

## The Need for Criminal Discovery Reform in Virginia - Support SB 1563

### *Brady v. Maryland and the Prevalence of Brady Violations in the Criminal Justice System*

In the 1963 case of *Brady v. Maryland*, the Supreme Court ruled that the Constitution requires prosecutors to disclose all exculpatory evidence to criminal defendants. Exculpatory evidence is evidence favorable to the defendant. *Brady* violations are the most prevalent form of prosecutorial misconduct.<sup>1</sup> Prosecutors are placed in the conflicting roles of securing a conviction, while examining evidence from a defense perspective in order to determine what must be turned over to the defense. The best way to enforce the *Brady* decision is through mandatory disclosure of every piece of evidence and information related to a criminal case.

### *Criminal Discovery: The Current Situation in Virginia*

- Discovery in a criminal case is the formal process by which prosecutors and defense attorneys exchange relevant information prior to trial.<sup>2</sup> Open and uniform criminal discovery laws increase fairness and access to justice, save state and attorney resources by limiting discovery disputes, promote efficient case resolution, and reduce the likelihood of wrongful convictions. Virginia's criminal discovery rules are among the most restrictive in the country. Virginia is identified as one of fourteen states that provide criminal defendants with the *least* discovery in the nation.<sup>3</sup>
- Currently, the prosecution is required to provide any statements made by the defendant to law enforcement and any criminal record of the defendant. This information is already available to the defendant since the defendant is the one who made the statement and has knowledge of his or her own criminal record. In Virginia, defendants are not entitled to police reports, witness lists or witness statements.

### *There Exists an Imbalance in How Jurisdictions Handle Pretrial Disclosure of Information*

Many Virginia jurisdictions have recognized that the current discovery system does not provide for the most effective and efficient method of achieving justice. As a result, those jurisdictions have chosen to provide more expansive discovery than what is provided under the current Rule 3A:11. However, by providing for more expansive discovery at their own discretion, those jurisdictions have created another type of imbalance where the rules are inconsistent across the Commonwealth. Inconsistent discovery practices can lead to fundamental and systemic inequality and inequity. The criminal justice system works best when the defense is aware of the evidence prior to trial; the sharing of information leads to more prepared defense attorneys who can better advise their clients and work to achieve the goals of our justice system.

### *Highlights from Virginia Supreme Court's Special Committee on Discovery Rules*

- Recommendations included in the report of the Special Committee on Criminal Discovery Rules would allow the defense to inspect "all relevant police reports," including "any formal, written report of investigation by any law enforcement officer" and "reports of interviews of witnesses."<sup>4</sup>
- The recommendations would've required the Commonwealth to disclose a written list of names of all witnesses expected to testify at trial at least seven days before trial. The defense would also be required to disclose its list of witnesses to the Commonwealth no later than three days before trial.
- The proposed rule changes provided several mechanisms for the protection of sensitive information so that witnesses and victims would be ensured that they may safely come forward without the threat of retribution or harm. Jurisdictions in Virginia that already provide open file discovery continue to prosecute criminal cases effectively without an epidemic of witness tampering.

### *The Need for Reform*

- Virginia's current discovery rules fall short of what is desirable and adequate for due process and fair trials and as a result, the lack of transparency in the current system has led to several miscarriages of justice. For example: In 2013, David Boyce was exonerated after serving 23 years in prison after being wrongfully convicted of capital murder and robbery in Virginia, as a result of a number of *Brady* violations, including a crucial piece of evidence in Boyce's favor withheld from his defense attorney.<sup>5</sup> In 2016, Keith Allen Harward was exonerated after serving

<sup>1</sup> Klinkosum, Mike. Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution's Files. The Champion Magazine, May 2013.

<sup>2</sup> Improving Discovery in Criminal Cases in Texas: How Best Practices Contribute to Greater Justice (2013).

<sup>3</sup> The Legal Aid Society of New York State, 2013 Discovery Reform Proposal.

<sup>4</sup> Report of the Special Committee on Criminal Discovery Rules (March 3, 2015).

<sup>5</sup> Dujardin, Peter. "After 23 years behind bars, David Boyce walks out of jail on bond." Daily Press. April 26, 2013.

33 years in prison for a murder and rape in Newport News, Virginia, as a result of “critical exculpatory and impeachment evidence” being withheld that proved that Harward’s blood type did not match blood recovered from the crime scene.<sup>6</sup>

- The reforms included in **SB 1563** reflect the recommendations of the Virginia Supreme Court Special Committee on Criminal Discovery Rules. As passed the Senate, **SB 1563** includes the following reforms:
  - Requires the attorney for the Commonwealth (upon written notice by an accused to the court and to the attorney for the Commonwealth) to permit the accused to inspect, copy, or photograph:
    - any relevant written or recorded statements or confessions made by the accused or any *codefendant*, or the substance of any oral statements or confessions made by the accused or any *codefendant*;
    - *any* books, papers, documents, tangible objects or buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth;
    - all relevant police reports; and
    - all relevant statements of any non-expert witness whom the Commonwealth is required to designate on a witness list.
  - Written list of names and addresses, if available, of all witnesses expected to testify at trial.
  - Provide its expert witness disclosure no later than 14 days before trial.
  - The Commonwealth may withhold or redact any personally identifying information to protect the security of a witness. *This includes limiting disclosure to defense counsel only.*
- **SB 1563** also provides for reciprocal discovery requirements for the defense. It requires:
  - Any written reports of autopsy examinations, ballistic tests, fingerprint, blood, urine, and breath analyses, and other scientific test that may be within the accused’s possession, custody, or control and that the accused intends to proffer or introduce into evidence at the trial or sentencing; notice if the defense intends to introduce evidence to establish an alibi; any written reports of physical or mental examination of the accused made in connection with the case if the accused intends to rely upon an insanity defense; all relevant statements of any non-expert witness whom the defense designated on a witness list; and provide its expert witness disclosure no later than seven days before trial.
  - Written list of names and addresses, if available, of all witnesses expected to testify at trial.

**The National Association of Criminal Defense Lawyers (NACDL) encourages the support and passage of SB 1563!**

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<sup>6</sup> Green, Frank. “Blood-typing error alleged to have contributed to wrongful murder, rape convictions.” Richmond Times Dispatch. April 6, 2016.