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HOUSE BILL NO. 2786

Offered January 17, 2003

A BILL to amend and reenact § 19.2-265.4 of the Code of Virginia, relating to Commonwealth's failure to provide discovery.

Patrons—Griffith and Marshall, R.G.

Referred to Committee for Courts of Justice

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. 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 Rule 3A:11 of the Rules of the Supreme Court. 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.

B. 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 has failed to comply with this section, the court may order the Commonwealth to permit the discovery or inspection, grant a continuance, or prohibit the Commonwealth from introducing evidence not disclosed, or the court may enter such other order as it deems just under the circumstances. *If the attorney for the Commonwealth fails to comply with an order of the court to provide discovery in accordance with this section, he is guilty of a Class 1 misdemeanor.*

The defendant may request the State Police to investigate and the State Police shall investigate such noncompliance upon request. If the State Police find that there exists cause to believe the Commonwealth has intentionally and willfully withheld proper discovery from the defendant, the State Police shall so inform the Attorney General who shall prosecute the case. Venue shall be proper in any district court in a jurisdiction adjacent to that of the attorney for the Commonwealth being prosecuted.

C. In addition to discovery permitted under Rule 3A:11, the following discovery shall also be permitted:

1. *Statement of Defendant.* Upon request of a defendant the Commonwealth shall disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the Commonwealth, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the Commonwealth; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a Commonwealth agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The Commonwealth shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant, whether before or after arrest in response to interrogation by any person then known by the defendant to be a Commonwealth agent, if the Commonwealth intends to use that statement at trial. Upon request of a defendant, which is an organization such as a corporation, partnership, association or labor union, the Commonwealth shall disclose to the defendant any of the foregoing statements made by a person who the Commonwealth contends (i) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (ii) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.

2. *Defendant's Prior Record.* Upon request of the defendant, the Commonwealth shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the Commonwealth, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the Commonwealth.

3. *Documents and Tangible Objects.* Upon request of the defendant the Commonwealth shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody, or control of the Commonwealth, and which are material to the preparation of the defendant's defense or

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59 *are intended for use by the Commonwealth as evidence in chief at the trial, or were obtained from or*
60 *belong to the defendant.*

61 *4. Reports of Examinations and Tests. Upon request of a defendant the Commonwealth shall permit*
62 *the defendant to inspect and copy or photograph any results or reports of physical or mental*
63 *examinations, and of scientific tests or experiments, or copies thereof, which are within the possession,*
64 *custody, or control of the Commonwealth, the existence of which is known, or by the exercise of due*
65 *diligence may become known, to the attorney for the Commonwealth, and which are material to the*
66 *preparation of the defense or are intended for use by the Commonwealth as evidence in chief at the*
67 *trial.*

68 *5. Expert Witnesses. At the defendant's request, the Commonwealth shall disclose to the defendant a*
69 *written summary of testimony that the Commonwealth intends to use during its case-in-chief at trial. The*
70 *summary provided under this subdivision shall describe the witnesses' opinions, the bases and the*
71 *reasons for those opinions, and the witnesses' qualifications.*

72 *D. Information Not Subject to Disclosure. This section does not authorize the discovery or inspection*
73 *of reports, memoranda, or other internal documents made by the attorney for the Commonwealth or any*
74 *other agent of the Commonwealth investigating or prosecuting the case. This section does not authorize*
75 *the discovery or inspection of statements made by witnesses or prospective witnesses for the*
76 *Commonwealth.*