

99-038

CRIMINAL PROCEDURE: PRELIMINARY HEARING.

Obligation of clerk of court to mail to counsel for accused certificate of analysis to be offered in evidence at hearing or trial of criminal offense. Certificate may be inadmissible if, when request was received, clerk merely notified counsel that case was not on court docket. When counsel requests certificate in specific case not yet docketed in court, preferable procedure would be for clerk to respond to request when and if case is docketed in court.

The Honorable Rex A. Davis
Clerk, Circuit Court for the City of Newport News
October 18, 1999

You ask whether, if the attorney for an accused requests a copy of a certificate of analysis in a case that has not been filed, certified or otherwise docketed in your court, you may satisfy the requirements of § 19.2-187(ii) of the *Code of Virginia* by so notifying the attorney or whether you must keep the request active and respond to it when and if a case is subsequently filed.

Section 19.2-187 relates to the admission into evidence of a "certificate of analysis of a person performing an analysis or examination, performed in any laboratory operated by the Division of Consolidated Laboratory Services or the Division of Forensic Science or performed by [certain federal bureaus or laboratories]." Section 19.2-187 provides that, in a hearing or trial of a criminal offense, such a certificate duly attested by the person performing the analysis or examination

shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein, provided (i) the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial and (ii) a copy of such certificate is mailed or delivered by the clerk or attorney for the Commonwealth to counsel of record for the accused at least seven days prior to the hearing or trial upon request made by such counsel to the clerk with notice of the request to the attorney for the Commonwealth.

The Supreme Court of Virginia has held that, because § 19.2-187 makes admissible evidence which otherwise might be subject to a valid hearsay objection, it is to be "construed strictly against the Commonwealth and in favor of the accused."¹ In addition, the Court of Appeals of Virginia has stated repeatedly that "[a] certificate of analysis is not admissible if the Commonwealth fails strictly to comply with the provisions of Code § 19.2-187,"² including the mail or delivery requirement in clause (ii) of the section.³ The Court of Appeals has reached different conclusions, however, in applying this standard to particular facts.

In the case of *Woodward v. Commonwealth*, the defendant's attorney wrote to the clerk two months before the trial, requesting a copy of the "forthcoming certificate of analysis."⁴ The certificate had not been filed at the time of the request but was filed twenty-six days later.⁵ Neither the clerk nor the Commonwealth's attorney mailed or delivered a copy of the certificate to the defendant's attorney.⁶ The court rejected the Commonwealth's argument that, because no certificate had been filed when the request was received, the Commonwealth need not comply with the mailing requirement.⁷ The court concluded: "[T]he statute contains no such limitation, and we have no authority to impose it."⁸ The ruling in *Woodward* indicates that the mailing and delivery requirement must be satisfied even when the request for the certificate is received

prematurely. Arguably, this analysis would apply to the facts you present in which the request is received before the case is docketed in the court.

In the case of *Cregger v. Commonwealth*,⁹ a divided panel of the Court of Appeals reached a different conclusion based on a different set of facts. The Commonwealth's attorney failed to comply with defendant attorney's request for a copy of a certificate made prior to the defendant's trial in the district court.¹⁰ The district court nevertheless admitted the certificate into evidence.¹¹ Although defendant's attorney did not renew his request on appeal of the case to the circuit court, the attorney objected in the circuit court to introduction of the certificate into evidence, arguing that the Commonwealth failed to comply with § 19.2-187.¹² The Court of Appeals reasoned that the appeal to the circuit court constituted a proceeding de novo, thus annulling the judgment of the district court as though there had been no prior trial and requiring the state and the accused to start over again.¹³ Since defendant's attorney submitted no request pursuant to the circuit court proceeding, the Commonwealth had no obligation to provide defendant's counsel a copy of the certificate. The Court of Appeals construed the language in § 19.2-187 as imposing obligations on a clerk or Commonwealth's attorney only in connection with a specific hearing or trial "pending in a particular tribunal," stating that "[t]he statute clearly does not contemplate a conjectural hearing or trial in an unknown forum."¹⁴ The argument can be made that, under the facts you present, a clerk would be under no obligation to retain and later comply with a request for a copy of a certificate if there is no case pending in the court at the time the request is received.

The facts in both *Woodward* and *Cregger* are distinguishable from the facts you present. In *Woodward*, it appears that the case was pending in the court at the time the request was received, although the certificate of analysis had not yet been filed. *Cregger* is distinguishable because the request was filed in the district court and no request was ever submitted to the circuit court clerk or the Commonwealth's attorney in connection with the circuit court proceeding.

It is my opinion that, although both cases are factually distinguishable from the facts you present, your circumstances may more readily be compared to those presented in *Woodward*. Accordingly, under the strict construction analysis applied to § 19.2-187 and the ruling in *Woodward* that the mailing obligation applies to prematurely filed requests, a court could determine that a certificate of analysis offered in evidence at a trial is inadmissible if the clerk merely notified the attorney when the request was filed that the case was not on the court's docket. Thus, it is my opinion that, in those cases in which counsel for the accused has made a case-specific request for a certificate of analysis and the case has not yet been docketed in the court, the preferable procedure would be for the clerk to respond to the request when and if the case is docketed in the court.¹⁵

¹Gray v. Commonwealth, 220 Va. 943, 945, 265 S.E.2d 705, 706 (1980) (certificate filed with clerk less than seven days before trial is not admissible, although defendant's counsel had copy of certificate one month before trial).

²Bottoms v. Commonwealth, 20 Va. App. 466, 469, 457 S.E.2d 796, 797 (1995) (quoting *Woodward v. Commonwealth*, 16 Va. App. 672, 674, 432 S.E.2d 510, 512 (1993)).

³See *Mullins v. Commonwealth*, 12 Va. App. 372, 374-75, 404 S.E.2d 237, 238-39 (1991).

⁴16 Va. App. at 674, 432 S.E.2d at 511.

⁵*Id.*

⁶*Id.*

⁷*Id.* at 675, 432 S.E.2d at 512.

⁸*Id.* The court held that admitting the certificate was harmless error in determining the defendant's guilt but that it could have affected his sentence. *Id.* at 675-76, 432 S.E.2d at 512-13. The court thus vacated the sentence and remanded the proceeding to the trial court for resentencing. *Id.* at 678, 432 S.E.2d at 514.

⁹25 Va. App. 87, 486 S.E.2d 554 (1997).

¹⁰*Id.* at 89, 486 S.E.2d at 554.

¹¹*Id.*

¹²*Id.* at 89, 486 S.E.2d at 555.

¹³*Id.* at 91, 486 S.E.2d at 556.

¹⁴*Id.* at 90, 486 S.E.2d at 555. Judge Elder dissented on the grounds that the majority opinion was inconsistent with a long line of cases requiring that § 19.2-187 be strictly construed against the Commonwealth. *Id.* at 91-92, 486 S.E.2d at 556. Judge Elder expressed his view that the statute does not require defense counsel ever to renew a request for a copy of a certificate of analysis. *Id.* at 94, 486 S.E.2d at 557.

¹⁵Section 19.2-187 provides that either the clerk or the Commonwealth's attorney is to mail or deliver the certificate to counsel for the accused. As amended in 1999, § 19.2-187 states that counsel for the accused is to present the request to the clerk with notice of the request to the Commonwealth's attorney. See 1999 Va. Acts ch. 296.