

June 1, 2018

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

VIA EMAIL: scvclerk@vacourts.gov

Re: Comments on Proposed Revisions to Rules 3A:11 and 3A:12 Received from the Virginia State Bar Criminal Discovery Reform Task Force

Dear Ms. Harrington:

The Constitution Project (TCP) at the Project On Government Oversight supports the revisions to Rules 3A:11 and 3A:12 proposed by the Virginia State Bar Criminal Discovery Reform Task Force. The proposed revisions will provide for exchanging witness lists and statements, producing law enforcement reports, and giving notice of expert testimony. These reforms will improve the speed, accuracy, and fairness of criminal proceedings in Virginia.

TCP makes its recommendation based on its extensive work with a range of criminal justice stakeholders, including those with experience as judges, prosecutors, public defenders, law enforcement officers, policymakers, victim advocates, and scholars. The work of TCP includes strengthening access to justice and ensuring government transparency and accountability. To further these goals, TCP has undertaken original research; developed policy recommendations; issued reports, statements, and policy briefs; filed amicus briefs; testified before Congress; and held briefings with legislative staff and policymakers.

The revisions would update Virginia's discovery practices and bring them in line with those of most other states: at least two-thirds of all states have policies similar to those being proposed. But beyond reflecting common practices, the proposed revisions serve a more fundamental purpose. Meaningful discovery is a cornerstone of a fair and impartial justice system. Open and timely discovery policies ensure that a person who is the subject of a criminal prosecution has the opportunity for a full and fair hearing. They also reduce the likelihood that exculpatory evidence will go undisclosed due to intentional or accidental omissions by the prosecution. Discovery protects innocent people from wrongful convictions, which not only helps prevent those injustices, but also promotes public safety by ensuring that the guilty do not go free, able to commit subsequent crimes.

TCP has followed a troubling number of cases across the country involving failures to disclose exculpatory evidence to the defense. Consequently, we have been advocating for criminal discovery reform for decades through the work of our bipartisan, blue-ribbon committees, two of which are mentioned below. TCP's committee members have prosecuted, defended, and adjudicated criminal

cases, and their recommendations on criminal discovery reform are informed by their collective expertise and extensive experience.

In 2009, TCP's National Right to Counsel Committee released its seminal report, *Justice Denied*, which includes important recommendations on strengthening discovery policies.¹ The Committee—which is co-chaired by former North Carolina Chief Justice Rhoda Billings; former National District Attorneys Association President Robert M. A. Johnson; and former federal prosecutor and U.S. Court of Appeals for the Third Circuit Judge Tim Lewis—advocated for open and timely discovery to comply with the Sixth Amendment right to counsel.

As outlined in *Justice Denied*, discovery policies have a direct impact on defender workloads and competent and diligent representation of indigent defendants. When evidence subject to *Brady v. Maryland* and other disclosure obligations is not provided, defense attorneys must spend extra time, resources, and money to obtain the information that is already in the possession of the prosecution. This leads to higher costs for courts and prosecution, as defense counsel must file and litigate motions, delay plea deals, or even proceed to trials that could have been avoided. Most troubling, innocent clients are more likely to be convicted due to the inability of their attorneys to mount a proper defense in the face of late disclosures. Thus, critical components of a fair criminal justice system are a prosecutor's adherence to discovery requirements and appropriate remedies when a prosecutor fails to do so. The proposed rule change is an important step toward strengthening these requirements in Virginia.

Additionally, over a decade ago, TCP convened a Death Penalty Committee chaired by former Florida Supreme Court Chief Justice Gerald Kogan, former Texas Governor Mark White, and Special Prosecutor in the Oklahoma City Bombing case, Beth Wilkinson. The Committee released a major report in 2014, *Irreversible Error*, which emphasizes, in part:

Although the adoption of full discovery principles in some jurisdictions will challenge accepted norms, the Committee believes that the provision of full discovery will be of great benefit to the prosecution in assuring the public of the fairness both of the process and of finality. It will eliminate questions about whether all favorable information has been supplied. Moreover, providing full discovery will minimize challenges on appeal to the scope and nature of discovery that was provided in the trial phase.²

To support the recommendations issued by our committees, TCP has advocated for legislative changes regarding criminal discovery policies. In 2012, after Senator Lisa Murkowski (R-AK) introduced the Fairness in Disclosure of Evidence Act, TCP released a statement from nearly 150 criminal justice experts, including more than 100 former federal prosecutors, urging changes in the federal criminal discovery process.³ TCP has also organized several friend-of-the-court briefs arguing for clearer

¹ The Constitution Project National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, April 14, 2009. <https://constitutionproject.org/wp-content/uploads/2012/10/139.pdf>

² The Constitution Project Death Penalty Committee, *Irreversible Error: Recommended Reforms for Preventing and Correcting Errors in the Administration of Capital Punishment*, May 7, 2014. http://constitutionproject.org/wp-content/uploads/2014/06/Irreversible-Error_FINAL.pdf

³ The Constitution Project, "A Call for Congress to Reform Federal Criminal Discovery," March 15, 2012. <http://constitutionproject.org/wp-content/uploads/2012/10/callforcriminaldiscoveryreform.pdf>

disclosure rules, as what may constitute *Brady* material is not always apparent to the prosecution.⁴ These efforts have shown that discovery reform has broad support across party lines and from stakeholders throughout the criminal justice system—from defenders to judges to prosecutors.

The proposed revisions move Virginia closer to the policies TCP has long advocated for—and to the goal of a system that fosters fair, efficient trials and minimizes the chances of unjust or unconstitutional failures to disclose information. We urge the Supreme Court of Virginia to adopt the revisions.

Sincerely,



Sarah Turberville
Director, The Constitution Project at POGO

⁴ The Constitution Project, “Publications and Resources: Criminal Discovery Reform Amicus Briefs.”
https://constitutionproject.org/documents/?tcp_search=&tcp_issue%5B%5D=criminal_discovery_reform&tcp_type%5B%5D=amicus_brief&tcp_datestart=&tcp_dateend=&sortbutton=Search+Library#tcp-lib