2017 Convention
Champions for Justice

Criminal Law Section Luncheon
The Current State of Discovery in Virginia vs. The Intractable John L. Brady

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"The Current State of Discovery in Virginia vs. The Intractable John L. Brady"

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I. CURRENT STATE OF DISCOVERY

A. "Discovery" and "exculpatory evidence" are different – although the courts continue to blur the distinction.

B. No *constitutional* right to discovery other than what is exculpatory.

1. Clagett v. Commonwealth, 252 Va. 79 (1996)

   "At the suppression hearing, the arresting officer was permitted, without objection, to refresh her memory by examining an investigation memorandum prepared following the arrest. During cross-examination, it was determined that the officer prepared this memorandum using handwritten notes taken at the time of Clagett's arrest. Clagett then requested that these notes be produced for his examination. At the request of the trial court, the officer retrieved her notes which were examined by the Commonwealth. The Commonwealth represented to the trial court that no statements made by Clagett or any potentially exculpatory evidence were contained within the notes and, on that basis, the trial court denied Clagett's request to review the notes."

   Unless they contain exculpatory evidence, "[t]here is ***no general right to discovery*** of witness statements, reports or other memoranda possessed by the Commonwealth."

C. Discovery pursuant to Rule 3A:11 (Circuit Court)

1. Discovery by the Accused

a) Written or recorded statements by the accused to anyone. "It is settled that the language of Rule 3A:11(b)(1)(i) requires the prosecutor to turn over written and recorded statements by the accused whether made to a law enforcement officer or not." Smoot v. Commonwealth, 37 Va. App. 495, 500 (2002). And technically, this is regardless of whether the statement is inculpatory or exculpatory;

b) Oral statements made to any law enforcement officer;

c) Written scientific reports or written reports of the victim's physical or mental examination made in connection with the case; and
d) Inspection of tangible evidence in possession of Commonwealth, excluding reports.

2. Reciprocal Discovery by Commonwealth

a) Copy of defense scientific reports;
b) Notice of alibi, including place; and
c) If insanity defense, there must be a *full report* of the physical or mental examination of the accused which must be sent to the Commonwealth after notice of an insanity defense is given. *VA Code §19.2-169.5(D) & (E).* However, the Commonwealth may not use any statements made by the accused in its case-in-chief.

D. Time of Motion

Motion by accused must be at least 10 days prior to trial, after that only upon a showing of cause why the motion would "be in the interest of justice."

E. Discovery pursuant to Rule 7C:5 (General District)

Available for jailable misdemeanors and felony preliminary hearings. This information includes:
1. Written Statements by the Accused *to Anyone;*
2. Oral Statements by the Accused to Law Enforcement; and
3. The Accused's Criminal Record.

F. Discovery pursuant to Rule 8:15 (J&DR)

1. All Adults Cases and Juvenile Misdemeanors – see Rule 7C:5
2. Juvenile Felonies – see Rule 3A:11.

II. What is Exculpatory Evidence?

A. Any evidence, material to guilt or punishment, that is favorable to the accused

Brady v. Maryland, 373 U.S. 83 (1963)

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 punishment, irrespective of the good faith or bad faith of the prosecution.

B. Tends to show the defendant is innocent

A confederate's statement that he actually killed the victim is favorable to the defendant, regardless of whether the prosecution believes such statement is incredible. White v. Commonwealth, 13 Va. App. 284 (1991).

C. Tends to discredit or impeach Commonwealth witnesses

Witness' criminal record and agreement to aid police are clearly exculpatory. Moreno v. Commonwealth, 10 Va. App. 408 (1990).

Statements that victim may have been armed and may have been involved in other unrelated shootings are relevant impeachment evidence in a self-defense case and must be disclosed. Workman v. Commonwealth, 272 Va. 633 (2006).

D. Tends to mitigate seriousness of offense or lessen punishment

Defendant's undisclosed statements were mitigating and exculpatory as to punishment, even though not exculpatory as to guilt. Knight v. Commonwealth, 18 Va. App. 207 (1994) (Another reason requiring disclosure, of course, may be Rule 3A:11 above.)

III. What Fits into These Categories?

A. Prior inconsistent statements of Commonwealth witnesses, of any type, to anyone. Mackenzie v. Commonwealth, 8 Va. App. 236 (1989).

B. Relevant criminal record, for felonies or crimes of moral turpitude (lying, stealing or cheating), of Commonwealth witnesses. Fitzgerald v. Bass, 6 Va. App. 38 (1988)

C. Deals with Commonwealth witnesses – plea agreements, cooperation agreements or any other promises made in exchange for cooperation that could affect the witness'

willingness to testify in a manner in support of the prosecution's theory of the case. Moreno v. Commonwealth, 10 Va. App. 408 (1990).

D. Eyewitness who fails to identify the defendant, either in a live or photographic line-up. Bowman v. Commonwealth, 248 Va. 130 (1994)

E. Statements of other witnesses that exonerate the defendant, minimize his involvement, support his theory of the case, or contradict the Commonwealth's theory or the testimony of Commonwealth witnesses. Humes v. Commonwealth, 12 Va. App. 1140 (1991)

F. Evidence of bias by Commonwealth witnesses. Burrows v. Commonwealth, 17 Va. App. 469 (1993)

IV. Materiality

A. United States v. Bagley, 473 U.S. 667 (1985); and progeny

The issue is whether there is a "reasonable probability or likelihood that had the evidence been disclosed the result of the trial, as to either guilt or punishment, would have been different."

B. Kyles v. Whitley, 514 U.S. 419 (1995)

1. The issue has also been stated as whether the non-disclosure of such evidence is of such significance as to ***"undermine confidence in the outcome"*** of the trial or so as ***"to deprive the defendant of a fair trial."***

2. The suppressed evidence must be ***"considered collectively, not item by item."***

C. Johnson v. Commonwealth, 53 Va. App. 79 (2008)

"The failure to disclose witness statements that were not 'materially contradictory of or inconsistent with those witnesses' trial testimony' failed the test of materiality."

D. What Triggers Disclosure? - In United States v. Bagley, 473 U.S. 667 (1985), the United States Supreme Court held that

regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

V. Information Known by Whom for Which the Prosecutor is Responsible?

A. That Prosecutor - For purposes of Rule 3.8 of the Rules of Professional Conduct, a prosecutor is subject to an ethics sanction for the non-disclosure of exculpatory evidence only for evidence actually known by that prosecutor. There is no disciplinary sanction for the non-disclosure of imputed knowledge – but there may be other sanctions, as we will see below.

B. Other Prosecuting Attorneys in that Office

1. Giglio v. United States, 405 U.S. 150 (1972)
   One prosecutor early in the case promised a co-defendant that if he testified against Giglio, he would not be prosecuted. The first prosecutor later told the trial prosecutor no such promise existed. The trial prosecutor did not disclose the promise to Giglio prior to trial. The promise was disclosed after the trial.

   "The prosecutor's office is an entity and as such is a spokesman for the Government. A promise made by one attorney [even if such promise is not known by the one handling the trial] must be attributed, for these purposes, to the Government."

C. Police in the Same Jurisdiction

1. Kyles v. Whitley, 514 U.S. 419 (1995)
   "The prosecutor remains responsible . . . regardless of any failure by the police to bring favorable evidence to the prosecutor's attention . . . . The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." This case involved the failure to turn over all the police "lead sheets."

2. Workman v. Commonwealth, 272 Va. 633 (2006).

Lead investigator concluded certain hearsay statements about the victim in a shooting case in which self-defense was claimed were inadmissible and did not include them in his investigative report presented to the prosecution.

3. "Constructive knowledge . . . has not been attributed to the prosecutor where the information was in possession of law enforcement officials of *different jurisdictions*." Fitzgerald v. Bass, 6 Va. App. 38 (1988)(reaffirmed in Conway, above).

D. Other "Agents of the Government"

1. Ramirez v. Commonwealth, 20 Va. App. 292 (1995)
   "Employees of Commonwealth agencies do not automatically qualify as 'agents of the Commonwealth' for purposes of [discovery.] However, where an agency is *involved in the investigation or prosecution of a particular criminal case,* agency employees become agents of the Commonwealth for purposes of [discovery.]" Here, the charge of rape grew out of a Department of Social Services investigation.

2. Tuma v. Commonwealth, 60 Va. App. 273 (2012), rev'd and remanded *sub nom*, Commonwealth v. Tuma, 285 Va. 629 (2013).
   "It is axiomatic that if personnel of a department of social services are agents of the Commonwealth for the purposes of discovery under Rule 3A:11, they are certainly such for the purpose of providing [exculpatory evidence]. . . . [§ 63.2-1516.1 of] the Code of Virginia specifies that when a department of social services participates in a criminal investigation, it is the law enforcement agency and the prosecutor who determine what information to release to third parties and not the department."

3. Mills v. Commonwealth, 14 Va. App. 459 (1992)
   "Some courts have adopted a ***two-part test*** for determining whether an individual was acting as an agent of the state while conducting a search:
   (1) whether the government knew of and acquiesced in the search, and
   (2) whether the search was conducted for the purpose of assisting law enforcement efforts or for the purpose of furthering the private party's ends.

[While] these criteria help focus the trial court's attention on the significance and impact of the government's involvement in a search, they should not be viewed as an exclusive list of relevant factors because trial courts must consider the extent of the government's involvement in the search, as well, in resolving the agency issue. It is the defendant's burden to establish by a preponderance of the evidence that the private party acted as a government instrument or agent, in order to invoke the protection of the fourth amendment.

E. Information in NCIC / VCIN

Fitzgerald v. Bass, 6 Va. App. 38 (1988)
There is an "obligation on the part of the prosecution to produce evidence actually or constructively in its possession." "A prosecutor's office cannot get around Brady by keeping itself ignorant. The Commonwealth needs to check the accessible criminal records of its witnesses."

F. "Open File" Policy

1. Strickler v. Greene, 527 U.S. 263 (1999), n. 23.
"We certainly do not criticize the prosecution's use of the open file policy. We recognize that this practice may increase the efficiency and the fairness of the criminal process. We merely note that, if a prosecutor asserts that he complies with Brady through an open file policy, defense counsel may reasonably rely on that file to contain ***all materials*** the State is constitutionally obligated to disclose under Brady."

2. Workman v. Commonwealth, 272 Va. 633, (2006).
"If a prosecutor asserts that he complies with Brady through an open file policy, defense counsel may reasonably rely on that file to contain ***all materials*** the State is constitutionally obligated to disclose under Brady. The defendant cannot be faulted for relying on the Commonwealth's open file policy and cannot be found to have failed to exercise reasonable diligence" by not conducting an independent investigation which would have turned up the exculpatory evidence.

VI. Timeliness of Disclosure / Continuing Duty

A. Moreno v. Commonwealth, 10 Va. App. 408 (1990)
"The constitutional right to receive exculpatory evidence is not fulfilled, and a prosecutor's duty is not satisfied, simply by disclosure; *timely disclosure* is required."

"So long as exculpatory evidence is obtained in time that it can be used effectively by the defendant, and there is no showing that an accused has been prejudiced, there is no due process violation. It is the defendant's ability to utilize the evidence at trial, and not the timing of the disclosure, that is determinative of disclosure."

B. Commonwealth v. Tuma, 285 Va. 629 (2013)
"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***. This principle applies without regard to when the prosecution was or should have been aware of the information. The point in the trial when a disclosure is made is not in itself determinative of timeliness. A defendant must show that the failure to earlier disclose prejudiced him because it came so late that the information disclosed could not be effectively used at trial."

C. Rule 3A:11(g) and by reference, Virginia Code Section 19.2-265.4, impose a ***continuing duty*** to disclose discovery material that the prosecution learns about after the initial disclosure.

VII. Sanctions For Failure to Provide Discovery – VA Code §19.2-265.4

A. Continuance
B. Mistrial
C. Exclusion of evidence
D. Retrial after appeal
E. Court's discretion
F. Ethical violation
G. Financial sanction (fine)

VIII. CURRENT CLIMATE

A. Report of the Special Committee on Criminal Discovery Rules to the Chief Justice and Justices of the Supreme Court of Virginia

B. Senator Bill Stanley's Bill: SB 1563

VIII. WHERE DO WE GO FROM HERE?

A. Rule or Statutory Change?

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SENATE BILL NO. 1563

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice on February 1, 2017)

(Patron Prior to Substitute—Senator Stanley)

A BILL to amend and reenact § 19.2-265.4 of the Code of Virginia, relating to discovery in criminal cases; duty to provide.

Be it enacted by the General Assembly of Virginia:

1. That § 19.2-265.4 of the Code of Virginia is amended and reenacted as follows:

§ 19.2-265.4. Discovery and failure to provide discovery.

A. In any criminal prosecution for a felony in a circuit court or for a misdemeanor brought on direct indictment, the attorney for the Commonwealth shall have a duty to adequately and fully provide discovery as provided under *this section and* Rule 3A:11 of the Rules of ~~the~~ Supreme Court *of Virginia*. Rule 3A:11 shall be construed to apply to such felony and misdemeanor prosecutions. This duty to disclose shall be continuing and shall apply to any additional evidence or material discovered by the Commonwealth prior to or during trial which is subject to discovery or inspection and has been previously requested by the accused. In any criminal prosecution for a misdemeanor by trial de novo in circuit court, the attorney for the Commonwealth shall have a duty to adequately and fully provide discovery as provided under Rule 7C:5 of the Rules of ~~the~~ Supreme Court *of Virginia*.

B. *Upon written notice by an accused to the court and to the attorney for the Commonwealth, the Commonwealth shall permit the accused to inspect and copy or photograph:*

1. Any relevant (i) 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 to any law-enforcement officer, the existence of which is known to the attorney for the Commonwealth, and (ii) written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine, and breath tests, other written scientific reports, and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case, that are known by the attorney for the Commonwealth to be within the possession, custody, or control of the Commonwealth;

2. 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, provided that the Commonwealth may object as to the reasonableness of the request;

3. All relevant police reports, subject to exemptions as provided in this section or otherwise required by statute. For purposes of this subdivision, "police reports" means any formal, written report of investigation by any law-enforcement officer, as defined in § 9.1-101, including reports of interviews of witnesses but not including notes or drafts; and

4. All relevant statements of any non-expert witness whom the Commonwealth is required to designate on a witness list pursuant to subsection J. The Commonwealth shall disclose any statements of rebuttal witnesses not previously disclosed prior to the beginning of its rebuttal case. For purposes of this subdivision, "statements" means a statement written or signed by the witness, a verbatim transcript, or an audio or video recording. This subdivision shall not limit the disclosure of police reports under subdivision 3, whether or not such reports contain accounts of statements made by prospective witnesses.

C. If the accused provides written notice for discovery under this section and the Commonwealth provides such discovery, the accused shall:

1. Permit the Commonwealth within a reasonable time, but not less than 10 days before trial or sentencing, to inspect, copy, or photograph any written reports of autopsy examinations, ballistic tests, fingerprint, blood, urine, and breath analyses, and other scientific tests 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;

2. Disclose within a reasonable time, but not less than 10 days before trial, whether he intends to introduce evidence to establish an alibi and, if so, the accused shall disclose the place at which he claims to have been at the time of the commission of the alleged offense;

3. If he intends to rely upon a defense as provided in § 19.2-168, permit the Commonwealth to inspect, copy, or photograph any written reports of physical or mental examination of the accused made in connection with the particular case, provided, however, that no statement made by the accused in the course of an examination shall be used by the Commonwealth in its case-in-chief, whether the examination shall be with or without the consent of the accused; and

4. Disclose all relevant statements, as defined in subdivision B 4, of any non-expert witness, other

than the defendant, whom the defense is required to designate on a witness list pursuant to subsection J. The accused shall disclose any statements of surrebuttal witnesses, not previously disclosed, prior to the beginning of it surrebuttal case.

D. Whenever the Commonwealth intends to introduce expert opinion testimony at trial, the attorney for the Commonwealth shall notify in writing the accused of the Commonwealth's intent to present such testimony not later than 14 days before trial, or as otherwise ordered by the court. The notice shall include the witness's name and contact information, a summary of the witness's qualifications, the substance of the facts and opinions to which the witness is expected to testify, a summary of the grounds for each opinion, and copies of written reports, if any, prepared by the witness.

Whenever the accused intends to introduce expert testimony at trial, he shall notify the attorney for the Commonwealth in writing of the intent to present such testimony not later than seven days before trial, or as otherwise ordered by the court. The notice shall include the witness's name and contact information, a summary of the witness's qualifications, the substance of the facts and opinions to which the witness is expected to testify, a summary of the grounds for each opinion, and copies of written reports, if any, prepared by the witness.

With leave of court for good cause shown, the parties may supplement the notice of expert witness testimony, and the Commonwealth may offer written notice of rebuttal expert witness testimony. When such testimony is allowed, the court shall require disclosure compliant with the provisions of this subsection as to the testimony to be offered by the expert.

Where a party intends to introduce expert testimony through a representative of the Department of Forensic Science, a party may provide the other party with a copy of a certificate of analysis prepared by the Department of Forensic Science and signed either by hand or by electronic means by the person performing the analysis or examination, in satisfaction of the requirements of this subsection.

If the court finds that a party has failed to provide this notice in a timely manner, the court may grant such relief as it deems appropriate, including the granting of a continuance or the exclusion of the expert testimony.

E. A notice by the accused under subsection B shall be made at least 10 days before the day fixed for trial. The notice shall include all relief sought under this section.

F. Neither the Commonwealth nor the accused shall be required to disclose mental impressions, opinions, theories, or conclusions of attorneys or their agents.

G. The Commonwealth and the accused shall agree as to the time, place, and manner of making the discovery and inspection permitted under this section. If the parties are unable to agree, upon motion of either party the court shall enter an order as to the time, place, and manner of making the discovery and inspection and may prescribe such terms and conditions as are just, including imposition of an award of attorney fees or other appropriate sanction if the failure of a party to agree as to the time, place, and manner of making the discovery and inspection is deemed unreasonable.

H. For good cause a party may withhold or redact such information or condition its disclosure on restrictions limiting copying or dissemination, including, where appropriate, limiting disclosure to counsel only. If a party withholds or restricts information, it shall notify the other party in writing and shall identify the reason. "Good cause" may include protection of a victim's or witness's personal or financial security, privacy in the case of graphic images or child pornography, and medical or mental health records.

The opposing party may file a motion to compel disclosure or to remove any restriction. The court may order the withholding party to submit the information for review in camera. The court may approve, reject, or modify the restriction and may order such other relief as is appropriate.

Upon sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted, or deferred or make such other order as is appropriate, including an order restricting the copying or dissemination of the material and the disposition of the material at the conclusion of the case. Upon motion by either party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court denies discovery or inspection following a review in camera, the entire text of the written statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the accused.

I. If, after disposition of a notice filed under this section, and before or during trial, counsel or a party discovers additional material previously requested by notice or falling within the scope of an order previously entered that is subject to discovery or inspection under this section, the party shall promptly notify the other party or his counsel or the court of the existence of the additional material and shall provide the other party with the inspection rights provided in this section. If at any time during the course of the proceedings it is brought to the attention of the court that ~~the attorney for the Commonwealth~~ *a party* has failed to comply with *the requirements of this section or with an order issued pursuant to* this section, the court ~~may~~ *shall* order ~~the Commonwealth~~ *such party* to permit the discovery or inspection~~, grant a continuance, or prohibit the Commonwealth from introducing evidence~~

~~not~~ *of materials not previously* disclosed~~, or the court~~ *and* may ~~enter~~ *grant* such other ~~order~~ *relief* as it deems ~~just under the circumstances~~ *appropriate*.

J. Each party shall provide to the opposing party a written list of names and addresses, if available, of all witnesses expected to testify at trial. Disclosure of rebuttal and surrebuttal witnesses is not required under this subsection. The Commonwealth shall provide a list no later than seven days before trial; the accused shall provide a list no later than three days before trial. Upon motion of either party, the court may modify the requirements of this subsection for good cause shown.

At the commencement of trial the parties shall provide their witness lists to the court. Where a party seeks to call a witness not disclosed on the list, upon objection of the other party, the court may fashion such relief as it deems appropriate, including granting a continuance or recess, granting further discovery, instructing the jury regarding nondisclosure, or prohibiting or limiting testimony of the witness. At the request of either party, the court may place the lists or portions of the lists under seal where appropriate for the protection of witnesses or others.

K. Upon indictment, waiver of indictment, or return of information, or prior to entry of a guilty plea or plea of nolo contendere, whichever first occurs, the attorney for the Commonwealth shall disclose to the accused all information in its 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 days prior to the date scheduled for trial. The duty to disclose under this subsection shall not require any request, demand, or notice by the accused and shall be continuing in nature, as otherwise required by law.