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SUPREME COURT OF VIRGINIA



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September 5, 2018

Today the Supreme Court of Virginia has promulgated new rules regarding criminal discovery in the Commonwealth.

For a number of years, many defense attorneys, Commonwealth's Attorneys, bar associations and academics have advocated reform. In 2014, then Chief Justice Cynthia D. Kinser appointed the Special Committee on Criminal Discovery Rules to consider reforms to the existing criminal discovery rules. The committee presented a final report to the Court on December 2, 2014. The recommendations were posted for public comment. The Court considered the recommendations and the comments, and on November 13, 2015, the Court issued an order wherein it "declined to adopt the Committee's recommendations."

Thereafter, legislative proposals to amend the criminal discovery process failed in 2016 and 2017. With the encouragement of the Court, Virginia State Bar President Michael Robinson appointed a task force of the Bar to consider this matter once again.

The VSB Criminal Discovery Reform Task Force submitted to the Court proposed revisions to Rules 3A:11 and 3A:12 regarding criminal discovery, and the Court posted these revisions for public comment in February 2018. The Court then considered and approved these proposed revisions at its August 28, 2018, business meeting.

Criminal discovery reform is a complex matter, and while there is not 100% agreement on all issues, this proposal has significant support from the numerous stakeholders involved in the criminal discovery process. Reforms of this magnitude require cooperation among the three branches of our government. The Court is aware that these revisions may impact the workload of Commonwealth's Attorneys. The Court is also aware of language in the 2018 Appropriation Act (Compensation Board (157), Item 73.U) that requires the Executive Secretary of the Compensation Board to convene a working group "to investigate how body worn cameras have or may continue to impact the workloads experienced by Commonwealth's Attorneys offices." These new rules and increased demands upon prosecutors from the use of body worn cameras may have a financial impact. Accordingly, the Court is delaying the effective date of these rule revisions until July 1, 2019 to give the General Assembly time to receive the report from the Compensation Board's working group and consider the cost of implementation of these rules.

A handwritten signature in blue ink that reads "Donald W. Lemons".

Donald W. Lemons
Chief Justice
Supreme Court of Virginia

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday, the 5th day of September, 2018.

It is ordered that the Rules heretofore adopted and promulgated by this Court and now in effect be and they hereby are amended to become effective July 1, 2019, subject to any further orders of this Court.

Amend Rule 3A:11 as follows:

Rule 3A:11. Discovery and Inspection.

(a) *General Provisions.* — (1) This Rule applies to any prosecution for a felony in a circuit court and to any misdemeanor brought on direct indictment.

(2) The constitutional and statutory duties of the Commonwealth's attorney to provide exculpatory and/or impeachment evidence to an accused supersede any limitation or restriction on discovery provided pursuant to this Rule.

(3) A party may satisfy the requirement to permit the opposing party to inspect and copy or photograph a document, recorded statement or recorded confession by providing an actual duplicate, facsimile or copy of the document, recorded statement or recorded confession to the opposing party in compliance with the applicable time limits and redaction standards set forth in this Rule.

(4) Any material or evidence disclosed or discovered pursuant to this Rule and filed with the clerk of court shall be placed under seal until it is either admitted as an exhibit at a trial or hearing or the court enters an order unsealing the specified material or evidence.

(b) *Discovery by the Accused.* — Upon written motion of an accused a court shall order the Commonwealth's attorney to: (1) Permit the accused to inspect and review any relevant reports prepared by law enforcement officers and made in connection with the particular case, including any written witness statements or written summaries of oral statements contained within such reports, that are known to the Commonwealth's attorney to be in the possession, custody or control of the Commonwealth. Nothing in this Rule requires that the Commonwealth provide the accused with copies of the relevant law enforcement reports, although it may do so in its discretion. The court's order providing for inspection and review of these reports shall be subject

to the provisions of subparts (c)(1) and (c)(2) of this Rule regarding redaction and restrictions on dissemination of designated material.

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

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

(B) written or recorded statements or confessions, or the substance of any oral statements or confessions, made by the accused to any person other than a law enforcement officer, that the Commonwealth intends to introduce into evidence against the accused at trial;

(C) written or recorded statements, or the substance of any oral statements, made by a co-defendant or co-conspirator that the Commonwealth intends to introduce into evidence against the accused at trial; and

(D) written reports of autopsy examinations, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports, and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case, that are known by the Commonwealth's attorney to be within the possession, custody, or control of the Commonwealth.

(3) Permit the accused to inspect, review and copy or photograph designated books, papers, documents, tangible objects, recordings, buildings or places, or copies or portions thereof, that are known by the Commonwealth's attorney to be within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to preparation of the accused's defense and that the request is reasonable.

(4)(A) Notify the accused in writing of the Commonwealth's intent to introduce expert opinion testimony at trial or sentencing and to provide the accused with: (i) any written report of the expert witness setting forth the witness's opinions and the bases and reasons for those opinions, or, if there is no such report, a written summary of the expected expert testimony setting forth the witness's opinions and the bases and reasons for those opinions, and (ii) the witness's qualifications and contact information.

(B) Nothing in subparts (b)(4)(A)(i) and (ii) of this Rule shall render inadmissible an expert witness's testimony at the trial or sentencing further explaining the opinions, bases and reasons disclosed pursuant to this Rule, or the expert witness's qualifications, just because the further explanatory language was not included in the notice and disclosure provided under this Rule.

Providing a copy of a certificate of analysis from the Virginia Department of Forensic Science or any other agency listed in Virginia Code § 19.2-187, signed by hand or by electronic means by the person performing the analysis or examination, shall satisfy the requirements of subparts (b)(4)(A)(i) and (ii) of this Rule.

(5) Provide to the accused a list of the names and, if known, the addresses of all persons who are expected to testify on behalf of the Commonwealth at trial or sentencing. This provision is subject to subpart (c)(1) of this Rule and to any protective orders entered by the court pursuant to subpart (g).

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

(7) This Rule does not authorize the discovery of the names and/or personal identifying information of confidential informants whom the Commonwealth does not intend to call at trial and with regard to whose identity the Commonwealth asserts it holds a privilege.

(c) *Redaction and Restricted Dissemination Material.* — (1) With regard to any material or evidence provided pursuant to this Rule,

(A) the Commonwealth may redact the residential address, telephone number, email address and place of employment of any witness or victim, or any member of a witness's or victim's family, who satisfies the conditions outlined in §19.2-11.2 of the Code of Virginia. The Commonwealth may redact the date of birth and Social Security Number of any person whose information is contained in material or evidence provided pursuant to this Rule; and

(B) If the Commonwealth redacts personal identifying information pursuant to this subpart of the Rule, the accused may file a motion seeking disclosure of the redacted

information. Should the court find good cause for disclosure, it may order the Commonwealth to provide the redacted information. In its discretion, the court ordering the provision of redacted personal identifying information may order that the information be identified as “Restricted Dissemination Material” pursuant to subpart (c)(2) of this Rule.

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

(A) The Commonwealth may designate any evidence or material subject to disclosure pursuant to this Rule as “Restricted Dissemination Material,” without supporting certification, if the accused’s attorney agrees to the designation.

(B) In the absence of an agreement by the attorney for the accused, the attorney for the Commonwealth may designate any evidence or material as “Restricted Dissemination Material” by stamping or otherwise marking it as such and providing a certification in writing, upon information and belief, that: (i) the designated material relates to the statement of a child victim or witness; or (ii) disclosure of the designated material may result in danger to the safety or security of a witness or victim, danger of a witness being intimidated or tampered with, or a risk of compromising an ongoing criminal investigation or confidential law enforcement technique.

(C) Except as otherwise provided by order of the court or these Rules, “Restricted Dissemination Material” may only be disclosed to the accused’s attorney, the agents or employees of the accused’s attorney, or to an expert witness. The accused’s attorney may orally communicate the content of “Restricted Dissemination Material” to the accused or allow the accused to view the content of such material but shall not provide the accused with copies of material so designated. “Restricted Dissemination Material” may not otherwise be reproduced, copied or disseminated in any way.

(D) If the Commonwealth designates evidence or material as “Restricted Dissemination Material” pursuant to subpart (c)(2)(B) of this Rule, the accused may at any time file a motion seeking to remove that designation from such evidence or material. Should the court find good cause to remove the designation, it may order that the evidence or material no longer be designated as “Restricted Dissemination Material.”

(E) Within 21 days of the entry of a final order by the trial court, or upon the termination of the representation of the accused, the accused's attorney shall return to the court all originals and copies of any "Restricted Dissemination Material" disclosed pursuant to this Rule. The court shall maintain such returned "Restricted Dissemination Material" under seal. Any material sealed pursuant to this subpart shall remain available for inspection by counsel of record. For good cause shown, the court may enter an order allowing additional access to the sealed material as the court in its discretion deems appropriate.

(F) In any case in which an accused is not represented by an attorney, the Commonwealth may file a motion seeking to limit the scope of discovery pursuant to this Rule. For good cause shown, the court may order any limitation or restriction on the provision of discovery to an accused who is unrepresented by an attorney as the court in its discretion deems appropriate.

(d) *Discovery by the Commonwealth.* — If the court grants disclosure to the accused under subpart (b) of this Rule, it shall also order the accused to: (1) Permit the Commonwealth to inspect and copy or photograph any written reports of autopsy examinations, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath analyses, and other scientific testing within the accused's possession, custody or control that the defense intends to proffer or introduce into evidence at trial or sentencing.

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

(3) Permit the Commonwealth to inspect, copy or photograph any written reports of physical or mental examination of the accused made in connection with the particular case if the accused intends to rely upon the defense of insanity pursuant to Chapter 11 of Title 19.2; provided, however, that no statement made by the accused in the course of such an examination disclosed pursuant to this Rule shall be used by the Commonwealth in its case-in-chief, whether the examination was conducted with or without the consent of the accused.

(4)(A) Notify the Commonwealth in writing of the accused's intent to introduce expert opinion testimony at trial or sentencing and to provide the Commonwealth with: (i) any written

report of the expert witness setting forth the witness's opinions and the bases and reasons for those opinions, or, if there is no such report, a written summary of the expected expert testimony setting forth the witness's opinions and the bases and reasons for those opinions, and (ii) the witness's qualifications and contact information.

(B) Nothing in subparts (d)(4)(A)(i) and (ii) of this Rule shall render inadmissible an expert witness's testimony at the trial or sentencing further explaining the opinions, bases and reasons disclosed pursuant to this Rule, or the expert witness's qualifications, just because the further explanatory language was not included in the notice and disclosure provided under this Rule.

Providing a copy of a certificate of analysis from the Virginia Department of Forensic Science or any other agency listed in Virginia Code § 19.2-187, signed by hand or by electronic means by the person performing the analysis or examination, shall satisfy the requirements of subparts (d)(4)(A)(i) and (ii) of this Rule.

(5) Provide to the Commonwealth a list of the names and, if known, the addresses of all persons who are expected to testify on behalf of the accused at trial or sentencing. The accused's attorney may redact the personal identifying information of any witness if so authorized by a protective order entered by the court pursuant to subpart (g) of this Rule.

(e) *Time of Motion.* — A motion by the accused under this Rule must be made at least 10 calendar days before the day fixed for trial. The motion shall identify all relief sought pursuant to this Rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(f) *Time, Place and Manner of Discovery and Inspection.* — The order granting relief under this Rule shall specify in writing the time, place and manner of making the discovery and inspection ordered. The court in its discretion may prescribe such terms and conditions as are reasonable and just.

(g) *Protective Order.* — (1) Upon the motion of either party and for good cause, the court may enter a protective order with regard to the discovery or inspection required by this Rule. The court in its discretion may order any condition that it deems necessary to the orderly adjudication

of the case or to the fair administration of justice. These conditions may include, but are not limited to:

(A) a requirement that the parties not disclose the contents of any material or evidence disclosed or discovered pursuant to this Rule in any public forum, including any website;

(B) a requirement that the parties not disclose the contents of any material or evidence disclosed or discovered pursuant to this Rule to any third-party who is not an agent or employee of the parties or an expert witness;

(C) authorization to either party to withhold the residential address, telephone number, email address or place of employment of any witness not covered by the terms of subpart (c)(1) of this Rule; or

(D) authorization for either party in appropriate circumstances to withhold from disclosure or place additional restrictions on dissemination of information otherwise discoverable but not exculpatory.

(2) Should either party believe in good faith that the terms of a protective order entered by the court have been violated, such party may move the court to enforce the order and to impose any necessary and appropriate sanction authorized by Virginia law.

(h) Continuing Duty to Disclose; Failure to Comply. — If, after disposition of a motion under this Rule, counsel or a party discovers before or during trial additional material previously requested or falling within the scope of an order previously entered, that is subject to discovery or inspection under this Rule but has not previously been disclosed, the party shall promptly notify the other party or their counsel or the court of the existence of the additional material. If at any time during the pendency of the case 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 shall order such party to permit the discovery or inspection of materials not previously disclosed, and may grant such other relief authorized by Virginia law as it may in its discretion deem appropriate.

Amend Rule 3A:12 as follows:

Rule 3A:12. Subpoena.

(a) *For Attendance of Witnesses.* — (1) A subpoena for the attendance of a witness to

testify before a court not of record shall be issued by the judge, clerk, magistrate, attorney for the Commonwealth or by the attorney for the accused.

(2) A subpoena for the attendance of a witness to testify before a circuit court or a grand jury may be issued by the clerk or attorney for the Commonwealth and, for the attendance of a witness to testify before a circuit court, by the attorney for the accused as well.

(3) A 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.

(4) No subpoena or subpoena duces tecum shall be issued in any criminal case or proceeding, including any proceeding before any grand jury, which is (i) directed to a member of the bar of this Commonwealth or any other jurisdiction, and (ii) compels production or testimony concerning any present or former client of the member of the bar, unless the subpoena request has been approved in all specifics, in advance, by a judge of the circuit court wherein the subpoena is requested after reasonable notice to the attorney who is the subject of the proposed subpoena. The proceedings for approval may be conducted in camera, in the judge's discretion, and the judge may seal such proceedings. Such subpoena request shall be made by the attorney for the Commonwealth for the jurisdiction involved, either on motion of the attorney for the Commonwealth or upon request to the attorney for the Commonwealth by the foreman of any grand jury. An accused may also initiate such a subpoena request.

(b) *For Production of Documentary Evidence and of Objects Before a Circuit Court.* —

(1) Upon notice to the adverse party and on affidavit by the party applying for the subpoena that the requested writings or objects are material to the proceedings and are in the possession of a person not a party to the action, the judge or the clerk may issue a subpoena duces tecum for the production of writings or objects described in the subpoena. Such subpoena shall command either (i) that the person to whom it is addressed shall appear with

the items described either before the court or the clerk, or (ii) that such person shall deliver the items described to the clerk. The subpoena 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. The term "material to the proceedings" as used in this subpart (b) does not require that the subpoenaed writings or objects be admissible at trial or that they be exculpatory.

(2) Any subpoenaed writings and objects, regardless of which party sought production of them, shall be available for examination and review by all parties and counsel. Subpoenaed writings or objects shall be received by the clerk and shall be placed under seal and shall not be open for examination and review except by the parties and counsel unless otherwise directed by the court. The clerk shall adopt procedures to ensure compliance with this subpart of the Rule. Until such time as the subpoenaed materials are admitted into evidence they shall remain under seal unless the court orders that some or all of such materials be unsealed.

(3) Where subpoenaed writings and objects are of such nature or content that disclosure to other parties would be unduly prejudicial, the court, upon written motion and notice to all parties, may grant such relief as it deems appropriate, including: (i) quashing the subpoena in whole or in part, (ii) prohibiting or limiting disclosure, removal and copying, (iii) redacting confidential or immaterial information, (iv) prohibiting or restricting further disclosure by parties to the litigation, and/or (v) ordering return of all copies of the subpoenaed material upon completion of the litigation. Such motions may be brought by a party to the litigation, by the entity or individual subpoenaed, or by the entity or individual who is the subject of the subpoenaed material.

(4) If a subpoena requires the production of information that is stored in an electronic format, the person to whom it is addressed shall produce a tangible copy of the information. If a tangible copy cannot be reasonably produced, the subpoenaed person shall permit the parties to review the information on a computer or by other electronic means during normal business hours, provided that the information can be accessed and isolated. If a tangible copy cannot reasonably be produced and the information is commingled with information other than that requested in the subpoena and cannot reasonably be isolated, the person to whom the subpoena is

addressed may file a motion to quash the subpoena or a motion for limitations on disclosure or other appropriate relief.

(c) *Service and Return.* — A subpoena may be executed anywhere in the Commonwealth 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 a properly served subpoena may be deemed a contempt of the court to which the subpoena is returnable.

(e) *Recognizance of a Witness.* — If it appears that the testimony of a person is material in any criminal proceeding, a judicial officer may require him to give a recognizance for his appearance.

(f) *Photocopying of Subpoenaed Documents.* — Subject to the provisions of subpart (b) of this Rule, removal and photocopying of subpoenaed documents by any party or counsel shall be permitted. The court shall direct a procedure for removal, photocopying and return of such documents.

(g) *Undue Burden.* — Where subpoenaed material is so voluminous that its production would place an undue burden on the subpoenaed entity, the court may order that the subpoena duces tecum be satisfied by making the writings and documents reasonably available for inspection by the requesting party, subject to review by the court.

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

(i) *Subpoena Issued to a Party.* — In a criminal proceeding, a subpoena duces tecum may not be used to obtain material from a party. Nor may a subpoena duces tecum be used to obtain material from an agency or entity participating in, or charged with responsibility for, the investigation or prosecution of a criminal case such that the agency and its employees are deemed agents of the Commonwealth. A subpoenaed agency or entity claiming party status may move for relief from a subpoena on that basis and – if the court quashes the subpoena – discovery shall be governed by Rule 3A:11 and orders issued pursuant to that

Rule. For purposes of this rule, the Department of Forensic Science and the Division of Laboratory Consolidated Services are not parties.

(j) *In Camera Review*. — In determining whether a protective order should issue, or other relief be granted, a court may in its discretion review subpoenaed material in camera.

(k) *Confidentiality Provisions of Code §19.2-11.2*. — Where the confidentiality provisions of Virginia Code §19.2-11.2 apply, any material produced pursuant to a subpoena duces tecum shall be treated in accordance with the provisions of that statute.

(l) *Health Records Privacy*. — Any subpoena duces tecum seeking health records, or records concerning the provision of health services, as those terms are defined by Virginia Code § 32.1-127.1:03, are subject to the procedures and requirements of § 32.1-127.1:03(H), including the provisions for objecting to disclosure by a motion to quash.

(m) *Decision of the Court*. — A court must state on the record, or in writing, its reasons for making a decision pursuant to this Rule.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By:



Deputy Clerk