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Annual Survey of Virginia Law: Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

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I. INTRODUCTION

This article discusses holdings and trends in the published cases of the Virginia Court of Appeals and the Supreme Court of Virginia from August 1996 to July 1997. Although the form of this article generally follows the same form used by prior authors, several subject headings have been renamed to reflect the current focus of the courts. For example, during this period the court of appeals grappled with the “community caretaker” doctrine, bifurcated sentencing proceedings in felony cases, jury selection, and various hearsay exceptions. The supreme court addressed an indigent defendant’s right to expert assistance, administrative license suspensions, and speedy trial issues.

II. FOURTH AMENDMENT

A. *Community Caretaker*

The Virginia Court of Appeals continues to advance the “community caretaker” function of police officers to justify intrusions upon individual privacy.¹ In three cases, *Terry v. Common-*

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1. The Virginia Court of Appeals previously defined the community caretaker function as a duty which “extends beyond the detection and prevention of crime, to embrace also an obligation to maintain order and to render assistance.” *Barrett v. Commonwealth*, 18 Va. App. 773, 777, 447 S.E.2d 243, 245 (1994) (en banc), *rev’d on other grounds*, 250 Va. 243, 462 S.E.2d 109 (1995). The court of appeals recently noted, however, that *Barrett* was overruled because the evidence did not support a

wealth,² *Commonwealth v. Thornton*,³ and *Wood v. Commonwealth*,⁴ the court of appeals approved law enforcement actions as "a medical information search,"⁵ "exigent circumstances" surrounding a fire report,⁶ and "community caretaking."⁷

In *Terry*, an officer was dispatched on a medical emergency call. He found the defendant gasping for air, unable to speak, and blue in the face.⁸ After the medical team arrived, the officer searched the defendant's belongings for identification in order to "locate medical information and to determine the cause of Terry's condition."⁹ The officer found rolling papers, a cigarette pack, and an inhaler.¹⁰ Suspecting marijuana use to be the cause of the defendant's condition, the officer opened the cigarette pack and discovered marijuana. On appeal, the defendant conceded that the officer had authority to conduct a medical information search, but argued that the purpose of officer's search of the cigarette pack was to search for evidence of a crime and not for medical information.¹¹

The court of appeals could find no support for the defendant's position in the record.¹² Although the officer stated that he associated the rolling papers with marijuana, and he concluded that marijuana use may have caused the defendant's condition, the court of appeals found the officer "had no information and no reason to suspect any criminal activity" and concluded that his search of the cigarette pack was necessary to obtain medical information.¹³

"reasonable suspicion" that Barrett needed assistance, and that the Supreme Court of Virginia did not specifically rule on the adoption of the community caretaker doctrine. See *Wood v. Commonwealth*, 24 Va. App. 654, 659 n.2, 484 S.E.2d 627, 629 n.2 (1997).

2. 23 Va. App. 87, 474 S.E.2d 172 (1996).

3. 24 Va. App. 478, 483 S.E.2d 487 (1997).

4. 24 Va. App. 654, 484 S.E.2d 627 (1997).

5. See *Terry*, 23 Va. App. at 90, 474 S.E.2d at 173.

6. See *Thornton*, 24 Va. App. at 484, 483 S.E.2d at 490.

7. See *Wood*, 24 Va. App. at 659, 484 S.E.2d at 630.

8. See *Terry*, 23 Va. App. at 88, 474 S.E.2d at 172.

9. *Id.*

10. See *id.* at 88, 474 S.E.2d at 172-73. The presence of the inhaler, suggesting that the defendant was an asthmatic, and providing a reasonable, innocent explanation to the defendant's condition, was not considered by the officer and the court.

11. See *id.* at 91, 474 S.E.2d at 174.

12. See *id.*

13. See *id.*

Officers in *Thornton* were dispatched on an emergency fire call. Firefighters entered the apartment and did not find a fire; instead they found a pager that made the beeping noises neighbors believed to be a smoke alarm. The firefighters also discovered a large stack of cash and a marijuana cigarette. The firefighters looked for smoldering fires and asked the officers to secure the cash. The officers then observed the money and the marijuana. After the firefighters left, "having found no one in the apartment and no evidence of a fire,"¹⁴ an officer checked the rest of the apartment to "verify that no one was present and for 'officer's safety sake."¹⁵ In a bedroom, the officer saw in plain view a gun and a white powder which he suspected to be cocaine.¹⁶

The Virginia Court of Appeals found that the firefighters and the officers had a right to enter the apartment because of the "exigent circumstances" of the fire report.¹⁷ The court of appeals also found the search of the bedroom to be justified based on the authority of officers to "conduct a limited security check in those areas where individuals [who might destroy the evidence] could hide."¹⁸

In *Wood*, officers responded to the defendant's home to investigate his wife's complaint that he had beaten her.¹⁹ The defendant was promptly arrested, and two officers stayed with his sleeping children. After a social worker came for the children, the officers searched the rest of the house, including the second floor, where drugs and a gun were found in plain view. The officers testified that they went upstairs to "secure the residence, [and] make sure there was nobody else there,"²⁰ and that they were specifically looking for the defendant's teenage stepson who had been reported missing several days before.²¹ Although they had not heard any noise upstairs, the officer did

14. *Commonwealth v. Thornton*, 24 Va. App. 478, 482, 483 S.E.2d at 487, 488 (1997).

15. *Id.* at 482, 483 S.E.2d at 489.

16. *See id.*

17. *See id.* at 484-85, 483 S.E.2d at 490.

18. *Id.* at 486, 483 S.E.2d at 491 (alterations in original) (citations omitted).

19. *See Wood v. Commonwealth*, 24 Va. App. 654, 484 S.E.2d 627 (1997).

20. *Id.* at 657, 484 S.E.2d at 629.

21. *See id.* at 658, 484 S.E.2d at 629.

notice a "foul smell" and a light.²² Viewing the application of the community caretaker function as a mixed question of law and fact, the Virginia Court of Appeals found the search justified by the "community caretaker" function.²³ The court of appeals held that "[a]n officer may take appropriate action under the community caretaker doctrine where the officer maintains a reasonable and articulable suspicion, based on objective facts, that such action is necessary."²⁴ The court focused on the officers' "concern for the child they believed to be missing" and determined that the search was not a "pretext for the investigation of criminal conduct."²⁵

Given the court of appeals' steadfast adherence to the community caretaker doctrine and the authority of officers to intrude upon the privacy of individuals in assisting them, future litigants may focus on the "[o]bjective reasonableness [that is] the linchpin of determining the validity of [such] action."²⁶ In the reported cases, officers stated that they were acting to secure information,²⁷ secure the house,²⁸ search for children,²⁹ or protect officer safety,³⁰ and the trial court's inquiry ended there. Nevertheless, is it objectively reasonable to ignore an inhaler and focus upon rolling papers to assume that marijuana is the source of breathing difficulties? Is it objectively reasonable for officers to search an apartment for people after

22. See *id.* at 657, 484 S.E.2d at 628-29.

23. See *id.* at 662, 484 S.E.2d at 630.

24. *Id.* at 661-62, 484 S.E.2d at 631 (citations omitted).

25. *Id.* at 663, 484 S.E.2d at 631. In his dissenting opinion, Judge Benton maintained that the United States Supreme Court opinion in *Cady v. Dombrowski*, 413 U.S. 433 (1973), discussing the distinction between automobiles and residences in determining reasonableness of searches, prohibits the community caretaker function from justifying a warrantless intrusion into home. See *Wood*, 24 Va. App. at 664, 484 S.E.2d at 632 (Benton, J., dissenting). Even if the community caretaker function could be applied to the warrantless search of a home, Judge Benton argued the officers' explanation that they were simply looking for the missing child was doubtful since they were searching for the child in the place *from which he had been reported missing*. By searching for the teenager at the home of his parents who had reported him missing, "the officers obviously were conducting a criminal investigation." *Id.* at 667, 484 S.E.2d at 633 (Benton, J., dissenting).

26. *Id.* at 662, 484 S.E.2d at 631 (quoting *Commonwealth v. Waters*, 20 Va. App. 285, 290, 456 S.E.2d 527, 530 (1995)).

27. See *Terry v. Commonwealth*, 23 Va. App. 87, 474 S.E.2d 172 (1996).

28. See *Wood v. Commonwealth*, 24 Va. App. 654, 484 S.E.2d 627 (1997).

29. See *id.*

30. See *Commonwealth v. Thornton*, 24 Va. App. 478, 483 S.E.2d 487 (1997).

firefighters have just conducted a similar search? Is it objectively reasonable to look for a missing child in the home of the parents who reported him missing and not identify the search as a criminal investigation? The court of appeals, giving "deference to the inferences the police officer draws from historical facts with which he or she is faced,"³¹ answered in the affirmative in each case. Defense attorneys will need to vigorously address related issues at the trial level in order to launch a successful defense.

B. *Hot Pursuit and Exception to "Knock and Announce"*

The doctrine of "hot pursuit" and exceptions to the "knock and announce" rule were also used this year by the Virginia Court of Appeals to expand police powers. In *Commonwealth v. Talbert*,³² the court of appeals relied upon a host of inferences and assumptions to justify an officer's warrantless entry into a home.³³

In *Talbert*, the officers had observed a drug purchase on the street. Although they decided to proceed against the purchasers first, the officers were able to quickly locate the seller, the defendant, as he was being lifted in his wheelchair into a house.³⁴ When an officer reached the house to arrest the defendant, the exterior door was "open about a foot" and the inside door was completely open.³⁵ The officer identified himself in a loud voice, opened the exterior door, and went inside. The officer arrested the defendant when the officer saw him drop a rock of cocaine.³⁶ The trial court suppressed the evidence based on findings that the police were not in hot pursuit when they entered the residence and that no other exigent circumstances necessitated the officer's entry into the home.³⁷ In determining that there were no exigent circumstances, the trial court re-

31. *Wood*, 24 Va. App. at 662, 484 S.E.2d at 631.

32. 23 Va. App. 552, 478 S.E.2d 331 (1996).

33. The court of appeals also used inferences to justify a "no knock" entry into a home to execute a search warrant in *Spivey v. Commonwealth*, 23 Va. App. 715, 479 S.E.2d 543 (1997).

34. *See Talbert*, 23 Va. App. at 555, 478 S.E.2d at 333.

35. *See id.* at 556, 478 S.E.2d at 333.

36. *See id.*

37. *See id.* at 557, 478 S.E.2d at 333.

ferred to the ten factors listed by the Supreme Court of Virginia in *Verez v. Commonwealth*,³⁸ and found that the Commonwealth had not established *any* of the ten factors, except probable cause to believe a crime had occurred.³⁹

The Virginia Court of Appeals disagreed, holding that the defendant did not need to know he was being pursued for the "hot pursuit" doctrine to apply.⁴⁰ The court of appeals reasoned that the defendant "*might* have learned the police were on his trail . . . *might* have eluded apprehension and *might* have disposed of the [evidence]."⁴¹ The court of appeals also identified several "general exigent circumstances" which gave the officers good cause to believe the defendant and the people with him were armed: the evidence was easily disposable, the ownership of the house was unknown, the officers did not know how long the defendant would remain in the house, the officers had good reason to believe the arrest of the purchasers would become known, and a drug crime was involved.⁴² The court of appeals reversed the trial court's suppression of the evidence, apparently giving no deference to the trial court's findings of fact concerning the existence of exigent circumstances.⁴³

In *Spivey v. Commonwealth*,⁴⁴ the Virginia Court of Appeals addressed whether police officers are entitled to enter the defendant's house to execute a search warrant without knocking and announcing their presence. Generally, police officers must

38. 230 Va. 405, 337 S.E.2d 749 (1985). The ten enumerated factors are: 1) the urgency and the time required to get a warrant; 2) the reasonable belief that contraband is about to be removed or destroyed; 3) danger to others, including police left to guard the site; 4) information suggesting that the possessors of the contraband are aware that the police may be on their trail; 5) whether the offense is serious or violent; 6) whether officers reasonably believe that the suspects are armed; 7) whether there is a clear showing of probable cause at the time of entry; 8) strong reason to believe that the suspects are present; 9) likelihood of escape if not swiftly apprehended; and 10) the suspects' recent entry into the premises after hot pursuit. *See id.* at 410-11, 337 S.E.2d at 753 (citations omitted).

39. *See Talbert*, 23 Va. App. at 557, 478 S.E.2d at 333.

40. *See id.* at 558, 478 S.E.2d at 334.

41. *Id.* at 560, 478 S.E.2d at 335 (emphasis added).

42. *See id.* at 560-61, 478 S.E.2d at 335.

43. *See id.* at 558, 478 S.E.2d at 334. The trial court found that there was no reasonable belief that the contraband was about to be removed or destroyed, that there was no likelihood of escape if not swiftly apprehended, and that the officers did not reasonably believe that the suspect was armed. *See id.* at 557, 478 S.E.2d at 333.

44. 23 Va. App. 715, 479 S.E.2d 543 (1997).

attempt to gain admittance to premises by announcing their presence, identifying themselves as police officers and stating their purpose.⁴⁵ Officers are permitted to make an unannounced entry "where they have probable cause to believe that their peril would be increased if they announced their presence or that an unannounced entry is necessary to prevent persons within from escaping or destroying evidence."⁴⁶ In *Spivey*, the court of appeals found that the officers were entitled to enter the premises without knocking because of the danger to police officers.⁴⁷ The court of appeals discerned the requisite danger from the assertions of the informant used to obtain the search warrant.⁴⁸ The informant reported that the defendant might have a handgun, and that the defendant's supplier was her son who lived nearby, frequently stayed with her, and had recently been arrested for shooting into an unoccupied vehicle.⁴⁹ Since the son might have been in the house, the defendant and her son might have had guns, and they might have been drug dealers, the court of appeals determined that the officers were justified in making the no-knock entry.⁵⁰

C. Good Faith

The Virginia Court of Appeals relied upon the officers' good faith in *Shears v. Commonwealth*⁵¹ and *Barnette v. Commonwealth*.⁵² In *Shears*, the officers had an arrest warrant for "Clyde Boyce" and attempted to lure him into custody by having an informant arrange a drug purchase with him.⁵³ While the officers were waiting to arrest Boyce, the defendant, David

45. See *Heaton v. Commonwealth*, 215 Va. 137, 138, 207 S.E.2d 829, 830 (1974).

46. *Spivey*, 23 Va. App. at 722, 479 S.E.2d at 546 (quoting *Heaton*, 215 Va. at 138, 207 S.E.2d at 830).

47. See *id.* at 722, 479 S.E.2d at 547.

48. See *id.*

49. See *id.* at 723, 479 S.E.2d at 547.

50. See *id.* The court of appeals also held that the omission of items from the search warrant inventory did not require their suppression. See *id.* The preparation of the inventory was required by Virginia Code section 19.2-57 and thus, the omission did not implicate constitutional rights. See *id.*; VA. CODE ANN. § 19.2-57 (Repl. Vol. 1995 & Cum. Supp. 1997).

51. 23 Va. App. 394, 477 S.E.2d 309 (1996).

52. 23 Va. App. 581, 478 S.E.2d 707 (1996).

53. See *Shears*, 23 Va. App. at 396, 477 S.E.2d at 310.

Shears, arrived at the informant's mobile home and said "this better not be no set up."⁵⁴ The officers, who testified they believed the defendant was Boyce based on the attending circumstances and his physical description, arrested him on the outstanding warrant and discovered drugs during a search incident to the arrest.⁵⁵ Because the officers had probable cause to arrest Boyce, the court of appeals held that "the only issue is whether [Detective Payne's] mistaken belief that [Boyce] and [the defendant] were one and the same person was reasonable and in good faith."⁵⁶ The court of appeals found that under the circumstances of the arranged drug transaction and the statement of the defendant, who matched the "general description"⁵⁷ of Boyce, suggesting an impending drug transaction, the officers clearly acted in good faith, "albeit in error."⁵⁸

In *Barnette*, a probation officer issued an arrest warrant on August 17, 1994, because the defendant violated the conditions of his parole.⁵⁹ The probation officer, pursuant to office policy, wrote "VOID AFTER 60 DAYS" on the warrant.⁶⁰ The officer mistakenly believed that service was issued within the time period shown on the warrant when he arrested the defendant on October 17, 1994, the sixty-first day after the issuance of the warrant.⁶¹ The trial court overruled the defendant's motion to suppress drugs found in a search incident to arrest, holding that the officer acted in good faith.⁶² "An arrest made pursuant to a mistake of fact is valid if (1) the arresting officer believed, in good faith, that his or her conduct was lawful, and (2) the arresting officer's good faith belief in the validity of the

54. *Id.* at 397, 477 S.E.2d at 310.

55. *See id.*

56. *Id.* at 399, 477 S.E.2d at 311 (quoting *United States v. McEachern*, 675 F.2d 618, 621 (4th Cir. 1982)).

57. Although the opinion of the court of appeals does not state the information the officers had concerning Boyce's appearance, the term "general description" implies the information contained in an arrest warrant, such as race, sex, age, height, weight, age, eye and hair color.

58. *Shears*, 23 Va. App. at 400, 477 S.E.2d at 311.

59. *See Barnette v. Commonwealth*, 23 Va. App. 581, 584, 478 S.E.2d 707, 708 (1996).

60. *See id.*

61. *See id.*

62. *See id.*

arrest was objectively reasonable.⁶³ The Virginia Court of Appeals determined that sixty days is commonly regarded as two months and the probation officer did not intend the warrant to become ineffective after sixty days. Thus, the warrant was not so facially deficient as to render the officer's good faith unreasonable.⁶⁴

D. Investigatory Detentions

A court must consider the totality of the circumstances to determine whether an officer has articulated a reasonable basis to suspect criminal activity and justify an investigative detention under *Terry v. Ohio*.⁶⁵ Cases involving the application of this standard are based predominantly on a factual analysis and are frequently decided by the Virginia Court of Appeals in unpublished decisions because of the lack of "precedential value."⁶⁶ The court of appeals did issue published opinions in five cases—two cases dealing with the reasonable suspicion of criminal activity to justify a detention, two cases involving reasonable suspicion to believe the suspect is armed and dangerous to justify a frisk for weapons, and one case where the court avoided the analysis by imputing knowledge from an officer who had probable cause to arrest.

*Commonwealth v. Thomas*⁶⁷ is instructive in its treatment of prior decisions of the Virginia Court of Appeals in *Limonja v. Commonwealth*⁶⁸ and *Deer v. Commonwealth*.⁶⁹ All three cases involved a lawful stop for a traffic infraction and the use of drug dogs.⁷⁰ In each case, the detention surrounding the traffic

63. *Id.*

64. *See id.* at 585-86, 478 S.E.2d at 707 (1996). In his concurring opinion, Judge Elder found it unnecessary to reach the issue of the officer's good faith because the probation officer's notation had no legal effect and thus, the warrant was valid. *See id.* at 586, 478 S.E.2d at 707 (Elder, J., concurring). In another concurring opinion, Judge Coleman agreed that the probation officer's language did not have legal effect; however, he also found that the officer did act in good faith. *See id.* at 587, 478 S.E.2d at 709 (Coleman, J. concurring).

65. 392 U.S. 1 (1968); *see Freeman v. Commonwealth*, 20 Va. App. 658, 460 S.E.2d 261 (1995).

66. *See* VA. CODE ANN. § 17-116.010 (Repl. Vol. 1996).

67. 23 Va. App. 598, 478 S.E.2d 715 (1996).

68. 8 Va. App. 532, 383 S.E.2d 476 (1989).

69. 17 Va. App. 730, 441 S.E.2d 33 (1994).

70. *Thomas* also involved an issue of first impression: whether the Virginia Court

infraction had terminated, or the consensual extension of the traffic stop had been withdrawn. In *Thomas*, the defendant was given a citation for having his bumper too low to the ground in violation of Virginia Code section 46.2-1063.⁷¹ The officer noticed an "odor of alcohol" and administered field sobriety tests, which the defendant performed adequately. The officer instructed the defendant to sit on the curb while the drug dog "sniffed" the car. Approximately one and a half minutes after the issuance of the summons, the drug dog signaled a hit on the car.⁷² The Virginia Court of Appeals found that the officer's detection of the odor of alcohol on the defendant, the defendant's nervous behavior (including locking the car door, pacing, and becoming agitated and excited), and the fact that the stop occurred at 11:00 p.m. in an isolated area, gave the officer reasonable articulable suspicion⁷³ to detain the defendant for the one and one-half minutes after completion of the traffic summons that it took for the drug dog to signal a hit.⁷⁴ Since the officer had a reasonable articulable suspicion, the court of appeals concluded that the defendant's case was controlled by *Limonja* and not by *Deer*.⁷⁵ Additionally, the court of appeals found that the defendant's reliance upon *Deer* was misplaced because *Deer* was required to wait for the arrival of the

of Appeals may review a prosecutor's certification, pursuant to Virginia Code section 19.2-398(2), that the evidence excluded is essential to the prosecution. See *Thomas*, 23 Va. App. at 605, 478 S.E.2d at 718; see also VA. CODE ANN. § 19.2-398(2) (Repl. Vol. 1995).

71. See *Thomas*, 23 Va. App. at 603, 478 S.E.2d at 717.

72. See *id.*

73. Exactly what criminal activity the officer suspected is unclear. *Thomas* passed field sobriety tests and was not traveling a known drug route or in a known drug area. The officer's observations do not seem to suggest any particular criminal activity.

74. See *Thomas*, 23 Va. App. at 613, 478 S.E.2d at 722.

75. See *id.* at 617, 478 S.E.2d at 721-22. In *Limonja*, the court held that the officers had reasonable suspicion based on the defendant's traveling a known drug route in a rental car, possession of a radar detector, lying about the reason for running a toll, nervousness, and confused and inconsistent answers regarding a package. See *Limonja*, 8 Va. App. at 542, 383 S.E.2d at 482.

On the other hand, the court in *Deer* held that the defendant's nervousness and hesitant, conflicting answer when asked to give his middle name and birth date were not sufficient to justify detention because it constituted an "inchoate and unparticularized suspicion or 'hunch.'" See *Deer*, 17 Va. App. at 736, 441 S.E.2d at 37 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

drug dog, while the drug dog in *Thomas* was already present when the officer finished writing the defendant's ticket.⁷⁶

The Virginia Court of Appeals' opinion in *Jones v. Commonwealth*⁷⁷ firmly endorses an officer's subjective determination of threatening circumstances. In *Jones*, the defendant was driving when a passenger in his car gestured as though he were shooting a gun at two officers in an unmarked car.⁷⁸ The defendant's car then took a position immediately behind and to the right of the unmarked car, a position the defendant maintained for twenty-five minutes even though the unmarked car varied its speed from seventy to fifty miles per hour and stopped at a stoplight.⁷⁹ Weeks earlier, the two officers in the unmarked car had received information that a "contract" had been placed on them and money paid for this purpose.⁸⁰ One of the officers testified that the defendant "looked very familiar to one of the ones that [they] arrested [in the incident that gave rise to the contract.]"⁸¹ The officers stopped the defendant's car and discovered drugs during a consensual search.⁸²

In asserting the error of the trial court in denying his motion to suppress the evidence as the result of an unlawful seizure, Jones relied on *Bethea v. Commonwealth*⁸³ for the proposition that gestures and erratic driving are not, by themselves, sufficient to provide a reasonable articulable suspicion of criminal activity.⁸⁴ The court of appeals held that the reliance was misplaced because *Bethea* did not involve the lawfulness of the stop of the vehicle.⁸⁵ Instead, *Bethea* involved the reasonableness of the officer's ordering a passenger from a car.⁸⁶ Considering the

76. See *Thomas*, 23 Va. App. at 612, 478 S.E.2d at 715. The practical interpretation of these cases might cause officers to radio ahead for the drug dog and to delay the completion of the summons until the dog arrives. Protracting the writing of the summons may have the added effect of angering the driver, possibly causing him to "pace" and to become "excited" and "agitated."

77. 24 Va. App. 519, 484 S.E.2d 125 (1997).

78. See *id.* at 520, 484 S.E.2d at 125.

79. See *id.*

80. See *id.*

81. *Id.* at 521, 484 S.E.2d at 126.

82. See *id.*

83. 245 Va. 416, 429 S.E.2d 211 (1993).

84. See *Jones*, 24 Va. App. at 521, 484 S.E.2d at 126.

85. See *id.* at 521-22, 484 S.E.2d at 126.

86. See *id.* The vehicle in *Bethea* was lawfully stopped for a traffic infraction. The

totality of the circumstances, including Jones' erratic driving, the gestures of the passengers in the car, and the recently reported threats, the court of appeals held that a particularized and reasonable suspicion of criminal activity existed justifying the investigative detention of the vehicle.⁸⁷ The court of appeals found that the unprovoked harassment and intimidation directed by Jones and his passengers at the officers created a traffic hazard and a potentially dangerous situation.⁸⁸

In another case in which the Virginia Court of Appeals focused on the potential danger of a police-citizen encounter, the court upheld a pat-down for weapons of a person suspected of burglary, based solely on the nature of the offense. In *Nelson v. Commonwealth*,⁸⁹ the court of appeals held that

[b]urglary is a felony that clearly has the potential for or is accompanied by violence. . . . The offender is subject to a substantial penitentiary term. . . . [Therefore,] [w]here burglary is the crime for which the suspect is lawfully detained, it is not unreasonable for the investigating officer to conduct a pat-down search.⁹⁰

Burglary now has been added to drug crimes in the list of offenses that give officers virtually a per se right to conduct a frisk for weapons.⁹¹

The Virginia Court of Appeals has continued to oppose using the characteristics of a particular location to justify intrusions on Fourth Amendment rights where the officers have no other

officer ordered the passenger, Bethea, out of the car based in part on his prior gestures to a police officer. The Supreme Court of Virginia found that the totality of the circumstances, including the safety of the officer, justified the intrusion on the defendant's Fourth Amendment rights that occurred when the officer asked him to step out of the car. See *Bethea*, 245 Va. at 420, 429 S.E.2d at 213.

87. See *Jones*, 24 Va. App. at 523, 484 S.E.2d at 126.

88. See *id.* at 523, 484 S.E.2d at 126-27.

89. 24 Va. App. 823, 485 S.E.2d 673 (1997).

90. *Id.* at 827, 485 S.E.2d at 674-75 (citations omitted).

91. See, e.g., *Williams v. Commonwealth*, 4 Va. App. 53, 67, 354 S.E.2d 79, 87 (1987) (holding that suspicion of narcotics distribution is a circumstance which, standing alone, justifies a pat-down for weapons). The Supreme Court of Virginia previously upheld a pat-down for weapons of a burglary suspect where an officer testified that, in his experience, one-fourth to one-half of all burglary suspects are armed. See *Simmons v. Commonwealth*, 217 Va. 552, 554, 231 S.E.2d 218, 220 (1977).

reasons to justify their actions. In *Toliver v. Commonwealth*,⁹² two uniformed officers approached both sides of the defendant's vehicle while the defendant was parked legally in the Creighton Court area of Richmond, Virginia.⁹³ One of the officers said, "let me see some hands," and then asked questions about the ownership and registration of the vehicle.⁹⁴ The defendant gave several different answers before stating that his girlfriend owned the vehicle. The defendant admitted that he did not have a license and gave his proper name. In response to the officer's questioning, the defendant denied having any drugs or guns in the car, and consented to a search of the vehicle. After Toliver exited the car, one of the officers conducted a pat-down and discovered a weapon on the defendant.⁹⁵ The Virginia Court of Appeals held that the officer had no objectively reasonable basis for suspecting that the defendant was armed and dangerous.⁹⁶ The court of appeals pointed to the defendant's cooperation and the officer's lack of information concerning criminal activity.⁹⁷

E. *Freedom of Movement*

In two cases decided by the Virginia Court of Appeals, the question of when the defendant was seized figured predomi-

92. 23 Va. App. 34, 473 S.E.2d 722 (1996).

93. *See id.* at 35, 473 S.E.2d at 723.

94. *See id.* at 36, 473 S.E.2d at 723-24. While the majority of the court found that this constituted a consensual encounter, Judge Benton did not agree. *See id.* at 37, 473 S.E.2d at 724 (Benton, J., concurring).

The Virginia Court of Appeals also found that an encounter was consensual in another case where an officer instructed the defendant to "come over" to him and the defendant stopped walking, turned to the officers, and let out a stream of profanity. *See Ford v. City of Newport News*, 23 Va. App. 137, 141, 474 S.E.2d 848, 850 (1996). Even though the defendant was only suspected of pushing a stolen bicycle, the court of appeals emphasized the fact that the officers did not draw their guns or shine a light on the defendant. *See id.* at 142, 474 S.E.2d at 850.

The better reasoning of *Ford* was that the officers lacked probable cause to arrest the defendant for disorderly conduct where the defendant was loud and boisterous, throwing his arms in the air, but not using threatening words or gestures. *See id.* at 144-45, 474 S.E.2d at 851-52. The court of appeals found that the defendant was "loud, profane, and uncivil," but that his conduct did not have the direct tendency to incite violence required by the city code. *Id.* at 145, 474 S.E.2d at 852.

95. *See Toliver*, 23 Va. App. at 36, 473 S.E.2d at 724.

96. *See id.*

97. *See id.* at 37, 473 S.E.2d at 724.

nantly in the decision. In *Thomas v. Commonwealth*,⁹⁸ the court of appeals held that the defendant was not "seized" when he stopped before reaching a roadblock and, therefore, the constitutionality of the roadblock was not an issue.⁹⁹ The court of appeals found that although the defendant was required by law enforcement officers to stop in a line of traffic leading to a roadblock on an exit ramp, the limiting of his "freedom of movement" was not accomplished by intentional means.¹⁰⁰ Since the defendant was neither stopped "at the roadblock" nor physically restrained "at the roadblock," and he did not submit to the show of police authority,¹⁰¹ he was not seized within the meaning of the Fourth Amendment.¹⁰² The majority rejected the contention of both the defendant and the dissent that the roadblock created a "zone" that the defendant entered when he was stopped by the line of traffic leading to the roadblock.¹⁰³

In *White v. Commonwealth*,¹⁰⁴ the seminal case of *California v. Hodari D.*¹⁰⁵ was not mentioned, but perhaps should have been. In *Hodari D.*, the United States Supreme Court held that an arrest requires one of two factors: either physical force or submission to authority.¹⁰⁶ In *White*, the officer suspected the defendant of driving with a suspended operator's license and followed him to the driveway of his home. The officer activated his lights and the defendant "quickly exited his vehicle and began walking rapidly away from his car."¹⁰⁷ The officer ordered the defendant back to his car and the defendant complied.¹⁰⁸ The officer arrested the defendant for driving with a suspended operator's license, searched the passenger compartment of the car, and discovered drugs in a paper bag between

98. 24 Va. App. 49, 480 S.E.2d 135 (1997) (en banc).

99. See *id.* at 54-55, 480 S.E.2d at 137-38.

100. See *id.* at 54, 480 S.E.2d at 137-38.

101. *Id.* Thomas stopped on the shoulder of the ramp thirty yards from the end of the ramp where officers had set up the roadblock. See *id.*

102. See *id.*

103. See *id.* at 55, 480 S.E.2d at 138.

104. 24 Va. App. 446, 482 S.E.2d 876 (1997).

105. 499 U.S. 621 (1991).

106. See *id.* at 626.

107. *White*, 24 Va. App at 449, 482 S.E.2d at 877.

108. See *id.*

the front seats.¹⁰⁹ The Virginia Court of Appeals held that the search of the passenger compartment was justified under *New York v. Belton*¹¹⁰ because the defendant was a "recent occupant" of the vehicle and the search was incident to a lawful arrest.¹¹¹ The fact that White was not "arrested" until he was some distance from the car, and the distinction that the defendant in *Belton* was removed from the car only upon arrest, apparently did not sway the court of appeals.¹¹²

F. Miscellaneous

In *Alvarez v. Commonwealth*,¹¹³ the Virginia Court of Appeals applied the automobile exception to a bus to justify the seizure of a package of marijuana indicated as "hot" by a drug dog.¹¹⁴

In *Perez v. Commonwealth*,¹¹⁵ the Virginia Court of Appeals held that the passage of eleven days between the sighting of a vicious dog and procurement of a search warrant did not render the information too stale to establish probable cause for the search warrant.¹¹⁶

In *Jones v. Commonwealth*,¹¹⁷ the Virginia Court of Appeals found that the authority to search a jacket falling within the

109. See *id.*

110. 453 U.S. 454 (1981) (holding that a search of the defendant's jacket incident to a lawful custodial arrest did not violate the Fourth Amendment).

111. See *White*, 24 Va. App. at 451, 482 S.E.2d at 878.

112. Other courts have found *Belton* inapplicable where the defendant was arrested away from the car. See *United States v. Strahan*, 984 F.2d 155, 159 (6th Cir. 1993) (holding *Belton* inapplicable where suspect suddenly parked car, jumped out, walked quickly to motel, and was arrested thirty feet from car); *State v. Foster*, 905 P.2d 1032, 1037-38 (Idaho Ct. App. 1995) (refusing to read *Belton* to allow search when arrest occurs outside vehicle); *People v. Fernengel*, 549 N.W.2d 361, 362 (Mich. Ct. App. 1996), *appeal denied*, 552 N.W.2d 170 (Mich. 1996), *cert. denied*, 117 S. Ct. 112 (1997) (declining to apply *Belton* where defendant voluntarily left vehicle and was stopped 20-25 feet away from it). Generally, the threat to officer safety that justified the search of the passenger compartment as the "grabbable area" in *Chimel v. California*, 395 U.S. 752 (1969), is not present if the defendant is no longer in the car.

113. 24 Va. App. 768, 485 S.E.2d 646 (1997).

114. See *id.* at 775, 485 S.E.2d 649-50.

115. 25 Va. App. 137, 486 S.E.2d 578 (1997).

116. See *id.* at 142-43, 486 S.E.2d at 581.

117. 23 Va. App. 93, 474 S.E.2d 825 (1996).

ambit of a search warrant was not dissipated when a visitor took the jacket a few feet from the apartment.¹¹⁸

In *Bynum v. Commonwealth*,¹¹⁹ a small pocket where a key was found was held to be within the scope of an express or implied consensual search where the officer asked the defendant if he was involved in "narcotics trafficking," and then asked for permission to search.¹²⁰

In *Price v. Commonwealth*,¹²¹ the court of appeals permitted a warrant check on a passenger, who offered to drive away from a roadblock, because the warrant check was part of the driving record check and the standard procedure of the roadblock.¹²²

In *Polston v. Commonwealth*,¹²³ the Virginia Court of Appeals found that a search warrant affidavit sufficiently established an informant's veracity and basis of knowledge, where the magistrate supplemented the information by questioning the informant under oath.¹²⁴

III. OTHER AMENDMENTS

A. *Due Process and Equal Protection*

In *Husske v. Commonwealth*,¹²⁵ the Supreme Court of Virginia held that a non-capital indigent defendant is entitled to non-psychiatric expert assistance upon a particularized showing of need for the assistance.¹²⁶ The supreme court also held that in showing a particularized need, the defendant must show that he would be prejudiced by the lack of expert assistance.¹²⁷ Un-

118. *See id.* at 98-99, 474 S.E.2d at 827-28.

119. 23 Va. App. 412, 477 S.E.2d 750 (1996).

120. *See id.* at 419, 477 S.E.2d at 754.

121. 24 Va. App. 496, 483 S.E.2d 496 (1997).

122. *See id.* at 499-501, 483 S.E.2d at 497-98.

123. 24 Va. App. 738, 485 S.E.2d 632 (1997).

124. *See id.* at 747-49, 485 S.E.2d at 636-37. Judge Benton dissented, arguing that while the factors cited by the majority were persuasive in the abstract, the entire context of the case undermined the warrant. *See id.* at 750-56, 485 S.E.2d at 738-41 (Benton, J., dissenting).

125. 252 Va. 203, 476 S.E.2d 920 (1996), *cert. denied*, 117 S. Ct. 1092 (1997).

126. *See id.* at 213, 476 S.E.2d at 926.

127. *See id.*

fortunately for Husske, the supreme court ignored his proffered materials in assessing his particularized showing of need, but did not ignore his subsequent confessions in assessing whether he was prejudiced by the lack of expert assistance.¹²⁸

In *Barnabei v. Commonwealth*,¹²⁹ decided on the same day as *Husske*, the Supreme Court of Virginia applied the same standard of "particularized showing" and put the defendant in a virtual "Catch-22." The defendant had asked for a forensic pathologist to assist in his defense and to rebut the testimony of the medical examiner that the bruises and other injuries to the victim occurred as the result of "violent penetration."¹³⁰ The supreme court held that the defendant failed to make the requisite showing because he only showed that he "suspected" an expert might testify that the injuries did not necessarily result from force.¹³¹ Unfortunately, the defendant needed an expert to examine the evidence in order to reach the desired conclusion. Without an expert, the defendant was unable to make the showing necessary to obtain an expert.

The Virginia Court of Appeals applied the supreme court's standard in *Husske* to the case of *Hoverter v. Commonwealth*,¹³² where the defendant asked for mental health expert assistance at sentencing. The court of appeals found that the defendant failed to establish the requisite showing of need because he alleged no existing mental illness, demonstrated no way that the services of the mental health expert might constitute a significant factor in his defense, showed no prejudice from the denial, and did not explain why a detailed presentence investigation report was insufficient to provide background and circumstances of the crime.¹³³

128. *See id.* The defendant had challenged his confession as a product of compulsion in violation of his Fifth Amendment rights because it was made during the course of court-ordered therapy that was part of a suspended sentence. The supreme court found that the statements were voluntary and the obligation to cooperate with his therapists did not render the situation one in which he had to choose between incriminating himself and jeopardizing his conditional liberty by remaining silent. *See id.* at 217, 476 S.E.2d at 928-29.

129. 252 Va. 161, 477 S.E.2d 270 (1996).

130. *See id.* at 170, 477 S.E.2d at 275.

131. *See id.* at 171, 477 S.E.2d at 276.

132. 23 Va. App. 454, 477 S.E.2d 771 (1996).

133. *See id.* at 466-67, 477 S.E.2d at 776. The case provides counsel a list of items to prove if mental health expert assistance is requested in future cases. *See id.*

In *Walton v. Commonwealth*,¹³⁴ the defendant argued that the suspension of his driver's license for conviction of possession of marijuana violated his substantive due process rights.¹³⁵ The Virginia Court of Appeals disagreed, finding that although the right to operate a motor vehicle is a property interest, it is not a constitutional right and, therefore, the suspension statute need only be supported by a rational basis.¹³⁶ The Commonwealth's identified purposes of deterring the use of illegal drugs and the operation of motor vehicles by persons under the influence of drugs were found to be proper purposes reasonably related to the statute.¹³⁷ Even though the conviction did not relate to the use of the motor vehicle, the legislature could reasonably conclude that persons who possessed illegal substances would drive under the influence and would transport the drugs in their cars.¹³⁸

B. *Double Jeopardy*

In *Weaver v. Commonwealth*,¹³⁹ the defendant was indicted by the Commonwealth for the charge of malicious wounding.¹⁴⁰ Federal authorities indicted the defendant for conspiracy to murder and attempted murder of a witness, and the state charge was given a *nolle prosequere*.¹⁴¹ After his acquittal on the federal charges, the defendant was indicted by the Commonwealth for attempted murder.¹⁴² During jury deliberations, a reporter contacted the prosecutor, who agreed to participate in a call-in program in which the case was discussed.¹⁴³ A juror reported seeing the program and admitted that his ability to re-

134. 24 Va. App. 757, 485 S.E.2d 641 (1997).

135. *See id.* at 758, 485 S.E.2d at 642. The defendant also asserted that the suspension violated the Eighth Amendment proscription against cruel and unusual punishment. Because he failed to raise this ground in the trial court, the court of appeals barred consideration of that issue under Virginia Supreme Court Rule 5A:18. *See id.*

136. *See id.* at 760, 485 S.E.2d at 642.

137. *See id.* at 760, 485 S.E.2d at 643.

138. *See id.* at 761, 485 S.E.2d at 643.

139. 25 Va. App. 95, 486 S.E.2d 558 (1997).

140. *See id.* at 97, 486 S.E.2d at 559.

141. *See id.* at 97-98, 486 S.E.2d at 559.

142. *See id.* at 98, 486 S.E.2d at 559.

143. *See id.*

main impartial had been affected.¹⁴⁴ The trial court granted the defendant's motion for a mistrial.¹⁴⁵ The defendant asserted that the subsequent retrial resulting in conviction was barred by Virginia Code section 19.2-294 and the Double Jeopardy Clause of the Fifth Amendment because of the prosecutor's misconduct necessitating the mistrial.

The Virginia Court of Appeals held that Virginia Code section 19.2-294¹⁴⁶ applied only to subsequent prosecutions for statutory offenses, and since attempted murder was a common law offense, the statute afforded the defendant no protection.¹⁴⁷ The court of appeals also held that the defendant's retrial was not barred by the Double Jeopardy Clause.¹⁴⁸ While characterizing the prosecutor's conduct as "regrettable," the court of appeals found that the trial court's finding of fact, that the prosecutor did not intend to cause a mistrial, was supported by evidence that the prosecutor did not initiate contact with the reporter.¹⁴⁹

In miscellaneous cases asserting a violation of the Double Jeopardy Clause of the Fifth Amendment, the Virginia Court of Appeals permitted the prosecution of a defendant for driving on a suspended license after administrative impoundment of his car for the same conduct,¹⁵⁰ allowed a protective order and a

144. *See id.*

145. *See id.*

146. The relevant language in Virginia Code section 19.2-294 provides: "[i]f the same act be a violation of both a state and a federal statute a prosecution under the federal statute shall be a bar to a prosecution under the state statute." VA. CODE ANN. § 19.2-294 (Repl. Vol. 1995).

147. *See Weaver*, 25 Va. App. at 101, 486 S.E.2d at 560 (suggesting also why the Commonwealth chose to indict for attempted murder, a Class 4 felony, rather than the original statutory charge of malicious wounding, a Class 3 felony).

148. *See id.* at 103-04, 486 S.E.2d at 562.

149. *See id.*

150. *See Wilson v. Commonwealth*, 23 Va. App. 443, 477 S.E.2d 765 (1996). After a lengthy discussion, the Virginia Court of Appeals concluded that *United States v. Ursery*, 116 S. Ct. 2153 (1996), was controlling because the proceeding was against property and was not intended to compensate the Commonwealth for harm. *See Wilson*, 23 Va. App. at 454, 477 S.E.2d at 770.

Applying the two-part test of *Ursery*, the court of appeals determined that the legislature intended the sanction to be civil (summary administrative in rem proceeding following impoundment by officer, not judge) and that the sanction was non-punitive and remedial. *See id.* The remedial ends were that the thirty days without a vehicle might get the defendant "to change his antisocial lifestyle" and would keep him from engaging in activity he was barred from undertaking. *Id.*

criminal prosecution to be based on the same conduct,¹⁵¹ determined that jeopardy in a bench trial does not attach when opening statements are made or when the defense offers to stipulate prior convictions,¹⁵² and prevented a second criminal contempt proceeding after the judge dismissed "all pending show causes."¹⁵³

The Supreme Court of Virginia dealt with the seven-day license suspension following a refusal to submit to a breath or blood test in both *Brame v. Commonwealth*¹⁵⁴ and *Simmons v. Commonwealth*.¹⁵⁵ In *Brame*, the supreme court held that a seven-day administrative license suspension, combined with a license suspension for one year for refusing to take a blood or breath test, did not violate the constitutional protection against double jeopardy.¹⁵⁶ The supreme court found both suspension provisions to have overriding remedial purposes.¹⁵⁷ Furthermore, the supreme court held that because the administrative suspension is a civil proceeding, it could not bar a proceeding under Virginia Code section 18.2-268.3 for refusing to take a blood or breath test.¹⁵⁸ In *Simmons*, the supreme court held that a one-year license suspension was not barred under the doctrines of res judicata and collateral estoppel by the seven-day administrative license suspension.¹⁵⁹ The supreme court ruled that the administrative suspension was not a judgment rendered by a court of competent jurisdiction, a condition prece-

151. See *Goodwin v. Commonwealth*, 23 Va. App. 475, 477 S.E.2d 781 (1996). The Virginia Court of Appeals found the protective order to be remedial, not punitive, because it protects against future abuse, rehabilitates the defendant by prohibiting him from placing himself in a situation that could lead to abuse, and effects a reconciliation of the parties by preventing future conflict. See *id.* at 483, 477 S.E.2d at 784.

152. See *Cummings v. Commonwealth*, 24 Va. App. 248, 481 S.E.2d 493 (1997).

153. *Courtney v. Commonwealth*, 23 Va. App. 561, 478 S.E.2d 336 (1996). The Virginia Court of Appeals found the dismissal of the pending show causes to be an acquittal on the charge of criminal contempt and barred a second proceeding based on a new show cause order for the same conduct. See *id.* at 570, 478 S.E.2d at 339-40.

154. 252 Va. 122, 476 S.E.2d 177 (1996).

155. 252 Va. 118, 475 S.E.2d 806 (1996).

156. See *Brame*, 252 Va. at 132, 476 S.E.2d at 183.

157. See *id.* at 130-32, 476 S.E.2d at 182.

158. See *id.* at 132, 476 S.E.2d at 183.

159. See *Simmons*, 252 Va. at 121, 475 S.E.2d at 808.

dent to the allowance of any plea in bar asserting either doctrine.¹⁶⁰

C. *Joint Trials and Statements of Co-Defendants*

The Virginia Court of Appeals narrowed the Sixth Amendment right of confrontation within the context of joint trials and the admission of co-defendants' statements in several cases this year, using the scope of hearsay exceptions to define parameters of the constitutional protection and finding reliability in every context.

In *Raia v. Commonwealth*,¹⁶¹ the defendant was tried alone. His co-conspirator was called by the Commonwealth to testify. When she asserted her Fifth Amendment rights, the Commonwealth introduced her confession, implicating both her and the defendant, into evidence as a declaration against interest made by an unavailable witness.¹⁶² The Virginia Court of Appeals distinguished the case from *Lee v. Illinois*¹⁶³ and *Bruton v. United States*,¹⁶⁴ which held that the admission of a co-defendant's confession into evidence violated the Confrontation Clause of the Sixth Amendment, because *Lee* and *Bruton* involved joint trials.¹⁶⁵ The court of appeals found that the co-conspirator's statement satisfied all of the requirements of the "declaration against interest of an unavailable informant" exception to the hearsay rule.¹⁶⁶ Furthermore, the court of appeals

160. See *id.* at 120, 475 S.E.2d at 807. Similarly, the Virginia Court of Appeals held in *Jones v. City of Lynchburg*, 23 Va. App. 167, 474 S.E.2d 863 (1996), that a general district court's finding that there was a lack of probable cause to arrest in an appeal of a seven-day license suspension, did not bar the defendant's subsequent prosecution for drunk driving. Because the issues of ultimate fact and the modes of proof are different in the two proceedings, collateral estoppel did not bar the subsequent criminal prosecution. See *id.* at 172, 474 S.E.2d at 865-66.

161. 23 Va. App. 546, 478 S.E.2d 328 (1996).

162. See *id.* at 550, 478 S.E.2d at 330.

163. 476 U.S. 530 (1986).

164. 391 U.S. 123 (1968).

165. See *Raia*, 23 Va. App. at 550, 478 S.E.2d at 330.

166. A third party's statement is admissible as an exception to the hearsay rule if: (1) the declarant is unavailable, (2) the statement was against the declarant's interest at the time it was made, and (3) the declarant was aware at the time the statement was made that it was against his interests to make it.

Id. (citations omitted). If the co-conspirator is repeatedly told by investigators that

ruled that the statement was "reliable" because it implicated the co-conspirator more than the defendant,¹⁶⁷ the co-conspirator voluntarily confessed, the statements of the defendant and the co-conspirator were consistent in significant respects, the statement was consistent with the physical evidence, and the investigator's description of the co-conspirator's demeanor while giving the statement supported a finding that the statement was reliable.¹⁶⁸ The court of appeals found that the admission of the statement under a "firmly rooted" hearsay exception satisfied the requirements of the Confrontation Clause because an "adversarial testing" would add little to its reliability.¹⁶⁹

In *Randolph v. Commonwealth*,¹⁷⁰ the Virginia Court of Appeals eliminated the distinction of the joint trial, embracing the same rules as applied in *Raia*. Randolph was tried jointly with two co-defendants for grand larceny, credit card theft, and conspiracy to commit a felony.¹⁷¹ One co-defendant told police that they came to the airport "to steal [and] . . . to pick pockets."¹⁷² The court of appeals again dismissed the *Bruton* objection, holding that *Bruton* did not apply where the statement was admissible against the defendant under an exception to the

cooperating and making a statement is in their best interests, whether the declarant knew the statement was against his interest should not be an "inescapable" conclusion.

167. Apparently, the court of appeals based this conclusion on the fact that the co-conspirator said that the plan to shoot the victim "was more her idea than [the defendant's]." *Id.* at 549, 478 S.E.2d at 329. She also said, however, that the defendant was the one who brought the gun and shot the victim. *See id.* at 549, 478 S.E.2d at 330.

168. *See id.* at 551, 478 S.E.2d at 330. The court of appeals did not describe the co-conspirator's demeanor.

169. *See id.* at 551-52, 478 S.E.2d at 331.

170. 24 Va. App. 345, 482 S.E.2d 101 (1997).

171. The defendant asserted that the trial court's denial of his motion to sever was error, but the court of appeals held that, because the statements objected to were admissible against the defendant both in a joint trial and in separate trials, no actual prejudice resulted. *See id.* at 364, 482 S.E.2d at 110.

To be entitled to severance, a moving party must show actual prejudice would result from a joint trial. Actual prejudice is the "serious risk that a joint trial would compromise a specific trial right of [defendant], or prevent the jury from making a reliable judgment about guilt or innocence." *Adkins v. Commonwealth*, 24 Va. App. 159, 163, 480 S.E.2d 777, 780 (1997) (citations omitted). In *Adkins*, the defendant complained that the evidence was so contradictory that the defendants were forced to take the stand to contradict each other. The Virginia Court of Appeals found that this was a "trial tactic" and that a "trial right" was not implicated. *See id.*

172. *Randolph*, 24 Va. App. at 349, 482 S.E.2d at 103.

hearsay rule.¹⁷³ The court of appeals found the statement to be admissible as a declaration against interest of an unavailable declarant,¹⁷⁴ sidestepping any violation of the Confrontation Clause.¹⁷⁵

D. *Right to Counsel*

In *Commonwealth v. Thornton*,¹⁷⁶ the defendant's apartment was searched by the police in his absence. Prior to being charged, the defendant consulted an attorney, who called the police and stated that he wanted to be present for any interviews with the defendant.¹⁷⁷ A week later, however, the defendant contacted the police, said that he wanted to proceed without his attorney, and agreed to come to the police station.¹⁷⁸ The Virginia Court of Appeals held that because the defendant was not in custody at the time, the purported assertion of the defendant's right to counsel by his attorney was ineffectual.¹⁷⁹

The Sixth Amendment right to counsel was also at issue in *Saleem v. Commonwealth*.¹⁸⁰ While Atif Saleem was in jail prior to trial, Detective Anthony Spencer visited another inmate, Watkins, and told him to "keep his ears open."¹⁸¹ Spencer mentioned several specific cases including a robbery

173. See *id.* at 359, 482 S.E.2d at 107.

174. The court of appeals found that the Commonwealth did not have to establish the unavailability of the declarant in a joint trial. See *id.* at 356, 482 S.E.2d at 106.

Where the declarant is not a co-defendant, however, the burden is on the Commonwealth to establish unavailability. In *McDonnough v. Commonwealth*, 25 Va. App. 120, 486 S.E.2d 570 (1997), the Virginia Court of Appeals held that the Commonwealth must attempt to subpoena the declarant or provide reasonable explanation why the subpoena was not issued. Testimony from officers concerning their attempts to locate the declarant was held insufficient to show due diligence in locating declarant. See *id.* at 130-31, 486 S.E.2d at 575.

The court of appeals found the erroneous admission of the statement, which was the only direct evidence of guilt, to be harmless error because the circumstantial evidence was "overwhelming." See *id.* at 132, 486 S.E.2d at 575.

175. See *Randolph*, 24 Va. App. at 357, 482 S.E.2d at 107.

176. 24 Va. App. 478, 483 S.E.2d 487 (1997).

177. See *id.* at 483, 483 S.E.2d at 489.

178. See *id.*

179. See *id.* at 488, 483 S.E.2d at 492. Perhaps the attorney would have been wise to alert his client that he wanted to be present at all interviews instead of notifying only the police.

180. 23 Va. App. 726, 479 S.E.2d 549 (1997).

181. *Id.* at 731, 479 S.E.2d at 551.

involving "Atif."¹⁸² Watkins agreed, and he testified that although Spencer did not promise him anything, he "hoped" his cooperation would get some of his court costs paid.¹⁸³ A few days later, Watkins was transferred to the building he had requested before Spencer's visit and was assigned to the defendant's cellblock.¹⁸⁴ When the defendant spontaneously began speaking about the case, Watkins questioned him to get more details, which Watkins reported to Spencer.¹⁸⁵ The Virginia Court of Appeals held that the defendant's Sixth Amendment rights were not violated because Watkins was not an agent of the government, and received no inducement or instruction from Spencer as to how to gain information about the offense.¹⁸⁶

E. *Miscellaneous*

The Virginia Court of Appeals used the First Amendment's protection of the freedom of religion to strike down a provision of the Wildlife Code criminalizing the possession of wild bird feathers and parts,¹⁸⁷ and held that producing false DNA and fingerprint reports during an interrogation did not render the defendant's confession involuntary and inadmissible under the Fifth Amendment.¹⁸⁸ Additionally, the Virginia Court of Appeals rejected a trial court's reliance on a scheduling order showing that a defendant waived her right to trial where the defendant requested a jury at arraignment and said she had

182. *See id.*

183. *See id.*

184. *See id.*

185. *See id.*

186. *See id.* at 733, 479 S.E.2d at 552. The fact that the detective had given the informant a "target list" was not considered "instruction" by the court of appeals.

187. *See Horen v. Commonwealth*, 23 Va. App. 735, 479 S.E.2d 553 (1997). The court of appeals found that Virginia Code section 29.1-521(A)(10) was not religiously neutral, burdened the free exercise of religion, and was neither supported by a compelling interest nor employed the least restrictive means to support a state interest. *Id.* at 743-44, 479 S.E.2d at 557; *see also* VA. CODE ANN. § 29.1-521(A)(10) (Repl. Vol. 1997).

188. *See Arthur v. Commonwealth*, 24 Va. App. 102, 480 S.E.2d 749 (1997). The court of appeals noted that the officers did not emphasize the false reports, the defendant did not confess immediately upon seeing the reports, and the defendant confessed several times. *See id.* at 107-08, 480 S.E.2d at 752.

not authorized her counsel to waive her right to a jury.¹⁸⁹ In a case decided en banc, the Virginia Court of Appeals expanded the courts' power to try a defendant in his absence by finding that the Commonwealth is not required to offer any specific reasons why it would be prejudiced by a delay.¹⁹⁰

IV. TRIALS

A. *Speedy Trial*

Two decisions from the Supreme Court of Virginia dealt with the statutory right of the defendant to a speedy trial. In *Johnson v. Commonwealth*,¹⁹¹ the supreme court interpreted the language of the statute concerning the pendency of appeals.¹⁹² Johnson had been arrested and convicted in 1992.¹⁹³ On appeal, the Virginia Court of Appeals reversed his conviction and remanded the case for new trial in December 1993.¹⁹⁴ In March 1994, Johnson filed a motion to dismiss alleging that he

189. See *Jones v. Commonwealth*, 24 Va. App. 636, 484 S.E.2d 618 (1997).

190. See *Cruz v. Commonwealth*, 24 Va. App. 454, 482 S.E.2d 880 (1997) (en banc). In *Cruz*, the court of appeals held that the unexplained absence of the defendant at trial constitutes a voluntary waiver of the Sixth Amendment right to appear if (1) the defendant had notice of the court date, and (2) he was warned that his failure to appear could result in trial in his absence. See *id.* at 463, 482 S.E.2d at 884. The court of appeals found that the "Appearance at Trial" form signed by the defendant was sufficient to establish both elements. See *id.*

The court of appeals declined to address whether signing a bond recognizance form would be sufficient to show a voluntary and intelligent waiver of the right to be present. *Id.* at 463-64 n.8, 482 S.E.2d at 885 n.8.

The court of appeals further held that although the trial court may proceed in the defendant's absence only if there has been a voluntary waiver of his appearance and the Commonwealth would be prejudiced by a continuance, prejudice can be shown by something other than the unavailability of witnesses. See *id.* at 464, 482 S.E.2d at 885. The court of appeals found sufficient prejudice to the Commonwealth where the Commonwealth offered no specific reasons it would be prejudiced, but instead relied on the general disruption to the proper administration of justice. See *id.* at 467, 482 S.E.2d at 886. The court of appeals also found the trial court's finding of prejudice supported by the fact that there were no assurances that the defendant would be present if the trial was rescheduled. See *id.* at 466, 482 S.E.2d at 886.

191. 252 Va. 425, 478 S.E.2d 539 (1996).

192. The relevant language of Virginia Code section 19.2-243 provides: "But the time during the pendency of any appeal in any appellate court shall not be included as applying to the provisions of this section." VA. CODE ANN. § 19.2-243 (Repl. Vol. 1995).

193. See *Johnson*, 252 Va. at 427, 478 S.E.2d at 540.

194. See *id.*

had been continuously in custody since January 1992, and that the Commonwealth had failed to try him within five months, minus the time during the pendency of his appeal.¹⁹⁵ The supreme court held that the speedy trial statute does not apply to persons held for retrial after a successful appeal because the statute requires only that trial "commence" within the statutory period.¹⁹⁶

In *Robbs v. Commonwealth*,¹⁹⁷ decided the same day as *Johnson*, the Supreme Court of Virginia held that the defendant's release prior to trial extended the time within which the Commonwealth was required to try him from five to nine months.¹⁹⁸ The defendant argued that the Commonwealth failed to meet even the nine month time limitation.¹⁹⁹ The Commonwealth contended that the twenty days that the trial court took to decide the defendant's pretrial motion to suppress should not be chargeable against the Commonwealth and, therefore, the Commonwealth fulfilled the obligation of the statute.²⁰⁰ The supreme court found from the record that twenty days after the defendant's motion was filed, the trial court heard oral argument and immediately ruled.²⁰¹ The supreme court held that because the trial date had not yet been fixed, the filing of the motion did not cause the case to be continued or otherwise delayed and, thus, the Commonwealth did

195. *See id.*

196. *See id.* at 429, 478 S.E.2d at 541. According to the supreme court, Johnson's trial began in 1992 and just had not reached "final judgment" yet. *See id.* In the second issue decided by the supreme court, Johnson argued that panels of the court of appeals are not bound by the rule of stare decisis in following the decisions of other panels of the court. Johnson relied upon the statutory language of Virginia Code sections 17-116.02(C) and 17-116.02(D)(ii) concerning the independence of panels of the court of appeals and the role of the en banc court. The supreme court affirmed its interpretation of the law in *Commonwealth v. Burns*, 240 Va. 171, 395 S.E.2d 456 (1990), holding that the rule of stare decisis applies to decisions of panels of the court of appeals. *See Johnson*, 252 Va. at 430, 478 S.E.2d at 541.

197. 252 Va. 433, 478 S.E.2d 699 (1996).

198. *See id.* at 436, 478 S.E.2d at 700. The Commonwealth apparently realized that the defendant's trial date was beyond the five-month limitation and moved to have him released on a personal recognizance bond before the five-month period ended. *See id.*

199. *See id.*

200. *See id.*

201. *See id.*

not carry its burden of showing that the defendant's motion caused the delay.²⁰²

The Virginia Court of Appeals addressed the right of a defendant to a speedy trial under Virginia Code section 19.2-243 in two cases with seemingly conflicting controlling principles. One case involved the duty of the defendant to notify the Commonwealth that he was ready for trial, while the other case involved the obligation of the trial court to control its docket and schedule criminal cases.

In *Jefferson v. Commonwealth*,²⁰³ the defendant appealed a pre-trial ruling of the trial court concerning double jeopardy. The trial court granted the defendant's motion for a continuance, supported by the Commonwealth, and entered a continuance order which stated "this case is continued from July 9, 1992 generally because defendant is appealing the court's ruling on his double jeopardy motion."²⁰⁴ The Supreme Court of Virginia ruled on interlocutory appeal that such appeals of double jeopardy claims were prohibited, and dismissed the appeal on May 9, 1995.²⁰⁵ On October 27, 1995, the defendant filed a motion to dismiss, alleging that his right to a speedy trial had been violated.²⁰⁶

The Virginia Court of Appeals acknowledged that the wording of the order suggested "that defense counsel and the prosecutor may have had an understanding as to the length of the continuance," but held that the additional words "continued . . . generally" meant the continuance was for an indefinite period of time.²⁰⁷ The court of appeals further stated that when the defendant is granted an indefinite continuance, "the speedy trial period will not recommence until the defendant announces. . . that he [is] ready for trial."²⁰⁸ The court of appeals reasoned that the Commonwealth should not be held responsible for keeping up with the case as it progressed through the appellate courts.²⁰⁹ Writing in dissent, Judge Benton noted that the tri-

202. *See id.*

203. 23 Va. App. 652, 479 S.E.2d 80 (1996).

204. *Id.* at 655, 479 S.E.2d at 81.

205. *See id.*

206. *See id.* at 656, 479 S.E.2d at 81.

207. *Id.* at 656-57, 479 S.E.2d at 82.

208. *Id.* at 657, 479 S.E.2d at 82.

209. *See id.* The court of appeals stated that the record did not "indicate that the

al court had received the mandate of the Supreme Court of Virginia dismissing the appeal on June 1, 1995, ending the appeal.²¹⁰ After the mandate was returned, the defendant's appeal of the double jeopardy ruling was not the cause for delay; therefore, the time after June 1, 1995, was charged to the Commonwealth.²¹¹

In *Baker v. Commonwealth*,²¹² the Commonwealth requested a continuance and the defendant objected. After the trial court granted the continuance, defendant's counsel suggested a date for trial, which he knew was beyond the statutory five month speedy trial period.²¹³ The Virginia Court of Appeals held that the suggestion of a trial date beyond the five month period was not a waiver of speedy trial rights and did not constitute a concurrence in the Commonwealth's request for a continuance.²¹⁴ The court of appeals reaffirmed that "[i]t is the responsibility of the trial court . . . to control the court's docket and schedule criminal cases for trial"²¹⁵ and that the trial court should "indulge every reasonable presumption against waiver."²¹⁶ If the court of appeals had employed similar guiding principles in *Jefferson*, the result might have been different in that matter.

Commonwealth was informed that the defendant had ended his appeal in the state courts nor that the defendant was forgoing [sic] any appeal in the federal court system." *Id.* at 659, 479 S.E.2d at 83. The court of appeals also considered this factor in deciding that the defendant's Sixth Amendment right to speedy trial had not been violated. *See id.*

As noted by the dissent, the court of appeals received the mandate from the Supreme Court of Virginia on June 1, 1995, which returned the case to the trial court's jurisdiction. The court of appeals and either the Commonwealth's Attorney or the Attorney General (whomever was counsel of record for the Commonwealth of Virginia in the appeal) was notified by the mandate that the defendant had ended his appeal in state courts. Also, had the defendant elected to pursue a petition for a writ of certiorari in the United States Supreme Court, counsel for the Commonwealth would have received notice of such an action.

210. *See id.* at 660, 479 S.E.2d at 84 (Benton, J., dissenting).

211. *See id.* at 660-61, 479 S.E.2d at 84 (Benton, J., dissenting).

212. 25 Va. App. 19, 486 S.E.2d 111 (1997).

213. *See id.* at 21, 486 S.E.2d at 112.

214. *See id.* at 24-25, 486 S.E.2d at 114.

215. *Id.* at 24, 486 S.E.2d at 113 (citing *Baity v. Commonwealth*, 16 Va. App. 497, 431 S.E.2d 891 (1993)); *see also Williams v. Commonwealth*, 2 Va. App. 566, 347 S.E.2d 146 (1986).

216. *Id.* at 25, 486 S.E.2d at 114.

B. Continuances

The failure to grant a continuance was held to be error in two cases decided by the Virginia Court of Appeals this year. In *Mills v. Commonwealth*,²¹⁷ the court of appeals found an abuse of discretion where a defense attorney was unprepared for trial, had not conducted an adequate investigation, and generally had not responded to or communicated with his client.²¹⁸ In *Crawford v. Commonwealth*,²¹⁹ the trial court denied a request for a continuance after the Commonwealth amended the indictments following its case-in-chief to allege new offenses with a different time frame.²²⁰ The Virginia Court of Appeals held that the language of Virginia Code section 19.2-231 is mandatory and the trial court must grant a continuance if the amendments were a surprise to the defendant.²²¹ Since the defendant adequately demonstrated surprise to the trial court by showing that a new defense would have included a different alibi and other exculpatory evidence for the new year alleged, and no contrary evidence supported the trial

217. 24 Va. App. 95, 480 S.E.2d 746 (1997).

218. *See id.* at 97, 480 S.E.2d at 747. The record reflected particularly egregious conduct by the attorney in this case. The attorney failed to contact or subpoena several material witnesses and the defendant could not get the attorney to return his telephone calls. The defendant even took the step of writing to the trial court asking for assistance in getting the subpoenas issued. *See id.*

219. 23 Va. App. 661, 479 S.E.2d 84 (1996) (en banc).

220. *See id.* at 664-65, 479 S.E.2d at 86. The Commonwealth indicted the defendant for having sex with a child under thirteen years of age, in violation of Virginia Code section 18.2-61, and sodomy with a child under thirteen years of age, in violation of Virginia Code section 18.2-67.1. On the stand, the victim could not remember if the events happened when she was thirteen or fourteen. At the conclusion of the Commonwealth's case-in-chief, the defendant moved to strike the evidence for failure to establish the crimes charged. Over the defendant's objections, the trial court allowed the Commonwealth to amend the charges to carnal knowledge of a child between thirteen and fourteen years old, a violation of Virginia Code section 18.2-63, and crimes against nature, a violation of Virginia Code section 18.2-361. *See id.*

The court of appeals noted that the Commonwealth was allowed to amend the indictment under Virginia Code section 19.2-231, which allows indictments to be amended at any time before a jury returns a verdict, provided the amendment does not change the nature or character of the offense charged. *See id.*

221. *See id.* at 666-67, 479 S.E.2d at 86-87. Virginia Code section 19.2-231 provides in part: "[B]ut if the court finds that such amendment operates as a surprise to the accused, he shall be entitled, upon request, to a continuance of the case for a reasonable time." VA. CODE ANN. § 19.2-231 (Repl. Vol. 1995).

court's finding of lack of surprise, the court of appeals reversed the convictions and remanded the case for a new trial.²²²

C. Jury Issues

1. *Batson v. Kentucky*²²³

In the only case considering a *Batson* challenge, the Virginia Court of Appeals held that the trial court's ruling that disallowed a peremptory strike of a white juror after the defendant offered a race-neutral explanation was clearly erroneous.²²⁴ Although the trial court's error was of statutory, not constitutional, dimension, the majority of the court of appeals found the error harmful because the defendant was denied a fair trial by a "lawful and properly constituted jury."²²⁵

2. Voir Dire

In *Skipper v. Commonwealth*,²²⁶ the Virginia Court of Appeals considered whether the trial court's limitation on voir dire

222. See *Crawford*, 23 Va. App. at 667, 479 S.E.2d at 87.

223. 476 U.S. 79 (1986).

224. See *Cudjoe v. Commonwealth*, 23 Va. App. 193, 475 S.E.2d 821 (1996).

225. *Id.* at 205, 475 S.E.2d at 827. Writing in dissent, Judge Annunziata found the error harmless because the juror could not have been removed for cause; therefore, the defendant was tried by an impartial jury. Judge Annunziata also opined that the error was harmless because the evidence was sufficient to convict the defendant. See *id.* at 207-08, 475 S.E.2d at 827-28 (Annunziata, J., concurring in part and dissenting in part).

In *Taylor v. Commonwealth*, 25 Va. App. 12, 486 S.E.2d 108 (1997), the Virginia Court of Appeals assessed the potential error in refusing to grant a mistrial using the harmless error principles of the dissent in *Cudjoe*. In *Taylor*, a juror delayed response to a voir dire question until after opening argument, prompting the defendant to request a mistrial. The jurors had been asked "Have any of you ever been the victim or have any members of your immediate family ever been the victim of a violent crime?" *Id.* at 15, 486 S.E.2d at 109. After opening arguments, a juror stated that her husband had been robbed at gunpoint earlier that year. The juror said she had simply forgotten to mention it and did not think it would affect her verdict. See *id.* The defendant conceded the juror could not be struck for cause, but said he would have removed her from the panel with a peremptory strike. See *id.* at 16, 486 S.E.2d at 110. The court of appeals held that because the juror could not be struck for cause, the defendant was tried by an impartial jury, and the trial court did not abuse its discretion in refusing to grant a mistrial. See *id.* at 18, 486 S.E.2d at 111.

226. 23 Va. App. 420, 477 S.E.2d 754 (1996).

was an improper restriction on the defendant's right to utilize his peremptory strikes in a race-neutral and gender-neutral manner in violation of *J.E.B. v. Alabama*.²²⁷ The court of appeals found that *J.E.B.* had not mandated expanded voir dire, and reaffirmed the trial court's discretion to limit voir dire.²²⁸ "A trial court's decision regarding the scope of voir dire . . . will be upheld on appeal [w]here [the trial court] affords ample opportunity to counsel to ask relevant questions and where the questions [it] actually propound[s] . . . [are] sufficient to preserve a defendant's right to trial by a fair and impartial jury."²²⁹ The trial court refused to allow two questions proposed by the defendant,²³⁰ and the court of appeals adopted the reasoning of the trial court finding one question too ambiguous and the other insufficient to uncover bias or prejudice of the jurors.²³¹ The court of appeals concluded that because the defendant received a fair trial by an impartial jury, the trial court did not err in limiting the scope of voir dire.²³²

In a case from Virginia Beach, the Virginia Court of Appeals unanimously agreed that the trial court's refusal to permit counsel to participate in voir dire, as provided in Virginia Code section 8.01-358, was error, but the panel could not agree as to the proper resolution regarding the error.²³³ After being informed by the Commonwealth's Attorney that the local practice was for the trial court to conduct voir dire, defense counsel asked to conduct his own voir dire, as provided in Virginia Code section 8.01-358.²³⁴ The trial court refused, stating "[t]hat's what I've always done, and that's what I'm going to do."²³⁵ The majority opinion, while deeply critical of the trial

227. 511 U.S. 127 (1994).

228. See *Skipper*, 23 Va. App. at 426, 477 S.E.2d at 757.

229. *Id.* at 427, 477 S.E.2d at 758 (quoting *Buchanan v. Commonwealth*, 238 Va. 389, 401, 384 S.E.2d 757, 764 (1989)).

230. The defendant proposed the following questions:

(1) Can anyone imagine why a not-guilty person would not testify?

(2) Who has children? For those with children, have you ever caught them in a lie to excuse what they were not permitted to do?

Id. at 424, 477 S.E.2d at 756.

231. See *id.* at 429, 477 S.E.2d at 758-59.

232. See *id.* at 429-30, 477 S.E.2d at 759.

233. See *Charity v. Commonwealth*, 24 Va. App. 258, 482 S.E.2d 59 (1997).

234. See *id.* at 270, 482 S.E.2d at 65 App. I.

235. *Id.* at 271, 482 S.E.2d at 65 App. I.

court for refusing to follow the statutory mandate, found the non-constitutional error to be harmless because the defendant had received a fair trial by an impartial jury.²³⁶ Judge Elder, writing in dissent, found the case to defy harmless error analysis because the record "could never demonstrate juror bias or prejudice affect[ed] the trial's outcome."²³⁷ Judge Elder also cautioned that affirmance would "send a signal that the judges of an entire judicial circuit may ignore the mandate of a statute with impunity and without concern for reversal upon appellate review."²³⁸

3. Miscellaneous

In cases of first impression, the Virginia Court of Appeals permitted jurors to ask questions of witnesses,²³⁹ and held that consent to an eleven-member jury panel after one member has been excused mid-trial is a waiver of a right to a jury trial and must be the product of voluntary, knowing and intelligently given consent.²⁴⁰ The court of appeals also held that Virginia Code section 19.2-262(4), concerning the procedure for making peremptory strikes when defendants elect to be tried jointly, does not apply to defendants involuntarily joined; therefore, involuntarily joined defendants are not entitled to additional pe-

236. *See id.* at 266, 482 S.E.2d at 63. The majority noted that defense counsel had been given the opportunity to supplement the voir dire with written questions, but declined to do so. *See id.*

237. *Id.* at 269, 482 S.E.2d at 64 (Elder, J., dissenting). "At the heart of an attorney's right to voir dire . . . [is the] desire to engage in one-on-one interaction. . . . These unquantifiable and indeterminate variables will rarely, if ever, be revealed in the record." *Id.* at 269-70, 482 S.E.2d at 64 (Elder, J., dissenting).

238. *Id.* at 268, 482 S.E.2d at 64 (Elder, J., dissenting).

239. *See Williams v. Commonwealth*, 24 Va. App. 577, 484 S.E.2d 153 (1997). The court of appeals cautioned trial courts to adopt procedures that assure control over the process and avoid the pitfalls that have the potential for prejudice. *See id.* at 582, 484 S.E.2d at 155-56. Although the court of appeals did not delineate the proper procedures, in reviewing cases from other jurisdictions the court of appeals included several procedures designed to avoid prejudice, such as having the question submitted in writing and allowing counsel to review the question and object outside of the presence of the jury. *See id.*

240. *See Moffett v. Commonwealth*, 24 Va. App. 387, 482 S.E.2d 846 (1997). The court of appeals also required both the trial court and the Commonwealth's Attorney to agree to the waiver and have the waiver obtained and entered of record. *See id.* at 392-93, 482 S.E.2d at 849.

remptory challenges.²⁴¹ The court of appeals also reversed a defendant's conviction because the trial court stated, in a juror's presence, that the defendant was challenging him for cause.²⁴²

D. *Evidentiary Issues*

1. Expert Testimony

In *Zelenak v. Commonwealth*,²⁴³ the en banc Virginia Court of Appeals vacated the judgment of the panel and affirmed the judgment of the trial court excluding expert testimony in support of the defense that the defendant participated in the crimes out of fear that her co-defendant would kill her or a member of her family.²⁴⁴ The defendant sought to introduce testimony of a licensed clinical social worker that the defendant suffered from multiple personality disorder, a dissociative disorder that resulted from traumatic stress, which made her "susceptible to duress."²⁴⁵ Defense counsel was allowed to proffer the excluded testimony and stated that the expert would testify that the defendant "was in such a fear of Mr. Morehead . . . [that] she was afraid that if she didn't go along with what he was saying that she was going to be harmed."²⁴⁶ Defense counsel further proffered that the expert would testify that it was her opinion that the defendant "got to the point

241. See *Adkins v. Commonwealth*, 24 Va. App. 159, 480 S.E.2d 777 (1997).

242. See *Brooks v. Commonwealth*, 24 Va. App. 523, 484 S.E.2d 127 (1997). The court of appeals held that the exchange in front of the jury, which also included the prosecutor's assertion that he found the juror fair and impartial, tainted the impartiality of the juror. See *id.* at 530-31, 484 S.E.2d at 130-32. Although the juror was struck by the Commonwealth during peremptories, the error was not harmless because the defendant was entitled to a jury panel free from exception. See *id.*

The second issue addressed by the court of appeals was the trial court's procedure of deferring argument on juror issues until *after* the jury was sworn and seated. The trial court immediately ruled on the defendant's motion to strike, but refused to hear argument on the issue until after the jury was sworn. The court of appeals condemned this procedure for giving "the appearance to the defendant and the public that the court is unwilling to timely hear or consider the grounds for a party's motion" and for necessitating a mistrial if the court is persuaded by argument. *Id.* at 531-32, 484 S.E.2d at 131-32. Because the court reversed on other grounds, the prejudice from the procedure was not addressed. See *id.*

243. 25 Va. App. 295, 487 S.E.2d 873 (1997).

244. See *id.* at 305-06, 487 S.E.2d at 878.

245. *Id.* at 298, 487 S.E.2d at 874.

246. *Id.*

where she believed that escape from him or disobedience would result in her death or the death of a family member.²⁴⁷

The court of appeals held that the proffered testimony expressed an opinion on an ultimate issue—whether the defendant acted under duress—and was properly excluded.²⁴⁸ Judge Benton and Judge Elder, dissenting, found that the testimony did not express an opinion as to the ultimate issue—whether the defendant acted under duress *on the day in question*²⁴⁹—and that the trial court erred in not admitting the relevant and probative portions of the expert's testimony.²⁵⁰ The majority took issue with the dissent's suggestion that the trial court had a duty to "cull the 'relevant and probative portions' of the proffer and admit only that testimony."²⁵¹

2. Rape Complaints

In two cases the Virginia Court of Appeals dealt with the issue of admissibility of rape complaints, changing the "recent complaint" rule, codified in Virginia Code section 19.2-268.2,²⁵² to the "not so recent description of events" rule. In *Terry v. Commonwealth*,²⁵³ the court of appeals held that a report made ten months after the incident was "recent" within the meaning of the statute because the complaint need only have been made "without delay *which is unexplained or is inconsistent with the occurrence of the offense*."²⁵⁴ Because the complainant offered explanations for the delay which the trial court found consistent with the nature and circumstances surround-

247. *Id.* at 300, 487 S.E.2d at 875.

248. *See id.*

249. *See id.* at 304, 487 S.E.2d at 877 (Benton, J., dissenting).

250. *See id.* at 305, 487 S.E.2d at 878 (Benton, J., dissenting).

251. *Id.* at 300 n.1, 487 S.E.2d at 876 n.1. The court of appeals did not clarify why the trial court's duty to distinguish relevant and admissible evidence should be obviated.

252. VA. CODE ANN. § 19.2-268.2 (Repl. Vol. 1995) (the "fact that the person injured made complaint of the offense recently after commission of the offense" is admissible as an exception to the hearsay rule).

253. 24 Va. App. 627, 484 S.E.2d 614 (1997).

254. *Id.* at 634, 484 S.E.2d at 617 (quoting *Woodard v. Commonwealth*, 19 Va. App. 24, 27, 448 S.E.2d 328, 330 (1994) (emphasis in original)).

ing the offense,²⁵⁵ the court of appeals held that the rape complaint was admissible to corroborate the victim's testimony.²⁵⁶

In *Mitchell v. Commonwealth*,²⁵⁷ the extent of the testimony concerning the complaint was at issue, not the timeliness of the complaint. The defendant was charged with proposing an act of sodomy to a minor.²⁵⁸ In the Commonwealth's case-in-chief, the complainant testified that the defendant said "Let me suck you," and his mother and brother testified that the complainant reported to them that he had been sexually solicited.²⁵⁹ The defendant testified that he had been misquoted, and had said instead: "All you do is come around trying to suck up to me for more money."²⁶⁰ On rebuttal, the Commonwealth recalled the complainant's brother.²⁶¹ Over the defendant's objection, the trial court ruled the brother's testimony was admissible as a "report of the victim's prior consistent statement."²⁶² The brother testified as to what the complainant told him happened between himself and the defendant, including surrounding circumstances.²⁶³

The Virginia Court of Appeals held that the testimony was not admissible as a prior consistent statement because none of the circumstances justifying admission of a prior consistent statement were present.²⁶⁴ The court of appeals held, however,

255. The complainant testified she did not tell her mother because she was "afraid her mother would not believe her because the defendant was her mother's good friend. She did not tell her father for fear her father would hurt the defendant and end up in jail. She testified she felt responsible for the rape because she insisted on staying home [that night]." *Id.* at 636, 484 S.E.2d at 618.

256. *See id.*

257. 25 Va. App. 81, 486 S.E.2d 551 (1997).

258. *See id.* at 83, 486 S.E.2d at 552.

259. *Id.*

260. *Id.*

261. *See id.*

262. *Id.*

263. *See id.* at 84, 486 S.E.2d at 552.

264. *See id.* The court of appeals noted that prior consistent statements are admissible when the opposing party:

- (1) suggests that the declarant had a motive to falsify his testimony and the consistent statement was made prior to the existence of that motive,
- (2) alleges that the declarant, due to his relationship to the matter or to an involved party, had a design to misrepresent his testimony and the prior consistent statement was made before the existence of that relationship,
- (3) alleges that the declarant's testimony is a fabrication of recent date and the prior consistent statement was made at a time when its

that the testimony was admissible as a report of a recent complaint of sexual assault under Virginia Code section 19.2-268.2.²⁶⁵ Recognizing that only the fact of complaint and not the details of the complaint were admissible under the "recent complaint" exception, the court of appeals found that the testimony of the brother was not outside the scope of the exception.²⁶⁶ The court of appeals found that

[i]t is consistent with human experience that [a child] will lodge his complaint in the form of a description of the event, and in that description lies his complaint of the offense The details of the victim's complaint were elements of the offense. Without those details, the complaint would have been incomplete.²⁶⁷

3. Other Hearsay Exceptions

The Virginia Court of Appeals recently decided three cases concerning other exceptions to the hearsay rule, rendering several exceptions very broad and barring the availability of another exception. In *Sparks v. Commonwealth*,²⁶⁸ the court of appeals gutted the "custodian" prong of the business records exception, allowing a vice president of corporate security at a bank to authenticate bank records even though the vice president was neither the custodian of the records nor the supervisor to the custodian of the records.²⁶⁹ In *Anderson v. Common-*

ultimate effect could not have been be foreseen, or (4) impeaches the declarant with a prior inconsistent statement.

Id. at 84-85, 486 S.E.2d at 552-53 (citation omitted).

The defense at trial was simply that the defendant's statement had been misrepresented. The defendant did not allege that the complainant had a motive to lie or a design to misrepresent his testimony, nor did he accuse the witness of recent fabrication. *See id.*

265. *See id.* at 85, 486 S.E.2d at 553.

266. *See id.* at 86, 486 S.E.2d at 553.

267. *Id.* at 86, 486 S.E.2d at 553. Apparently, the fact that the brother *had previously testified* in the Commonwealth's case-in-chief as to the fact of the complaint, and was able at that time to distinguish the complaint from the details of the offense did not concern the court. Nor did the fact that much of the brother's testimony concerning the circumstances surrounding the incident were not probative of elements of the offense.

268. 24 Va. App. 279, 482 S.E.2d 69 (1997).

269. *See id.* at 281-84, 482 S.E.2d at 70-71.

wealth,²⁷⁰ the court of appeals held that a certificate of analysis concerning a breath test is admissible under Virginia Code section 18.2-268.9 as an exception to the rule against hearsay even if the person attesting to the certificate has no personal knowledge of facts contained therein.²⁷¹ In *Wright v. Commonwealth*,²⁷² the en banc court of appeals held that the curative admissibility doctrine is unavailable if the party did not object to the inadmissible evidence to gain admission of other inadmissible evidence.²⁷³

4. Miscellaneous

The Virginia Court of Appeals recently held that the filing requirements of Virginia Code section 19.2-187 do not apply to the admission of a certificate of analysis under Virginia Code section 19.2-187.01 for proving chain of custody of evidence within a laboratory.²⁷⁴ Similarly, in *Cregger v. Commonwealth*,²⁷⁵ the Virginia Court of Appeals held that section 19.2-187 does not require the Commonwealth to deliver a copy of the certificate of analysis in a de novo proceeding in circuit court even though the defendant requested the certificate while the case was pending in general district court.²⁷⁶ The court of appeals held that the de novo proceeding starts the case anew, and that the defense attorney must make the request incidental to the de novo proceedings in circuit court.²⁷⁷

270. 25 Va. App. 26, 486 S.E.2d 115 (1997).

271. *See id.* at 31, 486 S.E.2d at 117. The officer who conducted the test and attested the certificate had no knowledge concerning the date the machine was last tested for accuracy and did not know whether the machine had been found to be accurate. *See id.* at 28-29, 34, 35, 486 S.E.2d at 116, 118-19; *see also* VA. CODE ANN. § 18.2-268.9 (Repl. Vol. 1996).

272. 23 Va. App. 1, 473 S.E.2d 707 (1996) (en banc).

273. *See id.* at 9, 473 S.E.2d at 711.

274. *See Alvarez v. Commonwealth*, 24 Va. App. 768, 776-78, 485 S.E.2d 646, 650-51 (1997).

275. 25 Va. App. 87, 486 S.E.2d 554 (1997).

276. *See id.* at 91, 486 S.E.2d at 556.

277. *See id.* The dissent pointed out that this logic would also necessitate the Commonwealth making a second delivery of the certificate if the defendant requests the certificate in general district as well as in circuit court. *See id.* at 93, 486 S.E.2d at 557 (Elder, J., dissenting).

5. What Were They Thinking?

Several cases decided during the past year involved courtroom conduct that was questionable, improper, or just unwise. In *Rosser v. Commonwealth*,²⁷⁸ the prosecutor called the defendant "an animal" in closing argument.²⁷⁹ The trial court sustained the defendant's objection and overruled the motion for a mistrial.²⁸⁰ The court of appeals found, however, that even clear direction to the jury to disregard the statements of the prosecutor would be insufficient, and remanded the case to "cure the inappropriate conduct of the prosecutor."²⁸¹

In *Mills v. Commonwealth*,²⁸² the arresting officer, in a case involving driving under the influence of alcohol and drugs, not only stated on cross-examination that the defendant had needle marks on his arms, but also proffered a photograph of the marks.²⁸³ Although the trial court in this case properly admonished the jury to ignore the remark, the improper evidence was so prejudicial that the Virginia Court of Appeals ordered a mistrial.²⁸⁴

The zealotry of the prosecutor apparently knew no bounds in *Pease v. Commonwealth*.²⁸⁵ Virginia Code section 19.2-201 provides that "no attorney for the Commonwealth shall go before any grand jury except when duly sworn to testify as a witness, but he may advise the foreman of a regular grand jury or any member or members thereof in relation to the discharge of their duties."²⁸⁶ Despite this statute, the prosecutor contacted the grand jury about a witness, informed them that he thought the witness would testify untruthfully, examined the witness for the grand jury, and had an officer present to witness her testimony so that he might impeach the witness later

278. 24 Va. App. 308, 482 S.E.2d 83 (1997).

279. *See id.* at 310, 482 S.E.2d at 84.

280. *See id.* at 312-14, 482 S.E.2d at 85-86.

281. *See id.* at 315, 482 S.E.2d at 87.

282. 24 Va. App. 415, 482 S.E.2d 860 (1997).

283. *See id.* at 419, 482 S.E.2d at 862.

284. *See id.* at 421, 482 S.E.2d at 863.

285. 24 Va. App. 397, 482 S.E.2d 851 (1997).

286. VA. CODE ANN. § 19.2-201 (Repl. Vol. 1995).

with her statement.²⁸⁷ The Virginia Court of Appeals found that this behavior "well surpasses that which the Code permits" and quashed the indictment because there was "no other conclusion but that [the prosecutor] substantially influenced the grand jury in reaching an indictment."²⁸⁸

In *Thomas v. Commonwealth*,²⁸⁹ the defense counsel filed two contradictory notices of alibi and the defendant testified as to a third alibi at trial.²⁹⁰ The Virginia Court of Appeals held that the Notices of Alibi, although signed only by defense counsel and not the defendant himself, could be used to impeach the defendant at trial.²⁹¹

In *Hoverter v. Commonwealth*,²⁹² the defendant alleged that Commonwealth represented to him that if he did not plead guilty to first degree murder and abduction, the Commonwealth would prosecute him for sodomy.²⁹³ After the defendant entered an *Alford* plea,²⁹⁴ the press reported that the prosecutor said he had never intended to charge sodomy because he lacked sufficient evidence to prove the charge.²⁹⁵ Later, the prosecutor testified that he "may have misspoken" at the press conference, but that he fully intended to charge sodomy in absence of the plea agreement.²⁹⁶ The trial court's refusal to allow the defendant to withdraw his guilty plea was affirmed.²⁹⁷

287. See *Pease*, 24 Va. App. at 399-400, 482 S.E.2d at 852.

288. *Id.* at 400, 482 S.E.2d at 852.

289. 24 Va. App. 614, 484 S.E.2d 607 (1997).

290. See *id.* at 615, 484 S.E.2d at 608. The first Notice of Alibi stated that the defendant intended to offer evidence that he was at his sister's residence in Falls Church. The Amended Notice of Alibi stated that the defendant would assert an alibi that he telephoned his sister from a public phone in Falls Church and that she picked him up and took him to Washington, D.C. where he took a train to New York. At trial the defendant said he was in New York all day. See *id.*

291. See *id.* at 616-17, 484 S.E.2d at 608-09.

292. 23 Va. App. 454, 477 S.E.2d 771 (1996).

293. See *id.* at 463, 477 S.E.2d at 775.

294. An *Alford* plea is made pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), where the United States Supreme Court held that a "guilty plea" is not required if the plea is a voluntary and intelligent choice of the alternatives available to the defendant. See *id.* at 31.

295. See *Hoverter*, 23 Va. App. at 463, 477 S.E.2d at 775.

296. See *id.*

297. See *id.* at 465, 477 S.E.2d at 776.

E. Instructions

In *Mosby v. Commonwealth*,²⁹⁸ the Virginia Court of Appeals considered instructions given in a prosecution under the child endangerment statute²⁹⁹ and found that two of the instructions given by the trial court improperly allowed the jury to find criminal liability based upon a finding of simple negligence.³⁰⁰ The instructions were not harmless error because the court of appeals was unable to find that the invitation to convict solely on simple negligence influenced the verdict.³⁰¹

In *Turner v. Commonwealth*,³⁰² the jury was instructed on first and second degree murder, but not voluntary manslaughter as the defendant had requested.³⁰³ The Virginia Court of Appeals held that the denial was error, but the majority determined that the error was harmless.³⁰⁴ In finding the defendant guilty of second degree murder rather than acquitting him, the jury found that the defendant acted with malice.³⁰⁵ "Homicide committed pursuant to a preconceived plan is not voluntary manslaughter; premeditation and reasonable provocation cannot co-exist."³⁰⁶ According to the majority, the verdict demonstrated that the jury necessarily excluded an alterna-

298. 23 Va. App. 53, 473 S.E.2d 732 (1996).

299. See VA. CODE ANN. § 40.1-103 (Repl. Vol. 1994).

300. See *Mosby*, 23 Va. App. at 59, 473 S.E.2d at 735. The court of appeals upheld the constitutionality of the statute as applied to the defendant because she had been charged and convicted of placing her child in an actual condition of endangerment, the clause of Virginia Code section 40.1-103 that was excepted from the holding in *Commonwealth v. Carter*, 21 Va. App. 150, 462 S.E.2d 582 (1995), which found the second clause of the statute concerning possibility of endangerment to be unconstitutionally vague and inclusive. See *id.* at 155, 462 S.E.2d at 585.

301. See *Mosby*, 23 Va. App. at 59, 473 S.E.2d at 735.

302. 23 Va. App. 270, 476 S.E.2d 504 (1996). The opinions in this case are interesting for the "battle of authority from other jurisdictions" over the harmlessness of refusing jury instructions that the majority and dissent used. Compare *id.* at 277-78 n.2, 476 S.E.2d at 509 n.2, with *id.* at 281-85, 476 S.E.2d at 510-11 (Benton, J., dissenting).

303. See *id.* at 274, 476 S.E.2d at 506.

304. See *id.* at 275, 278, 476 S.E.2d at 507-08.

305. See *id.* at 277, 476 S.E.2d at 508.

306. *Id.* (citing *Read v. Commonwealth*, 63 Va. (22 Gratt.) 924, 938 (1872)).

tive resolution of fact that would have supported the lesser-included offense of voluntary manslaughter; therefore the error was harmless.³⁰⁷

Writing in dissent, Judge Benton argued that the evidence of malice had been disputed at trial and the jury had "sufficient evidence from which it could have found, if properly instructed, a non-malicious killing."³⁰⁸ The fact that the jury selected culpability from one of the malicious homicides "did not manifest beyond a reasonable doubt that the jury would not have found a non-malicious killing if properly instructed."³⁰⁹

In *Brown v. Commonwealth*,³¹⁰ the defendant requested an instruction on attempted robbery. The defendant had approached the victim, displayed a firearm and said "give me your money."³¹¹ The victim said, "You've got the wrong guy," and the defendant responded, "Give me your wallet."³¹² The victim handed his wallet to the defendant who opened it, and seeing no money, threw it to the ground as he walked away.³¹³ The Virginia Court of Appeals held that the denial of an instruction on attempted robbery was not error because the crime was completed when the defendant took the victim's wallet with the intent to permanently deprive him of his money.³¹⁴ The dissent argued that the attempted robbery instruction should have been given and that the majority mistakenly failed to focus on the defendant's intent.³¹⁵ The dissent proposed that the proper question was whether the defendant could have taken the wallet merely to search it for money and not with the intent to steal money.³¹⁶ The dissent further argued that because the defendant possibly took the wallet only to look for money, the jury should have been instructed on the offense of attempted robbery.³¹⁷

307. *See id.* at 277-78, 476 S.E.2d at 508.

308. *Id.* at 279, 476 S.E.2d at 509 (Benton, J., dissenting).

309. *Id.* at 281, 476 S.E.2d at 510 (Benton, J., dissenting).

310. 24 Va. App. 292, 482 S.E.2d 75 (1997) (en banc).

311. *Id.* at 294, 482 S.E.2d at 76-77.

312. *Id.* at 294-95, 482 S.E.2d at 77.

313. *See id.*

314. *See id.* at 295, 482 S.E.2d at 77.

315. *See id.* at 296, 482 S.E.2d at 77-78 (Moon, J., dissenting).

316. *See id.* at 297, 482 S.E.2d at 77-78 (Moon, J., dissenting).

317. *See id.*

V. JUVENILE JUSTICE

With recent changes to the Virginia Code affected in order to "get tough" on juvenile crime, the distinctions between juvenile justice and general criminal procedure have diminished. The Virginia Court of Appeals published few opinions this past year dealing exclusively with issues of juvenile justice; the decisions reflect the change in treatment of juvenile offenders. In *Broadnax v. Commonwealth*,³¹⁸ the Virginia Court of Appeals interpreted the effect of the July 1, 1994 amendment to Virginia Code section 16.1-271, holding that the plain language of the statute divested the juvenile court of jurisdiction over a juvenile once he has been *tried* or treated as an adult; the juvenile need not be *convicted* as an adult to divest the juvenile court of jurisdiction.³¹⁹

In *Dodson v. Commonwealth*,³²⁰ the defendant argued that because Virginia Code section 18.2-308.2, prohibiting possession of a firearm by a convicted felon, had not yet been passed at the time of his prior felony conviction, the statute was an unconstitutional *ex post facto* law.³²¹ The Virginia Court of Appeals held that the prohibition in Virginia Code section 18.2-308.2 was not an *ex post facto* violation.³²² The court of ap-

318. 24 Va. App. 808, 485 S.E.2d 666 (1997).

319. *See id.* at 815, 485 S.E.2d at 669. The relevant language of Virginia Code section 16.1-271 provides:

The trial or treatment of a juvenile as an adult pursuant to the provisions of this chapter shall preclude the juvenile court from taking jurisdiction of such juvenile for subsequent offenses committed by that juvenile.

Any juvenile who is tried and convicted in a circuit court as an adult under the provisions of this article shall be considered and treated as an adult in any criminal proceeding resulting from any alleged future criminal acts and any disposed of by the juvenile court at the time of the criminal conviction.

VA. CODE ANN. § 16.1-271 (Repl. Vol. 1996).

In *Broadnax*, the court of appeals held that the first two provisions of the statute were not contradictory because the first paragraph specifically referred to subsequent offenses and the second paragraph concerns the effects of a juvenile's conviction in circuit court as an adult with respect to any charges pending in juvenile court at the time of conviction, regardless of when they were committed. *See Broadnax*, 24 Va. App. at 815, 485 S.E.2d at 669.

320. 23 Va. App. 286, 476 S.E.2d 512 (1996).

321. *See id.* at 294-95, 476 S.E.2d at 516.

322. *See id.* at 295, 476 S.E.2d at 516.

peals also held that the protections of former Virginia Code section 16.1-179, in effect at the time of the defendant's previous conviction, did not apply to juveniles, such as the defendant, who had been tried as adults.³²³

In *Wilson v. Commonwealth*,³²⁴ the Virginia Court of Appeals held that the circuit courts have inherent power to punish juveniles who violate their orders and that no guardian ad litem need be appointed where the juvenile's counsel adequately represents the juvenile's interests.³²⁵

VI. CRIMES

A. Traffic Offenses

1. Cruising and Boozing

The Virginia Court of Appeals considered the statutory language of Virginia Code section 18.2-266 in two cases, holding that the term "operate" did not limit prosecutions to situations where the ignition switch of a car was in the "on" position,³²⁶ and that the statutory provision "operated on the public highways" was a limitation applicable only to the operation of a moped.³²⁷

In two en banc decisions, the Virginia Court of Appeals interpreted the language of Virginia Code section 18.2-266.1 in a manner that makes defending minors in drinking and driving cases very difficult. In *Mejia v. Commonwealth*,³²⁸ the court of

323. See *id.* at 297-98, 476 S.E.2d at 517-18.

324. 23 Va. App. 318, 477 S.E.2d 7 (1996).

325. See *id.* at 323-25, 477 S.E.2d at 9-10. The court of appeals declined to declare void the trial court's sentencing order, which used the term "jail" in violation of Virginia Code section 16.1-292(A), which requires confinement of juveniles in "secure facilities for juveniles rather than in jail." VA. CODE ANN. § 16.1-292(A) (Repl. Vol. 1996 & Cum. Supp. 1997). The court of appeals assumed that the trial judge had knowledge of Virginia Code section 16.2-292, and construed the term "jail" as complying with the law and meaning "appropriate location for juvenile confinement." *Wilson*, 23 Va. App. at 326, 477 S.E.2d at 10.

326. See *Propst v. Commonwealth*, 24 Va. App. 791, 793, 485 S.E.2d 657, 658-59 (1997).

327. See *Gray v. Commonwealth*, 23 Va. App. 351, 352-53, 477 S.E.2d 301, 302 (1996).

328. 23 Va. App. 173, 474 S.E.2d 866 (1996) (en banc).

appeals held that "illegal" consumption of alcohol is an element of the offense of driving under the influence while a minor, but the Commonwealth may establish a prima facie case of illegality by proof that a person under the age of twenty-one has operated a motor vehicle while having the requisite breath alcohol level.³²⁹ Once a prima facie case is shown, the defendant bears the burden of introducing evidence to raise a reasonable doubt regarding the illegality of the alcohol consumption.³³⁰ In *Charles v. Commonwealth*,³³¹ the defendant wanted to introduce evidence explaining his performance on the field sobriety tests to rebut the presumption that the breath alcohol concentration measurement accurately reflected his blood alcohol concentration at the time of driving.³³² The Virginia Court of Appeals held that the field test performance was irrelevant and inadmissible because it constituted "evidence tending to prove that the defendant was not under the influence."³³³

2. Habitual Driving

In three cases, the Virginia Court of Appeals interpreted the statutory language of Virginia Code section 46.2-357 which prohibits habitual offenders from driving motor vehicles on highways during the pendency of revocation of their driving privileges.³³⁴ In *Long v. Commonwealth*,³³⁵ the court of appeals held that the legislature had abrogated the common law defense of necessity in habitual offender cases. The court of appeals reasoned that consideration of the factual circumstances necessary to the defense are relegated by statute to the punish-

329. *See id.* at 176-78, 474 S.E.2d at 867-68.

330. *See id.* The court of appeals reached this conclusion by construing the term "any such person" in the second sentence of the statute to mean "any person under the age of twenty-one." The court of appeals further construed the first sentence to establish the offense and the second sentence to establish how the Commonwealth proves a prima facie case. *See id.* at 177, 474 S.E.2d at 868. Although this rationale suggests contorted logic, this standard lessens the burden upon the Commonwealth in convicting minors for these offenses.

331. 23 Va. App. 161, 474 S.E.2d 860 (1996) (en banc).

332. *See id.* at 163, 474 S.E.2d at 861.

333. *Id.* at 165, 474 S.E.2d at 862.

334. *See* VA. CODE ANN. § 46.2-357 (Repl. Vol. 1996).

335. 23 Va. App. 537, 478 S.E.2d 324 (1996).

ment phase of the habitual offender proceedings.³³⁶ In *Shenk v. Commonwealth*,³³⁷ the Virginia Court of Appeals interpreted the "agricultural purposes" exception of the statute very narrowly.³³⁸ The court of appeals held that the "agricultural purposes" exception did not apply to driving a tractor from one residential yard to another where the tractor was used to mow lawns.³³⁹ Although the tractor fit the definition of a "farm tractor" under the statute, residential yards are not considered lands used for "agricultural purposes."³⁴⁰ In *Flinchum v. Commonwealth*,³⁴¹ the Virginia Court of Appeals interpreted the term "highway" to exclude private parking lots that were not open to the public at all times.³⁴²

B. Guns

Proof of the use of a firearm in commission of robbery in violation of Virginia Code section 18.2-53.1 remains a controversial topic. The Virginia Court of Appeals published three opinions on the subject over the past year. The court of appeals continues to deal with the Supreme Court of Virginia's opinion in *Yarborough v. Commonwealth*,³⁴³ which requires the Commonwealth to prove that the defendant actually had a firearm

336. *See id.* at 544, 478 S.E.2d at 327.

337. 24 Va. App. 816, 485 S.E.2d 669 (1997).

338. *See id.* at 819, 485 S.E.2d at 671-72. Virginia Code section 46.2-357 provides the following exemption:

However, the revocation determination shall not prohibit the person from operating any farm tractor on the highways when it is necessary to move the tractor from one tract of land used for agricultural purposes to another tract of land used for agricultural purposes, provided that the distance between the said tracts of land is no more than five miles.

VA. CODE ANN. § 46.2-357 (Repl. Vol. 1996).

339. *See Shenk*, 24 Va. App. at 820, 485 S.E.2d at 671.

340. *See id.* The court of appeals looked to other statutes defining "agricultural" and concluded that residential areas, such as the area where the defendant was arrested, are not "farming" areas, and therefore, the defendant was not engaged in "agricultural purposes." *See id.* The dissent argued that because the legislature included mowers within the definition of "farm tractor," the legislature "clearly intended a person such as Shenk could move his self-propelled mower from one lawn to another lawn." *Id.* at 822, 485 S.E.2d at 672 (Benton, J., dissenting).

341. 24 Va. App. 734, 485 S.E.2d 630 (1997).

342. *See id.* at 737-38, 485 S.E.2d at 631-32. The parking lots had posted "no trespassing" signs. *See id.*

343. 247 Va. 215, 441 S.E.2d 342 (1994).

in his possession in order to support a conviction for use of a firearm in commission of a felony.³⁴⁴ In *Miller v. Commonwealth*³⁴⁵ a rusty, inoperable gun was held to be a "firearm" within the meaning of the statute.³⁴⁶ In *Byers v. Commonwealth*,³⁴⁷ the Virginia Court of Appeals held that the actual possession of a firearm may be proven by circumstantial evidence and affirmed the defendant's conviction.³⁴⁸ The en banc Virginia Court of Appeals also affirmed the conviction in *McBride v. Commonwealth*,³⁴⁹ where the possession of the gun was established solely by circumstantial evidence.³⁵⁰

C. Property

In *Richardson v. Commonwealth*,³⁵¹ the defendant was convicted of four separate larcenies which all occurred on the same day at the Medical College of Virginia.³⁵² The defendant was convicted of taking property from four employees, including two

344. See *id.* at 218-19, 441 S.E.2d at 343-44.

345. 23 Va. App. 208, 475 S.E.2d 828 (1996).

346. See *id.* at 212-13, 441 S.E.2d at 830. The evidence was insufficient, however, to support a conviction for possession of a firearm by a convicted felon, because the courts have interpreted "firearm" under that statute to mean an operable firearm. See, e.g., *Jones v. Commonwealth*, 16 Va. App. 354, 429 S.E.2d 615, *aff'd en banc*, 17 Va. App. 233, 436 S.E.2d 192 (1993).

347. 23 Va. App. 146, 474 S.E.2d 852 (1996).

348. See *id.* at 152, 474 S.E.2d at 855-56. The circumstantial evidence in the case included: the defendant's statement ("This is a stick up. Don't look back. I'll] butt you in the head"); the victim's feeling a metal object against his neck which he thought was a gun; and the defendant's participation in the robbery of another cab-driver with his accomplices seven days before the incident. See *id.*

The circumstantial evidence which the Supreme Court of Virginia found to be insufficient in *Yarborough* included the defendant's statement "This is a stick up" and the victim's belief, based upon seeing a bulge in the defendant's pocket, that he had a gun. See *Yarborough*, 247 Va. at 217-18, 441 S.E.2d at 343-44.

349. 24 Va. App. 603, 484 S.E.2d 165 (1997) (en banc).

350. See *id.* at 607-08, 484 S.E.2d at 168. The circumstantial evidence in *McBride* was the defendant's statement that he would shoot if the victim turned around, and the victim's testimony that he felt the defendant push something against his back. See *id.*

The dissenting judges emphasized that there was also evidence that the defendant was holding a "baby" immediately before the incident and that a blanket and plastic bottle were found at the scene, supporting the conclusion that the defendant pushed the plastic bottle and not a gun against the victim's back. See *id.* at 611-12, 484 S.E.2d at 169-70 (Benton and Elder, JJ., dissenting).

351. 25 Va. App. 491, 489 S.E.2d 697 (1997) (en banc).

352. See *id.* at 493-95, 489 S.E.2d at 698-99.

purses from the tenth floor of the North Hospital (one on a desk and the other ten feet away and concealed by a wall), a third purse from the second floor of North Hospital, and a backpack and items from the seventh floor of the West Hospital.³⁵³ There was no evidence of the order in which the items were taken, nor of the time frame in which the defendant took the items.³⁵⁴ Evidence was introduced that the walk between the North Hospital and the West Hospital takes five to eight minutes. The en banc Virginia Court of Appeals affirmed the separate convictions for the larcenies of items from several floors or separate buildings of the hospital complex, but held that the theft of the two purses on the tenth floor constituted a single larceny.³⁵⁵ The court of appeals found that the distance of ten feet did not prove beyond a reasonable doubt that the defendant was not acting under *the same impulse to steal* at the time of both thefts.³⁵⁶

In *Catterton v. Commonwealth*,³⁵⁷ the defendant was convicted of stealing a car from a repair shop. The Commonwealth introduced the testimony of the car owner that she gave no one permission to take her car from the repair shop; no one from the repair shop testified.³⁵⁸ The defendant contended that the evidence did not exclude the inference that the repair shop gave the defendant permission to take the car.³⁵⁹ The Virginia Court of Appeals agreed with the trial court that, for purposes of larceny, ownership may belong to the true owner or the owner's bailee and that the testimony of the owner was sufficient.³⁶⁰

In other cases discussing crimes against property, the en banc Virginia Court of Appeals held that a prior robbery conviction should not have been considered a prior larceny conviction under the sentencing enhancement statute, Virginia Code sec-

353. *See id.*

354. *See id.* at 498-99, 489 S.E.2d at 701.

355. *See id.*

356. *See id.* at 496-97, 489 S.E.2d at 700.

357. 23 Va. App. 407, 477 S.E.2d 748 (1996).

358. *See id.* at 409-10, 477 S.E.2d at 749.

359. *See id.*

360. *See id.* at 411, 477 S.E.2d at 750. The Commonwealth could have charged larceny from either the owner or the bailee. In this case, the Commonwealth charged larceny from the owner and the court found the evidence proved that charge. *See id.*

tion 18.2-104;³⁶¹ "habituality" is not an element of burglary from a school;³⁶² a school is an "other house" covered by the burglary statute, Virginia Code section 18.2-90;³⁶³ and a bona fide claim of right is not a defense to extortion.³⁶⁴

D. Sex Offenses

In the only case interpreting the elements of a sex offense, the Virginia Court of Appeals reversed the conviction for insufficiency of the evidence.³⁶⁵ The defendant was charged with rape of a girl over fourteen, but under fifteen, years old.³⁶⁶ The trial court found that the sexual act did not occur by force, therefore the issue on appeal was whether sufficient evidence existed to prove the sexual act occurred "through the use of [complainant's] mental incapacity" in violation of Virginia Code section 18.2-61.³⁶⁷ To convict, the Commonwealth needed to prove: (1) the complainant was mentally incapacitated at the time of the offense; (2) the condition prevented her from under-

361. See *Harris v. Commonwealth*, 23 Va. App. 311, 477 S.E.2d 3 (1996), *aff'd* en banc, 24 Va. App. 613, 484 S.E.2d 170 (1997); VA. CODE ANN. § 18.2-104 (Repl. Vol. 1996).

The majority reviewed the legislative history and found that robbery is not a proper predicate offense because robbery is neither deemed nor punished as larceny in the Virginia Code. Robbery is properly classified as a crime against the person and larceny is a crime against property. See *Harris*, 23 Va. App. at 315-16, 477 S.E.2d at 5.

The dissent argued that larceny is merely a lesser-included offense of robbery, and therefore, robbery includes all of the necessary elements of larceny. Robbery, according to the dissent, is the most egregious form of larceny. See *id.* at 317, 477 S.E.2d at 6 (Moon, J., dissenting).

362. See *Allard v. Commonwealth*, 24 Va. App. 57, 64, 480 S.E.2d 139, 142 (1997). The court of appeals interpreted the burglary statute to apply an element of habitual-ity only to dwelling houses of another, automobiles, trucks or trailers. See *id.*

363. See *id.* The court of appeals adopted the language of *Buie v. Commonwealth*, 21 Va. App. 526, 465 S.E.2d 596 (1996), and *Dalton v. Commonwealth*, 14 Va. App. 544, 418 S.E.2d 563 (1992), to find an "other house" may include any structure, permanently fixed to the ground with walls and a roof, and sufficiently enclosed to be a barrier to trespass. See *Allard*, 24 Va. App. at 64, 480 S.E.2d at 142.

364. See *Strohecker v. Commonwealth*, 23 Va. App. 242, 475 S.E.2d 844 (1996). A bona fide claim of right is a defense to robbery and larceny, because it can negate the criminal intent necessary, such as the intent to steal. See, e.g., *Pierce v. Commonwealth*, 205 Va. 528, 138 S.E.2d 28 (1964); *Butts v. Commonwealth*, 145 Va. 800, 133 S.E. 764 (1926).

365. See *White v. Commonwealth*, 23 Va. App. 593, 478 S.E.2d 713 (1996).

366. See *id.* at 594, 478 S.E.2d at 713.

367. See *id.*; VA. CODE ANN. § 18.2-61 (Cum. Supp. 1997).

standing the nature and consequences of the sexual act; and (3) that at the time of the offense, the defendant should have known of the condition.³⁶⁸ The court of appeals held that the trial court's observations of the complainant two years after the sexual act occurred were insufficient to support a finding that the complainant was mentally incapacitated *at the time of the offense*.³⁶⁹

E. *Miscellaneous Offenses*

The Virginia Court of Appeals recently held that the stalking statute, Virginia Code section 18.2-60.3, is not unconstitutionally vague, thus affirming the defendant's conviction on the somewhat sparse evidence of the victim's "fear of death, criminal sexual assault, or bodily injury."³⁷⁰ In order to obtain a conviction under Virginia Code section 18.2-60.3, the Commonwealth must prove, among other elements, that the defendant's conduct caused a person to experience reasonable fear of death, criminal sexual assault, or bodily injury.³⁷¹ At trial, the complainant testified that the defendant's telephone calls made her "fearful," and that she was in constant fear during their past "abusive" relationship.³⁷² The court of appeals found that she was "afraid for her physical well-being" and that the "dynamics of her relationship with [the defendant]" gave the necessary support for the trial court's conclusion that "she reasonably feared bodily injury or one of the other evils listed in Code [section] 18.2-60.3"³⁷³ The court of appeals also noted the defendant's prior conviction for stalking indicated that "on at least one other occasion . . . the victim reasonably fear[ed] for her physical safety."³⁷⁴ Since there was no evidence that the abuse in the prior relationship was physical or that the defendant ever threatened physical harm, the defendant's conviction

368. See *White*, 23 Va. App. at 595, 478 S.E.2d at 713-14.

369. See *id.* at 596, 478 S.E.2d at 714.

370. See *Parker v. Commonwealth*, 24 Va. App. 681, 683, 485 S.E.2d 150, 151 (1997).

371. VA. CODE ANN. § 18.2-60.3(A) (Repl. Vol. 1996).

372. See *Parker*, 24 Va. App. at 683, 485 S.E.2d at 151.

373. *Id.* at 686, 485 S.E.2d at 153.

374. *Id.*

appears to have been supported mainly by the evidence of the prior conviction.

In another case, the Virginia Court of Appeals held that Virginia Code section 58.1-4017 requires proof of the defendant's knowledge that a negotiated ticket has been altered.³⁷⁵ Additionally, the Virginia Court of Appeals found that a defendant can be guilty as a principal in the second degree of unlawfully wearing a mask even though the defendant's own face was never obstructed,³⁷⁶ and that charges of possession of a controlled substance with intent to distribute and transportation of cocaine into the Commonwealth with intent to distribute do not require proof that the defendant intended to distribute the drugs in the Commonwealth.³⁷⁷

VII. SENTENCING

Although the Virginia Court of Appeal's opinions were lengthy and the discussions were full of authority, the law remained the same—defendants are not entitled to an instruction concerning parole ineligibility in non-capital cases.³⁷⁸ The Virginia Court of Appeals recently held that *Simmons v. South Carolina*³⁷⁹ does not apply to non-capital proceedings, even if the Commonwealth argues at sentencing that the defendant is a threat to society.³⁸⁰ Given the long line of cases holding that parole considerations are not properly considered by the jury, the position of the courts is not likely to change absent a mandate from the legislature or the United States Supreme Court.

However, the Virginia Court of Appeals recently determined that the legislature changed the law in the Commonwealth

375. See *Carlton v. Commonwealth*, 23 Va. App. 629, 633, 478 S.E.2d 730, 732 (1996). The Commonwealth argued that a presumption should apply, similar to cases involving presentation of bad checks, entitling the fact finder to presume the defendant knew the ticket was altered. The court of appeals disagreed and likened the offense to uttering a counterfeit note under Virginia Code section 18.2-170. See *id.*

376. See *McGill v. Commonwealth*, 24 Va. App. 728, 733, 485 S.E.2d 173, 175 (1997).

377. See *Seke v. Commonwealth*, 24 Va. App. 318, 322, 482 S.E.2d 88, 90 (1997).

378. See *Walker v. Commonwealth*, 25 Va. App. 50, 486 S.E.2d 126 (1997); *Mosby v. Commonwealth*, 24 Va. App. 284, 482 S.E.2d 72 (1997).

379. 512 U.S. 154 (1994).

380. See *Mosby*, 24 Va. App. at 289, 482 S.E.2d at 74.

concerning the role of jury sentencing under Virginia Code section 19.2-295.2, which authorizes the trial court to impose an additional suspended term of imprisonment conditioned on the completion of post-release supervision.³⁸¹ With the passage of Virginia Code section 19.2-295.2, the legislature changed the old rule where the jury sets the maximum sentence.³⁸² The court of appeals held that two sentencing principles still apply: (1) sentencing procedures are a matter of legislative determination; and (2) under Virginia's statutory scheme, the jury's recommendation is not final or absolute.³⁸³

The principle that sentences recommended by juries are not final was affirmed and relied upon by the Virginia Court of Appeals in *Shifflett v. Commonwealth*³⁸⁴ to affirm the trial court's ruling which prohibited certain evidence from being introduced to the jury during the sentencing phase.³⁸⁵ The defendant wanted to introduce economic evidence regarding his employment and family responsibilities.³⁸⁶ The majority characterized this evidence as an illustration of the economic effect of incarceration on his family, and found that this evidence did not bear on the declared purposes of punishment³⁸⁷ and did not fit within the statutory definition of mitigation evidence.³⁸⁸ The court of appeals stressed that the case concerned the admission to evidence to the jury, whose sentence was not final, as opposed to the admission of evidence to the trial court.³⁸⁹ The dissent argued that the evidence properly reflected the

381. See *Allard v. Commonwealth*, 24 Va. App. 57, 480 S.E.2d 139 (1997); VA. CODE ANN. § 19.2-295.2 (Repl. Vol. 1995 & Cum. Supp. 1997).

382. See *Allard*, 24 Va. App. at 68, 480 S.E.2d at 144.

383. See *id.* at 67, 480 S.E.2d at 144 (citing *Duncan v. Commonwealth*, 2 Va. App. 342, 344-45, 343 S.E.2d 392, 393-94 (1986)).

384. 24 Va. App. 538, 484 S.E.2d 134 (1997).

385. See *id.* at 540, 484 S.E.2d at 135.

386. See *id.*

387. The declared purposes of punishment are deterrence (general and specific), incapacitation, retribution and rehabilitation. See *id.* at 542, 484 S.E.2d at 136.

388. See *id.* at 543, 484 S.E.2d at 136. The court of appeals examined the capital sentencing statutes for a definition of mitigation evidence and found that although the list of factors is not exclusive, the enumerated factors all reflected "the defendant's history or background or circumstances surrounding the crime." *Id.* (citing *Coppola v. Commonwealth*, 220 Va. 243, 253, 257 S.E.2d 797, 804 (1979)).

389. See *id.* at 544 n.3, 484 S.E.2d at 137 n.3.

defendant's character as a caring, responsible family man who supported his family, and should have been admitted.³⁹⁰

With the reform in the criminal procedure statutes enabling juries to consider prior convictions during the sentencing phase, the trial courts encountered problems determining whether the Commonwealth presented proper proof of the convictions in several recent cases. In four cases, the Virginia Court of Appeals interpreted the statutory language of Virginia Code section 19.2-295.1 concerning the admission of "certified, attested or exemplified copies of the record of conviction."³⁹¹ In *Brooks v. Commonwealth*,³⁹² the court of appeals held that properly certified copies of the indictments are relevant and admissible as part of the "record of conviction" where the final order of judgment states that the defendant had been found guilty "as charged in the indictments."³⁹³ Similarly, in *Folson v. Commonwealth*,³⁹⁴ the court of appeals held that the "record of conviction" is not limited to a copy of the final order, but may be any "record" evidencing the conviction.³⁹⁵

This holding appears to contradict the court of appeals' decision in *Bellinger v. Commonwealth*,³⁹⁶ remanding a case for resentencing because a bad check conviction form did not comply with the statutory requirements of Virginia Code section 19.2-307 for final orders.³⁹⁷

390. See *id.* at 548-49, 484 S.E.2d at 139 (Benton, J., dissenting).

391. VA. CODE ANN. § 19.2-295.1 (Cum. Supp. 1997).

392. 24 Va. App. 523, 484 S.E.2d 127 (1997).

393. *Id.* at 533, 484 S.E.2d at 131.

394. 23 Va. App. 521, 478 S.E.2d 316 (1996).

395. See *id.* at 526, 478 S.E.2d at 318-19. The Commonwealth introduced the indictment and "docket entries" for one conviction and the "commitment record" for another conviction. The records indicated the convictions and the sentence to be served. See *id.* at 523-24, 478 S.E.2d at 317.

396. 23 Va. App. 471, 477 S.E.2d 779 (1996).

397. See *id.* at 474, 477 S.E.2d at 780. Virginia Code section 19.2-307 provides:

The judgment order shall set forth the plea, the verdict or findings and the adjudication and sentence, whether or not the case was tried by a jury, and if not, whether the consent of the accused was concurred in by the court and the attorney for the Commonwealth. If the accused is found not guilty, or for any other reason is entitled to be discharged, judgment shall be entered accordingly.

VA. CODE ANN. § 19.2-307 (Cum. Supp. 1997).

VIII. APPEALS

In the past year, the Virginia Court of Appeals found numerous waivers by trial and appellate counsel of arguments on appeal.³⁹⁸ Particularly noteworthy, however, are the instances when the court of appeals did *not* bar review of the issue, even though the objections were either nonexistent or incomplete.

In *Cudjoe v. Commonwealth*,³⁹⁹ the Commonwealth objected to the defendant's peremptory strike of a white juror. The trial court required the defendant to explain his reasons for the strike. After the trial court disallowed the strike, the defendant did not object to the trial court's ruling.⁴⁰⁰ The Virginia Court of Appeals found that the purpose of Virginia Supreme Court Rule 5A:18 had not been violated because the trial court had the positions of both parties clearly before it and fully understood the issue involved.⁴⁰¹

In *Herrera v. Commonwealth*,⁴⁰² involving a prosecution under the "possible endangerment" clause of the child endangerment statute, the defendant failed to raise any objection to the constitutionality of the statute at trial, on brief, or in argument on appeal.⁴⁰³ In another case decided while Herrera's case was pending on direct appeal, the Virginia Court of Appeals held that the "possible endangerment" clause of the statute was unconstitutionally vague.⁴⁰⁴ Regarding Herrera's case, the court of appeals found that because the unconstitutionality of the statute affected the jurisdiction of the trial court, the court of appeals could address the issue *sua sponte*.⁴⁰⁵ The court of appeals then reversed Herrera's conviction.⁴⁰⁶

398. See, e.g., *Littlejohn v. Commonwealth*, 24 Va. App. 401, 480 S.E.2d 853 (1997) (holding that failure to include written argument in brief on issue constitutes a waiver and bars review of the issue); *Strohecker v. Commonwealth*, 23 Va. App. 242, 475 S.E.2d 844 (1996) (finding no proffer of excluded testimony, and, therefore, no basis for review).

399. 23 Va. App. 193, 475 S.E.2d 821 (1996).

400. See *id.* at 196, 475 S.E.2d at 822.

401. See *id.* at 197, 475 S.E.2d at 822.

402. 24 Va. App. 490, 483 S.E.2d 492 (1997).

403. See *id.* at 492, 483 S.E.2d at 493.

404. See *Commonwealth v. Carter*, 21 Va. App. 150, 462 S.E.2d 582 (1995).

405. See *Herrera*, 24 Va. App. at 496, 483 S.E.2d at 495.

406. See *id.*; see also *Burfoot v. Commonwealth*, 23 Va. App. 38, 473 S.E.2d 724 (1996) (holding that subject matter jurisdiction cannot be waived at any time).

IX. CONCLUSION

Writing a summary of the law is an exercise that every attorney should do at least once. Reviewing a year's worth of cases from the Supreme Court of Virginia and the Virginia Court of Appeals provides an indication of what areas of the law are of current interest to the appellate courts. Such a review reminds prudent counsel of the importance of adequately preserving issues and preparing a record that best presents the case. Reviewing the law is a reminder, too, that effective appellate advocacy can be an invaluable factor in the resolution of an appeal.