



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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JUDGES

RETIRED JUDGES

March 3, 2021

mailed & emailed 3/4/2021

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Re: Commonwealth of Virginia v. Paul Dixon Jones
Case No. FE-2021-62

Commonwealth of Virginia v. Gregory Scott Burgess
Case No. FE-2021-64

Dear Counsel:

The issue before the Court is when to set discovery deadlines per Rule 3A:11 of the Rules of the Supreme Court of Virginia.

In each of the above cases, the defendant moved for a discovery order. The Commonwealth does not object, generally, but opposes the deadlines requested by each defendant. She asks the Court to set deadlines consistent with the model discovery order previously promulgated by this Court rather than those deadlines chosen by the defendants.

OPINION LETTER

Commonwealth's Request

The Commonwealth requests a 28-days-before-trial deadline in which to disclose reports, statements, criminal records, examination reports, physical items, and redacted and restricted dissemination materials. She requests a 14-days-before-trial deadline in which to disclose general witnesses, and a 5-days-before-trial deadline in which to disclose rebuttal expert witnesses. She requests a 14-days-before-trial deadline for *Giglio*¹ materials disclosure.²

For reciprocal discovery, the Commonwealth requests a 14-days-before-trial deadline for each defendant to disclose reports, insanity defense reports, and any alibi notice. She requests a 5-days-before-trial deadline for disclosing defense witnesses and a 10-days-before trial deadline for disclosing expert witnesses.

Defendants' Request

The defendants request a 30-days³-before-trial deadline in which the Commonwealth discloses statements, criminal records, examination reports, physical items, and redacted and restricted dissemination materials. The defendants request a 30-days-before-trial deadline for Commonwealth disclosure of general witnesses, and a 7-days-before-trial deadline for Commonwealth disclosure of rebuttal expert witnesses. The defendants request a 14-days-before-trial deadline for the Commonwealth to disclose *Giglio* materials.

For reciprocal discovery, the defendants request a 15-days-before-trial deadline for the defendants to disclose reports, insanity defense reports, and any alibi notice. The defendants request a 15-days-before-trial deadline for disclosing witnesses, general and expert.

Analysis

Rule 3A:11 of the Rules of the Supreme Court of Virginia sets only one deadline for discovery—the accused must make a discovery *motion* 10 calendar days before the trial date. VA. S. Ct. R. 3A:11(e). The Rule sets no deadlines for the Commonwealth or the defendant to comply with the discovery requests. Implicitly, this is left to the discretion of the Court. However, defendants have a constitutional right to prepare for trial, and that right requires that the accused and his counsel have sufficient time to investigate the case and to evaluate evidence

¹ *Giglio v. United States*, 405 U.S. 150 (1973).

² All “days” are “calendar days” in the Commonwealth’s proposal. This is important since the defendants in their proposed order mix the terminology.

³ Defendants request 30 “days” versus the Commonwealth’s request for 28 “calendar days.” The Court does not understand the distinction, but when different words are used there is a presumption that it was intentional, and courts must give it meaning. If “days” are business days, both parties could be requesting the same deadline, in effect. To avoid confusion and misunderstandings, it is wise for courts to use one convention in its orders.

that is procured. *Gilchrist v. Commonwealth*, 227 Va. 540, 545-46 (1984) (citing VA. CONST. ART. 1, § 8).

In the present case, the defendants' proposed discovery deadlines are not much different than those of the model the Commonwealth embraces. However, even a few extra days can make a big difference in preparing a case for trial or disposition. The defendants' stated reason for the deviation from the model is that the expected trial dates are delayed due to the judicial emergency spawned by the present pandemic and the discovery deadlines should take advantage of this delay to some degree. In a show of good faith, they propose longer deadlines for their reciprocal discovery, albeit not as generous as the deadlines they request of the Commonwealth. The Commonwealth argues she often needs closer-to-trial deadlines as she frequently acquires certain information late.

The Court agrees with the defendants. Considering the pandemic and the necessary delays for the sake of public health, giving defendants a few extra days of time with discovery materials as they request certainly seems reasonable.

The Court created a model discovery order form to assist the parties and the Court with this generally routine part of every criminal case. However, a model is just that—a guide subject to modification as circumstances warrant. It seems inefficient to have a state of affairs where a hearing is required for every discovery motion. However, a defendant's rights easily trump efficiency on this issue. The Court will grant the deadlines the defendants requested in their motions.

Conclusion

The Court will grant the defendants' discovery motions. Appropriate Orders are attached.

Kind regards,

A large black rectangular redaction box covers the signature of the judge.

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

OPINION LETTER

VIRGINIA :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA :

Case No. FE-2021-64

v. :

GREGORY SCOTT BURGESS, :
Defendant. :

ORDER

Gregory Scott Burgess

Upon the motion of the Defendant, ~~Paul Dixon Jones~~, by and through counsel, and with
the agreement of the Commonwealth, by and through her counsel, it is hereby,

*(Amended
3-4-21)*

DISCOVERY AND INSPECTION

Discovery by the Defendant

calendar

ORDERED pursuant to Rule 3A:11, that no later than **30** [✓] days before trial, the

Commonwealth shall produce the following:

1. **REPORTS:** The Commonwealth shall permit the defendant to inspect and review any relevant reports prepared by law enforcement officers and made in connection with the particular case, including any written witness statements or written summaries of oral statements contained within such reports, that are known to the Commonwealth's attorney to be in the possession, custody or control of the Commonwealth. Nothing in this Order requires that the Commonwealth provide the defendant with copies of the relevant law enforcement reports, although it may do so in her discretion. This order shall be subject to the provisions of subparts (c)(1) and (c)(2) of Rule 3A:11 regarding redaction and restrictions on "Restricted Dissemination Material."

2. **STATEMENTS:** The Commonwealth shall permit the defendant to inspect, review and

copy of photograph any relevant written or recorded statements or confessions, or the substance of any oral statements or confessions, made by the defendant to any law enforcement officer, that are known to the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth; written or recorded statements or confessions, or the substance of any oral statements or confessions, made by the Defendant to any person other than a law enforcement officer, that the Commonwealth intends to introduce into evidence at trial; written or recorded statements, or the substance of any oral statements, made by a codefendant or co-conspirator that the Commonwealth intends to introduce into evidence at trial.

3. **DEFENDANT'S CRIMINAL RECORD:** The Commonwealth shall allow the Defendant through counsel to review a copy of his/her prior criminal record, if any, as is within the possession, custody or control of the Commonwealth, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the Commonwealth.

4. **REPORTS OF EXAMINATIONS:** The Commonwealth shall permit the Defendant to inspect, review and copy or photograph any written reports of autopsy examinations, 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 Defendant or alleged victim made in connection with the particular case, that are known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth.

5. **PHYSICAL ITEMS:** The Commonwealth shall permit the Defendant to inspect and copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the Commonwealth, that may be material to the preparation of his/her defense, or that the

Commonwealth intends to introduce into evidence at trial. If counsel desires to inspect the physical evidence prior to the date of trial, counsel shall contact the Commonwealth, in writing, to set a mutually agreeable date and time for said inspection of physical evidence in the possession of the Commonwealth.

6. **EXPERT WITNESSES:** For any witness through which the Commonwealth intends to introduce expert testimony at trial or sentencing, the Commonwealth shall notify the Defendant in writing of the Commonwealth's intent to introduce such expert testimony and disclose to the Defendant: a) any written report of the expert witness setting forth the witness's opinions and the bases and reasons for those opinions, or, if there is no such report, a written summary of the expected expert testimony setting forth the witness's opinions and bases and reasons for those opinions; and b) the witness's qualifications and contact information. Pursuant to Rule 3A:11(b)(4)(B) the disclosure requirements under this section shall not render inadmissible an expert witness's testimony at the trial or sentencing further explaining the opinions, bases and reasons disclosed, or the expert witness's qualifications disclosed, just because the further explanatory language was not included in the notice and disclosure provided. The Commonwealth shall make the disclosure under this section no later than **30 calendar days** before trial, unless the expert testimony is to be offered in response to a previously-noticed expert of a defendant, in which case the disclosure pursuant to this section must be provided no later than **seven calendar days** prior to trial. Providing a copy of a certificate of analysis from the Virginia Department of Forensic Science or any other agency listed in Virginia Code § 19.2-187, signed by hand or electronic means by the person performing the analysis or examination, shall satisfy the requirements of this section. In an appropriate case, and for good cause shown,

either party may move the Court for an Order requesting earlier or later disclosure of expert witness notice and summaries.

7. **WITNESS LIST:** The Commonwealth shall disclose to the Defendant no later than **30 calendar days** before trial a list of the names and, if known, the addresses of all persons who are expected to testify on behalf of the Commonwealth at trial or sentencing. This disclosure is subject to Rule 3A:11(c) and to any protective orders entered by the Court.

8. **REDACTIONS AND RESTRICTED DISSEMINATION MATERIAL (“RDM”):**
The Commonwealth may make such redactions as are identified in Rule 3A:11(c)(1). Pursuant to Rule 3A:11(c)(2), the Commonwealth may designate disclosed materials as “Restricted Dissemination Material” by visibly marking the materials. Items may only be marked RDM by agreement with the Defendant’s attorney or by providing certification in writing, upon information and belief that the designated materials relate to the statement of a child victim or witness or that the disclosure may result in danger to the safety or security of a witness or victim, danger of a witness being intimidated or tampered with, or a risk of compromising an ongoing criminal investigation or confidential law enforcement technique. RDM may only be disclosed to the attorney for the Defendant, or the attorney’s agents or employees, or to an expert witness. The attorney for the Defendant may orally disclose the content of the RDM to the Defendant or allow the Defendant to view the content of the RDM but shall not provide the defendant with copies of the RDM. Disposition of the RDM shall be in accordance with Rule 3A:11(c)(2)(E).

9. **WORK PRODUCT:** This Order does not authorize discovery or inspection of the work product of the Commonwealth’s attorney, including internal reports, witness statements, memoranda, correspondence, legal research or other internal documents prepared by the office of

the Commonwealth's attorney or its agents in anticipation of trial. Should the Commonwealth seek to withhold from production as "work product" any law enforcement reports that would otherwise be made available for inspection and review pursuant to Section 1 of this Order, the Commonwealth shall notify the Defendant in writing, who may seek appropriate relief from the Court.

Discovery by the Commonwealth

If it further ORDERED pursuant to Rule 3A:11 that, no later than **15 calendar days** before trial, unless otherwise specified herein:

10. **REPORTS:** the Defendant shall permit the Commonwealth to inspect and copy or photograph any written reports of autopsy examinations, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine, and breath analyses, and other scientific testing within the Defendant's possession, custody or control that the defense intends to proffer or introduce into evidence at trial or sentencing.

11. **REPORTS RELATED TO THE DEFENSE OF INSANITY:** The Defendant shall permit the Commonwealth to inspect, copy or photograph any results or reports of any written reports of physical or mental examination of the Defendant made in connection with the particular case if the Defendant intends to rely upon the defense or insanity pursuant to Chapter 11 of Title 19.2; provided, however, that no statement made by the Defendant in the course of such examination disclosed pursuant to this Order shall be used by the Commonwealth in its case-in-chief, whether the examination was conducted with or without the consent of the Defendant.

12. **ALIBI NOTICE:** The Defendant shall disclose to the Commonwealth whether the

Defendant intends to offer a defense of alibi, and, if so, disclose the place at which the Defendant claims to have been at the time the alleged offense was committed.

13. **EXPERT WITNESSES:** For any witness through which the Defendant intends to introduce expert testimony at trial or sentencing, the Defendant shall notify the Commonwealth in writing of the Defendant's intent to introduce such expert testimony and disclose to the Commonwealth: a) any written report of the expert witness setting forth the witness's opinions and the bases and reasons for those opinions, or, if there is no such report, a written summary of the expected expert testimony setting forth the witness's opinions and bases and reasons for those opinions; and b) the witness's qualifications and contact information. Pursuant to Rule 3A:11(b)(4)(B) the disclosure requirements under this section shall not render inadmissible an expert witness's testimony at the trial or sentencing further explaining the opinions, bases and reasons disclosed, or the expert witness's qualifications disclosed, just because the further explanatory language was not included in the notice and disclosure provided. The Defendant shall make the disclosure under this section no later than **15 calendar days** before trial.

Providing a copy of a certificate of analysis from the Virginia Department of Forensic Science or any other agency listed in Virginia Code § 19.2-187, signed by hand or electronic means by the person performing the analysis or examination, shall satisfy the requirements of this section. In an appropriate case, and for good cause shown, either party may move the Court for an Order requesting earlier or later disclosure of expert witness notice and summaries

14. **WITNESS LIST:** The Defendant shall disclose to the Commonwealth no later than **15 calendar days** before trial a list of the names and, if known, the addresses of all persons who are expected to testify on behalf of the Defendant at trial or sentencing. The Defendant's attorney

may redact the personal identifying information or any witness if so authorized by a protective order entered by the Court, or as required by Virginia Code Section 19.2-11.2.

Protective Order

15. Any material or evidence disclosed or discovered pursuant to this Rule and filed with the clerk of the court shall be placed under seal until it is either admitted as an exhibit at a trial or hearing or the court enters an order unsealing the specified material or evidence.

16. The parties may move this Court for additional terms of, or relief from, the terms of this Order if such additional terms or relief are necessary for the orderly adjudication of the case or to the fair administration of justice.

Exculpatory Material

17. It is further ORDERED that the Commonwealth shall comply with its obligations to promptly produce exculpatory material, including material covered by *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny.

Giglio Materials

18. It is further ORDERED that, no later than 14 calendar days before trial, the Commonwealth shall produce to the defendant the Giglio materials for the witnesses who will testify in the Commonwealth's case-in-chief.

Providing of Copies

19. In accordance with Rule 3A:11(3), a party may satisfy the requirement to permit the opposing party to inspect and copy or photograph a document, recorded statement or recorded confession by providing an actual duplicate, facsimile or copy of the document, recorded statement or recorded confession to the opposing party in compliance with the applicable time

limits and redaction standards set forth in this Order.

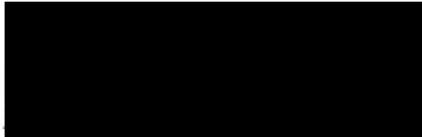
Date: MAR 03 2021



JUDGE

David A. Oblon

We ask for this:



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**Endorsement Waived
Per Rule 1:13**

Commonwealth's Attorney

*CW was present
and objected to
this Order.*