THE
REPORTERS
COMMITTEE
FOR
FREEDOM
OF THE
PRESS

Suite 1100
1101 Wilson Blvd.
Arlington, VA 22209-2211
(703) 807-2100

rcfp@rcfp.org
http://www.rcfp.org

Lucy A. Dalglish
Executive Director

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Mr. Steven Dalle Mura
Office of the Executive Secretary
Supreme Court of Virginia
100 North Ninth Street
Richmond, VA 23219

Dear Mr. Mura:

These comments are regarding draft Rule 3A:14.1: Confidentiality of Juror Personal Information, tentatively approved by the Advisory Committee on Rules of Court. We thank you for this opportunity to comment.

We urge the Committee to reconsider this draft rule, which introduces extreme secrecy to a public institution. Courts have made clear that juror information is presumptively public, as required by the First Amendment, *see, e.g.*, *U.S. v. Sanchez*, 74 F.3d 562, 564 (5th Cir. 1996), and the common law, *In re Baltimore Sun Co.*, 841 F.2d 74, 76 (4th Cir. 1988). The draft rule would turn this presumption on its head, requiring secrecy in all criminal cases.

About The Reporters Committee for Freedom of the Press

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors working to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970, and it frequently files *amicus curiae* briefs in significant media law cases.

The Reporters Committee also serves as a First Amendment clearinghouse, monitoring and compiling information about significant legal and statutory developments affecting journalists' and the public's right to know, and produces several publications to inform journalists and lawyers about media law issues, including a quarterly magazine, a bi-weekly newsletter, and a blog, which is updated several times daily.

The Reporters Committee operates a hotline to assist journalists with legal problems as they arise in their work. Often, these legal defense requests come from journalists who seek access to court records and information. This contact with reporters, editors and media lawyers around the country drives home the importance of court access in the everyday performance of journalism.

As both a news organization and an advocate of free press issues, the Reporters Committee has a strong interest in the policies governing the rights of reporters to access information from the judicial system. It is through this dual role that the Reporters Committee can offer a unique prospective on the dangers of keeping juror identities secret.

Comments on draft Rule 3A:14.1

The draft rule creates an extremely secretive system for handling juror information in all phases of all criminal cases. The proposed scheme, under which jurors would be referred to only by number and juror information would be hidden from the public, conflicts with established constitutional and common-law principles, and it conflicts with the statute that authorizes the rule. It also fails to take into account the benefits of public knowledge of court proceedings.

I. Juror information is presumptively public.

The public and press have a presumptive First Amendment right of access to judicial proceedings in criminal cases. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion) ("a presumption of openness inheres in the very nature of a criminal trial under our system of justice"). The Supreme Court explicitly extended this constitutional presumption of openness to voir dire proceedings in *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*), 464 U.S. 501, 505 (1984). In these and many other cases, federal courts relied on this presumption in striking down restrictions on access to state courts.

In determining whether the presumption of openness applies to particular records or proceedings, the Supreme Court requires a consideration of "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 8 (1986) (citations omitted). Where a constitutional presumption of access applies, the court may close proceedings only after making specific, on-the-record findings: (1) that closure is necessary to further a compelling governmental interest; (2) the closure order is narrowly tailored to serve that interest; and (3) that no less restrictive means are available to adequately protect that interest. *Id*. at 14.

The decision to impanel an anonymous jury is "a drastic measure, which should be undertaken only in limited and carefully delineated circumstances." *U.S. v. Krout*, 66 F.3d 1420, 1427 (5th Cir. 1995). Nearly all federal and state courts that have addressed the issue of anonymous juries have arrived at a "limited or qualified right" to juror names and addresses, "premised on the *Press-Enterprise* rationale that openness in all aspects of our justice system promotes fairness to litigants and promotes public faith in our jurisprudence." *In re Disclosure of Juror Names and Addresses*, 592 N.W.2d 798, 799 (Mich. App. 1999).

The Fourth Circuit recognizes a common-law presumption in favor of access to juror and alternate juror names and addresses after the jury is impaneled, noting that the "risk of loss of confidence of the public in the judicial process is too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity." *In re Baltimore Sun Co.*, 841 F.2d 74, 76 (4th Cir. 1988). The court concluded that "[w]e think it no more than an application of what has always been the law to require a district court, upon the seating of the panel of a jury … to release the names and addresses of those jurors who are sitting, as well as those veniremen and women who have attended court but have not been seated for one reason or another." *Id.* at 75.

It is important to note that the First Amendment and common-law presumption of openness does not leave courts powerless to protect jurors and the integrity of court proceedings. Courts can allow anonymous juries while limiting their use to the cases in which there is a real need for protection. Federal appellate courts have allowed the use of anonymous juries where the specific circumstances of the case raise particularized concerns for the protection of jurors or the integrity of the proceedings. Most federal appellate courts have based the decision for an anonymous jury on some combination of the following five factors: (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process; (4) the potential that the defendant will get a long jail sentence or substantial fines if convicted; and (5) extensive publicity that could expose jurors to intimidation or harassment. *See, e.g., U.S. v. Sanchez*, 74 F.3d 562, 564 (5th Cir. 1996) (quoting *Krout*, 66 F.3d at 1427); *U.S. v. Mansoori*, 304 F.3d 635, 649 (7th Cir. 2002); *U.S. v. Branch*, 91 F.3d 699, 724 (5th Cir. 1996); *U.S. v. Darden*, 70 F.3d 1507, 1532 (8th Cir. 1995); *U.S. v. Edmond*, 52 F.3d 1080, 1091 (D.C. Cir. 1995); *U.S. v. Ross*, 33 F.3d 1507, 1520 (11th Cir. 1994).

The Fifth Circuit, for example, unequivocally requires that any district court decision to use an anonymous jury be grounded in the five factors, holding that such a decision must be based on "more than mere allegations or inferences of potential risk," *Sanchez*, 74 F.3d at 564 (quoting *Krout*, 66 F.3d at 1427). It added that an anonymous jury is an abuse of the court's discretion unless "evidence at trial supports the conclusion that anonymity was warranted," *Sanchez*, 74 F.3d at 564 (quoting *U.S. v. Wong*, 40 F.3d 1347, 1376-77 (2d Cir. 1994)).

This standard has been applied by at least one federal district court in the Fourth Circuit. In *U.S. v. Byers*, 603 F.Supp.2d 826 (D. Md. 2009), the court used the five factors to determine whether there existed "a strong reason to believe the jury needs protection." *Id.* at 833 (quoting *U.S. v. Paccione*, 949 F.2d 1183, 1192 (2d Cir. 1991)). The court allowed an anonymous jury only after noting, among other factors, that the defendants had allegedly worked with the Bloods gang in conspiring to murder a witness to prevent him from testifying. *Byers*, 603 F.Supp.2d at 832.

The careful, limited use of anonymous juries in the Fourth Circuit and across this country should caution the Supreme Court of Virginia against adopting a blanket policy of juror secrecy in all

criminal trials. The juror numbering system set out in draft rule subsection (A), which calls for jurors to be referred to only by number during all times of the trial, including voir dire, combined with the restrictions on copying jury panel information in subsection (B), casts secrecy over the entire proceedings and undermines the presumption of openness required by the U.S. Supreme Court in *Richmond Newspapers, Inc. v. Virginia* and *Press-Enterprise I.* The subsection (B) requirement of a showing of good cause in order for a court to grant leave for the copying of jury panel information demonstrates that the draft rule creates a presumption in favor of secrecy. Such a system cannot be reconciled with the presumption access to juror information.

II. The draft rule conflicts with its authorizing statute.

Not only is the draft rule at odds with federal constitutional law and the common law, but it also undermines the intent of the statute authorizing a new rule for the protection of juror information. The language of Va. Code Ann. § 19.2-263.3 (2008) implicitly recognizes that the First Amendment requires jury anonymity to be the exception rather than the norm. The statute gives a court authority, "for good cause shown," to "issue an order regulating the disclosure of the personal information of a juror who has been impaneled in a criminal trial to any person, other than to a counsel for either party." The requirement of good cause implies that such regulations are to be issued on a case-by-case basis. The statute even lists examples of good cause that generally track the justifications approved by the federal courts, including "likelihood of bribery, tampering, or physical harassment of a juror if his personal information is disclosed." The use of juror numbers and restrictions on copying juror information in all cases goes far beyond the case-by-case, with-cause restrictions described in the statute.

The draft rule subsection (B) requirement of a showing of good cause to disclose juror information also conflicts with the statute. Section 19.2-263.3(A) requires good cause for dissemination to a non-party only when the court has already issued an order regulating the disclosure of personal information for good cause (*e.g.* likelihood of bribery). This is clear from the placement of the sentence regarding good-cause dissemination immediately after and in the same subsection as the sentence requiring good cause to regulate the disclosure of personal information.

Section 19.2-263.3(C) might appear to be faithfully implemented in subsection (C) of the draft rule, requiring a motion for good cause (*e.g.* likelihood of bribery) to issue an order "further regulating" the disclosure of juror information. However, the significance of draft rule subsection (C) is swallowed up by the pervasive system of secrecy prescribed in draft rule subsections (A) and (B). Since juror information is already hidden from anyone other than the client, co-counsel and jury selection consultants under draft rule subsection (B), it appears the only possible "further" regulation would be to restrict discussing the information with the client and jury consultants (disclosure to counsel cannot be limited under draft rule subsection (C)).

There is no indication in the statute that the motion to regulate disclosure for good cause should apply only in such narrow circumstances.

Comments by Del. Bob Marshall, who introduced the bill that was codified as § 19.2-263.3, also indicate that the overarching secrecy of this draft rule goes far beyond the intention of the statute. Marshall reacted with surprise to news that judges in Virginia Beach Circuit Court, relying on the new law, had been sealing the names of jurors in all criminal cases. Shawn Day, *Virginia Beach judges keep jurors' names secret*, The Virginian-Pilot, May 14, 2009, *available at* http://hamptonroads.com/node/509317. "You must have a complete riot, social anarchy, if for every case that comes into the court that you have to seal the names of every juror," Marshall said. *Id.* Del. Dave Albo, chairman of the House of Delegates Courts of Justice committee, had a similar reaction: "The intent of the law is that everything should be presumed to be open, and if there's good cause shown, it should be closed." *Id.* We hope the Committee will conclude that near-complete jury secrecy as outlined in the draft rule is not the intent of § 19.2-263.3.

III. The draft rule imperils the integrity of the jury system.

Finally, the draft rule overlooks the public policy interest in access to juror information, which is present even when the interest in secrecy seems most compelling. To pick just one example, an anonymous jury was used in the prosecution of mobster John Gotti, *U.S. v. Gotti*, 784 F.Supp. 1013, 1013 (E.D.N.Y. 1992), after the court found there to be an unusually high risk to juror safety. One of the jurors was George Pape, who had ties to an Irish-American organized crime group. According to legal scholars who have examined the trial, Pape contacted Gotti's attorneys, accepted a bribe, and arranged for Gotti's acquittal. Abramovsky & Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 St. John's J. Legal Comment. 457, 480-81 (1999). If the government, the press or the public had known Pape was on the jury, they argue, "his potential for corruption might have been unearthed prior to trial." *Id.* The Gotti case illustrates that the apparent benefits of juror secrecy lose much of their appeal when weighed against the costs of cutting off public scrutiny.

Conclusion

We thank you for the opportunity to comment on this draft rule. The Reporters Committee opposes Rule 3A:14.1 as drafted because it goes far beyond what has been allowed by courts and what is intended by the General Assembly, while ignoring the importance of an informed public. It is impossible to reconcile across-the-board secrecy with the constitutional and common-law presumption of openness in court proceedings – a presumption that already allows for exceptions when a real need is shown. This presumption of openness is inherent in the statute that authorized a rule for juror confidentiality, which called for the regulation of juror information

only when good cause is shown. Any new rule on juror confidentiality should protect the presumption of openness, not destroy it.

Respectfully submitted,

Lucy A. Dalglish
Executive Director
The Reporters Committee for Freedom
of the Press

Lucas Tanglen
Legal Intern
The Reporters Committee for Freedom
of the Press