



March 11, 2019

VIA EMAIL AND FIRST CLASS MAIL

scvclerk@vacourts.gov

Chief Justice Donald W. Lemons

Supreme Court of Virginia

100 North Ninth Street

5th Floor

Richmond, VA 23219

Dear Chief Justice Lemons,

We write on behalf of the National Association of Criminal Defense Lawyers (“NACDL”) and the Virginia Association of Criminal Defense Lawyers (“VACDL”) regarding the Supreme Court of Virginia’s decision to delay the effective date of the new criminal discovery rules until July 1, 2020.

The changes recommended and initially set for a July 1, 2019 implementation would bring Virginia closer to practices in the vast majority of states when it comes to providing the defense with the most basic information regarding the nature of the evidence the government will use to prosecute the accused. Regrettably, while the new rules are delayed for another year, Virginia continues to be an outlier with one of the most restrictive discovery rules in the country and those accused of a crime in the Commonwealth continue to be denied what is needed to receive a fair trial. Nearly all states provide for the exchange of witness lists and the provisions of witness statements, and well over half require notice of expected expert testimony and the production of law enforcement reports. Several states are going even further, requiring prosecutors to disclose the entire contents of their file at the outset of the case.

After submission by the Virginia State Bar’s Criminal Discovery Reform Task Force (“VSB Task Force”), the proposed rule was considered in an open and transparent process, which included public input. During the comment period, a host of politically diverse state and national criminal justice and victims’ rights organizations, as well as individuals, expressed their support for the new rules. In spite of this public engagement about the proposed rule and the necessity for changes to Virginia’s discovery practices, the same level of transparency and openness did not attend the

decision to delay the Rules' effective date. Despite the Court's public statements that "[r]eform of criminal discovery rules is long overdue," its private communications with the chairs of the General Assembly's Finance and Appropriations Committee undermine that sentiment.

Discovery reform and the implementation of the new rules appear to have become wrongly entangled in the ongoing conversation concerning the increased use of body-worn cameras and the potential workload impact as prosecutors review the resulting footage. However, there is no indication the new discovery rules will unduly burden prosecutors or impact their review of body-worn camera footage. As the Court acknowledges, the requirement of prosecutors to disclose potentially exculpatory evidence in the possession of the Commonwealth, including body camera footage, exists independent of the criminal discovery rules. Moreover, language recently adopted by legislators in the state's revised budget mandates that localities fund at least one prosecutor position for every 75 body-worn cameras deployed by their police departments, easing any workload issues caused by review of body-worn camera footage.

Recent concerns from the Court and legislature about implementation costs, whether arising from body-worn camera responsibilities or discovery duties, have wrongly overshadowed the direct and indirect savings and other benefits that will flow from these new procedures. In delaying the new rules, inadequate weight has been given to the fact that increased information will facilitate fairer case outcomes, avoiding unnecessary litigation and incarceration costs; reduce the risk of wrongful convictions; and enhance public confidence in the integrity of the Commonwealth's criminal justice system.

Concerns that the new rules are "far-reaching," impacting the operation of the offices of Commonwealth Attorney's and victim and witness safety¹, were considered and addressed during the promulgation and public comment periods. The proposed rules include substantive protections that would allow restrictions on access to the information being disclosed and call for the use of protective orders in any instances in which there are specific concerns for victims and witnesses. The current rules provide *no such* formalized protections. The patchwork way in which discovery is currently provided in the Commonwealth can leave victims and witnesses with greater exposure and fewer enforceable mechanisms to maintain their safety. A study comparing discovery practices in Virginia and North Carolina establishes that the dramatic cries of witness intimidation associated with additional discovery requirements are unsupported.²

The benefits of the proposed reforms would extend beyond the defense and the accused, positively impacting the prosecution and the entire judicial system. As noted in a recent op-ed by Texas prosecutors in support of New York discovery reform: "Open and transparent discovery is in the interest of the entire criminal justice community, from the prosecutors and police to the accused."³

¹ Weiner, Rachael and Vozzella, Laura. (Jan. 29, 2019). Criminal discovery reforms delayed in Virginia; police body cameras blamed. The Washington Post. Available at: https://www.washingtonpost.com/local/legal-issues/criminal-discovery-reforms-delayed-in-virginia-police-body-cameras-blamed/2019/01/29/13ed2882-23f5-11e9-ad53-824486280311_story.html?utm_term=.c38b2869e9ce

² Jenia Turner & Allison Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 Wash. & Lee L. Rev. 285 (2016).

³ Rubio, Julia and Garza, Linda. (Feb. 11, 2019). Texas Prosecutor Calls for Discovery Reform in NY State. New York Law Journal. Available at: <https://www.law.com/newyorklawjournal/2019/02/11/open-discovery-benefits-police-and-prosecutors-too/>.

In 2014, Texas passed open file discovery legislation, and the authors observe that after five years, there hasn't been any increased security concern for witnesses or victims.⁴ In both Texas and North Carolina, prosecutors have witnessed that more open discovery practices bring about speedier and fairer dispositions of cases, reducing the burden on taxpayers.

Virginia has been in a "wait and see" posture concerning discovery and criminal justice reform for far too long, eroding public confidence in its criminal legal system. Every day those who stand accused of a crime are denied the most basic information. For the thousands of Virginians who will face a felony prosecution in the coming year, justice delayed will be justice denied.

Therefore, we urge the Supreme Court to reconsider its decision to delay the effective date of the new criminal discovery rules.

Respectfully submitted,

Drew Findling, President
National Association of Criminal Defense Lawyers

Glen Franklin Koontz, President
Virginia Association of Criminal Defense Lawyers

⁴ *Id.*