

Friday

30th

January, 2004.

It is ordered that the Rules heretofore adopted and promulgated by this Court and now in effect be and they hereby are amended to become effective April 1, 2004.

Amend Rule 3A:11 to read as follows:

**Rule 3A:11. Discovery and Inspection.**

(a) *Application of Rule.* -- This Rule applies to any prosecution for a felony in a circuit court and to any misdemeanor brought on direct indictment.

(b) *Discovery by the Accused.*

(1) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph any relevant (i) written or recorded statements or confessions made by the accused, or copies thereof, or the substance of any oral statements or confessions made by the accused to any law enforcement officer, the existence of which is known to the attorney for the Commonwealth, and (ii) 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 or the alleged victim made in connection with the particular case, or copies thereof, that are known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth.

(2) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect

and copy or photograph designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This subparagraph does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except as provided in clause (ii) of subparagraph (b) (1) of this Rule.

(c) *Discovery by the Commonwealth.* -- If the court grants relief sought by the accused under clause (ii) of subparagraph (b) (1) or under subparagraph (b) (2) of this Rule, it shall, upon motion of the Commonwealth, condition its order by requiring that:

(1) The accused shall permit the Commonwealth within a reasonable time but not less than ten (10) days before trial or sentencing, as the case may be, 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 and which the defense intends to proffer or introduce into evidence at trial or sentencing.

(2) The accused disclose whether he intends to introduce evidence to establish an alibi and, if so, that the accused

disclose the place at which he claims to have been at the time of the commission of the alleged offense.

(3) If the accused intends to rely upon the defense of insanity or feeble-mindedness, the accused shall permit the Commonwealth to inspect, copy or photograph any written reports of physical or mental examination of the accused made in connection with the particular case, provided, however, that no statement made by the accused in the course of an examination provided for by this Rule shall be used by the Commonwealth in its case-in-chief, whether the examination shall be with or without the consent of the accused.

(d) *Time of Motion.* -- A motion by the accused under this Rule must be made at least 10 days before the day fixed for trial. The motion shall include all relief sought under this Rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(e) *Time, Place and Manner of Discovery and Inspection.* -- An order granting relief under this Rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(f) *Protective Order.* -- Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the Commonwealth the court may permit the Commonwealth to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in camera. If

the court denies discovery or inspection following a showing in camera, the entire text of the Commonwealth's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the accused.

(g) *Continuing Duty to Disclose; Failure to Comply.* -- 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. If at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with this Rule or with an order issued pursuant to this Rule, the court shall order such party to permit the discovery or inspection of materials not previously disclosed, and may grant such other relief as it may deem appropriate.

Amend Rule 4:9(c) to read as follows:

**Rule 4:9. Production of Documents and Things and Entry on Land for Inspection and Other Purposes; Production at Trial.**

(c) *Production by a Person Not a Party.*

(1) Subpoena duces tecum issued by clerk of court. Upon written request therefor filed with the clerk of the court in which the action or suit is pending by counsel of record for any party or by a party having no counsel in any pending case, with a certificate that a copy thereof has been served pursuant to Rule

1:12 upon counsel of record and to parties having no counsel, the clerk shall, subject to paragraph (c-1), issue to a person not a party therein a subpoena duces tecum which shall command the person to whom it is directed, or someone acting on his behalf, to produce the documents and tangible things (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) designated and described in said request, and to permit the party filing such request, or someone acting in his behalf, to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 4:1(b) which are in the possession, custody or control of such person to whom the subpoena is directed, at a time and place and for the period specified in the subpoena; but, the court, upon written motion promptly made by the person so required to produce, or by the party against whom such production is sought, may (1) quash or modify the subpoena if it is unreasonable and oppressive, (2) condition denial of the motion to quash or modify upon the advancement by the party in whose behalf the subpoena is issued of the reasonable cost of producing the documents and tangible things so designated and described or (3) direct that the documents and tangible things subpoenaed be returned only to the office of the clerk of the court through which such documents and tangible things are subpoenaed in which event, upon request of any party in interest, or his attorney, the clerk of such court shall permit the withdrawal of such documents and tangible things by such party or

his attorney for such reasonable period of time as will permit his inspection, photographing, or copying thereof.

(2) Subpoena duces tecum issued by attorney. In a pending civil proceeding, a subpoena duces tecum may be issued by an attorney-at-law as an officer of the court if he is an active member of the Virginia State Bar at the time of issuance. An attorney may not issue a subpoena duces tecum in those civil proceedings excluded in Virginia Code § 8.01-407. An attorney-issued subpoena duces tecum must be signed as if a pleading and be accompanied on the subpoena by the attorney's address, telephone number and Virginia State Bar identification number. A copy of any attorney-issued subpoena duces tecum must be mailed or delivered to the clerk's office of the court in which the case is pending by the attorney on the day of issuance with a certificate that a copy thereof has been served pursuant to Rule 1:12 upon counsel of record and to parties having no counsel. If time for compliance with an attorney-issued subpoena duces tecum is less than fourteen (14) days after service of the subpoena, the person to whom the subpoena is directed may serve on the party issuing the subpoena a written objection setting forth any grounds upon which such production, inspection or testing should not be had. If an objection is made, the party issuing the subpoena shall not be entitled to the requested production, inspection or testing, except pursuant to an order of the court in which the civil proceeding is pending. If an objection is made, the party issuing the subpoena may, upon notice to the person to whom the subpoena is directed, move for an order to compel the production, inspection or testing.

Upon a timely motion, the court may quash, modify or sustain the subpoena as provided above in subsection (c)(1) of this Rule.

Amend Rule 5A:11(b) to read as follows:

**Rule 5A:11. Special Rule Applicable to Appeals From the Virginia Workers' Compensation Commission.**

(b) *Notice of Appeal.* -- No appeal from an order of the Commission shall be allowed unless, within 30 days after entry of the order appealed from, or within 30 days after receipt of notice by priority mail with delivery confirmation or equivalent mailing option of the order appealed from, counsel files with the clerk of the Virginia Workers' Compensation Commission a notice of appeal which shall state the names and addresses of all appellants and appellees, the names, addresses, and telephone numbers of counsel for each party, and the address and telephone number of any party not represented by counsel, and whether the appellant challenges the sufficiency of the evidence to support the findings of the Commission. A copy of the notice of appeal shall be filed in the office of the clerk of the Court of Appeals, and except as otherwise provided by law, must be accompanied by a check or money order in the amount of \$25 payable to the clerk of the Court of Appeals. The fee shall be due at the time the notice of appeal is presented. The clerk of the Court of Appeals may file any notice of appeal that is not accompanied by such fee if the fee is received by the clerk within ten days of the date the notice of

appeal is filed. If the fee is not received within such time, the appeal shall be dismissed.

A Copy,

Teste:

Clerk