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January 4, 2017

Matt Foley, Public Defender
Arlington County & the City of Falls Church
2300 Clarendon Blvd., Suite 201
Arlington, VA 22201

Dear Matt,

I believe a review of my office's various policies and procedures, including our discovery policies, is in order in light of your recent proposal.

As you know, my office has long had a policy of providing open file discovery in felony cases. After my election as Commonwealth's Attorney in 2011, I expanded our open file policy to include *all* misdemeanors in both General District Court and the Juvenile and Domestic Relations District Court. In an effort to resolve as many cases as possible before the trial or preliminary hearing date, I also devised the Advanced Docket Program (ADP). With ADP, cases are assigned to an ACA three weeks out. This represents a major departure from the days when ACAs got their lower court cases the night before court. This innovation was designed to provide defense counsel an opportunity to review the case file, to assess the strength of the Commonwealth's case, to negotiate a potential resolution with the assigned ACA and to inform their clients about possible plea outcomes or the likelihood of success at trial. And just as importantly, ADP allows ACAs to better prepare crime victims and witnesses for court and in cases where a resolution is reached ahead of the court date, the opportunity to eliminate unnecessary and stressful court appearances and attendant waiting times for victims and witnesses of crime.

Under our office policy, defense counsel is provided far broader discovery and well beyond that which is required by the Rules of the Supreme Court. This is accomplished on an informal basis without discovery motions or court orders. When an attorney in private practice put an in-car

video on YouTube, we started requiring all lawyers taking advantage of our open file policy to sign an agreement promising not to disseminate discovery material. Earlier this year, we learned that a different attorney in private practice had signed our General District Court non-disclosure agreement and then photographed police reports while taking advantage of our open file policy. This was in clear violation of the agreement, but because it was not in a court order, we had no remedy. (I cite these as two examples but there have been numerous others.)

As a result, we incorporated the terms of our non-disclosure agreement into our Circuit Court discovery order for felony cases. When several attorneys in private practice raised concerns about the wording of the new discovery and protective order, I agreed to modify it. I take great pride in my accessibility to defense counsel. And as ministers of justice, which is what prosecutors are, it is vitally important that we work every day to insure that criminal defendants as well as victims and witnesses of crime are treated with fairness and equity.

It is against this backdrop that I reviewed your recent proposal to expand even more my office's discovery procedures. Regretfully, I find your proposal unserious and lacking any sense of equity.

Article I, § 8A of the Virginia Constitution guarantees to victims, among other things, the rights to respect, dignity, and fairness at all stages of the criminal justice system. Absent exculpatory evidence, giving defendants copies of videos that might depict a victim of sexual assault or some other crime in a state of undress accords victims neither respect nor dignity. Handing over to the defendant in a domestic violence case, the hand-written statement of his victim to be shoved in her face the next time he commits a brutal assault, re-victimizes an already vulnerable individual. Section 19.2-11.01 of the Code of Virginia states that victims' "privacy is to be protected to the extent permissible under law." Implementation of your discovery proposal is inconsistent with that laudable statutory goal.

Every time we reveal victim or witness information, we increase the potential danger to victims and witnesses of crime. In 2013, the daughter of murder victim Mack Wood received an unwanted call from her brother in jail and awaiting trial for the murder. When she asked him how he got her number, he replied "from the discovery" and told her that the co-defendants had all of that information as well. A few days ago, on December 16, the juvenile victim of a grand larceny from the person was brutally attacked at a restaurant by a group of men led by the grand larceny defendant. As he started the assault, the defendant told him "before I beat the fuck out of you, tell me why you snitched." Under your proposal, we would be required to turn over victim information in the new case to a defendant out on bond now awaiting trial for assaulting a "snitch." Crime victims are always at some risk of retribution. Witnesses have been murdered in nearby jurisdictions. My job is to prevent that from happening here and turning over personal, identifying information of victims and witnesses, when we do not have to, increases this risk.

The deadlines you suggest in your proposal are totally impractical. For example, by statute juveniles held in detention must have a trial date within 21 days. Your proposal for a 15-day deadline accords the Commonwealth 3 days to prepare discovery for a delinquent who is arrested on a Friday. We would have even less time to comply if this occurred over a holiday weekend. Under your proposal, we would have been required to have *all* police reports, physical evidence, recorded witness interviews, etc. ready in 3 days for defense counsel to review for Maxwell Adams, Brian Bowyer, Lamont Calloway , Keenan Griffin or one of the other juveniles we have prosecuted for murder. Indeed, both Adams and Bowyer committed murder on a Friday. This reality alone renders your proposal ill-conceived, nearly impossible to fulfill and utterly impractical.

LEO 1864 requires that discovery materials in an attorney's possession be turned over to the defendant if the attorney withdraws from the representation. This is true even when the attorney has signed an agreement with the Commonwealth promising to return "sensitive materials" – an agreement which requires the "informed consent, preferably in writing" from a criminal defendant. I doubt many criminal defendants will agree to such a provision. Under your proposal therefore, defendants can end up with all manner of witness and victim information. The idea that a defendant charged with identity theft would have unfettered access to the victim's social security number, date of birth, phone numbers, addresses, etc. is nothing short of perverse. To avoid such disclosures, your proposal suggests that police reports would be "redacted" of all identifying information, presumably by my office. This is a daunting task for which we lack the resources and would eviscerate any time savings your proposal purports to achieve.

Rules 7C:5 and 8:15 do not require the Commonwealth to provide more than the defendant's statements to law enforcement officers and criminal record which we intend to use at a misdemeanor trial or preliminary hearing for an adult charged with a felony. These rules do not provide for the exclusion of evidence as a remedy for a violation, only that the Court may grant a continuance to the accused. This limitation is a recognition by the Supreme Court that trials and preliminary hearings in the district courts are typically set more quickly than in Circuit Court and that officers and detectives may still be gathering evidence and writing reports after the defendant is arrested. Your proposal expanding district court discovery to include police reports, detective supplements, statements of co-defendants, victim and witness statements by agreed order, raises the specter that the Commonwealth would suffer a greater harm, i.e. exclusion of late-discovered evidence. My office would be foolish to agree to a scheme that could result in the Commonwealth being unable to introduce otherwise relevant and admissible evidence in an effort to prove your client committed the offense for which he or she is charged.

It is also worth noting that the Virginia Supreme Court expressly rejected similar modifications to their own discovery provisions as recently as last year.

Your proposal does not even include things to which the Commonwealth is entitled under Rule 3A:11 such as notice of alibi, results of scientific tests the defendant intends to introduce or

notice of an insanity defense. Your proposal for reciprocal discovery, to-wit: written reports of defense expert witnesses, is evidence of a lack of seriousness and does nothing to acknowledge the already expansive effort on the part of my office -- and me personally – to afford criminal defendants in Arlington and Falls Church an opportunity for fair, just and equitable treatment by our criminal justice system.

Your recent decision to eschew informal, expanded open file discovery in favor of orders requiring the production only of material covered by 7C:5 and which also cite the Rules of Professional Conduct and our duties under Brady, has all the hallmarks of using the discovery process as a sword against the Commonwealth, rather than an opportunity offered in good faith by my office to reach a just outcome in each and every case we prosecute.

Kind regards,

Theophani Stamos

Commonwealth's Attorney

cc: scanned copy to signatories