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SENATE BILL NO. 167

Offered January 10, 2018

Prefiled December 28, 2017

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

Patrons—Stanley, Petersen and Surovell

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. 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 and 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 and 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

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in the course of an examination shall be used by the Commonwealth in its case-in-chief, whether the examination is conducted 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 its 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. As used in this subsection, "good cause" includes 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.

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