May 31, 2018

VIA EMAIL AND FIRST CLASS MAIL
scvclerk@vacourts.gov
Patricia L. Harrington, Clerk
Supreme Court of Virginia
100 North Ninth Street
5th Floor
Richmond, VA 23219

Re: Comments on the Proposed Revisions to Rules 3A:11 and 3A:12 Received from the Virginia State Bar Criminal Discovery Reform Task Force

Dear Ms. Harrington,

I write on behalf of the National Association of Criminal Defense Lawyers ("NACDL") to provide NACDL's comments on the revisions to Rules 3A:11 and 3A:12 proposed by the Virginia State Bar's Criminal Discovery Reform Task Force ("VSB Task Force").

NACDL has worked extensively on criminal discovery reform initiatives at both the state and federal level. It is with this experience and perspective that we commend the members of the VSB Task Force for their efforts and urge the Virginia Supreme Court to adopt the proposed revisions. While not perfect, the proposed rule changes will provide greater access to basic information necessary for an effective defense without compromising public safety or imposing an undue fiscal burden on the Commonwealth of Virginia. Moreover, empirical evidence establishes that increased access to discovery by the defense is workable and promotes efficiency and fairness in the criminal justice system.

NACDL's Commitment to Fairness in the Context of Criminal Discovery

NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crimes or other misconduct and to promote the proper and fair administration of justice. A professional bar association founded in 1958,

NACDL's many thousands of direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current criminal justice system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

NACDL's representation of the defense perspective in the courts is unparalleled. NACDL files 60-70 amicus briefs every year, in courts ranging from the U.S. Supreme Court to federal circuit courts of appeals and state high courts and appellate courts. In the U.S. Supreme Court, NACDL is the most cited and, according to the leading Supreme Court blog, most effective amicus. Also a respected voice in the U.S. Judiciary Conference's rulemaking process, NACDL regularly files comments on proposed rule changes relevant to criminal proceedings.

NACDL has long been active in the area of criminal discovery reform. In 2014, NACDL developed a model open-file discovery law. Designed to promote fairness and informed decision-making, the model legislation calls for production immediately after arraignment and prior to entry of any guilty plea of all information generated during the investigation of a charged offense. This model law is the product of NACDL's extensive research, discussion, and revision and draws from best-practice provisions around the country.

That same year, in partnership with the Veritas Institute, NACDL undertook an unprecedented study of *Brady* cases litigated in the federal courts over a 5-year period. The resulting report, *Material Indifference: How Courts are Impeding Fair Disclosure in Criminal Cases* (*"Material Indifference study"*), documents the failure to ensure full, fair and timely disclosure of information favorable to the accused in courtrooms across the nation. Key findings in the report, include:

- The materiality standard produces arbitrary results and overwhelmingly favors the prosecution. Even in circumstances where the favorable information was withheld in remarkably similar factual situations, the courts' outcomes on the question of materiality were different. Moreover, in only 14 percent of the cases did the court deem the undisclosed favorable information material and find that a *Brady* violation occurred.

- Late disclosure of favorable information is almost never found to be a *Brady* violation. The study included 65 cases in which the prosecution disclosed favorable information late, and in only one

case did the court hold that the prosecution's late disclosure violated *Brady*.

- The prosecution almost always wins when it withholds favorable information. In 90 percent of the decisions in which the prosecution withheld favorable information – either disclosed it late or not at all – the defense lost the case. Meanwhile, the courts held that the prosecution's withholding of the favorable information violated *Brady* in just 10 percent of these decisions.

As the authors noted, the study "provides empirical support for the conclusion that the manner in which courts review *Brady* claims has the result, intentional or not, of discouraging disclosure of favorable information." *See Material Indifference* study at xii. Copies of the complete report, executive summary, and corresponding fact sheet are available at www.nacdl.org/discoveryreform/materialindifference.

The Need for the Revisions to Rules 3A:11 and 3A:12

NACDL's efforts to bring about criminal discovery reform are not academic. The organization's members – private criminal defense attorneys, public defenders, active U.S. military defense counsel, law professors and judges – have experienced firsthand the damage done when the government fails to timely meet its discovery obligations. As defense attorneys, our members carry a heavy responsibility to see that the accused in every criminal case has meaningful representation so that he or she can put the government to its burden, consistent with the rights guaranteed by the United States Constitution. That job is made more difficult, if not impossible, when the defense does not have access to the basic relevant information in the government's files, such as police reports and witness lists. Nor should a defense attorney's ability to effectively defend his or her client depend on which city or county they are in and whether the Commonwealth Attorney's Office for that particular jurisdiction does or does not have an "open file" discovery policy or practice.

Virginia is an outlier in this area. Under the current rules, criminal trials in Virginia amount to trials by ambush. The modest changes the VSB Task Force has recommended – including a requirement that the prosecutor provide access to police investigative reports, witness statements, witness lists, and notice of expected expert testimony – are entirely uncontroversial and are simply provided as a matter of course in many other jurisdictions. Nearly all states provide for the exchange of witness lists and the provision of witness statements, and well over half require notice of expected expert testimony and the production of law enforcement reports. In contrast, in Virginia the defense receives none of this information unless the Commonwealth Attorney's Office on an ad hoc basis decides to provide it.

Access to this information about the nature of the charges and the evidence against the accused is crucial to the defense attorney's ability to zealously represent their client. Requiring access to law enforcement reports and witness statements, for example, informs the attorney about the nature and strength of the government's case and enables them to intelligently advise their client regarding the feasibility of trial. This information also allows the attorney to understand where they might find additional information that can aid their client's defense. Moreover, understanding the prosecutor's evidence better enables the defense attorney to recognize government oversights, mistakes, or misconduct. Finally, receiving witness lists and notice of expert testimony will ensure that they can adequately prepare for trial.

The benefits of these reforms are not limited to the defense, however. The prosecution and the entire judicial system benefit, as well. For example, when the defense has an informed understanding of the charges and the evidence, plea discussions are more efficient and meaningful. And, because the revisions to the rules would require that the defense also provide its witness lists prior to trial, the prosecution can also be more prepared. These proposed revisions will reduce disparities between jurisdictions and prevent inadvertent failures to provide exculpatory evidence. All of this adds up to a stronger, more legitimate, and effective criminal justice system that better serves the public.

Empirical Evidence Strongly Suggests That These Reforms Will Not Pose Risks to the Public or Impose Undue Burdens on the Government

The systemic improvements that come from these reforms do not come at the price of victim and witness safety. The proposed rule includes substantive protections that 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 lesser formalized and enforceable mechanisms to maintain their safety. At the same time the rules provide a much-needed balance, by also protecting the rights and needs of the accused and bringing more confidence that case results are the product of fair, well-reasoned, and fully informed decisions by all those involved.

Concerns regarding the additional costs for increased disclosure are minimized by the fact that the primary documents at issue, police reports, are not being copied, but rather being made available for inspection—thereby reducing the direct burden being placed on prosecutors to make additional copies and retractions to the documents. It is important when considering both of these concerns, that a significant number of the 126 Commonwealth Attorney Offices in Virginia provide some type of open-file discovery. If the practice were one that cost significant

resources or created significant risks to victims and witnesses, it would be highly unlikely that any Commonwealth Attorney's Office would engage in the practice. This is further corroborated by the fact that the overwhelming majority of states routinely disclose information such as police reports, witness statements and witness lists, with none of those states acting to rescind these practices because of issues of witness endangerment or excessive costs.

Empirical evidence from within and outside of Virginia strongly suggests that open-file discovery – which goes farther than anything found in the recommended changes under consideration – works well and that prosecutors in jurisdictions with open-file discovery are satisfied with the practice of open-file discovery and believe in its benefits. A recent study comparing discovery practices in Virginia and North Carolina establishes that the dramatic cries of witness intimidation and unmanageable expense associated with additional discovery requirements are unsupported.[1] In the study, Professors Turner and Redlich compared the open-file discovery practices in North Carolina with the restrictive practices in Virginia. They noted that *ninety percent* of the prosecutors in North Carolina were satisfied with the open-file system and that the system's benefits included increased efficiency, more protection against violations of the prosecutor's obligations to produce exculpatory evidence, and increased fairness and trust in the criminal justice process.[2]

Remarkably, the study also found that the majority of Virginia prosecutors provide more discovery to the defense than the current rules require and that those prosecutors saw the same benefits as did the prosecutors in North Carolina.[3] The professors concluded that:

> Open-file discovery can promote more informed guilty pleas. It leads to improved pre-plea disclosure of most categories of evidence. The practice is also viewed as more efficient in that it reduces discovery disputes and speeds up case dispositions. We also found little evidence that open-file discovery endangers the safety of witnesses, a common argument against the practice.[4]

With the degree of information being made available being driven largely by the place of one's prosecution, the feeling of systemic unfairness is magnified by

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

[2] *Id*. at 354.

[3] *Id*. at 352-53, 356.

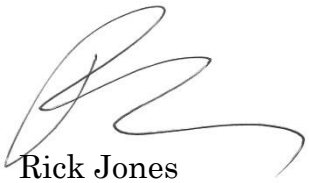
[4] *Id*. at 286.

current practices of the Commonwealth. Inconsistency vests disproportionate power in the prosecutor and creates opportunities for improper leverage and appearances of favoritism. If the promise of "equal justice under the law" etched in stone above the United State Supreme Court entrance is to have any meaning then all those facing criminal charges in the Commonwealth must have equal access to the basic tools for an adequate defense regardless of the place of their arrest or the person who is representing them.

NACDL Urges the Court to Adopt the Revisions to Rules 3A:11 and 3A:12

The changes recommended by the Task Force 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. These modest changes are long overdue – in fact, we note that this is the third statewide task force to recommend these types of changes to Virginia's rules. Our adversarial system of justice requires advocates on both sides to be competent and prepared. Currently, in too many cases in Virginia, the defense goes in to the fight with its arms tied behind its back, while the prosecutor is well-armed and prepared. It is time to remedy this lop-sided, trial-by-ambush system. The proposed changes do not level the playing field, but they are a significant step in fostering the fair administration of justice. We urge the Supreme Court to adopt the recommended rule revisions.

Respectfully submitted,



Rick Jones
President