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claims to the "deathtrap," defendants should first ask the state court to exercise its discretion and provide relief from the rules of the "deathtrap." Should this relief be denied, defendants must object to the enforcement of these rules and list the particular claims that they will be prevented from raising. Both the challenge to the Virginia rules and the reference to particular claims at risk for default must be properly federalized.

Through these efforts, defendants may be able to preserve both their substantive claims for future federal review and their challenge to the validity of the Virginia rules themselves. When these claims, supported by a clear record, are presented in the federal court system for review, it is hoped that the federal courts will grant capital defendants the relief from the "deathtrap" that the Supreme Court of Virginia refuses to provide.

LEAVING NO STONE UNTURNED: ALTERNATIVE METHODS OF DISCOVERY IN CAPITAL CASES

BY: TIMOTHY B. HEAVNER

The usual method of obtaining discovery in criminal cases in Virginia is by motion under Rule 3A:11 of the Rules of the Supreme Court of Virginia[1] and by motion for all exculpatory evidence in the possession of the Commonwealth, according to the requirements of *Brady v. Maryland*.[2] This article will discuss other tools which may be used in criminal discovery that are often overlooked and under-utilized by defense attorneys.

It is important to start this discussion with two caveats. First, the tools discussed in this article are not a substitute for the normal methods of discovery, but may be used to supplement that discovery and provide certain tactical advantages over these methods. Secondly, the use of all these tools of discovery should not replace, but merely be a component of a very thorough independent investigation by the defense of all of the facts involved in the capital case.

I. SUBPOENA DUCES TECUM

A subpoena duces tecum is available under Rule 3A:12 of the Rules of the Supreme Court of Virginia "for the production of writings or objects" that are "material to the proceedings and are in the possession of a person not a party to the action."[3] It is normally easy to determine what materials fit within the "writings and objects" requirement of this rule, thus there is no case law on this point in Virginia. There also has been little problem determining who is "a party to the action."[4] The most litigated element of this rule is that documents that are sought be "material to the proceedings." The leading case for determining materiality in the context of a subpoena duces tecum is *Cox v. Commonwealth*.[5] In this case the defendant, the Treasurer of the City of Fairfax, was charged with embezzlement and sought a subpoena duces tecum for the production of certain documents from four banks which contained information regarding the accounts of the City of Fairfax. The subpoena was issued but a large percentage of the requested documents were not provided to the defense by the banks. The defense then asked for a continuance, but the trial court determined that the requested documents were not "material."

On appeal Cox claimed that the lack of access to records material to her defense denied her the right "to call for evidence in her favor as guaranteed by the Constitution of Virginia."[6] The Supreme Court of Virginia agreed and stated that this right applied to the procurement of documentary evidence.

In response to the holding by the trial court that the documents sought by the defendant were not material to her case, the court established the standard of materiality to be applied in these situations. The court adopted the standard established by the United States Supreme Court in *United States v. Agurs*[7] and *Bowman Dairy Co. v. United States*,[8] which requires that "a substantial basis for claiming materiality exists" and that the materials in the hands of third parties "could be used at trial." If the records sought meet both of these requirements, they are the proper subject of a subpoena duces tecum. The court in *Cox* found that the trial court had erred, that the records were material, and that "denying the defendant access thereto violated her constitutional right 'to call for evidence in [her] favor.'"[9]

The Virginia Court of Appeals has further defined the limits of this standard. In *Farish v. Commonwealth* the court determined that a subpoena duces tecum "should not be used when it is not intended to produce evidentiary materials but is intended as a 'fishing expedition' in the hope of uncovering information material to the defendant's case."[10] In *Gibbs v. Commonwealth* the court clarified that the documents or objects obtainable by a subpoena duces tecum are not limited to those "that are admissible in evidence but may be issued for any writings or objects that are 'material to the proceedings.'"[11] The court's basis for this decision rests on a person's constitutional right "to call for evidence in his favor"[12] and the fact that this guarantee includes "the right to prepare for trial which, in turn, includes the right to interview material

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1 Va. Sup. Ct. R. 3A:11.

2 373 U.S. 83 (1963).

3 Va. Sup. Ct. R. 3A:12.

4 *See Patterson v. Commonwealth*, 3 Va. App. 1, 348 S.E.2d 285, 290 (1986) (question was raised whether the objects requested by a subpoena duces tecum were within the possession of the Commonwealth or a third party, but it was not necessary to decide this issue).

5 227 Va. 324, 315 S.E.2d 228 (1984).

6 *Cox v. Commonwealth*, 227 Va. 324, 326, 315 S.E.2d 228, 229 (1984). This right is established by Va. Const. art. I, § 8.

7 427 U.S. 97, 106 (1976).

8 341 U.S. 214, 221 (1951).

9 *Cox v. Commonwealth*, 227 Va. at 328-29, 315 S.E.2d at 230-31.

10 2 Va. App. 627, 630, 346 S.E.2d 736, 738 (1986).

11 16 Va. App. 697, 698, 432 S.E.2d 514, 515 (1993).

12 Va. Const. art. I, § 8. It is critically important that objection to a denial of a subpoena duces tecum also be made under the compulsory process clause found in the Sixth Amendment of the United States Constitution.

witnesses and to ascertain the truth."[13] *Cox* requires that this ability to "call for evidence" shall include demonstrative evidence. Through this analysis, the court determined that "[m]ateriality may be determined by the effect of a document on the preparation and presentation of an accused's case"[14] and that, "[t]o the extent that these [documents] . . . tend 'to establish a probability or improbability . . . of a fact in issue' at the defendant's trial, they are material."[15] Finally the court held that the error by the trial court of denying the defendant access to this material information is only reversible error upon a showing of prejudice.[16]

According to the language of the rules and case law, the subpoena duces tecum has many advantages over Rule 3A:11 and *Brady* material discovery. Comparing the language of these two rules, it is apparent that the breadth of what may be discovered by use of the subpoena is greater than that of Rule 3A:11 discovery.[17] A subpoena may be issued to any person not a party to the action, while 3A:11 discovery is limited to the Commonwealth's attorney and only to those materials within the "possession, custody or control of the Commonwealth."[18] Another advantage apparent from the language of the rules is that there is no requirement for reciprocal discovery established when requesting a subpoena duces tecum. Thus if records were necessary to prepare a defense and were available from either the Commonwealth or a third party, the better approach would be to seek a subpoena for these records, thus not triggering the mandatory reciprocity of Rule 3A:11.

Based on *Cox* and *Gibbs*, another advantage is the time in which this tool is available. It is not necessary to wait for the Commonwealth's attorney to compile all of the information and comply with any discovery order. At the earliest time that the defense determines that someone other than the Commonwealth has any materials that would "tend to establish a probability or improbability of a fact in issue," the subpoena should be available. Additionally, because of the emphasis these cases placed on the constitutional right to call for evidence, there is a strong case for claiming that these subpoenas should be issued as soon as materiality is shown. Having the time required to receive and use the evidence requested in preparing for the a criminal proceeding is at the heart of the truth finding process.

This showing of materiality required is not an onerous standard. Experienced Virginia defense attorneys report that materiality is rarely questioned and that there is little difficultly in obtaining the issuance of a subpoena duces tecum.[19] As noted above, the emphasis by the courts in analyzing this standard has focused on the ability of the accused to call for evidence in the preparation of his defense. When a trial court considers the affidavit of the accused that shows that the requested "writings or objects are material to the proceedings," the court should look at the substantial basis for claiming materiality and how a denial would "prejudice" the accused in preparing his defense in determining whether the requested documents are material. This focus is forward looking, determining only the effect such requested information would have on the preparation of the case by the defendant.

When appellate courts have addressed denials of these requests, they have applied a backward looking approach, sometimes confusing the issue of what is material by focusing on outcome determination. Thus confusion has arisen as to what standard of prejudice must be shown. In *Patterson v. Commonwealth* the Virginia Court of Appeals held that the standard created by *United States v. Bagley*[20] was adopted in Virginia for determining the effect of a denial of a subpoena duces tecum request.[21] Under this standard, the evidence requested would be material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[22] In *Gibbs v. Commonwealth* the Virginia Court of Appeals did not refer to the *Bagley* standard, but only to the fact that denial of the information requested by a subpoena duces tecum is not reversible error absent a showing of prejudice, citing *Conway v. Commonwealth* as the standard for determining whether prejudice exists.[23] *Conway*, however, applied a harmless error standard, rather than the *Bagley* standard. The two standards differ as to who has the burden of proof. If the *Conway* court had applied the *Bagley* standard, the appellant would have failed to carry the burden of proving that denial of the materials requested would have undermined confidence in the outcome. However, without discussing the burden of proof, the *Conway* court remanded the case to the trial court for a determination of prejudice. In any event, appellate review standards governing prejudice are employed only to judge the effect of what is concededly an error. Trial courts, who cannot forsee the effect of their rulings on the outcome of the proceeding, presumably will not commit error in the hope that it will later be found harmless. Thus the *Cox/Gibbs* standard will apply pre-trial.

These differing standards of finding prejudice established by the same court leave unsettled what must be shown to challenge a denial of information requested by a subpoena duces tecum. What is clear from both of these opinions however, is that the trial court really has broad discretion in applying a standard of materiality that is not hard to meet. Thus the focus of defense counsel should be on meeting the initial materiality requirement at the trial court. This requires only that the affidavit submitted when requesting the subpoena contain a "substantial basis for materiality" of the information, that it contain a basis for materiality that rises above the level of mere "surmise and speculation," and that contains enough to satisfy a trial court that the request is something more than a "fishing expedition."[24] These are the minimal levels that the basis for the request of a subpoena must meet so that it may survive a challenge to quash by the Commonwealth or the party to whom it is addressed. In the final analysis, it is important to remember that a request that is properly drawn will rarely be challenged, thus making the subpoena duces tecum a readily available discovery tool.

Since a subpoena duces tecum is not specifically directed at a party to the proceeding, a disadvantage is the absence of a continuing duty to

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[13] *Bobo v. Commonwealth*, 187 Va. 774, 779, 48 S.E.2d 213, 215 (1948).

[14] *Gibbs v. Commonwealth*, 16 Va. App. 697, 699, 432 S.E.2d 514, 515 (1993) (*citing White v. Commonwealth*, 12 Va. App. 99, 103, 402 S.E.2d 692, 695 (1991)).

[15] *Gibbs*, 16 Va. App. at 701, 432 S.E.2d at 516 (*quoting Ferrell v. Commonwealth*, 11 Va. App. 380, 388, 399 S.E.2d 614, 619 (1990)).

[16] *Gibbs*, 16 Va. App. at 701, 432 S.E.2d at 516 (*citing Conway v. Commonwealth*, 12 Va. App. 711, 716, 407 S.E.2d 310, 312-313 (1991)).

[17] *See Gibbs*, 16 Va. App. at 699-700, 432 S.E.2d at 515-16.; *Cox*, 227 Va. at 328, 315 S.E.2d at 230.

[18] Va. Sup. Ct. R. 3A:11(b).

[19] For further information concerning securing a subpoena duces tecum and the practical applications of this alternative discovery tool, contact David Baugh, Esq., P.O. Box 12137, Richmond, Va. 23241.

[20] 473 U.S. 667 (1985).

[21] *Patterson v. Commonwealth*, 3 Va. App. 1, 8, 348 S.E.2d 285, 289 (1986).

[22] *Id.* (*citing United States v. Bagley*, 473 U.S. 667 (1985)).

[23] *Gibbs*, 16 Va. App. at 701, 432 S.E.2d at 516 (*citing Conway v. Commonwealth*, 12 Va. App. 711, 407 S.E.2d 310 (1991)).

[24] *Farish v. Commonwealth*, 2 Va. App. at 629-30, 346 S.E.2d at 737-38.

disclose by the person having custody of the requested material.[25] Without this duty, it is imperative that defense counsel be assured that the documents are in the possession of the third party at the time the request is made.

The fact that a subpoena duces tecum may only be directed at persons not a party to the action, while normal criminal discovery under Rule 3A:11 and *Brady* are aimed at the Commonwealth's attorney show why this tool could not replace the normal methods of discovery. However, these factors also show how failure to utilize this tool could cause the loss of valuable information that is vital to preparing a defense in a capital murder case. Because of the breadth of the topics that will be litigated in a capital murder trial,[26] the lower materiality standard available under the issuance of a subpoena duces tecum is invaluable in investigating all the areas that will be tried.

II. FREEDOM OF INFORMATION ACT

There are two Freedom of Information Acts available to every defense attorney in Virginia: the United States Freedom of Information Act (US FOIA)[27] and the Virginia Freedom of Information Act (VA FOIA).[28] Both of these acts are potential tools to supplement normal methods of discovery in a capital murder case.[29]

Both the greatest asset and the greatest liability of using these acts as discovery tools for a criminal proceedings is that these acts were not established directly for discovery purposes. The stated purpose of the VA FOIA is to ensure "the people of the Commonwealth ready access to records in the custody of public officials and free entry to meetings of public bodies wherein the business of the people is being conducted."[30]

The most important reason that this is an advantage is that requests for information under either FOIA do not need to be tied to any proceeding. This affects the timing of the request and the standing necessary to make the request. Traditional discovery tools must be requested by motion within the time provided for such motions and completed within a certain period in relation to the proceeding in which it was requested. An FOIA request may be made before charges are even brought or after the period for conventional discovery has expired. Though defense counsel may not learn of potential capital charges until they are formally brought, the FOIA still allows for the request of information at the earliest stages of the proceeding.

The standing requirement is also very minimal for obtaining information under the FOIA. For the US FOIA, an agency must make requested records available to "any person,"[31] while the VA FOIA requires that "official records shall be open to inspection and copying by any citizens of this Commonwealth."[32] Thus there is no need for a proceeding to be filed or that the person requesting information be a party to any action. This further means that there is no materiality requirement. As long as the requirements of the statute are met, the intended use is of no importance to the fulfillment of the FOIA request.

The fact that there is no materiality requirement shifts the burden of proving that the information should not be disclosed to the government. Under the VA FOIA, the requested material must be disclosed unless the Government can demonstrate that it falls within a particular exemption.[33] In making these determinations, the FOIA "shall be liberally construed" and "any exception or exemption from applicability shall be narrowly construed."[34] This can be important, for in normal discovery materiality must be established for documents of which the contents are unknown. The reverse is true under the FOIA, where the right to the material is assumed without any initial burden on the person making the request.

Another important advantage of the FOIA is that there is little room for discretion by the courts. If the requirements of the statute are met and no exemption applies, the information must be given. Under Rule 3A:11, the defendant is entitled to certain discovery,[35] but in all other discovery matters, the trial court has wide discretion. The limited authority to deny FOIA requests should mean that more information is released.

The last important advantage is that FOIA requests, like the subpoena duces tecum, are not reciprocal. Thus if the same information could be obtained from the Commonwealth or through some public body, the FOIA request would be the optimal choice so that no information would have to be disclosed in return for the release of the information requested.

The disadvantages also stem from the fact that these acts were not designed as discovery tools. The first disadvantage is the difficulty in obtaining prompt release of the information. Each of the acts contain a time frame in which the public body must respond to any FOIA request.[36]

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[25] *See* Va. Sup. Ct. R. 3A:11(g):

> If, after disposition of a motion filed under this Rule, and before or during trial, counsel or a party discovers additional material previously requested or falling within the scope of an order previously entered, that is subject to discovery or inspection under this Rule, he shall promptly notify the other party or his counsel or the court of the existence of the additional material.

There is no equivalent provision in Rule 3A:12, which allows for the issuance of a subpoena duces tecum.

[26] Examples of the greater breadth of relevant evidence in a capital case compared to a non-capital criminal proceeding include: (1) Presentation of unadjudicated acts of the accused by the Commonwealth and (2) Presentation of mitigation evidence by the defense.

[27] 5 U.S.C. §§ 551-55 (1988).

[28] Va. Code Ann. §§ 2.1-340.1 to -346.1 (Supp. 1994).

[29] For comprehensive analysis of using the US FOIA for criminal discovery, see Note, *The Freedom of Information Act—A Potential Alternative to Conventional Criminal Discovery*, Am. Crim. L. Rev., Vol. 14, pg. 73 (1976). For other articles on use of FOIA in discovery, see Watkins, *Using the Freedom of Information Act as a Discovery Device*, 1994 Ark. L. Notes 59, pg. 59 (1994); Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 Md. L. Rev. 119 (1984).

[30] Va. Code Ann. § 2.1-340.1.

[31] 5 U.S.C. § 552(a)(3).

[32] Va. Code Ann. § 2.1-342(A).

[33] Under Va. Code Ann. § 2.1-342(B), there are fifty-six (56) exclusions from the requirement that all official records be open to inspection and copying by citizens. Even if requested material falls within one of these exclusions, the custodian of these materials may disclose them "in his discretion, except where such disclosure is prohibited by law."

[34] Va. Code Ann. § 2.1-340.

[35] Under Rule 3A:11, the defendant is entitled to any statements or confessions, written or recorded, by the defendant and certain reports that related to the defendant or the alleged victim made in connection with the case. Va. Sup. Ct. R. 3A:11.

[36] 5 U.S.C. § 552(a)(6)(A) (upon request, agency shall determine within 10 days whether to comply with request; agency shall immediately notify the person making the request of such determination and of their right to appeal an adverse determination to the head of the agency; determination must be made on such an appeal within 20 days); Va. Code Ann. § 2.1-342(A) (custodian must respond to citizens request within

These bodies may ask for extensions in exceptional circumstances. If the body refuses to provide the information, an FOIA suit must be filed under the US FOIA. Under the VA FOIA, a petition for injunction or mandamus must be filed.[37] The VA FOIA recognizes that this process could become time consuming, and requires that the petition be heard within seven days during the term of the court, or have precedence on the docket of a court not in session.[38] Even with these mechanisms, the actual time for receiving the documents may be extended beyond the time when they would be most helpful. Thus if this tool is to be used, it should be initiated at the earliest possible instance.

A disadvantage that arises merely from enforcing the right to the information is the potential maintenance of a separate proceeding in another court while preparing for the capital trial. If the public body should refuse to provide the information, it must be determined if it is worth the effort to carry out such a collateral matter or if it would be possible to initiate that matter in the same court in which the capital case will be heard.

Pursuing this avenue of discovery may also be costly. The public body is entitled to a reasonable fee to cover compiling and copying costs in responding to the FOIA request.[39] The possibility of litigating any request could substantially increase this cost. It is possible that none of the time or expense in pursuing such request will be reimbursed to appointed counsel. This is very important in the capital murder context since most defendants are indigent and are represented by appointed counsel.

Other disadvantages of using the FOIA for discovery are that there is no continuing duty to disclose information and no duty to "create or prepare a particular requested record if it does not already exist."[40] These disadvantages again emphasize the importance of an independent investigation to determine as specifically as possible what information a public body may have within its custody and in what form they hold that information.

Regardless of the advantages and disadvantages of FOIA as compared to traditional discovery, sometimes it is impossible to obtain important records through traditional methods of discovery. A possible list of that type of information includes: witness lists, policy guidelines of the prosecutor's office, and statistical information. For information such as this, the FOIA may be the only avenue to obtain this information.[41] In this situation, the only question should be whether the potential expense outweighs the potential benefit of the information.

The key to using either FOIA is to determine the strength of the argument that the requested information does not fall within any exception or exemption within the statute. There is no case law in Virginia dealing with use of the VA FOIA in criminal cases and the language of the US FOIA and that of the VA FOIA is not comparable, thus federal case law is not analogous. This could work either way for defense counsel. With no case law to overcome, defense counsel is free to rely upon the liberal purpose of the FOIA in general and argue that exemptions should not apply to information that they request. However, the public body which receives the request, and courts that review denials of such requests, will have more discretion since there is no case law to restrain them.

III. RIGHT TO REPORTS AND INVESTIGATION BY STATE LABORATORIES

Virginia Code section 2.1-434.11 guarantees that

> [u]pon the request of any person accused of a crime or upon the request of an accused person's attorney, the Division of Forensic Science or the Division of Consolidated Laboratory Services shall furnish to the accused or his attorney the results of any investigation which has been conducted by it and which is related in any way to a crime for which such person is accused.[42]

The statute also authorizes the attorney for the accused, if "in good faith he believes that a scientific investigation may be relevant to the criminal charge," to move the court for an order requiring the Division of Forensic Science (DFS) or the Division of Consolidated Laboratory Services (DCLS) to complete the requested investigation.

There are several advantages that this section has over normal discovery under Rule 3A:11. First, for the reports already completed by these labs, the defense must only "request" the reports and the labs "shall" provide them to the accused or his attorney, while a motion must be made for Rule 3A:11 discovery. When requesting that a scientific investigation be completed by a lab, a motion must be made, but that motion "shall be heard *ex parte*," unlike Rule 3A:11 discovery motions.[43]

A second advantage is that requests made under this section do not open reciprocal discovery, unlike Rule 3A:11. If an investigation is requested and conducted, the Commonwealth may, upon request, "be furnished the results of the scientific investigation."[44] However, this is not truly reciprocal in that only the report is available and no further information is required to be given because of the request.

A third advantage is that these requests may be made when there is an "accused." This presumably occurs upon arrest or return of the indictment. Rule 3A:11 requires that there be "a felony prosecution in circuit court." Thus the request should be available earlier than regular discovery.

Another advantage is the language of this section is slightly broader than Rule 3A:11, in that it requires the release of any reports that are "related in any way to a crime for which [the] person is accused."[45] Rule 3A:11 requires that "relevant" scientific reports be provided if they are "known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth."[46]

Finally, when a court hears the *ex parte* motion of the defense when requesting a scientific investigation, the court "shall, after a hearing upon the motion and **being satisfied as to the correctness of the certification,** order that the same be performed."[47] This language shows that the

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five work days after receipt of the request by the public body; if public body determines that it is "practically impossible" to provide the requested record or determine whether they are available within the five-work-day period, the body may inform the citizen and may have an additional seven work days in which to provide a response).

37 5 U.S.C. § 552(a)(4)(B), Va. Code Ann. § 2.1-346.

38 Va. Code Ann. § 2.1-346.

39 5 U.S.C. § 552(a)(4)(A)(ii); Va. Code Ann. § 2.1-342.

40 Va. Code Ann. § 2.1-342(A).

41 For more information on the use of the US FOIA for material that would not be discoverable through criminal discovery, see Note, *supra* note 29, at 139-59.

42 Va. Code Ann. § 2.1-434.11 (Supp. 1994). This section was formally § 2.1-433, until repealed by Acts of 1990 and replaced with the current section.

43 *Id.*

44 *Id.*

45 *Id.*

46 Va. Sup. Ct. R. 3A:11.

47 Va. Code Ann. § 2.1-434.11 (emphasis added).

hearing should look only to the validity of defense counsel's certification that in good faith he believes that the investigation requested may be relevant. It does not seem to require that the defense must prove the relevance, only that they truly believe that *it may be* relevant. This is a lower threshold than is required by Rule 3A:11 discovery.

A disadvantage of using this method of obtaining a scientific investigation, rather than the use of an *Ake* expert,[48] is that any report produced by the lab in conducting the investigation may be obtained by the Commonwealth. This provision is important in determining whether this section should be used. If the evidence leading to the investigation request is important enough to the case, the investigation should be conducted by an expert granted under an *Ake* motion for expert assistance. If this approach is taken, nothing produced by the investigation will be discoverable by the Commonwealth. However, there will be instances where the investigation will be merely duplicative of tests already conducted by the Commonwealth or where the harm of a report that is counter to its anticipated outcome would cause minimal damage if presented against the defense. An example that illustrates such a case: A soil sample was taken from the automobile of the accused and the test completed by the DFS shows that such a sample was consistent with soil found at the grave site of his alleged murder victim. This would be a good time for the defense to request that a soil sample from the accused's driveway be tested to determine if it was also consistent with that found in the automobile.[49] This would be an appropriate use of this section because if the samples were found to be inconsistent, the harm resulting from disclosure of the report to the Commonwealth would be minimal.

Another example of an appropriate use is provided in *Weeks v. Commonwealth*, where defense counsel, hoping to minimize the ability of the Commonwealth to use "vileness" as an aggravating factor for a capital murder charge, attempted to determine whether the police officer allegedly murdered by the accused was killed instantaneously.[50]

This provision is the main cause for the under-utilization of this section by defense counsel. A Symposium of Science and the Rules of Legal Procedure held in 1983 detailed that only four requests for such assistance have been documented in the previous decade.[51] The reasons provided by the panel for the limited use were the report disclosure provision and defense counsel's distrust of laboratory personnel, whom they considered to be "employees of a police laboratory."[52] This provision should require that defense counsel be assured of the effect that a negative report from a requested investigation may have on the defense, but it should not totally preclude defense counsel from utilizing this tool when it is determined that such an effect would be minimal.

IV. OBTAINING CRIMINAL RECORDS

The Virginia Code allows a defendant in a felony case to obtain criminal records from the Central Criminal Records Exchange (CCRE).[53] This information would be useful for impeachment of the Commonwealth's witnesses. The showing that must be made to obtain these records is that they "may be relevant to such a case,"[54] which is broader than the "relevance" requirement of Rule 3A:11. Also, the motion for this request may be made *ex parte*.

The difficulty in making such a request will come in determining what records should be requested, when the witness list of the Commonwealth is unknown to the defense. The Circuit Court of the City of Winchester addressed this issue in *Commonwealth v. Johnson*.[55] In that case the defendant requested a witness list from the Commonwealth so that the defendant could obtain criminal conviction information on those witnesses. When this request was denied, the defendant proposed that the Commonwealth have the criminal records of its witnesses available so that such information could be given to the defense when each witness was called.[56] The court held that it is the burden of the defendant to determine who may be called by the Commonwealth and to seek their criminal records through an *ex parte* motion under Code section 19.2-389(A).[57]

This section was also discussed in *Weeks v. Commonwealth*.[58] In that case, the trial court failed to grant the motion for the records requested by the defendant. The Supreme Court of Virginia determined that even assuming the right to obtain these records should have been granted, the denial was not reversible error because the record did not show that the defendant's right to defend himself had been prejudiced.[59]

The key in obtaining such information, as it was with a subpoena duces tecum, is to make a strong showing that the information is or may be relevant within the *ex parte* motion to the trial court, thus avoiding the pitfalls of the prejudice review by the appellate courts. Since the standard is low the information will normally be given by the trial court.

V. CONCLUSION

From this analysis, it is quite apparent that their are many strategic and practical decisions to be made when determining whether to use a subpoena duces tecum or FOIA to supplement the traditional methods of discovery. The key to properly utilizing all the tools available in discovery is being aware that they are available, what the aim of each is, and the way in which they compare to the other methods of discovery. Counsel should apply these considerations to the specific facts of each case to determine the best methods of discovery in each case.

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[48] *Ake v. Oklaholma*, 470 U.S. 68 (1985) (held that there is a Fourteenth Amendment due process right to expert assistance when that assistance is a basic tool, essential to an adequate defense). For a discussion of the showing required to obtain expert assistance under *Ake*, see case summary of *Weeks v. Commonwealth*, Capital Defense Digest, this issue.

[49] This example was contained in seminar materials provided at a 1994 Capital Defense Workshop sponsored by the Virginia Bar.

[50] 248 Va. 460, 450 S.E.2d 379 (1994). The investigation was not conducted because the trial court placed a requirement on the accused beyond that contained in the statute and took the motion under advisement. This motion was never renewed. *See* case summary of *Weeks v. Commonwealth*, Capital Defense Digest, this issue.

[51] 101 F.R.D. 599, 646 (1983).

[52] *Id.*

[53] Va. Code Ann. § 19.2-389(A) (Supp. 1993).

[54] *Id.*

[55] 7 Va. Cir. Ct. Opinions 251 (1985).

[56] *Id.*

[57] *Id.* at 252.

[58] 248 Va. 460, 450 S.E.2d 379 (1994).

[59] *Id.* at 472, 450 S.E.2d at 387.