V I R G I N I A:

IN THE ARLINGTON COUNTY CIRCUIT COURT

COMMONWEALTH OF VIRGINIA,	)	**Case Nos. CR 17-699 through -753**
	)	
v.	)	**Charges: CC theft x 19, conspire**
	)	**CC theft, money launder x 10,**
	)	**conspire money launder, CC**
	)	**fraud x 2, conspire CC fraud,**
	)	**ID theft, racketeering x 3, possess**
	)	**forgery instrument,**
	)	**CC forgery x 16**
	)	
ADIAM BERHANE,	)	
	)	
Defendant.	)	

AMENDED MOTION TO COMPEL PRODUCTION OF DISCOVERY AND BRADY INFORMATION

COMES NOW the Defendant, Adiam Berhane, by counsel, and respectfully moves this Court to compel the Commonwealth to provide copies of all materials to which she is entitled under the "open file" discovery agreement in this case, Virginia Supreme Court Rule 3A:11, and *Brady v. Maryland*, 373 U.S. 83 (1963), or to provide alternative relief as outlined below. The refusal to provide the defense its own set of discovery materials—particularly where discovery materials are voluminous—is arbitrary, unreasonable and does not advance the legitimate purposes of government in providing criminal discovery. Berhane makes this motion pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, section 8 of the Constitution of Virginia, Virginia Code section 19.2-265.4, and all points and authorities outlined in the following motion and memorandum of law.

SUMMARY OF ARGUMENT

1. State action, whether obligatory or discretionary, is always subject to the constraints of due process. This includes any action undertaken in the context of a criminal case.

2. Criminal discovery, whether directed by a Supreme Court rule or local policy, is state action undertaken in the context of a criminal case. Moreover, although not itself a right, criminal discovery and the manner in which it is undertaken has a profound impact on the fundamental rights of a defendant to a fair trial, to prepare a complete defense, and to the effective assistance of counsel.
3. For these reasons, criminal discovery is bound by due process limitations. Arguably, given the trial rights impacted by discovery, this means any policy or procedure relating to discovery must be justified by and advance a compelling state interest. At the very least, however, it means that criminal discovery policies and procedures must be reasonable—they must be rational, non-arbitrary, and relate to and advance a legitimate interest of the government.
4. This proposition has in fact achieved independent status as a rule of criminal procedure wherever the issue has been addressed, finding recognition as a "reasonableness requirement"—the notion that reasonableness is an implicit requirement of all criminal discovery processes, and vests in the judge the discretionary power to ensure a fair trial and a level playing field.
5. Obviously, the Commonwealth can't claim to have provided something to an individual if it has simultaneously made that thing impossible to obtain. That is precisely what the Commonwealth's has done with its "open file" policy.
6. And if it hasn't provided criminal discovery—which it hasn't in this case, and never will unless the court agrees in its discretion to compel a modification—then neither has it accomplished the objectives of the policy, which it absolutely must in order to survive constitutional scrutiny.

7. Although most apparent in cases involving voluminous discovery, in virtually all cases involving more than a modicum of discovery materials, the Commonwealth's policy ensures defense counsel will have insufficient time to both collect discovery and complete all other tasks necessary.
8. This undue burden posed by manual copying means that ineffective assistance is assured in virtually all cases, but particularly those with voluminous discovery. The choice for defense counsel is merely how to best mitigate the damage by deciding which type of ineffective assistance will hurt the client less: the type resulting from incomplete discovery, or the type resulting from inadequate time spent on legal research, investigation and trial preparation.
9. In addition to the foregoing effects on the ability to prepare for trial and provide effective assistance of counsel, the restrictions on obtaining "open file" discovery represent an unconstitutional disparity in the parties' ability to make use of discovery materials, including potential exhibits, *Brady* material, and information that must be reviewed and analyzed by experts in order to be useful. Although the Constitutional may have little to say about the quantity of discovery materials that must be provided, it has a great deal to say about "equally meaningful" access to them, which is necessary to ensure the basic due process and fair trial righst to a level playing field.
10. This is the unacceptable state of affairs the Commonwealth has created through the unreasonable and needlessly rigid restrictions placed on "open file" discovery. Although it does affect all cases, the court here need not decide all cases—it need only decide this case, and determine the measures that must be implemented to ensure equally meaningful access by the defense to the materials made available by the Commonwealth. Along those

lines, the Court should compel the Commonwealth to copy discovery materials for the defense, and allow all information derived from electronic devices to be "cloned" such that they may be appropriately analyzed.

11. A detailed statement of facts and memorandum of law is included below.

STATEMENT OF FACTS

12. Adiam Berhane is charged with 54 (fifty-four) felony counts of various financial crimes, and one misdemeanor. In total she faces over 1000 years of potential punishment, and nearly two-decades of jury minimums.
13. As it stands, the Commonwealth has refused to provide the defendant her own copies of discovery materials, prohibited her from using any technology (other than typing) to obtain them, and has implemented other restrictions as outlined below.
14. On information and belief, in electronic format, the discovery materials made available by the Commonwealth comprise more than 2 terabytes of data.
    a. This includes spreadsheets and financial records from dozens of different accounts, PDF documents (which are not searchable), emails and text messages, and the full contents of at least one Macbook laptop computer and one smart phone.
    b. Numerous hard drives were also seized by the police, and the data from those devices has been added to the discovery materials.
    c. In addition, the police supplements filed in the case are lengthy: perhaps 100 pages or more—so long, in fact, that a working draft was not completed by the lead detective and made available to the defense until April 10, 2018.

d. There are also what appear to be hundreds of images of various items observed during searches or seized by the police.

e. In total, if the discovery materials were reduced to paper, defense counsel believes the documents would number in the hundreds of thousands.

f. Supposing a pace of 7 minutes per page—which in counsel's experience is quite rapid—copying 100,000 pages of discovery would require 11,667 billable hours, or 69.45 weeks of time (working around the clock) for a single attorney.

15. According to the Arlington Commonwealth's Attorney, the purposes of its "open file" discovery policy are to minimize the time-consuming nature of formal discovery pursuant to Supreme Court Rules 7C:5 and 3A:11, "and to enhance the possibility of dispositions being reached prior to the trial/preliminary hearing date."

16. Implicit in the foregoing is a third purpose: to enable defense counsel to be more informed while expending less time and effort on the discovery process. Along those lines, the Commonwealth has consistently described its discovery policy as "generous" to defense counsel, indicating that the purpose is indeed to promote just outcomes in part by strengthening the litigation position of the defendant.

17. In order to avail herself of "open file" discovery, the Commonwealth required Berhane to sign two documents—a letter and an order—specifying some but not all of the rights, obligations and conditions entailed by the "open-file" agreement.

18. The order mostly tracks the language of Supreme Court Rule 3A:11. The letter provides, among other things, that the defense is barred from copying any materials without the permission of the prosecutor. This means counsel may not avail themselves of

photocopying, scanning, photographing or using any technology other than a keyboard or dictation to obtain the materials made available by the Commonwealth.

19. The Office of the Public Defender has asked that the Commonwealth consider relaxing its "open file" policy, see Exhibit A, Letter from B. Haywood to T. Stamos (April 20, 2018), particularly in cases involving voluminous discovery, to allow any of the following:

    g. Photocopying.
    h. Printing.
    i. Scanning.
    j. Photographing.
    k. Scanning, running the scan through character recognition software, then deleting the original scan (meaning the final product would simply be a Word document—no different than if counsel had typed the document themselves).
    l. Copying, scanning or photographing only portions of the discovery materials, such as pages with photographs or formatted text on them that can't be manually copied, or only the materials that contain no information about witnesses
    m. Duplication of electronic data.
    n. Allowing any of the foregoing on the condition that some or all of the discovery materials not be shared with the Defendant.
    o. Allowing any of the foregoing on the condition that some or all of the discovery materials be returned to the Commonwealth at the conclusion of the case.
    p. Allowing some or all of the foregoing in cases where it can be established that the Commonwealth, its employees, agents, witnesses or the public will not be prejudiced.
    q. Other discovery "protective orders" of the Commonwealth's choosing that would permit the defense to have copies while protecting the interests of the prosecution.
    r. Permitting defense counsel to borrow certain materials so that they can be reviewed after-hours or on weekends.

20. The Commonwealth refused to permit any of the foregoing or any other modifications to the "open file" procedures, stating that exceptions are only made in murder cases. Counsel is anecdotally aware of non-murder cases in which the Commonwealth agreed to

relax its policy, and the Commonwealth has provided no proof that its policy is implemented objectively, using this or any other criteria.

21. In addition to prohibiting copies from being made or provided, the "open file" policy restricts where and when discovery may be reviewed, as well who may review it.

22. With respect to availability, counsel for Berhane may only review discovery materials in the lobby area of the Commonwealth's Attorney's Office, on weekdays during business hours.

23. The lobby consists of one larger waiting room and two adjacent smaller rooms. The larger waiting room is fully public, and although there is seating, there are no tables. The two smaller rooms are furnished with tables and equipped with computers. The doors to the smaller rooms can be closed, which offers some privacy for such things as dictating documents or watching video recordings.

24. If the small rooms are occupied, counsel must either copy discovery in the general public waiting area or come back at another time. Electronic data and recordings must frequently be reviewed using the Commonwealth's computers.

25. With respect to the persons who may obtain discovery, the Commonwealth requires that a licensed attorney be present at all times while discovery materials are being copied at their office. Paralegals, administrative aides, investigators, sentencing advocates, interns, law clerks, and even employees of professional transcription or discovery companies are prohibited from obtaining discovery materials on their own, without an attorney to chaperone them.

26. The "open file" policy requires that the defense contact the prosecutor assigned to a case before discovery is made available. For the first several months the Public Defender was

assigned to this case, the Public Defender was required to contact the Deputy Commonwealth's Attorney every time counsel desired access to discovery. Toward the end of December 2017, the Commonwealth agreed that if the defense provided its own hard drive, it would copy the discovery onto that drive, so that discovery could remain available at the front without counsel having to request it prior to every session. Even then, however, the defense was prohibited from removing its own drive from the Commonwealth's Attorney's Office.

27. In this case, the Commonwealth has relied on the "open file" agreement as a means of discharging its *Brady* obligations. It has not identified any of the discovery materials as favorable to the defense.

28. In cases where a defendant has agreed to "open file" discovery, the Commonwealth does not provide copies of the vast majority of materials, copies of which the defendant would otherwise be entitled to under Rule 3A:11 and *Brady v. Maryland*.

29. As noted above, because counsel must hand-copy all materials, the defense is unable to make reasonable facsimiles of photographs or formatted text. Both, but particularly the latter, comprise a large portion of the discovery in this case.

30. Because the policy prohibits copies from being made or provided, if the defense wishes to use any item from discovery in preparing for trial—a potential defense exhibit, for example, or a statement with which a witness will be confronted on cross-examination—it must notify the Commonwealth in advance, either through an informal request or pretrial motion, asking for a copy of the item, and explaining why it is needed. In doing so, the defense is required to explicitly or implicitly divulge trial strategy.

31. The Commonwealth invited the defense to view a PowerPoint presentation it prepared concerning the case, and that PowerPoint presentation has remained available for review with the remainder of the discovery materials. The presentation did not substantially aid the defense in sorting through discovery or simplify the process of obtaining it. To the contrary, it made the Commonwealth's case for guilt, much like it would have during summation at trial. With a few exceptions that appeared in the PowerPoint, the Commonwealth has not explained the relevance of specific documents or how they might be used at trial. The Commonwealth has not provided a list of "hot docs," or a list of trial exhibits it intends to introduce. The defendant's motion for a bill of particulars was denied.
32. Because the Commonwealth has not permitted Berhane her own copies of discovery materials, she must review them in the form provided by the Commonwealth. None of the electronic data or other discovery materials are indexed or organized in a manner typical in white collar criminal cases. In the vast majority of financial fraud cases involving voluminous discovery, attorneys for both parties rely on "experts"—forensic computer experts, forensic accountants, or companies that specialize in discovery support—to help them manage and evaluate the evidence. Those "experts" use specialized software to process the information then organize and index it on searchable databases, so that it is easier for counsel to locate important items.
33. Discovery provided in electronic format, especially that which was derived from other electronic devices, frequently contains metadata. Roughly speaking, metadata is data that explains or provides context for other data. For example, metadata may include deleted files or emails, or it might indicate when and how a file was modified. Metadata often

contains information that is highly probative of guilt and punishment. The defense lacks meaningful access to any of the metadata that is in the possession of the Commonwealth.

34. Because of the conditions the Commonwealth has placed on accessing "open file" discovery, the defense has obtained but a fraction of it, despite having spent 85 hours or more on the discovery process alone. By insisting that discovery be transcribed manually, the Commonwealth has effectively ensured that it will never be duplicated at all.

MEMORANDUM OF LAW

It goes without saying that in order for the Commonwealth to have provided something to an individual, it must be possible for the individual to actually obtain it. Furthermore, if the Commonwealth is to restrict access in any way without violating due process, those restrictions must make sense. The restrictions here simply do not. The Commonwealth can no more require that counsel manually copy one hundred-thousand discovery documents than it could condition the availability of discovery on the defendant finishing a marathon, climbing Mount McKinley, or even climbing to the 12th floor of the Courthouse and back. It could not bar a defendant from using a computer to type while transcribing discovery documents, or require that counsel only use a No. 2 pencil, a yellow legal pad, and write by hand. It could not require that the copying of discovery only occur during the hours of noon and 1:00pm on Tuesdays and Thursdays.

Although the foregoing examples may seem absurd, all of them—and many others one might imagine—would be perfectly constitutional if the Commonwealth indeed had unbridled discretion to shape its "open file" policy in whatever way it wanted. That isn't the way due process works, however.

Overview of Due Process

The United States and Virginia Constitutions protect a criminal defendant's rights to substantive and procedural due process whenever state action is involved. U.S. Const. amends. V, XIV; Va. Const. Article I, section 8; *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (same) (Due Process Clause "contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them."); *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985) (applying *Mathews v. Eldridge*, 424 U.S. 319, in criminal context); *Krieger v. Commonwealth*, 38 Va. App. 569, 576-577 (2002) (procedural due process applies to procedures affecting liberty interests).

Although substantive and procedural due process are distinct legal concepts, they are often conflated with one another due to their analytical similarities, the importance of which will be discussed below. Whereas substantive due process deals with the types of interests involved, procedural due process focuses on the adequacy of the procedures used in acting on individual interests. The concepts aren't mutually exclusive: "[w]hen government action" affecting individual interests "survives substantive due process scrutiny, it must still be implemented in a fair manner." *United States v. Salerno*, 481 U.S. 739, 746 (1987).

Substantive due process claims have two stages of inquiry. First, the court must determine the nature of the individual right involved. If the right implicated is fundamental, a strict scrutiny standard is applied. According to a strict scrutiny standard, government action that infringes on a fundamental right must be narrowly tailored to serve a compelling government interest. If the right implicated is not fundamental, however, the government action is reviewed for rationality, meaning it must reasonably relate to and advance a legitimate governmental interest.

The purpose of procedural due process is to ensure that the government's rules satisfy minimum standards of fairness and lead to decisions with the degree of accuracy that society demands in different types of cases. A procedural due process analysis therefore requires consideration of three factors: 1) the private interest that will be affected by the action of the State; 2) the governmental interest behind the state action, which will be affected by any additional safeguard the court provides, and; 3) the probable value of the additional procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Obviously, the more significant the interests of the individual, the more substantial the governmental interests must be in order for state action to be constitutional—this is true regardless of whether the issue is analyzed as a matter of substantive or procedural due process. This reflects a broader truth about the interests-dependent, flexible nature of due process. *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (application of due process depends largely on the "governmental and private interests that are affected."). "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) (internal citations omitted). To the contrary, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

In the context of criminal procedure, because life and liberty interests are always implicated, analyses under substantive or procedural due process are frequently indistinguishable. Life and liberty interests are undoubtedly the most important interests upon which a government acts, leading to a heightened interest in fair, reliable outcomes wherever those interests are at stake. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (quoting *United*

States v. Salerno, 481 U.S. 739 (1987)) ("We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty."). This has led to the application of a much more rigorous procedural due process standard in criminal cases than in civil, due to the importance of the interests affected. In fact, some criminal procedures have such a profound impact on liberty interests that they have themselves become fundamental rights, and therefore subject to substantive due process analysis as well. "The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, *the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction* stands as a testament to that concern." *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985) (emphasis added). Procedural safeguards elevated to fundamental right-status include the right to the assistance of counsel, to compulsory process, to a fair trial and to prepare a complete defense. *See Wardius v. Oregon*, 412 U.S. 470 (1973) (substantive due process right to procedures that ensure a level playing field with prosecution, and therefore a fair trial); *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (right to expert assistance as part of "fundamental" right to fair trial and effective assistance of counsel); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (fundamental right to assistance of counsel). In this case, however the court conceives of the interests at stake, it is clear that they are considerable. Whether a procedural or substantive due process analysis applies, the Commonwealth must have a very good reason for doing what it did.

Due Process Applies to Action Affecting "Discretionary" Rights and Privileges

The mere fact that the state action at issue relates to a benefit the government was under no obligation to provide does not mean that action is exempt from constitutional scrutiny. To put it another way: even if, for sake of argument, the state action here was entirely discretionary, it must be rational, it must be fair and it must make sense. "The due process clause requires 'that

state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Brown v. Mississippi*, 297 U.S. 278, 285-286 (1936) (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316). This is true even where the discretionary benefit is relatively trivial as compared to liberty interests, or the procedures meant to safeguard them. For example, the government is not required to provide public benefits such as food stamps or cash welfare. *See Goldberg v. Kelly*, 397 U.S. 254 (1970). If it does, however, the manner in which it administers those benefits, including policies regarding eligibility and termination, must be rational in that they relate to and advance a legitimate interest of government. *Id*. Similarly, a state is under no obligation to issue drivers' licenses, but if it does, its process for licensing drivers must comport with the strictures of procedural due process. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) ("If the statute barred the issuance of licenses to all motorists who did not carry liability insurance . . . [it] would not . . . violate the Fourteenth Amendment. . . . Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood [and they] are not to be taken away without that procedural due process required by the Fourteenth Amendment.").

The Commonwealth frequently argues that it could eliminate discovery if it wanted. Although that proposition is questionable, it nonetheless does not resolve the issue before the court. Because if the government can eliminate drivers' licenses altogether (which it can) but is nonetheless bound by due process if it has created them (which it is), then how much more tightly bound must the Commonwealth be where the "benefit" created safeguards the right to a fair trial? Indeed, just as the analytical framework would suggest, the further we move down the continuum of policies that affect liberty interests, the more we find the government constrained in the actions it may take.

Due Process Applies to Discretionary Action Regarding Criminal Procedure: Appeals and Parole

Taking the next step forward in terms of what process is owed to an individual, state action receives even greater scrutiny when it affects a benefit the government was under no obligation to provide **and** that benefit pertains to the prosecution, adjudication and punishment of criminal conduct. "[A] State has great discretion in setting policies governing" liberty interests and criminal procedure, "but it must nonetheless make those decisions in accord with the Due Process Clause"—namely the requirement that they be reasonable, rational and consistent with legitimate governmental purposes. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481-484 (1972)) ("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.").

For example, the United States Supreme Court has never recognized a constitutional right to appellate review of a criminal conviction. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("There is, of course, no constitutional right to an appeal . . ."); *Billotti v. Legursky*, 975 F.2d 113, 114 (4th Cir. 1992) (West Virginia's discretionary review procedures "comport[ed] with the requirements of due process," despite not including appellate review). However, if a state has established a process for appealing a case, the governing procedures must comport with due process demands. As the United States Supreme Court stated in *Evitts v. Lucey*, 469 U.S. 387, 393 (1985):

> Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. *McKane v. Durston*, 153 U.S. 684 (1894). Nonetheless, if a State has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S., at 18, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.

For any procedures to "comport with the demands of due process," a legitimate state interest must exist for their creation, and the procedures must advance that interest. In the appellate context, the legitimate state interest for courts of appeal is ensuring that criminal trials were fair and their outcomes worthy of confidence. And whether the procedures advance that interest depends on the extent to which they enable access to meaningful review without erecting arbitrary or unreasonable obstacles. *Id*. Accordingly, a state may not deny an indigent defendant the opportunity to appeal simply because he can't afford a transcript, or because it was he and not his public defender who filed a transcript request. *See Griffin v. Illinois*, 351 U.S. 12, 17-19 (1956); *Lane v. Brown*, 372 U.S. 477 (1963). Nor can a state demand unreasonable filing fees prior to allowing appellate review. *Burns v. Ohio*, 360 U.S. 252 (1959) (invalidating state requirement that indigent defendants pay fee before filing notice of appeal of conviction). Likewise, a state could not require a defendant to note his appeal within an hour of entry of a final order, or hold him to filing deadlines even if he received no notice that the final order was entered. Such conditions are arbitrary, needlessly burdensome, and serve no legitimate purpose—in fact they serve no purpose at all other than to make appeals more difficult.

Similarly, although the Constitution does not recognize a right to parole, and "a State has great discretion in setting policies governing parole decisions . . . it must nonetheless make those decisions in accord with the Due Process Clause." *Evitts* at 400-01; *see also Morrissey v. Brewer*, 408 U.S. 471, 481-484 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The scrutiny is enhanced since a revocation of parole can "inflict a 'grievous loss'" on a parolee and substantially affect his liberty interests. *See Morrisey* at 483-86. As with appeals, this means that parole procedures must be grounded in a legitimate state interest and must advance that interest. Therefore, whether a parole system is due process-compliant depends on the extent to which it

incorporates reasonable "procedural guarantees," that aid the individual and the government in achieving the intended purposes of parole, without unfairly encroaching on individuals' liberty interests[1]. *Id*. at 484-85. For example, parole procedures must "assure that [decisions to grant or revoke parole] will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." *Id*. And they must "insure [a parolee's] liberty is not unjustifiably taken away," "a successful attempt at rehabilitation" is not "unnecessarily interrupt[ed]," and "the safety of the community" is not "imprudently prejudice[ed]." *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). This is essentially a reasonableness inquiry: is there a good reason for what the government is doing? Are persons who have been rehabilitated being allowed to remain at liberty? Are those who haven't being appropriately punished? Are the parole procedures actually advancing those objectives?

Due Process Applies to Criminal Discovery Policies

Although liberty interests are considerable in the context of appeals or parole, they pale in comparison to those of someone who still enjoys the presumption of innocence. For that reason, pretrial criminal procedures—whether constitutionally mandated or not—are subject to even greater scrutiny. This includes criminal discovery, which invariably affects one's ability to defend herself, the balance of forces with the government, and the right to a fair trial.

At the outset, it should be noted that whether the government must provide discovery is not entirely a matter of discretion. The specific quantity it must provide may be, but the fact that the defendant must be provided information, or provided access to it, most definitely is not. A

[1] In order to advance the purposes of parole, and therefore comport with Due Process demands, parole procedures should "insure [a parolee's] liberty is not unjustifiably taken away," "a successful attempt at rehabilitation" is not "unnecessarily interrupt[ed]," and "the safety of the community" is not "imprudently prejudice[ed]." *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). It is likewise appropriate for a reviewing court to determine if, in light of these considerations, the government action is consistent with procedural due process. *Id*.

defendant enjoys a constitutional right to discovery of information material to guilt or punishment pursuant to *Brady v. Maryland*. She also has a right to access physical evidence in the possession of the Commonwealth, and a right to access the crime scene. *Henshaw v. Commonwealth*, 19 Va. App. 338, 344 (1994). Furthermore, although not itself a constitutional right, a defendant has statutory entitlement to certain information under the Virginia Supreme Court Rules, and that includes a presumptive right to copies of that information. Va. Sup. Ct. Rule 3A:11.

All of these discovery rights, including the "statutory" right to discovery under Rule 3A:11, play a critical role in safeguarding the defendant's right to a fair trial, including her ability to prepare a complete defense, by affording her access to evidence she needs to meaningfully defend herself. *See Massey v. Commonwealth*, 230 Va. 436, 442, 337 S.E.2d 754 (1985) (right to call for evidence in defendant's favor "is central to the proper functioning of the criminal justice system. It is designed to ensure that the defendant in a criminal case will not be unduly shackled in his effort to develop his best defense."); *Gilchrist v. Commonwealth*, 227 Va. 540, 547, 317 S.E.2d 784 (1984) ("[T]he right to call for evidence in [one's] favor, including the right to prepare for trial . . . and to ascertain the truth . . . lie at the heart of a fair trial, and when they are abridged, an accused is denied due process.") (internal citations omitted); *Henshaw v. Commonwealth*, 19 Va. App. 338, 344 (1994) ("[A] criminal trial is fundamentally unfair if the State proceeds against [a] . . . defendant without making certain that he has access to the raw materials integral to the building of an effective defense."). "[T]he purpose of pretrial discovery is to ensure a fair trial. A criminal trial where the defendant does not have 'access to the raw materials integral to the building of an effective defense' is fundamentally unfair." *State in Interest of A.B.*, 219 N.J. 542, 555-556, 99 A.3d 782, 789-790 (N.J. 2014) (citing *Ake v.*

Oklahoma, 470 U.S. 68, 77 (1985)). "The basic object of the discovery process in criminal proceedings is to permit [the] defendant a decent opportunity to prepare in advance of trial and avoid surprise, thus extending to him fundamental fairness which the adversary system aims to provide." *State v. Scott*, 647 S.W.2d 601, 606 (Mo. App. W.D. 1983).

Because criminal discovery is an essential component of safeguarding a fair trial, the court has the authority to ensure that both parties have the time and the means to make effective use of it, and moreover that the process is conducted fairly. For example, in *Lomax v. Commonwealth*, 228 Va. 168, 172-173 (1984), it was held that "[w]hen a court orders discovery pursuant to Rule 3A:11, the Commonwealth has a duty to disclose the materials in sufficient time to afford an accused an opportunity to assess and develop the evidence for trial. The right to explore and develop this evidence was critical to the defendant's case." Although nothing in the rule or the discovery order entered in the case dictated disclosure in a particular timeframe, the court nonetheless had the power—indeed the obligation—to ensure that the defendant had equally meaningful access to discovery materials, and had sufficient time to use them in preparing a defense. *Id*. Furthermore, the trial court has the authority to punish discovery violations; a power it would not enjoy if the Commonwealth truly had unfettered discretion over the discovery process. *See* Virginia Code section 19.2-265.4 (equitable remedies authorized for discovery violations); *State v. Stapleton*, 539 S.W.2d 655, 659 (Mo. App. 1976) ("Indeed, compliance with the discovery rules is not discretionary because "the rules of criminal discovery are not mere etiquette but the festoons of due process."). In other words, even if the constitution does not mandate a specific quantity of discovery be provided, discovery is a key safeguard in ensuring the access to evidence and a fair trial, and the court has the authority to regulate it.

The court likewise has the authority to ensure a level playing field between the parties—in fact, it has a duty to, seeing as a level playing field is a fundamental feature of a fair trial. Along those lines, although the constitution may be silent about quantities of discovery, it has quite a bit to say about maintaining equity through the manner in which discovery is conducted. *See Wardius v. Oregon*, 412 U.S. 470, 473-476 (1973) ("Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . it does speak to the balance of forces."). Consistent with ensuring a level playing field, broad criminal discovery procedures must be equitable and enhance fairness in the adversarial system. *See Wardius,* supra; *State v. Lucious*, 518 S.E.2d 677, 680 (Ga. 1999) ("The Court in Wardius thus articulated a due process requirement of reciprocity in criminal discovery statutes in the absence of a strong state interest to the contrary."). This means that if the Commonwealth provides information to the Defendant, the process by which it does so must ensure equally meaningful access to the information: it may not be unreasonably time-limited, it may not be unduly burdensome to obtain, it may not require the defendant to divulge strategy in obtaining or making use of it, and it may not in any other way compromise her ability to prepare a defense, or create a needless disparity between her ability to prepare and that Commonwealths ability to do the same.

The notion that a gross asymmetry in access to evidence offends due process is not particularly novel[2]. *See Cox v. Commonwealth*, 227 Va. 324, 328, 315 S.E.2d 228, 230 (1984)

[2] As the Supreme Court stated in *Williams v. Florida*, 399 U.S. 78, 82 (1970), "[t]he adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence."

("For that reason, due process requires that "[i]n our adversary system of criminal justice, all relevant facts . . . be available to both the prosecution and the defense in order to preserve the system's integrity."). The same principles undergird the defendant's right to access to physical evidence seized by police and to access to crime scenes. *See Henshaw*, supra. And it's why the defendant has the same right to subpoena witnesses and evidence as does the Commonwealth. In the context of criminal discovery, the defendant may not be entitled to a specific quantum of evidence, but if she is given evidence, or evidence is made available to her, the procedures governing transfer of or access to it must be fair and equitable.

Due Process Requires Equally Meaningful Access to Discovery Materials

There being a due process right to discovery procedures that protect a defendant's rights to prepare a defense and to a level playing field with the prosecution, the question becomes what does a fair discovery procedure look like. At this point it is worth noting that the Commonwealth has relied on "open file" discovery to discharge it *Brady* obligations. The disclosures by the Commonwealth meant to satisfy *Brady* and its other discovery obligations are identical. Therefore, if the "open file" process is inadequate under *Brady*, then it's simply inadequate, and the court must order a remedy.

In the context of *Brady* disclosures, it is not enough that the government merely provide access to *Brady* materials—it must provide *meaningful* access to them. *See Lomax v. Commonwealth*, 228 Va. 168, 172 (1984) (Commonwealth does not satisfy Brady and its progeny simply by disclosure); *People v. Davie*, 571 N.W.2d 229, 231-232 (Mich. 1997) (discovery procedures only adequate if they give defendant the "opportunity to prepare a meaningful defense" with the benefit of the discovery materials); *cf. Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) ("Meaningful access to justice has been the consistent theme of" due process

jurisprudence in the context of criminal procedure). In order for access to *Brady* material to be meaningful, the Government is "required to make timely disclosure of *Brady* materials in a form that allows the defense a fair opportunity to effectively utilize such information in preparing for trial." *See United States v. Perry*, 2014 U.S. Dist. LEXIS 112277, *12 (E.D.Va. 2014) (citing *United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002) (discussing the "timing and manner" of the *Brady* disclosures, and that they were sufficient as long as defendant had time and means to make effective use of them); *see also Lomax v. Commonwealth*, 228 Va. 168, 172 (1984) (disclosure sufficient only if defendant is able to investigate and evaluate the evidence in preparation for trial); *Gilchrist v. Commonwealth*, 227 Va. 540 547 (1984) (same). Meaningful access requires that counsel be able to review all of the information and assess whether it is inculpatory or exculpatory through the exercise of reasonable diligence. *Id*. (citing *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) (quoting *United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988) and *Lugo v. Munoz*, 682 F.2d 7, 9-10 (1st Cir. 1982)). If there is no way to fully review material to determine whether it contains exculpatory or impeachment information, then the material has not been provided in a constitutional manner. In addition, in order to comport with "level playing field" restrictions, the defendant must have access that is *equally meaningful* to that of the prosecutor; she must have the "same opportunity, through reasonable diligence" to discover whether materials are exculpatory. *United States v. Parks*, 100 F.3d 1300, 1305-06 (7th Cir. 1996); *United States v. Morris*, 80 F.3d 1151, 1168 (7th Cir. 1996). Parties do not have equally meaningful access to information if, for example, only one party can hand a hard drive to an expert for analysis, scan the materials in order to use optical character recognition, or create exhibits without asking permission from the other party, and thereby divulging trial strategy.

Courts in Virginia have addressed the lack of equally meaningful access to *Brady* and other discovery material by granting continuances to allow the defense more time for review, as well as by providing experts to assist the defense in evaluating and making use of discovery material. *See, e.g.*, *Gilchrist v. Commonwealth*, 227 Va. 540, 317 S.E.2d 784 (1984) (error to deny continuance where defense did not have adequate ability to review discovery). However, these aren't the only methods available to the court to ensure that both parties are able to prepare adequately for trial. Courts have discretion to order other relief, so long as that relief is reasonably tailored to safeguard due process and the defendant's right to prepare an adequate defense. *See Meadows v. Commonwealth*, 35 Va. App. 298, 302-303, 544 S.E.2d 876, 878 (2001) (Oral statements must be "reduced to writing" in order to permit "careful examination" and inspection of the material.); *Commonwealth v. Murphy*, 78 Va. Cir. 415, 415-417 (Sussex Cir Ct. 2009) (Defendant entitled to copy of videotape containing his statements.).

Discovery is Always Subject to an Implicit Due Process "Reasonableness Requirement"

Although the authority of courts to take measures to ensure an adequate opportunity to review *Brady* material and criminal discovery arises out of due process, it has achieved its own independent status as a rule of criminal procedure: namely, that criminal discovery is always subject to a reasonableness requirement. No matter how carefully drafted, circumstances will arise when a strict reading of discovery rules means that one party will be far less prepared than the other, or be at a severe disadvantage in the ability to prepare. The reasonableness requirement provides courts discretionary authority to modify or supplement discovery procedures to ensure the fairness of the proceedings.

The reasonableness requirement is often invoked in cases involving voluminous discovery, in light of the unique procedural obstacles entailed by the sharing of large quantities

of information. As the court is likely aware, federal courts adjudicate a disproportionate number of such cases, many of which involve allegations of large-scale financial misconduct. And although the Federal Rules of Criminal Procedure command the government to produce certain classes of information in these cases, they are silent as to the method of production, or the format of materials to be given to the defense[3]. *See* Federal Rule of Criminal Procedure 16. In the vast majority of federal white collar criminal cases, prosecutors work cooperatively with defense counsel to provide discovery materials in a usable format that is easy to navigate. Federal white collar defense practitioners understand that not only is there is no way to defend a large-scale fraud case without their own copies of discovery materials; there's no way to defend those cases without expending a great deal of time, effort and money organizing discovery, including with the assistance of forensic computer experts, forensic accountants and discovery support professionals. With their own copies accessible, these "experts" can manipulate and index discovery materials such that they can be reviewed and searched using sophisticated database software. This is indeed standard practice among white collar criminal practitioners.

That said, in a number of reported cases, federal prosecutors refused to go beyond the explicit mandates of the discovery rules in carrying out their discovery obligations, and found themselves at odds with defense counsel as to the means or methods of disclosure. For example, in several instances, federal prosecutors refused to provide defendants with their own copies of discovery materials, or agreed to provide only one shared set of discovery materials to multiple co-defendants, to be available for review at a common location. Even though a strict reading of

[3] Virginia appellate courts have noted the similarity of the federal rules and the interpretation of them as providing persuasive authority. *See, e.g.*, *Hackman v. Commonwealth*, 220 Va. 710, 713-714, 261 S.E.2d 555, 557-558 (1998); *Yazid Abunaaj v. Commonwealth*, 28 Va. App. 47, 52-56, 502 S.E.2d 135, 137-139 (1998).

the Federal discovery rules compelled nothing more from the government, because of the unstated requirement of reasonableness, the prosecutor's actions were found to violate due process. *See United States v. Freedman*, 688 F.2d 1364, 1366 (11th Cir. 1982) ("[W]hile not expressly stated," discovery rules should be "applied with a limitation of reasonableness," arising out of due process protections). In essence, because the court is tasked with safeguarding a defendant's trial rights and ensuring a level playing field, it may order relief beyond what the operative discovery policy provides[4]. *See id.*

As noted above, whether state action in the realm of criminal procedure offends due process turns on the individual and governmental interests at stake, and how the action advances or infringes on them—in other, a cost-benefit analysis. This is precisely how the courts confronted with discovery disputes have resolved them, by weighing the costs and benefits, taking into consideration judicial efficiency, trial simplicity, the ability of the defendant to prepare for trial, the balance of forces between parties, and the prejudice the defendant will suffer if discovery procedures are not modified. *See Freedman*, 688 F.2d at1365-1367. Prejudice to a defendant is driven largely by the availability of discovery materials, and whether, without additional accommodations, discovery will pose an "undue hardship." *Freedman* at 1366; *see*

[4] The reasonableness principle is often marshaled where the defendant is indigent. *See United States v. Tyree,* 236 F.R.D. 242, 244-245 (E.D. Pa. 2006) (citing *Freedman*, *supra*). In *Tyree*, the court found that reasonableness takes into consideration the indigence of the defendant in determining whether the playing field is level: "But once Congress has spoken, and the result is the problem we face now, the Courts' overriding priority is to assure that every indigent defendant has as level a playing field as the Constitution requires, and to which the Courts have been most sensitive at least since the Supreme Court decided *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)." Other courts have noted that "[w]here warranted by the circumstances, courts have required the government to bear certain costs of discovery." *United States v. Green*, 144 F.R.D. 631, 636-37 (W.D.N.Y. 1992) (collecting cases in which courts have provided this relief, including one in which the government was ordered to provide defendants with rough transcripts of 1,200 hours of recorded conversations, *see United States v. DeLuna*, 31 CRL 2406-07 (W.D. Mo. 1982)).

also Bennett v. United States, 2013 U.S. Dist. LEXIS 102771, *26-28, 2013 WL 3821625 (S.D. Fla. 2013)). Unsurprisingly, Courts have applied the same standard to *Brady* material, noting that while "voluminous open file" does not constitute a per se violation of due process, it does where it is "unduly onerous to access." *United States v. Warshak*, 631 F.3d 266, 297 (6th Cir. 2010) (quoting *Skilling v. United States*). Hardship considerations that may warrant additional accommodations in the discovery process include the following:

- Are the materials organized, indexed and searchable? *See United States v. Poindexter*, 727 F. Supp. 1470, 1485-86 (1989) (government agreed to identify and index documents according to main factual categories implicated by charges); *United States v. Skilling*, 554 F.3d 529, 577 (5th Cir. 2009); *United States v. Ferguson*, 478 F. Supp. 2d 220, 242 (U.S. Dist. 2007)
- Has the government narrowed the voluminous discovery down to the "relevant" documents, or "hot docs?" *Skilling* at 577; *United States v. Ferguson*, 478 F. Supp. 2d 220, 242 (U.S. Dist. 2007) ("at arraignment, the government provided the defendants with its 'hot docs'") (hot docs comprised 1350 pages); *United States v. Hsia*, 24 F. Supp. 2d 14, 28 (1998) ("Since the filing of Ms. Hsia's motion, the government has provided her with three notebooks of information that it claims contain the relevant documents." Initially the government had produced 600,000 pages with no guidance); *United States v. Turkish*, 458 F. Supp. 874, 882 (S.D.N.Y. 1978).
- Was a bill of particulars ordered providing specific guidance as to which documents would be at issue at trial? *See United States v. Nachamie*, 91 F. Supp. 2d 565, 568-576 (U.S. Dist. 2000) ("Because the Government has declined to identify which of the [more than 200,000 pages of] documents provided to the defense pursuant to Rule 16(a)(1)(C) it intends to use in its case-in-chief at trial, it must, instead, respond to an appropriate bill of particulars."); *United States v. Bortnovsky*, 820 F.2d 572, 574-75 (2d Cir. 1987) (bill of particulars can provide guidance to defense faced with "mountains of documents"); *United States v. Davidoff*, 845 F.2d 1151, 1155 (2d Cir. 1988) (fact that Government produced 6,000 pages of discovery did not obviate need for bill of particulars in complex prosecution).
- Is there evidence from the litigation that the defendant is in fact "capably navigating discovery?" *Skilling* at 577.
- Can the discovery be meaningfully accessed "through an exercise of due diligence"? *Id.* at 576; *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002) ("When evidence is equally available to both the defense and the prosecution, the defendant must bear the responsibility of failing to conduct a diligent investigation."); *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980).

- Has the government provided a list of exhibits in advance of trial? *See United States v. Ferguson*, 478 F. Supp. 2d 220, 244 (U.S. Dist. 2007) (exhibit list required two months before trial).
- Were the documents already the subject of a separate trial? *United States v. Poindexter*, 727 F. Supp. 1470, 1485-86 (Dist. D.C. 1989) (much of government's evidence had already been presented at the trial of a co-defendant).

What should not be overlooked is that these cases deal with accommodations to the defense that are several steps beyond the most basic accommodation Berhane seeks: her own copies of discovery materials. In fact, these cases presume the availability of copies. And in the few cases where copies were at issue, the courts treated the matter as almost too elementary to entertain—*of course* a defendant needs his own set of discovery materials in order to be meaningfully prepared. Arguments to the contrary are plainly meritless. Take *United States v. Green*, for example. 144 F.R.D. 631, 636-638 (W.D. N.Y. 1992). In *Green*, a case involving multiple co-defendants, the Government provided one set of discovery documents to be shared by all co-defendants in the case. The questions presented were whether each defendant was "entitled to their own set of [discovery] documents from the government," *id.* at 637, whether a defendant could adequately prepare a defense without his own copy of discovery materials, *id.*, or whether it was enough that a defendant merely have access to discovery that was in the physical custody of someone else.

The court resolved the first question with ease: "The answer to the first question is readily apparent . . . . It is not feasible for defense counsel to prepare adequately for trial" with a shared copy of discovery materials. *Id.* "Clearly, each defense counsel has to be in a position to review all the government's evidence and to review this evidence with his or her client . . . in order to prepare for trial. . . . It is just not feasible that this be done with only one [shared] set of documents . . . ." *Id.* at 637. With respect to the latter question, the court found that "it is not a

solution to have each defense attorney personally review the one set of documents already provided to lead defense counsel and make selected copies of those portions deemed relevant by that attorney. Having [multiple] attorneys reviewing one set of documents and taking selected portions away for copying will be cumbersome, time consuming" and ultimately "more costly and . . . to all concerned." *Id*. at 637.

Other courts have made similar findings. In *United States v. Products Marketing*, 281 F. Supp. 348, 350-353 (D. Del. 1968), the defendant had no right under the rules to have the government provide him his own copies of materials, and he was unable to make copies himself as a result of his indigence. The showing of need (and hardship to the defendant) was virtually identical to the showing Berhane must make here. The court held that copies of discovery were required in order to "make appropriate pre-trial motions or prepar[e] a defense" and are therefore "necessary to enable counsel to properly carry out their constitutionally mandated task" of providing effective assistance. *Id*. at 352.

The Commonwealth "Open File" Discovery Policy is Constitutionally Infirm

The Commonwealth has previously articulated the purposes of its "open file" discovery as minimizing the time-consuming nature of formal discovery pursuant to Supreme Court Rules 7C:5 and 3A:11, and "to enhance the possibility of dispositions being reached prior to the trial/preliminary hearing date." Presumably, another purpose is to promote just outcomes by safeguarding a defendant's rights to prepare a complete defense, to effective assistance of counsel, and to a level playing field with the prosecution. There is also ample precedent, including from the United States Supreme Court, on the permissible purposes of discovery in general, and expanded, "open file" discovery such as the Commonwealth purports to provide here. "[L]iberal discovery . . . gives both parties the maximum possible amount of information

with which to prepare their cases and thereby reduces the possibility of surprise at trial," and "by increasing the evidence available to both parties, enhances the fairness of the adversary system." *Wardius v. Or.*, 412 U.S. 470, 473-474 (1973). "Broad discovery rights" are intended to "prevent[] surprise," lead to "an improved fact-finding process" that eliminates "trial by ambush," and in doing so promote the due process principle of fairness. *Cuciak v. State*, 410 So. 2d 916, 917-918 (Fla. 1982). Broad criminal discovery rules "seek to foster informed pleas, expedited trials, a minimum of surprise, and the opportunity for effective cross-examination." *State v. Wells*, 639 S.W.2d 563, 566 (Mo. 1982).

The Commonwealth's "open file" policy does not advance these purposes. If anything, it obstructs them. Particularly in cases involving large quantities of discovery materials, the "open file" policy only saves the *Commonwealth* time; it doesn't save the defense any time at all. Rather, a constitutionally effective defense attorney will spend exponentially more time manually copying discovery than he would if copies of discovery were provided to him, if he declined "open file" (instead availing himself of discovery pursuant to Rules 7C:5 and 3A:11), or if he relied on his own investigation in preparing his defense. Just as is the case here, trials aren't expedited by the Commonwealth's policy—they're delayed. Only plea deals are expedited, and that's for reasons that are unconstitutional. It seems unlikely that the policy "enhance[s] the possibility" of resolving cases in an informed fashion early in the litigation, since it makes the process of obtaining discovery—and therefore analyzing the merits of the case—considerably more onerous. Any plea negotiations that do occur are very likely to be uninformed from the standpoint of defense counsel, providing the Commonwealth considerably more leverage in the negotiation process.

To the extent the "open file" policy does lead to more guilty pleas, it is likely for unconstitutional reasons. The pernicious effects of excessive attorney workloads are well-recognized, and those effects are especially prevalent among public defenders and court-appointed counsel. *See* N. Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, AM. BAR. ASSOC. (2011). As the American Bar Association noted when it examined indigent defense services in Virginia, the more work an attorney has to do, the less time he has to "effectively litigate" each case, regardless of whether that entails "going to trial or negotiating a plea bargain." R. Spangenberg, et. al., *A Comprehensive Review of Indigent Defense in Virginia* at 32, AM. BAR ASSOC. (2004). More work increases the likelihood that an attorney will adopt a "triage" mentality, and that his cases will be "pled out"; as study after study has noted, "crippling" workloads "make it all but impossible to take cases to trial." R. Boruchowitz, et. al., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, at 31, NAT'L. ASSOC. OF CRIM. DEF. LAWYERS (2009).

Obtaining "open file" discovery in any case, but particularly a case involving large quantities of discovery materials, represents a considerable additional burden that can exponentially increase the amount of time required to provide competent representation. To better understand the practical impact of obtaining "open file" discovery on an attorney's workload, the court might consider how many additional cases the attorney could handle during the time spent copying discovery. Payments to private court-appointed counsel are a reasonable benchmark, since they establish the maximum amount of time the state expects attorneys to spend defending different types of court-appointed criminal cases. Those fee caps are set at $120 for misdemeanors and $445 for most felony cases. At $90 per hour, this means that court-appointed counsel are expected to spend no more than 1.3 hours on a misdemeanor case and 4.94

hours on a felony. In essence, an attorney who spends 15 hours per month manually copying discovery has, through that process alone, added the caseload equivalent of 11.5 additional court-appointed misdemeanors or 3 additional felonies each month. This works out to an additional 138 misdemeanors or 36 felonies per attorney per year. In 1973, the President's National Advisory Commission set forth public defender caseload guidelines, establishing the maximum number of cases an attorney should handle per year—400 misdemeanors or 150 felonies—which it described as a number "that should in no event be exceeded." *See* AM. BAR ASSOC., *Ten Principles of a Public Defense Delivery System; National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on Courts*, Standard 13.12 ("Workload of Public Defenders") (1973). In other words, the Commonwealth's policy increases overall attorney workload by as much as 35%. This is precisely the type of burden that increases the likelihood an attorney will adopt a "meet 'em and plead 'em" mentality, instead of providing thorough, competent representation.

Lastly, to the extent that "open file" discovery is intended to promote just trial outcomes by enhancing the defendant's access to information, and therefore his ability to prepare his defense, the policy falls well short of its objective. More often than not, due to the restrictions imposed by the Commonwealth, defense counsel is effectively unable to obtain all of the discovery materials. As a result, most attorneys don't even try—as noted in her Motion to Disqualify, available evidence suggests that Arlington defense attorneys usually obtain dramatically abbreviated and/or paraphrased versions of discovery materials, meaning they are not, in fact, preparing trial defenses based on complete information.

Furthermore, by failing to efficiently transfer information to the defense, the policy also creates a stark imbalance in the parties' ability to access and use discovery materials in preparing

for trial. Unlike the Commonwealth, which need not spend any time on the purely administrative task of transposing text, defense counsel might spend more time on administrative work than on any other task required to defend his client in a given case. As noted previously, counsel for Ms. Berhane have spent upwards of 85 hours solely on the discovery process, while the Commonwealth has presumably spent none—meaning it has had at least 85 more hours in which to do actual legal work: investigating and researching the law and facts, drafting legal memoranda, developing trial theories, preparing jury instructions, and doing whatever else is necessary to strengthen the Commonwealth's case for guilt. As a result, the prosecution now enjoys a distinct advantage with respect to trial preparation—an 85 hour advantage, to be precise, which it builds on every day the current "open file" policy remains in effect. Information that in theory should have been equally available to both parties is in fact much more available to the Commonwealth, and the longer this persists, the further the playing field will fall out of level. This is precisely the type of imbalance the reasonableness requirement is designed to remedy, and the court should therefore

Even with a full set of discovery materials from the Commonwealth, adequately reviewing them in order to be prepared for trial will be a colossal undertaking, requiring dozens if not hundreds of additional hours of review and organization by counsel. Should no accommodations be made, this will require literally months-worth of attorney hours outside of the Office of the Public Defender, and inside of one of the visiting rooms at the Commonwealth's Attorney's Office, where the attorneys are incapacitated in their ability to do *anything other than* review discovery. They won't be able to take a phone call, meet briefly with a client, consult reference materials, or do any of the other small-but-essential tasks that break up a public defender's workday.

To put it bluntly, this state of affairs is absurd. There is no discernible reason that defense counsel should not have their own copies of bank records, police supplements parsing the bank records, or a cloned copy of the contents of all seized computers, phones and electronic storage devices. There is no discernible reason the Commonwealth must prevent gigabytes worth of credit card transactions from leaving its office. Even if there were some reason, it is hard to imagine it outweighing Berhane's right to a fair trial, to meaningful access to the materials, or to equity in the discovery process.

No imagination is required, however, because if the discovery policy ever was able to operate as intended, it would be clear just how pointless the limitations are. By way of explanation, standards of practice for criminal defense attorneys very likely require that counsel make as close to an identical copy of all discovery materials as is possible. To reiterate: counsel has an obligation to copy all of the materials provided. The Commonwealth's policy purportedly allows access to all materials in the Commonwealth's file, both to the Defendant and her attorneys. If defense counsel complies perfectly with their professional obligation to obtain near-identical copies, then all of the discovery materials will land in the possession of the defense eventually. It is worth repeating this for emphasis: if the policy works as intended, all discovery materials will eventually be in the possession of the defense. The only difference is that the defense copy will have been typed by defense counsel rather than a detective, witness or prosecutor. This hardly seems like it makes much of a difference, and it's difficult to imagine a legitimate governmental purpose behind it. To use the language of due process, it is completely arbitrary, unless the objective is to waste as much of defense counsel's time as possible.

Indigent defense practice in Virginia is far from a perfect world, unfortunately. Realistically, most court appointed counsel and public defenders do not have the time or the

means to copy verbatim all of the discovery documents available in a given case while still being prepared for trial—this is true even in cases with a fraction of the discovery materials at issue here. For example, at a rate of 7-10 pages per minute, obtaining even a 100-page file would take at attorney 12-17 hours. As a result, the Commonwealth's policy creates an unacceptable dilemma for defense counsel, particularly in felony cases—either copy the discovery or prepare for trial. There is rarely time to adequately do both. The question then is not whether counsel will violate the Sixth Amendment, but rather how counsel will do so. They are essentially forced to choose between two different forms of ineffective assistance of counsel, and guess as to which one will cause less prejudice to their clients.

Lastly, the defense does not have meaningful access to photographs or formatted text, and if it requires those or any other materials to use in pretrial preparations—which it will in this case—then it must divulge trial strategy in order to obtain them. Moreover it cannot provide a cloned hard drive to an expert for analysis, it can't submit data to an expert to convert into a searchable database, or make use of the discovery materials in a variety of ways the Commonwealth is able.

CONCLUSION

The Commonwealth's discovery policy barring the defense from obtaining its own copies of discovery materials is arbitrary and unreasonable. This is arguably true of all cases, but that's not what the court needs to decide at this juncture. The court only needs to decide the issue as to Ms. Berhane's case, where the overwhelming quantity of information renders the process of obtaining discovery so unwieldly as to effectively be impossible.

For these reasons, and additional argument to be presented at a hearing on the matter, the Defendant asks the court to grant her motion and order the Commonwealth to provide a full set of discovery materials.

Respectfully submitted,
ADIAM BERHANE
By Counsel

I ASK FOR THIS:

_____/S/_____
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Certificate of Service

I hereby certify that I have served a copy of the foregoing motion upon the Office of the Commonwealth's Attorney, attention Evie Eastman, 1425 North Courthouse Road, Room 5200, Arlington, Virginia 22201, this 27th day of April, 2018.

_____/S/_____
Bradley R. Haywood