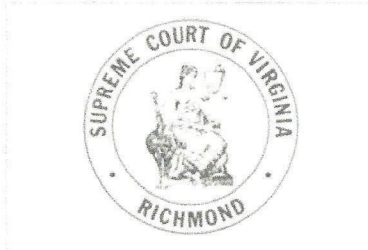


## High court mulls reforms in criminal discovery

By: Peter Vieth July 3, 2018



The Supreme Court of Virginia is under increasing pressure to approve reforms to the state's criminal discovery standards.

Despite opposition from the State Police and concerns from many prosecutors, a package of recommended changes now before the court has the support of the overwhelming majority of those who wrote to comment.

More than 100 of about 124 comments submitted to the court urged adoption of reforms advanced by a Virginia State Bar committee. Moreover, a key legislator made it clear this year that the General Assembly would likely craft its own fix if the court did not act to address longstanding concerns about uneven criminal discovery practices around the state.

### Lengthy history

The call for statewide standards for access to evidence in criminal cases goes back at least to 2004, when the American Bar Association put Virginia dead last among states in terms of protections for criminal defendants. Since then, however, study after study failed to produce a criminal discovery reform plan approved by the justices.

The latest effort comes from a 13-member task force chaired by Court of Appeals Judge Robert J. Humphreys. The group urges allowing access to police reports, but without an automatic right to copy police reports.

The proposals also call for reciprocal exchange of witness lists and defense disclosure of expert witness information.

The task force recommendations, emerging during the General Assembly session this year, led Sen. Bill Stanley, R-Moneta, to shelve his criminal discovery bill. He said the task force report captured much of what he sought to do with legislation. But, he said if the court failed to act, "the legislature will be forced to act."

### State speaks with two voices

The reform proposal produced an odd clash in comments from the cabinet of Gov. Ralph Northam and Virginia State Police Superintendent Gary T. Settle. Northam's team favored the proposal.

"The proposed changes will enable intelligent and efficient plea negotiations, result in fewer trials, and less time spent in court; less time spent in court by law enforcement officers will benefit public safety," wrote state Secretary of Public Safety and Homeland Security Brian Moran. He added that he hoped prosecutors' concerns would be considered.

But Settle – the State Police top executive – warned of opening doors to witness intimidation. He said "small-scale studies and surveys of police and prosecutors suggest that witness intimidation is pervasive and increasing."

Intimidation is a "quickly growing phenomenon, especially in gang and drug trafficking organizations," Settle wrote. He said the State Police continues in its strong opposition to release of criminal investigative files.

Settle's comments were echoed by some prosecutors.

### Defense: No uniform standard for prosecutors

From the defense point of view, the current system puts too much discretion into prosecutors' hands.

"Even in jurisdictions with open file policies, the policies are not uniform and they are dependent upon the good will of the prosecutors: one's privileges may be revoked at any time," wrote Bruce R. Williamson Jr. of Charlottesville.

"A defense attorney's ability to effectively defend his or her client should not depend on which city or county there are in and whether the Commonwealth's Attorney's Office for that particular jurisdiction does or does not have an 'open file' discovery policy or practice," wrote Seth C. Weston, president of the Virginia Association of Criminal Defense Lawyers.

### **Prosecutors support plan in principle**

The Virginia Association of Commonwealth's Attorneys, in measured language, stated it supported the concept of reform. It even supported in principle the requirement that prosecutors disclose police reports.

"However we are concerned about the breadth of these criminal discovery revisions all at one time," wrote VACA President Patricia T. Watson, the Greensville County commonwealth's attorney.

VACA urged changing the qualifier "which is known to the Commonwealth's attorney" to "which the Commonwealth's attorney has in his possession."

Other groups adding their voices of support included the criminal law section of the Virginia Trial Lawyers Association, the Virginia Indigent Defense Commission, the National Association of Criminal Defense Attorneys and the Mid-Atlantic Innocence Project.

### **Witness intimidation**

Commenters were split on the issue of witness intimidation. Richmond Deputy Commonwealth's Attorney Learned Barry said the task force overlooked the gritty realities of criminal prosecution in urban jurisdictions, said.

"The modern Courtroom is often packed with a rough group of folks from the same location where the witnesses live. Witness intimidation has become a normal course of pretrial activity," Barry wrote.

He said over his 44 years in practice, "I have had witnesses killed and I have convicted innocent defendants. I recognize there is a legal balancing act that must occur with discovery."

But Barry said the balance can be achieved without putting innocent witnesses in harm's way.

Witness intimidation is not the pervasive problem opponents describe, according to Winchester Public Defender Timothy S. Coyne.

"In my 27 years defending criminal cases, I have not seen instances of witness intimidation caused by a defense attorney receiving this type of full and complete discovery from the Commonwealth," Coyne wrote. He said he supported the rule revisions because they will "create uniformity and fairness in all jurisdictions."

### **No copying?**

Defense attorneys bristled at the proposal that rules would allow access to police reports while requiring a judge's approval for copying of those reports.

Allowing access to police reports without allowing copying ties the hands of defense lawyers, according to Capital Defender Jennifer T. Stanton. She said her team once had to spend weeks in a Charlottesville prosecutor's office handwriting every document they reviewed.

"It was a HUGE waste of time and resources that the Commonwealth is ultimately responsible for," Stanton said.

Patrick M. Blanch of Fairfax said getting a copy of the actual police report is more than a convenience for defense lawyers.

"Possession of the actual police report is essential for use at trial to correct, impeach, or refresh the recollection of testifying police officers and other witnesses. Handwritten notes made by counsel ... simply cannot perform the same function with the same credibility or effect," Blanch said.

### **Supporters of change**

Task force member Douglas A. Ramseur, Capital Defender for Virginia's Central Region, pointed to similarities in the recommendations of a previous study committee appointed by the court.

"It is clear there is public support for improvements to the rules of criminal discovery," Ramseur said. "From my own discussions, the public is shocked to learn that a person charged with a crime is not entitled to know who the witnesses against them will be or what the law enforcement investigation into their case has discovered. The most recent efforts in the legislature bear out this desire for improvements."

Robert Moody IV, Chief Deputy Public Defender in Newport News, said discovery reform is "long overdue."

He said Texas now allows access to police reports and witness statements and "none of the horrors which the VACA have put forth in opposing discovery reform have materialized."

Law Prof. Bandon L. Garrett at the University of Virginia has studied cases of defendants exonerated by post-conviction DNA testing. "Inadequate discovery played a troubling role in those cases," he said.

"Accurate information sharing is crucial to getting criminal cases right," he added.

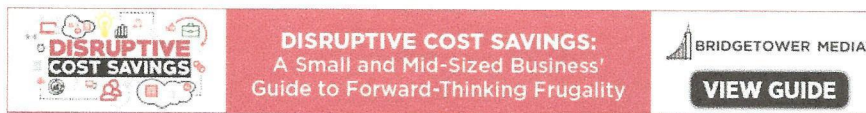
The proposed rule amendments would be "important steps forward towards insuring a more level playing field when liberty and life are at stake in criminal prosecutions," wrote Robert T. Hall of Reston.

Edward J. Ungvarsky of Alexandria, an experienced capital defender, encouraged adoption of the proposal in full.

"The proposed changes aren't perfect. There are more imperfect than federal discovery for example. But they are a substantial step in the right direction. And importantly they are a consensus compromise," Ungvarsky wrote.

While the comments supporting the task force recommendations far outnumbered those raising concerns about the proposal, a number of the favorable comments appeared to be form messages endorsing the views of the National Association of Criminal Defense Lawyers.

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