TO: Mark Schwartz
FROM: Parisa Dehghani-Tafti
DATE: June 4, 2020
RE: Ethics & Discovery Obligations Regarding Traffic Infractions & Misdemeanors

INTRODUCTION

At present, the Office of the Commonwealth's Attorney handles the traffic docket in the General District Court. This docket encompasses two categories of cases: 1) moving violations, such as speeding or failing to obey traffic signals, which are punishable by a fine; and 2) offenses classified as criminal misdemeanors, such as reckless driving or driving on a suspended license, DWI, or leaving the scene of an accident, which carry potential jail time. Within the category of misdemeanor traffic cases, there are two subsets of case: those handled in "traffic" court, or 3C, which include driving without a valid operator's license, driving on a suspended license, reckless by speed, and numerous registration offenses; and those handed in 3B, which generally have heightened public safety concerns, such as DUI, DWI, speeding to elude, and leaving the scene of an accident – this latter category are cases in which we receive advanced notice and documentation which permits preparation, and will, for purposes of this memo be referred to as "3B" cases. All other cases, which appear in 3C, will be referred to as "3C" cases.

In representing the Commonwealth in 3B cases, our office follows the same procedure and abides by the same discovery obligations as any other criminal case. However, historically we have not done so for 3C cases, including those misdemeanor 3C cases that potentially carry jail time. Rather, our office's procedure in all 3C cases has historically been to post a prosecutor outside the courtroom to plea-bargain these cases without any pre-court-date discovery to defendants and without the assigned prosecutor having any prior knowledge of the case.

It has come to our attention that this long-standing practice is a violation of our ethical duties as prosecutors. Under *Brady v. Maryland*, prosecutors have a constitutional obligation to disclose to defendants any potential exculpatory *or* impeaching evidence. On September 5, 2018, the Supreme Court of Virginia adopted Rule 3A:11, effective July 1, 2019, and subsequently by order on January 29, 2019 delayed its effective date to July 1, 2020. Rule 3A:11 is intended to update and modernize the criminal case discovery process with broad changes to the equity, fairness, and due process afforded to all parties in a criminal case in the Commonwealth of Virginia. In reviewing the Rule and preparing for its application, our office determined that the disposition of 3C cases without reviewing and disclosing footage from police in-car cameras and other evidence may not fulfill our *Brady* obligations or our diligence and competence obligations under Rules 1.1 and 1.3 of the Rules of Professional Conduct; we sought and received guidance from the Commonwealth's Attorneys' Services Council ("CASC"), the state agency responsible for providing training, education and services to prosecutors across the state, and from the Virginia State Bar Ethics Counsel ("VSB"). Our discussions with both CASC and VSB have led us to conclude that we have an ethical obligation to review and potentially disclose in-car video evidence before disposing of 3C cases.

Unfortunately, at present we have neither the staff nor resources to review, process and disclose camera footage and other evidence from 40,000 cases. Therefore, this memo identifies four potential options, but recommends one of two:

1. Cease OCA's participation in 3C while maintaining the current caseload in 3B at current staffing levels; or
2. Cease OCA's participation in 3C while migrating a small subset of cases implicating public safety over to 3B for OCA's handling with a more modest increase in staffing levels of 1-2 FTE positions.

Our current procedure for handling 3C cases is decades old. And while a few other OCAs across the Commonwealth engage in similar practices, we are in the minority in terms of the wide category and sheer number of cases in which we have been involved. However much our involvement has come to be expected, this much is now clear: our office can no longer continue business as usual and still comply with both our ethical and *Brady* obligations, as well as the discovery standards we believe are set by Rule 3A:11. We do not arrive at this conclusion lightly but, as we prepare to implement Rule 3A:11, we believe the status quo is not consistent with our ethical obligations. Below we explain why.

DISCUSSION

A. Our Current Procedures Do Not Provide Discovery to Defendants in traffic cases that are potentially subject to jail time

"Traffic" cases in the District Court encompass a wide variety of charges, but they are primarily divided into two categories:

The first category of traffic cases includes ordinary moving violations punishable only by a fine, such as speeding, incomplete stop at a stop sign, or failing to obey a red-light signal.[1] Historically, these number approximately 20,000 to 30,000 cases per year for the last several years.

The second category covers a number of other offenses classified by statute as criminal misdemeanors, such as reckless driving, driving with a suspended license, driving without a license, and numerous other registration-related offenses, and DUI. These cases are subdivided between 3C and 3B, with the cases that more closely implicate public safety being heard in 3B, such as DUI, eluding by speed, and leaving the scene of an accident. All of these types of cases may carry not only a fine but also a jail sentence. Historically, 3B cases number approximately 4,000 to 5,000 cases per year; 3C cases number approximately 6,000 to 7,000 cases per year for the last three years.

[1] In addition to any fine the Court may impose for these infractions, a finding of guilt on this category of cases is typically transmitted to the Virginia DMV and often directly impacts a defendant's DMV record with point deductions that can impact things such as insurance rates and even the privilege to drive.

So-called 3B traffic cases are not the concern of this memo. In these cases, we typically receive police reports and video footage several weeks ahead of court to adequately prepare. This enables us to comply with our ethical obligations as well as our discovery obligations governed by Supreme Court Rule 7C:5, which applies to misdemeanors punishable by jail.

Historically, our office has assigned a prosecutor to cover the daily docket in 3C. We do this assignment with no preparation or advance notice of the docket and simply station a prosecutor outside the courtroom to meet with defendants, either pro se or represented by counsel, and the ticketing officer to essentially plea bargain with those parties. We do this without regard to nature of the offenses, whether infractions or criminal charges, and we do so without any advance preparation or even inquiry into formal discovery beyond a cursory conversation with the ticketing officer despite the fact that almost all of the agencies we partner with maintain video footage in the form of at least in-car dashcam footage of almost every traffic stop.[2]

B. *Brady and other ethical obligations require disclosure of evidence in traffic cases that are subject to criminal penalties*

Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), prosecutors have an affirmative obligation to disclose exculpatory evidence or evidence that would tend to impeach the credibility of a government witness. Because the Commonwealth's Attorney has the duty to disclose, it has a similar affirmative duty to seek out such evidence. *Kyles v. Whitley*, 514 U.S. 419 (1995). *See Also Workman v. Commonwealth*, 272 Va. 633, 636 S.E.2d 368 (2006) (In order to comply with *Brady*, therefore, the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in this case, including the police).

Arguably, *Brady* and its obligations may extend only to criminal matters, and thus apply only to those 3C traffic misdemeanors categorized as criminal and not to 3C traffic violations subject to a fine.

However, the law is not settled in this area. Thus, while *Brady* has been held not to apply in certain civil proceedings such as administrative unfair labor proceedings before the National Labor Relations Board (See *N.L.R.B. v. Nueva Engineering, Inc.*, 761 F.2d 961, 969 (1985)) or in some civil enforcement actions (See *U.S. v. Project On Government Oversight*, 839 F.Supp.2d 330, 341-44 (2012)), it has been held that Brady does apply in other instances such as a civil denaturalization proceeding where, "the consequences... equal or exceed those of most criminal convictions..." (See *Demjanjuk v. Petrovsky*, 10 F.3d. 338, 353-54 (1993)), in federal sexually dangerous civil

[2] In-Car Video ("ICV"), also known as "dashcam" video, is deployed in most of the marked patrol vehicles of our partner law enforcement agencies to include the Arlington County Police Department, Virginia State Police and the Falls Church Police Department. Typically, the system is triggered to record every time police lights are activated by the responding officer by saving the 30 seconds or so prior to the lights going on, thus preserving some of the observations prior to the actual effecting of the traffic stop, and then continuing to record the rest of the encounter. These videos are then saved and preserved by each agency according to their own policies and retention guidelines and made available to our office by request.

commitment proceedings (See Generally *U.S. v. Edwards*, 777 F.Supp.2d 985 (2011)), and broadly in some civil actions brought by the government, where, "a defendant in a civil case brought by the government should be afforded no less due process of law." (See *E.E.O.C. v. Los Alamos Constructors, Inc.*, 382 F.Supp. 1373, 1386 (1974)).

The common thread of these cases is a distinction between simple civil cases involving money, where *Brady* is less likely to be found to apply, and cases such as extradition for a death-eligible offense and involuntary indefinite commitment, where it is more likely to be found to apply. It is not clearly settled that in the middle ground of cases such as traffic infractions where collateral consequences such as not just fines, but things such as loss of driving privileges and consequences to statutorily mandated insurance may require additional obligations. But this much seems clear, even if *Brady* does not apply to the category of 3C traffic cases subject only to a fine, it does apply to the category of 3C traffic misdemeanors that are potentially subject to jail time.

C. Guidance from CASC and VSB counsels that the exercise of prosecutorial functions by our office in any traffic case subject to jail time requires that we independently review and potentially disclose footage and other evidence collected during traffic stops

On September 5, 2018, the Supreme Court of Virginia adopted amended Rule 3A:11, governing discovery in Circuit Court cases, effective July 1, 2019, and subsequently by order on January 29, 2019 delayed it's effective date to July 1, 2020. Among other things, and relevant for purposes of this memo, the Rule's amendments were in large part driven by the proliferation of video footage, specifically body worn cameras ("BWCs"). Originally, the Rule was scheduled to go into effect in July 2019. However, concerns about the costs and staffing levels needed to manage discovery of BWC footage delayed implementation of the rule until July 2020.[3]

While Rule 3A:11 does not directly addresses the question of how to handle *Brady* obligations in traffic cases, implementation of the new rule, particularly with respect to BWC footage, brought to the fore a problem that had long existed in this office and indeed exits in virtually every CA office in the Commonwealth involved with traffic case: footage and other evidence from BWCs and in-car videos collected during traffic stops are Brady materials and subject to discovery and yet are neither reviewed nor disclosed by prosecutors in 3C traffic cases subject to jail time.

As the new rule's implementation approaches, agencies such as CASC and VSB have been working with offices such as ours to provide guidance on our new obligations. The consensus of this guidance is clear:

[3] The delay was to allow for an amendment to the 2019 budget passed by the General Assembly requiring localities that choose to use BWCs to fund an additional prosecutor per 75 cameras deployed to deal with the increased workload attendant to BWCs, as was recommended by the 2018 BWC Workgroup Study. See, *Budget Bill HB1700 (Chapter 854), Item 70*, Available at: https://budget.lis.virginia.gov/item/2019/1/HB1700/Chapter/1/70/

First, beyond simply obtaining these videos, the guidance from VSB is unequivocal about what must additionally be done with it:

> Further, as the Supreme Court stated in *Kyles v. Whitley*, it is the prosecutor alone, not the police, that must assess the "materiality" of the evidence. In a discussion about staffing and resources for the Commonwealth's attorneys, these legal requirements are important as they require the prosecutor to not only request BWC footage from law enforcement officers, but also personally review the footage, or risk a *Brady* violation that may cause a continuance, mistrial or reversal of a conviction.[4]

While the VSB guidance specifically mentions BWC, or body-worn camera, footage, it highlights that the handling of ICV footage, or lack of handling, is not a new issue and has been likely one of a lack of compliance since the deployment of ICV by law enforcement as long as no efforts were being made to obtain and review that footage. We are not alone in this regard and informally have heard similar "moments of reckoning" from the outlying offices across the Commonwealth that have operated in traffic court in a similar manner that we have (most operate in a far more limited capacity than the OCA has). The conversations about discovery, Rule 3A:11 and BWC footage merely brought a focus onto an issue that has been neglected for some time.

The simple explanation of the issue is that because these technically are criminal matters, our obligations are triggered. Moreover, it is not enough to simply say that we have provided discovery when requested because our obligations extend to affirmatively disclosing exculpatory evidence. We are unable to meet this obligation without reviewing the evidence in each case in which we involve ourselves.

Additionally, the issue of video footage implicates additional ethical obligations and considerations as further considered by guidance from VSB:

> Like all lawyers, Commonwealth's attorney must practice competently and diligently. The "Scope" section for the Rules of Professional Conduct states that the rules "apply to all lawyers, whether practicing in the private or public sector." Rule 1.1 requires an attorney to provide competent representation for his client; the rule defines "competent" as including "the legal knowledge, skill thoroughness and preparation reasonably necessary for the representation." Further pertinent clarification is found in Comment 5 to Rule 1.1; "adequate preparation" is presented as an aspect of the duty of competence. Rule 1.3 requires an attorney to perform

[4] *See* "Report to the General Assembly: Workgroup Study of the Impact of Body Worn Cameras on Workload in Commonwealth's Attorneys' Office, December 1, 2018," Appendix C: Summary of Prosecutors' Ethical Duties, Available at: https://www.scb.virginia.gov/docs/bodycameraworkgroupreport.pdf ("BWC Workgroup Study").

> his legal services with diligence and promptness. Comment 1 to that rule notes that a lawyer should control his work load, "so that each matter can be handled adequately." Also, Comment 2 to that rule explains that the duty of diligence includes *timely* performance of the legal work. As expressed in that comment, a "client's interests often can be adversely affected by the passage of time or the change of conditions."
>
> Rules 1.1 and 1.3 are without exceptions. There is no language in the Rules of Professional Conduct creating a different standard for prosecutors to act competently and diligently. Nor is it a defense to a bar disciplinary complaint that a lawyer's failure to act competently and diligently was caused by an overwhelming workload. Lawyers, and their supervisors, are expected to control their workload and not undertake more work than they can handle diligently and competently. This means declining a new representation if the lawyer has reached the maximum capacity under which he or she can represent a client with competence and diligence...
>
> No one questions that the increasing usage of BWCs by law enforcement officer will impact greatly the workload of prosecutors charged with responsibility for the content of video footage that must be processed, reviewed and analyzed in order for a prosecutor to discharge his or her legal obligations under the new discovery rules, *Brady* law, and ethical duties under the cited rules. Existing prosecutors' workloads will be significantly increased by the time taken to review footage derived from BWCs. To comply with legal and ethical standards, Commonwealth's Attorneys must staff more lawyers or decline handling cases. Breaching the legal and ethical standards is obviously not an option.[5]

Moreover, to the extent that the Commonwealth's Attorney exercises a "prosecutorial function" in any case, such as a simple traffic infraction, there is a reasonable basis to say that it should do so not just in compliance with the law, but to the higher standard of ensuring that convictions it seeks and obtains in any case are fair and just and supported by all of the available evidence. Anything less is inconsistent with the values and standards to which prosecutors should be held.

Thus, it is fair to say that whether *Brady* applies or not, and whether discovery rules apply or not, and whether ethical obligations apply or not, the combination of potential deficiency in some or all of those areas combined collectively is a problem this office needs to address.

---

[5] Id.

PROPOSED SOLUTIONS

It is worth noting at the outset the context of the OCA's involvement in the traffic docket: our office far exceeds the involvement of many of our peer offices in "traffic" cases. Surrounding jurisdictions typically are only involved in some combination of jailable traffic offenses, i.e. misdemeanors only, and/or attorney cases only. By contrast, our office is involved in every case that a party wishes us to be involved in, which includes *pro se* defendants. This is far from a standard practice across the Commonwealth, and informally, is a minority exercise of the statutory discretion afforded by §15.2-1627.

Importantly, those offices that involve themselves in these matters not only do so on a much more limited basis than ours, but also generally do so with far greater resources. Alexandria, for example – with a population that is roughly two-thirds the size of Arlington, despite having just 2-3 fewer prosecutors —is only involved in jailable traffic cases. Both Fairfax and Loudoun Counties are only involved in cases where defendants are represented by attorneys. Henrico County, a similar metropolitan area suburb, with a population only approximately 10% larger than Arlington's estimated daytime population has 34 total prosecutors and is only involved in attorney cases. These jurisdictions all have significant non-SCB-funded attorney positions. For instance, Alexandria reported an additional six attorneys beyond those funded by the SCB, Loudoun reported 11, Fairfax reported seven, and Henrico reported 11 purely county-funded attorney positions (in addition to county supplements to SCB-funded positions). Arlington has two non-SCB-funded, or purely county-funded, attorney positions. See "BWC Workgroup Study."[6] As an example of one of the limited jurisdictions that function in traffic court in a way that is comparable to the OCA, The City of Roanoke, with a population of 100,000, has 14 total attorneys -- which includes a dedicated full-time traffic court prosecutor and administrative staff solely for that court.

There are functionally four options available:

1. **Maintain the Status Quo:** This option would maintain the practice of being present outside of 3C on a daily basis and being available to handle as many as requested of the 30-40,000 cases annually. To adequately continue handling these cases as they are presently handled would require a substantial investment of resources for our office or additional burden sharing among other agencies we work with to do the necessary front-end work.

[6] Those two additional attorneys funded outside of the SCB are likely the same two attorneys funded over two decades ago as part of our office's "agreement" to cover the traffic court dockets. The demands of the docket have changed considerably with the growth of the population, increased caseload, and addition of dash cameras and other requirements that were likely not envisioned at the time those funding and staffing levels were determined.

First, it would require advanced preparation of the traffic docket necessitating a team of prosecutors (and support staff time) solely for that task. It would be incumbent on them to retrieve the dockets well in advance, ascertain which offenses were misdemeanors triggering our obligations (as opposed to infractions, which may or may not), and then obtain and review all possible discovery in those cases to include any reports, handwritten notes and audio/video evidence. Because we currently deal with all traffic matters, including pro se cases, this would require reviewing all the video for any given docket, a process which might total dozens of hours for any given docket each day.[7] Practically, this would require the addition of at least three FTE attorney positions – but given the volume and essentially uncharted territory involved, it is unclear whether that number would be adequate.

Second, it would require our office to have a process by which to provide that discovery in these cases and staff to do so. Additional staff would have to procure and produce the videos for our review, in addition to requiring the necessary hardware and capability for producing multiple discs daily. Practically, this would require at least one FTE administrative position to assist in compiling and complying with our obligations in addition to hardware investments in technology that would enable us to efficiently both provide discovery as well as timely review and make use of it.

The alternative to additional resources for our office is that the burdens will need to be spread out across other agencies. In the context of these cases, it would require the officers themselves to procure and provide all evidence such as notes and videos to our office well in advance of the scheduled court date. Additionally, this would include such things as providing our office with multiple copies of video discs so that they can be provided as discovery. This would necessarily entail additional work by our partner agencies in their own time and resources spent ensuring that we have all of the materials we need to fulfill our obligations. Again, given the volume, having other agencies fill the administrative gap may still not solve the problem for our office given the attorney needs.

2. **Cease Participation of OCA in 3C Traffic Dockets, but Continue in 3B as Current Practice:** This option entails the OCA exercising our discretion under §15.2-1627 to *not* involve our office in the prosecution of the matters that comprise the dockets in traffic court. We would then continue our role in prosecuting the limited number of traffic misdemeanors that are heard in the criminal courtroom such as DWI, DWI-related prohibited driving offenses, hit & run cases and eluding cases. This option would limit our involvement to those cases that most implicate public safety concerns and for which we have established procedures in place that already exist to ensure we

[7] For instance, a 15-minute stop with three police cars would require the tagging and entering of three separate videos and forty-five minutes of watching videos, for a single case – regardless of how serious the case is.

are able to fully comply with all of the obligations attendant with our involvement in a case.

As a result, several agencies would need to adjust their current procedures in 3C. For law enforcement, this would require them to appear in court as they already do, but without the assistance of conferencing cases with the defendants or attorneys and the prosecutor. To the extent that the issue could be solved by those agencies hiring their own attorneys to prosecute their cases, those attorneys would be subject to the same ethical and competence requirements. This problem is precisely why our type of involvement is not the norm in a jurisdiction of our size.

The court would additionally need to adjust and determine the limits and permissible boundaries of its authority insofar as resolving these cases is concerned. That may result in increased court times as courts and police officers determine whether individual defendants have adequately mitigated their offenses or complied with any legal requirements. Added court times would ultimately impact the operations of both the clerk's office and the Sheriff's Department.

3. **OCA Participation in Jailable Offenses from 3C and Stay Status Quo in 3B:** A middle option would be for our office to only be involved in a smaller subset of jailable offenses in cases where we might be seeking a jail sentence. This would be limited primarily to offenses such as high-speed cases and other reckless driving charges where the facts and circumstances may warrant us to seek a sentence that includes jail, whether suspended or not. This would enable us to limit ourselves to cases similar to our coverage of the criminal court such that those cases could be assumed as part of that workload with only some additional personnel needed rather than the needs of fully staffing another court.

   As the numbers indicate, there are a wide variety of misdemeanor traffic charges that constitute criminal offenses, but which our office generally does not seek jail sentences for. These include charges such as violating a restriction on a learner's permit, improper use of license plates, and driving without a license. Nonetheless these are criminal offenses which are considered crimes in the event of a conviction.

   This middle option would ultimately still result in an increased involvement on those types of misdemeanor traffic charges by the courts, court staff, Sheriff's Office, and law enforcement. It would, however, help allocate the burdens in a way that more closely matches the limited resources of our office to staff these matters, assuming a more modest increase in personnel for OCA were available than those laid out by other options. Further, to maximize resources, the current jailable 3C cases would have to be moved to 3B. We would need additional resources, but those are difficult to estimate at this time – we have asked the GDC Clerk for data broken down by charge so that we

can estimate the labor required to take on these cases in a way that is consistent with our ethical obligations. This data request from Richmond is several weeks outstanding.

We have identified a smaller subset of cases currently in traffic court with the highest impact on public safety, specifically relating to DWI enforcement and excessively dangerous driving, that we can assume into our current workflow and court coverage. Those cases are included in the Traffic Court Table. We anticipate presenting this to the judges before the end of the week.

4. **OCA Participation in Attorney Cases**: This option would see the office involved in cases where a defendant was represented by an attorney only, regardless of the seriousness of the case or the consequences of a finding of guilt. Several offices, including Fairfax[8] and Henrico, employ this option. But they are, admittedly, not 100% compliant with their ethical obligations, even though they have additional resources. Philosophically, this is an intolerable policy for this OCA because it would put people who lack funds for an attorney in a worse position potentially than those who can afford attorneys. As a matter of equity, consistency, and fairness, this office will not employ such a policy.

ADDITIONAL CONSIDERATIONS BASED ON CURRENT COVID-19 CIRCUMSTANCES

A final consideration as to our continued involvement is the present circumstances of the ongoing public health emergency regarding Covid-19. The General District Court is presently operating on a limited basis with the intention of re-opening in full within the next several weeks, including the full re-opening of traffic court. As plans are made to reopen traffic court, several proposals have been considered that will only exacerbate the issues discussed above, including a staggered docket that would run from start times of 9AM, 10AM, 11AM, each day of the week and to 2PM on Mondays, Wednesdays, and Fridays.

This would presumably include some version of the present system whereby an assigned prosecutor sits in the room outside of 3C and conferences the cases with the officers, attorneys representing defendants, and the pro se defendants themselves. Typically, those wishing to conference with the prosecutor line up and wait in a line that frequently stretches into the lobby and runs for between an hour or two depending on the day and the size of the docket. Eventually, they can meet with the prosecutor and the ticketing officer. Thus, a collection of first responders and a designated prosecutor will need to interact nearly all day with the general public, nearly every day. While no case is of greater or lesser importance, it is quite literally the least serious cases that

[8] Fairfax is in the process of re-evaluating their policy andreducing the number of discretionary cases in which they are involved.

would be responsible for the most high-risk interactions for community transmission between the public, employees of the OCA, other county employees, and law enforcement.

It is precisely these types of encounters that Dr. Reuben Varghese, our County's Public Health Director, has cautioned against in terms of determining what services the county can continue to provide while maintaining our values and services balanced against the need for containment measures during the current public health crisis. Noting that Northern Virginia and Arlington in particular remain a hotspot for virus transmission, Dr. Varghese has urged agencies such as ours to balance what is legally required with what are merely "nice services" that we are able to provide, and to further limit services where physical contact is needed. In short, no police officers or county employees should be put at the highest risk to dispose of the least serious cases in our system.

Additionally, and most relevant to the larger issue, a staggered docket that runs essentially all day requires a prosecutor and the ticketing officers who normally might dispose of the docket in an hour or two to be working on non-criminal matters for virtually the whole work-day. That attorney is therefore not available for any other work, but additionally would not be able to adequately prepare the future traffic dockets outside of court without pulling yet another attorney from other tasks.[9]

CONCLUSION

Dr. Varghese's advised balancing is actually in line with our own statutory duty under §15.2-1627, which makes prosecution of felonies by the elected Commonwealth's Attorney mandatory, but leaves to their discretion, Class 1, 2 and 3 misdemeanors, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of $500 or more, or both such confinement and fine. While historically our office has been able to strike the balance between carrying out our required duties, our discretionary ones, and even those beyond our

[9] It has additionally been requested that our office attempt to resolve traffic cases by email with a generic email address that would communicate with defendants or their attorneys. Given the volume of cases, this would entail a completely separate -- and additional -- commitment of a full-time attorney (at least) to spend each day monitoring the email account to look into each case in accordance with our ethical and legal obligations, communicate with the officers, defendant or attorney involved, and the clerk's office and ensure the resolution of the case.

This would also necessarily entail the need for cooperation from several other agencies for efficient operation. This would include things such as off-hours responsiveness by email or phone from all of the ticketing officers at a number of different agencies, increased front-end work properly cataloguing all video interactions and potentially writing additional reports depending on agency requirements. It could additionally include the creation of additional positions such as an administrative position to coordinate collection, proper storage and distribution of the materials needed by our office to fulfill our duties and obligations.

discretion, the modernization of criminal justice in terms of the tools we both have at our disposal as well as those we are required to now use have considerably changed over the last two decades. These changes are slowly being accompanied by legislative and statutory changes that continue to reshape the requirements and obligations offices such as ours must work within and it is incumbent on us to be realistic and clear-eyed about what addressing such issues means.

To be clear, we must now address areas that have long been overlooked. In the context of this issue, it means assessing our ethical obligations with regards to technological advances that have changed the ability of our office to continue to adhere to long-standing practices. Long-standing practices such as our role in traffic court are fundamentally different and require a different level of staffing than was ever envisioned in the decades since the practice was begun.

We recognize that the first instinct to our position may be to provide us with less because we are perceived to be doing less, but that would ignore the reality of the modern criminal legal system. That the Commonwealth of Virginia has long adhered to administering criminal justice at as low a cost as possible only explains why we are in this position -- it does not provide any solution to a way forward. Indeed, if not for the commitment of our local government, our office would barely be funded to the ability to fulfill only our statutory mandate. It is a simple reality that in 2020, maintaining public safety for a community of our size, scope and diversity as part of a major metropolitan area in a way that is also equitable, fair, and forward-looking requires a different set of tools and approaches than those that may have been agreed to decades ago.

By way of some examples, we recently had to effectively stop all work and instruct the entire office to back up all essential files because our internal network was at risk of crashing and not secure. As staff worked through that process we began noticing the inherent limitations of moving case files around on our issued laptops without sufficient storage for case files where videos, cell phone extractions and photos may number as much as 20-30GB of data *per case*. It is an amount of data that was unfathomable on even the most serious cases decades ago, and yet is fairly common on even some routine cases now.

As we have worked through the current situation, we have confronted the reality that our office inherited an almost complete lack of capability for telework as we had no reliable access to any of our internal networks from home. Similarly, we have improvised ways to provide discovery to defendants and their attorneys, but without any reliable form of sharing besides email, we have been virtually unable to provide digital items such as photos or videos beyond making them available for attorneys to collect from our office, both because we have no way to virtually share such items or to duplicate them efficiently. In our own courthouse, we lack the basics of secured wi-fi to access our network from outside of our wired desk connection, which means that we lack access to our own internal database from the courtroom to look up defendants, related cases or other information that is frequently needed dynamically as a part of daily routine operations.

Similarly, it means we are unable to make use of the digital evidence we do have in court without employing often cumbersome workarounds, which, in the context of this immediate issue,

highlights the inefficient use of our resources when those workarounds are being employed for traffic matters rather than criminal ones.

None of these examples should be taken as complaints. Rather they are examples of the reality on the ground that has been ignored for too long. The bottom line is that the work of prosecution has changed considerably over the past years, and arguably decades, and in some respects our office has failed to keep pace or appropriately adjust expectations about the services our office could reasonably provide with limited resources. As we have seen in the past several months, the shortcomings are at a critical point and implicate not just discretionary services but have the potential to begin impacting our core operations if they are not addressed soon. We are in the process of upgrading some of our long-overdue technological concerns, but if we fail to address similar issues in our actual workload and personnel capacity, the consequences may not be as easy to remedy.