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A CALL FOR JUSTICE: VIRGINIA'S NEED FOR CRIMINAL
DISCOVERY REFORM

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247

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I. CURRENT VIRGINIA CRIMINAL DISCOVERY RULES ARE OUTDATED AND DANGEROUS

In order for the promise of a strong and reliable criminal justice system to work properly in Virginia, there must be strong and prepared advocates on both sides of the process. The current process of discovery for criminal cases in Virginia fosters a culture of secrecy and unpreparedness that should not be tolerated in a system that has such power over the lives of every person in this state.¹ It is far past the time for Virginia to move forward on criminal discovery reform. The current rules for criminal discovery in Virginia were first adopted in 1972.² The rules do not require pretrial disclosure of witness statements, a list of witnesses, or police investigative reports.³ Over the past forty-four years, we have learned a great deal about the way our justice system falls short. DNA exonerations and wrongful convictions have demonstrated that mistakes happen more often than anyone would like to believe. The criminal justice system is not infallible but instead just as human as its creators. Our society has learned that there must be an appropriate counterweight to governmental power.

Rather than acknowledge the important role that a vigorous and prepared defense plays in our justice system, Virginia has allowed its system of trial by ambush to continue.⁴ The effect of Virginia's closed discovery system is exacerbated by the difficulty in obtaining defense investigative resources for indigent defendants. Virginia law only provides for the provision of ex parte expert requests in death penalty cases.⁵ Accordingly, in order to obtain funds for investigative assistance in a non-death penalty case, an indigent defendant must justify in open court a particularized need for investigative funds.⁶ This can be a difficult and strategically damaging path to obtain funding. Without knowledge of the particulars of the prosecution's case, a defendant would have a difficult time articulating the particularized need.⁷ Further, in order to show that particularized need, the defendant

¹ The rules for criminal discovery in the circuit courts of Virginia are codified at Rule 3A:11 of the Rules of the Virginia Supreme Court. VA. SUP. CT. R. 3A:11.

² See *Bellfield v. Commonwealth*, 208 S.E.2d 771, 773 (1974).

³ VA. SUP. CT. R. 3A:11.

⁴ SPECIAL COMM. ON CRIMINAL DISCOVERY RULES, REPORT TO THE SUPREME COURT OF VA.: CHAIRMAN'S INTRODUCTION (2014) available at http://www.courts.state.va.us/news/items/2015_0303_scv_press_release_comments_proposed_amendments.pdf [Hereinafter Special Committee's Report].

⁵ VA. CODE ANN. § 19.2-264.3:1.3.

⁶ See *Husske v. Commonwealth*, 476 S.E.2d 920, 921 (1996) (holding that defendant must show a particularized need in order to receive funding to appoint an expert witness at the Commonwealth's expense).

⁷ See *Barksdale v. Commonwealth*, 522 S.E.2d 388, 390 (1999) (holding that the record did not establish

would have to divulge in open court his or her investigative strategy thus giving the prosecution and any witnesses advance notice of the defense's strategy. One of the problems with Virginia's "trial by ambush" system is that neither side wants to be the only one to give up the advantage of secrecy. The difficulty of obtaining investigative resources coupled with a restrictive discovery system mandated by the rules combine for a toxic blend of ill prepared defense lawyers and inability to review for prosecutorial mistakes. This toxic blend is not merely theoretical. Virginia has already experienced the shame of wrongful convictions that were tainted by the failure of prosecutors and law enforcement to disclose exculpatory information, and the revelations just keep coming.⁸ Without steps to correct this problem, Virginia is likely going to follow the path of Texas and North Carolina who were forced to overhaul and expand their criminal discovery rules after headline grabbing scandals which damaged the public's trust in the criminal justice system.⁹

II. VIRGINIA'S SPECIAL COMMITTEE ON CRIMINAL DISCOVERY PROPOSED A BETTER SYSTEM

In response to recent calls for reform of the criminal discovery rules in Virginia, the Virginia Supreme Court established a Special Committee on Criminal Discovery [hereinafter Special Committee] to examine the criminal discovery rules and advise the court of any changes that might be recommended.¹⁰ The Chief Justice assembled a group of distinguished and

a particularized need and the defendant merely hoped the record would promote his defense).

⁸ Virginia has experienced several exonerations of people who were convicted of murder only to have been discovered to be factually innocent years and sometimes decades after their convictions. The exoneration of Keith Allen Harward unfolded during the writing of this piece. See *Michael Hash*, THE MIDATLANTIC INNOCENCE PROJECT, <http://www.exonerate.org/maip-victories/michael-hash/> (last visited Apr. 12, 2016) (documenting the wrongful conviction of Michael Wayne Hash due to law enforcement and prosecutorial misconduct); *David Boyce*, THE NATIONAL REGISTRY OF EXONERATIONS, Jan. 13, 2016, <https://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4279> (documenting the wrongful conviction of David Boyce due to the failure to provide exculpatory information); *After more than 30 years, Virginia to release wrongly convicted man*, USA TODAY, Apr. 8, 2016, <http://www.usatoday.com/story/news/nation/2016/04/08/virginia-wrongly-convicted-man-release/82781344/> (stating that Keith Allen Harward was recently released after 33 years of incarceration).

⁹ See Robert P. Mosteller, *Exculpatory Evidence, Ethics and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 272 (2008) (discussing how the wrongful conviction of Alan Gell led to the creation of open-file discovery in North Carolina); Texas Defender Service, *TOWARDS MORE TRANSPARENT JUSTICE: THE MICHAEL MORTON ACT'S FIRST YEAR II (2015)* available at http://texasdefender.org/wp-content/uploads/Towards_More_Transparent_Justice.pdf (discussing how a series of wrongful conviction led to the creation of new rules for open-file discovery).

¹⁰ Special Committee's Report, *supra* note 4.

experienced players in the criminal justice system in the Virginia.¹¹ The Special Committee included prosecutors, judges, professors, defense attorneys, law enforcement, victim advocates and administrative officers.¹² After a full year of study and deliberations, the Special Committee presented its proposals to the Virginia Supreme Court.¹³

The Special Committee concluded that a thorough overhaul of the criminal discovery rules is necessary in order to ensure justice and fairness in Virginia.¹⁴ Specifically, the Special Committee promulgated a new set of rules that provided broad reciprocal discovery including the pretrial provision of witness lists, witness statements, and police investigative reports.¹⁵ The proposed rules included advance notice of expert witness testimony and a requirement that prosecutors certify compliance with the requirements of *Brady v. Maryland*¹⁶ by providing exculpatory material prior to the taking of a guilty plea. The Special Committee's proposal contained robust reciprocity requirements so that both the prosecution and defense would be better prepared.¹⁷ The proposed rules also provided several mechanisms for the protection of sensitive information so that witnesses and victims would be ensured that they could safely come forward without the threat of retribution or harm.¹⁸

After the Special Committee's recommendations were presented for public comment, the response was predictable and unfortunately consistent with the reception of prior proposals to expand criminal discovery. The defense bar was strongly in favor of the proposed rule changes and the prosecution bar was strongly opposed.¹⁹ The Virginia Supreme Court then summarily and without explanation dismissed the proposed rules.²⁰

¹¹ Press Release, Supreme Court of Virginia, Comments of Chief Justice Donald W. Lemons upon Release of the Report of Special Committee on Criminal Discovery Rules (Mar. 3, 2015).

¹² Special Committee's Report, *supra* note 4, at ix–xi.

¹³ Special Committee's Report, *supra* note 4.

¹⁴ Special Committee's Report, *supra* note 4, at iii.

¹⁵ Special Committee's Report, *supra* note 4, at 17–33.

¹⁶ *Brady v. Maryland* 373 U.S. 83 (1963).

¹⁷ See generally Special Committee's Report, *supra* note 4, at 17–33 (discussing proposed amendments of rules and statutes).

¹⁸ Special Committee's Report, *supra* note 4, at 17–33.

¹⁹ Peter Vieth, *Prosecutors on rule changes: There is no 'trial by ambush'*, VA. LAWYERS WEEKLY, July 10, 2015, <http://valawyersweekly.com/2015/07/10/prosecutors-on-rule-changes-there-is-no-trial-by-ambush/>.

²⁰ Frank Green, *Justices reject recommendations on pretrial discovery in criminal cases*, Richmond Times-Dispatch, Nov. 26, 2015, http://www.richmond.com/news/article_a7518ce0-3e7c-5696-8cc2-0dda708dd9b1.html.

III. EXPANDED DISCOVERY IS PROVEN TO WORK BETTER

Much of the opposition against expanding criminal discovery obligations comes from a fear of the unknown and demagoguery of the effective role of transparency in the criminal justice system. One prominent Virginia prosecutor explained to a federal court that his office did not provide open-file discovery because it would allow a defense attorney to “fabricate” a defense for their clients.²¹ Further, this same prosecutor also explained that he only provided exculpatory evidence to a criminal defendant if he deemed it reliable and material.²² Others have warned of increased dangers to witnesses and victims of crime and reluctance to report crime.²³

Recent scholarship has shown that the reasons to oppose expanded discovery are baseless and should not prevent Virginia from moving forward.²⁴ Professors Turner and Redlich in a ground breaking study compared the discovery experiences of criminal law practitioners, both prosecution and defense, in Virginia and North Carolina.²⁵ In stark contrast to Virginia’s restrictive discovery practices, North Carolina has an open file discovery policy that mandates open access for the defense to the prosecution’s investigative file.²⁶ North Carolina’s discovery rules were overhauled and expanded in response to the wrongful conviction of death row inmate Alan Gell, after it was determined that the prosecution had withheld exculpatory evidence.²⁷ The study’s authors examined the experience of these two states to provide empirical evidence about the benefits of one system versus the other.²⁸ Their findings led them to conclude:

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

²¹ Wolfe v. Clark, 691 F.3d 410, 423 (4th Cir. 2012).

²² *Id.* (holding that the prosecution had wrongfully withheld exculpatory evidence and overturned the defendant’s conviction and death sentence).

²³ Special Committee’s Report, *supra* note 4, at 55–57.

²⁴ Jenia Turner & Allison Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 0000 (2016).

²⁵ *Id.*

²⁶ *Id.* at 9–10.

²⁷ See Mosteller, *supra* note 9. Ultimately the overhaul of the North Carolina discovery rules also led to the prevention of wrongful convictions in the infamous Duke Lacrosse case since now disbarred District Attorney Mike Nifong was required to comply with the open-file discovery process. This process ultimately allowed the defense to uncover the prosecutorial and law enforcement misconduct that unraveled the prosecutions. *Id.*

²⁸ Turner & Redlich, *supra* note 24.

case dispositions. We also found little evidence that open-file discovery endangers the safety of witnesses, a common argument against the practice.²⁹

The authors reach the conclusion that an open-file system is a better guarantor of informed decisions and a more efficient process.³⁰

Turner and Redlich's study found that ninety percent of North Carolina prosecutors were satisfied with open-file discovery³¹ and zero percent of respondents felt that open-file discovery had no advantages.³² The most common benefit mentioned by North Carolina prosecutors was increased efficiency.³³ The remaining benefits cited included protection against inadvertent nondisclosure of exculpatory evidence, facilitating guilty pleas, and promoting fairness and trust.³⁴

Interestingly, the study also found that the majority of Virginia prosecutors provide more expansive discovery than is currently required under the rules.³⁵ Those prosecutors identified the same benefits of efficiency and fairness as North Carolina prosecutors as reasons why they provided increased discovery.³⁶ The fact that many Virginia prosecutors already recognize the benefit of expanded discovery undercuts any arguments that expansion of the rules would be dangerous or counterproductive. Those prosecutors would have no incentive to provide more expansive discovery if it only resulted in the risk of harm to the public. Instead many Virginia prosecutors recognize that open-file discovery promotes speedy and efficient resolutions of cases; it protects prosecutors from accusations of withholding exculpatory evidence; and it promotes fairness and trust in the proceedings.³⁷ If opponents of open-file discovery truly believe that providing expanded discovery is dangerous then for the protection of the people of Virginia they should be moving to ban the practice from the many Virginia jurisdictions that already provide it.

Empirical evidence shows that open-file discovery is not a dangerous practice but a useful and efficient one.³⁸ In the Turner and Redlich survey, only ten percent of North Carolina prosecutors felt that witness intimidation

²⁹ Turner & Redlich, *supra* note 24.

³⁰ Turner & Redlich, *supra* note 24.

³¹ Turner & Redlich, *supra* note 24, at 71.

³² Turner & Redlich, *supra* note 24, at 72.

³³ Turner & Redlich, *supra* note 24, at 73.

³⁴ Turner & Redlich, *supra* note 24, at 73.

³⁵ Turner & Redlich, *supra* note 24, at 42.

³⁶ Turner & Redlich, *supra* note 24, at 73.

³⁷ Turner & Redlich, *supra* note 24, at 73.

³⁸ Turner & Redlich, *supra* note 24, at 78, n.301.

was a disadvantage of open-file discovery.³⁹ And overall ninety percent of North Carolina prosecutors believe that open-file discovery is beneficial.⁴⁰ Many Virginia prosecutors agree since it appears that a majority of prosecutors in Virginia provide more expansive discovery than is permitted under the current rules.

However, prosecutors in more open jurisdictions have created another problem for Virginia. By providing for more expansive discovery at their own discretion, many Virginia prosecutors have created a system where the rules are inconsistent and subject to favoritism. Because the power to provide expanded discovery is vested in the prosecution, and it is not uniform or guaranteed by right, the prosecutor has disproportionate power and improper leverage over the defense.⁴¹ The same prosecutor may use different discovery practices for different attorneys or different defendants for any reason or no reason at all. A prosecutor may choose to provide more expansive discovery to a favored defense attorney while punishing the accused who has an attorney that is less appreciated.

It is fundamentally unfair for a defendant charged with a crime in an open-file jurisdiction to receive complete pretrial disclosure of all evidence while an accused charged with the exact same crime in a neighboring jurisdiction would receive only the very sparse information currently allowed under the rules. The entrance to the United States Supreme Court building famously has the inscription "Equal Justice Under Law" and uniformity has long been an aspiration of the criminal justice system, and a necessity for the fair and just administration of justice.⁴² The current discovery rules undermine that ambition on a daily basis. There is no rational reason why a defendant should have more knowledgeable and prepared counsel in the City of Richmond than in Prince William County. Virginia's criminal justice system is important to everyone in the state and inequities are a state-wide problem.

³⁹ Turner & Redlich, *supra* note 24, at 76.

⁴⁰ Turner & Redlich, *supra* note 24, at 71.

⁴¹ Turner & Redlich, *supra* note 24, at 25; Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L. J. 1179, 1229 (1975) (discussing how defense attorneys become beholden to prosecutors because of restrictive discovery rules).

⁴² See generally Brevard E. Chrihfield & Mitchell Wendell, *Crime Control and Uniformity of Criminal Laws*, 42 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 571 (1951-1952).

IV. EXPANDED DISCOVERY WILL ENSURE A MORE JUST FUTURE FOR VIRGINIA

The discovery rules suggested by the Virginia Supreme Court's Special Committee are a thoughtful and well-balanced proposal for the betterment of the entire justice system. They contain robust reciprocity requirements so that both the prosecution and defense will be better prepared. The proposed rules provide several mechanisms for the protection of sensitive information so that witnesses and victims will be ensured that they may safely come forward without the threat of retribution or harm. Most importantly, the proposed rules provide for transparency and accountability so that the public can be assured that our system is performing properly.

It is time for Virginia to be honest about criminal discovery. Virginia has arguably the most restrictive and least informative criminal discovery rules of any jurisdiction in the United States of America. Virginia must learn from the examples of Texas and North Carolina where it was only after embarrassment and injustice that the discovery process was improved.⁴³ Virginia should not require a scandal and loss of public trust in the justice system before deciding that reform is a worthwhile endeavor. More effective discovery should not be held captive by the few who wish to cry that the sky is falling because of the perceived threat of expanded discovery. Those naysayers are ignoring the successful experience of many jurisdictions in Virginia and around the country that have implemented open-file discovery. Witnesses still come forward, massive witness tampering does not ensue and the guilty are still convicted in similar numbers with open-file discovery rules. The benefits are too great to be ignored. When the defense is given the opportunity to review evidence before trial, there is a decreased risk of convictions being overturned years later for the failure of the prosecution to provide exculpatory information, whether unintentionally or not. Trust in the system will increase and when both sides are more informed about the evidence in the case in advance of trial, it encourages knowledgeable and intelligent resolutions, which save time and resources.

If we are being honest, then we must realize that the opposition against implementing the Special Committee's proposed rules is not about danger to the public or decreased efficiency. Instead the real fear of these opponents is that with expanded discovery and the ability to be prepared before trial, an accused in Virginia may be the beneficiary of too much justice.⁴⁴

⁴³ See Mosteller, *supra* note 9; Texas Defender Service, *supra* note 9.

⁴⁴ *McClesky v. Kemp*, 481 U.S. 279, 339 (Brennan, J., dissenting) ("Taken on its face, such a statement

2016]	VIRGINIA'S NEED FOR CRIMINAL DISCOVERY REFORM	255
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seems to suggest a fear of too much justice.”).

