commonwealth's Attorney or its agents in anticipation of trial.**

# *New Rule: Subsection (b)*

Discovery by the Accused

## • III. What are Relevant Reports?

- For purposes of the Rule, what is “**Work Product?**”
- “[W]here an agency is involved in the investigation or prosecution of a particular criminal case, agency employees become agents of the Commonwealth for purposes of Rule 3A:11. . . .” *Commonwealth v. Ramirez*, 20 Va. App. 292, 456 S.E.2d 531 (1995).

# *New Rule: Subsection (b)*

Discovery by the Accused

- **Now.... let's look at (b)(2).**
- **(b)(2) allows the accused to inspect, review, and copy or photograph evidence outlined in subsections (A), (B), (C) and (D).**
- **Some of this is similar to the *current* rule under 3A:11(b), but there are several items that will now be subject to discovery that were not previously required for disclosure under 3A:11.**

# *New Rule: Subsection (b)*

Discovery by the Accused

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

(A) Written or recorded statements or confessions, or the substance of any oral statements or confessions, made by the accused to any law enforcement officer, that are known to the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth;

# *New Rule: Subsection (b)*

Discovery by the Accused

- **(b)2(A)**

- While the Commonwealth has previously not been required to share written or recorded statements or the substance of any oral statements made by the accused to anyone other than law enforcement officers, **the new rule requires that such statements be provided in discovery.**

# *New Rule: Subsection (b)*

Discovery by the Accused

- **(b)2(A)**

- “Written or recorded statements or confessions, or the substance of any oral statements or confessions, made by the accused to any law enforcement officer”

**BODY CAMERA FOOTAGE....**

# *New Rule: Subsection (b)*

Discovery by the Accused

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

(B) 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;

## *New Rule: Subsection (b)*

(b)(2)(B)

Discovery by the Accused

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.....***

....but *only* those that the Commonwealth intends to introduce into evidence against the accused at trial.

# *New Rule: Subsection (b)*

Discovery by the Accused

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

(C) Written or recoded 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;

# *New Rule: Subsection (b)*

Discovery by the Accused

- **(b)2(C)**

- Such statements made to a co-defendant or co-conspirators *that the Commonwealth intends to use at trial* must also be disclosed to the defense in discovery.

# *New Rule: Subsection (b)*

Discovery by the Accused

- **(b)2(D)**

Deals with autopsy examinations, 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 alleged victim.

This doesn't change. It is the same requirement as the discovery requirement in current Rule 3A:11(b)(1)(ii).

# *New Rule: Subsection (b)*

Discovery by the Accused

(b) (4)(A) “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) written reports or written summary of expected expert testimony

# *New Rule: Subsection (b)*

Discovery by the Accused

- **(b)4(A)**

- The Commonwealth ***must*** provide the **report** of any expert it intends to use at trial or sentencing, along with the expert's contact information.
- If there is no written report, then a **summary** of the expert's conclusions must be provided to the defense.

WITNESS LISTS!?!?!?!?!?



# *New Rule: Subsection (b)*

Discovery by the Accused

**(b) (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 subpart (c)(1) of this Rule and to any protective orders entered by the court pursuant to subpart (g).**

# *New Rule: Subsection (b)*

Discovery by the Accused

- **WITNESS LISTS!!!**

- **(b)(5)**

- The Commonwealth must provide a list of names and contact information of all persons who are expected to testify on behalf of the Commonwealth at trial or sentencing.

# *New Rule: Subsection (b)*

Discovery by the Accused

- **New 3A:11 (h):** Continuing duty to disclose and failure to comply
  - “If . . . it is brought to the attention of the court that a party has failed to comply with this Rule . . . the court may grant such other relief authorized by Virginia law. . . .”

## **Va Code 19.2-265.4**

“B. If at any time during the course of the proceedings it is brought to the attention of the court that the attorney for the Commonwealth has failed to comply with this section, the court may order the Commonwealth to permit the discovery or inspection, grant a continuance, or ***prohibit the Commonwealth from introducing evidence not disclosed***, or the court may enter such other order as it deems just under the circumstances.”

# *New Rule: Subsection (b)*

Discovery by the Accused

- **WITNESS LISTS!!!**

- **(b)(5)**

- **NOTE: “This provision is subject to subpart (c)(1) of this Rule and to any protective orders entered by the court pursuant to subpart (g).”**

# *New Rule: Subsection (b)*

Discovery by the Accused

- **Confidential informants / witnesses?**

- *(b)(5): “This provision is subject to subpart (c)(1) of this Rule and to any protective orders entered by the court pursuant to subpart (g).”*

- **How to preserve protected identities under the new rules?**
- (c)(1) – Redaction and Restricted Dissemination Material
- (g) – Protective Orders

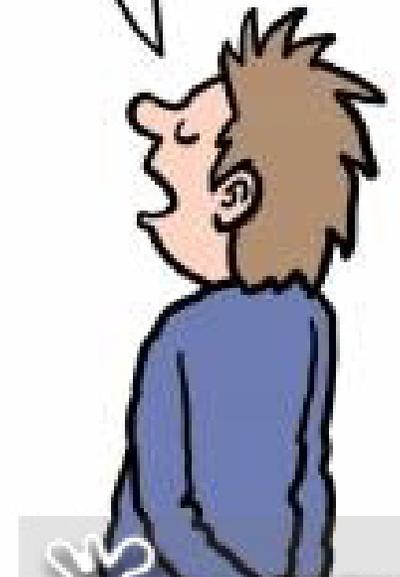
*With the new rule 3A:11 comes a  
New “Term of Art”*

**Restricted  
Dissemination  
Material**

Redaction  
and  
Restricted  
Dissemination  
Material



It's been redacted for security reasons



# *New Rule: Subsection (c)*

Redaction and Restricted Dissemination Material

- **(c)1(A) - Redaction.**

- The Commonwealth may redact dates of birth and social security numbers *for any person* whose identity must be revealed to the defense.
- The address, telephone number, email address and place of employment of any **victim** as defined in § 19.2-11.2.

# Va Code 19.2-11.2

- “Neither a law enforcement agency, the attorney for the Commonwealth, the counsel for a defendant, a court nor the Department of Corrections, nor any employee of any of them, may disclose, except among themselves, the residential address, any telephone number, email address, or place of employment of the witness or victim or a member of the witness’ or victim’s family, except to the extent that disclosure is (i) of the site of the crime, (ii) required by law or Rules of the Supreme Court, (iii) necessary for law-enforcement purposes or preparation for court proceedings, or (iv) permitted by the court for good cause.”

# Va Code 19.2-11.2

*Basically....*

- The address, phone number, email address, and place of employment of any witness or crime victim may not be disclosed upon request the witness or victim's request.
- Except with written consent of the victim of any crime involving sexual assault, sexual abuse, or family abuse, information may not be disclosed to the public that directly or indirectly identifies the victim.

# *New Rule: Subsection (c)*

Redaction and Restricted Dissemination Material

- **NEW HEARING!!!!!!**

- Defense motion Pursuant to Rule 3A:11(c)(1)(B).

**VIRGINIA:**

**IN THE CIRCUIT COURT OF WISE COUNTY & THE CITY OF NORTON**

**COMMONWEALTH OF VIRGINIA**

**V.**

**CASE NO.: F19-707**

**LENNON MCCARTNEY**

**MOTION FOR DISCLOSURE OF REDACTED MATERIAL**

COMES NOW the Defendant, by counsel, pursuant to Rule 3A:11(c)(1)(B), and respectfully moves this Honorable Court to Order the Commonwealth to disclose certain redacted information for good cause.

In support thereof, the Commonwealth states as follows:

1. Lennon McCartney stands charged with a felony offense in this court.
2. Pursuant to Rule 3A:11, the Commonwealth provided counsel for the defendant with a listing of witnesses that the prosecution intends to call at trial.
3. Included in the Commonwealth's witness list is the name "R.H." and all of the identifying information required by Rule 3A:11(b)(5) is redacted.
4. Disclosure of the redacted information is necessary for counsel to assert a defense on behalf of the Defendant.

WHEREFORE, the Defendant respectfully moves the Court, pursuant to Rule 3A:11(c)(1)(B), to disclose the redacted information.

# *New Rule: Subsection (c)*

Redaction and Restricted Dissemination Material

Under the new Rule 3A:11(c)(1)(B), the Defendant may file a motion and have a hearing asking the Court to compel the Commonwealth to disclose that personal information that was previously redacted.

It may be ordered to be disclosed for “good cause” shown.

*If it is ordered to be disclosed by the Court, the Court may order that the information be designated as Restricted Dissemination Material.*

# *New Rule: Subsection (c)*

Redaction and Restricted Dissemination Material

(c) (1) (B) If the Commonwealth redacts personal identifying information pursuant to this subpart of the Rule, **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 subpart (c)(2) of this rule.

# New Rule: Subsection (c)

Redaction and Restricted Dissemination Material

## • (c)2(A) -

# Restricted Dissemination Material.

VIRGINIA:

IN THE CIRCUIT COURT OF WISE COUNTY & THE CITY OF NORTON

COMMONWEALTH OF VIRGINIA

**RESTRICTED  
DISSEMINATION  
MATERIAL**

V.

CASE F19-720

RINGO HARRISON

### COMMONWEALTH'S WITNESS LIST

COMES NOW the Commonwealth, by counsel, pursuant to Rule 3A:11(b)(5), and respectfully submits 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 at sentencing in the above referenced case against the Defendant.

**PURSUANT TO RULE 3A:11(c)(2)(A), the Commonwealth designates this disclosure as RESTRICTED DISSEMINATION MATERIAL.**

### Trial Witnesses

1. Paul McCartney  
Address Unknown

2. Officer Guy Wise  
1 College Avenue, Wise, VA

# *New Rule: Subsection (c)*

Redaction and Restricted Dissemination Material

(c) (2) (A) The Commonwealth may designate evidence or material disclosed pursuant to this Rule as “Restricted Dissemination Material” by **prominently stamping** or **otherwise marking** such items as “**Restricted Dissemination Material.**”

# *New Rule: Subsection (c)*

Redaction and Restricted Dissemination Material

- **RESTRICTED DISSEMINATION MATERIAL – (c)2(B)**
- RDM is that which would result in **cognizable danger to the safety or security of a witness or victim**; or
- Would result in cognizable danger of a **witness being intimidated or tampered with**; or
- May compromise an **ongoing criminal investigation or confidential law enforcement technique**; or
- Relates to the statement of a **child victim** or a witness  $\leq 14$  years of age.

# *New Rule: Subsection (c)*

Redaction and Restricted Dissemination Material

- RESTRICTED DISSEMINATION MATERIAL – (c)2(B)

- **(New Form Alert!)**

- The Commonwealth's Attorney must execute a document certifying that the material qualifies as RDM unless the attorney for the accused agrees to the designation.
- RDM may only be disclosed to the attorney for the accused.
- Defense attorney cannot reproduce, copy or disseminate RDM in any way.  
(c)(2)(C)

# *New Rule: Subsection (c)*

Redaction and Restricted Dissemination Material

- **NEW**
- **FORM!**

**VIRGINIA:**

**IN THE CIRCUIT COURT OF WISE COUNTY & THE CITY OF NORTON**

**COMMONWEALTH OF VIRGINIA**

**V.**

**CASE F19-720**

**GEORGE JEFFERSON**

**CERTIFICATE OF THE COMMONWEALTH**  
**PURSUANT TO RULE 3A:11**

I hereby certify that the evidence enclosed is being designated as “Restricted Dissemination Material” pursuant to Rule 3A:11(c) and that this designation is based upon my belief and information provided by law enforcement that the designated material relates to the statement of a child victim and that disclosure of the designated material may result in danger to the safety or security of the witness.

Respectfully certified this the 30<sup>th</sup> day of January, 2020,

*/s/ Chuck Slemp*

---

Charles H. Slemp, III  
Commonwealth's Attorney  
Wise County & the City of Norton

# *New Rule: Subsection (c)*

Redaction and Restricted Dissemination Material

(c) (2) (C) 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 such 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.

# *New Rule: Subsection (c)*

Redaction and Restricted Dissemination Material

(c) (2) (D).

If evidence or material is designated by the Commonwealth as Restricted Dissemination Material, the accused may file a motion seeking removal of the designation.

The Court has discretion to remove the designation.

# *New Rule: Subsection (c)*

Redaction and Restricted Dissemination Material

(c) (2) (D).

## NEW HEARING!!!

Upon defense motion, pursuant to Rule 3A:11(c)(2)(D), the Court can consider whether to remove the Commonwealth's designation of Restricted Dissemination Material from evidence.

The Court must find that there is good cause to remove the designation.

# *New Rule: Subsection (c)*

Redaction and Restricted Dissemination Material

(c) (2) (E). *After the case is completed....*

Within 21 days of a FINAL ORDER, or termination of representation of the accused, accused's attorney shall return all originals and copies of any "Restricted Dissemination Material". It will remain under seal with the court.

## *New Rule: Subsection (c)*

Redaction and Restricted Dissemination Material

(c) (2) (E). *After the case is completed....*

Within 21 days of a FINAL ORDER, or termination of representation of the accused, accused's attorney shall return all originals and copies of any "Restricted Dissemination Material". It will remain under seal with the court.

# *New Rule: Subsection (c)*

Redaction and Restricted Dissemination Material

Under Rule 3A:11 (c) (2) (E), Restricted  
Dissemination Material must be returned!

It is not part of the client's permanent file and not  
the defendant's property.

# *New Rule: Subsection (c)*

Redaction and Restricted Dissemination Material

- ANOTHER NEW HEARING!?!?!?

- *Rule 3A:11 (c)(2)(F)*

Unrepresented defendants.

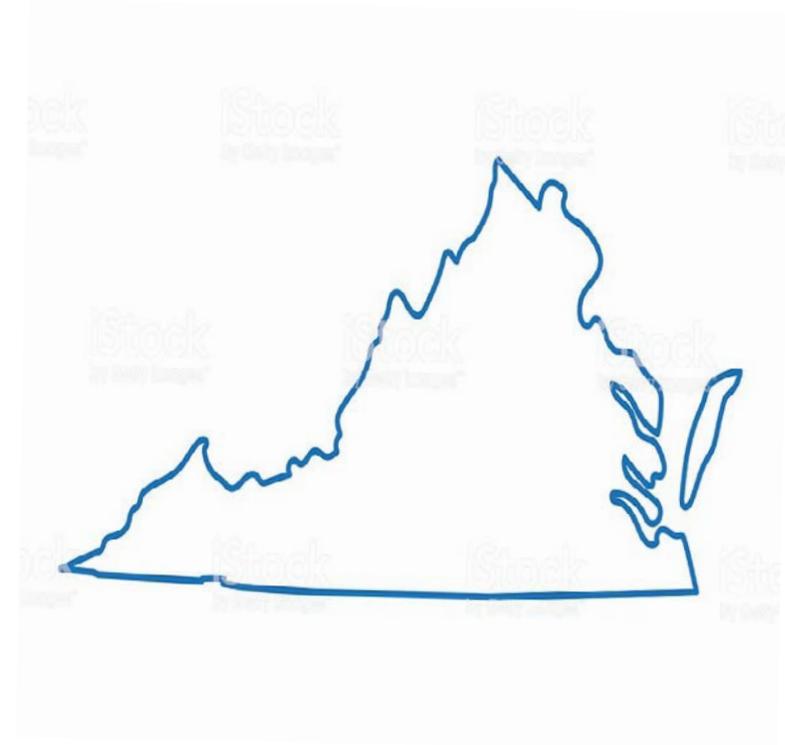
# *New Rule: Subsection (c)*

Redaction and Restricted Dissemination Material

- RESTRICTED DISSEMINATION MATERIAL – (c)(2)(F)
- Where a defendant is **NOT** represented by counsel ***(New Hearing Alert!)***  
The Commonwealth must move the court to limit the scope of discovery.
- “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.”

## *Reciprocal Discovery*

Discovery by the  
Commonwealth



# RECAP - Current rule:

- **2. Reciprocal Discovery by Commonwealth**
- a) Copy of defense scientific reports.
- b) Notice of alibi, including place.
- c) If insanity defense, there must be a *full report* of the physical or mental examination of the accused which must be sent to the Commonwealth after notice of an insanity defense is given. *VA Code §19.2-169.5(D) & (E)*. However, the Commonwealth may not use any statements made by the accused in its case-in-chief.

# *New Rule: Subsection (d)*

Discovery by the Commonwealth

- **(d) If the court grants disclosure to the accused under subpart (b) of this Rule, it shall also order the accused to . . .**

# *New Rule: Subsection (d)*

Discovery by the Commonwealth

**... (1) Permit the Commonwealth to inspect and copy or photograph any written reports of autopsy examinations, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath analyses, and other scientific testing within the accused's possession, custody or control that the defense intends to proffer or introduce into evidence at trial or sentencing**

*..... similar to current rule*

*3A:11(c)(1)*

# *New Rule: Subsection (d)*

Discovery by the Commonwealth

- **(d)(2) Disclosure whether the accused to introduce evidence to establish an alibi and, if so, disclose the place at which the accused claims to have been at the time the alleged offense was committed.**

- *....identical to Rule 3A:11(c)(2)*

# *New Rule: Subsection (d)*

Discovery by the Commonwealth

- **(d) (3) Permit the Commonwealth to inspect, copy or photograph any written reports of physical or mental examination of the accused . . . If the accused intends to rely upon the defense of insanity.**
  - *. . . no changes from current rule 3A:11(c)(3)*

# *New Rule: Subsection (d)*

Discovery by the Commonwealth

- **(d)4**

- Requires defense to notify the Commonwealth in writing of the intent to use expert testimony at trial or sentencing, and provide the same information that the Commonwealth is required to give pursuant to (b)4.

WITNESS LISTS!?!?!?!?!?



# *New Rule: Subsection (d)*

Discovery by the Commonwealth

- **WITNESS LISTS!!!**

- **(d)(5)**

- The Defense must provide a list of names and contact information of all persons who are expected to testify on behalf of the Defendant at trial or sentencing.

# *New Rule: Subsection (d)*

Discovery by the Commonwealth

- **Is NEW 3A:11 (d)5 the biggest change to criminal discovery in Virginia?**
- It requires defense counsel to provide the Commonwealth a list of witnesses it intends to use at trial or sentencing, and provide the same information that the Commonwealth is required to give pursuant to (b)5.
- The defendant can redact personal identifying information of any witness if authorized by a protective order pursuant to part (g).

# *New Rule: Subsection (d)*

Discovery by the Commonwealth

- **(d)(5). Provide to the Commonwealth a list of the names and, if known, the addresses of all persons 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 subpart (g) of this Rule.**

# Time of Motion

When must a request for discovery be filed?

- **REAP – current rule: 3A:11(d)**
- “A motion by the accused under this Rule must be made at least 10 days before the day fixed for trial. The motion shall include all relief sought under this Rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.”
- **NEW RULE: 3A:11(e)**
- “A motion by the accused under this Rule must be made at least 10 days before the day fixed for trial. The motion shall include all relief sought under this Rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.”

# Time of Motion

When must a request for discovery be filed?

- **No changes to the timing provision of 3A:11**
- Defense files first.
- Must be filed at least 10 days prior to trial.
- Motion must identify all relief sought.
- Subsequent motion can be filed.

# Protective Orders

- **RECAP** - Current rule 3A:11 (f):
  - “Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate.
  - Upon **motion by the Commonwealth** the court may permit the Commonwealth to make such showing, in whole or in part, in the form of a written statement to be inspected by the court **in camera**.
  - If 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 the court to be made available to the appellate court in the event of an appeal by the accused.”

## *New Rule: Subsection (g)*

- **Use of protective orders for discovery is expanded under the new Rule 3A:11.**

- (g)1

# *New Rule: Subsection (g)*

Protective Orders

- **Either party may petition the court.....**

- **Not just the Commonwealth!**

- 

- The petition seeks to protect materials required for discovery by ordering certain conditions for disclosure.

- *Examples are:*

- Restrict public disclosure including to any website (*e.g.*, Facebook, YouTube, etc);
  - Restrict disclosure to any third party except expert witnesses;
  - Authorization to withhold any personal information listed in (c)1;
  - Place additional restrictions on withholding non-exculpatory evidence.

# *New Rule: Subsection (g)*

Protective Orders

- **(g)1**
- Either party may petition
- Protective Order may be granted by the court upon a showing of **good cause**.
- The Court has discretion to order **any condition it deems necessary to the orderly adjudication of the case or to the fair administration of justice**.

# *New Rule: Subsection (g)*

Protective Orders

- **Violations!?!?! See new Rule 3A:11 (g)(2)**
- Either party may move the court to enforce a protective order if they believe in good faith that the terms of such order have been violated.
- A court can “impose any necessary and appropriate sanction authorized by Virginia law.”

# RULE 3A:12?!?

Subpoenas

- **Changes to Rule 3A:12 will also take effect on July 1, 2020.**

# RULE 3A:12?!?

Subpoenas

- **Changes to Rule 3A:12 will also take effect on July 1, 2020.**
- There are not as many material changes to Rule 3A:12 as there were to Rule 3A:11.

# RULE 3A:12?!?

## Subpoenas

- **RECAP** – Current Rule 3A:12(a) sets forth how subpoenas for attendance of witnesses may be obtained by the Commonwealth’s Attorney and defense counsel.
- The new rule 3A:12(a) does not significantly change the text or provisions. It merely reorders and enumerates the provisions of Rule 3A:12(a).

# RULE 3A:12?!?

## Subpoenas

- **RECAP** – Current Rule 3A:12(b) sets forth how subpoenas for production of documentary evidence and of objects before a circuit court.
- The new rule 3A:12(b) reorders and enumerates the provisions of Rule 3A:12(b). It also adds some small revisions to the current language.

# Rule 3A:12(b)

Subpoenas for Production of Documentary Evidence and Objects

- **RECAP** - Under the first paragraph of 3A:12(b) of the current rule (now subpart (b)(1)), a party applying for a subpoena duces tecum may request “writings or objects [that] are **material to the proceeding** and are in possession of a person not a party to the action.”

# *NEW RULE 3A:12(b)*

Subpoenas for Production of Documentary Evidence and Objects

- The new rule 3A:12(b) adds the following provision to the first paragraph.... Now subpart (b)(1) - “The term ‘material to the proceedings’ as used in this subpart (b) does not require that the subpoenaed writings or objects be admissible at trial or that they be exculpatory”

# Rule 3A:12(b)

Subpoenas for Production of Documentary Evidence and Objects

- **RECAP** - Under the second paragraph of 3A:12(b) of the current rule (now subpart (b)(2)), subpoenaed writings and objects are received by the clerk and not open for examination except by the parties. The current rules provide that the clerk shall adopt procedures to ensure compliance.

# *NEW RULE 3A:12(b)*

Subpoenas for Production of Documentary Evidence and Objects

- The second paragraph of the rule becomes 3A:12(b)(2)
- The new rule 3A:12(b)(2) rephrases this section and uses the term “**under seal.**” It provides that “until such time as the subpoenaed materials are admitted into evidence they shall remain under seal unless the court orders that some or all of such materials be unsealed.”

# Rule 3A:12(b)

Subpoenas for Production of Documentary Evidence and Objects

- **RECAP** - Under the third paragraph of 3A:12(b) of the current rule (now subpart (b)(3)), when items subpoenaed are “of such nature or content that disclosure to other parties would be unduly prejudicial,” the court can limit disclosure.
-

# *NEW RULE 3A:12(b)*

Subpoenas for Production of Documentary Evidence and Objects

- The third paragraph of 3A:12(b) becomes 3A:12(b)(3).
- Under the new rule 3A:12(b)(3) rephrases and adds detail to this section. The court still can “grant such relief as it deems appropriate,” but under the new rule the court has authority to take additional actions enumerated in five sub-parts of the new rule (including redacting information or quashing the subpoena). The new rule also clarifies that this request can be brought by any party to the litigation or by the entity or individual subpoenaed.

# *NEW RULE 3A:12(b)*

Subpoenas for Production of Documentary Evidence and Objects

- The fourth paragraph of 3A:12(b) of the current rule (now subpart (b)(4)) deals with production of information that is stored in an electronic format.
- This fourth paragraph is now 3A:12(b)(4). There are no other significant changes to this provision.

# Rule 3A:12(c)-(f)

Subpoenas

- No changes were made to parts (c) through (f) of Rule 3A:12.
  - (c) Service and Return
  - (d) Contempt
  - (e) Recognizance of a Witness
  - (f) Photocopying of Subpoenaed Documents

# *New Rule: 3A:12*

Subpoena Duces Tecum

- Other changes?
- The original proposal from the VSB task force provided for *ex parte* subpoenas duces tecum by the defendant.
- The Supreme Court rejected this suggestion.

# *New Rule: 3A:12*

## Subpoena

- In addition to the minor changes to Rule 3A:12 referenced above, the new Rule 3A:12 will have the addition of subsections (g) through (m).
- These subsections clarify that Subpoenas Duces Tecum may not be issued to agents of the Commonwealth and provide restrictions on subpoenas relate to FOIA, HIPAA and confidentiality.

## NEW RULE 3A:12(g)

### *Undue Burden*

- *(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.

## *NEW RULE 3A:12(h)*

FOIA

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

## *NEW RULE 3A:12(i)*

*Subpoenas issued to a Party*

- Under section (i), a subpoena duces tecum may not be used to obtain material from a party to the case.
- 
- No subpoena duces tecum can be issued to obtain material from agents of the Commonwealth (except for the Department of Forensic Science & Division of Laboratory Consolidated Services).

# *NEW RULE 3A:12(j)*

*In Camera Reviews*

- Under section (j), a court may in its discretion review subpoenaed material in camera to determine whether it should issue a protective order or other protections.

## *NEW RULE 3A:12(k)*

*Confidentiality*

- Va Code 19.2-11.2 provides for crime victim's rights to nondisclosure of certain information.
- Under the new Rule 3A:12, any material produced pursuant to a subpoena duces tecum must be treated in accordance with the confidentiality provisions of the statute.

## *NEW RULE 3A:12(I)*

*Confidentiality of Healthcare Records*

- Confidentiality of healthcare records are governed by Va Code 32.1-127.1:03.
- Under Section (I) of the new rule, any subpoena duces tecum seeking healthcare records are subject to the procedures and requirements of that section.

## *NEW RULE 3A:12(m)*

*Court Decisions*

The final rule change is a provision that requires courts to state “on the record, or in writing, its reasons for making a decision pursuant to this Rule.”

Thank you!

Questions?