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May 26, 2015

ACLU FOUNDATION OF VIRGINIA COMMENTS ON PROPOSED REVISIONS TO CRIMINAL DISCOVERY RULES

The ACLU Foundation of Virginia urges the Supreme Court of Virginia to adopt the revisions proposed to the criminal discovery rules by the Special Committee in their entirety. Enactment of these reforms would be a major step forward for the Commonwealth's criminal justice system. The members of the Special Committee on Criminal Discovery Rules are to be commended for their diligence and attention to an issue that affects the constitutional rights of tens of thousands of criminal defendants in Virginia.

In addition to the recommendations forwarded by the Special Committee that would govern discovery in circuit court cases, we also ask the Court to extend these reforms to cases brought in the district courts that present defendants with potential loss of liberty. If the same changes are not implemented in the district courts, this Court will set up two separate and unequal systems of justice: one for felonies in circuit court, and another for misdemeanors in district court. The Court should abolish the separate rules for district courts and ensure all defendants facing jail or prison have the same due process protections.

The American legal system has flourished for more than two centuries because of a strong adversarial system. This system is the fairest way to determine the outcome of a criminal case, but it works well only when both sides can fully participate. As Justice William Brennan said 25 years ago, "The central argument for *broad* criminal discovery is the claim that the truth is more likely to come out at trial if there has been an opportunity for the defense to investigate the evidence and to prepare its case."[1]

I. Recommendations of the Special Committee

The Supreme Court of Virginia should adopt all of the Special Committee's proposed rules. Together, they recognize a criminal justice system that is badly slanted in one direction: against criminal defendants. The proposed rules seek to remedy this injustice in large part by making critical information about criminal cases available to the defense before trial. Inclusion of police reports and witness statements in the routine discovery process would help end the Commonwealth's system of "trial by ambush."[2]

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[1] William J. Brennan Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L. Q. 1, 3 (1990).

[2] Report of the Special Committee on Criminal Discovery Rules, Executive Summary at v (Dec. 2, 2014); Editorial, *Virginia Supreme Court should revisit pretrial disclosure rules*, WASH. POST, Jan. 2, 2013,

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A. Police reports and witness statements

The proposed Rule 3A:11(b) would allow the defense to inspect "all relevant police reports," such as "reports of interviews of witnesses."[3] The new rule would also allow the inspection of "all relevant statements of any non-expert witness," including written or signed statements, transcripts, or recordings.[4]

The inclusion of police reports and witness statements in the routine discovery process will greatly improve the adversarial process. Under the proposed rules, defense attorneys will have access to the most basic information about their clients' cases. No person should have to stand trial without knowing basic information about the government's case against him. And in a criminal justice system that "is for the most part a system of pleas, not a system of trials,"[5] defendants must have access to this critical information before trial so that they can make an informed decision about whether to take a plea bargain or go to trial.

Police reports and witness statements contain invaluable pieces of information. They represent a snapshot of the Commonwealth's case at the time of the initial investigation, when memories were fresh. Certain details in these documents may offer new leads for the defense's own investigation of the case, perhaps leading to previously undiscovered witnesses or other evidence. The witness statements in particular are essential when assessing the credibility of the witnesses at trial. Finally, police reports and witness statements provide defense counsel and the defendant with a fair assessment of the Commonwealth's case, which is invaluable when making the critical decision of whether to accept a plea deal or take a case to trial.

Notably, these proposed revisions to 3A:11 provide for the withholding or redacting of information for good cause shown. When information is redacted by a party, notice is given to the other party with a reason provided for the redaction. With good cause, a court may enter an order restricting the information. This is a common-sense measure that provides a layer of protection to victims and witnesses who are concerned for their safety.

Counsel for the Virginia State Police argues that these proposed revisions "gamble with witness safety" and "will be counterproductive and ultimately detrimental to Virginia's judicial system."[6] This argument is misguided because it underestimates the ability of prosecutors to

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http://www.washingtonpost.com/opinions/virginia-supreme-court-should-revisit-pretrial-disclosure-rules/2013/01/02/de0368da-552e-11e2-8b9e-dd8773594efc_story.html.

[3] Report of the Special Committee on Criminal Discovery Rules 18 (Dec. 2, 2014).

[4] *Id.*

[5] *Lafler v. Cooper*, 132 S. Ct. 1376, 1381 (2012).

[6] Report of the Special Committee on Criminal Discovery Rules, Minority Comments at 55 (Dec. 2, 2014).

advocate on behalf of the Commonwealth's legitimate interest in protecting the safety of victims and witnesses. A more open criminal discovery process is good for the Commonwealth's criminal justice system, as demonstrated by the broad law enforcement support of the Special Committee's proposals – the Virginia State Police's objections notwithstanding. The Special Committee members who made these recommendations include a senior assistant attorney general, three Commonwealth's attorneys, a police chief, and a sheriff. None of these law enforcement officials would support these proposals if they believed that the Commonwealth they took an oath to protect would be made less safe. The time for a change to Virginia's criminal justice system has come.

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B. Witness lists

The proposed Rule 3A:11(i) would require the Commonwealth to disclose "a written list of names of all witnesses expected to testify at trial" at least seven days before trial. The proposed rule would require the defense to furnish its list to the Commonwealth no later than three days before trial.

More than 20 years ago, the American Bar Association's House of Delegates approved new standards for pretrial criminal discovery rules. In 1996, the ABA's Criminal Justice Standards Committee – comprised of judges, prosecutors, and other criminal justice stakeholders from across the country – published its report.[7] The introduction noted that since the ABA last spoke on the subject, in 1978, "both state and federal criminal justice systems have continued the trend toward imposing expanded pretrial discovery obligations on the prosecution and the defense in criminal cases."[8] The Committee acknowledged the recognition in the states and at the federal level that "expanded pretrial discovery in criminal cases is beneficial to both parties and promotes the fair administration of the criminal justice system."[9]

Among the ABA House of Delegates' submissions is Standard 11-2.1, "Prosecutorial disclosure," which states in relevant part:

> The prosecution should, within a specified and reasonable time prior to trial, disclose to the defense ... the names and addresses of all persons known to have information concerning the offense charged, together with all written statements of any such person that are within the possession or control of the prosecution and that relate to

[7] *ABA Standards for Criminal Justice Discovery and Trial by Jury* (3d ed., 1996), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/discovery_trialbyjury.authcheckdam.pdf.
[8] *Id.* at xv.
[9] *Id.*

> the subject matter of the offense charged. The prosecution should also identify the persons it intends to call as witnesses at trial.[10]

In the federal system, the government is not required to furnish the defense with pretrial witness lists except in capital murder cases.[11] Even 40 years ago, however, the House Committee on the Judiciary acknowledged the desirability of rules requiring pretrial disclosure of witness lists.[12] The Committee noted that as of 1975, some 22 states already required the pretrial disclosure of witness lists. During testimony on proposed amendments to the federal rule, the Committee heard from several United States Attorneys who had already begun disclosing witness lists and found that the practice helped rather than hindered the administration of justice. The Committee suggested that prosecutors who opposed changes to the federal witness list rule reflected "an unwillingness to trust judges to exercise sound judgment in the public interest."[13]

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Like the House Committee on the Judiciary some 40 years ago, the ACLU Foundation of Virginia today supports a criminal discovery rule that requires the pretrial disclosure of witness lists, except in those extreme circumstances when disclosure would place the life or safety of a witness in peril. And we, too, believe that courts can be trusted to decide when a witness's safety is at risk. We therefore endorse the proposed Rule 3A:11(i).

C. The Promulgation of *Brady*

Proposed Rule 3A:11(j) would, for the first time, formally enact the rule of *Brady v. Maryland*[14] into Virginia criminal procedure. More than 50 years ago, the United States Supreme Court held that, as a matter of federal constitutional law, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[15] The proposed rule provides:

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[10] *Id.* at 11. The committee's commentary to the standard makes clear that "the prosecution may move for a protective order" if victim or witness safety is at risk because of the disclosure. *Id.* at 19.

[11] *United States v. Chase*, 372 F.2d 453, 466 (4th Cir. 1967); 18 U.S.C. 3432 (2013) (requiring the disclosure of witness lists in capital cases at least three days before trial, except when the court finds by a preponderance that such disclosure will jeopardize the person's life or safety); *see also* FED. R. CRIM. P. 16.

[12] H.R. REP. NO. 94-247 (1975), *also available at* FED. R. CRIM. P. 16, Notes of Committee on the Judiciary on 1975 amendments (H.R. REP. NO. 94-247).

[13] *Id.*

[14] 373 U.S. 83 (1963).

[15] *Id.* at 87.

> Upon indictment, waiver of indictment, or return of information, or prior to entry of a guilty plea or plea of no contest, whichever first occurs, the attorney for the Commonwealth shall disclose to the defendant all information in his possession, custody or control that tends to negate the guilt of the accused, mitigate the offense charged, or reduce punishment, subject to modification or limitation by the court. Information that tends to impeach the Commonwealth's witnesses shall be produced no later than seven (7) days prior to the date scheduled for trial.

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This proposal is consistent with *Brady* and with adversarial principles. By requiring disclosure of exculpatory evidence upon indictment, waiver of indictment, or before entry of a plea, and by requiring the disclosure of impeachment evidence seven days before trial, the proposed rule provides stronger protection to defendants than offered by current constitutional jurisprudence. As this Court acknowledged just two years ago, "*Brady* is not violated, as a matter of law, when impeachment evidence is made available to a defendant during trial if the defendant has sufficient time to make use of it at trial."[16] Proposed Rule 3A:11(j) would extend Virginia's rules beyond what this Court has held are minimum due process requirements.

Such an extension of the *Brady* requirement is warranted. As Justice Brennan wrote, "The essential purpose of permitting a criminal defendant to engage in pretrial discovery of the prosecution's case is to enhance the truth-finding process so as to minimize the danger that an innocent defendant will be convicted."[17] By making clear that prosecutors must make disclosures of *Brady* evidence before trial, the proposed rule would place appropriate emphasis on the duty of a prosecutor to seek justice, not merely to convict.

In 2009, in response to the Department of Justice's mishandling of the prosecution of the late Senator Ted Stevens, then-Attorney General Eric Holder addressed a group of new federal prosecutors. He said, "Your job as assistant U.S. attorneys is not to convict people. Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing. Anybody who asks you to do something other than that is to be ignored."[18] This advice is consistent with Due Process and Rule 3.8 of the Virginia Rules of Professional Conduct.

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[16] *Commonwealth v. Tuma*, 285 Va. 629, 635 (2013) (internal quotations omitted).

[17] William J. Brennan Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L. Q. 1, 2 (1990).

[18] Nedra Pickler, ASSOC. PRESS, *Holder says justice, not winning, is main thing*, April 9, 2009, http://www.sfgate.com/news/article/Holder-says-justice-not-winning-is-main-thing-3165691.php.

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As the Special Committee debated a new *Brady* rule last year, they solicited the advice of Judge Randy Bellows of the Fairfax Circuit Court. In his astute analysis for the Special Committee, he wrote:

> [I]t ought not be necessary to establish a pattern of withheld evidence to conclude that the rules should be amended to include the fundamental requirement of disclosure of exculpatory and mitigating evidence. Even one defendant deprived of such evidence is one defendant too many. Nor are we required to find a recurring pattern of violations to recommend adding an explicit Brady requirement.[19]

We agree with Judge Bellows. If anything is more disturbing than the acknowledgment of a wrongful murder conviction based on prosecutorial misconduct, it is the realization that there are wrongful convictions based on prosecutorial misconduct that will forever go undiscovered. The proposed rule "will help ensure the fair administration of justice, whether or not it can be proven that a pattern of non-disclosure presently exists."[20] This alone is enough for the Court to adopt proposed Rule 3A:11(j).

II. Additional Proposals

A. Discovery in District Court

Again, the ACLU Foundation of Virginia urges this Court to adopt all of the Special Committee's recommendations. The Special Committee's recommendations focus primarily on reforms at the circuit court level, however. Yet, the justification for these proposed pretrial discovery reforms – such as the disclosure of police reports and witness statements, the exchange of witness lists, and the justice promoting aspects of compliance with the letter and spirit of *Brady* – apply with equal force at the district court level.

In the right to counsel context, the U.S. Constitution makes no distinction between misdemeanors and felonies. The line is drawn, rather, at whether a criminal defendant is facing the possibility of being sentenced to a term of imprisonment.[21] While felony cases by definition have greater potential for longer sentences than misdemeanors, thousands of misdemeanants are incarcerated every year in Virginia.

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[19] Judge Randy I. Bellows, *Alternative Brady Proposal*, Sept. 10, 2014 (included in Appendix to Special Committee's Report).

[20] Judge Randy I. Bellows, *Alternative Brady Proposal*, Sept. 10, 2014 (included in Appendix to Special Committee's Report).

[21] *Scott v. Illinois*, 440 U.S. 367, 374 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

Each of these misdemeanor defendants has the same right to counsel, the same right to due process, and the same rights to confront and compel witnesses as a defendant who faces a felony charge.

By accepting these proposed rules without adopting the same reforms in district court, this Court will set up two separate and unequal systems of justice: one for felonies in circuit court, and another for misdemeanors in district court. Accordingly, the ACLU Foundation of Virginia strongly recommends that the Court apply the Special Committee's recommendations to Rule 7C:5 and Rule 8:15. In the alternative, this Court should simply dispense with the district court rules by applying the new discovery rules to all Commonwealth trial courts. This change would improve the administration of criminal justice in the Commonwealth and avoid the development of separate and unequal justice for misdemeanants.

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