

1972

## An Introduction to Virginia's New Rules of Criminal Practice and Procedure

Murray J. Janus

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Murray J. Janus, *An Introduction to Virginia's New Rules of Criminal Practice and Procedure*, 6 U. Rich. L. Rev. 287 (1972).

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## AN INTRODUCTION TO VIRGINIA'S NEW RULES OF CRIMINAL PRACTICE AND PROCEDURE

*Murray J. Janus\**

ON JANUARY 1, 1972 the new Virginia Rules of Criminal Practice and Procedure became effective, some three and one-half years after the President of the Virginia State Bar Association appointed a Special Committee to draft these proposed Rules. Mr. Justice Thomas C. Gordon, Jr., was appointed Chairman of the Committee in June of 1968. Peter C. Manson, Professor of Criminal Law at the University of Virginia, acted as consultant for the Committee and he made available special student assistants who were invaluable with their research. In addition, two judges of courts of record with criminal jurisdiction, the Honorable Edmund P. Simpkins, Jr., and the Honorable William W. Sweeney, served on the Committee as well as two commonwealth's attorneys and a member of the Attorney General's staff. Three defense attorneys and a former judge of a court not of record comprised the rest of the Committee, giving it, at least theoretically, a balanced approach. After one year of work the Committee reported to the State Bar Association at its annual meeting in July of 1969. The Bar Association endorsed the Rules, and they were submitted to the Chief Justice of the Supreme Court of Virginia. After almost two years of hearings and recommendations from the Judicial Council, the Commonwealth's Attorneys' Association; the Criminal Bar Section of the Virginia State Bar and the Attorney General's Office, the Rules were adopted by the Supreme Court on June 15, 1971, to become effective on January 1, 1972.

Designated as Rule Three A, these new Rules of Criminal Practice and Procedure are an amendment to the Rules of the Virginia Supreme Court and have been added following Part Three of those Rules.

Along with each Rule, the Committee submitted annotations and comments which were not adopted by the Supreme Court in the final product. The format of this article is designed in part to include some extracts from the comments made by the Committee. However, the

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opinions expressed herein are the opinions of the author only and are not meant to express necessarily the opinions or the intent of the Committee as a whole. For convenience, each of the Rules will be set out with a comment immediately following.

## PART THREE A

### Criminal Practice and Procedure

#### I. *Scope, Purpose and Interpretation*

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### Rule 3A:1. Scope.

These Rules govern criminal proceedings in courts of record and courts not of record (except juvenile and domestic relations courts) and before the magistrates defined in Rule 3A:2. In matters not covered by these Rules, the established practices and procedures are continued.

#### COMMENT:

The overall purposes for having Rules in the State are obvious. The need for consistency and uniformity in the various jurisdictions is probably most important in the field of criminal law. Furthermore, it was and is hoped that these Rules will codify and simplify many of the past existing practices and procedures.<sup>1</sup>

The Committee gave considerable thought to whether or not the Rules should apply to courts not of record. The recommendation was made and the subsequent adoption included these courts, not only for preliminary hearings for felonies but for misdemeanors as well.

Juvenile courts are specifically excluded however. This is perhaps a shortcoming of the Rule because juvenile courts not only hold preliminary hearings for both juveniles and adults on felonies but also hear cases against adults on crimes committed against juveniles. The same demand for uniformity ought to exist in these courts, certainly with respect to felonies.

### Rule 3A:2. Purpose and Interpretation; Definitions.

(a) *Purpose and Interpretation.* These Rules are intended to provide for the just determination of criminal proceedings. They shall be interpreted so as to promote uniformity and simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay. Errors, defects, irregularities or variances that do not affect substantial rights shall not constitute reversible error.

(b) *Definitions.* Except as otherwise expressly provided in this Part Three A or unless the context otherwise requires:

- (1) "Clerk" includes deputy clerk.

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<sup>1</sup> VA. CODE ANN. § 8-1.2 (Cum. Supp. 1971) provides that any general law established by the General Assembly shall supersede all rules adopted by the Supreme Court. This reflects a direct reversal of previous law, necessitated by the recent revision of VA. CONST. art. VI, § 5. But the Code section further provides that any statute superseded by a rule adopted prior to July 1, 1971 shall not be revived. It is assumed that although these Rules, adopted June 15, 1971, do not specifically contravene any existing Virginia statute, any difficulty in that regard is eliminated by the statute as amended.

(2) "Commonwealth's attorney" includes assistant or acting Commonwealth's attorney.

(3) "Continuance" includes adjournment or recess.

(4) "Indictment" includes presentment and information filed upon presentment.

(5) "Magistrate" means a judicial or quasi-judicial officer authorized to issue arrest and search warrants, commit arrested persons to jail or admit them to bail, or conduct preliminary hearings. Depending on the context, "magistrate" may refer to a judge (of a court of record or a court not of record), clerk of any court, justice of the peace, special justice, bail commissioner, committing magistrate or other officer having authority to perform one or more of the functions enumerated in the preceding sentence.

(6) "Recognizance" means an undertaking, with or without surety or other security, made before a magistrate to perform one or more acts—for example, to appear in court. A recognizance may be written or oral but, if oral, shall be evidenced by a memorandum signed by the magistrate.

#### COMMENT:

Perhaps the Rule is too cautious when it states that "[e]rrors, defects, irregularities or variances that do not affect substantial rights shall not constitute reversible error." The Rules speak for themselves, and there should be an attempt for substantial if not strict compliance. We are letting the tail wag the dog if we become overly conscious of habeas corpus proceedings, or the possibility of one defendant out of one hundred being acquitted on the grounds of a "technical defense." The doctrine of harmless error applies regardless of this provision. It really adds little to the overall philosophy of the Rules.

#### Rule 3A:3. The Complaint.

The complaint shall consist of sworn statements of a person or persons of facts relating to the commission of an alleged offense. The statements shall be made upon oath before a magistrate empowered to issue arrest warrants. The magistrate may require the sworn statements to be reduced to writing and signed.

#### COMMENT:

The Rule does not require the complaint to be in writing. However, a written complaint would be an aid not only to magistrates, but to the courts as well (for example, on motions to suppress evidence, evidence as to the validity of an arrest) and would perhaps discourage frivolous

warrants. A form for a written complaint is included in the Appendix of the Rules. Although its use, as stated above, is not mandatory, it was nevertheless recommended. Perhaps in the future the language of the last sentence of the Rule will be amended to change the permissive "may" to the mandatory "shall."<sup>2</sup>

#### Rule 3A:4. Arrest Warrant or Summons.

(a) *Issuance.* If it appears from the complaint that there is probable cause to believe the accused has committed an offense, the magistrate shall issue a warrant for his arrest. The magistrate may issue a summons instead of a warrant in misdemeanor cases where specifically authorized by law. More than one warrant or summons may issue on the same complaint. A warrant may issue if the accused fails to appear in response to the summons.

(b) *Form.*

(1) *Warrant.* The warrant shall (i) be directed to an appropriate officer or officers, (ii) name the accused or, if his name is unknown, set forth a description by which he can be identified with reasonable certainty, (iii) describe the offense charged, substantially as provided in Rule 3A:7(a), (iv) command that the accused be arrested and brought before a court of appropriate jurisdiction in the county, city or town in which the warrant was issued, and (v) be signed by the magistrate.

(2) *Summons.* The summons shall command the accused to appear at a stated time and place before a court of appropriate jurisdiction in the county, city or town in which the summons was issued. It shall comply with the requirements of clauses (ii), (iii) and (v) of subparagraph (b)(1) of this Rule.

(c) *Execution and return.*

(1) *By whom.* The warrant or summons may be executed anywhere in the State by an officer authorized by law to execute a warrant in the place where the warrant or summons is executed.

(2) *Manner.* The warrant shall be executed by the arrest of the accused. The officer shall deliver a copy of the warrant to the accused at the time of the arrest unless the arrest is for a felony and the officer does not have the warrant in his possession at the time of the arrest, in which case he shall (i) inform the accused of the offense charged and that a warrant has been issued and (ii) deliver a copy of the warrant to the accused as soon thereafter as practicable. The summons shall be executed by delivering a copy to the accused personally or, if the accused be a corporation, in the same manner as in a civil case.

(3) *Return.* The officer executing a warrant shall endorse the date of execution thereon and make return thereof to a magistrate pursuant to Rule 3A:5(a). The officer executing a summons shall endorse the date of execu-

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<sup>2</sup>The federal rules require a written complaint. FED. R. CRIM. P. 3.

tion thereon and make return thereof to the court to which the summons is returnable.

COMMENT:

This Rule does not contravene any of the existing statutory authority. However, it is interesting to note that the first sentence uses the word "probable cause"<sup>3</sup> instead of the language of Section 19.1-91 of the Virginia Code, "good reason to believe." Even though the language probably has the same meaning, once again the Rules are interested in uniformity in using the constitutional language. Perhaps the most significant change is the provision allowing a state-wide execution by any law enforcement officer authorized by law to execute the warrant there.<sup>4</sup> This eliminates the ministerial act of the endorsement of the magistrate in the local jurisdiction required previously.<sup>5</sup>

**Rule 3A:5. First Appearance Before Magistrate  
and Preliminary Hearing.**

(a) *First appearance before magistrate.*

(1) *Arrest with warrant.* An officer making an arrest under a warrant shall bring the arrested person without unnecessary delay before a magistrate who shall admit him to bail or commit him to jail; provided, however, that instead of admitting to bail or committing to jail, the magistrate may, if the accused consents and the Commonwealth does not object, proceed to trial if the accused is charged with a misdemeanor and the magistrate is a judge of a court not of record having jurisdiction to try him for such misdemeanor.

(2) *Arrest without warrant.* An officer making an arrest without a warrant shall bring the arrested person without unnecessary delay before a magistrate authorized to issue arrest warrants who shall determine whether he should be released or an arrest warrant issued in accordance with Rules 3A:3 and 4. If a warrant is issued, the magistrate shall admit the arrested person to bail or commit him to jail; provided, however, that instead of admitting to bail or committing to jail, the magistrate may, if the accused consents and the Commonwealth does not object, proceed to trial if the accused is charged with a misdemeanor and the magistrate is a judge of a court not of record having jurisdiction to try him for such misdemeanor;

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<sup>3</sup> Probable cause for the issuance of an arrest warrant exists where the circumstances within affiants' knowledge and of which they have reasonably trustworthy information are sufficient to warrant a man of reasonable caution in the belief that an offense has been committed. *Ker v. California*, 374 U.S. 23, 35 (1963).

<sup>4</sup> This rule is based on a change in the federal rules which allows service of a warrant in any district. *FED. R. CRIM. P.* 4(c)(2).

<sup>5</sup> *VA. CODE ANN.* §§ 19.1-94, -99 (1960).



and provided, further, that such trial may be had without the issuance of a warrant where expressly authorized by statute.

(3) *Arrest in another jurisdiction.* If a person, who has been arrested in a jurisdiction other than the jurisdiction in which he is to be tried, cannot be transported forthwith to the jurisdiction in which he is to be tried, he shall be brought before a magistrate of the jurisdiction in which he was arrested who shall admit him to bail or commit him to jail.

(b) *Preliminary hearing.*

(1) If the accused is charged with a felony and is arrested before indictment, a preliminary hearing shall be conducted by the judge of the court not of record, unless the accused waives the hearing in writing. Before conducting the hearing or accepting a waiver of the hearing, the judge shall advise the accused of his right to counsel and, if the accused is indigent, shall appoint counsel pursuant to Rule 3A:31. At the hearing the judge shall, in the presence of the accused, hear testimony presented for and against the accused. The accused shall not be called upon to plead, but he may cross-examine witnesses, introduce witnesses in his own behalf, and testify in his own behalf. The judge of the court of record to which the case may be or has been certified may order the testimony of the witnesses at the preliminary hearing to be reduced to writing.

(2) Upon conclusion of the Commonwealth's evidence-in-chief, the judge may, if he finds there is probable cause to charge the accused only with a misdemeanor, arraign the accused as provided in Rule 3A:10 and proceed to try the accused for the misdemeanor. Otherwise, upon conclusion of the hearing, the judge shall:

(i) discharge the accused if he finds there is not probable cause to charge the accused with an offense; or

(ii) certify the case to a court of record having jurisdiction to try the accused if he finds there is probable cause to charge the accused with a felony and, in such event, the judge may admit the accused to bail or commit him to jail and shall transmit all papers in the case to the clerk of the court of record.

COMMENT:

This Rule does not affect the existing law with respect to the rights of police officers to make an arrest without a warrant.<sup>6</sup> Paragraph (a) (3) is designed to insure that a person is brought before a magistrate forthwith and gives an individual the same rights whether the arrest is made with or without a warrant.

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<sup>6</sup> VA. CODE ANN. §§ 16.1-129.1; 19.1-64, -94, -100 (1960).

**Rule 3A:6. The Grand Jury.**

(a) *Composition and impaneling of grand juries; selection of foremen.* Regular and special grand juries shall be comprised and impaneled as provided by law. Upon impaneling the grand jury, the court shall appoint one of the jurors to be foreman. The foreman shall have power to administer oaths and affirmations and shall sign the return on all indictments.

(b) *Who may be present.* Only the grand jurors and the witness under examination and, if directed by the court, an interpreter shall be present during the hearing of evidence. The Commonwealth's attorney shall be present only when called to testify or to advise the grand jurors respecting the discharge of their duties. Only the grand jurors shall be present during their deliberations and voting.

(c) *Secrecy of proceeding and disclosure.* A juror or interpreter may not disclose matters occurring before the grand jury except when so directed by the court. No obligation of secrecy may be imposed upon any person except in accordance with this Rule.

(d) *Finding and return of indictment.* The indictment shall be endorsed "A True Bill" or "Not a True Bill" and signed by the foreman. A true bill may be found only upon the concurrence of 4 or more jurors. The names of the witnesses or grand jurors giving the information shall be listed at the foot of the indictment. The indictment shall be returned by the grand jury in open court.

(e) *Motion to dismiss.* A motion to dismiss the indictment may be based on constitutional objections to the array or on the lack of legal qualification of an individual juror. No indictment or finding of a grand jury shall be dismissed because of any irregularity in the time or manner of selecting the jurors, or in the writ of venire facias, or in the manner of executing the writ.

**COMMENT:**

This Rule simply follows the existing law.<sup>7</sup>

**Rule 3A:7. The Indictment and the Information.**

(a) *Contents.* The indictment or information shall be a plain, concise definite written statement, (1) naming the accused, (2) describing the offense charged and citing the statute or ordinance that defines the offense or, if there is no defining statute or ordinance, prescribes the punishment for the offense, (3) identifying the county, city or town in which the accused committed the offense, and (4) reciting that the accused committed the offense on or about a certain date. In describing the offense, the indictment or information may use the name given to the offense by the common law, or the indictment or information may state so much of the common law or statutory definition of the offense as is sufficient to advise what offense is

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<sup>7</sup> VA. CODE ANN. §§ 19.1-147 to -156 (1960).

charged. Error in the citation of the statute or ordinance that defines the offense or prescribes the punishment therefor, or omission of the citation, shall not be ground for dismissal of an indictment or information, or for reversal of a conviction, unless the court finds that the error or omission prejudiced the accused in preparing his defense.

(b) *Joinder of offenses.* Two or more offenses, any of which may be a felony or misdemeanor, may be charged in separate counts of an indictment or information if the offenses are based on the same act or transaction, or on two or more acts or transmissions that are connected or constitute parts of a common scheme or plan.

(c) *Form.* The indictment or information need not contain a formal commencement or conclusion. The return of an indictment shall be signed by the foreman of the grand jury, and the information shall be signed by the Commonwealth's attorney.

#### COMMENT:

There will be many purists of the law who will be upset with the doing away with the old form indictments. This new Rule and its accompanying forms in the Appendix are perhaps the greatest single step taken by the Rules in the interest of simplicity in the field of criminal law. This change is long overdue. It is not infrequent under the previous law for a semi-literate defendant to be arraigned on a long-form, archaic robbery indictment and not have the slightest idea whether he was charged with assault, grand larceny, malicious wounding or an attempt to do any of the above. The Rule not only allows the common law name of the crime to be used but provides for the specification of the statutory offense citation. Although this Rule does authorize the joinder in separate counts of offenses based on the same act or acts that are connected or parts of a common scheme,<sup>8</sup> the Rule does not allow two defendants to be joined in one indictment.<sup>9</sup>

The language of the joinder paragraph is broad in the use of the word "common scheme or plan." Suppose an individual goes on a lark and issues 24 bad checks on 24 consecutive days. Where does the common scheme end? By the same token, suppose an individual is charged with three breaking and enterings in the same night. Query—Is this a common scheme? Suppose the three break-ins take place over a period of three days? Only case law will provide the answer to this,<sup>10</sup> but surely

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<sup>8</sup> See FED. R. CRIM. P. 8(a).

<sup>9</sup> See FED. R. CRIM. P. 8(b).

<sup>10</sup> See, e.g., *Tillman v. United States*, 406 F.2d 930 (5th Cir. 1969); *King v. United*

this will be ultimately tested in the Virginia Supreme Court, especially in light of Rule 3A:13 which will be discussed later.<sup>11</sup> It is further hoped that this Section will not encourage the federal practice of duplicity in indictments.<sup>12</sup> The ends of justice do not require multiple count indictments in most instances.

**Rule 3A:8. Written Charge Upon Which the Accused  
Is Tried; Bill of Particulars.**

(a) *Felonies.* A person accused of a felony shall be tried on an indictment or, if he waives indictment or indictment is not required by statute, on an information or warrant. Waiver of indictment shall be in writing and signed by the accused before a judge having jurisdiction to try the case.

(b) *Misdemeanors.* A person accused of a misdemeanor may be tried on an indictment, information, warrant or summons or, where expressly authorized by statute, on an oral charge.

(c) *Amendment of written charge.* The court may permit amendment of the written charge at any time before the jury returns a verdict or the court finds the accused guilty or not guilty, provided the amendment does not change the nature or character of the offense charged. If the amendment is made after the accused pleads, the amended charge shall be read to him and he shall be allowed to change his plea. If the court finds that the amendment operates as a surprise to the accused, it shall upon request grant a continuance for a reasonable time.

(d) *Bill of particulars.* A court of record may direct the filing of a bill of particulars at any time before trial. A motion for a bill of particulars shall be made before a plea is entered and at least 7 days before the day fixed for trial.

**COMMENT:**

The language in Section (b) “. . . or, where expressly authorized by statute, on an oral charge” is consistent with the provision in Rule 3A:5(a)(2), both of which are based on Section 16.1-129.1 of the Virginia Code which provides for a trial without a written charge. It is felt that this statute should be repealed by the legislature and the Rules amended to do away with those provisions. The defendant should be protected to the extent that he is always tried on a written charge regardless of whether the alleged offense is only a misdemeanor. It is hard to imagine emergency situations drastic enough to do away with

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States, 355 F.2d 700 (1st Cir. 1966); *Williamson v. United States*, 310 F.2d 192 (9th Cir. 1962).

<sup>11</sup> See p. 302 *infra*.

<sup>12</sup> See FED. R. CRIM. P. 7.

this procedural requirement. Riot control would, of course, be a possibility, but even there, the extra time required for the written charge should be the price we must pay. The statute does state that the defendant may demand a written warrant, but defendants can too easily waive these rights without the advice of counsel.

Section (c) of the Rule provides that if the court finds that the amendment operates as a surprise to the accused, it shall grant a continuance. This is still a subjective standard and discretionary with the judge. The defendant ought to be entitled to a continuance as a matter of law, after any amendment that amounts to a substantial change in the indictment.

Section (d) states that a court "may direct the filing of a bill of particulars." The motion must be made before arraignment and at least seven days before the day fixed for trial. However, the Rule is silent as to when the bill of particulars must be filed. If the Commonwealth's Attorney waits until the morning of the trial, the bill of particulars is virtually useless in the preparation of the defense. It should be filed a reasonable time before trial, and it is hoped that judges will so interpret the Rule.

### **Rule 3A:9. Capias or Summons Upon Indictment or Information.**

(a) *Issuance.* When an indictment has been returned or an information filed, the court shall, if the accused is not in custody, (i) direct the clerk to issue a capias for the accused if the indictment or information charges a felony, or (ii) direct the clerk to issue a capias or summons against the accused if the indictment or information charges a misdemeanor for which imprisonment may be imposed. The clerk shall issue a summons against the accused if the indictment or information charges a misdemeanor for which imprisonment may not be imposed. A capias shall issue if the accused fails to appear in response to a summons.

(b) *Form.*

(1) *Capias.* The form of the capias shall be the same as that provided for a warrant in Rule 3A:4(b)(1) except that it shall be signed by the clerk and shall state that an indictment or information has been filed against the accused. The amount of bail may be fixed by the court and endorsed on the capias.

(2) *Summons.* The summons shall be in the same form as the capias except that it shall summon the accused to appear before the court at a stated time and place.

(c) *Execution and return.*

(1) *Execution.* The *capias* shall be executed as provided in Rule 3A:4(c). The officer executing the *capias* shall bring the arrested person before the court that issued the *capias*. The summons shall be executed by delivering a copy to the accused personally or, if the accused be a corporation, in the same manner as in a civil case.

(2) *Return.* The officer executing a *capias* or summons shall endorse the date of execution thereon and make return thereof to the court that issued the *capias* or summons. At the request of the Commonwealth's attorney made at any time while the indictment or information is pending, a *capias* returned unexecuted and not cancelled or a summons returned unexecuted or a duplicate thereof may be delivered by the clerk to any authorized person for execution.

COMMENT:

This Rule follows Section 19.1-178 of the Virginia Code and is consistent with Rules 3A:4 and 3A:5. It is the meaning of the Rule that a *capias* should not be issued if the accused has been previously arrested and bonded, although the Rule states that it shall issue if the accused is not in custody. This should not be a literal interpretation, but include if he was formerly in custody but has not been bonded.

#### Rule 3A:10. Arraignment.

Arraignment shall be conducted in open court. It shall consist of reading to the accused the charge on which he will be tried and calling on him to plead thereto. In a felony case, arraignment is not necessary when waived by the accused. In a misdemeanor case, arraignment is not necessary when waived by the accused or his counsel, or when the accused fails to appear.

COMMENT:

The Rules does not provide for when the arraignment shall take place. This varies in different jurisdictions throughout the State, with some requiring arraignment at the docket call after the indictment, some having a separate date for arraignment and still others having the arraignment immediately preceding the trial. In the interest of uniformity, this aspect should have been covered.<sup>13</sup>

#### Rule 3A:11. Pleas.

(a) *Permissible pleas.* An accused may plead not guilty, guilty or, in a

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<sup>13</sup> For the guidelines set down by the federal courts, see *United States v. Butler*, 434 F.2d 243 (1st Cir. 1970), *cert denied*, 401 U.S. 978 (1971) (nine-month delay

misdemeanor case, *nolo contendere*. The court may refuse to accept a plea of guilty. A plea of *nolo contendere* may be made only with the court's consent.

(b) *Entering of pleas*. In a felony case a plea of guilty may be entered only by the accused after being advised by counsel, except that a corporation may enter a plea of guilty through its counsel or agent. In a misdemeanor case a plea of guilty or *nolo contendere* may be entered by the accused or his counsel. The court shall enter a plea of not guilty if a plea of guilty is not accepted or a plea of *nolo contendere* is not consented to, or if the accused refuses to plead, or if the accused fails to appear for trial for a misdemeanor.

(c) *Determining voluntariness of pleas of guilty or nolo contendere*. A court of record shall not accept a plea of guilty or *nolo contendere* without first determining that the plea is made voluntarily with an understanding of the nature of the charge and the consequences of the plea.

#### COMMENT:

This Rule allows the plea of *nolo contendere* in misdemeanor cases, although *Roach v. Commonwealth*<sup>14</sup> previously allowed a plea of *nolo contendere* with the permission of the court only in "light misdemeanor cases." The plea of *nolo contendere* for the most part is tantamount to a plea of guilty; however, it cannot be used as evidence against the defendant in a subsequent civil proceeding.

The Rule states that the court shall not accept a plea of guilty without determining its voluntariness. The Appendix to the Rules lists a group of sixteen questions which are suggested. It is submitted that the questions should be mandatory, for the additional time that has to be taken by the judge will be more than saved in the elimination of habeas corpus suits and/or the time needed to dispose of them where the question of voluntariness of the guilty plea is raised.

Although the Rule does not require the court to address the defendant personally, this is the practice in most courts in Virginia. The equivalent Federal Rule<sup>15</sup> does require the defendant to be addressed per-

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between indictment and arraignment was too long but did not require reversal, absent showing of prejudice to defendant); *Lathem v. United States*, 259 F.2d 393 (5th Cir. 1958) (defendant would not be deemed to have been arraigned too hurriedly where he was arraigned three hours after his arrest); *Picciurro v. United States*, 250 F.2d 585 (8th Cir. 1958) (defendant not deprived of fair trial merely because his arraignment and impaneling of the jury took place on the same day).

<sup>14</sup> 157 Va. 954, 162 S.E. 50 (1932).

<sup>15</sup> FED. R. CRIM. P. 11.

sonally. The failure to do this was held to be reversible error in *McCarthy v. United States*,<sup>16</sup> a case interpreting the Federal Rule. Certainly the better practice in our courts would be for the judge to address the defendant personally at all times in felony cases, and receive the answers only from the defendant.

**Rule 3A:12. Pleadings and Motions Before Trial; Defenses and Objections; Notice of Insanity Defense.**

(a) *Pleadings and motions.* Pleadings in a criminal proceeding shall be the indictment, information, warrant or summons on which the accused is to be tried, and the plea of not guilty, guilty or *nolo contendere*. Defenses and objections made before trial that heretofore could have been made by other pleas or by demurrers and motions to quash shall be made only by motion to dismiss or to grant appropriate relief, as provided in these Rules.

(b) *Notice of defense of insanity or feeble-mindedness.* If an accused proposes to introduce psychiatric evidence that he was insane or feeble-minded at the time of the alleged commission of the offense charged, he shall, at least 10 days before the day fixed for trial, serve a written notice of his intention to introduce such evidence. If an accused who failed to serve such notice presents psychiatric evidence at his trial as a defense, the Commonwealth shall have the right to a continuance for a reasonable period of time.

(c) *The motion raising defenses and objections.*

(1) *Defenses and objections that must be raised before trial.* Defenses and objections based on defects in the institution of the prosecution or in the written charge upon which the accused is to be tried, other than that it fails to show jurisdiction in the court or to charge an offense, must be raised by motion made within the time prescribed by paragraph (d) of this Rule. The motion shall include all such defenses and objections then available to the accused. Failure to present any such defense or objection as herein provided shall constitute a waiver thereof. Lack of jurisdiction or the failure of the written charge upon which the accused is to be tried to state an offense shall be noticed by the court at any time during the pendency of the proceeding.

(2) *Defenses and objections that may be raised before trial.* In addition to the defenses and objections specified in subparagraph (c)(1) of this Rule, any defense or objection that is capable of determination without the trial of the general issue may be raised by motion before trial. Failure to present any such defense or objection before the jury returns a verdict or the court finds the defendant guilty shall constitute a waiver thereof.

(3) *Form of motion.* Any motion made before trial shall be in writing if made in a court of record, unless the court for good cause shown per-

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<sup>16</sup> 394 U.S. 459 (1969).



mits an oral motion. A motion shall state with particularity the ground or grounds on which it is based.

(4) *Hearing on motion.* A motion before trial raising defenses or objections shall be determined before the trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be heard and determined by the court, unless a jury trial is required by constitution or statute.

(5) *Effect of determination.* If a motion is determined adversely to the accused, his plea shall stand or he may plead over or, if the accused has not previously pleaded, he shall be permitted to plead. The motion need not be renewed if the accused properly saves the point for the purpose of appeal when the court first determines the motion.

(d) *Time of filing notice or making motion.* A motion referred to in subparagraph (c)(1) shall be filed or made before a plea is entered and, in a court of record, at least 7 days before the day fixed for trial.

(e) *Relief from waiver.* For good cause shown the court may grant relief from any waiver provided for in this Rule.

#### COMMENT:

This Rule, as is the case with many of these Rules, is based on the equivalent Federal Rule of Criminal Procedure.<sup>17</sup> The overall purpose is to dispose of as many issues as possible before the trial on the merits. Although the Rule states that the defense of insanity must be raised well before the trial, the Committee rejected the same approach to the defense of alibi. The Rule at first reading seems a little harsh on defense attorneys, but once they become used to the new procedures, there should be no real hardship. Once again, the overall policy of taking away the surprise element in the trial of a lawsuit is present.<sup>18</sup>

An escape clause is present in Paragraph (e), for if the ends of justice require, the court may grant relief from any waiver, or in other words allow a defendant to make his motion even though it has not been filed timely.

#### Rule 3A:13. Trial Together of More Than One Accused or More Than One Offense.

(a) *More than one accused.* Two or more accused may be tried together if they consent thereto and if the offense or offenses with which they are charged meet the requirements of Rule 3A:7(b).

(b) *An accused charged with more than one offense.* The court may direct that an accused be tried at one time for all offenses then pending

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<sup>17</sup> FED. R. CRIM. P. 12.

<sup>18</sup> The Rule supersedes VA. CODE ANN. §§ 19.1-165, -242 (1960).

against him, if justice does not require separate trials and (i) the offenses meet the requirements of Rule 3A:7(b) or (ii) the accused and the Commonwealth's attorney consent thereto.

COMMENT:

Section 19.1-202 of the Virginia Code already provides that defendants must consent if they are to be tried together. Paragraph (b) of the Rule is going to raise the same difficulties inherent in Rule 3A:7(b) that were discussed in the comment to that Rule.<sup>19</sup> Much is going to depend on the judicial interpretation of the words "common scheme or plan." The opportunity for a jury to resolve all reasonable doubts against the accused are omnipresent where a defendant is tried for several offenses. What jury is going to pay attention to a technical defense or a missing link in the chain in one offense when there is no doubt that the defendant is guilty of three other offenses that are tried at the same time? The opportunity for excessive sentencing is likewise great. Careful judicial discretion in this area should be urged to avoid these pitfalls.

**Rule 3A:14. Discovery and Inspection.**

(a) *Application of rule.* This Rule applies only to a prosecution for a felony in a court of record.

(b) *Discovery by the accused.*

(1) Upon written motion of an accused a court may order the Commonwealth's attorney to permit the accused to inspect any copy or photograph any relevant (i) written or recorded statements or confessions made by the accused, or copies thereof, that are known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth and (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 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 may order the Commonwealth's attorney to permit the accused to inspect and copy or photograph 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. The subparagraph does not authorize the discovery or inspection

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<sup>19</sup> See p. 296 *supra*.

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.

(c) *Discovery by the Commonwealth.* If the court grants relief sought by the accused under clause (ii) of subparagraph (b)(1) or under subparagraph (b)(2) of this Rule, it may, upon motion of the Commonwealth, condition its order by requiring that:

(1) the accused permit the Commonwealth to inspect, copy or photograph any written reports described in such subparagraph (b)(2) that may be within the accused's possession, custody or control, and

(2) the accused disclose whether he 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.

(d) *Time of motion.* A motion by the accused under this Rule must be made at least 7 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.

(e) *Time, place and manner of discovery and inspection.* An order granting relief under this Rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(f) *Protective order.* 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.

(g) *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 shall promptly notify the other party or his counsel or the court of the existence of the additional material. If at any time during the course of the proceedings, 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 may order such party to permit the discovery or inspection of materials not previously disclosed, or it may grant a continuance, or it may enter such other order as it deems just under the circumstances.

## COMMENT:

This one Rule already has caused, and will probably cause in the future, more discussion than all of the rest of the Rules combined. Certainly, it was the most misunderstood of the proposed Rules for both the Commonwealth's attorneys and defense lawyers in the discussions which took place for adoption. Until this Rule there was no authorization for discovery in criminal cases in Virginia.<sup>20</sup> Although many jurisdictions allowed discovery and it was even more widespread on an informal basis as a matter of practice with certain Commonwealth's Attorneys in the State, this codification is unquestionably an instrument for the fair administration of criminal justice in Virginia. Although changed in many parts, the Rule was based in part on Rule 16 of the Federal Rules of Criminal Procedure. Perhaps case law thereunder would provide a guideline for attorneys since, of course, there will be no case law on these Rules for some time. This, of course, would be true in other appropriate parallel Federal Rules.

The Rule is specifically limited to felony prosecutions in the court of record. Of course, practical considerations are present for the judicial system would bog down if discovery were available in every case in courts not of record; but for serious misdemeanors, there should perhaps be some discovery available, certainly in a court of record on appeal.

Paragraph (b) (2) specifically prohibits the discovery of statements made by witnesses. Even recognizing the potential problems inherent with this discovery, it is felt that this is a shortcoming of the Rule. Written statements made by complaining witnesses or any witness, if they ultimately turn out to be inconsistent with their testimony in court or inconsistent with other written statements, can be the deciding factor in a close case. The practice of police officers and Commonwealth's attorneys making these available on an informal basis upon request should be continued in the interest of justice.

Superficially, discovery is an aid to the defense, but the Rule makes it a two-edged sword in that 14(c) provides for discovery by the Commonwealth, albeit conditioned only upon the court allowing the equivalent discovery on the part of the defendant. Although not required by Rule 3A:12, the Commonwealth is allowed the disclosure as to whether

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<sup>20</sup> *Westry v. Commonwealth*, 206 Va. 508, 144 S.E.2d 427 (1965).

the accused intends to introduce evidence to establish an alibi if the defendant has availed himself of the discovery process for his own benefit. The time and place specification of the Rule is good. There should have been the equivalent language in Rule 3A:6(d).<sup>21</sup> The continuing duty on the parties and counsel is, of course, in the interest of serving the ends of justice.

The Rule does not require the discovery of the list of names of potential witnesses on the part of the Commonwealth or the defendant. The argument against this traditionally has been that harm may be done to witnesses, threats made or even the possibility of bribery. However, this possibility is minimal when compared to the advantages that would be obtained from complete disclosure. Justice requires that the defendant be given an opportunity to investigate certain witnesses and take statements from them if they are willing to give them.

### Rule 3A:15. Subpoena.

(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 or Commonwealth's attorney. A subpoena for the attendance of a witness to testify before a court of record or grand jury shall be issued by the clerk or Commonwealth's attorney. 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.

(b) *For production of documentary evidence and of objects.* A subpoena, when authorized by a court order, may also command the person summoned thereby to produce writings or objects described in the subpoena. Such order may be entered, after notice to the adverse party, on affidavit that such writing or other object is material to the proceeding and is in the possession of a person not a party thereto. The order 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, and upon its production the court may permit the writing or object to be inspected by the parties and their counsel.

(c) *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) *Contempt.* Failure by any person without adequate excuse to obey

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<sup>21</sup> See p. 295 *supra*.

a subpoena served upon him may be deemed a contempt of the court to which the subpoena is returnable.

**COMMENT:**

Rule 3A:15(b) provides for the equivalent of a subpoena duces tecum in a criminal action. There was no such provision until this Rule. The Rule itself is for the most part a parallel of the existing statutory law in Virginia for civil cases.<sup>22</sup>

**Rule 3A:16. (Reserved.)**

**COMMENT:**

This Rule is reserved. The original recommendation by the drafting Committee was for a pretrial conference Rule. This was eliminated by the Supreme Court when the Rules were adopted. However, at some future time it is urged that a pretrial conference Rule be incorporated, for in certain involved cases, such as embezzlement, a pretrial conference would be most beneficial to aid in the simplification of the issues and to allow an opportunity for any stipulations as to acts and evidence.

**Rule 3A:17. Place of Prosecution and Trial.**

Except as otherwise permitted by statute or by these Rules, the prosecution of a criminal case shall be had in the county or city in which the offense was committed.

**COMMENT:**

The Constitution of Virginia<sup>23</sup> as well as the Code requires this Rule. It should be pointed out that there are exceptions to the general rule; for example, those offenses committed close to the boundary of certain cities and those offenses that are continuing in nature.<sup>24</sup>

**Rule 3A:18. Change of Venue for Trial.**

(a) *For prejudice.* Upon motion of the accused or the Commonwealth, a court of record shall transfer a criminal proceeding to another court of

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<sup>22</sup> VA. CODE ANN. §§ 8-296, -301, -302 (1957).

<sup>23</sup> VA. CONST. art. I, § 8.

<sup>24</sup> See VA. CODE ANN. §§ 19.1-220, -222, -223 (1960).

record if the court is satisfied that there exists in the place where the prosecution is pending so great a prejudice against the accused that he cannot obtain a fair and impartial trial.

(b) *Time of motion.* A motion under this Rule shall be made at least 7 days before the day fixed for trial.

(c) *Proceedings on transfer.* When a transfer is ordered, the clerk shall certify all papers in the proceeding to the clerk of the court to which the proceeding is transferred, and the prosecution shall continue in the court to which the proceeding is transferred. Pending action by the court to which the proceeding is transferred, the court ordering the transfer may admit the accused to bail or commit him to jail.

#### COMMENT:

Once again, this Rule is a simplification and compilation of the existing statutes<sup>25</sup> and merely reiterates the existing law with the exception of the 7 day requirement. This sometime requirement is consistent throughout the Rules. The motion should be in writing in accord with Rule 3A:12.<sup>26</sup> Although the Rule does not so state, it is contemplated that the court could, of course, hear evidence on the motion in determining any factual issues.

The requirement of "so great a prejudice" in Paragraph (a) is unnecessarily unfavorable to an accused seeking a change of venue and should not have been included. Any prejudice precluding a fair and impartial trial should be sufficient.

#### Rule 3A:19. Trial By Jury or By Court.

(a) *Right to jury; duty of court in non-jury trial.* The accused is entitled to a trial by jury only in a court of record on a plea of not guilty. In a trial without a jury the court shall have and exercise all the powers, privileges and duties given to juries.

(b) *Waiver of jury in court of record.* If an accused who has pleaded not guilty in a court of record consents to trial without a jury, the court may, with the concurrence of the Commonwealth's attorney, try the case without a jury. The court shall determine before trial that the accused's consent was voluntarily and intelligently given, and his consent and the concurrence of the court and the Commonwealth's attorney shall be entered of record. If an accused fails to appear for trial in a court of record for a misdemeanor, and if his recognizance recites that nonappearance shall constitute waiver of trial by jury, the court may try the case in his absence without a jury.

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<sup>25</sup> See VA. CODE ANN. §§ 19.1-224 to -226 (1960).

<sup>26</sup> See p. 301 *supra*.

(c) *Trial without jury on a plea of guilty or nolo contendere.* If the accused pleads guilty or *nolo contendere*, the court shall determine the case without the intervention of a jury.

(d) *Number of jurors.* The jury shall be comprised of the number of jurors prescribed or permitted by law.

COMMENT:

This Rule is interesting in that it does not allow a defendant to have a jury trial on a plea of *nolo contendere*. The language states that in order for the nonappearance of the accused to constitute a waiver of his right to trial by jury for a misdemeanor, his recognizance must so state.<sup>27</sup> It is felt that this is unnecessary and a burden on the Commonwealth.

**Rule 3A:20. Trial Jurors.**

(a) *Examination.* After the prospective jurors are sworn on the voir dire, the court shall question them individually or collectively to determine whether anyone:

(1) is related by blood or marriage to the accused or to a person against whom the alleged offense was committed;

(2) is an officer, director, agent or employee of the accused;

(3) has any interest in the trial or the outcome of the case;

(4) has acquired any information about the alleged offense or the accused from the news media or other sources and, if so, whether such information would affect his impartiality in the case;

(5) has expressed or formed any opinion as to the guilt or innocence of the accused;

(6) has a bias or prejudice against the Commonwealth or the accused; or

(7) has any reason to believe he might not give a fair and impartial trial to the Commonwealth and the accused based solely on the law and the evidence.

Thereafter, the court, or counsel with permission of the court, may examine on oath any prospective juror or may ask any question relevant to his qualifications as an impartial juror. A party objecting to a juror may introduce competent evidence in support of the objection.

(b) *Challenges for cause.* The court, on its own motion or following a challenge for cause, may excuse a prospective juror if it appears he is not qualified, and another shall be drawn or called and placed in his stead for the trial of that case.

(c) *Peremptory challenges.* Each side is entitled to four peremptory challenges if the offense charged is a felony, and to three peremptory challenges if the offense charged is a misdemeanor. Persons indicted for a felony who are tried jointly shall be allowed to strike four jurors from the panel.

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<sup>27</sup> Accord VA. CODE ANN. § 19.1-193 (1960).



If the accused do not agree on which four to strike, the four shall be ascertained by lot. The striking of jurors shall be done alternately with the Commonwealth making the first strike.

(d) *Alternate jurors.* A trial judge may direct that one or two alternate jurors be impaneled whenever he believes it advisable to have such jurors available to replace jurors who, before final submission of the case to the jury, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn from the same source and in the same manner, have the same qualifications, be subject to the same examination and the same challenges for cause, take the same oath, and have the same functions, powers, facilities and privileges as the regular jurors. The Commonwealth and the accused are each entitled to one peremptory challenge in the initial selection of alternate jurors. If, before final submission of the case, a regular juror dies or is for good cause discharged or excused, the court shall order the alternate juror (or by lot pick one, if two were provided) to take his place in the jury box. An alternate juror who does not replace a regular juror shall be discharged when the jury retires to consider its verdict.

(e) *Irregularities.* No irregularity in selecting, summoning, or impaneling jurors shall be cause for summoning a new panel or setting aside a verdict unless objection was made before the jury was sworn to try the case and the irregularity appears to have been such as likely to cause injustice.

#### COMMENT:

Although the Rule allows specific questions to be asked by the court, it does not limit a voir dire to these questions, and counsel, with the permission of the court, may ask any additional pertinent questions.

Additional questions that may be asked include the inquiry as to whether an individual lives within two miles of the place where the crime is alleged to have been committed.<sup>28</sup> Likewise consideration should be given to the statutory provision which states that in a capital case if a person's opinions are such as to prevent his convicting anyone for an offense punishable by death, he shall not be allowed to serve as a juror on trial for such an offense.<sup>29</sup> This statute, of course, has been subsequently restricted by the Supreme Court of the United States in *Witherspoon v. Illinois*.<sup>30</sup>

#### Rule 3A:21. Judge-Disability.

If by reason of death, sickness or other disability the judge who presided at a jury trial is unable to proceed with and finish the trial, another judge

<sup>28</sup> VA. CODE ANN. § 19.1-211 (1960).

<sup>29</sup> VA. CODE ANN. § 19.1-210 (1960).

<sup>30</sup> 391 U.S. 510 (1968).

of that court or a judge designated by the Chief Justice of the Supreme Court or by a justice designated by him for that purpose, may proceed with and finish the trial or, in his discretion, may grant and preside at a new trial. If by reason of such disability, the judge who presided at any trial is unable to perform the duties to be performed by the court after a finding of guilty by the jury or the court, another judge of that court, or a judge designated as provided in the preceding sentence, may perform those duties or, in his discretion, may grant and preside at a new trial. Before proceeding with the trial or performing such duties, such judge shall certify that he has familiarized himself with the record of the trial.

**COMMENT:**

This Rule, once again, is based on the existing Federal Rule.<sup>31</sup> Careful discretion should be exercised before a new judge proceeds with a case after familiarizing himself only with a written transcript. The demeanor of the witnesses and the defendant and impressions made by the defendant are all vital ingredients in making a decision, and this is lacking when only a cold record is read. In most cases it is submitted that justice requires a new trial in the event a judge becomes disabled, rather than a substitute judge taking up at a specific point.

**Rule 3A:22. Motion to Strike or to Set Aside Verdict;  
Judgment of Acquittal or New Trial.**

(a) *Motion to strike evidence.* After the Commonwealth has rested its case or at the conclusion of all the evidence, the court on motion of the accused may strike the Commonwealth's evidence if the evidence is insufficient as a matter of law to sustain a conviction. If the court overrules a motion to strike the evidence and there is a hung jury, the accused may renew the motion within the time specified in Rule 1:11 and the court may take the action authorized by that Rule.

(b) *Motion to set aside verdict.* If the jury returns a verdict of guilty, the court may, on motion of the accused made not later than 21 days after entry of a final order, set aside the verdict for error committed during the trial or if the evidence is insufficient as a matter of law to sustain a conviction.

(c) *Judgment of acquittal or new trial.* The court shall enter a judgment of acquittal if it strikes the evidence or sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction. The court shall grant a new trial if it sets aside the verdict for any other reason.

**COMMENT:**

This Rule does not state whether or not a motion to set aside the

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<sup>31</sup> FED. R. CRIM. P. 25.

verdict must be in writing. It must be assumed that it does not have to be since Rule 3A:12(c)(3)<sup>32</sup> states that it only refers to motions made before trial.

### Rule 3A:23. Instructions.

(a) *Giving of instructions.* In a felony case, the instructions shall be reduced to writing. In all cases the court shall instruct the jury before arguments of counsel to the jury.

(b) *Proposed instructions.* If directed by the court the parties shall submit proposed instructions to the court at such reasonable time before or during the trial as the court may specify and, whether or not proposed instructions have been submitted earlier, the parties may submit proposed instructions at the conclusion of all the evidence.

(c) *Objections.* Before instructing the jury, the court shall advise counsel of the instructions to be given and shall give counsel the opportunity to make objections thereto. Objections shall be made out of the presence of the jury, and before the court instructs the jury unless the court grants leave to make objections at a later time.

(d) *Alternate forms of verdicts; separate verdicts.* The court may submit alternate forms of verdicts to the jury. The jury shall be instructed to return a separate verdict on each count of an indictment or presentment.

#### COMMENT:

Although the Rule requires written instructions only in felonies, it would seem that the better rule would be to have written instructions in all cases. This is the practice in the majority of jurisdictions throughout the State although there are judges who prefer to orally instruct the jury. The Rule also allows a judge to require instructions to be submitted a reasonable time before trial. This should not preclude an attorney from offering additional instructions at the close of the evidence if the evidence should so require. Submitting alternate forms of verdicts to the jury is an inducement for good form verdicts and the requirement of a jury to give a separate verdict on each count of indictment is a better practice despite the language of Section 19.1-255 of the Virginia Code, which validates a general verdict of guilty on an indictment containing several counts.

### Rule 3A:24. Jury Verdicts.

(a) *Return.* In all criminal prosecutions, the verdict shall be unanimous,

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<sup>32</sup> See p. 301 *supra*.

in writing and signed by the foreman, and returned by the jury in open court.

(b) *Several accused.* If there are two or more accused, the jury may return a verdict as to any of them as to whom it can agree.

(c) *Conviction of lesser offense.* The accused may be found not guilty of an offense charged but guilty of any offense, or of an attempt to commit any offense, that is substantially charged or necessarily included in the charge against the accused. When the offense charged is a felony, the accused may be found not guilty thereof, but guilty of being an accessory after the fact to that felony.

(d) *Poll of jury.* When a verdict is returned, the jury shall be polled individually at the request of any party or upon the court's own motion. If upon the poll, all jurors do not agree, the jury may be directed to retire for further deliberations or may be discharged.

#### COMMENT:

Again, this Rule is merely a codification of the existing statutory provisions.<sup>33</sup> The polling of a jury is not specifically provided for by any statute, but is followed as a matter of practice throughout the State.

#### Rule 3A:25. Sentence and Judgment.

(a) *Sentencing authority.* Within the limits prescribed by law, the punishment shall be ascertained by the jury in all cases tried by a jury and by the court in all cases tried without a jury.

(b) *Pronouncement of sentence.* Sentence shall be pronounced, or decision to suspend the imposition of sentence shall be announced, without unreasonable delay. Pending pronouncement, the court may commit the accused to jail or may continue or alter the bail. Before pronouncing the sentence, the court shall inquire of the accused if he desires to make a statement and if he desires to advance any reason why judgment should not be pronounced against him.

(c) *Presentence investigation and report.*

(1) *When made.* After a plea of guilty or a finding of guilty, a court of record may direct a probation officer to make a presentence investigation and a written report in any case. The accused may demand and be entitled to such investigation and report after he has pleaded guilty to, or has been convicted in a trial without a jury of, a felony punishable by death or confinement for more than ten years.

(2) *Report.* The written report of the presentence investigation shall contain any prior criminal record of the accused and such additional information as the court may desire or the probation officer may deem helpful to the court in imposing sentence or in granting probation. The probation

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<sup>33</sup> VA. CONST. art. I, § 8; VA. CODE ANN. §§ 19.1-249, -254, -256 (1960).

officer shall file his written report with the judge and shall furnish copies to the Commonwealth's attorney and defense counsel after entry of a guilty plea or conviction and within a reasonable time before the day of sentencing. The probation officer shall present his report in open court in the presence of the accused, who shall be advised of its contents and given the right to cross-examine the probation officer as to any matter contained therein and to present additional facts bearing upon a proper sentence.

(d) *Withdrawal of plea of guilty.* A motion to withdraw a plea of guilty or *nolo contendere* may be made only before sentence is imposed or imposition of a sentence is suspended; but to correct manifest injustice, the court within 21 days after entry of a final order may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) *Suspension; probation.* After conviction, whether with or without jury, the court may, unless prohibited by statute, place the accused on probation or suspend his sentence in whole or in part.

(f) *Judgment.* The judgment order shall set forth the plea, the verdict or findings and the adjudication and sentence, whether or not the case was tried by jury, and if not, whether the consent of the accused was concurred in by the court and the Commonwealth's attorney. If the accused is found not guilty, or for any other reason is entitled to be discharged, judgment shall be entered accordingly. If an accused is tried at one time for two or more offenses, the court may enter one judgment order respecting all such offenses.

#### COMMENT:

Generally the Rule follows Section 53.278.1 of the Virginia Code. However, it was the consensus of the drafting Committee that a judge of a court of record has the inherent power, at his discretion, to require a pre-sentence report in any case. This would be true even though a defendant had been convicted by a jury and sentenced thereby. At the present time it is unusual for a judge to do this; however, the power is available.

Likewise, a judge has the inherent power to suspend a sentence and place an individual on probation even though a jury has sentenced the individual. This has always been the law in Virginia,<sup>34</sup> but the Rule sets it out expressly. Unfortunately, there were many practicing attorneys in Virginia who were unaware that this was an available relief, albeit one rarely exercised.

#### Rule 3A:26. Appeals.

(a) *Appeal from conviction in a court of record.* See Part Five of these Rules.

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<sup>34</sup> VA. CODE ANN. § 53-272 (1967).

(b) *Appeal from conviction in a court not of record.*

(1) *Right to appeal; procedure.* Upon conviction in a court not of record, an accused has the right to appeal to the court of record having jurisdiction over the offense, provided the accused or his counsel advises the judge or clerk of the court not of record, within 10 days after conviction, of his intention to appeal. The appeal shall be noted on the warrant or summons and, if the accused does not withdraw his appeal before the expiration of the 10-day period, the papers shall be filed with the court of record at the end of such period. Paying a fine or beginning to serve a sentence does not impair the right to appeal.

(2) *Defective warrants.* If the warrant or summons is defective, the judge of the court of record may amend it or issue a new warrant or summons.

(3) *Trial of appeal.* The case shall be tried de novo in the court of record.

#### COMMENT:

The Rule sets forth that all an individual has to do is advise the judge or clerk of the court of his intention to appeal. In many cases the defendant is incarcerated, and in this situation a letter addressed to the clerk should suffice, as his personal appearance before the judge or clerk is impracticable if not impossible.

The Rule sets forth that a case shall be tried de novo in the court of record, a statement of the existing law.<sup>35</sup> However, it leaves unanswered the question, de novo as to what? For example, if an individual is charged with reckless driving but convicted of improper driving and he appeals, there are many jurisdictions that try him de novo on the charge of reckless driving. It is the position of many defense attorneys that de novo within the meaning of the Virginia law means only de novo as to the offense of which convicted, the retrial of the higher offense possibly constituting double jeopardy in violation of article I, section 8 of the Virginia Constitution as well as the fourteenth amendment to the Constitution of the United States.<sup>36</sup> Because of the relatively few misdemeanor appeals that reach our Supreme Court, case law is scarce if not nonexistent on many of these issues.

#### Rule 3A:27. Search and Seizure Under a Warrant.

(a) *Subject of a search warrant.* A warrant may be issued under this

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<sup>35</sup> VA. CODE ANN. § 16.1-136 (1960).

<sup>36</sup> See *Evans v. City of Richmond*, 210 Va. 403, 171 S.E.2d 247 (1969). See generally *Spooner & Keith, Criminal Law and Procedure, 1969-1970 Annual Survey of Virginia Law*, 56 VA. L. REV. 1572, 1579-80 (1970).

Rule to search for and seize property constituting evidence of a crime or tending to show that a particular person has committed or is committing a crime, provided that no warrant shall issue for a seizure prohibited by law. As used in this Rule, the term "property" includes without limitation documents, books, papers, body fluids and any other objects.

(b) *Affidavit.* A warrant shall issue only on affidavit made before or filed with a magistrate authorized to issue search warrants. The affidavit shall (i) name or describe the place to be searched, (ii) identify the property to be searched for, and (iii) state facts or circumstances supporting the affiant's belief that the property is at the place to be searched, and that the property constitutes evidence of a crime (identified in the affidavit), or tends to show that a person (named or described therein) has committed or is committing a crime (identified therein).

(c) *Issuance and contents.* The magistrate shall issue a warrant if he finds from the facts or circumstances recited in the affidavit that there is probable cause for the issuance thereof. The warrant shall (i) be directed to an appropriate officer or officers, (ii) name the affiant, (iii) recite the offense in relation to which the search is to be made, (iv) name or describe the place to be searched, (v) describe the property to be searched for, and (vi) recite that the magistrate has found probable cause to believe that the property constitutes evidence of a crime (identified in the warrant) or tends to show that a person (named or described therein) has committed or is committing a crime. The warrant shall command that the place be forthwith searched, and that the property described in the warrant, if found there, be seized and produced before a court having jurisdiction of the offense in relation to which the warrant was issued. If a warrant is issued, the magistrate shall cause the affidavit, with the inventory attached (or a notation that no property was seized), to be filed in the clerk's office of a court of his county or city in which deeds are admitted to record.

(d) *Execution and return.*

(1) The warrant may be executed anywhere in the State by an officer authorized by law to execute a search warrant in the place where it is executed.

(2) *Manner.* The warrant shall be executed by the search of the place described in the warrant and, if property described in the warrant be found there, by the seizure of the property. The officer who seizes any property shall prepare an inventory thereof, under oath. Any seized property shall be produced before the court designated in the warrant. The officer executing the warrant shall endorse the date of execution thereon and shall file the warrant, with the inventory attached (or a notation that no property was seized), in the court having criminal jurisdiction that will hear the case involving the property seized.

#### COMMENT:

Search and seizure law has been perhaps the most rapidly expanding

sub-area within the field of criminal law in recent years. This Rule is based on existing statutory law.<sup>37</sup> The first paragraph provides for a search for "mere evidence" as allowed by *Warden v. Hayden*,<sup>38</sup> holding that the fourth amendment does not prohibit such a search.

A magistrate is not limited under the Rule to the jurisdiction in which he serves. The Rule did not adopt the Federal Rule which prescribes that a warrant shall be served only in the daytime unless the affidavit is positive that the property is on the person or place to be searched.<sup>39</sup> Section 19.1-86 of the Virginia Code states that the search may be "either in day or night."

Paragraph (d) (2) provides for an inventory which is for the future use of the owner of the property or custodian thereof as well as for the protection of the executing officer. The inventory must be filed with the warrant as well as with the affidavit.

#### **Rule 3A:28. Motion for Return of Seized Property and to Suppress.**

A person aggrieved by an allegedly unlawful search or seizure may move the court to return any seized property and to suppress it for use as evidence. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted by a court of record, any seized property shall be restored as soon as practicable unless otherwise subject to lawful detention, and such property shall not be admissible in evidence at any hearing or trial. If the motion is granted by a court not of record, such property shall not be admissible in evidence at any hearing or trial before that court, but the ruling shall have no effect on any hearing or trial in a court of record.

#### **COMMENT:**

This Rule is patterned largely after the Federal Rule of Criminal Procedure 41. It encompasses not only property seized pursuant to a search warrant but that which may have been seized incidental to an alleged lawful arrest. It would seem the better practice to file this motion in writing and to hold a separate hearing prior to the trial on the merits itself. The outcome of this motion could, of course, affect a plea or the manner and strategy of the case.

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<sup>37</sup> VA. CODE ANN. § 19.1-83 to -88 (1960).

<sup>38</sup> 387 U.S. 297 (1967).

<sup>39</sup> FED. R. CRIM. P. 41(c).



**Rule 3A:29. Release on Recognizance.**

(a) *Right to bail.* An accused who is held in custody pending trial for an offense shall be admitted to bail unless there is probable cause to believe that:

(1) he will not appear for trial or at such other time and place as may be directed, or

(2) his liberty will constitute an unreasonable danger to the public.

(b) *Terms.* If the accused is admitted to bail, the terms thereof shall be such as in the judgment of the magistrate will be reasonably calculated to insure the presence of the accused, having regard to (1) the nature and circumstances of the offense, (2) the weight of the evidence, (3) the financial ability to pay bail and (4) the character of the accused.

(c) *Appeal.* If a magistrate denies bail or requires excessive bail, an accused who is held in custody pending trial for an offense may petition successively the next higher authority up to and including the Supreme Court or a Justice thereof. An accused who has been convicted in a court of record may seek a writ of error pursuant to Part Five of these Rules to the order of such court denying bail or fixing the amount of bail and, pending action by the Supreme Court, execution of the sentence may be postponed as provided in Rule 1:9.

(d) *Recognizance of witness.* If it appears that the testimony of a person is material in any criminal proceeding, the magistrate may require him to give a recognizance for his appearance.

(e) *Forms; conditions; place of deposit.* A person permitted to give bail shall sign a written recognizance for his appearance. The magistrate, having regard to the considerations mentioned in paragraph (b) of this Rule, may require one or more sureties or other security, or may authorize the release of the accused without surety or other security. The magistrate shall advise a person admitted to bail of the penalties imposed by law for failure to appear.

(f) *Forfeiture.* If there is a breach of condition of a recognizance, the court in which the accused or other person is to appear shall declare a forfeiture and, provided the forfeiture is not set aside for good cause shown, shall on motion enter a judgment of default and execution may issue thereon.

(g) *Exoneration.* When the condition of the recognizance has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit in the amount of the bond or by a timely surrender of the accused or other person into custody.

**COMMENT:**

Unreasonable and excessive bail is, of course, prohibited not only by the Virginia Constitution<sup>40</sup> but also by the Constitution of the United

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<sup>40</sup> VA. CONST. art. I, § 9.

States.<sup>41</sup> In Virginia bail may be denied under the circumstances set forth in the Rule, although it is submitted that this should be a very exceptional case. In the original drafting of the proposed Rules, in paragraph (b) a number (5) was added which would have included “. . . and (5) the policy against unnecessary detention.” The final draft as adopted by the Supreme Court eliminated this number (5). For this reason a section of the Virginia Code<sup>42</sup> is often overlooked which states that a person in jail who has not been bailed shall be discharged from imprisonment if an indictment is not found before the end of the second term of the court in which he is held unless certain exceptions occur.<sup>43</sup> This statute is worth re-reading. It was the feeling of the Committee that by setting forth when bail may be denied, the Rule should eliminate the denial of bail by setting an excessive amount.

#### Rule 3A:30. (Reserved).

#### COMMENT:

This Rule as originally presented dealt with the presence of the accused in certain stages of the proceedings and has been eliminated by the Supreme Court.

#### Rule 3A:31. Court-Appointed Counsel.

(a) *Right to court-appointed counsel.* Every person who is charged with a felony and is unable to obtain counsel shall be entitled to have counsel appointed to represent him at any hearing in any court, including a hearing for revocation of suspension or probation.

(b) *Procedure.*

(1) Unless it is evident that the accused has retained counsel, an accused who is charged with a felony shall be brought before a court at the earliest practicable time to determine his need for counsel; provided, however, that if an accused has been arrested for a felony before indictment and is in custody, he shall be brought before a court not of record to determine his need for counsel on the first day on which such court sits after his arrest.

(2) If the accused has not retained counsel, the judge of the court before which he is first brought shall advise him of his right to employ counsel of

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<sup>41</sup> U.S. CONST. amend. VIII.

<sup>42</sup> VA. CODE ANN. § 19.1-163 (1960).

<sup>43</sup> Exceptions are where a material witness for the Commonwealth has been enticed or kept away or is prevented from attending by reason of sickness or inevitable accident, or where a question of sanity is raised by VA. CODE ANN. § 19.1-228 (1960). Also in cases of felonies, second term of court means the second term thereof at which a grand jury was impaneled.

his own choice and his right to court-appointed counsel if he is financially unable to employ counsel.

(3) If the accused desires to employ counsel of his own choice, he shall be given a reasonable opportunity to do so.

(4) If the accused states he is financially unable to employ counsel of his own choice, the judge shall, by oral examination of the accused and such competent evidence as may be reasonably available, ascertain whether the accused is indigent within the contemplation of law. If the court determines the accused is indigent as contemplated by law, the court shall provide him with a statement that shall contain the following:

“I have been advised this . . . . . day of . . . . ., 19. . . . ., by the (name of court) court of my rights to representation by counsel in the trial of the charge pending against me; I certify that I am without means to employ counsel of my own choosing and I hereby request the court to appoint counsel for me.”

.....  
(Signature of accused)

The accused shall execute the statement under oath, and the court by order shall appoint competent counsel to represent the accused in the proceeding against him. The executed statement shall be filed with the clerk.

(c) The attorney so appointed shall represent the accused at any preliminary hearing and at all other stages of the proceeding including appeal, until relieved or replaced by a court.

COMMENT:

The Rule incorporates the right of an individual to have an attorney for a revocation hearing under the law as set forth in *Mempa v. Rhay*.<sup>44</sup> The Rule likewise provides the policy that an attorney appointed shall represent the accused from the preliminary hearing on through every stage of the proceedings. This is the present policy in most of the jurisdictions in Virginia; however, at least one jurisdiction has the policy of not allowing the attorney who represented the indigent at the preliminary hearing to represent him in the court of record. It is submitted that the one attorney carrying the case straight through until circumstances arise wherein he shall be relieved is the better policy and provides for a better representation and a continuity that is otherwise lacking.

Rule 3A:32. Time.

(a) *Extension.* When under this Part 3A an act is required or allowed

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<sup>44</sup> 389 U.S. 128 (1967).

to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period extended if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period, permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 3A:22 and 26, except to the extent and under the conditions stated in those Rules.

(b) *Unaffected by expiration of term.* The period of time specified in this Part 3A for taking any action is not affected or limited by the expiration of a term of court.

COMMENT:

This Rule is, of course, a catchall which allows a judge a certain amount of discretion, which is as it should be. In addition to these provisions Rule 1:7 allows for an extension if the last day of any deadline falls on a Saturday, Sunday or legal holiday and is, of course, incorporated by reference into this Rule. It will be assumed that courts be liberal in their construction and application of this Rule for the first several months after the enactment of these Rules to allow an adjustment by the bar.

**Rule 3A:33. Service and Filing of Papers.**

(a) *Copies of written motions to be furnished.* All written motions and notices not otherwise required to be served shall be served on each counsel of record by delivering or mailing a copy to him on or before the day of filing. At the foot of such motions and notices shall be appended either acceptance of service or a certificate of counsel that copies were served as this Rule requires, showing the date of delivery or mailing.

(b) *Filing.* Papers required to be served shall be filed with the clerk.

COMMENT:

This Rule does not affect the existing law. It is consistent with the Civil Rules of Procedure<sup>45</sup> and in accord with the existing practice in Virginia at the present time.

**Rule 3A:34. Regulation of Conduct in the Court Room.**

A court shall not permit the taking of photographs in the courtroom during the progress of judicial proceedings or the broadcasting of judicial proceedings by radio or television.

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<sup>45</sup> VA. SUP. CT. R. 1:12.

**COMMENT:**

This Rule is in accord with the canons of professional responsibility as well as *Estes v. Texas*.<sup>46</sup> One item that this Rule does not touch upon is a tape recording in the court either for future use by the news media or by the attorney for his own use. Allowance of this practice varies from jurisdiction to jurisdiction at present. It is urged that if an attorney is making the recording for his professional convenience (and in many cases his client is not able to afford the luxury of a court reporter), the court should be cognizant of the exigencies of the practice of law and allow this as long as it does not interfere with the orderly procedure of the trial.

**Rule 3A:35. Forms.**

The forms contained in the Appendix of Forms are illustrative and not mandatory.

**COMMENT:**

Although the forms are not mandatory, their increased use will aid in achieving simplification and uniformity in the practice of law in Virginia.

**Rule 3A:36. Effective Date.**

The Rules set forth in this Part 3A shall be effective January 1, 1972. They shall govern all out-of-court criminal proceedings on or after that day, all criminal proceedings brought before courts on or after that day and, except to the extent that in the opinion of the court their application would not be feasible or would work injustice, all criminal proceedings pending before courts on that day.

**COMMENT:**

As the Rule states, the Rules will apply to all pending matters.

**CONCLUSION**

Only time will tell as to the use of the Rules themselves. Certainly problems will arise that are unforeseen at the present time, and there will be a need for judicial interpretation. Amendments to the Rules will, of

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<sup>46</sup> 381 U.S. 532 (1965).

course, clear up many of the problems in the future as will opinions handed down by the Supreme Court and the written reports of the courts of record. Regardless of their imperfections and shortcomings, it must be concluded that the new Rules of Criminal Practice and Procedure are a step in the right direction and are long overdue in the Commonwealth.

# UNIVERSITY OF RICHMOND LAW REVIEW

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VOLUME 6

SPRING 1972

NUMBER 2

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