

# COMMENTS

## A STEP TOWARD ROBUST CRIMINAL DISCOVERY REFORM IN VIRGINIA: THE DISCLOSURE OF WITNESS STATEMENTS BEFORE TRIAL

### INTRODUCTION

Calls for reform to the Virginia criminal discovery rules have been occurring for over a decade. Those calling for reform were optimistic after the Supreme Court of Virginia put together a special committee to propose new reforms to the current criminal discovery rules.<sup>1</sup> The Special Committee on the Criminal Discovery Rules (“Special Committee”) spent nearly a year debating new proposed rules for criminal discovery<sup>2</sup> and presented their final report to the Supreme Court of Virginia on December 2, 2014.<sup>3</sup> However, on November 13, 2015, the Supreme Court of Virginia declined to adopt the changes proposed by the Special Committee in a short, two-sentence order.<sup>4</sup>

The question is: what happens now? The Virginia State Bar (“VSB”) recently put together a new Criminal Discovery Reform Task Force to revisit the issue of criminal discovery reform in Virginia.<sup>5</sup> The president of the VSB, Michael W. Robinson, stated,

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1. See Tom Jackman, *Va. Decides Not to Change Rules That Withhold Documents from Defense*, WASH. POST (Dec. 12, 2015), [https://www.washingtonpost.com/local/public-safety/va-decides-not-to-change-rules-that-withhold-documents-from-defense/2015/12/12/6f76d982-9dc5-11e5-bce4-708fe33e3288\\_story.html?utm\\_term=.212c6ba07831](https://www.washingtonpost.com/local/public-safety/va-decides-not-to-change-rules-that-withhold-documents-from-defense/2015/12/12/6f76d982-9dc5-11e5-bce4-708fe33e3288_story.html?utm_term=.212c6ba07831).

2. SPECIAL COMM. ON CRIMINAL DISCOVERY RULES, REPORT TO THE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA xvi (Dec. 2, 2014) [hereinafter SPECIAL COMM. REPORT].

3. *Id.* at xvi.

4. Order Declining to Adopt the Proposal of the Special Committee on Criminal Discovery Rules (Nov. 13, 2015).

5. Peter Vieth, *VSB Tackles Criminal Discovery Yet Again*, VA. LAW. WKLY., Apr. 18, 2017, [valawyersweekly.com/2017/04/18/vsb-tackles-criminal-discovery-yet-again/](http://valawyersweekly.com/2017/04/18/vsb-tackles-criminal-discovery-yet-again/).

“The issue is obviously still percolating.”<sup>6</sup> There is still a pressing need for criminal discovery reform in Virginia. Discovery reform would allow for each side to be better prepared for trial and would promote more reliable outcomes.<sup>7</sup> Virginia has one of the most restrictive criminal discovery regimes in the United States.<sup>8</sup>

Chief Justice Lemons of the Supreme Court of Virginia stated that an “incremental approach would be more palatable to the court” in reference to making discovery rule changes.<sup>9</sup> This comment proposes one incremental change to the Virginia criminal discovery rules. Virginia should adopt a rule that provides witness statements to the defense forty-eight hours before trial. The proposal presented in this comment seeks to balance fairness to the defendant by providing witness statements before trial with the concerns about witness and victim safety.

Part I of this comment presents an overview of the Virginia criminal discovery rules in their present form. Next, Part II explains the proposed reforms by the Special Committee. Part III describes the reforms presented before the 2017 General Assembly and discusses the recently created Virginia Bar task force that was formed to address the proposed reforms. Part IV presents an overview of the dilemma surrounding the disclosure of witness statements: the balance between fairness to defendants and the promotion of witness safety. Lastly, Part V of this comment presents an incremental change that Virginia should adopt.

This comment urges Virginia to adopt a rule for witness statements similar to Kentucky Criminal Procedure Rule 7.26, which provides for discovery of witness statements forty-eight hours before trial unless good cause is shown.<sup>10</sup> This comment utilizes the Kentucky Rule of Criminal Procedure 7.26,<sup>11</sup> the federal Jencks

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6. *Id.*

7. See Darryl K. Brown, *Discovery in State Criminal Justice*, in ACADEMY FOR JUSTICE: A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM (Erik Luna ed., 2017) (forthcoming 2017).

8. See AM. CIV. LIBERTIES UNION OF VA., *BRADY V. MARYLAND* AND PROSECUTORIAL DISCLOSURES: A FIFTY STATE SURVEY 8 (2014), <https://acluva.org/wp-content/uploads/2015/05/150526-Criminal-Discover-Judge-Alston-article.pdf>; see also Brown, *supra* note 7. Compare VA. SUP. CT. R. 3A:11 (Repl. Vol. 2017), with N.C. GEN. STAT. § 15A-903 (2017).

9. Frank Green, *Justices Reject Recommendations on Pretrial Discovery in Criminal Cases*, RICH. TIMES-DISPATCH (Nov. 26, 2015), [http://www.richmond.com/news/justices-reject-recommendations-on-pretrial-discovery-in-criminal-cases/article\\_a7518ce0-3e7c-5696-8cc2-0dda708dd9b1.html](http://www.richmond.com/news/justices-reject-recommendations-on-pretrial-discovery-in-criminal-cases/article_a7518ce0-3e7c-5696-8cc2-0dda708dd9b1.html).

10. KY. RCR 7.26.

11. *Id.*

Act,<sup>12</sup> and the proposed rules in the Special Committee Report<sup>13</sup> in developing a proposed rule for disclosure of non-expert, testifying witness statements. Additionally, Part V of this comment seeks to provide a clear definition of witness statements and addresses the witness safety concerns presented by the opponents of the proposed changes presented by the Special Committee.

## I. VIRGINIA CRIMINAL DISCOVERY RULES

The Virginia criminal discovery rules are codified in Supreme Court of Virginia Rules 3A:11,<sup>14</sup> 3A:12,<sup>15</sup> 7C:5,<sup>16</sup> 8:15,<sup>17</sup> and Virginia Code section 19.2-11.2.<sup>18</sup> The current Supreme Court of Virginia Rules and the Virginia Code limit what defendants may receive from the prosecutor. The current Rules do not provide for witness statements, witness lists, or police reports.<sup>19</sup> This comment focuses solely on proposed changes to Rule 3A:11. Rule 3A:11 applies to felony cases in circuit courts and to misdemeanors brought on direct indictment.<sup>20</sup>

Currently, Rule 3A:11 allows the accused to inspect, copy, or photograph relevant “written or recorded statements or confessions made by the accused” and the substance of statements made by the accused to law enforcement officers.<sup>21</sup> Additionally, the rule allows the defendant to inspect, copy, or photograph “written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports,

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12. 18 U.S.C. § 3500 (2012).

13. SPECIAL COMM. REPORT, *supra* note 2, at 37.

14. VA. SUP. CT. R. 3A:11 (Repl. Vol. 2017) (governing criminal case discovery for felonies in circuit court and misdemeanors on direct indictment).

15. R. 3A:12 (Repl. Vol. 2017) (providing for subpoena power in order to compel the attendance of a witness to testify before a court and compel production of documentary evidence).

16. R. 7C:5 (Repl. Vol. 2017) (governing criminal case discovery for misdemeanors in the general district court).

17. R. 8:15 (Repl. Vol. 2017) (governing criminal case discovery in juvenile and domestic relations court).

18. VA. CODE ANN. § 19.2-11.2 (Cum. Supp. 2017) (providing for victim’s right not to disclose certain information to the accused).

19. *See* R. 3A:11 (Repl. Vol. 2017); R. 3A:12 (Repl. Vol. 2017); R. 7C:5 (Repl. Vol. 2017); R. 8:15 (Repl. Vol. 2017); VA. CODE ANN. § 19.2-11.2 (Cum. Supp. 2017).

20. R. 3A:11(a) (Repl. Vol. 2017).

21. R. 3A:11(b)(1) (Repl. Vol. 2017).

and written reports of a physical or mental examination of the accused or the alleged victim.”<sup>22</sup>

Furthermore, the rule provides that the defendant must disclose to the Commonwealth whether or not he intends to use an alibi defense or an insanity defense.<sup>23</sup> Also, the rule permits the Commonwealth to inspect, copy, or photograph “any written reports of autopsy examinations, ballistic tests, fingerprint, blood, urine and breath analyses, and other scientific tests that may be within the accused’s possession, custody or control” if the defendant wants to proffer or introduce any of the above into evidence at trial or sentencing.<sup>24</sup>

## II. SPECIAL COMMITTEE ON THE CRIMINAL DISCOVERY RULES

In October 2013, the Supreme Court of Virginia put together the Special Committee to explore changes to the Virginia criminal discovery rules.<sup>25</sup> The Special Committee was composed of defense attorneys, prosecutors, judges, professors, law enforcement officers, victim advocates, and administrative officers.<sup>26</sup> The goal was to bring together multiple voices of the criminal justice community to ensure the proposed rule changes reflected key stakeholder perspectives.<sup>27</sup>

The Special Committee held six meetings throughout 2014 to develop a comprehensive set of amendments to the criminal discovery rules.<sup>28</sup> The Special Committee was divided into six study groups, with each group considering a different aspect of criminal discovery reform.<sup>29</sup> The members of the Special Committee prioritized clarity, oversight, access to information, and transparency within the criminal discovery rules.<sup>30</sup>

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22. *Id.*

23. R. 3A:11(c)(2)–(3) (Repl. Vol. 2017).

24. R. 3A:11(c)(1) (Repl. Vol. 2017).

25. SPECIAL COMM. REPORT, *supra* note 2, at xv.

26. *Id.* at xv, 1.

27. *Id.* at 1.

28. *Id.* at v.

29. *Id.* at 2.

30. *Id.* at iv.

### A. *Special Committee Report*

After nearly a year of discussion, the Special Committee presented its report to the Supreme Court of Virginia.<sup>31</sup> The report concluded that a comprehensive overhaul of the Virginia criminal discovery rules was necessary.<sup>32</sup> The Special Committee believed the proposed changes would provide more complete information to both parties, provide fairness and clarity, and reduce the costs, burdens, and delays the current rules create.<sup>33</sup>

All of the proposed changes were designed to “assist in providing information to the prosecution and the defense that is vital to ensuring pleas are providently entered, preparation for trial is not a matter of guesswork, and judicial resources [are] properly allocated.”<sup>34</sup> Recommendations from the Special Committee included expanding discoverable material to include police reports, witness statements, and witness lists.<sup>35</sup> The proposal provided reciprocal discovery provisions for both the defense and prosecution.<sup>36</sup> Moreover, the proposed rules provided that routine discovery could be triggered by written notice instead of filing a motion.<sup>37</sup> Additionally, the Special Committee proposed to explicitly set forth a prosecutor’s duty to disclose *Brady* material<sup>38</sup> and proposed modifications to subpoena duces tecum rules.<sup>39</sup> Most importantly, the proposed reforms included provisions to protect sensitive victim and witness information.<sup>40</sup>

The proposed reforms presented by the Overall Discovery Process Study Group (“Study Group”) are imperative in understanding the need for disclosure of witness statements. The proposal presented by the Study Group focused on Rule 3A:11, Rule 7C:5, and Rule 8:15.<sup>41</sup> The Study Group concluded the disclosure of witness

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31. *Id.* at xv–xvi.

32. *See id.* at v–vii.

33. *Id.* at vi.

34. *Id.* at iii.

35. *Id.* at 17–18, 22; *see* Jackman, *supra* note 1.

36. SPECIAL COMM. REPORT, *supra* note 2, at v, 18–19.

37. *Id.* at 17.

38. *Id.* at 22. *See generally* *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that there is a constitutional duty to disclose witness statements containing exculpatory material).

39. SPECIAL COMM. REPORT, *supra* note 2, at 23.

40. *Id.* at 20.

41. *Id.* at 6–7.

lists each party intends to call at trial, disclosure of prior statements of witnesses, and disclosure of police reports should be included in the proposed rule changes.<sup>42</sup> The Study Group considered the concern for victim/witness information “being made public and disseminated on social media” as well as the necessity of a clear definition of witness statements and police reports.<sup>43</sup>

The proposed changes to Rule 3A:11 demonstrated the competing concerns governing the disclosure of witness statements: balancing witness safety with fairness to the defendant.<sup>44</sup> The amendments to Rule 3A:11 provided for written notice to trigger discovery, instead of a court order to initiate discovery.<sup>45</sup> The proposal created new sections of Rule 3A:11 that required disclosure of police reports, non-expert witness testimony, and witness lists.<sup>46</sup> The proposed changes to 3A:11 also included a subsection that provided for withholding, redacting, or restricting information for good cause shown.<sup>47</sup>

The proposed addition to Rule 3A:11 regarding witnesses stated,

Upon written notice by an accused to the court and to the attorney for the Commonwealth, the Commonwealth shall permit the accused to inspect and copy or photograph all relevant statements of any non-expert witness whom the Commonwealth is required to designate under subsection (i) of this rule. The Commonwealth shall disclose any statements of rebuttal witnesses, not previously disclosed, prior to the beginning of its rebuttal case.

The term “statements” means a statement written or signed by the witness, a verbatim transcript, or an audio and/or video recording. This paragraph shall not limit the disclosure of police reports under paragraph 3, whether or not such reports contain accounts of statements made by prospective witnesses.<sup>48</sup>

This comment utilizes the definition of “statements,” the notice requirement, and the good cause provision in the proposed Rule

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42. *Id.* at 7.

43. *Id.*

44. *Id.* at 6–7.

45. *Id.* at 37.

46. *Id.* at 38–39, 41.

47. *Id.* at 20 (“For good cause a party may withhold or redact such information, or condition its disclosure on restrictions limiting copying or dissemination including, where appropriate, limiting disclosure to counsel only. If a party withholds or restricts information, it shall notify the other party in writing and shall identify the reason. Examples of ‘good cause’ may include, but are not limited to, personally identifying information to protect a victim’s or witness’s personal or financial security, graphic images, child pornography, and medical or mental health records.”).

48. *Id.* at 18.

3A:11 to construct a new rule.<sup>49</sup> The Study Group proposed that the term “statements” means a statement written or signed by the witness, a verbatim transcript, and/or an audio or video recording.”<sup>50</sup>

### B. *Supreme Court of Virginia Order*

The public comment period for the Special Committee’s proposed rule changes opened on March 3, 2015.<sup>51</sup> The Supreme Court of Virginia received over three hundred pages of public comments on the proposed amendments.<sup>52</sup> The majority of the comments supported adopting the proposed changes to the criminal discovery rules.<sup>53</sup> The positive comments praised the Special Committee’s work and findings.<sup>54</sup> However, the Virginia Department of State Police and local prosecutors generally opposed the reforms and raised salient concerns about victim and witness safety and the burden of production on the Commonwealth.<sup>55</sup>

After receiving all of the comments, on November 13, 2015, the Supreme Court of Virginia declined to adopt the proposed discovery reforms presented by the Special Committee.<sup>56</sup> The order did not give a detailed answer as to why it declined to adopt the proposed reforms.<sup>57</sup> Instead, the court briefly stated, “Having considered the Committee’s report and the public comments submitted in response thereto, the Court declines to adopt the Committee’s

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49. *See infra* Part V.C.

50. SPECIAL COMM. REPORT, *supra* note 2, at 18.

51. Press Release, Supreme Court of Va., Comments of Chief Justice Donald W. Lemons Upon Release of the Report of Special Committee on Criminal Discovery Rules (Mar. 3, 2015).

52. Jackman, *supra* note 1.

53. *See, e.g.*, Va. Ass’n of Criminal Defense Lawyers, Comment on Criminal Discovery Rules (June 26, 2015) (on file with the the Supreme Court of Virginia); Rebecca Wade, Criminal Discovery Comments (June 18, 2015) (on file with the the Supreme Court of Virginia); Am. Civil Liberties Union Found. of Va., Comments on Proposed Revisions to Criminal Discovery Rules (May 26, 2015) (on file with the Supreme Court of Virginia).

54. *See, e.g.*, Va. Ass’n of Criminal Defense Lawyers, Comment on Criminal Discovery Rules (June 26, 2015) (on file with the Supreme Court of Virginia).

55. *See, e.g.*, Va. Dep’t of State Police, Comment on Proposed Amendments to Rule 3A:11 (June 26, 2015) (on file with the Supreme Court of Virginia); Virginia Ass’n of Commonwealth’s Attorneys, Public Comment on the Report of the Special Committee on Criminal Discovery Rules (June 29, 2015) (on file with the Supreme Court of Virginia).

56. Order Declining to Adopt the Recommendations of the Special Committee on Criminal Discovery Rules (Nov. 13, 2015); *see* Vieth, *supra* note 5.

57. *See* Order Declining to Adopt the Recommendations of the Special Committee on Criminal Discovery Rules (Nov. 13, 2015).

recommendations.”<sup>58</sup> Many members of the Special Committee were surprised by the decision of the Supreme Court of Virginia.<sup>59</sup>

After the order was handed down, Chief Justice Lemons said that a “more incremental approach would be more palatable to the court.”<sup>60</sup> He was concerned about “such fundamental and sweeping changes in the system, especially in light of the strong public comments opposing them.”<sup>61</sup> Furthermore, he worried about the trade-offs between interested parties in coming up with the proposed reforms.<sup>62</sup> He explained, “It would be difficult for the court to accept some of the proposals and not all of them as a package because the court cannot be certain about the interdependent nature of these compromises.”<sup>63</sup> However, Justice Lemons left open the possibility of future work by the Special Committee.<sup>64</sup> He said, “Perhaps the committee will want to reconvene in the future to consider whether additional efforts should be undertaken.”<sup>65</sup>

Given Chief Justice Lemons’s preference for an incremental change, this comment focuses solely on witness statements. This comment presents a limited solution that takes one incremental step toward broader, more robust discovery. Additionally, the rule proposed in this comment aims to balance the need for broader discovery for the defendant with the victim and witness safety concerns presented by the opponents of criminal discovery reform.

### III. PROPOSED REFORMS BEFORE THE 2017 VIRGINIA GENERAL ASSEMBLY AND VIRGINIA STATE BAR TASK FORCE

At the start of 2017, there were two bills in front of the General Assembly regarding criminal discovery rules in Virginia.<sup>66</sup> The legislators believed that inconsistency among Commonwealth’s Attorneys’ offices was the problem.<sup>67</sup> Those bills proposed changes to

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58. *Id.*

59. Green, *supra* note 9.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. See H.B. 2452, Va. Gen. Assembly (Reg. Sess. 2017); S.B. 1563, Va. Gen. Assembly (Reg. Sess. 2017).

67. Vieth, *supra* note 5.



Virginia Code section 19.2-265.4.<sup>68</sup> Glaringly absent from the original proposed changes before the General Assembly was the disclosure of witness statements.<sup>69</sup>

The bills in front of the General Assembly originally provided that the accused should be allowed, after written notice, to inspect, copy, or photograph statements made by the accused, police reports, “written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine, and breath tests, other scientific reports, and written reports of a physical or mental examination of the accused.”<sup>70</sup> On February 1, 2017, the Senate presented a new proposed bill that also provided for disclosure of,

[a]ll relevant statements of any non-expert witness whom the Commonwealth is required to designate on a witness list pursuant to subsection J. The Commonwealth shall disclose any statements of rebuttal witnesses not previously disclosed prior to the beginning of its rebuttal case. For purposes of this subdivision, “statements” means a statement written or signed by the witness, a verbatim transcript, or an audio or video recording. This subdivision shall not limit the disclosure of police reports under subdivision 3, whether or not such reports contain accounts of statements made by prospective witnesses.<sup>71</sup>

On February 7, 2017, the amended bill passed in the Senate by a vote of 39-1.<sup>72</sup> The Senate bill incorporated the proposed changes presented by the Special Committee in drafting the bill.<sup>73</sup> The bill presented in front of the House of Delegates was the original bill that did not include disclosure of witness statements and witness lists.<sup>74</sup> The proposed discovery reform “seemed to have momentum after clearing the Senate with only one negative vote.”<sup>75</sup> However, on February 21, 2017, the bill was left in the Courts of Justice Committee in the House of Delegates.<sup>76</sup>

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68. H.B. 2452; S.B. 1563.

69. See H.B. 2452; S.B. 1563.

70. H.B. 2452; S.B. 1563.

71. S.B. 1563 (as amended in the nature of a substitute, Feb. 1, 2017) (adding an additional section to include non-expert witness statements and witness lists).

72. *Id.*

73. News Release, Nat'l Ass'n of Criminal Def. Lawyers, Nation's Criminal Defense Bar Calls on Virginia House of Delegates to Pass Criminal Discovery Reform, <https://www.nacd.org/VA-Discovery-Reform-House/> (Feb. 9, 2017).

74. See H.B. 2452.

75. Vieth, *supra* note 5.

76. See S.B. 1563.

In response to the action taken by the legislature, the VSB put together a new task force on criminal discovery reform.<sup>77</sup> The VSB President, Michael W. Robinson, stated, “[t]here seems to be an appetite for some progress” for criminal discovery reform.<sup>78</sup> Furthermore, Douglas Ramseur, a member of the new task force, stated, “Legislators sent a ‘strong message’ that prosecutors need to accept some change.”<sup>79</sup> The new thirteen-member task force first met on May 2, 2017, to discuss new ideas for criminal discovery reform.<sup>80</sup> The creation of the new Virginia State Bar Task Force is a promising step toward criminal discovery reform.

#### IV. THE DILEMMA IN DISCOVERY OF WITNESS STATEMENTS— BALANCING FAIRNESS AND WITNESS SAFETY

The inherent conflict between the fairness provided by pretrial disclosure of witness statements and the threats those disclosures pose to witness safety presents a critical dilemma that the criminal discovery rules must address. The public comments to the proposed reforms presented in the Special Committee Report provide a clear picture for the arguments on both sides.

##### A. *Pretrial Disclosure of Commonwealth Witness Statements Is Essential to a Fair Trial*

In order for the justice system to operate fairly and accurately, the Commonwealth must disclose witness statements to the defense before trial. As Justice Douglas once said, “Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”<sup>81</sup>

In *Jencks v. United States*, Justice Brennan stated “the interest of the United States in a criminal prosecution ‘. . . is not that it shall win a case, but that justice shall be done . . . .’”<sup>82</sup> The Court

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77. See Vieth, *supra* note 5.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

82. *Jencks v. United States*, 353 U.S. 657, 668 (1957) (alterations in original) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

went on to hold that the petitioner was entitled to inspect the reports of two testifying witnesses to decide whether or not to use them in building his defense.<sup>83</sup> The Court explained “only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government’s witness and thereby furthering the accused’s defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.”<sup>84</sup> For example, only defense counsel knows what theory of the case they are going to present at trial. The prosecutor would have to make her best guess on what theory of the case the defense will make, but the only people who know what the defense theory of the case is are the defense lawyers themselves.

The public comments to the proposed criminal discovery reforms by the Special Committee explain why access to witness statements is critical to the defense. Many defense attorneys across the Commonwealth applauded the changes presented by the Special Committee.<sup>85</sup> Members of the Virginia Association of Criminal Defense Lawyers (“VACDL”) strongly supported the proposal because it would allow for strong and prepared advocates on both sides.<sup>86</sup> The VACDL believed the current discovery rules are inadequate and create inequality among defendants across the state.<sup>87</sup> Multiple comments in favor of the proposed rules focused on the necessity of mandatory disclosure of witness statements, witness lists, and police reports.<sup>88</sup> Some commenters urged the rules be expanded even further.<sup>89</sup> For example, one proponent of the proposed changes argued that the revisions were too narrow because the proposed changes did not also apply to misdemeanor cases.<sup>90</sup> The commenter believed it was “important in criminal cases of all levels of

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83. *Id.*

84. *Id.* at 668–69.

85. *See, e.g.*, Brandon L. Garrett, Comment on Criminal Discovery Rules (June 29, 2015) (on file with the Supreme Court of Virginia).

86. Va. Ass’n of Criminal Defense Lawyers, Comment on Criminal Discovery Rules (June 26, 2015) (on file with the Supreme Court of Virginia).

87. *Id.*

88. *See, e.g.*, Brandon L. Garrett, Comment on Criminal Discovery Rules (June 29, 2015) (on file with the Supreme Court of Virginia); Carla Peterson, Comment Letter (June 4, 2015) (on file with the Supreme Court of Virginia).

89. *See, e.g.*, Rebecca Wade, Criminal Discovery Comments (June 18, 2015) (on file with the Supreme Court of Virginia); Am. Civil Liberties Union Found. of Va., Comments on Proposed Revisions to Criminal Discovery Rules (May 26, 2015) (on file with the Supreme Court of Virginia).

90. *See* Brandon L. Garrett, Comment on Criminal Discovery Rules (June 29, 2015) (on

gravity for the defense to have access to the basic information that police and prosecutors have relied upon.”<sup>91</sup>

Witness statements are crucial to the defense because they allow defendants to know the foundational evidence against them. Turning over witness statements to the defense helps create and bolster equality among the parties within the criminal justice system. In order for the justice system to operate fairly and accurately, the accused must know what witnesses against them have said.<sup>92</sup> Accordingly, providing the defense with witness statements would promote fair trials and equality in the criminal justice system. Those in favor of discovery reform believe it would exponentially improve the criminal justice system in Virginia.<sup>93</sup>

### B. *Disclosure Raises Valid Concerns for Witness Safety*

Many opponents of discovery reform in the Commonwealth argue that the system is adequate<sup>94</sup> and raise concerns about victim and witness safety presented by the proposed disclosure reforms.<sup>95</sup> They believe turning over witness statements would require prosecutors and judges to gamble with witness safety.<sup>96</sup> Opponents also argue that discovery reform and turning over witness statements would place too great a financial burden on prosecutors and the courts.<sup>97</sup> Additionally, opponents believe a more “open file” system of criminal discovery would take significantly more time than the current system.<sup>98</sup> Prosecutors and the Virginia Department of

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file with the Supreme Court of Virginia).

91. *Id.*

92. The duty to disclose statements under the proposed rule in this comment is different than the constitutional duty to disclose witness statements under *Brady v. Maryland* and *Giglio v. United States*, as it encompasses more than just impeachment and exculpatory statements. *See infra* Part V.C.

93. *See Green, supra* note 9. *See generally* Douglas A. Ramseur, *A Call for Justice: Virginia's Need for Criminal Discovery Reform*, 19 U. RICH. J.L. & PUB. INT. 247 (2016) (explaining the benefits of discovery reform).

94. *See* C. Phillips Ferguson, Public Comment on the Report of the Special Committee on Criminal Discovery Rules (June 19, 2015) (on file with the Supreme Court of Virginia).

95. *See* Va. Dep't of State Police, Comment on Proposed Amendments to Rule 3A:11 (June 26, 2015) (on file with the Supreme Court of Virginia).

96. *Id.*

97. *Id.*

98. *Id.*

State Police constitute the majority of Virginia commenters in opposition to criminal discovery reform.<sup>99</sup>

The majority of the public comments in opposition to the proposed rule changes presented by the Special Committee came from the Virginia Department of State Police and Virginia prosecutors.<sup>100</sup> The Virginia Department of State Police focused their comment on witness safety and the burden the proposed reforms would have on prosecutors and judges.<sup>101</sup> The Virginia Department of State Police stressed that if victims experience intimidation, then they are less likely to come forward and participate in the criminal justice system and worried that the protective order recommendation would not cure the harm felt by victims and witnesses.<sup>102</sup> Additionally, the Virginia Department of State Police raised unanswered questions about: (1) whether the reforms would do more harm than good, (2) whether the new rule would create a chilling effect on members of the community reporting crime, (3) whether the new rule would perpetuate witness tampering, and (4) how the proposal would affect the false-conviction rate and financial costs.<sup>103</sup>

Prosecutors echoed the concerns brought up by the Virginia Department of State Police. The comments from prosecutors around the Commonwealth tended to focus on the safeguarding of witness and victim information.<sup>104</sup> They worried that the growth of technology and social media exacerbated the problem of victim and witness safety in recent years.<sup>105</sup> One prosecutor stated, “many criminal defendants will do whatever is necessary to beat a charge,

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99. SPECIAL COMM. REPORT, *supra* note 2, at 4.

100. *Id. See, e.g.*, Va. Dep’t of State Police, Comment on Proposed Amendments to Rule 3A:11 (June 26, 2015) (on file with the Supreme Court of Virginia); Nancy G. Parr, Virginia Ass’n of Commonwealth’s Attorneys, Public Comment on the Report of the Special Committee on Criminal Discovery Rules (June 29, 2015) (on file with the Supreme Court of Virginia). *See generally* Jackman, *supra* note 1 (stating Virginia’s prosecutors opposed the rule changes).

101. *See* Va. Dep’t of State Police, Comment on Proposed Amendments to Rule 3A:11 (June 26, 2015) (on file with the Supreme Court of Virginia); *see also* Vieth, *supra* note 5.

102. Va. Dep’t of State Police, Comment on Proposed Amendments to Rule 3A:11 (June 26, 2015) (on file with the Supreme Court of Virginia).

103. *Id.*

104. *See, e.g.*, Michael R. Doucette, Va. Ass’n of Commonwealth’s Attorneys, Public Comment Concerning Proposed Rule Change to wit: Virginia Rule of Court 3A:11 (Discovery and Inspection: Criminal) (Dec. 12, 2012) (on file with the Supreme Court of Virginia); Joshua A. Boyles, Comment on Criminal Discovery Rules (June 30, 2015) (on file with the Supreme Court of Virginia).

105. *See* Michael R. Doucette, Va. Ass’n of Commonwealth’s Attorneys, Public Comment

including intimidating witnesses and other nefarious acts.”<sup>106</sup> Multiple opponents worried that the good cause provision in the proposed rules and judicial oversight would not be enough to protect victims and witnesses.<sup>107</sup>

For example, a comment in opposition from the Virginia Association of Commonwealth’s Attorneys (“VACA”) focused on witness safety concerns and the financial burdens Commonwealth’s Attorneys would face if the proposed rule changes were adopted.<sup>108</sup> The comment stated, “A protective order is entirely insufficient to guard against dissemination of these materials by a recalcitrant criminal offender who is facing far greater consequences for their underlying criminal behavior than the punishment associated with a contempt charge for violating a protective order.”<sup>109</sup> Furthermore, like the Virginia Department of State Police, the VACA believed the proposed changes would produce a chilling effect on witnesses and it would cause them not to assist in police investigations and prosecutions.<sup>110</sup> The VACA urged that victim and witness rights “should be weighed more heavily” in drafting new rules.<sup>111</sup> The comment contended, “The defendant should be required to explain why the Commonwealth should not redact personal information, financial information, photos of child pornography, medical records, etc.”<sup>112</sup>

The other main concern raised by the comments in opposition was the additional financial and time burden placed on prosecutors.<sup>113</sup> For example, one VACA comment focused on the need to go through and redact personal information on every page that would

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Concerning Proposed Rule Change to wit: Virginia Rule of Court 3A:11 (Discovery and Inspection: Criminal) (Dec. 12, 2012) (on file with the Supreme Court of Virginia); *see also* Nancy G. Parr, Va. Ass’n of Commonwealth’s Attorneys, Public Comment on the Report of the Special Committee on Criminal Discovery Rules (June 29, 2015) (on file with the Supreme Court of Virginia).

106. C. Phillips Ferguson, Public Comment on the Report of the Special Committee on Criminal Discovery Rules (June 19, 2015) (on file with the Supreme Court of Virginia).

107. *See, e.g.*, Kenneth Blalock, Comment on Criminal Discovery Rules (Apr. 30, 2015) (on file with the Supreme Court of Virginia); Joshua A. Boyles, Comment on Criminal Discovery Rules (June 30, 2015) (on file with the Supreme Court of Virginia).

108. Nancy G. Parr, Va. Ass’n of Commonwealth’s Attorneys, Public Comment on the Report of the Special Committee on Criminal Discovery Rules (June 29, 2015) (on file with the Supreme Court of Virginia).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

be turned over.<sup>114</sup> Another comment raised concerns about the confusion that the new rules would create and the ambiguity in the proposed rules.<sup>115</sup> Multiple prosecutors wondered why there was a need to change the rules at all because they believed that the current rules strike the right balance and thus do not need a complete overhaul.<sup>116</sup>

#### V. AN INCREMENTAL PROPOSAL TO PROMOTE FAIRNESS AND PROTECT WITNESSES

In order to both promote fairness in the justice system and protect the safety of victims and witnesses, a rule for disclosing witness statements to the defendant needs to be limited in scope. The federal government and some state governments address the balance of fairness and protection by: (1) limiting application of their rules to testifying witnesses, (2) limiting disclosure to written, recorded, or substantially verbatim statements, and (3) limiting disclosure to occur at or near the time of trial.<sup>117</sup> Additionally, some rules include provisions for redaction and protective orders.<sup>118</sup> Both the federal Jencks Act and Kentucky Rule of Criminal Procedure 7.26 provide illustrations of how to balance fairness to the defendant and promote the safety of witnesses. Kentucky Criminal Procedure Rule 7.26 provides for disclosure of witness statements forty-eight hours before trial,<sup>119</sup> and the federal Jencks Act provides for disclosure of prior witness statements after direct examination of the witness.<sup>120</sup>

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114. Michael R. Doucette, Va. Ass'n of Commonwealth's Attorneys, Public Comment Concerning Proposed Rule Change to wit: Virginia Rule of Court 3A:11 (Discovery and Inspection: Criminal) (Dec. 12, 2012) (on file with the Supreme Court of Virginia).

115. Joshua A. Boyles, Comment on Criminal Discovery Rules (June 30, 2015) (on file with the Supreme Court of Virginia).

116. *See id.*; C. Phillips Ferguson, Public Comment on the Report of the Special Committee on Criminal Discovery Rules (June 19, 2015) (on file with the Supreme Court of Virginia); Nancy G. Parr, Va. Ass'n of Commonwealth's Attorneys, Public Comment on the Report of the Special Committee on Criminal Discovery Rules (June 29, 2015) (on file with the Supreme Court of Virginia).

117. *See* 18 U.S.C. § 3500 (2012); *see, e.g.*, KY. RCR 7.26.

118. *See* 18 U.S.C. § 3500; *see, e.g.*, KY. RCR 7.26.

119. KY. RCR 7.26.

120. 18 U.S.C. § 3500.

A. *A Federal Example—The Jencks Act*

In response to *Jencks v. United States*,<sup>121</sup> Congress promulgated the Jencks Act<sup>122</sup> to further the fair administration of justice.<sup>123</sup> The Act aims to promote fairness to the defendant by requiring the government, on motion of the defendant in federal prosecutions, to turn over witness statements after the witness has testified on direct examination and when the statement relates to the subject matter of their testimony.<sup>124</sup> The Jencks Act defines “statement” as:

- (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
- (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
- (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.<sup>125</sup>

Under the Jencks Act, the government needs to produce witness statements after direct examination only if the statement falls both into the definition above and relates to the subject matter of the witness’s testimony.<sup>126</sup> The language of the rule provides that the government does not have to turn over witness statements “until said witness has testified on direct examination in the trial of the case,”<sup>127</sup> which could lead to interruptions in the trial. The rule proposed in Part V of this comment limits interruption during trial by requiring statements be turned over forty-eight hours beforehand, instead of waiting until after direct examination of a witness. Under the Jencks Act, the government cannot be compelled to provide witness statements prior to direct examination,<sup>128</sup> and the defendant must request the prior statements on motion in order to be entitled to the prior statements.<sup>129</sup> However, the Jencks Act has been

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121. 353 U.S. 657 (1957).

122. 18 U.S.C. § 3500.

123. *Goldberg v. United States*, 425 U.S. 94, 107 (1976); *see Jencks*, 353 U.S. at 668.

124. *See* 18 U.S.C. § 3500; *see also* *United States v. Katz*, 494 F. Supp. 1287, 1296 (M.D. Fla. 1980).

125. 18 U.S.C. § 3500(e).

126. *Id.* § 3500(b).

127. *Id.* § 3500(a).

128. *See* *United States v. Beckford*, 962 F. Supp. 780, 787 (E.D. Va. 1997).

129. 18 U.S.C. § 3500(b).



interpreted to include a reasonable opportunity to review the prior statements before cross-examination.<sup>130</sup>

In deciding what is classified as a statement under the Jencks Act, the trial judge can conduct an inquiry outside the presence of the jury, consider extrinsic evidence, and hear argument from counsel to decide whether or not it is a “statement” within the meaning of the statute.<sup>131</sup> The defendant has the burden of showing, with reasonable particularity, whether the statement is actually a statement within the meaning of the Act.<sup>132</sup>

Under the first part of the statutory definition, a written statement need not be signed by a witness.<sup>133</sup> Furthermore, the Jencks Act has been interpreted not to require that a written statement be substantially verbatim of a prior oral statement in order to qualify as a “statement.”<sup>134</sup> A written statement does not need to happen contemporaneously with an oral statement.<sup>135</sup> Additionally, a majority of circuits have found that in order to “adopt” a statement under the Jencks Act “a witness must read the entire statement and formally approve the statement.”<sup>136</sup> Statements that lack any declarative aspect do not qualify as a “statement” under the Jencks Act.<sup>137</sup>

In *Goldberg v. United States*, the Supreme Court held that a writing prepared by a lawyer for the government, that related to the subject matter of the testimony of a government witness, and was signed or adopted by the government witness, was considered a statement within the meaning of the Jencks Act.<sup>138</sup> The Court went on to clarify that “a Government lawyer’s recordation of mental impressions, personal beliefs, trial strategy, legal conclusions,

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130. See *United States v. Holmes*, 722 F.2d 37, 40–41 (4th Cir. 1983); *United States v. Hinton*, 631 F.2d 769, 781 (D.C. Cir. 1980).

131. *Campbell v. United States*, 365 U.S. 85, 93 (1961).

132. See *United States v. Boyd*, 53 F.3d 631, 634 (4th Cir. 1995).

133. See *Campbell*, 365 U.S. at 93–94.

134. See *id.* at 95 (implying that a written statement need not be a substantially verbatim recording of a prior oral statement).

135. See *Clancy v. United States*, 365 U.S. 312, 314 (1961) (holding that memoranda made after an interview with the defendants still qualified as statements of the agents even though they were not made contemporaneously with the interviews).

136. *United States v. Beckford*, 962 F. Supp. 780, 796 (E.D. Va. 1997) (quoting *United States v. Jackson*, 978 F.2d 903, 909 (5th Cir. 1992)).

137. See *United States v. Susskind*, 4 F.3d 1400, 1406 (6th Cir. 1993) (holding questions by an attorney were purely interrogatory in character and not declarative, and therefore did not rise to the level of a “statement” under the Jencks Act).

138. 425 U.S. 94, 98 (1976).

or anything else that ‘could not fairly be said to be the witness’ own’ statement” is not discoverable under the Jencks Act.<sup>139</sup>

On the other hand, notes or reports of law enforcement officers create a question under the Jencks Act because some courts hold that they are “statements” and some hold that they are not.<sup>140</sup> In some circumstances, when a police officer is called as a witness, such notes can be considered a statement of the testifying officer under the Jencks Act.<sup>141</sup> Additionally, if a law enforcement report contains a statement of a government witness, some courts have said it was adopted by the witness, others have not.<sup>142</sup>

Federal Rule of Criminal Procedure 26.2(g) largely parallels the Jencks Act and incorporates it into the Federal Rules of Criminal Procedure, with one major exception.<sup>143</sup> It applies the Jencks Act to suppression hearings, preliminary hearings, sentencing hearings, hearings to revoke or modify probation or supervised release, and detention hearings.<sup>144</sup> Federal Rule of Criminal Procedure 26.2(g) broadens the scope of the original rule promulgated by Congress.

While the purpose of the Jencks Act is commendable and case law provides important insight into understanding the definitional components of witness statements, this comment proposes that Virginia take the rule a step further and provide witness statements forty-eight hours before trial rather than after the witness has testified on direct examination.

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139. *Id.* at 106 (citing *Saunders v. United States*, 316 F.2d 346, 350 (D.C. Cir. 1963)).

140. *Compare* *United States v. Redding*, 16 F.3d 298, 301 & n.3 (8th Cir. 1994) (holding that notes taken by a law enforcement officer during an interview of the defendant’s girlfriend did not constitute a statement under the Jencks Act because she had never “adopted” the statement), *with* *United States v. Welch*, 810 F.2d 485, 491 (5th Cir. 1987) (holding the reports prepared by a United States Drug Enforcement Administration agent who testified at trial were “statements” within the meaning of the Jencks Act).

141. *United States v. Sheer*, 278 F.2d 65, 67–68 (7th Cir. 1960) (holding that when the government witnesses were government agents, their reports constituted statements within the meaning of the Jencks Act).

142. *Compare* *Campbell v. United States*, 373 U.S. 487, 492 (1963) (holding an interview report qualified as a written statement under the Jencks Act), *with* *Menendez v. United States*, 393 F.2d 312, 316 (5th Cir. 1968) (holding the notes of an FBI agent had not been adopted or approved by the witness).

143. FED. R. CRIM. P. 26.2(g).

144. *Id.*

B. *A State Example—The Kentucky Rule*

Kentucky Criminal Procedure Rule 7.26 (“Kentucky Rule”) exemplifies a state trying to balance fairness to the defendant while protecting witnesses by allowing for the defense to review prosecution witness statements before trial.<sup>145</sup> Originally, the Kentucky Rule was developed as the procedural counterpart to the federal Jencks Act, which requires that witness statements be turned over to the defense after a witness for the government has testified on direct examination.<sup>146</sup> However, the rule was amended in 1981 to provide for disclosure of witness statements prior to trial in order to allow defense counsel an opportunity to inspect previous statements made by government witnesses without interrupting the trial.<sup>147</sup> The rule places a forty-eight hour temporal limitation on when the defense is entitled to witness statements.<sup>148</sup> Kentucky Criminal Procedure Rule 7.26(1) provides in part:

Except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness’s testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.<sup>149</sup>

The interpretation of the Kentucky Rule is that if the prosecution intends to call a witness at trial and the defense seeks access to witnesses’ recorded statements, it is within the trial court’s discretion whether or not to allow inspection prior to trial.<sup>150</sup> The Kentucky Rule requires only that the government turn over statements of testifying witnesses.<sup>151</sup> The defendant must request access to the witness statements in order to be provided with discovery by the

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145. KY. RCR 7.26.

146. *Lynch v. Commonwealth*, 472 S.W.2d 263, 267 (Ky. 1971) (discussing the comparison to the federal Jencks Act, 18 U.S.C. § 3500 (2012)).

147. William H. Fortune & Sarah N. Welling, *Kentucky Law Survey: Criminal Procedure*, 72 KY. L.J. 381, 391 (1983).

148. KY. RCR 7.26.

149. *Id.*

150. Fortune & Welling, *supra* note 147, at 391.

151. *Mudd v. Commonwealth*, No. 2012-SC-000664-MR, 2013 Ky. Unpub. LEXIS 59, at \*5–6 (Ky. 2013).

government under the rule.<sup>152</sup> Furthermore, if the witness statement is in writing, the defendant is entitled to have the writing admitted into evidence under this rule.<sup>153</sup>

The Kentucky Rule has been interpreted to include diagrams made during police interviews with eyewitnesses because they are considered witness statements in documentary form, in possession of the Commonwealth, related to the subject matter of the witness's testimony, and are signed by the witness.<sup>154</sup> Additionally, the Kentucky Rule includes investigative reports of police officers, if they testify at trial, as "statements."<sup>155</sup> In *Haynes v. Commonwealth*, the Supreme Court of Kentucky held that the trial court committed an error in denying the defendant's motion for production of the detective's written report because it was prepared and signed by the detective and it related to the subject matter of his testimony.<sup>156</sup> However, the Kentucky Rule does not require the production of police reports that do not purport to contain "substantially verbatim statements" of the witness.<sup>157</sup>

Overall, the Kentucky Rule allows the defense a brief but fair opportunity to inspect previous statements made by a government witness and gives them an adequate opportunity to prepare for cross-examination without interrupting trial.<sup>158</sup> Virginia would benefit immensely from adopting a rule similar to the Kentucky Rule because it provides a broader temporal scope than the Jencks Act does, but still balances fairness to the defendant while promoting the safety of witnesses.

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152. *See Davis v. Commonwealth*, 463 S.W.2d 133, 135 (Ky. 1970).

153. *Lynch v. Commonwealth*, 472 S.W.2d 263, 267 (Ky. 1971).

154. *Gosser v. Commonwealth*, 31 S.W.3d 897, 905 (Ky. 2000).

155. *Haynes v. Commonwealth*, 657 S.W.2d 948, 949–50 (Ky. 1983).

156. *Id.*

157. *Pankey v. Commonwealth*, 485 S.W.2d 513, 521 (Ky. 1972) (holding the failure to produce police reports not purporting to contain substantially verbatim statements of the eyewitness was not erroneous).

158. *Wright v. Commonwealth*, 637 S.W.2d 635, 636 (Ky. 1982) (discussing the amendment of the language of Kentucky Criminal Procedure Rule 7.26 from "[a]fter a witness called by the Commonwealth has testified" to "[b]efore a witness called by the Commonwealth testifies").

### C. *Virginia Rule Proposal*

Virginia should adopt a new rule or amend Rule 3A:11 to provide witness statements forty-eight hours before trial in criminal cases. A new rule would allow Virginia to move toward a more fair criminal system for defendants while balancing important concerns about witness safety. The rule would be limited in temporal scope to testifying witnesses and as to what types of statements could be turned over to the defense. Additionally, the proposed rule should include a provision for good cause to withhold the witness statements from the defense.

The witness statements that the rule would cover are statements of witnesses the prosecution intends to produce at trial and that will likely relate to the subject matter of their future testimony. The proposed rule, written below, incorporates aspects of the Kentucky Rule of Criminal Procedure 7.26,<sup>159</sup> the Jencks Act,<sup>160</sup> and the changes to Rule 3A:11 proposed by the Special Committee.<sup>161</sup>

The proposed rule is:

(a) Upon written notice by the defendant, the Commonwealth not later than forty-eight hours before trial shall produce all statements of any non-expert witness the Commonwealth intends to produce at trial that relates to the subject matter of the witness's future testimony, unless good cause is shown to withhold the statement of the witness.

(b) The term "witness statement" means any statement written, signed, or adopted by the witness; an audio and/or video recording of the statement; or a substantially verbatim transcript recorded contemporaneously of an oral statement made by the witness.

This proposed rule requires the prosecution to turn over witness statements of intended witnesses no later than forty-eight hours

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159. KY. RCR 7.26.

160. 18 U.S.C. § 3500 (2012).

161. SPECIAL COMM. REPORT, *supra* note 2, at 18. The Overall Discovery Process Group proposed that 3A:11 be amended to include: "(1) [d]isclosure of the names of witnesses each party intends to call at trial, (2) disclosure of prior statements of these witnesses, and (3) disclosure of police reports to defense counsel." *Id.* at 7.

before trial, similar to the Kentucky Rule.<sup>162</sup> Additionally, the proposed rule allows for written notice, instead of filing a motion with the court as required by the Jencks Act.<sup>163</sup> Similar to both the Jencks Act and the Kentucky Rule, the proposed rule requires that the prior statements relate to the witness testimony at trial.<sup>164</sup> The definition of “witness statement” in subsection (b) incorporates parts of the Kentucky Rule and the Jencks Act. Subsection (a) also includes a protective provision for good cause shown like the one included in the proposed rule in the Special Committee Report.<sup>165</sup>

To understand what the proposed rule would look like in practice, Virginia should look to Kentucky case law interpreting the Kentucky Rule and the case law interpreting the Jencks Act in deciding what the proposed rule’s definition of witness statement means. The proposed rule is similar to both the Kentucky Rule and the Jencks Act because it is limited to testifying witnesses, limited temporally in scope, and only requires disclosure before a trial.

The proposed rule applies only to cases that make it to trial and it does not apply to the plea bargaining process. In *United States v. Ruiz*, the Supreme Court said the requirement in *Giglio v. United States*<sup>166</sup> to disclose impeachment evidence does not apply to guilty pleas.<sup>167</sup> Following the logic set forth in those cases, the proposed rule is limited in application only to cases that make it to trial and will not apply to the plea bargaining process.

Similar to the Kentucky Rule, a police report would be considered a “witness statement” under the proposed rule if a police officer testifies at trial and his report relates to the subject matter of testimony.<sup>168</sup> Additionally, a police report that contains a substan-

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162. KY. RCR 7.26.

163. 18 U.S.C. § 3500.

164. *Id.*; KY. RCR 7.26.

165. SPECIAL COMM. REPORT, *supra* note 2, at 20 (“For good cause a party may withhold or redact such information, or condition its disclosure on restrictions limiting copying or dissemination including, where appropriate, limiting disclosure to counsel only. If a party withholds or restricts information, it shall notify the other party in writing and shall identify the reason. Examples of ‘good cause’ may include, but are not limited to, personally identifying information to protect a victim’s or witness’s personal or financial security, graphic images, child pornography, and medical or mental health records.”).

166. 405 U.S. 150, 154–55 (1972).

167. *United States v. Ruiz*, 536 U.S. 622, 625, 628 (2002).

168. *See Haynes v. Commonwealth*, 657 S.W.2d 948, 950 (Ky. 1983).

tially verbatim statement of a government witness should be considered a statement under the proposed rule.<sup>169</sup>

Similar to written statements under the Jencks Act, written statements of a witness do not need to be signed by the witness and do not need to be made contemporaneously with an oral statement.<sup>170</sup> The rule is disjunctive, meaning it can either be signed or adopted; it does not need to be both. Instead, the witness can adopt the “statement” if it has been read back to him and he affirms his statement.<sup>171</sup> The disjunctive nature of the rule will allow for more written statements to qualify as “statements.” A recording of a statement must be “substantially verbatim,” but it does not have to be word-for-word what the witness said.<sup>172</sup> Additionally, a recording of a statement must be made contemporaneously with the oral statement.<sup>173</sup>

Under the proposed rule, e-mails and text messages from a witness to anyone would be considered witness statements if they relate to the subject matter of the witness’s testimony, because they are written statements by the witness. Additionally, posts on social media, including Facebook and Twitter, written by the witness, would be considered statements under the proposed rule.

A police report will sometimes be considered a “statement” under the proposed rule and at other times a police report will not be considered a “statement” under the proposed rule. The Overall Discovery Process Study Group from the Special Committee proposed that “[t]he term ‘police reports’ means any formal, written report of investigation by any law enforcement officer (as defined by Code § 9.1-101) including reports of interviews of witnesses (whether verbatim or non-verbatim); it does not include notes and drafts.”<sup>174</sup> There are, however, times when a police report may become a witness statement. For example, when a police officer takes the stand,

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169. See *Campbell v. United States*, 373 U.S. 487, 492 (1963).

170. See *Campbell v. United States*, 365 U.S. 85, 93–94 (1961); *Clancy v. United States*, 365 U.S. 312, 314 (1961).

171. See *United States v. Beckford*, 962 F. Supp. 780, 796 (5th Cir. 1997) (citing *United States v. Jackson*, 978 F.2d 903, 909 (5th Cir. 1992)).

172. See *Campbell*, 373 U.S. at 489–91.

173. See *Clancy*, 365 U.S. at 314 (explaining the contemporaneous requirement applies only to a statement under 18 U.S.C. § 3500(e)(2), which deals with a “substantially verbatim oral statement”).

174. SPECIAL COMM. REPORT, *supra* note 2, at 18 (citing VA. CODE ANN. § 9.1-101 (Repl. Vol. 2012)).

the police report becomes a prior written statement similar to the approach under the Kentucky Rule.<sup>175</sup> Furthermore, if the police report contains a substantially verbatim statement of another government witness, it may become a witness statement for purposes of the proposed rule.

Victim and witness safety and intimidation are some of the main concerns in criminal discovery reform. The proposed rule presented in this comment addresses the witness safety concerns in multiple ways. The major opposition to disclosure of witness statements is due to concerns about the safety of government victims and witnesses.<sup>176</sup> The commenters in opposition were rightfully concerned with the potential for witness intimidation and related security issues.<sup>177</sup> Some commenters believed that the protective measures in the Special Committee report did not go far enough.<sup>178</sup> However, witness safety concerns are limited under the proposed rule for four reasons.

First, the proposed rule provides a temporal limitation on when the defense may receive witness statements, and the rule only applies to cases that make it all the way to trial. The temporal limitation should help curtail witness safety concerns because forty-eight hours limits the opportunities for defendants to find witnesses and intimidate them. Furthermore, very few cases make it to trial, limiting the number of defendants who will receive witness statements under the rule. The limited temporal scope also alleviates some of the potential cost concerns.

Second, the proposed rule will allow prosecutors to withhold witness statements for good cause shown through the use of protective measures. The proposed rule in the Special Committee Report included a protective provision, but some of the opponents of the changes believed the protective provision did not go far enough.<sup>179</sup> However, the protective provision included in the Special Committee Report was clear, flexible, and would help courts efficiently

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175. KY. RCR 7.26.

176. *See, e.g.*, Va. Dep't of State Police, Comment on Proposed Amendments to Rule 3A:11 (June 26, 2015) (on file with the Supreme Court of Virginia).

177. *Id.*

178. *Id.*

179. *See* Nancy G. Parr, Va. Ass'n of Commonwealth's Attorneys, Public Comment on the Report of the Special Committee on Criminal Discovery Rules (June 29, 2015) (on file with the Supreme Court of Virginia).



handle protective orders. The good cause provision in the proposed rule by the Special Committee stated,

For good cause a party may withhold or redact such information, or condition its disclosure on restrictions limiting copying or dissemination including, where appropriate, limiting disclosure to counsel only. If a party withholds or restricts information, it shall notify the other party in writing and shall identify the reason. Examples of “good cause” may include but are not limited to, personally identifying information to protect a victim’s or witness’s personal or financial security, graphic images, child pornography, and medical or mental health records.<sup>180</sup>

The protective provision in the Special Committee Report would have allowed the government to redact the information before there was any court order to do so.<sup>181</sup> Then, if the other party wished to receive the information they would have to file a motion with the court.<sup>182</sup> The Special Committee proposed a rule that included a non-exclusive list of examples that provided when discoverable information may be withheld, redacted, or made subject to limited disclosure.<sup>183</sup> The rule presented by the Special Committee illustrates what the good cause provision in the proposed rule in this comment should incorporate.

Kentucky Rule of Criminal Procedure 7.26 also includes a good cause provision, which states, “Except for good cause shown.”<sup>184</sup> The good cause language in the proposed rule is similar to that of the Kentucky Rule because it qualifies the rule from the outset as providing a protective measure. A protective order would allow the government to refuse to disclose witness information. The standard for protective orders should be flexible to allow the court to fashion a remedy for withholding information from the defendant for good cause shown. For example, the statements could be withheld from anyone but defense counsel.<sup>185</sup>

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180. SPECIAL COMM. REPORT, *supra* note 2, at 20.

181. *Id.*; *see also* Michael R. Doucette, Comment on Criminal Discovery Rules (June 16, 2015) (on file with the Supreme Court of Virginia).

182. SPECIAL COMM. REPORT, *supra* note 2, at 20; *see also* Michael Doucette, Comment on Criminal Discovery Rules (June 16, 2015) (on file with the Supreme Court of Virginia).

183. SPECIAL COMM. REPORT, *supra* note 2, at 4.

184. KY. RCR 7.26.

185. *See* N.Y. STATE BAR ASS’N, REPORT OF THE TASK FORCE ON CRIMINAL DISCOVERY 16 (2015), <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=54572>.

Third, in the Commonwealth of Virginia, there are other means of disclosing a witness's identity. For example, the rules of evidence apply to preliminary hearings, meaning in any given case, the identity of witnesses would likely be disclosed at an earlier stage.<sup>186</sup> One significant concern when it comes to protecting witnesses is the disclosure of witness identity. However, if a defendant already knows the witnesses against him because of a preliminary hearing, then there is less of a risk associated with disclosing the prior witness statement. Under the Sixth Amendment, all trials in the United States are public and the disclosure of the identity of witnesses becomes a matter of "when," not "if."<sup>187</sup>

Fourth, the majority of Virginia prosecutors already provide for broader discovery than is required under the current rules.<sup>188</sup> Many prosecutors voluntarily provide witness statements to the defense before trial.<sup>189</sup> The argument for restrictive discovery is undercut because Virginia prosecutors already provide more discovery than the rules require.<sup>190</sup> Many Virginia prosecutors also voluntarily follow an "open file" system, while many other jurisdictions do not.<sup>191</sup> The different levels of discovery allowed in each jurisdiction within the Commonwealth create inconsistencies among the jurisdictions and greater unfairness among defendants.<sup>192</sup> For example, an individual can be charged in one county with the exact same crime as an individual in another county and one of them may get vastly more information prior to trial. The proposed rule provides uniformity among jurisdictions in turning over witness statements to the defense.

Adding to the inconsistency among jurisdictions, some prosecutors will bring up felony charges on direct indictment in order to avoid preliminary hearings.<sup>193</sup> Defense attorneys use preliminary

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186. VA. R. EVID. 2:1101 (Repl. Vol. 2017) ("Evidentiary rules apply generally to (1) all civil actions and (2) proceedings in a criminal case (including preliminary hearings in criminal cases) . . .").

187. U.S. CONST. amend. VI.

188. See Jenia Turner & Allison Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 325 (2016); see also *supra* note 7.

189. See Green, *supra* note 9.

190. Ramseur, *supra* note 93, at 252.

191. See Green, *supra* note 9 ("Expanded, or even so-called 'open-file discovery,' is already informally practiced by some Virginia prosecutors . . .").

192. See *id.*; see also Jackman, *supra* note 1.

193. See Joseph Brown, *Felony Process in Virginia*, THE LAW OFFICES OF JOSEPH T. BROWN PLC (Oct. 20, 2014), <http://jtbrownlaw.com/felony-process-in-virginia/> ("An indictment can be issued by the Grand Jury either from a case that was certified by a District

hearings to discover the strength of the Commonwealth's case and to preview some of the government's evidence.<sup>194</sup> A rule requiring every jurisdiction to turn over witness statements forty-eight hours before trial evens out inconsistencies among jurisdictions. Providing uniformity among the jurisdictions ensures one defendant in one jurisdiction gets similar treatment to a defendant who is charged in another jurisdiction within the Commonwealth.

The proposed rule limits the scope of time and the instances in which the defense is allowed access to prior witness statements, thus reducing the opportunity for witness intimidation. It includes a protective measure that would allow the government to withhold statements for good cause to provide additional protection in certain cases with particularly vulnerable witnesses. The defendant likely already knows the identity of the witnesses against him through other means, such as pre-trial proceedings, so the potential chilling effect on witness participation and cooperation is likely limited. Finally, many prosecutors in the Commonwealth already provide for greater discovery than what is required by the rules,<sup>195</sup> meaning that the practical effect would be limited to codifying current practice and ensuring uniformity. Overall, the proposed rule sufficiently takes victim and witness safety into consideration while still promoting fundamental notions of fairness and justice for defendants.

### CONCLUSION

Criminal discovery reform is vital—the current rules are restrictive and unfair. Reforming the criminal discovery rules would create a system that promotes fairness and provides clarity. Heeding Chief Justice Lemons's call for incremental improvements, this comment focused on one specific change that should be made to promote a more accurate and fair justice system. Virginia should create a rule that provides for disclosure of witness statements to the defense forty-eight hours before trial. The Virginia legislature should adopt a rule similar to that of Kentucky Rule of Criminal

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Court judge or by what is called Direct Indictment by the Commonwealth's Attorney. A person who is Direct Indicted does not go through any of the process in the District Court.”).

194. Gilbert A. Bartlett et al., *Defense of Criminal Cases*, BARTLETT & SPIRN, PLC (2011), <http://www.bartlettspirn.com/criminal.pdf>.

195. Ramseur, *supra* note 93, at 252.

Procedure 7.26 because it provides the defendant with important information to help him build a defense. The rule is also limited temporally in scope and provides a flexible protective provision. The time limit lowers the risk of witness tampering and concerns of witness safety.

Virginia should adopt the proposed rule for providing non-expert witness statements to the defense forty-eight hours before trial except for good cause shown. Broader discovery would create a criminal justice system that is more accurate, fair, and transparent. Expanding the discovery rules would help both sides be more prepared and informed at trial. The rule proposed in this comment would bring Virginia one step closer to a more just system for criminal defendants.

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